UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-04-74-T

Date : 29 May 2013

Original : ENGLISH
French

IN TRIAL CHAMBER III

Before: **Judge Jean-Claude Antonetti, Presiding**
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: **Mr John Hocking**

Judgement of: **29 May 2013**

THE PROSECUTOR

v.

Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

PUBLIC

SEPARATE AND PARTIALLY DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI

Volume 6 of 6

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The **deliberations** of the Judges of the Trial Chamber took over **one year**. This period of time may at first seem excessive in view of the time taken for deliberations in other cases.

One must, however, be aware that this was a trial with **six accused** which, in terms of the time required for the work, means that there were in fact **six cases** to deal with, which to a large extent explains the time taken for the deliberations.

Moreover, unlike other cases, the number of crime scenes (70), of municipalities and camps (13) and of exhibits admitted into evidence (9872), makes it evident that this case has nothing in common with the other cases that have already been tried.

As such, the Trial Chamber was obliged to take time to examine **all** the evidence admitted and recalled, in particular, in the parties' final briefs.

This voluminous Judgement is the result of all of the Judges' deliberations, in the course of which every word of the Judgement was analysed, weighed and determined.

There was **broad consensus** on the majority of the issues dealt with, with the exception of those relating to the alleged JCE, the international armed conflict and the threshold of evidence required for certain crimes (mainly concerning sniper victims).

As I considered that there were certain points in the Judgement which I had to supplement, I ultimately opted for this partially dissenting opinion, which will follow a plan structured to help the reader gain a better understanding of certain thorny subjects. Indeed, I ultimately considered it my duty to make an important contribution to **International Justice** by delving further into certain aspects of the **Judgement,** while at the same time raising certain contentious issues. Similarly, I decided to raise subjects about which I disagreed with the other Judges, which explains why the wording "by a majority" can be found in some of its paragraphs.

The presentation of a personal point of view makes it possible for the reader to gain a better understanding of all the aspects of the Judgement, in particular its reasoning and, where they occur, the differences in the approaches taken by the Judges.

I am perfectly aware of the fact that this opinion is rather unusual as it is over 500 pages long, but given the complexity of the case, it was not possible for me to make it any shorter.

To make it easier for the reader to understand my opinion, I have presented it with an outline which makes it possible to have a brief view of the **essential elements** of the case and of my view on certain specific points.

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A) Background

The Croatian members of the JCE alleged by the Prosecution are **Franjo Tuđman, Janko Bobetko and Gojko Šušak.** Unfortunately, they passed away before the Indictment was issued, and the **presidential transcripts** are the principal and only evidence we have on their participation in a common purpose.

It therefore seemed essential to me to refer to these transcripts, focusing on exactly **64** of them. These transcripts will be analysed from page seven onwards of this opinion with a view to reaching a conclusion on pages 57 and 58.

In addition to making it possible to understand any statements that may have been made characterising the alleged JCE, the meetings that took place in **Zagreb** under the presidency of **Franjo Tuđman** also provide an overall view of the **political background.**

I also include the minutes of the Presidency of the Republic of Bosnia and Herzegovina in this section.

It is necessary to recreate the **political background** to this case in order to gain a better understanding of the acts and conduct of **each of the accused.**

In order to gain the most accurate view possible of the events that took place, I relied mainly on the presidential *transcripts* put in chronological order and on the minutes of the Presidency of the Republic of Bosnia and Herzegovina.

I also examined other documents admitted into evidence – United Nations documents, specifically the Secretary General's reports and resolutions, in order to gain the most accurate view possible.

Some of the events recalled here are referred to in the Judgement; however, in the case of the **background**, I found it necessary to provide my own point of view on the basis of all the particularly relevant documents that could not be fully discussed in the Judgement.

The Trial Chamber admitted numerous documents characterised as **presidential transcripts.** These documents are the more or less complete verbatim accounts of discussions between **Franjo Tuđman**, ministers from his government, foreign dignitaries and Croats from the Republic of Bosnia and Herzegovina.

The question that arises is how did the Prosecution gain access to these *verbatim* accounts? The answer was provided in the *Kordić* and *Čerkez* case in which witnesses explained how these recordings had been made and then transcribed.[1] What is quite surprising is that audio recordings were systematically made of all discussions, and, given the fact that microphones were visible in the rooms, it appears that the dignitaries present were not unaware of this fact.[2] They therefore knew that what they said was being recorded.

Unfortunately, we do not have these audio recordings in the language used by the participants, as the cassettes were reused when needed and then discarded.[3] This gives rise to a certain number of problems. These audio tapes were transcribed into **English** for the trial. Who translated them, and are the words used by the speakers rendered faithfully by the translation? Similarly, when President **Franjo Tuđman** had talks with foreign dignitaries (**Lord Owen** for example), what they both said was interpreted.[4] Did the interpreter, whose presence is not mentioned, interpret correctly? We can also see that gaps sometimes appear in the text, which occur when the person responsible for transcribing the recordings was not able to understand what was said.

With regard to the **probative value** of the recordings, it is necessary to ask how much **weight** we can give to recordings of this kind. In order to resolve this difficulty, it seems crucial to me to review each recording in the light of all the other recordings so as to determine whether there was a common thread or anything automatic in what was said, and so as to detect errors. This is the reason which prompted me to focus mainly on **64 recordings** in order to establish a **general structure** allowing me to better understand what was said and what the persons addressing their interlocutors really wanted, even if it meant discovering that some of the statements made were not very logical or had even been falsified. However, I must say, that almost all of the transcribed discussions are admissible in terms of their relevance and have a certain probative value, even though there are sometimes reasons to regret the gaps in the questions and answers.

To make it easier to follow, I had to summarise the exchanges in **each individual document** and organise my findings on the exchanges by putting words in italics preceded by the sign (" ➢"). This seemed all the more necessary, since in my view, it is then possible to situate the events described in the Indictment through those words and so have a full "picture."

[1] Slobodan Praljak, T(F), p. 43720; *Kordić and Čerkez* case, T(F) pp. 27489, 27490.
[2] Peter Galbraith, T(F), p. 6461.
[3] "Prosecution Reply to Defence Responses to Prosecution Motion to Admit Presidential Transcript Evidence", 3 December 2007, para. 19.

A) The Presidential Transcripts

1. **During the 7th session of the Supreme State Council of the Republic of Croatia on 8 June 1991**, President **Tuđman** stated that, from the perspective of a Croatia with full independence, or independence within an alliance, the present-day borders of Croatia, as established after the Second World War, were absurd from an administrative, commercial and security point of view.[5] Therefore, the solution was to be found in the partition of BiH. This partition would be in the interests of both **Serbia** and **Croatia**. The Muslim component would be forced to accept this solution.[6]

- According to **Franjo Tuđman,** Croatian leaders of the **HDZ-BiH** supported the position of the Croats from Croatia on the borders of Bosnia and Herzegovina and the determination of the borders of Croatia.[7] Should the events take an undemocratic turn, the Croatian politicians of Bosnia and Herzegovina should be prepared to take "Croatian decisions" in the same way that Serbian politicians will take "Serbian decisions."[8]

➢ ***There is no doubt that on 8 June 1991, President Tuđman was in theory in favour of the partition of the Republic of Bosnia and Herzegovina. This claim goes to support the Prosecution's point of view with regard to a Greater Croatia. The question that arises is whether this desire would lead to concrete acts. It is also necessary to note that these statements were made prior to the "deployment" of the international community through conferences, discussions, resolutions, etc....***

2. **During the 36th session of the Supreme State Council of the Republic of Croatia on 12 November 1991, Franjo Tuđman** and **Mate Boban** mainly discussed various important subjects such as the situation in Vukovar and Dubrovnik and the issue of the national and political status of the Croatian people of Bosnia and Herzegovina.[9]

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[4] Peter Galbraith, T(F), p. 6461.
[5] P 00037 (Minutes of the 7th Session of the Supreme State Council of the Republic of Croatia, 8 June 1991), p. 5.
[6] Josip Manolić, T(F), pp. 4293-4294; P 00037 (Minutes of the 7th Session of the Supreme State Council of the Republic of Croatia, 8 June 1991), pp. 38 and 39.
[7] P 00037 (Minutes of the 7th Session of the Supreme State Council of the Republic of Croatia, 8 June 1991), p. 8.
[8] P 000307 (Minutes of the 7th Session of the Supreme State Council of the Republic of Croatia, 8 June 1991), p. 8.
[9] P 00068 (Minutes of the 36th Session of the Supreme State Council of the Republic of Croatia, Meeting of the Supreme State Council, 12 November 1991), p. 52.

- **Franjo Tuđman** indicated that he had received a document signed by 18 Croatian officials attesting to a meeting on 15 October 1991 between the Croatian officials from 18 municipalities of Bosnia and Herzegovina, including Gornji Vakuf, Prozor, Jablanica, Mostar, Ljubuški, Čapljina and Stolac.[10]

- **Franjo Tuđman** declared that the Republic of Croatia would support and coordinate the military organisations of the seven municipalities close to the borders of the 1939 Croatian *Banovina* comprising the Croatian Community of Bosnian Posavina (Brčko, Orašje, Šamac, Odžak, Bosanski Brod, Derventa and Doboj).[11]

- Furthermore, he stated that he was going to conduct an operation to mobilise volunteers in Bosnia and Herzegovina so that the Croatian municipalities could organise their local defence against the well-armed Serbs and the Muslims who "were surely armed quite well, [too]." [12]

- **Franjo Tuđman** stated that the Republic of Croatia should provide these municipalities with instructions so they could form Croatian communities (the Community of Bosnian Posavina and the Community of Travnik), given that Serbian communities had already been created in this region.[13]

➢ ***What clearly emerges is that in November 1991, a number of municipalities decided to unite on their own initiative, but only seven of them close to Croatia, were to receive the support of the Republic of Croatia. Therefore, the initiative was not taken by Zagreb but by the Croats from the Republic of Bosnia and Herzegovina worried by the actions of the Serbs. Moreover, it should be noted that if Tuđman's intention had been to annex this region, he should have said that he was going to have the Croatian Army intervene directly whereas he speaks only of support or of coordination with the military organisations in seven municipalities close to the Croatian border.***

[10] P 00068 (Minutes of the 36th Session of the Supreme State Council of the Republic of Croatia, Meeting of the Supreme State Council, 12 November 1991), p. 52.
[11] P 00068 (Minutes of the 36th Session of the Supreme State Council of the Republic of Croatia, Meeting of the Supreme State Council, 12 November 1991), pp. 54, 55, 57 and 59.
[12] P 00068 (Minutes of the 36th Session of the Supreme State Council of the Republic of Croatia, Meeting of the Supreme State Council, 12 November 1991), p. 59.
[13] P 00068 (Minutes of the 36th session of the Supreme State Council of the Republic of Croatia, Meeting of the Supreme State Council, 12 November 1991), pp. 57 and 58.

It is therefore paradoxical to note that the Muslims from these municipalities wanted to be part of Croatia; this demonstrates the complexity of the problem.

3. At the 39th session of the Supreme State Council of the Republic of Croatia held on 18 November 1991 (in the presence of Franjo Tuđman, the representatives of the ministers involved in the Council's work, the Public Prosecutor, the Government's counsel and the heads of the information services),[14] **Franjo Tuđman** declared that the decision in question was not **a decision on establishing the Community of Herceg-Bosna** but a **declaration** which proved that the Croats of Bosnia and Herzegovina were working to establish themselves as a community, without however separating from Bosnia and Herzegovina.[15]

- ***This document does not substantiate the theory of a Greater Croatia, since according to Franjo Tuđman, the Croats of Bosnia and Herzegovina did not want a partition of Bosnia and Herzegovina.***

4. The purpose of the meeting in Zagreb on 8 January 1992 between **Franjo Tuđman** and **other key figures** – which was attended by Josip Manolić and Gojko Šušak, as well as by **the** members of the Presidency of Bosnia and Herzegovina, Nikola Koljević and Franjo Boras – was to discuss dividing Bosnia and Herzegovina between the Serbs and the Croats.[16]

- According to **Franjo Tuđman**, Europe, like the rest of the world, would be inclined to encourage a division of Bosnia and Herzegovina between Croatia and Serbia in order to avoid the creation of an Islamic state in Europe.[17]

- ***This meeting makes it possible to better identify the approach that some people had in relation to Bosnia and Herzegovina, which was to search for a legal solution (a referendum). Franjo Tuđman himself stated a possibility in respect of Europe's position on the partition of Bosnia and Herzegovina, which supports my feeling that Franjo***

[14] P 00080 (Minutes of the 39th Session of the Supreme State Council of the Republic of Croatia, 18 November 1991), p. 1.
[15] P 00080 (Minutes of the 39th Session of the Supreme State Council of the Republic of Croatia, 18 November 1991), p. 46.
[16] P 00108 (Minutes of the Meeting between Franjo Tuđman and the Members of the Presidency of Bosnia and Herzegovina, Zagreb, 8 January 1992), p. 1.
[17] P 00108 (Minutes of the Meeting between Franjo Tuđman and the Members of the Presidency of Bosnia and Herzegovina, Zagreb, 8 January 1992), p. 48.

Tuđman realised that partition depended on the international community and not his wishes.

5. A meeting was held on 3 March 1992 between **Franjo Tuđman and Gojko Šušak**, and was also attended by **Janko Bobetko, Ivan Čermak and Ivan Milas**, as well as a delegation including **Perković, Čalović, Munivrana, Adanić, Mijatović and Dr Mihomir Žužul** at the Presidential Palace in Zagreb**.**[18]

- **Franjo Tuđman** stated that he was going to give the order to establish such headquarters.[19] **Gojko Šušak** said that he had provided weapons[20] and that **Colonel Mikulić** was sending daily reports on the activities in each municipality to him and Generals **Bobetko** and **Roso**.[21]

➢ ***It thus appears that in March 1992, headquarters were established on the Dalmatian coast in Croatia for the purposes of coordination and that the Croatian Army was informed of the activities in each municipality.***

6. On 4 March 1992, a meeting was held between **Franjo Tuđman**, the commanders of the Army of the Republic of Croatia and other key figures.

➢ ***It appears that in March 1992, the 4th and 116th HV Brigades operated in Herzegovina without having received any orders, since the Croats of Herzegovina were incapable of defending the front line from Mostar to Popovo Polje. The objective was to mount a defence against the Serbian Army and not to launch an attack on the Serbs of Bosnia and Herzegovina and the Muslims, since the front line was in Dubrovnik.***

7. The purpose of the meeting on **10 March 1992** was in fact to discuss the leadership of the HDZ-BiH.[22] Franjo Tuđman explained that there were three candidates for the presidency of the HDZ-BiH.[23] Franjo Tuđman stated that **Miljenko Brkić** was the best candidate for the

[18] P 00130 (Minutes of the Meeting between Franjo Tuđman and Gojko Šušak, 3 March 1992), p.1.
[19] P 00130 (Minutes of the Meeting between Franjo Tuđman and Gojko Šušak, 3 March 1992), p.74.
[20] P 00130 (Minutes of the Meeting between Franjo Tuđman and Gojko Šušak, 3 March 1992), p.74
[21] P 00130 (Minutes of the Meeting between Franjo Tuđman and Gojko Šušak, 3 March 1992), p.74.
[22] P 00134 (Presidential Transcript of the Meeting of the HDZ presidency, 10 March 1992), p. 3.
[23] P 00134 (Presidential Transcript of the Meeting of the HDZ presidency, 10 March 1992), p. 99.

presidency of the HDZ, and that **Mate Boban** would remain the Vice-President with a role focused on the Croatian Government for Croatian unity in Bosnia and on economic issues.[24] Nevertheless, **Franjo Tuđman** stated that in the event that **Miljenko Brkić** refused, **Mate Boban** would take over the presidency.[25] In addition, **Franjo Tuđman** stated that **Markešić** would be relieved of his duties as party secretary and a different secretary would be appointed in his place.[26]

- **Mate Boban** suggested organising several public meetings of the HDZ with Herceg-Bosna in Split in order to address the Croats.[27] **Franjo Tuđman** agreed to the proposals made by **Mate Boban** and asked **Perica Jurić** and Drago Krpina to organise the Committee with Mate Boban, Kljuić and Miljenko Brkić.[28]

- **Franjo Tuđman** stated that **Alija Izetbegović** had appealed to him for unity between the Croats and the Muslims of Bosnia and Herzegovina, and told him to let the Serbs "separate into a ghetto."[29] According **to Franjo Tuđman, a Muslim-Croatian Bosnia and Herzegovina should emerge.**[30]

- **Franjo Tuđman** stated that **Mr Vance** and the European Community thought that the programme proposed by the HDZ-BiH was acceptable, which was a great success.[31]

➢ ***The conclusion that can be drawn from this HDZ meeting is that Franjo Tuđman was directly involved in the choice of a candidate for President of the BiH HDZ made by the Croats of Bosnia and Herzegovina, with Mate Boban appearing as their second choice. It is curious to note that Alija Izetbegović appeared to be in favour of separating from the Serbs in order to have a Muslim-Croatian Bosnia and Herzegovina.***

8. The meeting on 20 April 1992 between **Franjo Tuđman** and international dignitaries was held at the Presidential Palace in Zagreb.

[24] P 00134 (Presidential Transcript of the Meeting of the HDZ presidency, 10 March 1992), p. 114.
[25] P 00134 (Presidential Transcript of the Meeting of the HDZ presidency, 10 March 1992), p. 114.
[26] P 00134 (Presidential Transcript of the Meeting of the HDZ presidency, 10 March 1992), p. 121.
[27] P 00134 (Presidential Transcript of the Meeting of the HDZ presidency, 10 March 1992), p. 119.
[28] P 00134 (Presidential Transcript of the Meeting of the HDZ presidency, 10 March 1992), p. 120.
[29] P 00134 (Presidential Transcript of the Meeting of the HDZ presidency, 10 March 1992), p. 115.
[30] P 00134 (Presidential Transcript of the Meeting of the HDZ presidency, 10 March 1992), p. 115.
[31] P 00134 (Presidential Transcript of a Meeting of the HDZ Presidency 10 March 1992), pp. 112 and 113.

- **Franjo Tuđman** stated that the Croats of Bosnia and Herzegovina had asked him not to relinquish territories which had belonged to Croatia before the Second World War, that is to say, not to relinquish territories in Bosnia, nor relinquish the Croatian population of Bosnia and Herzegovina.[32]

- According to him, the new **Republic of Bosnia and Herzegovina** should consist of **three nations** in which the Croats would not form a minority and would have rights as a **constituent nation** and territories in which the majority of the inhabitants would be Croats.[33]

- **Franjo Tuđman** recalled that the Republic of Croatia had recognised the independence and sovereignty of Bosnia and Herzegovina.[34]

➢ ***President Franjo Tuđman laid out a two-pronged approach to the American Ambassador Warren Zimmerman. On the one hand, he recalled that the Croats of BiH had asked him not to relinquish territories in Bosnia inhabited by Croats while also saying that the Republic of Croatia had recognised the independence of BiH.***

9. A meeting was held between **Franjo Tuđman** and **Alija Izetbegović** in **Zagreb** on **21 July 1992**.

- **Alija Izetbegović** stated that the HVO of central Bosnia was trying to seize power in regions where the population was only 20 to 30 % Croat, and 60 to 70% Muslim.[35] **Alija Izetbegović** stated that the HVO was armed and/or aided by the **Republic of Croatia**, had light machine guns and mortars,[36] and that cooperation between the HVO and the TO had deteriorated in certain regions as a result of the HVO's intention of creating a state within Bosnia and Herzegovina.[37]

[32] P 00167 (Minutes of a Meeting between Franjo Tuđman, Warren Zimmerman and Others, 20 April 1992), pp. 6 and 7.
[33] P 00167 (Minutes of a Meeting between Franjo Tuđman, Warren Zimmerman and Others, 20 April 1992), p. 6.
[34] P 00167 (Minutes of a Meeting between Franjo Tuđman, Warren Zimmerman and Others, 20 April 1992), p. 6.
[35] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of Their Ministers and Associates, 21 July 1992), p. 50.
[36] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of their Ministers and Associates, 21 July 1992), p. 50.
[37] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of Their Ministers and Associates, 21 July 1992), pp. 36 and. 37.

- **Alija Izetbegović** declared that he was opposed to a military structure having the authority to change the civilian structure of a government and refused to accept the legalisation of the HVO.[38] In fact, **Alija Izetbegović** declared that if the HVO were accepted as a military structure, Bosnia and Herzegovina would not recognise nor accept the replacement of the civilian government by the HVO as a permanent solution.[39]

- **Franjo Tuđman** responded by saying that he expected the delegation of Bosnia and Herzegovina to establish "[a] **Government that is going to function in accordance with the circumstances created in the war" and the requests of the European Community**.[40]

- **Franjo Tuđman** declared that **Western Herzegovina** was "ethnically the cleanest" region, in which Croats accounted for **98% or 99%** of the population.[41]

- **Franjo Tuđman** assured **Alija Izetbegović** that the borders of Bosnia and Herzegovina and of Croatia would remain as the international community had recognised them.[42]

- **Franjo Tuđman** explained that out of concern for respect of the borders, the Republic of Croatia had encouraged the Croatian people to vote in the elections and the referendum.[43]

- **Franjo Tuđman** reminded **Alija Izetbegović** of Croatia's position in support of a unified Bosnia and Herzegovina, while asking him to take into account the situation of the Croats in Bosnia and Herzegovina.[44] In effect, **Franjo Tuđman** declared that a solution had to be found with a view to making the Croats a constituent unit of Bosnia and giving them the right to hold dual nationality.[45] The 7th item of the Agreement laid down the principle that

[38] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of Their Ministers and Associates, 21 July 1992), pp. 133 and. 140.
[39] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of their Ministers and Associates, 21 July 1992), p. 134.
[40] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of Their Ministers and Associates, 21 July 1992), p. 149.
[41] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of Their Ministers and Associates, 21 July 1992), p. 61.
[42] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of their Ministers and Associates, 21 July 1992), p. 42.
[43] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of Their Ministers and Associates, 21 July 1992), p. 43.
[44] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of Their Ministers and Associates, 21 July 1992), p. 45.
[45] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of their Ministers and Associates, 21 July 1992), p. 49.

the Republic of Bosnia and Herzegovina should recognise the members of the Croatian ethnic community in Bosnia and Herzegovina through regulations on nationality.[46]

- ***The meeting between Franjo Tuđman and A. Izetbegović on 21 July 1992 is interesting as all the issues were raised there.***

  Franjo Tuđman reaffirmed the inviolability of the borders. He supported the fact that the Croats of Herzegovina had to have dual nationality.

  Item 5 which stipulates that the HVO is an integral part of the unified armed forces of the Republic of BiH is the important item in the Agreement.

10. The meeting between **Franjo Tuđman, Slobodan Praljak** and a number of key figures, including **Anton Tus, Vinko Vrbanac, Josip Lucić, I. Agotić, S. Letica and Jezerčić,** was held in Zagreb on **1 August 1992**.

- **Slobodan Praljak** stated that he had provided **Ivan Čermak** with a precise ethnic map on which a line indicated the places where the Croats formed a majority with some Muslims.[47] **Slobodan Praljak** stated that **Ivan Čermak** was preparing to build fortifications which followed this line that **Franjo Tuđman** called the "ethnic line".[48]

- He stated that he had asked **Ivan Čermak** to have some of them sent to the municipalities in order to deal with the problems of structures.[49]

- **Slobodan Praljak** mentioned the difficulties with arming and the lack of organisation encountered in Slavonski Brod and in Bosnia, in particular by the 139th, 157th, 103rd and 108th Brigades,[50] as well as about the difficulties in Posavina due, in particular, to a failure

[46] P 00336 (Minutes of the Meeting between Franjo Tuđman, Alija Izetbegović and Some of Their Ministers and Associates, 21 July 1992), p. 129.
[47] P 00353 (Minutes of the Meeting between Franjo Tuđman, Slobodan Praljak, Anton Tus and Others, 1 August 1992), pp. 30 and 31.
[48] P 00353 (Minutes of the Meeting between Franjo Tuđman, Slobodan Praljak, Anton Tus and Others, 1 August 1992), pp. 30 and 31.
[49] P 00353 (Minutes of the Meeting between Franjo Tuđman, Slobodan Praljak, Anton Tus and Others, 1 August 1992), p. 29.
[50] P 00353 (Minutes of the Meeting between Franjo Tuđman, Slobodan Praljak, Anton Tus and Others, 1 August 1992), p. 24.

to understand the value of Posavina for the Republic of Croatia.[51] **Slobodan Praljak** stated that he had destroyed the police station in Slavonski Brod.[52]

- ***This meeting makes it possible to understand Slobodan Praljak's role and his point of view on the ethnic distribution in Bosnia and Herzegovina.***

11. The meeting on **29 August 1992** between **Franjo Tuđman, Alija Izetbegović, Mate Boban, Josip Manolić** and **Gojko Šušak** was held in Zagreb.

- **Franjo Tuđman** declared that there was no reason to include the towns of Nevesinje and Gacko in the Croatian region, but that the issue arose in the case of the Bosnian-Croatian region of Posavina.[53]

- He stated that Croatia had accepted **400,000** mainly **Muslim refugees** from Bosnia and Herzegovina and that Croatia was providing **Bosnia and Herzegovina** with provisions.[54]

- ***This meeting between Franjo Tuđman, Alija Izetbegović and Mate Boban made it possible to bring up the subject of the 400,000 refugees.***

12. A meeting between **Franjo Tuđman, Slobodan Praljak and Gojko Šušak** was held in Zagreb on **11 September 1992**.

- **Franjo Tuđman** declared that Croatia would insist that the regions which had been part of the **Croatian *Banovina*** were demographically and geopolitically part of Croatia.[55]

- ***This meeting made it possible to bring up the subject of the Banovina which, according to Franjo Tuđman, was demographically and geopolitically part of Croatia.***

[51] P 00353 (Minutes of the Meeting between Franjo Tuđman, Slobodan Praljak, Anton Tus and Others, 1 August 1992), p. 26.
[52] P 00353 (Minutes of the Meeting between Franjo Tuđman, Slobodan Praljak, Anton Tus and Others, 1 August 1992), pp. 27 and 28.
[53] P 00414 (Minutes of the Meeting between Franjo Tuđman and Alija Izetbegović, 29 August 1992), p. 41.
[54] P 00414 (Minutes of the Meeting between Franjo Tuđman and Alija Izetbegović, 29 August 1992), p. 19.
[55] P 00466 (Minutes of the Meeting of the HVO, attended by Franjo Tuđman, Slobodan Praljak, Gojko Šušak and Others, 11 September 1992, p. 54.

13. At the meeting with the Croats from the Republic of Bosnia and Herzegovina on 17 September 1992, **Franjo Tuđman** stated that Croatia had defended Herzegovina through the HVO in order to establish a Croatian government there, and he expressed his intention to maintain this government.[56] **Franjo Tuđman** made an appeal to work towards achieving unity between the military organisation and the political authorities.[57]

- **Jadranko Prlić** mentioned Croatia's assistance in the defence of Croatian territory in Bosnia and Herzegovina.[58]

- **Franjo Tuđman recalled Croatia's position which aimed at organising Bosnia and Herzegovina into three constituent units**.[59]

- **Jadranko Prlić** stated that the goal of the HVO soldiers and of the organs representing authority was to form and organise Bosnia and Herzegovina in accordance with the principles laid down by the European Community, that is to say, to form a Bosnia and Herzegovina consisting of three ethnic units.[60]

- **Franjo Tuđman** declared that Croatia would opt for secession if Bosnia failed to take Croatian interests into consideration, that is to say, one part would go to Serbia, and the other to Croatia, leaving a small Muslim state which would not be able to aspire to form a large Islamic state in Europe.[61] **Franjo Tuđman** stated that in order to secure the regions which were of vital interest to Croatia, the Muslim part included in the Serbian part of the Cazin-Bihać Krajina **would have to be annexed to Croatia.** [62]

[56] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 69.
[57] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 69.
[58] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 29.
[59] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 80.
[60] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 28.
[61] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), pp. 80 and. 81.
[62] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 75.

- **Franjo Tuđman** stated that the problem of Bosnia and Herzegovina was of historical and geopolitical importance for Croatia.[63] The preamble of the Croatian Constitution provided that the preservation of the state entailed the establishment of the **Croatian *Banovina***.[64] He explained that **the recognition of the independence of Croatia by the international community and the European Community provided a basis for pursuing Croatian policies in Bosnia and Herzegovina.**[65] **Franjo Tuđman declared that it was essential to organise the army and defend Herzegovina and Bosnian Posavina**.[66]

- In addition, **Franjo Tuđman** stated that he was in favour of signing an agreement between Croatia and Bosnia and Herzegovina authorising Croatia legally to intervene in Bosnia and Herzegovina.[67]

- He declared that the Muslims of Bosnia and Herzegovina could not obtain their weapons through Croatia alone, and announced that it was Croatia's intention to respect Security Council resolutions.[68]

- He called for quarrels with the Muslims to be avoided, but he also said that it was necessary to avoid submitting to the authority of **Alija Izetbegović** or that of any other Muslim.[69]

- He declared that the Croats would risk losing Bosnia and Herzegovina if they did not pay attention to the Muslim aspirations to create an Islamic state in Bosnia and Herzegovina.[70]

- He stated that when he was negotiating with him, Izetbegović refused to sign a military agreement which would have allowed the Croats to become directly involved in **Bosnian Posavina**.[71]

[63] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 65.
[64] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 67.
[65] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), pp. 65 and. 66.
[66] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 67.
[67] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 78.
[68] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 76.
[69] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 69.

- He stated that he was in favour of negotiations and friendship with the Muslims.[72]

➢ ***This meeting with the HDZ representatives makes it possible to note that at the end the position of the international community was recalled and reference was made to the existence of three constituent units in BiH. It should be noted that Izetbegović's refusal did not allow him to intervene directly in Posavina.***

14. The meeting on **26 September 1992** attended by **Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak, Hrvoje Šarinić** and **J. Lucić** at the Presidential Palace in Zagreb gave **Franjo Tuđman** the opportunity to say that reaching an agreement on the organisation of Bosnia and Herzegovina would be a wise solution with a view to putting an end to the war.[73]

- **Franjo Tuđman** stated that the difficult political and military situation Croatia was facing made it necessary to reach an agreement which could justify Croatia's involvement.[74]

- **Franjo Tuđman** expressed his concerns about the Muslims' aspirations to take control in the regions of Bosnia and Herzegovina the HVO had liberated and which were under its control.[75]

- **Slobodan Praljak** referred to discussions within the government according to which the refugees from Bosnia and Herzegovina were to be authorised to enter Croatia, since they were already in territory inhabited by Croats.[76] According to **Slobodan Praljak**, these

[70] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 70.
[71] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 71.
[72] P 00498 (Minutes of the Meeting of the Leadership of Croatia with the Representatives of the HDZ and the Croatian Representatives from Bosnia and Herzegovina, chaired by Franjo Tuđman, 17 September 1992), p. 73.
[73] P 00524 (Minutes of the 2nd Meeting of the HVO Government, attended by Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak and others, 26 September 1992), pp. 6 and 7.
[74] P 00524 (Minutes of the 2nd Meeting of the HVO Government, attended by Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak and others, 26 September 1992), p. 10.
[75] P 00524 (Minutes of the 2nd Meeting of the HVO Government, attended by Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak and others, 26 September 1992), p. 6.
[76] P 00524 (Minutes of the 2nd Meeting of the HVO Government, attended by Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak and others, 26 September 1992), p. 17.

refugees should then be sent from Croatia to the border and "wherever they can!"[77] However, Slobodan Praljak stated that it would be difficult to deport persons who had settled in the territory of Travnik, but at the same time emphasised the need to deport them so that the Croats could form a majority in the Travnik region.[78]

- **Franjo Tuđman** stated that the Serbs were going to hand over the 100-km Croatian region alongside the Sava river that had been part of the autonomous Croatian ***Banovina***.[79] He added that the Serbs were also offering the territory that stretched as far as Bosanski Brod, which means that they would give them more if the parties stopped fighting.[80]

- **Franjo Tuđman** said that **Panić** had told the United Nations that Croatia had **30,000** regular and **10,000** irregular Croatian soldiers in Bosnia and Herzegovina, and he stressed that it was necessary to cooperate militarily with the Muslims so that the Croats could defend their positions.[81]

- **Franjo Tuđman** stated that he had told the HVO to defend itself but also to negotiate with the two parties.[82]

➢ ***It is clear that in September 1992, Franjo Tuđman advocated negotiations with the Muslims and that there were discussions with the Serbs.***

15. The 5th session of the Croatian Defence and National Security Council (VONS) was held at the Presidential Palace in Zagreb on 27 November 1992 and was attended by **Franjo Tuđman, Janko Bobetko** and **Hrvoje Šarinić.**

- **Franjo Tuđman** explained that the Croats had to ensure that Bosnia and Herzegovina was organised "as a community of three constitutive peoples in which the Croatian people will

[77] P 00524 (Minutes of the 2nd Meeting of the HVO Government, attended by Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak and others, 26 September 1992), p. 17.
[78] P 00524 (Minutes of the 2nd Meeting of the HVO Government, attended by Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak and others, 26 September 1992), pp. 17 and 18.
[79] P 00524 (Minutes of the 2nd Meeting of the HVO Government, attended by Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak and others, 26 September 1992), p. 10.
[80] P 00524 (Minutes of the 2nd Meeting of the HVO Government, attended by Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak and others, 26 September 1992), p. 10.
[81] P 00524 (Minutes of the 2nd Meeting of the HVO Government, attended by Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak and others, 26 September 1992), p. 10.
[82] P 00524 (Minutes of the 2nd Meeting of the HVO Government, attended by Franjo Tuđman, Stjepan Mesić, Slobodan Praljak, Gojko Šušak and others, 26 September 1992), p. 10.

have their position ensured" [83] but if the international community authorised the Serbs to take their region, the Muslims should ally themselves with the Croats in order to preserve Croatian interests.[84]

- ***There is nothing ambiguous about this declaration of Franjo Tuđman to the Defence Council on 27 November 1992: he affirmed that BiH would have to be organised as a community of three constituent peoples and that if the international community authorised the Serbs to have a region, the Muslims should ally themselves with the Croats. It should be noted that no allusion was made to the events in Prozor...***

16. The meeting chaired by **Franjo Tuđman** was held at the Presidential Palace in Zagreb on **5 December 1992** and was attended by **Janko Bobetko, Gojko Šušak** and officials.

- **Franjo Tuđman** asserted that Croatia had secured Croatian territory in western Bosnia and Herzegovina which was of strategic importance for Croatia.[85] Moreover, according to **Franjo Tuđman**, the Croatian people in Bosnia and Herzegovina had complete independence in the HZ H-B region as well as international recognition, and they also had the right to the part of Bosnian Posavina in which the Croats formed a majority.[86]

- **Franjo Tuđman** affirmed that it was possible to recognise the rights of the Croats of Bosnian Posavina by determining the borders.[87] He added that given the geopolitical and strategic position of Croatia, it was in the historical and strategic interests of Croatia not to let the Cazin-Bihać Krajina region fall into the hands of the Serbs or of any other party. [88]

[83] P 00822 (Minutes of the 5th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Janko Bobetko and Hrvoje Šarinić, 27 November 1992), p. 52.
[84] P 00822 (Minutes of the 5th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Janko Bobetko and Hrvoje Šarinić, 27 November 1992), p. 52.
[85] P 00866 (Minutes of the Meeting Chaired by Franjo Tuđman and attended by Janko Bobetko, Gojko Šušak, the officials recently appointed to the Ministry of the Interior and the recently appointed commanders of zones and guards brigades, 5 December 1992), pp. 8 and 10.
[86] P 00866 (Minutes of the Meeting Chaired by Franjo Tuđman and attended by Janko Bobetko, Gojko Šušak, the officials recently appointed to the Ministry of the Interior and the recently appointed commanders of zones and guards brigades, 5 December 1992), p. 9.
[87] P 00866 (Minutes of the Meeting Chaired by Franjo Tuđman and attended by Janko Bobetko, Gojko Šušak, the officials recently appointed to the Ministry of the Interior and the recently appointed commanders of zones and guards brigades, 5 December 1992), p. 10.
[88] P 00866 (Minutes of the Meeting Chaired by Franjo Tuđman and attended by Janko Bobetko, Gojko Šušak, the officials recently appointed to the Ministry of the Interior and the recently appointed commanders of zones and guards brigades, 5 December 1992), p. 11.

- **Franjo Tuđman** said that it was now possible to discuss the internal organisation of Bosnia and Herzegovina as a federal community of three nations.[89]

➢ ***In December 1992, Franjo Tuđman referred to the role of Bosnian Posavina for the security of the Republic of Croatia, without however laying a claim to it, given that he once again recalled the organisation of Bosnia and Herzegovina into three nations.***

17. This meeting between **Tuđman, Cyrus Vance, Lord Owen, Ahtisaari, Alija Izetbegović** and **Mate Boban** was held in Zagreb on **15 January 1993.**

- **Mate Boban** expressed his support for the **Vance-Owen Plan**.[90]

- **Ahtissari** remarked that the cooperation between the Croatian and Muslim delegations was one of the positive elements of the process.[91]

- **Mate Boban** stated that in Mostar the Muslim party made up 50% of the provisional executive government [92] (Izetbegović affirmed that, on the contrary, there were no Muslim representatives in Mostar),[93] and that the Muslims made up 100% of the provisional executive government in certain municipalities of the free zone: in Konjić, Vakuf and Jablanica in particular.[94]

- **Mate Boban** also stated that from the very first day, the Croats made a proposal to the Muslims on establishing a joint command for the two armies.[95]

[89] P 00866 (Minutes of the Meeting Chaired by Franjo Tuđman and attended by Janko Bobetko, Gojko Šušak, the officials recently appointed to the Ministry of the Interior and the recently appointed commanders of zones and guards brigades, 5 December 1992), p. 9.
[90] P 01158 (Minutes of a Meeting between Franjo Tuđman, Cyrus Vance, Lord Owen, Ahtisaari, Alija Izetbegović and Mate Boban, 15 January 1993, p. 37.
[91] P 01158 (Minutes of a Meeting between Franjo Tuđman, Cyrus Vance, Lord Owen, Ahtisaari, Alija Izetbegović and Mate Boban, 15 January 1993, p. 17.
[92] P 01158 (Minutes of a Meeting between Franjo Tuđman, Cyrus Vance, Lord Owen, Ahtisaari, Alija Izetbegović and Mate Boban, 15 January 1993), pp. 37 and 38.
[93] P 01158 (Minutes of a Meeting between Franjo Tuđman, Cyrus Vance, Lord Owen, Ahtisaari, Alija Izetbegović and Mate Boban, 15 January 1993, p. 35.
[94] P 01158 (Minutes of a Meeting between Franjo Tuđman, Cyrus Vance, Lord Owen, Ahtisaari, Alija Izetbegović and Mate Boban, 15 January 1993, p. 38.
[95] P 01158 (Minutes of a Meeting between Franjo Tuđman, Cyrus Vance, Lord Owen, Ahtisaari, Alija Izetbegović and Mate Boban, 15 January 1993, p. 39.

- **Franjo Tuđman** stated that he had advised some Croats who wanted to proclaim that the Community of Herceg- Bosna was a constituent part of Croatia to organise a referendum and cooperate with the Muslims.[96]

➢ ***This high level meeting with the key players shows that Mate Boban accepted the Vance Owen Plan and that Franjo Tuđman had reservations about the position of some Croats who wanted to proclaim that Herceg-Bosna was a constituent part of Croatia and pointed out that holding a referendum and cooperating with the Muslims was necessary.***

18. The meeting on 20 January 1993 between **Franjo Tuđman, Mr Cyrus Vance, Lord David Owen and the Croatian representatives of BiH** was held at the Presidential Palace in Zagreb.

