**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-04-74-A

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Carmel Agius
Judge Fausto Pocar
Judge Liu Daqun
Judge Bakone Justice Moloto

Registrar: **Mr. John Hocking**

Date filed: **28 July 2015**

THE PROSECUTOR
v.
JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
and BERISLAV PUŠIĆ

PUBLIC

NOTICE OF RE-FILING OF REDACTED APPEAL BRIEF OF BERISLAV PUŠIĆ

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Ms. Dijana Tomašegović-Tomić and Mr. Dražen Plavec for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Jairaj Roger Sahota for Berislav Pušić

1. The Defence for Berislav Pušić after consultations with the Prosecution files this notice pursuant to the Appeals Chamber's Decision on the Prosecution's Urgent Motion to Reclassify Public Briefs and Modify the Public Redacted Briefing Schedule dated 8 July 2015.

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Date filed: **12 January 2015**

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INTRODUCTION

1. The conviction of PUŠIĆ ("the Appellant") by a Majority of the Trial Chamber raises profound questions about the viability, scope and application of the Tribunal's Joint Criminal Enterprise ("JCE") theory of criminal liability. In the Impugned Decision the Majority found that a JCE existed during the indictment period of almost unprecedented scale and breadth. It led to the commission of crimes aimed at realising the deportation and expulsion of the Muslim population from territory held by the HVO ("Croatian Defence Council") of the HZ(R) HB ("Croatian Community and Republic of Herceg Bosna") in Bosnia and Herzegovina ("BiH"). These crimes were committed in order to further an agreed ultimate purpose and a single "criminal common purpose" between the Accused. The agreed object of this ultimate purpose has been framed in extraordinarily broad terms and encompasses two visions; either the creation of an independent state in HZ(R) HB territory with close ties to Croatia or the annexation of territory to create a Greater Croatian Republic modelled on the 1930 Banovina.

2. To find that a JCE existed on such a vast canvas would, it might be fair to assume, require clear and incontrovertible evidence of planning and intent on the part of those many individuals said to be involved in its formulation and execution. However no such evidence was presented before the Majority. Instead, it is submitted that the inferences drawn by the Chamber from material documenting the historical genesis of the alleged JCE are too broad and extensive to be proved beyond a reasonable doubt. Moreover, the Majority arrived at the JCE findings because of wholesale errors in their approach to evaluating this evidence.

3. Having erroneously found that a JCE existed, the Chamber then compounded its errors. Through the overly broad application of JCE theory it further erred by finding that the Appellant was a party to the JCE and participated in it whilst possessing the required shared JCE intent.

4. The errors of fact in the Chambers findings concerning PUŠIĆ's powers within the Croatian Defence Council ("HVO") are another important plank of this Appeal. PUŠIĆ was not convicted of being a high-level leader of the HVO or policymaker. There was no finding that he took part in planning the JCE. It was also

accepted that PUŠIĆ was not a direct perpetrator of any crimes of violence. Instead, the Chamber held that his main contribution to the JCE came in implementing aspects of it by for example, acting as an advocate and spokesman person for the HVO in its relations with external bodies. The Chamber's manifold unsubstantiated, inconsistent and contradictory findings concerning his role and conduct indicate that the Chamber erred in fact in finding that he had any significant or substantial powers over HVO personnel, structures and processes.

5. The Grounds of Appeal in this notice consist of errors of law that invalidate the Judgement or factual errors that no reasonable tribunal of fact could have reached resulting in a miscarriage of justice. Whether taken cumulatively or individually, the grounds of appeal identified satisfy the relevant standards of review.

6. The Appellant thus seeks the reversal of the Trial Judgement from the Appeals Chamber. The remedy sought for this request and the grounds of appeal against the Trial Judgement ("TJ") are set out below.

7. In the alternative, it is requested that the Appeals Chambers reduce the manifestly excessive sentence imposed on the Appellant by the Trial Chamber.

8. A full procedural history of these proceedings can be found in Volume V of the Trial Judgement.[1]

9. All parties are asked to note that this Brief follows the same order as the Notice of Appeal filed on 16 May 2014, pursuant to the Practice Direction IT/201. The submissions contained in Ground 6 have been re-organised to help the Chamber and Parties understand the arguments in light of the complexity of the case, the structure of the Indictment, and the large number of convictions for offences in different geographical locations. Thus, the arguments relevant to Ground 6 (which include 28 sub-grounds) have been re-organised and will now be considered under the paragraph headings and numbering used in the section of the Trial Judgement dealing with "Berislav Pušić's Responsibility under the JCE 1."[2] Re-ordering causes no prejudice to any party.

[1] TJ, Vol.V, para.20 *et seq*.
[2] TJ, Vol.IV, paras.1094 to 1212.

Accordingly, the Appellant seeks the Chambers leave under Article 4 of the Practice Direction, to present the arguments in Ground 6 in a revised order.

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GROUND ONE - THE TRIAL CHAMBER ERRED IN FACT AND LAW IN ITS ASSESSMENT OF MR PUŠIĆ'S POWERS WITHIN THE HVO – (ARGUMENTS APPLICABLE TO ALL CONVICTIONS)

THE TRIAL CHAMBER ERRED IN FACT AND LAW IN ITS ASSESSMENT OF MR PUŠIĆ'S POWERS WITHIN THE HVO – GROUND 1 – PARAS.8-9 OF THE NOTICE.

Grounds

10. The Chamber erred in its assessment of PUŠIĆ's "substantial" or "significant" powers as an official of the HVO. These errors of fact occasion a miscarriage of justice warranting a reversal of the Accused's conviction because the Chambers findings concerning PUŠIĆ's "contribution to the perpetration of crimes" are predicated on him using his powers over HVO detainees and more specifically over their release and exchange, leading to their removal to BiH held territory and third countries.[3] In this regard it is important to note the precise terms of the Chamber's relevant factual findings:

a. The Chamber rejected the Prosecution's contention[4] that PUŠIĆ was a leader of the HVO (as is implicit from the concession that he was not a high level official.) It also noted that decisions relevant to PUŠIĆ's spheres of activity were often taken at a higher political level than his station.[5]

b. It found his contribution related to the implementation rather than planning or formulation of the JCE.[6]

c. In determining the extent of PUŠIĆ's contribution, the Chamber held that PUŠIĆ had "substantial powers" in certain areas of HVO activity and "significant powers" in relation to his dealings with the HVO and Croat leadership and the international community.

d. Thus, PUŠIĆ was said to have "substantial powers"[7] in respect of Bosnian Muslim detainees, whether civilian or military, in connection with their

[3] TJ, Vol.IV, para.1094.
[4] TJ, Vol.IV, para.1023.
[5] TJ, Vol.IV, para.1023.
[6] Ibid.para.1091.
[7] Ibid.para.1202 sets out the substantial powers of the Accused.

i. release from custody[8] and exchange[9]
ii. use for forced labour whilst in custody[10] (although in another passage from the Impugned Decision it was held that the accused had "significant powers" to send detainees to work.)[11]
iii. conditions of their detention[12] (although in another passage from the Impugned Decision it was stated that he had "significant powers" in relation to detention centres.[13])
iv. maintaining their detention[14]

e. In contrast, PUŠIĆ was found to have a lesser degree of "significant powers" to
i. represent the HVO before the international community[15]
ii. make representations to the HVO leadership[16]
iii. make representations to the Croat leadership.[17]

f. As a consequence of his exercise of all these powers the Chamber described PUŠIĆ as a key player in exchange negotiations and the movement of people[18] who exercised these powers to achieve the objectives of the HVO.[19]

g. Summing up its JCE findings it held that PUŠIĆ "methodically organised" the release of Muslims to ensure the departure to Muslim territory or third countries.[20]

[8] Ibid. It was also held that the accused had significant powers in this field as of May 1993 which increased in December 1993 (para.1050.).
[9] Ibid.
[10] Ibid.
[11] Ibid.para.1203.
[12] Ibid.
[13] Ibid.para.1056.
[14] Ibid.
[15] Ibid.para.1202 also sets out the significant powers of the Accused.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.

h. He also regularly informed the HVO leadership of the progress of efforts after the 10 December 1993 to expel those detained by the HVO from territory under their control.[21]

i. He was described as the link between the workings of the network of HVO detention centres and the HVO leadership and the most important members of it. [22]

No Significant or Substantial Powers

11. The Chamber erred in finding that PUŠIĆ had any "significant" or "substantial powers" over any aspect of HVO operations or personnel. No reasonable Chamber could have made these findings. These errors invalidate the decision because the Chamber's findings on PUŠIĆ's powers are the foundations for its subsequent decisions concerning the Appellant's participation in the JCE and his *mens rea*[23] and these errors invalidate those findings. Cited below in this regard are general submissions that apply to all the sub-grounds under this heading concerning:

a. The Chamber's Erroneous Assessment Of Exculpatory Evidence,
b. Errors And Failings In The Chambers Findings Concerning PUŠIĆ's Status Within The HVO,
c. Internal Contradictions Invalidating The Chambers Reasoning,
d. The 6th August 1993 Commission.

a. Exculpatory Evidence from Marijan BIŠKIĆ Is Ignored

12. In making its findings concerning PUŠIĆ's "substantial" powers over the fate of Bosnian Muslim detainees and his other significant powers the Chamber disregarded relevant exculpatory evidence from one of the key HVO insider prosecution witnesses, Marijan BIŠKIĆ.[24] He was the Croatian HVO Assistant Minister for Security in the

[21] Ibid.para.1209.
[22] Ibid.para.1209.
[23] In the introduction to the Section entitled "Berislav Pušić's Responsibility under JCE 1" it states "The Chamber will now analyse the extent to which Berislav Pušić contributed to the perpetration of crimes by using his powers over HVO's detainees, and more specifically over their release and exchange, leading to their removal to ABiH held territories and third countries.," Ibid.para.1094.
[24] No reference to this evidence in the passages of the Judgement concerning BIŠKIĆ which are TJ, paras. Vol I, 659, Vol II, 1519, 1637, 1737, Vol IV, 1092, 1093 1142. 1149. 1186 and 1196.

Department of Defence and an important witness for the Prosecution. Arriving in BiH in November 1993 he was asked to look into and report on the work of the Military Police, SIS and the operation and management of HVO detention centres.[25] It is submitted that BIŠKIĆ's findings, the actions he implemented and oversaw and his testimony concerning PUŠIĆ confirms that PUŠIĆ had no powers over any aspect of HVO activity. When asked to comment on the extent of PUŠIĆ's authority BIŠKIĆ testified that;

> "He [PUŠIĆ] could not issue an order to me or to anybody else, I believe."

13. BIŠKIĆ could not have been better placed to reach a conclusion on the remit of PUŠIĆ's powers and responsibilities. BISKIC's evidence suggested that he was one of the superiors within the HVO PUŠIĆ had to approach when making any request of his own initiative. The conclusion he reached was expressed in unambiguous language and its meaning is incontrovertible. If BIŠKIĆ was right the Chambers findings concerning PUŠIĆ's de facto powers would be wholly invalidated. Yet the Chamber entirely failed to address the clear and obvious glaring contradiction between BIŠKIĆ's findings and their own conclusions concerning the substantial or significant powers PUŠIĆ was said to have exercised. No attempt is made to reconcile this contradiction by, for example, explaining why BIŠKIĆ's evidence on this topic is not reliable. Indeed, one reference made to BIŠKIĆ by the Chamber concerns a request PUŠIĆ made to BIŠKIĆ suggesting that some of the detainees at the Heliodrom should be moved to Gabela Prison in order to reduce prison overcrowding.[26] This episode perfectly illustrates PUŠIĆ's limited influence and patently cannot support the Chambers findings regarding PUŠIĆ's allegedly "substantial" powers in this area.

14. The Chamber has therefore erred in fact in reaching its conclusions concerning PUŠIĆ's powers and participation in the face of clear contrary evidence from one of the main witnesses called by the Prosecution to the contrary.

[25] BIŠKIĆ T.15326, T.15046-7 and T.15053. His testimony concerning PUŠIĆ's influence over the use of Bosnian Muslim detainees for forced labour is particularly instructive in highlighting flawed approach adopted by the Chamber and is dealt with below.
[26] TJ, Vol II, Para.1519. Note that on 23 December 1993, Pušić asked Biškić, the SIS, the chief of the Military Police Administration, Radoslav Lavrić, and the military prosecutor to inform him of the procedure to be followed in order for the ICRC to obtain authorisation to visit HVO centres.

15. It also erred in law in its approach to determining the issue of PUŠIĆ's participation by wholly failing to address relevant contradictory evidence presented by BIŠKIĆ. The Trial Chamber thus failed to provide sufficient reasons for any of its findings concerning PUŠIĆ's powers and authority.

b. Failure to Identify Subordinates and Position within HVO Chain Of Command

16. As a preliminary observation, the Appeals Chamber is asked to note the view of the Minority regarding the theoretical liability of the Appellant under Article 7(3). The Minority states that PUŠIĆ

> "did not have command or disciplinary authority, he cannot be found responsible for any count under article 7 (3) of the Statute."[27]

17. In any event, and in light of the testimony of BIŠKIĆ one would have expected the Chamber to have conducted a thorough and systematic review of the evidence adduced at trial to support its findings and thereby rebut any claims alleging PUŠIĆ's absence of authority. As a matter of logic, any such enquiry concerning PUŠIĆ's powers over any aspect of the operation of the HVO, would need to address three key questions:

a. Who were PUŠIĆ's subordinates;
b. What was PUŠIĆ's relationship with the HVO command structure vis a vis these subordinates;
c. Did that relationship afford him effective control over their activities?

18. In a leadership case such as this, where the crimes on the indictment are not said to have been physically committed by HVO leaders but by operatives under their control, this exercise is essential. Yet, in the case of PUŠIĆ the Chamber fails to address any of these questions despite the lengths to which efforts are made to define his so-called "powers." It conspicuously fails to identify PUŠIĆ's subordinates in respect of the three formal positions he held within the HVO during the indictment period, namely in his

[27] TJ, Dissent, Vol VI, page 489.

capacity as an employee of the Military Police before 5 July 1993, as Head of the Service of Exchange[28] after that date and as Head of the notional 6th of August 1993 Commission.

19. This omission is troubling given that there is no clear evidence that PUŠIĆ had any *de jure* powers over important areas such as releases, the conditions of detention, forced labour and exchange negotiations by virtue of his posts as a military police officer and Head of 5 July Service of Exchange. The 6th August 1993 Commission, which did include within its remit some reference to *de jure* powers in these fields, was entirely ineffective.[29] Through none of these posts can PUŠIĆ be linked to any of the direct perpetrators of these crimes by way of a superior –subordinate relationship.

20. This defect explains why the Chamber cannot coherently explain where PUŠIĆ stood in the HVO chain of command. For example, the Chamber found that the Service of Exchange created on the 5th of July 1993 was answerable to the HVO of the HZ(R) HB,[30] a conclusion that does not explain how PUŠIĆ came to have authority to issue orders to staff at the Heliodrom or to military personnel stationed in Mostar responsible for granting access to humanitarian convoys or those officials responsible for medical evacuations. Consequently, without these predicate findings, the Chamber inevitably fails to determine PUŠIĆ's relationship with the key personnel who occasioned the crimes that he has been convicted of.

21. In the key areas he is said to exercise "substantial" or "significant" powers the Chamber cannot therefore determine:

a. PUŠIĆ's relationship with the prison governors and their staff at the detention centres he is ascribed responsibility for.
b. PUŠIĆ's relationship with the military personnel responsible for taking prisoners on forced labour assignments. [31]
c. PUŠIĆ's relationship with the military personnel manning checkpoints and controlling the circulation of humanitarian aid and population movements in HVO held territory.

[28] TJ, Vol.IV, paras.656-9.
[29] See discussion at paras.28 *et seq*.
[30] TJ, Vol.IV, paras.663-5.
[31] See the discussion in "*Forced Labour Powers,*" post

d. PUŠIĆ's relationship with the HVO military personnel responsible for committing the crimes in the Indictment.

c. Contradictory Findings and the PUŠIĆ Paradox – Not a Leader, Not A High Level Official, No Subordinates But Still Influential?

22. In a section of the Impugned Decision dealing with PUŠIĆ Powers to Represent the HVO before the International Community and representatives of the Armed Forces of the Republic of Bosnia and Herzegovina ("ABiH") the Chamber qualifies its findings concerning PUŠIĆ's significant powers in this area, holding that:

a. PUŠIĆ was "not an official per se" but depended on his superiors whom he consulted to and reported to when making a decision.[32]

b. In such cases "he did not have autonomous decision making power".[33]

23. These propositions reflect important admissions made by international community witnesses such as [REDACTED][34] and DV[35] who dealt with PUŠIĆ regularly on issues such as prisoner exchanges and humanitarian evacuations and believed that he could not take decisions without the green light from his superiors.

24. In contrast, when describing PUŠIĆ's involvement in the exchange and release of detainees, his alleged control over detention centres and forced labour and humanitarian evacuations, the Chamber held that PUŠIĆ did have decision making authority. However, the Chamber's distinction between PUŠIĆ's significant powers (in areas where he had non-autonomous decision making powers) and substantial powers (in areas he could make decisions) is artificial. It is a device that allows the Chamber not to link the evidence of DV and [REDACTED] regarding PUŠIĆ's dealing with external representatives with that of BIŠKIĆ, who arrived at the same conclusion as [REDACTED] and DV only in relation to PUŠIĆ's involvement in the internal, rather than external communication operations of the HVO.

[32] TJ, Vol.IV, para.1079.
[33] TJ, Vol.IV, para.1081.
[34] [REDACTED]
[35] Defence Final Trial Brief, paras.129-135.

25. This discrepancy in the Chamber's reasoning highlights another key question that is not addressed in the Impugned Decision. If PUŠIĆ was not a "high level official" how could he exercise "substantial" or "significant" powers over any aspect of HVO activity if his subordinates or place in the HVO hierarchy cannot be precisely identified? In other words, if PUŠIĆ is said to be a mid or low ranking HVO official implementing directives from above by transmitting orders to those on the ground, who exactly on the ground were his subordinates?

26. This is the paradox concerning PUŠIĆ's role that arises from the Trial Chamber's Judgement.

27. Without explicitly facing this conundrum head on, the Chamber draws conclusions concerning PUŠIĆ's powers and influence that either have no basis in fact or logic as they are inconsistent with and directly contradict the Chambers own findings elsewhere:

a. On the one hand PUŠIĆ is described as a mid-low ranking HVO official (the precise rank is never specified) said to be the "link" between the workings of the network of HVO detention centres and the HVO leadership and the most important members of it[36] because of the "substantial powers" he exercises in these areas. On the other hand the Chamber also concedes that PUŠIĆ was only in "occasional direct contact"[37] with the very same HVO leaders and that most of his communications were in writing[38] and took the form of many reports that he circulated to HVO leaders.[39] Little reference is made to any material circulated to him from the leadership by way of directives, orders and commands as would be expected in the case of an important and influential HVO official, whatever his status.

b. The Chamber's findings concerning PUŠIĆ's dealings with the international community are impermissibly vague. The description given of PUŠIĆ's "significant... even decision making ...power of representation" and resultant

[36] TJ, Vol.IV, para.1209.
[37] TJ, Vol.IV, para.1086.
[38] TJ, Vol.IV, para.1089.
[39] Ibid.

