

IN THE TRIAL CHAMBER

Before:
Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar:
Mr. Hans Holthuis

Decision:
16 June 2004

PROSECUTOR

v.

SLOBODAN MILOSEVIC

DECISION ON MOTION FOR JUDGEMENT OF ACQUITTAL

The Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Geoffrey Nice
Mr. Dermot Groome
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Slobodan Milosevic

Amici Curiae

Mr. Steven Kay, QC
Prof. Timothy L.H. McCormack

I. GLOSSARY

A. Abbreviations and Acronyms

B/C/S Abbreviation	B/C/S	English	English Abbreviation
BHS	Bosnanski/Hrvatski/Srpski	Bosnian/Croatian/Serbian	B/C/S; BCS
BiH	Bosna i Hercegovina	Bosnia and Herzegovina	BH
DB	drzavna bezbednost	state security	DB
EU	Evropska unija	European Union	EU
EZ	Evropska zajednica	European Community	EC
FBiH	Federacija Bosne i Hercegovine	Federation of Bosnia and Herzegovina	FBiH
JATD	Jedinica za antiterorističko dejstvo/delovanje	Anti-Terrorist Operations Unit	JATD
JNA	Jugoslovenska narodna armija	Yugoslav People's Army	JNA
JSO	Jedinica za specijalne operacije	Special Operations Unit	JSO
KMP; ILC	Komisija za međunarodno pravo	International Law Commission	ILC
LDK; DSK	Demokratski savez Kosova	Democratic Alliance/ Democratic League of Kosovo	LDK
MKCK	Medjunarodni komitet crvenog krsta	International Committee of the Red Cross	ICRC
MKS, ICC	Medjunarodni krivicni sud	International Criminal Court	ICC
MKSR	Medjunarodni krivicni sud za Ruandu	International Criminal Tribunal for Rwanda	ICTR
MUP	Ministarstvo unutrasnjih poslova	Ministry of the Interior	MUP
MVS	Medjunarodni vojni sud	International Military Tribunal	IMT
NATO	Organizacija sjevernoatlantskog ugovora	North Atlantic Treaty Organisation	NATO

OEBS; OESS; OSSE	Organizacija za evropsku bezbednost i saradnju - S; Organizacija za evropsku sigurnost i suradnju - C; Organizacija za sigurnost i suradnju u Europi - C	Organization for Security and Co-operation in Europe	OSCE
OUN	Organizacija ujedinjenih nacija/naroda	United Nations Organization	UN; UNO
OVK; UCK; UČK; UCK	Oslobodilacka vojska Kosova	Kosovo Liberation Army	KLA; UCK; UCK
RS	Republika Srpska	Republika Srpska	RS
RSK (SRK)	Republika Srpska Krajina	Republic of Serbian Krajina	RSK
SAO	Srpska autonomna oblast	Serbian Autonomous District/Region	SAO
SBZS	Slavonija, Baranja i zapadni Srem	Slavonia, Baranja and Western Srem	SBWS
SDA	Stranka demokratske akcije	Party for Democratic Action	SDA
SDK	Sluzba drustvenog knjigovodstva	Public Auditing Service	SDK
SDS	Srpska demokratska stranka	Serbian Democratic Party	SDS
SFRJ	Socijalisticka Federativna Republika Jugoslavija	Socialist Federal Republic of Yugoslavia	SFRY
SMB	sivo-maslinasta boja	olive drab (uniform)	SMB
SPGS	Specijalni predstavnik generalnog sekretara	Special Representative of the Secretary-General	SRSG
SPS	Socijalisticka partija Srbije	Socialist Party of Serbia	SPS
SRJ	Savezna Republika Jugoslavija	Federal Republic of Yugoslavia	FRY
SUP	Sekretarijat untrasnjih poslova	Secretariat of the Interior	SUP

TO	teritorijalna odbrana	Territorial Defence	TO
UNPROFOR	Zastitne snage Ujedinjenih nacija/naroda	United Nations Protection Force	UNPROFOR
UNTS	Sporazumi Ujedinjenih naroda	United Nations Treaty Series	UNTS
VJ	Vojska Jugoslavije; Vojska Savezne Republike Jugoslavije	Yugoslav Army; Army of the FRY; Army of the Federal Republic of Yugoslavia	JA
VRS	Vojska Republike Srpske; Vojska bosanskih Srba	Army of Republika Srpska; Bosnian Serb Army	VRS; BSA
VSO	Vrhovni savet odbrane	Supreme Defence Council	SDC

II. INTRODUCTION

A. Procedural Background

1. On 7 April 2003, the *Amici Curiae* filed a motion seeking directions on their future role, including the question as to whether they should file a motion pursuant to Rule 98bis of the Rules of Procedure and Evidence (“Rules”) at the close of the Prosecution case.¹ On 27 June 2003, the Trial Chamber issued an order stating, *inter alia*, that “the *amici curiae* may submit a Motion pursuant to Rule 98 bis within seven days of the close of the Prosecution case”.²
2. Considerably later, on 4 February 2004, the Prosecution filed an objection to the *Amici Curiae* filing a Rule 98 bis Motion on behalf of the Accused, relying on a Separate Opinion of Judge Shahabuddeen concerning the right of the *Amici Curiae* to file applications on behalf of the Accused.³ The Trial Chamber disposed of the Prosecution Motion on 5 February 2004, stating that the Appeals Chamber itself had decided to consider an appeal brought by the *Amici Curiae*, and in so doing proceeded on the basis they had *locus standi*, that the filing by the *Amici Curiae* of a Motion pursuant to Rule 98 bis did not in any way prejudice the Prosecution, nor infringe the interests of the Accused, and that it was in the interests of justice as a whole for such a Motion to be brought.⁴
3. On 25 February 2004, the Prosecution closed its case and the Trial Chamber ordered, *inter alia*, that any motion under Rule 98 bis should be filed by the Accused or *Amici Curiae* by 8 March 2004, and that any Response by the Prosecution was to be filed by 22 March 2004.⁵ The Accused has not filed a motion under Rule 98 bis.

B. The Rule 98 bis Motion

4. On 3 March 2004, the *Amici Curiae* filed their “Amici Curiae Motion for Judgement of Acquittal Pursuant to Rule 98bis”, along with two confidential Annexes and a public Annex (“Motion”). On 23 March 2004, the Prosecution filed its confidential “Prosecution Response to Amici Curiae Motion for Judgement of Acquittal Pursuant to Rule 98 bis” (“Response”).
5. The Motion may be summarised as follows:
 - (1) The Prosecution has failed to establish the existence of an “armed conflict” in Kosovo prior to 24 March 1999, requiring parts of the Kosovo Indictment dependent on this legal precondition to be excised from that Indictment;⁶
 - (2) The failure to establish that Croatia was a state before some time between 15 January and 22 May 1992. Consequently the conflict in Croatia was not international before that time and therefore all grave breaches counts in the Croatia Indictment which go to alleged crimes committed before these dates must be dismissed;⁷
 - (3) There is no evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a genocide, any genocidal acts, or that he was complicit in such, and that the *mens rea* requirement for establishing the crime of genocide is incompatible with the *mens rea* requirement for the third category of a joint criminal enterprise and command responsibility, as alleged in the Bosnia Indictment;⁸ and
 - (4) In relation to 185 separate allegations contained in the three Indictments, there is no or insufficient evidence.⁹
6. The Response may be summarised as follows:
 - (1) In respect of the argument that the Prosecution has failed to establish there was an “armed conflict” in Kosovo prior to 24 March 1999, the evidence adduced by the Prosecution during the trial is sufficient (if accepted) to satisfy a trier of fact beyond reasonable doubt that an armed conflict existed in Kosovo at all times relevant to the Kosovo Indictment;¹⁰
 - (2) In respect of the argument concerning the internationality of the conflict and the date on which Croatia became a state, as of 8 October 1991, the conflict in Croatia can be said to be international in character in so far as Croatia can be said to have satisfied the criteria of statehood under general international law by this date;¹¹
 - (3) In respect of the argument concerning the lack of evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted, or was complicit in, the planning, preparation, or execution of a genocide, there is evidence if accepted such that a trier of fact could convict. The Prosecution submits that the *mens rea* requirement for establishing the crime of genocide is compatible with the *mens rea* requirement for the third category of a joint criminal enterprise and with command responsibility, and relies on a recent Appeals Chamber Decision in support of this submission;¹² and
 - (4) In respect of some of the challenged allegations in the three Indictments, it is

conceded that there is no or insufficient evidence led to meet the legal standard required under Rule 98 *bis* and the Prosecution does not object to a judgment of acquittal being entered in respect of these allegations. However, many of the challenges to the Indictments are not conceded by the Prosecution.¹³

7. The Trial Chamber will now consider the Motion by the *Amici Curiae* and the Prosecution Response.

III. APPLICATION OF RULE 98 *BIS* – THE LAW

8. Rule 98*bis* provides as follows:

Motion for Judgement of Acquittal

(A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii).

(B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges.

9. The degree of proof necessary in a Rule 98*bis* Motion was settled by the Appeals Chamber in *Prosecutor v. Jelusic*,¹⁴ where it confirmed its holding in *Prosecutor v. Delalic*¹⁵ that the test for determining whether “the evidence is insufficient to sustain a conviction” is “whether there is evidence (if accepted) upon which a tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question... ; thus the test is not whether the trier of fact would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence if accepted, but whether it could”;¹⁶ or, to put it as the Appeals Chamber later did in the same case, a Trial Chamber should only uphold a Rule 98*bis* Motion if it is “entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction beyond reasonable doubt...”¹⁷
10. The test had, of course, been correctly stated prior to that decision by several Trial Chambers, including this one, whose approach to the question in *Prosecutor v. Kordic*¹⁸ was cited with approval by the Appeals Chamber. In the passage cited in *Prosecutor v. Jelusic*, the Chamber referred to the common law origin of Rule 98*bis*, but also pointed out that that origin did not necessarily mean that this Rule was to be applied in the same way as proceedings for “no case to answer” in common law jurisdictions:

[T]he regime to be applied for Rule 98 *bis* proceedings is to be determined on the basis of the Statute and the Rules, having in mind, in particular, its construction in the light of the context in which the Statute operates and the purpose it is intended to serve. That determination may be influenced by features of the regime in domestic jurisdictions with similar proceedings, but will

not be controlled by it; and therefore, a proper construction of the Rule may show a modification of some of those features in the transition from its domestic berth.¹⁹

11. The main rationale for the “no case to answer” procedure is that an accused charged with a crime should not be called upon to answer that charge if, at the end of the prosecution case, there is insufficient evidence on which a jury acting reasonably could convict him. Crucial to an understanding of the “no case to answer” procedure in common law jurisdictions is the differing roles of the judge and jury in criminal trials: the judge being the tribunal of law and the jury, the tribunal of fact. *R. v. Galbraith*²⁰ illustrates the purpose and function of the procedure in the United Kingdom (and, for that matter, in most common law jurisdictions).²¹ In discussing the two schools of thought as to the proper approach to be adopted by the judge at the close of the Crown’s case on a submission of “no case”, Lord Lane C.J. said that “a balance has to be struck between on the one hand a usurpation by the judge of the jury’s functions and on the other the danger of an unjust conviction”.²² Thus an essential function of the procedure is to ensure that at the end of the Prosecution’s case the jury is not left with evidence which cannot lawfully support a conviction; otherwise, it may bring in an unjust conviction.
12. If there is a need in common law jurisdictions to ensure that the jury only considers evidence capable of sustaining a conviction, it is also necessary to ensure that the judge in deciding a submission of “no case to answer” does not usurp the functions of the jury to determine issues such as the credibility and reliability of evidence. The balance between the functions of the judge and the jury is reflected in the following passage from *R v. Galbraith*.²³

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

13. The test whether there is evidence, if accepted, on which a Trial Chamber could convict, will be applied on the following bases:
 - (1) Where there is no evidence to sustain a charge, the Motion is to be allowed. Although Rule 98 *bis* speaks of the sufficiency of evidence to sustain a conviction on a charge, the Trial Chamber has, in accordance with the practice of the Tribunal, considered the sufficiency of the evidence as it pertains to elements of a charge, whether set out in separate paragraphs or schedule items;
 - (2) Where there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it, the Motion is to be allowed. This will be the case even if the weakness in the evidence derives from the weight to be attached

to it, for example, the credibility of a witness. This is in accordance with the exception to the general principle in common law jurisdictions that issues of credibility and reliability must be left to the jury as the tribunal of fact.²⁴

(3) Where there is some evidence, but it is such that its strength or weakness depends on the view taken of a witness's credibility and reliability, and on one possible view of the facts a Trial Chamber could convict on it, the Motion will not be allowed. This accords with the general principle in common law jurisdictions that a judge must not allow a submission of no case to answer because he considers the prosecution's evidence to be unreliable,²⁵ since by doing that he would usurp the function of the jury as the tribunal of fact.

(4) The determination whether there is evidence on which a tribunal could convict should be made on the basis of the evidence as a whole.²⁶

(5) Whether evidence could lawfully support a conviction must obviously depend on the applicable law of the Tribunal and the facts of each case. The common law cannot be relied on to rule evidence as incapable of supporting a conviction if on the basis of Tribunal jurisprudence the evidence is to be considered as having that capacity. Thus hearsay evidence, generally inadmissible in common law jurisdictions, is, pursuant to Rule 89(C), admissible, the principal factor determining admissibility being the reliability of the evidence.²⁷ Once admitted, it is for a Trial Chamber to determine the weight to be attached to hearsay evidence.²⁸

(6) In view of the peculiarly common law origin of Rule 98bis, and the well known difficulties to which its application has given rise in the work of the Tribunal, the Trial Chamber considers it important to stress the point made both in *Prosecutor v. Kordic*²⁹ and *Prosecutor v. Jelusic*³⁰ that a ruling that there is sufficient evidence to sustain a conviction on a particular charge does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that charge; that is so because the standard for determining sufficiency is not evidence on which a tribunal *should* convict, but evidence on which it *could* convict. Thus if, following a ruling that there is sufficient evidence to sustain a conviction on a particular charge, the Accused calls no evidence, it is perfectly possible for the Trial Chamber to acquit the Accused of that charge if, at the end of the case, it is not satisfied of his guilt beyond reasonable doubt.

(7) When, in reviewing the evidence, the Trial Chamber makes a finding that there is sufficient evidence, that is to be taken to mean that there is evidence on which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the accused.

IV. CHALLENGES TO THE THREE INDICTMENTS

A. KOSOVO INDICTMENT

1. The Existence of an Armed Conflict in Kosovo prior to 24 March 1999

14. The *Amici Curiae* submit that, in order for the Trial Chamber to have jurisdiction over crimes pursuant to Articles 3 and 5 of the Statute, the crimes must have been

committed in an armed conflict.³¹ They then go on to submit there was no evidence of an armed conflict in Kosovo in the FRY prior to 24 March 1999, that date being the commencement of the NATO bombing campaign.³² This submission is made against the background of the Kosovo Indictment, which charges that, at all relevant times, “a state of armed conflict existed in Kosovo in the FRY”.³³

(a) Law

15. It is settled in the International Tribunal’s jurisprudence that Article 3 (violations of the laws or customs of war) and Article 5 (crimes against humanity) of the Statute apply to acts committed in both internal and international armed conflicts.³⁴ It is also settled that Article 3 is a general, residual clause covering all serious violations of international humanitarian law not falling under Articles 2, 4, or 5 of the Statute, as well as violations of Common Article 3 of the Geneva Conventions, which specifically applies to cases of armed conflict not of an international character.³⁵ Both the Prosecution and the *Amici Curiae* agree as to the requirement of an armed conflict for Articles 3 and 5 of the Statute.³⁶
16. The test for determining the existence of an armed conflict was set out in the *Tadic* Jurisdiction Appeals Decision (“*Tadic* test”) as follows:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.³⁷

17. For the purposes of this Motion, the relevant portion of the *Tadic* test, which has been consistently applied within the Tribunal,³⁸ is “protracted armed violence between governmental authorities and organized armed groups”. This calls for an examination of (1) the organisation of the parties to the conflict and (2) the intensity of the conflict.³⁹
18. The Trial Chamber makes the following observations on the *Tadic* test.
19. First, the *Tadic* test is not inconsistent with the ICRC’s Official Commentary to Common Article 3 of the Geneva Conventions of 12 August 1949 (“ICRC Commentary ”),⁴⁰ upon which the *Amici Curiae* appear to place reliance.⁴¹ In this regard, the Trial Chamber observes that the ICRC Commentary is nothing more than what it purports to be, *i.e.*, a commentary, and only has persuasive value. The ICRC Commentary sets out a more extensive list of criteria than the *Tadic* test, which may be considered when determining whether an armed conflict exists; but the ICRC itself states that “these different conditions, although in no way obligatory, constitute convenient criteria”;⁴² as such, the ICRC criteria are neither definitive nor exhaustive, and Common Article 3 “should be applied as widely as possible”.⁴³
20. Second, and of greater significance, the *Tadic* test is consistent with the ICC’s treatment of war crimes committed during armed conflict not of an international character. Article 8 of the ICC Statute defines “war crimes” committed during armed conflict not of an international character as “violations of article 3 common to the Four Geneva Conventions of 12 August 1949”;⁴⁴ but states that this

- definition “does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.⁴⁵ “War crimes” under Article 8 also include “(o)ther serious violations of the laws and customs applicable in armed conflicts not of an international character”,⁴⁶ but this definition “does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”.⁴⁷ It thus can be seen that Article 8 is not only consistent with the *Tadic* test, but also incorporates part of the *Tadic* Jurisdiction Appeals Decision into its own definition of “war crimes”.⁴⁸
21. Third, the *Tadic* test is consistent with Additional Protocol II to the Four Geneva Conventions.⁴⁹
 22. The Trial Chamber will now carry out an examination of both elements of the *Tadic* test with a view to ascertaining whether they have sufficient evidential support.

(b) Evidence of an armed conflict

(i) Organisation of the KLA

23. The *Amici Curiae* submit that “[t]he KLA did not constitute a sufficiently organised armed group under responsible command or an organised military force ‘responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention’”.⁵⁰ However, the Trial Chamber has considered the question of the degree of organisation of the KLA and found that there is in fact a sufficient body of evidence pointing to the KLA being an organised military force, with an official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.
24. Lord Ashdown visited the region in June 1998.⁵¹ The Yugoslav Government had refused Lord Ashdown a visa to enter Kosovo, so he observed the operations of the KLA from the Albanian side of the border.⁵² He noted the extent of the KLA’s operations and witnessed an extensive passage of arms across the border; and it appeared to him that “the KLA were well organised”.⁵³ Lord Ashdown called the village of Tropojë, in Albania, an “arms supermarket”; weapons were brought up by (probably) criminal organisations, and the KLA would send runners with orders of weapons.⁵⁴ He thus concluded that the KLA was visible and organised, had support, and was exporting and collecting arms.⁵⁵ Mr. Buja became aware of the existence of the KLA in 1996 and began supporting it.⁵⁶ In 1998, Mr. Buja was given instructions by the KLA headquarters, and he confirmed that during this time the KLA had an official structure.⁵⁷ From June 1998, he became the commander of a subzone⁵⁸ and in 1999 was the KLA Commander in Racak.⁵⁹ Dr. Rugova testified that the KLA began as individual groups, but then unified and had a joint command by the end of 1998 and early 1999.⁶⁰ Mr. Merovci testified that, in the course of 1998 and in the beginning of 1999, the KLA was an

- organised and commanded army.⁶¹ K6 testified that in 1996 the KLA was concentrated in Drenica in Kosovo and that he was aware of plans from 1991 to 1998 to eliminate the KLA, especially in Drenica.⁶²
25. On the basis of this evidence, the Trial Chamber is satisfied that the conflict in Kosovo meets the first element of the *Tadic* test.

(ii) Intensity of the Conflict

26. The main purpose of the *Tadic* test is to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, all of which are not subject to international law.⁶³
27. There is in fact a large body of evidence in support of the intensity of the conflict between the KLA and Serb forces prior to 24 March 1999. Much of the evidence cited by the *Amici Curiae*, in the Trial Chamber's view, actually substantiates the case for the Prosecution that there was an armed conflict during the relevant times. The Trial Chamber has considered the question of intensity of the conflict and found supporting evidence, which will now be set out.

a. Length or protracted nature of the conflict and seriousness and increase in armed clashes

28. K6 gave evidence that during 1996 and 1997, the KLA conducted many operations against the police, including killing people who had been employees of the police and those who had cooperated with the police, amounting to about 20 persons in 1997.⁶⁴ Mr. Aliu gave evidence about the killings and also commented that the "entire Albanian population mobilized" from the moment that the Jashari family was massacred.⁶⁵ Mr. Abrahams gave evidence that by February/March 1998, 50 ethnic Albanians, all of whom were members of the Jashari family, lost their lives in the village of Prekaz.⁶⁶ Mr. Abrahams testified that these killings "radicalized the Albanian population. Up until that point, the KLA was still a disorganized and somewhat mysterious organization".⁶⁷ K6 testified that, after Drenica was attacked, concrete plans for the elimination of the KLA were drawn up and sent to Jovica Stanisic in Serbia.⁶⁸ Mr. Buja testified that, on 23 August 1998, there was a large scale offensive by Serbian forces against the villages of Racak, Petrova, and Mullopolc.⁶⁹ Mr. Elshani gave evidence of clashes in several areas around the town of Nagafc in Rahovec from 1998 to March 1999.⁷⁰ General Maisonneuve and Colonel Ciagliniski testified about armed clashes that took place in early January 1999, before the Racak incident.⁷¹ General Maisonneuve detailed an incident near Racak in which three policemen were killed on 8 January 1999 by the KLA during an ambush on the [timlje pass.⁷² Colonel Ciagliniski gave evidence of an incident concerning villages near Jablanica and Decani around 10 January 1999 where Serb forces launched a massive attack, using heavy artillery, against the villages from the Decani area towards Jablanica – they continued to shell the villages for two days.⁷³

b. Spread of clashes over the territory

29. K6 testified that the KLA conducted operations in Junik, Decani, Malisevo, Orahovac, Istok, Obilic, and [alska Bajgora throughout 1998.⁷⁴ Mr. Abrahams also gave evidence that in May 1998, the KLA was definitely active in the Decani region and was bringing arms and supplies from Northern Albania and that, in his estimation, the Serbian and Yugoslav governments attempted to create a “cordon sanitaire, in other words clearing the border”.⁷⁵ Mr. Kadriu testified that in June/July 1998 there was a “very severe” conflict in the area of Drenica between the KLA and Serb forces and that the conflict was expanding.⁷⁶ General Drewienkiewicz, a member of the OSCE Department of Security in Sarajevo, gave evidence that there had been much violence in the summer of 1998 in Decani and Malisevo in the west of Kosovo and then in Podujevo, to the north of Pristina, and that positions previously occupied by the VJ in the summer of 1998 and then vacated as a result of the October 1998 agreement were gradually occupied by the KLA.⁷⁷

c. Increase in number of governmental forces sent to Kosovo

30. Evidence was led that on 24 September 1998, a major Serbian offensive began to destroy the KLA in the triangle of municipalities: [timlje, Suva Reka, and Uro sevac; and during several days, Serbian soldiers, policemen, and paramilitaries poured into many villages in which the KLA was not active; the offensive lasted until 4 October 1998, involving massive Serbian forces and special military and paramilitary groups.⁷⁸

d. Weapons used by both parties

31. Mr. Buja gave evidence regarding the type of weaponry with which the KLA were equipped; this included rifles, guns, and mortars.⁷⁹ Mr. Abrahams testified that, by March 1997, 700,000 arms were distributed or looted in Albania, giving the KLA a new source of weapons, contributing to its “rapid explosion”.⁸⁰
32. On the basis of this evidence, the Trial Chamber is satisfied that the conflict in Kosovo meets the second element of the *Tadic* test.

(iii) Other Submissions of the *Amici Curiae*

33. The Trial Chamber now addresses briefly the other submissions of the *Amici Curiae*.

a. Organised under civil authority

34. It is asserted that the KLA did not act under the direction of an organised civil authority that was prepared to observe the ordinary laws of war.⁸¹ Although the Trial Chamber does not accept that the organisation of a group under civilian authority is a requirement for the existence of an armed conflict, it considers that there is in fact sufficient evidence for a finding that the KLA acted under the direction of an organised civil authority.

35. When Lord Ashdown was in Kosovo between 26-29 September 1998, he met with Dr. Rugova who told him he (Rugova) was in control of the KLA and that the KLA would obey a cease-fire order from him – although Lord Ashdown did not entirely believe this because he considered Dr. Rugova to have had control over the KLA, through the LDK structure, in villages but not the larger guerrilla movement.⁸² Lord Ashdown testified that he had spoken with several village representatives who accepted Dr. Rugova as their leader.⁸³ Lord Ashdown explained his understanding of the “three KLAs”.⁸⁴ Colonel Ciaglinski gave evidence that around 15 March 1999, the KLA recognised its own police unit for the first time.⁸⁵ According to Dr. Rugova, the KLA had a political representative who spoke for them, a Mr. Demaci.⁸⁶ Mr. Barani stated that in 1998 Mr. Demaci was the political representative of the KLA and someone with whom he held talks to secure the release of two Serbs.⁸⁷ Mr. Bakalli, a member of the delegation of Kosovo Albanian leaders, who met with the Accused in April and May 1998, testified that, while he did not have direct contact with KLA troops or commanders, he was asked by Mr. Demaci, whom he described as the political representative of the KLA in Pristina, to be his advisor and to give him his political ideas and views; he also stated that the political representative of the KLA used to keep daily contacts with foreign diplomats.⁸⁸

b. Control over territory

36. It is also asserted that the KLA did not exercise and maintain control over a part of the territory of Kosovo so as to enable it to carry out sustained and concerted military operations; rather, the KLA’s attacks were sporadic.⁸⁹ Here again, while the Trial Chamber does not accept that such control of territory is a requirement for the existence of an armed conflict, there is in fact [evidence showing that the KLA was, at times in 1998 and 1999, in sufficient control of certain territory in Kosovo to conduct sustained and concerted military actions.](#)

37. Mr. Crosland testified that the KLA controlled [50 percent of the territory in Kosovo, including three of the major roads across Kosovo](#) early in the summer of 1998.⁹⁰ Mr. Crosland also referred to a small village called Crnoljevo just beyond Racak [where the KLA had a quasi- control over a mountainous road that went up towards Dulje.](#)⁹¹ Mr. Merovci testified that in 1998 and the beginning of 1999 [the KLA had various regions under its control.](#)⁹² Mr. Gerguri testified that in February 1999 [the Serb army shelled Gornje Studime \(in the Vucitrn Municipality in Kosovo\)](#)⁹³ [because it was under KLA control.](#)⁹⁴ Mr. Kabashi was a member of the KLA from 1997 until 25 March 1999⁹⁵ and testified that [the entire town of Drenica was under the control of the KLA for a short while.](#)⁹⁶ The date that Drenica was under control of the KLA is not clear; however, it occurred prior to 24 March 1999 because between 1997 and 1999 Mr. Kabashi found accommodation for people displaced from combat areas and the witness was only a member of the KLA until 25 March 1999.⁹⁷

c. Evidentiary weight of human rights reports

38. The *Amici Curiae* also assert that limited evidentiary weight should be given to human rights reports.⁹⁸ In most cases, human rights reports constitute hearsay evidence, which is admissible under Rule 89 (C), provided it is relevant and reliable.⁹⁹ Whether such evidence will be evidence on which the Trial Chamber could convict depends on a number of factors, including the way in which the evidence was collected and presented, the nature of the evidence, for example how general or specific it is, and whether it is the only evidence relating to a specific charge. These reports must therefore be considered on a case by case basis.
39. The Trial Chamber has not found it necessary to refer to human rights reports in this connection.

(c) Conclusion

40. The Trial Chamber therefore concludes that there is sufficient evidence of an armed conflict in Kosovo at the relevant times for the purposes of Rule 98bis .

2. Deportation or Forcible Transfer

41. Article 2(g) of the Statute makes unlawful deportation or transfer of a civilian a grave breach.¹⁰⁰ Article 5(d) of the Statute makes deportation a crime against humanity.¹⁰¹ Article 5(i), which makes “other inhumane acts” a crime against humanity, has been interpreted as including forcible transfer.¹⁰²
42. Count 1 of the Kosovo Indictment charges the Accused with the offence of deportation as a crime against humanity, while Count 2 charges him with forcible transfer under other inhumane acts. Under the Croatia Indictment, Count 14 charges the Accused with deportation as a crime against humanity; Count 15 charges him with forcible transfer as an inhumane act, a crime against humanity, and Count 16 charges the Accused with unlawful deportation or transfer as a grave breach of the Geneva Conventions. Count 16 of the Bosnia Indictment charges the Accused with deportation, a crime against humanity; Count 17 of that Indictment charges the Accused with the offence of forcible transfer as an inhumane act, a crime against humanity, and Count 18 charges him with unlawful detention or forcible transfer, a grave breach of the Geneva Conventions.
43. The *Amici Curiae* challenge the sufficiency of evidence in relation to specific allegations set out in the Kosovo and Bosnia Indictments. The Trial Chamber deals with each of these allegations below in sections IV.A.4 and IV.C.2 of the Decision respectively. The *Amici Curiae* do not challenge specific allegations in the Croatia Indictment, but argue that the counts relating to deportation are only capable of being made out from the date on which Croatia became a state and had defined state borders across which civilians could be said to have been forcibly moved. The Trial Chamber deals with this issue below in section IV.B.1 of the Decision.
44. The *Amici Curiae* and Prosecution differ in respect of some of the elements which constitute the offences of deportation and forcible transfer. These arguments are set out in the relevant parts of this section below. The *Amici Curiae* submit that

there is sufficient evidence of forcible transfer but not deportation in respect of some allegations in the Indictments. The Trial Chamber will now examine the law relating to the crimes of deportation and forcible transfer and then deal with the specific allegations of the *Amici Curiae* as to the insufficiency of the evidence.

(a) Law

45. Deportation has been described as “the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, across a national border, without lawful grounds”.¹⁰³ Forcible transfer has been described as a forced removal or displacement of people from one area to another which may take place within the same national borders.¹⁰⁴
46. The Chamber will analyse those elements of the two crimes which are relevant to the Motion. They are:
 - (1) cross border transfer;
 - (2) the involuntary nature of the movement; and
 - (3) the intent of the perpetrator.

