SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE ANTONETTI

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I. Foreword

When the time for deliberations comes in a case of this importance, given the great number of victims,[1] a judge cannot mentally detach himself from the suffering of the victims and the families, from the fear experienced by the victims at the moment of their execution and the need not to commit an error when evaluating the facts and the conclusions to be drawn from them. This requires that a judge of the Appeals Chamber **devotes himself fully** to evaluating the grounds raised and the evidence that led in this particular case two Judges of the Trial Chamber to declare him **guilty** and one Judge to declare him **innocent.**

[1] It is extremely difficult to establish a precise figure, but it ranges from between 4,000 (low estimate) to 7,000 (high estimate) people.

II. General Observations

1. Address of General Tolimir

As part of the present appeal procedure, General Tolimir ("Accused") was given the floor for ten minutes, allowing him to present to the five Judges of the Appeals Chamber his final position with regard to his criminal liability.[2] As a general rule, the accused persons display one of two attitudes: either they recall that they are completely innocent or they seek a reduction of their sentence. The Accused did not in any way put himself in that situation because he only put forth the NATO operation.[3] Since a judge is supposed to assess the importance of these final words (that is what he does in general), in this instance, the justification for the crimes that were committed seems to be because of the NATO operation. If what the Accused says is true, we still have to conclude that he cannot be exonerated of his criminal liability.

2. Composition of the Appeals Chamber

Following the Judgement, on 27 September 2012 the President of the Tribunal designated Judges Agius, Liu, Khan and Tuzmukhamedov to the Appeals Chamber. However, a few days later, Judge Agius was replaced by Judge Güney, and I was appointed on 21 January 2014 to replace Judge Tuzmukhamedov. On 10 March 2014, the President replaced Judge Liu with Judge Robinson, and on 22 September 2014, Judge Sekule was designated to replace Judge Khan. As we can see, apart from Judge Meron, all the Judges who were initially designated were replaced. We can only wonder what led to this maelstrom of replacements of judges without knowing the reasons.

3. Date of Appeal Judgement

In view of the importance of this Appeal Judgement, I believe that it was necessary to accord a reasonable **length of time** for reflection and studying between the Judgement rendered by the ***Popović et al.*** Appeals Chamber[4] and the one rendered by the Appeals

[2] Appeals hearing, 12 November 2014, T(F), pp. 143-148.
[3] *Ibid.*, *see* in particular T(F), pp. 146-147.
[4] The Judgement, which is 792 pages long including the annexes, would require a period of at least one month before the final deliberations.

Chamber to which I belong. In this respect, I wish to indicate that the facts covered by the two cases are identical since, at the beginning, the Accused appeared in the *Popović et al.* Indictment.[5] Moreover, two judges in the *Popović et al.* Appeals Chamber also sat as judges in the ***Tolimir* Appeals Chamber**.[6]

Nonetheless, despite my repeated requests for the Appeal Judgement to be delayed, the Presiding Judge and my other colleagues retained the date for the rendering of the Judgement that was originally agreed before the **Security Council**. I acknowledged the wish of the majority to render the Appeal Judgement on the set date, but I find that there was no need for urgency, especially since the Accused had not put in a **request for provisional release** in the appeals phase. In addition, I believe that the importance of the ***Popović et al.* Appeal Judgement,** rendered on 30 January 2015, merited careful study without any haste.

4. Length of Deliberations

Following the Judgement rendered on 12 December 2012, the Accused appealed the Judgement on 11 March 2013.[7] The Judges appointed to this case were supposed to begin deliberations from the date of the filing of the initial submissions by the Appellant, 28 June 2013.[8] However, the various changes to the composition of the Appeals Chamber, for reasons that escape me, had repercussions on the proper course of the proceedings.

As I was only appointed on **21 January 2014** to this case and was initially without any legal assistance that the other Judges of the Appeals Chamber enjoyed, this meant that I had to start working **alone** on the entire case file until I was provided with legal assistance starting on 1 **September 2014**. Moreover, it was only on **23 October 2014** that I was able to meet with two members of the legal team of the Appeals Chamber who came to see me because I had sent an opinion on an additional matter. The first preparatory draft, consisting of **272 pages** and 680 paragraphs was sent to me on **8**

[5] *See*, *The Prosecutor v. Zdravko Tolimir et al.*, Second Consolidated Amended Indictment, 15 November 2006.
[6] Judges **Robinson** and **Sekule** were members of the Appeals Chamber in the *Popović et al*. and *Tolimir* cases.
[7] *See* Notice of Appeal, 11 March 2013.
[8] *See* Appeal Brief, 28 June 2013.

October 2014. At that point I discovered that the legal team had taken almost **22 months** to prepare the first working document entitled, "Preparatory Document". I consider this an excessive amount of time for the preparation of the first document, and it negatively affected the length of deliberations. I would however like to emphasise that the legal team is not **responsible** for this length of time.

It must be said that in the **22 months** the legal team had a considerable amount of time to prepare a document whereas, in comparison, the Judges themselves only had **a few weeks** to deliberate.[9] Of course, we could say that the Appeals Chamber had also taken its time because the Appeal Judgement was rendered almost more than **two and a half years** after the Judgement, but in reality the Judges had very little time for deliberations, working wonders without being given additional time, despite my repeated requests.

Moreover, I find it extraordinary that the first composition of the Appeals Chamber, with the exception of the Presiding Judge, was completely changed. I wish to mention this point to explain that the length of proceedings and the length of deliberations could be reduced if a **final and stable Appeals Chamber** is appointed from the start, that is, from the moment the document with the grounds of appeal is presented. I believe that the **Security Council** should request an audit to examine carefully this question and to find appropriate responses that would result in **expeditious proceedings**. It already had an opportunity in the past to resort to such a task with regard to the functioning of the Special Court for Sierra Leone.[10]

5. Desirable Joinder of the *Popović et al.* and *Tolimir* Cases

If there had been a **single** indictment, we would have had as evidence **the same witnesses and/or experts**. Of course, it would have been more useful in **establishing the truth** to have had the same persons in the dock in order to have a precise and **complete picture** of the chain of political and military command. Unfortunately, this was not possible and we had multiple trials using the so-called

[9] I would like to thank my assistant, **Flor de Maria Palaco Caballero**, who assisted me in preparing this separate and partially dissenting opinion in record time.
[10] *See*, "Report on the Special Court for Sierra Leone", submitted by the independent expert Antonio Cassese, 12 December 2006.

"established facts" method, which allowed for facts established by other Chambers to be taken into account and eventually integrated in the case being judged.

For my part, the Accused should have been judged with the other Accused in the ***Popović et al*** Case. As this was not the case, it led to **two judgements** being delivered on 10 June 2010 and 12 December 2012 and **two appeal judgements** being rendered by the Appeals Chamber with only a few months between them: in the *Popović et al*. Case, the Appeal Judgement was rendered on 30 January 2015 and in the *Tolimir* Case, it was delivered on 8 April 2015. In this regard, it must be noted that, initially, the Prosecution had rightly included the Accused in the *Popović et al.* Case, but for reasons involving his late arrest, two indictments were filed.

In fact, as the Accused had not been arrested by the time the *Popović et al*. trial had started, the Chamber seized of the case requested that the Prosecution remove the name of the Accused from the list of co-accused in this case.[11] Later, after the Accused in question was arrested, the Prosecution put in a motion for **joinder** with the *Popović et al.* Case,[12] but the Judges in the *Popović et al.* Chamber rejected this motion.[13]

As far as I am concerned, it seems clear that, in the interest of justice, the Accused should have been tried at the same time as his subordinates. Furthermore, he should have been tried at the same time as his superior, General Ratko **Mladić**. If the concept of **proper administration of justice** and **seeking to establish the truth** had prevailed, the Chambers seized could have, of course, interrupted their work and ensured a **joinder** of the cases in such a way as to have at the same time and in the same dock the Accused **Radovan Karadžić, Ratko Mladić, Goran Hadžić, Zdravko Tolimir** and so on. If this had been possible and effective, it seems clear that the individual liability of each Accused would have been better classified, and therefore **all** the evidence could have been examined from the standpoint of each of the defence teams. Technically, this was not impossible as the Chambers already

[11] *The Prosecutor v. Popović, Beara, Nikolić, Tolimir, Miletić, Gvero and Pandurević*, IT-05-88-PT, Oral Order, T(F), pp. 311-312, 13 July 2006.
[12] *The Prosecutor v. Popović et al.*, IT-05-88-T, "Motion for Joinder", 6 June 2007.
[13] *The Prosecutor v. Popović et al.*, IT-05-88-T, "Decision on Motion for Joinder", 7 July 2007.

trying the cases only needed to stop the proceedings **in the interest of justice** and to refer the file to the Judges in the **Radovan Karadžić** case for joinder.

6. Dissenting Opinion of Judge Nyambe

In her remarkable opinion of 46 pages[14] Judge **Nyambe** firmly declared herself in favour of acquittal. In this instance, she considered that there was no **joint criminal enterprise** and that the requirements of genocidal intent were not met in regard to the Accused.[15]

I consider that the approach of Judge **Nyambe** is an example to be followed and before any finding, one must return to the evidence in order to determine the existence of an alleged common plan and the knowledge by the Accused of the plan so as to determine as much as possible his criminal liability. I am in favour of this approach and this is why, at first, I focused on the **question of procedure** in order to point out in an extremely precise way that the Accused was not given a **fair trial**. In fact, his rights had been violated, on the one hand, by the admission of inconsistent adjudicated facts[16] without the Accused being able to appeal because of the Trial Chamber's opposition[17] and, on the other, some of the charges are based almost exclusively on the words and comments of the Prosecution witness **Richard Butler**, described as an "expert witness".[18] In view of these circumstances, I can only conclude that the testimony of **Richard Butler** should have been disqualified.

7. Legal Re-classification of Acts

The Judges of the Chambers are seized of crimes set out and punishable by Articles 2, 3, 4 and 5 of the Statute. As part of the indictments that were brought, the Prosecution classified these crimes as either grave violations of the Geneva

[14] *See* the opinion of Judge Prisca Nyambe attached to the Judgement.
[15] Opinion of Judge Prisca Nyambe, pp. 41-45.
[16] I will elaborate further on this question during the analysis of **Ground of Appeal no. 1** raised by the Appellant.
[17] *The Prosecutor v. Tolimir*, IT-05-88-2-PT, "Decision on Request for Certification of Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", 23 February 2010.
[18] I was in a position to review in great detail this question during the evaluation of **Ground of Appeal no. 3** raised by the Appellant.

Convention, or as violations of the laws or customs of war, or genocide, or crimes against humanity; it must be specified that sometimes the same act can have several classifications. At the beginning, the question of the legal classification of acts by the Judges arose, and it must be said that the Judges did not want to go down that path because of case-law and the practices inherent to the Tribunal. This approach was, to my mind, a **catastrophe,** because the role of a judge is limited by the legal scope put forward by the Prosecution, to the detriment of the search for truth.

More specifically, with respect to the situation of the Accused, it is interesting to note that the Indictment against him does not charge him with the mode of responsibility under Article 7 (3)[19] (command responsibility). This could have been done to the extent that his subordinates, like **Beara**, participated in the commission of crimes (*Popović et al.* Appeal Judgement). Similarly, the organisational chart linked the 10th Detachment to **Dražen Erdemović** under the authority of the Accused. I therefore deem that the fact of adhering completely to the classifications of the Prosecution leads in a number of cases to the principle of "all or nothing", even though the truth may be found somewhere "in between".

8. Fair Trial and the *Blagojević* and *Krstić* Appeal Judgements

The Judgement rendered by the Trial Chamber in ***Tolimir*** mentioned the ***Blagojević*** **case several times,** referring to the Judgement and the Appeal Judgement. With respect to this case, my position is identical to that of Judge **Mohamed Shahabuddeen** which he expressed in his dissenting opinion attached to the Appeal Judgement,[20] namely that **Vidoje Blagojević** had not received a fair trial because of a dispute with his attorney who was assigned to him *ex officio,* and therefore **Vidoje Blagojević** requested in his submission either a new trial or his acquittal.[21] For my part, I completely agree with this point of view.

[19] In the Second Amended Indictment dated 15 November 2006 (IT-05-88-PT), only the Accused Pandurević and Borovčanin were charged under Article 7 (3) of the Statute, while the Accused was charged under Article 7 (1).
[20] *See* the Dissenting Opinion of Judge Shahabuddeen attached to the Appeal Judgement of 9 May 2007, pp. 139-142.
[21] In his dissenting opinion, Judge Shahabuddeen indicated that, "Mr Blagojević was unlawfully prevented from telling his story, that this meant that he did not have a fair trial and that, in all the circumstances, his case should be remanded for retrial", p. 139, paragraph 1.

Likewise, with regard to the ***Krstić*** Appeal Judgement, one of the grounds of appeal concerned a violation of the Rules of Procedure and Evidence referring to the obligation of the Prosecution under Rule 68 to provide the Accused with evidence **in due course**.[22] Being aware of this problem, the *Krstić* Appeals Chamber partially agreed with the Appellant by acknowledging the error, but it did not draw fully the conclusion that presented itself and that should have led to the Judgement being set aside and to a new trial.[23]

9. Events in Srebrenica in 1993

I think it is important to emphasise the overall context that led to the unfolding of events. In Chapter IV of the *Tolimir* Judgement, entitled "The Events Leading up to the Attacks on Srebrenica and Žepa",[24] the Trial Chamber Judges mentioned, in a very succinct way, the general events that I believe warranted a more detailed discussion. For my part, I can only regret that this was how things progressed and will simply describe, on the basis of the **Report of the UN Secretary General dated 15 November 1999,**[25] the events that occurred sometime around 1993. In fact, in order to understand the facts fully, it is necessary to recall the events that occurred previously, which the Prosecution barely mentioned, which seems to me a travesty.

The UN Secretary General recalled these events in his 1999 report. It seems that on **6 May 1992** the Muslims had started fighting to seize control of **Srebrenica** from the Serbs.[26] A Serbian leader was killed in an ambush on 8 May 1992, and shortly after this the Serbs began leaving the town or were driven out.[27] On 9 May the Bosnian groups of fighters had taken control of the town; the most powerful of these groups was under the control of **Naser Orić**.[28] Over a period of several months, the Bosniak enclave, which centred on **Srebrenica**, was progressively extended under **Orić's**

[22] *Krstić* Appeal Judgement, pp. 68-69.
[23] *Krstić* Appeal Judgement, pp. 68-69.
[24] *Tolimir* Judgement, paras 159 *et seq.*
[25] *See* Exhibit D00122. The reference to this conclusive document is mentioned in the Final Defence Brief. In view of the importance of this exhibit, I will broach some aspects in an **annex** specially dedicated to this.
[26] D00122, para. 34.
[27] *Ibid.*
[28] *Ibid.*

command into the surrounding areas. As the **UN Secretary General** stated, the Bosnians had enlarged the territories by using the techniques of "ethnic cleansing", torching homes and terrorising the civilian population.[29] In September 1993, the Bosniak forces of Srebrenica had linked up with Žepa.[30] Thus the Srebrenica zone reached its greatest extent in January 1993 of around 900 km^2.[31] On 7 January 1993, the Bosniak forces attacked the village of **Kravica** (inhabited by Serbs); in this attack **40 Serbian civilians** were killed.[32] As stated by the UN Secretary General, Serbian forces carried out a counter-offensive and, as they advanced, they also committed acts of violence.[33] Because of this counter-attack, **50,000 to 60,000** Bosnians withdrew into the mountainous area centred on the town of Srebrenica.[34] In this situation, **Žepa** and **Srebrenica** were separated by a narrow corridor held by the Serbs.[35]

As the situation was perturbing, the UNPROFOR commander in Bosnia and Herzegovina travelled to the location and concluded that the town was under siege and that **overcrowding** was a major problem. The local population prevented the UNPROFOR commander from leaving, and he addressed the people in Srebrenica, telling them that they were under the protection of UN soldiers and that he would not abandon them.[36] After this statement by **General Morillon**, the UNHCR succeeded in getting several humanitarian aid convoys through and evacuating people to **Tuzla**. The first convoy went through on **19 March 1993** followed by a second one on **28 March**, a third on **31 March**, another on 8 **April** and the last convoy on 13 April. More than **8,000 to 9,000 persons in total were transported to Tuzla**.[37] It is important to note that the Accused was not charged with these "transfers". If we have understood the Prosecution correctly, we could wonder why the transfers of 1993 were deemed lawful unlike those of 1995 …

Similarly, I think it important to refer to the peace process undertaken by the International Community through an international conference on the former

[29] D00122, para. 35.
[30] D00122, para. 36.
[31] *Ibid*.
[32] D00122, para. 37.
[33] *Ibid*.
[34] *Ibid*.
[35] D00122, para. 37. *See* also, the map in Exhibit P00104.
[36] D00122, para. 38.
[37] D00122, para. 40.

Yugoslavia, and in particular the Vance-Owen plan.[38] On 2 September 1993, the **Vance-Owen plan** consisted of three parts: a body of constitutional principles, military provisions, and a map delineating ten provinces.[39] The objections of the Serbian leaders focused on Province 5, which would have had a Bosniak majority; it should be noted that Province 5 encompassed the enclaves of **Srebrenica and Žepa**.[40] Equally, when this peace plan was proposed, the Bosnian Serb Army was in control of 70 % of the territory, while the **Vance-Owen** plan only granted them **43 %** of the territory, which would have forced them to abandon a part of the territory claimed as being Serbian. The plan was adopted by Croatia. Following concerted pressure, **Radovan Karadžić** signed this agreement on behalf of the Serbs at a meeting in Athens on 2 May 1993, however his signature was subject to approval from the National Assembly of Republika Srpska, which rejected the plan at the plenary session held at Pale on 4 and 5 May 1993.

I also feel that in order to understand the situation properly I must note that **Srebrenica** was located in a valley in eastern Bosnia close to Serbia and, according to the 1991 census, it had a population of **37,000 inhabitants,** three quarters of whom were Bosniaks and one quarter were Serbs.

10. Witnesses Momir Nikolić and Dražen Erdemović

a. Momir Nikolić

Momir Nikolić pleaded guilty to Count 5 of the Indictment against him relating to persecutions, a crime against humanity punishable under Article 5 (h) of the Statute.[41]

Consequently, the Prosecution deleted from the Indictment the counts relating to genocide, complicity to commit genocide and extermination.[42]

[38] D00122, paras 29-32.
[39] D00122, par. 31.
[40] D00122, para. 31.
[41] Dražen Erdemović's guilty plea of 31 May 1996 to the count of crime against humanity under Article 5 (a) of the Statute.

This Accused was found guilty of Count 5 and as part of a guilty plea, the Prosecution and the Defence gave their recommendations to the Chamber: the Defence sought a sentence of 10 years and the Prosecution a sentence of 15 to 20 years.[43] The Trial Chamber pronounced a sentence of 27 years[44] and Momir Nikolić filed an appeal against this decision.[45]

The fact that a plea agreement was not followed by the judges raises a problem, because if the sentence handed down is higher than the Defence is expecting, not to mention the Prosecution (as is the case here), there would inevitably be new hearings before the Appeals Chamber because the Accused could rightly feel deceived. In this respect, for this type of plea agreement to be credible, I consider it vital that the judges do not exceed the maximum requested by the parties. If the judges agree to the request of the Accused, he will not appeal and will testify more willingly thereafter because he will feel that justice was done. Similarly, the Prosecution should also not distance itself too much from the figures requested by the Defence because it risks overturning the entire process implemented in the interest of justice and of the victims.

From my point of view, the conviction of 27 years for a single count could only give rise to problems. I will not comment on the grounds of appeal that were presented to the Appeals Chamber. Instead, I will point out the passage in the Appeal Judgement wherein the Appeals Chamber notes that the Appellant had lied to the Prosecution when he confessed to crimes he had not committed.[46] This sentence casts **complete suspicion** on anything that **Momir Nikolić** said or could have said thereafter. Why did he accuse himself of crimes that were not committed, was it to please the Prosecution in exchange for good will? The very fact that an accused who pleaded guilty acknowledges that an element of his conduct was characterised by falseness can only cast doubt on anything that he could have said. In these circumstances, I asked my colleagues during deliberations to reopen proceedings in order to hear once more

[42] Amended Joinder Indictment, 27 May 2002.
[43] *The Prosecutor v. Vidoje Blagojević et al*., IT-02-60-PT, "Joint Motion for Consideration of Amended Plea Agreement between Momir Nikolić and the Office of the Prosecutor", 7 May 2003.
[44] *Nikolić* Judgement, 2 December 2003.
[45] " *Nikolić's* Notice of Appeal", 30 December 2003.
[46] *Nikolić* Judgement on Sentencing Appeal, 8 March 2006, para. 107.

the full testimony of **Momir Nikolić**, because a part of the Judgement regarding the Accused Tolimir is based on the statements of the former. Unfortunately, my request was not accepted by the majority of the Judges of the Appeals Chamber.

b. Dražen Erdemović

The Indictment states that thousands of civilians who remained in Srebrenica fled to Potočari.[47] At this point, I am trying to find consistency with the argument of the Prosecution that enforced transfers had taken place even though this Indictment states that the civilians fled. Equally, the Prosecution indicates that between 11 and 13 July Bosnian Serb military personnel summarily executed an unknown number of Bosnian Muslims in Potočari and in Srebrenica.[48] I have not found any trace of this in the evidence. The Indictment further indicates that **Dražen Erdemović** was informed that bus loads of civilians from Srebrenica were due to arrive.[49] These buses were full of men aged between 17 and 60. Evidence shows that these men were either soldiers or men of military age and, in these circumstances, I find it difficult to qualify them as civilians.

At the end of his initial appearance, the Trial Chamber ordered a psychiatric and psychological evaluation.[50] Therefore, there seemed to be the need to assess whether the Accused suffered from any mental disorder. In the meantime, the Accused, who cooperated with members of the Office of the Prosecutor, testified during a Rule 61 hearing in the case of *The Prosecutor v. Karadžić and Mladić* (IT-95-5- R61 and IT-95-18 -R61).[51] During this testimony he stated that the buses from Srebrenica carrying Bosnian civilians between the ages of 17 and 60 arrived on 16 July 1995.[52] The party appealed,[53] his attorney indicated amongst other grounds of appeal that he did not have a moral choice as he had to carry out an order given by his military superior and that he therefore had no control over his conduct. The Appellant also indicated that the Chamber had committed an error of fact thus occasioning a miscarriage of justice

[47] *See* Initial Indictment, 22 May 1996, para. 3.
[48] Initial Indictment, para. 4.
[49] Initial Indictment, para. 10.
[50] Pre-trial hearing, 24 June 1996.
[51] *See* Status Conference of 4 July 1996, mentioned in the *Erdemović* Sentencing Judgement, 29 November 1996, para. 6.
[52] Hearing of 16 July 1995 (not accessible).
[53] Notice of Appeal, 3 December 1996.

by saying that "no conclusions as to the psychological condition of the Accused at the moment of the crime can be drawn".[54] The Appellant considered that it was up to a team of experts to give their opinion.

Pursuant to Rule 115 of the Rules, the Appellant requested the appointment of an expert panel of psychiatrists and psychologists to provide a new report on the state of health of the party at the time of the events in question.[55] Despite what I see as the merit of the request, the Appeals Chamber rejected it, deeming that the interest of justice did not require the presentation of additional material and that if the Appellant had thought that the evidence supported his argument, the Defence should have submitted it to the Trial Chamber.[56]

Nevertheless, with four votes to one, the Appeals Chamber deemed that the case should be referred to a Trial Chamber other than the one which sentenced the Appellant.[57] In these conditions, the newly composed Trial Chamber heard on 14 January 1998 a new plea from the Accused, who pleaded guilty to violating the laws or customs of war under Article 3 of the Statute, with the Prosecution having withdrawn the alternative count of crime against humanity.[58] As part of this guilty plea, the Chamber retained paragraphs 8 to 12 of the initial Indictment, mentioning the arrival of buses full of Bosnian civilians.[59] It should be noted that during the hearing of 5 July 1996 he was asked about the fate of those civilians, and his reply was that they were to be executed.[60] The Trial Chamber noted that on 20 November 1996 he said that Brano had told them: "Now buses will be brought in with civilian population from Srebrenica, men."[61] "He emphasised civilians."[62] It seems therefore that **Dražen Erdemović** concluded that the persons who were to be killed had the legal status of civilians when we know full well that combatants were often dressed as civilians ...

[54] *Erdemović* Appeal Judgement, 7 October 1997, para. 12 (d).
[55] *Erdemović* Appeal Judgement, para. 15.
[56] *Erdemović* Appeal Judgement, para. 15.
[57] *Erdemović* Appeal Judgement, "Disposition".
[58] Hearing of 14 January 1998.
[59] Hearing of 14 January 1998.
[60] *The Prosecutor v. Karadžić and Mladić* (IT-95-5- R61 and IT-95-18 -R61), hearing of 5 July 1996.
[61] *Erdemović* Judgement, 5 March 1998, para. 14.
[62] *Erdemović* Judgement, para. 14.

What seems extremely important to me is that we have proof that this key witness in a number of cases suffered from psychological and psychiatric problems. In the Judgement of 5 March 1998 it also states that the judges who accepted the guilty plea successively served in several armies (JNA, ABIH, HVO and VRS).[63]

The Appeals Chamber was seized of the Judgement of the Trial Chamber of 29 November 1996 sentencing **Dražen Erdemović** to 10 years, after he pleaded guilty to the crime against humanity charge for his involvement in the murder of around 1,200 unarmed civilians at the Vranjevo farm near Pilica on 16 July 1995 after the fall of Srebrenica.[64] I must now note an incongruity in the evaluation of the Appeals Chamber which talks of 1,200 unarmed Muslim civilians. In themselves these terms are contradictory: by definition a civilian is unarmed. The act of saying "Muslim unarmed civilians" raises the possibility that these Muslims had a military status and that at the time of their arrest they were unarmed. The Indictment against **Dražen Erdemović** indicates that thousands of Bosnian Muslim civilians present in Srebrenica had fled to the UN base in Potočari.[65] This claim is contrary to various exhibits that show that these men were either ABiH soldiers or men of military age.

Moreover, evidence indicates that they did not flee but that they had been ordered to go to Potočari, which is completely different. The Indictment further states that a second group of men, women and children fled Srebrenica.[66] This paragraph leads one to think of civilians, which was not the case. On 31 May 1996 the Accused pleaded guilty saying that he did not have a choice in what he did and if he had refused to do it he would have been killed with the others.[67] At the time, the Trial Chamber ordered a psychiatric and psychological evaluation which concluded that he suffered from post-traumatic stress disorder. It ordered hearings to be suspended and requested a second report, which indicated that he was fit to stand trial.[68] It must be noted that in the meantime he cooperated with the Office of the Prosecutor and testified pursuant to Article 61 in the case of *The Prosecutor v. Karadžić and Mladić* (IT-95-5- R61 and

[63] *Erdemović* Judgement, para. 16.
[64] *Erdemović* Judgement, 29 November 1996.
[65] Initial Indictment, para. 3.
[66] Initial Indictment, para. 6.
[67] Dražen Erdemović pleaded guilty on 31 May 1996 to the count of crime against humanity under Article 5 (a) of the Statute.
[68] Expert report of 27 June 1996.

IT-95-18 -R61). In my opinion the question is whether at the time of his testimony he was indeed mentally fit to give it.

Having serious doubts, as **Judge Nyambe** did, about the testimony regarding the guilty plea, I studied the expert reports on his mental health. I note that the report had been submitted on 24 June 1996 and that, because of the serious nature of his post-traumatic stress disorder combined with suicidal tendencies, he was not fit to attend trial and that a second examination by a medical team was recommended in **six to nine months**. How did the person in question then come to testify on **19 November 1996**, that is, less than six months before the second medical report?[69]

The Appeal Judgement does not mention at any point anything specific about his mental health. The report mentions that **Dražen Erdemović** had met with the experts and told them that he had been forced to fire at the Muslims and that if he had refused to do so, both he and his family would have been shot.

According to him, the killings ("butchering") had lasted five or six hours, and afterwards he had gone to a café to have a drink with the other soldiers. When one of his companions suddenly shot at him and at two other soldiers, he was seriously wounded with two shots to the stomach and one to the leg. He was taken to hospital for an operation, followed by another operation.[70] How could it be that such an extremely important fact had been hidden by everyone to this day? What happened in this café? Was it possible that because of **Dražen Erdemović**'s opposition to taking part in the execution, his companion had received an order to execute those who opposed it? Because the conduct of the soldier in the café seems completely incomprehensible, and it should have merited at least questions being put to **Dražen Erdemović**. In fact, the impact of this incident on the psychological state of **Dražen Erdemović** should be evaluated. If he had just cause to think that they had wanted to silence him, he must have been resentful of his superiors and everything that he could say about the chain of command is therefore tainted by irregularities. Another hypothesis that comes to mind is that **Dražen Erdemović** had effectively refused to

[69] Testimony in *The Prosecutor v. Karadžić and Mladić* (IT-95-5- R61 and IT-95-18 -R61), 19 November 1996.
[70] *Ibid*.

open fire and had not participated in the shooting and, for this reason, he was punished under the instructions of the chain of command when a soldier, perhaps manipulated by his superiors, had come to the café to execute him, but in that case, **Dražen Erdemović** had then falsely accused himself. For my part, I am staggered to note how casually this witness was treated.

Aware of his role, I asked in vain my colleagues in the Appeals Chamber to call this witness so that I could ask him the relevant questions in a professional way. Unfortunately, I had no support in this approach which I nevertheless deem necessary.

III. Preliminary and Other Questions

1. Judicial Notice of Adjudicated Facts (Ground of Appeal no. 1)

a. Principal complaints raised by the Appellant

The Appellant, in his Ground of Appeal no. 1, submits that the Trial Chamber committed an error when it admitted **523** facts adjudicated in other cases,[71] most of which significantly affected the outcome of his trial by virtue of the way they were used.[72] Recalling the applicable law in this matter, the Appellant states that these facts admitted by the Chamber went to the core of the case as they were used by the Prosecution in their Rule 94 (B) Motion which contains crucial legal elements.[73]

In this respect, the Appellant raises two main complaints: first, the use of sub-headings in the Annex proposed by the Prosecution in its Motion for Admission,[74] and a second one, related to the adjudicated facts that went to the core of the case.[75]

i. The sub-headings in Prosecution Annex containing crucial factual findings

On this point, it is true that the Prosecution generated, as part of their Motion for Admission, an **Annex** divided into sub-headings, grouping the adjudicated facts. For example, the Appellant notes that adjudicated facts 433 to 538 were presented under the heading, "Operation to forcibly remove the Bosnian Muslim Population of Srebrenica", adding sub-headings related to violence and terror in Potočari, the forcible transfer of women, children and elderly people, and the separation of the men.[76] For the Appellant, this procedure amounts to a predetermined qualification of groups of facts; it needs to be said that in its Motion, the Prosecution indeed did not indicate which of these facts went to the core of the case.[77]

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[71] *See* the "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B) of the Rules", 17 December 2009. The Prosecutor, in his motion, asks for the admission of 604 adjudicated facts under Rule 94 (B) of the Rules of Procedure and Evidence in the cases *Krstić* (trial and appeal) and *Blagojević and Jokić* (trial and appeal).
[72] Appeal Brief, para. 6.
[73] Appeal Brief, para. 7.
[74] Appeal Brief, para. 8.
[75] Appeal Brief, para. 10.
[76] Appeal Brief, para. 8.
[77] Appeal Brief, para. 9.

In its Rule 94 (B) Motion, the Prosecution created an Annex which initially follows the chronology of the events of July 1995 and the "operation to murder the Bosnian Muslim men of Srebrenica".[78] The mentioned execution sites relate to the killings committed at the Kravica warehouse on 13 July,[79] the killings at Sandići on 13 July,[80] the killings at the Luke school near Tišća,[81] the movement of prisoners from Bratunac towards the Zvornik area,[82] the killings at Orahovac,[83] the killings at the school in Petkovci[84] and the killings at the Petkovci dam.[85] Also, in the *Tolimir* case, the Prosecution chose to present evidence on the various mass graves: Glogova 1 and 2,[86] Lažete 1 and 2,[87] the Petkovci Dam and Liplje,[88] Kozluk,[89] and the Branjevo farm.[90]

In addition to these objective elements connected with the crimes, in the rest of its Annex the Prosecution emphasised more subjective aspects, like the forcible transfer of the Muslim population from Srebrenica[91] and opportunistic killings as a foreseeable consequence of the forcible transfer of the Bosnian Muslim population of Srebrenica.[92]

On the issue of **forcible transfer** of the Muslim population from Srebrenica, the Prosecution's Annex specifies:

Violence and Terror in Potočari
Organisation of the Buses
Forcible transfer of the Women, Children and the Elderly
Separation of the Men
The White House
The Presence of Drina Corps Officers in Potočari on 12 and 13 July 1995
The Column of Bosnian Muslim Men

[78] Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts under Rule 94 (B) of the Rules ("Decision on Adjudicated Facts"), pp. 29-43, adjudicated facts 195-432.
[79] Decision on Adjudicated Facts, p. 31, adjudicated facts 225-235.
[80] Decision on Adjudicated Facts, pp. 31-32, adjudicated facts 236-242.
[81] Decision on Adjudicated Facts, p. 32, adjudicated facts 243-253.
[82] Decision on Adjudicated Facts, p. 33, adjudicated facts 265-268.
[83] Decision on Adjudicated Facts, pp. 33-35, adjudicated facts 269-292.
[84] Decision on Adjudicated Facts, p. 35, adjudicated facts 293-297.
[85] Decision on Adjudicated Facts, pp. 35-36, adjudicated facts 298-307.
[86] Decision on Adjudicated Facts, p. 40, adjudicated facts 374-389.
[87] Decision on Adjudicated Facts, p. 41, 390-401.
[88] Decision on Adjudicated Facts, pp. 41-42, adjudicated facts 402-411.
[89] Decision on Adjudicated Facts, p. 42, adjudicated facts, 412-425.
[90] Decision on Adjudicated Facts, p. 43, adjudicated facts, 426-432.
[91] Decision on Adjudicated Facts, pp. 43-50, adjudicated facts 433-558.
[92] Decision on Adjudicated Facts, pp. 50-53, adjudicated facts 559-604.

Regarding the **opportunistic killings** as a foreseeable consequence of the forcible transfer of the Bosnian Muslim population, the Annex specifies:

Potočari
Bratunac
The Grbavci School in Orahovac
The Kula School near Pilica
Additional Relevant Facts
Widespread Knowledge of the Crimes
The Impact of the Crimes on the Bosnian Muslim Community of Srebrenica
Reliability of Intercepted Communications

In the Appellant's opinion, the Prosecutor's use of headings to group together certain adjudicated facts conditioned the Chamber from the outset of the trial to follow a predetermined qualification. On this basis, the Appellant claims that a large portion of these adjudicated facts **went to the core of the case** and, therefore, should have been set aside by the Trial Chamber when it was ruling on their admission. For my part, I subscribe to this view entirely. The Trial Chamber should have dismissed the adjudicated facts which are directly linked to the charges against the Accused - a subject to which I shall come back in detail in the further consideration of this ground of appeal.

ii. Admission of adjudicated facts that go to the core of the case

On the second point, the Appellant lists adjudicated facts which, in his submission, have a direct bearing on the core of the case, and regroups them.[93] It is interesting to note that, in his analysis, the Appellant cites specifically certain adjudicated facts related to Directives 4, 7 and 7/1 as well as to the three meetings at Hotel Fontana, the focal elements of the Indictment.[94] These adjudicated facts that were admitted by the Trial Chamber are : **18, 53, 61-62, 156-190, 201, 202, 203, 205, 206, 208, 209, 434, 435, 439, 441-442, 444, 460, 464, 470, 491, 492, 523, 540, 541, 553, 558, 586-604.**[95] It is undeniable that, among these facts, a significant number have a more or less direct link to the core of the case and to the responsibility of the Accused. In this regard, the Appellant claims that, using this practice of adjudicated facts, the Trial

[93] Appeal Brief, paras 10-21.
[94] Indictment, 28 August 2006. The principal elements are cited in the part dedicated to "The Joint Criminal Enterprise to Forcibly Remove the Muslim Population of Srebrenica and Žepa", paras 36-46.
[95] Indictment, para. 10.