"broad authority"[40] in respect of HVO dealings with international representative are the clearest examples of such failings.

c. The Chambers findings concerning PUŠIĆ's lack of autonomous powers in his dealings with the international community representatives cannot be squared with its conclusions concerning his role in blocking humanitarian aid in Mostar during and before the siege of that city.[41]

d. The 6th August 1993 Commission.

28. The Chambers findings concerning PUŠIĆ's powers following his appointment at President of the Commission for HVO Prisons and Detention Centres on the 6th August 1993 ("the 6th August 1993 Commission") also warrant close scrutiny for the reasons cited above.[42] The Chamber erred in fact in attaching any weight to its findings that PUŠIĆ had certain *de jure* or any *de facto* powers arising from his position in this Commission. This was one of the most important factors frequently cited by the Chamber as a reason for the Appellants conviction.[43]

29. The Chamber's findings cannot be sustained because when examining the influence of this body it held that there was no evidence that the 6th August 1993 Commission ever met or accomplished the tasks it was assigned.[44] The Chamber arrived at this finding in response to submissions from the Appellant in the Defence Final Brief that the Commission existed on paper only[45] and that PUŠIĆ therefore in reality had no *de facto* powers flowing from his appointment to it. For example, in PUŠIĆ's communications with the HVO leadership almost no reference is made to the 6th August

[40] TJ, Vol.IV, para.1081.
[41] See discussion at para.156 *et seq.*
[42] TJ, Vol.IV, para.1040.
[43] See for example, "Berislav Pušić, as a military policeman and subsequently as head of the Exchange Service and the President of the Commission for HVO Prisons and Detention Centres, had substantial power..." TJ, Vol.IV, para.1202.
[44] TJ, Vol.1,para.625 and Vol III, para.202 and Vol IV, para.1039-40. In this respect the Chamber reflected the evidence of one the members of the Commission, Joseph PRALJAK. PRALJAK claimed the Commission never met and that he did not take part in any of its work. J. PRALJAK, T:14974.
[45] TJ, Vol.IV, para.1038.

Commission.[46] PUŠIĆ is often referred to in this correspondence with the leadership as the Head of the Exchange Service or Exchange Commission.

30. In its analysis the Chamber examined several documents connected with the work of the Commission.[47] From this evidence it erroneously held that PUŠIĆ, as President of the Commission (i) had the role of compiling a list of all HVO detainees and sorting them into categories,[48] (ii) the power to organise the registration and classification of HVO detainees,[49] (iii) the role of regulating the release of detainees,[50] and played a key role in the release of detainees,[51] (iv) took part in the functioning of and security of detention centres and prisons,[52] and (v) issued a decision rather setting out the procedure to be followed for the release of detainees from HVO detention centres.[53] The Chamber further erred in not clarifying whether these conclusions reflect findings of *de jure* powers held by PUŠIĆ or *de facto* powers. Neither finding is warranted on the evidence given the Chamber's qualification as to the Commissions limited effectiveness and sphere of operation.[54]

31. Finally, when considering PUŠIĆ's powers over the conditions of detention of HVO detainees the Chamber accepted that it was necessary to focus on the evidence of PUŠIĆ's *de facto* involvement in this area because it acknowledged that the 6th August 1993 Commission never met to fulfil its remit. In fact this is the correct approach that should have been adopted globally in the Chamber's analysis of PUŠIĆ's influence.[55]

Power to Register and Classify Detainees[56]

32. The Chamber erred in finding that PUŠIĆ had the power and responsibility[57] to register and classify detainees. What the evidence merely shows is that PUŠIĆ made efforts to compile lists of those in detention at various detention facilities including the

[46] TJ, Vol.IV, para.1089.
[47] TJ, Vol.IV, para.1040.
[48] TJ, Vol.IV, para.1044.
[49] TJ, Vol.IV, para.1044.
[50] TJ, Vol.IV, paras.1049-50.
[51] TJ, Vol.IV, para.1156.
[52] TJ, Vol.IV, paras.1052, 1054, 1056.
[53] TJ, Vol.II, paragraph 1450 and Vol. IV paras.1049 and 1158.
[54] See also para.34 of this Brief.
[55] See Forced Labour Powers, para.58 *post*.
[56] TJ, Vol.IV, paras.1041-6.
[57] TJ, Vol.IV, para.1203 and 1042 – 1046.

Heliodrom,[58] Gabela and Ljubuški[59] detention facilities that were intermittently successful.

33. In respect of any *de jure* powers PUŠIĆ had in this field, it is important to note that PUŠIĆ derived no authority from his position as Military Police Control Officer. Further, the remit of the Service of Exchange of 5 July 1993 for example did not confer on PUŠIĆ a power to register and classify detainees. It did however refer to an obligation to maintain a database of those in custody.[60]

34. The Chamber has also mistakenly assumed that PUŠIĆ exercised the powers in this area referred to by him in a document connected to the 6 August 1993 Commission[61] and a work plan he prepared after the 10th December 1993 announcement by BOBAN.[62] As noted elsewhere, the Chamber acknowledged that the 6 August 1993 Commission was largely inactive and did not achieve its objectives.[63] The fact that certain documents connected with this Commission made reference to it having a power to register and classify detainees does not mean that PUŠIĆ actually exercised this power. Far too much emphasis is placed by the Chamber on this document.[64]

35. It is accepted that the evidence does demonstrate that PUŠIĆ had some limited *de facto* involvement restricted to compiling lists of those in detention. However, it is clear that PUŠIĆ did not attend the detention facilities to compile these lists but they were sent to him by the officials and wardens stationed there who were not his subordinates. The Chamber also rightly concludes that any efforts made by the HVO to classify and separate detainees based on their status were never completed.[65] Accordingly, this evidence does not support the sweeping generalisation that PUŠIĆ had a "power" to register and classify detainees given that, on occasions, taken at its highest, it shows that incomplete lists of those in custody were sent to PUŠIĆ by the relevant officials at the at the various HVO detention centres.

[58] TJ, Vol.IV, paras.1134 – 1136.
[59] TJ, Vol.IV, para.1171-3 (re Gabela facility) and para.1181 (re Ljubuški facility.)
[60] TJ, Vol.I, para.659.
[61] P04141.
[62] TJ, Vol.IV, para.1127.
[63] TJ, Vol.I, para.625
[64] P04141.
[65] TJ, Vol.IV, para.134 Vol IV (re Heliodrom) and Vol.III paras.202-3 (re Gabela). The Chamber also conceded that there was no evidence that PUŠIĆ was ever sent a list of detainees at Vitina Otok (TJ, Vol.IV, para.1185) and the prisoners at Dretelj (TJ, Vol.IV, para.1168) were ever registered and classified "in line" with P04141

Powers to Grant Access to Detention Centres[66]

36. The Chamber erred in fact in finding that any authority PUŠIĆ had to grant access to detention centres reflected his unilateral powers in this area. This was not a reasonable inference given that (i) no evidence was presented about internal HZ(R) HB procedures relevant to this area and (ii) the other evidence presented at trial suggesting that PUŠIĆ had very limited, if any authority.[67] Furthermore, the Chamber made another contradictory finding in holding that on certain occasions, when PUŠIĆ was uncertain of the procedure to be followed to obtain permission he sought information from other more senior HVO officials authorities (in respect of requests made by the ICRC to visit certain facilities.)[68]

37. The only reasonable inference from this material is that PUŠIĆ was merely obtaining the necessary permissions and paperwork from the HVO hierarchy to authorise visits for external representatives rather than exercising any unilateral powers.

Powers to Release Prisoners

38. The finding that PUŠIĆ had substantial powers [69] to order prisoner releases is an error of fact.[70] There is some recognition by the Chamber that PUŠIĆ's role in effecting prisoner releases was that of a facilitator with some limited scope to determine who was released once a decision had been taken at a higher level which appears to contradict many of the other findings it makes.[71] Indeed, the main expert witness on HVO structures and processes called by the Prosecution, TOMLJANOVICH, described as "bureaucratic processing"[72] the role played by PUŠIĆ in the prisoner release process.

39. Importantly, the Chamber did not find that PUŠIĆ played any role in formulating HVO policy which at the time dictated that the release of detainees should be conditional on their providing guarantees that they would leave for outside territory.[73]

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[66] TJ, Vol.IV, paras. 1051-2.
[67] See above.
[68] TJ, Vol.IV, para. 1154.
[69] TJ, Vol.IV, para.1159 and 1047-50.
[70] TJ, Vol.II, paras 1443, 1449, 1451-2, 1465, Vol. IV, paras.1157-9, 1166,
[71] "The Chamber finds that from May 1993 and until mid April 1994, Berislav Pušić played a key role in keeping detainees detained at the Heliodrom or releasing them. The Chamber deems that he facilitated the release of detainees and made sure that they had the proper documents to enable them to leave the territory of Herceg-Bosna." Ibid.para.1166.
[72] Tomljanovich T.6384 to 5, Defence Final Brief, para.299.
[73] TJ, Vol.IV, para.1159.

Given the Chamber's other conclusions concerning PUŠIĆ's lack of status and influence within the HVO, another reasonable inference that also arises is that PUŠIĆ was merely implementing decisions taken by the HVO leadership. Even if PUŠIĆ could (for the sake of argument) therefore choose who was to be released once he was given authorisation from his superiors, the assertion that he "had a key role in keeping detainees at the Heliodrom"[74] cannot be sustained.

40. Furthermore, the Chamber accepted that PUŠIĆ was not the only HVO official that could order the release of detainees.[75] It held that PUŠIĆ did not have the power to approve the release of a detainee without first obtaining a certificate confirming that the Criminal Investigations Department and Security Service did not object to the proposal.[76] Consequently, the Chamber's finding that PUŠIĆ "played a key role in releasing detainees"[77] is not based on the conclusion that he had unfettered unilateral power to order releases but on the fact he "facilitated" the release of detainees by, amongst other things, making sure "that they had the proper documents to enable them to leave the territory of [Herceg-Bosna]."

41. It is therefore inaccurate to describe PUŠIĆ as holding substantial powers in this area when the evidence indicates he was simply issuing discharge papers based on orders from above that dictated the terms of a conditional release policy. Notwithstanding that PUŠIĆ (*arguendo*) may have had some discretion in selecting who was to be released in these circumstances, the assertion that PUŠIĆ had substantial powers to order releases is a mischaracterisation giving rise to an error of fact. This analysis is also consistent with the Chambers findings in respect of PUŠIĆ's interactions with international community representatives[78] where it found that PUŠIĆ was simply implementing orders from higher political levels.

42. This analysis also applies to PUŠIĆ's involvement in detainee releases from the 10th of December 1993 onwards.[79] According to the Chamber, PUŠIĆ's role in detainee releases changed after BOBAN'S announcement that all HVO detention centres were to close was made on that date. From that day onwards the Chamber held that there

[74] TJ, Vol.IV, para.1166.
[75] TJ, Vol.IV, para.1050.
[76] TJ, Vol.IV, para.1158.
[77] TJ, Vol.IV, para.1166.
[78] See para.22 *et seq.*
[79] TJ, Vol.IV, para.1160-6.

was no evidence to support the finding that PUŠIĆ continued to "authorise" prisoner releases.[80] Nonetheless it claimed that his power increased from that date onwards[81] in view of his efforts towards implementing the 10 December 1993 decision. These efforts included (somewhat contradictorily, given the above) measures to release detainees from the Heliodrom in December 1993 effecting their departure abroad[82] and organise prisoner exchanges to the same end.[83] In addition PUŠIĆ was said to have reported on the progress made in general in putting BOBAN's order into effect, although as noted above, whilst reports were regularly sent by him to HVO leaders there was little interplay between them.

43. Against this context, the Chamber committed a discernible error in holding that PUŠIĆ had "substantial" powers to release HVO powers. PUŠIĆ's actual authority in this field was restricted to functions more accurately described as "bureaucratic processing." It was so limited that it would not justify the imputation of individual of criminal liability for his omissions in not ordering the release of more HVO detainees than he did or his conduct in facilitating their departure abroad.

Prisoner Exchanges and Powers to Represent the HVO

44. The Chamber's findings concerning PUŠIĆ's "substantial" powers in exchange negotiations[84] must be qualified by the Chamber's contradictory concession that when acting as a representative for the HVO PUŠIĆ only had significant powers[85] and did not have any autonomous decision-making powers.[86] Adopting the logic of the Chambers reasoning PUŠIĆ could only have acted as a messenger or spokesperson for the HVO leadership at the negotiations he attended with international observers. The Chamber further accepted that he would have to consult and report to HVO leaders before making any pronouncements. In the context of the international negotiations he attended his role would therefore be that of someone communicating decisions taken by the leadership. Most of the meetings PUŠIĆ attended were mainly low-level direct negotiations with the BiH. When attending these gatherings PUŠIĆ was normally part of a larger HVO

[80] TJ, Vol.IV, para.1450.
[81] TJ, Vol.IV, para.1049-50.
[82] TJ, Vol.IV, para.1160 (deals with the Heliodrom), 1183 (deals with Ljubuški prison.)
[83] TJ, Vol.IV, para.1161-5.
[84] TJ, Vol.IV, paras.1057-1063 and 1202.
[85] TJ, Vol.IV, paras.1202 and 1068-1080. See discussion above at para.22.
[86] Ibid. See para.82 ante.

delegation with members of the leadership at higher level meetings. The Chamber found little information about the extent of his involvement and degree of contribution at these higher level meetings.[87] On this basis it is a mischaracterisation giving rise to an error in fact to suggest that he had significant powers to represent the HVO in any capacity.

45. It would be consistent with this thesis to suggest that on those occasions PUŠIĆ made pronouncements which suggested that he did have decision-making authority e.g. that he "could make all the decisions" (as in a meeting he attended on 19 October with international representatives present)[88] he was overstating his influence. Similarly, on those occasions PUŠIĆ signed or approved agreements in the presence of international community representatives, it is fair to infer that this did not reflect the exercise of any autonomous powers on his part.

46. It is not consistent with the thesis that PUŠIĆ was a spokesman however to suggest that on occasions he may have had a "decision-making power of representation" or significant power of representation and was thus a key player[89] in these negotiations. The Chamber could not have reached this conclusion on the evidence before it if it had applied the correct standard of proof, as partly reflected by the fact that both conclusions are impermissibly vague and imprecise.

47. The inconsistencies, ambiguity and lack of clarity (through the use of phrases such as "decision making power of representation" and see submissions *ante*) in the language employed by the Chamber also indicates that the Chamber has further erred in law in failing to provide a properly reasoned decision.

48. The Chamber's findings concerning PUŠIĆ's conduct in organising exchanges also suggests that PUŠIĆ's role was limited in the sense his actions required a prior stamp of approval from the HVO leadership. No suggestion is made that an officer of PUŠIĆ's rank could have influenced the broad contours of HVO policy in this area. Further, there is no suggestion that PUŠIĆ played any role in shaping BOBAN's decision of 10 December 1993. It is within this context that PUŠIĆ's conduct generally in proposing, negotiating and organising exchanges from October 1992 to April 1994 must be viewed. Even taking into account (for the sake of argument) any powers PUŠIĆ may have had to

[87] TJ, Vol.IV, para.1073.
[88] TJ, Vol.IV, para.1088.
[89] TJ, Vol.IV, para.1202.

choose which detainees could be exchanged,[90] this type of conduct does not warrant a finding that PUŠIĆ had either significant or substantial powers in this field and the Chamber has clearly erred in its findings to that effect.

Forced Labour

49. The Chamber also erred in fact in finding that PUŠIĆ had any powers over the use of detainees for forced labour assignments.[91] As a starting point there is no evidence that PUŠIĆ was given *de jure* powers to authorise or approve forced labour assignments (or over any aspect of the conditions of detention of detainees for that matter) by virtue of the posts he held in the Military Police, the Service for Exchange and the largely defunct Commission of Exchange. For instance, there is no reference in the relevant founding documents of the Exchange Service[92] or the 6th August 1993 Commission[93] conferring any authority to PUŠIĆ in this area.

50. In respect of the evidence of any *de facto* powers held by PUŠIĆ in this respect, the Chamber erred in relying on the testimony of JOSIP PRALJAK to the effect that PUŠIĆ could approve labour assignments. Firstly, it is illogical to find that PUŠIĆ had any power over forced labour assignments when he had no direct authority over the commanding officers and soldiers in the military units that regularly took detainees out on these assignments. No evidence has been produced at trial of any orders sent by PUŠIĆ to any of the commanders or soldiers in any of these units for any reason, let alone to order forced labour assignments. Furthermore, two of the HVO military officers called as witnesses who were involved in taking out detainees for forced labour assignments made no reference to PUŠIĆ at all. They specifically did not name him as the individual they would contact to seek authorisation for these assignments. [REDACTED] was in fact responsible for the largest number of forced labour assignments. [REDACTED] [REDACTED].[94]

51. Secondly, the relationship that PUŠIĆ had with one of the Heliodrom wardens BOŽIĆ and JOSIP PRALJAK is unclear in terms of its hierarchical nexus within the

[90] TJ, Vol.I, para.660, Volume IV, para.1062.
[91] Ibid paras 1053-4.
[92] TJ, Vol.I, para.659.
[93] See para.28 *ante.*
[94][REDACTED].

HVO chain of command. In his capacity as a Military Police Control Officer before 5 July 1993, there is some evidence of contact between JOSIP PRALJAK and PUŠIĆ.[95] For a time according to JOSIP PRALJAK, PUŠIĆ worked in the branch of the Military Police unit that the Heliodrom staff were often in contact with. No logical explanation was provided by JOSIP PRALJAK as to why, after PUŠIĆ's appointment to the 5th July Service of Exchange, the remit of PUŠIĆ's responsibilities were expanded to include the approval of forced labour assignments. Curiously, what evidence there is of approvals or orders from PUŠIĆ concerning the use of detainees for forced labour assignments takes the form not of documents signed by PUŠIĆ but of notes of conversations made by JOSIP PRALJAK, mainly over the telephone, between JOSIP PRALJAK and PUŠIĆ.[96] JOSIP PRALJAK gave evidence that after receiving a request to use detainees for forced labour from a HVO military officer such as [REDACTED] or PAVLOVIĆ, he would telephone PUŠIĆ and ask him to approve the request. A note of this conversation would then be made in the form of a memorandum or in the Heliodrom logbook. This was the evidence of so called "orders" that were mischaracterised as such and relied on by the Prosecution.

52. From this description there must arise some doubt as to whether there is any nexus between the offences committed and the so-called approvals made by PUŠIĆ. In other words, would the forced labour assignments have gone ahead but for the so-called approvals issued by PUŠIĆ. An approval would only give rise to criminal liability for the act authorised if it can be shown that it would not taken place but for the approval.