(i) Cross border transfer

47. The *Amici Curiae* submit that deportation presumes transfer beyond state borders, whereas forcible transfer relates to displacement within a state.¹⁰⁵ The Prosecution submits that deportation does not require cross border transfer, arguing that deportation is an umbrella term covering displacement both across borders and within a state.¹⁰⁶
48. An examination of the history of the law on deportation and forcible transfer facilitates an understanding of its development and its current status.

a. Nuremberg Military Tribunal

49. During World War II, Germany carried out numerous acts of deportation of civilians under occupation.¹⁰⁷ A vast number of Germans were expelled from their territory and homes.¹⁰⁸ In the aftermath of the war, deportation was included in the Charter of the International Military Tribunal as a crime against humanity, giving the IMT jurisdiction over acts committed against persons of the same nationality as the principal offenders.¹⁰⁹ Article 6(c) of the Charter of the IMT established “deportation, and other inhumane acts committed against any civilian population, before or during the war” as crimes against humanity. Similarly, deportation of the civilian population was included as a crime against humanity in Control Council Law No. 10 and Principle VI of the Nuremberg Principles.¹¹⁰
50. One accused, Von Schirach, was convicted of deportation as a crime against humanity for his part in the removal of tens of thousands of Jews from Vienna into the “Ghetto of the East”, ghettos in Poland.¹¹¹
51. In *United States of America v. Milch*,¹¹² a Control Council Law No. 10 case, it was held:

Displacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime.... [D]eportation of the population is criminal whenever there is no title in the deporting authority or whenever the purpose of the displacement is characterised by inhumane or illegal methods.¹¹³

52. The IMT therefore dealt with deportation as a crime involving cross border transfer. It had no express jurisdiction to deal with forcible transfer, although, conceivably, that crime could have been covered in the reference to “other inhumane acts” in Article 6(c) of the Charter. The Trial Chamber has found no reference to forcible transfer in the Nuremberg Judgement.

b. Geneva Conventions

53. Following World War II, the Geneva Conventions begin to make explicit and distinct references to deportation and forcible transfer.¹¹⁴ Article 49 of the Geneva Convention IV provides:¹¹⁵

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

54. Then in 1977, Article 17 of Additional Protocol II to the Geneva Conventions,¹¹⁶ concerning violations of international humanitarian law in internal armed conflicts, deals with the prohibition of the forced movement of civilians, as follows:

(1) The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand....

(2) Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

55. Article 17 builds on the provisions of Article 49 of Geneva Convention IV. The first paragraph covers displacements of the civilian population within the territory of a State where a conflict is taking place.¹¹⁷ The second paragraph refers to the displacement of a population (individuals and groups) across state or territory borders. It was intended that the article would cover situations where groups of civilians were subject to expulsion across the boundaries by armed forces or groups. The term “territory” refers to the whole of the territory of a country.¹¹⁸
56. Thus, although Additional Protocol II does not deal with the crimes of deportation and forcible transfer in express terms, Article 17, paragraph 1 may be construed as referring to forcible transfer within the territory of a state, *i.e.*, internal displacement, and paragraph 2 may be interpreted as referring to deportation outside the territory of a state, *i.e.*, external displacement.

c. International Law Commission

57. In its 1996 Draft Code of Crimes Against the Peace and Security of Mankind, the ILC dealt with crimes against humanity under Article 18, paragraph (g), which refers to “arbitrary deportation or forcible transfer of population” as a crime against humanity. The Commentary to the Code would seem to distinguish between deportation and forcible transfer:

Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State.¹¹⁹

d. Tribunal Jurisprudence

58. The jurisprudence of the Tribunal is not uniformly consistent in relation to the element of cross border movement although, as will be seen, the preponderance of case law favours the distinction based on destination.
59. In *Prosecutor v. Krnojelac*, the Trial Chamber held that deportation requires the displacement of persons across a national border, to be distinguished from forcible transfer, which takes place within national boundaries.¹²⁰
60. In *Prosecutor v. Krstic*, the Trial Chamber held that “both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State”.¹²¹
61. In relation to the requirement that a national border must be crossed for deportation to be established, it was held in *Prosecutor v. Stakic*¹²² that Article 5(d) of the Statute must be read to encompass forced population displacements both across internationally recognised borders and *de facto* boundaries, such as constantly changing frontlines, which are not internationally recognised.¹²³ Thus, the definition of deportation of persons must include expulsion “from an area in which they are lawfully present to an area under the control of another party”.¹²⁴ The Trial Chamber, relying on the ICC Statute and the Elements of Crimes,¹²⁵ emphasised that the first element of forcible transfer and deportation as crimes against humanity is that the victims were deported or forcibly transferred to another state or location.¹²⁶ The Trial Chamber held:

[I]t is clear that the Statute of the International Criminal Court does not require proof of crossing an international border but only that the civilian population was displaced. This Trial Chamber is aware of the limited value of such a comparison when applied to acts that occurred prior to the establishment of the International Criminal Court. However, customary international law has long penalised forced population displacements and the fact that the Statute of the International Criminal Court has accepted the two terms ‘deportation’ and ‘forcible transfer’ in one and the same category only strengthens the view that what has in the jurisprudence been considered two separate crimes is in reality one and the same crime.¹²⁷

62. In *Prosecutor v. Simic*, the Trial Chamber held that to establish deportation under Article 5 of the Statute, the crossing of a national border must be proved.¹²⁸ The Trial Chamber noted that the European Union recognised Bosnia and Herzegovina as an independent state on 6 April 1992 and, therefore, the transfer of population across Bosnia and Herzegovina’s borders after this date satisfied the

- requirement of crossing a national border.¹²⁹ The Trial Chamber also referred with approval to the definitions in the *Krnjelac* and *Blaskic* cases.¹³⁰
63. The Trial Chamber held that the legal values protected by deportation and forcible transfer are the “right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location”,¹³¹ and that the elements of deportation and forcible transfer are substantially the same, except for the requirement that a national border must be crossed to establish deportation.¹³²
64. In the Tribunal jurisprudence, therefore, *Prosecutor v. Stakic* is the only case in which transfer across national borders is not treated as a requirement of the crime of deportation.

e. Statute of the ICC

65. In the ICC Statute, the terms deportation and forcible transfer appear to be given the same meaning. Article 7(2)(d) provides:

Deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

66. One commentator, after noting that the crime against humanity of deportation in the ICC Statute is said to apply regardless of the purpose of the deportation, takes the view that in light of the common distinction between deportation, as involving cross-border transfer, and forcible transfer, as relating to movement within a country, it is likely that the common distinction between the two crimes was intended.¹³³ Two other commentators, who were involved in the preparatory work of the ICC Statute and Elements of Crimes, assert that a clear distinction between the two crimes was intended:

The fourth and fifth inhumane acts, “deportation” and “imprisonment”, were clarified so as to exclude actions permissible under international law.... “*Forcible transfer of population*” was added as an alternative to “*deportation*” so as to encompass large-scale movements within a country’s borders.¹³⁴

67. In the Trial Chamber’s view, if this were the intention of the drafters of the ICC Statute, it would be in line with customary international law. However, the Trial Chamber recognises that the correctness of this interpretation must be a matter of dispute, since it contradicts what appears to be the plain meaning of Article 7(2)(d).

f. Conclusions

68. Having examined the foregoing strands of jurisprudence, the Trial Chamber concludes that the distinction between deportation and forcible transfer is recognised in customary international law. Deportation relates to involuntary transfer across national borders, while forcible transfer relates to involuntary

transfers within a state. Article 7(2)(d) of the ICC Statute, if it conflates the two crimes, does not reflect customary international law.

69. The Trial Chamber is persuaded by the reasoning in *Prosecutor v. Simic*, which is based on the premise that the values protected by both crimes are substantially the same, namely the “right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location”.¹³⁵ The Appeals Chamber in *Prosecutor v. Krnojelac* expresses this same principle:

The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.¹³⁶

In terms of these values, there is no detriment to a victim if the crime of deportation is confined to transfer across borders, because if it is established that he has not been so transferred, then he is protected by the prohibition against forcible transfer, which applies to involuntary movements within national borders. In other words, the values so properly identified by the Trial Chamber in *Prosecutor v. Simic* of a right to remain in one’s home and community are protected irrespective of whether deportation only takes place if there is transfer across borders.

(ii) Involuntary Nature of the Movement

70. Another critical element of both crimes is the involuntary character of the displacement. The question arises as to what vitiates the voluntary nature of the movement.
71. The *Amici Curiae* submit that movements across borders based on an individual’s free will to leave are lawful.¹³⁷ The Prosecution submits that the essential element is that the movement is involuntary in nature and the relevant persons had no real choice.¹³⁸
72. In *Prosecutor v. Krnojelac*, the Appeals Chamber held that it is the absence of genuine choice that makes displacement unlawful. Similarly, it is impossible to infer genuine choice from the fact that consent was expressed, where the circumstances deprive the consent of any value.¹³⁹
73. The Trial Chamber in *Prosecutor v. Krstic* relied on the definition of the term “forcibly” in the Elements of Crimes of the ICC. In *Prosecutor v. Simic*, the Trial Chamber referred to this definition. It was noted that the essential element is that the displacement be involuntary in nature, that “the relevant persons had no real choice”,¹⁴⁰ as noted by the Trial Chamber in *Prosecutor v. Krnojelac*, an apparent consent induced by force or threat of force should not be considered to be real consent.
74. Whether a person would have wished to leave the area, absent circumstances of discrimination or persecution, may also be considered as indicative of a person’s will. A lack of genuine choice may be inferred from, *inter alia*, threatening and intimidating acts that are calculated to deprive the civilian population of

- exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of – or the threat to commit – other crimes “calculated to terrify the population and make them flee the area with no hope of return”.¹⁴¹
75. In *Prosecutor v. Naletilic & Martinovic*, the Trial Chamber noted that the jurisprudence of the Tribunal supports the proposition that the term “forcible” should not be restricted to physical coercion.¹⁴² In *Prosecutor v. Kunarac*, the Appeals Chamber held that the coercive circumstances made “true consent... not possible”.¹⁴³
76. The determination as to whether a transferred person had a “real choice” has to be made in the context of all the relevant circumstances and on a case by case basis.¹⁴⁴

(iii) Intent of the Perpetrator

77. The *Amici Curiae* submit that the forces of FRY and Serbia must be proved to have deportation as their objective and the victim to have acted as a consequence of their acts or conduct.¹⁴⁵ The Prosecution, however, submits that no specific intent of the perpetrator is required for deportation to be a crime against humanity;¹⁴⁶ all that is required is that the perpetrator either directly intended that the victims would leave or acted in the awareness of the substantial likelihood that this would occur as a consequence of their action.¹⁴⁷ The Prosecution also submits that the forces of FRY and Serbia in fact intended that the victims leave Kosovo and thus a determination of the destination intended by the perpetrator is unnecessary.¹⁴⁸
78. The Trial Chamber is of the opinion that in relation to forcible transfer or deportation there must be evidence of an intent to transfer the victim from his home or community; it must be established that the perpetrator either directly intended that the victim would leave or that it was reasonably foreseeable that this would occur as a consequence of his action. If, as a matter of fact, the result of the removal of the victim is the crossing of a national border then the crime of deportation is committed; if there is no such crossing, the crime is forcible transfer.
79. The crimes of deportation and forcible transfer have the same elements, except in relation to destination.

(b) Application of the law

80. The Trial Chamber sets out in the relevant sections below its findings as to the sufficiency of evidence in respect of the specific allegations of deportation and forcible transfer raised by the *Amici Curiae*. In respect of the Kosovo Indictment, the findings are set out in the following section, IV.A.4. In respect of the Bosnia Indictment, the findings are set out in section IV.C.2. In respect of the Croatia Indictment, the findings are set out at section IV.B.2.

3. Methodology for dealing with submissions of no or insufficient evidence

81. The *Amici Curiae* have made submissions that 185 separate allegations in the three Indictments are either unsupported by any evidence at all, or are insufficiently supported by evidence such that a Trial Chamber could find the allegations established beyond reasonable doubt. The Trial Chamber, in addition to examining the evidence cited by the *Amici Curiae* and Prosecution in support of their submissions, has carried out its own independent examination of all the evidence led in the case. The decisions set out in the table below concern the submissions relevant to the Kosovo Indictment. The same methodology will be applied to submissions concerning the Croatia and Bosnia Indictments.
82. The table sets out the specific reference to the Kosovo Indictment. The Trial Chamber then summarises the submissions of the parties, which it has examined in detail. The specific findings of the Trial Chamber are then set out succinctly. The final column of the table shows the evidence supporting its conclusions. This evidence may not be exhaustive of the evidence relating to the charges.

4. Specific Challenges to the Kosovo Indictment

Indictment Reference	<i>Amici Curiae</i> Submissions	Prosecution Submissions	Trial Chamber's Decision	Evidence Examined
Count 1, para. 63(a)(i) DEPORTATION Nogavac	The <i>Amici Curiae</i> submit that there is no evidence of deportation from Nogavac (Motion, at pp. 21-25, paras. 39-51).	The Prosecution submits that there is sufficient evidence and cites Mr. Elsani, Mr. Hoti, Mr. Popaj, and Mr. Krasniqi (Response, at paras. 87-95).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Mr. Hoti (Ex. 105 (partially under seal), statement dated 19 May 1999; T. 3590-3593) Mr. Popaj (Ex. 225 (partially under seal), statement dated 14 June 1999; T. 6669) Mr. Elshani (T. 787-822) Mr. Avdyli (a.k.a. Mr.

				Krasniqi (Ex. 227 (partially under seal), statement dated 4 April 1999 and statement dated 5 October 2001; T. 6731)
Count 1, para. 63(i) DEPORTATION Gnjilane/Gjilan, Prilepnica/Përlepticë town	The <i>Amici Curiae</i> submit that there is no direct evidence of deportation or forcible transfer in relation to Prilepnica/Përlepticë and no evidence concerning the mosque at Vlastica or of destruction throughout the municipality (Motion, at pp. 25-28, paras. 52-60).	The Prosecution concedes that no direct evidence of deportation or forcible transfer was led in relation to Prilepnica/Përlepticë; but, submits that Ex. 106 contains sufficient material to support the allegations made about this village (Response, at paras. 96-103).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Exhibit 106, OSCE Report, <i>As Seen As Told</i> , at pp. 200-205 Mr. Shabani (T. 1512-1602) Professor Riedlmayer (Ex. 88)
Count 1, para. 63(j) DEPORTATION Urosevac/Ferizaj	The <i>Amici Curiae</i> submit that there is no evidence of shelling and/or attacking the villages of Biba/Bibe, Muhadzer Prelez/Prelez I Muhaxhereve, Raka/Rakaj, Papaz and Varos Selo/Varosh (Motion, at pp. 28-29, paras. 61-63).	The Prosecution submits that there is sufficient evidence, except with respect to Papaz where the Prosecution concedes no witness explicitly testified about the village (although villages nearby are mentioned). The Prosecution also relies upon Ex. 106 to support these allegations (Response, at paras. 104-109).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Mr. Bucaliu (T. 2040, T. 2106) K5 (T. 5521-5565) Mr. Florim Krasniqi (Ex. 138 (partially under seal), statement dated 23 April 1999; T. 4476-

				<p>4477)</p> <p>Mr. Nebihu (T. 4507; Ex. 139 (partially under seal), statement dated 2 May 1999 and addendum dated 20 November 2001)</p> <p>Exhibit 106, OSCE Report, As Seen As Told, at pp. 200-205</p> <p>Ex. 83 (Kosovo Atlas), at p. 12</p>
<p>Count 1, para. 63(k)</p> <p>DEPORTATION</p> <p>Kacanik</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence provided by the witnesses heard as to the "involuntariness" of movement across a state border (Motion, at pp. 29-30, paras. 64-67).</p>	<p>The Prosecution submits that there is sufficient evidence and cites Mr. Hazbi Loku, Mr. Isuf Loku, Mr. Raka, and Mr. Lami, Mr. Vishi (Response, at pp. 40-42, note 215, paras. 110-111).</p>	<p>The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.</p>	<p>Mr. Hazbi Loku (T. 1924-1950)</p> <p>Mr. Isuf Loku (Ex. 144 (partially under seal), statement dated 11 June 1999)</p> <p>Mr. Raka (Ex. 125 (partially under seal), statement</p>

				<p>dated 26 November 1999))</p> <p>Mr. Lami (Ex. 135 (partially under seal), statement dated 14 July 2000))</p> <p>Mr. Vishi (Ex. 137 (partially under seal), statement dated 18 October 1999))</p>
<p>Count 1, para. 63(1)</p> <p>DEPORTATION</p> <p>Decan/Decani</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation (Motion, at pp. 30-31, paras. 68-70).</p>	<p>The Prosecution submits that there is sufficient evidence and cites K-20 and Ex. 106 (Response, at para. 112).</p>	<p>The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.</p>	<p>K-20 (T. 2514)</p> <p>Ex. 106, OSCE Report, <i>As Seen As Told</i></p> <p>Mr. Peraj (Ex. 143 (partially under seal), statement dated 18 April 2000 and addendum dated 15 February 2002); T. 4659-4663)</p>
<p>Counts 3-4, para.</p>	<p>The <i>Amici Curiae</i> submit that there is no direct evidence</p>	<p>The Prosecution concedes that no direct evidence was</p>	<p>The Trial Chamber finds that</p>	<p>Dr. Baccard (T. 5265;</p>

<p>66(e)</p> <p>MURDER</p> <p>Dakovica/Gjakove:</p> <p>134a Ymer Grezda Street</p>	<p>and that the evidence that was adduced constitutes hearsay evidence and is insufficient to support these allegations (Motion, at pp. 31-33, paras. 71-75).</p>	<p>adduced with respect to these allegations, but relies upon Ex. 106 and forensic exhumation evidence to support these allegations (Response, at pp. 42-43, paras. 113-115).</p>	<p>there is sufficient evidence to support this allegation. The Motion is not allowed.</p>	<p>Ex. 159, 168)</p> <p>Exhibit 145, Human Rights Watch Report, <i>Under Orders</i></p> <p>Ex. 106, OSCE Report, <i>As Seen, As Told</i></p> <p>Mr. Peraj (Ex. 143 (partially under seal), statement dated 18 April 2000 and addendum dated 15 February 2002); T. 4659-4663)</p>
<p>Count 5, para. 68(c)</p> <p>PERSECUTIONS</p> <p>Prizren</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence and that the general hearsay evidence adduced is insufficient to support the allegation (Motion, at pp. 33-35, paras. 76-79).</p>	<p>The Prosecution submits that there is sufficient evidence and cites Mr. Beqiraj, Ex. 145, and Mr. Abrahams (Response, at pp. 43-45, paras. 116-119).</p>	<p>The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.</p>	<p>Mr. Beqiraj (Ex. 103; T. 3506-3537)</p> <p>Ex. 106, OSCE Report, <i>As Seen, As Told</i></p> <p>Ex. 145, Human Rights</p>

				<p>Watch Report, <i>Under Orders</i></p> <p>Mr. Thaci (T. 4558-4567; Ex. 140 (partially under seal), statement dated 13 November 1999)</p> <p>Mr. Abrahams (T. 6091-6092)</p> <p>K-31 (Ex. 267 (under seal), statement dated 16 October 1999)</p>
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B. CROATIA INDICTMENT

1. International Armed Conflict – Croatian Statehood

83. The *Amici Curiae* contend that in respect of the grave breaches counts in the Croatia Indictment, the Prosecution must prove that an armed conflict was international at all relevant times.¹⁴⁹ It is the Prosecution’s case that the armed conflict was international from 8 October 1991, which is the date on which Croatia’s declaration of independence became effective.¹⁵⁰ The *Amici Curiae*, however, submit that the conflict only became international at a point in time between 15 January 1992, when Croatia was recognised by the European Community, and 22 May 1992, when it became a member of the United Nations.¹⁵¹
84. The Appeals Chamber, in the *Tadic* Jurisdiction Appeal Decision, held that an international armed conflict is required for Article 2 of the Statute to apply, that is, there must be a conflict involving two or more states; in other words, the Article does not apply to a civil war.¹⁵² Article 2 of the Statute deals with grave

breaches of the Geneva Conventions of 1949. If the submission of the *Amici Curiae* is correct, those counts of the Croatia Indictment that deal with grave breaches, covering the period from 8 October 1991 and a point in time between 15 January 1992 and 22 May 1992, would have to be dismissed. Accordingly, it is necessary to determine whether Croatia was a state or became a state on 8 October 1991, as argued by the Prosecution, or whether it only became a state at some time between 15 January 1992 and 22 May 1992, as contended by the *Amici Curiae*.

(a) Definition of a State

85. The best known definition of a state is the one provided by Article 1 of the Montevideo Convention, which provides as follows:

The State as a person of international law should possess the following qualifications : (a) a permanent population; (b) a defined territory; (c) government ; and (d) capacity to enter into relations with other States.¹⁵³

86. These four criteria have been used time and again in questions relating to the creation and formation of states. In fact, reliance on them is so widespread that in some quarters they are seen as reflecting customary international law. Thus, one commentator says, “It has become common practice to regard this provision of the Montevideo Convention, a regional treaty, as a crystallization of the state of customary international law and it has exercised great influence on the way in which the legal characteristics of statehood have been understood since”.¹⁵⁴ While the Trial Chamber does not feel obliged to determine the question of the status of the criteria as customary international law, it feels sufficiently confident to rely on them as reflecting well-established core principles for the determination of statehood. In that regard, the Trial Chamber observes that, although other criteria have been developed for determining statehood, some of which are referred to in the Motion,¹⁵⁵ the Montevideo provisions may be characterized as the criteria in relation to which there is least dispute, although, of course, their application to particular situations may give rise to differing views.
87. The Trial Chamber does not consider it productive to engage in a discussion of the relative merits of the declaratory and constitutive theories of recognition in relation to the creation and formation of states.¹⁵⁶ Its conclusion, however, is that the formation of states is a matter that is regulated by law, that is, the criteria of statehood are laid down by law.¹⁵⁷ That law, in the Trial Chamber’s view, is reflected in the four criteria set out in the Montevideo Convention. Both parties have relied on those criteria. It is the opinion of the Trial Chamber that in the circumstances of this case, these criteria form the appropriate test to determine whether Croatia was a state prior to 15 January 1992.¹⁵⁸
88. The Montevideo Convention’s definition of a state is consistent with the definition by the Arbitration Commission of the International Conference on the Former Yugoslavia (“Badinter Commission”) in its Opinion No. 1. The Badinter Commission considered that “the State is commonly defined as a community

- which consists of a territory and a population subject to an organised political authority: that such a State is characterised by sovereignty”.¹⁵⁹
89. Both the Prosecution and the *Amici Curiae* have referred to the Opinions of the Badinter Commission.¹⁶⁰ In fact, the Prosecution has relied upon the Opinions to conclude that Croatia was a state as of 8 October 1991.¹⁶¹ The *Amici Curiae*, on the other hand, have submitted that the Arbitration Commission’s opinions are of limited legal relevance.¹⁶²
 90. The Badinter Commission’s mandate was to arbitrate differences submitted to it by the relevant authorities.¹⁶³ It consisted of jurists, three of whom were Presidents of the constitutional courts of their countries, including its President, Robert Badinter, who was the President of the Constitutional Council of France.¹⁶⁴ The Trial Chamber notes that at the time when Opinion No. 11, which deals with Croatian statehood, was issued, the Badinter Commission also included an eminent international lawyer in the person of Jose Maria Ruda, a former President of the International Court of Justice, and Elizabeth Palm, a Judge of the European Court of Human Rights.¹⁶⁵
 91. The *Amici Curiae* contend that the Badinter Commission was not independent.¹⁶⁶ However, the Trial Chamber has examined the instrument that created the Badinter Commission¹⁶⁷ and has found nothing therein to indicate that it was subject to direction from any Member State of the European Community, the European Community itself, or any political entity. Moreover, the Trial Chamber has found nothing to suggest that the Badinter Commission was not independent in carrying out its work.
 92. Although the Badinter Commission was clearly not a judicial body, the Trial Chamber views it as a body of independent and competent jurists, and considers its Opinions as material on which it may, as appropriate, draw in its determination of the question of Croatian statehood.
 93. The Trial Chamber now proceeds to an examination of the criteria of statehood to determine whether Croatia met those criteria on 8 October 1991 or at a later date.

(i) Population

94. With regard to this criterion, in relation to which the *Amici Curiae* have made no specific submission, there does not appear to be much controversy. The Prosecution submits that Article 1 of the Constitution of Croatia dated 22 December 1990 addresses this point.¹⁶⁸ That Article states, “The Republic of Croatia is a unitary and indivisible democratic and social State. Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens. The people shall exercise this power through the election of representatives and through direct decision making”.¹⁶⁹ The Prosecution has also referred to the evidence given by Mr. [arinic that “Croatia is a national state of the Croatian people and a state of all other nations and minorities who are citizens of the Republic of Croatia” and that “minorities” included Serbs.¹⁷⁰
95. The Trial Chamber finds that at 8 October 1991 Croatia had a permanent population.

(ii) Defined Territory

96. It is settled that the entity claiming to be a state must be in control of a certain area, although practice indicates that it is not necessary that its boundaries be defined. For example, Israel was admitted to the UN at a time when her borders were disputed,¹⁷¹ and Albania was recognised by a number of states despite a lack of settled frontiers.¹⁷² Moreover, it appears to be settled that claims to the territory as a whole or a part thereof do not affect the question of statehood.¹⁷³ Therefore, claims by the Serbs to SAO Krajina, Western Slavonia, Dubrovnik, SAO SBWS would not, by themselves, be adverse to the emergence of the Croatian state.
97. The *Amici Curiae* have not made any specific submission on this question, their main point being that the Croatian government did not exercise effective control over its entire territory.¹⁷⁴
98. On the other hand, the Prosecution has advanced a number of submissions in support of Croatian statehood on 8 October 1991. These submissions are as follows :
- (1) There must be a reasonably stable political community and this must be in control of a certain area.¹⁷⁵
 - (2) Past practice shows that the existence of fully defined frontiers is not required and that what matters is the effective establishment of a settled community.¹⁷⁶
 - (3) During examination-in-chief and cross-examination, the fact that there was a defined Croatian territory was not disputed.¹⁷⁷
 - (4) Maps used during the testimony of witnesses defined Croatian territory and usually followed the Republican borders within the SFRY.¹⁷⁸
 - (5) The Serbian leadership, including the Accused, did not dispute the existence of a Croatian territory, but rather pursued the redistribution of territories in Croatia based on ethnic principle.¹⁷⁹
 - (6) In October 1991, official SFRY documentation recognised both “the territory of the Republic of Croatia” and “the Republic of Croatia”.¹⁸⁰
 - (7) Due to the foregoing, the republican borders of Croatia became international frontiers.¹⁸¹
99. The Trial Chamber finds in the material referred to in the Prosecution submissions enough evidence of a defined Croatian territory.
100. The Badinter Commission, in Opinion No. 3, concluded that except where otherwise agreed, former boundaries became frontiers protected by international law.¹⁸² This conclusion was based on the *uti posseditis* principle of respect for territorial *status quo*.¹⁸³ The Badinter Commission also relied on the principle that all external frontiers must be respected; that boundaries between, *inter alia*,

- Croatia and Serbia may not be altered except by agreement freely arrived at.¹⁸⁴ Later, in Opinion No. 11, the Badinter Commission found that Croatia became a state on 8 October 1991.¹⁸⁵
101. The Trial Chamber concludes that there is evidence of a defined Croatian territory as of 8 October 1991.
- (iii) Government
102. The existence of an effective government is an important criterion of statehood.¹⁸⁶ It is here that the *Amici Curiae* make their strongest point. They contend that the Croatian government had “insufficient control over a substantial part of its territory for it to be considered an independent State.... The armed conflict was still ongoing in many areas of Croatia”.¹⁸⁷ There is evidence of an ongoing conflict in the SAO Krajina, Western Slavonia, Dubrovnik, and SAO SBWS. However, the *Amici Curiae* have not sought to say what percentage of Croatian territory is represented by those areas in respect of which they submit there was insufficient control. The Prosecution has referred to evidence that in August 1991 Croatia had control over 70 to 75 percent of its territory and that 25 to 30 percent was under Serb control. This evidence came from General Agotic, Mr. Kriste, and two maps.¹⁸⁸
103. The Prosecution also submits that the principle of effective control should not be calculated in strictly mathematical terms, but rather that the critical criterion is the sway the government holds over its territory and population, and that there is enough evidence of that factor.¹⁸⁹
104. The Trial Chamber observes a certain inconsistency in relation to the submission of the *Amici Curiae*, that Croatia had “insufficient control over a substantial part of its territory”:¹⁹⁰ even if the *Amici Curiae* are correct that Croatia did not become a state until some time between its recognition by the EC Member States on 15 January 1992 and its admission to the United Nations on 22 May 1992, it is clear that Croatia was still not in control of a substantial part of its territory at that time. Thus, by their own reasoning, Croatia would not have been a state in the period between 15 January 1992 and 22 May 1992.
105. Even if the test is a strict mathematical calculation as distinct from the sway the government holds over the territory and population, as argued by the Prosecution,¹⁹¹ the Trial Chamber holds that the evidence cited by the Prosecution shows sufficient control by the Croatian government over its territory to satisfy the requirement of an effective government.
106. Moreover, the Prosecution has also referred to evidence showing that Croatia had an effectively functioning government by 8 October 1991, with ministerial personnel¹⁹² and other personnel being sent to represent the government at meetings, including some with international institutions,¹⁹³ as well as the performance of a variety of other government functions.¹⁹⁴ Further, admitted exhibits evidence the adoption of significant legislation.¹⁹⁵
107. The Badinter Commission considered that the form of internal political organisation and the constitutional provisions were relevant factors in determining the government’s sway over the population and territory.¹⁹⁶

108. The Trial Chamber is satisfied that there is evidence of Croatia having an effective government as of 8 October 1991.

(iv) Capacity to enter into International Relations – Independence

109. Independence is generally regarded as the decisive criterion of statehood and the best evidence of it is the capacity to enter into international relations.¹⁹⁷

110. Croatia declared its independence on 25 June 1991, but was requested by the ministerial “troika” of the European Community to postpone implementation of its declaration for three months from 7 July 1991, which was the date of the Common Declaration on Peaceful Solution of the Yugoslav Crisis, (“Brioni Declaration”).¹⁹⁸ Croatia declared its independence on 8 October 1991.¹⁹⁹

111. The *Amici Curiae* have made no submissions on this point. But there is an abundance of evidence adverted to by the Prosecution in support of Croatia’s independence on 8 October 1991. This evidence includes:

(1) The Presidents of Serbia and Croatia entered into bilateral negotiations;²⁰⁰

(2) Representatives of Croatia entered into negotiations with international observers and signed resulting agreements such as the Brioni Declaration on 8 July 1991 and the “Igalo agreement” on 17 September 1991;²⁰¹ and

(3) The Croatian government was accepted by the EU and UN Commissions and representatives around 8 October 1991.²⁰²

112. In the Trial Chamber’s view, further evidence of Croatia’s independence by 8 October 1991 may be gathered, albeit indirectly, from the breakdown of the SFRY, which resulted in the cessation of control over the affairs of Croatia. The evidence of the breakdown of the federal government comes from a number of sources, including the then President of the SFRY, Mr. Mesic,²⁰³ and the then Prime Minister of the SFRY, Mr. Markovic.²⁰⁴ On 16 March 1991, the Accused appeared on television saying that Yugoslavia ceased to function and Serbia did not recognise any decision made by the Presidency.²⁰⁵

113. In relation to the question of Croatia’s independence, the Badinter Commission said that the suspension of the declaration of independence ceased to have effect on 8 October 1991 and only then did Croatia break all links with the organs of the SFRY and become a sovereign state in international law.²⁰⁶

114. The Trial Chamber therefore finds that there is evidence of Croatia’s independence by 8 October 1991.

(b) Conclusion

115. The Trial Chamber concludes that there is sufficient evidence that Croatia was a state by 8 October 1991 for the purposes of Rule 98 *bis*, and therefore dismisses the Motion with respect to the grave breaches counts relating to the period between 8 October 1991 and 22 May 1992.