- **Franjo Tuđman** stated that he was in favour of cooperating with the Muslims in order to repel Serbian aggression.[97]

➢ ***Cooperation with the Serbs was again recalled in the presence of Lord Owen and Cyrus Vance.***

19. During the 8th session of the Presidential Council, which was attended by **Franjo Tuđman, Antun Vrdoljak, Ivan Milas, Gojko Šušak, Vladimir Šeks, Jure Radić** and others at the Presidential Palace in Zagreb, **Ivan Milas** stated that official propaganda should **emphasise their loyalty to the international order.**[98]

➢ ***There is no doubt that Croatia's respect for the international order was affirmed.***

The need for cooperation between the Croats and the Muslims was also reaffirmed.

20. During the 2nd session of the Croatian Defence and National Security Council (VONS), **Franjo Tuđman** read out a letter that **Jadranko Prlić** had sent to him in which Prlić

[96] P 01158 (Minutes of a Meeting between Franjo Tuđman, Cyrus Vance, Lord Owen, Ahtisaari, Alija Izetbegović and Mate Boban, 15 January 1993, p. 45.
[97] P 01240 (Minutes of a Meeting between Franjo Tuđman, Mr Cyrus Vance, Lord Owen and the Croatian representatives from BiH, 20 January 1993), p. 1.
[98] P 01297 (Minutes of the 8th Session of the Presidential Council, attended by Franjo Tuđman, Antun Vrdoljak, Ivan Milas, Gojko Šušak, Vladimir Šeks, Jure Radić and others, 25 January 1993), p. 31.

affirmed that the HVO would ask Croatia for military assistance if the situation deteriorated.[99]

- **At the Defence Council, Franjo Tuđman read out Jadranko Prlić's letter mentioning the possibility of military assistance.**

21. At the 4th session of the Croatian Defence and National Security Council (VONS), **Franjo Tuđman** declared that the Croats had to maintain their position according to which Bosnia and Herzegovina should remain **independent**, but only as a union of three constituent peoples.[100]

- ***The conclusion that can be drawn from this meeting on 24 February 1993 is that the Vance-Owen Plan was unanimously supported and that there was the desire for the Republic of Bosnia and Herzegovina to remain independent.***

22. During the meeting on 8 March 1993 between **Tuđman** and representatives of municipalities of central Bosnia and of the HVO, including **Mate Boban** and **Mirko Lasić**, **Pero Skopljak,** the President of the HDZ and Vice-President of the HVO in Vitez**,**[101] stated that a meeting had been held between the presidents of the HVO and of the HDZ from five municipalities in central Bosnia (Travnik, Novi Travnik, Busovača, Zenica and Vitez), the purpose of which was to provide realistic information on the situation of the Croatian population in Central Bosnia**.**[102]

- **Mate Boban** stated that: "Herceg-Bosna is here to stay",[103] and that the task of the Croats of Bosnia and Herzegovina was "**to keep and create Croatia there**."[104]

[99] P 01325 (Minutes of the 2nd Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Hrvoje Šarinić, Jure Radić, Vladimir Šeks, P. Jurković, Gojko Šušak, Ivan Jarnjak and others, 27 January 1993), p. 5.
[100] P 01544 (Minutes of the 4th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Hrvoje Sarinić, Josip Manolić, Jure Radić, Žarko Domljan, Vladimir Šeks, Mladen Vedriš, Ivan Jarnjak, Dr Zdenko Škrabalo and others, 24 February 1993), p. 24.
[101] P 01622 (Minutes of the Meeting between Tuđman and Representatives of Municipalities in Central Bosnia and of the HVO, including Mate Boban and Mirko Lasić, 8 March 1993), p. 9.
[102] P 01622 (Minutes of the Meeting between Tuđman and Representatives of Municipalities in Central Bosnia and of the HVO, including Mate Boban and Mirko Lasić, 8 March 1993), p. 9.
[103] P 01622 (Minutes of the Meeting between Tuđman and Representatives of Municipalities in Central Bosnia and of the HVO, including Mate Boban and Mirko Lasić, 8 March 1993), p. 28.
[104] P 01622 (Minutes of the Meeting between Tuđman and Representatives of Municipalities in Central Bosnia and of the HVO, including Mate Boban and Mirko Lasić, 8 March 1993), p. 29.

- With a visit from the President of Turkey in mind, **Franjo Tuđman** stated that, for the time being, it was necessary on the one hand **to avoid provoking conflicts with the Muslims and to be cooperative, but on the other hand, nothing should be given up**.[105]

- **Gojko Šušak** stated that "**Praljak is permanently down there**" and that he had drawn up a list of the names of colonels who should be sent there.[106]

➢ ***This meeting on 8 March 1993 between Franjo Tuđman and representatives of the municipalities of central Bosnia contains a great deal of information. It seems that Franjo Tuđman advised moderation in order to avoid conflicts and that Slobodan Praljak had been sent to Bosnia and Herzegovina on a permanent basis.***

23. The meeting on 27 March 1993 between Franjo Tuđman, Mate Boban and Alija Izetbegović at the Presidential Palace in Zagreb gave **Franjo Tuđman** the opportunity to state that he had heard **Praljak** say that he believed that the Croats were mistreating the Muslims in Herceg-Bosna and affirmed his agreement that **Praljak** should go down there.[107]

- **Franjo Tuđman** affirmed that if the world supported the Serbs, the Muslims and the Croats should cooperate.[108]

➢ ***The obligation to cooperate is recalled again. Moreover, it should be noted that Tuđman expressed a kind of disapproval of the mistreatment of the Muslims.***

24. At the 7th session of the Croatian Defence and National Security Council (VONS) on 15 April 1993, **Franjo Tuđman** stated that he had advised **Mate Boban** to cooperate with the Muslims and to **avoid conflicts "for strategic reasons."**[109]

[105] P 01622 (Minutes of the Meeting between Tuđman and Representatives of Municipalities in Central Bosnia and of the HVO, including Mate Boban and Mirko Lasić, 8 March 1993), pp. 34, 35 and 36.
[106] P 01622 (Minutes of the Meeting between Tuđman and Representatives of Municipalities in Central Bosnia and of the HVO, including Mate Boban and Mirlo Lasić, 8 March 1993), p. 42
[107] P 01739 (Minutes of a Meeting between Franjo Tuđman, his Associates (including Gojko Šušak and Ivan Jarnjak), Mate Boban and Alija Izetbegović on 27 March 1993), p. 27.
[108] P 01739 (Minutes of a Meeting between Franjo Tuđman, his Associates (including Gojko Šušak and Ivan Jarnjak), Mate Boban and Alija Izetbegović on 27 March 1993), p. 30.
[109] P 01883 (Minutes of the 7th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikica Valentić, Stipe Mesić, Josip Manolić, Jure Radić, Hrvoje Šarinić, Mate Granić and others, 15 April 1993), p. 18.

- **Franjo Tuđman** stated that he had made a proposal to the French, American and Russian representatives to narrow down the Vance-Owen Plan to "**three constituent units"**[110] and expressed his intention to sign a friendship and cooperation agreement with the Turkish Government.[111]

➢ ***At this meeting of the Defence and National Security Council on 15 April 1992, Franjo Tuđman reaffirmed his desire to cooperate with the Muslims. It should be noted that no specific reference was made to the events in Sovići and Doljani.***

25. At the 8th Session of the Croatian Defence and National Security Council (VONS) on 27 April 1993, **Franjo Tuđman** stated that cooperating with the Muslims was in the strategic interest of the West and of Croatia but that it was necessary to take care to keep the territories of BiH that were of interest to Croatia.[112]

- **Franjo Tuđman** said: "**The World is not going to allow [us] to execute [...] ethnic cleansing,** thus [...] some compromise is needed."[113]

- **Franjo Tuđman** then explained the kind of compromises that could be made: the proposals made by **Ahtissari, Cutilliero, Vance** and **Owen** could be accepted and concessions could be made in eastern Slavonia and Baranja.[114] He added that such a compromise would be the least painful solution for the Croats.[115]

➢ ***It is clear that Franjo Tuđman was committed to an international solution and condemned ethnic cleansing.***

[110] P 01883 (Minutes of the 7th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikica Valentić, Stipe Mesić, Josip Manolić, Jure Radić, Hrvoje Šarinić, Mate Granić and others, 15 April 1993), pp. 9 and 10.
[111] P 01883 (Minutes of the 7th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikica Valentić, Stipe Mesić, Josip Manolić, Jure Radić, Hrvoje Šarinić, Mate Granić and others, 15 April 1993), p. 3 of the Prlić Defence translation.
[112] P 02122 (Minutes of the 8th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Hrvoje Šarinić, Stipe Mesić, Miroslav Tuđman, Josip Manolić, Nikica Valentić, Žarko Domljan and others, 27 April 1993), pp. 7 and 8.
[113] P 02122 (Minutes of the 8th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Hrvoje Šarinić, Stipe Mesić, Miroslav Tuđman, Josip Manolić, Nikica Valentić, Žarko Domljan and others, 27 April 1993), p. 16.
[114] P 02122 (Minutes of the 8th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Hrvoje Šarinić, Stipe Mesić, Miroslav Tuđman, Josip Manolić, Nikica Valentić, Žarko Domljan and others, 27 April 1993), p. 16.

26. At the 9th session of the Croatian Defence and National Security Council (VONS) on 11 May 1993, **Franjo Tuđman** stated that **they were populating the areas with refugees who had come from central and eastern Bosnia – not only in Mostar but also in other purely Croatian places in BiH where they had changed, and were still changing, the ethnic composition of these places**.[116]

- He stated that the conflict in Bosnia had arisen from a "**regular, however not normal, situation between Muslims and Croats" and that it had become an anti-Croatian conflict with Ustasha and Nazi signs in Vitez and, apparently, in Mostar.**[117]

- **Franjo Tuđman** declared that he had told **"all of them, including Clinton", that they supported the viability of BiH as a confederation of three constituent peoples.**[118] He added that in this way they would protect Croatian territory in BiH.[119]

- **Franjo Tuđman** stated that the Croats and the Muslims were cooperating in province 3 in BiH (that is, in the area between Tuzla and Orašje), and that there was now a political plan according to which the Croats would agree to this province not being a Croatian province, but a Muslim and Croatian one.[120]

➢ ***This meeting of the Defence and National Security Council was held two days after the events in Mostar. It should be pointed out that this event was not mentioned.***

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[115] P 02122 (Minutes of the 8th Session of the Croatian Defence and National Security Council (VONS) attended by Franjo Tuđman, Hrvoje Sarinić, Stipe Mesić, Miroslav Tuđman, Josip Manolić, Nikica Valentić, Žarko Domljan and others, 27 April 1993), p. 16.
[116] P 02302 (Minutes of the 9th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Stipe Mesić, Hrvoje Sarinić, Josip Manolić, Jure Radić, Vladimir Šeks, Gojko Šušak, Ivan Jarnjak and others, 11 May 1993), p. 7.
[117] P 02302 (Minutes of the 9th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Stipe Mesić, Hrvoje Šarinić, Josip Manolić, Jure Radić, Vladimir Šeks, Gojko Šušak, Ivan Jarnjak and others, 11 May 1993), p. 11.
[118] P 02302 (Minutes of the 9th Session of the Croatian Defence and National Security Council (VONS) attended by Franjo Tuđman, Stipe Mesić, Hrvoje Šarinić, Josip Manolić, Jure Radić, Vladimir Šeks, Gojko Šušak, Ivan Jarnjak and others, 11 May 1993), p. 49.
[119] P 02302 (Minutes of the 9th Session of the Croatian Defence and National Security Council (VONS) attended by Franjo Tuđman, Stipe Mesić, Hrvoje Šarinić, Josip Manolić, Jure Radić, Vladimir Šeks, Gojko Šušak, Ivan Jarnjak and others, 11 May 1993), p. 49.
[120] P 02302 (Minutes of the 9th Session of the Croatian Defence and National Security Council (VONS) attended by Franjo Tuđman, Stipe Mesić, Hrvoje Šarinić, Josip Manolić, Jure Radić, Vladimir Šeks, Gojko Šušak, Ivan Jarnjak and others, 11 May 1993), p. 7.

Franjo Tuđman referred to a change in the ethnic composition as a result of the arrival of refugees from central and eastern Bosnia.

The issue of cooperation between the Croats and the Muslims was raised once again with reference to the case of province 3.

What is most surprising is Josip Manolić's statement that the existence of Bosnia had to be ruled out and that the solution was to leave a little Bosnia with Muslims....

27. At the 10th session of the Croatian Defence and National Security Council (VONS) on 20 May 1993, **Franjo Tuđman** stated that he thought that the meeting in **Međugorje** had been a total success for the Croats, especially since Croatia's responsibility for the escalation of the conflicts with the Muslims had been reassessed (Croatia was said to bear less responsibility).[121]

- He added that the Muslim representatives **had approved of this reassessment** only because before the meeting he had told **Izetbegović** in private in **Split** that the conduct of the Muslims consisting of starting the conflict with the Croats and attempting to conquer territories under the rule and control of Croatia amounted to political suicide.[122] He added that Croatia could not agree to losing areas that had been part of the ***Banovina***, even if a large number of mostly Muslim refugees were in those areas.[123]

- Croatia could also not agree to the Muslims changing the demographic structure of Mostar or Travnik since otherwise the south of Croatia and Dalmatia would be put in danger.[124]

- **Franjo Tuđman** informed the Croats of BiH of the fact that by agreeing to the implementation of the **Vance-Owen Plan**, Croatian interests would be safeguarded,[125] and

[121] P 02466 (Minutes of the 10th session of the Croatian Defence and National Security Council (VONS) attended by Franjo Tuđman, Hrvoje Šarinić, Miroslav Tuđman, Franjo Gregurić, Jure Radić, Vladimir Šeks, Mate Granić, Gojko Šušak, Ivan Jarnjak and others, 20 May 1993), p. 10.
[122] P 02466 (Minutes of the 10th session of the Croatian Defence and National Security Council (VONS) attended by Franjo Tuđman, Hrvoje Šarinić, Miroslav Tuđman, Franjo Gregurić, Jure Radić, Vladimir Šeks, Mate Granić, Gojko Šušak, Ivan Jarnjak and others), 20 May 1993, p. 10.
[123] P 02466 (Minutes of the 10th session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Hrvoje Šarinić, Miroslav Tuđman, Franjo Gregurić, Jure Radić, Vladimir Šeks, Mate Granić, Gojko Šušak, Ivan Jarnjak and others), 20 May 1993, p. 10.
[124] P 02466 (Minutes of the 10th session of the Croatian Defence and National Security Council (VONS) attended by Franjo Tuđman, Hrvoje Šarinić, Miroslav Tuđman, Franjo Gregurić, Jure Radić, Vladimir Šeks, Mate Granić, Gojko Šušak, Ivan Jarnjak and others), 20 May 1993, p. 10.

he stated that he **had warned** the Croatian representatives of BiH that pursuing a policy of conflict escalation with the Muslims would endanger Croatia's interests because of the threat of sanctions by the European Community and the USA.[126]

- He stated that if a multi-ethnic government of coordination were established, the Prime Minister would be a Croat – and would be **Prlić.**[127]

➢ ***Franjo Tuđman stated that he had warned the Croatian representatives that pursuing a policy of conflict escalation with the Muslims was endangering Croatia's interests because of the threats of sanctions.***

He mentioned the fact that Croatia could not agree to losing areas which had been part of the Banovina even if there were Muslim refugees there.

In my opinion, these declarations indicate the end of any plan for annexation or escalation of the conflict, as the objective was cooperation with the Muslims.

28. At the meeting between **Franjo Tuđman, Lord David Owen and Thorvald Stoltenber**g in the Presidential Palace in Zagreb on 2 June 1993, **Franjo Tuđman** stated that he approved of UNPROFOR controlling the borders and said that he had made a proposal to Boutros-Ghali to have peace-keeping forces deployed at the borders between Serbia and Bosnia, between Bosnia and Krajina, and also at the Croatian borders, including Herceg-Bosna with Boban.[128]

[125] P 02466 (Minutes of the 10th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Hrvoje Šarinić, Miroslav Tuđman, Franjo Gregurić, Jure Radić, Vladimir Šeks, Mate Granić, Gojko Šušak, Ivan Jarnjak and others), 20 May 1993), p. 12.
[126] P 02466 (Minutes of the 10th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Hrvoje Šarinić, Miroslav Tuđman, Franjo Gregurić, Jure Radić, Vladimir Šeks, Mate Granić, Gojko Šušak, Ivan Jarnjak and others), 20 May 1993, p. 11.
[127] P 02466 (Minutes of the 10th session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Hrvoje Šarinić, Miroslav Tuđman, Franjo Gregurić, Jure Radić, Vladimir Šeks, Mate Granić, Gojko Šušak, Ivan Jarnjak and others), 20 May 1993, p. 13.
[128] P 02613 (Minutes of a Meeting between Franjo Tuđman, Lord David Owen and Thorvald Stoltenberg, 2 June 1993), p. 8.

- **Franjo Tuđman** stated that there was not a single squad of the Croatian Army in the Mostar area in **Central Bosnia**[129] and that he was prepared to persuade the Croats to agree to remain in a confederal Bosnia and Herzegovina.[130]

➢ ***The meeting between Franjo Tuđman, Lord Owen and Thorvald Stoltenberg makes it possible to observe that on 2 June 1993, the Croatian Army was not in Bosnia and that there was a desire to make the Croats of Bosnia understand that they had to agree to remain in a confederal Bosnia and Herzegovina.***

29. A meeting was held between **Franjo Tuđman** and **Alija Izetbegović** in Zagreb on 11 June 1993,

- **Alija Izetbegović** accused **Mate Boban** of having stated that he was in favour of the Vance Owen Plan but of doing everything to prevent its implementation.[131]

- **Alija Izetbegović** affirmed that the ABiH had taken 17 HV soldiers prisoner in the Mostar and Travnik area, to which **Franjo Tudjman** responded that they were not soldiers belonging to a Croatian unit, but were volunteers.[132]

- **Franjo Tuđman** stated that the Croats supported cooperation with the Muslims, that they were for Bosnia and Herzegovina, but for a Bosnia and Herzegovina in which the Croatian population would be secure.[133]

- **Alija Izetbegović** stated that on that very day he had sent an ABiH commander to Kiseljak where the commander reached a ceasefire agreement with Petković.[134]

- **Franjo Tuđman** stated that at the meeting in mid-May 1993 in **Međugorje**, he had appealed to the Muslims and the Croats to hold to account those responsible for causing the conflicts.[135]

[129] P 02613 (Minutes of a Meeting between Franjo Tuđman, Lord David Owen and Thorvald Stoltenberg, 2 June 1993), pp.7 and 9.
[130] P 02613 (Minutes of a Meeting between Franjo Tuđman, Lord David Owen and Thorvald Stoltenberg, 2 June 1993), p. 13.
[131] P 02719 (Record of the Conversation between Franjo Tuđman and Alija Izetbegović, 11 June 1993), p. 40.
[132] P 02719 (Record of the Conversation between Franjo Tuđman and Alija Izetbegović, 11 June 1993), pp. 21 and 22.
[133] P 02719 (Record of the Conversation between Franjo Tuđman and Alija Izetbegović, 11 June 1993), p. 49.
[134] P 02719 (Record of the Conversation between Franjo Tuđman and Alija Izetbegović, 11 June 1993), p. 57.

- ***The Izetbegović/Tuđman meeting on 11 June 1993 makes it possible to observe that Franjo Tuđman was in favour of cooperation with the Muslims and that he disputed the presence of the Croatian Army, saying that the 17 soldiers who had been captured were volunteers.***

30. At the 13th session of the Croatian Defence and National Security Council (VONS) on 25 June 1993, **Franjo Tuđman** said: " [...] I have already given [...] a task to our guys to help the HVO maintain control there [in BiH]".[136]

- During the talks in Geneva, **Franjo Tuđman** stated that since the Muslims were opposed to a confederal solution, he had suggested abandoning the wording "confederal solution" and using the wording "**union of three constituent nations.**"[137]

➢***Franjo Tuđman changed his position and said that insofar as the Muslims were against a confederal solution, it was necessary to accept the idea of a union.***

31. At the 14th session of the Croatian Defence and National Security Council (VONS) on 2 July 1993, **Franjo Tuđman** declared that in his opinion, Croatia had been too tolerant during the negotiations and should not allow the creation of three states in Bosnia.[138]

- **Franjo Tuđman** asked **Šušak** and **Bobetko** to meet the leaders of Herceg-Bosna: **Praljak, Petković, Sančević, Boban** and **Prlić** in order to discuss what should be done.[139]

- **Franjo Tuđman** stated that he thought that the Croats of Bosnia should not have started fighting the Muslims.[140]

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[135] P 02719 (Record of the Conversation between Franjo Tuđman and Alija Izetbegović, 11 June 1993), p. 70.
[136] P 03704 (Minutes of the 13th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Vladimir Šeks, Anton Tus, Janko Bobetko, Stipe Mesić, Josip Manolić and others, 25 June 1993), p. 37.
[137] P 03704 (Minutes of the 13th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Vladimir Šeks, Anton Tus, Janko Bobetko, Stipe Mesić, Josip Manolić and others, 25 June 1993), p. 28.
[138] P 03112 (Minutes of the 14th Session of the Defence and National Security Council (VONS), attended by Franjo Tuđman, Stipe Mesić, Josip Manolić, Jure Radić, Vladimir Šeks, Mate Granić, Gojko Šušak, Ivan Jarnjak, Janko Bobetko, Anton Tus, Miroslav Tuđman, Ivan Milas and others, 2 July 1993), p. 9.
[139] P 03112 (Minutes of the 14th Session of the Defence and National Security Council (VONS), attended by Franjo Tuđman, Stipe Mesić, Josip Manolić, Jure Radić, Vladimir Šeks, Mate Granić, Gojko Šušak, Ivan Jarnjak, Janko Bobetko, Anton Tus, Miroslav Tuđman, Ivan Milas and others, 2 July 1993), p. 54.

- ***The meeting of the Defence and National Security Council on 2 July 1993 is a criticism of the fighting in which the Bosnian Croats had engaged against the Muslims where it was suggested that there should be a meeting with the Croatian leaders of BiH.***

32. At the 14th Session of the Croatian Defence and National Security Council (VONS) on 5 July 1993, **Franjo Tuđman** said that he had sent a letter to **Izetbegović** around 25 June in which he asked him to take measures to put an end to the fighting.[141]

- **Franjo Tuđman** recalled that on 21 July 1992, the Croats had proposed a **military alliance** to Izetbegović.[142]

- ***It appears that after the events of June 1993 Tuđman wanted to put an end to the fighting.***

33. At the 14th Session of the Croatian Defence and National Security Council (VONS) on 6 July 1993, **Franjo Tuđman** said – in relation to **Lord Owen's** desire to grant the Muslims access to the sea – that it was clear that the Croats could not let the Muslims encroach on Croatian territory.[143] He added that he had already told **Lord Owen** that this was not something he could demand of Croatia, and that he had at least to take into consideration Article 39.[144]

- **Franjo Tuđman** stated that he had asked **Bobetko** and **Šušak** to take control of Jablanica because of the hydroelectric power station.[145] On the following day, **Franjo Tuđman**

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[140] P 03112 (Minutes of the 14th Session of the Defence and National Security Council (VONS) attended by Franjo Tuđman, Stipe Mesić, Josip Manolić, Jure Radić, Vladimir Šeks, Mate Granić, Gojko Šušak, Ivan Jarnjak, Janko Bobetko, Anton Tus, Miroslav Tuđman, Ivan Milas and others, 2 July 1993), p. 9.
[141] P 03195 (Minutes of the continuation of 14th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikica Valentić, Franjo Gregurić, Žarko Domljan, P. Jurković, Slavko Degoricija, Jure Radić, Mladen Vedriš and B. Mikša, 5 July 1993), p. 20.
[142] P 03195 (Minutes of the 14th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikica Valentić, Franjo Gregurić, Žarko Domljan, P. Jurković, Slavko Degoricija, Jure Radić, Mladen Vedriš and B. Mikša, 5 July 1993), p. 31.
[143] P 03240 (Minutes of the continuation of the14th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Gojko Šušak, Ivan Jarnjak, Nikića Valentić and others, 6 July 1993), p. 41.
[144] P 03240 (Minutes of the continuation of the14th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Gojko Šušak, Ivan Jarnjak, Nikića Valentić and others, 6 July 1993), p. 41.
[145] P 03240 (Minutes of the continuation of the14th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Gojko Šušak, Ivan Jarnjak, Nikića Valentić and others, 6 July 1993), p. 63.

explained to **Lord Owen** and **Stoltenberg** that a contract on the power station had been drawn up between Croatia and Bosnia before the war.[146]

- ***The meeting makes it possible to note that the Croats were opposed to the Muslims having access to the sea through Croatian territory.***

34. A meeting was held between **Franjo Tuđman, Lord David Owen** and **Mr Thorvald Stoltenberg** at the Presidential Palace in **Zagreb** on **7 July 1993**.

- **Lord David Owen** asked **Franjo Tuđman** why the territory of **Šid** was important to the Croats, to which **Franjo Tuđman** replied "**because in 1939 it was part of the Croatian Banovina."** [147]

- ***An explicit reference was made to the Banovina, which seems to me more psychological than political.***

35. At the 15th session of the Croatian Defence and National Security Council (VONS) on 9 July 1993, **Dr Branimir Jakšić** said that the **Republic of Croatia had asked the UN Security Council to send observers not only to the borders of Yugoslavia and of BiH but also to the borders between Croatia and BiH,** and he stated that he considered this the best proof of the political efforts Croatia was making to find a solution which would put an end to the crisis in BiH.[148]

- ***There is no doubt that for the Croats, the intervention of the international community was necessary.***

36. A meeting was held between **Franjo Tuđman, Mate Granić, Gojko Šušak** and **Janko Bobetko** at the Presidential Palace in Zagreb on 15 July 1993.

[146] P 03279 (Record of a Conversation between Franjo Tuđman, Lord David Owen and Mr Thorvald Stoltenberg), 7 July 1993, p. 7 of the Prlić Defence translation.
[147] P 03279 (Record of a Conversation between Franjo Tuđman, Lord Owen and Mr Thorvald Stoltenberg, 7 July 1993), pp. 21 and 22.
[148] P 03324 (Minutes of the 15th session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Stipe Mesić, Josip Manolić, Gojko Šušak, Mate Granić and others, 9 July 1993), p. 17.

- On 15 July 1993, **Franjo Tuđman** reaffirmed that there was no Croatian Army present on BiH territory and asserted that there were no official Croatian Army troops in Bosnia.[149]

- **He** stated that he had already proposed – and was again proposing – establishing international control of the borders.[150]

➢ ***The important issue of the involvement of the HV in the conflict was recalled. These statements are important because they undermine the theory of an international armed conflict. It is necessary to point out that this meeting was a meeting of the top leaders of the Republic of Croatia and that there was no reason to misrepresent the situation, as all the participants knew each other and were working together under the authority of the President of the Republic.***

37. At the 17th session of the Croatian Defence and National Security Council (VONS) on 17 July 1993, **Franjo Tuđman** reported on an agreement signed with **Milošević** after a meeting with **Lord Owen** and **Thorvald Stoltenberg**.

- **Franjo Tuđman** stated that on that same day, he and **Slobodan Milošević** had signed a declaration in Geneva after the meeting organised by **Thorvald Stoltenberg** and **Lord Owen**.[151]

- This declaration specifically stated that "speculations on the partition of Bosnia and Herzegovina between Croatia and Serbia are not based on facts" and that the only way of achieving permanent peace in BiH is by affirming the interests of the three constituent peoples and reaching an agreement on establishing three republics within the **Confederation**.[152]

➢***From my point of view, respect for the decisions of the international community was affirmed***.

[149] P 03467 (Minutes of the Meeting between Franjo Tuđman, Mate Granić, Gojko Šušak, Ivan Jarnjak, Janko Bobetko, Hrvoje Šarinić, Nikića Valentić and Dr J. Jakšić, 15 July 1993, p. 9.
[150] P 03467 (Minutes of the Meeting between Franjo Tuđman, Mate Granić, Gojko Šušak, Ivan Jarnjak, Janko Bobetko, Hrvoje Šarinić, Nikića Valentić and Dr J. Jakšić, 15 July 1993, p. 10.
[151] P 03517 (Minutes of the 17th session of the Croatian Defence and National Security Council (VONS) attended by Franjo Tuđman, Gojko Šušak, Mate Granić, Nikića Valentić and others, 17 July 1993), p. 5.
[152] P 03517 (Minutes of the 17th session of the Croatian Defence and National Security Council (VONS) attended by Franjo Tuđman, Gojko Šušak, Mate Granić, Nikića Valentić and others, 17 July 1993), p. 5.

38. At the session of the Croatian Defence and National Security Council (VONS) on 5 August 1993, **Franjo Tuđman** stated that **Milosević** had suggested that the Croats and Serbs issue a joint declaration seeking the normalisation of relations between these two peoples. [153]

- **Franjo Tuđman** added that it seemed to him that the **Croats should continue the discussions with Belgrade**, but that they should do so in secret and t**ry to persuade them to accept a truce and a ceasefire**.[154]

➢***There is an obvious willingness to put an end to the conflict with the Serbs.***

39. At the 20th session of the Croatian Defence and National Security Council (VONS) on 2 September 1993, **Franjo Tuđman** said that for obvious reasons the Croats could not give up the territory of Neum**.**[155]

- **Franjo Tuđman** said that **the Croats had to support the existence of the Croatian Republic in BiH as part of a union, while safeguarding the strategic interests of Croatia.**[156] To this end, **he considered providing assistance to the Croatian Republic of BiH** and made clear that the assistance provided should not make it possible to accuse them of direct involvement or military involvement in BiH. [157]

- He stated that he had had a discussion with the Minister of Defence, **General Bobetko**, in the presence of **Mate Boban,** during which they concluded that of course they had to help Herceg-Bosna in the area of defence and use Croatian Army forces to defend the Croatian

[153] P 03969 (Minutes of a Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Gojko Šušak, B. Mikša, Hrvoje Šarinić, Slavko Degoricija, Miroslav Tuđman and others, 5 August 1993), p. 3.
[154] P 03969 (Minutes of a Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Gojko Šušak, B. Mikša, Hrvoje Šarinić, Slavko Degoricija, Miroslav Tuđman and others, 5 August 1993), p. 5.
[155] P 04740 (Minutes of the 20th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikića Valentić, Stipe Mesić, Josip Manolić, Miroslav Tuđman and others (**including Mate Boban**), 2 September 1993), p. 3.
[156] P 04740 (Minutes of the 20th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikića Valentić, Stipe Mesić, Josip Manolić, Miroslav Tuđman and others (**including Mate Boban**), 2 September 1993), p. 6.
[157] P 04740 (Minutes of the 20th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikića Valentić, Stipe Mesić, Josip Manolić, Miroslav Tuđman and others (**including Mate Boban**), 2 September 1993), p. 6.

territories **around Dubrovnik that were under threat.**[158] He added that only the volunteers from BiH – **regardless of whether or not they were part of the Croatian Army – would be authorised to defend these areas.**[159]

- **Franjo Tuđman** stated that Minister **Šušak** and General **Bobetko** had been assigned the task of organising the training of volunteers (only those originating from BiH) who were ready to defend the Croatian areas.[160]

- He claimed, as he had already stated in public, that there was not, and never had been, an agreement between the Croats and the Serbs on the division of Bosnia.[161]

➢***On 2 September 1993, Franjo Tuđman asserted that the Croats could not give up the territory of Neum and that they had to accept the existence of the Republic of Bosnia and Herzegovina as part of a union.***

40. The meeting between **Franjo Tuđman, Mate Boban** and other members of the Croatian Government and of the HR H-Z was held at the Presidential Palace in Zagreb on 15 September 1993.

- **Slonodan Praljak** said that relations between the **Serbs** and the **Croats** had improved, especially at the military level, because all the units depended on the cooperation with the Serbs.[162]

➢***During the meeting between Franjo Tuđman and the Croatian representatives, Franjo Tuđman stated that he had reached an agreement with Izetbegović according to which relations between the two countries would be strengthened within a confederation. It***

[158] P 04740 (Minutes of the 20th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikica Valentić, Stipe Mesić, Josip Manolić, Miroslav Tuđman and others (**including Mate Boban**), 2 September 1993), pp. 9 and 10.
[159] P 04740 (Minutes of the 20th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikica Valentić, Stipe Mesić, Josip Manolić, Miroslav Tuđman and others (**including Mate Boban**), 2 September 1993), p. 10.
[160] P 04740 (Minutes of the 20th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikica Valentić, Stipe Mesić, Josip Manolić, Miroslav Tuđman and others (**including Mate Boban**), 2 September 1993), p. 21.
[161] P 04740 (Minutes of the 20th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Nikica Valentić, Stipe Mesić, Josip Manolić, Miroslav Tuđman and others (**including Mate Boban**), 2 September 1993, p. 10.
[162] P 05080 (Minutes of a Meeting between Franjo Tuđman, Mate Boban and Other Members of the Croatian Governments and of the HR H-B, 15 September 1993), p. 19.

should be noted what Slobodan Praljak said about the role of the Serbs at the military level. In actual fact, there are not only two parties in the conflict, but three with the Serbs.

41. A meeting between **Franjo Tuđman, Stipe Mesić , Josip Manolić, Gojko Šušak** and others was held at the Presidential Palace in Zagreb on 30 September 1993.

➢***During the meeting, the fact that Boban would present Prlić to Parliament so that he would be accepted as Prime Minister was noted.***

42. During the meeting at the Presidential Palace in Zagreb on 21 October 1993 between Franjo Tuđman, Mate Boban, the President of the Autonomous Province of Western Bosnia, **Fikret Abdić**, and others, **Fikret Abdić** suggested that Herceg-Bosna and the Autonomous Province of Western Bosnia recognise each other and that a peace agreement be signed.[163]

- **Franjo Tuđman** assured **Fikret Abdić** that the province that was under his leadership would have a place in Croatia as an autonomous province.[164]

- **Franjo Tuđman** added that the Croats should not give the impression that they were abandoning the idea of an alliance with BiH as a whole.[165]

➢***It appears that the Muslim community was divided and that there were some, like Fikret Abdić, who were pro-Croat, which yet again demonstrates the complexity of the problem.***

43. A meeting between **Franjo Tuđman, Janko Bobetko, Gojko Šušak** and others was held at the Presidential Palace in Zagreb on 22 October 1993.

- **Franjo Tuđman** said that several months earlier, he had assigned the Minster of Defence, M**r Šušak, and General Bobetko** the task of organising Croatia's involvement in BiH in

[163] P 05997 (Minutes of a Meeting between Franjo Tuđman, Mate Boban and the President of the Autonomous Province of Western Bosnia, Fikret Abdić, 21 October 1993, p. 3.
[164] P 05997 (Minutes of a Meeting between Franjo Tuđman, Mate Boban and the President of the Autonomous Province of Western Bosnia, Fikret Abdić, 21 October 1993, pp. 4 and 9.
[165] P 05997 (Minutes of a Meeting between Franjo Tuđman, Mate Boban and the President of the Autonomous Province of Western Bosnia, Fikret Abdić, 21 October 1993, p. 3 of the English translation 1D33-0576.

order to help the HVO keep certain territories, in particular, the territories of Novi Travnik, Vitez, Busovača and Mostar, and to settle the problems of Gornji Vakuf and Bugojno.[166]

- **Franjo Tuđman** added that he had said that the assistance should be provided by volunteers, and that he had explicitly stated that it concerned the borders of the future Croatian state.[167]

- **Franjo Tuđman** added that they had to continue trying to reach agreements with the Muslims and Izetbegović for strategic reasons, while safeguarding the strategic territorial interests of Croatia.[168]

- **Franjo Tuđman** said that Croatia had sent **General Praljak, General Petković** and **General Matić** and **Tole** to BiH.[169]

- **Franjo Tuđman** said that the day before, **Bruno Stojić** had asked him – through his Ministry – to send him a helicopter pilot for at least 15 days because he only had one pilot left.[170] **Franjo Tuđman** sent him two pilots and an engineer.[171] **Franjo Tuđman** stated that he thought that a **Croatian Air Force** unit should be based in Herceg-Bosna.[172]

➢***At this meeting, Croatia's engagement in Bosnia and Herzegovina through the assistance provided by the volunteers was mentioned, as well as the necessity of pursuing agreements with the Muslims, and he said that he had sent Praljak, Petković, Matić and Tole to Bosnia and Herzegovina.***

[166] P 06006 (Transcript of a conversation between Franjo Tuđman, Janko Bobetko, Gojko Šušak and others, 22 October 1993), p. 1.
[167] P 06006 (Transcript of a Conversation between Franjo Tuđman, Janko Bobetko, Gojko Šušak and Others, 22 October 1993), p. 2.
[168] P 06006 (Transcript of a Conversation between Franjo Tuđman, Janko Bobetko, Gojko Šušak and Others, 22 October 1993), p. 2.
[169] P 06006 (Transcript of a Conversation between Franjo Tuđman, Janko Bobetko, Gojko Šušak and Others, 22 October 1993), p. 9.
[170] P 06006 (Transcript of a Conversation between Franjo Tuđman, Janko Bobetko, Gojko Šušak and Others, 22 October 1993), p. 15.
[171] P 06006 (Transcript of a Conversation between Franjo Tuđman, Janko Bobetko, Gojko Šušak and Others, 22 October 1993), p. 15.
[172] P 06006 (Transcript of a Conversation between Franjo Tuđman, Janko Bobetko, Gojko Šušak and Others, 22 October 1993), p. 15.

