**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 Bakone Moloto
Judge Fausto Pocar
Judge Liu Daqun

Registrar: **Mr. John Hocking**

Date filed: **29 July 2015**

THE PROSECUTOR

v.

JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ

PUBLIC

NOTICE OF RE-FILING OF REDACTED VERSIONS OF MILIVOJ PETKOVIĆ APPEAL BRIEF AND BOOK OF AUTHORITIES

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NOTICE OF RE-FILING OF REDACTED VERSIONS OF MILIVOJ PETKOVIĆ APPEAL BRIEF AND BOOK OF AUTHORITIES

1. Pursuant to the Appeals Chamber;s *Decision on the Prosecution's Urgent Motion to Reclassify Public Briefs and Modify Public Redacted Briefing Schedule*, of 8 July 2015, the Defence for Milivoj Petković hereby submits public redacted versions of Milivoj Petković's Appeal Brief and Book of Authorities.

2. All redactions have been agreed with the Prosecution.

Word Count: 71

Respectfully submitted,

Vesna Alaburić, Lead Counsel

THE INTERNATIONAL CRIMINAL TRIBUNAL
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Before: **Judge Theodor Meron, Presiding**
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Judge Fausto Pocar
Judge Liu Daqun

Registrar: **Mr. John Hocking**

Date filed: **12 January 2015**

THE PROSECUTOR

v.

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SLOBODAN PRALJAK
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MILIVOJ PETKOVIĆ'S REDACTED APPEAL BRIEF

1. PROCEDURAL BACKGROUND

1. Pursuant to Article 25 of the Statute of the Tribunal, Rule 111 of the Rules of Procedure and Evidence and the Appeal Chamber's "Decision on Appellants' Requests for Extension of Time and Word Limits" dated 9 October 2014, which sets the filling date for the Appellants' briefs no later than 12 January 2015, Milivoj Petković ("Petković") hereby submits his Appeal Brief in support of his appeal against Trial Chamber III's Judgement of 29 May 2013 (IT-04-74-T) (hereinafter "Judgement"). Petković's Notice of Appeal was filed on 4 August 2014.

2. The procedural history, fully set out in the Judgement (paras.1-84,Vol.5), will not be listed here.

2. GROUND I – "BANOVINA": UNREASONED AND ERRONEOUS FINDING THAT PETKOVIĆ SHARED THE PURPOSE OF CREATING A *BANOVINA*-LIKE ENTITY

Impugned findings

3. The Trial Chamber found that the ultimate purpose of the HB leaders and Franjo Tuđman was to set up a Croatian entity that reconstituted, at least in part, the borders of the Banovina of 1939 and facilitated the reunification of the Croatian people. This Croatian entity was supposed to be joined to Croatia directly subsequent to a possible dissolution of BiH, or otherwise, to be an independent state within BiH with close ties to Croatia.[1]

4. The Chamber further inferred that (i) Tuđman, in order to achieve this purpose, advocated *dividing BiH between Croatia and Serbia*[2] and that (ii) "on 5 and 26 October 1992, Jadranko Prlić, Bruno Stojić, Slobodan Praljak and Milivoj Petković /…/ met with Ratko Mladić, the VRS General, for the specific purpose of discussing the partition of BiH" and that "during these meetings" Praljak stated: "The goal is Banovina or nothing."[3]

2.1. The Trial Chamber erred in law and fact when failed to render a reasoned finding about individuals who agreed about the alleged "ultimate purpose"

5. The Trial Chamber failed to make reasoned findings as to which of the Accused, it found, shared the ultimate purpose of Banovina and division of BiH. If, as the Chamber claimed, that purpose was shared and agreed upon political goal underlying the JCE, it was eminently the material to establish who, the Chamber thought, shared that purpose.

6. In particular, the Trial Chamber erred in law and fact when it failed to render a clear, explicit and reasoned finding in regard to the above allegation concerning Petković. It is unclear from paragraph 24 (Vol.4) whether the Trial Chamber found that Petković knew of and shared that "ultimate purpose" – insofar as the reference to "HZ(R) H-B leaders" could suggest that he did – and, if it did, on what basis it could reasonably have come to that view.[4] The absence of a clear and explicit reasoned finding that

[1] TJ,Vol.4,para.24.
[2] TJ,Vol.4,para.10.
[3] TJ,Vol.4,para.18.
[4] See also,TJ.Vol.4,paras.14,24,74,215,540,586,645,1219.

Petković knew and shared that purpose or not constitutes a violation of his right to a reasoned opinion and an error of law.[5] Considering that Petković was alleged to have shared that purpose and that the Defence had explicitly challenged it,[6] the Chamber was bound to render a reasoned opinion in relation to it.

7. It is unreasoned also insofar as Petković was questioned extensively throughout his testimony on this very issue, *inter alia* by Judge Antonetti, and Petković denied having shared that purpose.[7] In cross-examination, the Prosecution did *not* take issue with this aspect of his evidence, neither did it put to him (or to any other Defence witness) that he had shared the goal of the "Banovina" and division of BiH. The Judgement contains no reasoned rejection of Petković's evidence on that point.

2.2. The Trial Chamber erred in fact when finding that Petković shared the purpose of creating Banovina and partition of BiH

8. The Trial Chamber erroneously asserted that Tuđman and HB leaders (Petković implicitly included) intended to establish Croatian entity in BiH *by dividing BiH between Croatia and Serbia*. The evidence proves that:

i. Herceg-Bosna was established before BiH became independent state;[8]

ii. BiH became independent state owing to, *inter alia*, BiH Croats who vote for the independence at the referendum;[9]

iii. all documents of the international community about former Yugoslavia established the firm rule that borders of the Yugoslav republics cannot be changed by force, but only by mutual agreement;[10]

iv. in the context of international peace conferences *all* plans of the international community offered a composite (in contrast to unitary) internal organization of the BiH state and each plan

[5] *Krajišnik* AJ,para.139;*Furundžija* AJ,para.69;*Limaj* AJ,para.81;*Hadžihasanović/Kubura* AJ,para.13;*Naletilić/Martinović* AJ,para.603;*Kvočka* AJ,paras.23,288;*Kunarac* AJ,para.41.
[6] Petkovic FTB,paras.41,527-538,542,551;TJ,Vol.4,para.7 (not addressing these).
[7] T(E),49746,49749,49751,49764,49778,49782,49783,49790,49791,49800,49802,50466. See also Petković FTB,paras.41, 527-538,542,551.
[8] Decision on the Establishment of the Croatian Community of Herceg-Bosna was issued on 18 November 1991 (P00078)
[9] P09616,P00117,P00132;witness Robert Donia,T(E),1824;witness Stjepan Ključić,T(E),3998-9;witness Josip Manolić,T(E), 4060-1.
[10] Peace Conference on Yugoslavia, The Hague 18 October 1991 (4D01349,p.1);Opinion No.3 of the Arbitration Commission of the Peace Conference on Yugoslavia, Paris 11 January 1992 (P00109);Statement of Principles of 18 March 1992 for New Constitutional Arrangements for BiH, as part of the Cutilleiro's plan (1D00398,p.4);Report of the Secretary General on the International Conference on the Former Yugoslavia, 24 December 1992 (1D01313,para.9);Opening Statement of Cyrus Vance to Peace Talks, 2 January 1993 (P01047).

was based on the premise that BiH should be a state composed by three constituent people and that territorial units (at least three) should be based on national principles and taking into account economic, geographic and other criteria;[11]

v. HB leaders always declared that BiH should be organized as a composite (federation, confederation), not unitary, state and accepted all plans of the international community according to which territorial units should be established pursuant to national principles as well as economic, geographic and other relevant criteria;[12]

vi. the HVO armed forces were established as an *ad hoc* wartime army, which was common military force of both Croats and Muslims[13] and component of the BH armed forces.[14]

9. Petković position was that all three constituent peoples in BiH should agree on the modalities of internal BiH constitution within the internationally recognized BiH borders, as was indorsed and suggested by the international community. As far as Petković was concerned, if three constituent peoples in BiH had decided to set up a monarchy, Petković would – as he testified – "saluted the king".[15] For him, as a professional soldier, any political solution the political leaders of the three constituent peoples in BiH would agree upon had to be accepted without any reservation of objection from his part.[16]

10. There was no basis in the record on which a reasonable trier of fact could come to the view that Petković knew and shared the alleged "ultimate purpose" of Banovina.

11. The Trial Chamber's apparent sole basis for coming to that view is a suggestion that Petković attended a meeting at which, the Trial Chamber seems to believe, Banovina was discussed. The Chamber erred in fact when stated that Petković and other HB leaders met with Mladić on 5 and 26 October 1992 "for the specific purpose of discussing the partition of BiH" and participated in the

[11] Statement of Principles of 18 March 1992 for New Constitutional Arrangements for BiH, as part of the Cutilleiro's plan (1D00398);P09536,pp.40-41;Vance-Owen Peace Plan of 30 January 1993 (1D00892), Owen-Stoltenberg Plan of August 1993 (P03299,pp.3-5;1D01539,pp.3-4;witness Ole Brix Andersen;P10356,pp.10826-10828;TJ,Vol.1,paras.480-486).
[12] P01187 (pp.1-3);P01391(p.2);1D00398;1D02468;1D01521;1D01539(p.4);1D01670(p.4);1D02437;1D02700;1D02832; 1D02853;1D02854(p.2);1D02892;1D02903;1D02904;P00078;P09606;witness Robert Donia,T(E),1826,1827,1913.
[13] Petković,T(E),49342;[REDACTED]; Buntić,T(E),30724-5;Pavlović,T(E),46796-7;Marić,T(E),48095;P00180;2D00150;4D00914.
[14] Idrizović,T(E),9805;Akmadžić,T(E),29439-40;Zelenika,T(E),33228;Praljak,T(E),42321;Pinjuh,T(E),37739; Gorjanc,T(E),46400;Filipović,T(E),47773;[REDACTED] ; Jasak,T(E),48565-6;Petković,T(E),49310,49691.See also Petković FTB Annex 1: *HVO and ABiH components of the BH Armed Forces*;4D00826, Article 37;Bo Pellnas,T(E),19730; 2D00628,Article 2;2D01181,Article 1;2D01183,Article 1;3D03226,Article 2;Pavlović,T(E),46788,46790; [REDACTED]; Filipović,T(E),47403,47405-7,47412,47414,47416;Perić,T(E),47869;Marić,T(E), [REDACTED],48092,48159; [REDACTED]; Ćurčić,T(E),45785.
[15] Petković,T(E),49337.
[16] Petković,T(E),49338.

discussion in which Banovina was mentioned. Firstly, Petković was *not* present at the meeting on 5 October 1992.[17] Secondly, meeting with Mladić on 26 October 1992, attended by Petković, was not organized for the purpose to discuss "the partition of BiH", but for the realization of the previous agreement to calm the front line near Mostar and to re-connect electric power in Jajce."[18] Accordingly, no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that the delegation of Herceg-Bosna met with Mladić "to discuss the partition of BiH"

12. The Trial Chamber has not pointed to any other evidence that would support the suggestion of Petković knowing or sharing that "ultimate purpose".

13. To the extent that one would read the name of Petković into expressions such as "HZ(R) H-B leaders" and read into the Judgement the finding that Petković shared the goal of achieving Banovina and division of BiH, that finding would be factually erroneous and unreasonable.[19] There is no basis on the record that would have allowed a reasonable trier of fact to make that inference as the only reasonable finding on the evidence. Namely:

i. the Prosecution failed to put to Petković and/or to any other witness that he had shared the goal of creating "Banovina" and/or "Greater Croatia" and division of BiH;
ii. in response to Judge Antonetti's questions, Petković denied having discussed or having shared this "ultimate purpose" with any of the other alleged JCE-members.[20]
iii. the Trial Chamber failed to render a reasoned opinion as to why it could reasonably disregard or reject that part of Petković's evidence;
iv. there is no evidence of Petković having ever expressed support for such a purpose.
v. there is no evidence of Petković having attended any meeting where "Banovina" and/or division of BiH were discussed. To the extent that the Trial Chamber inferred Petković's support for and sharing of that "ultimate purpose" from his presence at certain meetings, such a finding would be erroneous in law and fact as no inference of his view could reasonably be drawn from his mere presence at such meetings or from the views expressed by others.[21] The Appeals Chamber recently rejected precisely such an argument - mere presence at a meeting being sufficient to make inference as to *mens rea* - and recalled, "where an inference of guilt is drawn

[17] P11376.
[18] P11380,pp.1,2.
[19] TJ,Vol.4,paras.11,13,14,20,43-44.
[20] See fn.7.
[21] Mere presence at meetings where others expresses a view on a particular point would not be sufficient. *Mugenzi/Mugiraneza* AJ,paras.88,92.

from circumstantial evidence, it must be the only reasonable inference available from the evidence".[22]

vi. there is no evidence of Petković having known of the contents of the other meetings or the views expressed or shared by the people present at those, which the Trial Chamber relied upon in paragraphs 6-23,Vol.4, to come to the view that some people in the Croatian and HB leadership shared that "ultimate" purpose. In that sense, no inference could reasonably be drawn from the views of others.

2.3. Conclusions and relief sought

14. Because of these errors, which meet the relevant standards of review, Petković submits that the Appeals Chamber should find that:

i. the Trial Chamber erred in law and fact when it failed to make individualized and reasoned findings that each of the accused intended to achieve the "ultimate purpose" of Banovina and division of BiH and assumed that it was shared by all of them;

ii. the Trial Chamber erroneously failed to render a fully reasoned opinion about Petković knowing about and sharing the "ultimate purpose" of Banovina and division of BiH and thereby committed an error of law which invalidates that part of the Judgement;

iii. if the Trial Judgement is read as including the finding that Petković shared that "ultimate purpose", the Appeals Chamber should find that no reasonable trier of fact could have come to that view and that the Trial Chamber therefore erred in fact resulting in a miscarriage of justice. The Appeals Chamber should also draw from that fact the necessary inference that Petković could not, therefore, reasonably be said to have agreed to or shared the "ultimate purpose" of division of BiH and creation of Banovina.

[22] *Mugenzi&Mugiraneza* AJ,para.88. In this respect, the Defence notes that the Appeals Chamber recently reversed a Trial Chamber finding as to the mens rea of two accused since "the Trial Chamber lacked a sufficient evidentiary basis to conclude that Mugenzi and Mugiraneza were aware of what the content of Sindikubwabo's speech at the ceremony would be or the aim behind it. […] Mugenzi's and Mugiraneza's participation in the installation ceremony therefore colt not reinforce the finding of their mens era for conspiracy to commit genocide."(para.92).

3. GROUND II - ERRORS REGARDING AN ALLEGED "CRIMINAL PLAN"

3.1. The Trial Chamber impermissibly and unreasonably modified the Prosecution's JCE case and thereby denied the Accused fair notice of the case

3.1.1. The Prosecution's JCE case

15. The Prosecution pleaded without specificity and clarity the existence of a JCE from or about 18 November 1991 to about April 1994.[23] The exact scope, nature and individual contributions to that alleged JCE were simply incomprehensible.[24]

16. After the case ended, the Prosecution argued in its Final Trial Brief that the nature and scope of crimes evolved throughout the course of the HVO-ABiH conflict[25] so that following JCEs existed in the period relevant for the Indictment:[26]

i. JCE 1 - original or "core" crimes at all relevant times: a/ persecution (C.1), b/ deportation and forcible transfer (C.6-9), c/ destruction of property (C.19-20), alternatively JCE 3;

ii. JCE 1 - expanded crimes (alternatively JCE-III):
   - as of 1 July 1993) a/ imprisonment (C.10-11), b/ conditions of confinement (C.12-14), c/ inhumane acts (C.15-17), d/ forced labour (C.18),
   - as of 15 June 1993 e/appropriation of property (C.22-23), f/ Mostar (C.24-26);

iii. JCE 3:
   - at all relevant times: a/ murder (C.2-3), b/ rape (C.4-5), c/ destruction of religious objects (C.21),
   - until 15 June 1993 - d/ appropriation of property (C.22-23),
   - until 30 June 1993 - e/ imprisonment (C.10-11), f/ conditions of confinement (C.12-14), g/ inhumane acts (C.15-17),

iv. JCE 2 as of 1 July 1993, alternatively to JCE 1: a/ deportation and forcible transfer (C.6-9), b/ imprisonment (C.10-11), c/ conditions of confinement (C.12-14), d/ inhumane acts (C.15-17), g/ forced labour (C.18).[27]

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[23] Indictment,para.5;Prosecution PTB,para.15.
[24] See, for example, the challenges to the form of the Indictment regarding the JCE by the Accused in this case.
[25] OTP FTB,para.6.
[26] OTP FTB,paras.7-70.
[27] The Prosecution requested the Trial Chamber, after considering the criminal responsibility of each accused based on his participation in the Herceg-Bosna JCE (JCE 1), to determine the responsibility of each accused based on his participation in the Prisoner JCE (FTB,para.66) and Deportation/Transfer JCE (FTB,para.70).

3.1.2. Trial Chamber's rejection of Prosecution case and moulding of its own JCE theory

17. The Trial Chamber rejected the Prosecution's JCEs case and found that there was "only one, single common criminal purpose – domination by the HR H-B Croats through ethnic cleansing of the Muslim population".[28] The Chamber also changed and moved the starting date of the alleged JCE to mid-January 1993.[29]

18. Differences between the Prosecution's case and the Chamber's case are significant:

i. alleged common criminal purposes are different;

ii. temporal scope is different;

iii. alleged (shared) *mens rea* is different;

iv. the number and categories of "core crimes" in Chamber's JCE are broader in scope and imports into the JCE 1 crimes that were not charged as such by the Prosecution;[30]

v. under the Prosecution's and the Chamber's theories, JCE 3 crimes arose from the pursuit of distinct alleged criminal purposes;

vi. under the Chamber's theory, certain crimes became "core crimes" much earlier (mid-January) than under the Prosecution's theory (1 July 1993) so that Petković was found responsible for certain crimes in some locations for which he had not been charged under JCE 1.[31]

19. The effect of the Chamber's *re-mastering* of the Prosecution's case and theory is to have turned (without notice) foreseeable crimes (JCE 3) into JCE 1 crimes:

i. murder/wilful killing (C.2,3), which impacts convictions for these crimes committed in: Gornji Vakuf, Jablanica, Mostar, Heliodrom, Vojno, Stolac, Čapljina, Dretelj, Gabela and Vareš;

ii. imprisonment (C.10,11) until 30 June 1993, which impacts these crimes committed in: Gornji Vakuf, Jablanica and partly Mostar and Heliodrom;

iii. conditions of confinement (C.12-14) until 30 June 1993, which impacts these crimes committed in: Gornji Vakuf, Jablanica, partly Heliodrom;

[28] TJ,Vol.4,para.41.
[29] TJ,Vol.4,paras.44-45.
[30] Crimes under Counts 2,3 and 21 the Prosecution charged in its FTB as JCE 3 crimes (paras.57-62), but the Trial Chamber convicted Petković for these crimes as JCE 1 (Vol.4,para.820 – C.2,3 – Gornji Vakuf,Mostar, Heliodrom, Vojno,Vareš;C.21-Prozor, Mostar).
[31] Crimes under Counts 10-18,22-26 committed before 1 July 1993 were charged as JCE 3 crimes, and those committed afterwards as JCE 1 crimes (FTB,paras.20-56), but the Trial Chamber convicted Petković for some of these crimes as JCE 1, even when committed before 1 July 1993 (C.10,11–Gornji Vakuf,Jablanica;C.15-17- Prozor,Gornji Vakuf (Vol.4,para.820)).

iv. inhumane acts (C.15-17) until 30 June 1993, which impacts these crimes committed in: Prozor partly, Gornji Vakuf, Jablanica, Mostar partly, Heliodrom partly;

v. forced labour (C.18) until 30 June 1993, which impacts the crime committed in: Jablanica and partly Heliodrom;

vi. damage to religious institution (C.21), which impacts these crimes committed in: Prozor partly Mostar and Čapljina.

3.1.3. Prejudice caused

20. The first, though not exclusive, prejudice caused to Petković was that the course taken by the Chamber resulted in Petković being denied a fair opportunity to prepare for the Chamber's alternative case and to confront it at trial.

21. Secondly, the Prosecution's theory having failed, the Trial Chamber was required to acquit. Under the Statute, the Chamber has no power to replace the Prosecution's failed case. The Trial Chamber, thus, transformed its adjudicative function into a prosecutorial one by creating an alternative theory of liability and circumventing any notion of fair notice of charges.

22. This re-formulation of the Prosecution case is impermissible and violates Petković's right to timely/adequate notice of the charges.[32] It also impermissibly distorts the role of the Chamber whereby it (rather than the Prosecution) is taking over the responsibility to determine the nature of the case and to shape it according to the evidence (as interpreted by the Chamber *ex post facto*). This course also constitutes a grave violation of the presumption of innocence (insofar as the Chamber took over the responsibility of setting out the case against the Accused after rejecting the Prosecution's case) and right to an impartial tribunal (the Chamber having thereby demonstrated its readiness to go beyond the Prosecution case to secure a conviction).[33]

[32] See e.g. *Muvunyi* AJ,paras.18-19;*Ntagerura* AJ,paras.27-28;*Nahimana* AJ,para.326;*Naletilić* AJ,paras.26,33-34;*Kvočka* AJ,paras.33-34.

[33] *Nyiramasuhuko et al.,* Case No.ICTR-97-21-T, Decision on Prosecutor's Allegations of Contempt, 10 July 2001,para.7; *Aleksovski,* Judgement on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2011, para.56;*Hartmann*, Report of Decision on Defence Motion for Disqualification, 27 March 2009, paras.46 *et seq*;*Kvočka* AJ,para.33;*Naletilić* AJ,para.26; *Ntagerura* AJ,para.28.

3.1.4. Conclusions and relief

23. Based on the above mentioned, the Trial Chamber may be said to have erred in law and fact which meet the relevant standards of review. Because the Trial Chamber made no findings regarding the case actually pleaded by the Prosecution, and because of the size and complexity of the evidential record concerned (effectively: the entirety of the record), the Appeals Chamber would be in no position to fairly and confidently evaluate the record *de novo*. The Appeals Chamber should, therefore, quash JCE findings made by the Trial Chamber and enter a verdict of not guilty on the case that was pleaded at trial.

3.2. The Trial Chamber erred in law and fact when establishing that there existed a common criminal plan of "ethnic cleansing" of the Muslim population and failed to consider totality of evidence

Impugned findings

24. According to the Trial Chamber:

i. there existed "only one, single common criminal purpose – domination by the HB Croats through ethnic cleansing of the Muslim population";[34]

ii. to establish a Croatian entity in BiH it was necessary to ethnically cleanse the Muslim population;[35]

iii. the JCE was established to accomplish the political purpose of ethnic cleansing at least as early as mid-January 1993[36] and military campaigns were accompanied by removals of the Muslim population outside the municipality;[37]

iv. the JCE was carried out in stages[38] and on 30 June 1993 "the implementation of the JCE became more efficient";[39]

v. the HVO authorities organized Croatian population movements from Central Bosnia to alter the balance of power in Provinces 8 and 10 so that it favoured the Croats;[40]

[34] TJ,Vol.4,para.41.
[35] TJ,Vol.4,para.43.
[36] TJ,Vol.4,para.44.
[37] TJ,Vol.4,para.48.
[38] TJ,Vol.4,para.45.
[39] TJ,Vol.4,paras.57,59,64.
[40] TJ,Vol.4,paras.53-55,60,62.

vi. many crimes committed by HVO forces tended to follow a clear pattern of conduct, they were not committed by chance or randomly, but resulted from the plan to modify the ethnic composition of the so-called Croatian provinces.[41]

3.2.1. The Trial Chamber erred in law and fact when suggesting that the only reasonable inference was that crimes were the result of the implementation of a common criminal plan hatched by the HZ(R)H-B/Croatian leadership (Petković included)

3.2.1.1. The Trial Chamber failed to establish the agreement to commit a crime provided for in the Statute

25. The *Tadić* Appeal Judgement set out that the Prosecution must prove "the existence of a common plan, design or purpose which amounts to or involves the commission of a *crime provided for in the Statute*".[42] This requirement was restated by subsequent judgements and it is established case law that the reason for the JCE's existence must be the realization of conduct that constitutes a *specific crime* in the Statute.[43]

26. The Trial Chamber failed to establish the existence of the plan of the alleged JCE to commit crimes *provided for in the Statute*. The Chamber concluded that (i) there was "only one, single common criminal purpose – domination by the HR H-B Croats through ethnic cleansing of the Muslim population"; (ii) members of the group "made use of the political and military apparatus of the HZ(R) H-B to accomplish this purpose"[44] and (iii) "a JCE was established to accomplish the political purpose".[45] However, "domination", "ethnic cleansing" and/or "political purpose" are not crimes provided for in the Statute.[46]

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[41] TJ,Vol.4,para.66.
[42] *Tadić* AJ,para.227 (emphasis added).
[43] *Stakić* AJ,para.64;*Kvočka et al.* AJ,para.81;*Kayishema and Ruzindana* AJ,para.193. Jurisprudence also clarified that this particular aspect of the agreement required for JCE applies only to the 1st and 3rd categories of JCE (*Kvočka* AJ,paras.118-119;*Krnojelac* AJ,para.97).
[44] TJ,Vol.4,para.41.
[45] TJ,Vol.4,para.44.
[46] With regard to the "political purpose" it should be noted that the Appeals Chamber confirmed the following position of the Trial Chamber in the *Martić* case: "…The Evidence establishes that the SAO Krajina, and subsequently the RSK, government and authorities fully embraced and advocated this objective, and strove to accomplish it in cooperation with the Serb leadership in Serbia and in the RS in BiH. The Trial Chamber considers that such an objective, that is to unite with other ethnically similar areas, in and of itself does not amount to a common purpose within the meaning of the law pursuant to Article 7(1) of the Statute…"(TJ,para.442;AJ,para.112).

27. The term *ethnic cleansing* means the creation of an ethnically homogenous geographic area through the elimination of unwanted ethnic group by deportation, forcible transfer or genocide. The term is literal translation of the BCS phrase *etničko čišćenje* and was widely employed in 1990s in regard to the conflicts in ex-Yugoslavia.[47] The term is not synonym for any crime prescribed by the Statute. Therefore, it is error of law to equate the crime of deportation/forcible transfer with the *ethnic cleansing*. Namely, deportation/forcible transfer of a civilian, or small number of civilians of "unwanted ethnic group", which does not change the ethnic structure of an area, cannot turn into *ethnic cleansing*. The Trial Chamber made numerous errors of law and fact when asserting that the common criminal purpose of ethnic cleansing was implemented in all locations, even where a small number of civilians were deported/forcibly transferred and the ethnic map did not change. The Trial Chamber thus erred in law and fact when convicted Petković upon JCE 1 form of criminal responsibility in spite of the failure to duly establish the existence of the common criminal plan to commit 21 core crimes.

3.2.1.2. The Trial Chamber failed to render a reasoned opinion about "ethnic cleansing" as necessary implication of the establishment of a Croatian entity in BiH

28. The Trial Chamber failed to give a clear explanation of the term "ethnic cleansing" and thus made the error in law, which violates Petković's rights to a reasoned opinion and fair trial, and also gravely undermines his ability to appeal effectively.

29. However, it could be inferred that the Trial Chamber used the term "ethnic cleansing" as the synonym for creation of ethnically homogenous geographic area supposed to be Croatian entity (provinces, federal or confederal unit) through removal of Muslim population.[48]

30. The Trial Chamber erroneously inferred that "ethnic cleansing" was *necessary* implication of the establishment of a Croatian entity in BiH and failed to give a reasoned opinion about the inference, as well as reference to relevant evidence.[49] All plans of the international community, as will be explained below, predicted that BiH would not be a unitary state, but composed of territorial units based on *inter alia* criteria of nationality so that each ethnic group would be majority in a certain territorial unit. Nobody thought that "ethnic cleansing" was necessary implication of such territorial composition of BiH.

[47] *Webster dictionary, Encyclopedia Britannica.*
[48] See e.g.TJ,Vol.4,para 44.
[49] TJ,Vol.4,para.41.

31. The Trial Chamber further asserted that HB and leaders of Croatia, including Boban and Tuđman, *"believed"* that in order to achieve the political purpose of the establishment of a Croatian entity in BiH it was "necessary" to change the ethnic make-up of the territories claimed to form HZ(R) HB.[50] The assertion is based on two evidence: (i) minutes of the meeting of Tuđman with a delegation of the HDZ BiH on 27 December 1991 (P00089,pp.34-35) and (ii) the book "Dividing Bosnia and Struggling for Its Integrity" by Anto Valenta, published on 1991 (P00021,pp.18-24).[51] However, none of these documents support the Trial Chamber's thesis:

i. the minutes of the meeting on 27 December 1991 does not contain a single word about the intent and/or implication of ethnic cleansing of the Muslim population in "Croatian municipalities in BiH";
ii. although the Trial Chamber did not give any explanation about the relevance of Anto Valenta and his book for determining believes of the leaders of Croatia and HB, it should be noted that the book does not contain an idea/implication of ethnic cleansing and achieving the idea of regional division of BiH by deportation/forcible transfers of the Muslim population.

32. Thus the Trial Chamber erred in fact when inferred that leaders of Croatia and Herceg-Bosna believed that the establishment of a Croatian entity *necessarily implies* "ethnic cleansing" of the Muslim population. There is no evidence to support such thesis and no reasonable trier of fact could have come to that conclusion as the only reasonable inference.

33. These errors meet the relevant standard of review and the Appeals Chamber should reverse the Trial Chamber's inference about the necessity of ethnic cleansing in order to establish a Croatian entity in BiH. Since this inference is a corner stone of the Trial Chamber's JCE case (the existence of "only one, single common criminal purpose" of ethnic cleansing), by reversing the inference of the "necessity" of ethnic cleansing the Trial Chamber's thesis of the common criminal plan of ethnic cleansing existing at least as of mid-January 1993 should be reversed as well. Accordingly, the conviction upon the JCE 1 form of criminal responsibility for all crimes committed from mid-January 1993 should be set aside.

[50] TJ,Vol.4,para.43
[51] TJ,Vol.4,para.43,fn.120.

3.2.1.3. Errors related to the inference that all (core) crimes were the result of the implementation of a common criminal plan

34. Even where the Chamber has found that a JCE existed, it was required to establish through a reasoned opinion that the underlying crime charged was a consequence of the implementation of that JCE and to exclude, as unreasonable, the possibility that crimes might have occurred "in the absence of any specific and concerted plan" or that the crimes occurred independently thereof[52] or that the perpetrators' relationship to any JCE-member was too tenuous.[53]

35. Instead of doing so and without verifying it through a reasoned opinion, the Chamber assumed that all crimes were the result of the implementation of a criminal plan (either as core crimes or natural/foreseeable consequences). This in-built assumption is unproven and unreasonable.

36. The Chamber's suggestion that all "core crimes" were the consequence of the implementation of a common criminal plan is premised on unproven factual presumptions, namely, that:

i. all underlying crimes are the consequence of *a* plan (because there is, what the Chamber calls, "patterns of crimes") and no other reason or cause;
ii. all underlying crimes are necessarily the consequence of *that* plan and no other plan or agreement;
iii. plan was being implemented in each and every location where underlying crimes were allegedly committed;
iv. *all of the Accused* partook in and shared that common plan.

3.2.2. The Trial Chamber erred in law and fact when failed to consider whether military operations might have been carried out for reasons unrelated to the implementation of a JCE and failed to consider the totality of the evidence

37. According to the Trial Chamber, the planning and preparation of HVO military operations involved the planning and preparation of crimes – as part of a "preconceived plan".[54]

[52] *Zigiranyirazo* TJ,para.418; *Limaj* AJ,para.99,TJ,para.669.
[53] *Brđanin* AJ,para.418.
[54] TJ,Vol.4,paras.65-66,691-699,704-710,716-717,747-750,756,767,814-818,922,926-927.

38. It was a fundamental aspect of the case that the Trial Chamber had to carefully distinguish between the legitimate/permissible use of military force and the commission of crimes that might accompany such instances.[55] Whilst the Chamber took note of this,[56] it failed to distinguish them. The Chamber reasoned that since both military operations and crimes were found to have been planned, they must *per force* have been the result of the same one plan and, therefore, whomever was involved in planning/facilitating military operations would have been involved in and known about the plan to commit crimes.

39. The Chamber's approach is entirely unreasonable. The fact that both military operations and crimes might have been planned does not allow for a necessary inference that those involved in planning/facilitating military operations *must* also have been involved in planning the crimes. In drawing such an "inference", the Chamber is artificially creating an unproven association between involvement in military operations and commission of crimes:

> "*Il est anti-juridique de vouloir assimiler la guerre à un complot, à une conspiration accompagnée de crimes et délits.*"[57]

40. The Chamber's inference also finds *no* support in the evidence: it is based exclusively on an unproven assumption that because both were planned (military operations and crimes) they *must* have been planned by the same people.

41. The suggestion that these were crimes that had been planned by the Accused is also contradicted by evidence of multiple reactions to these crimes, which were duly reported up the chain of command and condemned by supposed JCE-members.[58]

3.2.2.1. Errors related to the inference that Muslims were "ethnically cleansed" from certain areas

42. The Trial Chamber established that the evidence does not support a finding that there was an agreement concerning a common criminal design of ethnic cleansing prior to mid-January 1993 and inferred that the JCE was established at least as early as mid-January 1993, when the HVO leaders decided to eliminate all Muslim resistance within the provinces attributed to the BiH Croats under the

[55] Petković FTB,para.525 (and paras.130(ix)(b),144,241,254,281,294,381,542,571).
[56] TJ,Vol.4,para.39.
[57] Mr Larnaude and Mr Lapradelle (*Journal de Droit International Privé*, 1919, p. 157).
[58] E.g.,4D01082;P02050;P02059,p.30;P02088,pp.2-3;P02112,p.3;P09494,p.2;PetkovićT(E),49438-49446, 49450-49451.

Vance-Owen Plan and to "ethnically cleanse" the Muslims so that the provinces would become majority or nearly exclusively Croatian.[59]

43. The evidence on which the Trial Chamber based the mentioned inference (listed in the footnote 122,Vol.4) does not support the thesis that the common criminal plan of ethnic cleansing was established and implemented as of mid-January 1993:

i.. Thornberry (T(E),26166-26168 and 26173-26176) did not testify about such assertion;

ii. P10041,para.42, does not contain such assertion;

iii. [REDACTED], but not such assertion;

iv. [REDACTED];[60]

v. witness Brix Andersen,P10356, did not testify about "ethnic cleansing" as of mid-January1993;

vi. [REDACTED];

vii. P02787,p.4, report of 15 June 1993,does not contain such assertion;

viii. Factual findings "Negotiations within the Framework of the Vance-Owen Plan (August 1992-January 1993)" and "Subsequent History of the Vance/Owen Plan; Attempts to Implement the Principles of this Plan in the Field (January 1993 – August 1993)" do not contain assertion about the alleged plan od ethnic cleansing.[61]

No reasonable trier of fact would reasonably make such inference from the listed evidence.

44. The Chamber's factual and legal findings about crimes of deportation/forcible transfer of Muslims outside their municipalities disapprove the inference that the HVO started to "ethnically cleanse" the Muslim population as of mid-January 1993. These findings will be present and analysed further in this Appeal.

Gornji Vakuf

45. The Trial Chamber asserted that military actions in Gornji Vakuf in January 1993 were accompanied by removals of the Muslim population from the Municipality.[62]

[59] TJ,Vol.4,para.44.
[60] [REDACTED].
[61] TJ,Vol.1,paras.442-476.
[62] TJ,Vol.4,para.48.

46. The Trial Chamber stated that the HVO "moved *some*" (unspecified number) inhabitants of the villages of Duša, Hrasnica, Uzričje and Ždrimci to territories under ABIH control and inferred that it was done to ethnically cleanse the Municipality.[63] It should be noted that the Accused were not charged with the deportation/forcible transfer of Muslims from the *town* Gornji Vakuf and *46 other villages* in the Municipality.

47. The Trial Chamber did not make reference to specific evidence, but to its "Factual findings" about the village of Hrasnica and "Legal findings" related to Counts 8 and 9.[64] The Chamber's conclusion about removal of Muslims from Hrasnica is based on the [REDACTED] and the Witness Senad Zahirović statement (P10106,p.6). The evidence proves that some civilians rejoined their families and *some* (unspecified number) were taken to Bugojno by UNPROFOR because their houses were destroyed.[65]

48. In the legal findings with regard to Counts 8 and 9, the Trial Chamber stated that: (i) civilians from the village of Duša were taken by UNPROFOR *to Gornji Vakuf*;[66] (ii) some civilians (unspecified number) from the village of Uzričje escaped to Bugojno and some were forcibly transferred *to Gornji Vakuf*;[67] (iii) civilians from the village of Ždrimci were forcibly removed from the village (but the Chamber did not establish where they were transferred).[68]

49. According to the Chamber's findings, most of the villagers of four attacked villages stayed in the Municipality of Gornji Vakuf, whilst "some" (unidentified number) asked UNPROFOR to take them to another municipality (Bugojno).[69]

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[63] TJ,Vol.4,para.48.
[64] TJ,Vol.4,fn.127.
[65] In the legal findings with regard to counts 8 and 9 the Trial Chamber established that the UNPROFOR had to take *some of civilians* from Hrasnica to Bugojno (Vol.3,paras.846,902).
[66] TJ,Vol.3,paras.845,900.
[67] TJ,Vol.3, paras.847,904.
[68] TJ,Vol.3,paras.848,906.
[69] The TC established that:
i. "several dozen people" (Vol.2,para.405) of the village of Duša were taken by UNPROFOR to Gornji Vakuf (Vol.3, paras.845,899,900);
ii. "some of the civilians" from the village of Hrasnica were taken to Bugojno by UNPROFOR (Vol.2,paras.426,427);
iii. from the village of Hrasnica Senada Bašić and her family fled to Bugojno and some other Muslim villagers went to town of Gornji Vakuf (Vol.2,paras.452-454);
iv. some villagers of Ždrimci remained in the village and some left the village, but the TC did not establish where they went (Vol.2, paras.466-468).

50. The evidence thus proves that local Muslim population was not removed outside the Municipality of Gornji Vakuf, save certain, unknown number of inhabitants of *two villages*, Hrasnica and Duša. Therefore no reasonable trier of fact would have come to the conclusion that local Muslim population was "ethnically cleansed" from the Municipality, or that the HVO military actions were launched in January 1993 to further common criminal purpose of "ethnic cleansing" in the Municipality of Gornji Vakuf. The ethnic map of the Municipality remained unchanged. Thus the Chamber erred in fact when inferred that the common criminal plan of ethnic cleansing was implemented in January 1993 in Gornji Vakuf.

51. These errors meet the relevant standard of review and the Appeals Chamber should reverse the Trial Chamber's finding that the HVO military operations in Gornji Vakuf in January 1993 were launched and crimes committed in order to further common criminal plan of "ethnic cleansing". Petković's conviction for crimes committed in Gornji Vakuf in January 1993 based on the JCE form of criminal responsibility should accordingly be reversed and a verdict of not guilty entered.

Prozor April 1993

52. The Trial Chamber inferred that in *April* 1993 the HVO forces caused the Muslim population to flee outside the Municipality of Prozor.[70] On the other side, the Trial Chamber established that Muslims were not removed from the Municipality of Prozor until the end of *August* 1993 and thus determined that crimes under Counts 8 and 9 were committed on 28 August 1993 and 14 November 1993.[71] Accordingly, no reasonable trier of fact could reasonably conclude that the HVO military actions in April 1993 were launched to further common criminal plan of "ethnic cleansing" of Muslim population in the Municipality of Prozor, as erroneously asserted by the Trial Chamber in this part of the Judgement (Vol.4,para.47).

53. The Trial Chamber thus erred in fact when asserting that crimes in the villages of Parcani, Lizoperci and Tošćanica in April 1993 were committed to further the common criminal purpose of "ethnic cleansing" of Muslims in the Prozor Municipality. The error meets the relevant standard of review and the Appeals Chamber should reverse the Trial Chamber's finding that military operations in Prozor in April 1993 were launched and crimes committed in order to further common criminal plan of ethnic

[70] TJ,Vol.4,para.47.
[71] TJ,Vol.3,paras.840-844,894-898.

cleansing. Petković's conviction for crimes committed in Prozor in April 1993 based on the JCE form of criminal responsibility should accordingly be reversed and a verdict of not guilty entered.

Jablanica (Sovići and Doljani)

54. The Trial Chamber established that approximately 450 women, children and elderly were moved from Sovići on 5 May 1993,[72] not to Jablanica as planned, but to Gornji Vakuf,[73] and that by being transferred *from the Municipality of Jablanica* serious mental suffering was caused to the victims.[74] The Trial Chamber further concluded that the purpose of the HVO military actions was that BiH Muslims were *moved outside the Municipality and not to return to the region*,[75] which was in accordance with the alleged common criminal purpose of "ethnic cleansing".

55. However, evidence does not support such conclusion. The Trial Chamber correctly established that civilians were supposed to be transported to Jablanica, which did not happen, and they were transported to Gornji Vakuf. However, the Chamber failed to establish that these civilians were transported *from Gornji Vakuf to Jablanica in June 1993*.[76] The evidence thus undoubtedly proves that civilians from Sovići remained in the Municipality of Jablanica and that the ethnic map of the Municipality did not change.

56. By failing to evaluate the evidence that civilians from Sovići were later transported from Gornji Vakuf to Jablanica, the Trial Chamber made the error of law and fact. Consequently, the Chamber erred in law and fact when concluded that civilians from Sovići were "ethnically cleansed" from the Municipality of Jablanica. No reasonable trier of fact could have come to such conclusion because Muslims were not finally removed from the Jablanica Municipality and the removal to Gornji Vakuf was just temporary solution.

57. Additionally, the Chamber's thesis that the HVO forces launched military actions in the Municipality of Jablanica to further common criminal plan of "ethnic cleansing" contradicts its finding that the underlying reason for the HVO attack on Sovići and Doljani was completely different. Namely, the

[72] TJ,Vol.2.para.609.
[73] TJ,Vol.2,para.613.
[74] TJ,Vol.3,paras.850,908.
[75] TJ,Vol.4,paras.30,48.
[76] P02825, witness CA,T(E),10042;witness Kovač,T(E),10311. The Trial Chamber incorrectly stated that it did not have sufficient evidence to establish what happened after the removal of civilians to Gornji Vakuf,TJ,Vol.2,para.613.

Chamber established that the HVO's attack on Sovići and Doljani was defensive reaction (although not purely) to the ABiH attack on that same day.[77] The evidence proves combats between the ABiH and the HVO forces in the area at the time and no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that the HVO launched the attack on *two villages* to "ethnically cleanse" Muslims from the *Municipality* of Jablanica and/or *region*.

58. These errors meet the relevant standard of review and the Appeals Chamber should reverse the Trial Chamber's finding that the HVO military operations in the Jablanica Municipality in April 1993 were launched and crimes committed in order to further common criminal plan of ethnic cleansing. Petković's conviction for crimes committed in Sovići and Doljani in April and May 1993 based on the JCE form of criminal responsibility should accordingly be reversed and a verdict of not guilty entered.