Chamber created a presumption of accuracy.[96] By admitting findings based on adjudicated facts from other cases, the *Tolimir* Chamber took them into account without having had access to the totality of evidence that had led to those findings.[97]

However, as the Appellant rightly notes in his Ground of Appeal no. 1, the Trial Chamber is required to weigh the **probative value** of the exhibits admitted into evidence when deciding whether to adopt the factual findings made by other Chambers in other, related cases.[98] If this practice consists in reducing the need for repetitive testimonies and exhibits in successive cases[99], it is nonetheless the case that, for the Appellant, this approach clearly deprives the Trial Chamber of the substance of its primary role.[100] Indeed, its role is to make its own factual findings based on the evidence in the case, and not to adopt findings based on mere assumptions, especially with regard to the crucial elements of the case.[101]

And yet, it must be noted that the facts linked to Directives 4, 7 and 7/1 were admitted even though they lie **at the heart** of the Prosecution's demonstration of the culpability of the Accused. These facts, adjudicated by other Chambers, should never have been admitted by the Trial Chamber in this case.

b. Discretionary powers of the Trial Chamber in the matter of admission of adjudicated facts from other cases

The combined reading of Rules 89 (C) and 94 (B) of the Rules of Procedure and Evidence by the Appeals Chamber shows that, "A Chamber may admit any relevant evidence which it deems to have probative value". Consequently, under Rule 94 (B), "At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings." On this point, Appeals Chamber case-law vests discretionary powers in the Judges of the Chamber to decide on the weight to be

[96] Indictment, para. 14.
[97] Indictment, para. 14.
[98] Indictment, para. 13.
[99] Indictment, para. 13.
[100] Indictment, para. 17.
[101] Indictment, para. 17.

accorded to specific evidence and its probative value.[102] On this basis, the Appeals Chamber recalls that it is firmly established that a Trial Chamber must independently assess the totality of the evidence before it, notwithstanding its decision to take judicial notice of adjudicated facts.[103]

This constant position of the Appeals Chamber on the issue was affirmed by the Trial Chamber in its Judgement in the ***Tolimir* case**. Indeed, in its decision, it states that the legal effect of judicial notice of an adjudicated fact is that "a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which subject to that presumption may be challenged at that trial."[104] It adds that, furthermore, the effect of judicial notice is "to relieve the Prosecution of its initial burden to produce evidence on the point; the Defence may then put the point into question by introducing reliable and credible evidence to the contrary."[105]

The Chamber further states that, while **the burden of producing evidence** is shifted to the accused when the Chamber judicially notices an adjudicated fact proposed by the Prosecution, the ultimate burden of persuasion - that is, proof beyond a reasonable doubt - always remains on the Prosecution.[106] Insofar as these adjudicated facts relieve the Prosecution of its initial burden, it is, to say the least, incorrect to state that the burden of proving guilt remains upon it. In fact, the practice that emerges from adjudicated facts visibly tilts the scales against the Accused, as he must adduce evidence to the contrary. This imbalance is evident, as the Chamber rightly held, concluding that the burden of proof is reversed and shifted to the Accused.

[102] *Tolimir* Appeal Judgement, para. 25.
[103] *Tolimir* Appeal Judgement, para. 26.
[104] *Tolimir* Trial Judgement, para. 76. The Trial Chamber based its findings on *The Prosecutor v. Milošević*, case no. IT-02-54-AR73.5, "Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", 28 October 2003, p. 4.
[105] *Tolimir* Judgement, para. 76. On this point, the Trial Chamber refers to the following decisions: *The Prosecutor v. Prlić*, IT-04-74-PT, "Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B)", 14 March 2006, para. 10; *The Prosecutor v. Krajišnik*, IT-00-39-T, "Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 *bis*", 28 February 2003, paras 16 and 17.
[106] *Tolimir* Judgement, para. 76.

In this respect, in paragraph 76 of the Judgement, the Trial Chamber held that the burden of producing evidence is reversed and shifted to the Accused. To my knowledge, there is not one jurisdiction, national or international, that places on an accused the burden of proving his innocence. It is for the Prosecution to prove his guilt. This position is all the more surprising in that the Accused may **choose to remain silent**, exercising a right recognised by the Rules of Procedure and Evidence. The effect of this reversal of the burden of proof is that the Accused is presumed guilty, contrary to Article 21 (4) (g) of the Statute which stipulates that an accused shall not be compelled to testify or to confess guilt.

In order to ward off possible criticism regarding the role of the parties in the proceedings, the Chamber, following the aforesaid principles, assessed the weight of adjudicated facts in the light of the totality of evidence.[107] In its Judgement, the Trial Chamber in **the Tolimir case** states that it has made numerous factual findings where adjudicated facts have been supported or amplified by other evidence on the record.[108] Even though it is true that, in its Judgement, references to adjudicated facts are largely corroborated by other evidence, the fact remains that the adjudicated facts were admitted into evidence without the Judges in this case having access to the evidence available to the judges in the previous cases. In this regard, the Accused argued that: "whenever evidence is presented before the Trial Chamber, or when even more evidence is presented than in the proceedings which resulted in the Judgement on the basis of which judicial notice of these facts was taken, the Chamber should refrain from relying on the adjudicated facts".[109] This argument was rejected by the Chamber which held that the weight of adjudicated facts had been assessed in the light of the totality of evidence in the case.[110]

In this matter, I can only subscribe to the view of the Appellant. Personally, I do not agree that the facts justify a reversal of the burden of proof. The mere fact that the Trial Chamber admitted a certain adjudicated fact does not relieve the Prosecution of its obligation. If we pursued this reasoning, the trial would be over as soon as it started because all the facts that could establish the guilt of the Accused would have

[107] *Tolimir* Judgement, para. 77.
[108] *Tolimir* Judgement, para. 77.
[109] *Tolimir* Judgement, para. 77, referring to the Appeal Brief of the Accused, para. 211.
[110] *Tolimir* Judgement, para. 77.

already been admitted and it would be for the defence to prove his innocence. We would have a serious problem then.

c. The finding of the majority of the Appeals Chamber on Ground of Appeal no. 1

The Appeals Chamber, in its majority, holds that the Trial Chamber did not err in applying different criteria to identify the proposed facts that went to the core of the case.[111] Specifically, the Appeals Chamber, having reviewed all the adjudicated facts admitted in this case, found that only Fact 62 went to the core of the case.[112] In this regard, it noted that these findings on Fact 62 were also based on additional, independent evidence that mirrored *verbatim* the contents of the fact in question.[113] It concluded that Fact 62 did not constitute the sole basis of the Trial Chamber's findings and therefore its admission did not occasion a miscarriage of justice.[114]

I do not share that point of view because, in my eyes, even if this fact is important, there were also other adjudicated facts that **went to the core** of the case.[115] The decision taken by the *Tolimir* Chamber on 17 December 2009 on the Prosecution motion allows us to note, as stated in the Judgement, that the Chamber took judicial notice of **523 adjudicated facts.** The spirit of Rule 94 (B) is to admit adjudicated facts in order to save time, but with the agreement of all. If one party is not in agreement, it must be able to request a ruling from the Appeals Chamber, especially if significant consequences are at stake for the guilt of the accused.

Even though the Trial Chamber took care to indicate in paragraph 33 of its decision that the facts related to the joint criminal enterprise ("JCE") and the criminal conduct of the Accused should not be admitted, a certain number of facts related to these two issues eventually were. I am therefore compelled to go into detail to demonstrate the error made by the Trial Chamber. My analysis rests on two tables: one, related to the

[111] *Tolimir* Appeal Judgement, para. 30.
[112] *Tolimir* Appeal Judgement, para. 35.
[113] *Tolimir* Appeal Judgement, para. 36.
[114] *Tolimir* Appeal Judgement, para. 36.
[115] I have analysed all of these facts in the table on **adjudicated facts.**

facts proposed by the Prosecution that were not admitted, and a second, on adjudicated facts that can be considered as incriminating the Accused.

FACTS NOT ADMITTED	
FACT NUMBER	**OBSERVATIONS ON NON-ADMISSION**
42	This fact indicates that ABiH troops had no heavy weapons and were poorly trained. This fact should be juxtaposed with the numerous operations carried out by the ABiH outside of the enclaves that belie the proposition.
50 51 55 57	These facts concern fire opened by Serb forces on humanitarian convoys. It would have been interesting to admit these facts to allow the Accused to show that the firing was necessary because they were carrying weapons for the ABiH in the enclave.
79 80 81 82 83	Rather incoherently, facts 79 to 83 related to the *Krivaja 95* plan were not admitted, while the preceding facts (76 to 78), related to the same plan, were.
106	This fact, related to the shelling of a column of refugees, was not admitted, even though it raises the question whether there had been any casualties between Srebrenica and Potočari.
112	This fact concerns acts allegedly committed by members of the 10th Sabotage Detachment.
114	This fact indicates that the commander of the 10th Sabotage Detachment, Mićo Pelemiš, was present in the centre of Srebrenica on 11 July 1995.
121	This fact estimates the number of people in the column at 10,000 to 15,000, made up mainly of men, both civilians and soldiers.
122	This fact provides an insight into the composition of the 28th Division of the ABiH in Srebrenica, numbering 1,000 to 4,000 soldiers. The figure of 4,000 could be of import for the column, or at least its make-up.
254 264	These facts provide details of the executions. I fail to see why they were not admitted.
323 to 341	These facts, related to the executions at the Branjevo farm, were not admitted, even though they provide important details.
527 529 531 539	The importance of the issue of the column called for these facts to be admitted.

ADJUDICATED FACTS[116]		
SUBJECT	**FACT NUMBER**	**OBSERVATIONS ON ADMISSION**
1992-1993 Conflict in Srebrenica	16 (BJJ)	This fact regarding the decision on the strategic objectives of the Serbian people has a direct bearing on the JCE with which the Accused is charged.
	18 (BJJ)	This fact, related to the Directive 4, is the same in spirit, the Prosecution alleging that this Directive 4 fell squarely within the JCE.
The attack and fall of the Srebrenica enclave	60 (KJ, BJJ)	This fact refers to the Directive issued by Radovan Karadžić concerning the long-term strategy of the VRS in the enclave. This Directive is an integral part of the Prosecution case on the existence of the JCE that includes the Accused as a member.
	61 (KA, BJJ)	This fact is simply a variation of fact 60.
	62 (KA, KJ, BJJ)	This fact, too, only further elaborates Directive 7 on the creation of an "*unbearable situation of total insecurity, with no hope of further survival or life for the inhabitants of the enclave*". It is the most damning fact for the members of the JCE, and the phrase cited in "quotation marks" should have prompted the Trial Chamber to exert more prudence so as to allow the Accused to challenge it, instead of shifting on him the burden of proof. In a way, in my humble opinion, this trial was finished with the admission of Fact 62. The majority of the Appeals Chamber, who understood the key importance of this fact, elaborated its arguments in paragraphs 33 and 34 of the Appeal Judgement, acknowledging that it falls within the alleged JCE and that the Trial Chamber had erred. Nevertheless, it held that this fact was not the sole basis for the findings of the Trial Chamber, thereby rejecting the argument of the Accused. I disagree with this opinion and note in passing that it could have made the same finding on Facts 60 and 61, but did not. Fact 62 is mentioned in several instances, including in para. 35 of the Appeal Judgement, as going to "the core of the case"!
	66 (KA, BJJ)	This fact relates to the same issue because it concerns Directive 7/1 which lies at the heart of the Prosecution case on the JCE. In my view, this fact should never have been admitted. If the burden of proof was on the Accused, then he should have called General Mladić as a witness to explain the purpose of this directive and its nexus with Directive 7 of Radovan Karadžić, who should also have been called. But in that case, would there not have been a problem, because procedural law pursuant to Rule 90 (E) of the Rules of Procedure and Evidence holds that, "a witness may object to making any statement which might tend to incriminate the witness"? To take the point further, we would end up in a ludicrous situation because the same rule stipulates that the Chamber may compel the witness to answer, but such testimony shall not be used as evidence in a subsequent prosecution …When making a decision of this nature pursuant to Rule 94 (B), the Trial Chamber must ask itself a number of questions, specifically regarding other accused prosecuted on the same charges lest their decision prejudice the rights of the defence, and lest it wander into an area of procedure that can only be a dead end.

[116] The adjudicated facts are referenced by case, as follows:
KJ : *Krstić* Trial Judgement
KA : *Krstić* Appeal Judgement
BJJ : *Blagojević and Jokić* Trial Judgement
BJA : *Blagojević and Jokić* Appeal Judgement
For the purpose of analysis, I have adopted the Annex proposed by the Prosecution.

	97 (KJ, BJJ)	This fact is problematic because it indicates that President Karadžić issued a new order authorising the VRS to capture the town of Srebrenica. This poses certain problems: **Was this order written or verbal?** **Was this order really issued and confirmed by Radovan Karadžić?** **What were the reasons for changing the order when this logistically demanding military operation was in full swing?** **Was there a cause-and-effect relationship with NATO action or inaction?** This list of questions is not exhaustive and it can be noted that such an admission could only place the Accused in an extremely complicated situation when it comes to the burden of proof.
	98 (KJ)	This fact indicates that the order was given to General Krstić personally. This also raises crucial questions: **If the order was received by General Krstić on 9 July 1995, in what capacity did he receive it?** It appears that he assumed *de facto* command of the Drina Corps on 13 July 1995. This is mentioned in paragraph 45 of the Appeal Judgement in Krstić. Therefore, it seems that on 9 July 1995, he was not the commander of the Drina Corps. Fact 113 (KJ) confirms that the commander of the Drina Corps was General Živanović. This being so, how to explain President Karadžić, the Commander-in-Chief, skipping several rungs of the army hierarchy, including General Mladić, when it comes to a pivotal military operation? **If this order was indeed received by General Krstić, how did he interpret it?** **Weren't there parallel chains of command?** This was the theory of General Krstić elaborated in paragraph 48 of the Appeal Judgement in his case. It was not admitted by the Appeals Chamber. In this respect, it should be noted that, if General Krstić had truly received an order directly from Radovan Karadžić on 9 July 1995, it would mean that there were at least two chains of command: Karadžić ⟶ Krstić Mladić ⟶ Beara ⟶ Popović ⟶ Dragan Nikolić Before admitting this fact, the Trial Chamber ought to have considered the question of the existence of different chains of command. A third chain of command can be now contemplated: **Milošević ⟶ Simatović ⟶ Ministry of the Interior (MUP)** This third chain of command is arguable in the light of the Indictment against Slobodan Milošević (including Srebrenica).[117]
The column of Muslim men	120 (KJ)	This fact mentions the presence of civilians and soldiers who were intermingled ("mixed with soldiers"), raising the question of the exact nature of this column (military, mixed, civilian). By admitting this fact, the Trial Chamber made it incumbent upon the Accused to prove that the column was a military one, despite the presence of some civilians. This question should have been raised by the Prosecution in the *Tolimir* trial instead of being settled by the admission of Fact 120.

[117] *The Prosecutor v. Slobodan Milošević* , case no. IT-02-54-T, Indictment, 22 November 2001, para. 31.

Temporary units in the Drina Corps zone	143 (KJ)	Oddly, this fact was admitted, whereas the heading of this chapter concerns temporary units. Is this to say that the 10th Sabotage Detachment was re-subordinated to the Drina Corps? This is what the word "also" seems to infer in the sentence saying that it was subordinated directly to the Main Staff. This is not trivial because, at the moment Dražen Erdemović is executing the prisoners, what is his chain of command? The Drina Corps or the Main Staff? This question obviously raises the issue of the link with the Accused and his criminal liability. Consequently, this fact should not have been admitted.
First meeting at the Hotel Fontana	164 (BJJ)	This fact relates the incriminating words of General Mladić, "You can all leave, all stay, or all die here," to direct consequences for the Accused on several accounts, specifically his participation in the JCE to murder.
Second meeting at the Hotel Fontana	176 (KJ, BJJ)	The meaning that the Prosecution gave to General Mladić's words should have prompted the Trial Chamber not to admit this fact. Fact 176 (KJ, BJJ) is in the same spirit, because the words "survive, stay or disappear" are almost identical to those of Fact 164.
The killing of Muslim men	208 (KA, BJJ)	This fact refers to 7,000 or 8,000 Muslims who were systematically killed. How are we to reconcile this fact with the findings of the Trial Chamber which, after extensive work on the issue, estimated the real number of those killed at 5,749 in paragraph 596 of its Judgement? Caution should have guided the Trial Chamber not to admit this fact.
Violence and terror at Potočari	439 (KJ, BJJ)	This fact speaks to the campaign of terror inflicted on Muslim refugees when the Serb forces arrived at Potočari. It refers to looting, destruction of houses, rapes and murders. This fact, considered as constituting established crimes with which the Accused is charged, should not have been admitted. As it were, the inversion of the burden of proof puts the onus on the Accused to prove that some of the crimes mentioned do not incriminate him (notably rapes).
Forcible transfer	459 (BJA)	This fact refers to the women, children and elderly who were transferred from Potočari to Kladanj. Considering that the forcible transfer was challenged by the Accused in his pre-trial brief, caution was in order, all the more so because Fact 468 mentions that DutchBat soldiers escorted the first convoy of refugees.

In conclusion, I believe that the Trial Chamber in *Tolimir* erred in its decision on adjudicated facts when it admitted a whole batch of adjudicated facts that went to the core of the case, while rejecting other facts that deserved to be admitted. While admission of facts adjudicated in other cases pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence allows for a certain judicial economy, it nevertheless raises certain questions as to the right of the Accused to a fair trial. It is important to note that the Trial Chamber devoted in its Judgement only two paragraphs (76 and 77) to this matter which, for me, is one of the key issues of the trial.

I am therefore in favour of admitting Ground of Appeal no. 1 and its effect, in my opinion, is evident: partial reversal of the Trial Judgement. In this particular case, the Accused was not given a fair trial due to a serious violation of his rights by virtue of the reversal of the burden of proof, even though he was presumed innocent.

2. Unreliability of Intercepted Communications (Ground of Appeal no. 2)

In his submission, the Appellant raises in Ground of Appeal no. 2 the unreliability of the intercepts admitted by the Trial Chamber.[118] The standing objection before this Tribunal to the intercepts generated by one party to the conflict (ABiH) was never successful because all of the Chambers rejected the grounds of objection. Obviously, an intercept can be interpreted in multiple ways, especially if not all of the conversation is available, and there is no context. Moreover, with even the **audio recording** missing sometimes, all the judges have before them is an English transcription of words pronounced in another language. Nevertheless, it is my opinion that these intercepts can be admitted into evidence and could equally serve the Defence in its challenges to the Prosecution case.

It seems therefore that judges should be particularly careful in using the contents of intercepted communications. Judges should equally not lose sight of the possibility of tampering with audio recordings and translation errors. Regardless of these drawbacks, the Defence can always call to the stand those who were involved in these conversations to explain themselves on the meaning and the content. The Accused was, technically, also able to challenge the content of the intercepts by calling witnesses and/or experts.

I therefore wholly subscribe to the rejection of Ground of Appeal no. 2.[119] Still, I find it necessary to elaborate a **separate opinion** on the subject because it seems that the intercepts recorded during the conflict in the territory of ex-Yugoslavia have acquired a huge importance in incriminating the accused.

[118] Appeal Brief, paras 8-9.
[119] *Tolimir* Appeal Judgement, para. 61.

3. The Butler Report (Ground of Appeal no. 3)

In its Judgement, the Trial Chamber referred to the challenge made by the Defence on the **weight** to be accorded to the evidence given by **Richard Butler**.[120] It is only in footnote 97 of the Judgement that the Trial Chamber deals with the quality of expert **Richard Butler's** evidence, stating, on the one hand, that the reports of Richard Butler were admitted without any opposition from the Accused, and on the other hand, that in his cross-examination of this witness, the Accused appeared implicitly to accept him as an expert.

This was not the position of the Defence, as noted in its Final Brief,[121] and as it recalled in its submissions on Ground of Appeal no. 3.[122] Undeniably, the procedure applicable to **Rule 94 *bis*** of the Rules was not followed and therefore the Defence, unable to rebut the status of the expert in its submissions, found itself in a position where it had to face in the courtroom either an expert witness or an "investigator witness".

Generally speaking, the *common law* procedure followed by the ICTY has not facilitated independence or impartiality in expert reports because an expert witness is called and paid by one party. Contrary to what the Appeals Chamber has repeatedly held with regard to the impartiality of these expert witnesses, it is my opinion that they are not expert witnesses, strictly speaking, but rather "**experts, witnesses for the Prosecution"**. These problems could have easily been avoided if, at the request of the parties, the Chamber in charge had appointed an expert **independently** and **impartially**. Regrettably, this was not the procedure followed here, and so we are faced with endless objections in this matter.

a. The status of Witness Richard Butler and his capacity as expert

[120] *Tolimir* Judgement, para. 41.
[121] Defence Final Brief, paras 185-188.
[122] Appeal Brief, paras 31-43.

Witness **Richard Butler** testified in the ***Tolimir*** case from Thursday, 7 July to Wednesday, 31 August 2011.[123] From a review of the transcript, it appears that he had already testified in four other cases (Krstić, Blagojević and Jokić, Popović *et al.* and Perišić).[124] What is particularly interesting about this witness is that he was made available to the Office of the Prosecutor by the Government of the **United States of America** as an **analyst,** and that he was then hired as an official of the United Nations.[125] Subsequently, returning to the United States as an intelligence officer, he worked on the case of **Marko Boškić,** a member of the 10th Sabotage Detachment, as he had illegally entered the United States and on account of the crimes committed.[126] He had previously been tried before the State Court of Bosnia-Herzegovina and Richard Butler had testified. It follows from all of the above that **Richard Butler** cannot be considered as an expert witness, but rather as a member of the Office of the Prosecutor who testifies only for the Prosecution.

To see that this is indeed the case, one needs only to consider the question put to him on page **16329**:

> **Q.** If counter-intelligence work, as you've said, it would be to protect the secrets of an army, what was -- and just briefly, what was General Tolimir's role in -- first of all, at what level was he in the counter-intelligence hierarchy of officers?
>
> **A.** As the assistant commander for intelligence and security of the Main Staff of the Army of Republika Srpska, General Tolimir was the pinnacle of that effort by the Army of the Republika Srpska.
>
> **Q.** Would General Milovanović and General Mladić rely on him for that?
>
> **A.** Absolutely.

[123] Hearings of 7 July through 31 August 2011, T(F), pp. 16269 to 17488.
[124] Hearing of 7 July 2011, T(F), page 16274.
[125] P02469 (Curriculum vitae of Richard J. Butler).
[126] Hearing of 7 July 2011, T(F), pp. 16272-16273.

Q. Now, would a -- the plans associated with a military operation, keeping those plans and details of that military operation, would that be part of General Tolimir's job, to keep out of the hands of the enemy?

A. Yes, sir.

Q. How about an operation as charged in this indictment, to murder able-bodied -- thousands of able-bodied men, an operation to detain them, transport them to execution sites, summarily execute them, and bury them, and re-bury them, would that be a kind of a military secret?

A. In context, if you are seeking to prevent any public disclosure of your involvement in those acts, your security and counter-intelligence organs would play a very large part in making sure that disclosure did not occur. So again, as the head of the -- you know, as the – more accurately, as the assistant commander for intelligence and security for the Main Staff of the army, General Tolimir -- that effort revolves around him.

In the course of this very long hearing, he was shown documents that had been admitted by the Chamber. Among them, six documents numbered **P02470** to **P02475** were authored by him and these documents were admitted. It is useful to note the titles of these crucial documents:

- **P02470:** Report titled **"**VRS Corps Command Responsibility Report with Supporting Documents", 5 April 2000
- **P02471**: Report titled "Srebrenica Military Narrative – Operation 'Krivaja 95' with Supporting Documents ", 15 May 2000
- **P02472**: Report titled "VRS Brigade Command Responsibility Report with Supporting Documents", 31 October 2002
- **P02473**: Report titled "Srebrenica Military Narrative (Revised) – Operation 'Krivaja 95' with Supporting Documents", 1 November 2002

- **P02474**: Report titled “Chapter 8 Analytical Addendum to Srebrenica Military Narrative (Revised) with Supporting Documents”, 2003
- **P02475**: Report titled "VRS Main Staff Command Responsibility Report", 9 June 2006.

These documents were mainly used in the Krstić case.[127] Therefore,it cannot be said that a specific report was prepared for the Tolimir case. Thus, basing its case on reports produced in other cases, and by introducing these six documents, the Prosecution made up for the absence of a report pursuant to Rule 94 *bis* of the Rules. These six documents that form the basis of Richard Butler’s work should have been officially made available to the Accused before the hearing of 7 July 2011 pursuant to Rule 94 *bis* of the Rules.

b. Evaluation of certain references to the Butler Report made in the Judgement

In light of the above observations, the question is whether the testimony of this expert, together with his reports, has caused prejudice to the Accused? It is symptomatic that, on the **630 pages** of the Judgement, we find the name **Richard Butler** mentioned **261 times**. Thus, this expert witness played, in my opinion, a **capital role**, as the most oft-cited witness.

In order to grasp the scope of the impact of the documents authored by **Richard Butler** and his oral evidence, I made a **table attached in the Annex,** inventorying in four columns the paragraphs of the Judgement where the name of **Richard Butler** is mentioned, the footnotes mentioning his name, the documents citing his words, the numbers of adjudicated facts referring to his assertions and, finally, I deemed it necessary to cite *in extenso* the sentences in the Judgement referring to his evidence.[128] As we can see, inculpatory evidence appears in footnotes 4251, 4496 and 4498, among others, and was wholly based on the words of **Richard Butler** and taken into account by the Trial Chamber. This demonstrates clearly the importance of his

[127] Various references made to Richard Butler’s testimony and reports feature in the *Krstić* Trial Judgement of 2 August 2001.
[128] The table is available in **Annex 1** of this opinion.

evidence which was taken into account by the majority of the Chamber in its assessment of the Accused's criminal responsibility.

In footnote 576 referencing paragraph 163 of the Judgement, the Chamber holds that, while there may have been no formal adoption of the strategic objectives on **12 May 1992**, goals of the Republika Srpska leadership were known; the minutes do not reflect any objection to these objectives. More importantly, these goals were used to formulate later Directives of the VRS.[129] The fact that the Trial Chamber relies on the session of 12 May 1992 to say that there were six objectives and that strategic directives were made on the basis of these objectives, relying on the assertions of **Richard Butler**, allowed the majority to find a link between a political speech made by **Radovan Karadžić** on 12 May 1992 and the events that came to pass in Srebrenica and Žepa more than a year later. To make a "bridge" between the two, the Trial Chamber refers to operational directives in paragraph 164. In my personal opinion, these operational directives had a purely military purpose, and the reference to them in the footnotes had an impact on the assessment of the Accused's criminal responsibility.

Footnote 637 referencing paragraph 177 of the Judgement states that, according to **Richard Butler**, a Main Staff combat order dated 1 May 1993 for the "liberation of Žepa and Goražde" reflects a plan by the VRS to "move and take down Muslim military and civilian populations in Žepa and Goražde", in anticipation of the declaration of these areas as safe areas soon after Srebrenica.[130] The finding of the majority of the Trial Chamber is based on **Richard Butler's** view**.**

Similarly, **in footnote 648 referencing paragraph 180 of the Judgement,** relying on the evidence of **Richard Butler** given at the hearing of 20 July 2011, the Trial Chamber states that operational Directive 6 was written by Miletić and adopted by Karadžić on 11 November 1993. It revisits certain passages in Directive 4, specifically the one that says, "to create objective conditions for the achievement of

[129] *Tolimir* Judgement, para. 164, footnote 576.
[130] *Tolimir* Judgement, para. 177, footnote 637.

the VRS strategic war goals".[131] This acknowledgement by the majority of the Chamber derives **directly** from the statements of **Richard Butler.**

Footnote 676 referencing paragraph 186 of the Judgement states that **Butler** testified that, unlike Directive 4, Directive 7 went out in Karadžić's name as the political bodies took a greater role in the war effort in 1995.[132] This footnote refers to paragraph 186 of the Judgement dealing with Directive 7 which, in my view, is a directive that is military in nature, with a military rather than civilian objective.

In footnote 691 referencing paragraph 191 of the Judgement, the majority of the Trial Chamber states that, according to **Richard Butler**, Directive 7/1 does not use the language of Directive 7 (relating to making life unbearable in the enclave), because "some of the broader tasks don't lend themselves to military orders".[133] The majority, relying on **Richard Butler**'s position**,** draws the conclusion that Directive 7/1 was more technical in nature than Directive 7 by Radovan Karadžić. This implies that Directive 7 had a civilian objective, which was not the case with Directive 7/1.

As regards paragraphs 1080 *et seq.*, under the heading *Military Activities Aimed at Terrorising the Civilian Population in Srebrenica*, the Chamber, in its majority, accepted the testimony of **Richard Butler** according to whom the Accused's mention of a "disinformation" campaign by the ABiH about the VRS sabotaging civilian facilities constituted disinformation in itself. **Richard Butler** testified that the false information supplied by the Accused was aimed at influencing the opinion of the recipients of the report, that is to say, among others, the Main Staff, but also the civilian authorities, the Ministry of the Interior, the Army Corps commanders, and even the Security Administration of the Federal Army in Belgrade.[134] Relying on the testimony of **Richard Butler,** the majority therefore found that the Accused had engaged in a disinformation campaign against his own military and civilian authorities.

[131] *Tolimir* Judgement, para. 180, footnote 648.
[132] *Tolimir* Judgement, para. 186, footnote 676.
[133] *Tolimir* Judgement, para. 191, footnote 691.
[134] *Tolimir* Judgement, para. 1083, footnote 4251.

In paragraph 1069 of the Judgement, the Chamber states that Butler testified that the use of a derogatory term such as **"Turks"** is generally not an acceptable practice in the military. The majority considers that the Accused encouraged the use of derogatory terms so as to provoke ethnic hatred among members of the Bosnian Serb forces and an attitude that Bosnian Muslims were human beings of a lesser value, with a view to eradicating this particular group from eastern BiH.[135] As we can see, this paragraph concerns the Accused's criminal responsibility under Count 1: genocide. The result is that the majority drew its conclusions relying on the assertions of Richard Butler.

In conclusion, I note that, out of **4,652** footnotes in the Judgement, **85** explicitly refer to **Richard Butler**'s report or testimony, that **46** documents are correlated with Butler's position, as are references to **13** adjudicated facts. In view of all this, it seems that the testimony of **Richard Butler** and his reports had a significant, if not decisive, impact on the evaluation of Zdravko Tolimir's criminal responsibility, even though Butler's competence as an expert had not been established in accordance with the extremely strict provisions of Rule 94 *bis* of the Rules. In my view, there was a **violation of fair trial** as the defence was not in a position to challenge **Richard Butler's qualifications as an expert** or the contents of his reports in a timely fashion. **For this reason, Ground of Appeal no. 3 should have been admitted and the Judgement invalidated in part**.

[135] *Tolimir* Judgement, para. 1169, footnote 4496.

4. Investigators of the Office of the Prosecutor (Ground of Appeal no. 4)

The Appellant submits in his brief that the Trial Chamber erred in weighing the evidence of OTP investigators, namely Dušan Janc, Richard Butler, Jean-René Ruez, Dean Manning, Erin Gallagher, Tomasz Blaszczyk and Stefanie Freese.[136] On this issue, the Trial Chamber recalls in paragraph 23 of the Judgement that the Prosecution adduced evidence from 183 witnesses in total and that 126 witnesses testified orally, including 12 expert witnesses. The Trial Chamber points out in paragraph 38 of the Judgement that the Accused gave special attention "to investigators" of the Office of the Prosecutor, submitting that the reports of these witnesses could not serve as the only basis for establishing the facts.

The Judges of the Trial Chamber took care to make it clear that, in determining the weight to be given to their testimony, the Chamber had taken into consideration their expertise and knowledge. I can only subscribe to this view of the Trial Chamber. Nonetheless, across many ICTY cases, it is almost always the same witnesses who come to testify time and again, like **Jean-René Ruez,** for example, a former OTP investigator.

Although these witnesses were not present during the perpetration of the crimes, they still provide the judges with valuable insight derived from their investigation work. For these reasons, I find that the large number of investigators who have given evidence did not cause prejudice to the Accused and therefore, like the other Judges on the Appeals Chamber, I reject this ground of appeal, as elaborated in paragraphs 74 to 78 of this Appeal Judgement.

[136] Appeal Brief, paras 44-52.

5. The Number of People Killed (Ground of Appeal no. 9)

a. Expert Ewa Tabeau

This expert testified in a number of different trials and, by virtue of her numerous testimonies, she enjoys great authority. This expert testified in the *Popović et al.* case on 5 February 2008[137] and was employed by the Tribunal in early 2000 as Project Manager for the demographic service. She is therefore a staff member of the OTP. She authored the "Integrated Report on Srebrenica Missing". This report was updated on 16 November 2005.[138] Without going into the methodology used by Ms Tabeau, we can note that, with the passage of time, there have been adjustments of statistical data. I notice that the records of the ABiH were not used for the purposes of the 2005 report and that the report updated in 2007 includes 7,692 persons from Srebrenica who are registered as missing or killed. This expert has authored a large number of reports for the ICTY since 2000.[139]

The vital element that I see in the work of this expert is found in **Table 8** on page 19 of document P1776 where it is stated that the number of **7,692** persons missing and killed includes **68** women, **10** over **the age of 80** and only **two** under ten. We have no other information on the disappearance or death of these 68 women. In the table concerning the men, it is of interest to note that they are divided into age groups. For the first four age groups, 5 to 10, 10 to 14 and 15 to 19, we have the figures of 0.20 and 893.[140] Looking at men aged 70 and over, we see there are 118 aged between 70 and 80, and 13 between 80 and 90.

It appears that other lists were made both by the OTP and the ICRC.[141] We can see that their figures are different and that there are variations which are understandable,

[137] *The Prosecutor v. Popović et al*, IT-05-88-T, Hearing of 5 February 2008, T(F), p. 21030 *et seq*.
[138] P01776.
[139] *The Prosecutor v. Tolimir*, IT-05-88-2-T, Hearing of 16 March 2011, T(F), p. 11397.
[140] What seems important to me is that this figure of 893 may correspond to the persons qualified in the documents as "men of military age".
[141] *See* the ICRC report, P01780.

bearing in mind such a large number of victims. Nevertheless, document **D00165** caught my attention: it is a study made by Milivoje Ivanišević, who maintains that the persons whose names were recorded as victims of the Srebrenica massacre died either earlier or later, in different places. He has published a list of 87 such persons. This document is definitely credible because it is based on court rulings specifying the dates and places of death.

Regardless of the uncertainty regarding some persons, it transpires overall from the reports of Ewa Tabeau that several thousand went missing or were killed during the events related to Srebrenica.

b. The calculation of recorded victims

In his Appeal Brief of 28 February 2014, in paragraphs 89 to 142, the Appellant argues that the Trial Chamber erred in its calculation of the number of persons killed.

