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| International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 | Case No. | IT-06-90-A |
| | Date: | 5 October 2011 |
| | Original: | English |

**IN THE APPEALS CHAMBER**

**Before:** **Judge Theodor Meron, Presiding**
**Judge Fausto Pocar**
**Judge Andrésia Vaz**
**Judge Mehmet Güney**
**Judge Carmel Agius**

**Registrar:** **Mr John Hocking**

**Appeal Brief:** **5 October 2011**

**PROSECUTOR**
**v.**
**ANTE GOTOVINA AND MLADEN MARKAČ**

***PUBLIC***

# MLADEN MARKAČ'S PUBLIC REDACTED APPEAL BRIEF

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## INTRODUCTION

1. Pursuant to Rule 111, Mladen Markač ("Appellant") files his grounds of appeal against conviction and sentence. The Appellant appeals against the Judgment of Trial Chamber I (IT-06-90-T) of 15 April 2011. The procedural history, fully set out in the Judgment (paras. 2627-2685), will not be rehearsed here.

2. These grounds of appeal follow the same order as the Notice of Appeal filed on 16 May 2011, pursuant to the Practice Direction IT/201. The sub-grounds of Ground One have been re-organised to facilitate cogent exposition of the arguments. This reorganisation following the filing of the Notice of Appeal resulted from the assignment of two new members of the appeals team on 29 June 2011.[1] These sub-grounds have been re-ordered to help the Chamber and Parties understand the arguments, and the re-ordering causes no prejudice to any party. Accordingly the Appellant seeks the Chamber's leave, pursuant to Article 4 of the Practice Direction, to present the arguments in Ground One in a revised order.

3. The Appellant requests the Appeals Chamber to reverse the Trial Judgment. The grounds of appeal against the judgment and remedies sought for this request are set out below. In the alternative, the Defence requests the Appeals Chamber to reduce the manifestly excessive sentence imposed on the Appellant by the Trial Chamber.

4. Where reference is made to an error of law, it is one that, individually or cumulatively, invalidated the verdict. Where reference is made to an error of fact, it is an error that no reasonable trial chamber would have made and one that, individually or cumulatively, occasioned a miscarriage of justice.

## I. GROUND 1: ERRORS OF FACT AND LAW IN THE CHAMBER'S APPROACH TO JCE

[1] Messrs. John Jones and Kai Ambos.

5. The Appellant's first ground of appeal is that the Trial Chamber ("Chamber") erred in law and fact[2] in finding the Appellant was a member of a JCE whose objective was the permanent removal of the Serb population from the Krajina region through the commission of crimes of persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures), deportation and forcible transfer.[3]

6. The Chamber's finding of criminal responsibility is predicated on the alleged JCE**,** which is said to have been agreed upon at the Brioni Meeting of 31 July 1995 ("Brioni Meeting").[4] The Chamber erred in finding that there was such a JCE. This is developed in Sub-Ground 1(A).

7. Having erroneously found that a JCE existed, the Chamber then erred by finding the Appellant liable on the basis of his alleged "significant contribution" to the JCE.[5] This is developed in Sub-Ground 1(B).

8. Finally, the Chamber erred by finding the Appellant liable, on the basis of JCE III, with regard to further crimes, not included in the original JCE I, i.e., destruction, plunder, murder, inhumane acts, cruel treatment and unlawful detentions, on their own or as underlying acts of persecution. This is developed in Sub-Ground 1(C).

9. In summary, it is submitted that the Appellant's conviction on the basis of JCE liability cannot be supported even on the basis of the Chamber's own findings, and certainly not on the basis of the trial record. The Chamber applied a flawed legal standard and unreasonably, and systematically, drew inferences to the Appellant's detriment without any proper evidential and/or reasoned basis for so doing.

10. A telling symptom of the Chamber's flawed approach is that it failed to analyse the elements of JCE in a systematic and organised way, and it conflated the different elements of JCE, to the Appellant's prejudice.

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2 Trial Judgment (hereinafter "TJ"), paras.1948-1954, 1966-2321 (esp. 2303-2321), and 2552-2587 (esp.2578-2587).
3 TJ,para.2314.
4 TJ,paras.2303-2321
5 TJ,para.2582.

## A. Sub-Ground 1(A): Existence of a JCE

### *1. Legal standard*

11. The essence of a JCE is found in the common objective, design or purpose to which its members ("plurality of persons") are committed. To turn an otherwise lawful enterprise into a criminal one, the objective must be the commission of crimes within the Tribunal's jurisdiction.

12. While the Chamber acknowledged the importance of the common objective ("*... it is the common objective that begins to transform a plurality of persons into a group, or enterprise, because what this plurality then has in common is the particular objective*"[6]), it failed to recognise, much less apply, the *high standard* established as to proof of the existence of a *criminal* purpose.

13. According to the *Brđanin* Appeals Chamber, "*the contours of the common criminal purpose*" have to be properly defined and "*supported by the evidence beyond reasonable doubt*".[7] The inference of criminal purpose "*must be the only reasonable inference available from the evidence*".[8] The Chamber failed entirely to apply these principles.

### *2. Application to the case*

14. The Chamber's finding of a JCE to permanently remove the Serbian civilian population from the Krajina by criminal means is based squarely on its analysis of the minutes of the Brioni Meeting, as interpreted in the light of subsequent events. Its approach is best encapsulated in para. 2310, where the Chamber refers to "*the discussions at the Brioni Meeting*" and the subsequent "*mass exodus of the Krajina Serbs*" and "*the immediate efforts ... to prevent the population from returning*".[9]

15. The Chamber's reliance on the Brioni Meeting as the crucible of the JCE does not, however, stand up to serious scrutiny. No reasonable trial chamber would

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6 TJ,para.1953. See *Krajišnik* TJ,para.884; *Haradinaj*TJ,para.139.
7 *Brđanin*AJ,para.424
8 *Brđanin*TJ,para.353.
9 See also TJ,para.2317 with regard to Tuđman: "*Considering the discussions at the Brioni Meeting and the events that subsequently took place*, ...".

have found that the Brioni Meeting minutes established the existence of the JCE beyond a reasonable doubt.

16. Not a single witness confirmed the Chamber's interpretation of the Brioni Meeting. Indeed not a single witness even confirmed that the minutes of the meeting, P461, were an accurate reflection of what was discussed at that meeting.

*(a) The Chamber's flawed analysis of the Brioni Meeting minutes*

17. The Chamber's findings in relation to the Brioni Meeting were fundamental to its erroneous finding that there was a Common Plan. Had the Chamber not so erred in law, it would not have found a JCE.

18. According to the Prosecution, it was during the Brioni Meeting "*that the plan 'to permanently and forcibly remove the Krajina Serbs crystallised'*" (para.1970,TJ).

19. The Chamber adopted the Prosecution's theory and thus attached overwhelming importance to the Brioni Meeting, devoting 25 paras. of the Judgment (paras.1970 – 1995,TJ) to a detailed review of the minutes of the meeting. It was on the basis of the Brioni Meeting that the Chamber concluded that "*the joint criminal enterprise came into existence no later than at the end of July 1995*" (para.2315,TJ). Since no other events in July 1995 were relied on as the basis for its conclusion that the JCE came into being by the end of July 1995, the Brioni Meeting was, in fact, the sole basis for its conclusion that the JCE came into being by that date. The Brioni Meeting minutes are the only evidence the Chamber relied on to find the crystallisation of the JCE. There were no other meetings. The Prosecution produced no evidence of follow-up meetings, correspondence, nor any other evidence confirming, developing, or furthering the JCE.

20. Thus the JCE can only, if at all, have emerged at the Brioni Meeting. This means that absent a common criminal plan at the Brioni Meeting, there is no foundation whatsoever for the alleged JCE.

21. It is, therefore, of fundamental importance to note that the Chamber's analysis of, and approach to, the Brioni Meeting was entirely flawed. The Chamber repeatedly drew conclusions from the minutes of the meeting which are not even reasonable explanations at all, let alone the "*only reasonable inferences on the evidence*" as required by the Tribunal's case law.[10] The Chamber systematically construed the minutes of the meeting in the light the least favourable to the accused. As errors of logic and of approach, the Chamber's errors are errors of law.

22. The Chamber's errors may be broadly divided into errors of approach, errors of construction and errors of logic. Since the errors of logic are the most fundamental and pivotal to the Chamber's findings on JCE, the Appellant first sets out those errors.

*(i) Errors of logic*

23. The key findings for the Chamber in relation to the Brioni Meeting concern the references to a passage or route being left for civilians to leave the war zone once Operation Storm ("OS") was underway (paras.1974, 1977, 1983, in particular 1991-1995).

24. That discussion takes place in the context of patently obvious military facts:

> (1) It is generally desirable to achieve military victory as *swiftly as possible*;
>
> (2) A collapse in the enemy's morale is a legitimate, and indeed highly desirable, military objective to achieve the enemy's swift defeat;
>
> (3) It is in the interests of the military that both enemy soldiers and civilians leave the war zone as quickly as possible, for at least two reasons:
>
> (i) It accelerates military victory;

[10] *Brđanin*TJ,para.353.

> (ii) It reduces casualties for the attacking army who would otherwise have to engage enemy soldiers, fighting "*with their backs to the wall*", and have to deal with civilians in the war zone, reducing operational tempo.

There may, in addition, be a 3rd objective for wanting civilians to leave the war zone, namely:

> (iii) the desire to reduce casualties of enemy soldiers, and to reduce the potential for collateral damage to civilians and civilian objects.

However an army may desire that civilians leave the war zone for reasons (i) and (ii) alone.

(4) Civilians invariably leave war zones whenever they can, even war zones where they have no reason to expect violations of international humanitarian law. No sensible civilian would risk being killed by a stray shell or bullet if she has the option of fleeing to safety. Moreover there is a duty to remove civilians from harm's way.[11]

25. These facts, (1) to (4), are, it is submitted, incontrovertible propositions of common sense and military reality, confirmed by the evidence in the trial record.[12]

26. Moreover, as discussed in more detail below, it is clear from the discussions at Brioni that the participants had these facts of common sense and military reality in mind.[13]

27. Despite the abundant and uncontroverted evidence that there were sound military reasons for wishing to provide civilians in the war zone and the Serbian Army of Krajina ("SVK") soldiers with a way out, and that they should take that way out – and that those reasons were clearly expressed at the Brioni Meeting – the Chamber drew the conclusion that the discussion at

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11 Additional Protocol I to the 1949 Geneva Conventions, Arts. 51(1) and 57(1).
12 See *Mrkšić*,T.19139:8-15. Also,P698,para.15; D1530,p.3,para.2(a); D28,para.3.
13 See para.36, below.

Brioni concerned planning a JCE to permanently remove Serb civilians from the Krajina area. Moreover, according to the Chamber, it was a JCE not just to remove Serb civilians, permanently, but to do so *by criminal means*, by committing crimes against humanity of persecution and deportation, even though the evidence showed that the Serb civilians would have left the region purely as a result of (the lawful execution of) OS anyway.

28. The Chamber reached this perverse conclusion by committing fundamental errors of law, in particular by misrepresenting the Defence's position at trial and then dismissing that misrepresented position rather than dealing with the Defence's true position. This is known as the "Straw man fallacy" (para. 30 *ff,* below). The Chamber combined this error with the logical and legal error of positing a false dichotomy.

29. Although these are terms of formal logic, the flawed thinking is understandable to a layman, and the consequences are not technical, but profound – these errors caused the Chamber to err fundamentally in its findings on JCE, and thereby to wrongly convict the Appellant. All of the errors referred to below, therefore, were such as to invalidate the Judgment.

*a. The "*Straw Man*" fallacy*

30. "*The straw man fallacy is defined as an argument that tries to justify the rejection of a position by an attack on a different and usually weaker position*".[14]

31. In this case, the "*Straw Man*" that the Chamber attacks is the explanation for civilian evacuations given by Mate Granić when he testified. However Granić's evidence did not represent, nor purport to represent, the Appellant's position regarding the Brioni Meeting. Moreover, Granić did not attend the Brioni Meeting and his comments (in D179), relied on by the Chamber, at footnote 1055 (Vol.2), did not even relate to the Brioni Meeting. His evidence,

[14] D. Walton, Relevance in Argumentation, London: Routledge, 2004, at 70. See also G.J. Rossouw, Skilful Thinking, Pretoria: HSRC Pub., 1994, at 66: *"[In] the 'straw man fallacy' person A's viewpoint is distorted by presenting it in an exaggerated or one-sided form. This 'straw man' is then attacked and refuted while pretending that it is person A's actual viewpoint*".

therefore, did not even purport to be an explanation of what was said at the Brioni Meeting:

> "*1993. Granić commented that by opening a corridor for the evacuation of the civilian population and the SVK, the authorities of Croatia aimed at avoiding unnecessary civilian casualties at all costs. This raises the question of whether the participants* [at the Brioni Meeting] *merely discussed a way to ensure that the civilians would get out of harm's way during the hostilities. The Trial Chamber has considered the minutes of the meeting in this respect and whether this would constitute a reasonable interpretation*. …" (emphasis added).

Then, after a brief review of the facts, the Chamber concluded:

> "*The above statements do not lend support to an interpretation that the discussions at the meeting were about the protection of civilians*".

32. The "*Straw Man fallacy*" here consisted of the Chamber treating Granić's explanation of the reasons for leaving a civilian corridor – namely to avoid unnecessary civilian casualties at all costs – as if it were *the only explanation of the facts consistent with there not being a JCE* and as if it represented the Defence position at trial. Otherwise put, the Chamber proceeded as if there were only two possible explanations of the Brioni discussion about evacuating civilians:

> EITHER
>
> (1) the discussions were about deporting civilians and thus a JCE;
>
> OR
>
> (2) the discussions were *only* about the protection of Serb civilians (the Granić "*Straw Man*" explanation, which the Chamber equated with the Defence position at trial).

33. Since the Chamber found that, on the facts, it could safely reject explanation (2) – the Granić "*Straw Man*" explanation – it then left itself with explanation

(1) only, namely that of a JCE. The fallacy was then complete: the Brioni discussions about evacuating civilians must have been about a JCE.

34. This distorted form of reasoning is compounded by the Chamber's use of the word, "*merely*", in the above extract from para. 1993 of the Judgment. The "*Straw Man*", which the Chamber sets itself up to attack, therefore, is the proposition that the only reason for contemplating civilian evacuation was to reduce civilian casualties ("*merely ... to ensure that the civilians would get out of harm's way during the hostilities*"). As this is obviously wrong as a proposition (other good reasons, as set out at para. 24 above, are to ensure a swift military victory, to demoralise the enemy and to avoid Croatian Army casualties), the "*Straw Man*" is easily dismissed.

35. Yet it is obvious that the Granić, "*Straw Man*" explanation was *not* the only alternative explanation to a JCE. As set out at para. 24 above, the evacuation corridor served at least two other purposes:

(1) leading to swift military victory, by causing collapse of enemy morale; and

(2) reducing the risk of Croatian army casualties.

36. These are not only *possible* explanations of what was being discussed at Brioni; the participants explicitly referred to these objectives:

(a) Referring to the fact that if the enemy does not pull out it, there is a greater military engagement and hence more losses on the Croatian side and that therefore, "*on a military level*", there is advantage to leaving the enemy with "*a way out*":

> "*PRESIDENT: ...Do you know what, from a strategic point of view, is a drawback to our consideration of the plan? It's all very well that the Admiral is now supposed to close off their remaining three exits, but you are not providing them with an exit anywhere. There is no way out ... instead, you are forcing them to fight to the bitter end, which exacts a greater*

> *engagement and **greater losses on our side**. Therefore, let us also please take this into consideration because it's true, they are absolutely demoralised, and just as they have started moving out of Grahovo and Glamoc, when we put pressure on them, now they are already partly moving out of Knin. Accordingly, let us take into consideration, on a military level, the possibility of leaving them a way out somewhere, so they can pull out part /of their forces ...*
>
> *Davor DOMAZET: Mr. President, here is a way and two ways; that is why in planning the operation we left this road in this area. This is the Lika area, here where the Serbs are, it is by the Serbs. We are leaving a route here and they can get out. .... So there are two key routes.*
>
> *PRESIDENT: Yes**, let's make it easier on ourselves** and do that as quickly as possible.*
>
> *Davor DOMAZET: That's what we were thinking about*".
>
> (page 7)
>
> …
>
> "*PRESIDENT: Please understand, gentlemen, the situation in their ranks. ... It's a general psychosis of demoralisation. But we must not allow ourselves to make a mistake and have them inflict unnecessary losses **upon us**, do you understand me*"?

Thus Tuđman here stated three times that the purpose of leaving civilians a way out was to reduce the Croatian Army's own casualties.

(b) Referring to the importance that the evacuation of civilians would have on collapse of enemy morale:

> "*PRESIDENT: I've said, and we've said it here, that they should be given a way out here ... Because it is important that*

> *those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other".* (i.e. collapse of enemy morale)

(c) *"Vladimir ZAGOREC: Mr. President, we must open up a pocket for them. When they start to flee they will have to flee somewhere, they won't go towards Knin or Kostajnica, we must open up a pocket where they will flee - Dvor na Uni*".[15]

(d) referring to the military advantage in the civilians evacuating by one route, leaving the Croatian army "*to do as little as possible*":

> "*Dr. Miroslav TUĐMAN: But you will close off certain routes, and tell them which direction to head in, so we have as little to do as possible*" (page 23, emphasis added).

37. Yet rather than considering those other explanations, which were consistent with there being no JCE, for the interest expressed by various participants at the Brioni Meeting in Serb civilians evacuating during OS (namely reducing Croatian army casualties and achieving victory as swiftly as possible), and whether they were reasonable interpretations on the evidence – which they obviously were – of why Serb evacuation was being discussed at Brioni, the Chamber attacked a "*straw man*", in the form of Granić's suggestion that the purpose of civilian evacuation was to protect civilians which was not even made in relation to the Brioni Meeting, and could not have been, as Granić did not attend the Brioni meeting.

38. As noted above, Tuđman thrice (at least) referred to the fact that civilians leaving the war zone meant fewer Croatian Army casualties. The Chamber never dealt with this as a reasonable, non-JCE explanation of the Brioni discussions.

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[15] Interestingly, Zagorec appears in the transcript for the first time at page 20. He says exactly what Domazet had said earlier in the meeting (page 7) that a pocket must be left for civilians to leave at Dvor na Uni. His comment is basically ignored. This strongly suggests that Zagorec was not even present at the earlier part of the meeting, or not listening – illustrating (as developed at para.47 below) the Chamber's grave error in simply assuming, without evidence, that all parties attended all of the meeting and heard – and agreed with - everything that was said.

39. This was a clear error of logic and law. If the Chamber had not so erred, it would not have found that a JCE was agreed upon at Brioni.

*b. The false dichotomy or false dilemma*

40. Another fundamental error of law and logic committed by the Chamber was to reason according to a "*false dichotomy*". A "*false dichotomy*", or "false dilemma", is the false assumption, on a given set of facts, that there are only two positions (e.g. an argument of the form, "*you are either for me, or against me*", which leaves out the possibility of a neutral bystander).

41. The false dichotomy in this case – and, again, it is a piece of fallacious reasoning which was crucial to the Chamber's findings on JCE – is that there were only two possible explanations of the references at Brioni to civilians being shown a way out:

> EITHER
>
> (1) It was about the protection of civilians;
>
> OR
>
> (2) It was about civilians being forced out (and thus a JCE).

42. So, at para. 1995, the Chamber stated:

> "*Considering the above, the Trial Chamber finds that the references at the meeting to civilians being shown a way out was not about the protection of civilians but about civilians being forced out*".

These are the two horns of the Chamber's false dilemma.

43. Thus the Chamber's fallacy lies in considering that there are only two positions: protecting civilians OR forcing them out. It further erred in assuming that any plans to "*force civilians out*" necessarily entailed criminal means to achieve that end. However it is, again, obvious that, if civilians would in any event flee the Krajina once OS began, it would be unnecessary to use criminal means to force them out.

44. The Chamber's reasoning was, therefore, deeply and fatally flawed. As errors of logic, and hence of rationality, the Chamber's errors are errors of law. It is an error of law for the Chamber to reach a decision which is irrational.[16]

*(ii) Errors of approach*

45. In addition to, and compounding, the above-mentioned legal errors, are the Chamber's fundamental errors of approach in relation to the Brioni Meeting. As a result of these errors of approach, the Chamber drew conclusions on the basis of an insufficient quantum and quality of evidence.

46. The *sole* evidence upon which the Chamber relied as to what was discussed by the participants at the Brioni Meeting was the translation of a transcript made from a tape of the meeting (P461). No participant confirmed P461. Although the Chamber referred to Marko Rajčić as having attended the meeting, the Chamber did not rely on his evidence to confirm any of what was said. This is not surprising given that, Rajčić, a Prosecution witness, only *disputed* that P461 was an accurate record of the meeting!

47. Accordingly, as any reasonable trial chamber would have appreciated, manifold dangers arose from placing too much emphasis on the sole transcript of the Brioni Meeting:

> (1) Things may have been lost, or added, in translation. Nuances and idiomatic expressions are often incapable of direct translation, even by the most professional translator;
>
> (2) The audio recording of P461 self-evidently did not capture all of what was said. There are many gaps, with whole parts of speech not having been recorded, signified by ellipses and copious markings such

[16] "*By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' ... It applies to a decision which is so outrageous in its defiance of logic ... that no sensible person who had applied his mind to the question to be decided could have arrived at it*" (See Lord Diplock in Council of Civil Service Union v Minister for the Civil Service [1983] UKHL 6). This corresponds to the continental law on appeal on legal grounds (French *cassation*, German *Revision*) according to which an error of rationality or logic is considered an error of law giving ground to cassation or Revision (see for France F. Desportes/L. Lazerges-Cousquer, *Traité de Procédure Pénale*, Paris: Economica, 3rd ed. 2009, at 1975-6; J. Pradel, *Procédure Pénale*, Paris: Cujas, 15th ed. 2010, at 794; for Germany M. Nagel in Radtke/Hohmann, Strafprozessordnung Kommentar, München: Vahlen 2011, § 337 mn. 3 with further references).

as "*(Several voices heard simultaneously)*", "*(papers being shuffled)*", "*(unclear)*", "*/?*", "(*Intermingling of voices*)", etc., all of which demonstrate that the tape is far from a complete and accurate recording of all of what was said by the participants. The transcript is, therefore, likewise, neither complete nor accurate.

(3) The Chamber had no evidence of the general mood of the meeting, its (in)formality, how what was said by participants was received by others, whether anything said was said sardonically or ironically, where participants were located and whether each was in a position to hear any given statement by another participant, whether any participant left the meeting at any stage, etc. (see, for example, *supra* note 15). In short, the Chamber had no evidence of the myriad, non-verbal and situational factors which would have provided vital context to what was said and its significance.[17]

(4) The Chamber had several sheets of paper to evaluate and nothing more. It would have meant nothing to the Chamber to listen to the tape of P461 in a foreign language.

48. Under those circumstances, any reasonable trier of fact would have been extremely wary of over-reliance on P461, aware of the many mistakes it could make by placing literal interpretations on the English words found in that exhibit. Yet the Chamber showed no such caution or restraint.

49. The Chamber's conviction of the Appellant was based squarely on its interpretation of words in one document, P461, devoid of any testimony to corroborate the Chamber's tendentious, controversial and contradictory interpretation of that exhibit. This approach to interpreting the discussions at Brioni was contrary to Rule 89(B), not being one calculated to "*best favour a fair determination of the matter before it*",[18] namely the crucial matter of

[17] See, in the *Krajišnik* case, the discussion of the importance of tone of voice/original context (T.23658).

[18] As a general rule, live testimony is still primarily accepted as being the "*most persuasive evidence before a court*" (*Akayesu*AJ,paras.134-135; see also *Simba*AJ,para.103; *Nyiaramasuhuko*, AC Decision, 24/09/2003).

whether a JCE was agreed at Brioni or not. As the Trial Chamber recently stated in *Karadžić*:

> "*… it is the Chamber's view that the most appropriate method for the admission of a document or item of evidence is through a witness who can speak to it and answer questions in relation to it. …*"[19]

Yet no witness spoke to P461 and was able to "*answer questions in relation to it*", save Rajčić who only said that P461 was utterly inaccurate as a record! (see paras. 92 *ff,* below)

50. It would be a "*dangerous oversimplification*" to construe these observations about the dubious reliability of P461 as a challenge to its *authenticity*. Whether a document is reliable is a different question from whether it is authentic, though there may be overlap.[20] As explained in the English case of *Tanveer Ahmed*:

> "*The permutations of truth, untruth, validity and "genuineness" are enormous. At its simplest we need to differentiate between form and content; that is whether a document is properly issued by the purported author and whether the contents are true. They are separate questions. It is a dangerous oversimplification merely to ask whether a document is 'forged' or even 'not genuine*'".[21]

51. Thus P461 may well be "*genuine*" and "*authentic*" in the sense that it is a genuine transcript of a genuine recording. But that is not to say that it does not contain significant gaps nor that what is recorded is not open to multiple interpretations. It was neither safe nor reliable for the Chamber to lift phrases from P461, denuded of any political, cultural or even verbal context provided by a live witness as to how the phrase was said, by whom it was heard and how it was received, and to rely on its own interpretation of those phrases as the lynchpin for its JCE finding. But that is precisely what the Chamber did.

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19 Decision on the Prosecution's First Bar Table Motion,13/04/2010,para.9.

20 *Bagosora et al.* TC Decision, 13/09/2004,para.8: stating that authenticity and reliability are "*overlapping concepts: the fact that the document is what it purports to be enhances the likely truth of the contents thereof*".

21 [2002] UKIAT00439,para.31.

The Chamber did not show that it was at all aware or concerned by the clear dangers in its approach. This error of law led to an erroneous finding.