53. Thirdly, the Chamber has ignored exculpatory evidence from BIŠKIĆ arising from his review of the relevant procedures for forced labour assignments. BIŠKIĆ said that any request for detainees to perform forced labour would be sent from HVO main staff military officials to the warden of the Heliodrom who in turn normally "automatically complied with the order." BIŠKIĆ made no reference to PUŠIĆ in his testimony concerning forced labour procedures.[97]

54. BIŠKIĆ's evidence is all the more important because, fourthly, no other witness corroborated PRALJAK's account of PUŠIĆ's influence in this area.[98]

[95] Defence Final Brief, para.413.
[96] Ibid.
[97] Defence Final Brief, para.416.
[98] Defence Final Brief, para.412.

55. Fifth, it is correct to note that the Defence raised doubts about the credibility of JOSIP PRALJAK in general at trial.[99] The Chamber in fact accepted some of these concerns about PRALJAK's credibility. Most notably, the Chamber rejected PRALJAK's claim not to have any knowledge that detainees were abuses under his watch at the Heliodrom.[100] PRALJAK could only have made this assertion in an attempt to evade criminal liability for this grave misconduct at a facility where he was appointed as a senior warden. The Chamber should have applied the same scepticism to PRALJAK's evidence concerning PUŠIĆ's role in approving forced labour assignments. The obvious inference that arises from his evidence is that PRALJAK contacted PUŠIĆ as he needed a convenient scapegoat to help him escape liability for future claims against him holding him responsible for the mistreatment of the detainees taken on these assignments.

56. Sixth, the allegation that PUŠIĆ failed to take any steps to try and stop the use of detainees for forced labour assignments is incorrect and casts further doubts on the Chamber's findings. On 29 January 1994 PUŠIĆ sent a report to BIŠKIĆ documenting abuses at the Vojno facility.[101] In having to address BIŠKIĆ in an effort to persuade the HVO leadership to rectify this situation, this report reinforces the reality, which is that PUŠIĆ had no power to remedy them himself.

Powers over Conditions of Detention

57. As is the case with forced labour practice, the Chamber erred in finding that PUŠIĆ either had substantial powers[102] over the conditions of detention at HVO prison facilities or, confusingly, significant powers in the same area.[103]

58. PUŠIĆ had no *de jure* powers by virtue of his positions in the Military Police or Service of Exchange over the conditions of detention in HVO prisons. The Chamber also specifically noted that it is was necessary to focus on the evidence of PUŠIĆ's *de facto* involvement in this area because it acknowledged that the 6th August 1993 Commission never met to fulfil its remit.[104]

[99] Defence Final Brief, para.413.
[100] TJ, Vol.II, para.1589. Defence Final Brief, paras.427-430.
[101] TJ, Vol.II, paras.1737.
[102] TJ, Vol.IV, para.1202.
[103] TJ, Vol.IV, paras.1056.
[104] TJ, Vol.IV, paras. 1040 and 1041.

59. Most tellingly, there is no evidence that PUŠIĆ had *de jure* or *de facto* hierarchical powers over the wardens, management and military personnel at these facilities.[105] The Chamber conspicuously failed to make any finding to this effect. Indeed, there is also very little evidence of PUŠIĆ ever attending any of these detention facilities.

60. Any influence PUŠIĆ had to transfer prisoners[106] between facilities also does not justify a legal finding that he had substantial or significant powers in this regard. It is obvious that PUŠIĆ could only act in this area in accordance with the broader dictates of HVO policy in relation to releases and exchanges, which he had no influence over. Many of the orders to transfer prisoners for example, took the form of papers or forms issued by PUŠIĆ in furtherance of decisions taken at a higher political level such as BOBAN's 10 December 1993 decision to close and all detention centres.

61. The suggestion that PUŠIĆ could therefore have used his unilateral powers to transfer prisoners to other detention centres as a remedy to tackle overcrowding and other issues of detainee abuse is unsustainable if his intervention depended on approval from higher authorities. PUŠIĆ's request for permission for detainees to be transferred away from the HELIODROM to ease overcrowding in January 1994 to BIŠKIĆ[107] illustrates his dependency on superiors in the HVO hierarchy in this regard.

Berislav Pušić's Powers to Represent the HVO before the International Community[108]

62. The Appellant adopts *mutatis mutandis* the arguments made above.

Berislav Pušić's Interactions with the HVO Leadership[109]

63. The Appellant adopts *mutatis mutandis* the arguments made above.

[105] See para.17 *et seq ante.*
[106] TJ, Vol.IV, para.1056.
[107] TJ, Vol.II, para.1159.
[108] TJ, Vol.IV, para.1068 *et seq*.
[109] TJ, Vol.IV, para.1082 *et seq*.

Relief Sought

64. Each of the errors of fact identified above individually and collectively occasions a miscarriage of justice. The errors identified above caused the Chamber to find erroneously that the Appellant was guilty of the crimes enumerated under the umbrella of the JCE.

GROUND 2 THE TRIAL CHAMBER ERRED IN LAW IN APPLYING JOINT CRIMINAL ENTERPRISE ("JCE")

THE TRIAL CHAMBER ERRED IN LAW IN APPLYING JOINT CRIMINAL ENTERPRISE ("JCE") LIABILITY – PARAGRAPH 10 OF THE NOTICE

Grounds

65. The Trial Chamber erred in law when applying JCE, as a form of liability in the commission of serious international crimes in the former Yugoslavia, contrary to customary international law ("CIL").[110]

Argument

66. The Trial Chamber erred in law in refusing to consider submissions questioning the validity of JCE liability as a recognised mode of criminal responsibility in CIL.[111] It based this decision on the fact that there is settled ICTY case law recognising three different categories of JCE and the Appeals Chamber ruling that it has "clearly established that the JCE is a mode of responsibility firmly established under customary international law."[112] The Chamber thus declined to consider the jurisprudence of other international tribunals which could be interpreted to suggest that JCE liability is no longer universally recognised as reflecting a CIL precedent and should be interpreted narrowly or subsumed and replaced by mode of liability based on co-perpetration.

67. In regard to the Majority's judgment the Appellant adopts the position advanced in the Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti ("the Minority") to the Trial Judgement ("the Dissent")[113]. The Minority held that the Appeals Chamber may depart from previous precedents and case law handed down in the jurisprudence of the court where there are "cogent reasons in the interests of justice"[114] to do so or in other words, where another interpretation of the law would lead to a more sound administration of justice. In this case, recent developments in international law, which call into question the validity of JCE theory as a mode of liability

[110] TJ,Vol IV, paras 202-82.
[111] TJ, Vol I, paras 206-111.
[112] Ibid.
[113] TJ, Dissent, Vol 6, pages 117-128 and 151-155.
[114] TJ, Dissent, Vol 6, page 95. See also *Prlić* Final Trial Brief at para.42.

in CIL warrant the intervention of the Appeals Chamber in the interests of justice.

68. The Appellant notes that in numerous judgements pronounced by the ICTY Appeals Chamber it has both recognised and upheld the theory of JCE liability. However, the Appellant adopts the submissions in the *Prlić* Defence Final Trial Brief that were erroneously dismissed by the Chamber.[115] One of the factors highlighted therein was the anomaly whereby the *Tadić* Appeals Chamber cited the provisions of Article 25(3)(d) of the Rome Statute of the ICC in support of its theory that JCE theory has long been recognised in CIL.[116] Subsequent interpretations of Article 25(3)(d) of the Statute by the ICC have rendered this argument redundant as it has resulted in the ICC conclusively rejecting JCE liability as a mode of commission in favour of a mode of liability based on "co-perpetration."[117]

69. The Appellant notes in particular the arguments advanced by the Minority in raising the question "on what legal basis should the theory of JCE be enshrined in customary international law if it is not specifically acknowledged in the practice of the ICC."[118] It is submitted that consideration of this issue is now timely and appropriate given the recent decision in the ICC case of *Katanga*.[119]

70. The Appellant calls for the Appeals Chamber to review its position on the viability of JCE theory as established in the jurisprudence of the Tribunal in light of the above and the Minority's conclusion that the "theory of JCE should be abandoned in the future in favour of co-perpetration within the meaning of the Rome Statute, which supports establishing the criminal responsibility of the Accused in strict and precise fashion in the context of his participation in the group's criminal acts."[120] Another ICTY Judge has also called for the Appeals Chamber to focus on "committing" as a form of co-

[115] *Prlić* Final Trial Brief, paras.35,39 to 43.
[116] *Tadic*, AJ, paras.222-223.
[117] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07, Decision on Confirmation of Charges, 30 September 2008, paras 522-525."The ECCC Decision and the *Katanga* Decision are substantial developments arising since 19 February 2007 which, together, *cast doubt* on JCE I and II's status as customary international law, and *discredit* JCE III's purported status in customary international law. These developments, together with the *Lubanga* Decision, explain why the *Prlić* Defence has changed its opinion on this issue. Failure to challenge JCE at this point in the proceedings would constitute a lack of due diligence, violating Dr. Prlić's fair trial rights." (*Prlić* Final Trial Brief at para.41, footnote.)
[118] TJ, Dissent, Vol 6, page 155.
[119] *Prlić* Final Trial Brief at paras.39-41.
[120] TJ, Dissent, Vol 6, page 155.

perpetration as the principal mode of liability under Article 7(1) "leaving the JCE behind."[121]

[121] Wolfgang Schomburg, "Jurisprudence on JCE- Revisiting a Never Ending Story," published on 3 June 2010 on the website of the CAMBODIA TRIBUNAL MONITOR, page.28. Quote cited from TJ, Dissent, Vol 6, page 139 and see discussion of Judge Schomburg's views on pages 131-139.

GROUND 3 THE TRIAL CHAMBER ERRED IN FACT AND LAW IN CONCLUDING THAT A JCE EXISTED

THE TRIAL CHAMBER ERRED IN FACT AND LAW IN CONCLUDING THAT A JCE EXISTED - GROUND 3, PARAS.11-20 OF THE NOTICE

71. The Chamber erred in finding that a JCE existed. It has framed the JCE in extraordinarily broad terms. The Chamber's JCE has two limbs - an ultimate non-criminal purpose[122] and a separate and distinct common criminal purpose.[123] It erroneously assumed that the existence of this multi-faceted JCE, was the only reasonable inference that could be drawn from the evidence. In so doing it committed a discernible error in the weight of considerable evidence suggesting a multiplicity of alternative inferences arising from the material considered by the Court and produced at trial. The Chamber failed to deliver a reasoned opinion on the existence of these two limbs.

72. The submissions below question the existence of the original purpose (broad or long term political goals) and the common criminal purpose separately and in turn.

Law

73. The application of JCE theory to large scale cases such as this one was approved in a detailed judgement by the Appeals Chamber in Brđanin.[124] In Brđanin the Appeals Chamber also held that a JCE can have a non-criminal purpose as long as the Accused contemplated crimes within the ICTY Statute as the means to achieve that non-criminal objective. JCE liability can apply in this type of situation as "what JCE requires in any case is the existence of a common purpose which amounts to, or involves, the commission of a crime."[125]

74. The legal elements necessary to prove that a JCE exists were defined in Brđanin to include "the requirement, in such cases, is that the contours of the common

[122] TJ, Vol IV, para 24.
[123] TJ, Vol IV, para 41.
[124] *Brđanin* AJ, para 423; "This matter was addressed by the ICTR Appeals Chamber in the Rwamakuba case. In response to a challenge that the concept of JCE was limited to smaller cases, the ICTR Appeals Chamber stated that "o]n the contrary, the Justice Case shows that liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a 'nation wide government-organized system of cruelty and injustice.' See also, *Rwamakuba* Appeal Decision, para. 25.
[125] Ibid, para.418.

criminal purpose have been properly defined in the indictment and are supported by the evidence beyond reasonable doubt."[126] It follows that the inference of the criminal purpose must be the only reasonable available from the evidence.[127]

75. In this case the Chamber failed to recognise or apply the high standard of proof required to prove the existence of both the ultimate purpose of the JCE as well as its common criminal purpose.

Argument – The Ultimate Purpose of the JCE Did Not Exist

76. The Chamber's findings as to the existence of the ultimate purpose of the JCE cannot be sustained. The Appellant makes four arguments in this regard. The first concerns the stated terms of the common purpose, which are contradictory. The second alleges that the vague language and poorly-defined concepts employed to describe the common purpose render it unintelligible. The third alleges error of logic in the definition of the JCE common purpose. Finally it is submitted that the existence of the ultimate purpose of the JCE is not the only reasonable inference available from the evidence.

1. Contradictory Aims v Objectives of Ultimate Purpose

77. Firstly, the Chamber's definition of the stated aims (statements of intent, written in broad terms) contradict the objectives (specific statements which define measurable outcomes) of the JCE ultimate purpose. Because of these errors the agreed ultimate purpose cannot have existed.

78. In the present case the Chamber found that the aims(s) of the Greater Croatia JCE comprised the following multifaceted non-criminal ingredients, namely:

> (AIM 1) a desire to set up a Croatian entity
> WITH
> (AIM 2) the aim of reconstituting, at least in part, the borders of the 1939 Banovina
> TO
> (AIM 3) facilitate the reunification of the Croatian people.[128]

79. The objectives of the JCE included a Croatian entity that was either supposed

[126] *Brđanin* AJ, para.424.
[127] *Brđanin* AJ, para.353.
[128] TJ, Vol IV, para 24.

to be

(OBJECTIVE A) incorporated by Croatia after a dissolution of BIH
OR
(OBJECTIVE B) to remain an independent state within BiH with close ties to Croatia.[129]

80. It is self-evident however that OBJECTIVE (B), namely the goal of creating an independent Croatian state within BiH, however closely tied to Croatia, cannot meet the purpose of the second or third aims of the JCE:

a. An independent state within BiH could not "reconstitute", at least in part, the borders of the 1939 Banovina (AIM 2). Only the expansion of Croatian territory to include areas formerly included within the borders of Banovina could achieve this aim.

b. An independent state could not "facilitate the reunification" (AIM 3) of the Croatian people. Assuming that "reunification" means reuniting, a matter of logic this could only take place if the Bosnian Croat population within Banovia borders were absorbed by the mother nation, i.e. the Republic of Croatia.

81. These contradictions create insurmountable problems in identifying the agreed object to the JCE.

2. Impermissibly Vague Objectives of Ultimate Purpose

82. The Chamber has further erred in law in its construction of the JCE's ultimate purpose. It has used impermissibly vague language to define AIMS (1) – (3) above of the ultimate purpose. What is meant by the terms "Croatian entity",[130] and the import of the phrases with "the aim of reconstituting,[131] at least in part, the borders of the 1939 Banovina" in order to "facilitate the reunification"[132] of the "Croatian people"[133] is

[129] Ibid.
[130] Ibid.
[131] Ibid. No further clarification is provided as to what the term "reconstituting" means in this context.
[132] Ibid. See ante discussion assuming that "reunification" can be understood to mean "reuniting."

unclear. All these terms have multiple possible interpretations. The ultimate purpose of the JCE cannot thus be determined to the required legal standard i.e. beyond reasonable doubt. This defect illustrates the dangers inherent in inferring the existence of a JCE on evidence that largely consists of pronouncements or expressions of support for broad political goals by the political actors in a conflict (see post).

3. Overly Broad Definition of Ultimate Purpose

83. The Chamber has also erred in logic by defining the ultimate purpose of the common plan as an agreement to realise any one of two alternative visions of a future Croat dominated "entity." This definition, framed in the alternative, is too broad in scope to be capable of forming an *agreed* criminal object. It would inevitably capture within its net those Accused who are said to have agreed to the common purpose but who, through their conduct, can only be linked to OBJECTIVE A exclusively or OBJECTIVE B exclusively. Can it be inferred from this that what they actually agreed to was a plan with the objectives of achieving *either* A or B and they were neutral as to which one materialised? In leaving open this ambiguity and not clarifying whether those individuals falling into this category could also be said to support the common purpose the Chamber has failed to properly define the agreed objects of the JCE.

4. The Stated Ultimate Purpose Or Long Terms Goals of the JCE Is Not the Only Reasonable Inference Available From the Evidence

84. In broad outline, the Appellant submits that the inferences the Chamber has drawn from the evidence are too broad and sweeping to prove to the required standard the existence of the ultimate purpose of the JCE. As there is no evidence of an explicit statement of common purpose between those Accused said to have taken part in formulating it, the inferences that are to be drawn must be taken from the relevant parts of the evidence presented by the trial. Clearly the starting point in ascertaining if the ultimate purpose existed is to examine the motives of its author and principal architect TUĐMAN.

85. The Chamber has carefully distinguished the ultimate purpose of the JCE from

[133] Ibid. Does this phrase include the large expatriate Croatian people living outside the Balkans? If so, how would the objectives specified achieve their "re-unification?"

the common purpose, which is the "only one, single criminal purpose" of the enterprise.[134] It can thus be inferred that the Chamber regards the ultimate purpose of the JCE as a set of non-criminal political aims or broad political goals as is consistent with the notion that TUĐMAN's vision of a Greater Croatia is not a criminal idea in itself. Nonetheless, as the ultimate purpose is seen as an essential component and integral part of the JCE[135] its existence must be established to the criminal standard. To determine the prevailing political objectives and imperatives of the main political and military actors of the time requires a thorough and forensic examination of historical evidence.

86. The Appellant accepts that evidence was presented during the trial to support the thesis that, at various junctures during the relevant indictment period TUĐMAN (and some of the other Accused) made pronouncements that supported the cause of OBJECTIVE A (Greater Croatia) and/or OBJECTIVE B (an independent state within BiH).[136] This evidence appears to be the foundation of the Majority's reasoning behind its ultimate purpose finding. However, it is submitted that neither OBJECTIVE A nor OBJECTIVE B can be established beyond reasonable doubt as the motive(s) (either standing alone or in an "either or" agreement) behind the stated ultimate purpose to the collective common plan. The evidence before the Chamber, insofar as it consists of TUĐMAN and others making pronouncements of their broad political goals, is not of sufficient quality or quantity to warrant such a finding.

87. Furthermore, other inferences also arise from the evidence that have not been addressed by the Chamber. This is readily apparent from even the most superficial comparison between the reasoning of the Majority with that of the Minority as expressed in the Dissent. Some of these inferences are discussed and illustrated below. These additional inferences, like Objective A (Greater Croatia) or Objective B Independent state within BiH) may also be described as "reasonable" inferences and the Chamber erred in holding that the inference it drew was the only reasonable inference available from the evidence. No one theory or inference can be established as a legal finding beyond reasonable doubt because the evidence concerning the motives and broad political goals of those said to have framed the ultimate purpose is inconclusive on this point.

[134] TJ, Dissent, Vol.VI, page.41.
[135] TJ, Vol.IV, paras.24 and footnote 119 of para.42.
[136] TJ, Vol IV, paras.9-24.

