

## **Summary of the Appeals Chamber Judgment in the Case of *Prosecutor v. Zdravko Tolimir* , Case No. IT-05-88/2-A**

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seised of an appeal by Zdravko Tolimir (“Tolimir”) against the judgment rendered by Trial Chamber II of the Tribunal (“Trial Chamber”) on 12 December 2012 in the case of Prosecutor v. Zdravko Tolimir, Case. IT-05-88/2-T (‘Trial Judgment’).
2. Following the practice of the Tribunal, not all points discuss in the judgment will be mentioned in this summary which only focuses on central issues. This summary does not constitute any part of the authoritative written judgment of the Appeals Chamber. It is intended for academic consumption.

### **I. THE APPEAL OF ZDRAVKO TOLIMIR**

3. During the events that unfolded in Srebrenica and Žepa enclaves, in Eastern Bosnia, between 1992 and 1995, Mr. Tolimir was Assistant Commander and Chief of Sector for Intelligence and Security Affairs of the Main Staff of the Army of the Republika Srpska (“VRS”).
4. He was charged with eight counts (Genocide (Count 1); Conspiracy to Commit Genocide (Count 2); Extermination (Count 3); Murder (Count 4 and 5); Persecutions (Count 6); Inhumane Acts through forcible transfer (Count 7) and Deportation (Count 8)) pursuant to Articles 3, 4, and 5 of the Statute of the Tribunal (“Statute”) and two distinct joint criminal enterprises (“JCE”) that is ( “JCE to Murder” and “JCE to forcibly remove”) pursuant to Article 7 (1) of the Statute.
5. Mr. Tolimir submits 25 grounds of Appeal to overturned his sentence or alternatively to reduce his sentence significantly. The prosecution requested that his Appeal should be quashed.
6. The Appeals Chamber upheld Tolimir’s life sentence.
7. Judge Sekule and Judge Güney appended a partly dissenting opinion.

## A. Standard of Appellate Review

8. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 25 of the Statute. The Appeals Chamber reviews only errors of law that invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.<sup>1</sup>
9. The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the trial chamber in the body of the judgment or in related footnote, and evidence contained in the trial record referred to by the parties.<sup>2</sup>
10. The Appeals Chamber reserves the right to decide the merits of the case and may dismiss any arguments raised that are unfounded without providing detailed reasoning.
11. Regarding errors of law, the Appeals Chamber has stated that:

Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does automatically lose its points since the appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.<sup>3</sup>

12. In determining the reasonableness of a trial chamber's finding of fact as a general principle the Appeals Chamber contend that:

[...], the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.<sup>4</sup>

13. The Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or formally insufficient.<sup>5</sup>

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<sup>1</sup> *Zdravko Tolimir*. Appeal Judgment, para. 8.

<sup>2</sup> *Zdravko Tolimir*. Appeal Judgment, para. 10.

<sup>3</sup> *Callixte Kalimanzira*, Appeal Judgment, para. 7.

<sup>4</sup> *Zdravko Tolimir*. Appeal Judgment, para. 10; *D. Milošević* Appeal Judgment, para. 16; *Martić* Appeal Judgment, para. 14; *Callixte Kalimanzira*, Appeal Judgment, para. 9.

<sup>5</sup> *Zdravko Tolimir*. Appeal Judgment, para. 13.

## B. Preliminary Matters

### 1. Alleged Errors of Adjudicated Facts (Ground 1)

14. Tolimir contend that the Trial Chamber erred in law by judicially noticing the Adjudicated Facts from the trial and appeal judgments in the *Krstić* and *Blagojević* and *Jokić* cases proposed by Prosecution for judicial notice; he continued similarly that most of the Adjudicated Facts significantly affected the outcome of the trial, and that the Trial Chamber erred in its assessment of those Facts which consequently invalidate the Trial Judgment.<sup>6</sup> In this light, he raises three challenges to the Trial Chamber's findings: first, Tolimir submits that the Trial Chamber erred by taking judicial notice of the Adjudicated Facts instead of making its own findings on the same evidence supporting the Adjudicated Facts; second, he noted that the Trial Chamber erred by taking judicial notice of Adjudicated Facts that went to the core of the case despite its expressed indication that it would not do so and finally, Tolimir challenges the Trial Chamber's use of sub-headings in the Annex to the Adjudicated Facts Decision which in his submission may have prejudiced the outcome of the trial proceedings. To redress these errors, Tolimir persuade the Appeals Chamber to review the legal standard employed or order a retrial.<sup>7</sup>
15. In response, the Prosecution argues that Tolimir's submissions should be quashed for failing to show errors in the Trial Chambers findings and repetition of already discussed facts.<sup>8</sup>
16. From the argument raised by Tolimir, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground 1 of Appeals.<sup>9</sup>

### 2. Alleged Intercepted Communications (Ground 2)

17. The prosecution contended that it took large volume of intercepted communication produced by the Bosnian Muslim side and also the viva voce testimony of 17 intercept

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<sup>6</sup> *Zdravko Tolimir*. Appeal Judgment, para. 17.

<sup>7</sup> *Zdravko Tolimir*. Appeal Judgment, para. 17.

<sup>8</sup> *Zdravko Tolimir*. Appeal Judgment, para. 18.

<sup>9</sup> *Zdravko Tolimir*. Appeal Judgment, para. 40.

operators and two of their supervisors including Stefanie Frease who is the former Prosecution analyst.<sup>10</sup> In response, Tolimir argue that the Trial Chamber made a number of errors which invalidate the Trial Judgment as follows: first, he submits that the Trial Chamber erred in law in taking judicial notice of Adjudicated Facts 595-604 which adversely affected its reasoning on the authenticity and reliability of the intercepts and its assessment of the evidence was informed by the presumptions created by this judicial notice.<sup>11</sup> Tolimir submits that the Trial Chamber erred by failing to mention the Defence Exhibit 48, an appendix to a report by the Netherlands Institute for War Documentation that demonstrated that the ABiH and BH MUP had neither real time intelligence nor capacity at the two surveillance sites to record intercepted communication of the VRS creating reasonable doubts as to their authenticity. He argues that Trial Chamber did not exercise caution in assessing the evidence of Frease and over relied on it despite: (i) her association with the Prosecution; (ii) the hearsay nature of her knowledge; and (iii) the fact that her analysis was limited to the internal information. Furthermore, he says the corroboration of other sources of the intercepts is not a cogent reason to rely on it. Finally, Tolimir pointed out the inaccuracy and defect of intercepted conversation between himself and UNPROFOR General Nicolai by the ABiH that the Trial Chamber failed to consider.<sup>12</sup>

18. Regarding the argument that the Trial Chamber failed to provide a seasoned opinion in respect of the intercepts, the Appeals Chamber recalls that pursuant to Article 23 of the Statute and Rule 98ter(C) of the Rules, every accused is guaranteed the right to a reasoned opinion, however, the trial chamber is not obliged to justify its findings in relation to every submission made during trial<sup>13</sup>; In making factual findings, a trial chamber is entitled to rely on the evidence it finds most convincing, and it not obliged to refer to every witness testimony or evidence on the record as long as there is no sign that a trial chamber completely disregard evidence that is relevant.<sup>14</sup>

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<sup>10</sup> *Zdravko Tolimir*. Appeal Judgment, para. 41.

<sup>11</sup> *Zdravko Tolimir*. Appeal Judgment, para. 42.

<sup>12</sup> *Zdravko Tolimir*. Appeal Judgment, para. 44 – 45.

<sup>13</sup> *Zdravko Tolimir*. Appeal Judgment, para. 53.

<sup>14</sup> *Zdravko Tolimir*. Appeal Judgment, para. 53.

19. Building on the submissions of Tolimir, the Appeals Chamber dismisses Ground 2 of his Appeal.<sup>15</sup>

### 3. Expert Evidence of Richard Butler (Ground 3)

20. The Trial Chamber acknowledge Mr. Butler's relation with the Prosecution and vow to take special notice on this during his testimony, however, Tolimir argue that the Trial Chamber erred in law by accepting his expert evidence which he submit invalidate the judgment; he pointed out that the Prosecution failed to disclose the Expert Reports as required under Rule 94bis of the Rules, he continue similarly that disclosure of the Expert Reports pursuant to Rule to Rule 94bis of the Rules is mandatory and the Prosecution's failure to submit the Expert Reports according to this procedure deprived him of the opportunity to challenge Butler's reports as expert reports as instructed under Rule 94bis(B) of the Rules.<sup>16</sup> Tolimir further contend that Butler's long-standing relation with the Prosecution should have led the Trial Chamber to characterize him as an OTP investigator and that he lacks the requisite expertise to provide an expert opinion on matters related to military structures and strategic organs of the VRS and request that the Appeals Chamber reverses the Trial Chamber's characterization of Butler as an expert and consider him as an OTP investigation.<sup>17</sup>

21. In response the Prosecution contends that she had disclosed the Expert Reports to Tolimir in March and September 1998, and that Tolimir received notice of the Prosecution's intention to call Butler as an expert witness by virtue of Rule 65ter list and its opening statements, which he failed to waived the right to challenge any failure to comply with

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<sup>15</sup> *Zdravko Tolimir*. Appeal Judgment, para. 61.

<sup>16</sup> Rule 94bis (B) provides that "Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:

- (i) it accepts the expert witness statement and/or report; or
- (ii) it wishes to cross-examine the expert witness; and
- (iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

<sup>17</sup> *Zdravko Tolimir*. Appeal Judgment, para. 63.

