

1 Tuesday, 25 August 2020

2 [Open session]

3 [The appellant entered court]

4 --- Upon commencing at 9.27 a.m.

5 JUDGE NYAMBE: [Via videolink] Good morning, ladies and gentlemen.  
6 Are we connected?

7 THE REGISTRAR: Good morning, Your Honours. Yes, we're  
8 connected.

9 JUDGE NYAMBE: [Via videolink] Okay. As some of us are  
10 participating in this hearing through a video-conference connection, I  
11 would like to emphasise that only persons who are speaking may have their  
12 microphones turned on. All others kindly keep your microphones off until  
13 such time as you are invited to speak.

14 Thank you for your co-operation. We'll now proceed.

15 MR. IVETIC: Madam Judge, we are getting the French channel  
16 mixing into the English channel.

17 JUDGE NYAMBE: [Via videolink] That is correct. Can I proceed?

18 THE REGISTRAR: Your Honours, we are looking into the problem.

19 JUDGE NYAMBE: [Via videolink] Very well.

20 Registrar, could you please call the case.

21 THE REGISTRAR: Good morning, Your Honours. This is the case  
22 MICT-13-56-A, the Prosecutor versus Ratko Mladic.

23 THE INTERPRETER: The interpreters are really bothered by the  
24 French they hear all the time.

25 THE REGISTRAR: Your Honours, my IT colleagues are looking into

1 the issue. We will get back to you regarding the interpreters' channels.

2 This is a test, 1, 2, 3. This is a test, 1, 2, 3. Is the  
3 situation better now? Test, 1, 2, 3. Testing, 1, 2, 3.

4 Your Honours, I can report the situation has been resolved.  
5 Thank you.

6 Madam Presiding Judge, the situation has been resolved.

7 JUDGE NYAMBE: [Via videolink] Good morning, are we connected?  
8 You can hear me now?

9 THE REGISTRAR: Good morning, Madam Presiding Judge. We can hear  
10 you. We can proceed now. The issue has been resolved.

11 JUDGE NYAMBE: [Via videolink] Okay. So we start again.

12 Good morning, ladies and gentlemen. As some of us are  
13 participating in this hearing through a video-conference connection, I'd  
14 like to emphasise that only the person who is speaking may have their  
15 microphone turned on. All others kindly keep your microphones off, until  
16 such time as you are invited to speak. Thank you for your co-operation.  
17 We'll now proceed.

18 Registrar, could you please call the case.

19 THE REGISTRAR: Thank you. And good morning, Your Honours. This  
20 is the case MICT-13-56-A, the Prosecutor versus Ratko Mladic.

21 JUDGE NYAMBE: [Via videolink] Thank you.

22 Mr. Mladic, can you follow the proceedings in a language you  
23 understand?

24 MR. IVETIC: Mr. Mladic has said he's not hearing anything.

25 JUDGE NYAMBE: [Via videolink] I know that even Judge Panton

1 cannot hear anything. All right. Can everybody hear me? I'll start  
2 again.

3 THE REGISTRAR: Yes, Judge, we can hear you loud and clear.

4 JUDGE NYAMBE: [Via videolink] Sorry?

5 THE REGISTRAR: Madam Presiding Judge, we can hear you loud and  
6 clear.

7 JUDGE NYAMBE: [Via videolink] Okay.

8 Registrar, could you please call the case.

9 THE REGISTRAR: Yes, this is the case MICT-13-56-A, the  
10 Prosecutor versus Ratko Mladic.

11 JUDGE NYAMBE: [Via videolink] Thank you.

12 Mr. Mladic, can you follow the proceedings in a language you  
13 understand?

14 I hear no response from Mr. Mladic. Can please somebody give him  
15 the microphone.

16 THE APPELLANT: [No interpretation].

17 JUDGE NYAMBE: [Via videolink] I heard Mr. Mladic speak, but I did  
18 not get the translation of what he said.

19 THE APPELLANT: [Interpretation] I can follow the proceedings in  
20 my language.

21 JUDGE NYAMBE: [Via videolink] Sorry?

22 THE APPELLANT: [Interpretation] I can follow the proceedings in  
23 my language. I'm not receiving any interpretation.

24 JUDGE NYAMBE: [Via videolink] I take it you are saying you can  
25 follow the proceedings in a language you understand?

1 THE APPELLANT: [Interpretation] Yes, yes, I can now.

2 JUDGE NYAMBE: [Via videolink] Thank you.

3 Let me now ask for the appearances of the parties. First, the  
4 Prosecution.

5 MS. BAIG: Good morning, Your Honours. Laurel Baig and  
6 Barbara Goy for the Prosecution. We are joined by our case manager,  
7 Janet Stewart. And today we'll be joined in the courtroom by three of  
8 our colleagues. Right now, that is Rafael Braga da Silva. And later in  
9 the day, Mariya Yakusheva and Katharine Marsden. Thank you.

10 JUDGE NYAMBE: [Via videolink] Appearances for the Defence.

11 MR. IVETIC: Good morning, Madam Presiding Judge and  
12 Your Honours. Appearing for the Defence, Dragan Ivetic, co-counsel for  
13 Mr. Mladic. And I'm joined in court by Peta-Louise Bagott, legal  
14 consultant for Mr. Mladic. Thank you.

15 JUDGE NYAMBE: [Via videolink] Thank you. As a preliminary matter  
16 before calling on Mr. Mladic's counsel, I note that Defence have  
17 requested, through a letter to the Appeals Chamber's senior legal  
18 officer, that their assigned legal consultant, Ms. Peta-Louise Bagott and  
19 Mr. Boris Zorko respectfully be granted a right of audience during the  
20 appeal hearing. This request has been unopposed.

21 I further note that in submitting this request, counsel for  
22 Mr. Mladic provided letters from Office of Legal Aid and Defence Matters  
23 of the Mechanism demonstrating that Ms. Bagott and Mr. Zorko have been  
24 officially assigned as legal assistants to Mr. Mladic's legal team. In  
25 these circumstances, the Appeals Chamber grants Ms. Bagott and Mr. Zorko

1 a right of audience at the present hearing.

2 Now, counsel for Mr. Mladic, sorry, I called you before. Thank  
3 you.

4 MR. IVETIC: Thank you.

5 JUDGE NYAMBE: [Via videolink] Mr. Mladic and the Prosecution have  
6 both appealed against the judgement rendered on 22 November 2017 by the  
7 Trial Chamber I of the International Criminal Tribunal for the former  
8 Yugoslavia. On 16th December 2019, the Appeals Chamber scheduled the  
9 appeal hearing to take place on 17 and 18 March 2020. This hearing was  
10 stayed on 6 March 2020 on the basis of Mr. Mladic's request regarding his  
11 then upcoming surgery and recovery.

12 On 1st May 2020, the Appeals Chamber noted Mr. Mladic's progress  
13 in recovering from surgery and scheduled the appeal hearing to take place  
14 on 16 and 17 June, subject to change in light of Coronavirus  
15 pandemic-related restrictions. On 28 May 2020, the Appeals Chambers  
16 further stayed the scheduled appeal hearing given the unavailability of  
17 counsel and complications arising from the Coronavirus pandemic-related  
18 restrictions.

19 On 17 June 2020, the Appeals Chamber scheduled the present  
20 hearing.

21 This case concerns the criminal responsibility of Mr. Mladic, who  
22 was appointed commander of the Main Staff of the -- right. We are  
23 reconnected.

24 As I was saying, this case concerns the criminal responsibility  
25 of Mr. Mladic who was appointed commander of the Main Staff of the Army

1 of Republika Srpska, the VRS, on 12 May 1992 by the Bosnian Serb  
2 Assembly. Mr. Mladic remained in command of the VRS Main Staff until at  
3 least 8 November 1996.

4 The Trial Chamber convicted Mr. Mladic, pursuant to Article 7(1)  
5 of the ICTY Statute, of genocide, crimes against humanity, violations of  
6 the laws or customs of war; in particular, the Trial Chamber concluded  
7 that from 12 May 1992 until 3 November 1995, Mr. Mladic participated in  
8 the overarching JCE, a joint criminal enterprise, with the objective of  
9 permanently removing Bosnian Muslims and Bosnian Croats from  
10 Bosnian Serb-claimed territory in Bosnia and Herzegovina through  
11 persecution, extermination, murder, inhumane acts, forcible transfer, and  
12 deportation. The Trial Chamber convicted him of these crimes.

13 The Trial Chamber found that between 12 May 1992 and  
14 November 1995, Mr. Mladic participated in a joint criminal enterprise  
15 with the objective of spreading terror among the civilian population of  
16 Sarajevo through a campaign of sniping and shelling. The Trial Chamber  
17 convicted him of the crimes of terror, unlawful attacks on civilians, and  
18 murder.

19 The Trial Chamber also found that from the days immediately  
20 preceding 11 July 1995 to at least October 1995, Mr. Mladic participated  
21 in a joint criminal enterprise with the objective of eliminating the  
22 Bosnian Muslims in Srebrenica by killing the men and boys and forcibly  
23 removing the women, young children, and some elder men. It convicted him  
24 of the crimes of genocide as well as persecution, inhumane acts, forcible  
25 transfer, murder, and extermination.

1           Finally, the Trial Chamber found that from approximately  
2   25 May 1995 to approximately 24 June 1995, Mr. Mladic participated in a  
3   joint criminal enterprise with the objective to capture United Nations  
4   personnel deployed in Bosnia and Herzegovina and detain them in strategic  
5   military locations to prevent the North Atlantic Treaty Organisation from  
6   launching several military air strikes on Bosnian Serb territory  
7   targets -- military targets, sorry. It convicted him of the crime of  
8   hostage-taking as a violation of the laws or customs of war.

9           The Trial Chamber sentenced Mr. Mladic to life imprisonment.

10          Mr. Mladic advances many grounds of appeal with numerous  
11   subgrounds challenging his conviction and sentence. He requests that the  
12   Appeals Chamber reverse erroneous findings of the Trial Chamber, quash  
13   his convictions, and acquit him. In the alternative, Mr. Mladic seeks a  
14   retrial or a reduction of his sentence.

15          The Prosecution responds that Mr. Mladic's appeal should be  
16   dismissed in its entirety.

17          The Prosecution presents two grounds of appeal challenging  
18   certain findings or conclusions of the Trial Chamber, including its  
19   acquittal of genocide in relation to the overarching JCE. The  
20   Prosecution requests that the Appeals Chamber correct the Trial Chamber's  
21   errors and convict Mr. Mladic of genocide under the Count 1 of the  
22   indictment, pursuant to the first category of joint criminal enterprise,  
23   or alternatively, the third category of joint enterprise or as a superior  
24   under Article 7(3) of the ICTY's Statutes.

25          Mr. Mladic responds that the Prosecution's appeal should be

1 dismissed in its entirety.

2 I now summarise the manner in which we will proceed. I would  
3 like to remind both parties that the appeal process is not a retrial  
4 de novo and the parties must refrain from presenting their case as  
5 presented at trial. The arguments must be limited to alleged errors of  
6 law which invalidate the trial judgement or alleged errors of fact which  
7 occasion a miscarriage of justice.

8 Throughout the hearing, the parties may present their grounds of  
9 appeal in any order they consider suitable. The parties shall present  
10 their submissions in a precise, clear, and concise manner, and should  
11 also provide precise references to materials supporting their oral  
12 arguments. I would also like to remind both parties to be particularly  
13 careful not to reveal any confidential information, including information  
14 that could identify protected witnesses.

15 As set out in the 17th July 2020 decision, the hearing schedule  
16 has been adapted to ensure the safety of all those participating in  
17 person and will adjust it further to ensure that all breaks are one-hour  
18 long to allow for thorough cleaning and ventilation. The hearing today  
19 and tomorrow will proceed as follows.

20 Today we shall first hear the submissions in support of  
21 Mr. Mladic's appeal for one hour. After a pause of one hour, we shall  
22 continue to hear the submissions in support of Mr. Mladic's appeal for  
23 one hour. Then after a pause of one hour, counsel for Mr. Mladic will  
24 have another hour to make submissions. After a one-hour break, the  
25 Prosecution will respond for one hour. Following a pause of one hour,

1 the Prosecution will continue its response to another hour.

2 Tomorrow, starting at 9.30 a.m., the Prosecution will have one  
3 hour to finish its response. After a pause of one hour, counsel for  
4 Mr. Mladic will have one hour to reply to the Prosecution's response.  
5 This will be followed by a pause of one hour. After which, we will hear  
6 the final 30 minutes of reply submissions in support of Mr. Mladic's  
7 appeal.

8 Directly following this, we shall hear the Prosecution's appeal  
9 submissions for 30 minutes. After a pause of one hour, counsel for  
10 Mr. Mladic will respond for 30 minutes. Subsequently, the Prosecution  
11 will have 15 minutes to reply. Finally, Mr. Mladic will have ten minutes  
12 for an optional personal address.

13 Now, I would like to invite counsel for Mr. Mladic to present his  
14 appeal. You have one hour for this part of the submission.

15 MR. IVETIC: Good morning. And thank you, Madam Presiding Judge.

16 Before I begin, I must place on the record that during the  
17 submissions that you just made in the courtroom, we had about several  
18 minutes of loud English being broadcast, and Mr. Mladic complained that  
19 he had difficulty following the proceedings due to the same. But that  
20 has now been resolved.

21 Your Honours, before we begin with the appeal, I am mandated to  
22 put on the record pertinent information, objections, and reservations of  
23 rights to protect Mr. Mladic's interests and explain my presence. Lead  
24 counsel Lukic and legal consultant Zorko from Serbia are unable to attend  
25 based on consultation of their ethical code and bar, which prevents them

1 from acting against the explicit instructions of their client and, absent  
2 waiver, prevents them from substituting their own interests over the  
3 rights of the client. Likewise, the risk of travel bringing illness to  
4 the client. Lastly, the Serbian Code and Bar have a very strong stance  
5 forbidding purely video-link proceedings in this matter.

6 These statements, and my own, are made from a difficult position  
7 imposed by the majority decisions on our most recent filings to press on  
8 with these proceedings without a legal competency hearing as to  
9 Mr. Mladic. Upon consultation and discussion with the ethics board  
10 lawyers of the Illinois Supreme Court Attorney Registration and  
11 Disciplinary Commission, and upon diligent review and study of the  
12 relevant rules of conduct they referred me to, as well as pertinent  
13 substantive legal literature and jurisprudence relating to the same, I  
14 have been reminded of my ethical and professional duties that are partly  
15 in conflict with the majority decision to proceed with the appeals  
16 hearing today.

17 In light of a bona fide reasonable conclusion as to my client's  
18 ill health and inability to meaningfully prepare and take instructions  
19 from him, and a reasonable belief in his diminished capacity, I am  
20 personally and professionally required to make a strong record objecting  
21 to the majority decision and this appeals hearing today.

22 Under my domestic, ethical, and professional obligations, and  
23 case law, this hearing today is inappropriate and threatens, as  
24 Presiding Judge Nyambe stated in her dissent, a miscarriage of justice,  
25 such that I cannot abide to be a silent participant in this questionable

1 proceeding.

2 My presentations during the last Status Conference and the  
3 Defence's subsequent written filings on the record have all been  
4 undertaken in accord with the Model Rules of ethics, comments 1.14,  
5 et cetera, and also Illinois Rules of Professional Conduct, 1.14,  
6 et cetera, dealing with diminished capacity clients.

7 Lengthy consultations with my ethics board and diligent review of  
8 the prevailing authorities on this matter mandate my further action as  
9 follows. Aware of my role as an officer of the court, and concerned  
10 about not misleading the court, counsel, such as I, must seriously  
11 question the propriety of allowing my impaired client and myself to  
12 proceed today when competency issues remain unresolved. Here, I would  
13 direct you to Bennett, "A Guided Tour Through Selected American Bar  
14 Association Standards Relating to Incompetence to Stand Trial," 53,  
15 George Washington Law Review, 375, at pages 383 to 384 (1985).

16 The American Bar Association Criminal Justice Mental Health  
17 Standards, particularly 7-4.2, requires me as Defence counsel to raise  
18 competency, even if that may conflict with obligations to the Court. To  
19 do otherwise, I would violate my jurisdiction's ethical professional  
20 standards and I would betray my client's interests.

21 Further, I note that both the Prosecutor and Judges have that  
22 same ethical and professional obligation to prevent the legal process  
23 from being demeaned by proceeding against an incompetent defendant.  
24 Her Honour, Presiding Judge Nyambe, and the Defence have acted in accord  
25 with the professional obligations placed on us as officers of the court.

1 The client, Mr. Mladic, has ultimate authority to determine the purposes  
2 served by his counsel, especially in an appeal where significant  
3 decisions are made. I am unable to meaningfully gain instruction from  
4 Mr. Mladic, nor be assured that he is able to meaningfully participate  
5 and follow the same, owing to the majority decision.

6 Under these circumstances, the authorities consulted in my home  
7 jurisdiction dictate that I, the attorney, should protect the due process  
8 rights of the alleged incapacitated individual and advocate strenuously  
9 for my client's wishes. If I, the attorney, do not do so, the alleged  
10 incapacitated person has no voice in these proceedings. This is an  
11 ethical obligation of I, the attorney, as an officer of the court which  
12 also protects these proceedings from attack based on due process  
13 violations - here contained in the Statute of the IRMCT and the  
14 jurisprudence.

15 Thus, I must make this objection and make a record of the  
16 majority's error and its consequences.

17 It is a denial of due process to sentence or proceed criminally  
18 against someone who is incompetent to stand trial. And at that point,  
19 the Court should on its own initiative conduct a hearing on that matter.  
20 I will cite three United States Supreme Court cases: Pate v. Robinson,  
21 (1966); Dusky v United States, 362 US 402, (1960) (per curiam), cited  
22 with approval in Indiana v. Edwards, also the Supreme Court, (2008).

23 Second, there is a presumption that psychiatric and other medical  
24 examinations will be included in the decision-making process,  
25 Mata v. Johnson, United States Court of Appeals, 5th Circuit (2000),

1 citing the US Supreme Court in *Rees v. Peyton*, 384 US 312 (1966). Even  
2 assuming *arguendo* that a court has not received evidence raising a bona  
3 fide doubt as to competency, my Supreme Court mandates that courts  
4 indulge every reasonable presumption against waiver of fundamental due  
5 process rights. *Mata v. Johnson*, again from the US Court of Appeals,  
6 5th Circuit (2000) citing to the US Supreme Court *Hodges v. Easton*, 106  
7 US 408, at page 412.

8 In the instant case against Mr. Mladic, the majority, without  
9 medical expert examination on this matter, have forced me to this  
10 untenable position of proceeding with the appeal hearing in violation of  
11 all the aforesaid legal tenets from my domestic jurisdiction. And in  
12 some cases, in violation of domestic and professional ethics standards in  
13 other jurisdictions, which is why counsel Lukic and consultant Zorko  
14 cannot attend today, as to do so would place them in violation of their  
15 domestic ethics code and licensing body.

16 Therefore, my presence here today as co-counsel is under a  
17 continued objection, protest, and strongest possible reservation of  
18 rights. My client has not waived any of his rights, nor have I or  
19 counsel Lukic, as his counsel, waived his rights in his stead. We cannot  
20 as to do so would infringe upon his due process rights.

21 Your Honours, my presence here today is of a limited scope and  
22 again is due to the majority decision. I am professionally unable to  
23 fully present the appeal as envisaged, nor obtain meaningful  
24 participation, nor instruction from my client, due to the position of the  
25 majority having placed on me.

1 I, in accordance with my ethical duties, and after consultations  
2 with my home ethics bar and review of relevant and authoritative  
3 jurisprudence and literature, do not consent to this being the ultimate  
4 appeals hearing and will undertake to preserve all my client's rights to  
5 a repeated proceeding if and when he has undergone a capacity review that  
6 finds him competent to do so.

