

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER
YUGOSLAVIA**

CASE NO IT-05-88-T

IN THE TRIAL CHAMBER

Before: Judge Carmel Agius, Presiding
Judge O Gon-Kwon
Judge Kimberley Prost
Judge Ole Bjorn Stole, Reserve Judge

Registrar: Mr John Hocking

Date Filed: 30th July 2010

THE PROSECUTOR

-v-

VUJADIN POPOVIC
LJUBISA BEARA
DRAGO NIKOLIC
LJUBOMIR BOROVCANIN
RADIVOJE MILETIC
MILAN GVERO
VINKO PANDUREVIC

PUBLIC & REDACTED

FINAL BRIEF ON BEHALF OF MILAN GVERO

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Case No. IT-05-88-T
30 July 2010

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BACKGROUND AND CONTEXT TO THE INDICTMENT

Milan Gvero's background

1. Milan Gvero was born 72 years ago into a family of six with extremely modest means, in the small, impoverished town of Mrkonjic Grad, located in the Western part of Bosnia and Herzegovina. This region of Bosnia is known as Bosanska Krajina, and is a former frontier between the Austrian and Ottoman empires.
2. His first seven years were marked by the Second World War, very hard living conditions, serious illness, and the premature passing of his father of cancer. After witnessing the tragedy of war, human misery, social injustice, and poverty on his native soil, Milan Gvero realised that education – his own and in general - would be his primary focus in lessening some of the problems he faced in the outside world. This was not a simple goal, however, as he was the fourth child in a poor farmer's family, growing up without a father and without financial support. Even as a child, he began working in the field to provide for his family and for his own education¹.
3. Milan Gvero's schooling began in Mrkonjic Grad, and continued in nearby Banjaluka, where he obtained a teaching degree. For a while, he worked as a teacher in the Krajina area. However, his goals were beyond this and the Military Academy in Belgrade represented a unique solution in this regard. It was an institution that provided free education for carefully selected young, hardworking people from under-privileged social backgrounds among the various nationalities of the former Yugoslavia.
4. After graduating from the Military Academy in 1958, Milan Gvero was duty-bound to become a JNA officer and thus he spent his entire carrier in the army. However,

¹ Gvero, M. Opening statement T. 612 (23/08/06).

Milan Gvero's interests were not in combat tactics, weaponry or in military matters *per se*. For example, unlike many of his fellow graduates, he chose not to attend the Command and Staff Academy to advance his military and command skills. His passion for social issues instead led him to continue his studies in Sociology and Political sciences in Belgrade, where he obtained his Masters Degree in sociology and politics and began studying for a PhD that, for personal and professional reasons, he was unable to finish.²

5. In fact, throughout his professional career with the JNA and the VRS, Milan Gvero never performed any command duties, save for the short mandatory period after graduation from the Military Academy from 1958 to 1963, when he was a platoon leader³. This was a post typically regarded as the lowest possible command position.
6. During his military service, Milan Gvero dedicated himself to social and educational matters, working in military schools or in the organs for morale. By way of example, he taught Sociology at two undergraduate schools and at the University of Belgrade, as well as International Relations at the JNA Political School,⁴ where he presented a workshop on Marxism⁵. He spent 10 years as a teacher and Principal of the High school. Indeed, the Military High School in Belgrade was recognized as the best overall high school in the country while he was the Principal there⁶.
7. Milan Gvero also wrote dozens of publications during his career, including several papers and books dealing with international relations and socio-political problems, a thesis on comparative political systems at the Faculty of Political Sciences, and a

² Gvero, M. Opening statement T. 613 (23/08/06)

³ Milovanovic, M., T. 12251 (30/05/07) (From what the witness could see in his biography, General GVERO's only command responsibility was that of a platoon commander, after which he moved into professorial duties (lecturing and political responsibilities).

⁴ Milovanovic, M., T. 12251 (30/05/07). (When the witness attended the military school of the JNA, [General GVERO] led (part time) a workshop on Marxism). See also 5DW Simic, N., T. 28600 (21/11/08) (GVERO had for many years been a professor at the high political school of the JNA (the post-secondary school)

⁵ Milovanovic, M., T. 12250-12251 (30/05/07).

⁶ Savčić, M., T. 15340 (13/09/07) (Milan Gvero was director of the military high school that I went to in the fourth year of studies). See also Gvero, M. Opening statement T. 613 (23/08/06).

textbook on international economic relations that ultimately became official examination material.

8. His subsequent military posts in Titograd (now Podgorica), Belgrade and Sarajevo reflected this interest in academia, as he worked almost exclusively in the segment of the Army involved with morale issues. In this way, he never held any command duties or had responsibility for subordinate units or indeed, any kind of operational matter.
9. The breakout of the war in Bosnia found Milan Gvero in Sarajevo, where he was posted as an Assistant Commander for morale, education and legal affairs at the Command of the JNA 2nd Military district. Since the other two ethnic groups in Bosnia and Herzegovina had already started creating their own armies, it was suggested that the JNA officers of Serbian nationality born in BiH should stay there and join the soon-to-be-formed Army of the Serbian Republic of Bosnia and Herzegovina.
10. Milan Gvero became a member of this newly created body in May 1992 and served as the Assistant Commander for Morale, Religious and Legal affairs of the Main Staff before being discharged at the end of 1996⁷. He retired in 1997 after 40 years of army service.
11. After retiring, as a lifelong academic and intellectual, Milan Gvero wanted to continue with his PhD at the Faculty for political sciences in Belgrade. However, initially due to extenuating personal circumstances, and subsequently due to the ICTY indictment and his deteriorating health, Milan Gvero had to abandon this plan.

⁷ Gvero, M. Opening statement T. 615 (23/08/06)

Broader developments in the Bosnian conflict in mid-1995

12. The spring and early summer of 1995 saw a great deal of combat activity by the Bosnian Muslim forces throughout Bosnia and Herzegovina. This was part of a military strategy to inflict maximum VRS losses and to prevent the VRS from engaging in any offensive, as opposed to defensive, combat operations.⁸
13. By February, March and early April 1995 there were many indications that the Cessation of Hostilities Agreement was breaking down and that the ABiH forces were beginning to gain strength. They had been forced back into a small enough area that their numerical superiority and plentiful supply of arms were going to give them an advantage vis-a-vis the VRS if fighting were to recommence.⁹
14. At the time, it was thought that Bosnian Croatian - Bosnian Muslim alliance would not abide by the cease-fire and that the alliance was in fact preparing for a series of major offensives against both the Republika Srpska and against the Republika Srpska Krajina.¹⁰ This fear ultimately came to fruition when the BiH army used all its available forces to launch offensives in the Herzegovina, around Sarajevo,¹¹ at Majevisa, and at Vlasic, in an effort to reduce the territory under the control of the VRS before the beginning of the peace negotiations.¹² This large scale offensive, which led to a “critical” situation for the VRS everywhere, was conducted from the

⁸ Butler, R., T. 19774-19775 (16/01/08): The Muslim forces have been launching a series of offensives out of the 2nd Corps area, Tuzla, against Mount Majevisa and the transmitter sites up on the mount. The 28th Infantry Division was specifically tasked to conduct small-scale raids and military operations out of the enclave, with the goal of preventing the VRS and specifically the Drina Corps from pulling forces away from those enclaves and sending them to more important areas of the front lines. ... So their job was, essentially, to take whatever military actions they could in order to tie down the VRS away from where the main attacks were going in the 1st and 2nd Corps area; and, in fact, they engaged in those types of raids against Serb military and village positions.

⁹ Smith, R., T. 17471-17472 (05/11/07). See also Masal, D., T. 29021 (28/11/08).

¹⁰ Masal, D., T. 29077-29080 (01/12/08).

¹¹ 5D 1165, dated 15 June 1995 (Order to Reinforce the Sarajevo-Romanija Corps on the northwestern part of the front, strictly confidential no. 03/4-1305, from Commander Colonel General Ratko Mladic, to Commands of inter alia the IBK /Eastern Bosnia Corps, the D/?K/ /?Drina Corps/, SRK /Sarajevo-Romanija Corps/).

¹² 5DW Simic, N., T. 28560 (20/11/08).

direction of Sarajevo toward the VRS forces of the Romanija Corps in order to meet with forces from the direction of Srebrenica and Zepa.¹³ The BiH Army, together with the HVO forces, additionally launched a general offensive against the Krajina municipalities, where a decisive battle for the very existence of Republika Srpska was being waged.¹⁴

15. As a result of this intense activity in the other theatres of war throughout Bosnia and Herzegovina, by the summer of 1995 VRS manpower and resources were stretched to the absolute limit. It was seriously overextended, desperately short on manpower and was struggling to hold onto the territory already gained.¹⁵

Background to the conflict in Srebrenica

16. Prior to the breakout of the Bosnian war, Srebrenica formed part of the Tuzla region and the Zvornik sub-region. At that time, although the town of Srebrenica was ethnically mixed, there was usually one ethnic group that dominated in the surrounding villages and hamlets.¹⁶

17. Mutual distrust began to rise in the enclave due to the conflicts in the neighbouring regions. By mid-April 1992, people were already fleeing Srebrenica *en masse* in anticipation of an armed clash between the Bosnian Serb and Bosnian Muslim armies.¹⁷

18. While the Bosnian Serbs enjoyed military superiority, they were outnumbered by Bosnian Muslims troops who had successfully adopted guerrilla warfare techniques. In 1992 and 1993 Bosnian Muslim forces raided a number of villages inhabited by

¹³ 5DW Simic, N., T. 28559 (20/11/08).

¹⁴ 5DW Simic, N., T. 28562 (20/11/08): The ABiH Bihac Corps's commencement of combat activities required General Milovanovic to go personally to the Krajina in order to establish an IKM.

¹⁵ Smith, R., T. 17472 (05/11/07): The Bosnian Serbs had gained so much territory and had so few people that they were overextended, and would have liked for a cessation of hostilities to work so that it would become the basis from which they could bargain.

¹⁶ Adjudicated Fact 19.

¹⁷ Adjudicated Fact 20.

Bosnian Serbs using these tactics, causing significant losses in life and in property.¹⁸ For the Bosnian Serbs, these Bosnian Muslim raids were matters of great military concern. Quite apart from the loss of life and property, they tied down considerable VRS troops and resources, thereby rendering them unavailable for combat activity elsewhere. Bosnian Serb leaders vigorously expressed their anger over these actions during meetings with international observers.¹⁹

19. On 16 April 1993 the UN Security Council passed resolution 819 declaring Srebrenica a "safe area" and on 6 May 1993, UN Security Council resolution 824 created the two other protected enclaves, Zepa and Gorazde.²⁰ After UNPROFOR forces entered the Srebrenica and Zepa protected areas in 1993 the Bosnian Muslim forces stationed in the enclaves prepared combat operations to seize the areas of Podrinje, Rudo, Visegrad, and their surrounds in order to connect Gorazde and Zepa.²¹ In this way, it was envisaged that the Bosnian Muslim side would gain uninterrupted territory all the way from central Bosnia via Sarajevo, Gorazde, Visegrad and Zepa. In turn, this would have allowed the ABiH to undertake joint combat initiatives to take over all of Podrinje using forces from the direction of Tuzla.²²

20. UNPROFOR then negotiated a cease-fire agreement that called for the Srebrenica enclave to be disarmed under the supervision of UNPROFOR troops.²³ According to this agreement, the cease-fire was to take effect from 1 January 1995 for an initial period of four months.²⁴ Unfortunately, immediately after signing the safe area agreement, General Halilović, the commander of BiH army, ordered that no serviceable weapons or ammunition in the enclaves be relinquished to

¹⁸ Adjudicated Fact 21.

¹⁹ Adjudicated Fact 22.

²⁰ Adjudicated Fact 29.

²¹ Masal, D., T. 29026 (28/11/08).

²² Masal, D., T. 29026 (28/11/08).

²³ Adjudicated Fact 34.

²⁴ Trivic, M., T. 11915 (22/05/07); P 107, dated 2 July 1995 (Order for Active Combat Activities Operation no. 1, strictly confidential no. 04/156-2, from Commander Major-General Milenko Zivanovic, to the commands *inter alia* of the 1st Zvornik Infantry Brigade, 1st Rirac Infantry Brigade and the 2nd Romanija Motorised Brigade "Krivaja – 95").

UNPROFOR.²⁵ This meant that only old and dysfunctional weapons were handed over and anything in working order was retained.²⁶

21. Quite apart from complaints by the Bosnian Serbs that Bosnian Muslim raids were taking place from within the enclave resulting in the killing of civilians, UNPROFOR also knew that the enclaves were not demilitarised and that this represented a serious drain on VRS manpower, which was required in a different part of Bosnia.²⁷ Indeed, the enclaves were anything but demilitarised²⁸. Bosnian Muslim helicopters flew in violation of the no-fly zone, the ABiH opened fire toward Bosnian Serb lines, and moved freely throughout the “safe areas”.²⁹ These activities increased from the middle of April, May and June with the acquisition of newer ABiH uniforms and some small arms.³⁰ There was a perception in May 1995 that the ABiH forces were flaunting the fact that they had recently received new weapons.³¹ Furthermore, the 28th Division of the ABiH in Srebrenica was even appropriating at least some of the humanitarian aid coming to the enclave for its own military use.³² In the spring and early summer of 1995, the newly transformed 28th Division also increased its reconnaissance and sabotage activities. In approximately June 1995, more people with arms were seen by DutchBat,³³ which “sort of turned a blind eye” to this activity.³⁴ In fact, there were so many armed Muslim fighters in June that DutchBat

²⁵ Adjudicated Fact 49.

²⁶ Adjudicated Fact 49

²⁷ Nicolai, C, T. 18561 (30/11/07). See also Smith, R., T. 17472 (05/11/07) (The “running sore” in their situation were the enclaves, and in particular those of Srebrenica, Zepa, and Gorazde, which required a large number of forces and resources to guard).

²⁸ Masal, D., T. 29034 (28/11/08), see also P 2934, dated 7 March 1995 (Meeting General Smith and General Mladic 7 March 1995, from Lt Col J. R. Baxter): “The major issue(s) that emerged from the meeting was ... Mladic’s explanation of his military concerns with the eastern enclaves...”

²⁹ Adjudicated Fact 50.

³⁰ Boering, P., T. 2067 (22/09/06). See also Franken, R., T. 2537 (17/10/06) (The possession by the ABiH of approximately 4000-4500 small arms and mortars changed in May, when suddenly there were new combat suits and new types of Kalishnikovs); Franken, R., T. 2601 (17/10/06) (More weapons were coming into the enclave during the time that DutchBat III was there).

³¹ Egbers, V., T. 2862 (06/10/20).

³² Adjudicated Fact 50.

³³ Boering, P., T. 2170 (26/09/06). See also Koster, E., T. 3059 (26/10/06) (The witness noticed more and more armed Muslim fighters from mid-June).

³⁴ Boering, P., T. 2116 (25/09/06).

was incapable of disarming them.³⁵ Not only then was Srebrenica not disarmed,³⁶ it was also not demilitarized, which was “a clear breach” of the agreement at the time.³⁷ It came to no surprise to Prosecution witnesses Nicolai or Smith when the VRS started an attack on the enclave – they had been expecting it.³⁸

22. The threat that the ABiH represented within the enclave was such that Pieter Boering referred to 1,000 ABiH soldiers there as “a nucleus of well-trained soldiers.”³⁹ However, there could have been many more soldiers and weapons there, located in particular in the Bandera Triangle, of which DutchBat had only limited insight.⁴⁰ There was evidence, for example, of 14,000 BiH soldiers in the Srebrenica region and it was known at the time that there were five brigades and approximately 9,600 troops.⁴¹ There was a further estimate at the time of between five and eight brigades and 15,000 armed Muslims,⁴² which outnumbered by far those in the Drina Corps.⁴³ **REDACTED**⁴⁴

23. The ABiH forces were well equipped enough to attack the VRS Main Staff headquarters in Crna Rijeka in an attempt to engage the VRS forces and to tie them down, thus preventing them from going to the Sarajevo front.⁴⁵

³⁵ Koster, T. 3066 (26/10/06); 1D 44, dated 25 and 26 1995 (Lieutenant Koster’s witness statement to the Office of the Prosecutor).

³⁶ The Prosecution concedes as fact that DutchBat was unable to disarm the enclave: T. 2171 (25/09/06). See also Nicolai, C, T. 18559 (30/11/07) (As of July 1995, Srebrenica was not demilitarised to the extent that [UNPROFOR] would have liked it to be); Smith, R., T. 17642-17643 (07/11/07) (Smith conceded that demilitarization never took place – weapons clearly remained in use in the area) ; 5D 503, dated ; Smith, R., T. 17769-17770 (09/11/07); Smith, R., T. 17647 (07/11/07).

³⁷ Smith, R., T. 17647 (07/11/07); 5D 502, dated 8 May 1993.

³⁸ Nicolai, C, T. 18561 (30/11/07).

³⁹ The witness increased this number by 3 000 when including farmers carrying a weapon: it all depends on what you call a soldier. Boering, P., T. 2067-2068; 2115-2116 (22/09/06).

⁴⁰ Franken, R., T. 2603, 2604 (17/10/06).

⁴¹ Lazić, M., T. 21731 (04/06/08). **REDACTED**

⁴² Nikolić, M., T. 33010 (22/04/09).

⁴³ See Adjudicated Fact 44 (“Between 1 000 and 2 000 soldiers from three Drina Corps Brigades were deployed around the enclave”).

⁴⁴ PW-168, T. 16243 (11/10/07) Closed session.

⁴⁵ OTP PTB para 9, see also 5D 3, dated 30 June 1995 (Operational report forwarded by the Chief of Staff, Major Ramiz Becirovic, to the 2nd Corps Command in Tuzla): “With the aim to distract the enemy forces and direct your attention elsewhere from the Sarajevo theatre and to focus their attention on Srebrenica and Zepa, on the 29th of June of 1995”.

24. Under these circumstances, the military action against the Srebrenica and Zepa enclaves was a military necessity for the VRS and this fact was acknowledged by the Prosecution.⁴⁶

Background to the conflict in Zepa

25. From the standpoint of the VRS, Srebrenica and Zepa were viewed as part of the same larger security issue, since both enclaves tied up a considerable number of troops that could be usefully deployed elsewhere in more critical theatres of war.⁴⁷ However, ABiH military activities in the Zepa “safe area” mandated that VRS units had to be engaged in securing the Zepa enclave, not least because of its proximity to the Main Staff headquarters and the communication facilities at the Mt. Veliki Zep.⁴⁸

26. The Zepa enclave was manned by the continually active 285th Eastern Bosnia Light Infantry Brigade, also known as 1st Zepa Brigade, which was under the command of the 28th Infantry Division from Srebrenica.⁴⁹ Indeed, immediately prior to the fall of Zepa and pursuant to the order of the second corps of the BiH army, eight large sabotage groups had infiltrated into RS territory from Zepa.⁵⁰ Their mission was to carry out combat operations on the Sokolac-Vlasenici road in order to engage the Serb forces and move them away from Sarajevo.⁵¹ Many civilians and a few members of the VRS were killed in the course of these missions⁵² and it therefore became vital for the VRS to the 285th Brigade.⁵³ As a result, military action around Zepa area commenced on 13 July 1995.

⁴⁶ OTP Opening statement, T. 388, 395-396. See also Butler, R., T. 20578 (28/01/08): Butler took the view that there was a valuable military justification to be able to separate the enclaves such that the movement of Bosnian Muslim forces between Srebrenica and Zepa could be interrupted.

⁴⁷ Butler VRS MS Command responsibility report at 4.2 , P2764.

⁴⁸ Butler VRS MS Command responsibility report at 4.1 , P2764.

⁴⁹ Butler VRS MS Command responsibility report at 4.0 , P2764.

⁵⁰ 2DW-21 Vojinovic, M., T. 23694-23696 (21/07/08).

⁵¹ 2DW-21 Vojinovic, M., T. 23694 (21/07/08).

⁵² 2DW-21 Vojinovic, M., T. 23694 (21/07/08).

⁵³ 2DW-21 Vojinovic, M., T. 23694 (21/07/08).

SUBMISSIONS ON MODES OF LIABILITY

The various modes of liability with which Milan Gvero is charged

27. The modes of liability with which Milan Gvero is alleged to be individually responsible for the crimes charged in the Indictment are multifarious, and some might even say, Kafkaesque. In particular, he is alleged to have “committed [including by participating in a JCE], planned, instigated, ordered and otherwise aided and abetted in the planning, preparation and execution” of counts 4 & 5 (murder), 6 (persecutions), 7 (forcible transfer) and 8 (deportation).⁵⁴ The Defence submit that this over burdening of the indictment with excessive modes of liability is symptomatic of a case that rests on weak foundations. The paucity of evidence as to Milan Gvero’s involvement in any of the crimes with which he is charged cannot be overcome by the Prosecution’s attempt to cast a thick fog over the exact means of his alleged perpetration of such crimes. The Trial Chamber is still required to analyse the evidence to the requisite standard of proof and, as a result, the weakness of the Prosecution case persists.

'Commission' by means of participation in a joint criminal enterprise

Introduction

28. The Defence respectfully submit that the JCE with which Milan Gvero is charged is phantasmagoric in nature. This is because of the impossibility of reconciling the two JCEs simultaneously alleged in the indictment and, in particular, the purported common purpose of these JCEs. As a result, it is the Defence's primary contention that, as charged, JCE is an improper mode of liability for the crimes alleged against the co-accused in this case. In the event that this primary submission is not accepted by the Trial Chamber, the Defence maintain that Milan Gvero's participation in, the JCE has been (a) inadequately pleaded; (b) insufficient to amount to a significant

⁵⁴ Paragraph 88 of the Indictment.

contribution to the common criminal purpose; and (c) not established beyond reasonable doubt in any event. Finally, it is maintained that the prosecution have failed to prove that Milan Gvero possessed the requisite *mens rea* for both the basic and extended forms of the JCE.

JCE is an improper mode of liability for the crimes alleged against the co-accused in this case

29. The existence of two JCEs pleaded alternatively against different Defendants which are said to have been devised at the same time, and which each have identical memberships, but quite distinct common criminal objectives, defies logic and represents an inappropriate use of the JCE doctrine. It is respectfully submitted that the Prosecution's simultaneous reliance on these two JCEs is indicative of their trying to 'cast a wide net' in respect of all of the accused in this case, rather than charging each of the seven accused with a form of liability which properly represents their alleged culpability in the Indictment offences.

30. In order to develop this argument fully, it is necessary to analyse the two JCEs alleged against the multiple accused in this case in some detail.

31. The first JCE charges all seven co-accused, together with others listed in Attachment A to the Indictment with participation in a common criminal plan to force the Muslim population out of the Srebrenica and Zepa enclaves to areas outside the control of the RS from about 8 March 1995 through the end of August 1995.⁵⁵ At two different points in the Indictment the Prosecution variously allege that this criminal plan, which underpins the first JCE, is said to have been developed in the evening hours of 11 July and on the morning of 12 July.⁵⁶

⁵⁵ Paragraph 49 of the Indictment.

⁵⁶ Paragraphs 27 and 58 of the Indictment.

32. By contrast, the second JCE charges Ljubisa Beara, Vujadin Popovic, Vinko Pandurevic, Drago Nikolic and Ljubomir Borovcanin (but not Milan Gvero or Radivoje Miletić), together with others listed in Attachment A, with participation in a common criminal plan to »kill the able-bodied Muslim men from Srebrenica that were captured or surrendered after the fall of Srebrenica on 11 July 1995, and remove the remaining Muslim population of Srebrenica and Zepa from the Republika Srpska, with the intent to destroy those Muslims«. ⁵⁷ Again, at different junctures in the Indictment, this second JCE is alleged to have: (a) been developed »at the same time« as the JCE for forcible transfer »during the evening of 11 July and into the early morning of 12 July 1995« ⁵⁸; (b) been implemented on or about 12 July 1995; ⁵⁹ and (b) arisen as a result of an agreement at about 2000 hours on 13 July 1995 to kill the able-bodied Muslim men from Srebrenica and to remove the remaining Muslim population of Srebrenica and Zepa. ⁶⁰

33. To clarify matters, all of the accused are alleged to have been members of both JCEs (which have entirely identical memberships) ⁶¹ and to have shared the (completely distinct) common criminal objectives for each of the JCEs (which, in several parts of the Indictment as exemplified above, are said to have been devised at exactly the same time – in the late evening of 11 July 1995). However, Milan Gvero and Radivoje Miletić are categorically *not* charged with membership of the JCE to murder the able-bodied men from Srebrenica and are instead are charged with the JCE to forcibly transfer the Bosnian Muslim populations from Srebrenica and Zepa.

34. The Defence rely on Milan Gvero not being charged with the JCE to mass murder based on the explicit terms of both the Second Consolidated Indictment of 14 June

⁵⁷ Paragraphs 27 and 34 of the Indictment.

⁵⁸ Paragraph 27 of the Indictment.

⁵⁹ Paragraph 36 of the Indictment.

⁶⁰ Paragraph 34 of the Indictment.

⁶¹ See paragraph 96 of the Indictment (at Attachment A): “The JCE to forcibly transfer or deport the Muslim populations of Srebrenica and Zepa and the JCE to murder the able-bodied Muslim men from Srebrenica have been identified in the Indictment as two JCEs. However, the officers within these JCEs are the same.

2006⁶² and the Indictment of 4 August 2006.⁶³ This reliance on the exact terms of the Indictment is strengthened by the fact that its terms were amended following the Trial Chamber's 21 May 2006 Decision which describes the role and actions of Milan Gvero in furtherance of the JCE to forcibly remove the Bosnian Muslim population from the two enclaves and which required that the "alleged acts of [Milan Gvero] in furtherance of the JCE should be pleaded [by the Prosecution] as exhaustively as possible, in order for the Accused to be put fully on notice of the charges against [him]".⁶⁴ The Defence's understanding of the more limited JCE allegation against Milan Gvero is further bolstered by the Prosecution Pre-trial Brief⁶⁵ /**REDACTED**/⁶⁶

35. The absence of uniform JCE charging against all of the accused in respect of the alleged mass murder operation is a clear indication that JCE is an improper vehicle of

⁶² Paragraph 76 of the Second Consolidated Indictment of 14 June 2006 reads in relevant part that Milan Gvero committed acts in furtherance of the JCE to forcibly transfer, "including but not limited to the following", after which reference is made to paragraph 90. For its part, paragraph 90 states that all accused save Milan Gvero and Radivoje Miletic "had knowledge of the plan to murder the able-bodied men of Srebrenica and were involved in the execution of that plan". Included also in the Second Consolidated Indictment is Attachment A, which is referred to in Count 2 (Conspiracy to Commit Genocide). This Attachment is a list of the alleged members of the two JCEs (both of which had the same members) which includes Milan Gvero. Whilst Milan Gvero is alleged in this Attachment to have been a member of the conspiracy to commit genocide, he is not alleged either to have had knowledge of it, or indeed to have knowingly participated in it (see paragraphs 34-36 and 90).

⁶³ The Indictment reads in relevant part with regard to paragraph 76 – and with regard to Milan Gvero's role *only* in the JCE to forcibly transfer – that Milan Gvero committed acts in furtherance of the said JCE *as described in paragraphs 50-54* of the Indictment. This is contrasted significantly with the alleged furtherance by other accused in the present case of the JCE one, to forcibly transfer and two, to summarily execute the able-bodied Srebrenica men as described in paragraphs 74 and 77, and in paragraphs 38-44 of the Indictment, respectively. Milan Gvero therefore cannot be said to have been charged with being a member of both JCEs. The Indictment reads in furtherance only of the JCE to forcibly transfer.

⁶⁴ *Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules*, 31 May 2006, para. 122(7)(i). The Trial Chamber's contention that the Accused ought to be fully on notice of the JCE charged against him is supported by: *See Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, *Judgment*, 28 November 2006, para. 22.

⁶⁵ Pre-Trial Brief, para 27 and fn 21. The Prosecution state specifically in their Pre-Trial Brief with regard to common plan to forcibly transfer and to commit genocide, that Milan Gvero (and Radivoje Miletic) are "not been indicted for the Genocide", but are charged only with opportunistic killings as a foreseeable consequence of the said transfer. In paragraph 349 of their pre-trial brief the prosecution list all the accused in the present case charged with the said crime, save Milan Gvero and Radivoje Miletic. The same holds true too, with regard to paragraph 386 of the Pre-Trial Brief and in particular, with regard to the charge of conspiracy to commit genocide. *See also* OTP Pre-Trial Brief, para. 429 ("The Accused Radivoje Miletic and Milan Gvero are charged with direct criminal responsibility under Article 7(1) for all counts of the Amended Indictment except Counts I and II"). Whilst the Prosecution in paragraph 397 of same state that "all eight Accused" (as there then were) are charged *inter alia* with extermination (Count 3), the Indictment omits where relevant (i.e. under Count 3) any mention whatsoever of Milan Gvero.

⁶⁶ PW-168, T. 16243 (11/10/07) Closed session.

liability by which to frame the charges and acts alleged in the Indictment. Common purpose liability is predicated on the understanding that all participants in the common plan share a common intent and thus are liable for *all* of the crimes that occur through the realisation of the common design or purpose.⁶⁷ Whilst the Defence acknowledge that it is permissible to charge the same members of a single JCE with having multiple common criminal objectives,⁶⁸ or indeed a single JCE with one common criminal objective which has expanded over time,⁶⁹ it is plainly improper that an identical group of people could be alleged to “share” two entirely distinct common criminal objectives (which are purportedly devised at the same point in time), and charge only part of that group with participation in both JCEs. Such a practice simply belies the weakness of the Prosecution case against the alleged participants in both JCEs.

36. The Defence submit that the real rationale for the incomprehensible use of two distinct and simultaneous JCEs within the same Indictment is due to a need for expedition rather than a proper consideration of the evidence. The Tribunal’s ambitious completion strategy has, in effect, forced the Prosecution to shoehorn the cases of Gvero and Miletic (who were originally charged, together with Zdravko Tolimir, with the forcible transfer JCE) into the much broader Popovic et al JCE for mass murder. The result is an Indictment which is internally inconsistent and deficiently pleaded. The extremely confused nature of the Prosecution’s case as to the number and nature of the JCEs charged is particularly obvious in paragraph 89 of the Indictment which provides that the “JCE identifies the criminal endeavour to force the Muslim population from the Srebrenica and Zepa enclaves and murder all the able-bodied men captured from the Srebrenica enclave, as described in this Indictment.” Indeed, the Prosecution themselves appear to have explicitly

⁶⁷ Type JCE III liability is an exception to the rule and is dealt with by submission below in terms of the differing *mens rea* standards. However, the possibility of type III liability with respect to one or more of the accused for the opportunistic killings does not detract from the Defence’s central argument that an identical group of people cannot logically “share” two entirely distinct common criminal objectives at the same point in time.

⁶⁸ Implicit approval of this type of charging appears to be given by the Appeals Chamber in *Prosecutor v Blagojevic*, Appeals Chamber Judgment, 9 May 2007, paragraphs 250-276.

⁶⁹ *Prosecutor v Krajisnik*, Appeals Chamber Judgment, 17 March 2009, paragraph 171.

acknowledged this contradiction in their case in their rule 98bis submissions by stating that:

“The fact that there are two JCEs in this case, forcible transfer and the murder operation, does not mean that these crimes, the forcible transfer and the murder operation, are distinct. They’re completely intertwined, they’re overlapping, and they’re all involved with the same objective, which is to get rid of the entire Muslim population, not just the women and children, not just the men, but the population from Srebrenica and Žepa enclaves.”⁷⁰

37. Faced with a lack of credible proof and dearth of direct evidence that implicates Milan Gvero in the mass murders, the Prosecution has resorted to casting a ‘wide net’ of criminal liability through the inappropriate use of the doctrine of JCE. It is the Defence position that there is no basis upon which the Prosecution could have properly charged the seven co-accused in this case with one JCE with a singular common criminal objective as there is simply no evidence to suggest that the seven co-accused shared a common intent. In the absence of any basis for suggesting such a common purpose, the Prosecution does not have the discretion to arbitrarily and nonsensically allege that an identical group of people can “share” two entirely distinct common criminal objectives, purportedly devised at the same point in time in order to found two JCE liability for different members of this group. The selective and deficiently pleaded nature of the JCE charges in this Indictment suggest fundamental flaws in the Prosecution theory of the case and an improper application of JCE that has no foundation in the jurisprudence of this Institution.

38. For all of the above reasons, the Defence submit that the Prosecution’s non-uniform charges concerning JCE bring into question the propriety of the use of JCE as a mode of liability in the present case and JCE liability should accordingly not be relied upon to found any conviction for Milan Gvero.

⁷⁰ OTP Rule 98bis Submissions, T. 21431-21442 (18/02/08).

Milan Gvero's participation in and mens rea for the alleged JCE have not been proven in any event

Actus Reus

39. Even if the Defence is wrong as to this primary submission regarding the deficiencies in the pleading of JCE that are discussed above and, as a corollary, the inappropriateness of its use in the present case, the Prosecution has not established that Milan Gvero's participation in the alleged JCE was sufficiently 'significant' or 'real' in any event.⁷¹

40. The Defence note at the outset that the Prosecution, in the Indictment, allege eight means by which Milan Gvero is said to have participated in the JCE. These eight means, which are particularized in paragraph 76 of the Indictment,⁷² are as follows:

(a) Defeating the Muslim forces militarily

(i) he released to the media a false statement concerning the attacks on the enclaves in order to assist in the take-down of the Srebrenica enclave; and,⁷³

(ii) he assisted in the attack on the Srebrenica enclave from the Drina Corps Forward Command Post on 9 July 1995 and advised General Krstic on the ongoing operation;⁷⁴

(b) Disabling the local UN forces militarily

(i) he assisted in the attack on Srebrenica, knowing that one of the main objectives was to force the Muslim population to leave Srebrenica, by lying to UNPROFOR about Muslim attacks, in particular on UN Ops, and VRS intentions and actions with respect to the enclave; and⁷⁵

⁷¹ *Prosecutor v Kvočka*, Appeal Judgment, 28 February 2005, paragraph 193.

⁷² Paragraph 76 of the Indictment provides that: "Milan Gvero, acting individually or in concert with other members of the Joint Criminal Enterprise to forcibly transfer and deport the populations of Srebrenica and Zepa and knowing that forcing the Muslims out of the enclaves was unlawful, committed acts in furtherance of the Joint Criminal Enterprise as described in paragraphs 50-54 of this Indictment and below..."

⁷³ The relevant conduct in relation to this allegation on the part of Milan Gvero is said to have taken place on 10 July 1995.

⁷⁴ The relevant conduct in relation to this allegation on the part of Milan Gvero is said to have taken place on 9 July.

⁷⁵ The relevant conduct in relation to this allegation on the part of Milan Gvero is said to have taken place during the day on 11 July 1995.

- (ii) he kept RS President Radovan Karadzic informed of his communication with the international forces;⁷⁶
- (c) Preventing and controlling outside international protection of the enclaves, including air strikes and international monitoring
 - (i) he threatened and pressured an UNPROFOR commander in an attempt to stop air strikes; and,⁷⁷
 - (ii) after the fall of the Srebrenica enclave, he lied to international representatives in order to block the UN's and other international organisations' access to Srebrenica;⁷⁸
- (d) Controlling the movement of the Muslim population out of the enclaves
 - (i) he helped to organise and coordinate the capture and detention of Muslim men from Srebrenica; and,⁷⁹
 - (ii) he facilitated and oversaw the movement of wounded Muslims from Srebrenica."⁸⁰

41. Of these eight allegations in Indictment paragraph 76, the first five (ie. paragraphs 76(a)(i) to 76(c)(i)) relate to acts and conduct which took place prior to the development of the common criminal objective which, according to paragraphs 27 and 58 of the Indictment, was only devised in the late evening hours of 11 July 1995 and on the morning of 12 July (see footnotes above for the dates on which Milan Gvero's acts and conduct was alleged to have taken place in relation to these allegations). As a result, Milan Gvero's acts and conduct in relation to the allegations contained in paragraphs 76(a)(i) to 76 (c)(i) of the Indictment can have no possible bearing on his purported responsibility for crimes according to the JCE. The Defence make this same submission in relation to the prosecution's very recent allegations in relation to Zepa, which are not pleaded in the Indictment as alternative or additional

⁷⁶ The relevant conduct in relation to this allegation on the part of Milan Gvero is said to have taken place on during the day on 11 July 1995.

⁷⁷ The relevant conduct in relation to this allegation on the part of Milan Gvero is said to have taken place on during the day on 11 July 1995.

⁷⁸ The relevant conduct in relation to this allegation on the part of Milan Gvero is said to have taken place on 12 July 1995.

⁷⁹ The relevant conduct in relation to this allegation on the part of Milan Gvero is said to have taken place on 13 July 1995.

⁸⁰ The relevant conduct in relation to this allegation on the part of Milan Gvero is said to have taken place on 16 July 1995.

forms of participation in the JCE. Accordingly, whether he did or did not carry out these acts is of no possible relevance to his JCE liability.

42. If this submission is not accepted by the Trial Chamber, the Defence maintain, in the alternative, that as set out below in the sections of this brief dealing with the allegations contained in Indictment paragraph 76 and Gvero's alleged responsibility with respect to Zepa, that the prosecution have failed to prove beyond a reasonable doubt these acts of alleged participation. Finally, the Defence contend that even if the Trial Chamber were to find that these acts of participation are made out on the evidence, that they do not amount to a sufficiently 'significant' or 'real' contribution to the execution of one or more of the underlying offences so as to establish Milan Gvero's liability pursuant to the doctrine of JCE.

Mens Rea for JCE generally

43. For Milan Gvero to be liable for the counts 4 to 8 of the Indictment pursuant to JCE, the Prosecution must establish beyond reasonable doubt⁸¹ that he shared a common design with one or more of the other members of the alleged JCE to (a) make life unbearable for the Muslim population of Srebrenica and Zepa; and (b) forcibly remove them from the enclaves to areas outside the control of the RS.⁸² The Defence submit in relation to this requirement that the Prosecution have failed to establish any such common plan. In particular, contrary to paragraph 73 of the Indictment, they have not proved that members of the JCE made life unbearable for the inhabitants of the enclave by: (1) shelling civilian targets in Srebrenica and Zepa; and (b) controlling the movement of the Muslim population out of the enclaves.⁸³ Detailed submissions showing that each of these limbs of the prosecution's case have not been proved are set out in subsequent sections of this brief.⁸⁴ As a result, there is plainly

⁸¹ *Prosecutor v Furundzija*, Appeal Judgment, 21 July 2000, para 120.

⁸² See paragraph 91 of the Indictment.

⁸³ Paragraph 73 of the Indictment.

⁸⁴ See the sections of this brief entitled 'Submissions on crimes'. See also the section of this brief dealing with the allegation in paragraph 76(a)(i) of the Indictment.

no basis upon which the Trial Chamber can draw an inference that the common criminal plan as alleged actually existed in fact.⁸⁵

Mens Rea – JCE I

44. To incur individual criminal responsibility under the basic form of JCE (JCE I), Milan Gvero must be found to have shared with the other JCE members the intent to commit counts 7 and 8 of the Indictment.⁸⁶ The Defence also recall the Appeals Chamber’s guidance in this regard that “a Chamber can only find that the accused has the requisite intent if this is the only reasonable inference on the evidence”.⁸⁷

45. Contrary to their paragraph 91 of the Indictment, the Defence suggest that the assertion that Milan Gvero possessed the *mens rea* for these horrendous crimes is absurd. There is plainly no evidence to prove that Gvero possessed the requisite intent to remove the Bosnian Muslims from the enclaves.⁸⁸ In fact, all of the evidence adduced in this case, as demonstrated in the sections of this brief below dealing with ‘Gvero’s relationships’ and ‘Gvero’s role and responsibilities’, illustrates that Milan Gvero was a humanist both by nature and in his job. This characteristic actually led to him being ridiculed and alienated by other VRS members and representatives of the RS political leadership. Furthermore, there is a plethora of evidence to suggest that in true communist fashion, Gvero did his best to ensure equal and proper treatment for all, regardless of religious or ethnic background. His proper conduct during the war was even recognized by UN representatives.

⁸⁵ *Prosecutor v Tadic*, Appeal Judgment, 15 July 1999, para 227.

⁸⁶ *Prosecutor v Vasilijevic*, Appeals Judgement, 25 February 2004, para. 101; *Prosecutor v Stakic*, Appeal Judgment, 22 March 2006, para 65; *Prosecutor v Kvočka*, Appeal Judgment, 28 February 2005, para 82.

⁸⁷ *Prosecutor v Brdjanin*, Appeal Judgment, 3 April 2007, para 429.

⁸⁸ *Prosecutor v Stakic*, Appeal Judgment, 22 March 2006, para 278; *Prosecutor v Krstic*, Trial Judgment, 2 August 2001, para 519-532. In relation to proving intent for forcible transfer, with respect to an allegation of failing to provide humanitarian aid, see: *Prosecutor v Blagojevic & Jokic*, Appeal Judgment, 9 May 2007, paragraphs 250-276.

Mens Rea – JCE III

46. To incur individual criminal responsibility for any count under the extended form of JCE (JCE III), Milan Gvero must be found to have: (a) known that additional crimes were the natural and foreseeable consequence of the common criminal purpose and (b) willingly taken the risk that such crime/s might be perpetrated by a member of the JCE by continuing to participate in the enterprise.⁸⁹ The additional crimes with which Milan Gvero is charged under JCE III are those contained in counts 4 to 6 of the Indictment (ie. opportunistic killings and persecutions).

47. The primary Defence submission in relation to the JCE III is that this mode of liability is inapplicable to crimes of specific intent and therefore, Milan Gvero cannot be held responsible for the persecutions (including those opportunistic killings charged as persecutions) pursuant to the extended form of JCE in any event. At the outset, the Defence observes that even though there has been some very limited jurisprudence (primarily the *Brdjanin* interlocutory appeal decision)⁹⁰ to suggest that specific intent crimes, such as genocide or persecution, can be committed pursuant to JCE III, there has, in fact, never been a conviction on this basis before any international tribunal. Indeed, at least one respected commentary describes the *Brdjanin* interlocutory decision as not providing “any precedential authority” and as a result states that the question remains “debatable and unsettled”.⁹¹ The weight of jurisprudential authority is clearly opposed to the imposition of liability for specific intent crimes via JCE III due to concerns as to the corollative dilution in the *mens rea* standard for these most egregious of international crimes.⁹² Leading academic and extra-judicial writings also adopt this approach to JCE III as it is currently

⁸⁹ *Prosecutor v Kvočka*, Appeal Judgment, 28 February 2005, para 83; *Prosecutor v Stakic*, Appeal Judgment, 22 March 2006, para 65.

⁹⁰ *Prosecutor v Brdjanin*, Decision on Interlocutory Appeal, 19 March 2004, paras 5-9; *Prosecutor v Milutinovic*, Trial Judgment, 26 February 2009, paras 109-110.

⁹¹ Mettraux, G., *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, 2005 at page 265.

⁹² *Prosecutor v Stakic*, Trial Judgment, 31 July 2003, paragraphs 437, 442, 530, 558; *Prosecutor v Kvočka*, Trial Judgment, 2 November 2001, paragraph 288; *Prosecutor v Kvočka*, Appeal Judgment, 28 February 2005, paragraph 110; *Prosecutor v Krnojelac*, Appeal Judgment, paragraph 111; *Prosecutor v Krstic*, Appeal Judgment, 19 April 2004, paragraph 134.

understood.⁹³ Cassese notes that “it is a logical impossibility” to be: “held responsible for committing a crime that requires special intent (in addition to the intent needed for the underlying crime) unless that special intent can be proved, whatever mode of responsibility for the commission of crimes is relied upon”.⁹⁴ Likewise, Ramer takes the view that “attributing responsibility to an individual based on another individual’s thoughts is contrary to the fundamentals of individual criminal responsibility. The third category of JCE liability, therefore, should not be used as a vehicle for attributing liability for specific intent crimes”.⁹⁵ On this basis, the Defence suggest that finding Milan Gvero liable for the specific intent crime of persecution pursuant to JCE type III would be improper and contrary to the fundamental principle of *nullem crimen sine lege*.⁹⁶

48. The alternative Defence submission in relation to JCE III is that Milan Gvero was not aware that the opportunistic killings and persecutions alleged in paragraphs 31 and 48 of the Indictment were the natural and foreseeable consequence of the alleged JCE to forcibly transfer and deport the populations of the Srebrenica and Zepa enclaves.⁹⁷ This is because, the Defence contend, the opportunistic killings charged as murder and as a form of persecution actually formed part of the JCE to mass murder the able-bodied men from Srebrenica and indeed, took place in the course of, or in furtherance of, this operation. In this vein, the Defence note in particular that the opportunistic killings did not take place ‘in the course of’ the alleged forcible transfer operation. Furthermore, it is the Defence position that as these crimes were, in fact, carried out

⁹³ Cassese, A., “Proper limits of individual responsibility under the doctrine of JCE”, *Journal of International Criminal Justice*, (2007), Volume 5: 109-133 at pages 121-122; Ramer, Jacob., “Hate by Association: Individual Criminal Responsibility for Persecution through participation in a joint criminal enterprise”, *Chicago-Kent Journal of International and Comparative Law*, Spring, 2007, Volume 7, page 31; Danner, A., & Martinez, J., “Guilty Associations: JCE, Command Responsibility and the Development of International Criminal Law”, *California Law Review*, January 2005.

⁹⁴ Cassese, A., “Proper limits of individual responsibility under the doctrine of JCE”, *Journal of International Criminal Justice*, (2007), Volume 5: 109-133 at pages 121.

⁹⁵ Ramer, Jacob., “Hate by Association: Individual Criminal Responsibility for Persecution through participation in a joint criminal enterprise”, *Chicago-Kent Journal of International and Comparative Law*, Spring, 2007, Volume 7, page 31.

⁹⁶ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, 3 May 1993 (“Report of the Secretary-General”), para. 34, (emphasis added). See also *Aleksovski Appeals Judgement*, 24 March 2000, para. 127.

⁹⁷ Cf. Paragraph 86 of the Indictment.

for reasons of personal revenge, it would have been completely impossible for Milan Gvero to foresee their commission as they bore no relationship whatsoever to the forcible transfer operation. They were either completely outside the JCE with which he was charged or formed part of an expanded JCE to commit acts of revenge against Bosnian Muslims of which Milan Gvero formed no part. For further clarification of these arguments please see the submissions in respect of the opportunistic killings and persecutions detailed in the section of this brief below entitled ‘Submissions on crimes’.

Conclusion as to JCE

49. The Prosecution has therefore failed to prove beyond a reasonable doubt that Milan Gvero, acting individually or in concert with other members of the JCE, was a member of the alleged JCE to forcibly transfer the Bosnian Muslim populations of Srebrenica and Zepa. The Prosecution has failed to establish either the actus reus or the mens rea for the crimes charged under the alleged JCE and accordingly, he must be acquitted of all counts of the Indictment under this mode of liability. As Cassese has emphasized in his extra-judicial writings on JCE:

“the latitude that the notion leaves to judges should induce them to proceed gingerly and with utmost prudence when appraising the evidence and establishing the existence of both actus reus and mens rea. In case of doubt, they should arguably opt for a not guilty determination.”⁹⁸

⁹⁸ Antonio Cassese, “The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise”, *Journal of International Criminal Justice* (2007) Volume 5, pages 109-133 at 133.

Other modes of liability under Article 7(1) of the Statute

'Planning'

50. Planning involves the formulation of a ‘method of design or action, procedure, or arrangement for the accomplishment of a particular crime’, by one or more persons.⁹⁹ Individual responsibility under this mode of liability accrues only when the level of participation in the planning has been substantial – for example, formulating the plan, or endorsing the plan of another.¹⁰⁰ It must also be proved beyond reasonable doubt that the accused was involved in the immediate preparation of the concrete crimes.¹⁰¹ The Defendant must be proven to have possessed the state of mind required by the underlying offence with which he is charged, and to have ‘directly or indirectly intended that the crime in question be committed’.¹⁰²

'Instigating'

51. Instigation consists of ‘urging, encouraging or prompting’ another to commit an offence.¹⁰³ There is a threshold causal requirement – that the act of instigation must constitute a substantial or real contribution to the offence. The Defendant must have the requisite intention for the crime alleged, and the act of instigation must have been deliberately intended to provoke the commission of the crime.¹⁰⁴

'Ordering'

52. Ordering involves a person deliberately using their position of authority – *de jure* or *de facto* – to convince another to commit the offence charged.¹⁰⁵ Though the order

⁹⁹ *Prosecutor v Kordic and Cerkez*, Trial Judgement, 26 February 2001, para. 386.

¹⁰⁰ *Prosecutor v Bagilishema*, Trial Judgement, 7 June 2001, para. 30.

¹⁰¹ *Prosecutor v Brđjanin*, Trial Judgment, 1 September 2004, para 380.

¹⁰² *Prosecutor v Blaskic*, Trial Judgement, 3 March 2000, para. 278. *Prosecutor v. Galić*, Trial Judgment, 5 December 2003, para. 168; *Prosecutor v. Brđjanin*, Trial Judgment, 1 September 2004, paras 357–358.

¹⁰³ *Prosecutor v. Kordić & Čerkez*, Appeal Judgment, 17 December 2004, para. 27.

¹⁰⁴ *Prosecutor v Kordic and Cerkez*, Trial Judgement, 26 February 2001, para. 386.

¹⁰⁵ *Prosecutor v Krstic*, Trial Judgement, 2 August 2001, para. 601.

may be implicit, it must be proven that the person intended to give the order.¹⁰⁶ It is also not sufficient that a person giving an order know that there is a risk that a crime will be committed. A person who orders an act or omission must, at a minimum, act with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.¹⁰⁷

'Otherwise aiding and abetting'

53. For an individual to incur liability for aiding and abetting, it is necessary to prove the carrying out of any act of practical assistance, encouragement, or moral support to the principle offender.¹⁰⁸ The act of assistance must be proven to have had a 'substantial effect' on the commission of the crime by the principal offender.¹⁰⁹ Where a Defendant is accused of having rendered knowing assistance *after* the completion of the core crime, the Prosecution must prove a prior agreement between the accused and the perpetrators, such that the latter were genuinely assisted in their conduct.¹¹⁰

54. The requisite mental element consists of knowledge that the Defendant's acts assisted in the commission of the specific crime in question by the principal offender.¹¹¹ The Defendant must also have been aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind (even for crimes of specific intent),¹¹² and have taken a conscious decision to act in the knowledge that they would thereby support the commission of the crime.¹¹³

¹⁰⁶ *Prosecutor v Blaskic*, Trial Judgment, 3 March 2000, para. 282.

¹⁰⁷ *Prosecutor v Blaskic*, Appeals Judgement, 29 July 2004, para. 42.

¹⁰⁸ *Prosecutor v. Delalić et al*, Trial Judgment, 16 November 1998, para. 327; *Prosecutor v. Blagojević & Jokić*, Appeal Judgment, 9 May 2007, para. 127; *Prosecutor v. Simić et al*, Appeal Judgment, 28 November 2006, para. 85.

¹⁰⁹ *Prosecutor v. Blagojević & Jokić*, Appeal Judgment, 9 May 2007, para. 127; *Prosecutor v. Brđanin*, Appeal Judgment, 3 April 2007, para. 277.

¹¹⁰ *Prosecutor v. Haradinaj*, Trial Judgment, 3 April 2008, para. 145; *Prosecutor v. Blagojević & Jokić*, Trial Judgment, 17 January 2005, para. 731.

¹¹¹ *Prosecutor v. Blagojević & Jokić*, Appeal Judgment, 9 May 2007, paras. 127, 219–221; *Prosecutor v. Brđanin*, Appeal Judgment, 3 April 2007, para. 484.

¹¹² *Prosecutor v. Seromba*, Appeal Judgment, 12 March 2008, paras. 56, 65; *Prosecutor v. Blagojević & Jokić*, Appeal Judgment, 9 May 2007, para. 127.

¹¹³ *Prosecutor v. Seromba*, Appeal Judgment, 12 March 2008, para. 44.

55. Some tribunal jurisprudence has alluded to the possibility of aiding and abetting by “omission” when under a positive duty.¹¹⁴ One context in which this has been discussed is the “approving spectator” doctrine, where the mere silent presence at the scene of a crime “of a person with superior authority, such as a military commander” *may* be determined on the facts (and subject to proof of the necessary mental element) to have a sufficient effect on the perpetrators to constitute aiding and abetting by means of providing ‘moral support’.¹¹⁵ However, situations of this type are highly exceptional,¹¹⁶ and have only so far been reached by majority verdicts and accordingly, great caution should be exercised in considering the possibility of imposing liability for aiding and abetting by omission.

Submissions as to Milan Gvero’s liability for ordering, planning, instigating and aiding and abetting

Actus Reus

56. The conduct alleged by the Prosecution which purportedly establishes the *actus reus* of Milan Gvero’s liability for ordering, planning, instigating and aiding and abetting the crimes charged in the Indictment is that same as that allegedly constituting his participation in the joint criminal enterprise. This conduct is as set out by the prosecution in paragraph 76 of the Indictment, and is implied in relation to the much more recent allegation of his involvement with Zepa. The defence position as to this alleged conduct is dealt with in detailed submissions set out subsequently in this brief. The thrust of the defence submissions for the purpose of these modes of liability are:

¹¹⁴ *Prosecutor v. Mrkšić*, ICTY, Appeal Judgment, 5 May 2009, para. 49; *Prosecutor v. Orić*, Appeal Judgment, 3 July 2008, para. 42; *Prosecutor v. Blaškić*, Appeal Judgment, 29 July 2004, para. 47; *Prosecutor v. Mrkšić*, Trial Judgment, 27 September 2007, paras. 553–554; *Prosecutor v. Orić*, Trial Judgment, 30 June 2006, para. 283; *Prosecutor v. Limaj et al*, Trial Judgment, 30 November 2005, para. 517; *Prosecutor v. Strugar*, Trial Judgment, 31 January 2005, para. 349.

¹¹⁵ *Prosecutor v. Brđanin*, ICTY, Appeal Judgment, 3 April 2007, paras. 273, 277.

¹¹⁶ *Prosecutor v. Mrkšić*, Trial Judgment, 27 September 2007, para. 553. The ICTY Appeals Chamber has recently ruled in a case which may represent a “genuine” example of aiding and abetting by omission, where the accused failed to take actions available to him to prevent the murder of prisoners of war. However, the decision was reached by a narrow margin (3–2) and illustrates some of the difficulties inherent in this form of liability. See: *Prosecutor v. Mrkšić*, Appeal Judgment, 5 May 2009, paras 101–103.

- (a) the prosecution have not proven to the requisite standard the prosecution's allegations as to Milan Gvero's conduct in relation to Srebrenica and Zepa in any event; and
- (b) even if the prosecution's allegations as to Milan Gvero's conduct in relation to Srebrenica and Zepa were proved beyond reasonable doubt (which is not admitted), they would not, of themselves, suffice to establish a substantial contribution to the crimes charged by Milan Gvero.

57. Furthermore, and for the purposes of determining planning liability, the Defence contend that there is simply no evidence whatsoever to indicate that Milan Gvero formulated or endorsed the alleged plan to remove the Bosnian Muslim populations of the Srebrenica and Zepa enclaves. Likewise, in respect of instigating, the Defence point to the total absence of any evidence of urging, encouraging or prompting anyone to commit the offences charged in the Indictment. Turning to liability for ordering, there is again a complete lacunae in the prosecution's case, as they have failed to show that Milan Gvero had either *de jure* or *de facto* authority sufficient to convince anybody to carry out the crimes set down in indictment counts 4, 5, 6, 7 and 8.

58. Finally, and with regard to the possibility of incurring liability for aiding and abetting, the Defence suggest that there is no evidence to substantiate the Prosecution's allegation that Milan Gvero carried out any act (or indeed, any omission) which rendered practical assistance, encouragement or moral support to any person alleged to have committed the offences for which Milan Gvero has been indicted. Similarly, and in relation to the prosecution allegation of Milan Gvero's knowing assistance after the completion of the forced transfer of the Bosnian Muslim population from Srebrenica, the Defence submit that there was plainly no prior agreement between him and the alleged perpetrators and any such perpetrators could therefore not have been assisted by him in their conduct.

Mens Rea

59. Turning to the *mens rea* for ordering, planning, instigating and aiding and abetting the crimes charged in the Indictment, the Defence maintain that, based on the submissions in the section of the brief below dealing with Milan Gvero's knowledge, there is plainly no evidence capable of belief beyond reasonable doubt, to indicate that Milan Gvero possessed the necessary mental state for the modes of liability.

60. With respect to planning, Milan Gvero did not possess the *mens rea* for the underlying offences and did not directly or indirectly intend that the crimes in question be committed. In relation to instigation liability, there is a similar lack of any evidence to the effect that Milan Gvero intended the crimes charged and deliberately intended to provoke others to carry out these crimes. In terms of ordering, no evidence has been adduced to indicate that Milan Gvero gave an intentional order (or even one which was implicit) with the awareness that there was a substantial likelihood that a crime would result in the course of the order's execution.

61. Finally, the Defence assert that Milan Gvero clearly had no knowledge that any of his acts could have been of any assistance to any individual alleged to have carried out the specific crimes with which he is charged. In this vein, he was certainly not aware of the essential elements of the crimes alleged, and in particular was not aware of the specific persecutory intent which would be required on the part of any perpetrators for liability under aiding and abetting to be made out. Milan Gvero categorically did not take a conscious decision to act in the way he did during the Indictment period in the knowledge that he would be supporting individuals committing the offences set down in counts 4 to 8 of the Indictment.

Conclusion

62. It is therefore submitted that the Prosecution has failed to adduce any evidence, or any credible evidence, before the Trial Chamber to establish to the requisite standard

their contention that Milan Gvero “planned, instigated, ordered, or otherwise aided and abetted” the commission of the murders, persecutions, forcible transfers and deportations of Bosnian Muslims alleged in the Indictment.

The modes of liability alleged are therefore not established in Milan Gvero’s case

63. For the reasons set forth above, it is submitted that there is insufficient evidence that Milan Gvero committed, planned, instigated, ordered or aided and abetted the commission of any of the crimes alleged in the Indictment pursuant to Article 7(1) of the Statute. Accordingly, he must be acquitted of all charges.

SUBMISSIONS ON CRIMES

Milan Gvero cannot be liable for opportunistic killings charged as murder (Counts 4 and 5) or for the opportunistic killings charged as persecutions committed pursuant to the alleged genocide or extermination (Count 6)¹¹⁷

64. If the Trial Chamber were to find, as alleged, that the plan to commit mass murder was developed in the evening of 11 and 12 July¹¹⁸, then arguably, the killings committed thereafter were pursuant to the alleged genocide or extermination, with which Milan Gvero is not charged.¹¹⁹ Such a finding would necessitate acquittal under Counts 4 and 5, and indeed under Count 6, paragraphs 48(a), 48(b), 48(d), and

¹¹⁷ “Opportunistic killing” is not a crime *per se* under the ICTY Statute, so the Defence deal with it as allegations of murder. See *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Judgment, 17 January 2005, para. 561.

¹¹⁸ Indictment para. 27. The Defence note that the said plan alleged to have been developed in the evening of 11-12 July is in the Indictment under Genocide (Count 1) and in particular, under the heading, “Joint Criminal Enterprise to Murder the Able-Bodied Bosnian Muslim Men”.

¹¹⁹ Indictment paras 46 and 47 (Milan Gvero is responsible for the crime of murder as carried out exclusively by way of “opportunistic killings”); OTP Pre-Trial Brief, para. 21 & fn 21 (Milan Gvero has not been indicted for genocide, but is charged with “opportunities murders as the foreseeable consequences of the forced movement of the Bosnian Muslim population”).

48(e) with regard to the forcible transfer of the men to the Zvornik area (i.e. to where it is alleged that “they were ultimately executed”).

65. The execution of the plan to murder the able-bodied Srebrenica men is alleged to have begun *on the afternoon of 12 July* with the separations of the able-bodied men in Potočari.¹²⁰ The alleged plan to mass murder encompassed both these separated men, who were transported to Bratunac, where they were held temporarily,¹²¹ and those captured or those who surrendered *beginning in the morning of 13 July* from the column.¹²² Alleged too, is that the mass murder of Bosnian Muslim men from Srebrenica “*began on the morning of 13 July ... and continued through July 1995*”.¹²³

66. Indeed, the opportunistic killings allegedly took place during and after the organised executions, and were alleged *inter alia* “the natural and foreseeable consequence of the Joint Criminal Enterprise *to murder all the able-bodied Bosnian Muslim men from Srebrenica*”.¹²⁴ Any distinction between the genocide and extermination and “opportunistic killings” is thus wholly artificial.

67. The net result of this is that in order to convict Milan Gvero of any or all of the alleged opportunistic killings the Trial Chamber would need to be satisfied beyond

¹²⁰ Indictment, para. 28. Emphasis added. *See also* Indictment para. 27 (“In the evening hours of 11 July and on the morning of 12 July 1995 ... Ratko Mladić and others developed a plan to murder the hundreds of able-bodied men identified from the crowd in Potočari”); OTP Pre-Trial Brief, para. 24 (“Beginning in the morning of 12 July 1995 and continuing through about 1 November 1995, VRS and MUP forces executed more than 7, 000 Bosnian Muslim men at a number of different locations. These executions included opportunistic killings perpetrated shortly after the men had been separated in Potočari or captured from the column along the Bratunac-Milići road, as well as organised and systematic executions of men who were first separated in Potočari or captured from the column of Bosnian Muslim men retreating from Srebrenica and then transported to various execution sites”); Prosecution Opening Statement, T. 374-376, 379, 425-430 (“The plan to separate and kill the approximately one-thousand military aged men in Potočari was formulated in the night of 11 to 12 July.” “These men were marked for death, particularly when you put all the evidence together from 12 July and continually thereafter: the decision the night of 11 to 12 July to screen the men as war criminals, their separation, their detention in buildings, and their transport out of the area”).

¹²¹ Indictment, para. 28. Emphasis added. *See also* Prosecution Opening Statement, T. 428, 430, 433-434 (06/08/21) (The men from Potočari were to be murdered around Bratunac. However, there were so many prisoners on 13 July that they couldn’t kill them all around Bratunac, so the decision was made to move them to Zvornik).

¹²² Indictment, para. 29. Emphasis added.

¹²³ Indictment, para. 30. Emphasis added.

¹²⁴ Indictment para. 31. Emphasis added.

reasonable doubt that such a killing was not part of the mass murder plan. Put another way, if it could have been part of the mass killings, then it cannot be said beyond reasonable doubt to be an opportunistic killing and, as unattractive as this submission might be, it must lead to Milan Gvero's acquittal of all the murder charges. The Prosecution cannot have it both ways.

Separations to Temporary Detention Sites

68. Support for the sameness of the mass murder operation and the "opportunistic killings" is found in the evidence about the separations to temporary detention sites. Momir Nikolić was informed on 12 July that the men separated in Potočari would all be killed.¹²⁵ Facilities in Bratunac, including the Vuk Karadžić School, the hangar, and other facilities in that same part of Bratunac town were identified on 12 July as the only areas in Bratunac in which it was possible to detain the men destined to be killed.¹²⁶ The White House in Potočari thus served as a temporary detention site prior to the transport of these men to Bratunac.¹²⁷
69. Indeed, Major Franken received reports that the exact number of men going into the White House all subsequently came out, and that they were later taken by bus in the direction of Bratunac.¹²⁸ Evidence that these men were told prior to their gathering in the White House to discard their IDs and personal belongings¹²⁹ These incidents all took place on 12 July or thereafter.

¹²⁵ Nikolić, M., T. 32917-32921, 32925 (21/04/09). See also Janjić, M., T. 17928-17929, 17932 (20/11/07); T. 19824 (16/01/08).

¹²⁶ Nikolić, M., T. 32917-32918, 32920-32922 (21/04/09).

¹²⁷ See OTP Pre-Trial Brief, para. 22 ("The men and boys who had been separated from their families by the VRS and MUP personnel were detained in Potočari before being transported to temporary detention sites in Bratunac ten kilometers north of Srebrenica to await transfer to various execution sites").

¹²⁸ Franken, T. 2497-2498 (16/10/06). See also Franken, T. 2591 (17/10/06); PIC 17, dated 13 July 1995 (Aerial Image of Potocari marked by the witness on 16 October 2006); Franken, T. 2512-2513 (16/10/06), P 1897 (Colour photograph showing the burning pile of belongings in the vicinity of the "White House"). See also Groenewegen, P., T. 2963, 3015-3016 (25/10/06).

¹²⁹ See Van Duijn, L., T. 2356 (28/09/06), T. 2410-2411 (29/09/06); Koster, L., T. 3024-3025 (25/10/06); Boering, P., T. 2019, 2012 (22/09/06); **REDACTED**; Rutten, J., T. 4801-4802 (29/11/06); Kingori, J., T. 19457-19458 (11/01/08).

70. Locations in Bratunac as identified by Momir Nikolić also served as temporary detention sites prior to the transfer of the men from these locations to the final execution sites.¹³⁰ Ratko Mladić said at the stadium at approximately 1600 hours on 13 July¹³¹ that the prisoners gathered there should be transported to the Vuk Karadžić school.¹³² **REDACTED**¹³³ Indeed, bodies from the Vuk Karadžić school were taken to Glogova, where they were buried in a mass grave.¹³⁴
71. **REDACTED**.¹³⁵ Momir Nikolić similarly testified that the evening of 13 July is the first time at which he heard that “the prisoners from Bratunac who had been separated in Potočari and temporarily detained in Bratunac would be transferred to the territory of Zvornik”.¹³⁶ The killings that took place at the Petkovci School on 14-15 July, located near Zvornik thus also form part of the mass killings,¹³⁷ for which Milan Gvero cannot be held liable.

The Prosecution has failed to prove the opportunistic killings in any event

72. The Defence turn next to the specific allegations as enumerated in Indictment paragraphs 31.1, 31.2, and 31.4, which it is submitted have not been proved beyond reasonable doubt, in any event. The Defence note that no evidence was adduced in support of the allegations at paragraphs 31.1(b) and 31.1(c)¹³⁸ and Milan Gvero must therefore be acquitted of these charges.

¹³⁰ Nikolić, M., T. 32917-32918, 32920-32922 (21/04/09). See also Indictment para. 28, 62.

¹³¹ The witness clarified that the stadium at which the prisoners were accommodated was located on the road approximately 800 to 900 metres from his command towards Zvornik, on the left-hand side of the road: 2DW-044, Subotic, B., T. 24984 (01/09/08).

¹³² Subotic, B., T. 24986-24989, 25003, 25010 (01/09/08). See also Filipović, N., T. 27017-27018 (10/10/08); Orić, M., T. 889 (28/08/06); Orić, M., T. 976 (29/08/06); PW-113, T. 3329, 3368 (31/10/06); PW-111, T. 6973 (06/02/07); PW-111, T. 6976-6977, 6980-6981 (06/02/07).

¹³³ **REDACTED**

¹³⁴ See PW-161, T. 9372 (23/03/07), T. 9389-9393, 9431, 9467 (26/03/07) **REDACTED** See Indictment para. 32.

¹³⁵ PW-168, T. 15830-15831, 15831, 15842-15843 (26/09/07), T. 15886 (27/09/07) Closed session. See also PW-138, T. 3902-3905 (06/11/09); PW-104, T. 7941, 7944 (28/02/07).

¹³⁶ Momir Nikolić, T. 32937-32938 (21/04/09).

¹³⁷ **REDACTED**; Indictment paragraphs 30.7 & 30.8 & 48(e).

¹³⁸ Rule 98bis Decision, T. 21473-21474 (03/03/08).

Indictment Paragraph 31.1(a) (Nine Bodies – Potočari)

73. PW-114 went to investigate rumours of corpses on 12 July.¹³⁹ He found the bodies around noon that day and estimated that they were killed on either 11 July or in the morning of 12 July.¹⁴⁰ He also testified that there were a couple of houses and some Bosnian Muslim bunkers in the hills in the area where the bodies were found.¹⁴¹ The Defence submit, based on evidence about an individual seen fleeing the area, taken in conjunction with the presence of the column, the retreating Bosnian Muslim fighters, and on the identification papers found, that the Prosecution did not prove beyond reasonable doubt that Milan Gvero can be liable as charged.

The Individual Fleeing the Area

74. Prosecution witness and DutchBat officer Lieutenant Rutten testified that an individual that could have been a soldier dressed in civilian clothes was seen fleeing the area not long before the bodies were found (on the Budak side of the road).¹⁴² However, no evidence was adduced at trial about the identity of this individual. The Defence submit on this basis alone that the Milan Gvero must be acquitted of this charge as it is possible that this individual was in fact responsible for the killings for personal revenge or other reasons.¹⁴³

The Column

75. On 11 July, ten rifles of Mevludin Orić's company were used before the attack on Srebrenica, after which they were deployed along the Bosnian Muslim front line.

¹³⁹ PW-114, T. 3146, 3157, 3177 (27/10/06).

¹⁴⁰ PW-114, T. 3147-3148 (06/10/27).

¹⁴¹ PW-114, T. 3146, 3157, 3177 (27/10/06).

¹⁴² Rutten, J., T. 4907, 4840-4841 (30/11/06); Rutten, J., T. 4802, 4803 (29/11/06). For the location of the bodies, *see* Rutten, T. 4803 (29/11/06); Rutten, T. 4813-4815 (29/11/06); P 2179, dated (Aerial of Potocari marked by Lieutenant Rutten on).

¹⁴³ Orić, M., 00472627 (Some killings that occurred in the column were the result of earlier mutual conflicts and of personal revenge).

They were then left at Buljim and were used by another ten ABiH soldiers.¹⁴⁴ That evening, Bosnian Muslim men fled the enclave to the Buljim area, which leads to Jagličići and Šušnjari. This was where the column gathered for its departure from the enclave¹⁴⁵ and the very area in which the nine bodies were found.

76. Some killings that occurred in the column were the result of earlier mutual conflicts and of personal revenge.¹⁴⁶ That the bodies in relation to Indictment paragraph 31.1(a) were dressed in civilian clothes, or that the victims were all men between the ages of 15 to 45¹⁴⁷ does not exclude the possibility based on the evidence, that the deceased were in fact combatants.¹⁴⁸ Also, it cannot be excluded that the houses located in the area in which the bodies were discovered were used by the Bosnian Muslim forces. At least three Prosecution witnesses, including Lieutenant Rutten, Major Franken, and Lieutenant Koster testified that the 28th Division used civilian buildings, and particularly ordinary houses, for military purposes.¹⁴⁹ Of particular note is that the headquarters of the 280th Brigade was located at one place in a small village north-west of the enclave, when looking at Potocari itself.¹⁵⁰ As illustrated by CIC 15151, this is in the region of Jagličići and Šušnjari (that is, where the column gathered and where the relevant bodies were discovered). In short, it can reasonably be inferred that the deceased may have been combatants and that they may have perished as a result of earlier mutual conflict or acts of personal revenge committed by individual(s) within the column.

¹⁴⁴ Orić, M., T. 986-988 (29/08/06).

¹⁴⁵ Rutten, J., T. 4837-4839 (30/11/06); 6DIC 54 (Aerial of Potocari marked by Johannes Rutten on 30 November 2006). See also submissions below in relation to paragraph 76(d)(i) of the Indictment.

¹⁴⁶ Orić, M., 00472627.

¹⁴⁷ PW-114, T. 3146 (27/10/06).

¹⁴⁸ See also submissions below in relation to paragraph 76(d)(i) of the Indictment.

¹⁴⁹ Rutten, J., T. 5239-5240 (07/12/06) (Houses used by the Bosnian Muslim forces in and around Potočari were regular houses). See also Franken, R., T. 2646 (18/10/06) (The witness conceded that the 28th Division used civilian buildings for military purposes); Koster, E., T. 3059-3060, 3100 (26/10/06); 1D 44, dated 25 and 26 1995 (Lieutenant Koster's witness statement to the Office of the Prosecutor). (The witness was stationed on 10 July at a cross roads near Potocari] when a Bosnian Muslim fighter told him to come to a small headquarters of theirs that was located in the basement of a house that looked like a normal house).

¹⁵⁰ Boering, T. 2180 (06/09/26).

¹⁵¹ CIC 15 (Map of the Srebrenica enclave and surrounding areas).

The Retreating Bosnian Muslim Fighters

77. On 11 July, Bosnian Muslim fighters with mortars were seen in Potočari on both sides of the UN base up in the hill area, as well as at the northern side of the said base.¹⁵² These Bosnian Muslim fighters were coming to and fro, and by 12 July had left for the woods.¹⁵³ 6DIC29¹⁵⁴ reveals that Serb forces arrived from the south of the compound in Potočari and advanced in a northern direction. The Bosnian Muslim fighters retreated in a northern direction ahead of the Serb forces into the woods. The location at which PW-114 discovered the bodies, as marked in 6DIC29, suggests that these individuals could have been killed by these retreating Bosnian Muslim fighters.

Identification Papers

78. Official documents with names were found near the bodies,¹⁵⁵ including some passports.¹⁵⁶ This is inconsistent with what the Prosecution suggest was a common practice of having the Bosnian Muslim men surrender their identification upon detention and destroying it thereafter. The absence of so doing allows at the very least for the possibility that these killings were not committed by VRS forces.

¹⁵² PW-114, T. 3172-3175 (27/10/06), 6DIC 29 (Aerial Overview of Potočari, Marked by PW-114 on 27 October 2006).

¹⁵³ PW-114, T. 3172-3175 (27/10/06). See also Rutten, J., T. 4832-4835, 4837-4839 (30/11/06) (Three armed men took leave of their wives from the UN base in Potočari), 6DIC 54 (Aerial of Potocari marked by Johannes Rutten on 30 November 2006).

¹⁵⁴ PW-114, T. 3172-3175 (27/10/06), 6DIC 29 (Aerial Overview of Potočari, Marked by PW-114 on 27 October 2006).

¹⁵⁵ Koster, E., T. 3033 (26/10/06).

¹⁵⁶ Rutten, J., T. 4811-4812 (29/11/06) (All kinds of papers were lying around the bodies, including some passports).

Indictment Paragraphs 31.2 (Petkovci School), 31.4 (Bratunac Town), and 31.1(d)(The White House)

79. The Defence submit that killings alleged in Indictment paragraphs 31.2, and 31.4, and 31.1(d) were carried out on the basis of personal revenge, which as detailed below in the modes of liability section of this brief, Milan Gvero cannot be liable.

Evidential Submissions

80. The Defence recall in relation to Indictment paragraph 31.2 that during the night of 13 July, a soldier boarded Mevludin Orić's bus and asked whether anybody by the name of Catic or Dzanic was on the bus, whereupon a man got up, went with the soldier to the Vuk Karadžić school, and never returned to the bus.¹⁵⁷ Also in the night of 13 July, Serb soldiers surrounded the vehicles, asking if anybody was from the predominately Bosnian Muslim villages of Husmanići, Potočari, Slatina, Bljeceva, Glogova, and Pulsmulići, and would ask these people for their names and their father's name.¹⁵⁸ This was done, according to PW-110 because people wanted to take revenge against them.¹⁵⁹ Likewise, in the morning of 14 July, soldiers asked the men for their fathers' names.¹⁶⁰ Also that morning, two men were taken off PW-110's

¹⁵⁷ Orić, M., T. 915 (28/08/06).

¹⁵⁸ PW-110, T. 663, 836 (24/08/06). See submissions in section below in relation to paragraph 76(d)(i) of the Indictment. See also *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006, paras 593-676. Mevludin Orić confirmed in this regard that people from *inter alia* the units of Glogova, Potočari, Kraglijivoda, Sućeska Šušnjari, Jagličići, Babuljice, Vlahovici, Brosevici, Biljeg, Skenderivici, and Osmace were in the column (Orić, M., T. 1111 (31/08/06)). Also, Ejub Golić, who *inter alia* led the Glogova Bosnian Muslim fighters in the attacks on the Serb village of Ježestica, also led the Mountain Battalion in the column from the enclave in July 1995. See *Orić* Judgement, paras 620-633, 646-658, 659-676 and **REDACTED**; PW-137, T. 3664, 3749 (06/12/06); PW-110, T. 795, 806 (25/08/06), PW-110, T. 646 (24/08/06). In addition, Zulfo Tursunović participated in the attacks on Serb villages in 1992 and in 1993 (*Orić* Judgement, paras 634- 676). Avdo Palić in agreement with Zulfo Tursmonović had planned and carried out on approximately 26 June 1995 nine sabotage operations during which *inter alia* several civilians were killed (Vojinović, M., T. 23731 (21/07/08)). Zoran Janković saw Zulfo Tursunović when captured and in the column on 14 July (Janković, Z., T. 27369, 27371-27372 (27/10/08)). For his part, Ramiz Bećirović participated in attacks on various Serb villages in 1993 (*Orić* Judgement, paras 659-676). With regard to the column in July 1995, he ordered that it start moving and led the way (Orić, M., T. 977 (29/08/06); Orić, M., T. 1050-1051 (30/08/06)). See also Pandurević, V., T. 30790-30791 (28/01/09) (146 Serb villages and hamlets were burned as a result of Muslim offences between May 1992 and January 1993) and 7D 940 (Surrogate Sheet Photo Material – Map showing the destruction of Serbian villages in the municipalities of Srebrenica and Bratunac between May 1992 and January 1993).

¹⁵⁹ PW-110, T. 838-840 (28/08/06).

¹⁶⁰ PW-110, T. 667, 672 (24/08/06).

lorry, both of whom had been recognized by the soldiers. Neither of these two men were brought back.¹⁶¹

81. PW-113 similarly testified about Indictment paragraph 31.4 that a soldier came in the classroom of the Petkovci School on 14 July and asked the group if there was anyone from Cerska, Konjevic Polje, Glogova or Osmace, and other villages. Those that raised their hands were taken outside the classrooms and never returned.¹⁶² Also, the evidence does not exclude the possibility that the killing at the White House (Indictment paragraph 31.1(d)) was one of revenge.¹⁶³

82. The personal revenge theory is further supported by the allegation that various specific refugees at Potočari were singled out for individual terrorisation and intimidation. Indeed, the Prosecution refer to these incidents as individual attacks.¹⁶⁴ Furthermore, the Prosecution refer to the morning of 12 July, during which Serb soldiers entered Potočari and were allowed to exact revenge against the civilian population.¹⁶⁵

Legal Submissions

83. With regard to the mode of liability with which Milan Gvero is charged for opportunistic killings (JCE III), the finding by the Appeals Chamber in *Tadić*

¹⁶¹ PW-110, T. 668 (24/08/06), T. 811 (25/08/06).

¹⁶² PW-113, T. 3331 (31/10/06). *See also* Orić, M., T. 908-913 (28/08/06) (Indictment para. 31.1(2)(c)); Groenewegen, P., T. 2963-2965 (25/10/06); Boering, P., T. 2008-2018 (22/09/06), T. 2208 (26/09/06) (Indictment para. 31.1(d)).

¹⁶³ *See* Groenewegen, P., T. 2963-2965 (25/10/06); Boering, P., T. 2008-2018 (22/09/06), T. 2208 (22/09/06)).

¹⁶⁴ OTP Pre-Trial Brief, para. 119. *See also* Prosecution Pre-Trial Brief, para. 158.

¹⁶⁵ Prosecution Opening Statement, T. 425 (06/08/21). For evidence of revenge killings in Potocari, *see* Rutten, T. 4800, 4801, 4816 (06/11/29); Rutten, T. 4853, 4855, 4856, 4860, 4897-4898 (06/11/30); 3D 37, dated 9 October 1995 (Johannes Rutten's witness statement to the Office of the Prosecutor) [Revised Summaries – Compilation of Cross References dated 070122, para 241].

suggests an immediacy of the foreseeable consequence in carrying out the common purpose:

An example of the third category of JCE would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, *in the course of doing so*, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of *those* civilians.¹⁶⁶

84. The Appeals Chamber similarly noted that:

*Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.*¹⁶⁷

85. The opportunistic killings in the present case are not alleged to have been committed during the course of the forcible transfer itself. Furthermore, one killing may have been committed prior to the start of the transfer whilst others are alleged to have been committed after the transfers ended on 13 July.¹⁶⁸

86. In *Blagojević*, the Trial Chamber noted the possibility that some members of the original enterprise – possibly an inner circle – agreed amongst themselves to embark on a new enterprise with an objective that could be either more specific or an expansion of the original enterprise (i.e. the original objective is the detention of a large group of persons based on particular criteria, and the *new objective* is the murder of a particular person or group of persons within the group of detained persons).¹⁶⁹ In *Krajisnik*, the Appeals Chamber also recognized the possibility of

¹⁶⁶ *Prosecutor v. Tadić*, Case No. IT- 94-1-A, Judgement, 15 July 1999, para. 204. Emphasis added.