Rule 94*ter* of the Rules given that he did not raise any concern during Butler's testimony.<sup>18</sup>

22. Considering the arguments raise, the Appeals Chamber, Judge Antonetti dissenting dismisses Ground 3.<sup>19</sup>

#### 4. The Status of Prosecution Witnesses (Ground 4)

23. Tolimir submit that the Trial Chamber erred in law by heavily relying on the testimony of Prosecution Investigators and not applying caution as set forth in the *Martic* Trial Judgement; he urged the Appeals Chamber to formulate the correct legal standard for the evaluation of evidence provided by Prosecution Investigators and to review the trial judgement applying that standard.<sup>20</sup>

24. In response, the Prosecution argues that the Trial Chamber was right to uphold the view that the connection between the Prosecution Investigators and the Prosecution did not render their evidence unreliable and that his argument should be dismissed.<sup>21</sup>

25. The Appeals Chamber in light of the submissions dismisses Ground 4 with Judge Antonetti appending a dissenting opinion.<sup>22</sup>

### C. The Number of those who Perish in Srebrenica in July 1995

#### 5. Alleged error in the Number of those Killed in the Events in Srebrenica and the Consequences (Ground 9)

26. Tolimir contends that the Trial Chamber erred in its finding that is limited to the victims of the incidents specified in the indictment; he submits that the incidents not specified in the Indictment were not the subject of proof and that the Trial Chamber did not establish the circumstances of the death of persons linked to those incidents. He further argues that the Trial Chamber's methodology in evaluating the incident cannot be the basis for

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<sup>18</sup> *Zdravko Tolimir*. Appeal Judgment, para. 64.

<sup>19</sup> *Zdravko Tolimir*. Appeal Judgment, para. 71.

<sup>20</sup> *Zdravko Tolimir*. Appeal Judgment, para. 73.

<sup>21</sup> *Zdravko Tolimir*. Appeal Judgment, para. 74.

<sup>22</sup> *Zdravko Tolimir*. Appeal Judgment, para. 80.

defining the gravity of the crime and to determine whether genocide or extermination has been committed. As a consequence of these findings, Tolimir argues that it has significantly impact his sentence and urged the Appeals Chamber to review the findings in relation to counts 1 – 7.<sup>23</sup>

27. In reaction to Tolimir's contention, the Prosecution argues that the Trial Chamber's conclusion that 5,749 Bosnian Muslims were unlawfully killed by Bosnian Serb Forces was covered by the Indictment which alleged that "over 7,000 Bosnian Muslim men and boys from the Srebrenica enclave" were summarily executed as a consequence of the JCE to Murder. To this the Prosecution submits that Tolimir has failed to convince the court that this has had any impact in the judgment and so request that his argument be dismissed.<sup>24</sup>
28. From the argument presented, with Judge Antonetti appending a separate opinion, the Appeals Chamber dismisses Ground 9.<sup>25</sup>

## **D. Crimes Against Humanity**

### **6. Alleged Extermination**

29. Tolimir challenged the Trial Chamber for his conviction on extermination that the Chamber erred in law by applying an incorrect standard of *mens rea* for extermination. He alluded to the fact that the wording of Article 5 of the Statute requires that all crimes against humanity including extermination must be "directed against the civilian population" and thus the victims must have been targeted base on their civilian status. Tolimir further argue that the target of the murder operation was directed at military-aged men who were considered to be members of the ABiH Army, given that there was an order issued by the ABiH to the men within the Srebrenica enclave a few days before its fall, which according to him had the effect of ripping off the men of their civilian status; and that the Chamber found that the murder victims were predominantly males age who were either at Potočari or captured from a column that was engaged in military operation

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<sup>23</sup> *Zdravko Tolimir*. Appeal Judgment, para. 84.

<sup>24</sup> *Zdravko Tolimir*. Appeal Judgment, para. 85.

<sup>25</sup> *Zdravko Tolimir*. Appeal Judgment, para. 134.

thus justifying this argument that the victims were not civilians.<sup>26</sup> He further argue that the Trial Chamber erred in asserting that the killing of three Bosnian Muslim leaders from Žepa were part of “a single murder operation” and argue that the murder of these three men that occurred after the operation in Srebrenica cannot be considered as extermination and that there was no particle of evidence to this incident.<sup>27</sup>

30. In response, the Prosecution argues that Tolimir fails to identify any error in the Trial Chamber’s finding that the attack was directed against Bosnian Muslim civilian population of Srebrenica and Žepa and the forcible transfer of thousands. The Prosecution further contend that victims of crimes against humanity need not be civilians, but may also be persons *hors de combat* and that Article 5 of the Statute only requires that the “attack overall” is directed against a civilian population and the victims included boys, elderly men and women.<sup>28</sup> To clarify the requirement that individual victims of crimes against humanity be civilians the Appeals Chamber stated that:

Whereas the civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population are factors relevant to the determination of whether the *chapeau* requirement of Article 5 of the Statute that an attack be directed against a “civilian population” is fulfilled, there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be civilians.<sup>29</sup>

31. With regards to the killing of the three leaders according to the jurisprudence of the Tribunal, the crime of extermination the Prosecution submits can arise on “an accumulation of separate and unrelated incidents, meaning on an aggregate basis”.<sup>30</sup> In determining this point the Appeals Chamber submit that:

The assessment of “large scale” is made on a case-by-case basis, taking into account the circumstances in which the killings occurred. Relevant factors include, inter alia: the time and place of the killings; the selection of the victims and the manner in which they were targeted; and whether

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<sup>26</sup> *Zdravko Tolimir*. Appeal Judgment, para. 136.

<sup>27</sup> *Zdravko Tolimir*. Appeal Judgment, para. 137.

<sup>28</sup> *Zdravko Tolimir*. Appeal Judgment, para. 138.

<sup>29</sup> *Zdravko Tolimir*. Appeal Judgment, para. 141.

<sup>30</sup> *Zdravko Tolimir*. Appeal Judgment, para. 139, 146



the killings were aimed at the collective group rather than victims in their individual capacity.<sup>31</sup>

32. The ICTR Appeals Chamber has determine with regards to the scale of killing, the location of the incident and the period of time with regards to extermination that “[a]s a general matter, the element of killing on a large scale cannot be satisfied by a collective consideration of distinct events committed in different locations, in different circumstances, by different perpetrators, and over an extended period of time, i.e. a period of two months”.<sup>32</sup>
33. Deducing from the arguments submitted, the Appeals Chamber upheld Ground 6 of Tolimir’s Appeal in part, and dismisses the remainder. Judge Antonetti appended a separate opinion.<sup>33</sup>

#### 7. Inhumane Acts (Forcible transfer - Ground 13)

34. Tolimir prays the Appeals Chamber to overturn his conviction submitting that the Trial Chamber erred in law and fact in finding that the transfer of the population was forced since it was the Bosnian Muslim authorities in Sarajevo and Žepa that sought to evacuate the civilian population of Srebrenica and Žepa before the attacks began in the enclaves. He added that the agreement signed between the VRS and Žepa War Presidency on 24 July 1995 was voluntary and valid and vindicates that transfer of Bosnian Muslims out of the enclave was sanction by all the parties.<sup>34</sup> Tolimir further contend that the Trial Chamber reasoning that the civilian populations of the two enclaves were displaced within border did not constitute forcible transfer because the border between RS and BiH was a *de facto* or *de jure* border.<sup>35</sup> He continue that the Prosecution argument that the border being a “constantly changing frontline” holds no water.<sup>36</sup>
35. In reply, the Prosecution relies on the Appeals Chamber’s finding in the *Stakić* case, where it was held that “forcible transfer has been defined in the jurisprudence of the

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<sup>31</sup> *Zdravko Tolimir*. Appeal Judgment, para. 146.

<sup>32</sup> *Zdravko Tolimir*. Appeal Judgment, para. 147.

<sup>33</sup> *Zdravko Tolimir*. Appeal Judgment, para. 151.

<sup>34</sup> *Zdravko Tolimir*. Appeal Judgment, para. 153.

<sup>35</sup> *Zdravko Tolimir*. Appeal Judgment, para. 154.

<sup>36</sup> *Zdravko Tolimir*. Appeal Judgment, para. 157.

Tribunal as the forcible displacement of persons which may take place within national boundaries”<sup>37</sup> on this ground the Prosecution contend that the Trial Chamber correctly convicted Tolimir of forcible transfer arguing that the Bosnian Muslims were forced to leave the enclaves as their only hope for survival.<sup>38</sup>

36. Deducing from the reasoning presented, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground 13 of Appeal.<sup>39</sup>

## E. Genocide

### 8. Protected Group Defined (Ground 8)

37. The Trial Chamber, Tolimir, argued erred in law by not providing a reasoned opinion why the Bosnian Muslims were qualified as protected group under Article 4 of the Statute and why the Bosnian Muslims of Eastern BiH were a substantial part of that group. He continued similarly that the Trial Chamber relied on the findings of other cases which does not apply to this case, and does not have binding force except to parties in those cases. Tolimir argue that the identification of the protected group under Article 4 of the Statute is a factual – not legal – issue and that the identification of the protected group – has not been established on the evidence in the trial record.<sup>40</sup>

38. He further contend that the parts of the Trial Judgement quoted by the Prosecution do not sufficiently explain why Serb and Muslim populations in Eastern BiH were distinct ethnic groups as required by the Trial Chamber.<sup>41</sup>

39. In response, the Prosecution submits that the Trial Chamber’s conclusion that the Muslims of Eastern BiH constituted a substantial part of the protected group<sup>42</sup> is

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<sup>37</sup> *Stakic* Appeal Judgment, para. 317.

<sup>38</sup> *Zdravko Tolimir*. Appeal Judgment, para. 155.