44. At the 29th session of the Croatian Defence and National Security Council (VONS) at the Presidential Palace in Zagreb on 26 October 1993, **Franjo Tuđman** declared that the Croats had reached agreements with both **Izetbegović** and **Abdić**.[173]

➢***The Croats wanted to "make a pact" with the Muslims who shared their views, while taking into consideration the point of view of other Muslims.***

45. At the meeting held on **5 November 1993** between **Franjo Tuđman** and the representatives of Herceg-Bosna (including **Boban, Prlić, Praljak** and **Petković**) at the "Dalmacija" villa in Split, **Franjo Tuđman** stated that the problem of BiH concerned the Croatian people in BiH, but also the Croatian state and its future, in particular in relation to its borders.[174]

- **Franjo Tuđman** recalled that his objective was to implement the **Vance-Owen Plan** and to strengthen the ties between the Croats and the Muslims in BiH in order subsequently to incorporate them into a confederation with the Croatian state.[175]

- **Franjo Tuđman** asked the participants at the meeting to say after the meeting that he personally had never appointed any officials in BiH, that the Croats had provided a "certain type" of military assistance but had not provided any political assistance.[176]

- **Jadranko Prlić** stated that he thought the number of qualified staff was insufficient in Herceg-Bosna[177] and suggested forming a new Government of Herceg-Bosna.[178] Similarly, **Slobodan Praljak** complained about the poor level of military competence within the HVO, and said that he was in favour of making changes to the staff in the civilian and military

[173] P 06123 (Minutes of the 29th Session of the Croatian Defence and National Security Council (VONS) attended by Franjo Tuđman, Stipe Mesić, Josip Manolić, Nikića Valentić, Franjo Gregurić, Radić, Vladimir Šeks, Mate Granić, Škegro, Janko Bobetko, Antun Bebić and others, 26 October 1993), pp. 3 to 5.
[174] P 06454 (Minutes of a Meeting between Franjo Tuđman and the Representatives of Herceg-Bosna, 5 November 1993), pp. 1 and 2.
[175] P 06454 (Minutes of a Meeting between Franjo Tuđman and the Representatives of Herceg-Bosna, 5 November 1993), pp. 2 and 3.
[176] P 06454 (Minutes of a Meeting between Franjo Tuđman and the Representatives of Herceg-Bosna, 5 November 1993), p. 14.
[177] P 06454 (Minutes of a Meeting between Franjo Tuđman and the Representatives of Herceg-Bosna, 5 November 1993), p. 33.
[178] P 06454 (Minutes of a Meeting between Franjo Tuđman and Representatives of Herceg-Bosna, 5 November 1993), p. 37.

departments of Herceg-Bosna.[179] The participants at the meeting then brought up the subject of the future composition of the Government of Herceg-Bosna.[180]

- **Jadranko Prlić** said that Mostar was obviously the capital of Herceg-Bosna.[181] He added that they had to play a game with the Serbs because of the enclaves, and that they had to play a double game with the Muslims – one with Izetbegović and the other with Abdić.[182] **Jadranko Prlić** concluded by saying that Tuđman or some other Croatian official would certainly coordinate these games.[183]

- Item 3 of the conclusions of the meeting provides that the decision was taken "to take urgent measures to complete the investigations into the events in Stupni Do and to punish those responsible."[184]

➢ ***During the meeting with the Croatian representatives at Stupni Do, it was decided that urgent measures should be taken to conduct investigations in Stupni Do. The objective was to implement the Vance-Owen Plan. Franjo Tuđman added that he had not appointed any officials in Bosnia and that the Croats had provided military assistance but no political assistance.***

46. A meeting was held between the President of the Republic of Croatia, Franjo Tuđman, **Janko Bobetko** and others at the Presidential Palace in Zagreb on 6 November 1993. **Franjo Tuđman** stated that it was important to take control of Gornji Vakuf, but that this should be done solely under the cover of sending volunteers.[185] He added that they could

[179] P 06454 (Minutes of a Meeting between Franjo Tuđman and the Representatives of Herceg-Bosna, 5 November 1993), pp. 50 and 56.
[180] P 06454 (Minutes of a Meeting between Franjo Tuđman and the Representatives of Herceg-Bosna, 5 November 1993), pp. 89-104 and 122.
[181] P 06454 (Minutes of a meeting between Franjo Tuđman and the Representatives of Herceg-Bosna, 5 November 1993), p. 38.
[182] P 06454 (Minutes of a meeting between Franjo Tuđman and the representatives of Herceg-Bosna, 5 November 1993), pp. 38 and 39.
[183] P 06454 (Minutes of a meeting between Franjo Tuđman and the representatives of Herceg-Bosna, 5 November 1993), p. 39.
[184] P 06454 (Minutes of a meeting between Franjo Tuđman and the representatives of Herceg-Bosna, 5 November 1993), p. 112.
[185] P 06485 (Transcript of a Conversation between the President of the Republic of Croatia, Franjo Tuđman and the Minister of Defence, Janko Bobetko, 6 November 1993), p. 2.

perhaps directly deploy an HV brigade in Mostar in order to make an HVO brigade available but added that this brigade would only be involved in defence operations.[186]

- **Janko Bobetko** said that the idea of volunteers was admittedly the most legal and efficient one, but that a command had to be established so that they would have the authority and knowledge needed to take control of Gornji Vakuf, to which **Franjo Tuđman** responded by saying he agreed.[187]

➢ ***The possibility of sending an HV brigade to Mostar for defence operations was mentioned. Janko Bobetko stated that the idea of volunteers was more legal and efficient.***

47. At the meeting between Franjo Tuđman and the representatives of Herceg-Bosna (including Mate Boban and Jadranko Prlić) at the Presidential Palace in Zagreb on **10 November 1993**, **Mate Boban** explained that a member of UNPROFOR had been threatened by **Ivica Rajić. Tuđman** and **Granić** stated that Ivica Rajić should be replaced.[188]

- **Franjo Tuđman** stated that he had dispatched a new commander and had asked that new volunteers be sent to the Vitez front line.[189]

- It seems that **Franjo Tuđman** did not know **who** had destroyed the bridge in Mostar, as he asked **Mate Boban** about it.[190]

➢ ***On 10 November 1993, Boban said that a member of UNPROFOR had been threatened by Ivica Rajić and it should be noted that Franjo Tuđman asked Boban about the destruction of the Old Bridge. It is obvious that the order to destroy the Old Bridge did not come from Zagreb.***

[186] P 06485 (Transcript of a Conversation between the President of the Republic of Croatia, Franjo Tuđman and the Minister of Defence, Janko Bobetko, 6 November 1993), p. 5.
[187] P 06485 (Transcript of a Conversation between the President of the Republic of Croatia, Franjo Tuđman and the Minister of Defence, Janko Bobetko, 6 November 1993), p. 10.
[188] P 06581 (Transcript of a Conversation between Franjo Tuđman and the Representatives of Herceg-Bosna (including Mate Boban and Jadranko Prlić), 10 November 1993, pp. 14-16.
[189] P 06581 (Transcript of a Conversation between Franjo Tuđman and Representatives of Herceg-Bosna (including Mate Boban and Jadranko Prlić), 10 November 1993, p. 18.
[190] P 06581 (Transcript of a Conversation between Franjo Tuđman and Representatives of Herceg-Bosna (including Mate Boban and Jadranko Prlić), 10 November 1993, p. 20.

48. A meeting was held on 23 November 1993 between the President of the Republic of Croatia, **Franjo Tuđman**, the Minister of Defence, **Gojko Šušak**, and General **Janko Bobetko** at the Presidential Palace in Zagreb.

- **Franjo Tuđman** affirmed that in addition to the volunteers, they would also send regular army forces to BiH, and he demanded that these forces be placed on stand-by.[191]

➢ ***There is no doubt that there was a change of direction, as Franjo Tuđman said that he was prepared to send in regular forces.***

49. During a conversation between **Franjo Tuđman** and **Mate Boban**, the President of the HZ H-B, at the Presidential Palace in Zagreb on 28 November 1993, **Mate Boban** stated that in some way, **Franjo Tuđman** had helped him become the leader of Herceg-Bosna.[192]

- **Mate Boban** stated that he did not know who had given the order to destroy the bridge in Mostar.[193]

- **Mate Boban** stated that 60 Croatian soldiers were in prison at the time, suspected of murder or other human rights violations.[194]

- **Franjo Tuđman** suggested appointing **Prlić** as head of a Croatian Council, and **Mate Boban** stated that if it had been only up to him, **Prlić** would never have become Prime Minister, for "**solid reasons**" **that he did not go into**.[195]

➢ ***Mate Boban wanted Franjo Tuđman to become involved in the events. There is no doubt that tension existed between the Croatian members of the Republic of Bosnia and Herzegovina and Tuđman.***

[191] P 06831 (Transcript of the Conversation between the President of the Republic of Croatia, Franjo Tuđman, the Minister of Defence, Gojko Šušak, and General Janko Bobetko, 23 November 1993), pp. 25 and 26.
[192] P 06930 (Transcript of a Conversation between Franjo Tuđman and Mate Boban, President of the HZ H-B, 28 November 1993), p. 16.
[193] P 06930 (Transcript of a Conversation between Franjo Tuđman and Mate Boban, President of the HZ H-B, 28 November 1993), p. 20.
[194] P 06930 (Transcript of a Conversation between Franjo Tuđman and Mate Boban, President of the HZ H-B, 28 November 1993), p. 22.
[195] P 06930 (Transcript of a Conversation between Franjo Tuđman and Mate Boban, President of the HZ H-B, 28 November 1993), pp. 34-37.

50. At a meeting held on 4 December 1993 **between Franjo Tuđman, Z. Červenko, J. Bobetko, D. Krpina, J. Juras** and representatives of the "Croatian Home Guard" at the Presidential Palace in Zagreb, **Franjo Tuđman** stated that the future borders of Croatia depended on what happened in BiH.[196]

- **Franjo Tuđman** stated that he would reduce the number of Croatian Army troops.[197]

- **Franjo Tuđman** recalled that Croatia could not intervene solely through the intermediary of volunteers in the areas of Travnik, Vitez, Busovača and Mostar and could not deploy its armed forces there.[198]

➢ ***On 4 December 1993, Franjo Tuđman asserted that the future borders of Croatia would depend on what happened in BiH, that he was going to reduce the number of Croatian Army troops and that he could not send armed forces to Travnik, Vitez, Busovača and Mostar***

51. During a meeting at the Presidential Palace in Zagreb on **15 December 1993** between **Franjo Tuđman** and representatives of the Croatian Coordination Committee of Herceg-Bosna who had come from Sarajevo, **Franjo Tuđman** stated that he had taken measures and sent men to BiH. He said that **General Praljak** thought the Croats were making a mistake in BiH, that he himself had told **Praljak** to go to BiH, and that two weeks later, Praljak admitted that he had made a mistake.[199]

- **Franjo Tuđman** stated that he was aware of the **geopolitical importance of Bosnia** and that **for this reason he had suggested holding a referendum, adopting a cantonal structure and had advised against a union of three republics**.[200]

[196] P 07031 (Minutes of a Meeting between Franjo Tuđman, Z. Červenko, J. Bobetko, D. Krpina, J. Juras and Representatives of the "Croatian Home Guard", 4 December 1993), p. 11.
[197] P 07031 (Minutes of the Meeting between Franjo Tuđman, Z. Červenko, J. Bobetko, D. Krpina, J. Juras and Representatives of the "Croatian Home Guard", 4 December 1993), p. 11.
[198] P 07031 (Minutes of the Meeting between Franjo Tuđman, Z. Červenko, J. Bobetko, D. Krpina, J. Juras and Representatives of the "Croatian Home Guard", 4 December 1993), p. 11.
[199] P 07198 (Minutes of a Meeting between Franjo Tuđman and Representatives of the Croatian Coordination Committee of Herceg-Bosna who had come from Sarajevo, 15 December 1993), p. 21.
[200] P 07198 (Minutes of a Meeting between Franjo Tuđman and Representatives of the Croatian Coordination Committee of Herceg-Bosna who had come from Sarajevo, 15 December 1993), p. 8.

- **Franjo Tuđman** characterised those who had destroyed the bridge as "idiots"; he said that he understood them, but was not excusing their actions and had ordered that they be prosecuted.[201]

➢ ***He brought up the subject of the destruction of the Old Bridge, characterising those who had destroyed it as "idiots", and said that he had given the order to prosecute them. It should be noted that Tuđman changed direction again and was now opposed to a union of the three republics, whereas on 25 June 1993, he had advocated this solution instead of the confederal solution.***

52. A conversation was held between **Franjo Tuđman** and representatives of Herceg-Bosna (including **Mate Boban**) in the Presidential Palace in Zagreb on **19 December 1993.**

- The participants at the meeting prepared for the meetings in Geneva and Brussels.[202]

- **Franjo Tuđman** stated that it was out of the question for Croatia to accept a reduction of its territory.[203] He added that from Croatia's point of view, Mostar had to remain completely Croat.[204] **Mate Boban** stated that he would agree to the Neretva becoming a border. It would appear that the purpose of accepting this was to avoid having the 45,000 Muslims who left Mostar during the war return to the Croatian part of Mostar.[205]

➢ ***What emerges at this meeting is the clear desire to release prisoners and keep Mostar under Croatian control.***

53. The meeting between **Franjo Tuđman** and others was held at the Presidential Palace in Zagreb on 2 January 1994.

[201] P 07198 (Miutes of a Meeting between Franjo Tuđman and Representatives of the Croatian Coordination Committee of Herceg-Bosna who had come from Sarajevo, 15 December 1993), 15 December 1993), pp. 13 and 14.
[202] P 07260 (Record of the Conversation between Franjo Tuđman and Representatives of Herceg-Bosna (including Mate Boban) 19 December 1993, p. 15.
[203] P 07260 (Record of the Conversation between Franjo Tuđman and Representatives of Herceg-Bosna (including Mate Boban) 19 December 1993, p. 18.
[204] P 07260 (Record of the Conversation between Franjo Tuđman and Representatives of Herceg-Bosna (including Mate Boban) 19 December 1993, p. 23.
[205] P 07260 (Record of the Conversation between Franjo Tuđman and Representatives of Herceg-Bosna (including Mate Boban) 19 December 1993), p. 23.

- **Franjo Tuđman** stated that if the Serbs of **BiH joined Serbia**, Herceg-Bosna **would join Croatia**.[206] He added that if the Serbs of BiH joined Serbia, the Croats would not be able to agree to remain on their own in a union with the Muslims.

- In light of the upcoming international conferences, and the negotiations in Vienna in particular, the participants at the meeting discussed various legal options which would allow the Muslims to have access to the sea through the port of **Ploče** while retaining Croatian sovereignty in this territory.[207]

- **Franjo Tuđman** stated that if Herceg-Bosna joined Croatia, it would be possible to sign friendship, economic and even defence agreements with the Bosnian Republic.[208] He also considered concluding a treaty on a confederation or an alliance with the Bosnian Republic.[209]

➢ ***During this meeting, Franjo Tuđman mentioned the possibility of Herceg-Bosna joining Croatia but said that if the Serbs of BiH joined Serbia, it would be possible to reach agreements.***

54. At the meeting between **Franjo Tuđman, Gojko Šušak** and **Janko Bobetko** at the Presidential Palace in Zagreb on 4 January 1994, the President and his ministers made preparations – with the help of a map – for military operations in BiH in the areas of Novi Travnik, Vitez and Busovača, and as far as Gornji Vakuf.[210]

- **Franjo Tuđman** stated that it was absolutely necessary to keep control of a road by using aerosol bombs if necessary.[211]

[206] P 07464 (Minutes of a Meeting between Franjo Tuđman, Hrvoje Šarinić, Gojko Šušak, Krešimir Kašpar, Mile Akmadžić, Mate Granić and Others, 2 January 1994), p. 54.
[207] P 07464 (Minutes of a Meeting between Franjo Tuđman, Hrvoje Šarinić, Gojko Šušak, Kresimir Kašpar, Mile Akmadžić, Mate Granić and Others, 2 January 1994), pp. 16-22 of the English translation 1D33-0630.
[208] P 07464 (Minutes of a Meeting between Franjo Tuđman, Hrvoje Šarinić, Gojko Šušak, Krešimir Kašpar, Mile Akmadžić, Mate Granić and Others, 2 January 1994), p. 54.
[209] P 07464 (Minutes of a Meeting between Franjo Tuđman, Hrvoje Šarinić, Gojko Šušak, Krešimir Kašpar, Mile Akmadžić, Mate Granić and Others, 2 January 1994), p. 54.
[210] P 07475 (Minutes of a Meeting between Franjo Tuđman Gojko Šušak and Janko Bobetko, 4 January 1994), pp. 6 and 7.
[211] P 07475 (Minutes of a Meeting between Franjo Tuđman Gojko Šušak and Janko Bobetko, 4 January 1994), p. 8.

- ***At this meeting, preparations were made for military operations in BiH, although it is not possible to conclude that they had started to carry them out.***

55. At the meeting between **Franjo Tuđman, Milo Akmadić** and **Mato Granić** at the Presidential Palace in Zagreb on 5 January 1994 after they had returned from the Vienna Conference, **Franjo Tuđman** said that **the union could be of an economic, military, defensive or general nature**,[212] and then asked his ministers to make advance preparations for such a union.[213]

- **Thus, it seems that a future Union with poorly defined contours was under discussion.**

56. At the 34th session of the Croatian Defence and National Security Council (VONS) on 6 January 1994, **Franjo Tuđman** said that he had been informed of **Mate Boban's** withdrawal.[214] **He added that he had informed people around the world about this and complained that Boban was the main obstacle to cooperation with the Muslims, and he repeated that he was not behind his appointment.**[215]

- **Franjo Tuđman** stated that the previous summer he had assigned **Šušak** and General **Bobetko** the task of ensuring - with the help of volunteers from Croatia - that Croatian areas in central Bosnia (he mentioned Novi Travnik, Vitez, Busovača, Kiseljak and Kreševo) were under control in order to determine "the future borders of the Croatian State, perhaps for centuries."[216]

- **Franjo Tuđman** stated that he wanted to reach an agreement with the Muslims and Izetbegović in order to put an end to the ethnic cleansing of the Croatian population.[217]

[212] P 07480 (Minutes of a Meeting between Franjo Tuđman, Milo Akmadić and Mato Granić, 5 January 1994), p. 14.
[213] P 07480 (Minutes of a Meeting between Franjo Tuđman, Milo Akmadić and Mato Granić, 5 January 1994), p. 18.
[214] P 07485 (Minutes of the 34th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Janko Bobetko, Miroslav Tuđman, Mate Granić, Franjo Gregurić and others, 6 January 1994), p. 7.
[215] P 07485 (Minutes of the 34th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Janko Bobetko, Miroslav Tuđman, Mate Granić, Franjo Gregurić and others, 6 January 1994), p. 7.
[216] P 07485 (Minutes of the 34th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Janko Bobetko, Miroslav Tuđman, Mate Granić, Franjo Gregurić and others, 6 January 1994), pp. 7 and 8.
[217] P 07485 (Minutes of the 34th Session of the Croatian Defence and National Security Council (VONS), attended by Franjo Tuđman, Janko Bobetko, Miroslav Tuđman, Mate Granić, Franjo Gregurić and others, 6 January 1994), pp. 8 and 9.

➢ ***The case of Mate Boban was referred to on 6 January 1994. It would appear that he was going to withdraw, as he was an obstacle to cooperation with the Muslims, and Franjo Tuđman stated that he was not behind his appointment.***

The purpose of the cooperation agreement was to prevent the ethnic cleansing of the Croatian population.

57. A meeting was held between **Franjo Tuđman** and bishops from BiH **(Komarica, Perić, Pranjić, Prljić and Pašalić**) in the presence of **Jadranko Prlić** at the Presidential Palace in Zagreb on 12 January 1994.

- **Jadranko Prlić** stated that he had been at the front line the day before.[218]

➢ ***What Jadranko Prlić said shows that he was also concerned about the military situation, which is not surprising given his political responsibilities even though he did not have the power to influence military operations.***

58. At the meeting between **Franjo Tuđman, Mate Granić, Gojko Šušak** and **Drago Krpina** at the Presidential Palace in Zagreb on 29 January 1994, **Franjo Tuđman** stated that there were between 1,500 and 2,000 Croatian volunteers in BiH.[219]

- **Franjo Tuđman** recalled that on 12 July 1992 he had reached an agreement with **Alija Izetbegović** on cooperation in the border areas.[220]

➢ ***It appears that the number of volunteers was limited (2,000) and that the inviolability of borders was recalled.***

59. During a discussion on the future of BiH at the Presidential Palace in Zagreb on **20 February 1994**, **Franjo Tuđman** stated that the Croats should take care not to let the Muslims influence the Croats of Herceg-Bosna.[221]

[218] P 07570 (Minutes of the Meeting between Franjo Tuđman and Bishops from BiH (Komarica, Perić, Pranjić, Prljić and Pašalić) in the presence of Jadranko Prlić, 12 January 1994), p. 3.
[219] P.07719 (Minutes of the Meeting between Franjo Tuđman, Mate Granić, Gojko Šušak and Drago Krpina, 29 January 1994), p. 5.
[220] P.07719 (Minutes of the Meeting between Franjo Tuđman, Mate Granić, Gojko Šušak and Drago Krpina, 29 January 1994), p. 5.

- He added that they should accept the division of BiH, as the world was forcing them to do so[222] **but that at the same time they should protect Croatian regions in Bosnia and Croatia against islamisation.** [223]

➢ ***An examination of what Franjo Tuđman said shows that he wants to appear as a victim of the international community that is forcing the Croats to divide BiH.***

60. At the 37th session of the Croatian Defence and National Security Council (VONS) on 4 March 1994, **Franjo Tuđman** justified the creation of the **HR H-B** by saying that without it, the Croat-Muslim federation would not have been established in BiH, nor would there have been a confederation between this Croat-Muslim federation and Croatia.[224] He added that one year prior to the signing of the agreement, he had been in contact with **Mr Clinton** in order to suggest a similar agreement to him.[225]

- During a discussion about the conflict, **Franjo Tuđman** stated that the Muslims had tried to create a Muslim state, initially on Serbian territory, and then on Croatian territory.[226] They therefore launched an offensive against the Croats.[227]

➢ ***It appears that Franjo Tuđman attempted to justify his action by passing himself off as the key player.***

61. A meeting between **Franjo Tuđman** and other officials was held in the Presidential Palace (in Zagreb) on 14 March 1994.

- At this meeting, **Franjo Tuđman** stated that **Herceg-Bosna should win the elections in territories that were under its control.**[228]

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[221] P 08012 (Minutes of the Meeting between Franjo Tuđman, Mate Granić, Gojko Šušak, Mile Akmadžić, Kresimir Zubak and Others, 20 February 1994), p. 35.
[222] P 08012 (Minutes of the Meeting between Franjo Tuđman, Mate Granić, Gojko Šušak, Mile Akmadžić, Krešimir Zubak and Others, 20 February 1994), p. 35.
[223] P 08012 (Minutes of the Meeting between Franjo Tuđman, Mate Granić, Gojko Šušak, Mile Akmadžić, Krešimir Zubak and Others, 20 February 1994), p. 35.
[224] P 08012 (Minutes of the Meeting between Franjo Tuđman, Krešimir Zubak, Mile Akmadžić, Ivan Jarnak, Mate Granić, Franjo Gregurić, Haris Silajdžić, Janko Bobetko, Stjepan Mesić and Others, 4 March 1994), p. 4.
[225] P 08012 (Minutes of the Meeting between Franjo Tuđman, Krešimir Zubak, Mile Akmadžić, Ivan Jarnak, Mate Granić, Franjo Gregurić, Haris Silajdžić, Janko Bobetko, Stjepan Mesić and Others, 4 March 1994), p. 55.
[226] P 08012 (Minutes of the Meeting between Franjo Tuđman, Krešimir Zubak, Mile Akmadžić, Ivan Jarnak, Mate Granić, Franjo Gregurić, Haris Silajdžić, Janko Bobetko, Stjepan Mesić and Others, 4 March 1994), p. 6.
[227] P 08012 (Minutes of a Meeting between Franjo Tuđman, Krešimir Zubak, Mile Akmadžić, Ivan Jarnak, Mate Granić, Franjo Gregurić, Haris Silajdžić, Janko Bobetko, Stjepan Mesić and Others, 4 March 1994), p. 6.

- ***A few days before the Washington Agreement was signed, the need to ensure Croatian domination over certain territories could be felt.***

62. The meeting between **Franjo Tuđman** and others officials, including Jadranko Prlić, was held at the Presidential Palace in Zagreb on 31 May 1994.

- At the meeting, **Franjo Tuđman** declared that the Muslims who were still in BiH or were going to return to BiH should be declared as Croats of **Muslim faith**.[229]

- **Jadranko Prlić** then raised the issue of their Bosnian language and nationality, and explained that it was their role (of the Croats) to prove the contrary (i.e. that they were not Bosniaks).[230]

- **Franjo Tuđman** responded by explaining that they should persuade the Muslims to write in Croatian and that the problem would be solved by imposing a common currency and language on them.[231]

- ***It seems clear that there was always the will, on the part of the Croats to subjugate some of the Muslims through various means.***

63. At the meeting between **Franjo Tuđman, Jadranko Prlić, Krešimir Zubak**, President of the Croat-Muslim Federation, and others at the Presidential Palace in Zagreb on 2 September 1994, **Franjo Tuđman** demonstrated just how determined he could be when it came to the creation of a Croatian state.[232]

[228] P. 08066 (Minutes of the Meeting between Franjo Tuđman and Other Officials, 14 March 1994), p. 14.
[229] P. 08288 (Minutes of the Meeting between Franjo Tuđman and Other Officials, including Jadranko Prlić, 31 May 1994), ET 0132-3773), p. 28.
[230] P. 08288 (Minutes of the Meeting between Franjo Tuđman and Other Officials, Including Jadranko Prlić, 31 May 1994), ET 0132-3773), p. 29.
[231] P. 08288 (Minutes of the Meeting between Franjo Tuđman and Other Officials, Including Jadranko Prlić, 31 May 1994), ET 0132-3773), p. 29.
[232] P. 08448 (Minutes of the Meeting between Franjo Tuđman, Krešimir Zubak, Jadranko Prlić and Others, 2 September 1994), ET 0132-3954), p. 63.

- For Franjo Tuđman, as long as **Alija Izetbegović** did not accept such an agreement, the HVO had to reinforce its troops.[233]

➢ ***It was at this time that the Croat-Muslim Federation was established.***

64. At the meeting between **Franjo Tuđman, Gojko Šušak** and other officials from Herceg-Bosna, including **Jadranko Prlić** and **Anto Roso,** at the Presidential Palace in Zagreb on **30 September 1994**, President **Franjo Tuđman** declared that Herceg-Bosna would remain with the HVO until the implementation of the **Washington Agreement**.[234]

- He also noted that many Croats were leaving the regions in which the Muslims had authority. According to **Jadranko Prlić**, the Croats were leaving these regions because they no longer believed they had a future together.[235]

- **Jadranko Prlić** also asked President **Franjo Tuđman** if he did indeed favour an overarching policy.[236]

- Before bringing the meeting to an end, President **Franjo Tuđman** recalled that arrangements had been made with the Croats, but that it was important to obtain weapons and solve the problems, first with one of the parties, and then, with the other.[237]

➢ ***In spite of the international agreements, Franjo Tuđman still wanted to "control" the situation of the Croats in Bosnia and Herzegovina, even if it meant continuing to supply weapons.***

The background was assessed on the basis of 64 transcripts of **meetings Franjo Tuđman** had with Croatian representatives of BiH or with members of the Croatian Armed Forces, or discussions held

[233] P. 08448 (Minutes of the Meeting between Franjo Tuđman, Krešimir Zubak, Jadranko Prlić and Others, 2 September 1994), 1 D 33-0714, p. 13.
[234] P 08465 (Minutes of the Meeting between Franjo Tuđman, Gojko Šušak and Other Officials, including Jadranko Prlić, 30 September 1994), p. 14.
[235] P 08465 (Minutes of the Meeting between Franjo Tuđman, Gojko Šušak and Other Officials, including Jadranko Prlić, 30 September 1994), p. 16.
[236] P 08465 (Minutes of the Meeting between Franjo Tuđman, Gojko Šušak and Other Officials, including Jadranko Prlić, 30 September 1994), p. 16.
[237] P 08465 (Minutes of the Meeting between Franjo Tuđman, Gojko Šušak and Other Officials, including Jadranko Prlić, 30 September 1994), p. 21.

at the Defence and National Security Council (VONS) or meetings of another nature, such as meetings of the Supreme State Council or with foreign dignitaries.

The summary of these documents makes it possible to note that **Franjo Tuđman** always had the idea of joining **Herceg-Bosna** to **Croatia**, but on the basis of various legal solutions, such as holding a referendum or establishing a confederation or a federation, and that he also changed his position on several occasions.

What also emerges is that he was constantly concerned about cooperation with the Muslims, which he invariably insisted upon, since cooperation was necessary on account of the Serbian aggression. He did so while also stressing the major role of the international community.

He was fairly critical of the Croatian representatives of BiH, highlighted a number of mistakes and no longer supported **Mate Boban** who was an obstacle.

The Republic of Croatia intervened in Bosnia and Herzegovina, but mainly **through volunteers** and officers who had been dispatched there, such as **Praljak, Petković and Roso.** Material aid was an issue he constantly raised.

To the extent that there was **direct intervention of the Croatian Army (HV),** it was very limited. **Franjo Tuđman** constantly referred to the international community by mentioning the issue of sanctions.

One can see that he never wanted to confront the **international community** and that he was forced to recognise the existence of borders, even going so far as to suggest that UNPROFOR should be deployed on the borders.

Ultimately, it seems to me that the position Tuđman reaffirmed on numerous occasions in these 64 meetings runs counter to the theory of a JCE alleged by the Prosecution.

B) Meetings at the Presidency of the Republic of Bosnia-Herzegovina.

I had to focus on Sarajevo and the Presidency of the Republic of Bosnia and Herzegovina to find any trace of discussions between Alija Izetbegović and his entourage along the same lines as those held in Zagreb in order to gain a clear view of the position of the Muslim side.

I therefore focused on the presidential transcripts of the Republic of Bosnia and Herzegovina and on other documents. By comparison with the mass of transcripts from Zagreb, I was only able to analyse **six** of the most relevant documents.

An analysis of the various documents concerning the Presidency of the RBiH shows that the conflict between the Croats and the Muslims originated from a profound disagreement among the politicians of different groups with regard to what the future of **Bosnia and Herzegovina** should be based on the referendum of 29 February 1992.

A reading of the transcripts of the meetings held by the Presidency of Bosnia and Herzegovina and other documents concerning the Presidency of the Republic of Bosnia and Herzegovina shows the tripartite aspect of the conflict in Bosnia and Herzegovina from 1992 to 1994.

Although the existence of a real agreement between the Croats and the Muslims prior to the referendum on 29 February and 1 March 1992[238] was emphasised in the interview given by **Franjo Boras,** a member of the Presidency of the RBiH at the time, as demonstrated by the agreement on the equality of the three peoples of Bosnia reached by the leaders of the SDA (Party of Democratic Action) and the HDZ (Croatian Democratic Union), what emerges is that the various entities composing the RBiH shared the desire for the international community to recognise Bosnia and Herzegovina as an independent state, but that contrary to the Croats, the Muslims were categorically opposed to the creation of an RBiH consisting of regions based on their ethnic composition: "*It is difficult to provide a date or a specific incident. In my opinion, what explains the disagreements and fighting that followed is the fact that the leaders of the two peoples had different political objectives. The first and most important of these goals was to organise Bosnia and Herzegovina in accordance with the interests of the people who were represented by these leaders.*"[239]

This disagreement was referred to by **Alija Izetbegović** in his speech to SDA members in Sarajevo on 25 February 1992 in anticipation of the referendum on the independence of the RBiH on 29 February 1992.[240] President **Izetbegović** spoke about the negotiations at the **Lisbon Conference** from 21 to 22 February 1992. It appears that the plan discussed consisted of three key elements.

[238] 1D02473 (Interview with Franjo Boras, member of the Presidency of the RBiH, on Croat-Muslim relations and the end of the war in Bosnia and Herzegovina given on 23 July 1993, p. 2.
[239] 1D02473 (Interview with Franjo Boras, member of the Presidency of the RBiH, on Croatian-Muslim relations and ending the war in Bosnia and Herzegovina, given on 23 July 1993, p. 2.
[240] 1D02720 (Article in *Dani* magazine: Alija Izetbegović and the Lisbon Secret).

The first stipulated that the RBiH would keep its historical and present-day borders. The second and most contentious element divided the RBiH into a number of regions on the basis of their ethnic composition. Finally, the third stipulated that everything done in the future would be done in the presence of and with guarantees from the EC.

He pointed out that the Croats were very hesitant and referred only to what the politicians from Zagreb were saying, although their vote was indispensable for the Muslims of the RBiH to break away from Yugoslavia. "*The Croats are wavering. They constantly have consultations in Zagreb and we have received news from that side today, unpleasant for us, that they continue encouraging the Croatian element here to put a knife against our throat at the last moment and demand changing the questions, demand confederalisation, etc."*

He was worried about the fact that the Croats could hesitate until the last moment, and in the end, impose their notion of confederalism on the referendum.

Izetbegović also spoke of his concern about the meeting planned between Karadžić and Boban in Graz on 26 February 1992 and about the fact that the two of them seemed to favour a partition of the RBiH. "*He said that he had more unpleasant news: KARADŽIĆ and BOBAN are meeting in Graz tomorrow. It's a secret meeting and I don't know if it will be announced. It has not yet been announced, but they will have the meeting. Therefore, the future of Bosnia as a state has not yet been decided. We should not get our hopes up when it comes to getting approval from the international community and getting very firm assurances from America, Europe, all these countries, that they will stand by it,", he said, and he stressed that some of the players had not given up the idea of dividing Bosnia and Herzegovina: "Which way can it be done? It can be done by creating chaos. And in such a situation, those on top will say: Well, allright, we do not want to have fire here, because all of this was done to extinguish it. Extinguishing fire here would imply preserving Bosnia and Herzegovina and preventing its division. Division can only be done in the event of chaos and they will not give it up until the very last moment. This is demonstrated by tomorrow's meeting. They will try it again; it is not a fait accompli."*[241]

"[...] chaos suits the stronger side. When, as they say, the lights go out in the inn, then the biggest person has the greatest advantage. Those who are weaker will get the beating. What suits us is some sort of order and law in that Bosnia and Herzegovina, some sort of control, lights being on,

[241] 1D02720 (Article in the magazine *Dani:* Alija Izetbegović and the Lisbon Secret), p. 3.

some sort of inspection. What does not suit us is chaos. We are not the stronger side! We might have [a] somewhat higher morale for surviving, and it is a good thing that people are prepared to fight." This document very clearly reflects the tension already present between the communities the day before the referendum.

The document with the interview given by **Franjo Boras**,[242] member of the Presidency of the RBiH, provides further details on this Croat-Muslim disagreement and refers to the involvement of the Serbs in the conflict. He mentioned the fact that the Muslims had taken possession of certain territories in Bosnia and Herzegovina previously held by HVO forces, but added that this was also due to the fact that they could not return to the sectors that had been taken by the Serbs. *"The Muslim leaders know that they have to have control over enough territory for their future federation." Being aware of the fact that t**hey could not get back territory that had been taken by the Serbs**, they opted for Croatian territories in central Bosnia and certain parts of Herzegovina. According to recent statements made by Alija IZETBEGOVIC, they were even prepared to accept a confederation, in particular, since they had taken control of territory in some parts of Bosnia and Herzegovina that had previously been held by the HVO/the Croatian Defence Council.*"[243]

He also stated that the Muslims had decided to attack the Croats - a weaker enemy - rather than the Serbs, in order to obtain territories, because they would not have been able to maintain control in any other way: *"I believe that it was the assessment that it would be possible to legalise wartime gains that launched the Muslim offensive in central Bosnia. When the Muslim leaders saw that it would not be possible to put the whole of Bosnia and Herzegovina under the control of its majority people, they directed their efforts at conquering the territory militarily. Of course, they chose the easier option: they did not attack the Serbs in eastern Bosnia, but the Croats, who are a weaker opponent.*"[244]

He mentions the fact that Croat-Muslim relations took a downward turn between 1992 and 1993 but nevertheless explained that the two peoples were the losers in this conflict as this contributed to the development of the plan of the politicians advocating a Greater Serbia. *"It is the Muslim and Croatian people*

[242] 1D02473 (Interview with Franjo Boras, member of the Presidency of the RBiH, on Croat-Muslim relations and the end of the war in Bosnia and Herzegovina, given on 23 July 1993), p. 2.
[243] 1D02473 (Interview with Franjo Boras, member of the Presidency of the RBiH, on Croat-Muslim relations and ending the war in Bosnia and Herzegovina, given on 23 July 1993), p. 1.
[244] 1D02473 (Interview with Franjo Boras, member of the Presidency of the RBiH on Croat-Muslim relations and the end if the war in Bosnia and Herzegovina, given on 23 July 1993), pp. 1 and 2.

who will lose the most. ***What is happening now is the fulfilment of the hope of politicians advocating a Greater Serbia.*** *"*[245]

He added that the Croats had become closer to their common enemy, the Serbs, as a result of the Muslim aggression against them. *"It is questionable whether there is any point in talking about a common enemy any more. An open aggression by the BiH against the Croatian people and its historic territory is underway in Bosnia and Herzegovina. In the past several months,* ***the Croatian people have suffered incomparably more from the BiH Army aggression than from the Serbian aggression. The Muslim leadership is the only one to blame for the fact that the Croats in some areas are forced to ask this common enemy for assistance and thus feed its media campaign.*** *"*[246]

Lastly, he referred to Croatian policy in the region which had first to confront the Serbian aggression before confronting the Muslim aggression: *Speaking about the policies of the Croats in Bosnia and Herzegovina, we should bear in mind several of its segments. One of them, definitely the most important one, is the defence of the Croatian people and its areas in Bosnia and Herzegovina, first from the Serbian aggression, and now also from the Muslim aggression."*[247]

A comprehensive examination of the documents shows that the role of the **international community** was to provide a framework for negotiations with a view to resolving the conflict between the Croats and the Muslims.

A document which is the transcription of part of a session of the Presidency of Bosnia and Herzegovina on 21 October 1993 can serve as an example.[248] It refers to the fact that the International Red Cross was playing an important role in the prisoner exchanges carried out between the ABiH and the HVO.

Similarly, in the speech he made on 25 February 1992,[249] **Izetbegović** referred to the events that took place at the Lisbon Conference organised from 21 to 22 February 1992 as a second round of negotiations on the constitutional future of the RBiH. In this document, Izetbegović says that it was through the EC, and not through the parties involved in the negotiations, that he learned about a

[245] 1D02473 (Interview with Franjo Boras, member of the Presidency of the RBiH on Croat-Muslim relations and the end of the war in Bosnia and Herzegovina, given on 23 July 1993), p. 3.
[246] 1D02473 (Interview with Franjo Boras, member of the Presidency of the RBiH on Croat-Muslim relations and the end of the war in Bosnia and Herzegovina, given on 23 July 1993), p. 3.
[247] 1D02473 (Interview with Franjo Boras, member of the Presidency of the RBiH, on Croat-Muslim relations and the end of the war in Bosnia and Herzegovina, given on 23 July 1993), pp. 3 and 4.
[248] 1D02304 (Transcription of a tape recording of the session of the Presidency of Bosnia and Herzegovina held on 21 October 1993).

proposal to organise the RBiH as a confederation. "*In the evening after the first day of the negotiations, we received a piece of paper from the European Community. We received two pieces of paper there; I am referring here to the first piece of paper, which we received the first evening and which, if nothing else, filled us with dismay. This note envisaged a confederal organisation of Bosnia and Herzegovina, and to our surprise, it came from the European Community, not as a proposal of some of the partners, some of the parties, but instead from the European Community itself.*"[250]

According to **Izetbegović**, this proposal suited only the Serbs and the Croats, not the Muslims. It was in fact no more than an English translation of the Serbian proposal which recognised the RBiH as an independent state within its present-day borders while suggesting that the RBiH become a confederal state composed of three "states" with Sarajevo having an extra-territorial status.

The situation in BiH in 1992 was specific for the European Community, and none of the proposals made by the parties could be fully taken into consideration. *"The European Community negotiators replied that we have to take [...] Bosnia and Herzegovina's specific situation [into account], that it seems to them that we have not taken that into account and that nobody's option can be accepted in its entirety. They told us: We know what your objective is, an independent Bosnia and Herzegovina, and here you have it. Their objective is [the] reorganisation of Bosnia and Herzegovina, and you cannot deny them that. You have to bear in mind that the two peoples are requesting that.*"[251]

One could also cite documents referring to the transcript of the meeting of the Presidency of the Republic of Bosnia and Herzegovina on 7 February 1994[252] as well as to the transcript of the meeting of the Assembly of the Presidency from 28 to 30 March 1994.[253] These documents mention various negotiations held under the auspices of the international community – the European Community or the United Nations – with a view to reaching peace agreements putting an end to the conflict pitting the Croats against the Muslims.

In his interview on 23 July 1993, **Franjo Boras**, a member of the RBiH Presidency, stated that the failure of the **Vance-Owen Plan** could be attributed to the Serbs who did not want to accept the map on the division into provinces proposed by Vance and Owen. "*However, as the **VANCE-***

[249] 1D02720 (Article in *Dani* magazine: Alija Izetbegović and the Lisbon Secret), pp. 2 and 3.
[250] 1D02720 (Article in *Dani* magazine: Alija Izetbegović and the Lisbon Secret), p. 2.
[251] 1D02720 (Article in *Dani* magazine: Alija Izetbegović and the Lisbon Secret), p. 3.
[252] 1D01367 (Minutes of the Meeting of the Presidency of the Republic of Bosnia and Herzegovina on 7 February 1994).
[253] 1D01435 (Minutes of the Session of the Republic of Bosnia and Herzegovina Assembly from 28 to 30 March 1994).