52. An egregious example of the Chamber's approach in this case is the overwhelming significance it attached to the word, "*ostensibly*" ("*tobože*" in the original), used in a statement made by President Tuđman. It is no exaggeration to say that, without this rather innocuous (and ambiguous) word appearing in the transcript of the Brioni Meeting, the Chamber would not have concluded that the JCE existed. Yet, seen in context, the word may have indicated nothing more than that Tuđman did not think highly of the concept of "civil rights", as set out further below. In any event, no reasonable trial chamber would allow its whole judgment to depend so heavily on one ambiguous word.

53. It is, therefore, essential to see exactly how flawed the Chamber's approach is to this piece of evidence.

54. The Chamber, first, only quoted a part of President Tuđman's speech when it provided this excerpt at para. 1983:

> "*so in that way, to give them a road, while ostensibly* ["*tobože*"] *guaranteeing them civil rights, etc*".

55. By simply quoting this excerpt, a vital fact was hidden from view in the Judgment, namely that *there is a gap in what Tuđman says immediately prior to these words which the tape has not recorded*. The full quotation in P461 is:

> "*PRESIDENT: A leaflet of this sort - general chaos, the victory of the Croatian Army supported by the international community and so forth. Serbs, you are already withdrawing, and so forth, and we are appealing to you not to withdraw, we guarantee …. This means giving them a way out, while pretending to guarantee civil rights, etc*".[22] (underlining added – the ellipsis indicates a gap in the transcript)

[22] This last sentence was corrected from the original version, "*pretending*" having been a mistranslation – which affords yet another example of placing too much reliance on a translation of a document without corroborating or explanatory witness testimony

56. This illustrates one of the key pitfalls of relying on the transcript of tape recording, namely that the tape did not capture everything. In some cases, it may not matter greatly, if it is clear from the context that what is omitted is not significant. However, the danger always remains – how does one know that something is insignificant if one does not know what it is?

57. Here, the omission is potentially very significant. The Chamber attached such importance to Tuđman's use of "*tobože*" that it sought out the expertise of CLSS to clarify the word's meaning:

> *1994. Finally, the Trial Chamber considered Tuđman's statement about "ostensibly guaranteeing* […] *civil rights" to the Serbs while at the same time showing them a way out. With regard to this particular statement … there was a dispute between the parties about the translation and the contextual interpretation of the Croatian word tobože. In order to resolve the dispute, the Trial Chamber sought the assistance of the CLSS which translated tobože as "ostensibly". The word refers to "guaranteeing" but the Trial Chamber considered that even if it referred to "civil rights" that would not fundamentally alter the meaning of the statement. Tuđman contrasted two concepts that are not, or at least not fully, reconcilable, namely showing Serbs the way out while guaranteeing them civil rights (which would require the Serbs to stay). The Trial Chamber therefore considered that the statement was an expression of the true intent to show Serbs out but at the same time give them the impression that they could stay*" (emphasis added).

58. This last sentence highlights the serious evidentiary shortcomings the Chamber faced. The Prosecution failed to produce any evidence of the effect of Tuđman's words on the listeners. A solid evidentiary foundation for the Chamber's finding would have required such testimony or at least orders from a JCE member giving effect to this "*true intent*".

59. In fact, it is very hard to understand what President Tuđman is referring to when he speaks of "*guaranteeing civil rights*". What "*civil rights*"? It is surely

vital, to make any sense of what he said, to understand which "*civil rights*" were "*ostensibly*" to be guaranteed. There is, however, no indication whatsoever of what it means in the transcript.

60. Moreover, immediately before he used this phrase, Tuđman had specifically referred to "*guarantees*", saying "*we guarantee ...*" (see para. 55, above), with the words after "*guarantee*" being lost. Yet it is precisely those lost words which might hold the key to the nature of the "*civil rights*" to be "*guaranteed*".

61. In short, the Chamber favoured a damning interpretation of what Tuđman meant when he referred to "*ostensibly guaranteeing civil rights*", when it had no concept of what civil rights were being referred to (there is no reference in the Judgment to what the relevant "*civil rights*" would be), and when words are missing from the transcript which might have shown the Chamber's interpretation to be false. Yet this damning interpretation is the lynchpin for the Chamber's findings at para. 1995, which directly led to its findings in chapter 6.2.7 that there was a JCE.

62. This approach is deeply flawed, particularly in terms of the burden of proof. In such a situation of uncertainty regarding what was said and meant by a single speaker (who is not even one of the accused), the Chamber opted for the interpretation least favourable to the Accused.

63. Moreover, read in context, it looks very much as if Tuđman's remark was in any event an interrogative. Gojko Šušak had just proposed to Tuđman that leaflets be dropped. Tuđman appears to turn this proposal over in his mind, and it is in that context that his remark about "*ostensibly guaranteeing civil rights is made*". The sentence could appropriately end, therefore, in a question mark, in the sense of "*is this your suggestion?*". Dr. Miroslav Tuđman then interjects that it would be better to use television and radio before Šušak confirms his proposal about the leaflets and Tuđman says, "*I agree, it also proves our strength. Good, we'll go along with it*" (emphasis added).

64. In other words, the key passage relied on by the Chamber, referring to "*ostensibly guaranteeing civil rights*", is not even a well thought out plan

conceived by Tuđman – the plan for a JCE – but a comment made by him while turning over a proposal by Šušak, which he then endorses: a plan, in short, to drop leaflets to sow confusion and to show the strength of the Croatian forces.

65. For the Chamber to use this brief exchange, with all the uncertainties as to what it meant, how it was said, and in what context, as a central plank of its findings on JCE was a blatant error of law by the Chamber.

66. Further, CLSS's revised translation of this key passage remains flawed in a central aspect: it fails to recognise that in that passage, "*tobože*" is an adjective rather than an adverb, and it should, therefore, have been translated as "*ostensible*" not "*ostensibly*", and as qualifying the words, "*civil rights*" not the word, "*guarantee*".[23] In short, Tuđman said, "*and guaranteeing ostensible civil rights*", rather than, "*ostensibly guaranteeing civil rights*". A better translation would therefore be, "*and guaranteeing so-called civil rights*". There is in that phrase no suggestion of a pretence of guaranteeing civil rights; only a suggestion that the speaker did not particularly believe in the concept of "*civil rights*". Thus Tuđman appears, in effect, to have been agreeing that leaflets should be dropped, informing the Serbs that the Croatian forces were on the brink of victory, showing the Serbs a way out but making clear that, if they wished to stay in Croatia, their "so-called civil rights" would be guaranteed. Thus this statement, properly translated and properly construed, does not provide any evidence of any criminal intent, much less a JCE.

67. However the Chamber's approach is flawed on even more fundamental levels.

68. First, the Chamber's approach means that everything hangs on the single word, "*tobože*" (translated as "*ostensibly*") spoken by President Tuđman. Even assuming that the word was used by him in the sense understood by the Chamber, there are several inferential leaps taken by the Chamber, without any basis, much less proof beyond a reasonable doubt, which are vital for its finding of guilt against the Appellant:

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[23] To mean, "*ostensibly guaranteeing civil rights*", the phrase in Croatian would have been, "*a tobože jamciti gradanska prava itd*", not "*a jamciti tobože gradanska prava itd*".

(1) It is not known whether the Appellant even heard the word, "*tobože*", spoken by Tuđman. For all the Chamber knew, the Appellant had stepped out of the meeting or been out of earshot during that exchange, or simply was not paying attention. No witness testified that the Appellant was present when Tuđman made that particular statement.

If the whole case against the Appellant on JCE hangs on whether he heard one word spoken or not – as to which there is no evidence – then that only illustrates how ludicrously thin the case against the Appellant is;

(2) Even if the Appellant did hear the word, "*tobože*" spoken, there is no evidential foundation for saying that he understood in what sense Tuđman meant to use it. The word was spoken in an instant; the Chamber itself agonised, with the assistance of CLSS, over its meaning and significance. Why should the Appellant have grasped the word's significance in a trice?

(3) Even if the Appellant did hear the word spoken, and understood that by using it, Tuđman meant that the civil rights of Serb civilians would only be "*ostensibly*" guaranteed, there is no evidential foundation for saying, nor indeed is there any earthly reason for supposing, that the Appellant would have understood that to mean that Tuđman was proposing a JCE to expel Serb civilians using criminal means, namely deportation and persecution, with the aim of permanently removing them from the Krajina;

(4) Even if the Appellant did hear and understand the word used by Tuđman, *and* understood that it was code for expelling Serb civilians using deportation and persecution, there is no evidential foundation or logical basis for finding that *his mere presence at the meeting amounted to assent to the criminal plan*. Nothing that the Appellant said at the meeting could justify such an inference. His interventions during the Brioni Meeting were limited to operational matters and he

> said nothing about shelling or civilians leaving.[24] Therefore it is clearly the Appellant's *mere presence* at the Brioni Meeting which the Chamber relies on to find him a member of the JCE; a form of strict liability.

69. When broken down thus, the unfairness of the Chamber's reliance on one word, "*tobože*", and one incomplete sentence spoken by Tuđman, to infer that there was a common criminal plan, is self-evident. No reasonable trial chamber would have erred in this way.

70. Point (4), above, illustrates another fundamental error of approach by the Chamber. The Chamber evidently considered that everyone who attended the Brioni Meeting was, *by virtue of that fact alone*, a member of the JCE. That reasoning makes no sense, for at least two reasons.

71. First, there is no convention that everyone at any given meeting agrees entirely and is completely *ad idem* with anything said by everyone else at that meeting. The proposition itself is its own repudiation. On the contrary, as everyone knows from their own experience of meetings, disagreement is at least as common as agreement. Nor may silence at a meeting, without more, be taken as assent. Indeed, under certain circumstances, silence may signal *disagreement*, such as by facial or body expression or simple absence of approving comment when such comment is expected. Individuals may have many reasons for not objecting every time another person says something they disagree with, particularly when the speaker is "*the President of the Republic … the Supreme Commander*", as Tuđman always announced himself.[25] Indeed, any meeting would quickly descend into chaos if it were not so. Certainly, the Chamber never made any finding that the Appellant's silence was tantamount to acceptance of the terms of any JCE then being proposed.

72. These common sense considerations appear to have been completely overlooked by the Chamber when it considered the Brioni Meeting. The

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24 For the importance of considering the contributions made at meetings at which a JCE was allegedly discussed, see *Milutinović*TJ,Vol.III,paras.132-143, esp. 143. His contributions were "*general morale-boosting speeches*" only – he was duly acquitted.

25 See D534,p.8.

Chamber gives no reasons for holding that everyone who attended the Brioni Meeting thereby agreed with everything said by everyone else at that meeting.

73. The Chamber cited Tuđman's statement, "*that everybody would bear responsibility for the decisions taken on that day, stressing the importance of cooperation in order to successfully liberate the areas within a short time* ...".[26] Possibly, therefore, the Chamber relied on that statement as the basis for its implicit "*collective responsibility*" approach to the Brioni Meeting. If so, that approach is flawed for at least three reasons:

(1) President Tuđman could not unilaterally make others responsible for things said or done by words alone. One person does not make another person responsible, much less criminally so, simply by intoning the words, "*I will hold you personally responsible*";

(2) It is clear from the context of the Brioni Meeting that Tuđman – very sensibly in the context of planning for a military operation - was making all the high-ranking officers aware that they all had to work together. A military operation would obviously be a disaster if units arrived, for example, 2 days after the date when they were meant to arrive. So all assembled were being told that they would be responsible for putting the agreed military plan into effect. They were not being told that they were about to agree to a JCE. Nothing approaching solid orders or plans for the alleged JCE emerged at all from Brioni. Where is the flurry of orders and instructions one would reasonably have expected the alleged JCE participants to have issued following the Brioni Meeting? Nothing amounting to assent or agreement was expressed either. Moreover, innocent explanations of Tuđman's statements abound when one considers the lengths to which the Appellant and others went to ensure their subordinates understood their legal obligations with respect to the Serbs and law of armed conflict. Furthermore, such steps are strong indications that even if Tuđman proposed a criminal plan, the

[26] TJ,para.1972.

Appellant did not consent to or further the plan in any deliberate fashion.

(3) The Chamber misstated, in para. 1972, what Tuđman in fact said. He said (according to P461), "*Everyone of you will bear responsibility for what we agree to implement*". The question, then, is of what they "*agreed to implement*" at Brioni. Nowhere in the minutes of the Brioni Meeting is there any express, or even implicit, agreement to implement JCE by forcible deportation and persecution of Serbs. Nor did the Chamber make any finding as to what the participants at the Brioni meeting "*agreed to implement*".

74. The second reason why it is a flawed approach to consider everyone who attended the Brioni Meeting, *ipso facto*, as a member of the JCE, but not those who did not attend the meeting, for example the Croatian Prime Minister and Deputy Prime Minister, is that the Chamber is then forced into positing a JCE *which was kept secret from the highest-ranking Croatian government officials*. Yet at the same time, according to the Chamber, the JCE was implemented on the ground, right down to the lowliest gunner who carried out the allegedly unlawful shelling. According to the Chamber, therefore, the lowliest soldier was privy to a JCE from which the most senior government officials were excluded. The Chamber's findings on JCE are, therefore, nonsensical.

*(iii) Errors of construction*

75. The Chamber further committed grave errors of law in interpreting what was said at Brioni. While it paid lip-service to the notion of construing terms in context (para. 1990, TJ), in fact it lifted the sentences upon which it placed the greatest reliance wholly out of context. This has already been shown, above, in relation to Tuđman's "*ostensibly*" remark.

76. It is demonstrated again by several examples.

77. Perhaps most significant is the comment by Gotovina on which the Chamber relied heavily in convicting him and the Appellant on the basis of JCE:

> "*Ante GOTOVINA: A large number of civilians are already evacuating Knin and heading towards Banja Luka and Belgrade. That means that if we continue this pressure, probably for some time to come, there won't be so many civilians just those who have to stay, who have no possibility of leaving*" (p. 15, P461)

78. That the Chamber attached tremendous importance to these words is shown by paras. 2304-2305. After quoting from this extract, the Chamber states:

> "*Within days of the discussion at Brioni, Gotovina's words became a reality ....*".

79. The Chamber thus sees in Gotovina's words an encapsulated expression of the JCE.

80. Yet again, the Chamber committed a fundamental error of construction. Gotovina's "*words*" are a response to what Tuđman has just said and therefore have to be analysed in that context. Tuđman had said how it is important for civilians to evacuate, because "*then the army will follow them*" and then seeing "*the columns set out*", this will have a "*psychological impact*". In other words, the departure of civilians and the departure of the army will have a mutually reinforcing effect on each other. This is the well-known phenomenon of positive feedback, such as the type which leads herds to stampede and to mass cash withdrawals from financial institutions, i.e. systems of *mutually reinforcing panic*.

81. In other words, the evacuation of civilians would lead to swift military victory. As noted above, this is a strategy which makes sound military sense.

82. In response to that, Gotovina responds that "*a large number of civilians are already evacuating Knin ...*" and that if pressure continues, "*there won't be so many civilians just those who have to stay*". This remark is therefore obviously a factual statement, made in the context of *a strategy for quick military victory.*

83. The Chamber's fundamental error of construction is to ignore the context and focus on the remark as if it were about an objective of removing civilians *per se*, divorced from the military objective of swiftly defeating an enemy army.

84. Moreover, the translation of Gotovina's words is not a fair one. A fair translation is, "*That means that if we continue this pressure, probably for some time, there won't be so many civilians*", which would make clear that the notion was of continuing pressure "*for some time*", not of there being not many civilians "*for some time to come*". If the phrase had not been mistranslated, the Chamber would not have treated Gotovina's words as a crystallised expression of the JCE, which "*became a reality*" (para.2305,TJ), only days later.

85. Finally, Gotovina's words, to which the Chamber attaches such importance, must, if believed, also be taken to show that, at that time, 31 July 1995, "*a large number of civilians* [were] *already evacuating Knin*". This would then show the Chamber's lynchpin theory that it was unlawful shelling which drove large numbers of Serb civilians away from the Krajina to be wrong. These large-scale evacuations from Knin were taking place days before OS began! Yet, the Chamber chose to overlook entirely the exculpatory aspect of Gotovina's statement.

86. Had the Chamber properly considered this evidence, as a whole rather than simply extracting what it took to be the incriminating part, and ignoring the exculpatory part (taking the duff and ignoring the plum), it would have had to ask itself why so many Serb civilians were leaving the Krajina area even before military operations began. This is addressed at paras. 311 *ff* below.

*(iv) The Chamber failed to properly consider the evidence contradicting its analysis of the Brioni Meeting*

87. The Chamber's analysis of the Brioni Meeting is, therefore, *prima facie* flawed. It committed multiple errors of law, as set out above.

88. However the Chamber's errors of law are gravely compounded by its failure to deal adequately with the host of evidence, including live testimony, which contradicted its interpretation of the Brioni Meeting.

*a. Mate Granić*

89. The Chamber used Granić's evidence for the wrong purpose – to comment on the discussions at the Brioni Meeting which he did not attend – while failing to use it for the correct purpose, namely to show that there was no policy on the part of Croatia at the time to expel Serb civilians and that there were great efforts undertaken to ensure that OS was conducted in accordance with international humanitarian law ("IHL").[27]

90. Granić's testimony, referring explicitly to the protection of civilians and compliance with IHL,[28] was not rejected by the Chamber as unreliable. Also, in its analysis on the Croatian policy with regard to the Serb minority,[29] the Chamber quoted former US ambassador Galbraith as testifying that Tuđman gave assurances that civilians would be protected,[30] which corroborated Granić's evidence.

91. The Chamber therefore had no adequate basis to disregard Granić's evidence generally and did not explain why it did so. It therefore erred in law. If it had not done so, it would not have found that a JCE existed.

*b. Marko Rajčić*

92. The Chamber notes that Rajčić commented on the transcript of the Brioni Meeting (para.1985,TJ). Yet it fails entirely to engage with his categorical evidence that the transcript did not correspond at all to his recollection of the meeting.

93. Rajčić was adamant on this point:

> *"First of all, Mr. Russo, this body of text that we see does not correspond, neither in its format, nor in its content, to – with the meeting I attended on the 31st of July at Brioni. If you wish our communication to continue along these lines, then I would have to read the whole text, but I believe I can say with full responsibility that*

27 D1797,paras.20 and 22;T.24767-24768.
28 TJ,para.1986.
29 TJ,chapter 6.2.3.
30 TJ,para.2003 *ff*. See also Škare-Ožbolt, D1471,para.4 and Žužul,D1485,paras.18-20.

> *this piece of text I've read does not correspond, neither in terms of format, nor in terms of content, with the meeting I attended and the way developed"*.[31]

94. Given this categorical evidence, by a Prosecution witness – the only witness who attended the Brioni Meeting, and who gave evidence on it – it was incumbent on the Chamber to address his evidence. If it did not accept Rajčić's evidence, it was bound, given the vital importance of the Brioni Meeting and the Chamber's interpretation of what was allegedly said there, as the expression of a JCE, to explain why. While the Chamber is not obliged to give its reasons for rejecting every piece of evidence, it is obliged to do so when the matter is central to its determination of guilt.[32] The Chamber's failure to give reasons for not accepting Rajčić's evidence is an error of law. If the Chamber had not so erred, it would not have relied on the Brioni Meeting minutes as proof of a JCE.

*c. The meeting on 2 August 1995*[33]

95. Likewise, the Chamber referred to a meeting on 2 August 1995 of "*a number of high-ranking military officials, including Ante Gotovina and Mladen Markač* [who] *met with the Minister of Defence, Gojko Šušak*" (para.1987,TJ). These are three of the people who attended the Brioni Meeting and whom the Chamber found to have been members of the JCE alleged to have crystallised there.

96. The 2 August meeting poses insuperable difficulties for the Chamber's theory that a JCE with the object of forcing Serb civilians out of the Krajina materialised at the Brioni Meeting. It shows that two days after the Brioni Meeting, Šušak, the Croatian Defence Minister, who would have had to have been a pivotal member of the JCE:

- "*stressed to the participants that the* '[m]*ilitary police must be more energetic in its actions and must prevent all offences*"; and

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31 T.16596.
32 *Furundžija*AJ,para.69.
33 D409.

- "*instructed that the MD commanders must pass on to other commanders the prohibition 'of any kind of uncontrolled conduct (torching, looting, etc.)*" (para.1987,TJ)

97. Šušak's instructions for the conduct of OS are plainly inconsistent with a plan, allegedly agreed to by Gotovina, the Appellant and others, to permanently expel Serb civilians from the Krajina by criminal means.

98. How, then, did the Chamber deal with this evidence? Not by finding that there was no JCE, but by declaring that the JCE, while it encompassed deportation and persecution, was designed not to include plunder or destruction of property (although these crimes re-entered through the back-door via JCE III). In other words, the Chamber defined the JCE in such a way as to sidestep the exculpatory evidence.

99. This approach to JCE is not only entirely improper and unfair to the Accused – the JCE being defined in terms of what offences were subsequently committed, and avoiding offences in respect of which there is incontrovertible exculpatory evidence that they were not part of the JCE – but also deeply incoherent.

100. One might ask rhetorically, what sort of a JCE is it in which the participants plan:

(1) to expel Serb civilians by force;

(2) but in such a way that some Serbs remain;[34]

(3) by use of unlawful shelling, even though Serb civilians would flee whether the shelling were lawful or not, to escape a war zone, and on evidence accepted by the Chamber, they were in any event fleeing *en masse* days before OS began;

(4) by use of discrimination, even though any civilian – Serb, Croat, Jew, Ruthenian or Gypsy, would also have fled the war zone;

[34] TJ,para.2314:"*The purpose of the JCE requested that the number of Serbs remaining in the Krajina be reduced to* [a] *minimum but not that the population be removed in its entirety".*

(5) and yet in which the expulsion of Serbs is to be achieved not by burning houses or engaging in plunder or wanton destruction, even though those would be the *most effective* means of ensuring that Serb civilians left and did not return (which is why those practicing ethnic cleansing throughout Bosnia invariably burnt the houses of those they were expelling);

(6) but nonetheless those crimes (looting and plunder) were foreseeable, and hence the Appellant is liable for them, via JCE III.

101. All of this makes for a very strange-looking JCE, and a very odd – indeed a flagrantly unfair – basis upon which to convict the Appellant of the most serious crimes known to humankind.

102. In fact, the Chamber's JCE is a bogeyman. It is a strange creature patched together by the disparate threads of contradictory evidence and faulty reasoning relied upon by the Chamber.

103. The Chamber failed to draw the proper conclusions from the fact that the Brioni Meeting concerned the Croatian authorities' legitimate plan to recapture their territory.

104. The Chamber found that "*the primary focus of the* [Brioni] *meeting* .... [was] *whether, how, and when a military operation against the SVK should be launched*".[35] Thus the main purpose of the meeting was, in the Chamber's own assessment, the discussion of a military operation of the Croatian Forces against the SVK.[36]

105. In a similar vein, the Chamber, in its final section on the JCE, "*acknowledges that all measures taken at the time, were taken in the context of an armed conflict that had been ongoing in the territory of the former Yugoslavia for many years and of Croatia having faced an occupation of part of its*

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35 TJ,para.1990.

36 Significantly, the Chamber entirely overlooked the transcript of the earlier Brioni Meeting on 17 July 1995, which was a military briefing *identical* in purpose to that held on 31 July 1995, also attended by Tuđman, Šušak, Gotovina and the Appellant (D534). This meeting showed the purpose of the Brioni Meeting on 31 July 1995 simply as one of *military planning*.

*territory*".[37] The Chamber quoted former President Tuđman referring to the "*immense historical significance*" of the decision to be taken in the meeting[38] and to the liberation of "*occupied territories*",[39] which the Krajina indisputably was. It also quoted former Deputy Prime Minister Granić as having testified that the "*most important reason for launching Operation Storm was the liberation of the occupied territories*".[40] In other words, the Chamber was keenly aware of the historical context of OS and of Croatia's desire to regain control of the RSK.[41]

106. Notwithstanding this, the Chamber did not explore at all whether the Brioni Meeting could be explained in terms of a legitimate plan to recapture Croatian territory. Indeed, by qualifying the Brioni Meeting as the discussion of a *criminal* enterprise, the Chamber did not even appear to consider the possibility of a lawful plan/military operation which was then, allegedly, unlawfully executed. Yet the explanation that what was discussed at Brioni was a lawful operation, which was then subsequently unlawfully executed, was a reasonable explanation on the evidence which, in accordance with the Tribunal law, should have been adopted in the Appellant's favour. Yet the Chamber did not even consider this possibility. This was an error of law.

107. Given that the entire context of this case was OS (indeed the case-name is "*Operation Storm*" in the Tribunal's records), which was not itself declared to be illegal, the Chamber could only sensibly approach its task by drawing and maintaining a distinction between "*OS-activity*" and "*JCE-activity*", and only convicting the Appellant if any culpable conduct could only be reasonably explained as "*JCE-activity*" and not as "*OS-activity*". However the Chamber consistently failed to consider explanations of the discussion of evacuation at Brioni which were consistent with the lawful conduct of the planned hostilities.

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37 TJ,para.2309.
38 TJ,para.1979.
39 TJ,para.1986.
40 TJ,para.1986. See also para.2012, where Granić is quoted as saying "*[T]he only policy of the Croatian leadership was the reintegration of the occupied territory into Croatia*".
41 All references to the RSK are to be understood as references to the so-called RSK.