2. Specific Challenges to the Croatia Indictment

116. The *Amici Curiae* submit that, should the Trial Chamber accept that Croatia was not a state as of 8 October 1991, the Accused would be entitled to have a judgement of acquittal entered in respect of counts 17, 22, 25, and 28, which charge the Accused with grave breaches of the Geneva Conventions, and which allegedly took place before Croatia became a state and therefore before the conflict became international. As set out immediately above, the Trial Chamber has found that Croatia was a state at 8 October 1991 and therefore the relevant grave breaches counts will not be dismissed.

Indictment Reference	<i>Amici Curiae</i> Submissions	Prosecution Submissions	Trial Chamber's Decision	Evidence Examined
Count 1, para. 36(1) PERSECUTIONS Sarengrad, Bapska, Nadin, and Bruska	The <i>Amici Curiae</i> submit that there is insufficient evidence to support these allegations (Motion, at paras. 102-103).	The Prosecution submits that there is sufficient evidence and that "the relevant evidence for each of the four named villages is set out below", but makes no reference to where such evidence can be found in its Response (Response, at para. 155).	The Trial Chamber finds that there is sufficient evidence to support these allegations. The Motion is not allowed.	Mr. Kraljevic (T. 25411; Ex. 516, tab 1, statement dated 8 November 1995 and addendum dated 17 June 2003, tab 2) Mr. Babic (T. 12855, 13065, 13400, 13405-13406) Ex. 326, tab 11 Mr. Miljanic (Ex. 501, statement dated 25 July 1996, at para. 11, and addendum dated 19 June 2003;

				T. 24318) Ms. Denona (Ex. 576, statement dated 25 September 1996, at pp. 2, 4)
Counts 2-5, para. 40 EXTERMINATION, MURDER, AND WILFUL KILLING Bacin	The <i>Amici Curiae</i> submit that there is insufficient evidence of who killed 43 persons in Bacin on 21 October 1991 and no evidence to support the remainder of the allegation (Motion, at paras. 105-107).	The Prosecution concedes that no eye-witnesses to the killings gave evidence, but submits that there is sufficient evidence to sustain the allegation, citing one survivor (C-1141) and the pattern of evidence adduced through Mr. Babic and Mr. Josipovic (Response, at paras. 157-162).	The Trial Chamber finds that there is sufficient evidence to support these allegations. The Motion is not allowed.	C-1141 (T. 11913, 11921-11928, 11930-11940, 11944, 11965, 11970-11977, 11981-11982, 11989-11990; Ex. 344 (under seal)) Colonel Grujic (T. 17282-17283; Ex. 402, tabs 6-10) Mr. Josipovic (Ex. 521, statement dated 10 November 2000 and addendum dated 7, 11 March 2002) Dr. Strinovic

				(T. 17910; Ex. 409-410) Mr. Babic (T. 13649)
Counts 2-5, para. 41 EXTERMINATION, MURDER, AND WILFUL KILLING Saborsko, Poljanak, and Lipovanic	The <i>Amici Curiae</i> concede that there is evidence of attacks on Saborsko, Poljanak, and Lipovanic by the JNA, TO, and Martić's police, but submit that there is insufficient evidence that Serb forces killed all remaining inhabitants found when they entered the villages (Motion, at para. 108).	The Prosecution submits that there is sufficient evidence, citing the pattern of evidence adduced through Mr. Babic and exhumations adduced through Mr. Marjanovic (Response, at paras. 163-168).	The Trial Chamber finds that there is sufficient evidence to support these allegations. The Motion is not allowed.	Mr. Babic (T. 13064-13069) Mr. Marjanovic (T. 25010-25014, 25021-25033; Ex. 511) C-1220 (T. 11561, 11589-11600, 11602-11603, 11609-11610) Mr. Vukovic (Ex. 479, tab 1A (public redacted version), statement dated 20 January 2001 and addendum dated 18 June 2003; T. 23713) C-1230 (T. 23724-23726; Ex. 480, tab 2A (public

				<p>redacted version), statement dated 28 February 2001)</p> <p>Colonel Grujic (T. 17254; Ex. 401-403)</p> <p>General Agotic (T. 23236)</p> <p>Ms. Bicanic (Ex. 519. statement dated 20 January 2001; T. 25533-25537)</p>
<p>Counts 2-5, para. 50</p> <p>EXTERMINATION, MURDER, AND WILFUL KILLING</p> <p>Detention facility in the police building in Dalj</p>	<p>The <i>Amici Curiae</i> (1) submit that hearsay evidence was produced by the Prosecution in the form of a letter in support of the allegation, (2) concede there is evidence that 9 of the 11 persons listed in the Indictment were later exhumed, (3) but submit</p>	<p>The Prosecution submits that there is sufficient evidence that the eleven victims named in the Indictment were murdered by members of the TO of the SAO SBWS led by Arkan (Response, at paras. 169-172).</p>	<p>The Trial Chamber finds that there is sufficient evidence to support these allegations. The Motion is not allowed.</p>	<p>C-013 (T. 15170-15171, 15187-15200, 15304, 15345-15349; Ex. 375, tabs 1-2; Ex. 376 (under seal))</p> <p>Mr. Sutalo (Ex. 520, statement dated 17 April 1999 and addendum dated 18 June 2003;</p>

	that there is no direct eye-witness evidence that these persons were shot and buried by members of the TO of the SAO SBWS led by Zeljko Raznatovic ("Arkan") (Motion, at paras. 109-111) .			T. 25550, 25575) Colonel Grujic (T. 17290-17318; Ex. 401-403) C-025 (T. 14132-14137)
Counts 2-5, para. 51 EXTERMINATION, MURDER, AND WILFUL KILLING Detention facility in the police building in Dalj	The <i>Amici Curiae</i> submit that there is insufficient evidence because there is no eye-witness evidence with respect to these allegations. The only evidence is hearsay in the form of an "Official Note" from the Ministry of Interior, which refers to 12 dead bodies being removed from a room at the detention facility (not 28 as alleged in the	The Prosecution submits that there is sufficient evidence and cites Dr. Strinovic, Mr. Rastija, and Colonel Grujic (Response, at paras. 173-177).	The Trial Chamber finds that there is sufficient evidence to support these allegations. The Motion is not allowed.	Dr. Strinovic (T. 17944-17945) C-025 (Ex. 356 (under seal), 357, 358 (under seal)) C-013 (T. 15193-15199; Ex. 375, 376 (under seal), statement dated 17 May 1999, 377) Mr. Rastija; Ex. 629, deceased witness statement dated 1 March 2002) Colonel

	Indictment) and "does not clarify whether these individuals were civilians or Croats" (Motion, at paras. 112-114).			Grujic (T. 17292-17314; Ex. 401-403) C-037 (Ex. 327, tab 4)
Counts 2-5, para. 53 EXTERMINATION, MURDER, AND WILFUL KILLING Training centre of the TO in Erdut	The <i>Amici Curiae</i> submit that there is insufficient evidence with respect to the alleged murder of Marija Senasi (Motion, at paras. 115-117).	The Prosecution submits that there is sufficient evidence with respect to each of the allegations and cites C-020 (Response, at paras. 178-184).	The Trial Chamber finds that there is sufficient evidence to support these allegations. The Motion is not allowed.	C-020 (T. 12165-12182; Ex. 347 (partially under seal)) B-071 (T. 18403-18404; Ex. 416, tab 3) Mr. Milanovic (Ex. 549, tab 7) Colonel Grujic (T. 17292-17318; Ex. 401-403) C-057 (Ex. 607)
Counts 2-5, para. 55 EXTERMINATION, MURDER, AND WILFUL KILLING Vukovar	The <i>Amici Curiae</i> submit that there is insufficient evidence to support these allegations, <i>i.e.</i> , that the alleged actions were taken	The Prosecution submits that there is sufficient evidence to support the allegations because a reasonable inference can	The Trial Chamber finds that there is sufficient evidence to support these allegations. The Motion is not allowed.	Colonel Grujic (T. 17290-17297; Ex. 401-403) C-1175 (Ex. 517 (under seal); T. 25483,

	<p>pursuant to a request by Goran Hadzic and the means by which the alleged victims were killed (Motion, at paras. 118-121).</p>	<p>be drawn from exhumation evidence (adduced through Colonel Grujic and Dr. Strinovic) and the evidence of C-1175 and C-1071 that "the story of one of these victims can stand for the story of all" (Response, at paras. 185-188).</p>		<p>25485-25487, 25513)</p> <p>Mr. Dulovic (T. 11649-11913)</p> <p>B-071 (Ex. 416, tab 3; T. 18403-18404)</p> <p>Dr. Strinovic (Ex. 409-410, tab 45)</p> <p>C-1071 (Ex. 518, tab 1 (under seal), statement dated 10 May 2001; T. 25506)</p>
<p>Counts 2-5, para. 56</p> <p>EXTERMINATION, MURDER, AND WILFUL KILLING</p> <p>TO training centre in Erdut</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence to support these allegations (Motion, paras. 122-124).</p>	<p>The Prosecution submits that there is sufficient evidence and cites Colonel Grujic and Mr. Sutalo (Response, at p. 71, notes 356-357, para. 189).</p>	<p>The Trial Chamber finds that there is sufficient evidence to support these allegations. The Motion is not allowed.</p>	<p>Colonel Grujic (Ex. 401-403; T.17292-17318)</p> <p>Mr. Sutalo (Ex. 520; T. 25540)</p> <p>B-071 (Ex. 416, tab 3; T. 18403-18404)</p>
<p>Counts 2-5, para. 57</p> <p>EXTERMINATION, MURDER, AND</p>	<p>The <i>Amici Curiae</i> submit that the evidence of C-1162 is insufficient to</p>	<p>The Prosecution submits that there is sufficient evidence and</p>	<p>The Trial Chamber finds that there is sufficient evidence to</p>	<p>Colonel Grujic (Ex. 401-403; T. 17292-17318)</p>

<p>WILFUL KILLING</p> <p>TO training centre in Erdut</p>	<p>support this allegation (Motion, at paras. 125-129).</p>	<p>cites C-1162 and Colonel Grujic (Response, at paras. 190-194).</p>	<p>support these allegations. The Motion is not allowed.</p>	<p>C-1162 (Ex. 481 (partially under seal), statement dated 10 June 1999 and addendum dated 17 June 2003)</p> <p>B-071 (Ex. 416, tab 3)</p> <p>Ms. Albert (Ex. 631, statement dated 17 December 1998)</p>
<p>Counts 2-5, para. 58</p> <p>EXTERMINATION, MURDER, AND WILFUL KILLING</p> <p>TO training centre in Erdut</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation (and its level of detail) (Motion, at paras. 130-131).</p>	<p>The Prosecution submits that there is sufficient evidence and cites Dr. Strinovic (Response, at paras. 195-198).</p>	<p>The Trial Chamber finds that there is sufficient evidence to support these allegations. The Motion is not allowed.</p>	<p>Colonel Grujic (Ex. 401-403; T. 17292-17318)</p> <p>C-020 (Ex. 346 (under seal), 347 (partially under seal); T. 12177-12179)</p> <p>B-071 (Ex. 416, tab 3)</p> <p>Dr. Strinovic (T. 17955)</p>
<p>Counts 6-13, para. 64(b)</p> <p>UNLAWFUL CONFINEMENT,</p>	<p>The <i>Amici Curiae</i> submit that there is (1) no direct evidence</p>	<p>The Prosecution concedes that this allegation is</p>	<p>The Trial Chamber finds that there is insufficient</p>	<p>Colonel Grujic (Ex. 401- 403; T. 17292-</p>

<p>IMPRISONMENT, TORTURE, AND INHUMANE ACTS</p> <p>Military barracks in Kumbor in Montenegro</p>	<p>regarding the existence, organisation, and leadership of this particular detention facility, (2) no evidence regarding alleged offences committed there, and (3) no evidence that it was "run by the JNA" (Motion, at paras. 132-136).</p>	<p>unsupported by evidence (Response, at paras. 199-201).</p>	<p>evidence to support these allegations. The Motion is allowed.</p>	<p>17318)</p> <p>General Marinovic (Ex. 374, statement dated 7 August 2000)</p>
<p>Counts 6-13, para. 64(f)</p> <p>UNLAWFUL CONFINEMENT, IMPRISONMENT, TORTURE, AND INHUMANE ACTS</p> <p>Military barracks in Zrenjanin in Serbia</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence because (1) Colonel Grujic was only asked one question by the Prosecution and (2) no evidence was adduced regarding (a) who established and subsequently ran the facility and (b) whether any offences</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at paras. 202-203).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support these allegations. The Motion is allowed.</p>	<p>Colonel Grujic (Ex. 401-403; T. 17292-17318)</p> <p>C-1149 (T. 24267-24268)</p>

	were committed at this camp (Motion, at paras. 137-138).			
<p>Counts 6-13, para. 64(h)</p> <p>UNLAWFUL CONFINEMENT, IMPRISONMENT, TORTURE, AND INHUMANE ACTS</p> <p>Prison in Knin, SAO Krajina</p>	<p>The <i>Amici Curiae</i> submit that there is no direct evidence regarding the existence, conditions, organisation, or possible crimes committed at the prison (Motion, at paras. 139-140).</p>	<p>The Prosecution submits that there is evidence to support this allegation and cites Mr. Babic who testified that he received information from, <i>inter alia</i>, his Minister of Justice (Risto Matkovic) that there were two prisons in Knin where non-Serbs were detained (Response, at paras. 204-205).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support these allegations. The Motion is allowed.</p>	<p>Colonel Grujic (Ex. 401-403; T. 17306)</p> <p>Mr. Babic (T. 13067)</p> <p>C-037 (T. 10452-10453, 10851-10858; Ex. 332 (under seal), statement dated 4 May 2002)</p>
<p>Counts 6-13, para. 64(j)</p> <p>UNLAWFUL CONFINEMENT, IMPRISONMENT, TORTURE, AND INHUMANE ACTS</p> <p>Police buildings and the hangar near the railway station in Dalj, SAO SBWS</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence because no evidence was adduced that this facility was administered by the JNA and Mr.</p>	<p>The Prosecution submits that there is sufficient evidence and cites C-013 who testified regarding the co-operation between the JNA, the local Serb TO, and</p>	<p>The Trial Chamber finds that there is sufficient evidence to support these allegations. The Motion is not allowed.</p>	<p>C-013 (T. 14148, 15127-15128, 15148-15151, 15158, 15169-15172, 15234-15236, 15300)</p>

	Sutalo expressly testified to the contrary (Motion, paras. 139-140).	the SAO SBWS government led by Goran Hadzic in the SAO SBWS region (Response, at paras. 206-210).		C-1175 (T. 25464-25469) Mr. Sutalo (Ex. 520, statement dated 17 April 1999 and addendum dated 18 June 2003; T. 25576-25578)
Counts 6-13, para. 64(p) UNLAWFUL CONFINEMENT, IMPRISONMENT, TORTURE, AND INHUMANE ACTS Police station in Opatovac, SAO SBWS	The <i>Amici Curiae</i> submit that there is no evidence as to the "police station" in Opatovac operating as a detention facility (Motion, at paras. 144-145).	The Prosecution submits that there is sufficient evidence, but concedes that C-1126 was the only witness to testify about detention and mistreatment in Opatovac (Response, at paras. 211-214).	The Trial Chamber finds that there is insufficient evidence to support these allegations. The Motion is allowed.	C-1126 (Ex. 485, tab 2A (public redacted version), statement dated 13 February 1996 and addendum dated 18 June 2003; T. 23762-23777)
Counts 17-20, para. 71 WANTON DESTRUCTION AND PLUNDER OF PUBLIC OR PRIVATE PROPERTY SAO SBWS: Celija, Sarengrad, and	The <i>Amici Curiae</i> submit the following (Motion, at paras. 146-154): <u>Celija</u> – no evidence: only reference to a mass grave site found at this	The Prosecution submits the following (Response, at paras. 215-224): <u>Celija</u> – concession that there is no evidence to support the	The Trial Chamber finds that there is insufficient evidence with respect to <u>Celija</u> , but sufficient evidence with respect to <u>Nadin</u> , <u>Sarengrad</u> ,	Mr. Kraljevic (Ex. 516, tab 1, statement dated 8 November 1995 and addendum dated 17 June 2003, tab 2) Mr. Babic (T. 13064-

<p>Bapska</p> <p>SAO Krajina: Nadin and Bruska</p>	<p>location;</p> <p><u>Sarengrad</u> – insufficient evidence, citing C-1136;</p> <p><u>Bapska</u> – no evidence.</p> <p><u>Nadin</u> – insufficient evidence, citing C-061; and</p> <p><u>Bruska</u> – insufficient evidence, citing Ms. Denona..</p>	<p>allegation;</p> <p><u>Sarengrad</u> and <u>Bapska</u> – sufficient evidence of heavy shelling by the JNA, citing Mr. Kraljevic;</p> <p><u>Nadin</u> – sufficient evidence, citing Mr. Miljanic and Mr. Babic; and</p> <p><u>Bruska</u> – sufficient evidence, citing Ms. Denona and Mr. Babic.</p>	<p><u>Bruska</u>, and <u>Bapska</u>. The Motion is allowed with respect to <u>Celija</u>, but not allowed with respect to <u>Nadin</u>, <u>Sarengrad</u>, <u>Bruska</u>, and <u>Bapska</u>.</p>	<p>13066, 13400, 13405-13406)</p> <p>Mr. Miljanic (Ex. 501, statement dated 25 July 1996 and addendum dated 19 June 2003)</p> <p>Ms. Denona (Ex. 576, statement dated 25 September 1996)</p> <p>Mr. Sutalo (Ex. 520, statement dated 17 April 1999 and addendum dated 18 June 2003; T. 25575)</p> <p>Colonel Grujic (T. 17290-17301)</p>
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118. **C. BOSNIA INDICTMENT**

119. **1. Genocide and Complicity in Genocide**

120. **(a) The Motion**

121. The *Amici Curiae* submit:

(1) There is no evidence that the Accused possessed the “special intent” required to commit the crime of genocide;²⁰⁷ however, no concessions or admissions are

made in relation to proof of the crime of genocide at this stage in the proceedings.²⁰⁸

(2) There has been no evidence of acts and/or conduct of the Accused which could be interpreted as declarations of an intention to commit genocide.²⁰⁹

(3) The crimes in Schedules A, B, and C of the Bosnia Indictment, if proved, do not provide evidence of the specific intent for the crime of genocide by their scale or context, which was primarily territorial in nature.²¹⁰

(4) There is no evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of genocide, or any genocidal acts.²¹¹

(5) There is no evidence that the crime of genocide was within the object of the alleged joint criminal enterprise, and the special intent required for genocide is not compatible with the *mens rea* requirement for a conviction pursuant to the third category of joint criminal enterprise; the Prosecution must prove that the Accused possessed the specific intent required for genocide before a conviction can be entered.²¹²

(6) The specific intent requirement of genocide cannot be reconciled and is not compatible with the simple *mens rea* requirement of command responsibility.²¹³

(7) In the alternative, there is insufficient evidence that the Accused exercised “effective control” over the perpetrators of the alleged crime of genocide. Furthermore, there is no evidence that (1) a subordinate to the Accused killed individual Bosnian Muslims or Bosnian Croats with the intent to destroy them as a group and (2) the Accused “knew or had reason to know” that a subordinate was about to commit genocide, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.²¹⁴

(8) In relation to Count 2 (complicity in genocide), there is no evidence that the Accused knowingly aided or abetted one or more persons to commit genocide.²¹⁵

(b) The Law

(i) The Required Intent

122. The definition of genocide in Article 4(2) of the Statute is taken *verbatim* from Article II of the 1948 Genocide Convention.²¹⁶ It provides as follows:

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical

- destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

123. The intent required for genocide has been referred to as “special intent”, “specific intent”, or *dolus specialis*, terms which have been used interchangeably to describe the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.²¹⁷ Thus, for the enumerated acts proscribed in Article 4(2) of the Statute to constitute genocide, it has to be proved that, in addition to the criminal intent accompanying the underlying offence (*e.g.*, killing), the perpetrator also intended to destroy, in whole or in part, a protected group.²¹⁸

124. While it is not impossible to have express evidence of the required intent, most usually the intent will have to be inferred from the evidence. In *Prosecutor v. Jelusic*, the Appeals Chamber held that in the absence of direct evidence, proof of specific intent may be inferred from

a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.²¹⁹

125. The Prosecution has conceded that “there is little direct evidence to that precise effect, such as a specific order to commit genocide signed by the Accused or a confession by him”.²²⁰ However, the Prosecution submits that the Trial Chamber must look at all the facts and circumstances proved in the Prosecution case and that “if a sufficient number of circumstances can be objectively identified that together demonstrate a coherent series of actions on the part of the Accused, a reasonable tribunal of fact would be entitled to draw the necessary inference that the Accused did intend the destruction of part of the Bosnian Muslim group”.²²¹

126. The Prosecution submits that “the inferences from the crime-base evidence, together with evidence of the actings and role of the Accused himself, allow the Trial Chamber at this stage to hold that the Accused did possess the requisite intent to destroy in whole or in part a national, ethnical, racial or religious group as such”.²²²

127. Genocide is a discriminatory crime in that, for the crime to be established, the underlying acts must target individuals because of their membership of a group. The perpetrator of genocide selects and targets his victims because they are part of a group that he seeks to destroy.²²³ This means that the destruction of the group must have been sought as a separate and distinct entity.²²⁴ According to the International Law Commission, “the action taken against individual members of the group is the means used to achieve the ultimate objective with respect to the group”.²²⁵ As held by the Trial Chamber in *Prosecutor v. Sikirica*,

Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, the individuals belonging to that group.²²⁶

128. It is the material destruction of the group which must be intended and not the destruction of its identity. As noted by the International Law Commission in 1996,

As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.²²⁷

129. Since the acts in Article 4(2) of the Statute are only required to be committed with an intent to destroy the protected group, it is clear that the actual destruction of the group need not take place. However, the extent of the actual destruction, if it does take place, will more often than not be a factor from which the inference may be drawn that the underlying acts were committed with the specific intent to destroy, in whole or in part, a specific group as such.²²⁸

130. What matters for the purpose of the legal requirements of genocide is the aim that the perpetrator intends to achieve. In its *Advisory Opinion on the Legality of Nuclear Weapons*,²²⁹ the International Court of Justice examined whether the deployment of atomic armaments could be considered genocide. The Court noted that “the prohibition of genocide would be pertinent... if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such”; in order to determine whether the intent to commit genocide is present, “due account of the circumstances specific to each case” must be considered.²³⁰

(ii) Determination of Intent to Destroy Part of a Group

131. Perhaps more complex is the question of how much of a group a perpetrator must intend to destroy in order to meet the legal requirements of genocide as distinct from how much of the group must physically be destroyed. One of the earliest academic commentators on the Genocide Convention, Nehemiah Robinson, argues that genocide is aimed at destroying “a multitude of persons of the same group,” as long as the number is “substantial”.²³¹

132. The United Nations Expert Study on Genocide considered that the term “in part” implied “a reasonably significant number, relative to the total of the group as a whole, or else a significant section of the group such as its leadership”.²³² Dealing with the same question, the International Law Commission observed that

it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.²³³

133. This interpretation is also reflected in the Judgements of the International Criminal Tribunal for Rwanda. In *Prosecutor v. Kayishema & Ruzindana*, the Trial Chamber found that the phrase “in part” required “the intention to destroy a considerable number of individuals who are part of the group”.²³⁴ Similarly, in *Prosecutor v. Bagilishema*, the Trial Chamber considered that “the intention to destroy must target at least a substantial part of the group”.²³⁵

134. In *Prosecutor v. Jelusic*, the Trial Chamber held that genocide must involve the intent to destroy a “substantial” part of a group.²³⁶ As to the exact determination of what would amount to a “substantial part”, the same Trial Chamber observed that

a targeted part of a group would be classed as substantial either because the intent sought to harm a large majority of the group in question or the most representative members of the targeted community.²³⁷

135. Similarly, in *Prosecutor v. Sikirica*, the Trial Chamber held that the intent to destroy a group may be established if the destruction is related to a significant section of the group, such as its leadership.²³⁸

136. However, the operative requirement is that of substantiality, and the intention to destroy a significant section of the group such as its leadership is not an “independent consideration”,²³⁹ but an element that may establish that requirement. In *Prosecutor v. Krstic*, the Appeals Chamber held:

In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.²⁴⁰

(c) Territorial Scope of the Bosnia Indictment

137. Before proceeding to examine the Motion, it is necessary to determine the geographical area to which the charges of genocide relate.

138. Paragraph 32 of the initial Bosnia Indictment dated 22 November 2001 lists in a non-exhaustive manner the territories in respect of which the Accused is charged with genocide; it charges the Accused with “... the destruction, in whole or in part, of the Bosnian Muslim and Bosnian Croat national, ethnical, racial or religious groups, as such, in territories within Bosnia and Herzegovina, including: Bijelina ; Bosanski Novi; Bosanski Samac; Bratunac; Brcko; Doboj; Foca; Sarajevo (Ilijas); Kljuc; Kotor Varos; Sarajevo (Novi Grad); Prijedor; Rogatica; Sanksi Most; Srebrenica ; Visegrad; Vlasenica and Zvornik”.²⁴¹

139. However, in its Pre-Trial Brief submitted on 31 May 2002 pursuant to Rule 65ter, the Prosecution indicated that it would not seek to prove that genocide was committed against the Bosnian Croats and that it intended to proceed to prove the crime of genocide only in respect of seven municipalities: Bosanski Novi, Brcko, Kljuc, Kotor Varos, Prijedor, Sanski Most, and Srebrenica.²⁴² Thus the areas in respect of which the Prosecution would seek to prove genocide were confined to the seven named territories.

140. In the amended Bosnia Indictment of 22 November 2002, the territories of Zvornik and Bratunac were expressly deleted as territories on which the Prosecution relied to establish genocide.²⁴³

141. In its Response to the Motion, the Prosecution submitted that it had led evidence on four municipalities: Brcko, Sanski Most, Prijedor, and Srebrenica.²⁴⁴ Thus, the specific areas to be considered for the crime of genocide were further limited. But the Prosecution also submits, in a footnote, that there is “limited

evidence” in relation to Kotor Varos, Kljuc, and Bosanski Novi.²⁴⁵ It asserts that genocidal acts were perpetrated in other municipalities, “in fact wherever required to implement the strategic objective of the SDS leadership”,²⁴⁶ and that there is sufficient evidence of crimes within the meaning of Article 4(2) of the Statute in municipalities other than the identified four, including Zvornik and Bratunac.²⁴⁷ The Prosecution also refers to other evidence (*e.g.*, in relation to Bijeljina and Teslic)²⁴⁸ that it submits supports its case that genocide was committed in a number of other municipalities. However, Teslic is not referred to either in the initial or amended Indictments, or in the Pre-Trial Brief, as a territory on which the Prosecution relies to establish genocide.

142. In the light of this history of the Bosnia Indictment and the Prosecution submissions thereon relating to genocide, the Trial Chamber will consider genocide in the following territories in Bosnia and Herzegovina: Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kotor Varos, Kljuc, and Bosanski Novi (“the specified territories”).

(d) Analysis of the Motion

143. The Chamber recalls the analysis set out in Part III of this Decision and its conclusion that “sufficient evidence” is evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the Accused in relation to a specific allegation in the amended Bosnia Indictment. Essentially, the Motion challenges the sufficiency of the Prosecution’s evidence in respect of Count 1, which charges the Accused with genocide, and Count 2, which charges the Accused with complicity in genocide. The specific submissions in the Motion are set out above.²⁴⁹

144. The Prosecution submits that the Accused participated in a joint criminal enterprise, the objective of which was the destruction of the Bosnian Muslim group in that part of the territory of Bosnia and Herzegovina intended to be included in the Serbian state.²⁵⁰ According to the Prosecution, members of that joint criminal enterprise included the Bosnian Serb leadership, notably Radovan Karadzic and Ratko Mladic.²⁵¹

145. The Chamber proposes to examine the Motion by considering the following questions :

(1) Is there evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt that the Accused was a participant in a joint criminal enterprise, the aim and intention of which was to destroy, in whole or in part, the Bosnian Muslims as a group?

(2) Is there evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt that the Accused was a participant in a joint criminal enterprise to commit other crimes than genocide and it was reasonably foreseeable to him that, as a consequence of the commission of that crime, genocide, in whole or in part, of the Bosnian Muslims as a group, would be committed by other participants in the joint criminal enterprise, and it was committed?

(3) Is there evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt that the Accused aided and abetted in the commission of the crime of genocide, in whole or in part, of the Bosnian Muslims as a group?

(4) Is there evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt that the Accused was complicit in the commission of the crime of genocide, in whole or in part, of the Bosnian Muslims as a group?

(5) Is there evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt that the Accused knew or had reason to know that persons subordinate to him were about to commit or had committed genocide, in whole or in part, of the Bosnian Muslims as a group, and he failed to take the necessary measures to prevent the genocide or to punish the perpetrators thereof?

146. In the sections of the Decision that deal with evidence, the Trial Chamber will set out the evidence (whether from witnesses or documents) in a summary form without reflecting its own analysis of that evidence. The Trial Chamber's analysis of the evidence is set out in sections headed "finding". In the evidence section, therefore, there is nothing that reflects the view of the Trial Chamber; it is simply a summarised narration of the evidence with sources referenced. The evidence may not be exhaustive of all the evidence supporting the charges in Counts 1 and 2.

(i) Is there evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt that the Accused was a participant in a joint criminal enterprise whose intention was to destroy, in whole or in part, the Bosnian Muslims as a group?

147. An analysis of this question ("First Question") calls for an examination of the following issues:

(a) Whether a Trial Chamber could be satisfied beyond reasonable doubt that there existed a joint criminal enterprise, the aim and intention of which was to destroy, in whole or in part, the Bosnian Muslims as a group, and whether genocide was, in fact, committed ; and

(b) Whether there is evidence upon which a Trial Chamber could be satisfied that the Accused was a participant in the joint criminal enterprise described in (a), and that he shared the intent of its participants.

a. Whether a Trial Chamber could be satisfied beyond reasonable doubt that there existed a joint criminal enterprise, the aim and intention of which was to destroy, in whole or in part, the Bosnian Muslims as a group, and whether genocide was, in fact, committed.