¹⁶⁷ *Prosecutor v. Tadić*, Case No. IT- 94-1-A, Judgement, 15 July 1999, para. 204. Emphasis added.

¹⁶⁸ Van Duijn testified that the transports ended on 13 July approximately 17:00 or 18:00. Van Duijn, L., T. 2307 (27/09/06). See also Agreed Fact 219. For opportunistic killings alleged to have occurred thereafter, see Indictment paras 31.2 (b-d), 31.1, and 31.4.

¹⁶⁹ *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Judgment, 17 January 2005, para. 701. The Defence note that the Trial Chamber did not find that the broadening of the initial plan from the execution of 1000 Bosnian Muslim men and boys to the execution of over 6000 Bosnian Muslim men and boys reflects an escalation of the joint criminal enterprise. The overarching objective to capture, detain,

expanded crimes being added to the common objective of the JCE, pursuant to which a JCE member could only be liable after the expanded crimes were, in effect, added to the JCE after leading members were informed of them, took no effective measures to prevent their recurrence, and persisted in the implementation of the common objective, thereby coming to intend these expanded crimes.¹⁷⁰

87. The original objective alleged in the present case with regard to Milan Gvero is the forcible transfer to areas outside the control of the RS¹⁷¹ and was directed against the women, children, and the elderly. Arguably in relation to Indictment paragraphs 31.2 and 31.4, the original enterprise became completely irrelevant because they were acts of personal revenge which fell entirely outside the scope of the JCE,¹⁷² or because these acts formed part of an expanded common purpose to a new and more specific enterprise (i.e. to carry out revenge killings of men from specific villages - based on specific criteria)¹⁷³ that were carried out by an inner circle. This new, more specific enterprise entailed acts far beyond the original objective alleged with regard to Milan Gvero. These acts appear to have been carried out not pursuant to the forcible transfer but rather, for reasons of personal revenge. Such acts cannot beyond reasonable doubt have been envisaged within the alleged joint criminal enterprise with which Milan Gvero is charged.¹⁷⁴

summarily execute by firing squad, bury, and rebury thousands of Bosnian Muslim men and boys from Srebrenica enclave remains the same. *Idem*, para. 718.

¹⁷⁰ *Prosecutor v Krajisnik*, Appeal Judgment, 17 March 2009, paragraphs 170-171.

¹⁷¹ Indictment para. 49. See also Prosecution Pre-Trial Brief, para. 1 (On 12 and 13 July, 15,000 refugees were forcibly transferred to territory held by the BiH Army); para. 4 (as early as 1992, Bosnian Serb authorities expressed their clear intention to ethnically cleanse Bosnian Muslim communities in Eastern Bosnia); 5 (the Strategic Objectives); para. 14 (the plan contemplated the forced movement of the entire Bosnian Muslim population to areas outside Bosnian-held control), para. 20 (plan to forcibly transfer the women and children to Kladanj), para. 21 (women and children were bussed to Kladanj), para. 160 (throughout the day on 13 July, thousands of women, children, and elderly men were bussed to Kladanj).

¹⁷² See also *Prosecutor v Martić*, Appeals Judgment, 8 October 2008, para 192 and 200.

¹⁷³ See also Prosecution Pre-Trial Brief, para. 125 (re Bratunac. "On the evening of 13 July, another Bosnian Muslim survivor was detained in a large truck filled with other Bosnian Muslim men. ... Throughout the night, Bosnian Serb soldiers called out the names of people from villages around Srebrenica").

¹⁷⁴ A similar approach with regard to the expansion of the original enterprise to include crimes not originally envisaged was taken in *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, 30 November 2005, para. 668. The Defence emphasise in relation to the current case, that the relevant murders were far beyond the scope of the alleged original enterprise.

Conclusion

88. Milan Gvero cannot be liable for the opportunistic killings charged as murder if only because these killings form part of the genocide or extermination, with which Milan Gvero is not charged. By the same token, Milan Gvero cannot be liable for the opportunistic killings charged as persecutions committed pursuant to the alleged genocide or extermination. In addition and/or in the alternative, the evidence allows for it to be reasonably inferred that the opportunistic killings were committed by individuals for whom Milan Gvero cannot be liable (either because they were acts of personal revenge which fell entirely outside the scope of the JCE or because they formed part of an expanded JCE - of which Milan Gvero did not form a part - to carry out revenge killings on certain groups of the Bosnian Muslim population within the enclaves). Also, the mode of liability with which Milan Gvero is charged for opportunistic killings (JCE III)¹⁷⁵ does not allow for him in law or in fact to be liable for those opportunistic killings charged as part of the specific intent crime of persecutions. In short, Milan Gvero must be acquitted of these crimes as charged.

Milan Gvero Cannot be Liable for Terrorisation of the Civilian Population at Srebrenica or at Potočari (Count 6) (Indictment paragraph 48(c))

89. The VRS did not terrorise the civilian population at Srebrenica town or at Potočari. As evidenced in the section of this final brief dealing with the allegations in paragraph 76 of the Indictment, civilians and objects afforded civilian protection were not proved to have been the object of VRS attack beyond reasonable doubt. As noted by the Commentary to Article 51(2) of Additional Protocol I, acts of violence carried out during a state of war undoubtedly and “almost always give rise to some degree of terror among the population”. This Commentary explains further,

¹⁷⁵ See further submissions in the section on modes of liability.

In the second sentence the [Diplomatic] Conference wished to indicate that the prohibition covers acts intended to spread terror; there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage.¹⁷⁶

90. Given the location of 28th Division forces in civilian areas, the knowledge thereof by the VRS at the relevant time, and of the attack directed against the said military targets, terror as “merely an incidental effect” of such acts of warfare – without more – does not constitute terrorisation of the civilian population. The conduct must be intentional. It must be specifically directed against the spreading of terror, thereby excluding unintended terror by a belligerent (that is, incidental acts of warfare that have another primary purpose and are in all other respects lawful).¹⁷⁷

91. As such, Milan Gvero cannot be liable as charged with regard the alleged terrorisation at Srebrenica town or at Potočari.

Forcible Transfer (Count 7)

Introduction

92. Though there is obvious linkage between the events in Srebrenica and Zepa, it is the Defence contention that the Trial Chamber will need to consider the allegation of forcible transfer in each separately. So far as Srebrenica is concerned, this trial has considered the allegation extensively. The Defence are aware that submissions in relation to this will be made by some, if not all the other Defence teams. In the

¹⁷⁶ Commentary of Article 51(2) of Additional Protocol I, which notes that Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva, Dordrecht: ICRC, Martinus Nijhoff Publishers, 1987), para. 1940 (p. 618).

¹⁷⁷ *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgement, 5 December 2003, para. 101, 136 and footnote 228 (emphasis in original).

circumstances by reasons of economy, time and space constraints and also because the Defence genuinely wish to save the Trial Chamber the tiresome task of reading the same argument over and over again, it has been decided not to address this specific allegation in this brief but to rely on the submissions and arguments of others.

93. However, the position so far as Zepa is concerned is somewhat different. For reasons explained elsewhere in this brief, this is a topic that the Defence have been active on throughout the trial and in the circumstances the Defence now wish to specifically address the issue of the alleged forcible transfer in Zepa. The Prosecution have clearly failed to discharge their burden in this regard. The evidence allows, at the very least, for the reasonable possibility that the evacuation was carried out because of ABiH military necessity and/or for the security of the population.¹⁷⁸

Background

94. There is irrefutable evidence to suggest that many of the inhabitants of the Zepa enclave wished to leave to Muslim held areas. In 5D259, dated 5 May 1995, Mehmed Hajric, the President of the local War Presidency stated that living conditions of a significant part of the population were “very poor.” He went on to say that this part of “the population is continually pressuring the municipal authorities in Zepa with the demand that they be evacuated.” The Bosnian Muslim political and military authorities were none too keen on this idea, no doubt for purely strategic and political reasons. As a result they did what they could to stop the population departing.¹⁷⁹ The short but important point here is that the whole context of what happened to the Zepa population in late July 1995 needs to be viewed very much with

¹⁷⁸ See eg. Article 49(2) of the Fourth Geneva Convention, which permits the evacuation of a civilian population of a given area “if the security of the population or imperative military reasons so demand”). As evidenced below, the evacuation in question was taken in the interests of the protected persons themselves: as a result of Žepa being in danger because of military operations (the safety of the population) and/or because the presence of the protected persons in the area hampered ABiH military operations.

¹⁷⁹ See for example 5D224, 6D39 5D244, 5D235.

this background in mind. The local civilian population were in reality pawns in the hands of the Muslim authorities (both locally and in Sarajevo, in particular) and the population's subsequent departure was heavily influenced by the actions of these politicians and soldiers.

The Evacuation of Protected Persons from Žepa does not Constitute Forcible Transfer

95. On 13 July, the Bosnian Muslim War Presidency in Žepa requested permission from Alija Izetbegović, President of the Presidency of Bosnia and Herzegovina, and from the 1st Corps Command of the ABiH to attend negotiations with the VRS. This request was made via General Rasim Delić, Commander of the ABiH.¹⁸⁰ A response was received on 13 July granting this request.¹⁸¹ Also on 13 July, the Command of the 285th Žepa Light Brigade was informed by Brigadier General Enver Hadžihasanović, Chief of Staff of the ABiH that “[t]he people and fighters should continue preparations for an organised resistance against the [VRS]”.¹⁸² Indeed, there was quite fierce fighting between both sides in and around Žepa in the second and third weeks of July.¹⁸³

96. On 18 July, Izetbegović asked Delić, after the former had spoken to General Smith, whether he would accept the women, children, and the elderly being evacuated by UNPROFOR. If this was accepted, according to Izetbegović, a brigade or battalion of soldiers could be inserted into Žepa to “continue combat with more success. These men from Žepa say that they could find between 500 and 1000 [soldiers]”.¹⁸⁴

¹⁸⁰ 6D104, dated 13 July 1995, 10:20 hours (Letter, Number 1/925/113, from Commander Army General Rasim Delić, to 1st Corps Command Brigadier General Mustafa Hajrulahović Talijan, and to the President of the Presidency of the Republic of BH) and Torlak, H., T. 9794-9795 (02/04/07) (The witness allows for the possibility that this request was sent to the Bosnian Muslim army, the command, the General Staff, and to the political leadership).

¹⁸¹ Torlak, H., T. 9795 (02/04/07).

¹⁸² 5D275, dated 13 July 1995, Operational time 10:50 hours (Reply to your request, Number 1/825-1135, from Chief of Staff Brigadier General Enver Hadžihasonić, to the Command of the 285th Light Brigade of Žepa (to pass on to the War Presidency of Žepa)).

¹⁸³ Džebo, M., T. 9601, 9602 (28/03/07).

¹⁸⁴ 6D107, dated 18 July 1995 (Letter from Alija Izetbegović to General Delić) and Torlak, H., T. 9797-9798 (02/04/07).

Torlak confirmed that the fighting was at its fiercest at this time, and allowed for the possibility that these were plans that the Bosnian Muslim military and political leadership had in mind.¹⁸⁵ He confirmed also that there were indeed communications to this effect with the military and the political leaderships.¹⁸⁶

97. The following day, Izetbegović informed Effendi Hajrić, the President of Žepa of the following:

“Here are my answers to your questions of last night. ... 3. My plan: Move out as m[an]y civilians as possible, all if possible. The troops stay on and continue to resist. We will do all to help you (1) by supplying MTS / material and technical equipment /; (2) volunteers and; (3) offensive action in your direction (I believe that this is starting today). If we do not succeed in this, you try to push on those roads (you know which) but now without the burden of women and children who would in the meantime be taken out”.¹⁸⁷

98. Torlak confirmed that these were clear instructions from the very highest echelon of the Bosnian Muslim leadership. His testimony was that he has no recollection of receiving the document. However, he accepted that others, including Hajric may have done.¹⁸⁸ The reality is that the local Bosniak leadership almost certainly did receive it and at the very least all were aware of the message that it was seeking to convey. In fact it is at a minimum possible and, in fact probable, that these instructions about the evacuation (save of the soldiers and of those directly participating in hostilities), were indeed carried out (i.e. that directives from Sarajevo were both received and implemented pursuant to the reasons put forth by Izetbegović).

99. Already on 13 July, Palić reported back to the ABiH Main Staff that his troops were disarming UkrBat “in accordance with the directive we received earlier”. Palić also confirmed that he had received instructions from the ABiH Main Staff prior to 13 July, and that “everything is going according to plan”, which was probably true,

¹⁸⁵ Torlak, H., T. 9796-9797 (02/04/07).

¹⁸⁶ Torlak, H., T. 9797 (02/04/07).

¹⁸⁷ 6D36, dated 19 July 1995 (Letter to Mehmed Effendi Hajrić, President of Žepa, from Alija Izetbegović).

¹⁸⁸ Torlak, H., T. 9798, 9799 (02/04/07)

according to Torlak.¹⁸⁹ Torlak also confirmed that Palić was fighting hard to prevent the fall of the enclave.¹⁹⁰

100. Furthermore, Palić was on the Žepa mountain around the period of 16 July, where the communications centre was located and where documents were first received.¹⁹¹ Torlak personally did not receive any instructions in the form of documents,¹⁹² however, he only denied in part that he was carrying out Izetbegović's instructions.¹⁹³ Moreover, it could reasonably be inferred that Palić received such instructions or at the very least, was made aware as the Commander of the Žepa Brigade, of their contents¹⁹⁴ and that he acted in accordance with these instructions. Indeed, when the women, children, and the elderly were told on 24 July to return to Žepa town from the mountain, Esmā Palić, Avdo Palić's wife, knew that he had participated in negotiations with the VRS.¹⁹⁵ Importantly, Palić originally did not want to negotiate with the VRS because he was awaiting for permission to do so from a higher level in Sarajevo.¹⁹⁶

101. A similar inference can be drawn with regard to the directives from Sarajevo as to the motivation this played in the decision of the Žepa Brigade to continue fighting. Orders from the ABiH Army to continue fighting were issued on 19 July to the 285th Žepa Light Brigade,¹⁹⁷ and fighting in fact went on until at least 29 July.¹⁹⁸ Whilst

¹⁸⁹ 6D34, dated 16 July 1995 (Letter, Strictly confidential no. 08-22-188/95, from Avdo Palic to the Main Staff of the ABiH) and Torlak, H., T. 9795 (02/04/07) (Whilst 6D34 is dated 16 July, it was from the period 13 July).

¹⁹⁰ Torlak, H., T. 9796 (02/04/07).

¹⁹¹ Torlak, H. T. 9795-9796, 9798-9799 (02/04/07).

¹⁹² Torlak, H. T. 9799 (02/04/07).

¹⁹³ 6D36, dated 19 July 1995 (Letter to Mehmed Effendi Hajrić, President of Žepa, from Alija Izetbegović) and Torlak, H. T. 9799 (02/04/07) (The War Presidency used all instructions from Sarajevo "more as a device" because they made decisions *mostly* on their own).

¹⁹⁴ In addition to the evidence generally suggesting that Palić was acting pursuant to the Sarajevo instructions received, he could also have been made aware of these instructions by radio communication from the communications centre, for example.

¹⁹⁵ Palić, E., T. 6918 (07/02/06).

¹⁹⁶ Palic, E., T. 6918 (07/02/06).

¹⁹⁷ 5D270, dated 19 July 1995 18:15 hours (Order, Number 1/825-1423, from Commander Army General Rasim Delić, to 2nd Corps Command, 285th IBlbr Žepa): "Order: Set up and organize defence with the

Hamdija Torlak testified that decisions were made on the basis of what was happening on the ground (that is, he could not confirm whether during the negotiations on 19 July the Žepa Infantry Brigade was receiving orders to continue to fight),¹⁹⁹ the evidence as noted above suggests otherwise. Directives from Sarajevo were both received and implemented, at least insofar as the Žepa Infantry Brigade was concerned.

102. Also, the 19 July letter from Izetbegović to Hajrić makes clear that instructions were sought from the Žepa Presidency and that a response ensued the following day. At the very least, this suggests that the Žepa Presidency was actively seeking instructions from Sarajevo as late as 18 July in order to implement decisions pursuant to such instructions. The reasons to continue fighting may very well have been the result of the decision by the Federation on 23 July to soon move onto the offensive, thereby tying down the VRS at the Žepa front.²⁰⁰ Indeed, Smith testified that a leader or representative of the Žepa Wartime Presidency was trying to get the population, particularly the women and children, out of harm's way on 25 July.²⁰¹ This decision could have been the result of the Sarajevo military and political authorities' instructions to the Žepa Brigade to continue fighting, and to evacuate the remainder of the population accordingly.

elements and principles of active defence, therefore, continue decisive action along with carrying our surprise attacks from flanks, setting up ambushes, etc. ...”).

¹⁹⁸ See Joseph, E., T. 14248-14249 (23/08/07) (The witness allowed for the possibility that he heard fighting when he returned to Žepa on 26 July and thereafter. He saw evidence of military movement and testified that it was very possible that there was fighting on 28-29 July); 6D136, dated 30 July 1995, at 1805 (UNMO Sector HQ Daily Sitrep, from UNMO HQ Sector Sarajevo, to UNMO UNPROFOR HQ Sarajevo): "Update from Žepa. Four UNMOs remain in the Žepa pocket and have maintained regular contact with UNMO HQ at Sarajevo. ... Team reported hearing intensive shelling on 29th July (23 explosions, 8 HMG bursts and 4 to 6 outgoing mortar rounds) but could not confirm firing points and impact areas"); Trivić, M., T. 11908 (22/05/07) (The witness was wounded on 29 July); Dibb, T. 16339 (15/10/07).

¹⁹⁹ Torlak, H., T. 9852-9853 (02/04/07) and 5D 270.

²⁰⁰ Smith, R., T. 17539-17540 (06/11/07) (The witness met with Minister --- Sacirbey in Split on 23 July and told him of the decision taken by the Federation that day that it would soon move on the offensive).

²⁰¹ Smith, R., T. 17528 (06/11/07).

Conclusion

103. It is beyond dispute that the majority of the Zepa population wished to leave prior to the attack on the enclave. The Bosnian Muslim authorities prevented them from so doing. Thereafter the evidence reasonably allows for the inference to be drawn that when the evacuation of the population took place (save of those directly participating in hostilities and of combatants) it was pursuant to instructions received from the Sarajevo military and political leaderships, so that fighting could continue. Since they were keen to leave, in any event, the population readily obliged with the instructions that they had received. An evacuation for these reasons (i.e. pursuant to imperative ABiH military necessity and/or for the security of the population so evacuated) simply does not amount to forcible transfer.

Deportation (Count 8)

104. The relevant provisions of IHL prohibit the deportation of civilians. They do not prohibit the deportation of combatants or of those directly participating in hostilities. As evidenced below, the men that crossed the Drina River were combatants or were directly participating in hostilities and were treated as such from the VRS prior to their withdrawal across the river and indeed once having arrived in Serbia. The Prosecution thus failed to prove beyond reasonable doubt that the charge in question amounts to deportation.

Legal Submissions

Deportation

105. The relevant provisions of IHL only prohibit the deportation of civilians. Article 49 of the Fourth Geneva Convention Relative to the Protection of *Civilian* Persons in Time of War, prohibits the forced displacement of persons in the hands of a party to

the conflict of which they are not nationals.²⁰² Persons protected *inter alia* by the Third Geneva Convention (ie. prisoners of war) are not protected persons within the meaning of the Fourth Geneva Convention.²⁰³ As noted by Jean-Marie Henckaerts, “the purpose of Article 49 is to protect *civilians* from a forced relocation (compulsory movement).”²⁰⁴ Rule 129 of the ICRC Study on Customary International Law similarly prohibits the forced relocation of civilians: “Parties to an international armed conflict may not deport or forcibly transfer the *civilian* population of an occupied territory, in whole or in part, unless the security of the *civilians* involved or imperative military reasons so demand.”²⁰⁵

106. In other words, the prohibition of forced displacement for the purposes of Article 49 relates to civilians and not to combatants or to persons directly participating in hostilities. Article 85 of Additional Protocol I and Article 17 of Additional Protocol II similarly only prohibit forcible displacement of the civilian population.²⁰⁶ The

²⁰² See also Commentary, Geneva Convention IV, p. 278. The aim of Geneva Convention IV in its entirety is the protection of civilians. Also, Article 49 is related to Articles 51 and 52, which prohibit the Occupying Power from compelling civilians to “serve in its armed or auxiliary forces” and from “creating unemployment or ... induc[ing] [civilians] to work for the Occupying Power.”

²⁰³ Article 4, Geneva Convention IV.

²⁰⁴ Jean-Marie Henckaerts, Deportation and Transfer of Civilians in Time of War, 26 *Vanderbilt Journal of Translational Law* 469 (1993).

²⁰⁵ Emphasis added. Rule 129 is repeated verbatim with regard to non-international armed conflicts. See also Rule 130 (“States may not deport or transfer parts of their own civilian population into a territory they occupy [IAC]”); Rule 131 (“In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated [IAC/NIAC]”). Henckaerts, J-M. and Doswald-Beck, L. *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge 2005). See also Article 6(c) of the Nuremberg Charter, which lists as a crime against humanity deportation committed against any civilian population, as does Article 5(c) of the International Military Tribunal for the Far East; Principle VI(c) of the International Law Commission’s Principles of International Law Recognised in the Charter of the Nuremberg Tribunal; *United States of America v. Milch*, conducted under Control Council Law No. 10, which reads in relevant part, “[i]nternational law has enunciated certain conditions under which the fact of deportation of civilians ... during times of war becomes a crime”. *Milch* Judgment, Concurring Opinion of Judge Phillips, p. 865 (which was then cited with approval in *United States of America v. Alfred Krupp et al.* See *Krupp* Judgment, pp. 1432-1433): Field Marshal Erich von Manstein was charged before a British military tribunal at Hamburg in 1949 with “the mass deportation and evacuation of civilian inhabitants” from the Ukraine in 1944. In re von Lewinski, 16 Ann.Dig. at 510.

²⁰⁶ The following is a grave breach according Article 85 of Additional Protocol: “The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention”. Article 17 of Additional Protocol II is entitled “[p]rohibition of forced movement of civilians”.

jurisprudence of the International Tribunal also defines the prohibition of forced movement as that of civilians.²⁰⁷

107. With regard to the requisite *mens rea* the Defence submit, based on the prohibition on the deportation of civilians, that the status of the victims as civilians or their entitlement to civilian protection is an element of the crime of deportation. This element can be proved if it is shown that the perpetrator was aware of the factual circumstances that established the status of the victims as civilians²⁰⁸ or the perpetrator was aware of the factual circumstances that established their civilian protection at the relevant time.

108. It is for the Prosecution to establish beyond reasonable doubt the civilian status of the victim. The Prosecution must also prove that the perpetrator could not reasonably have believed that the victim was a member of the armed forces²⁰⁹ or that the perpetrator could not reasonably have believed that the victim was entitled to civilian protection at the relevant time. Whilst civilian status under IHL is presumed in case of doubt²¹⁰, this provision is intended for the specific situation to which IHL is

²⁰⁷ In essence, according to the Trial Chamber in *Stakić*, “the prohibition against deportation serves to provide civilians with a legal safeguard against forcible removals in time of armed conflict and the uprooting and destruction of communities by an aggressor or occupant of the territory in which they reside”. Prosecutor v. Milomir Stakić, Case No. IT-97-27-T, Judgment, 31 July 2003, para. 618. See also *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Judgment, 27 September 2007, para. 458 (“[d]eportation under Article 5(d) cannot be committed against prisoners of war”).

²⁰⁸ See *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Judgment, 27 September 2007, para. 464 (The Chamber believed because the civilian status of the victims is a jurisdictional requirement only and not an element of the crime, that “it is sufficient for the perpetrator to have been aware of the factual circumstances that established the status of the victim”). As noted above, the status of the victims with regard to combatants is an element of the crime of deportation. The Defence thus incorporate in part the *mens rea* requirement in *Mrkšić* and present evidence establishing the combatant status and the loss of civilian protection of the men in the hills when directly participating in hostilities.

²⁰⁹ See e.g., *Prosecutor v. Kunurać et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, para. 435 (“...Article 5 of the Statute protects civilians as opposed to members of the armed forces and other legitimate combatants ... As a minimum, the perpetrator must have known or considered the possibility that the victim of his crime was a civilian. ... The Prosecution must show that the perpetrator could not reasonably have believed that the victim was a member of the armed forces”).

²¹⁰ Article 50(1) of Additional Protocol I.

intended to apply; that is, to ensure the greatest possible protection to non-combatants in situations of armed conflict.²¹¹

109. The provisions of IHL, at the time of their drafting, were never intended to be utilised as such in criminal proceedings. As a result, elementary considerations that are integral for a criminal trial, such as the burden of proof resting with the prosecution, do not feature in the text. To presume civilian status in a criminal trial would be a wholesale reversal of the burden of proof.²¹² The same applies with regard to the entitlement of civilian protection for those directly participating in hostilities. It is for the Prosecution to prove that such persons were entitled at the relevant time, to the protection afforded to civilians. That the burden still rests with the Prosecution in such circumstances has been confirmed by the Appeals Chamber.²¹³ In case of doubt in a criminal trial of the status of the victims or of the protection to which they are entitled at the relevant time, the principle *in dubio pro reo* must apply.

²¹¹ “...the very purpose of the Geneva Conventions, which is to protect the dignity of the human person”: *Prosecutor v. Celebici, Judgement*, Appeals Chamber, 20 February 2001, paragraph 172. See also Pictet Commentaries to Preamble of Third Geneva Convention: “Persons taking no active part in the hostilities, ... shall in all circumstances be treated humanely...’ This minimum requirement ... proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built”, <http://www.icrc.org/ihl.nsf/COM/380-600002?OpenDocument>, last accessed 25 July 2009.

²¹² Cf. *Prosecutor v. Mrkšić et al.*, para. 464 &fn. 1722 (The civilian status of the victim need not be established by the Prosecution. Civilian status under IHL is presumed, absent evidence to the contrary).

²¹³ See *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008, para. 172 (“In order to prove cruel treatment as a violation of Common Article 3 under Article 3 of the Statute, the Prosecution must prove beyond reasonable doubt that the victim of the alleged offence was a person taking no active part in hostilities”). See also *Prosecutor v. Blaskić*, Appeals Judgment, 29 July 2004, para 111: “[regarding article 50 of Additional Protocol 1] ‘In case of doubt whether a person is a civilian, that person shall be considered a civilian.’ The Appeals Chamber notes that the imperative ‘in case of doubt’ is limited to the expected conduct of a member of the military. However, when the latter’s criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution”.

Civilian and Combatant Status

110. The definition of civilians as applied by the Tribunal and indeed, as defined by IHL excludes combatants. In *Blaškić*, the Appeals Chamber held in the relevant part that

Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organised resistance groups²¹⁴

Article 50(1) as it defines civilians reflects customary international law in international armed conflict.²¹⁵

111. Also in *Blaškić*, the Appeals Chamber specifically rejected defining the term civilian broadly for the purposes of crimes against humanity, finding instead that “[i]f he is indeed a member of an armed organisation, the fact the he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status”.²¹⁶ Indeed, the Appeals Chamber in *Kordić and Čerkez* held that members of a Territorial Defence (TO) are to be considered combatants at all times during the armed conflict, irrespective of whether or not they are *hors de combat* or are not directly participating in hostilities. As such, they cannot claim civilian status.²¹⁷ With regard to persons directly participating in hostilities, they lose the protection afforded

²¹⁴ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, 29 July 2004, para. 110. See also paras 110-114 of same (The definition of civilians contained in Article 50(1) of Additional Protocol I is applicable to crimes against humanity). This was confirmed by the Appeals Chamber in *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, para. 144, fn. 437 and in *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgment, 8 October 2008, para. 295. See also ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Geneva 2009), pp. 20-23.

²¹⁵ Henckaerts, J-M. and Doswald-Beck, L. *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge 2005) (Rule 5).

²¹⁶ *Blaškić* Appeal Judgment, para. 114. Approved in *Galić* Appeal Judgment, para. 144 and in *Martić* Appeal Judgment, paras 293-297

²¹⁷ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, paras 51, 458, 461.

to civilians unless and for such time as they so participate²¹⁸, but retain their civilian status as such.

112. For their part, the armed forces of a party to the conflict “comprise all organised armed forces, groups, and units that are under a command responsible to that party for the conduct of its subordinates”.²¹⁹ A combatant is thus either a member of the armed forces *stricto sensu* of a party to an international armed conflict²²⁰ or a member of another armed group.²²¹ As noted above, combatants – also those unarmed and *hors de combat* – at all times retain their combatant status (that is, they do not have civilian status or the protection afforded to civilians as such).

Evidentiary Submissions

Combatant Status of the Žepa Infantry Brigade, the SJB, the Territorial Defence, and of the SVB

113. The armed forces of the ABiH comprised the Žepa Infantry Brigade.²²² Weapons and ammunition were delivered by helicopter from the ABiH to the Žepa Infantry

²¹⁸ See generally ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Geneva 2009); Article 51(3) of Additional Protocol I. The Appeals Chamber has noted when with regard to the case law considering whether or not victims of Article 3 crimes were participating in hostilities at the time of the offence, that “this jurisprudence does not redefine the meaning of the term ‘civilian’, but merely refers to the rule laid down in Article 51(3) of Additional Protocol I, according to which civilians enjoy ‘general protection against dangers arising from military operations’ unless and for such time as they take a direct part in hostilities”) *Martić Appeal Judgment*, paras 298, 299. For an overview of direct participation in hostilities prior to the release by the ICRC of *Interpretive Guidance* and the applicable IHL provisions, see *Strugar Appeal Judgment*, paras 172-179.

²¹⁹ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Geneva 2009), pp. 21-23.

²²⁰ Article 4A(1) of the Third Geneva Convention.

²²¹ Article 4A(2) of the Third Geneva Convention or Article 43 of Additional Protocol I.

²²² 6D83, dated 2 February 1994 (Proposal to Register Units which have Operated in the Territory of Žepa so far, Number 21/94, from Commander Avdo Palić to the 1st Corps of the Armed Forces, Sarajevo) (“[On 13 July 1992], the 1st Žepa Detachment and the 2nd Žepa Detachment were formed. ... The command of the 2nd Žepa Detachment 4 *Juni* consisted of the following men: Avdo Palić, Commander ... Hamdija Torlak, Chief of Communications ... On 18 October 1992, Avdo Palić was appointed Commander of the Žepa region armed forces ... Hamdija Torlak [was appointed] Chief of Communications. ... On 27 January 1993, the 1st Žepa Brigade was formed from units of 1st and 2nd Žepa Detachments. The Brigade Command was made up of the following officers: ... Hamdija Torlak, Chief of Communications”).

Brigade,²²³ and coordinated military and political action was ordered or instructed from the ABiH and the highest echelons of the Bosnian Muslim political leadership to the Žepa Infantry Brigade and to the War Presidency in Žepa.²²⁴ The members of the

²²³ Savčić, M., T. 15330 (13/09/07) (In conflicts in May 1993, the witness noticed for the first time from the Bosnian Muslim combat positions that fire was opened from pieces that [the VRS] had not been able to register until then: mortars (60 and 82 millimetres) and light rocket launchers (128 millimetres)); Torlak, H., T. 9722, 9783 (30/03/07) (Helicopter deliveries were made in the second half of 1994 in early 1995); Džebo, Meho, T. 9603, 9630-9631 (28/03/07) (Helicopter flyovers transporting ABiH weapons were registered and ABiH movements were observed in the Žepa area) and 6D73, dated 17 February 1995 (Order Taking measures to lift brigade units' combat readiness, from 2nd Corps Commander Brigadier Sead Delić, to *inter alia* OG-8 [Operations Group], number 02/1-177/8); 5D265, dated 28 May 1996 (Report on delivery of UBS [lethal assets] and MTS [material and technical equipment] to the Žepa and Srebrenica enclaves, Number 1-1/V-169, from Brigadier General Enver Hadžihasanović, to Commander Republic of Bosnia and Herzegovina Army General Staff) ("An air brigade was established with Žepa on 31 December 1994 and lasted until 27 May 1995. Ten flights took place, with nine of them being successful. The MTS and UBS sent via this route went to the 28th Srebrenica dKoV and the 185th Žepa Light Brigade"). It is noteworthy here that the testimony of Džebo on this issue is of no further assistance with respect to these documents. He was unable to provide any further clarification on their contents when they were put to him during his testimony. One possible reason for this witness' inability to provide any further information in relation to their contents may result from a desire to avoid self-incrimination. His testimony should therefore be treated with considerable circumspection.

²²⁴ Torlak, H., T. 9820 (02/04/07) (Attacks from the enclave from 1993 until the fall of Žepa were carried out under the direct command of the 2nd Corps in Tuzla); 6D73, ("I order: ...OG 8 units deployed to Srebrenica are to be in a state of readiness for a coordinated action with the 1st Žepa Light Brigade..."); 5D228, dated 17 February 1995 (Taking measures to raise the level of combat readiness in units, Order, number 1-1/280-1, from Brigadier General Enver Hadžihasanović, to 2nd Corps Command, Command of Operations Group 8 Srebrenica, 1st Žepa Brigade Command); 6D75, dated 2 June 1995 (Instruction, Number 13-05-78/95, from PK for Security Captain Nedžad Bektić, Army of the Republic of the BiH Command of the 28th Division, to Command of the 295th IBLbr/Eastern Bosnia Light Brigade/Žepa) ("With reference to your document strictly confidential number: 08-13-86/95, we hereby give you the following instructions"); 6D34, dated 16 July 1995 [re reporting period of 13 July 1995] (Letter, Strictly confidential no. 08-22-188/95, from Avdo Palić to the Main Staff of the ABiH): "We are disarming UNPROFOR in accordance with the directive we received earlier. I received certain instructions earlier from you too. Everything is going according to plan"; 6D104, dated 13 July 1995, 10:20 hours (Letter, Number 1/925/113, from Commander Army General Rasim Delić, to 1st Corps Command Brigadier General Mustafa Hajrulahović Talijan, and to the President of the Presidency of the Republic of BH) ("The president of the War Presidency has requested permissions to go to the negotiations [with the Serbs]") and Torlak, H., T. 9794-9795 (02/04/07) (A response was received on 13 July, telling them that they could attend the negotiations); 5D275, dated 13 July 1995, Operational time 10:50 hours (Reply to your request, Number 1/825-1135, from Chief of Staff Brigadier General Enver Hadžihasanović, to the Command of the 285th Light Brigade of Žepa (to pass on to the War Presidency of Žepa)): "We hereby inform the President of the War Presidency of Žepa that there should be no negotiations with the aggressor. The people and fighters should continue preparations for an organized resistance against the aggressor"; 6D107, dated 18 July 1995 (Letter from Alija Izetbegović to General Delić) ("Perhaps in this case [of evacuation of women, children, and the elderly] we could insert a brigade or battalion of soldiers to Žepa across the forest path and thus continue the combat with more success. These men from Žepa say that they could find between 500 and 1000") and Torlak, H., T. 9796-9798 (02/04/07); 6D36, dated 19 July 1995 (Letter to Mehmed Effendi Hajrić, President of Žepa, from Alija Izetbegović): "Here are my answers to your questions of last night. 3. My plan: Move out as m[an]y civilians as possible, all if possible. The troops stay on and continue to resist. We will do all to help you (1) by supplying MTS/material and technical equipment/; (2) volunteers and; (3) offensive action in your direction").

Civilian Police (SJB) also formed part of the ABiH,²²⁵ as did the Territorial Defence.²²⁶ Indeed, the SJB engaged directly in fighting the Serb forces at the relevant time of the Žepa attack.²²⁷

The withdrawal of combatants or of those directly participating in hostilities across the Drina River does not constitute deportation

114. As noted above, the relevant prohibitions regarding deportation relate only to civilians. The withdrawal of the Žepa Infantry Brigade across the Drina River simply does not amount to deportation. The retreat of those directly participating in hostilities also does not amount to deportation (they were no longer afforded civilian protection for such time as they so participated). There is no evidence to suggest in this regard that armed combat ceased prior to their retreat.

115. There were an estimated 1, 500 to 2, 000 armed members of the ABiH in the Žepa area on 13 July.²²⁸ As noted above, Alija Izetbegović planned to “move out as many civilians as possible, all if possible. The troops stay on and continue to resist”.²²⁹ It can then be seen during the evacuation on 25-27 July that able-bodied men were

²²⁵ 6D69, dated 16 February 1994 (Reference: Your dispatch no. 17/03-75 of 28 January 1994, from Chief of the Žepa SJB Hurem [ahić, to Security Services Centre Sarajevo) (All members of the Žepa SJB carries out binding tasks envisaged *inter alia*, by “the order of the command of the Žepa municipality armed forces in the zone of responsibility to the unit”); 6D 97, dated 30 January 1995 (Army of BH Republic Command, Srebrenica 8th Operations Group Security Organ, Number 13-05-12, “Prevention of illegal abandonment of the Srebrenica 8th Operations Group”, to Defence of the Republic); 6D47, dated 5 February 1995 (Assistant Commander for Security Senior Captain Salih Hasanović, 1st Žepa Light Brigade – Security Organ -, Number 08-13-36/95, “Your reference no. 13-05-12 of 30 January 1995”, to Command of 8th Operations Group Srebrenica, Assistant Commander for Security) (Hasanović has engaged the SJB to locate and identify persons that leave the territory without permission); 6D 39, dated 26 May 1995 (Chief of Staff Brigadier General Enver Hadžihasanović, Strictly confidential Number 1-1/844-1, “Instructions in case certain persons leave the zone of Žepa”, to Command of the 285th Eastern Bosnia Light Brigade Žepa) (Hadžihasanović ordered the Žepa Brigade to cooperate with the SJB to prevent persons from illegally leaving the territory of Žepa).

²²⁶ **REDACTED**; 6D24, dated 17 January 1995 (Letter from Commander Avdo Palić to Brigadier General Hadzi Hasanović) **REDACTED**.

²²⁷ Džebo, Meho, T. 9594-9595 (28/03/07), Džebo, Meho, T. 9650-9652 (29/03/07),

²²⁸ Trivić, M., T. 11903 (22/05/07). **REDACTED**

²²⁹ 6D36. See also Smith, R., T. 17633 (07/11/07) (There were no ABiH troops in Žepa village (where the civilian population was located) when the evacuation took place).

among those so evacuated.²³⁰ Indeed, during the evacuation and by 26 July in particular, the bulk of Colonel Avdo Palić's Žepa Infantry Brigade had withdrawn to the Žepka-Planina mountain located to the north of the Žepa centre.²³¹ Efforts were made by UkrBat once everybody was evacuated from the village, to ensure that no civilians were left in the mountains and that all civilians had been found and evacuated. The VRS did not prevent this.²³² On 28 July, there appeared to be no more people in Žepa to be evacuated. Approximately 1, 500 ABiH troops remained.²³³

116. The military forces of the ABiH in Žepa did not give up their weapons and did not surrender.²³⁴ According to Prosecution witness Milomir Savčić, Mladić simply could not believe the fierceness of the fighting until when he arrived at Savčić's location to see why the task could not be accomplished within the specified time frame. Mladić was convinced that the fire was "really strong", which is why the battle for Brezova Raven lasted for approximately 10 days, until it was finally captured on 24 or on 25 July.²³⁵ The Bosnian Muslim forces had certainly been "making their presence

²³⁰ P4537, undated (Transcript of Boksanica Video V000-8160, from 00:00:00 to 00:35:01, p. 17, lines 28-29).

²³¹ Torlak, H., T. 9766-9767 (30/03/07). *See also* Smith, R., T. 17636 (07/11/07) (Members of the ABiH took refuge in the hills); Dibb, T. 16310 (15/10/07) (The Bosnian Muslim military unit of Žepa were in the hills during the evacuation); Dibb, T. 16372, 16373 (16/10/07) (Palić did not want to exchange the 2, 000 Bosnian Muslim soldiers who were in the hills with 500 VRS soldiers); PW-111, T. 7019, 7020 (07/02/07) (The Bosnian Muslim army was on the mountain).

²³² Dibb, T. 16315 (15/10/07).

²³³ Torlak, H., T. 9818-9819 (02/04/07) and 6D89, dated 28 July 1995 (UNPF HQ Daily Sitrep 270001B to 272359B July 1995, from LGen Janvier, to MNEMONIC 670) ("Žepa: The evacuation of displaced people continued. A total of about 4000/5000 displaced persons have been evacuated from Žepa to Central Bosnia since 25 July 1995. It seems there are no more people in Žepa to be evacuated. The BiH troops (approximately 1500) remain") (The witness confirmed that the 1500 people who remained in Žepa were in fact BiH troops).

²³⁴ Dibb, T. 16307 (15/10/07); 6D108, dated 26 July 1995 (The Situation in Žepa, Letter from Lieutenant Colonel J. R. J. Baxter) ("At the heart of the situation is the local agreement concluded by local Bosnian officials with the Bosnian Serbs. The agreement is dependent on three things that those who signed cannot deliver. Firstly, that the cease-fire will hold. Secondly, that the Bosnian fighters will lay down their weapons and accept POW status on the basis of a putative POW exchange"); Torlak, H., T. 9810-9811, 9819, 9824 (02/04/07) (When 6D108 was placed on the table on 24 July, the disarmament was clearly not going to happen; now was the POW exchange) (The Žepa Brigade abandoned Žepa still in possession of their weapons).

²³⁵ Savčić, M., T. 15332-15333 (13/09/07). *See also* Džebo, M., T. 9601, 9602 (28/03/07) (There was quite fierce fighting between both sides in and around Žepa in the second, third weeks of July).

known” from 20-24 July with heavy anti-aircraft machine guns and other weapons and equipment, including combat hardware and weapons seized from UN personnel (e.g., at least nine personnel carriers with the accompanying weapons and ammunition were believed to have been incorporated into the Bosnian Muslim armed force defence).²³⁶ Indeed, Thomas Dibb saw lots of VRS troops lining the road in a state of exhaustion when he entered the enclave on 25 July.²³⁷ The fighting continued thereafter until at least 29 July.²³⁸

117. By 31 July, at least some of the ABiH were still up in the inaccessible ground of the enclave “being prepared to cross over to Serbia“. In fact, Rupert Smith was aware by 31 July or even earlier of the ABiH intention to break out over the Drina towards Serbia. Carl Bildt was making arrangements for there to be suitable reception arrangements when they crossed the river.²³⁹ Those that did not withdraw were

²³⁶ 6D82, dated 24 July 1995 (Intelligence Information on the Enemy in the Žepa and Goražde Enclaves, strictly confidential no. 17/9, from Lieutenant Colonel Kosorić, Command of the Drina Corps Department for OB Tasks to the Main Staff of the VRS) (“For four days now the Bosnian Muslim have been making their presence known with heavy 14.5 mm PAM/anti-aircraft machine guns/. Reserve ammunition was at about 25,000 to 30,000 rounds. Likewise, coaxial 7.62 mm PM / light machine guns/ of the PKT type, with around 40,000 rounds, were probably also dismantled from the OT. The Ukrainian checkpoints also had 40 mm RBR/hand-held rocket launchers/ of the RGP type; of the nine pieces in total, three RBR were equipped with night optical devices. They had at least 120 40 mm rockets in their reserves. By seizing the personal weapons and equipment of UN personnel, the Bosnian Muslims probably acquired the following firearms: 7.62 mm PM --- 3 pieces; 5.54 /mm/ PM --- 18 pieces; 5.54 mm SNP/sniper rifles/ --- 9 pieces; 5.54 mm AP/automatic rifles --- 70 pieces. Eight AP in complete sets. They also had the same number of add-ons for firing bombs, with a caliber of 25 mm”) and Trivić, M., T. 11905 (22/05/07) (The witness confirmed on the basis of the fire on Serb forces from Borak, that this fire was consistent with 6D82). *See* also Džebo, Meho, T. 9649 (29/03/07).

²³⁷ Dibb, T. 16337, 16279 (15/10/07).

²³⁸ *See* Joseph, E., T. 14248-14249 (23/08/07) (The witness allowed for the possibility that he heard fighting when he returned to Žepa on 26 July and thereafter. He saw evidence of military movement and testified that it was very possible that there was fighting on 28-29 July); 6D136, dated 30 July 1995, at 1805 (UNMO Sector HQ Daily Sitrep, from UNMO HQ Sector Sarajevo, to UNMO UNPROFOR HQ Sarajevo): “Update from Žepa. Four UNMOs remain in the Žepa pocket and have maintained regular contact with UNMO HQ at Sarajevo. ... Team reported hearing intensive shelling on 29th July (23 explosions, 8 HMG bursts and 4 to 6 outgoing mortar rounds) but could not confirm firing points and impact areas”); Trivić, M., T. 11908 (22/05/07) (The witness was wounded on 29 July); Dibb, T. 16339 (15/10/07).

²³⁹ Smith, R., T. 17582 (06/11/07); Smith, R., T. 17560 (06/11/07) and P 2947, dated 31 July 1995 (Meeting General Smith/General Mladić – 31 July 1995, from Lt. Col. J. R. J. Baxter, to HQ UNPF Zagreb for SRSG, FC, DFC) (“Žepa. ... The main points from the discussion were as follows: b. Mladić maintains that the evacuation of the civilian population is complete. He claimed that the BiH have started to break out of the pocket on three routes: to Goražde, to Serbia and to Kladanj”); Trivić, M., T. 11997 (23/05/07) (Information circulated at the time that parts of the Žepa Brigade withdrew in an organized manner by

engaged in further combat action. For example, Trivić's unit was engaged in combat with the forces pulling out towards Kladanj (i.e. towards Tuzla).²⁴⁰ The withdrawal of these forces over the mountains could have been envisaged by Izetbegović as early as 19 July.²⁴¹

118. Further support of the combatant status of the men in the hills or at the very least, the presence of those directly participating in hostilities is evidenced by Hamdija Torlak's tactic as a negotiator (in the exchange of the approximately 1200 men in the hills for approximately 400 Serb POWs in Bosnian Muslim custody), which may have been in part to help out the armed men that remained in the enclave.²⁴² Even General Smith, who participated in the negotiations referred to the men in the hills collectively as POWs²⁴³ (i.e. as combatants or those directly participating in hostilities, who are entitled to similar protection once captured²⁴⁴), and as "Bosnian

swimming across the Drina; other parts went in an organized manner in the direction of Kladanj). See also Indictment para. 71 (On or about 25 July, hundreds of for the most part able-bodied men are alleged to have begun fleeing across the Drina River to Serbia).

²⁴⁰ Trivić, M., T. 11997-11998 (23/05/07). See also Torlak, H., T. 9824-9825 (02/04/07) (Part of the armed troops broke through Serb territory and reached Olovoj and Kladanj. Most of these armed troops went to Serbia).

²⁴¹ 6D36, dated 19 July 1995 (Letter to Mehmed Effendi Hajrić, President of Žepa, from Alija Izetbegović) ("Beside [the plan to evacuate as many civilians as possible and the troops stay on and continue to resist], there is another one on joint withdrawal over the mountains which was prepared by Dr. Heljić [-----] and his team").

²⁴² Torlak, H., T. 9823, 9818-9819 (02/04/07) and 6D89, dated 28 July 1995 (UNPF HQ Daily Sitrep 270001B to 272359B July 1995, from LGen Janvier, to MNEMONIC 670) ("Žepa: The evacuation of displaced people continued. A total of about 4000/5000 displaced persons have been evacuated from Žepa to Central Bosnia since 25 July 1995. It seems there are no more people in Žepa to be evacuated. The BiH troops (approximately 1500) remain") (The witness confirmed that the 1500 people who remained in Žepa were in fact BiH troops).

²⁴³ Smith, R., T. 17550-17551 (06/11/07) and 6D108, dated 26 July 1995 (The Situation in Žepa, from Lt. Col. J. R. J. Baxter) ("General Smith emphasized that his two most critical requirements had been ... and to establish what agreement could be reached concerning POW exchange) (Smith testified that he believed that POW exchange would be worthwhile if some profit could be taken). See also Torlak, H., T. 9873 (03/04/07) (According to the agreement reached, the Bosnian Muslim fighters were supposed to be handed over within the circle of UNPROFOR and registered by the ICRC); Fortin, L., T. 18374-18375 (28/11/07) (In July 1995, the witness did not find it inadequate for the Bosnian Serbs to offer that the ICRC come in under the supervision of UNPROFOR and register all those that were to be detained as POWs); PW-111, T. 7019, 7021, **REDACTED**

²⁴⁴ See Article 45(1) of Additional Protocol I: "A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of

army fighters”.²⁴⁵ Furthermore, Torlak testified that those who made it to Serbia across the Drina were treated as POWs. Indeed, most of the armed troops that broke out went to Serbia, where they were put up in two reception centres.²⁴⁶ Absent any legal determination whilst in captivity of their POW status, the men in question are assumed to have been combatants.²⁴⁷

119. Whilst some evidence may suggest that not all these troops at the Žepa mountain top had weapons,²⁴⁸ their status was that of combatants, irrespective of whether or not they were in fact armed.²⁴⁹ Similarly, it cannot be inferred with regard to those directly participating in hostilities that the absence of weapons means that they did not fulfill the constitutive elements of direct participation in hostilities²⁵⁰ (thereby losing their civilian protection for such time as they so participated).

120. With regard to the requisite *mens rea*, the Defence submit that the VRS members consistently referred *de facto* to the entire group of men at the Žepa mountain as combatants. They did so firstly, by expressing their willingness to afford them POW status and secondly, by participating in the prisoner-exchange negotiations.²⁵¹ Also,

prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal”).

²⁴⁵ Smith, R., T. 17552 (06/11/07).

²⁴⁶ Torlak, H., T. 9824-9825 (02/04/07). See also PW-155, T. 6880 (05/02/07) (The witness learned *inter alia* from the ICRC that there were approximately 950 men from Žepa that crossed the Drina into Serbia: 450 in the camp where he was and 500 in the Sljivovica camp).

²⁴⁷ The actual legal status as POWs of the men once captured on the other side of the Drina was never challenged. In fact, no such evidence was presented at trial. Furthermore, Article 5 of the Third Geneva Convention provides as follows: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [Prisoners of War], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” This provision is repeated in Article 45(1) of Additional Protocol I (i.e. with regard to “a person who takes part in hostilities”).

²⁴⁸ Smith, R., T. 17636 (07/11/07) and Torlak, H., T. 9818-9819 (02/04/07). The Trial Chamber cannot rely on this evidence as proof of a civilian component amongst those who crossed the Drina. See Rule 98bis Decision, T. 21463 (03/03/08), in which the Trial Chamber appears to have done so.

²⁴⁹ Blaskic Appeal Judgment, 29 July 2004, paragraph 111.

²⁵⁰ See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, pp 46-64.

²⁵¹ 6D103, dated 19 July 1995 23:15 hours (Report on the negotiations with the Serbian side and request for opinion, from War Presidency Žepa Municipality and Command of the 285th IBlbr Žepa, Strictly confidential no. 03-22-245/95, to Alija Izetbegović, Dr. Haris Siladjdžić, General Rasim Delić, and Dr. Bećir Hejjić) (“The Serbian side set the following conditions: ... A list would be compiled of these men by

VRS members differentiated between civilians and those who could reasonably have been perceived as persons directly participating in hostilities.²⁵²

121. The absence of adequate evidence before this Trial Chamber to conclusively establish the role of the men as being members of in the Žepa Infantry Brigade, the SJB, the Territorial Defence, the SVB, or as civilians directly participating in hostilities, does not show beyond reasonable doubt that these men had no such role, or that the VRS occasionally acted in error by being willing to afford them POW status in some cases. The evidence does establish that the VRS acted in the knowledge or in the belief at the relevant time that these men on top of the Žepa mountain were members of the ABiH or were directly participating in hostilities. Given this state of mind by VRS members at the time, the men on top of the Žepa mountain must be regarded as combatants or at the very least, not afforded civilian protection in the Trial Chamber's consideration of the deportation charge.

the Red Cross and they would be taken to a holding centre for processing and they would be exchanged after an agreement is reached with our Government"); Torlak, H., T. 9801-9802 (02/04/07); 6D 102, dated 20 July 1995 (Conversation between Amro Masović and Žepa after 2200 hours) (The witness testified that Ratko Mladić said that there would be an exchange all for all (all people from Žepa for all captured Serb soldiers. Things were left at that point and they were to contact their political and military leaderships to try to find a way for the exchange of the 400 Serb soldiers for all able-bodied men from Žepa); Dibb, T. 16371-16372 (16/10/07) (On 25 July, there appeared to be an effort to thrash out an agreement on the ground with Mladić and Avdo Palić, who was happy to say, "please look after my troops I'd like to get into a prisoner swap with the ABiH troops from Žepa and BSA prisoners". Word from Sarajevo was to hang on, as they wanted an all for all exchange); 6D108, dated 26 July 1995 (The Situation in Žepa, Letter from Lieutenant Colonel J. R. J. Baxter) (Mladić still supported the proposals for an all for all POW exchange; that is the 1500-2000 men of military age from Žepa in exchange for the BSA POWs held by the Bosnian Government) and; P2946, undated (The Situation in Žepa: Summary as at 0800 hrs 28 July 95, from Lt. Col. J. R. J. Baxter) ("The POW Exchange Commissions from the Serb and Bosnian sides reconvened at the Airport at 1200hrs. Little progress was made as the Serbs emphatically maintained their position that the men of Žepa must surrender their weapons and then an all for all POW exchange would take place"). The VRS willingness to afford these men POW status does not amount to any determination of their legal status *per se* as combatants. They were never physically in the hand of the Detaining Power, the only point at which POW status may be afforded. However, *see* submissions above as to how the status of POWs of the men once captured on the other side of the Drina was never challenged).

²⁵² Torlak, H., T. 9851 (02/04/07) (The offer on paper and expressed orally by Zdravko Tolimir on 13 July included the safe evacuation of the able-bodied men); 6D103, ("The Serbian side set the following condition: ... It would allow safe passage across Serbian territory by free choice to the population according to the following schedule: a) the wounded and sick; b) women and small children, c) the elderly, and d) the remainder of the population"); 6D102, ("You should know that at the negotiations yesterday [Ratko] Mladić agreed to the evacuation of the civilian population and all military conscripts from Žepa in whatever manner you and Bulajić agree. This is why our side will release 400 of their soldiers from the list of prisoners you have in your possession... The all-for all agreement reached at the airport on 20 July") (emphasis added).

Witness Credibility

122. The Trial Chamber cannot rely on the testimony of PW-155 to establish beyond reasonable doubt a civilian component amongst the men allegedly deported.²⁵³ PW-155 was biased in the extreme, having testified contrary to established facts that Žepa was a demilitarised zone, that weapons (if there were any, he said) were confiscated by the civilian police and by UkrBat, and that the Bosnian Muslim command in Žepa was a civilian structure without any weapons.²⁵⁴ As noted by the Prosecution in its Opening Statement,

A word of caution here. Many of these witnesses will be adverse witnesses. Many of these witnesses will not be telling you the full truth. Many of the witnesses will go back and forth. However, with your knowledge of the case and you experience, I'm confident that you will be able to glean the truth from these witnesses. And in fact, even in lies you can find the truth.²⁵⁵

123. **REDACTED**²⁵⁶ In fact, the evidence suggest that the Luka Territorial Defence became part of the organised Žepa Infantry Brigade already in 1993.²⁵⁷
REDACTED²⁵⁸

124. Interestingly, as noted by Torlak, there was no firm distinction between military and civilians. In 1995, everybody had some military activities.²⁵⁹ This comment

²⁵³ The Trial Chamber relied on the testimony of PW-155 in its 98bis Decision that there was a civilian component amongst those deported. See T. 21463 (03/03/08).

²⁵⁴ PW-155, T. 6876 Private session, 6885 (05/02/07).

²⁵⁵ OTP Opening Statement, T. 386 (21/08/06). Whilst this comment was made in relation to VRS and to MUP witnesses, the Defence believe that it aptly applies to other witnesses, not the least of which including those that minimised their own involvement at the expense of the accused generally in the present case.

²⁵⁶ PW-155, T. 6871-6875 (05/02/07) Private Session and **REDACTED** and 6D24, dated 17 January 1995 (Letter from Commander Avdo Palić to Brigadier General Hadzi Hasanovic).

²⁵⁷ See **REDACTED** and 6D24, dated 17 January 1995 (Letter from Commander Avdo Palić to Brigadier General Hadzi Hasanovic) (“... On the 27th January 1995, the 1st Žepa Brigade is celebrating its second birthday. Grown out of the patriotic league via units of the Territorial Defence in the local communes of Žepa, Koristim, Podlepije, Godjenje, and Luka, or rather from the 4th June, and detachment and 1st Žepa detachment, the 1st Žepa Brigade was formed on 27 January 1993”).

²⁵⁸ **REDACTED**

amounts to an admission against interest and the Defence rely upon it on the basis that it might be true. By the same token Torlak somewhat unconvincingly denied having been part of the Žepa Infantry Brigade and his evidence on this topic needs to be treated with circumspection.²⁶⁰ Of course to use this part of Torlak's evidence adverse to the interests of the Defence, the Trial Chamber would have to be satisfied beyond reasonable doubt that it was true. The Defence make no apology for having it both ways. This is the logical result of the burden and standard of proof. Obviously this principle applies to each and every witness as well as to all the evidence in the trial.

Conclusion

125. In the absence of proof beyond reasonable doubt, deportation does not amount to a crime in the circumstances of the present case. The men allegedly deported were simply not protected by the relevant provisions to which Count 8 applies. Also, the Prosecution did not prove that the perpetrator could not reasonably have believed that the men were members of the armed forces or at the very least, not entitled to civilian protection at the relevant time. Moreover, no enquiry was made or was indeed possible in order to determine as required on a case-by-case basis, the status of the men.²⁶¹ In the circumstances an acquittal on Count 8 must follow.

²⁵⁹ Torlak, H., T. 9832 (02/04/07) and 5D228, dated 17 February 1995 (Taking measures to raise the level of combat readiness in units, Order, number 1-1/280-1, from Brigadier General Enver Hadžihasanović, to 2nd Corps Command, Command of Operations Group 8 Srebrenica, 1st Žepa Brigade Command). See also Džebo, M., T. 9597-9598 (28/03/07) (In a certain sense, all inhabitants participated in the defence of Žepa).

²⁶⁰ Torlak, H. T. 9769-9771 (30/03/07) and 6D83, dated 2 February 1994 (Proposal to Register Units which have Operated in the Territory of Žepa so far, Number 21/94, from Commander Avdo Palić to the 1st Corps of the Armed Forces, Sarajevo). He confirmed that nobody in the Žepa enclave shared his first and last name. However, when the Defence put to him 6D83, "Proposal to Register Units which have Operated in the Territory of Žepa so far", which lists Hamdija Torlak as Chief of Communications both of the 2nd Žepa Detachment 4 *Juni* and of the Brigade Command of the Žepa Brigade, the witness testified merely that he socialised with the members of the army and "did not serve in the army in the proper way during the war".

²⁶¹ See e.g., *Strugar Appeal Judgment*, para. 178. The Appeals Chamber held in relevant part that "...in order to establish the existence of a violation of Common Article 3 under Article 3 of the Statute, a Trial Chamber must be satisfied beyond reasonable doubt that the victim of the alleged offence was not participating in acts of war Such an enquiry must be undertaken on a case-by-case basis ...").

GVERO'S RELATIONSHIPS

Introduction to Milan Gvero's relationships

126. The Prosecution is heavily reliant on the alleged close relationships between Milan Gvero and Radovan Karadzic, Ratko Mladic and Zravko Tolimir as supporting their theory of the case that these individuals worked together in devising and implementing the joint criminal enterprise to forcibly transfer the Muslim populations of Srebrenica and Zepa. The Defence submit that this allegation is not only without merit but is also unsupported by the evidence.

The Nature of the Milan Gvero - Radovan Karadzic Relationship

Introduction

127. As discussed below in the section dealing with Milan Gvero's participation in the JCE and, in particular, the Prosecution allegation that Gvero kept Radovan Karadzic informed of his communication with the international forces (paragraph 76(b)(ii) of the Indictment), the evidence adduced at trial shows that Milan Gvero and Radovan Karadzic's relationship was extremely poor.

The volatile relationship between the VRS and the political leadership

128. The attitude of the Supreme Command towards the Main Staff was described as rather "volatile" by Prosecution witness Milovanovic.²⁶² Attempts were made to ignore the Main Staff when the army started combat operations, and especially once the Supreme Command was established.²⁶³ For its part, the Main Staff wanted the Supreme Command to provide funds for the army and for waging war, but the latter throughout the war provided only eight percent of the total requirements of the

²⁶² Milovanovic, M., T.12253 (30/05/07).

²⁶³ Milovanovic, M., T.12253 (30/05/07)

army.²⁶⁴ The conflict escalated in 1995 because the RS political leadership agreed to the return of the army from the parts under VRS control, to which the Main Staff objected, trying to overturn such decisions.²⁶⁵ The view from the military was that the political leadership displayed political and diplomatic inaptitude²⁶⁶; while that of the political authorities was such that they never trusted nor liked the army.²⁶⁷ By March 1995, according to Prosecution expert Butler, the army believed that people from the SDS were actually out to assassinate key leadership figures.²⁶⁸ And by mid-May of that year, there was close to, if not actually an open mistrust between the leadership of the army and the RS political leadership.²⁶⁹

The particular animosity between Milan Gvero and Radovan Karadzic

129. Whilst verbal attacks were mutual and widespread insofar as the branding by the political authorities of all professional JNA-trained officers as old communists,²⁷⁰ Milan Gvero was singled out for especially adverse treatment by Radovan Karadzic. Prosecution witness Milomir Savcic became aware of the dispute between Milan Gvero and Radovan Karadzic in 1994 after which it escalated and continued until the end of the war.²⁷¹ On a Serbian radio-TV programme, for example, the inner state leadership openly portrayed Milan Gvero as guilty of many things and tried to have him removed.²⁷²

²⁶⁴ Milovanovic, M., T.12253 (30/05/07). See also (Simic, N.): [The army] sent frequent requests that a state of war be declared or for some measures to be introduced that would make it easier for commanders to command because many inappropriate things were going on in a country in a state of war (i.e. civilian authorities were living and working as if it were peacetime with office hours, taking annual leave; coffee bars were full of men, especially in wartime but there were not enough men at the frontline; fuel could be bought at petrol stations, but there was not enough for the army), T.28615-28616 (21/11/08)

²⁶⁵ Milovanovic, M., T.12254 (30/05/07)

²⁶⁶ Trifkovic, S., T.25221 (04/09/08)

²⁶⁷ Simic, N., T.28608 (21/11/08)

²⁶⁸ Butler, R., T. 20285 (23/01/08).

²⁶⁹ Butler, R., T. 19746 (15/01/08); T. 20092 (21/01/08); T. 20284-20285 (23/01/08).

²⁷⁰ Simic, N., T.28661 (21/11/08)

²⁷¹ Savcic, M., T. 15347 (13/09/07).

²⁷² Savcic, M. T.15346 (13/09/07) See also P 3928, dated 7 May 1995 (Letter, strictly confidential no. 22/2-887, from Commander Major General Novica Simic, to the President of Republika Srpska). It reads in relevant part, "Further to your order to prevent anything that is against the Constitution or the law, we assure you that this Command shall continue to operate in the spirit of the law and thoroughly analyse the quality of the people employed in the organs for morale, religious and legal affairs...". Novica Simic testified in relevant part with regard to P 3928 that in the course of the war, the organ for morale was under

130. Also in 1994, a letter from Radovan Karadzic to Milan Gvero was described by prosecution witness Petar Skrbic as only partially illustrative of the poor relationship between them, because it was in fact even worse than what the said document showed.²⁷³ Indeed, one can see in the document in question that the Supreme Commander (i.e. Radovan Karadzic) was very intolerant towards Milan Gvero and that he really did not like him:

... you have no respect whatsoever for the institution of the President of the Republic and the Supreme Commander, and even less so for the person holding these offices at the moment. ... You failed to follow orders, you allow yourself the right to analyse my orders and documents, you express your views and criticise. In the future you are to act in compliance with the laws and the Rules of Service.²⁷⁴

131. Novica Simic testified in this regard that it was inappropriate for the Supreme Commander to communicate directly with the Assistant Commander of the Main Staff; rather, it should have been sent through the commander of the Main Staff.²⁷⁵ Karadzic was trying to make an example of Gvero in front of the rest of the VRS by sending this letter which was indicative of the long standing hostilities between the two men. In response to this letter from Radovan Karadzic, Milan Gvero defiantly stated that he carried out all activities mentioned by Radovan Karadzic as ordered by his immediate superior, the commander of the VRS General Staff (Ratko Mladic).²⁷⁶

a lot of pressure to have SDS people join that followed the party line, and that P 3928 refers to the efforts to replace Milan Gvero. He testified too, that it was obvious that the said organ "was a thorn in the side of the local and central authorities." The said document refers to the efforts to replace GVERO and that at the Sanski Most meeting, there were also calls to replace Tolimir - Simic, N. T.28669 (24/11/08)

²⁷³ Skrbic, P. and 6D 137, dated 18 December 1994 (Letter, strictly confidential no. 01-2480-2/94, from President of the Republic Dr. Radovan Karadzic, to General Milan Gvero, Assistant Commander, personally).

²⁷⁴ 6D 137, dated 18 December 1994 (Letter, strictly confidential no. 01-2480-2/94, from President of the Republic Dr. Radovan Karadzic, to General Milan Gvero, Assistant Commander, personally).

²⁷⁵ Re 6D 137 dated 18 December 1994 (Letter, strictly confidential no. 01-2480-2/94, from President of the Republic Dr. Radovan Karadzic, to General Milan Gvero, Assistant Commander, personally), Simic, N, T.28606 (21/11/08) The tone is political; this is not how one talks to a soldier. ... This was some sort of a fierce argument.

²⁷⁶ P 2757, dated 18 July 1995 (Letter, strictly confidential no. 07/21-327, from Lieutenant General Milan Gvero, to the President of Republika Srpska) (emphasis added).

However, whilst Milan Gvero was right to obey Ratko Mladic directly, a prosecution witness confirmed that he was in fact duty-bound to execute the instructions of the Supreme Command.²⁷⁷ Milan Gvero thus by-passed – and indeed ignored outright – the instructions issued to him by Radovan Karadzic, thereby illustrating further the deep-seeded conflict between the two.

132. The conflict between the Milan Gvero and Radovan Karadzic became even more fraught at the 15 April 1995 Assembly at Sanski Most, during which Milan Gvero was attacked²⁷⁸ and it was proposed that he, together with a number of other generals be retired.²⁷⁹ This occurred in the context of an attempt made by the military leaders at the Assembly to obtain a number of decisions from the politicians, which was interpreted by the latter as an attack on their own position and authority. Prosecution witness Milovanovic testified that Radovan Karadzic thereafter did not want to get in touch *inter alia* with Milan Gvero and intended to retire him.²⁸⁰ Whilst nobody from the Supreme Command asked that it be carried out on this occasion, another such order was again issued at the end of the war and Milan Gvero was indeed retired.²⁸¹ According to Prosecution witness Skrbic, Ratko Mladic reacted to this conflict and to the increasingly frequent demands that Milan Gvero be replaced by sidelining him.²⁸² Thereafter, GVERO thus performed only a part of the duties that were actually in his purview. For example, prior to this incident, Gvero was duty-bound on behalf of the Main Staff to attend the sessions of the RS Assembly and those of the government of

²⁷⁷ For example, Manoljo Milovanovic testified that upon completion of the task given to him by the Supreme Command with regard to Bihac, he asked the said body what to do because he was directly executing their orders. The witness also asked Ratko Mladic what to do because he was supposed to address his immediate superior; the latter told him to stop, pending further instructions from the Supreme Command, so the witness did so. He testified too, that the decision to attack Bihac was that of the Supreme Command. Milovanovic, M. T. 12263-12264 (29/05/07). See also Adjudicated Fact 86: “In July 1995, the Commander of the Main Staff was General Mladic. In turn, the Main Staff was subordinate to President Karadzic, the Supreme Commander of the VRS.” KJ 101.

²⁷⁸ Subotic, B., T. 25013 (01/09/08)

²⁷⁹ Skrbic, P., T.15562 (18/09/07).

²⁸⁰ Milovanovic, M., T.12256-12257 (30/05/07).

²⁸¹ GVERO mentioned to the witness his offer of resignation; he informed GVERO that a general can only make an application for termination of service and cannot resign. GVERO informed him that he had submitted his written resignation, but it never reached the personnel service. Skrbic, P., T. 15564 (18/09/07).

²⁸² Skrbic, P., T. 15562 (18/09/07).

RS, at least as an invited guest; thereafter, however, either Manojlo Milovanovic or Zdravko Tolimir (or his deputy) attended in his place.²⁸³

133. Following this assembly Rupert Smith testified with regard to a meeting on 20 April 1995, that a Lieutenant General (Milan Gvero) engaged in a “heated discussion” with his Supreme Commander (Radovan Karadzic), in front of UNPROFOR members.²⁸⁴ Indeed, this is consistent with a comment in the American journalist, Bob Djurdjevic’s diary at the time, which recalled that at a 1 May 1995 meeting (which was, in effect, an informal interview) Radovan Karadzic said that “Milan Gvero is one piece of human garbage”.²⁸⁵ It is quite clear from any reading of Djurdjevic’s diary that what Karadzic had told him was very heartfelt and had in no way been uttered for show. Srdja Trifkovic likewise testified that it would not be difficult to guess that Radovan Karadzic regarded Milan Gvero as part of the inherited milieu of ex-officers (“komunjare” and “Red Plague”) with whom he had serious misgivings.²⁸⁶

134. Adding further credence to the poor relationship between Gvero and Karadzic, during a meeting on 14 July 1995, Radovan Karadzic said to Petar Skrbic that he was not an old lady and would certainly remove Milan Gvero²⁸⁷ and that he would act strictly with all the generals, primarily with Milan Gvero.²⁸⁸ Milan Gvero was thus under some pressure²⁸⁹ in this regard. Indeed, Petar Skrbic was surprised, judging by

²⁸³ Milovanovic, M., 12255 (29/05/07).

²⁸⁴ Smith, R. T.17712 (08/11/07) P 2936, dated 22 April 1995 (Meetings in Sarajevo and Pale – 20 April 1995, from Lt Col J. R. J. Baxter, MA to Commander). P 2936 reads in relevant part, “...the pressure on the Serb leadership and the cracks between the politicians and the military were very clear. ... Krajišnik was clearly upset that the pledge that he had made a meeting the previous day to ensure that the necessary guarantees for UN civilians would be provided had not been honoured. This issue provoked some heated discussions between Karadzic and Gvero.”

²⁸⁵ 2D 531, dated 5-31 July 1995 (A European Trip Diary: War Drums are Beating, by Bob Djurdjevic).

²⁸⁶ Trifkovic, S., T. 25249 (04/09/08).

²⁸⁷ Skrbic, P., T. 15487 (17/09/07).

²⁸⁸ This critique of GVERO had to do with information about the state of morale and not with Srebrenica. Nobody mentioned Srebrenica when he went to meet Karadzic on 14 July 1995. Skrbic, T. 15554, 15580-15581 (18/09/07), and P 2905).

²⁸⁹ Savcic, M. T. 15357 (13/09/07) and P 2756, dated 17 July 1995 (Letter, strictly confidential no. 01-1391/95, from President of the Republic and Supreme Commander of the Republika Srpska Armed Forces Dr. Radovan Karadzic, to the Main Staff of the Republika Srpska Army, Lieutenant General Milan Gvero, personally), which reads in relevant part that “Despite my order[s], ... [y]ou are acting contrary to all these

what was said about Milan Gvero at the time, that he did not leave the RS altogether, but noted that in this time period he did leave Crna Rijeka.²⁹⁰ In other words, Milan Gvero was transferred away from the Main Staff Command where the command post, the staff, and the chief of branches were located (i.e. the basic command post of the Main Staff), to the logistical command post in Han Pijesak, where the sector for ORMO and personnel affairs were also located as a direct result of the Sanski Most Assembly altercation²⁹¹ This move post the 15 April incident illustrates a significant downgrading of Gvero's position in comparison with the location of his office at the beginning of the war.²⁹² Indeed, even prosecution witness Truklja stated that once he had his office in Han Pijesak, he appeared thereafter only every now and again at the command post in Crna Rijeka.²⁹³ Gvero's complete alienation from the general political leadership, and from Radovan Karadzic in particular, was such that he did not meet with Karadzic at all from mid June 1995 until at least the end of July 1995.²⁹⁴

mandatory documents. ... I hereby order immediately sent a written statement about this non-compliance with an order and exceeding authority, following which you will be called for an interview to give a personal explanation."

²⁹⁰ Babic, V T.29203 (02/12/08); and Skrbic, P., T. 15564 (18/09/07). See also 2DW-043, Kerkez, Z. T. 24087 (25/07/08), "the sector for morale had its headquarters at the hotel in Han Pijesak"; Sladojevic, B., T. 14405 (27/08/07); 2DW-008 Perula, S., T. 24172 (28/07/08), "in early May 1995, he dropped by the hotel Gora in Han Pijesak; he was informed that GVERO was on the second floor of the hotel, where they met and at which time he found out that GVERO's office was transferred from Crna Rijeka to the Gora hotel in Han Pijesak. After this period in 1995, he would visit GVERO at the said hotel"); Milovanovic, M., T. 12269-12270 (29/05/07), "GVERO's section, information and legal affairs (the press centre) was based in Han Pijesak").

²⁹¹ Skrbic, P., T. 15563 (18/09/07).. see also 5D 1395 (Transcript dated 25/11/07), p. 28762, 66-71.

²⁹² GVERO occupied room number 6 at Crna Rijeka at the beginning of the war; this room was turned into a conference room in 1995 and GVERO was moved to room number 7. In the summer of 1995, Tolimir used the office that the witness designated as GVERO's when he was there with his wife. GVERO was relocated from the blue room to the adjacent room. The inner Main Staff (the Chief of Staff, the operations and education administration, the administration for branches, and the general office) was located in the shelter where the witness was (Milovanovic, M. T. 12209 (29/05/07), and P 2828); see also Trkulja, N. T.15138 (10/09/07), and P 2828, on which no marking was made indicating that GVERO had an office there. See also Milovanovic, M., T. 12151-12152 (29/05/07).

²⁹³ Truklja, N, T.15098 (10/09/07), "GVERO had his office in Han Pijesak; he only appeared every now and then at the command post in Crna Rijeka").

²⁹⁴ Although Petar Skrbic initially testified that Milan Gvero was present at a meeting he was summoned to with Radovan Karadzic on 14 July 1995, he later clarified that Gvero could not in fact have attended this meeting. Skrbic stated that he was ordered to see Karadzic on 14 July 1995 and was told to take to him the orders for the decorations that he was supposed to sign. He believed that Bogdan Subotic was also present and stated originally that he believed that Milan Gvero also attended, but later accepted that he was confused by the fact that Radovan Karadzic mentioned General GVERO at this meeting in the sense that he supposedly had written a report that was detrimental to the morale of the VRS. On further reflection,

The ideological and professional differences underpinning this animosity

135. The source of the tension between Milan Gvero and Radovan Karadzic was described on the one hand as ideological and on the other, as running even deeper than mere philosophical differences. Prosecution witness Milomir Savcic believed that Milan Gvero entered into a conflict at an ideological level with the RS state leadership as a result of his position disallowing reprisals against those not of Serb ethnicity.²⁹⁵ A further prosecution witness, Skrbic, claimed that the criticism suffered by Milan Gvero for having made it possible in 1994 for General Hodzic, a Muslim, to have treatment at the Military Academy hospital in Belgrade occurred at the ideological level, where his views and those of Karadzic seemed to diverge very dramatically.²⁹⁶ The same witness testified that Radovan Karadzic believed that Milan Gvero was the “principal kommie”, an Orthodox MPV, and used derogatory terms for him, including “a Red Plague, the devil of the Main Staff, [and] somebody who was stalling the work of the Main Staff.”²⁹⁷ Milomir Savcic thus identified the cause of disagreement between the two - the latter’s belief in brotherhood and unity and its dissolution at the beginning of the war.²⁹⁸

Skrbic acknowledged that his job with the President had nothing to do with what Gvero had to deal with and concluded that Gvero was therefore was not at the meeting. This conclusion is supported by P 2905 (Excerpt from Appointment Calendar for Radovan Karadzic for July 1995) which is a list of the visitors who, on the 14th of July 1995, had appointments with President Karadzic. The list mentions Petar Skrbic but omits Milan Gvero. In cross-examination Skrbic testified that if General GVERO had been with him, his name would be there, noting the time of 12.15 to 12.36 “hardly enough room for two generals there.” See Skrbic, P., T. 15484-15486 (17/09/07), T. 15551-3 (18/09/07).

²⁹⁵ The document leading to this conflict is 6D 129, dated 20 June 1992 (Prevention of Reprisal and Treatment of Journalists and Representatives of International Organisations, from Major General Milan Gvero, to all units) (Such actions are not and must not be characteristic of members of our army because they tarnish the reputation and moral image of the Serbian soldier. We cannot allow improper conduct towards reprisals against innocents and helpless people merely because they are not Serbs”). Savcic, M., T. 15346, 15347 (13/09/07) testified in relation to this document : ”I believe that as a result of this position of his, he had problems with the state leadership of Republika Srpska. He was proclaimed as nostalgic of the former Yugoslavia and I believe that he entered into a conflict at an ideological level with the state leadership and so on and so forth. He was perceived as the advocate of the fraternity and unity ideas that had disappeared at the beginning of the war.”

²⁹⁶ Skrbic, P, T. 15561 (18/09/07).

²⁹⁷ Skrbic, P. T. 15555 (18/09/07).

²⁹⁸ Savcic, M., T. 15357 (13/09/07); and P 2756 (letter from Karadzic to GVERO).

136. The conflict ran even deeper on two very specific issues: firstly, whereas Milan Gvero wanted to uphold the constitution and did not want to politicise the army, a prosecution witness gave evidence that Radovan Karadzic wanted to appoint only members of the SDS as assistant commanders for moral guidance on all levels.²⁹⁹ With regard in particular to Milan Gvero, there were attempts throughout the war to replace him as the Assistant for Morale by someone from the inner circle of the SDS; this initiative originated from several SDS deputies and was supported by Radovan Karadzic.³⁰⁰ Secondly, a prosecution witness revealed that Radovan Karadzic wanted to monopolise all information about the army and its activities and to remove the issuance of such information from Milan Gvero and place it within a civilian body.³⁰¹ Petar Skrbic had no reason to doubt that this replacement was to be Miroslav Deronjic, an Orthodox SDS member.³⁰²

Conclusion

137. On the basis of the evidence discussed above, the Defence submit that the relationship between Milan Gvero and Radovan Karadzic was, at its highest, an extraordinarily strained one. There is no simply reliable evidence to support an assertion that the two had the kind of professional relationship which would facilitate their working together to further the joint criminal enterprise.

²⁹⁹ Skrbic, P, T. 15555 (18/09/07).

³⁰⁰ Simic, N., T. 28607 (21/11/08)

³⁰¹ Skrbic, P, T. 15555-15556 (18/09/07).

³⁰² Ultimately this is why Karadzic established a press centre with Sonja Karadzic as its head in order to provide exclusive information: Skrbic T.15556 (18/09/07).

The Nature of the Milan Gvero - Ratko Mladic Relationship

Introduction

138. Contrary to the Prosecution's assertions, Milan Gvero was not one of Mladic's principal advisors³⁰³, nor was he Mladic's eyes and ears³⁰⁴ and they did not work together closely throughout the war.³⁰⁵ Their relationship was also fraught and this meant that it would have been quite impossible for Milan Gvero to act as a "jack of all trades for Mladic".³⁰⁶

Milan Gvero was not one of Ratko Mladic's most trusted associates

139. The testimony presented during the trial illustrates that Milan Gvero was not one of Ratko Mladic's most trusted associates. Only one person, Miletic Defence witness Obradovic, supported the Prosecution's case that Gvero was "a close associate" of Mladic.³⁰⁷ However, careful analysis of the video and transcript of this witness' testimony reveals that Obradovic was partial to the extreme, both in his answers and his demeanor, and that his overriding consideration in giving evidence was not to tell the truth but to exculpate Miletic at all costs. It is in this context that Obradovic's testimony regarding Gvero and Mladic's relationship must be viewed. Moreover, even if the Defence concerns about Obradovic's credibility are not accepted, the Defence maintain that it would still be inappropriate for the Trial Chamber to accord any weight to this aspect of Obradovic's evidence. The witness was incapable of confirming not only whether Gvero and Mladic had a long history of knowing each

³⁰³ Pre-Trial Brief, para. 30: "Mladic relied on Milovanovic, Tolimir, GVERO, and Miletic as his principal advisors and men he could count on to make sure his orders were carried out. ... GVERO was assigned to oversee the Srebrenica operation on 9 July and was present at that time at the forward command post of Pribicevac."