Mostar May 1993

59. The Trial Chamber established that no crimes of forcible removal of Muslims from West Mostar were committed in the first half of May 1993.[78]

Second half of May 1993

60. The Trial Chamber established in the "Factual Findings" that as of mid-May 1993 the HVO forced the Muslims from West Mostar to leave their homes to go mostly to East Mostar.[79] In the second half of May, as stated by the Chamber, between 1,200 and 2,000 Muslim inhabitants were forced to leave West Mostar. In the "Legal findings" the Chamber stated that in the second half of May 1993 HVO soldiers forced "a large number of Muslims from West Mostar to cross the front line into East Mostar".[80]

61. The Chamber's findings are based on the evidence which does not support such conclusion:[81]

i. the witness Salčin did not testify about Muslims expelled from West Mostar in the second half of May 1993;

[77] TJ,Vol.4,para.46.
[78] TJ,Vol.3,paras.782-785,811-815,853-862,911-919.
[79] TJ,Vol.3.paras.783,811,853,911;Vol.2,para.806.
[80] TJ,Vol.3,paras.782,811.
[81] TJ,Vol.2,fn.1899: witness Miro Salčin,P09834,para.9; [REDACTED].

ii. the exhibit P09834,para.9, does not relate to the second half of May;

iii. [REDACTED].

62. Accordingly, there is no evidence that the HVO soldiers forced Muslims to leave West Mostar in the second half of May 1993 and no reasonable trier of fact could reasonably come to that conclusion on the basis of mentioned, or any other, evidence.

26 May 1993

63. The Trial Chamber established that 300 Muslim civilians were transported from West Mostar to East Mostar on 26 May 1993.[82]

64. This finding is based on the evidence [REDACTED] which, however, does not support the Chamber's conclusion. [REDACTED].

65. Not only that the Chamber incorrectly interpreted the evidence, but it also failed to consider the totality of evidence, which clearly and undoubtedly shows that a voluntarily relocation of Croats from East Mostar and Muslims from West Mostar was organized on 26 May 1993:

i. P02512: on 25 May 1993 Croat and Muslim sides in Mostar signed an agreement that both sides would prepare a list of individuals who wanted to move from one local community to another and organize their transport, followed by the Spanish Battalion;

ii. P02524: according to the list determined on 26 May, between 400 and 500 civilians were supposed to go from West Mostar to East Mostar and 1250 civilians from East to West Mostar;

iii. [REDACTED].[83]

66. Accordingly, the Trial Chamber erred in fact when concluded that "ethnic cleansing" began in Mostar in mid-May 1993 and that Muslims were forcibly transferred from West to East Mostar on 26 May

[82] TJ,Vol.2,paras.816-818,Vol.3,paras.782,811.
[83] [REDACTED].

1993. No reasonable trier of fact would establish that the voluntarily relocation of inhabitants of Mostar, both Croats and Muslims, was forcible, unlawful transfer of Muslim civilians launched by the HVO soldiers, neither such conclusion could be reasonably inferred from the evidence.

67. These errors of fact and law meet relevant standard of review and the Trial Chamber's inference that Muslims were "ethnically cleansed" from West Mostar in May 1993 should be reversed, as well as the inference that military actions of the HVO forces in May 1993 were launched to further common criminal plan of "ethnic cleansing" of Muslims from Mostar. Accordingly Petković's conviction for crimes committed in Mostar in May 1993 upon the JCE form of criminal responsibility should be reversed and a verdict of not guilty entered.

Vareš and Stupni Do

68. The Trial Chamber did not establish *expressis verbis* that the HVO military actions in Vareš and Stupni Do in October 1993 were launched to further common criminal plan of "ethnic cleansing" and/or that the HVO forces removed a single Muslim inhabitant outside the Municipality or that they planned to do so.[84]

69. However, Petković was convicted for crimes committed in Vareš and Stupni Do under the JCE form of criminal responsibility, which *implies* the Chamber's inference that crimes were committed to further common criminal plan of "ethnic cleansing", as the "only one single common criminal purpose". The Chamber failed to give a reasoned opinion about conviction for these crimes under JCE 1 and thus made the error of law, which constitutes a grave violation of Petković's right to a reasoned opinion and fair trial, and also gravely undermines his ability to appeal effectively against a completely unreasoned finding.

70. There is no evidence about forcible transfer or deportation of Muslims, and the Trial Chamber did not even infer otherwise. Therefore the Chamber erred in fact and law when convicted Petković as a member of the JCE with the criminal plan of "ethnic cleansing" of the Muslim population in the Vareš Municipality. These errors meet the relevant standard of review and the Appeals Chamber should reverse Petković's conviction under the JCE form of criminal responsibility for crimes committed in the Municipality of Vareš and enter a verdict of not guilty.

[84] TJ,Vol.4,paras.61-63.

3.2.2.2. The Trial Chamber erred in law and fact when inferred that the "JCE was carried out in stages" and that on 30 June 1993 "the implementation of the JCE became more efficient"

71. Undisputed fact is that 30 June 1993 was the turning point in the conflict between the HVO forces and the ABiH. The matter of dispute is the reason for the commencement of the full-out war on 1 July 1993. Did the HVO authorities suddenly, on 30 June 1993, simply decide to "implement the JCE more efficiently", as inferred by the Trial Chamber, or some other events and military situation in the field caused intensifying combats and implementation of special security measures?

72. Underlying reasons for military actions during which, or in relation to which, crimes were committed are irrelevant as evidence about the commission of crimes. The evidence adduced to show which party of the conflict is responsible for starting combats is equally irrelevant. However, the reasons for certain political and/or military activities, military plans and operations of the opposing party to the conflict, events occurring on certain locations are relevant as they tend to disprove allegation that these activities were launched to further common criminal plan of "ethnic cleansing" of Muslim population.[85]

73. The Trial Chamber's thesis that security measures taken by the HVO authorities on 30 June 1993 (*inter alia* isolation of the HVO soldiers of Muslim ethnicity and the military conscripts of the ABiH) were the consequence of the HZHB leaders' decision to "implement the JCE more efficiently" contradicts the Chamber's factual findings about events on 30 June 1993. Namely, the Trial Chamber correctly established that on 30 June 1993 the ABiH launched an offensive and, in cooperation with the HVO soldiers of Muslim ethnicity, succeeded in taking control of the north zone of East Mostar, Salakovac dam, *Tihomir Mišić* Barracks, Bijelo Polje, Raštani, Vrapčići and other locations within a 26-km radius in the north of Mostar. The international observers pointed out that the ABiH seemed to have as its military objective uniting the area of Mostar with that of Jablanica and Konjic. The Trial Chamber further correctly established that "*in response to the attack launched by the ABiH on 30 June 1993"* HZ HB/HVO authorities took certain actions.[86]

[85] *Kupreškić et al.,* Case no.IT-95-16-T, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, 17 February 1999.
[86] TJ,Vol.2,paras.880-886.

74. The Trial Chamber failed to evaluate evidence about the ABiH military offensives as of April 1993 and the continuous broadening the territory under the control of the ABiH. However, speaking about Croats expelled from Central Bosnia, the Trial Chamber indirectly acknowledged expansion of the territory under the control of the ABiH (Konjic, Travnik, Novi Travnik, Kakanj).[87]

75. To sum up: the Trial Chamber acknowledged that the underlying reason for taking special security measures by the HVO leaders on 30 June 1993 was broad military offensive of the ABiH and HVO's losing control over certain areas. The evidence clearly supports this Trial Chamber's conclusion. Therefore, no reasonable trier of fact could reasonably come to the conclusion that the HVO measures of 30 June 1993 were taken to further common criminal plan of "ethnic cleansing in a more efficient manner". By such inference, which contradicts Chamber's factual findings, the Trial Chamber erred in law and fact.

76. These errors meet the relevant standard of review and the Appeals Chamber should reverse the Trial Chamber's inference that on 30 June 1993 the HVO leaders decided to "implement the JCE more efficiently" and that political and military activities of the HVO authorities and forces as of 30 June 1993 were launched to further common criminal plan of ethnic cleansing. Accordingly, Petković's conviction for "expended core crimes" under JCE 1 should be reversed and the verdict of not guilty entered.

3.2.2.3. Errors related to the alleged self-ethnic cleansing

77. The Trial Chamber asserted that it was clear from all the evidence that the HVO arranged removals of Croats from Central Bosnia and northern part of BiH to Provinces 8 and 10 "not merely to come to the rescue of one part of the Croatian population located in combat zones, but also to remove the other part of the population that did not fear any real danger, doing so by force and voluntarily". By this, as stated by the Chamber, "the HVO could alter the balance of power in these provinces so that it favoured the Croats".[88]

[87] TJ,Vol.3,para.284;Vol.4,para.60. See Annex 1.
[88] TJ,Vol.4,para.55.

78. The Trial Chamber thus acknowledged that "Croatian population movements"[89] were (at least partly) caused by fear of real danger of ABiH's conquering certain towns and areas. Accordingly, it is not justified to consider that assistance of the HVO authorities to refugees of Croatian ethnicity was part of the common criminal plan to "alter the balance of power" in areas where these refugees were coming to. The Trial Chamber erred in law and fact when made such inference. No reasonable trier of fact could reasonably have come to such conclusion, as the only reasonable inference.

79. Moreover, the Trial Chamber in addition erred in law and fact when failed to distinguish Croats who were expelled/removed from their municipalities conquered by the ABiH from Croats who were allegedly forced to remove from their municipalities by the HVO. The consequence of this failure is that the Trial Chamber finally treated removal of all Croats as a part of the alleged common criminal plan to change ethnic map of certain territories supposed to be Croatian entity. Thus the Trial Chamber erred in law and fact with regard to the reasons of the removal of the Croat population and the existence of the alleged common criminal plan of ethnic cleansing, including self-ethnic cleansing[90].

80. All these errors meet the relevant standard of review and the Appeal Chamber should reverse the Trial Chamber's inference about self-ethnic cleansing as the part of the alleged common criminal plan of ethnic cleansing of the Muslim population.

3.2.2.4. Errors related to the inference about "clear pattern of conduct" as the result of the plan to modify the ethnic composition of Croatian entity

81. The Trial Chamber inferred, as "the only conclusion that may reasonably be drawn from the evidence", that many crimes committed by the HVO forces from January 1993 to April 1994 tended to follow a "clear pattern of conduct" and that they were the result of a plan established by the HZ(R) HB leaders seeking to modify the ethnic composition of the so-called Croatian provinces.[91] The "pattern" was defined as regular repetition of similar criminal conduct.[92]

82. The Trial Chamber failed to establish that warfare in populated areas always follows a "pattern", which includes shelling, entry of infantry, imprisonment of members of the enemy army, security

[89] TJ,Vol.4,para.56.
[90] See annex 1.
[91] TJ,Vol.4,para.65.
[92] TJ,Vol.1,para.41.

measures related to civilians and their evacuation if necessary.[93] Civilian property is often collateral damage. Therefore, the "pattern" consists of nothing other than the course of military operations. This provides no reasonable basis to draw a necessary inference that a criminal plan of "ethnic cleansing" was at play.

83. With regard to the Prosecution thesis that Muslim houses were burnt in order to change, permanently or temporarily, ethnic composition of the municipality or region (and therefore crimes under Counts 19-20 were determined as "core" JCE crimes throughout the relevant time), the Trial Chamber had to carefully evaluate destruction of Muslim houses on each location to establish whether the destruction was done for special, underlying purpose of "ethnic cleansing" or not. For example, many Muslim houses in four (out of 50) villages in the Municipality of Gornji Vakuf were destroyed in January 1993, but most of the villagers stayed in the Municipality and thus no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that houses were destroyed with the purpose to remove Muslims from the Municipality or region. Another example – Sovići and Doljani: Muslim houses were undoubtedly burnt down after combats, on 21 April 1993, the day after KB's commander Čikota was killed, when some soldiers of KB turned back to villages and set fire to houses[94] and thus no reasonable trier of fact could reasonably conclude, as the only possible inference, that these crimes were not an act of revenge of members of one HVO unit, but were committed with the purpose to ethnically cleanse Muslims from the Municipality of Jablanica. Furthermore, the Chamber established for Prozor April 1993 that crimes of destruction of Muslim houses not justified by military necessity were committed,[95] but no Muslims were removed from the Municipality[96] and therefore no reasonable trier of fact could have reasonably come to the conclusion, as the only possible inference, that destruction crimes were committed with the purpose to ethnically cleanse Muslims from the Prozor Municipality.

84. To sum up, the Trial Chamber erred in law and fact when from the similarity of acts of imprisonment and destruction of property concluded that the "pattern" was the consequence of implementation of the common criminal plan of "ethnic cleansing". The similarity proves the existence of a military/operational plan, but not the existence of a plan to commit crimes. Such inference would be entirely unreasonable and unproven.

[93] P00004,paras.333-427;Praljak,T(E),39461.
[94] TJ,Vol.2,para.643.
[95] TJ,Vol.3,paras.1526-1529,1559-1563.
[96] Crimes under Counts 6-9 were not committed in Prozor in April 1993.

3.3. Conclusion and relief sought

85. All these errors, separately and put together, meet the relevant standard of review. They effectively mean that the Trial Chamber failed to consider and/or establish beyond reasonable doubt through a reasoned opinion that necessary element of the JCE liability had been met in this case. The Appeals Chamber should quash JCE findings made by the Trial Chamber and enter a verdict of not guilty on the case that was pleaded at trial.

4. GROUND III – ERRORS REGARDING PETKOVIĆ'S ALLEGED JCE 1 *MENS REA*

Impugned findings

86. The Chamber found that Petković shared the common criminal purpose or plan to "modify the ethnic composition of the so-called Croatian provinces […] in order to extend their political and military control over them"[97] and thus to ethnically cleanse certain areas of its Muslim population.[98] The Chamber failed, however, to make reasoned findings that Petković shared the *mens rea* of the twenty-one "core" crimes for which he was found guilty pursuant to JCE 1. As a matter of law (and fact), the Chamber was required to do so.[99]

4.1. The Trial Chamber erred in law and fact when failing to make reasoned findings that Petković possessed and shared JCE 1 *mens rea*

Legal consideration

87. The Trial Chamber was required to satisfy itself that the Prosecution had proved beyond reasonable doubt that the Accused shared the *mens rea* of and intended to commit those offences said to be "core" of the alleged JCE.[100] And where the offence charged is a specific-intent offence, the Accused must be shown to have possessed and shared that specific intent.[101] In accordance with this jurisprudence, the Trial Chamber was requested to establish through a reasoned finding that Petković intended to commit *each and every one of the twenty-one "core" crimes of the JCE.*[102] For persecution under Count 1, this required proof "that the accused shared the common discriminatory intent of the JCE"[103] and for the crime of unlawful infliction of terror on civilians (Count 25) this required proof of *specific* intent of spreading terror among the civilian population.[104] No lesser standard of *mens rea* would be legally sufficient.[105]

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[97] TJ,Vol.4,para.65.
[98] TJ,Vol.4,paras.41-68,688,814-821,822-853,1225,1230.
[99] Those crimes are listed in TJ,Vol.4,paras.68,820 (also,*ibid,*paras.41,66-67).
[100] *Tadić* AJ,para.196;*Stakić* AJ,para.65;*Simić* TJ,para.160;*Milutinović et al.,*Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction Joint Criminal Enterprise, 21 May 2003,para.29 (referring to *Aleksovski* AJ,para.162).
[101] *Milutinović* TJ,para.109.
[102] *Brđanin,* AJ,paras.365,430-431;*Stakić* AJ,para.65;*Vasiljević* AJ,para.101;*Tadić* AJ ,para.228.
[103] *Kvočka* AJ,para.110;*Krnojelac* AJ,para.111.
[104] *Galić* TJ,para.133.
[105] Explaining modes of responsibility under Article 7/1 of the Statute, the Trial Chamber established that personal knowledge and inference about the intent based on the authority are standard for *JCE Form 2* (Vol.1,para.215) and knowledge

88. The suggestion that Petković "accepted" or „allowed" crimes was legally and factually insufficient as the Chamber had to satisfy itself that Petković *intended* those. The Chamber's failure to establish through a reasoned opinion and beyond reasonable doubt that Petković could reasonably be said to have intended these crimes is an error of law and fact. As a matter of law, where a crime requires proof of intent, that intent must be shown to have existed *prior to* the commission of the crime.[106] *Dolus subsequens* does not, therefore, meet the requirement of intent.

4.1.1. Failure to establish *mens rea* required for the JCE 1

89. The Chamber failed to make the necessary reasoned findings that Petković possessed and shared the intent to commit *each and all* of the underlying "core" crimes. As a result, Petković stands convicted of committing 21 distinct crimes, none of which he had any demonstrable or demonstrated intent for. This constitutes an egregious error of law and fact that meets the relevant standards of review. It also amounts to a serious interference with the basic principal of individual criminal responsibility in violation of Appeals Chamber's binding caselaw.[107]

90. The Chamber further erred in law and fact when:

i. failing to render a reasoned opinion regarding the elements of crimes which require stricter subjective graduations than "ordinary" intent and/or elements of the *chapeau*, and/or render erroneous finding regarding these elements;

ii. failing to make a reasoned finding that possible mistake of law does not exclude Petković's criminal responsibility for certain crimes.

possessed by the accused with regard to the personality and past of the perpetrator, accused's awareness of a climate of violence etc. are standards relevant to establish foreseeability of a crime and the criminal responsibility under *JCE Form 3* (Vol.1,para.221). However, the Trial Chamber implemented these standards for establishing *JCE Form 1* and thus erred in law.

[106] *Fagan v. Metropolitan Police Commiossioner, p.446; People (DPP) v Murray,p.418; B.Gewin, Beginselen Van Strafrecht (Leiden 1913),p134; Constantijn Kelk, Studieboek Materieel Strafrecht (Kluwer 2010), p.216.*

[107] *Naletilić/Martinović* AJ,para.114.

4.1.2. Failure to render a reasoned opinion about circumstances of Petković's alleged joining in a common criminal plan

91. The Chamber failed to render a reasoned opinion as to how, when and in which circumstances Petković could reasonably be said to have learnt of the existence of a criminal plan to ethnically cleanse certain areas through crimes and on what basis the Chamber could reasonably have come to the view that he then adhered to it. Its failure to provide a clearly reasoned opinion on these critical issues is all the more serious because the Chamber did not accept the Prosecution's case on that point, but distorted and moulded it entirely.[108] In those circumstances, the need for the Chamber to clearly outline the basis of the finding which differed so greatly from the Prosecution's theory was fundamental. The Chamber erred in law and fact when failed to render a clearly reasoned opinion regarding the circumstances under which Petković could reasonably be said to have learnt of and joined in a common criminal plan as of mid-January 1993.

4.2. The Trial Chamber erred in law and fact when finding that Petković knew and shared the goal of alleged criminal plan

92. The Trial Chamber, as already explained, failed to render a reasoned opinion as to how, when and in which circumstances Petković could reasonably be said to have learnt of the existence of a criminal plan to ethnically cleanse Muslims from Herceg-Bosna. However, by convicting Petković as a member of JCE the Chamber implicitly asserted that Petković knew and shared the goal of alleged criminal plan. The assertion is erroneous.

4.2.1. The Trial Chamber erred in law and fact when failing to account for, or if it did, to provide a reasoned opinion for disregarding evidence relevant for Petković's *mens rea*

93. Before drawing an inference prejudicial to an accused, a Chamber must ensure that it has considered all of the evidence that is relevant to that inference.[109] A failure to consider evidence

[108] See Ground 2,paras.17-23 of the Appeal.
[109] *Tadić*, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, paras.91-92;*Kvočka et al.* AJ,para.23;*Limaj et al.* TJ,para.20;*Lukić and Lukić* TJ,para.230;*Karadžić,* Decision on Evidence of Robert Donia, 19 February 2010,para.7;*Musema* AJ,para.134;*Ntagerura* AJ, paras.171-172,174;*Rwamakuba* TJ,para.35;*Simba* AJ,para.103; *Karera* AJ,para.174.

favourable to the accused would render that inference unsafe. In addition, and for the lack of direct evidence in the case at bar, the Trial Chamber could only rely on purely circumstantial evidence. In such cases, a conviction "may be based on circumstantial evidence but […], where an inference of guilt is drawn from circumstantial evidence, it must be the only reasonable inference available from the evidence."[110]

94. The Trial Chamber erred in law and fact when it failed to account for evidence that was directly relevant to its drawing of an inference that Petković knew of and had become a member of a criminal enterprise directed at expelling Muslims by commission of crimes. Clear evidence that rendered such an inference of JCE-membership unreasonable or, at the very least, excluded its conclusion as the only reasonable inference possible, was available to the Chamber.

4.2.1.1. Evidence that Petković did not share the alleged "ultimate purpose" of the JCE

95. Asked about the political purpose of Herceg-Bosna, Petković responded (unchallenged) that it was to protect Croatian people and others, both in areas where Croats were majority and minority.[111] Petković proceeded to give unchallenged evidence of his own motives and point of view about what he was trying to achieve performing his function, none of it having to do with the implementation of the supposed JCE or its "ultimate purpose".[112]

96. Petković also made it clear that he never discussed or shared such a goal with those whom the Prosecution suspected of having harbored that ultimate purpose (Tuđman or Šušak;[113] Boban;[114] Prlić;[115] Praljak;[116] Ćorić;[117] Pušić;[118] Kordić;[119] Naletilić).[120]

97. That evidence was *not* challenged by the Prosecution and was, therefore, undisputed. The Chamber failed to explain how it could arrive at the view that Petković shared that "ultimate purpose"

[110] *Mugenzi and Mugiraneza* AJ,para.88, with further references.
[111] Petković,T(E),50458-50459.
[112] Petković,T(E),49746-49747;T(E),50439;T(E),49687;P02019.
[113] Petković,T(E),49748-49749.
[114] Petković,T(E),49751.
[115] Petković,T(E),49764.
[116] Petković,T(E),49782-49783.
[117] Petković,T(E),49790-49791.
[118] Petković,T(E),49799.
[119] Petković,T(E),49800.
[120] Petković,T(E),49803. See also Petković's explanation of his position to that allegation,T(E),49836-49839

with the others despite Petković's evidence on that point and without providing a reasoned opinion as to how a reasonable trier of fact could have rejected that un-challenged evidence. If this evidence is regarded as being undisputed and is not rejected through a reasoned opinion, the Trial Chamber would have had to explain how, despite this evidence, it could reasonably arrive at the conclusion that Petković in fact possessed and shared that ultimate purpose. No such finding is made in the Judgement and the Trial Chamber failed entirely to deal with Petković's evidence on that point.

98. The Defence recalls, at this point, that the Trial Chamber "need not refer to the testimony of every witness or every piece of evidence on the trial record, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence". Such disregard is shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning".[121] Evidence given by Petković that he did not share the alleged ultimate purpose of a JCE would be precisely such evidence.

4.2.1.2. Evidence of Petković's efforts to favor peaceful negotiations over war

99. At trial, the Defence put forward unchallenged evidence of Petković's efforts to find peaceful solutions to the conflict with ABiH, to improve the humanitarian situation of all civilians (regardless of ethnicity) and more generally to protect vulnerable civilians.[122] When asked about his position regarding the protection of civilians, Petković said (without being challenged on it) that civilians that presented no security threat should not be disturbed or displaced.[123]

100. Petković systematically worked for peace and negotiations with the ABiH.[124] This was the evidence that the Defence had flagged at trial,[125] which directly rebutted the Chamber's suggestion that Petković intentionally contributed to the JCE by planning military operations in which crimes were planned and committed under the cover of a military operation.[126] If that were the case, it would have been entirely incoherent and unreasonable for Petković to press for peace and negotiations rather than war as he would have been denying himself (and the JCE) the very means (military operations) by

[121] *Limaj* AJ,para.86 (citations omitted);*Kvočka* AJ,para.24.
[122] See Annex 3.
[123] Petković,T(E),49579-49580.
[124] See Annexes 2,4. Referred to in Petković FTB,fn.942 and ignored by the Trial Chamber. Petković,T(E),49416.
[125] Petković FTB,para.537(ix). The Chamber only made reference to this as a matter in mitigation (TJ,Vol.4,para.1361), in response to Petković FTB,para.672(xii).
[126] TJ,Vol.4,paras.814-820.

which he was contributing to the goals of the JCE. Nowhere the Trial Chamber explains how its finding of JCE-*mens rea* could remain reasonable had that evidence been taken into account in that context.

4.2.1.3. Evidence that Petković did not possess/share the alleged intent to expel Muslims

101. The core of the Chamber's JCE is that the Accused shared the intent to cleanse the area of its Muslim population through the use of crimes. In coming to the unreasonable view that Petković shared such a purpose the Trial Chamber failed to consider or, if it did, failed to explain how it could reject clear and corroborated evidence that Petković positively did not share such a criminal purpose.[127] Nowhere does the Chamber explain why it could reasonably disregard that evidence or how, having taken it into account, it could still draw a conclusion, as the only reasonable one, that Petković possessed and shared the JCE-*mens rea*.

102. Regarding the absence of intent on Petković's part to expel/deport Muslims, the Chamber also failed to consider an array of orders that demonstrably rendered its finding unreasonable.[128]

103. The evidence proves that Petković's intent was not to expel Muslim population through the use of crime and no reasonable trier of fact could have come to the opposite conclusion.

4.2.1.4. Evidence of Petković's demonstrable absence of discriminatory/persecutory *mens rea*

104. At the core of the Trial Chamber's JCE theory lays the proposition that Petković (and co-accused) was driven by a discriminatory/persecutory *mens rea* that is reflected in his conviction under Count 1.

105. In his evidence, Petković explained that he had not pursued any political or *ethnic* agenda in his role for the HVO and that he had thought that all three constitutive people of BiH should have equal rights without discrimination.[129] He was not challenged in cross-examination on that evidence.[130]

[127] P01959,P01445,4D01078,P02344,P02726,P03584,P02036,P02089.
[128] See Annex 2.
[129] Petković,T(E),49337.
[130] It had been flagged in Petković FTB,para.537(vii).

106. The evidence was corroborated by Petković's actions (providing help to unblock Sarajevo;[131] negotiating peaceful solutions with ABiH;[132] being honored by the BH government with a high distinction for his help[133]). The Chamber failed to address that evidence or, if it did, to explain how it could reasonably reject it when coming to the view that Petković shared the discriminatory/persecutory *mens rea* of the JCE.

107. The Trial Chamber also failed to address much corroborating evidence of Petković's testimony and other evidence which systematically and positively demonstrate a lack of discriminatory intent towards Muslims and which were ignored by the Chamber.[134] The dates of documents mentioned in the Annex 2 clearly demonstrate that Petković's view did not change over time and remained non-discriminatory all through the relevant period.

4.2.1.5. Evidence of Petković's efforts to protect and assist civilians, regardless of ethnicity

108. In several of his orders, Petković insisted that local (Muslim) civilians should be protected and subject to no harm.[135] Had the Chamber accounted for that unchallenged evidence, it could not reasonably have concluded that Petković knew of the alleged criminal plan and shared its purpose. It would be entirely unreasonable to conclude that Petković would have been taking good faith steps to protect civilians from crimes whilst planning and intending these crimes. The unreasonableness of such finding cannot be avoided by simply ignoring record evidence that was unchallenged at trial. This evidence was identified by the Defence at trial as relevant to the Chamber's finding on JCE membership/*mens rea*.[136] It was entirely ignored by the Chamber in this part of its Judgement.[137]

109. There was also plenty of corroborated evidence that Petković had repeatedly taken steps to ensure that humanitarian aid would reach vulnerable (Muslim) civilians trapped in the conflict.[138] That evidence was again ignored by the Chamber when drawing an inference that Petković was part of JCE which intended to target civilians through crimes.

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[131] E.g.Petković,T(E),49417-8 (also Petković FTB,para.537(ix).
[132] See above.
[133] Petković,T(E),49369-49370 (also Petković FTB,para.537(ix).
[134] See Annex 2.
[135] See Annex 3;Petković FTB,para.537(vi),537(viii)/fn.946.
[136] Petković FTB,para.537(ix).
[137] Again, the Trial Chamber only made reference to this as a matter in mitigation (Vol.4, para.1361), in response to Petković FTB, para.672(ix).
[138] See Annex 3.

4.2.1.6. Conclusion and relief sought

110. The Trial Chamber's failure to take this highly relevant evidence into account and/or to explain how it could reasonably reject it is both an error of law and fact that meets the relevant standard of review.[139] Had the Trial Chamber taken that evidence into account in that context, it could *not* reasonably have reached the conclusion that Petković possessed the requisite *mens rea* of these offences or, at the least, conclusion that this was the only reasonable inference on the evidence.

111. The Appeals Chamber should, therefore, reverse the Trial Chamber's finding of JCE-membership, quash the Chamber's JCE conviction and enter a not guilty verdict for Petković.

4.3. The Trial Chamber committed a number of errors of law and fact and abused its discretion when evaluating Petković's actions in various locations and coming to the view that he had made culpable contribution to commit crimes

4.3.1. Errors with regard to various locations

112. Instead of applying and verifying the presence of *mens rea* required for JCE 1 in relation to each and all crimes which the Chamber said Petković committed, the Trial Chamber applied a lower, legally erroneous and ultimately irrelevant standard of *"acceptance"* or *"allowance"* or *"knowledge"* of crimes or *"intention that a crime be committed"*.[140] This error affects the Trial Chamber's convictions for crimes committed in the following locations:

i. Prozor: the Chamber asserted that Petković: a/ *intended to have these crimes committed* (destruction of Muslim houses), or *intended to have this property*

[139] *Limaj* AJ,para.86(citations omitted);*Kvočka* AJ,para.24;*Ćelebići* AJ,para.498;*Kupreškić* AJ,para.39;*Kordić/Čerkez* AJ,para.382.
[140] *TJ,Vol.4,paras.697,698,710,724,730,734,735,750,777,782,783,785,789,796,798,815.*

destroyed;[141] b/ *intended to have detention crimes committed*, or *accepted these detentions*;[142]

ii. Gornji Vakuf: the Chamber asserted that Petković *intended to have committed* crimes of destruction of property belonging to Muslims, killing civilians, confinement and removal of local population.[143]

iii. Sovići, Doljani: the Chamber asserted that Petković: a/ *knew* that crimes of destruction of Muslim houses were an integral part of military operations;[144] b/ made no inference about Petković's *mens rea* with regard to transfer crimes (Counts 8,9); c/ made no inference about Petković's *mens rea* to commit crimes of imprisonment (Counts 10,11).[145]

iv. Mostar: the Chamber inferred that Petković: a/ *accepted* the destruction of the Baba Bešir Mosque;[146] *b/ accepted* the evictions in Mostar in June 1993;[147] *c/ must have been aware of the terror* under which Muslim population of East Mostar was living;[148] *d/ intended to have these* (murder, injuries, destruction of property, including mosques) *crimes committed*.[149]

v. Vareš: the Chamber stated that Petković *accepted crimes* committed in Vareš and Stupni Do.[150]

vi. detention crimes: the Chamber asserted that Petković ordered the arrest of "men who did not belong to any armed force", but there is no inference about cognitive and volitional components of intent, especially with regard to the Petković's state of

[141] *TJ,Vol.4,paras.693,695,699.*
[142] *TJ,Vol.4,paras.697,698,699.*
[143] *TJ,Vol.4,para.710.*
[144] The inference that the crimes of destruction of property belonging to Muslim population were part of the planned military operation contradicts to the Trial Chamber's correct inference that soldiers of the KB set fire to houses belonging to Muslim in Sovići and Doljani on about 21 April 1993, after the death of Mario Hrkač aka Čikota, who was killed on 20 April 1993 (TJ,Vol.2,para.643), which proves that these crimes were revenge. Also adjudicated fact no 66 (*Naletilić* Judgement,para. 706). Since this is the issue related to *actus reus*, it will be discussed in Ground 4 of the Appeal.
[145] The Trial Chamber only established that it was unable to find that Petković had accepted the poor conditions of confinement.(TJ,Vol.4,para.724).
[146] TJ,Vol.4,para.730.
[147] TJ,Vol.4,para.735.
[148] TJ,Vol.4,para.750.
[149] TJ,Vol.4,para.750.
[150] TJ,Vol.4,para.777.

mind about the status of persons who were to be arrested upon his order (not civilians, but HVO soldiers of Muslim ethnicity and military conscripts of the ABiH);[151]

vii. conditions of confinement crimes: the Chamber established that Petković:

a/ *accepted crimes* related to conditions of confinement in Gabela;[152] b/ *accepted* the mistreatment[153] and crimes related to conditions of confinement in Dretelj;[154]

viii. murder/wilful killing: the Chamber asserted that Petković *accepted* the murders and injuries in Heliodrom,[155]

ix. forced labour: the Chamber inferred that Petković *accepted* the unlawful work of detainees on the front line and the death and injuries of the detainees while working in Vojno;[156]

x. infliction of terror on civilians: the Chamber inferred that Petković "*must have been aware of the terror*".[157]

4.3.2. The Trial Chamber failed to make reasoned finding that possible mistake of law does not exclude Petković's criminal responsibility for certain crimes

113. There is a general rule that "ignorance of the law is no excuse". However, a mistake of law may be ground for excluding criminal responsibility if it negates the mental element required by such a crime.[158] By failing to make reasoned finding that possible mistake of law does not exclude Petković's criminal responsibility for certain crimes the Trial Chamber erred in law and fact.

[151] Petković was convicted for detention crimes under Counts 10,11 in Prozor,Gornji Vakuf,Jablanica, Heliodrom,Stolac, Čapljina and Vareš (TJ,Vol.4,para.820).
[152] TJ,Vol.4,para.782.
[153] TJ,Vol.4,para.783.
[154] TJ,Vol.4,para.785.
[155] TJ,Vol.4,para.796.
[156] TJ,Vol.4,para.798.
[157] TJ,Vol.4,para.750.
[158] ICC Statute,Art.32/2;Criminal Law of the Socialist Federal Republic of Yugoslavia, Art.17 ("Offender who for justified reasons did not know that his conduct was prohibited cannot be mitigated or remitted.")

4.3.2.1. Petković's 30 June 1993 arrest order (P03019)

114. The Trial Chamber found Petković guilty for crimes under Counts 10 and 11 on the basis that he: (a) "ordered the arrest of men not belonging to any armed force" and thus intended these crimes to be committed[159] or (b) was informed that "men who did not belong to any armed force" were being detained, but continued to carry out his functions and thus accepted these detentions.[160]

115. On 30 June 1993 Petković ordered the arrest of (i) HVO soldiers of Muslim ethnicity and (ii) military conscripts (military capable men) of ABiH, which is extensively discussed below, under Ground 4.[161] With regard to the Petković's *mens rea* to commit the crime of imprisonment under Article 5(e) and the crime of unlawful confinement of a civilian under Article 2(g) of the Statute relevant issues are: (i) Petković's opinion about the status of men who were supposed to be arrested; (ii) if Petković's opinion about the status of the HVO soldiers and ABiH military conscripts was not correct, whether his possible mistake of law can be blamed on him; (iii) did Petković know that the HVO Supreme Commander order, upon which he issued the arrest order, was unlawful; (iv) was the HVO Supreme Commander order manifestly unlawful.[162]

4.3.2.1.1. Petković's possible mistake of law

116. Considering that 30 June 1993 was the beginning of the full-out war and that Petković's arrest order was one of the most relevant evidence in the case, the Petković Defence extensively explained in its FTB the reasons and circumstances of issuing the order, as well as Petković's understanding of the order.[163] Petković explained, and the evidence proves, that Muslims soldiers were considered by the HVO authorities like all other HVO *soldiers* and ABiH military conscripts as non-combatant *members of the ABiH*.[164] *Ergo*, none of these two groups of men was considered to be civilians or "men not belonging to any armed force". Evidence proves beyond reasonable doubt that Petković' position was that he ordered the arrest of HVO soldiers and members of the ABiH and that he considered the order legal and justified.

[159] TJ,Vol.4,paras.738,758,759,815.
[160] TJ,Vol.4,paras.698,699.
[161] See paras.174-213 of the Appeal.
[162] See ICC Statut,Art.32,33.
[163] Petković FTB,paras.241-297.
[164] Petković,T(E),49594;4D01731,paras.53-62;4D01470.

117. In the same order Petković gave instructions that Muslim women and children be allowed to remain in their houses. This proves that he ordered protection of civilians according to relevant standards of IHL and the isolation of men whom he considered as members of the armed forces (HVO soldiers and non-combatant members of the ABiH).

118. Even if the Chamber had taken the view that Petković's order was unlawful, it was required to exclude the reasonable possibility that he might have committed an excusable mistake of law to the lawfulness of that order. A mistake of law that is both "honest and reasonable" is excusable in principle and would offer a valid defence to the charges.[165] Would it be unreasonable to consider that HVO Muslim soldiers and ABiH military conscripts were not civilians, protected by the GC IV ("Relative to the Protection of *Civilian* Persons in Time of War")? The Trial Chamber failed to render a reasoned finding whether Petković made the error of law and whether this error was justified or not. By this failure the Trial Chamber erred in law and fact with regard to the Petković's *mens rea* to commit crimes of internment of civilians under Counts 10 and 11.

4.3.2.1.2. Petković obeyed the order of his superior

119. The evidence proves beyond reasonable doubt that Petković's arrest order was one of the measures taken by the HVO authorities on 30 June 1993, when the full-out war started, which the Trial Chamber correctly established in the "Factual Findings".[166]

120. An officer may not be held responsible for implementing an order unless that order is unlawful on its face.[167] Boban's order was not such order: It demanded that Petković should order the securing of individuals who could lawfully be subject to security measures of the sort ordered by Petković.[168] Therefore, under international law, Boban's order was lawful and Petković had no reason to believe that, by implementing the order with his own order, he was obeying an unlawful order or that he was acting unlawfully.

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[165] E.g.Art.154(a)(4) of the US 1951 Manual for Courts Martial,which uses that wording(in Cassese, *International Criminal Law*, 1st ed, 262).
[166] TJ,Vol.2,para.884.
[167] *United States v. Wilhelm List et al., Trials of War Criminals*, Vol.XI,p.1236.
[168] Petković testified that Boban's order was legal and justified,T(E),49577,49594-6. That position was corroborated by the evidence of others: 4D01731.para138, M.Gorjanc,T(E),46118,46127,46132-3;P09549.para.78, E.Pringle,T(E),24265.

121. Furthermore, the order was consistent with relevant local laws, known to Petković, which provided that able bodied men of certain age were members of the armed forces. It was also consistent with international law, which supports a presumption that at the time of the arrest it would not be unreasonable for a party to the conflict to regard men aged between 17 and 65 as not being civilians for the purpose of their initial internment.[169]

122. The Trial Chamber did not render a reasoned finding about Petković's obeying the order of his superior, which was not manifestly unlawful. By this failure the Trial Chamber erred in law and fact with regard to the Petković's *mens rea* to commit crimes of internment of civilians under Counts 10 and 11.

4.3.2.1.3. Conclusion

123. Based on the above mentioned, the Trial Chamber erred in law and fact when finding that Petković issued his 30 June 1993 order in the knowledge of its unlawfulness and erred when taking this order into account as evidence of Petković's supposed intentional and knowing contribution to a JCE. It was erroneous, therefore, for the Trial Chamber to rely on this order as evidence that Petković possessed the requisite JCE 1 *mens rea* and that he intended the commission of crimes by issuing his order. This in turn affects the correctness and reasonableness of Petković's convictions for imprisonment (Count 10) and unlawful confinement of a civilian (Count 11), as well as persecutions (Count 1) with regard to these detention crimes. The Appeals Chamber should overturn those convictions insofar as the Trial Chamber failed to establish Petković's culpable *mens rea* from his order of 30 June 1993.

4.3.2.2. Transfer of Muslim population from Sovići and Doljani

124. The Trial Chamber established that Petković "orchestrated" the removal of Muslim population from Sovići to Gornji Vakuf on 5 May 1993 and made no inference about his *mens rea* to commit crimes of forcible/unlawful transfer of civilians under Counts 8 and 9. The Chamber recalled that the Petković Defence had submitted that "all circumstances surrounding the evacuation of Muslim civilians led Petković to believe that this was a legal operation, conducted in accordance with the wishes and well-

[169] *Kordić* AJ,paras.607/609,615,623 and corresponding *Kordić* TC's findings.

being of the civilians, and organized by the civilians themselves and the ABiH commanders, including Halilović and Pašalić",[170] but failed to establish Petković's alleged intent to commit these crimes.

125. Assuming that Petković did not just provide buses upon the request of Halilović,[171] but was involved in making decision about the accommodation of civilians whose houses were destroyed, the relevant issue for the Petković's *mens re*a to commit the crime of unlawful/forcible transfer would be his knowledge about the legality of the evacuation, opinion about the purpose of transporting civilians from Sovići, his contribution to Muslim civilians' well-being and intent to unlawfully transfer civilians from two villages in the Municipality. If Petković erred in law with regard to these aspects of removal of civilians from Sovići, the next relevant issue is whether this error was justified or nor. If the error was justified, it negates mental element required for crimes of forcible/unlawful transfer of civilians and Petković's criminal responsibility should be excluded on that ground.

126. There exists a general principle that an otherwise impermissible act would not constitute a crime when it is carried out for the purpose of preventing a greater evil.[172] In this particular instance, civilians were moved because everyone involved agreed that they were vulnerable and exposed to the possibility of falling victims to the ongoing military activities. They were moved, wisely, to prevent the risk of harm and no one at the time thought of suggesting that this was a crime. Furthermore, as Petković testified, some of the people there wanted to leave Sovići voluntarily,[173] and Petković did his best to help protect them.[174]

127. The Trial Chamber failed to make a reasoned finding about Petković's intent and by this failure it erred in law and fact with regard to the Petković's *mens rea* to commit crimes of unlawful/forcible transfer of civilians from Sovići under Counts 8 and 9. The Appeals Chamber should overturn those convictions insofar as the Trial Chamber failed to establish Petković's *mens rea* required to commit crimes of unlawful/forcible transfer under JCE 1 form of criminal responsibility.

[170] TJ,Vol.4,para.722.
[171] Petković testified that upon the request of the ABiH commanders he did his best to arrange for buses to transport civilians,T(E) 49488-9.
[172] *United States v.Flick*,p.1199.
[173] Petković,T(E),49487-8.
[174] Petković,T(E),49489.

4.3.2.3. Forced labour orders

128. The Trial Chamber erred in law and fact when it failed to render reasoned findings in relation to the *mens rea* relevant to forced labour offences for which Petković was convicted under JCE 1 (Counts 1,18), including finding that Petković intended POW's and/or civilians to be taken to carry out unlawful labour.

129. The Chamber erred in coming to the view that Petković had issued labour orders that were unlawful. Even if it could reasonably have reached that conclusion, and in light of Petković's evidence that he understood his orders to be lawful in character,[175] the Trial Chamber was required to consider and exclude as unreasonable the possibility that Petković might have mistakenly believed them to be lawful in the circumstances. It erroneously failed to do so or, if it did, failed to render a reasoned opinion justifying the reasonable rejection of that real possibility. It is significant in that respect that Petković expressly testified to this matter and that his evidence was not challenged in cross-examination.[176]

130. Whilst a Chamber could consider those orders to be unlawful, they were not such that a reasonable commander could not have regarded them – rightly or mistakenly – as lawful in the circumstances. Here relevant is the only known precedent on this matter (as per LRTWC, Vol.15, pp 104-105):

> *"On the other hand the Tribunal in the* High Command Trial *did not list Article 31 [of the Geneva Convention] among those which it regarded as being an expression of existing customary law and held that 'in view of the uncertainty of the international law' as to the question of the 'use of prisoners of war in the construction of fortifications' (which might not unreasonably have been regarded as work having direct connection with the operations of war) 'orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal on their face…'. It has been conceded in the notes to the* High Command Trial *that 'prosecuting staffs have preferred to charge accused with exposing prisoners of war to danger rather than with employing them in work directly connected with operations of war, when the facts of cases could have given reasonable prospects of a conviction on either.'"* (footnotes omitted)

[175] On P04020 (order of 8 August 1993), Petković did not say it was legal directly, but he explained: When checking these things, we can see that these were people who were detained. And, secondly, these people were 15 or 20 kilometres away from the closest line of fire (T(E),50678).
[176] Petković,T(E),49817-8.