148. The Prosecution asserts that in those municipalities identified in the Bosnia Indictment, a significant section of the Bosnian Muslim groups, namely their leadership, as well as a substantial number of members of the groups as a whole, were targeted.²⁵² According to the Prosecution, the evidence supports a finding that there was a systematic pattern according to which municipalities in Bosnia and Herzegovina targeted for inclusion in the Serbian state were taken over by the Bosnian Serbs and that a systematic pattern developed according to which Serb forces set the framework for the commission of and committed genocidal and persecutory crimes.²⁵³

i. Evidence relating to the takeover of municipalities

Existence of a Plan or Policy for the Takeover of Municipalities: Variant A and B

149. Around 20 December 1991, B-024 attended a meeting of the RS Assembly, which was held at the Holiday Inn Hotel in Sarajevo; also in attendance were deputies of the RS Assembly and Presidents of the Municipal Boards, along with Radovan Karadzic, Momcilo Krajisnik, and Biljana Plavsic of the SDS.²⁵⁴ They identified precise steps to be taken within the respective municipalities in order to establish Bosnian Serb control.²⁵⁵ The Presidents of the Municipal Boards of the SDS Party were given a document outlining actions to be taken in times of crisis.²⁵⁶ There were two plans: Plan A applied to municipalities in which the Serbs had a majority, and Plan B applied to municipalities in which the Serbs were a minority.²⁵⁷ There is little variance between the two plans, except that Plan A emphasised the need to respect the rights of nations, and Plan B emphasised the need to rally together with larger Serbian territories to protect the Serbian population.²⁵⁸

150. During the 50th session of the RS Assembly held in April 1995, Radovan Karadzic acknowledged the Variant A and Variant B Plans, stating, “In the moment the war began, in the municipalities where we were in the majority, we had municipal power, held it firmly, controlled everything. In the municipalities where we were in the minority, we set up secret government, municipal boards, municipal assemblies and presidents of executive boards. You will remember the A or B variant. In the B variant, where we were in the minority – 20 percent, 15 percent – we had to set up a government and a brigade, a unit no matter what size, but there was a detachment with a commander”.²⁵⁹

151. Six Strategic Goals were approved at the 16th session of the RS Assembly in May 1992 as a guide for Serbian unification within the following four years.²⁶⁰ These steps were (1) separation from the other two national communities and a separation of states, (2) establishment of a corridor between Semberija and Krajina, (3) establishment of a corridor in the Drina Valley, (4) establishment of a border on the Una and Neretva rivers, (5) division of Sarajevo into Serbian and Muslim parts, and (6) establishment of access of RS to the sea.²⁶¹

Brcko

152. The municipality of Brcko is located in north-eastern Bosnia and Herzegovina. The population in Brcko municipality in 1991 was approximately 72,926, with around 31,186 (43 percent) of the population being of Muslim ethnicity.²⁶² In 1997-1998, the population of Brcko (RS) was approximately 20,752, with around 546 (2.6 percent) of the population being of Muslim ethnicity.²⁶³ In 1997-1998, the population of Rahic/Ravne (Brcko FBiH) was 12,871, with around 10,023 (77.9 percent) of the population being of Muslim ethnicity.²⁶⁴
153. There was a JNA garrison located in Brcko; and Mr. Gasi, whose garden overlooked the JNA garrison, noticed that from 1990 to 1992 many JNA arms and convoys of military personnel passed through Brcko, some of which remained at the JNA garrison.²⁶⁵ The witness also saw a similar build-up in the Serb villages around Brcko, while no such build-up occurred in Muslim villages.²⁶⁶ Checkpoints along the roads outside the town began to appear from mid-1991 to the spring of 1992, manned by JNA military police and civilian police from Brcko.²⁶⁷
154. Members of the SDS issued an ultimatum in the parliament of the municipality of Brcko that Brcko should be partitioned into a Serb municipality of Brcko, a Croatian municipality of Brcko, and a Muslim municipality of Brcko.²⁶⁸ The SDS stated that the partitioning had to be accomplished by 4 May 1992 and that, after this date, no negotiations would be possible.²⁶⁹
155. The takeover of Brcko municipality began on 30 April 1992 with the detonation of two bridges over the Sava River.²⁷⁰ Mr. Ramic testified that the bombing of the bridges caused many casualties because approximately 150 people were crossing at the time.²⁷¹ A few minutes after the first bridge was destroyed, the railway bridge was also detonated.²⁷² These events caused panic in the town.²⁷³
156. B-1405 testified that, while detained in the house of a Muslim in Brcko by Simo Radovanovic (a.k.a. "Captain"), who was a member of the Red Berets from Serbia, she worked like a servant and was used as an object of sexual gratification. Also during this time, the witness overheard Simo Radovanovic saying, "Oh, we didn't know that there would be so many people on that bridge at the time".²⁷⁴
157. Captain Rade Bozic of the JNA told Mr. Gasi that he was responsible for the operation and that he regretted it due to the civilian casualties.²⁷⁵ About a month before the takeover, Mr. Gasi saw JNA helicopters landing at the JNA garrison, out of which emerged individuals wearing red berets and "olivey" green camouflage uniforms.²⁷⁶ Later, Captain Bozic told the witness that the men were "members of those special units of the JNA and under direct command... (of Captain Dragan's soldiers that came from Serbia)".²⁷⁷
158. On 1 May 1992, Captain Petrovic appeared on television to inform the people that "the army unit... the military police force security", of which he said he was the Captain, "had been given the mandate to take over the control of Brcko within 48 hours".²⁷⁸ On 3 May 1992, Mr. Gasi saw soldiers with all kinds of uniforms (JNA, camouflage, reserve, regular) on the streets. On 4 or 6 May 1992, two JNA airplanes bombed Muslim and Croat parts of town.²⁷⁹

159. On 7 May 1992, Mr. Gasi witnessed executions of civilians in the town of Brcko.²⁸⁰ These executions were perpetrated by soldiers wearing camouflage uniforms of an olive-grey colour and a man in a blue police uniform.²⁸¹ On 12 May 1992, the witness saw men in camouflage SMB uniforms in front of the Galeb Hotel guarding dead bodies in civilian clothing.²⁸²
160. While detained at Luka Camp from 27 May to 7 June 1992, Mr. Gasi also saw bodies being unloaded from refrigerated meat trucks and then buried in a mass grave with a bulldozer by soldiers in camouflage grey and olive-green uniforms.²⁸³ Although the witness did not see any JNA personnel killing anyone, he did see Ranko Cesic, who belonged to the JNA and who was wearing a camouflage uniform of the JNA, kill two men.²⁸⁴
161. After the destruction of the bridges on 30 April 1992, B-1011 was detained in the Posavina Hotel, where he saw four dead bodies that were dressed in civilian clothes and appeared to have been recently killed.²⁸⁵ There were 25 detainees, and the witness saw Jelusic beat some of them.²⁸⁶ Sadik Ljaljic, an older Muslim man from Brcko was beaten and, when he complained, was separated out from the group and shot.²⁸⁷ The detainees were lined-up on the terrace of the hotel, and then the witness and some others were taken from the hotel to the SUP building. As the witness was entering the SUP building, he heard a burst of gunfire coming from where the detainees had been lined-up on the terrace.²⁸⁸ He saw Jelusic standing in front of the group, and he had a firearm in his hands. The men who had been lined-up on the terrace had fallen to the ground and were lying haphazardly as if they had been executed. The witness was able to identify by name six of the persons who had been standing with him on the terrace of the Posavina Hotel and to describe seven others. None of the people in the group has ever been seen again.²⁸⁹
162. B-1407 testified that he witnessed what he thought were paramilitaries escorting prisoners from the SUP building. Jelusic was among these paramilitaries. These prisoners were shot in the vicinity of the SUP building.²⁹⁰
163. Many Muslim men of Brcko were detained in Luka Camp in May and June 1992.²⁹¹ Witnesses gave testimony describing the manner in which these detainees were transported by bus to Luka Camp in Brcko.²⁹² The number of detainees incarcerated there varied on a daily basis; and B-1408 estimated that the number of detainees could have been up to 1,500 at any given time.²⁹³ The conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings.²⁹⁴ Jelusic personally participated in these beatings and executions.²⁹⁵
164. One of the detainees was B-1408, who was transferred to Luka Camp on 8 May 1992 with about four or five busloads of other detainees.²⁹⁶ When they disembarked from the buses, all their personal belongings, including identification papers, were taken from them; they were then placed in “the hangar”.²⁹⁷ Many of the detainees were called out, beaten, and executed – Jelusic personally participated in beatings with batons, sticks, and electric and telephone cables.²⁹⁸ B-1408 saw men from [eselj]’s or Arkan’s group kill a Serb who had tried to help a Muslim flee the former Yugoslavia; later that night, the soldiers killed the Muslim, who was an active member of the SDA.²⁹⁹

165. At Luka Camp, B-1408 and other detainees were forced to remove the bodies, which typically had marks of beatings and gunshot wounds to the back of the head.³⁰⁰ The witness personally moved about 12 to 15 bodies and saw approximately 100 bodies stacked up like firewood at Luka camp; each day a refrigerated meat truck from the local Bimeks Company in Brcko would come to take away the dead bodies.³⁰¹ On another occasion, Jelusic said around noon, “Well, I’ve killed seven people so far. I’m going to kill another eight, and that will do for the day”.³⁰²
166. Around 3 or 4 May 1992, B-1450, a female Bosnian Muslim, was taken to Luka Camp where she saw about 50 men forced to line up against a wall and heard someone yell, “Ready”; she heard many gun shots and saw bodies falling down to the ground.³⁰³ Subsequently, the witness was taken out of the camp to Sava River and raped at knifepoint.³⁰⁴
167. Mr. Gasi described the brutal treatment to which the detainees were subjected.³⁰⁵ The witness saw, on one occasion, the killing of at least two people who were detained at Luka Camp. One of the perpetrators of these killings was one of the witness’s former Serb neighbours, named Ranko ^esic.³⁰⁶ According to the witness, Jelusic was among the people who physically abused men detained at Luka Camp.³⁰⁷ The witness was forced to help dispose of corpses at Luka Camp into the River Sava.³⁰⁸
168. Mr. Ramic, who was involved in the formation of the SDA and elected Mayor of Brcko in 1990, estimated that, out of the 1991 pre-conflict population of Brcko (87,000), most of the population fled after the hostilities began, leaving about 10,000, of whom about 3,000 were Bosniak.³⁰⁹ Of the 3,000 Bosniaks who remained, about 2,000 were either killed or missing.³¹⁰ The plan of the SDS was to reduce the Bosniak population down to the level of 10 percent, including Bosniaks and Croats.³¹¹
169. Mr. Ramic stated that, on 3 May 1992, thirty young people, at least three of whom were members of a Muslim youth organisation encouraging young people to become SDA members, were killed; Jelusic participated in these killings.³¹² The witness testified about the political structure of Brcko and identified by name prominent Bosniaks from Brcko and members of the SDA who were killed on the first day of the conflict.³¹³
170. B-1408, who was detained with others at the Laser Bus Company, testified about an incident on 6 or 7 May 1992 when a man showed up with two others wearing masks with slits for their eyes.³¹⁴ The man stated, “Muslims, in case you didn’t know, my name is Jelusic, nicknamed Adolf. I’ve killed 80 Muslims so far, and I’ll finish all of you too”.³¹⁵ People were then called out by their surnames and beaten, because their names were recognised as belonging to those who had been organisers of the SDA. The witness remembers the surname “Causevic” as one of these names.³¹⁶ Although the witness was not certain, he testified that he thought some people were taken to Luka Camp because they were members of the SDA.³¹⁷
171. On 15 May 1992, B-1411, who was a member of the SDA, was brought to the office in Luka Camp and interrogated by Jelusic, who accused the witness of being an extremist.³¹⁸ Jelusic asked the witness about various people, including the

Ramic brothers, one of whom was the Mayor of Brcko and the other, the President of the SDA.³¹⁹ Jelusic accused the witness of being a member of the Patriotic League and accused the SDA of hiding weapons in the basement of the mosque; the witness admitted that he was a member of the SDA, but denied the rest.³²⁰

172. During the interrogation, B-1411 saw Jelusic circle the names of three people on a list and order them to be brought into the office.³²¹ When the three Bosnian Muslims (between 20 to 25 years of age) were brought to the office, Jelusic interrogated them, beat one of them, and then took them out of the office.³²² The witness heard gunshots and screaming.³²³

Sanski Most

173. In 1991, the population of Sanski Most was about 50,293, with around 22,830 (45.4 percent) of the population being of Muslim ethnicity.³²⁴ In 1997-1998, the population of Sanski Most (RS) was 1,114, with around three members (0.2 percent) of the population being of Muslim ethnicity.³²⁵ During the same period, the population of Sanski Most (FBiH) was 16,341, with around 15,586 (95.4 percent) of the population being of Muslim ethnicity.³²⁶

174. In early April 1992, the 6th Light Partisan Brigade was transferred from Croatia to Sanski Most with mortars, rocket launchers, and a B1 gun.³²⁷ The operation in Sanski Most began on 26 May 1992.³²⁸ B-108 testified that the speech of Radovan Karadzic, in which he instructed people to be prepared to take over the SDK decisively, accurately reflects the events in Sanski Most.³²⁹

175. In the weeks afterwards, no attention was paid to ensuring respect for the rights of other nationalities as required by Variant A document.³³⁰ Almost all non-Serbs were removed from positions of authority.³³¹

176. Subsequent to the beginning of operations, there was evidence submitted regarding the killing of Muslim civilians by Bosnian Serb forces.³³² Mr. Begic testified that on 31 May 1992 about 20 men (including the witness) were told they were being taken to Vrhpolje Bridge.³³³ All the men were shot as they were forced to jump off the bridge – the witness was the only one to survive.³³⁴ B-1044 testified that at the end of May 1992 he was told by a Serbian neighbour that all the male inhabitants of the small hamlet of Begici, in Kljevci, had been killed.³³⁵

177. B-1611 testified that on 31 May 1992 a group of about 30 people, including children, took refuge in a garage, in Merdanovici.³³⁶ When soldiers entered the village, three of them approached the garage, started shooting at the garage, and demanded that everyone come out.³³⁷ Husein Merdanovic, an unarmed civilian, exited the garage and attempted to tell the soldiers that women and children were inside, but was instantly killed.³³⁸ The Serb soldiers continued to fire with rifles into the garage.³³⁹ The witness fled the garage and hid about 15 or 20 metres away, where she was able to see several dead and wounded bodies of women and children.³⁴⁰ The witness then fled to a neighbour's house.³⁴¹ She later learned that the other people in the garage were dead, including her sister.³⁴²

178. B-108 testified that in June 1992 more than 25 Muslims were killed during the cleansing-operations on the Sana bridge in Vrhopolje and that 19 Muslims

- were killed in Kenjani village.³⁴³ In addition, the witness received an assignment from Colonel Ancic to remove the entire civilian population in Podbrize in early June 1992.³⁴⁴ The entire civilian population was taken to the Krings Hall and then transported by bus in the direction of Bihac.³⁴⁵ The witness first saw Arkan's men in Sanski Most in September 1995; Arkan's men withdrew, one month later, after the Federation's forces attacked on 10 October 1995. During the one month period when Arkan's men were in Sanski Most, many Muslim civilians were killed – to the witness's knowledge 60 or 70 people in the village of Sasina.³⁴⁶
179. Civilians of Sanski Most were detained under inhumane conditions in the Krings Factory, at Betonirka garages, and at the Sports hall.³⁴⁷ The commander of the prison was from the police station, and the men were detained on the authority of the SDS.³⁴⁸ All those detained in the Sports Hall and garages were detained on the basis of the criteria laid down by the SDS.³⁴⁹
180. Mr. Muhic testified that about 1,000 people, including men, women, and children, were detained in a Sports hall in June of 1992 in the centre of Sanski Most.³⁵⁰ B-108 testified that they were detained under absolutely inhumane conditions.³⁵¹ They did not have the minimum requirements for personal hygiene.³⁵² At that time the temperatures were very high in Sanski Most, and the food they were given was only what their families could bring them.³⁵³ On 18 June 1992, Mr. Zulic was arrested and taken to the Betonirka factory, which was located about 100 to 150 metres from the police station and had been converted into a detention facility.³⁵⁴ It consisted of a main building and three small, metal garages. Mr. Zulic was locked in the first garage, which already held about 30 detainees.³⁵⁵ There was not enough room, it was insufferably hot, and they were regularly beaten and humiliated by the Serbian guards.³⁵⁶ Mr. Zulic also testified that the guards carved a sign of the cross on his chest with a knife.³⁵⁷ On 22 June 1992, the witness was present when about 19 men were murdered at Kriva Cesta, which is about two kilometres from Betonirka.³⁵⁸ The witness was given a hoe, ordered to join about 20 to 25 other men, and start digging his own grave.³⁵⁹ At a picnic table about a hundred metres away, the witness saw the then SDS president of the municipality, Professor Nedeljko Rasula, in civilian attire, as well as others wearing camouflage and former olive-grey JNA uniforms.³⁶⁰ All of the men except three were executed.³⁶¹
181. B-1684 testified that on 1 August 1992 at noon, Serb soldiers in olive-drab uniforms with red bands tied on their epaulettes arrived in the area, broke into the witness's house in Lukavica, and searched it.³⁶² After searching his home, the soldiers took the witness towards his parents' home located down a nearby hill. As the witness was going down the hill, he saw a group of 14 people, consisting of his male relatives.³⁶³ When the witness asked the soldiers if they would be beaten or killed, the soldiers told him to return home. The witness was allowed to leave, and he sought the assistance of a Serb neighbour, who declined to help for fear that he would also be killed. When the witness later returned home, the women told him that all 14 of his relatives had been killed.³⁶⁴ The witness later recovered the corpses, which were full of bullets and disfigured from automatic gunfire at close range.³⁶⁵ Among the dead were his father and 22-year old brother.³⁶⁶ He is the only male survivor from his village.³⁶⁷

182. Many detainees of the Betonirka factory and the Sports hall were later driven from Sanski Most to Manjaca prison camp in Banja Luka.³⁶⁸ Mr. Zulic was among the 64 men taken from Betonirka factory to Manjaca camp, and, *en route*, a number of detainees died.³⁶⁹ Mr. Zulic testified that, at the Manjaca camp, they were beaten with clubs, cables, bats, or other similar items by the military police.³⁷⁰ The men were placed in small, bare stables, which were overcrowded and contained no toilet facilities.³⁷¹ While at the camp, the detainees received inadequate food and water.³⁷² Their heads were shaved, and they were severely beaten during interrogations.³⁷³ Mr. Zulic himself was beaten in the infirmary.³⁷⁴

Prijedor

183. The municipality of Prijedor is located in northwestern Bosnia. The population in Prijedor municipality in 1991 was approximately 94,028, with around 40,075 (42.6 percent) of the population being of Muslim ethnicity.³⁷⁵ In 1997-1998, the population of Prijedor was 39,248, with approximately 397 (1 percent) of the population being of Muslim ethnicity.³⁷⁶
184. Mr. Mesanovic testified that in 1991, when Yugoslavia was still a unified state, orders came from Belgrade for the TO in Prijedor to mobilise. Only people of Serb ethnicity were mobilised in 1992.³⁷⁷ Although there was no need for self-defence in spring 1992, weapons were publicly distributed to the local Serb population in Prijedor.³⁷⁸ Most Muslims had responded to the mobilisation call-up in 1991, but already at the beginning of 1992, a large number of them left the JNA. Only a small number remained within the JNA.³⁷⁹
185. On 23 May 1992, members of the Serb army fired at a concentration of Bosnian Muslim villages called Brdo, which is made up of Zecovi, Carakovo, Hambarine, Rakovcani, Rizvanovici, and Bišcani. Hambarine fell on 23 May 1992.³⁸⁰
186. Mr. Selak served in the JNA from 1955 until his request for retirement was formally granted in September 1992.³⁸¹ On 27 May 1992, there was a daily reporting with Colonel Marcetic and General Tali c about the events in Kozarac, at which Colonel Marcetic reported that on that day in Kozarac 800 “citizens” were killed and 1,200 were taken prisoner. Mr. Selak thought the number killed was actually 2,000 and that the number had been diminished because he was the only Bosniak present. General Tali c then looked at Colonel Marceti c and stated, “You mean that 80 persons were killed... that is the information that you are supposed to send to the general staff”. This information was then recorded and signed by Colonel Marcetic in his report to the 1st Krajina Corps command. The witness said that General Tali c did this because he knew he would be held accountable and that he was violating international law.³⁸² Mr. Selak testified that “a genocide occurred (in Prijedor), ethnic cleansing” because of the large discrepancy in casualties between the 343rd Motorised Brigade and the Muslims.³⁸³
187. At the end of May 1992, after the take-over of Prijedor and the outlying areas, the Serb forces confined thousands of Muslim and Croat civilians in the Omarska, Keraterm, and Trnopolje detention camps.³⁸⁴

188. B-1805 was a member of the Intervention Platoon in the Prijedor police, which was given lists of lawyers, doctors, and other prominent Muslims who were specifically targeted for arrest.³⁸⁵ He testified that most of the civilians who were taken out of their houses in the Brdo operation during the clearing up of the terrain of Hambarine, Carine, Pisare, Rizvanovici, *etc.*, did not end up at the police station to be interrogated, but instead were directly taken to the camps without any investigation or accompanying procedures.³⁸⁶ A large majority were unarmed and innocent civilians.³⁸⁷
189. B-1805 testified that in both Bišcani and Carakovo he saw the military forcing the Muslim men, women, and children out of their homes and making them gather at a central location where pre-arranged trucks and buses were waiting. The buses were owned by Transport Prijedor and Ljubija mines.³⁸⁸ Approximately 2,000 civilians were driven out of their homes and taken to detention camps in Prijedor. So far as the witness was aware, these civilians were not guilty of anything.³⁸⁹ After the Carakovo operation, the witness saw between eight and ten military trucks transporting Muslim bodies from the Brdo area.³⁹⁰ Between Ljubija and Carakovo, at a hamlet called Raljaš, the witness saw 30 to 50 recently killed Muslim civilians. B-1805 thought that it looked like an execution, because the bodies were scattered over approximately 100 square meters and no weapons were found on the bodies.³⁹¹
190. B-1805 testified that on 21 August 1992 over 100 men were taken off two buses being driven out of Prijedor by the Intervention Platoon. The prisoners were taken off the buses at Koricanske Stijere (Vlasic Mountain) in groups and then taken to the edge of the cliff, where they were shot.³⁹² Some of those who were executed fell off the cliff; and those who did not fall were pushed over either by members of the intervention platoon or by the prisoners who were brought after them to be shot. The prisoners on the cliff pleaded for their lives before being shot. All the prisoners from both buses were killed in this way and grenades were thrown over the edge of the cliff onto their bodies in order to finish off anyone who was still alive. The whole process took about 30 minutes.³⁹³
191. Mr. Garibovic, who survived the killings, testified that he had boarded a bus with about 150 men and they were lined up at Vlasic Mountain and shot at from behind. The witness survived and escaped to the woods. The witness heard the moaning of dying people the entire night. The witness and another man wandered around for 2 to 3 days on Mount Vlasic.³⁹⁴
192. B-1032 testified that on 23 July 1992 he was ordered to drive a truck and collect bodies in Ravine. Over a two-day period, he collected bodies from the Biscani-Rizvanovici area that covered a distance of roughly eight kilometres. The witness collected about 300 to 350 bodies in total and the witness testified that 90 percent of the bodies were Muslims and a small percentage were Croats.³⁹⁵
193. Ultimately non-Serbs were divided into two groups: one which consisted of men aged between 12 to 15 and 60 to 65, and one of women, children, and elderly men.³⁹⁶ Generally the men were taken to the Keraterm and Omarska detention camps and the women to the Trnopolje detention camp.³⁹⁷ During confinement, both male and female prisoners were subjected to severe mistreatment, which included beatings, sexual assaults, torture, and executions.³⁹⁸

- Prisoners were guarded by soldiers, police forces, local Serb military or TO units, or a combination thereof, who were dressed in uniforms and generally had automatic rifles and other weapons on their persons. The guards cursed the prisoners, referring to them as “Balijas” or “Ustasa”.³⁹⁹ Members of paramilitary organisations and local Serbs were routinely allowed to enter the camps to abuse, beat, and kill prisoners.⁴⁰⁰
194. The Omarska camp consisted of two large buildings, the hangar and the administrative building, and two smaller buildings, known as the “white house” and the “red house”.⁴⁰¹ Omarska held as many as 3,000 prisoners at one time, primarily men, but also had at least 36 to 38 women. With few exceptions, all the prisoners in Omarska were Muslims or Croats. The only Serb prisoners held in Omarska were said to have been there because they were on the side of the Muslims.⁴⁰²
195. Prisoners were held in large numbers in very confined spaces, with little room either to sit or to lie down to sleep.⁴⁰³ Sometimes 200 persons were held in a room of 40 square metres. Three-hundred prisoners were confined in one small room. Some Omarska prisoners spent the time crowded together in the lavatories.⁴⁰⁴ In the lavatories, prisoners were packed one on top of the other and often they had to lie amidst excrement.⁴⁰⁵ The crowded rooms at Omarska were stifling in the summer heat, and often guards refused to open windows in rooms crowded to overflowing or demanded the handing over of any possessions prisoners had managed to retain as the price of an open window or a plastic jar of water.⁴⁰⁶
196. Mr. Mesanovic was taken to Omarska camp on 24 June 1992 and left on 6 August 1992.⁴⁰⁷ The witness spent the first three days of his detention in the white house and for the rest of the time he was detained in the glass house.⁴⁰⁸ The witness estimated that there were about 3,000 people detained at Omarska Camp.⁴⁰⁹ The witness testified that Ranko Mijic was the person most responsible for the killings and beatings that took place at Omarska camp. Towards the end of July 1992 about 100 people from the Brdo area were taken to the white house and killed.⁴¹⁰ At the camp, the witness slept on ceramic tiles; the food provided and toilet facilities were not adequate.⁴¹¹
197. Among the prisoners, suffering from hunger was acute. The prisoners were fed in batches of about 30 at a time and had to run to and from their daily meal, often being beaten by guards as they came and went.⁴¹² Some prisoners lost 20 to 30 kilograms in body weight during their time at Omarska, others considerably more.⁴¹³ Women who were held at Omarska were routinely called out of their rooms at night and raped. One woman was taken out five times and raped, and after each rape she was beaten.⁴¹⁴
198. After Mr. Mesanovic’s left Omarska camp, he heard that approximately 150 men had been killed at Keraterm camp.⁴¹⁵
199. The Keraterm detention camp, located on the eastern outskirts of Prijedor, was previously used as a ceramic tile factory.⁴¹⁶ The Keraterm camp began operating on 25 May 1992 and held up to 1,500 prisoners crowded into a number of large rooms or halls.⁴¹⁷ Conditions in Keraterm were atrocious; prisoners were crowded into its rooms, as many as 570 in one room, with barely space to lie

- down on the concrete floors.⁴¹⁸ The rooms in Keraterm were unlit, without windows, and in the summer, intensely hot, with no ventilation.⁴¹⁹ Prisoners in Keraterm were kept locked in these rooms for days on end, crowded together.⁴²⁰
200. Beatings were very frequent at Keraterm; prisoners were called out, attacked with bars and batons, and made to beat each other.⁴²¹ There was much calling-out and beating of prisoners at night and those who returned were bloody and bruised all over; some died of their injuries.⁴²² Some who were called out never returned, and prisoners assumed that they had died as a result of the beatings.⁴²³
201. On 23 July 1992 approximately 120-130 Muslim men of military age from the Brdo area were taken to Keraterm camp, including B-1088.⁴²⁴ The conditions in the room were terrible and people were regularly called out and beaten.⁴²⁵ Around 24 July 1992 the witness heard the first burst from the light machine-gun that was about 20 metres away from Room 3 pointing at it.⁴²⁶ There were also some infantry weapons being used, some gunfire and when the door was broken down the shooting became very intense.⁴²⁷ The shooting lasted for roughly four to five minutes. The witness heard several bursts of fire with a pause of a couple of minutes in between. Nobody was allowed to leave the room.⁴²⁸ The witness only saw what had happened in the morning. He estimates that there were about 200 bodies. The bodies of those killed were taken away on a truck. Those who were wounded were also taken away and the witness never saw any of them again.⁴²⁹ The shooting apparently occurred through the closed doors of the room in which those prisoners were confined; these doors had large bullet holes pierced through them.⁴³⁰
202. B-1805 testified that on 24 July 1992 he reported to the Keraterm camp to secure a crime scene. He saw between 100 and 150 dead bodies of prisoners in the camp who had been killed with automatic weapons.⁴³¹
203. The Trnopolje detention camp was located near the Kozarac station, on the Prijedor -Banja Luka railway line.⁴³² The Trnopolje camp held thousands of prisoners, most of whom were older men and women and children.⁴³³ Armed soldiers guarded the camp and the camp commander was Slobodan Kuruzovic.⁴³⁴ No food was supplied by the camp authorities to the prisoners at Trnopolje. Initially, prisoners ate what they had brought with them, and after that they survived on food passed to them by members of the local population.⁴³⁵ Although there was no regular regime of interrogations or beatings, as in the other camps, beatings and killings did occur.⁴³⁶
204. Because the Trnopolje camp housed the largest number of women and girls, there were more rapes at this camp than at any other.⁴³⁷ Girls between the ages of 16 and 19 were at the greatest risk of rape.⁴³⁸ During evenings, groups of soldiers would enter the Trnopolje camp, take out their victims from the Dom building and rape them.⁴³⁹ Women were gang raped. One 19-year old woman was raped by seven men; she subsequently suffered terrible pains and sought medical attention at the clinic for treatment of her haemorrhaging.⁴⁴⁰ These rapes caused terrible fear and mental trauma among all the prisoners.⁴⁴¹ Because of the lack of food and the unsanitary conditions at the Trnopolje camp, lice and scabies were rampant; and the majority of inmates suffered from dysentery, with one estimate

- being as high as 95 percent.⁴⁴² There was no running water at all at Trnopolje, and only limited lavatory facilities.⁴⁴³
205. The Trnopolje camp was the culmination of the campaign of ethnic cleansing because those Muslims and Croats who were not killed at the Omarska or Keraterm camps were sent to Trnopolje, and then deported from Bosnia and Herzegovina.⁴⁴⁴