<sup>39</sup> *Zdravko Tolimir*. Appeal Judgment, para. 174.

<sup>40</sup> *Zdravko Tolimir*. Appeal Judgment, para. 179.

<sup>41</sup> *Zdravko Tolimir*. Appeal Judgment, para. 181.

<sup>42</sup> On the issue of substantial part of the population, the Trial Chamber referred to and applied by analogy the reasoning given in the *Popovic et al.* Trial Judgement and the *Krstic* Appeal Judgement as to why the Bosnian Muslim population of Srebrenica, even though constitute a small percentage of the overall Muslim population of BiH amounted to a substantial part of the group. The Trial Chamber stated as follows:

overwhelmingly backed by numerous findings about the strategic importance of the enclaves of Eastern BiH in terms of the Bosnian Serb leadership attaining the goal of removing Muslim population in the area. She continues similarly that the qualification of Bosnian Muslims as a protected group is common knowledge that does not require judicial notice by the Trial Chamber pursuant to Rule 94(A) of the Rules.<sup>43</sup>

40. Deducing from the foregoing, the Appeals Chamber quashed Ground 8 of Appeal.<sup>44</sup>

9. Causing serious bodily or mental harm to members of the group (Ground 7 of Appeal in part and Ground 10 in part )

41. Tolimir argues that the Trial Chamber erred in law and fact that the Bosnian Muslim population suffered “serious bodily or mental harm” as engrain in Article 4(2)(b) of the Statute. She contended that the Chambers’ qualification of harm is “too general and imprecise” ; he stress that “serious mental harm” must involve permanent impairment to mental faculties that is sufficiently serious to destroy a group. Tolimir went further to argue that the Trial Chamber adopted and applied a broader definition of mental harm that is contained in the first draft of the Genocide Convention, instead of adopting the more précised definition in the Genocide Convention.<sup>45</sup>

42. The suffering of Bosnian Muslim men who were detained by Bosnian Serb Forces in the hours and days prior to their death did not amount to serious mental harm to destroy a group Tolimir argues. He contend that if the *actus reus* of genocide consist of killing members of the protected group, any mental harm suffered by them prior to their death

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[t]he Srebrenica enclave was of immense strategic importance to the Bosnian Serb leadership because (1) the ethnically Serb state they sought to create would remain divided and access to Serbia disrupted without Srebrenica; (2) most Muslim inhabitants of the region had, at the relevant time, sought refuge in the Srebrenica enclave and the elimination of the would accomplish the goal of eliminating the Muslim presence in the entire region; and (3) the enclave’s elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their defencelessness and be “emblematic” of the fate of all Bosnian Muslims.” See generally Zdravko *Tolimir*. Appeal Judgment, para. 186

<sup>43</sup> Zdravko *Tolimir*. Appeal Judgment, para. 180.

<sup>44</sup> Zdravko *Tolimir*. Appeal Judgment, para. 189.

<sup>45</sup> Zdravko *Tolimir*. Appeal Judgment, para. 193.

does not amount to a separate act of genocide; and that the survivors did not experience serious mental harm as a group within the meaning of Article 4 of the Statute.<sup>46</sup>

43. Tolimir contends that the Trial Chamber erred in concluding that the women, children, and elderly forcibly transferred from Srebrenica and the Bosnian Muslim from Žepa suffered serious mental harm amounting to genocide. He continue similarly that population transfer does not amount to genocide unless the members of the protected group are transferred in a manner leading to their physical destruction. Tolimir argued that the Trial Chamber erred in considering that irrelevant factors such as the group's post-transfer quality of life and their inability to return to their former home which is inconsistent with the main question.<sup>47</sup>
44. Tolimir argue that the Trial Chamber has no evidence to conclude that serious bodily and mental harm has been inflicted upon the Žepa Bosnian Muslims. He contend that the Chamber erred in fact in finding that he brandished his weapon in the air while supervising the transfer operation in Žepa, when in fact he was unarmed and instructed that no harm should be done to the people. He argues further that the Trial Chamber analysed Mladić's statements out of context to the Bosnian Muslim civilians on board the buses in Žepa; Tolimir said Mladić actually ordered that Zepa evacuees not be mistreated.<sup>48</sup>
45. In response, the Prosecution argue that the Murder of Bosnian Muslims by Bosnian Serb Forces should not prevent a Chamber from treating the harm suffered prior to murder as a separate *actus reus* of genocide and that it is proper to establish genocide under both Article 4(2)(a) and (b) of the Statute, because it establishes the full extent of the defendant's culpability and also a measure to determine the sentence.<sup>49</sup>
46. The Prosecution contends that the Trial Chamber was right in concluding that the Bosnian Male Muslims who were forcibly transferred from Potočari had suffered serious mental harm; because there are no limits as to the kind of act that might result to serious bodily or mental harm to a protected group of people the Prosecution argued. Referring to ICTY jurisprudence, the Prosecution submits that deportation can cause "grave and long-

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<sup>46</sup> *Zdravko Tolimir*. Appeal Judgment, para. 194.

<sup>47</sup> *Zdravko Tolimir*. Appeal Judgment, para. 195 (Emphasis added).

<sup>48</sup> *Zdravko Tolimir*. Appeal Judgment, para. 196.

<sup>49</sup> *Zdravko Tolimir*. Appeal Judgment, para. 198.

term disadvantage to a person's ability to lead a normal and constructive life, which has been accepted as tending towards the group's destruction".<sup>50</sup>

47. The Prosecution argues that Tolimir fails to explain why no reasonable trial chamber could not rely on credible eyewitnesses to assert that he brandished his weapon to coerce Žepa's population on to the vehicle and his comrade Mladić whose statements to Žepa Bosnian Muslims during their evacuation should not be used to determine their involvement in the crime.<sup>51</sup>
48. Building from the arguments presented, the Appeals Chamber quashed Grounds 7 in part (with regards to serious mental harm as the *actus reus* of genocide) and 10 in part (with regards to serious mental harm as the *actus reus* of genocide *visa-à-vis* the Bosnian Muslim men from Srebrenica who were detained and executed, those who survived the executions, and the women, children, and elderly transferred from Srebrenica). Judge Antonetti appended a separate opinion.<sup>52</sup>
49. The Appeals Chamber, granted Ground 10 of the Appeal in part with regards to serious mental harm as the *actus reus* of genocide *vis-à-vis* the Bosnian Muslims forcibly transferred from Žepa and reverses Tolimir's conviction for genocide through causing serious mental harm to the Bosnian Muslim population of Eastern BiH under Article 4(2)(b) of the Statute, to the extent that this conviction was based on the forcible transfer of Bosnian Muslims from Žepa. Judges Sekule and Güney appended a dissenting opinion.<sup>53</sup>

10. Deliberately inflicting calculated harm to a group that will bring about their physical destruction (Ground 10 in part)

50. Tolimir contends that the Trial Chamber erred in fact and law in making its findings on an incorrect understanding of the term "physical and biological destruction", in that the condition of life deliberately imposed as a result of killing and forcible transfer operations aimed at "destroying the Bosnian Muslim community [of Eastern BiH] and

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<sup>50</sup> *Zdravko Tolimir*. Appeal Judgment, para. 199.

<sup>51</sup> *Zdravko Tolimir*. Appeal Judgment, para. 200.

<sup>52</sup> *Zdravko Tolimir*. Appeal Judgment, para. 220.

<sup>53</sup> *Zdravko Tolimir*. Appeal Judgment, para. 221.

preventing the reconstitution of the group in this area”. In his view, the purpose of Article 4 of the Statute is to protect the survival of certain groups as such, not the survival of a group in a particular area; and that the separate findings should have been made for the populations of Srebrenica and Žepa, although he said, there is no evidence that either group were subjected to conditions of life meeting the threshold of Article 4(2)(c). He indicated that both groups were transferred to Muslim-held territory where they were not subjected to living conditions calculated to bring about their physical destruction.<sup>54</sup>

51. In replies, the Prosecution contends that the Trial Chamber correctly found that there was forcible transfer and deliberately inflicting calculated harm that lead to physical destruction of Bosnian Muslim population of Eastern BiH. It submits that this position is consonant to the Appeals Chamber’s decision in *Krstić* Appeal Judgment that the transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating the possibility that “the Muslim community in the area could reconstitute itself”; and that the Trial Chamber was not obliged to treat the populations in Srebrenica and Žepa separately when assessing the combined effect of the Bosnian Serb Forces’ operations in relation to the Muslims of Eastern BiH. The Prosecution submit that Article 4(2)(c) of the Statute does not require proof of physical destruction of the protected group; and that the Trial Chamber was permitted to consider the same acts of forcible transfer and killings as amounting to multiple acts of genocides and therefore requested the summary dismissal of the Tolimir’s submissions.<sup>55</sup>

52. Accordingly, the Appeals Chamber affirmed Ground 10 in part to the extent that it challenges the Trial Chamber’s findings under Article 4(2)(a)-(c) of the Statute and reverses Tolimir’s conviction for genocide under Article 4(2)(c) of the Statute.<sup>56</sup>

#### 11. Genocidal intent of the perpetrators (Grounds of Appeal 7, in part and 11)

53. Tolimir argues that the Trial Chamber erred by inferring genocidal intent for all the underlying acts from the evidence viewed as a whole; meaning it merely inferred

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<sup>54</sup> *Zdravko Tolimir*. Appeal Judgment, para. 223.

<sup>55</sup> *Zdravko Tolimir*. Appeal Judgment, para. 224.