131. It is also relevant to note that Petković had no information suggesting that the implementation of any of his orders had resulted in harm or injury to any individual or that any of them had been made to do work that is unlawful as a matter of international law (either because it was dangerous or otherwise). Nor did he have information suggesting that necessary precautions intended to protect the workers from harm had not been taken by those charged with implementing his orders.

132. To the extent that the Chamber found that Petković issued unlawful orders, and in light of Petković's evidence that he considered those to be lawful, the Chamber was required to consider and exclude the reasonable possibility that Petković had committed an honest and reasonable mistake of law and/or fact. The Chamber erred in law and fact when it failed to do so and, instead, assumed without evidence that Petković knew that his orders were unlawful despite his protestations to the contrary.

133. These errors meet the relevant standard of review on appeal. The Appeals Chamber should quash and reverse the conviction for forced labour crimes because the Trial Chamber failed to establish Petković's *mens rea* required for JCE 1 form of criminal responsibility and enter a verdict of not guilty.

4.4. The Trial Chamber erred in law and fact when failed to render a reasoned opinion regarding elements of the *chapeau* and specific intent

134. The Trial Chamber erred in law and fact when failed to render a reasoned opinion regarding Petković's possessing the requisite *mens rea* for the *chapeau* elements of crimes against humanity, especially that he intended to commit a crime as part of the (i) widespread or systematic attack (ii) against a civilian population and that (iii) he intended that criminal conduct was a part of such attack.

135. The Chamber also failed to consider or, if it did, to exclude through a reasoned opinion, evidence that contradicted its findings that Petković possessed the requisite *mens rea*. For instance, there was positive evidence (*unaddressed by the Chamber*) that Petković was not aware of crimes being committed on a widespread or systematic basis, which would have rendered a finding that he possessed the requisite (*chapeau*) *mens rea* under Article 5 of the Statute unreasonable:

> "[**Prosecution counsel**] You would agree, sir, based on your knowledge of these matters, not in this particular report but more generally, these HVO crimes could not be blamed simply on the

> random acts of individuals, that some of these crimes – some of these practices were being carried out on a widespread and systematic basis, weren't they?
> [**Petković**] No, I cant agree with you there, because all the information that I received from these people, regardless of the fact that they weren't checked out, indicated that they were groups that were out of control."[177]

136. The Chamber failed to address that evidence. The Chamber's failure to make reasoned findings in relation to these legal requirements constitutes an error of law (both as result of its failure to render a reasoned opinion and for failing to verify and establish legal requirements of the offence) and an error of fact (having failed to satisfy itself that these had been established beyond reasonable doubt and to consider and/or reject evidence relevant to these facts).

137. The Trial Chamber made no finding about the requisite *mens rea* for crimes which elements are *wilful*, *unlawful*, *wanton* and therefore require stronger subjective graduations than "ordinary" intent. The Trial Chamber, further, failed to render reasoned finding about Petković's specific intent to spread terror, but simply stated that he "*must have been aware of the terror* under which Muslim population of East Mostar was living",[178] although according to the jurisprudence spreading terror must be the *primary* purpose of the acts or threats of violence (namely, the *mens rea* of the crime of terror consists of (i) the intent to make the civilian population or individual civilian not taking part in the hostilities the object of the acts of violence or threats and of (ii) the *specific intent* to spread terror among the civilian population).[179]

138. All these failures constitute errors of law and fact (having failed to satisfy itself that the legal requirements had been established beyond reasonable doubt) and meet the relevant standards of review as they show the conviction to have been entered absent necessary findings.

[177] Petković,T(E), 50698.
[178] TJ,Vol.4,para.750.
[179] *Galić* AJ,para.104;*Dragomir Milošević* AJ,para.37.

4.5. Conclusion and relief sought

139. All these errors, separately and put together, meet the relevant standard of review and thus the Appeals Chamber should quash the conviction for all "core" crimes under JCE 1 form of criminal responsibility and enter a verdict of not guilty.

5. GROUND IV: ERRORS PERTAINING TO *ACTUS REUS* OF JCE

5.1. Errors regarding Petković's "powers"

Impugned findings

140. The Trial Chamber's findings about Petković's alleged participation in the JCE and his alleged significant contribution to the implementation of the common criminal plan of ethnic cleansing of Muslim population are based on the following:

i. his "directing and controlling the HVO armed forces", whereby he is said to have used the armed forces to commit crimes;
ii. his negotiating with the ABiH authorities and
iii. implementing the policies and decisions of the government in the field.[180]

141. Each of those and the errors accompanying them will be reviewed in turn before considering the Chamber's errors that affect particular locations.

5.1.1. Errors regarding Petković's "directing and controlling the HVO armed forces" and using the armed forces to commit crimes

5.1.1.1. Errors regarding *de jure* command and control

142. Throughout the Judgement the Trial Chamber asserted that military units were subordinated to and controlled by the HVO *Main Staff* and that the HVO *Main Staff* had the central mission to command the armed forces and to conduct military operations.[181] Orders of the Chief/Commander of the Main Staff, or his deputy, the Chamber regularly considered as "orders given by the Main Staff".[182]

143. Military command and control authority *per definitionem* cannot be assigned to a military *body* or *personnel in the body*, but only to a leading person (chief or commander) of a military body and/or military unit. Therefore the Chamber erred in law and fact when asserting that the Main Staff, as a kind

[180] TJ,Vol.4,para.818.
[181] TJ,Vol.1,para.747;Vol.4,paras.483,654,657.
[182] TJ,Vol.1.paras.750-755.

of the collective body, "controlled", "commanded" or "gave orders", which implies that not only the Chief/Commander of the Main Staff had such *de jure* competence.

144. The Trial Chamber erred in law and fact when established that Petković as *deputy* Commander/Chief of the HVO Main Staff had *de jure* command authority over the HVO armed forces and that the HVO units were subordinated to his command in the capacity of deputy commander.[183]

145. The Chamber noted that Petković was removed from the position of the Chief of the Main Staff and appointed to the position of Deputy Commander on 24 July 1993,[184] but failed to properly account for Petković's change of the position and his *de jure* authority. Namely, the Chamber failed to establish that Petković lost *de jure* command authority and the position in the direct chain of command by this removal.

146. The Chamber based its conclusion about Petković's alleged contribution to the implementation of the common criminal plan on, *inter alia*, erroneous assertion that he had *de jure* command authority over the HVO armed forces in the capacity of the deputy Commander/Chief of the HVO Main Staff in the period from late July 1993 until April 1994. Therefore the mentioned errors caused miscarriage of justice and invalidated the Judgement.

5.1.1.2. Errors in respect of changes of competences of the Commander of the Main Staff

147. The Trial Chamber established that the change of name in the title of the office heading the Main Staff ("commander" instead of "chief") occurred simultaneously with reorganization at the top levels of the Main Staff.[185] The Chamber acknowledged the changes of competences of the Commander of the Main Staff, but erred in law and fact when on the basis of competences of the Commander as of August 1993 concluded about competences of the Chief of the Main Staff until August 1993. For example, Chamber's conclusion about Petković's alleged power to organize the armed forces is based on orders issued by the Commander of the Main Staff in September 1993.[186]

[183] TJ,Vol.1.paras.12,709,755;Vol.4,paras.656,657,663.
[184] The Trial Chamber erroneously inferred that Petković was "moved up" from the rank of the Chief of the Main Staff to the rank of Deputy Commander/Chief of the Main Staff (Vol.1,para.748).
[185] TJ,Vol.1,para.717.
[186] TJ,Vol.1,paras.695/fn.1624;750.

148. Since the Trial Chamber based its conclusion about Petković's "significant contribution" to the implementation of the goals of the alleged JCE on, *inter alia*, his *de jure* command and control authority as the Chief of the HVO Main Staff, the incorrect inference that the Chief of the Main Staff had the same authority as the Commander of the Main Staff caused the miscarriage of justice.

5.1.1.3. Errors regarding the role of the HVO Supreme Commander

149. The Trial Chamber analyzed the role of the HVO Supreme Commander "in order to better understand the distribution of powers and authority between the Supreme Commander and the Chief of the Main Staff"[187] and then established that the HVO armed forces were *headed* by the Main Staff [188] and that the classic chain of command *proceeded from* the Main Staff.[189]

150. The Chamber made numerous errors of law and fact:

i. the Chamber failed to establish that according to the *Decree of Armed Forces* the Supreme Commander, not the Chief of the Main Staff, leaded and commanded armed forces;[190]

ii. the Chamber failed to establish that the Main Staff was organized within the Defence Department in order to provide the Supreme Commander with staff and other specialized services and that the *Decree of the Armed forces* differentiated "command"/"command headquarters" and "staff"[191], which proves that the Main Staff was the staff of the Supreme Commander;

iii. the Chamber failed to establish that the Chief of the Main Staff did not have origin power and authority prescribed by law, but that according to the *Decision on the Basic Principles of Organisation of the Defence Department* he exercised superior authority over the Command of the HVO "within the scope of general and specific powers *vested on him by the President"* of Herceg/Bosna;[192]

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[187] TJ,Vol.1,para.690.
[188] TJ,Vol.1,para.709.
[189] TJ,Vol.1,para.791. It should be noted that the Trial Chamber incorrectly interpreted Petković's testimony when inferred that he stated that the command of military operations fell to the HVO Main Staff "alone" (Vol.1,para.747;Vol.4,para.654). Petković testified that civilian authorities were not competent to issue military or operational orders but that ultimately the army was subject to the authority of civilian authorities (T(E),49768-49771). There is no suggestion that within the army only the Main Staff directed military operations.
[190] P00289,Art.29;P00588,Art.29.
[191] Ibid,Art.17.
[192] P00586,B.IX 5;P07236,Art.12,13.

iv. the Chamber failed to establish that the Chief of the Main Staff had no power to appoint and/or relieve of duty any commander, although it correctly established that the Supreme Commander was authorized to appoint Chief of the Main Staff, OZ and brigade commanders, as well as other senior officers;[193]

v. the Chamber failed to establish that the Chief of the Main Staff had no competence to award ranks and/or promote officers to higher ranks and that this authority was vested in the President/Supreme Commander and commanders of units;[194]

vi. the Chamber failed to establish that all Petković's ceasefire orders were issued on the basis of a decision/order of the Supreme Commander and/or agreement signed by the President/Supreme Commander;

vii. the Chamber failed to establish that the Supreme Commander of the Armed Forces, not the Chief of the Main Staff, had the disciplinary power regarding disciplinary offences.[195]

151. No reasonable trier of fact could have come to the conclusion that the HVO armed forces were headed by the Chief of the Main Staff and not by the Supreme Commander. Since the factual allegation about heading armed forces was one of the basic premises for the conclusion about significance of the Petković's alleged contribution to the implementation of the criminal plan of ethnic cleansing, the mentioned factual error occasioned miscarriage of justice.

5.1.1.4. Errors regarding *de jure* command authority over KB and its ATGs

152. The Trial Chamber inferred that KB and its ATGs were "integrated into the overall chain of command and reported directly to the *Main Staff*".[196] The inference is based on the following arguments:

i. that the Chamber did not have any order of the HVO Supreme Commander which could prove that the HVO Supreme Commander directed KB and its ATGs;[197]

ii. that on 12 August 1993 Praljak issued an order that the Main Staff would exercise direct command over KB and its ATGs;[198]

iii. that on 23 December 1993 Roso issued an order that ATG unit was formed out of KB and placed under the command of the Main Staff.[199]

[193] TJ,Vol.1,para.694.
[194] Witness Tomljanovic,T(E),6319-6320;P00289;P00588.
[195] P00425,Art.67.1.
[196] TJ,Vol.1,para.829.
[197] TJ,Vol.1,para.825.
[198] TJ,Vol.1,para.826.

153. The Trial Chamber made numerous errors of fact when inferred, or implicated, that Petković had *de jure* command and control over the KB and its ATGs:

i. The Chamber's conclusion that Boban did not have direct command and control over KB and its ATGs was based on the fact that no written Boban's order to KB and its ATGs was tendered in the case. Petković, as the Chief of the Main Staff, also did not issue orders to KB and its ATGs,[200] but this fact did not prevent the Chamber to infer that he had *de jure* command and control.

ii. By referring only to Praljak's and Roso's orders the Trial Chamber actually acknowledged that Petković did not issue orders to KB and its ATGs. The Chamber made erroneous assertions about Petković's authority on the basis of Praljak's and Roso's orders.

iii. The Chamber failed to establish that deputy Commander/Chief of the Main Staff was not in the direct chain of command and accordingly Petković as deputy Commander/Chief could not have *de jure* command and control over commander of any unit, including KB and/or its ATGs.

iv. The Trial Chamber failed to evaluate evidence which clearly and undoubtedly proves that the Chief of the HVO Main Staff was not superior to the commanders of the KB and/or its ATGs.[201]

v. The Chamber inferred that Roso's order of 23 December 1993 was proof of his *de jure* command authority over the KB and its ATGs. However, reasonable trier of fact would conclude quite opposite. Namely, Roso ordered: "Following a suggestion by Mr.Mladen Naletilić, an ATG unit shall be formed out of the units of 'Kažnjenicka bojna'. The ATG *shall be* under the command of the Main Staff of the HVO. The outstanding staff shall be put under the command of the Military District Mostar."[202] The only reasonable conclusion could be that on 23 December 1993 the KB was not, but was supposed to become under the command of the Chief of the Main Staff.

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[199] TJ,Vol.1,para.827.
[200] [REDACTED].

[201] 4D00618;Petković,T(E),49390,49394,49455;Praljak,T(E),42382,43422,43462; [REDACTED]; 4D01356; P07419,p.1. See also Petković FTB,fn.991.
[202] P07315,p.1(c.4.).

5.1.1.5. Errors regarding Petković's alleged use of the armed forces in military operations to commit crimes

154. The Trial Chamber inferred that Petković used the armed forces to commit crimes.[203] Analyzing Petković's powers in relation to HVO military operations the Chamber asserted that Petković issued orders to the commanders to launch offensive operations.[204] The assertion is based on two documents: order of 6 November 1992[205] and order of 8 November 1993.[206]

155. The first document is Petković's order issued on 6 November 1992 to the 1st Mostar Brigade, which was the *unit of the ABiH*.[207] The order was related to joint HVO and ABiH combats against the VRS. Therefore, the order does not support the Chamber's assertion that Petković used armed forces to commit crimes against Muslim population.

156. The second document is order of 8 November 1993, which is not signed and Petković argues that he did not issue that document (see below, paras.279,280). If the Appeals Chamber accepts Petković's argumentation and finds that the Prosecution did not prove beyond reasonable doubt that the order was issued by Petković, there will be no evidence that Petković issued any order to launch offensive operation against the ABiH.

157. No reasonable trier of fact could have come to the conclusion, on the basis of this evidence, that Petković issued orders to launch offensive operations against the ABiH. This error of fact caused miscarriage of justice because the Chamber's inference that Petković significantly contributed to the implementation of common criminal purpose was based on the premise that he issued orders to launch offensive operations against the ABiH and thus used armed forces to commit crimes.

[203] TJ,Vol.4,para.818.
[204] TJ,Vol.4,para.668.
[205] 2D03057 (TJ,Vol.4,para.668,f.1274.)
[206] P06534 (TJ,Vol.4,para.668,f.1275.)
[207] See *inter alia* 2D00021,2D00305,2D00452,2D00478,2D00524.

5.1.1.6. Errors regarding Petković's effective control

158. The Trial Chamber analyzed types of orders issued by Petković and thus inferred that he had "command and control authority and effective control over the armed forces" in matters of, *inter alia*, offensive operations.[208]

159. The finding about effective control is made to suggest that Petković could control those troops and could, for instance, prevent and punish their crimes and that he culpably failed to do so (which in turn the Chamber uses to say that he made a culpable contribution to a JCE[209]). These findings are erroneous for a number of reasons:

i. The concept of "effective control" is an impermissible import from the law of "command responsibility".[210]

ii. Such an allegation did not form a valid part of the Prosecution's *JCE* case against Petković.

iii. The interpretation of that concept is distorted by the Chamber: as a matter of law, "effective control" (understood as the material ability to prevent/punish) must exist a) vis-à-vis the perpetrators (*not the armed forces as a whole*) and b) at the time of the crimes (*not in the abstract, regardless of time or location*).

iv. Factually, the Trial Chamber failed to establish through a reasoned finding that, *at the time of the offence*, Petković had effective control over *the perpetrators* in the sense of his being materially able (and competent) to prevent or punish their crimes. Furthermore, as specifically laid out in Judge Antonetti's Opinion, *actual* control over the troops (effective or otherwise) was never with Petković.[211]

v. *De jure* authority to issue orders and/or issuing orders are not sufficient evidence to establish effective control of a superior over a subordinate who committed particular crime[212] and various factors must be taken into account when assessing effective control.[213] Thus, the Trial Chamber erred in law when on the basis of issued orders inferred about Petković's effective control.

160. Based on the above, the Chamber has erred in law and fact when suggesting that Petković significantly contributed to the implementation of the JCE by using the HVO armed forces to commit

[208] TJ,Vol.4,para.679.
[209] See, in particular, TJ,Vol.4,paras.814-815.
[210] E.g., *Ćelebići* AJ,paras.196, 256;*Krajišnik* AJ,para.352;*Krajišnik* TJ,para.1121(e).
[211] TJ,Vol.6,pp.251,439-444.
[212] Blaškić AJ,para.485.
[213] Orić,TJ,paras.480,481,532,578,782;Brđanin,TJ,para.277;Stakić TJ,para.494.

crimes. These errors meet the relevant standard of review and the Appeals Chamber should reverse the mentioned Trial Chamber's inference.

5.1.2. Errors regarding Petković's power to negotiate and to order cease-fire as his contribution to the implementation of the alleged common criminal plan

161. The Indictment contains no suggestion that Petković contributed to the goal of the alleged JCE by involving himself in negotiations with the ABiH. Furthermore, there was no clear, consistent and timely disclosure of such an allegation. So, the Defence was deprived of the notice of the "charges" and of a fair opportunity to confront such a claim. The Chamber therefore went impermissibly beyond the charges, thereby committing an error of law and a violation of Petković's right to be fairly tried, which includes the right to be timely informed about charges.

162. There is no evidence on which a reasonable trier of fact could have concluded that:

i. Petković conducted negotiations (or issued cease-fire orders) in bad faith and with a view to further an alleged JCE. To this day, none of his interlocutors ever made that claim. Any suggestion that negotiations were driven by the intent to implement the JCE is contradicted by other findings where the Chamber acknowledges that this was done in good faith;[214]

ii. Petković's involvement in negotiations and cease-fire orders had demonstrable effect on the implementation of the alleged JCE to ethnically cleanse Muslims.

163. To be relevant to the doctrine of JCE, the contribution of the Accused must be a contribution to the commission of one or more (core) crime(s) or to the criminal goal of the enterprise. None of Petković's actions in negotiations or cease-fires were shown to have contributed to the commission of any of the core crimes or to be in furtherance of the alleged criminal purpose of the enterprise. In that sense, this could not reasonably be said to support the Chamber's findings that Petković made a significant contribution to a JCE and its reliance upon this as evidence thereof was erroneous and unreasonable.

[214] E.g.,TJ,Vol.4,para.1361.

164. Pursuant to the requirement to distinguish the lawful performance of one's duties from the culpable contribution to a crime,[215] the Chamber was obliged to establish that Petković, when involved in negotiations or ordering cease-fires, was driven by the goal of furthering a JCE. The Chamber erroneously failed to do so.

165. Thus the Chamber has erred in law and fact when suggesting that Petković contributed to the implementation of the JCE through his role in negotiations and cease-fire orders.

5.1.3. Errors regarding Petković's power to transmit decision of the HVO political branch to the military branch as his contribution to the implementation of the alleged common criminal plan

166. Petković had no fair notice that his actions in implementing government policies were alleged to form part of his contribution to a JCE. The HVO armed forces were supposed to be under the control of civilian authority and implementation of the decisions of civilian authority as such cannot constitute contribution to the commission of crimes.

167. The Trial Chamber erred in law and fact when suggesting that Petković's implementation of government policies amounted to or was an indication of his membership in and contribution to an alleged JCE.[216] It is the duty of any military commander to follow and obey the commands of its civilian superiors unless those commands are evidently criminal in nature. There is no support in law for the view that a military commander may engage his criminal responsibility for passing or implementing decisions of political leaders unless those are plainly unlawful.

168. Petković was a military commander who was, at all times, subject to the authority of the civilian leaders (and thus government policies).[217] The fact that he obeyed those is not evidence of criminal participation, but of the implementation of his duties as a military officer. The suggestion that a military officer could be held responsible for obeying orders (short of unlawful orders) and that this could constitute evidence of his involvement in a criminal scheme is legally erroneous and factually unreasonable.

[215] Record of discussion of drafting of IMT Judgement, 12 September 1946, comments attributed to Justice Lawrence, President of the IMT.
[216] TJ,Vol.4,para.818.
[217] Petković,T(E),49386-49387,50384. Also, Petković FTB,paras.66-83.

169. None of the policies to which the Chamber has pointed to in this section of the Judgement were unlawful on their face, so obedience thereto could not have attracted criminal responsibility under customary international law.[218] Further, none of Petković's actions in implementing government policies was shown to have been intended by Petković to further an alleged JCE and, finally, none of Petković's actions in implementing government policies was shown to have made a contribution to the implementation of a JCE, let alone a significant one.

170. Based on the above, the Chamber erred in law and fact when suggesting that Petković contributed to the implementation of the JCE through the implementation of government decisions and policies.

5.1.4. Conclusion and relief sought

171. In sum, contrary to the Chamber's findings, Petković's negotiations with ABiH, his implementing of government policies or the exercise of his "commanding" powers were not shown to have been used to further the commission of JCE crimes. No reasonable trier of fact could have come to the conclusion that Petković had made a "significant contribution" to a JCE to ethnically cleanse Muslims from the HZ(R) H-B. To the contrary, the Trial Chamber's finding should, therefore, be quashed and overturned.[219]

5.2. Erroneous and unreasonable finding that Petković made significant contribution to a JCE and absence of fair notice of charges and reasoned opinion

172. The Trial Chamber erroneously suggested that Petković had planned, directed or facilitated military actions and operations and further drew unreasonable, unreasoned and erroneous findings that (i) crimes were part of a preconceived plan to which Petković had participated and that (ii) Petković knew of and contributed to the implementation of that plan by planning, directing or "facilitating" military operations. These erroneous inferences affect and are core to Petković's conviction in relation to: a/ Prozor, b/ Gornji Vakuf, c/ Jablanica, d/ Mostar, e/ Stolac, f/ Čapljina, g/ Vareš and h/ in the HVO detention centres.

[218] *United States v. List,TWC*,Vol. XI,p.1236.
[219] TJ,Vol.4,paras.814-818.

173. Petković was convicted for crimes of imprisonment and unlawful confinement of civilians under Counts 10 and 11 committed by the imprisonment of HVO soldiers of Muslim ethnicity and military conscripts of the ABiH upon his order of 30 June 1993.[220] The Chamber asserted that "the implementation of the JCE became more efficient" by these arrests and detentions as of 30 June 1993[221] and thus events of 30 June 1993 rated crucial for this case. This is the reason to commence this sub-ground of the appeal by errors which the Trial Chamber made in relation to Petković's 30 June 1993 order and to continue with errors in relation to specific locations and events in the order specified in the Judgement.

5.2.1. Errors regarding Petković's 30 June 1993 order (P03019)

174. An important aspect of the Trial Chamber's conclusion that Petković belonged to a joint criminal enterprise and shared a common criminal purpose with other members of that JCE is the Chamber's finding that Petković's order of 30 June 1993 pertaining to the isolation of HVO Muslim soldiers and the ABiH military conscripts was not lawful.[222] In arriving at the view that this order was unlawful and that Petković issued it knowing this to be the case and intending to further the common criminal plan of ethnic cleansing, the Chamber committed a number of grave errors as regard the status of those concerned by Petković's 30 June 1993 order, the lawfulness of that order and Petković's intentions in issuing that order.

5.2.1.1. Impugned findings

175. The Trial Chamber established that Petković ordered the arrest of "men who did not belong to any armed force".[223] It also inferred that on 13 July 1993 Petković was informed by Šiljeg that "men who did not belong to any armed force" were being detained at the Prozor Secondary School in July 1993,[224]

[220] P03019.
[221] TJ,Vol.4,paras.57,64.
[222] Vol.2,paras.1501,1502,1511,1690,1691,1919,1920,1921,2079,2080,2082,2083;Vol.3,paras.40,41,42,49,195,200,967, 975,980,983,986,987,993,994,996,997,1025,1027,10028,1030,1031,1032,1033,1036,1038,1041,1042,1047,1050,1052; Vol.4,paras.737-8.
[223] TJ,Vol.4,paras.738,758,759.
[224] TJ,Vol.4,para.698.

that as of May 1993 "people who were not members of any armed force" were being detained at the Heliodrom[225] and that Petković "accepted" these crimes.

176. The Trial Chamber established that HVO soldiers of Muslim ethnicity were civilians because "from 30 June 1993 onwards they were perceived by the HVO as loyal to the ABiH" and consequently they "had indeed fallen into the hands of the enemy and were thus persons protected by within the meaning of Article 4 of the Fourth Geneva Convention".[226]

177. With regard to the Muslim men of military age, or military conscripts of the ABiH, the Trial Chamber opined that they were civilians because a reservist "retains the status of combatant from the instant he is mobilized and enters into active duty until such time as he is permanently demobilized".[227] However, the Trial Chamber acknowledged that men of military age were not presumed civilians, so the Prosecution carries the burden of proving civilian status of these men.[228]

5.2.1.2. Implying that "men who did not belong to any armed force" were civilians the Trial Chamber shifted the burden of proof and thus erred in law

178. Throughout the Judgement the Trial Chamber speaks about "men who did not belong to any armed force", but failed to give a reasoned opinion about who these men were. The term "men who did not belong to any armed force" sometimes is synonym for men under the age of 16 and over the age of 60, who were indisputably considered as civilians until proved otherwise.[229] However, the term mostly relates to the "military aged Muslim men" or military conscripts of the ABiH and disarmed HVO soldiers of Muslim ethnicity.[230]

179. Since the Trial Chamber in most of its factual and legal findings uses the term "men who did not belong to any armed force" when addressing military conscripts of the ABiH and disarmed HVO soldiers of Muslim ethnicity, it would be justified to assume that this is the only proper meaning of the term.

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[225] TJ,Vol.4,para.789.
[226] TJ,Vol.3,paras.600-611.
[227] TJ,Vol.3,paras.618,619.
[228] TJ,Vol.3,para.621.
[229] For example, the Trial Chamber established that in summer 1993 in Prozor the HVO hold "Muslim men ranging from 16 to 60 years of age, who were members of the TO/ABiH, as well as seven detainees under the age of 16 and 40 detainees over the age of 60 who were not members of any armed forces" (Vol.3,para.951).
[230] TJ, with regard to Heliodrom:Vol.2,para.1381 and Vol.3,para.972; Ljubuški:Vol.3,para.974; Vojno:Vol.3,para.975; Stolac:Vol.3,para.980; Čapljina:Vol.3,para.986.

180. The Chamber correctly established that it was the *Prosecution that carried the burden of proving civilian status* when seeing to have the regime of crimes against humanity or that of the GC IV applied to crimes committed against men of military age. Furthermore: where the evidence does not prove beyond reasonable doubt that the persons involved are civilians, the Chamber is bound to find *in dubio pro reo* that such persons are combatants.[231] The Trial Chamber, however, did not follow this rule and thus erred in law and fact when *a priori* considered that all military aged Muslim men (military conscripts of the ABiH or disarmed HVO soldiers), *en masse*, were civilians and thus shifted the burden of proof on the Accused to prove otherwise.

5.2.1.3. HVO soldiers of Muslim ethnicity

5.2.1.3.1. The Trial Chamber failed to give a reasoned opinion whether servicemen within an army fall within the jurisdiction of international humanitarian law

181. The Trial Chamber noted that several of the Defence teams argued that the law of armed conflict, or IHL, does not protect members of armed groups from acts of violence directed against them by their own forces.[232] However, the Chamber failed to give a reasoned opinion about this important issue and simply stated that it had to determine "whether these persons are thus protected by the Third or the Fourth Geneva Convention",[233] as the issue of the jurisdiction of the IHL was not challenged at all.

182. Servicemen within the army of the detaining Power do *not* fall within the jurisdiction of IHL. As observed by Cassese:

> *"War crimes may be perpetrated by military personnel against enemy servicemen or civilians, or by civilians against either members of the enemy armed forces or enemy civilians (for instance, in occupied territory). Conversely, crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes. Such offences may nonetheless fall within the ambit of the military law of the relevant belligerent."*[234]

[231] TJ,Vol.3,para.621.
[232] TJ,Vol.3,para.592;Petković's FTB, paras.258-260. (emphasis added)
[233] TJ,Vol.3,para.600.
[234] A.Cassese, International Criminal Law (2008),p.82.

183. The Special Court for Sierra Leone reiterated this principle in its RUF case, specifying that "the law of armed conflict does not protect members of armed forces from acts of violence directed against them by their own forces",[235] and that "the law of international armed conflict regulates the conduct of combatants vis-à-vis their adversaries and persons *hors de combat* who do not belong to any of the armed groups participating in the hostilities".[236] The Court established:

> *"The law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal law of the State of the armed group concerned and human rights law. In our view, a different approach would constitute an inappropriate re-conceptualisation of a fundamental principle of humanitarian law. We are not prepared to embark on such an exercise."*[237]

184. This principle has been framed in general terms in both the jurisprudence and the commentaries that have addressed it, and therefore would appear to have unconditional application, regardless of the religious, ethnic or national make-up of servicemen in question. The post-World War II cases to deal with this issue, such as *Pilz* and *Motosuke*, support this position, holding that the nationality of the victim was overruled by their military allegiance.[238]

185. The Geneva Conventions and their Protocol therefore cannot be said to envisage members of one's own forces within their protection, regardless of their background – a restriction designed to uphold the distinction between the law of armed conflict and the realms of domestic criminal and military law. This jurisdictional distinction does not appear to encourage a "gap" in protection for either category of combatant. It rather identifies which body of law is best suited to address the crimes committed, depending on the relationship between the perpetrator and the victim.

5.2.1.3.2. Protection of the GC IV

186. The Trial Chamber concluded that Muslim HVO soldiers detained on 30 June 1993 were not protected by GC III because "the fact the HVO in this particular instance detained *its own soldiers*

[235] RUF TJ,para.1451.
[236] Ibid,para.1452.
[237] Ibid,para.1453.
[238] *Motosuke*, 13 Law Reports of Trial of War Criminal (1949),p.129: *In re Pilz*, International Law Reports Vol.17,(1957), p.391.

weights the notion that these detainees could be characterized as prisoners of war"[239] and "members of the armed forces of a party to the conflict may not be considered prisoners of war when they are placed into detention by *their own armed forces*".[240] The Trial Chamber then inferred that these HVO soldiers, members of the HVO armed forces, were perceived by the HVO as loyal to the ABiH from at least 30 June 1993 and thus found that Muslim HVO soldiers "had fallen into the hands of the *enemy power*" and were thus civilians, protected by the GC IV.[241]

187. The Trial Chamber's assertions are contradictory: while analyzing possible protection under GC III the HVO was treated as the army of the Muslim soldiers (*"its own soldiers", "their own armed forces"*), but for the purpose of the GC IV the HVO was considered as "enemy power".

188. While asserting that HVO soldiers of Muslim ethnicity were persons protected by GC IV, according to Article 4, the Trial Chamber failed to observe that the definition of protected person under Article 4 relates to – *civilians*, persons taking no active part in the hostilities. Although the word "civilian" is not expressly mentioned in the Article 4, there is no doubt that the article relates to civilians because (i) GC IV relates to the protection of civilian persons in time of war; (ii) the ICRC Commentary of Article 4 explains that it relates to civilians.[242] HVO *soldiers* (of Muslim ethnicity) certainly were not *civilians* at the moment of disarmament and isolation.

189. HVO soldiers of Muslim ethnicity did not "find themselves in the hand of a Party to the conflict of which they are not nationals". Detained HVO soldiers of Muslim ethnicity did not loose their status of HVO soldiers[243] and "time spent in detention, prison, detention centre or assembly camp regardless of the cause or duration /was/ recognized as time spent in a military unit and as such is recorded as special length of service for retirement".[244]

190. Even if the HVO perceived its soldiers of Muslim ethnicity as "loyal to the ABiH", as inferred by the Trial Chamber, this perception cannot transform soldiers into civilians. This perception had no impact on their status as members of the HVO armed forces. If HVO soldiers of Muslim ethnicity could be considered as soldiers who "had fallen into the hands of the enemy power", as established by the

[239] TJ,Vol.3,para.603.
[240] TJ,Vol.3,para.604 (emphasis added).
[241] TJ,Vol.3,paras.610,611 (emphasis added).
[242] Commentary GC IV,Geneva 1994, p.45.
[243] The Trial Chamber noted that Praljak, Petković and Ćorić Defence claimed that Muslim HVO soldiers, placed in isolation by the HVO on 30 June 1993, did no forfeit their status as HVO soldiers.(Vol.3,para.594).
[244] 4D01466. See also Petković FTB,para.256.

Chamber, they should be regarded as prisoners of war protected by the GC III and not as civilians protected by the GC IV.

191. The Chamber erred in law and fact when inferred that HVO soldiers of Muslim ethnicity were civilians at the moment of their disarmament and isolation/detention. No reasonable trier of fact could reasonably come to the conclusion that (Muslim) *soldiers* (of the HVO) *were civilians*. If protected by the IHL, HVO soldiers of Muslim ethnicity would have to be treated as prisoners of war.

5.2.1.3.3. The Trial Chamber erred in law when failed to acknowledge justified reasons for isolation of the HVO Muslim soldiers

192. The Trial Chamber correctly established that on 30 June 1993 the ABiH succeeded in taking control of the north zone of East Mostar (in particular the HVO *Tihomir Mišić* Barracks, Bijelo Polje, Raštani, Vrapčići and Salakovac and other locations within a 26-km radius in the north of Mostar)[245], noting that the ABiH's offensive was launched "in cooperation with HVO soldiers of Muslim ethnicity who had deserted the HVO in order to join the ranks of the ABiH"[246] and concluding that HVO Muslim soldiers were perceived by the HVO as loyal to the ABiH.[247]

193. However, the Trial Chamber failed to establish that Muslim HVO soldiers were disarmed and isolated for justified reason. The Chamber simply ignored all evidence that clearly and undoubtedly proves the existence of danger that the HVO could lose control over all areas defended by the HVO units in which was a large number of Muslim soldiers because of their betrayal, as happened on 30 June 1993 in the Mostar region.[248] Muslim soldiers in the HVO units became security threat and special security measures had to be taken, as confirmed by military expert witnesses Andrew Pringle[249] and Milan Gorjanc.[250] The HVO authorities, including Petković, opined that disarmament and isolation of

[245] TJ,Vol.2,para.881.
[246] TJ,Vol.2,para.882.
[247] TJ,Vol.3,para.610.
[248] Evidence about the ABiH policy towards Muslim in the HVO: 4D01461,2D00281,4D00469,4D00568,4D00033,4D00034, 4D00035,4D00473,[REDACTED](Petković FTB,Annex 13);other evidence 2D00150,P03038,P01438,2D01379,P03355, P04699.
[249] Pringle confirmed that on the basis of the same documents of the ABiH an HVO commander could reasonably believe that Muslim soldiers in the HVO posed a certain security threat, a danger.T(E),24265. Also P09549,para.78.
[250] Gorjanc gave the following, unchallenged, explanation: "It is my opinion that under the described assumptions it is reasonable and from a military point of view completely justified to believe that there was a danger of new betrayals by HVO soldiers of Muslim ethnicity and that the HVO could lose control of other areas as well because of that. In these conditions, every military commander must issue an order on measures to monitor the conduct in battle of his own soldiers of the same ethnicity as the opposing side, restrict access to confidential information and not send them on important combat missions,

Muslim soldiers was lawful and justified. Petković's 30 June 1993 order was sent only to the commander of the OZ SEH (Mostar region) because in other areas Muslim HVO soldiers did not pose the same threat at the moment,[251] which proves that security measures were proportionate to the exigencies of the circumstances.

194. If it concluded that HVO soldiers of Muslim ethnicity were protected by the IHL as victims of crimes committed by the HVO and if opined that HVO Muslim soldiers were civilians at the moment of disarmament and isolation/detention, the Trial Chamber was obliged to evaluate grounds of internment according to Article 42 of the GC IV. This Article prescribes that protected persons may be interned if the security of the Detaining Power makes it absolutely necessary. ICRC clarifies in its Commentary that the internment is justified if a State has a good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.[252] And further:

> *"The fact that a man is of military age should not necessarily be considered as justifying the application of these measures, unless there is a danger of him being able to join the enemy armed forces."*[253]

195. Muslim HVO soldiers were of military age and the danger of their joining the ABiH was immanent and very probable, as explained above.

5.2.1.3.4. Conclusion and relief

196. The Trial Chamber erred in law and fact when failed to give a reasoned opinion about the jurisdiction of the IHL with regard to the HVO's disarmament and isolation/detention of its soldiers of Muslim ethnicity. These errors invalidate the judgement and miscarriage the justice since isolation/detention of the HVO soldiers of Muslim ethnicity would not be considered as war crime and Petković would not be convicted for crimes under Counts 10 and 11 with regard to Muslim HVO soldiers

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including the drastic measure of disarming and isolation in the event of individual inadequate conduct, and in the event of inadequate conduct (desertion, collective disobedience) by a large number of personnel of the same ethnicity as the opposing side, those measures can be undertaken against the majority or, rather, all personnel in own ranks who are of the same ethnicity as the opposing side. This is the only way to prevent losses in own ranks, defeat and loss of own territory." (4D01731,paras.114,138)

[251] [REDACTED]

[252] ICRC Commentary IV Geneva Convention,1994,p.258.

[253] Ibid,p.258,f.1.

if the Trial Chamber established, as it should have done, that IHL cannot be implemented for acts of violence or offences committed within an army/armed group. These errors meet the relevant standard of review and the Appeals Chamber should establish that IHL could not be implemented and accordingly Petković's conviction for crimes committed against HVO soldiers of Muslim ethnicity (Counts 1,2,4,6,7,8,9,10,11) should be set aside.[254]

197. Alternatively, assuming that servicemen of an army are protected by the IHL with regard to crimes committed within the army, the Trial Chamber erred in law and fact when established that HVO soldiers were civilians at the moment of disarmament and isolation/detention and not prisoners of war. No reasonable trier of fact could have come to the conclusion that HVO soldiers of Muslim ethnicity were civilians, protected by GC IV. These errors invalidate the judgement and miscarriage the justice regarding the crimes under Counts 10 and 11, which cannot be committed by detention of a prisoner of war. Relevant standard of review is met and the Appeals Chamber should establish that HVO soldiers of Muslim ethnicity, disarmed and isolated upon 30 June 1993 order, were prisoners of war and accordingly Petković's conviction under Counts 10 and 11 with regard to these soldiers should be set aside.

198. Thirdly, the Trial Chamber erred in law and fact when failed to evaluate evidence which proves the reason for the disarmament and isolation/detention of the HVO soldiers of Muslim ethnicity and to establish whether these reasons were justified or not. No reasonable trier of fact would have come to the conclusion that reasons for the isolation/detention of the HVO Muslim soldiers on 30 June 1993 and afterwards were not justified by serious security reasons. These errors invalidate the judgement and occasioned a miscarriage of justice with regard to the conviction for crimes under Counts 10 and 11 committed by isolation/detention of the HVO Muslim soldiers. As already explained, even if servicemen of an army are protected by the IHL as victims committed by their own army and even if the HVO Muslim soldiers could be regarded as civilians, their internment was lawful and justified if security reasons caused their internment. The Appeals Chamber should accordingly reverse Petković's conviction for crimes of internment under Counts 10 and 11 in relation to HVO Muslim soldiers.

[254] In the *Pilz* case the Dutch Special Court of Cassation stated that crimes committed against own soldier could not be crimes against humanity, "since the victim no longer belonged to the civilian population of occupied territory and the acts committed against him could not be considered as forming part of a system of 'persecution on political, racial or religious grounds'". *In re Pilz*,p.392.

5.2.1.4. Able bodied men of Muslim ethnicity /military conscripts of the ABiH/

5.2.1.4.1. The Trial Chamber erred in fact and law when failed to make difference between combat and non-combat members of armed forces and inferred that military conscripts of the ABiH were civilians

199. The Trial Chamber opined, by majority, that a reservist became a member of the armed forces within the meaning of the IHL once he has been mobilized and has taken up active duty. "Such a person thus retains the status of *combatant* from the instant he is mobilized and enters into active duty until such time as he is permanently demobilized. Outside this temporal framework, a member of the reserves is a civilian and cannot in any event be considered a prisoner of war if put in detention by opposing party during a conflict."[255] The Chamber erred in law when asserting that a person who is not a *combatant* is civilian,[256] because armed forces may consist of combatants and non-combatants, and in the case of capture by the enemy, both have a right to be treated as prisoners of war, which is prescribed by the Hague Regulations (Article 3).

200. It is indisputable that military conscripts of the ABiH (or HVO) were not combatants until taking active duty in a military unit. The issue in dispute is: are military conscripts non-combat members of the ABiH or not? Petković argued that military conscripts, or able bodied men, were *non-combat members* of armed forces and that it was necessary to consider the legislation of the relevant state to determine when reservists actually become *members* of armed forces.[257] The Chamber failed to render a reasoned opinion about the difference between combat and non-combat members of armed forces and the right of the non-combat members of armed forces to get the status of POWs if imprisoned.