Srebrenica

206. In 1991, the population of Srebrenica was 29,198 people, 21,361 (73.2 percent) being of Muslim ethnicity.⁴⁴⁵ In 1997-87, the population of Srebrenica was 7,442, with 7 (0.1 percent) being of Muslim ethnicity.⁴⁴⁶
207. According to the evidence of General Morillon, Commander of the UN Protection Force in Bosnia and Herzegovina from September 1992 until July 1993, and Ambassador Arria, Head of the UN Security Council Mission to Bosnia and Herzegovina sent to ascertain the situation on the ground and report to the Security Council, the Srebrenica enclave was surrounded by Serb forces, beginning some time in 1993 until 1995, during which time tens of thousands of Bosnian Muslim refugees lived in the overcrowded town under tragic humanitarian conditions.⁴⁴⁷
208. On 21 March 1995, Radovan Karadzic signed a “Directive for Up-coming Operations ” addressed to the Command of the 1st Krajina Corps. In relation to the Drina Corps, the Directive says, “planned and well-thought-out combat operations create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Zepa”.⁴⁴⁸ General Smith understood this paragraph to be instructions to “squeeze and compress, both physically and in terms of a way of life, the existence of those enclaves ”.⁴⁴⁹ The Directive also states that “in case the UNPROFOR forces leave Zepa and Srebrenica, the DK (glossary) command shall plan an operation... with the task of breaking up and destroying the Muslim forces in these enclaves and definitively liberating the Drina valley region”.⁴⁵⁰ General Smith understood this to mean that, if the UN withdrew, the enclaves would be “done away with”.⁴⁵¹
209. On 6 July 1995, an attack on the Srebrenica enclave started, and shelling of the town intensified in the following days.⁴⁵² Bosnian Muslim forces present in the area resisted with small arms and mortars, but were easily outgunned.⁴⁵³ On 11 July 1995, the VRS entered the town under the command of Ratko Mladic,⁴⁵⁴ who stated, “Here we are on the 11th of July 1995 in Serbian Srebrenica. On the eve of one more great Serbian holiday we present this town to the Serbian people. After the rebellion against the Turkish governor, the moment has finally come for us to take revenge on the Turks here”.⁴⁵⁵
210. The majority of the population gathered around the UN “Dutchbat” compound at Potocari.⁴⁵⁶ Meanwhile, the Bosnian Muslim Army (28th Division) decided to try to break through hostile territory. Many civilians decided to follow them and formed a column in the village of Jagli ci.⁴⁵⁷ According to Mr. Becirevic, the column numbered between 12,000 to 15,000 men, stretching for about 10 to 15 kilometres as it moved towards Tuzla.⁴⁵⁸

211. The Trial Chamber heard evidence of the unfolding events from Mr. Deronjic who was appointed Civil Commissioner for Srebrenica around 11 July 1995.⁴⁵⁹ In the early morning of 12 July 1995 the witness went to Hotel Fontana where he found Ratko Mladic and two other men. A meeting set for later in the morning involving the Muslims and UNPROFOR was discussed. At the meeting the Muslim representatives made it clear that they wanted to leave safely. The witness realised that Ratko Mladic must have had a previous meeting with the group and this was confirmed by a waiter from Hotel Fontana. Ratko Mladic had a meeting with UNPROFOR on the evening of 11 July 1995.⁴⁶⁰ Around 13 July 1995 buses and trucks were coming to Bratunac from Konjevic Polje with imprisoned Muslims. During the evening people were mobilised and told to guard the buses. The witness stated that Ljubo Simic reported that evening that killing and shooting was occurring.⁴⁶¹ Late in the evening of 13 July 1995 Colonel Beara told the witness that he had “orders from the top to kill the prisoners” from Srebrenica in Bratunac.⁴⁶² There is evidence that the killings were perpetrated by VRS units and organised at the highest levels of the VRS.⁴⁶³
212. The majority of refugees in Potocari were women and children, but there were about 300 men in the compound and 500 to 600 men outside the compound.⁴⁶⁴ Approximately 25,000 women and children and some elderly men were evacuated by bus out of Potocari.⁴⁶⁵ Major Franken, Deputy Commander of the Dutch battalion, testified that he became anxious about the fate of the men, because Ratko Mladic had told DutchBat that he was going to separate men who were 16 to 60-years of age from other refugees in order to check if they were war criminals.⁴⁶⁶ The men were separated, interrogated in “the white house”, which was about 300 to 400 metres outside the main gate, and then taken outside the enclave in a blue bus.⁴⁶⁷ The witness tried to send escorts but failed as they were stopped by Serb forces.⁴⁶⁸ It was obvious that the VRS did not want DutchBat to witness what was going to happen.⁴⁶⁹ Nine bodies of executed men were found in an area near a brook directly south of the white house; a soldier reported to the witness that he had actually seen two Serb soldiers execute a Muslim man; and reports came in that the men who were expected to go to Kladanj were not arriving.⁴⁷⁰ The witness complained at least twice to Colonel Jankovic about the treatment of men in the white house.⁴⁷¹ Without any acknowledgement of mistreatment, Colonel Jankovic stated that the VRS had 6, 000 prisoners under their control.⁴⁷²
213. B-1804, who held a senior position in the Zvornik Brigade,⁴⁷³ received information on 12 July 1995 that parts of the Muslim 28th Division were passing between Buljin and the Milici Brigade. In the evening of the same day the witness had information that measures were being taken to block these parts of the 28th Division on the Kravica-Nova Kasaba-Milici road. The witness organised an ambush of the Muslim 28th Division.⁴⁷⁴ On the morning of 14 July 1995 the Zvornik Brigade engaged in combat with part of the column of the 28th Division. The fighting continued and increased during the night of 15 July 1995. At 14:00 hours on 16 July 1995 a provisional truce was reached which allowed for a corridor to be opened for 24 hours. B-1804 testified that a large number of Muslims was able to pass through the corridor when it was open.⁴⁷⁵ After the

- corridor had been closed the Zvornik Brigade, along with several units of the MUP searched the terrain for “stragglers from the 28th Division” and this continued until 30 July 1995. People that were found were either captured or immediately killed.⁴⁷⁶
214. On 13 July 1995 B-1804 received a call from the Assistant Commander for Security of the Zvornik Brigade, Drago Nikolic, who said that the Brigade was expecting a large number of Muslim prisoners to come from Bratunac and that preparations had to be made for them. Mr. Nikolic told the witness that the prisoners were not being sent to Batkovic camp because the ICRC and UNPROFOR “knew about it” and that Ratko Mladic had personally ordered that the prisoners were to be executed in Zvornik. In the afternoon of the same day, the witness had information that this concerned about 3,000 prisoners.⁴⁷⁷ There is also evidence that the orders for the massacres were given by Radovan Karadzic on 9 July 1995.⁴⁷⁸
215. On 13 July 1995, witness B-1401 was part of a group of Muslim men who were forced to run along the road to Bratunac. They turned at a meadow above the Bratunac -Konjevic Polje Road where there were between 1,000 and 2,000 people surrounded by Bosnian Serb soldiers.⁴⁷⁹ The Muslim men in the meadow were told to get on to trucks, one of which had “Tuzla Transport” written on it. The trucks travelled in the direction of Bratunac, and the men spent the night in the trucks. The truck passed through Konjevic Polje, Drinjaca, and Zvornik and reached Karakaj.⁴⁸⁰ In the afternoon of 14 July 1995 the men were taken from the truck and detained at Petkovici School.⁴⁸¹ When the men were detained in a classroom, soldiers came and asked for Muslim men from certain geographical locations to come out. When the men were taken out the witness could hear blows and moans and did not see them again. When darkness fell, groups of men were taken to the front of the school and loud bursts of fire could be heard.⁴⁸² B-1401 and other detainees from Petkovici School were forced to board a truck and taken to Petkovici Dam area.⁴⁸³ As the witness left Petkovici School, he saw a pile of those who had been killed earlier in front of the school.⁴⁸⁴ When the truck stopped the prisoners heard shots.⁴⁸⁵ The prisoners were called out in small groups of five for execution.⁴⁸⁶ When the witness and others in his group were forced to leave the truck, they were told to “find a place”. At the right hand side of the truck the witness saw rows of corpses.⁴⁸⁷ The men were told to lie down and then the shooting started. The witness subsequently heard other groups of people being taken from the truck and shot. When the shooting stopped, the soldiers inspected the bodies to ensure that everyone was dead; anyone found alive was shot again. When the truck left, the witness looked up and saw many corpses, but was unsure how many.⁴⁸⁸
216. B-1395 testified that on 13 July 1995 he was captured by Serb soldiers and transported with a group of other Muslim men to a meadow in Lolici. They were searched for money, and their hands were tied behind their necks. The witness heard some people say that there must be about 2,000 people in the meadow. They were given some water, and one person who complained was killed.⁴⁸⁹ Ratko Mladic came and assured them that they would be exchanged, and the witness told Ratko Mladic that he had lost his boots. Ratko Mladic responded by

promising him that he would get a pair of shoes.⁴⁹⁰ Approximately 20 minutes later, a person in a civilian uniform without any insignia told the Muslim men to make a column. The column was between 400 and 500 metres long, guarded every six metres by Serb soldiers armed with automatic rifles. The prisoners were taken to a warehouse near Kravica, which became very full. The last person to enter the warehouse was told to sit down, but he could not, so the guards shot him. Immediately thereafter, the Serb soldiers began to shoot into the warehouse, and this continued until nightfall.⁴⁹¹ The witness managed to reach a little reception booth and pulled a dead body over himself, where he remained for the next 24 hours. The next morning, 14 July 1995, a man was shot when he stood up to urinate.⁴⁹² At a certain point the soldiers offered to take any wounded people to a hospital ; when some crawled out of the warehouse, they were killed immediately. When it became dark, the witness crawled out and stood behind an excavator, noticing that two other people were still alive inside the warehouse. The witness heard dead bodies being loaded onto a truck, and then managed to escape.⁴⁹³

217. B-161, a member of the Serbian MUP in Loznica, was in Zvornik in July 1995 and testified that at the RS command in Zvornik, Drago Nikolic told him that Beara had ordered that 6,900 people “had to disappear” within five days in the area between Zvornik and Bijeljina, and that they were transporting men to various villages and killing them.⁴⁹⁴
218. On 15 July 1995, B-1804 spoke to Major Jokic who said that Mr. Beara, Colonel Popovic, and Mr. Nikolic “were taking people whenever they felt like it” and that Colonel Popovic had ordered that there should be no radio communication or anything recorded or written down about the prisoners. Later on the same day, the witness informed Lieutenant Colonel Pandurevic about the executions who then asked why the civilian defence were not “digging in”. The witness understood this to mean why were the civilian defence not burying the executed prisoners.⁴⁹⁵
219. Several witnesses testified about widespread killings in the Srebrenica area, including killings at Cerska,⁴⁹⁶ Kravica,⁴⁹⁷ Orahovac,⁴⁹⁸ Petkovici Dam,⁴⁹⁹ Branjevo Military Farm,⁵⁰⁰ Pilica Dom,⁵⁰¹ and Kovluk.⁵⁰²
220. About April 1994, Mr. Erdemovic joined the 10th Sabotage Unit, which was a unit belonging to the VRS in Bijeljina.⁵⁰³ When the unit grew it was divided into two platoons, the Vlasenica and the Bijeljina platoons, and the witness was part of the Bijeljina platoon.⁵⁰⁴ On 16 July 1995, the witness’s unit was involved in the killing of people at Branjevo Military Farm. He estimates that 1,000 people were killed on this occasion.⁵⁰⁵ After this, the lieutenant colonel (who had previously given the orders for the killings at Branjevo Military Farm) arrived and gave further orders to Brano Gojkovic (who was the one who gave orders to the witness).⁵⁰⁶ The lieutenant colonel said that at the Pilica Cultural Dom there were about 500 men trying to get out. The witness stated that he would not and could not do it any longer and was supported in this by some of the men from his unit. Instead, men from Bratunac carried out the execution of these 500 men.⁵⁰⁷ The witness heard automatic gunfire and a few hand grenades when the men of Bratunac were at Pilica and he saw bodies lying in front of the Pilica Cultural

- Dom.⁵⁰⁸ It is not clear how many people survived this execution, just that there were some survivors.⁵⁰⁹
221. Mr. Manning, an Investigations Team Leader in the Office of the Prosecutor, attended all the exhumation sites directly linked to Srebrenica.⁵¹⁰ There are 43 known Srebrenica related mass graves: 23 have been exhumed by the Office of the Prosecutor, and 20 have been probed to confirm the existence of multiple human remains.⁵¹¹ The witness gave evidence about the distinction between primary graves and secondary graves. Primary graves contain individuals who were buried soon after their deaths. In Srebrenica these include Branjevo Military Farm, Kozluk, Petkovici Dam, Orahovac, Cerska, Nova Kasaba, Konjevic Polje, Ravnice, and Glogova. Secondary graves contain the bodies of individuals who have already been buried in primary graves, but then have been exhumed and buried again elsewhere. These include Hodzici Road, Lipje, Ancari Road, and Zeleni Jadar. Primary and secondary sites can be linked using forensic scientific methods.⁵¹² There is evidence that, after the executions, units of the VRS then transferred the bodies from the primary graves to secondary graves.⁵¹³ The bodies were removed from the primary grave sites using heavy machinery.⁵¹⁴
222. The major cause of death of those exhumed during the Srebrenica investigation was gunshot injury. Mr. Manning testified that there was no indication that people had been killed in battle. In the majority of graves, especially in the primary graves, there was evidence of ligature or blindfolding of individuals. There was also evidence that individuals had been killed *in situ*, *i.e.*, they had been shot in the grave or beside the grave. Bullets were found under the bodies, which were in postures indicating they had been executed. For example, in Glogova, all the bodies had been shot in the head, and some had also been shot twice in the chest after having been bound.⁵¹⁵
223. Mr. Manning gave evidence that there was a minimum of 2,570 individuals found in Srebrenica mass grave sites exhumed between 1996 and 2001.⁵¹⁶ This figure is conservative because it does not take into account the large number of body parts still to be assessed or the secondary graves which have not been exhumed by either the Office of the Prosecutor or the Bosnian Commission for Missing Persons.⁵¹⁷

ii. Other municipalities

224. The Trial Chamber now turns to a consideration of whether there is sufficient evidence that genocide was committed in the remaining specified territories: Kotor Varos, Kljuc, Bosanski Novi and Bijeljina..⁵¹⁸ The Prosecution had submitted in a footnote that there is what it described as “limited evidence” in relation to Kotor Varos, Kljuc, and Bosanski Novi and that there was other evidence in relation to Bijeljina.⁵¹⁹
225. The evidence in relation to these four territories is set out in summary form below.

Kotor Varos

226. There is no evidence of genocide in this territory.

Bijeljina

227. The takeover of Bijeljina commenced on 31 March 1992.⁵²⁰

228. In 1991, there were 24,314 Muslims, or 29.8% of the population. In 1997-1998, there were 1,429 Muslims, or 2.6% of the population.⁵²¹

229. There is evidence of –

(1) Killings:

(a) Tens of people were killed in the centre of Bijeljina and behind the SDS headquarters.⁵²²

(b) During the war, an unspecified number of bodies were seen floating in the Drina River.⁵²³

(c) Forty-eight bodies were seen in the streets of Bijeljina – a witness was aware of more corpses that existed.⁵²⁴

(d) A witness heard it announced on Radio Bijeljina that 25 bodies had been found in a garbage dump.⁵²⁵

(e) A TO member referred to killing “quite a lot of them” (Muslims) – number unknown.⁵²⁶

(f) Twenty-two people were tortured and killed in a basement.⁵²⁷

(g) Forty-one people were killed during the takeover and their names were announced by Radio Bijeljina and the Semberija newspaper.⁵²⁸

(h) On 31 March 1992, a witness learned through Bijeljina Television that “Arkan’s men and people from Captain Dragan’s guards, the Chetniks of Vojvoda, Mile Blagic” entered Bijeljina and killed people, including whole families, in the centre of town.⁵²⁹

(2) Persecutions:

(a) A list of Muslims to be arrested was used by the police. The list included the names of well-off Muslims or Muslim businessmen and was given to every checkpoint or exit from SAO Semberija.⁵³⁰

(b) Police patrols were formed with Arkan’s men, who went from house to house with lists of “suspects” – many people were taken from their homes and never seen again.⁵³¹

(c) The Serb plan was to cleanse Bijeljina of its non-Serb population by first targeting people with economic, political, and religious influence so the remainder of the population would be easier to control.⁵³²

(d) In 1992 there was a general announcement that all able-bodied Bosniaks were to report for service to the VRS; they then received call-up papers to the VRS.⁵³³ Those who did not comply were sent to work details on the frontline; no Serbs had to work on the front lines, even the ones who were not in the army.⁵³⁴

(e) Non-Serbs were dismissed from their jobs and replaced with Serbs. Only irreplaceable non-Serbs were kept in their positions, and even then, only under close supervision.⁵³⁵

(3) Detention and Mistreatment:

(a) Three to four hundred men, women, and children took shelter at the JNA barracks.⁵³⁶ General Jankovic told Fikret Abdic that, in addition to the several hundred refugees in the barracks, there were another one-and-a-half thousand refugees in Petkovaca, mostly Muslims.⁵³⁷

(b) On 10 August 1993, a witness (along with 47 others) was detained by Serbs, transferred to the Brcko area, and forced to work digging trenches and fortifications on the frontlines of the VRS.⁵³⁸ Almost a year later, when the witness declared his intention not to leave Bijeljina, he was harassed and badly beaten by Major Vojkan \urkovic's men.⁵³⁹

(c) Four people were detained and beaten at the SUP building.⁵⁴⁰

(d) About 2,000 people were detained at Batkovic Camp, mostly Muslims.⁵⁴¹ People were beaten. About 100 people died in the camp.⁵⁴² A group of ten men was selected for beating and if one succumbed, they would make up the number.⁵⁴³ A witness was tormented by being hanged.⁵⁴⁴ Sexual activity was forced upon the men.⁵⁴⁵ Around September 1993, the witness was again detained at Batkovic Camp – this time there were between 800 and 900 Muslims, but in the following few days 600 to 700 were exchanged.⁵⁴⁶

(4) Destruction of cultural property:

(a) In March 1993 two mosques in Janja were destroyed. All five mosques in Bijeljina were also destroyed.⁵⁴⁷

(b) Serbs targeted “symbols of non-Orthodox religion” – all mosques in Bijeljina and in the outlying villages were destroyed with dynamite. There were 11 mosques in total.⁵⁴⁸

(5) Forcible Transfer and Deportation:

(a) A witness left Janja in September 1994 after being forced to abandon his house and property.⁵⁴⁹ No one coerced the population of Janja to leave as such, but the population had its property taken away and had to leave because of the psychological pressure exerted on them.⁵⁵⁰

(b) The Red Cross alerted a witness that in the beginning of mid-July 1994 large numbers of Muslims were being forced out of Bijeljina. Over the next months, 2,500 Muslims were moved, and in the autumn a further 2,500.⁵⁵¹

(c) On 22 August 1994, a witness and his family were detained and taken away with 30 or so other Muslim residents in a cattle truck towards Tuzla.⁵⁵² Bijeljina had a population of 30,000 and they were all expelled, and only 5% of the Muslims – 800-2,000 persons – remained.⁵⁵³

(6) Miscellaneous:

(a) In April and May 1992, a witness was assigned to escort convoys transporting weapons, ammunition, and other military equipment from Serbia to Bosnia via Srijemska Ra ca to Bijeljina, Brcko, Zvornik, and Majeвица – to the battlefields.⁵⁵⁴ He accompanied such convoys at least ten times across the Sava River.⁵⁵⁵ Each convoy consisted of between ten to 20 “heavy duty trucks”.⁵⁵⁶

Kljuc

230. The takeover of Kljuc commenced in April 1992.⁵⁵⁷

231. In 1991, there were 17,696 Muslims, or 47.3% of the population. In 1993, 14,000 to 15,000 Muslims had left Kljuc. In 1995, there were 1,211 Muslims, or 6.0% of the population.⁵⁵⁸

232. There is evidence of –

(1) Killings:

(a) About one hundred people were killed in front of the old primary school in Velagi ci.⁵⁵⁹

(2) Detention and Mistreatment:

(a) Dozens were beaten and detained at the Velagici school.⁵⁶⁰

(b) Fifty-one Muslims were taken to the frontline to do forced labour.⁵⁶¹

Bosanski Novi

233. The takeover of Bosanski Novi commenced in May 1992.⁵⁶²

234. In 1991, there were 14,040 Muslims, or 33.7% of the population. In 1993, 13,000 Muslims had left Bosanski Novi. In 1995, there were 1,513 Muslims, or 4.8% of the population.⁵⁶³

235. There is evidence of –

(1) Killings and Forcible Transfer and Deportation:

(a) In May 1992, the Muslim village Suhaca was shelled from the direction of neighbouring Serb villages.⁵⁶⁴ On 24 May 1992, after the shelling stopped, 8,000 to 10,000 men, women, and children (including 1,200 from Suhaca) attempted to flee the area around the village of Suhaca.⁵⁶⁵

(b) In June 1992, in Blagaj Japra, soldiers surrounded the Muslim civilians who had fled from the Suhaca area and opened fire upon them – for two hours.⁵⁶⁶

(c) Nine-thousand persons left Bosanski Novi and travelled to Croatian territory.⁵⁶⁷

(d) Inhabitants of the village of Sikare were driven from their homes; some were then taken and killed.⁵⁶⁸

(2) Detention and Mistreatment:

(a) In June 1992, Muslim civilians in the town of Blagaj Japra were detained at the Japra Company.⁵⁶⁹ Beatings and took place.⁵⁷⁰ At least two detainees were shot and killed.⁵⁷¹ The men were separated from the women and children and then transferred to the Mlakve football stadium on 11 June 1992.⁵⁷² They were detained there for around 46 days, and the conditions were terrible.⁵⁷³ At least one detainee was beaten.⁵⁷⁴

(b) A football field of detainees was the tip of the iceberg in the efforts of local Serbs to establish RS as free of Muslims, including camps at Keraterm, Trnopolje, Omarska, and Manjaca, and there was cooperation between local Serbs and the mayors and TO of Bosanska Dubica, Banja Luka, Prijedor, Sanski Most, and Kljuc.⁵⁷⁵

(3) Destruction of cultural property:

(a) In May 1992, mosques in the Muslim village of Suhaca were shelled from the direction of neighbouring Serb villages.⁵⁷⁶

iii. Other Evidence

Demographic Evidence

236. Demographic evidence shows that, in 1991, 344,803 Muslims lived in the Republika Srpska part of the Milosevic case area (as defined in Professor Tabeau's expert report).⁵⁷⁷ Of that number, about 7,933 (or about 1.4 percent) remained in 1997-1998.⁵⁷⁸

Destruction of Cultural Heritage

237. The Trial Chamber heard evidence of destruction of the Bosnian Muslims' cultural and religious properties in the territories of Bosnia and Herzegovina. Professor Riedlmayer testified that all of the 277 mosques that were surveyed were damaged and only 22 of those were assessed as only lightly damaged.⁵⁷⁹ Most of the mosques surveyed were located in territories seized and held by Bosnian Serb forces during the conflict, with Sarajevo being an exception.⁵⁸⁰ In a number of cases mosques were not only razed to the ground, but the site was cleared and other objects were placed on the site, such as rubbish dumps.⁵⁸¹ A majority of the religious sites identified in Professor Riedlmayer's report were destroyed as a result of attacks directed at them, rather than incidental to fighting in the vicinity.⁵⁸²

Expert Evidence

238. Dr. Zwaan, Associate Professor at the Centre for Holocaust and Genocide Studies, University of Amsterdam, testified about the importance of ideology and use of propaganda in setting the context for genocide. According to Dr. Zwaan, ideology plays a major role in processes leading to the commission of genocide, involving various types of radical nationalism,⁵⁸³ which dehumanise the targeted group, also using collective historical memory (where applicable) in an attempt to create a "them" and "us" culture.⁵⁸⁴ These nationalist ideologies are later used to legitimise, rationalise, and justify the genocidal process.⁵⁸⁵ Although individual motives for participating in the acts may be varied, ideologies give an overall sense of direction to what should be done and impart a sense of purpose and intent to individual perpetrators.⁵⁸⁶ Dr. Zwaan testified that scholars generally agree that genocide is a crime of state, *i.e.*, the overall perception, attitude, behaviour, and decision of the central political leadership are decisive factors in the emergence of genocidal crimes.⁵⁸⁷ According to Dr. Zwaan, genocidal crimes never develop from the "bottom up";⁵⁸⁸ they are "top down" affairs.⁵⁸⁹ Such crimes occur with the "knowledge, approval, and involvement of the state authorities".⁵⁹⁰
239. Dr. Budding, an Associate at the Harvard Academy for International and Area Studies,⁵⁹¹ prepared a report entitled "Serbian Nationalism in the Twentieth Century: Historical Background and Context".⁵⁹² The expert report of Dr. Budding provided the historical background and context relevant to understanding Serbian national mobilisation in the 1980s and the sequence of political events that led to the dissolution of the Yugoslav state and the beginning of the post-Yugoslav wars in 1991.⁵⁹³ The report had a particular focus on the Serbs' attitude toward the Yugoslav state and on the relation between Serbs inside Serbia and those outside and sought to identify and explain the elements of a national

- mindset that contributed to the disintegration of Yugoslavia.⁵⁹⁴ The report was not intended to imply that Serbia's leaders bore exclusive responsibility for Yugoslavia's collapse : independent of Serbian actions, forces in favour of independence existed in both Slovenia and Croatia.⁵⁹⁵ However, the report stated that the Accused's policies and rhetoric helped these forces move from marginal to dominant political positions.⁵⁹⁶
240. From 1990, although the Accused's regime declined to set out explicit border claims in public, it took a variety of actions directly and indirectly aimed at aligning Serbs in Bosnia and Herzegovina and Croatia with Belgrade, and against the newly elected governments of those republics.⁵⁹⁷ At this time, a flood of stories in the Belgrade media promoted the idea that Serbs outside Serbia were again threatened by the genocide they had suffered during the Second World War.⁵⁹⁸ It was also fed by personal and family memories of the war, and – in Croatia – by the Tujman regime's highly nationalist rhetoric, partial rehabilitation of the Ustasa state, and many acts of insensitivity toward the Serb population.⁵⁹⁹ All of these actions were aimed at promoting a territorial, rather than a political, solution to the re-emerging "Serbian problem".⁶⁰⁰
241. Professor de la Brosse of the University of Reims, an expert in the use of propaganda by the media, prepared a report entitled "Political Propaganda and the Plan to Create a State for all Serbs".⁶⁰¹ The report of the witness focused on the use of propaganda by the Accused and Serbs, but also examined the use of propaganda by other parties to the conflict.⁶⁰² Professor de la Brosse determined that a comparison between Serbian, Croatian, and Bosnian nationalist propaganda yielded the conclusion that Serbian propaganda surpassed the other two both in the scale and content of the media messages put out.⁶⁰³

iv. Evidence of genocidal intent of Bosnian Serb leadership

242. Both Radovan Karadzic and Biljana Plavsic stated that the basic goal of the Serb war aim was to redistribute the population of Bosnia and Herzegovina so that the Serbs would be left in control of a single continuous block of territory, embracing the whole of the border with Montenegro, Serbia, and all of the traditionally Serb -inhabited areas.⁶⁰⁴ This required the removal of very large numbers of Bosnian Muslims because they were the majority population along the Drina River Valley in North-Eastern Bosnia, adjacent to Serbia.⁶⁰⁵
243. Aleksa Buha, Foreign Minister of the RS, stated in May 1994 in the Assembly of Republika Srpska that their "primary option [was] unification with Serbia, and if that doesn't fly, then independence".⁶⁰⁶ This was reiterated in May 1994 by Milan Martić, President of Republic of Serbian Krajina who stated in the same session that "we are one and the same nations... and be sure that before long, whether it please someone or not, we will be one state".⁶⁰⁷ Radovan Karadzic had also promoted the idea of unification when he announced in October 1993 that "we must propose the complete unity of the Serbian people, including Yugoslavia, the RSK and the RS".⁶⁰⁸
244. Mr. Harland testified that on numerous occasions, members of the Bosnian Serb leadership expressed their resolve to achieve the stated objective at all costs,

and that Radovan Karadzic, in particular, in his pre-conflict statements forecast the extermination of the Bosnian Muslim population in the event of war. Radovan Karadzic stated, “We will use this Serbian-supported war machine to make life impossible for civilians”, to terrorise the civilians in order to reach a particular political goal.⁶⁰⁹

245. The following quotations provide insight into Radovan Karadzic’s state of mind at the relevant time:

- “They [Muslims] will disappear, that people will disappear from the face of the Earth.... They do not understand that there would be bloodshed and that the Muslim people would be exterminated. The deprived Muslims, who do not know where he is leading, to what he is leading the Muslims, would disappear...”.⁶¹⁰
- “In just a couple of days, Sarajevo will be gone and there will be five hundred thousand dead, in one month Muslims will be annihilated in Bosnia and Herzegovina...”.⁶¹¹
- “First, none of their leaders would survive, they’d all be killed in three to four hours. They’d stand no chance of surviving whatsoever”.⁶¹²
- “This is the road that you want Bosnia and Herzegovina to take, the same highway of hell and suffering that Slovenia and Croatia went through. Don’t think you won’t take Bosnia and Herzegovina to hell and Muslim people in possible extinction. Because, Muslim people will not be able to defend itself if it comes to war here!”⁶¹³
- “What will we do if we get a state in which we are a minority?... They want us and the Croats to remain in a unified Bosnia so that we control the Muslims. We cannot be in that unified state. We well know, where fundamentalism arrives, you cannot live any more.... This conflict was incited so that the Muslims would not exist”.⁶¹⁴
- “We certainly know that we must give up something – that is beyond doubt insofar as we want to achieve our first strategic goal: to drive our enemies by the force of war from their homes, that is, the Croats and Muslims, so that we will no longer be together in a state”.⁶¹⁵

242. On 1 May 1992, Biljana Plavsic told Mr. Doyle, Lord Carrington’s personal representative, that if there was to be a division of territory, the Serbs deserved more territory, and if it took the lives of three million people to solve the problem, then they should get on with it.⁶¹⁶

243. Similarly, Dragan Kalinic, Minister of Health of Republika Srpska, said in May 1992, at the 16th RS Assembly in relation to Sarajevo, “... knowing who our enemies are, how perfidious they are, how they cannot be trusted until they are physically, militarily destroyed and crushed, which, of course, implies eliminating and liquidating their key people”.⁶¹⁷

244. At the 34th Assembly of Republika Srpska from 27 August to 1 October 1993, Momcilo Krajisnik stated, “Believe me, it would be the greatest tragedy if the Muslims accepted to live together with us. You’ve seen how they engravitate [sic] themselves with the Croats.... (W(e might lose our state. I simply wouldn’t

accept that ; I would accept a lesser percentage than we have now in order to remain divided, that we have our state and not be with the Muslims”.⁶¹⁸

245. Other examples of statements by Radovan Karadzic are the following: “we have preserved 250,000 places of the living space where Muslims lived”,⁶¹⁹ “we have no further reason to fight; we have liberated almost all that is ours”,⁶²⁰ and “They will challenge us because of ethnic cleansing,... but we will say – Serbs have also been ethnically cleansed”.⁶²¹ Following the take-over of Srebrenica in July 1995, Radovan Karadzic addressed the 54th Assembly of Republika Srpska in October 1995: “I... found General Krstić and advised him to go into the city and proclaim the fall of Srebrenica, and after that we will chase the Turks through the woods. I approved that radical mission, and I feel no remorse for it”.⁶²²

v. Finding

246. On the basis of the inference that may be drawn from this evidence, a Trial Chamber could be satisfied beyond reasonable doubt that there existed a joint criminal enterprise, which included members of the Bosnian Serb leadership, whose aim and intention was to destroy a part of the Bosnian Muslim population, and that genocide was in fact committed in Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ and Bosanski Novi. The genocidal intent of the Bosnian Serb leadership can be inferred from all the evidence, including the evidence set out in paragraphs 238 -245. The scale and pattern of the attacks, their intensity, the substantial number of Muslims killed in the seven municipalities, the detention of Muslims, their brutal treatment in detention centres and elsewhere, and the targeting of persons essential to the survival of the Muslims as a group are all factors that point to genocide.