108. In these circumstances, the Chamber could only sensibly proceed to determine the issues arising in this case by first taking a position on the question of whether Croatia, as a sovereign state, had the right to maintain its territorial integrity by means of its sovereign powers. It needed to decide this question *not* in order to decide on issues of *jus ad bellum* which were plainly outside the Tribunal's jurisdiction, but in order to be able coherently to approach the Prosecution's theory, which it adopted, of a JCE "wrapped up" inside OS. If OS was, in itself, lawful, then it follows that, according to the Tribunal's case law, *the Chamber could only find a JCE if the evidence could only reasonably be explained by reference to a JCE rather than by reference to a legitimate military operation which may or may not have been unlawfully executed.*

109. The Prosecution sought to obfuscate the issue, by stating that the Chamber did not need to decide whether OS was legitimate or not; that it simply "*was not an issue*". Thus in its Closing Speech, the Prosecution stated:

> "*The Defence has argued ... that 'Croatia' had no plan or policy to expel the Serb population but "instead" was a victim of Serbian aggression and wanted to reintegrate its territories peacefully as evidenced by the Vance Plan.*
>
> *Now it should be noted first that no one is alleging that Croatia had a plan or policy to expel. It was the members of the JCE*".[42]
>
> *"So I will say again, as we said in the opening. Croatia's decision to conduct a military operation to retake the Krajina is not at issue. What is at issue is the successful effort undertaken by certain officials, including the three accused, to use that circumstance to eliminate much of the Serb presence in the Krajina*".[43]

110. This approach is incoherent. If the JCE was a common plan with President Tuđman at its centre, using the state apparatus to implement it, then, of course, the acts committed during the JCE's execution would be imputable to Croatia and Croatia would incur responsibility under international law. This is

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42 T.29025.
43 T.29029.

especially true given the Chamber's theory that other parts of the Croatian state apparatus – the legislature and judiciary – were also used to realise the JCE by creating obstacles to Serbs' return to the Krajina.

111. It is artificial to drive a wedge between the Croatian state and a JCE which is posited to have existed at the epicentre of State power. If a JCE did exist, "certain officials" could not execute it independently of Croatia. The trial could not coherently be shorn of any international implications for Croatia.

112. A clear view on the legality of OS was, therefore, requisite to a coherent approach to the Brioni Meeting. For how could the Chamber find, on a proper application of the burden and standard of proof, that a meeting of Croatian military officials amounted to a criminal enterprise, when the evidence was equally consistent with the discussions being directed at the lawful objective of Croatia regaining control of its territory by force?

113. If the Chamber had addressed these key issues correctly, it would have found that the objective of OS conformed fully with international law, for the following reasons.

114. In public international law the concept of the territorial sovereignty of states is one of the fundamental building blocks of the international order.[44] This concept is based on the principle of the self-determination of peoples,[45] and is defined as "*the capacity of a state to provide for its own well-being and development free from the domination of other states, providing it does not impair or violate their legitimate rights*".[46] While external sovereignty should guarantee that other states do not intervene in "*matters which are essentially within the domestic jurisdiction of any state*",[47] internal sovereignty means that a state has a monopoly on the use of force and is responsible for the peace and security of the people living within its territory.[48] From this it follows that states are, as a rule, not bound by the norms of public international law

44 I. Brownlie, *Principles of Public International Law*, Oxford: OUP 7th ed. 2008, at 289; A. Cassese, *International Law*, Oxford: OUP 2nd ed. 2005, at 49.
45 Craven, in: M. Evans (ed.), *International Law*, Oxford: OUP 3rd ed. 2010, at 230.
46 M. Shaw, *International Law*, Cambridge: CUP 6th ed. 2008, at 211.
47 Cf. Article 2 (7) UN Charter.
48 J. Kokott, States, Sovereign Equality, in: R. Wolfrum (ed.), *MPEPIL*, Oxford: OUP, 2008, online edition, [visited on 6 June 2011], margin number 24.

concerning inter-state relations, e.g. the prohibition of the use of force,[49] with regard to actions within their own borders.[50] Those actions are limited only by domestic and human rights law. This rule is qualified by three reservations:

> (1) A UN member state is obliged to *maintain international peace and security.*[51]
>
> (2) If a certain region within the territory of a sovereign state has a *right to secede*, the state may not interfere.
>
> (3) If a region within the territory of a state has become a subject of public international law, i.e. if it has become a *de facto* state (*de facto* regime), certain norms of public international law might apply.

115. The first qualification applies to Croatia, which joined the UN on 22 May 1992.[52] Accordingly, Croatia was a UN member state during OS and thus bound by the obligation to maintain international peace and security. Even though threats to international peace and security can be caused indirectly,[53] the UN never considered the conflict in Croatia a threat to international peace and security. Indeed, it can hardly be expected that a sovereign state will consider actions *within its own territory* a threat to *international* peace and security. To the contrary, it seems to be a valid conclusion that regaining control over a rebellious group or entity within the territory of a sovereign state might, while causing short-term *intra-state* disturbances, serve *international* peace and security.

116. With regard to the right to secede, the Prosecution never maintained, and the Chamber never found, that the so-called RSK had the right to secede under international law, such as would raise any questions as to Croatia's right to regain the territory.

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49 Cf. Article 2 (4) UN Charter.

50 Cf. Fischer, in: K. Ipsen (ed.), *Völkerrecht*, München: Beck 5th ed. 2004, § 59 mn. 20.

51 Cf. Article 4 (1) UN Charter.

52 A/RES/46/238 (20 July 1992).

53 E.g. when a domestic conflict has international repercussions, cf. S/Res/788 (19/11/1992) concerning Liberia. Cf. J. Frowein, *Das de facto-Regime im Völkerrecht*, Köln: Heymann 1968, at 47.

117. Under public international law, pursuant to the right of the self-determination of peoples[54], there is a right of peoples to secede under certain conditions.[55] In the instant case, the requisite conditions were never met by the RSK. Accordingly, it never had the right to secede.

118. The RSK also never became a *de facto* state, having never been internationally recognised as a sovereign state. This absence of recognition is evidenced by the Z-4 Plan,[56] an agreement between the USA, Russia, France and Germany from the beginning of 1995 to end the Croatian War of Independence by reintegrating the RSK into Croatia (as an autonomous region with self-administration, but not as an independent state/region) in order to restore Croatia's territorial sovereignty.[57] Accordingly, as the RSK never became a subject of international law, Croatia was not bound by the prohibition on the use of force when resolving the RSK conflict.

119. Croatia therefore had the right to use force to regain control of the RSK under public international law. This right was disputed neither by the Prosecution nor the Chamber.

120. Yet this has profound consequences. If, as the evidence showed, the lawful implementation of OS would have led to an exodus of civilian Serbs from

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54 A concept which has become customary public international law (cf. Blay, *Territorial Integrity and Political Independence*, in: R. Wolfrum (ed.), *MPEPIL*, Oxford: OUP, 2008, online edition, [visited on 6 June 2011], mn 36) and is also contained in Article 1 (2) UN charter.

55 The criteria:
(1) There must be a people which, though forming a numerical minority in relation to the rest of the population of the parent state, forms a majority within a part of the territory of that state.
(2) The state from which the people in question wishes to secede must have exposed that people to serious grievances consisting of either
   a. a serious violation or denial of the right of internal self-determination of the people concerned (through, for instance, a pattern of discrimination), and/or
   b. serious and widespread violations of fundamental human rights of the members of that people;
(3) There must be no (further) realistic and effective remedies for the peaceful settlement of the conflict.
Cf. D. Raič, *Statehood and the Law of Self-Determination*, Leiden: Nijhoff 2002, at 332; M. Kohen, *Secession*, Cambridge: CUP 2006, at 109.

56 The text of the Z-4 plan available here: *Nacrt sporazuma o Krajini, Slavoniji, Južnoj Baranji i Zapadnom Srijemu (Plan Z4)*, in: D. Paucović *(ed.), Uspon i Pad "Republike Srpske Krajine", Zagreb 2005, at 359-82.*

57 See also Security Council resolutions alluding to RSK reintegration, cf. S/RES/981 (31/03/95); S/RES/982 (31/03/95).

the Krajina *in any event*, then the notion of a JCE is otiose and thus nonsensical. It would be like positing a criminal enterprise to flood a town using the incoming tide; the tide will come in anyway, so the criminal enterprise becomes irrelevant. If the Chamber had not so erred, it would not have found a JCE.

*d. Inferences from subsequent events*

121. The Chamber interpreted the Brioni Meeting "in light of subsequent events".[58] The way in which it did so resulted in further errors of law.

122. As a general matter there is a fundamental conceptual difficulty in interpreting the Brioni Meeting in light of subsequent events. Certainly, subsequent events may sometimes be used to cast light on earlier events, but particularly in a criminal trial, where the standard of proof is beyond a reasonable doubt, there has to be a very solid basis for doing so. Otherwise, there is a real danger of assuming that everything that happened after the Brioni Meeting happened *because* of it (the logical error known as "*post hoc ergo propter hoc*"), whether those later events were discussed at Brioni or not. That assumption would clearly be false.

123. The dangers are particularly acute when one considers that the central plank of the Chamber's theory of the JCE was that it was a plan to drive out Serb civilians permanently using unlawful shelling and creating legal obstacles to their return. Yet neither of these objectives was discussed at Brioni. On the contrary, as regards shelling, Tuđman said, "*The psychological effect of the fall of a town is greater than if you shell it for two days*", implying that it was better that a town should fall (without shelling) rather than that it should be shelled.

124. Therefore the Chamber's interpretation of Brioni "*in light of subsequent events*" – i.e. finding that systematic unlawful shelling subsequently occurred and that obstacles to return were subsequently created, and that the Brioni discussions *must*, therefore, have been an agreement to implement those

[58] TJ,para.2305.

objectives – reflects a deeply flawed process of reasoning, and a tragically unfair approach in a criminal trial.

125. Likewise, statements made by Tuđman on the days and weeks following Brioni cannot, by themselves, cast light on what was in the minds *of the other participants* at Brioni. Nor can subsequent discussions concerning the return of Serbs and policies related thereto provide any basis for inferring that these matters were agreed to at Brioni, particularly when there was no discussion at Brioni whatsoever about preventing Serbs from returning.

126. By "*subsequent events*", the Chamber evidently meant to refer to the (subsequent) acts on the ground, i.e., OS and the military actions taken during and after the operation, in particular the (alleged) unlawful attacks[59] deportation[60] and persecution/discriminatory measures, in particular with regard to the repopulation of the Krajina by Croats.[61]

127. At para. 2310, the Chamber explicitly referred to "*the mass exodus of the Krajina Serbs*" and "*the immediate efforts, on a policy and legislative level, to prevent the population from returning*". It inferred from these (alleged) events "*that members of the Croatian military and political leadership intended to force the Krajina Serbs from their homes*".[62]

128. As to the "*mass exodus of the Krajina Serbs*" the Chamber's argument presupposes that their alleged mass departure was caused exclusively or at least mainly by the JCE's implementation – as distinct from being caused by OS as a lawful operation to regain territory[63] – and subsequent events.

129. The Chamber erred in fact, however, by failing to distinguish between lawful and unlawful artillery attacks in determining the cause of civilian departures.[64] It is obvious that civilians will evacuate an area being shelled regardless of the

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59 TJ,para.2305.
60 TJ,para.2305, referring to chapter 5.8.2.(i) [sic], and para.2308, referring to chapter 6.2.3.
61 TJ,para.2308, referring to chapter 6.2.3.
62 *Ibidem.*
63 See para.307 *ff*, below.
64 TJ,paras.1710, 1720, 1742-1763, 1843, 1862, 1863, 2098, 2305, 2308, 2310, 2311, 2314, 2369, 2370, 2372, 2373.

shelling's (un)lawfulness. The Chamber erred in fact by apparently not even considering that possibility.

130. The Chamber further erred in fact by rejecting, on an inadequate basis, overwhelming reliable evidence of RSK evacuation orders and propaganda-induced fear of a Croatian military victory as causes of Serb civilian departures. The evidence and arguments in relation to this issue are further developed in Ground 8 below.

131. In relation to Croatia's Law on Temporary Takeover and Administration of Certain Property ("Law on Temporary Takeover"), the Chamber erred in fact by drawing conclusions which no reasonable trial chamber would reach on the evidence.

132. First, there was no discussion at the Brioni Meeting of using laws on return to make it difficult for Serbs to return to the Krajina. There was, therefore, no evidential foundation for the Chamber to find that the common plan, reached at Brioni, included the permanent removal of the Serb population from the Krajina by use, *inter alia*, of discriminatory laws.

133. Second, no reasonable trial chamber could conclude, on the evidence that the Law on Temporary Takeover was developed and employed to realize the objectives of the alleged JCE. The Chamber was only able to so conclude by ignoring an overwhelming body of evidence to the contrary, which showed that the Law was agreed upon, and monitored by, the international community, and it could not therefore have been criminal in nature or objective.[65]

134. In particular, the Chamber ignored entirely the relevant decisions of the European Court of Human Rights, and standards on return enunciated by the United Nations High Commission for Refugees which the Appellant referred

[65] TJ,para.2098. Pejković testified that "*the entire Programme for Return in the legislative part … was written in cooperation with the international community*" (T.25079:6-8). Croatia was constantly monitored by the international community, and acted in good faith to enable everyone to return to their homes (T.25084:7-13). Radin stated that if there had been a plan to expel Serbs, he would have known about it (T.22148:22-22149:11). Dodig stated the same (T.22631:2-18); Pasić testified that he knew of no obstacles to the Serbs' return (T.22742:18-22743:7). Cipci testified that neither he nor any of his contacts were ever subject to any pressure to engage in an alleged joint criminal enterprise (T.23149:4-24).

to and adduced at trial, and which contradicted the Chamber's interpretation of the Law on Temporary Takeover.[66] The total lack of consideration of these arguments by the Chamber constitutes an error of law.[67]

135. Against this overwhelming evidence, the Chamber only cited by name (significantly, without any transcript reference) the evidence of Galbraith.[68] The Chamber's reliance on Galbraith is highly selective. His evidence in fact contradicted the core of the Prosecution case:

> *JUDGE ORIE: First of all, Mr. Galbraith, did you consider the purpose of Operation Storm primarily to expel the Serbs?*
> *GALBRAITH: No, not at all.*
> *JUDGE ORIE: Did you consider that this was or could be a side effect of militarily taking over the Krajina territory and have it within Croatia again?*
> *GALBRAITH: I did not consider that the expulsion of the Serbs would be a side effect, but I did consider that the departure of the Serbs would be a side effect*.[69]

136. The Chamber overlooked this crucial, exculpatory evidence relating to the existence of a JCE,[70] while relying on Galbraith's evidence regarding the Law on Temporary Takeover. However the decree and law on Temporary Takeover, enacted in August/September 1995, are in themselves utterly incapable of sustaining the Chamber's finding that a JCE to use laws to obstruct the return of Serbs existed by the end of July 1995. Therefore, if

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66 The European Court of Human Rights, in *Saratlić v. Croatia,* 35670/03, ECtHR, 24/10/06, affirmed the State's "*legitimate interest in housing displaced persons in the property left behind by persons who left Croatia during the war*". It further held that "*the system which allows such persons to remain in the occupied property before they have been provided with adequate housing is not in itself in contradiction with the guarantees contained in Article 1 of Protocol 1, providing that it ensures sufficient safeguards for the protection of the applicant's property rights*;" See also: *Kunić v. Croatia*, 22344/02, ECtHR, 11/01/07; *Radanović v. Croatia*, 9056/02, ECtHR, 21/12/06; *Kostić v. Croatia*, 69265/01, ECtHR, 18/11/04; *Momčilović v. Croatia*, 59138/00, ECtHR, 29/08/02; *Zaklanac v. Croatia*, 48794/99, ECtHR, 15/11/01.
On compliance with UNHCR standards of return, see D690, p. 2, and T.24705-24706:11.

67 *Boškoski and TarčulovskiAJ*,para.16, quoting *MrkšićandSljivančaninAJ*,para.16; *Simić et al.AJ*,para.12; and ICTR, *GacumbitsiAJ*,para.9.

68 TJ,para.2091.

69 Galbraith,T.5055:21-50556:4 (emphasis added).

70 See also Galbraith,T.4973,T.4918-4919; Škare-Ožbolt,T.18051-18063; AG18,T.18657-18658.

Galbraith is a credible witness, his evidence, far from sustaining the JCE finding, eliminates it.

137. Furthermore, the modes of inception of the Law on Temporary Takeover, passed as a Decree by the Government of the Republic of Croatia on 31 August 1995, and adopted by Parliament on 20 September 1995, are irreconcilable with the Chamber's finding that the Law on Temporary Takeover was central to the JCE. On the Chamber's reasoning, the Government of Croatia, all of the members of Croatian Parliament who voted to adopt the Law on Temporary Takeover, and all the Judges who implemented it, would have to have participated in the alleged JCE. To state this absurd hypothesis is its own repudiation.

138. Moreover, the Chamber never found that legislators and judges were parties to the JCE, and thus flinched from drawing its findings on JCE to their logical conclusion. One can understand that for reasons of tact the Chamber did not wish to openly accuse legislators and judges of being parties to a JCE. Yet there is little virtue in being "*willing to wound, and yet afraid to strike*".

139. The Chamber's unstated thesis that Croatian judges and legislators were also parties to the JCE was an essential step in the Chamber's findings of guilt. It was a flaw for it not to make that finding. Moreover, the Prosecution disavowed the very idea at trial:

> "*Now it should be noted first that no one is alleging that Croatia had a plan or policy to expel. It was the members of the JCE*".[71]

140. Yet if the purpose of the laws adopted by the Croatian government and parliament was to permanently expel Serbs from the Krajina, then it would indeed have to be alleged that "*Croatia had a plan or policy to expel*". Yet, according to the Prosecution, "*no one* [was] *alleging*" that. This itself shows the complete confusion existing in the Prosecution's mind as to the JCE, and by extension, the Chamber's own confusion.

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[71] T.29025.

141. The evidence at trial was incontrovertible: the rationale behind the promulgation and implementation of the Law on Temporary Takeover was the protection of the properties themselves, as well as the interests of their owners and potential creditors, irrespective of ethnicity. The law was passed largely in answer to the fact that Croatia was not equal to the task of protecting many of the relevant properties from theft and vandalism.[72] In light of this evidence, no reasonable trial chamber would have found that "*the legal instruments were discriminatory*",[73] and/or that the laws were passed as part of a JCE to prevent Serbs from returning to the Krajina.

*3.* *Termination of the JCE*

142. The Chamber erred in law by failing to find that the JCE to permanently remove the Krajina Serbs, if it existed, would have terminated *via facti* with the conclusion of OS and the departure of the Serbs from the Krajina by 8 August 1995. It follows from this that crimes committed in the Krajina after 8 August 1995 would have no *nexus* with the alleged JCE. Therefore criminal responsibility in relation to those crimes could not be imputed to the Appellant on the basis of JCE liability.[74] The Chamber erred in law by failing to so find. Had it not so erred, the Appellant would have been acquitted, as the Chamber relied on post-8 August 1995 crimes to convict the Appellant on the basis of JCE liability.

*4.* *Conclusion as to the Chamber's errors in finding that a JCE existed*

143. The object of the Brioni Meeting was to plan a legitimate military operation, and the discussions which arose within the meeting addressed the proposed operation, not the alleged JCE. The Chamber erred in law by assuming that any plan for Serb civilians to leave the Krajina during OS was necessarily a criminal plan. Even if one assumes that there was a plan whose objective was

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72 D427, "*Explanation of the final proposal regarding the Law on Temporary Takeover and Administration of Specific Properties*", September 7, 1995,pp.9-10. The Law's purpose was further articulated by Croatia's Minister of Justice, Bosiljko Mišetić,at the 262nd Closed Session of the Government of the Republic of Croatia, held on August 31, 1995, see D1832, pp. 2-3. See also the testimony of Granić, M. (the Appellant-15),T.24961:5-24964:11.

73 TJ,para.2098.

74 This was Sub-Ground 2(B) (*sic*) in the Notice of Appeal, in relation to the "*Conclusion*" of the JCE.

for Serb civilians to leave the Krajina during OS (which is denied), there is no evidence of a plan at the Brioni Meeting to achieve that objective by criminal means. Leaving civilians an exit corridor, and even wanting them to leave (to avoid casualties and/or to achieve a swift military victory) is neither a crime against humanity nor a war crime, but a laudable humane objective. In short, even if there were a plan at Brioni for Krajina Serb civilians to leave the area during the operation, there was no evidence that it was a *criminal* plan.

144. The Chamber fundamentally misconstrued the evidence relating to the Brioni Meeting, and the minutes themselves, on every level. Its interpretation of the Brioni Meeting is inaccurate and tendentious, and constitutes an error of fact as no reasonable trial chamber would have drawn the same conclusions and multiple errors of law by virtue of its flawed logical reasoning to its conclusions. Moreover, the Chamber's failure to inquire into the legal basis of the reconquest of the Krajina by Croat forces constitutes an error of law.

## B. Sub-Ground 1(B): Appellant's Participation in Alleged JCE

### *1. Objective element*

#### *(a) Legal standard*

145. The requirement that the Appellant make a substantial or significant contribution to the JCE is the *individual element* of the otherwise collective nature of JCE liability. Without this individual element, JCE liability comes dangerously close to conspiracy and membership liability, and has for that reason been heavily criticized in the academic literature.[75]

146. It is for this reason that the Appeals Chamber has rightly emphasised:

> "*[t]hat JCE is not an open-ended concept that permits convictions based on guilt by association. On the contrary, a conviction based on*

[75] Cf. K. Ambos, 'Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" 08/08/08', 20 CLF 2009, at 360-361. Cf. W. Schomburg, The jurisprudence on JCE III – the danger of extended criminal law? Journal für Strafrecht 8 (2010), 131, at 132; R. Cryer, in: R. Cryer et al., *An introduction to international criminal law and procedure*, Cambridge: CUP, 2nd ed. 2010, at 373 *ff*; B. Krebs, 'Joint Criminal Enterprise', Mod. L. Rev. 73 (2010), 602-604.

*the doctrine of JCE can occur only where the Chamber finds all necessary elements satisfied beyond a reasonable doubt*".[76]

147. Unfortunately the Tribunal has never defined the participation requirement precisely. It has been said that "*participation need not involve commission of a specific crime … but may take the form of assistance in, or contribution to, the execution of the common plan or purpose*".[77]

148. The Chamber followed this definition, requiring that the Accused make a "*significant contribution*".[78] The problem with this definition, apart from its excessive breadth, is that it blurs the line between JCE as a form of co-perpetration[79] and mere aiding and abetting of a JCE, or one of the crimes committed pursuant to a JCE.[80] In fact, according to the *Tadić* Appeals Chamber, an aider and abettor may contribute more than a co-perpetrator: the former carries out substantial acts "*specifically directed*" at assisting the perpetration of the (main) crime, while the latter must only perform acts (of any kind) that "*in some way*" are directed at furthering the common plan or purpose.[81] Thus under the Tribunal's theory of JCE – counter-intuitively – an aider and abettor may be more culpable than a member of the JCE. Yet the *Kvočka et al.* Appeals Chamber did not follow that view when it stated that "[a]*iding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise*".[82]

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76 *Brđanin*AJ,para.428.

77 See originally *TadićAJ*,para.227; see also *Krnojelac*AJ,para.31; *VasiljevićAJ,*para.100; *Kvočka*AJ,para.96; *Stakić*AJ,para.64; similar *Babić*AJ,para.38.

78 TJ,para.1953 (iii). See also *BrđaninAJ*,paras.427,430; ICTR, *SimbaAJ*,para.303; SCSL, *Sesay, Kallon and Gbao*AJ,para.611.

79 This was already acknowledged in the *Tadić*AJ, where the Chamber spoke of "*co-perpetratorship*" (para.38) and compared JCE to co-perpetration as invoked in the German and Italian Post-WW II co-perpetration cases (para.201).

80 The *Kvočka* Appeals Chamber only applied aiding and abetting to a single crime object of a JCE but not to the JCE as a whole (*Kvočka*AJ,para.90). This arguably follows from the wording of Art. 7 (1) of the Statute, since it distinguishes between "*committed*" (read JCE) and "*otherwise aided and abetted*".

81 *Tadić*AJ,para.229; concurring: *Krnojelac*AJ,para.33; *Vasiljević*AJ,para.102; *Kvočka et al.*AJ,para.89.

82 *Kvočk*aAJ,para.92. See also *Kvočka*TJ,para.284 (aider or abettor may graduate to a co-perpetrator if his participation "*lasts for an extensive period or (he) becomes more involved*;"),participation depends on "*the position in the organizational hierarchy and the degree of … participation*". (*Ibid*.,para.306); co-perpetrator performs a more active role, "*either through committing violations of human rights in his own right or through the pervasiveness of his influence*;" aider and abettor plays a more limited role, basically doing his

149. The way out of these lamentable contradictions is for the Tribunal to make it clear that JCE participation requires a contribution which is more significant and substantial than that of an aider and abettor to a JCE. As the Appeals Chamber has acknowledged, it is:

> "*important, both to accurately describe the crime and to fix an appropriate sentence*".[83]

*(b) Application to the case*

*(i) Inferences from presence at the Brioni Meeting*

150. Whether the Appellant was a "member of the JCE" (ignoring the conceptual and linguistic problem of being described as the "member" of a "plan") and whether he significantly contributed to it are distinct issues. Yet the Chamber systematically conflated them.

151. The Chamber, in finding that the Appellant participated in the JCE, relied on the Appellant's attendance at the Brioni Meeting.[84] Mere attendance at a meeting cannot be equated with significantly contributing to an alleged criminal plan. In fact, the minutes of the Brioni Meeting show nothing more than that the Appellant attended the Brioni Meeting and discussed purely operational military matters. There can be no suggestion that anything that he said at the Brioni Meeting had any connection whatsoever with the alleged JCE.