As an example, he cites paragraph 45 of the Judgement which states that 1,000 to 1,500 Muslims were killed at the Branjevo military farm, and another 500 at the Pilica Cultural Centre. The Trial Chamber devoted a whole chapter in its Judgement entitled, "Calculation of the Total Number of Bosnian Muslims Killed in the Aftermath of the Fall of Srebrenica".[142] The Trial Chamber calculated the number of Bosnian Muslims killed at the specific sites mentioned in the Indictment[143] and the number of those killed outside of combat operations under circumstances that the Indictment does not specify.[144]

The Chamber specifies it is not taking into account in its calculation the number of Muslims killed in combat, those who committed suicide or those who were killed in skirmishes with other Muslims.[145] There is thus a strict standard according to which each person killed must be precisely placed in the appropriate category. On the basis

[142] *Tolimir* Judgement, para. 314. The methodology of the Chamber is explained in para. 566 of the Judgement.
[143] *Tolimir* Judgement, paras 568-571.
[144] *Tolimir* Judgement, paras 595-597.
[145] *Tolimir* Judgement, paras 592-594.

of its calculation, the Trial Chamber found that at least 4,970 Muslims had been killed.[146] Table 1[147] gives a precise overview. This table specifies five sites involving large numbers of victims:

- the Kravica warehouse (600)
- Grbavci school at Orahovac (830)
- Petkovci (809)
- Kozluk (761)
- Branjevo military farm and the Pilica Cultural Centre (1,656)

The Trial Chamber is less convincing in its analysis in paragraph 574 where it rejects the arguments of the Accused concerning the figure of 7,000 persons which, according to him, is untenable. The analysis of the Trial Chamber also takes into account the more recent integrated report of 2009.[148] This report puts the real number of persons missing and killed at 7,905. The Trial Chamber then considers the 1,683 identified victims from Srebrenica who are mentioned in the April 2010 report by **Dušan Janc**.[149] Of these 1,683 victims, the Trial Chamber states that 734 were killed outside of combat operations. In paragraph 591 of the Judgement, the Trial Chamber finds that, out of the 1,683 Srebrenica victims, Serb forces killed 830 outside of combat.

Lastly, in its overview in Table 2[150] the Chamber added to the number of 4,970 the 734 victims found at Glogova 1 and 2 and in secondary graves, as well as 96 victims found in other sites, arriving at a total of 5,749 victims.

This figure seems acceptable and I do not see how the Accused can contest it, even though, as noted in footnote 2589, Judge Nyambe expressed certain reservations. As far as I am concerned, the core of these calculations are the victims uncovered at the sites **Krahovac, Orahovac, Petkovci and Branjevo**, amounting to several thousand.

[146] *Tolimir* Judgement, *see* Table 1, p. 314.
[147] *Tolimir* Judgement, *see* Table 1, p. 314.
[148] *Tolimir* Judgement, para. 576. This report was given the exhibit number P01776.
[149] *Tolimir* Judgement, para. 586 *et seq*.
[150] *Ibid*., p. 330.

Like the other Judges of the Appeals Chamber, I reject Ground of Appeal no. 9, while noting, at the same time, that the "expert" Ewa Tabeau is a member of the Office of the Prosecutor and that her figures are sometimes debatable, and also noting that she decided to keep in her table the age group 15 to 19 even though she knows that, as of age 16, a person is considered to be of military age.

IV. The Crimes

A. CRIME AGAINST HUMANITY

1. Extermination (Ground of Appeal no. 6)

While I join in the finding of the Appeals Chamber on this ground of appeal, resulting in the partial acquittal of the Accused for the crime of extermination,[151] I differ on the reasoning it followed.[152] In this regard, according to the reasoning expounded by the Appeals Chamber, the legal standard applicable to crimes against humanity is well-established in case-law.[153] In the view of the majority of the Appeals Chamber, while the establishment of the *actus reus* of a crime against humanity requires that the crime occur as part of a widespread or systematic attack directed against a population, there is no requirement that the victims be civilians.[154]

The trial and appeal judgements returned by the ICTY give me cause to question this linear analysis of the Appeals Chamber with regard to the legal standard applicable to crimes against humanity under Article 5 of the Statute. A comparative reading of different trial and appeal judgements as well as the writings of the Preparatory Commission for the Rome Statute call into question the reasoning developed by the Appeals Chamber in this case.

a. Definition of the concept of "civilian" for the purposes of international humanitarian law

First of all, it should be noted that Article 5 of the Statute does not provide a precise definition of the crime of extermination, but only places it in the category of "crimes against humanity". Although the crime of extermination features on this list, it is noteworthy that, over the years, several Chambers have had occasion to consider the precise nature of this concept and analysed it in their judgements. It should also be

[151] *Tolimir* Appeal Judgement, para. 151.
[152] *Tolimir* Appeal Judgement, para. 141. In support of its statements, reference is made to the Trial Judgements in the *Martić* and *Mrkšić and Šljivančanin* cases. *Tolimir* Appeal Judgement, para. 139, footnote 404.
[153] *Tolimir* Appeal Judgement, para. 141.
[154] *Tolimir* Appeal Judgement, para. 141.

noted, as the Trial Chamber in *Mrkšić* rightly did, that "over the years, this jurisprudence has evolved".[155] On the term "civilian" under Article 5 of the Statute, it held that it "has been defined *only* in the context of the *chapeau* requirements of Article 5, i.e. in the context of the requirement of an attack directed against a civilian population".[156] It recalled that this question was considered in a number of cases where the concept of "civilian" was expansive and included individuals who at one time performed acts of resistance, as well as persons who were *hors de combat* when the crime was committed.[157]

Later on, jurisprudence made another evolution with the Appeal Judgement rendered in the *Blaškić* case in 2004.[158] While in previous judgements the judges focused on the specific situation of the victim at the time of the crime, the Appeals Chamber in *Blaškić* looked more closely at the **civilian status pursuant to Article 50, item 1, of Additional Protocol I.**[159] On this basis, the Judges of the Chamber held 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 groups."[160] It added that the nature of a crime against humanity is defined as much by the victim's civilian status as by its scale and its organisation.[161] This approach narrows the concept of "civilian" in conformity with international humanitarian law and will be subsequently upheld by the Appeals Chamber in the ***Galić*** Appeal Judgement which found that "it would not necessarily be correct to state […] that a person *hors de combat* is a civilian in the context of international humanitarian law".[162]

In the present case, the Appeals Chamber notably relies in its reasoning on the ***Martić*** Appeal Judgement. Nevertheless, it is interesting to observe that this Chamber

[155] *Mrkšić* Judgement, para. 449.
[156] *Mrkšić* Judgement, para. 449.
[157] *Mrkšić* Judgement, para. 450. The Judgement also refers to the *Tadić* Judgement, paras 641 and 643 as well as the *Blaškić* Judgement, para. 214.
[158] *Blaškić* Appeal Judgement, paras 113 and 114.
[159] *Blaškić* Appeal Judgement, paras 113 and 114.
[160] *Blaškić* Appeal Judgement, paras 113 and 114.
[161] *Blaškić* Appeal Judgement, paras 113 and 114.
[162] *Galić* Appeal Judgement, para. 144.

considered the fact that Article 5 of the Statute defines crimes against humanity more narrowly than required under customary international law by including a requirement that they be linked "to an armed conflict in which distinction must be made between combatants and non-combatants" under international humanitarian law.[163] On this point, Article 50 (1) of Additional Protocol I gives a precise definition of the concept of "civilian population". In a commentary on this Article, the International Committee of the Red Cross specifies in para. 1915 the persons excluded from civilian status under Article 4 (A) of the Third Convention:

"(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war."

In the light of these precedents, I find the reasoning followed by the Appeals Chamber in the ***Tolimir*** case highly questionable because, as stated by the Trial Chamber in the ***Martić*** Judgement, "to allow for the term 'civilians' to include all persons who were not actively participating in combat, including those who were *hors de combat* at the time of the crime would impermissibly blur this necessary distinction".[164] It appears that, in this matter, the Chamber chose to apply Common Article 3 of the Geneva Conventions, which makes a distinction between persons directly involved in

[163] *Martić* Judgement, para. 56.
[164] *Martić* Judgement, para. 56.

hostilities and those who are not, including members of armed forces who have laid down their arms.

While Common Article 3 is the applicable law in the context of a non-international armed conflict, the fact remains that the strict and precise definition given in Article 50 (1) of Additional Protocol I applicable in the context of an international armed conflict is the correct one to apply in the present case. Indeed, as stated in the ***Mrkšić*** Judgement, "it would have been totally incongruous for the Appeals Chamber to have drawn a customary law definition of civilians and civilian population from the sources above, as applied to Article 5, and not intended the definitions thereafter to apply whether in international or non-international armed conflict".[165] While I join in the findings of the ***Mrkšić*** Chamber, this Article is in my view intended to apply to **all types of armed conflict**. Consequently, I do not share the reasoning adopted by the Appeals Chamber in its broad definition of the notion of a civilian population.

b. The legal standard applicable to crimes against humanity under customary international law

To understand why it is necessary to take a strict approach to the concept of "civilian", it is useful to take a look at the Statute of our predecessors in international criminal law showing that crimes against humanity were from the outset understood to be crimes against civilians, as evident in the expression "against any civilian population" in Article 6 (c) of the Nuremberg Statute.[166] This further supports the proposition that crimes against humanity are committed against civilians, not combatants or fighters. The argument underlying the requirement for a widespread or systematic attack is only justified insofar as a civilian population is the target, and should therefore be treated not as a condition *sine qua non*, but as a threshold

[165] *Mrkšić* Judgement, para. 456
[166] *Mrkšić* Judgement, para. 458.

requirement, to avoid isolated yet serious violations of human rights being brought before the Tribunal.[167]

This approach was taken by the Preparatory Commission for the International Criminal Court which in Article 7 (1) (b) of its draft on the elements of crimes included extermination as a crime against humanity. In item 3 of this Article, it is stated that the *mens rea* of the crime of extermination lies in the context of a **massacre of members of a civilian population**.[168]

In the light of customary provisions and the evolution of jurisprudence since the ***Tadić*** Appeal Judgement, it is incorrect to say that this is "long-standing jurisprudence", in the words of the majority of the Appeals Chamber. On the contrary, it seems that the findings of the majority depart from a jurisprudence that has the merit of embracing the language of the **Nuremberg Statute** and is consistent with the reasoning of the preparatory work on the **Rome Statute**. It would be incongruous to adopt a broad interpretation of Article 5 of the Statute as it risks errors. A rigorous reading of applicable law in Article 5 of the Statute exposes a significant contradiction with the findings of the majority.

It is also important to note that a refusal to consider atrocities committed against combatants *hors de combat* as crimes against humanity does not confer impunity. If such crimes were committed in the context of an armed conflict, they would qualify as **war crimes**, as is most often the case at the ICTY.[169]

c. Analysis of the constituent elements of the crime of extermination

Regardless of the fact that the majority of the Appeals Chamber made an error in law by erroneously applying Article 5, it also had to find that there was a **widespread or systematic attack against a civilian population**. According to the findings of the Trial Chamber, the killing of the men of **Srebrenica** was only a part of a systematic

[167] *Mrkšić* Judgement, para. 458.
[168] *See* Draft of the Preparatory Commission for the Rome Statute.
[169] *Mrkšić* Judgement, para. 460.

and widespread attack targeting primarily the civilian population, and also including military operations against the two enclaves, the expulsion of thousands of women, children and the elderly and restrictions of humanitarian aid.[170]

On the concept of "attack", the jurisprudence of this Tribunal retained several general conditions that must be met, specifically: there must be an attack; the attack must be widespread or systematic; the attack must be directed against a civilian population; the acts of the perpetrator must be a part of that attack.[171] An "attack" in the sense of Article 5 of the Statute is understood to mean conduct involving acts of violence.[172] It is not limited to the use of armed force and also encompasses any mistreatment of the civilian population. The attack does not necessarily have to be a part of an armed conflict.[173] Furthermore, the attack has to be widespread or systematic, this requirement being disjunctive rather than cumulative. The adjective "widespread" describes an attack carried out on a large scale and the number of targeted victims, while the adjective "systematic" refers to the organised nature of the acts of violence, their deliberate repetition and the improbability of their random occurrence.[174]

It is interesting to read paragraphs 103 and 105 of the ***Kunarac*** Appeal Judgement on the moral element required with regard to the attack. It is therefore the attack that must be directed against a civilian population, not the acts of the accused. To qualify the attack as a crime of extermination, a civilian population must be the principal target of the attack. According to the jurisprudence of this Tribunal, there are several elements that must be taken into account to make this determination: the attack, of whatever nature, must be directed against a civilian population. As the Appeals Chamber held, "in the context of a crime against humanity, the civilian population is the primary object of the attack". To make that determination, one must consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes

[170] *Tolimir* Judgement, paras 701 and 710. At this point, I set aside forcible transfer which I shall deal with in more detail in my dissenting opinion on Ground of Appeal no.13.
[171] *Kunarac et al*. Appeal Judgement, para. 85.
[172] *Kunarac et al.* Appeal Judgement, para. 86. *See* also the *Vasiljević* Judgement, paras. 29 et 30, and the *Naletilić* Judgement, para. 233.
[173] *Kunarac et al*. Appeal Judgement, para. 86.
[174] *Blaškić* Appeal Judgement, para. 101.

committed in its course, the resistance to the assailants at the time, and the extent to which the forces.[175]

Strictly observing the jurisprudence, the expression "civilian population" must be taken in its broad meaning and understood to denote a largely civilian population. It must be noted that, on this point, the standard set in the jurisprudence is vague and leaves room for doubt as to the actual presence of civilians compared to combatants. According to this principle, "a population may qualify as 'civilian' even if non-civilians are among it, as long as it is predominantly civilian".[176] The presence within a population of members of armed resistance groups and former combatants, who have laid down their arms, does not alter its civilian character. Although I could subscribe to this approach as far as the **civilian majority** is concerned, I find the way in which the Appeals Chamber applied it in this case to be erroneous.

The Prosecution was unable to prove beyond a reasonable doubt that the 4,970 men who had been killed were civilians in their majority, and not combatants. The various reports and exhibits adduced in evidence do not show clearly the difference between civilians and combatants. Without calling into question the mass crimes perpetrated in the course of these events that could constitute the *actus reus* of the crime of extermination, on the basis of the evidence, **it is not possible to conclude, beyond a reasonable doubt, that the targeted population was civilian in its majority**. In this respect, I believe that the status of the victims, the discriminatory nature of the attack and the resistance to the assailants make this crime a war crime punishable under Article 3 of the Statute. It is for this reason that I differ from the majority opinion as regards the qualification of the *mens rea* for the crime of extermination as a crime against humanity. It is my opinion that Ground of Appeal no. 6 should have been admitted in its entirety.

[175] *Kunarac* Appeal Judgement, para. 96.
[176] *Blaškić* Appeal Judgement, para. 113.

d. Conclusion

In conclusion, I support the partial acquittal of the Accused on Ground of Appeal no. 6.[177] Nevertheless, I differ on the reasoning followed by the Appeals Chamber.

[177] *Tolimir* Appeal Judgement, para. 151.

2. Forcible Transfer (Ground of Appeal no. 13)

The Appeals Chamber recalls that a trial chamber need not refer to the testimony of every witness or every piece of evidence on the trial record "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence".[178] On this basis, it finds that the evidence adduced by the Defence does not disprove the forced character of the displacement of population.[179] Still, a detailed review of the evidence reveals certain facts that deserve to be taken into account. For reasons that I shall explain here below, I **disagree** with the finding of the majority because the evidence does not make it possible to determine beyond a reasonable doubt that the **transfer was forcible and unlawful.**

The forced character of the displacement derives from the **absence of genuine choice** for the displaced persons,[180] as well as the intent to **forcibly displace** a population within national boundaries.[181] International law recognises certain circumstances where forced displacements may be legally justified in times of conflict. Thus, Article 49 of the Fourth Geneva Convention and Article 17 (1) of Additional Protocol II allow for forced displacement under specific circumstances if it is required for the safety of the population or for imperative military reasons.[182]

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[178] *Tolimir* Appeal Judgement, para. 161.
[179] *Tolimir* Appeal Judgement, para.162.
[180] *Stakić* Appeal Judgement, para. 279; *Krnojelac* Appeal Judgement, paras 229 and 233; *Krajišnik* Judgement, para. 724; *Blagojević* Judgement, para. 596; *Brđanin* Judgement, para. 543. *See* also the *Simić* Judgement, para. 126; *Krstić* Judgement, para. 147.
[181] *Stakić* Appeal Judgement, para. 317. *See* also *Popović et al.* Judgement, para. 904; *Milutinović* Judgement, vol. 1, para. 164; *Martić* Judgement, para. 111.
[182] With regard to "imperative military reasons", the Commentary on the Fourth Geneva Convention specifies: If therefore an area is in danger as a result of military operations or is liable to be subjected to intense bombing, the Occupying Power has the right and, subject to the provisions of Article 5, the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge. The same applies when the presence of protected persons in an area hampers military operations. Evacuation is only permitted in such cases, however, when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate.
See the Commentary on the Fourth Geneva Convention, p. 302. Also, the Commentary on Additional Protocol II specifies that "[i]mperative military reasons […] as a ground for derogation from a rule always requires the most meticulous assessment of the circumstances", referring to Article 49 of the Fourth Geneva Convention. *See supra*, footnote 3280. The Commentary adds that, in any case, "The situation should be scrutinised most carefully as the adjective 'imperative' reduces to a minimum cases in which displacement may be ordered." Commentary on Additional Protocol II, p. 1495. *See* also the *Stakić* Appeal Judgement, paras 284 and 285; *Popović et al.* Judgement, paras 901 to 903; *Milutinović* Judgement, vol. 1, para. 166; *Blagojević* Judgement, para. 597.

It follows from the evidence which will be analysed below that not only were **the civilians** resolute in their wish to leave the enclaves of their own accord, but that the intention to displace these populations originated with the leaders of the ABiH in agreement with UNPROFOR and its DutchBat, with the explicit approval of the UN.

a. Forced displacement of the Muslim population of Srebrenica and Potočari

It is important to observe that, despite the short distance separating the town of Srebrenica from the town of Potočari (approximately 5.7 km), a clear distinction should have been made between the events that occurred in these two places. Although the fates of these two towns were locked together when the population of Srebrenica assembled in order to walk to Potočari, it would have been more sensible, in terms of judicial rigour, to describe first the events linked to **Srebrenica** and only then concentrate on the town of **Potočari.**

The evidence shows that, despite the presence of a **common factor** – the population's wish to leave those places - there are certain differences as regards the intent to displace them. While in the **town of Srebrenica** the population was displaced because it was the intention of the authorities of the Republic of Bosnia-Herzegovina to have the population leave with the help of the DutchBat,[183] in the town of Potočari the population was displaced at the initiative of the UN authorities, i.e. UNPROFOR.

In her dissenting opinion, **Judge Nyambe** rightly points out the significance of the Prosecution's Exhibit **D00538**. This exhibit, a letter dated **28 August 1995, addressed by the 2nd Corps of the ABiH** to its General Staff, describes the context of the negotiations and relates the fall of Srebrenica, stating that the evacuation of civilians was discussed in the context of military operations and that it was **proposed**

[183] The evidence shows that the UN initiated the displacement of the Bosnian Muslims of Srebrenica towards Potočari. Vincentius Egbers, Exhibit P01142, Transcript *Popović et al.*, p. 2879 (20 October 2006); Evert Rave, Transcript p. 6858 (27 October 2010); Evert Rave, Exhibit P01004, Transcript *Krstić*, p. 923 (21 March 2010); Mirsada Malagić, Transcript p. 10021 (16 February 2011) (where the witness testifies that, even though the Bosnian Muslims could not understand what DutchBat soldiers were saying, the latter motioned and gestured to them to direct them to Potočari); Johannes Rutten, Exhibit P02629, Transcript *Popović et al.*, p. 4883 (30 November 2006).

***to,* and not *by* the VRS**.[184] This report makes no mention of any forced displacement of the population as a result of being targeted by the Bosnian Serb forces; it explains instead that the population had received orders to leave even before arriving at Potočari.[185] On this point, Exhibit **P00990** contains facts that corroborate the significance of Exhibit D00538, showing that, as of 9 July 1995, the authorities of the **Srebrenica municipality** evidently had the intention to get the population of the enclave to leave, since they had begged **Alija Izetbegović,** the BH President, as well as Delić, to conclude urgently an agreement with the VRS to open a corridor for this purpose.[186]

This evidence does not lead me to the same reasoning as the majority of the Appeals Chamber reached, underestimating the significance of Exhibit **D00538**. For as it held that the Trial Chamber need not refer to every piece of evidence,[187] the Appeals Chamber proceeded to make a very narrow interpretation of Exhibit D00538.[188] On this point, I cannot help but recall the jurisprudence of the Tribunal in appeals proceedings which holds that, "insufficient analysis of evidence on the record can amount to a failure to provide a reasoned opinion *[by the Trial Chamber]*".[189] Such a failure in the reasoning "*constitutes an error in law requiring de novo review of evidence by the Appeals Chamber"*.[190]

As regards the restrictions on **humanitarian convoys**, the Accused said in his closing statement that different treatment had been given to **UNHCR** convoys carrying food for the civilian population of Srebrenica and the **UNPROFOR** convoys carrying

[184] Exhibit D00538, p. 4.
[185] Exhibit D00538, p. 6.
[186] Exhibit P00990; Ratko Škrbić, Transcript, pp. 18944 to 18947 (7 February 2012). *See* also Exhibit P00023.
[187] *Tolimir* Appeal Judgement, para. 161.
[188] *Tolimir* Appeal Judgement, para.162.
[189] *Zigiranyirazo* Appeal Judgement, paras 44 to 46; *Muvunyi* Appeal Judgement, paras 144 and 147, footnote 321, referring to the *Simba* Appeal Judgement, para. 143 (stating that, in that specific context, the fact that the Trial Chamber had neglected to explain its treatment of a particular witness testimony constituted an error in law).
[190] *Kalimanzira* Appeal Judgement, paras 195 to 201; *Zigiranyirazo* Appeal Judgement, paras 44 to 46; *Simba* Appeal Judgement, paras 142 and 143; *Limaj* Appeal Judgement, para. 86; *Kalimanzira* Appeal Judgement, paras 99 and 100; *Muvunyi* Appeal Judgement, paras 144 and 147, footnote 321.

materiel for the same.[191] **It emerges from the evidence that UNHCR convoys were not subject to restrictions**; Exhibit D00538 attests to the fact that the town had several food depots and that, on the eve of the capture of Srebrenica, people had broken into "all the warehouses in the town and gathered all the stocks of food".[192] In addition, evidence shows that beginning in July 1995, the **ABiH** not only established several checkpoints in order to block and inspect the convoys themselves,[193] but seized the food and other supplies carried by humanitarian convoys.[194]

Concerning the disastrous conditions faced by the people seeking refuge in the UN base in Potočari from 11 to 13 July 1995, it transpires from witness testimony that, as of 1993, the civilians had been eager to leave the enclave and used UN supply convoys to depart from the area.[195] Paragraph 206 of the Judgement stated that the wish of the population to leave had become stronger in the months that followed because of the intense fighting between the warring parties and the fear of NATO air strikes. The fighting between the parties and the presence of 30,000 to 50,000 refugees living in life-threatening conditions could only result in the civilian population wishing to leave and to be evacuated.[196] It is also useful to cite Exhibit **D00324** wherein Leendert Van Duijn (a Dutchbat officer), corroborates this proposition by describing before the Dutch Parliament the living conditions in Potočari as intolerable and making it impossible to stay there any longer.[197]

[191] Closing statement of the Accused, Transcript pp. 19469 and 19470 (22 August 2012).
[192] Exhibit D00538, p. 4.
[193] Cornelis Nicolaï, Transcript, pp. 4095 to 4097 (18 August 2010).
[194] Exhibit D00080; Richard Butler, Transcript, p. 17214 (24 August 2011); Slavko Kralj, Transcript, pp. 18292 to 18295 and 18299 (23 January 2012).
[195] PW-022, Exhibit P00097, Transcript *Popović et al*, p. 3934 (15 November 2006). PW-022 testified about the transport and stated that some high officials or their families had priority and that many ordinary people were therefore unable to board the UNHCR lorries, so there was a process of selection to decide who could or could not have a place on a lorry. PW-022, Exhibit P00096 (confidential), Transcript *Popović et al.*, pp. 4040 and 4041 (private session) (16 November 2006); PW-022, Transcript, pp. 1107 to 1110 (14 April 2010). *See* also the testimony of a witness who states that his sister had already left in 1993 in an organised convoy. Salih Mehemedović, Exhibit P01531 (15 June 2000), p. 3.
[196] PW-063 testified that he had never "heard of any case of anybody who had expressed a desire to stay in the area, either in Srebrenica or in Bratunac". *See* PW-063, Transcript p. 6522 (19 October 2010). He had the impression that those in Potočari wanted to leave for Tuzla as soon as possible. *See* PW-063, Exhibit P00867, Transcript *Popović et al.*, p. 9316 (23 March 2007). *See* also Mirsada Malagić, Transcript, p. 10033 (16 February 2011) ("Everybody […] simply wanted to leave Potočari").
[197] Exhibit D00324, p.17.

As for the negotiations about transporting the population out of Potočari, it is important to note that the recording in Exhibit P02798 shows that these negotiations started at the initiative of the **UNPROFOR, not the VRS**, and only after consultations with the authorities in Sarajevo.[198] In response to a request from **Colonel Karremans** who believed he had to support the Bosnian Muslims' express wish to be safely transported out of the enclave with the assistance of the VRS, **General Mladić** took it upon himself to organise new talks at the **Hotel Fontana**, attended by representatives of the Bosnian Muslim civilians.[199] In the course of these meetings, contrary to what is stated in the Judgement,[200] none of the recordings show any intimidation or authoritarian behaviour on the part of General Mladić towards the participants; on the contrary, he is hospitable and courteous.[201] **The video footage that I have seen is particularly edifying as regards the atmosphere and the substance of the discussions.**

Regarding the transport of Bosnian Muslim civilians, it is important to note that not only was the UN aware of the evacuation, but that the highest-ranking UNPROFOR and DutchBat officers were informed of the agreements on the transport of civilians from Potočari. Exhibits **D00174**[202] and **P00608**[203] are two encrypted telegrams dated 11 and 12 July 1995 sent by **Akashi** to **Kofi Annan**, Deputy Secretary-General at the time, referring to the UNPROFOR plan to evacuate the refugees from Srebrenica.[204] Furthermore, in his

[198] Exhibit P02798, disc 1, 00 hr 42 mn 55 sec, p. 17.
[199] Exhibit P02798, disc 1, 01 hr 00 mn 24 sec to 01 hr 01 mn 40 sec, p. 26.
[200] The Judgement focused on the testimony of Evert Rave and other participants in the meeting for whom the screams of the pig being slaughtered was menacing; *See* Evert Rave, Transcript, pp. 6753, 6756 and 6757 (26 October 2010). *See* also PW-071, Transcript, p. 6077 (private session) (30 September 2010). Still, it is possible to draw a different conclusion from the evidence. *See* on this point exhibit D00037, where it is clearly stated that "[a]uthorisation had been given to slaughter and deliver [a pig] for UN troops stationed in the hotel at Bratunac".
[201] He offers cigarettes to those present (Exhibit P02798, disc 1, 00 hr 46 mn 46 sec to 00 hr 46 mn 52 sec, p. 18); beer and sandwiches for lunch (Exhibit P02798, disc 1, 01 hr 08 mn 22 sec to 01 hr 09 mn 30 sec, pp. 31 and 32). As there was no beer, the soldiers later had white wine mixed with mineral water (Exhibit P02798, disc 1, 01 hr 08 mn 22 sec to 01 hr 09 mn 30 sec, p. 32). He continued to behave in the same way at the third meeting at Hotel Fontana, offering his car to Čamila Omamović so that she and her daughter, grand-daughter and mother could be evacuated in perfect safety, as she had asked (Exhibit P02798, disc 3, 00 hr 12 mn 57 sec to 00 hr 13 mn 12 sec, p. 51). He later gave the same treatment to the Bosnian Muslims present at the subsequent meetings in Bokšanica, offering, for example, a jacket to Hamdija Torlak, who was freezing (Exhibit P02798, disc 4, 00 hr 25 mn 08 sec to 00 hr 25 mn 50 sec, pp. 118 and 119).
[202] Exhibit D00174, p.2.
[203] Exhibit P00608, p.5.
[204] *See* the closing statement of the Accused, Transcript, pp. 19508 to 19512 (22 August 2012).

own testimony, officer **Franken** speaks of a **written agreement** concluded between **General Mladić** and **General Rupert Smith on this evacuation**,[205] but as the UN was not in a position to carry out the evacuation itself, **they accepted that it be carried out by the VRS.**[206] Exhibits P01008[207], D00036[208] and P02798[209] containing transcripts of the video footage of the meetings initiated by members of the DutchBat for the local Bosnian Muslim authorities to negotiate with the VRS authorities clearly show the initiative taken by the DutchBat to reach an **immediate cease-fire agreement in order to protect the civilian population.**[210] For the above reasons I completely disagree with the interpretation of these exhibits made by the Appeals Chamber and join in the opinion of Judge Nyambe on this issue, i.e. that "*[c]learly, the evacuation was discussed on all levels of the leadership, meaning at the level of the UN, by Akashi and Annan, at the level of the BH leadership in Sarajevo, and on the ground at the level of UNPROFOR, in that case DutchBat.*"[211]

Even though, in the course of this evacuation, certain members of the VRS and the MUP may have triggered panic, other members were deployed around the civilians to protect them.[212] At Potočari, Franken had received the order to cooperate so that the evacuation could be "done in the most humanitarian and legalised way".[213] Witness testimony speaks to the desire of the civilian population to leave **of their own accord** in order to be transported to safer areas held by the ABiH,[214] and not to return until after the cessation of hostilities.[215] It follows from the analysis of the evidence that

[205] Robert Franken, Exhibit P00597, Transcript *Popović et al.*, pp. 2553 and 2554 (17 October 2006).
[206] Robert Franken, Exhibit P00597, Transcript *Popović et al.*, p. 2560 (17 October 2006).
[207] Exhibit P01008, pp. 19-22 and 26-27.
[208] Exhibit D00036.
[209] Exhibit P02798, disc 4, 00 hr 35 mn 48 sec to 00 hr 36 mn 39.
[210] On this point, Exhibit D00174 refers to a communication of 11 July 1995 wherein we read that the DutchBat was to "enter into local negotiations with the [VRS] forces for immediate ceasefire" and "take all reasonable measures to protect refugees and civilians in [your] care". *See* also Exhibit P01463, p. 2; the closing statements of the Accused, Transcript, pp. 19509 to 19511 (22 August 2012).
[211] *See* the Dissenting Opinion of Judge Nyambe, p. 21, para. 43.
[212] Mendeljev Đurić, Exhibit P01620, Transcript *Popović et al.*, pp. 10807 and 10808 (2 May 2007).
[213] Robert Franken, Exhibit P00597, Transcript *Popović et al*, pp. 2680, 2682 and 2683 (18 October 2006). *See* also Eelco Koster, Exhibit P01483, Transcript *Popović et al*, pp. 3094 and 3095 (26 October 2006).
[214] PW-017, Exhibit P02883, Transcript *Krstić*, pp. 1255 and 1256 (24 March 2000); Mirsada Malagić, Transcript, p. 10036 (16 February 2011). *See* also Paul Groenewegen, Exhibit P00098, Transcript *Blagojević*, p. 1025 (10 July 2003).
[215] Mevlinda Bektić, Exhibit P01534 (16 June 2000), p. 5; Šifa Hafizović, Exhibit P01527 (16 June 2000), p. 4; Nura Efendić, Exhibit P01528 (21 June 2000), p. 5.

neither the intention, nor the forced character of the displacement as constitutive elements of forcible transfer were present in the events that followed at Srebrenica and then Potočari.

b. Forcible transfer of the Muslim population of Žepa

Exhibit **D00144**[216] demonstrates that the civilian population wanted to leave of their own accord from the beginning of 1995. This wish was a consequence of the constant fighting between the VRS and the ABiH and resulted in mass departures of civilians who wanted to leave the enclave without asking the approval of the local authorities.[217] According to the military narrative on the fall of Žepa found in exhibit **D00055**, Palić was confronted with a wave of departures and had to stop between **300 and 400** persons per day in order to stop illegal departures.[218] The ABiH viewed these voluntary departures as a serious problem because none of the measures taken by the military and civilian authorities could dissuade people from leaving.[219] On this point, **Hamdija Torlak** testified that it was only natural that people wanted to leave because they were besieged under very difficult conditions.[220]

Under those circumstances, the **War Presidency of Žepa** understood that some measure of protection was necessary to end that situation.[221] Indeed, it can be seen from certain exchanges between the ABiH authorities that the leaders in Žepa were trying to come up with a **plan to evacuate the civilian population**. This intention is further confirmed by Exhibit **P00127,** which is a report from **Živanović** addressed to the Drina Corps Command, dated **13 July 1993,** where he writes that the leadership of Žepa was ready to proceed with the evacuation, but that the leadership in Sarajevo was negatively influencing their decision.[222] Exhibits D00106,[223] D00060[224] and

[216] Exhibit D00144, pp.1-2. Ratko Škrbić, Transcript, pp. 18843 to 18845 (6 February 2012).
[217] Exhibit D00144, p.1.
[218] Exhibit D00055, paras 11 and 12.
[219] Exhibit D00144 p.1.
[220] Hamdija Torlak, Transcript, p. 4607 (30 August 2010). D00099, p.1.
[221] Hamdija Torlak, Transcript, p. 4375 (24 August 2010).
[222] Exhibit P00127, p. 1.
[223] Exhibit D00106, Letter of 18 July 1995, from the President of Žepa Mehmed Hajrić to the President of BiH Alija Izetbegović.

D00054[225] are letters exchanged between the political leaders of BiH who speak of their wish to begin negotiations with the VRS. In fact, Exhibit D00060 attests to the fact that the BiH political leadership had prepared a plan **of withdrawal** of the civilian population from Žepa, while simultaneously coordinating operations to engage even further in combat with the VRS.[226]

Exhibit **D00636,** which is a draft plan of evacuation from Žepa signed by **Bećir Heljić, Rašid Kulovac and Sejdalija Sućeska** and submitted to **Alija Izetbegović,** amply corroborates these exchanges. This Prosecution exhibit which includes a cover letter signed by **Bećir Sadović**, sent to General **Delić** on 18 July 1995, makes four important points. In item (1) **Sadović** proposes to **Delić** that the **UNPROFOR** evacuate the women, children and elderly from Žepa, items (2) and (3) describe, among other things, the efforts being made for other volunteers to come to the aid of the ABiH, and then item (4) states that a plan of evacuation of the population has been prepared in case that "items 1 and 2 above should fail". In this regard, **UNPROFOR** recognised, in a report dated **26 July 1995**, that the civilians had not been forced to leave, but had decided to as part of the total evacuation of the enclave, which did not involve physical violence or the use of force.[227] It seems rather surprising, under the circumstances, that a different decision could have been made …

Indeed, the evidence shows that the population wanted badly to be transported out of **Žepa** and that this plan of evacuation of the civilian population of **Žepa** was initiated by the political leadership of the ABiH. It follows from this analysis that the evacuation of the civilian population had been planned by the political leadership of the ABiH **even before** the last military attack on **Žepa** was launched. With this in mind, the argument that "forced displacement is not justified in circumstances where the humanitarian crisis that caused the displacement is itself the result of the accused's

[224] Exhibit D00060, Letter of 18 July 1995, from the President of BiH Alija Izetbegović to General Rasim Delić.
[225] Exhibit D00054, Letter of 19 July 1995 from the President of BiH Alija Izetbegović to the President of Žepa Mehmed Hajrić.
[226] Exhibit D00060.
[227] Exhibit D00175.

unlawful activity"[228] does not apply to the present case. Once this is clear, **there is no evidence to** conclude beyond a reasonable doubt that the evacuation scenario for the Bosnian Muslim population was the direct result of VRS restrictions and VRS military activities.[229]

In reality, the evacuation was a step taken at the initiative of the ABiH for preventive purposes: to protect the civilian population. Although Article 49 of the Fourth Geneva Convention and Article 17 (1) of Additional Protocol II allow for forced displacement under specified circumstances, when required for the security of the population or for imperative military reasons, these two texts are not applicable in the present case. In effect, the measures taken by the ABiH leadership do not fall within the scope of application of these articles, as this leadership was not acting as an occupying power, but as the leadership of the territory involved in the conflict, and their wish to evacuate their population was therefore completely legitimate.

In light of the above, none of the constituent elements of forcible transfer are present in this case – not the intent and not the forced character of the displacement. It is important to note that the evacuation of the population of **Žepa** was done in a **voluntary fashion**, because the population wanted to leave the enclave. This wish became reality through negotiations initiated by the ABiH leadership who had prepared an evacuation plan in order to move the civilian population.