247. Having examined the evidence, the Trial Chamber finds no evidence of genocide in Kotor Varos.

248. The Trial Chamber notes that the number of killings and other acts of mistreatment in Bijeljina, Ključ and Bosanski Novi is lower than in the other four territories. However, it concludes, that by reason of the geographic contiguity of these three territories to the other four territories and the relative similarity in the period of time when both sets of territories were taken over, there is also sufficient evidence of a genocidal intent in relation to these three territories.

b. Is there evidence upon which a Trial Chamber could be satisfied that the Accused was a participant in the joint criminal enterprise and that he shared the required intent of its participants?

i. The Leader of All Serbs

249. Mr. Babic testified that the Accused was the leader of the Serbian people in Yugoslavia, and the people in Knin saw him as the protector of the Serbs in Yugoslavia.⁶²³ Ambassador Galbraith testified that he believed that the Accused “was the architect of a policy of creating Greater Serbia and that little happened without his knowledge and involvement”.⁶²⁴

250. On 16 March 1991, the Accused stated that in order to be powerful, the Serbs had to be united, and ordered mobilisation of the reserve police to ensure security and to defend the interests of the Republic and Serbs outside Serbia.⁶²⁵ The Accused said that he had been in touch with “our people” in Knin and Bosnia and Herzegovina and hoped that “they” would not be “stupid enough to fight us”.⁶²⁶
251. The idea of all Serbs living in one State had been put forward for many years.⁶²⁷ On 15 January 1991, the Accused made a speech during which he asserted that the Serbian people wanted to live in one State, and therefore, a division that would force them to live in separate sovereign states was unacceptable.⁶²⁸
252. In March 1991, during a secret meeting at Kara|or|evo, the Accused agreed with President Tu|man to the division of Bosnia and Herzegovina along ethnic lines and its annexation to Croatia and Serbia respectively, allowing the possibility for the Bosnian Muslims to live in an enclave.⁶²⁹ An outline of “Six Strategic Goals” in order to achieve a Serbian state was passed by the RS Assembly during its 16th session held on 12 May 1992.⁶³⁰
253. In July 1991, Mr. Babic, Radovan Karadzic, and the Accused had a conversation during which Radovan Karadzic stated that he would chase the Muslims into the river valleys in order to link up all Serb territories in Bosnia and Herzegovina. The Accused warned Mr. Babic not to “stand in Radovan’s way”.⁶³¹
254. The Accused articulated his desire for a separate Serbian state to Hrvoje Sarinic, on 12 November 1993, when he stated, “I am telling you frankly that with Republika Srpska in Bosnia, which will sooner or later become part of Serbia, I have resolved ninety percent of Serbia’s national question”;⁶³² and again in September 1995 the Accused stated, “We, Hrvoje, are going to solve our problem and without the international community. We are each going to annex our part of Bosnia Hercegovina”.⁶³³
255. The Accused manipulated the Serbian media to impose nationalist propaganda in order to justify the creation of a Serbian State.⁶³⁴ The Accused kept the Serbian press under tight surveillance, with independent media channels given less than one-tenth of the national media space in the interest of foreign policy.⁶³⁵ General Morillon believed that the Accused was responsible for sowing fear of past atrocities in the Yugoslav population, thereby unleashing “dogs” which escaped his control and contributed to the tragic events.⁶³⁶
256. Mr. Jovic testified that “for more than a decade, (the Accused(was the main political figure in Serbia. He held absolute authority within the people and within the party, and he had the possibility of having a decisive role on all decisions made. And by the same token, he was in a way the main actor of everything that came to pass during that period of time”.⁶³⁷ Mr. Jovic gave evidence that “[t]his period of our history was marked, without any doubt, by (the Accused(. In every sense, he was the key figure, the main actor in this Serbian tragedy...”.⁶³⁸ Professor de la Brosse gave evidence that Mr. Jovic, in his book entitled *Last Days of the SFRY*, stated, “For years, [the Accused] paid the biggest attention to the media, especially television. He personally appointed editors-in-chief of the newspapers and news programmes, especially directors-general of the

radio and television.... He was deeply convinced that citizens formed their view of the political situation on the basis of what they were presented and not on the basis of their real material and political position. What is not published has not happened at all – that was [the Accused’s] motto”.⁶³⁹

ii. Relationship of the Accused with Bosnian Serb political and military authorities

257. The Accused was the dominant political figure in Serbia and he had profound influence over the Bosnian Serb political and military authorities.⁶⁴⁰
258. Mr. Harland, a UN Civil Affairs and Political Affairs Officer in Sarajevo from 1993 until 1999,⁶⁴¹ testified that there was a basic level of support from Serbia to the Bosnian Serbs and in particular to the Bosnian Serb military.⁶⁴² The Bosnian Serb military emphasised that the chain of command really ran to Belgrade.⁶⁴³ Dr. Williams, the UNPROFOR Director of Information and Spokesperson for the UN Special Representative Yasushi Akashi between 1994 and 1995, testified that by the autumn of 1994, Serbs were using greater radar and air defence around Sarajevo and North-Western Bosnia.⁶⁴⁴ Mr. Akashi, as well as UN military personnel, concluded that the equipment must have come from Yugoslavia.⁶⁴⁵ The VJ and the Serb leadership received operational reports from the VRS and provided direct assistance.⁶⁴⁶ General Clark once told General Perisic to turn off the air defence connectivity that linked the air defence system in Bosnia and Herzegovina with that in Serbia.⁶⁴⁷
259. A report to the Main Staff of the VRS, dated September 1992 and signed by Ratko Mladic, indicated that the decision of the Assembly of Republika Srpska of 12 May 1992 provided the Serbs from the former JNA with the available material and equipment to form the VRS.⁶⁴⁸ Ratko Mladic recognised that the VRS started off with a very substantial amount of assets, especially in relation to combat hardware, ammunition, fuel, and food reserves.⁶⁴⁹ When the JNA pulled out of Bosnia and Herzegovina in the second-half of 1992, it left the Serbs in Bosnia and Herzegovina with a nearly complete army supplied with the equipment from the former JNA 2nd Military District.⁶⁵⁰
260. VRS officers received pay as members of the 30th Personnel Centre of the Yugoslav Army until 28 February 2002.⁶⁵¹ The 30th Personnel Centre was an administrative unit within the General Staff in Belgrade which was established by an order of Momcilo Perisic, VJ Chief of General Staff, for the purpose of attending to personnel matters of VRS officers, contract personnel, and other personnel.⁶⁵² When the JNA pulled out of Bosnia and Herzegovina in 1992, the JNA officers and non-commissioned officers – approximately 1,800 persons – who originally came from Bosnia and Herzegovina, wished to remain in the territory of Bosnia and Herzegovina.⁶⁵³ Mr. Lilic formalised the situation through a decision of the SDC in November 1993 establishing the 30th and 40th Personnel Centres. This was to resolve the status of persons, formerly members of the JNA, who were outside the territory of the FRY.⁶⁵⁴ All personnel attached to the 30th Personnel Centre were paid by the VJ.⁶⁵⁵ B-127 worked for the 30th Personnel Centre and did not receive a single dinar from the VRS.⁶⁵⁶ As acknowledged by

General Smith, “the man who pays the cheque is usually the person who is in command eventually ”. ⁶⁵⁷

261. The minutes of the 50th session of the RS Assembly, held on 15-16 April 1995, recorded Ratko Mladic as stating that the “Yugoslav army provided VRS with weapons and other equipment, which covered about 50% of the needs”. ⁶⁵⁸ To illustrate this, Ratko Mladic gave a consumption review from the beginning of the war until 31 December 1994, stating that

9,185 tones [sic] of infantry ammunition have been consumed; 1.49% of which was self-produced, 42.2% from supplies VRS inherited and found in the former JNA barracks ; 47.2% provided by the Yugoslav Army and 9.11% imported or purchased.

Currently VRS has got only 9.11% of the total needs for 1995.

As for artillery ammunition, 18,151 tones (sic) have been consumed, out of which 26.2% was self-produced, 39% from supplies, 34.4% provided by the Yugoslav Army, and 0.26% imported. VRS has got 18.36% of this year’s needs.

As for anti-aircraft ammunition, 1,336 tones (sic) have been consumed, 0% was self -produced, 42.7% from supplies, 52.4% provided by the Yugoslav Army, 4.9% imported. ⁶⁵⁹

262. At the Third Congress of the SPS in 1996, the Accused acknowledged the material assistance the SPS party had given to “Serbs outside Serbia”, including “those at war where a war was waged”. ⁶⁶⁰ The Accused stated, “As regards the resources spent for weapons, ammunition and other needs of the Army of Republika Srpska and the Republic of Serbian Krajina, these expenditures constituted a state secret and because of state interests could not be indicated in the Law on the Budget, which is a public document. The same applies to the expenditures incurred by providing equipment... for the security forces and special anti-terrorist forces in particular... and this was not made public because it was a state secret, as was everything else that was provided for the Army of Republika Srpska”. ⁶⁶¹ The Accused also stated, “Extra-budgetary spending was limited exclusively to some specific forms of assistance to Serbs on the other side of the Drina. The other extra-budgetary funds, the majority of them, one could say, were used for the needs, for the various needs to strengthen and preserve the country’s security”. ⁶⁶² In another statement, the Accused said that “most of the assistance was sent to people and fighters and Bosnia and Herzegovina”. ⁶⁶³

263. B-174 gave evidence that in October 1992 the 72nd Brigade, of which he was a member, was trained at Pancevo by officers of the VJ. ⁶⁶⁴ Members of a special police unit from Knin were also undergoing training at the same place. The witness referred to his training as inter-army cooperation between the VJ and the army of Krajina. ⁶⁶⁵ During the night in January 1993, just before the men (about 300 from the 72nd Brigade) crossed the border into Bosnia, they changed their uniforms, replacing the insignia of the VJ with symbols of the VRS provided

- by their superior officers.⁶⁶⁶ Once across the border, they met the 63rd Parachute Brigade from Nis and attacked the village of Skelane.⁶⁶⁷ The attack began with shooting from hand held rocket launchers and setting fire to haystacks so that people would panic and leave their homes.⁶⁶⁸ When the people did leave their homes, the soldiers opened fire with automatic weapons and threw grenades.⁶⁶⁹ Armed and civilian people attempting to flee were met with machine gun fire.⁶⁷⁰ When the resistance declined, the soldiers went further into the village and threw grenades into houses before entering to make sure that no one was hiding.⁶⁷¹ The children in the village were killed by the only soldier willing to do so, Lieutenant Zolotic (a.k.a. Zombie) from the 72nd Brigade.⁶⁷²
264. B-1804 gave evidence that in May 1992 the JNA General Staff and Ratko Mladi c, who had been appointed Commander of the Main Staff of the VRS, issued orders that officers who were born in Bosnia and Herzegovina should remain there along with all their equipment.⁶⁷³ While the witness was on assignment with the VRS, he and other members of the VRS were paid by the VJ.⁶⁷⁴ VRS soldiers who needed medical assistance could receive it in Serbia.⁶⁷⁵ Decisions of the VRS, such as promotions, had to be approved by the VJ before becoming effective; and decisions by the VRS needed to be in compliance with VJ regulations.⁶⁷⁶ The relationship between the VRS and the VJ was both administrative and financial; the personnel records of VRS officers who were born in Bosnia and Herzegovina were kept with the 30th Personnel Centre of the VJ, which was based in Belgrade and responsible for all personnel matters related to VRS officers who were also JNA officers.⁶⁷⁷ The VJ partially supplied the VRS with ammunition, fuel, spare parts, equipment, food, and other supplies.⁶⁷⁸ During the course of the conflict in Bosnia and Herzegovina, including around February or March 1993, the VJ rendered direct assistance to the VRS in combat operations.⁶⁷⁹
265. Ambassador Galbraith gave evidence that in May 1992, when the JNA withdrew from Bosnia and Herzegovina, 85 percent of their men and most of their equipment were left behind under the control of the Bosnian Serbs.⁶⁸⁰ Ambassador Galbraith also testified that the VRS was created in May 1992 and that it received financial support directly from Serbia; in particular, the salaries came from Serbia.⁶⁸¹
266. Mr. Anastasijevic was often in Bosnia and Herzegovina during the war. He testified that around May 1992, when the JNA changed its name, all ethnic Serbs born in either Croatia or Bosnia and Herzegovina were given the choice of transferring to the VRS or the army of the Republic of Srpska Krajina or being dismissed from the army.⁶⁸² Consequently, almost all of the officers in the VRS were previously officers in the JNA, such as Ratko Mladic, the Commander of the VRS.⁶⁸³ The salaries and pensions of VRS members came from Belgrade; the JNA provided the VRS continual support in terms of equipment, ammunition, and manpower and occasionally participated in armed operations during the war.⁶⁸⁴
267. Baron van Lynden gave evidence that he had no doubt that all the soldiers of the VRS that he saw were working within a fairly strictly controlled hierarchal army and that the commanders that he met were always well-attired professional officers of the JNA.⁶⁸⁵

268. General Morillon testified that he understood the VRS to be the “federal army”. In May 1992 – and practically overnight – the federal army, under the orders of General Kukanjac, was “repainted” and became the VRS: it consisted of the same officers and equipment, and therefore all ammunition, fuel, logistics, and weapons came from the federal army, which always submitted to the authority of the President. The assistance to the VRS was “obvious for everybody”.⁶⁸⁶ Despite the fact that, according to official reports, Belgrade no longer exerted control over the VRS, in reality, General Morillon was absolutely convinced that Belgrade continued to exercise its authority on Ratko Mladic.⁶⁸⁷
269. B-127 gave evidence that, when the JNA formally withdrew from Bosnia and Herzegovina, the officers who remained became members of the VRS through the 30th Personnel Centre.⁶⁸⁸ In autumn 1992, a VJ reservist told the witness that he had been mobilized in Belgrade and would have lost his job if he did not respond to the call-up for mobilisation.⁶⁸⁹ The witness had a JNA identification document that was issued in 1992 and a VRS identification document that was issued July or August 1996. The two documents had the same identification number.⁶⁹⁰ If IFOR, or later SFOR, stopped the witness, he had to show his VRS identification ; otherwise, he may have been arrested as a member of the JNA.⁶⁹¹ Senior officers of the VRS who belonged to the 30th Personnel Centre only had JNA identification documents. After 1996, VRS identification documents were issued.⁶⁹²
270. Mr. Theunens, a military expert with experience as a Balkan analyst in the Belgian Ministry of Defence and who has participated in various UN peacekeeping operations in the former Yugoslavia between 1994 and 1999, gave evidence regarding the transition of the JNA to the VRS and VJ support of the VRS.⁶⁹³ The formation of the VRS, officially on 12 May 1992, came about through the re-structuring of the JNA’s former 2nd Military District headquartered in Sarajevo.⁶⁹⁴ The final key decisions in the transformation of the JNA into the VRS were the appointment by the SFRY Presidency of Ratko Mladic as Commander of the 2nd Military District on 25 April 1992; General Ad‘ic’s visit to Banja Luka on 2 May 1992; and the establishment of the VRS Main Staff between 3 and 19 May 1992.⁶⁹⁵
271. In late summer 1992, the VRS and VJ agreed upon a plan – code named *Izvor* – whereby the VJ was to re-supply the VRS with ammunition and fuel.⁶⁹⁶ The witness pointed to various documents, such as an “Analysis of the Combat Readiness of the VRS for 1992” wherein the VRS Main Staff noted that 7,451 tons of ammunition were received from the FRY via the *Izvor* plan,⁶⁹⁷ and a logistics report dated 1 January 1993 from the VRS 1st Krajina Corps noting that 29 trailer trucks were dispatched from the FRY for material transport as per the *Izvor* plan.⁶⁹⁸
272. Mr. Theunens gave evidence that the VJ did not completely forfeit its direct role in combat operations in Bosnia and Herzegovina, as indicated by actions along the Drina Valley (December 1992 to August 1993 and Spring 1995), around Sarajevo (October 1993 and September 1994), and Western Bosnia and Herzegovina (July to November 1994).⁶⁹⁹ Mr. Theunens testified about an operation outside Sarajevo (25 October 1993 to 25 February 1994), the aims of

- which were to push the Army of Bosnia and Herzegovina out of a wider area of Vogosca and to take and hold the Nisici Plateau to the northwest of Sarajevo.⁷⁰⁰
273. General Vegh, a retired General and former Commander of the Hungarian Defence Forces,⁷⁰¹ also gave evidence with respect to JNA participation in events in Bosnia and Herzegovina;⁷⁰² JNA transition to the VRS;⁷⁰³ and VJ support of the VRS.⁷⁰⁴ The witness opined that as long as military organisations stationed in Bosnia and Herzegovina were subordinated to the JNA, they operated on the theory and practice of “one army”, an expression the witness saw used quite often in several records and reports.⁷⁰⁵ After the withdrawal of the JNA and creation of the VRS, two independently functioning armed forces were formed.⁷⁰⁶ However the relationship between them did not end, and yet they did not function as “one army” either.⁷⁰⁷ Rather, the coordinated and harmonised activities and support resulted in exceptionally close cooperation of the two armies.⁷⁰⁸
274. Mr. Harland testified that when he personally had to write “signs” for negotiation meetings for Ratko Mladic and the Bosnian Serb delegation, Ratko Mladic would cross out the word “Bosnian” and say, “No, no, we are a single Serb delegation. You know, Belgrade is our capital”.⁷⁰⁹ In general, when the UN had problems with getting the Bosnian Serb civilians to take the appropriate decision, there would often be a delegation to Belgrade, as in the case of Gorazde. They would talk with the Accused, who, according to Mr. Harland, would be able to bring about the desired outcome with the Bosnian Serb military; ⁷¹⁰ further, the Accused was able to influence the behaviour of the VRS.⁷¹¹
275. Secretary Vance, Lord Carrington, and Ambassador Okun understood the Accused’s signature of the Cessation of Hostilities Agreement⁷¹² to indicate the assent of the paramilitaries and irregulars, as was recorded in the document, because these groups were, in their opinion, under the Accused’s control.⁷¹³
276. At a meeting on 22 April 1994, regarding the situation in Gorazde, the Accused directed Radovan Karadzic during the meeting to instruct his officials to remove obstacles to a UN aid convoy in Rogatica, and Radovan Karadzic complied.⁷¹⁴ The Accused’s influence over Radovan Karadzic was apparent from the pressure the Accused placed upon him to help resolve the UN hostage crisis in May and June 1995.⁷¹⁵ In an intercepted conversation on 9 July 1991, Radovan Karadzic said to the Accused, “Get in touch with me maybe daily. It is very important for me to hear your assessment”.⁷¹⁶
277. UNPROFOR was able to detect direct intervention by the Accused and others in Belgrade in the VRS only at a few key points in time, most evidently in relation to Gorazde, Mount Igman, and Bjelasnica area.⁷¹⁷ Thus the fact that nothing was done to restrain the VRS around Sarajevo and in other places, including Srebrenica, was taken as either acquiescence or support of these activities.⁷¹⁸ Support given by Belgrade enabled it to influence a number of outcomes in Bosnia and Herzegovina.⁷¹⁹ The Bosnian Serbs were almost entirely dependent on the support from Serbia; and, had a serious effort been made to restrain them, Mr. Harland believes that the Bosnian Serbs would have been responsive.⁷²⁰
278. As a Delegate for the Special Representative of the UN Secretary-General in Belgrade,⁷²¹ Charles Kirudja had about six meetings with the Accused on

- issues concerning UNPROFOR, Prevlaka, and no-fly zones.⁷²² The witness was struck by the Accused's command of detail and knowledge of matters on which they spoke;⁷²³ usually in meetings with government leaders, aides are the keepers of details,⁷²⁴ but there was never an issue of delegation to FRY President Lilic or anyone else ; it was sufficient to meet only with the Accused.⁷²⁵ In a memorandum of 16 May 1995, the witness referred to the Accused's "solo role in the negotiations".⁷²⁶ It was clear to the witness at the time that the Accused had a role to play in the recovery of hostages in Sarajevo.⁷²⁷
279. As part of the shuttle negotiations to achieve peace in Bosnia and Herzegovina, General Clark, then Commander of the NATO Operation Allied Force, met with the Accused on 17 August 1995, along with Richard Holbrooke and other members of the Belgrade delegation.⁷²⁸ The delegation went to meet the Accused because it was thought that he would be a dominant factor in achieving peace in Bosnia.⁷²⁹ Holbrooke asked the Accused whether he should deal with him or the Bosnian Serbs. The Accused replied, "With (me), of course".⁷³⁰ The Accused stated that he should be given the terms of the agreement and that he would hold an election, a referendum on the agreement.⁷³¹ When asked why a referendum vote in Serbia would bind people in Bosnia and Herzegovina, the Accused stated that they will not disobey the will of the Serb people.⁷³²
280. General Clark asked the Accused why, if he had this influence over the Bosnian Serbs, he had allowed Ratko Mladic to kill all those people at Srebrenica.⁷³³ The Accused replied, "Well, General Clark, I told him not to do it but he didn't listen to me".⁷³⁴ General Clark testified that he had regarded the admission as stunning, because it showed foreknowledge of Srebrenica.⁷³⁵
281. There was a further meeting on 13 September 1995 at a lodge near Belgrade. The Accused recommended that General Clark and Richard Holbrooke speak to Radovan Karadzic and Ratko Mladic, who were in a building only 200 metres away.⁷³⁶
282. During the Dayton negotiations, the Accused marked on a map of Sarajevo a line in red to identify those portions of Sarajevo he would be willing to return to the Federation of Bosnia and Herzegovina, and those portions that he would retain.⁷³⁷ The Accused revealed a great deal of personal knowledge of the terrain and had no need to speak to anyone.⁷³⁸ When the time came to discuss the establishment of a sovereign road between Sarajevo and the Bosnian Muslim enclave of Gorazde, the Accused worked on a computerised map with General Clark and, without consulting with any member of the Bosnian Serb team, he seemed very familiar with the road and terrain; the Accused identified parts of the land held by the Bosnian Serbs that he was willing to return to the Federation of Bosnia and Herzegovina to establish a sovereign road between Sarajevo and Gorazde.⁷³⁹ For General Clark, the significance of the map marked by the Accused at Dayton is that the Accused drew the line himself, without consulting: it was an indication of his authority.⁷⁴⁰ He did not consult anyone during the negotiations.⁷⁴¹
283. In relation to negotiations at Dayton, when General Clark had trouble with the Bosnian Serbs, he went to the Accused who was able to respond.⁷⁴² The

- Accused said that his initials were enough to verify the Dayton Agreement and that he would produce the Bosnian Serbs' signatures later.⁷⁴³
284. At least one member of the Contact Group said that he had seen the Accused in Serbia with Ratko Mladic on 7 July 1995, four days before Srebrenica fell.⁷⁴⁴ A code cable to the Accused on the 11th July 1995 states that "the BSA (VRS (is likely to separate the military-age men from the rest of the population", an eventuality about which UNPROFOR troops will be able to do very little. The fact that the VRS will have practical difficulties controlling 40,000 people may mitigate against their desire to prolong or exacerbate the plight of the Srebrenica population.⁷⁴⁵
285. The Accused would be informed every day.⁷⁴⁶ The following persons attended the State Security meetings every morning: Messrs. Prodanic, Stanisic, Tapavcevic, and for a while Kertes while he was at the federal MUP.⁷⁴⁷ B-179 heard in Bubanj Potok conversations between Milan Prodanic and Jovica Stanisic that the Accused had to be informed about everything that was being done.⁷⁴⁸ The witness heard that the Accused received reports, through Mr. Prodanic, from the State Security of Serbia⁷⁴⁹ and that the Accused had to be informed about everything that was sent to the front line.⁷⁵⁰
286. The fact that nothing was done to restrain the VRS around Sarajevo or Srebrenica was taken by Mr. Harland to mean that the Accused either acquiesced or supported these activities.⁷⁵¹ General Smith concluded that the Accused knew of the killings after the event because, at the meeting on 15 July 1995, he must have understood what had happened because Ratko Mladic was there.⁷⁵²
287. The contents of this paragraph are set out in a confidential annex.

iii. Finding

288. On the basis of the inference that may be drawn from the evidence, including evidence referred to in paragraphs 250-287 and 304-308, a Trial Chamber could be satisfied beyond reasonable doubt that the Accused was a participant in the joint criminal enterprise, found by the Trial Chamber in paragraph 246 to include the Bosnian Serb leadership, and that he shared with its participants the aim and intention to destroy a part of the Bosnian Muslims as a group, Judge Kwon dissenting.

On the basis of the evidence as to –

- (1) the overall leadership position of the Accused among the Serbian people, including the Bosnian Serbs in Bosnia and Herzegovina;
- (2) the Accused's advocacy of and support for the concept of a Greater Serbia;
- (3) the logistical and financial support from Serbia to the Bosnian Serbs, which it is reasonable to infer was provided with the knowledge and support of the Accused ; the logistical support is illustrated by the close relationship of VJ personnel with the VRS;

(4) the nature of the Accused's relationship and involvement with the Bosnian Serb political and military leadership, as evidenced by the request of Karadzic that the Accused keep in touch with him and that it was very important for Karadzic to have his assessment ;⁷⁵³

(5) the authority and influence of the Accused over the Bosnian Serb leadership;

(6) the intimate knowledge that the Accused had "about everything that was being done"; his insistence that he be informed "about everything that was going to the front line";⁷⁵⁴ and

(7) the crimes committed, the scale and pattern of the attacks on the four territories, their intensity, the substantial number of Muslims killed, the brutal treatment of Muslims in detention centres and elsewhere, and the targeting of persons essential to the survival of the Muslims as a group,

a Trial Chamber could infer that he not only knew of the genocidal plan of the joint criminal enterprise, but also that he shared with its members the intent to destroy a part of the Bosnian Muslims as a group in that part of the territory of Bosnia and Herzegovina which it was planned to include in the Serbian state.

c. Answer to the First Question

289. The Trial Chamber concludes that there is sufficient evidence that genocide was committed in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi and, Judge Kwon dissenting, that there is sufficient evidence that the Accused was a participant in a joint criminal enterprise, which included the Bosnian Serb leadership, the aim and intention of which was to destroy a part of the Bosnian Muslims as a group.

(ii) Is there evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt that the Accused was a participant in a joint criminal enterprise to commit a particular crime and it was reasonably foreseeable to him that, as a consequence of the commission of that crime, a different crime, namely genocide, in whole or in part, of the Bosnian Muslims as a group, would be committed by other participants in the joint criminal enterprise, and it was committed?

a. Genocide and *mens rea* requirement for a conviction pursuant to the third category of joint criminal enterprise liability

290. The *Amici Curiae* submitted, firstly, that there is no evidence that the crime of genocide was within the object of the alleged joint criminal enterprise and, secondly, that the special intent required for genocide is not compatible with the *mens rea* requirement for a conviction pursuant to the third category of joint criminal enterprise and that the Prosecution must prove the Accused possessed the specific intent required for genocide before a conviction can be entered.⁷⁵⁵ In

Prosecutor v. Tadic,⁷⁵⁶ the Appeals Chamber identified three categories of joint criminal enterprise, the third of which requires the Prosecution to establish (1) that the crime charged was a natural and foreseeable consequence of the execution of that enterprise and (2) that the Accused was aware that such crime was a possible consequence of the execution, and that, with that awareness, he participated in that enterprise.⁷⁵⁷ The essence of this category of joint criminal enterprise is that an accused person who enters into such an enterprise to commit a particular crime is liable for the commission of another crime outside the object of the joint criminal enterprise, if it was reasonably foreseeable to him that as a consequence of the commission of that particular crime the other crime would be committed by other participants in the joint criminal enterprise.

291. The Appeals Chamber in *Prosecutor v. Brdjanin*⁷⁵⁸ held that there is no incompatibility between the requirement of genocide and the *mens rea* requirement for a conviction pursuant to the third category of joint criminal enterprise;⁷⁵⁹ it is therefore not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of liability. That submission of the *Amici Curiae* is, therefore, without merit.

b. Finding and Answer to the Second Question

292. On the basis of the inference that may be drawn from the evidence set out in relation to the First Question, a Trial Chamber could be satisfied beyond reasonable doubt that the Accused was a participant in a joint criminal enterprise to commit other crimes than genocide and it was reasonably foreseeable to him that, as a consequence of the commission of those crimes, genocide of a part of the Bosnian Muslims as a group would be committed by other participants in the joint criminal enterprise, and it was committed.

293. Although this basis of liability is alternative to the liability of the Accused as a perpetrator sharing the intent of the other members of the joint criminal enterprise (First Question), the Trial Chamber will not make a final determination as to the one or the other basis at this stage, that is, whether to acquit the Accused at this stage of one or the other basis of liability. The reason is that a determination as to the Accused's liability depends to a certain extent on issues of fact and the weight to be attached to certain items of evidence, which calls for an assessment of the credibility and reliability of that evidence. These issues do not arise for determination until the judgement phase.

(iii) Aiding and Abetting Genocide and Complicity in Genocide

a. Is there evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt that the Accused aided and abetted in the commission of the crime of genocide in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi?

b. Is there evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt that the Accused was complicit in the commission of the crime of genocide in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi?

294. The *Amici Curiae* submit that there is no evidence that the Accused knowingly aided or abetted one or more persons to commit genocide.⁷⁶⁰

295. In *Prosecutor v. Krstic*, the Appeals Chamber held:

(1) Aiding and abetting genocide is a separate mode of liability; its *mens rea* is simply knowledge of the genocidal intent which need not be shared by the Accused.

The Trial Chamber observes that the Appeals Chamber's conclusion that the proper characterisation of Krstic's liability is aiding and abetting is confined to the facts of that case.⁷⁶¹

(2) There is authority for the view that complicity in genocide requires that the Accused share the genocidal intent when it "strikes broader than the prohibition of aiding and abetting".⁷⁶² The Appeals Chamber cited national legislation and the *travaux préparatoires* of the 1948 Genocide Convention to support that view, but took no position on that question since it was not an issue before the Chamber, thereby rendering their comments *obiter dicta*.⁷⁶³

296. There is, therefore, no authoritative decision within the Tribunal as to whether there is a difference in the *mens rea* for aiding and abetting genocide and complicity in genocide, either when the latter is broader than aiding and abetting, or indeed, when it is of the same scope as aiding and abetting.