7 I note in light of the strongly worded dissent of  
8 Presiding Judge Nyambe that proceeding in this way may be regarded as a  
9 miscarriage of justice, threatening the integrity of these proceedings  
10 without any medical expert testimony as to the current mental fitness and  
11 capacity and ability to meaningfully participate of Mr. Mladic.

12 Based on the same, Mr. Mladic does not waive his right to have a  
13 full appeal hearing on another date. I do not waive rights to any part  
14 of the appeal, and I engage today in a limited capacity in good faith as  
15 an officer of the court and in accordance with my consultations with the  
16 domestic ethics and licensing bar of Illinois and the Federal Court of  
17 the United States.

18 Subject to this objection and reservation of rights, I now defer  
19 to my colleague to make a record of the substance of the appeal to the  
20 extent that she and I are able to do so today under these circumstances.  
21 And I thank you very much, and I pass the floor to Ms. Bagott.

22 MS. BAGOTT: Good morning, Madam Presiding Judge, Your Honours.  
23 Mr. Ivetic and I will be making submissions on behalf of Mr. Mladic on  
24 the grounds of appeal set out in the appeal brief. We invite the Chamber  
25 to overturn Mr. Mladic's convictions entered by the Trial Chamber on the

1 22nd of November, 2017.

2 We do not intend to make submissions on every ground and every  
3 subground in the appeal brief. Given the size of the appeal and the  
4 detailed and comprehensive written submissions the Chamber has already  
5 received in the form of the appeal brief and the reply to the  
6 Prosecution's response, we are addressing the Chamber on selected  
7 grounds.

8 I will be addressing the Chamber on Grounds 1, 2, and 4 of the  
9 appeal brief. Mr. Ivetic will be addressing the Chamber on Grounds 3 and  
10 5, and making our concluding remarks.

11 Before turning to the substance of this appeal, we wish to make a  
12 few introductory remarks.

13 International criminal courts and tribunals are unusual  
14 institutions. Decisions made by the tribunal has an impact that extends  
15 beyond purely legal outcomes. The consequences of a conviction or, dare  
16 I say it, an acquittal, has an impact that extends beyond these four  
17 walls.

18 For many, convictions are seen as a victory and acquittals a  
19 failure. Not only do the Prosecution come under scrutiny when  
20 convictions are not secured, but criticism is directed towards the  
21 judiciary.

22 It is the fact that the application of the black letter of the  
23 law can in some way be interpreted as betraying the interests of justice  
24 that makes international criminal courts and tribunals so unusual as  
25 legal institutions.

1           They are, are they not, just criminal courts hearing criminal  
2 trials at the end of the day.

3           It is trite to say, but an important reminder, that trials before  
4 this Tribunal require the same strict application of the burden and  
5 standard of proof as any other criminal trial. They require the same  
6 unflinching application of the presumption of innocence at every stage of  
7 the process.

8           If the Prosecution fails to discharge its burden of proof, then  
9 the accused must be acquitted. The law is dispassionate in this sense.

10           As Justice Jackson made it clear in his opening statement at the  
11 Nuremberg trial: "We must never forget that the record on which we judge  
12 these defendants today is the record on which history will judge us  
13 tomorrow ... we must summon such detachment and intellectual integrity to  
14 our task that this trial will commend itself to posterity as fulfilling  
15 humanity's aspirations to do justice."

16           When international criminal trials were in their infancy, there  
17 was a clear recognition and understanding that the application of the law  
18 should be rooted in fairness.

19           Both in the past and the present, it is understood that justice  
20 cannot be served if corners are cut and due process norms are cast to one  
21 side.

22           When Judges at this Tribunal are sworn in, they take an oath to  
23 "honourably, faithfully, impartially, and conscientiously" perform their  
24 duties and exercise their powers. Incumbent upon the judiciary is a  
25 heavy burden to make often difficult, and unpopular, decisions to give

1 effect to what is right as a matter of law.

2 What we invite the Chamber to do may not be easy or popular, but  
3 in our submission it is right. It is right because it will represent the  
4 dispassionate application of the law.

5 It is right because it will represent that this Chamber  
6 recognises that the fundamental principle of a right to fair trial is  
7 more than just empty rhetoric.

8 During the course of the appeal, Mr. Ivetic and I will address  
9 the Trial Chamber's errors.

10 Some, as this Chamber will have seen --

11 THE REGISTRAR: Ms. Bagott, we have lost the Presiding Judge.  
12 Could you kindly wait until we reconnect?

13 MS. BAGOTT: Of course. Do we know at which point?

14 JUDGE NYAMBE: [Via videolink] We are back? You can hear me? You  
15 can hear me now?

16 THE REGISTRAR: Yes, Judge. We can hear you now. We are  
17 reconnected. Thank you.

18 JUDGE NYAMBE: [Via videolink] Sorry, Ms. Bagott. We got -- they  
19 said my connection dropped. You may continue.

20 MS. BAGOTT: Madam Presiding Judge, please could you let me know  
21 where we were at before the connection broke?

22 JUDGE NYAMBE: [Via videolink] You were at the point where you  
23 were reminding us about the fact that the decisions of this Tribunal will  
24 transcend to many borders or something to that effect. I don't have a  
25 copy of the transcript, so I think we'll start from where you were saying

1       which counts you are going to deal with.

2               MS. BAGOTT: I will go back.

3               JUDGE NYAMBE: [Via videolink] Yes.

4               MS. BAGOTT: So I will be addressing the Chamber on Grounds 1, 2,  
5       and 4 of the appeal brief. Mr. Ivetic will be addressing the Chamber on  
6       Grounds 3 and 5 and making our concluding remarks.

7               Before I turn to the substance of this appeal, we wish to make  
8       some introductory remarks.

9               International criminal courts and tribunals are unusual  
10       institutions. Decisions made by the tribunal have an impact that extends  
11       beyond purely legal outcomes. The consequences of a conviction or, dare  
12       I say it, an acquittal, has an impact that extends beyond these four  
13       walls.

14              For many, convictions are seen as a victory and acquittals a  
15       failure. Not only do the Prosecution come under scrutiny when  
16       convictions are not secured, but criticism is directed towards the  
17       judiciary.

18              It is the fact that applying the black letter of the law can in  
19       some way be seen to be betraying the interests of justice that makes  
20       international criminal courts and tribunals so unusual as legal  
21       institutions.

22              They are, are they not, just criminal courts hearing criminal  
23       trials at the end of the day.

24              It is trite to say, but an important reminder, that trials before  
25       this Tribunal require the same strict application of the burden and

1 standard of proof as any other criminal trial. They require the same  
2 unflinching application of the presumption of innocence at every stage of  
3 the process.

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5 accused must be acquitted. The law is dispassionate in that sense.

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7 Nuremberg trial:

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11 our task that this trial will commend itself to posterity as fulfilling  
12 humanity's aspirations to do justice."

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14 was a clear recognition and understanding that the application of the law  
15 should be rooted in fairness.

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17 cannot be served if corners are cut and due process norms are cast to one  
18 side.

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20 "honourably, faithfully, impartially, and conscientiously" perform their  
21 duties and exercise their powers. Incumbent upon the judiciary is a  
22 heavy burden to make often difficult, and unpopular, decisions to give  
23 effect to what is right as a matter of law.

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25 in our submission it is right.

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2 application of the law.

3           It is right because it will represent that this Chamber  
4 recognises that the fundamental principle of a right to a fair trial is  
5 more than just empty rhetoric.

6           During the course of the appeal, Mr. Ivetic and I will address  
7 the Trial Chamber's errors. Some, as this Chamber will have seen from  
8 the appeal brief, are also substantive legal errors that for many years  
9 successive Appeals Chamber have shied away from grappling with.

10          The areas identified in the appeal brief, the appellant submits,  
11 infect all the convictions such that those entered by the Trial Chamber  
12 on Counts 2 to 11 of the indictment should be reversed and not guilty  
13 verdicts entered.

14          Ground 1.

15          The appellant submits that the Trial Chamber erred by holding  
16 Mr. Mladic criminally responsible for what the appellant has termed  
17 "unnamed unscheduled incidents."

18          The appellant's written submissions are at paragraphs 41 to 60 of  
19 the appeal brief and paragraphs 8 to 14 of the reply.

20          To assist the Chamber, my submissions will focus on: First, how  
21 the appellant defines "unnamed unscheduled incidents"; second, the issue  
22 of notice; third, the fact that the error was not remedied through the  
23 presentation of a general defence or cross-examination; and finally, the  
24 impact of the Trial Chamber's error.

25          Definition.

1           Scheduled incidents are incidents that are identified in a  
2           schedule attached to the indictment. They are numbered, named, and  
3           listed in black and white. Notice is given that they form part of the  
4           allegations against the accused by the very fact that they are annexed to  
5           the indictment.

6           Unscheduled incidents are incidents that can be relied on by the  
7           Prosecution to prove material elements of the crime; for example, a  
8           course of conduct. Notice of these is given in, for example, the 65 ter  
9           witness list in which the Prosecution explicitly states that a witness  
10          will be called to give evidence on an "unscheduled incident." Examples  
11          of this include:

12                 RM109, page 222, of the 65 ter witness list, at paragraph 3:

13                 "The witness can also testify to his personal participation in  
14                 investigation of unscheduled incidents of sniping and shelling."

15                 RM138, page 219, at paragraph 6:

16                 "The State Hospital was targeted with shell and mortar fire  
17                 (unscheduled)."

18           Here, the fact that the witness would give evidence on what the  
19           Prosecution considered to be an unscheduled incident was explicitly  
20           identified as such.

21           Unnamed unscheduled incidents are something quite distinct. They  
22           are incidents that do not fall in either of the aforementioned  
23           categories. What they are, in fact, are incidents that witnesses made  
24           accusations about at trial in the course of their evidence on scheduled  
25           incidents or other defined subjects but which no notice was provided to

1 the Defence that they were in fact incidents, either scheduled or  
2 unscheduled, for which Mr. Mladic could be held responsible.

3 To highlight this distinction, it's useful to go back to basics  
4 with an example.

5 An accused stands trial for incident 1. Witness A is called to  
6 give evidence about incident 1. In the course of this, they make  
7 additional accusations against the accused. These are not charged. In  
8 an adversarial trial, a trier of fact could not enter convictions on  
9 these other accusations. The Prosecution would have to put the Defence  
10 on notice that it sought to add them to the indictment before any  
11 convictions could be entered.

12 This general principle remains unchanged in an international  
13 criminal trial. Before convictions can be entered, notice must be given.  
14 Mere accusations fall outside the scope of the indictment.

15 Contrary to the Prosecution's submissions at paragraphs 6 to 13  
16 of its response, this issue is not about the indictment being defective.  
17 The issue is that an indictment cannot be expanded to include any  
18 accusations made during the course of a trial.

19 This, we say, is the Trial Chamber's error. It convicted  
20 Mr. Mladic of such accusations that were never identified as scheduled or  
21 unscheduled incidents.

22 Notice.

23 As set out previously, when the Prosecution sought to call a  
24 witness to give evidence about an unscheduled incident, it specified this  
25 and in doing so gave notice to the Defence that Mr. Mladic could be held

1 criminally responsible for these incidents.

2 It follows, therefore, that the appellant withdraws incidents for  
3 which the Defence received notice of in this manner from the Chamber's  
4 consideration.

5 In contrast to the approach taken to unscheduled incidents, the  
6 Defence did not receive notice of unnamed unscheduled incidents. The  
7 first time that the Defence was made aware that these accusations were  
8 being treated as unscheduled incidents was when the judgement was  
9 rendered.

10 It was the Trial Chamber that referred and identified them as  
11 unscheduled incidents. Not the Prosecution.

12 By way of example from the appellant's brief at paragraph 48,  
13 incidents: Srebrenica incident (u) opportunistic killings, 13 to  
14 14 July 1995; sniping incident (e) 31 March 1993; Srebrenica incident (w)  
15 23 July 1995; sniping incident (k) 9 November 1993; shelling incident (d)  
16 14 May 1992; cruel and inhumane treatment incident (j)(ii) 31 May -  
17 8 June 1992; unlawful detention incident (e)(iii).

18 For each of these, the 65 ter list did not make any reference to  
19 these accusations as unscheduled incidents in the summary. In fact, the  
20 accusations simply formed part of the narrative on the scheduled incident  
21 or defined subject matter the witness was called to give evidence about  
22 in the pre-trial brief witness summaries or 65 ter list.

23 In the absence of notice that these accusations were being  
24 treated by the Prosecution as unscheduled incidents, the Trial Chamber  
25 erred by treating them as such.

1           Contrary to the Prosecution's suggestion at paragraph 12, the use  
2           of inclusive language in the indictment is not a blank cheque to convict  
3           Mr. Mladic of any accusation made before the Trial Chamber. There must  
4           be limits as a matter of fairness.

5           The appellant submits that it is contrary to the most basic  
6           principles of an adversarial criminal trial if any accusations made could  
7           fall within the scope of the indictment without notice. The Prosecution  
8           must identify what case, and which incidents, it seeks convictions of so  
9           the Defence can defend against each incident specifically accordingly.

10          The presentation of a general defence or cross-examination did  
11          not cure this error.

12          Absent notice and specifying the crimes alleged, the only defence  
13          available is a general one --

14          JUDGE NYAMBE: [Via videolink] Sorry?

15          MS. BAGOTT: And a general --

16          JUDGE NYAMBE: [Via videolink] Yes, Ms. Bagott, would this be a  
17          nice time to take a break for one hour?

18          MS. BAGOTT: Yes, this is a convenient moment.

19          JUDGE NYAMBE: [Via videolink] Very well. The proceedings will  
20          pause for one hour and will proceed -- what's the time now?

21          MS. BAGOTT: It is half past 11.00 -- 10.00.

22          JUDGE NYAMBE: [Via videolink] So we will resume at half past  
23          12.00 -- 1.00?

24          THE REGISTRAR: Madam Presiding Judge, it will be half past  
25          11.00.

1 JUDGE NYAMBE: [Via videolink] Sorry, my time is half past 11.00  
2 about. It's the same time as The Hague? No?

3 THE REGISTRAR: No, it's half past 10.00 now. In fact, it's  
4 10.31 now. We should be resuming at 11.31.

5 JUDGE NYAMBE: [Via videolink] Oh, so it's half past 10.00 there.  
6 Okay, half past 11.00 my time we resume.

7 --- Recess taken at 10.32 a.m.

8 --- On resuming at 11.30 a.m.

9 JUDGE NYAMBE: [Via videolink] Very well. You don't have to  
10 repeat appearances as before.

11 When we broke off, the Defence were making their submissions.  
12 And as at the time when we broke off, according to my record, you have  
13 2.5 hours remaining of your allotted time. This session will last one  
14 hour, until 12.30. You may proceed.

15 MR. IVETIC: Thank you, Your Honour. Just before we begin, to  
16 put on the record, that for the first 25 minutes of the break I was  
17 unable to have telephonic communications with my client due to technical  
18 issues. That has now been resolved. Thank you.

19 JUDGE NYAMBE: [Via videolink] Sorry, can you repeat that again  
20 Mr. --

21 MR. IVETIC: Mr. Ivetic. During the first 25 minutes of the  
22 break, the telephonic line, privileged line, did not function, and I was  
23 unable to speak with my client. That has now been resolved. So for half  
24 of the break, I did not have an opportunity to speak to Mr. Mladic.

25 JUDGE NYAMBE: [Via videolink] I think we should allocate this

1 time to the Defence at the beginning of this session, which means their  
2 time will be one hour and 25 minutes for this session. We may proceed.

3 Mr. Lukic.

4 MR. IVETIC: Mr. Ivetic, Madam President. Can you please  
5 clarify?

6 JUDGE NYAMBE: [Via videolink] Sorry?

7 MR. IVETIC: Can you please clarify? We're not sure as to what  
8 the last portion of what you said indicated.

9 JUDGE NYAMBE: [Via videolink] Okay. The audio is not very clear.  
10 My understanding is that you said you lost 25 minutes because of  
11 miscommunications and breakdowns in the communications. Is that correct?

12 MR. IVETIC: No, Madam President. During the recess of the  
13 proceedings, I was unable to have privileged communications with my  
14 client due to technical difficulties, and therefore did not have access  
15 to my client for approximately 25 to 27 minutes of the allocated one-hour  
16 break.

17 JUDGE NYAMBE: [Via videolink] Okay. So you lost 25 minutes of  
18 the time you should have spent with your client during break due to  
19 miscommunications?

20 MR. IVETIC: That's correct, Your Honours.

21 JUDGE NYAMBE: [Via videolink] You want to consult with your  
22 client now before we proceed?

23 MR. IVETIC: No, Your Honours. We can proceed. I'm just making  
24 a record.

25 JUDGE NYAMBE: [Via videolink] Very well. You may proceed,

1 Ms. Bagott.

2 MS. BAGOTT: Madam Presiding Judge, Your Honours, before the  
3 break I was addressing the Chamber on why the presentation of a general  
4 defence case in cross-examination did not cure the errors in relation to  
5 Ground 1.

6 Absent notice, and specifically of the crimes alleged, the  
7 Defence could only put forwards a general one. And a general defence  
8 cannot counter a specific accusation or incident.

9 In relation to cross-examination, this can only be deployed to  
10 undermine the Prosecution's case when the Defence knows in precise terms  
11 what case it has to meet and the incident to which the Prosecution seeks  
12 a conviction on. In addition, meaningful instructions can be taken in  
13 this regard.

14 Absent notice, neither can cure the Trial Chamber's error.

15 The prejudice suffered by Mr. Mladic lies in the fact that these  
16 accusations were transformed into unscheduled incidents by the  
17 Trial Chamber at the judgement stage. Therefore, it was too late for the  
18 Defence to defend against them in the same way that it would with  
19 scheduled and unscheduled incidents that it was put on notice of.

20 The impact of this error.

21 As a result of the Trial Chamber's error, Mr. Mladic was held  
22 criminally responsible for these unnamed unscheduled incidents, which  
23 constituted crimes against humanity, terror, unlawful acts, and  
24 persecution. The Trial Chamber then took these into account when  
25 determining the ambits of the count on the indictment and the extent of

1 his criminal responsibility.

2 For the reasons set out, the appellant invites this Chamber to  
3 reverse the findings on the crimes identified in paragraphs 52 to 58 of  
4 the appeal brief.

5 Turning now to Ground 2.

6 The appellant submits, first, that there are compelling reasons  
7 for this Chamber to revisit Karemera to determine whether the  
8 Trial Chamber erred by taking judicial notice of facts relating to  
9 Mr. Mladic's proximate subordinates under Rule 94(b); and second, that  
10 the Trial Chamber erred by applying a heightened standard to rebuttal  
11 evidence.

12 These will be taken in turn.

13 The appellant's submissions on Karemera are at paragraphs 62 to  
14 95 of the appeal brief and paragraphs 16 to 19 of the reply.

15 The ICTR Appeals Chamber held in the Karemera interlocutory  
16 decision that facts relating to the conduct of the physical perpetrators  
17 of crimes for which an accused is alleged to be criminally responsible  
18 may be subject to judicial notice; paragraph 50.

19 The appellant submits that the relevance of the Appeals Chamber's  
20 findings in the Galic Rule 92 bis(C) decision and the Milosevic  
21 interlocutory decision lies in the further guidance they issued about the  
22 circumstances in which Trial Chambers should withhold their discretion in  
23 this specific context.

24 The Galic Rule 92 bis(C) decision considered that admitting  
25 Rule 92 bis evidence that went to the conduct of the "immediately

1 proximate subordinates" of an accused was inherently unfair when they  
2 were charged under Article 7(3) or the evidence goes to the elements of  
3 Article 7(1).