88. The Majority relied on evidence of TUĐMAN's speeches and pronouncements during the Indictment period as the foundation of its reasoning behind the existence of the ultimate purpose to the JCE in conjunction with statements made by other Accused and other non-indicted JCE members such as BOBAN.[137] The Presidential transcripts, which comprise more or less complete verbatim accounts of discussions involving TUĐMAN with other government officials from Croatia and BiH as well as foreign dignitaries, are one of the main sources of this evidence. These records viewed in conjunction with other relevant material[138] clearly demonstrate that TUĐMAN was inconsistent in his public and private pronouncements and frequently shifted positions.[139] TUĐMAN, for example vacillated in his support for a solution in BiH based on a union of states and a confederation of states in addition to the Greater Croatia ideal, a fact, which the Chamber recognised.[140] He also on occasions advocated solutions that were consistent with Security Council Resolution 819 of 1993 (which reaffirmed the sovereignty, territorial integrity and political independence of BIH)[141] and that required the co-operation of the Muslims in BiH and the international community.

89. The Majority's ultimate purpose theory embraces the two diametrically opposed arguments that were regularly advanced by TUĐMAN at the time i.e. to divide BiH with a Croat Majority part attached to it (OBJECTIVE B, ante) or a Croat intervention in BiH to create a Greater Croatia (OBJECTIVE A, ante). The Chamber's dual "ultimate purpose" theory is not the only reasonable inference available from the evidence of TUĐMAN's pronouncements however. It is an inaccurate oversimplification that distorts the truth and cannot be proved beyond reasonable doubt. No reasonable Chamber could have arrived at the finding that a JCE existed on these terms for the reasons below.

90. Firstly, the Prosecution Witness [REDACTED][142] (who also identified the two inconsistent strands in TUĐMAN's thinking) evidence highlights the difficulties that commentators and historians of the period have encountered in ascertaining TUĐMAN's

[137] TJ, Vol.IV, paras.9-24.
[138] See also the Dissent, TJ, Vol VI, pages 383 – 385.
[139] TJ, Dissent, Vol.VI, page 376.
[140] TJ, Vol.IV, paras.12 and 17.
[141] TJ, Dissent, Vol.VI, page 376.
[142] [REDACTED]

true motives. Witness [REDACTED] repeated several times [REDACTED][143] Having conducted another thorough survey of the relevant historical material it bears highlighting that, in the Dissent, the Minority concludes, that the position TUĐMAN reaffirmed on numerous occasions ran counter to the theory of a JCE alleged by the Prosecution and, by implication, the Chambers findings.[144]

91. Secondly, the Presidential transcripts reveal that TUĐMAN frequently emphasised his preference for working with the international community in finding a solution to the conflict in BiH[145] and the need for Bosnian Croat and Croat representatives to cooperate with the Muslims in reaching an agreeable settlement.[146] On 27 April 1993 for example TUĐMAN told the 8th session of the Croatian Defence and National Security Council that he would not allow ethnic cleansing to be conducted.[147] These sentiments conflict with the Chambers ultimate purpose findings. In reality the objectives of the ultimate purpose (and indeed the common purpose) could only be achieved in the teeth of opposition from Muslims and the international community, which is a situation TUĐMAN wanted to avoid.

92. Third, the Chambers analysis rests on the assumption that there was a joint command structure that enabled TUĐMAN to direct and control the military activities of the Bosnian Croats.[148] Contrary to the thesis that military action in BiH was controlled and led and coordinated by the authorities in Croatia, the Presidential Transcripts indicate that TUĐMAN only authorised the deployment of volunteers and certain individual officers to HZ(R) HB held territory with some material and logistical aid.[149] He also denied the HV forces were present in BiH[150] and appeared not to have had advance knowledge of the full extent of military operations.[151] In addition, it is relevant to bear in mind that by overtly interfering in the BiH conflict TUĐMAN ran the risk of incurring international sanctions. This was a considerable disincentive that would make it highly

[143] [REDACTED]
[144] TJ, Dissent, Vol.VI, page 50.
[145] P01297. TJ, Dissent, Vol.VI, pages 9 to 10, 32 and 33.
[146] P01539. P05139, P00498, P00524, P01158, P01622, P01893. *See* also the Dissent, pages 24, 22, 19, 26, 27, 28, 29, 40, 45, 376 to 377 and 417.
[147] P02122. TJ, Dissent, Vol.VI, page 25.
[148] TJ, Vol.III, paras.526 to 568.
[149] P07131. TJ, Dissent, Vol.VI, page 38 to 39.
[150] P02613 and P04267. See also para.230 *et seq*.
[151] According to the Minority, TUĐMAN always demanded detailed explanations of incidents he appear to be unaware of such as the destruction of the Old Bridge in Mostar and the incident in Stupni Do. TJ Dissent, Vol VI, pages 40 and 394.

unlikely that Croatia would intervene in the manner suggested by the Chamber.

93. Fourth, there were significant divisions of opinion between TUĐMAN and senior Bosnian Croat leaders[152] and amongst the Bosnian Croats leaders themselves that would preclude any finding that an agreement existed between them. Notably, TUĐMAN did not support MATE BOBAN in his candidacy for the Presidency of the HZ(R) HB and was extremely critical of him before he stepped down from office, citing him as the main obstacle to cooperation with the Muslims.[153] There were also conflicts over the direction of policy between the HZ HV leaders i.e. between PRLIĆ and BOBAN. [154]

94. This evidence of internal conflict rebuts any suggestion that the HZ(R) HB military and political structure was a simply a tool or instrument that TUĐMAN could manipulate to his own ends. Indeed the Minority speculates that in light of evidence of this type of discord that there was no shared agreement between the Bosnian Croats and TUĐMAN. The Croat leaders in BiH only enjoyed "modest" support[155] from TUĐMAN who incited the departure of BOBAN and dismissed SLOBODAN PRALJAK whom he blamed for the bombing of the Mostar Bridge, which seems to have taken place without TUĐMAN's knowledge.[156] This thesis refutes the underlying reasoning behind OBJECTIVE B, namely that there may have been an agreement amongst the Bosnian Croat leaders and TUĐMAN to implement the Vance Owen plan "hastily,"[157] on a time frame that was not supported by the international community and through illegal means when there was no consensus for it.[158]

95. Fifth, it is highly relevant that in no other ICTY case concerning the activities of Croats in Bosnia has any finding been made confirming the existence of an ultimate purpose to a JCE in the terms defined by the Chamber.[159] According to the Minority, "in almost all of the cases charging Croats, there was no reference to a joint criminal enterprise of any kind. An informed observer might have drawn the conclusion the crimes

[152] TJ, Dissent, Vol.VI, page 49, 376, 385. There was no "unity of perspective between them." (page 393).
[153] Dissent, TJ, Vol.IV, page 45.
[154] Ibid, page 381.
[155] Ibid, page 393.
[156] Ibid, page 393.
[157] Ibid,
[158] Ibid.
[159] "The conclusion is simple – in nine cases involving Croats from the Republic of Bosnia or the Republic of Croatia, the prosecution did not at any time referred to the existence of a comprehensive common plan." Ibid, page 373, see also 369.

were committed sporadically, without any link to another."[160] Against that background, the Chamber's findings of an overarching JCE that subsisted at the same time as the crimes in many of these cases were committed is inherently implausible.

96. It further bears highlighting that in the case of *Gotovina et al* the Trial Chamber was invited to infer the existence of a JCE based on evidence of speeches made by TUĐMAN. The Chamber held that it was "not clearly apparent from the rhetoric and the goals embodied by TUĐMAN in his speeches that he joined the JCE or that they embodied the common purpose."[161] The Chamber is invited to adopt a similar approach to the *Gotovina* Trial Chamber in its assessment of the evidence in this case. If it does it cannot fail but to draw a similar conclusion here albeit in regard to an entirely different JCE founded on entirely different facts.

97. Sixth, the Chamber has erred in its findings concerning TUĐMAN's support for the creation of the ideal of a Greater Croatian Republic for the reasons outlined below.

a. The Chamber has mis-characterised TUĐMAN's support for the notion of a Greater Croatian Republic as an unconditional aspiration. Even Witness [REDACTED][162] accepted that TUĐMAN appeared to support the Banovina ideal only as a measure of last resort in response to Serb aggression.

b. There are also many other references in the Presidential Transcripts that suggest that TUĐMAN advocated policies that would negate any possibility that a Greater Croatian Banovina could ever be realised in conflict with the stated "either or" terms of the ultimate purpose. TUĐMAN frequently for example referred to Croatia's respect for and recognition for the independence of BiH as a nation of three constituent peoples. This is a consistent theme of TUĐMAN's speech as recorded in the Presidential Transcripts as are TUĐMAN's many statements referring to the inviolability of the borders of BiH[163] even to the extent he contemplated the possible deployment of

[160] Ibid, page 377. "There was no JCE and that moreover a process of distancing between politicians and Soldiers was underway."
[161] *Gotovina* et al,TJ, para.94. TJ, Dissent, Vol.VI, page 146.
[162] [REDACTED]
[163] P00336. See also Dissent, TJ, Vol VI, pages 392 to 393.

UNPROFOR at the borders.[164]

c. Another reasonable inference that therefore arises from the evidence is that TUĐMAN harboured a desire for a Greater Croatia which he did not want to see implemented through criminal means as that would jeopardise Croatia's relationship with the international community which was necessary to guarantee its continued survival.

The Chamber has thus mis-characterised TUĐMAN's support for a Greater Croatia ideal as a concrete objective that he took steps to implement immediately rather than a lofty aim or aspiration he did not view as a realistic political possibility in the context of the time.[165] In the Dissent the Minority takes the view that TUĐMAN longed for the Banovina with an attachment that was "historical and psychological rather than political"[166] but the evidence does not suggest that he acted to implement it as he "enjoyed neither the support of the international community nor the support of his own camp to realise this dream."[167]

d. In support of this theory, there are many political and strategic reasons that can be identified as to why TUĐMAN could not take action to implement his aspirations for a Greater Croatia at the time:

i. TUĐMAN had not been elected on a Greater Croatia platform.[168]

ii. With Croatia struggling to assert itself as a newly constituted nation in the face of Serb aggression he had neither the internal or international support he needed to realise his vision.[169]

iii. TUĐMANs effort to forge Croatia's identity and security as a nation state in the short term depended on maintaining its territorial integrity and promoting the idea of a Greater Croatian Republic project stood in

[164] P04267. TJ, Dissent, Vol.VI, page 376.
[165] TJ, Dissent, Vol.VI, page 32.
[166] Ibid, page 391.
[167] Ibid, page 385.
[168] Ibid, page 418.
[169] Ibid, page 385.

contradiction to this.

iv. Further, there was a danger that if TUĐMAN promoted the Greater Croatia idea he would also *ipso facto* have to accept the Serbs vision of a Greater Serbia. This would have caused problems for the Croats that lived in the territory that the Serbs claimed as part of their own Greater Serbia.[170]

v. Croatia was not in a position to bear the economic burden of absorbing the population from a Croat dominated territory in BiH, either administratively, socially and economically.[171]

98. Seventh, the Prosecution's theory that TUĐMAN adopted a two track policy where he tried to hide his true ambitions from the international community is inherently implausible.[172] This theory presupposes that TUĐMAN was playing a highly dangerous and risky double game (considering the public and media scrutiny he was under)[173] in his communications with international negotiators, other political leaders and also with the Security Council at a time when Croatia's position as a newly founded and emerging nation state had not been secured. It is further apparent, that TUĐMAN repeated the statements, which are cited to support this two track theory not only to international representatives but also to his closest allies including BOBETKO and ŠUŠAK.[174]

Argument – A JCE with the Common Criminal Purpose Did Not Exist

99. Falling within the umbrella of the ultimate purpose of the JCE is a subsidiary common criminal purpose describing what can only be the short-term goal of the common plan. According to the Chamber the "only one single common criminal purpose" was the "domination by the HZ(R) HB Croats through ethnic cleansing of the Muslim population."[175]

100. However, another reasonable inference available from the evidence is that

[170] Ibid, pages 417-8.
[171] Ibid, page 393.
[172] Ibid, page 374-5, 384 and 392.
[173] Ibid, page 392.
[174] Ibid.
[175] TJ, Vol.IV, para.41.

ethnic cleansing in BiH was caused not by actions taken by of Croat and Bosnian Croat leaders to achieve their expansionist visions but due to the "unplanned effects of the new situation created by the influx of refugees who by their very presence upset the demographic equilibrium between the ethnicities."[176] This influx stemmed from the ethnic cleansing by Serb forces driving Croat Muslims into Central Bosnia creating overcrowding and conflict.[177] The Minority noted in this regard that

> "I am persuaded that the majority of these forcible transfers and departures might have been caused by the need to protect the civilian populations and to offer them another more peaceful living environment by allowing them to take up residence in Croatia or a third country." [178]

101. The Chambers failure to address this reasonable alternative inference also indicates that it has failed to provide a reasoned decision and invalidates the Trial Judgement.

JCE Theory is Historically Inaccurate

102. In conclusion, a thorough review of the relevant evidence demonstrates that there was no shared ultimate purpose between the Accused but rather a multitude of such purposes.[179] There was also no common criminal purpose.

103. In respect of the Chambers ultimate purpose theory, due to the complex interplay of political factors and the distance of some of the Accused, notably TUĐMAN, who was "structurally remote"[180] from events on the ground, a set of shared objectives taking the crude form of a shared agreement based on common broad political goals cannot be identified to the required standard. In layman's terms, the evidence cited does not show that all the Accused knew what they ultimately wanted from the conflict while it

[176] Ibid, page 392.
[177] Ibid, pages 369-70. The Minority also noted that several witnesses Prosecution witnesses gave evidence that suggested that no criminal plan existed to drive out all non-Croats from the territory of the HZ HB.
[178] TJ, Dissent, Vol.VI, page 395-6.
[179] Ibid, page 408.
[180] Although it did not detect any bar to the use of JCE theory in large scale cases the Appeals Chamber in Brđanin did recognise that difficulties may arise in defining the agreed object in such prosecutions where individuals that are distanced from the crimes feature. "The Appeals Chamber is also of the view that, whether or not the Trial Chamber is correct in stating that seeking to include structurally remote individuals within the JCE creates difficulties in identifying the agreed criminal object of that enterprise, this does not as such preclude the application of the JCE theory." *Brđanin* AJ.

unfolded let alone agreed on what it was they sought in the short term. The Majority erred in law because the "ultimate purpose" theory that they have created simply does not reflect the complicated historical reality.

104. Moreover, the Chamber has erred in attempting to take on the mantle of an "arbiter[] of historical truth",[181] in a manner that is entirely inappropriate for a court of law. The Appellant accepts that the International Courts have a limited function[182] in contributing to the historical record of war crimes and but this should be viewed principally as a by-product[183] of the judicial process. In some large-scale cases where those indicted include senior political[184] and military leaders it is inevitable that the Courts will have to adjudicate on the political and historical background and context to the crimes committed. A question arises however as to the balance to be struck between history and law between context and act. In delving so deeply into matters of background and political context the Majority has clearly failed to strike the correct balance. Rather than limiting "this background section to those facts which are necessary to situate the evaluation of the present case"[185] it has tried to decide "who started, prolonged, or ended the war and why"[186] a task which may be possible in certain clearer cut cases of mass crimes such as those tried at Nuremberg but is impossible in the more nuanced and complicated backdrop to the crimes that took place in this part of the former Yugoslavia. This is dangerous territory for International Courts whose judgements have to stand the test of time and aspire to a degree of finality that historians interpretations do not.

105. In addition, the Chamber has erred in trying such issues "in the context of criminal proceedings without the States [Croatia] themselves having input is basically unfair, or at least does not contribute to future reconciliation."[187] The same criticism can be applied to the Majority who have embarked on this process in the absence of

[181] See the discussion in "*Unimaginable Atrocities*", William Schabas, Oxford University Press, 2012, Chapter 6,pages 153 to 172 ("*Unimaginable Atrocities*").
[182] *Krstić* IT 98-33-T, Judgement, 2 August 2001, paragraph 2. Courts should leave it "to historians and social psychologists to plumb the depths of this episode of the Balkan conflict and to profile deep-seated causes. The task at hand is a more modest one; to find, from the evidence presented during the trial, what happened" during the period relevant to the Indictment.
[183] *Unimaginable Atrocities* Schabas, p.160.
[184] *Unimaginable Atrocities* Schabas, pages 153 to 172.
[185] *Delalic* et al, IT-96-21-T, TJ, 16 November 1998, paragraph 88.
[186] *Unimaginable Atrocities*, page 161.
[187] *Unimaginable Atrocities*, Ibid.

TUĐMAN or other senior Croatian leaders.

GROUND 3, PARAGRAPHS 12 – 17 AND 20

106. The Appellant adopts, *mutatis mutandis*, the submissions made above in support of these grounds of appeal.

GROUND 3, PARAGRAPHS 18 AND 19

107. These grounds are no longer pursued as self standing grounds of appeal.

Relief Sought

108. 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 finding of fact, namely that the Prosecution has failed to prove beyond reasonable doubt that there was a JCE with the ultimate purpose and common criminal purpose specified.

109. The Appeals Chamber should therefore reverse the Appellant's convictions that resulted from the Chambers error under this ground.

GROUND 4 THE TRIAL CHAMBER ERRED IN FACT AND LAW IN CONCLUDING THAT BERISLAV PUŠIĆ WAS A MEMBER OF THE JCE

Overly Broad Application of JCE Theory

110. The Chamber erred in finding that PUŠIĆ was a member of the JCE. In *Brđanin* the Appeal Chamber indicated that it considered that JCE liability was inappropriate where the link between an Accused and "those who physically perpetrated the crimes" is "too tenuous." [188] In a Declaration to the Judgement Judge Van Den Wyngaert held that the approach of the Appeals Chamber clearly showed that JCE theory "is not an open ended formula that allows convictions based on guilt by association" because of the safeguards set out in "Chapter VI.D.5 ("Conclusion")" of the Judgment.[189] However the unintended consequences arising from the over-inclusive application of JCE theory that the Appeals Chamber attempted to eliminate in *Brđanin* have arisen in the very case. Most strikingly, PUŠIĆ has been erroneously convicted of a number of crimes – including those said to have been committed in Prozor, Čapljina, Jablanica and crimes of violence and property destruction in Mostar when he had no link with the physical perpetrators[190] and played no role in planning these crimes. His relationship with those individuals that committed these crimes is simply "too tenuous" to justify the finding that he was a member of a JCE that encompassed these crimes.

Mens Rea As a Factor Tending to Prove JCE Membership

111. Submissions concerning the Chamber's errors in finding that the Appellant shared the requisite intent to prove his membership in the JCE will be outlined below in Ground 5.

[188] *Brđanin*, AJ, para.418.
[189] Ibid, pages 164-165.
[190] See submissions in connection with Ground 6 for Prozor, Čapljina, Jablanica and Mostar for an analysis of the evidence relied on by the Chamber.