297. In the absence of anything to indicate that complicity is broader than aiding and abetting in the circumstances of this case, the Trial Chamber considers that there is merit in the Prosecution's submission that the two are essentially the same.⁷⁶⁴ The Prosecution also submitted that, in light of the similarities between the charges, the Trial Chamber should confine itself to a determination on aiding and abetting under Article 7(1) of the Statute.⁷⁶⁵ It appears to the Trial Chamber that because complicity in genocide under Article 4(3)(e) of the Statute is, following the Trial Chamber's Judgement in *Prosecutor v. Stakic*,⁷⁶⁶ the *lex specialis* in relation to liability under Article 7(1) of the Statute, the proper characterisation of the Accused's liability in this case may be complicity in genocide. However, the matter need not be determined at this stage. The final determination, if necessary, will be made at the judgement phase.

c. Finding and Answer to Third and Fourth Questions

298. On the basis of the evidence set out above in relation to the First Question, a Trial Chamber could be satisfied beyond reasonable doubt that the Accused aided and abetted or was complicit in the commission of the crime of genocide in

that he had knowledge of the joint criminal enterprise, and that he gave its participants substantial assistance, being aware that its aim and intention was the destruction of a part of the Bosnian Muslims as a group.

299. Although complicity and aiding and abetting are possible alternatives to the liability of the Accused as a principal, the Trial Chamber will not, for the reason stated in paragraph 293 in relation to the third category of joint criminal enterprise, make a determination at this stage as to the one or the other.

(iv) Is there evidence upon which a Trial Chamber could be satisfied beyond reasonable doubt that the Accused knew or had reason to know that persons subordinate to him were about to commit or had committed genocide, in whole or in part, of the Bosnian Muslims as a group in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi, and he failed to take the necessary measures to prevent the commission of genocide or punish the perpetrators thereof?

300. The *Amici Curiae* submit that the specific intent required for genocide cannot be reconciled and is not compatible with the simple *mens rea* requirement of command responsibility under Article 7(3) of the Statute.⁷⁶⁷ On the basis of the Decision of the Appeals Chamber in *Prosecutor v. Br/anim*,⁷⁶⁸ this submission is unmeritorious.

301. The *Amici Curiae* also submit that there is insufficient evidence that the Accused exercised “effective control” over the perpetrators of the alleged crime of genocide and that there is no evidence that (1) a subordinate to the Accused killed individual Bosnian Muslims or Bosnian Croats with the intent to destroy them as a group and (2) that the Accused “knew or had reason to know” that a subordinate was about to commit genocide, or had done so, and that the Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.⁷⁶⁹

302. The Prosecution submits that there is sufficient evidence that the Accused exercised “effective control” over General Adžic, the Chief of the Main Staff of the JNA, Ratko Mladic, the Chief of the General Staff of the VRS, and Franko Simatovic and Jovica Stanisic of the Serbian DB.⁷⁷⁰ It submits that the evidence demonstrates that the Accused had the ability to prevent or punish the commission of crimes by forces subordinated to these individuals.⁷⁷¹ In addition, it is submitted that the evidence supports a finding that the Accused’s influence and control over the Bosnian Serb leadership amounted to *de facto* control.⁷⁷² The Accused could have prevented the perpetration of crimes of genocide had he wished to.⁷⁷³ According to the Prosecution, the Accused’s approval, acquiescence, and continuing support following the commission of atrocities by forces under his control are indications of his intentions.⁷⁷⁴

303. The Chamber will now consider the evidence relevant to these submissions.

a. Evidence in relation to liability under Article 7(3) of the Statute

304. The Accused exercised *de facto* control over the JNA through his influence over (1) the SFRY Presidency;⁷⁷⁵ (2) the Chiefs of the Main Staff (Kadijevic, Adzic, and Panic);⁷⁷⁶ (3) the finances of the JNA;⁷⁷⁷ and (4) the appointment of loyal JNA officers.⁷⁷⁸ The VRS and the VJ were created out of the JNA,⁷⁷⁹ and throughout the war the VRS received logistical support from the VJ.⁷⁸⁰ Indeed, funding for the VRS and the VJ emerged from a single financing plan.⁷⁸¹
305. The Accused had both *de jure* and *de facto* control over the Serbian MUP and the State Security Service (DB).⁷⁸² Jovica Stanisic, who controlled the Serbian DB, is reported to have said the following to the Accused at an anniversary celebration of the founding of the special forces formed under the direction of the DB, or the Red Berets (later JATD and JSO): “ Mr. President, everything we have done so far we did with your knowledge and with your consent”.⁷⁸³ At the same ceremony, the Accused said to a member of the Red Berets, Radojica Bozovic, that he “read the reports” from Bozovic.⁷⁸⁴
306. B-129 testified that, through the DB, the Accused controlled and supported the Red Berets and Arkan’s Tigers and knew of their activities in Bosnia and Herzegovina.⁷⁸⁵ When asking Mihalj Kertes whether Arkan was under control, the Accused stated, “We need people like this now, but no one should think that they are more powerful than the state”.⁷⁸⁶ In addition, the Accused stated to Borisav Jovic in 1991 that “Arkan was a criminal and that it was unthinkable that our official organs would co-operate with someone like Arkan”.⁷⁸⁷ The Accused covertly provided support to paramilitary groups from Serbia such as the [eseljevci].⁷⁸⁸ During meetings and negotiations, the Accused was understood to represent all of the forces operating in Bosnia and Herzegovina, including paramilitaries.⁷⁸⁹
307. The Accused had intimate knowledge of events and geography, and was familiar with the strategic importance of villages and the terrain around Sarajevo.⁷⁹⁰ The Accused was aware of the crimes occurring on the ground in Bosnia and Herzegovina directly through national sources, such as the Serbian MUP,⁷⁹¹ Security Administration,⁷⁹² and his close associates (*e.g.*, Radovan Karadzic),⁷⁹³ as well as international sources, such as Helsinki Watch,⁷⁹⁴ Ambassador Okun, and Secretary Vance.⁷⁹⁵
308. At a FRY Council for Coordination of State Policy meeting held on 18 August 1992, the issue of ethnic cleansing of Bosnia Muslims was discussed in the presence of the Accused,⁷⁹⁶ who stated that it would be unacceptable for “us” to leave the Bosnia Serbs helpless and that the aid to the Bosnia Serbs was humanitarian.⁷⁹⁷

b. Finding and Answer to Fifth Question

309. On the basis of this evidence as well as other evidence, a Trial Chamber could be satisfied beyond reasonable doubt that the Accused was a superior to certain persons whom he knew or had reason to know were about to commit or had committed genocide of a part of the Bosnian Muslims as a group in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi, and he

failed to take the necessary measures to prevent the commission of genocide, or punish the perpetrators thereof.

2. Specific Challenges to the Bosnia Indictment

(a) Schedule A

Indictment Reference	<i>Amici Curiae</i> Submissions	Prosecution Submissions	Trial Chamber's Decision	Evidence Examined
<p>No. 2</p> <p>Bosanski Novi</p> <p>In Blagaj Japra, 7</p> <p>Bosnian Muslim men were killed during the expulsion of Bosnian Muslims.</p> <p>9 June 1992</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>B-1354 (Ex. 652, tab 1 (partially under seal), transcript from <i>Brdjanin</i>)</p> <p>Professor Riedlmayer (Ex. 486, at pp. 6, 11)</p>
<p>No. 2</p> <p>Bosanski Novi</p> <p>In Alici, 27</p> <p>Bosnian Muslims were killed.</p> <p>23 June 1992</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.</p>	<p>The Trial Chamber has found no evidence.</p>
<p>No. 5</p> <p>Foca</p> <p>In Jelec, 18</p> <p>Bosnian Muslims, including elderly people</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>B-1538 (Ex. 495 (under seal), transcript from <i>Krnojelac</i>, at T. 4045-4046)</p>

and 8 members of 1 family, were executed by JNA soldiers. 4-10 May 1992				
No. 5 Foca In Brod, 14 Bosnian Muslim men from Trnovaca were executed by Serb soldiers. 22 June 1992	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).	The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.	The Trial Chamber has found no evidence.
No. 6 Gacko 2 Muslim males were killed by Serbs in a field near Mount Zelengora. 18 June 1992	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	B-1122 (Ex. 566, tab 1 (under seal), statement dated 27 January 1999, at para. 39)
No. 6 Gacko At least 8 Muslims were killed by Serb soldiers near Mount Zelengora. 18-23 June	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	B-1122 (Ex. 566, tab 1 (under seal), statement dated 27 January 1999, at para. 39)

1992				
<p>No. 7</p> <p>Kljuc</p> <p>In Prhovo, 38 Bosnian Muslim villagers, including women and children, were killed by shooting and grenades.</p> <p>1 June 1992</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.</p>	<p>The Trial Chamber has found no evidence.</p>
<p>No. 8</p> <p>Kotor Varos</p> <p>In Kotor Varos town, approximately 13 non-Serbs were killed in and around the Medical Centre.</p> <p>25 June 1992</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.</p>	<p>The Trial Chamber has found no evidence.</p>
<p>No. 8</p> <p>Kotor Varos</p> <p>In a barn in Dabovci, at least 15 Bosnian Muslim men were killed.</p> <p>August 1992</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.</p>	<p>The Trial Chamber has found no evidence.</p>

<p>No. 8</p> <p>Kotor Varos</p> <p>In Grabovice, a large number of Bosnian Muslim and Bosnian Croat detainees were held in the Grabovice</p> <p>School, beaten and never seen again.</p> <p>November 1992</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.</p>	<p>The Trial Chamber has found no evidence.</p>
<p>No. 9</p> <p>Nevesinje</p> <p>At or near Lipovaca and Dubrovaci, at least 34 Bosnian Muslim men, women and children were killed.</p> <p>June-July 1992</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>C-017 (T. 22044-22045, 22049-22050)</p>
<p>No. 9</p> <p>Nevesinje</p> <p>Near Kiser, approximately 17 Bosnian Muslim civilians were killed by Serb</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>C-017 (T. 22044-22045, 22049-22050)</p>

soldiers. mid-July 1992				
No. 10 Priedor In Hambarine and Behlici, at least 3 Bosnian Muslims were killed. 11 June-1 July 1992	The <i>Amici Curiae</i> submit that the evidence to support this allegation is insufficient and cite B-1369 (Ex. 658) and B-1032 (Ex. 656).	The Prosecution submits that there is sufficient evidence and cites B-1369 (Ex. 658, tabs 1-2; T. 12648-12649, 12655-12657) and B-1032 (Ex. 656, tab 1, at T. 11852, 11864) (Response, at para. 442).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	B-1369 (Ex. 658, tab 1 (under seal), transcript from <i>Brdjanin</i> , tab 2 (under seal), transcript from <i>Stakic</i> , tabs 4-5 (under seal)) Mr. Husein (Ex. 655) Mr. Garibovic (Ex. 657) B-1032 (Ex. 656 tab 1 (under seal), transcript from <i>Brdjanin</i> , at T. 11852, 11864)
No. 10 Priedor In Kamicani, approximately 8 non-Serbs were killed in Mehmed Sahoric's house. 26 May 1992	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	B-1493 (T. 18953-18955)
No. 10 Priedor In Jaskic, at least 19	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence	The Trial Chamber finds that there is insufficient evidence to support this	B-1493 (T. 18953-18955)

Bosnian Muslim men were killed. 14 June 1992		(Response, at para. 441).	allegation. The Motion is allowed.	
No. 10 Prijedor In Brisevo, at least 68 non-Serbs were killed during the attack. 24 July 1992	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	B-1493 (T. 18953-18955)
No. 10 Prijedor In Kipe iron ore mine (near Ljubija), at least 8 Bosnian Muslim men were executed. 25 July 1992	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	B-1493 (T. 18953-18955)
No. 10 Prijedor In Ljubija, at least 3 Bosnian Muslim men were executed at the football stadium. 25 July 1992	The <i>Amici Curiae</i> submit that the evidence to support this allegation is insufficient and cite B-1369 (Ex. 658).	The Prosecution submits that there is sufficient evidence and cites B-1369 (Ex. 658, tab 2, at T. 3930-3932) (Response, at para. 442).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	B-1369 (Ex. 658, tab 2 (under seal), transcript from <i>Stakic</i> , at T. 3931)
No. 10	The <i>Amici Curiae</i> submit that there is no	The Prosecution concedes that	The Trial Chamber finds that there is	B-1493 (T. 18953-18955)

Prijedor In Tomasica, 4 non-Serbs were killed. 3 December 1992	evidence to support this allegation.	this allegation is unsupported by evidence (Response, at para. 441).	insufficient evidence to support this allegation. The Motion is allowed.	
No. 11 Prnjavor In Lisna, 4 Bosnian Muslim men were executed. May 1992	The <i>Amici Curiae</i> submit that the evidence to support this allegation is insufficient and cite B-1610 (Ex. 532, at T. 16017; T. 26183-26184).	The Prosecution submits that there is sufficient evidence and cites B-1610 (Ex. 532; T. 26149) (Response, at para. 442).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	B-1610 (Ex. 532, tab 1 (under seal), transcript from <i>Brdjanin</i> , at T. 26149, 26184)
No. 12 Sanski Most: In Donji Kruhari near Skrljevit, 5 Bosnian Croat men were killed. 2 November 1992	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).	The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.	The Trial Chamber has found no evidence.
No. 12 Sanski Most In Sasina, at least 65 non-Serb men were executed by members of Arkan's Tigers under the direct	The <i>Amici Curiae</i> submit that the evidence to support this allegation is insufficient.	The Prosecution submits that there is sufficient evidence and cites B-108 (T. 19916) and B-1047 (T. 22496, T. 22527)	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	B-108 (T. 19915-19916, 20022, 20038; Ex. D128) Mr. Zulic (T. 30046-30047)

command of Arkan. 21 September 1995		(Response, at para. 442).		
No. 13 Srebrenica Following the take-over of Srebrenica, several thousand Bosnian Muslim men were executed by Bosnian Serb forces, including at the following location: . . . (7) Kozluk (Zvornik municipality), at least 340 Bosnian Muslim men. 15-16 July 1995	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation and cite three witnesses dealing with Kozluk: (1) Mr. Banjanovic (T. 20614, 20626; Ex. 444), (2) B-024, T. 21894, and (3) Riviere (T. 28139).	The Prosecution submits that there is sufficient evidence and cites Mr. Manning (T. 31411-31413; Ex. 642, tabs 1, 3-6, 8-11, 16-20, 23-26) (Response, at para. 442).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Mr. Manning (T. 31406-31409, 31411-31413; Ex. 642, tab 1, statement dated 24 November 2003, tabs 4-6, 8-9, 15, 18, 23)
No. 14 Visegrad In Bikavac settlement, approximately 70 Bosnian Muslim and other non-Serb civilians were burnt to death	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite B-1054 (T. 25600, 25596; Ex. 522).	The Prosecution submits that there is sufficient evidence and cites B-1054 (T. 25596-25600) (Response, at para. 442).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	B-1054 (Ex. 522, tab 1, transcript from <i>Vasiljevic</i>)

<p>in a house ignited by Serb paramilitaries led by Milan Lukic.</p> <p>27 June 1992</p>				
<p>No. 15</p> <p>Vlasenica</p> <p>In Drum (Vlasenica town), approximately 22 Bosnian Muslim men were killed.</p> <p>June 1992</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation.</p>	<p>The Prosecution submits that there is sufficient evidence and cites Mr. Osmanovic (Ex. 597, tab 1) (Response, at para. 442).</p>	<p>The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.</p>	<p>Mr. Osmanovic (Ex. 597, tab 1, statement dated 10 October 1994, tab 2, statement dated 11 October 1995, tab 3, statement dated 7 June 2001)</p>
<p>No. 15</p> <p>Vlasenica</p> <p>In Zaklopaca, at least 58 Bosnian Muslim men, women and children were executed during the Serb attack on the village.</p> <p>16 May 1992</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.</p>	<p>The Trial Chamber has found no evidence.</p>
<p>No. 17</p> <p>Ilijas (Greater Sarajevo)</p> <p>In Ljesevo, 21 Bosnian Muslims were</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 441).</p>	<p>The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.</p>	<p>The Trial Chamber has found no evidence.</p>

killed.				
4 June 1992				

(b) Schedule B

Indictment Reference	<i>Amici Curiae</i> Submissions	Prosecution Submissions	Trial Chamber's Decision	Evidence Examined
No. 1 Banja Luka Between Krings camp and Manjaca camp, approximately 20 non-Serb men were killed during transportation between the camps. 4 July 1992	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 446).	The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.	The Trial Chamber has found no evidence.
No. 2 Bileca In SUP detention facility, 2 non-Serb detainees killed. 25 June - 18 December 1992	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 446).	The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.	The Trial Chamber has found no evidence.
No. 4 Bosanski	The <i>Amici Curiae</i> seem to submit that there is	The Prosecution submits that there is	The Trial Chamber finds that there is sufficient	B-1643 (Ex. 654, tab 1 (under seal), transcript from

<p>Samac</p> <p>In Crkvina camp, approximately 17 non-Serb detainees were killed.</p> <p>6 May 1992</p>	<p>insufficient evidence to support the allegation because B-1643 (Ex. 654) testifies to the killing of 16 people on 7 May 1992.</p>	<p>sufficient evidence and cites B-1643 (Ex. 654; T. 11571-11575, 11557-11583) (Response, at para. 444).</p>	<p>evidence to support this allegation. The Motion is not allowed.</p>	<p><i>Simic</i>, at T. 11569-11582)</p> <p>B-1244 (T. 23464, Ex. 476, tab 3 (under seal))</p>
<p>No. 7</p> <p>Cajnice</p> <p>At Mostina Hunting Lodge, 53 non-Serbs killed.</p> <p>19 May 1992</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (T. 17431-17432).</p>	<p>The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (T. 17431-17432) (Response, at para. 444).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>Ms. Malesevic (Ex. 404, tab 7; T. 17429-17433, 17439)</p>
<p>No. 9</p> <p>Gacko</p> <p>5 Bosnian men killed in the SUP building in Gacko.</p> <p>3 July 1992</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.</p>	<p>The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 446).</p>	<p>The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.</p>	<p>The Trial Chamber has found no evidence.</p>
<p>No. 10</p> <p>Kalinovik</p> <p>Approximately 23 Muslim men and boys from the Gunpowder warehouse were shot in a field near</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cites Ms. Malesevic (T. 17432).</p>	<p>The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (T. 17432) (Response, at para. 444).</p>	<p>The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.</p>	<p>Ms. Malesevic (Ex. 404, tab 7; T. 17429-17433, 17439)</p>

Ratine. 5 August 1992				
No. 14 Sanski Most Near Hrastova Glavica, approximately 100 non-Serb men taken from Keraterm and Omarska camps were killed. 5 August 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation.	The Prosecution submits that there is sufficient evidence and cites B-1088 (Ex. 624, at T. 2527) (Response, at para. 444).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	B-1088 (Ex. 624, tab 1 (under seal), transcript from <i>Sikirica</i> , at T. 2522-2523, 2527, tab 3 (under seal), statement dated 19 November 2000)
No. 14 Sanski Most At Sanakeram ceramics factory, at least 10 non-Serb men were killed. 30 September - 09 October 1992	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution submits that its pending Rule 92bis(C) application for admission of the evidence of Mr. Alisic, if granted, would provide sufficient evidence to support this allegation (Response, at para. 444).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Mr. Alisic (Ex. 670, tab 1, statement dated 16 January 1997)
No. 15 Teslic In Teslic town, at least 5 non-Serb men were killed at the	The <i>Amici Curiae</i> submit that there is no evidence to support this allegation.	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 446).	The Trial Chamber finds that there is no evidence to support this allegation. The Motion is allowed.	The Trial Chamber has found no evidence.

TO building. June 1992				
No. 17 Zvornik At Novi Izvor building, at least 2 non-Serb male detainees were killed. May 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite B-1461 (Ex. 437) and Mr. Deronjic (Ex. 606).	The Prosecution submits that there is sufficient evidence and cites B-1461 (Ex. 437; T 20197) and Mr. Deronjic (Ex. 606; T. 29719) (Response, at para. 444).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	B-1461 (T. 20212-20214, 20263) Mr. Deronjic (Ex. 600, statement dated 25 November 2003) B-1516: Ex. 606 (partially under seal)

(c) Schedule C

Indictment Reference	<i>Amici Curiae</i> Submissions	Prosecution Submissions	Trial Chamber's Decision	Evidence Examined
No. 2 Bihac Traktorski Servis, Ripac (garages and houses) July-October 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429).	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-17430) (Response, at paras. 446(i)-(ix), 447).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 4 Bileca SUP Detention Facility	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and	The Prosecution concedes that this allegation is unsupported by evidence (Response, at	The Trial Chamber finds that there is insufficient evidence to support this allegation. The	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)

10 June - 19 December 1992	cite Ms. Malesevic (Ex. 404, tab 7; T. 17429).	para. 445).	Motion is allowed.	
No. 4 Bileca Student Hostel (Dacki Dom) 25 June - 05 October 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429).	The Prosecution submits that this allegation is in dispute, but does not specifically oppose the Motion (Response, at para. 440; p. 208).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 8 Bosanski Novi Bosanska Kostajnica Police Station May-July 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429).	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 445).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 11 Cajnice Mostina Hunting Lodge April-May 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-17432) (Response, at paras. 446(i)-(ix), 447).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 11	The <i>Amici Curiae</i> submit	The Prosecution	The Trial Chamber finds	Ms. Malesevic

Cajnice Cajnice SUP Building June-July 1993	that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	concedes that this allegation is unsupported by evidence (Response, at paras. 445, 497).	that there is insufficient evidence to support this allegation. The Motion is allowed.	(Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 12 Doboj Seslija Camp March - October 1993	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 445).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 15 Kalinovik Gunpowder house between Jelasica and Jazici 05 July - 05 August 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-17432) (Response, at paras. 446(i)-(ix), 447).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 16 Kotor Varos: Kotor Varos Prison June - November	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T.	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)

1992 Kotor Varos Sawmill June 1992 Kotor Varos Police Station May - September 1992	17429-17432).	17432) (Response, at paras. 446(i)- (ix), 447).		
No. 16 Kotor Varos Kotor Varos Elementary School August - September 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	The Prosecution concedes that this allegation is unsupported by evidence (Response, at para. 445).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 17 Nevesinje Central Heating Factory (Kilavci) June - July 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-17432) (Response, at paras. 446(i)-(ix), 447).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 18 Prijedor Miska Glava	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this	The Prosecution concedes that this allegation is unsupported by evidence	The Trial Chamber finds that there is insufficient evidence to support this	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et</i>

July 1992	allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	(Response, at para. 445).	allegation. The Motion is allowed.	<i>seq.</i>)
No. 20 Sanski Most Boiler Room of Old Hotel 21-25 September 1995	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-17430) and Mr. Alisic (Response, at paras. 446(i)-(ix), 447).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>) Mr. Alisic (Ex. 670, tab 1, statement dated 16 January 1997)
No. 21 Teslic Pribinic (old post office) June - October 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-17430) (Response, at paras. 446(i)-(ix), 447).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 21 Teslic TO Building June 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T.	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)

	17429-17432).	17430) (Response, at paras. 446(i)-(ix), 447).		
No. 21 Teslic SUP Building June 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-17430) (Response, at paras. 446(i)-(ix), 447).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>)
No. 22 Visegrad Detention Centre in tourist hotel in Vilina Vlas 1 May 1992	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432) and B-1510 (Ex. 661).	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-17430) and B-1510 (Ex. 661) (Response, at paras. 446(i)-(ix), 447).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>) B-1510 (Ex. 661, tab 1, transcript from <i>Vasiljevic</i> , at T. 663-666, 675, 678, 681)
No. 22 Visegrad Uzamnica, a former military warehouse and barracks August 1992 - October 1994	The <i>Amici Curiae</i> submit that there is insufficient evidence to support this allegation and cite Ms. Malesevic (Ex. 404, tab 7; T. 17429-17432).	The Prosecution submits that there is sufficient evidence and cites Ms. Malesevic (Ex. 404, tabs 7-8; T. 17427-17430) and B-	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Ms. Malesevic (Ex. 404, tabs 6-9; T. 17414, <i>et seq.</i>) B-1510 (Ex. 661, tab 1, transcript from

		1510 (Ex. 661) (Response, at paras. 446(i)-(ix), 447).		<i>Vasiljevic</i> B-1505 (Ex. 523, tab 1, transcript from <i>Vasiljevic</i> , at T. 144-145, 151-152, 188-189; T. 25888)
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(d) Schedule D

Indictment Reference	<i>Amici Curiae</i> Submissions	Prosecution Submissions	Trial Chamber's Decision	Evidence Examined
No. 1 Banja Luka Deportations to Hungary 19,359 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> concede that there is evidence of forcible transfer, but submit that there is no evidence of deportation from Banja Luka into Hungary.	The Prosecution submits that there is sufficient evidence to support this allegation: (1) Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) (a) proof of movement across a national border is not necessary to prove forcible transfer from Banja Luka and, (b) irrespective of whether there was movement across a national	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 69, 73, 77, Annex A2, at pp. 85, 89, 93, Annex A5, at p. 133) Mr. Kirudja (Ex. 378, tabs 5, 7; T. 15412-15436, 15485) <u>Mr. McLeod (Ex. 650, tabs 11-13, 17)</u> Mr. Babic (T. 12855, 13064-13069, 13081-13082)

		border, there is evidence of forcible transfer from Banja Luka (Response, at paras. 452-457, 459).		
No. 2 Bileca Deportations to Montenegro 993 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer from Bileca or deportation from Bileca into Montenegro.	The Prosecution submits that there is evidence to support this allegation: (1) Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) evidence of forcible transfer from the neighbouring municipality of Gacko (Response, at paras. 452-457, 460).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 69, 73, 77, Annex A2, at p. 85) C-017 (T. 22037-22038) B-1122 (Ex. 566, tab 1, statement dated 27 January 1999, at p. 4) Ex. 613, tab 145 (intercepted communication) Mr. Babic (Ex. 353, tab 40; T. 13446-13447)
No. 5 Bosanska Krupa: Buzim 389 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer and cite Mr. Velic (T. 29578).	The Prosecution submits that there is evidence to support this allegation: (1) Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) it is not	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, pp. 69, 73, 77, Annex A2, p. 85) Mr. Velic (T. 29573-29579) Mr. Kirudja (T. 15440-15442, 15485)

		necessary for the evidence to match the allegation exactly (Response, at paras. 450, 452-457, 461).		Mr. Palic (T. 29719; Ex. 603, statement dated 26 August 1999 and addendum dated 31 July 2001)
No. 5 Bosanska Krupa: Krupa na Uni 1 non-Serb displaced person and refugee	The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.	As above	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 69, 73, 77, Annex A2, pp. 85, 93)
No. 6 Bosanska Dubica 3,310 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.	The Prosecution submits that there is evidence to support this allegation: (1) Annex A5 of Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) evidence of abuses (including forcible transfer) in Bosanski Novi, Prijedor, and Sanski Most (Response, at paras. 452-457, 462).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 69, 73, 77, Annex A2, at p. 85, Annex A5, at p. 133) Mr. Kirudja (Ex. 378, tabs 7, 9; T. 15422-15428, 15433) Mr. Mesanovic (Ex. 638)

<p>No. 7</p> <p>Bosanska Gradiska</p> <p>7,516 non-Serb displaced persons and refugees</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.</p>	<p>The Prosecution submits that there is evidence to support this allegation: (1) Annex A5 of Professor Tabeau's report, (2) Riedlmayer's report, and (3) evidence of abuses (including forcible transfer) in Bosanski Novi, Prijedor, Banja Luka, and Sanski Most (Response, at paras. 452-457, 463).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 69, 73, 77, 79, Annex A2, at p. 85, Annex A5, at p. 133)</p> <p>Mr. McLeod (Ex. 650, tab 1, transcript from <i>Brdjanin</i>, at T. 7301-7302, tab 5)</p>
<p>No. 9</p> <p>Bosanski Petrovac:</p> <p>Bosanski Petrovac – 778 non-Serb displaced persons and refugees</p> <p>Petrovac – "unknown" number of non-Serb displaced persons and refugees</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer and cite B-127 (T. 24668).</p>	<p>The Prosecution submits that there is evidence to support this allegation: (1) Annex A5 of Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) evidence of abuses (including forcible transfer) in Sanski Most,</p>	<p>The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 69, 73, 77, Annex A2, at p. 85, Annex A5, at p. 134)</p> <p>Mr. Selak (Ex. 464, tab 9; T. 22208-22212)</p> <p>B-127 (T. 24668-24669)</p>

		Kljuc, Prijedor, Banja Luka, and Bosanski Novi (Response, at paras. 452-457, 464).		
No. 12 Brcko Ravne / Rahic 1,532 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> concede that there is evidence of forcible transfer from Brcko, but submit that there is no evidence of forcible transfer from Ravne / Rahic.	The Prosecution submits that there is evidence to support this allegation: (1) Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) it is not necessary for the evidence to match the allegation exactly (Response, at paras. 450, 452-457, 465).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 70, 73, Annex A2, at pp. 86, 94) B-1493 (T. 18901) Mr. Babic (T. 12855, 13064-13069, 13081-13082) C-037 (Ex. 326, tab 11) B-1408 (Ex. 557, tab 1 (under seal), transcript from <i>Jelusic</i> , at T. 1553-1557) B-1407 (Ex. 556, tab 1 (under seal), transcript from <i>Jelusic</i> , at T. 1192-1193)
No. 13 Cajnice 2,214 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.	The Prosecution submits that there is evidence to support this allegation: (1) evidence of	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 70, 74, 78, Annex A2, at p. 86)

		Melika Malesevic, (2) Professor Tabeau's report, (3) Professor Riedlmayer's report, and (4) evidence of abuses (including forcible transfer) from Foca and Visegrad (Response, at paras. 452-547, 466).	allowed.	Ms. Malesevic (T. 17430-17433, 17439)
No. 14 Celinac 608 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.	The Prosecution submits that there is evidence to support this allegation: (1) Annex A5 of Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) evidence of abuses (including forcible transfer) in Prijedor, Banja Luka, and Doboj (Response, at paras. 452-457, 467).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 70, 73, 74, 78, Annex A2, at pp. 86, 94, Annex A5, at p. 135) Mr. Babic (Ex. 352, tabs 46-47; T. 13056-13058, 13094, 13108, 13811-13812)
No. 16	The <i>Amici Curiae</i> submit	The Prosecution	The Trial Chamber finds	Professor Tabeau (Ex. 548,