4 It decided this on the basis of what it considered to be the  
5 "short step" from a finding that crimes charged were committed by such  
6 subordinates to a finding that the accused knew or had reason to know  
7 that these crimes were about to be or had been committed; paragraph 14.

8 The Appeals Chamber said that careful consideration should always  
9 be given by trial chambers to the exercise of its discretion in these  
10 "special and sensitive" situations; paragraph 19.

11 The Galic Appeals Chamber did not define "immediately proximate  
12 subordinates" with reference to the rank of an accused, but rather  
13 whether the conduct of them was so widespread that the inference would be  
14 drawn that "there is no way that the accused could not have known about  
15 it" or "the accused had to be aware" of the objectives of his  
16 subordinates; paragraph 14.

17 It considered that where this link became sufficiently pivotal to  
18 the Prosecution's case on responsibility, "it may not be fair to the  
19 accused" to permit this evidence in written form as it could not be  
20 challenged by the Defence; paragraph 15.

21 In the same vein, but specifically in the context of adjudicated  
22 facts, the Appeals Chamber in the Milosevic decision held that:

23 "While it is possible to take judicial notice of adjudicated  
24 facts regarding the existence of crimes, the actus reus and mens rea  
25 element supporting the responsibility of the accused for the crimes in

1 question must be proved by other means than judicial notice."

2 Paragraph 16.

3 It distinguished this from adjudicated facts that provided  
4 evidence as to the existence of crimes committed by others for which the  
5 accused was not charged with; paragraph 16.

6 Therefore, both Appeals Chambers considered that if the link  
7 between the accused and the crime committed was such that the  
8 responsibility of an accused could be easily inferred from the untested  
9 witness statement or adjudicated fact, then the Prosecution would have to  
10 establish this by calling evidence that could be confronted by the  
11 Defence.

12 This, the appellant says, is the conceptual issue that was  
13 overlooked by the Karemera Appeals Chamber and why the Mladic  
14 Trial Chamber's reliance on it led it into discernible error.

15 An example.

16 The judgement highlights that the Trial Chamber took judicial  
17 notice of facts that related to the criminal activities conducted by  
18 those the Prosecution alleged were Mr. Mladic's subordinates to hold him  
19 responsible for them.

20 THE REGISTRAR: Ms. Bagott, could you kindly pause? We have  
21 dropped the signal of the Presiding Judge.

22 MS. BAGOTT: Of course.

23 THE REGISTRAR: Thank you.

24 THE INTERPRETER: The counsel is also asked to slow down for the  
25 purposes of interpretation. She is going quite fast. Thank you.

1 MS. BAGOTT: Apologies.

2 THE REGISTRAR: Madam Presiding Judge, are you in a position to  
3 see and hear us now?

4 JUDGE NYAMBE: [Via videolink] Sorry?

5 THE REGISTRAR: We have re-established connection, it appears.

6 JUDGE NYAMBE: [Via videolink] Okay, you may proceed.

7 MS. BAGOTT: Madam Presiding Judge, it might assist if you can  
8 let me know what the last thing you heard was before I cut out.

9 JUDGE NYAMBE: [Via videolink] You had started talking about --  
10 you were into Count 2.

11 MS. BAGOTT: How far into Count 2?

12 JUDGE NYAMBE: [Via videolink] Yes. You may proceed where you  
13 left.

14 MS. BAGOTT: Madam Presiding Judge, I'm just conscious of the  
15 fact that other Judges, and particularly other people in the courtroom,  
16 would have heard my submissions. And I'm conscious of the fact that if  
17 you cut out, perhaps you've missed a portion of it. And if it would  
18 assist you, I can go back.

19 JUDGE NYAMBE: [Via videolink] Unfortunately, I am unable to help  
20 because I can hardly hear you or any other Judge. I am thinking we are  
21 going to rely on the transcript when it is eventually generated, because  
22 unless -- unlike normal proceedings, I should have a transcript on the  
23 screen to follow the proceedings. I don't have that possibility.

24 MS. BAGOTT: I will take it from where I left off, and then the  
25 transcript will reflect the words that I spoke in the interim period.

1 JUDGE NYAMBE: [Via videolink] Yes, okay.

2 MS. BAGOTT: By way of example, I would refer the Chamber to  
3 incidents of 23 July 1995 at paragraph 2210 of the judgement. The  
4 Trial Chamber took judicial notice of a number of adjudicated facts in  
5 relation to the SRK's possession of modified air bombs between  
6 August 1994 and November 1995 and relating to a shelling incident on this  
7 day.

8 It specifically took judicial notice of the fact that "the  
9 modified air bomb was fired from a north-westerly direction from SRK-held  
10 territory." Paragraph 2210, footnote 9385, and adjudicated fact 2871.

11 On the basis of a judicial fact alone, no Prosecution evidence,  
12 it concluded that "a member or members of the SRK launched a modified air  
13 bomb" on that day and killed two civilians, seriously injuring others;  
14 paragraph 2212.

15 Pausing there. The Prosecution's case was that Mr. Mladic was  
16 the most senior officer in the VRS and that he significantly contributed  
17 to achieving the objectives of the JCEs primarily through the use of the  
18 VRS forces; indictment paragraph 13.

19 These specifically included the SRK, which the Prosecution said  
20 "implemented" Mr. Mladic's orders through ethnically cleansing  
21 municipalities and terrorising Sarajevo's civilians through a campaign of  
22 shelling and sniping; Prosecution final trial brief paragraphs 102 to  
23 103.

24 In light of this, the adjudicated fact established that the  
25 crimes charged were committed by Mr. Mladic's alleged subordinates.

1 Given that the Prosecution's case was that the SRK was implementing  
2 Mr. Mladic's orders and were used as tools to achieve the objectives of  
3 the JCEs, the adjudicated fact on the identity of the perpetrator went to  
4 the core of its case on his responsibility.

5 Despite this, the Trial Chamber took judicial notice of this fact  
6 in the absence of any Prosecution evidence that could establish the SRK's  
7 responsibility for the incident.

8 The appellant submits this example demonstrates the error with  
9 the Trial Chamber's reliance on the Karemera approach. The Trial Chamber  
10 considered that there were no limitations on which judicial facts could  
11 be taken -- judicial notice could be taken of in the context of the  
12 conduct of other members of the JCE or the physical perpetrators.

13 This is just one example of when the Trial Chamber took this  
14 approach in relation to Mr. Mladic's alleged proximate subordinates. The  
15 appellant invites the Chamber to consider the others identified. For  
16 example, at paragraphs 107 and 108 of the appeal brief.

17 It is important to consider how other Trial Chambers have  
18 exercised their discretion to highlight the divergence in practice. I  
19 would refer the Chamber to paragraph 69 and footnotes 97 and 98 of the  
20 appeal brief in this regard.

21 There are broadly two approaches that can be seen in the  
22 jurisprudence: The Karemera approach and the Milosevic approach. An  
23 example of the latter is an approach taken by the Trial Chamber in the  
24 Stanasic and Zupljanin case. The Judges held that:

25 "Where the proposed fact goes to the core of the Prosecution's

1 case and relates to the conduct of others for whose criminal acts and  
2 omissions the accused is alleged to be responsible, the Trial Chamber  
3 will nevertheless exercise its discretion to withhold judicial notice if  
4 it considers that doing so would be in the interests of justice."  
5 Paragraph 41.

6 In light of the Prosecution's case against Mico Stanisic and  
7 Stojan Zupljanin, namely, that in their roles as the Minister of the  
8 RS MUP and Chief Regional Security Services Centre of Banja Luka  
9 respectively, that they committed crimes through the police, the  
10 Trial Chamber concluded that "where a proposed fact refers to the  
11 criminal activities conducted by the police within an ARK municipality,  
12 the fact is considered to go to the core of the case." Paragraph 41.

13 For that reason, it withheld judicial notice of such facts in the  
14 interests of justice.

15 Importantly, the Trial Chamber in this case did not limit which  
16 members of the police this would apply to by, for example, rank. Given  
17 the Prosecution's case, it considered that all members of the police  
18 could constitute the accused's "immediately proximate subordinates."

19 This demonstrates that, contrary to the Prosecution's assertion  
20 at paragraph 30, this is not limited to those close to an accused in  
21 rank.

22 Had the Mladic Trial Chamber taken this approach, it would have  
23 withheld its discretion and declined to take judicial notice of facts  
24 that related to the criminal activities conducted by those the  
25 Prosecution alleged were Mr. Mladic's subordinates in the interests of

1 fairness.

2 The appellant submits that the fact that there is such a  
3 divergence in the approach taken in the jurisprudence gives further  
4 impetus to revisit the Appeals Chamber's decision in Karemera and  
5 articulate the correct legal standard.

6 By way of conclusion, the appellant emphasises that it is not  
7 argued that the Trial Chamber can never take judicial notice of facts.

8 The appellant asserts that the Trial Chamber fell into error when  
9 it admitted a specific category of facts; namely, those that related to  
10 the criminal activities conducted by those the Prosecution alleged were  
11 Mr. Mladic's subordinates acting under his orders. As, the appellant  
12 says, these were sufficiently pivotal to the Prosecution's case on his  
13 responsibility for the alleged conduct. Therefore, it should have  
14 presented evidence itself in this regard.

15 The appellant invites this Chamber to find that the Trial Chamber  
16 erred in exercising its discretion and overturn the relevant findings  
17 affected by this approach identified, for example, in paragraphs 107 and  
18 108 of the appeal brief.

19 Ground 2A.2 - the Trial Chamber erred by applying a heightened  
20 standard to rebuttal evidence.

21 The appellant's submissions on this ground are at paragraphs 94  
22 to 114 of the appeal brief and paragraphs 20 to 37 of the reply.

23 Taking judicial notice under Rule 94(B) creates a rebuttable  
24 presumption of accuracy of that fact. However, as the Trial Chamber  
25 acknowledged at paragraph 5272 of the judgement, the ultimate burden of

1 persuasion remains with the Prosecution.

2 The appellant submits that the standard applied to the Defence  
3 rebuttal evidence was heightened. As a result, it was deprived of its  
4 opportunity to enliven the debate and from that rebut the adjudicated  
5 fact.

6 Turning first to the standard articulated in the jurisprudence.  
7 Within this it states that the Defence bear the burden to produce  
8 credible and reliable evidence sufficient to bring the accuracy of the  
9 adjudicated fact into dispute.

10 The threshold of credible and reliable rebuttal evidence, as the  
11 Karemera rebuttal decision states, is "relatively low: what is required  
12 is not the definitive proof of reliability or credibility of the  
13 evidence, but the showing of prima facie reliability and credibility on  
14 the basis of sufficient indicia." Paragraph 151.

15 The Trial Chamber itself recognised in its decision on  
16 adjudicated facts that the accuracy of facts could, for example, be  
17 challenged through the cross-examination of Prosecution witnesses or the  
18 presentation of Defence evidence to meet this threshold; paragraph 19.

19 Therefore, contrary to the Prosecution's assertion at  
20 paragraph 37 of the response, the Defence was not required necessarily to  
21 present rebuttal evidence as part of its case to bring the accuracy of  
22 the adjudicated fact into dispute. It was, as the Trial Chamber  
23 acknowledged in that decision, able to do so by confronting the  
24 Prosecution evidence and eliciting inconsistencies and weaknesses  
25 therein.

1           Despite this, the Trial Chamber imposed an erroneous additional  
2           requirement on the evidence presented by the Defence. It required it to  
3           be "unambiguous."

4           Examining the approach the Trial Chamber took.

5           The Trial Chamber explained at paragraph 5273 how the Defence  
6           could enliven the evidentiary debate:

7           "In either presenting evidence on a specific alternative  
8           scenario, as opposed to a mere suggestion of one or more possible  
9           alternative scenarios, or in the unambiguous demonstration that a  
10          scenario as found in the adjudicated fact must reasonably be excluded as  
11          true."

12          To further explain what it meant by a "specific alternative  
13          scenario," it gave an example in the only footnote within that paragraph.  
14          It reads: "If an adjudicated fact stated B killed C, and the  
15          Trial Chamber received evidence that C was possibly/likely killed by A,"  
16          it said, "this would be deemed insufficient to reach the threshold of  
17          'unambiguous' evidence." Footnote 18018.

18          Let's consider that for a moment. If something is possible or  
19          likely, then there is doubt. And where there is doubt, as is trite in  
20          criminal law, that doubt must be resolved in favour of the accused. To  
21          expect the Defence to present evidence that is without doubt is to  
22          reverse the burden of proof and impose a heightened standard: that of  
23          beyond reasonable doubt.

24          It follows then that eliciting doubt through cross-examination of  
25          Prosecution witnesses, such that inconsistencies or weaknesses could be

1 pointed out, would not be sufficient.

2 Therefore, following the Trial Chamber's example, to challenge  
3 the accuracy of the adjudicated fact on the basis of its standard, the  
4 Defence would have had to have proved beyond reasonable doubt that C was  
5 killed by A. And it would have had to have done so by presenting  
6 evidence in this regard.

7 There is no legal basis for this standard. The fact that the  
8 Trial Chamber does not cite a single authority for it in paragraph 5273  
9 is perhaps indicative of this.

10 In the next paragraph, 5274, the Trial Chamber stated that it is  
11 "mindful that evidence contradicting the adjudicated fact does not  
12 automatically rebut the adjudicated fact." The Defence also had to show  
13 that the evidence that was brought was reliable and credible. The  
14 reliable and credibility test was a secondary consideration.

15 As such, the appellant asserts the Trial Chamber imposed an  
16 additional hurdle that the Defence had to overcome before it could reach  
17 the accepted standard required by the jurisprudence to enliven the  
18 evidentiary debate.

19 The appellant submits that in light of the Trial Chamber's  
20 explanation of its methodology, this Chamber can be satisfied that it  
21 applied a heightened standard.

22 The consequences of this error.

23 The appellant has identified the consequences of this error at  
24 paragraphs 106 to 113 of the appeal brief and paragraphs 22 to 37 of the  
25 reply.

1           However, here is one example of the Trial Chamber's erroneous  
2           approach. From this, the Chamber can see how the test in paragraph 5273  
3           was applied in practice.

4           Unscheduled incident 24 October 1994, paragraphs 2001 to 2002 of  
5           the judgement.

6           The Trial Chamber sought to rely on adjudicated facts that said  
7           that the shot came from a known sniper location of the SRK and that the  
8           shots were fired by members of the SRK; paragraph 2001, adjudicated facts  
9           2752 and 2753. The Defence argued that the Prosecution's expert evidence  
10          was defective. It also produced a Defence expert testimony in which it  
11          was said that the trees were likely to have blocked the line of sight.

12          The Trial Chamber held that likely was not enough to contradict  
13          the adjudicated fact. Further, it did not have to address the Defence's  
14          submissions on the deficiencies within the Prosecution evidence because  
15          it relied on the unrebutted adjudicated fact "instead"; paragraph 2002.

16          Therefore, even when the Defence could introduce doubt through an  
17          expert and also point to weaknesses in the Prosecution's evidence, this  
18          was insufficient to bring the accuracy of the adjudicated fact into  
19          dispute. Had the debate been enlivened, the Prosecution's evidence would  
20          not have been sufficient to re-establish the accuracy of the fact as to  
21          the clear line of sight, as it would not have been able to overcome the  
22          lingering doubt created by the Defence expert and the weaknesses in its  
23          own evidence.

24          The appellant submits that the standard applied by the  
25          Trial Chamber to rebuttal evidence was erroneous. And as a result, its

1 approach to evidence tendered by the Defence or reliance on  
2 inconsistencies or weaknesses in the Prosecution's case to enliven the  
3 evidentiary debate was flawed.

4 This infected the Trial Chamber's approach to adjudicated facts  
5 throughout the judgement. The examples provided in the appeal brief  
6 demonstrate the existence of this systematic error such that the  
7 Trial Chamber's approach to every single adjudicated fact is called into  
8 question.

9 The appellant asserts that this Chamber can be satisfied that the  
10 Trial Chamber fell into discernible error and applied a standard that no  
11 reasonable Trial Chamber would and, in fact, ever has.

12 As such, it invites the Chamber to reverse the Trial Chamber's  
13 findings to the extent of this error.

14 At this, Madam Presiding Judge, Your Honours, I will pass to  
15 Mr. Ivetic for submissions on Ground 3.

16 MR. IVETIC: Your Honours, I again incorporate by reference my  
17 objection, reservation of rights, and very strong protest as to today's  
18 appearance by myself. Again, without the ability to meaningfully prepare  
19 with my client and with a reasonable and bona fide question as to his  
20 legal capacity to participate, I am limited by my ethical  
21 responsibilities to provide you with a very limited, minimal, and  
22 shortened summary argument as to the Trial Chamber's errors as they  
23 pertain to a finding of an overarching joint criminal enterprise and my  
24 client's criminal culpability for the same.

25 This would be Ground 3 of the written appeal.

1           My goal is to highlight the meritorious claim that my client has  
2           and to preserve his rights and make a record of the same. In doing so, I  
3           do not substitute my participation as being acquiescence nor recognition  
4           of today as being the appropriate appellate procedure, nor do I waive  
5           anything written in our appeal which I do not have the time to mention.

6           As to the overarching JCE, the judgement is replete with errors,  
7           so many that it is rendered unsound, and this Chamber needs to take a  
8           look at it and correct the same in order to serve both the interests of  
9           justice and allow our client, Mr. Ratko Mladic, a fair result in accord  
10          with the legal standards.

11          Let's talk about temporal geographic scope.

12          Respectfully, the Trial Chamber's erroneous approach on the  
13          overall assessment of evidence and failure to properly apply acceptable  
14          legal standards led to erroneous findings as to an overarching JCE. To  
15          start, I would like to draw your attention to the temporal and geographic  
16          scope that was found by the Trial Chamber. That's in paragraph 4232 and  
17          in our appeal at paragraph 194.

18          The overarching JCE is defined as lasting from 1991 to  
19          30 November 1995, and is limited to the geographic scope of  
20          Bosnia-Herzegovina. It is a fundamental principle of criminal law that  
21          there be a temporal co-existence of the actus reus and the mens rea of  
22          the prescribed conduct.

23          Adding to the cases we have cited in our appeal brief that  
24          support this position, we have the Nahimana appeal judgement at  
25          paragraph 313:

1            "... the Tribunal should have jurisdiction to convict an accused  
2            only where all of the elements required to be shown in order to establish  
3            his guilt were present ..."

4            And then later in that same section:

5            "The acts or omissions of the accused under any of the modes of  
6            responsibility referred to in Article 6(1) and (3) of the Statute  
7            occurred in 1994, and at the time of such acts or omissions the accused  
8            had the requisite intent (mens rea) in order to be convicted pursuant to  
9            the mode of responsibility in question."

10           THE REGISTRAR: I apologise, Mr. Ivetic. I am advised that the  
11           Presiding Judge's signal has dropped again. Could you kindly bear with  
12           us for a minute while we reconnect.

13           JUDGE NYAMBE: [Via videolink] Right. We were disconnected and I  
14           think I'm back.

15           Mr. Lukic, you may continue where you left.

16           MR. IVETIC: Thank you, Your Honour. This is Mr. Ivetic, and I  
17           will continue where the transcript stopped.

18           JUDGE NYAMBE: [Via videolink] Okay.

19           MR. IVETIC: I would also cite to the Simba appeals judgement  
20           paragraph 266:

21           "The inquiry is ... whether at the moment of commission the  
22           perpetrators possessed the necessary intent."

23           Indeed, the Naletilic & Martinovic appeal judgement followed this  
24           the same approach in paragraph 114. And your esteemed colleague,  
25           Judge Tuzmukhamedov, who said to call him Judge T, supported this same

1 approach in his dissent in the Sainovic appeal judgement at paragraph 8.  
2 In the words of Judge T, neither conduct prior to the period of the JCE  
3 nor any actions on the part of the accused thereafter could have  
4 reasonably amounted to a significant contribution to the JCE.