OWEN plan *fell through in the first place because the Serbian side did not want to accept the map of provinces proposed by* ***VANCE and OWEN****, it is obvious that the Serbs will not accept a proposal for a federal organisation that would include this map, so the Muslim leadership knows that it can count only on the territory taken by the BiH Army."*[254]

A reading of the minutes of the session of the Presidency of the Republic of Bosnia and Herzegovina on 7 February 1994 also makes it possible to note that the Presidency was against the **Owen and Stoltenberg Plan** which was proposed after the **Vance-Owen Plan** had fallen through. In fact, according to **Ivo Komšić**, a member of the Presidency of Bosnia and Herzegovina, the plan stipulated that the partition of BiH should be carried out urgently in order to end the conflict, which was disputed by the RBiH, *"However, we would have to let them know that the negotiations cannot be finalised on the basis of this* ***OWEN and STOLTENBERG*** *plan on the union of three national states. Take the latest statements by* ***OWEN*** *and* ***STOLTENBERG*** *before the house; he said that Bosnia and Herzegovina should be urgently partitioned, that this is the solution to stop the war. Also in this situation, you can see [...] his insolence. He is not taking [anything] into account, he is not interested in what anyone thinks. He keeps pushing his own agenda. Persistently. There he was in Belgrade, he went up there. They are pushing that line of theirs. They could not care less about the dead, about this or that. And we all know that the war is going on because of his [vision], because as long as such a [vision] exists, in this state the war will be waged for every village. And that will go on until the inhabitants of either the villages or the cities are exterminated. The Muslims will never settle for being under someone else's [authority] because they have become militarily weak."*[255]

The table below makes it possible to place the statements made in **Zagreb** and **Sarajevo** within the context of the political events that took place during these periods.[256]

1 December 1918	**1st Yugoslavia, a monarchy, Peter the 1st of Serbia**
29 November 1945	**Federal People's Republic of Yugoslavia**

[254] 1D02473 (Interview with Franjo Boras, member of the Presidency of the RBiH, on Croat-Muslim relations and the end of the war in Bosnia and Herzegovina, given on 23 July 1993, p.2.
[255] 1D01367 (Transcript of a Recording of the Session of the Presidency of Bosnia and Herzegovina on 7 February 1994), pp. 6 and 7.
[256] It did not seem necessary to me to use footnotes to refer to events of public knowledge. These are historical facts that do not require evidence to prove them; it should, however, be made clear that all of these events are mentioned in **documents** that have been admitted into evidence or were referred to by **witnesses**.

19 July 1956	**Brioni Conference**
7 April 1963	**The Socialist Federal Republic of Yugoslavia**
4 October 1980	**Death of Tito**
6 December 1990	**Election of Milošević**
21 December 1990	**Creation of the Serbian Krajina**
16 May 1991	**Annexation of the Serbian Krajina to the Republic of Serbia**
25 June 1991	**Independence of the Republics of Slovenia and Croatia**
July - August 1991	**Armed incidents in Croatia between the Serbian Armed Forces supported by the Yugoslav People's Army**
27 August 1991	**Creation of the Badinter Commission**
7 September 1991	**Start of Conference on Yugoslavia**
25 September 1991	**UNSC Resolution 713: Arms embargo on the FRY**
25 October 1991	**Constitution of the Assembly of the Serbian People in Bosnia and Herzegovina**
18 November 1991	**Creation of the Croatian Community of Herceg-Bosna**
23 December 1991	**Germany, the Vatican and Austria recognise the independence of Croatia and Slovenia**
2 January 1992	**Ceasefire agreement between Tuđman and Milošević**
9 January 1992	**Creation of Republika Srpska**
21 February 1992	**Resolution 743: Establishment of UNPROFOR**
1st March 1992	**BiH independence (referendum)**
18 March 1992	**Signing of the Carrington-Cutilleiro Plan by Izetbegović, Karadžić and Boban**
6 April 1992	**EU recognises the independence of Bosnia and Herzegovina**
27 April 1992	**Federal Republic of Yugoslavia (Serbia and Montenegro)**
15 May 1992	**Resolution 752 demanding that the Croatian elements withdraw from BiH or to submit to the BiH Government**
30 May 1992	**Resolution 757 renewing the demand for the withdrawal of Croatian elements**
16 November 1992	**Resolution 787 renewing the demand for the withdrawal of Croatian elements**
3 December 1992	**Report of the Secretary General of the United Nations to the General Assembly (A/47/747)**
18 December 1992	**Resolution 798 demanding that detention camps in BiH, and in particular, camps for women, be closed**
3 January 1993	**Presentation of the Vance-Owen Peace Plan in Geneva (division of BiH into 10 provinces)**
22 February 1993	**Resolution (ICTY)**
5-6 May	**Rejection of the Vance-Owen Plan by the Assembly of the Serbian**

1993	**Republic of BiH**
25 May 1993	**Resolution 827 (ICTY)**
20 August 1993	**Presentation of the Owen-Stoltenberg Plan: partition of BiH into 3 constituent republics: Serbian (51%), Bosniak (30%) and Croatian (16%)**
24 August 1993	**Resolution 859 (the continuing siege of Mostar)**
28 August 1993	**Proclamation of the Croatian Republic of Herceg-Bosna**
9 January 1994	**Tuđman-Izetbegović meeting in Bonn**
1 March 1994	**Washington Agreement (Establishment of the Croat-Muslim Federation of Bosnia and Herzegovina)**
4 March 1994	**Resolution 900: concerned by the situation in Mostar and taking note of the developments towards a peace process between the Croatian and Muslim leaders of Bosnia**
25 April 1994	**Creation of the "Contact Group" by the USA, Russia, GB, France**
5 July 1994	**"Contact Group's" peace plan**
8 September 1995	**Geneva Accord between the Contact Group countries, Bosnia and Herzegovina, Croatia and the FRY**
1 November 1995	**Beginning of the Dayton Peace Negotiations (USA)**
21 November 1995	**Dayton Agreement (Peace plan for Bosnia)**

The table below provides the dates of the events alleged in the Indictment:

June 1992	**The HVO takes control of the town of Stolac**
1 July1992	**The HVO takes control of the town of Vareš**
3 September 1992	**Establishment of the Heliodrom Camp**
October 1992	**The HVO takes the town of Mostar**
23 October 1992	**The HVO attacks the ABiH in the town of Prozor**
24 October 1992	**Men are arrested and detained in the Ripci Primary School in the Municipality of Prozor**
24 October 1992 (or around that date)	**Attack on the village of Paljike in the Municipality of Prozor The ABiH and the HVO clash in Gornji Vakuf. The HVO took over a number of factories and the MUP building**
6 January 1993	**The Croatian flag is raised in Gornji Vakuf. An HVO policeman fired at an ABiH soldier trying to take the flag down**
11 and 12 January 1993	**Fighting breaks out between the HVO and ABiH in Gornji Vakuf**
18 January 1993	**HVO attacks and artillery shelling, and the HVO seizes power in Gornji Vakuf**
January 1993	**Curfew in the town of Mostar**
Beginning of April 1993	**HVO ultimatum in Mostar**
Beginning of April to 15 April	**HVO ultimatum in Sovići and Doljani**
April 1993 to March 1994	**Crimes committed by the HVO in the town of Ljubuški and in Vitina Otok.**
April 1993 to April 1994	**Muslims detained at Dretelj Prison**
17, 18 April 1993	**Arrests and detention in the Sovići School, the execution of four men and mistreatment**
Around 17-19 April 1993	**Attacks on Parcani, Lizoperci and Tošćanica in the Municipality of Prozor**

18 April 1993	**Transfers from the Ljubuški School**
18 to 22 April 1993	**Destruction of religious property in Sovići and Doljani**
18 to 23 April 1993	**Detention at the Fish Farm in Jablanica**
20 April 1993	**Prominent Muslims in Stolac arrested**
20 April 1993	**Muslim men, including prominent men from Čapljina, arrested and detained**
Spring - end of 1993	**Muslim men arrested and detained (in the secondary school, the Unis building, Military Police building and the Ministry of the Interior)**
17 April to 4 May 1993	**Plunder of Muslim property in Jablanica**
May 1993 to March 1994	**Crimes committed against the Muslims at the Helidorom**
9 May 1993	**HVO attack on Mostar**
10 May 1993	**12 Muslim men mistreated at the Mechanical Engineering Faculty in Mostar**
8 June 1993 to April 1994	**Muslims detained at Gabela Prison**
June to mid-August 1993	**Muslim civilians are attacked and property plundered in and around Duge, Lug, Lizoperci, Skrobućani, Parcani, Munikose, Podonis and Graćanica**
June 1993 to March 1994	**Detentions in the Vojno Camp**
Mid-June 1993	**HVO expelled Muslims from their homes in West Mostar**
30 June 1993	**Attack on the Tihomir Misić Barracks and detention of Muslim men at the Heliodrom and in Dretelj**
6 July 1993	**Deportations from the village of Prenj in the Municipality of Stolac**
13 July 1993	**Deportations, transfers and murders of two women in the Municipality of Čapljina**
Mid-July 1993	**New HVO attack, transfers and deportations in the Municipality of Mostar**
31 July 1993	**50 detained Muslims used on the front lines in Prozor**
Late July 1993	**Destruction of property and houses in the Municipality of Stolac**
July and August 1993	**Women, children and elderly people are detained in Prozor**
August and September 1993	**Transfers of women, children and elderly people in Čapljina. The main operation took place on 23 August**
4 and 5 August 1993	**Destruction of property and deportation in Stolac**
24 August 1993	**Attack on the surroundings of the town of Mostar, Raštani, the hydroelectric power station and the Tihomir Mišić Barracks.**
End of August 1993	**The HVO forced the civilians to walk towards ABiH-held territories and continued to persecute those who remained in Prozor**
September 1993	**Deportation of Muslims to Centar II**
18 October 1993	**Arrest of six ABiH members and mistreatment in Vareš**
21 and 22 October 1993	**Attack on the village of Kopjari in the Municipality of Vareš**
23 October 1993	**Arrests of Muslim civilians and members of the military in the Municipality of Vareš**
23 October 1993	**Attack on the Village of Stupni Do**
8 November 1993	**Destruction of the Old Bridge in Mostar**

B) The Proceedings

1. Admission of Documents

The admission of documents is at the very heart of all the cases before the ICTY, as the evidence comes from witness statements or documents.

The documents are very diverse since they come mainly from the international community or international organisations such as the UNHCR, UNPROFOR and the EU which were active in the field, or from press articles, interviews, dispatches from press agencies and books as well as from the belligerents' **civilian or military documents.**

As the proceedings at this Tribunal are in essence based almost entirely on the common law system, it is common practice to present a document to a witness before it is admitted, and the document is admitted only after it has been presented to a witness, because it shows **criteria of relevance and probative value.**

Accordingly, it is interesting to note that during the first trial before this Tribunal, Exhibit No. 1 was admitted only after it had been shown to the witness.[257]

In certain cases, a document has shortcomings (translation errors or questionable reliability), and in such cases it is given an **MFI number for purposes of identification** and can later be given a definitive number if the doubts are dispelled.

It seemed to me particularly interesting to observe that over the years, there has been a **marked increase in the number of documents admitted**, and the table below will make it possible to provide a better break-down of this **inflationary process**.

[257] *The Prosecutor v. Duško Tadić* (" Prijedor "), Open session on 7 May 1996, T(F), p. 52.

i. Trials with one accused

Case and number		Number of documents admitted	
Case	***Case no.***	***Prosecution***	***Defence***
The Prosecutor v. Tadić	IT-94-1	362	103
The Prosecutor v. Blaškić	IT-95-14	787	614
The Prosecutor v. Furundžija	IT-95-17/1	15	22
The Prosecutor v. Krnojelac	IT-97-25	283	279
The Prosecutor v. Jelisić	IT-95-10	74	8
The Prosecutor v. Aleksovski	IT-95-14/1	139	37
The Prosecutor v. Đorđević	IT-05-87/1	1,585	933
The Prosecutor v. Krstić	IT-98-33	910	183
The Prosecutor v. Milan Simić	IT-95 -9/2	190	43
The Prosecutor v. Stakić	IT-97-24	796	594
The Prosecutor v. Vasiljević	IT-98-32	133	40
The Prosecutor v. Galić	IT-98-29	603	651
The Prosecutor v. Brđanin	IT-99-36	2,736	350
The Prosecutor v. Strugar	IT-01-42	292	119
The Prosecutor v. Delić	IT-04-83	689	657
The Prosecutor v. Halilović	IT-01-48	287	207
The Prosecutor v. Orić	IT-03-68	625	1,024
The Prosecutor v. Momčilo	IT-00-93	3,938	382
The Prosecutor v. Martić	IT-95-11	901	90
The Prosecutor v. Dragomir	IT-98-29/1	937	459
The Prosecutor v. Perišić	IT-04-81	2,913	846

The ICTY has had a number of trials with multiple accused, i.e. with 2, 3, 4, 5, 6 or 7 accused (including *the Prosecutor v. Popović et al* (7) (Srebrenica)). It is interesting to note that when there were two or more accused, the number of documents increased exponentially.

ii. Trials with multiple accused

Cases and numbers		**Number of documents admitted (Prosecution and Defence)**							
Case	***Case no.***	***The Prosecution***	***D1***	***D2***	***D3***	***D4***	***D5***	***D6***	***D7***
The Prosecutor v. Kupreskić et al.	IT-95-16	394	20	68	31	116	18	30	
The Prosecutor v. Mucić et al.	IT-96-21	192	Total number of exhibits (for the Defence): 218						
The Prosecutor v. Sikirica et al.	IT-95-8	86	58	4	50				
The Prosecutor v. Kordić and Cerkez	IT-95-14/2	2,721	Total number of exhibits (for the Defence): 1,643						
The Prosecutor v. Kvočka et al.	IT-98-30/1	305	58	13	35	32	46		
The Prosecutor v. Kunarac et al.	IT-96-23	132	Total number of exhibits (for the Defence): 130						
The Prosecutor v. Naletilić and Martinović	IT-98-34	963	441	81					
The Prosecutor v. Simić et al.	IT-95-9	190	183	196	56				
The Prosecutor v. Blagojević and Jokić	IT-02-60	876	Total number of exhibits (for the Defence): 364						
The Prosecutor v. Limaj et al.	IT-03-66	206	Total number of exhibits (for the Defence): 44						
The Prosecutor v. Hadžihasanović and Kubura	IT-01-47	Total number of exhibits 2,949							
The Prosecutor v. Haradinaj et al.	IT-04-84	1,044	Total number of exhibits (for the Defence): 145						
The Prosecutor v. Boškovski and Tarčulovski	IT-04-82	1,587	363	118					
The Prosecutor v. Šainović et al.	IT-05-87	1,455	Total number of exhibits (for the Defence): 2,896						
The Prosecutor v Milan Lukić and Sredoje Lukić	IT-98-32/1	347	250	70					

The Prosecutor v. Popović et al.	IT-05-88	2,906	488	119	234	563	666	122	282
The Prosecutor v. Gotovina et al.	IT-06-90	2,687	1024	717	391				
The Prosecutor v. Prlić et al.	IT-04-74	4,914	1619	1032	1047	764	422	63	

In the present case, the Prlić *Case,* we had six Accused with **4,914** Prosecution documents and **4,947** Defence documents admitted into evidence.[258] In a trial involving multiple Accused, it was impossible to follow the *common law* practice of putting a document to a witness, because such an approach results in thousands of documents, and it was impossible to put all the documents to all the witnesses, because the trial would have lasted for decades. Faced with this challenge, the Chamber decided that a document could be admitted by way of a written motion without being put to a witness beforehand.[259]

At first, the lawyers from the common law countries had reservations about this method, but this was the only way to meet the requirements of the trial. Ultimately, everybody found this method advantageous.

Could the rights of the Defence have been violated by this procedure?

The answer is **no** because if either of the parties objected to the admission of a document, it was given the opportunity to express its views by way of a **written motion**. To my mind, this is the fairest and the most efficient approach as it **guarantees that everybody has access to a maximum amount of evidence with the possibility of contesting every piece of evidence in writing**. This approach placed a heavy burden on the Chamber because, before making any decisions, it first had to examine the content of a document thoroughly as well as its relevance and probative value for admission.

Furthermore, this procedure has a **definite advantage** in that a document is shown to the Accused by his own counsel in order to elicit his opinion which can then be reflected in his written submissions.

However, when a document is put to a witness in court, such a link is not possible and, given the position of the Accused and their counsel in the courtroom and the need to proceed quickly at that moment, the Accused cannot voice his opinion to his counsel in real time.

[258] More precisely, of the 4,947 documents admitted, the Prlić Defence requested the admission of 1,619 exhibits, the Stojić Defence 1,032 exhibits, the Praljak Defence 1,047 exhibits, the Petković Defence 764 exhibits, the Ćorić Defence 422 exhibits and the Pušić Defence 63 exhibits.
[259] *The Prosecutor v. Jadranko Prlić et al.*, "Decision on Admission of Evidence", public, 13 July 2006; "Decision Amending the Decision on the Admission of Evidence Dated 13 July 2006", 29 November 2006.

In this regard, there were differences of opinion in the Chamber between my colleagues and I because, having had the opportunity to preside over thousands of trials in my home country, I have a much broader approach. In my view, the admission of documents must be contemplated on the basis of a simple and even minimal consideration of their possible relevance and probative value without the importance of their probative value and relevance being assessed at that stage

As relevant examples, I point to several of my opinions relating to the non-admission of documents.[260]

Consequently, it is not until the final deliberations that a document is assessed *in fine* in relation to other documents, and if there is an adversarial argument regarding its scope, the Chamber will have to issue an in-depth ruling on its importance. There is a risk that discarding a document earlier during the trial, for lack of familiarity with the case as a whole and the strategies of both Parties can in some cases lead to a **miscarriage of justice**.

A specific example of this was the admission of a document relating to a book by an American historian on the ABiH offensive in Bosnia and Herzegovina. The document was not admitted by a majority despite the fact that, in my opinion, it had relevance and might have some probative value.[261]

For that reason, in the interests of justice, it is better to have a **very broad approach** regarding the admission of documents, save in exceptional cases when it is clear that a document is a fake or when it is obvious that is has no importance for the resolution of the dispute at issue. If, at this stage of the trial, a document were to be rejected, the Chamber would have to explain with **full and detailed reasoning** why it has not been admitted and, referring to the document, we should not merely state *"lack of relevance [or] probative value"* - which has unfortunately been the case - without specifying the real reasons which prevented its admission.

Given **the context of the break-up of the former Yugoslavia,** the confrontations between the communities (Serbs, Croats, Muslims) could, for obvious reasons, compromise oral testimonies. On

[260] *See* in particular *The Prosecutor v. Jadranko Prlić et al.*, "Decision on the Praljak Defence Motion to Add Two 92 *bis* Witnesses and Two 92 *bis* Statements to its 65 *ter* List", Dissenting Opinion of Judge Jean-Claude Antonetti, public, 2 September 2009; "Order on Admission of Evidence Relating to Witness Milan Gorjanc", Dissenting Opinion of Judge Jean-Claude Antonetti, public, 14 December 2009; "Order to Admit Evidence Regarding Witness Zvonko Vidović", Dissenting Opinion of Judge Jean-Claude Antonetti, public, 10 May 2010.

the other hand, documents issued at the time – when it was not known that they would one day be subjected to examination by independent, impartial and competent Judges – may turn out to be very useful for understanding the events and are more useful than someone's statement which, for obvious reasons, may lack objectivity.

I deeply regret the fact that, in my view, the **Prosecution** had a **very selective approach** to its documents, retaining only those supporting its arguments and setting aside all those likely to compromise its point of view. I do not think this is the most efficient practice to adopt with regard to crimes falling under international humanitarian law. I find it absolutely necessary to say that when there are several opposing forces and three armies on the ground (VRS, HVO and ABiH), a military incident is understood only by way of a **horizontal examination of the crimes** and not by selecting a few documents issued by only one army which support the Prosecution's argument.

To be more precise, I think that in the case of a military incident (for example, *sniper fire*), it is necessary to have all the military documents from the **three** parties to the conflict issued on the day of the event and not to be satisfied merely with the statement of a victim hit by a bullet without knowing exactly from where the shot came. Research into the archives of the combat units might have unearthed the order instructing the sniper to be on the ground with his weapon and ammunition. Of course, such documents would have been reviewed against other documents, in particular those of the international community so as to have a full picture of the incident.

As we can see, through the issue of the admission of documents, the investigation technique of the Prosecution or of the Defence – which must take into account all the documents relating to a situation or a fact – is unquestionably brought into focus. In this context, a broad and open approach is the only one to take with regard to the admission of documents.

2) Time Limits

The right to be tried within a reasonable time is set out in Article 14 (3) (c) of the International Covenant on Civil and Political Rights, which stipulates that everyone charged with a criminal offence shall have the right "[t]o be tried without undue delay".

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[261] *The Prosecutor v. Jadranko Prlić et al.*, "Decision on the Praljak Defence Motion to Add Two 92 *bis* Witnesses and Two 92 *bis* Statements to its 65 *ter* List", 2 September 2009.

The International Criminal Tribunals are bound by their Statutes to respect the right to a fair trial.[262]

The question of time in a criminal trial can be viewed from two angles. First, there is the time needed to prepare the trial, that is, **the time prior to the proceedings**. Then there is the time needed to present the evidence and the case, that is, the time **during the proceedings**.

In the *Prlić et al.* Case, the time needed prior to the proceedings was never a problem. The lawyers never complained of a lack of time during the preparation of their defence. However, on many occasions, the Parties complained that they did not have enough time to present their case and their defence during the trial proceedings.[263]

Accordingly, the Trial Chamber and the Appeals Chamber rendered several decisions on time allocation issues, in particular with regard to the distribution of time between the Parties during the proceedings. In a decision dated **24 April 2008**, the **Trial Chamber** laid down **guidelines** for the presentation of Defence evidence. Guideline 5 determined the division of court time between the Defence and Prosecution teams for examination, cross-examination and re-examination of Defence witnesses.[264] Paragraph 14 of the Decision set out that, for its cross-examination, the Prosecution should have 100% of the time allocated for direct examination. Following an appeal against that Decision by the Accused Petković and Praljak on 24 April 2008, the Appeals Chamber ruled on the time allocated to the Parties. In its decision dated **18 July 2008**, the **Appeals Chamber** recalled that it was well established in the Tribunal's jurisprudence that **Trial Chambers exercise discretion in relation to trial management and that the allocation of time stems from that power**.[265] In

[262] *Rutaganda* Case (ICTR), Trial Judgement, 6 December 1999.
[263] T(F), pp. 42300- 41303, for example, an extract from p. 42302: *"The Petković Defence considers that by changing the position on this important issue the right of an accused to a fair trial would be violated along the lines of Article 20 of the Statute and Article 21(1) of the Statute on equal rights and equality of arms for the accused. Of course, it is possible that the Petković Defence has erroneously evaluated the possible arguments as to the change in the Trial Chamber's position, and therefore we expect that a decision on this oral motion will be explained in the proper way, and the Petković Defence, depending on how the decision is expounded, will see whether it needs to seek legal remedies against that decision or not."*
[264] "Decision Adopting Guidelines for the Presentation of Defence Evidence", 24 April 2008, extract, "13. The Chamber shall determine the amount of time the party presenting the witness shall have for examination and re-examination on the basis of the information provided in accordance with Guideline 4 mentioned above and of the lists filed in accordance with Rule 65 *ter* (G) of the Rules. 14. For its cross-examination, the Prosecution shall have 100% of the time allocated for the direct examination. 15. With regard to the amount of time that should be allocated to the Defence teams for cross-examination, the Chamber considers that in total, that is, for the cross-examining Defence teams as a whole, they should have 50% of the time allocated for the direct examination."
[265] *The Prosecutor v. Jadranko Prlić et al*, "Decision on Defendants Appeal against *Décision portant attribution du temps à la défense pour la présentation des moyens à décharge*", 1 July 2008 ("Prlić Decision on the Allocation of Time for the Presentation of Defence Evidence"), para. 15; *The Prosecutor v. Jadranko Prlić et al.*, "Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's oral Decision of 8 May 2006 relating to Cross-Examination

paragraph 19, the Appeals Chamber recalled that the division of court time between the two Parties is governed by "**a principle of basic proportionality, rather than a strict principle of mathematical equality**".[266] As the Appeals Chamber already stated, "[i]n a case with multiple accused, the issue of proportionality is affected not only by the burden of proof upon the Prosecution, but also by the circumstance that not all of the evidence presented by the Prosecution is directed to prove the responsibility of one individual Accused".[267] Thus in its Decision, the Appeals Chamber affirmed the allocation of time determined by the Trial Chamber.

The Appeals Chamber's validation of the Trial Chamber's allocation of time in the *Prlić et al.* Case can now be set against other ongoing cases before the Tribunal. We thus notice that in the pre-trial stage of the *Karadžić* Case, Judge Bonomy said that only 60% of the time would be allocated for cross-examination.[268]

Article 6 of the European Convention on Human Rights guarantees the right to a fair trial both with regard to civil and criminal matters.[269] Its main principle is that everyone is entitled to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". This is one of the rights most frequently invoked before the European Court of Human Rights. Article 6 of the European Convention on Human Rights consists of two parts. The first part

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by Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief", 4 July 2006 ("Prlić Decision relating to Cross-Examination), p. 3.

[266] *The Prosecutor v. Naser Orić*, "Interlocutory Decision on Length of Defence Case", 20 July 2005, paras 7 and 8; *The Prosecutor v. Jadranko Prlić et al.*, "Decision on Prosecution Appeal concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case", 6 February 2007.

[267] "Prlić Decision on the Allocation of Time for the Presentation of Defence Evidence", para. 39.

[268] T(F), p. 42303, extract: *"[...] pre-trial conference of Mr Karadžić, and I noted that in the time that has been allotted for cross-examination, Judge Bonomy in person said that cross-examination would be allowed 60 per cent of the time. I'm sure you know that here it's a hundred per cent of the time that is allotted. So we were extremely generous. I even believe that we were excessively generous. We should have placed limits on this. The problem is we placed no limits and now we run into problems."*

[269] Article 6 of the European Convention on Human Rights - Right to a fair trial:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

sets out general guarantees for a fair trial in civil and criminal matters.[270] The second part lays down specific guarantees with regard to criminal matters.[271] The right to have adequate time and facilities for the preparation of defence is thus enshrined in Article 6 (3) (b) and means that an Accused must have adequate time to prepare his defence.

Article 6 (3) of the Convention, relating to the length of the proceedings, must of course be read in combination with Article 5 (3)[272] which applies to the length of detention and obliges the courts to limit the length of provisional detention so as to ensure that the principle of the presumption of innocence is respected. The court indeed must determine "*whether the time that has elapsed, for whatever reason, before judgement is passed on the accused has at some stage exceeded a reasonable limit, that is to say imposed a greater sacrifice that could, in the circumstances of the case, reasonably be expected of a person presumed to be innocent*".[273]

According to the European Court of Human Rights, the right to a fair trial is **an effective right**, that is, the Court is not satisfied if there is only an appearance of justice and fairness. For this condition to be fulfilled, the Parties need to have the facilities necessary for the preparation of their defence.[274]

To determine effectively whether the defendant and his counsel have had adequate time and all necessary facilities for the preparation of their defence, the Commission and now the European Court of Human Rights refer to the circumstances of the case[275] and the general situation for the Defence.[276]

According to **Franklin Kuty** in *Justice pénale et procès équitable*, Article 6 (3) (b) must be viewed in the light of the right of the Accused to prepare his defence. He must have the opportunity to organise his defence in an appropriate manner and without restriction as to the possibility to put all

[270] Article 6 (1) and (2) of the European Convention on Human Rights.
[271] Article 6 (3) of the European Convention on Human Rights.
[272] Article 5 (3), relating to the right to liberty and security, stipulates: "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. [...]" *See* also Article 9 (3) of the ICCPR, which offers arrested and detained persons the same guarantees.
[273] *Wemhoff v. Germany* (European Court of Human Rights), 27 June 1965, para. 5.
[274] *Stran Greek Refineries and Stratis Andreadis v. Greece* (European Court of Human Rights), 9 December 1994.
[275] *X and Y v. Austria* (European Commission of Human Rights), 12 October 1978; *Huber v. Germany* (European Commission of Human Rights), 4 and 5 October 1974; *X v. Belgium* (European Commission of Human Rights), 9 May 1977.
[276] *X v. Austria* (European Commission of Human Rights), 11 February 1967.

relevant defence arguments before the Judges.[277] Therefore, Defence activity comprises everything that is necessary to prepare for trial,[278] while the concept of "necessary facilities" refers to the facilities which must contribute or help contribute to the preparation of the Defence.[279]

Generally speaking, according to the European Court of Human Rights, a fair trial is not a question of time, but a right to an expeditious trial, with a lawyer (if the Accused so wishes) and in a language the Accused understands. The European Court of Human Rights takes the view that the question of time refers only to the **time necessary** to prepare the defence, that is, to the right to have sufficient time to organise the defence appropriately. In this respect, it should be noted that this time must not be indefinite and must be monitored by the Judge.

The Commission and the European Court of Human Rights have issued several important decisions about time issues at trial.

The Appeals Judgment rendered in the ***Pelissier and Sassi v. France*** Case **on 25 March 1999** is without doubt the reference on this matter. In that case, the Court considered that "Article 6, para. 1 of the Convention imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision, including the obligation to decide cases within a reasonable time"[280] and that "[t]he reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular, the complexity of the case, the conduct of the applicant and the conduct of the relevant authorities".[281]

The Court holds that the circumstances of the case must be assessed *in concreto* and it cannot provide a "standard chart" on the subject.[282] The Court therefore conducts a *prima facie* examination, while the presumption of *non-reasonableness* falls to the respondent State. However, the Court identified two criteria which it systematically examines while exercising its control:

[277] *Mayzit v. Russia* (European Court of Human Rights), 20 February 2005, para. 79.
[278] Report *Can v. Austria* (European Commission of Human Rights), 12 July 1984, para. 53.
[279] *Ross v. The United Kingdom* (European Commission of Human Rights), 11 December 1986.
[280] *Pelissier and Sassi v. France* (European Court of Human Rights), 25 March 1999.
[281] *Gelli v. Italy* (European Court of Human Rights), para. 40, 19 October 1999.
[282] The Italian State made a request in this sense in the *Scordino v. Italy* Case, 29 March 2006, para. 157.

i. **The complexity of the case**: The Court will examine the complexity of the facts to be determined,[283] the legal facts to be decided on[284] and, of course, the complexity of the proceedings;[285]

ii. **The conduct of the Parties:** The State must ensure that domestic proceedings are not unduly long. Nevertheless, if the proceedings are prolonged due to a conduct imputable to the Accused, the State should not be condemned.[286]

The European Court in fact considers that individuals accused of an offence must not remain too long in a state of uncertainty about their fate.[287] The State must give effect to its obligation; the means used are less important, what is important is to ensure that the domestic proceedings respect the requirement of a reasonable time.[288] It should be observed that in international trials, the Accused waits for a long time before learning of his ultimate fate.

Based on this premise, the Court developed jurisprudence on what, in its view, must be included in the concept of a reasonable time. Accordingly, in the ***Kamasinski v. Austria*** Case of 19 December 1989,[289] the Court stated that the right to have adequate time and facilities in a timely manner means the right of access to the case file, either through a lawyer or – in the case of self-represented Accused – directly by the Accused.[290]

As regards the starting point for time calculation in criminal cases, the Court observed that ***"the period to be taken into consideration [...] necessarily begins with the day on which a person is charged"***.[291]

[283] *See*, for example, *Yalgin and Others v. Turkey*, 25 September 2001, para. 27; *Rigeinsen v. Austria*, 16 July 1971, para. 110. Therefore, the Court will assess the nature of the offence, the separate or cumulative criminal acts, etc.
[284] *See*, for example, the *Pretto and Others v. Italy* Case, 8 December 1983, when the Court had to examine a recent law which did not contain any specific provisions on the point in issue, para. 32.
[285] For example, the case may involve multiple litigants, *H. v. The United Kingdom*, 8 July 1987, para. 72.
[286] *Debbasch v. France* (European Court of Human Rights), Application no. 49392/99, 3 December 2002. In this case, the Court observed that given the fact that the applicant filed an over-abundant number of appeals, the delay in the proceedings could not be imputable to the State.
[287] *Lehtinen v. Finland* (European Court of Human Rights), 13 September 2005, para. 28; *Merit v. Ukraine*, 30 March 2004, para. 75.
[288] *Belilos v. Switzerland* (European Court of Human Rights), 29 April 1988, para. 78.
[289] *Kamasinski v. Austria* (European Court of Human Rights), 19 December 1989.
[290] *Kamasinski v. Austria* (European Court of Human Rights), 19 December 1989, Application no. 9783/82; *Foucher v. France*, 18 March 1997, Reports of Judgments and Decisions 1997-II, para. 36.
[291] *Neumeister v. Austria* (European Court of Human Rights), 27 June 1968, para. 18.

However, it should be borne in mind that the right to be tried within a **reasonable time** does not mean that the proceedings must be hurried over in order to minimise the overall time.[292] This seems to me to be especially important, but the Judge must also have the means to control the exercise of due diligence by the Prosecution and the Defence.

However, even though the European Convention on Human Rights stresses the need for an Accused to have adequate time to prepare his defence, it remains silent on the time needed to present his case, and case-law does not seem to pay much attention to this issue either. **The position of the European Court of Human Rights is not different from that of the Law on Criminal Procedure of the former Yugoslavia.**[293] Article 11 (3) of the Law on Criminal Procedure of the former Yugoslavia follows the rule laid down in Article 6 (3) (b) of the European Convention on Human Rights, whereby the Accused must have adequate time to prepare his defence.[294] The Law on Criminal Procedure of the former Yugoslavia makes no mention of the allocation of or the need for adequate time to present his case.

This element reinforces the idea that a **fair trial** is not a question of allocation of time to the Accused to present his case, that is, his evidence, but much more a **question of time needed to prepare his defence, assign a counsel and understand the alleged charge.** Thus the main responsibility falls on counsel for the Accused, who must act with due diligence.

The various elements mentioned above demonstrate that the issue of time in a trial is an issue discussed prior to the start of the trial. The Accused must be allocated adequate time to prepare his defence. There must be sufficient time before the proceedings begin. Nonetheless, **regarding the time during the trial**, that is, **the time allocated to the Accused to present his case, case-law shows that this time must be fair, but it has not been the subject of discussion in case-law.**

I also wish to add that the Defence and the Prosecution cannot allege any kind of prejudice on the ground that they did not have adequate time during the trial.

[292] *Neumeister v. Austria* (European Court of Human Rights), 27 June 1968. The Court clearly states that "a concern for speed cannot dispense [those] judges [...] from taking every measure likely to throw light on the truth or falsehood of the charges", para. 21.
[293] Exhibit 4D 01105.
[294] Article 11 of the Law on Criminal Procedure of the former Yugoslavia, 16 May 1996: "*(1) The accused has the right to present his own defence or to defend himself with the professional aid of defence counsel, whom he shall himself select from among professional attorneys. (2) If the accused does not engage a defence counsel on his own, in order to*

The representatives of the Prosecution and the Defence counsel are, in theory, experienced professionals who must be able to manage the allotted time in the best possible manner by distinguishing, in particular, **the essential** from **the non-essential**.

Referring specifically to the allocation of time established by the Registry, the length of this trial, which took more than four years, attests to the fact that the Prosecution and the Defence had more than enough time and on occasion even overused the flexibility of the Chamber to be allowed additional time, even though according to the Rules, and particularly Rule 90 (F), the Judges are **timekeepers**.

Rule 98 *ter* (C) of the Rules of Procedure and Evidence stipulates that "*[t]he Judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, [...]*".

If we compare this with the provisions of Article 23 (2) of the Statute, we see that, in the Rule, the Plenary Assembly of the Tribunal added the words "*as soon as possible*".

Why was this added when it is common practice for the Judges to deliberate after the end of the trial and before rendering their judgement?

The ICTY Judges without a doubt took into account the inherent constraints involved in the examination of the case and the time necessary to draft the judgement which, I must recall, must be accompanied by a reasoned opinion. Furthermore, the deliberations in this case were particularly long since the trial ended on 2 March 2011 and the Judgement was rendered today. Therefore, it took this Chamber more than a year to render its judgement.

In view of the Statute and the Rules, was this too long or was this length consistent with the relevant criteria?

It seems to me that I must provide some explanations to justify this length. To do so, I will first find support in the judgements of the International Tribunals in order to get a precise idea as to the length of the deliberations that led to the judgements.

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provide for his defence, the court shall appoint a defence counsel in the case specified by this law. (3) The accused must

	Start of Trial	End of Trial	Date of Judgement	Length of Deliberations
Nuremberg Military Tribunal	20/11/1945	02/09/1946	01/10/1946	1 month
International Military Tribunal for the Far East ("Tokyo Trials")	03/05/1946	06/04/1948	04-12/11/1948	7 months
Special Court for Sierra Leone *Charles Taylor* Trial	04/06/2007	08/02/2011	26/04/2012	1 year and 2 months
Iraqi Special Tribunal *Saddam Hussein* Trial	19/10/2005	08/2006	05/11/2006	3 months
Special Tribunal for Cambodia *Douch* Trial	17/02/2009	27/11/2009	26/07/2010	8 months

Regarding the ICTY, it is also appropriate to examine some of the representative cases for clear reference purposes. This examination will be more precise than that of the preceding cases as it will be supported by a number of factors that are more open to research.

I. Completed Proceedings			
Cases	**End of Trial**	**Delivery of Judgement**	**Time (days)**
Aleksovski	23 March 1999	25 June 1999	94 days
Babić	28 January 2004	29 June 2004	181 days
Banović	26 June 2003 (guilty plea)	28 October 2003	122 days
Blagojević and Jokić	1 October 2004	17 January 2005	137 days
Blaškić	30 July 1999	3 March 2000	212 days
Boškoski and Tarčulovski	8 May 2008	10 July 2008	62 days
Bralo	19 July 2005	7 December 2005	132 days
Brđanin	22 April 2004	1 September 2004	130 days
Češić	7 October 2003 (guilty plea)	11 March 2004	154 days
Delić	11 June 2008	15 September 2008	64 days
Deronjić	30 September 2003 (guilty plea)	30 March 2004	180 days
Đorđević	14 July 2010	23 February 2011	219 days
Erdemović	31 May 1996 (guilty plea)	29 November 1996	179 days
Furundžija	22 June 1998	10 December 1998	168 days
Galić	9 May 2003	5 December 2003	236 days
Gotovina *et al.*	1 September 2010	15 April 2011	225 days
Hadžihasanović and Kubura	15 July 2005	15 March 2006	210 days
Halilović	17 April 2005	16 November 2005	209 days
Haradinaj *et al.*	23 January 2008	3 April 2008	71 days

be given sufficient time to prepare his defence."

Jelisić	22 September 1999	14 December 1999	82 days
Jokić	1 April 2003 (guilty plea)	18 March 2004	318 days
Kordić and Čerkez	14 December 2000	26 February 2001	72 days
Krajišnik	30 August 2006	27 September 2006	27 days
Krnojelac	20 July 2001	15 March 2002	235 days
Krstić	29 June 2001	2 August 2001	392 days
Kunarac *et al.*	22 November 2000	22 February 2001	90 days
Kupreškić *et al.*	10 November 1999	14 January 2000	64 days
Kvočka *et al.*	19 July 2001	2 November 2001	104 days
Limaj *et al.*	1 September 2005	30 November 2005	60 days
Lukić *bis*	20 May 2009	20 July 2009	60 days
Martić	12 January 2007	12 June 2007	150 days
Milošević, Dragomir	10 October 2007	12 December 2007	58 days
Mrđa	13 October 2003	31 March 2004	168 days
Mrkšić *et al.*	16 March 2007	27 September 2007	191 days
Mucić *et al.*	1 September 1998	16 November 1998	76 days
Naletilić and Martinović	31 October 2002	31 March 2003	150 days
Nikolić, Dragan	7 May 2003	18 December 2003	221 days
Nikolić, Momir	4 September 2003	2 December 2003	58 days
Obrenović	20 May 2003 (guilty plea)	10 December 2003	110 days
Orić	10 April 2006	30 June 2006	50 days
Perišić	31 March 2011	6 September 2011	157 days
Plavšić	2 October 2002 (guilty plea)	27 February 2003	145 days
Popović *et al.*	15 September 2009	10 June 2010	265 days
Rajić	27 April 2006 (guilty plea)	8 May 2006	11 days
Šainović *et al.*	27 August 2008	26 February 2009	179 days
Sikirica *et al.*	19 September 2001 (guilty plea)	13 November 2001	54 days
Simić *et al.*	4 July 2003	17 October 2003	103 days
Simić, Milan	15 May 2002 (guilty plea)	17 October 2002	152 days
Stakić	14 April 2003	31 July 2003	107 days
Stanišić and Župljanin	1 June 2012	27 March 2013	360 days
Strugar	9 September 2004	31 January 2005	131 days
Tadić	28 November 1996	14 July 1997	226 days
Todorović	29 November 2000 (guilty plea)	31 July 2001	242 days
Vasiljević	14 March 2002	29 November 2002	254 days
Zelenović	17 January 2007	4 April 2007	77 days

An examination of the table shows that the Chamber had to rule on more than 50,000 pages of transcripts, several thousand Prosecution and Defence documents, a significant number of counts (26) and a significant number of motions submitted to the Chamber by the Parties. It should also be noted that all forms of responsibility under the Statute were alleged, both in terms of Article 7 (1) and Article 7 (3), including responsibility under Article 7 (1) for the three forms of JCE.