152. Additionally, the Chamber's inference as to the Appellant's attendance at the meeting amounts to impermissible "*double-counting*" with regard to both his alleged membership in the JCE and his alleged "*significant participation*". The Chamber repeats that the Appellant participated in the meeting "*and took active part in the planning of Operation Storm*".[85] As noted above, however, it is an error of law to conflate the JCE with OS. Taking an active part in

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job discreetly (*Ibid*.,para.328). And *Krnojelac*TJ,para.75 ("*The seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender*".).

83 *Kvočka*AJ,para.92.

84 TJ,para.2580, referring to chapter 6.2.2.,para.1970 ff. where the Appellant's participation is explicitly mentioned in para.1971.

85 TJ,para.2583.

planning OS cannot, without more, be counted towards "*significant participation in the JCE*".

153. In this same para. (para.2584,TJ), the Chamber discussed the Appellant's *mens rea* , which is yet another distinct element of JCE liability (distinct from the question of membership of the JCE, and distinct from the question of significant participation in the JCE) that the Chamber conflated with the other elements that must be proved beyond a reasonable doubt. But then, surprisingly, the Chamber returned to the question of JCE *membership*, finding that the Appellant was, "[c]*onsidering all of the above*", a member of the JCE.[86] Yet, the Chamber did not say more regarding membership than that the Appellant participated in the Brioni Meeting and in the planning of OS. In other words, the Chamber's argument is both devoid of content and circular. It thereby erred in law. Had it not so erred, it would not have found that the Appellant significantly contributed to the JCE.

154. Moreover, the Chamber did not rely upon any concrete evidence regarding the Appellant's explicit or implicit acts during the Brioni Meeting from which it could infer whether he agreed or not with what was said at the meeting. Thus, the Chamber inferred both the Appellant's **membership** in the JCE and his ensuing significant **contribution** to the alleged JCE from his mere presence in the Brioni Meeting and his rank of Assistant Minister of the Interior during the Indictment period.

155. The Chamber then failed to consider in favour of the Appellant the fact that, save for the 2 August 1995 meeting, he was not present at any of the subsequent meetings that the Chamber relied upon to inform its finding that a JCE was conceived at Brioni.[87] The Appellant attended two meetings after Brioni. At the 2 August 1995 meeting, Defence Minister Šušak urged respect for the laws of armed conflict.[88] The meeting on 3 August in Zadar was purely operational in character.[89] Thus no inferences relating to a possible JCE and

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86 TJ,para.2583*ff*.
87 TJ,chapter 6.2.3., esp.paras.2028*ff*.
88 D409,p.3.
89 D45.

the Appellant's participation in it can be drawn from his presence at these two meetings; and, in fact, the Chamber drew no inferences.

*(ii) Inferences from role in implementation of alleged JCE*

*a. Shelling of Gračac*

156. As to the Appellant's participation in the implementation of the alleged JCE, the Chamber, at para. 2580, erred in fact in failing clearly to distinguish between, on the one hand, the military operations and events during and after OS (namely, the alleged shelling of Gračac, allegedly unlawful attacks on civilians and civilian objects and the alleged forcible displacement of persons from Gračac) and the *Appellant's role in these events*, i.e., the concrete conduct of the Appellant which may serve as a basis for attributing these events to him, on the other. The Chamber only "*considered*" that the Appellant "*ordered and commanded the HV artillery units attached to the Collective SP Forces throughout* [OS] *and that he ordered the shelling of Gračac*".[90]

157. The Chamber's finding that the Appellant ordered the shelling of Gračac is, itself, arrived at inferentially, on the basis not of direct evidence of any such orders but on the basis that the Appellant "*ordered and commanded*" the forces which allegedly carried out the shelling.[91] The inference itself is not justified, even assuming that the Chamber correctly identified the forces which shelled Gračac and even assuming Gračac was unlawfully shelled,[92] in that it requires the Chamber to assume that every single action carried out by those forces was carried out on the Appellant's orders. However if forces under the Appellant's command either shelled Gračac on their own initiative or pursuant to an order emanating from a higher authority than the Appellant, or if the Appellant ordered lawful shelling and the forces carried it out unlawfully, then the Chamber's inference would be fatally flawed. Yet the Chamber had no basis for rejecting any of those alternative explanations; it therefore erred in law by rejecting them.

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90 TJ,para.2580.
91 TJ,para.2561.
92 See paras. 255-258, below, on the shelling of Gračac.

158. Moreover, P109 shows that not even the UNMOs blamed the Appellant's subordinates, the Special Police (SP), for the shelling of Gračac.

*b. The Appellant's alleged failure to prevent, report and punish crimes*

159. The other major limb of the Chamber's erroneous finding that the Appellant significantly participated in the JCE lies, curiously, in alleged omissions. Here, the Chamber erred in at least two respects.

160. First, it is blatantly obvious that there may be a failure to prevent or punish crimes for reasons unrelated to a subsisting JCE. The Chamber was, therefore, required to consider whether the Appellant's alleged failure to prevent or punish crimes – a failure which is vehemently denied[93] – arose for reasons unrelated to any JCE. The Chamber failed entirely to make relevant findings on this point. This is an error of law invalidating the Judgment.

161. Second, the Chamber erred in fact because no reasonable trial chamber would have concluded on the evidence: (i) that the Appellant failed to prevent or punish crimes, (ii) that he did so with the intention to contribute to the JCE, and (iii) that any such failure did in fact significantly contribute to the implementation of the JCE. Its flawed conclusions relate to three incidents: Donji Lapac, Grubori and Ramljane. If it had not so erred, it would not have found that the Appellant had significantly contributed to the JCE and thus not convicted him.

*c. Donji Lapac*

162. With regard to Donji Lapac the Chamber started from the assumption that the Appellant "*knew that his subordinates had committed crimes in Gračac on 5 and 6 August 1995, and was therefore alerted to the possibility that his subordinates could commit crimes again*".[94] This assumption is, however, flawed, as there was no evidence that the Appellant was ever informed of any crimes having been committed in Gračac. Yet the Chamber then built on that flawed assumption, reached with no evidential support, going on erroneously

93 See paras. 195 *ff*, below.
94 TJ,para.2573.

to conclude that "*the only reasonable inference is that Markač learnt about the destruction and plunder in Donji Lapac in the days immediately following the commission of the crimes. Consequently*, *the Trial Chamber finds that Markač knew that destruction and plunder were perpetrated in Donji Lapac*".[95]

163. This finding is deeply flawed. The Chamber reasoned to this finding via three steps, each of them flawed:

> (1) "*the scope of the destruction of Donji Lapac … did not affect just a limited number of buildings, but rather a substantial part of the town".*[96]
>
> This would only be a sound basis for imputing knowledge of the destruction to the Appellant if he had been in the town when the destruction was visible. Yet the Chamber accepted that "*the evidence does not establish that Markač was present in* [Donji Lapac] *when his subordinates committed crimes*". [97] Moreover, the evidence cited by the Chamber showed that the town was "*practically undamaged*" on 7 August 1995;[98]
>
> (2) [REDACTED]
>
> However both these assumptions are again flawed and based on misstating CW-3's evidence. CW-3 never claimed to know that the Appellant's subordinates burned Donji Lapac. Accordingly there was no basis for assuming that CW-3 informed the Appellant that the latter's subordinates had burned Donji Lapac. Moreover, it is incorrect to equate "*being regularly informed*" with omniscience; it may never be safely assumed that a well-informed commander automatically knows of *everything* that his subordinates have done, particularly where crimes are concerned which the subordinates may have an incentive to conceal;

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95 TJ,para.2573.
96 TJ,para.2573
97 TJ,para.2573
98 TJ,para.605

(3) "*The evidence of Repinć indicates that possible problems on the ground were of particular interest to Markač, as he was duty bound to include emerging problems in his daily reports to Červenko*"[99]

In fact, Repinc's evidence concerned daily reports received by the Appellant and forwarded on. The Chamber's flaw in assuming that this would have meant the Appellant was aware of burning in Donji Lapac is that it assumes that the burning of Donji Lapac was documented in reports received and forwarded on by the Appellant. Yet there was no such evidence. So this step, too, in the Chamber's reasoning is entirely faulty.

164. Accordingly, the Chamber had no basis for finding that the Appellant knew that destruction and plunder were perpetrated in Donji Lapac. Reports or even first-hand observation of destruction could easily have been interpreted as results of units engaging lawful targets. The Judgment conceded that Donji Lapac included lawful targets, such as military trucks and a police station (paras. 1488, 1946 and 1493) and that the SVK had been present during the attack. If the Chamber had not so erred in fact, it would not have found that the Appellant significantly contributed to the JCE by his failure to prevent or punish crimes committed in Donji Lapac.

*d. Grubori*

165. In relation to Grubori, and the Chamber's finding that the Appellant's alleged role in a "cover-up" as to the events there constituted significant contribution to the JCE, the Chamber committed various errors, both legal and factual, which not only vitiate its findings but also throw doubts on the Chamber's whole approach to JCE.

166. First and foremost, the events in Grubori took place on 25-26 August 1995, long after the mass exodus of Serb civilians from the Krajina. As noted above, the Chamber erred in failing to find that the JCE had terminated by 8 August 1995. The alleged cover-up in Grubori, therefore, had nothing to do with

[99] TJ,para.2573.

implementing a JCE. The events in Grubori and any alleged cover-up had, therefore, *prima facie*, no nexus with the JCE at all. To find that the events *did* have a bearing on the Appellant's significant participation in the JCE, therefore, the Chamber would have had to set forth a convincing explanation of the nexus. Yet no such explanation appears anywhere in the Judgment.

167. To the contrary, in relation to its findings with respect to Čermak, the Chamber clearly stated that the cover-up was unrelated to the JCE:

> "*Considering its finding on the objective of the JCE, being the permanent removal of the Serb civilian population from the Krajina by force or threat of force, the Trial Chamber finds that Čermak's misleading assurances were not of a magnitude and nature to constitute contributions to the JCE. With regard to Čermak's denial and concealment of the crimes committed in Grubori, the Trial Chamber finds, considering the finding on the JCE objective and the nature of Čermak's acts, that they did not constitute a significant contribution to the JCE. The Trial Chamber therefore does not need to address whether they could have constituted any kind of contribution*".[100]

168. This shows that the Chamber, when dealing with Čermak, was squarely aware of the issue: given that the JCE was about permanently removing Serb civilians from the Krajina, an alleged "cover-up" of murders of Serb civilians in Grubori occurring weeks later could not constitute a "*significant contribution*" to the JCE.

169. It was, therefore, a blatant error for the Chamber not to draw the same conclusion with respect to the Appellant, namely that *even if* (which is strenuously denied) the Appellant was involved in any cover-up in relation to Grubori (the magnitude of which would pale into insignificance compared to the Chamber's findings on Čermak's "*cover up*", involving placing weapons next to dead civilians to suggest they were killed in a clash), "*considering the JCE objective*", this would not and could not constitute a significant

[100] TJ,para.2548.

contribution to the JCE. Yet the Chamber drew the opposite conclusion when it came to the Appellant:

> "… *the Trial Chamber finds that [Markač's] ... active role in covering up the crimes committed in Grubori and Ramljane, were also aimed at contributing to this objective* [the JCE objective]. *On this basis, the Trial Chamber finds that Markač had the state of mind that the crimes forming part of the objective should be carried out. Considering all of the above, the Trial Chamber accordingly finds that Markač was a member of the JCE. The Trial Chamber finds that Markač thus intended that his actions contribute to the JCE*".[101]

170. It is plainly an error of law for the Chamber to apply double standards to two different defendants. The fact that Čermak was found not to be a member of the JCE (largely, if not entirely, because he did not attend the Brioni Meeting, which again shows the excessive reliance that the Chamber placed on mere attendance at Brioni as amounting to membership of the JCE), whereas the Appellant did attend the meeting, makes no difference on this point. Either covering up crimes in Grubori could amount to a significant contribution to the specific JCE of removing Serb civilians from the Krajina or it could not. In Čermak's case, it could not amount to significant contribution. In the Appellant's case, it could. This is illogical, inconsistent and hence an error of law.

171. Beyond this fundamental error, the Chamber committed further grave errors in its findings in relation to the Appellant's alleged "cover-up" of events in Brioni.

172. [REDACTED]

173. [REDACTED]

174. The finding that the Appellant ordered reports designed to strengthen "*the terrorist story*" contradicts the Chamber's own findings, set out in para. 2240.

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101 TJ,para.2583.

175. The Chamber's third error of fact emerges from its reference, at para. 2300, cited above, to "*forwarding a false report*". The Chamber accepted that the Appellant's subordinates had fed him false and misleading reports.[102] Nowhere did the Chamber find that the Appellant knew, when he forwarded those reports, that they contained false or misleading information. The Chamber could not, therefore, logically find on that basis that he engaged in a "cover-up" when he forwarded those reports.

176. Fourth, the evidence incontrovertibly established that the Appellant lacked the authority to conduct an effective cover-up because he did not control investigative or prosecutorial assets. The Chamber therefore erred in fact by accepting Morić's evidence that the Grubori investigation fell under the Crime Police's, not the SP's, jurisdiction,[103] yet failing to draw the appropriate conclusion from this, namely that the Appellant was right to consider that it was up to the Crime Police to find out the truth,[104] and that it would not only have been unnecessary, but inappropriate and indeed an interference, for the Appellant to get involved in it. The evidence was incontrovertible: the Appellant had no authority to investigate and/or order criminal investigations. He could not conduct criminal investigations, nor could he convene or refer his employees to criminal tribunals. Instead, the Croatian Government's Decree on Ministry of Interior Organization and Operation (MUP Decree) limited his power to discipline to proposing administrative measures related to employment, for example, to suspend police, issue fines, and reprimand.[105] In this respect his authority more closely resembled that of a civilian employer or civilian government agency administrator than a military commander's. Therefore the Chamber's finding that by failing to order an investigation, "*Markač created a climate of impunity which encouraged the commission of further crimes against Krajina Serbs*" (para.2581,TJ) is nonsensical.

177. Fifth, the Chamber erred entirely in its approach to P505.[106] Given that there was no evidence as to who even drafted the letter, and no evidence that the

102 See TJ,para.2235 and P767,P768 and P770.
103 TJ,para.2221 and footnote 2071(Vol.1).
104 TJ,para.2295.
105 D527.
106 TJ,para.2301

Appellant drafted, signed or sent out this letter, there can be no basis for the Chamber's *non-sequitur* of considering *"the drafting of such a letter, even if it was not sent out,* [as] *an expression of the atmosphere of the cover-up*". Certainly, it can have no bearing on whether *the Appellant* was involved in such a cover-up. The Chamber therefore erred in fact by considering P505 in this light.

178. The Prosecution bore the burden of proving the relevance and probative value of P505 beyond a reasonable doubt:

> "*The burden of proof with respect to relevance and probative value lies on the party seeking to introduce a particular piece of evidence. With respect to documentary hearsay evidence, the Prosecution must prove its relevance and probative value beyond reasonable doubt*".[107]

179. P505's authenticity was challenged by the Appellant[108] and thus its relevance and probative value. Yet the Prosecution brought no evidence that P505 was authentic, much less relevant and probative. On the contrary, Prosecution witness Žganjer cast doubt on its authenticity.[109] In these circumstances, it was an error of law under the rules of evidence applicable before this Tribunal for the Chamber to rely on P505.[110]

180. Finally, the Chamber erred in fact by considering that the Appellant's role in relation to events in Grubori "*shows a certain acceptance of such a consequence of the JCE",*[111] which it then used to establish his liability under JCE III (see paras. 223, *ff*). Aside from the phrase, "*a certain acceptance*" being impermissibly vague and indicative of the Chamber's own uncertainty

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107 *Orić*TJ,para.23, citing *Brđanin*TJ,para.29.

108 The Appellant challenged the authenticity of P505 and did not, as the Chamber mis-stated, at para.2301, merely argue that the letter was not sent out. See T.29338:4-22. For the Appellant's position at trial, see T.5306:23-5307:16;T.6183:22-6184:14; and T.7523:2-7525:11.

109 T.11618; see also D909 and D910 (official document from Croatian government that P505 never entered the official records).

110 The *Blaškić* Trial Chamber said with regard to authentication, *inter alia*, that the weight attached to a document admitted into evidence depends on the elements adduced to authenticate it (Decision, 30/01/1998,para.11 *ff).* The *Bagosora et al.* Trial Chamber stated that authenticity and reliability are "*overlapping concepts: the fact that the document is what it purports to be enhances the likely truth of the contents thereof*". (Decision,13/09/2004,para.8).

111 TJ,para.2586.

in relation to its own findings, even the Chamber's own findings do not permit a finding that the Appellant "*accepted*" that old people would be callously murdered.

*e. Ramljane*

181. With respect to Ramljane,[112] the only evidence on record established unequivocally that the Appellant ordered SP Unit Commander Ždravko Janić to investigate what had happened there. Janić informed the Appellant that SP units had exchanged fire with terrorists. This was the full extent of information available to the Appellant. The Chamber's characterisation of these events as a "*cover up*" is, therefore, also an error of fact, as no reasonable trial chamber would have made that finding on the evidence. Moreover, in relation to the Chamber's findings on JCE, its findings on Ramljane are subject to the same errors set out above in relation to Grubori, namely that the Judgment contains no explanation of any nexus between the alleged "*cover-up*" and significant contribution to the JCE of expelling Serb civilians during OS, and subsequently creating obstacles to their return, and there is no conceivable nexus.

*(iii) Erroneous assessment of exculpatory evidence*

182. The above-mentioned errors were compounded by the Chamber's erroneous approach to exculpatory evidence.

183. The Chamber accepted that the Appellant "*paid particular attention to include units that were not from the area to be searched, so as to avoid sentiments of revenge against people the forces might know and to avoid possible conflicts*".[113] The Chamber also acknowledged that the Appellant "*gave instructions prior to the beginning of Operation Storm concerning the need to respect the laws of war and to treat civilians fairly*"; and, it stated that he "*ordered the investigation of a suspected arson attack*".[114]

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112 TJ,paras.2302, 2581.
113 TJ,para.2567.
114 TJ,para.2577.

184. The Chamber, however, bizarrely concluded that these facts "*do not play a determining role in assessing Markač's alleged criminal responsibility*".[115] It so concluded on the basis of its findings on his role "*in relation to the crimes committed by SP members in Gračac, Donji Lapac, Grubori and Ramljane*".[116] It follows that if its findings in relation to any of those incidents were flawed – as they were, as set out at paras. 156-182 above – then the facts of the Appellant seeking to prevent crimes would have played a central role in determining his criminal responsibility, if any. Certainly the facts should have played a part in sentencing, but did not.[117]

185. However there is a more fundamental contradiction at the heart of this reasoning. The JCE required that crimes be committed against the civilian population, in particular deportation by unlawful shelling of civilian objects and persecution. The Chamber was, therefore, presented with a fundamental problem given that it had to accept that the Appellant gave instructions that the laws of war had to be respected during OS. If the laws of war were respected, the JCE could not be implemented. The Appellant therefore gave instructions which, if carried out, would have frustrated the very objective of the JCE. Rather than addressing this contradiction, the Chamber simply skirted around it. Its failure to deal with a key contradiction in the accepted evidence and its conclusions is a manifest error of law invalidating the Judgment.

*2. Subjective (mental) element*

*(a) Legal standard*

186. As to the subjective or mental element which must be proved in relation to the Appellant's participation in the JCE, the Appeals Chamber has made clear that all participants in a JCE must "*possess the same criminal intent*" [118] or "*intention*"[119] with regard to the crimes committed pursuant to the JCE.

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115 TJ,para.2577.
116 TJ,para.2577.
117 See paras.401-404, below.
118 *Tadić*AJ,para.220 (emphasis added); also *Id.*,para.196 ("*same criminal intention*"); followed e.g. by ICTR, *Ntakirutimana*AJ,para.463.
119 *Tadić*AJ,para.196 (emphasis added); followed, e.g. by ICTR *Ntakirutimana*AJ,para.463.

187. This intention may be established by showing that (i) the Accused voluntarily participated in one of the aspects of the common criminal design and (ii) intended the criminal result.[120] Yet, the case law has never explicitly defined this intent. The *Tadić* definition has simply been repeated without further elaboration. The *Vasiljević* Appeals Judgment is the most explicit, requiring "*intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators)*".[121] The ICTR has stressed the volitional character of the intent requirement implicitly by contrasting it with knowledge:

> "*A co-perpetrator (a term used to refer to a participant in a joint criminal enterprise) must intend by his acts to effect the common criminal purpose. Mere knowledge of the criminal purpose of others is not enough: the accused must intend that his or her acts will lead to the criminal result*".[122]

188. From this it follows that mere knowledge is insufficient for membership in a JCE.[123] Intent in connection with JCE is to be understood in a volitional sense, stressing the perpetrator's desire, wish or will to bring about a certain criminal result.

189. As to proof of the perpetrator's state of mind, the Chamber may rely on circumstantial evidence. However, any inference drawn from the objective circumstances of a crime with a view to the Accused's state of mind must be "*the only reasonable inference available on the evidence*".[124] The objective acts on which the inference is based deserve "*special attention*". Inquiry into "*whether these acts are ambiguous, allowing for several reasonable inferences*"[125] is necessary.

190. The particular intent requirement for co-perpetration in a JCE also serves as a guideline to distinguish it from aiding and abetting. The *Kvočka et al.* Trial Chamber thus differentiated co-perpetration and aiding and abetting on the

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120 *Tadić*AJ,para.196; *Simić et al.*TJ,para.157; *Šainović et al.*TJ,para.108.
121 *Vasiljević*AJ,para.101. See also *Brdanin*TJ,para.264; *Mrkšić et al.*TJ,para.546.
122 *MpambaraTJ*,para.14, (emphasis added).
123 *Krajišnik*AJ,para.697; concurring *ĐordevićTJ*,para.1864.
124 *Vasiljević*TJ,paras.68-69; *Vasiljević*AJ,para.120.
125 *Vasiljević*AJ,para.131.

subjective level: if "*the participant shares the intent of the criminal enterprise*", he is a co-perpetrator, if he "*only*" possesses knowledge, he is an aider and abettor to the JCE.[126] In *Ojdanić*, the Appeals Chamber stated that JCE is a form of commission "*insofar as a participant shares the purpose of the JCE … as opposed to merely knowing about it*" and, therefore, "*cannot be regarded as a mere aider and abettor*".[127]

*(b) Application to the case*

191. In considering the Appellant's state of mind, the Chamber asked whether he "*intended to contribute*" to the JCE.[128] It inferred his intent from his participation in the Zadar meeting of 3 August 1995 where the use of artillery against Gračac and other operations were coordinated. The Chamber concluded, therefore, that "*the only reasonable interpretation of the evidence*" was that the Appellant "*was aware of the nature*" of these operations[129] and of the unlawfulness of the attack and that this "*shows his intent to contribute to the JCE objective*".[130]

192. Further, the Appellant's alleged omissions with regard to crimes committed by the SP and his cover up activities "*also aimed at contributing to this objective*"[131] "*On this basis*" the Chamber found that the Appellant's "*state of mind*" was "*that the crimes forming part of the objective should be carried out*".[132] All other considerations regarding the Appellant's *mens rea* are merely inferences from the alleged facts. The Chamber then "*finds that Markač thus* [sic!] *intended that his actions contributed to the JCE*".[133]

193. In this para., the Chamber erred in law by *confusing objective and subjective considerations* in its analysis of the Appellant's *mens rea*.[134] In addition, the

126 *Kvočka*TJ,paras.273,284-285; *Kvočka*AJ,para.90 (explicitly applying the Vasiljević definition); concurring *Limaj*TJ,para.510; *Limaj*AJ,paras.99.
127 *Ojdanić*, Appeals Chamber Decision on Dragoljub Ojdanić Motion Challenging Jurisdiction-JCE, May 21, 2003,para.20; *Stakić*TJ,para.432.
128 TJ,para.2583.
129 Ibid.
130 *Ibid.*
131 *Ibid.*
132 *Ibid.*
133 *Ibid.*
134 *Ibid.*

Chamber failed to clarify the nature and degree of the required intent. It conflated the volitional and cognitive aspects of *mens rea*, did not explicitly state that the required intent is to be understood in a volitional sense, wrongly equated "*knowledge*" with "*intent to contribute*", and, finally, did not provide a reasoned basis for considering that the existence of this intent had been proved beyond a reasonable doubt.

194. Moreover, the Chamber engaged in significant and impermissible "*double-counting*". The Chamber found that the Appellant was allegedly aware, when he ordered the attack on Gračac, that it was an unlawful attack. It should be noted that this was already "double-counted" as the allegedly unlawful attacks were also used by the Chamber to infer that there was a JCE agreed at Brioni, under the "*subsequent events*" rubric. Here the Chamber used this finding, again, as evidence that the Appellant significantly participated in the JCE and that he *intended* to contribute to the JCE.

195. In light of that finding, the Chamber then found that the Appellant's alleged omissions and cover-up "*were also aimed at contributing to this objective*", presumably referring to the JCE objective. Yet this is a *non sequitur*. No reasonable trial chamber would infer from alleged awareness of an unlawful attack on Gračac that the Appellant omitted to prevent or punish crimes and engaged in cover-up with the aim of contributing to the JCE. A commander may fail to punish crimes out of simple negligence. A person may engage in a cover up for myriad reasons. The connection between these events and an intent to contribute to the JCE, which was by then complete, is unexplained, and indeed inexplicable. This is an error of law.

196. There are yet further problems in para. 2583. The Chamber's reasoning relating to the two *mens rea* requirements for JCE is of the form: (A) is true because of (B); (B) is true because of (A).