5 We have correctly argued in our appeal that the Trial Chamber  
6 erred in its approach, especially insofar as to infer mens rea from  
7 statements beyond the scope of the overarching JCE made in 1991 in  
8 Croatia, not in Bosnia-Herzegovina; appeal paragraph 304.

9 First, I note that the indictment alleged that Mr. Mladic was not  
10 considered part of the overarching JCE until 12 May 1992 when appointed  
11 Chief of the Main Staff of the VRS army. That's in paragraph 5 of the  
12 fourth amended indictment.

13 Prior to that month, he neither was on the territory of  
14 Bosnia-Herzegovina nor within the command structure of the VRS army since  
15 he was in Croatia and the JNA army at that time. Our appeal  
16 paragraph 203. Indeed, the first error of the Chamber is that it  
17 violated the aforementioned jurisprudence by trying to attribute his  
18 speeches to Bosnia-Herzegovina in 1991, when Mr. Mladic was neither  
19 temporally nor geographically linked to those events. That's in our  
20 appeal paragraph 203.

21 Mr. Mladic was not in the chain of command for receiving reports  
22 about events, and certainly could not send commands to persons outside of  
23 his chain of command either to commit these crimes or punish  
24 perpetrators.

25 The second error in this respect was that the trial judgement

1 performs an analysis of what others, such as politicians, the police, or  
2 other armed groups --

3 THE REGISTRAR: Mr. Ivetic.

4 MR. IVETIC: Yes?

5 THE REGISTRAR: I'm sorry to barge in, but we have lost one of  
6 the Judges as well. So could you kindly wait until we restart her  
7 connection.

8 MR. IVETIC: Of course.

9 JUDGE NYAMBE: [Via videolink] Good afternoon, Judges. Good  
10 afternoon, everybody in the courtroom. One of our Judges is  
11 disconnected -- ah, Judge Kam is back. Judge N'gum is disconnected, and  
12 IT advises that we take the one-hour break now, to resume 1.25 Hague  
13 time. Is that agreeable? Or we are restored?

14 MR. IVETIC: The Defence is fine with that, Your Honour.

15 JUDGE NYAMBE: [Via videolink] Registry -- I mean, IT -- are all  
16 the Judges connecting?

17 THE REGISTRAR: Madam Presiding Judge, IT colleagues are looking  
18 into the issue, and we will revert as soon as possible once the  
19 connection has been re-established.

20 JUDGE NYAMBE: [Via videolink] Can everybody hear me?

21 THE REGISTRAR: Madam Presiding Judge, we can hear you.

22 JUDGE NYAMBE: [Via videolink] We now take our one-hour break.

23 All rise.

24 --- Luncheon recess taken at 12.24 p.m.

25 --- On resuming at 1.30 p.m.

1 JUDGE NYAMBE: [Via videolink] Good afternoon. Can everybody hear  
2 me? Good afternoon.

3 THE REGISTRAR: Good afternoon, Judge. We can see and hear you  
4 clearly.

5 JUDGE NYAMBE: [Via videolink] Very well. Thank you. The  
6 Appeals Chamber will now continue the hearing of Mladic's appeal.  
7 Counsel for Mr. Mladic, you have one hour for this particular session as  
8 well.

9 MR. IVETIC: We're waiting for the transcription of the -- I'm  
10 not sure how much time we have left, but I will continue with the  
11 arguments.

12 As I was saying, the second error in this respect was that the  
13 trial judgement performs an analysis of what others, such as politicians,  
14 the police or other armed groups said or did in the same time-period  
15 prior to Mr. Mladic coming to Bosnia-Herzegovina.

16 Much of this and many of the crimes underpinning the overarching  
17 JCE come in this time-period before Mr. Mladic was in Bosnia and before  
18 the VRS. This violates the above jurisprudence as the Trial Chamber  
19 utilises events that pre-dates Mr. Mladic's appointment and geographic  
20 position to establish his mens rea in contribution to a JCE where the  
21 actus reus was before his physical and temporal presence. This is very  
22 much in error.

23 Further, as to the temporal and geographic scope of the trial  
24 judgement, it did not take into account that the VRS started off with  
25 just Mladic and a few officers at the Main Staff, and that it took time

1 to bring various remnants of the JNA, various local defence units, and  
2 even regional or local armed forces under the VRS's structure and  
3 command. By way of example, in Foca, it was several months before this  
4 took place.

5 The judgement's analysis as to overarching JCE relies heavily on  
6 adjudicated facts, and you've heard my colleague's submissions as to  
7 same.

8 Crimes that took place before Mladic and his VRS had hierarchy  
9 and military command and control in all regions of Bosnia cannot be used  
10 to establish his mens rea, even if the actus reus is shown to be  
11 perpetrated by others.

12 Now, I will move on to the mens rea and actus reus being  
13 scrambled and muddled together in analysis.

14 The Trial Chamber erred in almost exclusively basing its analysis  
15 of Mr. Mladic's purported contribution to the overarching JCE on  
16 circumstantial evidence. In using this modus, these conclusions had to  
17 be the only reasonable inferences available. I would point to the appeal  
18 judgements in Lukic and Lukic, paragraph 149; and Boskoski and  
19 Tarculovski, paragraph 99, for this holding. As we see from the appeal,  
20 this was not the case, and the Trial Chamber thus committed discernible  
21 error in finding Mr. Mladic guilty.

22 If I can direct your attention to paragraph 311 of our appeal, we  
23 have summarised that there was direct evidence that Mr. Mladic did not  
24 share a criminal intent in accord with the overarching JCE, which was not  
25 accepted by the Trial Chamber because it felt it had more circumstantial

1 evidence to the contrary. This disregard of direct evidence in favour of  
2 circumstantial evidence is discernible error. It violates the above  
3 jurisprudence and violates in dubio pro reo.

4 If the Chamber has conceded that direct evidence exists showing a  
5 lack of criminal intent or a mens rea as to Mr. Mladic, and if indeed  
6 that direct evidence is corroborated by other circumstantial evidence, as  
7 is shown in appeal paragraph 312, footnote 463, then no reasonable trier  
8 of fact can choose to ignore that direct evidence and go with "more"  
9 circumstantial evidence to say that the "only" available inference is one  
10 indicative of guilt.

11 Circumstantial evidence cannot outweigh direct evidence. Much of  
12 the direct evidence that was available to the Trial Chamber and which was  
13 disregarded included the notebooks that the Chamber asserted as being  
14 authored by Mr. Mladic himself. Appeal paragraphs 202, 234, and 309 give  
15 some examples.

16 The appellant submits that the Trial Chamber erred in law by  
17 employing a defective method that resulted in a finding of the  
18 appellant's mens rea being satisfied beyond reasonable doubt. Based on  
19 this fundamental legal error in the method of the Trial Chamber's  
20 analysis, the appellant invites the Appeals Chamber to overturn the  
21 Trial Chamber's convictions on the JCE 1 mode of liability, pursuant to  
22 the Vasiljevic appeal judgement paragraph 12 and Blaskic appeal judgement  
23 paragraph 13.

24 The first error was that the Trial Chamber made findings of the  
25 appellant's mens rea before the actus reus was established. This is akin

1 to building a house before setting the foundation upon which it will  
2 stand. As explained in the appeal brief at paragraphs 271 to 285, to  
3 establish the actus reus element of JCE, the Trial Chamber must determine  
4 the existence and scope of a common criminal purpose shared by a  
5 plurality of persons. This is a necessary prerequisite in determining  
6 whether the acts performed by the appellant were related, contributed to  
7 the participation of the common criminal objective. Thus said the  
8 Stanasic and Simatovic appeal judgement in paragraph 82.

9 We recall that the doctrine of JCE demands that the appellant  
10 made a significant contribution to the crimes for which he has been  
11 convicted. Here both the Krajisnik appeal judgement paragraph 215 and  
12 Brdjanin appeal judgement paragraph 987 set that forth, as does our  
13 appeal in footnote 273. This requires the trier of fact to characterise  
14 Mr. Mladic's contribution to the common criminal purpose. This is from  
15 paragraph 430 of the Brdjanin appeal judgement.

16 Here we must point out that the Trial Chamber and the Prosecution  
17 in its response brief make assumptions and draw inferences that -- of  
18 Mr. Mladic to circumstantially link him to crimes based on his position  
19 in the VRS and the evidence of behaviour of alleged subordinates to  
20 satisfy the guilt of Mr. Mladic by this mode. See judgement  
21 paragraph 3561, 4218 to 4239.

22 Indeed, the Prosecution has misled you by submitting that the  
23 word "link" between Mr. Mladic in the overarching JCE with other  
24 participants is merely any link. Look to their response brief  
25 paragraph 101. Thereby, the Prosecution have confused the actual

1 requirement from the Brdjanin appeal judgement which requires an  
2 understanding or agreement to be that link. And that's paragraph 419.  
3 No other link works.

4 The Trial Chamber also relied on circumstantial links --

5 THE REGISTRAR: Mr. Ivetic, I am advised that we have lost the  
6 connection with the Presiding Judge. Could you kindly pause until we  
7 re-establish connection. Thank you.

8 MR. IVETIC: Of course. Of course.

9 THE REGISTRAR: Madam Presiding Judge, I am advised that we have  
10 reconnected. Can you reconfirm that, please?

11 JUDGE NYAMBE: [Via videolink] Thank you very much. The session  
12 is resumed.

13 Mr. Lukic, please proceed.

14 MR. IVETIC: As I was saying, the Trial Chamber also relied on  
15 circumstantial "links" rather than finding actual understanding or  
16 agreement by Mr. Mladic to support any overarching JCE.

17 Quoting again to Judge Tuzmukhamedov's Sainovic dissent at  
18 paragraph 34:

19 "... no one incurs criminal liability merely by virtue of being a  
20 person of authority or capable of issuing instructions. Responsibility  
21 justifying a criminal conviction may attach only to individuals who  
22 actually put their powers into use for the commission of crimes or ...  
23 fail to exert their influence over perpetrators."

24 And this must be proven beyond reasonable doubt.

25 Once the actus reus is established, the Trial Chamber is then

1 required to examine whether the appellants shared intent to further the  
2 common criminal objective could be inferred from his knowledge, acts,  
3 words, and interactions with others; Stanisic and Simatovic appeal  
4 judgement paragraph 82.

5 Again, much like a person building the foundational layer upon  
6 which their house will be built, the Trial Chamber is required to  
7 determine the objective actus reus elements of JCE first before the  
8 subjective mens rea element can be considered. And that's from the same  
9 appeal judgement, Stanisic and Simatovic, paragraph 82.

10 The appellant submits --

11 THE REGISTRAR: Mr. Ivetic, I apologise. We have lost the  
12 connection of one of the Judges, so we'll try to re-establish connection.  
13 Thank you.

14 Madam Presiding Judge, can you see and hear us clearly now, and  
15 also Judge N' Gum as well?

16 JUDGE NYAMBE: [Via videolink] I can. Shall we proceed?

17 MR. IVETIC: Thank you, Your Honour.

18 The appellant submits that the second error in the  
19 Trial Chamber's analysis was when it made mens rea findings while doing  
20 the actus reus consideration. That's in the appeal at paragraphs 262 to  
21 290.

22 The consequence of this is that if mens rea inferences are drawn  
23 prior to the actus reus being established, not only does this contravene  
24 the established method explained in the first error, but how can the  
25 Trial Chamber then, moving into the mens rea consideration, remain

1 objective when they have already made findings about and against the  
2 appellant's mental state? Reliance on conclusions already drawn about  
3 the appellant's guilt does not provide an objective or balanced analysis  
4 of the appellant's mens rea.

5           Instead, the Trial Chamber automatically applies these findings  
6 to conclude Mr. Mladic's guilt, thereby indelibly tainting their  
7 findings. You can see this in our appeal paragraph 291 and our reply  
8 paragraph 55. On this very point, the Prosecution was unable to address  
9 this error but rather chose to paint over the elements with a  
10 broad-brush.

11           The appellant avers that the method used by the Trial Chamber to  
12 establish the different elements of the OJCE are flawed. This  
13 invalidates this Trial Chamber's findings for the OJCE. Such a piecemeal  
14 approach deprived the appellant of his rights under *in dubio pro reo*,  
15 fair trial, and the jurisprudence which we have discussed earlier. In  
16 essence, the Trial Chamber has not been able to articulate by what  
17 measure Mr. Mladic was involved in crimes or furthered the common  
18 criminal purpose.

19           In light of these facts, we submit that the judgement failed to  
20 properly characterise through which specific conduct Mr. Mladic  
21 contributed to the overarching JCE, again, during the relevant  
22 time-period he was in Bosnia-Herzegovina and in the VRS.

23           By using such a nebulous and blurred analysis, muddling the *actus*  
24 *reus* analysis and the *mens rea* analysis, the Trial Chamber ultimately  
25 left open whether it held Mr. Mladic responsible for active conduct,

1 omission, or both.

2 Now, I'd like to talk about the civilian police, MUP, and  
3 paramilitaries.

4 The Trial Chamber identified approximately 60 paramilitary groups  
5 on the territory of the Bosnian Serb republic, totalling between 4- and  
6 5.000 men as of July 1992. And it conceded Mr. Mladic's efforts to  
7 disarm and disband those units and groups. See in the judgement  
8 paragraph 3855. No reasonable trier of fact would ignore constant  
9 attempts of Mr. Mladic and his VRS to eradicate paramilitaries while  
10 including acts that were alleged to be committed by these same  
11 paramilitaries who were named as participants in the overarching JCE.

12 To be blunt, Mr. Mladic cannot have been fighting to eradicate  
13 Serbian paramilitaries while at the same time contributing to their  
14 actions and thus significantly contributing to the alleged common  
15 objective through these paramilitaries.

16 In doing so, the Trial Chamber failed to give sufficient weight  
17 to General Mladic's many orders to subordinates to breakup, disarm, and  
18 liquidate Serbian paramilitary groups and arresting them if they had  
19 committed crimes.

20 The appellant's approach to not tolerate any actions or existence  
21 of paramilitary groups is supported by various meetings evidenced in the  
22 notebooks attributed to him. See, for example, in our appeal footnote  
23 452. Indeed, the consistent opposition of General Mladic to the  
24 existence and activities of paramilitary groups is evidenced and  
25 documented from the entire period from when he came to Bosnia in 1992

1 through the end of the alleged overarching JCE in 1995. Please look to  
2 appeal paragraph 310.

3 The selective, erroneous, and biased approach of the  
4 Trial Chamber was followed by a superficial approach on evidentiary  
5 assessment as to findings on paramilitary structures. Instead of  
6 reaching conclusions in favour of the appellant under the direct evidence  
7 of his opposition to paramilitaries, the Trial Chamber attempted to  
8 somehow portray non-existing connections and the impression of joint  
9 furtherance of common objectives with the VRS through ambiguous  
10 terminology based on circumstantial evidence and unacceptable for proper  
11 Article 7(3) analysis, using words like "operated in co-operation," cited  
12 several times in the judgement, look at 3859 and 3866, for instance;  
13 "worked in co-ordination," judgement 3863; "worked in co-operation with  
14 VRS units," judgement paragraph 3873.

15 But again, direct evidence shows otherwise. One example, an  
16 elite VRS unit directly subordinated under General Mladic, the  
17 65th Protection Regiment, was personally sent by General Mladic to Ilidza  
18 and engaged to deal with a paramilitary group. Here we have Radojcic  
19 transcript page 23055, and wherein he continued that group outnumbered  
20 the military police available to that brigade commander who asked for  
21 Mr. Mladic's help to deal with this group.

22 Orders were issued to disarm and arrest them. An example is  
23 P5112. Only those who had not committed crimes were allowed to submit to  
24 the rules of war and submit to army induction, and they were separated,  
25 assigned to different units so as not to work together. Unrefuted

1 evidence defies to meet the requisite legal elements as to JCE I  
2 liability. The VRS and Mr. Mladic's position as to paramilitaries is  
3 "that the patriotic motives of the above-mentioned individuals are  
4 secondary, and unlawful enrichment and looting is the only reason for  
5 their presence in this area."

6 Moving on to the civilian police known as the MUP. The  
7 Trial Chamber's flawed approach is most evident in its use of adjudicated  
8 facts and flawed logic to establish that Mr. Mladic had command and  
9 control over the MUP, even though, at most, all he did was order the VRS  
10 army to co-operate in legitimate actions with the MUP. Look at appeal  
11 paragraph 218 to 221 and contrast with the trial judgement  
12 paragraph 3794.

13 This error is best illustrated in the judgement where the  
14 Trial Chamber concedes it cannot identify between actions and crimes  
15 committed by the VRS or members of the MUP and others but rather stirs  
16 them all together in the same cauldron for purposes of the overarching  
17 JCE. And I will quote that paragraph to you:

18 "Many of the charged crimes were committed by members of the VRS,  
19 who were under the operational command of one of the corps, and  
20 ultimately of the VRS Main Staff. Many other crimes were committed by  
21 the MUP members, either under the operational supervision of the VRS or  
22 under the supervision of the MUP. Some crimes were committed by the  
23 Territorial Defence members, under the supervision of the Bosnian-Serb  
24 Ministry of Defence. Crimes were also committed by paramilitary groups  
25 subordinated to the VRS or MUP."

1           The Trial Chamber resorted to inventing a brand new mode of  
2           liability in command and control jurisprudence - "Operational  
3           Supervision." What is it? Upon what basis in law and jurisprudence does  
4           it arise? The Trial Chamber is silent on this point. Evidence to the  
5           contrary is not silent and should have led the Trial Chamber to abandon  
6           its creative folly.

7           First of all, evidence was submitted to rebut the adjudicated  
8           fact as to command and control. Look at our appeal paragraph 218.  
9           Secondly, the record is replete with reliable and credible evidence that  
10          co-ordinated action of the MUP with the VRS did not lead to  
11          resubordination under the army's command. Here, look at appeal  
12          paragraph 221, which includes the Prosecution's own expert Reynaud  
13          Theunens at transcript page 20615 to 20617. The evidence showed that at  
14          all times the effective control, reporting, and discipline of MUP units  
15          remained with the MUP commander and MUP ministry; appeal paragraph 221,  
16          footnote 327.

17          Based on this evidence as to the MUP, and in accord with the  
18          requirements of *in dubio pro reo*, it was unreasonable and therefore an  
19          error for the Trial Chamber to find the appellant shared the intent of  
20          the MUP or that he contributed towards the common criminal purpose of any  
21          overarching JCE via the actions of the MUP.

22          Now, I'd like to switch gears to talk about legitimate goals of  
23          the army.

24          Respectfully, the Trial Chamber further erred in its conclusions  
25          linking Mr. Mladic's legitimate activities to political goals of

1 politicians. The Trial Chamber found that Mr. Mladic could influence the  
2 political leadership. That's discussed in the judgement at 4474, appeal  
3 paragraph 204. But at the same time, it refers to evidence that  
4 Mr. Mladic was continually subject to the political leadership; judgement  
5 paragraphs 4466, and 4472 through 4474.

6 Indeed, the Trial Chamber chose selectively the statements of UN  
7 outsiders interpreting the behaviour of Mr. Mladic that were often  
8 contradictory to one another. We set that out in the appeal at  
9 paragraph 204.

10 For example, contrary to reliance on Witness Wilson, in the  
11 judgement paragraph 4473, and its use and oversimplification elsewhere in  
12 the judgement, as to the existence of the Supreme Command for all tasks  
13 and objectives of the armed struggle, it should be noted that the same  
14 document used throughout the judgement, P338, at para -- at page 159,  
15 plainly set forth that General Mladic's VRS Main Staff was formulating  
16 its own military tasks, i.e., seven overall military goals, instead of  
17 six strategic objectives as formulated by politicians. There was no  
18 malicious meaning attached to them. They simply provided for formulating  
19 legitimate military tasks.