The sheer volume of work explains, to a large extent, why so much time was needed. Moreover, it is also appropriate to have a very precise picture as to how the Tribunal works in general as the Chambers can adopt somewhat different approaches.

As a rule, a summary with footnotes is made of a witness's testimony, referring to what the witness stated or to the documents admitted. Since there were 206 witnesses (both Prosecution and Defence) who testified *viva voce* or pursuant to Rule 92 *ter*, another 111 witnesses, whose testimony was admitted pursuant to Rule 92 *bis* and Rule 92 *quater*, also had to be added.

This work is done by the assistants or interns under the supervision of the Chamber's senior legal officer. At the deliberations stage, the Judges have all the summaries, compare them and examine them in light of many written documents.

The Judges must also examine the pre-trial and the final trial briefs of the Prosecution and the Defence which consist of thousands of pages in total.

	Prosecution[295]	D1[296]	D2[297]	D3[298]	D4[299]	D5[300]	D6[301]
Number of pages of final trial briefs	398	192	191	185	200	199	149
Number of footnotes in final trial briefs	2,784	818	1,661	778	1,075	1,608	667

It is particularly interesting to compare in detail the three cases before the Tribunal that have the largest number of Accused tried simultaneously; in addition to our case, there are the ***Popović et al***. Case and the ***Milutinović et al*.** Case.

[295] Prosecution Final Trial Brief, English original, public, 1 April 2011.
[296] Prlić Defence Final Trial Brief, English original, public, 29 March 2011.
[297] Stojić Defence Final Trial Brief, English original, public, 31 March 2011.
[298] Praljak Defence Final Trial Brief, English original, public, 31 March 2011.
[299] Petković Defence Final Trial Brief, English original, public, 31 March 2011.
[300] Ćorić Defence Final Trial Brief, English original, public, 28 March 2011.
[301] Pušić Defence Final Trial Brief, English original, public, 31 March 2011.

The following table shows that, in terms of the complexity and number of counts, the *Prlić et al.* Case is of a completely different nature.

Cases	Number of Accused	Length of Trial (in days)	Number of Witnesses	Admitted Exhibits	Temporal Scope	Geographical Scope	Crime Sites
Prlić et al.	6	465	317	9,872	2 years and 6 months	8 municipalities and 5 camps	70
Popović et al.	7	425	315	5,383	3 and a half months	2 municipalities	31
Milutinović et al.	6	285	235	4,351	5 and a half months	13 municipalities	29

Overall, the deliberations consisted of three main stages:

- **determination of the crimes committed;**

- **aspects linked to the existence of the alleged JCE;**

- **responsibility of each of the Accused.**

Before making a finding beyond reasonable doubt as to the responsibility of an Accused, each Judge has to correlate all the factors described above. This is obviously a complex and lengthy process which takes time and which explains why some people might claim, in all innocence, that the deliberations have taken too long. However, those familiar with all these elements could conclude that the Judges have acted expeditiously and rendered a judgement in record time. Be that as it may, the reader himself will ultimately form his own opinion.

On this extremely sensitive issue, it is my duty to provide the reader with all the appropriate information so that he can get an idea of how the Judges worked and of their diligence. Irrespective of what one may think when one has this very useful information, it is almost certain that substantial gains in time could have been achieved with different internal working methods and a

more *civil law* approach – more specifically, with the **Presiding Judge** having control over administrative matters in the recruitment of assistants and interns, the distribution of work and the conduct of the trial and deliberations.

As an avenue for reflection, I believe that the work could have been divided into two parts in order to reconcile the need for expeditious justice, consideration for the victims and the Accused and the outcome of the trial

- **A judgement on the counts and responsibility rendered in record time;**

- **A judgement accompanied by a reasoned opinion issued several months later.**

This way of working would have required a "cultural revolution" which would be very difficult to carry out in an institution that has existed for more than 20 years (see Resolution 827 of the Security Council dated 25 May 1993) and in which habits have become entrenched, which means that we cannot work any faster. Admittedly, **Nuremberg** is a shining example because the Judgement which concerned 24 Accused was rendered in record time in a few months. It should be noted though that the Judgement had no footnotes and that the urgency of the matter necessitated a speedy judgement, which is not the case here although the Nuremberg documentation was greater than ours...

Likewise, the **working methods** in place at the ICTY for many years would have had to undergo major changes to enable the Chamber's senior legal officer and the assistants to take on greater responsibility in preparing the material for the Judges' deliberations. This explains why it took so long, because at this stage the Judges and, most of all, the Presiding Judge have no way of issuing instructions or even orders to the "legal team". For them to be able to do so, the "legal team" would have to be recruited solely from among lawyers who had already held identical positions in national or international courts and would have to be assessed or even dismissed by the Judges and not fall under the administration (the Registry). It was impossible to work faster in this context – which, in my view, constituted a **straight jacket.** I believe that this is one of the main reasons why international justice is so slow.

I must go back to this issue in view of the appeals judgement issued recently by the **Appeals Chamber** in the ***Gatete* Case**.[302] In the appeals judgement, the Appeals Chamber found that the

[302] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Appeals Judgement, 9 October 2012.

right of the Accused to be tried within a reasonable period of time was violated.[303] It considered that the pre-trial delay of **seven years** was undue given that the case was not particularly complex, and found that this protracted delay and the resulting prolonged provisional detention constituted prejudice *per se*.

The Trial Chamber paid constant attention to the rights of the Defence and systematically responded to the Accused's motions on alleged violations of his rights. On several occasions, it ruled on the issue of undue delays in the proceedings and provisional detention. On no account can the Accused draw on the **Gatete jurisprudence** to allege prejudice on the grounds of prolonged provisional detention, because the two cases are different in many respects.

Jean-Baptiste Gatete was born in 1953 in Rwankuba sector, Rwanda.[304] He was b*ourgmestre* of Murambi *commune* from 1982 until June 1993. Gatete was a member of the national congress of the National Revolutionary Movement for Development and was active in politics at both the national and prefectural levels.[305] In April 1994, he was appointed *Directeur* in the Ministry of Women and Family Affairs. He thus held a position of responsibility when the genocide was committed in April 1994.

In the amended indictment issued by the Office of the Prosecutor against **Jean-Baptiste Gatete** on 10 May 2005 six counts were retained[306] (ten counts were retained in the initial indictment): genocide (Article 2 (3) (a) of the ICTR Statute); or in the alternative complicity in genocide (Article 2 (3) (e) of the ICTR Statute); conspiracy to commit genocide (Article 2 (3) (b) of the ICTR Statute); crimes against humanity (extermination) (Article 3 (b) of the ICTR Statute); crimes against humanity (murder) (Article 3 (a) of the ICTR Statute); and crimes against humanity (rape) (Article 3 (g) of the ICTR Statute).

Jean-Baptiste Gatete was arrested in the Democratic Republic of Congo on 11 September 2002 and was transferred to the ICTR Detention Unit in Arusha two days later.[307] His trial began on 20 October 2009.[308] He was thus remanded in custody **for seven years**.

[303] *Gatete* Appeals Judgement, para. 288.
[304] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), "Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* (B) of the Rules of Procedure and Evidence", para. 1.
[305] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), "Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* (B) of the Rules of Procedure and Evidence", para. 1.
[306] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Amended Indictment, 10 May 2005.
[307] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Appeals Judgement, 9 October 2012, para. 13.

The trial of **Jean-Baptiste Gatete** opened on 20 October 2009 and the last Prosecution witness was heard on 13 November 2009.[309] **Forty-nine witnesses** appeared before the Chamber, 146 exhibits were admitted into evidence and the trial ran for thirty sitting days over a period of five months and nine days.[310]

Trial Chamber I was in charge of the pre-trial proceedings in the *Gatete* Case from 2004 onwards; it consisted of Presiding Judge Mose and Judge **Jai Ram Reddy** and Judge **Sergei Alekseevich Egorov**. On 6 July 2009, the case was assigned to Trial Chamber III which set 19 October 2009 as the date for the start of the trial.

Trial Chamber III, which rendered its judgement on 31 March 2011,[311] was composed of Judge **Khalida Rachid Khan (Presiding Judge)**, Judge **Lee Gacuiga Muthoga** and Judge **Aydin Sefa Akay**. It was to rule on the responsibility of the Accused **Gatete** for the murder of Tutsis in various localities (Rwankuba sector and the parishes of Kiziguro and Mukarange) in April 1994. Based on Article (6) (1) of the Statute, the Chamber found the Accused guilty of participation in genocide and of extermination as a crime against humanity.[312] **Jean-Baptiste Gatete** was sentenced to life imprisonment.[313]

During the trial, the Accused **Gatete** raised the issue of **undue delay** in the proceedings. Referring to the length of the Accused's provisional detention, the Defence submitted that his right to trial without undue delay had been violated.[314] Over **seven years** elapsed between the arrest of **Jean-Baptiste Gatete** and the commencement of his trial. Accordingly, the Defence sought relief. The Defence raised several issues:[315]

- The length of the provisional detention cannot be justified by the complexity and importance of the case against **Gatete**;

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[308] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), "The Pre-Defence Brief of Jean-Baptiste Gatete", 29 January 2010, para. 1.
[309] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), "The Pre-Defence Brief of Jean-Baptiste Gatete", 29 January 2010, para. 1.
[310] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing Judgement 31 March 2011, public, para. 60.
[311] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing Judgement, 31 March 2011, public.
[312] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing Judgement 31 March 2011, public, paras 640, 643, 646 and 668.
[313] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing Judgement 31 March 2011, public, paras 682 and 683.
[314] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing Judgement 31 March 2011, public, para. 54.
[315] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), SentencingJudgement , 31 March 2011, public, para. 55

- The Prosecutor did not bring the Accused to trial within an appropriate amount of time;
- The Pre-Trial Chamber experienced delays between April 2003 and April 2007, **the length of the delays being due to the involvement of the Chamber's Judges and legal staff in several other cases**;
- The Accused submits that, as a result of the delays, he suffered prejudice due to the unnecessarily long deprivation of his liberty, which adversely affected the preparation of his defence, as the memories of the witnesses and the number of available witnesses diminished with time.

The Defence asserted that **Gatete**'s right to be tried without undue delay had been violated and that, in the case of a conviction, the Chamber should afford him appropriate remedy **by reducing his sentence**.[316]

The Prosecutor submitted that the length of the Accused Gatete's provisional detention was not due to its conduct but to the structure and resources of the Tribunal. Due to the limited resources of the Tribunal, the Prosecutor was compelled to request that the case be transferred to the Rwandan courts. Finally, for a long time, the Accused evaded all attempts to arrest him, which contributed to the delay.[317]

The Prosecutor's arguments may be challenged because time obviously starts to run from the moment Gatete was arrested. Moreover, the question of resources cannot be seriously raised as it was the Prosecutor's responsibility to work with the resources available to him which, compared to those of national courts, were considerable.

The Trial Chamber recognises that pre-trial delay is significant but that several other factors must be taken into consideration in determining whether the delay was undue.[318] It noted that the ***Gatete* Case** could not be compared to multi-accused trials which gave rise to trials lasting several years with over a thousand exhibits and more than a hundred witnesses. This point of view is especially relevant to the ***Prlić et al.* Case**. It recalled that while the charges against **Gatete** were reduced to six counts, the crimes in question involved several allegations, such as participation in a joint

[316] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), SentencingJudgement 31 March 2011, public, para. 55.
[317] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing,Judgement 31 March 2011, public, para. 56.
[318] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing Judgement 31 March 2011, public, para. 59.

criminal enterprise and conspiracy to commit genocide, which raised complex issues of fact and law.[319]

Finally, the Trial Chamber noted that the conduct of the relevant authorities and the Prosecutor led to pre-trial delay which could not be explained.[320] It noted for example "particular instances where it appears that the conduct of the relevant authorities and the Prosecution has led to pre-trial delay which cannot be explained".[321] For instance, on 29 March 2004, the Pre-Trial Chamber ordered the Prosecutor to file an amended Indictment.[322] However, it was not until 29 November 2004, that is, eight months later, that the Prosecution submitted a request for leave to file an amended indictment.[323] Another example: even though **the Accused Gatete** was transferred to the Tribunal in September 2002, it was not until 28 November 2007 that the Prosecutor submitted a request for the referral of the case to Rwanda,[324] which means that the Accused was held in provisional detention for more than five years. The Trial Chamber also recalled that although the Prosecutor has discretion with respect to investigations and prosecutions, he also has a duty to conduct the proceedings. In the ***Gatete*** Case, there were **instances of delay on the part of the Prosecution** for which the Chamber **found no justification**.[325]

As we can see, according to the Trial Chamber, the real cause of the delay rested with the Prosecutor, which the Prosecutor failed to state in his written submissions...

While the Trial Chamber recognised that the pre-trial delay was significant, it found that it was not unreasonable given that the case was complex, that the Prosecutor had submitted a request for the referral of the ***Gatete*** Case to the Rwandan judicial authorities pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence (the Chamber denied this request), that the prejudice caused by the delay had been minimal and, finally, that once the trial commenced, it was conducted expeditiously.[326]

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[319] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing Judgement 31 March 2011, public, para. 60.
[320] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), SentencingJudgement 31 March 2011, public, para. 61.
[321] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing Judgement 31 March 2011, public, para. 61.
[322] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), "Decision on Defense Preliminary Motion", 29 March 2004. *See* also *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), "Sentencing Judgement", 31 March 2011, public, para. 62.
[323] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), "The Prosecutor's Submission and Request for Leave to File an Amended Indictment Complying with the Chamber's Order of 29 March 2004", 29 November 2004. The Amended Indictment was filed on 10 May 2005.
[324] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), "Prosecutor's Request for the Referral of the Case to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence", 28 November 2007.
[325] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing Judgement,31 March 2011, public, para. 62.
[326] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Sentencing Judgement,31 March 2011, public, para. 64.

The Appeals Chamber upheld the Trial Judgement convicting **Gatete** for genocide and extermination as a crime against humanity.[327] Having considered all the relevant factors, it found that a term of life imprisonment was the appropriate sentence for Jean-Baptiste **Gatete** in view of the convictions that had been upheld. However, the Appeals Chamber recalled that it had **found that the Accused's right to be tried without undue delay had been violated and that, in this case, the extent of the pre-trial delay constituted prejudice *per se***. The Appeals Chamber held that any violation of a person's rights must entail an effective remedy pursuant to Article 2 (3) (a) of the International Covenant on Civil and Political Rights. The Appeals Chamber considered that a prison term of a certain number of years, constituting in itself a reduced sentence, was the appropriate remedy for the violation of the Accused's rights. In order to determine the appropriate remedy, the Appeals Chamber recalled its finding that Gatete had failed to demonstrate that he was prejudiced in either the preparation or the presentation of his case.[328]

Having considered the gravity of the crimes for which **Jean-Baptiste Gatete**'s conviction was upheld and taking into account the violation of his right to be tried without undue delay, the Appeals Chamber set aside the Trial Chamber's sentence of life imprisonment and concluded that it should be reduced to a term of 40 years in prison.[329]

The Appeals Chamber was unambiguous in its Judgement since it recognised that the rights of the Accused had been violated. Nonetheless, it did not go so far as to invalidate **the proceedings as a whole** and merely reduced the sentence symbolically.

Although the Accused in the present case were arrested on **5 April 2004**, it seems to me that the aforementioned jurisprudence can in no way be applied here since all the proceedings have been completed and the length of the deliberations is amply justified by the number of Accused, the number of counts and the number of municipalities and detention sites involved. It is true that the Appeals Chamber's decision in the *Gatete* Case is an invitation to reduce the sentence when an Accused's right to be tried expeditiously has been violated.

More recently, on **4 February 2013**, the Appeals Chamber in the ***Justin Mugenzi and Prosper Muginareza*** Case responded to the Accused's claims that their right to a **fair trial** had been

[327] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Appeals Judgement, 9 October 2012, public, para. 284.
[328] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Appeals Judgement, 9 October 2012, public, para. 286.
[329] *The Prosecutor v. Jean-Baptiste Gatete* (ICTR), Appeals Judgement, 9 October 2012, public, para. 287.

violated because the **deliberations had taken too long**. The appellants also based their claims on **Judge Short**'s dissenting opinion on this issue.

First, the issue of the violation of the right to a **fair trial** was settled in a judgement rendered on 23 June 2010 which, **by a majority**, rejected the arguments. **Judge Short produced** a dissenting opinion holding that the Accused's rights had been violated and that the deliberations had taken too long due to the fact that **Judge Khan and Judge Muthoga** had also been assigned to other cases, which had an impact on the deliberations. It should be noted that the case closed on 5 December 2008 and the Judgement was rendered on 30 September 2011.[330]

In the Judgement rendered on 30 September 2011, **Judge Short** again produced a dissenting opinion, recalling that the Accused had been incarcerated without judgement **for more than 12 years** and that his right to a **fair trial** had been violated. He was of the opinion that the appropriate remedy would be to reduce his sentence by five years.

In response to that opinion, in its judgement of 4 February 2013,[331] the Appeals Chamber stated that the **complexity of the case** justified the length of the trial and that the duration should be viewed in the overall context (cf. para. 37). **Judge Robinson** differed and attached a dissenting opinion saying that the **trial** had not been **fair** because **the deliberation phase had taken too long**. He said that in cases of similar complexity this phase had been relatively **short**, recalling in particular the ***Bagosora et al.*** Case and the ***Popović*** Case**.**

As we can see, this was an important issue and the main reason submitted was the fact that the Judges had been assigned to other cases.

As regards the ***Prlić et al.*** **Case**, it is true that I was assigned to the ***Šešelj*** **Case** as the Presiding Judge and **Judge Mindua** was assigned to the ***Tolimir*** **Case**. This, however, had **no consequences** because I was able to deal with the two cases to which I had been assigned, while **Judge Mindua**, who was a **Reserve Judge** in this case, participated in all of our decisions and deliberations, except in the vote on the guilt of the Accused and the determination of the sentence. Hence, there was no impact whatsoever.

[330] *The Prosecutor v. Casimir Bizimungu et al.* (ICTR), Sentencing Judgement 30 September 2011.
[331] *The Prosecutor v. Justin Mugenzi and Prosper Mugiraneza* (ICTR), Trial Judgement, 4 February 2013.

Accordingly, although the Accused **Justin Mugenzi and Prosper Muginareza**, who were acquitted in the end, raised an interesting issue, it seems to me that this problem has **no direct bearing** on the present case. I agree with the position of **Judge Robinson** and **Judge Short** and think it would have been better not to have assigned the Judges to other cases and to have put some cases on hold even if this meant releasing the Accused pending trial. This would have been a **viable** solution which would have avoided insurmountable problems. I am, however, aware, as this has already been brought up in some of the written submissions, that having to wait a significant time for the trial to commence and the Judgement to be delivered can cause **stress** to both the family of the Accused and the Accused himself, and in the event that an Accused is ultimately found innocent, significant financial compensation must be awarded.

(C) Questions of Law

1. The Rule of Precedent

May I, as a Judge, depart from the decisions of the Appeals Chamber which on several occasions has stated that for reasons of legal certainty its decisions were binding upon the Trial Chamber?[332]

While it seems obvious that for reasons of legal certainty a national court of last resort would impose its judgements on the lower courts, does this mean that the same rule must automatically apply to an international court or tribunal?

In the case at bar, I have doubts which arise from how common law itself operates and from various commentaries on what is known as the rule of precedent ("*stare decisis*").

In common law countries, a substantial share of the law derives from customary law as there were neither statutes nor regulations, and it is the jurisprudence, resulting from the accumulation of decisions and reasoning ("*ratio decidendi*"), which provides guidance to the lower courts.

Nevertheless, the rule of precedent, defined by the House of Lords in the case of *London Street Tramways v. London County Council*, was adjusted in 1966 by the House of Lords, which acknowledged that it could revoke precedents which were no longer appropriate or which were unjust. This was likewise the position taken by the United States Supreme Court in respect of the rule of precedent.

The European Court of Human Rights considered that the imperatives of legal certainty and to safeguard legitimate confidence do not give rise to law that resembles established case-law.

According to the Appeals Chamber, any reversal of the case-law must be validated by a dynamic, progressive construction of the law that is warranted in law and has a reasonable basis.[333]

Exactly what is the situation of the JCE at the ICTY?

[332] I would like to thank lawyer **Laura Grimaldi** for her contribution to this opinion.
[333] *The Prosecutor* v. *Aleksovski* Appeals Judgement, 24 March 2000; *Semanza* case (ICTR), Decision on Appeal, 31 May 2000; *Čelebići* case, Appeals Judgement, 20 February 2001.

It should be noted that this concept was challenged in the Appeals Chamber itself by **Judge Schomburg**; however, this position largely **downplays** the impact of this jurisprudence; in addition several Chambers have demonstrated their reticence about this issue by not upholding the JCE. Moreover,,another international tribunal – the Cambodia Tribunal – departed completely from JCE form 3.

Beyond the theoretical issue lies another problem that legal doctrine on the subject does not address, namely, can an independent Judge within the meaning of the Statute be independent if he must blindly apply the case-law handed down by other Judges? If so, what is the true extent of his independence? Following one strand of jurisprudence in the Appeals Chamber, it must in fact be quite restricted.

In such a case, the Judge would have little margin for manoeuvre and if the Judges who comprise the Appeals Chamber consider themselves bound by the rule of precedent initiated by their predecessors, the system is bound to collapse, which I do not think was ever the intent of our legislator, the Security Council.

Moreover, from a purely theoretical perspective, if the dissenting Judges or those with reservations had themselves formed the Appeals Chamber in the *Tadić* Case, it is almost certain that there would **never** have been any *Tadić* jurisprudence. Furthermore, the Security Council recalled in the Statute that each Judge is equal in **judicial office.** If a Judge must apply a particular jurisprudence in quasi-military fashion, what becomes of the equality advocated?

Admittedly, it should be noted that the earliest international tribunals ruled in the first and last instance without an Appeals Chamber. The idea of introducing a mechanism for appellate jurisdiction is consistent with the spirit of the times.

The rule of precedent, or *stare decisis*, that arose from common law means that the judge is bound by judgements already rendered.

In countries with a civil law tradition, this rule does not hold sway, because statutes create the law – not judges who use the concept of settled case-law – which is more flexible than *stare decisis*.

At the ICTY, the Appeals Chamber considered in the *Aleksovski* Case[334] that it was bound by its previous decisions and that it could only depart from them in "*situations where cogent reasons in the interests of justice require a departure from a previous decision*".[335]

The Judges of the Appeals Chamber held that "*the right of appeal is [...] a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. This will not be achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and to decide the law as it sees fit*".[336]

The Trial Chamber is thus bound to follow the precedents established by the Appeals Chamber and to comply with them on those occasions when a **similar situation** comes before it.

In this case, two points of law previously adjudicated seem to me in need of revision. These are successor superior responsibility and the joint criminal enterprise (the validity of form 3 in particular).

The question which then arises is knowing whether the Trial Chamber is free to act contrary to the position of the appellate Judges without risking being "sanctioned" when an appeals judgement is handed down. Does the rule of precedent, as applied at the Tribunal, allow trial Judges to adopt different positions, and, if so, why and under what circumstances?

To attempt to answer this question, it is appropriate (I) to analyse the principle of *stare decisis* as such and (II) to ask whether the interpretation given by the Appeals Chamber of the Tribunal is open to debate.

I. The Principle of *Stare Decisis*

We must examine (A) domestic and (B) international practice in order (C) to draw conclusions as to how the principle is applied by the Judges.

[334] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeals Judgement, 24 March 2000.
[335] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeals Judgement, 24 March 2000, para. 107. This rule was also adopted by the ICTR Appeals Chamber in the case of *The Prosecutor v. Laurent Semanza*, 31 May 2000, para. 92.
[336] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeals Judgement, 24 March 2000, para. 113 (iii).

A. In the Domestic Legal Order

The principle of *stare decisis* comes out of the common law, which, because there are no written rules, for reasons of legal certainty imposed the rule whereby precedent is binding upon the courts hearing similar cases.

However, applying this rule in practice is not so easy, and the path taken by (i) British and (ii) American courts is enlightening.

(i) The Practice in England and Wales[337]

In 1898, the House of Lords laid down the principle that the courts must follow the principles of law established by higher judges or even by those of the same rank.[338]

Over time this rule has been the subject of increasing criticism and judges have on many occasions drafted opinions in which they advocated a change to the principle of *stare decisis*.[339]

The House of Lords, and Lord Chancellor Gardiner in a statement in his name on behalf of all the Lords, considered that a "*too rigid adherence to precedent may lead to injustice in a particular case and also* ***unduly restrict the proper development of the law***. *[The Law Lords] propose to modify their present practice and, while treating former decisions of this House as normally binding,* ***to depart from a previous decision when it appears right to do so****"*.[340]

Since that time, Anglo-Welsh practice in matters of *stare decisis* has become more flexible.

(ii) The American Practice[341]

The Supreme Court has placed great importance upon judicial precedent, saying:

[337] On this topic, see Gérard DWORKIN, "*Stare Decisis* in The House Of Lords", *The Modern Law Review*, 1962, Vol. 25, Issue 2, pp. 163-178; and by the same author, "*Un adoucissement de la théorie du Stare Decisis à la Chambre des Lords*", *Revue internationale de droit comparé*, 1967, Vol. 19, N° 1, pp. 185-198.
[338] *London Street Tramway v. L.C.C.* [1898] A.C. 375.
[339] Lord RADCLIFFE, "The Law and its Compass", 1960, p. 39. See the case of *Rookes v. Barnard* (1964) A.C., and Lord Evershed's opinion at pp. 1184-1185.
[340] This decision on judicial practice was read out by Lord Gardiner prior to the delivery of the appellate judgements of 26 July 1996.
[341] Elizabeth ZOLLER, "*Les revirements de jurisprudence de la Cour Suprême des Etats-Unis*", *Cahiers du Conseil constitutionnel*, N° 20, June 2006.

"[l]iberty finds no refuge in a jurisprudence of doubt".[342] *Stare decisis* was thus imposed at the very outset in the famous case of ***Cohens v. Com. of Virginia***.[343]

However, even if the rule of precedent must be strictly followed, the judges consider that an exception may be allowed when it favours the accused.[344]

It was in 1992 that the Supreme Court had to adopt a position on the issue of whether it had the authority to reverse its own jurisprudence. The issue put before the Court was whether the ***Roe v. Wade***[345] decision, which legalised abortion, could be overturned or not. On this occasion, the Supreme Court laid down the requirements for reversing case-law.

According to the US Supreme Court, four points must therefore be taken into consideration before any reversal of case-law may be envisioned:

> (1) whether the rule has proven to be intolerable, defying practical workability;
>
> (2) whether the rule is subject to the kind of reliance such that would lend special hardship to the consequences of the reversal envisaged;
>
> (3) whether related principles of law have so far developed that the rule has been abandoned;
>
> (4) whether the facts have so changed, or come to be seen so differently, that the former rule has been robbed of any significant intended application or justification.[346]

This decision established the framework for overturning precedent, which has been achieved on numerous occasions after that.[347]

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[342] Supreme Court of the United States, 505 US 833 (1992).
[343] Supreme Court of the United States, 19 US (6 Wheat) 264 (1821).
[344] Ontario Court of Appeals, *RU v. Goderavoc, Popović and Askov* (1974), 16 C.C.C, 30R (2D) 238.
[345] Supreme Court of the United States, *Roe v. Wade*, 410 US 113 (1973).
[346] Supreme Court of the United States, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833, 854-855 (1992).
[347] See for example the famous Supreme Court decision ***Lawrence v. Texas*** in which the Court found that the *Bowers v. Harwick* decision from 1986, which had held that the Constitution did not guarantee a right to homosexuality, lacked a proper basis in law, 539 US 538 (2003).

At this point, I would observe that these four points are very interesting with respect to the issues adjudicated by the Appeals Chamber of the ICTY and the ICTR, particularly with regard to the **lack of reliance**.

B. In the International Legal Order[348]

We must first examine current practice at (i) the International Court of Justice, whose jurisprudence undoubtedly constitutes the leading source from which international public law is drawn, and then (ii) examine the reasoning of the Judges of the specialised international courts and tribunals.

(i) Precedent at the International Court of Justice

Article 38(1)(d) of the Statute of the Court provides that: "*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
[...] ***subject to the provisions of Article 59, judicial decisions*** *and the teachings of the most highly qualified publicists of the various nations,* ***as a subsidiary means*** *for the determination of rules of law*".

Jurisprudence, therefore, is considered as a **subsidiary source of international law**, and thus can never trump a rule of codified law or well-established custom.

Article 59 of the ICJ Statute moreover clearly sets out a prohibition against the principle of *stare decisis*, as it clearly indicates that the appellate judgements of the Court have binding force only between the parties.

The Court itself has declared that its previous decisions had no binding force and that it was therefore under no obligation to follow its own precedents.[349] The Permanent Court of International Justice even held as early as 1926 that *"[the object of Article 59 of the Statute] is [...] to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes*".[350]

[348] On this topic, see G. GUILLAUME, "*Le précédent dans la justice et l'arbitrage international*", *Journal du droit international* (Clunet), N° 3, July 2010, Doct. 8.
[349] Case of the *Continental Shelf Tunisia v. Malta* (International Court of Justice), ICJ Reports, p. 26, para. 42.
[350] *Case concerning Certain German Interests in Polish Upper Silesia* (ICJ), The Merits, Reports Series A, N° 7, p. 19. The principle was restated in the *Chorzow Factory Case*, 1927, Series A Reports, N° 1, p. 20.

It is nevertheless true that the Judges at the ICJ readily cite their previous jurisprudence when required to resolve a dispute resembling a case previously addressed but then only to refer to previously existing jurisprudence.[351]

The ICJ does however acknowledge that it is preferable that "*[t]he same kind of cases […] must be decided in the same way and [**if possible**] by the same reasoning"*,[352] but this in no way constitutes an obligation.

The rule of *stare decisis* has thus clearly been discarded at the ICJ, by the Statute as well as by the Court itself. From my perspective, this position appears to have a particularly solid basis.

(ii) Precedent in Specialised International Public Law

The European Court of Human Rights stated that it "*is not bound by its previous judgments*" and that it may depart from its jurisprudence if there are cogent reasons for doing so[353] and considers, moreover, that what is needed for legal certainty and to safeguard legitimate confidence does not imply a law that may be likened to settled case-law.[354]

The principle of *stare decisis* has thus clearly also been ruled out by the Judges in Strasbourg.

The same holds true for the International Tribunal for the Law of the Sea which is under no obligation to follow its own precedents, pursuant to a reading of Article 196 of the Montego Bay Convention, which incorporates Article 59 of the ICJ Statute, and also for the WTO Dispute Resolution Mechanism, which has clearly expressed its refusal to be bound to follow its own precedents.[355]

The above analysis thus shows that the principle of *stare decisis* is indeed a fundamental component of a trial in *common law*, but that, even so, the Judges frequently permit exceptions in order to render just and fair decisions.

[351] *See* for example the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (ICJ), 1980, ICJ Reports, p. 18, para. 33.
[352] *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (ICJ), Initial Pleadings: Preliminary Objections, 1964, ICJ Reports, p. 65.
[353] *Cossey v. The United Kingdom* (ECHR), 27 September 1990, Series A Reports, N° 184, para. 35.
[354] *Unedic v. France* (ECHR), 18 December 2008. *See* also *Boumaraf v. France*, 30 August 2011.

Binding precedent, as a rule, appears to lack widespread support in international law. The reluctance of the Judges to consider themselves bound by their own case-law is understandable, because the complexity of the cases they are called upon to handle requires a judgement adapted on a case-by-case basis relying on a solid legal foundation. The ICJ has clearly always refused even to engage in judicial construction of the law, recalling that "*it is not the role of the judge to take the place of the legislator [...]* ***the Court must limit itself to recording the state of the law,"*** [356] with jurisprudence constituting nothing more than a subsidiary source of international law.

The European Court of Human Rights justifies this refusal to comply automatically with its own precedents by the fact that it is "*of crucial importance that the Convention is interpreted and applied in a manner which renders* ***its rights practical and effective****.... A failure by the Court to maintain a dynamic and evolutive approach would risk* ***rendering it a bar*** *to reform or improvement*".[357]

The Appeals Chamber, however, held that it had to take another approach; it is therefore appropriate to review the reasons underpinning this and whether they have a proper basis in law.

I. The Authority of the Appeals Judgements of the ICTY and ICTR

The (A) reasoning of the Appeals Chamber may be questioned (B) on certain points.

A. The Reasoning of the Appeals Chamber

(i) The Acknowledgement of Mandatory Precedent

The Appeals Chamber has found that *"a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice*".[358]

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[355] DSB, "*Décision sur les mesures antidumping américaines"*, WT/DS/344/AB/R, 30 April 2008.
[356] *See* the Statement by Judge Gilbert Guillaume, "Advisory Opinion of 8 July 1996 – Legality of the Threat or Use of Nuclear Weapons", separate opinion, 8 July 1996, ICJ Reports of Judgements 1996, p. 293. In this opinion, it is clear that the Court refused to rule on the question put to it because the state of the law at the time did not make it possible to answer it, p. 266, para. 105.
[357] *Stafford v. The United Kingdom* (ECHR), 28 May 2002, paras 67-68.

In support of its reasoning, the Appeals Chamber first relied on domestic and international practice. However, as has been shown above, national courts tend to make *stare decisis* more accommodating in order to render judgements that are just and adapted to each situation. International practice shows a tendency to recognise precedent as a possible source of inspiration but never as a practice which the Judge is bound to observe. It would be more fitting, then, to speak of "the rule of precedent as a source of inspiration and interpretation" rather than of pure *stare decisis*.

However, it should be noted that the Appeals Chamber acknowledges that it may depart from its earlier decisions in the interest of justice. I heartily embrace this approach.

(ii) Submission of the Trial Chambers to the Decisions of the Appeals Chamber

In the *Aleksovski* case, the Appeals Chamber thus considered that "*a proper construction of the Statute requires that the ratio decidendi of its decisions is binding upon the Trial Chambers*".[359] The Appeals Chamber has a three-fold basis for its reasoning:

(1) The hierarchy among the Chambers of the Tribunal
(2) The need for legal certainty and predictability
(3) The fundamental right of the accused to lodge an appeal

Relying on this approach, I consider that there is no "hierarchy" among the Chambers of the Tribunal. Hierarchy presupposes authority and subordination. As an independent Judge, I am not subject to any hierarchy inasmuch as every Judge is equal in judicial office.

Concerning the issue of legal certainty, I fully agree with the Appeals Chamber, but legal certainty may be put into practice without requiring subordination. Quite simply, if the decision is compelling because of its clarity, quality and logic, that is sufficient.

The third point concerns the right to lodge an appeal, which in my view, does not affect the rule of precedent in any way. The right of appeal is a principle that forms part of a fair trial and every

[358] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeals Judgement, 24 March 2000, para. 107.
[359] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeals Judgement, 24 March 2000, para. 113.

accused has the right to have his case re-examined by other Judges in an appeals chamber, particularly with regard to questions of law.

B. The Discussion

Article 25 of the Statute introduces the principle of appeal as a last resort. However, in what respect is the right to lodge an appeal a corollary of the principle of *stare decisis*, and in particular, in what respect does it impose the authority of the matter adjudicated on the Trial Chambers?

Article 25 reads as follows:

"*1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:*

(a) an error on a question of law invalidating the decision; or
(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."

The principle of appellate jurisdiction is recognised by international law. It is indeed enshrined in Article 14-5 of the International Covenant on Civil and Political Rights, which reads: "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".*

However, I note that nothing in this Article or in the Statute implies that the Trial Chambers are bound, when ruling on a point of law previously adjudicated by the Appeals Chamber in another case, to follow the reasoning previously established.

The very principle of an appeal presupposes that the accused or the victims hope to see their case adjudicated with the utmost fairness. The appellate judges make sure that the law is correctly applied and that the interpretation of the facts has not led to a miscarriage of justice.

Moreover, no provision of the Statute expressly states that judicial precedent is binding upon the Judges of the Tribunal.[360] Article 25 affords no such presumption – on the contrary, as stated above.

International criminal law has a body of norms, both written and customary, which is sufficiently "ample" and does not need to be supplemented by the Judges. A Judge's authority to interpret or adjust the Norm is obviously not open to question, but as the ICJ expressed, in its Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, that authority can be implemented only on the basis of the applicable law, **as the judge does not have jurisdiction to create law.**[361]

Therefore, in applying this principle, would the Judges of the ICTY be able to create a mode of criminal responsibility not contemplated in the Statute, particularly with regard to the modes of responsibility enumerated in Articles 7.1 and 7.3 of the Statute?

The reasoning of the Appeals Chamber in the *Aleksovski* Case therefore stands in complete contradiction to Article 38 (1) (d) of the ICJ Statute, **which makes jurisprudence a subsidiary source for determining international law. Judge Shahabuddeen** himself clearly expressed his disagreement in the dissenting opinion he attached to the ***Semanza* Decision**. The Judge considered that as nothing in the Statute would permit declaring that precedent is binding, **the solution put forth by the Chamber applies solely to the case before it, not to the future**.[362]

"*I would interpret such a pronouncement not as asserting that the Statute itself lays down a requirement for the Appeals Chamber to follow its previous decisions subject to a limited power of departure, but as asserting that the Statute empowers the Appeals Chamber to adopt a practice to that end and that such a practice has now been adopted*".[363]

[360] The Judges of the Appeals Chamber themselves acknowledge this in the *Aleksovski* Appeals Judgement, para. 99.
[361] For a commentary on the ICJ's opinion, see M. G. KOHEN, "*L'avis consultatif de la CIJ sur la licéité de la menace ou de l'emploi de l'arme nucléaire et la fonction judiciaire*", 2 EJIL (1997), pp. 336-362, which is available at http://www.ejil.org/pdfs/8/2/1436.pdf.
[362] *Laurent Semanza v. The Prosecutor* (ICTR), "Decision on Appeal", Separate Opinion of Judge Shahabuddeen. *See* also Philippe WECKEL's very critical commentary, "*Jurisprudence internationale*", *Revue Générale de Droit International Public* (2000), pp. 802-804, in which the author says that the Appeals Chamber's reasoning in the *Aleksovski* case with regard to *Stare Decisis* "ignores Article 38 of the World Court, which has nevertheless been drafted to prevent any transposition into international law of the common law tradition of the legal authority of jurisdictional precedent", p. 803.
[363] *Laurent Semanza v. The Prosecutor* (ICTR), "Decision on Appeal", Separate Opinion by Judge Shahabuddeen, 31 May 2000, para. 17.

The Appeals Chamber itself recognises that an overly strict application of the principle of *stare decisis* as in *common law* might lead to injustice in certain cases,[364] and that national courts have evolved in respect of this principle, which has become much more flexible.[365] It even reserves the right to revisit its own jurisprudence "*for cogent reasons in the interests of justice*".[366]

For this reason, the Trial Chamber in the *Kupreškić* Case properly identified the problem when it stated that "*judicial precedent is not a distinct source of law in international criminal adjudication*"[367] but "*a subsidiary means for the determination of rules of law*"[368] and that therefore "*the International Tribunal cannot uphold the doctrine of binding precedent (stare decisis) adhered to in common law countries*".[369] I fully agree with this principle.