197. So the Chamber reasons thus:

(A) the Appellant's intent to contribute to the common plan (the *mens rea* required for participation in the JCE);

PROVES

(B) his shared intent in the common plan (the *mens rea* required for membership in the JCE)

WHICH IN TURN PROVES

(A) the Appellant's intent to contribute to the common plan

198. The Chamber's reasoning is, therefore, circular.

199. Elsewhere the Chamber repeats the error of using the Appellant's alleged JCE membership to prove his intent to contribute to the JCE ("*... the Trial Chamber ... finds that Markač was a member of the JCE, The Trial Chamber finds that Markač thus intended that his actions contribute to the JCE*"). Thus, on the Chamber's approach, anyone who is a member of the JCE, *ipso facto*, intends that his acts contribute to the JCE, and conversely, anyone who intends to contribute to the JCE is, *ipso facto,* a JCE member. This erroneously elides the two separate *mens rea* requirements for JCE into one. This is a clear error of law.

200. The Chamber committed an error of legal interpretation to the detriment of the Accused by finding intent where a reasonable reading of the evidence is exculpatory.[135] If the Appellant, as acknowledged by the Chamber, "*paid particular attention to include units ... so as to avoid sentiments of revenge*",[136] then this clearly demonstrates that he took steps to prevent the commission of revenge crimes and, consequently, did not possess intent with regard to these crimes which formed part of the alleged JCE III. The Chamber does not draw this conclusion, though, and fails to explain why it opted for a manifestly less reasonable and favourable interpretation of the evidence. Similarly, the Chamber's finding that the Appellant "*favour*[ed] *the creation of an environment conducive to the commission of crimes*"[137] is wholly unreasonable, and indeed incompatible with the Chamber's acceptance of evidence that the Appellant tried to prevent revenge crimes. Thus the

135 TJ,para.2586.
136 TJ,para.2586.
137 TJ,para.2586.

Chamber's findings and its conclusions cannot intelligibly be reconciled.

201. The Chamber's findings on this point also entirely overlook the fact that the Appellant's spoken contribution to the Brioni Meeting contained no indicia of criminal intent.[138]

202. The Chamber was obliged to weigh all of this evidence in favour of the Accused in accordance with the fundamental principle *in dubio pro reo*. Its failure to do so constitutes an error of law.

*3. Special discriminatory intent for persecution*

*(a) Legal standard*

203. In the case of persecution, it must be proved beyond a reasonable doubt that "*all the participants in the common plan ... had a discriminatory intent*".[139] It must be demonstrated "*that the accused shared the common discriminatory intent of the joint criminal enterprise*".[140]

204. If the Accused does not possess such intent, he can only be liable, at best, as an aider and abettor.[141] In that case the Prosecution would have had to establish "*that the Appellant had **knowledge** that the principal perpetrators of [JCE] intended to commit the underlying crimes, and by their acts they intended to discriminate ... and that, with that knowledge, the Appellant made a substantial contribution to the commission of the discriminatory acts by the principal perpetrators*".[142] In short, the Accused must "*knowingly*" make "*a substantial contribution to the crime*" to be responsible even as an aider and abettor.[143] This means that special discriminatory intent cannot be inferred from mere knowledge.[144]

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138 See para.68, above.

139 *Simić et al.,*TJ,para.156 (emphasis added).

140 *KvočkaAJ*,para.110. See also ICTR, *Simba*TJ,para.388; ICTR, *Renzaho*TJ,para.741; ICTR, *Nsengimana*TJ,para.803; ICTR, *Setako*TJ,para.453 ("*Where the underlying crime requires a special intent, such as discriminatory intent, the accused, as a member of the joint criminal enterprise, must share the special intent*").

141 *Ibid*.

142 *Vasiljević*AJ,para.142.

143 *Kvočka*AJ,para.110.

144 *KrstićAJ,*para.131 ("*...knowledge on his part alone cannot support an inference of genocidal intent*".).

*(b) Application to the case*

205. The Chamber addressed the Appellant's *mens rea*[145] but only drew conclusions in relation to his alleged intent with regard to the alleged JCE (paras. 191-202, above). The Judgment contains no explicit finding of discriminatory intent on the part of the Appellant with regard to the alleged persecutions. The failure to make any finding of discriminatory intent when convicting the Appellant of persecution, which requires such an intent, is a fundamental error of law.

206. Indeed, quite to the contrary, the Chamber found that the Appellant did not contribute to the alleged JCE by creating and/or supporting discriminatory policies.[146] Consequently, the Appellant's conviction for persecution as a crime against humanity is unsustainable, and must be reversed.

*4. Conclusion as to the Chamber's errors in relation to the Appellant's participation in the alleged JCE*

207. The Chamber erred in law by failing to provide adequate reasoning for convicting the Appellant as a JCE member when the evidence against the Appellant, taken at its highest and making all assumptions in favour of the Prosecution, clearly showed that the acts of the Appellant did not amount to participation, and certainly not to *significant* participation, in the implementation of the common objective.

208. The Chamber erred by finding that the only reasonable inference from the evidence was that the Appellant shared the intent to permanently remove the Serb population from the RSK. Without proof of the Appellant's intent, the Chamber lacked the requisite *mens rea* to find him guilty as a co-perpetrator of the alleged JCE. His conviction must, therefore, be reversed.

## C. Sub-Ground 1(C): JCE III

*1. Legal standard*

209. In order for liability to arise under JCE III, four elements *additional* to those

[145] TJ,para.2583.
[146] TJ,paras.2562-3.

required under JCE I must be proved:

- On the objective level, additional or "*secondary"* ("excess") crimes not covered by the (original) JCE (I) must have been committed and those crimes must have been a natural and foreseeable consequence of the JCE's implementation.[147]

- On the subjective level, there must be knowledge as to the possibility/probability of these additional crimes[148] or awareness as to their foreseeability[149] and *dolus eventualis* (willingly taking the risk) with regard to these additional crimes.[150]

210. The Appeals Chamber has confirmed in at least two Judgments that the Accused must willingly accept or approve the risk of the (further) commission of crimes to be liable under JCE III.[151]

211. Moreover, the (objective) foreseeability standard is complemented by a knowledge/awareness requirement,[152] suggesting unease with the too strict foreseeability standard. Thus as the *Kvočka et al.* Appeals Chamber forcefully stated:

> "*What is natural and foreseeable to one person participating in a systemic joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for all crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant*

147 *Tadić*AJ,para.228; *Krstić*AJ,para.150; *Blaškić*AJ,para.33; *Kvočka*AJ,para.86; *Babić*AJ,para.27; *Deronjić*AJ,para.43; *Stakić*AJ,para.65.

148 See, in particular, *Krstić*AJ,para.150 ("*accused participated in that enterprise aware of the probability that other crimes may result*".); *Blaškić*AJ,para.33; *Deronjić*AJ,para.43; *Ntakirutimana*AJ,para.467; *Stakić*AJ,para.65 ("*foreseeable to the accused in particular*".); SCSL, *Sesay, Kallon and Gbao*AJ,para.475 ("*reasonably foreseeable to the accused*").

149 *Krstić*AJ,para.150 ("*aware that those acts outside the agreed enterprise were a natural and foreseeable consequence of the agreed joint criminal enterprise*").

150 *Tadić*AJ,para.228; *BlaškićAJ*,para.33; *BabićAJ*,para.27; *Deronjić*AJ,para.43; *StakićAJ*,para.65; SCSL, *Sesay, Kallon and Gbao*AJ,para.475.

151 *Blaškić*AJ,para.33 *ff*.; *Kordić and Čerkez*AJ,paras.29-32,111*ff*.

152 See references in *supra* notes 148 and 149.

*may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him*".[153]

*2. General criticisms of JCE III*

212. There is an overwhelming body of academic opinion which is highly critical of the expansion of criminal liability by JCE III as it has been applied at this Tribunal, in particular out of concerns relating to the *principle of culpability*.[154] It is worth noting that these criticisms have been made by commentators from a wide-range of legal traditions including even a scholar with an Islamic Law background.[155] This reflects a virtually unanimous critical stance, rarely seen in international criminal law, which can only be explained by the profound discomfort created by this mode of liability because of its deeply *unfair and unjust imputation of criminal results* which fall entirely outside of the respective Accused's control.

213. This case reinforces these criticisms, as it demonstrates that JCE III-liability can extend to a point where it becomes tantamount to strict liability (paras. 217-222, below).

214. The *principle of culpability* has long been recognized in international criminal law. In general, the jurisprudence has acknowledged that the principle of (personal) guilt requires the Defendant's knowledge of the circumstances of the offence. The International Military Tribunal at Nuremberg ('IMT')

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153 *Kvočka*AJ,para.86.

154 Among others, see most recently S. Manacorda/C. Meloni, 'Indirect Perpetration *versus* Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?', JICJ 9 (2011), 159, at 166-167; G. Fletcher, 'New Court, Old *Dogmatik',* JICJ 9 (2011), 179, at 186-187; J. Ohlin, Joint Intentions to Commit international Crimes, Chi. J. Int'l L. 11 (2011), 706-8; M. Badar, 'Participation in Crimes in the Jurisprudence of the ICTY and ICTR', in: W. Shabas/N.Bernaz, Routledge Handbook of International Criminal Law, London: Routledge, 2011, 247, at 255-257; M. Damaška, 'What is the point of international criminal justice?', ChicKentLR 83 (2008), 329, at 351 *et seq*; K. Hamdorf, JICJ 5 (2007), 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law', 208, at 224 *ff*; H. Olásolo, 'Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgement', ICLR 7 (2007), 143, at 157 *ff*; A. Bogdan, 'Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia', ICLR 6 (2006), 63, at 108 *ff*; R. Cryer, in: R. Cryer et al., *supra* note 75 , at 373 *ff*

155 See M. Badar's seminal critique, 'Just convict everyone!" - Joint Perpetration: From Tadić to Stakić and Back Again, ICLR 6 (2006), 293 *ff*.

referred to the principle in the context of the question of criminal accountability of certain Nazi-organizations, stating that:

> "*one of the most important [legal principles] ... is that criminal guilt is personal, and that mass punishments should be avoided*"

and that

> "*the Tribunal should make such declaration of criminality (of an organization or group) so far as possible in a manner to ensure that innocent persons will not be punished*".[156]

215. The war crimes trials held subsequent to the IMT reaffirmed that individual responsibility presupposes *personal guilt*.[157]

216. Similarly, the Appeals Chamber recognized the principle of culpability in *Tadić*, stating that "*nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated* (*nulla poena sine culpa*)".[158]

217. The *conflict* of JCE III with the principle of culpability is obvious. If, according to JCE III, *all* members of a criminal enterprise incur criminal responsibility even for criminal acts by *some* members or even non-members which have not been agreed upon beforehand on the basis of (objective) foreseeability, the previous agreement or plan of the participants as the basis of reciprocal attribution and, thus, the essential requirement of liability in this form of collective responsibility is abolished.[159] The possible existence of (objective) causality between the initial agreement or plan and the criminal

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156 *Trial of the Major War Criminals before the International Military Tribunal* (The Blue Series), Vol. I, at 256.

157 *U.S. v. Krauch & Others,* Trials of War Criminals before the Nurenberg Military Tribunals under Control Council Law No. 10 (The Green Series, *hereinafter* TWC), Vol. VIII, at 1081-210, 1155-56, 1157, 1158-59, 1160; *U.S. v. Krupp & Others*, TWC, Vol. IX, at 1327-484, 1331, 1448; *U.S. v. von Leeb & Others*, TWC, Vol. XI, at 462-697, 484. See also: *U.S. v. Flick & Others*, TWC, Vol. VI, at 1187-223, 1208 ("reasonable and practical standards" for the determination of guilt).

158 Compare: *Tadić*AJ,para.186 with further references. See also recently: *Martić*AJ,para.82.

159 See K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', JICJ 5 (2007), 159, at 174; *Martić*AJ,Separate Opinion of Judge Schomburg, at 134, § 7: "…*the current shifting definition of the third category of JCE has all the potential of leading to a system, which would impute guilt solely by association*". See also recently Schomburg, *supra* note 75.

excess does not overcome the deficit of (subjective) culpability since the former – focusing on the objective course of events – has nothing to do with the latter – focusing on the Accused's state of mind with regard to the events.

218. Moreover, the foreseeability standard is neither precise nor reliable.[160] Ultimately, this standard entails a form of strict liability in the sense of the Roman law maxim, *versanti in re illicita imputantur omnia, quae sequuntur ex delicto:* he who commits an illicit act, is liable for everything – even accidental consequences – flowing from this act.[161] While this explains the Prosecution's attraction to the doctrine, i.e., the possibility of overcoming the typical evidentiary problems in international criminal law, especially where proof of direct participation is lacking,[162] it also explains why this doctrine delivers a fatal blow to the Accused's fair trial guarantee. Further, it leads to the perverse consequence that the Prosecution has to prove a higher mental standard for aiding and abetting (i.e. knowledge) than for JCE III perpetration.[163]

219. These problems of principle with JCE III are not only addressed in academic writings. Judges of this Tribunal have also forcefully expressed concerns with JCE in general[164] and JCE III and its foreseeability standard in particular. Thus

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160 Cf. G. Fletcher and J. Ohlin, Reclaiming Fundamental Principle of Criminal Law in the Darfur Case, 3 JICJ (2005), at 550. See also V. Haan, 'The development of the concept of joint criminal enterprise at the International Criminal Tribunal for the Former Yugoslavia', (2005) 5 ICLR 167, at 191-192.

161 For historical background see H. Rüping/W. Sellert, *Studien- und Quellenbuch zur Geschichte der deutschen Strafrechtspflege*, Vol. 1, Aalen: Scientia-Verl., 1989, at 249. With regard to general criminal law see Hall, *General Principles of Criminal Law*, Indianapolis: Bobbs-Merrill, 2nd ed. 1960, at 6; A. Ashworth, *Principles of Criminal Law*, Oxford: OUP, 6th ed. 2009, at 77; C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. 1, München: Beck, 4. ed. 2006, § 10 mn. 122. With regard to JCE (III) similarly critical, see E. van Sliedregt, *The criminal responsibility of individuals for violations of international humanitarian law*, The Hague: TMC Asser Press, 2003, at 106 *ff*., 357 *ff*; W. Schabas, *An Introduction to the ICC*, Cambridge: CUP, 4th ed. 2011, at 216 *ff*; G. Mettraux, *International Crimes and the ad hoc Tribunals* (2005), at 292-293; Haan, *supra* note 160, at 200; Fletcher and Ohlin, *supra* note 161, at 550.

162 Cf. J. Vogel, 'Individuelle Verantwortlichkeit im Völkerstrafrecht', 114 Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) (2002), at 421; Haan, *supra* note 160, at 172 *ff*; A.M. Danner and J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 California Law Review (2005), at 134; van Sliedregt, *supra* note 161, at 187.

163 In this respect Badar, in W. Schabas/N.Bernaz, *supra* note 154, at 256, convincingly argues that the accused is more likely to be exonerated if he participates materially in the crimes (as an aider and abetter) than if he is only loosely connected to them via JCE III.

164 Apart from the references cited above, see Judge Lindholm's dissenting opinion in

in *Kvočka*, the Appeals Chamber took issue with the highly uncertain foreseeability standard.[165]

220. To compensate for JCE III's culpability and fairness defects, the jurisprudence either downgrades JCE co-perpetration to *aiding and abetting*[166] or increases or modifies the *subjective threshold* by requiring knowledge or awareness of the foreseeability of the excess crimes.[167]

221. Consequently, JCE III responsibility presupposes, first, objective foreseeability of the crimes that went beyond the object of the JCE (on the basis that such crimes normally occur in the ordinary course of events pursued by such an enterprise) and, secondly, the participant's knowledge of this (objective) foreseeability.[168] Otherwise put: the participant must know that the crimes in question naturally (foreseeably = in the ordinary course of events) result from the given enterprise.

222. But where the Accused credibly pleads a lack of knowledge in relation to foreseeability, i.e. argues that he – psychologically – was not aware of the foreseeability of the excess crimes, then simply to assume knowledge in this case would mean *de facto* abolishing the knowledge requirement and rendering JCE III equivalent to an objective or strict form of liability which is incompatible with the principle of culpability. Clearly, this principle demands that the actual *ex ante* perception of the individual Accused, i.e. his subjective state of mind, be taken into account instead of subjecting him to the "*reasonable person standard*" of objective foreseeability.

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*Simić*,*Tadić* and *Zarić*TJ,para.2: "I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. ….".

165 See s*upra* note 153, and accompanying text.

166 See e.g. *Blagojević*TJ,paras.704 *ff*.,713; *Kvočka et al.*TJ,paras.273*ff*.

167 See *supra* notes 148 and 149.

168 Although the case law is unclear, such an objective-subjective interpretation may be read into various statements requiring awareness with regard to possible (unintended) crimes, see e.g.: *Brđanin and Talić*, Trial Chamber Decision on Form of Further Amended Indictment and Prosecution Application to Amend, June 26, 2001,para.31; *Blaškić*AJ,para.33. See also: S. Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?', 2 JICJ (2004), 606, at 609. More recently: *Haradinaj*TJ,para.139: "*The objective element does not depend upon the accused's state of mind. This is the requirement that the resulting crime was a natural and foreseeable consequence of the JCE's execution. It is to be distinguished from the subjective state of mind, namely that the accused was aware that the resulting crime was a possible consequence of the execution of the JCE, and participated with that awareness*".

*3.* *Application to the case*

223. It is respectfully submitted, first, that the Appeals Chamber should take this opportunity to declare that JCE III's application to the instant case violates the principle of culpability and minimum standards of fairness and, in addition, that JCE III should no longer be applied at the ICTY as a matter of principle.

224. If the Appeals Chamber, notwithstanding the arguments set out above, does uphold JCE III, it is submitted that it must nonetheless opt for the *least restrictive interpretation* of JCE III, in strict adherence to the principles set out above.

225. Applying the requisite, restrictive interpretation to JCE III, it is apparent that the Chamber erred in several key respects.

226. First, the Chamber misdirected itself in law by virtue of its overly simplistic presentation of the JCE III requirements in para. 1953(ii), where these are summarized as follows:

> "*The third form of the JCE depends on whether it is natural and foreseeable that the execution of the JCE in its first form will lead to the commission of one or more other statutory crimes. In addition to the intent of the first form, the third form requires proof that the accused person took the risk that another statutory crime, not forming part of the common criminal objective, but nevertheless being a natural and foreseeable consequence of the JCE, would be committed*".

227. This description is inadequate in that it does not clearly set out the requirement that the Accused be (subjectively) *aware of the foreseeability* of the (additional) JCE III crimes.

228. The Chamber further erred in fact and in law by finding that:

> (a) The crimes of murder, inhumane acts, cruel treatment, plunder, destruction and unlawful detention (on their own or as

underlying acts of persecution) were natural and foreseeable consequences of the execution of the JCE; and

(b) The Appellant was aware of the risk that these further crimes might be perpetrated; and

(c) He willingly took that risk.[169]

229. These will be considered in turn.

*(a) Extended crimes as natural and foreseeable consequences of the JCE's implementation*

230. Where the Chamber referred to the establishment of the objective foreseeability of the additional JCE III crimes,[170] it provided only this statement:

> "*The Trial Chamber further finds that the crimes of destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions (on their own or as underlying acts of persecution) were a natural and foreseeable consequence of the JCE's implementation*".[171]

231. This is mere assertion of a conclusion without a statement of the reasons which led to the conclusion. As such, it is inadequate. As a matter of law, it is *plainly insufficient* as an articulation of the legally decisive question of whether the crimes can be considered foreseeable according to a reasonable person standard. There is no other discussion of this issue in the Judgment.

232. Thus, on this point the Chamber fails to provide even cursory legal reasoning in support of its findings. The Chamber's inadequate reasoning would be unacceptable in any court of law which complies with the minimum standards of a rational and fair administration of justice. Consequently, the Chamber erred in law by not providing an adequately reasoned basis for its "finding" that the said crimes were foreseeable.

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169 TJ,paras.2584-2586
170 TJ,para.2586, referring to chapter 6.3.6., i.e., to the findings on Gotovina's liability.
171 TJ,para.2374.

233. The Chamber further erred in relation to finding a nexus between the "extended crimes" and the alleged JCE (see paras. 165 *ff* above). If the events in Grubori had no nexus with the JCE (as the Chamber found in acquitting Čermak), they cannot be regarded as the natural and foreseeable consequence of the JCE's implementation either. Hence the Chamber's findings in relation to Grubori cannot, without error, be used to support its conviction of the Appellant on the basis of JCE III liability.

*(b) Awareness/knowledge of the Appellant as to foreseeability*

234. The Chamber found that the Appellant "*was aware of this context* [the context of alleged ethnic tension]", existing at the outset of OS, "[s]*ince this context was common knowledge to those present in Croatia at the time*".[172] This statement does not answer the only relevant question, namely, whether the Appellant was aware of the foreseeability of the extended crimes.

235. When the Chamber went on to address the relevant question more directly, it did so only by drawing inferences totally contrary to common sense.[173] The Chamber inferred the Appellant's awareness of the foreseeability of the extended crimes from a meeting he attended on 2 August 1995 at which the then Defence Minister Šušak "*gave instructions regarding the risk of uncontrolled conduct, including torching and looting*". The Chamber inferred from the Appellant's previously-mentioned laudable attempt "*to include units that were not from the area where the operation was to be carried out, so as to avoid sentiments of revenge …*" that he "*was aware of the possibility that members of the Croatian military forces and Special Police would perpetrate acts of revenge*". On the basis of these indicia, the Chamber found that the Appellant "*had the awareness*" that the said crimes "*were possible consequences of the execution of the JCE*".

236. This is such a fundamental error, and one so imbued with potential to harm the enforcement of international humanitarian law, that it deserves close analysis.

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172 TJ,para.2585.
173 TJ,para.2586.

237. If a person takes a precaution, say locking his front door, it may indicate his awareness of the possibility of burglary (although it may be a very remote possibility indeed), but the reason he locks his door is to eliminate that possibility. Having locked the door, as a precaution, it can no longer be said that the person is aware of a possibility of burglary. To his mind, by taking the precaution, he has *eliminated* (or, at least, significantly reduced) the possibility of burglary.

238. Likewise, a person who takes an umbrella when he goes for a walk may be said to contemplate that it may rain. But he has not accepted that he may get wet. By taking the umbrella, as a precaution, he has eliminated the possibility, which he had foreseen, of getting wet.

239. There are two important issues here. By taking a precaution, it does not mean that the event which the person seeks to avoid is anything more than *theoretically possible*. It does not mean that it is a *realistic possibility*, much less a likelihood; only that it is a possibility against which the person considers it worthwhile to take precautions.

240. Second, even if a person does take precautions against an undesired outcome (getting burgled, getting wet), those events may happen despite the precautions (e.g. if the burglar breaks through a window, or a car drives through a puddle next to the person, soaking him).

241. Applying these obvious truths to the instant case:

(1) If the Appellant took steps to avoid war crimes being committed, that does not mean that he regarded the possibility of those crimes being committed as being a *realistic* possibility, only that he considered it worth taking steps to avoid that possibility;

(2) The Appellant is entitled to consider that such possibility as there was that war crimes would be committed was eliminated (or sufficiently reduced), precisely because of the precautionary steps he took;

(3) Crimes may have been committed for reasons independent of the risk that the Appellant foresaw (e.g. war crimes not committed as "revenge attacks" against known victims, but as a callous, sadistic act of one person towards a stranger);

(4) The Appellant could have been mistaken about the risks he perceived (just as a home-owner who locks his front door cannot be said to have, *ipso facto*, been aware of the possibility that a burglar would gain entry through his window);

(5) Any fair-minded person would not ordinarily hold a person responsible for consequences which the person took all reasonable steps to avoid, e.g. blaming a person for being burgled even though he had diligently locked his doors and windows. So it is perverse to attach criminal liability to the Appellant through reliance on his laudable, precautionary acts, as showing that he willingly took the risk that the very crimes which he sought to prevent, would occur;

(6) Thus the real injustice is that the Chamber derived intent that these "foreseeable" crimes be committed or awareness that they might occur from the Appellant's very efforts to prevent them.

242. Point (3), above, is particularly important when analysing the Chamber's focus on the Appellant's alleged awareness that there might be "revenge attacks". If the crimes which were committed were, in fact, not "revenge attacks" at all, then surely that is relevant to the crimes which were said to be foreseeable to the Appellant. In other words, if the Appellant foresaw a possibility of "revenge attacks", but the relevant extended crimes were not "revenge attacks" at all, then he must not incur liability under JCE III for those crimes. The Chamber appeared never to consider this possibility. Nor did it find that the crimes for which he was held responsible under JCE III were "revenge crimes". The Chamber's reasoning is strikingly incomplete. This is therefore an error of law.

243. Thus, again, the Chamber's considerations are insufficiently substantiated to meet the reasonable trier of fact standard. On the one hand, the Chamber used

*per se* exculpatory evidence and interpreted it to the Appellant's detriment. On the other, it was too willing to draw adverse conclusions about the Appellant's state of mind – with serious consequences for him – without seriously examining reasonable alternative interpretations which would have pointed to a different outcome.

244. Further, the Chamber entirely overlooked the Appellant's specific situation with regard to his (limited) control over the forces on the ground. The most active forces in the Indictment area were not under the Appellant's control. In other words, the application of JCE III to an accused, like the Appellant, who only has *control or command over a very limited number of forces* acting on the ground, proves to be more unjust than in the normal case of application to a supreme commander with control over *all* the forces on the ground.

245. The *Halilović* Trial Chamber stated, with regard to command responsibility, that it "*is a principle of international criminal law that a commander cannot be held responsible for the crimes of persons who were not under his command at the time the crimes were committed*".[174] The Appeals Chamber confirmed this view.[175] If this is correct for the subsidiary command responsibility liability it must be true, *a fortiori,* for a mode of liability which is, like JCE, considered by this Tribunal as a primary, perpetrator-like form of liability.