20 It should be recalled that this was all at a time when it was  
21 clear that the Bosnian Muslims and Bosnian Croats had already established  
22 their own armed forces, and attacks by these forces had been directed  
23 against municipalities in Bosnia-Herzegovina.

24 The judgement, besides speculative narratives, does not contain  
25 conclusions nor important analysis as to whether even the political

1 strategic objectives, nor the A-B variant document, were criminal per se.  
2 Hence, conclusions previously reached in the Perisic appeal judgement  
3 should direct us, namely, that "the implementation of the RS strategic  
4 objectives did not entail the systematic commission of crimes." That's  
5 to be found in paragraphs 100 to 102 of the Perisic appeal judgement, and  
6 must be taken into consideration. It's also identified in paragraph 243  
7 of our appeal.

8 Merely citing and speculating on objectives of a political nature  
9 do not satisfy the standard of evidence sufficient to establish the  
10 existence of a common criminal plan. We recall here the holding from the  
11 Martić Appeals Chamber that political intentions are not sufficient to  
12 establish a joint criminal enterprise. And that's at paragraphs 123 to  
13 124.

14 The absence of any correlation or identical agenda between  
15 Mr. Mladić and the VRS on the one side and political authorities on the  
16 other, let alone a common criminal objective, is seen in paragraph 3707  
17 of the judgement. But instead of analysing the clear divergency between  
18 political and military goals, the judgement lacks proper analysis and  
19 application of *in dubio pro reo*.

20 Per the arguments in paragraph 206 of the appeal, considering the  
21 undue weight given to evidence of the appellant's role in establishing  
22 the VRS, in light of the existing jurisprudence that "one's routine  
23 duties will not exculpate them," we submit this standard is interpreted  
24 and turned upside down. Performing routine duties in isolation is  
25 insufficient to establish indication of guilt and cannot substitute the

1        requisite actus reus or mens rea as to any overarching JCE.

2                The Trial Chamber failed to explain how performance of routine  
3        military duties of Mr. Mladic had an actual effect on and substantially  
4        contributed to the activities of perpetrators in the course of crimes in  
5        furtherance of the common objective. Without such analysis, the  
6        Trial Chamber has not been able to articulate by what measure Mr. Mladic  
7        was involved in crimes committed in furtherance of the alleged common  
8        objective. There is a clear error in reasoning that Mr. Mladic has made  
9        a significant contribution to the OJCE.

10                It should be recalled in this regard that the VRS, in the Perisic  
11        appeal judgement, was confirmed to be an organisation that was not  
12        criminal in itself and which undertook lawful combat activities. That's  
13        in our appeal paragraph 206.

14                Even a highly controversial doctrine of JCE demands that the  
15        appellant made a significant contribution to crimes, which requires the  
16        accused's contribution to the common objective; Brdjanin appeal judgement  
17        paragraph 430. How acts and conduct of Mr. Mladic performing his routine  
18        duties as a military commander had any tangible effect on crimes which  
19        were committed in furtherance of a common objective remain completely  
20        unanswered. We reiterate that this is an error, as in paragraph 235 of  
21        our appeal.

22                The Trial Chamber ignored the reasonable inference of  
23        Mr. Mladic's comments and speech at the 16th Bosnian Serb Assembly when  
24        he first assumed his title in the VRS, wherein he stated: "We do not  
25        want a war against the Muslims as a people, or against the Croats as a

1 people." Appeal paragraph 325. This is said after Karadzic proclaimed  
2 the six strategic objectives, and its plain interpretation is to only  
3 engage in war when attacked and against combatants, not civilians, which  
4 is a legitimate stance; appeal paragraph 326.

5 By failing to consider the same, the Trial Chamber erred as to in  
6 dubio pro reo.

7 Orders from the VRS Main Staff in evidence, particularly those  
8 from Mr. Mladic, were entirely lawful and legitimate. They were specific  
9 to the extent that can be interpreted as of a military nature. Their  
10 purpose cannot in any way be connected to any criminal plan or objective  
11 whatsoever.

12 Starting with directive number 1, upon assuming command of the  
13 VRS, General Mladic consistently urged adherence to the  
14 Geneva Conventions and proper treatment of civilians and POWs; appeal  
15 paragraph 311 to 312. These orders indicate that the appellant ordered  
16 his subordinates to abide by international law and did not order them to  
17 further the objectives of any common criminal objective.

18 We believe that given the Trial Chamber's complete disregard of  
19 this direct evidence of lawful orders from Mr. Mladic, it is incumbent  
20 upon this Appeals Chamber to intervene in the Trial Chamber's mens rea  
21 analysis where this direct evidence of probative value has not been given  
22 sufficient weight.

23 For those reasons, we would ask that you vacate the Trial Chamber  
24 convictions based on an overarching JCE and grant Ground 3 of the appeal.

25 And I yield the floor to my colleague as to Ground 4.

1 MS. BAGOTT: Madam Presiding Judge, Your Honours, I will now be  
2 addressing the Chamber on Ground 4.

3 I will not be addressing the Chamber on every subground within  
4 Ground 4, which relates to the Trial Chamber's errors in relation to  
5 Sarajevo.

6 My submissions will be focused on ground 4A.1: That the  
7 Trial Chamber erred in law by finding that the Tribunal has jurisdiction  
8 over the crime of terror. The appellant submits the Trial Chamber's  
9 error invalidates the conviction entered on Count 9 for the crime of  
10 terror.

11 The appellant's written arguments are at paragraphs 336 to 349 of  
12 the appeal brief, and paragraphs 67 to 69 of the reply.

13 Before turning to my submissions, it's important to note that our  
14 argument is focused on the fact that the criminalisation of terror could  
15 not be considered to have formed part of customary international law  
16 during the indictment period. The appellant does not challenge the  
17 finding that there existed a custom on the prohibition against terror;  
18 paragraph 341 of the appeal brief.

19 I will start by considering the legal basis relied on by the  
20 Trial Chamber to conclude it did, in fact, have jurisdiction over the  
21 crime of terror.

22 At paragraph 3185 of the judgement, the Trial Chamber held that  
23 "the Appeals Chamber has confirmed that the Tribunal has jurisdiction  
24 over this crime" and cited two cases in support of this conclusion, the  
25 Galic appeal judgement and the Dragomir Milosevic appeal judgement.

1 These will be taken in turn.

2 The Galic Appeals Chamber, in the first instance, acknowledged  
3 the Secretary-General's remarks that "the International Tribunal was  
4 expected to apply 'rules of international humanitarian law which are  
5 beyond any doubt part of customary international law.'" Paragraph 81.

6 It then went on to explain the importance of forensically  
7 analysing the jurisprudence to avoid confusing a custom prohibiting  
8 certain conduct with a custom that criminalises it. This was because "in  
9 most cases, treaty provisions will only provide for the prohibition of  
10 certain conduct, not for its criminalisation, or the treaty provision  
11 itself will not sufficiently define the elements of the prohibition they  
12 criminalise ..." Paragraph 83.

13 After considering domestic practice to determine whether or not  
14 there was sufficient state practice to evidence a norm of customary  
15 international law for the criminalisation of terror, the Appeals Chamber  
16 found that individual criminal responsibility could be inferred from  
17 state practice. Paragraph 92. Judge Schomburg dissented.

18 It pointed to six states to evidence state practice: The  
19 Ivory Coast, Czechoslovakia, Ethiopia, the Netherlands, Norway, and  
20 Switzerland. The other states it pointed to - Ireland, Bangladesh, the  
21 United States, China, and the former Yugoslavia - on closer inspection  
22 did not, in fact, criminalise terror so cannot be said to constitute  
23 evidence of state practice in this regard. I would refer the Chamber to  
24 Judge Schomburg's dissent at paragraphs 9 to 13, and also the appellant's  
25 reply at paragraph 68.

1           Therefore, on the basis of six, or at best 12 states, the Galic  
2 Appeals Chamber concluded beyond any doubt a breach of the prohibition  
3 against terror in a manner corresponding to the additional protocols in  
4 the Geneva Conventions gave rise to individual criminal responsibility  
5 under customary international law; paragraph 96.

6           The Appeals Chamber in Milosevic did not take this issue much  
7 further. It relied on the Galic appeal judgement to conclude that the  
8 Tribunal had jurisdiction over the crime of terror because its  
9 criminalisation was part of customary international law; paragraph 30.

10          Judge Liu dissented in Milosevic. He alone chose to undertake an  
11 independent analysis of the jurisprudence. He endorsed Judge Schomburg's  
12 dissenting analysis in Galic and concluded a custom criminalising terror  
13 could not be established due to the absence of sufficient state practice.

14          It's important to consider the Galic Appeals Chamber's approach  
15 to state practice in light of the North Sea Continental Shelf case.

16          In this case, the International Court of Justice found that state  
17 practice could only evidence a custom where it was "both extensive and  
18 virtually uniform"; paragraph 74. Where state practice is inconclusive,  
19 a custom cannot be established.

20          Of the six states that the Galic Appeals Chamber pointed to that  
21 did actually criminalise terror, there is not a single state from the  
22 permanent five of the Security Council at the time, not a single one  
23 located in Asia, the Americas, or Oceania. There are no common law or  
24 other legal systems represented.

25          The state practice it purported to find from these six states is

1 insufficient evidence of settled practice, extensive practice, or  
2 virtually uniform practice as required by the North Sea Continental Shelf  
3 case. It falls demonstrably short of what was required to show beyond  
4 any doubt that the criminalisation of terror was part of customary  
5 international law at the material time.

6 The fourth Tadic jurisdiction condition reads:

7 "The violation of the rule must entail, under customary or  
8 conventional law, the individual criminal responsibility of the person  
9 breaching the rule." Paragraph 94.

10 The appellant submits that the Galic Appeals Chamber failed to  
11 establish such a custom. As a result, there are cogent reasons to depart  
12 from this decision.

13 I will now consider the impact the Trial Chamber's deference to  
14 this decision had on Mr. Mladic.

15 As demonstrated by paragraph 3185 of the judgement, the  
16 Trial Chamber relied on and recycled the erroneous legal basis proffered  
17 by the Galic Appeals Chamber for the criminalisation of terror. It did  
18 so without conducting any form of legal due diligence itself.

19 The error in Galic was pointed out by the Defence at trial, but  
20 the Trial Chamber failed to engage with the issue and concluded that  
21 there was "nothing which would lead it to deviate from the established  
22 case law"; paragraph 3185.

23 Had the Trial Chamber conducted any form of legal analysis, it  
24 could not have satisfied itself beyond any doubt that the criminalisation  
25 of terror was part of customary international law during Mr. Mladic's

1 indictment period.

2 The Secretary-General made it clear that the principle of nullum  
3 crimen sine lege required the Tribunal to apply rules that were beyond  
4 any doubt part of customary law at the time of the relevant offence. The  
5 criminalisation of terror does not meet this threshold.

6 For this reason, the appellant submits that the Trial Chamber  
7 fell into error when it relied on the Galic Appeals Chamber's findings  
8 that it could exercise jurisdiction over the crime of terror under  
9 Article 3 of the Statute.

10 For this reason, the appellant invites the Chamber to overturn  
11 Mr. Mladic's conviction on Count 9 and remove considerations of the crime  
12 from the analysis of the alleged Sarajevo JCE.

13 I will now defer --

14 JUDGE NYAMBE: [Via videolink] May I interrupt you, Ms. Bagott?

15 MS. BAGOTT: Yes, of course.

16 JUDGE NYAMBE: [Via videolink] I think this would be an  
17 appropriate time to take an hour break. Therefore, the proceedings are  
18 paused until one hour from now. All rise.

19 --- Recess taken at 2.30 p.m.

20 --- On resuming at 3.31 p.m.

21 JUDGE NYAMBE: [Via videolink] Good afternoon. We resume now  
22 hearing Mr. Mladic's appeal. Counsel for Mr. Mladic, you have the floor.

23 MR. IVETIC: If I may begin, Your Honours, I will now address and  
24 highlight portions of Ground 5 of our appeal as they relate to the  
25 alleged forcible transfer and genocide convictions in Counts 2 through 8.

1           I wish to start with the conviction for forcible transfer which  
2           was reached in error and by a disregard of evidence on the part of the  
3           Trial Chamber.

4           Let me try to simplify it for you. As to forcible transfer, the  
5           Trial Chamber selectively relied upon evidence, including Dutch Battalion  
6           officer Franken, only when it supported its erroneous conclusion, but  
7           disregarded Franken and his evidence that the forcible transfer was a  
8           humanitarian evacuation ordered, indeed organised, at the highest levels  
9           of the United Nations, and that the United Nations asked Mr. Mladic to  
10          assist with this humanitarian evacuation. This is in appeal paragraph  
11          576, judgement paragraph 2474 to 2478, 2480 to 2559.

12          In these paragraphs alone, Franken is selectively cited out of  
13          context no fewer than 61 times. A close second is insider witness  
14          Momir Nikolic, referred to 35 times in these same paragraphs. Who, by  
15          the way, is identified by the DutchBat and other witnesses as the main  
16          instigator of abuses relating to the buses, not Mr. Mladic.

17          The Trial Chamber also relied on other even lower-level Dutch  
18          Battalion officers who may not have known of the evacuation agreement  
19          that the United Nations presented to Mr. Mladic at his first meeting with  
20          Colonel Karremans. To try to buttress Franken and support the judgement,  
21          the Prosecution, in its response at paragraph 224, recalls that the  
22          Trial Chamber also relied upon the evidence of Eelco Koster, an even  
23          lower-level subordinate who had a direct encounter with General Mladic,  
24          relying on Mr. Koster's testimony but not on the video of their  
25          encounter. And that's at judgement paragraph 5188.



1 interpreter at transcript page 1229 to 1230 when shown this video. And  
2 by the way, his commander on the radio is Franken.

3 And indeed, to demonstrate the veracity of Mr. Mladic's intent to  
4 engage in a humanitarian and voluntary evacuation, we see Mr. Mladic  
5 repeat to civilians that if they want to go, buses will be made  
6 available. Mr. Mladic is thanked and praised by the crowd of Bosnian  
7 Muslim civilians.

8 Later on in the same video he talks to another gathering of  
9 civilians, and that is in evidence too, explicitly telling them that  
10 those that want to stay and return to their homes may do so. So  
11 Mr. Mladic's words and deeds in Potocari, spoken in the same language as  
12 understood by the Bosnian Muslims, does not accord to the Dutch  
13 lower-level officer's understanding of the same.

14 Now, let's take a step further backward from this appearance in  
15 Potocari. What has transpired prior to this appearance? Specifically,  
16 this is the evidence that the Trial Chamber disregarded that predates  
17 Mr. Mladic and the arrival of buses at Potocari.

18 First, the highest leadership of the UN has determined evacuation  
19 is necessary for humanitarian reasons from Potocari; appeal  
20 paragraph 578, citing General Cornelis Nicolai, citing Colonel Boering  
21 the deputy commander of the Dutch battalion, and citing Mr. Kingori, the  
22 Kenyan UN officer in a blue helmet that we also saw in this same video.

23 Second, deputy chief of UNPROFOR BH command, Dutch  
24 General Cornelis Nicolai has obtained the agreement of the Dutch minister  
25 of defence to issue an order to Colonel Karremans, the Dutch Battalion

1 commander in Srebrenica, to obtain Mr. Mladic's help, to ask for it, for  
2 an urgent humanitarian evacuation from Potocari; appeal -- look at our  
3 appeal footnote 661.

4 Again, this is before any of the meetings at the Hotel Fontana  
5 with Mr. Mladic.

6 Third, at the first Fontana meeting, the video shows that  
7 Colonel Karremans expresses that the Bosnian Muslim civilian leadership  
8 has asked to leave and conveys the UN, United Nations, request for  
9 assistance in a humanitarian evacuation to Mr. Mladic. That's the video  
10 we just looked at, P1147, and it's in appeal paragraph 578, footnote 663.  
11 This is confirmed by the Prosecution military expert Butler. It's also  
12 confirmed by Karremans's own deputy commander, Boering, who is physically  
13 present and testified at trial that the UN did not have enough buses to  
14 do this evacuation on its own. You can find that in the appeal in  
15 footnote 663 to 664.

16 Indeed, Muslim civilian leaders had already ordered their own  
17 people to leave, women and children and elderly to Potocari and fighters  
18 to Susnjari. That's in evidence as P1547, and RM253 testified to it at  
19 transcript page 12516 to 12517.

20 These high-level UN meetings and discussions end up involving  
21 UNPROFOR Commander General Rupert Smith, Ambassador Yasushi Akashi, and  
22 Under-Secretary-General of the UN Kofi Annan. Look at D1479. The  
23 United Nations asked for Mr. Mladic to help evacuate civilians out of  
24 Potocari.

25 The Chamber finding him guilty of forcible transfer for the same

1 act would implicate the United Nations and is an unreasonable reading  
2 that selectively disregards the evidence.

3 If you watch all three Hotel Fontana meetings, in the video  
4 P1147, you will see Mr. Mladic welcoming, offering comforts to attendees,  
5 including cigarettes, beer, and sandwiches for lunch. This pattern of  
6 behaviour is similarly demonstrated in the third Fontana meeting with  
7 Bosnian Muslim civilian attendees, including Mr. Mladic offering his own  
8 vehicle to safely escort a female participant, Camila Omanovic, her  
9 daughter, grandchild, and mother during the evacuation. Again,  
10 Prosecution expert Richard Butler could not identify anything criminal  
11 said in these meetings by Mr. Mladic.

12 Ironically and demonstrative of its error, the Trial Chamber  
13 actually disregarded its own finding which accepted that during the  
14 Fontana meetings Mr. Mladic offered civilians a choice to leave for  
15 Yugoslavia or the federation or to stay in Republika Srpska. That is in  
16 judgement paragraph 2472 and is dealt with in appeal paragraph 579.

17 Now, let's return to Dutch Battalion officer Franken, who is  
18 among the primary lower-level officers selectively relied upon to convert  
19 this humanitarian evacuation into the crime of forcible transfer. The  
20 Trial Chamber focused on Franken to say "that the transportation of  
21 Bosnian Muslims out of Potocari to Kladanj was not a decision made by the  
22 Muslim delegation, but rather ordered by Mladic"; paragraph 5004 of the  
23 judgement. It is puzzling and a discernible error that the judgement  
24 disregarded this witness's own testimony to the contrary, in violation of  
25 in dubio pro reo.

1           Indeed, Franken acknowledged that his commander,  
2 Colonel Karremans, ordered Franken to assist the VRS with the  
3 humanitarian evacuation and that he later found General Smith - that's  
4 Rupert Smith - and other high-ranking UN had asked Mr. Mladic for the  
5 evacuation, and that separation of men was proper according to the laws  
6 of war to see if they were combatants. He testified to this in T10804 to  
7 10807, 10817 to 10823, 10816, 10824 to 10825, and in his statement D280.

8           Now, most importantly, the Trial Chamber disregarded that Franken  
9 had not viewed the entire Hotel Fontana video before of which we saw part  
10 of. That's at transcript page 10803 to 10807. Against this backdrop, it  
11 was error on the part of the Trial Chamber to rely selectively on other  
12 evidence of Franken, Koster, and other lower-level DutchBat officers in  
13 light of the overwhelming evidence, even from Franken, and especially  
14 higher-level DutchBat and United Nations officials that demonstrate the  
15 United Nations, not Mr. Mladic, ordered this evacuation for humanitarian  
16 purposes, and Mr. Mladic agreed with the UN to help.