<sup>56</sup> *Zdravko Tolimir*. Appeal Judgment, para. 237.

genocidal intent merely from the acts constituting *actus reus* of genocide and their consequences. That the following factors do not support the inference of genocidal intent as follows: (a) opportunistic killings which by their nature can only provide a very limited basis for inferring genocidal intent; (b) the capture by the Bosnian Serb Forces of thousands of Bosnian Muslim men from the column which Tolimir claims was a lawful military operation to capture enemy soldiers; (c) the destruction of the detainees' identification documents; (d) the inhumane conditions of the detention of Bosnian Muslim men from Srebrenica; (e) the VRS's initial opposition to the proposal to open a corridor for the column to pass and systematic targeting of the column which he argues was lawful as it aimed at the "[d]estruction of enemy forces engaged in [a] military operation"; (f) the large number of Bosnian Muslims killed which according to him, cannot be considered as evidence of genocidal intent; (g) the involvement of "several layers of leadership" in the killing operations, which Tolimir argues is not supported by the evidence on the record; (h) the burial and reburial of murdered Bosnian Muslims which Tolimir contends only revealed the perpetrators' intent "to conceal murders"; and (i) the suffering of the Bosnian Muslims separated from their families in Potočari, detained, and killed, those who survived and those transferred from Potočari and Žepa, along with the "combined effect" of the forcible removal and killing operations.<sup>57</sup>

54. Tolimir submit that genocidal intent must be established specifically in regard to the group forcibly transferred, and cannot be inferred from measures imposed on another part of the group considered together with the forcible transfer to a location which exposes them to their extermination as a group such as enslavement, starvation, or detention in concentration camps.<sup>58</sup>

55. Tolimir avers that the Trial Chamber did not consider two exhibits in the operation in Žepa which allegedly contradict the genocidal intent. It includes: (i) Defence Exhibit 217, Tolimir's alleged instruction to Zoran Čarkić during the Žepa evacuation process that "nothing should happen to the people" and (ii) Prosecution Exhibit 2427, Mladić's

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<sup>57</sup> *Zdravko Tolimir*, Appeal Judgment, para. 241.

<sup>58</sup> *Zdravko Tolimir*, Appeal Judgment, para. 242.

alleged explicit order that “nothing must be taken from the [Muslim people] whom [the VRS] evacuated from Žepa and that they must not be maltreated”.<sup>59</sup>

56. The Prosecution in response contends that, Tolimir’s submission that the Trial Chamber focus on the individual strands of evidence while ignoring the totality of the circumstances is misguided. With regards to Tolimir’s submissions in connection to the factors considered by the Trial Chamber, the Prosecution argues that: (i) opportunistic killings can indicate genocidal intent, as Tolimir acknowledges, and the Trial Chamber did so “to a minimal extent”, relying on a single killing on 13 July 1995; (ii) the Bosnian Muslim men captured from the column were detained in inhumane conditions alongside those men separated from their families at Potočari and were not engaged in combat when killed, thus their capture and execution reasonably supported the finding of genocidal intent; (iii) the decision of Zvornik Brigade Commander Vinko Pandurević to open a corridor for the column in light of the combat situation does not undermine the inference of genocidal intent since genocide does not require proof that the perpetrator chose the “most efficient method” to achieve the objective of destroying the targeted group; and (iv) the Trial Chamber properly considered the victims’ suffering and the combined effect of the forcible transfer and murder operations along with other evidence, in assessing whether the Bosnian Serb Forces acted with genocidal intent and persuade the Appeals Chamber to quash Tolimir’s remaining arguments.<sup>60</sup>
57. The Prosecution argues that conduct not amounting to a genocidal act can be used to infer genocidal intent such as forcible transfer as was held the *Krstić* case.<sup>61</sup>
58. Deducing from the arguments, the Appeals Chamber, Judge Antonetti dissenting, quashed Grounds 11 and 7 of Appeal in part (with regard to forcible transfer as an indicator of genocidal intent).<sup>62</sup>

## 12. Genocidal intent in respect of killings of Mehmed Hajrić, Amir Imamović and Avdo Palić (Ground 12)

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<sup>59</sup> *Zdravko Tolimir*. Appeal Judgment, para. 243.

<sup>60</sup> *Zdravko Tolimir*. Appeal Judgment, para. 244.

<sup>61</sup> *Zdravko Tolimir*. Appeal Judgment, para. 245.

<sup>62</sup> *Zdravko Tolimir*. Appeal Judgment, para. 256.



59. Tolimir argues that the Trial Chamber erred in law and fact in finding that Bosnian Serb Forces killed Palić, Hajrić, and Imamović with the intent to destroy part of the Bosnian Muslim population of Eastern BiH. He submits that the Trial Chamber conclusion that the selective targeting of the leading figures of the community of Žepa is baseless and the assertion that they are “key for the survival” of Bosnian Muslim Community holds no water. Tolimir indicated that the members of the War Presidency were appointed and not elected officials, and that their involvement in combat activities was “illegal under the law of war” and in contravention of the Demilitarization Agreement of 8 May 1993 and the COHA of 1994. Tolimir argue that the Trial Chamber relied on the “emotional” testimony of Perlic’s wife without considering the fact that he was less influential and disrelish than what the Chamber assumed.<sup>63</sup>
60. The Trial Chamber’s reasoning was erroneous Tolimir argued that its presumption that the three Žepa leaders were killed with genocidal intent as demonstrated by the speculation why (Mr. Hamdija Torlak, President of the Executive Board of Žepa, who was also taken into detention) was not killed. Again, the forcible transfer of the Žepa population immediately the murder of the leaders vindicates the genocidal intent.<sup>64</sup>
62. In response, the Prosecution contends that Tolimir failed to ascertain that the Trial Chamber erred in fact and law in its finding that the murder of the three Žepa leaders was linked to genocidal intent; and that Palić was respected and trusted by the Zepa population as his widow testified with other evidence presented.<sup>65</sup>
63. Deducing from the argument presented, the Appeals Chamber grants Ground 12 of Appeal and reverses Tolimir’s conviction for genocide for the killings of Hajić, Palić, and Imamović. His remaining arguments are rendered moot and need not be addressed.<sup>66</sup>

## F. Joint Criminal Enterprise

### 13. Joint Criminal Enterprise (JCE) as mode of liability (Ground 5)

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<sup>63</sup> *Zdravko Tolimir*. Appeal Judgment, para. 258.

<sup>64</sup> *Zdravko Tolimir*. Appeal Judgment, para. 259.

<sup>65</sup> *Zdravko Tolimir*. Appeal Judgment, para. 260.

<sup>66</sup> *Zdravko Tolimir*. Appeal Judgment, para. 270.

64. Tolimir argues that the Trial Chamber erred in law in holding that JCE is a mode of liability under customary international law and thus violated the principle of legality; and that there is no evidence that this form of liability form part of customary international law. Tolimir further submits that if JCE had customary law status, it would have been included in the Rome Statute of the International Criminal Court (ICC) or it would have been inferred by the chambers of the ICC from provisions of the Rome Statute. He continues similarly that the application of JCE liability in its third form is the “most problematic” mode of liability in his opinion because it lowers the *mens rea* element for the most serious crimes “below the acceptable level”.<sup>67</sup>
65. Tolimir requested the Appeals Chamber to quashed or order retrial because there was no clear majority as Judge Mindua stated in his separate and concurring opinion that the “classic” modes of individual criminal responsibility pursuant to Article 7 of the Statute “are preferable to that of JCE liability”.<sup>68</sup>
66. In replies, the Prosecution requested the dismissal of Tolimir’s arguments for repetition of his submission without demonstrating any error in the Trial Chamber’s approach of adhering to the jurisprudence on JCE as a form of responsibility including the third form under customary international law at the time of events in the former Yugoslavia. The Prosecution argue that Tolimir’s submission is misguided with regards to references to the Rome Statute and the practice of the ICC concerning co-perpetration and that this submission had been quashed by the Appeals Chamber.<sup>69</sup>
67. Again the Prosecution argue that Tolimir is misguided in this reliance on Judge Mindua’s separate opinion; she continue that Judge Mindua contended that “JCE” liability has been recognized and well developed by the ICTY Appeals Chamber and found that, Tolimir participated in the two JCEs.<sup>70</sup>
68. From the forgoing reasons, the Appeals Chamber, Judge Antonetti dismisses Ground 5 in its entirety.

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<sup>67</sup> *Zdravko Tolimir*. Appeal Judgment, para. 275.

<sup>68</sup> *Zdravko Tolimir*. Appeal Judgment, para. 276.

<sup>69</sup> *Zdravko Tolimir*. Appeal Judgment, para. 277.

<sup>70</sup> *Zdravko Tolimir*. Appeal Judgment, para. 278.

#### 14. VRS principles and Tolimir's position (Ground 14)

69. Tolimir persuaded the Appeals Chamber to overturn all convictions against him because of the erroneous findings of the Trial Chamber into the relevant VSR military principles, and his position as Assistant Commander and Chief of the Sector for Intelligence and Security Affairs, which led to the false assumption that he had knowledge of and participated in the two JCEs.<sup>71</sup>
70. Regarding the principle of singleness of command, Tolimir argues that the Trial Chamber erred in that he exerted command authority over his subordinates; this principle he says provides that only a commander and not an assistant commander or chief of sector, the position he occupied, had the exclusive right to command subordinate units and subordinate security organs. He further argue that the Trial Chamber erred in its finding that he had “control” of subordinate intelligence officers by relying on an inaccurate translation by the CLSS of the word “*rukovodenje I kamandovanje*” in BCS to “control” (the function of an assistant commander). Tolimir further contend that the Trial Chamber misrepresented the evidence of Prosecution witness Milenko Todorović and fail to consider other evidence in its conclusion on the meaning of command and control within the VRS.<sup>72</sup>
71. Tolimir submits that the Trial Chamber erred in law by disregarding the evidence of the Defence witness Slavko Čulić who testified that superior security organs did not give orders to security organs at the lower level and that they were superiors only in terms of professional education; and that the Sector for Intelligence and Security was involved in works out of its jurisdictional scope.<sup>73</sup>
72. Tolimir challenged the Trial Chamber in his role to information-sharing, authority over the 410<sup>th</sup> Intelligence Centre and his control over the appointment of security and intelligence officers. He further contend that his relation with Mladić was wrongly construed by the Trial Chamber, and that the Prosecution relied on a witness evidence in

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<sup>71</sup> *Zdravko Tolimir*. Appeal Judgment, para. 289.