³⁰⁴ Opening Statement, T. 465 (22/08/06): "[re P 33] as it pertains to GVERO, it shows how important he is. He is Mladic's man in Srebrenica. He is there so the key decisions can be made on whether to attack or not to attack. Krstic, of course, is commanding the operation, but GVERO is Mladic's eyes and ears to the operation".

³⁰⁵ Pre-Trial Brief, para. 30: "Mladic, Milovanovic, Tolimir, GVERO, and Miletic were career JNA officers before the war in Bosnia and knew each other quite well and worked closely together throughout the entire war."

³⁰⁶ Cf. OTP Opening Statement, paragraph 464.

³⁰⁷ Obradovic, L., T. 28317 (17/11/08).

other³⁰⁸ but also which of Mladic's associates was his most trusted.³⁰⁹ Even more fundamentally, Obradovic had no contemporaneous knowledge of the relationship between Gvero and Mladic leading up to July 1995 as he had been absent from the Main Staff on sick leave from 27 January 1995 to 17 July 1995.³¹⁰

140. Likewise, Reuters journalist Branimir Grulovic distanced himself from his own description in a wire service article of Gvero as Mladic's closest aid during his oral testimony before the Chamber.³¹¹ According to Grulovic, all of the generals in the Main Staff, who each had different purviews, were associates of Mladic³¹² as they were required to be according to the military rules of service³¹³ During cross-examination by the Prosecution, the witness clarified that he could not have known the closeness of the relative relationships at the time of drafting the text and making this conclusion³¹⁴ as Reuters staff could not attend Main Staff meetings and therefore could not draw their own personal conclusions as to who the closest associates of Mladic's were.³¹⁵ Also, although he had met Gvero near Gorazde in the Spring of 1994 and perhaps on other occasions as well,³¹⁶ the witness had never taken notes during these meetings (he only ever had a camera).³¹⁷ Grulovic concluded that he would have drafted the article more precisely if he were in the same situation today.³¹⁸

141. A variety of other witnesses gave credible testimony to the effect that Gvero was not Mladic's most trusted confidant. Milovanovic was asked whether Milan Gvero could be considered as Mladic's closest associate, confidant or most trusted man, he

³⁰⁸ Obradovic, L., T. 28317 (17/11/08).

³⁰⁹ Obradovic, L., T. 28370 (18/11/08).

³¹⁰ Obradovic, L., T. 28250 (14/11/08); T. 29310, 29312 (17/11/08).

³¹¹ Grulovic, B., T. 23804, 23805 (22/07/08); P3539, dated 18 November 1996 (Reuters Article, "Maverick Serb Generals Meet Rival Politicians", by Branimir Grulovic, states: "Top generals except for Mladic and his closest aid General Milan GVERO").

³¹² Grulovic, B., T. 23806 (22/07/08).

³¹³ Grulovic, B., T. 23806-23807 (22/07/08); P3539, dated 18 November 1996.

³¹⁴ Grulovic, B., T. 23807 (22/07/08); P3539, dated 18 November 1996.

³¹⁵ Grulovic, B., T. 23808 (22/07/08); P3539, dated 18 November 1996.

³¹⁶ Grulovic, B., T. 23809 (22/07/08); P3539, dated 18 November 1996.

³¹⁷ Grulovic, B., T. 23809-23810 (22/07/08); P3539, dated 18 November 1996.

³¹⁸ Grulovic, B., T. 23808-23809 (22/07/08); P3539, dated 18 November 1996.

responded that contrarily, Gvero did not enjoy any special trust with General Mladic.³¹⁹ He elaborated on this by stating that Gvero was not Mladic's "stooge", or somebody who did everything for him.³²⁰ In fact, Milovanovic was adamant that Gvero was not Mladic's operational right-hand man, and that he personally, and no one else, fulfilled this role for Mladic and was the person in whom Mladic confided most.³²¹ The witness' assertion that he was Mladic's most trusted associate was confirmed by Miljanovic.³²² When asked to clarify the role and importance of Milan Gvero,³²³ this prosecution witness expressly contradicted the prosecution allegation that Gvero was Mladic's eyes and ears; stating instead that Mladic's eyes were the security administration and his ears were the intelligence administration.³²⁴ In Milovanovic's view, General Mladic avoided having anybody among the assistant commanders in whom he would have placed most trust.³²⁵

142. Not only was Milan Gvero not Mladic's "right-hand man" but on many occasions he even could not get in touch with him, even when he had urgent or important matters to discuss with his superior. For example, Jevdjevic testified about Milan Gvero's attempt to reach Mladic by phone in regard to a critical situation on the western front of the Republika Srpska. Since Mladic never returned the call Milan Gvero had to send him a telegram on the same subject.³²⁶ Jovanovic likewise testified as to the poor manner in which Milan Gvero was treated by Mladic at Boksanica on 26 July 1995 when he tried to speak with his superior about the same issues on the western front. Jovanovic understood that Gvero "was in some kind of a waiting room, so to speak; to wait until Mladic has finished another urgent business".³²⁷ At this time, Mladic knew that Gvero was trying to get hold of him but he said that he had more important business to deal with.³²⁸ When they finally did

³¹⁹ Milovanovic, M., T. 12252 (29/05/07).

³²⁰ Milovanovic, M., T. 12252 (29/05/07).

³²¹ Milovanovic, M., T. 12252 (29/05/07).

³²² Miljanovic, R., T. 28947 (27/11/08).

³²³ Milovanovic, M., T. 12251-12252 (29/05/07).

³²⁴ Milovanovic, M., T. 12251-12252 (29/05/07).

³²⁵ Milovanovic, M., T. 12252 (29/05/07).

³²⁶ Jevdjevic T. 29695-29700 (15/12/08).

³²⁷ Jovanovic S. T. 33919 (03/07/09)

³²⁸ Jovanovic S. T. 33920 (03/07/09)

speak, they had a “heated” interchange and Jovanovic found it “unpleasant”, as a non-commissioned officer, to have overheard two superiors interacting in this manner.³²⁹

143. Other witnesses recounted Mladic not listening to Gvero’s views and opinions. Simic, for example, who spoke to Mladic daily on the telephone, saw him at Main Staff briefings and had visits from him on several occasions when he came to see Simic’s units,³³⁰ recollected that Mladic “had his own will when he made decisions”,³³¹ was “very independent” and “very stubborn” and very often would not take anybody’s proposal into account.³³² In relation to Gvero in particular, Simic gave evidence that in addition to the political authorities not liking him, Mladic was also “not particularly fond” of Gvero,³³³ Simic even went on to say that during half of the war, Mladic and Gvero were not on good terms, as they were in an argument with each other.³³⁴ He explained that the result of their being on “bad terms with one another” was that Gvero was handicapped and could not do his job properly.³³⁵ Simic recalled that the key problem in the Gvero-Mladic relationship was the extent to which Mladic was willing to accept his organ for morale’s proposals.³³⁶ He spoke of the risk that Mladic took as a commander in not accepting the proposals of his assistant - if the situation turned against Mladic the mistake would be his alone.³³⁷ However, it was Mladic’s discretionary right to accept or reject such proposals.³³⁸ Simic recalled that Mladic simply did not like the proposals that Gvero gave to him, and that this was a shame as it would have been better for everyone if Mladic had listened to Gvero on many points.³³⁹ Simic additionally took the view that “to accuse

³²⁹ Jovanovic S. T. 33921 (03/07/09)

³³⁰ Simic, N., T. 28626-28627 (21/11/08).

³³¹ Simic, N., T. 28627 (21/11/08).

³³² Simic, N., T. 28627 (21/11/08).

³³³ Simic, N., T. 28624 (21/11/08).

³³⁴ Simic, N., T. 28598 (21/11/08).

³³⁵ Simic, N., T. 28598 (21/11/08).

³³⁶ Simic, N., T. 28597, 28598 (21/11/08).

³³⁷ Simic, N., T. 28597-28598 (21/11/08).

³³⁸ Masal, D., T. 29076-29077 (01/12/08).

³³⁹ Simic, N., T. 28598 (21/11/08).

[Gvero] of anything is ridiculous” as this was a person who was not allowed to issue orders and was perhaps first on the list of people who are allowed to say anything.³⁴⁰

144. The evidence at trial also established that Gvero in fact often disagreed with Mladic. Ratko Miljanovic (General Djukic’s deputy and another witness called on behalf of Miletic) testified of the Main Staff members that Djukic expressed his disagreement with Mladic’s decisions³⁴¹ and that Gvero also had the ability and courage to disagree with Mladic.³⁴² He made this assessment in light of and in agreement with a statement to similar effect by Dordje Djukic, which said *inter alia*, “some members of the Main Staff expressed their disagreement and I know that this disagreement was expressed by Gvero, Maric, Salapura and Djukic”.³⁴³ This is significant as it shows that even counting only the members of the main staff from Major or Colonel upwards, there were still only 4 out of 52 who disagreed with Mladic. This indicates that Gvero was clearly not a close and trusted associate of Mladic. Miljanovic then went on to concur further with Djukic, to the effect that Mladic did not like negative information.³⁴⁴

Milan Gvero did not work closely with Ratko Mladic throughout the war

145. The evidence shows that Gvero did not work closely with Mladic during the war. Mladic met regularly with others to the exclusion of Gvero, and even on the rare occasions that they did meet, as outlined above, Gvero had little or no influence over the decision-making which took place in such meetings.

146. Miljanovic testified that during the time when he stood in for General Djukic (from late March to mid June 1995 or early July 1995)³⁴⁵ he did not attend any Main

³⁴⁰ Simic, N., T. 28598 (21/11/08).

³⁴¹ Miljanovic, R., T. 28947-28948 (27/11/08). See also 6D315 at 0099-6143 (Further Statement of Dordje Djukic).

³⁴² Miljanovic, R., T. 28962 (27/11/08).

³⁴³ Miljanovic, R., T. 29003 (28/11/08).

³⁴⁴ Miljanovic, R., T. 28953-28954 (27/11/08). See also 6D315 at 0099-6143 (Further Statement of Dordje Djukic).

³⁴⁵ Miljanovic, R., T. 28963 (27/11/08).

Staff meetings at which the assistants, including Gvero, were present. The only two exceptions to this were personnel board meetings which took place just before army day and St Vitus Day (28 June) at which proposals were reviewed by subordinate units in terms of promoting soldiers to a higher rank.³⁴⁶ This situation was a manifestation of Mladic's 'one man show' approach to leading the VRS.³⁴⁷ As the witness confirmed, Mladic "was not your run-of-the-mill officer", he was not really in the habit of holding meetings because he was well aware of the situation throughout the army as a whole.³⁴⁸ Miljanovic also attested, again in agreement with Djukic, that the reason why the Main Staff did not meet often may well have been due to the disagreements with Mladic's ideas which had been expressed by Gvero and three other Main Staff members (Maric, Salapura and Djukic).³⁴⁹

147. Djukic's statement also explains that when meetings of the Main Staff did take place, they usually functioned as a situation briefing and ideas were put forward about subsequent tasks for the VRS. However, a decision would already have been made beforehand by Mladic based on his own plan in conjunction with a select few senior officers, Gvero not being amongst them.³⁵⁰ According to Djukic, Mladic was not inclined to listen to other views and tended to favour his close acquaintances from the past and fellow countrymen regardless of their position."³⁵¹ The Defence submit that Gvero was not among this inner circle of close acquaintances. He was not one of Mladic's countrymen (as the term was understood at the time of the disintegration of the FRY) as Mladic hailed from the region of Eastern Bosnia while Gvero regarded the very distinct area of Western Bosnia as his homeland. Likewise, although they

³⁴⁶ Miljanovic, R., T. 28946-28947 (27/11/08).

³⁴⁷ Miljanovic, R., T. 28947 (27/11/08).

³⁴⁸ Miljanovic, R., T. 28947 (27/11/08).

³⁴⁹ Miljanovic, R., T. 28953-28954 (27/11/08). See also 6D315 at 0099-6143 (Further Statement of Dordje Djukic).

³⁵⁰ 6D315 at 0099-6143 (Further Statement of Dordje Djukic). Admitted pursuant to R92 *ter* as Djukic died in 1996: T. 28958-28959 (27/11/08). Though the Prosecution were unable to cross-examine Djukic by reason of this, his evidence as to Gvero's relationship with Mladic should be relied upon. For Defence submissions on this see: *Motion on Behalf of Milan Gvero seeking the Admission into Evidence of Three Statements of Dordje Djukic Pursuant to Rule 92 Quarter*, dated 16 December 2008. It should also be borne in mind that in tendering this evidence, the Defence are only seeking to raise a reasonable doubt. Put another way, if what Djukic says might be true then it should act in Gvero's favour.

³⁵¹ 6D315 at 0099-6143.

had both served in the JNA previously, Gvero only met Mladic in 1991 and so, unlike for example Tolimir, did not have a long-standing relationship or association with Mladic.³⁵² Indeed, the comparatively poor calibre of the Gvero – Mladic relationship is further evidenced by the fact that not only did the Staff Sector (headed by Milovanovic) meet with Mladic everyday,³⁵³ but it would have been very rare for Mladic not to accept Milovanovic's proposals.³⁵⁴

148. Simic testified that during 1995 Gvero's relationship with Mladic had deteriorated to such an extent that for a time, on the rare occasions when the Main Staff did actually meet³⁵⁵, Gvero was excluded from reporting, briefing or making conclusions at these meetings.³⁵⁶ Furthermore, Simic gave evidence that Mladic was, in effect, forced to invite Gvero to attend the annual briefings on combat readiness, regardless of the extent to which he personally respected him, as questions would have arisen from other attendees as a result of Gvero's absence.³⁵⁷ Skrbic likewise attested that he would attend sessions of the Government or the Assembly in Gvero's place when legal documents regarding the army were discussed.³⁵⁸ Such actions formed part of Mladic's marginalising and sidelining of Gvero as a consequence of the increasingly frequent demands from the political leadership that Gvero be replaced.³⁵⁹

³⁵² Note: Milovanovic, M., T. 12158 (29/05/07) assumed that Mladic and Gvero knew each other before their arrival to the Main Staff in Crna Rijeka in 1992 because Mladic graduated from a number of military schools and Gvero occasionally lectured in one of those schools. Although they may have met in this context and while Mladic might have recalled his lecturer from this time, Gvero could not possibly recall all of his students over the years. To Gvero's knowledge, the first time that he and Mladic met was in 1991.

³⁵³ Milovanovic, M., T. 12155 (29/05/07).

³⁵⁴ Milovanovic, M., T. 12155 (29/05/07).

³⁵⁵ The extended collegium was where all the assistant commanders and corps commanders were present: Simic, N., T. 28599 (21/11/08).

³⁵⁶ Simic, N., T. 28599-28600 (21/11/08).

³⁵⁷ Simic, N., T. 28599 (21/11/08).

³⁵⁸ Skrbic, P., T. 15562 (18/09/07).

³⁵⁹ Skrbic, P., T. 15562 (18/09/07).

Conclusion

149. On the basis of the evidence discussed above, the Defence submit that the relationship between Milan Gvero and Ratko Mladic could be accurately characterised as ‘volatile’ but not ‘close’. They did not have the foundation of trust requisite to devise and implement the joint criminal enterprise as charged.

The Nature of the Milan Gvero - Zdravko Tolimir Relationship

Introduction

150. Although Milan Gvero and Zdravko Tolimir knew each other, having both been career JNA officers before the Bosnian war, contrary to the Prosecution’s assertion,³⁶⁰ they did not work closely together throughout the entire war. Even taking the Prosecution case at its highest, there is simply no direct evidence to back up this alleged coordination and cooperation between Gvero and Tolimir.

Lack of cooperation and coordination between Gvero and Tolimir

151. Prosecution expert witness Richard Butler testified that while staff officers and elements (such as assistant commanders of morale, political works, logistics, security and intelligence) have their own specific responsibilities, that they work with an eye towards ensuring that their activities are properly coordinated and with the ultimate goal of fulfilling and ensuring the commander’s order. However, this conclusion was reached “in the context of the former JNA” when asked about P699, a ‘JNA Manual for the work of Command and Staff’ dating back to 1983. This interpretation of a theoretical document is a vastly insufficient basis on which one could premise a conclusion that members of the VRS Main Staff - an entirely differently constituted body from its predecessor in the former JNA – worked together and coordinated their

³⁶⁰ Prosecution Pre-Trial Brief, paragraph 30.

activities.³⁶¹ This was particularly so in relation to the Morale Sector, which had undergone very large changes by reason of the collapse of communism.³⁶²

152. The only other witness that could possibly be relied upon to support the Prosecution's case on this issue is Mikajlo Mitrovic who testified that as the security organ and the assistant for morale are members of the same team, they are almost duty bound to cooperate and to exchange information among themselves within the command.³⁶³ According to Mitrovic, this is because security threats and desertions may have a detrimental impact on morale and in turn, low morale can adversely affect security.³⁶⁴ As such, he could not exclude the possibility that Tolimir had read and extracted some information from Gvero's reports on the current political situation, and that Gvero had done the same in relation to Tolimir's security reports.³⁶⁵ In this vein, Mitrovic stated that it was common practice to have meetings where everybody provided information and shared problems pertinent to their respective sectors.³⁶⁶ However, this witness confirmed in cross-examination that he could only rely on assumptions about the Main Staff and the inter-relationships and dealings between its members as he had never worked there.³⁶⁷ He also clarified that he could really only give evidence as to the principles of work in the corps and its subordinated units, especially in his own corps.³⁶⁸ What takes places at corps level is entirely distinct from Main Staff activities. Indeed, Prosecution expert Butler expressed the view that the situation is "more complex" at the level of the Main Staff than at the Brigade level.³⁶⁹

³⁶¹ Butler, R., T. 19631-19632 (14/01/08) when discussing 5DP699, dated 28 January 1983 (JNA Manual for the Work of Command and Staff).

³⁶² See the evidence of Vuga, who was cross-examined by the Prosecution on this subject T. 23380-23381 (07/07/08).

³⁶³ Mitrovic, M., T. 25145-25146 (03/09/08).

³⁶⁴ Mitrovic, M., T. 25145-25146 (03/09/08).

³⁶⁵ Mitrovic, M., T. 25146-25147 (03/09/08).

³⁶⁶ Mitrovic, M., T. 25146 (03/09/08).

³⁶⁷ Mitrovic, M., T. 25083(02/09/08).

³⁶⁸ Mitrovic, M., T. 25083-25084 (02/09/08).

³⁶⁹ Butler, R., T. 20784-20785 (31/01/08).

1. Likewise, P2512 cannot be relied upon to establish that there was cooperation between Milan Gvero and Zdravko Tolimir.³⁷⁰ Prosecution witness Skrbic testified in relation to this document that it applied only to organs for morale, from the level of battalion up to the level of the Main Staff (ie. only subordinated units but not to the Main Staff itself).³⁷¹ Moreover, even at the lower levels, Skrbic confirmed that he had neither the material nor personnel capacity to ever organise close cooperation with the intelligence organs.³⁷²

Conclusion

2. From this it is clear that there is simply no basis for the Prosecution's assertion that Milan Gvero had a close working relationship with Zdravko Tolimir such that the two worked together to further the joint criminal enterprise.

Conclusion as to Gvero's Relationships with Karadzic, Mladic & Tolimir

3. As outlined above the Prosecution have failed to establish close relationships between Milan Gvero and Radovan Karadzic, Ratko Mladic and Zdravko Tolimir. This omission reflects the fact that there has been insufficient evidence adduced to show beyond reasonable doubt that these individuals worked together to devise and implement a joint criminal enterprise to forcibly transfer the Muslim populations of Srebrenica and Zepa.

³⁷⁰ P 2512, dated 10 February 1995 (Authority and Filling of Personnel Vacancies for Organs for Moral, Religious and Legal Affairs in Units and Institutions of the Republika Srpska Army, Highly confidential no. 07/21-88. Cover letter dated 19 July 1995, Highly confidential no. 15/354-40, from Assistant Commander Colonel Slobodan Cerovic, to *inter alia* the Drina Corps Command, to the Assistants Commander for Moral of the 1st Zvornik Infantry Brigade and to the 1st Birac Infantry Brigade): "Shall have close cooperation with intelligence..."

³⁷¹ Skrbic, P., T. 15574-15575 (18/09/07).

³⁷² Skrbic, P., T. 15576 (18/09/07).

GVERO'S ROLE AND RESPONSIBILITIES

Introduction to Milan Gvero's role

1. As outlined in the 'Background and Context' section above, Milan Gvero did not have any operational or command expertise. His entire professional experience was in the realm of education, training and morale. Apart from the very beginning of his career, when he held the lowest possible command position in the JNA, he worked for the duration of his army life either in a teaching capacity or in one of the several organs for moral guidance (see Background and Context section for further information in this regard).
2. Milan Gvero was appointed the Assistant Commander of the Main Staff of the VRS and headed the sector for Moral Guidance, Religious and Legal Affairs from the formation of the VRS in 1992 until the end of the war in 1995.³⁷³

Overview of the sector for moral guidance, religious and legal affairs

3. This sector, which was significantly under-resourced,³⁷⁴ dealt predominantly with the morale of soldiers in the army and in liaising with civilian institutions in relation to its areas of competence.³⁷⁵ According to Simic, several factors impact heavily on morale: the way a soldier is armed, how he is trained, clothed, fed, how his family is taken care of, the combat situation and the functioning of civilian and military

³⁷³ Butler, R., T. 19671-19672 (15/01/08); Milovanovic, M., T. 12151-12153, 12242 (29/05/07). See also P2739, 12 May 1992 (Information About Post Assignments, strictly confidential Operative No. 436-2, for Commander Major General Momir Talic, to *inter alia* Operations and Training Organ, Organ for Moral Guidance and Legal Affairs.

³⁷⁴ Savcic, M., T. 15341 (13/09/07).

³⁷⁵ Milovanovic, M., T. 12246 (29/05/07).

authorities.³⁷⁶ It was the role of the morale organ to assess those various factors in order to make sure that the fighting spirit is kept at a maximum level and to make suggestions for any improvements in these factors to the commander.³⁷⁷

4. Special attention was dedicated to those units that for various reasons faced morale problems due to losses of territory or human life, having seriously wounded men, abandoning of positions en masse, or expressions of mass discontent. For the most part it was involved in humanitarian matters: caring for the troops, making arrangements for wounded combatants and their families, organising funerals and memorial services for the dead, and providing the families of such individuals with financial and welfare support. The sector was also responsible for providing information to the troops and to the public. A final important part of the Sector's work related to religious matters, particularly organising the *Slava* (Patron Saints' Feasts), celebrations of state and religious holidays, and organising cultural events and entertainment for the troops. The sector did not have any operational responsibilities.³⁷⁸

5. The work of the Sector at the Main Staff level was quite different to that carried out by its equivalent morale organs at the Corps level.³⁷⁹ These organs also had responsibility for cooperating with international organizations, engaging in prisoner exchanges, and dealing with the media.³⁸⁰ Milan Gvero's office for morale did not have these additional functions as the Main Staff had special organs to deal with such

³⁷⁶ Simic, N., T. 28592-28593 (21/11/08).

³⁷⁷ Simic, N., T. 28699 (24/11/08).

³⁷⁸ Butler, R., T. 20551-20552 (28/01/08): The witness testified in cross-examination that the assistant commanders for morale, legal and religious affairs, for logistics, and for intelligence and security do not fall under the bodies that are known as the operative staff part of the Main Staff (i.e. the staff officer for mechanised, the staff officer for air defence, the staff officer for training, communications, etc.). There is a specific operations-related staff that for the most part deals with the day-to-day operational activity of the army; within this context, people like GVERO and Djukic are not part of that staff.

³⁷⁹ Simic, N., T. 28584 (20/11/08): "Q. I just wanted to point out the difference of the set up. The morale organ was in a different place in the establishment in your corps, and in the Main Staff, because one could get the impression that it was organised the same way in your corps and the Main Staff. That's why I wanted to clarify this, which may have been unclear based on your first interview.

A. [No verbal response] ... Q. Mr. Simic, the way I phrased it may not be the best, but I believe that you agreed with what I implied in my question by nodding? A. Yes, I agree."

³⁸⁰ Simic, N., T. 28579-28580 (20/11/08).

tasks.³⁸¹ Indeed, Simic testified that not only were the levels of command different between the morale organs in the Main Staff and the Corps but the whole “approach or concept” was also distinct and that “this must be borne in mind” when considering the functionality of each.³⁸²

Responsibility for morale

6. According to Prosecution witness Milovanovic, the primary work of the sector was to monitor the state of VRS morale (an important part of combat readiness)³⁸³, to draft evaluations in light of the same, and to formulate proposals for strengthening morale in order to give the best chance of success in future combat operations.³⁸⁴ In this way, the sector was a specialist body charged with providing expert advice to unit commanders on assessing, maintaining and building combat morale. It would draft reports on the state of VRS morale, which were then to be discussed by the Main Staff extended collegium, on the basis of daily and monthly morale reports by the commanders of subordinate units (to the extent that such reports were available).³⁸⁵ Such discussions, which took place rarely, would then inform the drafting of recommendatory reports on VRS morale which would proposals to be undertaken at the various command levels in order to maintain and strengthen morale. These recommendatory reports would then be submitted to the Supreme Commander and the Ministry of Defence as well as the commands of operational units. It was not the responsibility of the sector to implement such reports, but merely to identify morale problems and suggest remedial steps which could be social, psychological, welfare related, or even political in nature.³⁸⁶
7. Part of the sector’s work involved the development of a program for the moral, psychological and patriotic training of soldiers in addition to instructions for the

³⁸¹ Simic, N., T. 28579-28580 (20/11/08).

³⁸² Simic, N., T. 28580 (20/11/08).

³⁸³ Simic, N., T. 28591 (21/11/08).

³⁸⁴ Milovanovic, M., T. 12245-12246 (30/05/07).

³⁸⁵ See also: Simic, N., T. 28686-28687 (24/11/08).

³⁸⁶ Simic, N., T. 28686-28687 (24/11/08).

conduct of the said training. The objective of this program was “to develop an awareness and knowledge of the Army of the Serbian Republic of BH among the troops, a feeling for the Army and for man as the basic factor in the armed combat, to develop their patriotism, love of freedom and sense of combat traditions, courage, discipline, loyalty and motivation.”

8. This program was a part of the overall effort to educate members of the VRS in the importance of morale issues. This was absolutely vital as the foundations of morale prior to the war (the socialist system, fraternity and unity) became marginalised in the VRS and new foundations upon which to base combat morale had to be found.³⁸⁷ However, the educational significance of the training program as well as the role of the program developers were continuously subject to challenge by stakeholders both inside and outside of the VRS, making its implementation extremely difficult. Indeed, the organ for morale and the individuals engaged therein were often reproached for being “nostalgic for the former Yugoslavia ...supporters of the idea of brotherhood and unity”, and “nationally unenlightened” individuals.³⁸⁸

Responsibility for religious affairs

9. The very foundations of JNA morale prior to the war (the socialist system, and the interlinked doctrines of fraternity and unity) were rendered irrelevant and embarrassing in the context of the newly created RS, where both civilian and military leaders clearly distanced themselves from Communist ideology. As a result, the introduction and practice of religion and the development of spirituality was seized upon as a new basis for enhancing combat morale. This was an entirely novel approach to developing army morale and it was therefore an important part of the sector’s work to study how religion and spirituality were used to similar effect in other armies, to research spiritual and religious traditions, and to draft the necessary instructions and guidelines in co-operation with church representatives.

³⁸⁷ Simic, N., T. 28591-28592 (21/11/08).

³⁸⁸ Savcic, T. 15346-15347, 13 September 2007.

10. The sector had to define how army personnel could fulfill their religious duties both within the military environment generally, and more specifically, when taking part in active hostilities.³⁸⁹ It also had responsibility for commemorating significant religious occasions and creating a place for these within the VRS calendar, such as St. Vitus Day (28 June), Army Day, VRS Day, Christmas, Easter and the various patron saints' days affiliated with each unit.³⁹⁰ These occasions, and their corollative religious, memorial and ceremonial services were accompanied by numerous educational, cultural and sports events (for example, literary evenings, concerts, shows, creative competitions, sports and competitions involving traditional skills) which were additionally organised by the Milan Gvero's sector.³⁹¹ Finally, the sector was charged with developing methods to enrich the spiritual content of other army activities, including funerals³⁹² and ceremonies for taking the military oath.³⁹³

Responsibility for legal affairs

11. Milan Gvero's responsibility for legal affairs was administrative, rather than functional, in nature. This meant that his role was limited to setting up the structures within the VRS which were then charged with carrying out disciplinary functions in relation to the troops. As such, in October 1992 Milan Gvero's office³⁹⁴ devised the guidelines for the work of the military prosecutor's office which included providing for military discipline (such as failures to follow orders, procedures with respect to conscript call-ups and mobilisations)³⁹⁵ and individual criminal responsibility for VRS members found to be breaching the SFRY Criminal Code and provisions of

³⁸⁹ Milovanovic, M., T. 12246 (30/05/07).

³⁹⁰ Milovanovic, M., T. 12246-12248 (29/05/07).

³⁹¹ Milovanovic, M., T. 12247-12248, 30 May 2007.

³⁹² See for example P1129(a), Under seal **REDACTED**

³⁹³ P2764 Butler Report on Command Responsibility in the VRS Main Staff, p. 12 (ERN 0600-6255-0600-6283)

³⁹⁴ And in particular a staff member named Savo Sokanovic: Butler, R., T. 19607 (14/01/08).

³⁹⁵ Ristivojevic, B., T. 27962 (07/11/08).

international law.³⁹⁶ These guidelines also provided for criminal liability for officers failing to prevent or punish crimes committed by members of their unit.³⁹⁷ It was mandatory for any crimes detected by unit commands to be reported to the military police, the security organs and the military judiciary organs.³⁹⁸ Milan Gvero was also charged by Ratko Mladic with establishing military courts which he did.³⁹⁹ Immediately after they were set up they fell under the supervision of the Ministry of Defence.⁴⁰⁰ From mid-1993 onwards Gvero's task in setting up the VRS military prosecutor's office was complete and he ceased to have control over the organ as responsibility for all its operations shifted to the Ministry of Defence.⁴⁰¹

12. Even after mid 1993 matters of military discipline remained of some relevance to Milan Gvero⁴⁰² - but only to the extent that they were of relevance to morale⁴⁰³ - issues to do with the actual determination of criminal responsibility or the functional operation of the military courts were not within his purview.⁴⁰⁴ By way of example,

³⁹⁶ P 28, dated 6 October 1992 (Military Prosecutor's Office, VRS Main Staff, Guidelines for Determining the criteria for criminal punishment); Butler, R., T. 19606-19609 (14/01/08)

³⁹⁷ P 28, dated 6 October 1992 (Military Prosecutor's Office, VRS Main Staff, Guidelines for Determining the criteria for criminal punishment); Butler, R., T. 19609 (14/01/08).

³⁹⁸ Ristivojevic, B., T. 27942-44 (07/11/08).

³⁹⁹ Milovanovic, M., T. 12246-12247 (29/05/07). These courts were established pursuant to 4DP420, dated 30 December 1993 (Decree on the Proclamation of the Law on Military Courts, Official Gazette of Republika Srpska, Number 01-42/94, from President of Republika Srpska Dr. Radovan Karadžić); and 6D 234, dated 31 December 1993 (Law on Military Courts, Official Gazette of Republika Srpska no. 27). See also 4D525, dated 2 November 1994 (Law on the Application of the Law on Military Courts and the Law on the Office of the Prosecutor in times of war, Official Gazette of the Republika Srpska, Number 01/2067/94, from President of Republika Srpska Dr. Radovan Karadžić)

⁴⁰⁰ Milovanovic, M., T. 12246-12247 (29/05/07).

⁴⁰¹ Butler, R., T. 19606-19608 (14/01/08); T. 20209 (22/01/08); T. 20679 (30/01/08).

⁴⁰² OTP Pre-trial Brief, paragraph 284.

⁴⁰³ Milovanovic, M., T. 12247 (29/05/07): Legal affairs also covered all deficiencies in the work of the army that are not subject to prosecution, including violations of discipline and disciplinary infractions, which is one of the indicators of the state of morale in a unit. For example, if one brigade has 50 disciplinary infractions in one month while another unit has ten, this means that the morale of the unit with ten infractions is better than that of the unit that has 50 such infractions. The focus of General GVERO and his sector was on the unit that had the most problems.

⁴⁰⁴ See for example: P3184, dated 21 September 1995 (Report on the Characteristics of the Combat Situation in the Western Part of Republika Srpska, confidential no. 07/21-416, from Colonel Dr. Peter O. Dmitrovic, to Assistant Commander Lieutenant General Milan GVERO, personally): "In view of the requirements of the current combat situation and the objectives of the struggle of the Serbian people, the following measures must immediately be taken in commands and units at all levels ... (c) Raise the level of responsibilities of the officers for building discipline in units, raising the level of discipline particularly in commands of all levels. Immediately take appropriate measures for all cases of indiscipline that might have negative consequences for the execution of combat assignments and the lives of personnel."

Milovanovic or Miletic could ask Gvero to look into why there were so many disciplinary violations or infractions within a particular logistical unit if it was beginning to affect morale.⁴⁰⁵ However, even within the disciplinary realm, the actual instituting of disciplinary proceedings against soldiers violating disciplinary rules had nothing to do with Milan Gvero – it was handled at Brigade level at the initiative of the Brigade commander.⁴⁰⁶

13. After relinquishing his responsibility for VRS criminal matters in mid 1993, Milan Gvero continued to exhort his troops to protect the civilian population⁴⁰⁷ and representatives of international organisations⁴⁰⁸ even though he no longer had any

⁴⁰⁵ Milovanovic, M., T. 12305-12306 (31/05/07); see also 4DW-012 Ristivojevic, B., T. 27942-27944 (07/11/08).

⁴⁰⁶ See the evidence of Celanovic, Z., T. 6626-6627, 6629-6630, 6679-6680, 6683-6684: In 1995, the witness was an officer for legal affairs, religious affairs, and moral guidance with the command of the brigade, the light infantry Bratunac Brigade. The witness also described his position as that of a clerk within the Bratunac Brigade command. His duties were to institute proceedings against soldiers, conscripts, who violated disciplinary rules. He was not competent to initiate criminal proceedings. The commander always gave the order to initiate an interview with an offender or an investigation. When a soldier committed a crime, such as theft or assault, the witness would take a statement from the offender, and would then decide whether it was a crime or a disciplinary infraction, and report to the commander. He did not report to the assistant for moral guidance.

See in addition the evidence of Jeremic, N., T. 10421, 10459, 10463-10465: Drago Nikolic would direct the witness to investigate or draw up charges against a soldier. Disciplinary measures and orders were recorded by the service for combating crime and not by the service for religious and moral affairs [organ for moral, religious and legal affairs]. The witness's brigade only had a section for morale. The witness confirmed the contents of 7D370, dated 1 June 1992 (Official Gazette of the Serbian People Living in BiH, Law of the Army): Article 79: Commander of brigade and military officers of senior positions are entitled to issue all disciplinary measures provided for by this law.

⁴⁰⁷ See for example: P3182, dated 4 August 1995 (The Current Situation on the Front in the Republika Srpska and Forthcoming Tasks of the VRS, confidential no. 07/21-367, P.S. SS/RT Assistant Commander Lieutenant General Milan GVERO, to *inter alia* Main Staff 1st and 2nd Krajina Corps, Sarajevo-Romanija Corps): "Unfortunately, even some members of the army sometimes do not know what to do in a situation where the population temporarily leaves the territory or in a more fierce enemy attack and they too pass on and spread certain rumours that have the effect of unsettling the population and units. All such members of the army and civilians who play a part in passing on and spreading rumours shall be identified and prosecuted, and a special unit will be made up of these people to be used in the most complex combat situations." This document is discussed by Butler, R., T. 20983 (01/02/08).

⁴⁰⁸ See for example: 6D207, dated 11 July (Warning on the Treatment of UNPROFOR, from GVERO) – "In relation to the total situation in the enclave of Srebrenica, the monitoring of reactions from UNPROFOR representatives and the world public opinion indicates that the attitude of the VRS towards UNPROFOR personnel and units in the Srebrenica area is in the focus of attention. To that end, the Drina Corps Command ... will ensure utmost decency in the attitude towards UNPROFOR personnel – our guests, and prevent any actions and provocations directed against UNPROFOR units in the enclave, regardless of their behaviour. Such attitude towards UNPROFOR units is at this moment of multifarious importance for the realisation of the assignment at hand and of our set objectives." This entreaty was issued by Gvero just after speaking to Nicolai (see Butler, R., T. 20721 (30/01/08)).

ability to commence investigations or prosecutions against persons acting contrary to this advice.⁴⁰⁹ He premised such warnings on his residual mandate for legal affairs,⁴¹⁰ but his primary motivation in issuing them was due to his deeply felt commitment to justice, discipline and good order gleaned from his JNA training in brotherhood and unity.⁴¹¹ It is notable in this regard that prosecution expert Butler testified as to the importance of justice, good order discipline as being goals of military justice in most countries and a tool for a commander to ensure that soldiers would not shirk their duties.⁴¹²

Responsibility for the dissemination of information

14. The Defence do not dispute that Milan Gvero's sector was responsible for psychological and propaganda related activities in a general sense,⁴¹³ however, it should be remembered that it was Tolimir who was responsible for psychological and propaganda related activities in relation to the Srebrenica and Zepa enclaves.⁴¹⁴ It must also be noted at the outset that within the Serbian language the term 'propaganda' does not have a pejorative meaning⁴¹⁵ and so this function as its core was simply the dissemination of information in order to motivate the troops (ie.

⁴⁰⁹ Gvero also distributed ICRC documents among the troops: Skrbic, P., T. 15568-15569, 15572 (18/09/07).

⁴¹⁰ For these kinds of warnings in 1992 see: Skrbic, P., T. 15568 (18/09/07); 6D 129, dated 20 June 1992 (Prevention of Reprisals and treatment of journalists representative of international organizations, Confidential no. 16/10-28 from Assistant Commander Major General Milan GVERO, to all units): "In our previous documents, on several occasions, we have drawn the attention to the need to prevent retaliation against the innocent population, plunder, arson, destruction, and ill treatment. Such actions are not and should not be characteristic of the members of our army because they tarnish the reputation and the moral figure of the Serbian soldier. We cannot allow the incorrect and vindictive behaviour and actions against the innocent and powerless population whose only fault is the fact that they are not Serbs. ... For that reason, it is necessary, within the next period of time, to pay a lot more attention to this activity. With this regard, the attitude towards local and foreign journalists, representatives of UNPROFOR, the ICRC, and other international organisations has to be warm, humane, and extremely correct. Their requests to have been met at all times. Their work has to be facilitated, and they have to be won over as much as possible."

⁴¹¹ Butler, R., T. 20983-20984 (01/02/08).

⁴¹² Butler, R., T. 20982-20984 (01/02/08) in relation to P3184 at page 6, paragraph (c). See also: Butler, R., T. 20722-20723 (30/01/08).

⁴¹³ OTP Pre-Trial Brief, paragraph 277.

⁴¹⁴ See paragraph 44(c)(i) of the Initial Indictment against Zdravko Tolimir, Radivoje Miletic and Milan Gvero, 10 February 2005: Zdravko Tolimir "led the psychological and propaganda activities related to the operations in Zepa and Srebrenica."

⁴¹⁵ Skrbic, P., T. 15571-15572 (18/09/07).

morale enhancement). In this way, Milan Gvero's organ bore responsibility for keeping members of the army up to date with the most important events and developments both inside and outside the army on the one hand, and informing the public of the activities and results achieved by the army on the other. In that sense, there was: (a) internal military information and (b) external military information for the general public.

15. Internal military information was directed towards keeping the troops informed of key events within the VRS, which were primarily the progress and results of combat operations, and of current affairs, both domestically and internationally which could be of assistance in boosting combat morale. The primary means of disseminating this information from the Main Staff level was through an internal military gazette which would then be distributed to the various Corps.⁴¹⁶ Each Corps also had their own gazette to keep troops informed of particular issues arising within that Corps.⁴¹⁷ In comparison with the media, which tended to focus only on stories about high level military officials, these gazettes were directed towards being the voice of the troops on the ground. As such, they included competitions and had mainly individual interest stories including interviews with soldiers from various units about their career and activities.⁴¹⁸ The dissemination of external information, primarily through a magazine called "Srpska Vojska", was designed to acquaint the public with the role and tasks of the VRS, the current situation at the front, and results of ongoing combat operations.

16. Milan Gvero's sector did not have sufficient staff or financial resources need to properly fulfill his propaganda related functions.⁴¹⁹ Skrbic confirmed this, commenting in relation to P2512, a document applying at Corps level, stipulating *inter alia* how to collect information for propaganda activities, that there was neither

⁴¹⁶ Simic, N., T. 28581-28582 (20/11/08).

⁴¹⁷ Simic, N., T. 28581 (20/11/08) eg. The East Bosnia Corps had its own gazette. The journalists that edited the gazette in this Corps also staffed the Corps Press Centre.

⁴¹⁸ Simic, N., T. 28581-28582 (20/11/08).

⁴¹⁹ Savcic, M., T. 15341 (13/09/07).

the “material nor personnel capacities to ever organize that kind of activity”.⁴²⁰ Indeed, Skrbic regarded a document listing the tasks of the morale organs at the Corps level and the personnel required for these functions, as a kind of theoretical wish list, which could never actually be implemented in “reality”.⁴²¹ Savcic made this same point in relation to the Main Staff level morale organ somewhat more colourfully. Amidst his acknowledging that he did not “respect” the propaganda functions of the organ for morale and “literally hated that part of job [sic]”, he stated that “Gvero was defeated” in trying to conduct propaganda activities as he had no funds available to him and did not have access to the media due to restrictions on press access placed on him by the RS leadership.⁴²² The actual interchange, in which counsel refers to Savcic’s earlier interview with the prosecutor is highly illustrative of both the widespread contempt for Gvero’s role and his total ineffectiveness in utilizing the media for propaganda related purposes:

“Q. If we could go to the next page in the B/C/S, because the interview continues, and Mr. McCloskey deals with the matter from another angle and he asks you, “Well, he was the propaganda officer, wasn't he? The combat veterans may not like combat, I mean propaganda, but it's an important part of all military.” And you say, “Yes. I understand. Not only that, I didn't respect them but I literally hated their part of job. My job, as a commander, everybody knows and they can see it. What propaganda? He was defeated. Gvero was defeated at the beginning of the war by someone who was not doing this kind of job ever.” Expand on that, please, General.

A. When speaking of propaganda, what I was referring there was the fact that the assistant commander for moral guidance, religious and legal affairs, had no funds available to him to carry out any propaganda activities. One knows very well how effective propaganda is carried out, in order to achieve its aim. You have to have powerful media on your side. Not just at a local level. And he didn't have that type of media available to him, even in his own country. So what

⁴²⁰ Skrbic, P., T. 15576 (18/09/07). Skrbic goes on to admit: “We tried only to protect our fighting men from propaganda; but regrettably, even in that, we were not particularly successful.”

⁴²¹ Skrbic, P., T. 15575 (18/09/07): In terms of personnel, P 2512 was never implemented in practice. As far as these general sentences are concerned, these are ideal prototypes that were sometimes not attained in wartime. And there is probably a discrepancy between school textbooks and what happens in reality. P 2512, dated 10 February 1995 (Authority and Filling of Personnel Vacancies for Organs for Moral, Religious and Legal Affairs in Units and Institutions of the Republika Srpska Army, Highly confidential no. 07/21-88. Cover letter dated 19 July 1995, Highly confidential no. 15/354-40, from Assistant Commander Colonel Slobodan Cerovic, to *inter alia* the Drina Corps Command, to the Assistants Commander for Moral of the 1st Zvornik Infantry Brigade and to the 1st Birac Infantry Brigade).

⁴²² Savcic, M., T. 15341 (13/09/07).

Republika Srpska did have was not available to Mr. Gvero. The state leadership did not put it at his disposal. That's what I was referring to.”⁴²³

17. Despite this position, prosecution witness Butler’s evidence supports the Defence submission that propaganda was absolutely central to Gvero’s morale responsibilities.⁴²⁴ According to Butler, within the JNA, morale was part of a larger process of motivating soldiers by educating them on the socialist values of the nation-state of the former Yugoslavia and how that process evolved.⁴²⁵ Absent these communist trappings, VRS morale had to be an exercise in educating the rank-and-file soldiers on the goals and objectives of the RS nation-state and imbuing them with a sense of what they were fighting for.⁴²⁶ This view was supported by Simic who described the need for the soldiers in the trench to not only understand what he is putting his life on the line for but also to agree with the goals of the struggle as once these goals are achieved the soldier will be prepared to sacrifice himself for the war objective regardless of extremely difficult circumstances.⁴²⁷ This was of particular significance in a context where the senior leadership of the army recognized from very early on that most of the soldiers did not have a vested interest in the creation of an independent state or the ascension to power of the SDS but rather, were fighting for their own simple goals - the protection of their families and their villages.⁴²⁸ As a result, the VRS effort through information campaigns (ie. propaganda) to impart shared goals and values on a largely apathetic group of soldiers was of enormous importance.⁴²⁹

18. The propaganda that Milan Gvero, using the limited resources of his sector, was able to prepare and disseminate thus necessarily emphasized the need to fight in order to

⁴²³ Savcic, M., T. 15341 (13/09/07).

⁴²⁴ Butler, R., T. 20677 (30/01/08) in relation to P2764, dated 9 June 2006 (VRS Main Staff Combat Responsibility Report by Richard Butler): Para. 2.10 And after saying that the sector for morale, legal and religious affairs was an important component of the Main Staff, Butler says, "First and foremost, this staff element was responsible for managing the information/propaganda campaign in support of war aims."

⁴²⁵ Butler, R., T. 20649 (29/01/08).

⁴²⁶ Butler, R., T. 20649 (29/01/08).

⁴²⁷ Simic, N., T. 28698-28699 (24/11/08).

⁴²⁸ Butler, R., T. 20680-20681 (30/01/08).

⁴²⁹ Butler, R., T. 20680-20681 (30/01/08).

ensure the survival of the Serbian people.⁴³⁰ This emphasis on the need to engage in combat for sheer defensive purposes⁴³¹ was integral to his role in raising morale and is perfectly lawful activity. There is no link between the propaganda that Milan Gvero's sector prepared (which was entirely anodyne in nature) and the crimes alleged in the Indictment (which he could never have predicted).

The personal remit of Milan Gvero

19. The actual work of Milan Gvero covered various jobs within the spectrum of his responsibilities for morale and religious and legal affairs.⁴³² In terms of morale, in the spring and summer of 1995, a primary focus of his work was the declining morale situation in the western part of Republika Srpska and in the Sarajevo area, which was the result of intense Muslim and Croat combat operations, and major losses of Serbian territory and life.⁴³³ In order to obtain an insight into these morale problems, it was necessary for Milan Gvero and other members of his sector to spend a significant amount of time in this region, liaising with the relevant political and military institutions and units in order to devise solutions to the morale issues which

⁴³⁰ See for example: P414, dated in Han Pijesak, April 1993 (Republika Srpska, Main Staff of the Army of Republika Srpska, Analysis of the Combat Readiness and Activities of the Army of Republika Srpska in 1992): "With its organisational structure comprising seven operational and a number of tactical formations, it is capable of protecting the Serbian people against genocide and of protecting its heritage, of liberating territories belonging to it, and of defeating the Muslim-Croat forces in a significant part of the war theatre. ... To defend the Serbian people against genocide by the Muslim Ustasha forces."

See further: P3180, dated 15 July 1993 (Article from Srpska Vojska Subject: "GVERO describes the just struggle waged by Serbs in Bosnia", Title: "Silk Cord for Alija", by Major General Milan GVERO): "The defensive and national liberation war waged by the Serbs in the former Bosnia and Herzegovina has been underway for 16 months. Everyone knows that the Serbs did not want this war and that they did everything possible to prevent it. The Serbs are well acquainted with the horrors and hells of war. In the past they took part in all wars in these parts and always suffered the greatest losses. They were victors and they were on the side of the victors. In peacetime, their fate was that of the defeated. They could not express themselves as Serbs so as not to violate the pride of the few around them. But in this war which they did not want and which was imposed on them, the Serbs had no choice. They had to fight or disappear. They had to fight or face the suffering and humility and death in large numbers. It was a question of fighting or assent by the survivors of the now vengeful sinister Asiatic Turkish oppression and constant threats by Ustasha knives and in Ustasha pits. Exceptionally peace loving, tolerant and dignified the noble and honourable Serbian people chose the path of self-preservation to defend themselves and everything that makes a nation worthy of respect. A nation of peace and tolerance ..."

⁴³¹ Butler, R., T. 19688-19689 (15/01/08); T. 20979-20981 (01/02/08).

⁴³² Milovanovic, M., T. 12247, (30/05/07).

⁴³³ Skbric, P., T. 15580, (18/09/07); Trkulja, N., T. 15145-15146 (10/09/07).

were then afflicting combat operations. Due to staff shortages at that time, Milan Gvero was also heavily engaged in protocol activities in order to prepare more senior VRS members for meetings and gatherings.⁴³⁴ He was additionally the President of the committee for organizing St Vitus Day and the other important holidays over the Spring and Summer of 1995, an undertaking which took up almost half of the year. Finally, as part of his role as head of the sector Milan Gvero had to draft and sign official documents on issues related to moral guidance, religious and legal affairs⁴³⁵ and to deal with any personnel issues arising in this field.⁴³⁶ It was not possible for Milan Gvero to adopt the role or responsibilities of any of the other Assistant Commanders on the Main Staff. Each Assistant Commander had specific competencies and in practice there was no interchangeability between the different mandates of the seven Assistant Commanders.⁴³⁷

20. The nature of Milan Gvero's work in improving morale dictated that the focus of his attention was always on those units where morale was lowest, or in other words, in those areas where the army is losing rather than winning.⁴³⁸ To this end, during the summer of 1995 he was most concerned about areas within Bosnia and Herzegovina where territory was being lost, which at that time was the Krajina region.⁴³⁹ This was a particular worry for Milan Gvero as this also happened to be his birthplace and the region which he regarded as his homeland. There were major losses being suffered on this western front, and over the course of July 1995 more and more commanders

⁴³⁴ 5D1021 Order of the Commander of the GS VRS for a farewell on the retirement of General Zivanovic, confidential no. 03/4-1668 of 17 July 1995 (ERN 04257967), ; Trivic, M., T. 11879-11880, (21/05/07); Milovanovic, M., T. 12247 (30/05/07).

⁴³⁵ Milovanovic, M., T. 12244 (29/05/07): The title assistant for some particular kind of affair is an exact description of the job performed by that assistant. The name of the position describes the jurisdiction of that person.

⁴³⁶ Simic, N., 28580-28581 (20/11/08): At the beginning of the war, Simic suspended his assistant for morale. He requested from Mladic and Gvero to be given another man; Gvero gave him his own assistant, Colonel Jelacic, who then assessed and reported to the witness about morale at the Corps level and also performed other non-morale functions including maintaining contact with international organisations at the Corps level.

⁴³⁷ Skrbic, P., T. 15541 (18/09/07).

⁴³⁸ Milovanovic, M., T. 12247 (29/05/07).

⁴³⁹ Trkulja, N., T. 15145-15146 (10/09/07); Skrbic, P. T. 15580 (18/09/07).

and assistants were joining in with Gvero's primary focus on this front by decamping to this region.⁴⁴⁰

The lack of importance of Milan Gvero's role

21. Both Milan Gvero and his sector for moral guidance and religious and legal affairs were regarded as something of a joke within the VRS, as well as externally in the RS political sphere. He was anything but a "jack of all trades" for Mladic.⁴⁴¹

Gvero was poorly perceived within the VRS

22. In the realm of the army, and in a war-time context where resources were limited, the Sector for morale was perceived as being fit only for people who were not as capable or experienced as those staffing other sectors. It was seen as an organ which was not really necessary for the war effort and which utilized scarce resources without contributing anything substantive back in terms of army operations. This can be clearly seen in the evidence of prosecution witness Skrbic who testified that there was a broad perception that the work of the Sector was of lesser importance or was unnecessary, and therefore, priority in recruitment of personnel went to other establishment posts, primarily those with command and operations duties.⁴⁴² In explaining why an order in relation to the filling of vacancies in the morale organs was never implemented, Skrbic noted that "officers were in short supply, even for operations and other important duties, and [so we] thought to themselves, 'we can't waste them on moral guidance'".⁴⁴³ The lack of respect for Gvero's Sector was such

⁴⁴⁰ Milovanovic, M., T. 12313 (31/05/07); Celic, P., T. 13463-13464 (28/06/07); Obradovic, L., T. 28293-28294 (17/11/08).

⁴⁴¹ Cf. OTP Opening Statement, T. 464.

⁴⁴² Skrbic, P., T. 15574-15578, (18/10/07).

⁴⁴³ Skrbic, P., T. 15575 (18/09/07); P 2512, dated 10 February 1995 (Authority and Filling of Personnel Vacancies for Organs for Moral, Religious and Legal Affairs in Units and Institutions of the Republika Srpska Army, Highly confidential no. 07/21-88. Cover letter dated 19 July 1995, Highly confidential no. 15/354-40, from Assistant Commander Colonel Slobodan Cerovic, to *inter alia* the Drina Corps Command, to the Assistant Commander for Moral of the 1st Zvornik Infantry Brigade and to the 1st Birac Infantry Brigade).

that if someone should happen to stand out for his command abilities, he would soon be transferred out of the sector to a command or operations post.

23. This lack of respect for Gvero's mandate was also demonstrated by his former pupil, Savcic, who testified in relation to his former High School Director, that he held a job which "he respected least" out of all the positions in the JNA and the VRS.⁴⁴⁴ In Savcic's view as a fighting man, morale should be created and led by the commander of a regiment rather than by a man sitting behind a desk at the Main Staff. Following this reasoning, the issue of combat morale can be best resolved by way of the personal example of a commander rather than by somebody explaining the goals of the fighting theoretically.⁴⁴⁵
24. The reasons for this poor perception of the morale sector as a whole are not difficult to understand. It did not engage in combat operations and did not have an influence on the use of units.⁴⁴⁶ It did not participate in the planning of combat operations, and did not even have responsibility for lower level operations carried out by subordinate units. Of the small group of people staffing the sector at Main Staff level, none had any operational and command experience, or even the formal education for such assignments.⁴⁴⁷ It was therefore of no great surprise that VRS members engaged in operational activities would not regard the sector's staff or activities with much respect. Prosecution witnesses Milovanovic and Trkulja both gave evidence that the personnel in the Sector had little or no command experience and were mostly of ailing health or with some disability.⁴⁴⁸ Indeed, the level of doubt by these witnesses in Gvero's operational credentials was such that when they were on the stand both were concerned to have caused him serious offence. Trkulja confirmed that Gvero was "only a platoon commander, nothing else" and went on to state:

⁴⁴⁴ Savcic, M., T. 15440, 15343 (13/09/07).

⁴⁴⁵ Savcic, M., T. 15345 (13/09/07).

⁴⁴⁶ Trkulja, N., T. 15141-15142 (10/09/07).

⁴⁴⁷ Trkulja, N., T. 15144 (10/09/07);

⁴⁴⁸ Milovanovic, M., T. 12251 (30/05/07); Trkulja, N., T. 15141 (10/09/07).

“I don’t want to belittle his role but that was his only job [to publish wall paper bulletins usually pinned on notice boards in military barracks to inform soldiers of events] and that’s the only thing he could do.”⁴⁴⁹

25. Finally, Trkulja confirmed as being entirely correct a statement from his initial interview with the prosecution where he had said:

“Gvero cannot have any influence. Gvero could not have any influence given the fact that all his life he was the principal of a military grammar school. He was never in command of any military unit so what proposal could he have put forth”⁴⁵⁰

26. Likewise, Milovanovic contrasted his own extensive command experience with Gvero’s lack thereof:

“Whether he had the experience [to lead troops into combat], I don't know. I hope Gvero won't be offended, but I don't think he had, because from what I could see in his biography, he -- his only command responsibility was as platoon commander, and then he moved into a different area, professorial duties, lecturing duties, political responsibilities. I know that while I went to the military school of the JNA, part time he led a workshop on Marxism.”⁴⁵¹

27. Indeed, Gvero’s lack of power within the VRS was so obvious that Skrbic acknowledged this fact during his viva voce testimony. When referring to P2906 (an intercept between Gvero and General Nicolai), Skrbic remarked upon a response by Gvero to Nicolai that “he cannot and does not have to stop anything” and concluded that this shows that Gvero “de facto, has no power”.⁴⁵²

Gvero was poorly perceived outside of the VRS

28. Outside of the VRS, the position and role of General Gvero and his Sector was detrimentally affected by the mistrust and conflict between the RS political leadership and certain military structures in the VRS. Part of the RS political leadership

⁴⁴⁹ Trkulja, N., T. 15140-15142 (10/09/07).

⁴⁵⁰ Trkulja, N., T. 15140-15142 (10/09/07);

⁴⁵¹ Milovanovic, M., T. 12250-12251 (30/05/07).

⁴⁵² Skrbic, P., T. 15638 (19/09/07), referring to P2906 (Intercept Gvero-Nicolai from 11 July).

harbored reserve and intolerance towards the professional career officers of the VRS who prior to 1992 had been in the JNA. According to prosecution witness Milovanovic:

“When it comes to the successes of the Republika Srpska army on the battlefields, we got increasingly attacked by the political leaders of Republika Srpska, by the individuals in that leadership. They would refer to us as the red gang because we had taken over the things that I spoke about yesterday. We had taken over the rules and the war rules from the former JNA, because, before the war, we had all served in the JNA, carrying the five-pointed stars on our hats. They called us Milosevic's mercenaries because the army of Yugoslavia was duty-bound to pay the officers' salaries.”⁴⁵³

29. This is because the JNA was seen not as an army for the Serbian people but rather as an army protecting national equality and the brotherhood and unity of the Yugoslav peoples. Prejudice against former JNA officers was particularly prevalent in relation to those former JNA officers who, like Milan Gvero, had served for extended periods in the JNA organs for morale, as the primary focus of these positions had been to imbue the military with communist ideology in an effort to raise morale. As a result, personnel in the VRS sector for morale were often demeaned as “weak Serbs”, “communist hard-liners”, “nationally unenlightened individuals”, “BROZ’s officers” or “JNA relics”.⁴⁵⁴ Indeed, the entire philosophy of the VRS Morale Sector, which strove for specialist qualifications, good discipline, strict adherence to the rules of engagement and respect for human rights, was ridiculed, and this diminished the authority of the Sector in general and of Milan Gvero in particular.

30. The RS leadership was of the view that the assistant commanders for moral guidance, from the Main Staff right down to the battalions, ought to be proven SDS members appointed by the party.⁴⁵⁵ This itself indicates that Milan Gvero’s role was understood by the leadership as requiring political acumen first and foremost, and military knowledge and experience as a mere secondary consideration. Indeed,

⁴⁵³ Milovanovic, M., T. 12253-12254 (30/05/07).

⁴⁵⁴ Savcic, M., T. 15346-15347 (13/09/07), Skrbic, P., T. 15554-15564, (18/09/07).

⁴⁵⁵ Skrbic, P., T. 15555 (18/09/07).

Karadzic wanted to appoint Miroslav Deronjic, a civilian without any military experience who was an orthodox SDS party member to Milan Gvero's post.⁴⁵⁶ In the absence of this preferred candidate for the leading morale role, the RS political leadership used every opportunity to publicly criticize the VRS, and particularly the officers of the morale sector.⁴⁵⁷ The mistrust between the morale sector and the political leadership did not just tarnish the reputations of Milan Gvero's personnel but, in effect, rendered his entire organ ineffective in its work.

Gvero did not have responsibility for VRS relations with international organisations

31. Contrary to the Prosecution's assertion⁴⁵⁸, the evidence establishes that Milan Gvero did not have responsibility for overseeing the VRS relationship with UNPROFOR in the enclaves. The Defence note that the Prosecution's case in relation to this allegation is so weak that they did not bother to admit all the supporting documents on this issue in their pre-trial brief into evidence during the trial.⁴⁵⁹ Indeed, key Prosecution witness Milovanovic testified explicitly that Milan Gvero did not have responsibility for VRS liaison with UNPROFOR.⁴⁶⁰ His evidence on this issue is supported by that given by Simic,⁴⁶¹ Skrbic, Butler and Kralj among others. In fact, the evidence shows that there were several individuals who dealt with UNPROFOR

⁴⁵⁶ Skrbic, P., T. 15556 (18/09/07).

⁴⁵⁷ Skrbic, P., T. 15560-15562 (18/09/07). Milovanovic, M., T. 12253-12257, (30/05/07).

⁴⁵⁸ Prosecution pre-trial brief, paragraphs 279.

⁴⁵⁹ See Prosecution pre-trial brief para 279: "One of GVERO's primary responsibilities was overseeing the relationship of the VRS with UNPROFOR in the enclaves." This passage cites in support the following documents which are not in evidence: (1) GŠ VRS Report 07/21-236 (OTP English translation) 30 May 1995 (ERN: 0345-8308-0345-8839); (2) GŠ VRS Report 03/4-1617 (OTP English translation) 11 Jul. 1995 (ERN: 0190-2752-0190-2752); (3) Report of the Secretary-General pursuant to General Assembly resolution 53/35, "The fall of Srebrenica", General Assembly, 54th Session, A/54/549, 15 November 1999, paragraphs 311, 378.

⁴⁶⁰ Milovanovic, M., T. 12248 (29/05/07): "Or if a representative of the UNPROFOR was coming to the staff or another cooperating armed force, Gvero again had nothing to do with it. It was handled by the staff sector. That is the secretary of the commander of the Main Staff. What I'm trying to say is that it was not Gvero's obligation and responsibility to prepare all kinds of meetings for the Main Staff or personalities of the Main Staff with other people. Q. And in particular, it was not his responsibility to liaise with the UNPROFOR on a permanent basis? A. No."

⁴⁶¹ Simic, N., T. 28583 (20/11/08).

and the ICRC⁴⁶² more frequently than Gvero. It cannot be excluded that one or more of these people was charged with responsibility for the VRS relationships with international organisations.

32. The documentary evidence which was ultimately exhibited by the prosecution does not assist in establishing their case on this issue. For example, P413, which was drafted for the JNA morale organ (and which was, as described above, a very different creature to the VRS morale organ), and therefore not applicable to Milan Gvero's sector, merely provides for "cooperation with social and political community bodies in the area of the corps".⁴⁶³ It would be absurd to construe such an extract as providing a mandate for Gvero to adopt responsibility for liaising with UNPROFOR or the ICRC on behalf of the VRS.⁴⁶⁴

33. P2512⁴⁶⁵ casts further doubt on the assertion that Milan Gvero was in charge of VRS relations with international organisations. Although this exhibit ostensibly applied to organs for morale and mandates cooperation with UNPROFOR and other humanitarian organizations, Skrbic was adamant that this document applied only to organs for morale from the level of battalion up to the level of the Main Staff (ie. only subordinated units but not to the Main Staff itself)⁴⁶⁶ and that such liaison was not within the remit of Milan Gvero.⁴⁶⁷ He further clarified that it was the Chief of Staff

⁴⁶² Gvero's case in relation to this alleged liaison with the ICRC is outlined in the section of this final brief dealing with the allegation at paragraph 76(d)(ii) of the Indictment: "that he facilitated and oversaw the wounded Muslims from Srebrenica".

⁴⁶³ Referred to in the Prosecution Pre-trial Brief at paragraph 277.

⁴⁶⁴ The Prosecution in their Pre-trial Brief at paragraph 277 stated that this document says: "... co-operation with the appropriate bodies and organisations of socio-political communities and organisations."

⁴⁶⁵ P 2512, dated 10 February 1995 (Authority and Filling of Personnel Vacancies for Organs for Moral, Religious and Legal Affairs in Units and Institutions of the Republika Srpska Army, Highly confidential no. 07/21-88. Cover letter dated 19 July 1995, Highly confidential no. 15/354-40, from Assistant Commander Colonel Slobodan Cerovic, to *inter alia* the Drina Corps Command, to the Assistants Commander for Moral of the 1st Zvornik Infantry Brigade and to the 1st Birac Infantry Brigade): "In keeping with the positions instructions and orders from superior commands, there is to be cooperation with UNPROFOR and other humanitarian organisations."

⁴⁶⁶ Skrbic, P., T. 15574-15575 (18/09/07). See also Prosecution expert Butler expressing the view that the situation is "more complex" at the level of the Main Staff than at the Brigade level: Butler, R., T. 20784-20785 (31/01/08).

⁴⁶⁷ Skrbic, P., T. 15625 (19/09/07); P 2907, dated 12 July, 1445 hours (Notes of a Telephone Conversation General Nicolai – General GVERO, from Lt Col. De Ruiter, To MA/COMD).

in the command of the 2nd Krajina Corps who was responsible for performing this duty.⁴⁶⁸ Skrbic also gave evidence that there was a specific office charged with responsibility for liaison with international military representatives which was linked to the commander's office (ie. Ratko Mladic)⁴⁶⁹ and which in 1995 was headed by Djurdjic, who also acted as Secretary to the commander. This testimony is supported by 6D 7, dated 14 March 1995 which is a notification in the RS Official Gazette of a Decision on forming a state committee with the United Nations and international humanitarian organizations which was to be presided over by Nikola Koljevic, with Maksim Stanisic as his deputy and Djurdjic as coordinator of the committee's relationships with the Ministry of Defence and the VRS Main Staff.⁴⁷⁰

34. At least three other *viva voce* witnesses additionally indicated that persons other than Gvero were responsible for VRS liaison with international organisations. Simic agreed with prosecution witness Skrbic that contacts with international organizations at the Main Staff level did not go through the morale organ but were instead carried out by a special office directly subordinated to the commandant whose Chief was Djurdjic.⁴⁷¹ Prosecution expert Butler testified that it was Tolimir who "frequently" dealt with UNPROFOR "at a higher level" on behalf of the VRS and who even signed an agreement between the VRS and UNPROFOR on 12 February 1995 relating to UNPROFOR movement on RS territory.⁴⁷² Indeed, Butler gave evidence in this regard that he was "not surprised" that Tolimir was the person that the VRS had dealing with the UN in order to conclude this agreement.⁴⁷³ Likewise, Kralj stated that in the period from January to July 1995 the people from the Main Staff

⁴⁶⁸ Skrbic, P., T. 15576 (18/09/07).

⁴⁶⁹ Skrbic, P., T. 15539 (18/09/07). See also 5D431 GS VRS Formation No 111.900.

⁴⁷⁰ 6D 7, dated 14 March 1995, RS Official Gazette, Decision on forming a state committee with the United Nations and international humanitarian organizations Number 01-466/95, from President of the Republika Srpska Dr. Radovan Karadzic: "Decision on forming a state committee for cooperation with United Nations and international humanitarian organisations." Nikola Koljevic was appointed the president of it, Maksim Stanisic, deputy president. Article 2 to number 7, we see reference to a Colonel Djurdjic, coordinator for the committee's relation with the Ministry of Defence and the Main Staff of the army of Republika Srpska.

⁴⁷¹ Simic, N., T. 28583 (20/11/08).

⁴⁷² 5D 725, dated 12 February 1995 (UNPROFOR Movement in the Territory of Republika Srpska, strictly confidential no. 12/46-110/95, from Assistant Commander Major General Zdravko Tolimir, to inter alia Commands of the 1st Krajina Corps, 2nd Eastern Bosnia Corps, Sarajevo-Romanija Corps

⁴⁷³ Butler, R., T. 20511-20513 (28/01/08).

involved in dealings with UNPROFOR or international organizations were, Djudjic, Babic and Djurdjevic.⁴⁷⁴ He explained that it was Colonel Djurdjic who “met with the coordination body or the UNPROFOR office at Pale.”⁴⁷⁵ In this vein, Kosovac also testified that “cooperation [with UNPROFOR and the ICRC] remained at the level of General Mladic and General Milovanovic”.⁴⁷⁶

35. While it is acknowledged that Gvero did have some dealings with UNPROFOR members and representatives of the ICRC in relation to the enclaves it is submitted that this was on almost all occasions due to sheer happenstance rather than because he possessed the authority to liaise on behalf of the VRS with international organisations. This can be demonstrated clearly with respect to the telephone conversation between Milan Gvero and General Gobilliard on 11 July 1995 at 1810 (which is transcribed in P2968).⁴⁷⁷ Prosecution witnesses Louis Fortin testified in relation to this conversation that General Gobilliard had called the Main Staff in order to speak to Mladic but was told that in effect the only person who was available to take the call was Milan Gvero.⁴⁷⁸ Indeed, at no time did General Gobilliard ask to speak to Gvero.⁴⁷⁹ Gvero’s lack of knowledge of relations with UNPROFOR was such that UNPROFOR officer Fortin gave a frank assessment of the interchange, by stating that he did not really get the impression that Gvero “knew what he was talking about [or] knew what he was doing in this conversation”.⁴⁸⁰

⁴⁷⁴ Kralj, S., T. 29316-29317 (05/12/08).

⁴⁷⁵ Kralj, S., T. 29316-29317 (05/12/08). Note the translation mistake in the original answer, the witness clearly meant Djudjic.

⁴⁷⁶ Kosovac, S., T. 30437, 30440 (21/01/09). It must be noted in relation to Kosovac’s evidence that although he went on to say that he “thought” that Gvero may have been delegated the authority to deal with these organisations by Mladic, he did not want to “take anything out of context” as he had not been provided with an overview of the roles of the Main Staff and therefore did not feel able to provide any expert conclusions in relation to whether Gvero had a coordination role in relation to these organisations (see particularly pages 30431-30442 of his testimony).

⁴⁷⁷ P 2968, dated 11 July 1995 (Notes of Telephone Conversation General Gobilliard – Milan Gvero 11 July 1995 at 1810 hours, from Major Fortin to MA/COMD, CAC, PIO).

⁴⁷⁸ Fortin, L., T. 18384 (28/11/07).

⁴⁷⁹ P 2379 reads in relevant part (note that only GVERO’s end of the line can be heard):“-General Mladic is in the field, and he too is away. -I can only put him through to General GVERO if he wants. -Please. - Hold on. -Hello, this is GVERO. -Who? -Svetlana -My regards to you and General Gobilliard.” Whilst Louis Fortin testified that this telephone call was made from General Gobilliard’s office to the VRS Main Staff, the Defence recall that Louis Fortin had no idea where Milan Gvero physically was at the time of this conversation; nor did he know that Svetlana was physically at a different location than the latter.

⁴⁸⁰ Fortin, L., T. 18427 (28/11/07).

36. Likewise, prosecution witness and UNPROFOR Chief of Staff Nicolai testified that his most regular and first designated contact at the VRS was Milovanovic (who he perceived as Mladic's "trouble shooter" and an autonomous decision-maker⁴⁸¹) and that in Milovanovic's absence he would be passed onto somebody else on the phone, sometimes Mladic, Tolimir or Gvero,⁴⁸² depending on who happened to be present at the time.⁴⁸³ He clarified that he only spoke to Gvero twice during the war, once on 11 July and once on 12 July 1995.⁴⁸⁴ Nicolai stated that he had been dealing with Tolimir on 8 and 9 July "and [in] the subsequent days, all of a sudden it was General Gvero" but did not know why this was.⁴⁸⁵ Indeed, at the point of the first conversation on 11 July,⁴⁸⁶ Nicolai had no real idea of who Gvero was or what his role entailed, apart from the fact that he was a VRS Main Staff general.⁴⁸⁷ He certainly did not understand where General Gvero fitted into the scheme of things and in particular, what his relationship was with Mladic.⁴⁸⁸ Nicolai even confirmed that his belief during this conversation that Gvero had been entrusted with maintaining contact with the UN in Mladic's absence was a "mere assumption".⁴⁸⁹
37. On the few occasions where Milan Gvero himself either initiated contact with international organisations (whether by meeting or telephone) or was requested by name by representatives of the UN, this was invariably a mere protocol liaison⁴⁹⁰ where nothing of substance was discussed and Gvero's involvement was simply to perform administrative functions for those VRS officers actually negotiating with

⁴⁸¹ Nicolai, C, T. 18556 (30/11/07).

⁴⁸² Nicolai, C, T. 18448 (29/11/07).

⁴⁸³ Nicolai, C, T. 18449 (29/11/07).

⁴⁸⁴ Nicolai, C, T. 18450, 18455 (29/11/07), see P2374 dated 11 July 1995 Under seal **REDACTED**

⁴⁸⁵ Nicolai, C, T. 18550 (30/11/07).

⁴⁸⁶ P 2374, dated 11 July 1995 Under seal **REDACTED**

⁴⁸⁷ Nicolai, C, T. 18555-18556 (30/11/07).

⁴⁸⁸ Nicolai, C, T. 18556 (30/11/07).

⁴⁸⁹ Nicolai, C, T. 18551-18552 (30/11/07), see also: 6D 7, dated 14 March 1995 (Official Gazette of Republika Srpska, Decision on forming a state committee with the United Nations and international humanitarian organizations, Number 01-466/95, from President of the Republika Sprska Dr. Radovan Karadzic).

⁴⁹⁰ Trivic, M., T. 11879-11880 (21/05/07).

international representatives,⁴⁹¹ or his involvement was required pursuant to his function as part of the committee monitoring the implementation of the Cessation of Hostilities Agreement⁴⁹² or in order for him to fulfill his information dissemination functions (see further submissions on this below in relation to the 31 July 1995 meeting).

38. The meetings on 25 and 31 July in relation to Zepa between Mladic and Smith which were also attended by Gvero have been dealt with substantively in the section of this document dealing with substantively with Zepa. However, it must be borne in mind for present purposes that Milan Gvero's role at both meetings was very much protocol related.⁴⁹³ Indeed, when he was left alone with Smith due to Mladic's late arrival Milan Gvero went to great lengths to engage in small talk – including role of the speaker in the House of Commons, the House of Lords and the Prime Minister, in addition to his views on various political philosophers such as John Stuart Mill, John Adams, Robert Owen, and Bertrand Russell – rather than discuss anything of substance.⁴⁹⁴ This is not the mark of a person who had full VRS authority to deal with international organisations. Indeed, Gvero was only in attendance at this meeting at all as he understood that General Smith was going to brief the VRS representatives there as to the Rapid Reaction Force and the decisions adopted at the London Conference. These matters were within his purview as head of VRS morale as they were topics on which he would typically disseminate information both to his troops and to the public (see submissions above as to Gvero's propaganda related activities).⁴⁹⁵ Contrary to the Prosecution's case, this exhibit in no way demonstrates

⁴⁹¹ See for example P1181 an intercept of a telephone conversation where Gvero called a UN General merely to let him know that the General could call the Main Staff back in half an hour to obtain an update as to developments in the field overnight. See also discussion below as to Gvero's protocol related attendance at the 25 and 31 July and 22 and 25 August 1995 meetings.

⁴⁹² See for example P2936, dated 22 April 1995, Summary prepared by Baxter of meetings on 20 April 1995 between Akashi, Smith and representatives of the Bosnian Government in Sarajevo and Bosnian Serb officials in Pale (Dr Karadzic, Professor Koljevic, Mr Krajisnik and General Gvero): "The purpose of the meetings was to seek agreement by the parties to an extension of the Cessation of Hostilities Agreement."; Kralj S. T.29378-29379 (05/12/08).

⁴⁹³ P2747 & 6D108.

⁴⁹⁴ P2947.

⁴⁹⁵ P1320a.

that he has any authority on behalf of Mladic or that he is in close contact with Mladic⁴⁹⁶ (please see submissions above as to the Gvero – Mladic relationship).

39. The fact that Milan Gvero did not bear responsibility for liaison with international organisations is also readily demonstrated by the qualitative difference between a Mladic-Smith meeting which he did attend on 22 August 1995 and a subsequent Mladic-Smith meeting to which he was not invited on 25 August 1995. The earlier meeting, which was attended by Mladic and all his commanders (including Gvero), was characterised by prosecution witness Smith as “brief and business-like”.⁴⁹⁷ Unlike Mladic’s other commanders, Gvero did not attend the subsequent meeting, which Smith regarded as “a success” and “a step in the right direction” and described as a fascinating meeting which last five hours and included a barbecue lunch in magnificent surroundings⁴⁹⁸. The Defence submit that Gvero’s absence from what was clearly the more important meeting was no coincidence and is consistent with the Defence case that he really had no authority or responsibility in relation to liaison with international organisations. Smith’s testimony that Gvero said little at the three meetings which he attended and that Mladic was clearly the dominant attendee in all VRS-UNPROFOR meetings is clearly noteworthy in this regard.⁴⁹⁹
40. In conclusion, and contrary to the Prosecution’s allegation, the Trial Chamber cannot be satisfied beyond reasonable doubt, on the basis of the evidence outlined above, that Milan Gvero had any responsibility for liaison with international organizations.

⁴⁹⁶ Prosecution’s Submission in support of the admissibility of intercept evidence with confidential annexes, 1 May 2007, page 77 in relation to 65ter 1320.

⁴⁹⁷ Smith, R., T. 17721 (08/11/07); P 2949, dated 22 August 1995 (Meeting General Smith/General Mladic: 22 August 1995, from Lt. Col. J. R. J. Baxter).

⁴⁹⁸ Smith, R., T. 17720 (08/11/07); P 2950, dated 25 August 1995 (Meeting General Smith/General Mladic: 25 August 1995, from Lt. Col. J. R. J. Baxter, to HQ UNPF).

⁴⁹⁹ Smith, R., T. 17722 (08/11/07).

Gvero did not have responsibility for liaison with the press

41. Contrary to the Prosecution's assertion, Gvero was not responsible in charge of VRS media liaison, was not "mainly dealing with media issues"⁵⁰⁰ and did not serve as "the public mouthpiece of the army of the RS".⁵⁰¹ Butler's assertion that the morale sector controlled access to the media for both the Main Staff and the Corps is simply wrong.⁵⁰² Butler's testimony in relation to the functions of the VRS organs for morale should be treated with particular care, and in the view of the Defence, cannot properly be accorded any weight at all. Butler received some basic training in the concept of morale in the US Army context and undoubtedly understands the fundamental importance of good morale to military formation.⁵⁰³ However, he has no practical understanding of how the morale was dealt with in the Yugoslav context. The Defence accept Butler's evidence that upon joining the ICTY prosecution team that he took steps to study the importance which was placed on morale by the JNA and how it was applied in the VRS by looking at JNA regulations and subsequent VRS documents on the topic.⁵⁰⁴ While such a study would undoubtedly be helpful in understanding the distinct philosophical underpinnings for morale within the two armed forces, it would not give any indication as to the activities and responsibilities of the different morale organs at both Main Staff and Corps level. Indeed, Butler himself admits that he did not have any practical understanding of how morale was implemented in the VRS during the war, and did not benefit from any training or in-depth discussions from those with experience in the area who could have enlightened him on the topic.⁵⁰⁵

42. For this reason, Butler's testimony plainly can be of no assistance in determining the core competencies of the Morale Sector. It certainly cannot be used to establish that Milan Gvero, as opposed to another political or military body, took charge of media

⁵⁰⁰ OTP Opening Statement, T. 464 (22/08/06).

⁵⁰¹ OTP Pre-Trial Brief, paragraph 278.

⁵⁰² Butler, R., T. 20684 (30/01/08).

⁵⁰³ Butler, R., T. 20648 (29/01/08).

⁵⁰⁴ Butler, R., T. 20648-20649 (29/01/08).

⁵⁰⁵ Butler, R., T. 20650-20651 (29/01/08).

liaison, because as Butler himself admitted whether or not media liaison “was subordinate to Karadzic or superior to the politicians is not a matter that I looked into”.⁵⁰⁶ This statement alone reveals that Butler did not undertake a detailed analysis of media issues within the RS and is therefore not qualified to draw definitive conclusions as to which VRS organ controlled media access in 1995. In addition, though it is in no way Butler’s fault, his total lack of independence from the OTP (basically he worked on this investigation as an integral member of the Prosecution team for many years) is something that the Trial Chamber need to have at the forefront of their minds at all times when considering his evidence and purported expertise.