Under these circumstances, I cannot but admit Ground of Appeal no. 13 which is particularly well-supported by the evidence.

c. The legal status of the members of the column

For the events that occurred after the fall of Srebrenica, the Prosecution alleged that **the moving of the column** was an element of **forcible transfer**.[230] The facts,

[228] *See* paras 800-810 of the Judgement. *See* also the *Krajišnik* Appeal Judgement, para. 308, footnote 739; *Stakić* Appeal Judgement, para. 287; *Popović et al.* Trial Judgement, para. 903.
[229] *See* para.1036 of the Judgement.
[230] *See* paras 818-822 of the Judgement.

however, point to a very different conclusion. Apart from the purely formal aspects, such as the need for a more rigorous observation of the rules of procedure,[231] the real issue is to establish the exact legal status of the members of the column in order to determine the applicable law.

In this case, according to the witnesses, we have a column several thousand strong, between **10,000** and **15,000** persons,[232] made up first of sappers, military men who cleared the path, followed by members of the 28th Division and various other sections stretching several kilometres and headed to the town of Tuzla as their final destination.[233] It was a mixed column made up of army members divided into brigades and "civilians" with and without weapons.[234] In the brigades, some of the men did not carry weapons and some did,[235] some were in civilian clothes and others in uniform.[236] There were also within the column military-age men, a **small number of women**[237] and **children** as well as some medical personnel from hospitals.[238] In each section of the column there were military men who kept the column together and showed the way.[239] The presence of civilians seems to have been due to the fear that reigned among the people who had found themselves in Srebrenica and had preferred to flee together with ABiH troops and go in the direction of the column, rather than becoming prisoners of the Serb forces and suffering mistreatment, or even death.[240] As the column advanced, certain sections were cut off from the others and were caught in several ambushes that killed a large number of persons on the ABiH side and some on the VRS side.[241] The victims on the ABiH side were buried in mass graves, primary or secondary. Only forensic medical examination of the bodies of the victims can establish whether these persons died in an explosion or were summarily executed.

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[231] In the *Popović et al.* Judgement, Judge Kwon rightly invokes procedural errors resulting from the legal qualification of the column as a constituent element of forcible transfer.
[232] Judgement, para. 269.
[233] Mevludin Orić, Exhibit P00069, T(F) *Popović et al.*, p. 873 (28 August 2006) and p. 1078 (30 August 2006).
[234] T(F) *Popović et al.*, p.1050 (30 August 2006).
[235] T(F), *Popović et al.*, p. 874 (28 August 2006).
[236] T(F), *Popović et al.*, p. 1059 (30 August 2006).
[237] PW-116, T(F), *Krstić*, p. 2944 (14 April 2000).
[238] PW-106, T(F), *Popović et al.*, pp. 4019, 4026 and 4027 (private session) (16 November 2006).
[239] PW-127, T(F), *Popović et al.*, p. 3574 (private session) (3 November 2006).
[240] PW-116, T(F), *Krstić*, p. 2995 (14 April 2000).
[241] The VRS also suffered losses, but these losses were minimal.

But what was the legal status of these victims? In the eyes of international humanitarian law, combatants, including members of armed groups, do not enjoy the protection of *common* Article 3 of the four Geneva conventions unless they have laid down their arms or were placed *hors de combat*. In this case, there was no surrender of weapons – on the contrary, a fair number of the members of the armed force of the 28th Division were militarily well equipped. In that sense, in the eyes of **international humanitarian law**, these members, including those in civilian clothes and not carrying weapons or who did not take part in combat, were **belligerents,** considered as legitimate military targets for the whole duration of the conflict.

This approach was taken by the ICRC in its commentary on Protocol I which reads: *"All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of 'quasi-combatants', which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears".*[242] The ICTY Appeals Chamber, in the ***Blaškić*** Appeal Judgement dated 29 July 2004, upheld this approach when it corrected the Trial Judgement, stating that *"the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organisation, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status".*[243] This decision accords with the position of the ICRC when it holds that *"The Protocol […] does not allow this combatant to have the status of a combatant while he is in action, and the status of a civilian at other times. It does not recognize combatant status 'on demand' On the other hand, it puts all combatants on an equal legal footing, in accordance with a desire expressed long ago, as we have seen."*[244]

[242] *See* the Commentary on Article 43, para. 2 of Additional Protocol I, p.521, para. 1677.
[243] *Blaškić* Appeal Judgement, para.114.
[244] *See* the Commentary on Article 43, para. 2 of Additional Protocol I, pp. 521-522, para. 1678.

What remains to be seen is: what was the actual status of the civilians in that column? Regarding the participation of civilians in the hostilities, there still remain several lacunae in the law. While common Article 3 of the four Geneva conventions and Article 51, para. 3 of Protocol I and Article 13, para. 3 of Protocol II stipulate that their direct participation suspends their protection against the dangers resulting from military operations,[245] the question is which criteria determine such participation. According to ICRC recommendations, direct participation requires a convergence of **three cumulative elements**: a threshold regarding the harm likely to result from the act, a relationship of direct causation between the act and the expected harm, and a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.[246]

Thus, civilians who directly participate in hostilities without belonging to armed forces or armed groups lose protection only for the duration of their participation.[247] In other words, civilians who participate directly in hostilities do not cease to be part of the civilian population, but their protection against direct attack is temporarily suspended.[248] On this point, it is important to distinguish between the restrictive term **"direct participation"** and another, proximate term "**active participation"** which includes all hostile acts, direct and indirect, committed against a party to the

[245] According to the ICRC, civilians who, by their direct participation, engage in acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces forfeit the benefits of their protection and are considered as a legitimate military target. *See* Commentary on Article 51, para. 3 of Protocol I, p.633, para. 1944. In the same sense, the *Blaškić* Judgement, para.180; *Galić* Judgement, para. 48.

[246] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, op. cit.*, p.48. The ICRC, in its Interpretative Guidance, considers direct participation also to include measures preparatory to the execution of a specific hostile act, as well as the deployment to and return from the site of its execution. *Ibid.*, pp.68-71. Previously, certain delegates at the 1974 Diplomatic Conference expressed the view that direct participation in hostilities included "preparations for combat and return from combat". *See* the Acts of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977, XIV, p. 340. *See* also the Report of the Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, Doc. OEA/Ser.L/V/II.102, 26 February 1999. Chap. IV, paras 54-55.

[247] Direct participation of civilians in hostilities has been interpreted in a number of trial judgements of the ICTR and the ICTY as reflecting an analogy between combatant and civilian status. However, this view was rejected by the ICTR Appeals Chamber in *Akayesu* and in ICTY trial judgements in *Blagojević & Jokić and Strugar*, which favoured a broader and more differentiated approach to the notion of civilians not participating directly in hostilities.

[248] *See* in this sense *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, op. cit.*, p.73.

conflict.[249] Thus, when it comes to distinguishing between combatants and non-combatants, i.e. legitimate military targets and targets protected from attacks, only the term **direct participation** should be used to avoid considering innocent people as legitimate military targets.[250] ICTY chambers have favoured extensively safeguarding this principle, extending protection to any person who was not participating, or no longer participating at the moment of the commission of the culpable act. In the *Halilović* Judgement, the Trial Chamber invokes the "*criterion of the specific situation*" of the victim at the time of the commission of the crime to determine if the victim was entitled or not to protection under Common Article 3.[251] This question needs to be examined on a case-by-case basis, having regard to the individual circumstances of the victim at the time of the acts.[252]

Today, what we call **non-combatants** – those who, in the past, were more or less just spectators in the drama – now play a part which is hardly less important than that of combatants. This is evident from the activities of resistance or self-defence movements,[253] whose structures are established outside of any control of a traditional army and the participation of civilians in resistance becomes a reality that is difficult to deal with because of the delayed effects of some of its operations. The result of this transformation of players in modern non-international armed conflicts is that it makes it more difficult to distinguish between **civilians** and **combatants**, since the civilians

[249] This broader term is found in certain reports from expert meetings organised by the ICRC. *See*, for example, the Report presented by the ICRC at the 21st International Conference of the Red Cross in Geneva, May 1969, pp. 81 *et seq*. 41.

[250] Article 8, para. 2 (e) of the ICC Statute qualifies a war crime in non-international armed conflicts as "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities". It therefore opts for a restrictive interpretation of participation in hostilities which does not include civilians indirectly participating in the conflict. In the case *Thomas Lubanga Dylo*, with regard to supplying food to an air base, the ICC holds that acts clearly unrelated to the conflict should not be considered as direct hostile acts. *See* ICC, Preliminary Chamber I, Decision of 29 January 2007, *Thomas Lubanga Dylo*, ICC-01/04-01/06, para. 262.

[251] Regarding the immediate result of military operations, Jean MIRIMANOFF-CHILIKINE considers it appropriate to take a relative view of the question of immediacy of the result of an act of participation because there are circumstances where the harmful effect of an act of participation is delayed.

[252] *Strugar* Appeal Judgement, para. 178.

[253] For example, the second Gulf war (2003) which ended in the US occupation of Iraq, saw the emergence of an armed resistance movement against this occupation. The most prominent among them was the "Mehdi army" of Muqtada Al-Sadr based in Sadr City, to the north-east of Baghdad. Before the US occupation the conflict was between the regular Iraqi army and the US-British coalition troops. In that case, it was important to separate the inter-state conflict from the hostilities related to the occupation.

who participate in this type of conflict wear neither uniforms nor any other signs that would enable such a distinction. The simultaneous presence of members of armed forces and the civilian population can also add to the complexity of some situations. On this issue, Article 50 para. 3 of Additional Protocol I provides that the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.[254]

In this case, the evidence does not enable us to determine to what degree the civilian victims had participated. If, based on witness testimony, some of the armed civilians may be thought to have had direct **participation,** because of their role in the fighting, the harm inflicted by the weapons they carried and their direct link with the fighting men in the column,[255] what needs to be determined is the status of the civilians who were in the column, but did not carry weapons. Can they be considered as having had a direct participation in the hostilities by their mere presence alongside the armed forces?[256] Can they be considered as legitimate targets and their deaths collateral damage?

In terms of IHL, the protection of the civilian population must at all times observe the distinction between civilians and combatants. Thus, operations shall only be directed against military objectives,[257] taking precautions[258] to avoid causing losses or damage which would be excessive in relation to the military advantage anticipated.[259] The prohibition against directing attacks at the civilian population is a fundamental

[254] *Kupreškić et al.* Judgement, para. 513.
[255] Nonetheless, a civilian who takes part in combat, alone or in a group, becomes thereby a legitimate target, but only when and for such a time as he participates in hostilities, *D. Milošević* Appeal Judgement, para. 57; *Strugar* Appeal Judgement, paras 174 and 179.
[256] In the *Strugar* Appeal Judgement, the Appeals Chamber considers as examples of indirect participation in hostilities: participating in activities in support of the war or military effort of one of the parties to the conflict, selling goods to one of the parties to the conflict, expressing sympathy for the cause of one of the parties to the conflict, failing to act to prevent an incursion by one of the parties to the conflict, accompanying and supplying food to one of the parties to the conflict, gathering and transmitting military information, transporting arms and munitions and providing supplies, and providing specialist advice regarding the selection of military personnel, their training or the correct maintenance of the weapons. *Strugar* Appeal Judgement, para. 177.
[257] Article 48 of Additional Protocol I and Article 13, para. 2 of Protocol II; *Galić* Appeal Judgement, para. 190; *D. Milošević* Appeal Judgement, para. 53; *Galić* Appeal Judgement, para.190; *Kordić and Čerkez* Appeal Judgement, para. 54.
[258] Additional Protocol I, Article 57.
[259] Additional Protocol I, Article 51, para. 5 (b).

principle of customary international law; civilian casualties are only legitimate if their deaths were *incidental* to military operations and if their number is not disproportionate to the specific and direct military advantage anticipated.[260]

In this particular situation, we have *a priori* thousands of deaths on the ABiH side and dozens on the side of the VRS, whereby the **degree of proportionality** seems to be exceeded in violation of the principle of precaution. Still, the different degrees of participation of civilians in the hostilities pose some practical problems, one of the main ones being doubt as to the identity of the adversary. Thus, when the fighting occurs at night, in the woods or in bad weather, the armed forces face serious difficulties in guaranteeing respect for the principle of distinction between civilians and combatants. In the present case, the difficulty for the VRS was in distinguishing accurately between three categories of persons: the members of the ABiH armed forces, the civilians who directly participated in the hostilities in a spontaneous, sporadic or non-organised manner, and the civilians who may or may not have acted in support of the enemy but who, at the critical time, were not **directly** participating in the hostilities. In such a situation, IHL considers that, when there is doubt as to a person's status, that person must be considered as a civilian. The ICRC, in its commentary on Article 50 of Additional Protocol I states that it "*concerns persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked.*"

According to this approach, acting with disregard for the consequences of the attack,[261] the VRS forces failed to take the necessary precautions to avoid that protected persons be taken for military targets; still, the evidence does not make it

[260] *Boškoski and Tarčulovski* Appeal Judgement, para. 46; *D. Milošević* Appeal Judgement, para.53; *Galić* Appeal Judgement, para.190; *Strugar* Appeal Judgement, para.179.

[261] *Strugar* Appeal Judgement, para.270, referring to the Commentary to Additional Protocols, Additional Protocol I, para. 3474, where intent is defined as follows: "the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ("criminal intent" or "malice aforethought"); this encompasses the concepts of "wrongful intent" or "recklessness", viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences".

possible to definitively establish the status of the victims. Consequently, **the evidence does not make it possible to establish beyond a reasonable doubt the identity and the exact circumstances of the killing of the persons who died in the column during the attacks by Serbian forces.**[262] For this reason, the Accused's responsibility for the murders of **civilians** not directly participating in the hostilities does not fall under Article 3 of the Statute which qualifies these crimes as war crimes.

I believe that a more rigorous approach should have been taken on this issue, distinguishing among the dead the persons who died in combat (military men and civilians who participated directly) from civilians who were summarily executed. Based on that list, the exact circumstances of the death of each victim should have been established.

In paragraphs 689 *et seq.* in its Judgement, the Trial Chamber refers to the applicable law, from paragraphs 689 to 697. While I agree completely with its legal analysis, I see a glaring contradiction when it comes to **persons *hors de combat***. The Trial Chamber states in paragraph 695 of the Judgement, relying on the appeal judgements in ***Martić*** and ***Galić***, that these persons cannot claim civilian status,[263] whereas in paragraph 697, referring to the appeal judgements in ***Mrkšić*** and ***Martić***, the Appeals Chamber held that: *"under Article 5 of the Statute, a person hors de combat may thus be the victim of an act amounting to a crime against humanity, provided that all other necessary conditions are met, in particular that the act in question is part of a widespread or systematic attack against any civilian population"*.[264]

In my view, this contradiction calls for a clarification of the protection extended to the "civilian population". Indeed, while the protection granted by common Article 3 of the four Geneva Conventions applies generally at all times and to all persons, combatant or civilian, none the less, combatants, including members of armed groups, can claim protection only on the condition that they have laid down their

[262] *Kvočka et al.* Appeal Judgement, para. 260, referring to the *Krnojelac* Judgement, paras 326-327 and the *Tadić* Judgement, para. 240.
[263] *Martić* Appeal Judgement, para. 302 and *Galić* Appeal Judgement, para. 144.
[264] *Mrkšić* Appeal Judgement, para.36, and *Martić* Appeal Judgement, para. 313.

arms or been placed *hors de combat*. For all other persons who do not have the status of combatant, it is the criterion of "**direct participation**" that applies. Consequently, military-age men who participated directly in the hostilities did not enjoy that protection for the entire duration of their participation.[265]

In its findings in paragraphs 701 *et seq*., the Trial Chamber, in its majority, Judge Nyambe dissenting, concluded that the attack had been widespread and targeted the civilian population, relying on Directive 7 which was, in the opinion of the Trial Chamber, expressly directed against protected civilian populations. Therefore, as stated in paragraph 710, the Trial Chamber found that it had been an attack primarily directed against the Muslim populations of the enclaves of Srebrenica and Žepa. I absolutely cannot share that finding because a review of Directives 7 and 7/1 recalling that the population must be protected shows that they were not directed against the civilian population, but were rather part of a legitimate military operation that had several objectives: to put a stop to ABiH attacks launched from the enclaves; to create a VRS-controlled corridor between the two enclaves; and to achieve recognition from the International Community of the territorial discontinuity of Republika Srpska without enclaves.

Obviously, the military takeover of the two enclaves could not but have an impact on the civilian population, however, as can be seen from the documents and the meetings at Hotel Fontana held by **General Mladić**, the civilian populations had the choice to stay or to leave. Apart from that, it is my opinion that the civilian populations of these two enclaves had only one thing on their minds: to leave the enclaves, because some of them wanted to go back to their areas of origin, while others wanted to go to areas held by the Bosnian army, or even, as we saw in the case of Žepa, go to Serbia. **In conclusion, there was no forcible transfer, and this ground of appeal should have been admitted.**

[265] Among the documents in evidence, the forces that were present (ABiH or VRS) mention the term military-age men between 18 and 60. Upon careful examination of the exhibits, I noticed that some of them were intermingled with the military personnel (D00055). Still, we do not know exactly how many of them joined the column that was fleeing **Srebrenica**, formed by the 28th Division of the ABiH.

B. GENOCIDE

With regard to **genocide,** I cannot concur with the theory of the Prosecution which, like every prosecution, is supposed to be uniform and, whatever it expresses in one case is automatically echoed in other cases.[266]

Thus, Senior Trial Attorney **Nice** said on 12 February 2002 in the trial of **Slobodan Milošević** that "genocide was the natural and foreseeable consequence of the joint criminal enterprise forcibly and permanently to remove non-Serbs from the territory under control".[267] A propos this assertion, it should be noted – as I shall demonstrate further below – that the Prosecution is conflating forcible transfer (resulting from a JCE) with genocide.

In fact, this position of the Prosecution, recurring in all the ICTY cases, must be carefully qualified case-by-case and exhibit-by-exhibit. I am inclined to accept that there was a "genocide", but not the kind portrayed by the vague claims of the Prosecution which fails to take into account the actual status of the persons belonging to the protected group of Muslims gathered in Srebrenica. Indeed, a number of the persons that made up this group were killed in an almost systematic manner, in several locations, within just a few days, in plain sight of the International Community.[268]

[266] *See* the Indictment in the *Tolimir* case, 28 August 2006, Count 1: *Genocide*, pp. 4-17.
[267] *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Hearing of 12 February 2002, T(E), p. 92 (the original text reads: "(…) genocide was the natural and foreseeable consequence of the joint criminal enterprise forcibly and permanently to remove non-Serbs from the territory under control".
[268] As represented by UNPROFOR, the UNHCR, NGOs and the media (CNN in particular) as well as members of military units, all of whom, in theory, had General Mladić as their military Chief and Radovan Karadžić as their Supreme Commander.

1. The Concept of Protected Group (Ground of Appeal no. 8)

Article 4 of the ICTY Statute gives a definition of the **crime of genocide** similar to the one found in Article 3 of the Genocide Convention, consisting of a number of acts intended to destroy, in whole or in part, a "national, ethnic, racial or religious group as such".[269] Consequently, **identifying the victims** who belong to a protected group is a necessary prerequisite for qualifying the crime as genocide.

It is important to note that, when the **Genocide Convention** protects the group in part, it actually protects the group in its entirety. Thus, to recognise that one fraction of a group is distinct based on its geographic location would be to diminish the effect of the protection enjoyed by the group as a whole. As the Trial Chamber of the ICTR stressed in a number of cases, "the victim of the crime of genocide is the group itself, not only the individual".[270]

To this effect, the evidence adduced at trial shows very clearly that the highest Bosnian Serb political authorities and the Bosnian Serb forces operating in **Srebrenica** in July 1995 considered all the Bosnian Muslims, in their totality, as a national group. Indeed, there is no national, ethnic, racial or religious feature or criterion of geographic location that distinguished the Bosnian Muslims residing in Srebrenica during the 1995 offensive from any "other" Bosnian Muslims. On this point, I **disagree** with the Trial Chamber in *Krstić* where it states that: "*the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it*".[271] As a matter of fact, this interpretation goes far beyond the strict meaning of a protected group as defined in Article 2 of the Genocide Convention. Also, it is difficult to follow this reasoning insofar as, in this case, the Bosnian Muslims residing in Srebrenica are seen to constitute a distinct group compared to the Muslims of Bosnia as a whole. Under

[269] *See* Article 2 of the Genocide Convention, and Article 4 of the Statute of the Tribunal.
[270] *Akayesu* Judgement, para. 521. *See* also the *Niyitegeka* Appeal Judgement, para. 53.
[271] *Krstić* Judgement, para. 559, cited in the *Krstić* Appeal Judgement, paras 6-15.

the Convention, however, a national, ethnic or religious group is not an entity composed of distinct parts, but a **distinct entity in itself**.

On the other hand, I subscribe to the reasoning of the Trial Chamber in *Krstić* when it held that the Muslim population of eastern Bosnia-Herzegovina constituted a substantial part of the protected group.[272] In this regard, it is important to recall that under Article 2 of the Genocide Convention, the targeted part must be significant enough to have an impact on the group as a whole.[273] The **International Court of Justice ("ICJ")** holds that it is it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area.[274] On this point, I subscribe to the reasoning of the Trial Chamber when it states that the *"enclave of Srebrenica was of immense strategic importance".*[275] It follows that, despite the relative number of Muslims present in this geographic area compared to the whole Muslim population of Bosnia, they could still be considered as a substantial part of the group inside this area.

In fact, there is no minimal number of victims required in terms of numerical threshold for the targeted group;[276] the targeted part of the group must be "significant enough to have an impact on the group as a whole".[277] Still, although the number of individuals targeted, in absolute terms, is relevant for determining if the part of the group is substantial, it is not decisive".[278] On this issue, the Trial Chamber in ***Jelisić*** was correct in finding that genocidal intent could consist of desiring the extermination of a very large number of the group, but it could also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.[279]

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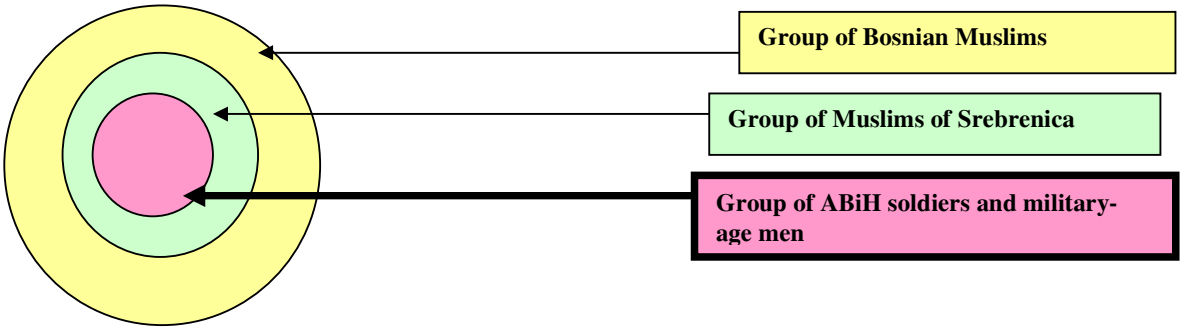
[272] Judgement para. 749. *See* also the *Krstić* Appeal Judgement, para. 12.
[273] Judgement, para. 749, *Krstić* Appeal Judgement, para. 8.
[274] The International Court of Justice held this opinion in para. 193 of its Appeal Judgement of 26 February 2007.
[275] Judgement para. 775. *See* also *Popović et al.* Judgement, para. 865, cited in the *Krstić* Appeal Judgement, paras 15-16.
[276] *Semanza* Judgement, para. 316; *Kajelijeli* Judgement, para. 809.
[277] *Krstić* Appeal Judgement, para. 8.
[278] *Krstić* Appeal Judgement, para.12
[279] *Krstić* Appeal Judgement, para. 8.

It is evident that in this case, the Trial Chamber made its own sub-division of the protected group of Bosnian Muslims.[280] The Chamber held that the intent to destroy military-age men within the group meant the intent to destroy a substantial part of the group, substantial not only in terms of *quantity*,[281] but also in terms of *quality*.[282] This sub-division of a part of the group into sub-groups seems to be based on three criteria: the gender of the victims (only men), their age (only or mainly those of military age) and their geographic origin (Srebrenica and its environs).[283] Such sub-division does not amount to a will to "*destroy a substantial part of the group*",[284] as it includes only the Muslim men of Srebrenica of military age and fit for combat. This means that there was a **"sub-group"** consisting of ABiH soldiers and military-age men. The following diagram provides an exact picture of the protected group in question:



I believe this issue should have been viewed in a much broader framework, regrouping different localities of Bosnia-Herzegovina, including **Srebrenica**. This would have allowed a reasonable trier of fact to consider the **totality** of the victims whose testimonies served as a basis for all the indictments, in order to define properly the concept of "protected group". If there had been, like at Nuremberg, **one single**

[280] In paragraph 750 of the Judgement, the Trial Chamber addresses the issue of the "protected group" indicating in footnote 3141 that this question was ruled on in various judgements (*Krstić* Appeal Judgement, *Blagojević* Judgement, *Popović et al.* Judgement). Whether the Bosnian Muslims of Central Bosnia qualify as a substantial part of the **protected group** is discussed in paras 774 and 775 of the Judgement.
[281] *Krstić* Judgement, para. 594.
[282] *Krstić* Judgement, para. 595.
[283] G. Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, 2005, p. 222.
[284] C. Tournaye, "Genocidal Intent before the ICTY", *International and Comparative Law Quarterly*, Vol. 52, April 2003, p. 459.

trial against Slobodan Milošević, Radovan Karadžić, Ratko Mladić, Zdravko Tolimir and the other accused, the court presiding over that case would have dealt with the totality of the victims. Regrettably, the "slicing up" of the cases did not give us the possibility to have **a view of the whole**: limiting this issue to the enclaves of **Srebrenica** and **Žepa** gave rise to controversies that are amply reflected in the submission of the Appellant.

In his submission, the Accused alleges, pursuant to Article 23 of the Statute, that the Trial Chamber erred in law by omitting to provide a **reasoned opinion** on the criteria for defining a protected group;[285] he also submits that, under Article 4 of the Statute, the Chamber had to establish the facts supporting the finding that the Muslims of Eastern Bosnia were distinct ethnic groups, and it should have also properly identified the reasons that led it to conclude that the Muslims of Eastern Bosnia were a substantial part of the group.[286] The Appellant asserts that the Trial Chamber misinterpreted the conclusions made in other cases, without taking judicial notice of the supporting evidence.[287] In the Appellant's submission, the protected group under Article 4 of the Statute must be identified on a case-by-case basis, relying on the evidence adduced at trial.[288]

In this matter, although I do not share the view of Trial Chamber as regards its findings and reasoning on the concept of a "distinct group",[289] I still believe, like the **Appeals Chamber,**[290] that there is **nothing** in the Statute, the Rules or the jurisprudence of the Tribunal to stop the Trial Chamber from relying on conclusions made in other cases that cover similar facts, in order to reinforce its own findings in

[285] *See* Notice of Appeal, paras 39-40; Appeal Brief, paras 83-85, 87-88.
[286] *See* Notice of Appeal, para. 39; Appeal Brief, paras 83-85, 87-88. *See* Notice of Appeal, para. 40.
[287] Appeal Brief, paras 83, 85. *See* Notice of Appeal, para. 39.
[288] Appeal Brief, paras 83, 85-87.
[289] The *Tolimir* Chamber applied this reasoning to the broader targeted population in the Indictment, namely the Muslim population of Eastern Bosnia, and specifically the enclaves of Srebrenica, Žepa and Goradžde. On this point, I should like to stress that the number of persons missing or killed determined by the *Tolimir* Chamber - 5,749 – is relatively **small** in proportion to the total Muslim population of Bosnia-Herzegovina, but compared to the population of the Srebrenica municipality – 5,749 out of 35,000 – it is very significant.
[290] *Tolimir* Appeal Judgement, para. 185.

the identification of the protected group and what could constitute a substantial part thereof in this case.[291]

For these reasons, I believe the Appellant has not shown that the Trial Chamber failed to provide a **reasoned opinion** on the subject or to establish any required element of the crime of genocide. In conclusion, and despite my reservations, I believe that Ground of Appeal no. 8 should be rejected.[292]

[291] *See* on this issue the Judgement, para. 750 (adopting the Prosecution's definition of "the targeted group that is the subject of the charges in the Indictment as the 'Muslim population of Eastern Bosnia', as constituting 'part' of the Bosnian Muslim people" (cited in the Indictment, paras 10 and 24, and the Final Brief, para. 197). *See* also the Judgement, para. 730.
[292] *Tolimir* Appeal Judgement, paras 188-189.

2. Serious Bodily or Mental Harm to Members of the Group (Grounds of Appeal nos 7 and 10)

Article 4 (2) (b) of the Statute adopts the definition given in Article 2 of the Genocide Convention, establishing as an **underlying act** any **act** or **intentional omission** that causes serious bodily or mental harm to members of the targeted group. Even though this "serious bodily or mental harm" is not defined in the ICTY Statute, this expression can be understood, according to several judgements, to mean acts of torture, inhumane or degrading treatment, sexual violence including rape, assaults, threats of death and harm that damages health or causes disfigurement or serious injury to members of the group,[293] and noting that this list is not exhaustive.

In this regard, it has been established that the harm must involve simultaneously the "acts in question" and "specific intent (*dolus specialis)*" to commit these acts with the aim of destroying, in whole or in part, the protected group. This means that it is not enough that these acts be committed against members of the group because they belong to that group; it is also required that the acts be perpetrated with the **intent to destroy**, in whole or in part, the group as such.[294] This issue arose notably in the ***Krstić*** **case** where the Trial Chamber declared itself "satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica". [295]

It can only be regretted that the Trial Chamber and the Appeals Chamber did not make a distinction in their analyses between the Bosnian Muslims who were killed and those who survived. As a matter of fact, serious bodily or mental harm to these men should not be approached in the same way for both categories. By systematically conflating the suffering endured by the men who were later killed with the suffering undergone by the survivors, the Trial Chamber considers the harm suffered by the

[293] *Brđanin* Judgement, para. 690. *See* also the *Blagojević* Judgement, para. 645; *Gatete* Judgement, para. 584.
[294] On this point, *see* ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, Appeal Judgement 2007, para. 187.
[295] *Krstić* Judgement, para. 546.

victims prior to their death as an ***actus reus*** separate from genocide, which in my mind does not make sense. To make this distinction, both Chambers needed to take their time to examine the status of the victims **case by case.**

There is nothing in the Statute of the ICTY or in the Genocide Convention that prevents a trial chamber from considering **the harm** suffered by a victim prior to death as a separate *actus reus* of genocide;[296] the silence on this issue, far from supporting the view of the Chamber, reflects in fact a concern to ensure consistency. On this point, it is important to emphasise that the Genocide Convention must be interpreted in good faith in the light of the object and the purpose of this instrument.[297] If, as upheld by the Appeals Chamber, the analysis of the Trial Chamber was informed by the duty to identify all the legal implications of the evidence presented,[298] it would have been desirable for this analysis to be fully germane.

If we follow the reasoning of the Appeals Chamber: the persons who were killed were **at the same time** victims of serious bodily and mental harm in the moments leading up to their death. This suffering, which I do not question, does not, in my view, amount to a separate *actus reus* of the crime of genocide; instead, it demonstrates the gravity of the crime committed pursuant to Article 4 (2) (a) which relates to the acts of murder of members of the group, and also demonstrates the commission of other crimes by acts of torture. Apart from my own opinion, if we wish to follow the reasoning of the Appeals Chamber, it is also necessary to stay in conformity with the jurisprudence of the Tribunal that requires proof that the acts committed indeed produced that particular result.[299] This seems to me even more complicated, unless we are to infer the consequences and the effects of these acts vis-à-vis the deceased persons …

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[296] *Tolimir* Appeal Judgement, para. 206.
[297] *See* on this issue Article 38 of the Vienna Convention on the Law of Treaties. *See* also ICJ, Advisory Opinion of 28 May 1951, p. 23.
[298] Appeal Judgement, para. 205; *Krnojelac* Appeal Judgement, para. 172; Appeal Judgement *Rutaganda*, para. 580.
[299] *Brđanin* Judgement, para. 688; *Stakić* Judgement, para. 514. *See* also the *Popović et al.* Judgement, para. 811.

I have great reservations in accepting that the suffering endured by the victims in the moments leading up to their death was a separate *actus reus* of genocide; on the other hand, I have no doubt in my mind that the suffering of the survivors who escaped imminent death should be taken into account separately. These persons, who were victims of extreme suffering in the sector of Potočari and in places of detention in Bratunac and Zvornik,[300] were subjected to serious bodily and mental harm, with long-lasting consequences.[301] On this aspect, I believe that these acts fall under the underlying acts of genocide. In fact, this harm may have been inflicted with the **specific intent** to contribute to the destruction of the group or a part of it. The suffering endured by these persons prevented them from leading a normal and constructive life.[302]

As regards the women, children and the elderly who were separated from the male members of their families and "transferred" from **Srebrenica** toward **Tuzla**, their situation should be analyzed in a nuanced manner in order to determine the physical or mental harm they may have suffered. When analysing Ground of Appeal no. 6, I had occasion to elaborate on this aspect, establishing that the evidence did not support a finding that these acts constituted **forcible transfer.** From my point of view, neither the intent not the forced character of displacement are present in the events that occurred first at **Srebrenica** and then at **Potočari.**

Still, even if I disagree with the qualification given by the majority to the voluntary displacement of these persons, I believe that the separation of the male members from their families must have caused them great suffering and emotional distress. In this regard, I believe that the suffering endured by the men, women, the elderly and children caused by the separation could have had significant repercussions on their quality of life, by the very fact that they were unable to process what had happened at that time.[303] Nevertheless, unlike the Trial Chamber and the Appeals Chamber, I believe that this suffering, indubitably amounting to serious harm to these persons,

[300] *Tolimir* Judgement, para. 864.
[301] *Tolimir* Judgement, para. 755.
[302] *Tolimir* Appeal Judgement, para. 207; *Tolimir* Judgement, para. 755.
[303] *Tolimir* Judgement, para. 757.

does not constitute an underlying act of the crime of genocide. In reality, the evidence does not allow for a conclusive determination, beyond a reasonable doubt, that these acts were committed with the specific intent *(dolus specialis)* to destroy the protected group, in whole or in part.[304]

As regards the situation of Žepa, I do not share the reasoning of the Appeals Chamber due to the absence of the elements of forcible transfer; I consider, however, just as the Appeals Chamber does, that the transfer of the population from this locality was carried out in circumstances that do not amount to mental harm since the Trial Judgement does not mention any proof of lasting psychological trauma.[305]

[304] From my point of view, this harm could have been qualified under Article 5 of the Statute which sanctions inhumane acts as crimes against humanity.
[305] *Tolimir* Appeal Judgement, para. 221. The Trial Chamber does not present any proof of any mental harm suffered by this group that could be considered as contributing to the destruction of the Muslims of Eastern Bosnia and Herzegovina as such. I wish to stress that I do not share the reasoning of the Appeals Chamber at para. 217 concerning what constitutes the protected group.

3. Intentional Subjection of the Group to Living Conditions Intended to Lead to Their Physical Destruction (Ground of Appeal no. 10, in part)

As regards the acts contained in Article 4, para. 2 (c) of the Statute, consisting in inflicting on the persons concerned living conditions calculated to bring about their physical destruction, in whole or in part, these acts had to be carried out "intentionally", by subjecting the group to conditions "calculated" to bring about its destruction, and inflicted on them "deliberately", through specific measures.