246. Thus, taking all these aspects together, the Chamber's finding that it has been proved beyond reasonable doubt that the Appellant was aware of the foreseeability of the crimes was wrong in law. The error in law directly caused the Appellant's conviction.

*(c) The Appellant's dolus eventualis*

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174 *Halilović*TJ,para.752.

175 *Halilović*AJ,para.67: "*… the Trial Chamber rightly relied here upon a principle laid down in the Hadžihasanović case, where the Appeals Chamber held that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the accused assumed command over this subordinate*". (referring to *Hadžihasanović and Kubura*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, July 16, 2003,para.51).

247. The Chamber failed clearly to distinguish between JCE III's knowledge and *dolus eventualis* requirements. The Chamber found that "*Markač nevertheless contributed to the JCE, thus favouring the creation of an environment conducive to the commission of crimes and reconciling himself with the possibility that the above mentioned crimes could be committed*".[176] Thus, the Chamber referred to the *dolus eventualis* requirement using the term "*reconciling*". This is followed by a sentence which refers back to the knowledge requirement ("*Thus* [sic!], *Markač knowingly took the risk that these crimes would be committed*"[177]). The Chamber then returned to *dolus eventualis*: "*In addition, the Trial Chamber considers that Markač's conduct with regard to the crimes committed in Grubori shows a certain acceptance of such a consequence of the JCE*".[178] The term "*certain acceptance*" apparently is intended to indicate that the Appellant acted with the necessary *dolus eventualis*; yet, the correct standard requires proof beyond reasonable doubt that the Accused "*willingly took that risk*".[179] Thus, the Chamber failed to apply the correct legal standard. In so doing, it committed an error of law.

**Relief sought**

248. Each of the errors of law set out above individually and collectively invalidates the verdict. Each of the errors of fact identified above individually and collectively occasions a miscarriage of justice. The errors identified above with respect to JCE caused the Chamber to find erroneously that the Appellant was guilty under Article 7(1) of counts 1, 2, 4, 5, 6, 7, 8, and 9 of the Indictment.[180]

249. In light of the errors of law and fact identified above, the Appeals Chamber should apply the correct legal standards in evaluating the existence of a JCE and make its own findings of fact, namely:

250. The Prosecution failed to prove beyond a reasonable doubt that there was a JCE with the objective of permanently removing the Serb population from the

176 TJ,para.2586 (emphasis added).
177 *Ibid.*
178 *Ibid.*
179 See references in *supra* note 150 and accompanying text.
180 TJ,paras.2587 and 2622.

Krajina region through the commission of crimes of persecution, deportation and forcible transfer, plunder, and destruction.

251. Alternatively, that even if there was a JCE, the Appellant was not a member and made no significant contribution to it;

252. In the further alternative, that even if there was a JCE, of which the Appellant was a member and to which he contributed significantly, he did not know of the crimes being committed, and/or did not intend to further those crimes and/or by his acts. Accordingly, he is not responsible for any crimes committed pursuant to JCE I, as charged in the Indictment.

253. In the further alternative, that even if there was a JCE, of which the Appellant was a member, to which he contributed significantly while in possession of the requisite *mens rea*, the further crimes committed outside the original JCE cannot be attributed to him on the basis of a JCE III as:

a) this form of liability violates the principle of culpability,

b) the alleged additional crimes were not reasonably foreseeable,

c) in the alternative, the Appellant was not aware of the alleged foreseeability of those crimes,

d) in the further alternative, the Appellant did not willingly take the risk that those crimes would be committed.

254. Having made these findings, the Appellant requests that the Appeals Chamber overturn the convictions rendered against him on Counts 1,2, 4, 5, 6, 7, 8, and 9 under Article 7(1) of the Statute, and substitute acquittals on these counts.

## II. GROUND 2: THE CHAMBER ERRED IN FINDING THAT THE SPECIAL POLICE DESTROYED GRAČAC TOWN

255. The Majority erred in fact and law in finding, at para. 697, that the SP were involved in substantial destruction in Gračac. The error was a fundamental one. There was, quite simply, no evidence to support the finding.

256. Judge Ķinis dissented on this issue.[181] The Appellant respectfully adopts his reasoning and conclusions, which show the Majority's errors.

*1. Artillery Damage*

257. In relation to the alleged destruction caused by artillery and shelling, the evidence clearly established the following:

(1) The Appellant was not involved in planning the artillery fire on Gračac, which was the Main Staff's responsibility;

(2) Civilian areas were not targeted, only three military and strategic objects;

(3) The use of artillery was legitimate;

(4) There was no evidence that any civilians died as a result of this artillery fire;

(5) Only 15 rounds of artillery were fired at Gračac;

(6) Kardum's evidence and video evidence[182] prove that Gračac was completely preserved.

258. The Chamber relied on the fact that Gračac was not greatly damaged by shelling on 4-5 August 1995 to demonstrate that any subsequent damage to houses on 5-6 August 1995 must have been caused by deliberate burning. However the Chamber's finding, at para. 697, that there were "*limited signs of damage*" to Gračac "*on the afternoon of 5 August 1995*" contradicts its finding, at para. 1935, that "*the shelling of Gračac on 4 and 5 August 1995 constituted an indiscriminate attack on the town and thus an unlawful attack on civilians and civilian objects in Gračac*" (emphasis added).

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181 TJ,para.2626.
182 D294;D547.

*2. Non-artillery damage (burning of houses)*

259. In relation to non-artillery damage, para. 697 shows that the Majority's finding is based exclusively on an UNMO report, P109. P109 does not, however, demonstrate the SP's responsibility for the alleged destruction. On the contrary:

(1) P109 refers to "*HV troops*", not SP, engaged in looting in Gračac (pp. 1 and 6);

(2) P109 does not state that any houses in Gračac were destroyed or damaged *by fire*. It states that, "*all the houses in Gračac are partially destroyed and five of the houses are completely destroyed*". The cause of destruction is unstated;

(3) P109 does not state that HV troops or SP were responsible for the partial or complete destruction of houses in Gračac. It does not state who was responsible for the destruction, whether it be random individuals, looters, retreating Serb soldiers or HV soldiers, nor whether the destruction occurred because of shelling, arson or for some other reason;

(4) There is no indication in P109, or any other report, that the SP engaged in any criminal activities.

260. It appears, therefore, that the sole reason for the Majority's finding that the SP engaged in destruction in Gračac is that the SP were in Gračac when the alleged destruction took place, and that the SP engaged in the destruction of Donji Lapac two days later. The latter finding is based on speculation,[183] not evidence, and in any event would not, in itself, be sufficiently probative, to a reasonable trial chamber, of the SP's responsibility for the alleged earlier destruction in Gračac.

261. No prosecution witnesses stated that the SP engaged in destruction in Gračac. Steenbergen, a member of the UNMO Team Gračac, who patrolled Gračac at

[183] TJ,para.697.

the relevant time, stated that he did not observe the SP burning houses.[184] Nor did P-82 testify that the SP was responsible for destruction in Gračac; only that they were present in the town.[185]

262. The Majority, erred by referring to "*the later arrival in or passage through Gračac of members of the HV, VP or civilian police*",[186] thereby implying that the SP was alone in town at the time when the alleged destruction took place and establishing its responsibility for the destruction by a process of elimination. No reasonable chamber would have drawn this conclusion in the face of the overwhelming evidence demonstrating the presence of civilian and military police, HV, and civilians, in Gračac at the relevant time.[187] P614, for example, shows that civilian police opened a police station in Gračac at 1220hrs on 5 August.[188] The Majority failed to address this evidence, which undermines its findings. As there was no evidence supporting the Majority's findings, no reasonable trial chamber would have found that the SP engaged in wanton destruction in Gračac.

263. In relation to this ground, and generally, the Appellant adopts Co-appellant Gotovina's shelling impact data. An extremely high proportion of shells landed on military objectives in Gračac, evincing the intent to strike the RSK rather than to scare off civilians or to wantonly destroy the town. The goal of re-establishing control of the town, and the fact that Croat forces were evidently prepared in advance to occupy the town with civil police, further undermines the Chamber's conclusion that the Appellant intended to destroy Gračac.

264. Moreover, at para. 1435, the Chamber noted that the Appellant advised Turkalj to make sure that civilians would not be harmed in the selection of targets. The Chamber also noted, at para. 1437, Turkalj's decision to fire fewer shells in order to neutralize targets rather than destroy them and to

184 T.5417.

185 P-82's testimony and associated credibility issues are discussed at length under Ground 5 of this Appeals Brief.

186 TJ,para.697.

187 P614; D507; D2083; P2359,para.25.

188 P614,p.18: 5 August at 12.20 pm "*A company of regular police began organising and establishing Gračac police station, and securing vital administrative and commercial facilities in the general area of Gračac and Sveti Rok*".

minimize collateral damage. Steenbergen's testimony, recounted by the Tribunal at para. 1447, also supported the notion that rather than firing indiscriminately, Turkalj fired with the assistance of observers tracking SVK movements on the ridge above the JORBAT compound. Yet the Chamber did not take this evidence to its logical conclusion.

**Relief sought**

265. In light of the above, it is submitted that the Chamber committed errors of law and fact which led to the Appellant's conviction. The Appellant respectfully requests the Appeals Chamber to reverse the impugned findings.

## III. GROUND 3: THE CHAMBER ERRED IN FINDING THAT THE SPECIAL POLICE ENGAGED IN PLUNDER IN GRAČAC TOWN ON 8 AUGUST

266. The Chamber's conclusion that the SP engaged in plunder in Gračac was based mainly on the evidence of one witness: Vanderostyne.[189] Two types of plunder are said to have taken place: (i) loading goods onto a truck, and (ii) jumpstarting cars.[190]

267. At para. 693, the Chamber found Vanderostyne to be a "*credible witness*". However, the Chamber failed to deal with the serious credibility challenges to Vanderostyne's live testimony.[191] His evidence, first, was purely speculative.[192] Second, his evidence in fact demonstrated that the SP was not involved in the crime of plunder in Gračac.

268. The Chamber's findings against the Appellant were based on two photographs (P324 and D295), and the fact that the SP were in Gračac on 8 August.[193] Mere presence, however, does not prove the commission of any offence,

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189 TJ,para.693.
190 TJ,para.693.
191 Vanderostyne ,T.4035:18-4036:10; 4046:5-4046:15; 4063:16-4063:19; 4064:2-4064:8; 4072:15-4073:16; 4078:11-4078:25; 4085:13-4085:16; 4085:17-4085:24.
192 *Ibid.*
193 TJ,para.693.

particularly given the contemporaneous presence of other units of the HV and civilian and military police in Gračac town.

269. The two photographs that the Chamber relied on also do not indicate that the SP engaged in looting. In relation to loading goods onto a truck, the Chamber's conclusion is entirely flawed considering that the Chamber's sole eyewitness, Vanderostyne, admitted that he had no first-hand evidence of the alleged looting.[194] Furthermore, the SP "commander" or "lieutenant" that Vanderostyne spoke to informed him that the unit was packing up to leave Gračac.[195] In spite of the fact that Vanderostyne spent fewer than 15 minutes[196] in Gračac, and was the only witness who testified to the alleged looting there,[197] the Chamber did not give any reasons for rejecting the reasonable alternative explanation that the SP members were removing their own goods rather than looting.

270. The Chamber ignored overwhelming exculpatory evidence confirming that the SP unit was departing from its base when photographs of alleged looting were taken.[198] Vanderostyne photographed departing SP loading their equipment and belongings onto a blue police logistics truck, not looting.[199] The lawfulness of SP conduct is reinforced by the fact that they were seemingly very comfortable posing for Vanderostyne's camera.[200] The evidence would have led any reasonable chamber to conclude that it had not been proved beyond a reasonable doubt that the SP had looted any goods from Gračac. The Chamber erred in law by failing to give reasons for dismissing this significant body of exculpatory evidence.

271. Regarding the jumpstarting of a car, the Chamber again ignored reliable and credible evidence as to why the SP jumpstarted the car in the photograph,[201]

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194 Vanderostyne,T.4078:17-21.
195 Vanderostyne,T.4035:9.
196 Vanderostyne,T.4032:14.
197 Vanderostyne,T.4077:7.
198 P2383,p.3 and P1241,p.6.
199 Janić,T.6353.
200 See D295.
201 Pavlović D1830 p.2;T.25254; 25299-25301; 25303-25306; 25315; 25317-25319; 25254-25255; 25304-25306.

and the reason behind painting the name of the unit on the car.[202] The finding that the SP stole the car is not supported by a theft report, nor is the person from whom it is alleged to have been stolen identified. Again, the Chamber erred in law by failing to explain its rejection of this exculpatory evidence.

272. On the evidence, no reasonable Chamber would have found that the SP engaged in plunder. The Chamber therefore erred in law. Given its link between these crimes and its reasons for convicting the Appellant on the basis of JCE liability (on the basis that his alleged knowledge of these crimes showed his significant contribution to the JCE and in the Chamber's linking of these crimes to those allegedly committed in Donji Lapac, [see para. 275 below]), if it had not so erred, it would not have convicted the Appellant.

**Relief sought**

273. In light of the above, it is clear that the Chamber committed errors of law and fact which led to the Appellant's conviction. The Appellant respectfully requests the Appeals Chamber to reverse the impugned findings.

## IV. GROUND 4: ERRORS OF LAW AND FACT RELATING TO APPELLANT'S RESPONSIBILITY FOR SHELLING DURING OS

274. This is no longer pursued as a self-standing ground of appeal.

## V. GROUND 5: THE CHAMBER ERRED IN FINDING THAT THE SPECIAL POLICE DESTROYED DONJI LAPAC TOWN

275. The Chamber found that the SP destroyed Donji Lapac town. This finding was crucial for its finding of guilt against the Appellant since the Chamber relied upon it as a basis for imputing JCE liability to the Appellant. In paras. 2569, 2573, 2581 and 2586 the Chamber found that the Appellant participated in the alleged JCE by failing to take steps to prevent the SP from committing crimes

202 Pavlović,T.25255, 25319-25320

in Donji Lapac in spite of his alleged knowledge that SP members had committed crimes in Gračac on 5 and 6 August 1995.

276. The Chamber erred in fact in so finding.

277. Foremost among the Chamber's errors was its reliance on P-82 in relation to the SP's alleged destruction of Donji Lapac town. Any reasonable trial chamber would have found P-82 to be an entirely unreliable witness. [REDACTED].[203] [REDACTED].[204]

278. Recognising P-82's unreliability, the Chamber stated that it relied on his evidence "*only where it is corroborated by other evidence*".[205] However the Chamber failed to keep to its own strictures.

279. The Chamber noted that P-82's live testimony revealed "*lapses of memory and significant inconsistencies*".[206] To overcome this, the Chamber relied mainly on P-82's 2004 witness statement, P2359.[207] However it is plainly an error of law to consider that a witness's evidence can be "*corroborated*" by his own (earlier) evidence. Moreover, that statement merely proves the inconsistency and unreliability of P-82's live testimony. It is submitted that the Chamber committed a serious error of approach when it based its conclusions mainly on P-82's evidence.

280. It is evident that the Chamber failed to give weight to the entire body of evidence on this issue and instead selected only the evidence that fitted the Prosecution's case. This was an error of approach in violation of the presumption of innocence.

281. At para. 617, the Chamber relied on the following to prove the SP's involvement in the alleged destruction, most of which derived from P-82's statement:

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203 [REDACTED].
204 [REDACTED].
205 TJ,para.625.
206 TJ,para.625.
207 TJ,para.617.

- P-82 saw the SP standing in front of the burning houses with fingers in the air, waving, and laughing.[208]

  [REDACTED].[209]

- The SP marked certain houses with the letters 'MUP.'[210]

  [REDACTED].[211] The word, "*probably*" indicates that he was speculating, rather than speaking from personal knowledge. The Chamber should not have relied on speculation as a basis for its findings. Moreover, in the same part of his testimony, [REDACTED];[212]

- The Chamber also cited P-82 as having testified that he saw soldiers and SP entering buildings and throwing hand grenades, after which the houses caught fire.[213]

  [REDACTED],[214] nor was this evidence given specifically in relation to Donji Lapac. Further, there was no suggestion that throwing hand grenades into buildings was unlawful. [REDACTED].[215]

- The Chamber relied on evidence that P-82's commander told him that the SP insisted on burning the houses down.[216]

  During his live evidence, however, [REDACTED].[217] It was, therefore, entirely wrong for the Chamber to rely on sections of P-82's witness statement which he renounced during live testimony.

282. Considering the many inconsistencies between P-82's statement and his live testimony, the Chamber erred in accepting his evidence and, particularly, in systematically privileging his written statement over his live testimony. The

208 TJ,Vol.1,footnote 2674.
209 [REDACTED].
210 TJ,Vol.1,footnote 2678.
211 [REDACTED].
212 [REDACTED].
213 TJ,Vol.1,footnote 2682.
214 [REDACTED].
215 [REDACTED].
216 TJ,Vol.1,footnote 2688.
217 [REDACTED].

Chamber failed to provide reasons for favouring his written over his oral testimony. The irresistible inference is that it did so simply because the former was incriminating and the latter exculpatory.

283. The "*sufficient corroboration*" that the Chamber found between P-82's evidence and that of other witnesses was no corroboration at all. The evidence of other witnesses merely showed that the SP logistics and communication personnel were in Donji Lapac and that one SP unit left the town as late as nightfall.[218] Thus, the Chamber erred by simply equating the SP's presence in a town, without more, with responsibility for widespread and wanton destruction. This is plainly a wholly unsatisfactory approach in a criminal trial. The Chamber could not regard P-82's evidence that the SP set fire to houses as being "*corroborated*", since [REDACTED] There was, therefore, nothing to corroborate.

284. In relation to the exculpatory evidence of SP witnesses, the Chamber stated that "*the evidence does not indicate that these Special Police witnesses had any solid factual basis for their affirmations*"[219] This conclusion is simply wrong. The evidence provided by Janić, corroborated by the Report on the Takeover of Donji Lapac on 7 August[220] and Pavlović,[221] demonstrates that Janić complained to HV officers about the destruction and was told not to worry.[222] The Chamber failed to provide the Appellant with any reason why this evidence was not considered credible. Similarly, the Chamber ignored direct evidence[223] regarding who was responsible for the destruction, namely HV units, without any reasoned opinion.

285. Likewise, the Chamber failed to have proper regard to the unchallenged evidence that the SP tried to prevent looting in Donji Lapac.[224] Any reasonable trial chamber would have asked itself this question: why would anybody

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218 More precisely, six logistics and four communication personnel:T.25263, 25265-25266, 25308-25309.
219 TJ,para.625.
220 P586.
221 Pavlović,T.25311.
222 D556, Janić,T.6220-6221.
223 D556,P586.
224 [REDACTED].

wishing to burn buildings want to prevent others from looting those buildings first? It is simply illogical.

286. There was no evidence upon which the Chamber could find that the SP logistics and communication unit, or Janić's unit, engaged in destruction. Based on the available evidence, no reasonable Chamber would have found that the SP were involved in the destruction of property belonging to Krajina Serbs.

**Relief sought**

287. In light of the above, it is clear that the Chamber committed errors of law and fact that led to the Appellant's conviction, as explained in para. 275 above. The Appellant respectfully requests the Appeals Chamber to dismiss the impugned findings.

## VI. GROUND 6: THE CHAMBER ERRED IN FINDING THE SPECIAL POLICE RESPONSIBLE FOR SCHEDULED KILLING NO. 10

288. The Chamber erred in fact when it found, at para. 218, that "*the person or persons who killed Marko Ilić, Rade Bibić, Ruža Bibić, and Stevo Ajduković were members of the SP*".

289. This affords another instance of the Chamber reversing the burdens of proof and production. The mere presence of persons in uniform contemporaneous with killings shifted the burden to the Appellant to prove that his policemen did not do it. This was an error of law.

290. The killings occurred in Oraovac and the evidence showed no more than that that the perpetrators wore uniforms.

291. In concluding that the SP committed the killings, the Chamber relied mainly on the evidence of Milan Illić,[225] in particular his description of the perpetrators' uniforms.[226]

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225 TJ,paras.211,214,217-218.

226 P725,p. 2; P726,para.9 pp.3-4; Illić's live testimony.

292. In so doing, the Chamber relied on blatantly contradictory evidence.[227] Illić provided the Chamber with three different statements indicating no more than that the perpetrators wore a uniform.[228] Illić never identified SP as the perpetrators of Scheduled Killing No. 10.[229]

293. Moreover, in his live evidence, Illić was entirely unable to describe the uniforms in question.[230]

294. In spite of these obvious errors, and the relevant evidence the Appellant presented at trial,[231] the Chamber found the SP responsible for the killings.

295. In para. 218, the Chamber stated, incorrectly, that the SP wore plain-grey and grey-green uniforms and that this corresponded with the evidence reviewed in chapter 3.3. This is wrong, as chapter 3.3 shows that SP uniforms were green.

296. Moreover, even though the Chamber mentioned two types of uniforms in one sentence, it went on to conclude that the persons responsible for the murders wore grey–green uniforms and were thus members of the SP. The Chamber's errors are, therefore, errors on the face of the record, justifying the intervention of the Appeals Chamber.

297. [REDACTED].[232] The Chamber's habit[233] of equating proximity to a crime with criminal responsibility for it is unacceptable in a criminal trial, in particular in a war crimes trial, where a conviction carries the gravest of consequences.

298. [REDACTED],[234] [REDACTED].[235]

299. Moreover, the Chamber never addressed the Appellant's attack on CW-3's credibility.[236]

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227 *Ibid.*
228 *Ibid.*
229 *Ibid.*
230 Illić,T.7557:2-7;T.7574:5-7;T.7574:14-15; 7575:5-7.
231 P329; Vurnek,T.26180:8-10; 26180:11-14; Čvrk,T.25361:2-3.
232 Chapter 4.
233 See also, para.268.
234 [REDACTED].
235 *Ibid*.

300. The Chamber had an opportunity to question Janić, the commander of one of the units allegedly responsible for the murders, about these events. Janić, [REDACTED], led his troops past Oraovac. The Chamber failed to do so.[237] [REDACTED].

301. [REDACTED]. Instead it relied on contradictory and legally insufficient evidence. The Chamber thereby missed the opportunity to obtain the best probative evidence on this issue, choosing instead to reach its conclusions without fully considering the evidence.

302. There is simply no evidence that SP members were responsible for killing the four civilians. No reasonable Chamber would have found the SP responsible for the murders. The Chamber's error of fact therefore directly occasioned a miscarriage of justice, as the Chamber relied on these killings in finding, at paras 2581-2582, that the Appellant's "*conduct amounted to a significant contribution to the JCE*".

**Relief sought**

303. In light of the above, it is clear that the Chamber committed errors of fact which led to the Appellant's conviction. The Appellant respectfully requests the Appeals Chamber to dismiss the impugned findings.

## VII. GROUND 7: DENIAL OF RIGHT TO FAIR TRIAL

304. This is no longer pursued as a self-standing ground of appeal.

## VIII. GROUND 8: THE CHAMBER ERRED IN FACT AND IN LAW IN FINDING THAT THE CRIME OF DEPORTATION AS A CRIME AGAINST HUMANITY WAS COMMITTED DURING THE INDICTMENT PERIOD

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236 [REDACTED].
237 [REDACTED].

305. The Chamber committed a host of errors in finding that the crime of deportation as a crime against humanity was committed during the indictment period. In particular, the Chamber erred:

(1) In finding that Serb civilians left the Krajina primarily due to unlawful shelling;

(2) In failing to make any finding that the unlawful shelling was carried out with the intent to force civilians to leave;

(3) In finding that the shelling amounted to forcible displacement;

(4) By confusing the means by which the alleged deportation was carried out with whether it was carried out for reasons permitted under international law;

(5) By failing to distinguish between the *mens rea* required for deportation from that required for forcible transfer, and making no finding as to the former.

306. These errors will be reviewed in turn.

*(1) The Chamber erred in finding that Serb civilians left the Krajina primarily due to unlawful shelling*

307. The Chamber erred, first, in fact by finding that "*in general people did not leave their homes due to any evacuation planned or organised by the RSK and SVK authorities*".[238]

308. The primary error of the Chamber related to *causation*. There was no basis to find that Serbs left the Krajina primarily due to *unlawful* shelling. Yet if they did not leave for that primary reason, it cannot be said that they were *deported*.

[238] TJ,para.1539.

309. The Chamber had no adequate basis to discount the overwhelming body of reliable evidence of RSK evacuation orders and propaganda-induced fear of a Croatian military victory as causes of the Serb civilians' departure.

310. In rejecting these other causes for the Serb exodus, the Chamber committed the very error it criticised Counsel for during the proceedings, [REDACTED],[239] whereas the truth was that people left for many reasons. There was accordingly no basis for the Chamber to find that the direct and primary cause was shelling.[240] No reasonable trial chamber would have so found.

311. The evidence clearly established that Serbs left the Krajina for a combination of reasons, unrelated to any alleged unlawful shelling, namely:

(1) Poor living conditions;[241]

(2) Increased tension in the area;[242]

(3) RSK leadership spreading anti-Croatian propaganda;[243]

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239 [REDACTED].

240 TJ,paras.1743-1744.

241 [REDACTED].

242 [REDACTED]; Flynn,T.1309:15-21 (rumours that the Croatian military would be attacking based on the fact that the war was a fact for several years); [REDACTED]; Elleby,T.3480:2-4 (RSK propaganda increased tension among the civilian population); Hayden,T.10692 (learnt from refugees that people left for fear of what was occurring); Gilbert,T.6419:21-6420:1 (state of panic among Knin population at the end of July; rumours that there would be a Croatian attack); Puhovski,T.16153:18-16154:14,Puhovski confirming Lazarević's statement re RSK policy of casting Croatia as fear-inducing enemy, drawing on 'Ustasha' legacy;T.16155:25-16156:6,Puhovski confirming Lazarević's statement: inducing an atmosphere of fear amongst the RSK population was necessary for evacuation to take place prior to and during OS;T.16159:5-16,RSK's evacuation plan created to challenge the perception of Croatia as victim of aggression, and to persuade the Serb population to head to Kosovo).