43. The only other witness to testify that Milan Gvero did have any kind of involvement with press reports or issuing press statements was prosecution witness Trkulja who said that Gvero “must have had [something to do with it] because nobody else was designated to do those things, and in any case, all that fell under the larger or broader area of morale”.⁵⁰⁷ However, just prior to making this statement he had himself said that he was not able to provide any more details as to Gvero’s role and responsibilities as “as that would be merely a guessing game”. These comments were also made in the context of a series of leading questions posed by prosecution counsel, which the Presiding Judge had required to be rephrased, in relation to P2512.⁵⁰⁸ This prosecution exhibit was a document which defined the tasks of VRS officers for morale and religious and legal affairs at the Corps level only.⁵⁰⁹ It categorically did not assist in delineating the tasks of the Main Staff organ for morale and religious and legal affairs, and in fact its contents were never implemented even at the Corps level due to a lack of resources.⁵¹⁰ In fact, Skrbic even described its contents as purely theoretical and bearing no resemblance to reality.⁵¹¹ Trkulja’s

⁵⁰⁶ Butler, R., T. 20685 (29/01/08).

⁵⁰⁷ Trkulja, N., T. 15180-15181 (11/09/07).

⁵⁰⁸ Trkulja, N., T. 15161, 15178-15181, see particularly T. 15180 (11/09/07).

⁵⁰⁹ Skrbic, P., T. 15574-15575 (18/09/07).

⁵¹⁰ Skrbic, P., T. 15576 (18/09/07).

⁵¹¹ Skrbic, P., T. 15575 (18/09/07): In terms of personnel, P 2512 was never implemented in practice. As far as these general sentences are concerned, these are ideal prototypes that were sometimes not attained in wartime. And there is probably a discrepancy between school textbooks and what happens in reality. P

uncertainty as to Gvero's role, taken in conjunction with the inappropriate leading by prosecution counsel on this issue, mean that it would be improper for the Trial Chamber to accord any weight to his testimony on this issue.

44. Likewise, P2756 cannot be taken to indicate that Gvero had responsibility for media relations within the RS. In fact, this prosecution exhibit shows the contrary to be true. It is the Information Ministry, rather than the Morale Sector, which has the "exclusive task" of giving information to the media. According to this document, Milan Gvero is alleged to have "sabotaged" the "assigned channels" by giving a press release to the media on one occasion.⁵¹² While Gvero's response to this letter does not deny that he had given the said press release⁵¹³ this is unsurprising in light of the fractious relationship between Gvero and Karadzic.⁵¹⁴ Its contents cannot therefore be taken to establish beyond reasonable doubt that Gvero did in fact give a press briefing.
45. Simic gave evidence in support of the defence case that the dealings with the press at the Main Staff level were handled not by Gvero's organ for morale, but rather, by a specific press centre, called the Centre for Information and Propaganda, which was an autonomous organ of the Main Staff.⁵¹⁵ This organ, which was comprised of three men and was the smallest unit of the Main Staff, was directly subordinated to the Main Staff commander and did not form part of the organ for morale, religious and legal affairs.⁵¹⁶

2512, dated 10 February 1995 (Authority and Filling of Personnel Vacancies for Organs for Moral, Religious and Legal Affairs in Units and Institutions of the Republika Srpska Army, Highly confidential no. 07/21-88. Cover letter dated 19 July 1995, Highly confidential no. 15/354-40, from Assistant Commander Colonel Slobodan Cerovic, to *inter alia* the Drina Corps Command, to the Assistants Commander for Moral of the 1st Zvornik Infantry Brigade and to the 1st Birac Infantry Brigade).

⁵¹² P 2756, dated 17 July 1995 (Letter, strictly confidential no. 01-1391/95, from President of the Republic and Supreme Commander of the Republika Srpska Armed Forces Dr. Radovan Karadzic, to the Main Staff of the Republika Srpska Army, Lieutenant General Milan Gvero, personally). P 2756 reads in relevant part that "You have sabotaged the Order pertaining to the Information Ministry's exclusive task of information, which inflicted serious propaganda-related damage, both domestically and abroad."

⁵¹³ P2756, dated 18 July 1995 (Letter, highly confidential no. 07/21-327, from Lieutenant General Milan Gvero to the President of the Republika Srpska).

⁵¹⁴ See earlier section on the poor relationship between Karadzic and Gvero.

⁵¹⁵ Simic, N., T. 28585 (20/11/08), see also 6D620 / P3178 (Main Staff Personnel Employment Records).

⁵¹⁶ Simic, N., T. 28585-28586 (20/11/08), see also 6D620 / P3178 (Main Staff Personnel Employment Records).

46. Prosecution witness Skrbic testified that all VRS press dealings were stopped early in the war when Karadzic established a press centre headed by his daughter, Sonja Karadzic, which was vested with exclusive responsibility for the provision of information to the media.⁵¹⁷ This was part of Karadzic's wish to ensure that all key roles within the RS were fulfilled by civilian, rather than military, bodies.⁵¹⁸
47. Grulovic, who was the bureau chief for the Balkan section of Reuters TV and was headquartered in Belgrade from 1992 to 1997,⁵¹⁹ corroborated Skrbic's explanation of RS press liaison when he testified that the International Press Centre headed by Sonja Karadzic and based in Pale had sole responsibility for the media.⁵²⁰ This portfolio included the exclusive right to grant permission to journalists to gain access to the frontline in the period from 1992 to 1996.⁵²¹ Grulovic specifically said that if a journalist wanted to enter Republika Srpska they did not have to speak to the military because the military had no right to issue permits as this was the exclusive purview of the International Press Centre.⁵²² The witness also referred to P3540 as supporting his view that Sonja Karadzic's press centre had total media control over the territory and that there was no other body authorised to deal with the media.⁵²³
48. Apart from the hearsay extract dealt with above, in the rest of his testimony prosecution witness Savcic gave clear evidence that Gvero had no opportunity to deal with the media as this was controlled exclusively by the RS political leadership. He stated explicitly:

“One knows very well how effective propaganda is carried out, in order to achieve its aim. You have to have powerful media on your side. Not just at a local level. And he didn't have that type of

⁵¹⁷ Skrbic, P., T. 15555-15556 (18/09/07).

⁵¹⁸ Skrbic, P., T. 15555 (18/09/07).

⁵¹⁹ Grulovic, B., T. 23756 (22/07/08).

⁵²⁰ Grulovic, B., T. 23766-23767 (22/07/08).

⁵²¹ Grulovic, B., T. 23766-23767 (22/07/08).

⁵²² Grulovic, B., T. 23766-23767, 23797 (22/07/08).

⁵²³ Grulovic, B., T. 23791-23793 (22/07/08); P 3540, dated 5 August 1995 (Daily Radio Monitoring Report, strictly confidential no. 15/5895, Intercept at 1830 no. 1066, from Army of the Republic of Bosnia and Herzegovina, 2nd Corps, to Intelligence Organ of the 2nd Corps).

media available to him, even in his own country. So what Republika Srpska did have was not available to Mr. Gvero. The state leadership did not put it at his disposal.”⁵²⁴

49. Savcic’s evidence, taken in conjunction with that of Grulovic, Skrbic and Simic thereby corroborates the Defence position that Gvero had no responsibility for, or indeed any actual liaison with, the media.

Milan Gvero was renowned to be a 'good man'

50. Milan Gvero was renowned to have been the only good man on the Main Staff. This characterization is recorded in a Krajina Corps security briefing of 25 May 1995⁵²⁵ and was reiterated several times during the testimony of both prosecution and defence witnesses in the courtroom.⁵²⁶ Other evidence records Milan Gvero’s reasonable nature, his inclination towards “compromise” and the gulf existing between him and the “hardcore militarism” of others on the Main Staff.⁵²⁷

⁵²⁴ Savcic, M., T. 15341 (13/09/07).

⁵²⁵ See 6D330, Official Note to the Security Department of the 1st Krajina Corps, Command of the 43rd Prijedor Motorized Brigade, Security Organ, Strictly Confidential No 216/1, 25 May 1995, “The Security Organ of the 43rd Prijedor Motorized Brigade, Major Milinko Njegovan, was at a funeral in Kozarska Dubica which was also attended by conscript Radomir RadaKovic aka Cita from the 11th Dubica Brigade. Among other things, the above mentioned said in connection with the Main Staff of the VRS that only General Gvero was a good man but General Milovanovic would be kicked out of the Main Staff and that General Mladic would be removed by Karadzic’s protégés”.

⁵²⁶ Kosovac, S., T. 30274-30276 (19/01/09). See also Bajagic, Z., T. 32488-32489 (09/03/09): “I could see that he was a good man, a good person”.

⁵²⁷ 6D312, 1st Krajina Corps Command, Security Department, Strictly confidential no: 5-69, 7 February 1995 Report to the VRS Main Staff Security and Intelligence Affairs Sector, Colonel Ljubisa Beara personally. “On 5 February 1995, MLJ informed the 1st Krajina Corps Security Department of observations and some information of interest to security, which he had obtained during his trip to Pale. Our source was there to regulate the status of Glas Srpski and the paper’s editorial policy. We hereby stress the following as being the most relevant regarding the VRS. During a general conversation between our source and Nenan Novakovic, General Manager of Glas Srpski and Dr Koljevic, Vice –President of Republika Srpska on 31 January and 1 February this year, Dr Koljevic said that there were three currents in the top military leadership of the RS, namely: 1) a hardcore militaristic one with General Milovanovic, 2) a semi-militaristic one with General Gvero, inclined to compromise, and 3) one with a preference for Yugoslavia with General Mladic, and that preparations had been made to dismiss General Milovanovic, only for him to appear on television that day. The source of this information has been checked and is objective. We send you this for your information and assessment.” See also: Kosovac, S., T. 30274-30276 (19/01/09).

51. Milan Gvero clearly earned the respect of some representatives of the United Nations and even received gifts from senior officers as a mark of the esteem in which he was held. For example, Lieutenant General Wilcox, a British officer who was the Chief of the Ace Rapid Reaction Corps, and who was described as “impartial”, “very objective” in his views, and as a person “insight into the real state of affairs” in Bosnia and Herzegovina at the time, presented a bottle of whisky to Milan Gvero as a token of gratitude for his good cooperation.⁵²⁸ Likewise, Lieutenant General Sir Michael Walker, another “highly respected” British officer at the Allied Command Europe Rapid Reaction Corps, who went on to become Chief of Defence Staff, and was subsequently ennobled to become Lord Walker of Aldringham,⁵²⁹ presented Milan Gvero with a commemorative regimental plaque at Han Pijesak.⁵³⁰

52. The exceptionality of these kinds of gestures was recognised by Smith who testified that he was not in the habit of giving gifts of this kind to the warring parties.⁵³¹ The Defence submit that this alone indicates the degree to which Milan Gvero’s approach must have stood out and been appreciated by those members of the international organisations whom he had the opportunity to deal with. Indeed, Butler gave evidence that he was not surprised that Gvero received these gifts from UN representatives as he had “heard anecdotal stories” that these gifts were typically given in recognition of “professionalism” by VRS officers in any engagements that they may have had with UN officers.⁵³²

53. Milan Gvero’s commitment to the humanitarian needs of all, regardless of ethnic background, can be demonstrated by his arranging for the transport of a Bosnian Muslim retired JNA general, Asim Hodzic, who was in poor health from the entirely

⁵²⁸ Simic, N., T. 28577-28578 (20/11/08). See also 6D194, dated 4 May 1996 (Photograph of a bottle of whiskey, presentation to Lieutenant General Milan Gvero from Major Wilcox, Chief of Staff of the Ace Rapid Reaction Corps).

⁵²⁹ Smith, R., T. 17797-17798 (09/11/07).

⁵³⁰ Smith, R., T. 17797-17798 (09/11/07), 6D 193, dated 13 August 1996 (Photograph of a commemorative regimental plaque, from Michael Walker, to General Gvero, 13th of August 1996, Han Pijesak): “Allied Command Europe Rapid Reaction Corps presented by Lieutenant General Sir Michael Walker.”

⁵³¹ Smith, R., T. 17797-17798 (09/11/07).

⁵³² Butler, R., T. 20726 (30/01/08).

Muslim village of Satorovici (which was located in territory controlled by the RS), to the military medical academy in Belgrade to undergo treatment there.⁵³³ Gvero made this arrangement at considerable personal cost as it resulted in him being denigrated for being “Yugo-nostalgic” and a “partisan of brotherhood and unity” and ultimately, this act was the straw that broke the camel’s back in destroying any semblance of a professional working relationship with Karadzic.⁵³⁴

54. The Defence rely on this evidence as to Milan Gvero’s character as demonstrative of his lawful behaviour throughout the war. His humanitarian nature as recounted above cannot be reconciled with the acts described in the Indictment and this, in itself, indicates that Milan Gvero took no part in either the formulation of the common criminal plan or in its subsequent implementation.

GVERO’S KNOWLEDGE

General comments regarding the Prosecution’s onus as to knowledge

1. The concept of proof of guilty knowledge (and the evidence in support of the *mens rea* to commit a crime) of an accused person is nearly always a difficult one in a criminal trial. More often than not there is no direct evidence to assist the tribunal of fact. As a result, knowledge has to be inferred through indirect or circumstantial evidence, which may include documentary or other exhibits. As hard as it can be to prove knowledge, it is often much harder to disprove it. This is in the nature of this type of litigation and the Trial Chamber is asked to bear this in mind at all times. Like many things it is always much easier to make the allegation than to actually refute it. In this regard, it is obviously a central tenet at the International Tribunal that the burden in relation to this topic does not shift in any way to the Defence.

⁵³³ Masal, D., T. 29029-29030 (28/11/08).

⁵³⁴ Skrbic, P., T. 15561-15562 (18/09/07).

Gvero's lack of knowledge during the Indictment period

2. First and foremost the Defence maintain that there is no direct evidence in this case as to knowledge on the part of Milan Gvero. There is no piece or pieces of evidence that the Prosecution can point to in order to say, he must have known or he must have had the requisite *mens rea*.
3. The lack of direct evidence of knowledge is a crucial factor in Milan Gvero's favour. Firstly, it supports his case as to his lack of knowledge. Secondly, when crimes are committed, individuals tend to try and cover them up and not broadcast them – it is thus hardly surprising that Milan Gvero never heard about the crimes even after they were committed.

Prosecution witness perceptions as to Gvero's lack of knowledge

4. In these circumstances the Prosecution will, no doubt, turn to various pieces of evidence and invite the Trial Chamber to draw an adverse inference as to knowledge from them. As an important starting point, the Defence contend that in many ways the evidence of their own expert – Richard Butler – suggests that the Prosecution's task in this regard is hopeless. In order to put this evidence in context, it must be remembered that Milan Gvero had visited the Drina Command Forward Command Post on 9 July on his way from Belgrade to Han Pijesak. The social and benign nature of his visit there is discussed elsewhere in this brief when dealing with Paragraph 76 (a) (ii) of the Indictment.
5. The relevant piece of evidence that was put to Butler as to Main Staff knowledge of the situation at Prbicevac and in Srebrenica was P1112. This is an intercept between Panorama (the Main Staff) and someone in Potocari at 12:40 on 12 July 1995. It is of

note that when particular questions relating to this intercept were put to the Prosecution's military expert, the Prosecution's Senior Trial Attorney objected but was, in effect, overruled. The revealing answer from Butler was that Panorama was being informed by Y that those "civilians who want to and they can stay. Those who don't want to can choose where they'll go." Butler went on to say that he believes that this is the only information going to Panorama with respect to the evacuation and the events that took place at Potocari on the 12th of July.⁵³⁵ There were reports pertaining to the logistics aspects of getting buses and things of that nature, but Butler did not believe that there are reports going to the Main Staff about what was actually happening on the ground in Potocari.⁵³⁶ The situation of what was actually happening on the ground in Potocari was not reflected back in either intercepts, or in the concept of daily combat reports or in anything else.⁵³⁷ The significance of this evidence is worth stressing. Butler's evidence means that the Prosecution have no possible basis for suggesting that those physically located at the Main Staff had any idea what was really going on at that time.

6. From the Prosecution's point of view the above piece of evidence sits very unhappily with what General Nicolai had to say about his conversation with Milan Gvero a couple of hours later at 14:45.⁵³⁸ Nicolai concluded, based on what was said during these conversations, that Gvero was poorly informed. However, Nicolai then went on to say that he assumes that Milan Gvero was well-informed about what was going on, but did not say so.⁵³⁹ It is of note that the witness used the word "assume". He was then asked to explain this assumption and said that he premised it on his impression of the VRS as a well-trained, disciplined army in all respects.⁵⁴⁰ He reasoned that in every well-trained and disciplined army, reports are submitted daily or multiple times a day about communications. In his estimation, the VRS had the communication

⁵³⁵ Butler, R., T. 20598 (29/01/08).

⁵³⁶ Butler, R., T. 20599 (29/01/08).

⁵³⁷ Butler, R., T. 20600 (29/01/08).

⁵³⁸ **REDACTED**

⁵³⁹ Nicolai, C, T. 18496 (29/11/07).

⁵⁴⁰ Nicolai, C, T. 18497 (29/11/07).

means required to do this, so it would have been highly improbable for VRS headquarters to be unaware of what was happening in the Srebrenica enclave.⁵⁴¹

7. Unfortunately for the Prosecution, Nicolai's assumption was totally incorrect in the light of Butler's evidence, discussed above, that there were no reports going to the Main Staff providing detail about what was actually happening on the ground in Potocari. The Defence have no doubt that the Trial Chamber will not draw adverse inferences from assumptions, and would certainly not do so from assumptions which are unsubstantiated and, quite simply, wrong.
8. Indeed, the Defence take this opportunity to submit that such an assumption demonstrates both the danger of making assumptions at all and a real degree of partiality on the part of Nicolai. Like many in UNPROFOR (perhaps for sound reasons – but that is not the issue in this trial) he was not keen on the Bosnian Serbs in general, and its senior military leadership, in particular. The rather difficult conversations that Nicolai had with Gvero on these two days clearly made him view Gvero in a rather unfortunate and unfair light. This lack of even handedness is reflected in this piece of evidence and is a typical example of how cautious the Trial Chamber must be in its approach to international witnesses.

Gvero's lack of knowledge from documents

Introduction

9. The Defence maintain that there is simply no evidence to suggest that Milan Gvero obtained knowledge of the alleged common criminal plan to forcibly transfer the Bosnian Muslim populations from Srebrenica and Zepa from documents which he saw during the Indictment period.

⁵⁴¹ Nicolai, C, T. 18497 (29/11/07).

The irrelevance of the Six Strategic Goals and Directive 7 to determining Gvero's knowledge of the alleged common criminal plan

10. The Defence submit that the Six Strategic Goals and Directive 7 are completely irrelevant to determining whether Milan Gvero had knowledge of or shared the *mens rea* for the alleged common criminal plan in relation to the enclaves.⁵⁴² These documents were entirely political in nature⁵⁴³ and were mere anodyne statements which only appear to have insidious hidden meanings due to the tragic (and unforeseen) events that followed. As the Trial Chamber in *Krajisnik* explained:

It would be incorrect to place these goals on a pedestal, as the Prosecution does, for in the final analysis they are anodyne statements, serving as official state policy and even qualifying for publication in the Bosnian-Serb Republic's *Official Gazette*. If one is inclined to find in them insidious hidden meanings, it is because of the context and the events that followed. An anachronistic reading of the May goals is not only inadvisable, it misses the point, just as an anachronistic reading of the December Instructions misses the point. The instructions and the goals lacked substance and utility, but they did symbolize a new central authority at a time when the old order had disintegrated. The extent to which they found currency among Bosnian Serbs is an indication of the degree of acceptance of that new authority.⁵⁴⁴

The manner in which documents and reports were distributed within the VRS

11. Various witnesses have testified as to how, as a general rule, documents and reports were distributed within the VRS. Manojlo Milovanovic in particular described how he understood this to work in practice. He stated that every day the Main Staff would receive regular combat reports from the Corps commanders by 20:00 hours. These reports were based on the situation in the field at 15:00 hours and would be received

⁵⁴² Cf. OTP Pre-Trial Brief, para. 5.

⁵⁴³ Butler, R., T. 20089-20090 (21/01/08); Simić, N., T. 28657-28659, 28617-28618 (21/11/08).

⁵⁴⁴ *Prosecutor v. Krajisnik*, Case No. IT-00-39, Trial Chamber Judgment, 27 September 2006, para. 995. This finding was subsequently approved on appeal: *Prosecutor v. Krajisnik*, Case No. IT-00-39, Appeals Chamber Judgment, 17 March 2009, para. 579.

at the Main Staff either by himself personally or, in his absence, by Miletic.⁵⁴⁵ There was a time delay in the reports due to the chain of command which required that a battalion commander sent a combat report to the brigade commander at 15:00 hours who would then take approximately one hour to read it and then draft his own report for the Corps commander. The Corps commander would then review all of his brigade reports and draft a report to the Main Staff based on these. As five hours in combat can mean an enormous change in the combat situation, it was the practice for the Corps commanders to phone Milovanovic or Miletic after 20:00 hours to report orally any changes to the combat situation since 15:00 hours. Miletic would then study all reports which had been received at the Main Staff and separate out the issues which were important for each sector.⁵⁴⁶

12. Novica Simic confirmed this procedure of report distribution both in his evidence and in his 2004 interview with the Prosecution. He testified that he would distribute the information in his regular combat reports as to morale only to the assistant for morale. Simic adhered to this practice as it was in keeping with the principle of unity of command that was in place in the VRS.⁵⁴⁷ The significance of this evidence about the dissemination of combat reports is, of course, that Milan Gvero would, as a rule, only receive the information from the daily combat reports which related to his portfolio. He would not receive matters relating to operational matters that were outside his sphere of competence.

13. The Defence further submit that even though this trial has dealt with the issue of report distribution in detail, it does not assist the prosecution in establishing any guilty knowledge on Milan Gvero's part. Even if there was evidence to show that the procedure outlined above was not followed (which there is not), the Trial Chamber could only rely upon it, if there was clear and probative evidence beyond reasonable doubt – that documents were being sent, received and seen by Milan Gvero that would give him specific knowledge of the alleged common criminal plan to remove

⁵⁴⁵ Milovanovic, M., T. 12187 -12188 (29/05/07).

⁵⁴⁶ Milovanovic, M., T. 12188 (29/05/07).

⁵⁴⁷ Simic, N., T. 28590-28591 (21/11/08).

the Bosnian Muslim population from the Srebrenica and Zepa enclaves. The Prosecution have failed to discharge their evidential burden in relation to Milan Gvero.

There is no evidence of a common criminal plan in documents sent to the Main Staff

14. Even if Milan Gvero had received full versions of combat reports (which is not accepted), those received at Main Staff level do not indicate the existence of any common criminal plan.
15. Milenko Jevdjevic testified in this regard as to the nature of the information that was getting through to the Main Staff in such reports. He clarified that he was able to send reports, from the Forward Command Post at Pribicevac, directly to the Command of the Drina Corps, which could then forward telegrams onto the Main Staff.⁵⁴⁸ He confirmed that on 9 July, the information he had was that the attack by the VRS on the Bosnian Muslim forces was being launched exclusively because the Bosnian Muslims had been conducting excursions from the enclave and had engaged in attacks against both civilian and military targets.⁵⁴⁹ As a result, military action was necessary to prevent further circulation between Srebrenica, Zepa, Kladanj and Tuzla. Jevdjevic had orders that the civilian population and UNPROFOR were not to be targeted and that the town of Srebrenica was not to be shelled. He understood that the Bosnian Muslim forces had attacked UNPROFOR and had killed one of their soldiers. He went on to say that reports to this effect were sent to the superior command and that the information in these reports would be the only information that a person reading them would have.⁵⁵⁰ To the best of his knowledge at the Forward Command Post of Pribicevac (where he was situated), this information corresponded to what was actually happening on the ground.⁵⁵¹

⁵⁴⁸ Jevdjevic, M., T. 29687 (15/12/08).

⁵⁴⁹ Jevdjevic, M., T. 29691-29692 (15/12/08).

⁵⁵⁰ Jevdjevic, M., T. 29692-29693 (15/12/08).

⁵⁵¹ Jevdjevic, M., T. 29693 (15/12/08).

16. The limited knowledge by the Main Staff of the situation on the ground in Srebrenica can also be seen in 6D 328 which is a report dated 10 July 1995 from Krstic to the Main Staff, was put to him. The relevant part of the document reads:

“On the basis of surveillance and monitoring of the situation in the Srebrenica enclave, as well as the statements of UNPROFOR soldiers who surrendered to our forces and asked for our protection, we conclude that the Muslim army has surrounded UNPROFOR and assumed control over it. The Muslims seized some of UNPROFOR's combat equipment (armored combat vehicles, heavy artillery pieces and ammunition) and are using it in combat against our forces.”⁵⁵²

17. Jevdjevic confirmed that this report reflected the information that they had at Pribicevac at the time as to the situation of UNPROFOR in the Srebrenica enclave.⁵⁵³ It is noteworthy that there is no inkling of any common criminal plan vis-à-vis the Srebrenica enclave contained in this report.

18. The Defence note that several witnesses described problems with the accuracy and indeed, the truthfulness of reports.⁵⁵⁴ However, at least two witnesses observed that erroneous reports would soon be discovered and corrected the following day, if not before.⁵⁵⁵ Indeed, Dragutinovic testified that he could not recall any cases where erroneous information was passed on to the superior command which might have resulted in adverse consequences.⁵⁵⁶

19. It was therefore entirely reasonable for Milan Gvero to believe the information in the reports that he received at Han Pijesak (to the extent that he received operational information at all) regarding the situation on the ground in Srebrenica. As he understood the position, their contents were correct and if there were any mistakes they would be rectified by interim reports as soon as reasonably possible and certainly within 24 hours at the latest. Furthermore, and given that there was no

⁵⁵² Jevdjevic, M., T. 29689 (15/12/08).

⁵⁵³ Jevdjevic, M., T. 29691 (15/12/08).

⁵⁵⁴ Pandurevic, V., T. 31409-31410 (13/02/09) & Masal, D., T29050-29052 (01/12/08).

⁵⁵⁵ Masal, D., T. 29052 (01/12/08); Dragutinovic, M., T. 12767 (18/06/07).

⁵⁵⁶ Dragutinovic, M., T. 12802 (18/06/07).

common criminal plan alluded to in these reports, he cannot be said to have had any knowledge of such a plan based on their contents.

Specific documents relied on by the Prosecution to allege Gvero's guilty knowledge

P33

20. The Defence continue to maintain, as set out in the section of this brief dealing with the Prosecution allegation that Milan Gvero assisted in the attack on the Srebrenica enclave from the Drina Corps Forward Command Post on 9 July 1995,⁵⁵⁷ that there is simply no evidence that Milan Gvero ever received P33 or otherwise knew of its contents. He was specifically included on the address line purely as a matter of courtesy as he had contacted the Main Staff from the Pribicevac command post in order to inform them of his return from Belgrade (as was common VRS practice).⁵⁵⁸ Indeed, by the time P33 was received at Pribicevac at 23:50 hours, Milan Gvero was long gone, having departed from the command post at approximately 13:00 hours.⁵⁵⁹ It is the Defence position that the prosecution have adduced no evidence upon which an inference could properly be drawn that Milan Gvero knew of the contents of P33.

P192

21. The Prosecution have also sought to make much of two documents in relation to 13 July 1995 – P192 and P131. Each will be dealt with in turn. P192 is a document that is purportedly from Milomir Savcic. In his evidence Savcic was clear that he was not

⁵⁵⁷ See section dealing with paragraph 76(a)(ii) of the Indictment.

⁵⁵⁸ Momcilovic B. T.14094 (22/08/07); Simic N. T. 28605 (21/11/08)

⁵⁵⁹ P 33 was received [at the IKM] after General GVERO was no longer at Pribicevac (Momcilovic, B.). Momcilovic B. T. 14132-14133 (22/08/07); Trisic and PW-162 stayed at Pribicevac for between one and two hours, after which they left together; GVERO left at the same time in a separate vehicle Trisic D.T. 27117, T.27118 (21/10/08); *see also* PW-162 "GVERO remained at Pribicevac for approximately an hour". The witness and General GVERO stayed at Pribicevac for approximately one hour, after which they returned to and reached Bratunac together. General GVERO told him that he was in a hurry to reach Vlasenica PW-162 T. 9333, T. 9334 (23/03/07)

the author and that he knew nothing about it at the time.⁵⁶⁰ It remains very unclear to the Defence as to whether the Prosecution accept this evidence. As far as the Defence are aware, the Prosecution have not suggested at any stage in the trial that Savcic is being untruthful about this. This certainly casts a shadow over any attempt by the Prosecution to use this document in a manner adverse to the Defence at this stage of the case.

22. During the trial there has also been conflicting evidence as to whether the document was ever sent and the Trial Chamber will need to compare the evidence of Gojkovic⁵⁶¹ with that of Pajic in this regard. The latter witness stated that in his profession, he distinguished between on the one hand, an act or a document, and a telegram, on the other. He went on to explain that:

“An act should display in its header, in the upper left corner the name of the relevant institution or unit, the file number, the date it was sent, the addressee, the substance of the document, and finally the sender. There should be a handwritten signature and a round stamp.”

23. As this document bore none of the above, Pajic therefore asserted that it could not be regarded as a telegram or an act.⁵⁶² In relation to the Cyrillic markings that the document was “handed over at 15:10, 13th July 1995”, Pajic testified that this told him “nothing”.⁵⁶³ He concluded that the regulations had not been followed, and importantly from the viewpoint of the Defence, he did not know whether the recipient would ever in fact have received the document. Pajic explained that there is no confirmation of receipt on the document’s face and as it was completed improperly, it may not have been accepted by the encryption system. Finally, when asked how far this document could possibly have got, he testified that he did not know.⁵⁶⁴

24. At the very least, the above testimony casts real doubt as to whether Milan Gvero ever received this document. There is no evidence that the Prosecution have put

⁵⁶⁰ Savcic, M., T15261-15262 (12/09/07).

⁵⁶¹ T10712 -10731 (27/04/07) & (01/05/07).

⁵⁶² Pajic, V. T. 28785 (25/11/08).

⁵⁶³ Pajic, V. T. 28785-28786 (25/11/08).

⁵⁶⁴ Pajic, V. T. 28786 (25/11/08)

before the court saying that he did in fact receive it. The burden is firmly, of course, on the Prosecution.

25. However, in the event that the Trial Chamber concludes beyond reasonable doubt that Milan Gvero had in fact received it, the Defence contend that there is nothing inherently illegal in its contents. It is primarily concerned with ensuring protection for prisoners of war from unauthorized filming and photographs and to remove them from away from the Milici – Zvornik road (where there were ongoing combat operations against the combatants in the column).⁵⁶⁵ The first objective is entirely consistent with Article 13 of the Third Geneva Convention⁵⁶⁶ and with statements by the ICRC spokespeople in relation to the proper treatment of prisoners of war.⁵⁶⁷ Likewise, the second objective is entirely in accordance with Article 19 of the Third Geneva Convention which requires the evacuation of prisoners of war from combat zones in order for them to be safe from danger.⁵⁶⁸ It is also compliant with SFRY Regulation 217 which requires that immediately upon capture POWs must be evacuated from the combat zone.⁵⁶⁹ This dual motivation for moving the prisoners of war away from the Milici – Zvornik road was confirmed by prosecution witness Savcic during his evidence in chief. He volunteered that the rationale for the contents of P192 was in order to “provide security” for the prisoners and to protect them from

⁵⁶⁵ 4D81 (Drina Corps Command - Regular Combat Report, Strictly confidential no. 03/2-214 signed by General Krstic) relevant paragraph 8.

⁵⁶⁶ Article 13 provides: “... Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity”.

⁵⁶⁷ “It is forbidden to expose prisoners of war to public curiosity... and the essential thing is to make clear to all parties that PoWs should not be exposed in any form,” said Jakob Kellenberger, the Swiss president of the ICRC. ... ‘Article 13 is called ‘humane treatment’ and it’s there to protect the dignity of PoWs... and to protect their families against seeing this kind of thing in the media,’ ICRC spokesman, Florian Westphal, told swissinfo.ch: Extract from ‘ICRC says POW images breach Geneva Convention’, 25 March 2003, swissinfo.ch, last accessed 27 July 2009,

<http://www.swissinfo.ch/eng/index.html?siteSect=105&sid=1716883>

⁵⁶⁸ Article 19 provides: “Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger”.

⁵⁶⁹ Ristivojevic, B., T. 27944, 27951-27952 (07/11/08) in relation to P409, dated 13 April 1988 (Regulations on the Application of the Rules of International Law of War in the Armed Forces of the SFRY, from President of the SFRY Presidency Lazar Mojsov, sgd), Item 217: “Immediately upon capture, POWs must be evacuated from the combat zone”.

both “being exposed to the general public” and any “knee-jerk reactions on the part of individuals or groups”.⁵⁷⁰

26. In addition, it would have been very clear why it was sent to Gvero (albeit for “information only”), namely because of the item numbered one in the document. Skrbic confirmed as much, when he was asked:- “What aspect of this document goes to a Morale, Religious, and Legal Affairs?” He replied:- “Only point 1.”⁵⁷¹ Ensuring that the prisoners of war were treated in accordance with the international humanitarian law obligation to prevent exposure to public curiosity, fell squarely within his responsibility for information dissemination within the VRS.

P131

27. So far as P131 is concerned, the Defence make the same point as to its provenance. It is incumbent on the Prosecution to show that it was sent and even more so that it was in fact received and read by Milan Gvero. The Prosecution have to prove this beyond reasonable doubt. Merely recovering the document does not equate to Milan Gvero seeing it during the Indictment period and they bear the onus in proofing that he in fact did so.

28. In terms of its content, the document does not in fact seem to say anything remarkable on its face. There has been some differing testimony as to whether any significance can be read into Tolimir’s purported request to avoid contact between groups of prisoners. Of course, and to state the obvious, Gvero was not being asked to be involved in that activity. Moreover, it is the Defence position that this request is anodyne in nature and has been given insidious significance due to the tragic events which took place thereafter.⁵⁷²

⁵⁷⁰ Savcic, T. 15273 (12/09/07).

⁵⁷¹ Skrbic, P., T15617 (19/09/07).

⁵⁷² See submissions above in relation to the Six Strategic Goals and Directive 7.

29. In addition the Defence would observe that Tolimir is not very insistent on this request and simply says that it “would be best”. It is noted that Butler draws the following conclusions from this when he said that as a practical matter, if you're able to segregate prisoners who have no awareness yet that their counterparts are being killed, it would make them a lot easier to guard at that location to the south (i.e. they have less incentive to escape and become a security problem).⁵⁷³ However, this evidence needs to be contrasted with that of Petar Vuga, the military expert called on behalf of a number of the co-accused. He explained that the advisory to do with prisoners comes from the part of the instruction issued by the ministry, namely, item 14 of that instruction, which stipulated that POWs can be talked to in order to obtain intelligence useful for the purposes of the VRS.⁵⁷⁴ Tolimir is directing attention to this point and states that it would be best from this particular point of view, to regard this group as possibly a new source of information that could be arrived at by the security and intelligence organs. He went on to say that if they had already been in touch with the POWs, from whom they could have learned what the security organs already came by in terms of intelligence, this would be a way of painting the whole picture and of double-checking whether all the information gathered from the POWs was accurate. The underlying purpose was to arrive at new intelligence, rather than arrive at intelligence that had already been gathered.⁵⁷⁵

30. Vuga was further asked about this in cross-examination by counsel on behalf of Milan Gvero. To this end Vuga was shown 6D 305, namely the Methodology Manual For Military Police Training, Federal Secretariat of National Defence. The relevant part of which states:- “Prisoners of war are separated, in principle, into the following groups: officers, non-commissioned officers and soldiers. If the officer in charge so orders, prisoners of war may be grouped in another way. Separating officers from soldiers, and those who have been interrogated from those who have not, is important for intelligence and security. In terms of intelligence, separated and unprepared, are more likely than officers to give the information requested from

⁵⁷³ Butler, R., T. 19908-19909 (17/01/08).

⁵⁷⁴ Vuga, P., T. 23314-23315 (04/07/08).

⁵⁷⁵ Vuga, P., T. 23315 (04/07/08).

them, and in terms of security, they pose less danger of organized escape and attack on escort. It should be noted that such occurrences will certainly take place if officers and soldiers are escorted together, especially if the front line is in the vicinity”. Vuga confirmed the document.⁵⁷⁶

31. He was also shown 6D 304, Methodology of Combat Training for Military Police, Federal Secretariat of National Defence Security Administration. The relevant part stating: “Prisoners of war are separated, in principle, into the following groups: officers, non-commissioned officers and soldiers, unless the officer in charge orders otherwise. ... When possible, prisoners of war who have been interrogated should be separated from those who have not, as should soldiers from officers, in order to prevent conspiring and any influence of officers on junior subordinates. ...” Vuga confirmed that these regulations were also used by the VRS in the relevant period of time.⁵⁷⁷ In further cross-examination, Vuga stated that the rules in 6D 304 and 6D 305 are consistent with the relevant sentence of P 131, from the point of view of the rules and of the action taken by Tolimir.⁵⁷⁸

32. In relation to the farm work part of the document, the Defence note that it is perfectly lawful under article 49 of the Third Geneva Convention to utilise the labour of prisoners of war who are physically fit, and under article 50 of this same Convention, such labour may include agricultural work.⁵⁷⁹

33. Although it is undoubtedly distasteful, there is also nothing inherently illegal under customary IHL about providing for agricultural work on, *inter alia*, pig farms for Bosnian Muslim prisoners of war. In this regard, the Defence note at the outset that

⁵⁷⁶ Vuga, P., T. 23322-23323 (04/07/08).

⁵⁷⁷ Vuga, P., T. 23324 (04/07/08).

⁵⁷⁸ Vuga, P., T. 23324 (04/07/08).

⁵⁷⁹ Articles 49 & 50 provide: “Art 49. The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health. ...

Art 50. Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes: (a) agriculture; ... Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78.”

the manner in which the requirement as to agricultural work is phrased (“use them for agricultural work, maintaining the horse, pig and sheep farm”) shows that the religious practices of the prisoners had not been under consideration at the time of drafting. There was clearly no deliberate policy on the part of the drafters to deliberately select work which would be inappropriate for prisoners of the Muslim faith.⁵⁸⁰ And given the Bosnian context, it would hardly have been possible for the prisoners of war to undertake agricultural work on alpaca or emu farms.

34. In any event, the Defence maintain that there was no customary law requirement under IHL at the time of the Indictment to provide forms of labour sensitive to a person’s religious beliefs. While article 34 of the Third Geneva Convention requires that prisoners shall enjoy “complete latitude in the exercise of their religious duties”, it is clear from the Pictet commentary that this latitude must be balanced against respect of the “disciplinary routine” of the detaining power.⁵⁸¹ Moreover, the very text of the provision seems primarily directed at ensuring prisoners may attend religious services in adequate premises.⁵⁸² Furthermore, although article 14 of the Third Geneva Convention requires respect for the prisoner’s person and honour,⁵⁸³ the Pictet commentary demonstrates that the requisite parameters of religious sensitivity were not agreed upon by the drafters even when discussing the extent to

⁵⁸⁰ *Prosecutor v Aleksovki*, Trial Chamber Judgment, 25 June 1999, paragraphs 165-168.

⁵⁸¹ The relevant extract from the Pictet commentary is as follows: “The provision ... implies ... that the organization and administration of the camp must not be such as to hinder the observance of religious rites. A balance must be found between the prisoners' obligation to comply with the disciplinary routine prescribed by the military authorities and the obligation for the Detaining power to afford complete latitude to prisoners in the exercise of their religious duties. ... Respect of the "disciplinary routine" implies that the exercise of religious duties, including attendance at services, is allowed without special authorization as part of the normal system of administration, general timetable and other activities. There is no need to wait for special "routine and police regulations" to be laid down before prisoners may practise their religious faith, whatever it may be. Nevertheless, although the Convention refers to all "religious faiths" without discrimination, reservations should be made concerning the performance of certain rites if such rites obviously conflict with the normal disciplinary routine in a prisoner-of-war camp”, last accessed 28 July 2009, <http://www.icrc.org/ihl.nsf/COM/375-590044?OpenDocument>

⁵⁸² Article 34 provides: “Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities.

Adequate premises shall be provided where religious services may be held.”

⁵⁸³ Article 14 provides: “Prisoners of war are entitled in all circumstances to respect for their persons and their honour. ... Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.”

which prisoners of war may be subjected to propaganda which is directly contrary to their religious beliefs.⁵⁸⁴ The Defence submit by analogy that there was not a crystallization of a customary IHL norm restricting labour which is insensitive to religious belief (as this is a less direct assault on religious freedom than propaganda) during the Indictment period. It is acknowledged that there is now a more general customary IHL requirement to respect the personal convictions and religious practices of persons deprived of their liberty,⁵⁸⁵ but it is submitted that this customary norm had not crystallized at the time of the Indictment, and alternatively, that even if such a norm did exist during the relevant temporal period, that it did not particularize a requirement to provide for forms of labour which are sensitive to religious belief.

35. The broader Defence submission as to general agricultural work is supported by the evidence of Vuga who commented that at the time, there were the instructions of the Ministry of the Interior of Republika Srpska for the treatment of POW, item 10 of which speaks of the use of POWs for farm work.⁵⁸⁶ He went on to confirm that international conventions governing the treatment of POWs also provide for the possibility to use them for farm work unless this is related with any combat activities

⁵⁸⁴ The relevant extract from the *Pictet* commentary on article 14 provides: “Respect for the person goes far beyond physical protection and must be understood as covering all the essential attributes of the human person. These include on the one hand a whole gamut of convictions, whether religious, political, intellectual, social, etc., and, on the other hand, the desire to strive to carry out these convictions. These qualities and aspirations, which are the rightful attributes of each individual, are referred to in diverse ways in the various legislative systems. Captivity restricts the blossoming of personality more than any other mode of life, but its harmful effects must not exceed the hardship imposed by captivity itself. Although the exercise of social or patrimonial rights may seem to be incompatible in practice with the status of prisoner of war, there are certain essential rights which may not be affected by that status, such as the civil capacity which is safeguarded by the present Article and the exercise of religious duties, which is ensured by Article 34. The Convention contains no express reference to freedom of opinion; and yet this right, which is one of the fundamental elements of personality, may be threatened today because of the ideological nature of conflicts, either by those who guard the prisoners, if the Detaining power endeavours to weaken the morale of detainees or to win them over to its cause, or by their own fellow prisoners. *This problem of propaganda was the subject of a lively discussion at the Conference of Government Experts (4). The discussion did not lead to any positive result, as it seemed too difficult to define the type of propaganda which should be prohibited. Propaganda is the dissemination of certain opinions with the object of persuading the listener to support them. It may be aimed at a variety of objectives: religious, social, economic, cultural, political etc., and may, in fact, harm the interests of the Power of [p.145] Origin of the prisoners concerned...* (emphasis added), last accessed 27 July 2009, <http://www.icrc.org/ihl.nsf/COM/375-590018?OpenDocument>

⁵⁸⁵ See Rule 127 “the personal convictions and religious practices of persons deprived of their liberty must be respected” in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, London, 2005.

⁵⁸⁶ Vuga, P., T. 23324 (04/07/08).

of the detaining party.⁵⁸⁷ He concluded that the witness testified in cross-examination that there is nothing in P 131 that is contrary to the regulations in Republika Srpska that should have been adhered to.⁵⁸⁸

36. The Defence finally observe that in addition to the above reference to Butler's testimony as to Gvero's general state of knowledge,⁵⁸⁹ Butler alluded to this document at a slightly earlier stage of his evidence. Prosecution counsel asked him in relation to Tolimir:- "Is there any -- do you have any indication in documents subsequent to this that that may have changed, his knowledge?"⁵⁹⁰ In his response Butler relied on P131, (describing the document rather than giving the exhibit number). In other words it is Butler's contention this document indicates Tolimir's knowledge of the mass murder plan. Whether this is correct, may or may not be something that this trial will want to consider, bearing in mind that Tolimir is not on trial and has not been in a position to defend himself. However, Butler bases this conclusion on the request not to mix the prisoners, discussed above.⁵⁹¹ The point that the Defence wish to emphasise is that the Prosecution asked Butler what it was that indicated his state of knowledge and he pointed to P131. Prosecution counsel did not do the same way, so far as the man actually on trial is concerned, namely Milan Gvero. The Defence have no doubt that Prosecution counsel would have done that if he was of the view that it would advance the case against Milan Gvero. The failure on the part of the Prosecution's Senior Trial Attorney to do this speaks volumes. In any event, the fact is that there is no evidence, expert or otherwise that sight of this document would have been indicative of Gvero's having knowledge of the alleged common criminal plan, particularly bearing in mind the surrounding circumstances of his case. In fact all that Prosecution counsel asked Butler about this document was:- "Can you -- what can you conclude, if anything, about the presence of General Gvero, the location of General Gvero, from this document?" Butler answer was "I conclude from this document that General Gvero is present at the Main Staff headquarters." Of

⁵⁸⁷ Vuga, P., T. 23324-23325 (04/07/08).

⁵⁸⁸ Vuga, P., T. 23325 (04/07/08).

⁵⁸⁹ Butler, R., T. 19908-19909 (17/01/08).

⁵⁹⁰ Butler, R., T. 19863 (17/01/08).

⁵⁹¹ Butler, R., T. 19864 (17/01/08).

course, this answer says nothing about whether Gvero received the document, let alone whether it imparted to him any guilty knowledge at all.

Gvero's lack of knowledge as indicated in the intercept evidence

37. There are three Muslim intercepts from 25 July 1995 that the Prosecution have indicated that they rely upon to show guilty knowledge on the part of Milan Gvero.

38. The first of these is P1333. This intercept was introduced at the very tail end of this marathon trial on 9 July 2009. The Prosecution clearly thought it of such little relevance that they had made no attempt to adduce it before, not least among the morass of intercepts that they did in fact introduce at the start of this case. The admissibility of this document in this way at this stage of the case, is dubious in the extreme, both in law and in fairness. It was put by the Prosecution to defence witness Sasa Jovanovic,⁵⁹² who knew nothing about it. The Defence can only assume that the Prosecution put it to him simply as a very belated and desperate effort to bolster their flagging case. With respect to its contents, the Defence simply observe that it is not clear that Milan Gvero is an actual participant in the conversation as his involvement appears to be premised on an assumption by the intercept operator on the basis that one of the participants is called "Milan". This is most unsatisfactory and because of the way it has been introduced the Defence have had no opportunity to explore and examine this.

39. There is then a conversation between Gvero and a man called Subara in P1334. This was intercepted at 09:50 on the same day (25 July 1995). It was not used in the trial at all, apart from being put to Jovanovic who knew nothing about it.⁵⁹³ To be fair to the Prosecution they have, at least, long sought to rely on this intercept and they set

⁵⁹² T33949 (06/07/09).

⁵⁹³ T33950 (06/07/09).

out their case on it in an annex to a filing in 2007.⁵⁹⁴ In the intercept Milan Gvero tells Subara that the rumours that are circulating about “slaughter and rampage” in Srebrenica are lies. In their 2007 submission on intercepts the Prosecution assert that “Gvero is fully aware that thousands of Muslim men from Srebrenica were summarily executed in the days before the fall of Zepa and that he lied to Subara to cover up this fact.” In other words the Prosecution claim that back is white as they clearly have no evidence whatsoever to support their case on this intercept. The Prosecution are forced to say that Milan Gvero must be lying to Subara because otherwise their case is plainly wrong. Not only does the Prosecution have no evidence to support their assertion but this intercept in fact supports the Defence case that Milan Gvero did not have knowledge of the executions. Gvero says “they’re lying”, because that was what he genuinely believed to be the position. Interestingly, in the second paragraph of their commentary, the Prosecution rather curiously seem to concede that on everything else Milan Gvero is telling the truth.

40. The last in this series of intercepts is P1336, where the Prosecution rely in particular on Milan Gvero’s use of the word “Turks”. In fact, rather than showing prejudice this is yet another example of the way that this word was used in common parlance at the time in Bosnia and Herzegovina without having the pejorative overtones that the Prosecution in fact suggest.⁵⁹⁵

41. In relation to these intercepts of 25 July 1995 more generally, the Defence comment that it has always been Milan Gvero’s case that he had knowledge on that day of the perfectly lawful ongoing events in Zepa, to the extent that he was present shortly after these intercepts at the meeting at the Jela restaurant between Smith and Mladic.⁵⁹⁶ Gvero had also been involved to some extent in the setting up of this meeting.⁵⁹⁷ (For further analysis and comment on this, please see the Zepa section of this brief.)

⁵⁹⁴ *Prosecution’s Submission in Support of the Admissibility of Intercept Evidence with Confidential Annexes*. (01/05/07).

⁵⁹⁵ See Milovanovic, M., T12191 (29/05/07).

⁵⁹⁶ P2747 & 6D108.

⁵⁹⁷ P1320.

Gvero's lack of knowledge from meetings⁵⁹⁸

Introduction

42. Contrary to the prosecution case, Milan Gvero did not gain knowledge of the alleged common criminal plan from Main Staff meetings.⁵⁹⁹ Not only did Gvero not attend the morning briefings of the Main Staff, at which such a common criminal plan (if such a plan did exist) may have been illuminated, but apart from two meetings relating strictly to personnel matters, there is no evidence that Gvero attended any other Main Staff meetings during the Indictment period.

Gvero did not attend Main Staff 'inner collegium' morning briefings

43. The Defence do not dispute that informational morning briefings were held by the Main Staff. However, the evidence establishes that Milan Gvero was not part of the 'inner collegium' which attended these morning briefings and that, in any event, no morning briefings were held after 28 June 1995.

44. When speaking generally about the operation of the Main Staff (rather than commenting upon any specific practice during the Indictment period), prosecution witness Milovanovic gave evidence that it was the practice for there to be a briefing each morning at 7:00am.⁶⁰⁰ These meetings were usually attended by an inner sanctum of the Main Staff comprised of Ratko Mladic and his assistant commanders for the operations, intelligence and security organs (ie. not the assistant commander for morale).⁶⁰¹ These meetings were informational in nature⁶⁰² and involved Milovanovic (or Miletic in his absence) informing those present about any problems

⁵⁹⁸ These submissions should be read in conjunction with those contained in the section of this final brief dealing with the Gvero – Mladic relationship.

⁵⁹⁹ The Prosecution's case on this issue was outlined during their rule 98bis submissions at T. 12188-12189.

⁶⁰⁰ Milovanovic, M., T. 12188 (29/05/07).

⁶⁰¹ Milovanovic, M., T. 12188-12189 (29/05/07).

⁶⁰² He testified that they were, in essence, a way of avoiding reading complete combat reports which would have taken all day: Milovanovic, M., T. 12189 (29/05/07).

arising on the front line, drawing each sector chief's attention to any issues within their remit which they would be required to make proposals on to Mladic immediately after the meeting or at a subsequent meeting later that day.⁶⁰³

45. Prosecution witness Skrbic confirmed this testimony, noting that the inner collegium of the Main Staff included only some of the assistant commanders, namely those responsible for intelligence and security matters, organisation and mobilisation, logistics, air force and anti-aircraft defence, and planning and finances.⁶⁰⁴ This evidence is also consistent with that given by Simic who testified that it was in fact the extended collegium of the Main Staff that consisted of all of the assistant commanders and the corps commanders.⁶⁰⁵
46. The only witness to assert that the inner collegium of the Main Staff did include all the assistant commanders (in addition to Mladic and Milovanovic) was Obradovic.⁶⁰⁶ Quite apart from the Defence's general concerns as to the partial testimony given by this witness,⁶⁰⁷ Obradovic's testimony to this effect cannot be safely accorded any weight by the Trial Chamber. Not only is his meaning unclear as to whether all of the assistant commanders did actually attend such meetings (and according to the principle of *in dubio pro reo* any doubt must therefore be construed in Milan Gvero's favour), but Obradovic could not know who did, in fact, attend these meetings during the Indictment period, as he was absent on sick leave from January to July 1995.⁶⁰⁸
47. The Defence submit that the testimony of Trkulja should be given primary place in any consideration of Gvero's attendance at such briefings, as he gave express evidence that in the three years that he was based at the Main Staff, which was situated in Crna Rijeka, Gvero did not attend any of the morning briefings there. Indeed, he clarified that as Gvero's office was located some distance away in Han

⁶⁰³ Milovanovic, M., T. 12189 (29/05/07).

⁶⁰⁴ Skrbic, P., T. 15516 (17/09/07).

⁶⁰⁵ Simic, N., T. 28599-28600 (21/11/08).

⁶⁰⁶ Obradovic, L., T. 28249 (14/11/08); T. 28314 (17/11/08).

⁶⁰⁷ See submissions to this effect in the section of this brief dealing with the Gvero – Mladic relationship.

⁶⁰⁸ Obradovic, L., T. 28250 (14/11/08); T. 29310, 29312 (17/11/08).

Pijesak⁶⁰⁹, Gvero would only occasionally call into Crna Rijeka in the evenings in order to play chess with him.⁶¹⁰

48. Furthermore, the Defence note that due to the poor situation on the front line at the time, prosecution witness Skrbic gave evidence that there were no more senior staff members after the St Vitus Day celebrations on 28 June 1995.⁶¹¹ It would have been quite impossible for Milan Gvero to gain knowledge of the alleged common criminal plan at meetings to which he was not invited and, which ultimately did not take place during the critical period of the Indictment.

Gvero only attended two Main Staff ‘extended collegium’ meetings during the Indictment period

49. The Defence assert that during the Indictment period there were very few ‘extended collegium’ meetings of the Main Staff and, due to his poor relationship with Ratko Mladic, Milan Gvero was, for the most part, excluded from attending such meetings in any event.

50. Miljanovic confirmed that during the period when he stood in for Djukic (from late March to mid June or early July 1995) he did not attend any meetings of the Main Staff at which the assistant commanders were present, except for two personnel meetings (at which discussion was limited to the promotion of certain soldiers) just prior to Army Day and St Vitus’ Day on 28 June 1995.⁶¹² In Miljanovic’s view there was no need for meetings of the Main Staff at this time as Mladic was not a conventional officer and hence led the army very much on his own (apart from some assistance in decision making from his closest aide, Milovanovic).⁶¹³

⁶⁰⁹ See submissions elsewhere in this brief as to Gvero’s transfer from Han Pijesak to Crna Rijeka in the section dealing with the poor relationship between Gvero and Karadzic.

⁶¹⁰ Trkulja, N., T. 15098-99 (10/09/07).

⁶¹¹ Skrbic, P., T. 15579 (18/09/07).

⁶¹² Miljanovic, R., T. 28946-28947 (27/11/08).

⁶¹³ Miljanovic, R., T. 28947 (27/11/08).

51. Even if there had been meetings of the Main Staff during this time which Milan Gvero, as Assistant Commander for morale was eligible to attend, it was highly likely that he would have been excluded from attendance in any event. Evidence was given to this effect by Simic who stipulated that during 1995 Gvero's relationship with Mladic had deteriorated to such an extent that for a time, on the rare occasions when the Main Staff did actually meet, Gvero was excluded from reporting, briefing or making conclusions at such meetings.⁶¹⁴ It is the Defence case that even if Gvero did attend any extended collegium meetings during the Indictment period (the Prosecution has adduced no evidence for this in any event) it would have been limited strictly to matters of morale and he would not have been entitled to contribute to any discussion beyond this very limited sphere of competence.

52. It is therefore clear that Gvero did not gain knowledge of the alleged common criminal plan from attending Main Staff meetings during the Indictment period.

There is no evidence that Gvero attended the debriefing prior to the Zivanovic farewell party on 20 July 1995

53. The Defence also note the farewell party for General Zivanovic held on 20 July 1995. There is no dispute that Milan Gvero attended this event. However, far more importantly there is no evidence to suggest that was any discussion of real substance at this social occasion. Still less is there a jot of evidence to suggest that any crime or wrong doing was mentioned or discussed.

54. Late on in the case Obradovic claimed that prior to the party there was a debriefing session at in Crna Rijeka. Though Obradovic made this assertion, in fact he did not attend the debriefing session himself, although said that Milovanovic was in attendance.⁶¹⁵ Of course, Milovanovic was not asked about this when he gave evidence, as he had testified some eighteen months previously. Obradovic went on to

⁶¹⁴ Simic, N., T. 28599-28600 (21/11/08).

⁶¹⁵ Obradovic, L., T. 28250 (14/11/08).

explain that the briefing was led by Milovanovic in the absence of Mladic, and that although his own Chief of Staff was in attendance, the commander of the East Bosnia Corps was not.⁶¹⁶ Obradovic could not recall when asked if Milan Gvero was present at the briefing.⁶¹⁷

55. Milan Gvero's only involvement with the farewell party and the briefing was to "arrange a suitable farewell gift".⁶¹⁸ The Order from Mladic making directions for the party and the briefing clearly specifies that all other aspects of the occasion were to be organised by the logistics sector and the intelligence and security sector.⁶¹⁹

56. This evidence clearly does not advance the Prosecution case against Milan Gvero at all.

Western Front meetings did not deal with the enclaves

57. The Defence do not dispute that when Mladic and his assistant commanders were stationed in Western Bosnia they had daily morning briefings to the extent that this was possible due to the hostilities. Indeed, Masal gave evidence in this regard that they would also have evening meetings if they returned to Banja Luka from the front line at a reasonable hour.⁶²⁰ However, it is the Defence contention that these meetings dealt purely with the situation in the Bosnian Krajina. There is no evidence to suggest that they dealt with the situation in Srebrenica or Zepa enclaves at all.

⁶¹⁶ Obradovic, L., T. 28251 (14/11/08).

⁶¹⁷ Obradovic, L., T. 28365 (18/11/08).

⁶¹⁸ 5D1021, dated 17 July 1995 (Order On the Occasion of the Retirement of the Commander of the DK /Drina Corps/, General Milenko Zivanovic, confidential number 03/4-1668, from Commander Lieutenant General Ratko Mladic, to *inter alia* Commanders of the Corps, V /Air Force/ and PVO /Anti-aircraft Defence), paragraph 4.

⁶¹⁹ 5D 1021, dated 17 July 1995 (Order On the Occasion of the Retirement of the Commander of the DK /Drina Corps/, General Milenko Zivanovic, confidential number 03/4-1668, from Commander Lieutenant General Ratko Mladic, to *inter alia* Commanders of the Corps, V /Air Force/ and PVO /Anti-aircraft Defence).

⁶²⁰ Masal, D., T. 29073 (01/12/08).

Conclusion

58. As outlined above, the Prosecution have not demonstrated that Milan Gvero attended Main Staff meetings, let alone that he gained knowledge of the alleged common criminal plan from such attendance.

GVERO'S ALLEGED PARTICIPATION IN THE JCE

Gvero's alleged participation in the JCE: Indictment Paragraph 76(a)(i)

“Defeating the Muslim forces militarily:- he release to the public media a false statement concerning the attacks on the enclave in order to assist in the take-down of the Srebrenica enclave”

Introduction

153. The reference in the so called “Trump Card” document⁶²¹ to “sabotage groups” and to “terrorist actions” and “terrorists” when describing attacks from within the enclave against *inter alia* Serb civilian targets was not inflammatory or propagandist, and was not used to vilify the Bosnian Muslims.⁶²² Nor did it lead to the commission of crimes.

154. Furthermore and as conceded by the Prosecution,

The first page [of the Trump Card] is a synopsis of Srebrenica and ... examples of how the Muslims have been violating the truce and that the

⁶²¹ P 2753, dated 10 July 1995 (Srebrenica – The Muslim War Trump Card, by Milan Gvero). This document is also, on occasions, referred to in the transcript as 6D125. In fact no party ever sought the admission of 6D125 as it is identical to P 2753.

⁶²² See OTP Opening Statement, T. 466-467 (22/08/06) (The tone of the Srebrenica Trump card “is somewhat inflammatory. It’s directed to vilify the Muslims and in an inflammatory propagandist tone... The tone of this is that Muslims and Islam amounts to terror and they are terrorists”).

enclaves were never demilitarised and that they were constantly attacked outside of the villages, outside the enclave, which is all true. ... [F]undamentally the information in it is true.

... And then we get to the second page and it goes on to the more recent events, many of which are also true ... And then the last half of the page, where it begins: 'They also killed a United Nations soldier ...' This is true ...⁶²³

155. The Prosecution conceded that the statements made by Milan Gvero "...are not all false".⁶²⁴ The Defence submit, as evidenced below, that all of his statements were true and that as a result, the Prosecution have failed to prove that Milan Gvero, *by the release of the Trump Card*, either furthered the JCE or that he assisted in the take-down of the enclave.

The language used in the trump card is not inflammatory or propagandist, and did not lead to the commission of crimes

156. The use of "terrorists" and "sabotage groups" in describing those carrying out operations not of a military nature simply describes the actions which were carried out and those responsible for them at the time. UNPROFOR and the Muslim forces also used this same language in the context of the war in Bosnia. In fact, the use of "terrorists" by Milan Gvero is in reality no different from that word being used by former President Clinton with regard to the KLA⁶²⁵, or by former President George W. Bush with regard to the war on terrorism more generally.

⁶²³ OTP Opening Statement, T. 466-467 (22/08/06).

⁶²⁴ T. 3876 (09/11/06).

⁶²⁵ See Rein Müllerson, Commentary, in: Legal and Ethical Lessons of NATO's Kosovo Campaign, Andru E. Wall (ed) International Law Studies Vol 78 Naval War College (2002), p. 454.

Those carrying out terrorist and sabotage actions were characterised accurately in the document

157. In the words of the Prosecution, “there were some terrorists among the BiH army and they did some terrible things”.⁶²⁶ Mirko Trivic defined terrorist acts as:

All actions that do not target the enemy because mainly civilians were along the lines. These were sabotage actions, terrorist acts, where people doing work in their yards, in their fields, would be killed, their throats would be slit, they would be robbed, and left to rot.⁶²⁷

The military expert called on behalf of a number of the co-accused, Petar Vuga, similarly testified that any form of activity that sows terror among the population, including attacks on facilities that are not purely military in nature, are characteristic of terrorist actions.⁶²⁸

158. The use of “terrorists” when referring to persons carrying out terrorist acts was an accurate description of the persons responsible for such actions. **REDACTED**⁶²⁹

159. **REDACTED**⁶³⁰

160. With regard to the term “sabotage groups”, the Prosecution never disputed that there were excursions from the Srebrenica and Žepa enclaves throughout the relevant period.⁶³¹ The “policy” by the Bosnian army of conducting sabotage operations “has been a part of [its] case for a long time” and it is an issue that “is really not in contest”.⁶³² However, the carrying out of sabotage activities “on a regular basis

⁶²⁶ OTP Opening Statement, T. 467 (22/08/06).

⁶²⁷ Trivic, M., T. T. 11811 (18/05/07).

⁶²⁸ Vuga, P., T. 23232 (03/07/08). *See also* Vuga, P., T. 23173-23174 (02/07/08) (Attacks from within the protected area against Serb villages were sabotage and terrorist actions and not regular combat activities).

⁶²⁹ **REDACTED**

⁶³⁰ **REDACTED**

⁶³¹ T. 29023 (28/11/08).

⁶³² T. 9635 (28/03/07) and 6D 78, dated 4 July 1995 (Some clarification regarding your dispatch, from Commander Avdo Palic to the Command of the 28th Division, Srebrenica, strictly confidential no. 08-02-142/95) (“I’ve written this report and I’ve signed it, because most of the sabotage actions were carried out in the responsibility of the 285th East Bosnia Light Infantry Brigade”). *See also* 5D 3, dated 30 June 1995

against VRS forces in the area”⁶³³ also created problems for the inhabited Serb settlements.⁶³⁴

161. These incursions were described at the relevant time – and no less so by members of the Muslim forces – as “sabotage operations” and were in fact ordered on this basis.⁶³⁵ The 28th Division even had what it described as KoV 28th Division IDGs, which stood for “Reconnaissance and Sabotage Groups”.⁶³⁶ Serb forces anticipated

(Situation Report, strictly confidential no. 04-114/95, from Standing in for the Commander Chief of Staff Major Ramiz Becirovic, to the 2nd Corps Command in Tuzla).

⁶³³ See Adjudicated Fact 46. See also Van Duijn, L., T. 2375 (28/09/06) (Muslim forces regularly got out of the enclave and carried out acts of sabotage).

⁶³⁴ PW-168, T. 15944 (27/09/07) Closed session.

⁶³⁵ See 4D134 dated 23 June 1995 (Monthly report by the 28th Division that was forwarded to the 2nd Corps in Tuzla) (“On the 22nd of June, 1995, DIV Sabotage and Reconnaissance Platoons were dispatched by units to carry out active sabotage in the general Kragljivode area and along the Vlasenica-Han Pijesak Road. Acts of sabotage were launched in order to provide assistance to units of the 1st, 2nd, and other Corps in order to stretch enemy forces”); 6D 179, dated 27 June 1995 (Information Obtained by RI /radio-reconnaissance/, strictly confidential number 02/8-01-988, from 2nd Corps PK /Assistant Commander/ for ObP /Intelligence/ Dr. Esad Dadžic, to 28th Division Command, Intelligence Organ, personally) (“[the 28th Land Army Division] brigades’ attention was drawn to the fact that the highest level of combat readiness was still in force because of the infiltration of our sabotage groups”); (6D 77, dated 29 June 1995 (Report, from the Stand-in for the commander Chief of Staff, Ramiz Becirovic, to Command of the 2nd Corps Tuzla Command and to Command of the 285th Eastern Bosnia Light Brigade, Žepa, strictly confidential no. 01-150/950): “Namely, these sabotage operations [referred to in the combat report of the 285th Eastern Bosnia Light Brigade, Žepa strictly confidential no. 08-21-244/95 of 28 June 1995] were conducted against aggressor targets on the order of the commander of the 28th KoV Division, strictly confidential number 01-127/95 of 20 June 1995, and they were aimed at distracting the Chetniks from the Sarajevo front and tying down a part of their forces to the zone of responsibility of the 28th KoV Division. In order to ensure that sabotage operations are planned as well as possible and successfully conducted, I send the PK for intelligence ...”); 5D 3, dated 30 June 1995 (Situation Report, strictly confidential no. 04-114/95, from Standing in for the Commander Chief of Staff Major Ramiz Becirovic, to the 2nd Corps Command in Tuzla) (“In order to prevent enemy forces from sending additional forces from the Srebrenica and Žepa areas to the Sarajevo theatre, two acts of sabotage were carried out near Srebrenica on the 23rd of June, 1995, at Osmace, and on the 23rd of June, 1995, at Bijelo Stijenje near Koprivno, and the following results achieved: seven Chetniks killed”); 6D 26, dated 15 December 1994 (Your Telegram Strictly Confidential Reference Number 02-1 1609 dated 13 December 1994, strictly confidential number 180-93/94, from Commander Colonel Avdo Palic, to SVK/ Supreme Command/ of the Kakanj KM/Command Post, to Brigadier General Enver Hadzihasanovic, personally) (“Regarding your strictly confidential telegram with the above reference number, we inform you of the following: 1) Two sabotage operations were carried out in the sector Laze-Mislovo. The operation was carried out on 12 December 1994. 2) We suffered no losses in those operations and had no wounded. The Chetniks had five killed, of whom one was an officer”); Masal, D., T. 29025-29026 (28/11/08) and 5D 1266, dated 14 December 1993 (Order, strictly confidential no. 01-743/93, from Commander Colonel Dragiša Masal, to the Command inter alia of the 1st, 2nd, and 4th Plpbr) (Armed units in Srebrenica and Žepa were tasked with carrying out sabotage activities around the protected areas in order to relieve the armed units in the Olovo and Teocak areas, where intensive fighting was ongoing).

⁶³⁶ See 5D 3, dated 30 June 1995 (Situation Report, strictly confidential no. 04-114/95, from Standing in for the Commander Chief of Staff Major Ramiz Becirovic, to the 2nd Corps Command in Tuzla).

such actions⁶³⁷, Milenko Jevdjevic described them as “a real threat” – and considered that “the possibility of sabotage groups infiltrating the depth of your territory and wreaking havoc is the worst possible thing for a soldier”.⁶³⁸ In this regard, the reference in P107, for example, to sabotage and terrorist groups having infiltrated behind Serb lines, torching unprotected villages and killing civilians, is thus “a very fair representation” based on information received.⁶³⁹

The use of the term “terrorists” did not lead to the commission of crimes

162. The word “terrorism” was bandied around in 1995 by soldiers in a wider context and was used extremely loosely.⁶⁴⁰ For example, the 4th Battalion considered all these armed groups to be enemy groups, so the term “terrorists” did not strike members of the Battalion as being particularly pejorative in nature and so in this regard was unimportant.⁶⁴¹ **REDACTED.**⁶⁴²

163. The use of “terrorists” or saying that the enemy is “stupid” thus did not lead to war crimes.⁶⁴³ Nor can it rightly be said to have been designed to “raise the furor of the public”, for which Milan Gvero – in his capacity of a military official – is not responsible, or of the soldiers for the reasons as set out above. The Defence note also

⁶³⁷ See 5D 1037, dated 10 October 1994 (Regular Combat Report, strictly confidential no. 01/4-405, from Commander Major General Milenko Živanovic, to the GŠ /Main Staff/ of the VRS) (“It may be expected that the enemy will continue carrying out intensive reconnaissance of our positions, provocations, and infiltration of DTG /sabotage and terrorist groups/ behind the lines in our territory ...”); Masal, D., T. 29021 (28/11/08) and 5D 1264, dated 12 November 1993 (Order, strictly confidential no. 01-689/93, from Commander Colonel Dragisa Masal, to 1st, 2nd, 4th Prodinje Light Infantry Brigade) (“We believe that a DTG [Subversive Terrorist Group] has been infiltrated from Žepa via Totince”).

⁶³⁸ Jevdjevic, Milenko., T. 29485 (10/12/08).

⁶³⁹ See Butler, R., T. 20062 (21/01/08).

⁶⁴⁰ See Smith, R., T. 17796 (09/11/07).

⁶⁴¹ See Ristic, L., T. 10202-10203 (18/04/07) and 7D 362, dated 16 July 1993 (Sabotage and Terrorist Activities by Muslim Forces and Steps Taken to Counter Them. A Warning Sent to All units of the Zvornik lbr, strictly confidential no. 341-1, from Vinko Pandurevic to all units of the Zvornik lbr) (“Armed groups should be considered terrorists, because recently they have inflicted major losses on us”).

⁶⁴² PW-168, T. 15943-15946 (27/09/07) Closed session and 7D 362, dated 16 July 1993 (Sabotage and Terrorist Activities by Muslim Forces and Steps Taken to Counter Them. A Warning Sent to All units of the Zvornik lbr, strictly confidential no. 341-1, from Vinko Pandurevic to all units of the Zvornik lbr) (“Armed groups should be considered terrorists, because recently they have inflicted major losses on us”).

⁶⁴³ See OTP Opening Statement, T. 467-468 (22/08/06) (“Saying the enemy is stupid is designed to demean the enemy, designed to raise the furor of the public and the soldiers. This is the kind of thing that leads to war crimes”).

that if the use of the word “terrorists” in an order (i.e. in a military document destined for military personnel only) is not problematic, it is even less so in the Trump Card, a document released to the general public.⁶⁴⁴ In this regard it is of note that no evidence was adduced to suggest that the public was involved in the commission of the crimes charged in the Indictment.

164. The prosecution have also mis-characterised the penultimate sentence of P2753 which provides that “in Srebrenica the main decisions are made by people of little strength and intelligence”. Contrary to the Prosecution case, this sentence does not describe Bosnian Muslims as stupid but rather, when read in the context of the previous sentence “the problem of Srebrenica is that the Muslims ... make crazy decisions”⁶⁴⁵, simply meant that some of the decisions which had been made were unwise. **REDACTED.**⁶⁴⁶

Milan Gvero did not provide a false statement

Srebrenica was not demilitarised

165. As noted above, the Prosecution accepted this to be true and the Presiding Judge also stated that “[t]here is no argument that it should have been demilitarized”.⁶⁴⁷ This relevant passage in the Trump Card is therefore correct.⁶⁴⁸

⁶⁴⁴ PW-168, T. 15943-15946 (27/09/07) Closed session and 7D 362, dated 16 July 1993 (Sabotage and Terrorist Activities by Muslim Forces and Steps Taken to Counter Them. A Warning Sent to All units of the Zvornik lpr, strictly confidential no. 341-1, from Vinko Pandurevic to all units of the Zvornik lpr) (“Armed groups should be considered terrorists, because recently they have inflicted major losses on us”).

⁶⁴⁵ P2753 dated 10 July 1995 (Srebrenica-The Muslim Trump Card)

⁶⁴⁶ PW-168 T.17173 (30/10/2007) Closed session

⁶⁴⁷ See T. 3758 (07/11/06). See also Adjudicated Fact 50 (“Bosnian Muslim helicopters flew in violation of the no-fly zone; the ABiH opened fire toward the Bosnian Serb lines and moved through the safe area; the 28th Division was continuously arming itself”); Trivic, M., T. 11908 (22/05/07) and P2753, dated 10 July 1995 (Srebrenica – The Muslim War Trump Card, by Milan Gvero) (The witness confirmed in relation to P2753, that demilitarization was not done and that the relevant passage therein is correct).

⁶⁴⁸ Trivic, M., T. 11908 (22/05/07).

Žepa was not demilitarised

166. Žepa was also not completely demilitarized by UNPROFOR after their arrival in 1993.⁶⁴⁹ Weapons and ammunition were delivered by helicopter in the second half of 1994 until the beginning of May 1995 and were used by Avdo Palic and his men on Bosnian Serbs outside the enclave in mid-June 1995.⁶⁵⁰ These helicopters were subject to strong firing from Bosnian Serb positions, producing “such a spectacle” as described by Hamdija Torlak, that everybody in the vicinity would have seen it, including UNPROFOR, which “should and ought to have known about these flights”.⁶⁵¹ This was a clear breach of the agreement on demilitarization.⁶⁵² When it was put to Tom Dibb, the UNPROFOR liaison that this type of complaint was quite common from the Bosnian Serbs, he replied “Yes. I would say it was probably an ongoing theme for some of the time.”⁶⁵³

⁶⁴⁹ Torlak, H. T. 9819 (02/04/07). See also Džebo, M, T. 9599 (28/03/07); Dibb, T. 16336 (15/10/07) and 6D 82, dated 24 July 1995 (Intelligence Information on the Enemy in the Žepa and Goržade Enclaves, from Lieutenant Colonel Kosoric, Command of the Drina Corps Department for OB Tasks, Strictly confidential no, 17/9, to the Main Staff of the VRS); Savcic, M., T. 15329-15330 (13/09/07) (In conflicts that were renewed in May 1993, the witness noticed for the first time from the Muslim combat positions that fire was opened from pieces that the VRS had not been able to register until then); 6D 24, dated 17 January 1995 (Request for Opinion, from Commander Colonel Avdo Palic, to Brigadier General Enver Hadžihasanovic, personally) (“On the 27th January 1995, the 1st Zepa Brigade is celebrating its second birthday. Grown out of the patriotic league via units of the Territorial Defence in the local communes of Žepa, Koristim, Podlepije, Godjenje, and Luka, or rather from the 4th June, and detachment and 1st Žepa detachment, the 1st Žepa Brigade was formed on 27 January 1993”).

⁶⁵⁰ Torlak, H. T. 9722, 9783, 9784 (30/03/07), Torlak, H. T. 9827 (02/04/07) and 5D 265, dated 28 May 1996 (Report on delivery of UBS [lethal assets] and MTS [material and technical equipment] to the Žepa and Srebrenica enclaves, Number 1-1/V-169, from Brigadier General Enver Hadžihasanovic, to Commander Republic of Bosnia and Herzegovina Army General Staff). See also Džebo, M., T. 9603 (28/03/07) (Some weapons were brought in by helicopter); 6D 73, dated 17 February 1995 (Order Taking measures to lift brigade units’ combat readiness, from 2nd Corps Commander Brigadier Sead Delic, to *inter alia* OG-8 [Operations Group], number 02/1-177/8); 5D 228, dated 17 February 1995 (Taking measures to raise the level of combat readiness in units, Order, number 1-1/280-1, from Brigadier General Enver Hadžihasanovic, to 2nd Corps Command, Command of Operations Group 8 Srebrenica, 1st Žepa Brigade Command).

⁶⁵¹ Torlak, H. T. 9827-9828 (02/04/07).

⁶⁵² See Smith, R., T. 17647 (07/11/07) and 5D 502, dated 8 May 1993 (Agreement on the Demilitarization of Srebrenica and Žepa, signed by Lieutenant General Ratko Mladic, General Sefer Halilovic; witnessed by Lieutenant General Philippe Morillon). See also Joseph, E., T. 14220-14221 (23/08/07), Joseph, E., T. 14266 (24/08/07) (It was clear that the enclave had not been demilitarised; knowledge thereof would have been widely known or even assumed within UNPROFOR).

⁶⁵³ Dibb, T. 16329 (15/10/07). See also 6D 164, dated 21 May 1995 (Meeting of Lt. General Smith and Dr. Karadzic 21 May 1995, from Lt. Col. J. R. J. Baxter, to *inter alia* SRSG Zagreb).

“UNPROFOR, although fully aware of the Muslim terrorist as well as the complete military actions, does not prevent them”

167. DutchBat was aware of the continued militarisation of the enclave and requested support with regard to incoming Bosnian Muslim helicopter flights and the supply of arms into the enclave. However, this was not forthcoming.⁶⁵⁴ Momir Nikolic reported to Major Franken about an ambush carried out by the ABiH in the south of the enclave, during which seven or nine Serb soldiers were killed. Whilst it was part of DutchBat’s mandate to prevent this and similar incidents, it was “absolutely not successful” in this regard.⁶⁵⁵ Even though General Smith received reports of violations committed by the Bosnian Muslim side relating to combat operations led from within the enclave, he explained to the Bosnian Serbs that the UN was not in a position to do anything about it (i.e. they were unable to police the agreement).⁶⁵⁶

“Our combat activities at the moment are directed towards simply neutralising the Muslim terrorists and are in no way directed against civilians

168. The Prosecution have failed to prove that civilians and objects afforded civilian protection were not the object of the VRS attack and that, in any event, they have failed to prove this beyond reasonable doubt.

169. As a starting point, it is clear from the evidence that ABiH 28th Division targets were located in the direct vicinity of – if not actually located directly in – what were previously civilian facilities. This, of course changes their IHL protection and means that they do not continue to benefit from having civilian status. As a result, attacking

⁶⁵⁴ See Van Duijn, L., T. 2394 (29/09/06).

⁶⁵⁵ Franken, R., T. 2580 (17/10/06) (Another ambush reported by Major Nikolic may also have taken place on 26 June 1995). See also Boering, P., T. 1911-1912 (19/09/06), Boering, P., T. 2110, 2112-2113, 2145-2146 (25/09/06), Boering, P., T. 2212 (26/09/06).

⁶⁵⁶ Smith, R., T. 17653 (07/11/07).

such dual use facilities does not equate to unlawfully targeting civilians or civilian objects at the time at which the Trump Card was issued.⁶⁵⁷

170. From the time at which Srebrenica was proclaimed a safe area, the VRS “knew full well the deployment of the 28th Division forces” and were shown “the exact deployment positions of each brigade”.⁶⁵⁸ For example, the 282nd, 283rd, and the 284th Brigades were located in Srebrenica town,⁶⁵⁹ and the 280th Brigade was deployed elsewhere, in facilities located very close to the UN base in Potočari.⁶⁶⁰ There were also fortified artillery shelters in the front-line defence and trenches surrounding buildings which were being used as brigade quarters, including both residential houses and industrial facilities.⁶⁶¹ It is therefore clear that civilian facilities were used during wartime for military purposes.⁶⁶²

⁶⁵⁷ The Defence note in particular in this regard the reference in the Trump Card to VRS combat activities “at the moment” at which it was issued.

⁶⁵⁸ Pandurevic, V., T. 31984, 31985 (23/02/09). See also Vuga, P., T. 23195 (02/07/08) and P107, dated 2 July 1995 (Order for Active Combat Activities Operation no. 1, strictly confidential no. 04/156-2, from Commander Major-General Milenko Živanovic, to the commands *inter alia* of the 1st Zvornik Infantry Brigade, 1st Birac Infantry Brigade and the 2nd Romanija Motorised Brigade “Krivaja – 95”) (The witness testified with regard to P107 that the VRS was well-acquainted with the deployment of the enemy: it had good counter-intelligence and knew the exact disposition of enemy forces).