GROUND 5 THE TRIAL CHAMBER ERRED IN FACT AND LAW IN CONCLUDING THAT BERISLAV PUŠIĆ HAD THE REQUISITE SHARED INTENT TO BE A MEMBER OF THE JCE

THE TRIAL CHAMBER ERRED IN FACT AND LAW IN CONCLUDING THAT BERISLAV PUŠIĆ HAD THE REQUISITE SHARED INTENT TO BE A MEMBER OF THE JCE – GROUND 5, PARAS. 24-27 OF THE NOTICE

Grounds

112. The Trial Chamber erred in fact and law in deciding beyond reasonable doubt that PUŠIĆ shared the intent to commit the criminal objectives of the JCE.[191]

Law

113. To prove JCE 1 liability requires a finding that the Accused and the other participants in the JCE possessed the same criminal intent to commit a crime pursuant to the JCE.[192] In *Tadić* the Appeals Chamber defined intent taking the example of a situation where a group of perpetrators planned a killing as follows:

> "the objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the [crime] are as follows;
>
> (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and
>
> (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result."[193]

114. As to what is meant by "intended" in the second limb above, no explicit elaboration was provided in *Tadić*. It is however submitted that intention in this context should be interpreted to mean that a perpetrator has the desire to bring about a particular

[191] Ibid, paras. 66-7, 1202-32.
[192] *Tadic,* AJ, paragraph 228. TJ, Vol 1, para. 214.
[193] *Tadic,* AJ, paragraph 196.

result from his conduct in the volitional sense. The Appeals Chamber in the *Vasiljević* judgement confirmed this when it stated that what is required is an "intent to perpetrate a certain crime (this being the share that intent on the part of all co-perpetrators)".[194]

115. When defining the elements of JCE category 1 *mens rea*, the intent of a perpetrator should also be distinguished from his or her knowledge. The ICTR has stressed that

> "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".[195]

116. In *Odjanić*,[196] the Appeals Chamber distinguished an aider and abettor from a participant in a JCE on the basis that

> "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."

117. JCE 1 intent can be established by circumstantial evidence but, any inferences drawn from such evidence must be the only reasonably available inferences from that material. Close attention must be paid to the conduct on which these inferences are made to ascertain

> "whether these acts are ambiguous, allowing for several reasonable inferences....The Appeals Chamber considers that when a Chamber is confronted with the task of determining whether it can infer from the acts of an Accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences."[197]

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[194] *Vasiljević,* AJ, para.101.
[195] *Mpambara*.TJ, paragraph 14,
[196] *Odjanić,* paragraph 20 of the Appeal Chamber's decision on Motion Challenging Jurisdiction – JCE, May 21, 2003. *Stakić,* TJ, paragraph 432.
[197] *Vasiljević* AJ, para.131

Arguments

Double Counting

118. The Chamber has engaged in impermissible double counting in its findings concerning the Appellants *mens rea*.[198] It concluded that the Appellant demonstrated the required shared intent by citing the same conduct that it has relied on to make a finding that he significantly participated in the JCE. [199] In fact, the Chamber adopted the near identical wording employed to establish the Appellant's significant participation in a crime to also prove his JCE intent. Thus, for example, the finding that the Appellant played a significant role in the use of Heliodrom detainees to work on the front line as he was one of the authorities who could authorise or approve this[200] is used both to establish his JCE intent[201] and as proof that he made a significant contribution to the JCE.[202] This is circular reasoning whereby the Chamber has cited the same conduct as proof of shared in the intent (the *mens rea* for JCE membership) and an intent to contribute to the JCE (which is the *mens rea* for participation.) The Chambers *mens rea* conclusions are impermissibly vague and unspecific insofar as it simply relies on a generalised and wide-ranging review of all its findings to support the same. In failing to provide a reasoned opinion the Chamber has erred in law.

Shared Intent Can Not Be Proved for All the Crimes in This Vast JCE

119. Shared intent, which is a critical requirement to prove JCE 1 *mens rea* is a difficult requirement to prove in a case such as this when a JCE on a vast scale is alleged. According to the late Prof. Cassese,

> "the intent must be shared in that it is common to all the participants; it is not sufficient for the participants to have formed an independent yet identical intent. The requirement for shared intent limits the crimes for which each individual can be criminally responsible. For this reason it is difficult to imagine shared intent in the type of vast JCE imagined by the ICTR Appeals

[198] TJ, Vol.IV, para.41.
[199] See in particular the conduct cited as evidence of intent at paras.1203-1207, TJ, Vol.IV.
[200] TJ, Vol.IV, para.1203.
[201] Ibid.
[202] TJ, Vol.IV, para.1054 and 1203. See para.188 of this Brief.

Chamber in the *Karemera* case."[203]

120. It is uncontroversial that the JCE alleged in this case is on a very similar scale to that alleged in the *Karemera*[204] case. The JCE members in this case also include a long list of political and military leaders on various levels and it encompasses mass crimes on a large scale across the territory of a State over a long time period.

121. In addition to the concerns raised by Professor Cassese, other obstacles also arise in establishing shared intent on the part of PUŠIĆ in this case because he is said not to have planned the JCE crimes but to have facilitated their implementation.[205] It follows that in order to establish *mens rea* based on inferences from an Accused's conduct in this situation, what must be found is some linkage between the conduct and the perpetration of the JCE crimes. Where there is a paucity of evidence to link PUŠIĆ in a way to a JCE crime or to any of the direct physical perpetrators of that crime finding JCE intent will be problematic. As demonstrated below, the Chamber has erred in holding that PUŠIĆ had the required *mens rea* in respect of the crimes on the Indictment where the of this linkage is weak. In these cases where PUŠIĆ's conviction rests on very weak inferences from his conduct the Chamber has applied JCE in an over-inclusive manner. PUŠIĆ has thus been found "guilty by association"[206] based on his complicity with his fellow Accused for the conduct of others that is unrelated to his own.[207]

Counts 2 and 3, 24 and 25

122. In respect of Counts 2 and 3 (Murder and Wilful Killing respectively) convictions have been entered for these crimes in Mostar and the Heliodrom whilst Counts 24 and 25 relate to events in Mostar exclusively. In all these cases the Chamber erred in finding that PUŠIĆ had the required *mens rea* for these crimes.[208]

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[203] "*Cassese's International Criminal Law,"* Ed. Antonio Cassese, Oxford, page 164.
[204] *Karemer*a et al, AJ, ICTR-98-44, page 100.
[205] TJ, Vol.IV, paras.1217 to 1232.
[206] See discussion at para. 110 *ante.*
[207] See, e.g. *Prosecutor v. Deronjić,* Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005, para. 124: "A person cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible". And see Delalić AJ, IT-96-21-A, 20 February 2001, Separate and Dissenting Opinion of Judge Hunt and Bennouna, para. 27: "The fundamental function of the criminal law is to punish the accused form his criminal conduct, and only for his criminal conduct".
[208] TJ, Vol.IV, paras.1203 to 1207.

123. With regards to events in Mostar, weak inferences drawn from evidence of statements unconnected to these crimes by PUŠIĆ and his supposed conduct in blocking humanitarian aid combined with his knowledge of the crimes committed in the area[209] are not capable of establishing *mens rea*. The factors cited do not go to show that PUŠIĆ intended that as a result of this conduct the crimes of murder, wilful killing or terrorising or attacking the civilian population or destruction to property should occur. As for what his intention or *mens rea* was, it is not a reasonable inference to draw (*arguendo*) from his conduct in taking steps that resulted in the blocking of humanitarian aid that he also intended that civilians in Mostar should be killed, attacked, badly treated or terrorised in subsequent HVO military operations that he had no connection with.

124. The Chamber has also conflated the *mens rea* requirements for JCE 1 and JCE 3 in that it has based on findings on what it considered to be the reasonably foreseeable consequences of PUŠIĆ's conduct.

125. Similar concerns apply in connection with the same finding for the Heliodrom. Even taken at its highest, evidence that PUŠIĆ was given notice of forced labour assignments[210] and had notice of the crimes that took place subsequently does not go to show his requisite *mens rea* for the reasons outlined above. It cannot be inferred from PUŠIĆ's conduct that he intended the murders of those inmates simply on the basis of inferences drawn from conduct relied on to prove another crime.

126. In addition, the Prosecution have also failed to prove that PUŠIĆ had notice that inmates sent on these type of assignments were murdered or wilfully killed when performing work at the front line at the time he is said to made these approvals. The evidence, taken at its highest, shows that PUŠIĆ gave his so-called "approvals" to these type of assignments from 17th February to 24 July 1993. The evidence does not show that he received notice that inmates were killed during the course of this work in this time frame.[211]

Counts 19, 20 and 21[212]

127. In respect of Counts 19, 20 and 21 (extensive destruction of property,

[209] See discussion at para.
[210] See discussion at para. 50 *ante*.
[211] TJ, Vol.IV, paras.1146 to 1151.
[212] TJ, Vol.IV, paras.1203 to 1207.

destruction of cities and damage to religious and educational establishments) convictions have been entered for crimes in Prozor (Counts 19 and 20), and Mostar (20 and 21.)

128. As regards the relevant crimes in Mostar, the Appellant adopts the submissions above.[213]

129. Concerning the relevant crimes in Prozor, the Chamber has erred in finding PUŠIĆ's culpable *mens rea*. Weak inferences are drawn from evidence that PUŠIĆ knew what had happened in the area and continued to function within the HVO regardless.[214] This material however construed is not capable of proving JCE 1 intent i.e. that PUŠIĆ intended these crimes as a result of his conduct. Mere knowledge is insufficient to establish intent. Insofar as it appears to rely on evidence of foresight on the part of PUŠIĆ the Chamber has conflated the *mens rea* requirements for JCE 1 and JCE 3. Furthermore the Chamber fails to show that PUŠIĆ had the required *mens rea* before or at the time the crimes took place as the Impugned Decision holds that PUŠIĆ knew about the crimes that occurred in the area based on an episode that took place on 18 August 1993 some time after the crimes in question occurred.

Minority View - No Mens Rea For Counts 2,3, 19, 21, 24 and 25[215]

130. The Appellant further adopts reasoning behind the Minority's conclusion that "it is obvious"[216] that PUŠIĆ lacked the intent required for the commission of these crimes.

Counts 12, 13, 14, 15, 16, 17[217]

131. In this section the Appellant will address the Chambers findings concerning PUŠIĆ's *mens rea* for the crimes of inhumane acts, inhumane treatment and inhuman treatment. The Appellant submits that the Chamber erred in finding that PUŠIĆ had the *mens rea* to commit these crimes.

[213] See discussion at para.123 *ante*.
[214] TJ, Vol.IV, paras.1097 to 1099.
[215] TJ, Vol.IV, paras.1203 to 1207.
[216] TJ, Dissent, Vol.VI, page,489.
[217] TJ, Vol.IV, paras.1203 to 1207.

132. In connection with any relevant crimes committed during the siege of Mostar the Appellant adopts the submissions above.

133. In relation to any crimes committed in HVO detention centres, it is submitted that the evidence of conduct relied on by the Chamber does not show that PUŠIĆ intended that Muslim detainees in HVO facilities should be in any way mistreated. This intent cannot be inferred from evidence that PUŠIĆ had notice of their mistreatment from the reports sent to him combined with an assessment of his powers that is wholly erroneous.[218]

Counts 6,7,8 and 9

134. In respect of the crimes of unlawful transfer and deportation two distinct submissions are advanced by the Appellant. Firstly, the Chamber has erred in its findings of *mens rea* in that the actions of the Accuse arose not from a desire to brings about the ethnic cleansing of Muslims from BiH but from motives connected to "the need to protect the civilian populations and to offer them another more peaceful living environment by allowing them to take up residence in Croatia or a third country."[219] This is another reasonable inference that arises from the evidence that the Chamber fails to address. Under the Geneva Conventions "a belligerent has the possibility of moving a civilian population" pursuant to Article 49 of Geneva Convention IV Relative to the Protection of Civilian Persons in time of War of 12 August 1949 where the security of population or imperative military reasons so demand.[220]

135. The military justification in this case could include the threat presented by imprisoned HVO soldiers who if released and allowed to return home could have rejoined the ABiH. The Appellant this adopts the reasoning of the Minority in relation to a military justification for these evacuations and transfers in that "releasing and deporting them to third countries was quite justified for a military reason."[221]

[218] See discussion at para.57 *ante*.
[219] TJ, Dissent, Vol VI, page 395-6. Se also discussion at para. 100 *ante.*
[220] TJ, Dissent, Vol VI, page 338-9.
[221] Ibid.

Special Intent for Persecution

136. The *mens rea* for the crime of Persecution requires a finding of special discriminatory intent. Where the Accused is aid to participate in a JCE, this arises where it can be demonstrated that "the Accused shared common discriminatory intent of the joint criminal enterprise."[222]

137. It is clear from the relevant jurisprudence that a finding of special intent is required for the crime of Persecution. It is a fundamental error of law for the Chamber to omit to address this issue. In the Impugned Decision however no reference is made to the crime of Persecution in the section of the judgement dealing with the Appellants *mens rea*.[223] In failing to make a specific and explicit finding in respect of the Accused's special intent for the crime of Persecution, the Chamber has erred in law.

138. The Appellant also adopts the position taken by the Minority in finding that PUŠIĆ did not have the required special intent for the crime of Persecution. In the view of the Minority,

> "for count 1, I find no basis for any charge against him [PUŠIĆ] of involvement in discrimination of any kind because he was responsible only for taking care of Muslims, which means that he acted without discriminatory intent."[224]

Knowledge of International Armed Conflict

139. The Appellant disputes the Chamber's finding that the armed conflict in BiH was of an international nature and the relevant submissions in this regard submissions can be found at Ground 7. It follows that the Chamber erred in finding that the Appellant must have known that an international armed conflict existed in BiH at the relevant time. [225] It cannot be inferred from the factors cited by the Chamber, namely (i) PUŠIĆ's contact with Mate GRANIĆ in the course of negotiations concerning the release of detainees and humanitarian aid arrangements and (ii) his knowledge of the presence of HV troops in the

[222] *Kvočka,* AJ, para. 110. TJ, Vol.I, para.214.
[223] TJ, Vol.IV, para.1208.
[224] TJ, Dissent, Vol.VI, page,489.
[225] TJ, Vol.IV, para.1210.

area, that PUŠIĆ knew the Croatian government had overall control of the activities of the HVO.[226]

Relief Sought

140. In light of the errors of law and fact identified above, the Appeals Chamber should apply the correct legal standards in evaluating PUŠIĆ's *mens rea*. The Chamber erred by finding that the only reasonable inference from the evidence was that the Appellant shared the intent to permanently remove the Muslim population from BiH. Without proof of intent, the Chamber lacks the requisite *mens rea* to find him guilty as a co-perpetrator of the alleged JCE. His conviction must, therefore, be reversed.

[226] See discussion at para. 232 et seq.

GROUND 6 THE TRIAL CHAMBER ERRED IN FACT AND LAW IN CONCLUDING THAT BERISLAV PUŠIĆ PARTICIPATED IN THE JCE - PARAS.28-34 OF THE NOTICE

Grounds

141. The Trial Chamber erred in fact and law when concluding that PUŠIĆ participated in the JCE. In respect of each of the grounds and sub-grounds identified below, it is submitted that the Trial Chamber erred in fact and law when concluding that the acts performed by PUŠIĆ, whether viewed individually or cumulatively, and taking the evidence against him at the highest, were such as to amount of participation in the JCE.

142. In particular, none of the factors cited by the Chamber as evidence of his participation establishes any link to a common criminal plan. Instead, they reflect the Chambers erroneous premise that PUŠIĆ had effective control over the perpetrator of crimes. No reasonable Chamber could have made this finding. Consequently, PUŠIĆ's conduct has been wholly mischaracterised. His conviction, based on the unsupported finding that he participated in a JCE, should be quashed.

Law

143. The Appeals Chamber has failed to define precisely the participation requirement in its judgements concerning JCE theory. The guidance that can be gleaned from the Tribunal's jurisprudence does however make it plain that to prove participation in a JCE requires evidence at the very least of conduct amounting to a significant contribution to the common plan. This requirement is an essential ingredient in the requirements for a JCE;

a. It is one of the main safeguards against the overbroad application of JCE theory resulting in a finding of guilt by association. Thus, JCE liability cannot be equated with membership liability as it is not "an open-ended concept that permits convictions built on guilt by association. On the contrary, the doctrine of JCE can only occur when a Chamber finds that all necessary elements satisfied beyond reasonable doubt."[227] Indeed the jurisprudence of the Tribunal

[227] *Brđanin*, AJ, para.428

suggests that to prove participation in a JCE an Accused must do far more than merely associate with criminal persons.

b. "Not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability"[228] notwithstanding that an Accused's participation need not be a "sine qua non, without which the crimes could or would not have been committed." Thus, "the argument that an accused did not participate in the joint criminal enterprise because he was easily replaceable must be rejected."[229]

c. "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."[230] It need not involve criminal conduct and can take the form of public statements protected by freedom of speech[231] or omissions.[232]

d. Arguably, JCE participation requires a contribution which is more significant and substantial than that of an aider and abetter. The relevant case law provides no clear answer to this question, hence the equivocation. The Appeals Chamber in *Kvočka* suggested that aiding and abetting "generally involves a lesser degree of individual criminal responsibility" than participation in a JCE.[233] The opposite could be inferred from the decision of the Appeals chamber in *Tadić.* In that decision the Chamber held that an aider and a better need only perform an act that contributes "in some way"[234] to furthering the common plan whereas an aider or abettor is required to carry out substantial acts that are specifically directed at bringing about the perpetration of the main crime.

e. Another reasons why the nature of the contribution made by an Accused is important is because it will reflect his JCE intent, i.e."[i]n practice, the

[228] *Tadić* AJ, para.192 and Kvočka TJ, para. 311 in light of the discussion in Kvočka AJ, paras 95-98.
[229] *Kvočka* AJ, paras 97-98.
[230] *Tadić* AJ, para. 192.
[231] *Krajišnik* AJ, para.695-6.
[232] *Gotovina* TJ, para.2370 and Kvočka AJ, paras 187.
[233] *Kvočka* AJ, paras 97-98
[234] *Kvočka* AJ, paras 97-98

significance of the Accused's contribution will be relevant to demonstrating that [the Accused] shared the intent."[235]

f. The rationale behind the concept of JCE liability, in the view of the *Tadić* Appeals Chamber, was that those that ordered crimes and were structurally remote from their commission were none the less criminally liable because of the "moral gravity of their conduct" i.e. "It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question."[236]

Law - The Conduct Threshold for Participation

144. A cursory review of the relevant jurisprudence therefore provides little relief in determining how a Chamber should measure the "significance" of an Accused's contribution save for that it should contribute in a significant way to the implementation of the common purpose. In the absence of any specific practical guidance as to where to set the bar it is submitted that the Chamber has in this instance fallen into error by setting it far too low. Often as is demonstrated below, the Chamber has found that PUŠIĆ's conduct significantly contributes to the JCE when there is no evidence that it has any real impact on the execution of the common plan.