By analogy, it is interesting to observe that in the pending ICC case of *The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui*, Judge Pikis considered that Article 21(2) of the Rome Statute, which enables the Court to refer to its own jurisprudence[370] could not in any way be likened to the *stare decisis* principle, but offers the judges only **the option**, not **the obligation**, to follow what has been previously adjudicated.[371] Judge Pikis in fact stated that:

Article 21(2) of the Statute reads: "[t]he Court may apply principles and rules of law as interpreted in its previous decisions" but this article does not bind the Court to follow its previous decisions.[372]

This position is thus in keeping with the one prevailing under international law more broadly.

[364] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeals Judgement, 24 March 2000, para. 101: "The Appeals Chamber [...] also recognises that there may be instances in which the strict, absolute application of that principle [*stare decisis*] may lead to injustice".
[365] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeals Judgement, 24 March 2000, para. 92.
[366] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeals Judgement, 24 March 2000, para. 107. *See* also *Čelebići* case, "Appeals Judgement", 20 February 2001, para. 8; *Semanza* case (ICTR), Decision on Appeal, 31 May 2000, para. 91.
[367] *The Prosecutor v. Kupreškić et al.*, "Judgement", 14 January 2000, para. 540.
[368] *The Prosecutor v. Kupreškić et al.*, "Judgement", 14 January 2000, para. 540.
[369] *The Prosecutor v. Kupreškić et al.*, "Judgement", 14 January 2000, para. 540.
[370] Article 21(2) of the Rome Statute reads: "The Court **may** apply principles and rules of law as **interpreted** in its previous decisions". It should be noted that it is the word **interpret** which is used, and not "create", which confirms the idea that jurisprudence is not a primary source of international law.
[371] *The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui* (ICC), "Judgement on the Appeal of Mr Mathieu Ngudjolo Against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9'", Dissenting Opinion of Judge Pikis, 27 May 2008, para. 15.
[372] *The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui* (ICC), "Judgement on the Appeal of Mr Mathieu Ngudjolo Against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9'", Dissenting Opinion of Judge Pikis, 27 May 2008, para. 15, p. 9.

In light of such considerations, is the Trial Chamber bound to follow the Appeals Chamber jurisprudence without commentary?

Am I then, as a Judge, bound to apply the jurisprudence of the Appeals Chamber dispassionately? If mandatory precedent must be disregarded at the Tribunal, there is no reason why the Trial Chamber should feel obligated to follow the previous decisions of the Appeals Chamber when it deems, in the case before it, that another interpretation would lead to more sound administration of justice.

In my view therefore, the only option remaining to the Chamber is either to show that the principle of law to which it wishes to turn cannot be applied in the case at bar[373] or to show that the interpretation previously given is flawed.[374] This is, I think, all the more necessary as a decision rendered by the Appeals Chamber in the ***Gotovina* Case** sparked an uproar in the international legal community.[375]

2. Joint Criminal Enterprise ("JCE")

Prior to the establishment of the **Nuremberg Tribunal**, responsibility for participation in **a common plan** existed in various forms under national statutes acknowledging this form of co-perpetration, such as the American concept of "*conspiracy*", the "*felony murder rule*"[376] as well as the French concept of "*association de malfaiteurs*" [criminal association].[377]

In 1945, after negotiations lasting more than one month among the five major victors of the Second World War, during which the French and the Soviets found themselves on the **opposite side** of the

[373] The Appeals Chamber actually considers that "[w]hat is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases [....]", para. 110. It appears thus that if the problem which arises is not the same, the trial chamber may depart from a previous decision.

[374] The Appeals Chamber considers that "[i]nstances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principles or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law", *Aleksovki*, para. 108.

[375] *See* R. TOE, "*Acquittement de Gotovina : pour les Serbes de Bosnie, « le TPIY a perdu toute crédibilité »*", in *le Courrier des Balkans*, 16 November 2012; C. VALLET, "*Acquittement de Gotovina : retour au pays en fanfare pour les « héros »*", *le Courrier des Balkans*, 17 November 2012; "*Acquittement de Gotovina : indignation unanime en Serbie*", *Blic*, 16 November 2012; "*Les ex-généraux croates Gotovina et Markac acquittés en appel par le TPIY*", *Le Monde*, 16 November 2012.

[376] *See* D. CRUMP and S. W. CRUMP, "In Defense of the Felony Murder Doctrine", 8 Harv. J. L. & Pub. Pol'y 359 (1985).

[377] It should be noted that according to Professor van Sliedregt, the notion of *association de malfaiteurs* inspired the drafters of the Nuremberg Statute to criminalise membership in a criminal organisation. E. van SLIEDREGT, "Joint

Americans and the British as to whether to adopt the **concept of conspiracy**, the London Agreement establishing the Charter of the International Military Tribunal at Nuremberg was finally signed on 8 August 1945. Control Council Law No. 6 in this agreement reads **"*Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan*".**[378]

As can be observed, there can be a **common plan** or a **conspiracy**; these two concepts are not identical; the said text results from disagreement among the five major Powers.

This led the **Nuremberg Tribunal** and the tribunals established under Control Council Law No. 10 to adopt their own definition of a joint criminal enterprise as a mode of responsibility.[379]

Several important factors must be noted. It falls first to the Judges to say whether the group or organisation is indisputably **criminal in nature**. Secondly, any affiliation with this group or organisation will lead to criminal prosecution.

These tribunals established that "the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it".[380]

Thus, one observes that there may be a conspiracy without the acts being carried out whereas a common design requires that the acts be carried out.

However, we must note that, although it differs from the concept of a **conspiracy (or *complot*)**, the concept of **joint criminal enterprise** is frequently considered an offshoot of the concept of *complot*

Criminal Enterprise as a Pathway to Convicting Individuals for Genocide", *Journal of International Criminal Justice*, 2006.

[378] Control Council Law No. 6, Charter of the International Military Tribunal at Nuremberg (London Charter); *see* also Article 5(c) of the Charter of the International Military Tribunal for the Far East (Tokyo Charter).

[379] Control Council Law No. 10, stating that **"[i]n cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual[s] to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned".**

[380] UN War Crimes Commission, "XV Law Reports of Trials of War Criminals 97-98", 1948 (summarising the jurisprudence from Nuremberg and the trials conducted pursuant to Control Council Law No. 10), unofficial translation.

or an adaptation of the common law concept of **conspiracy**, as it primarily involves taking into consideration the criminal objectives.

Conspiracy

In common law, **conspiracy** consists of an **agreement between two or more persons that violates the law in force**. There is no limit to the number of participants in a conspiracy and in many cases, the actual implementation of the plan is not a requirement for the offence.[381] One of the essential criteria for characterising this offence is the continuity of the *actus reus*, that is, the parties may join the "group" later on and be held responsible for conspiracy; the *actus reus* constitutes the agreement among the participants.[382]

In this respect, a conspiracy consists of **three elements**:[383]

(i) *an agreement;*

(ii) *between two or more persons sharing a common purpose;*

(iii) *the criminal objective pursued may be either the ultimate purpose of the agreement or simply constitute a means whereby the purpose is realised.*

This concept of a conspiracy was developed and applied, in particular, **in India** by the Supreme Court following the assassination of **Indira Gandhi**.

First, the Court restated the three elements to determine its findings in the case brought before it. The Court specified that the offence of conspiracy consists of an actual agreement between two or more persons with a view to committing a criminal offence, irrespective of whether these crimes were already committed. The central element of the offence, according to the Court, is its **mental character**, regardless of how the implementation of the criminal plan proceeded.[384]

This Indian jurisprudence reverberated abroad, particularly in the United States of America, where the American courts reviewed the *mens rea* and the intent of the offender. The American courts clarified this standard in several cases.

[381] *See* J. HERRING, *"Criminal Law: Text, Cases and Materials"* (3rd edition), Oxford University Press.
[382] *See*, for example, Supreme Court of India, *Yash Pal Mittal v. State of Punjab*, AIR 1977 SC 2433; *Suresh Chandra Bahri v. State of Bihar*, AIR 1994 SC 2420.
[383] Supreme Court of India, *Ajay Agarwal v. Union of India*, AIR 1993 SC 1637.
[384] Supreme Court of India, *Suresh Chandra Bahri v. State of Bihar*, AIR 1994 SC 2420.

In a variety of cases, the issue of *mens rea* was largely commented upon and was incorporated into the legal doctrine of the time.[385]

(i) First, by way of example, is the ***Hawkesley*** Case[386] where the Court held that in light of the facts of the case submitted to it, it considered the Accused innocent of the charges against him, inasmuch as he was unaware of the unlawful, criminal intent of his two co-conspirators, and that he did not, moreover, share their cause ("identity of cause") in any way.

(ii) Second, in the ***Lauria*** Case,[387] the Court was more nuanced, raising two very different situations. In that case, the Judges essentially drew a distinction between the situation where a person clearly possesses criminal intent and the necessity to demonstrate the reality of this intent through a form of cooperation and furthering of the common purpose. To this end, the Judges used a kind of *graduated scale* for the intent of the person charged, saying that such intent must be based on more than mere suspicion or basic awareness, and that there must be real cooperation, stimulation and instigation in favour of the common plan.

In similar fashion, **the Supreme Court of India**, in the ***Som Nath Thapa*** **Case,**[388] reiterated the need for objective, factual analysis based on the evidence of the conduct alleged, while leaving room for doubt as to any presumption of guilt in certain areas. According to **Judge D. P. Wadhwa** corroborating the Court's findings in the **case of *State v. Mohd Afzal***,[389] there must be compelling evidence to establish that the Accused took part in the conspiracy, which itself requires marshalling solid proof of active participation drawn from appropriately detailed evidence and in some cases a high level of awareness may be sufficient.

The common law courts have chosen an appropriately detailed application of the prevailing requirements for characterising an offence as conspiracy. These courts, quite reasonably, envisage that responsibility may be incurred in view of the evidence tendered in the case. In their view, the participants in a crime "come and go", and any one of the conspirators may not necessarily know or

[385] *See* M. SINGH, "Criminal Conspiracy – A Question of Proof", 1989 Crim. L. J. 7.
[386] *Hawkesley* (1959) Crim. L.R. 211.
[387] *Lauria* (1967) 251 California Appeal 2d 471; *Feola* (1975), 420 US 671.
[388] Supreme Court of India, *State of Maharashtra v. Som Nath Thapa*, AIR 1996 SC 1744.
[389] Supreme Court of India, *State v. Mohd Afzal*, MANU/DE/1026/2003.

come to understand every stage of the implementation of the plan that was decided by the other conspiratorial perpetrators.[390]

The concept of "common criminal plan" that was standardised by the Nuremberg Tribunals, unlike the concept of the JCE discerned by the *Tadić* Appeals Judgement, based criminal responsibility on the concept of membership in the criminal enterprise. The post-war tribunals insisted, through the concept of a "common plan", on **formal membership** in an organisation declared criminal beforehand by the Nuremberg Tribunal[391] (as were the Nazi Party, the SS, the Gestapo and the SD) constituting the *actus reus*, whereas the *Tadić* jurisprudence is less formalistic and requires **the mere participation** in a joint criminal enterprise without declaring the organisation criminal.

Herein we see the major difference between the original concept defined at **Nuremberg**, requiring **formal membership** whereas the more expansive ***Tadić* jurisprudence** requires **mere participation.** Why this significant departure on the part of the ICTY Judges? Is this a desire to "favour" the Prosecution by removing an encumbrance from the burden of proof? I cannot answer this question, although it must nevertheless be asked.

It is interesting to draw a parallel between Control Council Law No. 6, which classified into categories the persons taking part in the plan or conspiracy, namely, the leaders, organisers, instigators or accessories, and Article 7 of the ICTY Statute, which contemplates a single mode of responsibility concerning anyone who plans, orders, instigates, commits or aids and abets.

Thus, one sees a distinction between these two texts, namely, that the **direct perpetrators** are not enumerated under Control Council Law No. 6, but that, by contrast, Article 7 of the Statute places them in the category of those who commit the offences.

I consider that Article 7 of the Tribunal Statute, contrary to what the Judges of the *Tadić* Chamber say about it, does not in itself conceal a "lacuna" making it necessary to create jurisprudence in order to prosecute certain persons. From my perspective, there was no legal lacuna: at no time did any such possibility exist within the **Security Council**, which is assisted by eminent legal specialists on its staff or informed by widely recognised professors of law.

[390] P. MARCUS, "Criminal Conspiracy: The State of Mind Crime-Intent, Anti-Federal Intent", College of William and Mary Law School Faculty Publication, 1976, pp. 632-633.
[391] See Control Council Law N° 10.

We must recall that **Security Council Resolution 827** was adopted after much consultation and many preparatory documents submitted by States or international legal scholars. It would be impossible, under such conditions, for every one of the persons involved to have committed the error of overlooking certain perpetrators of offences. The *Tadić* jurisprudence was not absolutely necessary in my view as Article 7 of the Statute does not suffer from any defect requiring compensatory jurisprudence.

One need simply return to the text and take into consideration the spirit of Article 7(1) of the Statute which fully grasped the commission of offences resulting from a common plan. There are the planners, then those who instigate the commission of crimes through the media; there are those who give orders to translate the common plan into action on the ground, and there are those on the ground who carry out the plan: it is the latter who commit the crimes on the ground contemplated under the Articles of the Statute who fall into the very specific category of perpetrators, and not of planners, instigators or persons giving the orders.

For this reason, it seems incongruous to place those committing the crimes on the same level as those planning them, as the JCE theory "the *Tadić* way" would suggest. In my view, a JCE based on a plan of common design falls into the category of **planning.**

Does the fact that Tadić was present at the scene of the crime place him in a safe area where he was exempt from prosecution? I do not believe so. When one member of a military group carries out an order, and is aware that a crime is being committed before his very eyes, he is duty-bound to intervene to prevent the crime by raising the issue of the execution of an unlawful order with a superior.

International criminal law subsequent to Nuremberg, symbolised by the creation of *ad hoc* tribunals such as the ICTY, the ICTR ("International Criminal Tribunal for Rwanda"), the SCSL ("Special Court for Sierra Leone"), and the STL ("Special Tribunal for Lebanon"), and the creation of the ICC, no longer imposed the mechanism of a prior declaration of an organisation's criminal status. This mechanism was based, in the first place, on the objective status of a member in a criminal organisation and could be likened to collective responsibility. For this reason, in order to establish individual criminal responsibility upholding the principle of individual guilt,[392] as set out in the

[392] *See* Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute, and Article 25(3)(d) of the Rome Statute.

Nuremberg Judgement's celebrated dictum, "*crimes against international law are committed by men, not by abstract legal entities* [...]".

We have no choice but to conclude that the ***Tadić* jurisprudence** and the **concept of JCE** it gave rise to have produced a degree of legal uncertainty brought about by the ambiguity of this concept.

The Appeals Chamber did not clearly define the **objective requirements** which must be met to prove the existence of a JCE. It indicated that a JCE exists when several persons share a common purpose, without however requiring the determination of their identity, the specific purpose they were pursuing, the specific methods they implemented to reach it, or the geographic or temporal context…

This problem recurs with proof of intent regarding JCE 3. The subjective requirements the Chamber sets out are not defined with any greater precision than the objective requirements. Indeed, the Chamber considers that an accused may be declared responsible for a crime other than the one envisaged in the common plan "if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*".[393] The Chamber does not, however, specify what it means by the term "foreseeability", and whether this foreseeability must be assessed objectively or subjectively.[394]

If we compare the requirements that must be satisfied to sentence a person as a **perpetrator** on the basis of JCE 3 and to convict someone as an **accessory** to a crime committed in connection with a JCE, we see that:

- **from an objective point of view,** the accessory must have aided or abetted the perpetrator of a specific crime in order to achieve the common purpose whereas according to the requirements of the expanded form of JCE, it is sufficient that he participate in such an enterprise to be considered a perpetrator.

[393] *Tadić* Appeals Judgement, p. 106.

[394] By way of comparison, in English law, the theory of "common purpose" whose roots go back to the 14th century, makes it possible to find a person responsible for a crime committed in furtherance of a common plan, even when the action goes beyond the plan, depending on certain requirements, which have evolved over time. According to the early case-law, the crime was attributable to such a person if it constituted the probable consequence of the common plan in *the eyes of a neutral third party* ("*objective probable consequences test*"). Since the 1985 Privy Council decision in the *Chan Wing-Sui* case, the test used to assess this is subjective. For further details, see Barthe, cited *supra*, pages 148 *et seq.*

- **from a subjective point of view**, the accessory must possess the intent to aid and abet the commission of a specific crime, whereas a perpetrator participating in an expanded JCE may be found responsible if he could have foreseen the commission of a crime that went beyond the common purpose, but did not otherwise possess the specific intent appropriate for that crime.

In the *Tadić* Appeals Judgement, the Appeals Chamber **specifically relies on Article 7(1) of the Statute, but also on the expanded form of Joint Criminal Enterprise, based on the cases of the *Essen Lynching* and *Borkum Island***, stating that "the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal".[395]

The Appeals Chamber first recalls the principle of individual responsibility enshrined in Article 7 (1) of the ICTY Statute, whereby "*[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in [A]rticles 2 to 5 of the present Statute, shall be individually responsible for the crime.*"

The Chamber considered that the object and purpose of the ICTY Statute are to be interpreted in such a way as to extend the Tribunal's jurisdiction to every person responsible for serious violations of humanitarian law in the former Yugoslavia, regardless of the manner in which they participated in these violations. The Chamber infers therefrom that the ICTY Statute does not rule out the possibility of holding a person responsible for crimes committed by one or more other persons in circumstances where all of them constituted a group in pursuit of a common purpose, an interpretation it deems justified, moreover, in light of the nature of the crimes committed during wartime.[396]

This construction of the ICTY Statute is now the subject of debate. The ICTY Statute does not in effect mention the term "JCE" and there are many who consider that the extended interpretation of the Appeals Chamber in the *Tadić* Appeals Judgement runs contrary to the principle of the legality of crimes, since in criminal law, statutory texts must be strictly construed.[397]

[395] *Tadić* Appeals Judgement, p. 102.
[396] *Tadić* Appeal Judgment, pp. 83 *et seq.*
[397] *Martić* Appeals Judgement, Dissenting Opinion of Judge Schomburg.

The Appeals Chamber bases the expanded form of the Joint Criminal Enterprise on two decisions in particular: the decision regarding the ***Essen Lynching*** **and the** ***Borkum Island*** **Case.**

The Cases of the *Essen Lynching* and *Borkum Island* and the Expanded Form of JCE

In the first of these cases, the case known as the *Essen Lynching* Case, brought before a British military tribunal, three British prisoners of war were lynched by a German mob on 13 December 1944 in Essen. Seven persons, two soldiers and five civilians were accused of war crimes. Among the accused was *inter alia* the German captain, who had handed the prisoners over to an escort telling him not to intervene if the mob went after them because they were going or had to die. The order was given in such a way that it could be heard by the civilians present on site. The prisoners were then subjected to various forms of mistreatment by the soldiers and civilians in the street. Once they reached a bridge, they were thrown from the parapet into the abyss. One died on the spot, the two others were finished off subsequently, one by gunshots, the other after being beaten by the mob.

At trial, the public prosecutor argued that the offence was committed in three phases: the German captain inciting the lynching, the mistreatment suffered by the prisoners in the street, and then the violence that was the cause of their death. The Prosecutor considered that, inasmuch as it was impossible to determine precisely **who** administered the fatal blows and that in truth all those who took part in what transpired contributed to the result, each person who participated in these acts was responsible for the death of the prisoners.

According to the ICTY Appeals Chamber, "[i]t would seem warranted to infer from the arguments of the parties and the verdict that the court upheld the notion that all the accused who were found guilty took part, in various degrees, in the killing; not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoners of war. Nevertheless they were all found guilty of murder, because they were all "concerned in the killing". The inference seems therefore justified that the court assumed that the convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder".[398]

[398] *Tadić* Appeals Judgement, p. 95.

Certain authors have criticised this interpretation, finding that it was impossible to know whether the Court **convicted the accused due to the foreseeability** of the murder by the other members of the group or on the basis of a shared willingness to kill.

In the case of *Borkum Island* (or *Kurt Goebell et al.* Case), the following facts were adjudicated: on 4 August 1944, an American flying fortress made a forced landing on the **island of Borkum**, in Germany. The seven crew members were taken prisoner and forced to walk under military escort through the streets of Borkum. First, they were struck by the members of the *Reichsarbeitsdienst*, acting on the orders of an officer, then by civilians encouraged by the city's mayor to kill them "like dogs". Their guard encouraged these acts of aggression and took part in the brutality. The American soldiers were finally gunned down by German soldiers once they reached the town hall.

Appearing before the American military tribunal in charge of the case were high-ranking officers, soldiers, the Mayor of Borkum, policemen, a civilian and the official from the *Reichsarbeitsdienst*. All had to answer charges of war crimes, and more specifically of having both "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing" of the airmen and for "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in" the assaults upon the airmen.

In its closing statements, the Prosecutor deemed it impossible to determine which acts had caused the deaths of the victims, and that it was therefore necessary to consider the various participants in the crimes committed as cogs in the same machine, with each one of them contributing to make it work. As a consequence, he asked that each accused whose participation in the violence was established be found guilty of murder.[399] The American tribunal convicted some of the accused for murder and assault, whereas others were found guilty of assault only.

According to the ICTY Appeals Chamber, "[i]t may be inferred from this case that all the accused found guilty were held responsible for pursuing a common criminal design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even when there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have

[399] For citations from the closing statements by the Prosecution, *see* the *Tadić* Appeals Judgement, p. 96.

predicted that the assault would lead to the killing of the victims by some of those participating in the assault".[400]

These inferences were criticised, with some authors asserting that one could not infer from the judgement of the American tribunal that some of them were convicted of murder and others of assault because the latter group could have foreseen, due to their status, their role or their conduct, that the attack would lead to the death of the victim. The tribunal could also have convicted some of them of murder, because it was sufficiently established that they were acting with homicidal intent, not merely with the intent to commit violence.[401] Moreover, the fact that all of the accused were not found guilty of the same crime runs contrary to the intended purpose of the JCE concept, which seeks to punish every participant as a perpetrator, regardless of the level of their involvement in the commission of the crime.[402]

Consequently, those who criticise the *Tadić* jurisprudence consider the Appeals Chamber to have made **an erroneous, or at least, overly broad interpretation of both the ICTY Statute and previous jurisprudence.** They consider therefore that the concept of JCE lacks an adequate basis in international law, whether in the treaty texts or in the case-law, and that this runs contrary to the principle of *nullum crimen sine lege*. This conclusion is bolstered by the fact that JCE 3 is based on vague elements that cannot satisfy the exigencies of narrowly construing criminal laws.

The *Stakić* Jurisprudence

The *Stakić* Chamber, which followed the ***Tadić* Appeals Judgement**, adopted a different position in, referring to the concept of **co-perpetration**

The Trial Chamber in the *Stakić* Case, while considering participation in a JCE to be a form of **commission** within the meaning of Article 7(1) of the Statute, turned instead to the concept of **co-perpetration,** using the following objective requirements:[403]

- a plurality of perpetrators,
- a common goal,

[400] *Tadić* Appeals Judgement, p. 98.
[401] *See* the position of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, set out in its decision of 20 May 2010 concerning the order of the co-investigating judges concerning joint criminal enterprise, paragraph 80.
[402] L. ENGVALL, "The Future of Extended Joint Criminal Enterprise – Will the ICTY's Innovation Meet the Standards of the ICC?", *Nordic Journal of International Law*, 2007, No. 76, pp. 241 to 263; this is from page 245.

- **express or tacit agreement among the co-perpetrators, both as to the goal to reach as well as to the steps required to achieve it,**
- coordinated co-operation to achieve the goal that was set,
- **joint control over a criminal conduct.**

It is immediately evident that the Prosecution will face an enormous challenge proving that there was express or tacit agreement among the co-perpetrators (unless there are documents to that effect or properly detailed confessions by one of the co-participants), as well as the exercise of **joint control** over the conduct of criminal acts carried out in the field in particular. This concept of **joint control** goes against the **key principle** of sole command, which can be exercised only in the context of a chain of command, by **one individual** and not by several of them simultaneously.

The Trial Chamber first considered that it needed to ascertain whether the co-perpetrators were mutually aware of the substantial likelihood that the crime would be committed and that each was aware of the importance of his own role. The Trial Chamber, moreover, contradicted the Prosecution, which was relying on the Tribunal's case-law in its consideration that under JCE 3, it was sufficient that the crime committed – particularly genocide, which involves a specific intent to destroy (*dolus specialis*) – be a natural and foreseeable consequence of pursuing the common purpose. The Appeals Chamber stated:

> "According to this Trial Chamber, the application of a mode of liability cannot replace a core element of a crime. The Prosecution confuses modes of liability and the crimes themselves. Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished. Thus, the Trial Chamber finds that in order to "commit" genocide, the elements of that crime, including the *dolus specialis*, must be met. The notions of "escalation" to genocide, or genocide as a "natural and foreseeable consequence" of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a)".[404]

[403] *Stakić* Judgement, pp. 132 *et seq.*
[404] *Stakić* Judgement, p. 150.

The Appeals Chamber, sitting in the ***Stakić*** **Case**, stated that the concept of co-perpetration used by the Trial Chamber lacked a proper basis in international criminal law and in the case- law of the ICTY, unlike the JCE concept it had applied.[405]

Concerning this point, it must be said that the Appeals Chamber finally put an end to the uncertainties regarding the status of the persons belonging to a JCE (co-perpetrators, accessories, participants) in the 21 May 2003 decision rendered in the ***Milutinović*** **Case.** The Chamber defined JCE as a mode of commission contemplated under Article 7(1) of the Statute and considered that the Prosecutor's proposition in his indictment that participation in a JCE falls under co-perpetration was correct. In this respect, the Appeals Chamber underscored that this was **a mode of criminal responsibility that was distinct from accomplice liability in that, to be held responsible, the Accused had to share the common purpose of the JCE**.[406]

The statement of the Appeals Chamber whereby co-perpetration had no basis in international criminal law led me to conduct an in-depth examination of **German law** in this area.

German Law

German law contemplates three modes of commission of an offence: **direct perpetration** (*die unmittelbare Täterschaft*), **co-perpetration** (*die Mittäterschaft*), and **indirect perpetration** (*die mittelbare Täterschaft*). It likewise contemplates various **modes of participation in an offence**: participation (*die Teilnahme)*, the participant (*der Teilnehmer*) being in contrast to the perpetrator; abetting (*die Beihilfe*) and instigation (*die Anstiftung*).

Among the three modes of commission of an offence, the first – direct commission – poses no difficulties, either in German law or in international law. The two other modes of commission contemplated by German law, depending on the context in which the offence was committed, might make it possible to attribute to senior organisation officials, such as those the ICTY is called to adjudicate, the acts committed pursuant to their orders or by others in agreement with them.

Co-perpetration is contemplated under paragraph 2 of Article 25 of the German Penal Code (*das Strafgesetzbuch*), which is reproduced hereinafter:

[405] *Stakić* Appeals Judgement, p. 24.
[406] *The Prosecutor v. Milutinović et al.*, "Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise", 21 May 2003, paras 18-20.

***para. 25 Täterschaft* (Commission)**

> (1) *Als Täter wird bestraft, wer die Straftat selbst oder durch einen anderen begeht.*
> Whoever commits the offence, personally or acting through another, shall be punished as the perpetrator thereof.
> (2) *Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter).*
> If several persons commit an offence together/jointly, each one shall be sentenced as a perpetrator (co-perpetrator).

For there to be co-perpetration, the perpetrators must act **by common agreement**. If they act independently from one another, this is **"*Nebentäterschaft*"** (the perpetrators stand alongside one another, **without any connection between them**).

Co-perpetration assumes a **division of labour and of roles**, with each participant considered an equal partner and a "fellow bearer" of the common purpose and in the decision to act in common. Therefore, each participatory act rounds off the whole, and it is indeed this overall effect that is ascribed to each co-perpetrator.

For the acts committed by one of the co-perpetrators to be attributable to the others, three requirements must be met:

(i) **The common agreement** concerns the furtherance by the group of the offence, with all participants having equal standing. The common plan may be established expressly or tacitly, and this may be done prior to or during the carrying out of the offence. It is not necessary that all of the participants know one another. It is sufficient that each of them know that the others are acting in concert with him. This seems rather complicated to me: how can there be a **common plan** without at least some meetings? Nevertheless, a unilateral willingness to act in concert with others is not sufficient to characterise co-perpetration, which assumes reciprocity.

According to the **Bundesgerichtshof** (BGH) – the Supreme Court of Germany –and the majority of legal doctrine, once a person joins in an action that is underway, he may be

considered a **co-perpetrator** (*sukzessive Mittäterschaft*) if there is still time for him to contribute to the commission of the offence.

The issue then is knowing which aggravating circumstances may be attributed to this co-perpetrator. Some agree that events already fully carried out when a perpetrator becomes involved in the act at a later time cannot be attributed to him. There might be a problem if, for example, a new military commander who belonged to the JCE took over command of a unit that previously committed crimes falling within the JCE. In my opinion, insofar as he was aware of these crimes, this person should also be held responsible.

(ii) **Co-perpetration** is characterised by a **distribution of tasks** during the commission of the offence, with each of the acts thus committed being attributable to **each co-perpetrator.** It must be noted, however, that the objective constituent elements of the offence may be divided among the co-perpetrators, setting aside the subjective elements.

The jurisprudence which defends the so-called "subjective" theory, holds that an act in preparation or in support, albeit merely conceptual, may suffice for its perpetrator to incur responsibility as a co-perpetrator, if this person has thought about and willed the action carried out with the help of others, as though it were his own. It is therefore unnecessary for each co-perpetrator to realise an objective constituent element of the offence. This theory was developed to allow for the "ringleader" who conceives of the criminal act without involving himself in its execution to be held responsible as a co-perpetrator and not merely as an instigator (a participant to a lesser degree).

According to the majority doctrine, which advocates the theory of *Tatherrschaft*, **control of the act**, each co-perpetrator must, as a result of and in connection with the common plan, actively cooperate in carrying out the offence, a form of cooperation which may consist in a preparatory act or an act in support. This active cooperation must, however, be substantial enough to hold that the person had control over the act. One notes here the difficulty of defining "substantial active cooperation". If the person considers himself as equal to his partners, he is a co-perpetrator. If the person views his active cooperation as being of lesser importance, he will merely be an accessory (or

perhaps an instigator). According to this school of thought, "a minus during the act must be balanced out by a plus during the planning stage".[407]

From an evidentiary perspective, when the judge has established co-perpetration, he does not need to determine the exact contribution of each participant and whether it helped to cause the offence.[408]

(iii) It is impossible to mutually attribute the intent of the perpetrators.[409]

Under German law, **co-perpetration by omission is possible**, on those occasions when several persons are under a legal duty **to act** and **decide by common agreement to refrain from doing so**. Here we see that a common agreement must come into play, for instance, meetings, interviews, conversations, etc.

In sum, the matrix that follows will enable us to check whether the requirements for co-perpetration have been satisfied and to conclude whether or not the person being prosecuted may be held responsible:

- As for the **positive actions** required to carry out the offence:
  - Was the offence carried out jointly?
  - Is it possible to ascribe to each participant the acts carried out by others, applying the subjective theory or the control of the act theory?
- As for the **intent required** to carry out the offence:
  - Did the person intend for the offence to be carried out, including the intent to act in concert with others?
  - Does the person otherwise possess the required specific intent to commit the offence?

[407] R. SCHMIDT and S. SEIDEL, "*Strafgesetzbuch Allgemeiner Teil"*, 5th Edition, 2001, Verlag Rolf Schmidt, page 217.
[408] I. PUPPE, "*Der gemeinsame Tatplan der Mittäter"*, *Zeitschrift für internationale Strafrechtsdogmatik*, 2007, No. 6, pages 234 *et seq.*
[409] Concerning the definition and the requirements of co-perpetration, *see* SCHMIDT, *supra*, pp. 214 *et seq.*

The distinction between **co-perpetration** and **participation in an offence** has long been a controversy in German law. The oldest jurisprudence held that all forms of participation in an offence were equivalent and made characterisation of the offence depend on a single, subjective criterion: any person who considered the act to be his own was a perpetrator, whereas anyone who sought to encourage action by another was an accessory. The former legal theory found that only the person who personally committed the constituent elements of the offence could be considered a perpetrator.

This doctrine split into several streams, the main one today being that of "*Tatherrschaftlehre*" **(the "theory of control over the act"), whereby the perpetrator must be understood to be the central figure in the action who has control over the events and decides on the mode and time for carrying out the offence.** The participant (**accessory or instigator**), is **a marginal figure in the action, who causes or assists in its realisation in some way or other.**

Tatherrschaft, or control over the act, is defined thus: *das vom Vorsatz umfasste In-den-Händen-Halten des tatbestandmässigen Geschehensablaufes,*[410] that is to say, the willingness to direct the course of the operations constituting the offence.

The form of *Tatherrschaft* is defined differently according to the mode of commission of the offence. When it comes to the direct perpetrator, one speaks of "*Handlungsherrschaft*" ("control over the execution of the act"); when it comes to the indirect perpetrator, one speaks of "*Willens- oder Wissensherrschaft*" (literally, "control over the will or knowledge", in the sense that it is the intent of the indirect perpetrator, not that of the direct perpetrator, that predominates); when it comes to the co-perpetrator, one speaks of "*funktionnelle Tatherrschaft*" ("operational control over the act").

Recent jurisprudence has aligned itself with this trend and now takes into consideration a variety of elements to distinguish between **perpetrators** and **participants**. It has looked closely at the interest displayed by the person in carrying out the offence, the extent of his participation and his desire to control how the action unfolds. **Co-perpetration** thus requires the accused to have not merely wanted to assist an action external to himself, but to have considered his participation as forming

[410] *Ibid*, page 157.

part of the action carried out by other co-perpetrators and, conversely, that their action must supplement his own participation.

(1) The specific case of one of the co-perpetrators committing an act that goes beyond the common purpose (*Mittäterexzess*).[411]

When one of the co-perpetrators commits acts which go beyond the common plan or purpose, those acts may not in principle be attributed to any of his co-perpetrators. Only he may be found guilty of these acts. The common plan in this case has a two-fold function, allowing for reciprocal attribution in connection with the common purpose and limiting any such attribution in the event they go beyond the shared purpose.

There are, however, two scenarios in which it is not possible to go beyond: when the purpose becomes remote due to circumstances or when the unexpected consequences are equivalent in gravity and danger to those initially foreseen. In such cases, the jurisprudence considers that the intent of the co-perpetrators covers these two possibilities: according to the **Bundesgerichtshof**, each co-perpetrator is responsible for the isolated acts he ought to have foreseen or towards which he was indifferent.

Moreover, in case of an involuntary departure from the common objective, for example, when one of the co-perpetrators mistakes the person he is shooting for the victim but shoots his co-perpetrator, the dominant viewpoint holds that this mistake, which has no effect as far as his own guilt is concerned, must likewise have no effect on his co-perpetrators. This mistake is regarded as part of the inherent risk in carrying out the plan.

(2) Co-Perpetration as an Alternative to the Concept of a JCE

A review of the German concept of co-perpetration makes it possible to liken it to form 1 of Joint Criminal Enterprise. In fact, these two concepts are based on the perpetrators' common plan, which results in the commission of one or of several crimes, each perpetrator being required to possess both the desire to participate in this common act as well as the intent to commit the crime contemplated.

[411] SCHMIDT, *supra*, page 243.

It is interesting to note, moreover, that the ***Tadić*** **Appeals Judgement** mentions co-perpetrators in its definition of JCE and that the ***Stakić*** **Appeals Judgement** handed down by the Trial Chamber, which uses the concept of co-perpetration, insists that requirements similar to those of German co-perpetration be satisfied for the accused to incur responsibility on such grounds. The concept of "control over the crime" used in that decision is moreover similar in scope to the German concept of *Tatherrschaft*.

The concept of co-perpetration makes it possible to establish a nexus between the accused and the crime, by expressly setting out the necessary physical requirements and by highlighting each perpetrator's contribution within the system in place.[412] The political and military leaders who shared a common purpose could then be punished as co-perpetrators since they committed crimes, while complying with the principles of legality and individual responsibility and the text of Article 7 of the ICTY Statute. Thus, it would appear suitable as a replacement for form 1 of JCE.

As concerns form 2 of JCE, the *Tadić* case-law stipulated that this was in fact a variant of form 1. However, this has given rise to a certain amount of criticism: some authors have been critical of this form of JCE included in the case-law for it invoked presumption, when it came to proving the physical element and proving intent. As they put it, this double presumption has the effect of **reversing the burden of proof.** Others assert that legal doctrine and jurisprudence are incapable of explaining how the participants are linked to the particular crimes.[413] Applying the concept of co-perpetration with clearly defined, very specific requirements would have the advantage of putting an end to such criticism.

To prove co-perpetration, it suffices that one of the co-perpetrators physically committed the offence and that they prepared it together on an equal footing. Such a case may occur at the highest decision-making level, but the concept is undoubtedly better suited to cases involving small groups.[414] By contrast, this concept appears ill-suited to more substantial power structures, where a true hierarchy has been established. The German concept of indirect commission might provide a legal response better suited to this scenario.

[412] Harmen van der WILT, "Joint Criminal Enterprise – Possibilities and Limitations", *Journal of International Criminal Justice*, 2007, No. 5, pages 91-108; this is from pages 105 *et seq.*
[413] Harmen van der WILT, "Joint Criminal Enterprise – Possibilities and Limitations", *Journal of International Criminal Justice*, 2007, No. 5, pages 91-108; this is from page 100.
[414] OLASOLO, "Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes", Hart 2009, pages 288 *et seq*.

The notion of indirect perpetration is contemplated at paragraph 25, sub-paragraph 1 of the German Penal Code. It is used when the indirect perpetrator (*der mittelbare Täter*) commits the offence through the agency of another person (*der Tatmittler*). This scenario is characterised by the fact that it is the *Hintermann*, that is, the man behind the scenes (literally, "the man behind"), who directs the action, considers it his own, and is criminally responsible for it, while the person who executes it constitutes a mere tool.

In certain cases, the direct perpetrator cannot be considered criminally responsible for the act he committed, because he acted under duress, in legitimate self-defence, or because he is irresponsible.

To determine whether the *Hintermann* acted as the indirect perpetrator, the jurisprudence has, as in the case of co-perpetrators, turned to the subjective theory, whereby it is the person's intent, his desire to consider or not the crime as his own, which is the deciding factor. Legal doctrine generally uses **the theory of control over the act** in this case, as in the case of co-perpetration.

In sum, the **matrix that** makes it possible to verify whether the requirements for indirect commission have been satisfied and to conclude that the person charged may be held responsible is the following:

- Concerning the **positive acts** required to carry out the offence:
    - A conclusion that the person did not act alone.
    - When applying the subjective theory or the theory of control over the action, may we consider that the person we suspect of being the indirect perpetrator of the crime directed the direct perpetrator's act?
- Concerning the **intent** required to carry out the offence:
    - Did the person intend to carry out the offence?
    - Does the person otherwise possess the required specific intent to commit the offence?

It sometimes happens that although the direct perpetrator may be considered responsible for his act, it is the will of the indirect perpetrator that has precedence over his will. This theory, known as "*Willensherrschaftkraft organisatorischer Machtapparate*" (literally, "control over the will by

means of an organised power apparatus") or "*Organisationsherrschaft*" was developed by **Claus Roxin in 1963** following the post-war trials (the trial of **Adolf Eichmann** in particular), because he considered the existing hypotheses insufficient for punishing mass crimes of such consequence.[415] It was subsequently utilised by the ***Bundesgerichtshof***.