⁶⁵⁹ See Pandurevic, V., T. 31994 (23/02/09) and 4D210, dated 1 January 1994 (Order on Organisational Changes – Forming RJ /War Units/ in the Area of Responsibility of the 2nd Corps, strictly confidential no. 14/75-156/93, from Standing in for Commander Deputy Brigadier General Stjepan /?Šiber/, to *inter alia* 2nd Corps Command). See also Pandurevic, V., T. 31998 (23/02/09) and 4D135, dated 22 February 1995 (List of Office Space Used by the OS/ Armed Forces/ of the Republic of BH, strictly confidential no. 03-55-2/95, from Chief of the Defence Department Professor Suljo Hasanovic, to Tuzla Secretariat of Defence) (The Radnik GP Construction Company Srebrenica was used for the command of the 28th Brigade and was located in Srebrenica town).

⁶⁶⁰ Pandurevic, V., T. 31988-31990 (23/02/09) and 4D135, dated 22 February 1995 (List of Office Space Used by the OS/ Armed Forces/ of the Republic of BH, strictly confidential no. 03-55-2/95, from Chief of the Defence Department Professor Suljo Hasanovic, to Tuzla Secretariat of Defence) and 4D653, dated 4 February 2009 (Republika Srpska Republican Land Survey and Property Rights Administration for Srebrenica Municipality) and 4D 683 (Video of Google Earth Imagery of Hrvacic Plot, North of DutchBat Compound, Potocari). See also Pandurevic, V., T. 31994 (23/02/09) (The Battalions and Companies were deployed close to the UNPROFOR checkpoints on the Zeleni-Jadar-Srebrenica axis).

⁶⁶¹ Pandurevic, V., T. 31984-31985 (23/02/09). See also Pandurevic, V., T. 31985-31987 (23/02/09) and 4D 210, dated 1 January 1994 (Order on Organisational Changes – Forming RJ /War Units/ in the Area of Responsibility of the 2nd Corps, strictly confidential no. 14/75-156/93, from Standing in for Commander Deputy Brigadier General Stjepan /?Šiber/, to *inter alia* 2nd Corps Command) and 4D 682, undated (Video of Google Earth Imagery of Potocari, Srebrenica and Surrounding Terrain) and 4D135, dated 22 February 1995 (List of Office Space Used by the OS/ Armed Forces/ of the Republic of BH, strictly confidential no. 03-55-2/95, from Chief of the Defence Department Professor Suljo Hasanovic, to Tuzla Secretariat of Defence) (The witness confirmed that Colonel Blagojevic pointed to him the deployment of the 280th Brigade forces on a map; the command of the said Brigade was located in a residential house in Potocari). See also Koster, E., T. 3059-3060, 3100 (26/10/06) (The witness was stationed on 10 July at a cross roads

171. P107⁶⁶³ dated 2 July 1995 sets out in great detail the positions of the 28th Division throughout the enclave, as well as their strength and military objectives. It also lists the location of different brigade command posts in various villages and the location and strength of the reserve 28th Division “in the village of Potočari (in the school)” which consisted of approximately 800 men.⁶⁶⁴ It can similarly be seen on the basis of P3025 (on which combat activities were later carried out in Srebrenica) that the VRS believed that there was a military component in the Potočari school (which on 6 July 1995 was closed for the summer recess).⁶⁶⁵ In this regard, it is additionally of note that there were VRS attacks directed against the hunting lodge and Hotel Domavija which were other dual use objects located in Srebrenica town.⁶⁶⁶

near Potocari when a Muslim fighter told him to come to a small headquarters of theirs that was located in the basement of a house that looked like a normal house).

⁶⁶² See e.g. Lazic, M., T. 21891-21892 (06/06/08) and 4D135, dated 22 February 1995 (List of Office Space Used by the OS/ Armed Forces/ of the Republic of BH, strictly confidential no. 03-55-2/95, from Chief of the Defence Department Professor Suljo Hasanovic, to Tuzla Secretariat of Defence) (The witness confirmed as contained in 4D 135 that the Hotel Domavija, located in Srebrenica town was a civilian facility used during wartime for military purposes: the 282nd East Bosnian Light Brigade was housed there); Pandurevic, V., T. 31992-31998 (23/02/09) (The VRS knew that the 28th Division command was in Srebrenica town and in particular, that they were using the post office as their communications centre, the Domavija Hotel, and the hunting lodge); Franken, R., T. 2646 (18/10/06) (The 28th Division had two headquarters: one classroom in the village of Potocari and some rooms in the former post office in Srebrenica).

⁶⁶³ P107, dated 2 July 1995 (Order for Active Combat Activities Operation no. 1, strictly confidential no. 04/156-2, from Commander Major-General Milenko Živanovic, to the commands *inter alia* of the 1st Zvornik Infantry Brigade, 1st Birac Infantry Brigade and the 2nd Romanija Motorised Brigade “Krivaja – 95”).

⁶⁶⁴ See e.g. Pandurevic, V., T. 31990-31991 (23/02/09) and P107, dated 2 July 1995 (Order for Active Combat Activities Operation no. 1, strictly confidential no. 04/156-2, from Commander Major-General Milenko Živanovic, to the commands *inter alia* of the 1st Zvornik Infantry Brigade, 1st Birac Infantry Brigade and the 2nd Romanija Motorised Brigade “Krivaja – 95”) (The witness testified with regard that the 280th Brigade command activities took place in Budak village as per P107).

⁶⁶⁵ See Butler, R., T. 20720-20721 (30/01/08) and P 3025, dated 5 July 1995 (Order for Active Combat Order, Operational Number 1, confidential no. 439-2, from Commander Colonel Vidoje Blagojevic, to Commands of the 1st, 2nd, 3rd, and 4th Infantry Battalion); Gavric, Mico, T. 26505 (01/10/08).

⁶⁶⁶ Pandurevic, V., T. 31995-31996 (23/02/09) and 4D 8, dated 28 August 1995 (Fall of Srebrenica, from Ministry of Interior State Security Service Tuzla Sector, to General Staff, BH Army Sarajevo); Lazic, M., T. 21891-21892 (06/06/08) and 4D135, dated 22 February 1995 (List of Office Space Used by the OS/ Armed Forces/ of the Republic of BH, strictly confidential no. 03-55-2/95, from Chief of the Defence Department Professor Suljo Hasanovic, to Tuzla Secretariat of Defence) and P 3359, dated 25 May 1995 (Interim Combat Report, strictly confidential no. 03/253-54-1 from Vidoje Blagojevic, to Drina Corps Command). See *also* Gavric M. T.26508 (01/10/08) (Hotel Domavija “is a former hotel which I believe housed the command of the 28th Division or one of their battalions”). The factory which was shelled by the VRS had also been shut down for a long time by 6 July 1995.

172. Major Franken allowed for the possibility that approximately 1500 armed Muslim men in the Srebrenica town market place were the target of VRS fire on 10 July, but remarked that the whole of Srebrenica town was hit on 10 July.⁶⁶⁷ However, General Smith noted that Bosnian Muslim military units would not indicate their headquarters very distinctively in order to differentiate them from other houses. In his words, “no one is trying to make himself obvious on the battlefield”.⁶⁶⁸ Furthermore, there were no less than 12 dual use facilities, including residential houses, located within Srebrenica town.⁶⁶⁹ As discussed above, the VRS had knowledge at the relevant time of the precise deployment of each 28th Division brigades. Such intelligence was used to guide the movement of VRS troops by way of invasive reconnaissance and detection of targets.⁶⁷⁰

173. Thus, what may to some have appeared to have been indiscriminate shelling⁶⁷¹ has not been proven to be such beyond reasonable doubt. It is for the Prosecution to prove that the shelling was indiscriminate and to establish that unmarked 28th Division locations were not the object of VRS attacks. The Prosecution must also prove that any resultant civilian deaths and/or damage to civilian properties was not incidental damage from an attack otherwise proportionate to the military advantage gained.⁶⁷² The Prosecution additionally bear the onus of establishing beyond reasonable doubt that the VRS did not take precautionary measures when planning their attacks.

⁶⁶⁷ Franken, R., T. 2584 (17/10/06), Franken, R., T. 2646-2648 (18/10/06).

⁶⁶⁸ See Smith, R., T. 17608 (07/11/07).

⁶⁶⁹ See 4D135, dated 22 February 1995 (List of Office Space Used by the OS/ Armed Forces/ of the Republic of BH, strictly confidential no. 03-55-2/95, from Chief of the Defence Department Professor Suljo Hasanovic, to Tuzla Secretariat of Defence).

⁶⁷⁰ See Trivic, M., T. 11884-11885 (21/05/07).

⁶⁷¹ See e.g. Nicolai, C., T. 18477 (29/11/07) (It was reported several times that civilians were killed as a result of VRS shelling of the enclave). The evidence of Ahmo Hasic that “the shells were killing everyone” on 10 July is simply not credible (T. 1175 (06/09/06)). In this regard, please also contrast the testimony of PW-118.

⁶⁷² The Prosecution led no evidence to suggest beyond reasonable doubt that the attack was disproportionate to the military advantage gained (i.e. that the number of wounded civilians was disproportionate to the military advantage gain). See submissions in section of this brief regarding paragraph 76 (d)(ii) of the Indictment. See also Kingori, J., T.19185 (13/12/07).

174. Moreover and in relation to Milan Gvero's knowledge at the relevant time, there is P33. Elsewhere in this brief the Defence has argued that there is insufficient evidence for the Trial Chamber to conclude beyond reasonable doubt that Gvero had received and therefore knew of the existence of this document. However, in the alternative the Defence contend that if Gvero knew about it (or for these purposes may have known about it – because the burden and standard of proof always operates in an accused's favour on each and every point as well as piece of evidence) then P33 ordered the provision of maximum safety *inter alia* to Muslim civilians and also for troops to refrain from engaging civilian targets. At any rate there is plenty of other evidence that this was a standing instruction of the type received prior to commencing an operation.⁶⁷³ Prosecution witness Mirko Trivic and his men abided by these instructions in their combat operations as did the other units.⁶⁷⁴

175. It was never an objective of the VRS to target the civilian population. Their focused aim was towards military targets. But the Defence make no apology for repeating that this is not the test that the Trial Chamber has to apply as otherwise there would be a total reversal of the burden of proof. It is for the Prosecution to prove that this was not the case and they have to do so beyond reasonable doubt. It is the Defence submission that they have failed to do. Resultantly, there is no basis for maintaining that Milan Gvero told a lie in the Trump Card in this respect.

⁶⁷³ Trivic, M., T. 11886 (21/05/07) and P 33, dated 9 July 1995 (Conduct of Operations around Srebrenica, strictly confidential no. 12/46-501/95, from Assistant Commander Major General Zdrakvo Tolimir, to President of Republika Srpska, Generals Gvero and Krstic) (“You must order subordinate units to refrain from destroying civilian targets unless forced to do so because of strong enemy resistance. ... [T]reat the civilian population ... in accordance with the Geneva Conventions of 12 August 1949”). See also P107, dated 2 July 1995 (Order for Active Combat Activities Operation no. 1, strictly confidential no. 04/156-2, from Commander Major-General Milenko Živanovic, to the commands *inter alia* of the 1st Zvornik Infantry Brigade, 1st Birac Infantry Brigade and the 2nd Romanija Motorised Brigade “Krivaja – 95”) (“In dealing with ... the civilian population behave in every way in accordance with the Geneva Conventions”); P 3025, dated 5 July 1995 (Order for Active Combat Order, Operational Number 1, confidential no. 439-2, from Commander Colonel Vidoje Blagojevic, to Commands of the 1st, 2nd, 3rd, and 4th Infantry Battalion) (Comply with the Geneva Conventions in the treatment of ... the civilian population”) (emphasis in original); Jevdjevic, Milenko, T. 29533-29534 (11/12/08) and P 33 (The witness heard Radislav Krstic tell his commanders on 9 July “that they should avoid any sort of firing on civilians”. He also believes that a telegram other than P 33 arrived on 11 July regarding the treatment of civilians).

⁶⁷⁴ See Trivic, M., T. 11886 (21/05/07) and P 33, dated 9 July 1995 (Conduct of Operations around Srebrenica, strictly confidential no. 12/46-501/95, from Assistant Commander Major General Zdrakvo Tolimir, to President of Republika Srpska, Generals Gvero and Krstic). See also Trivic, M., T. 11909 (22/05/07).

Neither Srebrenica nor Potočari were subject to mass shelling

176. The Defence submit, based on the small size of Srebrenica town, that the evidence does not establish beyond reasonable doubt that civilians or objects afforded civilian protection were the object of VRS attack. It would have been simply impossible for the town to have been subject to “non-stop” shelling for an extended period of time before and after the fall of the enclave and for this reason it is submitted that evidence to this effect is subject to such wild variance that it cannot be believed and should be accorded no weight whatsoever.⁶⁷⁵

177. On 2 July, the Srebrenica enclave was approximately 58 square kilometers in size. Large numbers of the population were located in the urban centre⁶⁷⁶ and the surrounding terrain is a hilly, mountainous ground, impassable because of the gorges, canyons, and dominant heights.⁶⁷⁷ In geographical terms, this kind terrain is highly favourable to mounting a defence.⁶⁷⁸ The urban area of Srebrenica town was one kilometer wide and two kilometers long and had just one long street running up a valley flanked by houses mostly on the left side and with little space for additional buildings.⁶⁷⁹ If Srebrenica was mass shelled as alleged, the town should have been destroyed if not in its entirety, at least to an important degree. The town did not however suffer vast shelling damage and the Defence therefore maintain that shelling on the scale alleged by the Prosecution could not have taken place.

⁶⁷⁵ It is the defence contention that the following evidence should not be accorded any weight whatsoever: PW-126, T. 3632-3635, 3598-3599 (06/11/06): “non-stop” shelling for between five and fifteen days; PW-113, T. 3327 (31/10/06): shelling every day from the beginning of July; Van Duijn, L., T. 2263 (27/09/06): “intense and constant shelling” from 6-12 July; PW-127, T. 3502-3504 (02/11/06): “heavy” and “continuous” shelling from 7-10 July; Oric, M., T. 870 (28/08/06): continuous shelling for a week where “everything was targeted”; Kingori, J., T. 19352, 19352 (10/01/08); Kingori, J., T. 19514-19516 (11/01/08); Kingori, J., T. 19187 (13/12/07): an “onslaught” of 1000 shells; Franken, T. 2473 (06/10/16): “massive shelling” and 160 or 200 shells; Hasic, A., T. 1174 (06/09/06): shelling for 5 days straight.

⁶⁷⁶ See OTP Pre-Trial Brief, para. 14.

⁶⁷⁷ Jevdjevic, Milenko, T. 29598 (12/12/08).

⁶⁷⁸ Jevdjevic, Milenko, T. 29598 (12/12/08).

⁶⁷⁹ Adjudicated Fact 10; Truklja, N., T. 15139 (10/09/07); Momcilovic, B., T. 14093 (22/08/07); Smith, R., T. 17480 (05/11/07); OTP Pre-Trial Brief, para. 14. Simic, L. T. 27260-27263 (22/10/08), Pandurevic, V., T. 32145 (26/02/09); Franken, R., T. 2545 (17/10/06).

178. Indeed, on 11 July, neither Mirko Trivic nor anyone else could see any visible damage in Srebrenica town inflicted by artillery fire or any shelling marks within either the Bravo Company compound or in the yard itself.⁶⁸⁰ The following day, Ljubisav Simic passed through the whole of Srebrenica town and did not see any damage to the following buildings: the municipal assembly, the court, the culture hall, or the hospital. Nor did he see any shell impacts or the kind of damage one expects to see after fighting (e.g. broken glass, rubble, etc.).⁶⁸¹ Also on 12 July, Trivic did not observe any shell damage on the hospital building.⁶⁸² Similarly, PW-162 drove through the whole of Srebrenica town on 13 July and did not see any traces of shelling at the hospital or at the post office. He also did not see shell-caused marks on the façade of the buildings or indeed any shell craters.⁶⁸³

179. On 14 July, Zoran Petrovic walked unescorted in an area of 200 metres along the main road in Srebrenica.⁶⁸⁴ His film included buildings in the centre and in the main street. He did not see freshly destroyed houses, visible traces of shelling anywhere, shattered glass, or anything to indicate recent wartime damage. The town was, in his view, in good condition.⁶⁸⁵ Nedeljko Trkulja also passed through Srebrenica from north to south on approximately 15 or 16 July, at which time he saw no traces of any damaged walls or of debris in Srebrenica town.⁶⁸⁶

⁶⁸⁰ Trivic, M., T. 11899-11900 (22/05/07).

⁶⁸¹ Simic, L. T. 27260-27266 (22/10/08) 27269-27271. (23/10/08)

⁶⁸² Trivic, M., T. 11889 (21/05/07); Trivic, M., T. 12045 (23/05/07). **REDACTED** Kingori, J., T. 19182 (13/12/07) (Even the hospital was not hit); Egbers, V., T. 2926, 2930 (20/10/06) (The witness did not have any information that there was any sort of attack the hospital; nor was he informed that anyone had been killed in the hospital as a result of shelling); Gavric, M., T. 26525-26526 (01/10/08) (The hospital was well sheltered; the witness does not see how any artillery weapons could have targeted it).

⁶⁸³ PW-162, T. 9334-9335 (23/03/07). See also PW-161, T. 9545-9546 (27/03/07) (The witness inspected the entire city centre area of Srebrenica town (the post office and the hospital) and did not see any shell traces or damage caused by shrapnel on the façades).

⁶⁸⁴ Petrovic, Z., T. 18822-18823 (05/12/07).

⁶⁸⁵ Petrovic, Z., T. 18867-18868, 18870 (06/12/07). See also Petrovic, Z., T. 18869 (06/12/07) (The witness would have been ashamed as a professional journalist and if in an editorial office that published reports to the effect that hundreds of shells fell for many days on Srebrenica, to show his face in Srebrenica).

⁶⁸⁶ Truklja, N., T 15139-15140 (10/09/07).

180. Though he personally did not visit Srebrenica at that time, Mico Gavric rather astutely pointed out that to have fired hundreds or even thousands of shells, would have taken time, a precious commodity that people did not have.⁶⁸⁷ If shelling on the scale alleged by the Prosecution had taken place, Srebrenica would have been completely destroyed and would have looked far more akin to Vukovar after it had been bombarded. The short point is that after their respective attacks Srebrenica and Vukovar looked totally different.⁶⁸⁸

181. The explanation given by Joseph Kingori that he was “surprised” there was not more damage nor a greater number of wounded or fatalities, and that resultantly Srebrenica must have been “lucky”⁶⁸⁹ stands up to no belief. Likewise, his evidence that Srebrenica was “not the same place” insofar as Bravo Company and parts of roads were cratered, that the hospital was shelled, and that a lot of buildings were freshly damaged,⁶⁹⁰ is also incapable of belief. This brief is not going to spend long on Kingori whose evidence was at best bizarre and at worst lacking any credibility whatsoever. The many journeys the poor man had to make to get to The Hague to give his evidence (at what will be remembered was a difficult time) begs the question as to why on earth the Prosecution wished to call him at all to give his somewhat preposterous account. The Defence case on this is supported by General Janvier’s report on 10 July that whilst an increase in VRS offensive activity in shelling urban areas “can be expected”, there was at that time “no indications suggesting this. All [VRS] offensive activity has been concentrated on the south-eastern part of the enclave and there are no reports of advances in other areas”.⁶⁹¹

⁶⁸⁷ Gavric, M., T. 26525 (01/10/08).

⁶⁸⁸ Erdemovic, D., T. 11003 (07/05/07) (He did not see any major damage i.e. craters from shells when he entered Srebrenica town between 10 and 11 July. He was in Vukovar in 1991: there is no comparison to Srebrenica).

⁶⁸⁹ Kingori, J., T. 19519-19520 (11/01/08).

⁶⁹⁰ Kingori, J., T. 19516-19517 (11/01/08).

⁶⁹¹ 6D 204, dated 10 July 1995 (UNPF – HQ Daily Sitrep 090001B to 092359B Jul 95, from LGen Janvier FC UNPF, to *inter alia* MNEMONIC 670) and Nicolai, C, T. 18563 (30/11/07) (The witness confirmed that this was the assessment i.e., that Janvier perceived at that time as being in the minds of the VRS).

182. The Defence suggest that it was in the best interests of the Bosnian Muslims to exaggerate the attack and to report accordingly. Major Boering informed Ramiz Becirovic in May or June of the “smoking gun” principle required for air support, after which the ABiH sent a limited patrol from Srebrenica toward the Swedish Shelter Project, at which point they came under fire.⁶⁹² In fact, Emir Suljagic, Joseph Kingori’s twenty year-old interpreter reported on 8 July that Bravo Company was shelled by the VRS that day, and this was the source of UNMO information about events in Srebrenica town from 9 July.⁶⁹³ Obviously, the objectivity, truthfulness, and credibility of such evidence is questionable at best. Also, it could be that the Bosnian Muslims, untrained and inexperienced in distinguishing shelling from legitimate military operations, were honestly mistaken as to the scale of the attack.

183. Indeed, no combat-activity damage is visible in the recently discovered P4536⁶⁹⁴ and certainly none of the scale alleged by the Prosecution with regard to Potočari or Srebrenica town. In this regard, the Defence also note the contents of the video evidence in V2047⁶⁹⁵, V4458⁶⁹⁶, and V4417⁶⁹⁷. In these videos the population appears to be calm, which would not be the case if shelling were taking place on such a mass scale, even if the shelling is not depicted therein.

“Some UNPROFOR members, for their own safety have crossed into our territory and are our guests now, well sheltered and safe”

ABiH Attacks Against DutchBat

⁶⁹² Boering, P., T. 1927 (19/09/06).

⁶⁹³ Kingori, J., T. 19216-19217, 19191-19193 (13/12/07), Kingori, J., T. 19487-19489, 19536-19538 (11/01/08).

⁶⁹⁴ P 4536, dated 12 July 1995 (Video containing footage of Potocari on 12 July 1995).

⁶⁹⁵ P 2047 (Srebrenica Trial Video and Transcripts, ERN V 3851)

⁶⁹⁶ V4458

⁶⁹⁷ V 4417, dated 10 July 1995 (One Portion of V 4417 Showing Bosnian Muslim Troops in Srebrenica Town)

184. As evidenced below and as stated in P2753, *at least some* DutchBat soldiers crossed over for their own safety to Serb territory. Events of January 1995 and of 8 July 1995 in particular were decisive insofar DutchBat withdrawing through Serb rather than through Muslim lines.
185. Towards the end of January 1995, Muslim fighters captured 100 UN personnel in the Bandera Triangle and kept them hostage for a few days, during which they lived in poor conditions.⁶⁹⁸ The relationship between DutchBat and the armed Bosnian Muslim men became “quite troubled” thereafter.⁶⁹⁹ It cumulated in the killing on 8 July by a Bosnian Muslim soldier of Private Van Renssen when together with other DutchBat troops Van Renssen was attempting to withdraw from OP F. This act was “tantamount to murder”, according to General Gobillard.⁷⁰⁰
186. Franken then ordered that OPs withdraw only when given permission to do so (i.e. when there was an agreement with the local Muslim commander). DutchBat was “very keen to prevent the shooting of more soldiers by the ABiH”.⁷⁰¹ In the absence of such an agreement, DutchBat were at a “greater risk” and were instead told to await the arrival of Serb troops and surrender to them.⁷⁰² This instruction depended on what those at the OPs felt to be the safest course of action.⁷⁰³
187. There were other such attacks against DutchBat, including: (i) the grenade attack in the evening of 8 July by Bosnian Muslims against Lieutenant Egbers when he

⁶⁹⁸ Koster, E., T. 3118 (27/10/06). *See also* Boering, P., T. 1883-1885 (19/09/06) (Troops under the command of Zulfo [Tursunovic] took approximately ten DutchBat hostage near OP Charlie, including the witness because they tried to patrol the Bandera Triangle, which was a DutchBat no-go area, according to Zulfo); Egbers, V., T. 2906 (20/10/06) (In January/February the witness was taken hostage in the Bandera Triangle by men under the command of a man named Zulfo)

⁶⁹⁹ Egbers, V., T. 2859 (20/10/06).

⁷⁰⁰ Fortin, L., T. 18363, 18396 (28/11/07); 6D 45, dated 10 July 1995 (Letter, from Lieutenant General Bernard Janvier, to General Rasim Delic) (“There is no question that the fire came from your soldiers. I am unable to admit such flagrant and totally unnecessary action against my soldiers...”). *See also* Smith, R., T. 17763 (09/11/07) (That the killing of Van Renssen was discussed at Geneva).

⁷⁰¹ Franken, T. 2478 (16/10/06). *See also* Nicolai, C, T. 18567 (30/11/07) (Whilst DutchBat were not attacked by Muslim troops if they remained at their OPs and performed their duties, they “encountered an impediment” on the part of the ABiH when they wanted to leave their positions).

⁷⁰² *See* Franken, R., T. 2619 (17/10/06).

⁷⁰³ Butler, R., T. 19793 (16/01/08).

drove to OP U;⁷⁰⁴ (ii) Captain Hageman and Egbers coming under AK-47 fire on the morning of 10 July by Bosnian Muslims because, as Egbers believed, they were sure that DutchBat would abandon them;⁷⁰⁵ and (iii) The positioning by Muslim fighters of an RPG on Lieutenant Van Duijn's blocking position on 10 July in order to make him and his unit stay there.⁷⁰⁶ In such circumstances, and given the danger as a result of the killing of Van Renssen, most of those at the OPs elected to put themselves into the custody of the VRS rather than transit through Muslim lines.⁷⁰⁷

188. DutchBat thus fled voluntarily to Serbian territory insofar as they were more afraid of passing the ABiH positions and felt that the Serbs would treat them better than the ABiH soldiers.⁷⁰⁸ As noted by the Prosecution, DutchBat went to the Serb side following the killing of Van Renssen "and were taken by the VRS in a humanitarian way and set up in Hotel Fontana".⁷⁰⁹ Milenko Jevdjovic explained:

You should have seen the enthusiasm of those UNPROFOR soldiers when they came to our side and their frightened faces when a colleague of theirs, a soldier, was killed by Muslim fire an hour before I encountered them; that fire was intentional, it was not accidental.⁷¹⁰

⁷⁰⁴ Egbers, V., T. 2710 (18/10/06).

⁷⁰⁵ Egbers, V., T. 2795-2797 (19/10/06), Egbers, V., T. 2869 (20/10/06).

⁷⁰⁶ Van Duijn, L., T. 2398-2399, 2403 (29/09/06), Van Duijn, L., T. 2267 (27/09/06), Van Duijn, L., T. 2376, 2283 (28/09/06).

⁷⁰⁷ See Butler, R., T. 19794 (16/01/08) and P 236, dated 9 July 1995 (Daily Combat Report, strictly confidential no. 03-253-99, from Commander Vidoje Blagojevic, to Command of the Drina Corps) ("Two UNHCR vehicles with 15 UNPROFOR soldiers who fled to our territory were brought into the brigade command and have been put up in the Hotel Fontana in Bratunac"). See also Nicolai, C, T. 18542 (30/11/07) (In some cases, DutchBat surrendered because they thought it "too risky" to withdraw across ABiH lines).

⁷⁰⁸ Nicolai, C, T. 18477 (29/11/07). See also Nicolai, C, T. 18468 (29/11/07) (On 9 July, the witness spoke to Zrdavko Tolimir about the return of DutchBat soldiers who fled their OPs to Serb territory as a result of their fear of moving across ABiH positions); P 2972, dated 9 July (Notes of Telephone Conversation between General Nicolai and General Tolimir on 9 July at 1230 hours) ("[General Tolimir] asked General Nicolai that his men go to Bratunac immediately, while he would order his troops to enable them to proceed to Zvornik. When on the BSA territory, his men would be received by his troops, he would immediately pass the instructions to the BSA units accordingly"); Nicolai, C, T. 18567 (30/11/07) (DutchBat that surrendered at their Ops were well-treated by the VRS); Celanovic, Z., T. 6680-6681 (31/01/07) (The witness saw a large group of DutchBat in front of the military police building in Bratunac in July; they were armed with their rifles. The military police commander informed him that they had either surrendered or crossed over to the Serb side following the death of Van Renssen; also, they felt threatened by the Muslims and by the Serbs, but trusted the latter and believed that they would not harm them). Jankovic Z.T. 3871-3872 (09/11/06)

⁷⁰⁹ See OTP Opening Statement, T. 420-421 (21/08/06).

⁷¹⁰ Jevdjovic, Milenko., T. 29732 (15/12/08).

189. Mirko Trivic similarly confirmed with regard to a crew of an armoured APC on 9 July, that UNPROFOR “surrendered fully” to Serb forces “with all their weapons and equipment, and asked for our protection”. They were afraid, he said, that the 28th Division would use them as human shields.⁷¹¹ **REDACTED.**⁷¹² **REDACTED.**⁷¹³ The following day, two soldiers asked Bojan Subotic’s commander to provide them with security because they believed that they could not reach their base safely.⁷¹⁴ Clearly (i.e. on this basis alone), and as stated in P2753, some DutchBat for their own safety crossed into VRS-controlled territory.
190. Surrender to Serb forces was not the only option, however. On 8 July, Franken ordered the withdrawal of OP F because the ABiH was no longer positioned there. The crew was then allowed, once checked over by Serb forces, to pull out to Srebrenica.⁷¹⁵ On 9 July, Lieutenant Koster’s colleagues whilst stationed at OPs U and S were approached by VRS servicemen. The Serbs gave the Dutch troops the choice of either returning to the compound or of driving into Serbian held territory.⁷¹⁶ Similarly, all members that withdrew from OP P on either 13 or 14 July returned to the UN base.⁷¹⁷

⁷¹¹ Trivic, M., T. 11887, 11888 (21/05/07) and 6D 22, dated 9 July 1995 (Interim Combat Report, strictly confidential no. 08/95 from General Krstic to the VRS Main Staff and the Drina Corps Command. Received on 9 July at 2320 hrs). *See also* Jevdjevic, Milenko, T. 29532-29533 (11/12/08) (After the death of Van Renssen, DutchBat pulled out on 9 July behind Serb lines towards Zeleni Jadar, where Krstic ordered the witness to receive them and take them to a safe area (i.e. Pribicevac). The said soldiers were in four APCs and already moving from Zeleni Jadar to the roads leading to Pribicevac. They remained at all times in their own combat vehicles).

⁷¹² PW-138, T. 3819, 3826, 3872 (06/11/09) Private Session.

⁷¹³ PW-138, T. 3872 (06/11/09). Private Session. *See also* PW-138, T. 3872 (06/11/09); PW-138, T. 3856 (06/11/09) Private Session.

⁷¹⁴ Subotic, B., T. 24994-24997, 25010 (01/09/08).

⁷¹⁵ Franken, R., T. 2460 (16/10/06); Franken, R., T. 2589 (17/10/06).

⁷¹⁶ Koster, E., T. 3121 (27/10/06). *See also* Adjudicated Fact 95 (“Some of the Dutch soldiers retreated into the enclave after their posts were attacked, but the crews of the other observation posts surrendered into Bosnian Serb custody”).

⁷¹⁷ Franken, R., T. 2589 (17/10/06).

*DutchBat Soldiers in VRS Custody were not used as Propaganda*⁷¹⁸

191. Milan Gvero may have had the knowledge on or about 9 July of the following order issued pursuant to that of Radovan Karadžić, to Krstic: “you must issue an order to all combat units participating in combat operations around Srebrenica to offer maximum protection and safety to all UNPROFOR members...”.⁷¹⁹ In addition, Mirko Trivic confirmed as per the contents of 6D22⁷²⁰ that UNPROFOR members at the Slapovici and Bocija checkpoints surrendered to Serb forces complete with weaponry and equipment, and sought their protection.⁷²¹ Milenko Jevdjevic also confirmed that he was aware of the event as described.⁷²² On 10 July, similar information from Radislav Krstic addressed to the VRS Main Staff reached Pribicevac.⁷²³

192. The relevant excerpt (“some UNPROFOR members, for their own safety have crossed into our territory and are our guests now, well sheltered and safe”) was thus not used as propaganda.⁷²⁴ Rather, it was an accurate reflection of the events as they were at the time and indeed of Milan Gvero’s knowledge thereof.

⁷¹⁸ Cf OTP Opening Statement, T. 467 (22/08/06).

⁷¹⁹ P 33, dated 9 July 1995. Please see above submission as to how the Defence are addressing P33 in the alternative.

⁷²⁰ 6D 22, dated 9 July 1995 (Interim Combat Report, strictly confidential no. 08/95 from General Krstic to the VRS Main Staff and the Drina Corps Command. Received on 9 July at 2320 hrs).

⁷²¹ Trivic, M., T. 11886-11887 (21/05/07).

⁷²² Jevdjevic, Milenko., T. 29687 (15/12/08) and 6D 22, dated 9 July 1995 (Interim Combat Report, strictly confidential no. 08/95 from General Krstic to the VRS Main Staff and the Drina Corps Command. Received on 9 July at 2320 hrs).

⁷²³ Jevdjevic, Milenko., T. 29691 (15/12/08) and 6D 23, dated 10 July (Interim Combat Report, strictly confidential no. 11/95, from Chief of Staff Major General Radislav Krstic, to the Main Staff of the VRS /Army of Republika Srpska and K-DC/ Drina Corps Command) (“On the basis of surveillance and monitoring of the situation in the Srebrenica enclave, as well as the statements of UNPROFOR soldiers who surrendered to our forces and asked for our protection, we conclude that the Muslim army has surrounded UNPROFOR and assumed control over it”).

⁷²⁴ See OTP Opening Statement, T. 467 (22/08/06) (The statement that ‘some UNPROFOR members, for their own safety have crossed into our territory and are our guests now’ “all part of the ongoing operation to get his public behind him and get the word out to the whole world in a false way to allow their job to be easier”).

“Our combat activities at the moment are directed towards simply neutralising the Muslim terrorists and are in no way directed against members of UNPROFOR”

193. The Defence submit as evidenced below, that the VRS directed their attack against ABiH positions located in the direct vicinity of DutchBat OPs and of DutchBat blocking positions and not against DutchBat *per se*.

ABiH Positions at DutchBat OPs

194. Dragisa Masal explained with regard to P3785⁷²⁵ that a number of features, including UN checkpoints, are planned as targets for artillery fire but they are not automatically targets as such. The plan is used only in order to be able to quickly establish the coordinates for the target (i.e. enemy force) that shows up. In most cases, targets appear in the immediate vicinity of or at a short distance away, enabling the artillery to fire on those targets on the basis of existing elements in the plan.⁷²⁶ The Prosecution noted with regard to P4097, for example, “This is assuming, ... as we see in this order, assuming UNPROFOR is leaving. So it's not talking about any operation to do with UNPROFOR, but this is the operation to fight the Muslims when

⁷²⁵ P 3785, undated (Cut out from Drina Corps Command Map entitled, “Susica Combat Plan of the Drina Corps”, approved without signature by Colonel General Ratko Mladic and Major General Milenko Živanovic, showing combat activities in the Srebrenica and Žepa enclaves).

⁷²⁶ Masal, D., T. 29127-29129 (02/12/08) and P 3785, undated (Cut out from Drina Corps Command Map entitled, “Susica Combat Plan of the Drina Corps”, approved without signature by Colonel General Ratko Mladic and Major General Milenko Živanovic, showing combat activities in the Srebrenica and Žepa enclaves). See also Gavric, M., T. 26509-26510 (01/10/08) and P 2884, undated (Drina Corps Map entitled, Excerpt from the Drina Corps Artillery Activities Plan regarding the Srebrenica and Žepa Enclaves, coded Susica-95, approved and signed by Major General Milenko Živanovic and Colonel Stojan Veletic, showing the positions of artillery) (The witness explained with regard to the identification on P2884 of an UNPROFOR OP, that this does not mean that one intends to fire thereon; rather, all locations and features are identified in order to enable the firing crew to move quickly from one object to another if the enemy moves rapidly); Gavric, M., T. 26505-26506 (01/10/08) and P 3025, dated 5 July 1995 (Order for Active Combat Order, Operational Number 1, confidential no. 439-2, from Commander Colonel Vidoje Blagojevic, to Commands of the 1st, 2nd, 3rd, and 4th Infantry Battalion) (The witness testified with regard to the planned targeting *inter alia* of the 11 March Factory (which was at some point used as a storage facility for UN equipment and located outside the UN compound), that the Bratunac Brigade did not fire thereon: just because something is planned does not mean that it is carried out in the field); Butler, R., T. 20720 (30/01/08) (The witness is not aware of any direct information that the 11 March Factory was shelled).

they come try to fill the gap.”⁷²⁷ Most often it was the case however, that the 28th Division positioned itself in the direct vicinity of UN OPs still manned by DutchBat and fired on Serb forces from that point.

195. Franken recalled one occasion in February 1995 in the surroundings of OP A in which ABiH soldiers, complete with blue hats came within a distance of 15 metres from one of the OPs. Resembling UN personnel, they opened fire in the direction of the VRS front line. In doing this, the Bosnian Muslim combatants were attempting to draw fire from the VRS onto the OP and thus involve DutchBat in the combat actions. DutchBat protested to the 28th Division, but to no avail.⁷²⁸ According to Koster, “firing was sometimes provoked: Muslim fighters would take up positions at observation posts at night and fire in the direction of the Serb[s], who would respond by firing back.”⁷²⁹

196. Bosnian Muslim soldiers maintained shadow positions near UNPROFOR OPs “most of the time.”⁷³⁰ There was also “a significant increase” in the Bosnian Muslim heavy weapons operating from near UNPROFOR facilities in June 1995.⁷³¹ The Serbs threatened at the beginning of June to shoot at ABiH soldiers using artillery or other weapons if they kept shooting at them from UN positions.⁷³² Whilst this message was conveyed to the ABiH by UNMOs,⁷³³ the positioning in July of Bosnian Muslim weapons near the TACP operated by British soldiers “hampered the situation

⁷²⁷ T. 29726 (15/12/08) and P 4097, dated 29 May 1995 (Order Taking Control of the Area of Zeleni Jadar, strictly confidential no. 04/4-136-2, from Commander Major General Milenko Živanovic, to the Commands of the 1st Zvornik Infantry Brigade, 1st Bratunac Light Infantry Brigade, the Independent Infantry Battalion Skelani).

⁷²⁸ Franken, R., T. 2626-2627 (18/10/06) (The witness also received one or two reports where Dutchbat saw a couple of ABiH soldiers with blue berets within a distance of 400 or 500 meters). *See also* Fortin, L., T. 18357 (28/11/07) (In June and July 1995, “we felt that the Bosnian Muslims tried at time to draw UNPROFOR into the conflict against the Serbs”).

⁷²⁹ Koster, E., T. 3119 (27/10/06). *See also* Egbers, V., T. 2862 (20/10/06) (Bosnian Muslims would fire at DutchBat from near the border of the enclave so that DutchBat thought the VRS was firing at them, and return fire on the VRS).

⁷³⁰ *See* Adjudicated Fact 41.

⁷³¹ Fortin, L., T. 18356-18363 (28/11/07).

⁷³² Kingori, J., T. 19497-19498 (11/01/08).

⁷³³ Kingori, J., T. 19497-19498 (11/01/08).

for DutchBat” with regard to the air support on 11 July, according to Louis Fortin.⁷³⁴ Similarly, Radislav Krstic on 11 July ordered his commanders to by-pass UNPROFOR at trig point Biljeg. The latter complained, however, of the infiltration by the 28th Division into UN shelters and of their fire on Serb forces from these UN shelters, which complicated the combat situation “significantly”.⁷³⁵

ABiH at DutchBat Blocking Positions

197. On 9 July there was a continuing battle between ABiH and VRS forces.⁷³⁶

During the course of the day, the Bosnian Muslim fighters, including some dressed in Ukrainian uniforms, were positioned with a Mike 48 (a piece of artillery), an RPG-47, and an AK-47 from within 40-50 metres DutchBat at Bravo 1.⁷³⁷ Whilst fire came from the VRS on 9 and 10 July, Lieutenant Egbers was not sure whether he was the target or if it was aimed at the said piece of artillery.⁷³⁸ Similarly, on 10 July, whilst shells were aimed at Lieutenant Van Duijn’s general location, he was unable to say if they were aimed directly at any UN APC.⁷³⁹ On the same day Muslim positions, which were located a few metres away from his first blocking position (two or three kilometers from Bravo Company) had trained an RPG on his unit in order to make them stay.⁷⁴⁰

198. Also on 10 July, ABiH forces in the surroundings of Srebrenica town probably shot at the VRS when they approached. “It’s obvious”, according to Franken, that

⁷³⁴ Fortin, L., T. 18362-18363 (28/11/07).

⁷³⁵ Jevdjevic, Milenko, T. 29606 (12/12/08). See also Butler, R., T. 19782 (16/01/08) and P 3025, dated 5 July 1995 (Order for Active Combat Order, Operational Number 1, confidential no. 439-2, from Commander Colonel Vidoje Blagojevic, to Commands of the 1st, 2nd and 3rd, and 4th Infantry Battalion) (Butler does not believe there were any instances where the VRS targeted the UN deployed check-points with the goal of preventing them from withdrawn from their positions).

⁷³⁶ Franken, R., T. 2461 (16/10/06).

⁷³⁷ Egbers, V., T. 2792-2793 (19/10/06). See also Egbers, T. 2798 (06/10/19).

⁷³⁸ Egbers, V., T. 2870-2871 (20/10/06) (He does not know if he was the intended target of fire because he was not hit). See also Egbers, V., T. 2715 (18/10/06); Egbers, V., T. 2909-2910, 2934, 2945 (20/10/06).

⁷³⁹ Van Duijn, L., T. 2401 (29/09/06).

⁷⁴⁰ Van Duijn, L., T. 2254, 2383, 2398-2399 (29/09/06). See also Van Duijn, L., T. 2376, 2382 (28/09/06); Van Duijn, L., T. 2266-2267 (27/09/06) (Prior to withdrawing to the north on the night of 10 July, the ABiH blocked the witness’ positions and would not allow him to leave. He spent all of the day light hours and night at his blocking position until he retreated on 11 July).

this would have been done in the vicinity of the blocking positions.⁷⁴¹ In the words that day of Lieutenant General Janvier,

The BiH will continue to try to block DutchBat in their OPs or in positions in front of the BiH. This will involve the use of force. They can co-locate with UN positions to use them as human shields. This might provoke a reaction from the BSA with a risk for UN personnel to get caught in cross-fire between both factions.⁷⁴²

199. With regard to Milan Gvero's knowledge at the relevant time, the Main Staff on 8 July ordered Krstic not to attack UNPROFOR, "but to prevent any surprises and stop the Muslims in their intention to join up Srebrenica."⁷⁴³ Although Gvero left Pribicevac before P33 was received there⁷⁴⁴ (and therefore never saw this document), his state of mind was consistent with P33, in that he also wished for UNPROFOR to be protected from attacks.⁷⁴⁵ Indeed, Milenko Jevdjevic confirmed with regard to 9 July that he had information *inter alia* that UNPROFOR forces should not be targeted and that this information at Pribicevac corresponded to information on the ground.⁷⁴⁶ Such reports were sent to the Main Staff and would be the only information one reading them would have.⁷⁴⁷

⁷⁴¹ Franken, R., T. 2628 (18/10/06).

⁷⁴² 6D 204, dated 10 July 1995 (UNPF – HQ Daily Sitrep 090001B to 092359B Jul 95, from LGen Janvier FC UNPF, to *inter alia* MNEMONIC 670). See also Pandurevic, V., T. 31988-31990 (23/02/09) (280th Brigade Forces were deployed like elsewhere, in facilities located very close to the UN base in Potocari) and 4D135, dated 22 February 1995 (List of Office Space Used by the OS/ Armed Forces/ of the Republic of BH, strictly confidential no. 03-55-2/95, from Chief of the Defence Department Professor Suljo Hasanovic, to Tuzla Secretariat of Defence) and 4D 653, dated 4 February 2009 (Republika Srpska Republican Land Survey and Property Rights Administration for Srebrenica Municipality) and 4D 683 (Video of Google Earth Imagery of Hrvacic Plot, North of DutchBat Compound, Potocari). See also Pandurevic, V., T. 31994 (23/02/09) (The Battalions and Companies were deployed close to the UNPROFOR checkpoints on the Zelene-Jadar-Srebrenica axis).

⁷⁴³ P 109, dated 8 July 1995 (Untitled, strictly confidential no. 04/156-5, from Major General Milenko Živanovic, the Drina Corps Command, to Pribicevac Drina Corps Forward Command Post to Major General Radislav Krstic personally and Main Staff of the VRS, to Major General Zdravko Tolimir, for information). Although Gvero was actually in Belgrade on this day.

⁷⁴⁴ See submissions in this brief in relation to paragraph 76(a)(ii) of the Indictment.

⁷⁴⁵ P 33, dated 9 July 1995 (Conduct of Operations around Srebrenica, from Assistant Commander Major General Zdravko Tolimir, to the President of the Republika Srpska for information, the Drina Corps Forward Command Post, and to Generals Gvero and Krstic, personally).

⁷⁴⁶ Jevdjevic, M., T. 29692 (15/12/08).

⁷⁴⁷ Jevdjevic, M., T. 29687, 29692-29693 (15/12/08).

200. Combat reports sent up the chain of command stated too, that no weapons were used against the UNPROFOR base.⁷⁴⁸ If such things had happened at Zeleni Jadar and Djoko [phoen] Brdo areas (the location at which Van Renssen was killed), UNPROFOR soldiers at the said location would not have sought the protection of the VRS from Muslim forces.⁷⁴⁹ Contrary then, to the relevant allegations,⁷⁵⁰ the statement in the Trump Card that UNPROFOR was not the object of the VRS attack, is true.

DutchBat POWS

201. In addition to the evidence discussed above of members of DutchBat not being the object of the VRS attack, the Defence submit (in the alternative, if need be) that the VRS was nevertheless entitled under the laws of war, to take them from the fallen or withdrawn OPs as prisoners of war (POWs).⁷⁵¹

202. On 9 July, UNPROFOR higher command ordered Franken to defend Srebrenica town “with all their military means”.⁷⁵² The operational order issued by him to B Company required all units to be in blocking positions at 0500 hours.⁷⁵³ This “seriously intended green order” meant that Franken could immediately use all his means without UN execution restrictions. They now had to proceed as a normal army and were no longer neutral, for they had started firing on the VRS⁷⁵⁴ and were

⁷⁴⁸ Gavric, M., T. 26526 (01/10/08).

⁷⁴⁹ Gavric, M., T. 26527 (01/10/08).

⁷⁵⁰ See OTP Opening Statement, T. 467 (22/08/06) (The statement that ‘some UNPROFOR members, for their own safety have crossed into out territory and are our guests now’ “all part of the ongoing operation to get his public behind him and get the word out to the whole world in a false way to allow their job to be easier”).

⁷⁵¹ See Nicolai, C, T. 18477-18478 (29/11/07) (In the following days of DutchBat surrendering to the VRS, those manning their OPs then surrendered to armed Serbs because they felt threatened).

⁷⁵² Franken, R., T. 2462 (16/10/06).

⁷⁵³ Franken, R., T. 2462, 2465 (16/10/06) and P 2263, dated 9 July 1995 (Order from Major Franken to Captain Groen, Commander of B Company).

⁷⁵⁴ Franken, R., T. 2464-2465 (16/10/06), Franken, R., T. 2537 (17/10/06), Rutten, J., T. 5246 (07/12/06). See also Van Duijn, L., T. 2403 (29/09/06) (During the morning of 10 July, Captain Groen ordered over the radio that the witness shoot directly at the Serb forces); Van Duijn, L., T. 2376 (28/09/06) (The gunner did shoot).

engaged in armed confrontation with the VRS.⁷⁵⁵ At the relevant time then, DutchBat did not benefit from protection afforded to civilians in time of armed conflict (i.e. insofar as protected from being the object of attack).⁷⁵⁶

203. Furthermore, Egbers testified with regard to the aircraft involved in the close-air support at approximately 1400 hours on 11 July, the target of which (a Serb tank) was either hit or demolished, that they could have been associated with the UN⁷⁵⁷ (i.e. with a party to the armed conflict).⁷⁵⁸ As noted by Franken, some soldiers were brought to Milici, “but in the end, they all ended up as POWs in Bratunac”.⁷⁵⁹

204. With regard to the allegations of UN OPs having been attacked prior to the issuance of the green order⁷⁶⁰, DutchBat – albeit unwillingly – and as a matter of law, became a party to the armed conflict at the moment they were first targeted by fire by

⁷⁵⁵ See Franken, T. 2607-2608 (17/10/06) (Once one fires back on the Serb army, or any army for that matter, this is likely to cause the opposing army to treat you as hostile and now use force on you).

⁷⁵⁶ Whilst peacekeeping forces are usually professional soldiers, state practice treats such forces as civilians *so long as they do not take a direct part in hostilities*. International Committee of the Red Cross, *Customary International Humanitarian Law*, Volume 1: Rules, Cambridge: Cambridge University Press (2005), p. 112 (emphasis added). By virtue of peacekeeping personnel using force, they are drawn into and engage in hostilities and act as combatants, thereby forgoing their protection as civilians under international humanitarian law. Michael Cottier, War Crimes – para. 2 (b)(iii), in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Salzburg: Nomos Verlagsgesellschaft (1999), p. 195. Once captured, combatants become POWs. Their enemies may thus not be punished for having attacked UN forces during armed hostilities. See Marco Sassòli, International Humanitarian Law and Peace Operations, Scope of Applications *ratione materiae*, in: International Humanitarian Law, Human Rights Law, and Peace Operations, 31st Round Table on Current Problems of International Humanitarian Law , Proceedings, San remo, 4-6 September 2008, pp 105-106.

See also Rome Statute of the International Criminal Court Article (U.N. Doc. A/CONF.183/9*) and in particular, 8(2)(b)(iii) thereof: “Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”. Article 2(2) of the *Convention on the Safety of United Nations and Associated Personnel* reads as follows: “This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies”.

⁷⁵⁷ Franken, R., T. 2485 (16/10/06); Egbers, V., T. 2716, 2717 (18/10/06); Egbers, V., T. 2879 (20/10/06).

⁷⁵⁸ The VRS could thus reasonably have perceived DutchBat as a party to the armed conflict.

⁷⁵⁹ Franken, T. 2479 (16/10/06).

⁷⁶⁰ See e.g., Indictment para. 53 (“On 3 June 1995, VRS forces attacked United Nations observation Post (OP) Echo...”); Indictment para. 54 (“On or about 6 July 1995, pursuant to General Živanovic’s order of 2 July 1995, units of the Drina Corps ... attacked OPs manned by DutchBat, which were located outside the enclave”).

another party to the said conflict.⁷⁶¹ The Defence note too, with regard to the relevant allegations⁷⁶² and as a matter of law, that the VRS did not terrorise DutchBat: to do so vis-à-vis a party to the armed conflict is not prohibited under the laws of war.⁷⁶³

Conclusion

205. The language used in the Trump Card did not lead to the commission of crimes. In fact, no such evidence has been adduced to this effect. The prosecution has failed to prove its case in this regard and has failed to prove beyond reasonable doubt that Milan Gvero issued a false statement. This means that he did not further the JCE as charged (i.e. *by the release of the Trump Card*), and that he did not assist in the take-down of the enclave.

⁷⁶¹ Marco Sassòli explains with regard to the level of violence necessary for an armed conflict to arise, that “If there are hostilities, then the legal basis of the use of force and the mandate of the international forces are irrelevant. Even if they have the mandate not to use force or to use force only in individual self defence, if they are attacked by the enemy they have to decide whether to run away or to use force and then the law of international armed conflict applies. It is like the case of a Swiss soldier who defends Switzerland against ... a French attack. The Swiss soldier has no will and no mandate to make war. He only wants to protect Switzerland, but once the French attack, then, independently of the fact that the Swiss soldier does not want that, the law of international armed conflicts applies and he becomes, under that law, a lawful target”. Sassòli explains, further, “Since [peacekeeping forces] have uniforms and weapons, and they are driving around in armoured personnel carriers, I would submit that they look like combatants and must be combatants.” Marco Sassòli, *International Humanitarian Law and Peace Operations, Scope of Applications ratione materiae*, in: *International Humanitarian Law, Human Rights Law, and Peace Operations*, 31st Round Table on Current Problems of International Humanitarian Law, Proceedings, San Remo, 4-6 September 2008, pp 102, 103-104. Furthermore, the *Convention on the Safety of United Nations and Associated Personnel* (9 December 1994) entered into force only on 15 January 1999 and was not in force at the relevant time. That is to say, there was no prohibition under international law – and none under customary international law – that prohibited the targeting of UN peacekeepers.

⁷⁶² OTP Opening Statement, T. 467 (22/08/06).

⁷⁶³ *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, 5 December 2003, para. 135 (Acts of violence as reproduced in the elements of the war crime of terror against the civilian population include only unlawful attacks against civilians; they do not include legitimate attacks against combatants). See also The Commentary of Article 51(2) of Additional Protocol I, which reads in relevant part that “[i]n the second sentence the [Diplomatic] Conference wished to indicate that the prohibition covers acts intended to spread terror; there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here.”

Gvero's alleged participation in the JCE: Indictment paragraph 76(a)(ii)

“Defeating the Muslim forces militarily:- he assisted in the attack on the Srebrenica enclave from the Drina Corps Forward Command Post on 9 July 1995 and advised General Krstic on the ongoing operation.”

Introduction

206. Milan Gvero was not assigned to oversee the Srebrenica operation, he was not competent to assist in the attack and to advise Radislav Krstic, and he neither assisted nor advised in this regard. The test here is a conjunctive one. The Prosecution bear the burden of proving beyond reasonable doubt both factual allegations as charged: that Milan Gvero assisted in the attack on the enclave and that he advised Krstic, as alleged..

Milan Gvero was not Assigned to Oversee the Srebrenica Operation

207. The evidence at trial has not been at all suggestive that Milan Gvero was sent by Ratko Mladic to the IKM.⁷⁶⁴ At the very least, it allows reasonably for the possibility that Milan Gvero was there for other reasons on 9 July.

208. It is worth remembering, by way of background, the evidence of Novica Simic, the Commander of the 2nd KK, that Assistant Commanders would frequently drop by to see him, and to refuel their vehicles when on their way towards Banja Luka. Because this trip would sometimes take several hours, Milan Gvero would call the

⁷⁶⁴ See OTP Opening Statement, T. 397 (21/08/06) (“[Mladic] would send [Milan] Gvero to Srebrenica to the forward command post. ... This is how he commanded”). See OTP Pre-Trial Brief, para. 30 (“Mladic relied *inter alia* on [Milan] Gvero as his principal advisor on whom he could make sure his orders were carried out. For example, ... [Milan] Gvero was assigned to oversee the Srebrenica operation on 9 July and was present at that time at the forward command post at Pribicevac. He was carrying out his responsibilities in the field”).

staff to see *inter alia* if there was anything new, visit Novica Simic, and would then continue on his original task.⁷⁶⁵

209. With specific regard to Pribicevac on 9 July, Milan Gvero arrived there in a private car with only a driver rather than also with a body guard (indicating that he was travelling in a private, rather than an official, capacity)⁷⁶⁶ and was seen there at approximately noon by prosecution witnesses Momcilovic and PW-162, as well as by Trisic.⁷⁶⁷ Bozo Momčilovic assumed that Milan Gvero arrived from Belgrade because he brought with him Belgrade editions of daily newspapers (one could not buy any magazines or newspapers in Bratunac at that time). It was only logical, he continued, that Milan Gvero would bring the newspapers to the IKM because he was in charge of the morale of the troops.⁷⁶⁸ Indeed, Milan Gvero informed PW-162 that he was on his way from Belgrade and that he dropped by the IKM to see Krstic and to see either the brigade or the battalion.⁷⁶⁹ Witness Zoranovic also confirmed that he drove Milan Gvero to and from Belgrade around 9th July⁷⁷⁰. Similarly, Novica Simic learned that the road was blocked and that Milan Gvero chanced to stop by the IKM.⁷⁷¹ Witness Milenko Jevdjevic additionally testified that he met Milan Gvero at Pribicevac at 9th July.⁷⁷² However this witness erroneously took PW-162 and Trisic for Milan Gvero's body guard as they travelled together to the Command Post.⁷⁷³ Witness 6DW-02 was Milan Gvero's only bodyguard in that period of time but he did not go with him to Belgrade nor to Pribicevac that day.⁷⁷⁴

⁷⁶⁵ Simic, N., T. 28604-28605 (21/11/08).

⁷⁶⁶ Zoranovic. N T.33905.

⁷⁶⁷ Momcilovic, B., T. 14080-14081 (22/08/07); PW-162 T.9332 (23/03/07); Trisic, D., T. 27116-27117 (21/10/08).

⁷⁶⁸ Momcilovic, B., T. 14093-14094 (22/08/07).

⁷⁶⁹ PW-162, T. 9332 (23/03/07).

⁷⁷⁰ Zoranovic. N T.33902

⁷⁷¹ Simic, N., T. 28604 (21/11/08).

⁷⁷² Jevdjevic M. T. 29693 (15/12/08)

⁷⁷³ PW-162 T.9332 (23/03/07) ("The command post was about 250 to 300 metres from the logistics base, and we went there together; DT, the General and I").

⁷⁷⁴ 6DW02 T.33853 (02/07/09)

210. The evidence therefore falls short of establishing beyond reasonable doubt that Milan Gvero was assigned to oversee the Srebrenica operation. In fact, on the evidence, Milan Gvero went to the IKM for perfectly innocent reasons.

Milan Gvero was not Competent to Assist in the Attack and to Advise Krstic⁷⁷⁵

211. As stated above there is no evidence that Milan Gvero went to the IKM pursuant to any order, or request of anyone, still less Mladic. At any rate and in addition it is the Defence case that merely by virtue of being an assistant commander, Milan Gvero did not have the skills and the knowledge to conduct military operations (i.e. lead troops in combat).

212. The only witness who testified that every General, including Milan Gvero, by virtue of being a commander had the skills to lead troops into combat was prosecution witness Milovanovic. However, even he conceded that he did not believe that Milan Gvero *actually had* the experience to conduct military operations.⁷⁷⁶ Indeed, after the first five years of Milan Gvero's career, during which he was a platoon leader, most of his professional life was spent dealing primarily with political branch issues and not the mainstream track of an infantry officer who would work within a battalion or a brigade command.⁷⁷⁷

213. Smith claimed that:- "But if you've put one of these forward headquarters forward and if you've put one of these senior commanders in it, then he's commanding in your name, in this case in General Mladic's name, across the whole range of your -- of the responsibilities."⁷⁷⁸ The evidence suggests that, contrary to this rather broad and

⁷⁷⁵ See also submissions in this brief in relation to paragraph 76(d)(i) of the Indictment.

⁷⁷⁶ Milovanovic, M., T. 12250-12251 (30/05/07). See also submissions in this brief in relation to paragraph 76(d)(i) of the Indictment.

⁷⁷⁷ **REDACTED** Butler, R., T.20950. See also Milovanovic, M., T. 12251 (29/05/07) (From what the witness could see in Milan Gvero's biography, his only command responsibility was that of a platoon commander, after which he moved into lecturing and political responsibilities).

⁷⁷⁸ See Smith, R., T. 17583 (06/11/07).

generalised claim of Smith, that Milan Gvero as an assistant commander could not and did not cover the full range of responsibilities. It is also of particular note in this regard that Smith's testimony as an expert witness specifically precluded both the function and operation of the VRS Main Staff and the command doctrine of the VRS.⁷⁷⁹ So on that basis alone it would be quite wrong of the Trial Chamber to place any reliance on Smith's assertions in this regard.

214. Thus, contrary to the Prosecution allegation, Milan Gvero was simply not competent to be present at the IKM in order that key decisions could be made on whether or not to attack.⁷⁸⁰ Nor was he carrying out Mladic's intent via his derived authority by commanding in Mladic's name.⁷⁸¹ As described by Butler, Krstic controlled and directed the operation at the IKM.⁷⁸²

Milan Gvero did not Advise Krstic on the Ongoing Operation

215. No such advising actually occurred. On 9 July Dragoslav Trisic went together with Prosecution witness PW-162 to Pribicevac, where they first stopped at the rear sector of the 3rd Battalion.⁷⁸³ Trisic sat and had a coffee with Milan Gvero and PW-162, and primarily discussed every day things.⁷⁸⁴ The three of them then went to sit with Krstic.⁷⁸⁵ Milan Gvero and Trsic never went to the front line and Milan Gvero did not go to the elevation points to observe Srebrenica.⁷⁸⁶ Furthermore, Trisic, who was with Milan Gvero and Krstic for the duration of his and Gvero's stay at

⁷⁷⁹ *Prosecutor v. Popovic et al.*, Case No. IT-05-88-T, Second Decision Regarding the Evidence of General Rupert Smith, 11 October 2007, p. 5. Smith was not precluded from testifying to reasonable inferences he drew from his personal experience with the VRS Main Staff or from his direct observations of the functioning thereof and of its officers. *Idem*, p. 4. However, the weight afforded to such inferences is of course different to that afforded to expert testimony.

⁷⁸⁰ See OTP Opening Statement, T. 466 (22/08/06).

⁷⁸¹ See Butler, R., T. 20625 (29/01/08); OTP Opening Statement, T. 397, 422 (21/08/06) (Milan Gvero at Pribicevac "during the key moment of Srebrenica" is "a very typical Mladic command structure").

⁷⁸² Butler, R., T. 19794-19795 (16/01/08). See also OTP Opening Statement, T. 460 (22/08/06). ("Krstic, of course is commanding the operation").

⁷⁸³ Trisic, D., T. 27116-27117 (21/10/08).

⁷⁸⁴ Trisic, D., T. 27117, 27138-27139 (21/10/08).

⁷⁸⁵ Momcilovic, B., T. 14082-14083 (22/08/07).

⁷⁸⁶ Momcilovic, B., T. 14094 (22/08/07); Trisic, D., T. 27118 (21/10/08).

Pribicevac, did not see Milan Gvero suggesting any operational or other measures to Krstic. Nor did Milan Gvero ask Krstic to take any steps or the such like.⁷⁸⁷ PW-162 similarly testified that he did not believe that Milan Gvero advised Krstic about carrying out military operations – the operation was discussed in a general sense only (i.e. how it was going).⁷⁸⁸ That the military activities were discussed in a general sense is hardly surprising. No doubt, had these witnesses suggested otherwise, adverse comment to that effect would be made by the Prosecution (although it should be remembered that PW-162 was called by the Prosecution and at no time did they seek to impeach him as to credibility). At any rate there is no evidence to suggest that Milan Gvero actually advised Krstic in any way at all. Any conclusion to that effect would be utter speculation. It simply does not follow beyond reasonable doubt that Milan Gvero was advising in relation to the attack.

216. Also, Prosecution witness Bozo Momčilovic was at a place from which he was able to see how Krstic commanded and led the Srebrenica operation. He did not see anybody else assisting Krstic during the conduct of the operation, save the liaison officer Jevdjevic and Colonel Vukota. Nobody came from the outside to take over command, to give orders to the units, or to interfere with the commanding duties of Krstic.⁷⁸⁹

217. In addition to all of the above described evidence, Milan Gvero was not authorised to issue commands or to monitor Krstic.⁷⁹⁰ Nor did he usurp the responsibility or authority of Krstic as the Chief of Staff.⁷⁹¹ The IKM was under the direct command of the Drina Corps Command⁷⁹² and the troops deployed there in relation to the Srebrenica operations were all part of the Drina Corps and were all

⁷⁸⁷ Trisic, D., T. 27118-27119 (21/10/08).

⁷⁸⁸ PW-162, T. 9333-9334 (23/03/07).

⁷⁸⁹ Momcilovic, B., T. 14092-14093 (22/08/07).

⁷⁹⁰ Simic, N., T. 28604 (21/11/08).

⁷⁹¹ Butler, R., T. 20694-20695 (30/01/08).

⁷⁹² Jevdjevic, Milenko, T. 29504 (10/12/08).

operationally commanded by Krstic.⁷⁹³ The exclusive right at the Main Staff to approve decisions made by the corps commanders was vested in the commander of the Main Staff or his deputy, Milovanovic⁷⁹⁴ and not in Milan Gvero. Furthermore, the separation of the enclaves had already been completed by the time of Milan Gvero's visit to Pribicevac. There was in fact no operation during the time that Milan Gvero was there,⁷⁹⁵ which means of course that he could not have advised on the *ongoing* operation⁷⁹⁶, as alleged, because at that point in time there was in fact no ongoing operation, as alleged in the very specific and no doubt carefully drafted particulars of paragraph 76 (a) (ii) of the Indictment.

218. Richard Butler's explanation as to what Milan Gvero was doing at the IKM on 9 July is sheer speculation.⁷⁹⁷ His testimony that Milan Gvero's presence there was Main Staff customary practice to send these people to forward locations⁷⁹⁸ was a mere generalisation. His initial answer is hardly impressive or convincing when he says that "I don't have the specific document that articulates why he's there and exactly what he's supposed to accomplish there".⁷⁹⁹ And when pressed he, in effect, concedes the issue when he says (with what might be thought to be some slightly unfair facetiousness):- "I mean, I assume he wasn't there in a lounge chair, but I can't

⁷⁹³ Momcilovic, B., T. 14073-14074, 14092 (22/08/07). See also Obradovic, L., T. 28298 (17/11/08) (Krivaja 95 was within the zone of the Drina Corps).

⁷⁹⁴ Masal, D., T. 29065-29066 (01/12/08).

⁷⁹⁵ PW-162, T. 9333 (23/03/07); Momcilovic, B., T. 14095 (22/08/07); Jevdjevic, Milenko, T. 29687-29688 (15/12/08). See also 6D22, dated 9 July 1995 (Interim Combat Report, strictly confidential no. 08/95, from Chief of Staff Major General Radislav Krstic, to VRS GS and DK Command) ("On 9 July, our units carried out a fierce attack... thus separating the enclaves of Žepa and Srebrenica").

⁷⁹⁶ See Butler, R., T. 19794 (16/01/08) (P33 is the first document that the witness has seen that reflects because of the success of the combat operations, that now for the first time, the goal is going to be expanded to the occupation of Srebrenica town); Jevdjevic, Milenko, T. 29702-29703 (15/12/08) (Operation Krivaja 95 was not meant to take the town of Srebrenica. Karadžić modified the original Zivanovic order of 2 July and approved the takeover of the enclave). See also OTP Pre-Trial Brief, para. 54 ("On 9 July 1995, Karadžić modified the original [Zivanovic order of 2 July] and approved the takeover of the Srebrenica enclave"); OTP Opening Statement, T. 422 (21/08/06) (P33 passes on the directions of Karadžić "that it's now time to go in and take the enclave"); Adjudicated Fact 101 ("Late on 9 July, President Karadžić issued a new order authorising the VRS to capture the town of Srebrenica").

⁷⁹⁷ Butler, R., T. 20695-20696 (30/01/08).

⁷⁹⁸ Butler, R., T. 20695 (30/01/08).

⁷⁹⁹ Butler, R., T. 20695 (30/01/08).

tell you that, you know, his role, you know, on the basis of any specificity.”⁸⁰⁰ Of course, Butler was not anxious to concede this (no doubt so as not to disappoint his former paymasters at the OTP). However, ultimately, and to be fair to Butler, he does have the good grace to admit that he does not in fact know what Milan Gvero was doing at Pribicevac.

Milan Gvero did not Assist in the Attack on the Srebrenica Enclave

219. The Prosecution suggested – albeit implicitly – through the evidence of Milenko Jevdjevic that on account of Milan Gvero’s presence at Pribicevac Mladic suggested to Radovan Karadžic to modify the original operation to take over the enclave.⁸⁰¹ The Defence submit that this was not the case. First and foremost the Defence contend that there is simply no evidence on the basis of which a reasonable inference can be drawn to this effect on the evidence that the Trial Chamber has heard. This would be speculation or the drawing of one of a large number of possible inferences that could be drawn in this regard. It is also fair to say that if this is the Prosecution’s case they should have articulated it far more clearly during their own case and not attempted to get in it in through the back door with a witness called by a co-accused at the tail of the trial.

220. Milenko Jevdjevic testified with regard to the agreement given by Karadžic in P33 (“The President of the Republic has agreed with the continuation of the operations for the takeover of Srebrenica”), that the situation changed at around 2250 or 2350 on 9 July. He testified also with regard to the said excerpt, that the general principle was that the subordinate (Mladic) gives the proposal to the superior (Karadžic), who agrees or not. However, he could not confirm whether this applied to P33.⁸⁰²

⁸⁰⁰ Butler, R., T. 20696 (30/01/08).

⁸⁰¹ Jevdjevic, Milenko, T. 29703-29708 (15/12/08).

⁸⁰² Jevdjevic, Milenko, T. 29703-29706 (15/12/08).

221. Butler simply presumes that at some point in time, members of the Main Staff, *potentially* including Mladic, personally briefed Karadzic on where the operation was and what the next possible goals could be. It may very well have been that Radivoje Miletic was part of this and that he was relaying the message back through the Main Staff. The alternative also according to Butler, is that Zdravko Tolimir was present at this particular meeting and that he was taking it upon himself to call the command post.⁸⁰³ In any event, Butler certainly does not suggest that Milan Gvero's transient presence at the IKM in any way whatsoever contributed to the decision in P33. Nor does the evidence establish by Milan Gvero's presence there, that he was Mladic's "right hand man" in Srebrenica or his "eyes and ears" to the operation.⁸⁰⁴ Quite simply, according to Nedeljko Trkulja, Mladic was not assisted in the field by Milan Gvero.⁸⁰⁵

222. The evidence shows that Milan Gvero simply dropped in to Pribicevac on his way from Belgrade. He was only there for approximately one hour (until approximately 1300 hours)⁸⁰⁶ and P33 was received well after he had left Pribicevac (at 2350 hours).⁸⁰⁷ Indeed, this document was actually sent to Pribicevac primarily for the benefit of Krstic in order to direct to start planning for the force-movement to occupy Srebrenica. It is reasonable to assume that Milan Gvero's name appears on P33 only

⁸⁰³ Butler, R., T. 20590 (29/01/08).

⁸⁰⁴ See OTP Opening Statement, T. 460 (22/08/06).

⁸⁰⁵ See Trkulja, N., T. 15135 (10/09/07).

⁸⁰⁶ Trisic and PW-162 stayed at Pribicevac for between one and two hours, after which they left together; GVERO left at the same time in a separate vehicle Trisic, D.T. 27117, T.27118 (21/10/08); see also PW-162 "GVERO remained at Pribicevac for approximately an hour". The witness and General GVERO stayed at Pribicevac for approximately one hour, after which they returned to and reached Bratunac together. General GVERO told him that he was in a hurry to reach Vlasenica (PW-162). T. 9333, T. 9334 (23/03/07)

⁸⁰⁷ P 33, dated 9 July 1995 (Conduct of Operations around Srebrenica, strictly confidential no. 12/46-501/95, from Assistant Commander Major General Zdravko Tolimir, to President of Republika Srpska, Generals GVERO and Krstic): "The President of Republika Srpska is satisfied with the results of combat operations around Srebrenica and has agreed with the continuation of operations for the takeover of Srebrenica, disarming of Muslim terrorist gangs and complete demilitarization of the Srebrenica enclave." P 33 was received [at the IKM] after General GVERO was no longer at Pribicevac (Momcilovic, B. T. 14132 (22/08/07). Note: received at the IKM at 2350 hours.

because he had contacted the Main Staff from Pribicevac to inform them about his return from Belgrade, as per common practice within the VRS.⁸⁰⁸

223. Furthermore, it could reasonably be inferred that 6D22 is the basis on which Karadžić could have been informed as stated in P33, “of successful combat operations around Srebrenica by units of the Drina Corps and that they have achieved results which enable them to occupy the very town of Srebrenica.” 6D22 reads in relevant part that “on 9 July, our units carried out a fierce attack, thus separating the enclaves of Žepa and Srebrenica.” It could also reasonably be inferred that the proposal to take over the enclave reads as follows in 6D22 (and not by Milan Gvero’s presence there):

On 9 July 1995, our units ... separate[ed] the enclaves of Žepa and Srebrenica, carried out the immediate task [and] created conditions for *extending* the attack towards Srebrenica. ... Decision for further operations: Taking advantage of the success achieved, regroup the forces and carry out a vigorous and decisive attack towards Srebrenica.⁸⁰⁹

224. In essence, 6D22 reports that all primary objectives with regard to the original 2 July order for Krivaja 95 have been reached and the stage is now set for further operations⁸¹⁰ (i.e. the take-over of the enclave). Indeed, 6D22 was sent on 9 July 1995 from Krstić to the VRS Main Staff and to the Drina Corps Command, and was received on the said date at 2320 hours. P33 was sent also on 9 July 1995 from Zdravko Tolimir to Krstić and to the Drina Corps IKM, and was received at 2350 hours.

225. In other words, the evidence allows for the reasonable possibility that 6D22 (i.e. Krstić) via the Main Staff (that is, via Mladić, Miletić, or Tolimir) was the basis on which the decision was then made by Karadžić to modify the operation in question.

⁸⁰⁸ Momčilović B. T.14094 (22/08/95); Simić N. T. 28605 (21/11/08)

⁸⁰⁹ Emphasis added.

⁸¹⁰ Butler, R., T. 19789 (16/01/08).

On this basis, the evidence shows that the presence at the IKM of Milan Gvero played no part in the decision to take over Srebrenica.

Conclusion

226. As stated above, the failure by the Prosecution to prove beyond reasonable doubt even one of the two factual allegations must result in an acquittal in regard to this particular of the Indictment.

Gvero's alleged participation in the JCE: Indictments paragraph 76(b)(i)

“Disabling the local UN forces militarily:- he assisted in the attack on Srebrenica, knowing that one of the main objectives was to force the Muslim population to leave Srebrenica, by lying to UNPROFOR and Muslim attacks, in particular on UN OPS, and VRS intentions and actions with respect to the enclave”

Introduction

227. To a degree this topic has been covered above and in the interests of not being repetitious, the Defence incorporate where relevant and supplement below the submissions in relation to Indictment paragraph 76(a)(i). In essence, the Prosecution failed to prove with regard to P2374⁸¹¹ and P2379⁸¹² that Milan Gvero took a deceitful stance or was part of a deliberate strategy to disable UNPROFOR, take over the enclave, and to gain control of the civilian population.⁸¹³ Specifically, Milan Gvero did not lie to UNPROFOR about Bosnian Muslim attacks on UN OPs, about their firing at the VRS from UN combat vehicles, or about VRS attacks against

⁸¹¹ P2374, dated 11 July 1995 **REDACTED** See also P 2906, dated 11 July 1995 (Notes of Telephone Conversation General Nicolai – General Gvero 11 July 1995 at 1615 hours, from Lieutenant Colonel de Ruiter to MA/COMD, CAC, PIO).

⁸¹² P 2379, dated 11 July 1995 **REDACTED**

⁸¹³ See Annex 1, dated 1 May 2007 Prima Facie Relevance of Intercepts with Corroborating Materials, p. 4 (P 2374 **REDACTED**); p. 6 (P 2379 **REDACTED**); pp 11-12 (P 1119, **REDACTED**).

civilians. Furthermore, Milan Gvero was not involved in determining how to deal with the civilians and did not engage in delay tactics with regard to NATO air support.

Preliminary Observations

P2379⁸¹⁴

228. This was a telephone call from General Gobillard's office to the Main Staff.⁸¹⁵ It appears on the basis of P2379 that the person to whom Gobillard first wanted to speak was Ratko Mladic and not specifically Milan Gvero, and that Gobillard was told that the only person available to field the said conversation was Milan Gvero.⁸¹⁶
REDACTED⁸¹⁷

229. One observation so far as this is concerned, relates to the failure by the Prosecution to call Gobillard to attest personally as to this conversation. This would not be as to its accuracy, which is not in dispute, but and as to how he viewed and perceived what Gvero was saying, as well as to his (Gobillard's) personal state of knowledge at the time. By any standards his military assistant – Fortin - was a very poor substitute to attest to these events in his place. No explanation has been advanced as to why the Trial Chamber has not heard from Gobillard. Of course, the Prosecution can call who they want (this being an ostensibly adversarial trial). However, the failure to call this significant witness on an important aspect of the Gvero's case makes something of a nonsense of the continual assertions by the Prosecution that they are involved in some sort of search for the truth. Much more importantly than this, the failure to call Gobillard cannot be compensated for by

⁸¹⁴ P2379.

P 2968, dated 11 July 1995 (Notes of Telephone Conversation General Gobillard – Milan Gvero 11 July 1995 at 1810 hours, from Major Fortin to MA/COMD, CAC, PIO).

⁸¹⁵ Fortin, L., T. 18394 (28/11/07).

⁸¹⁶ See Fortin, L., T. 18384-18385 (28/11/07).

⁸¹⁷ See *Prosecution's Submission in Support of the Admissibility of Intercept Evidence, with Corroborating Annexes*, 1 May 2007, Confidential Annex I, p. 6.

speculation on the part of the Trial Chamber (who it should be added also could have ordered the attendance of this retired French General). Any *lacuna* in the evidence as a result must count in Milan Gvero's favour.

*General Nicolai and UNPROFOR Bias (P2374)*⁸¹⁸

230. The Defence recall that General Nicolai was not present in the enclave between 1 and 20 July, so everything about which he testified regarding the events as to what actually occurred in and around there, is hearsay.⁸¹⁹

231. On the one hand, Nicolai in common with everyone received "confused and diverse reports" and "scant and confused information" as to what was going on in the enclave over the period 1-20 July.⁸²⁰ Although Nicolai received standard reports from DutchBat, the latter during this time had very limited information because they were not able to leave their compound. Also, there were "all kinds of rumours", many of which were never confirmed.⁸²¹ On the other hand, however, Nicolai also testified that he continuously received accurate reports from DutchBat until the fall of the enclave, that he was particularly well informed about what was happening, and that his information at the relevant time was not at all confused.⁸²²

232. This latter testimony was in response to Defence Counsel having put to Nicolai based on 6D207,⁸²³ and on his denial of its contents, that his impression of the situation was obtained through various sources of confused information that he was receiving at the time. Counsel put to him too, that his said impression was from his

⁸¹⁸ P2374.

⁸¹⁹ Nicolai, C, T. 18558 (30/11/07).

⁸²⁰ Nicolai, C, T. 18558, 18559 (30/11/07).

⁸²¹ Nicolai, C, T. 18558 (30/11/07).

⁸²² Nicolai, C, T. 18571 (30/11/07).

⁸²³ 6D 207, dated 11 July (Warning on the Treatment of UNPROFOR Personnel in the Enclave of Srebrenica, top secret no. 03/4-1617, from Assistant Commander Major General Milan Gvero, to Drina Corps Headquarters and Drina Corps Command Post no. 1, received on 11 July 1995 at 1735 hours).

general view of having tarred all those in the VRS with the same brush.⁸²⁴ Nicolai denied prejudices regarding any party and in relation to Milan Gvero in particular.⁸²⁵ Nevertheless, the Defence submit based on his contradictory evidence – and especially with regard to that unhelpful to the Defence – that Nicolai was not objective and that his evidence must be weighed accordingly.

233. In terms of the killing of Van Renssen, Nicolai also did not foresee DutchBat being attacked by the Bosnian Muslim troops as long as they remained in their OPs and performed their duties.⁸²⁶ Nicolai said that they encountered what he described merely as “an impediment” on the part of the ABiH only when they wanted to withdraw from their positions.⁸²⁷ Nicolai’s testimony adverse to the defence generally should thus, at the very least, be treated with caution.

234. Novica Simic, testified that UNPROFOR as a whole was biased throughout the war. This witness maintained that their activities were geared towards the dictates of the international community and in particular, towards the forces of the Muslim and Croat Federation.⁸²⁸ For example, he watched UNPROFOR representatives in the media speak about certain events that differed greatly from the information he had about the same events.⁸²⁹ Also, he witnessed first hand some of the events in the field that were portrayed “completely differently” when he then read about them subsequently in the press.⁸³⁰ This theory is supported by UNPROFOR officers Boering and Karremans assisting the ABiH by warning them about the upcoming air strikes in Srebrenica. Such actions did not improve the VRS view of UNPROFOR and fuelled suspicions of its bias against Serbs.⁸³¹ **REDACTED**⁸³² because this was not the case with regard to Milan Gvero, as further evidenced below.