145. In this regard it is submitted that the Appeals Chamber should consider carefully the significance of the acts of the Accused to determine if they are directly related to the breadth of the purpose of the alleged JCE. Where, as in this case, the JCE has been extremely broadly defined, it may be more difficult to prove that a specific act is directly related to its purpose (here, ethnic cleansing) that it would be in a case where the JCE was more narrowly defined.[237]

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[235] *Brđanin* AJ, para. 427.
[236] *Tadić* AJ, para.191.
[237] By way of illustration, the Appellant cites a theoretical scenario cited from "*Hate By Association: Joint Criminal Enterprise Liability For Persecution*" By Jacob A. Ramer, CHICAGO-KENT JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW SPRING, 2007, page 29; "a 13-year old aspiring insurgent, A, wishes to topple his current regime. Throughout his young life he has experienced oppression at the hands of his autocratic ruler. In the past few years a budding insurgency has grown into a formidable opposition and it has piqued his interest. The opposition is underground, making joining somewhat difficult. Not to be undeterred, A goes to the local café known for radicalism and, through a series of introductions, meets an individual with scant information on joining the insurgency. A then follows the instructions and meets D, a local leader responsible for

146. In the context of this extremely large-scale case where PUŠIĆ is not deemed to be either a direct perpetrator or a high level official, the Chamber has erred in holding that conduct which is tenuously related to such a broadly defined common purpose (because it is *de minimis* or far below the required threshold in terms of its impact on the JCE) constitutes a significant contribution.

SUB GROUNDS TO GROUND 6

147. It is against the background of the submissions above that the Chamber's findings concerning PUŠIĆ's involvement in specific areas of HVO activity identified in the sub-grounds to Ground 6 are addressed below.

148. In all the submissions made in the Brief the evidence cited is taken at its highest and no admissions are made contrary to the position advanced by the Accused at trial.

1. MUNICIPALITY OF PROZOR [238]

Grounds

149. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to any crimes committed in Prozor pursuant to the JCE by obstructing a visit by international community representatives to the area in August 1993[239] and by continuing in his post in the HVO thereafter. [240](Sub-ground, para.29.30)

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a small neighborhood. D has approximately ten fighters under his command. After testing A's dedication to the cause and willingness to fight, D orders A to monitor police movements from a rooftop and report back to D everyday." Applying JCE liability "Is the aspiring Insurgent responsible only for the criminal acts resulting from his rooftop information, or for all the acts of D's cohorts?" The answer depends on how the JCE is framed, "The analysis would then require whether monitoring police movements from a rooftop constituted a "significant contribution" to the enterprise, which in turn requires the defining of the JCE…If at the outset of this "hypothetical, the JCE was characterized as being the overthrowing of the regime. Working with this alleged purpose, standing atop a rooftop may be considered too tenuously connected to activities taking place several hundred miles away, even if those activities are undertaken with the goal of overthrowing the regime. But the rooftop lookout is closely related to the acts of D and his cronies, and therefore, when the criminal enterprise is narrowly defined, those same acts may be considered "significant" rather than when the criminal enterprise is broadly defined. The significance of the acts should be directly related to the breadth of the purpose of the alleged JCE. In other words, monitoring the rooftop is a significant contribution when the purpose of the JCE was the overtaking of Neighborhood X, but the same act is not a significant contribution when the purpose was the overthrowing of the central government."

[238] TJ, Vol.IV, para.1097. See para.9 of the Brief.

[239] TJ, Vol.IV, paras.1097.

[240] TJ, Vol.IV, paras.605,635 and 773 of Vol. II and 1099 of Vol. IV.

Argument

Accepting the Unlawful Detention of Muslim Civilians In Prozor[241]

150. Even taken the material cited by the Chamber at its highest, it is submitted that evidence that PUŠIĆ had knowledge of what had happened in this area yet continued to work within the HVO regardless (said to constitute "acceptance" of these crimes) could not have contributed to the implementation of the common purpose. This is all the more so given that that PUŠIĆ knowledge is based on an episode that took place on 18 August 1993 some time after the crimes in question occurred.

151. The Appellant could not have made a significant contribution to the JCE on this basis.[242]

2.MUNICIPALITY OF JABLANICA (SOVIĆI AND DOLJANI)[243]

Grounds

152. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to any crimes committed in Jablanica pursuant to the JCE by visiting the area on the 4 May 1993[244] and by continuing in his post in the HVO thereafter. (Sub-ground, para.29.31)

Argument

Accepting Crimes Including The Removal Of The Civilian Muslim Population In Jablanica[245]

153. PUŠIĆ's conduct in attending as part of a joint delegation of HVO and ABiH the villages of Sovići and Doljani on the 4 May 1993 does not warrant the inferences drawn by the Chamber that in so doing (i) he facilitated the evacuation of the residents of those villages on the following day[246] and/or (ii) accepted crimes that took place in the

[241] TJ, Vol.IV, paras.1099.
[242] TJ, Vol.IV, paras.1097.
[243] TJ, Vol.IV, para.1100.
[244] TJ, Vol.IV, paras.1100 – 1104, Vol.IV.
[245] TJ, Vol.IV, paras.1099.
[246] TJ, Vol.IV, paras.1103.

area in the period between the 17th April and 4th May 1993.[247] No other evidence is presented to link PUŠIĆ directly to (i) the decision to evacuate the villagers which appears to have been taken by PETKOVIĆ on the 5th May 1993 or to the crimes that followed or (ii) the HVO attack on the 17th April 1993.

154. While there is evidence that indicates PUŠIĆ knew of the HVO attack on the 17th April[248] and the crimes that followed, PUŠIĆ's failure to remedy or act on these crimes does not in itself meet the threshold for contribution to a JCE. This is particularly the case given that the evidence shows that PUŠIĆ only became aware of these crimes more than two weeks after the date they took place on the 17 April 1993. Further, the Chamber has not considered the normal criteria for omission liability which, even in the context of participation in a JCE, requires some consideration of whether a duty to prevent or punish existed between the Accused and the physical perpetrators of the crimes. No such duty arose in this case. Indeed the evidence of any links between the physical perpetrators and the Accused is so tenuous that JCE liability is wholly inappropriate.[249]

155. Accordingly, this conduct could not possibly have furthered or "facilitated" the common criminal purpose of the JCE.

3.MUNICIPALITY OF MOSTAR[250]

Grounds

156. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to the JCE:

a. by participating in the expulsion of Muslims from Mostar West to Mostar East from May 1993 onwards.[251] (Sub-ground, para.29.22)

b. by blocking or obstructing access for international organisations and humanitarian evacuations in Mostar during the siege of the city in May 1993 in Mostar.[252] (Sub-ground, para.29.23)

[247] TJ, Vol.IV, paras.1104.
[248] TJ, Vol.IV, paras.1123..
[249] See discussion at para.110.
[250] TJ, Vol.IV, para.1105 *et seq*.
[251] TJ, Vol.IV, para. 1111 to 1116.
[252] TJ, Vol.IV, paras.1117-1122 and 1206.

c. by blocking or obstructing humanitarian evacuations in Mostar during May 1993.[253] (Sub-ground, para.29.24)
d. making a significant contribution to any crimes committed in Mostar, pursuant to the JCE. [254] (Sub-ground, para.29.33)

Argument

Arrest Campaigns In May 1993

157. In respect of PUŠIĆ's involvement in the release of those Muslims arrested on 11 May 1993[255] the Appellant adopts the relevant submissions elsewhere.[256] This conduct does not meet the required threshold for participation in the JCE as by unconditionally releasing detainees the Accused could not have advanced the common criminal purpose.

Encouraging The Permanent Removal Of Muslims[257]

158. The conduct cited in Mostar on 26th May 1993[258] does not meet the required participatory threshold. The incident seen by Nissen on the 26th May 1993 was part of a pre-arranged transfer of civilians agreed by the HVO and ABiH. The background as to how this was facilitated was never discovered. It did not have a significant impact on the implementation of a broadly defined JCE.

159. The statements made by PUŠIĆ on the 16 June 1993 to ECMM representatives[259] and the comments said in the presence of Witness [REDACTED]on 16 September 1993[260] also do not meet the required participatory threshold in terms of any contribution made to the execution of the common plan. The statements had no impact on the measures adopted by the HVO in furtherance of its efforts to implement the common purpose of the JCE.

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253 TJ, Vol.IV, paras.1117-1122 and 1206. .
254 Judgement paragraphs 625, 656 to 665, 905, 906 of Volume 1, paragraphs 851 to 856, 873, 876, 1231, 1239, 1439, 1441, 1443,1445 to 1453, 1454 to 1456, 1472, 1492, 1496, 1512, 1519, 1541, 1579, 1589, 1601, 1637, 1645, 1646, 1350, 1653, 1686, 1737, 1762, 1811, 1814 and 1838 of Volume II, paragraphs 16, 35, 59, 144, 166, 183, 184, 191, 192,203, 211, 264, 265 and 273 of Volume III and paragraphs 905, 908 and 1023 – 1212 of Volume IV.
255 TJ, Vol.IV, paras.1106 to 1110.
256 See discussion at para.196 *et seq.*
257 TJ, Vol.IV, paras.1111 to 1116.
258 TJ, Vol.IV, paras.1111-2. Defence Final Brief paras. 138-140. .
259 TJ, Vol.IV, paras.1113.
260 TJ, Vol.IV, paras.1113.

160. Moreover, the vague and imprecise language used to describe the impact of this conduct to the JCE suggests that the test for participation in the JCE cannot be satisfied. It is not clear who within the HVO is "encouraged" by these remarks or what constitutes the "system encouraging the permanent removal of Muslims." referred to the Chamber.[261]

Worsening Living Standards

161. As explained in Ground 1, the Appellant did not have the significant powers cited by the Chamber to represent the HVO in international negotiations, notwithstanding the inconsistent conclusions drawn by the Chamber on this question. The Chamber has assumed that he did. Absent this assumption, the Appellant could not have made a significant contribution to the JCE.

162. Even taken the material cited by the Chamber at its highest, the statements said to have been made by PUŠIĆ on the 16th September 1993 and others recorded in an ECMM report dated 28 November 1993 and another report from him dated 24 February 1994 do not meet the threshold requirement for participation in a JCE.[262] No link can be established between these statements and PUŠIĆ's conduct having influenced any HVO official or had any impact on the execution of the common plan.

163. PUŠIĆ's conduct, insofar as he is said to have "participated in worsening living conditions"[263] does not meet therefore the threshold for a contribution to the JCE.

Liability for Other Crimes in Mostar[264]

164. On the basis of the Chamber's disputed finding *ante* that PUŠIĆ "participated" in worsening living conditions in Mostar combined with his knowledge of the crimes committed during the siege[265] and the fact he continued to perform his functions within the HVO[266] the Chamber also found him liable for "accepting" the following crimes:

a. the destruction of property in the city including religious buildings

[261] TJ, Vol.IV, paras.1116.
[262] TJ, Vol IV, para.1121.
[263] TJ, Vol.IV, paras.1122.
[264] TJ, Vol.IV, paras.1120 - 22.
[265] TJ, Vol.IV, paras.1120 and 1122.
[266] Ibid.

b. the murders of civilians
c. the extremely harsh living conditions imposed on the population of East Mostar.

165. As explained in Ground 1, the Appellant did not have the unilateral power to obstruct humanitarian evacuations. The Chamber has assumed that he did.[267] Absent this assumption, the Appellant could not have made a significant contribution to the JCE.

166. Even taken the material cited by the Chamber at its highest, it is submitted that PUŠIĆ's acceptance of these crimes would not have contributed to the implementation of the common purpose. The Appellant could not have made a significant contribution to the JCE on this basis.

Failing to Denounce Crimes in Mostar

167. PUŠIĆ is also found culpable for his failure to denounce or report crimes in Mostar. It is submitted that any omissions in this regard would not have impacted on the execution of the JCE as PUŠIĆ, who was not a high level HVO official did not have sufficient authority to influence others or influence events in general by his said omissions.

Conclusion

168. The absence of evidence of any links between the physical perpetrators and the Accused is so tenuous that JCE liability for any crimes in Mostar is wholly inappropriate.[268]

4.MUNICIPALITY OF ČAPLJINA[269]

Grounds

169. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to any crimes committed in Čapljina pursuant to the JCE by

[267] See discussion at para.44 *ante*.
[268] See discussion at para.110.
[269] TJ, Vol.IV, para.1123 *et seq*.

visiting the area on the 19-20 July 1993 and taking part in a HVO delegation on those dates and by continuing in his post in the HVO thereafter. [270] (Sub-ground, para.29.32.

Argument

Accepting The Removal Of The Civilian Muslim Population In Čapljina[271]

170. The Appellant adopts the submissions made elsewhere above concerning his involvement in the working group commissioned on the 19th July 1993 to visit Čapljina with as part of its remit the task of inspecting detention sites.[272]

171. Even taking the material cited by the Chamber at its highest, it is submitted that PUŠIĆ's "acceptance" of these crimes would not have contributed to the implementation of the common purpose. The Appellant could not have made a significant contribution to the JCE on this basis.

172. Finally, the absence of evidence of any links between the physical perpetrators and the Accused is so tenuous that JCE liability for any crimes in this area is wholly inappropriate.[273]

5.DETENTION CENTRES[274]

a.IMPLEMENTATION OF MATE BOBAN'S DECISION OF 10 DECEMBER 1993

173. The Appellant adopts the submissions made below elsewhere in the Brief in respect of this conduct.[275] PUŠIĆ played a minor administrative role in the implementation of this order. The Chamber has assumed that he had influence that he did not in fact have. Absent this assumption, the Appellant could not have made a significant contribution to the JCE.

[270] TJ, Vol.IV, para.1123.
[271] TJ, Vol.IV, paras.1099.
[272] See discussion at para.206 *et seq.*
[273] See discussion at para.110.
[274] TJ, Vol.IV, para.1124 *et seq.*
[275] See discussion at para.42 *et seq.*

b.THE HELIODROM

i. BERISLAV PUŠIĆ'S ROLE IN THE REGISTRATION AND CATEGORISATION OF HELIODROM DETAINEES[276]

Grounds

174. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to the JCE by virtue of any responsibility held by him to register and classify detainees.[277] (Sub-ground, para.29.1)

175. The Trial Chamber erred in fact and -law when concluding that PUŠIĆ made a significant contribution to the JCE by establishing a database of detainees held by the HVO.[278] (Sub-ground, para.29.2)

Argument

Failing to Register and Classify Detainees

176. The Chamber erred in finding that PUŠIĆ, in failing to act to rectify a situation he was aware of by virtue of his power to compile lists of those in detention, namely that Muslim civilians were being unlawfully detained in HVO detention centres, accepted their unlawful detention and thus contributed to the JCE.

177. As stated in Ground 1, the Appellant did not have the power to order the registration and classification of detainees. The Chamber has assumed that he did. Absent this assumption, the Appellant could not have made a significant contribution to the JCE. The Chamber has mischaracterised evidence which shows he intermittently received lists of detainees from other HVO officials and that this work was never completed.[279]

178. Even taking the evidence relied on by the Chamber at its highest however, it is submitted that that the Majority erred in law in concluding that PUŠIĆ's "culpable omission" in accepting the unlawful detention of Muslims based on his powers to collate lists of those held in detention by the HVO constituted participation on the basis of a significant enough contribution to the JCE. This omission did not contribute to the single

[276] TJ, Vol.IV, para.1134 *et seq*.
[277] TJ, Vol.IV, paraa.1134 – 1136, 1045.
[278] TJ, Vol.IV, para.1045, Volume IV.
[279] See discussion at para.32 *et seq*.

criminal purpose of ethnic cleansing which is at the heart of the JCE enterprise. Accurate records were never kept distinguishing civilians from ABiH personnel in custody and there is no evidence that PUŠIĆ had any hand in shaping the general contours of HVO detention and release policy.

Establishing A Database Of Detainees

179. The Majority erred in law in concluding that PUŠIĆ's conduct in collating lists of those held in detention by the HVO constituted participation in or a significant contribution to the JCE purpose. The Appellant adopts the submissions above *mutatis mutandis*.

ii. BERISLAV PUŠIĆ'S KNOWLEDGE OF AND INVOLVEMENT IN THE CONDITIONS OF CONFINEMENT AND MISTREATMENT INSIDE THE HELIODROM[280]

Grounds

180. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to the JCE:

a. by participating and facilitating in the operation of HVO detention centres as part of a system created and designed to detain Muslim civilians.[281] (Sub-ground, para.29.5)
b. by influencing or dictating or controlling the conditions of detention for those held in HVO detention centres.[282] (Sub-ground, para.29.9)
c. by failing to take steps to improve conditions for detainees or stop their ill-treatment or abuse despite his knowledge of the same[283] by, *inter alia*, transferring detainees out of these facilities or alerting the authorities.[284] (Sub-ground, para.29.12)
d. by virtue of his knowledge of poor conditions of inmates in Dretelj and Gabela and the fact he continued to play a role in the HVO and perform his duties.[285]

[280] TJ, Vol.IV, para.1137 *et seq*.
[281] TJ, Vol.IV, paras.1054, 1173, 1181 and 1203.
[282] Judgement paragraph 1056, Volume IV.
[283] Judgement paragraphs 1182, 1176, , Volume IV.
[284] Judgement paragraph 1203, 1187 Volume IV.
[285] TJ, Vol.IV, paras.1167 to 1170.

[286] (Sub-ground, para.29.25 and 29.26 respectively)

e. by making a significant contribution to any crimes committed in the Heliodrom, Dretelj, Gabela and Ljubuški pursuant to the JCE. [287] (Sub-ground, para.29.33)

f. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to the JCE by ordering or facilitating the transfer of detainees between different HVO detention centres. [288] (Sub-ground, para.29.7)

g. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to the JCE:

   a. by failing to speak out, denounce, or report the poor conditions of detention and ill-treatment of detainees (including forced labour practices) in HVO detention centres.[289]

   b. by failing to speak out, denounce, or report crimes committed during the arrest of members of the Muslim population. [290]

Argument

No Powers Over Conditions of Detention

181. As explained in Ground 1, the Appellant did not have any powers over the conditions of detention in HVO prison facilities.[291] The Chamber has assumed that he did. Absent this assumption, the Appellant could not have made a significant contribution to the JCE.