201. Legislation of BiH clearly and undoubtedly proves that *components of the ABiH were reserve and standing forces*.[258] While standing forces consisted of active military personnel, soldiers, workers and civilians employed with the Army, the *reserve forces included military conscripts* fit for military service.[259] On *20 June 1992* the RBiH Presidency ordered a general public mobilization of all conscripts,

[255] TJ,Vol.3,para.619. (emphasis added)
[256] Also TJ,Vol.1,para.99.
[257] Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol.I: Rules, Rule 3,p.14 (f.included); Petković FTB,paras.262-280.
[258] Decree Law on Service in the Army of the RBiH Article 7 (4D00412).
[259] Ibid,Article 8,9;Decree Law on Compulsory Military Service RBiH,Article 4/3 (4D01030).

who were obliged to report with their military equipment and small arms to the nearest TO unit.[260] Those who were not actively engaged in armed forces due to shortage of weapons and equipment, or initial problems in establishing and organizing the TO/ABiH, stayed in the reserve or performed other tasks important for the defence.[261]

202. The evidence clearly proves that the ABiH and Muslim authorities treated able bodied men, military conscripts, as members of armed forces, and there is no evidence to prove otherwise. For example:

i. "civilians from the village of Doljani are being evacuated at the moment, conscripts will remain", as reported by the 44th Mountatin Brigade of the ABiH;[262]

ii. witness Zahirović testified that "people fit for military service from /his/ village established the defence line";[263]

iii. [REDACTED];[264]

iv. Mahmutović testified that "all healthy men of military age in the village /Stupni Do/ were under an obligation to join the Territorial Defence";[265]

v. ABiH commanders treated Croat military recruits as members of the HVO;[266]

vi. [REDACTED];[267]

vii. according to the *Decision on matters concerning the status of citizens of the Republic of BiH in the Republic of Croatia* of 24 September 1992, military conscripts could not get the departure approval to other countries and had to return to BiH; collection centres were organized for their reception, providing accommodation and sending them to military and work obligations.[268]

203. The evidence further proves that the HVO authorities treated military conscripts as the reservists of the ABiH. For example, at the working meeting held on 6 September 1993 the HRHB Government discussed the situation regarding imposing penalties and measures of isolation on POWs

[260] 4D01164.
[261] 4D01731,para.119.
[262] 4D00430.
[263] P09198,p.29 (Zahirović).
[264] [REDACTED]
[265] Mahmutović,T(E),25694.
[266] Idrizović testified that after the attack on 15 April 1993 in Jablanica "MUP carried out a search of the apartments and houses of military recruits, members of the HVO who remained in Jablanica".T(E),9903-4.
[267] [REDACTED]
[268] 1D01410.

pursuant to the provision of the international law of war and clarified that POWs were captured as active-duty and *reserve* enemy forces.[269]

204. It should be noted that the Trial Chamber, when speaking about the HVO, also acknowledged that military conscripts were members of the armed forces. Thus the Trial Chamber stated that the HVO Brigade in Ljubuški "comprised 2,392 *conscripts*".[270]

5.2.1.4.2. The Trial Chamber erred in law and fact when failed to acknowledge justified reasons for detention of military conscripts of the ABiH

205. Detention of members of the enemy forces (combat as well as non-combat) is not a crime. However, if non-combat members of the ABiH (military conscripts) are considered as civilians, reasons for their detention is legally relevant because detention of a civilian could be lawful and justified if the security of the Detaining Power makes it absolutely necessary.[271] ICRC stated in its Commentary GC IV that men of military age could represent a security threat for the purpose of security detention where there is a "danger of him being able to join the enemy armed forces".[272]

206. Evidence proves that able-bodied Muslim men were physically able and obliged by the law to join the ABiH[273] and thus no reasonable trier of fact could conclude that they did not represent a security threat and that their security detention was not necessary.

207. The Trial Chamber failed to render a reasoned opinion about the reasons that could justify detention of Muslim military aged, able bodied men after the full-out war broke out between the HVO armed forces and the ABiH (on 30 June 1993).

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[269] P04841.
[270] TJ,Vol.2,para.1771.
[271] GV IV, Article 42/1. Petković Defence in its FTB (paras281-284) explained that the internment of Muslim able-bodied men was based on lawful grounds, i.e. legitimate concern and fear, based on objective grounds, that these men might present a security risk for the HVO forces because of their physical ability and legal obligation to join the enemy side. As the Appeals Chambers concluded in the *Kordić* case about the arrest of broad categories of individuals who might pose a security threat (as opposed to blanket, all-encompassing, orders): in the circumstances the evidence does not support that the HVO carried out blanket detentions of all Muslim civilians, but rather suggests that men of military age between 18 and 60 were targeted. (Kordić AJ,para.609)
[272] ICRC Commentary GC IV (1994),p.258,f.1.
[273] 4D01030;1D00349;1D01410.

5.2.1.4.3. The Trial Chamber erred in law and fact when failed to differentiate between initial and continuing detention

208. According to the ICTY jurisprudence, military aged men are not presumed civilians,[274] but nevertheless detaining power must, within a reasonable time, process and decide whether detained persons were civilians and, if so, whether they posed the security risk which could justify *continuing detention*.[275] Accordingly, *initial detention* of military aged men could be lawful and justified, but *continuing detention* could become unlawful if the detained military aged man was civilian to whom the procedural rights required by Article 43 of GC IV were not granted.

209. Assuming that military conscripts of the ABiH were civilians, the Trial Chamber erred in law and fact when failed to make difference between *initial* and *continuing* confinement. If the Trial Chamber did not make these errors, it could establish that *initial* confinement of the able bodied Muslim men was lawful and justified, but *continuing* confinement became unlawful when the HVO authorities, which had competence over detention centres, failed to determine the status of detainees and/or reconsider reasons for the continuation of internment of those detainees who were civilians.

210. These errors are relevant for Petković's responsibility for detention crimes because he was one of responsible persons for *initial* confinement of the military conscripts of the ABiH, but did not have competence over detention centres or authority to determine the status of detainees and decide about the *continuation* of internment. Therefore, if only continuing confinement was unlawful, Petković could not be responsible for the crime.

5.2.1.4.4. Conclusion and relief sought

211. No reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that Prosecution proved beyond reasonable doubt that all military conscripts of the ABiH were civilians. The Trial Chamber erred in law and fact when taking that position. These errors meet the relevant standard of review and the Appeals Chamber should accordingly reverse Petković's conviction for crimes under Counts 10 and 11 with regard to this category of detained persons.

[274] *Kordić and Čerkez*,AJ,paras.608,609,615,623.
[275] Ibid,para.609;*Ćelebići case*,AJ,para.328.

212. The Trial Chamber further erred in law and fact when failed to evaluate the Defence thesis and evidence about justified, security reasons for the internment of military conscripts of the ABiH. These errors meet the relevant standard of review and the Appeals Chamber should accordingly, if confirms the presumption of the civilian status of the military conscripts of the ABiH, evaluate evidence *de nuovo* and establish the existence of security reasons for the internment of these men. Petković's conviction for crimes under Counts 10 and 11 should be then reversed with regard to this category of detained persons.

213. Finally, the Trial Chamber erred in fact and law when failed to differentiate initial and continuing internment and establish that initial detention of the able bodied Muslim men was justified and lawful even if continuing confinement became unlawful. Namely, the competent HVO authorities could fail to determine the status of these detainees and decide about the continuation of internment of civilians only if justified security reasons existed. These errors meet the relevant standard of review and since Petković did not have competence to decide about the status of detainees and continuing confinement, he cannot be responsible for possible unlawful continuation of confinement. His conviction for crimes under Counts 10 and 11 should be reverse with regard to this category of detained persons.

5.2.2. Errors regarding Petković's alleged contribution to the commission of crimes in particular locations

5.2.2.1. Prozor Municipality

214. Petković was convicted for crimes under Counts 1,10,11,15,16,17,19,20 and 21 in the Prozor Municipality which were committed until mid-July 1993.[276] Analyzing Petković's alleged responsibility under JCE 1, the Trial Chamber did not refer to factual elements of crimes under Counts 15-17, Petković's alleged contribution to the commission of these crimes and relevant evidence, and thus the Chamber failed to give a reasoned opinion about Petković's criminal responsibility for these crimes.

[276] TJ,Vol.4,paras.691-699,820. Since the Trial Chamber did not make any reference to crimes committed after mid-July 1993 Petković Defence will not challenge the Trial Chamber's legal and factual findings about crimes committed after mid-July 1993.

April 1993

215. The Trial Chamber firstly, on the basis of *one* evidence (Petković's 18 April 1993 order to Šiljeg to launch an offensive towards Klis, P01949), inferred that Petković "directed the HVO attacks in Parcani"[277] and then, without any further evidence, jumped to the "finding" that he "directed operations in April 1993 in the villages of Parcani, Lizoperci and Tošćanica".[278]

216. No reasonable trier of fact could have come to such conclusion as the only reasonable inference because:

i. the HVO attack on Parcani was launched on *17 April* 1993[279] and it is not possible that this attack could have been "directed" by the Petković's order of *18 April* 1993;

ii. there is no evidence that villages Parcani, Lizoperci and Tošćanica were located "towards Klis", which was direction of actions mentioned in the Petković's order;

iii. three other villages (Here, Kute, Šćipe) were mentioned in the Petković's 18 April 1993 order and not Parcani, Lizoperci and Tošćanica.

217. Accordingly, the Trial Chamber erred in fact when concluded that Petković "directed" the HVO operations in Parcani, Lizoperci and Tošćanica. Since this inference was the premise for the Chamber's conclusion about Petković's participation in the JCE, contribution to the JCE and his *mens rea* ("to have the crimes committed"),[280] this error caused miscarriage of justice with regard to Petković's conviction for crimes committed in the mentioned villages in April 1993. This error meets the relevant standard of review and the Appeals Chamber should reverse Petković's conviction for crimes committed in the Prozor Municipality in April 1993.

May 1993

218. The Prosecution did not claim that any HVO military action was launched in May 1993 or that a crime was committed. Nevertheless, the Trial Chamber modified the Prosecution case and inferred that

[277] TJ,Vol.4,para.691.
[278] TJ,Vol.4,para.693.
[279] TJ,Vol.2,paras.83-85.
[280] TJ,Vol.4,para.693.

the village of Skrobučani was maybe attacked in May 1993.[281] There is no evidence to support the inference.[282]

June 1993

219. The Trial Chamber erred in fact when inferred that crimes in the villages of Skrobučani and Lug were committed in June 1993 "during the HVO operations" and that Petković was taking part in directing these operations.[283] The evidence clearly proves, as the Trial Chamber actually did establish in the "Factual Findings", that crimes in these villages were criminal acts of particular soldiers and/or individual criminal incidents,[284] and had no connection with planned HVO military operations.

220. Petković's documents issued between 23 April and 22 June 1993 about the reinforcement of troops and deployment of tanks[285] were not related to criminal incidents in the villages of Skrobučani and Lug in June 1993 and thus cannot support the Chamber's thesis that Petković "was taking part in directing operations" in these villages.

221. Accordingly, no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that Petković had any connection whatsoever with the crimes committed in the mentioned villages in late June 1993. This factual error caused miscarriage of justice because the impugned findings were the premise for Petković's conviction for crimes committed in the Prozor Municipality in June 1993. Error meets the relevant standard of review and the Appeals Chamber should reverse Petković's conviction for these crimes.

[281] TJ,Vol.4,para.694;Vol.2,para.95,96;Vol.3.para.1564.
[282] The Chamber referred to the testimony of the witness BS (Vol.2,paras.96,97). [REDACTED]

[283] TJ,Vol.4,para.695.
[284] TJ,Vol.2,paras.96-102.
[285] TJ,Vol.4,para.694 (P02040-deployment/reinforcement order of 22 April 1993;P02055-order of 23 April 1993 to Knez Domagoj brigade to send three tanks to Prozor;P02526-preparedness and deployment order of 26 May 1993;P02911-reinforcement order of 22 June 1993).

July 1993

a/ Internment on 11 July 1993

222. The Trial Chamber stated that Petković "again ordered the organization of combat operations" and "planned the operations" in the Municipality in July and August 1993.[286] This inference is one of the premises for the Chamber's conclusion that Petković "intended to have committed" detention crimes committed by the Kinder Vod on 11 July 1993.[287]

223. The inference about Petković's "ordering" and "planning" military operations was based on three evidence,[288] but none of them had any reference or effect to the internment of Muslim minors, elderly and sick men on 11 July 1993, which was the crime committed by the Kinder vod:

i. P03246 – Petković's order of 7 July 1993 for combat actions on Bokševica;
ii. P03384 – Petković's order of 11 July 1993 to Šiljeg to divide the area of responsibility in order to ensure more efficient commanding;
iii. 3D02582 – Petković's order of 6 August 1993 to the HVO Brigade in Široki Brijeg to direct one battalion to reinforce the forces in Vakuf-Prozor area.

224. Accordingly, on the basis of the mentioned evidence no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that Petković "planned operations" related to detention of Muslim civilians in Prozor Municipality by Kinder vod.

b/ "Acceptance" of detentions in July 1993

225. The Trial Chamber concluded that Petković was informed by Šiljeg's report of 13 July 1993[289] that "men who did not belong to any armed forces" were detained in the Prozor Secondary School in July 1993. This inference was the premise for the Trial Chamber to assert Petković's *mens rea* to "accept" detention crimes of civilians.

[286] TJ,Vol.4,para.696.
[287] TJ,Vol.4,para.697.
[288] P03246,P03384,3D02582 (TJ,Vol.4,f.1336).
[289] P03418.

226. However, the Trial Chamber misinterpreted Šiljeg's report. Namely, Šiljeg did not report about transfer of "men who did not belong to any armed forces", but of Muslims liable for military service,[290] who were considered by the HVO authorities, as already explained, as non-combat members of the ABiH and thus, if detained, POWs. Accordingly, the report contains no indication about the detention of civilians and/or unlawful arrests.

Conclusion and relief sought

227. The Trial Chamber erred in law when failed to give a reasoned opinion about Petković's responsibility for crimes under Counts 15-17. This error invalidates the Judgement and constitutes a grave violation of Petković's right to a reasoned opinion and thus his fair trial. This error also gravely undermines his ability to appeal effectively against an unreasoned finding.

228. The Trial Chamber erred in law and fact when inferred that Petković contributed to the commission of destruction and detention crimes by "planning" certain military activities in the region. No reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that mentioned Petković's orders have any connection with the mentioned crimes.

229. These errors meet the relevant standard of review and the Appeals Chamber should accordingly reverse Petković's conviction for crimes committed in the Prozor Municipality and enter a verdict of not guilty.

5.2.2.2. Gornji Vakuf Municipality

230. Petković was convicted for crimes under Counts 1,2,3,8,9,10,11,15,16,17,19,20,21 committed in the Municipality of Gornji Vakuf. The conviction is based on the Chamber's erroneous and unreasonable inference that Petković:

i. planned and facilitated the HVO operations in Gornji Vakuf in January 1993;
ii. was aware that crimes were part of a preconceived plan;
iii. did not genuinely intend to punish and put an end to the crimes against the Muslims and thus

[290] P03418,p.4.

iv. intended to have these crimes committed.[291]

Alleged Petković's planning and facilitating the HVO operations

231. The evidence on which the Chamber relied when asserted that Petković planned and facilitated the HVO operations on 18 January 1993 in the Municipality of Gornji Vakuf does not support the inference:

i. Petković's 6 January 1993 order to the *Bruno Bušić* Regiment[292] was not issued in relation to combats in Gornji Vakuf launched on 18 January and there is no evidence to prove otherwise. Furthermore, the Chamber's inference that this order, issued on 6 January, was relevant for the Petković's alleged participation in the JCE contradicts the Chamber's conclusion that the JCE was established in *mid-January* 1993 and that the evidence does not support the finding that the common criminal plan existed prior to that date. [293] Accordingly, if the alleged JCE was established in mid-January 1993, as asserted by the Chamber, Petković's order of 6 January 1993 cannot be viewed as his contribution to the implementation of the alleged JCE.

ii. Petković's letter of 18 January 1993 was not sent to the HVO in Gornji Vakuf, but to the HVO in the municipalities allocated to Muslims by the Vance-Owen plan[294]. Therefore the letter was not tied at all to planning and/or conducting the HVO attack on 18 January 1993 on four villages in the Gornji Vakuf Municipality.

iii. Consolidated report of 18 January 1993,[295] as all such reports, bore the name of Petković, but was simply collection of all daily reports received by the HVO Main Staff from the OZs, re-typed by Petković's secretary or some other administrative servant in the Main Staff.[296] The consolidated report indicated that certain parts were "report from Prozor at 12,00", "report from Prozor at 12,30", "report from Gornji Vakuf at 14,00" etc. Actually, the Trial Chamber was aware of the nature of consolidated reports and the fact that Petković did not write and/or issue these

[291] TJ,Vol.4,paras.708-710.
[292] P01064.
[293] TJ,Vol.4,para.44.
[294] P01190.
[295] P01193.
[296] Radmilo Jasak,T(E),48647-8,48650-1.

reports,[297] but nevertheless inferred that Petković wrote them[298] and thus implied Petković's knowledge about certain events, or his confirmation about operations "as scheduled" or villages "captured", although this was the wording of the author of the HVO brigade's or OZ's reports.

iv. Šiljeg's report of 21 January 1993[299] did not state that villages were "cleansed" in the meaning of ethnic cleansing, as implied by the Chamber, but that the villages were moped-up in the military sense.

v. In his report of 28 January 1993[300] Šiljeg reported about civilians in Duša "who were killed as a *result of shelling*" (pp.5,6), not about *killing* of civilians, as implied by the Chamber.

vi. VOS report of 24 January 1993[301] indicates that elevations of Krč and Malo Seoce were captured, that the road Vrse-Gornji Vakuf was cut off and thus the town of Gornji Vakuf was under control in the *sense of communication*, not capturing the town, as implied by the Trial Chamber.[302] This document proves the Defence thesis that the HVO did not plan to take control over the town of Gornji Vakuf and all villages in the Municipality, but only certain locations relevant for control of communication in the area.

vii. The Trial Chamber erred in fact when inferred that Petković ordered combat to cease "only after the HVO had taken control of the area", on 24 January 1993.[303] The Trial Chamber failed to notice that:

a/ on 19 January 1993 the HVO Supreme Commander Mate Boban issued the cease-fire order for Gornji Vakuf;[304]

b/ on 19 January 1993, upon the Supreme Commander order, Petković agreed cease-fire with the ABiH commander in the region Arif Pašalić;[305]

c/ on 20 January 1993 Petković and Pašalić issued the cease fire order;[306]

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[297] TJ,Vol.1,para.740.
[298] E.g. the Trial Chamber inferred that Petković "stated" in the report of 19 January 1993 that two villages had been "captured" although that section of the consolidated report bore the subtitle "Report from Prozor". TJ,Vol.4,para.705,P01220.
[299] P01249.
[300] P01351.
[301] 3D02530
[302] TJ,Vol.4,para.706.
[303] TJ,Vol.4,para.709.
[304] P01211.
[305] P01205,P01215.
[306] P01238.

d/ during the peace conference in Geneva,[307] Boban and Petković were informed that combats in Gornji Vakuf did not cease, which prompted Petković to issue a further order for an immediate cease-fire. The Trial Chamber failed to establish that combats did not stop even then, but only after Šiljeg issued the cease-fire order on 25 January 1993.[308]

232. On the basis of the mentioned, or any other evidence, no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that Petković planned and/or participated in the conducting of the HVO military operations in the Gornji Vakuf Municipality. Not single evidence indicates that any crime was planned to be committed. Accordingly, the Trial Chamber's inference that Petković "was aware" of the plan containing crimes is incorrect and groundless, and no reasonable trier of fact could have come to such conclusion as the only reasonable inference. Furthermore, the fact that Petković's cease-fire orders were not respected clearly proves that he did not have *effective control* over the HVO units in Gornji Vakuf in January 1993.[309]

Intention to punish perpetrators of crimes

233. The Trial Chamber inferred that, by issuing his 24 January 1993 order, Petković "ultimately did not genuinely intend to punish and put an end to the crimes against the Muslims".[310] The assertion is based on three premises:

i. that "it was effectively not until 24 January 1993" that Petković ordered HVO "extremists" to be arrested;
ii. that in his 29 January 1993 order Petković "merely requested of Željko Šiljeg to 'impress' upon HVO members not to cause any further damage";
iii. that *Bruno Bušić Regiment* was redeployed several times after January 1993 although its soldiers committed crimes in Gornji Vakuf.

234. None of the mentioned premises is correct:

i. Petković was in Geneva in the period 22-26 January 1993[311] and on 24 January 1993 he did not issue an order that HVO "extremists" should be arrested, as stated by the Chamber. He

[307] Petković participated in the peace conference in Geneva in the period 22-26 January 1993 (P01275).
[308] P01300.
[309] TJ,Vol.4,para.709.
[310] TJ,Vol.4,para.709.

issued such order on 29 January 1993,[312] right after receiving Šiljeg's 29 January 1993 report,[313] which was the first indication that certain crimes were committed in Gornji Vakuf. Petković issued instruction for further action to Šiljeg, including the order to arrest and imprison "all our extremists".

ii. There is no evidence that Petković had ever been informed that members of the *Bruno Bušić Regiment* committed crimes in Gornji Vakuf in January 1993 or behaved improperly.

iii. Furthermore, there is no evidence that members of the *Bruno Bušić Regiment* committed crimes in Gornji Vakuf:

a/ The Chamber noted that the witness Nedžad Čaušević mentioned the role of the Regiment in arresting inhabitants of Ždrimci (Vol.2,f.922), but the witness actually stated that the HVO, including *Bruno Bušić*, detained him and other men in the village, *who defended the village*.[314] Since detention of combatants is not a crime under Counts 10 and 11, this testimony cannot reasonably be considered as evidence that members of *Bruno Bušić Regiment* committed war crimes.

b/ The Chamber inferred that members of the *Regiment* were implicated in the thefts and in fires in the village of Uzričje (Vol.2,para.436). The inference is based on two evidences:

- document of the BiH intelligence service produced on 27 *December* 1993,[315] in which 3 soldiers allegedly of *Bruno Bušić Regiment* were mentioned;
- testimony of the witness Zijada Kurbegović, who actually did not mention the *Regiment* at all.[316]

Conclusion and relief sought

235. Accordingly, no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that Petković did not try to stop combats in Gornji Vakuf immediately (the first cease-fire order was issued the very second day, on 19 January 1993) and that he did not intend for the perpetrators of crimes to be arrested and punished. No reasonable trier of fact could have concluded, as the only reasonable inference, that Petković culpably and intentionally contributed to the crimes

[311] P01275;Petković FTB,Annex 8.
[312] P01344.
[313] P01351.
[314] P09201.
[315] P07350.
[316] TJ,Vol.2,f.1030;Kurbegović,T(E),8981-3.

committed in Gornji Vakuf or to the furtherance of the alleged JCE. The Trial Chamber's finding is unreasonable and affected by the errors outlined above, which all meet the relevant standards of review.

236. The Appeals Chamber should quash the Trial Chamber's finding that Petković made culpable contribution to the commission of crimes in Gornji Vakuf, reverse his conviction and enter a verdict of not guilty in relation to crimes charged in that location.

5.2.2.3. Jablanica (Sovići and Doljani)

237. Petković was convicted for crimes under Counts1,8,9,10,11,19 and 20 committed in Sovići in Doljani in April and May 1993.

Contribution to planning and directing the HVO operations

238. The Trial Chamber found that Petković "contributed to planning and directing" the HVO attack on Sovići and Doljani[317] on the basis of the following evidence:

i. Petković's 15 April 1993 order to *Bruno Bušić* and *Ludvig Pavlović* to raise combat readiness;[318]
ii. reports which were sent to the HVO Main Staff;[319]
iii. Petković's 22 April 1993 cease fire order.[320]

239. However, none of this evidence supports the thesis that Petković participated in planning and directing the HVO attack on Sovići and Doljani:

i. order of 15 April 1993[321] was general order that *Bruno Bušić* and *Ludvig Pavlović* raise combat readiness and does not relate to Sovići and Doljani;
ii. all operative zones regularly sent reports to the HVO Main Staff and these reports do not prove that the Chief of the Main Staff participated in planning and directing actions and activities

[317] TJ,Vol.4,para.716.
[318] TJ,Vol.4,para.712.
[319] TJ,Vol.4,para.714.
[320] TJ,Vol.4,para.715.
[321] P01896.

described in reports. None of these reports contain an assertion that the Petković planned or "orchestrated" certain military action;

iii. on 18 April 1993 Izetbegović and Boban signed the *Joint Declaration to stop hostilities*[322] and Petković and Halilović accordingly signed the agreement on 20 April 1993 to implement immediate and complete cease fire.[323] Petković's 22 April 1993 order to HVO units in the region[324] to "cease IMMEDIATELY offensive activities" was the repeated cease-fire order of 20 April, which obviously was not respected. This proves that Petković did not have effective control over the HVO units in the field.

240. Accordingly, on the basis of the mentioned evidence, or any other evidence, no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that Petković participated in planning and directing the HVO attack on Sovići and Doljani.

Muslim houses and mosques were set on fire* after *fights

241. The Trial Chamber stated that the HVO set fire to all Muslim houses and two mosques pursuant to orders of "senior commanders" and further inferred that Petković, "insofar as he planned and directed the military operations", knew that these crimes were an integral part of the said plan.[325]

242. However, the Trial Chamber previously established that Muslim houses were set on fire "after all or most of the principal fighting had ended",[326] precisely that "on about 21 April 1993, after the death of Mario Hrkač alias 'Čikota', the KB commander killed on 20 April 1993, KB soldiers set fire" to Muslim houses.[327] Accordingly, the Trial Chamber did establish that Muslim houses were set on fire by the KB soldiers after their commander Čikota was killed, which undoubtedly proves that these destruction crimes were not part of the planned military action to attack Sovići and Doljani on 17 April 1993.

243. The Trial Chamber correctly established that Muslim houses were set on fire pursuant to "order of senior commanders", as reported by the HVO Defence Department of Jablanica on 23 April 1993

[322] 2D00089.
[323] P01988.
[324] P02037.
[325] TJ,Vol.4,para.717.
[326] TJ,Vol.2,para.638.
[327] TJ,Vol.2,para.643. See Naletilić TJ,para.706 (Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006, 7 September 2006, adj.f.66).

(P02063). However, the Trial Chamber failed to establish that Petković was not one of the "senior commanders" who ordered destruction of Muslim property[328] and that there was no evidence that could reasonably connect Petković with setting fire on Muslim houses in Sovići and Doljani.

Obstruction of passage to some international observers

244. The Trial Chamber inferred that Petković obstructed the access and passage to certain international observers and peace-keeping convoys for the purpose of concealing crimes.[329] The inference is based on one evidence only: a report from Šiljeg's deputy of 24 April 1993, who mentioned "oral order" received from the Main Staff to prevent an UNPROFOR convoy from passing through Jablanica.[330] The Trial Chamber concluded that the oral order came from Petković because (a) he was the Chief of the Main Staff and (b) he was personally involved in planning and directing the HVO operations in Jablanica.

245. The Trial Chamber failed to establish that Petković was in Zagreb, Croatia, on 24 April 1993, at the Tuđman, Izetbegović and Boban meeting with co-chairman for ex-Yugoslavia Vance and Owen[331] and that he simply could not be a person "from the Main Staff" (located in Mostar) who issued an oral order on 24 April 1993. Besides, Petković was the Chief of the Main Staff and if he gave an order to a military commander, the order would not be referred to as an "order received *from the Main Staff*".

246. Thus, the Trial Chamber erred in fact when inferred that Petković hindered access of the convoy for the purpose of concealing the crimes committed in Sovići and Doljani. No reasonable trier of fact could have come to such conclusion, as the only reasonable inference.

Re-location of Muslims from Sovići and Doljani

247. The circumstances of Petković's involvement in the re-location of Muslims from Sovići and Doljani by the ABiH command with the assistance of UNPROFOR has already been extensively

[328] The Trial Chamber in the *Naletilić* case concluded that Naletilić ordered the destruction of houses in Doljani (TJ,para.596). Also adjudicated fact no.68 (Decision of 7 September 2006).
[329] TJ,Vol.4,para.721.
[330] P02066.
[331] P02088;Petković FTB,Annex 8.

discussed above (see Ground 2, paras.54-58). In light of all circumstances outlined above, Petković's decision to accept ABiH's request to assist in re-locating a number of vulnerable civilians to a more secure environment (and to do so under the overall umbrella of UNPROFOR) could not reasonably be regarded as a culpable contribution to a JCE.

248. The Chamber's suggestion that Petković "orchestrated" the "removal" of these civilians is misleading.[332] Petković's sole contribution was to have (i) proposed that he and Halilović should go to Doljani to take care of the situation of those trapped civilians[333] and (ii) acceded to Halilović's request to help with the evacuation of civilians leaving in poor conditions and to secure safe-passage for that purpose and buses to transport civilians,[334] with a view to find a peaceful solution.[335] Petković's evidence on that matter[336] is duly corroborated by Filipović.[337] The Chamber's suggestion that Petković "orchestrated" the removal of civilians from Sovići/Doljani and thus culpably contributed to a crime is entirely unreasonable and demonstrates a grave failure by the Chamber to consider all relevant evidence.

249. The Trial Chamber failed to establish that civilians from Sovići and Doljani were transported to Gornji Vakuf and not to Jablanica because of the obstacles on the road. However, in couple of weeks, in June 1993, they were transferred to Jablanica, as civilians agreed with Halilović. The ethnic-map of the Jablanica Municipality thus remained unchanged.

Conclusion and relief sought

250. All these errors of fact and law caused miscarriage of justice and invalidate the judgement. No reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that Petković participated in commission of crimes in Sovići and Doljani or that his contribution to the crimes for which he was found responsible was significant. These errors meet the relevant standard of review. The Appeals Chamber should quash the Trial Chamber's finding that Petković made culpable contribution to a JCE in Sovići/Doljani, reverse his conviction in relation to that location and enter a verdict of not guilty for all crimes charged in that location.

[332] TJ,Vol.4,para.723.
[333] P02187,pp.15,21 (p.28–Halilović supporting the proposition).
[334] P02187,p.49;Petković,T(E),49821-49822,49487-49489,49909.
[335] P02187.
[336] See in particular Petković,T(E),49488-49489.
[337] Filipović,T(E),47523.

5.2.2.4. Mostar

251. Petković was convicted for crimes under Counts 1,2,3,6,7,8,9,15,16,17,20,21,24 and 25.[338] The Trial Chamber made inferences about Petković's alleged contribution to crimes committed in Mostar by examining evidence about four topics:

i. destruction of Baba Bešir Mosque;

ii. evictions and removals of Muslims from West Mostar as of second half of May 1993;

iii. the arrest of Muslim men as of 30 June 1993 and

iv. crimes linked to the siege of East Mostar.[339]

Destruction of the Baba Bešir Mosque

252. The Chamber inferred that Petković was informed that the Baba Bešir Mosque had been destroyed on orders from Miljenko Lasić and that Petković failed to take any measures against the perpetrator of the crime. There is no evidence to support this inference.

253. Petković was indeed informed about the destruction of the mosque by a letter from bishop Ratko Perić, sent on 10 May 1993,[340] but the bishop did not say a word about "orders from Miljenko Lasić". The name of a perpetrator of the crime was not mentioned neither in that letter nor any other document sent to Petković.

254. There is only one evidence with the statement about "orders from Miljenko Lasić" with regard to the destruction of the mosque. It is SIS report of 31 May *1994* and the Trial Chamber acknowledged that this is the only evidence.[341] There is no evidence that this document, issued 12 months after the destruction of the Mosque, was sent to Petković or that Petković had information about the document.

[338] TJ,Vol.4,para.820.
[339] TJ,Vol.4,para.725.
[340] P02264.
[341] P08287. In the "Factual Findings" the Trial Chamber correctly established that Bishop Perić condemned the destruction of the mosque on Balinovac (Vol.2,para.791) and that "Lasić's orders" were mentioned in the SIS report of 31 May 1994 (Vol.2,para.792).

255. Since the evidence proves that Petković was not informed about "Lasić's order", the Chamber erred in fact when asserted that Petković failed to punish Lasić and thus contributed to the commission of the crime. This error meets the relevant standard of review and accordingly Petković's conviction for destruction of this mosque should be reversed and not guilty verdict entered.

Evictions as of 9 May 1993

256. The Trial Chamber inferred that Petković (i) was informed about the "operations to evict" Muslims from West Mostar in June 1993 (ii) by "HVO units subordinated to him", (iii) "allowed this to happen insofar as the same units continued operating in the same atmosphere of violence", (iv) failed to take any measures to stop evictions and (v) punish perpetrators.[342]

257. The evidence proves indeed that on 14 June 1993 Petković was informed that Vinko Martinović and some other HVO soldiers made criminal offence of eviction of Muslims from West Mostar on 13 June 1993.[343] The Defence Department and the Military Police Administration were also informed about this criminal action and there is no doubt that the HVO authorities considered the "action" as a crime.[344] There is no evidence that Petković was informed about other evictions from West Mostar[345] and thus the Chamber erred in fact when inferred that Petković was informed about the eviction "operations" (plural).

258. The Chamber erred in fact inferring that Vinko Martinović and his ATG were subordinated to Petković. It was explained above that the KB and its ATGs were subordinated directly to the HVO Supreme Commander and not to the Chief of the Main Staff.[346]

259. The Trial Chamber erred in law and fact when made general assertion that Petković "allowed /eviction crimes/ to happen". The assertion is based on two premises: (i) that Petković was "directly informed" about one eviction action in June 1993 and (ii) that the "same units continued operating in the same atmosphere of violence in evicting and removing the population of West Mostar until February 1994".[347]

[342] TJ,Vol.4,paras.734,735.
[343] P02770.
[344] P02749;P02770;P02754.
[345] TJ,Vol.4,paras.731-736.
[346] See above paras.152,153.
[347] TJ,Vol.4,para.734.

260. Firstly, there is no evidence that Petković had any indication that the eviction action would be launched on 13 June 1993 and therefore he could not neither allow nor prevent that action. The fact that Petković was "directly informed" about the criminal action the *next* day after crimes were committed cannot be reasonably considered as his permission for the commission of these eviction crimes.

261. Secondly, the Chamber asserted that "same units continued" to evict and remove Muslim population, but failed to refer to any evidence relevant for Petković and to give a reasoned opinion about Petković's contribution to the commission of these crimes. Thus the Chamber erred in law and fact.

262. With regard to the Chamber's assertion that Petković failed to take any measure to stop evictions,[348] it should be noted that the eviction criminal action of 13 June 1993 was the first such "action" in West Mostar and Petković could not stop it simply because he did not have information that the action was going to happen.[349] The Trial Chamber failed to give a reasoned opinion about latter evictions which Petković could stop, but failed to do so, and thus erred in law and fact.

263. The Chamber also erred in fact when inferred that Petković failed to punish perpetrators of eviction crimes:[350]

i. Petković as the Chief of the Main Staff did not have authority to punish commanders and soldiers of subordinated HVO units;[351]
ii. Petković as the Chief of the Main Staff was not superior to Vinko Martinović, his ATGs, nor to the KB and its other ATGs;
iii. Petković was removed from the position of the Chief of the Main Staff on 24 July 1993 and as deputy Commander/Chief of the Main Staff was not in the direct chain of command.

264. All these errors meet the relevant standard of review and the Appeals Chamber should establish that no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that Petković significantly contributed to the commission of eviction crimes in Mostar and accordingly conviction for these crimes should be reversed and not guilty verdict entered.

[348] TJ,Vol.4,para.735.
[349] The Trial Chamber erred in fact when asserted that eviction crimes were committed in May 1993, which is extensively explained above,paras.59-67.
[350] TJ,Vol.4,para.735.
[351] See above,para.150.

Arrest of Muslim "men who did not belong to any armed forces"

265. Petković never ordered the arrest of Muslim "men who did not belong to any armed forces", but he did order disarmament and isolation of Muslim HVO soldiers and arrest of military conscripts of the ABiH. This sub-ground of appeal is explained above (paras.174-213).

Siege of East Mostar

Existence of a siege

266. The Trial Chamber established that East Mostar was not completely surrounded by the HVO because the roads to the north and south were open, but the town was nevertheless besieged:

i. "in the sense that it was a target of prolonged military attack by the HVO over several months that included intense constant shooting and shelling, including sniper fire, on a cramped densely-populated residential zone";
ii. population could not leave East Mostar of its own free will and had to live under extremely harsh conditions;
iii. the HVO blocked the arrival of the humanitarian aid and
iv. the HVO destroyed the Old Bridge.[352]

267. The Trial Chamber analyzed Petković's alleged involvement in (i) shelling, (ii) obstructing the delivery of the humanitarian aid and access by international organisations and (iii) the destruction of the Old Bridge.[353]

Shelling

268. The Trial Chamber established that the HVO artillery was under the control of the *Main Staff* and that the Široki Brijeg artillery regiment was under the direct command of the *Main Staff* between 12 August and 1 December 1993.[354] However, as already explained, the Trial Chamber erred in law and

[352] TJ,Vol.2,para.1378.
[353] TJ,Vol.4,paras.741-756.
[354] TJ,Vol.4,para.744;P04134.

fact when asserted that military command and control belonged to the Main Staff, which implied the superior authority of all personnel in the Main Staff, not only its Chief/Commander.[355] Since authority and power of a superior belong to a commander of a military unit/body, Petković, as deputy Commander/Chief in the mentioned period, although in the Main Staff, did not have *de jure* command and control competence.

269. The Trial Chamber inferred that the HVO's shelling and shooting were not limited to specific military targets, but were also carried out in residential areas.[356] However, the Trial Chamber did not infer that the HVO *targeted* civilian objects and/or civilian population of East Mostar,[357] which is essential element of crime of unlawful attack on civilians under Count 24.

270. The Trial Chamber inferred that Petković "planned the shelling during the siege of Mostar". The inference is based on two evidence: Petković's order of 27 March 1993[358] and (allegedly his) order of 8 November 1993.[359] However, none of these orders can reasonably support the Chamber's inference:

i. Petković's order of 27 *March* 1993 was not issued during the siege and therefore cannot serve to prove Petković's alleged planning the shelling "*during the siege*", which according to the Chamber's finding commenced in June 1993[360];

ii. order of 8 November 1993 was not issued by Petković (see below para.279); even if it was issued by Petković, it cannot be an evidence that he ordered shelling in the period from June (when the siege started) until the day of issuing the order.

271. Accordingly, the Chamber erred in fact when inferred that Petković "planned the shelling during the siege of Mostar". There is no evidence that Petković was involved in unlawful shelling and no reasonable trier of fact could infer from mentioned or any other evidence that he was making an intentional contribution to the commission of murders, injuries to civilians and unlawful destruction of property. The Chamber's finding to that effect is entirely unreasonable and finds no support in the records.

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[355] See above, paras.147,148.
[356] The fact that there was continued fighting between the HVO armed forces and the ABiH in the town of Mostar as of 30 June 1993 is undisputable. The Trial Chamber established: (i) that the HVO was technically able to identify its targets, and that certain zones where military targets were located were targeted more particularly (Vol.2,para.1003);(ii) that headquarters of the ABiH were in the residential area of East Mostar (Vol.2,para.1009);(iii) that the ABiH often positioned its mortars close to the East Mostar Hospital (Vol.2,para.1013).
[357] TJ,Vol.4,para.743.
[358] P01736.
[359] P06524;TJ,Vol.4,paras.745,746,750.
[360] TJ,Vol.2,Heading 4,Section 8 (pp.257-378);Vol.4,para.740.

Humanitarian aid and access by international organisations to East Mostar

272. The Trial Chamber erred in fact when concluded that Petković, when failed to allow humanitarian convoys to pass, "it was because he intended to facilitate the hindering of the humanitarian convoys /…/, thereby contributing to the continuation of the harsh living conditions of the Muslim population in East Mostar".[361]

273. The Chamber inferred that Petković had the power to allow humanitarian convoys to pass and to grant international organisations access to East Mostar.[362] However, the evidence on which the Chamber relied[363] clearly proves that Petković did not have the competence to *approve the departure* of a convoy, but did have the authority to order to the HVO commanders to allow free pass of a convoy if fighting was going on in the area under their control. The Trial Chamber expressly stated that Petković issued a number of such orders to OZs or directly to brigades.[364]

274. The Trial Chamber failed to render a reasoned opinion as to which incident of non-passage of a convoy Petković was alleged to have culpably contributed to and for which he was found guilty. This error of law constitutes a grave violation of his right to a reasoned opinion and thus his fair trial. This also gravely undermines his ability to appeal effectively against a completely unreasoned finding.

275. There is no evidence that Petković was requested an assistance with regard to the access of the humanitarian aid and/or international organisations to East Mostar and that he did not comply with the request,[365] or that he culpably contributed to denying humanitarian access where security conditions would have allowed for its passage. The Trial Chamber did not infer otherwise.

276. No reasonable trier of fact could have come to the view, as the only reasonable inference, that Petković (intentionally and) culpably failed to allow any humanitarian convoy to pass to East Mostar. Since such failure did not exist, it is entirely unreasonable to assert that Petković contributed to the

[361] TJ,Vol.4,para.755.
[362] TJ,Vol.4,para.752.
[363] TJ,Vol.4,f.1437.
[364] TJ,Vol.4,para.669.
[365] The Trial Chamber referred to the letter of 3 August 1993 from Darinko Tadić to Jadranko Prlić (P03923), who complained that he did not get a guarantee from Petković for the passage of a convoy to Central Bosnia. The Chamber failed to establish that on 2 August 1993, pursuant to *Makarska agreement* on humanitarian aid convoys signed by Prlić, Efendić and Granić (P10264), Petković issued the order (P03895) that all HVO units should enable the unobstructed passage of convoys.

continuation of the harsh living conditions in East Mostar by hindering the arrival of humanitarian convoys to East Mostar.

Destruction of the Old Bridge

277. According to the Trial Chamber, Petković's culpable contribution to the destruction of the Old Bridge consists of his alleged planning the military offensive on the Old town of Mostar and thereby intention to destroy the bridge.[366] The Chamber established that the Old Bridge "was on the verge of collapse by the evening of 8 November 1993 after being shelled by a tank positioned on Stotina hill throughout the day of 8 November 1993"[367] and that the crime under Count 20 has been committed because the impact on the Muslim civilians was disproportionate to the military advantage expected by the destruction of the bridge.[368]

278. The Trial Chamber made numerous errors of law and fact:

i. Destruction of the Old Bridge does not and cannot amount to the crime of wanton destruction of cities, towns or villages, or devastation not justified by military necessity under Article 3(c) of the Statute.[369] As a matter of law, destruction must be *widespread enough* and the effect of that destruction significant enough to be said to have been directed at "cities, towns or villages" as a whole, rather than simply at random dwellings or properties individually.[370] The destruction of a single bridge does not meet either of the combined requirements of widespread and significant effect. The Chamber failed to provide reasons as to how a single act of destruction could reasonably be said to meet these requirements. The finding is therefore legally and factually erroneous.

ii. Destruction of the Old Bridge could, under certain circumstances, constitute the crime under Count 21. The Trial Chamber concluded that it was unable to take into account the destruction of the Old Bridge under Count 21 because this count, as charged, deals only with the

[366] TJ,Vol.4,para.756.
[367] TJ,Vol.2,para.1345.
[368] TJ,Vol.3,para.1584.
[369] TJ,Vol.3,para.1587.
[370] *Naletilić/Martinović* TJ, paras.583-585;*Kordić/Čerkez* TJ, paras.803 *et seq*.

destruction of institutions dedicated to religion or education.[371] However, failure of the Prosecution to properly charge the destruction of the Old Bridge as the crime under Count 21 does not justify the conviction under Count 20.

iii. The Trial Chamber correctly established that the Old Bridge was a legitimate military target.[372] The Trial Chamber also correctly established that residents of Donja Mahala could use *Kamenica* bridge after the fall of the Old Bridge and that the destruction of the Old Bridge had *psychological impact* on the Muslim population. The Chamber did not give a reasoned opinion about the military advantage of the destruction of the bridge used by the ABiH and substantiated opinion that the impact of the destruction of the bridge on Muslim population was disproportionate to the expected military advantage. In other words, the Chamber failed to give a reasoned opinion that the destruction of the Old Bridge was not justified by military necessity. The failure to render a reasoned opinion about the crucial issue of proportionality constitutes a grave violation of Petković's right to get a fair trial and gravely undermines his ability to appeal effectively against an unexplained finding.

iv. The Trial Chamber erred in fact when concluded that the Old Bridge was shelled throughout the day of 8 November 1993 *upon the Lasić's order* of 8 November 1993, issued upon the (alleged) Petković's order of the same day.[373] The analysis of Lasić's order shows that it was received in the Artillery Battalion in Čitluk at *17,00 hours*.[374] Since it was sent via package-radio, all recipients (three HVO Sectors in Mostar, ONO unit and Artillery Battalion) received the order at the same time. If the tank located at the Stotina hill "opened fire throughout the day" and the bridge was "at the verge of collapse by the evening of 8 November 1993"[375], that fire could not have been opened upon the Lasić's order received at 17,00 hours. Consequently, the fire on the Old Bridge could not have been opened upon Lasić's order issued upon the alleged Petković's order of 8 November. [376]

[371] TJ,Vol.3,para.1611.
[372] TJ,Vol.3,para.1582.
[373] TJ,Vol.2.para.1315;Vol.4,para.756;Lasić's order P06524;"Petković's" order P06534.
[374] See the receive stamp on Lasić's order P06524.
[375] Sunset in Mostar on 8 November at 16.32.
[376] It should be noted that Lasić's reported on 8 November 1993 (P09993), at 19.00 hours, about the tank opening fire from Stotina *as of 8,10 hours* (TJ,Vol.2,para.1312), which additionally proves that the tank located on Stotina did not open fire to the Old Bridge upon Lasić's order od 8 November 1993 (P06524) received at *17,00 hours* in the HVO units in Mostar area, but some earlier order.