⁸²⁴ Nicolai, C, T. 18571 (30/11/07).

⁸²⁵ See Nicolai, C, T. 18571-18672 (30/11/07).

⁸²⁶ Nicolai, C, T. 18566-18567 (30/11/07).

⁸²⁷ See Nicolai, C, T. 18567 (30/11/07).

⁸²⁸ Simic, N., T. 28576 (20/11/08).

⁸²⁹ Simic, N., T. 28576-28577 (20/11/08).

⁸³⁰ Simic, N., T. 28576 (20/11/08).

⁸³¹ 5D56 NIOD report Srebrenica-Chapter 6 - Last meeting between Karremans and the Opstina

Milan Gvero did not lie to UNPROFOR about Muslim attacks and thus did not assist in the attack in this regard

235. With regard to his statement **REDACTED** that UN OPs were attacked by Muslim forces, Milan Gvero had knowledge at the relevant time of such attacks. (6D22, 6D23).⁸³³ Indeed, it would be difficult to think of any reason why such information would be falsified or misleading.⁸³⁴ The denial by Milan Gvero that the VRS attacked UNPROFOR and his statement that they were instead attacked by Bosnian Muslims was not “nonsense and lies.”⁸³⁵ Indeed, General Smith conceded that both parties were in the habit of blaming each other for various actions.⁸³⁶ He described in relation to the assertion by one party that it had not done something but that the other one had, that this was “an entirely understandable reaction.”⁸³⁷

236. Furthermore, Louis Fortin knew what Milan Gvero implied when referring in P2379 to “the familiar scenario.”⁸³⁸ UNPROFOR command believed about the events of 10 July that the ABiH could attempt to draw UNPROFOR, the RRF, or NATO into

⁸³² **REDACTED**

⁸³³ See Franken, R., T. 2541 (17/10/06) (One OP was fired upon from a direction that could not have been from the VRS); Boering, P. T. 2073-2074 (22/09/06) (Whilst Pieter Boering did not see the ABiH fire at OP H, despite evidence by an UNMO sitrep dated 9 July to the contrary, he did not suggest that the information contained therein is unreliable); Trivic, M., T. 11887-11888 (21/05/07) and 6D 22, dated 9 July 1995 (Interim Combat Report, strictly confidential no. 08/95 from General Krstic to the VRS Main Staff and the Drina Corps Command. Received on 9 July at 2320 hrs) (The witness confirmed the combat situation at the time reflected UNPROFOR concerns at OP (at Slapovici and Bocija) that the 28th Division would use them as human shields). See also Fortin, L., T. 18388-18389 (29/11/07); 6D 23, dated 10 July (Interim Combat Report, strictly confidential no. 11/95, from Chief of Staff Major General Radislav Krstic, to the Main Staff of the VRS /Army of Republika Srpska and K-DC/ Drina Corps Command) (Bosnian Muslims took UNPROFOR checkpoints, weapons, and other military hardware).

⁸³⁴ Fortin, L., T. 18390 (28/11/07) and 6D 23, dated 10 July 1995 at 2315 hours (Interim Combat Report, strictly confidential no. 11/95, from Major General Radislav Krstic, Pribicevac IKM, to Main Staff of the VRS and Drina Corps Command).

⁸³⁵ See Nicolai, C, T. 18517 (29/11/07).

⁸³⁶ Smith, R., T. 17599 (07/11/07).

⁸³⁷ Smith, R., T. 17599, 17602 (07/11/07).

⁸³⁸ P2379, (“If UN members have been shot at, it is not by us. Rather, following the familiar scenario, they were shot at by the Muslims”).

the conflict and on their side as they did in Goražde in 1994.⁸³⁹ Milan Gvero thus did not lie when he said that the ABiH tried to lure UNPROFOR into the dispute at Goražde and at Bihac. Nor was this irrelevant to the discussions in question.⁸⁴⁰ His reference to these events cautions UNPROFOR as to taking at face value allegations made by the Bosnian Muslims that in similar situations had been proven false. He was also inviting Gobillard not to show bias towards any party.⁸⁴¹ UNPROFOR was therefore aware on this occasion of the truth of his assertion.⁸⁴²

Milan Gvero did not Lie about Bosnian Muslims Firing at the VRS from UN Combat Vehicles (P2379)

237. Whilst Fortin denied that the ABiH had taken any UN APCs⁸⁴³, he was not even close to the Srebrenica enclave between 8 and 11 or 12 July, so everything about which he testified with regard to the said period is hearsay.⁸⁴⁴ As discussed above, Gobillard's state of knowledge is, sadly, a matter of sheer guess work.

238. The VRS and Lieutenant General Janvier⁸⁴⁵ anticipated that the Bosnian Muslim forces would "by force or otherwise, obtain the use of UNPROFOR equipment", including DutchBat vehicles.⁸⁴⁶ On 8 July, the Main Staff had knowledge that

⁸³⁹ Fortin, L., T. 18386 (28/11/07) and 6D 204, dated 10 July 1995 (UNPF – HQ Daily Sitrep 090001B to 092359B Jul 95, from LGen Janvier FC UNPF, to *inter alia* MNEMONIC 670). For further explanation of these events in Goražde and similar events in Bihac, see Milovanovic, M., T. 12261-12266 (29/05/07).

⁸⁴⁰ See also Nicolai, C, T. 18517 (29/11/07) and P 2374, dated 11 July 1995 **REDACTED** See also P 2906, dated 11 July 1995 (Notes of Telephone Conversation General Nicolai – General Gvero 11 July 1995 at 1615 hours, from Lieutenant Colonel de Ruiter to MA/COMD, CAC, PIO).

⁸⁴¹ See Fortin, L., T. 18392-18393 (28/11/07).

⁸⁴² See Fortin, L., T. 18385 (28/11/07). See also Egbers, V., T. 2862 (20/10/06) (The witness is sure that DutchBat was shot by several Bosnian Muslims during DutchBat's stay in the enclave. They would fire at DutchBat from near the border of the enclave so that DutchBat thought the BSA was firing at them, and return fire on the BSA).

⁸⁴³ Fortin, L., T. 18256-18257 (26/11/07).

⁸⁴⁴ Fortin, L., T. 18248-18249 (26/11/07) (The witness and General Gobillard spent most of their time at BH command between 8 and 11 or 12 July and not at PTT headquarters).

⁸⁴⁵ It is yet another mystery and curiosity as to why the Prosecution have not called Janvier, who was the man who had ultimate military charge of the UN forces. It certainly does not assist in the "search for the truth."

⁸⁴⁶ P 107, dated 2 July 1995 (Order for Active Combat Activities Operation no. 1, "Krivaja – 95", strictly confidential no. 04/156-2, from Commander Major-General Milenko Živanovic, to the commands *inter alia*

Bosnian Muslims were using six APCs painted white and bearing UNPROFOR markings.⁸⁴⁷ Likewise, on 10 July, based on surveillance as well as on statements from UNPROFOR, the Muslims surrounded UNPROFOR and seized their combat equipment (i.e. APCs and heavy artillery pieces and ammunition), and were using it in combat against VRS forces.⁸⁴⁸ Indeed, this was the information at Pribicevac at the time.⁸⁴⁹

Milan Gvero did not lie about VRS attacks against civilians

The Srebrenica-Potočari Column (11 July)

239. The Bosnian Muslim forces and their positions located in the vicinity of the Srebrenica-Potočari column were the object of attack rather than the column itself. In fact, there was no shelling of the road on which the column was travelling when on 11 July DutchBat accompanied the population from Srebrenica to Charlie Company, the UN base at Potočari.⁸⁵⁰ Whilst some witnesses testified in regard to this journey that they were not shelled directly (rather, shells landed around them),⁸⁵¹ the Bratunac

of the 1st Zvornik Infantry Brigade, 1st Birac Infantry Brigade and the 2nd Romanija Motorised Brigade); 6D 204, dated 10 July 1995 (UNPF – HQ Daily Sitrep 090001B to 092359B Jul 95, from LGen Janvier FC UNPF, to *inter alia* MNEMONIC 670) (“The BiH is likely to attempt to capture weapons and vehicles from DutchBat to compensate for their lack of armament”).

⁸⁴⁷ P109, dated 8 July 1995 (Untitled, strictly confidential no. 04/156-5, from Major General Milenko Živanovic, the Drina Corps Command, to Pribicevac Drina Corps Forward Command Post to Major General Radislav Krstic personally and Main Staff of the VRS, to Major General Zdravko Tolimir, for information). See also 5D1083, dated 3 June 1995 (Regular Combat Report, strictly confidential no. 17/95, from Major Milenko Jevdjevic, to the Army of Republika Srpska Main Staff, to the Chief of Staff personally) (“After a successful operation and forceful expulsion of UNPROFOR from the Zeleni Jadar post, the enemy was observed systematically building up large forces and moving them from Srebrenica sector towards the general sector of Zeleni Jadar. Their formulation included two OT/APC/ and one tank”).

⁸⁴⁸ 6D328, dated 10 July 1995 (UNPROFOR Situation in the Srebrenica Enclave, strictly confidential no. 10/95, from Chief of Staff Major General Radislav Krstic, to the Main Staff of the VRS; See also 6D23, dated 10 July (Interim Combat Report, strictly confidential no. 11/95, from Chief of Staff Major General Radislav Krstic, to the Main Staff of the VRS /Army of Republika Srpska and K-DC/ Drina Corps Command) (Bosnian Muslims took UNPROFOR checkpoints and used some of the weapons and other military hardware in operations against VRS forces).

⁸⁴⁹ Jevdjevic, Milenko, T. 29691 (15/12/08).

⁸⁵⁰ See Boering, P., T. 2204-2205 (26/09/06). See also P4536 (video that opens with VRS soldiers driving along the Srebrenica-Potocari road, which is undamaged by shell fire, including craters).

⁸⁵¹ See PW-115, T. 3309 (31/10/06) (Shells fell around them as they walked to Potocari, but they were not shelled directly); Van Duijn, L., T. 2269-2270 (27/09/06) (The witness took up blocking positions one at a

Brigade neither fired on the said population nor close to it. Fire was instead opened some time later at between two and two and a half kilometres east of the Srebrenica-Potočari route. For example, Mico Gavric noticed Muslim forces engaged in combat activity whereupon he opened fire on them at approximately 1500 hours at below elevation 877.⁸⁵²

240. Furthermore, on 9-13 July there was a continuing battle between ABiH and VRS forces in the enclave, including in Srebrenica town.⁸⁵³ Lieutenant Koster received reports on the morning of 11 July about fighting that was taking place.⁸⁵⁴ Bosnian Muslim fighters with mortars were seen in Potočari on both sides of the UN base.⁸⁵⁵ Also on 11 July, fortified positions and bunkers of Bosnian Muslim units along the Bratunac-Srebrenica road were targeted by a T-55 tank.⁸⁵⁶ Had fire on the civilian population been intended – which was technically possible – “it would have been a massacre”, for it was a group of between 40, 000 and 50, 000 people, tightly packed along the 3 to 4 kilometres stretch of road between Srebrenica and Potocari.⁸⁵⁷

Charlie Company (the UN Base at Potočari)

241. Once at the UN base in Potočari on 11 July, there was no direct shelling or firing at the population.⁸⁵⁸ Whilst Major Boering could hear continuous fire with short interruptions, he could not recall if any shells came anywhere near the UN compound

time en route to Potocari; shells fell further from their location, behind, and in front of their position). See also Adjudicated Fact 121 (“The refugees fleeing Potocari were shot at and shelled”).

⁸⁵² See Gavric, M., T. 26503-26505 (01/10/08). See also Koster, E., T. 3060 (26/10/06) (The witness saw the first group of people arrive at Charlie Company at approximately 1500 hours); Rutten, J., T. 4798 (29/11/06) (People arrived all day until approximately 1700 or 1800 hours).

⁸⁵³ Franken, R., T. 2461 (16/10/06), Franken, R., T. 2628 (18/10/06); Koster, E., T. 3117, 3120-3121 (27/10/06). See also PW-127, T. 3579-3581 (03/11/06) and V 4417, dated 10 July 1995 (One Portion of V 4417 Showing Bosnian Muslim Troops in Srebrenica Town); Egbers, V., T. 2912, 2914, 2925-2926 (20/10/06) and P 2047 (Srebrenica Trial Video); Pandurevic, V., T. 31993-31994 (23/02/09) (the VRS was exposed to mortar fire directly from Srebrenica town).

⁸⁵⁴ Koster, E., T. 3120-3121 (27/10/06).

⁸⁵⁵ PW-114, T. 3172-3175 (27/10/06), 6DIC 29 (Aerial Overview of Potocari, Marked by PW-114 on 27 October 2006).

⁸⁵⁶ Nikolic, M., T. 32911-32913 (21/04/09).

⁸⁵⁷ Boering, P. T. 1938-1939 (21/09/06).

⁸⁵⁸ Koster, E., T. 3023 (25/10/06).

at this time.⁸⁵⁹ PW-115 described the first day at Potočari as “peaceful and calm”.⁸⁶⁰ That night, Koster and his men patrolled outside the compound. There was no mortar, shelling, grenade, or shooting directed at the vicinity of the shelter.⁸⁶¹ Similarly, it was “clear” on 12 July, according to Major Franken, that an approaching Serb infantry was not firing on the population gathered at Potočari. In addition there was no shelling heard at the compound that night.⁸⁶²

242. Ahmo Hasic gave evidence that he spent that night on the outside of the Potočari compound. He claimed that those gathered there were shelled.⁸⁶³ However, he conceded that he could not see everything because it was “quite a large compound”.⁸⁶⁴ Moreover, PW-118 testified that the people in the compound could hear powerful detonations of shells, which this witness believed came from the shelling of the town centre and the surrounding area⁸⁶⁵ (i.e. and not of the Potočari compound).

243. With regard to the “very close shelling” of the UN base at Potočari on 11 July⁸⁶⁶, Bosnian Muslim military positions were deployed “very close” to the said base.⁸⁶⁷ Evidence that the population gathered at the bus station (which was located outside

⁸⁵⁹ Boering, P., T. 1941 (21/09/06).

⁸⁶⁰ PW-115, T. 3309 (31/10/06). *See also* T. 19485 (11/01/08) (“The factory at Potocari was already full [on 11 July] and they had to stop 100 metres outside the compound. This was not a problem because it was already reported that the [VRS was] not firing on the area”).

⁸⁶¹ Koster, E., T. 3023 (25/10/06), Koster, E., T. 3012 (26/10/06).

⁸⁶² Franken, R., T. 2614-6515 (17/10/06); Hasic, A., T. 1265 (07/09/06).

⁸⁶³ Hasic, A., T. 1175 (06/09/06).

⁸⁶⁴ Hasic, A., T. 1232 (06/09/06).

⁸⁶⁵ PW-118, T. 3407-3408 (01/11/06).

⁸⁶⁶ Koster, E., T. 3023 (25/10/06). *See also* PW-118, T. 3475-3476 (02/11/06) (The immediate vicinity of the bus compound was shelled on 11 July and not the UN base itself).

⁸⁶⁷ Pandurevic, V., T. 31988-31990 (23/02/09) and 4D135, dated 22 February 1995 (List of Office Space Used by the OS/ Armed Forces/ of the Republic of BH, strictly confidential no. 03-55-2/95, from Chief of the Defence Department Professor Suljo Hasanovic, to Tuzla Secretariat of Defence) and 4D 653, dated 4 February 2009 (Republika Srpska Republican Land Survey and Property Rights Administration for Srebrenica Municipality) and 4D 683 (Video of Google Earth Imagery of Hrvacic Plot, North of DutchBat Compound, Potocari). *See also* Pandurevic, V., T. 31994 (23/02/09) (The Battalions and Companies were deployed close to the UNPROFOR checkpoints on the Zelenei-Jadar-Srebrenica axis).

the UN compound⁸⁶⁸) and “seemed” to be the target of VRS shelling on 12 July⁸⁶⁹ is certainly not capable of establishing beyond reasonable doubt that such was in fact the case.

Milan Gvero was not Involved in Determining how to Deal with the Civilians

244. Milan Gvero’s assurance to Gobillard that the Muslim refugees that went over to the VRS will be safe does not indicate, contrary to the OTP’s assertion, “that he is involved in determining how to deal with the civilians who a day later are either forcibly transported out of the enclave or separated from their families and shipped for execution.” No such evidence – however remote – was ever adduced to this effect. Furthermore, Milan Gvero speaks about protecting the civilians and of the possibility that they go over to the Serb side, but he does not say anything about their leaving the enclave as such.⁸⁷⁰

Milan Gvero did not Engage in Delay Tactics with Regard to NATO Air Support

245. Whilst the evidence suggests that the denial by Serb representatives of attacking UNPROFOR or the civilian population amounted to a “delay tactic” with regard to the use of air support⁸⁷¹, Milan Gvero played no role in relation to this. Close air support had already taken place (at approximately 1400 hours) on 11 July⁸⁷² by which time Milan Gvero had his telephone conversations that day with Nicolai and with Gobillard (at approximately 1600 and at 1800 hours, respectively).

246. Additionally, it cannot be excluded that BH command in “mostly trying to figure out what was happening on the ground” between 8-12 July itself introduced a delay

⁸⁶⁸ See PW-118, T. 3475 (02/11/06).

⁸⁶⁹ See Koster, E., T. 3025 (25/10/06), Koster, E., T. 3038, 3057 (26/10/06).

⁸⁷⁰ Fortin, L., T. 18419-18420 (28/11/07). See also Fortin, L., T. 18391 (28/11/07) (Milan Gvero does not personally promise to keep the situation under control).

⁸⁷¹ See Fortin, L., T. 18250-18252 (26/11/07); Smith, R., T. 17599 (07/11/07).

⁸⁷² Franken, R., T. 2485 (16/10/06) (There was close-air support at approximately 14:00 hours on 11 July).

with regard to air support.⁸⁷³ According to Fortin, information gathering “was not a simple matter” because the enclave was located at some distance away from BH command in Sarajevo, and because information came in from no less than five different channels, including the Bosnian Government.⁸⁷⁴ Nor was it entirely clear who was attacking DutchBat and from which location. It was difficult, he said to get a clear picture of what was happening.⁸⁷⁵

Conclusion

247. In addition to the Prosecution having failed to prove with regard to Indictment paragraph 76(b)(i) that Milan Gvero provided a false statement, the Prosecution failed here too, to prove beyond reasonable doubt that he lied and thus as alleged, that he assisted in the attack on the enclave. Clearly then, Milan Gvero did not commit acts to further the JCE and must therefore be acquitted in this regard.

Milan Gvero’s played no part in the alleged restriction of the supply of fuel to UNPROFOR

248. Contrary to the Prosecution assertion, Milan Gvero played no part in denying access and supplies in the months leading up to the takeover of Srebrenica and did not personally contribute to the military disabling of the local UN forces. It is the Defence case that Milan Gvero had credible intelligence to support his assertion at a 20 April 1995 meeting (summarised in P2936)⁸⁷⁶ that UNPROFOR had sufficient

⁸⁷³ See Fortin, L., T. 18249-18250 (26/11/07), Fortin, L., T. 18395-18396 (28/11/07).

⁸⁷⁴ Fortin, L., T. 18249 (26/11/07).

⁸⁷⁵ Nicolai T.18558 (30/11/07) , L., T. 18395-18396 (28/11/07). See also Fortin, L., T. 18395 (28/11/07) (It was difficult in dealing with the period of time prior to 11 July insofar as getting accurate information from the enclave and then deciding what to do).

⁸⁷⁶ P 2936, dated 22 April 1995 (Meetings in Sarajevo and Pale – 20 April 1995, from Lt. Col. J. R. J. Baxter).

fuel reserves and was supplying fuel to the ABiH forces and it was on this basis that the VRS carefully scrutinised UNPROFOR supplies of fuel.⁸⁷⁷

249. It was apparent as Smith gave his evidence in relation to this issue that he had little independent recollection of the relevant part of the meeting beyond the information contained in Baxter's note. By way of example he conceded in cross-examination, "No, I don't, I don't even remember any more than the absolute outlines that we'd had -- he was there at the meeting and this matter came up."⁸⁷⁸ A further example of his general uncertainty in relation to this document can be seen in his incorrect assumption that the participants had gone for lunch after the meeting.⁸⁷⁹

250. In the circumstances, Smith was unable to reject the case put to him on behalf of Milan Gvero. Indeed, he accepted much of it. Smith agreed with the suggestion made by counsel that Milan Gvero had said that it was the belief of the Main Staff that there were sufficient fuel reserves.⁸⁸⁰ He could not remember but equally did not exclude the possibility that he asked Milan Gvero how he (Gvero) knew about the fuel situation, and that Gvero replied that the VRS had carried out a technical analysis based on motor vehicles, electricity use, generators, etc. into the number of fuel consumers within the enclaves.⁸⁸¹ The following was then put to him, namely that Gvero:- "explained that the VRS technical services had also looked at the amount of fuel that was going into the enclaves, and they looked at these two figures and the result was that sufficient fuel was being allowed into the enclave at the relevant time. That's the conversation that I suggest took place outside the confines of the meeting. What do you say about that?" Smith's answer was:- "It may have done and to a degree it's supported by the conclusion in that paragraph that he said that there was enough fuel."⁸⁸²

⁸⁷⁷ Cf OTP Pre-Trial Brief, paragraph 279.

⁸⁷⁸ Smith, R., T. 17703 (08/11/07).

⁸⁷⁹ "I was only surmising that there had been a meal." Smith, R., T. 17702 (08/11/07).

⁸⁸⁰ Smith, R., T. 17702 (08/11/07).

⁸⁸¹ Smith, R., T. 17703 (08/11/07).

⁸⁸² Smith, R., T. 17704 (08/11/07).

251. It appears from this that Milan Gvero had a genuine and reasonable belief, based on the information that he had received from those responsible for this issue within the VRS, to the effect that UNPROFOR had sufficient fuel. Importantly there is strong evidence to support this view from other sources. Smith was shown 6D 72, dated 12 May 1995 (an Order from the Commander of the Birac Brigade), the relevant part of which reads:

“We have received information that members of UNPROFOR, UNHCR, and other international organisations have been transporting fuel illegally to Muslims in the enclaves of Sarajevo, Gorazde, Zepa and Srebrenica. They smuggle fuel in double or large tanks on combat and non-combat vehicles which they empty in the enclaves leaving just the quantity needed for their return journey from the enclaves to the territory of the FRY or the RS.”⁸⁸³

252. Smith was asked about this and said that if he had any knowledge of this kind of smuggling at the time, such a practice would have been stopped. As far as he was concerned, UNPROFOR was not smuggling fuel into those enclaves.⁸⁸⁴ The trouble with this answer is that it was obvious that this document had not been written for public show or propaganda related purposes. Its author, Colonel Andric, obviously believed that this sort of thing was going on and needed to be stopped. In short the document is genuine in every sense. If anything, Smith’s answer is indicative of the fact that for too much of the relevant time, he was a remote figure based in Sarajevo and he was not getting sufficient or proper information as to the situation on the ground. The Defence do not criticise Smith for this but simply observe that it was a somewhat inevitable fact of UN life in Bosnia and Herzegovina at the time.

253. The truthfulness of the information in 6D72 is greatly enhanced by the contents of 1D19, dated 23 February 1995 (in fact this is almost certainly a typographical error in the B/C/S original and the date was in fact 1996). It is an Analytical Summary of the Reasons for the Fall of Srebrenica and Zepa, from Chief Brigadier General Jusuf Jasarevic to General Rasim Delic. The relevant bit which was put to Smith reads:

⁸⁸³ Smith, R., T. 17706-17707 (08/11/07).

⁸⁸⁴ Smith, R., T. 17707 (08/11/07).

"The increasing mistrust felt by citizens of Srebrenica for the civilian and military leadership was encouraged by the unequal allocation and manipulation of goods provided by humanitarian aid. Naser Oric and municipal officials, Osman Sulic, Adnan Salilovic [phoen] and Hanj Fedic [phoen] were linked to this. There is information indicating that these men smuggled humanitarian aid, weapons, oil, et cetera, and that they collaborated with members of UNPROFOR and even with the aggressor in their smuggling activities."⁸⁸⁵

254. Smith said that he was not aware of this at the time, but testified that hoarding and the manipulation of humanitarian aid is common in these circumstances, occurs throughout the world, and he was therefore not surprised that this was happening.⁸⁸⁶ The Defence further observe that this information, which specifically confirms the fear and belief of the Bosnian Serbs that oil was being smuggled in conjunction with certain UNPROFOR elements, is contained within a Bosnian Muslim document and therefore cannot be said to be mere paranoia on the part of the Bosnian Serbs.

255. The problems that the VRS encountered in respect of the smuggling of fuel by UNPROFOR were described by Slavko Kralj. He explained that the estimating of the necessary quantities of fuel for the enclave was done by the competent organs of the technical services, together with Colonel Djukic. This estimate was based on the number of vehicles and on the UNPROFOR activities taking place in Srebrenica in order to calculate the fuel that should be required for this normal work.⁸⁸⁷ Kralj added that there was intelligence which suggested that some of the fuel was shared with Bosnian Muslim military in Srebrenica.⁸⁸⁸

256. The sheer prevalence of this problem is indicated by the fact that it was admitted by three of the Zepa inhabitants who gave evidence. Hamdija Torlak accepted that he may have heard that the 28th Division received fuel from Zepa (from the question he

⁸⁸⁵ Smith, R., T. 17705 (08/11/07).

⁸⁸⁶ Smith, R., T. 17706 (08/11/07).

⁸⁸⁷ Kralj, S., T. 29283-29284 (04/12/08).

⁸⁸⁸ Kralj, S., T. 29284 (04/12/08).

clearly meant via UNPROFOR). He clarified this by saying that he had heard that fuel was sold to the local people at certain UNPROFOR check-points.⁸⁸⁹

257. Meho Dzebo similar evidence, stating that he was aware that fuel was smuggled into the enclave. He said that UNPROFOR would sell fuel at all their checkpoints⁸⁹⁰ and that UNPROFOR had created a black market in fuel.⁸⁹¹ He further testified that the inhabitants of Zepa paid UNPROFOR troops for this illegal fuel in cash and in alcohol.⁸⁹²

258. PW-155 gave a personal example of this phenomenon in his evidence by describing how he had bought petrol from the UNPROFOR soldiers in Zepa for personal use.⁸⁹³ He did this by trading two litres of plum brandy for five litres of petrol. He conceded that other inhabitants of Zepa presumably did the same.⁸⁹⁴ Interestingly this was one of the things that he said that was actually credible. **REDACTED**⁸⁹⁵ In this respect the credibility of PW-155 was not at all high. The fact that he admitted that UNPROFOR soldiers sold him fuel - in effect an admission against interest - perhaps suggests that this was so prevalent that he felt he really had to admit that this was going on.

259. The conclusion that one can glean from all of this is that the VRS were in fact quite right to be extremely cautious in their supply of fuel to UNPROFOR. The evidence overwhelmingly suggests that certain elements of UNPROFOR were passing onto the Bosnian Muslims some of the fuel that they were receiving in the enclaves. The reality was that a good proportion of this fuel was being diverted to the Bosnian Muslim military effort within the enclaves. To suggest, as the Prosecution seek to do, that Milan Gvero's actions in respect of UNPROFOR and fuel was in

⁸⁸⁹ Torlak, H. T. 9841 (02/04/07).

⁸⁹⁰ Dzebo, Meho, T. 9619 (28/03/07).

⁸⁹¹ Dzebo, Meho, T. 9620 (28/03/07).

⁸⁹² Dzebo, Meho, T. 9619-9620 (28/03/07).

⁸⁹³ PW-155, T. 6829 (07/02/05); PW-155, T. 6867 (07/02/05).

⁸⁹⁴ PW-155, T. 6866-6867 (07/02/05).

⁸⁹⁵ **REDACTED**

furtherance of a criminal act is simply absurd and has not been remotely proved beyond reasonable doubt. He clearly had a reasonable basis for his assertion that UNPROFOR had sufficient fuel reserves at the meeting on 20 April 1995 (which is chronicled in P2936) and this document therefore cannot be utilised to infer that he was part of any conspiracy to militarily disable the UN forces in the enclave.

Gvero's alleged participation in the JCE: Indictment paragraph 76(b)(ii)

“Disabling the local UN forces militarily: - he kept RS President Radovan Karadžić informed of his communication with the international forces.”

Introduction

260. Milan Gvero did not keep Radovan Karadžić informed of his communication with the international forces. As discussed above in the section of this brief dealing with the Gvero – Karadžić relationship, the evidence adduced at trial shows that Milan Gvero and Radovan Karadžić’s relationship was so poor that it would have been impossible for Milan Gvero to keep Radovan Karadžić apprised of any such developments. Indeed, as outlined below, the only manifestation of this alleged reporting relationship is contained within the intercepted telephone conversations transcribed in P1096 and P2375. However, the evidence relied on by the Prosecution with respect to these telephone conversations does not establish beyond reasonable doubt that the person to whom Milan Gvero speaks is Radovan Karadžić.

P1096 – REDACTED

Friendly nature of the exchange

261. The Defence submit that the nature of the conversation in P1096 indicates that it can not be between Milan Gvero and Radovan Karadžić. Petar Skrbic characterised the interchange in P1096 as a “friendly exchange”. On any reading this is obviously

correct. He described a “relationship full of respect” between the collocutors which as he confirmed in his testimony, could not possibly be reflective of the fractious relationship that Milan Gvero and Radovan Karadžić had in July 1995.⁸⁹⁶

Use of “President”

262. There is little doubt that the mere fact that Milan Gvero addresses the person to whom he speaks in P1096 as “President” does not establish beyond reasonable doubt that he is conversing with Radovan Karadžić. While Radovan Karadžić was undisputedly addressed as “President” at that time,⁸⁹⁷ there were “a large number of Presidents” in the RS in July 1995, including Presidents of over 50 municipalities; more so in fact, than the number of generals⁸⁹⁸ (and there were a good few of those as well). PW-145, the primary witness relied upon by the Prosecution to assert that Milan Gvero speaks to Radovan Karadžić, did so on the basis *inter alia* that the title “President” is mentioned.⁸⁹⁹ The said witnesses conceded, however, that at the relevant time, there were at least three people in the RS that could have been addressed as such.⁹⁰⁰

263. Furthermore, PW-145 accepted with regard to 6D43 that Milan Gvero treats his collocutor, whose name does not appear in the conversation but who is addressed as “Mr .President”, with respect.⁹⁰¹ The Defence do not rely on the information as such in the heading identifying the collocutor as Momcilo Krajišnik, but emphasise instead that the person to whom Milan Gvero speaks is a president *other than* Radovan Karadžić. Also, the Defence note that the participants identified in the heading of this intercepted telephone conversation are Milan Gvero and Momcilo Krajišnik; the

⁸⁹⁶ See Skrbic, P., T. 15566 (18/09/07).

⁸⁹⁷ Eg. The confirmation by Ljubo Obradovic of “President” as meaning President Karadžić in P 3917: Obradovic, L., T. 28448-28449 (19/11/08).

⁸⁹⁸ Skrbic, P., T. 15564-15565 (18/09/07).

⁸⁹⁹ See PW-145, T. 7239-7240 (09/02/07).

⁹⁰⁰ PW-145, T. 7257 (19/02/07). See also PW-104, T. 7944 (02/28/07) (Colonel Beara informed the witness that two presidents gave him the order to get rid of the prisoners in such a way that all their bodies would need to be buried).

⁹⁰¹ PW-145, T. 7241-7244 (09/02/07) and 6D 43, dated 28 April 1995 (Intercept at 1241 hours between Milan Gvero and Momcilo Krajišnik).

Defence note too, that the names of the speakers do not appear in the body of the conversation.

264. Also, Skrbic testified that he was present during a conversation between Milan Gvero and Nikola Koljevic, whom Milan Gvero held in great esteem and during which Milan Gvero addressed him as “President”.⁹⁰² With regard to 6D21, the exchange is clearly a cordial one. Milan Gvero first refers to his collocutor as “President”, after which he then addresses him as “Deputy President”, and “Professor”.⁹⁰³ It is also noteworthy with respect to 6D21 that the subject discussed was relations with UNPROFOR⁹⁰⁴, the very matter for which the State Committee was formed⁹⁰⁵ and presided over by Koljevic (and *not* Karadžic).⁹⁰⁶ As with 6D 43, the Defence do not rely on the information in the heading of 6D21 as such identifying the collocutor to whom Milan Gvero speaks as Koljevic. Rather, in the absence of the names of the speakers appearing in the body of the this conversation, it is the Defence case based: (i) on the way in which Milan Gvero addresses the other party; (ii) on the subject-matter of the conversation; and (iii) on the nature of the exchange between them, that the person to whom he speaks was almost certainly Nikola Koljevic. Of course this is not the test, it is for the Prosecution to prove beyond reasonable doubt: (a) that it was not Koljevic; (b) that it was not anyone else; and (c) that it was in fact Karadžic.

265. Similar to the observations made a propos 6D43 and 6D21, the Defence submit with regard to P 1096 that in the absence of the names of the speakers appearing in the body of the conversation, the way in which Milan Gvero addresses the second participant, the subject-matter of the conversation, and on the nature of the exchange

⁹⁰² Skrbic, P., T. 15565 (18/09/07).

⁹⁰³ PW-145, T. 7244-7245 (09/02/07) and 6D 21, undated (Intercept between Milan Gvero and Nikola Koljevic).

⁹⁰⁴ PW-145, T. 7244-7245 (09/02/07).

⁹⁰⁵ 6D 7, dated 14 March 1995 (Decision on Forming a State Committee for Cooperation with the United Nations and International Humanitarian Organisations, Official Gazette of Republika Srpska, Year IV, Number 3). *See* Article 2 thereof.

⁹⁰⁶ 6D 7, dated 14 March 1995 (Decision on Forming a State Committee for Cooperation with the United Nations and International Humanitarian Organisations, Official Gazette of Republika Srpska, Year IV, Number 3). *See* Article 1 thereof.

between them, that the person to whom he speaks is probably not Karadžić, let alone that it was him beyond reasonable doubt.

Failure to identify the second speaker

266. The Defence note as conceded by PW-145, who transcribed the conversation in question, that the second speaker in P1096 is not identified during the conversation; nor is the name Radovan Karadžić mentioned.⁹⁰⁷ The identification in the body of the conversation in P3917 of President Karadžić – and by the actual speakers themselves (“Good afternoon, Karadžić speaking/ Good afternoon, Colonel Obradovic. Can I help you, President?”) does not assist the identification in P1096 of Karadžić.⁹⁰⁸ The lack of any such identification in P1096 can not allow for the conclusion to be drawn beyond reasonable doubt that the reference to President in P3917 is the same as that in P 1096.

267. Furthermore, PW-128 testified that if names did appear in the body of conversations, the operators were instructed to put those names in parentheses, and that if the speakers were not identified, they would be marked X and Y, names unknown.⁹⁰⁹ No such indications appear in P1096. Similarly, if names did not appear in the body of conversations, the operators were instructed to put the names of those they believed to be speaking in parentheses; often, there would be an X and a Y with perhaps a name in parenthesis. There were in fact “plenty” such reports.⁹¹⁰

268. Whilst again, no such indication appears in P1096, such a belief, according to PW-128, could have been based on an indication by the switchboard operator when the connection was put through. However, PW-128 testified too, that the switchboard

⁹⁰⁷ See PW-145, T. 7239-7240 (09/02/07).

⁹⁰⁸ Obradovic, L., T. 28448-28449 (19/11/08) and P3917, dated 3 September 1995 (Transcription of Intercepted Conversation between Radovan Karadžić, Colonel Obradovic, and General Tolimir, Report, strictly confidential no 05/03039, from Republic of Bosnia and Herzegovina, Army of the Republic of Bosnia and Herzegovina, to Defence of the Republic)

⁹⁰⁹ PW-128, T. 6141 (22/01/07).

⁹¹⁰ Frease, S., T. 6389 (01/25/07).

operator would only *sometimes* identify the speakers when the connection was put through.⁹¹¹ Likewise, PW-146 testified that the speakers would *frequently* introduce themselves because they had to ask for a telephone conversation through a switchboard.⁹¹² The identification of an otherwise unidentified speaker based on information *sometimes* and *frequently* conveyed is not information from which proof can be inferred beyond reasonable doubt.

269. Furthermore, PW-145 accepted during his testimony that he could not identify either speaker in the conversation transcribed in P1096.⁹¹³ He simply assumed, without certainty, that there was a conversation between the subordinates of the participants in P 1096.⁹¹⁴ Moreover, the said witness confirmed that 6D14 is identical to the audio-tape of the said conversation and that he did not hear the name Karadžić. In addition he did not hear the second participant in the conversation on that audio tape.⁹¹⁵ The Defence further note that even the header information in 6D14 states only “Participants: X – Y (President – inaudible)”. Also, there are no assumptions, conclusions, or additions to be found in it. On this basis alone, it is highly questionable that the heading to P1096 is accurate when it states **REDACTED**.

270. The only sensible explanation for this discrepancy is that PW-145 erred when he identified the participants in the heading to P1096. This mistaken identification, if not based on the mistakenly assumed (and notably missing from the evidence in this trial) conversation between the subordinates of the participants in P1096, could well have arisen through an error in army communications. According to PW-145, when recording and transcribing these conversations and when producing reports, he always inserted in the heading certain data that preceded the conversation, including the participants, if known at the time.⁹¹⁶ He would also normally insert information that he received from the army in the report that he sent to the superior command.

⁹¹¹ See PW-128, T. 6142-6143 (22/01/07).

⁹¹² PW-146, T. 6202 (23/01/07)

⁹¹³ PW-145, T. 7239-7240 (09/02/07).

⁹¹⁴ PW-145, T. 7274 (19/02/07).

⁹¹⁵ PW-145, T. 7263-7265 (19/02/07).

⁹¹⁶ PW-145, T. 7238 (09/02/07).

When inseting this data, however, PW-145 did not listen to the conversation he received from the army.⁹¹⁷

271. Similarly, PW-128 testified that the speaker in the type-written text by him was identified by the army, after which he would then send it off to his superior service; this was done “very infrequently”, however.⁹¹⁸ The Defence note too, in this regard the testimony of PW-148, who could not recall anything that would indicate that the person to whom Colonel Cerovic speaks in P1294 is in fact General Krstic, even though the heading to that intercept contains information identifying both participants.⁹¹⁹ Not unlike P1096, the latter’s name is not identified in the body of P2388 and only one participant is heard.⁹²⁰

272. Arguably, the identification by PW-145 of Karadžic in P1096 was of little importance to his work. All the more so with respect to the additions made by him in the information header in P1096, for “no one at the mountain top in July 1995 was even remotely considered to be an analyst”.⁹²¹ In essence, according to PW-128 “the participants were not that important to us. What was important was the actual content of the conversation, the intercept. ... The army was using and moving and positioning units in these places. As far as we were concerned we were not doing that; so for us, the actual data, the intelligence was important.”⁹²²

The impossibility of recognition of Radovan Karadžic’s voice

273. There is also no voice recognition evidence available to refute the Defence contention that Milan Gvero does not speak to Radovan Karadžic in P1096. Karadžic was not heard in this intercept. In addition PW-145 conceded that, there was no chance of comparing it with another conversation in order to determine if he was in

⁹¹⁷ PW-145, T. 7237 (09/02/07).

⁹¹⁸ PW-128, T. 6147 (22/01/07).

⁹¹⁹ PW-148, T. 6252-6253 (23/01/07) and P 1294, Intercept dated 21 July 1995, 13:05 hours

⁹²⁰ PW-148, T. 6252-6253 (23/01/07).

⁹²¹ PW-132, T. 4436-4437 (23/11/06).

⁹²² PW-128, T. 6147, 6148 (22/01/07).

fact the second speaker.⁹²³ It is noteworthy that Stephanie Frease, the former OTP Analyst who “was heavily involved in the translation, authentication, and analysis of radio intercepts obtained by the [OTP] from the Army of Bosnia-Herzegovina and the State Security Services” did not do any work to verify that this conversation was in fact between Milan Gvero and Radovan Karadzic.⁹²⁴ Moreover, even if the voice of the second speaker was heard, PW-145 could not use this as a basis for concluding that it was that of Radovan Karadzic.⁹²⁵ **REDACTED**⁹²⁶ Nor indeed did PW-132 have any training or experience in voice recognition or in voice identification.⁹²⁷

The mistaken basis for PW-145’s erroneous conclusion as to Radovan Karadžic

274. PW-145 also concluded that the second collocutor was Radovan Karadžic because he believed that Milan Gvero was the only superior at the Main Staff present and everything that he said at that time was conveyed directly to his immediate superior, Karadžic. He also premised his identification of Radovan Karadžic in the heading of P1096 on the fact that he, somewhat conceitedly, never wrote things down of which he was unsure.⁹²⁸

275. With regard to the belief by PW-145 that Milan Gvero was the only superior present at the Main Staff, the conclusion in P2375 **REDACTED**⁹²⁹ However, PW-138 testified that high level officers stuck to the doctrine that they should not reveal their locations over open airwaves.⁹³⁰ PW-145 so manifestly erred that he conceded that the Supreme Command was located at Pale, that Milan Gvero was not a member of the Supreme Command, and that Milan Gvero did not sit at the Supreme Command at the time that the said observation was made. The witness admitted

⁹²³ PW-145, T. 7260 (19/02/07). See also PW-145, T. 7265 (19/02/07).

⁹²⁴ *Prosecution’s Filing of Pre-Trial Brief Pursuant to Rule 65ter and List of Exhibits Pursuant to Rule 65ter (E)(v)*, Annex B, 28 April 2006, p. 7 Under Seal; Frease, S., T. 8240-8243 (05/03/07).

⁹²⁵ See PW-145, T. 7257, 7260 (19/02/07).

⁹²⁶ **REDACTED**

⁹²⁷ PW-132, T. 4449 (23/11/06) **REDACTED**

⁹²⁸ PW-145, T. 7257 (19/02/07); PW-145, T. 7239-7241 (09/02/07).

⁹²⁹ PW-145, T. 7267-7268 (19/02/07) and P2375 **REDACTED**

⁹³⁰ PW-132, T. 4288 (21/11/06).

further that a mistake was made in noting the Supreme Command at all. Ultimately, PW-145 accepted that he was unable to distinguish between the Supreme Command and the Main Staff.⁹³¹

276. Contrary then, to PW-145's testimony that it was possible to make mistakes when entering comments, but not ones that were detrimental,⁹³² the Defence submit that critical mistakes were made by him with respect to P1096. Not only did he assume an incorrect location for Milan Gvero, but he also relied upon this mistaken assumption to conclude, that the person with whom the latter spoke in P1096 was Karadžić.

P2375 – REDACTED

277. The Defence rely on their submissions above with regard to P1096 to the extent that they relate also to P2375. Specifically in relation to P2375, the conversation transcribed therein is identical to that heard in 6D15 during which, as conceded by PW-145, he did not hear the name Karadžić or the voice of the second collocutor.⁹³³ Furthermore, the header to 6D15 reads "Participants: X – Y (President – inaudible)". It is notable that the speakers are identified only as X and Y, and there are no assumptions as to which President may be involved in the conversation. It is therefore inexplicable that the header to P2375 contains the following information and analysis: **REDACTED** Apart from the lack of subsequent voice recognition work referred to above, PW-145 admitted that he could not recall with certainty whether they compared the voices with additional documents in order to make a proper analysis.⁹³⁴ It seems again that this highly prejudicial identification of Karadžić in the header to P2375 was premised on a series of mistaken assumptions by a single Prosecution witness who, during his live testimony before this Tribunal, essentially admitted that he could not identify with certainty the participants of this conversation.

⁹³¹ PW-145, T. 7268-7270 (19/02/07) and P2375, **REDACTED**

⁹³² PW-145, T. 7270 (19/02/07).

⁹³³ PW-145, T. 7265-7267 (19/02/06).

⁹³⁴ PW-145, T. 7265-7267 (19/02/07).

278. The Defence note further that the supposedly corroborating material relating to a Serbian flag on the church in Srebrenica⁹³⁵ in no way assists in the identification of Karadžić as the second participant in P2375. The said material consists of still photographs showing a Serbian flag on the Orthodox Church in Srebrenica, taken from video shot on 11 July.⁹³⁶ Unsurprisingly, the Prosecution analyst Stephanie Frease could not conclude the identity of those speaking or the exact words used in P2375 by making a comparison between the said intercept and the photographs in question.⁹³⁷ There is plainly no corroboration for the Prosecution's case on P2375 to be found in these still photographs.

Conclusion

279. As outlined above, the Prosecution failed to prove the allegation in paragraph 76(b)(ii) of the Indictment. There is insufficient evidence upon which the Trial Chamber could premise a finding beyond reasonable doubt that Milan Gvero kept Radovan Karadžić informed of his communications with the international forces. The only evidence in support of this allegation is an unfounded assertion that Milan Gvero participated in intercepted conversations with Karadžić in P1096 and in P2375. This allegation is plainly wrong. Rather than based on objective evidence, it is premised on a series of mistaken assumptions by sole Prosecution witness PW-145. The Defence make no apology for reminding the Trial Chamber that such a foundation is manifestly insufficient for a finding beyond reasonable doubt against Milan Gvero.

Gvero's alleged participation in the JCE: Indictments paragraph 76(c)(i)

“Preventing and controlling outside international protection of the enclaves including air strikes and international monitoring:- he threatened and pressured an UNPROFOR commander in an attempt to stop air strike«

⁹³⁵ See Prosecution's Submission in Support of the Admissibility of Intercept Evidence, with Corroborating Annexes, 21 May 2007, Confidential Annex I, p. 5.

⁹³⁶ P1074, dated (tab 2, ERN 0603-0092, Video Still frames

⁹³⁷ The witness cannot conclude the identity of those speaking or the exact words that they used by making a comparison between the intercept and the photographs (Frease, S. T. 8164 (02/03/07) and P 1074)

Introduction

280. The Prosecution allege in Indictment paragraph 76(c)(i) that Milan Gvero “threatened and pressured an UNPROFOR commander.” The reference here is to one commander only. It has been the understanding of the Defence that Indictment paragraph 76(c)(i) refers to Milan Gvero’s telephone conversation with General Nicolai, as indeed referenced in the Prosecution Pre-Trial Brief,⁹³⁸ in its Opening Statement,⁹³⁹ and in *Prosecution Submission in Support of the Admissibility of Intercept Evidence with Confidential Annexes*.⁹⁴⁰

281. However, for the first time in May 2007 nonetheless; that is, 22 months after the commencement of trial, the Prosecution alleged that Milan Gvero “also threatens [General] Gobillard ...”⁹⁴¹ For the sake of completeness, the Defence address the allegations as they relate both to Nicolai and to Gobillard. However, the Defence maintain that any allegation with respect to Gobillard⁹⁴² has not been adequately pleaded by the Prosecution and therefore cannot form the basis of the allegation in Indictment paragraph 76(c)(i). The Prosecution must prove both that Milan Gvero threatened *and* that he pressured Nicolai, as charged. In other words, the test is a conjunctive one in that both factual elements must be proved beyond reasonable doubt.

⁹³⁸ In its Pre-Trial Brief, the Prosecution allege that Milan Gvero “threatened and pressured an UNPROFOR commander in an attempt to stop air-strikes in the midst of the conflict **REDACTED** OTP Pre-Trial Brief, para. 282.

⁹³⁹ OTP Opening Statement, T. 468-469 (22/08/06).

⁹⁴⁰ *Prosecution’s Submission in Support of the Admissibility of Intercept Evidence, with Corroborating Annexes*, 1 May 2007, Confidential Annex I, pp 3-4.

⁹⁴¹ The Prosecution allege with regard to P2379, dated 11 July 1995 at 1800 hours (Intercept between General Gvero and General Gobillard, no. 539), that Milan Gvero “also threatens Gobillard. ... It is the Prosecution’s position that this is a clear threat to disable UNPROFOR’s ability to act.” *Prosecution’s Submission in Support of the Admissibility of Intercept Evidence*, pp 5-6.

⁹⁴² See also Defence comments on the Prosecution’s failure to call Gobillard in the para. 76(b)(i) section above.

Milan Gvero did not Threaten an UNPROFOR Commander

P 2374 – **REDACTED**⁹⁴³

282. The Defence say, as a starting point, that Milan Gvero did not say that he would have the compound at Potočari and the surrounding areas shelled. Of this all concerned can be sure. The reason for this is that if it was literally said in this way, it would have appeared explicitly in the transcript of the telephone conversation **REDACTED**.⁹⁴⁴

283. Nevertheless, both Nicolai and apparently Gobillard interpreted the mention of responsibilities to mean that the threat would be carried out if they did not discontinue the air support.⁹⁴⁵ Running any such risk, according to Nicolai prompted Sarajevo HQ into ordering a cessation of the air support in question.⁹⁴⁶ He testified too, that by the time that Gobillard had his telephone conversation with Milan Gvero at 1800 hours on 11 July, he had already told Gobillard of his telephone conversation with same two hours earlier. Nicolai and Gobillard then discussed what else remained to be done and decided to discontinue the air support.⁹⁴⁷ As discussed below, however, the telephone conversation between Milan Gvero and Gobillard was neither determinative nor influenced the decision by UNPROFOR to stop the air support.

284. Furthermore, two threats were issued prior to the Gvero-Nicolai telephone conversation that led directly to the cessation of air support: the first one, issued on the DutchBat command net (i.e. on their frequency) by a DutchBat NCO in VRS custody, and the second one issued by Ratko Mladic to Colonel Karremans during the second Hotel Fontana Meeting. This first threat is unrelated to that allegedly issued by Milan Gvero. So too, is this second threat, for Nicolai merely *assumed* that the

⁹⁴³ P2374. See also P 2906, dated 11 July 1995 (Notes of Telephone Conversation General Nicolai – General Gvero 11 July 1995 at 1615 hours, from Lieutenant Colonel de Ruiter to MA/COMD, CAC, PIO).

⁹⁴⁴ Nicolai, C, T. 18513-18515 (29/11/07).

⁹⁴⁵ Nicolai, C, T. 18516, 18517 (29/11/07).

⁹⁴⁶ Nicolai, C, T. 18487 (29/11/07).

⁹⁴⁷ Nicolai, C, T. 18543 (30/11/07).

two were related. Any relationship between these threats and the alleged threat by Milan Gvero falls short of being evidenced beyond reasonable doubt.

The DutchBat Command Net Threat

285. There was air support at approximately 1400 hours on 11 July. One of Major Franken's NCOs in VRS custody read over the radio of a DutchBat APC in Bratunac that air support had to stop immediately, or the VRS would shell the area of DutchBat's base, including the refugees, and would kill DutchBat in VRS custody.⁹⁴⁸ Franken only partially heard the message and did not know whether or not the messenger identified himself. Also, DutchBat had no possibility of verifying whether this was an authorised VRS message as air support was understood to endanger the DutchBat in VRS custody.⁹⁴⁹

286. Major Boering was informed of this threat and there was no further air support after having received this message as air support was understood to endanger the Dutchbat NCO in VRS custody.⁹⁵⁰ Major Fortin also confirmed that the air support was suspended because the VRS threatened to kill the DutchBat in their custody if the air support continued.⁹⁵¹ Richard Butler confirmed that this was the case.⁹⁵² The latter also testified that the bombing was suspended as a result.⁹⁵³

The Karremans Threat

287. With regard to the second threat, Nicolai testified that he seemed to remember that a warning was issued to Karremans by the local Serbian commander as a result of the air support. He testified too, that a threat was also received at headquarters that

⁹⁴⁸ Franken, R., T. 2485 (16/10/06).

⁹⁴⁹ Franken, R., T. 2548 (17/10/06), Franken, R., T. 2647, 2648 (18/10/06).

⁹⁵⁰ Boering, P., T. 1924, 1928-1929 (19/09/06).

⁹⁵¹ Fortin, L., T. 18261 (27/11/07) and P2968, dated 11 July 1995 (Louis Fortin's Notes of a Telephone Conversation General Gobillard – General GVERO 11 July 1995, 1810 Hours).

⁹⁵² Butler, R., T. 19801 (16/01/08).

⁹⁵³ Butler, R., T. 19791 (16/01/08).

the compound and its surroundings would be shot at. This gave rise to discussions in the staff, which led to the decision to stop the air support.⁹⁵⁴

288. However, Nicolai could not confirm how this report at headquarters was received (i.e. if it was taken through Karremans or directly from Milan Gvero); nor could he confirm who said what, exactly. *As far as he knew*, this threat came from Milan Gvero.⁹⁵⁵ To the best of his ability, he could not recall with 100 per cent certainty that Milan Gvero said it exactly this way.⁹⁵⁶

289. Moreover, Nicolai did not accuse Milan Gvero in so many words of being responsible for the threat – they received a threat and in the telephone conversation in question, Milan Gvero told him again that all responsibility for the consequences of not discontinuing the air support would be his responsibility. The witness conceded that it was possible that Karremans received the threat and that he *assumed* that Milan Gvero was referring to the same consequences. However, he does not recall whether it was literally said this way and does not read it either in P2906 or in P2374.⁹⁵⁷ Indeed, Nicolai agreed that he did not know what was in Milan Gvero's mind.⁹⁵⁸

290. This suggests – even by his own admission – that Nicolai confused the so-called Karremans threat with his telephone conversation with Milan Gvero. Furthermore, the Defence submit with regard to the threat received at UN headquarters, that this refers to the threat issued by Ratko Mladic to Karremans, which was forwarded *inter alia* to the Commander of Bosnia-Herzegovina Command, HQ UNPROFOR Sarajevo. In describing his meeting with Mladic on 11 July 1995, Karremans says,

Again, [Mladic] demanded that there will not be any air strikes or CAS longer. If air strikes or CAS should occur or be continued, compound Potočari with DutchBat and about 2, 500 refugees in it and about 15, 000 in the direct vicinity

⁹⁵⁴ Nicolai, C., T. 18510 (29/11/07).

⁹⁵⁵ Nicolai, C, T. 18509, 18510 (29/11/07).

⁹⁵⁶ Nicolai, C., T. 18511 (29/11/07).

⁹⁵⁷ Nicolai, C, T. 18514-18515 (29/11/07).

⁹⁵⁸ Nicolai, C, T. 18556 (30/11/07).

or it will suffer shelling. He emphasised in most threatening way that he will use all his assets to outgun the compound.⁹⁵⁹

291. Nicolai appears to be mistakenly or wrongly attributing the contents of this threat to his conversation with Milan Gvero. Also suggestive of the lack of any such threat issued by Milan Gvero, Butler testified that he could not see that anyone below Mladic would personally feel that they had the authority to make the threat as alleged with regard to P2906 and P2374.⁹⁶⁰

*Milan Gvero – General Gobillard Telephone Conversation on 11 July at 1810 hours (P 2968)*⁹⁶¹

292. Milan Gvero did not make any threat during the course of this conversation. According to Fortin there were two occasions on which Milan Gvero wanted air support stopped.⁹⁶² The two such occasions read verbatim as follows in P2968, about which Fortin testified: “Gobillard *should not* call for the air power ...; He *suggested* that no air power be used by [the time of another contact by phone the next morning]”.⁹⁶³ Of note, is that Fortin did not form in his mind at the time whether Milan Gvero knew what he was talking about and knew what he was doing in this conversation.⁹⁶⁴

293. Interestingly, Stephanie Frease, the former OTP Analyst **REDACTED**,⁹⁶⁵ could not confirm with regard to P2379 why Gobillard was not consulted directly to confirm this conversation. Nor could she recall him being asked about it on 8

⁹⁵⁹ 1D26, dated 12 July 1995 (Meetings with Gen Mladic on 11 and 12 July 1995, from Lieutenant Colonel Th. J. P. Karremans, to *inter alia* Force Commander Lieutenant General Janvier Zagreb, Commander Bosnia-Herzegovina Command HQ UNPROFOR Sarajevo, and Commander Sector North East Tuzla).

⁹⁶⁰ Butler, R., T. 19801-19802 (16/01/08).

⁹⁶¹ P2968 and P2379.

⁹⁶² Fortin, L., T. 18260 (27/11/07).

⁹⁶³ P2968 (emphasis added).

⁹⁶⁴ Fortin, L., T. 18427 (28/11/07).

⁹⁶⁵ *Prosecution’s Filing of Pre-Trial Brief Pursuant to Rule 65ter and List of Exhibits Pursuant to Rule 65ter (E)(v)*, Annex B, 28 April 2006, p. 7 Under Seal.

February 1999 in a formal interview carried out in the Paris Court of Appeal at the behest of the ICTY, during which he stated that Milan Gvero “*criticised* [him] for requesting air support.”⁹⁶⁶ Beyond Gobillard using the word “criticised” in this interview, the Trial Chamber has no idea as to how the actual participant to this conversation – Gobillard – viewed or perceived what was being said.

294. A further practical problem in assessing precisely what was said in this conversation is that it became apparent during Fortin’s evidence that the whole process was going through a process of interpretation between three different languages – French into English into BCS (and vice versa). The margin for things getting lost in translation is significant in this sort of three language interpretation. As the Prosecution rather aptly observed with respect to this conversation: - “I didn’t think things could get more cumbersome than they are in here but it sounds like they did.”⁹⁶⁷

Milan Gvero did not Pressure an UNPROFOR Commander

295. Whilst the Prosecution have failed to prove beyond reasonable doubt that Milan Gvero threatened an UNPROFOR commander, the Defence submit too (and for the sake of completeness) that neither Nicolai nor Gobillard was pressurised. In fact, Nicolai testified that he was not very upset at the time and that he was not under pressure.⁹⁶⁸

296. Regarding Milan Gvero’s telephone conversation with Gobillard, the decision to discontinue the air support had already been taken by the time they spoke (i.e. the time of this conversation). Because the air support was withdrawn shortly before

⁹⁶⁶ Frease, S., T. 8233-8234 (05/03/07).

⁹⁶⁷ Fortin, L., T. 18252 (26/11/07).

⁹⁶⁸ Nicolai, C, T. 18530 (30/11/07).

their conversation,⁹⁶⁹ the purpose of their speaking was to make clear this decision.⁹⁷⁰ Clearly then, Milan Gvero cannot be said to have pressured Gobillard, either.

297. Milan Gvero's behaviour in both of the conversations that he had with both of these Generals, as well as his attitude toward UNPROFOR, is best described in 6D207⁹⁷¹. He obviously does not take lightly the information that was provided to him by Nicolai. This is evidenced by the fact that he immediately reacts to it by issuing 6D207, a warning on the proper treatment of UNPROFOR personnel. In fact this document is similar to 6D129 which also talks about treatment of journalist and representatives of international organisation.⁹⁷² In short, 6D207 is consistent with 6D129 meaning that Milan Gvero would send out such warnings when he thought it proper to do so. Prosecution expert Richard Butler likewise testified that "there are multiple references" which indicate VRS commands telling subordinate units to obey international humanitarian law⁹⁷³

"In an attempt to stop air strikes": Factual & Legal Submissions

298. **REDACTED**⁹⁷⁴ This conversation had no such effect, however.⁹⁷⁵ There is no causal link between the telephone conversations in question and the decision to cease

⁹⁶⁹ Fortin, L., T. 18393 (28/11/07). Fortin referred with regard to the decision to discontinue air support, to the statement in P2968 that "General Gobillard drew [Milan] Gvero's attention to the fact that now there were no aircraft over the region of Srebrenica." See also P2379, ("The order to stop the bombings was rational ...").

⁹⁷⁰ Nicolai, C, T. 18492-19493 (29/11/07). See also Fortin, L., T. 18384-18385 (28/11/07) (Milan Gvero was not specifically the person to whom Gobillard wanted to speak. Rather, Gobillard was told that in effect, the only person available to field the conversation was Milan Gvero. Indeed, it appears that Gobillard first wanted to speak to Mladic). P2379 reads in relevant part (note that only GVERO's end of the line can be heard): "/General Mladic is in the field, and he too is away. /I can only put him through to General GVERO if he wants. /Please. /Hold on. /Hello, this is GVERO. /Who? /Svetlana /My regards to you and General Gobillard." Whilst Louis Fortin testified that this telephone call was made from General Gobillard's office to the VRS Main Staff, the Defence recall that Louis Fortin had no idea where Milan Gvero physically was at the time of this conversation; nor did he know that Svetlana was physically at a different location than the latter. See Fortin, L., T. 18378, 18394 (28/11/07).

⁹⁷¹ 6D207 dated 11 July 1995 Warning on treatment of UNPROFOR personnel in the enclave of Srebrenica

⁹⁷² 6D129 dated 20 June 1992 (Prevention of reprisal and treatment of journalist and representatives of international organization.

⁹⁷³ Butler, R., T.20722 (30/01/08).

⁹⁷⁴ *Prosecution's Submission in Support of the Admissibility of Intercept Evidence*, p. 6.

the air support. Even if as alleged, Milan Gvero attempted to stop the air support, the decision to do so is attributable to the acts of others. Milan Gvero simply did not succeed in so doing – whichever way one looks at it, the stopping of the air strikes was not down to Gvero. In these circumstances, Milan Gvero cannot be held liable for attempting to contribute to or to further the JCE. Attempt is not a mode of liability within the jurisdiction of the International Tribunal.⁹⁷⁶

299. Whilst the act of assistance with regard to aiding and abetting (or JCE, the *actus reus* of which is similar to that of aiding and abetting, the only modes of liability that Milan Gvero’s conduct could fall under with respect to this charge) need not have caused the act of the principal offender, it must nevertheless have had a *substantial effect on the commission of the crime by the principal offender*⁹⁷⁷ (or in the case of JCE, a significant contribution thereto). The Defence submit in light of the evidence adduced at trial, that the act of assistance by Milan Gvero had no such effect.

Milan Gvero did not Engage in Propaganda

300. In addition to Milan Gvero not having threatened or pressured either one of the two UNPROFOR Generals, there is no proof beyond reasonable doubt that his statement to Nicolai about DutchBat having crossed over was used in “combination, propaganda, and strategy” with “the operation to disable UN forces, take over the

⁹⁷⁵ Louis Fortin testified that it had no effect on the decision by UNPROFOR as to whether or not to bomb the VRS. Fortin, L., T. 18393 (28/11/07).

⁹⁷⁶ The Defence note in particular that the attempted commission of a crime is a mode of liability specifically enumerated under Article 25 of the Rome Statute, and contrasts the lack thereof under Article 7(1) of the ICTY Statute. Article 25(3)(d) of the Rome Statute reads in relevant part that the following gives rise to criminal liability: if a person “[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.” A person shall also be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if according to Article 25(3)(f), that person “attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions.”

⁹⁷⁷ *Vasiljevic*, Judgment, November 29 2002, para. 70.

enclave, and gain control of the population”.⁹⁷⁸ No mention is made – implied or otherwise – by Milan Gvero in his telephone conversation with Nicolai of the DutchBat in VRS custody, except of their crossing over for their own protection. Also, no evidence was adduced at trial suggesting any connection whatsoever between Milan Gvero’s statement of affording protection to the DutchBat at that time on VRS territory and the threats issued against them.

301. Furthermore, there is no evidence to suggest that Milan Gvero was aware that any such threats were made. In fact, Fortin understood Milan Gvero to be saying with regard to his statement “UNPROFOR troops are most welcome on the BSA territory where they would be treated comfortably and would be complete[ly] safe”, that UNPROFOR would not be taken “hostage” as was done so at the end of May.⁹⁷⁹ Indeed, 6D22 – the contents of which in relevant part are consistent with this statement by Milan Gvero – appears to have been sent to the VRS Main Staff, where Milan Gvero was stationed at that time.⁹⁸⁰ In other words, his statement is consistent with his knowledge of the facts as they stood on the ground at that time.

Conclusion

302. Milan Gvero did not threaten or pressure either Nicolai or Gobillard. Further and in the alternative, the cessation of air support is attributable to the acts of others, including unidentified person(s) for whom Milan Gvero can not be held liable. Furthermore, Milan Gvero did not engage in propaganda so as to gain control over the population. No evidence however slight was ever adduced to this effect. As such,

⁹⁷⁸ See OTP Opening Statement, T. 466-469 (22/08/06); **REDACTED**. See also submissions above in respect of paragraph 76(b)(ii) of the Indictment (re P 1096 **REDACTED**)

⁹⁷⁹ Fortin, L. T. 18387-18388 (28/11/07); P2968.

⁹⁸⁰ Fortin, L. T. 18388-18389 (28/11/07); 6D22, dated 9 July 1995 (Interim Combat Report strictly confidential no. 08/95, from Chief of the Staff Major General Radislav Krstic, to VRS Main Staff) (“The UNPROFOR forces at the check-points in Slapovici village and Bucje [phoen] village surrendered fully to our forces with all their weapons and equipment and asked for our protection. Ten UNPROFOR soldiers from the UNPROFOR check-point in Bucje village have been sent to and accommodated in Milici, while five soldiers from the check-point in Slapovici have been accommodated in Bratunac. UNPROFOR forces from the base in Potocari village did not intervene at the check-points or attack our forces”).

Milan Gvero can not have contributed to the legal extent required under Article 7(1) in order for liability to arise for this allegation.

Gvero's alleged participation in the JCE: Indictment paragraph 76(c)(ii)

“Preventing and controlling outside international protection of the enclaves including air strikes and international monitoring:- after the fall of the Srebrenica enclave, he lied to international representatives in order to block the UN’s and other international organisations’ access to Srebrenica”

Introduction

303. The Prosecution failed to prove that Milan Gvero lied to international representatives after the fall of the enclave in order to block their access to Srebrenica.⁹⁸¹ First and foremost, no request was made by UNPROFOR to access Srebrenica during the conversation referenced in support of the allegation in question. Second, ICRC access to the detainees was agreed to on two separate occasions prior to Milan Gvero allegedly having ensured the same access. Thirdly, the only evidence adduced at trial specifically alleging Milan Gvero having granted ICRC access to detainees is documentary, for which there is no witness testimony *viva voce* or otherwise confirming the veracity of the information contained therein

⁹⁸¹ See OTP PTB, para. 282 (“[Milan] Gvero acted to prevent and control outside international protection of the enclaves, including air strikes and international monitoring. ... After the fall of the enclave, he lied to international representatives in order to block the UN’s and other international organisations’ access to Srebrenica”).

Milan Gvero did not Block International Organisations' Access to Srebrenica

304. The Prosecution footnote in support of the relevant allegation only P1119⁹⁸², about which General Nicolai testified that he contacted the VRS Main Staff, wanting to talk about *the evacuation of the wounded*.⁹⁸³ Whilst Nicolai testified that he would have boarded a helicopter to Srebrenica had VRS permission been so granted⁹⁸⁴, no such request was put forth by him to Milan Gvero. In other words, Nicolai did not speak to Milan Gvero regarding access to Srebrenica by international organisations. Milan Gvero must on this basis alone be acquitted of the allegation as charged. How the Defence ask, can Milan Gvero be accountable for having denied access to the enclave when no such access was even discussed, let alone requested at the relevant time?

Agreements by Ratko Mladic and by Slobodan Milosevic to ICRC Access

305. Ratko Mladic agreed with General Smith as early as 15 July to grant the ICRC access to reception points.⁹⁸⁵ The following day, Carl Bildt declared to the media after negotiations in Belgrade with Slobodan Milosevic that the ICRC would be granted access to all detainees around Bratunac.⁹⁸⁶ Smith and Mladic then met on 19 July, throughout which Smith was in contact with Bildt, who was at a parallel meeting with Milosevic in Belgrade. Indeed, the purpose of the Smith-Mladic

⁹⁸² See OTP PTB, para. 282. The Prosecution footnote P1119, **REDACTED** See also P2907, dated 12 July, 1445 hours (Notes of a Telephone Conversation General Nicolai – General GVERO, from Lt Col. De Ruiter, To MA/COMD).

⁹⁸³ Nicolai, C, T. 18552-18553 (30/11/07). Emphasis added. See also P2907.

⁹⁸⁴ Nicolai, C, T. 18554 (30/11/07).

⁹⁸⁵ P2265. Franken, R., T. 2698 (18/10/06) (The witness confirmed that it would be logical to conclude that agreements in P2256 were made long before 19 July). See in particular P2265, paragraph 2, which reads refers to 15 July.

⁹⁸⁶ P4156, dated 17 July 1995 (Update No. 9 on ICRC Activities in the Former Yugoslavia, Msg. No. COMREX/FIN 95/1305, from ICRC Geneva); P2943, dated 19 July 1995 (Meeting Notes General Smith/General Mladic – 19 July 1995, from Lt Lol J.R.J. Baxter, to HQ UNPF Zagreb). See also P2942, dated 17 July 1995 (Code Cable entitled “Meeting in Belgrade”, re: Understandings from Belgrade Discussions Situation in Bosnia and Herzegovina 15 July 1995, from Mr. Akashi, UNPF-HQ, Zagreb, to Kofi Annan, United Nations, New York) (“Srebrenica. Full access to the area for UNHCR and ICRC. ICRC to have immediate access to “prisoners of war” to assess their welfare, register, and review procedures at Bosnian Serb reception centre in accordance with the Geneva Convention. UN presence in one form or another is agreed in key areas”).

meeting was to follow up the negotiations conducted by Bildt in Belgrade on 16 July.⁹⁸⁷ Mladic was accompanied on 19 July by Zradvko Tolimir and Lieutenant Colonel Indic⁹⁸⁸ (i.e. not Milan Gvero). Furthermore, Mladic confirmed to Smith on 25 July, on the basis of their 19 July agreement, that the ICRC would be allowed access to Srebrenica.⁹⁸⁹

306. Milan Gvero allegedly having assured the ICRC in Pale that they would be given access to all detainees (P4156)⁹⁹⁰ did not contribute to alleged the JCE and certainly not to the mass murder operation, with which he is not charged.⁹⁹¹ This alleged assurance was *after* two separate agreements were reached granting such access (by Mladic as early as 15 July and by Milosevic on 16 July). Milan Gvero merely reiterated what had already been agreed, assuming the contents of P4156 to be true. Absent any further evidence confirming the veracity of the information contained in P4156, the Defence submit that, for reasons developed in the section below dealing with paragraph 76(d)(ii) of the Indictment, any weight to be attributed to P4156 must be accorded in favour of Milan Gvero.

307. The Defence wish to correct the paragraph 285 allegation in the OTP Pre-Trial Brief, which refers to P4157, dated 20 July⁹⁹², as the basis on which the Prosecution allege Milan Gvero's knowledge on that particular date. Upon closer examination, however, P4157 actually refers in relevant part to a statement allegedly made by Milan Gvero "early [in the week of 20 July]". The statement was then broadcast on 20 July. In other words, the Prosecution confuse the date of the broadcast (20 July) with events alleged to have transpired earlier that week. Moreover, and given in

⁹⁸⁷ See P2943. See generally with regard to P2943 Smith, R., T. 17533-17536 (06/11/07).

⁹⁸⁸ P2943.

⁹⁸⁹ P2747, dated 26 July 1995 (Meeting Notes General Smith/General Mladic 25 July. From Lt. Col. J. R. J. Baxter, to HQ UNPF Zagreb for SRSG, FC, DFC). See generally with regard to P2747 Smith, R., T. 17544 (06/11/07); Smith, R., T. 17713-17716 (08/11/07).

⁹⁹⁰ P4156.

⁹⁹¹ See OTP Pre-Trial Brief, para. 278.

⁹⁹² P4157, dated 20 July 1995 (ICRC Interview to Deutsche Welle Interview Broadcast, Nr. 0300, from Anselmo/Munier).

particular the source of the evidence in question (the ICRC), the Defence reiterate for reasons set out above and developed elsewhere,⁹⁹³ that any reliance thereon be accorded in favour of Milan Gvero.

308. Before leaving the subject of both P4156 and P4157, the Defence wish to point out that the Prosecution elected not to rely on either of these documents during their case (i.e prior to the Rule 98 *bis* stage of the proceedings). The fact that they did this speaks volumes as to how unimportant the documents are and how little reliance they placed on this material, as well as how negligible they regarded them in advancing their case. In particular, they could easily have sought to have them admitted via the Bar Table as they did with P536. In short, even by the Prosecution's own standards these documents obviously carry little, if any, weight. In fact they were both introduced in the course of cross-examination by the Prosecution of the Miletic military expert, Kosovac⁹⁹⁴. The Defence recognise that the Trial Chamber chose to admit them, but that Decision needs to be revisited in the light of the important subsequent Appeals Chamber Decision⁹⁹⁵ in relation to this way of the Prosecution adducing material.

Conclusion

309. Because no request was made by international organisations to access Srebrenica in the only evidence on which the Prosecution rely to prove Indictment paragraph 76(c)(ii), Milan Gvero must be acquitted of this allegation. In addition, such access was already agreed to by no less than two individuals in negotiations in which Milan Gvero took no part.

⁹⁹³ See submissions below in relation to paragraph 76(d)(ii) of the Indictment.

⁹⁹⁴ P4156 at T30432 and P4157 at T30438 (21/01/09).

⁹⁹⁵ Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents By the Prosecution in Cross-Examination of Defence Witnesses (20/02/09).

Gvero's alleged participation in the JCE: Indictment paragraph 76(d)(i)

“Controlling the movement of the Muslim population out of the enclaves:- he helped to organise and coordinate the capture and detention of Muslim men from Srebrenica”

Introduction

310. This allegation centers around P45.⁹⁹⁶ The Prosecution first have to prove to the requisite standard that Milan Gvero did in fact issue this document. On the evidence the Prosecution have failed to do this. There is, at the very least, evidence to suggest that he was not competent to send out this document. In addition, the Trial Chamber will need to consider matters relating to the sector number and issuance of P45 as well as its lack of signature, or of the markings “SR” and “ZA”. Further, and in the alternative, the use within the document of “among them are criminals and villains” did not lead to the commission of crimes.⁹⁹⁷

311. The Trial Chamber is also invited to consider whether the Prosecution have proved that the opportunistic killings⁹⁹⁸ and persecutory acts⁹⁹⁹ with which he is charged were foreseeable based on the following: the military composition of the enclave and of the ensuing column; the military threat posed by it; the knowledge at the time that the column was a military one (or at least predominately so); and the compliance of P45 with IHL. In addition, the Prosecution have not proved that Milan Gvero made a significant enough contribution to merit liability for events related to the capture of the column. The Defence maintain that Orders – written and oral –

⁹⁹⁶ P45, dated 13 July 1995 (Order to Prevent the Passage of Muslim Groups toward Tuzla and Kladanj, Strictly confidential no. 03/7-1629, from Assistant Commander Lieutenant General Milan Gvero, to *inter alia* the Commands of the Drina Corps, the Zvornik Infantry Brigade and the Birac Infantry Brigade, received at 1335 hours)

⁹⁹⁷ See OTP Opening Statement, T. 470 (22/08/06) (“But when you describe a group to your soldiers as inveterate criminals and villains, ‘among them are inveterate criminals and villains’, you’re asking them, you’re giving the green light to commit crimes”).

⁹⁹⁸ Indictment paras 31.2 (Bratunac town); 31.3 (Kravica Market); and 31.4 (Petkovci School).

⁹⁹⁹ Indictment para. 48(a) (opportunistic killings); 48(b) (cruel and inhumane treatment); 48(d)(the destruction of personal property and effects); and 48(e) (forced bussing of the men captured of having surrendered from the column, to the Zvornik area).

which were similar, if not identical to the tasks enumerated in P45 had been issued and implemented prior to and irrespective of P45. In summary, Milan Gvero did not control the movement of the Muslim men from the Srebrenica enclave pursuant to the JCE to forcibly transfer them.¹⁰⁰⁰

Milan Gvero did not Issue P45

Milan Gvero was Not Competent to Issue P45

312. According to Prosecution Military Analyst Richard Butler, Milan Gvero had commanded nothing larger than a platoon.¹⁰⁰¹ Manojlo Milovanovic did not believe that Milan Gvero actually had sufficient experience to conduct military operations; that is, to lead troops into combat.¹⁰⁰² Similarly, Novica Simic believed that only Milan Gvero's first posting was a command post. All others were morale related jobs.¹⁰⁰³

313. The fact of the matter is that Milan Gvero did not draft orders of this type in July 1995. He was not in a position nor did he have the authority to say, "I hereby order".¹⁰⁰⁴ As Prosecution witness Milovanovic testified, even in the absence of Mladic and himself (Milovanovic), no one could issue an order without following certain procedures.¹⁰⁰⁵ Considering *inter alia* the nature of his duties, Milan Gvero could control only his close associates (that is, five or six men) in his own sector for

¹⁰⁰⁰ Milan Gvero is alleged with regard to P45, to have furthered the JCE as described in paras 50-54 of the Indictment; that is, with regard to the alleged forcible transfer of the Muslim population from Srebrenica and Žepa. See Indictment para. 76.

¹⁰⁰¹ Butler, R., T. 20950 (01/02/08); **REDACTED**

¹⁰⁰² Milovanovic, M., T. 12250-12251 (29/05/07).

¹⁰⁰³ Simic, N., T. 28692 (24/11/08).

¹⁰⁰⁴ Skrbic, P., T. 15606 (18/09/07).

¹⁰⁰⁵ Milovanovic M. T.12307 (31/05/07) ("In that case, General Miletic would have had to call me regardless of the distance, but if the case in question called for it, if it was an emergency, he would have called me or if Mladic was closer, he would have had to call Mladic so that one of us could issue appropriate orders").

morale and nobody else.¹⁰⁰⁶ In short, and pursuant to unity of command, Milan Gvero did not have the right to command¹⁰⁰⁷ and could not have had any influence when it came to the use of units.¹⁰⁰⁸

314. At face value then, P45 fell outside the remit of Milan Gvero's particular job and appears to have been more appropriately type-signed by the chief of operations.¹⁰⁰⁹ Indeed, one would not expect P45 to come from the assistant commander for morale. Even Butler was forced to concede (although, it remains of course, not admitted by the Defence), that this was the first time that Milan Gvero had purportedly issued such a document. He went on to say that he could not think of another example during this period of a presumed operational order seemingly emanating from Milan Gvero.¹⁰¹⁰ The Canadian Military Expert Rémi Landry, called on behalf of Drago Nikolic, similarly confirmed that it had to be an operational document because it gives specific operational orders which are technical in nature. He testified too, that the operational branch has the authority and the knowledge to draft this kind of operational order.¹⁰¹¹ Milan Gvero never drafted anything even remotely similar to P45 when Nedeljko Trkulja was in the operations room.¹⁰¹² Nor did assistant commanders ever interfere with the competences and duties of a different assistant.¹⁰¹³ Interchangeability, according to Trkulja, did not exist in the VRS.¹⁰¹⁴

¹⁰⁰⁶ The witness clarified in this regard that this was control and not command because the latter implies issuing combat orders, orders to the units, whereas control takes place within a certain organ or sector (i.e. subordination of the men in Milan Gvero's sector and team work. Simic, N., T. 28599 (21/11/08).

¹⁰⁰⁷ Simic, N., T. 28598-28599 (21/11/08) (None of the assistants or members of the staff save the Chief of Staff and the Deputy Commander of the Main Staff had the right to command pursuant to the principle of unity of command, which was respected and abided by in the army).

¹⁰⁰⁸ Trkulja T.15141 (10/09/07).

¹⁰⁰⁹ Butler, R., T. 20699-20700, 20709 (30/01/08).

¹⁰¹⁰ Butler, R., T. 20699-20700, 20713-20714 (30/01/08).

¹⁰¹¹ Landry, R., T. 26311-26312 (26/09/08). *See also* Butler, R., T. 20219 (23/01/08) (An ambush is a tactical-level military operation). Contrary to Butler's testimony that P45 does not deal with concrete issues (i.e. the movement of military forces or the changing various components of an operational plan, for example), P45 could not easily have been issued under Milan Gvero's name. *See* Butler, R., T. 19873 (17/01/08).

¹⁰¹² Trkulja T. 15154 (11/09/07)

¹⁰¹³ Skrbic, P., T. 15541 (18/09/07).