17           Now, the lack of credibility as to Momir Nikolic will be  
18 discussed later as it pertains to killings. I think I mentioned that he  
19 was cited 35 times in these paragraphs.

20           So there was no forcible transfer of Bosnian Muslims from  
21 Srebrenica, nor was there a common objective for the alleged JCE under a  
22 correct review of the above evidence and under the appropriate standard.  
23 The requisite elements of establishing the crime of forcible transfer  
24 must include expulsion or other forms of coercion as to carrying out  
25 forced displacement of persons. The forced character of the displacement

1 is determined by the absence of a genuine choice by the victim in his or  
2 her displacement. This is from the Krnojelac appeal judgement, paragraph  
3 229, 233, and the Stakic appeal judgement, paragraph 279.

4 Again, in all of this it must be established with proper  
5 application of in dubio pro reo. It is clear that in this judgement the  
6 Trial Chamber did not abide by this jurisprudence, nor by this standard,  
7 and thus committed a discernible error in convicting Mr. Mladic of  
8 forcible transfer.

9 Turning now to genocide, extermination murders, and various other  
10 charges relating to the alleged executions of an undetermined number of  
11 men in Srebrenica. Let me at the outset make clear, as we have  
12 throughout the trial, that we do not dispute that, in addition to  
13 legitimate combat casualties, some individuals, including individuals  
14 from the local area, the MUP, and even Momir Nikolic and other rogue  
15 members of the VRS security professional line of command took it upon  
16 themselves to conduct acts of revenge and killings of prisoners of war  
17 but did so during the time-period when Mr. Mladic was not in the area and  
18 contrary to any orders of Mr. Mladic, or his knowledge at that time.

19 I must stress that the VRS security line had its own parallel  
20 chain of command separate and apart from the normal chain of command,  
21 such that it could exclude Mr. Mladic.

22 Now, it must be stressed that the Krivaja 95 military operation  
23 was conceded to be a legitimate military operation due to the failure to  
24 demilitarise the Srebrenica "safe area." The Prosecution can't fight  
25 that. Their own lead counsel for this part of the case,

1 Mr. Peter McCloskey, said that at transcript page 486. Their chief  
2 expert as to Srebrenica, Richard Butler, said that at transcript  
3 page 16498 to 16499.

4 It must be also be stressed that Directive 7.1 issued by  
5 Mr. Mladic replaced Directive 7 issued by President Karadzic, and that  
6 both Directive 7.1 and the Krivaja 95 orders of the Drina Corps, by their  
7 wording, directed that civilians not be targeted and that the laws of war  
8 be followed including the Geneva Conventions.

9 Directive 7.1 is P1470. Krivaja 95 is D302.

10 It must also be stressed that the column of men and boys set out  
11 from Srebrenica in combat formation and armed, and engaged in ambushes,  
12 combat, suicides, infighting, minefields, and deaths in "kamikaze-style  
13 attacks," look to appeal paragraph 674, such that unfortunately we will  
14 never know the true number of actual legitimate casualties and those  
15 related to acts of the crime of murder.

16 We must also at the outset repeat that the infamous Fontana hotel  
17 meetings and the language used by Mr. Mladic has been declared legitimate  
18 military language, non-criminal by Richard Butler at transcript  
19 page 16831. Thus, the Chamber's conclusion that Krivaja 95 intended the  
20 cleansing of Muslims from Srebrenica is an impermissible inference,  
21 unsupported by the evidence. We have already discussed this error as to  
22 forcible transfer.

23 In order to establish JCE liability of Mr. Mladic for the  
24 genocide and killings in Srebrenica, the evidentiary bar was supposed to  
25 be set at a high level. Per the jurisprudence, the standard of proof is

1 beyond reasonable doubt which "presents a high hurdle for the Prosecution  
2 to overcome." That's the Milutinovic trial judgement, Volume 1,  
3 paragraph 62.

4 As outlined by the Martić Appeals Chamber, it must meet more than  
5 "a high degree of probability." That's paragraph 57. And, of course, as  
6 set forth in the Celebici appeal judgement, it must be the only available  
7 conclusion under law and fact, as existence of any alternative conclusion  
8 mandates acquittal. And that's at paragraph 458. Additionally, since we  
9 are talking about genocide, the evidence must, in accord with stated high  
10 standards, establish specific intent, *dolus specialis* for genocide. And  
11 since it is a JCE, Mr. Mladic must be shown to have agreed to a common  
12 criminal purpose and significantly contributed to the same.

13 Now, instances wherein the Trial Chamber erred in respect to  
14 applying the jurisprudence to the facts are too numerous to go through.  
15 Allow me to simplify to the most essential. Per the Prosecution, and per  
16 the judgement, the JCE to kill and commit genocide did not even exist  
17 prior to the night between 11 and 12 July 1995. This is in the  
18 Prosecution final trial brief at 1063. It's in the judgement at  
19 paragraph 4926. And it's discussed in our appeal at paragraph 586.

20 Now, this is critical. As we have discussed before, under the  
21 jurisprudence, conduct and statements before the JCE and outside its  
22 temporal scope cannot be used to prove Mr. Mladic was part of that JCE.

23 However, as to Srebrenica, the Trial Chamber does precisely  
24 erroneously rely on that type of evidence and so does the Prosecution.  
25 Look at the Prosecution response, paragraph 270 to 278, and the trial

1 judgement at paragraph 2358 to 2362. And they also rely on  
2 circumstantial evidence and hearsay to attribute Mr. Mladic's agreement  
3 to a criminal plan requiring specific intent to commit genocide in  
4 addition to murder. For the convictions, impermissible inferences, and  
5 indeed I will call them implied conclusions or implications - you will  
6 see why in a second - are relied upon with no direct support as to  
7 Mr. Mladic, who, by the way, during this time-period, the Prosecution  
8 agrees, was not in Srebrenica but was far away in Belgrade when the  
9 killings started.

10 Again, as to the Fontana meetings that are on video, both  
11 Prosecution and Defence military experts say the language used is  
12 appropriate as it is aimed in the context of the armed 28th Bosnian  
13 Muslim Division still on the loose in the area of Srebrenica; appeal  
14 paragraph 595. Without any direct orders, without any direct evidence  
15 linking Mr. Mladic to any killings, the Trial Chamber committed its  
16 gravest error. It created a legal fiction, a legal fiction that looks  
17 real from afar, but when you get closer, it becomes a mirage. This is a  
18 violation of the jurisprudence and is a discernible error.

19 Now, I do not ask you to take my word for the approach of the  
20 Trial Chamber in this regard. Rather, I would invite you to listen along  
21 with me to an insider, the team leader and senior legal officer of the  
22 Mladic Trial Chamber, Jonas Nilsson, speaking publicly at the Asser  
23 Institute after the Mladic judgement. Let us see what secret evidence  
24 the Trial Chamber used in its approach to convict Mr. Mladic of the most  
25 serious crime of genocide.

1           We have another video. I await instruction.

2                               [Video-clip played]

3           "Mr. Paulussen: Good evening to you all. My name is Christophe  
4 Paulussen, and I would like to welcome you to the Asser Institute and to  
5 this new supranational criminal law or SCL lecture."

6           MS. BAIG: Sorry, excuse me. Can we pause for just a moment?  
7 Could you point to me where in the record this video can be found?

8           MR. IVETIC: It's in the public record.

9           MS. BAIG: It's in the public record in this case?

10          MR. IVETIC: No, it's in the public record, public domain, and  
11 it's germane to the way that the Trial Chamber dealt with the judgement.  
12 It's talking about the judgement.

13          MS. BAIG: Can I just have a moment, please, Your Honours.

14                               [Prosecution counsel confer]

15          MS. BAIG: Your Honours, the Prosecution is going to reserve our  
16 position on this video. We have no knowledge of what's in it.

17          MR. IVETIC: Okay. I will rewind it so that we get the whole  
18 video. Thank you.

19          THE INTERPRETER: The interpreters note that we do not have a  
20 transcript for this video to be able to interpret it into B/C/S. And  
21 without a transcript, I'm not sure that we can continue.

22          MR. IVETIC: You do have a transcript in English that was  
23 provided, in English, two pages. There were only two videos and this was  
24 the second one. Does that assist? It should be labelled at the top --

25          THE INTERPRETER: We do have video 1. I'm not sure we have

1 video 2.

2 MR. IVETIC: At the top it's labelled "Asser Institute -  
3 Jonas Nilsson Video." I have a copy, if it can be provided, that might  
4 assist.

5 THE INTERPRETER: Yes, thank you, that would assist.

6 MR. IVETIC: And I apologise if I missed something, because I did  
7 not have my headset in. So I will wait for the document to be given to  
8 the booth and then I will put the video on. So please give an indication  
9 when you are ready.

10 I have been told that they have it. I will now try again.

11 [Video-clip played]

12 "Mr. Paulussen: Good evening to you all. My name is Christophe  
13 Paulussen, and I would like to welcome you to the Asser Institute and to  
14 this new supranational criminal law or SCL lecture.

15 "Now, the SCL lecture series is a series on international  
16 criminal law and has been organised since 2023 by the Asser Institute in  
17 co-operation with the coalition for the ICC and the Grotius Center for  
18 International Legal Studies of Leiden University.

19 "On the 22nd of November, 2017, the International Criminal  
20 Tribunal for the former Yugoslavia, or ICTY, rendered the judgement in  
21 its final trial, in the case of the Prosecutor versus Ratko Mladic.  
22 After more than five years of trial, the rendering of the judgement  
23 marked the end, not only of the proceedings in this case, but also the  
24 work of the ICTY.

25 "As one of the biggest war crimes trials in history, it presents

1 numerous challenges and lessons that are relevant for other present and  
2 future international courts and tribunals. And because of this, I am  
3 very happy that we have an excellent speaker for you tonight who is in  
4 the unique position to give an insider's view of these challenges and  
5 lessons.

6 "Jonas Nilsson, he has worked at the ICTY between 2005 and 2017  
7 as a Senior Legal Officer and Legal Officer, and during the last years he  
8 was the team leader in Trial Chamber I, assigned to the Mladic case.

9 "Mr. Nilsson: The first question was who ordered the killings  
10 of -- in Srebrenica. There is a -- interesting passages in the judgement  
11 about when, more or less. Now, I can't remember the dates in my head,  
12 but there is during a certain night in the -- in the -- when men and boys  
13 are being captured, detained, and held, and there is -- there is  
14 discussions between the military leadership and Mladic is around. And  
15 you can -- there is no -- there is no meeting -- there is no order,  
16 written order. There is no meeting where we have minutes where it says  
17 this -- where -- where this is set out. But the Trial Chamber looked at  
18 various indication, what was said on the certain day, what was said in  
19 the evening, what was discussed with various people, and then suddenly  
20 what was discussed the day after, and what -- in particular, what some  
21 witnesses says, some insiders did testify, what they were indicating.  
22 And it was possible to somehow pin-point, more or less, not by the hour  
23 but which night this decision must have been taken, where it was -- when  
24 the decision was taken that from -- deporting or capturing, or whatever,  
25 these men, and decision was taken to -- that they should be killed. Now,

1 don't know exactly who did it, but there -- there is an implication that  
2 -- this is the -- the whole military leadership was -- the high military  
3 leadership of Bosnian Serb Republic was involved at the time and Mladic  
4 was present around this time as well in Srebrenica, and certainly the  
5 implication that he must have been involved in taking the decision. I  
6 don't think that there is a finding on this, particular, and it didn't  
7 really have to be finding on it in the context of the joint criminal  
8 enterprise. Had he only been charged with ordering -- ordering, then it  
9 would be necessary to go that far, and it was not possible to go that  
10 far. Because again, no -- there is no written order, there is no  
11 meeting, minutes or anything like that. It's somehow what you can  
12 understand from the change of attitude of people -- high military leaders  
13 who were involved and some of who then stepped forward and testified in  
14 the case."

15 MR. IVETIC: So the reason I show this is to show that the  
16 Trial Chamber relied upon --

17 THE INTERPRETER: The counsel is just asked to pause a little bit  
18 until the interpretation into B/C/S is finished. Thank you very much.

19 MR. IVETIC: So the reason I showed this is because it  
20 demonstrates that the Trial Chamber created a legal fiction, including  
21 participation in a meeting that they don't know who was there, if it took  
22 place at all, they don't know where, but they convict Mr. Mladic merely  
23 by implication for genocide, the highest crime of all.

24 There is an admission of no orders. In fact, no particular  
25 finding as to Mr. Mladic's participation nor acceptance of this illusory

1 meeting's conclusion to commit genocide. Nothing. Mr. Nilsson  
2 stuttering on possibilities and implications based on nothingness. No  
3 application of in dubio pro reo or any of the relevant jurisprudence.  
4 And to reach a conviction as to Mr. Mladic, they have to interpret  
5 changed behaviours in persons other than Mr. Mladic and key insider  
6 witnesses who testified. I submit the conviction of Mr. Mladic for  
7 genocide was made out of thin air.

8 But let's look at who the key insider witness relied upon by the  
9 Chamber for this infamous meeting that, again, they cannot prove,  
10 Mr. Nilsson doesn't say. Per the judgement, this insider is  
11 Momir Nikolic. Appeal footnote 678; judgement paragraphs 4926 to 4927,  
12 4970, 5096 to 5097, 5128. Even worse, it is not Momir Nikolic himself  
13 but primarily hearsay evidence including hearsay notes of an interview  
14 taken by OTP investigator Bruce Bursik for purposes of litigation that is  
15 among the main sources cited. And that's D1228.

16 Please take note that D1228 was not presented for the truth of  
17 the matters asserted in it and was only presented to Mr. Nikolic by the  
18 Prosecution to confirm a hand gesture from a purported meeting with  
19 Mr. Mladic. The Trial Chamber rejected that as been unreliable evidence.  
20 That's in the judgement paragraph 5127.

21 In fact, D1228 was only used in cross-examination of  
22 Witness Bursik to establish that Nikolic lacked credibility and was  
23 evasive, and that the Prosecution violated its own rules by not filming  
24 the critical interviews where he alleged to implicate Mr. Mladic. More  
25 importantly, Mr. Bursik could not corroborate Nikolic as to any encounter

1 with Mr. Mladic. That is in our appeal, paragraph 588 to 592.

2 D1228 could not be relied upon as to the truth of the hearsay  
3 comments of Mr. Nikolic as it would be in violation of the *lex specialis*  
4 of then Rules 92 bis and ter. We have the jurisprudence listed in  
5 footnote 691 of our appeal.

6 Now, Momir Nikolic is someone who appears everywhere. Everywhere  
7 that there are killings, either directing them or as an accomplice. He  
8 admitted to hiding the burial operation from superiors, including the VRS  
9 Main Staff. That's in D301, page VII. And during his testimony at  
10 T11965 to T11966.

11 The Trial Chamber further erred in relying upon Mr. Nikolic  
12 despite another Prosecution insider witness, RM265, who testified as to  
13 opportunistic revenge killings that they witnessed in the presence of  
14 Momir Nikolic, and that prisoners of war taken to schools in Zvornik were  
15 undertaken under the orders of Momir Nikolic and Nikolic's superior  
16 within the security chain of command in the brigade,  
17 Lieutenant-Colonel Popovic. That is at P2450 and P2451.

18 RM265 did not implicate Mladic in any of Nikolic or Popovic's  
19 illegal and criminal activities.

20 It is all the more interesting that Momir Nikolic's security  
21 chain of command superior is implicated - that is to say, Popovic - by  
22 another Prosecution insider witness from the VRS, a high-ranking officer,  
23 RM376, who also does not implicate Mr. Mladic in any of the events  
24 relating to revenge or killings, but does identify that the very the same  
25 Popovic of the security chain of command asked for volunteers outside the

1 army, i.e., civilians, to execute Muslim prisoners which this VRS officer  
2 refused. That's at P1594, page 31 to 42; and in the public transcript,  
3 2794 to 2796.

4 Now, this all begs the question: If General Ratko Mladic,  
5 commander of the Main Staff of the VRS army, had hypothetically or, to  
6 use Mr. Nilsson's term, implicitly agreed to significantly contribute to  
7 genocide, why would security officers aligned with Momir Nikolic, not  
8 even in the direct chain of command to Mladic, be in charge of this, and  
9 why would they be asking for non-army volunteers to do the killing while  
10 actual VRS officers and subordinates under Mladic refused such requests  
11 and never received them from Mr. Mladic through the normal chain of  
12 command?

13 I think you'll agree this demonstrates an error in the  
14 Trial Chamber's implied reasoning linking Mr. Mladic to these crimes.

15 Momir Nikolic pled guilty to try to get a better deal for  
16 himself, despite having his arms soaked in blood. Further, Nikolic  
17 confirmed he destroyed documentary evidence which could have compromised  
18 him in relation to Srebrenica crimes. That's D301, page 7. But guess  
19 what? Coming back to this illusory meeting, even Momir Nikolic cannot be  
20 relied upon by the Chamber as to this illusory meeting because even he  
21 does not have direct evidence about it. See the judgement at  
22 paragraph 4953. See the appeal at paragraph 587.

23 So to what imaginary insider VRS witness testimony linking  
24 Mr. Mladic to this supposed meeting is Mr. Nilsson referring to upon  
25 which the Trial Chamber relied? The Defence submits no one.

1           No fewer than five insider witnesses - three Defence, two  
2           Prosecution - gave direct evidence that the only meeting during this  
3           critical time-period was related to Zepa and contained only legitimate  
4           military instructions. Look to appeal paragraph 594. By disregarding  
5           this evidence in favour of impermissible hearsay of Momir Nikolic, the  
6           Trial Chamber erred. This is particularly true given the jurisprudence  
7           that accomplice evidence is to be treated with caution.

8           The Setako Appeals Chamber highlighted such concerns, that  
9           accomplice witnesses may have motives or incentives to implicate the  
10          accused person before the Tribunal or to lie. That was Setako appeal  
11          judgement paragraph 143.

12          This Setako appeal judgement requires the Chamber to be bound, to  
13          carefully consider the totality of the circumstances in which such  
14          accessory evidence is given. With all due respect, in the instant case  
15          as to Momir Nikolic, the Trial Chamber erred, and in doing so, tried to  
16          make Nikolic the illusory link to Mr. Mladic with the JCE that could not  
17          be proven in accord with the prevailing legal jurisprudence and thus  
18          resorted to the legal fiction of guilt by implication.

19          Now, we've already talked about Fontana and Potocari and all the  
20          words of Mr. Mladic there. I'm going to talk about the other evidence,  
21          again, by several Prosecution and Defence witnesses, that Mr. Mladic made  
22          similarly non-criminal statements to captured or surrendered members of  
23          the 28th Division's column, where he tells them they will be fed and then  
24          transported and exchanged with the other side's forces. We have RM292 at  
25          transcript page 12659 and 12662. We have RM253 at transcript page 12532.

1 We have RM364 at P118. Witness Jovcic, D976, paragraph 9; Witness Bojan  
2 Subotic, transcript page 32826. And this evidence also shows us that  
3 Mr. Mladic's direct orders to subordinates were consistent with  
4 protecting these prisoners during transport and medical aid and water was  
5 provided to them in accord with these orders. Bojan Subotic transcript  
6 page 32826 to 32827, and D926, paragraph 30 to 34.

7 Can such action be considered a significant contribution to the  
8 implied JCE that the Trial Chamber concluded, or does in dubio pro reo  
9 indicate otherwise?