279. With regard to the evidence P06534, the alleged Petković's 8 November 1993 order, the Trial Chamber erred in fact when asserted that the order was issued by Petković:

i. The order does not contain signature or some other proof that it was issued by Petković.

ii. The Trial Chamber erred in fact inferring that Petković "argued in its *Final Trial Brief*" that he could not have signed the order, but in the footnote (3261, Vol.2) correctly stated that Petković argued so in the *Closing Argument*.[377] It is relevant to underline that Petković argued so indeed only in the Closing Argument because he had no fair notice of such a claim. Petković was, for the first time, faced with the accusation that he ordered the destruction of the Old Bridge in the Prosecution Final Trial Brief.[378] The Trial Chamber erred in law when denying Petković fair and adequate notice of charges of his alleged contribution to the destruction of the Old Bridge. Since the Prosecution did not even mention Petković's involvement in the destruction of the Old Bridge, neither in the Indictment not the Pre-trial Brief, and such assertion had never been mentioned during the Prosecution case, the destruction of the Old Bridge was not a specific topic of the Petković Defence case at all.

iii. The Trial Chamber noted that Petković was *not* in Čitluk on 8 November 1993, but concluded that "even if /he/ was not physically present /…/ *nothing prevented him from issuing the order from a distance*". "The Chamber has no evidence that Milivoj Petković did not issue the order"[379] and thus the Chamber concluded that he did issue the order. The Trial Chamber erred in law when from the lack of evidence that Petković did not issue the order "from a distance" concluded that he did so.

iv. There is another order of 8 November 1993, on which Petković's name was also typed, but which was signed by Praljak.[380] The evidence clearly proves that Petković was not in Čitluk on 8 November 1993 and that Praljak signed the order.[381]

v. There is no evidence that Petković signed the order "from a distance".

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[377] TJ,Vol.2,para.1301.
[378] Prosecution FTB,paras.825-6,831,953.
[379] TJ,Vol.2,para.1301.
[380] 4D00834;Praljak,T(E),41270.
[381] Petković met with General Briquemont on 7 November 1993 in Divulje, Croatia (4D02026);Praljak testified that Petković was in Split "over those days" (Praljak,T(E),41270);Petković testified that he was in Split because of the meeting with Briquemont (Petković,T(E),49643).

280. Accordingly, no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that on 8 November 1993 Petković issued the order "from a distance" to all operative zones for offensive actions in all areas of Herceg-Bosna, including Mostar, and that the Old Bridge was destructed upon the Petković's order.

No reasoned opinion about crimes under Counts 2 and 3

281. Petković was convicted for crimes under Counts 2 and 3. However, the Trial Chamber failed to render a reasoned opinion as to which crimes or murder/wilful killing Petković was alleged to have culpably contributed to and for which he was found guilty. This constitutes a grave violation of his right to a reasoned opinion and thus his fair trial. This also gravely undermines his ability to appeal effectively against a completely unreasoned finding.

Conclusion and relief

282. The Trial Chamber erred in law and fact when inferred that Petković significantly contributed to the commission of crimes in Mostar. All mentioned errors, separately and together, invalidate the judgement and cause the miscarriage of justice. All errors meet the relevant standard of review and the Appeals Chamber should quash the Trial Chamber's erroneous findings, reverse the conviction and enter a verdict of not guilty in relation to each and all incidents and crimes connected thereto.

5.2.2.5. Stolac and Čapljina

283. Petković was convicted for crimes under Counts 1,10 and 11 committed in the municipalities of Stolac and Čapljina. Conviction for detention crimes is based on the inference that on 30 June 1993 Petković ordered detention of people "who were not members of any armed force".[382] The Trial Chamber made numerous errors of fact and law when inferred that on 30 June 1993 Petković ordered detention of civilians protected by the GC IV, which are extensively explained above (paras.174-213).

[382] TJ,Vol.4,paras.758,759.

5.2.2.6. Vareš and Stupni Do

Errors regarding conviction under JCE 1

284. The Trial Chamber established that Petković, as a member of the JCE, significantly contributed to the commission of crimes in the Vareš Municipality in October 1993 and therefore convicted him for crimes under Counts 1,2,3,10,11,19 and 20.[383]

285. However, the Chamber failed to make any inference that the HVO military actions in Vareš and/or Stupni Do were launched to further the alleged common criminal plan of ethnic cleansing of Muslim population which was, according to the Chamber, "only one, single common criminal purpose".[384] Just the opposite, the Chamber concluded that HVO actions were "reaction to the attack on the village of Kopjari by the ABIH forces on 21 October 1993".[385]

286. Consequently, the Chamber could not reasonably conclude that crimes in Vareš and Stupni Do were committed to further (alleged) common criminal plan of ethnic cleansing and thus erred in law when convicted Petković for these crimes under JCE 1 form of criminal responsibility.

Petković's alleged contribution to the commission of crimes

287. The Trial Chamber asserted that Petković (i) "planned the operations on the Municipality of Vareš", although "was not involved in making the decision to attack the village of Stupni Do", but (ii) "was informed of the acts of violence committed by the men under the command of Ivica Rajić as of 23 October 1993".[386]

288. There is no evidence that Petković "planned the operations" in Vareš. Furthermore, evidence clearly proves that Petković *did not plan* any HVO action in Vareš. For example, the Chamber asserted that Rajić did not receive orders from Petković on the actions to be carried out other than general order

[383] TJ,Vol.4,para.820.
[384] TJ,Vol.4,para.41.
[385] TJ,Vol.4,para.764;Vol.3,paras.310-313.
[386] TJ,Vol.3,paras.340,486;Vol.4,para.762,767.

to establish the defence line in Vareš against the advance made by ABiH.[387] Since the evidence proves that Rajić independently decided about the actions launched in Vareš and Stupni Do, no reasonable trier of fact could have come to the conclusion that Petković significantly contributed to the commission of crimes in the Municipality of Vareš by "planning the operations".

289. The Chamber erroneously asserted that Petković was informed about crimes and acts of violence by Rajić's report of 23 October 1993.[388] The Chamber accepted the evidence that Rajić's report was sent to Petković via packet communication to Mostar while he was in Kiseljak and therefore he could not receive this Rajić's report. However, the Chamber asserted that Rajić's report "*could be forwarded t*o Milivoj Petković" by the duty officer in the Main Staff in Mostar[389] and further inferred that Petković was informed by Rajić as of 23 October 1993. The Chamber thus erred in fact because there is no evidence that a duty officer forwarded Rajić's report from Mostar to Petković in Kiseljak.

Investigation about crimes committed in Stupni Do

290. The Trial Chamber found that Petković took the steps to launch an investigation into the events in Stupni Do solely to deceive the international community by making it believe that investigations were ongoing[390] and concluded that he participated in setting up a fake investigation and in fake sanctions against Rajić.[391]

291. The Chamber made numerous errors of fact:

i. On 25 October 1993 Petković sent the order to Rajić in Vareš to allow the UN to enter Stupni Do *"whatever the consequences (understand that the more difficult it is made for them the worse it is for us)"* and to avoid any kind of conflict with the UN.[392] The evidence proves that Petković was informed by General Ramsey, not Rajić or any other HVO commander, that the HVO had blocked UNPROFOR's entry to Stupni Do and that Petković gave UNPROFOR written permission to go to Stupni Do.[393] [REDACTED][394]

[387] TJ,Vol.3,paras.314-316.
[388] P06026.
[389] TJ,Vol.3,para.341.
[390] TJ,Vol.4,para.772.
[391] TJ,Vol.4,para.775.
[392] P06078.
[393] P06144.

The Chief of the HVO Main Staff, Žarko Tole, ordered that anti-armour weaponry be positioned around UNPROFOR and that UNPROFOR was to be warned that "our forces would destroy them in case they rendered our combat activities inoperative against the MOS in any way".[395] [REDACTED].[396]

Petković was not informed about Tole's and Blaškić's orders.

ii. As of 25 October 1993, when representatives of the international community entered in Stupni Do, all evidence about crimes committed in the village were in the possession of UNPROFOR and/or UNMO and afterwards ABiH.[397] Therefore Petković was not in the position to prevent or obstruct any investigation about crimes committed by the HVO soldiers in Stupni Do.

iii. Petković was at the time deputy Commander of the HVO Main Staff, later deputy Chief, when Roso replaced Praljak. As deputy, Petković did not have authority, power or competence to suspend HVO commanders, discipline them and/or punish them. As deputy, Petković could act only on behalf of his superior, according to the competences delegated to him by his superior and to the extend that his superior would agree to it. Accordingly, Petković as deputy could not decide personally and independently whether an investigation against HVO soldiers and commanders responsible for crimes committed in Stupni Do would be launched or not.

iv. The evidence clearly proves that the military prosecutor initiated investigation with regard to crimes committed in Stupni Do[398], that Boban was informed and personally involved in investigation about crimes committed in Stupni Do and that the Defence Minister Jukić decided to treat Rajić with suspicion.[399] Therefore Petković had no reason to involve himself in a matter that his superiors were dealing with.[400]

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394 [REDACTED].
395 P06066; [REDACTED].
396 [REDACTED].
397 ABiH took control over the area at the beginning of November 1993.
398 4D00499;4D00500; [REDACTED]; Petković,T(E),49645,50741;P10092,para.22.
399 P06291; [REDACTED]; P06454; [REDACTED]
400 Petković FTB,para.464,fn.840.

v. Petković informed Praljak about everything he knew about the events in Stupni Do and on 8 November 1993 Praljak sent Rajić a request for urgent report.[401] Petković accordingly effectively fulfilled his obligation to notify his superior.

vi. SIS was engaged to investigate crimes committed in Vareš and Stupni Do and the Defence Minister was informed about the investigation.[402] Petković had no right, no authority and no ability to interfere in the work of SIS, nor did he have any reason to do so.

vii. The Trial Chamber concluded that a handwritten message received by Ivica Rajić on 26 October 1993[403] was authentic document, that Petković indeed ordered Rajić not to follow the instructions to conduct an investigation.[404] However, the Trial Chamber erred in law and fact:

a/ [REDACTED][405]
[REDACTED]

b/ [REDACTED][406]

c/ [REDACTED][407]

d/ the document does not have a stamp of an archive or any authority;

e/ the Prosecution did not call Vinko Lučić to testify, although it interviewed him during the trial;

f/ Petković testified that he had never seen the document before the trial, that he had no need to dictate anything for he could write himself (as he did write the message 4D00516), that he did not speak with Rajić upon his arrival to Kiseljak because he was in Split and could not communicate with Rajić;[408]

g/ the Chamber did not give explanation about reasons for which the credence was given to the witness EA and not Petković,

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[401] 4D00834 – the request was prepared and signed by Praljak, although Petković's name was typewritten. Both Petković and Praljak confirmed that Petković was in Split on 8 November 1993 and that Praljak signed the document. (T(E),41154,41270,49643)
[402] P06828;P06964;witness Bandić,T(E),38324;P10092,paras.24-29;P06959
[403] P09895.
[404] TJ,Vol.3,paras.480-484.
[405] [REDACTED]
[406] [REDACTED];see also Petković FTB,f.903.
[407] [REDACTED]
[408] Petković asked General Ramsey for UNPROFOR to transport him from Kiseljak to Split and he was thus transported to Split on 26 October 1993 (Petković,T(E),49636-7, [REDACTED];4D00844,P06144,).

h/ Ivica Rajić sent three reports about investigation:
- upon Praljak's request[409] on 8 November 1993,[410]
- on 15 November 1993 upon Petković's order of 26 October 1993[411] (which proves that this 26 October order for investigation was not derogated by the "written message") and
- on 31 October 1993 directly to the HVO Supreme Commander Boban.[412]

292. To the extent that Petković's superiors (Supreme Commander and the President of Herceg-Bosna Boban, Defence Minister Jukić and the Chief of the HVO Main Staff Roso) declined or refused to take the last step in the punishment of Rajić and, instead, decided to shield him from prosecution, there was nothing that Petković could do and no subsequent failure that could render him liable.

Conclusion and relief sought

293. Accordingly, no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that Petković, then deputy Chief of the Main Staff, failed to take any measure against the perpetrators of crimes, that he concealed the crimes committed in Stupni Do, obstructed investigation against Rajić and/or significantly contributed to the change of Rajić's identity.[413] There is no evidence that any Petković's action/omission contributed that crimes in Vareš and Stupni Do be committed. Therefore the Trial Chamber erred in law and fact when convicted Petković for crimes committed in Vareš and Stupni Do.

294. These errors meet the relevant standard of review and the Appeals Chamber should reverse Petković's conviction and enter a verdict of not guilty for all crimes committed in Vareš and Stupni Do.

[409] 4D00834.
[410] P06519.
[411] P06671 (Rajić wrote that the report was issued upon "your" /Petković's/ order of 26 October 1993).
[412] P06291.
[413] Petković did not deny that he was informed about Boban's decision to relieve Rajić of duty and to appoint him on the same duty under the name Viktor Andrić.

5.2.2.7. Detention centres

5.2.2.7.1. Gabela Prison

295. Petković was convicted for crimes under Counts 1,12-14 committed in the Gabela Prison. The Trial Chamber did not establish which Petković's acts and/or omission contributed to the commission of crimes related to conditions of confinement (Counts 12-14). There is no evidence about any, let alone significant Petković's contribution to the commission of these crimes. The Chamber just asserted that Petković "accepted these crimes" because he (i) "was aware" about extremely poor conditions of confinement but (ii) continued to exercise his functions within the Main Staff.[414]

296. The Chamber's inference that Petković "was aware" of extremely poor conditions in the Gabela Prison is based on evidence that (i) two reports of the Defence Department medical inspection in the Prison (of 29 September and 19 October 1993) were sent to the Main Staff and (ii) the assertion that poor conditions in the prison were public knowledge.[415] The Trial Chamber did not assert that reports were sent to Petković or that Petković received them, nor it asserted that there was single evidence that Petković was informed indeed about conditions in the Gabela Prison. The inference that Petković was aware about conditions in the Prison is based on the assumption that he, as deputy Commander of the Main Staff, was informed about all reports sent to the Main Staff, which is incorrect.

297. Further, the Chamber did not establish when the poor conditions in the prison allegedly became public knowledge. The Chamber also failed to refer to evidence which could prove that Petković became aware of this fact of common knowledge and, if he did, when it happened.

298. Accordingly, no reasonable trier of fact could have come to the conclusion that Petković was aware of conditions in the Gabela Prison.

299. Since the Commander/Chief of the HVO Main Staff did not have any authority over Gabela Prison, nor such authority had any other person in the Main Staff, including Petković as deputy Commander-Chief, his continuation to exercise his functions within the Main Staff could not reasonably be regarded as any, let alone significant contribution to the commission of crimes in the Gabela Prison.

[414] TJ,Vol.4,para.782.
[415] TJ,Vol.4,para.782.

300. Accordingly, the Trial Chamber erred in law and fact when convicted Petković for crimes of conditions of confinement committed in the Gabela Prison. These errors meet the relevant standard of review and the Appeals Chamber should reverse Petković's conviction and enter the verdict of not guilty.

5.2.2.7.2. Dretelj

301. Petković was convicted for crimes under Counts 1,12-17 committed in the Dretelj Prison.

302. The Trial Chamber correctly established that Dretelj was *closed* in the first days of *October 1993.*[416] With regard to Petković, the Trial Chamber only established that he was *informed* about harsh conditions as of at least *January 1994*.[417] There is no reasonable ground to conclude that a person who was informed about crimes six months *after* crimes were committed and three months after the closing of the prison contributed to the commission of these crimes and no reasonable trier of fact could have come to such conclusion.

303. Thus the Chamber erred in law and fact when convicted Petković for crimes committed in Dretelj. These errors meet the relevant standard of review and the Appeals Chamber should reverse Petković's conviction and enter a verdict of not guilty.

5.2.2.7.3. Heliodrom

304. Petković was found guilty of four categories of crimes: unlawful detention (Counts 10 and 11); unlawful labour (Count 18); murders incurred in the context of unlawful labour (Counts 2 and 3) and inhumane acts (Counts 15-17).[418]

[416] TJ,Vol.3,para.137.
[417] TJ,Vol.4,para.785.
[418] TJ,Vol.4,para.820.

Detention crimes

305. The Trial Chamber convicted Petković for detention crimes committed by detention of "people who were not members of any armed force".[419] The Trial Chamber's errors of law and fact with regard to this and such convictions are explained above (paras.174-213).

Unlawful labour

306. Regarding "unlawful labour", the Chamber found that "by having ordered and authorized the work of Heliodrom detainees on the front line Milivoj Petković ordered and facilitated this crime".[420]

307. The Chamber erred in law and fact when failed to establish through a reasoned opinion that the elements of "ordering" liability were met. Firstly, it should be noted that what the Chamber called "orders" were merely *authorisations*. The decision to actually use detainees for labour purposes, the circumstances in which this was done and the measures taken to protect them and guarantee the lawfulness of such labour was left to the detaining authorities.[421] In that sense already, the suggestion that Petković *ordered* the commission of unlawful labour finds no support in the record. If anything, it would be the implementation of such order which could involve the commission of a crime: Petković never learnt of such a case and could not in any case be held responsible for the acts of others.

308. Secondly, the Chamber erred in law and fact when coming to the view that Petković's labour "orders" were unlawful. Petković was *not* convicted for issuing unlawful orders but for issuing orders that actually *resulted in* unlawful forced labour. The Chamber failed to establish that, *as a result of Petković's order* and with his knowledge, anyone was taken to carry out unlawful work. On the contrary, both "orders" issued by Petković (P03474,P03592) were not carried out,[422] and the Chamber failed to take this into consideration.

309. Thirdly, there is no evidence that any individual sent to work pursuant to Petković's "order" was placed in a location that was dangerous *per se* and/or that anyone was made to carry out work that was

[419] TJ,Vol.4,para.789,820.
[420] TJ,Vol.4,para.793.
[421] Petković FTB,paras.373-375;Petković,T(E),50677-50679,50681,50686.
[422] Petković FTB,paras.369-370.

impermissible under humanitarian law in execution of one of his orders, and that Petković was informed about that.[423]

310. Finally, even if Petković had committed a crime by "authorising" unlawful labour (and subject to issues of necessary intent), it had to be established that this crime was a contribution to the implementation of a criminal plan to ethnically cleanse an area. There is no evidence that this made any (let alone a significant) contribution to the implementation of the alleged JCE and there is no reasoned finding in the Judgement explaining how this could reasonably be concluded. No reasonable trier of fact could have come to the view that one was linked to the other: such labour was in no demonstrable way linked to a plan to cleanse Muslims from an area.

Murders and injuries

311. The Trial Chamber found that Petković *"accepted"* murders and injuries of detainees (i) by having ordered and facilitated their use for work on the front line while (ii) being aware of at least one incident where a detainee had been used as human shield and thus (iii) he must have been aware that many of them would certainly be killed or wounded while performing these activities.[424]

312. The Chamber's assertion is based on three presumptions:

i. that Petković ordered and facilitated the crime of injuring a detainee by the ABiH while working because he "allowed" a brigade to use detainees to perform labour;

ii. that he was informed on 20 January 1994 that several detainees had been taken to the front line in Mostar;

iii. that detainees were regularly injured and killed while performing this work.[425]

313. The Chamber erred in fact when on the basis of Petković's *authorization* to the HVO unit to use detainees *for work* concluded that he *ordered or facilitated the commission of crime of injuring* a detainee. The report on which the Chamber based its inference was not sent to Petković.[426]

[423] See e.g.,TJ,Vol.4,para.797.
[424] TJ,Vol.4,para.796.
[425] TJ,Vol.4,paras.792-795.
[426] P06133.

314. The ICRC letter of 20 January 1994 was received by the HVO authorities on *9 February 1994*.[427] The letter referred to the situation "over the past few months", especially August and September. There is no evidence that Petković was informed about these crimes before February 1994 and this letter could not provide him *retroactive* knowledge of something he had not known at the time when these crimes were being committed.

315. Therefore the Chamber erred in fact when inferred that Petković significantly contributed to murders and injuries of detainees. The Chamber erred in law when used legally erroneous and insufficient standard of "acceptance" to establish Petković's culpability under JCE 1 form of criminal responsibility.

Conclusion and relief sought

316. The Trial Chamber, therefore, erred in law and fact in a manner that meet both standards of review. No reasonable trier for fact could have come to the view that Petković had made a culpable contribution to any of the various categories of crimes for which he was convicted in relation to Heliodrom. In those circumstances, the Appeals Chamber should quash and reverse his conviction in relation to those crimes.

5.2.2.7.4. Vojno

317. Petković was found guilty of three categories of crimes: unlawful labour (Count 18); murders incurred in the context of unlawful labour (Counts 2 and 3) and inhumane acts (Counts 15-17).[428]

318. The Trial Chamber convicted Petković for these crimes because it found that (i) in January 1994 he was informed by the ICRC letter that some detainees were being used to do work on the front line and that some of them were injured or killed while working; (ii) but he continued to exercise his functions and (iii) failed to take any measures to stop these crimes and thus (iv) accepted these crimes.[429]

[427] P07636 (see receiving stamp).
[428] TJ,Vol.4,para.820.
[429] TJ,Vol.4,para.798.

319. Firstly, it should be noted that the Trial Chamber established that the Vojno Detention Centre was not in operation after January 1994,[430] which means that the Centre was already closed at the moment when the HVO authorities received the ICRC letter.[431] Therefore the Chamber's assertion that Petković failed to take any measures to stop these crimes in Vojno is unreasonable.

320. The Judgement also reveals a complete absence of reasons that would provide a clear indication of how the Trial Chamber could reasonably come to the view that it was Petković (then deputy Chief of the Main Staff) who was responsible and competent to take any measure to stop these crimes. The Judgement also discloses a complete absence of reasoned opinion regarding the elements of liability for omission under the JCE doctrine. In those circumstances, no reasonable trier of fact could come to the view that Petković was responsible to investigate this matter and culpably failed to do so.

321. The Chamber additionally erred in law when used legally erroneous and insufficient standard of "acceptance" to establish Petković's culpability under JCE 1.

322. The Trial Chamber thus erred in law and fact in a manner that meets both standards of review. No reasonable trier of fact could have come to the view that Petković had made a culpable contribution to any of the various categories of crimes for which he was convicted in relation to crimes committed in Vojno. In those circumstances, the Appeals Chamber should quash and reverse his conviction in relation to those crimes.

5.2.2.7.5. Ljubuški Prison and the Vitina-Otok Camp

323. The Chamber found that on 8 August 1993 Petković ordered the HVO commanders to fortify the front line by using Muslim prisoners and detainees and thus ordered the use of detainees from the Vitina-Otok Camp to do forced labour on the front line.[432]

324. Firstly, it should be noted that the HVO authorities differentiated "prisoners" and "detainees". "Prisoners" were POWs (active or reserve members of the ABiH) and "detainees" HVO soldiers detained for any reason.[433] Petković's 8 August 1993 order[434] was related both to "prisoners" and

[430] TJ,Vol.2,para.1669.
[431] ICRC letter of 20 January 1994 was received by the HVO authorities in February 1994 (P07636).
[432] TJ,Vol.4,paras.800,802.
[433] Petković FTB,para.373;also P00514(p.8);P00956(p.14);P00513;P01635;Josip Praljak,T(E),14649-50.

"detainees", both to the work on the front line and at the rear. "Prisoners" were not supposed to work on the front line and commanders who implemented the order knew, or were supposed to know the rule.

325. There is no evidence that upon Petković's 8 August 1993 order prisoners were taken to work on the front line or to a place where they were in danger of harm.[435] That is an unsupported and unverified assumption on the part of the Trial Chamber. Absent of the proof that the crime was actually committed, Petković could not legally be held responsible for unlawful labour/persecutions.

326. Based on the above, no reasonable trier of fact could have come to the view that Petković had made a culpable contribution to an incident of unlawful labour/persecution regarding prisoners of the Vitina-Otok camp. The Trial Chamber's finding that he did should, therefore, be quashed and overturned.

5.2.3. Erroneous and unreasonable findings pertaining to all or several locations

5.2.3.1. Errors concerning deployment of KB and its ATGs and *Bruno Bušić Regiment*

327. The Trial Chamber's assertion that Petković denied crimes committed against Muslims, failed to prevent and punish them and encouraged them[436] rests on the inferences (i) that he had effective control over the HVO units, including the KB and its ATGs and the *Bruno Bušić Regiment* and (ii) that he continued to use and did not prevent his commanders from using the KB and its ATGs and the *Regimen*t even though he had been informed since January 1993 that they were repeatedly committing crimes.[437]

328. The Chamber's analysis of evidence relates only to the KB and its ATGs and the *Bruno Bušić Regiment*. Thus the Chamber failed to give a reasoned opinion about Petković's alleged culpable acts and/or omissions regarding crimes committed by other HVO units.

329. The Trial Chamber found that Petković not only failed to punish and to prevent the commission of certain crimes, but also continued to use, or agreed to the deployment of the KB and its ATGs and

[434] P04020.
[435] Report of 11 August 1993 (P04068) does not contain such information.
[436] TJ,Vol.4 (title of the Sub-section 9, Section C.Petković's Responsibility Under JCE, paras.803-813) .
[437] TJ,Vol.4,paras.803,804.

Bruno Bušić Regiment despite his awareness that they had committed crimes in the past.[438] This, in turn, is used by the Chamber as a basis to suggest that Petković "accepted" the JCE-crimes.

330. Petković will focus here on a number of factual errors associated with the deployment of these units.

a/ KB and its ATGs

331. The Trial Chamber inferred that Petković as the Chief and Deputy Commander of the Main Staff (i) had *effective* command and control over the KB and its ATGs and (ii) continued to use these units even though he had been informed, since January 1993, that they were repeatedly committing crimes.[439]

Effective command and control

332. The Trial Chamber failed to give a reasoned opinion that Petković had *effective* command and control over the KB and its ATGs. The Chamber did not refer to any evidence but simply inferred that Petković had effective control.[440] The Chamber thus erred in law and this error constitutes a grave violation of Petković's right to a reasoned opinion and fair trial, and also gravely undermines his ability to appeal effectively against a completely unreasoned finding.

Alleged information about crimes as of January 1993

333. The Trial Chamber established that there were 10 ATG units and three of them were especially mentioned with regard to crimes – *Benko Penavić*, *Vinko Škrobo* (previously *Mrmak*) and *Baja Kraljević*.[441] The evidence proves that these three ATGs were accentuated in the HVO reports as units

[438] TJ,Vol.4,para.804.
[439] TJ,Vol.4,paras.803,804.
[440] The Chief/Commander of the Main Staff did not have *de jure* command authority over the KB and its ATGs (see above,paras.152,153)
[441] TJ,Vol.1,para.818,819;P07009;P01531

that caused problems or committed crimes[442] and therefore the Chamber's generalization that *all* ATGs had serious disciplinary problems is groundless.

334. The Chamber made contradictory assertions about the date when Petković was informed that the KB and its ATGs committed crimes. The Chamber sometimes asserted that Petković was informed about these crimes as of *January* 1993[443] and sometimes as of *April* 1993.[444] However, asserting that Petković was informed about these crimes already in January 1993 the Chamber failed to refer to any evidence. Such evidence does not exist for the period until April 1993, when crimes in Sovići and Doljani were committed.

335. In short, the Chamber erred in fact inferring that the KB and its ATGs committed crimes as of January 1993 and that Petković was informed about the crimes.

Alleged Petković's deployment and use of these units

336. The Trial Chamber asserted that Petković "continued deploying the KB and its ATGs on the *battlefield*",[445] but failed to establish where and when Petković deployed these units. The Chamber thus erred in law and this error constitutes a grave violation of Petković's right to a reasoned opinion and fair trial, and also gravely undermines his ability to appeal effectively against a completely unreasoned finding.

337. The Chamber noted that KB and its ATGs committed crimes after April 1993 by physically abusing Muslims from West Mostar in September 1993, evicting Muslim inhabitants out of their homes in West Mostar between June 1993 and February 1994, raping and mistreating Muslims during evictions, participating in operations to arrest Muslims, abusing detainees at the Heliodrom and raping a Muslim woman in West Mostar in September 1993.[446] However, none of these crimes was committed during a *military operation on the battlefield* and there is no evidence that Petković was even informed about commission of all these crimes and/or that he contributed to the commission of these crimes in

[442] TJ,Vol.1.para.820,f.1932.
[443] TJ,Vol.4,para.804.
[444] TJ,Vol.4,para.808.
[445] TJ,Vol.4,para.808.
[446] TJ,Vol.4,para.807.

any capacity. Most of these crimes were committed while Petković was Deputy Commander/Chief of the Main Staff.

338. For all these reasons no reasonable trier of fact could have come to the conclusion that Petković "continued deploying" the KB and its ATGs in any military action.The Chamber thus erred in fact when inferred that *by continuing to use* these units Petković failed to punish crimes committed against Muslims.[447] As already explained, Petković did not "use" the KB and its ATGs and there is no evidence to prove otherwise.[448]

b/ *Bruno Bušić Regiment*

Effective command and control

339. The Trial Chamber concluded that Petković, both as the Chief of the Main Staff and subsequently deputy, had *effective* command and control over the *Regiment*.[449] The Chamber did not refer to any evidence, but simply made such assertion.[450]

340. The Trial Chamber erred in fact when asserted, without single evidence, that Petković had *effective* control over the *Regiment*. The Chamber also erred in law when on the basis of *de jure* command and control of the Chief of the Main Staff, without any evidence, concluded about *de facto* (effective) command and control.

Petković's responsibility for crimes committed by the Regiment

341. With regard to Petković's responsibility for the alleged crimes committed by members of the *Regiment* the Trial Chamber made numerous errors of fact:

[447] TJ,Vol.4,para.808.
[448] There is one Petković's order (P03128) which relates to Mladen Naletilić and the ATG and was co-signed by the Head of the Defence Department because the Chief of the Main Staff was not superior to the KB and its ATGs.
[449] TJ,Vol.4,para.803.
[450] The Trial Chamber actually referred to its factual findings "The *Bruno Bušić* Regiment and the *Ludvig Pavlović* PPN" (Vol.1). However, in this section of the Judgement the Chamber did not make any analysis about effective control, but only correctly established that the unit was under *de jure* command of the Chief of the Main Staff and that the unit, once deployed, was subordinated to the commander of the OZ where it was deployed. (Vol.1,paras.811-814)

i. The Chamber inferred that Petković "personally ordered" the *Regiment* to be dispatched to Gornji Vakuf in January 1993, but did not refer to any evidence.[451] The only Petković's order to the *Regimen*t was issued on 6 January 1993 (P01064) and no reasonable trier of fact could have come to the conclusion that on 6 January 1993 Petković ordered the *Regiment* to be dispatched in Gornji Vakuf with regard to the HVO attack launched on 18 January 1993.[452]

ii. The Chamber inferred that Petković was informed about the criminal conduct of the *Regiment* as of January 1993, but failed to refer to any evidence.[453] The Chamber's inferences about crimes committed by members of the *Regiment* relate to Gornji Vakuf,[454] Sovići and Doljani[455] and Heliodrom.[456]

Gornji Vakuf

342. There is no evidence that Petković received any report about crimes committed by the *Regiment* in Gornji Vakuf.

343. In its "Factual Findings" the Chamber referred to three evidence as proof that the members of the *Regiment* committed crimes (the statement of the witness Čaušević, report of the BiH intelligence service of 27 December 1993 and testimony of Zijada Kurbegović).[457] However, none of this evidence proves the Chamber's inference that the *Regiment* committed crimes and/or that Petković was informed about the crimes committed by the *Regiment*.[458]

344. Accordingly, on the basis of this, or any other, evidence no reasonable trier of fact could have come to the conclusion that Petković was informed about crimes allegedly committed by members of the *Regiment* in the Municipality of Gornji Vakuf in January 1993.

[451] TJ,Vol.4,para.809.
[452] It should be also noted that Petković participated at the Peace Conference in Geneva in the period 2-6 January 1993 (P01038; Petković FTB, Annex 8).
[453] TJ,Vol.4,paras.804,809,810,813.
[454] TJ,Vol.4,para.809.
[455] TJ,Vol.4,para.810.
[456] TJ,Vol.4,paras.811,812.
[457] TJ,Vol.2,fn.922,para.436.
[458] See above,para.234.iii..

Sovići and Doljani

345. The Trial Chamber erred in law and fact when asserted that Petković was criminally responsible for ordering the deployment of the *Regiment* in the Jablanica Municipality on 15 April 1993 "despite the information he had since January 1993 about their criminal conduct".[459] As explained above, there is no evidence about crimes committed by the *Regiment* and/or information sent to Petković about *Regiment's* crimes allegedly committed in January 1993.

346. The Trial Chamber did not establish that the *Regiment* was involved in the commission of crimes in Sovići and Doljani. It established only that some members of the *Regiment* were *present* at the Fish Farm at the time when crimes of mistreatment of detained persons were committed.[460] The Chamber did not infer that members of the *Regiment* committed crimes at the Fish Farm. Furthermore, the Trial Chamber did not assert that Petković was informed about any crime committed at the Fish Farm.

Heliodrom

347. The Trial Chamber established that members of the HVO, including the *Regiment*, beat the Heliodrom prisoners.[461] This factual finding is based on one evidence solely – testimony of the witness A, who was detained [REDACTED]. The witness A testified that he saw members of the *Regiment* take prisoners out of the room where they were held in order to beat them.[462] Accordingly, the Chamber's inference that members of the *Regiment* "*regularly and brutally*" beat the Heliodrom detainees is incorrect and groundless.

348. The Trial Chamber did not infer that Petković was informed about beatings and mistreatment of the detained persons at the Heliodrom.

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[459] TJ,Vol.4,para.810.
[460] TJ,Vol.3,paras.965,1238,1330. The Chamber established that it could not find that crimes of imprisonment were committed at the Fish Farm (Vol.3,para.965) and thus Chamber's inference about crimes of detention of Muslims at the Farm on 20 April 1993 (Vol.4,paras.810,812) is completely groundless. The Chamber established that members of the *Regiment* were present at the Fish Farm, were aware of the mistreatment of detainees and did nothing to stop it (Vol.3,para.1238), but did not infer that they beat detained members of the ABiH.
[461] TJ,Vol.2,para.1591;Vol.3.paras.1257,1258,1352,1353,1455,1456.
[462] TJ,Vol.2,paras.1591,1584; [REDACTED]

349. The Trial Chamber erred in fact when asserted that Petković "personally ordered /the *Regiment*/ to commit crimes such as the use of detainees to fortify defence lines" (P03474).[463] Analysis of the order's content shows that it related not only to the defence line, but the zone depth as well. "Detainees" (detained members of the HVO) were supposed to work on the defence line, while "prisoners" (active or reserve members of the ABiH) were supposed to work in the zone depth. All HVO documents, as already explained, clearly show that military and civilian authorities made difference between "detainees" and "prisoners". There was no reason that Petković assumed that his order, if carried out as he had intended, would not be complied with in a lawful manner and that labourers would not be safe since the authorities were competent to make determination as to who should be eligible for certain kind of work.

350. The Trial Chamber erred in fact when concluded that Petković received information as of January 1993 about criminal conducts of the *Regiment*, that he "personally ordered them to commit crimes" and that members of the *Regiment* "again committed numerous crimes".[464] Accordingly, the Chamber erred in fact when on the basis of these incorrect premises asserted that Petković had failed to punish or prevent crimes committed against Muslims by the *Regiment*. No reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that the *Regiment* committed numerous crimes from January 1993, that the justified reason not to deploy this unit existed as of January 1993 and that Petković was informed about that.

c/ Conclusion and relief sought

351. The Trial Chamber erred in law and fact when on the basis of the above mentioned evidence inferred that Petković denied crimes committed against Muslims, failed to prevent and punish them and encouraged them. Since the Chamber founded its conclusion about Petković alleged contribution to the commission of crimes and implementation of the common criminal plan of ethnic cleansing of Muslim population on, *inter alia*, above mentioned conclusions, these errors meet the relevant standard of review. Thus the Appeals Chamber should substitute the impugned Trial Chamber's findings with its own that no reasonable trier of fact could have come to the conclusion, as the only reasonable inference, that Petković had effective control over the HVO units, including the KB and its ATGs and the *Bruno Bušić Regiment* and that he deployed these units on the battlefield despite the information as of

[463] TJ,Vol.4,para.813.
[464] TJ,Vol.4,para.813.

January 1993 that members of these units were repeatedly committing crimes. In addition, the Appeals Chamber should reverse the Trial Chamber's conclusion that Petković significantly contributed to the implementation of goals of the alleged JCE.

5.2.3.2. Erroneous and unreasonable summary findings with regard to Petković's responsibility under JCE 1

352. The Trial Chamber erred in fact when inferred that Petković, as the Chief of the Main Staff and subsequently deputy commander/chief, had *effective* command and control over the HVO armed forces:[465]

i. *effective* command and control is not presumed from *de jure* command and control, but have to be proved (see above, paras.158-160), and thus the Trial Chamber erred in law and fact when it made the inference that Petković as the Chief of the Main Staff had effective command and control although there is no sufficient factual basis to support such inference;

ii. Deputy Commander/Chief of the Main Staff is not in the direct chain of command and therefore does not have *de jure* command. There is no evidence that Petković as the Deputy Commander/Chief of the Main Staff had *de facto* command and control and thus the Trial Chamber erred in law and fact when asserted that he had both *de jure* and effective control.

353. The Trial Chamber made an error of fact when inferred that Petković – by having effective command and control over the HVO armed forces, making decision on military operations, forwarding decision of the Government to the armed forces and implementing these decisions – "ordered, planned, facilitated, encouraged and concealed the crimes" committed by members of the HVO.[466] The Chamber impermissibly equated legal rights and duties of a military commander (to have control, to decide about military operations, to implement decision of the civilian authorities) with the criminal activities of ordering, planning, facilitating, encouraging and concealing *crimes*.

354. Save the crime of unlawful labour under Count 18, the Trial Chamber did not establish, or made an inference, that Petković *ordered* a crime to be committed. Accordingly, by general assertion that Petković "ordered crimes committed by members of the HZ(R)H-B armed forces" the Trial Chamber made errors of fact and law.

[465] TJ,Vol.4,para.814.
[466] TJ,Vol.4,para.815.

355. The Trial Chamber did not establish, or made an inference, that Petković *planned* any specific crime. Accordingly, by general assertion that Petković "planned crimes committed by members of the HZ(R)H-B armed forces" the Trial Chamber made errors of fact and law.

356. The Trial Chamber acknowledged that Petković did make efforts to put an end to the commission of crimes by members of the HVO armed forces, but inferred that *efforts were not "serious"*.[467] The Trial Chamber failed to explain whether it evaluated Petković's efforts on the basis of his intention or *results* of his efforts. Petković does not challenge the implication that results of his efforts for the members of the HVO armed forces to comply with the humanitarian law were not fruitful enough. However, Petković does challenge the erroneous assertion that he did not seriously intend to put an end to the commission of crimes.

357. The Trial Chamber failed to establish the relevance of the fact that Petković was relieved of duty of the Chief of the Main Staff on 24 July 1993, which happened only three weeks after the commencement of the full-out war on 30 June 1993. As deputy commander/chief, Petković did not have *de jure* competence and authority of the military commander and was not in the direct chain of command, save acting as commander/chief on behalf of the absent commander/chief.

358. The Trial Chamber erred in fact and law when concluded that Petković *"used the armed forces … to commit crimes"*. This inference implies that Petković actively participated in the commission of crimes by using armed forces and directly (*dolus directus*) intended to commit crimes. However, the Chamber did not establish Petković's *dolus directus* with regard to particular crimes.[468]

359. The Trial Chamber concluded that Petković "intended to *expel* the Muslim population" from Herceg-Bosna and shared this intention with other members of the JCE.[469] However, the Chamber did not convict Petković for expelling Muslims (crimes under Counts 6-9) in Prozor, Heliodrom, Ljubuški, Stolac, Čapljina, Dretelj and Gabela.[470] Accordingly, the Trial Chamber erred in fact when generally inferred that Petković intended to expel Muslims from Herceg-Bosna.

[467] TJ,Vol.4,para.816.
[468] See above,para.112.
[469] TJ,Vol.4,para.817.
[470] Petković was convicted for deportation crimes committed in Mostar and crimes of forcible transfer committed in Gornji Vakuf in January 1993, Sovići and Doljani in April 1993 and Mostar. (TJ,Vol.4,para.820) With regard to these convictions the Trial Chamber made numerous errors of fact and law, which is extensively explained above (paras.45-67, 247-249, 256-264).

360. The Trial Chamber's inference about Petković's "*significant role*" in implementing the common criminal purpose is based on the evidence about (i) his position in the military hierarchy, (ii) his duties to participate in negotiations with the ABiH and (iii) implement policy of the civilian authorities on military matters. The Chamber erred in law when failed to decide about Petković's alleged contribution to the implementation of the common criminal purpose of ethnic cleansing on the basis of his acts and/or omissions, instead of his position and legal duties. The significance of somebody's contribution to the commission of crimes does not depend on his position and prescribed duties, but only on his acts and/or omission that give such contribution to the implementation of the common criminal purpose that can reasonably be regarded as *significant*. Since the Trial Chamber did not convict Petković for deportation/transfer crimes in most municipalities and locations, it is obvious that there is no evidence about his contribution to the alleged ethnic cleansing in those areas.

361. The Trial Chamber erred in fact when asserted that Petković was aware that the conflict between the HVO and ABiH was *international* in nature because of Croatia's participation.[471] The Petković Defence does not challenge the fact that Croatia gave support both to the HVO and ABiH, but does challenge the conclusion that Croatia's assistance to the HVO transformed this internal conflict into international. (See Ground 6.)