¹⁰¹⁴ Trkulja T.15144 (10/09/07) *see also* Milovanovic T. 12245 (30/05/07)

Sector Number and Issuance

315. The sector number under which P45 was issued was “03/4”, which belonged to the Administration for Operations and Training Sector.¹⁰¹⁵ In fact, “03/04” was the numbering sequence used by the operations organ for its orders, whilst “07” was the number for the organ for Morale. This was clarified by Butler, who also confirmed that the contents of P45 were drafted by the operations people.¹⁰¹⁶ The drafting of all written documents relative to combat activities to be issued by the Main Staff was within the purview of the operations sector.¹⁰¹⁷

Lack of Signature, of SR and of “ZA

316. There is no signature by Milan Gvero on P45, but a block signature only on the original.¹⁰¹⁸ P45 is an incoming telegram¹⁰¹⁹, which means that there is not an actual signature¹⁰²⁰ and that the individual did not necessarily sign the document in question.¹⁰²¹ In fact, Prosecution witness Trivic testified in reference to 5D6D127 that although his name appears in the block signature he did not issue or sign this document because he was at different location at the time when the document was sent.¹⁰²² It is therefore not clear whether or not Milan Gvero signed P45¹⁰²³ The indication “SR” at the bottom of a document signifies that a person indicated on the

¹⁰¹⁵ See T. 28995 (28/11/08).

¹⁰¹⁶ Butler, R., T. 20710-20711 (30/01/08).

¹⁰¹⁷ Milovanovic, M., T. 12275 (30/05/07) & see Trkulja T.15215 (11/09/07)

¹⁰¹⁸ Landry, R., T. 26308-26309 (26/09/08).

¹⁰¹⁹ Trkulja, N. T. T.15152 (11/09/07).

¹⁰²⁰ Butler T.19872 (17/01/08)

¹⁰²¹ Pajic, V. T. 28796-28799 (25/11/08) and **REDACTED** Pajic, V. T. 28795-28796 (25/11/08) and 6D 178, dated 4 November 1995 (Zvornik Brigade Regular Combat Report, no. 06-335) (With regard to the block signature on the incoming telegram in question, Vinko Pandurevic could have signed it, but not necessarily); Trivic, M., T. 11909-11910 (22/05/07) and 5D6D 127, dated 15 July 1995 (Combat Report, strictly confidential no. 1151/2-95, from [block signature] Commander Colonel Mirko Trivic, to the Drina Corps Command) (The fact that the witness' name is on the document does not mean that he signed it); Obradovic, L., T. 28233 (14/11/08) (The witness testified with regard to the receipt of combat reports from the Main Staff, that since it was an encrypted communication in the bottom left part of each telegram, there was a so-called block signature featuring the Chief of General Staff, Colonel General Manojlo Milovanovic. The witness doubted his actual signature, however, because Milovanovic was at the forward command post in the western front).

¹⁰²² Trivic T. 11910 (22/05/07).

¹⁰²³ Butler, R., T. 19871-19872 (17/01/08). Also, it is not clear whether or not Milan Gvero signed P45 because the original does not have the notation normally found indicating that it is earthly signed (“SR”), discussed further below. See Butler, R., T. 19872 (17/01/08).

signature line signed the document personally in his own hand.¹⁰²⁴ The letters “SR” not appearing on P45 reflects the fact that it was not personally signed by the individual.¹⁰²⁵

317. In the alternative, the indication “Za” (“for”) appears when one signs for another.¹⁰²⁶ Even if no such indication appears on P45, the Defence note that when a document is sent by teletype and when the incoming telegram is received, the recipient would only see the typewritten part and would not see the word “for” and the signature.¹⁰²⁷ For example, whilst P13 states “For the Assistant Minister”, the recipient would conclude that it was signed by the Assistant Minister because the teletypist would not type “for”.¹⁰²⁸ In other words, only what is typed out is encrypted, and not the signature.¹⁰²⁹

¹⁰²⁴ Milovanovic, M., T. 12267-12268 (29/05/07) and 6D 129, dated 20 June 1992 (Prevention of Reprisals and treatment of journalists representative of international organizations, Confidential no. 16/10-28 from Assistant Commander Major General Milan GVERO, to all units) (There is no such indication on 6D 129, which means that the document is not of Milan Gvero’s own hand).

¹⁰²⁵ Butler, R., T. 20711-20712 (30/01/08).

¹⁰²⁶ See Butler, R., T. 20545 (28/01/08). For further evidence of “za” as applied to documents, see Galic, M., T. 10658-10659 (27/04/07); 7D99, dated 14 July 1995 (The witness’ subordinates could sign for him by putting “za” and then his name); Simic, N., T. 28610-28611 (21/11/08) and 6D 311, dated 24 March 1995 (Proposals for the Directive to the RS President on Special Measures in the IBK Zone of Responsibility, strictly confidential no. 01/1369-2/245, from Commander Major General Novica Simic, to Advisor to the RS President Major General Subotic) (There is a stamp of the witness’ command, “za”, and somebody else’s signature. The witness authorized the duty operations officer at the time to sign on his behalf because when it was ready for dispatch, the witness was no longer at the command); Obradovic, L., T. 28423 (18/11/08) and 65 ter 3924, dated 31 March 1995 (Main Staff document No. 06/17-305, addressed to the UNPROFOR Command, Sarajevo, signed by Col Radivoje Miletic on behalf of Gen Manojlo Milovanovic). Original Only (With regard to “za”: it is not Milovanovic’s signature, but that of Miletic, who was authorized by the Chief of Staff to sign the document); Miljanovic, R., T. 28937-28942, 28945-28946 (27/11/08) and 5D 1113, dated 19 July 1995 (GS VRS document no.10/33-1-192, regarding transport of civilians from Zepa, signature illegible) (With regard to “deputy assistant commander for”: the witness could have signed it, or it could have been signed by someone ordered to sign it by Djukic in the witness’s absence).

¹⁰²⁷ Skrbic, P., T. 15578-15579 (18/09/07).

¹⁰²⁸ Skrbic, P., T. 15578-15579 (18/09/07) and P 13, dated 12 July 1995 (Request for Mobilisation of Buses, from For the Assistant Minister, to Secretariat of the Defence Ministry Zvornik).

¹⁰²⁹ Trkulja T.15152 (11/09/07) For further evidence that “for” is not seen on the receiving end and that one only sees the typed name of the person in the signature line, see Trivic, M., T. 11909-11910 (22/05/07) and 5D6D 127, dated 15 July 1995 (Combat Report, strictly confidential no. 1151/2-95, from [block signature] Commander Colonel Mirko Trivic, to the Drina Corps Command) (When somebody signs and adds “for” Mirko Trivic, the recipient would not see the signature because it was encrypted); Milovanovic, M., T. 12267 (29/05/07) (When a document is submitted for transmission by teletype, the individual is indicated in the signature spot, indicating his rank and title. If when he does not sign in his own hand to verify the

318. Trkulja's evidence was that "anything is possible [with regard to P45] insofar as someone else having signed on behalf of Milan Gvero".¹⁰³⁰ The Prosecution thus failed to prove beyond reasonable doubt and as alleged, that Milan Gvero was authorised either from Ratko Mladic or from his own (or anyone else's) authority to issue P45.¹⁰³¹

319. Very significantly, Butler could not exclude the possibility that P45 was sent out in Milan Gvero's name without Gvero actually knowing of its existence at that time.¹⁰³² The Defence strongly maintain that this one piece of evidence coming from the Prosecution's military expert puts paid to any prospect that the Prosecution had of proving this matter beyond reasonable doubt. In short, if it was possible that Gvero did not know about P45, then that is the end of the matter and all further debate and argument on this topic is purely academic. This, of course, is notwithstanding all the other Defence arguments on this document as detailed both above and below.

"Among them are Inveterate Criminals and Villains"

320. Out of an abundance of caution, and in the alternative, this brief will now examine the contents of the document. Even if the Trial Chamber were to find that Milan Gvero issued P45, the language used within it has not been proven beyond reasonable doubt to be untrue. P45, in general, told of the composition of the column both for information and as a warning. The Prosecution have not proved that the language used led to the commission of crimes.

document, somebody signed with the handwritten prefix "for," this inscription is not seen on the receiving end; you only see the typed name of the person in the signature line).

¹⁰³⁰ Trkulja T. 15153 (11/09/07)

¹⁰³¹ T. 470 (22/08/06).

¹⁰³² Butler, R., T. 20715 (30/01/08).

“Criminals and Villains” were Among the Armed Men Tasked with Crossing to ABiH-controlled Territory

321. The use in P45 of “among them are inveterate criminals and villains” refers when read in its ordinary meaning, to those among the armed men fit for military service who based on instructions received and following defeat in the enclave, were tasked with crossing in groups to Tuzla and to Kladanj. The Prosecution does not contest the general proposition that there were sabotage and other acts committed by forces from within both the Srebrenica and the Žepa enclaves.¹⁰³³ However, reconnaissance and sabotage activities were carried out by the 28th Division on a regular basis against not only the VRS forces in the area¹⁰³⁴ but also, against civilians and against civilian objects.

322. **REDACTED.**¹⁰³⁵ Also, Serb civilian and military detainees in Srebrenica detention facilities were subject to cruel treatment in 1992 and in 1993, the result of which in some cases led to their death.¹⁰³⁶ At that time too, Serb villages in the Srebrenica area were attacked and destroyed by groups of Bosnian Muslim fighters, including those present in the column that set out from the enclave on the night of 11-12 July 1995.¹⁰³⁷ Such language (“among them are inveterate criminals and villains”)

¹⁰³³ T. 23710 (21/07/08). In fact, Van Duijn testified that Muslim forces regularly got out of the enclave and carried out acts of sabotage (Van Duijn, T. 2375 (28/09/06)).

¹⁰³⁴ Adjudicated Fact 46.

¹⁰³⁵ PW-168, T. 16244-16247 (11/10/07) Closed session.

¹⁰³⁶ *Prosecutor v. Naser Oric*, Case No. IT-03-68-T, Judgment, 30 June 2006, paras 357-474.

¹⁰³⁷ *See Prosecutor v. Naser Oric*, Case No. IT-03-68-T, Judgment, 30 June 2006, paras 593-676. Mevludin Oric confirmed in this regard that people from *inter alia* the units of Glogova, Potocari, Kraglijivoda, Suceška Šušnjari, Jaglici, Babuljice, Vlahovici, Brosevici, Biljeg, Skenderivici, and Osmace were in the column (Oric, M., T. 1111 (31/08/06)). Also, Ejub Golic, who *inter alia* led the Glogova Bosnian Muslim fighters in the attacks on the Serb village of Ježestica, also led the Mountain Battalion in the column from the enclave in July 1995. *See Oric* Judgment, paras 620-633, 646-658, 659-676 and **REDACTED**; PW-137, T. 3664, 3749 (06/12/06); PW-110, T. 795, 806 (25/08/06), PW-110, T. 646 (24/08/06). In addition, Zulfo Tursunovic participated in the attacks on Serb villages in 1992 and in 1993 (*Oric* Judgment, paras 634- 676). Avdo Palic in agreement with Zulfo Tursunovic had planned and carried out on approximately 26 June 1995 nine sabotage operations during which *inter alia* several civilians were killed (Vojinovic, M., T. 23731 (21/07/08)). Zoran Jankovic saw Zulfo Tursunovic when captured and in the column on 14 July (Jankovic, Z., T. 27369, 27371-27372 (27/10/08)). For his part, Ramiz Becirovic participated in attacks on various Serb villages in 1993 (*Oric* Judgment, paras 659-676). With regard to the column in July 1995, he ordered that it start moving and led the way (Oric, M., T. 977 (29/08/06); Oric, M., T. 1050-1051 (30/08/06)). *See also* Pandurevic, V., T. 30790-30791 (28/01/09) (146 Serb villages and hamlets were

is therefore not necessarily untrue. As the evidence suggests, among the armed men in the column were those that both in law and in fact appear to have committed crimes.

“Among them are Criminals and Villains”: Information and Forewarning

323. The said reference in P45 tells of the composition of the column, namely that there are dangerous criminals within the normal soldiers in the column that are capable of doing anything to get through to the 2nd Corps, including criminal, violent means, if need.¹⁰³⁸ **REDACTED.**¹⁰³⁹ A complete ceasefire was then ordered with the opening of the corridor at Balkovica. **REDACTED.**¹⁰⁴⁰ The Defence similarly recall the evidence of a Bosnian Muslim fighter who, at the point at which he surrendered to a civilian recruit, threw a grenade, severely disabling the recruit.¹⁰⁴¹

324. Bogdan Ristivojevic, the Military expert called on behalf Borovcanin, when asked against the backdrop of enemy soldiers doing everything they could to avoid capture, including detonating explosives resulting in the death and injury of soldiers, confirmed that it would be consistent under Article 213 of the Regulations on the Application of the Rules of International Law of War in the Armed Forces of the SFRY, to order that nothing should be risked in the taking of prisoners.¹⁰⁴² A

burned as a result of Muslim offences between May 1992 and January 1993) and 7D 940 (Surrogate Sheet Photo Material – Map showing the destruction of Serbian villages in the municipalities of Srebrenica and Bratunac between May 1992 and January 1993).

¹⁰³⁸ Landry, R., T. 26313 (26/09/08).

¹⁰³⁹ PW-168, T. 15891-15892 (27/09/07) Closed session.

¹⁰⁴⁰ PW-168, T. 15895 (27/09/07) Closed session.

¹⁰⁴¹ PW-100, T. 14839-14840 (05/09/07). **REDACTED**

Ristic, L., T. 10155-10157 (17/04/07) (Once a Muslim officer from a brigade in Srebrenica left after having surrendered and having seen the disposition of the Bosnian Serb forces and that they were out of ammunition on 16 July, the 2nd Corps attacked them that morning, starting a more intense attack using artillery and infantry forces and mobile mortars); Celic, P., T. 13509-13510 (28/06/07) (At Balkovica, Muslims kidnapped the self-propelled combat pieces; fierce fighting later ensued, which continued for a long time);

¹⁰⁴² Ristivojevic, B. T. 28066-28067 (12/11/08) and P 409, dated 13 April 1988 (Regulations on the Application of the Rules of International Law of War in the Armed Forces of the SFRY, from President of the SFRY Presidency Lazar Mojsov, sgd.): Section VIII (Prisoners of War) Article 213 reads in relevant

commander is bound pursuant to the said article, to take all such precautionary measures. Discretion is left to him with regard to the measures that he will employ.¹⁰⁴³ Petar Vuga, an expert called on behalf of a number of co-accused, similarly confirmed that all documents related to the implementation of combat assignments contain information about the enemy, and that such an obligation is in accordance with all regulations in the RS at that time stipulating how the enemy is to be assessed and analysed.¹⁰⁴⁴ The use then, of what the Prosecution allege is inflammatory language in P45 is not beyond reasonable doubt other than to warn against unexpected attacks and to prepare accordingly.

325. Indeed, Vinko Pandurevic issued an order at the relevant time on the basis of information from events on the ground, in which he stated,

In fighting with our forces [the enemy] showed the utmost imprudence, unexpected moves, and an animal instinct for survival. Forces from the front are still determined to coordinate action in enabling the withdrawal of the remaining groups at any costs.¹⁰⁴⁵

326. **REDACTED.**¹⁰⁴⁶

327. Similar to P45, the use in P117¹⁰⁴⁷ of “[t]here are hard-core criminals and felons among them, who will go to any lengths to evade capture and reach the territory under Muslim control”, was a warning to be cautious to avoid surprises and losses as

part: “When capturing a member of the enemy armed forces, the commanding officer of a unit of the armed forces of the SFRY shall take all precautionary measures for the security of the unit.”

¹⁰⁴³ Ristivojevic, B. T. 28066-28067 (12/11/08). When asked what precautionary measures Viktor Pandurevic took for the security of his units pursuant to Article 213, he testified that he ordered on 18 July that his men proceed with caution, making sure that they were safe. He also “...counted on all sorts of perfidies that might have been used by the enemy soldiers” (Pandurevic, V., T. 31128-31129 (09/02/09)).

¹⁰⁴⁴ Vuga, P., T. 23258 (03/07/08). *See also* Vuga, P., T. 23326 (04/07/08).

¹⁰⁴⁵ P334, dated 18 July 1995 (Zvornik Brigade Interim Combat Report 06-222, dated 18 July 1995 and Pandurevic, V., T., 31126 (09/02/09)). *See also* Pandurevic, V., T. 31470-31471 (13/02/09) (“Members of the 28th Division had very serious intentions to break through towards the 2nd Corps at any costs”).

¹⁰⁴⁶ **REDACTED**

¹⁰⁴⁷ P117, dated 13 July 1995 (Preventing Passage of Muslim Groups to Tuzla and Kladanj, Order, strictly confidential no. 03/156-12/crossed out/handwritten:/11, from Commander Major General Milenko Živanovic, to the Commands of all Drina Corps subordinated units and for the attention of Drina Corps Forward Command Post-1).

a result of being poorly informed about the enemy in question.¹⁰⁴⁸ The importance of such information was confirmed by Vuga, who testified that each commanding officer issuing an order is duty-bound to provide sufficient information for the successful implementation of the task involved.¹⁰⁴⁹

“Among them are Inveterate Criminals and Villains” Did not Lead to the Commission of Crimes

328. Without wishing to take a cheap point, the Defence invite consideration of the following statement made by the Prosecution’s Senior Trial Attorney in relation to the use in a document of the words “crush and destroy the Ustasha forces”. Counsel said to the witness:

You don't think it's because all sides in war come up with really derogatory nasty names to call each other? We are not here because of nasty names, General; but isn't this what is about? This is just a nasty name being used in a document?¹⁰⁵⁰

329. The reality is that this is no different from the statement made by Canada’s Chief of Defence Staff, General Rick Hillier when describing opposition forces in Afghanistan, the target of a 2,000-troop deployment, as “detestable murderers and scumbags”?¹⁰⁵¹

¹⁰⁴⁸ Vuga, P., T. 23258 (03/07/08). See also Vuga, P., T. 23326 (04/07/08) and P36, dated 13 July 1995 (Order to Block the Passage of Muslim Groups to Tuzla and Kladanj, strictly confidential no. 03/156-12/last two numbers crossed out and 11 written instead, from Commander Major General Milenko Živanovic, to Commands of All Drina Corp Subordinate Units and Drina Corps Forward Command Post 1, Received 13 July 1600 hours, processed 13 July 1720 hours) (The witness testified that the use of “criminals and villains” in P36 is a specific caution to individuals involved in the operation requiring the disarming of such individuals); **REDACTED**

¹⁰⁴⁹ See Vuga, P., T. 23258 (03/07/08); Vuga, P., T. 23325-23326 (04/07/08) (The said information about the enemy points to the problems and tasks for individuals responsible for carrying out the assignment).

¹⁰⁵⁰ T. 28342 (17/11/08) and 5D963, dated 11 November 1993 (Directive for Further Operations Operational Order No. 6, strictly confidential no. 02/2-934 from Supreme Commander Radovan Karadzic, to *inter alia* the Commands of the 1st KK /Krajina Corps/, the 2nd KK, SRK /Sarajevo Romanija Corps). According to Ljubo Obradovic, “Crush and destroy the Ustasha forces” means defeat the Muslim forces militarily (Obradovic, L., T. 28342 (17/11/08)).

¹⁰⁵¹ ‘Canadian Task Force ‘JFT2’ to hunt al-Qaeda in Afghanistan’, *The Globe and Mail*, 15 July 2005. Of note with regard to the relevant allegations is the reference in P45 to a smaller number of individuals within the larger group. This is contrasted with the characterisation as a whole of the group by Canada’s Chief of Defence Staff. Arguably, the lack of any such characterisation in P45 is indicative further that the use of the language in question was not inflammatory.

330. With regard to P45 generally, Landry did not find anything surprising therein, bearing in mind what was happening in Zvornik at the time.¹⁰⁵² Indeed, the use of “criminals and villains” is not an invitation to engage in lynching or retaliation.¹⁰⁵³ In other words, the Prosecution failed to prove beyond reasonable doubt that the use of what is alleged to be inflammatory language in P45 led to the commission of crimes. In fact, no such evidence was adduced to this effect.

The Crimes with Which Milan Gvero is Charged were not Foreseeable

331. In the event that the Trial Chamber were to find that P45 was issued by Milan Gvero, the crimes with which he is charged were not foreseeable. It is noteworthy that the column was military in nature, posed a military threat, and that this was known at the time. Moreover, P45 was compliant with IHL.

Military Nature of the Column

332. On 11 July, word spread through the Bosnian Muslim community that the able-bodied men should take to the woods near the villages of Jaglici and Šušnjari, form a column with members of the 28th Division, and attempt to breakthrough to Bosnian Muslim held territory.¹⁰⁵⁴ There were a large number of members of the BiH army among those *en route* to Jaglici.¹⁰⁵⁵ As described by Marko Milosevic, these were

¹⁰⁵² Landry, R., T. 26309 (2609/08).

¹⁰⁵³ Vuga, P., T. 23326 (04/07/08) and P36/P117, dated 13 July 1995 (Order to Block the Passage of Muslim Groups to Tuzla and Kladanj, strictly confidential no. 03/156-12/last two numbers crossed out and 11 written instead, from Commander Major General Milenko Živanovic, to Commands of All Drina Corp Subordinate Units and Drina Corps Forward Command Post 1, Received 13 July 1600 hours, processed 13 July 1720 hours).

¹⁰⁵⁴ Adjudicated Facts 245 and 246. *See also* PW-137, T. 3664 (06/12/06); PW-137, T. 3747 (07/12/07) (The witness and other members of the Territorial Defence were ordered at approximately 2000 hours on 11 July out of their trenches to meet and discuss what should be done about the fall of Srebrenica); PW-137, T. 3664 (06/12/06) (It was decided after they were ordered out of their trenches that women, children, and the elderly should go to Potocari while the witness and other men were advised to gather in Šušnjari).

¹⁰⁵⁵ PW-111, T. 7032-7034 (07/02/07).

well-armed elements of the Bosnian Muslim army.¹⁰⁵⁶ Clearly, there were “a substantial number of people who had weapons”.¹⁰⁵⁷

333. Ramiz Becirovic ordered that the column to start moving and led the way. The command went first.¹⁰⁵⁸ **REDACTED**,¹⁰⁵⁹ there were the de-mining units and the troops that were armed, after which the column was organized in brigades.¹⁰⁶⁰ Whilst the column was dispersed,¹⁰⁶¹ there is also evidence that officers under the command of Ejub Golic of the Mountain Battalion (which was located at the front part of the column) tried to organize the column under the leadership of various units of the army.¹⁰⁶² Zoran Jankovic, Platoon Leader, PJP Unit of the Doboj CJB, who was captured on 14 July by well-camouflaged and concealed soldiers in the column, described it as an orderly formation, well organised: there was nothing chaotic about it.¹⁰⁶³ It had scouts, leaders, and guides familiar with the terrain, and elite units composed of the youngest and most capable men, as well as flank and rear security.¹⁰⁶⁴ **REDACTED**.¹⁰⁶⁵

334. Indeed, 80 percent of the men in the middle and closer to the front of the column were armed; there were complete uniforms, parts of uniforms, as well as a number of

¹⁰⁵⁶ Milošević, M., T. 13324 (26/05/07) (The witness described them as well-armed elements of the Muslim army trying to break through from Srebrenica).

¹⁰⁵⁷ PW-111, T. 7032-7034 (07/02/07).

¹⁰⁵⁸ Oric, M., T. 977 (29/08/06); Oric, M., T. 1050-1051 (30/08/06). *See also* PW-127, T. 3579-3580 (03/11/06); V 4458 at 8:43:7 (The witness confirmed that Ramiz Becirovic is the man depicted in V 4458).

¹⁰⁵⁹ PW-168, T. 15868, 15866, 15874 (26/09/07) Closed session.

¹⁰⁶⁰ Oric, M., T. 874 (06/08/28); Oric, M., T. 1083-1084 (31/08/06). *See also* Adjudicated Fact 256, which reads in relevant part, that “The head of the column was comprised of units of the 28th Division, then came civilians mixed with soldiers, and the last section of the column was the 28th Independent Battalion of the 28th Division”.

¹⁰⁶¹ Oric, M., T. 1122 (31/08/06). *See also* PW-113, T. 3328 (31/10/06) (Soldiers went ahead in the column).

¹⁰⁶² **REDACTED** *See also* PW-110, T. 806 (25/08/06) (The witness saw Ejub Golic when the former gathered in Susnjari prior to the departure of the column. Ejub Golic wore a camouflage uniform and was armed with an automatic rifle, and was a commander in Glogova).

¹⁰⁶³ Jankovic, Z., T. 27372, 27373 (27/10/08). *See also* Jankovic, Z., T. 27374 (27/10/08) (The soldiers in the column also had good communication means, including military communication means that he had never before seen).

¹⁰⁶⁴ Jankovic, Z., T. 27373 (27/10/08).

¹⁰⁶⁵ PW-168, T. 15868, 15866, 15874 (26/09/07) Closed session.

armed civilians.¹⁰⁶⁶ Jankovic was astonished when he saw their weaponry, examples of which that he had never seen in his police or in military. They even had anti-helicopter rockets known as “strijela” or arrows; they were, he testified, “really well armed”.¹⁰⁶⁷ Major Franken similarly confirmed with regard to the weaponry in the column, that members of the 28th Division that crossed at Nezuk on 16 July were carrying the same type of weapon that DutchBat was carrying.¹⁰⁶⁸

335. Also with regard to the military nature of the column, the Prosecution conceded that a general mobilisation preceded the events in Srebrenica, which included men as young as 16 years of age.¹⁰⁶⁹ The armed column of the 28th Division was described as conducting a regular military action; that is, a withdrawal from the theatre,¹⁰⁷⁰ during which it engaged in offensive combat activities.¹⁰⁷¹ **REDACTED**¹⁰⁷² Whilst

¹⁰⁶⁶ Jankovic, Z., T. 27371 (27/10/08). Jankovic, Z., T. 27372 (27/10/08) (Jankovic was mostly in the middle of the column or closer to its front. The command was in the first third of the column, where he saw Zulfo Tursunovic and the commander of the 28th Division).

¹⁰⁶⁷ Jankovic described the weaponry as follows: rifles with nitro-glycerine bullets, two 12.7 machine guns, Brownings, which is a machine gun that can be used in anti-aircraft defence (i.e. its barrel can be directed vertically), sniper rifles, and 84-millimetre machine guns. With regard to artillery pieces, the witness noticed Brownings mounted on horses, as well as anti-helicopter rockets known as “strijela” or arrows. Jankovic, Z., T. 27373 (27/10/08).

¹⁰⁶⁸ Franken, R., T. 2584-2586 (06/10/06), V3914 (4DP2007). See also Franken, T. 2586-2587, V 376 (65ter P 2017). The Defence note in particular in this regard that Charlie Company was overwhelmed by about 30-40 Muslims, who took DutchBat’s weapons similar to those seen in V3914 (4DP2007): Franken, R., T. 2584-2586 (06/10/06).

¹⁰⁶⁹ 7D57 Proclamation ordering the mobilization of the municipality of Srebrenica, undated.

¹⁰⁷⁰ Jevdjovic, M., T. 29894 (17/12/08). See also 6DP439, dated 11 July 1995 (Order to Block the Linking up of the Forces of the 28th Enemy Division with the Forces in the Enclaves, strictly confidential no. 03/157-4, from Commander Major General Milenko Živanovic, to Commands *inter alia* of the IKM DK/Drina Corps Forward Command Post/, 2 Rmbtr /2nd Romanija Motorised Brigade/, 1 Vlpbr /1st Vlasenica Light Infantry Brigade) (The said order was issued *inter alia* to prevent the withdrawal of Muslim forces from the Srebrenica enclave); P149, dated 12 July 1995 (Untitled, strictly confidential No. 17/897, from Chief Major General Zdravko Tolimir, to *inter alia* the Intelligence and Security Departments, the Commands of Sarajevo-Romanija Corps, Eastern Bosnia Corps): “The organs of the Brigade Commanders will propose to the commanders of the units positioned along the line of withdrawal of elements of the 28th Muslim Division from Srebrenica to undertake all measures to /prevent the withdrawal/ and to capture enemy soldiers.”; **REDACTED**

¹⁰⁷¹ Stanojevic, D., T. 12880-12883 (19/06/07) (Shooting from Muslim units came from the hills above the witness and his units in Sandici on 12 July); Zanic, Z., T. 26934-26937 (09/10/08) (The witness was wounded in the early hours of 13 July from bursts of fire originating from the hill and the forests located in front of him, whereupon his colleagues returned fire); Filipovic, N., T. 27004 (10/10/08) and P3113, dated 14 July 1995 (Bulletin of Daily Events of the Zvornik Public Security Centre for 13/14 July 1995, number 195/95, from Duty Operations Officer Vlado Kovacevic) (Zvornik public centre police officers came under armed attack in the morning hours of 13 July from large groups of military formations from Srebrenica, during which one such officer was killed and three others were wounded); Trivic, M., T. 11933 (22/05/07)

all attacks on the column took place in territory under the control of the Bosnian Serb army, from which the column expected a possible attack,¹⁰⁷³ **REDACTED**¹⁰⁷⁴

Military Threat Posed by the Column

336. The column, as described by Butler, posed a “significant military threat” to Zvornik¹⁰⁷⁵ and by Lazar Ristic with regard to the morning of 13 July as “an imminent military threat”.¹⁰⁷⁶ Certainly by 13 July, there was a growing awareness of the military threat of the column.¹⁰⁷⁷ As duly noted by the Prosecution,

The column of Muslim men [with whom Bogdan Subotic] engaged on 13 July presented a grave risk to the Serb territory [through which it was travelling] ... We know that the threat to Zvornik was so great that the VRS pulled troops out from around Žepa and sent them back to Zvornik. ... We also know that there was talk of mobilising civilians, we know soldiers were sent from the Krajina corps and MUP forces were sent from all over Bosnia. We also heard earlier that Zoran Malinic ordered ... Aleksandar Lucic to return [on 12 July].¹⁰⁷⁸

and 5D6D127, dated 15 July 1995 (Combat Report, strictly confidential no. 1151/2-95, from [block signature] Commander Colonel Mirko Trivic, to the Drina Corps Command) (The witness confirmed the situation on 15 July in his area of responsibility referred to in the said document: the heavy attack sustained on 14 July and subsequent occasional firing in provocation by the enemy).

¹⁰⁷² PW-168, T. 16646 (19/10/07) Closed session.

¹⁰⁷³ Oric, M., T. 1117 (31/08/06). *See also* PW-111, T. 7032 (06/02/07) (The witness set out from the village of Jaglici, located at the very outskirts of the enclave with a column heading towards Tuzla. Once outside the enclave’s borders, the column was then in the territory under control of the VRS); Adjudicated Facts 251 and 252. The Defence recall that the International Tribunal applies IHL and is not called upon – nor has the jurisdiction – to adjudicate matters concerning *jus ad bellum* (i.e. the resort to armed force and the possible acquisition of territory in so doing). In other words, that the VRS was occupying territory that was otherwise Bosnian is not relevant to the deliberations currently before the Trial Chamber.

¹⁰⁷⁴ PW-168, T. 16627 (19/10/07) Closed session.

¹⁰⁷⁵ Butler, R., T. 20075 (21/01/08), T. 19857 (16/01/08). *See also* Vuga, P., T. 23284 (04/07/08) (Within the area of responsibility of the Zvornik Brigade, there were several security threats that existed throughout the whole period of the implementation of the brigade's tasks: sabotage and terrorist groups infiltrated in the area of the brigade's responsibility, representing a major threat to the brigade); Butler, R., T. 19857 (16/01/08) (the column posed a military threat); Butler, R., T. 20408 (24/01/08) (There was a general awareness on 12 and 13 July among the soldiers that their families were in some form of threat, most of which was related to the column); **REDACTED**; Pandurevic, V., T. 31455-31456 (13/02/09)) (This was the first instance that the Zvornik Brigade faced conflict to this extent both from the front (the 2nd Corps) and from the rear (the column)); **REDACTED**.

¹⁰⁷⁶ Ristic, L., T. 10196 (18/04/07). *See also* Ristic, L., T. 10196, 10197 (18/04/07) (There was a possibility on 13 July that the men in the column might suddenly attack in the rear; a defence was mounted accordingly).

¹⁰⁷⁷ Butler, R., T. 20710 (30/01/08).

¹⁰⁷⁸ T. 25030 (01/09/08).

337. There was also a fear at that time that the men in the column might attack surrounding Serb villages, for which a heightened level of alert was issued and during which a great deal of caution was required.¹⁰⁷⁹
338. The threat to the Zvornik area continued through 14 July.¹⁰⁸⁰ Two days later, there was very intensive combat with the column; so much so that Butler was not aware of another incident in which one VRS unit of brigade size had 40 combat deaths in less than a 24-hour period.¹⁰⁸¹ Indeed, when as a commander Vinko Pandurevic estimated that he would suffer losses, the most realistic and logical thing was to open the corridor and allow the army to pass through to ABiH-controlled territory.¹⁰⁸² **REDACTED**¹⁰⁸³
339. On 17 July, Ristic observed with regard to the passage of the column, a lot of uniformed soldiers and 32 84-milimeter machine guns, and confirmed that this column posed the threat for which he had prepared on 13 July.¹⁰⁸⁴

Civilian Component

340. In terms of the civilian component of the column, soldiers and civilians were interspersed behind, where most civilians stayed with a group of armed soldiers.¹⁰⁸⁵

¹⁰⁷⁹ Ristic, L., T. 10197, 10200-10201 (18/04/07). *See also* Lazic, Milenko, T. 21737 (04/06/08) (Because the relevant Drina Corps forces had already been sent towards Žepa, there were no serious troops in the area through which this large group was moving; as such, the 28th Division could not be stopped).

¹⁰⁸⁰ *See* Jevdjevic, Milenko, T. 29614-29615 (12/12/08) (Dragan Obrenovic informed the witness on 14 July that he was very much concerned: the military situation in the Zvornik area was very uncomfortable because he received information about a huge column of the 28th Division that was breaking the defences of his units, and he did not have enough men to carry out combat missions). **REDACTED**; Butler, R., T. 20024 (18/01/08); P 1201, dated 16 July 1995 (Intercept Palma, Lieutenant Colonel Vujadin Popovic and Rasic) ("Just the thing ... Horrible ... It was horrible"). *See also* Celic, P., T. 13485 (28/06/07) (The witness confirmed that approximately 30 members of the VRS and the MUP were killed during this action in Baljkovica); Sladojevic, B., T. 14373-14375 (27/08/07) (On 16-17 July, the column engaged in heavy fighting and there were enormous casualties); **REDACTED**.

¹⁰⁸² Sladojevic, B., T. 14380 (27/08/07).

¹⁰⁸³ PW-168, T. 16563-16564 (18/10/07) Closed session.

¹⁰⁸⁴ Ristic, L., T. 10180 (17/04/07); Ristic, L., T. 10198 (18/04/07).

The army would not let civilians go in the front of the column. Although PW-113 testified that he only saw a few troops at the rear of the column, the said witness also testified that the number of soldiers at the rear of the column “was great”.¹⁰⁸⁶

341. Civilians voluntarily seeking refuge in the column¹⁰⁸⁷ does not *prima facie* alter its status as a military object. Just as a population is considered to be civilian in nature if it is “predominately civilian”¹⁰⁸⁸, so too, the Defence submit, does a military object retain its status as such, if it is “predominately military.” Similarly, the presence of civilians within a military object does not alter its military character.¹⁰⁸⁹ Of particular importance in this regard is the knowledge based on information reasonably available at the time, of the military nature of the column. In other words, those who ordered engagement with the column believed it at the time to be a military column, or at least a predominately military object. Whilst the Defence trust that the Prosecution will accept the above propositions, not least, as no more than good common sense, none the less the thorough review of the evidence as described above and in the footnotes, demonstrates the strength of the Defence assertions in this regard.

Knowledge and Belief at the Relevant Time of the Military Nature of the Column

342. The VRS in the Pribicevac forward command post sector had general information on 11 July that the main bulk of the 28th Division (i.e. the armed soldiers) was grouping in the north-western section of the enclave from Srebrenica towards

¹⁰⁸⁵ PW-113, T. 3328 (31/10/06). *See also* Oric, M., T. 975 (29/08/06) (There was a unit with weapons at the very back of the column, whose task was to protect the rear of the column).

¹⁰⁸⁶ PW-113, T. 3347, 3348, 3364 (31/10/06).

¹⁰⁸⁷ *See also* Oric, M., T. 871 (28/08/06), Oric, M., T. 1077 (30/08/06) (The decision on 11 July to go to Tuzla by Ramiz Becirovic and the command from Srebrenica at a gathering in Susnarji was communicated to others by word of mouth); PW-115, T. 3308-3309 (31/10/06) (The witness’s father said on 11 July that they would join those through the woods because everybody decided to go there); PW-113, T. 3357-3358 (31/10/06) (The witness heard that the BiH army command ordered in the evening of 11 July that men be separated from women, that it established which group would take which route, and that men were ordered to assemble in Susnjari. However, the witness also testified that it wasn’t anything strict).

¹⁰⁸⁸ *See Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009, para. 146.

¹⁰⁸⁹ *See Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009, para. 146.

Konjevic Polje and Kasaba, and that they were intending to break through with the main bulk of their forces, towards Tuzla.¹⁰⁹⁰

343. On 12 July, the first plausible piece of information begins circulating that people are noticing the establishment of a column from Jaglici towards Buljim and that there are Bosnian Muslim forces at that location that are trying to penetrate the VRS lines.¹⁰⁹¹ Taken in context with the understanding the VRS had at the time (i.e. that most of the 28th Division was going to retreat towards the Bandera Triangle and potentially go to Žepa), VRS operations scheduled for 12 July attempted to regain contact and engage the 28th Division.¹⁰⁹² Momir Nikolic explained with regard to intelligence received, “there were lots of members of the 28th Division who were armed and who had set up a standard formation for movement and for breakthrough in military terms”.¹⁰⁹³ **REDACTED**,¹⁰⁹⁴ and that all soldiers referred to in the groups that broke out of the enclave were armed with infantry weapons, whilst some even had RPGs.¹⁰⁹⁵

344. Also on 12 July, the Main Staff were informed, primarily by the Drina Corps, that there was a general understanding that the 28th Division is now moving in a column formation out of the former enclave and is trying to break out towards Muslim territory.¹⁰⁹⁶ However, some information being reported up from the Drina Corps to

¹⁰⁹⁰ Jevdjevic, Milenko, T. 29766 (16/12/08). See also Nikolic, M., T. 33017-33018 (22/04/09) (There was information on 11 July that the military and civilian authorities decided that all armed military-aged men in units should leave the enclave together in a column).

¹⁰⁹¹ Butler, R., T. 19803-19804 (16/01/08) **REDACTED**. See also Nikolic, M., T. 32916 (21/04/09) (Already in the morning of 12 July and more intensely thereafter, information started pouring in that elements of the Muslim forces located in the Jaglici and Susnjari sectors were pulling out towards Muslim-controlled territory. The said information was sent up both the intelligence and the command chain; the appropriate individuals and organs were notified).

¹⁰⁹² Butler, R., T. 19804 (16/01/08).

¹⁰⁹³ Nikolic, M., T. 33333 (24/04/09).

¹⁰⁹⁴ PW-168, T. 15818-15819 (26/09/07). Closed session.

¹⁰⁹⁵ P 75, dated 12 July 1995 (Untitled, number 05-1998/95, from Dragan Kijac, Head of the RDB, to RS MUP RDB Sarajevo).

¹⁰⁹⁶ Butler, R., T. 19849 (16/01/08) and P 2748, dated 12 July 1995 (Untitled, strictly confidential no. 03-3-193, from R\MM Standing in for the Chief of Staff, Major General Radivoje Miletic, to the President of Republika Srpska, the Commands of 1st and 2nd Krajina Corps, Sarajevo-Romanija Corps).

the Main Staff was not accurate.¹⁰⁹⁷ There were only isolated incidents of children accompanying the column. Similarly, Butler did not believe that there were any women in sizeable number accompanying it.¹⁰⁹⁸

345. When asked how as an intelligence analyst he would have evaluated initial battlefield reports and contacts coming in on 12 July, Butler recalled with respect to the US military context, that the first report is wrong, the second report is only half right, and that one does not know which part of the report is correct. It is not until the third or fourth report that one starts to get a clear picture of what is actually happening in a particular battle or in a particular situation.¹⁰⁹⁹

346. Whilst initially, it was reported – albeit erroneously – that women and children were accompanying the column, the evidence shows that it could reasonably have been inferred, based on information available at the relevant time, that the column was military in nature, or at least predominately so. For example, on the basis of an interview with a POW captured on 12 July, it was reported that:

The said POW] gave the following information during the interview on the situation in the Suceska area: All military-aged men in the Suceska area were organized and set off under the command of Zulfo Tursunovic to cross the territory of RS illegally to Kladanj and Tuzla. [The POW] assessed that a group of about 500 armed Muslims, including children and unmarried women fit for military service, set off under Zulfo's command on 11 July this year. ... On the basis of this interview, it can be concluded that civilians – mainly women, children, old people and the wounded – have set off in an organized fashion to the UNPROFOR base in Potočari, while the armed formations of able-bodied men have left to break through illegally to reach Tuzla.¹¹⁰⁰

¹⁰⁹⁷ Butler, R., T. 19849 (16/01/08) and P 2748, dated 12 July 1995 (Untitled, strictly confidential no. 03-3-193, from R/MM Standing in for the Chief of Staff, Major General Radivoje Miletic, to the President of Republika Srpska, the Commands of 1st and 2nd Krajina Corps, Sarajevo-Romanija Corps).

¹⁰⁹⁸ Butler, R., T. 19849 (16/01/08). See also Indictment para. 56, which reads in relevant part: "...[a]pproximately 15 000 Bosnian Muslim men from the enclave, with *some* women and children, ... fled on 11 July in a huge column through the woods towards Tuzla" (emphasis added).

¹⁰⁹⁹ Butler, R., T. 19805 (16/01/08). For example, Butler testified with regard to 12 July, that as these events occur on the ground and more and more reports about them are passed up the chain of command, people start to get a little bit of a clearer picture that their initial assessments on where the 28th Infantry Division were might not be completely accurate (Butler, R., T. 19805-19806 (16/01/08) **REDACTED**

¹¹⁰⁰ P 148, dated 12 July 1995 (Statement by Prisoner of War Izudin Bektic, strictly confidential no. 17/896, from Chief Major General Zdravko Tolimir, to *inter alia* Main Staff of the VRS Intelligence and Security Sector, Intelligence Administration, Drina Corps Forward Command Post Pribicevac General Krstic personally, and Drina Corps Forward Command Post Lieutenant Colonel Popovic personally). See also P

347. At the relevant time then, intelligence and reports indicate that the column was a military one – or at the very least, predominately so – and that it was treated as such by the VRS. Information relevant to this potential military threat was shared by the MUP and the VRS.¹¹⁰¹ Panic set in about the serious military threat that the column posed within the ranks of the VRS as well as within the Main Staff.¹¹⁰² This panic did not however even begin to take account of the true nature of the military threat which the column posed. If anything, there was always an under-appreciation by the military operations and the military intelligence on just how large the column was and how many armed members were part of the column.¹¹⁰³ For example, information that the size and combat power of the column was much greater than was previously estimated on 12 July is missing from the Main Staff document. The sheer scale of the column was clearly not fully appreciated by the Main Staff.¹¹⁰⁴

149, dated 12 July 1995 (Untitled, strictly confidential No. 17/897, from Chief Major General Zdravko Tolimir, to *inter alia* the Intelligence and Security Departments, the Commands of Sarajevo-Romanija Corps, Eastern Bosnia Corps): Elements in the column "...seem to be divided into several groups headed by Ibrahim Mandžic, aka Mandža, one of Naser Oric's deputies. ... The OBP organs of the Brigade Commands will propose to the commanders of the units positioned along the line of withdrawal of elements of the routed 28th Muslim Division from Srebrenica to undertake all measures to /?prevent the withdrawal/ and to capture the enemy soldiers. ... The Muslims wish to portray Srebrenica as a demilitarised zone with nothing but a civilian population in it. That is why they ordered all armed men fit for military service to illegally pull out from the area, cross RS territory, and reach the Muslim-controlled area so that they could accuse the VRS of an unprovoked attack on civilians in a safe haven.";

REDACTED

¹¹⁰¹ Butler, R., T. 19856 (16/01/08) and P 148, dated 12 July 1995 (Statement by Prisoner of War Izudin Bektic, strictly confidential no. 17/896, from Chief Major General Zdravko Tolimir, to *inter alia* Main Staff of the VRS Intelligence and Security Sector, Intelligence Administration, Drina Corps Forward Command Post Pribicevac General Krstic personally, and Drina Corps Forward Command Post Lieutenant Colonel Popovic personally): "[Izudin Bektic] said that all military-aged men in the Sucevka area were organised and set off under the command of Zulfo Tursunovic to cross the territory of RS illegally to Kladanj and Tuzla. ... On the basis of this interview, it can be concluded that the civilians – mainly women, children, old people and the wounded – have set off in an organised fashion to the UNPROFOR base in Potocari, while the armed formations of able-bodied men have left to break through illegally to reach Tuzla..."

¹¹⁰² Butler, R., T. 20710 (30/01/08).

¹¹⁰³ Butler, R., T. 19846 (16/01/08).

¹¹⁰⁴ Butler, R., T. 19849 (16/01/08) and P 2748, dated 12 July 1995 (Untitled, strictly confidential no. 03-3-193, from R\MM Standing in for the Chief of Staff, Major General Radivoje Miletic, to the President of Republika Srpska, the Commands of 1st and 2nd Krajina Corps, Sarajevo-Romanija Corps). The Defence note also that the column size was consistently underestimated on 12 and on 13 July (Butler, R., T. 20075 (21/01/08)).

Compliance with of P45 with IHL

P45 Distinguished between Civilians and Combatants

348. Parties to an armed conflict must at all times distinguish between civilians and combatants, and between civilian objects and military targets.¹¹⁰⁵ Common sense also tells one that attacks may thus only be directed against military objectives and not against civilians or civilian objects.¹¹⁰⁶ Clearly, P45 aimed to make this distinction, for it was to target a military object: *armed* groups of men fit for military service were instructed and tasked (i.e. ordered) to cross over to Tuzla. Also, reference is made specifically to troops and to armed men: “*and carrying weapons*”; “a number of *troops* managed to pull out”; “*disarm and capture*”; “detain the captured and *disarmed* Muslims”. Like P45, those to whom P117 is addressed are being informed that military-aged men from the enclave were tasked (i.e. ordered) to divide themselves into groups and with arms to go in the direction of Tuzla.¹¹⁰⁷

349. Furthermore, the column was withdrawing through Serb-controlled territory, during which it engaged in offensive military activities. Fighting came from a homogeneous group, which was in return targeted as a whole. The column in its entirety, believed at the relevant time to be military, or at least predominately so, was the object of counter attack by the VRS, and not protected persons or anyone that could not be legitimately targeted under IHL.¹¹⁰⁸ Regardless indeed of the civilian presence, the column would qualify at face value as a legitimate military target.¹¹⁰⁹

¹¹⁰⁵ Articles 48 and 52(1) of Additional Protocol I.

¹¹⁰⁶ In case common sense is not enough in this regard, see Jean-Louis Henckaerts and Louise Doswald-Beck, *ICRC Customary International Humanitarian Law: Volume I: Rules*, Cambridge: Cambridge University Press (2005), p. 25.

¹¹⁰⁷ Vuga, P., T. 23258 (03/07/08). See also Jevdjevic, Milenko, T. 29681 (15/12/08) (As a result of this order, all addressees are provided with information concerning the Muslim forces heading towards Tuzla).

¹¹⁰⁸ If any civilians were believed to be in the column, they were armed and directly participating in hostilities. As such, they would have constituted a legitimate military target. See section above ‘legal submissions on crimes’.

¹¹⁰⁹ Butler, R., T. 20244-20245 (23/01/08).

Butler referred in particular in this regard to "legitimate military combat engagements" with the column.¹¹¹⁰

350. Whilst P45 clearly aimed to distinguish, it was always going to be a problem differentiating the men of military age who may or may not be fighters, according to General Smith, who testified too, that "it was not going to be easily resolved".¹¹¹¹ With regard especially to the war in Bosnia, a male of fighting age in civilian clothes might be a civilian, but he may also be a soldier. One does not know which one he is by simply looking at him if he is not openly bearing an arm and is dressed in civilian clothes.¹¹¹² The dilemma is illustrated by to Major Boering: "to give you an example, the mayor up to that point had no involvement with the army at all to his own indication. I saw him at a certain point, and he was wearing a uniform and he was armed".¹¹¹³ Joseph even testified in this regard that as a generalised perception in fact, a male of military age was perceived to be military.¹¹¹⁴

351. For his part, Lieutenant Egbers did not differentiate between armed fighters in uniforms and civilians without uniforms.¹¹¹⁵ For example, Mevludin Oric, who testified (unconvincingly, the Defence add) that he resigned from being an ABiH

¹¹¹⁰ See Butler, R., T. 20245 (23/01/08). The Defence note too, in this regard the following statement made by the Prosecution: "It was a military column and no war crimes are charged with regard to the attack of this column. The head of this column was a military column and it did a hell of an attack on 16 July and many Serb soldiers were killed – this has been part of the case from the beginning." T.3382 (01/11/06). The Prosecution also confirmed with the Presiding Judge that the column consisted to an extent of armed Muslims and that there were shoot-outs. The Prosecution then stated when asked by Counsel whether it was a military column from the very beginning and a legitimate military target, that "...it is not a subject matter of the Indictment, and I think that's pretty clear. A lot of this – I think I already agreed to informally" T.7041 (07/02/07)

¹¹¹¹ See Smith, R., T. 17541 (06/11/07). See also Franken, R., T. 2577-2578 (17/10/06) (The witness confirmed that it is extremely difficult, if not impossible, to distinguish a civilian and a BiH soldier when it came to the able-bodied men).

¹¹¹² Statement made by the Prosecution, as confirmed by Zaric, Z., T. 26955-26956 (10/10/08).

¹¹¹³ Re 8 July. Boering, P., T. 2075 (22/09/06).

¹¹¹⁴ Joseph, E., T. 14311 (24/08/07).

¹¹¹⁵ Egbers, V., T. 2865 (20/10/06). See also Egbers, V., T. 2792, 2798 (06/10/19); Egbers, V., T. 2913 (20/10/06); Egbers, V., T. 2862 (20/10/06) (There were just a few uniforms worn by the Bosnian Muslims during the fall of the enclave and they could be armed, but not wearing a uniform); Koster, E., T. 3101 (26/10/06) (Some armed Muslim fighters were dressed in camouflage, whilst others wore civilian clothing and uniforms).

commander when he headed off from Jaglici towards Tuzla, was armed with two grenades and was dressed in civilian clothes.¹¹¹⁶ Also with regard to the difficulty of distinguishing within the column, the 28th Division did not have enough uniforms for all its soldiers in July 1995 – the majority of soldiers wore civilian clothes and only a certain number had camouflage uniforms.¹¹¹⁷ At the relevant time and of the approximately one-third of the 12, 000 – 15, 000 armed men gathered in Susnjari on 11 July, many in fact dressed in civilian clothes.¹¹¹⁸

P45 was Proportionate to the Expected Military Advantage Gained

352. IHL prohibits attacks that may be expected to cause incidental loss of civilian life or injury to civilians that would be excessive to the concrete and direct military advantage anticipated.¹¹¹⁹ The expected military advantage gained in taking out the column before the attack was a great one. There was a general call to mobilisation, pursuant to which the column of approximately 15, 000 able-bodied men then made its way in the direction of ABiH-controlled territory. There was every likelihood that these men, if not stopped would engage further in the ongoing armed conflict, both on the way and also when re-united with their comrades in Bosnian Muslim controlled territory. Whilst the attack was not directed against civilians, it would have been possible, bearing in mind the difficulty of distinguishing between the different groups, that civilian deaths and/or injury would occur during the course of any attack. In this highly defensive action at the relevant time, there was, no doubt, further difficulty given the nature of the terrain (the densely wooded area through which the

¹¹¹⁶ Oric, M., T. 875 (28/08/06), Oric, M., T. 989 (29/08/06). *See also* Nikolic, M., T. 33068 (23/04/09) (The witness had information that those conducting sabotage operations from within the enclave against Serb civilians in nearby villages had civilian clothes, mixed civilian and military items, and different types of uniform).

¹¹¹⁷ Oric, M., T. 1058 (30/08/06); Oric, M., T. 1095 (31/08/06). *See also* Rutten, J., T. 4832 (30/11/06) (It would be right to characterize a wounded BiH soldier dressed in civilian clothes as a soldier who had put on civilian clothing).

¹¹¹⁸ PW-112, T. 3201, 3259 (30/10/06).

¹¹¹⁹ *See ICRC Customary International Humanitarian Law*, *see also* Articles 51(5)(b) and 57 of Additional Protocol I.

column withdrew) and as described above, to apply the principle of distinction in practice. Fundamentally, however, P45 made such a distinction.

353. If, as Butler testified, the column was a legitimate military target, any casualties among the Muslim military and civilians directly participating in hostilities related to that particular operation would, by definition, be lawful.¹¹²⁰ Incidental damage would thus have been proportionate to the expected military advantage gained.¹¹²¹ The Prosecution adduced no evidence that the (possible) incidental damage was disproportionate to the military advantage gained. Indeed, the Prosecution is of the view that “it was a military column” and that accordingly, “no war crimes are charged with regard to the attack of this column”.¹¹²²

354. In essence, for a military action to be in accordance with IHL, it had to be directed against a legitimate target, take reasonable precautions, and the incidental damage that could arise had to be proportionate with regard to the actions as set out in P45. The Prosecution did not prove beyond reasonable doubt that these requirements were unfulfilled. P45 and P117 were thus wholly justifiable in military terms and were proper military tasks¹¹²³ (i.e. the said orders were in accordance with IHL). Landry similarly stated that P45 was lawful and was the kind of order that they would practice when he was in the 4th Brigade in Germany.¹¹²⁴ There is nothing wrong either in using the term “ambushing” in this context – it is part of the vocabulary of any army with which he has been acquainted.¹¹²⁵

355. It cannot be said, on the basis of a lawful order directed towards what was believed and known at the time to be a military target posing a military threat, that

¹¹²⁰ See Butler, R., T. 20245 (23/01/08).

¹¹²¹ See *Prosecutor v. Martić*, Case No. IT-95-11, Judgment, 12 June 2007, para. 69 and accompanying footnotes.

¹¹²² T.3382 (01/11/06)

¹¹²³ **REDACTED**

¹¹²⁴ Landry, R., T. 26315 (26/09/08).

¹¹²⁵ Landry, R., T. 26311-26312 (26/09/08).

any ensuing crimes were foreseeable. The capture and detention of the column was lawful under IHL in light of the circumstances at the relevant time

Milan Gvero did not Contribute Significantly Enough for Liability to be Attributed to Him

356. Should the Trial Chamber find that P45 was issued or just signed by Milan Gvero, he did not make a contribution significant enough to merit liability for events related to the capture of the column. The evidence suggests at least in part that the capture of the column was but a continuation of combat orders issued and implemented prior to – and indeed irrespective of – P45.

Orders Issued and Implemented Prior to P45

357. Already on 11 July, orders were issued to prevent *inter alia* the withdrawal of Muslim forces from the enclave, to carry out ambush activities, to block their passage, and to take control in relation to the road.¹¹²⁶ Similar tasks were assigned the following day in the area of Sandici (in the direction of Konjevic Polje), to prevent the break through of Muslim forces and their endangering the Serb population.¹¹²⁷ Also, an ambush was sent to the Tisova Kosa sector.¹¹²⁸

¹¹²⁶ 4D78, dated 11 July 1995 (Order, strictly confidential number 03/4-1616, from Commander General Ratko Mladic, to *inter alia*, the commands of the DK /Drina Corps/, the zntp /Zvornik Motorised Regiment/, and the 67th pv /?Communications Regiment/) (“According to verified information, the Command of the 28th Division (Srebrenica), which is currently deployed in the Sarajevo theatre, has asked the Command of the self-styled Army of Bosnia and Herzegovina to send it immediately to Srebrenica. ... c) By constructing additional obstacles and setting ambushes, introduce patrols to /illegible - ?maintain control/ of the territory along the frontline and deep in the zones and areas of defence ... e) The commands of the units surrounding the enclave are to pay special attention to the alertness and readiness of their troops to reject any attacks from the rear (because of the possible arrival of Muslim forces) and to prepare for a circular defence...”). See also Trivic, M., T. 11902 (22/05/07) and 6DP439, dated 11 July 1995 (Order to block the linking up of the forces of the 28th enemy division with the forces in the enclaves, strictly confidential no. 03/157-4, from Commander Major General Milenko Živanovic to *inter alia* Drina Corps Forward Command Post, 2nd Romanija Motorised Brigade. Received at 2350 hrs); **REDACTED**

¹¹²⁷ Filipovic, N., T. 26999, 27000 (10/10/08). See also P 1114, dated 12 July 1995 (Intercept at 1305 hours) (“Until further notice, secure that part of the road”); Stanojevic, D., T. 12880-12883 (19/06/07) (The witness and his unit were ordered on 12 July to deploy along and secure the Sandici road in order to guard Serb villages in the area from Muslim units); Trivic, M., T. 11832-11836; 11843-11848 (21/05/07) (The

REDACTED¹¹²⁹ It was also proposed on 12 July to capture enemy soldiers.¹¹³⁰ That evening is the first real period when large numbers of Muslim fighters are captured along the Bratunac to Konjevic Polje road and then the Konjevic Polje to Milici road.¹¹³¹

358. **REDACTED.**¹¹³² Also in the morning of 13 July, able-bodied men surrendered to or were captured by Bosnian Serb forces stationed along the road between Bratunac, Konjevic Polje, and Milici.¹¹³³ With regard to evidence of a fierce battle in the early morning hours of 13 July, in which reference is made to the large number of Muslim soldiers, Butler confirmed that the MUP forces were given the responsibility

witness assigned his unit the road from Srebrenica to Milici in order to conduct searches for elements of the 28th Division present along the said route. According to intelligence at the time, approximately several thousand 28th Division forces were breaking through to Muslim-held territory; they had not laid down their arms and there were concerns that they would move through VRS-held territory); Celic, P., T. 13468-13741, 13501-13502 (28/06/07) (On 12 July, the witness was assigned to secure the Bratunac-Konjevic Polje road and to protect surrounding villages from what he was informed were members of the BiH army moving from Srebrenica through the forest); Djuric, M., T. 10812-10813 (02/05/07) (The witness assigned some of his men on 12 July to deploy along the road from Bratunac to Konjevic Polje because it was suspected that groups of Muslims from Srebrenica could try to enter the town). Also, General Krstic informed Vinko Pandurevic on 12 July with regard to the main body of the 28th Division, that measures were already put in place by units of the Drina Corps, the Milic and the Bratunac Brigades, and by parts of the 65th Protectio Motorised Regiment, and that control of the ground and roads were carried out by the special police units of the security centre in Zvornik (Pandurevic, V., T. 30901-30901 (20/01/09)

REDACTED

¹¹²⁸ Ristic, L., T. 10184 (17/04/07), Ristic, L., T. 10043 (16/04/07), Ristic, L., T. 10195 (18/04/07), Ristic, L., T. 10195-10196 (18/04/07) (The witness was first informed late in the morning of 13 July that that an intervention platoon from the 3rd Battalion was coming to his aid at the Motovo intersection and Grujici location). **REDACTED**

¹¹²⁹ PW-168, T. 15989-15983 (28/09/07). Closed session.

¹¹³⁰ P 149, dated 12 July 1995 (Untitled, strictly confidential No. 17/897, from Chief Major General Zdravko Tolimir, to *inter alia* the Intelligence and Security Departments, the Commands of Sarajevo-Romanija Corps, Eastern Bosnia Corps).

¹¹³¹ Butler, R., T. 19865 (17/01/08) and P 323, dated 12 July 1995 (intelligence Report, strictly confidential no. 19/39, from Assistant Chief of Staff for Intelligence Captain 1st Class Dusko Vukotic, to Drina Corps Command). See also Adjudicated Fact 263 ("By afternoon or early evening of 12 July 1995, the Bosnian Ser forces were capturing large numbers of these men in the rear"); Kerkez, Z., T. 24090-24091 (25/07/08) (A group of Muslim soldiers was seated on a football pitch located at Kojevic Polje towards Kasaba; also located there was a VRS reception point to register disarmed soldiers).

¹¹³² PW-168, T. 15826 (26/09/07). Closed session.

¹¹³³ See Indictment para. 29. See also Nikolic, M., T. 32933 (21/04/09) (The witness was at Konjevic Polje at sometime between 1200 and 1300, during which time he saw a group of captured Muslims); Butler, R., T. 19866 (17/01/08) (One starts to see on the morning of 13 July indications of numbers of prisoners having been caught).

to guard the road from Kravica north to Konjevic Polje towards Milici.¹¹³⁴ In terms of the protection of women and children in Kasaba, Bogdan Subotic was tasked in the morning hours of 13 July with patrolling the area.¹¹³⁵ **REDACTED.**¹¹³⁶

359. It is likely that the activities of blocking, ambushing, and of capturing the column were but a continuation of the same ones ordered and implemented already on 11, 12, and on the morning of 13 July.¹¹³⁷ Furthermore, there is no indication to suggest the time at which P45 was processed. **REDACTED**¹¹³⁸ However, upon closer examination, 1720 hours is actually the time at which P991 was processed – an hour and twenty minutes after it was received. No such indication appears on P45. Rather, included thereon is a stamp confirming only its receipt at 1335 hours on 13 July. It is therefore possible that P45 was processed only later that afternoon¹¹³⁹ and that it relates solely to the capture of the column from this time on 13 July onwards.

360. Also in this regard, the capture and/or surrender of thousands of prisoners as alleged on 13 July and in particular, their subsequent detention and transfer from the combat zone to various temporary holding sites (before then being transferred to Bratunac), would arguably have required a considerable amount of time. If P45 was processed only in mid- to late afternoon on 13 July, the gathering of prisoners at

¹¹³⁴ Butler, R., T. 19867 (17/01/08) and P 62, dated 13 July 1995 (Untitled, Number 282/95, from Dragomir Vasic Chief of the Zvornik Public Security Centre, to MUP RS Office of the Minister, Pale). See also Nikolic, M., T. 33168-33169 (24/04/09) (Dusko Jevic informed the witness on the morning of 13 July that the unit to which he belonged was along the Konjevic Polje-Bratunac road).

¹¹³⁵ Subotic, B., T. 24975 (01/09/08).

¹¹³⁶ PW-168, T. 15826 (26/09/07). Closed session.

¹¹³⁷ 7DP325 Zvornik Brigade Daily Combat Report (“In order to cut off groups of Turks, retreating from Srebrenica towards Tuzla and to protect our Brigade units, we have taken the following steps...”, received at Drina Corps at 1137)

¹¹³⁸ PW-168, T. 16696-16697 (22/10/07) Closed session.

¹¹³⁹ See e.g., P 991, dated 13 July 1995 (Order to Block the Passage of Muslim Groups to Tuzla and Kladanj, strictly confidential no. 03/156-12/last two numbers crossed out and 11 written instead, from Commander Major General Milenko Živanovic, to Commands of All Drina Corp Subordinate Units and Drina Corps Forward Command Post 1, Received 13 July 1600 hours, processed 13 July 1720 hours); See also P1059, which is otherwise similar in relevant part to P45, but was received only on 14 July. P1059, /illegible/ July 1995 (Prevention of Muslim Groups from Crossing Towards Tuzla and Kladanj, Order, strictly confidential no. /illegible/ 1-1223, from Lieutenant General Milan Gvero, to inter alia the Commands of the DK/ Drina Corps/, DK IKM-1 /Forward Command Post/, and 1st zpbr /Zvornik Infantry Brigade/).

temporary holding sites prior to late afternoon necessarily relates to orders implemented prior to it.

Orders Issued and Implemented Irrespective of P45

361. Reaction to the column in the morning of 13 July was spontaneous, for neither Subotic nor his commander received orders from their superior commands about how to conduct themselves vis-à-vis the column.¹¹⁴⁰ **REDACTED**¹¹⁴¹

362. Similarly, Pandurevic's evidence was that he neither knew about P117 nor acted on it. Instead, he arrived at Zvornik on 15 July with an order of that same day from General Krstic (issued orally). By 15 July, the order of 13 July had become redundant as the 13 July order related to forces that were not nearly as strong or as numerous as those of which General Krstic had become aware by 15 July.¹¹⁴² Whilst the Krstic order was similar to P45 insofar as fighting the column, Pandurevic testified in this regard that "*probably* Krstic received such an order from the Main Staff".¹¹⁴³ However, the said Krstic order states in relevant part, "*Based on the latest developments in the general area of Zvornik*".¹¹⁴⁴ In other words, the blocking and capture of the column was not necessarily pursuant to P45, or to P117 for that matter. Instead, the evidence allows for the possibility that developments on the ground resulted at least in part¹¹⁴⁵ from impromptu engagement with the column.

¹¹⁴⁰ He continued, had anything had been planned, he does not believe that a shift change would have been permitted, during which people went home. Subotic, B., T. 25010-25011 (01/09/08).

¹¹⁴¹ PW-168, T. 15826--15827 (26/09/07). Closed session. **REDACTED**

¹¹⁴² Pandurevic, V., T. 31818-31819 (19/02/09). *See also* Pandurevic, V., T. 31819 (19/02/09) When Pandurevic arrived at Zvornik on 15 July, nobody gave to him, informed him of, or discussed with him the instructions issued by Živanovic on 13 July); Pandurevic, V., T. 30929-30930 (29/01/09) (Neither General Krstic nor General Živanovic delivered the 13 July order to him).

¹¹⁴³ Pandurevic V. T.32024 (23/02/09);

¹¹⁴⁴ 5D7D686 Drina Corps Command Order, 15 July 1995

¹¹⁴⁵ **REDACTED**

Conclusion

363. The Defence go back to where they began on this topic. The fact that Milan Gvero's name appears on P45 is not remotely sufficient to give rise to a finding beyond reasonable doubt that he was responsible for it. However, in the event that this submission is rejected, the Defence have sought to cover all bases (as is our duty) and have set out in great detail the factual and legal position that arises from this document. The Defence maintain that the crimes with which Milan Gvero is charged were simply not foreseeable given the compliance of P45 with IHL. In addition, P45 did not contribute to the capture of the column to the extent required for any criminal liability to arise. This is because P45 was a legitimate military order according to IHL. It was not issued pursuant to the alleged JCE to forcibly transfer the men from Srebrenica and the Trial Chamber certainly cannot rely on it in this regard or indeed in relation to Milan Gvero's alleged role as set out in the Indictment.

Gvero's alleged participation in the JCE: Indictment paragraph 76(d)(ii)

"Controlling the movement of the Muslim population out of the enclaves: he facilitated and oversaw the movement of wounded Muslims from Srebrenica"

Introduction

364. The Defence assert that the Prosecution failed to prove beyond reasonable doubt that the medical evacuation of the sick and wounded¹¹⁴⁶ from Srebrenica amounts to forcible transfer. Further or in the alternative the Prosecution have not established that Milan Gvero possessed the requisite *mens rea* for forcible transfer, or that he

¹¹⁴⁶ **REDACTED** PW-106, T. 3940 (15/11/06) (The change in the number of wounded civilians in June was a result of their hitting an ambush or minefield in Žepa); Boering, P., T. 1940 (21/09/06) (DutchBat agreed to take approximately 100 patients from MSP to Potocari); Egbers, V., T. 2717-2718 (18/10/06), Egbers, V., T. 2929, 2918 (20/10/06) (There were only sick, mentally ill, and women with babies on his vehicle to Potocari); Franken, R., T. 2610-2611 (17/10/06), Franken, R., T. 2628-2629 (18/10/06) (The witness had 114 wounded in his compound, but he does not know from where they came or their real cause of injury). See also Koster, E., T. 3022 (25/10/06); Hasic, A., T. 1256 (09/09/06); **REDACTED**

participated in the medevac to Bratunac or to Tuzla to the legal extent required under Article 7(1).

The Law

365. Generally, forcible transfer is the involuntary and unlawful movement of individuals from the territory in which they reside.¹¹⁴⁷ As such, the Prosecution must prove beyond reasonable doubt that the transfer in question was both compulsory and that it was unlawful.¹¹⁴⁸ Failure to prove beyond reasonable doubt each of these two material elements of the crime must therefore result in an acquittal. For the purposes of paragraph 76(d)(ii), the Defence limit its submissions to the first of these two elements; namely, the requirement that the transfer in question was forced. It is essential in this regard that it take place under coercion¹¹⁴⁹ i.e. that those relocated are

¹¹⁴⁷ See *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Judgement, 2 August 2001, para. 521. The Trial Chamber in *Martic* distinguished between deportation under Article 5(d) and forcible transfer under Article 5(i) as follows: “The *actus reus* of deportation is ‘the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* border or, in certain circumstances, a *de facto* border, without grounds permitted under international law. The *actus reus* of forcible transfer is the forced displacement of persons within national boundaries.” *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007, para. 107. In *Krajišnik*, however, the Trial Chamber made no such distinction, save with regard to the border requirement. See *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, 27 September 2006, para. 723. See too in this regard *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, para. 540. Hence the qualification by the Defence of the definition “generally” of forcible transfer under Article 5(i).

¹¹⁴⁸ In *Krstic*, the Trial Chamber held with regard to its general considerations of deportation under Article 5(d) and of forcible transfer under both Article 5(h) and 5(i), that “[b]oth deportation and forcible transfer related to the involuntary and unlawful evacuation of individuals from the territory in which they reside.” *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Judgement, 2 August 2001, para. 521 (emphasis added). The Trial Chamber held in *Simić et al.* with regard to Article 5(d) (deportation) and Article 5(h) (forcible transfer as persecution), that “[t]he displacement of persons is only illegal where it is forced, i.e. not voluntary, and ‘when it occurs without grounds permitted under international law.’ ... Both deportation and unlawful or forcible transfer relate to the involuntary and unlawful displacement, or movement, or relocation, or removal of persons from the territory in which they reside.” The following elements must therefore be ascertained in order to find that forcible transfer has occurred: “(i) the unlawful character of the displacement; ... and (iii [*sic*]) the intent of the perpetrator to ... forcibly transfer the victim.” *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, 17 October 2003, paras 121, 123, 124 (emphasis added). See also *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, 17 September 2003, para. 218 (“The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator ...”). See also *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005, para. 596 (“It is the ‘forced character of displacement and the forced uprooting of the inhabitants of a territory’ that give rise to criminal responsibility”). Whilst these findings were in relation to forcible transfer under Article 5(h), the Defence submit that such a finding is also applicable to forcible transfer under Article (i) of same.

¹¹⁴⁹ *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Judgement, 2 August 2001, para. 543.

moved against their will or in the absence of genuine choice.¹¹⁵⁰ In other words, it is illegal for the purposes of this discussion only where it is forced.¹¹⁵¹

366. The requisite mental state required for forcible transfer under Article 5(i) is that the perpetrator of forcible transfer “must intend to forcibly displace the persons.”¹¹⁵² In finding forced displacement, the intended goal of the relocation must also be considered in relation to the intent of the Accused.¹¹⁵³

Legal and Evidential Submissions

The Prosecution Failed to Establish Beyond Reasonable Doubt That the Transfer Was Forced

367. In *Cyprus v. Turkey*, the European Commission for Human Rights held with regard to negotiated transfer of medical cases and other persons on humanitarian grounds, that

The transfer to the south of medical cases and other persons for humanitarian reasons, whether on the basis of intercommunal agreements or individual arrangements, would appear to have been in the own interest of the persons concerned; indeed, it often happened upon their own request. The evidence before the Commission tends to show that the particular difficulty experienced by this category of persons was the removal of obstacles preventing their speedy transfer. The Commission, therefore, was unable to establish that their transfer, as such, was a forcible measure¹¹⁵⁴

¹¹⁵⁰ *Prosecutor v. Momcilo Krajišnik*, Case No. IT-00-39-T, 27 September 2006, para. 724.

¹¹⁵¹ *See Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002, para. 475.

¹¹⁵² *Prosecutor v. Momcilo Krajišnik*, Case No. IT-00-39-T, 27 September 2006, para. 726. In order to find that forcible transfer under Article 5(d) or 5(h) has occurred, “... the intent of the perpetrator to ... forcibly transfer the victim” must be established. *Prosecutor v. Blagoje Simic et al.*, Case No. IT-95-9-T, 17 October 2003, para. 124.

¹¹⁵³ *See Prosecutor v. Blagoje Simic et al.*, Case No. IT-95-9-T, 17 October 2003, para. 134. The Defence note that these comments were made in relation to the requirement that the accused intended that the forcible transfer be permanent (i.e. that those displaced do not return). Whilst the intent to permanently displace need not be proved (*Prosecutor v. Milomir Stakic*, Case No. IT-97-24-A, Judgement, 22 March 2006, paras 304-307). Nevertheless and as examined herein, the intended goal of the relocation may be indicative of the intent or not of the accused to forcibly displace.

¹¹⁵⁴ *Cyprus v. Turkey* (1982) 4 E.H.R.R. 482, para. 198

368. The Defence note the following similarities between this finding and the relevant facts in the current case – working for these purposes on the basis of the Prosecution case. First, the transfers for medical purposes were carried out in *Cyprus v. Turkey* and allegedly in the current case, to create ethnically homogeneous areas and within the context of an armed conflict.¹¹⁵⁵ Second, the evacuation for medical reasons of the sick and wounded from Potočari and Bratunac to Tuzla took place (upon request of General Nicolai¹¹⁵⁶) after actual fighting in the area ceased and could thus be said not to have been directly connected with VRS military action at the relevant time (the medevac having taken place on 17 and 18 July).¹¹⁵⁷ Third, there was a difficulty in removing obstacles preventing what was believed to be the speedy evacuation of medical cases (i.e. the disagreement between General Nicolai and Milan Gvero about the method of the evacuation). And finally, the prohibition of forced transfer under IHL is similar to the finding made in *Cyprus v. Turkey*.¹¹⁵⁸

369. Bearing in mind the requirement in the case law of the Tribunal that the transfer be coercive, as well as this persuasive finding by the European Commission in *Cyprus v. Turkey*, the Defence submit that the evacuation for medical reasons was not forcible in nature.

¹¹⁵⁵ *Cyprus v. Turkey* (1982), paras 89-97, 185-197.

¹¹⁵⁶ P2907 dated 12 July, 1445 hours (Notes of a Telephone Conversation General Nicolai – General GVERO, from Lt Col. De Ruiter, To MA/COMD)

¹¹⁵⁷ The transfer of medical cases finding in *Cyprus v. Turkey* was made with regard to “Measures of displacement not directly connected with the Turkish military action in the phases of actual fighting.” It refers only to “phases of actual fighting” and not to the overall military campaign. Srebrenica fell on 11 July, after which the fighting was then diverted elsewhere (i.e. the column and Žepa). Arguably, the Srebrenica phase of fighting was complete by the time at which the medevac took place. See also P536: “Three medical teams of the ICRC ... evacuated 88 wounded people from Bratunac and Potocari on 17 and 18 July.”

¹¹⁵⁸ Article 49 of Geneva Convention IV obliges “to the greatest practicable extent” that members of the same family not be separated from one another. As the Commentary explains, “[t]his provision represents a very appropriate addition to those of Article 27 [of Geneva Convention IV] under which the Parties to the armed conflict are in general obliged to respect family rights.” The Commentary notes further that Article 49 is intended to keep the family united. Article 49 Commentary, p. 281. In *Cyprus v. Turkey*, the forced transfer findings (other than transfer to the south of medical cases and other persons for humanitarian reasons) were made in relation to an alleged breach of Article 8 (Right to Family and Private Life) under the European Convention for the Protection of Human Rights.

370. On 12 July, patients were brought from the Srebrenica hospital to the DutchBat compound during the attack because treatment at the former was not as good or as advanced as it was in the DutchBat compound. Also, there was an MSF hospital in the DutchBat compound.¹¹⁵⁹
371. In the case of the transfer from Potočari to Bratunac, a meeting in which UNMOs, DCO DutchBat, MSF, and the ICRC took part on 17 July was organised by Major Franken so that they could speak to the Bosnian Serb authorities about how to handle the sick and wounded in the DutchBat compound; their feeling was that the said persons could be better handled in Bratunac Hospital.¹¹⁶⁰ It cannot be excluded that the subsequent medical evacuation from Bratunac to Tuzla was because of restrictions in Bratunac in 1995 both in power and in water supply, because of the lack of food there, and/or because the supply with regards to medication in the hospital in Bratunac was not regular.¹¹⁶¹ By contrast, stocks of medical needs were available at the time in Tuzla.¹¹⁶²
372. Further credence is given to this possibility by the fact that the purpose of the said evacuation was described as “urgent medical evacuation of the wounded and sick from Bratunac.”¹¹⁶³ Indeed, Nicolai testified that it was a “sensible humanitarian course of action”, for it was necessary that a number of wounded receive medical treatment as soon as possible.¹¹⁶⁴ The said persons were described at the time as “seriously wounded”¹¹⁶⁵, “desperately ill”¹¹⁶⁶ and as casualties, some of them “in very serious condition.”¹¹⁶⁷

¹¹⁵⁹ Kingori, J., T. 19265 (14/12/07).

¹¹⁶⁰ Kingori, J., T. 19284-19285 (14/12/07) and P524, dated 17 July (Sitrep at 2300 hours, from Team Srebrenica, to TX).

¹¹⁶¹ Celanovic, Z., T. 6677 (31/01/07).

¹¹⁶² P 4156, dated 17 July 1995 (Update No. 9 on ICRC Activities in the Former Yugoslavia, Msg. No. COMREX/FIN 95/1305, from ICRC Geneva).

¹¹⁶³ 6D320, dated 16 July 1995 (Urgent Medical Evacuation of the Wounded and Sick from Bratunac, PAL 95/897/N, from the International Committee of the Red Cross, to State Committee for Cooperation with International Organisations Coordinating Body).

¹¹⁶⁴ Nicolai, C, T. 18554 (30/11/07).

¹¹⁶⁵ P4157, dated 20 July 1995 (ICRC Interview to Deutsche Welle Interview Broadcast, Nr. 0300, from Anselmo/Munier) (“The ICRC vehicles evacuated two days ago seriously wounded people from Bratunac to Tuzla”).

373. Whilst Serbian hospitals were capable of caring for the injured, according to Nicolai,¹¹⁶⁸ the evacuation to Tuzla for medical treatment after the fall of the enclave is consistent with a similar practice in March 1995 (i.e. prior to the fall of the enclave) of requests by UNPROFOR for medical evacuation from Žepa and Srebrenica to Sarajevo.¹¹⁶⁹ In this same vein, request was also made by BH Command in February 1995 for medical evacuation from Goražde to Sarajevo.¹¹⁷⁰ In other words, the transfers to Tuzla and to Sarajevo have been the result of better medical treatment available there and not as alleged, the result of restriction of aid to the enclaves, including medical supplies.¹¹⁷¹ It could thus reasonably be inferred that the medevac in question was for medical purposes only (i.e. that it was in the own interest of those so evacuated) and that as such, it was not forcible in nature.

The Prosecution Failed to Establish Beyond Reasonable Doubt that Milan Gvero had Committed the Actus Reus or Possessed the Requisite Mens Rea

374. Further or in the alternative, even if the Trial Chamber were to find that the medevac in question amounts to forcible transfer, the Prosecution failed to prove beyond reasonable doubt that Milan Gvero had committed the *actus reus* or possessed the requisite *mens rea to fulfill the requirements of the allegation*.

¹¹⁶⁶ P 4156 dated 17 July 1995 (Update No. 9 on ICRC Activities in the Former Yugoslavia, Msg. No. COMREX/FIN 95/1305, from ICRC Geneva)

¹¹⁶⁷ P536, dated 18 July 1995 (ICRC Communication to the Press, No. 95/32, “ICRC Evacuates 88 Wounded from Bratunac and Potocari”) (Three medical teams of the ICRC evacuated 88 wounded people from Bratunac and Potocari on 17 and 18 July. These casualties, some of them in very serious condition, were taken to Tuzla”).

¹¹⁶⁸ Nicolai, C., T. 18494-18495 (29/11/07). Note: Nicolai was not in the enclave at the relevant time and as such, this testimony is mere hearsay.

¹¹⁶⁹ See 5D890, dated 22, 23 March 1995 (Untitled, number 06/18-127, from Chief of Staff Lieutenant General Manojlo Milovanovic, to the Commands of VP/ Military Postcode/ 7111 and VP 7598); 5D1313, dated 27 March 1995 (Untitled, number 06/17-292, from Chief of Staff Lieutenant General Manojlo Milovanovic, to UNPROFOR Command Sarajevo); 5D894 dated 27 March 1995 (GŠ VRS report (06/18-139) addressed to VP 7111 and VP 7598, regarding humanitarian aid convoys, signed by Manojlo Milovanovic)

¹¹⁷⁰ 5D1298, dated 13 February 1995 (Untitled, number 06/17-151, from Chief of Staff Lieutenant General Manojlo Milovanovic, to UNPROFOR Command Sarajevo).