In order to demonstrate the presence of such acts, the Trial Chamber deemed that **the only reasonable inference** to draw from the evidence was that the conditions resulting from **the combined effect** of the operations to kill and forcibly transfer women and children had been deliberately inflicted and calculated to lead to the physical destruction of the Muslim population of Eastern BiH.[306] Even if Article 4, para. 2 (e) of the Statute envisages that the forcible transfer of children from the group to another group may constitute an underlying act of genocide, as long as it is committed with the intent to destroy the group as such, in whole or in part, it also requires that these acts have a **forced character**, and that it is not a case of voluntary movement of the population. Furthermore, Article 4, para. 2 refers solely to the forcible transfer of children and does not contemplate the forcible transfer of women or the elderly as underlying acts of genocide.[307]

In the present case, it appears that the Trial Chamber, in order to determine the physical destruction of the Muslim population of Eastern Bosnia, refers to forcible transfer in a global way, encompassing women, children and the elderly, addressing this issue in combination with the acts of killing. On this point, it is important to make clear that, unlike the acts of killing, the acts of forcible transfer did not entail actual

[306] *Tolimir* Judgement, para. 766.
[307] It seems to me that, if the authors of this Article had wished to make a distinction, they would have inserted in Article 4, para. 2 (c) the words "women" and "the elderly", which they did not.

destruction, but grave physical and mental harm that, for some, had a delayed and protracted effect.

Although, on the face of it, the Trial Chamber followed the strict interpretation given by the Appeals Chamber in the ***Blagojević*** case, it qualified it by taking into account the broader approach of the Trial Chamber in that case.[308] Thus, it treats the issue in a **contrasted manner**, reasserting first that the displacement of a people is not equivalent to destruction, and that forcible transfer in and of itself is not a genocidal act,[309] while at the same time leaning toward a "broader notion of the term destroy" applicable to "acts which may fall short of causing death".[310] This interpretation, which goes even **beyond** the interpretation of destruction under the Genocide Convention, enabled the Trial Chamber to interpret the term "destruction" contained in the definition of genocide as a term which may include acts of forcible transfer of the population.[311]

The Appeals Chamber, in its turn, set aside in its analysis the killings of at least **5,749 Bosnian Muslim men** in the same way it did the destruction of Bosnian Muslim houses and mosques after the fall of the two enclaves, instead focusing on the **acts of forcible transfer** as the only elements satisfying the requirements of Article 4, para. 2 (c).[312] According to the Appeals Chamber, even if the trauma caused by the forcible transfer operations and the inability of the displaced community to reconstitute itself in a particular area do not meet the standards of Article 4 (2) in themselves, they could still be taken into account in order to determine if the acts were committed with the intent to ensure the physical destruction of this community.[313]

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[308] *Tolimir* Judgement, paras 764-765.
[309] *Tolimir* Judgement, para. 765. *See* also on this point the *Blagojević* Appeal Judgement, para. 123; *Krstić* Appeal Judgement, para. 33; ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, 2007 Appeal Judgement, para. 190.
[310] *Tolimir* Judgement, para. 765. *See* also the *Blagojević Judgement*, para. 662.
[311] *Tolimir* Judgement, para. 766. *See* also on this point the *Blagojević* Judgement, para. 665.
[312] *Tolimir* Appeal Judgement, para. 227, *Tolimir* Judgement, para. 766. *See* in this sense the *Popović et al.* Judgement, para. 854.
[313] *Tolimir* Appeal Judgement, para. 233. *Tolimir* Judgement, para. 766. *See* in this sense the *Popović et al.* Judgement, para. 854.

Apart from my own position regarding the absence of forcible transfer of the population, I find that, when attempting to establish **a legal nexus** between **two acts** of a different nature and with very distinct consequences, the majority of the Appeals Chamber made an erroneous assessment of the acts of genocide in order to establish the intent to destroy the group physically as such. **In reality, proof of forcible transfer cannot, on its own, serve as a basis for inferring genocidal intent, given that the conclusion drawn from the jurisprudence of the Tribunal itself is that forcible transfer "*does not constitute in and of itself a genocidal act*".**[314] Under the **Genocide Convention,** the factual elements required for inferring genocidal intent must, as a rule, consist of **material acts** capable of producing genocidal effects and must be clearly distinguished from acts aimed at a mere dissolution of the group.[315] Therefore, **material acts that do not produce those effects, such as acts of forcible transfer, can only serve to corroborate genocidal intent to some extent, but they can by no means serve as proof of its existence.** Such reasoning would be tantamount to placing acts of forcible transfer **at the same level** as the underlying acts of genocide contained in Article 4 (2) of the Statute and Article 2 of the Genocide Convention.

In this respect, it is important to recall that, although the ICJ considers that acts of deportation or displacement of members belonging to a group can be qualified as acts covered by Article 2 (c) of the Genocide Convention, it specifies that such an action must be carried out with the necessary specific intent *(dolus specialis)*, that is to say, with a view to the destruction of the group, as distinct from its removal from the region.[316] I find it rather hard to discern a logical explanation for the facts underlying this analysis. If, in fact, the intention of the VRS Main Staff was to achieve the destruction of the group as such, it is hard to understand why they ordered the displacement of women, children and the elderly from the zone controlled by the

[314] *Stakić* Judgement, para. 519; *Krstić* Appeal Judgement, para. 33; *Blagojević* Appeal Judgement, para. 123.
[315] *Brđanin* Judgement, paras 692 and 694; *Krstić* Judgement, para. 580; *Stakić* Judgement, para. 519. *See* also: ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, 2007 Appeal Judgement, para. 344.
[316] ICJ, *Croatia v. Serbia*, 2015 Appeal Judgement, para. 162; ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, 2007 Appeal Judgement, para. 190. *See* also *Blagojević* Judgement, para. 666.

Bosnian Serbs to other, Muslim-held areas of Bosnia.[317] By doing so, were the VRS members not going against their own intention to destroy the group as such, taking this population to safety away from the Serbian army?

In this respect, it is important to point out that, although it is possible for acts of "ethnic cleansing" to occur in parallel to acts prohibited by Article 2 of the Genocide Convention, these acts can only serve to infer the existence of a specific intent *(dolus specialis)* inspiring the acts in question.[318] The jurisprudence of this Tribunal has expressed itself on this issue, stating that a clear distinction must be made between physical destruction and mere dissolution of a group, and that expulsion of a group or a part thereof does not in itself suffice for genocide.[319]

It therefore seems evident that **combining** acts of killing with those of forcible transfer is not a sensible assessment that allows for a determination of intent to destroy the Bosnian Muslims of **Srebrenica** as such. It seems to me an exaggeration to rely solely on the displacement of women, children and the elderly to safe areas in order to establish any intent to destroy, especially if we remember the context in which this transfer took place.

Moreover, in considering the combined effect of different categories of genocidal acts proscribed by Article 4 (2) of the Statute as potentially constituting the *actus reus* of genocide,[320] the Trial Chamber **erred in law**. Indeed, as the Appeals Chamber held, the underlying acts contained in Article 4 (2) (a) and (b) cannot be combined in order to characterise the conditions found under (c) of the same Article, there being a clear distinction in the characterisation of the said acts.[321] Items (a) and (b) of Article 4 (2) of the Statute proscribe acts that cause a specific result, while the acts in item (c) of the same Article involve the use of methods of destruction that do not kill members of

[317] Notice of Appeal, para. 164.
[318] *See* on this issue: ICJ, *Croatia v. Serbia*, 2015 Appeal Judgement, para. 162; ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, 2007 Appeal Judgement, para. 190.
[319] *Brđanin* Judgement, paras 692 and 694; *Krstić* Judgement, para. 580; *Stakić* Judgement, para. 519. *See* also ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, 2007 Appeal Judgement, para. 344.
[320] *Tolimir* Judgement, paras. 765-766.
[321] *Tolimir* Appeal Judgement, paras. 228-229. *Tolimir* Judgement, para. 741.

the group immediately. Obviously, this clear distinction should have been taken into account by the Trial Chamber in its assessment.

Unlike acts of destruction with a delayed effect, as is the case with acts that inflict upon the population living conditions calculated to bring about its physical destruction, in whole or in part, acts of killing are aimed at a **rapid, even immediate, destruction** of members of the group, leading to certain death. It follows that the **element of time** marks a crucial difference between these two acts because it results in distinct types of destruction.[322] On this point I subscribe to the reasoning of the Appeals Chamber with regard to a separate analysis of the evidence that enables the qualification of each underlying act,[323] so as to avoid any inconsistency or error in assessment that would run counter to the principles governing the application of this Article.

Even though I have my own personal position on the analysis of the facts and the absence of evidence to characterise any forcible transfer whatsoever, I nevertheless agree with the finding of the Appeals Chamber that the **Muslim population of Žepa was not the direct victim of acts that would have led to its physical destruction pursuant to Article 4, para. 2 (c)**.[324] It is my opinion that the events that occurred in Srebrenica and Žepa had very different characteristics and consequences, and should have been analysed separately.

[322] *See* on this point the *Kayishema and Ruzindana* Judgement, para. 548.
[323] *Tolimir* Appeal Judgement, paras 228-229.
[324] *Tolimir* Appeal Judgement, para. 236.

4. The Genocidal Intent of the Perpetrators (Ground of Appeal no. 7, in part, and Ground of Appeal no. 11)

In order to arrive at a more consistent analysis of the elements of genocide, it would have been useful if the Appeals Chamber had examined with great precision the *mens rea* relative to the *actus reus.* Even if, in practice, the enumeration of genocidal acts can contribute to inferring genocidal intent, it is still necessary to establish properly the elements of such an act. By dealing with the concept of the **protected group** in the preamble, instead of addressing it in the part dedicated to the *mens rea,* the majority of the Appeals Chamber stripped this part of all its substance. In the chapter on *mens rea*, the Appeals Chamber should have examined the **intent to destroy the protected group** as such, in order to be able to determine whether the acts considered in the context of genocide were committed with this specific intent, *dolus specialis.*

As I stated earlier, I disagree with the majority both on the very existence of forcible transfer and on the analysis of these acts as proof of genocidal intent. Forcible transfer "*does not constitute a genocidal act in and of itself*";[325] indeed, it can only serve to corroborate genocidal intent once that has been established. Also, in order to corroborate this specific intent, the acts of forcible transfer must occur in such conditions that they lead to the physical destruction of the group as such.[326] Furthermore, acts likely to bring about such destruction can only occur in the event that the forcible transfer is a direct consequence of the commission of acts likely to constitute in themselves the *actus reus* of genocide.[327] That is the case, for example, when members of the protected group are transferred to a place where they are subjected to living conditions that can lead to their physical destruction, such as slavery or starvation, or when they are detained in a concentration camp. In the present case, the evidence in the trial record does not allow me to conclude beyond a

[325] *Stakić* Judgement, para. 519; *Krstić* Appeal Judgement, para. 33; *Blagojević* Appeal Judgement, para. 123. *See* also: ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, 2007 Appeal Judgement, para. 344.
[326] *See* on this issue: ICJ, *Croatia v. Serbia*, 2015 Appeal Judgement, para. 376.
[327] *Ibid.*

reasonable doubt that there was a forcible transfer, ***as the only reasonable inference from the available evidence***.[328]

As regards proof of genocidal intent, even if, by its nature, such intent is generally not limited to direct proof[329] and can be inferred from a certain number of very specific facts and circumstances, one must also bear in mind the **conduct** by which this **specific intent** is displayed. On this issue, in line with the jurisprudence of the Tribunal, I believe that, in order to determine such intent, it needs to be shown that the **only reasonable inference** that can be drawn from the conduct in question is the intent to destroy the protected group, in whole or in part.[330] To determine properly the scope of the atrocities committed, it would have been helpful if the majority of the Appeals Chamber had elucidated **both** the general context in which the acts had taken place **and** the systematic targeting of the victims for the reason that they belonged to a particular group, as well as the recurrent nature of the acts of destruction and discrimination. Such an analysis would have enabled a better understanding of the logic of destruction which characterised the killings, the burials, the reburials, the inhumane acts of detention and the destruction of identification documents, making it possible to identify these actions as factors revelatory of genocidal intent.[331]

While some of the aforesaid acts are consistent with genocidal intent, there are other facts that do not fit into that context. On this point, in the section related to forcible transfer, I have already stated my views on the fate of the men in the column, explaining that this large number of murders – which I do not question – does not fall into the category of acts of genocide. Taking into account the specific nature of this column and the circumstances under which it was formed, a large part of the alleged murders resulted from military operations and, in some cases, could have been qualified as war crimes or possibly as crimes against humanity, had the presence of an

[328] *Tolimir* Judgement, para. 745, *See* also: ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, 2007 Appeal Judgement, para. 373; ICJ, *Croatia v. Serbia*, 2015 Appeal Judgement, para. 148.
[329] *Karadžić* Rule 9 *bis*, Appeal Judgement, para. 80.
[330] *Tolimir* Judgement, para. 745, *see* also: ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, 2007 Appeal Judgement, para. 373; ICJ, *Croatia v. Serbia*, 2015 Appeal Judgement, para. 440.
[331] *Tolimir* Appeal Judgement, para. 248.

essentially civilian component in the column been ascertained and irrefutably established.

As regards the analysis by the Appeals Chamber of the opportunistic murder of a Bosnian Muslim man in **Potočari**, it must be noted that, even if genocidal intent may be inferred from evidence of "*other culpable acts systematically directed against the same group*",[332] it is at the same time necessary to take into account the ambit of such evidence. In this respect, the Appeals Chamber should have borne in mind that "'*opportunistic killings' by their very nature provide a very limited basis for inferring genocidal intent*",[333] relying on this type of evidence only incidentally, without making it the focus of their assessment. Moreover, when analysing the responsibility of the Accused, the Trial Chamber found that "*it cannot be conclusively determined that it occurred after the Accused joined the JCE to Murder*".[334]

As regards the assessment of the evidence, even though the Appeals Chamber rightly recalls that considering all of the evidence taken together may demonstrate a genocidal mental state,[335] it overlooks the **central element** that allows for such a conclusion. On this issue, the majority of the Appeals Chamber would have done well to emphasise that such an approach is possible only **on the condition** that the resulting conclusion is "the *only reasonable one available on the evidence*".[336] Indeed, the analysis of all the evidence, taken together, must allow for the inference that the acts were committed with the required specific intent.

For these reasons, I believe that the majority of the Appeals Chamber **erred in law** when finding that the operation of the forcible transfer of Muslims from Žepa met the

[332] *Tolimir* Judgement, para. 748, *Krstić* Appeal Judgement, para. 33.
[333] *Blagojević* Appeal Judgement, para. 123.
[334] Judgement para. 1141. Is there not a discrepancy between the theory of JCE 3 and genocidal intent? The theory of JCE 3 as formulated in the jurisprudence in *Tadić* places on individuals responsibility for the consequences that they had reason to foresee at the time when they were developing their plan, which would mean that these "opportunistic killings" were not part of their original plan. Thus, if they were not in the plan, does it mean that, initially, there was no genocidal intent? Operating with these concepts without pondering them in depth leads to inconsistencies.
[335] *Tolimir* Appeal Judgement, para. 247. *Tolimir* Judgement, para. 775, *Stakić* Appeal Judgement, para. 55. *See* also *Popović et al*. Judgement, para. 820.
[336] Judgement, para. 745, *See* also: ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, 2007 Appeal Judgement, para. 373; ICJ, *Croatia v. Serbia*, 2015 Appeal Judgement, para. 440.

standard of the *actus reus* under Article 4 (2) (b) and (c) of the Statute.[337] As I recalled above, the acts that occurred in these two localities do not constitute forcible transfer. More specifically, regarding the acts that occurred in the locality of Žepa, I believe they do not contain either the *actus reus* or the *mens rea* as elements of genocide. In order to avoid misinterpreting the facts, it would have been preferable for the majority of the Appeals Chamber to endeavour to make a consistent analysis of the facts, maintaining a clear distinction between the acts committed in **Srebrenica** and those committed in **Žepa**.

[337] *Tolimir* Appeal Judgement, para. 254.

5. Genocidal Intent with regard to the Murders of Mehmed Hajrić, Amir Imamović and Avdo Palić (Ground of Appeal no. 12)

In its assessment of genocidal intent, the Trial Chamber considered that those responsible for killing **Mehmed Hajrić, Amir Imamović** and **Avdo Palić** targeted them because they were leading figures in the Žepa enclave.[338] The Trial Chamber deemed that these killings should not be viewed in isolation, as these three leaders were purposefully "selected for the impact that their disappearance would have on the survival of the group as such".[339]

For my part, even though I concur that genocidal intent may be realised both by destroying a sufficiently substantial number of members of the group[340] and by destroying a more limited number of persons,[341] I must still point out that it is the substantial nature of the selected part that is the principal element[342] for determining the impact that their disappearance would have on the survival of the group.[343] Indeed, in order to determine that impact, the disappearances must be assessed in the context of the fate of the rest of the group[344] and based on a "case-by-case" analysis of the evidence.[345]

In finding that the killings of **Hajrić, Palić** and **Imamović** were probably linked to the leading positions they occupied, the Trial Chamber did not take into account the totality of the facts that indicate that the Bosnian Serb forces had not killed all the political and military leaders. As Judge Nyambe writes in her dissenting opinion, "*Hamdija Torlak, the President of the Executive Board of Žepa, was held in the same prison as Hajrić and Imamović, but he was not killed and was ultimately exchanged with the remaining prisoners in January 1996.*"[346] Furthermore, the evidence is not

[338] *Tolimir* Judgement, para.779.
[339] *Tolimir* Judgement, paras 780-782.
[340] *Krstić* Appeal Judgement, para. 8.
[341] *Semanza* Judgement para. 316; *Kajelijeli* Judgement, para. 809.
[342] *Krstić* Appeal Judgement, para. 32.
[343] *Krstić* Appeal Judgement, para. 12.
[344] *Jelisić* Judgement, para. 82.
[345] *Krstić* Appeal Judgement, para. 14.
[346] Dissenting Opinion of Judge Nyambe, para. 81, Judgement, para. 665.

conclusive on how exactly the events unfolded. On this issue, the findings of the Trial Chamber are based only on witness testimonies, including in some cases contradictory ones, and in others, based on mere rumours.[347] In reality, there is **not a single piece of evidence** that allows us to determine the actual circumstances of these killings.

In finding that the Bosnian Serb forces that killed the three community leaders were driven by specific genocidal intent to destroy a part of the Bosnian Muslim population as such, the Trial Chamber resorted to a biased analysis of the facts. It took into account neither the lack of proof that the Accused intended to target these men because of their leading positions, nor the lack of conclusive evidence as to the exact circumstances of these killings. It must be said that, in the absence of concrete material and mental elements that would make it possible to identify the origin of these killings, the Trial Chamber relied more on mere assumptions.

Also, it does not provide precise elements that could demonstrate the impact of the death of these three Muslim leaders from Žepa on the survival of the protected group as such. Although it is incontestable, in view of the forensic evidence, that the three leaders of Žepa met a violent death caused by head injuries,[348] it has not been established in what manner the effect of these killings would have constituted a form of intimidation contributing to the elimination of the Bosnian Muslims of Žepa.

Given that there is no proof to establish beyond a reasonable doubt that the killings of **Hajrić, Palić** and **Imamović** were driven by specific **genocidal intent**, I am unable to conclude based on the evidence available that these three men were chosen and killed for the impact that their death would have on the survival of the group as such. For these reasons, although I do not share the reasoning of the Appeals Chamber, I agree that the consequences of these acts are not constituent acts of genocide.[349]

[347] *Tolimir* Judgement, para. 679.
[348] *Tolimir* Judgement, para. 749.
[349] *Tolimir* Appeal Judgement, para. 270.

V. Responsibility

A. JCE

In his Ground of Appeal no. 5, the Appellant maintains that the Trial Chamber **erred in law** when it held that the joint criminal enterprise was a mode of liability under customary international law.[350] In support of his complaint, the Appellant cites several arguments concerning the very existence of the concept of joint criminal enterprise as developed by the ICTY Judges in the ***Tadić*** Case and used in subsequent ICTY and ICTR cases.

On the basis of the principle of legality,[351] the Appellant wants to show that the ICTY should refrain from relying on JCE as a mode of liability since there is no evidence that this form of liability is recognized by customary international law. He indicates that if that had been the case, the International Criminal Court would have subsequently included it when it adopted the Rome Statute, which was not done. He maintains that in the Rome Statute, the perpetration or co-perpetration were elaborated based on the concept of "control over the crime".[352] The Trial Chamber thus erred in law by confounding perpetration and co-perpetration with other forms of liability, including participation in the commission of a crime.[353]

The Appellant also states the fact that in the present case the Trial Chamber did not have a clear majority in favour of the JCE form of liability.[354] In fact, the position of one of the Judges expressed in a separate opinion attached to the Judgement was, according to the Appellant, "contrary"[355] to the position of the majority of the Trial Chamber as stated in paragraph 884 of the Judgement. Thus, the Appellant submits that, the judge in question declared in his opinion that the "JCE mode of liability, with its three forms, is not developed *expressis verbis* in the Statute of the ICTY. It is also

[350] Appeal Brief, para. 53.
[351] Appeal Brief, para. 54.
[352] Appeal Brief, para. 56.
[353] Appeal Brief, para. 57.
[354] Appeal Brief, para. 62.
[355] *Ibid.*

absent from the Rome Statute of the ICC and is not applied before that Court",[356] and that it would have been "preferable" to refer to the classical modes of liability as set out in Article 7 (1) of the Statute rather than to the mode of JCE.[357]

With respect to Ground of Appeal no. 5, the Appeals Chamber, by a majority, rejected the arguments of the Appellant basing itself in particular on ***Tadić*** case-law and the more recent Appeal Judgement in **Đorđević.**[358] It ruled that the argument presented by the Appellant with regard to the relevant provisions of the **Rome Statute** is without merit.[359] Moreover, with regard to JCE 3, which was specifically criticised by the Appellant in his Appeal Brief,[360] the Chamber recalled that the sources of international law examined by the ***Tadić*** Appeals Chamber are reliable, and […] the principles in relation to the third category of joint criminal enterprise set out therein are well-established in both customary international law and the jurisprudence of the Tribunal.[361]

I do not agree with the majority of the Appeals Chamber on Ground no. 5. While this question has been broached in numerous cases at the ICTY, I nonetheless consider that there has not been sufficient discussion dedicated to this question. The key point regards the existence of the **JCE** as **a form of liability** accepted under customary international law. The Appeals Chamber in this case limited itself to applying long-standing ICTY case-law stemming from the ***Tadić*** Appeal Judgement.

A. The Tadić case-law: genesis of the notion of joint criminal enterprise

In order to understand better the ins and outs of this complaint, we must refer to the Judgement rendered by the Appeals Chamber in the **Tadić** case. In this Appeal

[356] Appeal Brief, par. 63.
[357] *Ibid.*
[358] *Tolimir* Appeal Judgement, para. 280.
[359] *Tolimir* Appeal Judgement, para. 282.
[360] Appeal Brief, para. 58. On this matter, the Appellant emphasises in his pre-trial brief that the most problematic mode of liability is characterised by JCE 3 as developed by the ICTY and in particular the criteria of *mens rea* affecting the most serious crimes, which is undervalued in this context.
[361] *Tolimir* Appeal Judgement, para. 283.

Judgement, the Appeals Chamber considered the notion of **"common purpose"**[362] under Article 7 (1) of the Statute by raising two key questions: "(i) whether the acts of one person give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and (ii) what degree of *mens rea* is required in such a case."[363]

In this regard, the Appeals Chamber indicated that the Statute does not confine itself "to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution […] It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons."[364] However, the Statute of the Tribunal does not specify the objective and subjective elements of this category of collective criminality and to identify them, one must turn to customary international law.[365] In this regard, it specified that the customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.[366]

As part of its analysis, the Appeals Chamber studied several cases tried after the Second World War and grouped them into three categories corresponding to the three forms of JCE accepted in ICTY case-law.[367] It added that with regard to the objective and subjective elements of a crime, case-law shows that the notion applies to three distinct categories of cases.[368] It is on the basis of this reasoning that the Appeals Chamber in this case held that the notion of common design as a form of **accomplice** liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal.[369]

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[362] *Tadić* Appeal Judgement, paras 187-137.
[363] *Tadić* Appeal Judgement, para. 187.
[364] *Tadić* Appeal Judgement, para. 190.
[365] *Tadić* Appeal Judgement, para. 194.
[366] *Tadić* Appeal Judgement, para. 194.
[367] *Tadić* Appeal Judgement, para. 195.
[368] *Tadić* Appeal Judgement, para. 220.
[369] *Tadić* Appeal Judgement, para. 220.

In this sense, it distinguishes three categories of cases:

The **first category** relates to cases in which all the participants have the **same intent** to commit a crime, and they are all liable, regardless of their role and position in the realisation of the common criminal plan (even if they had all merely voted, in an assembly or in a group, in favour of implementing such a plan). Beyond the shared intent, the *dolus eventualis* (the recklessness or advertent recklessness) can also be enough to consider all the participants in the criminal plan as criminally liable.[370]

The **second category** covers the cases in which an initial plan is not necessary. We can legitimately consider that each participant in this criminal institution (a concentration camp, for example) is not only aware of the crimes in which the institution or its members are involved, but also, implicitly or explicitly, shares the criminal intention to commit such crimes. This category includes persons who had agreed to contribute in one way or another to running the camp in a brutal way, and all those people shared the state of mind in question.[371]

Lastly, the **third category** corresponds to the Form 3 of the JCE and concerns cases in which one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural foreseeable consequence of the effecting of that common purpose. Two cases were recalled: the **Essen Lynching** and **Borkum Island**. The Appeals Chamber recalled that in the second case the accused were **"**cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs.**"**[372]

[370] *Tadić* Appeal Judgement, paras 196-201.
[371] *Tadić* Appeal Judgement, paras 202-203.
[372] *Tadić* Appeal Judgement, paras 204-219. In this complex case, the accused were found guilty of murder despite the absence of evidence that they actually killed those people. For the Appeals Chamber, this verdict probably rested on the fact that the accused, because of their status, their role or their conduct, could have foreseen that the aggression would lead to the murder of the victims by some of the persons involved.

In addition to the aforementioned case-law, the Appeals Chamber related that the notion of a "common plan" was upheld in at least two international treaties[373] and that an essentially similar notion was laid down in Article 25 of the Statute of the International Criminal Court.[374] While noting that in that period this Statute remained a non-binding international treaty, it already possessed significant legal value. The presence of an overwhelming majority of States attending the Rome Diplomatic Conference shows that this text was supported by a great number of States and may be taken to express their legal position i.e. ***opinio juris***. It concluded that the notion of **accomplice** liability under discussion is well established in international law and distinct from **aiding and abetting,** and it referred to the national legislation of many States in relation to this claim.[375]

With regard to the question raised by the ***Tadić*** Appeals Chamber that, "[b]earing in mind the preceding general propositions, it must be ascertained whether criminal responsibility for participating in a common criminal purpose falls within the ambit of Article 7 (1) of the Statute,"[376] the Judges responded positively by highlighting three categories of joint criminal enterprise. It should be noted that in its reasoning, the Appeals Chamber based itself on several post-Second World War case-laws, on the work that preceded the adoption of the **Rome Statute** as well as on an interpretation of the Statute of the Tribunal. It should be noted at the start that, while certain elements revealed the legal existence of the notion of "**common plan**", the Appeals Chamber nevertheless could not draw the conclusion that the form of liability of joint criminal enterprise existed in customary international law. At the most, it could have been analysed as a practice specific to the Tribunal that could not take on a customary existence other than through continuous and uniform practice.

B. The existence of a joint criminal enterprise as a form of liability in customary international law

[373] *Tadić* Appeal Judgement, para. 221.
[374] *Tadić* Appeal Judgement, paras 222-223.
[375] *Tadić* Appeal Judgement, para. 223.
[376] *Tadić* Appeal Judgement, para. 187.

1. Elements establishing the existence of an international custom

From a purely legal point of view, the relation of the legal concept of JCE to customary international law is determined by the existence of two elements: the practice of States or the **material element and *opinio juris* or the mental element.**[377] In his ground of appeal, the Appellant did not analyse in detail the question of the relation of this form of liability to customary international law, merely restricting himself to a negative response in paragraph 54 of his submission.[378] In this case, the Appeals Chamber, by a majority, did not deem it necessary to go over the elements of the custom as a formal source of international law, preferring to refer to judgements and appeal judgements rendered by the ICTY.[379] The question of the validity of this form of liability, which stems from ICTY case-law, as a concept of customary international law has been the subject of several decisions at the ICTY and ICTR after a number of accused called into question the competence of the Tribunal in relation to the JCE.[380]

At this stage, it should be recalled that the customary process is only complete when the two elements are present, the actual practice and the *opinio juris* of the States. The bringing together of **these two elements** was established by the **International Court of Justice** ("ICJ"), which stated that "the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States".[381] The first

[377] *See* in particular on this point, S. Seferiades, "*Aperçu sur la coutume juridique internationale*", *Revue générale de droit international public*, 1936, pp. 129-196; S. Sur, "*La Coutume internationale. Sa vie, son œuvre*", *Droits*, 1986, pp. 111-124.
[378] Appeal Brief, para. 54.
[379] *Tolimir* Appeal Judgement, para. 280.
[380] *See* in particular the interlocutory appeal after the decision rendered on 11 May 2004 by the Trial Chamber sitting in the case of André Rwamakuba. In his request, this Accused called into question the jurisdiction with regard to this form of liability. To reinforce his arguments, the Accused maintained that the JCE "doctrine" was completely unknown in customary international law as well as in the Statute of the International Tribunal. To support this position, the Accused claimed, on the one hand, that there was not a sufficient amount of State practice and *opinio juris* to reach this conclusion. On the other hand, the Accused listed the crimes punishable under the ICTR Statute, including the crime of genocide set out in Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide. To uphold a conviction for genocide on the basis of a JCE would, according to him, be tantamount **to watering down prejudices pertaining to the crime of genocide,** thus resulting in **collective criminal liability**.
[381] *See*, ICJ, *Continental Shelf* (*Libyan Arab Jamahiriya v. Malta*), Judgement 1985, p. 29, par. 27 ; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 1996, p. 253.

element is considered as the repeated commission of acts called "precedents" which constitute the material element which may only have been simple usage at the start of the process.[382] The second element, for its part, comes from the subject's feeling, conviction that it is lawful, that committing such acts is compulsory because it is required by law.[383]

With regard to international legal sources, custom is distinguished from conventional process, and a degree of flexibility in this method should be allowed. Customary process in fact corresponds to a balance between international forces at a given time, to a confrontation of legal subjects with an international problem.[384] The spontaneous establishment of such rules happens as a result of a legal awareness of social necessity. Nonetheless, the existence of a custom must meet formal requirements and I will return successively to the analysis of the two elements of custom.

The material element, first of all, consists of the conduct likely to constitute precedents emanating from international legal subjects, composed of States and international courts.[385] Moreover, these actions must be attributable to their author, and therefore, must not be defective. In regard to the acts of international courts, we must first refer to judicial acts and those of international arbitration.[386] To be able to speak of usage, these acts must be repeated over time. On this point the ICJ keeps to the need for a "constant and uniform practice"[387] synonymous with consolidating practice.

The mental element is in itself formed by the requirement of *opinio juris*, that a customary rule does not exist unless the act considered is motivated by the awareness of a legal obligation.[388] In this respect, Article 38, paragraph 1 of the Statute of the

[382] *See*, P. Daillier, M. Forteau, A. Pellet, *"Droit international public"*, 8th edition, p. 353.
[383] *Ibid.*
[384] R. J. Dupuy, *Coutume sage et coutume sauvage, Mélanges Rousseau*, 1974, pp. 75-89.
[385] P. Daillier, M. Forteau, A. Pellet, "*Droit international public*", 8th edition, p. 355.
[386] Ch. Rousseau, *"Droit international public"*, Vol. I, 1971, pp. 338-339. In this regard, the International Court of Justice, the principal legal organ of the United Nations, does not hesitate to cite its own case-law as a basis for useful precedents.
[387] ICJ, *Asylum Case*, Judgement, 1950, p. 277; ICJ, *Case concerning Right of Passage over Indian Territory*, Judgement, 1960, p. 40.
[388] P. Daillier, M. Forteau, A. Pellet, "*Droit international public*", 8th edition, p. 361.

International Court of Justice clearly distinguishes custom from other sources of international law by qualifying them as "general practice accepted as law".[389] It applied this principle as part of long-standing jurisprudence. Traditionally, *opinio juris* rests on practice, in the sense that it is the repetition of precedents over time that gives rise to the feeling of obligation.[390]

At this stage, it is worth noting that the elements showing the existence of international custom should be analysed strictly and cannot be conceived without bringing together these two elements. It seems that the Appeals Chamber in the *Tadić* case wanted to "speed things up" by not taking into account these strict conditions imposed on it. The analysis carried out in that Judgement on Appeal could not lead to the conclusion that a joint criminal enterprise existed in the sense of customary international law. It seems to me that the arguments presented by the Appeals Chamber from the beginning did not make it possible to arrive at that conclusion. However, the "constant and uniform practice" at the Tribunal with regard to this form of liability could have given birth to an international custom.

2. Singularity of the notion of JCE with regard to the notion of co-perpetration as set out in the Statute of the International Criminal Court

Based on the elements showing the existence of international custom, the Appellant alleges that the theory of joint criminal enterprise as conceived since the ***Tadić*** Appeal Judgement and practiced at the ICTY differs from the notion of **co-perpetration** under Article 25 of the Rome Statute.[391] The concept of co-perpetration set out in Article 25 (3) (d) of the Rome Statute, even if it may be perceived as a restriction on individual criminal liability, has the advantage of "circumscribing" criminal liability only to the **individual co-perpetrators** who contributed to facilitating the joint criminal activity or the group's criminal design. It has the merit of recognising only those co-perpetrators or co-participants who facilitated the common criminal activity,

[389] Wording in Article 38 of the ICJ Statute.
[390] ICJ, "North Sea Continental Shelf", Reports 1969, p. 44.
[391] Appeal Brief, p. 14, para. 55; *see* also, J. D. OHLIN, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,* p. 89.

fully aware of the intent of each one of the members of the group.[392] Article 25 of the Rome Statute recognises only the individual criminal liability of individuals, taking into account primarily their actions and not their affiliation with a criminal group, which seems to me consistent with a strict construction of international criminal law.[393]

By choosing to discard the notion of joint criminal enterprise and retain a form of liability corresponding to the definition of co-perpetration, the States Parties to the **Rome Statute** clearly opted for an **objective approach**, careful to establish a clear distinction between those who are **innocent** and those who are **guilty** and responsible for criminal activity, without referring to group affiliation, which would allow various interpretations of the principle of criminal liability; this implies an individual being criminally charged only for the criminal activity which he perpetrated. This distancing of the ICC from the theory of joint criminal enterprise may be seen as a guarantee of the *nullum crimen sine lege* principle and of a fair trial.[394] This argument was taken up by the Appellant in the introduction to his Ground of Appeal no. 5, putting forward the principle of legality.[395]

To justify the existence of a JCE as a form of liability within the meaning of customary international law, the ***Tadić*** Appeals Chamber maintains in its Judgement the nexus between the two notions recognised by the two jurisdictions by concluding that the notion of the liability of a co-perpetrator, with which we are dealing here, is well established in international law and distinct from **aiding and abetting**, relating

[392] *See* for example "Warrant of Arrest for Laurent Gbagbo", p. 10, which states: "There is a sufficient basis to conclude that the pro-Gbagbo forces that put the policy into effect did so by almost automatic compliance with the orders they received. Finally, there is sufficient evidence that Mr Gbagbo acted with the necessary degree of intent and knowledge."
[393] *See* Article 25 (3) (d) of the Rome Statute.
[394] "Code of Professional Conduct for Counsel Appearing before the International Tribunal" as amended on 29 June 2006, Article 11; *The Prosecutor v. Haradinaj et al.*, "Decision on Lahi Brahimaj's Request to Present Additional Evidence under Rule 115", 3 March 2006, para. 10; *The Prosecutor v. Naletilić and Martinović*, "Decision on Naletilić's Consolidated Motion to Present Additional Evidence", 20 October 2004, para. 30; *The Prosecutor v. Kupreškić et al.*, "Decision on the Admission of Additional Evidence following Hearing of 30 March 2001", 11 April 2001, para. 12; *The Prosecutor v. Delalić et al.*, Appeal Judgement, 20 February 2001, para. 631: "Failure of counsel to object will usually indicate that counsel formed the view at the time that the matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto."
[395] Appeal Brief, para. 54.

this statement to the national legislation of many States.[396] Thus, the doctrine of joint criminal enterprise is considered to be among the causes of many violations of the rights of the accused, in particular those linked to the presumption of innocence and a fair trial.[397] The ICTY Appeals Chamber itself acknowledged that joint criminal enterprise is not "an open-ended concept that permits convictions based on guilt by association".[398]

3. Compatibility of co-perpetration with Forms 1 and 2 of the joint criminal enterprise

The case-law of the ad-hoc tribunals, ICTY and ICTR, allows **three different forms** of this criminal liability. The three forms represent: liability for a common intentional purpose, responsibility for participation in an institutionalised common criminal plan, and incidental criminal responsibility based on foresight and voluntary assumption of risk.