243 Elleby,T.3479:13-3480:1(heard of propaganda that it would be very bad for the Serb population when the HV would take Krajina back); [REDACTED]; Galbraith,T.5051:17-20 (anti-Croat propaganda of the Serb leadership equated Tuđman's Croatia with the Ustasha regime); Puhovski, P2320 (RSK propaganda that Serbs could never safely live within Croatia contributed to exodus);T.1661:2-1661:5,(RSK instilled fear of HV);T.1664:19-1665:9 (propaganda based on lies); Šinobad,T.16969:22-16970:8 (people from Benkovac did not leave because of shelling or artillery but because they feared entry of the HV forces); Lazarević,T.17958:7-17959:8,T.17965-17966, and D1461 p. 28 (RSK authorities, under instructions from Belgrade, were responsible for circulating inaccurate portrayals of Croats throughout the civilian population to ensure successful evacuation); [REDACTED]; Granić,T.24669:23-24570:4 (evacuees indoctrinated by the RSK);T.24778:5-6 ("*even if we had wanted to, we could not keep them from leaving*"); Pejković,T.25226:18-25227:7 (Serb propaganda an impediment to Serbs returning to Croatia).

(4) "*Self-ethnic cleansing*";[244]

(5) Civilians initiating their own evacuation;[245]

(6) RSK's evacuation plans;[246]

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244 Galbraith,T.5151:10-24 (a substantial group of people left because they did not want to live in Croatia); [REDACTED].

245 [REDACTED]; Mirković**,**T.7447:23-25 (witness left because everybody else was leaving); [REDACTED]; [REDACTED]; Gačesa,T.2917:6-2917-20 (her own decision to join the column on 4th August; no electricity; no communication; no information coming from anywhere); Vujnović,T.4566:13-24 (people were leaving voluntarily); [REDACTED]; Berikoff,T.7675:4-7675:15 (indication of civilian evacuation evident 5 or 6 days before OS).

246 [REDACTED]; Flynn**,**T.1308:15-24 ("*orderly*" exodus of the Krajina Serbs;T.1309:5-14 not much "*un-orderly*" exodus); D60 (Mazowiecki Report stated "*RSK authorities had previously held regular evacuation drills, and there are reports that some of the refugees may have been forced into leaving against their will*".); D136 (video of an evacuation drill); D137 (on 4 August 1995, Martić ordered to begin the planned evacuation of all inhabitants unfit for combat); D138, D139, D140 (details of Serb evacuation plans); Ermolaev,T.2397:19-2398:13 on P102,para.1 and D337 (RSK authorities requested UNHCR and UNPF assistance in evacuating 32,000 civilians); D182 (RSK had a plan to head for Banja Luka); [REDACTED]; Dijkstra,T.4784:9-4785:1 (Krajina people told him that an evacuation order was broadcast on the radio); Galbraith,T.4941:22-23 (Galbraith understood the Serbian authorities ordered the population to leave); [REDACTED]; Rehn,T.6591:18-19 (Serb leadership demand that people leave); Dangerfield**,**T.7136:7-24;T.7137:14-20 (witness 'fascinated' by orderly evacuation of the civilians from Knin); Mirković,T.7485:6-14 (civil protection or such-like people told local population to evacuate); Berikoff,T.7909:9-7910:8; also P740,para.2a (on 29 July 1995, many local UN employees failed to show up for work; evacuation evident a couple of days before OS; SVK soldiers said civilians must leave the area); [REDACTED]; [REDACTED]; Novaković (W-40),T.11716:2-11716:9 (RSK authorities, more specifically the civil protection were duty bound to have evacuation plans ready; witness confirmed existence of evacuation plans); D1516,para.6 "*in the course of 4 August the RSK government issued a public statement calling the entire population in the endangered areas to evacuate, which caused a chaos within the units and their dispersion, because the solders started leaving in order to go home and help their families with evacuation*".; D256 plans for evacuation; D326 Kovačević speaks on evacuation of Knin; D923 p. 7, for instance: whatever the actions by the authorities and the command organs, the evacuation could not have been stopped; D951 Ratko Mladić in a phone conversation with an unknown person: "*Well, in the north, things are good, but down south, it looks like they did something stupid. They wrote an evacuation order for women and children, and that caused a mass exodus*"; [REDACTED];T.15040:7-15040:12 on D798 p. 3 (Martić *encouraged people to leave the Krajina*); Puhovski on P2320, an article he wrote: leadership was ready not only to flee but to organise the escape of the entire population;T.15981:23-15982:7 (Puhovski testified that one week before OS, RSK began organising population extraction points. Puhovski learnt this from several people in the civilian and military apparatus. Puhovski also saw documents to that effect);T.15982:20-23 (very high percentage of people from the area had planned routes to leave their homes before of OS);T.1660:13-1661:1 (evacuation of the Serb population was organised and ordered); Šinobad,T.16970:13-16971:13 (engaged by RSK to provide transport for evacuation); Vukasinović,T.18556:16-18557:11 (evacuation plans in place not only in the event of an outbreak of hostilities but also in case of major natural disasters); D254 (dated 31 July 1995; an order from the Ministry of the Interior to Secretaries of the Interior for the "*rapid evacuation of day-to-day documentation*"); D938 (dated 2 August 1995 from Civilian Protection Staff to Regional Civilian Protection Staff calling for evacuation preparations); Mrkšić,T.18820:4-7 (RSK leadership had an evacuation plan in place which had been rehearsed by a significant portion of the RSK population in "*a great many*" instances);T.19004:12-14 (Evacuation organised to Srb);T.18819:9-18821:5 (SVK involved evacuating civilians in July 1995);

(7) FRY's plans to create a more favourable Serb demography elsewhere in the former Yugoslavia;[247]

312. Despite this overwhelming evidence that the Serb exodus from the Krajina was due to causes other than unlawful shelling, the Chamber found to the contrary. Its finding was, accordingly, perverse and unsustainable.

313. The Chamber held that Serbs did not leave due to any evacuation plans because, though there were some evacuation plans for certain municipalities, the degree to which the plans were implemented varied. Considering how and when people left their homes, these evacuation orders had little or no influence on people's departure. The Chamber further found that when Martić signed the evacuation order on 4 August 1995, a large number of people had already left their homes and were on the move.[248] Finally, the Chamber considered that the evidence did not indicate that the RSK authorities or the SVK were responsible for people's decision to depart the Krajina, and the movement of people was not in any way organized.[249]

314. In making these findings, the Chamber erred. In particular, it erred in finding that "*in general people did not leave their homes due to any evacuation planned or organized by the RSK and SVK authorities*".[250] To reach this conclusion the Chamber rejected, on an inadequate basis, reliable evidence of RSK evacuation orders and propaganda-induced fear of a Croatian military victory as causes of the Serb civilians' departure.

315. Although the Chamber recognized that poor living conditions and the imminent approach of Croatian forces might also have influenced individuals'

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Granić,T.24669:25-24670:11 (people left in a planned way; urged to do so by their leadership);T.24671:22-24672:10 (Granić frequently met with British Ambassador Hewitt who said that the Serbs left because RSK leadership planned and executed evacuation); [REDACTED]: on the Russian Ambassador's comments that RSK planned and ordered the evacuation; [REDACTED] (roads were being repaired in the Krajina before OS in preparation for the evacuation).

247 Puhovski**,**T.1667:5-17 (one of the RSK's reasons for evacuation was to alter Kosovo's ethnic composition); Akashi**,**T.21743:11-22 (FRY made instrumental use of the many refugees, repatriating them in Eastern Slavonia, Serb-occupied sections of Bosnia, and Kosovo)

248 TJ,para.1537.

249 TJ,para.1539.

250 TJ,para.1539.

decisions to flee Knin,[251] it held that unlawful shelling was the "*primary and direct cause*" of their departure.[252] In areas where the Chamber did not find that Croatian military or SP forces had "*created an environment in which those present had no choice but to leave*"[253] the Chamber considered the possibility that civilian departures may have been prompted by fears of violence associated with the outbreak of armed conflict.

316. Nowhere in its Judgment did the Chamber consider whether shelling *per se*, whether lawful or otherwise, might trigger an evacuation. In the absence of a reasonably substantiated finding that civilians are unlikely to flee when sections of their village are being *lawfully* shelled, the Chamber's findings in relation to the causal effect of 'unlawful' shelling on the civilian exodus are incomplete and illogical. The findings fail, therefore, to meet the evidentiary standard of proof beyond a reasonable doubt.

317. Indeed, it is even open to question whether the Chamber made the requisite finding that Serb civilians left due to *illegal* shelling rather than to shelling (or even the *fear* of shelling) generally. In its key conclusion on this point, the Chamber stated:

> "*For the vast majority, if not all, of those leaving Knin on 4 and 5 August 1995, this fear* [fear of an "*artillery attack*", not "*fear of an unlawful artillery attack*" or "*fear of unlawful shelling*"] *was the primary and direct cause of their departure*".[254]

318. In relation to this Sub-Ground of appeal, the Appellant will also rely on material recently disclosed by the Prosecution which it will seek to adduce under Rule 115, namely:

> (i) 0345-8372-8405 Eng: Shorthand notes from 41st Enlarged Session of Supreme Defence Council (FRY), 14 August 1995: President Milošević stated that on the day of OS, the RSK was ordered to leave

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251 In relation to Knin, the Chamber observed that, "*in some cases, poor living conditions in Knin, the departure of others, and the imminent approach of Croatian forces may have had some bearing on persons leaving*" (TJ,para.1743).

252 TJ,para.1743.

253 See municipalities referred to in TJ,para.1762.

254 TJ,para.1743.

the Krajina without engaging the HV. The RSK mingled within the columns of evacuating civilians. According to Milošević, the decision to evacuate caused the exodus, and was made in spite of the fact that the RSK "*had all conditions provided for defence*".[255] The RSK's unreasonable and shameful decision to withdraw was executed with "*practically no resistance and no casualties*".[256]

(ii) 0308-7982-7988: Eng. Minutes from 42nd Session of Supreme Defence Council (FRY) 23 August 1995: General Mladić opposed the proposal to send RSK members to Eastern Slavonia, because if they did not want to defend their ancestral lands in the Krajina, they would not do so elsewhere;[257]

(iii) 0308-8830-8831: Eng. Minutes from 43rd Session of Supreme Defence Council (FRY) 29 August 1995: Item 1 on the session's agenda was "[i]*n view of the fact that the territory of the RSK was abandoned pursuant to a decision of the RSK leadership, due to which the defence of the RSK ceased to exist, the SDC concludes that there is no more basis for providing assistance to the RSK armed forces*".[258]

319. Rather than electing for these explanations of the Serbs' departure, which was a reasonable inference on the evidence and which was consistent with their departure not being due to a JCE, and hence the explanation most favourable to the Accused, the Chamber concluded that the "*primary and direct cause*" of the departure of 20,000 Serb civilians was the marginal percentage of artillery projectiles which did not fall within the immediate range of military targets.[259]

320. Furthermore, the Chamber did not cite any evidence that a single Serb civilian fled because of *unlawfully targeted* artillery projectiles rather than because of

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255 0345-8372-8405 Eng, P. 27/36. Milošević goes on to say that the RSK did not defend the Krajina at all but, rather, according to reports from police officers and citizens, ordered people to evacuate as soon as artillery preparation terminated (p. 28/36).

256 P.36/36.

257 0308-7982-7988 Eng, P. 3.

258 0308-8830-8831 Eng, P. 1.

259 See the Gotovina Appeals Brief in relation to the percentage of projectiles which fell outside the range of military objectives, which the Appellant adopts

the overall effect of lawful combat operations. This is a glaring evidentiary shortcoming.

321. The Chamber's reasoning was of this form:

(1) People left due to shelling;

(2) The shelling was unlawful;

(3) Therefore people left due to unlawful shelling.

322. This is a superficially valid, but in fact flawed, chain of reasoning.

323. It is flawed, first, because the premise is incorrect: the shelling was not unlawful.

324. However, even assuming that the shelling was unlawful, a reasonable explanation remains that civilians would have left the area because of the shelling, *whether it was lawful or not*. The Chamber had no evidence that people left their homes specifically because of *unlawful* shelling, rather than because of combat operations in general, and shelling in particular.

325. The flaw in the arguments becomes apparent when one considers the following, two syllogisms:

(1) People left due to shelling;

(2) The shelling was lawful;

(3) Therefore people left due to lawful shelling.

326. This makes the point that people could leave due to lawful or unlawful shelling, and unless there is evidence that they left because of unlawful shelling, it cannot simply be assumed that they left because of *unlawful* shelling.

327. Compare, too, this syllogism:

(1) People left due to shelling;

(2) The shelling occurred on a Tuesday;

(3) Therefore people left due to the fact that the shelling occurred on a Tuesday (i.e. they would not have left if the shelling had occurred on a Monday!).

328. This again shows the fallacy in the Chamber's reasoning, and hence its error of law. It is known as the fallacy of the "undistributed middle" - you can substitute any proposition for (2) above and obtain the conclusion that the people left for that reason.

*(2) The Chamber erred in failing to make any finding that the unlawful shelling was carried out with the intent to force civilians to leave*

329. In order to find that the crime of deportation was committed by means of unlawful shelling, the perpetrators' requisite *intent* must be found. Yet the Chamber failed entirely to make any findings as to this intent.

330. Instead, the Chamber found only that unlawful attacks on civilians and civilian objects were "*carried out with the intention to discriminate against Krajina Serbs on political, racial or religious grounds*".[260] The intention to discriminate is not at all the same thing as the intention to forcibly deport civilians by means of unlawful shelling. The Chamber therefore erred in law by failing to make a key finding in relation to the *mens rea* required on the part of the perpetrators committing deportation.

*(3) The Chamber erred in finding that the shelling amounted to forcible displacement*

331. It is well established that the commission of a crime within the Tribunal's jurisdiction is as a precondition to JCE liability.[261] It follows that if proof that a crime has been committed depends on proof that there was a JCE, then there is impermissible circular reasoning. It must be possible to describe the underlying crime committed without reference to a JCE. The corollary of that is that a Chamber, finding JCE liability, must be able to establish that the

260 TJ,para.1746.
261 *Brđanin*AJ,para.430.

underlying crimes were committed *without relying on the same evidence that it relied on to prove that there was a JCE in the first place.*

332. Here, as in so many other parts of the Judgment, the Chamber employed impermissibly circular reasoning. It reasoned that a JCE existed by reference to later crimes that were committed, and it proved that those later crimes were committed by reference to the existence of a JCE.

333. So with the crime of deportation. The Chamber, in finding that deportation occurred, was faced with serious evidential, conceptual and causation problems, namely:

- *evidential problem*: the commission of the core crimes must be proved without relying on evidence that there was a JCE
- *conceptual problem*: does it make sense to speak of deporting people by shelling them?
- *causation problem*: did the shelling in fact cause people to flee?

334. The causation problem has been discussed above. The other two problems are the subject of this Sub-Ground of appeal. It is submitted that the Chamber erred, conceptually, by conceiving it correct, as a matter of language and still more so as a matter of military reality, to describe persons as having been "*deported by shelling*". If people are unlawfully shelled, then that is itself a war crime. If it leads to them fleeing, even were that the intention, it is not the crime of *deportation*, which assumes that the people in question *are in the hands of* or *in the control of* the party to the conflict. It remains the war crime of unlawfully attacking civilian objects. This is obvious if one considers the whole spectrum of war crimes. Murders and rapes may lead to people fleeing the zone where these crimes occur, but fleeing rape and murder is not the same as being deported.

335. The Chamber also erred in relation to the evidential problem alluded to above. In finding that deportation occurred, the Chamber relied squarely on its findings relating to the JCE:

> "*The Trial Chamber further refers to the evidence reviewed in chapter 6.2.7 regarding the existence and objective of a [JCE], and particularly the evidence regarding the Brioni Meeting of 31 July 1995. Based on the aforementioned evidence and conclusions, the Trial Chamber finds that the HV forces and SP forces .... shelled ...with the intent to forcibly displace persons from these towns*".[262]

336. This is, first, circular. The JCE was proved, *inter alia*, by reference to the alleged deportation, which occurred subsequent to the Brioni Meeting. Then, the characterisation of those subsequent events as deportation is done by reference to the Brioni Meeting. A proves B, and B proves A.

337. Second, it is clear from the foregoing that, without the Brioni Meeting, the Chamber would not have been able to find that the events amounted to deportation. Thus the Chamber was unable to establish the commission of the underlying crimes without relying on the evidence that there was a JCE. This contravenes the principle enunciated in the *Brđanin* Appeals Judgment at para. 430.

*(4) The Chamber erred by confusing the means by which the alleged deportation was carried out with whether it was carried out for reasons permitted under international law*

338. At para. 1758, the Chamber stated:

> "*Considering that the forcible displacement was committed by means of crimes including murder, inhumane acts, detention, plunder and destruction, the Trial Chamber finds that the forcible transfer was without grounds permitted under international law*".[263]

339. This was, however, to mix up two entirely disparate concepts. The evacuation of civilians may be entirely justified under international law, namely as a measure to protect civilians from armed conflict, yet in its execution crimes may be committed against the very civilian population whom the evacuation seeks to protect. A situation can even be imagined in which, for their own

[262] TJ,para.1746.
[263] TJ,para.1758.

safety, criminal acts are used to persuade the civilians to move, if that is the only way to achieve that aim. In failing to appreciate this crucial distinction, the Chamber erred in law.

*(5) The Chamber erred by not distinguishing the mens rea required for deportation from that required for forcible transfer, and making no finding as to the former*

340. The Chamber also erred in law by merging the *mens rea* requirements for the two separate offences of forcible transfer and deportation. The Chamber stated the *mens rea* of deportation and forcible transfer as being the same, namely the perpetrator "*must intend to forcibly transfer the persons*".[264]

341. However since the crime of deportation differs from that of forcible transfer in that the former requires, as the *actus reus*, displacement across a *de jure* state border,[265] it follows that the *mens rea* required for deportation is also not merely to displace civilians but to do so *across a* de jure (or, in certain circumstances, a *de facto) state border*. The Chamber erred in law by failing to so find, and thus also failed to make the requisite legal finding for the purposes of the Appellant's conviction for deportation.

**Relief sought**

342. In light of the above, it is clear that the Chamber committed errors of law and fact which led directly to the Appellant's conviction. The Appellant respectfully requests the Appeals Chamber to reverse the impugned findings.

## IX. GROUND 9: ERRORS RELATING TO ARMED CONFLICT

343. The Chamber erred in law and fact, at paras. 1695-1697 in finding that the armed conflict in the relevant geographical area lasted at least until into the middle of September 1995, i.e. throughout the whole period of the Indictment.

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264 TJ,para.1741.
265 TJ,para.1738.

344. The Chamber's principal error was to find that the conflict did not end *via facti* because it was an *international* armed conflict, which continued in the adjacent state of Bosnia and Herzegovina into August and September 1995. This was an error because the Prosecution never alleged, in the Indictment or at trial, that the conflict was an *international* conflict. It was, therefore, too late for the Chamber to raise the issue of an international armed conflict *for the first time, in its Judgment*, and to find in the Judgment that the conflict was international, thereby depriving the Defence of any opportunity to challenge that allegation during the course of the trial.

345. Moreover, the Appellant submits that:

> (1) As a matter of customary international law, an armed conflict may end *via facti*;
>
> (2) The conflict in the Krajina ended *via facti* on or around 8 August 1995;
>
> (3) Crimes occurring after that date, therefore, were not committed within an armed conflict;
>
> (4) Therefore crimes occurring after 8 August 1995 fell outside the Tribunal's jurisdiction under Articles 3 and 5 of the Statute, both of which require an armed conflict as a jurisdictional prerequisite.

*(1) Legal standard*

*(a) Cessation of conflict via facti*

346. The law of armed conflict operates and must be observed until the conflict ends, but, as with the commencement of hostilities, there is controversy in IHL and practice as to when an armed conflict may be said to have ended. As one leading authority has put it:

> *"The law of armed conflicts operates and must be observed until the conflict ends, but, as with the commencement of hostilities, there is*

*controversy in international humanitarian law and practice, as to the date of its end".*[266]

347. The Tribunal's case law may be read as suggesting that an armed conflict can only be terminated by some sort of *formal agreement* between the conflicting parties, such as a peace treaty or the official surrender of one of the parties.[267]

348. The main advantage of this approach is the legal certainty it entails with regard to the (exact) termination date of a conflict and thus the application of IHL. The obvious problem with this approach is, however, its excessive formalism. It ignores the *actual situation on the ground*, i.e., situations where an armed conflict has been terminated as a matter of fact. For this reason, the prevailing doctrinal view is that an armed conflict can be terminated *via facti*.[268]

349. Undoubtedly, the most authoritative and clearest method of terminating an armed conflict is by means of a peace treaty. However, the fact remains that while a peace treaty is being negotiated a *de facto* complete cessation of hostilities may arise.

350. Just as IHL does not require a declaration of war, or a proclamation of a state of war, for an armed conflict to be said to have *commenced*,[269] determinations of an armed conflict's end point should not be bound by the constraints of excessive formalism. A formal declaration of peace, or signature of a peace

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266 L. Green, *The contemporary law of armed conflict*, Manchester: Manchester Univ. Press, 3rd ed. 2008,p.104.

267 Cf. *Tadić*, Decision on the Defence Motion for interlocutory Appeal on Jurisdiction, 2/10/1995, IT-94-1-AR 72,para.70: "… *an armed conflict exists whenever there is a resort to armed force … International humanitarian law … extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved*". Confirmed by *Kunarac et al*.AJ,para.57; *Limaj et al*.TJ,para.84; *Delić*TJ,para.40, and *Milutinović*TJ,para.127.

268 This is also the prevailing scholarly opinion. Cf. C. Greenwood, The Scope of Application of Humanitarian Law, in: D. Fleck, *The handbook of international humanitarian law*, Oxford: OUP, 2nd ed. 2008, at 72; H. Friman, in: R. Cryer et al., *supra* note 75, at 280; T. Stein / C. von Buttlar, *Völkerrecht*, Köln: Heymanns, 12th ed. 2009, mn. 1222; E. David, *Principes de droit des conflits armés*, Bruxelles: Bruylant, 4th ed. 2008,para.1233; K. Ipsen, *Völkerrecht*, München: Beck 5th ed. 2004, § 68 II marginal number 5. See also P. Wallensteen / M. Sollenberg, 'Armed Conflicts, Conflict Termination and Peace Agreements, 1989-96', 34 Journal of Peace Research (1997) 339, at 342 identifying three forms of termination.

269 See Green, *supra* note 266, p. 72–73 and para.353, below.

treaty or settlement, should not be regarded as a *conditio sine qua non* for legitimate pronouncements of a conflict's end.

351. The preferred, sensible approach, therefore, is to determine an armed conflict's duration by reference to the factual situation (*via facti*), i.e. by reference to the commencement of protracted armed violence at the beginning and the cessation of armed violence at the end.

352. This view is, first of all, supported by an analysis of the *relevant norms of IHL*.

353. First, the fact that the existence of an armed conflict requires that a certain threshold in terms of the intensity of the actual conflict be reached, most explicitly in case of a non-international armed conflict (cf. Article 1 Additional Protocol II to the Geneva Conventions ("AP II")), shows, by way of an inversion of this provision, that an armed conflict must be considered terminated when it falls below this threshold.[270]

354. According to Art. 3 (b) AP I, the Convention and the Protocol are no longer applicable "*on the general close of military operations*".[271] This is a factual test which does not depend on the conclusion of a peace treaty or settlement.

355. While prior to World War II states were obliged (by virtue of Article 1 of the 1907 Hague Convention III) to issue a formal declaration of war,[272] this is no longer true. Nowadays, it is generally recognized that a war or armed conflict can begin *via facti*, i.e., by the actual use of force. Indeed, the UN Charter's prohibition of the use of force in international relations (Art. 2 (4) Charter) has

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270 This idea has been taken up by J. Kreutz, among others, who proposes three criteria to assess if the armed conflict threshold is satisfied ('How and when armed conflicts end: Introducing the UCDP Conflict Termination dataset', 47 Journal of Peace Research (2010) 243, at 244.

271 Article 3 AP I reads: "*(b) the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release repatriation or re-establishment*".

272 Article 1 Hague Convention III: "*The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war*". Cf. also D. Turns, 'The Law of Armed Conflict', in: M. Evans, *International Law*, Oxford: OUP, 3rd ed. 2010,p.818; I. Detter, *The Law of War*, Cambridge: CUP, 2nd ed. 2000, at 10.

rendered formal declarations of war legally impossible or at least politically illegitimate.[273] This being so, it follows that an armed conflict can be terminated *via facti*.[274]

356. The *Encyclopaedia Britannica*, 'Law of War, Cessation of Hostilities' section, reads:

> "*Hostilities may be suspended pending negotiation between parties. ... Of course, it is possible to end hostilities without any treaty, neither the Falklands conflict nor the Iran-Iraq War ended in this way, ...*".[275]

357. Therefore, a peace agreement is obviously not the only possible legal means of terminating an armed conflict. It may also be terminated *via facti*.

*(b) Threshold/intensity*

358. Neither the Geneva Conventions nor AP I contain any definition of "*armed conflict*". Whether any particular intervention crosses the threshold so as to become an armed conflict will depend on all the surrounding circumstances.[276]

359. The legal test for the existence of an armed conflict was set down by the *Tadić* Appeals Chamber:

> "*... an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*".[277]

Also:

> "*The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict: the intensity of the conflict and the*

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273 I. Detter, *supra* note 272, at 12; House of Lords Select Committee on the Constitution, 15th Report of Session 2005-06, Waging war: Parliament's role and responsibility, Vol. I: Report (HL Paper 236-I, 27 July 2006),para.10.