¹¹⁷¹ See *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-A, Judgment, 22 March 2006, para. 487 (Displacement for humanitarian reasons “is not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused’s own unlawful activity”).

“To Areas Outside the Control of the RS”

375. Milan Gvero did not participate in this regard in a JCE, of which (as pleaded by the Prosecution) the common purpose was to force the Muslim population out of the Srebrenica enclave *to areas outside the control of the RS*.¹¹⁷² The Trial Chamber in *Simic et al.* examined incidents alleged about the destination of the relocation, save those specifically pleaded:

The Trial Chamber notes, however, that Count 2 of the Amended Indictment charges “the unlawful deportation and forcible transfer of [...] non-Serb civilians [...] from their homes in the Bosanski Šamac municipality *to other countries or to other parts of the Republic of Bosnia and Herzegovina not controlled by Serb forces*”. The inclusion of this phrase imposes a factual requirement – not controlled by Serb forces – that the [p]rosecution is not obliged to prove under the offence. However, it forms part of the allegations in the Amended Indictment, and the Trial Chamber will accordingly consider whether this requirement is made out on the evidence.¹¹⁷³

376. With regard to the current case, Milan Gvero conveys in his conversation with Nicolai the offer of the treatment of the sick and wounded *in Serb territory*:

¹¹⁷² Indictment para. 49 (Count 7). See also Indictment para. 91 (“The plan to make life unbearable for the Muslim population of Srebrenica and Žepa and forcibly remove them from the enclaves to areas outside the RS.”); Prosecution Pre-Trial Brief, para. 1 (On 12 and 13 July, 15,000 refugees were forcibly transferred to territory held by the BiH Army); para. 4 (As early as 1992, Bosnian Serb authorities expressed their clear intention to ethnically cleanse Muslim communities in Eastern Bosnia); Para. 5 (The Strategic Objectives); Para. 14 (The plan contemplated the forced movement of the entire Muslim population to areas outside Bosnian-held control), Para. 20 (Plan to forcibly transfer the women and children to Kladanj); Para. 21 (women and children were bussed to Kladanj); Para. 160 (Throughout the day on 13 July, thousands of women, children, and elderly men were bussed to Kladanj). However, see also Indictment paras 48, 50-71, 83, 89, and the Prosecution Pre-Trial Brief, para. 27, in which no destination is specified. Importantly, the Defence note that Count 7 (Article 5(i) inhumane acts (forcible transfer)), when read in conjunction with para. 76 of the Indictment, specifies the location “to areas outside the control of the RS.” The evidence must therefore be evaluated accordingly. Finally, see too, Rule 98bis Decision, T. 21468 03/03/08 (“The Trial Chamber notes that what is before us in the Indictment in Count 7 is a joint criminal enterprise, the common purpose of which was to force the Bosnian Muslim population, as a whole, out of the Srebrenica and Žepa enclaves from about 8 March to the end of August 1995, as is alleged in paragraph 49 of the Indictment”) (i.e. to areas outside the control of the RS).

¹¹⁷³ *Prosecutor v. Blagoje Simic et al.*, Case No. IT-95-9-T, 17 October 2003, para. 131 (emphasis in original). See also *Prosecutor v. Radoslav Brđanin*, Case No.IT-99-36-T, Judgement, 1 September 2004, para. 546 (“In view of the specificity with which the charges were pleaded, the Trial Chamber is precluded from making any finding of guilt under Counts 8 and 9 with respect to incidents where the transfer destination was to locations other than to Travnik or Karlovac.”).

REDACTED ¹¹⁷⁴ Clearly, it cannot be said that Milan Gvero intended the factual requirement “to areas outside the control of the RS.”

REDACTED ¹¹⁷⁵

377. General Nicolai and Milan Gvero disagreed about the way in which the medevac was to be carried out. Whilst the former believed that the quickest way to do so was by air,¹¹⁷⁶ Milan Gvero reiterated the offer for treatment in Serb hospitals, which he said “could be reached easier by car than by helicopter to any other hospital.”¹¹⁷⁷ It must be borne in mind that Nicolai was not in the enclave between 1 and 20 July and that everything about which he testified regarding the events as to what actually occurred in and around the enclave, is at the best second hand.¹¹⁷⁸ He may have believed that medical evacuation by helicopter was quickest, but he was not on the ground at the relevant time in order to ascertain whether in fact this was the case.

378. Moreover, it was not unreasonable for Milan Gvero to believe that the Muslim forces, which were equipped at the time with anti-aircraft systems, presented a credible threat to UN helicopters.¹¹⁷⁹ In fact, Milan Gvero had knowledge at the time

¹¹⁷⁴ **REDACTED**. See also relevant passages of P2907, dated 12 July, 1445 hours (Notes of a Telephone Conversation General Nicolai – General GVERO, from Lt Col. De Ruiter, To MA/COMD): “The BSA had already offered *their hospitals* for medical treatment of the wounded. ... [GVERO] clearly reiterated Serb hospitals.” See too, 1D35, dated 12 July (Outgoing Code Cable, number UNPRPFOR Z-1142, from Akashi, UNFP-HQ Zagreb, to Annan, UNations, New York): “The BSA has informed the Dutchbat CO in Srebrenica that the wounded and the elderly can move to Bratunac, *in Serb controlled territory*, for care and safety. A MSF medical outpost has been established in Bratunac.”

¹¹⁷⁵ See P1119; *Prosecution’s Submission in Support of the Admissibility of Intercept Evidence, with Corroborating Annexes*, 1 May 2007, Confidential Annex I, pp. 11-12.

¹¹⁷⁶ P1119; P2907 Nicolai, C, T. 18554 (30/11/07).

¹¹⁷⁷ **REDACTED**

¹¹⁷⁸ Nicolai, C, T. 18558 (30/11/07). See also Nicolai, C, T. 18558, 18559 (30/11/07) (The witness in common with everyone else received confused and diverse reports, and scant and confused information as to what was going on in the enclave between 1-20 July); Fortin, L., T. 18249-18250 (26/11/07), Fortin, L., T. 18395-18396 (28/11/07) (BH Command was mostly trying to figure out what was happening on the ground between 8-12 July because the situation was confused. Such information gathering “was not a simple matter” because the enclave was located at some distance away from BH command in Sarajevo, and because information came in from no less than five different channels, including the Bosnian Government).

¹¹⁷⁹ **REDACTED**. See Trivic, M., T. 11883 (21/05/07) and **REDACTED** 1D464, dated 13 July 1995 (Interim Report by Army General Rasim Delic) (It talks about the aid that was delivered into the enclave by the BH Army, 2nd Corps. Under “Srebrenica,” it says ... RPG [rocket propelled grenade] with the optical

of this threat.¹¹⁸⁰ Because of the mixed nature of the column it was uncertain as to what extent helicopter evacuation of Bosnian Muslim wounded soldiers would be transmitted to the combat groups in the column, in order that the helicopters could avoid becoming a target of their anti-aircraft systems. Nicolai similarly knew that the ABiH had anti-aircraft resources (i.e. a division).¹¹⁸¹ His evidence *inter alia* that he did not believe that such concerns were reasonable¹¹⁸² must be weighed in conjunction with the fact that he himself would not get into a helicopter for fear that he might be shot and killed.¹¹⁸³

379. Furthermore, General Smith's helicopter was engaged and damaged on 31 July by small arms fire over Bosnian Serb territory despite clearance by the Bosnian Serbs for the said helicopter flight.¹¹⁸⁴ According to Slavko Kralj, "the question of helicopter flights is a very sensitive one." It was necessary after receiving approval of helicopter medical evacuation to send to units the time and the precise route along which the travel would take place. This was done in order to prevent the downing of the helicopter.¹¹⁸⁵

380. Similar concerns with regard to the use of helicopter medical evacuations existed five months prior to the relevant conversation between Nicolai and Milan Gvero on

site, RPG, 7; missiles, 292; rocket-launcher, 107-millimetre, one; 28 107-millimetre missiles"); (Jankovic, Z., T. 27372, 27373 (27/10/08) (The witness described he saw when captured and in the column on 14 July as follows: Brownings mounted on horses, which is a machine gun that can be used in anti-aircraft defence (i.e. its barrel can be directed vertically and anti-helicopter rockets known as "strijela" or arrows).

¹¹⁸⁰ P1119 is at 1445.

¹¹⁸¹ Nicolai, C, T. 18554 (30/11/07).

¹¹⁸² Nicolai, C, T. 18554 (30/11/07) and P2907.

¹¹⁸³ Nicolai, C, T. 18554 (30/11/07). See also Nicolai, C, T. 18550 (30/11/07) (Neither the witness nor General Gobillard took an APC to Srebrenica, for this would have meant fighting one's way onto Serbian territory; the same held true for getting into a helicopter).

¹¹⁸⁴ P2947, dated 31 July 1995 (Meeting General Smith/General Mladic – 31 July 1995, from Lt. Col. J. R. J. Baxter, to HQ UNPF Zagreb for SRS, FC, DFC). See also Smith, R., T. 17717-17718 (08/11/07) (The witness allowed for the possibility that Milan Gvero tried to calm him down on 31 July because he had just had his helicopter engaged and shot down when he was flying on a controlled route); Sayer, E., T. 21135-21136 (06/02/08) (The witness confirmed Smith's anger at that time that someone had taken several shots at his helicopter).

¹¹⁸⁵ Kralj, S., T. 29292 (04/12/08).and 5D1298, dated 13 February 1995 (Letter, no. 06/17-151, from Chief of Staff Lieutenant General Monojlo Milovanovic, to UNPROFOR Command Sarajevo). Whilst the said document relates to approval of a helicopter medical evacuation from Gorazde to Sarajevo, it nevertheless is illustrative of the problem generally with regard to the use of helicopters.

12 July. For example, the Main Staff paid special attention to the approvals granted to helicopter missions, which meant that there was analysis and most missions were requested to use the land route, if at all possible.¹¹⁸⁶ The suggestion to the same effect by Milan Gvero to Nicolai refutes the allegation that he did so intending to gain control over the sick and wounded and ensure their departure from the enclave (i.e. that he intended their forced transfer).

381. Finally, consideration must also be had of the intended goal of the relocation vis-à-vis Milan Gvero's intent. As submitted above, it could reasonably be inferred that the medevac was for medical purposes only and that as such, Milan Gvero did not intend to forcibly displace the sick and wounded.

The Prosecution Failed to Prove Beyond Reasonable Doubt that Milan Gvero participated in the Transfer to Bratunac or to Tuzla

382. With regard to aiding and abetting, there is no evidence that Milan Gvero rendered encouragement or moral support to the transfer of the sick and wounded to Bratunac or to Tuzla. If, however, the Trial Chamber were to find that he rendered practical assistance in the form of agreement¹¹⁸⁷, the Defence submit for the reasons set out below that this did not have a substantial effect on the commission of the alleged crime, as is a requirement.¹¹⁸⁸

383. The transfer of the population, including that of the sick and wounded, was discussed and agreed during the Hotel Fontana Meetings on 11 and 12 July,¹¹⁸⁹ in

¹¹⁸⁶ Kralj, S., T. 29294 (04/12/08) and 5D1299, dated 14 February 1995 (Letter, from Chief of Staff Lieutenant General Manojlo Milovanovic, to UNPROFOR Command Sarajevo, attention J. W. Brinkman).

¹¹⁸⁷ See P536, dated 18 July 1995 (ICRC Communication to the Press, No. 95/32, "ICRC Evacuates 88 Wounded from Bratunac and Potocari") ("The ICRC conducted this operation with the agreement of General Gvero of the Bosnian Serb Army").

¹¹⁸⁸ See *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Judgment, November 30 2005, para. 516.

¹¹⁸⁹ Boering, P., T. 2051-2061 (22/09/06), Boering, P., T. 1968, 1974 (21/09/06) and 1D26, dated 12 July 1995 (Meetings with General Mladic on 11 and 12 July 1995, Nr. TK95114, from Lieutenant Colonel Karremans, to *inter alia* Lieutenant General Janvier, Comander BH Command, Commander Tuzla); Van Duijn, L., T. 2341, 2342 (28/09/06); Franken, R., T. 2649, 2679-2683 (18/10/06), Franken, R., T. 2554-

which there is no evidence to suggest that Milan Gvero took part. Indeed, in his telephone conversation with General Nicolai, Milan Gvero refers to the agreement that had already been reached between the DutchBat and VRS Commanders at Hotel Fontana, insisting that it be carried out accordingly.¹¹⁹⁰ Further informal agreements were reached on 15 July between Smith and Mladic (i.e. not Milan Gvero), including the organisation by UNPROFOR of the immediate evacuation of sick and wounded from Potočari and Bratunac.¹¹⁹¹ Similarly, Major Franken testified that the evacuation of refugees, including that of the wounded Muslims from Potočari and from the hospital in Bratunac was arranged and laid down on paper between Smith and Mladic, and that it was made long before 19 July 1995.¹¹⁹²

384. Additionally, Milan Gvero did not take part in the negotiations organised by Franken on 17 July in order to talk to the Bosnian Serb authorities as to how to handle the sick and wounded in the DutchBat compound.¹¹⁹³ Franken described these negotiations as “decisive” in terms of coordination of the transfer from Potočari to Bratunac and that Colonel Jankovic was “absolutely in command of the delegation.”¹¹⁹⁴ Also during the said negotiations, those present were informed that Nikola Koljevic had to be called about the issue.¹¹⁹⁵

2555 (17/10/06) and 1D35, dated 12 July 1995 (Situation in Srebrenica, number UNPROFOR Z-1142, from Yashusi Akashi, to Kofi Annan); **REDACTED** P2048 (Srebrenica Trial Video Transcript), pp.19, 25-27; Nicolai, C, T. 18497 (29/11/07) and P2978, dated 16 July 1995 (Notes of a Telephone Conversation between General Nicolai and Colonel Markovic at 1500 hours on 16 July 1995, from Lieutenant Colonel de Ruiter, to MA/COMD, CAC, PIO).

¹¹⁹⁰ **REDACTED** P2907, (“[Milan Gvero] suggested that all further actions be in agreement reached by CO DutchBat Srebrenica and General Mladic. ... [Milan Gvero] once again insisted on the meeting between CO DutchBat Srebrenica and General Mladic.”)

¹¹⁹¹ P2942, dated 17 July 1995 (Code Cable entitled “Meeting in Belgrade”, re: Understandings from Belgrade Discussions Situation in Bosnia and Herzegovina 15 July 1995, from Mr. Akashi, UNPF-HQ, Zagreb, to Kofi Annan, United Nations, New York).

¹¹⁹² Franken, R., T. 2553 (17/10/06), Franken, R., T. 2698 (18/10/06) and P2265, dated 19 July 1995 (Agreement between General Smith and General Mladic),

¹¹⁹³ Kingori, J., T. 19284-19285 (14/12/07) and P524.

¹¹⁹⁴ Franken, R., T. 2516 (16/10/06), Franken, R., T. 2530 (17/10/06), **REDACTED** 2654-2655 (18/10/06) and P453, dated 17 July 1995 (Statement of the civilian authorities of the Srebrenica enclave regarding the implementation of the agreement on the evacuation of the civilian population from the enclave); Koster, E., T. 3121 (27/10/06); Franken, R., T. 2530 (17/10/06),

¹¹⁹⁵ Kingori, J., T. 19285 (14/12/07).

385. This in turn is evidenced by John Ryan of DCAC Civil Affairs document of 15 July in which he stated that he would be traveling to Pale to ask Koljević to obtain clearance for the evacuation of sick and wounded from Bratunac and Potočari. Ryan then goes to Pale and Koljević “signed an order” allowing the evacuation.¹¹⁹⁶ This suggests that it was Koljević’s State Committee that facilitated, oversaw, actively participated in, and decided about the medevac in question.¹¹⁹⁷ This committee took the lead in these matters. This raises reasonable doubt as to Milan Gvero’s role in this matter.

Milan Gvero did not attend a meeting with one or more international organisations at Jahorina on 16 July 1995

386. The crux of the Prosecution’s case appears to be that it was at one or more meetings at Jahorina on 16 July 1995 that Milan Gvero facilitated the movement of these wounded. As the Defence hope is clear from the earlier arguments advanced in this section of this brief, the Defence contend that it does not, in fact, matter whether he did or did not so attend, because the evacuation of the wounded was not part of

¹¹⁹⁶ 6D 348, dated 15 July 1995 (Note Concerning the Meeting between Mr. John Ryan, Acting CAC, and Mr. H. Muratović, Minister for Relations with UNPROFOR Sarajevo, 15 July 1995, from John Runa, to Mr. Y. Akashi, SRSG). (“Medevac. Prof. Koljević signed an order in Mr. Ryan’s presence to allow the evacuation of the wounded from the Hospital in Bratunac”); see also Skrbić, P., T. 15541-15542 (18/09/07) and 6D7, dated 14 March 1995 (Official Gazette of Republika Srpska, Decision on forming a state committee with the United Nations and international humanitarian organizations, Number 01-466/95, from President of the Republika Sprska Dr. Radovan Karadžić) (The witness confirmed that Nikola Koljević was appointed President of the State Committee for Cooperation with the United Nations and International Humanitarian Organisations (“State Committee”), which was in charge of issuing permits for the movement of convoys and employees of the said organisations. This was a legal obligation for which adherence was mandatory for everyone). See also Skrbić, P., T. 15543 (18/09/07) and 6D147 dated 5 December 1994 (Instruction about Contacts with International Organisations, strictly confidential no. 01-2391/94, from Radovan Karadžić, to Supreme Headquarters of the VRS)

¹¹⁹⁷ 6D7, dated 14 March 1995 (Official Gazette of Republika Srpska, Decision on forming a state committee with the United Nations and international humanitarian organizations, Number 01-466/95, from President of the Republika Sprska Dr. Radovan Karadzic) (The witness confirmed that Nikola Koljevic was appointed President of the State Committee for Cooperation with the United Nations and International Humanitarian Organisations (“State Committee”), which was in charge of issuing permits for the movement of convoys and employees of the said organisations. This was a legal obligation for which adherence was mandatory for everyone). See also Skrbic, P., T. 15543 (18/09/07)

any alleged forcible transfer. In addition, as outlined above, it is the Defence case that these were matters which fell within the remit of Koljevic's State Committee and that any role played by Milan Gvero in attending any meeting was therefore insignificant. However, in the event that the Trial Chamber reject these contentions and are of the view that attending the 16 July meeting was in some way an act in furtherance of the JCE, the Defence now address the issue as to whether the Prosecution have proved beyond reasonable doubt that Milan Gvero did, in fact, attend this meeting.

387. As a preliminary matter on the issue of 16 July, there seems to be some real confusion in the evidence as to whether there were meetings with the UNHCR or the ICRC or both. To return unapologetically to a constant refrain of the Defence, as usual the Defence have no actual idea how the Prosecution put their case so far as this is concerned. They seem to throw things into a melting pot and hope for the best. The result is that in common with many allegations in this case, the Defence are not sure what they are being asked to answer. This point is well demonstrated by the Prosecution in its Pre-Trial Brief. In paragraph 283 in support of the allegation that Gvero "facilitated and oversaw the movement of wounded Muslims from Srebrenica" the Prosecution have one footnote - 412. This in turns references what is now P1130.¹¹⁹⁸ Somewhat more recently on 1 May 2007,¹¹⁹⁹ the Prosecution have stated in relation to the said intercept that **REDACTED** In fact there is nothing to suggest that P1130 has anything whatsoever to do with the transfer of the sick and wounded, and even less so about Milan Gvero's alleged role therein. **REDACTED**¹²⁰⁰ Basically as usual the Prosecution keep chopping and changing their case more particularly, the evidence that Milan Gvero is being asked to meet.

¹¹⁹⁸ P1130 Intercept dated 13 July 1995, 10.15 hours.

¹¹⁹⁹ *Prosecution's Submission in Support of the Admissibility of Intercept Evidence, with Corroborating Annexes* (01/05/07).

¹²⁰⁰ *Prosecution's Submission in Support of the Admissibility of Intercept Evidence, with Corroborating Annexes* (01/05/07).

388. At any rate and addressing the issue as best as the Defence can, there was allegedly a meeting with the UNHCR at Jahorina on 16 July 1995. As to whether Milan Gvero attended it, the starting point is perhaps P2942.¹²⁰¹ This is a memo of a high level meeting held in Belgrade on 15 July. It states “UNHCR to meet with General Gvero 1200 hrs Sunday 16 July 1995 at Jahorina Hotel”. Presumably Mladic had told the Belgrade meeting that Gvero would attend. This document was put to Smith who said that he *believed* that this meeting took place.¹²⁰² At no point was he able to affirm that the meeting definitely took place, still less, of course, that Milan Gvero actually attended.

389. Then there is P2978, which is a UN memo of a telephone call on 16 July between a Colonel Markovic and Nicolai which suggests that at that time of this call Milan Gvero was at a meeting with the UNHCR. In fact when Prosecution counsel put this to Nicolai he was very dubious and said that that he did not receive any information that Milan Gvero met with UNHCR or with any other NGOs on or about 16 July. According to Nicolai, the only remaining possibility is that local UNHCR authorities in Tuzla were speaking with Milan Gvero, but “this sounds at the very least highly improbable”. Indeed, Nicolai found it “remarkable” that if there was an agreement with the UN, a new one had to be reached with UNHCR.¹²⁰³ In essence, the Prosecution’s own key witness on this topic thought it unlikely that Milan Gvero had attended.

390. **REDACTED.**¹²⁰⁴ As has been seen before in this trial this intercept is rather more accurate than the actual UNPROFOR memo of the same conversation. What Markovic actually said was “I *think* General Gvero is still at the meeting with the UNHCR.” The Defence rely on Markovic’s use of the word “think”.

¹²⁰¹ P2942, dated 17 July 1995 (Code Cable entitled “Meeting in Belgrade”, re: Understandings from Belgrade Discussions Situation in Bosnia and Herzegovina 15 July 1995, from Mr. Akashi, UNPF-HQ, Zagreb, to Kofi Annan, United Nations, New York).

¹²⁰² Smith, R., T. 17533 (06/11/07) and P2942.

¹²⁰³ Nicolai, C, T. 18498-18499 (29/11/07).

¹²⁰⁴ P1191.

391. The next piece of evidence that it is assumed the Prosecution will point to is P536. This is an ICRC “Communication to the Press” dated 18 July 1995. It was introduced into evidence at the end of the Prosecution’s case in chief via the Bar Table. It talks of the ICRC evacuating “88 wounded people from Bratunac to Potacari.” It says that this was done “with the agreement of General Milan Gvero”. The fact of the matter is that this document is from an evidential point of view pretty worthless. Whilst, of course, no one is critical of the fact that the ICRC are not in a position to testify as to these or any other events, this document is pure hearsay. Although ICRC employees have an absolute right under customary international law to non-disclosure of information relating to ICRC activities, the failure on their part to testify should in no way be used to Milan Gvero’s detriment. The Trial Chamber, therefore has no idea how, in what way and from whom the ICRC got this information. Also, and very importantly, the Defence have had no opportunity to test the evidence and challenge the provider at all. The result is that it simply adds nothing to any sensible enquiry as to Milan Gvero’s alleged role in these matters.

392. Much the same can be said of P4156 and P4157.¹²⁰⁵ They basically provide the same information as P536 and the source of both of these documents (or their contents) is clearly the ICRC. Therefore exactly the same problem arises as in P536. In short, repeating the same error (ie. relying upon information which is from the same source) does not make it correct. P4156 and P4157 take matters no further than P536. All three documents could not possibly satisfy the Trial Chamber beyond reasonable doubt that Milan Gvero had such dealings with the ICRC.

393. The Defence repeat that it is unclear in the extreme if it is alleged that Milan Gvero had meetings with one or both the UNHCR and the ICRC.¹²⁰⁶ At any rate there is material to suggest that it was not Milan Gvero but Colonel Milos Djurjic (often spelt Durdic) who was dealing with these matters. He was a member of

¹²⁰⁵ For criticism as to the manner of their introduction see the Para. 76 (c) (ii) part of this brief.

¹²⁰⁶ Although just to further confuse matters P2567 a Main Staff document does state that there was an agreement “on 16 July 1995 between representatives of the VRS GS and representatives of the ICRC and UNHCR”.

Koljevic's State Committee and was, in fact the only Main Staff representative on it.¹²⁰⁷ That this sort of work, i.e. the evacuation of the wounded involved Djurdjic is beyond dispute.¹²⁰⁸ He was primarily responsible for it within the Main Staff.

394. His direct involvement in these events is further confirmed by P1200, dated 16 July. In this intercept Đjurđić, discusses the sick and wounded in Bratunac and Potočari and states, "We agreed today for UNPROFOR /to transport/ them from Potočari to Bratunac to a designated place and then from there to take the shortest road to Ljubovija along the right bank. And where will the selection and triage be done to see who goes to Belgrade and who to Tuzla, or do they all go to Tuzla?" This suggests that he was involved in a meeting that day and was heavily involved in the logistics as to the evacuation.

395. This is corroborated by P2567 and in particular the extract: "The ICRC team from Bijeljina: ... The itinerary: Biljeljina-Sepak-Lubovija-Bratunac". P1200 shows Đjurđić discussing the route and P2567 is the Main Staff authorisation of that route. It is further corroborated by an ICRC document 6D320¹²⁰⁹, which states that the "Team from Bijeljina: Bijeljina – Zvornik – Ljubovija – Bratunac." In other words it confirms the same route that Đjurđić has organised.

396. There can be little doubt that the central figure within the Main Staff so far as this was concerned was Đjurđić.¹²¹⁰ In conjunction with Koljevic's State Committee he

¹²⁰⁷ 6D7, dated 14 March 1995 (Official Gazette of Republika Srpska, Decision on forming a state committee with the United Nations and international humanitarian organizations, Number 01-466/95, from President of the Republika Sprska Dr. Radovan Karadzic).

¹²⁰⁸ See Skrbic, P., T. 15542, 15539 (18/09/07); Butler, R., T. 19713-19714, 19725 (15/01/08); Kralj, S., T. 29295 (04/12/08). See also the sketch by Skrbic T. 15540, where he identified Colonel Djurdjic as a member of the Office for Cooperation with Foreign Military Representatives within the Main Staff (6DIC 149); see also 6D 7. See also *Prosecution's Submission in Support of the Admissibility of Intercept Evidence, with Corroborating Annexes*, p.45 ("REDACTED").

¹²⁰⁹ 6D320 dated 16 July 1995 (Urgent Medical Evacuation of the Wounded and Sick from Bratunac, PAL 95/897/N, from the International Committee of the Red Cross, to State Committee for Cooperation with International Organisations Coordinating Body).

¹²¹⁰ See also *Prosecution's Submission in Support of the Admissibility of Intercept Evidence, with Corroborating Annexes*, p. 45 REDACTED.

was responsible for this evacuation. The only question is whether there is sufficient evidence to do say beyond a reasonable doubt that the Prosecution have proved that Milan Gvero was present at one or more of these meetings. The Defence contend that, at best, the evidence on this issue is equivocal and certainly insufficient for the finding sought by the Prosecution.

397. As a further alternative the Defence contend that, in any event, on the evidence taken at its highest that Milan Gvero's participation in this allegation was insufficiently significant for it to be said to have contributed to the alleged JCE.

Conclusion

398. The Defence maintain as set out above that the movement of the wounded was not in furtherance of any alleged forcible transfer. Further and in the alternative, to put it mildly, the evidence is unclear as to how many meetings there were, who these meetings were between and whether Milan Gvero attended any or all of them. Further and in alternative, if he did attend that he played no significant role in furtherance of the JCE. It is simply impossible to conclude anything in relation to this issue beyond reasonable doubt.

Gvero's alleged participation in the JCE: Gvero's alleged involvement with Zepa

The Defence's lack of notice of the Gvero – Zepa allegation

399. When considering this topic it is worth bearing in mind that during the course of this trial, the evidence in relation to Milan Gvero's alleged role in Zepa has changed and developed to a significant degree. The net effect of this is to mean that in reality the Prosecution have greatly expanded the ambit of their allegations in relation to this matter.

400. The Defence ask that two things be borne in mind in this regard. Firstly, the Defence have been severely disadvantaged by this course of events. It may well be that it is not the fault of the Prosecution that some of the evidence emerged in the way that it did, but by the same token it has meant that a fundamental tenet of any fair system of criminal justice has been broken, namely that an accused person should know the nature of the evidence against him in advance of the proceedings. The reasons as to why this is a fundamental tenet are obvious and do not require expansion here. The fact of the matter is that in this case when the majority of Zepa related Prosecution witnesses were testifying, the Defence were not aware of the allegation let alone of any evidence suggesting that Milan Gvero was present at any time at OP2, (or as appears to be General Sir Rupert Smith's allegation actually in the Zepa enclave itself) . So far as this is concerned, the Defence invite the Trial Chamber to afford every allowance for the severe disadvantage caused by the late revelation of the evidence. This includes both Smith and Emma Sayer's allegation and, in particular, the Boksanica footage.¹²¹¹

401. Secondly, both technically and also fundamentally, it is a fact that the Indictment contains no direct allegation relating to Milan Gvero's actions let alone specific role in Zepa. As a result one might ask oneself if there is a point in the Prosecution having to make any specific allegations as to the actions and role of any accused in an Indictment. Indictments at the International Tribunal require and invariably include detailed particulars, and so far as Milan Gvero is concerned these are set out in paragraph 76. Much of this Final Brief seeks to address those specific paragraph 76 allegations. The Defence have been on notice in relation to them from well before the start of the trial and, as a result, both Milan Gvero and his lawyers knew from the outset that these had to be met. The absence of any such allegation so far as Zepa is concerned, begs the question as to why such particulars need averring at all, if the Prosecution can simply add to such allegations during the course of the trial, without any recourse to the Indictment, by amending it or otherwise. But even if the Trial Chamber concludes that the statute and/or rules allow for this to happen, then the

¹²¹¹ P4537.

Defence strongly assert that a Trial Chamber should bend over backwards to give an accused every allowance for the fact that, what on any reckoning or analysis, amounts to a fundamental allegation not being pleaded in the Indictment. The prejudice to an accused in only discovering an important allegation well into the trial is, quite simply, enormous.

402. To put all of this into perspective, the first time that the Defence were aware of any allegation that Milan Gvero had visited the Zepa area was on 30 October 2007¹²¹² (in other words far nearer the end of the Prosecution case than the beginning), when the Defence received a proofing note in relation to Smith from the Prosecution. This may well beg the question on the part of the Trial Chamber as to why the Defence had in many ways taken the lead in cross-examining many of the witnesses who gave evidence prior to that date in relation to events in and around Zepa.¹²¹³ In fact the answer to this is pure coincidence. It was apparent to the Defence from the outset of this trial that as a generalisation they may have wished to explore fewer avenues in cross-examination than many of the other defence teams in this case. In part this was a matter of strategy and tactics but also due to the fact that Milan Gvero was not charged with the most serious crimes on the Indictment, namely those arising from the mass murder. In order to shoulder a fair burden of the work, the Defence agreed informally to, in effect, take the lead on the subject of the Zepa crime base allegations. As is obvious when one reads the Defence cross-examination of these witnesses, the questions asked went to general and crime based relate matters. They did not pertain to the direct evidence relating to Milan Gvero's alleged presence in Zepa for the very good reason that the Defence had no idea that such allegations were going to be made.

403. The Trial Chamber are urged to give Milan Gvero every possible allowance for the fact that he was unable to cross examine any of these witnesses as to the purpose of his presence at Boksanica. In particular the Defence remind the Trial Chamber

¹²¹² See T17283, 1 November 2007.

¹²¹³ Eg. Palic, Dzebo, Torlak, Trivic, Joseph, Savcic and Dibb.

that they refused the Defence application to have recalled four such witnesses following the admission of the Boksanica footage.¹²¹⁴

404. A further problem that arises from the manner in which the evidence on this subject has developed is that the Defence, even now, are far from certain as to precisely what the case against Milan Gvero is in respect of Zepa. This is both disgraceful and unfair. It is apparent from the Boksanica footage that the Prosecution are alleging that he was present at the Boksanica checkpoint on 26 July 1995. However, no doubt caused by the very late discovery of this piece of evidence, the Prosecution have not stated with any degree of clarity as to why this matters and where this takes their case. Again the problem is obvious – this makes it impossible for the Defence to properly address the issue in this Brief when they are not aware of precisely what is being alleged. To return to the theme above that is why accused persons on trial receive particularised indictments and pre-trial briefs - so that they know what is being alleged against them. Unfortunately, this has not happened in Milan Gvero's case.

405. Furthermore, the Prosecution have given no indication as to how the Boksanica footage fits into the testimony of Smith and Sayer as to their alleged encounter with Gvero on the road leading to Zepa. The Defence are completely in the dark as to the nature of the specific allegation as to Milan Gvero's movements on the 26, 27, 28, 29 July 1995 is Milan Gvero. Again the Defence are forced to deal with the matter in this Brief on the basis of mere guess work and intuition. This is not the way that a serious International Tribunal should allow litigation of this sort to be conducted.

Smith's failure to mention the Gvero – Zepa encounter prior to 2007

406. The primary thing to bear in mind in relation to the evidence of Smith and Sayer is that, by their own admission, neither of them mentioned their alleged sighting of

¹²¹⁴ *Partial Decision on Gvero Motion seeking the Recall of Certain Prosecution Witnesses And the Reopening of the Case*, 15 June 2009.

Milan Gvero from 1995 to 2007.¹²¹⁵ In the case of Sayer this is less surprising, but the same cannot be said of Smith. Firstly, according to Smith, this was quite a significant encounter by reason of his recollection that Milan Gvero stated that he was now in charge of Zepa.¹²¹⁶ One would have thought that he would have reported this to someone at the time or at the very least made sure that this alleged statement by Milan Gvero was noted down somewhere. Secondly, he had been asked about his recollection of Zepa events on various occasions prior to 2007. Of course nothing can be made of his not mentioning it in the trial of Slobodan Milosevic but the same cannot be said when it comes to his 25 page detailed witness statement given on 14 August 1996. This was just over a year after the event and one would have thought that it should have featured therein. The same point is true to an even greater extent with respect to his so called “expert statement” of 13 July 2006.¹²¹⁷ This was an interview where he was dealing specifically with Milan Gvero for the purposes of the present trial. The whole point of this interview was to give examples of the role of VRS Assistant Commanders, their closeness to one another and how this manifested itself in practice. Smith was ready enough during the trial to use this alleged sighting as an example of an Assistant Commander being forward on behalf of Mladic.¹²¹⁸ Indeed, he confirmed in cross-examination that he was asked very specifically in that interview about Milan Gvero’s role within the VRS and to draw various conclusions about it.¹²¹⁹ Yet he could not explain why, when answering questions that Mr. Thayer posed to him towards the end of his examination-in-chief, he chose this encounter as a specific example of Gvero at work within the VRS, but did not mention him at all in his July 2006 interview.¹²²⁰ This raises real questions about his memory and accuracy.

407. Quite apart from this, it is of real note how confused and inaccurate Smith is in relation to many aspects of his evidence so far as the alleged encounter is concerned.

¹²¹⁵ Smith, R., T. 17727 (08/11/07).

¹²¹⁶ Smith, R., T. 17557 (06/11/07).

¹²¹⁷ P6D183. See also Smith, R., T. 17727-17728 (08/11/07).

¹²¹⁸ Smith, R., T. 17579 - 17580 (06/11/07).

¹²¹⁹ Smith, R., T. 17728 (08/11/07).

¹²²⁰ Smith, R., T. 17728 (08/11/07).

As stated above, he made no mention of any of this in his lengthy 1996 statement to the OTP. He did say of this period:- “In the course of the period 26 to 29 July, I visited the pocket three times and there met with Mladic twice.”¹²²¹ Of course, when he wrote this witness statement matters would have been much fresher in his mind than when he gave his evidence.

408. So far as his evidence is concerned, when asked about the topic in examination in chief he said:

Q. “General, I want to turn your attention to when you were leaving Zepa for the last time. Do you recall encountering anyone as you were leaving Zepa?” A. “Yes. We were driving out from Zepa, and just as we were passing one of the - I called them earlier temporary check-points that had been set up - I saw a vehicle coming towards me that I recognised as one of those ones used by the Main Staff, and a -- and we were at the check-point, the vehicle stopped, and we got out and General Gvero got out, and we met -- I met him there. He was going into Zepa, and I was coming out. I was interested to know what he was doing there, because he hadn't been there the day before. And Mladic had already left, and we'd understood that he was heading off to the Banja Luka, to the other side of Bosnian Serb territory, the other side of central Bosnia. And I wanted to understand what the situation was. And General Gvero said that he was now in charge of Zepa.”¹²²²

409. The first observation is that it was most unfortunate that prosecution counsel chose to ask him a leading question, by suggesting to the witness that he was “leaving Zepa for the last time”. The fact that counsel chose to do that significantly devalues the quality of the evidence so far as the date is concerned.

410. Furthermore, Smith alleges that he “was interested to know what he was doing there, because he hadn't been there the day before”. If ultimately the Prosecution are asserting that the encounter took place on the 27 July, then Smith is wrong about this as we now know that Milan Gvero was at Boksanica the day before. In this regard it is a great pity that the Trial Chamber refused the Defence application to have Smith

¹²²¹ Smith, R., T. 17722-17723 (08/11/07).

¹²²² Smith, R., T. 17556-17557 (06/11/07).

recalled after the admission of the Boksanica footage, so that he could be asked about this. The disadvantage to the Defence caused by this, must be taken into account by the Trial Chamber when they examine the relationship of the Boksanica footage and Smith's evidence.

411. **REDACTED**¹²²³ He may have been there on the morning of the 29 July as well as he only arrived in the Banja Luka area sometime on the 29 July.¹²²⁴

Smith's mistaken allegation that Gvero was in charge of Zepa

412. On any analysis it is simply impossible that "General Gvero said that he was now in charge of Zepa". Prior to considering this absurd allegation in detail, it is worth emphasising just how sure Smith was that Milan Gvero uttered such words. In answer to a question from Judge Prost, he confirmed that in terms of the conversation itself and its contents his recollection was as clear in relation to that as it was of the fact that he encountered Gvero at all.¹²²⁵

413. In terms of why such an utterance by Milan Gvero is impossible, the Defence would begin by observing that on the evidence the logistics for such a conversation seem unlikely in the extreme. Smith confirmed when questioned by the Trial Chamber that the conversation he had with Gvero at the checkpoint must have been through an interpreter, and that he had one with him, either Captain Bliss (Sayer) or Captain Dibb.¹²²⁶ It could not have been Dibb. As for Sayer, whilst she confirmed being with Smith on the journey and whilst she recalls an encounter with Milan Gvero, she has no recollection of something as significant as Milan Gvero asserting that he was now in charge in Zepa. In fact she has no clear recollection of Smith actually leaving the vehicle because of the security situation (it was not common practice for the principal to get out of the vehicle when they were between places).¹²²⁷

¹²²³ P6D165 Under seal **REDACTED**.

¹²²⁴ 6D195 (to be read in conjunction with 6D196) & Jovanovic, S., T 33920 (03/07/09)

¹²²⁵ Smith, R., T. 17827 (09/11/07).

¹²²⁶ Smith, R., T. 17827 (09/11/07).

¹²²⁷ Sayer, E., T. 21133 (06/02/08).

In addition, in her witness statement of 24 January 2008, she stated that "I believe that General Smith was a party to the conversation, possibly speaking through an open door at his vehicle." In cross-examination she clarified this by explaining that she would have been the conduit of the conversation between the two generals.¹²²⁸ In other words she would have inevitably have been present as well as interpreted any such conversation.

414. Sayer also explained in cross examination:

Q. Again, in the witness statement, you say that had you heard Gvero say that he was taking command or charge, you would have put it in the report. And then you go on to explain that because they were the three busiest days of your deployment, not everything made it into an official record. What was it that would have been significant about him saying that he was in charge to merit that going in a report, rather than the encounter itself?

A. The reports that we wrote, the meeting notes, they were solely designed as a summary, and you will, I hope, appreciate that over the course of these days, there were many interactions between a variety of different people, and the primary ones were summarised, what we thought to be salient facts at the time, so that they could then be recorded and sent up to Zagreb.

Q. And so a salient fact would have been a senior officer saying he was taking charge, but the actual encounter wouldn't have been sufficiently salient; is that right?

A. Yes, that's -- that would be a fair statement.¹²²⁹

415. In other words she confirmed in both her witness statement and in evidence that had such words been uttered by Milan Gvero, it would have almost inevitable that she would have noted them down somewhere. The fact that she did not do so speaks volumes as to the accuracy of what Smith now alleges.

416. Another equally significant consideration about the impossibility of Milan Gvero uttering such words, is it would simply have made no sense for him to say anything of the sort – because it obviously was not true. The evidence reveals that at no time was Milan Gvero in charge of anything at all in or around Zepa. This fact does not require

¹²²⁸ Sayer, E., T. 21133-21134 (06/02/08).

¹²²⁹ Sayer, E., T. 21134 (06/02/08).

much expansion. There is a lot of evidence showing Mladic's hands on involvement in Zepa up to 29 July.¹²³⁰ **REDACTED**¹²³¹ and was clearly in charge of the civilian evacuation.

417. Equally, the evidence is clear (as examined below) that the last thing Milan Gvero would be doing on the 26, 27 or 28 July would be taking charge in Zepa. Quite the opposite would have been true, as he was desperate to get to the other side of the country to monitor the morale situation on the Western Front which, as explained elsewhere in this brief,¹²³² he was desperately concerned about.

418. Of course, it is not incumbent on the Defence to proffer any explanation as to why Smith has wrongly recalled Milan Gvero saying he was in charge. However, one explanation and certainly a reasonable inference that has not been re-butted might be confusion on his part with the events of 31 July 1995. On that day, Smith, Mladic, Gvero and others met in Mrkonjic Grad. During the course of that meeting, Mladic stated in respect of the Croat western offensive, that he had "appointed General Gvero to be responsible for managing the humanitarian and refugee problem."¹²³³ Put another way, Milan Gvero was to be in charge of the Serbian evacuation from that area. Finally, in so far as this meeting is concerned Sayers "clearly" remembers Gvero having been present at this meeting, because this was one of the very few occasions on which she was called upon to act as the primary interpreter.¹²³⁴

Confusion as to the date of the encounter

419. As stated above, Smith only stated that the encounter took place when he was "leaving Zepa for the last time" when this was put to him by prosecution counsel in leading form.¹²³⁵ As to which date this last time was, he said in his 1996 statement to

¹²³⁰ **REDACTED** Jovanovic, S., T33921 (03/07/09).

¹²³¹ **REDACTED**

¹²³² See submissions in section of this final brief on Milan Gvero's role and responsibilities.

¹²³³ P2947.

¹²³⁴ Sayer, E., T. 21136 (06/02/08).

¹²³⁵ Smith, R., T. 17556 (06/11/07).

the OTP that :- “In the course of the period 26 to 29 July, I visited the pocket three times and there met with Mladic twice.”¹²³⁶ In cross-examination he conceded that he could be easily persuaded that he encountered General GVERO on the second day (of his three days that he travelled to Zepa) rather than on the last.¹²³⁷

420. As for Sayer, she maintained in her evidence that the date was 27 July, but in her witness statement had conceded that “these days are difficult to distinguish.”¹²³⁸ This is hardly surprising in light of everything that was taking place at that time in Bosnia and Herzegovina, and represents the minimum possible concession that she could have made bearing in mind that she was being asked to cast her mind back in excess of 12 years.

421. It is also worthy of mention that in respect of the same period of time, Tom Dibb took a rather more realistic view of the various dates. He testified in examination in chief that he had a bit of a problem even shortly afterwards trying to fit all the days into each other.¹²³⁹ In cross-examination he accepted that the passage of time clearly affects memory and can play tricks thereon.¹²⁴⁰

422. In regard both to the date and the general accuracy of both Smith and Sayer’s recollection, it is worth bearing in mind the evidence of Willem Wagenaar. He stated that usually, memory gets worse over time, which is also true for witnesses. In his view, confidence in memory is a totally different thing, and there is not much of a relationship between the accuracy of memory and the confidence that a person has in their memory.¹²⁴¹ In time, accuracy tends to go down and confidence sometimes goes up, so the discrepancy between what a person actually remembers and how confident

¹²³⁶ Smith, R., T. 17722-17723 (08/11/07).

¹²³⁷ Smith, R., T. 17738 (08/11/07).

¹²³⁸ Sayer, E., T. 21127 (06/02/08).

¹²³⁹ Dibb, T. 16288 (15/10/07).

¹²⁴⁰ Dibb, T. 16331 (15/10/07).

¹²⁴¹ Wagenaar, W., T. 25371 (08/09/08).

they are about these memories becomes bigger and bigger.¹²⁴² Whilst in many ways this is no more than common sense it is certainly true and worth bearing in mind.

423. When one considers Dibb's comment on how difficult these days were to remember, in conjunction with the expert evidence of Wagenaar, the certainty as to dates that Sayer portrayed in her actual evidence (as opposed to her witness statement) becomes implausible and makes it impossible to rely on her evidence, in this regard beyond a reasonable doubt.

424. One other important feature in relation to the accuracy of Sayer's evidence that the Defence point to is her account that Tolimir was present at the Jela restaurant meeting of 25 July. In cross-examination she was asked:- "Who, if anyone from the VRS, was there to greet you when you arrived at the restaurant?"¹²⁴³ She answered:- "My recollection is that General Tolimir was at the restaurant." This answer is very revealing as she is wrong that Tolimir was at the meeting. All evidence in relation to this meeting, both from Smith himself and also Baxter's notes indicate that Tolimir was not there. In addition, according to paragraph 4 of 6D108, Mladic had been with Tolimir in Zepa since early in the morning of 25 July, but the clear implication of Baxter's memo is that Tolimir remained in Zepa (no doubt to oversee the evacuation) and that Mladic had come to the Jela restaurant without him. The same paragraph of the memo indicates that "Mladic arrived at the meeting 30 minutes late by helicopter". So who was the person who greeted Sayer and Smith that morning? The Defence case has always been that it was Milan Gvero. It therefore follows that there is in fact little doubt that, at least so far as the identity of the person who did the greeting is concerned, Sayer has confused Gvero with Tolimir. In short, she has said it was Tolimir who attended the meeting when it was in fact Milan Gvero. The doubt and uncertainty that this casts over her evidence as to the entirety of the encounter that she suggests occurred on 27 July is obvious and overwhelming. At the very least

¹²⁴² Wagenaar, W., T. 25371 (08/09/08).

¹²⁴³ Sayer E, T.21117 (06/02/08).

it is a possibility that in relation to 27 July she made the same mistake in reverse and thought that it was Gvero that she encountered when in fact it was Tolimir.

425. It is obvious that the evidence of Smith and Sayer will need to be considered against other evidence that relates to Milan Gvero's movements. Of particular significance is the evidence of Petar Skrbic. He stated "I left on the 27th July 1995, for the western part of Republika Srpska, where the situation on the front line was very bad, very difficult, and General Gvero was there already."¹²⁴⁴ It is worth remembering that he, in effect, said this in passing when answering questions in re-examination. This was not an area that the Defence had been interested in exploring with him. This was hardly surprising as Skrbic stated this in September 2007, long before there was any suggestion from any witness or source that the whereabouts of Milan Gvero on that date would be a matter of contention. The Defence rely on this evidence strongly – at the very least it raises a reasonable doubt that Milan Gvero was near the western front on the day he was supposed to be in the Zepa area.

426. More recently there were various Defence witnesses who gave evidence on this subject. 6DW-02, Slavko Culic and Nedeljko Zoranovic all testified to the fact that Milan Gvero was in the Krajina on 27 July.¹²⁴⁵ The Prosecution had an opportunity to cross-examine each of these witnesses on this subject and for reasons best known to themselves they chose not to do so. This is particularly stark in the case of Culic. The only reason that he was called by the Defence was to attest to the dealings that he had had with Milan Gvero on 27 July. Yet the Prosecution chose to ask him about other things that allegedly went to his credibility. The reality is that by embarking on this type of cross-examination, the Prosecution have placed the Trial Chamber in an impossible position. The Prosecution, actions in failing to challenge in any real sense the "alibi" (ie. the assertion by Culic that he saw Gvero on the 27 July), mean that the Trial Chamber is unable to assess Culic's evidence and to be in a position to say that it is incorrect and/or untrue. In particular, it is worth remembering in this regard that

¹²⁴⁴ Skrbic, P., T.15594 (18/09/07).

¹²⁴⁵ 6DW02 T.33850 (02/07/09); Culic S. T. 33866 (02/07/09); Zoranovic N. T.33893 (03/07/9)

it is not for the Defence to prove the truth of Culic's assertions (i.e. his alibi evidence) – or for that matter the truth of the evidence of 6DW-02 and Nedeljko Zoranovic (who support the said alibi). It is for the Prosecution to disprove it beyond a reasonable doubt. The Defence maintain that it is impossible for the prosecution to have done this in the light of the cross-examination and tactics they chose to deploy. By failing to ask any questions remotely relevant to this issue and, in particular, by failing at the very least to test these witnesses credibility and reliability as to the date the Prosecution have not begun to discharge the heavy burden that they bear in relation to alibi evidence.

427. In addition, the emergence of 6D346 during the Defence case is highly significant. This document reveals that Zoranovic (who was Gvero's driver at the time) swapped vehicles on 26 July 1995 and picked up an "all-terrain motor vehicle". As Zoranovic explained, this was done in Vlasenica in order to have a more suitable vehicle for the difficult journey to the west that they were about to undertake.¹²⁴⁶ Furthermore, the fact that after leaving Zepa on 26 July they changed to an off road vehicle in Vlasenica before heading to Banja Luka was also confirmed by 6DW-02.¹²⁴⁷

428. It is again of real note that no serious attempt (and arguably no attempt whatsoever) was made by Prosecution counsel to challenge this, let alone to ask any questions about this vital exhibit when Zoranovic was giving his evidence. In short, 6D346, with or without its supporting testimony, raises substantial doubts as to any suggestion that Milan Gvero was in the Zepa area on 27 July.

The confusion as to where the alleged encounter took place

429. Both Smith and Sayer were asked in some detail as to where they thought that the alleged encounter had taken place. Smith described the direction from which he was travelling when he met Milan Gvero as follows: he used to drive from south to north,

¹²⁴⁶ Zoranovic., N. T33893 -33894 (03/07/2009).

¹²⁴⁷ 6DW-02, T33850 -33851 (02/07/2009).

having come in on the road to Gorazde, after which they then went north.¹²⁴⁸ There was a Bosnian Serb army check-point somewhere in the vicinity of Brezova Ravan, where one turns off and enters Zepa, at which point the witness met Gvero, who appeared to be going into the pocket as the witness was leaving it.¹²⁴⁹ Based on his observation of the location of communication vehicles, the witness believes that the IKM was in the vicinity of this check-point.¹²⁵⁰

430. The first point to make is that Smith was certainly wrong that the IKM was at this check-point. But far more fundamentally there is a real question as to whether Smith ever penetrated that far into the Zepa enclave. The geography is well set out in PIC 282 - a map that was marked by Hamdija Torlak. It is clear from what Torlak said in explaining this map (and common sense dictates this as well) that "BCP" is the Boksanica checkpoint, and that the "X" is a separate checkpoint at Brezova Ravan. To get to Brezova Ravan, one had to go through the Boksanica checkpoint in order to enter the enclave.¹²⁵¹

431. In fact it is very questionable as to whether Smith ever got as far as Brezova Ravan. In his evidence in chief, Dibb on two occasions stated that Smith on his three visits to the area never made it beyond OP 2 (the Boksanica checkpoint).¹²⁵² On 27 July, Smith met with the Zepa War Presidency, including Torlak.¹²⁵³ This meeting must have taken place at the Boksanica checkpoint as Torlak confirmed that he went there on 26 July (as seen in the Boksanica footage)¹²⁵⁴ and remained there overnight until the next day, when the meeting, as described in P2946, took place. It is clear that after 26 July Torlak remained at the Boksanica checkpoint until his arrest late on 27 July.¹²⁵⁵

¹²⁴⁸ Smith, R., T. 17724 (08/11/07).

¹²⁴⁹ Smith, R., T. 17724 (08/11/07).

¹²⁵⁰ Smith, R., T. 17726-17727 (08/11/07).

¹²⁵¹ Torlak, H., T9742-9743 (30/03/07).

¹²⁵² Dibb, T. 16291 & 16315 (15/10/07).

¹²⁵³ P2946 (although this document is headed "28 July 95", there is no dispute that it relates to events the day before).

¹²⁵⁴ P4537.

¹²⁵⁵ Torlak, H., T9746-9749 (30/03/07).

432. Sayer gave a markedly different account as to where the alleged encounter occurred. She said that she never went into Zepa town, but remained instead at the check-point at the top.¹²⁵⁶ By this, she clearly means the Boksanica checkpoint. In other words, she confirmed that she never actually made it into the Zepa enclave *per se* and had never got anywhere near Brezova Ravan, the very place where Smith alleged the encounter had taken place. She went onto say that the check-point at which she met Gvero was on the road from Zepa back to Sarajevo.¹²⁵⁷ They had been travelling for approximately 20-30 minutes when they met Gvero and it was relatively soon after they had left OP-2.¹²⁵⁸

433. It is clear that Smith and Sayer are at total variance with one another as to the spot at which this alleged encounter occurred. Smith's account is impossible – not least because Sayer certainly never got as far as Brezova Ravan and Smith himself probably did not either. In addition, Sayer's account would place the encounter as having taken place a significant distance away from Zepa. Both individually and collectively the evidence from these two witnesses as to where the encounter occurred, raises far more questions than it provides answers about and could not possibly satisfy anyone of anything beyond a reasonable doubt.

The unreliability of Sayer's memory

434. In addition to the above mentioned difficulties with the evidence of Sayer, the Defence would point to another significant discrepancy between her evidence and that of another Prosecution witness - Louis Fortin. Fortin gave evidence in November 2007, well before Sayer had been spoken to by the Prosecution, let alone any decision by them to add her to their witness list.

¹²⁵⁶ Sayer, E., T. 21125 (06/02/08).

¹²⁵⁷ Sayer, E., T. 21132, 21135 (06/02/08).

¹²⁵⁸ Sayer, E., T. 21133, 21135 (06/02/08).

435. Fortin gave evidence about the mechanics of the conversation that he interpreted, in part, between Milan Gvero and General Gobillard.¹²⁵⁹ As is apparent from the transcript, he somewhat surprised counsel cross-examining him on behalf of Milan Gvero when he revealed that the principal UNPROFOR interpreter during this conversation (translating from B/C/S into English) was British and was sitting right beside Fortin.¹²⁶⁰ He then named her as Captain Bliss (Sayer's maiden name) and revealed that she was one of Smith's liaison officers.¹²⁶¹ In fact when pressed on this a little later on, he said, "I'm quite sure it was Captain Bliss."¹²⁶²

436. When Sayer gave her evidence, she was asked about this conversation (despite the Prosecution objecting).¹²⁶³ She clearly did not remember it all and said, "all I can comment is that I don't have a recollection of having interpreted this conversation."¹²⁶⁴

437. The significance of this is that Fortin had a clear memory of this event and distinctly remembers Sayer being there as well as interpreting. This was after all an important conversation and tensions were running very high. Yet Sayer's memory was so poor that she could not remember it all. This casts grave doubts over her memory of other incidents. In the light of this no serious reliance can be placed on her recollection of any event at this time.

Gvero's involvement with Zepa as portrayed in the Boksanica footage¹²⁶⁵

438. The Trial Chamber does not need reminding of how late the Boksanica footage emerged into the trial. For the purposes of these submissions, the blame for this is being laid at no particular door. However the Defence maintain that they have been severely disadvantaged and that, as a result, the Trial Chamber should afford every

¹²⁵⁹ P2379

¹²⁶⁰ Fortin, L., T18379 (29/11/07).

¹²⁶¹ Fortin, L., T18379-T18380 (29/11/07).

¹²⁶² Fortin, L., T18383 (29/11/07).

¹²⁶³ Sayer, E., T. 21112 (06/02/08).

¹²⁶⁴ Sayer, E., T. 21113 (06/02/08).

¹²⁶⁵ P4537.

allowance in this regard. The Defence also place great reliance on the words of the Trial Chamber in relation to this footage during the course of some its Decisions on the issue. Of particular note the Trial Chamber has stated that the “admission of the Boksanica Footage is of a limited nature”¹²⁶⁶ and also that the admission has “narrow scope and implications”.¹²⁶⁷ The Defence trusts that the Trial Chamber will maintain this approach to this material in its judgment.

439. It is of note that the Boksanica checkpoint as seen in the footage was in fact an UNPROFOR checkpoint that was manned by the Ukrainian Battalion. It was not actually in the Zepa enclave. It follows from this that presence there did not place one within the enclave itself. Indeed, the Boksanica checkpoint was not even at the actual entrance to the enclave.¹²⁶⁸ Milan Gvero knew this as he can be heard on the video to say to the Ukrainian Commander:- “You are lucky to be in Serb territory.”

440. In terms of what one can see and hear the footage is not revelatory as to any significant role that Milan Gvero was playing there. The prosecution seem to be relying on Gvero’s words:- “You are lucky to be in Serb territory. Imagine you are down there with Turks now.” The use of the words “Turks” was ubiquitous¹²⁶⁹ amongst Serbs and Croats at that time.¹²⁷⁰ It was not, by definition and common usage, either derogatory or pejorative in nature. To invite some sort of adverse inference to be drawn from its use would be neither fair nor reasonable. All Milan Gvero was saying to Dudnik was that Dudnik was personally better off at the checkpoint than in the enclave with his (Gvero’s) enemies and opposing combatants. His subsequent remark as to “wartime conditions” illustrates this point that the conversation must be read in the context of the ongoing hostilities.

¹²⁶⁶ *Decision on Gvero Motion seeking certification to appeal the Decision on the Prosecution’s Second Motion to reopen its case*, Trial Chamber, 3 June 2009.

¹²⁶⁷ *Decision on Motion on Behalf of Milan Gvero seeking a variation of the Trial Chamber’s Order*, Trial Chamber, 11 June 2009.

¹²⁶⁸ Pajic, V., T. 28801 (25/11/08).

¹²⁶⁹ See Milovanovic, M., T12191 (29/05/07).

¹²⁷⁰ Milovanovic M. T.12191 (29/05/07)

441. It is also of real note that the Bosnian Muslim negotiator, Torlak, viewed the atmosphere at Boksanica on 26 July as “relaxed.” In fact, he specifically said:

“Well, I spent most of the time there in General Mladic's company. We were sitting there at this table, and there was some general discussion on other topics, and every convoy that would arrive from Zepa, as far as I can remember, was visited by General Mladic. He would get on the buses. There was a relaxed atmosphere throughout this day. I'm talking about the 26th.”¹²⁷¹

442. The footage itself does not suggest Milan Gvero playing any part or role in relation to the departing Bosnian Muslims. His presence there in this regard, or indeed generally, was at the highest, so insignificant that it is quite apparent that Torlak has no memory of Milan Gvero being there, since Torlak made no mention of Gvero being there let alone playing any role during the course of his (Torlak's) long and detailed evidence in relation to these events.

The Defence case as to the rationale for Gvero's visit to Boksanica

443. The Boksanica footage in no way suggests what, if anything, Milan Gvero was actually doing at the checkpoint. This is where the evidence of 6DW-02, Nedeljko Zoranovic and Sasa Jovanovic are important. In carrying out an analysis of their evidence, the Trial Chamber is reminded that by calling them the burden of proof has in no way shifted to the Defence. To reject their evidence as to what Milan Gvero was doing there, the Trial Chamber would have to conclude beyond a reasonable doubt that each and every one of them had come to the International Tribunal to commit perjury. In relation to their evidence there is no middle ground available, such as mistake or confusion – to put it colloquially - no fudge is available.

444. All three of these witnesses were witnesses of truth. The Defence contend that, in particular, Jovanovic was a compelling witness, giving good clear informative answers and having a genuine and impressive memory for detail. It is of note that the Prosecution had a complete weekend to prepare for their cross-examination of him

¹²⁷¹ Torlak, H., T9747 (30/03/07).

and in spite of this, his performance when under pressure from Mr McCloskey, demonstrated his truthfulness and quality as a witness.

445. The Defence do not propose to use this opportunity to remind the Trial Chamber in any detail of what these Defence witnesses had to say, but would urge each member of the court to read and re-examine their evidence in a critical way. They were clearly telling the truth but that is not the test - they were even more clearly not undermined by the Prosecution beyond a reasonable doubt.

446. In essence the Defence case is that Milan Gvero went to Boksanica to find and speak to Mladic. All three witnesses - 6DW-02, Nedeljko Zoranovic and Sasa Jovanovic –confirmed this account in their own ways.¹²⁷² Of equal significance in this regard is the evidence of Milenko Jevdjovic. In assessing his evidence, it is first and foremost important to bear in mind that he gave his evidence in December 2008 – long before the Defence had any knowledge of the existence, let alone relevance, of the Boksanica footage. In other words, it had always been an important plank of Milan Gvero’s case that he was desperate to speak to his Commander and to get his permission to decamp to the western front.

447. Jevjedvic’s evidence on this topic is worth recalling in a little detail. At the end of July 1995, Mladic arrived at Zepa and he spent some time there.¹²⁷³ During those days, Milan Gvero tried to establish contact with Mladic, but this proved impossible.¹²⁷⁴ At some point when Jevjedvic was at the Forward Command Post in the village of Godjenje a call came through from the Main Staff at the Forward Command Post. The soldier who answered the telephone gave the connection to Jevjedvic because Mladic was not at the Forward Command Post. Gvero was at the other end of the line and asked to speak to Mladic in order to inform him of the seriousness of the situation during those days on the western front of the Republika

¹²⁷² 6DW02 T.33844 (02/07/09); Zoranovic Z. T.33891 (03/07/09); Jovanovic S. T. 33919 (03/07/09)

¹²⁷³ Jevdjovic, M., T. 29696 (15/12/08).

¹²⁷⁴ Jevdjovic, M., T. 29695-29696 (15/12/08).

Srpska.¹²⁷⁵ Since Mladic was not there at the time the call came through,¹²⁷⁶ the witness assumed that Mladic was at Boksanica or elsewhere at that time.¹²⁷⁷ Milan Gvero then explained to Jevjedvic that he was very worried about the Krajina, whilst at the same time being of the view that the situation in Zepa was satisfactory.¹²⁷⁸

448. The fact that Milan Gvero was desperate to speak to Mladic is corroborated by P1311, dated 23 July 1995 at 0829 hours admitted under seal.¹²⁷⁹ This intercept states a “Message for Panorama First “Call Gvero As Soon As Possible””.¹²⁸⁰ Panorama is the code name for the Main Staff; the first was Mladic.¹²⁸¹

449. Thereafter Jevjedvic recalled Milan Gvero sending out a telegram, addressed for Mladic personally, to the village of Godjenje and the Forward Command Post there.¹²⁸² The contents of the telegram were similar to what they had spoken about over the telephone.¹²⁸³ Milan Gvero fully explained to Mladic the difficulties facing the Western front in Krajina.¹²⁸⁴ Using a conciliatory tone, Gvero suggested that it would be a good idea in the difficult situation faced by the VRS that Mladic listen to the opinion of his assistants and advisers and that they should cooperate as they had been doing thus far.¹²⁸⁵ Jevjedvic understood Milan Gvero to be saying that Mladic was not paying due attention to what his assistants were telling him.¹²⁸⁶

450. Finally on this topic, the fact that Milan Gvero had not been able to speak to Mladic was put to Smith in cross-examination as far back in the trial as November 2007. This was in the context of the meeting at the Jela restaurant on 25 July, when

¹²⁷⁵ Jevdjevic, M., T. 29696 (15/12/08).

¹²⁷⁶ Jevdjevic, M., T. 29696 (15/12/08).

¹²⁷⁷ Jevdjevic, M., T. 29696 (15/12/08).

¹²⁷⁸ Jevdjevic, M., T. 29696-29697 (15/12/08).

¹²⁷⁹ See also submissions above as to the Gvero – Mladic relationship in the section of this brief dealing with Gvero’s relationships.

¹²⁸⁰ Jevdjevic, M., T. 29697 (15/12/08).

¹²⁸¹ Jevdjevic, M., T. 29697-29698 (15/12/08).

¹²⁸² Jevdjevic, M., T. 29698, 29699 (15/12/08).

¹²⁸³ Jevdjevic, M., T. 29698 (15/12/08).

¹²⁸⁴ Jevdjevic, M., T. 29698 (15/12/08).

¹²⁸⁵ Jevdjevic, M., T. 29698-29699 (15/12/08).

¹²⁸⁶ Jevdjevic, M., T. 29699-29700 (15/12/08).

they were waiting for Mladic who was late. Defence counsel asked:- “Gvero went on to say that he hadn't spoken to Mladic directly. He had simply -- he, Gvero, had simply been told to come to this meeting with an interpreter. No recollection?”¹²⁸⁷ Smith indicated that he had no recollection but did not deny that this had happened. In this regard, and as was also subsequently put to Smith, P1339 supports the Defence case.¹²⁸⁸

451. The significance of this evidence is that it was clearly part of Milan Gvero’s case in 2007 (i e. long before the Boksanica footage came to light) that at that time he had had no chance to speak to Mladic. In short this is not some fanciful defence that Milan Gvero has invented as an answer to the Boksanica footage.¹²⁸⁹

The relationship between the evidence of Smith and Sayer and the Boksanica footage

452. The Defence reiterate that even while they are writing this final brief, they have absolutely no idea precisely how the Prosecution put their case on the correlation between the evidence of Smith and Sayer and the Boksanica footage. The Defence assume that the Prosecution will say that Milan Gvero was in Zepa on 26 July based on the Boksanica footage and there again on the next day based on the testimony of Smith and Sayer.¹²⁹⁰ The Defence maintain that having to deal with this issue by assumption is unsatisfactory in the extreme.

453. Moreover, the Defence continue to assert that they have been greatly disadvantaged by the fact that when they cross-examined the vast majority of the Prosecution witnesses relating to Zepa they knew nothing of Smith and Sayer’s allegation. Even more importantly, when the Defence cross-examined both Smith and Sayer (and obviously all the other Zepa-related witnesses) they knew nothing of the Boksanica footage. Thereafter the Trial Chamber refused the Defence application to recall these two witnesses to ask them about this footage and to allow the Defence

¹²⁸⁷ Smith, R., T. 17714 (08/11/07).

¹²⁸⁸ Smith, R., T. 17714 -17716 (08/11/07).

¹²⁸⁹ P4537.

¹²⁹⁰ P4537.

to explore the correlation between their evidence and what can be seen in the Boksanica footage.¹²⁹¹

454. Finally, and to state the obvious, the Defence are under no duty to advance any theory or conclusion as the state of the evidence on the subject. By doing so now, no burden whatsoever shifts to the Defence. As such, the Defence maintain their position that the uncertainties in Smith and Sayer's evidence are such that their evidence, taken both individually and collectively, cannot be properly used by the Trial Chamber in a manner adverse to Milan Gvero beyond a reasonable doubt.

455. In terms of how it is Smith and Sayer come to say that such an encounter took place and, in particular, if the Trial Chamber come to the conclusion beyond a reasonable doubt that some sort of encounter did take place, the Defence contend:

- (1) that if such an encounter took place Smith and Sayer have mistaken Gvero for Tolimir. As mentioned above, Sayer definitely did this on 25 July. In addition, there is every chance that if they had met Tolimir he would have said that he was going to take charge of Zepa, because that was in fact the case.
- (2) In the alternative, that Smith and Sayer have gotten their days mixed up and that at some point in time they saw and/or had some sort of encounter with Milan Gvero on the 26 July somewhere near the Boksanica checkpoint.
- (3) In the alternative, that Smith and Sayer have confused the alleged encounter with their dealings with Milan Gvero on 31 July at Mrkonjic Grad.

¹²⁹¹ *Partial Decision on Gvero Motion seeking the Recall of Certain Prosecution Witnesses And the Reopening of the Case*, 15 June 2009.

456. Any of these above theories are reasonable possibilities and even though the Defence is under no duty to raise them, they are nonetheless presented in this brief for the consideration of the Trial Chamber.

Gvero's alleged role in the Zepa negotiations

457. In paragraph 180 of the Prosecution's Pre-Trial Brief, the Prosecution allege that Milan Gvero remained actively involved in the Zepa negotiations and that this role was significant. In this regard, they point to Milan Gvero's presence at two meetings between Smith and Mladic at which Zepa was on the agenda. The first of these was on 25 July 2009 at the Jela restaurant,¹²⁹² where events in Zepa were the main topic of conversation. The evidence suggests that Milan Gvero's role that day was a very mundane one and involved protocol and practicalities rather than matters of significance. P1339 suggests that Milan Gvero was to be at the Jela Restaurant "to receive Smith". In other words he needed to be there to greet Smith, in the event, as the Defence suggests happened, that Mladic was late. Though Smith could not remember in cross-examination if this was what happened,¹²⁹³ 6D108, which clearly refers to the same meeting at the Jela restaurant¹²⁹⁴ states in paragraph 4 that "Mladic arrived at the meeting 30 minutes late by helicopter." P1339 also indicates that Milan Gvero was to be "with that girl". In other words, Gvero needed to bring an interpreter with him.¹²⁹⁵ After this meeting, Smith (by road) and Mladic (by helicopter) went to Zepa. Smith accepted that Milan Gvero did not go with them.¹²⁹⁶

458. Milan Gvero's subordinate role in relation to the meeting of 25 July is further illustrated by P1320, which shows Gvero acting as the counterpart to Smith's Military Assistant, Colonel Baxter, on 23 July 1995 in setting up the meeting between Smith and Mladic.

¹²⁹² P2747 & 6D108.

¹²⁹³ Smith, R., T. 17714 -17717 (08/11/07).

¹²⁹⁴ See T17548, where in the course of examining Smith, Prosecution counsel points out that this document refers to 25 July.

¹²⁹⁵ Smith, R., T. 17716 (08/11/07).

¹²⁹⁶ Smith, R., T. 17717 (08/11/07).

459. The other relevant meeting was at Mrkonjic Grad on 31 July 1995.¹²⁹⁷ Yet again Mladic was late – this time by 45 minutes - and Smith was met by Milan Gvero. Smith's helicopter had been engaged by small arms fire and not surprisingly he was none too pleased. Milan Gvero had the unenviable task of trying to calm him down. It is apparent that whilst they were waiting for Mladic, Gvero tried to make small talk and avoid discussing any matters of substance.¹²⁹⁸ Furthermore, as Smith accepted, Zepa did not feature in the meeting to any great extent.¹²⁹⁹

460. Significantly, Smith also conceded that Milan Gvero said little at these meetings. This is supported by the fact that there is no suggestion in any of the Baxter minutes of Gvero having said anything.¹³⁰⁰ Milan Gvero is not even mentioned in 6D108, the Baxter note that deals in detail with the Jela restaurant meeting of 25 July. Mladic was the dominant member of the meeting from the Bosnian Serb side on each occasion.¹³⁰¹

461. A further document on which the Prosecution place reliance in relation to the significance of Milan Gvero's alleged role in the events at Zepa is P191. The first and perhaps obvious point to make about this document is that Milan Gvero was one of its intended recipients. He was not its author or sender. In fact there is no evidence to suggest whether Gvero received it, let alone what, if anything, he did when he received it. In these circumstances, quite where the prosecution assert that it takes the case is somewhat questionable.

462. The Prosecution suggests that the sinister part of P191 is section 2 where Tolimir recommends that the VRS attempt to get UNPROFOR to send an officer of the rank of colonel rather than general to visit the Boksanica checkpoint.¹³⁰² In fact the

¹²⁹⁷ P2947.

¹²⁹⁸ Smith, R., T. 17717 -17719 (08/11/07) & Sayer, E., T. 21136 (06/02/08).

¹²⁹⁹ Smith, R., T. 17720 (08/11/07).

¹³⁰⁰ Smith, R., T. 17722 (08/11/07).

¹³⁰¹ Smith, R., T. 17722 (08/11/07).

¹³⁰² Opening Statement T.474-476 (22/08/06).

context of this is explained, in part, within the document, but is also clarified in the evidence of Manojlo Milovanovic. He explained that in 1993, General Morillon abused his position as force commander of UNPROFOR and entered Srebrenica when it was already under blockade.¹³⁰³ Tolimir and Milovanovic met with Morillon, and Tolimir knew what was going on.¹³⁰⁴ Thus, all that Tolimir was doing in this document was invoking his own experience from 1993 and applying some standards of conduct to the situation in 1995.¹³⁰⁵ Tolimir must have been afraid of the fact that in 1993, Morillon brought with him 19 soldiers, who mixed in with Bosnian Muslim soldiers.¹³⁰⁶ Even if the VRS had wanted to attack in 1993, they could not do so because UNPROFOR served as a human shield.¹³⁰⁷ Tolimir thought that the Muslims could break their agreement, as they did many times before, and would have a General as protection.¹³⁰⁸

463. What the Prosecution always fail to mention about this document is that whatever Tolimir meant or intended about his comments about wanting a colonel rather than a general, it is apparent that no one took the blindest bit of notice of his wishes. After P191, the most senior general in UNPROFOR (and its Commander no less), went to the Boksanica checkpoint on three occasions. Of particular note is the fact that one of these visits was on the 25th itself, which, as described above, was when Mladic seemed quite happy to adjourn the Jela Restaurant meeting to Zepa later in the day.¹³⁰⁹ **REDACTED**¹³¹⁰

464. Furthermore, in the intercept P1320, Milan Gvero is contacted by Baxter who wants to arrange a meeting between Smith and Mladic. Baxter suggests that Smith “would like to proceed to Zepa”, in other words to make a visit there. In his response

¹³⁰³ Milovanovic, M., T. 12375 (01/06/07).

¹³⁰⁴ Milovanovic, M., T. 12375 (01/06/07).

¹³⁰⁵ Milovanovic, M., T. 12375 (01/06/07).

¹³⁰⁶ Milovanovic, M., T. 12376 (01/06/07).

¹³⁰⁷ Milovanovic, M., T. 12376 (01/06/07).

¹³⁰⁸ Milovanovic, M., T. 12376 (01/06/07).

¹³⁰⁹ P2747.

¹³¹⁰ **REDACTED.**

to this idea, Milan Gvero in no way attempts to discourage Baxter's suggestion. In short, Milan Gvero did not share Tolimir's views on this subject.

465. The Trial Chamber can therefore safely conclude that P191 is a red herring which takes the Prosecution's case no further at all.

The alleged Croatian intercept, variously numbered P4110 (not admitted) and P4559

466. On its face, this purported Croatian intercept suggests further involvement in the events surrounding Zepa by Milan Gvero, by claiming that he was inspecting the frontline near Zepa at an unspecified time on 23 July 1995.

467. The purported intercept was first put to Jevjedvic by the Prosecution on 17 December 2008. Jevjedvic certainly did not confirm the information contained in it and commented that what struck him forcefully about it is this last sentence:- "The advance of Serb forces is stopped currently at the bridge head and railroad tracks."¹³¹¹ He stated that a bridge head is a land feature that one would capture by crossing the river using available means to allow the unit to reach the opposite bank and then enable the entry of the rest of the forces.¹³¹² However, he noted that the whole area only has one little small creek (called the Zepa) which is not on the map.¹³¹³ So far as the "railroad tracks" are concerned there was absolutely never any railroad or railroad tracks near Zepa or Sarajevo and Sarajevo is at least 100 kilometers away from Zepa.¹³¹⁴

468. Subsequently, the Defence took objection to the admission of this intercept in an oral decision the Trial Chamber refused admission on the basis that virtually the whole document had been read into the record making admission unnecessary in any

¹³¹¹ Jevdjevic, M., T. 29872-29873 (17/12/08).

¹³¹² Jevdjevic, M., T. 29873 (17/12/08).

¹³¹³ Jevdjevic, M., T. 29873 (17/12/08).

¹³¹⁴ Jevdjevic, M., T. 29873 (17/12/08).

event.¹³¹⁵ The Defence are bound to observe that this decision left the evidential worth of the document and/or its content somewhat unclear.

469. The Prosecution did not give up there and sought to put the same document to another witness – Zoranovic – this time rather bizarrely with a totally different exhibit number – P4559. Zoranovic was also unable to assist as to the truth of its contents and made a similar point to Jevjedvic about the reference to rail tracks.¹³¹⁶ Whereupon the Prosecution produced a map – P4587 - from the year 1959 purporting to show a railway in the area.¹³¹⁷ In due course the Prosecution sought admission of both of these documents and the Defence objected.¹³¹⁸ The Trial Chamber has today rendered its Decision¹³¹⁹ admitting P4587, and refusing the admission of P4559.

470. Though not admitted, out of an abundance of caution the Defence will address this purported intercept. It is the contention of the Defence that the Trial Chamber should not place the slightest reliance on it. This trial has spent many months examining the reliability of the many Muslim intercepts that the Prosecution and, on occasions, some accused, have relied upon. It was presumably for good reason that the Trial Chamber allowed so much time to be exhausted on this topic – namely that it was important for the reliability of such intercepts to be proven beyond a reasonable doubt before any reliance by the Prosecution could possibly be placed on them. Nothing of the sort has happened in relation to this purported Croatian intercept. In particular, the Trial Chamber have no information as to who intercepted it, where they were, or in what manner they intercepted the alleged conversation. An illustration of this was given when the Defence had an opportunity to re-cross examine Jevjedvic who was a communication officer throughout the war. He confirmed that the purported intercept had only two of the key elements (namely the date and time) one needs to look for in relation to a particular intercept. But it

¹³¹⁵ T. 32547 (10/03/09).

¹³¹⁶ T. 33897-33898 (03/07/09).

¹³¹⁷ T. 33898-33899 (03/07/09).

¹³¹⁸ T. 33910 (03/07/09).

¹³¹⁹ *Decision on Exhibits Tendered By the Prosecution in the Cross-Examination of Witnesses Called by Gvero.* (30/07/09).

contained none of the other important features a properly verified intercept should include, namely the azimuth; the channel; the direction; or the participants.¹³²⁰

471. So far as the map is concerned,¹³²¹ the Defence remain strongly of the view that the way that this was sprung on them at the very back end of this case with no prospect of the Defence responding at all is unfair in the extreme. This is not the way to conduct fair and proper criminal litigation. At any rate the fact that all the Prosecution could dredge up was something from 1959 is in itself indicative of the dearth of any contemporaneous evidence to support their case.

472. Furthermore, the Defence are bound to observe that it is slightly puzzling to them that the purported intercept, P4559, is denied admission, but at the same time the map, P4587, which only has any use whatsoever in connection with the intercept, is admitted.

473. At any rate there is not a jot of evidence to support the assertion made in the purported intercept that Milan Gvero was anywhere near the Zepa frontline on 23 July. Neither of the witness that it was put to was able to confirm it. The lack of any supporting evidence whatsoever, coupled with the very troubling lack of provenance as to the purported intercept itself, mean that it would be simply be impossible to properly place any reliance on it all beyond a reasonable doubt.

Conclusion

474. As can be seen from this review of the various aspects of the case relating to Zepa, (that despite the constantly changing nature of the Prosecution's evidence), the allegations leveled against Milan Gvero as to his participation in events in and around Zepa does not materially advance the case against him, at least not to the required degree.

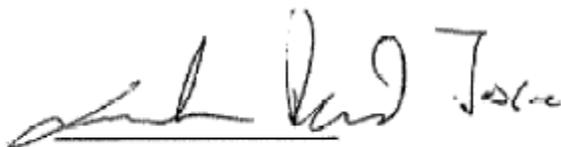
¹³²⁰ Jevdjevic, M., T. 29875 (17/12/08).

¹³²¹ P4587.

ULTIMATE CONCLUSION

475. Any reader who has waded through this Final Brief, no doubt examining with great care the various Defence arguments and legal submissions, might expect some final rhetorical flourish or even a quotation from a famous jurist. However, the Defence make no apologies in reiterating the fundamental purpose of this Brief, namely to assist the Trial Chamber in determining the individual criminal responsibility of one man. To that end, the Defence simply conclude by stating that the Prosecution have failed to discharge their heavy burden in this regard and that Milan Gvero should accordingly be found “Not Guilty” on all the Counts on this Indictment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Dragan Krgovic and David Josse QC', written over a horizontal line.

Dragan Krgovic and David Josse QC
Lead and co-counsel for Milan Gvero

Dated this 30th day of July 2010

The Hague, Netherlands