<sup>72</sup> *Zdravko Tolimir*. Appeal Judgment, para. 290.

<sup>73</sup> *Zdravko Tolimir*. Appeal Judgment, para. 291.

the name of Rupert Smith who said he was “closer to being equals” and the witness Manojlo Milovanvić statement that Tolimir was Mladić’s “eyes and ears”.<sup>74</sup>

73. In replies, the Prosecution contends that Tolimir’s submissions should be summarily dismissed because his argument is based on the misunderstanding that the Trial Chamber convicted him solely on the basis of his institutional position as Chief of the VRS Sector for Intelligence and Security Affairs. The Prosecution further argues that Tolimir merely repeats his trial submissions or seeks to substitute his interpretation of the evidence with that of the Trial Chamber. Moreover, the Prosecution submits that he failed to demonstrate that the Trial Chamber unreasonably accepted the long-standing interpretation of these terms by CLSS, and contend that it considered the totality of the evidence when rejecting Tolimir’s submission. Finally, regarding his relationship with Mladić, the Prosecution argues that Smith’s views were in line with Mladić’s statement and that of David Wood.<sup>75</sup>

74. In sum, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground 14.

#### 15. JCE to forcibly Remove (Ground 15 in part)

75. Tolimir argue that the Prosecution’s Exhibit 2477, the minutes of the 15<sup>th</sup> Session of the National Assembly and Mladić’s comments (“we do not want a war against the Muslims as a people [...] we cannot cleanse [...] so that only Serbs would stay [...] that would be genocide”) demonstrated that the Six Strategic Objectives were not adopted at this session, and that deliberations during the session cannot be understood as reflecting any unlawful policy. He continues similarly that the Trial Chambers misinterpretation of JCE to Forcibly Remove has the following outcome: (i) failure to establish the actual strategic objectives of both the RS and the VRS; (ii) incorrect interpretation of evidence presented by Prosecution Witness Milenko Lazić; and (iii) failure to establish facts that concern the events of 1992-1995 in the Podrinje region. Tolimir further submits that Trial Chamber’s

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<sup>74</sup> *Zdravko Tolimir*. Appeal Judgment, para. 292.

<sup>75</sup> *Zdravko Tolimir*. Appeal Judgment, para. 293.

conclusion that “the political goals set out in Directive 7 [...] were implemented through military orders” is misguided.<sup>76</sup>

76. In replies, Tolimir pointed that there is no connection between Directive 7 and the Six Strategic Objectives and that these objectives were set out in Directive 6. In connection with Directive 7 and 7/1, he argued that the Prosecution Exhibit 2719, a Drina Corps Order dated 20 March 1995, and Exhibit 1202, a Drina Corps Command Order dated 2 July 1995 signed by Milenko Živanović, and Prosecution Exhibit 2509, a Drina Corps Daily Combat Report dated 16 May 1995 signed by Radislav Krstić.<sup>77</sup>
77. The Prosecution in replies noted that Tolimir ignores the Trial Chambers findings in relation to the Six Strategic Objectives, challenge a finding which does not constitute a basis for his conviction and merely recounts unsuccessful submissions presented during trial. Because of Mladić’s involvement in JCE, the Prosecution prays the court to disregard his statement during the deliberation of the 16<sup>th</sup> Session of the National Assembly. The Prosecution further contends that Tolimir: (i) does not show how the Trial Chamber erred in “failing to establish real strategic objectives [...] formulated in Directive 6”; (ii) simply questions the Trial Chamber’s interpretation of evidence presented by Lazić; and (iii) does not show what the relevance of the events of 1992-1995 in the Podrinje region is and ignores the fact that the Trial Chamber took notice of these events. Again the Prosecution Exhibit 1202, the order for active combat operations issued by Živanović amounts to evidence of the military implementation of the directives.<sup>78</sup>
78. Tolimir argues that the Trial Chamber erred in finding that the VRS participated in the prevention of humanitarian convoys and submits that the VRS had no authority over humanitarian convoys, and that before 14 May 1995 there were separate processes for the approval of UNPROFOR re-supply and humanitarian aid convoys and it was the State Committee for Cooperation with the UN and International Humanitarian Organisations and the Ministry of Health (“State Committee”) that possess exclusive right over the approval of humanitarian convoys. Tolimir argues that the real cause for cancellations of convoys were “problems between UNHCR and DutchBat” as evidenced by Prosecution

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<sup>76</sup> *Zdravko Tolimir*. Appeal Judgment, para. 314.

<sup>77</sup> *Zdravko Tolimir*. Appeal Judgment, para. 316.

<sup>78</sup> *Zdravko Tolimir*. Appeal Judgment, para. 315.

Exhibit 619, and the Trial Chamber failed to analyze that sufficient supplies reach Srebrenica and Žepa during the Indictment period.<sup>79</sup>

79. Tolimir contend that the restrictions on UNPROFOR re-supply convoys could not affect its ability to distribute humanitarian aid or cause a humanitarian crisis, because the provisions sent through the re-supply conveyes were only meant for UNPROFOR and not the local population<sup>80</sup> and that alleged provision of food to the ABiH by UNPROFOR is established in Defence witness Slavko Kralj's testimony.<sup>81</sup>
80. The Prosecution submits that while Additional Protocol I allows a party to a conflict to prescribe technical requirements for passage of convoys, it also prohibits any interference with humanitarian relief consignment<sup>82</sup>; the Prosecution further argues that Tolimir relies on evidence showing that on a single occasion, a UNHCR employee threatened to discontinue the convoys if the ABiH insisted on extensive checks.<sup>83</sup>
81. Tolimir argued that the Trial Chamber erred in law, according to him, VRS had the right to attack Srebrenica and Žepa under Additional Protocol I because, despite their designation as "safe areas" by the UN Security Council and as "demilitarized zones" under the belligerents' agreement, the ABiH materially breached the enclaves' status by maintaining a military presence there; he continued similarly that the VRS operations were only undertaken in response to ABiH's attacks and was aimed at taking control of the area – a lawful military objective under Geneva Convention IV and Additional Protocol I.<sup>84</sup>
82. In replies, the Prosecution prays the Appeals Chamber to dismissed Tolimir's claims adding that whether VRS was entitled to attack the two enclaves is irrelevant in this case since he was convicted as a member of JCE aiming to primarily attack the civilian populations of the enclaves which rendered the VRS attacks unlawful irrespective of the ABiH's military presence in the two safe zones.<sup>85</sup>

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<sup>79</sup> *Zdravko Tolimir*. Appeal Judgment, para. 323.

<sup>80</sup> *Zdravko Tolimir*. Appeal Judgment, para. 324.

<sup>81</sup> *Zdravko Tolimir*. Appeal Judgment, para. 327.

<sup>82</sup> *Zdravko Tolimir*. Appeal Judgment, para. 325.

<sup>83</sup> *Zdravko Tolimir*. Appeal Judgment, para. 326.

<sup>84</sup> *Zdravko Tolimir*. Appeal Judgment, para. 343.

<sup>85</sup> *Zdravko Tolimir*. Appeal Judgment, para. 344.

83. Deducing from the forgoing reasons, the Appeals Chamber, Judge Antonetti dissenting dismissed Tolimir's arguments in Ground 15 relating to the existence of the JCE to Forcibly Remove.<sup>86</sup>

16. Tolimir's contribution to the JCE to Forcibly Remove (Ground 15 in part)

84. Regarding the JCE's common plan to forcibly remove the Bosnian Muslim of Srebrenica and Žepa, the Trial Chamber found the following: (i) participating in the restrictions of convoys entering the enclaves; (ii) limiting UNPROFOR's ability to carry out its mandate and facilitating VRS's takeover of the enclaves by "keeping UNPROFOR at bay", and making false representation concerning VRS intentions; and (iii) his direct involvement in the preparation and implementation of the forcible removal of Žepa's civilian population, an operation of which he was in control.<sup>87</sup>

85. Tolimir argue that the absence of evidence linking him to approval of restrictions of humanitarian aid to the enclaves cannot be construe that he contributed to the JCE to Forcibly Remove. Regarding the UNPROFOR re-supply convoys, he submits that the Trial Chamber failed to take into account evidence showing that Mladić Deputy Commander and Chief of the Main Staff Mr. Milovanović had the right to issue authorizations for such convoys while he was to "provide information" as to the approval of certain items.<sup>88</sup>

86. In response, the Prosecution contends that the Trial Chamber rightly found Tolimir participation in the restriction of convoys into the enclaves and that he had a prominent role in the approval of UNPROFOR re-supply convoys.<sup>89</sup>

87. From the arguments presented, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground 15 (in part) related to Tolimir's liability pursuant to the JCE to Forcibly Remove.<sup>90</sup>

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<sup>86</sup> *Zdravko Tolimir*. Appeal Judgment, para. 349.