10 Alibi.

11 Again, while Mr. Mladic is far from Srebrenica attending to a  
12 secret peace meeting with the international community, in Belgrade at a  
13 wedding, and at a hospital, he could not have effective control nor  
14 information from Bosnia-Herzegovina, let alone exercise command. Again,  
15 his absence was not contested by the Prosecution at trial; appeal  
16 paragraph 605. The failure of the Trial Chamber to give a reasoned  
17 opinion as to four routine orders issued in this time by others under  
18 Mr. Mladic's name is set forth in paragraphs 610 to 612 of our appeal,  
19 including errors as to an inference that Mr. Mladic personally signed  
20 such orders from another country, and failure to analyse and give weight  
21 to their content because none of them related to Srebrenica, and each had  
22 log entries showing they did not come from Mladic's office; appeal  
23 paragraph 611.

24 The Trial Chamber's conclusion that Mr. Mladic issued the orders  
25 and was in command and control while he was physically and geographically

1 absent from Srebrenica in another country is contrary to evidence and is  
2 therefore a demonstrable error. It disregarded and contradicted itself  
3 in the judgement at paragraph 4299 that "in Mladic's absence, reports  
4 were to be submitted to Milovanovic." Now, Milovanovic and other  
5 military witnesses confirmed that during this time-period when Mladic was  
6 gone in July of 1995, Milovanovic was in charge; Stevanovic at transcript  
7 page 35265, and Milovanovic himself at transcript page 11751 and 16950.

8 Furthermore, in paragraph 605 of the appeal -- strike that. I'm  
9 going to move on.

10 In paragraph 605 of the appeal, we talk about the meeting that  
11 Mr. Mladic attended where a plan was signed to allow the Red Cross access  
12 to Srebrenica POWs and that they were to be exchanged "all for all" with  
13 the other side for Serb detainees. Also, a lasting and permanent  
14 cease-fire was negotiated to try to end the war. No reasonable trier of  
15 fact could conclude Mr. Mladic could engage in complex peace negotiations  
16 with high officials in Dobanovci, again UN officials, while exercising  
17 effective control in Srebrenica. Such conduct, agreeing to allow access  
18 to the Red Cross of Srebrenica POWs before exchanging them, cannot be  
19 used to support knowledge of, nor a purported contribution to, any JCE to  
20 exterminate, let alone commit genocide against these same persons.

21 Moving along. I'm almost done. My colleague has given you the  
22 law on adjudicated facts. We recognise that any illegal killings in  
23 Srebrenica that were outside of combat are reprehensible, but they are  
24 not tied to Mr. Mladic. And the Trial Chamber erred in not performing  
25 any analysis to determine which were victims of murder and which were

1 deaths resulting from alternate legitimate reasons.

2 The Trial Chamber relied upon adjudicated facts to establish all  
3 were victims of crimes and all were civilians. Judgement paragraph 3062,  
4 3546, discussed in our appeal at paragraph 669 to 672.

5 In doing so, the Trial Chamber disregarded its own finding that  
6 the armed elements of the column of men had casualties. This is  
7 discussed in appeal paragraph 671; judgement paragraphs 2395, 2444, 2446,  
8 2573 to 2586, 2515 to 2645.

9 The Trial Chamber further disregarded the Prosecution's own  
10 demography expert whose evidence indicated that 70 per cent of the  
11 victims were registered as soldiers of the Armija BiH. That's in appeal  
12 paragraph 671. It also disregarded evidence rebutting the adjudicated  
13 fact and showing that bodies in the mass graves came from different  
14 events in different years and included legitimate casualties of combat -  
15 suicides, minefields, et cetera, appeal paragraph 674 - and that both  
16 Defence and Prosecution forensic experts relating to the alleged  
17 blindfolds said they could have been bandanas dropped over the eyes as  
18 bodies decayed, bandanas as seen in the footage of the Armija BiH  
19 fighters that arrived in Tuzla from Srebrenica; appeal paragraph 674, and  
20 D340.

21 The lack of analysis of the Trial Chamber thus failed to  
22 establish the number of victims and their relation to any crime, let  
23 alone genocide.

24 In this regard, I would be remiss if I did not point out  
25 referencing Ground 8 and paragraph 787 and 793 of our appeal, that one of

1 the final witnesses which the Trial Chamber erroneously did not allow the  
2 Defence to call was a member of the Srebrenica column. And since trial,  
3 they have died and become deceased, thus increasing the gravity of this  
4 refusal and this error.

5 When everything is taken together, we believe the errors are very  
6 clear and Ground 8 must be granted and an acquittal issued as to  
7 Mr. Mladic.

8 Your Honours, at this stage that is about all that either myself  
9 or my colleague, Ms. Bagott, can do. We, under these circumstances,  
10 would refer you to our written submissions as we have no further oral  
11 submissions given our inability to meaningfully seek instruction from our  
12 client. And I thank you.

13 JUDGE NYAMBE: [Via videolink] Thank you, Mr. Lukic, and I think  
14 this would be a suitable time to pause for an hour. All rise.

15 --- Recess taken at 4.32 p.m.

16 --- On resuming at 5.30 p.m.

17 JUDGE NYAMBE: [Via videolink] Good afternoon, everybody, or is it  
18 good evening? You can hear me, everybody? Please sit. You may sit  
19 down. Please be seated.

20 The Appeals Chamber will now hear the Prosecution's response.

21 Counsel for the Prosecution, you have one hour for this part of  
22 the session.

23 MR. IVETIC: Apologies, Madam Presiding Judge. Mr. Mladic has  
24 stood to his feet, and I believe he has something he'd like to say at  
25 this point.

1 JUDGE NYAMBE: [Via videolink] Yes?

2 THE APPELLANT: [Interpretation] Your Honour, this is the ninth  
3 hour. I've been here for nine hours now. As far as tomorrow is  
4 concerned, I would like to ask you for us to follow the prior procedure.  
5 We could have a short break, not one hour. I spend four hours in a room,  
6 an isolation room. I can't put up with this sort of thing. I won't be  
7 able to put up with it tomorrow. I'm sorry about this.

8 JUDGE NYAMBE: [Via videolink] As I understand, the one-hour break  
9 we have is to facilitate fumigation of the courtroom. And I would  
10 therefore invite the Registry to respond to that, whether it's possible  
11 to make the breaks shorter.

12 THE REGISTRAR: Madam Presiding Judge, I will take that on board  
13 and alert my colleagues to it, and revert to the Chamber before the end  
14 of the session. Thank you.

15 JUDGE NYAMBE: [Via videolink] Thank you.

16 Now, counsel for the Prosecution, you may proceed.

17 MS. BAIG: Thank you, Madam Presiding Judge.

18 Your Honours, Ratko Mladic is not a war hero. He is a war  
19 criminal. He abused his vast military power to deliberately target the  
20 civilian population, destroying lives, families, and communities.

21 Mladic was properly convicted and sentenced after a fair trial  
22 for some of the most heinous crimes of the 20th century. And during the  
23 trial, which lasted more than three and a half years, the Chamber  
24 received evidence from nearly 600 witnesses and admitted almost  
25 10.000 exhibits.

1           And after comprehensively assessing the totality of this  
2           extensive evidentiary record, and with full respect for the burden of  
3           proof and the criminal standard of beyond reasonable doubt, the Chamber  
4           found Mladic guilty of war crimes and crimes against humanity as well as  
5           genocide in Srebrenica.

6           His crimes affected hundreds of thousands of people, with  
7           long-term effects that are still felt today. And for the extreme gravity  
8           and scale of his crimes, Mladic was properly sentenced to life  
9           imprisonment.

10          In his appeal, Mladic calls into question vast portions of the  
11          trial judgement, seeking full exoneration, a retrial, or a reduction in  
12          his sentence, but none of Mladic's grounds of appeal show any error  
13          warranting Your Honours' appellate intervention.

14          On appeal, it is not enough for Mladic to say that he wanted a  
15          different outcome. Instead, he bears the burden of showing errors in the  
16          trial judgement that meet the well-established standards of review on  
17          appeal. He cannot do so. He does not even come close.

18          For example, many of Mladic's arguments seek to trigger review of  
19          the entire trial judgement based on what he calls illustrative examples,  
20          impermissibly asking Your Honours to figure out if his arguments could  
21          apply to other unspecified findings or other unspecified incidents.  
22          Throughout his appeal, he misstates the record, the trial judgement, and  
23          the jurisprudence. He improperly reiterates failed trial arguments  
24          without engaging in the Trial Chamber's reasons for rejecting them, and  
25          he repeatedly claims that the Trial Chamber disregarded evidence that the

1 Trial Chamber clearly considered in the trial judgement.

2 These flawed arguments show no error. They cannot even come  
3 close, and many warrant summary dismissal. Mladic's appeal should be  
4 dismissed in its totality.

5 I'll begin the Prosecution's response today by addressing  
6 Mladic's arguments concerning the overarching joint criminal enterprise.  
7 That's Ground 3. And then my colleague, Ms. Goy, will make submissions  
8 on Ground 4, Sarajevo. And tomorrow I will address Srebrenica, Ground 5,  
9 and Ms. Goy will conclude by responding to Mladic's remaining grounds of  
10 appeal.

11 Starting with Ground 3, concerning the so-called overarching  
12 joint criminal enterprise, the purpose of which was to permanently remove  
13 non-Serbs from Serb-claimed municipalities in Bosnia-Herzegovina through  
14 persecution, extermination, murder, deportation, and forcible transfer.

15 The Trial Chamber reasonably concluded that at the latest when  
16 Mladic became the commander of the VRS Main Staff on 12 May 1992, he  
17 joined with other Bosnian Serb leaders in pursuit of this common goal of  
18 ridding entire municipalities of non-Serbs. That objective was to be  
19 achieved "by whatever means"; paragraph 4222.

20 Your Honours, in the face of the extensive evidence proving his  
21 responsibility, Mladic's appeal is manifestly deficient. He focuses  
22 primarily on the Chamber's weighing of individual pieces of evidence. He  
23 argues that the Chamber could have looked at this evidence in a different  
24 way to reach an acquittal. But nowhere does he explain how his proposed  
25 approach to these individual items of evidence, taken in isolation, would

1 have impacted the Chamber's conclusions. And nowhere does he address the  
2 Chamber's analysis of this same evidence and these same arguments at  
3 trial. And nowhere does he show that the Trial Chamber's findings were  
4 unreasonable.

5 This does not reach the appellate standard. Appeals Chambers  
6 have repeatedly emphasised the margin of deference afforded to the  
7 findings of fact by a Trial Chamber. Mladic might not like these  
8 findings, but nowhere in his appeal does he give Your Honours a reason to  
9 change them.

10 I'd like to begin by highlighting some of the Chamber's  
11 conclusions that led it to find that this joint criminal enterprise  
12 existed and addressing the challenges to this conclusion, before turning  
13 to Mladic's significant contribution, and finally to his mens rea.

14 Your Honours, there is no doubt that an overarching joint  
15 criminal enterprise existed which Mladic joined in 1992. Mladic knew,  
16 even before he joined, that violent take-overs which transformed  
17 previously multiethnic municipalities into Serb-only municipalities had  
18 already begun.

19 In 1991, preparations began to establish separate Serb political  
20 institutions at the republic and municipal levels. And pursuant to the  
21 instructions of the Bosnian Serb president, Radovan Karadzic,  
22 Bosnian Serb authorities created Serbian crisis staffs and mobilised  
23 Serbian police and Territorial Defence units in each of the  
24 municipalities. Their aim was to assert Serb control at the municipal  
25 level, by military means if necessary, in municipalities where Serbs were

1 in the majority but also in municipalities where Serbs were in a  
2 minority.

3 And the Chamber reasonably concluded that Mladic shared the  
4 intent to achieve the common purpose by, at the latest, 12th of May,  
5 1992, when he was hand-picked by President Karadzic to lead the Bosnian  
6 Serb army. On his very first day in command, Mladic addressed the  
7 Bosnian Serb Assembly, calling for a strong, disciplined army with a  
8 robust chain of command. He was capable of influencing the Bosnian Serb  
9 leadership while being ultimately subject to it. There is no  
10 inconsistency between the two.

11 During this assembly meeting on 12 May 1992, the Bosnian Serb  
12 leadership agreed that the objective of ethnic separation should be  
13 achieved by "whatever means," and that care should be taken to hide this  
14 truth. The Bosnian Serb leadership agreed with Mladic's proposition,  
15 that their plan had to be guarded as their deepest secret.

16 Your Honours, in reaching this conclusion, the Chamber carefully  
17 considered the statements of all of the participants in this meeting and  
18 the context of the meeting. My learned colleague cannot show error in  
19 the trial judgement by highlighting a single excerpt out of context. For  
20 the Chamber's finding, I would refer Your Honours to the trial judgement  
21 at paragraph 4222.

22 As the Bosnian Serbs took power in more and more of the  
23 municipalities, Mladic's VRS soldiers worked together with other Serb  
24 forces under the control of other JCE members to commit crimes. These  
25 forces included: The police units of the Bosnian Serb Ministry of the

1 Interior, referred to in the judgement as the MUP, and the  
2 Territorial Defence units of the Ministry of Defence called the TO, and  
3 the Serb paramilitary units under the command of the VRS or the MUP, and  
4 members of regional and municipal authorities.

5 Members of the JCE, including Mladic, used the forces under their  
6 control as tools to commit crimes in the municipalities, as found by the  
7 Trial Chamber at paragraph 4239.

8 And let me pause here, Your Honours, to clear up two legal issues  
9 that were raised this morning.

10 First with regard to tools.

11 The law does not require an agreement between the tools and the  
12 JCE members. My learned friend accused the Prosecution of misleading the  
13 Court by suggesting that any link was sufficient. This is not the  
14 Prosecution's position. The Brdjanin appeals judgement explains that JCE  
15 members can use tools to carry out the actus reus of the crimes. The  
16 link between the tools and the JCE member who is using them is a factual  
17 matter to be assessed on a case-by-case basis. And I would refer  
18 Your Honours to paragraphs 410 to 413 of the Brdjanin appeals judgement.

19 Subsequent jurisprudence has clarified some of the situations  
20 that satisfy this test so that the crimes of the tools can be attributed  
21 to the JCE members. For example, when the tool belongs to a hierarchical  
22 organisation, such as the military or police, that is controlled by a JCE  
23 member. And I would refer you, for example, to the Martić appeals  
24 judgement at paragraph 187 to 188.

25 The Brdjanin appeals judgement, paragraph 419, was cited this

1 morning for the proposition that there needs to be an agreement between  
2 the tools and the JCE member, but this paragraph plainly says the  
3 opposite. It says that the Trial Chamber in that case was in error when  
4 it required such an agreement between the JCE members and the tools.

5 The second legal issue that I'd like to address concerns the  
6 relevance of evidence outside the temporal scope of the joint criminal  
7 enterprise. And here, Your Honours, we need to distinguish between on  
8 the one hand the timing of the contribution, which must coincide with the  
9 mens rea and must generally be within the temporal scope of the joint  
10 criminal enterprise as charged. And we distinguish that with, on the  
11 other hand, the evidence used to prove that actus reus and mens rea,  
12 which is not restricted in the same way.

13 The Trial Chamber was entitled to rely on evidence concerning  
14 events before and after the joint criminal enterprise to establish both  
15 the actus reus and the mens rea. And the case law shows that the  
16 Trial Chamber's approach was the correct one. And I would refer Your  
17 Honours to the Appeals Chamber's 18 April 2002 decision in the  
18 Slobodan Milosevic case and to the Prlic appeals judgement paragraph 711.

19 The Trial Chamber correctly and reasonably found that together  
20 the JCE members and the tools working under them unleashed unimaginable  
21 violence, creating an environment so coercive that tens of thousands of  
22 non-Serbs were left with no choice but to leave the territory. Bosnian  
23 Muslims and Croats were fired from jobs, subjected to other  
24 discriminatory measures.

25 In Prijedor, those who weren't expelled or sent to the camps were

1 required to wear white armbands to distinguish themselves from the Serb  
2 population. On the radio, propaganda spread and encouraged ethnic hatred  
3 and discrimination. Mladic's soldiers, working with other Serb forces,  
4 attacked predominantly non-Serb towns and neighbourhoods. They  
5 indiscriminately shelled civilian areas.

6 In a single attack in Prijedor, over 800 inhabitants were  
7 murdered.

8 Serb forces were cold-blooded and methodical. Reading names off  
9 lists. Executing women, old men, children. Forcing victims to jump from  
10 bridges and then shooting them to be sure that they were dead. According  
11 to a witness, the river was full of corpses.

12 Muslims and Croats were rounded up, families were separated.  
13 Non-Serbs were stripped of their valuables, forced to hand over their  
14 property. Convoys of buses and trains were organised by the Bosnian Serb  
15 authorities to drive tens of thousands of men, women, and children out of  
16 Bosnian Serb-claimed territory. Human beings torn from their homes and  
17 communities, fearing for their lives, forced onto buses and convoys,  
18 guarded by armed soldiers, suffocating in airless refrigerator trucks,  
19 crammed onto freight trains. The Bosnian Serb forces intended that they  
20 would never return. They burnt Muslim and Croat places of worship and  
21 destroyed non-Serb homes and businesses. Serb property was spared.

22 The Trial Chamber found that across the Serb-claimed  
23 municipalities, non-Serb civilians - male and female, young and old -  
24 were also detained en masse in transit and detention camps established  
25 throughout the municipalities, often with the support of the VRS.

1           Detention camps whose names are synonymous with human suffering:  
2     Batkovic, Manjaca, Omarska, Keraterm and Trnopolje, KP Dom Foca, and  
3     other smaller makeshift prisons, in factories, schools, sport facilities,  
4     police stations, and other public buildings. And over the course of  
5     1992, non-Serb civilians were arrested and detained throughout this camp  
6     system in appalling conditions, overcrowded, unsanitary, lacking food,  
7     water, and medical care. Many were raped and sexually assaulted, women  
8     and men, girls as young as 12 and 13. Many were beaten and tortured.  
9     Many were forced to do dangerous labour and used as human shields. Many  
10    died from starvation and abuse. And many were executed, their bodies  
11    dumped into mass graves, buried and reburied to hide their murders.

12           In one of the most notorious camp massacres, VRS soldiers gassed  
13    and then slaughtered 200 detainees with a single machine-gun while the  
14    guards sang songs. And I'd refer you to paragraph 1121 of the trial  
15    judgement.

16           While this event stands out for its horrific facts, it is by no  
17    means unique. Prisoners in these camps faced death every day. And for  
18    the vast majority of the detainees, their only crime was their ethnicity.  
19    And this is what the realisation of the common criminal purpose looked  
20    like. This is what it had to look like to achieve their goal, which was  
21    a complete redrawing of the regional map, mass suffering in the name of  
22    ethnic ideology. And this is what Mladic signed up for when he joined  
23    the joint criminal enterprise in May 1992. A joint criminal enterprise  
24    whose objective was to permanently remove non-Serbs from the charged  
25    municipalities by whatever means necessary.

1           The JCE's campaign was as brutal as it was successful. By the  
2           end of 1992, most of the territory claimed by Mladic and the other JCE  
3           members had been rendered ethnically pure Serb territory. In five of  
4           these municipalities, the crimes committed were so extreme that the  
5           Trial Chamber found that the local perpetrators, most under Mladic's  
6           direct control, intended to destroy those parts of the Bosnian Muslim  
7           group; paragraph 3526. And Mladic and the other JCE members continued  
8           this violent ethnic cleansing campaign until 1995, in order to cleanse a  
9           few remaining Muslim enclaves in Eastern Bosnia.

10           This, Your Honours, is the basis for the Trial Chamber's  
11           conclusion that there was a joint criminal enterprise. This intense  
12           pattern of violence committed by soldiers and others under Mladic's  
13           command, working hand-in-hand with police, Territorial Defence,  
14           paramilitaries, and administrative authorities.