With regard to Forms 1 and 2 of the JCE whose legal anchoring is well established at the ICTY and ICTR, they are the product of an "academic contest" seeking to create a new doctrine in international criminal law whose fundamental principles were included in the modes of criminal liability established and acknowledged in various jurisdictions. In this respect, **co-perpetration** displays a similarity of principle to Form 1 of the JCE and Form 2 of the JCE resembles Form 2. Some sources indicate that the concept of co-perpetration constitutes a mode of liability more precisely outlined than the JCE and established and recognised by a number of national jurisdictions.[399] The Appeals Chamber in the ***Tadić*** case adopted these two JCE categories and defined them.

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[396] *Tadić* Appeal Judgement, para. 224 *et seq.*
[397] *See* in particular, J. D. OHLIN, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, p. 89.
[398] *Brđanin* Appeal Judgement, para. 428.
[399] *See* in particular on this point the thesis by P. Wrange, "Joint Criminal Enterprise and the International Criminal Court: A Comparison between Joint Criminal Enterprise and the Modes of Liability in Joint Commission in Crime under the Rome Statute; Can the International Criminal Court Apply Joint Criminal Enterprise as a Mode of Liability? ", thesis in international criminal law written at the University of Stockholm.

On Forms 1 and 2 of the JCE, I agree with the **theoretical position** expressed by many, and in particular by the Judges of the *Tadić* Appeals Chamber, but by "transferring" it to the form of responsibility under Article 7 of the Statute, a "**person who planned**". Nevertheless, in my opinion, it was not necessary to create this notion which, instead of making available to judges and the parties a clear and precise instrument, complicates enormously the task causing judges to introduce constant amendments over time to the detriment of legal certainty.

B. Objective determination of individual liability of an accused with regard to the Statute of the ICTY

In its Appeal Judgement, the *Tadić* Chamber recalled that the report of the **UN Secretary- General** on the establishment of the International Tribunal indicates that "[a]n important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the principle of **individual criminal responsibility**. [In fact], the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations."[400] This report also indicates that "all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations."[401]

I consider that, contrary to what the Judges of the *Tadić* Chamber say, the Statute of the ICTY does not in itself conceal "a lacuna" making it necessary to create jurisprudence in order to prosecute some of the Accused. I deem that there has been no legal lacuna; such a possibility could not exist at any point within the **Security Council**, which is continually assisted by eminent legal specialists or informed by various, widely renowned professors of law … It must be recalled that Security Council **resolution 827** was adopted after many consultations and numerous

[400] Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, para. 53 cited in the *Tadić* Appeal Judgement, para. 186.
[401] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, para. 54, cited in the *Tadić* Appeal Judgement, para. 190.

preparatory documents submitted by the States or international legal scholars. Under such conditions, it would not be possible for all of those involved to have made the error of overlooking certain perpetrators of offences. I believe that there was absolutely no need for the *Tadić* case-law; in this respect, Article 7 (1) of the Statute does not suffer from any defect requiring "compensatory jurisprudence".

One need simply return to the text and take into consideration the spirit of Article 7 (1) of the Statute which fully grasps the commission of offences resulting from a common plan. First, there are the planners, then those who instigate the commission of crimes through the media, there are those who give orders to translate the common plan into action on the ground, and those on the ground who carry out the plan; it is the latter who commit the crimes on the ground contemplated under the Articles of the Statute who fall into the very specific category of perpetrators, and not of planners, instigators or persons giving the orders.

For this reason, it seems to me incongruous to place those **committing** the crimes on the same level as those **planning** them, as the JCE theory the "*Tadić* way" would suggest. In my view, the JCE based on a project of common design falls into the category of planning.

International criminal law subsequent to **Nuremberg**, symbolised by the creation of *ad hoc* tribunals such as the ICTY, the ICTR, the Special Tribunal for Sierra Leone, the Special Tribunal for Lebanon and the creation of the ICC, no longer imposed the mechanism of a prior declaration of an organisation's criminal status. This mechanism was, in effect, based primarily on the **objective** nature of the member of the criminal organisation and could be allied to a collective responsibility. In addition, in order to establish individual criminal liability upholding the principle of individual guilt,[402] as set out in the famous *dictum* in the Nuremberg Judgement, *"*[*c*]*rimes against international law are committed by men, not by abstract entities* […]"[403].

[402] *See* Article 7 (1) of the ICTY Statute, Article 6 (1) of the ICTR Statute and Article 25 (3) of the Rome Statute.
[403] *See* the Nuremberg Judgement.

We have no choice but to conclude that the Tadić jurisprudence and the concept of JCE to which it gave rise have produced a degree of legal uncertainty brought about by the ambiguity of this concept.

In fact, the Appeals Chamber in the *Tadić* case and the cases that followed did not define precisely the objective requirements that must be met in order to prove the existence of a JCE. It indicated that a JCE exists if several people share a **common goal**, without however requiring the **determination of their identity**, **the specific goal** they were pursuing, the **specific methods** they implemented to reach it, the **geographical and temporal context, etc**.

This problem recurs with proof of intent regarding JCE 3. The subjective requirements the Chamber sets out are not defined with any greater precision than the objective requirements. Indeed, the Chamber considers that an accused may be declared responsible for a crime other than the one envisaged in the common plan "if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk".[404] The Chamber does not specify, however, what it understands by the term "foreseeable" and whether this foreseeability must be assessed objectively or subjectively.[405]

[404] *Tadić* Appeal Judgement, para. 228.

[405] By way of comparison, in English law, the theory of "common purpose" whose roots go back to the 14th century, makes it possible to find a person responsible for a crime committed in furtherance of a common plan, even when this action goes beyond the plan, depending on certain requirements that have evolved over time. According to early case-law, the crime was attributable to such a person if it constituted the probable consequence of the common plan *in the eyes of a neutral third party* ("objective probable consequences test"). Since the decision of the Privy Council in *the Chan Wing-Sui* case in 1985, the test used to assess this is subjective. For further details *see* C. Barthe, *Joint Criminal Enterprise*, pp. 148 *et seq*.

C. Controversies surrounding the expansion of this form of liability to Form 3 of the JCE

1. Lack of sufficient criteria constituting the element of intent of *mens rea* as *dolus eventualis*

Form 3 of JCE introducing "incidental criminal responsibility based on foresight and voluntary assumption of risk,"[406] has come under considerable criticism. It was observed that the standard of foreseeability is not reliable. In fact, it is not easy for a tribunal to ascertain whether the criminal conduct of a person participating in a JCE, which lies beyond the scope of the common plan, was foreseeable by another participant and whether this other participant deliberately assumed the risk that the conduct might be realised.

According to some sources, Form 3 of JCE has **no basis** in the Statutes of the ICTY and the ICTR, and the principle of *nulla poena sine lege stricta* precludes application of Form 3 of the JCE doctrine.[407]

Recurring weaknesses appear in the analysis of the *mens rea* required for Form 3 of the JCE in case-law. The second element of the *mens rea* specific to JCE 3, namely, the evaluation of a **voluntary risk** taken by an accused that a crime, other than the ones comprising the common plan in which he participated, might be perpetrated by one or more members of the group, is frequently omitted from the analysis in case-law, with the exception of the *Blaškić* and *Kordić* Appeal Judgements in which the Appeals Chamber expressly clarified that voluntary acceptance or approval of the risk taken by the presumed perpetrator of the crime is required in order to meet the standard of *dolus eventualis*.[408]

[406] C. Barthe, *Joint Criminal Enterprise*, pp. 148 *et seq.*
[407] W. Schomburg, "Jurisprudence on JCE – Revisiting a Never-ending Story", published on 3 June 2010 on the *Cambodia Tribunal Monitor* site, pp. 3 and 4.
[408] *Ibid.*, pp. 6 and 7. On this point, it is worth noting that the author does not provide any precise references to the two appeal judgements cited or references to the judgements or appeal judgements wherein the second constituent element of *mens rea* of JCE 3 is omitted.

I believe that it would be up to the Prosecution to prove that the participant had knowledge of a *specific* fact or a circumstance attesting to the probability that the other participant might commit a crime not previously agreed upon. It would likewise fall to the Prosecution to prove that the overall circumstances surrounding the commission of the agreed crime were likely to render it highly probable, and thus foreseeable, that other "incidental" crimes would be committed. The Prosecution must also prove that, in addition to having this knowledge, the participant in question knowingly assumed the risk that the foreseeable scenario might occur. Once again, this could be inferred from an entire range of factual circumstances.

According to this approach, if the Prosecution does not succeed in proving all of this, the charge should be rejected. It would run counter to the principles of a **fair trial** to transfer the burden of proof onto the Defence and to require it to prove that the Accused did not know the relevant facts, did not foresee the crime and deliberately took the risk that the crime would be committed.

It seems to me that the latitude afforded to judges by this concept should encourage them to proceed with caution and the greatest care when assessing evidence and establishing both the *actus reus* and the *mens rea.* When in doubt, judges should choose to enter a finding of not guilty or, as Judge **Mindua** rightly states, to resort to classical forms of responsibility provided for in the Statute.

2. The practice of other international tribunals: the example of the courts of Cambodia

In its "Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE)" of 20 May 2010, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia reviewed category 3 of the JCE. As part of the appeals lodged, the claim that this form of liability may constitute a solid base in customary international law was contested, this being an argument going against the legal principle that a rule of customary international law can only be determined on the basis of practice and the established and widespread *opinio juris* of

States. According to the appellants, its application at the Extraordinary Chambers in the Courts of Cambodia (ECCC) would violate the principle of legality.[409]

While the Co-Prosecutors responded to this argument, saying "many advanced jurisdictions" recognised modes of criminal co-perpetration similar to the third category of the Chamber, the Pre-Trial Chamber is of the view that these [authorities] do not provide sufficient evidence of consistent state practice or *opinio juris* in relation to category 3 at the time relevant to Case no. 002 and concluded, for the reasons set out below, that JCE 3 was not recognised as a form of responsibility applicable to violations of international humanitarian law.[410]

With regard to case-law, the Chamber referred in turn to the cases that the ICTY Appeals Chamber had relied on in the Tadić Appeal Judgement, namely the cases of Borkum Island and the Essen Lynching, and several other cases brought before Italian courts following the Second World War. In light of these precedents, the Chamber held that it was unable to consider these cases valid precedents for describing the status of customary international law. According to the Chamber, these cases did not fall within international jurisprudence because they were adjudicated under domestic law.[411] For the foregoing reasons, the Chamber held that the precedents used in the *Tadić* Appeal Judgement, and consequently in the disputed Order, did not constitute a sufficiently solid foundation for finding that the expanded JCE existed under customary international law at the time of the events touching directly upon Case no. 002.[412]

In a later decision, the Trial Chamber once more had the opportunity to rule on the question, following a motion filed by **IENG Sary** on 24 February 2011 seeking to strike parts of the Closing Order due to defects.[413]

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[409] Pre-Trial Chamber of the ECCC, Case no. 002/19-09-2007-CETC-CP/BCJI (CP 38) no. D97/15/9, "Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)" ("Decision on JCE Form 3 of 20 May 2010"), para. 75.
[410] Decision on JCE Form 3 of 20 May 2010, para. 77.
[411] *Ibid.*
[412] Decision on JCE Form 3 of 20 May 2010, para. 83.
[413] ECCC Trial Chamber, Case no. 002/19-09-2007/ECCC/TC, "Decision on the Applicability of Joint Criminal Enterprise", 12 September 2011, paras 2 and 3.

The Trial Chamber noted at the outset that the applicability of the theory of the third category of JCE had been extensively litigated before the ECCC. The issue had also previously been examined on appeal by the Pre-Trial Chamber in Case no. 002. Although the Trial Chamber does not hear appeals against decisions of the Pre-Trial Chamber, it did note that the motion it was asked to rule on was largely similar to the one previously before the Pre-Trial Chamber. That Chamber had reviewed in detail – in its Decision concerning the JCE – the legal instruments in effect prior to 1975, including the **Nuremberg Charter and Control Council Law No. 10**. The Pre-Trial Chamber held, as did the Trial Chamber in the *Duch* Judgement, that the first and second categories of JCE constituted modes of participation recognised in customary international law during the period relevant to the Closing Order. However, it did point out that these international instruments did not specifically acknowledge JCE 3.

It should be noted that in this case, the Co-Prosecutors based their charges primarily on JCE 1 while seeking to retain JCE 3 as a possible additional mode of participation, but only for certain incriminating acts within Case no. 002 if the nexus between these criminal acts and the accused could not be established through the application of category 1 of JCE.[414] It is appropriate to note that the Prosecution's position is that JCE 3 should be considered **a supplemental means** of prosecuting certain accused in the event that it does not have enough evidence to bring against them under Form 1. For the Prosecution, this is just an opportunity to dispose of "an array" of modes of liability which would enable it to proceed in any direction depending on the evidence at hand. It might be said that the less evidence there is, the more one ought to use Form 3.

Lastly, the Trial Chamber replied to the question of whether **category 3 of JCE** could be retained as a mode of participation for which the Accused might incur criminal responsibility due to the fact that it formed part of the "general principles of law recognized by civilized nations" at the time of the crimes charged. It first noted the finding of the ICTY Appeals Chamber in the Tadić Appeal Judgement, namely that a

[414] "Decision on the Applicability of Joint Criminal Enterprise" at the ECCC, para. 23.

single concept of common purpose liability was not adopted by most domestic legal systems. It then held that it would serve no purpose for it to determine whether the expanded form of JCE amounted to a general principle of law between 1975 and 1979, on the grounds that, in any case, it was not satisfied that it was sufficiently foreseeable to the Accused at that time that the crimes exceeding the scope of the common purpose may result in the Accused incurring responsibility as co-perpetrators or that the relevant statutes for convicting them were sufficiently accessible to them, given that there was no basis for category 3 of the JCE in Cambodian domestic law.[415]

[415] "Decision on the Applicability of Joint Criminal Enterprise" at the ECCC, para. 28.

3. A form of liability of secondary importance to the classic form under Article 7 (1) of the Statute

In his Ground of Appeal no. 5, the Appellant raises the fact that the Trial Chamber did not have a **clear majority** in favour of applying the JCE in the present case. In fact, Judge **Mindua**'s position expressed in his separate opinion attached to the Judgement is, according to the Appeal Brief, in contradiction with the position the Chamber expressed in paragraph 884 of the Judgement. On this point, an examination of this opinion reveals the fact that Judge **Mindua** stated that it was "preferable"[416] to refer to the classic forms of liability as set out in Article 7 (1) of the Statute rather than to the JCE form, while indicating that "the JCE mode of liability with its three forms, is not developed *expressis verbis* in the Statute of the ICTY. It is also absent from the Rome Statute of the ICC and is not applied before that Court."[417]

With regard to the opinion of Judge **Mindua**, the Appellant indicated that in view of the particular circumstances of this case, the majority had the obligation to study in greater detail the alternative modes of liability because a judge stated in his separate opinion that recourse to the classic forms of liability was preferable to the joint criminal enterprise, and these different modes of liability could have led, pursuant to Article 7 (1) of the Statute, to different legal findings. For the Appellant, this contradiction, which arises from the content of the opinion of one of the judges, equates to a **legal error** that invalidates the Judgement and he asks the Appeals Chamber to quash the Judgement and order a re-trial.[418]

This is an important question because one of the Judges in the *Tolimir* Chamber, Judge Mindua, also raised the problem in his concurring opinion, saying that: "I believe that when an accused can be found liable under the classical modes of liability [...] these modes of liability are preferable to that of JCE liability [...]".[419] I fully agree with this point of view and in this case, the Prosecution should have first determined

[416] *See* opinion of Judge Mindua attached to the *Tolimir* Judgement, para. 6.
[417] Opinion of Judge Mindua attached to the *Tolimir* Judgement, para. 4.
[418] Appeal Brief, para. 64.
[419] *See* the opinion of Judge Mindua attached to the *Tolimir* Judgement, para. 6.

the most appropriate **classic mode of liability** and perhaps in that case, Judge **Nyambe** could have supported a classic form of liability; even she deemed that the Accused could not be charged with a form of liability ensuing from the JCE.

However, on the basis of the classic forms of liability, the liability of the Accused comes under Article 7 (1) of the Statute of the ICTY and I do not see the need of translating this mode of liability into the JCE concept.[420] Consequently, I consider that Ground of Appeal no. 5 should have been admitted without annulling the Judgement because the Appeals Chamber has the possibility of annulling the conviction based on the JCE form of liability and of substituting another, more appropriate, form of liability which would be, as I shall explain in this case, the form of aiding and abetting as part of the classic forms of liability set out in Article 7 (1) of the Statute.

In this particular case, since I do not share the point of view of the Appeals Chamber with regard to the form of liability to be applied to the Accused, I **am dissenting** on Grounds of Appeal nos **15, 16, 17, 18 and 19** while concurring with the findings of the Appeals Chamber on Ground of Appeal no. **20**.

On **Ground of Appeal no. 15** and the question of the weight to be assigned to Directives 7 and 7/1, upon a careful examination of these documents I conclude that they were of a **purely military** nature. In fact, they did not only relate to **Srebrenica** and **Žepa,** but also included other locations. Therefore, we cannot consider that Directives 7 and 7/1 only had the specific goal of **Srebrenica** and **Žepa**. A study of the documents as a whole shows that the **only goal** was to separate the two enclaves and to wipe out the forces of the Muslim army. Therefore, I consider this to be a **strictly** military goal.[421] I am therefore in favour of **admitting** Ground of Appeal no. 15.

[420] W. Schomburg, "Jurisprudence on JCE – Revisiting a Never-Ending Story", *op. cit.,* p. 5.

[421] With regard, more specifically, to the *Tunnel* attack on 23 and 24 June 1995, I believe that the person who could have offered more precise information about the tunnel attack was Dražen Erdemović. In his detailed statement he did not say at any point that the goal had been to terrorise the civilian population, and even less so to kill or wound civilians. Whatever the case may be, we do not know the identity of the people who were allegedly killed in the attack on the tunnel. What is more, it seems that the target was the police station, which was a military target and, in this sense, if there had been any victims, we do not know whether they had civilian or military status and we cannot conclude

On **Ground of Appeal no. 16**, I note once again that when we examine in detail the statements of witnesses, important contradictions appear that cast serious doubt on their credibility. In view of the "reliability" of these testimonies, the Trial Chamber cannot draw the conclusions mentioned in the Judgement.[422] I can therefore only find in favour of **admitting** Ground of Appeal no. 16.

On **Grounds of Appeal nos 17 and 18**, it seems to me that in view of the weakness of the evidence, the Prosecution charged the Accused with the murder of three leaders in **Žepa** as a foreseeable and natural consequence of JCE 3. To the extent that I deem that JCE 3 does not have a legal basis, I cannot agree with the point of view of the majority of the Appeals Chamber. I am therefore in favour of **admitting Grounds of Appeal nos 17 and 18**.

On **Ground of Appeal no. 19** and the murders committed at the Kravica warehouse, the Trial Chamber states that a column of around **600 to 800** prisoners entered the Kravica warehouse between approximately 1500 and 1700 hours.[423] Sometime in the afternoon, intense shooting started after a Muslim prisoner seized a rifle from one of the men on guard duty and killed a member of the Bosnian Serbian MUP.[424] It is therefore undeniable that the **trigger element** was the revolt of one of the detainees who fired at the guard. The Trial Chamber also indicates that the executions continued in the morning of 14 July.[425] It therefore acknowledges that a number of people were killed in reaction to the actions of a Muslim prisoner. Therefore, I cannot see how it can be claimed that these murders were planned as part of the joint plan.[426] Consequently, I cannot but **admit** Ground of Appeal no. 19.

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that the attack on the tunnel was an attack that targeted the civilian population and, even less so, include this attack in the JCE.

[422] In paragraph 1110 of the Judgement, the only inference the Trial Chamber draws from the fact that the Accused supervised the evacuation of the wounded was that this was done to divert the attention of the International Community. In my opinion, another inference could be drawn, namely, that he had completed his task concerning the wounded prisoners of war.

[423] *Tolimir* Judgement, para. 355.

[424] *Tolimir* Judgement, para. 359.

[425] *Tolimir* Judgement, para. 362.

[426] *Tolimir* Judgement, paras 1054-1055.

On **Ground of Appeal no. 20** and the murders committed in Trnovo, it is equally significant to note that the **Scorpions unit**, whose chain of subordination to Republika Srpska is not entirely clear, arrested and executed people **on an unspecified date**. In these circumstances, I believe it impossible to assert, beyond reasonable doubt, as the Trial Chamber did,[427] that the six victims were included amongst the victims of the JCE. In these circumstances, I am in favour of admitting **Ground of Appeal no. 20**.

[427] *Tolimir* Judgement, para. 551.

B. COMPLICITY

1. The Functions of the Accused in His Capacity as Chief of Intelligence (Ground of Appeal no. 14)

I would firstly like to point out that while I consider that, by virtue of his functions, the **Accused** should have taken all the necessary measures to care about the prisoners of war, on the other hand, I do not agree on the fact that he had a command function within the organs of direction.

As the Trial Chamber indicated in its Judgement, the Accused was Chief of the **Sector for Intelligence and Security Affairs** which was the "highest administrative […] organ for activities relating to the organisation of security and intelligence organs, the military police, and reconnaissance, sabotage and electronic reconnaissance units; planning and organisation of security measures and intelligence support […]".[428] As the **chief of this sector**, the Accused directed, coordinated and supervised the work of the two administrations comprising it, as well as the subordinate intelligence and security organs, including the military police.[429]

It is important to note that with regard to the evidence presented by the Prosecution, a large part of it consists of testimony that points to the **important role played** by the security and intelligence organs within the VRS Main Staff.[430] Although the majority of these testimonies confirm that the information on the ground was reported by the brigades to the Security and Intelligence Sector, on the other hand, testimony differs on the command role of the Accused. With regard to military operations, the directives and orders to attack and defend reveal that the person signing them was not the Chief of Security and Intelligence but the Commander, who, as a general rule,

[428] *Tolimir* Judgement, para. 103.
[429] *Tolimir* Judgement, para. 104.
[430] The witnesses cited most often are Milenko Todorović (Hearing of 19 April 2011), Manojlo Milovanović (cited in para. 103 of the Judgement), Petar Salapura (cited in para. 103 of the Judgement), Mikajlo Mitrović (Hearing of 1 June 2011) and Petar Skrbić (Hearing of 2 February 2012).

should have been present. In that respect, Witness **Culić**,[431] confirms this fact when stating that "the exclusive right to command and take decisions was with us, commanders".[432]

With regard to the role of the Accused in the events that took place between 10 and 12 July 1995, the Trial Chamber in its Judgement mentioned two important documents, Exhibits **D00064**[433] **and P02203**.[434] The question that should be asked is whether the Accused had **control** over the intelligence and security organs established alongside the combat units. The Accused states that the Trial Chamber **erred** in this respect, pointing out that he commanded only certain organs. The Accused also states that the Trial Chamber erred when translating the term *rukovođenje* (B/C/S) as control, whereas it should have been "management".[435] Moreover, the Accused denies having had authority over the 410th Intelligence Centre. He adds that the Trial Chamber erred

[431] It should be noted that the testimony of Witness Culić, a Defence witness, was not taken into consideration by the Trial Chamber in its Judgement.

[432] During the cross-examination of this witness, the Prosecution highlighted two documents, Exhibit D00264 and Exhibit P02880 that contradict his statements. The first document is an order from General Mladić dated 11 October 1995 regarding the launching of combat operations. Page 2 of this document mentions the name of the Accused who is to "coordinate action defending the axis Mrkonjić Grad – village of Trijebovo – village of Stričići". The second document corresponds to a session of the National Assembly that mentions that the presence of the commanders of the Main Staff, or of a representative of the Main Staff, in the units carrying out the mission to liberate Podrinje is a specific way of giving weight to **steering** the combat operations towards a single goal. In that respect, the Prosecution brought up various visits made by the heads of the VRS, notably the Accused, to the front line just before the events in July 1995.

[433] As interpreted by the Prosecution, the first document, **D00064**, indicates that the Accused ordered the intelligence and security organs of commands "to undertake all measures to prevent the withdrawal of enemy soldiers and to capture them". The term "ordered" is not accurate if one refers to the original document. The original states "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 of enemy soldiers and to capture them". Although it is true that he requests that the names of all able-bodied men who are about to be evacuated from the UNPROFOR base in Potočari be recorded, he justifies this by the fact that "The Muslims wish to portray Srebrenica as a demilitarized zone with nothing but a civilian population in it," which was not the case.

[434] With regard to Exhibit **P02203**, the Trial Chamber states that the Accused ordered subordinate intelligence and security organs to "propose measures to be taken by commands to prevent [penetration], such as setting up ambushes […] to arrest them". However, a reading of the text qualifies the translation. It states that the subordinate organs "shall propose measures" to be taken by commands to prevent armed Muslims from illegally reaching Tuzla and Kladanj, such as setting up ambushes along the routes in order to arrest them and prevent possible "surprises" against civilians and the combat units present there. The Trial Chamber's interpretation clashes with a precise reading of the order issued on **12 July 1995** by the Accused. This communication indicates that the brigade commanders have the responsibility to inform fully the security station present in their respective areas of responsibility.

[435] Appeal Brief, para. 222; *Tolimir* Judgement, para.109, *Tolimir* Appeal Judgement, para. 290.

in regard to his role in the approval of humanitarian convoys and that it also erred in respect of his relations with **General Mladić**.[436] With regard to the Military Police, the Trial Chamber states that: "at all command levels, however, the MP units were **professionally controlled** by the security organs".[437]

With respect to the question of **control** and **management**, Defence witness **Slavko Culić**, the commander of the 1st Šipovo Light Brigade, pointed out that **he** had been the commander of all of the units, including those of the Military Police and the Security Sector. In his opinion, it was only the **brigade commander** who had the right to command,[438] all of the orders originated from the command centre[439] and the Accused, who had come to his brigade on several occasions, had never commanded this brigade. When questioned about the exact role of the Accused, he stated that his **task was to coordinate**: "Gentlemen, General Tolimir did not lead the operation. He was there merely as a representative of the command in order to coordinate the work to the extent that it was necessary on the battlefield to achieve coordinated actions. In command were the commander of the division and the commander of the corps."[440] When questioned by **Judge Flügge** about the word "coordinate", he said that this meant that he was responsible for the coordination and organisation of the forces engaged in defence.[441]

It is clear that the Trial Chamber was well aware of the problem, as attested to by its analysis in paragraphs 109, 110 and 111 regarding the security organs and the Military Police. The Trial Chamber believed it had solved this problem by the theory of "**professional control**". In my opinion, in a professional chain of command, control is in the hands of the **superior**. In this sense, as the Military Police units were

[436] Appeal Brief, para. 222; *Tolimir* Judgement, para.109, *Tolimir* Appeal Judgement, para. 290.
[437] *Tolimir* Judgement, para. 111.
[438] *Culić* testimony, 15 February 2012, T(F), p. 19278.
[439] *Culić* testimony, 15 February 2012, T(F), p.19279.
[440] *Culić* testimony, 15 February 2012, T(F), p. 19292.
[441] *Culić* testimony, 15 February 2012, T(F), p. 19293. During cross-examination, when answering the question whether the Accused and other specialist commanders were experts in implementing orders, the witness stated that although they were experts they were not the ones to implement orders on the ground because the system of control was very clear: orders were enforced by the commanders. It appears to me that the Trial Chamber did not take into account the statements of Witness Culić nor did it draw any legal conclusions from them.

attached to a brigade, they came under the command of the brigade chief and not the deputy commander of the Main Staff. Likewise, the security organs were directly dependent on the brigade commander. However, it should be noted that while the Main Staff could not carry out the task of command and control it could perform the task of "managing" staff through appointments, transfers, evaluations, etc.

The role of the 65th Protection Regiment as defined in paragraph 112 of the Judgement is particularly illustrative. Being an independent unit, as described in the Judgement, the 65th Motorised Protection Regiment was comprised of several units, including a Military Police battalion. Its task was to provide security to the Main Staff personnel, though it was also deployed in combat operations. It is clear that as part of combat operations it was dependent on the brigade in the relevant zone of responsibility. For some of its activities not involving combat operations, the 65th Regiment came under the command of **General Mladić** and, consequently, under the Accused for certain activities.[442]

The Accused also put forth the fact that there had been no transfer of authority over the 410th Intelligence Centre. In paragraph 917, the Trial Chamber stated that Mladić had transferred certain authorities of the 410th Intelligence Centre to him. This was based on the testimony of **Petar Skrbić**.[443] Nevertheless, having certain transferred powers does not amount to directing a military operation because this was an intelligence unit. Under such conditions, it seems very difficult to tie the Intelligence Centre to the Accused because it was directly dependent on Mladić.

Although I agree on the fact that the Accused was General Mladić's "eyes and ears", this does not mean that he had direct command over military units. This is why I am

[442] Footnote **362** is particularly explicit as it states that in May 1995 an order was issued to re-subordinate a company of the 65th Protection Regiment to the Drina Corps in order to execute a combat plan ordered by the VRS Main Staff (mention is made of Exhibit P2431). Likewise, in the same footnote, Witness Skrbić stated that the professional aspect of the task assigned to him involved training and deployment, which was under the auspices of the Security Administration (mention is made of Exhibit P02473). It is not because Prosecution Witness Manoljlo Milovanović said that the Accused "always knew more", that the Accused, who had to know everything, had the legal authority to issue orders outside of the traditional chain of command.
[443] *Skrbić* testimony, 2 February 2012, T(F), p. 18789.

in favour of admitting Ground of Appeal no. 14, contrary to the majority of the Appeals Chamber.[444]

[444] *Tolimir* Appeal Judgement, para. 577.

2. Tolimir's Responsibility for the Counts (Ground of Appeal no. 21)

The Trial Chamber and the majority of the Appeals Chamber concluded that **the only reasonable finding** to be made based on all of the evidence is that the Accused had **genocidal intent**. On this basis, the Accused is criminally responsible within the scope of the crime of genocide for his participation in the JCE to Murder. The majority of the Appeals Chamber is of the opinion that the Accused was aware of the murder operation from **13 July 1995** based on the measures he allegedly told Malinić to take, through Savčić, to remove Bosnian Muslims captured in the area of Kasaba.[445] According to the majority, these measures were astonishingly similar to those contained in the order issued by Mladić that same day,[446] contained in Exhibit **P00125**, whose authenticity was strongly contested. In a word, the Accused objects to the measures that were implemented which he claims he did not order.

I disagree with the majority about the **probative value** to be assigned to Exhibit **P00125**. In addition to the importance of the factual arguments regarding the authenticity of this exhibit, which cast serious doubt on its probative value,[447] a reading of the document reveals that a handwritten signature from the sender does not appear on this exhibit and that its content combining an **order** and a **proposal** seems completely **illogical**, which gives credence to my feeling that a **false document** was created for unknown reasons. With respect to the explanations put forth about the authenticity of this document, I deem that the fact that it was sent by a teleprinter diminishes its probative value and does not allow for a finding that it is an **original document** originating from **Savčić.** In reality, the fact that the teleprinter operator acknowledged that he signed the document and wrote "sent" merely confirms that he performed his job, but it is the prior **intellectual preparation** of the document that is important. With respect to the mixed content of the document, simultaneously

[445] Exhibit P00125.
[446] Exhibit P02420.
[447] Notably with regard to the inability to confirm the authenticity of the *Atlantida* binder in which this document was found, the statements of Malinić and Savčić, who do not remember having either received or drafted this document, and the objection regarding the existence of a forward command post of the 65th Regiment, *see Tolimir* Judgement, para. 936. The authenticity of this document, challenged by the Accused, has already been debated. The majority found the document to be authentic. *See Tolimir* Judgement, paras 937-944.

combining an **order** and a **proposal**, I find that none of the explanations presented by the Trial Chamber adequately respond to the concerns about the coherence of the document and instead leave serious doubts about its authenticity.

Moreover, irrespective of the questions about when the Accused's participation in and significant contribution to the JCE to Murder began, I consider that, generally speaking, the JCE can only be assessed in the context of **planning** and not **execution**. It is for this reason that I do not accept the responsibility of the Accused in the JCE to Murder but rather in the context of **complicity in genocide**. In this respect, the question is whether in order to be held responsible for complicity (aiding and abetting) pursuant to Article 7 (1), it is enough that the Accused had knowledge of the **specific intent** of the main perpetrator of genocide, or whether the Accused also had to share this intent? In this respect, the Appeals Chamber had the opportunity to state, on several occasions, that anyone who aids and abets an offence with **specific intent** may be held responsible if he does so knowing the intent behind it.[448] This principle applies to the Statute's prohibition of genocide, which is also an offence requiring specific intent. The conviction for aiding and abetting genocide under Article 7 (1) upon proof that the defendant **knew** about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal.[449] In this respect, evidence shows that on the one hand, the Accused had knowledge of the **genocidal intent** of certain members of the VRS Main Staff[450] and on the other, as the Chief of Intelligence, he was aware of the consequences of his actions in the perpetration of these crimes. It is for these reasons that, while his awareness of this genocidal intent does not in itself allow for a finding that he had the same intent as the principal perpetrator,[451] it does however establish a **causal link** between the Accused's failure to intervene and the commission of the crime of genocide.[452]

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[448] *Krnojelac* Appeal Judgement, para. 52, *Vasiljević* Appeal Judgement, para. 142; *Tadić* Appeal Judgement, para. 229, *Krstić* Appeal Judgement, para. 140.
[449] *Krstić* Appeal Judgement, , para.140.
[450] Based on the fact that by virtue of his function he must have been aware that prisoners of war had been executed.
[451] *Krstić* Appeal Judgement, para. 134.
[452] In my opinion, the evidence presented by the Prosecution does not provide any basis for finding that the Accused shared this genocidal intent. Had that been the case, relevant proof should have been presented in respect of this issue instead of having it inferred from circumstantial evidence. Supposing that a mass execution had been ordered by the top political leadership with precise restrictions given by

While noting the fact that the responsibility of the Accused as a superior is not charged under Article 7 (3) of the Statute, in terms of the conduct of his subordinates or subordinated organs at the time of the events, it should be noted that his role as the Chief of Intelligence and Security was of substantial importance, notably regarding the exchange of prisoners of war.[453] The Accused directed, coordinated and supervised the work of its two administrations, as well as of the subordinate security and intelligence organs including the Military Police.[454] Together with the Military Police, he was in charge of the prisoners of war[455] and was kept informed, amongst others, of the work and engagements of the Military Police units of various corps.[456]

Moreover, as **Salapura**'s immediate superior,[457] the Accused was kept abreast of the operations carried out by the **10th Sabotage Detachment**.[458] In regard to his deputy, **Petar Salapura,** I am astonished he was not prosecuted,[459] and I deem that he should have been called by the Appeals Chamber as an additional witness.[460] In regard to the

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Radovan Karadžić to General Mladić, shouldn't the latter have been required then, for technical reasons, to inform his subordinates in the Main Staff, including the Accused? The chronology of events, his presence in Žepa and his role as mediator in Žepa lead me to conclude that he did not initially share the genocidal intent. However, due to the circumstances, he must have known that ABiH soldiers had been captured and detained. At this stage, he should have intervened in his capacity as the Chief of Security and Intelligence to ensure that the prisoners would be treated in full accordance with the Geneva Conventions, which he did not do.

[453] *Tolimir* Judgement, paras 104, 106 and 916.

[454] *Tolimir* Judgement, para. 104.

[455] *See* in this sense Exhibit P02203; Exhibit D00064.