<sup>87</sup> *Zdravko Tolimir*. Appeal Judgment, para. 351.

<sup>88</sup> *Zdravko Tolimir*. Appeal Judgment, para. 354.

<sup>89</sup> *Zdravko Tolimir*. Appeal Judgment, para. 355.

<sup>90</sup> *Zdravko Tolimir*. Appeal Judgment, para. 414.

## G. JCE to Murder

### 17. The Killing at the Kravica Warehouse (Ground 19)

88. Tolimir argue that the Trial Chamber erred in fact and law in finding that there was a common plan of the JCE to Murder 600 – 1000 Bosnian Muslims in the Kravica Warehouse on 13-14 July 1995. He refers to evidence on the record, such as video footage from the car in which Ljubomir Borovčanin, the commander of the police units in the area passed by the Kravica Warehouse and asserts that this evidence clearly shows that Borovčanin saw nothing. Tolimir submits that the Trial Chamber's findings demonstrate that the killings were a retaliatory action by the Bosnian Serb Forces for the killing in the warehouse. According to him, the killings were vastly disproportionate and inappropriate response to the incident as stated by Judge Nyambe in her dissenting opinion. He contends that the errors have invalidated the judgment and/or caused a miscarriage of justice.<sup>91</sup>
89. In replies, the Prosecution argues that the Trial Chamber properly considered the Kravica Warehouse killings as being part of the common plan to murder. It submits that Tolimir's submissions should be summarily dismissed. Again, the Prosecution contends that Tolimir fails to show how the Trial Chamber's findings based on the evidence of the execution of the Bosnian Muslim prisoners in the warehouse were ones that no reasonable trial chamber could have reached.<sup>92</sup>
90. In light of the foregoing, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground 19 of Appeal.<sup>93</sup>

### 18. The killing of six Bosnian Muslims near Trnovo (Ground 20)

91. Tolimir submits that the Trial Chamber erred in finding that the killing of the six Bosnian Muslims near Trnovo by the Scorpions Unit was part of the JCE to Murder, and that there

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<sup>91</sup> *Zdravko Tolimir*. Appeal Judgment, para. 416.

<sup>92</sup> *Zdravko Tolimir*. Appeal Judgment, para. 417.

<sup>93</sup> *Zdravko Tolimir*. Appeal Judgment, para. 425.



is no evidence that these murders were committed pursuant to the common purpose of JCE. In this light he argue that: (i) the Scorpions Unit was deployed in the area of responsibility of the Sarajevo Romanijo Corps, and all other killings were committed in the area of responsibility of the Drina Corps; (ii) the Scorpions Unit was deployed in Trnovo, “approximately 200 kilometers” away from Srebrenica, before the Srebrenica operation, and did not take part in the operation; (iii) there is no evidence as to how the six Bosnian Muslims arrived in Trnovo and how they came into the custody of the Scorpions Unit or evidence of any contact between members of the Scorpions Unit and members of the JCE to Murder; and (iv) unlike the other murders which were kept secret, the murders at Trnovo were video-recorded, which, in Tolimir’s submission, is a strong indication that those who ordered the murders also ordered the video-recording. He further contend that the Scorpions Unit was acting under the direction of the Bosnian Serb Forces – a finding he does not deny – is an insufficient ground he argue to infer the Scorpions Unit’s act with members of the JCE to Murder.<sup>94</sup>

92. In replies, the Prosecution argue that the Trial Chamber reasonably concluded that the killing of the six Bosnian Muslim men and boys from Srebrenica in Trnovo were part of the JCE to Murder. The Prosecution submits that Tolimir merely repeats trial argument and tries to substitute the Trial Chamber’s interpretation of evidence with his own.<sup>95</sup>

93. The Prosecution submits that the Trial Chamber based its finding that the Scorpions Unit “was cooperating with VRS and/or RS MUP members of the JCE to murder during its deployment in Srebrenica in July 1995”. It goes on that the Trial Chambers concluded that: (i) following the largest-known killings, the Bosnian Serb Forces continued to search the terrain for ABiH soldiers and captured and killed smaller groups of Bosnian Muslim men who were fleeing from Srebrenica; (ii) the six victims killed near Trnovo had been reported missing or dead along the route of the column; and (iii) the Scorpions Unit was ordered to provide vehicles and go to Srebrenica to take the victims to different locations to be killed. No doubt the Prosecution submits that the six men and boys were

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<sup>94</sup> *Zdravko Tolimir*. Appeal Judgment, para. 427.

<sup>95</sup> *Zdravko Tolimir*. Appeal Judgment, para. 428.

killed in Trnovo, since this was where the Scorpions Unit had been deployed when they received orders from active hostilities to help Bosnian Serb Forces in Srebrenica.<sup>96</sup>

94. In replies, Tolimir argue that contrary to the Prosecution's assertion, the Trial Chamber did not find that the Scorpions Unit had been deployed to Srebrenica in July 1995.<sup>97</sup>

95. In view of the argument presented above, the Appeals Chamber, Judge Antonetti appends a separate opinion; finds that from the evidence presented, no reasonable Trial Chamber could establish a link between members of the JCE to Murder and the Scorpions Unit. It therefore grants ground 20 in favour of Tolimir.<sup>98</sup>

#### 19. Tolimir's liability pursuant to the JCE to Murder (Ground 16)

96. The Trial Chamber found that Tolimir contributed to the JCE to Murder through the following acts and omissions:

- (i) His transmission of message to Major Malimić, the commander of the Battalion of the 65<sup>th</sup> Protection Regiment on 13 July 1995 regarding measures to be taken for the accommodation of more than 1,000 Bosnian Muslims captured in the Kasaba area, including measures to remove POWs from the road and detain them indoors or in a protected area;
- (ii) His proposal on 13 July 1995, to the VRS Main Staff and personally to Lieutenant Colonel General Gvero, Chief of the Sector for Morale, Guidance, Religious and Legal Affairs, concerning the accommodation of 800 POWs in the agricultural buildings in Sjemeć, noting that the transfer of the POWs had to be done at night and contact with other POWs had to be avoided;
- (iii) His instruction, at the earliest on 13 July 1995 to Milenko Todorović, Chief of Security of the Eastern Bosnia Corps, to halt all preparations for the accommodation of an anticipated group of 1,000 to 1,300 ABiH soldiers at the Batković Collection Centre;
- (iv) His active involvement in the forcible transfer of Bosnian Muslims in Žepa enclave “[w]ith his understanding of the murder operation on the ground”;

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<sup>96</sup> *Zdravko Tolimir*. Appeal Judgment, para. 429.

<sup>97</sup> *Zdravko Tolimir*. Appeal Judgment, para. 430.

<sup>98</sup> *Zdravko Tolimir*. Appeal Judgment, para. 435.

- (v) His instruction to Major General Miletić Chief of the Administration for Operations and Training in the Staff Sector of the VRS Main Staff, in the morning of 16 July 1995 to transmit to Colonel Salapura and other officers the message that it was safer to communicate by telegram through the Drina Corps IKM in Krivače;
- (vi) His authorization, on 16 July 1995, and supervision on 18 July 1995, of the evacuation of 22 wounded ABiH soldiers and local MSF staff from the Bratunac Health Centre in Srebrenica with a view to concealing the killings that had taken place and diverting international attention from the fate of the detained and killed Bosnian Muslim males from Srebrenica;
- (vii) His direction to Popović in the context of a telephone conversation concerning a missing relative of the latter, to “do his job” on 22 July 1995, the day before Popović supervised the killings of Bosnian Muslim men in Bišina by the 10<sup>th</sup> Sabotage Detachment;
- (viii) His proposal in a report to Lieutenant Colonel Gvero and Major General Miletić, dated 25 July 1995, that the Republika Srpska’s State Commission for Exchange of POWs be advised not to agree to a longer procedure for POW exchanges with the ABiH, since Bosnian Muslims could take advantage of the 24 July 1995 Agreement “which they have already tried to do so by bringing up the issue of the prisoners from Srebrenica”;
- (ix) His lies, in August and September 1995, to families of captured VRS soldiers and Bosnian Muslims about the reason why the VRS did not have enough Bosnian Muslim prisoners for exchanges with VRS soldiers captured by the ABiH;
- (x) His proposal in February 1997 not to respond to a request from the Dutch Embassy in Sarajevo for assistance in the identification of 239 persons listed as present at the UN compound in Potočari on 13 July 1995;
- (xi) His failure to protect the Bosnian Muslim prisoners from Srebrenica.<sup>99</sup>

97. The summary above demonstrate Tolimir’s intent the Trial Chamber argues that his instruction in Todorović, his proposal to Gvero, and his contacts with Salapura and

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<sup>99</sup> *Zdravko Tolimir*. Appeal Judgment, para. 437.