Transferring Detainees Between Facilities

182. This section addresses the Chamber's findings that PUŠIĆ made a significant

[286] TJ, Vol.IV, paras. 1167 to 1170.
[287] Judgement paragraphs 625, 656 to 665, 905, 906 of Volume 1, paragraphs 851 to 856, 873, 876, 1231, 1239, 1439, 1441, 1443,1445 to 1453, 1454 to 1456, 1472, 1492, 1496, 1512, 1519, 1541, 1579, 1589, 1601, 1637, 1645, 1646, 1350, 1653, 1686, 1737, 1762, 1811, 1814 and 1838 of Volume II, paragraphs 16, 35, 59, 144, 166, 183, 184, 191, 192,203, 211, 264, 265 and 273 of Volume III and paragraphs 905, 908 and 1023 – 1212 of Volume IV.
[288] TJ, Vol.IV, para.1056. V.
[289] Judgement paragraphs 1137 – 1151, 1134 – 1145, 1167 – 1170, 1181 to 1182 and 1203, Volume IV.
[290] Judgement paragraph 1207, Volume IV.
[291] See discussion at para.57 *et seq.*

contribution to the JCE by virtue of his conduct in effecting the transfer of detainees between HVO Detention Centres. [292] In respect of the detention centre at Gabela[293] PUŠIĆ is said to have participated in the JCE by issuing an order that Gabela was to be used as a transit centre to accommodate detainees arriving from other centres as they were about to be sent abroad. A similar finding is made in respect of the Ljubuški facility.[294]

183. The Chamber erred in concluding that this conduct amounted to a significant contribution to the JCE which had as its central purpose a broadly defined objective, namely ethnic cleansing. It cannot be said that every act that facilitated this purpose must necessarily constitute a significant contribution to the JCE. Otherwise, criminal liability could potentially arise from every act carried out in office by a civil servant.

184. Furthermore, as explained in Ground 1, the Appellant did not have the unilateral power to order the transfer of detainees between detention centres.[295] The Chamber has assumed that he did. Absent this assumption, the Appellant could not have made a significant contribution to the JCE.

185. Whether viewed in isolation or collectively with other evidence, PUŠIĆ's conduct in effecting the transfer of prisoners or omitting to do so[296] given his limited powers does not meet the threshold for participation in the JCE.

Failing to Denounce Crimes

186. In regard to the Chambers findings concerning PUŠIĆ's culpability for his failure to denounce or report crimes at HVO detention centres,[297] as explained in Ground 1, the Appellant did not have any significant or substantial powers over the conditions of detention in these facilities. The Chamber has assumed that he did. Absent this assumption, the Appellant could not have made a significant contribution to the JCE.[298]

187. Even taking the evidence relied on by the chamber at its highest, it is submitted

[292] TJ, Vol.IV, para.184,1056.
[293] TJ, Vol.III 183-4,191, 273, Vol. IV, paras,1179 and 1455-6.
[294] Judgement, Volume III 183, Volume IV, paragraph 1183.
[295] See discussion at para.60 *et seq.*
[296] TJ, Vol.IV, para.1143.
[297] TJ, Vol IV, para.1191-1201.
[298] See discussion at para.57 *et seq.*

that, this conduct, does not meet the threshold for participation in a JCE.

iii. BERISLAV PUSIĆ'S KNOWLEDGE OF AND INVOLVEMENT IN THE LABOUR CARRIED OUT ON THE FRONT LINE BY DETAINEES

Grounds

188. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to the JCE by:

a. approving or authorising the use of detainees for forced labour assignments in HVO detention centres.[299] (Sub-ground, para.29.6)
b. making a significant contribution to any crimes committed in the Heliodrom pursuant to the JCE. [300] (Sub-ground, para.29.33)

Argument

189. As explained in Ground 1, the Appellant did not have any powers over forced labour assignments.[301] The Chamber has assumed that he did. Absent this assumption, the Appellant could not have made a significant contribution to the JCE.

190. Furthermore, taking the evidence relied on by the Chamber at its highest, in the absence of any evidence that that "but for" the approvals said to have been issued by PUŠIĆ these assignments would have ceased, it is submitted that PUŠIĆ's conduct does not meet the threshold for participation in that it did not contribute to the JCE common purpose.

191. Finally the Chamber has also erred in not clarifying that it did not hold the Accused liable for any crimes that occurred before the date in April 1993 that he joined the JCE. Forced labour approvals were said to have been issued by the Accused from January 1993.

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[299] TJ, Vol.IV, paras.1054 and 1203. .
[300] Judgement paragraphs 625, 656 to 665, 905, 906 of Volume 1, paragraphs 851 to 856, 873, 876, 1231, 1239, 1439, 1441, 1443,1445 to 1453, 1454 to 1456, 1472, 1492, 1496, 1512, 1519, 1541, 1579, 1589, 1601, 1637, 1645, 1646, 1350, 1653, 1686, 1737, 1762, 1811, 1814 and 1838 of Volume II, paragraphs 16, 35, 59, 144, 166, 183, 184, 191, 192,203, 211, 264, 265 and 273 of Volume III and paragraphs 905, 908 and 1023 – 1212 of Volume IV.
[301] See discussion at para.49 *et seq.*

iv.BERISLAV PUŠIĆ'S ROLE IN GRANTING ACCESS TO THE HELIODROM[302]

Grounds

192. The Trial Chamber erred in law when concluding that PUŠIĆ made a significant contribution to the JCE by preventing or allowing members of the international community to visit and inspect HVO detention centres[303] (Sub-ground, para.29.3) or participating in any crimes committed in the Heliodrom pursuant to the JCE. [304] (Sub-ground, para.29.33)

Argument

193. The Majority erred in law in finding that PUŠIĆ's conduct in this area constituted participation in the JCE. Taken the Prosecution's evidence at its highest,[305] it bears highlighting that the Chamber found that PUŠIĆ in general cooperated with international community organisations in obtaining permission for them to visit detention centres. He granted authorisations to international community representatives to visit the Heliodrom on a small number of occasions from May 1993 to January 1994.[306] The Chamber also concluded that there was no evidence that PUŠIĆ denied international organisations access to the Heliodrom or hid detainees from them.

194. Allegations that PUŠIĆ obstructed efforts by international community representatives to visit some detention centres, even taken at their highest, did not sufficiently impact or contribute to ethnic cleansing purpose of the JCE as to meet the required threshold for participation in it.

v. BERISLAV PUŠIĆ'S ROLE IN THE RELEASE OF DETAINEES FROM THE HELIODROM EITHER THROUGH ORDINARY RELEASES OR THROUGH EXCHANGES[307]

Grounds

[302] TJ, Vol.IV, para.1152 *et seq*.
[303] TJ, Vol.IV, paras.1052,1152 to 155 and 1203.
[304] TJ paragraphs 625, 656 to 665, 905, 906 of Volume 1, paragraphs 851 to 856, 873, 876, 1231, 1239, 1439, 1441, 1443,1445 to 1453, 1454 to 1456, 1472, 1492, 1496, 1512, 1519, 1541, 1579, 1589, 1601, 1637, 1645, 1646, 1350, 1653, 1686, 1737, 1762, 1811, 1814 and 1838 of Volume II, paragraphs 16, 35, 59, 144, 166, 183, 184, 191, 192,203, 211, 264, 265 and 273 of Volume III and paragraphs 905, 908 and 1023 – 1212 of Volume IV.
[305] See discussion at para.32 *et seq.36*
[306] TJ, Vol.IV, para.1152-55 and 1051-2.
[307] TJ, Vol.IV, para.1156 *et seq*.

195. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to the JCE:

a. by ordering the release of detainees held by the HVO[308] (Sub-ground, para.29.4)
b. by organizing or facilitating the release of detainees from HVO detention centres on the basis they departed for a third country or to territory held by the ABiH.[309] (Sub-ground, para.29.8)
c. by participating in the detention and then release of Muslim civilians during the 9 to 11 May 1993 in Mostar[310] (Sub-ground, para.29.21)
d. through his interactions[311] with other senior HVO leaders.[312] [313] (Sub-ground, para.29.20)
e. by organising or facilitating a system designed to achieve the expulsion of Muslims from HVO held territory (Sub-ground, para.29.15)
f. by participating in the execution of BOBAN's order of the 10th December 1993 (Sub-ground, paras.29.16 and 29.18) to close all detention centres after all Muslim detainees had been sent to third countries
g. By reporting on the progress made in executing BOBAN's order of the 10th December 1993 (Sub-ground, para.29.17)
h. by negotiating, organizing or facilitating as a major player[314] the exchange of prisoners between the HVO and other warring parties.[315] (Sub-ground, para.29.13)
i. by participating in meetings, talks and negotiations between the HVO and representatives of the HVO between April 1993 to April 1994 concerning detainee and non-detainee releases, exchanges, transfers, the passage of humanitarian convoys, access to detention centres, checkpoints, ceasefires, evacuations, population movements and the treatment of detainees.[316](Sub-ground, para.29.19)
j. making a significant contribution to any crimes committed in the Heliodrom pursuant to the JCE. [317] (Sub-ground, para.29.33)

[308] TJ, Vol.IV, paras.1050, 1156 to 1166.
[309] TJ, Vol.IV paras 1056,1203, 1156 to 1166 , 1183 to 1184.
[310] TJ, Vol.IV, para.1206.
[311] TJ, Vol.IV, para.1131.
[312] TJ, Vol.IV, para.1082 to 1093.
[313] TJ, Vol.IV, paras.1054, 1173, 1181 and 1203.
[314] TJ, Vol.IV, para.1202.
[315] TJ, Vol.IV, paras.1057 to 1063, 1071.
[316] Judgement paragraphs 1068-1081, Volume IV.
[317] Judgement paragraphs 625, 656 to 665, 905, 906 of Volume 1, paragraphs 851 to 856, 873, 876, 1231, 1239, 1439, 1441, 1443,1445 to 1453, 1454 to 1456, 1472, 1492, 1496, 1512, 1519, 1541, 1579, 1589, 1601, 1637, 1645, 1646, 1350, 1653, 1686, 1737, 1762, 1811, 1814 and 1838 of Volume II, paragraphs 16, 35, 59, 144, 166,

Argument

May 1993 Releases from the Heliodrom[318]

196. The Majority erred in law in finding that PUŠIĆ's role and conduct in securing the release of those Muslims taken into custody following the mass arrests in West Mostar by the HVO after the 9 May 1993[319] meets the threshold for JCE participation. Leaving aside questions concerning the extent of PUŠIĆ's authority, the orders for release attributed to PUŠIĆ mandated the unconditional release of all detained. These orders cannot therefore be said to have contributed to a JCE, which had, as one of its central aims, the expulsion of Muslims from HVO held territory.

197. Furthermore, the Chamber cannot have reached a decision beyond reasonable doubt on this point as it concedes that it "does not know the motive behind the releases."[320]

198. It is also relevant that the terms of the Official Note said to have been penned by PUŠIĆ states that the authorities should "release those people, let them go home, back to their homes."[321] It would be perverse to attribute criminal liability to a HVO official in a situation where that individual was trying to secure the release of unlawfully detained civilians.

Prisoner Releases from July to 10 December 1993 from the Heliodrom[322] and PUŠIĆ's Role in Shaping HVO Deportation Policy

199. The Chamber erred in law in finding that PUŠIĆ's limited role in prisoner releases from July to 10 December 1993[323] meets the threshold for participation in a JCE. No reasonable Chamber could have reached this finding.

183, 184, 191, 192,203, 211, 264, 265 and 273 of Volume III and paragraphs 905, 908 and 1023 – 1212 of Volume IV.
[318] TJ, Vol.IV, para.1156.
[319] TJ, Vol.IV, para.1156.
[320] TJ, Vol.IV, para.1496.
[321] P02260
[322] TJ, Vol.II, paras1443, 1449, 1451-2, 1465, Vol. IV, paras.1157-9, 1166,
[323] TJ, Vol.II, paragraphs 1443, 1449, 1451-2.

200. As explained in Ground 1, the Appellant did not have the power to order the release detainees without prior approval from his superiors.[324] The Chamber has assumed that he did have some unilateral powers in this regard however. Absent this assumption, the Appellant could not have made a significant contribution to the JCE.

201. Even taken at its highest, the evidence cited by the Chamber concerning PUŠIĆ's conduct in taking part in exchange negotiations, issuing paperwork and transit papers in accordance with HVO policy dictated by the leadership (that he had no role in shaping), reporting on the progress made in executing the 10 December 1993 order and interacting with the HVO leadership[325] does not satisfy the threshold requirement for participation in the JCE.

Informing the HVO Leadership of Progress in Exchange Negotiations

202. The significance of PUŠIĆ's conduct in interacting and reporting to the HVO leadership[326] concerning the progress of exchange initiatives particularly in the context of the after the announcement of BOBAN's decision of 10 December 1993 has been greatly exaggerated. It does not meet the threshold for participation in a JCE. As documented above, these interactions are largely one-way and take the form of PUŠIĆ sending reports to the leadership in writing and there is little evidence of any response in return.[327] This conduct did not have a significant impact on the execution of the alleged JCE.

Participation In International Negotiations

203. As explained in Ground 1, the Appellant did not have the unilateral power to represent the HVO in international negotiations or control exchanges. The Chamber has assumed that he did. Absent this assumption, the Appellant could not have made a significant contribution to the JCE.[328]

204. Even taken at its highest, the evidence cited by the Chamber concerning PUŠIĆ's conduct in taking part in exchange negotiations, or other international talks, issuing paperwork and transit papers in accordance with HVO policy dictated by the

[324] See discussion at para.38 *et seq.*
[325] See discussion at Ground 1.
[326] TJ, Vol.IV, para.1091.
[327] See discussion at para. 27 *et seq.*
[328] See discussion at para.44 *et seq.*

leadership (that he had no role in shaping), reporting on the progress made in executing the 10 December 1993 order and interacting with the HVO leadership does not satisfy the threshold requirement for participation in the JCE.

c. DRETELJ PRISON[329]

Grounds

205. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to any crimes committed in Dretelj pursuant to the JCE. [330] (Sub-ground, para.29.33)

Argument

19 July 1993 Working Group

206. PUŠIĆ's conduct in taking part in working group despatched on 19 July 1993 to identify new sites to take detainees from the overcrowded prison at Dretelj[331] does not meet the threshold for a significant contribution to the JCE. It is relevant to note that PUŠIĆ was a junior member of this delegation and was not one of the members of the party said to have reported back to the HVO cabinet concerning this assignment the next day.[332] This visit had no impact on the implementation of the JCE objective.

207. As it is not clear from the evidence that the proposals set out by PUŠIĆ on the 12th August 1993 to suspend releases were ever adopted[333] this conduct also does not meet the participatory threshold.

20 September 1993

208. PUŠIĆ was informed at a meeting on 20 September 1993[334] that detainees at that prison were exhibiting signs of malnutrition. As explained in Ground 1, the Appellant did not have the power to order the transfer of detainees unilaterally. The Chamber has

[329] TJ, Vol.IV, para.1167 *et seq*.
[330] TJ, paras. 625, 656 to 665, 905, 906 of Vol.1, paras. 851 to 856, 873, 876, 1231, 1239, 1439, 1441, 1443,1445 to 1453, 1454 to 1456, 1472, 1492, 1496, 1512, 1519, 1541, 1579, 1589, 1601, 1637, 1645, 1646, 1350, 1653, 1686, 1737, 1762, 1811, 1814 and 1838 of Vol.II, paras. 16, 35, 59, 144, 166, 183, 184, 191, 192,203, 211, 264, 265 and 273 of Vol.III and paras. 905, 908 and 1023 – 1212 of Vol.IV.
[331] Ibid, Vol IV, para.1167.
[332] Defence Final Brief, paras,379-382.
[333] TJ, Vol IV, para.1168.
[334] TJ, Vol IV, para.1169.

assumed that he did.[335] Absent this assumption, the Appellant could not have made a significant contribution to the JCE.

209. In any event it is submitted that PUŠIĆ's conduct in receiving this information and failing to act did not contribute or have any effect to the implementation of the JCE common purpose given his limited powers.

210. In respect of any finding that PUŠIĆ failed to denounce crimes at this facility the submissions above are adopted.[336]

d.GABELA PRISON[337]

Grounds

211. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to any crimes committed in Gabela and pursuant to the JCE. [338] (Sub-ground, para.29.33)

Argument

212. The Chamber's findings concerning PUŠIĆ's conduct in issuing a decision on the 12th August 1993[339] are dealt with above.[340] The Chamber's admission that the detainees at that facility were never actually registered or classified must mean that the test for a contribution to the common criminal purpose has not been met.

213. It is submitted that evidence that PUŠIĆ received lists of those detained at this prison and drew up such lists[341] does not meet the threshold for a significant contribution to the JCE and the relevant submissions made elsewhere in this ground are adopted *mutatis mutandis*.

214. As for any findings concerning PUŠIĆ's participation in the working group of

[335] See discussion at para.60 *et seq.*
[336] See discussion at para.186 *et seq.*
[337] TJ, Vol.IV, para.1171 *et seq.*
[338] TJ, paras. 625, 656 to 665, 905, 906 of Vol.1, paras. 851 to 856, 873, 876, 1231, 1239, 1439, 1441, 1443,1445 to 1453, 1454 to 1456, 1472, 1492, 1496, 1512, 1519, 1541, 1579, 1589, 1601, 1637, 1645, 1646, 1350, 1653, 1686, 1737, 1762, 1811, 1814 and 1838 of Vol.II, paras. 16, 35, 59, 144, 166, 183, 184, 191, 192,203, 211, 264, 265 and 273 of Vol.III and paras. 905, 908 and 1023 – 1212 of Vol.IV.
[339] TJ, Vol IV, para.1171.
[340] See discussion at para.30 *et seq.*
[341] TJ, Vol IV, para.1172.

19 July 1993[342] reference is made to the submissions above concerning the Dretelj facility.[343]

215. PUŠIĆ's conduct in transferring detainees to Gabela to effect their removal abroad[344] is also dealt with above as is the allegation that he had powers to control the conditions of detention[345] at this facility.[346]

e.LJUBUŠKI PRISON

Grounds

216. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to any crimes committed in Ljubuški pursuant to the JCE. [347] (Sub-ground, para.29.33)

Argument

217. Submissions addressing the Chamber's findings that until September 1993 PUŠIĆ received lists of those detained at this facility and must have known that civilians were being held there[348] and his culpable omissions arising from this are dealt with above.

218. The Chamber's finding concerning PUŠIĆ's conduct in visiting the prison on at least two occasions between April and September 1993[349] does not meet the threshold requirement for participation in a JCE. This conduct did not contribute in a significant way or impact at all on the implementation of the common purpose, in the absence of any further evidence to the contrary.

219. PUŠIĆ's involvement in the transfer of detainees to or from this facility is dealt with above.[350]

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[342] TJ, Vol IV, para.1174.
[343] See discussion at para.206 *et seq.*
[344]TJ, Vol IV, para.1178.
[345] TJ, Vol IV, para.1176.
[346] See discussion at para.57 *et seq.*
[347] TJ, paras. 625, 656 to 665, 905, 906 of Vol.1, paras. 851 to 856, 873, 876, 1231, 1239, 1439, 1441, 1443,1445 to 1453, 1454 to 1456, 1472, 1492, 1496, 1512, 1519, 1541, 1579, 1589, 1601, 1637, 1645, 1646, 1350, 1653, 1686, 1737, 1762, 1811, 1814 and 1838 of Vol.II, paras. 16, 35, 59, 144, 166, 183, 184, 191, 192,203, 211, 264, 265 and 273 of Vol.III and paras. 905, 908 and 1023 – 1212 of Vol.IV.
[348] TJ, Vol IV, para.1181.
[349] TJ, Vol IV, para.1182.
[350] TJ, Vol IV, para.1183.