274 Cf. Turns, *supra* note 272,para.818.

275 Emphasis added.

276 *Rutaganda*TJ,para.93

277 *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2/10/95,para.70; followed by: *Tadić*TJ,paras.561,628.

> *organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to the international humanitarian law".*[278]

360. Therefore, the *Tadić* Trial Chamber held that the criteria relevant to determining whether an armed conflict exists are:

> a. – intensity of armed clashes
>
> b. – the organization of its respective parties

361. The *Delalić* Trial Chamber offered further guidance:

> "…. *in order to distinguish an internal armed conflict from terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of the organization of the parties involved*".[279]

362. The ICRC's Commentaries to AP II distinguish between an armed conflict and internal disturbances, describing the latter as:

> "*situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order".*[280]

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278 *Tadić*TJ,para.562.

279 *Delalić et al.*TJ,para.184.

280 ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) - Commentary*, 8 June 1977,p.1354 mn. 4475.

363. Internal disturbances are defined as:

> *"…. marked by serious disruption of domestic order resulting from acts of violence which do not, however, have the characteristics of an armed conflict. For a situation to be qualified as one of internal disturbances, it is of no consequence whether State repression is involved or not, whether disturbances are lasting, brief with durable effects, or intermittent, whether only part or all national territory is affected or whether the disturbances are of religious, ethnic, political or any other origin*".[281]

364. In 1971, the Sub-Group of the Working Group established at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, recommended three criteria, subsequently incorporated in AP II, which had to be satisfied by the insurgents for recognition of armed conflict to apply:

> a. A responsible command
>
> b. Such control over part of the territory as to enable them to carry out sustained and concentrated military operations
>
> c. Ability to implement the Protocol

365. With regard to the first (a) requirement, the ICRC stated that:

> "*…the existence of a responsible command implies a degree of organization of the insurgent armed group or dissident armed forces … It means an organization capable, on the one hand of planning and carrying out sustained and concentrated military operations, and on the other, of imposing discipline in the name of de facto authority".*[282]

366. With regard to the second (b) requirement, the ICRC stated that:

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281 M. Harroff-Tavel, 'L'Action du Comité International de la Croix-Rouge Face aux Situations de Violence Interne', 75 Revue Internationale de la Croix-Rouge (1993), 211. See also *Musema*TJ,para.248.

282 ICRC, *supra* note 280,p.1352mn.4463.

> "…*In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of the territory they can claim to control will be that which escapes the control of the government armed forces. There must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol".*[283]

367. With regard to the third (c) requirement, the ICRC stated that:

> "… *this is the fundamental criterion which justifies the other elements of the definition: being under responsible command and in control of a part of the territory concerned, the insurgents must be in a position to implement the Protocol.*[284]

368. The ICRC has defined the criteria determining the existence of internal disturbances and tensions, i.e. situations *falling short of an armed conflict,* as follows:

> (a) *Riots*, that is to say, all disturbances which from the start are not directed by a leader and have no concerted intent;
>
> (b) *Isolated and sporadic acts of violence*, as distinct from military operations carried out by armed forces or organized armed groups;
>
> (c) *Other acts of a similar nature* which cover, in particular, mass arrests of persons because of their behaviour or political opinion.[285]

369. The *Tadić* Appeals Chamber appeared to regard the legal definition of "*protracted armed violence*" as a question of the intensity of the conflict.[286]

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283 *Id.*,p.1352,mn.4467

284 *Id.*,p.1353,mn.4470

285 ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949 - Commentary*, Oct. 1973, at 133. These criteria have also been adopted by the Inter-American Commission on Human Rights, Special Meeting of the Committee on Juridical and Political Affairs on Current Issues in International Humanitarian Law, Panel on Protection of Persons in Situations of Internal Disturbances and Tensions, February 2, 2006, at 2.

286 *Tadić*TJ,para.562.

370. In *Limaj*,[287] the Chamber gauged the intensity of the hostilities by reference to: the seriousness of the attacks, any increase in armed clashes, and the spread of clashes over the territory and over a period of time.

371. A review of the Tribunal's case law reveals that an armed conflict – the prerequisite of the Tribunal's jurisdiction under Articles 2, 3 and 5 of the Statute – is found to exist where there is "*protracted armed violence*" in the relevant area at the relevant time. Whether there is "*protracted armed violence*" depends, in turn, on whether the hostilities between the parties are sufficiently intense and sustained. Where armed clashes are not present throughout the Indictment period, the requirement of an armed conflict may not, therefore, be satisfied.

*2. Application to the case*

372. The Appellant argued at trial that the armed conflict in the Krajina region terminated *via facti* by cessation of intensity of the armed clashes and by the absence of SVK command and control over previously occupied Croatian territory.[288]

373. The Chamber's finding to the contrary that the relevant crimes were committed in the context of an armed conflict, ongoing throughout the Indictment period, is based entirely on its finding that the conflict was an *international* armed conflict (paras. 1694-1698). This was an entirely new development. Not once did the Prosecution argue at trial that the conflict was international. It was, therefore, a blatant violation of the Appellant's right to know the case against him - and hence his right to a fair trial - for the Chamber to posit such a fundamentally different type of conflict – an international one – for the first time in its Judgment convicting the Appellant.[289]

374. Thus the Chamber based its finding of an on-going, *international* armed conflict in August and September 1995 on evidence of:

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287 *Limaj*TJ,para.90.

288 See, for example, P2176, showing the surrender of 1,000s of SVK soldiers to the HV on 9 August 1995.

289 See *Kupreškić*AJ,para.124.

> "*…further clashes between the HV and Serbian forces including the SVK beyond 8 August 1995, taking place in Bosnia-Herzegovina*".[290]

375. While the Chamber "*recognize*[d] *that the bulk of this evidence relates to events that occurred outside of the Indictment area, as the participants in the armed conflict moved across the border and continued fighting in Bosnia-Herzegovina*", it nonetheless found that, "*the search operations that continued throughout the Indictment period provide further indication that during the Indictment period there was no termination of the international armed conflict sufficiently general, definitive and effective so as to end of applicability of the law of armed conflict*".[291]

376. Thus the Chamber implicitly acknowledged that beyond 8 August 1995, in the Indictment area, on the territory of the RSK, there were no clashes between Croatian Army (HV) and SVK. At the relevant time, the only armed clashes were occurring on the territory of another sovereign state, i.e. Bosnia-Herzegovina.

377. The Chamber erred, moreover, in finding that the search operations performed by SP forces in the Indictment area, throughout the Indictment period, provided proof of an armed conflict *after OS had concluded* given the complete absence of two elements required by IHL, even for the conflict to constitute a non-international armed conflict, namely (1) protracted armed violence and (2) the absence of any organised armed forces on the other side, "*which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement* [AP II]".[292]

378. Accordingly, the Chamber erred in failing to conclude that, applying the relevant principles of IHL, a state of armed conflict ceased to exist in Croatia after on or about 8 August 1995.[293]

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290 TJ,para.1695.
291 TJ,para.1697.
292 AP II,Art.1(1).
293 The Appellant agrees with the Prosecution that the Chamber did not need to decide the point whether the conflict was international or non-international (T.29043).

379. The Chamber erred in fact and in law by considering it relevant to its finding of an ongoing armed conflict in Croatia after 8 August 1995 that there were ongoing clashes between the HV and Serbian forces in Bosnia-Herzegovina after that date. This was erroneous for the following reasons:

(a) Upon OS's completion, on/about 8 August 1995, the HV crossed the border towards Grahovo in Bosnia-Herzegovina, there engaging in armed conflict with the Serbian Army from Republika Srpska ("VRS"). The VRS was, however, a different counter-belligerent than the SVK. The armed conflict in Bosnia-Herzegovina may not, therefore, be considered a continuation of the armed conflict in Croatia which took place during OS.

Taken to its logical conclusion, the Chamber's reasoning would mean that any conflict occurring in the adjacent territory of Bosnia-Herzegovina, for example in southern Herzegovina, would sustain the finding of an on-going conflict in Croatia, even if peace reigned in Croatia at that time. That is plainly incorrect as a matter of IHL.

(b) Armed conflict in the Indictment area began long before the Croatian Army launched OS. Throughout the whole preceding period since 1991, heavy clashes occurred between the HV and the SVK, undoubtedly characterized as an armed conflict under IHL. Upon successfully terminating OS, there were no intensive clashes (due to the absence of SVK forces) in the area. So, the intensity of the clashes, as one of the requisite elements for the definition of an armed conflict, ceased to exist.[294] Following OS's completion, no insurgent group had stable control of any part of the territory.

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294 See D882, 09/08/95 Order of the Republic of Croatia's Minister of Defence, Gojko Šušak on demobilization of 70,000 soldiers; D1820, Notes on UNSG Report further to UN Security Council Resolution 1009 and his suggestions to change the UNCRO mandate in Republic of Croatia; D554 - Report by Chief of the Main Staff General Červenko to President Tuđman on OS, 08/08/95, which gives an account of the surrender of the XXI Kordun Corps known to be the last organized SVK unit that withdraw from the Krajina region; see also P2176.
See also the evidence of Mikhail Ermolaev, Mile Đuric, Claude Bellerose, Lennart Widen, Sava Mirković, Milan Ilić, Laila Malm, Soren Liborius, Robert Williams, Erik Hendriks, Rajko Guša, Stig Marker-Hansen, Mile Mrkšić, referred to in the Appellant's final brief at para.47.

(c) Furthermore, as the Chamber found, the complete RSK political and army leadership fled from the area together with the vast majority of SVK combatants after OS. The very few former SVK combatants who did remain in the area hid in the woods, having lost contact with their command. With these circumstances in mind, any reasonable trier of fact would have concluded that there was a complete lack of organization on the part of insurgent forces and that none of the criteria for the existence of an armed conflict, in particular those set out in Article 1 of AP II, were satisfied.

(d) The Chamber erred in relying on the SP's post-OS terrain searches as proof of the existence of an armed conflict. It should be recalled that the SP's core duty, under domestic law, was *counter-terrorism*, not combat, activities. [295] No reasonable trial chamber would have found that isolated clashes between the SP and former SVK members and other enemy-orientated civilians/paramilitary provided sufficient evidence of an on-going armed conflict in the relevant area at the relevant time, in the absence of any intensity of armed clashes and the absence of any link between those individuals in a command structure.[296]

380. Finally, the Chamber erred in finding, at para. 1681, that only the Erdut Agreement of 12 November 1995 brought an end to the armed conflict in the area of the Indictment. This was a blatant error of fact on the record since the Erdut Agreement, concluded under the auspices of the UN, concerned the area of Eastern Slavonia, Baranja and Western Sirmium, not the Indictment area.

**Relief sought:**

381. The Appeals Chamber should, in light of the errors of law and fact identified above, apply the correct legal standard in evaluating the existence of an armed

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295 D527, Decree on Internal Organisation and Operation of the Ministry of the Interior of the the Republic of Croatia, Article 27; P1148, Decision of the Promulgation of the Law on Amendments to the Law on Imternal Affairs, Article 11

296 The Appeals Chamber may be aware of the story of the Japanese soldier, Hiroo Onoda, who surrendered in 1974, 29 years after World War II ended. He had been engaged in skirmishes with Filipinos over the preceding 30 years. Yet no one would suggest that an armed conflict continued in the Philippines until 1974.

conflict and consequently correct the Chamber's errors and find that an armed conflict ceased to exist in the relevant area on or around 8 August 1995 because of its termination *via facti* due to the lack of intensity of armed clashes and the absence of military organization on the part of the counter-belligerent. The Appeals Chamber should, therefore, reverse the Appellant's convictions that resulted from the Chamber's errors under this Ground.

## X. GROUND 10: LEGALITY OF THE JCE I AND JCE III DOCTRINES

382. This is no longer pursued as a self-standing ground of appeal.

## XI. GROUND 11: THE TRIAL CHAMBER ERRED IN LAW IN FINDING CROATIAN FORCES RESPONSIBLE FOR ALL CRIMINAL ACTS ALLEGED IN THE INDICTMENT

383. This is no longer pursued as a self-standing ground of appeal.

## XII. GROUND 12: ERRONEOUS IMPOSITION OF A MANIFESTLY EXCESSIVE SENTENCE

384. This ground is pleaded in the alternative, should the Appellant's appeal against conviction not succeed on all counts. If his appeal against conviction succeeds to any degree, reflecting a lesser degree of responsibility, then of course the Appeals Chamber will order a corresponding reduction in the Appellant's sentence.

385. It is submitted that the Chamber erred in law by abusing its discretion and passing a sentence on the Appellant that was in all of the circumstances excessive and disproportionate.[297]

*1. Sentencing Principles*

386. Sentencing Trial Chambers have considerable discretion[298] but appeals lie where a 'discernible error' is made.[299] Sentences must fit the gravity of the crime and the Accused's circumstances, both general and particular:[300]

> "[determining] *the gravity of crime requires ... consideration of the particular facts of the case, as well as the form and degree of participation of the accused in the crime*".[301]

387. Other sentencing principles, although relevant, cannot override this core objective.[302] A defendant may be punished solely on the basis of *his* or *her* wrongdoing.[303]

388. Criminal liability and sentencing are distinct; a finding of criminal liability for the most serious crimes does not necessitate the imposition of the severest sentence. This principle is essential in the case of JCE liability for, although all members are equal in law, sentences must nonetheless be individualized:

> "*Gradations of fault within the JCE doctrine are possible, and may be reflected in sentences given*".[304]

*2. The Chamber erred in its application of sentencing principles to the Appellant*

297 TJ,para.2623.
298 *Krnojelac*AJ,2003,para.11; *Babić*AJ,para.7.
299 *Nikolić*AJ,para.9; *Babić*AJ,para.7.
300 *Delalić et al*.AJ,para.717; *Babić*AJ,para.32.
301 *Aleksovski*AJ,para.182; *Delalić et al*.AJ,para.39.
302 *Nikolić*AJ,para.64.
303 *Nikolić*AJ,para.46.
304 *Nikolić*AJ,para.46.

389. The sentence of 18 years' imprisonment is excessive and disproportionate for a number of reasons. The Chamber committed a number of errors of law in arriving at this excessive sentence.

390. First, the sentence is excessive given that the Appellant was not found to have directly perpetrated or ordered any of the crimes of which he was convicted.

391. The Chamber erred in law by failing to recognise gradations of fault attributable to the different members of the alleged JCE. In particular, the Chamber imposed a sentence on the Appellant that was incommensurate with the lesser degree of responsibility associated with the commission of crimes by perpetrators not under his command at the relevant time. This is without prejudice to the Appellant's principal argument, above,[305] that the finding of responsibility, on this basis, itself violates the rules of individual criminal responsibility and the principle of culpability.

392. The Chamber correctly stated the principle that the determination of the gravity of an offence requires a consideration of the particular circumstances of the case and the crimes for which the person was convicted, as well as the *form and degree of participation* of the convicted person in those crimes.[306] However, the Chamber failed to apply this principle by not taking any account of the Appellant's degree of participation in the underlying crimes. The Appeals Chamber has consistently held that degree of participation is relevant to the gravity of the offence.[307]

393. Had the Chamber considered the degree of the Appellant's participation in the underlying crimes, as found by it, then it would have imposed a less severe sentence. The Chamber thus abused its discretion so as to justify the intervention of the Appeals Chamber.

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305 See, generally, Ground 1.

306 TJ,para.2599.

307 *BabićAJ*,para.88, and authorities cited therein; *Aleksovski*AJ,para.182; *Delalić et al*.AJ,para.39.

394. The Appellant's participation in the underlying crimes, as found by the Chamber, was limited, as indicated by the Chamber's own findings on the Appellant's *actus reus*.[308] The Chamber only found the requisite *mens rea* on the basis of weak inferences.[309] There was no direct evidence that the Appellant knew of or approved of any campaign to permanently remove the Serb population from the Krajina by force, fear or threat of force, persecution, forced displacement, transfer and deportation, as well as appropriation and destruction of property.

395. If the Appellant's convictions remain, therefore, nonetheless his sentence should be reduced so as accurately to reflect the Appellant's limited contribution to the alleged JCE, as found by the Chamber.

*3. Errors of law committed by the Chamber*

*(a) Double-counting*

396. The Chamber committed "*double-counting*" errors in imposing a manifestly excessive sentence on the Appellant.

397. The Chamber held that the Appellant's "*high-ranking position*" during the Indictment period, and the fact that he "*contribut*[ed] *to the JCE in several ways*", constituted "*abuse of his position*" which the Chamber then counted as an aggravating factor.[310] This constitutes wholly unjust "*double counting*". In effect, the Chamber counted as "*abuse of position*" precisely what it had relied on to impute criminal responsibility to the Appellant in the first place. Thus "*abuse of position*" was double-counted to aggravate the penalty.

398. First, the Appellant's position as Assistant Minister of the Interior and as Operation Commander in charge of SP Forces is precisely what the Chamber relied on to find him guilty on the basis of JCE in

308 TJ,para.2581.
309 The Chamber's reliance upon language such as "*must have known*" indicates that the nature of the case against the Appellant is one based upon circumstantial evidence.
310 TJ,para.2605.

the first place. It was in that capacity that his participation at the Brioni Meeting was regarded as vitally significant:

> "*2580. The Trial Chamber considered Markač's participation in the Brioni Meeting ... in relation to planning and preparing OS. It did so in light of Markač's position as Assistant Minister of the Interior in charge of SP matters and Operation Commander of the Collective SP Forces ...* " (emphasis added).

399. The Chamber would not have convicted the Appellant on the basis of JCE at all, had the Appellant not held the high-ranking position that he did. That position cannot, therefore, at the same time be an aggravating factor in sentencing. As the Appeals Chamber has held, where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing.[311]

400. Second, the Chamber "*double-counted*" its finding that the Appellant contributed to the JCE as aggravation of the penalty. Contributing to the JCE is, however, an essential ingredient of JCE liability. If there is no contribution to the JCE, there is no liability for JCE. So the Chamber cannot, at one and the same time, use the Appellant's alleged participation in the JCE to find him liable, and then as a factor aggravating the sentence. Yet that is precisely what the Chamber did:

> "[The Appellant] *did not fulfil the responsibility attached to his position to uphold the standards of international humanitarian law, but he abused it by contributing to the JCE in several ways, as detailed above in chapter 6.5*".[312]

401. In this same para., the Chamber erred by discounting what it described merely as "*some witnesses' evidence on efforts by Markač*

311 *Blaškić,*AJ,para.693; *Vasiljević*AJ,paras.172-173.
312 TJ,para.2605.

*that aimed at ensuring that his subordinates adhered to national and international laws of war*".[313] Revealingly, the Chamber only cites the Defence Final Brief. Yet several of the Chamber's *key findings* depended on evidence that the Appellant had tried to prevent crimes. Thus in relation to Ramljane, virtually the sole basis for the Chamber's finding that the SP had burned properties there was that the Appellant had shouted at his men that "*they should not have done this*". In relation to Grubori, the Chamber found, at para. 2234, that "*Janić and Čelić then heard Markač state angrily that there would be an investigation into the matter and those responsible would be punished*". At para. 2586, the Chamber found that the Appellant urged the use of units from outside the area to avoid revenge attacks.

402. There are, at least, two fundamental flaws here, both of reasoning and fairness to an Accused. The first is that it is both unfair and illogical to use a piece of evidence only for an incriminating purpose and not for an exculpatory purpose. Indeed that approach irresistibly suggests that the Chamber interpreted the evidence selectively in order to secure a conviction. Plainly, if the Chamber accepted that Markač shouted at his subordinates that they should not have burned houses, then that shows both that his subordinates burned houses and that Markač disapproved of such a practice and tried to prevent it. However the Chamber could not accept the latter as that would have crucial consequences for its findings that he wilfully "*created a climate of impunity*". So the Chamber simply ignored it.

403. Second, the Chamber in this passage patently failed to apply the principle that mitigating factors need only be proved on a balance of probabilities. On any view, the evidence that Markač shouted at his soldiers in Ramljane and the other examples given in para. 401 above showed that Markač disapproved of crimes; even if the Chamber did not consider that evidence sufficient to cast a reasonable doubt, it

[313] TJ,para.2605.

erred in not considering that, on a balance of probabilities, it amounted to a mitigating factor.

404. Third, the Chamber erred again in double-counting in relation to the Appellant's intent. Having found that the Appellant's knowledge of crimes by SP members combined with his continuing ordering of, and participation in, military operations was indicative of criminal intent, the Chamber then proceeded to consider the same evidence again as an aggravating factor, as an "*abuse of authority*".[314] Criminal intent is a fundamental element of every crime and thus, according to the Tribunal's jurisprudence, cannot reasonably be considered an aggravating factor for sentencing.

405. The Chamber further erred in law, in respect of his JCE III liability, by not sentencing the Appellant less severely for those crimes than for the crimes for which he was found responsible under JCE I. Yet plainly much greater criminal responsibility attaches to crimes which are planned as part of the JCE than for those which were only the natural and foreseeable consequence of the JCE (and which were even undesired by the Appellant).

406. The Chamber erred further by considering "*the vulnerability of the murder victims*" as an aggravating factor. This is wrong for a host of reasons.

407. First, while the Chamber found that murder was a natural and foreseeable consequence of implementing the JCE, it did not find that the murder of vulnerable victims was natural and foreseeable.

408. Second, on the contrary, the Chamber's finding that the JCE required that certain "Krajina Serbs" remain[315] – which would naturally be those too old or infirm to move – contradicts any notion that it was foreseeable, much less intended, that elderly victims should be killed.

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314 TJ,para.2605.

315 "*The purpose of the joint criminal enterprise required that the number of Serbs remaining in the Krajina be reduced to* [a] *minimum but not that the Serb civilian population be removed in its entirety*" (TJ,para.2314).

409. Third, the Chamber erred by apparently relying on what Gotovina said at the Brioni Meeting in aggravating the Appellant's sentence. That the Chamber, in para. 2603, was aggravating the sentences of both Accused is clear from the word, "are" ("*... for which the accused are held responsible ...*"). Yet what Gotovina said, taken in context, cannot possibly aggravate the Appellant's sentence.

410. Moreover, the Chamber utterly misconstrued those remarks, which could not on any fair view be deemed to amount to contemplating, much less accepting, that there would be "*particularly cowardly and blameworthy*" murders of the elderly and disabled. Thus the Chamber acted utterly unfairly, and abused its discretion, in using these factors to aggravate the Appellant's sentence.

411. The Chamber also erred in the following respects:

*(b) Good Character*

412. The Chamber failed to give credit for good character, apparently misunderstanding what good character is, and confusing it with whether the Appellant was virtuous or not (hence the curious reference to "*a good character*" in para. 2610), whereas the term is generally understood as referring to lack of criminal convictions and good conduct (i.e. no disciplinary violations) while in custody.[316] The Appellant had these and the Chamber erred in not giving appropriate credit for it.

*(c) Failure to take former Yugoslavia's sentencing practices properly into account*

413. The Chamber stated that it had taken sentencing practice in the former Yugoslavia into consideration, yet it failed to give any reasons as to why it imposed a sentence very close to the maximum sentence available in the former Yugoslavia for war crimes, or even to explain

316 P. Murphy, Murphy on Evidence, Oxford: OUP, 11th ed. 2009, at 135: "*In a criminal case the accused is entitled to adduce evidence of his good character by showing that he has no previous convictions* ..." (emphasis added).

how it had engaged with the criteria affecting sentences which applied in the former Yugoslavia.

*(d) Conflating high-ranking responsibility for OS with high-raking responsibility for the JCE*

414. Finally, and most fundamentally, the Chamber systematically confused, in sentencing as it did in conviction, high-ranking responsibility for implementing OS, which the Chamber accepted was a legitimate military operation, with high-ranking responsibility for implementing the alleged JCE. As Assistant Minister of the Interior for the SP, the Appellant had a duty to command the SP during, and in the aftermath of, OS. His position in that respect was a high-ranking one. However the Chamber's findings did not support any finding that his participation in the JCE was akin to a high-ranking or leadership role. Yet it sentenced him as severely as if he was. This was an error of law.

*(e) Failure to give proper consideration to Appellant's poor state of health*

415. The Chamber further erred by failing to give proper consideration to the Appellant's poor state of health, as demonstrated by his medical files, as a mitigating factor. While the Chamber stated that it took this factor in consideration in mitigation of the sentence[317], it is not at all clear how it did so, as it did not indicate what sentence he would have received but for this mitigating factor.

*(f) No credit for good behaviour*

416. Finally, the Chamber erred in giving the Appellant no credit for good behaviour[318], while it mitigated Gotovina's punishment for good behaviour[319], when the only difference between them, as found by the Chamber, was that the Appellant once breached the conditions of his provisional release (for which he was punished by losing his

317 TJ,para.2610.
318 *Ibid.*
319 TJ,para.2608.

provisional release); against that, the Appellant, unlike Gotovina, had voluntarily surrendered to the Tribunal.

417. In all the circumstances, the Chamber imposed a manifestly excessive sentence, entitling the Appeals Chamber to intervene to impose an appropriate sentence.

**Relief Sought**:

418. The Appeals Chamber should correct the Chamber's abuse of its discretion and reduce the Appellant's sentence.

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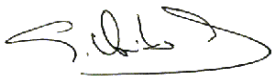
Respectfully submitted,



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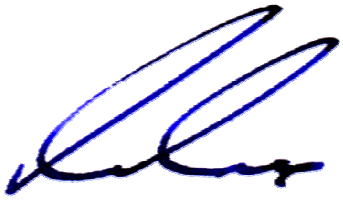

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