Popović on 16 and 22 July 1995 respectively is testament to his intent and plan to murder.<sup>100</sup>

98. In replies, Tolimir challenge the Trial Chamber's findings that he was aware of, intended and contributed to the common plan to murder Bosnian Muslim men from Srebrenica enclave.<sup>101</sup>

99. In light of the above submissions, the Appeals Chamber, Judge Antonetti dissenting dismisses Ground 16 of Appeal.<sup>102</sup>

### **F. Tolimir's liability under the third category of JCE**

#### 20. Foreseeable Opportunistic Killings and Persecutory Acts (Ground 17)

100. The Trial Chamber found Tolimir criminally responsible Pursuant to JCE III, for persecutory acts, and opportunistic killing of one Bosnian Muslim man in Potočari, as a natural and foreseeable consequence of the JCE to Forcibly Remove.<sup>103</sup>

101. Tolimir argue that the Trial Chamber erred in fact and law in that no evidence demonstrate that he had information that enabled him to reasonably foresee that opportunistic killings and persecutory acts would be committed. He claims that foreseeability must be assessed on the basis of the information in possession of the accused at the relevant time, and that there was failure on the part of the Trial Chamber to identify such information beyond reasonable doubt. In this regard, he pointed out that the trial Chamber failed to consider Defence Exhibits 41 and 85, his military reports of 9 July 1995, which he claims are in contradiction to the Trial Chamber's finding. Regarding the Trial Chamber's finding that he was aware that the VRS seized control of Potočari early on 12 July 1995, Tolimir argue that this information was a matter of common knowledge. He however argues that there is no evidence regarding his acquisition of information and participation of the situation in Potočari, Bratunac, or Zvornik. Because at the time he said that he was involve in Žepa operation and there were other top ranking officers of VRS on the ground in Potočari.<sup>104</sup>

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<sup>100</sup> *Zdravko Tolimir*. Appeal Judgment, para. 438.

<sup>101</sup> *Zdravko Tolimir*. Appeal Judgment, para. 439.

<sup>102</sup> *Zdravko Tolimir*. Appeal Judgment, para. 508.

<sup>103</sup> *Zdravko Tolimir*. Appeal Judgment, para. 509.

<sup>104</sup> *Zdravko Tolimir*. Appeal Judgment, para. 510.

102. Tolimir further submits that there is no evidence to suggest that he intended to make life unbearable for Bosnian Muslims in the Srebrenica enclave, and that he would have foreseen that crimes would be committed. He further argue that the Trial Chamber failed to demonstrate that he had knowledge of “ethnic hatred” between Bosnian Muslims and Serbs, that he used derogatory language such as “Turks” and “balijas” to promote crimes against the Bosnian Muslim population.<sup>105</sup>
103. In replies, the Prosecution argues that the Trial Chamber did not rely on the “mere existence of JCE” to establish foreseeability to establish the crime, and that she did not need to find that he had specific knowledge of killings for them to be foreseeable to him.<sup>106</sup>
104. The Prosecution argues that Tolimir failed to address the totality of the evidence considered by the Trial Chamber to establish foreseeability, and that he misunderstood the element of JCE III in his argument.<sup>107</sup>
105. In light of the above arguments, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground 17.<sup>108</sup>

21. Whether the killings of the three Žepa leaders were reasonably foreseeable to Tolimir  
(Ground 18)

106. Tolimir submits that, the Trial Chamber erred in concluding that the killings were as a result of the implementation of the JCE to Forcibly Remove because they were committed outside the time frame of the JCE as charged in the Indictment, and after the implementation of the JCE was concluded with the completion of the population transfer to Kladanj. Again, he avert that the fact that the three men were prominent figures in Žepa Muslim community, is no basis for foreseeability on his part regarding their eventual dead. He further contends that the Trial Chamber erred in relying on the testimony of Imam Ramiz Dumanjic.<sup>109</sup>
107. Tolimir argue that the Trial Chamber erred in fact in finding that the security organs of the VRS were under his “professional command” and that the Trial Chamber erroneously equated involvement in exchanges of POWs (in which he was involve) with responsibility

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<sup>105</sup> *Zdravko Tolimir*. Appeal Judgment, para. 511.

<sup>106</sup> *Zdravko Tolimir*. Appeal Judgment, para. 512.

<sup>107</sup> *Zdravko Tolimir*. Appeal Judgment, para. 513.

<sup>108</sup> *Zdravko Tolimir*. Appeal Judgment, para. 523.

<sup>109</sup> *Zdravko Tolimir*. Appeal Judgment, para. 525.

for their treatment, when it was the Unit under which they were that was responsible for their treatment.<sup>110</sup>

108. Tolimir submits that the Trial Chamber erred in concluding that an ICRC team visited the Rasadnik Prison, and registered Imamović and Hajrić, this had no bearing on his ability to foresee that these men could be killed. He went further that the circumstances of their disappearance and death was not properly investigated by the Trial chamber because there is no evidence about the perpetrator and the circumstances in which they were killed.<sup>111</sup>
109. Tolimir contend that the Trial Chamber failed to consider evidence that is contrary to its finding that the killings was foreseeable to him or that there was no evidence that he received information about Perlić after 30 July 1995, and that he only knew that Perlić was alive when he was told that he has “better accommodation”<sup>112</sup>
110. The Prosecution in replies, argue that by sending the three men to the Srebrenica area where death had already occurred, Tolimir knew or could foresee that they will be killed, as a result the trial chambers was right in its conclusion for murder of the three Žepa leaders.<sup>113</sup>
111. The Prosecution submits that Hajrić and Imamović were both release from the Rasadnik Prison in mid-August 1995 and never seen alive again, implying they were murdered in August 2005, which is around the same time JCE took place as the Trial Chamber rightly found. The Prosecution further contends that Tolimir failed to prevent the Bosnian Serb Forces from killing Perlić during the implementation of the JCE to Forcibly Remove albeit foreseeable to him. The Prosecution contends that Tolimir misunderstand the Trial Chamber’s findings regarding his duty to protect prisoners.<sup>114</sup>
112. From the foregoing, the Appeals Chamber, Judge Antonetti dissenting, dismisses Tolimir’s submissions by majority. Ground 18 of appeal.<sup>115</sup>

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<sup>110</sup> *Zdravko Tolimir*. Appeal Judgment, para. 526

<sup>111</sup> *Zdravko Tolimir*. Appeal Judgment, para. 527.

<sup>112</sup> *Zdravko Tolimir*. Appeal Judgment, para. 528.

<sup>113</sup> *Zdravko Tolimir*. Appeal Judgment, para. 529.

<sup>114</sup> *Zdravko Tolimir*. Appeal Judgment, para. 530.

<sup>115</sup> *Zdravko Tolimir*. Appeal Judgment, para. 550.

## H. Tolimir's responsibility in relation to counts

### 22 Genocidal intent (Ground 21)

113. Tolimir contends that the Trial Chamber erred in law by relying on the Tribunal Jurisprudence and that because genocidal intent is rarely overt, intent may be inferred from the totality of evidence. This he said cannot be use as the starting point for determining his *mens rea*.<sup>116</sup>
114. Tolimir avert that the Trial Chamber erred in law and fact by relying on his education, experience as an officer, his position in the VRS, his capabilities regarding his duties, and the responsibilities stemming from his professional position in determining his genocidal intent. He further contend that, the Trial Chamber relied on his relationship with Mladić and its assessment of his *mens rea* by taking into account several factual findings that overlap the temporal boundaries of the alleged genocide as indicated in the Indictment, it includes: (i) the implementation of Directive 7, (ii) the restriction of convoys, (iii) his contribution to the aim of limiting UNPROFOR's ability to carry out its mandate, and (iv) the facilitation of the takeover of the enclaves. Tolimir argue that the Trial Chamber failed to provide adequate reasoning as to why, and how, these factors demonstrate genocidal intent.<sup>117</sup>
115. Tolimir argue that the Prosecution Exhibit 488 were out of range of the VRS, and that his intention was not to destroy fleeing groups of members of the Muslim population of Žepa, but rather to destroy places where they could arrived at. This he said the Trial Chamber erred in fact by relying on a report dated 21 July 1995, purporting to destroy groups of Muslim refugees fleeing from the direction of Stublić, Radava and Brloška Planina by either chemical weapons or aerosol grenades or bombs. Furthermore, he challenged the allegation that he used derogative words to incite ethnic hatred among members of the Bosnian Serb Forces.<sup>118</sup>
116. In replies, the Prosecution requested the dismissal of Tolimir's position in the VRS, and his participation in the JCE to Murder and the JCE to Forcibly Remove as exonerating him from the responsibility for genocide. The Prosecution contends that he was aware of the fate of the prisoners in Srebrenica and was in direct contact with Mladic. The Prosecution further

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<sup>116</sup> *Zdravko Tolimir*. Appeal Judgment, para. 552.

<sup>117</sup> *Zdravko Tolimir*. Appeal Judgment, para. 553.

<sup>118</sup> *Zdravko Tolimir*. Appeal Judgment, para. 554 – 555.

submits that the Trial Chamber's consideration that the accused intended to destroy the Bosnian Muslim population as demonstrated in Exhibit 488 is founded. Furthermore, his use of derogatory words and the consideration of evidence out of the Indictment to determine his *mens rea* are plausible grounds to ascertain his intent to commit genocide.<sup>119</sup>

117. From the foregoing, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground 21.<sup>120</sup>

## 22 Conspiracy to commit genocide (Ground 22)

118. The Trial Chamber convicted Tolimir for genocide and conspiracy to commit genocide under Article 4(3) (a) and (b) of the Statute. He however challenge his conviction as erroneous in law and fact, arguing that conspiracy to commit genocide cannot be considered a separate crime if genocide has already been committed. Again he argued that even though the conspiracy charge only encompassed "the agreement to kill the able-bodied men from Srebrenica", the Trial Chamber inferred his intent to commit genocide from a wider factual basis. In his opinion, conspiracy to commit genocide should only be considered as a mode of liability, and it is distinguishable from JCE as a mode of liability.<sup>121</sup>

119. The Prosecution argues in response that, the Trial Chamber correctly convicted Tolimir for both conspiracy to commit genocide and genocide. It contends that Tolimir ignores the *Gatete* Appeal Judgement, where the ICTR Appeals Chamber determined that convictions for conspiracy to commit genocide and genocide were possible. The Prosecution submits that since the *actus reus* of conspiracy is the act of entering into an agreement to commit genocide, she was not required to give an explanation as to the mode of liability.<sup>122</sup>

120. From the above grounds, the Appeals Chamber Judge Anonetti dissenting dismisses Ground 22.<sup>123</sup>

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<sup>119</sup> *Zdravko Tolimir*. Appeal Judgment, para. 556 – 559.