<p>Donji Vakuf</p> <p>1,729 non-Serb displaced persons and refugees</p>	<p>that there is no evidence of forcible transfer.</p>	<p>submits that there is evidence to support this allegation: (1) Annex A5 of Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) evidence of Mr. Selak (Response, at paras. 452-457, 468).</p>	<p>that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>tab 2, Annex A1, at pp. 70, 74, 78, Annex A2, at pp. 86, 94, Annex A5, at p. 135)</p> <p>Mr. Selak(Ex. 462, transcript from <i>Brdjanin</i>, at T. 13015-13030, 13036-13039, 13078-13084, transcript from <i>Tadic</i>, at T. 1963-1964)</p>
<p>No. 19</p> <p>Gorazde:</p> <p>Gorazde FBiH – 2,563 non-Serb displaced persons and refugees</p> <p>Srpsko Gorazde – 1,834 non-Serb displaced persons and refugees</p>	<p>The <i>Amici Curiae</i> submit that there is insufficient evidence of forcible transfer.</p>	<p>The Prosecution submits that there is sufficient evidence to support this allegation: (1) Professor Tabeau's report, (2) Professor Riedlmayer's report, (3) evidence of the humanitarian situation in Gorazde given by (a) Dr. Williams, General van Baal, and Mr. Harland (Response, at paras. 452-457, 469).</p>	<p>The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.</p>	<p>Professor Tabeau (T. 27093-27096, 27099, 27139, 27609; Ex. 548, tab 2, at pp. 10-12, 26-27, Annex A1, at pp. 70, 74, 78, Annex A2, at pp. 86, 94, tabs 3-4)</p> <p>Dr. Williams (T. 22898)</p> <p>General van BAAL (Ex. 534)</p> <p>Mr. HARLAND (T. 26927, <i>et seq.</i>)</p> <p>Mr. Donia (Ex. 537, tab 4, at pp. 10-11)</p> <p>B-1505 (T. 25851-25852,</p>

				<p>25844; Ex. 523, tab 1, transcript from <i>Vasiljevic</i>, at T. 139-142)</p> <p>Mr. Taranin (Ex. 491, tab 1, transcript from <i>Krnojelac</i>, at T. 3003-3004)</p>
<p>No. 20</p> <p>Kalinovik</p> <p>612 non-Serb displaced persons and refugees</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.</p>	<p>The Prosecution submits that there is evidence to support this allegation: (1) Professor Tabeau's report, (2) Professor Riedlmayer's report, (3) the fact that Kalinovik borders Sarajevo, (4) evidence of Ms. Malesevic (T. 17432), (5) evidence of B-1537 (Ex. 494, at T. 2404), and (6) evidence of abuses (including forcible transfer) in Foca and Gacko (Response, at paras. 452-457, 470).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 70, 74, 78, Annex A2, at p. 86)</p> <p>B-1538 (Ex. 495 (under seal), transcript from <i>Krnojelac</i>, at T. 4144, 4147-4149)</p>

<p>No. 22</p> <p>Kotor Varos</p> <p>6,870 non-Serb displaced persons and refugees</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.</p>	<p>The Prosecution submits that there is evidence to support this allegation: (1) Annex A5 of Professor Tabeau's report and (2) Professor Riedlmayer's report (Response, at paras. 452-457, 471).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 70, 74, 78, Annex A2, at p. 86, Annex A5, p. 135)</p> <p>Professor Riedlmayer (Ex. 488; T. 23800-23801)</p>
<p>No. 23</p> <p>Nevesinje</p> <p>1,483 non-Serb displaced persons and refugees</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.</p>	<p>The Prosecution submits that there is evidence to support this allegation: (1) Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) evidence of C-017 (Response, at paras. 452-457, 472).</p>	<p>The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.</p>	<p>Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 70, 74, 78, Annex A2, at p. 86)</p> <p>C-017 (T. 22049-22050)</p> <p>Professor Riedlmayer (Ex. 486, at p. 6; T. 23802-23803, 23806-23807)</p>
<p>No. 25</p> <p>Prnjavor</p> <p>3,490 non-Serb displaced persons and refugees</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.</p>	<p>The Prosecution submits that there is evidence to support this allegation: (1) Annex A5 of Professor Tabeau's report, (2)</p>	<p>The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.</p>	<p>Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 71, 75, 79, Annex A2, at p. 87, Annex A5, at p. 136)</p> <p>B-1610 (Ex. 532, tab 1 (under seal), transcript</p>

		Professor Riedlmayer's report, and (3) evidence of B-1610 (Ex. 532, tab 1, at T. 15991-15993, 15997) (Response, at paras. 452-457, 474).		from <i>Brdjanin</i> , at T. 15982, <i>et seq.</i> , tabs 3-5 (under seal))
No. 26 Rogatica 6,650 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.	The Prosecution submits there is evidence to support this allegation: (1) Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) evidence of abuses (including forcible transfers) in Srebrenica and Visegrad (Response, at paras. 452-457, 472).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (T. 27093-27096, 27099, 27139; Ex. 548, tab 2, at pp. 11, 26-27, Annex A1, at pp. 71, 75, Annex A2, at p. 87, tabs 3, 4) B-1770 (Ex. 616, tab 1 (under seal), statement dated 13 March 2002, at para. 9) B-1619 (T. 30608, 30629, 30633; Ex. 620 (under seal), statement dated 28 June 1997, at paras. 2, 28, 31-32, 36)
No. 27 Rudo Deportations to Macedonia 1,614 non-	The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer from Rudo or deportation from Rudo	The Prosecution submits there is evidence to support this allegation: (1) Professor Tabeau's report, (2)	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 71, 75, 79, Annex A2, at p. 87)

Serb displaced persons and refugees	into Macedonia.	Professor Riedlmayer's report, and (3) evidence of abuses (including forcible transfer) in Visegrad and Gorazde (Response, paras. 452-457, 475).		
No. 30 Sekovici 162 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.	The Prosecution submits there is evidence to support the allegation: (1) Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) evidence of abuses (including forcible transfer) in Zvornik and Bratunac (Response, paras. 452-457, 476).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 72, 76, 80, Annex A2, at p. 88) Mr. Osmanovic (Ex. 597, tab 1, statement dated 10 October 1994, at p. 2)
No. 31 Sipovo 1,427 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is insufficient evidence of forcible transfer.	The Prosecution submits that there is sufficient evidence to support this allegation: (1) Annex A5 of Professor	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 72, 75, 80, Annex A2, at p. 88, Annex A5, at p. 136) B-1021 (T.

		<p>Tabeau's report and (2) Professor Riedlmayer's report (Response, at paras. 452-457, 477).</p>		<p>30073)</p> <p>Professor Riedlmayer (Ex. 488)</p>
<p>No. 32</p> <p>Sokolac</p> <p>2,670 non-Serb displaced persons and refugees</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer.</p>	<p>The Prosecution submits that there is evidence to support this allegation: (1) Professor Tabeau's report and (2) the fact that Sokolac borders Sarajevo (Response, at paras. 452-457, 478).</p>	<p>The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.</p>	<p>Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 72, 76, 80, Annex A2, at p. 88)</p>
<p>No. 33</p> <p>Teslic</p> <p>7,789 non-Serb displaced persons and refugees</p>	<p>The <i>Amici Curiae</i> submit that there is no evidence of forcible transfer and cite General Vasiljevic (T. 16326).</p>	<p>The Prosecution submits that there is evidence to support this allegation: (1) Annex A5 of Professor Tabeau's report, (2) Professor Riedlmayer's report, and (3) evidence of General Vasiljevic (T. 15898; 16326), and (4) evidence of</p>	<p>The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.</p>	<p>Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 72, 76, 80, Annex A2, at p. 88, Annex A5, at p. 137)</p> <p>General Vasiljevic (T. 15898, 16326)</p> <p>B-1643 (Ex. 654, tab 1 (under seal), transcript from <i>Simic</i>, at T. 11566)</p> <p>Professor Riedlmayer (Ex.</p>

		abuses (including forcible transfer) in Prnjavor and Doboj (Response, at paras. 452-457, 479).		488)
No. 34 Trebinje: Trebinje 3,116 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is insufficient evidence of forcible transfer and cite C-017 (T. 22014-22015, 22049-50) and Mr. Babic (T. 13347).	The Prosecution submits that there is sufficient evidence to support this allegation: (1) Professor Tabeau's report and (2) Professor Riedlmayer's report (Response, at paras. 452-457, 480).	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 72, 76, 80, Annex A2, at p. 88)
No. 34 Trebinje: Ravno 201 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is insufficient evidence of forcible transfer and cite Mr. Kljuic (T. 24448).	The Prosecution submits that this allegation is in dispute (Response, at para. 440) and that there is sufficient evidence to support this allegation: (1) Professor Tabeau's report and (2) Professor Riedlmayer's report (Response, at	The Trial Chamber finds that there is insufficient evidence to support this allegation. The Motion is allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 72, 76, 80, Annex A2, at p. 88)

		paras. 452-457, 480).		
No. 36 Vlasenica 6,942 non-Serb displaced persons and refugees	The <i>Amici Curiae</i> submit that there is insufficient evidence of forcible transfer and cite B-1056 (Ex. 597).	The Prosecution submits that there is sufficient evidence to support the allegation: (1) Professor Tabeau's report, (2) Professor Riedlmayer, (3) evidence of Mr. Osmanovic, and (3) evidence of B-1500 (Response, at paras. 452-457, 481).	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Professor Tabeau (T. 27093-27096, 27099, 27139; Ex. 548, tab 2, pp. 26-27, Annex A1, at pp. 72, 76, 80, Annex A2, at p. 88, tabs 3 and 4) Mr. Gusalic (T. 18276-18278) B-1461 (T. 20265) Mr. Osmanovic (T. 29470; Ex. 597, tab 1, statement dated 10 October 1994, tab 2, statement dated 11 October 1995, tab 3, statement dated 7 June 2001) B-1770 (Ex. 616, tab 1 (under seal), statement dated 13 March 2002, at para. 9)
City of Sarajevo: No. 38	The <i>Amici Curiae</i> submit that there is insufficient evidence of forcible	The Prosecution submits that there is sufficient evidence to	The Trial Chamber finds that there is sufficient evidence to support these	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 71-72, 75-76, 79-80, Annex A2, at pp.

<p>Ilidza:</p> <p>Ilidza – 218 non-Serb displaced persons and refugees</p> <p>Srpska Ilidza – 60 non-Serb displaced persons and refugees</p> <p>No. 39</p> <p>Novi Grad Sarajevo</p> <p>9,008 non-Serb displaced persons and refugees</p> <p>No. 40</p> <p>Novo Sarajevo:</p> <p>Novo Sarajevo – 7,097 non-Serb displaced persons and refugees</p> <p>Srpsko Novo Sarajevo – 4 non-Serb displaced persons and refugees</p> <p>No. 41</p> <p>Vogosca</p>	<p>transfer.</p>	<p>support these allegations: (1) intercepted conversations concerning the Bosnian Serb Leadership’s plans to take over and divide Sarajevo (Ex. 613, tabs 48, 50, 51, 54, 56, 57, 90, 168; Ex. 451, tab 12),</p> <p>(2) intercepted communication concerning the existence of a column of 7,200 Muslims (Ex. 613, tab 228),</p> <p>(3) Professor Tabeau’s report, (4) Professor Riedlmayer’s report, and (5) evidence concerning the humanitarian situation and the shelling and sniping campaigns in Sarajevo, <i>e.g.</i>, evidence of Mr. Harland (T. 26953-26955) (Response, at paras. 452-457, 482-484).</p>	<p>allegations. The Motion is not allowed.</p>	<p>75, 79, 87-88, 95)</p> <p>Dr. Williams</p> <p>(Ex. 470, tab 26)</p> <p>General van Baal (Ex. 534, tab 1, transcript from <i>Galic</i>, at T. 9862, 9880)</p> <p>Lord Owen</p> <p>(T. 28372, <i>et seq.</i>)</p> <p>B-1369 (Ex. 658 (under seal))</p> <p>B-1345 (Ex. 575, tab 1 (under seal))</p> <p>Mr. Harding</p> <p>(Ex. 587)</p> <p>Mr. Harland</p> <p>(T. 26927, <i>et seq.</i>)</p> <p>Baron van Lynden (Ex. 540)</p> <p>Mr. Kucanin</p> <p>(Ex. 586)</p> <p>Mr. Hafizović</p> <p>(Ex. 588)</p>
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2,099 non-Serb displaced persons and refugees				Mr. Hamill (Ex. 590) Ex. 613 (intercepted communications)
Greater Sarajevo: No. 43 Ilijas 1,889 non-Serb displaced persons and refugees No. 44 Pale: Pale – 1,697 non-Serb displaced persons and refugees Pale FBiH – 115 non-Serb displaced persons and refugees No. 45 Trnovo: Trnovo RS – 744 non-Serb displaced persons and refugees Trnovo FBiH	As above	As above	The Trial Chamber finds that there is sufficient evidence to support this allegation. The Motion is not allowed.	Professor Tabeau (Ex. 548, tab 2, Annex A1, at pp. 72, 75-76, 79-80, Annex A2, at pp. 87-88) Dr. Williams (Ex. 470, tab 26) General van Baal (Ex. 534, tab 1, transcript from <i>Galic</i> , at T. 9862, 9880) Lord Owen (T. 28372, <i>et seq.</i>) B-1369 (Ex. 658 (under seal)) B-1345 (Ex. 575 (under seal)) Mr. Harding (Ex. 587) Mr. Harland (T. 26927, <i>et seq.</i>) Baron van Lynden (Ex.

<p>– 415 non-Serb displaced persons and refugees</p>				<p>540) Mr. Kucanin (Ex. 586) Mr. Hafizović (Ex. 588) Mr. Hamill (Ex. 590) Professor Riedelmayer (Ex. 488)</p>
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(e) Schedule E

310. This Schedule of the Bosnia Indictment lists 44 individual incidents of sniping in Sarajevo. The *Amici Curiae* submit that there is no evidence to support allegations numbered 1-23 and 25-44. Although the Prosecution concedes that all (save one) of the scheduled sniping incidents are not supported by evidence,⁸⁰² it submits that the “overview evidence” of a shelling and sniping campaign in Sarajevo during the indictment period is sufficient for a Trial Chamber to convict the Accused with respect to paragraphs 43-45 of the Bosnia Indictment.⁸⁰³
311. Having reviewed all the evidence,⁸⁰⁴ the Trial Chamber finds that there is no evidence with respect to numbers 1-23 and 25-44. The Motion is allowed with respect to these allegations.
312. The Trial Chamber notes that incident No. 24,⁸⁰⁵ which is not challenged by the *Amici Curiae*, is the only sniping incident that remains.

(f) Schedule F

313. This Schedule of the Bosnia Indictment lists 26 individual incidents of shelling in Sarajevo. The *Amici Curiae* submit that there is (1) insufficient evidence to support allegations numbered 1 and 4 and (2) no evidence to support allegations numbered 2-3 and 6-26. Although the Prosecution concedes that most of the scheduled shelling incidents are not supported by evidence,⁸⁰⁶ it submits that the “overview evidence” of a shelling and sniping campaign in Sarajevo during the indictment period is sufficient for a Trial Chamber to convict the Accused with respect to paragraphs 43-45 of the Bosnia Indictment.⁸⁰⁷
314. Having reviewed all the evidence,⁸⁰⁸ the Trial Chamber finds that there is either no or insufficient evidence with respect to numbers 1-4 and 6-26. The Motion is allowed with respect to these allegations.

315. The Trial Chamber notes that incident No. 5,⁸⁰⁹ which is not challenged by the *Amici Curiae*, is the only shelling incident that remains.

V. DISPOSITION

316. The effect of the Trial Chamber's determinations is that it has found sufficient evidence to support each count challenged in the three Indictments, but there is no or insufficient evidence to support certain allegations relevant to some of the charges in the Indictments.

317. In summary, the Trial Chamber holds as follows:

A. Kosovo

318. With respect to the submission that there was no evidence of an armed conflict in Kosovo in the FRY prior to 24 March 1999, that date being the commencement of the NATO bombing campaign, the Motion is **DISMISSED**.

[Section IV.A.1 of the Decision]

319. With respect to each of the specific challenges to the Kosovo Indictment as to sufficiency of evidence, the Motion is **DISMISSED**.

[Section IV.A.4 of the Decision]

B. Croatia

320. With respect to the submission that Croatia only became a state some time between 15 January and 22 May 1992, and that consequently the conflict in Croatia was not international before that time and therefore all grave breaches counts in the Croatia Indictment which go to alleged crimes committed before these dates must be dismissed, the Motion is **DISMISSED**.

[Section IV.B.1 of the Decision]

321. With respect to the specific challenges to the Croatia Indictment as to sufficiency of evidence in paragraphs 64(b), 64(f), 64(h), 64(p), and 71 (Jelija) of that Indictment, the Motion is **GRANTED**.

322. With respect to the specific challenges to the Croatia Indictment as to sufficiency of evidence in paragraphs 36(l), 40-41, 50-51, 53, 55-58, 64(j), and 71 (Nadin, [arengrad, Bruska, and Bapska) of the Indictment, the Motion is **DISMISSED**.

[Section IV.B.2 of the Decision]

C. Bosnia

323. With respect to the *Amici Curiae* submissions concerning genocide, the Trial Chamber, except for its holding in paragraph 324, **DISMISSES** the Motion and holds that there is sufficient evidence that

(1) there existed a joint criminal enterprise, which included members of the Bosnian Serb leadership, the aim and intention of which was to destroy a part of the Bosnian Muslims as a group, and that its participants committed genocide in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi;

(2) the Accused was a participant in that joint criminal enterprise, Judge Kwon dissenting ;

(3) the Accused was a participant in a joint criminal enterprise, which included members of the Bosnian Serb leadership, to commit other crimes than genocide and it was reasonably foreseeable to him that, as a consequence of the commission of those crimes, genocide of a part of the Bosnian Muslims as a group would be committed by other participants in the joint criminal enterprise, and it was committed;

(4) the Accused aided and abetted or was complicit in the commission of the crime of genocide in that he had knowledge of the joint criminal enterprise, and that he gave its participants substantial assistance, being aware that its aim and intention was the destruction of a part of the Bosnian Muslims as group;

(5) the Accused was a superior to certain persons whom he knew or had reason to know were about to commit or had committed genocide of a part of the Bosnian Muslims as a group, and he failed to take the necessary measures to prevent the commission of genocide, or punish the perpetrators thereof.

324. The Trial Chamber finds no evidence that genocide was committed in Kotor Varos.

[Section IV.C.1 of the Decision]

325. With respect to each of the specific challenges to Schedule A of the Bosnia Indictment as to sufficiency of evidence:

Concerning items 2, 5, 6, 7, 8, 9, 10, 12 (Donji Kruhari in Sanski Most), 15 (Zaklopa ca in Vlasenica), and 17, the Motion is **GRANTED**.

Concerning items 11, 12 (Sasina in Sanski Most), 13, 14, and 15 (Drum in Vlasenica), the Motion is **DISMISSED**.

[Section IV.C.2.a of the Decision]

326. With respect to each of the specific challenges to Schedule B of the Bosnia Indictment as to sufficiency of evidence:

Concerning items 1, 2, 7, 9, 15, and 17 the Motion is **GRANTED**.

Concerning items 4, 10, and 14, the Motion is **DISMISSED**.

[Section IV.C.2.b of the Decision]

327. With respect to each of the specific challenges to Schedule C of the Bosnia Indictment as to sufficiency of evidence:

Concerning items 4, 8, 11 (Cajnice SUP Building in Cajnice), 12, 16, 17, 18, 21, and 22 (Uzamnica in Visegrad), the Motion is **GRANTED**.

Concerning items 2, 11 (Mostina Hunting Lodge in Cajnice), 15, 20, and 22 (detention centre in tourist hotel in Vilina Vlas in Visegrad), the Motion is **DISMISSED**.

[Section IV.C.2.c of the Decision]

328. With respect to each of the specific challenges to Schedule D of the Bosnia Indictment as to sufficiency of evidence:

Concerning items 2, 5, 7, 9, 12, 13, 14, 16, 20, 22, 26, 27, 30, 31, 32, and 34, the Motion is **GRANTED**.

Concerning items 1, 6, 19, 23, 25, 33, 36, 38, 39, 40, 41, 43, 44, and 45, the Motion is **DISMISSED**.

[Section IV.C.2.d of the Decision]

329. With respect to each of the specific challenges to Schedule E of the Bosnia Indictment as to sufficiency of evidence, the Motion is **GRANTED**.

[Section IV.C.2.e of the Decision]

330. With respect to each of the specific challenges to Schedule F of the Bosnia Indictment as to sufficiency of evidence, the Motion is **GRANTED**.

[Section IV.C.2.f of the Decision]

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

Judge Robinson
Presiding

Dated this sixteenth day of June 2004
At The Hague
The Netherlands

[Seal of the Tribunal]

VI. SEPARATE OPINION OF JUDGE PATRICK ROBINSON

1.

In this Opinion, I comment on Part III of the Decision,⁸¹⁰ which is devoted to an analysis of the degree of proof necessary in a Rule 98bis Motion. I am particularly concerned to ascertain whether the features of the common law procedure of no case to answer, from which the Rule is derived, remain unchanged in the application of the Rule.

2. When the Rules were first adopted in 1994, they did not contain a provision for a motion of acquittal at the end of the Prosecution case. This provision was introduced in 1998.

3. It is not surprising that the 1994 Rules contained no such provision, because the no case to answer procedure has a peculiarly common law origin and does not fit readily into a regime that attempts to blend the civil and common law systems. It may be that there was no agreement on its inclusion in the 1994 Rules. Generally, civil law jurisdictions do not have a procedure equivalent to Rule 98bis, because they do not have a system in which evidence is first presented by the Prosecution and then by the Defence;⁸¹¹ thus the closure of the Prosecution's case, which underpins the no case to answer procedure, does not exist in civil law jurisdictions.

4. Significantly, the Rules of Procedure and Evidence of the International Criminal Court ("ICC") do not provide for a procedure equivalent to Rule 98bis. In fact, there is no provision for a sequence in the presentation of evidence by the Prosecution and the Defence such as that set out in the Tribunal's Rule 85. The ICC's regime for the presentation of evidence appears to follow the civil law inquisitorial model. Article 69 (3) of the ICC Statute provides that:

"the parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth."

5. While Rule 98bis provides that the accused is to be acquitted if the Trial Chamber finds that the evidence is insufficient to sustain a conviction, it does not identify the standard for determining the sufficiency of evidence. In determining what "sufficiency"

means in the Rule, it is natural, therefore, that recourse would be had to the law and practice of common law countries relating to the no case to answer procedure.

6. However, the mere fact that the Rule owes its origin to the common law does not necessarily mean that it bears all the features of the no case to answer procedure in its application at the Tribunal. That is why this Trial Chamber said in *Kordic* that while the application of the Rule may be influenced by features of the no case to answer procedure in domestic jurisdictions, it will not be controlled by that procedure.⁸¹² Ultimately, the Rule has to be interpreted in the light of the context in which the Statute operates and the purpose it is intended to serve. This is the effect of the requirement in Article 31(1) of the Vienna Convention on the Law of Treaties that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁸¹³

7. The meaning of “sufficiency” in Rule 98bis has implications for the broader question of how national rules and practices are transferred to the international plane. The Tribunal’s jurisprudence warns against the importation of domestic procedures “lock, stock and barrel” into the Tribunal’s legal system. Rule 89 (A) provides that the Tribunal “shall not be bound by national rules of evidence”. The Trial Chamber in *Delalic* said, “A Rule may have a common law or civilian origin but the final product may be an amalgamation of both common law or civilian elements, so as to render it *sui generis*.”⁸¹⁴ Also, Judge Cassesse in his Dissenting Opinion in the Appeals Chamber Judgement in *Erdemovic* said, “Legal constructs and terms of art upheld in national law should not be automatically imported into international criminal proceedings. The International Tribunal being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules.”⁸¹⁵ In *Jelusic*, Judge Pocar also emphasised the need to avoid “the application, in a mechanical fashion, of national solutions without assessing whether they may require adaptations to the needs of the procedure before this Tribunal ...”⁸¹⁶ The main consequence of the transfer of a domestic practice to an international regime such as the Tribunal’s, is that the practice becomes subject to international law – a consequence that has implications for its interpretation and application.

8. It is important to note that the Tribunal’s jurisprudence does not prohibit the use of national rules and practices in its proceedings. What it does is to require that a national procedure be interpreted and applied in accordance with the Tribunal’s Statute. Ultimately, then, the issue is one of interpretation. An issue of interpretation is less likely to arise when the Tribunal’s Rules detail the manner in which a domestic procedure is to be applied; thus, some provisions in the Tribunal’s Rules may reflect conformity with the domestic procedure, while others may not. Generally, where a Rule is based on a domestic procedure, it is better to set out in as detailed a manner as is appropriate the provisions for its application at the Tribunal.

9. But where, as in the case of Rule 98bis, some aspects of the application of the domestic procedure are not set out in the Tribunal’s Rules, the meaning of the Rule will have to be

ascertained by the interpretative process, which may show that the domestic procedure has been modified to take account of its new legal environment.

10. I fully support the analysis in paragraph 11 of the Decision and the conclusion that “an essential function of the procedure (in common law jurisdictions) is to ensure that at the end of the Prosecution’s case the jury is not left with evidence which cannot lawfully support a conviction; otherwise, it may bring in an unjust conviction.”

11. However, when this procedure is transposed to the Tribunal in the form of Rule *98bis*, it has to be applied and construed in the context of a Statute which provides for a Trial Chamber performing the dual functions of tribunal of law and tribunal of fact; there is no separate, lay jury to be given directions by the judge ; there is instead a Chamber of professional judges perfectly capable of sifting evidence to determine what items could lawfully sustain a conviction and what items could not. Thus, in principle, there is far less danger of an unjust conviction at the Tribunal than in criminal proceedings in common law jurisdictions; there is certainly less need to insulate judges of a Trial Chamber from evidence which can not lawfully sustain a conviction.

12. Nothing in this analysis is to be taken as meaning that Rule *98bis* is unnecessary; rather, my purpose is to stress that in applying the no case to answer procedure at the level of the Tribunal, the need to screen the trier of fact from evidence which could not lawfully support a conviction is not as urgent as it is in domestic common law jurisdictions where the tribunal of fact is a jury. In my view, it is appropriate for a Trial Chamber to take this into account in applying the test in *Prosecutor v. Jelusic*.⁸¹⁷ This may be the kind of modification, referred to in *Prosecutor v. Kordic*,⁸¹⁸ that the common law features of the no case to answer procedure might undergo in the transition from their domestic berth to the Tribunal.

13. I do not mean to suggest that that the test for determining the sufficiency of evidence under Rule *98bis* is lower than the common law test confirmed by the Appeals Chamber in *Jelusic*, that is, evidence upon which a trier of fact could, not should, convict.⁸¹⁹ But surely the fact that a Trial Chamber is composed of professional judges, whose need to be insulated from weak evidence is not as great as a lay jury, must make a difference to the application of the no case to answer procedure at the level of the Tribunal? If the effect of my analysis is that evidence that is discarded at the half way stage in common law jurisdictions may be retained under Rule *98bis*, that does not necessarily mean that I am advocating a standard that is lower than the applicable criterion in those jurisdictions. It may be a different standard, but not necessarily one that is lower.

14. In any event, the time has come to evaluate the operation of Rule *98bis* so as to determine whether changes are needed to make it a more beneficial instrument in the work of the Tribunal.

15. In the first place, although the Rule itself is designed to secure an acquittal of an accused on an offence charged, its use is more directed at the dismissal of specific paragraphs or allegations in a count of an indictment than the count itself. True enough,

in common law jurisdictions sometimes no case to answer submissions have a similar purpose. But at the level of the Tribunal, it is more the norm than the exception that Rule 98bis is used in this way.

16. Charges at the Tribunal are multilayered to a degree that is generally not present in indictments at the domestic level. Thus, a charge could have as many as a hundred or more separate allegations: it could cover forty municipalities, be allegedly committed by fifteen different means, details of which could be set out in fifty or more items in a Schedule. Is it useful to devote the Tribunal's resources to an exercise which may result in the elimination of a dozen of these hundred or more individual allegations or details of a charge while the charge or count remains intact? Is there any prejudice to an accused in leaving those dozen individual allegations for consideration by the Trial Chamber at the judgement phase?

17. Consideration should be given to confining motions under Rule 98bis to submissions:

that are designed to eliminate a charge or count rather than individual allegations of fact relating thereto; in most cases, such submissions will relate to a missing legal ingredient of a charge, *e.g.*, *mens rea*. However, the possibility cannot be ruled out that, in some cases (generally where the Prosecution's case has broken down as a whole) submissions for the dismissal of individual allegations of fact may lead to the dismissal of a charge or count as a whole, although, by virtue of the multilayered character of charges, this will not happen frequently;

that allege that there is no evidence, as distinct from insufficient evidence, to sustain a charge, the reason being that the Tribunal's trier of fact is a Chamber constituted of professional judges, not a lay jury as in common law jurisdictions, and there is, therefore, less need to screen the Chamber from evidence that cannot lawfully sustain a conviction; provision may be made for an exception when allegations of insufficiency are such that they imply that the Prosecution's case has broken down either in respect of a particular count or the charge as a whole; in which case, it would be in the interest of judicial economy that that count or the case itself should be dismissed at the half way stage rather than at the judgement phase. In order to facilitate the identification of instances where there is no evidence to sustain a charge, at the end of the Prosecution's case, the Prosecution should be required to list the allegations in the indictment in respect of which no evidence has been adduced; the accused may comment on the list or produce his own list; if there is a dispute as to whether there is evidence supporting a charge, generally, the issue should be treated as a submission that there is insufficient evidence, which should be left for consideration at the judgement phase.

18. The no case to answer procedure is a very valuable instrument for securing justice ; it promotes judicial economy by allowing for the acquittal of an accused at the half way stage in a trial. But if it is to be of real benefit to the Tribunal, modifications should be made that take into account the differing role of the judge at the Tribunal and the judge in a common law court with a jury.

Done in both English and French, the English text being authoritative.

Patrick Robinson
Presiding Judge

Dated this sixteenth day of June 2004
At The Hague
The Netherlands

[Seal of the Tribunal]

VII. DISSENTING OPINION OF JUDGE O-GON KWON

1. With respect to the count of genocide under the first category of joint criminal enterprise, I do not agree with the majority that there is sufficient evidence upon which a Trial Chamber could find beyond reasonable doubt that the Accused had the *dolus specialis* required for genocide, *i.e.*, the intent to destroy the Bosnian Muslims as a group in whole or in part.
2. I agree with the finding that there is sufficient evidence upon which a Trial Chamber could convict the Accused of (i) genocide under the third category of joint criminal enterprise, (ii) aiding and abetting or complicity in genocide, or (iii) genocide as a superior under Article 7(3). However, such finding does not affect my dissent.
3. Taking the evidence from the Prosecution's case at its highest, the furthest that a Trial Chamber could infer in relation to the *mens rea* requirement is the knowledge of the Accused that genocide was being committed in the specified municipalities in Bosnia and Herzegovina, but not the genocidal intent of the Accused himself. The latter conclusion cannot be automatically inferred from the finding that the Accused knew that genocide was being committed by the principal perpetrators, or that it was reasonably foreseeable to him that genocide could be committed as a consequence of the commission of other crimes. And, with the evidence presented, finding of the genocidal intent of the Accused is too tenuous.
4. Accordingly, the Motion should be granted with respect to the count of genocide under the first category of joint criminal enterprise.

Done in both English and French, the English text being authoritative.

O-Gon Kwon
Judge

Dated this sixteenth day of June 2004
At The Hague
The Netherlands

[Seal of the Tribunal]