[456] Milenko Todorović, T, pp. 12960 to 12963 (18 April 2011). The Accused frequently accompanied Koljević to meetings in order to contribute to the drawing up of agreements for prisoner exchange. Ljubomir Obradović, T, pp. 11930 and 11931 (29 March 2011).

[457] Judgement, para. 115.

[458] Judgement, para. 121. The Intelligence Administration, headed by Salapura, directly controlled the 10th Sabotage Detachment. Dragomir Pećanac, T, p. 18134 (16 January 2012); Ljubomir Obradović, T, pp. 11960 to 11962 (29 March 2011).

[459] He was in fact the superior of Dražen Erdemović, who carried out his orders. I consider the fact that Petar Salapura ended up as merely a Prosecution witness in the Srebrenica trials, a Prosecution witness before the Court of Bosnia and Herzegovina (Case no. S1 1K003372 10 Krl) in the trial of the members of the 10th Sabotage Detachment (Franc Kos *et al.*), and was the 23rd Prosecution witness who testified on 13 May 2011 (Cf. Annex B of the Judgement) is a denial of justice for the victims. I find it incomprehensible that Dražen Erdemović, who simply carried out orders, was convicted by the ICTY while his superior slipped through the net. This deserves an explanation and I consider that he should have been called as an additional witness by the Appeals Chamber.

[460] The Appeals Chamber has two legal means by which to call a witness to testify:
- Rule 98 of the Rules of Procedure and Evidence entitled "Power of Chambers to Order Production of Additional Evidence".

10th Sabotage Detachment, although it was an independent unit of the VRS Main Staff directly subordinated to Mladić, it still came under the Intelligence Administration directed by **Salapura** as it carried out reconnaissance tasks and was required to inform the Accused of everything that the detachment was engaged in.[461] While the actions of the subordinates are not attributable to the Accused as the superior,[462] it is highly unlikely, based on the information that was given to him, that he was unaware of the murders committed at the time of the events. Although I agree with the fact that the responsibility of the Accused can be established on the basis of deductions, I consider nevertheless that, due to his function and role, he should have taken all the necessary measures to care for the prisoners of war, which he failed to do.

As the Deputy Commander for Intelligence and Security, the Accused was responsible for ensuring the security and well-being of the prisoners, an obligation he failed to accomplish entirely. Moreover, as an experienced military officer, the Accused was aware of his obligations under the military rules[463] and the rules of international law.[464] Tribunal case-law is very specific in this regard and states that the Third Geneva Convention invests "*all agents of a Detaining Power into whose custody prisoners of war have come with the obligation to protect them by reason of*

- Rule 115 of the Rules of Procedure and Evidence applicable before the Appeals Chamber entitled "Additional Evidence". Although the rule states that a "party may apply by motion to present additional evidence before the Appeals Chamber", there is nothing to prevent the Appeals Chamber from calling a witness, in the manner of the Trial Chamber. In my opinion, to ensure a fair trial, the following should have been called to testify: Dražen Erdemović, Momir Nikolić, Milorad Pelemiš or, failing this, Frank Kos.

[461] Judgement, paras 120, 121 and 917.

[462] Therefore, the Chamber pointed out that the Accused had communicated with Salapura on 16 July and with Popović *et al*. on 22 July. *Tolimir* Judgement, para. 1113.

[463] *See* in this sense, the Regulations on the application of international laws of war in the armed forces of the Socialist Federative Republic of Yugoslavia, which recognise that the provisions in the Fourth Geneva Convention of 1949 and the two Additional Protocols of 1977 (requiring for example that prisoners of war and civilians who are in the power of a party to the conflict be treated humanely) are also based on customary international law on the application of the international law of war by the armed forces of the Socialist Federative Republic of Yugoslavia. *See* notably Articles 9-12, 20-22, 207, 253, 210, 212 and 253 contained in Exhibit P02482. The Criminal Code of the RS, based on that of the SFRY, deals with crimes against humanity or violations of international law, including war crimes against civilian populations and prisoners of war. *See* Exhibit P02480, pp. 1, 3. The Constitution of the RS also prohibits inhumane treatment and unlawful detention. Exhibit P02215, p. 3, Articles 14 and 15.

[464] The requirement to treat prisoners of war humanely set out in Article 13 of the Third Geneva Conventions is also enshrined in Common Article 3 of the Geneva Conventions which, as it forms part of international customary law, applies to all of the parties, whether the armed conflict is of an international character or not.

their position as agents of that Detaining Power".[465] The fundamental principles enshrined in the Third Geneva Convention do not allow for any departure, thereby requiring that prisoners of war be treated humanely and protected from physical and mental suffering from the moment they are in the enemy's custody until they are released and permanently repatriated.

While the direct participation of the Accused in the "negotiations" regarding the transportation of Bosnian Muslim civilians and the exchange of Bosnian Muslim prisoners of war in Žepa indicates his knowledge of the applicable rules of international law,[466] some of his instructions can be interpreted as being **evasive**, even **contradictory,** in respect of a strict adherence to the rules of international law. **In August and September 1995**, when the families of the captured VRS soldiers and Bosnian Muslims were exerting pressure, the Accused could not proceed with the exchanges of the prisoners of war and claimed that there were simply not enough captured ABiH soldiers.[467] At that particular time, the Accused should have taken all the necessary steps to determine **the causes** that might explain such a situation instead of merely claiming that a prisoner exchange was impossible due to the small number of enemy soldiers captured by his units.[468] The fact that during this same period the **reburial operation** was underway and was **coordinated** and **supervised** by the security and intelligence officers who were under the authority of the Accused, namely **Beara** and ***Popović***, is a fact to consider when examining the reasons why the

[465] *Mrkšić* Appeal Judgement, paras 70-71 and 73.
[466] In the report that he sent to the Command of the Drina Corps on 9 July 1995 in which, while passing on Karadžić's instructions, he enjoined Krstić to order his units to "treat the civilian population and war prisoners in accordance with the Geneva Conventions of 12 August 1949". *See* Exhibit D00041; Judgement, para. 929. In the same line of conduct, on 28 July the Accused stated that Bosnian Muslim men who were taken off the buses on 27 July and then detained in Rasadnik prison would be registered by the ICRC as prisoners of war. *See*, Judgement, para. 992. A report dated 30 July and drafted by Čarkić, pursuant to the authorisation of the Accused, also shows that regarding the prisoners of war detained in Rasadnik prison, all the necessary measures concerning their treatment were taken in accordance with the orders and instructions of the Accused, including classifying the prisoners of war into categories; providing them with meals, ensuring that they received medical care; ensuring that they had the possibility to pray and that they were registered with the ICRC. *See*, Exhibit P01434, p. 3, Judgement, para. 999. Moreover, the Accused sent the VRS Main Staff a cease-fire agreement signed in October 1995 which provided for "humane treatment of all civilians and prisoners of war". *See*, Exhibit D00263, p. 3; *Tolimir* Judgement, para. 1005.
[467] Exhibit P02751; Exhibit P02250, p. 2. *See* also Judgement, paras 1003 and 1004.
[468] Exhibit P02250, p. 4.

Accused might have responded in such a way.[469] Another event that caught my attention was the proposal from the Accused not to respond to a request from the Embassy of the Netherlands in Sarajevo and not to assist in the identification of **239 persons** on a list of persons present at the UN base in Potočari on 13 July 1995.[470]

Although evidence shows that the Accused had, on several occasions, intended to respect the international rules applicable to prisoner exchanges,[471] there is no excuse for his inactivity and lack of cooperation in response to repeated requests for information. The Accused should have, in fact, obtained intelligence and counter-intelligence from units and personnel on the ground that were subordinated to him. **Mladić**'s instructions regarding command and control of the VRS security organs issued on 24 October 1994 show that the Accused had "**centralised control**" over their activities. Evidence shows that the Accused gave guidance, instructions and orders to his subordinates, who kept him informed about the progress of the situation, which casts no doubt on the actual ability of the Accused to protect the Bosnian Muslim prisoners in Srebrenica.

In this respect, although evidence suggests that the Accused was not part of the JCE plan, as the Assistant Commander for Intelligence and Security, he had an absolute obligation to protect the Bosnian Muslim prisoners from **Srebrenica.** Nevertheless, despite his knowledge of the situation on the ground and the obligations incumbent on him, the Accused chose not to act, which made the commission of these crimes possible. It is for these reasons that I do not agree with the reasoning of the majority of the Appeals Chamber[472] because I consider that it would have been appropriate and

[469] *Tolimir* Judgement, paras 558-564, 1064 and 1066.
[470] *See* Exhibit P02433. *See* also Exhibit P00122, p.2; Exhibit P02875 (document from the BiH MUP office in charge of state security, dated 3 August 1995, recounting an intercepted conversation between two members of the Bosnian Serb forces and one of the speakers transmits the order of General Tolimir, to whom they refer as Toša: "Do not register the detainees. Talk to them as much as possible and keep them for future exchanges.").
[471] The fact that he was involved at length with the prisoner exchanges from 1992 until the end of 1995. *See* Exhibit P02871; Exhibit P02251; Exhibit P02250.
[472] *Tolimir* Appeal Judgement, para. 591.

fair to hold the Accused responsible for **complicity in genocide** (aider and abettor)[473] and not as the **principal perpetrator of genocide**.

In my opinion, the evidence that relates to the principal perpetrator of genocide must be consistent and indisputable. We cannot rely on basic assumptions to establish that form of responsibility. In respect of this subject, I deem that, by basing itself chiefly on questionable evidence,[474] the Prosecution failed to present conclusive evidence to support its demonstration.[475]

[473] *See Krstić* Appeal Judgement, para.137; *Krnojelac* Appeal Judgement, para. 52; *Vasiljević* Appeal Judgement, para. 102.
[474] The Prosecution relies chiefly on reports from experts who are employees on the payroll of the Office of the Prosecutor, on courtroom testimony from members of the Office of the Prosecutor, on questionable plea agreements and on witnesses from the VRS such as Salapura.
[475] It is notably for this reason that a Judge of the Trial Chamber was in favour of acquitting the Accused.

3. Conspiracy to Commit Genocide (Ground of Appeal no. 22)

In his submission, the Appellant maintains that the Trial Chamber erred in finding that the Accused had genocidal intent.[476] The Trial Chamber and the Appeals Chamber concluded by a **majority** that the Accused was criminally responsible for **conspiracy to commit genocide** under Article 4 (3) (b) of the Statute.[477] As per the findings of the Appeals Chamber, proof of the Accused's alleged agreement to commit the crime of genocide can be inferred from his significant contribution to the JCE to Murder.[478]

I consider that the Accused is only liable in terms of complicity in genocide. **Knowledge** alone of **genocidal intent** cannot render the Accused liable to the same degree as the members of the JCE.[479] I deem that not only was the Accused not **part** of the JCE, but also that **no exhaustive and serious legal analysis** would reach the conclusion that there was a form of conspiracy to commit genocide between **the Accused** and **members of the JCE**. Based on the legal facts at our disposal, there is **no direct or indirect proof** that could be interpreted as being the only **reasonable and possible inference to be drawn**[480] that the Accused had an agreement with the alleged members of the JCE by significantly contributing to it.

Moreover, in addition to my personal position and my difference of opinion when it comes to the form of liability applicable to the Accused, the legal analysis of the Appeals Chamber raises several questions that, in my opinion, deserved a more careful reasoning. In that respect, although the Appeals Chamber rightly mentions the fact that the ***mens rea*** for the crime of genocide and the crime of conspiracy to

[476] Appeal Brief, paras 456-466. The Appellant objects to the findings of the Trial Chamber recalled in paragraph 1175 of the Judgement that a plan to kill the Muslim men of Srebrenica had already been drawn up and that an agreement existed between at least two or more persons to commit genocide. In paragraph 1176 of the Judgement, the Trial Chamber points out that at the latest by the afternoon of 13 July 1995, the Accused had knowledge of the murder operation and was actively engaged in concealing the murder, which was part of his significant contribution to the joint criminal enterprise to murder. Likewise, the Trial Chamber stated that the fact that he failed to protect the Muslim prisoners constitutes **deliberate inaction** with a view to assist the common purpose shared with the other JCE members, resulting in the commission of genocide.
[477] *Tolimir* Judgement, paras 172-173, 175-176, *Tolimir* Appeal Judgement, para. 589.
[478] *Tolimir* Judgement, paras 1176, 1206. *Tolimir* Appeal Judgement, para. 580.
[479] *Krstić* Appeal Judgement, para.134.
[480] *Popović et al.* Appeal Judgement, para. 544; *Nahimana et al.* Appeal Judgement, paras 896-897; *Seromba* Appeal Judgement, para. 221.

commit genocide is **identical,**[481] it has a more difficult time marking the difference that characterises the ***actus reus* of these two crimes**.[482] The crime of genocide requires the commission of one of the acts enumerated in Article 4 (2) of the Statute, whereas the crime of conspiracy to commit genocide requires the act of entering into an **agreement** to commit genocide.[483] Although in theory such a distinction seems obvious, in practice the matter is more complex. With the aim of arriving at such a distinction, the Appeals Chamber unwittingly confounded these two notions and made them indiscernible.

In order to establish the ***actus reus*** of the crime of conspiracy to commit genocide, the Appeals Chamber based itself not only on the findings on the acts of genocide but also on the Accused's liability pursuant to his participation in the JCE.[484] Consequently, in the absence of direct proof, the Appeals Chamber wanted to infer the agreement to commit genocide on the basis of the **conduct of the members of the JCE at the time of the commission of the acts of genocide**.[485] In order to achieve this, it carried out an analysis of all of the facts and circumstances linked to the crime of genocide to infer the existence of the crime of a conspiracy to commit genocide.[486] In that sense, while there was a lack of direct proof of an agreement to commit genocide, and the majority of the Appeals Chamber was right to consider all of the relevant facts and circumstances including the factual findings in order to determine whether genocide was committed,[487] it should have nevertheless taken into account as part of its analysis the fact that such an approach led to incriminating the Accused **twice** for the same acts.

On the other hand, it emerges from the Trial Chamber's reasoning, which was upheld by the Appeals Chamber, that the agreement to commit genocide was inferred from

[481] *Tolimir* Appeal Judgement, para. 586; *Tolimir* Judgement, para. 787 ; *Nahimana et al.* Appeal Judgement, para. 894.
[482] *Tolimir* Appeal Judgement, paras 582 and 585.
[483] *Nahimana et al.* Appeal Judgement. para. 894; *Seromba* Appeal Judgement, para. 218; *Ntagerura et al.* Appeal Judgement, para. 92.
[484] *Tolimir* Appeal Judgement, para. 583.
[485] *Tolimir* Appeal Judgement, para. 583.
[486] *Tolimir* Appeal Judgement, para. 583; *Nahimana et al.* Judgement, para. 896.
[487] *Popović et al.* Appeal Judgement., para. 544; *Nahimana et al.* Appeal Judgement, paras 896-897; *Seromba* Appeal Judgement, para. 221.

13 July 1995, the date of the Accused's purported knowledge of the joint murder operation.[488] To follow this reasoning, the Trial Chamber inferred that the Accused acceded to the agreement to commit genocide based on his knowledge of the genocidal intent of the members of the JCE.[489] This means that the Trial Chamber used the same evidence by which it determined the *mens rea* to infer the existence of an *actus reus* of the crime of conspiracy to commit genocide. I **completely disagree** with this reasoning which, in my opinion, goes far beyond presumptions or other circumstantial evidence and limits analysis.

I draw attention to the fact that the **crime of conspiracy to commit genocide** is an **inchoate and preventative crime** that deserves particular attention, notably when an accused has already been convicted for acts of genocide.[490] Although, pursuant to case-law, a conviction for genocide does not exclude cumulative convictions for conspiracy to commit genocide, due to the fact that the crime of genocide does not punish the agreement to commit genocide,[491] it is still necessary for **such an agreement** to have actually existed and for it to be possible to infer its existence from an exhaustive legal analysis.

The Appeals Chamber also recalls the fact that criminalising conspiracy to commit genocide involves not only preventing the commission of the substantive offence, but also **punishing** the collaborative aspect of the crime, which inherently poses a specific danger regardless of whether the substantive crime is ultimately committed.[492] Although I do not doubt that such a conclusion falls under the aims of the Convention on Genocide,[493] I do however have serious reservations on the danger that such a

[488] *Tolimir* Appeal Judgement, para. 585. *Tolimir* Judgement, para. 460.
[489] *See Tolimir* Appeal Judgement, paras 583-585. *Tolimir* Judgement, para. 1206.
[490] *See* Don Stuart, *Canadian Criminal Law: A Treatise*, 4th ed. (2001), pp. 698 to 700 (since conspiracy is a preventative and incomplete offence, "once the completed offence has been committed there is no justification for also punishing the incomplete one").
[491] *Gatete* Appeal Judgement, para. 262.
[492] *Tolimir* Appeal Judgement, para. 589, *Tolimir* Judgement, para. 1207, *Gatete* Appeal Judgement, para. 262.
[493] *Travaux préparatoires* for the Genocide Convention and the Ad Hoc Committee on Genocide, Report of the Committee and Draft Convention Drawn up by the Committee, Economic and Social Council, E/794, 24 May 1948, p. 19.

conspiracy could represent, particularly once the crime of genocide has been established.

In this regard, I consider that although the purpose of criminalising an **inchoate offence**, such as **conspiracy**, is to prevent the commission of the substantive offence,[494] once the latter is committed, the justification for punishing the prior conspiracy is less compelling.[495] This is particularly true when proof of the substantive offence is the main piece of evidence from which an inference of a prior agreement is drawn and upon which the conspiracy conviction is based.

I wonder, moreover, whether by attempting to integrate the conviction for conspiracy to commit genocide within the Accused's participation in the JCE to Murder there was not a forced articulation of the evidence? In other words, is the basis for these two convictions not the same, namely, the Accused entering into an agreement to commit genocide? In that sense, although a finding of guilt for the crime of genocide does not render a conviction for conspiracy to commit genocide redundant,[496] it is essential on the other hand to recall, as was done in the *Popović et al.* case, that "*the fundamental principle animating the concern regarding multiple convictions for the same act is one of fairness to the accused*".[497] Aside from my own position on the matter of the Accused's responsibility, I consider that the Appeals Chamber should have applied the **principle of fairness** in this case due to the fact that the basis for the two convictions derives from the Accused's knowledge of the genocidal plan. Consequently, in cases where these acts already resulted in a conviction for **genocide**,

[494] *Nahimana* Appeal Judgement, para. 678; *Kalimanzira* Judgement, para. 510; *See* also official UN documents A/C.6/SR.85 and A/C.6/SR.84 (*Travaux préparatoires* for the Genocide Convention wherein it states that "the aim of the Convention is to prevent genocide rather than punish it").
[495] *Popović et al.* Judgement, para. 2124.
[496] *Gatete* Appeal Judgement, para 263. This is notably due to the fact that conspiracy to commit genocide is a crime under the Statute, whereas joint criminal enterprise is a form of criminal liability.
[497] *Popović et al.* Judgement, para. 2123. *See* also, *Kunarac* Appeal Judgement, para. 173 (wherein it states that the Appeals Chamber will "scrutinise […] the multiple […] convictions" and "will be guided by the considerations of justice for the accused"; *Čelebići* Appeal Judgement, para. 412.

an additional conviction would result in double jeopardy for the Accused for the same acts.[498]

For the aforementioned reasons, I do not share the opinion of the Appeals Chamber[499] because I consider that the Trial Chamber **erred in law**, and therefore my finding is in favour of admitting Ground of Appeal no. 22.

[498] *Musema* Judgement para.198. In this case, the Trial Chamber adopted the more favourable definition whereby an accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts.
[499] Appeal Judgement, para. 590.

VI. The Sentence

The Sentence (Ground of Appeal no. 25)

The Appeals Chamber convicted, by a majority, the Accused to **life imprisonment**. The charges against the Accused are particularly grave and deserve to be punished in fitting with the level of his effective military responsibility within the VRS Main Staff.

On the procedural level, I found that there had been no fair trial with respect to Grounds 1 and 3, but I considered, however, that the case-file contained a large quantity of evidence that would enable me, as a reasonable trier of fact, to assess the criminal responsibility of the Accused. This is the reason why I accepted certain grounds put forth by the Appellant and rejected others. On pages 9 and 10 of my general observations I indicated that it seemed necessary to me to give an **exact legal characterisation** of the alleged acts.

In my opinion, the Accused is criminally responsible in two ways:

- Pursuant to Article 2 [for] violations of the Geneva Conventions of 1949 because under paragraph (A) the Accused is responsible for the wilful killing of several thousand prisoners of war

- Pursuant to Article 4 (2) (a), he can be declared an **accomplice in genocide** for the murders of members of the group of Srebrenica Muslims.

A guilty conviction based on these two articles must entail a **maximum sentence**, which in this case can only be life imprisonment, with a **minimum term of 30 years**.

Why this minimum term of 30 years? The number of victims in Srebrenica is enormous: several thousand soldiers and men of military age were executed without a trial over a period of a few days, as part of an appalling *modus operandi*. Although the *Tolimir* Chamber was immersed in assessing the responsibility of others, such as Krstić, Popović *et al.*, Pandurević and Beara, it should have focused **solely** on the

Accused. The Accused is not some subordinate on the ground such as Sergeant **Dražen Erdemović**, he is part of the category of generals, meaning a part of the high command of Republika Srpska, with only **General Mladić** and President **Radovan Karadžić** above him. If one day **Radovan Karadžić** and **Ratko Mladić** are convicted, the Accused would in a way be the "number 3", and if they were acquitted or died in the course of the trial, the Accused could in theory find himself in **position 1 or 2**, which highlights the importance of the Accused's role.

Of course, the evidence presented by the Prosecution did not, in my opinion, link the Accused to the planning of a JCE or show the Accused to have been a perpetrator of genocide. On the other hand, the evidence assessed in light of the grounds of appeal led me to find in favour of his guilt and in favour of a sentence with a minimum term of 30 years; bearing in mind his age, he would never be released. This sentence seemed necessary to me, all the more so because in the residual Mechanism, it will be up to the President of the Tribunal **alone** to grant pardon, a commutation of sentence or early release pursuant to Rule 150 of the Rules.

Of course, Rule 151 of the MICT Rules of Procedure and Evidence requires the President to take into account, *inter alia*, the gravity of the crime committed, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation and any substantial cooperation of the prisoner with the Prosecutor. However, as the scope of the President's power is extensive, it seem necessary to me to "restrict" the possibility of pardon and the appropriate way to do this is to issue a life sentence with a minimum term of 30 years.

Likewise, in a disposition enclosed in the annex, I clearly stated that the Accused must serve his sentence in Serbia, I do not see why the expenses associated with his long should be taken on by another State; it is up to Serbia to provide the related security and care. Moreover, as the period of detention will be very long, I do not wish to punish his family members who are not responsible for any of the events. His family should be allowed to see him during prison visits, which accused persons are

entitled to, if they wish to do so, and to facilitate contact with family, the best solution would be to have him serve his sentence in Serbia.

VII. Conclusion

After an extensive analysis of the evidence on record and consideration of the submissions from the parties, I am able to state **how** the acts that led to the capture and subsequent execution of thousands of men (soldiers and those of military age) in Srebrenica unfolded.

The point of departure is **exclusively** the attack by the Serbian forces against the positions of Dutchbat in the Srebrenica enclave. The capture of these positions, described in the annex, raises the question of **why** the Serbian forces attacked these positions in the first place?

This is not easy to answer, although in my opinion it is the key to these events, notably due to the Trial Chamber's lack of interest in the question. It is undeniable that there was a "power struggle" between Republika Srpska and the International Community, particularly NATO.[500]

Therefore, it was logical that an attack on the Srebrenica enclave by the Serbian forces would again provoke NATO air strikes. The International Community could not remain impervious to an attack launched against an enclave legally protected by a Security Council resolution. As the Serbian forces were **inside** the **Srebrenica** enclave and under such conditions the Muslim population must have been concerned about the risk of collateral damage in the case of air strikes, they had no choice but to leave the combat zone. This is what they did by **spontaneously** leaving the area and taking refuge in Potočari, the Dutchbat headquarters, a location that would offer better protection in case of NATO air strikes.

In the confusion following the operation conducted against Dutchbat, the ABiH military forces took the opportunity to flee the enclave and took with them able-bodied men between the ages of 16 and 60,[501] the majority of whom had directly

[500] Another enclave, Goražde, had come under attack by the Serbian forces on 4 April 1994 and 10 April 1994, NATO had bombed Serbian positions around Goražde, which led to a proposal on 25 April 1994 by the "Contact Group" consisting of the United States, Russia, Great Britain and France to draw up a peace plan for Bosnia and Herzegovina. On 25 and 26 May 1995, **NATO** bombed the Serbian positions around Pale.

[501] Who had the status of conscripts under national law.

participated in the hostilities. It should be noted that a small number of women were also present, for personal reasons, in what was essentially a military column. The Trial Chamber found beyond a reasonable doubt that this column had fought against the Serbian forces and inflicted losses on them, which led to a temporary cease-fire between the two parties to allow the column to leave under the best possible conditions.

The capture of positions held by Dutchbat without a reaction from NATO was undeniably a success for General Mladić, who publicly boasted about this as evidenced in video P02807, wherein he states that a well-known CNN journalist had told him he was the new General GIAP[502] since a comparison could indeed be drawn due to General GIAP's capture of *Dien Bien Phu* following the capture of French Army positions from the high ground.

It follows therefore that the sequence of events in no way supports the argument of a JCE to forcibly transfer the civilian population. I find this conclusion to be a major error in the assessment of the evidence because this hypothetical plan does not correspond in any way to Directives 7 and 7/1 on which this theory is based. The question is why did this military operation transform into a massacre of the prisoners of war? By failing to examine this avenue, the ICTY did not perform its duty to establish the truth.

In that respect, I must mention the **expectation** of the victims' families to learn the truth regarding these events and to have international justice precisely determine the identity of the perpetrators of these tragic events that culminated in the execution of several thousand Muslims from Bosnia and Herzegovina. The present case only concerned the Accused who has been sentenced by the Judges of the Appeals Chamber for his participation in the acts recorded in the Judgement of the Trial Chamber and largely upheld by the Appeals Chamber.

[502] Given that the journalist, a recipient of the Pulitzer Prize in 1966, was knowledgeable of the war, he should have been more cautious about his statements since despite General GIAP's military feat he was also responsible for the death of 7,801 prisoners of war and the departure of 3,013 Indo-Chinese prisoners captured on the territory.

His role, which was irreversibly determined by this Appeal Judgement, does not, however, provide an answer to the legitimate question of the victims' families as to who ordered the mass executions.

The splitting up of the case files on Srebrenica, and the almost complete control over presentation of evidence by the parties, does not seem to me to have provided an answer to this question that is crucial to the victims' families and the expectations of the international community.

Another important matter to be pondered concerns the common-law procedure followed from the beginning of the trials by the first judges of the Tribunal, which, however, does not allow us to get closer to the truth. The Judges' involvement in the course of the trial should have been through putting specific questions to the witnesses and the parties on the evidence. I asked my colleagues to summon witnesses such as **Karadžić** and **Mladić** to the trial, but to no avail.

The fact that the **Statute** rightly recognises in Article 21 that the Accused has the right not to **incriminate himself**, does not prevent the judges from being able to ask him to testify with his consent, especially if he pleaded **not guilty**. Certain accused understood that it was in their own interest to ensure their own defence (which was the case with the Accused) which I believe is an excellent thing, but I nonetheless consider that they should have completed their defence **by testifying themselves**. It is astonishing to note that in several cases the Prosecution and the Defence called witnesses who had been convicted or were still on trial to testify about the facts.

It also seems important to me to point out that the voices of the victims are missing in the judicial system; they are only heard when testifying before the ICTY as witnesses, subjected to cross-examination by the other party. In other international jurisdictions, the victims have a status that allows them to express their point of view; this is a shortcoming that I had to raise!

Lastly, we should also think about the question of **witness protection**. Is it really necessary, 20 years after the events, to protect witnesses, except for victims of rape (for which General Tolimir was not charged)? The weight afforded to the public testimony of a witness is undoubtedly greater than that afforded to a witness testifying without protective measures who may, due to the passing of time, occasionally tend to take certain liberties in respect of the events.

The solution is therefore clear: judges should take back control of the trial and, to use aviation terminology, "**move from automatic to manual piloting**". This would allow us to obtain the Truth and to know **who** took the decision to execute thousands of victims and **why**. To this day, based on the evidence in the case file, I do not have an answer to this question.

VIII. Annexes

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		706	
		710	
96	195	711	
		712	
		713	
96-97	196	718	
97-98	197	723	
99-100	200	739	
100	201	744	
101	203	753	
102	204	757	***Continuing Military Attacks***
103	207	767	
		768	
104-105	209	776	
		778	
		779	
		780	
105-106	210	785	

		786	
107-108	211	791	
110-111	217	819	***Operation Krivaja 95 Orders (2 July)-Start of VRS Combat Operations against Srebrenica (6 July)***
		821	
125	238	921	***Formation of the Column on the Night of 11 July and its Composition***
126	239	924	
126-127	240	927	
		930	
131-132	246	968	***Hotel Fontana Meetings (11-12 July)***
		974	
132	247	980	
133	249	999	
134	250	1001	
139-140	260	1057	
141	262	1074	***Bosnian Serb Forces Taking Over Control of Potočari (12 July)***
		1076	
		1077	
141-142	263	1082	
142-143	265	1097	
144-145	269	1108	***Transportation of Bosnian Muslims from Potočari (12-18 July)***
		1111	
145	270	1113	
		1114	
145-146	271	1117	
147	274	1127	
		1128	
		1129	
148-149	275	1141	
155	281	1178	
156-157	282	1184	
157	283	1192	
159-160	285	1211	
167-168	298	1272	
179-180	316	1382	***Military Action against the Column and Developments Related to the Column***
183	321	1407	
193-194	338	1484	***The Nova Kasaba Football Field***
220	394	1715	***Bosnian Muslim Men Taken from the Trailer of a Truck in Which They Were Detained in Bratunac Town***
265-266	483	2122	***Detentions –Kula School***
270-271	489	2156	***Killings – Branjevo Military***

271-272	490	2158	***Farm and Pilica Cultural Centre***
272-273	491	2164	
274-275	494	2187	
276	496	2193	
283-284	509	2261	***Developments After 16 July Involving the Column and its Members***
284	510	2263	
284-285	511	2267	
285-286	512	2271	
		2277	
289-290	521	2313	
293-294	528	2348	
		2350	
294-295	530	2362	
		2363	
		2364	
307-308	556	2457	***Detentions at Batković***
311	562	2483	***The Reburial Operation (September and October 1995)***
327	589	2580	***Other Victims Identified in the Janc Report of April 2010***
329-330	594	2587	***Total Number of Srebrenica Victims Killed by Bosnian Serb Forces Otherwise Than in Combat***
338-339	612	2638	***The Attack on Žepa***
351	636	2730	***Fate of the Bosnian Muslims of Žepa and Related Developments from 25 July 1995***
371-372	674	2901	***Arrest and Detention of POWs and Bosnian Muslim Leaders***
372-373	675	2909	
		2910	
		2911	
472	914	3607	***Role of the Accused as the Chief of the Sector for Intelligence and Security Affairs and Assistant Commander***
		3608	
472-473	915	3614	
		3616	
		3617	
473	916	3621	
		3627	
475-476	921	3646	***Mladić's "Inner Core"***
476-477	923	3660	***Acts and Conduct of the Accused***
477	924	3665	
478	926	3670	
		3671	
		3672	
480-481	929	3693	
483	932	3711	

		3712	
483-484	933	3716	
485-486	936	3730	
494	952	3797	
494-495	953	3802	
495-496	954	3810	
496	955	3813	
		3814	
496-497	957	3817	
		3818	
497-498	958	3821	
498	961	3831	
499	962	3833	
	963	3837	
499-500	964	3838	
		3843	
501	966	3850	
		3853	
		3854	
512	997	3952	
515	1004	3970	
518-519	1012	3992	***Policy of Ethnic Separation: Six Strategic Objectives - Directive 7***
520	1015	3999	***Military Activities Aimed at Terrorising the Civilian Population***
524-525	1023	4033	***Attack on the Srebrenica Enclave***
538-539	1050	4127	***Development of a Common Plan to Murder the Able-Bodied Muslim Men from Srebrenica***
544	1059	4175	
544-545	1060	4179	
		4180	
545	1061	4185	
		4186	
548-549	1068	4202	
553-554	1077	4226	***Policy of Ethnic Separation Culminating in Issuance of Directive 7***
		4227	
556-557	1083	4251	***Military Activities Aimed at Terrorising the Civilian Population in Srebrenica***
558	1085	4259	***Disabling of UNPROFOR and Enabling the Takeover of Srebrenica***
559-560	1087	4264	***Knowledge of Forcible Removal and Coordinating Activities of Subordinates in Potočari***
		4266	
602	1169	4496	***Findings Count 1: Genocide***

		4498	

2. Report of the United Nations Secretary-General[503] (Exhibit D00122)

a. Historical overview of the events that led to the creation of safe areas

The events linked to **Srebrenica** and the crimes attributed to **General Tolimir** concern two enclaves (Srebrenica and Žepa) that had been declared "**safe areas**" by the Security Council.[504] This raises the question of why a safe area was attacked by the Serbian forces. In order to answer this question one must first examine the reasons that led to the creation of the safe area.

At the start of the conflict in Bosnia and Herzegovina, Muslims were expelled from their homes and some were maltreated and killed by the Serbs.[505] In May 1992, the Bosnians regrouped to contest Serb control of Srebrenica and after the death of **Goran Zekić**, a Serbian leader, the Serbian community began to evacuate Srebrenica[506] and the town was secured on 9 May 1992 by the Bosnian soldiers under the command of **Naser Orić**.[507]

Under Orić's leadership, the Bosnians expanded their control during combat and according to statistics from both parties, over 1,300 Serbs were killed by the Bosnians.[508] In September 1992, the forces from **Srebrenica** linked up with those of **Žepa.**[509] On 7 January 1993, the Bosnian forces launched an attack against the village of **Kravica** killing 40 Serbian civilians.[510] In March 1993, the Serbian forces overran the villages of Konjević Polje and Cerska in a counter-offensive that resulted in 50,000 to 60,000 inhabitants being compressed around Srebrenica; during the counter-

[503] Comprehensive report containing an assessment of the events dating from the establishment of the safe area of Srebrenica on 16 April 1993 under Security Council resolution 829 (1993) of 16 April 1993 and other safe areas until the endorsement of the Peace Agreement by the Security Council under resolution 1031 (1995) of 15 December 1995.
[504] Security Council resolution 819, 16 April 1993.
[505] D00122, para. 33.
[506] *Ibid.*, p. 13, para. 34. Srebrenica, which lies in a valley in Eastern Bosnia, had a population of 37,000 in 1991, of which one quarter were Serbs.
[507] *Ibid.*
[508] D00122, para. 35.
[509] D00122., para. 36.
[510] D00122, para. 37.

offensive, the town of Žepa was separated from Srebrenica by a narrow corridor held by the Serbs, becoming an enclave of its own.[511] The situation in **Srebrenica** became desperate and the UNPROFOR commander travelled there on 11 March 1993 and observed that there was no running water, limited electricity, that there was overcrowding and that schools and buildings had been emptied to accommodate displaced persons. The local population prevented the UNPROFOR Commander from leaving and the latter stated that the persons present were under the protection of the UN.[512]

During the weeks that followed, the UNHCR succeeded in bringing in a number of humanitarian aid convoys and in evacuating vulnerable people to Tuzla.[513] These evacuations were opposed by the Government authorities in Sarajevo who spoke of "ethnic cleansing". The first UNHCR convoy entered the town on 19 March 1993 and returned to Tuzla with 600 civilians.[514] On 28 March, 1,600 persons wanted to go to Tuzla, leading to the death of six persons and seven more in the overcrowded vehicles. Several other people died in a third UNHCR convoy in which 3,000 women and children and elderly men were evacuated in 14 trucks.[515] Subsequently, there were additional limited evacuations despite opposition from the Bosnian Government. According to the report from the UN Secretary-General, a total of **8,000 to 9,000** people were transported to Tuzla.