<sup>120</sup> *Zdravko Tolimir*. Appeal Judgment, para. 577.

<sup>121</sup> *Zdravko Tolimir*. Appeal Judgment, para. 578 – 580.

<sup>122</sup> *Zdravko Tolimir*. Appeal Judgment, para. 581.

<sup>123</sup> *Zdravko Tolimir*. Appeal Judgment, para. 591.



## 23 *Mens rea* requirements of crimes against humanity (Ground 23)

121. Tolimir submits that the Trial Chamber erred in fact in finding that he had knowledge that the attack on the Srebrenica and Žepa enclaves was an attack against the civilian population, and that his acts formed part of the attack. He recall the finding submitted under Ground of Appeal 15, specifically that the Trial Chamber: (i) misinterpreted Directive 7, in particular when it mistakenly assumed that “every” subsequent act was in implementation of this directive, and (ii) disregarded the explicit wording of a number of documents issued after Directive 7, some of them issued by Tolimir, which ordered VRS officers to treat civilians and POWs in line with the Geneva Convention.<sup>124</sup>
122. In replies, the Prosecution submits that the accused merely repeats arguments made under Grounds of Appeal 15 – 17, for this reason Tolimir’s submission under Ground of Appeals 23 should be quashed.<sup>125</sup>
123. For the following reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground 23 of Appeal.<sup>126</sup>

### I. Cumulative Convictions (Ground 24)

124. Tolimir argued that the Trial Chamber erred in law by relying on the test articulated in the *Čelebići* Appeal Judgment (“*Čelebići test*”)<sup>127</sup> in assessing his cumulative conviction for

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<sup>124</sup> *Zdravko Tolimir*. Appeal Judgment, para. 593.

<sup>125</sup> *Zdravko Tolimir*. Appeal Judgment, para. 594.

<sup>126</sup> *Zdravko Tolimir*. Appeal Judgment, para. 598.

<sup>127</sup> The *Čelebići* test is as follows:

[...] reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additionally materially distinct element, then a conviction should be entered only under that provision.

the following pair of offences: (i) intra-Article 5 cumulative convictions (persecution and murder, and forcible transfer as an act of persecution and forcible transfer as an inhumane act); (ii) genocide and extermination as a crime against humanity; (iii) genocide and murder as a crime against humanity or as a violation of the laws or customs of war; and (iv) genocide and conspiracy to commit genocide.<sup>128</sup>

125. Tolimir argue that the Trial Chamber erred by relying on the *Čelebići* test claiming that it is not a complete test. He argues that this test is “inappropriately narrow for the determination of combinations of crimes” pursuant to Articles 3, 4, and 5 of the Statute. He further submits that it is necessary to establish not only whether elements of crimes overlap, but also to compare elements that do not.<sup>129</sup>

126. Tolimir in line with the permissibility of *intra*-Article 5 cumulative convictions submits that the Joint Dissenting Opinion of Judges Schomburg and Guney in the Kordic and Cerkez Appeal Judgement articulated the correct legal standard under international criminal law.<sup>130</sup>

127. In responds, the Prosecution avert that intra-Article 5 cumulative convictions are permitted under well-settled precedent.<sup>131</sup>

128. With regards to genocide and extermination, Tolimir argues that although both crimes possess distinct elements, genocide is an aggravated form of crimes against humanity. He pointed out that to avoid any doubt that genocide could be committed both in times of peace and war, the drafters of the Convention on Genocide did not describe it as crimes against humanity. Tolimir argues further that the specific intent required for genocide “is much more serious” than that required for crimes against humanity, in this light, entering a cumulative conviction is impermissible because both forms of intent are materially distinct.<sup>132</sup>

129. The Prosecution in reply submits that a conviction for genocide may be cumulated with murder or extermination as crimes against humanity which is permitted under the *Čelebići* test.<sup>133</sup>

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See generally the *Gatete* Appeal Judgement, para. 259; *Krajišnik* Appeal Judgement, para. 386; *Ntagerura et al.* Appeal Judgement, para. 425; *Stakić* Appeal Judgment, paras 355-357; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 542; *Musema* Appeal Judgement, paras 360-361.

<sup>128</sup> *Zdravko Tolimir*. Appeal Judgment, para. 599.

<sup>129</sup> *Zdravko Tolimir*. Appeal Judgment, para. 600.

<sup>130</sup> *Zdravko Tolimir*. Appeal Judgment, para. 603.

<sup>131</sup> *Zdravko Tolimir*. Appeal Judgment, para. 604.

<sup>132</sup> *Zdravko Tolimir*. Appeal Judgment, para. 608.

<sup>133</sup> *Zdravko Tolimir*. Appeal Judgment, para. 609.

130. In line with genocide and murder as a war crime, Tolimir argue that the Trial Chamber erred in law in permitting cumulative convictions for genocide and murder as a violation of the laws or customs of war.<sup>134</sup>
131. The Prosecution responded that as for genocide and crimes against humanity, murder as a violation of the laws or customs of war contains a distinct element not contained in the crime of genocide, which is the existence of a nexus between the acts of the accused and the armed conflict.<sup>135</sup>
132. From the foregoing, the Appeals Chamber dismisses Ground 24 in its entirety.<sup>136</sup>

## II. SENTENCING (Ground 25)

133. Pursuant to Article 24 of the Statute and Rule 101(B) of the Rules, a trial chamber must consider the following factors in determining the appropriate sentence: (i) the gravity of the offence; (ii) the individual circumstances of the convicted person; (iii) the general practice regarding sentences in the courts of the former Yugoslavia; and (iv) any aggravating and/or mitigating circumstances.<sup>137</sup> A trial chamber it is submitted is vested with broad discretion in determining an appropriate sentence reflecting the circumstances of the particular accused and the gravity of the crime.<sup>138</sup>
134. The Appeals Chamber identify that the Trial Chamber rightly stated the Tribunal's jurisprudence that to assess the gravity of the offence, it must consider the inherent seriousness of the crime as well as the totality of the criminal conduct of the convicted person in light of the particular circumstances, including the form and degree of participation of the convicted person. The Appeals Chamber notes that the Trial Chamber did not, however, analyze Tolimir's own criminal conduct when determining the gravity of the offence. Instead the Trial Chamber considered Tolimir's own role and participation in the crimes when

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<sup>134</sup> *Zdravko Tolimir*. Appeal Judgment, para. 612.

<sup>135</sup> *Zdravko Tolimir*. Appeal Judgment, para. 613.

<sup>136</sup> *Zdravko Tolimir*. Appeal Judgment, para. 623.

<sup>137</sup> *Zdravko Tolimir*. Appeal Judgment, para. 626.

<sup>138</sup> *Popović et al.* Appeal Judgement, para. 1961; *Dorđević* Appeal Judgment, para. 931; *Šainović et al.* Appeal Judgment, paras 1797-1798; *Boskoski and Tarčulovski* Appeal Judgement, paras 203-204; *D. Milošević* Appeal Judgement, para. 297; *Mrksić and Šljivančanin* Appeal Judgement, para. 352; *Strugar* Appeal Judgement, para. 336; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Blagojević and Jokić* Appeal Judgement, paras 137, 321; *Blaskić* Appeal Judgment, para. 680. See generally *Zdravko Tolimir*. Appeal Judgment, p. 257 – 258.

assessing aggravating circumstances. She took this approach in line with the sentencing principle that the same factor should not be considered both in assessing the gravity of the crime and as an aggravating circumstance. In assessing the aggravating circumstances, the Trial Chamber considered: (i) Tolimir's abuse of his high rank and central position in the VRS Main Staff to contribute cover up crimes of murder and forcible removal; (ii) his contact with his subordinates, who informed him about the events on the ground and whose criminal activities he directed; (iii) his active involvement in the VRS's implementation of the aims of Directive 7 to create unbearable living conditions for the population of Srebrenica and Žepa; and (iv) his active and direct involvement in the implementation of the common criminal goals of the JCE to Forcibly Remove and the JCE to Murder by intentionally forming plans and issuing orders to further these goals.<sup>139</sup>

135. The Appeals Chamber reiterates that it has reversed several of Tolimir's convictions, as set out in paragraph 134 above. The Appeals Chamber recalls that it reverses his convictions for genocide, extermination as crime against humanity, and murder as a violation of the laws or customs of war to that extent that they concern the killings of the six Bosnian Muslim men near Trnovo as well as his convictions for genocide and extermination as a crime against humanity to the extent that they involve the killings of the three Žepa leaders. The Appeals Chamber indicated that the remaining convictions of Tolimir, which includes genocide, committed through the killings of men from Srebrenica and through the infliction of serious bodily or mental harm to the Bosnian Muslim population of Srebrenica was upheld.

136. In light of the foregoing, the Appeals Chamber affirms Tolimir's sentence of life imprisonment.<sup>140</sup>

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<sup>139</sup> *Zdravko Tolimir*. Appeal Judgment, para. 633.

<sup>140</sup> *Zdravko Tolimir*. Appeal Judgment, para. 648.

### III DISPOSITION

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

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

**NOTING** the respective written submissions of the parties and the arguments they presented at the Appeal Hearing on 12 November 2014;

**SITTING** in open session;

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

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

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

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

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

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

**DISMISSES** Tolimir's remaining grounds of appeal;

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

**AFFIRMS** Tolimir's sentence of life-imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

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

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