15           And it's against this background that Mladic claims that there  
16           wasn't a JCE, that he wasn't a member, because he purportedly acted to  
17           protect non-Serbs. For example, because a limited number of non-Serbs  
18           remained in one municipality, or because of a couple of entries in his  
19           notebook about purported constraints that his army experienced, or  
20           because of supposed good deeds he ordered, which - as we've explained in  
21           our response brief at paragraphs 54 to 60 - were neither relevant nor  
22           particularly good.

23           All of his arguments are based on the Trial Chamber's treatment  
24           of specific exhibits, but he fails to show any error in the Chamber's  
25           assessment. In short, Your Honours, the limited evidence he relies on

1 cannot establish the positive attitude that he claims to have had towards  
2 non-Serbs, and the incalculable suffering of the victims for three and a  
3 half years across the 14 municipalities convincingly proves the opposite.

4 Your Honours, there was an overarching joint criminal enterprise  
5 in the municipalities, and the concerted actions of Mladic's military,  
6 along with the other Bosnian Serb organs, proves it. Mladic shows no  
7 error in the Chamber's conclusion.

8 This brings me, Your Honours, to his challenges concerning the  
9 Chamber's findings on his JCE contribution. The Trial Chamber found that  
10 Mladic's contributions to the overarching joint criminal enterprise were  
11 not just significant. They were instrumental. It concluded that without  
12 his contributions, the crimes would not have been committed as they were.  
13 And in reaching this conclusion, the Trial Chamber considered Mladic's  
14 many contributions to this goal. The summary and conclusion can be found  
15 at paragraphs 4611 and 4612 of the judgement.

16 First and foremost, Mladic was in command and control of the VRS,  
17 members of which were found to have been involved in a vast array of  
18 crimes from 1992 to 1995. Mladic's contributions, analysed extensively  
19 in chapter 9.3 of the trial judgement, go far beyond the routine duties  
20 of a legitimate commander.

21 Mladic raises three main arguments against the Trial Chamber's  
22 findings on his JCE contribution, all of which claim that the  
23 Trial Chamber failed to give sufficient weight to his preferred evidence.  
24 Again, without demonstrating error, without engaging in the Chamber's  
25 treatment of that evidence, and without showing that no reasonable trier

1 of fact could have made that finding.

2 Before I address the three arguments, I want to focus for a  
3 moment on what he does not challenge, because Mladic only challenges a  
4 few of the JCE contributions found by the Chamber. But even if these  
5 challenged contributions were removed, his remaining contributions would  
6 still have been sufficiently significant to meet the legal requirements  
7 for a JCE contribution. Especially when you consider, as the  
8 Trial Chamber did at paragraph 4612, that many of the crimes were  
9 perpetrated by the VRS.

10 He does not challenge, for example, the Chamber's conclusion that  
11 he contributed to the JCE by establishing and maintaining the VRS,  
12 including by seeking assistance from Serbia in meeting the ongoing needs  
13 for personnel, equipment, and ammunition. He does not challenge the  
14 finding that he contributed by addressing the Bosnian Serb Assembly and  
15 advising the political leadership. He does not challenge the Chamber's  
16 finding that he contributed by introducing and maintaining a propaganda  
17 machinery aimed at spreading anti-Muslim and anti-Croat fear and hatred.  
18 And he does not challenge that he contributed through deliberately  
19 misleading the international community about the crimes or the Chamber's  
20 conclusion that he contributed by severely restricting humanitarian aid  
21 in the later part of the JCE.

22 These findings that Mladic does not challenge would still amount  
23 to a significant contribution.

24 Turning to the challenges he does make.

25 His first argument concerns the resubordination of the MUP police

1 forces to the VRS. Mladic claims that he lacked general command and  
2 control over the police, and so crimes committed by the police could not  
3 form part of his significant contribution.

4 Now, the Chamber did make general findings that the police were  
5 in some instances resubordinated to and in other instances co-operating  
6 with the VRS. But the Chamber's specific findings on Mladic's own  
7 contribution to the JCE were much more narrowly focused and conservative.  
8 The only contribution based directly on crimes committed by the police  
9 concerned the police in Manjaca camp, one detention camp in Banja Luka  
10 municipality. And I would refer Your Honours to this specific finding in  
11 paragraph 4404 of the judgement.

12 Similarly, Mladic's contribution through failure to prevent and  
13 punish crimes was expressly limited to crimes of the VRS and the other  
14 Serb forces discussed in chapter 9.3.4. And with regard to the police,  
15 this was again limited to Manjaca camp. That's at paragraph 4544.

16 In other places, the crimes committed by the police are  
17 attributed to Mladic through the other JCE members, but they are not  
18 counted as Mladic's personal contribution to the joint criminal  
19 enterprise. So Mladic's arguments about general command and control over  
20 the police is irrelevant to the question of Mladic's personal  
21 contribution.

22 Likewise, Your Honours, the crimes of the paramilitaries were  
23 only specifically counted as Mladic's contribution in those couple of  
24 situations where the paramilitary group was specifically found to be  
25 under Mladic's command and control. And I would refer you to

1 paragraphs 4402 to 4403, and again 4544.

2 Turning to his second argument. Mladic claims that the  
3 Trial Chamber failed to give sufficient weight to evidence that his lack  
4 of professional subordinates affected his ability to command the VRS.  
5 Even assuming this were true, he never explains how inexperience would  
6 deprive him of effective command and control. But many of the VRS  
7 soldiers under his command were not inexperienced.

8 The Trial Chamber detailed how the VRS was formed, drawing on the  
9 ranks of the 90.000 experienced soldiers of the JNA, the Yugoslav  
10 People's Army, who were Bosnian Serbs. The Trial Chamber found, at  
11 paragraph 3747, that many of the commands and units of the JNA simply  
12 renamed themselves units of the VRS.

13 So the VRS did not start off with just Mladic and a few officers,  
14 as we heard this morning. For example, the JNA 5th Corps simply became  
15 the VRS 1st Krajina Corps and was established between the 12th and  
16 20th of May, 1992. That's trial judgement paragraph 147. It was the  
17 largest VRS corps with a zone of responsibility including half of the  
18 municipalities in the Bosnian Serb republic.

19 Of course, the Trial Chamber considered evidence of actual  
20 indiscipline. This was already factored into the Trial Chamber's  
21 consideration of the strong evidence of Mladic's very high level of  
22 command and control over his subordinates. This included evidence from  
23 Mladic's own subordinates, including Defence witnesses, proving that  
24 Mladic was in command, was respected as a leader, and that his orders  
25 were strictly adhered to.

1 Mladic's third argument is that the Trial Chamber failed to give  
2 sufficient weight to evidence that he did not know of specific crimes  
3 and, therefore, his failure to punish the perpetrators should not be  
4 counted as JCE contributions. As we point out in our response brief,  
5 some of the documents he relies on actually informed Mladic that crimes  
6 were being committed by his subordinates. One notes concerns of the ICRC  
7 about detention facilities, and the other reports a massacre of  
8 detainees.

9 But even if this evidence could be read in his favour, it doesn't  
10 get his argument anywhere. The Trial Chamber did not find that he knew  
11 of every incident, because it did not need to. The evidence was  
12 sufficient for the Trial Chamber to conclude more generally that Mladic  
13 knew that crimes against humanity and war crimes were being committed  
14 against Bosnian Muslims and Croats in the municipalities and in the  
15 detention facilities.

16 To reach this conclusion, the Chamber reasonably considered the  
17 extensive evidence concerning Mladic's hands-on command as well as the  
18 fact that the crimes in question were widely acknowledged and recorded by  
19 the international media and the United Nations.

20 This was sufficient to trigger his superior responsibility to  
21 prevent and punish, yet the Chamber found that it did not receive any  
22 evidence of any Bosnian Serb being prosecuted for war crimes committed  
23 against non-Serbs between the 12th of May, 1992, and the  
24 30th of November, 1995. That's paragraph 4545.

25 Instead, Mladic chose to cover up the crimes and to promote and

1       congratulate VRS officers involved in atrocities. None of Mladic's three  
2       actus reus challenges show any error in the Trial Chamber's conclusion.

3               Turning finally, Your Honours, to Mladic's shared intent. Mladic  
4       challenges the mens rea analysis on the basis of methodology and because  
5       it's based on circumstantial evidence.

6               First, there was nothing wrong with the Chamber's methodology.  
7       The Chamber's approach was fully consistent with the logic set out in the  
8       Stanisic and Simatovic appeals judgement.

9               And I should clarify here that the Stanisic and Simatovic  
10      judgement does not stand for the proposition that trial chambers must, in  
11      every instance, follow a particular order of analysis. Its holding is  
12      more narrow, that the trial chamber in that case erred in finding that  
13      the mens rea element was not met without having first adjudicated the  
14      other elements of joint criminal enterprise responsibility.

15              But in the Mladic case, the Trial Chamber did follow the order of  
16      presentation recommended in the Stanisic and Simatovic judgement. It set  
17      out the existence and scope of the JCE and whether the accused's acts  
18      contributed to that purpose before determining whether he shared the  
19      intent.

20              And there is no reason to think that the Trial Chamber's findings  
21      are in any way tainted by a purported mix-up between the actus reus and  
22      the mens rea findings. This argument rests on the idea that a trial  
23      judgement is a linear document that records a sequential deliberation on  
24      each topic in a particular order. But as the case law has repeatedly  
25      emphasised, trial judgements must be read as a whole. And I would refer

1       you, for example, to the Sainovic appeal judgement at paragraph 306.

2               But in this case, there was no mix-up and there is no taint.  
3       Mladic cannot identify a single clear example of this problem. What his  
4       examples do show is the Chamber using language that is consistent with  
5       its mens rea analysis in the contribution's chapter and cross-referencing  
6       in the contributions chapter to the evidence reviewed in the mens rea  
7       chapter.

8               There is simply nothing wrong with this, as Mladic acknowledges  
9       at paragraph 288 of his appeals brief. There is nothing improper about a  
10       Chamber relying on the same underlying evidence or factual findings to  
11       draw conclusions on different aspects of the case.

12               Mladic's second argument concerns the Chamber's reliance on  
13       circumstantial evidence to make intent findings, in particular. In  
14       Mladic's view, the Chamber should have preferred what he calls direct  
15       evidence of his mens rea. But this argument is wrong on two levels.

16               First, there is no legal support for his preference for direct  
17       evidence. Not in relation to mens rea, but also not in relation to the  
18       many other instances where he raises this distinction throughout the  
19       appeal.

20               Criminal intent can be, and absent a confession usually is,  
21       proven primarily through circumstantial evidence. And in his reply, at  
22       paragraph 64, Mladic denies that he is arguing that direct evidence is  
23       inherently more valuable than circumstantial evidence, yet he repeatedly  
24       claims that direct evidence is automatically stronger. And my learned  
25       colleague submitted this morning that circumstantial evidence cannot

1       outweigh direct evidence.

2               This is incorrect. The Tribunal's jurisprudence is clear. There  
3       is no rule that a Chamber should prefer direct evidence. The only rule  
4       is that a Chamber has to consider the evidence in its totality, including  
5       both the direct and the circumstantial evidence. And this is because the  
6       probative value of evidence is determined by looking at it within the  
7       totality of the evidence in the case. Not by labelling it direct or  
8       circumstantial.

9               And this is what the Trial Chamber did in this case. It looked  
10       at the totality of the evidence before concluding, at paragraph 4688,  
11       that Mladic shared the common purpose and intended the underlying crimes.  
12       And the evidence of Mladic's mens rea was overwhelming. It included his  
13       expressions of commitment to an ethnically pure Serb republic, his  
14       statements indicating that he was willing to disobey the laws of war, his  
15       fomenting of fear and hatred towards Muslims and Croats, his repeated use  
16       of derogatory terms for Bosnian Muslims and Croats such as Turks,  
17       balijas, and Ustashas, and, of course, his long-standing instrumental  
18       contributions to the common purpose with full knowledge of the crimes  
19       committed in its pursuit; paragraphs 4685 and 4686.

20              Your Honours, the jurisprudence is also clear that on appeal the  
21       same standard of review for factual findings - the reasonableness  
22       standard - applies whether the evidence is direct or circumstantial. And  
23       I would refer you, for example, to the Galic appeals judgement,  
24       paragraph 9.

25              Mladic cannot meet his burden by claiming that his preferred

1 evidence is better or should have been given more weight because it was  
2 supposedly direct rather than circumstantial. Nor can he succeed on  
3 appeal by proposing different inferences than the Trial Chamber based on  
4 isolated parts of the evidence. Instead, Your Honours, to show error he  
5 must address the totality of the evidence and the Chamber's analysis of  
6 the whole evidentiary record.

7 He did not do that in his written briefs, and he has not done  
8 that today.

9 Turning to the second point concerning the direct and probative  
10 evidence that Mladic repeatedly claims was disregarded. It was not  
11 really any of those things. It wasn't direct, it wasn't probative, and  
12 it wasn't disregarded.

13 Much of the evidence that he labels as direct is actually  
14 circumstantial evidence of his intent. For example, at paragraph 309 of  
15 his appeals brief, he calls the paramilitary orders direct. But what  
16 he's actually seeking is an inference that reflects his disapproval of  
17 crimes. Technically speaking, this makes the evidence circumstantial for  
18 the point that he's trying to make with it.

19 But the evidence he complains about does not have significant  
20 probative value in light of the totality of the evidence. For example,  
21 evidence that Mladic occasionally ordered adherence to the  
22 Geneva Conventions weighs very little when compared with the powerful  
23 evidence showing that he knew that his troops were committing war crimes  
24 and crimes against humanity with his approval and support.

25 The Trial Chamber was entitled to conclude that these orders did

1 not demonstrate his true intent. In any event, all of this evidence was  
2 analysed in the trial judgement. None of it was disregarded.

3 When the evidence was found to be relevant, it was addressed by  
4 the Chamber in its reasoning. Mladic cannot show error by complaining  
5 that the Trial Chamber failed to specifically refer in the mens rea  
6 section to irrelevant evidence or to evidence that it found to be  
7 unreliable or inaccurate.

8 To conclude on Ground 3, Your Honours, the Chamber reasonably  
9 found, on the totality of the evidence in this case, that Mladic was a  
10 member of the overarching joint criminal enterprise, that his  
11 contributions were instrumental, and that he shared the intent to commit  
12 the crimes of persecution, extermination, murder, deportation, and  
13 forcible transfer. Mladic's deficient arguments show no error.

14 Your Honours, Ground 3 should be dismissed.

15 Madam Presiding Judge, we're at your disposal. We can start with  
16 the Sarajevo response right now for ten minutes. We believe that we can  
17 get through most of it within the next ten minutes. Do we have  
18 sufficient time, or would you rather pause at this stage?

19 JUDGE NYAMBE: [Via videolink] I think you have ten minutes. My  
20 time here is 6.19, and we were supposed to stop at 6.30.

21 MS. BAIG: Okay. Then I am passing the floor to my colleague,  
22 Ms. Goy. Thank you very much for your attention.

23 MS. GOY: Good afternoon, Your Honours. I will respond to  
24 Ground 4, and thereby limit the Prosecution's submission to the question  
25 of jurisdiction over the crime of terror since this was the only part of

1 Ground 4 that was addressed in oral argument today.

2 The ICTY has jurisdiction over the crime of terror. The  
3 prohibition of terror under customary international law is not disputed  
4 by Mladic. But the criminalisation of terror, the individual criminal  
5 responsibility for the crime of terror, also form part of customary  
6 international law at the time of the events.

7 The infliction of terror upon the civilian population at the time  
8 of the Sarajevo events has been adjudicated in a number of cases before  
9 the ICTY and the Mechanism. In Galic, the ICTY Trial Chamber examined  
10 the criminal responsibility for the crime of terror under customary  
11 international law, but ultimately relied on an agreement between the  
12 parties to the conflict in which the parties agreed to apply certain  
13 rules of international humanitarian law, including the prohibition of  
14 terror, and agreed to punish those responsible for violating the rules.  
15 That's the Galic trial judgement, paragraphs 124 and 127.

16 The Appeals Chamber in Galic found the criminalisation of the  
17 prohibition of terror based on customary international law after a  
18 careful analysis. That's the Galic appeal judgement, paragraph 98. This  
19 holding was confirmed by the ICTY Appeals Chamber in the  
20 Dragomir Milosevic case, in the last ICTY appeal judgement in Prlic  
21 et al, and by the Mechanism Appeals Chambers in the Karadzic case.  
22 Mladic fails to provide cogent reasons to depart from this settled  
23 jurisprudence. Rather, he complains that there was insufficient state  
24 practice but ignores that the Galic Appeals Chamber did not only rely on  
25 national laws.

1           The Galic Appeals Chamber also pointed out in paragraph 93 of the  
2           appeal judgement that terror as a war crime was first referred to in a  
3           report published in 1919 by the Commission on Responsibilities. The  
4           Commission on Responsibilities was created by the Peace Conference of  
5           Paris to inquire into breaches of the laws and customs of war committed  
6           by Germany and its allies during the First World War.

7           Moreover, the Statute of the ICTR confirmed the customary  
8           international nature of terror, even for non-international armed  
9           conflicts. It explicitly contains acts of terrorism.

10          As the ICTY Appeals Chamber in Celebici noted, when the Security  
11          Council established the ICTR, it was not creating new law but was  
12          codifying existing customary rules. That's the Celebici appeal  
13          judgement, paragraph 170. This shows that the crime of terror formed  
14          part of customary international law by the time Mladic committed terror  
15          in Sarajevo.

16          And importantly, Mladic himself could foresee that his conduct in  
17          Sarajevo could lead to a conviction for the crime of terror. He could  
18          foresee this not only based on the international sources I mentioned, but  
19          also because terror was criminalised in the 1976 Yugoslav criminal code.

20          Mladic is correct that this Yugoslav criminal code did not define  
21          terror, but it did criminalise subjecting the civilian population to  
22          terror "in violation of rules of international law effective at the time  
23          of war." And these rules on international law effective at the time of  
24          war were set out at the time of the events in Sarajevo in the 1988  
25          Yugoslav military manual. This military manual explicitly said that

1 attacking civilians for the purpose of terrorising them is explicitly  
2 prohibited. That's on page 29, paragraph 47 of the military manual that  
3 Your Honours will find in the book of authorities to the Prosecution  
4 response brief.

5 So read together, the criminal provision on terror and the 1988  
6 military manual made criminal responsibility for terror sufficiently  
7 foreseeable to Mladic, a career officer in the Yugoslav Army, the JNA,  
8 who had served for almost 27 years before he became the commander of the  
9 VRS Main Staff on 12 May 1992.

10 This conclusion is supported by the ICTY Appeals Chamber in  
11 Galic. There, the Appeals Chamber held that the same combination of  
12 provisions - the Yugoslav criminal code and the military manual - was  
13 relevant to the foreseeability of incurring criminal responsibility for  
14 terror for Mladic's subordinate, General Galic. That's the Galic appeal  
15 judgement, paragraph 96.

16 Your Honours, the ICTY had jurisdiction over the crime of terror,  
17 and Ground 4 should be dismissed.

18 Your Honours, might this be an opportune moment to break for the  
19 day?

20 JUDGE NYAMBE: [Via videolink] You have four minutes. But if you  
21 think this is the right time to break --

22 MS. GOY: We think so.

23 JUDGE NYAMBE: [Via videolink] -- we can adjourn.

24 MS. GOY: Because then we would --

25 JUDGE NYAMBE: [Via videolink] Very well.

1 MS. GOY: -- start a new ground and that might be better to start  
2 tomorrow. Thank you, Your Honour.

3 JUDGE NYAMBE: [Via videolink] Very well. Now, the  
4 Appeals Chamber will adjourn to tomorrow and start at 9.30 for the  
5 Prosecution to continue their reply. All rise.

6 --- Whereupon the hearing adjourned at 6.27 p.m.  
7 to be reconvened on Wednesday, the 26th day  
8 of August, 2020, at 9.30 a.m.

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