The Theory of Claus Roxin

In the case of *Organisationsherrschaft*, it is possible to hold both the **direct perpetrator** and **the indirect perpetrator** responsible for one and the same offence, committed by the former. This can be explained by the fact that the direct perpetrator, who frequently occupies a rather low position in a hierarchical organisation, executes the act in fulfilment of an order issued by the leader. Thus, the crux of the issue is the concept whereby **the one giving the order**, who has a decision-making role within the organisation, has **control over the action** and uses this organisation to identify a person ready to commit the offence he wishes to have carried out. The power apparatus operates successfully and does not need any particular person to carry it out. Anyone will do and someone will always be found to get it done.

Claus Roxin initially based his theory on the interchangeability of the person executing the order. **Friedrich-Christian Schroeder** speaks of a "*Tatentschlossenheit*" (resolve to commit the act) of the direct perpetrator: the will of the person who carries out the act is in fact directed by the operations of the organisation in place, and his decision to commit the offence is therefore guided. In his more recent articles, **Claus Roxin** has drawn closer to this point of view, and now believes that the two criteria can be used interchangeably to prove the dominance of the will of the one giving the orders over the will of the person carrying them out.[416]

Thus, the fact that **the direct perpetrator** is completely responsible for his own act does not relieve **the person giving the order of responsibility**. In this case, the order-giver's instrument is not the person carrying out the act (which would correspond to the concept of indirect perpetrator developed above), but the structured organisation (State apparatus, criminal organisation, ...).

[415] Claus ROXIN, *"Täterschaft und Tatherrschaft"*, 8th ed., 2006, pages 242 *et seq.*
[416] Claus ROXIN, *"Organisationsherrschaft und Tatentschlossenheit", Zeitschrift für Internationale Strafrechtsdogmatik*, 2006, No. 7, page 298.

This construction is possible only when the authority established by the organisation considers itself freed of any obligation to comply with the law and is no longer bound by any legal order, because if there were such a bond, the apparatus could no longer be used to commit crimes with impunity. [417]

This theory has drawn criticism from those who considered that if the direct perpetrator were responsible for his act, there could be no indirect perpetrator. The doctrine that opposes the theory of *Organisationsherrschaft* holds that either there is co-perpetration between two persons or that the person giving the orders is the instigator of the direct perpetrator. Nevertheless, as **Claus Roxin** asserts, the co-perpetration solution cannot be envisioned when no common decision to commit the act has been taken, when only the direct perpetrator acts at the stage of the execution and when the person giving the order and the direct perpetrator are not on equal footing but in a **hierarchical relationship.** Moreover, to consider the person who gives the order a mere instigator is unsatisfactory because this reverses the importance of the roles played by the two actors. It is in fact the person giving the order who, by planning and organising the crime – and particularly mass crimes – bears the greater responsibility.[418]

Jurisprudence of the Bundesgerichtshof

Despite these criticisms of **Roxin**'s theory, **the Bundesgerichtshof** (BGH) used it in several important decisions.

The most significant decision concerning the use of the *Organisationsherrschaft* theory was rendered on 26 July 1994.[419] The accused were members of the GDR National Defence Council (the central state organ) who were responsible for all security and defence measures in the entire GDR. East German soldiers were indicted for the murder of seven civilians who had attempted to cross the iron curtain – acts that took place between 1971 and 1989.

In this decision, the BGH first explained that the accused, as members of the GDR National Defence Council, had issued decisions in their session of 14 September 1962 in which fugitives crossing the GDR border needed to be stopped *whatever the cost.* The orders were intended to make the soldiers think that the inviolability of the border was more important than human life, and that the fugitives were enemies who needed to be destroyed, if necessary. Subsequent to these decisions

[417] Claus ROXIN, "*Täterschaft und Tatherrschaft"*, page 249.
[418] Claus ROXIN, "*Organisationsherrschaft und Tatentschlossenheit"*, pages 294 *et seq.*
[419] *Bundesgerichtshof*, Decision of 26 July 1994, BGHSt 40, pages 218 *et seq.*

taken by the Council, to which the accused belonged, numerous persons lost their lives on the German border, including the seven victims in question in that case.

The trial court found the accused guilty of **instigating** and **abetting**. It found that the soldiers who fired were guilty of murder and that the accused could not be considered as co-perpetrators because they had not taken part in the execution of the crime. They had simply prompted the decision of the soldiers to act.

The Court also found that the theory of *Willensherrschaft kraft organisatorischen Machtapparates* was not applicable in the case before it, because the GDR was not comparable to a totalitarian dictatorship, such as the one created by **Adolf Hitler**. It found, furthermore, that the accused did not have control over the action, inasmuch as the decision to shoot, in the end, fell to the soldiers. On this point, I note that the accused did have control over the action, because they could have changed their decision at any point in time.

The BGH did not subscribe to this position. It derogated from the principle of personal responsibility, relying upon the writings of **Claus Roxin** in its consideration that the person giving the orders is the **indirect perpetrator** of the offence when he intentionally uses the availability and obedience to the hierarchy of the direct perpetrator, and when he considered the success of the action to be his own.

Citing a passage from the book *Der Täter hinter dem Täter* by **Friedrich-Christian Schroeder**, the BGH, explained that, in such situations, not considering the person giving the orders as a perpetrator would amount to not taking into account the responsibility he incurs, which increases with his remoteness from the scene of the crime. It held that the three accused, due to their position within the hierarchy, had rendered decisions that were binding upon the soldiers. It therefore found them guilty of the acts for which they were indicted, not as **participants** (instigators or accessories), but as **indirect perpetrators**. On this point, I consider that the members of the GDR National Defence Council ought to have been considered **instigators** and not **indirect perpetrators**.

Subsequently, the **BGH** applied the theory developed by **Claus Roxin** to systemic criminality through negligence or by omission. It found three members of the "Politbüro" of the Central Committee guilty of the murder of fugitives committed by soldiers stationed at the GDR border. It found that, in violation of their obligations flowing from their membership in the most senior

executive organ of the GDR, the accused had failed to speak out in favour of amending the rules applicable to the borders in order to make the system more humane, which might have saved lives.

The **BGH** added that "**indirect commission by omission or through negligence**" presupposes neither activity on the part of the accused nor causation identical to what is required in cases of action. Their inaction, which runs contrary to legal obligations, led to the commission of an offence by a third party, which was subsequently attributed to the first party.[420]

The **BGH**'s position is interesting in more than one way, but, in my view, contains a significant flaw insofar as the **mastermind** is considered the **indirect perpetrator** whereas he is the source of the commission of the crime and should be considered an **instigator** and thus a **principal perpetrator**, not an **accessory,** let alone an **indirect perpetrator**. It is appropriate, I think, for international trials to highlight the responsibility of the plan's **mastermind**, who may alternatively be either an **instigator** or a **perpetrator** but in no case an **indirect perpetrator**. This **mastermind** may initially stand alone and subsequently by assisted by others; by the same measure, there may be several such masterminds present at the very outset in order to conceptualise the plan.

Peruvian Jurisprudence (the *Alberto Fujimori* Case)

The Peruvian Federal Supreme Court applied the theory of *Organisationsherrschaft* when it found the former President of Peru, **Alberto Fujimori**,[421] guilty of the death of 25 persons killed during the massacres at Barrios Altos and La Cantuta by the ***Grupo Colina***,[422] and sentenced him to 25 years in prison.

In holding the accused guilty of the crimes for which he was indicted, the Peruvian Court relied on indirect or circumstantial evidence, which it considered to be the type of evidence best suited to demonstrate the criminal responsibility of high-ranking officers who use a clandestine power structure to commit their crimes.

[420] *Bundesgerichtshof*, Decision of 6 November 2002, BGHSt 48, pages 77 *et seq.*
[421] Alberto Fujimori was the President of Peru, from 28 July 1990 until 22 November 2000. Accused of murder and violations of human rights, he went into exile for six years to Japan, of which he was also a national, before being extradited to Peru and sentenced to 25 years in prison in 2009 by the Federal Supreme Court of Peru.
[422] The *Grupo Colina* was created in 1992 within the National Intelligence Service in connection with the Peruvian government's fight against the guerrillas. Consisting of soldiers, it was directed by one of President Fujimori's closest advisors, Vladimiro Montesinos, and had extended powers, such as the power to arrest persons suspected of terrorism and the power to have them tried in secret by military tribunals.

Due to the lack of direct evidence concerning the role of the accused in establishing and supervising the military operations of the ***Grupo Colina***, the Court relied on the following evidence to render its decision:

- The crimes took place during the presidency of the accused and were directed by members of the armed forces against political opponents and alleged members of terrorist organisations;

- The operations were **planned** by the central intelligence agency ("SIN"), under the control of **Vladimiro Montesinos**, Alberto Fujimori's closest advisor during the 1990s: the President received regular updates concerning SIN operations from **Vladimiro Montesinos**;

- Those closest to the accused (including **Vladimiro Montesinos**) were prosecuted for crimes committed under their responsibility;

- **The *Grupo Colina*** started as a special intelligence group established by **Alberto Fujimori** and as a result received significant logistical, material, and financial support as of 1991;

- Every attempt to report or investigate the crimes attributed to the ***Grupo Colina*** was frustrated by **Alberto Fujimori**, who had amnesty laws passed to prevent any investigation.[423]

The Peruvian Court, which essentially drew on the works of **Claus Roxin**, identified five requisite conditions for indirect commission by virtue of an organised power structure:

(1) There must be a hierarchical organisation;
(2) The indirect perpetrator must have command authority;
(3) The organisation must have distanced itself from the laws in force;
(4) The direct perpetrator must be interchangeable;
(5) The direct perpetrator must be predisposed to commit the criminal act. [424]

In the end, the Peruvian Court took a position with regard to the responsibility of the actors acting at various levels of the hierarchy. It understood the concept of **indirect perpetrator** broadly,

[423] Kai AMBOS, "The Fujimori Judgment, A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus", *Journal of International Criminal Justice*, 2011, No. 9, pages 137 to 158; this is from page 145.
[424] Kai AMBOS, "The Fujimori Judgment, A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus", *Journal of International Criminal Justice*, 2011, No. 9, pages 137 to 158; this is from pages 148 *et seq.*

holding that indirect commission was not restricted to senior levels but could exist at several levels within the hierarchy. For my part, I think that although the possibility of indirect commission has been acknowledged for persons not belonging to senior levels of command, as in the ***Eichmann*** **Case, for example, it is undeniable that only the leaders at the highest level have control over the existing structure and that they alone bear full responsibility for the totality of the crimes committed by that structure.** I consider that only persons with **complete control** over the structure, whose orders may not be rescinded or voided, may be **direct perpetrators**. As concerns those persons who do not belong to the ruling class but to a middle echelon with control over their subordinates only, their responsibility must be sought either on the basis of **co-perpetration** within the meaning of **German law**, which is itself based on a division of tasks or **on the basis of commission** within the meaning of Article 7 of the Statute – which I would prefer in the instant case[425] or on the basis of aiding and abetting.

Examination of the concept of **indirect perpetration**, particularly the theory of *Organisationsherrschaft*, whereby a person is capable of committing crimes without perpetrating them physically but by **having control** over a power structure, has brought to light a possible alternative to the JCE for punishing political and military leaders when the crimes have taken place on a broad scale.

Despite this, I see two difficulties that may arise. Applying the concept of *Organisationsherrschaft* does not pose any difficulties when it arises in the context of very ordered, hierarchical structures, as was the case with the Nazi hierarchy or even the communist structure of East Germany. However, applying this concept may prove more difficult in the case of informal power structures, such as those which existed in the former Yugoslavia with "a mixture" of state, pseudo-state, municipal and regional power. When such structures exist, it is not always easy to prove their existence. It may be that the routing of orders from the top to the bottom of the hierarchy and the interchangeability of those carrying them out can only be established with difficulty.[426]

In the ***Fujimori*** **Case**, the Supreme Court of Peru proceeded by using **an array of circumstantial evidence** in its attempt to resolve the difficulties described above. This is a familiar situation in which direct evidence does not exist, either because it has vanished or because the investigation has

[425] Kai AMBOS, "The Fujimori Judgment, A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus", *Journal of International Criminal Justice*, 2011, No. 9, pages 137 to 158; this is from pages 151 *et seq.*
[426] Stefano MANACORDA and Chantal MELONI, "Indirect Perpetration versus Joint Criminal Enterprise", *Journal of International Criminal Justice*, 2011, pages 171 *et seq.*

not been conducted according to the rules of the art – "approximation" being the common thread in a botched investigation. The **International Criminal Court** has taken into account the criterion of **interchangeability** of the person carrying out the crime, but of the **context** as well, in determining whether there was **indirect action.** In this respect, it is appropriate to turn to a decision of the ICC:

> "Attributes of the organisation – other than the replaceability of subordinates – may ... enable automatic compliance with the senior authority's orders. ... [the] means by which a leader secures automatic compliance via his control of the apparatus may be through intensive, strict, and violent training regimens ... For example, abducting minors and subjecting them to punishing training regimens in which they are taught to shoot, pillage, rape, and kill, may be an effective means for ensuring automatic compliance with leaders' orders to commit such acts. The leader's ability to secure this automatic compliance with his orders is the basis for his principal – rather than accessorial – liability. The highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed".[427]

On first impression, it is thus apparent that the concept of **indirect commission** as defined under **German law** and applied by international jurisprudence offers the opportunity to reconcile a theoretical concept that comports with the demands of international criminal law and the ICTY Statute with the practical challenges that may arise under international law, particularly in matters of evidence.

It has been observed that the International Criminal Court has, in recent appeals judgements, resorted systematically to the two concepts of **co-perpetration** and **indirect commission.** Furthermore, it has employed both simultaneously.

In its ***Lubanga* and *Katanga* and *Ngudjolo* decisions on appeal,** the International Criminal Court held that "there are no legal grounds for limiting the joint commission of a crime solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it. Rather, through a combination of individual responsibility for committing crimes through other persons

[427] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC), "Decision on the Confirmation of Charges", 30 September 2008, page 188, para. 518.

together with the mutual attribution among the co-perpetrators at a senior level, a mode of liability arises which allows the Court to assess the blameworthiness of 'senior leaders' adequately".[428]

In the ***Katanga and Ngudjolo*** **Appeal Decision**, the two accused each controlled a military organisation and decided to mount a joint attack upon a village. Although the two leaders were acting according to a **common plan**, certain members of each group would accept orders only from their own leader. As a result, not all the direct perpetrators were directly controlled by the two leaders. Despite this, the Court held that "[a]n individual who has no control over the person through whom a crime would be committed cannot be said to commit the crime by means of that other person. However, if he acts jointly with another individual – one who controls the person used as an instrument – these crimes can be attributed to him on the basis of mutual attribution".[429] One sees that that the notion of "**mutual attribution**" makes it possible to hold in the nexus of foresight a perpetrator who lacks direct authority over the perpetrators of the direct crimes.

Here we see the development of the obligation to prosecute **every person** by simultaneously demonstrating rigour (control over the person) as well as creativity in jurisprudence by resorting to the concept of **mutual attribution.** In some sense, an individual may be responsible even if he has **no control whatsoever over the perpetrator of the crime**, so long as he acts jointly with another who does have direct control. This concept significantly expands the **scope of prosecution**.

The German concepts of **co-perpetration** and **indirect commission, as understood by the ICC**, show that these two concepts are in principle complementary. Whereas co-perpetration makes it possible to punish persons with a common desire to carry out an offence together and who consider one another equals, **indirect commission**, and in particular, *Organisationsherrschaft* makes it possible to establish the responsibility of the giver of orders who has a crime committed by a person who is his subordinate or who may be subordinate to another member of the group or the joint enterprise.

It is also possible to use these two concepts together if two leaders act in concert to broaden the scope of responsibility of each perpetrator to actions committed by a person who answers to the other one.

[428] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC), "Decision on Confirmation of Charges", 30 September 2008, pages 177 *et seq.*, para. 492.
[429] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC), "Decision on Confirmation of Charges", 30 September 2008, para. 493.

The concepts of **co-perpetration** and of **indirect commission** could theoretically be a useful replacement for the concept of JCE within the case-law of the ICTY, offering an established basis in law and better defined at first glance.

However, none of these concepts perfectly matches a given situation. In that case it becomes necessary to determine the responsibility of persons acting at an **intermediate level in the hierarchy** of an organised power structure. In this case, as we have noted, the case-law turned to indirect commission (***Eichmann*** Case in Germany). Legal doctrine,[430] however, disputes this position, holding that such persons lack adequate power to truly control the structure to which they belong and use it to commit crimes. Nor are these persons the ones who take the most important decisions and implement systems possibly resulting in mass crimes, such as the creation of extermination camps during the Second World War. Therefore, **they do not have a responsibility equivalent to that of the leaders in respect of these crimes.** It may be said that these persons are not at the same level in the hierarchy as the direct perpetrator of the crime, and they do not consider themselves his equal in carrying out a common plan, as required for co-perpetration.

As aptly summarised by Professor **Kai Ambos**, the case of persons at an intermediate level in the hierarchy poses the following question: would we prefer to accept a defect in the requirement of authority over the hierarchical structure on the part of the indirect perpetrator or an unequal ranking of co-perpetrators?[431]

Nevertheless, there are solutions that have recourse to **superior responsibility**, **abetting** or **instigation**.

Likewise, it may happen that these intermediate levels form part of a chain between the masterminds and those who carry out the acts and that, without them, it would be impossible to commit the crimes because they are the "communications channel" for orders, and even taking into account that their hierarchical position may have been minimal, they are capable of assessing the contents of the orders or instructions given and of weighing the consequences thereof. For this reason, from my point of view, they are criminally responsible on the basis of individual responsibility. The only difficulty will be to assign them on a case by case basis to either the

[430] AMBOS, "The Fujimori Judgment", pages 151 *et seq.*; OLASOLO, "Criminal responsibility of senior political and military leaders as principals to international crimes", pages 288 *et seq.*
[431] AMBOS, "The Fujimori Judgment", page 153.

category of persons giving orders (when they are close in the hierarchy, e.g. Colonel/General, Commander/Colonel, Captain/Commander, etc...), or to the category of those who carry out the acts, if they are subordinate non-commissioned officers (e.g. Corporal/Soldier, Sergeant/Corporal, etc ...).

It is appropriate to conclude these statements concerning **German law** by mentioning an emerging doctrine: the theory of "*Zurechnungsprinzip Gesamttat*".

Professor **Kai Ambos** has developed the theory of *Organisationsherrschaft* which confirms that the system for attributing responsibility that has been provided for ordinary crimes (when an individual commits a crime) must be adapted to suit the needs of **international criminal law** through the development of a **hybrid system of individual-collective responsibility.** In this system, it is the criminal enterprise or the organisation as a whole which must be considered as the entity to which one can attribute criminal responsibility. This is what the theory of the "*Zurechnungsprinzip Gesamttat*" (literally, "**principle of attribution for the entire act**"), which means, a theory whereby the entire act (the criminal enterprise) constitutes the central focus in the attribution of responsibility.[432]

As attractive as it may appear, this theory runs contrary to the cardinal principle of individual responsibility: there can be no hybrid system. **It thus seems evident that German law does not accurately account for every situation arising in the context of offences under the Statute or in international criminal law that is described in this case.** For these reasons, we should review **the *Tadić* jurisprudence** in greater detail in relation to the Tribunal's Statute, as I am unable to subscribe to **Judge Schomburg**'s conception of **co-perpetration**.

The *Tadić* Appeals Judgement

Concerning the concept of a joint criminal enterprise, **at paragraph 227 of the Appeals Judgement, the Appeals Chamber in the *Tadić* Case** expressed the following with respect to the physical elements (*actus reus*):

[432] Kai AMBOS, "Command Responsibility and *Organisationsherrschaft*: Ways of Attributing International Crimes to the 'Most Responsible'", originally from A. Nollkaemper/H. van der Wilt, *System Criminality in International Law*, Cambridge 2009, pages 127-157, conclusion on page 157.

"i. *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is clearly shown in the *Essen Lynching* and the *Kurt Goebell* cases.

"ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put the joint criminal enterprise into effect.

"iii. *Participation of the Accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under the provisions of the Statute (murder, extermination, torture, rape, etc.) but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."

Regarding the mental element (*mens rea*), the Chamber clarified that it "differs according to the category of common design under consideration". (*cf. Tadić* Trial Chamber)

- For form 1, the requisite element is the intent to commit a specific crime (this intent would be shared by all of the co-perpetrators);

- For form 2, the Accused must have personal knowledge of the system of mistreatment (whether proven by specific testimony or inferred from the authority held by the Accused), and the intent to participate in this concerted system of mistreatment;

- For form 3, the so-called "expanded" form, the requisite element is the intent to participate in and contribute to the criminal activity or criminal design of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of the case:

    - (i) It was *foreseeable* that such a crime might be perpetrated by one or the other members of the group, and

    - (ii) The Accused *deliberately took that risk*.

In order to remain both succinct and accurate, I must point out that the Statute contains no reference whatsoever to a JCE. What is more, **in his report presented on 3 May 1993 to the Security Council, the UN Secretary-General,** stated: "*The question arises, however, whether a juridical person, such as an association or organisation, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups*". (*cf.* paragraph 51).

Reading **paragraph 51** closely, one sees that the UN Secretary-General **rejects** taking membership in a group into account with regard to criminal responsibility. The ***Tadić*** **Chamber,** however, chose to take a **completely opposite approach**, working out a concept of joint criminal enterprise which is neither more nor less than a reference to a group (plurality of individuals, common purpose, perpetration of a crime).

There can be no **collective responsibility,** as was said, moreover, at the **Nuremberg Tribunal**. ***"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".***

I wish to observe, furthermore, that the very mention of **collective responsibility** runs contrary to the Tribunal's mandate, which is to promote peace and reconciliation in the former Yugoslavia. How will we achieve reconciliation if we place everyone in the same boat (head of State, soldiers, generals, administrations, various entities, etc. ...)?

This jurisprudence is far from unanimous, and was contested even by the Judges of this Tribunal.

Judge Schomburg's Position

Judge Schomburg **proposes revisiting recourse in international criminal law of the "doctrine"[433] of Joint Criminal Enterprise ("JCE").**

[433] The term "doctrine" of JCE is used by the author himself. This summary will therefore use that term.

However, he does not question JCE 1 and 2, firmly established in customary international law ("CIL"), but stresses that JCE 1 and 2 are the result of an academic contest seeking to create a new doctrine in international criminal law whose fundamental principles were included in the modes of criminal liability established and acknowledged in various jurisdictions. The author notes more specifically that **co-perpetration** displays a similarity of principle to JCE 1 and asserts that JCE 1 resembles JCE 2. He argues, as a consequence, that the notion of co-perpetration constitutes a mode of criminal responsibility with better delineated contours than JCE, and that it is established and recognised in a great many national courts.

He argues further that JCE 3 has **no basis** in the Statutes of the ICTY and the ICTR, and more specifically submits that the principle of *nulla poena sine lege stricta* precludes application of form 3 of the JCE doctrine.[434]

He recalls that criminal responsibility for commission is contemplated in Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute, and questions whether it was necessary to translate this mode of responsibility into the concept of JCE.[435]

Judge Schomburg identifies a recurring weakness in the analysis of the requisite *mens rea* for JCE 3 in the case-law. He notes that the second element of the *mens rea* specific to JCE 3, namely, the evaluation of a voluntary risk taken by an accused that a crime, other than the ones comprising the common plan in which he participated, might be perpetrated by one or more members of the group, is frequently omitted from the analysis in case-law, except for the *Blaškić* and *Kordić* Appeals Judgements in which the Appeals Chamber expressly clarified that voluntary acceptance or approval of the risk taken by the presumed perpetrator of the crime is required in order to meet the standard of *dolus eventualis*.[436]

Judge Schomburg first turns to a decision by the Appeals Chamber in the case of ***Milutinović et al.***, in which the Defence for the **Accused Ojdanić** called into question the foundations of the JCE doctrine.

[434] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, pp. 3 and 4.
[435] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 5.
[436] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, pp. 6 and 7. On this point, we must note that the author does not provide specific citations of the two appellate judgements cited or references to judgements or judgements on appeal where this second element of JCE 3 has been omitted.

Defence Counsel for the Accused **Ojdanić** argued that the ICTY Appeals Chamber had interpreted the intent of the drafters of the ICTY Statute erroneously, stressing more particularly that a JCE would have been expressly defined in the Statute had they envisioned that the concept would constitute a mode of criminal responsibility applicable in cases before the ICTY. The Appeals Chamber rejected the argument of the **Ojdanić Defence**, stating that the ICTY Statute establishes an overall framework for the jurisdictional authority of the Tribunal but does not exhaustively identify every conceivable mode of responsibility applicable before this court[437] (a point of view I do not share).

The Appeals Chamber defined a JCE as a mode of commission contemplated under Article 7(1) of the Statute and held that the definition of the concept of commission proposed by the Prosecutor in his indictment, namely participation by an accused in a JCE as a co-perpetrator, and not as the physical perpetrator of the crime alleged, was correct. In this respect, the Appeals Chamber underscored that this was a mode of criminal responsibility different from abetting in the sense that to be held responsible, the perpetrator in question had to share in the common purpose of the JCE.[438]

The Chamber notes that it would have been wiser to define the term "commission" as it appears in the Statute and to identify to what extent this definition has a basis in CIL, rather than working the other way around.[439] I agree on this point; it would suffice simply to say that commission, as defined in Article 7 of the Statute, concerns solely the perpetrators of crimes committed pursuant to orders or non-orders.

In the ***Stakić Judgement***, the Trial Chamber reasoned that a JCE constitutes **one** of the possible definitions of criminal responsibility for **committing**, as defined in Article 7(1) of the ICTY Statute. In this respect, the Chamber observed in particular that co-perpetration constituted **another definition** for this mode of criminal responsibility.[440]

[437] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 7.
[438] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 8.
[439] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 8.
[440] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 8; *Stakić* Judgement, para. 438.

The Trial Chamber defined commission as the participation physically or otherwise, direct or indirect, of an accused in a material element of the crime alleged, by way of positive actions based on a duty to act, or omissions, whether individual or joint. He then recalled that the Chamber also observed that it was not necessary to establish the accused's participations in every aspect of the alleged criminal conduct.[441]

The Trial Chamber emphasised resorting to the concept of co-perpetration, as described by **Claus Roxin**, that is to say, the sharing of acts carried out jointly with a common purpose with the same degree of control over the commission of the common acts, which, despite its apparent similarity with the JCE doctrine, more closely resembles the concept of committing and avoids making it seem as if a new crime not contemplated under the Statute has been introduced.[442]

Judge Schomburg then turned his attention to an analysis of the dissenting opinion of **Judge Per-Johan Lindholm** in the ***Simić* Judgement,** which criticises the JCE doctrine. The author recalls that the construction offered by **Judge Per-Johan Lindholm** was the subject of sharp criticism in the ***Simić* Judgement** to which he joined a dissenting opinion that also criticised the foundations of JCE.

In his dissenting opinion, **Judge Per-Johan Lindholm** characterises the doctrine of JCE as a "new label" for the notion of co-perpetration, and a waste of time for the Tribunal.[443] According to **Judge Per-Johan Lindholm,** the ***Stakić* Judgement** can be read as the Tribunal's distancing itself from the JCE doctrine and prefers the analysis of a mode of criminal responsibility based on the doctrine

[441] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 8; *Stakić* Judgement, para. 439.
[442] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 9; *Stakić* Judgement, paras 440 and 441. The author uses the word "crime", citing in this regard the example of membership in a criminal organisation. Here Judge Schomburg is referring to a work by Claus Roxin entitled *Täterschaft und Tatherrschaft* ("Perpetration and Control over the Act"), published in 1994. By way of information, Claus Roxin is a German jurist who has authored a reference work concerning the co-perpetratorship mode of criminal responsibility. In his writings, he has developed with greater specificity the theory of the "**perpetrator behind the perpetrator**". The ICC specifically recognised the applicability of this mode of responsibility in the "*Décision relative à la confirmation des charges*" before Pre-Trial Chamber I in the *Katanga* Case (redacted public version of 30 September 2008, para. 499), *inter alia*, in which it reasoned that Roxin's theoretical position reflects the intent of the drafters of Article 25 of the Rome Statute.
[443] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, pp. 9 and 10; *Simić* Appeals Judgement, Dissenting Opinion of Judge Per-Johan Lindholm, pp. 2 and 5.

of "**power over the act**" ("*Tatherrschaft*"), that is, the exercise of control by a co-perpetrator over his acts .[444]

Judge Schomburg notes that the parties did not lodge an appeal on the basis of this assessment of the jurisprudence submitted by **Judge Per-Johan Lindholm**, but that the construction advocated by the Judge in his dissenting opinion was nevertheless criticised by the Appeals Chamber in the ***Stakić*** **Appeals Judgement**. The Appeals Chamber found, more specifically, that individual criminal responsibility for co-perpetration was devoid of any basis in either customary international law or in the case-law of the Tribunal.[445]

On this point, **Judge Schomburg** recalls his dissenting opinion in the ***Simić*** **Appeals Judgement**, in which he underscored that the terminology used in the ICTY Statute limits its interpretation and that the only modes of criminal responsibility applicable were those contemplated in the Statute.[446] On this point, I share his opinion entirely. Also, according to him, the Prosecutor is in no way required to plead any legal theory and may simply plead in accordance with Article 7(1) of the Statute without having to make any further choice.[447] He adds that it would then have been up to the Judges to assess the significance of what the accused contributed to the commission during the sentencing phase.[448] I would supplement this perspective by saying that the Prosecutor may assign an accused one of the modes of responsibility under Article 7 of the Statute on a case-by-case basis, just as he may also simply say that the accused is responsible pursuant to Article 7(1) or 7(3), leaving broad discretion to the Judges to define the form of responsibility that most accurately befits him.

In his opinion, **Judge Schomburg** recalls that JCE constitutes one possible interpretation of the concept of commission.[449] I **disagree** with him on this point because in my view, JCE can be only a possible interpretation of the notion of **planning**, not of **committing**. He notes, moreover, that the statutes of the former Yugoslavia, of the republics that emerged from the break-up of the former Yugoslavia, as well as those of other jurisdictions, in each of their respective codes identify co-

[444] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 10; *Simić* Appeals Judgement, Dissenting Opinion of Judge Per-Johan Lindholm, p. 2. The author provides no further details.
[445] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 10; *Stakić* Appeals Judgement, para. 62. The author provides no further details.
[446] *Ibid.*, p. 12; *Simić* Appeal Judgment, Dissenting Opinion of Judge Schomburg, para. 3.
[447] *Ibid.*, p. 12; *Simić* Appeal Judgment, Dissenting Opinion of Judge Schomburg, para. 3.
[448] *Ibid.*, pp. 12 and 13; *Simić* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 11.
[449] *Ibid.*, p. 13; *Simić* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 12.

perpetration as a mode of individual criminal responsibility, recalling in this regard that Article 24(1) of the Statute provides that the Tribunal must apply the general practice at the time regarding sentencing in the former Yugoslavia.[450]

In the ***Seromba*** **Appeals Judgement**, the Appeals Chamber found that the accused shared **a common purpose**, exercising his influence over the perpetrator of the crime, in that case, the bulldozer driver who destroyed a church.[451] The Appeals Chamber concluded from its analysis that Seromba took part in the *actus reus* of the crime and characterised him as the principal perpetrator.[452] In my view in that case, although the bulldozer driver may be qualified as the "principal perpetrator" for the specific offence of **destroying the church**, he may be considered a co-perpetrator or an accomplice of the primary offence only if he carried out a particular order. In that case, the **principal perpetrator** is the one who planned the operation, not the driver of the bulldozer, who may only be said to be the principal perpetrator of the physical destruction of the church through the use of the bulldozer.

In his dissenting opinion, **Judge Liu** notes that the approach adopted by the majority, namely holding an **indirect perpetrator liable** as the principal responsible party ("*perpetrator behind the perpetrator"*) was the most simple approach but, citing the *Stakić* Appeals Judgement, which rejected co-perpetration as a mode of criminal responsibility applicable in cases before the Tribunal, submits that this approach runs counter to the case-law of the Tribunal .[453]

Turning then to his dissent in the ***Martić*** **Appeals Judgement, Judge Schomburg** calls for a cautious selection of the language used in the legal definitions of the modes of criminal responsibility that were confirmed. **I fully agree with this point of view: we must be extremely cautious and specific.**

Judge Schomburg recalls that, in his opinion, he criticised the Appeals Chamber's characterisation of the **Accused Martić**'s criminal conduct on the basis of his membership in a group ("member of the JCE" and "fellow members of the JCE").[454] In his dissenting opinion, he contended that the ICTY Statute does not criminalise membership in a group, arguing that the very idea of collective

[450] *Ibid.*, pp. 13 and 14; *Simić* Appeals Judgement, Dissenting Opinion of Judge Schomburg, paras 13 and 14.
[451] Wolfgang SCHOMBURG, "*Jurisprudence on JCE – Revisiting a Never Ending Story*", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 11; *Seromba* Appeals Judgement, para. 171.
[452] *Ibid.*, p. 11; *Seromba* Appeals Judgement, para. 171.
[453] *Ibid.*, pp. 11 and 12; *Seromba* Appeals Judgement, Dissenting Opinion of Judge Liu, paras 8 and 9.
[454] *Ibid.*, p. 16; *Martić* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 5.

responsibility is *ultra vires* and counter-productive in view of the Tribunal's mandate and its goal of reconciliation.[455]

I fully agree with this observation, because there can be no collective responsibility, which would necessarily be counter-productive in relation to the goal of reconciliation. This is a very strong argument that calls into question any recourse to JCE.

In his opinion, **Judge Schomburg** underscored that co-perpetration was a more appropriate legal instrument for illustrating the criminal conduct of the **Accused *Martić*** in his capacity as a high-ranking, principal perpetrator of crimes under Article 7(1).[456] **Judge Schomburg** recalls once more in this article that the Statute does not penalise the individual criminal responsibility of an accused in connection with a JCE.[457]

Judge Schomburg likewise underscores the dislike of the Appeals Chamber (of which he was a member) for internationally accepted definitions of the concept of committing, such as the concept of co-perpetration or the perpetrator behind the perpetrator, all of which are acknowledged under CIL.[458] He likewise underscores that these definitions are set out in the **Treaty of Rome** and enshrined in the case-law, particularly in the decisions regarding the confirmation of charges in the ***Lubanga* and *Katanga* Cases**.[459]

Moreover, **Judge Schomburg** argues that constant adjustments to the scope of the JCE that follow from the ICTY and ICTR Appeals Chamber case-law contribute to serious concerns about a possible violation of the principle of *nullum crimen sine lege*. For example, he recalls that JCE 3 is not based on an objective element, such as proof of the perpetrator's control over the realisation of the crime, that would serve to limit the individual criminal responsibility of the accused and to distinguish between the principal perpetrator and the accessory. Thus, according to **Judge Schomburg**, JCE 3 carries with it the risk that guilt will be imputed to the accused merely based on membership in a group.[460] On this technical point, he is entirely correct.

[455] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 16; *Martić* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 5.
[456] *Ibid.*, p. 16; *Martić* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 2.
[457] *Ibid.*, p. 16; *Martić* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 5.
[458] *Ibid.*, p. 17; *Martić* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 6.
[459] *Ibid.*, p. 17; *Martić* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 6.
[460] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 17; *Martić* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 7.

Judge Schomburg concludes by recalling that only the individual contribution of an accused to a crime, not the JCE doctrine, constitutes a decisive element when it comes to sentencing.[461]

The author then recalls his dissenting opinion attached to the ***Gacubitsi* Appeals Judgement**, wherein he set out an analysis of the concept of indirect perpetration as a form of criminal responsibility for commission.

In that dissenting opinion, **Judge Schomburg** briefly sketches a history of how the concept of indirect perpetration came to be used in criminal law. He observed, more particularly, that this mode of criminal responsibility, which seeks to identify the criminal responsibility of the "perpetrator behind the perpetrator" was applied in cases of organised crime, white collar crime and even cases of terrorism.[462] **Judge Schomburg** more specifically underscored the relevance of this concept when analysing the liability of those responsible for crimes in the context of an organised power structure in which the direct or physical perpetrator may be easily replaced.[463]

According to **Judge Schomburg**, application of this concept suits the needs of international criminal law inasmuch as it makes it possible to bridge the potential physical distance between an accused and an alleged crime scene and his involvement and degree of control over the crime.[464] Thus, this concept enables us to acknowledge the current state of the law while avoiding resort to the creation of law, such as JCE.[465] In this respect, Judge Schomburg emphasises that Article 25(3)(a) of the Rome Treaty recognises the concepts of co-perpetration and indirect perpetration as modes of commission.[466]

I fully agree with the aforementioned point of view. The concept of indirect perpetration can provide a solution in certain situations, when there is a perpetrator behind the direct perpetrator, but this must be evidenced, which is another matter entirely.

[461] *Ibid.*, p. 18; *Martić* Appeals Judgement, Dissenting Opinion by Judge Schomburg, para. 9.
[462] *Ibid.*, pp. 18 and 19; *Gacumbitsi* Appeals Judgement, Dissenting Opinion of Judge Schomburg, paras 19 and 20.
[463] *Ibid.*, p. 19; *Gacumbitsi* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 20.
[464] *Ibid.*, p. 19; *Gacumbitsi* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 21.
[465] *Ibid.*, p. 19; *Gacumbitsi* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 21.
[466] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 19; *Gacumbitsi* Appeals Judgement, Dissenting Opinion of Judge Schomburg, para. 21.

By way of conclusion, **Judge Schomburg** recalls that the JCE doctrine is rooted in the *Tadić* Appeals Judgement, the first appeals judgement rendered by the ICTY Appeals Chamber.[467] In this respect, the author regrets the distance taken from the language of the ICTY Statute, underscoring that this legal and factual distancing from the Statute brought on by what he terms an "academic exercise" was completely unnecessary.[468] The author notes that the desire to create a comprehensive mode of criminal responsibility in international criminal law making it possible to put an **end to impunity** for the crimes falling under international criminal law was admirable, but the Judges who were behind this *obiter dictum* over-reached their mandate.[469] The author recalls on this point that the terminology of the Statute and the desire to comply with the principle of *nullum crimen sine lege stricta* ought to have restricted the Judges in their creative undertakings.[470] The author reminds the reader that the ***Sesay, Kallon and Gbao* Appeals Judgement** from the Special Court for **Sierra Leone** depicts the flaws of the JCE doctrine and the challenge of employing categories as vague as JCE 3.[471]

Judge Schomburg is entirely correct when he says that it was not necessary to create the concept of JCE because for me, the term "planning" included in Article 7 of the Statute encompasses this concept.

According to Judge Schomburg, **the Rome Statute** succeeded in identifying the strict modes of criminal responsibility that act as guarantors of the survival of international criminal law.[472] By way of conclusion, the author expresses **two wishes**: his first **wish** is to see the Trial Chamber and the Appeals Chamber of the ECCC **reject** the applicability of JCE 3 and the second is that the legal debate in the future should focus upon responsibility for committing, leaving the JCE behind.[473] **I am compelled to share his conclusion, but will decline to express any wishes of my own involving other Judges or legislators, and say only that JCE 3, as defined in the *Tadić* Appeals Judgement, was fatally flawed from the outset, and that a serious problem has resulted from the fact that this notion was tied to the term "committing" in Article 7 when, in my view, JCE form 1 and JCE form 2 should be tied to the term "planning".**

[467] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 27.
[468] *Ibid.*, p. 27.
[469] *Ibid.*, p. 27.
[470] *Ibid.*, p. 27.
[471] *Ibid.*, p. 28.
[472] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 28.
[473] Wolfgang SCHOMBURG, "Jurisprudence on JCE – Revisiting a Never Ending Story", published 3 June 2010 on the website of *Cambodia Tribunal Monitor*, p. 28.