At this point, I must note that no one has been prosecuted for these evacuations, which obviously happened because of the wishes of 9,000 people against the wishes of the Muslim leaders.

According to the UN Secretary-General, as the situation deteriorated the Security Council increased its activities.[516] In his remarks at the London Conference, the President of the ICRC stated in August 1992 that the massacres must cease and that a haven would have to be found for 10,000 detainees, and he asked the delegates

[511] *Ibid.*
[512] D00122., para. 38.
[513] D00122, para. 39.
[514] D00122, para. 40.
[515] *Ibid.*
[516] D00122, para. 41.

whether they would consider establishing "protected zones".[517] Austria, a non-permanent member of the Security Council, considered this question although none of the permanent members of the Security Council were supportive and merely invited the Secretary-General, in resolution 787, to study in consultation with the UNHCR the possibility of, and requirements for, the promotion of "safe areas" for humanitarian purposes.[518]

Several issues had to be resolved beforehand:

- these areas had to be created with the agreement of the parties
- these areas were to be occupied solely by civilians and be exempt from all military activity
- these areas were to be demilitarized
- they were to be protected by UNPROFOR

Almost immediately, **Lord Owen,** the Co-Chairman of the International Conference on the Former Yugoslavia, stated that these areas were flawed in concept.[519] The other Co-Chairman, **Cyrus Vance**, echoed his message that the safe areas would encourage further "**ethnic cleansing**" operations.[520] The case was the same for the UN High Commissioner, **Ms Ogata**, who expressed caution on the subject and showed insight when she said that the parties to the conflict could take advantage of this to further their own military objectives.[521] Moreover, the UNPROFOR commander deemed that the safe areas could only be established by an agreement between the belligerents.[522] Confusion reigned in the **Security Council,** but it nevertheless adopted **resolution 819** demanding that all parties treat Srebrenica as a safe area and that paramilitary units cease launching armed attacks against Srebrenica.[523] When UNPROFOR was informed of this, it let it be known that this system could only work if the parties consented. UNPROFOR remained active by convincing the Bosnian commanders that

[517] D00122, para. 45.
[518] D00122, para. 47.
[519] D00122, para. 48.
[520] *Ibid.*
[521] D00122, para. 49.
[522] D00122, para. 51.
[523] D00122, para. 55.

they should sign an agreement in which they would give up their weapons to UNPROFOR in return for the establishment of a ceasefire.[524]

The text of the agreement negotiated in **Sarajevo** was signed by **Generals Halilović and Mladić** on 18 April 1993.[525] The parties had differing interpretations of the agreement, notably on the issue whether it applied only to Srebrenica or whether it included the surrounding area as well. A Canadian UNPROFOR contingent was deployed as part of this agreement. However, **General Halilović** issued orders to the Bosnians not to hand over any serviceable weapons or ammunition.[526] The Secretary General informed the UNPROFOR commander not to pursue the demilitarization process with undue zeal. Despite the context, UNPROFOR issued a press statement entitled, "**Demilitarization of Srebrenica a Success**!"[527]

The Security Council sent a mission to the location which stated in a report that it had noted a discrepancy between the resolutions and the situation on the ground.[528] Despite that, it recommended that **Goražde, Žepa, Tuzla and Sarajevo** be declared as "safe areas" as "an act of Security Council preventive diplomacy".[529] On the ground, the agreement of 18 April was followed up by a more comprehensive agreement of 8 May 1993 containing measures that covered the whole of the **Srebrenica** enclave and the adjacent enclave of **Žepa**. Under the terms of this agreement, the Bosnian forces would hand over their weapons and ammunition to UNPROFOR and the Serbian heavy weapons and units would be withdrawn.[530] It should be noted that the Serbian Assembly had rejected the **Vance-Owen** peace plan and that the Security Council then adopted resolution 824 declaring that Sarajevo, Tuzla, Žepa, Goražde and Bihać should be treated as **safe areas** and should be free from armed attacks.[531] The representative of Pakistan sent a memorandum to the President of the Security Council arguing that the safe area concept would fail unless

[524] D00122, para. 59.
[525] D00122, para. 60.
[526] D00122, para. 61.
[527] D00122, para. 62.
[528] D00122, para. 64.
[529] *Ibid.*
[530] D00122, para. 65.
[531] D00122, para. 66.

the security of those areas was guaranteed and protected by UNPROFOR.[532] France also sent a memo outlining changes to be made to the UNPROFOR mandate to provide for the possibility of using force to stop territorial gains by the Serbian forces.[533]

Spain, the United States, France, Russia and the United Kingdom agreed on a joint action programme that mentioned the possibility of humanitarian aid, the enforcement of sanctions against the Serbs, the possible sealing of the Yugoslav border with Bosnia and Herzegovina, the continued enforcement of the no-fly zone and the establishment of a war crimes tribunal and the "valuable contribution" that could be made by the concept of safe areas.[534]

The Security Council asked the Secretary-General to prepare a working paper on safe areas, which was then presented to the Security Council on 28 May 1993. This document stated that if UNPROFOR was given the task of enforcing the establishment of safe areas, it would likely require weapons such as artillery and perhaps even air support.[535]

Resolution 836 decided to extend the mandate of UNPROFOR in order to enable it to deter attacks against the safe areas, to monitor the ceasefire, to promote the withdrawal of military or paramilitary units and to occupy some key points on the ground.[536] This resolution authorised the use of force for self-defence and taking the necessary measures to reply to bombardments by any of the parties, armed incursions or obstructions to the freedom of movement of UNPROFOR or humanitarian convoys. Furthermore, the Member States could take, under the authority of the Security Council and subject to close coordination with the Secretary-General, all necessary measures in and around the safe areas. The Secretary-General convened a meeting of all the sponsors of the resolution to tell them that an additional **32,000** ground troops would be needed and this proposal was not accepted.[537] Nevertheless,

[532] D00122, para. 71.
[533] D00122, para. 72.
[534] D00122, para. 75. *See* S/25829.
[535] D00122, para. 77.
[536] D00122, para. 78.
[537] D00122, para. 94.

the Secretary-General submitted the first report on 14 June, estimating that **34,000** troops would be needed.[538] As for Srebrenica, he stated that it was not necessary to increase manpower under a "light option".[539] Resolution 843 of 18 June 1993 approved the deployment of **7,600** troops under the light option.[540]

The report of the Secretary-General identified the causes that led to **the catastrophe**. It states that none of the sponsors of resolution 836 had offered additional troops.[541] UNPROFOR encountered problems with Member States refusing to allow the deployment of personnel already in the theatre of operations to the safe areas.[542] For example, the Canadian battalion was to be replaced in Srebrenica by the Nordic battalion yet the Government of Sweden refused this replacement. The system of safe areas encountered problems due to the Mount Igman crisis in April 1993. There were diverging views **between NATO and the UN regarding the use of air strikes**.[543] The Serbian forces withdrew from Mount Bjelašnica and Mount Igman.[544] This withdrawal was interpreted by the UNPROFOR commander as the result of the threat of air strikes. Political negotiations resumed when President Izetbegović returned on board the British ship *Invincible* with a package of provisions that envisaged a union of three republics, with a Bosnian, Croatian and Serbian majority.[545] The republic with a Bosnian majority would cover 30% of the land area of Bosnia and Herzegovina, including Srebrenica and Žepa. The Serbs were opposed to this last point for strategic reasons. The Serbs proposed an exchange of these enclaves which would be ceded to the Serbian-majority republic in exchange for the Serbian-controlled territory around Sarajevo. On 28 and 29 September 1993, the Bosnian delegation of Srebrenica and Žepa was informed by **President Izetbegović** of the exchange and they were opposed to it.[546] Under the auspices of the European Union, a modified version of these provisions was developed into an action plan. This plan stated that **Srebrenica** and **Žepa** would be administered by a Bosnian-majority

[538] D00122, para. 96.
[539] D00122, para. 97.
[540] D00122, para. 98.
[541] D00122, para. 103.
[542] D00122, para. 104.
[543] D00122, para. 107.
[544] D00122, para. 114.
[545] D00122, para. 114.
[546] D00122, para. 115.

republic.[547] The safe areas were the subject of an assessment by the Secretary-General in his report to the General Assembly.[548] The report mentioned that out of the **7,600** additional troops that were to be deployed to the safe areas, fewer than **3,000** had arrived.[549] It noted that the Bosnian Serbs had not complied with the provisions of resolutions 819, 824 and 836. The NATO Heads of State declared on 11 January 1994 that NATO was prepared to carry out air strikes in order to "prevent the strangulation of Sarajevo [and] the safe areas […]".[550]

When the Serbian forces launched an offensive against the **Goražde** safe area in March 1994, there was a debate on how to respond.[551] UNPROFOR was opposed to the use of force to deter the Serbs. It informed the Government of Bosnia and Herzegovina that it was a peacekeeping force. The UNPROFOR commander wrote to the UN Headquarters to tell them that by choosing to adopt the light option, the International Community had accepted that the safe areas would be established by agreement as opposed to force.[552] However, as artillery and tank fire on the town continued, on 10 April 1994 UNPROFOR asked NATO for close air support to begin.[553]

After American planes dropped three bombs, **General Mladić** warned UNPROFOR that United Nations personnel would be killed if the NATO attacks did not stop.[554] The next day, the Serbs resumed shelling Goražde, which initiated further air support that destroyed a Serbian tank and two armoured personnel carriers. The Serbs took 150 United Nations personnel hostage near Sarajevo.[555] When a NATO aircraft was brought down, the NATO commander-in-chief informed the UNPROFOR commander that because of the risk to his aircraft he would not approve any further attacks on tactical-level targets but only on strategic-level ones.[556] That same evening, the Serbs agreed to a ceasefire and the release of the hostages. On 22 April 1994, the

[547] D00122, para. 116.
[548] *See* A/48/847.
[549] D00122, para. 125.
[550] *See* S/1994/131.
[551] D00122, para. 131 *et seq.*
[552] D00122, para. 132.
[553] D00122, para. 135.
[554] *Ibid.*
[555] D00122, para. 137.
[556] D00122, para. 138.

Security Council adopted resolution 913 in which it demanded a ceasefire agreement and the withdrawal of the forces and weapons.[557] The following day, an agreement was signed in Belgrade between the Special Representative of the Secretary-General and the Serbian leaders Karadžić, Krajišnik and Mladić.[558]

Following this offensive, the Secretary-General submitted a new report on the safe area policy.[559] It is interesting to note that it was claimed that the concept had been applied with a greater degree of effectiveness in **Srebrenica** and **Žepa** owing to the demilitarization agreements in effect. It should be noted that the Secretary General remained cautious with regard to the future use of NATO air strikes, mentioning that this risked exposing UN military and civilian personnel to retaliation.

In this report, he defined UNPROFOR's mission as protecting the civilian populations of the designated safe areas against armed attacks and other hostile acts through the presence of its troops and, if necessary, through the use of air power.[560] It is appropriate to conclude, at this stage, that the example of Goražde could only incite the Serbian forces to attempt the operation elsewhere (Srebrenica), knowing that air support would not be automatic and that, moreover, the International Community was divided over the concept of safe areas.

In my opinion, the concept could have proven appropriate to the requirements of civilian protection, but the two parties should have been forced to **demilitarize Srebrenica** and the Bosnian forces should have been asked to withdraw fully. In case of attempted intrusions by the Serbian forces into the enclave, there should have been immediate recourse to force by using air support to destroy the military sites involved in the intrusion operation. In order for the concept to work, UNPROFOR should have been placed outside of the enclaves to prevent any potential hostage-taking incidents or, as we saw, direct attacks on observation posts. A forced withdrawal of the **ABiH** from the enclaves was also necessary to demilitarize the area, and if it refused to withdraw it would also risk being targeted by the air strikes.

[557] D00122, para. 142.
[558] D00122, para. 143.
[559] *See* S/1994/555.
[560] D00122, para. 150.

To sum up, the Secretary-General's report was instrumental in providing vital information to the International Community about the creation of the **safe areas** and their inherent limitations.

b. Information regarding the role of Dutchbat

Information concerning Dutchbat was taken from the UN Secretary-General's report to the General Assembly entitled, **"The Fall of Srebrenica"**. Although the report contains a few approximations and is a self-justification, I nevertheless consider it to be reliable in regard to Dutchbat.

This battalion ("Dutchbat 3"), which replaced Dutchbat 2 on 18 January 1995, consisted of **780** men, **600** of whom were deployed in the safe area.[561]

The headquarters was based in **Potočari** about 6 or 7 kilometres from Srebrenica. C Company established five observation posts north of Srebrenica (*Alpha, November, Papa, Quebec* and *Romeo*), and B Company, which was located in town, established three in the south (*Charlie, Echo, Foxtrot*).[562]

The observation post was painted in white with the UN flag. Each post was manned by an average of seven soldiers equipped with an armoured personnel carrier with a 0.5-calibre machine-gun.[563] Each post was equipped with one TOW anti-tank weapon and with shoulder-launched AT-4 anti-tank rockets. Following the flood in January, a 9th observation post (*Mike*) was set up near Simići. On approximately 18 February, due to the drive of the Serbian forces, the battalion did not receive new fuel supplies which resulted in the creation of three other posts (*Delta, Hotel, Kilo*) from which foot patrols were conducted.[564] Compared to Dutchbat, the Serbian forces had at their disposal 1,000 to 2,000 well-equipped soldiers. They were armed with tanks, artillery and mortars. The 28th Division of the ABiH, although numerically superior with 3,000

[561] D00122, para. 226.
[562] D00122, para. 227.
[563] D00122, para. 228.
[564] D00122, para. 229.

to 4,000 soldiers, was not armed with heavy weapons and had only some light mortars.[565] UNPROFOR's attempt to disarm them was unsuccessful. In addition to Dutchbat, there were also **three UN military observers and three Joint Commission Officers** in the enclave.

Due to the Serbian military operation that led to the fall of the ***Echo* post**, the Dutchbat commander stated that the battalion was powerless and that it was a hostage of the Serbian army.[566] He shared his concern about the loss of the *Echo* post which would enable the Serbian army to reach the **Jadar** valley in the south of Srebrenica, from where 3,000 refugees of the Swedish project could be expelled.[567] He created two new posts (*Sierra* and *Uniform*) in the vicinity of the *Echo* post. He appealed on behalf of the population of the enclave to his superiors and the UN to make a plea for the situation to end. Three weeks later, he sent another plea indicating that the Serbian army had not allowed a **single soldier** to leave or enter the enclave. He concluded his plea with the following: "My battalion is no longer willing, able and in the position to consider itself as impartial due to the … policy of the Bosnian-Serb Government and the BSA".[568] We can note that Dutchbat was left to its own devices in an extremely difficult situation. Oddly, the UN military observers stated that the military situation for the week of 25 June to 2 July was less tense than before.[569] Thus, on 5 July only six altercations were registered in the area surrounding Srebrenica. It seemed therefore that the UN authorities had no reason to be alarmed.[570]

On 6 July 1995, Dutchbat came under an attack by the Bosnian Serb Army when five rockets detonated 300 metres from its headquarters and reported heavy firing in the Bandera triangle.[571] **Ramiz Bećirović**, the commander of the Bosnian forces, asked in vain the UNPROFOR commander to return the weapons surrendered as part of the demilitarization agreements of 1993.[572] Observation post ***Foxtrot*** was targeted by a

[565] D00122, para. 230.
[566] D00122, para. 233.
[567] *Ibid.*
[568] D00122, para. 235.
[569] D00122, para. 236.
[570] D00122, para. 237.
[571] D00122, para. 239.
[572] D00122, para. 240.

Serbian tank at 1255 hours.[573] The battalion commander informed his authorities in Tuzla and the UNPROFOR commander in Sarajevo, who in turn informed the UNPROFOR headquarters in Zagreb noting that the report concerned "sporadic" firing.[574]

On the ground, Dutchbat went on red alert and the *Foxtrot* watchtower was hit. The battalion commander requested the deployment of close air support from his superior in Tuzla in order to respond to the attack against *Foxtrot*.[575] This request was transmitted through the chain of command to Sarajevo. It should be noted that the report mentions that communications between the UNPROFOR commander in Bosnia and Herzegovina and Dutchbat during the crisis were handled by the UNPROFOR Chief-of-Staff who discouraged the sending of air support, and this assessment was echoed by the Chief of Land Operations and the UNPROFOR commander.[576] After other rounds had been fired (*Papa* and *Foxtrot*), the shelling stopped. It should be noted that during this time **Carl Bildt** met with **Milošević** and General **Mladić** on 7 July 1995 urging the Serbs to exercise restraint, but he was obviously unaware of the seriousness of the events that occurred.[577] Dutchbat registered 287 detonations originating from the Serbs and 21 originating from the ABiH, with four killed and 17 wounded.[578] At the end of the day, the Dutchbat commander assessed the situation and pointed out that the Serbian army would not be able to conquer the enclave …[579]

On 8 July 1995, the *Foxtrot* post came under fire once again while other shells hit the centre of Srebrenica.[580] The assessment of the authorities in Sarajevo and Zagreb was that the Serbs had crossed the "Morillon Line" to enter the enclave.[581] The *Foxtrot* soldiers were ordered to withdraw in order to make place for the Serbian soldiers.[582] The Dutchbat soldiers were forced to leave their weapons behind. The outcome would be tragic because the unarmed UNPROFOR soldiers left the site in an APC and

[573] D00122, para. 241.
[574] D00122, para. 242.
[575] *Ibid.*
[576] D00122, para. 243.
[577] D00122, para. 247.
[578] D00122, para. 248.
[579] D00122, para. 249.
[580] D00122, para. 250.
[581] Paragraph 253 describes in detail the exchange of fire between the Serbs and Muslims in combat.
[582] D00122, para. 254.

encountered three ABiH soldiers who were blocking the road, one of whom opened fire and killed a Dutch soldier.[583] One can easily imagine the state of mind of Dutchbat, all the more so because coming under fire forced the *Uniform* observation post to withdraw to Srebrenica and then to Bratunac.

At the same time, the UN Secretary General was holding a meeting in Geneva with the Co-Chairman of the International Conference on the Former Yugoslavia, the UNHCR, the UNPF commander and the UNPROFOR commander.[584] During the meeting, there was no discussion about the Serbian offensive against Srebrenica ... On the afternoon of 9 July 1995, UN military observers drew up a report indicating that the Serbian army offensive would continue until its aims were achieved.[585] The Serbian soldiers took over the *Uniform* observation post and the Dutch soldiers went to Bratunac. The UNPROFOR Command's Chief-of-Staff called **General Tolimir** to tell him that the Dutch soldiers had been well treated but that they needed to be allowed to go to Potočari.[586] An APC vehicle dispatched to the Swedish shelter was stopped and its soldiers disarmed and they had to go on foot to the Serbian-held territory.[587] The *Kilo* post was attacked, as was the *Mike* post. The *Delta* observation post had also been captured and the Dutch soldiers were disarmed. They were given the choice of returning to Srebrenica or going to Milići. The UNPROFOR commander issued an order to Dutchbat to set up blocking positions in order to prevent the Serbs from approaching the town from the south and sent a written request for close air support.[588] **General Tolimir** was informed by telephone of these decisions. However, the Dutchbat commander changed his assessment and stated that the use of air support was not feasible …[589] In execution of the order, B Company began establishing the position on 10 July with approximately 50 soldiers and six APCs.[590] The Special Representative of the UN Secretary-General made a mistake when he stated that the APC had been hit by the ABiH, whereas the shot had come from the Serbs … He

[583] *Ibid*.
[584] D00122, para. 259 *et seq.*
[585] D00122, para. 263.
[586] D00122, para. 266.
[587] D00122, para. 267.
[588] D00122, para. 273.
[589] D00122, para. 274.
[590] D00122, para. 277 (on the technical plan).

made another mistake when he stated that the Serbian advance toward the town had stopped, and erred again when he stated that the Serbs had ceased firing.

It should be noted that despite these errors, the Bosnian Serbs had not opened fire at the blocking position.[591] Upon seeing infantry units, the company commander gave the order to fire warning flares and to fire over the Serbian positions which did not return fire. Nevertheless, an order was issued to withdraw towards the town to avoid being outflanked during the night.[592]

At 1930 hours, the *Lima* post was attacked.[593] In Zagreb, three options were offered:

- do nothing
- request air support
- wait until morning to call in air support.

The Dutchbat commander then stated that the blocking position could still hold its ground and that it would not be useful to request **air support**. The Dutchbat commander met with the Bosnian leaders in Srebrenica and informed them that he had received a surrender ultimatum from the Serbs, which he had rejected, and that from 0600 hours, NATO would launch massive air strikes.[594] The Dutchbat commander was informed that NATO planes would hit 46 identified targets at 0650.[595] When he did not see anything materialize, he telephoned the chief of operations in Sector North-West who responded that there was no record of any air support having been requested! The Bosnian Serb Army resumed their attacks at approximately 1100 hours, notably on posts *Mike* and *November*.[596] A new request for air support was sent in case of attacks against UN observation posts. At 1210 hours, the crew from the *November* post had to withdraw and at 0230 hours, a shot was fired at the B1 blocking

[591] D00122, para. 283.
[592] D00122, para. 284.
[593] D00122, para. 285.
[594] Paragraph 296 mentions that numerous armed soldiers were leaving the town and moving west (1,000 to 15,000 soldiers)
[595] D00122, para. 297.
[596] D00122, para. 302.

position.[597] The Serbian forces entered the town meeting little resistance and hoisted the Serbian flag above a bakery.[598] At approximately 1440 hours, two NATO aircraft dropped two bombs on Serbian vehicles.[599] The Serbian forces let it be known that if NATO continued shelling, Dutch soldiers would be killed or taken hostage. The Dutch Minister of Defence called for an end to the air support. At the request of the Force Commander, the acting UNPROFOR commander issued an order to Dutchbat to begin ceasefire negotiations with the Serbs. The Serbs contacted Dutchbat and ordered the Dutchbat commander to go to Hotel Fontana in Bratunac.[600]

It should be noted that the content of this paragraph does not correspond to the video footage of the meeting at Hotel Fontana. The Dutchbat commander returned to Hotel Fontana at 1330 hours accompanied by the director of Srebrenica's secondary school who was representing the refugees. **General Mladić** committed to a cease-fire until 1000 hours on 12 July.[601] When he returned to his command post, the Dutchbat commander sent a report stating that the 15,000 people were in a vulnerable position and that he could not defend them or find civilian or military representatives and that in his opinion, the only way out was "negotiations […] at the highest level […]".[602]

In addition to the witness statements and notably statements from of Dutchbat, the Secretary-General's report, which we can consider to be **objective**, describes Dutchbat as having done all it could with limited means rather than having been a battalion overwhelmed by the events. The battalion suffered the full force of **two shocks**: the death of one of their soldiers killed by the ABiH and multiple attacks on their observation posts. Dutchbat fulfilled its mission by maintaining the blocking point until the end. The only surprising change of mind concerns the issue of air support that was initially requested and then subsequently abandoned. This is perfectly clear from the chronology of events because of the delicate situation wherein Dutchbat was in a weakened position when it was disarmed, not to say ridiculed. In

[597] D00122, para. 303.
[598] D00122, para. 304.
[599] D00122, para. 305.
[600] D00122, para. 313.
[601] D00122, para. 314.
[602] D00122, para. 315.

his analysis, the Dutchbat commander concluded rightly that, *in fine*, calling for air strikes was not necessary as it could lead to even more damage. **In any case, by virtue of the creation of this safe area, Dutchbat was placed in a delicate position because it did not have the means to enforce the decision of the Security Council, much less to oppose the Serbian forces that were superior in size and heavy weapons.**

In conclusion, I would say that Dutchbat **conducted itself heroically or at least in an exemplary fashion bearing in mind the impossible mission** it was assigned in a theatre of war not conducive to mediation. I considered it necessary to mention the role of Dutchbat in the period from 6 to 12 July 1995 for a greater understanding of the events that would take place between 12 and 20 July that were discussed in this report in paragraphs 318 to 403. Therefore, the limits on the action of Dutchbat are clear but despite these limits, the representatives of the Republic of Bosnia and Herzegovina who spoke before the Security Council during a debate on the adoption of resolution 1004 read out a statement from **President Izetbegović** demanding that the UN and NATO forcibly reinstate the violated safe area of Srebrenica; this statement was fully justified but the ABiH forces should have surrendered all of their weapons when the safe area was created, which they did not do, and moreover launched military attacks from the enclaves against the Serbian forces and Serbian villages. Under those conditions, the Dutchbat mission was doomed to **fail** from the beginning.

3. Direct Participation in the Hostilities[603]

a. The concept of civilians in international armed conflicts

Based on the principle of distinction in international armed conflicts, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack, and unless and for such time as they take a direct part in hostilities.

According to Protocol Additional I, in situations of international armed conflict, civilians are defined by default as all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.[604] While treaty IHL predating Protocol I does not expressly define a civilian, the terminology used in the Fourth Hague Convention Regulations and in the four Geneva Conventions nevertheless suggests that the concepts of civilians, armed forces and *levée en masse* are mutually exclusive and that every person involved in or affected by the hostilities falls into one of these three categories.

b. Direct participation in the hostilities as a specific act

The notion of direct participation in the hostilities essentially comprises two elements, the first of which is "hostilities" and the second of which is "direct participation".[605] The concept of "hostilities" refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy whereas "participation" in hostilities refers to the (individual) involvement of a person in these hostilities.[606] Depending on the quality and degree of such involvement, individual participation in the hostilities may be described as being either "direct" or "indirect". The notion of

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[603] "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law", Nils Melser, Legal Adviser at the ICRC, October 2010, p. 88.

[604] Article 50, para. 1 of Protocol I. This definition of civilians reflects customary IHL in international armed conflicts. The categories listed under Articles 4 (A), paras 1, 2 and 3 of the Third Geneva Conventions are included in the general definition of the armed forces under Article 43, para. 1 of Protocol I. *See* also *Sandoz et al*. (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), paras 1916-1917. [hereinafter: *Commentary on Additional Protocols*].

[605] "Report Expert on the Notion of Direct Participation in Hostilities", ICRC, 2005, p. 17.

[606] *See* Article 51, para. 3; Article 43, paras 2 and Article 67, para. 1 (e) of Additional Protocol I and Article 13, para. 3 of Additional Protocol II.

direct participation in the hostilities has evolved from the phrase "taking no active part in the hostilities" used in common Article 3 to the Geneva Conventions.

The notion of direct participation in the hostilities refers to specific "hostile acts" carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It must be interpreted in the same manner in international and non-international armed conflicts. The English-language terms used in the treaties – direct and active – have the same quality and degree of individual participation in the hostilities.

c. Constitutive elements of direct participation in hostilities

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:
1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict, or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm);
2. There must be a direct causal link between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (direct causation), and;
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[607]

d. Beginning and end of direct participation in hostilities

As civilians lose protection against direct attack "for such time" as they directly participate in hostilities, the beginning and end of specific acts amounting to direct

[607] The requirement of belligerent nexus is conceived more narrowly than the requirement for an armed conflict nexus developed in the case-law of the ICTY and ICTR as a precondition for the qualification of an act as a war crime (*see* ICTY, *The Prosecutor v. Kunarac et al.*, Case No. IT-96-23, Judgement of the Appeals Chamber of 12 June 2002, para. 58; ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgement of the Appeals Chamber of 26 May 2003, para. 570). While the armed conflict nexus requirement refers to the relation between an act and a situation as a whole, the requirement of belligerent nexus refers to the relation between an act and the conduct of hostilities between the parties to an armed conflict. During expert meetings, it was generally agreed that no conduct lacking a sufficient nexus to the hostilities could qualify as direct participation in such hostilities. *See* Report DPH 2005, p. 25 and, more generally, Background Doc. DPH 2004, pp. 25-26; Report DPH 2004, pp. 10, 25; Background Doc. DPH 2005, WS II-III, p. 8; Report DPH 2005, pp. 9-10, 22 *et seq.*, 27, 34.

participation in hostilities must be determined with the utmost care.[608] Without any doubt, the concept of direct participation in hostilities includes the immediate execution phase of a specific act meeting the three accepted criteria – *threshold of harm, direct causation* and *belligerent nexus.* It may also include measures preparatory to the execution of such an act, as well as the deployment to and return from the location of its execution, where they constitute an integral part of such a specific act or operation.

e. Temporal scope of the loss of protection

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities. Such a suspension of protection lasts exactly as long as the corresponding civilian engagement in direct participation in hostilities.

f. Precautions and presumptions in situations of doubt

All feasible precautions must be taken in determining whether a person is a civilian and, if so whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.

Prior to any attack, all feasible precautions must be taken to verify that targeted persons are legitimate military targets.[609] Once an attack has commenced, those responsible must cancel or suspend the attack if it becomes apparent that the target is not a legitimate military target.[610] Before and during any attack, everything feasible must be done to determine whether the targeted person is a civilian and, if so, whether he or she is directly participating in hostilities.

As soon as it becomes apparent that the targeted person is entitled to civilian protection, those responsible must refrain from launching the attack, or cancel or suspend it if it is already underway. This determination must be made in good faith

[608] *See* also the debates mentioned in Report DPH 2006, pp. 54-63.
[609] Article 57 (2) (a) (i) of Additional Protocol I.
[610] Article 57 (2) (b) of Additional Protocol I.

and in view of all information that can be said to be reasonably available in the specific situation.[611]

Civilians are generally protected against direct attack unless and for such time as they directly participate in hostilities. In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.

g. Restraints on the use of force in direct attack

In addition to the restraints imposed by IHL on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

Any military operation carried out in a situation of armed conflict must comply with the applicable provisions of customary and treaty IHL governing the conduct of hostilities.[612]

- These provisions include rules derived from three principles:

- **Distinction between civilians and combatants;**
- **Precautions and;**
- **Proportionality**.

- there are also prohibitions of:

- **Denial of quarter and perfidy;**
- **Restriction or prohibition of selected weapons;**
- **Prohibition of means and methods of warfare of a nature to cause superfluous injury.**

[611] Report DPH 2006, pp.70 *et seq*.
[612] *See* also Report DPH 2006, p. 76, and Report DPH 2008, pp. 24, 29 *et seq*.

In the absence of express regulation, the kind and degree of force permissible in attacks against legitimate military targets should be determined, first of all, based on two fundamental principles:

- **Military necessity and**
- **Humanity**

These principles underlie and inform the entire normative framework of IHL and, therefore, shape the context in which its rules must be interpreted.[613] The principles of military necessity and humanity neither derogate from nor override the specific provisions of IHL but constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters set by these provisions.[614]

Today, the **principle of military necessity** is generally recognised to permit "*only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources".*[615] **The principle of humanity**, which "forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes", complements the principle of military necessity wherein it is implicit.[616] Therefore, aside from those actions expressly prohibited by IHL, the permissible military actions are reduced to those actions actually necessary for the accomplishment of a legitimate military purpose in

[613] See notably: *Commentary on the Additional Protocols, op.cit.*, para. 1389.
[614] Report DPH 2008, pp. 7-8, 19-20. *See* also the statement by Lauterpacht that "*the law on these subjects must be shaped – so far as it can be shaped at all – by reference not to existing law but to more compelling considerations of humanity, of the survival of civilisation, and of the sanctity of the individual human being*" (quoted in: *Commentary on the Additional Protocols, op.cit.*, para. 1394).
[615] *See* for example, France: Ministry of Defence, *Manuel de Droit des Conflits Armés* (2001), pp. 86-87; Germany: Federal Ministry of Defence, *Triservice Manual ZDv 15/2: Humanitarian Law in Armed Conflicts* (August 1992), para. 130; Switzerland: Swiss Army, Regulations 51.007/IV, *Bases Légales du Comportement à l'Engagement* (2005), para. 160. Historically, the modern concept of "military necessity" has been strongly influenced by the definition provided in Article 14 of the Lieber Code (United States: *Adjutant General's Office, General Orders No.100*, 24 April 1863).
[616] Thus, as far as they aim to limit death, injury or destruction to what is actually necessary for legitimate military purposes, the principles of military necessity and of humanity do not oppose, but mutually reinforce, each other. Only once military action can reasonably be regarded as necessary for the accomplishment of a legitimate military purpose, do the principles of military necessity and humanity become opposing considerations which must be balanced against each other as expressed in the specific provisions of IHL.

the prevailing circumstances.[617] The aim is rather to avoid error, arbitrariness and abuse by providing guiding principles for the choice of means and methods of warfare based on an assessment of the situation.[618]

[617] See *Commentary on the Additional Protocols, op.cit.,* para. 1395. *See* also the determination of the International Court of Justice (ICJ) that the prohibition on the use of means and methods of warfare of a nature to cause unnecessary suffering to combatants constitutes an intransgressible principle of international customary law and a cardinal principle of IHL: it is prohibited to cause "harm greater than that unavoidable to achieve legitimate military objectives" (emphasis added). *See*: ICJ, "Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons", 1996, para. 78.

[618] It has long been recognized that matters not expressly regulated in treaty IHL should not, "for want of a written provision, be left to the arbitrary judgement of the military commanders" (Preamble H II; Preamble H IV) but that, in the words of the famous Martens Clause, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience" (Article 1 [2] AP I). First adopted in the Preamble of Hague Convention II (1899) and reaffirmed in subsequent treaties and jurisprudence for more than a century, the Martens Clause continues to serve as a constant reminder that, in situations of armed conflict, a particular conduct is not necessarily lawful simply because it is not expressly prohibited or otherwise regulated in treaty law. *See*, for example: Preambles H IV R (1907); AP II (1977); United Nations Convention on Certain Conventional Weapons (1980); Articles 63 G I, 62 CG II, 142 CG III, 158 CG IV (1949) ; ICJ, *Legality of the Threat of Use of Nuclear Weapons*, advisory opinion (footnote 217, above), para. 78; lastly, ICTY, *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T-14, Judgement of 14 January 2000, para. 525. For debates on the Martens Clause during the expert meetings, see Report DPH 2008, pp. 22-23.

4. Disposition Based on My Position

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

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

NOTING the respective written submissions of the parties and the arguments they presented at the Appeal Hearing on 12 November 2015;

SITTING in open session;

GRANTS IN PART, Ground of Appeal 6 and **REVERSES** Tolimir's conviction for extermination as a crime against humanity, to the extent that it concerns the killings of the three Žepa leaders specified in paragraph 23.1 of the Indictment;

GRANTS IN PART, Judge Sekule and Judge Güney dissenting, Ground of Appeal 10 and **REVERSES** Tolimir's conviction for genocide committed through causing serious mental harm to the Bosnian Muslim population of Eastern BiH under Article 4(2)(b) of the Statute to the extent that this conviction was based on the forcible transfer of Bosnian Muslims from Žepa;

GRANTS IN PART, Judge Güney dissenting, Ground of Appeal 10 and **REVERSES** Tolimir's conviction for genocide through inflicting conditions of life calculated to destroy the Bosnian Muslim population of Eastern BiH under Article 4(2)(c) of the Statute;

GRANTS Ground of Appeal 12 and **REVERSES** his conviction for genocide (Count 1) to the extent that it concerns the killings of the three Žepa leaders specified in paragraph 23.1 of the Indictment;

GRANTS Ground of Appeal 20 and **REVERSES** Tolimir's conviction for genocide (Count 1), extermination as a crime against humanity (Count 3), and murder as a violation of the laws or customs of war (Count 5) to the extent they concern the killings of six Bosnian Muslim men near Trnovo specified in paragraph 21.16 of the Indictment;

DISSMISSES, Judge Antonetti dissenting, Grounds of Appeal 1, 3, 5, 7, 11, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, and 25;

DISSMISSES Tolimir's remaining grounds of appeal;

AFFIRMS the remainder of Tolimir's convictions under Counts 1, 2, 3, 5, 6, and 7;

AFFIRMS Tolimir's sentence of life-imprisonment **with a minimum term of 30 years;**

RULES that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules;

ORDERS that in accordance with Rules 103 (C) and 107 of the Rules, Tolimir is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the **Republic of Serbia** where he will serve his sentence.

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

/signed/
Judge Jean-Claude Antonetti

Done this eighth day of April 2015
The Hague (Netherlands)