5.2.3.3. Erroneous and unreasonable findings with regard to plurality of persons sharing the alleged common criminal purpose

362. The Trial Chamber found that a "plurality of persons consulted each other to devise and implement the common criminal purpose" and that Petković was in the group.[472] The conclusion is based on the following incorrect assertions:

i. that Prlić, Stojić, Praljak, Petković and Ćorić all participated in the planning and/or conducting of military operations that led to the commission of crimes in the Gornji Vakuf Municipality.[473] As explained above (para.231), Petković did not participate in planning or conducting of the HVO military operation launched on 18 January 1993;

[471] TJ,Vol.4,para.819.
[472] TJ,Vol.4,para.1231.
[473] TJ,Vol.4,para.1220.

ii. that attacks on the villages of the Municipalities of Prozor and Jablanica in April 1993 were planned by Petković pursuant to an ultimatum by Prlić to the ABiH.[474] Firstly, as explained above (paras.215-217, 238-240), there is no evidence that Petković planned these attacks and the evidence on which the Chamber relied does not support its inferences. Secondly, the Chamber failed to give a reasoned opinion that Petković planned military actions in April 1993 "pursuant to an ultimatum by Prlić" and there is no evidence to support the thesis;

iii. that Prlić, Stojić, Petković and Ćorić planned the campaign of arrests and then mass detention of Muslims "who did not belong to any armed force" following the ABiH attack on 30 June 1993:[475]

a/ the HVO did not detain Muslims "who did not belong to any armed force", but Muslim soldiers of the HVO and the reserve members, or military conscripts of the ABiH, as explained above (paras.174-213);

b/ the order to detain Muslim soldiers of the HVO and military conscripts of the ABiH (P03019) was issued the very same day when the ABiH attacked the HVO (not only on the *Tihomir Mišić* barrack, as incorrectly asserted by the Chamber in this part of the Judgement) and when the HVO lost control over the area of 26 km in the Mostar region because of the betrayal of the HVO soldiers of Muslim ethnicity. The evidence proves beyond reasonable doubt that justified security reasons caused detention of HVO soldiers of Muslim ethnicity and the military conscripts of the ABiH (see above paras. 192-195, 205-207), which directly disapproves the Chamber's thesis that the detention was the result of the implementation of the alleged criminal plan of the HVO authorities;

iv. that Stojić, Praljak and Petković planned and/or facilitated military operations in the Vareš Municipality in October 1993:[476]

a/ the Chamber established in its Factual Findings that Rajić made decisions about military actions launched in Vareš and Stupni Do (see above para.288), which disapproves the thesis that Stojić, Praljak and Petković planned these operations or facilitated them;

[474] TJ,Vol.4,para.1220.
[475] TJ,Vol.4,para.1220.
[476] TJ,Vol.4,para.1220.

b/ the Chamber failed to give a reasoned opinion how the HVO military actions in Vareš and Stupni Do could contribute to the commission of the alleged criminal plan of ethnic cleansing, which is the error of law that constitutes a grave violation of the right to a reasoned opinion and fair trial and also gravely undermines the ability to appeal effectively against a completely unreasoned finding;

v. that Praljak and Petković attempted to conceal from the international community the crimes committed during the attack on Stupni Do in October 1993.[477] The Chamber previously established that Petković issued the permission to the representatives of the international community to enter Stupni Do the day after crimes were committed (see above para.291). From that day all evidence about crimes were in the possession of UNPROFOR and UNMO and the impugned Chamber's assertion is therefore incorrect and unreasonable;

vi. regarding the forced departure[478] of the Muslims relieved from the HVO detention centres Petković was not convicted for these crimes and the Trial Chamber did not assert that he was related to these deportation crimes. Accordingly there is no factual ground to assert that Petković was the member of the JCE group who contributed to these deportation crimes;

vii. that Petković attended *several* presidential meetings in Croatia during which various topics were discussed.[479] As evidence clearly proves, Petković was present at *one* meeting (on 5 November 1993) during which the crimes committed in Stupni Do were on the agenda;[480]

viii. that Petković *continuously* contributed to the JCE by performing his functions within the HVO Main Staff.[481] The Chamber erred in law when asserted that performing functions is *per se* contribution to the implementation of the common criminal plan;

ix. that Petković used members of the HVO to commit crimes that were part of the common criminal purpose to ethnically cleanse the Muslim population from the territory claimed as Croatian.[482] This impugned finding implies Petković's *direct intent* to commit crimes by using the

[477] TJ,Vol.4,para.1220.
[478] TJ,Vol.4,para.1221.
[479] TJ,Vol.4,para.1223.
[480] P06454.
[481] TJ,Vol.4,para.1225.
[482] TJ,Vol.4,para.1232.

HVO armed forces (see above paras. 215-221,231-232,238-240,270,277-280,287-289). However, there is no evidence to prove such inference.

5.3. Conclusion and relief sought

363. In sum, contrary to the Chamber's findings:

i. Petković's negotiations with ABiH, his implementing government policies or the exercise of his "commanding" powers were not shown to have been used to further the commission of JCE crimes;

ii. Petković did not deploy KB/ATGs and/or *Bruno Bušić Regiment* whilst knowing of their prior commission of crimes, nor did he culpably fail to punish their crimes or encourage them to continue doing so;

iii. Petković was not shown to have contributed to any crimes in any of the relevant locations with a view to further that JCE.

364. Based on the above, no reasonable trier of fact could have come to the conclusion that Petković had made a "significant contribution" to the alleged common criminal plan to ethnically cleanse Muslims from Herceg-Bosna. The Trial Chamber's finding to the contrary should, therefore, be quashed and overturned and the verdict of acquittal entered.

6. GROUND V - ERRONEOUS FINDINGS REGARDING JCE FORM 3 LIABILITY

6.1. Errors of law and fact regarding the requisite *mens rea*

6.1.1. Legal considerations

365. Under the JCE 3 doctrine, the Trial Chamber must satisfy itself that "it was foreseeable to the accused that such a crime might be committed by a member of the JCE or one or more of the persons used by the accused (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose, and the accused *willingly* took the risk that such a crime might occur by joining or continuing to participate in the enterprise".[483] The "question is therefore whether the extended crimes […] were *foreseeable consequences* of the implementation of the common purpose".[484] That test is subjective so that the possibility a deviatory crime could be committed must be "sufficiently substantial as to be foreseeable *to the accused*"[485] "on the basis of the information available to [him] […] Depending on the information available, what may be foreseeable to one member of a JCE, might not be foreseeable to another".[486]

366. In this particular case, the Chamber therefore had to satisfy itself –beyond reasonable doubt and through a reasoned opinion– that Petković had foresight of the risk of rapes (Counts 4,5), acts of destruction (Count 21) and theft (Counts 22,23) being a natural and foreseeable consequence of the implementation of the alleged JCE.

6.1.2. Impugned findings and errors

367. Whilst acknowledging that it was required to establish that crimes were a natural and foreseeable consequence of implementing the common criminal purpose, the Trial Chamber applied a lower-than-required standard of *mens rea* and evaluated Petković's *mens rea* pursuant his alleged knowledge that these crimes might be committed and knowingly taking this risk *in general,* not as a

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[483] *Šainović* AJ,paras.1061,1557(footnotes omitted).
[484] *Šainović* AJ,para.1583;*Martić* AJ,paras.169,171;*Brđanin* AJ,para.411;*Stakić* AJ,para.87;*Kvočka* AJ,para.83;*Blaškić* AJ,para.33;*Vasiljević* AJ,para.101;*Tadić* AJ,para.204.
[485] *Prosecutor v. Radovan Karadžić,* Case No. IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009,para.18 (emphasis added);*Šainović* AJ,para.1557.
[486] *Šainović* AJ,paras.1550,1557,1575. Also *Kvočka* AJ,para.86.

result of the implementation of the alleged JCE.[487] The "causal" requirement between the implementation of the common criminal plan and the foreseeability of crimes at the *mens rea* level is the critical element justifying an accused's liability for JCE 3 crimes.[488]

368. The Chamber's failure to adopt, apply and verify the relevant 'causal' element between (alleged) involvement in a JCE and ''deviatory" crimes is also apparent from its failure to correctly apply the second tier of the *mens rea*. The Trial Chamber had to satisfy itself that "the accused *willingly* took the risk that such a crime might occur *by joining or continuing to participate in the enterprise*".[489] Therefore, there must be a demonstrable link in relation to the Accused's *mens rea* between his *knowing* participation in a JCE and his *acceptance* of the crimes. The Chamber failed to verify that requirement and, instead, merely sought to establish whether Petković took the risk that certain crimes might be committed irrespective of any established and reasoned connection to the implementation of the JCE.[490] This error affects each/every crime for which Petković was found responsible under JCE 3.[491]

6.1.3. Conclusion and relief sought

369. In sum, the Trial Chamber erred in law and fact when it failed to establish the requisite elements of *mens rea* for this mode of liability and applied, instead, a lower-than-required standard of *mens rea*. These errors meet the relevant standards of review. The Chamber's failure means that Petković was improperly and unfairly convicted for these crimes. The Chamber's conviction of Petković under JCE 3 should therefore be quashed and reversed.

370. If the Appeals Chamber decides, however, to consider the merit of the matter, it should be noted that the Trial Chamber has pointed to no evidence that would demonstrate that deviatory crimes were to Petković foreseeable consequences of the implementation of the alleged common criminal purpose and that he willingly took the risk that crimes be committed, as outlined further below.

[487] TJ,Vol.4,paras.822,830,834,837,840,844,848,852.
[488] Stakić AJ,para.87.
[489] *Šainović* AJ,para.1557 in fine (emphasis added) (referring to *Kvočka* AJ,para.83);*Tadić* AJ,paras.204,220,228;*Vasiljević* AJ,para.99.
[490] E.g.,TJ,Vol.4,paras.830 in fine,834,837,840,845,848,852.
[491] TJ,Vol.4,paras.830,834,837,840,844-845,848,852.

6.2. Errors of fact and law regarding categories of crimes

6.2.1. Sexual abuse

6.2.1.1. Mostar

371. The rapes committed in Mostar for which Petković was convicted had been committed by HVO members, including soldiers of *Vinko Škrobo* ATG, in June, July and September 1993.[492]

13 June 1993

372. The Trial Chamber erroneously inferred that Petković "knowingly took the risk that these /sexual abuse/crimes would be committed" in June 1993 because he knew (i) from April 1993 that the eviction operations were taking place in an atmosphere of extreme violence in Mostar and (ii) that the sexual abuse was a natural and foreseeable consequence of deploying the KB and its ATGs, whose criminal conduct he had been aware of since April 1993.[493]

373. The Trial Chamber erred in fact when:

i. asserted that *"eviction operations"* were taking place in Mostar as of April 1993, because *13 June* 1993 criminal eviction action committed by Martinović and some members of his ATG, as well as some other HVO soldiers, was *the first one of that kind*;[494]

ii. asserted that *a crime of sexual abuse* was a natural and foreseeable consequence of deploying the KB and its ATGs because:

a/ the sexual abuse crime was committed *for the first time on 13 June 1993*);[495]

b/ soldiers of the KB and its ATGs *did not commit sexual crimes before 13 June 1993*;

c/ the ATG *Vinko Škrobo* and Vinko Martinović were not involved in crimes committed in Sovići and Doljani in April and May 1993;[496]

[492] TJ,Vol.4,para.826.
[493] TJ,Vol.4,para.830.
[494] See above para.262.
[495] TJ,Vol.3, Counts 4 and 5,paras.757-780.
[496] See TJ,Vol.2,paras.565,591,594,599,643.

iii. when implicitly inferred that Martinović's criminal action on 13 June 1993 was planned military "eviction operation" and that Petković *"deployed"* Štela's ATG in that "operation";

iv. when failed to properly evaluate the fact that Petković learnt of acts of rapes on *14* June[497] and that there was no evidence that he received any information about the action prior or during its conduct.

374. Thus no reasonable trier of fact could reasonably come to the conclusion that sexual abuse crimes committed on 13 June 1993 were foreseeable for Petković and that he willingly took the risk that these crimes would be committed.

July 1993

375. The Trial Chamber established that HVO soldiers (unit not identified) raped one Muslim woman in July 1993.[498] There is no evidence that Petković was informed about the crime or that he was associated with the crime in any way, and the Trial Chamber did not even infer otherwise. Therefore, no reasonable trier of fact could have come to the conclusion that Petković foresaw and knowingly took the risk that a crime of sexual abuse would be committed in Mostar in July 1993.

4 September 1993

376. The Trial Chamber established that on 4 September 1993 one Muslim woman was sexually abused by a military policeman and nine other members of the HVO, including members of the ATG *Vinko Škrobo*.[499] There is no evidence that Petković was informed about the crime or that he was associated with the crime in any way, and the Trial Chamber did not even infer otherwise. Therefore, no reasonable trier of fact could have come to the conclusion that Petković foresaw and knowingly took the risk that a crime of sexual abuse would be committed in Mostar on 4 September 1993.

[497] TJ,Vol.4,para.828.
[498] TJ,Vol.3,paras.762,775.
[499] TJ,Vol.2,para.978;Vol.3,paras.763,775.

29 September 1993

377. The Trial Chamber established that on 29 September 1993 three Muslim women were raped and two sexually abused and that crimes were committed by HVO soldiers, including members of the ATG *Vinko Škrobo*.[500] There is no evidence that Petković was informed about the crime or that he was associated with the crime in any way, and the Trial Chamber did not even infer otherwise. Therefore, no reasonable trier of fact could have come to the conclusion that Petković foresaw and knowingly took the risk that a crime of sexual abuse would be committed in Mostar on 29 September 1993.

Conclusion and relief sought

378. The Trial Chamber erred in law and fact when established that Petković could foresee the possibility of sexual abuses in Mostar and that he possessed the requisite *mens rea*. No reasonable trier of fact could have come to that view and the Trial Chamber's findings were un-supported and unreasonable. These errors of law and fact, individually and comprehensively, meet the relevant standards of review, so that the Appeals Chamber should quash and reverse Petković's conviction in relation to counts 4 and 5 (Mostar).

6.2.1.2. Vareš

379. The Trial Chamber established that on 23 October and 24/25 October 1993 two witnesses, DF and DG, were forced to engage in sexual relations by the HVO soldiers, including *Maturice* unit and convicted Petković under Counts 4-5.[501]

380. The Chamber goes on to infer Petković's JCE 3 *mens rea* from the following propositions:

i. that members of the *Maturice* unit were involved in both sexual crimes,

ii. as of 23 October 1993 Petković knew that the military operations in the town of Vareš were taking place in an atmosphere of extreme violence,

iii. that sexual abuse was a natural and foreseeable consequence thereof,

iv. that nevertheless Petković knowingly took the risk that these crimes would be committed by:

[500] TJ,Vol.2,para.982;Vol.3,paras.764,776.
[501] TJ,Vol.4,para.832.

a/ continuing to exercise his functions within the HVO Main Staff and

b/ failing to take any measures to prevent the commission of new crimes.[502]

Errors regarding the Maturice unit

381. The Trial Chamber erred in fact when inferred that members of the *Maturice* unit were involved in the sexual abuse of the witness DF, committed on 23 October. There is no evidence to support such inference. The witness DF testified that "three soldiers" forced her to have sexual intercourse and did not mention the *Maturice* unit.[503] Accordingly, no reasonable trier of fact could conclude beyond reasonable doubt that the HVO soldiers who committed this crime belonged to the *Maturice* unit.

382. The witness DG, who was sexually abused during the night 24-25 October, said that the HVO soldiers who raped her "came from Kiseljak and they were the *Maturice"*.[504] Asked in the cross-examination whether she was informed that except the Maturice some other HVO units arrived to Vareš, DG answered negatively and further testified that she considered as *Maturice* all HVO soldiers who were not the Vareš Brigade.[505]

383. The Trial Chamber correctly established that Rajić went from Kiseljak to Vareš with soldiers of *Maturice* and *Apostoli* special units, the Ban Josip Jelačić Brigade and eight military policemen from the platoon of this same brigade.[506] Thus, no reasonable trier of fact could reasonably infer on the basis of the testimony of the witness DG that sexual abuse crime was committed by the *Maturice* unit, since she actually testified that the crime was committed by soldiers who were not from the Vareš Brigade.[507]

384. There is no evidence that members of the *Maturice* unit committed any sexual crime before 23 October 1993 and the Trial Chamber did not assert otherwise.

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[502] TJ,Vol.4,para.834.
[503] TJ,Vol.3.para.401.
[504] Witness DG,T(E),15994.
[505] Witness DG,T(E),16018.
[506] TJ,Vol.4,para.831.
[507] It should be noted that the Trial Chamber did not mention the *Maturice* unit with regard the witness DF (Vol.3,para.401), but nevertheless concluded that both DF and DG were abused by the HVO soldiers, "some of whom belonged to the *Maturice* special unit" (Vol.3,para.404).

Errors regarding assertion that Petković was on 23 October 1993 informed of an "atmosphere of extreme violence" in Vareš

385. The Trial Chamber asserted that Petković was informed by Rajić's report of 23 October 1993 that "as of 23 October" military operations in Vareš were taking place in an "atmosphere of extreme violence".[508] It has been explained above (para.289) that Petković did not receive the Rajić's report. However, in this context it is relevant that Rajić did not report about the atmosphere of extreme violence, insults, threats, beatings. [REDACTED].[509]

Accordingly, even if Petković did receive Rajić's 23 October report, he would not have any knowledge about the "atmosphere of extreme violence" and crimes committed in Vareš.

Errors regarding assertion that sexual abuse was a natural and foreseeable consequence thereof

386. As noted above, Petković did not dispose of any information in his possession prior to these incidents of rapes that would have provided him foresight of the risk that such acts might be committed by members of the *Maturice*, or any other HVO unit. As already submitted, an awareness of general and unspecific phenomenon of sexual crimes would not be sufficient to meet the requisite legal standard of foresight of rapes.[510]

Errors regarding assertion that Petković knowingly took the risk that these crimes would be committed

387. The Trial Chamber inferred that Petković "knowingly took the risk" that these crimes would be committed by: a/continuing to exercise his functions within the HVO Main Staff and b/ failing to take any measures to prevent the commission of new crimes. This is erroneous standard for the establishment of the JCE 3 *mens rea* because the risk for a crime to be committed has to be taken *before* the commission of the crime (*dolus eventualis*).

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[508] P06026.
[509] [REDACTED]
[510] See above, especially *Šainović* AJ,para.1575 .

388. However, it should be noted that the continuation for a professional officer to exercise his/her functions within his/her army, especially in times of war, no reasonable trier of fact could consider as the circumstantial evidence that he/she intended for crimes to be committed. Additionally, there is no evidence that Petković knew that certain crimes were planned and/or prepared, that he could prevent the commission of these crimes, but failed to do that. The Trial Chamber's inference about Petković's failure to prevent crimes is completely groundless and no reasonable trier of fact could have come to such inference.

Conclusions and relief sought

389. The Trial Chamber erred in law and fact when established that Petković could foresee the possibility of sexual abuses by *Maturice* members in Vareš and that he possessed the requisite *mens rea*.[511] No reasonable trier of fact could have come to that view and the Trial Chamber's findings are unsupported and unreasonable. These errors of law and fact, individually and comprehensively, meet the relevant standards of review, so that the Appeals Chamber should quash and reverse Petković's conviction in relation to Counts 4 and 5 (Vareš) and enter a verdict of not guilty.

6.2.2. Theft

6.2.2.1. Gornji Vakuf; Sovići and Doljani

390. The Trial Chamber inferred that:

i. Petković could have reasonably foreseen that HVO soldiers would commit thefts insofar as HVO military operations, both in Gornji Vakuf and Sovići and Doljani, took place in an atmosphere of extreme violence and

ii. he knowingly took the risk that thefts would be committed by "having planned and facilitated HVO operations".[512]

[511] TJ,Vol.4,paras.833-834.
[512] TJ,Vol.4,paras.837,840.

391. In arriving at the unreasonable view that Petković had foresight of the possibility of thefts being committed in Gornji Vakuf, Sovići and Doljani and knowingly taking the risk that this would occur, the Trial Chamber committed a number of errors:

i. For the purpose of establishing liability under JCE 3, the Chamber had to distinguish between a fact (e.g. the existence of an "atmosphere of extreme violence") and what an accused could be shown to have known about that fact. There was no evidence that *prior* to these crimes Petković had information that operations would be taken in an "atmosphere of extreme violence". The Chamber's factual premise (that prior to the commission of the crimes Petković was aware of such an "atmosphere") is therefore not established on the record.

ii. Even if this had been established, awareness of such generic, unspecific, state of affair ("atmosphere") is not enough to provide for foresight of the possibility of thefts.

iii. Nothing in the information Petković had in his possession *prior* to the commission of these crimes could reasonably have given him foresight thereof. The Trial Chamber failed to provide a reasoned finding that theft was crime that Petković could have reasonably foreseen both in Gornji Vakuf and Sovići and Doljani.

iv. The Judgement reveals a complete lack of reasoned finding as to which instance(s) of theft Petković would have been able to foresee and on what basis, in particular, which units he should have had reason to foresee that might commit such crimes. Therefore, this is no reasoned finding as to whose actions he could have foreseen, which constitutes a violation of Petković's right to a reasoned opinion, an error of law and prejudices the ability of Petković to establish the unreasonableness of the Chamber's findings.

v. Even if Petković had been involved in the military planning and "facilitating" operations in these locations, no inference could have been drawn (as the sole reasonable inference) that he would thus have been *willingly* taking the risk of such crimes being committed. The two facts are not logically connected: the fact of involvement in the planning of a military operation allows for no logical inference of an awareness of the risk that thefts will occur in the context thereof.

vi. In addition, the Trial Chamber does not explain how Petković's "planning or facilitating" the operations could reasonably have been said to demonstrate his knowingly taking the risk of

such crimes being committed. To a lack of logical connection between the two (an error of fact), the Trial Chamber added an error of law (denial of a reasoned opinion).

vii. The Trial Chamber's finding that Petković would have willingly taken the risk to see the acts of theft being committed is also demonstrably unreasonable because the Chamber failed to address the evidence that is directly contradicts such a suggestion and demonstrates Petković's strict and unqualified opposition to such acts whenever he considers that such a risk exists.[513]

392. Based on the above, no reasonable trier of fact could have drawn an inference of foresight on Petković's part based on information demonstrably in his possession *prior* to those events. Furthermore, no reasonable trier of fact could have concluded, as the only reasonable inference, that Petković willingly took the risk of leading his conduct to the commission of thefts in Gornji Vakuf and Sovići and Doljani. The Trial Chamber's failure to deal with that evidence is not only the evidence of the unreasonableness of its finding, it is also the evidence of its failure to fulfill its duty and responsibility to render a reasoned opinion on this matter.

Conclusions and relief sought

393. The Trial Chamber, therefore, erred in law and fact when finding that Petković possessed the requisite *mens rea*. No reasonable trier of fact could have come to that view. These errors of law and fact, individually and in combination, meet the relevant standards of review, so that the Appeals Chamber should reverse Petković's conviction in relation to counts 22 and 23 (Gornji Vakuf; Sovići and Doljani) and enter a verdict of not guilty.

6.2.2.2. West Mostar

394. As a preliminary matter, it should be noted that the Trial Chamber did *not* enter a conviction on any count of unlawful appropriation for that location,[514] although it established that Petković could reasonably have foreseen that thefts would be committed during "operations to evict" Muslims from

[513] E.g.P01445;P01598;P02599;P04055(3D01146).
[514] TJ,Vol.4,para.853.

Mostar and that he knowingly took this risk.[515] The Appeals Chamber should consider that Petković was not validly convicted under those counts. Should the Appeals Chamber take a different view of the Trial Chamber's omission, impugned findings are discussed below.

395. The Chamber found that between May 1993 and February 1994, HVO members - notably the *Benko Penavić* ATG in May 1993, members of the 4th Battalion of the 3rd HVO Brigade and the members of the KB in June 1993, the members of the *Vinko Škrobo* and *Benko Penavić* ATGs in September 1993 – committed acts of theft in West Mostar.[516] Absent a reasoned opinion on that point, it is unclear from this part of the Judgement, which incidents of theft ("until February 1994") are relevant to Petković's liability, especially because the Trial Chamber only established that he was informed about one "eviction action" (13 June 1993).

396. The Trial Chamber came to the erroneous conclusion that Petković had foresight of – unspecified – incidents of theft in West Mostar during that period, based on the following erroneous and unreasonable factual propositions:

i. Petković was directly informed of the operations to evict Muslims from West Mostar in June 1993 carried out by HVO units subordinated to him and of the atmosphere of violence surrounding these operations,[517]

ii. at the very least, he allowed this to happen insofar as these same units continued operating in the same atmosphere of violence, evicting and removing the population of West Mostar until February 1994.[518]

iii. Petković could reasonably have foreseen that thefts would also be committed during the operations to evict the Muslims from Mostar between June 1993 and February 1994, and he knowingly took this risk.[519]

[515] TJ,Vol.4,para.845.
[516] TJ,Vol.4,para.842.
[517] TJ,Vol.4,para.844.
[518] TJ,Vol.4,para.844.
[519] TJ,Vol.4,para.845.

Errors

397. The Trial Chamber erred in law and fact when concluded that Petković possessed the requisite JCE 3 *mens rea* in relation to acts of theft committed in West Mostar between May 1993 and February 1994 and, in addition to errors already explained, it should be stated:

i. The Trial Chamber did not infer that Petković was informed about any "eviction operation" save that on 13 June 1993 (P02770). The report received on 14 June 1993 did not provide evidence of JCE 3 foresight of crimes committed a day *before*, on 13 June 1993.

ii. This report contains no reference whatsoever to any act of theft (or the risk thereof). In that sense, evidentially, it provides no support for the Chamber's suggestion that Petković or anyone acquainted with that report could be said to have had foresight of the risk of acts of theft on the basis of the information contained in that report.

398. The following considerations should be added:

i. Absent a clear and reasoned findings of which acts of theft committed between May 1993 and February 1994 Petković is supposed to have had foresight of, it is almost impossible for him to exercise his right of appeal (an element of the fair trial guarantee), with any real effectiveness. This unfair denial of a reasoned opinion and the prejudice it causes to Petković would justify the Appeals Chamber in "quashing" the Trial Chamber's findings in relation to these incidents and resist any suggestion by the Prosecution to enter convictions under Counts 22-23 in relation to that location.

ii. As already noted, even if Petković had known of an "atmosphere of violence", this would not meet the requisite level of foresight relevant to this mode of liability.

iii. Whilst the Trial Chamber appears to say that the 14 June 1993 report put Petković on notice of problems with members of the 4th Tihomir Mišić Battalion of the 3rd HVO Brigade, Martinović and members of his Vinko Škrobo ATG, there is no reasoned finding that, after that date, members of these units committed (further) acts of theft. In that sense, even if one accepts the Chamber's account, that document would have given Petković's "foresight" of something that actually did not occur thereafter. In that sense, this report would be irrelevant for establishing foresight of any crime relevant to this case.

399. Concerning the finding that Petković knowingly took the risk of these crimes being committed, the following should be noted:

i. the Trial Chamber (again) failed to render a reasoned opinion as to the basis on which it could reasonably have come to that view;
ii. there is no evidence that members of any of the mentioned units continued to commit acts of thefts after Petković had become aware that the members of one of the units had committed thefts before;
iii. there is no evidence that it was Petković who decided their "continued deployment" in that area;[520]
iv. as already noted, Petković did not have any information suggesting that members of these units had committed theft at the time so that there would have been no reason to refrain from deploying them for fear of this happening.

Conclusions and relief sought

400. The Trial Chamber thus erred in law and fact when finding that Petković could possess the requisite *mens rea*. No reasonable trier of fact could have come to that view. These errors of law and fact, individually and in combination, meet the relevant standards of review, so that the Appeals Chamber should reverse Petković's conviction in relation to Counts 22 and 23 (Mostar) and enter a verdict of not guilty.

6.2.2.3. Vareš

401. The Trial Chamber found that between 23 October 1993 and 1 November 1993, HVO soldiers, including members of *Maturice,* stole from Muslim inhabitants of Vareš.[521] The Chamber concluded that Petković (i) was informed both about arrests and thefts as of 23 October 1993, (ii) that thefts continued until 1 November and (iii) thus he could have foreseen them and (iv) knowingly took the risk that the thefts would occur.[522]

[520] P03773;P07314.
[521] TJ,Vol.4,para.847.
[522] TJ,Vol.4,para.848.

402. In arriving at the erroneous and unreasonable finding that Petković possessed the requisite *mens rea* for a JCE 3 conviction for acts of theft committed in Vareš, the Trial Chamber made a number of errors:

i. The Chamber finds that Petković was informed of the arrests of Muslim inhabitants.[523] It does not suggest that Petković was informed of acts of theft. That is because the evidence on which it relies contains no indication of thefts being committed in that context. However, in paragraph 848 (Vol.4) the Trial Chamber makes a different finding whereby Petković knew as of 23 October 1993 of both "arrests" *and* "thefts". The Trial Chamber provides no evidential support for the suggestion that he had learnt of instances of theft on that day. That proposition is unsupported and unreasonable.

ii. The Chamber failed to identify any report or information that Petković received *before* 23 October or *during* the period 23 October–1 November 1993 that would have put him on notice of the risk of thefts occurring in Vareš. No such evidence exists and no such proposition was put to Petković when he testified – thereby depriving him of a fair opportunity to confront any suggestion to the contrary.

iii. The Chamber had to establish that Petković had relevant information *before the crimes in question*. However, the Chamber has failed to demonstrate through a reasoned opinion that Petković had received information suggesting a risk of theft in that location prior to that time, so that whatever information he might have received after that date is not relevant to inferring foresight or his knowingly taking the risk of those crimes being committed.

iv. The Trial Chamber also failed to provide a reasoned opinion as to how it could reasonably have come to the view that Petković had knowingly taken the risk that such acts would be committed in Vareš between 23 October–1 November 1993. This failure to render a reasoned opinion constitutes an error of law and gravely prejudices Petković's ability to effectively challenge the Chamber's reasoning.

[523] TJ,Vol.4,para.847.

Conclusion and relief sought

403. The Trial Chamber, therefore, erred in law and fact when finding that Petković possessed the requisite *mens rea*. No reasonable trier of fact could have come to that view. These errors of law and fact, individually and in combination, meet the relevant standards of review, so that the Appeals Chamber should reverse Petković's conviction in relation to Counts 22 and 23 (Vareš) and enter a verdict of acquittal.

6.2.3. Destruction of mosques in Jablanica (Sovići/Doljani)

404. The Trial Chamber found that on 17 April 1993, when combat was over, the HVO set fire to all the Muslim houses and two mosques following orders from "senior commanders".[524] The Chamber established that Petković knowingly took the risk that institutions dedicated to the Muslim religion would be destroyed since (i) HVO operations in Jablanica were part of the HVO leadership's /Petković included/ plan and (ii) it was likely that the destruction of the mosques was also a part of this plan.[525]

405. The Chamber's assertion that mosques were destroyed on *17 April* 1993 contradicts the Chamber's correct factual finding that mosques were destroyed *between 18 and 24 April* 1993 by soldiers of the KB, who after the funeral of the KB's commander Čikota, returned to the villages and burnt Muslim houses and mosques.[526]

406. Accordingly, even if Petković planned or participated in planning the HVO attack on Sovići and Doljani launched on 17 April 1993, this planning did not include the death of the KB commander, the revenge of the KB's soldiers and commission of crimes. These crimes were not part of any HVO military plan and they were not foreseeable for Petković.

407. Therefore, there was no basis upon which a reasonable trier of fact could reasonably conclude that Petković had foresight of these crimes and willingly took the risk that they would be committed.

[524] TJ,Vol.4,para.850.
[525] TJ,Vol.4,para.852.
[526] TJ,Vol.2,para.641;Vol.3.para.1606. See also above,paras.241-243.

408. Regarding the Chamber's further suggestion that Petković knowingly took the risk of these crimes being committed, it should be noted that the Trial Chamber (again) provided no reasoned finding explaining how a reasonable trier of fact could have come to that view. Petković invites the sanctioning of this prejudicial and erroneous denial of a reasoned finding by quashing and overturning the Chamber's convictions under Count 21.

Conclusions and relief sought

409. The Trial Chamber, therefore, erred in law and fact when finding that Petković possessed the requisite *mens rea*. No reasonable trier of fact could have come to that view. These errors of law and fact, individually and in combination, meet the relevant standards of review, so that the Chamber should reverse Petković's conviction in relation to Count 21 (Jablanica) and enter the verdict of not guilty.

7. GROUND VI - INTERNATIONAL ARMED CONFLICT AND STATE OF OCCUPATION

7.1. International armed conflict

7.1.1. Impugned findings

410. The Trial Chamber asserted that the armed conflict between the HVO and the ABiH was international in nature due both to the direct involvement of the HV and the overall control wielded by the HV and Croatia over the HVO.[527]

411. The Chamber's thesis about the direct i*ntervention* by the HV is based on the assertion that HV *troops* were deployed on the *"southern front", in BiH*, at all relevant time,[528] as well as in the municipalities relevant to the Indictment.[529]

412. The Chamber based its thesis about the HV's and Croatia's overall control over the HVO on premises that (i) HV officers joined the HVO and were officers of both armies at the same time;[530] (ii) the HV and the HVO jointly directed military operations;[531] (iii) the HVO dispatched reports to the Croatian authorities;[532] (iv) there was logistical support from Croatia.[533]

7.1.2. Conflict between the HVO and ABiH was a conflict between two equal entities of BiH

413. It is undisputable that a conflict is possessed of an international character when it puts two or more states against each other and that internal conflict may become international if (i) another state intervenes in that conflict engaging its troops or (ii) when armed forces fighting against the central authorities of the state in which they live and operate may be deemed to act on behalf of another State.[534] Internal conflict in both cases is rebellion, revolt, fighting *against the State,* de jure *Government*.[535]

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[527] TJ,Vol.3,para.567.
[528] TJ,Vol.3,para.530.
[529] TJ,Vol.3,para.531.
[530] TJ,Vol.3,paras.546-548.
[531] TJ,Vol.3,paras.549-552.
[532] TJ,Vol.3,para.553.
[533] TJ,Vol.3,paras.554-567.
[534] TJ,Vol.1,para.85; *Tadić AJ*,para.84
[535] ICRC Commentary IV GC on Article 3.

414. The Chamber concluded that the conflict between the HVO and the ABiH was "fundamentally internal, inasmuch as it took place between two entities of the RBiH".[536] Judge Antonetti also established in his *Separate and Partially Dissenting Opinion* that the conflict was between the Bosnian Croats and the Muslims rallying around Alija Izetbegović.[537] The evidence clearly and undoubtedly proves that conclusions about the nature of the internal conflict (*conflict between two entities in BiH*) are correct.

415. However, if the internal conflict was the conflict between *two equal entities* in BiH, and not the conflict of the Croatian/HVO authorities against the State or *de jure* Government, this conflict may not become international in nature. IHL, as explained above, requires for a party of the internal conflict to be legal Government.[538] Thus the Chamber erred in law and fact when asserting that this internal conflict possessed the qualification of the international armed conflict.

7.1.3. Errors regarding the HV's direct intervention and duration of the alleged HV participation in the hostilities

416. The Prosecution mentioned the alleged engagement of the HV in two lines in the paragraph 37 of the Indictment (stating that in *early July* 1993 the HVO "supported by (and involving) the government and the armed forces" of Croatia launched "a massive campaign to attack, arrest and cleanse Bosnian Muslims from areas claimed to be part of Herceg-Bosna"). There is no factual assertion in the Indictment that the HV directly intervened by its troops in conflict between the HVO and the ABiH, or that the HV was involved in the conflict in any capacity before July 1993.

417. The Trial Chamber erred in law and fact when asserting, contrary to the factual allegations in the Indictment, that the international armed conflict due to the *direct intervention* of the HV existed *at all times* relevant to the Indictment.[539]

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[536] TJ,Vol.3,para.523.
[537] TJ,Vol.6,p.212.
[538] In the *Tadić* case the Chambers analyzed the conflict between FRY/VRS *against BiH, "central authorities"* (TJ,AJ,*Decision on Jurisdiction*). Since the Trial Chamber did not establish that the HVO fought against the Republic of BiH, the case-law based on *Tadić* case is not applicable in this case.
[539] TJ,Vol.3,paras.530-544.

7.1.4. Errors regarding deployment of the HV troops on the "southern front" and all municipalities at all times relevant to the Indictment

418. The Trial Chamber erred in fact when asserting that the HV troops were deployed on the *"southern front" in BiH* at *all times relevant to the Indictment*. The "southern front", as s single theatre of war from a military point of view, encompassed the southern part of Croatia (Dubrovnik area) and neighboring areas in BiH and Montenegro. The HV troops were engaged indeed in deliberation of these areas in *spring and summer 1992*. In July 1992 Bobetko withdrew the HV from BiH; after deliberation of Dubrovnik in August 1992 he ceased to be involved in combats on the South battlefield and in the autumn 1992 he left that area.[540] The HVO and the ABiH were allies at the time and therefore deployment of the HV troops was not "intervention alongside the HVO in the conflict with the ABiH", as asserted by the Chamber.

419. The assertion that some evidence undermine the Defence argument that HV soldiers and officers participated in the HVO military operations on the individual basis and support the thesis about the deployment of the HV troops, the Chamber based on two evidence: Kapular's report of 23 July 1993 (P03667) and the order of 27 November 1993 (P11033).[541]

420. Firstly, it should be noted that the Chamber did not rely on any evidence for the period January-late July 1993 and therefore no reasonable trier of fact could have come to the view that the HV *troops* were deployed on the "southern front" in BiH *at all times* relevant to the Indictment.

421. Secondly, both documents, issued by Kapular, relate to the engagement of *soldiers* of the 5th HV Brigade on the "Southern front" and *not the HV unit*. Therefore, this evidence cannot reasonably prove the thesis that the HV *troops* were engaged. Numerous evidences prove that HV soldiers and officers participated in combats in BiH, but individually, under the command of the HVO commanders.[542]

422. Thirdly, the Chamber erred in fact and law when the undisputable fact that a certain number of the HV soldiers and officers joined the HVO interpreted as the presence of the HV *troops*. For example, the Chamber stated that "HV personnel" were present in Gornji Vakuf in January 1993[543], or that

[540] Petković FTB,paras.9-14.
[541] TJ,Vol.3,para.529.
[542] P00798;P00153;4D00701;P07535;P02738;P11033;P07587;P06157;P04295;P02176;P02647;2D01239;2D01240; P01657;P02871;P03818;P00917; [REDACTED];P07742;P03752;P00742.
[543] TJ,Vol.3,para.534.

"soldiers from the HV participated alongside the HVO in the attack on Sovići on 17 April 1993"[544] and then concluded that the HV *troops* were present in all municipalities relevant for the Indictment.

423. These errors invalidate the Judgement regarding the Chamber's conclusion that the HV directly intervened by deploying its *troops* in BiH against ABiH.

7.1.5. Errors regarding the indirect intervention and overall control by Croatia

424. The Trial Chamber asserted that Croatia wielded overall control over the HVO by:

i. sending HV officers to join the HVO;[545]

ii. joint direction of military operations;[546]

iii. receiving HVO reports[547] and

iv. giving logistical support to the HVO.[548]

425. It is undisputable fact that some HV officers, including Petković, joined the HVO. However, there is no evidence that they "were *sent by Zagreb* to join the ranks of the HVO" and that Croatia thus wielded the control over the HVO. Petković extensively explained the circumstances of his engagement in the HVO, which proves that he was not the agent of Croatia or the means of Croatia's control over the HVO.[549]

426. The Chamber erroneously asserted that the HV and the HVO jointly directed military operations. The evidence on which the Chamber relies cannot reasonable prove this assertion:[550]

i. Ciril Ribičič was the constitutional expert witness. In his expert report, P08973 (p.25), he presented legal analysis of the Decree on the Armed Forces and did not analyze directing the HVO military operations;

ii. decision of 7 September 2006, Adjudicated fact No.8 (*Naletilić* Judgement, p.15) does not relate to joint directing military operations;

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[544] TJ,Vol.3,para.535.
[545] TJ,Vol.3,paras.546-548.
[546] TJ,Vol.3,paras.549-552.
[547] TJ,Vol.3,para.553.
[548] TJ,Vol.3,paras.554-567.
[549] See Petković's FTB,paras.8-17.
[550] TJ,Vol.3,fn.1139-1145.

iii. P03048 – the order for the HVO military operation "South", July 1993, issued by Luka Đanko, does not prove joint directing the military operation;[551]

iv. Beneta testified that Đanko was assigned to this task and "if HV members came to help out, that means that somebody from the HVO was in command";[552]

v. Biškić did not testify that the HVO and the HV jointly directed military operations;[553]

vi. P07236 is Boban's Decision on the Foundation of the Organisation of the Ministry of Defence of HRHB, issued on 18 December 1993, and does not relate to the alleged joint directing the HVO military operations;

vii. P06994 - Decision on appointment of Biškić to the position of the assistant of the HRHB Minister of Defence for security issues;

viii. P06998 – Decision on Biškić's appointment published in the "Official Gazette";

ix. P06485 – the transcript proves that Tuđman discussed military situation in BiH with Šušak and HV officers, but it is not a proof that the HVO military operations was directed jointly by the HV;

x. P04191 – the report of Croatian MP on working visit to the HVO MP in order to help to improve organization and provide professional assistance does not prove "joint directing" the HVO military operations.

427. Some of numerous HVO reports were sent indeed to the Croatian authorities. However, the HVO authorities decided which topics are so relevant that Croatian authorities should be informed about. These reports do not prove Croatia's overall control over the HVO authorities. Furthermore, the evidence on which the Chamber relies[554] does not prove the thesis:

i. P07135 – internal HVO report on the manner of operation of the Central Logistics Base.

ii. P03242 – information of the Croatian Ministry of Defence to the Head of the HZHB Defence Department about the telephone and telefax number for sending reports and information.

iii. Manolić confirmed that the Croatian authorities were informed about the situation in BiH, but did not testify that the HVO authorities sent reports.[555]

428. Croatia provided logistical and financial support both to the HVO and the ABiH. The Chamber decided not to review Croatian logistical and humanitarian support to the Muslim side in the conflict, asserting that this support may be taken into consideration in determining whether there was a JCE, but

[551] Petković,T(E),49598-49600.
[552] TJ,Vol.3,fn.1140.
[553] TJ,Vol.3,fn.1141-1144.
[554] TJ,Vol.3,fn.1146.
[555] TJ,Vol.3.fn.1146.

is not relevant to determine international nature of the armed conflict.[556] The Chamber failed to explain how the same logistical support may grow to the Croatia's "overall control" and international armed conflict if given to the HVO, but is irrelevant if given to the ABiH.

429. Furthermore, overall control goes beyond the financing and equipping and involves participation in planning and supervision of military operations.[557] The Trial Chamber did not establish that Croatian authorities planned and supervised the HVO military operations and thus erred in law and fact when asserting that Croatia, nevertheless, had overall control over the HVO.

7.1.6. Petković's *mens rea*

430. The principle of individual guilt requires that the accused's awareness of the factual circumstances establishing the armed conflict's international character must be proven by the Prosecution.[558] The Trial Chamber asserted that Petković "was aware of Croatia's participation in the conflict between the HVO and the ABiH in BiH and facilitated it",[559] but failed to find explicitly whether Petković was aware of *all factual circumstances* necessary to properly establish the international nature of the armed conflict. Namely, Petković could be aware of the Croatia's financial and logistical support to the HVO, but this awareness does not constitute required *mens rea* since such support, as correctly established by the Chamber, cannot cause the growing of the internal conflict to international. Other circumstances should exist to make the conflict international and Petković had to be aware of them.

431. The Chamber erred in law and fact by failing to *explicitly* establish Petković's awareness about the alleged international character of the armed conflict between the HVO and the ABiH.