6.BERISLAV PUŠIĆ GAVE AND SPREAD FALSE INFORMATION ABOUT CRIMES COMMITTED BY THE HVO[351]

Grounds

220. The Trial Chamber erred in fact and law when concluding that PUŠIĆ made a significant contribution to the JCE by giving and spreading false information about crimes committed by the HVO[352] and by trivialising the crimes committed by the HVO.[353] (Sub-grounds, para.29.27 and 29.28)

Argument

Linking Conduct to JCE

221. The Chamber erred in law in failing to establish any link between the type of conduct specified as giving rise to JCE liability and the stated aims of the JCE, which is, in relevant part, the expulsion and removal of Muslims from HVO held territory. In particular, by way of example, PUŠIĆ's statements concerning those soldiers said to have been missing after the assault on the Vranica building in May 1993[354] cannot be said to amount to participation or reflect intent further to a JCE defined around those parameters.

JCE Threshold

222. PUŠIĆ's conduct in failing to cooperate with international community organisations,[355] evading questions and responding in a pre-emptory manner[356] and providing vague answers to questions of international community representatives[357] are all examples of conduct that fall below the minimum threshold requirement for participation in a JCE. It is clear that the statements made by PUŠIĆ, were often viewed with extreme scepticism by the international community representatives he spoke to and were not taken as either reflecting the truth or as reliable information emanating from an

[351] TJ, Vol.IV, para.1188 *et seq*.
[352] TJ, Vol.IV, paras.1188 – 1201.
[353] TJ, Vol.IV, paras.1188 to 1201.
[354] TJ, Vol.IV, paras.1191 to 1192.
[355] TJ, Vol.IV, paras.1200.
[356] TJ, Vol.IV, paras.1193.
[357] TJ, Vol.IV, paras.1201.

individual acknowledged as a senior HVO official.[358]

June 1993 HELIODROM

223. The Chamber has further erred in finding that the statements made by PUŠIĆ in June 1993[359] concerning the conditions of detention at the HELIODROM amounted to participation in the JCE. In providing reasons for its decision, the Chamber acknowledged that it could not establish if PUŠIĆ knew about the poor conditions at the HELIODROM at the time those statements were made.

224. It is quite clear from the evidence presented at trial that the international community representatives present at any meetings with PUŠIĆ would not have accepted the assertions made by the Accused.[360] There is also ample evidence of numerous visits that were carried out to the Heliodrom by international community organisations, often facilitated by the Accused,[361] who would have their own independent verified information about the conditions in which detainees were kept at these facilities.[362] The conduct alleged therefore cannot have contributed in any way to the implementation of the common purpose of the JCE as there is no evidence it was relied on by any individual. Nor did PUŠIĆ have the status and influence within the HVO necessary to mean that his pronouncements were capable of having such an impact on the execution of the JCE.

Statements to the ICRC

225. In respect of the Chamber's findings concerning PUŠIĆ's reply to an ICRC request concerning the fate of 98 detainees at Gabela prison, as explained in Ground 1, the Appellant did not have any powers over the conditions of detention in these facilities.[363] The Chamber has assumed that he did. Absent this assumption, the Appellant could not have made a significant contribution to the JCE

226. Furthermore, even if the evidence cited by the Prosecution is taken at its highest, the conduct cited does not meet the required threshold for participation in a JCE

[358] TJ, Vol.IV, paras.1200. [REDACTED]
[359] TJ, Vol.IV, paras.1193.
[360] TJ, Vol IV, para.1200.
[361] TJ, Vol.IV, paras.1200.
[362] TJ, Vol IV, para.1051-2 and 1152-5.
[363] See discussion at para.57 *et seq.*

for the reasons cited above. Failing to provide this information to the ICRC cannot have had a significant impact on the implementation of the JCE.

RELIEF SOUGHT

227. Each of the errors of law set out above individually and collectively invalidates the verdict. The errors identified above with respect to JCE caused the Chamber to find erroneously that the Appellant was guilty under Article 7(1) of the ICTY Statute. Having made these findings, the Appellant requests that the Appeals Chamber overturn the convictions rendered against him on all the counts for which he has been convicted.

GROUND 7 CRIMES AGAINST HUMANITY AND REQUIREMENT FOR AN INTERNATIONAL ARMED CONFLICT

CRIMES AGAINST HUMANITY

Grounds

228. The Trial Chamber erred in fact and law in deciding that Muslim men who are reservists or of an age that requires their mobilisation in the armed forces under national law do not fall within the definition of combatants in the armed forces within the meaning of international humanitarian law.[364]

Argument

229. The Appellant adopts the position of the Minority in regard to this issue insofar as it is confined to the Minority's opinion on the question defined above i.e. whether Muslim men in the region at the time of the relevant age fell within the definition of combatants in the armed forces within the meaning of international humanitarian law.[365]

REQUIREMENT FOR AN INTERNATIONAL ARMED CONFLICT

Grounds

230. The Trial Chamber erred in fact and law in deciding that the armed conflict in the region was of an international nature based on the presence and intervention of the HV army[366] and the erroneous finding that the Croatian authorities jointly directed and exercised overall control of the HVO.[367]

Law

231. It is settled law that Article 2 of the Statute is only applicable in the case of an International Armed Conflict.[368] To establish the international aspect of this conflict, the Trial Chamber found that the Republic of Croatia participated in the hostilities in BiH to

[364] TJ, Vol.IV, paras.618 to 621.
[365] TJ, Dissent, Vol, IV, page 421.
[366] TJ, Vol.III, paras.526 to 568.
[367] TJ, Vol.III, paras.526 to 568.
[368] Ibid.

an extent that satisfied the "overall control" test described in the leading case of *Tadić*.[369] In that case the Appeals Chamber said that an armed conflict becomes international when a foreign state wields overall control over the armed forces of the belligerent. For a finding of "overall control" in a situation where collective actions take place and the belligerent force has a hierarchical structure it must be proved that the assistance provided by the foreign state goes beyond the provision of technical and financial intervention and must include the planning, monitoring and coordination of military operations.[370]

Argument

232. The Appellant adopts the arguments of the Minority and supports the contention that the Majority erred in its findings concerning the degree of control exercised by the Croatian government over HVO forces. Thus, whilst it is conceded that the Croatian Army had troops present in BiH[371] it is submitted that this does not in itself establish that the Republic of Croatia had overall control over HVO forces even if some of the HVO units were under the command of HV personnel. From examining other evidence relating to the involvement of the Croatian government it is clear that operational leadership on the ground remained with the HVO[372] given that:

a. In particular, no evidence was produced at trial to support the assertion that military operations were planned from Zagreb.[373]
b. The Indictment also limits any reference to Croatian involvement in the conflict to a short period in July 1993 and no witnesses were called by the Prosecution to demonstrate that the intervention of the Croatian Army extended to the degree that they could be said to have planned the conflict.[374]
c. Furthermore, the relevant extracts from the Presidential Transcripts suggest that TUĐMAN was not always cognisant of the activities of HVO troops in BIH.[375]
d. In addition, the fact that SLOBODAN PRALJAK or PETKOVIĆ sent officers from the HV to BiH also does not necessarily in isolation meet the test for overall control.[376]

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369 *Tadic*, AJ, para.145.
370 Ibid. See also discussion in the TJ, Dissent, Vol.VI, page 189.
371 See Majority view, Ibid and the Dissent, Ibid, pages 208 to 212 and 191 to 192.
372 Ibid.
373 TJ, Dissent, Vol.VI, page 190.
374 Ibid. page 191.
375 Ibid. See para.91.

233. Accordingly, the material and logistical assistance provided by the HVO to the HV does not meet the test set out in *Tadić*.

234. The Appellant also adopts the observations and critique of the Minority in connection with the relevant jurisprudence of the regarding previous ICTY findings on the existence of an international armed conflict in this region. It should be noted that the Minority concludes that

> "there was therefore a conflict of an internal nature between the Bosnian Croats and the Muslims... This internal conflict came to be part of a broader international conflict due to the involvement of the international community and to the conflict with the Bosnian Serbs "assisted" by Serbia."[377]

Relief Sought

235. The Appeals Chamber, should in light of the errors of fact and law identified above, apply the correct legal standard in evaluating the existence of an International Armed Conflict and consequently correct the error that such a conflict existed in BiH during the relevant period. The Appeals Chamber should therefore reverse the conviction of the Appellant that resulted from the Chambers error under this ground.

[376] Ibid., page 188.
[377] Ibid., page 212.

GROUND 8 - SENTENCING

THE SENTENCE IMPOSED BY THE TRIAL CHAMBER WAS MANIFESTLY EXCESSIVE – GROUNDS EIGHT, PARAGRAPHS 37, 37.1 TO 37.3

Grounds

236. Should the Appellant's appeal against conviction not succeed on all counts, the Appellant relies on the grounds stated herein. If the appeal against conviction succeeds partially, and the Chambers findings reflect a lesser degree of responsibility, it is anticipated that the Appeals Chamber will order a corresponding reduction in the length of the Appellant sentence.

237. The Trial Chamber committed a discernible error when it imposed on PUŠIĆ a sentence of 10 years imprisonment. The sentence imposed is manifestly unreasonable in the circumstances of this case, particularly taking into account the form and degree of PUŠIĆ's alleged participation in the crimes committed. Having properly assessed the totality of the evidence, no reasonable Trial Chamber could have imposed such a harsh and patently excessive sentence.[378]

Law

238. The core objective of the sentencing exercise which overrides all other sentencing principles requires a determination of the gravity of the crime for which the Appellant stands convicted. This will in turn depend upon "consideration of the particular facts of the case, as well as the form and degree of participation of the accused in the crime."[379]

239. The Chamber has a wide discretion in sentencing but where a Chamber abuse its discretion and a discernible error can be identified a sentence will be amenable to appeal.

[378]See paragraphs of the Judgement cited at footnotes 72-80, post.
[379] *Aleksovski* AJ, para.182.

240. Although all members of a JCE are equal in law, sentences following conviction should reflect their individual circumstances.[380]

Argument

Abuse of Discretion

241. The sentence passed was in all the circumstances excessive and disproportionate and arose as a result of the Chamber abusing its discretion.

242. Firstly, the sentence passed cannot be justified in law because PUŠIĆ did not directly perpetrate any of the crimes for which he was convicted.

243. Secondly, the Chamber did not adjust the sentence passed on the Appellant to recognise his culpability, role and degrees of criminal responsibility vis a vis that of the other members of this particular JCE. The sentence imposed was excessive given that the Chamber found that BP joined the JCE late[381] and had no role in the formulation and planning of the JCA crimes. PUŠIĆ was not an architect of the policy of ethnic cleansing. He was said to have implemented the JCE crimes but was not a high level official, had limited contact with the leadership, and could not in many spheres of his activity autonomously take decisions. The Chamber's findings as to the Appellant's *actus reus* also reflected his limited participation in the underlying crime and his limited contribution to the alleged JCE.

244. The sentence passed therefore did not reflect or take account of the degree of participation of PUŠIĆ in the underlying crimes. PUŠIĆ was clearly not one of the driving forces behind the JCE and, given the broad scope of the common plan, only made a minor contribution to it. In the proper exercise of its discretion the Chamber should have passed a far lower sentence.

Double Counting

[380] *Nikolić,* AJ, para.46
[381] TJ, Vol.IV, para.1229.

245. The Chamber has further erred in double counting[382] the factors which it relied on to impute criminal responsibility in the JCE as aggravating factors for the purposes of sentencing. In considering PUŠIĆ aggravating circumstances, the Chamber found that "he abused his authority" in his capacity as Head of the Exchange Service and President of the 6 August Commission to facilitate the JCE crimes "by using the resources that is disposal for the implementation of those crimes."[383] The Chamber should not have found that the Appellant's contribution to the JCE was also as an aggravation of sentence. If PUŠIĆ is guilty because he participated in the JCE it is an error of law to find that his JCE participation also aggravates his sentence.

Good Character

246. The Chamber erred in not giving appropriate credit for the Appellant's good character i.e. his lack of criminal convictions in addition to its finding that his good conduct whilst in custody was a mitigating factor.[384] In previous cases before the ICTY good character has been deemed a mitigating factor particularly where, as here, there is an absence of any prior discriminatory behaviour on the part of the Accused.[385] Evidence of good character is relevant as an indicia of (i) the propensity of the Accused to rehabilitation, (ii) the absence of discriminatory intent and (iii) to assist the Chamber in determining if an expression of remorse is sincere.[386] It is submitted that an Accused person who has never committed crimes before has better rehabilitation prospects and responds more positively to the deterrent effect of the whole trial process.

Sentencing Practices in the Former Yugoslavia

247. The Chamber held that they had taken into account the sentencing practices in the former Yugoslavia but did not explain how it had engaged with these practices. Moreover, the Chamber did not explain why PUŠIC's conduct warranted a sentence of 10 years imprisonment, which is 50% of the maximum that can be applied from Articles 38, 48 and 142 of the Socialist Federal of Republic of Yugoslavia's Criminal Code (the

[382] *Blaškić*, AJ, para.693. *Vasiljević*, AJ, paras.172-173.
[383] TJ, Vol.IV, para.1381.
[384] TJ, Vol.IV, para.1383.
[385] *Aleksovski*, TJ, para.236 and *Aleksovski*, AJ.para184. *Krjonelac, TJ* p515-9.
[386] *Aleksovski*, TJ. para.236 and *Popović* TJ, para.2156.

"Code"). Article 38 of the Code stipulates that the most severe sentence that can be applied is 20 years imprisonment which is reserved for crimes that would have previously been punished by the death penalty.

Other Mitigating Circumstances

248. The Chamber failed to take into account the Accused in various interventions in person and through his Counsel during the trial.[387] The Chamber can take into account circumstantial evidence of what was said by his Counsel in closing and there is no need to demonstrate an early guilty plea or co-operation with the Prosecution.

249. The Chamber failed to recognise that PUŠIĆ's conduct in ordering the release of Muslim detainees allow them to escape the poor conditions of detention prevalent in various HVO facilities. It earned him the gratitude of some former Bosnian Muslim detainees.[388]

250. The Chamber also failed to recognise as a mitigating factor PUŠIĆ's evident cooperation with international agencies. .[389]

251. The Trial Chamber erred in that it did not specifically mention these factors in its analysis of mitigating factors.

Failure to Give Proper Consideration [REDACTED]

252. The Chamber erred in stating that it did not [REDACTED][390] [REDACTED]

[387] [REDACTED] and T.52793-4.
[388] Defence FTB, paras.448-449. See *Blaškić* TJ para.781, "Another indication that the Accused's character is reformable is evident in his lending assistance to some of the victims...").
[389] Defence FTB, paras.154, 146 and [REDACTED]
[390] [REDACTED]

Credit for Time Spent on Provisional Release

253. PUŠIĆ has spent [REDACTED] on provisional release during the course of trial and whilst awaiting Judgement.[391] The Trial Chamber also committed a discernible error when it failed to deduct the time spent by PUŠIĆ on provisional release [REDACTED] from the time he must serve in custody as part of his sentence.[392] Whilst on provisional release he has been subject [REDACTED]. The ECHR jurisprudence recognises that house arrest in this type of situation can amount to a deprivation of liberty[393] and has cited the factors to be taken into account when making such a determination.[394]

254. In *Blaškić* the time spent under house arrest by the Accused was taken into account when determining his sentence.[395] The *Blaškić* decision demonstrates that the Trial Chamber has the right to determine what constitutes time served by the Applicant and is creditable against his sentence. In this case the Chamber should have recognised that the conditions attached to PUŠIĆ's provisional release [REDACTED] and as a matter of fairness, deemed it appropriate to reduce the remainder of the time he is required to spend in custody to take into account the period spent by the Appellant on provisional release[396] It bears highlighting that one of the reasons why the Appellant was granted

[391] TJ, Vol.V.para.56 *et seq* and [REDACTED].
[392]TJ, Vol.IV, para.1385 to 1386.
[393] *Lavents v. Latvia* (Fr) (ECtHR), para. 63h; *Ciobanu v. Italy and Romania* (Fr) (ECtHR), paras 63–65.
[394] *Guzzardi v. Italy* (ECtHR), paras 92–93.
[395] *Blaškić* TJ, para. 794 and p. 270 (Disposition).
[396] National court decisions can serve as an aid in recognising law. The Court of Appeal of England and Wales considered the question of whether the period spent by an Accused under house arrest on bail between conviction and sentence was for the equivalent of a remand in custody. Delivering judgment on behalf of the Court LJ Hughes held that, "Whereas if he had been in custody the 123 days would count towards his sentence, unless the judge adjusted the five year sentence Mr Glover's 123 days under house arrest would not. Says Mr Ageros for Glover, the right way to deal with that is to reduce the sentence by eight months to achieve the result which would be the same as if the four months had been spent in custody and counted towards the sentence. Alternatively, says Mr Ageros, if the first submission fails there ought to be some recognition in the sentence by way of reduction of the fact that there was this period of house arrest. 14 The judge was asked to make this adjustment. Clearly after thought, he did not do so. The question for us is whether that was wrong in principle. It seems to us that the judge was quite entitled to decide that the onerous conditions of Glover's bail did not put him in a position equivalent to being in prison, where no doubt he would have been in the hospital. It is perfectly true that bail on conditions which amount to house arrest are not conditions which individuals would choose to have applied to them, but the judge was entitled to say that it is distinctly different from being in prison. In

provisional release was due to the fact that [REDACTED],[397] a factor entirely unrelated to PUŠIĆ's conduct or culpability. This is an additional exceptional factor warranting the Chamber's intervention in this particular case.

Relief Sought

255. The Trial Chamber passed a manifestly excessive sentence in all the circumstances, which justifies the intervention of the Appeals Chamber and the imposition of a lesser sentence to remedy this abuse of discretion.

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Respectfully submitted on 12 January 2015

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prison Glover would not have been in his own home; he would not have had his own things around him; he would not have been attended by his own family. He would have been subjected to a very much more severe regime — prison officers, institutional treatment, security and limited visits. *It is possible that in some circumstances a judge might be persuaded by the facts of a particular case to make some modest adjustment in the final sentence in circumstances of this kind, but it seems to us that that is a question for assessment by the judge in each case.* This judge was, we are quite satisfied, perfectly entitled to say that this was not the same as being in prison. He cannot be criticised for taking that view. Indeed, if he had shortened Glover's sentence on this ground this court might have been faced with an argument from Jones that an illegitimate distinction had been created between them." Regina v Peter Glover, Raymond Cox, Brett Issitt [17 July 2008] EWCA Crim 1782. [*Emphasis added*.]

[397] [REDACTED]