7.1.7. Conclusion and relief sought

432. The Chamber's failure to render a reasoned opinion about the above mentioned legal issues constitutes a grave violation of Petković's right to a reasoned opinion and thus his fair trial. This also

[556] TJ,Vol.3,para.526.
[557] *Tadić* AJ,para.145.
[558] *Naletilić* AJ, para.121.
[559] TJ,Vol.4,para.819.

gravely undermines his ability to appeal effectively against a completely unreasoned finding relevant for the implementation of the Article 2 of the Statute.

433. The Trial Chamber further erred in law and fact when asserted that the armed conflict between the HVO and the ABiH grew into international due to the HV's direct intervention and Croatia's overall control over the HVO.[560] These errors invalidate the Judgement regarding the implementation of Article 2 of the Statute and thus meet the relevant standard of review. The Appeal Chamber should accordingly modify the Trial Chamber's finding about the existence of the international armed conflict, establish that the conflict was not international in nature and consequently acquit Petković for crimes under Article 2 of the Statute.

7.2. State of occupation

7.2.1. Impugned findings

434. The Trial Chamber endorses the criteria identified by the *Naletilić* Chamber for establishing the state of occupation, but concludes that "these criteria need not be cumulative".[561]

435. The Chamber found that the HVO occupied Prozor, Gornji Vakuf, Sovići and Doljani, West Mostar, Ljubuški, Stolac, Čapljina, Vareš and Stupni Do at the time relevant for the Indictment[562] and that the state of occupation by the HVO may be established inasmuch as Croatia/HV wielded overall control over the HVO[563].

[560] Judge Antonetti in his *Separate and Partially Dissent Opinion* concluded the Prosecution was unable to prove beyond a reasonable doubt that the HV intervened military in BiH, that if wielded overall control over the HVO and that it planned all the military operations itself. (Vol.6,p.190)
[561] TJ,Vol.1,para.88.
[562] TJ,Vol.3,para.589.
[563] TJ,Vol.3,fn.1175.

7.2.2. The Trial Chamber erred in law and fact when asserting the existence of the state of occupation on the basis of the HVO military presence and its only ability to give orders

436. The Trial Chamber correctly presents five criteria identified by the *Naletilić* Trial Chamber for establishing the state of occupation,[564] but erred in law when concluded that each of the mentioned criterion satisfies the requirements for establishing the state of occupation and need not be cumulative.

437. Consequently, the Chamber erred in law and fact when on the basis of only two criteria only (the HVO military presence and its ability to give orders) concluded that the state of occupation existed in Prozor,[565] villages of Duša, Hrasnica, Ždrimci and Uzričje,[566] Sovići and Doljani,[567] West Mostar;[568] Ljubuški,[569] Stolac,[570] Čapljina[571] and Vareš.[572]

438. The Chamber further erred in law and fact when failed to establish that the substitution of the authority of the "occupied power" by the authority of the "occupying power" is *necessary* requirement for determination of the state of occupation.[573] The consequences are numerous erroneous assertions that the HVO was "occupying power" in the municipalities/areas in which the HVO authorities predominated before the armed conflict with the ABiH broke out and in which the substitution of the authority did not happen. For example, the Chamber established that according to the 1991 census 94% of the population of Ljubuški were Croats[574] and that the HVO in Ljubuški was set up on 10 July 1992,[575] and thus in August 1993 the HVO could not become the "occupying power" in the Municipality. Accordingly Ljubuški cannot reasonably be considered as occupied territory. The same conclusion applies to West Mostar, Čapljina, Stolac, Vareš.

[564] *Naletilić* TJ,para.217.
[565] TJ,Vol.3,paras.578,589.
[566] TJ,Vol.3,paras.579,589.
[567] TJ,Vol.3,paras.580,589.
[568] TJ,Vol.3,paras.583,589.
[569] TJ,Vol.3,paras.584,589.
[570] TJ,Vol.3,paras.585,589.
[571] TJ,Vol.3,paras.587,589.
[572] TJ,Vol.3,paras.588,589.
[573] Articles 42 and 43 of the Hague Regulations of 1907;ICRC Commentary on Article 47 of the GC IV;*Naletilić* TJ,para.218.
[574] TJ,Vol.2.para.1765.
[575] TJ,Vol.2,para.1766.

7.2.3. The Trial Chamber erred in law and fact when asserting that the Croatia's overall control is sufficient to establish the state of occupation and when failing to establish HVO's effective control

439. The Trial Chamber erred in law when asserting that the overall Croatian/HV control over the HVO is sufficient criteria to establish the state of occupation by the HVO.[576] The overall Croatian/HV control over the HVO could be sufficient to establish the international character of the armed conflict, but not the state of occupation. The effective control of the occupying power is needed to establish the state of occupation.[577]

440. The Chamber failed to establish whether the HVO had effective control in relevant areas and thus erred in law and fact when, on the basis of the inferences that the HVO "had sufficient military presence to be able to issue orders to the local population and to have them carried out", asserted that it occupied:

i. Prozor for 6 days in October 1992, the village of Parcani for undefined number of days in April 1993 and the whole Municipality from August to December 1993;[578]
ii. villages of Duša, Hrasnica, Ždrimci and Uzričje after 18 January 1993 (for unknown period of time);[579]
iii. Sovići and Doljani after 17 April 1993;[580]
iv. West Mostar from May 1993 to February 1994;[581]
v. Ljubuški in August 1993;[582]
vi. Stolac in July and August 1993;[583]
vii. Čapljina from July through September 1993;[584]
viii. Vareš after 23 October 1993.[585]

[576] TJ,Vol.3,fn.1175.
[577] *Naletilić* TJ,para.214.
[578] TJ,Vol.3,paras.578,589.
[579] TJ,Vol.3,paras.579,589.
[580] TJ,Vol.3,paras.580,589.
[581] TJ,Vol.3,paras.583,589.
[582] TJ,Vol.3,paras.584,589.
[583] TJ,Vol.3,paras.585,589.
[584] TJ,Vol.3,paras.587,589.
[585] TJ,Vol.3,paras.588,589.

7.2.4. The Trial Chamber erred in law and fact when inferred that the state of occupation existed in combat zones

441. The Trial Chamber recalled that combat zones are not considered as occupied territories whereas sporadic local resistance does not call into question the status of the occupied territory.[586] However, the Chamber inferred that West Mostar was an occupied territory although it correctly established that the whole Mostar area was a combat zone from June 1993 to February 1994.[587]

442. Regarding the Vareš zone the Chamber correctly established that on 21 October 1993 the ABiH "carried out a victorious offensive against the village of Kopjari" and that Rajić came from Kiseljak to help the Vareš Brigade to organize the defence of the town. Rajić returned with his troops to Kiseljak on 26 October 1993.[588] The ABiH commenced its offensive in the region in August 1993 and conquered Vareš on 3 November 1993.[589] Therefore no reasonable trier of fact could have come to the conclusion that the HVO occupied Vareš after 23 October 1993.

7.2.5. Conclusion and relief sought

443. Occupation is relevant in dealing with the charges of forcible transfer and deportation of civilians [590] (Counts 7,9) and destruction of property [591] (Count 19) for relevant provisions of the GC IV have no application in the absence of a state of occupation.[592] Petković was convicted for the crime of unlawful deportation of civilians under Count 7 committed in Mostar, for the crime of unlawful transfer of civilian under Count 9 committed in Gornji Vakuf, Sovići and Doljani and Mostar, and for the crime of extensive destruction of property under Count 19 committed in Prozor, Gornji Vakuf, Sovići and Doljani and Vareš. All above mentioned errors directly influence the conviction for the mentioned crimes, which can be committed only in the occupied territory, and thus these errors meet the relevant standard of review.

444. The Appeals Chamber should accordingly modify the Trial Chamber's conclusion about the existence of the state of occupation in the mentioned localities and establish that no reasonable trier of

[586] TJ, Vol.3, para.570.
[587] TJ, Vol.2, paras.812,1180,1248; Vol.3,paras.583,589,912; Vol.4.para.939.
[588] TJ, Vol.3, para.311-313,315.
[589] 4D00526; 4D00523; 4D00519; [REDACTED]; Praljak,T(E),40223,41058,41151; Petković,T(E),49610; Watkins,T(E),19027-8.
[590] GC IV,Art.49.
[591] Ibid,Art.53.
[592] *Naletilić* TJ,para.210.

fact could have come to the conclusion that the Prosecution proved beyond reasonable doubt the existence of the state of occupation. Petković's conviction for the mentioned crimes should be then set aside and replaced by the acquittal.

8. GROUND VII – SENTENCING

8.1. Errors pertaining to the extent of Petković's participation in the commission of crimes

445. The Trial Chamber erred in law and fact and abused its discretion when taking into consideration as evidence of the *extent* of Petković's participation in the commission of crimes his involvement in military operations, alleged effective control over the HVO armed forces and intent to evict Muslims and other acts/omissions which have been already taken into account as evidence relevant to establishing his *criminal responsibility*.[593] The Appeals Chamber has already had occasion to point out that evidence relevant to establishing Petković's responsibility and it may not, in addition, be taken into account as evidence in aggravation of sentencing.[594]

446. The involvement of a military commander in military operations is not a recognized factor relevant for sentencing so the Chamber's reliance upon it constitutes a clear violation of the principle of legality.

447. The Trial Chamber also erred in law and fact and abused its discretion when taking into account what it says is Petković's "effective control" over the armed forces as a factor in sentencing.[595] This approach may be said to be erroneous for a number of reasons:

i. It is not a factor recognized as aggravating under customary international law so that the Trial Chamber had not valid basis to rely upon it as aggravating factor and therefore violated the principle of legality.
ii. It is an undue and impermissible import from the doctrine of command responsibility (i.e., an element of a mode of liability, not a recognized aggravating factor for sentencing).
iii. At trial, it was unproven in relation to any of the crimes committed by one of the principal perpetrators.
iv. To the extent that it purports to reflect Petković's *de jure* (or *de facto*) position, it was already taken into consideration by the Chamber as both proof of Petković's involvement/membership in a JCE and as principle factor relevant to evaluating the nature/significant nature of his participation.[596]

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[593] TJ, Vol.4, para.1353.
[594] See e.g.*Naletilić AJ*,par.610; *Hadžihasanović AJ*,para.320; *D.Milošević AJ*,para.309; see also *Kordić* AJ, para.1089; *Galić* AJ, para.408.
[595] TJ,Vol.4,para.1353.
[596] See,in particular,TJ,Vol.4,paras.814-819.

448. The Trial Chamber erred in law and fact and abused its discretion when double-or triple-counting Petković's alleged intent to evict the Muslim population from the HZ(R) H-B as a relevant consideration for purposes of sentencing.[597] This element already formed a part of a) Petković's supposed JCE intent (to ethnically cleanse based on discriminatory factors) and b) was one of the constitutive element of the "core crime" of persecution for which he was convicted pursuant to Article 5(h).

449. These errors meet the relevant standards of review and would warrant a significant reduction in sentencing. These factors lay at the core of the Trial Chamber's finding that Petković participated in a JCE and made a significant contribution thereto. The aggravating Petković's sentence based on the facts that warranted his conviction is entirely unfair and erroneous. The Appeals Chamber should, therefore, find that the Trial Chamber erred in law and fact in considering these factors in aggravation, quash these findings and significantly reduce Petković's sentence if his conviction is upheld (in whole or in part).

8.2. Errors pertaining to aggravating factors

450. The Trial Chamber erred in law and fact and abused its discretion when it double or triple-counted Petković's alleged powers and position, as well as his alleged efforts to conceal the responsibility of the HVO authorities before international representatives, as an aggravating factor for sentencing.[598]

451. As noted above, this factor had already been taken into account by the Trial Chamber a) in support of Appellant's alleged significant contribution to a JCE, b) as basis for the inference of his alleged JCE *mens rea*, c) as sentencing factor regarding the "extent of his participation" in the commission of the crimes.[599]

452. Petković submits that the Appeals Chamber should find that the Trial Chamber erred in law and fact in this matter, that this error meets the relevant standards of review and quash those erroneous

[597] TJ, Vol.4, para.1353.
[598] TJ, Vol.4, paras.1355,1361.
[599] TJ, Vol.4, paras.814-819,1353-1355.

findings. This error meets the relevant standard of review on appeal and should result in a significant reduction of sentence insofar as it was said to have aggravated Petković's sentence. The Appeals Chamber should accordingly reduce Petković's sentence if his conviction is upheld (in whole or in part).

8.3. Errors pertaining to mitigating factors

453. In paragraph 1361 (Vol.4), the Trial Chamber took notice of Petković's efforts to improve the situation for vulnerable people and to cooperate with the commanders of the ABiH to end the conflict. "Nevertheless", the Chamber found, "considering the extent of the Accused's participation in the crimes for which he was convicted and in particular his efforts to conceal the responsibility of the HVO authorities before international representatives, his preference for negotiation has limited weight in the determination of the sentence for the Accused Petković".

454. The Chamber's holding was a clear abuse of its discretion for at least two reasons: (i) Petković's humanitarian efforts were *not* limited to a "preference for negotiations" (see below); (ii) the Trial Chamber failed to account for and consider all his other efforts to alleviate the hardship of the war affecting civilians and to try to protect them from harm. These were considerations essential and central to establishing a fair and adequate sentence for his conduct. As outlined earlier in this Brief, Petković's efforts that were relevant to evaluating his conduct included, *inter alia*,

i. consistent and repeated efforts to find peaceful resolution to conflict (including through cease-fire agreements).[600]
ii. securing and facilitating the safe-passage of humanitarian aid and convoys to vulnerable (Muslim) communities.[601]
iii. issuing many orders all through the relevant timeframe trying to protect civilians from the consequences of the conflict and to remind troops of their obligations to respect humanitarian law.[602]
iv. taking many steps to try to protect Muslim properties[603] and ordered that their religious holidays be respected.[604]
v. taking steps to try and secure the release of civilians who had been arrested.[605]

[600] See Annexes 2,4.
[601] See Annex 3.
[602] See Annex 3.
[603] See Annex 3.
[604] 4D00016 (P02577).

vi. ensuring safe passage for UNPROFOR.[606]

455. Petković might not have been and clearly was not successful in all of his endeavors to protect vulnerable Muslim civilians. But none of these steps was alleged or was it suggested to him to have been carried out in bad faith or for any other reason than to try to give greater protection to civilians in the context of that conflict. The Trial Chamber gave no apparent consideration to these highly significant mitigating circumstances.

456. ICTY jurisprudence acknowledges that efforts directed towards peace, peaceful resolutions of conflicts and better relationships between (former) warring communities should constitute a significant factor in mitigation.[607] With those efforts, and through his personal courage, Petković protected many from further hardship and suffering, a fact that appears to count for nothing for the Trial Chamber.

457. Based on the above, the Trial Chamber may be said to have erred and abused its discretion when it failed to give due weight and consideration to each and all of Petković's efforts to improve the lot of vulnerable civilians and to try to find peaceful solutions instead of violent resolution to tensions with the opposing warring party. Despite all the suffering of the war, these efforts unquestionably protected many civilians from more, or more severe, hardship. Petković's efforts in that regard should justify a *significant* reduction of his sentence to account for these actions.

458. The Appeals Chamber should therefore find that the Trial Chamber erred in law and fact when it failed to consider these factors in evaluating Petković's conduct for the purpose of sentencing and in mitigation of that sentence. Having factored those in its considerations, the Appeals Chamber should revise the sentence accordingly and impose a significantly reduced sentence reflecting Petković's many and consistent humanitarian efforts.

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[605] P01467;P01709;P01959;P02344;P02726;P05138; See also Petković,T(E),49526-7.
[606] See Annex 3.
[607] *Plavšić*, Sentencing Judgement, para.94; *Blagojević/Jokić* AJ,para.328; *D. Milošević*, TJ, para.1003; *Bagosora* TJ,para.2273.

8.4. Credit for time served by Petković

459. The Trial Chamber established that Petković was entitled to credit for time spent in detention pending and during the trial and that consequently, after deducting the time spent on provisional release, the fact that he had been in Tribunal custody since 5 April 2004 had to be taken into account.[608]

460. In the course of the proceedings Petković;

i. has been in custody of the Tribunal since 5 April 2004;[609]

ii. was on provisional release for a total of [REDACTED] days;

iii. of that amount, he spent [REDACTED] days under house arrest/home-confinement [REDACTED];[610]

iv. of the total amount, he spent a total of [REDACTED] days under tightly restrictive conditions which, it is submitted below, are akin to house arrest for the purpose of reduction of sentence.

461. The Trial Chamber erred in law and fact when calculating the time to be deducted from Petković's sentence as time served. In particular, the Trial Chamber failed to account for and deduct the time spent by Petković a/ under house arrest/detention and b/ on provisional release subject to restrictive measures upon his freedom (respectively, iii. and iv. above).[611]

462. Where relevant, the Tribunal has endeavored to apply – minimum – standards of protection of human rights. In that regard, Petković notes that human rights practice acknowledges that time spent under judicially-ordered conditions affecting the freedom of the accused should in principle be regarded as a form of deprivation of liberty and thus be accounted for in relation to sentencing.[612] This is consistent with the practice of many domestic jurisdictions.[613]

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608 TJ,Vol.4,paras.1362,1363.

609 TJ,Vol.4,para.1363.

610 Petković spent time in home confinement/house-arrest during the following periods:

- [REDACTED];
- [REDACTED] (Decision on the Accused Petković's Motion for Provisional Release, 17/06/2009);
- [REDACTED] (Decision on Motion for Provisional Release of the Accused Petković, 09/12/2009);
- [REDACTED] [REDACTED];
- [REDACTED] [REDACTED];
- [REDACTED] (Decision on Milivoj Petković's Motion for Provisional Release, 24/06/2011);

611 TJ, Vol.4, para.1363.

612 E.g. *Ciobanu v. Romania and Italy*, Appl.No.4509/08, 9 July 2013,para.63;*Lavents v. Latvia*, Appl.No. 58442/00, 28 November 2002,para.63.

613 See e.g. "Detention, preventive imprisonment and obligation to stay at home, suffered by the defendant in the process in which he is to be sentenced, are discounted in full in the enforcement of the imprisonment penalty imposed on him", Art. 80(1) Código Penal Português (Criminal Code of Portugal). See also (Italy) Codice di Procedura Penale (Code of Criminal Procedure) Arts. 657 and 284(5);(Spain) Art. 508 Ley de Enjuiciamiento Criminal (Criminal Procedure Act) and Art. 58(1)

463. These –minimum– human rights standards have been duly acknowledged and applied by international criminal tribunals and, in particular, by the ICTY. In the *Blaškić* case, for instance, house arrest was recognized as a form of detention, including 'the right to have the period spent under house arrest taken into account for determining the penalty' under Rule 101(C).[614]

464. Based on the above, and in order to apply the minimum standards of protection of human rights recognized by international law, the Trial Chamber was required to account for these periods in the calculation of the time to be deducted from Petković's sentence.

465. There was another basis requiring the Trial Chamber to do so. Pursuant to Rule 101(B), the Trial Chamber was required to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia. This, in turns, implies not just the actual *barème* of sentences, but all factors relevant to and affecting the quantum of sentence being given – all of which are inherent parts of the process of 'sentencing' in itself. In this particular respect, Petković was and would have been entitled to the deduction of time being spent under house arrest and conditional/restrictive provisional release under his own domestic law (and thus in accordance with the right to the natural judge and equality of treatment).[615]

466. In addition, the Trial Chamber should have deducted, as time-served, those periods of time when Petković was "provisionally" released under measures and conditions that significantly restricted or affected the full enjoyment of his rights and freedom. Outside the period covered by home-confinement/house-arrest (see above), this would include a total period of [REDACTED] days during which Petković's freedom of movement (and associated freedoms) were restricted as a result of the conditions set by the Trial Chamber to his release. These conditions included strenuous restrictions on his freedom, including:

Código Penal (Penal Code);(England and Wales) *R v Taylor*, Court of Appeal (Criminal Division), 24 September 2013, para. 1;(New Zealand) *R v Potoru*, Auckland High Court, 14 September 2007;(Canada) *R.. v Downes* 79 O.R. (3d) 321 [2006] O.J. No. 555, at para.42.

[614] *Blaškić*, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, 3 April 1996, paras.13,18.

[615] See Annex 5:
(i) Penal Code, Article 54;
(ii) Law on Criminal Proceedings, Article 119,120;
(iii) Law on Serving the Prison Sentences, Articles 106,128,130.

[REDACTED] [616]

467. These restrictive measures affected the exercise of his rights and freedom and had an effect comparable, though less severe, than those resulting from house-arrest.[617] Again, as an effect of Rule 101(B), Petković would have been entitled to the accounting of that amount of time and the Trial Chamber erred when it failed to take this fact into account.

468. Based on the above, the Trial Chamber should, *proprio motu*, have deducted from the sentence to be served:

i. [REDACTED] days for time spent under house arrest.

ii. [REDACTED] days for conditional/restrictive provisional release.

469. The Chamber's failure to account for and deduct those periods is an error of law and fact and constitute an abuse of discretion that meet the respective standards of review. As a relief, and should the Appeals Chamber not acquit Petković altogether, it should order that these two periods be accounted for and deducted from the time remaining to be served.

[616] See, e.g., Order on Provisional Release of Milivoj Petković, 30/07/2004;Decision to Grant Accused Milivoj Petković's Application for Variation of the Conditions for Provisional Release, 07/10/2005;Decision on the Motion for Provisional Release of the Accused Petković, 11/06/2007.

[617] See, e.g., ECHR, *Guzzardi v. Italy*, Appl. No. 7367/76, 6 November 1980;Council of Europe Recommendation CM/Rec(2014)4;UK: Criminal Justice Act 2003, Section 240A;*R v Morgan*, Court of Appeal (Criminal Division), 25 July 2014, paras.18-20.

OVERALL RELIEF SOUGHT

470. As set out above, the Trial Chamber erred when finding Petković liable as a participant in a JCE and his conviction on this mode of liability should be overturned. The Appeals Chamber should quash and reverse Petković's conviction and enter a Judgement of not guilty on all counts.

471. If Petković's appeal succeeds to some degree, reflecting a lesser degree of responsibility, the Appeals Chamber should order a corresponding reduction in the Petković's sentence, in addition to reduction justified by errors pertaining to sentencing – Ground 7).

472. If Petković's appeal does not succeed with regard to the criminal responsibility, the Appeals Chamber should correct the Trial Chamber's errors and abuse of its discretion regarding Petković's sentence and significantly reduce his sentence.

Word Count: 49991
Respectfully submitted,

Vesna Alaburić, Lead Counsel

APPEAL BRIEF ANNEXES

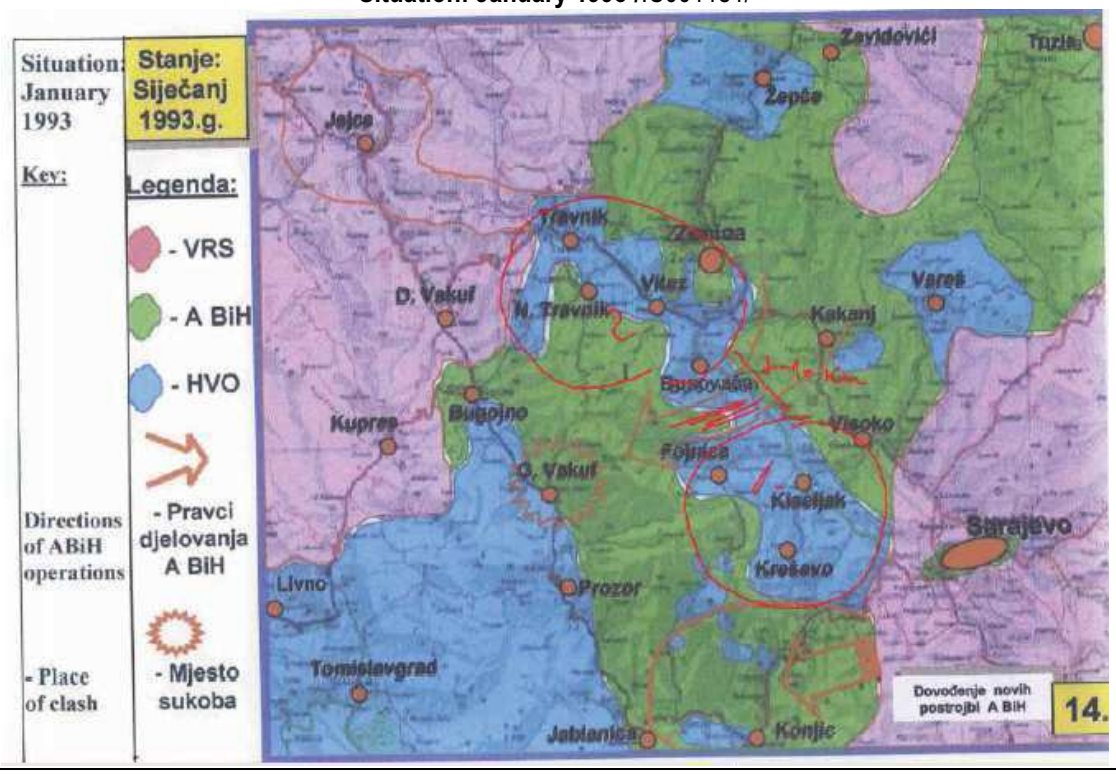
ANNEX 1

Expansion of the territory under the control of BH Army in 1993

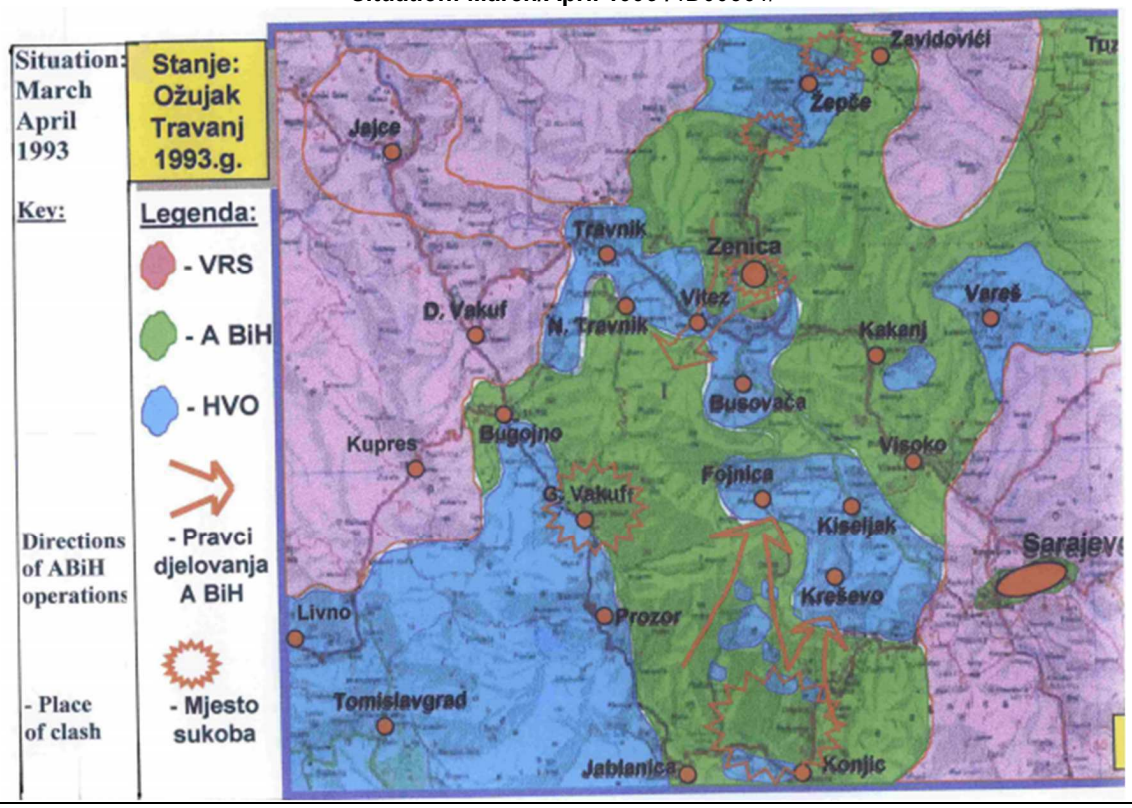
Third amended Indictment: Prosecutor v. Enver Hadžihasanović and Amir Kubura

26. In 1993 (and until 18 March 1994), the ABiH participated in an armed conflict with the Croatian Defence Council (hereafter: HVO) and the Army of the Republic of Croatia (hereafter: HV). In particular, in April 1993 and in early summer 1993, ABiH 3rd Corps units launched a series of heavy attacks against the HVO including, but not limited to, the municipalities of Bugojno, Busovaca, Kakanj, Maglaj, Novi Travnik, Travnik, Vares, Vitez, Zavidovici, Zenica and Zepce. The ABiH operations culminated in a massive attack between 7 and 13 June 1993 within, *inter alia*, the municipalities of Kakanj, Travnik and Zenica.

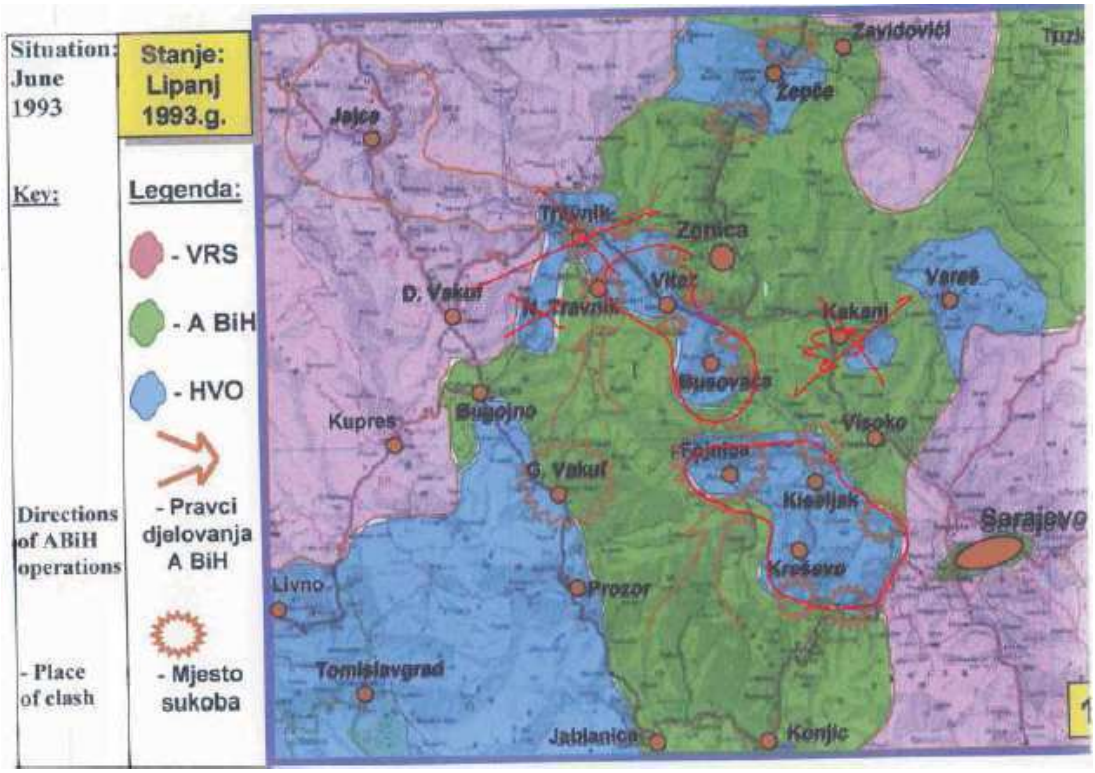
Situation: January 1993 /IC001181/



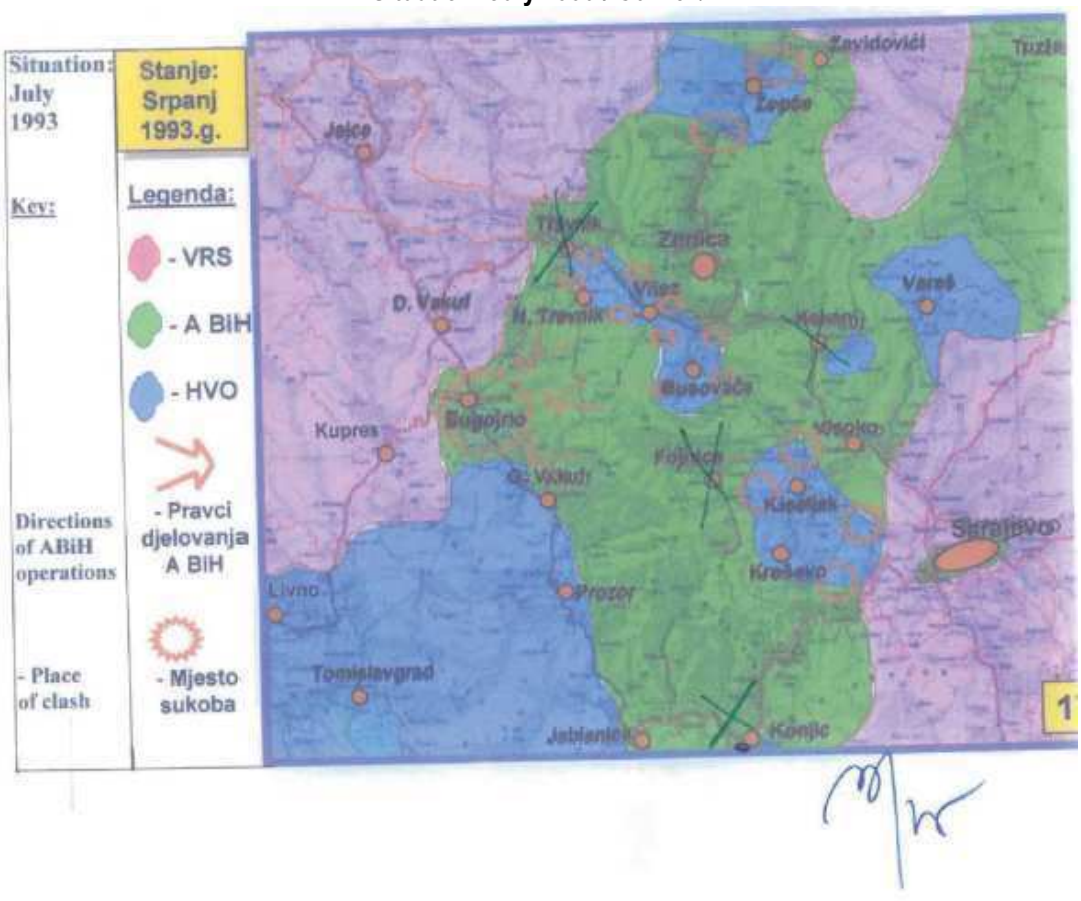
Situation: March/April 1993 /4D00561/



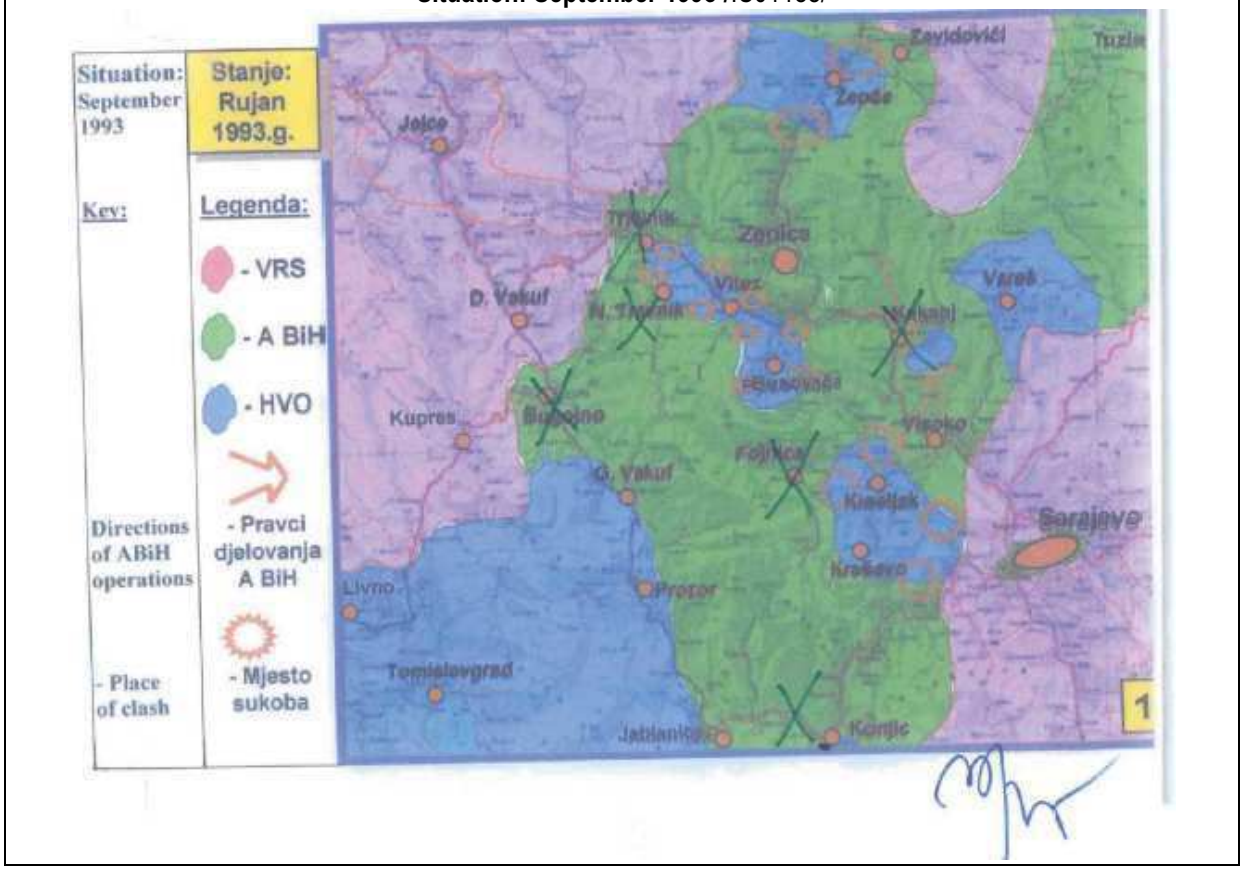
Situation: June 1993 /IC01183/



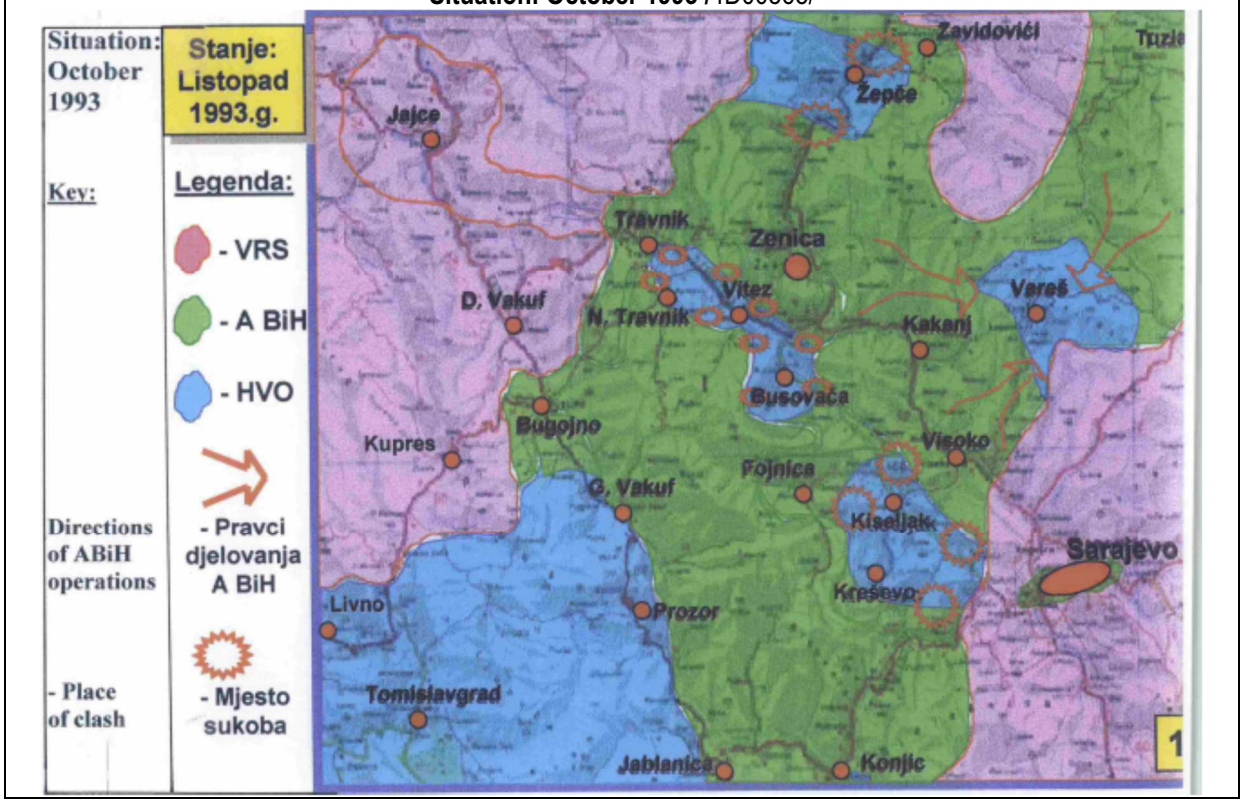
Situation: July 1993 /IC01187/



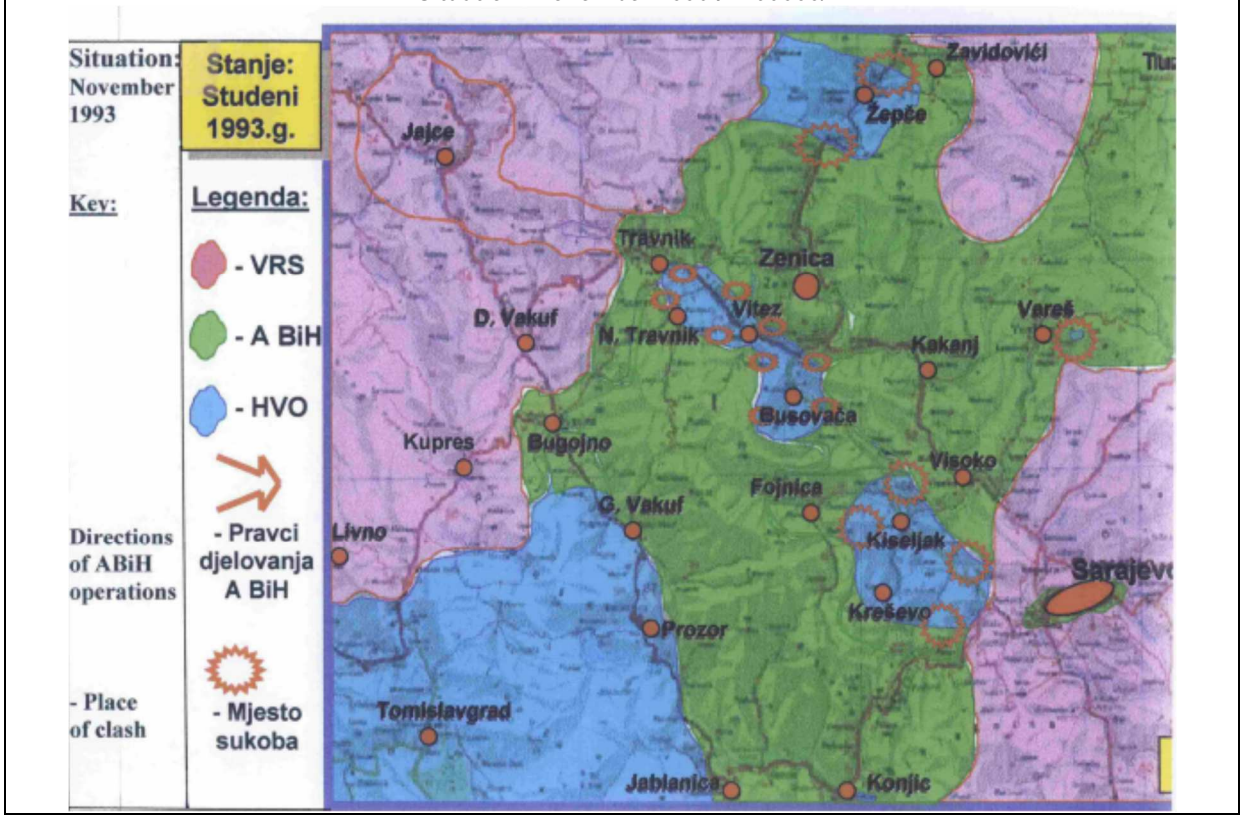
Situation: September 1993 /IC01188/



Situation: October 1993 /4D00565/



Situation: November 1993 /4D00566/



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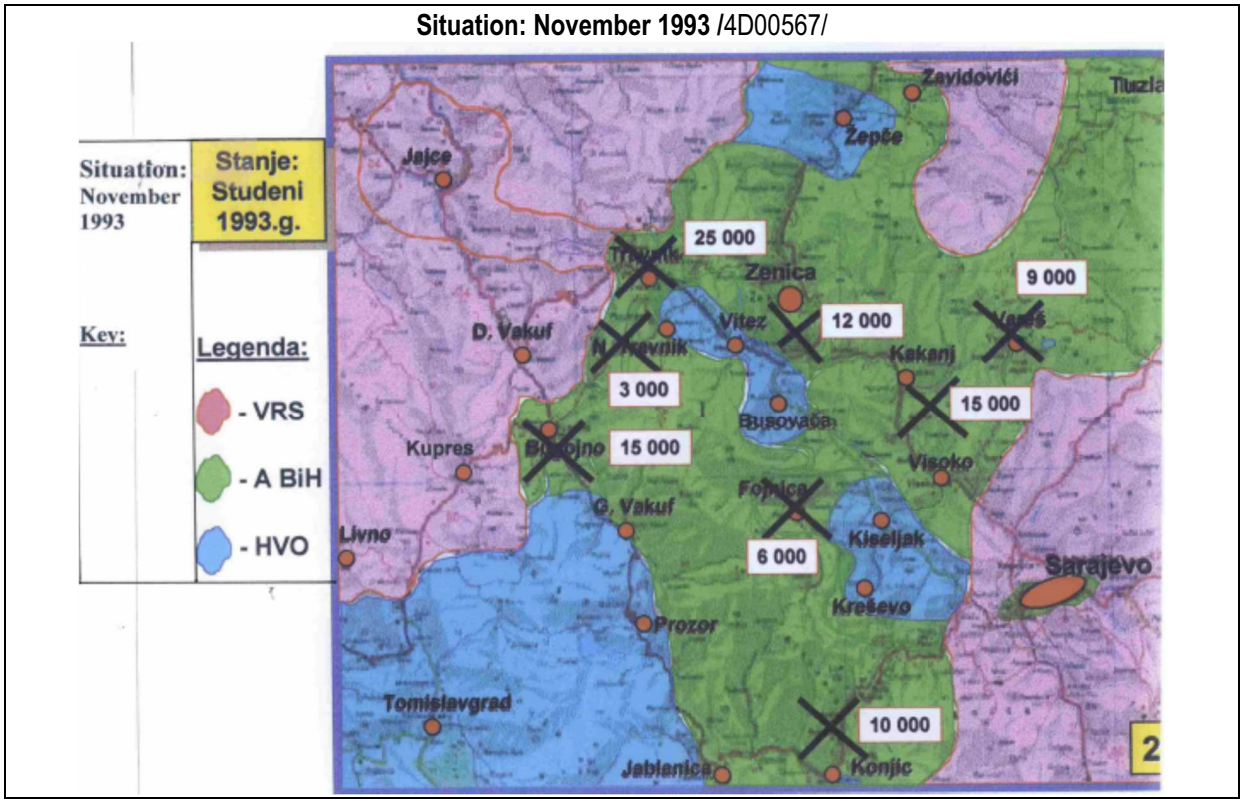
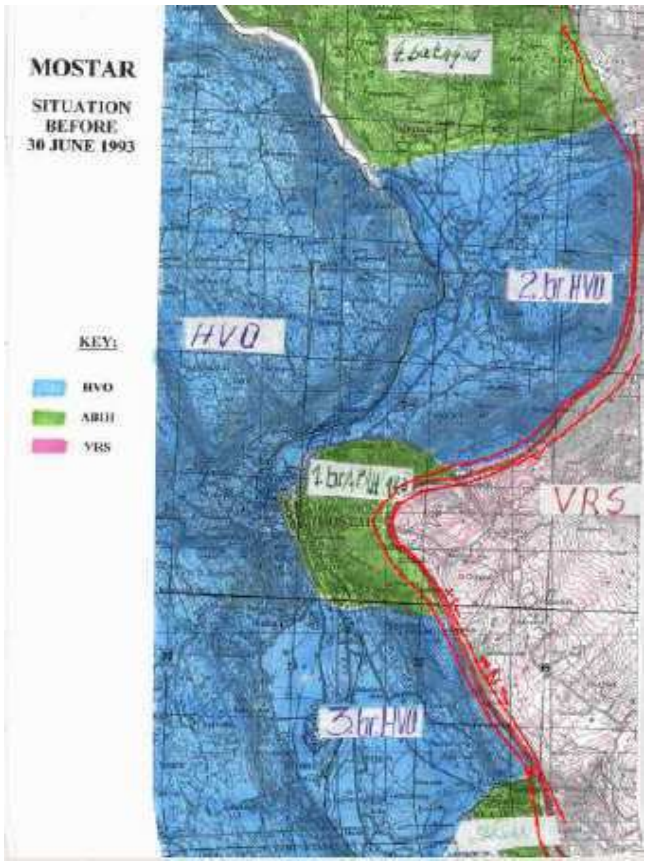
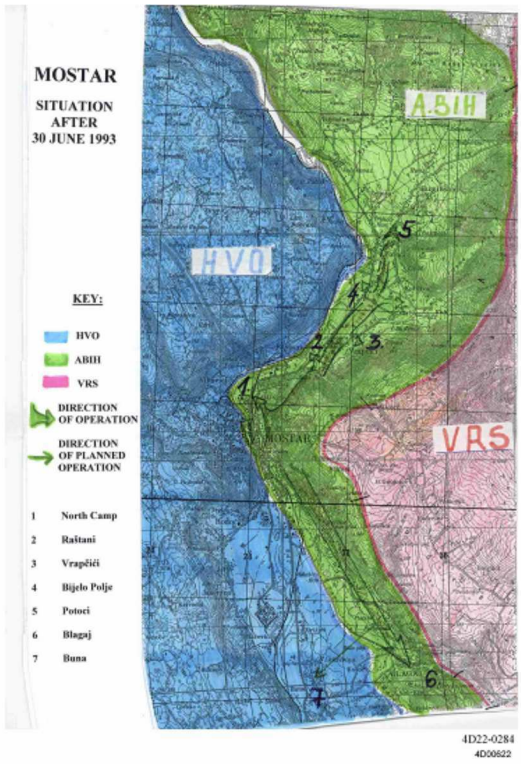


Mostar: Situation before 30 June 1993 /IC01184/

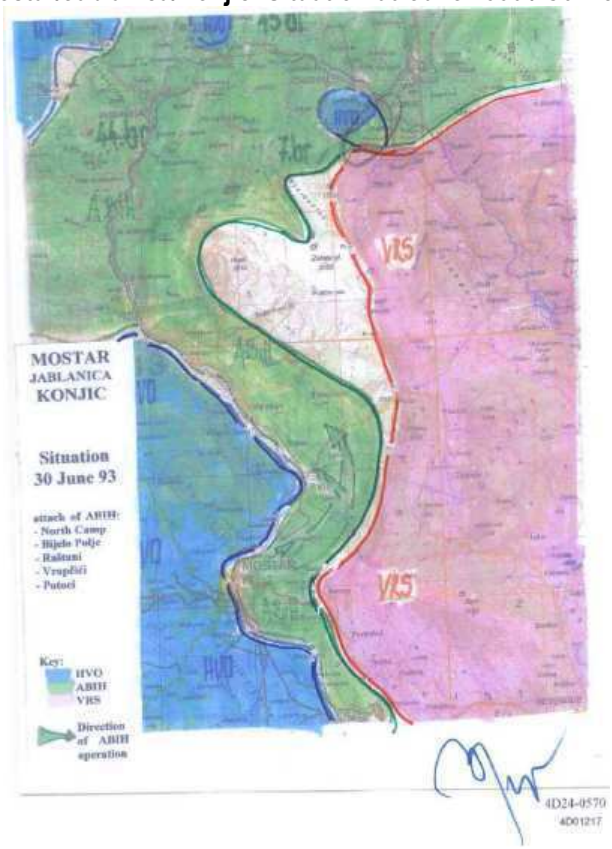


Mostar/Jablanica/Konjic: Situation till 30 June 1993 /IC01185/

Mostar: Situation after 30 June 1993 /4D00622/



Mostar/Jablanica/Konjic: Situation 30 June 1993 /IC01186/



ANNEX 2

Petković's orders to avoid conflicts with the ABIH

20 June 1992 / **Petkovic to HVO Municipal Staff in Konjic and Gornji Vakuf** /4D00397/

Gentlemen, I have been informed by TO (Teritorial Defence) and HVO that the situation among you is extremely tense and dangerous. Sit down immediatelly at the common table and clear up the situation you are faced with. I expect that you did not forget that TO and HVO are integral parts of OS BH (the Armed Forces of Bosnia and Herzegovina). Instead of strengthening of your mutual bonds in the fight against our common anemy who is on the treshold of your Municipality, you are preparing to use arms against each other.

In the name of Croats and Muslims I beg you to overcome this situation, as the members of the OS BH (Armed Forces of BH) you are bound to do that.

Don't allow that serbo-chetnick's enemy occupy your Municipality, therefore come to your senses and move together to the first line.

28 October 1992 / **Order issued by Milivoj Petkovic to Zeljko Siljeg, re: setting up of a commission in order to shed light on the events in Prozor, ref: 01-2437/92, 28 October 1992** / 4D00901/

In order to shed light on the events in Prozor, set up a commission of 3 (three)

members with the task of preparing a detailed report on the following:

1.) The causes and reasons for the conflict between the HVO /Croatian Defence

Council/ and the TO /Territorial Defence/

16 November 1992 / **Order by Petkovic to OZ NWH Command** /4D00399/

Get in touch urgently with the Command of the BH Army in Gornji Vakuf to overcome mistrust and to send units to the defence lines in Bugojno.

16 December 1992 / **Order by Milivoj Petkovic to OZ NWH** /4D00389/

5. In executing this order, achieve full coordination with Bosnian Army units.

11 January 1993 / **Order by Milivoj Petkovic, Mostar, 11 January 1993.** / 4D00354/

Send us the report on the situation in Gornji Vakuf and particularly pay attention and elaborate on the relations between your side and our allies.

13 January 1993 / **Petkovic's order on avoiding conflicts** /P01115/

1. All HVO Commands must identify the causes of conflicts in their territory.

2. Immediately establish contact with the Muslim side and solve the problems through talks.

3. Prevent any attempts of lower commands to solve the problems by using force.

4. Where possible, set up joint teams with the Muslim side to solve the past or current conflicts.

18 January 1993 / **Petkovic's letter to Bugojno, Travnik, Vitez and N. Travnik** /P01190/

Please avoid conflicts of any kind, because we and the Muslims do not want our dispute to escalate again.

20 January 1993 / **Order by Petkovic to Konjic HVO** /4D00433/

Establish contact with the BH Army in Konjic and work on calming down the situation.

27 January 1993 / **Order by Milivoj Petkovic regarding ceasefire between HVO and ABiH** /4D00019/

Resolve all disputes with the BiH Army units through negotiations with the competent BiH Army commanders.

05 February 1993 / **Order by Petkovic and Miljenko Lasic to units of OZ SEH** /4D01048/

Inform the units of the Army of BiH so that they could reinforce their defense lines too.

09 February 1993 / **Petkovic's letter to Halilovic** /4D00075/

I looked forward to each new soldier, Croatian or Muslim, because I knew that they had a common goal.
The HVO has not changed its attitude or behaviour towards the BH Army to this day.
We are aware that with the present balance of powers, neither the HVO nor the BH Army alone can defeat the Chetniks.

23 March 1993 / **Order by Petkovic and Pasalic** /P01709/

1. Immediately cease all actions and activities that harm the joint struggle of the HVO and BH Army.

5. Resolve all disagreements which led to the tense situation by joint agreements with mutual understanding and readiness by both sides to make concessions.

18 April 1993 / **Order by Petkovic to all operational zones** /P01959/

5. Establish communications with the BH Army Command and request them to implement the same order.

01 June 1993 / **Order from Petkovic to all Operational Zones** /P02599/

You should negotiate with the Muslim side to calm the situation whenever it is possible.

ANNEX 3

Petković's orders to comply with humanitarian law and enable the operations of international organizations

08 September 1992 / **Order to HVO municipal staff** /P00458/

Humanitarian aid vehicles of the UN High Commission for Refugees /UNHCR/ were unnecessarily kept at the checkpoints controlled by the Croatian Defence Council /HVO/ for several times, and to avoid such cases, I

ORDER

1. All humanitarian aid convoys are allowed to go through and should be escorted by the police as necessary.

23 October 1992 / **Order to HVO in Prozor, Gornji Vakuf, Bugojno, Vitez, Travnik and Konjic** /P00625/

U R G E N T Work on the suspension of combat activities. For talks seek the most responsible and most influential individuals.

Prevent uncontrolled activities of individuals and groups.

23 October 1992 / **Order to OZ NWH** /P00633/

TAKE URGENT ACTION TO STOP THE FIGHTING.

FIND AND TALK TO THOSE WITH THE GREATEST RESPONSIBILITY AND INFLUENCE.

PREVENT INDIVIDUALS AND GROUP FROM ACTING IN AN UNCONTROLLED WAY.

31 October 1992 / **Order to HVO re: an order to stop individuals from destroying Muslim houses in Prozor** /P00679/

Preventing the wild behaviour

of individuals

15 November 1992 / **Order for defence signed by Milivoj Petkovic on 1992/11/15 on Forward Command Post Capljina regarding combat activities in past days** /2D01295/

Prevent defeatism and panic in units and soldiers from fleeing their positions. Prevent any misconduct which would disrupt performance of tasks. Vigorous legal measures shall be taken against those responsible for violence, crime and looting directed against the population or prisoners of war.

29 January 1993 / **Order to HVO in Prozor** /P01344/

1. Arrest and imprison all our extremists.

20 April 1993 / **Order to all OZ** /P01994/

1. Free access for ICRC to civilians in all territories.

2. Respect and protection of the civilian population affected by combat activities.

3. Arrested civilians and soldiers to be treated in a humane manner and ensure adequate protection ensured for them.

4. The ICRC shall be informed of the identity of all arrested and detained persons and ICRC representatives allowed to visit them.

5. All the wounded shall be collected, taken care of and protected at all times and in every of their affiliation.

6. Free access and safe passage shall be given to convoys of humanitarian and medical aid.

22 April 1993 / **Order directing proper treatment of civilians and the capture all out of control units and individuals** /P10268/

3. The individuals and groups that have gone out of control are to be arrested immediately.

....

5. All those who obstruct the missions of the UNPROFOR, UNHCR and other international institutions are to be prevented from doing so in most energetic manner.

All these organisations must have full freedom of movement and activity and must be assisted in carrying out their tasks.

22 April 1993 / **Order to all OZ's: abide International Humanitarian laws** /P02038/

1. The respect and protection of the civilian population affected by war.

Civilians, by definition, do not have an active role in the conflicts and can therefore not be the object of attack.

22 April 1993 / **Order to all OZ** /P02036/

3. Immediately set about arresting individuals or groups who have gone totally out of control.
4. Using all available means, including even the use of force, stop the most extreme individuals and groups who are out of control, who are not protecting civilians, are torching and destroying civilian buildings, and whose actions are sheer terrorism.
5. Take the most rigorous measures to stop anyone who obstructs the missions of UNPROFOR, the UNHCR, and other international institutions.

   All of these organisations must have full freedom of movement and operation, and they must be assisted in performing their tasks.

23 April 1993 / **Order by Stojic and Petkovic** /4D00320/

When need arises for medical assistance, ensure that your doctors and other medical personnel have access to each injured person at any moment – regardless of whether the person is a civilian, or a member of an enemy unit.

Behave towards civilians and prisoners solely in accordance with international conventions and rules.

25 April 1993 / **Order by Stojic and Petkovic to all OZ** /P02084/

3. Do not react to provocative actions, and in the event of an attack take all necessary measures to protect civilian population and soldiers, with the use of all available means repel the attack assertively.

25 April 1993 / **Order to Zeljko Siljeg from Stojic and Petkovic to suspend all offensive actions against Armija Bosnia I Herzegovina in accordance with the cease fire agreement signed in Zagreb** /P02089/

3. Do not respond to provocations; in case of attack, take all necessary measures for protection of civilian population and soldiers and energetically repel the attack using all available means.

28 April 1993 **/ Request to HVO Ban Jelacic Josip Brigade** /P11213/

2. Prohibit setting fire to facilities owned by Muslims and severely punish persons who do that. Submit to me immediately any information on perpetrators.

26 May 1993 / **Order to all operative zones regarding freedom of movement and guaranteed safety for UNPROFOR and humanitarian organisations** /P02527/

1. UNPROFOR and international humanitarian organisations must be allowed free and unrestricted access and movement.

2. I demand that HVO members provide guaranteed security for UNPROFOR and international humanitarian organisations.

3. I demand free passage and unrestricted movement for civilian and commercial goods.

01 June 1993 / **Order to all OZ to get ready for defensive actions against ABIH** /P02599/

4. You should request all members of HVO to treat the civilians and property in the spirit of international conventions.

13 June 1993 / **Signed and stamped order, ref. 02-2/1-01-1048/93, from Milivoj PETKOVIC to all Croatian Defence Council commanding levels re: necessity to protect UNPROFOR staff members.** / P02739/

– protecting the lives of UNPROFOR members

– avoiding opening fire in areas where UNPROFOR members are encountered

– stopping UNPROFOR members from moving from our territory to the left bank at times of intensified fire

14 June 1993 / **Order by Petkovic** /4D00332/

Humanitarian convoy of the UNCHR which has been stopped on the section Jablanica-Konjic at the check-point Drecelj should be allowed to pass.

20 July 1993 / **Order re: treatment of prisoners and civilians** /3D01163/

1. HVO members must treat imprisoned soldiers and, civilians in particular, in accordance with international standards.

2. Prevent wilful behaviour by individuals and groups.

3. Prevent destruction of property.

4. Protect women, children and the elderly.

02 August 1993 / **Order to all HVO units** /P03895/

1. All HVO units will enable the unobstructed passage of convoys of humanitarian aid.

09 August 1993 / **Signed and stamped order issued by Milivoj PETKOVIC re: complying with Croatian Defence Council Main Staff orders, maintaining order, discipline and responsibility. Ref. 02-2/1-01/1782/93** / P04055/

11. Prevent looting, inhumane conduct and arbitrary behaviour by members of your units by all possible means.

17 August 1993 / **Stamped order issued by Milivoj PETKOVIC to all Croatian Defence Council Oz's: Mate BOBAN's order reiterated re: unhindered movement of UN forces in the Territory of Bosnia and Herzegovina. Ref: 02-2/1-01-2007/93.** / P04251/

1. The UN forces shall be given freedom of movement on all roads controlled by the HVO /Croatian Defence Council/.
2. Freedom of movement shall also mean unhindered UN helicopter flights along designated corridors.

....

4. The HVO Main Staff shall be advised on any possible misunderstanding; those breaching /this order/ shall be severely prosecuted.

17 September 1993 / **Order issued by Milivoj PETKOVIC, ref. GS-2507-1/93 addressed to all Croatian Defence Council units to cease military actions not later than 18-Sep-1993; and all POWs to be released by 21-09-93** / P05138/

4. Secure the unhindered passage of all humanitarian convoys and the activity of charitable organisations.

14 October 1993 / **Signed and stamped order issued by Milivoj Petkovic to OZ NW Herzegovina and SE Herzegovina, re: lecture on the International Humanitarian Law, ref: 02-2/1-01-2964/93, Citluk, 14 October 1993** / 4D00838/

1. By arrangement with the ICRC (International Committee of the Red Cross) the lecture on the international humanitarian law will be given to the oficers of the HR HB Armed forces.

24 October 1993 / **Order to Croatian Defence Council Vares issued by Milivoj PETKOVIC, dated 24/10/1993.** / P06063/

1. To cease all combat activities against UNPROFOR members immediately;

2. To ensure unhindered passage for the vehicles and soldiers as well as their return to the base;

3. To cooperate to a maximum degree in the realization of UNPROFOR mission;

25 October 1993 / **Signed request, ref. GS-1-25/93, by Milivoj PETKOVIC to Ivica RAJIC for information on the situation in Vares and Stupni Do and further actions** / P06078/

1. Submit correct information on Stupni Do to me by 0900 hours

....

3. Allow the UN to enter Stupni Do tomorrow, whatever the consequences

(understand that the more difficult it is made for them the worse it is for us).

4. Avoid any kind of conflict with the UN.

10 November 1993 / **Order to Rajic** /P06580/

1. On the territories of HVO-controlled opcina Kiseljak, Kresevo and part of Fojnica a smooth running of operations carried out by UN, UNHCR, IRC and other organizations must be secured.

2. All contacts and talks with the representatives of these organizations must be characterized by calmness and dignity.

22 November 1993 / **Stamped order signed by Milivoj PETKOVIC, Croatian Defence Council GS Deputy COS, to Military Districts Mostar, Vitez and Tomislavgrad re: new measures for the reduction of criminal offences in Croatian Defence Council units** /P06791/

1. To analyse without delay the criminal offences committed in your units.
2. To take the most rigorous measures to disable the perpetrators of any such criminal offence.

23 November 1993 / **Order, ref. 02-2/1-01-3428/93, issued by Milivoj PETKOVIC re: unrestricted passage of humanitarian aid convoy via Prozor.** / P06825/

1. The convoy departing from Tomislavgrad via Prozor-Vakuf to Central Bosnia at 0630 hrs on 24.11.1993 shall be enabled a free passage without any additional explanation.

ANNEX 4

Petković's cease fire orders

23 October 1992 / **Order issued by Milivoj PETKOVIC to all Croatian Defence Council armed forces in Prozor, Gornji Vakuf, Bugojno, Vitez, Travnik and Konjic re: the immediate suspension of combat activities. Ref. 23/10-92** / P00625/

U R G E N T Work on the suspension of combat activities. For talks seek the most responsible and most influential individuals.

Prevent uncontrolled activities of individuals and groups.

24 October 1992 / **Order issued by Milivoj PETKOVIC to the units in Prozor; Bugojno; Gornji Vakuf; Vitez; Konjic; Tomislavgrad and Travnik re: cease fire. Ref. 24-10/92** / P00644/

1. Establish contact with the conflicting party and agree an unconditional ceasefire.

....

/illegible/ /handwritten word:/ Establish ceasefire form a mixed group for monitoring the situation and solving any problems.

06 January 1993 / **Order, ref. 01-04/93, issued by Gen. Milivoj PETKOVIC to Commanders of the Tomislavgrad, Vitez and Mostar Operative Zones, dated 6.1.93.** / P01059/

1. Respect the cease-fire and suspension of combat activities.

20 January 1993 / **Stamped and signed order aborting all Croatian Defence Council combat activities against Armija Bosnia I Herzegovina in the Gornji Vakuf municipality issued by Milivoj PETKOVIC and Arif PASALIC, dated 20.1.93.** / P01238/

1. Simultaneously and unconditionally end all combat operations between HVO and BH Army forces in the entire territory of Gornji Vakuf municipality.

24 January 1993 / **Order issued from Geneva by Milivoj PETKOVIC for Croatian Defence Council to cease all offensive activities towards Armija Bosnia I Herzegovina in Gornji Vakuf.** / P01286/

1. HVO units in Gornji Vakuf shall stop the offensive activities against ABiH /Army of Bosnia and Herzegovina/ units (IMMEDIATELY).

11 February 1993 / **Stamped and signed joint order by Milivoj PETKOVIC and Sefer HALILOVIC to issue joint command orders to honour the mutual agreement between the Croatian Defence Council and the Bosnia and Herzegovina Army to prevent the further disagreement** / P01467/

b) It shall issue an order that units immediately abandon positions between the BH Army and the HVO, cover all trenches and bunkers built for that purpose /as written/ and withdraw to the positions facing the aggressor.

18 April 1993 / **Order by Petkovic to all operational zones** /P01959/

1. All HVO units shall immediately cease hostilities with BH Army units.

22 April 1993 / **Order cease offensive activities and fortify achieved positions, issued by Milivoj PETKOVIC, dated 22.4.93.** / P02037/

1. I hereby order to cease IMMEDIATELY offensive activities against the Bosnian army and artillery fire on Jablanica.

25 April 1993 / **Signed and stamped order, ref. 02-1-438/93, issued by Bruno STOJIC and Milivoj PETKOVIC, dated 25.4.93.** / P02084/

1. Immediately cease all offensive operations against BH Army units.

28 April 1993 / **Stamped request by PetkovicMilivoj to HVO BanJelacicJosipBrigade Cmdr to immediately submit a report** / P11213/

4. Take immediate measures in order to stop conflicts.

31 May 1993 / **Stamped order, ref. 02-2/1-01-905/93 issued by Milivoj PETKOVIC, dated 31/05/1993.** / P02577/

1. All HVO units must fully respect the ceasefire during the Muslim holiday of Greater Bairam from 1 June to 4 June 1993.

20 July 1993 / **Signed and stamped circulation issued by Milivoj PETKOVIC of a decision by Alija IZETBEGOVIC, regarding immediate and unconditional cease fire. Ref. 02-011-376/93** / P03584/

1. The units of the Army of BiH and of the Croatian Defence Council are called upon to suspend immediately and unconditionally the mutual attacks and to release without delay the captured soldiers and civilians.

17 September 1993 / **Order issued by Milivoj PETKOVIC, ref. GS-2507-1/93 addressed to all Croatian Defence Council units to cease military actions not later than 18-Sep-1993; and all POWs to be released by 21-09-93** / P05138/

1. The HVO shall cease firing and all combat operations by 1200 hours on 18 September at the latest.

12 April 1994 / **Signed and stamped order, ref. 02-10-02-94-25, issued by Milivoj PETKOVIC re: disengagement of military units in accordance with the Peace Agreement signed in Split** / P08188/

1. Carry out all preparations to pull out military forces from the town of Mostar to the lines specified on the map of disengagement.

ANNEX 5

Provisions of Croatian laws relevant for crediting
custody, home detention, time spent for medical treatment, exceptional leaves, annual leave and going out as a part of prison sentence

1.

KAZNENI ZAKON

(Urednički pročišćeni tekst, „Narodne novine“, broj 125/11 i 144/12)

Uračunavanje pritvora, istražnog zatvora i ranije kazne

Članak 54.

Vrijeme provedeno u pritvoru i istražnom zatvoru, kao i svako oduzimanje slobode u vezi s kaznenim djelom, uračunava se u izrečenu kaznu zatvora, kaznu dugotrajnog zatvora i novčanu kaznu. Prilikom uračunavanja izjednačuje se jedan dan pritvora, istražnog zatvora i svakog drugog oduzimanja slobode te jedan dnevni iznos novčane kazne s jednim danom zatvora.

PENAL CODE

(Editorial consolidated text, "Official Gazette", No. 125/11 and 144/12)

Crediting custody, remand and earlier penalties

Article 54

Time spent in custody and remand, as well as any deprivation of freedom related to the criminal offense, shall be included as a part of prison sentence, long-term imprisonment and a fine. When counting the credit, one day in custody, remand or any other deprivation of liberty and one daily amount of fine is equated to one day in prison.

2.

ZAKON O KAZNENOM POSTUPKU

(Urednički pročišćeni tekst, "Narodne novine", broj 152/08, 76/09, 80/11, 91/12 - Odluka i Rješenje USRH, 143/12, 56/13, 145/13 i **152/14**)

8. Istražni zatvor u domu

Članak 119.

(1) Kad postoje okolnosti iz članka 123. stavka 1. točke 1. do 4. ovog Zakona, sud može odrediti istražni zatvor u domu protiv trudne žene, osobe s tjelesnim nedostacima koje joj onemogućuju ili bitno otežavaju kretanje, osobe koja je navršila 70 godina života te u onim slučajevima kada to sud ocijeni iznimno opravdanim, ako je za ostvarenje svrhe istražnog zatvora dovoljna zabrana okrivljeniku da se udaljuje iz doma.
(2) Prije određivanja istražnog zatvora u domu sud će zatražiti od okrivljenika pisanu suglasnost punoljetnih osoba koje borave u domu okrivljenika o primjeni tehničkih sredstava nadzora iz stavka 3. ovog članka.
(3) Rješenje o istražnom zatvoru u domu sadrži zabranu okrivljeniku da se udaljuje iz doma. Tim rješenjem sud može odrediti primjenu tehničkih sredstava nadzora kojim se osigurava provođenje istražnog zatvora u domu.Prema potrebi, sud može naložiti mjeru opreza.
(4) Osobi u istražnom zatvoru u domu, sud može iznimno odobriti da se za određeno vrijeme udalji iz doma ako:
1) je to neophodno potrebno radi liječenja osobe, ili
2) to nalažu posebne okolnosti uslijed kojih bi mogle nastupiti teške posljedice po život, zdravlje ili imovinu.
(5) Ako se osoba u istražnom zatvoru u domu udalji iz doma protivno zabrani suda, ili na drugi način ometa provođenje istražnog zatvoru u domu, protiv te osobe odredit će se istražni zatvor. O tome će se osoba upozoriti u rješenju o određivanju istražnog zatvora u domu.

Članak 120.

Ako drukčije nije propisano ovim Zakonom, na istražni zatvor u domu se odgovarajuće primjenjuju odredbe o istražnom zatvoru.

LAW ON CRIMINAL PROCEEDINGS

(Editorial consolidated text, "Official Gazette", No. 152/08, 76/09, 80/11, 91/12 – Decision and Resolution of the Constitutional Court of the Republic of Croatia, 143/12, 56/13, 145/13 and 152/14)

8 Home Detention

Article 119

(1) If there are circumstances referred to in Article 123 paragraph 1 items 1 to 4 of this Act, the court may order home detention against pregnant women, a person with physical handicaps that prevent or significantly interfere with the movement, a person who has reached 70 years of age and in those cases when the court deems duly justified when a restriction to the defendant to leave one's home is deemed sufficient for the purpose of investigative detention.
(2) Before ordering home detention the court shall request from the defendant a written consent from persons of age who live in the defendant's home on the application of technical devices used for surveillance purposes referred to in paragraph 3 of this Article.
(3) The ruling on home detention shall prohibit the defendant from leaving his home. This ruling of the court may provide for the use of technical surveillance devices in order to ensure the implementation of home detention. If necessary, the court may order a precautionary measure.
(4) A person who is ordered to be under home detention may be granted by the court, by way of an exception, to leave his home for a certain period of time if:
1) it is necessary for medical treatment of the person, or
2) it is necessary due to special circumstances in midst of which there may be serious consequences to the life, health or property of that person.
(5) If a person under home detention leaves his home contrary to the orders of the court, or interferes with implementation of home detention in another way, investigative detention shall be ordered against that person. The person shall be informed thereof in the ruling on home detention.

Article 120

If not otherwise prescribed by this Act, the provisions on investigative detention shall apply respectively to home detention.

3.

ZAKON O IZVRŠAVANJU KAZNE ZATVORA

(Pročišćeni tekst, „Narodne novine“, broj 128/99, 55/00, 59/00, 129/00, 59/01, 67/01, 11/02, 190/03, 76/07, 27/08, 83/09, 18/11, 48/11, 125/11, 56/13 i 150/13)

SMJEŠTAJ RADI LIJEČENJA

Članak 106.

(1) O smještaju zatvorenika u bolesničku sobu iste kaznionice, odnosno zatvora radi liječenja odlučuje liječnik.

(2) U slučaju težih ili dugotrajnih bolesti za čije uspješno liječenje ne postoje uvjeti u kaznionici, odnosno zatvoru zatvorenika će se na prijedlog liječnika premjestiti u kaznionicu, odnosno zatvor u kojem postoje uvjeti za takvo liječenje ili u zatvorsku bolnicu. Za vrijeme liječenja u zatvorskoj bolnici prema zatvoreniku će se provoditi program izvršavanja utvrđen u kaznionici, odnosno zatvoru iz kojeg je upućen na liječenje.

(3) Kad postoji opasnost ugrožavanja života zatvorenika zbog dužeg prijevoza u kaznionicu, odnosno zatvor iz stavka 2. ovoga članka, kao i kad ne postoji mogućnost potrebnoga specijalističkog liječenja, na prijedlog liječnika zatvorenika će se uputiti u zdravstvenu ustanovu. O upućivanju odlučuje Središnji ured Uprave za zatvorski sustav. U slučaju žurnosti o upućivanju će odlučiti upravitelj i o tome obavijestiti Središnji ured Uprave za zatvorski sustav.

(4) Vrijeme provedeno u zdravstvenoj ustanovi radi liječenja uračunava se u kaznu.

POGODNOSTI
IZVANREDNI IZLASCI

Članak 128.

(1) Upravitelj može zatvoreniku odoboriti izvanredni izlazak radi:

1) nazočnosti pokopu člana obitelji,

2) posjeta teško bolesnom članu obitelji,

3) rođenja, krštenja i vjenčanja u obitelji,

4) odlaska na sud ili tijelo uprave zbog sudskog ili upravnog postupka radi ostvarenja pravnih interesa,

5) radi obavljanja neodgodivog i važnog posla.

(2) Izvanredni izlasci iz stavka 1. ovoga članka odobravaju se jednokratno u pravilu na vlastiti trošak, pod nadzorom ili bez nadzora u trajanju do tri dana.

(3) Molbi za izvanredni izlazak zatvorenik će priložiti dokumentaciju u svezi s razlogom zbog kojeg izlaz traži.

(4) Zbog neopravdanog kašnjenja u trajanju duljem od dvadeset četiri sata upravitelj će dati nalog za raspisivanjem tjeralice.

(5) Zatvoreniku se neće računati u izdržavanje kazne zatvora neopravdano kašnjenje u trajanju duljem od dvadeset četiri sata.

VRSTE POGODNOSTI

Članak 130.

(1) Pogodnosti ublažavanja uvjeta unutar kaznionice, odnosno zatvora jesu:

1) korištenje vlastitoga televizijskog prijamnika,

2) samostalna priprava hrane i napitka,

3) uređenje životnog prostora osobnim stvarima,

4) češće primanje paketa i primanje paketa u većoj težini,

5) slobodno raspolaganje određenim novčanim iznosom s pologa unutar kaznionice, odnosno zatvora,

6) nagrađivanje novčano ili u stvarima.

(2) Pogodnosti smanjivanja ograničenja kretanja unutar kaznionice, odnosno zatvora jesu:

1) nezaključavanje prostorija za smještaj i boravak zatvorenika,

2) produljen boravak u zajedničkim prostorijama (čitaonica, knjižnica, prostorije za dnevni boravak, učionice, dvorana za tjelovježbu, športska igrališta, blagavaonica i drugi prostori i prostorije za korištenje slobodnog vremena),

3) produljeni boravak na zraku.

(3) Pogodnosti češćih dodira s vanjskim svijetom jesu:

1) češći i dulji posjeti obitelji i trećih osoba s nadzorom ili bez nadzora u kaznionici, odnosno zatvoru,

2) telefoniranje bez nadzora,

3) boravak s bračnim ili izvanbračnim drugom u posebnoj prostoriji bez nadzora,

4) korištenje godišnjeg odmora ili dijela godišnjeg odmora u poluotvorenom ili otvorenom djelu

kaznionice, odnosno zatvora ili izvan kaznionice, odnosno zatvora,

5) izlazak s posjetiteljem u mjesto u kojem se nalazi kaznionica, odnosno zatvor u trajanju od dva do osam sati,

6) izlazak bez posjeta u mjesto u kojem se nalazi kaznionica, odnosno zatvor u trajanju od dva do četiri sata,

7) izlazak u mjesto prebivališta, odnosno boravišta ili drugo mjesto, ili izlazak radi posjeta članovima obitelji ili drugoj osobi u ukupnom trajanju do sto dvadeset sati mjesečno, a u mjesecima u kojima su blagdani, do sto četrdeset četiri sata,

8) raspored u odjel s blažim uvjetima izdržavanja kazne iste kaznionice, odnosno zatvora.

(4) Rješenje o odobravanju i uskrati s pogodnosti unosi se u osobnik.

(5) Zbog neopravdanog kašnjenja s pogodnosti izlaska u trajanju duljem od dvadeset četiri sata upravitelj će dati nalog za raspisivanje tjeralice.

(6) Zatvoreniku se neće računati u izdržavanje kazne zatvora neopravdano kašnjenje u trajanju duljem od dvadeset četiri sata.

LAW ON SERVING THE PRISON SENTENCE

(Consolidated text, "Official Gazette", No. 128/99, 55/00, 59/00, 129/00, 59/01, 67/01, 11/02, 190/03, 76/07, 27/08, 83/09, 18/11, 48/11, 125/11, 56/13 and 150/13)

ACCOMODATION FOR THE PURPOSE OF MEDICAL TREATMENT
Article 106

(1) Transfers of inmates to infirmaries within prisons or jails for the purpose of their medical treatment shall be decided by medical doctor.
(2) In the case of a serious or lengthy illnesses which can not be adequately treated in prison or jail, inmates shall be transferred to the prison or jail where conditions for such treatment exist, or to the prison hospital, subject to a proposal given by a medical doctor. During the medical treatment in the prison hospital, the execution program determined in prison or jail from which the inmate was sent to hospital shall be applied.
(3) When danger of threat to life of an inmate due to a long transportation to the prison or jail mentioned in Paragraph 2 of this Article exists, as well as when it is not possible to provide for the necessary specialist medical treatment, inmate shall be directed to a medical institution subject to a proposal made by medical doctor. Decision on such transfer shall be made by the Head Office of the Prison Administration. In case of urgency warden shall decide about it and inform the Head Office of the Prison Administration.
(4) The time spent in a medical institution for the purpose of medical treatment shall be includeed as a part of prison sentence.

BENEFITS
EXCEPTIONAL LEAVES
Article 128

(1) Warden may approve an exceptional leave to an inmate for purpose of:
1) going to a funeral of a family member;
2) visiting seriously ill family member;
3) birth, baptism and marriage in the family,
4) going to court or public administration body to attend judicial or administrative proceedings in order to pursue his or her legal interests,
5) performing the urgent and important task.
(2) Exceptional leaves specified in Paragraph 1 of this Article may be approved once, as a rule at its own expense, with or without supervision and up to three days.
(3) An inmate shall attach documents related to reasons for applying for a leave, to his or her application for an exceptional leave.
(4) An arrest warrant shall be issued by warden if an inmate does not return without justified reason within 24 hours following the time of scheduled return.
(5) An unjustified delay of more than twenty-four hours shall not be calculated as a part of a served prison sentence to an inmate.

TYPES OF BENEFITS
Article 130

(1) Conveniences of mitigation conditions inside the prison or jail are:
1) use of own television set,
2) independent preparation of food and drink,
3) arranging the living space with the personal stuff,
4) receiving packages more often and receiving packages of a greater weight,
5) free disposal of a certain amount of money from the deposit within the prison or jail,
6) receiving rewards in funding or in stuff.
(2) Benefits of reduced restrictions on movement within the prison or jail are:
1) unlocked rooms for the accommodation and stay of prisoners,
2) extended stay in the common areas (reading room, library, lounge rooms, classrooms, gymnasium, sports grounds, dining room and other spaces and facilities for the use of free time),
3) extended stays on the air.
(3) Conveniences of frequent contact with the outside world are:
1) more frequent and longer visits of families and third parties with supervision or without supervision in prison or jail,
2) telephone calls without supervision,
3) room stay with marital or extra-marital spouse in a separate room without supervision,
4) use of annual leave or a part of annual leave in the semi-open or open part of prison or jail or outside of prison or jail,
5) going out with the visitor in a place where a prison or jail is situated from two up to eight hours,
6) going out without a visit to a place where a prison or jail is situated from two up to four hours,
7) going out to the place of residence or temporary residence or other place, or going out to visit family members or another person for a total amount of one hundred and twenty hours per month, and up to one hundred forty-four hours in the months with the holidays included,
8) placement in the department with milder conditions for serving the sentence, inside of the same prison or jail.
(4) The decision on approval and denial of the benefits shall be entered in the personal file.
(5) Due to the unjustified delay in the return from the benefit release for more than twenty-four hours, the warden will issue an order for a warrant.
(6) The unjustified delay of more than twenty-four hours shall not be counted to the inmate's serving of the sentence of imprisonment.

ABBREVIATIONS

ABIH	– Army of Bosnia and Herzegovina
ATG	– Anti-Terrorist Group
BCS	– Bosnian-Croatian-Serbian language
BiH	– Bosnia and Herzegovina
ECMM	– European Community Monitoring Mission
FRY	– Former Republic of Yugoslavia
FTB	– Final Trial Brief
GC	– Geneva Convention
HR HB	– Croatian Republic of Herceg Bosna
HVO	– Croatian Defence Council
HZ HB	– Croatian Community of Herceg Bosna
HZ(R) H-B	– Croatian Community (Republic) of Herceg Bosna
ICC	– International Criminal Court
ICRC	– International Committee of the Red Cross
ICTR	– International Criminal Tribunal for Rwanda
ICTY	– International Criminal Tribunal for the Former Yugoslavia
IHL	– International Humanitarian Law
IMT	– International Military Tribunal
Indictment	– Prosecutor v. Prlić et al., Second Amended Indictment
JCE	– Joint Criminal Enterprise
KB	– Convict's Battalion
LRTWC	– Law Reports of Trials of War Criminals
MOS	– Muslim Armed Forces
MP	– Military Police
ONO	– Operations and Training Department
OZ	– Operative Zone
OZ NWH	– Operative Zone North West Herzegovina
OZ SEH	– Operative Zone South East Herzegovina
POW	– Prisoner(s) of War
PPN	– Special Purposes Unit
RBiH	– Republic of Bosnia and Herzegovina
Regiment	– Bruno Bušić Regiment
RUF	– Revolutionary United Front
SIS	– Informative and Security Service
TO	– Territorial Defence
UNHCR	– United Nations High Commissioner for Refugees
UNMO	– United Nations Military Observer
UNPROFOR	– United Nations Protection Force
VOS	– Military Informative Service
VRS	– Army of the Republic of Srpska