The *Brđanin* Appeals Judgement

In support thereof, I also regard it as necessary to cite the ***Brđanin*** **Appeals Judgement**, starting with an article by **Cliff Farhang** entitled: "**Point of No Return: Joint Criminal Enterprise in Brđanin".**

The purpose of this article is to show the **failure** of the theory of a joint criminal enterprise ("JCE") as a result of its expansion in the ***Brđanin*** Appeals Judgement.

He states first that the modes of responsibility besides commission that are enumerated in Art. 7(1) are forms of **"accomplice" liability**,[474] with which I do not agree as I hold a contrary point of view. For me, principal responsibility lies in the planning and not conversely in the commission, which I believe relates to execution.

He then indicates that since 2003 JCE may be considered as *principal* responsibility.[475] He is not wrong in this respect, because since the *Tadić* Appeals Judgement, indictments have been based primarily upon this form of responsibility, while avoiding (out of precaution?) any dismissal of other forms of responsibility under Article 7 of the Statute, by using the terms "and/or".

However, the Appeals Chamber in the ***Brđanin*** Case appears to have overturned this view.[476] In this form of JCE, the physical perpetrator stands outside the enterprise and is possibly not even connected to the accused;[477] this makes it necessary to (i) attribute the crime to a member of the enterprise, and then (ii) show that the member in question was acting according to the common plan. Such responsibility, says the author, can no longer be autonomous.

[474] For example, the responsibility of an instigator (accessory) results from the criminal conduct of the committer, of the physical (principal) perpetrator, p. 140; the author relies on the fact that the characteristics of these modes of responsibility vary from one to the next and this variation produces a variation in the level of culpability encountered during the conviction phase, pp. 141 and 146.

[475] In reference to *The Prosecutor v. Milutinović et al.*, "Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise", 21 May 2003. Prior to this, the author says, the Statute was ambiguous, p. 149; *see* also pp. 138-139; there is principal responsibility if the crime has been foreseen in the common plan (JCE 1) or it is a foreseeable consequence of that plan's implementation (JCE 3).

[476] The first step in this reversal happened with an interlocutory appeal, *see* p. 149; however, the position taken involved *The Prosecutor v. Brđanin*, Appeals Judgement, 3 April 2007.

[477] The Appeals Judgement removed the requirement of express agreement between the accused and the physical perpetrator which had been introduced at first instance, and which theoretically justified expanding the JCE as was done, pp. 150-152.

Moreover, for the author, theoretically speaking, there is no satisfactory theoretical matrix upon which to base such responsibility. He exemplifies this by looking at several hypotheses: postulating two composite JCEs;[478] by qualifying the conduct of an intermediate member of the JCE towards a physical perpetrator who was not a member as indirect commission or as an order;[479] by including the physical perpetrator in the Accused's JCE ("dilution of the JCE");[480] by postulating that the common plan foresaw the use of an executor outside of the JCE;[481] by proving accomplice liability;[482] or by allowing responsibility for co-perpetration based on control wielded over the crime.[483]

The Appeals Chamber would then find itself in a deadlock, and its willingness to expand **the scope of the JCE** to cover the conduct of the "brain trust" would lead to the downfall of the theory of this otherwise promising mode of responsibility. In my view, the primary problem goes to the responsibility of the "brain trust", which is a matter of planning.

The *Gotovina* Appeals Judgement

The Appeals Judgement handed down by the **Appeals Chamber on 16 November 2012** sheds additional light on this issue. The Trial Judgement was rendered on 15 April 2011. The Trial Chamber sentenced **Ante Gotovina** and **Mladen Markač** to 24 and 18 years of imprisonment, respectively. Ivan Čermak was found not guilty of the counts with which he was charged.

Ante Gotovina raised four grounds of appeal on 16 May 2011[484] and **Markač** eight grounds of appeal[485] that same day. Both of them requested that the judgement be overturned in its entirety. The Prosecutor requested that all grounds of appeal of the two appellants be dismissed.

The Trial Chamber acknowledged that **Ante Gotovina and Mladen Markač** participated substantially in a **joint criminal enterprise,** the purpose of which was to permanently remove the civilian Serbian population from the Krajina by force or by threat of force.[486]

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[478] Theoretical problems concerning the evidence then arise, pp. 154-155.
[479] The issue then becomes the change in responsibility when turning from one participant to another, pp. 156-157.
[480] Cliff FARHANG, "Point of No Return: Joint Criminal Enterprise in Brđanin", *Leiden Journal of International Law*, 2010, Vol. 23 Issue 1, pp. 157-158.
[481] *Ibid.*, pp. 158-159.
[482] *Ibid*, pp. 159-160.
[483] *Ibid.*, pp. 161-162.
[484] *The Prosecutor v. Ante Gotovina et al.*, "Notice of Appeal of Ante Gotovina", 16 May 2011.
[485] *The Prosecutor v. Ante Gotovina et al.*, "Mladen Markač's Notice of Appeal", 16 May 2011.
[486] *Gotovina* Judgement, paras 2371 to 2375 and 2578 to 2587.

The Chamber found that during the period relevant to the Indictment, **Ante Gotovina** held the post of Lieutenant General in the HV and that he was the Commander of the Split Military District. The Chamber acknowledged that Gotovina contributed significantly to the JCE **by ordering unlawful artillery attacks on Knin, Benkovac and Obrovac** and by failing to take substantial measures to prevent the crimes committed by his subordinates against Serbian civilians from the Krajina or to open an investigation concerning them. The Chamber found him guilty of crimes against humanity: persecution (Count 1 of the Indictment) and deportation (Count 2 of the Indictment), which were committed in connection with category 1 of JCE. The Chamber also found him guilty of crimes against humanity: murder (Count 6 of the Indictment) and inhumane acts (Count 8 of the Indictment), and of violations of the laws or customs of war: plunder of public or private property (Count 4), wanton destruction (Count 5), murder (Count 7), and cruel treatment (Count 9), which were committed in connection with category 3 of JCE.

The Chamber also found that **Markač** had been the Assistant Minister of the Interior in charge of special police forces. The Chamber found that **Markač** contributed significantly to the joint criminal enterprise by ordering an unlawful artillery attack on Gračac and by creating a climate of impunity through his breach of duty to prevent the crimes committed by members of the special police forces against Serbian civilians, to investigate these crimes or to punish them. The Chamber found him guilty of crimes against humanity: persecution (Count 1 of the Indictment) and deportation (Count 2 of the Indictment), committed in connection with category 1 of JCE. The Chamber likewise found him guilty of crimes against humanity: murder (Count 6 of the Indictment) and inhumane acts (Count 8 of the Indictment) and of violations of the laws or customs of war: plunder of public or private property (Count 4), wanton destruction (Count 5), murder (Count 7), and cruel treatment (Count 9), committed in connection with a category 3 of JCE.

In support of its finding of a **Joint Criminal Enterprise**, the Chamber retained primarily **three** categories of evidence. The first includes the transcripts of a meeting at Brioni on 31 July 1995 between the senior leaders of the Croatian Main Staff. The transcripts made it possible to ascertain the purpose of the JCE. The second brings together the evidence regarding Croatian laws and policies that discriminated against the Serbs, seeking to prevent their return to the Krajina. The third category of evidence concerns the artillery shots fired upon the towns of **Knin, Benkovac, Obrovac and Gračac**, usually designated as the "Four Towns".

The Chamber held that the artillery attacks conducted against the four towns were **unlawful**. In

support of this finding, the Trial Chamber used the 200-metre standard. Under this standard, a projectile falling less than 200 metres from a target is considered to have been originally aimed at that target.[487] This means that all of the impact shots less than 200 metres from an illegitimate target are considered unlawful. For the judgement, the Chamber thus analysed the impacts of the artillery shots that hit the four towns. Using the 200-metre standard, the analysis found that the artillery attack on civilians and civilian objects in the four towns was unlawful.

Gotovina alleged[488] that the Indictment contained nothing pertinent to the indiscriminate attack.

Concerning the 200-metre standard, he alleged that none of the evidence supported the idea that the margin of error for HV shots was 200 metres. He submits that this is an **arbitrary rule**. According to him, the three testimonies the Trial Chamber relied on did not support the average margin of error of 200 metres. He also points out that the witness for Prosecutor Andrew Leslie mentioned a margin of error of 400 metres, which considerably reduces the extent of the zone considered as civilian. Moreover, he submits that the margin of error depends on specific conditions such as the environment, the climate, the distance to the target and the type of artillery employed.

Moreover, he submits the argument that, beyond this presumptive unlawfulness, there is no relevant evidence on which to base a finding that the attacks were unlawful, such as exhibits with regard to civilians killed or civilian property actually destroyed. Lastly, he criticises the method used by the Chamber, which is to analyse impact by impact, disfavouring an overall analysis of the attack.

The two appellants argue that the method used by the Chamber to demonstrate that the attack on the four towns was unlawful cannot be used, which makes it impossible to prove that they were unlawful. For this reason, there is no longer an objective evidence of participation in a JCE. Moreover, they allege that the Chamber did not establish their intention to pursue discriminatory policies following the meeting at Brioni.

[487] *Gotovina* Judgement, para. 1898; *Gotovina* Appeal Judgment, para. 55.
[488] *Gotovina* Appeals Judgement, paras 28 to 44; *The Prosecutor v. Ante Gotovina et al.,* "Notice of Appeal of Ante Gotovina", 16 May 2011; *The Prosecutor v. Ante Gotovina et al.,* "Mladen Markač's Notice of Appeal", 16 May 2011.

According to the Prosecutor,[489] **Ante Gotovina** did order an **indiscriminate attack** on the four towns.

The Appeals Chamber first recalled that the Trial Chamber's finding that the attack on the four towns was unlawful is largely premised on the impact analysis, which was in turn performed using the 200-metre standard.[490]

Concerning the 200 metre-standard, the Appeals Chamber considered that the Trial Chamber did not explain why it uniformly applied this rule,[491] whereas one testimony upon which it based its reasoning in using this rule mentioned certain factors that increased the margin of error, such as the distance to the target or the wind.

Concerning the finding in the Judgement that there were no targets of opportunity, the Appeals Chamber discerned no error in respect of the towns of Benkovac, Gračac and Obrovac.[492] Nevertheless, concerning the town of Knin, the Appeals Chamber considered that the Trial Chamber did not explicitly rule out the possibility that targets of opportunity may have been identified. For this reason, it was forced to conclude that none of the shots was intended for an opportunistic target.[493]

The Appeals Chamber argued, by a majority, that the 200-metre standard constituted the cornerstone of the impact analysis conducted by the Trial Chamber. It found that the Judgement did not make it possible to justify the use of this rule and the 200-metre margin of error. Therefore, the fact that some artillery shots landed more than 200 metres from their legitimate targets might be consistent with a broader margin of error. The impact analysis could not be sustained as valid.[494]

The Appeals Chamber then analysed the other evidence used by the Trial Chamber to establish that the attack was unlawful. It held that all of the other evidence supported a finding that the attack was

[489] *The Prosecutor v. Ante Gotovina et al.*, "Prosecution Response to Markač's Second Rule 115 Motion", 24 November 2011; *The Prosecutor v. Ante Gotovina et al.*, "Prosecution Response to Gotovina's Rule 115 Motion", 28 November 2011.
[490] *Gotovina* Appeals Judgement, para. 49.
[491] *Gotovina* Appeals Judgement, paras 58 to 61.
[492] *Gotovina* Appeals Judgement, para. 63.
[493] *Gotovina* Appeals Judgement, para. 63.
[494] *Gotovina* Appeals Judgement, paras 64 to 67.

unlawful only in light of the impact analysis. The Appeals Chamber therefore found that there was insufficient evidence to establish that the attack on the four towns was unlawful.[495]

The Appeals Chamber first followed the definition of JCE contained in the ***Brđanin*** **Appeals Judgement.**[496]

It held that if the attack on the four towns was no longer considered unlawful, it was no longer possible to say that the only reasonable interpretation of the facts of the case and of the evidence is that there was a JCE the common purpose of which was to permanently remove the Serbian civilian population by force or threat of force.[497]

Additionally, the Appeals Chamber held that it was not reasonable to interpret the transcripts of the Brioni meeting as establishing the existence of a common purpose seeking to remove the Serbian civilians by force[498] because these were assessed by the Trial Chamber in light of its findings that the subsequent attack did target civilians. Outside this context, it is not reasonable to find that the only possible interpretation of the Brioni meeting transcripts is that there was a JCE seeking to remove the Serbs by force. By way of illustration, the Appeals Chamber provides several examples of alternative interpretations. The Appeals Chamber mentions, specifically, lawfully reaching a consensus on the necessity of helping the civilian populations, temporarily evacuating them from a conflict zone in order to gain legitimate military advantages or even reducing the number of victims.[499]

The debate concerning the artillery attack, the possible departures of civilians or even the creation of "exit corridors" could thus reasonably be interpreted in relation to lawful combat operations or public relations initiatives. The portion of the transcript where Gotovina proclaims that his troops could destroy the town of Knin may also be interpreted as a short cut to describe the military forces present in the area or to demonstrate the military power available in the context of planning a military operation.

[495] *Gotovina* Appeals Judgement, para. 83.
[496] *Gotovina* Appeals Judgement, para. 89; *Brđanin* Appeals Judgement, para. 430.
[497] *Gotovina* Appeals Judgement, para. 91.
[498] *Gotovina* Appeals Judgement, para. 93.
[499] *Gotovina* Appeals Judgement, para. 93.

The Appeals Chamber likewise held that the **speeches by Tuđman** or even the **crimes committed** by the Croatian Army and special police following the attack on the four towns offered insufficient proof of a **JCE**.

Specifically, the Appeals Chamber stressed that it was not clearly apparent from the rhetoric and the goals embodied by Tuđman in his speeches that he joined the JCE or that they embodied the **common purpose**.[500] In addition, with regard to the crimes committed by the Croats after the artillery attack, the Appeals Chamber found that their origins could not be pinpointed in the discussions that took place in Brioni, unlike the attacks that were part of Operation Storm.

Therefore, the Appeals Chamber found nothing in the Judgement supporting a finding of guilt on the basis of another form of responsibility.

In his separate opinion, **Judge Meron** did not think that the Appeals Chamber should have embarked upon analysis of alternate modes of responsibility beyond the JCE because this could not be done without undermining the rights of the Accused.

In his dissenting opinion, **Judge Agius** agrees with the majority, saying that the Trial Chamber was in error when it adopted the 200-metre standard.[501]

Nevertheless, he rejects the findings of the Chamber in respect of targets of opportunity at Knin as well as all the other findings.

According to **Judge Agius**, the Chamber took a compartmentalised view of the evidence instead of analysing it as a whole for the purpose of deciding whether the attacks on the four towns were unlawful or not. He criticised the majority for having reasoned by ricochet and having concluded therefrom that all of the other evidence was invalid, once it had invalidated the impact analysis.[502]

He criticised the majority for having considered the 200-metre standard as the cornerstone of the logic that led to the finding that there was nothing inherently unlawful in the attack on the four towns. Questioning the 200-metre rule snowballed into questioning the entire judgement.

[500] *Gotovina* Appeals Judgement, para. 94.
[501] *Gotovina* Appeals Judgement, Dissenting Opinion of Judge Carmel Agius, para. 2.
[502] *Gotovina* Appeals Judgement, Dissenting Opinion of Judge Carmel Agius, para. 4.

Relying on the remaining evidence, he considers that the attack was indeed unlawful and that there was therefore a JCE.

Judge Robinson's separate opinion concerns the method the Appeals Chamber used to find that there was no evidence to support a conviction against **Markač** on the basis of another form of responsibility.

Regarding the JCE, **Judge Pocar** criticises the majority for having relied solely on the unlawful nature of the attack to conclude that the Trial Chamber committed an error when it found that there was a JCE.[503]

He says that it was predominantly the fear caused by the attacks that sparked the departures of civilians, not the unlawfulness of the attack. Moreover, he considers that the deportations that took place on 4 and 5 August 1995 were due to events distinct from the artillery attack on the four towns, such as the actions carried out by the special police,[504] the Brioni meeting[505] or the policy of discrimination introduced by the Croats.[506]

This recent appeals judgement attests to the **complexity** of the concept of JCE.

I must go further into the issue of JCE form 3, which is more problematic than JCE form 1 and JCE form 2.

JCE Form 3

In the ***Tadić*** **Appeals Judgement**, at paragraphs 204 to 219,[507] the Appeals Chamber cites various cases from the jurisprudence that may be useful for the assessment of category 3 of JCE.[508] In particular, in paragraphs 214 to 219, the Appeals Chamber refers to and examines the cases brought before the Italian courts between 1946 and 1950 that involved individuals who had committed war crimes during Second World War.

[503] *Gotovina* Appeals Judgement, Dissenting Opinion of Judge Fausto Pocar, para. 23.
[504] *Gotovina* Appeals Judgement, Dissenting Opinion of Judge Fausto Pocar, paras 24, 27.
[505] *Gotovina* Appeals Judgement, Dissenting Opinion of Judge Fausto Pocar, para. 26.
[506] *Gotovina* Appeals Judgement, Dissenting Opinion of Judge Fausto Pocar, para. 28.
[507] *The Prosecutor v. Duško Tadić,* "Appeals Judgement", 15 July 2009, paras 204 to 219.
[508] The category 3 of JCE involves cases of common purpose in which one of the perpetrators commits an act which, although it does not proceed from the common purpose, is nevertheless a natural and foreseeable consequence of its implementation.

It seemed necessary to me to discuss these examples in depth, and to recall the Italian law in question.

As for the cases referred to in the body of this text, I was able to find only five appellate judgements: the appellate judgements of *D'Ottavio et al.,*[509] *Tossani,*[510] *Bonati et al.,*[511] *Aratano et al.,*[512] and *Ferri.*[513] Each of these five appellate judgements is **handwritten**. However, I was unable find the full text of the sixth appellate judgement, the *Mannelli* appellate judgement.[514]

Concerning the cases referred to in the footnotes, I was only able to find excerpts of the *Mannelli, Montagnino, Solesio* and *Antonini*[515] appellate judgements contained in the *Giustizia penale* law review. It was not possible to find and/or to access the appellate judgements or excerpts of the appellate judgements of *Torrazzini, Palmia, Peveri, Minafò* and *Minapò*.

The reason these appellate judgements and/or passages are so difficult to find lies in the fact that both the appellate judgements of the Italian Court of Cassation and the excerpts of the appellate judgements contained in certain law reviews such as *Giustizia penale* or *Archivio penale* are available to the public solely by means of a paid subscription.[516] Unfortunately, the ICTY budget contains no heading for this purpose. Given the importance of this issue, it is unfortunate that the Judges of the *Tadić* Chamber, working in apparent reliance on the Italian Judge and his colleagues, did not have the handwritten manuscripts translated into English and French – or even B/C/S – and subsequently archived in the ICTY Library.

Prior to reviewing the appellate judgements, it is of interest to analyse the Italian Penal Code.

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[509] Court of Cassation, case of *D'Ottavio et al.*, 12 March 1947, handwritten (unpublished opinion).
[510] Court of Cassation, case of *Tossani*, 17 September 1946, handwritten (unpublished opinion).
[511] Court of Cassation, case of *Bonati et al.*, 15 July 1946, handwritten (unpublished opinion).
[512] Court of Cassation, case of *Aratano et al.*, 21 February 1949, handwritten (unpublished opinion).
[513] Court of Cassation, case of *Ferri*, 25 July 1946, handwritten (unpublished opinion). The *Ferri* appellate judgement is referred to in the text as the "*Ferrida"* appellate judgement. This is incorrect – it is actually the *Ferri* appellate judgement.
[514] However, I was able to locate the key passage from this appellate judgement, which is contained in the body of the following judgement: Court of Cassation, case of *Mannelli*, 20 July 1949, in *Giustizia penale*, 1949, Chapter II, col. 906. One should note that the references to this passage in the judgement contain errors. According to footnote 276, the passage referred to should be located in columns 696 to 697, columns which were impossible to locate. However, if one looks at column 906, referred to moreover in footnote 277, it is possible to locate this passage in the *Mannelli* appellate judgement.
[515] Court of Cassation, case of *Mannelli*, 20 July 1949, in *Giustizia penale*, 1949, Chapter II, col. 906; Court of Cassation, *Montagnino* case, 24 February 1950, in *Giustizia penale*, 1950, Chapter II, col. 821; Court of Cassation, case of *Solesio et al.*, 19 April 1950, in *Giustizia penale*, 1950, Chapter II, col. 822; Court of Cassation, *Antonini* case, 29 March 1949, in *Giustizia penale*, 1949, Chapter II, cols 740 to 742.

Articles 110 to 119 of the Italian Penal Code[517] address multiple persons taking part in the commission of an offence. According to Article 110 of the penal code, each person taking part in the commission of an offence committed by several persons generally receives a sentence which accords with the commission of such an offence.

Article 116 of the Penal Code is especially significant. It provides that when the offence committed is different from the one sought by one of the participants, that person must answer for the offence if the event is the consequence of his action or failure to act. However, if it turns out that the offence committed is more serious than the one originally intended, his sentence will be reduced. One notes the similarity with JCE 3, but with a reduced sentence…

Article 89 of the Wartime Military Penal Code addresses agreements among soldiers to commit offences that would constitute a breach of loyalty or of military defence.[518] It must be noted that, according to this article, a soldier who withdraws from the agreement before the offence in question is carried out and prior to arrest and judicial proceedings is not subject to prosecution.[519]

Objective responsibility appears to flow from by the above-mentioned articles. However, the Court of Cassation specifies in its jurisprudence that the responsibility of the participants for an offence committed by a group is not objective, but is based on material and psychological causation and on a requirement of foreseeability.

In the case of *D'Ottavio et al.*,[520] the Court states that the responsibility of the participants is based on the concurrence of interdependent causes: each one of the participants may be held responsible for the crime, whether they caused it directly or indirectly, in keeping with the well-known adage *causa causae est causati*.[521]

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[516] Furthermore, reading the appellate judgements that were found is difficult because they are handwritten.
[517] Promulgated in 1930, it remains in force despite several amendments introduced by the Cour de Cassation.
[518] Art. 89, Wartime Military Penal Code. If several soldiers agree to commit one of the offences inflicting bodily harm,violating bodily integrity, individual freedoms or liberty, as provided in Articles 48(1) and 49, or one of the offences covered in Articles 50, 51, 59, 66 and 86, each of the participants shall be punished, for that reason alone, with a sentence not under five years. Also see Art. 77 of the Peacetime Military Penal Code.
[519] Art. 89, Wartime Military Penal Code.
[520] Court of Cassation, case of *D'Ottavio et al.*, 12 March 1947, handwritten (unpublished opinion).
[521] *In casu*, a nexus of material causation and a nexus of psychological causation were present. There was a nexus of material causation given that all of the participants had directly contributed to the crime of attempted "unlawful arrest". The crime was the indirect cause of a subsequent different kind of event, namely, the gunshot fired at one of the fugitives, wounding him fatally. Moreover, there was a nexus of psychological causation, because all of the participants had both awareness and the intent to commit an attempted unlawful arrest, and were able to foresee that a crime of a different kind would be committed, which necessarily resulted from the use of arms.

In the *Tossani*[522] appellate judgement, the Court finds that he did not actively participate in any way in the rounding up of civilians that led to the death of a partisan, and furthermore, that the event charged was extraordinary and unforeseen. There was no nexus of material or psychological causation between his participation and the death of the partisan. The same reasoning appears in the *Ferri*[523] appellate judgement. Material and psychological causation likewise constitute the basis of the Court's reasoning in the *Antonini*[524] appellate judgement, where it is asserted that he not only needed to have contemplated the death of the victim, but also to have intended it. Similarly, in the *Bonati et al.*[525] appellate judgement, it is stated that a relationship of material and psychological causation is required.[526]

The *Mannelli*[527] appellate judgement further specifies that the nexus of material causation must be understood from the vantage point of the law and must be clearly distinguished from a fortuitous linkage. For there to be a nexus of material causation between the crime intended by one of the participants and the distinct crime committed by another, the latter must constitute the **logical and foreseeable consequence of the former.** If, however, the two crimes are entirely independent of each other, a merely fortuitous linkage could be established. In the *Montagnino*[528] appellate judgement, the Court states that in order to rule out the relationship of material causation between the action and the event, it is necessary that the incident be considered new, with its own causal autonomy, either due to extraordinary circumstances or because it stands completely outside of or in contradiction to the limits of the activity agreed upon.

In the case of *Aratano et al.*,[529] the crime committed (the murder of a partisan) was an unintended occurrence more serious than what had been intended; for the participants in this act to be held guilty of voluntary homicide there needed to be a deliberate, act of will related to the homicide.

Finally, in the *Solesio*[530] appellate judgement, the Court examined the issue of foreseeability, confirming that a more serious offence may even be attributed to one who did not intend it, if it was

[522] Court of Cassation, case of *Tossani*, 17 September 1946, handwritten (unpublished opinion).
[523] Court of Cassation, case of *Ferri*, 25 July 1946, handwritten (unpublished opinion).
[524] Court of Cassation, case of *Antonini*, 29 March 1949, in *Giustizia penale*, 1949, Chapter II, cols 740 to 742.
[525] Court of Cassation, case of *Bonati et al.*, 15 July 1946, hand-written (unpublished opinion).
[526] However, in this case, amnesty could not be given to the appellant because even if the offence committed is more serious than what was sought by certain participants, the appellant is nevertheless responsible because the offence was the indirect consequence of his participation, and amnesty cannot be granted to an offence of this type.
[527] Court of Cassation, case of *Mannelli*, 20 July 1949, in *Giustizia penale*, 1949, Chapter II, col. 906.
[528] Court of Cassation, case of *Montagnino*, 24 February 1950, in *Giustizia penale*, 1950, Chapter II, col. 821.
[529] Court of Cassation case of *Aratano et al.*, 21 February 1949, hand-written (unpublished opinion).

not out of the ordinary or an unforeseeable departure from the act that they originally wanted to commit.[531]

Therefore, as we conclude this review, it is appropriate to note that the Judges in the *Tadić* Chamber did not depart from the jurisprudence of the Italian Court of Cassation, while at the same time it should be noted that some of the accused were able to profit from mitigating circumstances due to the fact that on several occasions the Court of Cassation mentioned the words "relationship of physical or psychological causation", "exceptional and unforeseen event", "as distinguished from the formal linkage", etc… which is not the case at the ICTY and the ICTR.

JCE and the ICC

At the **International Criminal Court** (ICC), the concept of JCE has been raised repeatedly in various pleadings and decisions.

Joint Criminal Enterprise (JCE) is not mentioned in any of the provisions of the **Rome Statute**. Criminal responsibility for the commission of a crime involving several participants is regulated by Article 25 of the Rome Statute in terms of **co-perpetration**. Article 25(3)(d) essentially emphasises the requirement of the subjective element, that is, the intent exhibited by an individual who in full awareness contributes to the group's criminal activity or criminal design.[532]

It seems to me that in the *Tadić* Case, the Appeals Chamber was wrong to base itself *inter alia* on Article 25(3)(d) of the Rome Statute[533] in its attempt to establish the customary nature of this form

[530] Court of Cassation case of *Solesio et al.*, 19 April 1950, in *Giustizia penale*, 1950, Chapter II, Col. 822.
[531] Committing homicide or causing bodily injury to persons who are attempting to fight off a robbery is neither out of the ordinary nor unforeseeable by those who decide to get together to commit such an act. If such offences happen in addition to that of robbery, the participants therein are responsible.
[532] For Judge Antonio Cassese, "this expansive interpretation of Article 25 would be justified by the need to punish criminal conduct that otherwise would not be regarded as culpable. In addition, it would not be contrary to the principle of personal culpability, for in any case, the person at issue (i) would be guilty of intentionally participating in a criminal purpose or plan; (ii) his *mens rea* concerning the additional, not previously concerted crime would have to be proved by the Prosecution; and (iii) his lesser culpability would have to be taken into account at the sentencing stage". See Antonio Cassese, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise", p. 132.
[533] Article 25(3)(d) of the ICC Statute states: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (d) in any other way [...] contribute to the commission or attempted commission of such as crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) [b]e made with the aim of furthering the criminal activity or criminal [design] of the group, where such activity or purpose involves the commission of the crime within the jurisdiction of the Court; or (ii) [b]e made in the knowledge of the intention of the group to commit the crime [...]".

of criminal responsibility.[534] The ICC Pre-Trial Chamber, seized of the ***Lubanga* and *Katanga* cases**, construed Article 25(3)(a) of the Rome Statute[535] as directed towards joint commission through co-perpetration[536] and Article 25(3)(d) as a form of criminal responsibility of the accomplice and not of the principal perpetrator.[537] The case-law of the ICC does refer to the principle of a joint criminal enterprise to establish individual criminal responsibility in connection with the group's common criminal plan.

Article 25 of the Rome Statute does not mention "foreseeability" to establish individual criminal responsibility in the context of co-perpetration. In the language of Article 25(3)(d)(ii), the accused is not criminally responsible and may only be punished if he has contributed in any other way to the commission or attempted commission of this crime by a group of persons acting in concert. Such contribution must be intentional and "*be made in the knowledge of the intention of the group to commit the crime*". For this reason, the foreseeability theory must be ruled out entirely because if the person is not fully aware of the criminal intent that drives the criminal group or at least one of its members, that person cannot foresee, either in law or in fact, the commission of the criminal act contemplated by the group or one of its members, let alone discern the criminal intent allegedly driving one of its members.

The recklessness or *dolus eventualis* required by form 3 of the Joint Criminal Enterprise does not appear in the Rome Statute. In other words, the accused can incur criminal responsibility only on the ground that the criminal plan to which he belonged was a "*natural and foreseeable consequence*"[538] of the events.

Despite Article 25(3)(d) of the Rome Statute appearing more open to the expansion of individual criminal responsibility (in reference to the criminal activity or criminal design of the group enabled

[534] *Tadić* Appeals Judgement, paras 222-223.
[535] Article 25(3)(a) of the Rome Statute reads: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) [c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible" [...].
[536] *Lubanga* Decision, para. 334; *Katanga* Decision, para. 483.
[537] *Lubanga* Decision, para. 337; *Katanga* Decision, para. 490.
[538] Some authors think that Article 30 of the Rome Statute contains an umbrella clause ("unless otherwise provided"). This clause "leaves other subjective frames of mind unaffected, so long as they are provided for or required by other provisions of the Statute or by customary international law", G. WERLE and F. JESSBERGER, "*Unless Otherwise Provided*" in Journal of International Criminal Justice (2005), 35-55. Judge CASSESE: "hence the contention can be made that dolus eventualis or recklessness for form 3 of the joint criminal enterprise is not excluded by the ICC Statute", *International Criminal Law*, p. 212.

by some form of contribution),[539] it is nevertheless the case that this provision does not herald, let alone regulate, recourse to the theory of joint criminal enterprise. On the contrary, on the one hand, it ushers in another form of **individual criminal responsibility** which consists in establishing the criminal responsibility of an accused for crimes committed outside the group. On the other hand, it purports to establish such criminal responsibility if it is established beyond a reasonable doubt that the person contributed to the commission of the crime without being a member of the criminal group. Such a contribution would be distinct from abetting.

Another hindrance to applying the theory of a joint criminal enterprise at the ICC lies in demonstration of the criminal intent or ***mens rea*** needed to establish the individual criminal responsibility cited in Article 30 of the Rome Statute.[540] Joint criminal enterprise – in form 3 – obviates any requirement or reference to criminal intent on the part of the participant in the common criminal plan.[541] The theory of category 3 of joint criminal enterprise would be inapplicable in matters of genocide, which themselves require demonstration of specific intent.[542]

The theory of joint criminal enterprise, as conceived in the *Tadić* Appeals Judgement and practised by the ICTY is clearly incompatible with Article 25 of the Rome Statute. Therefore, application of this theory by the ICC in the future could only be envisaged subsequent to a reform of Article 25 of the Rome Statute,[543] which is not presently under discussion.

There are those who believe that any reform would contain a **major handicap** due to the fact that, as in the *Tadić* Decision, it would require the **participant** in a common criminal plan to make "superhuman efforts to halt the common criminal plan", even though he may be unaware of the criminal intent of each of the members of the group. Put differently, this presupposes that the accused may incur criminal responsibility for not having taken measures considered reasonable to halt the commission of the crime, even though he neither gave his approval nor indicated his will to

[539] Article 25(3)(d) of the Rome Statute states that a person shall be criminally responsible and may be punished for a crime within the jurisdiction of the Court if that person "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose". Some legal opinion even takes the view that Article 25 of the Rome Statute refers to the doctrine of joint criminal enterprise in the guise of co-perpetration (the same crime is committed by several persons who commit the same criminal act) and also covers the joint criminal enterprise. See Antonio Cassese, *International Criminal Law*, p. 212).
[540] *Lubanga* Decision, paras 322-367.
[541] Article 30(1) of the Rome Statute provides: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge".
[542] It is necessary to prove that the person who takes part in a joint criminal enterprise is motivated by a specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group *per se*. *See* Article 6 of the Rome Statute.
[543] J. David OHLIN, "*Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*", p. 89.

participate in the common criminal design, and, in addition, had no knowledge of the criminal intent of each member of the group. The *Tadić* Appeal Chamber did not submit a definition of its own for the words "**reasonable measures"**. These "**reasonable measures**" mean that the accused possessed the elements that would be likely to enable him not merely to foresee the commission of the crimes, but first and foremost to perceive the criminal intent of each one of the members forming part of the group. In essence, the burden of proving this lies solely upon the Prosecution.

The concept of **co-perpetration** raised in Article 25(3)(d) of the Rome Statute, even if it may be perceived as a restriction on individual criminal responsibility, nevertheless has the advantage of "circumscribing" criminal responsibility only to the **co-perpetrators** who provided their contribution in support of the group's common criminal activity or criminal design. It has the merit of circumscribing only those co-perpetrators or co-participants who facilitated the common criminal activity fully aware of the intent of each one of the members of the group.[544] Article 25 of the Rome Statute rules out any application of joint criminal enterprise and allows the Court to establish **the individual criminal responsibility of individuals, taking into account primarily their actions, not their affiliation with a criminal group,** which seems to me consistent with a strict construction of international criminal law.

By ruling out the application of a joint criminal enterprise, **the Rome Statute** attempts to create a clear distinction between **the innocent** and **the guilty** who are responsible for criminal acts, without reference to any group membership that would give rise to various interpretations of the principle of criminal responsibility meaning that the individual would not be criminally prosecuted for the criminal acts he has perpetrated. The rejection of the theory of joint criminal enterprise by the ICC may be perceived as safeguarding the principle of *nullum crimen sine lege* and guaranteeing a fair trial.[545]

[544] Arrest Warrant against Laurent Gbagbo, p. 10: "There is a sufficient basis to conclude that the pro-Gbagbo forces that put the policy into effect did so by almost automatic compliance with the orders they received. Finally, there is sufficient evidence that Mr Gbagbo acted with the necessary degree of intent and knowledge".

[545] Code of Professional Conduct for Defence Counsel Appearing Before the ICTY, as amended on 29 June 2006, Article 11; *The Prosecutor v. Haradinaj et al.*, "Decision on Lahi Brahimaj's Request to Present Additional Evidence under Rule 115", 3 March 2006, para. 10; *The Prosecutor v. Naletilić and Martinović*, "Decision on Naletilić's Consolidated Motion to Present Additional Evidence", 20 October 2004, para. 30; *The Prosecutor v. Kupreškić et al.*, "Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001", 11 April 2001, para. 12; *The Prosecutor v. Delalić et al.*, Appeals Judgement, 20 February 2001, para. 631: "The failure of counsel to object or call attention [...] will usually indicate that counsel formed the view at the time that the matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto".

To proceed further with a theory of **automatic group responsibility** would amount to involving every member of a group even if that member joined the group unaware of any criminal plan and did not himself possess any criminal intent. There is no room in international criminal law for "putting everyone in the same basket".

The theory of joint criminal enterprise is considered to be among the causes for many violations of the rights of the accused, particularly those linked to the presumption of innocence and a fair trial. The ICTY Appeals Chamber itself acknowledged that joint criminal enterprise is not "*an open-ended concept that permits convictions based on guilt by association*".[546]

Admittedly, JCE does have certain positive points; however, in my view it was broadly defined and artlessly extended to every aspect of individual criminal responsibility, including its territorial scope, its temporal scope and the range of offences to which it has given rise. This mode of criminal responsibility broadly applied has been the source of such confusion and divergent, even erroneous, interpretations that it has extended criminal responsibility to participants of subordinate rank who were more or less remote from one another in the supposed common criminal plan, and further caused a **presumption of guilt** to hang over the participants of higher rank even though the original common plan may not have been criminal but became so along the way due to subordinate agents acting out of control or acting on grounds other than those originally put forward by their superiors, or even by the leader acting against the will of the other members of the group by personally taking decisions not submitted in advance to the members of the group in order to ascertain his position.

Therefore, it is reasonable to conclude that the theory of joint criminal enterprise should be abandoned in the future in favour of **co-perpetration** within the meaning of the **Rome Statute** which supports establishing the criminal responsibility of the accused in strict and precise fashion in the context of his participation in the group's criminal acts. For this reason, legitimate questions abound: on what legal basis should the theory of joint criminal enterprise be enshrined in **customary international law** if it is not specifically acknowledged in the practice of the ICC, which is supposed to be the only criminal jurisdiction that is universal in character, even though many of the most important States have not, for the moment, ratified the Rome Statute (Russia, the United States, China).

[546] *Brđanin* Appeals Judgement, para. 428.

It is appropriate, I think, to scrutinise the ICC's position with regard to the case involving the post-election violence in Kenya.

On 23 January 2012, Pre-Trial Chamber II of the International Criminal Court (ICC) decided to commit to trial **Francis Kirimi Muthaura** and **Uhuru Muigai Kenyatta** who were suspected of crimes against humanity committed during the 2007-2008 post-election violence in Kenya.

Francis Kirimi Muthaura was a former director of the civil service sector and the Secretary General of the Government of the Republic of Kenya.

Joshua Uhuru Muigai Kenyatta was the Vice-Prime Minister and the former Minister of Finance of the Republic of Kenya.[547]

In the indictment, the ICC Prosecutor states that **Muthaura and Kenyatta** committed crimes in and around the towns of **Nakuru** and **Naivasha**, as **indirect co-perpetrators** within the meaning of Article 25(3)(a) of the Rome Statute.[548] The Prosecutor alleges that **Muthaura and Kenyatta**, jointly with the other co-perpetrators, agreed to pursue a policy to keep the PNU in power by any means necessary, including orchestrating the failure of the police to prevent the commission of these crimes. According to the Prosecutor, in order to implement their policy, the accused devised a **common plan** enabling them to mount widespread and systematic attacks on the supporters of ODM, ostensibly as reprisals, while deliberately neglecting to take measures to prevent or stop the attacks on them.[549]

The Chamber recalled its earlier findings in the Decision on the Confirmation of Charges against **Jean-Pierre Bemba Gombo**, where it was acknowledged that the concept of co-perpetration (joint commission), whether **direct or indirect**, laid down in Article 25(3)(a) of the Rome Statute and reflected in the words "[committing] jointly with another or through another person" must go together with the notion of "control over the crime".[550]

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[547] **Joshua Uhuru Muigai Kenyatta** was elected President of Kenya on 4 March 2012 and a warrant for his arrest has currently been issued by the ICC Prosecutor.
[548] *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, para. 287.
[549] *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, para. 288.
[550] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 346-351; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", para. 296.

The Chamber likewise recalled that the mode of indirect criminal responsibility by means of co-perpetratorship comprises the following elements:

(i) The accused must form part of a concerted plan or an agreement with one or more persons;

(ii) The accused and the other co-perpetrator must make essential contributions in a coordinated manner which results in the realisation of the material elements of the crime;

(iii) The accused must have control over the organisation;

(iv) The organisation must consist of a hierarchical apparatus of power;

(v) The execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect;

(vi) The accused must satisfy the subjective elements of the crime;

(vii) The accused and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the realisation of the material elements of the crimes;

(viii) The accused must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person.[551]

I note that elements (iii), (iv) and (v), which are bolded here, are overshadowed in the *Tadić* jurisprudence. They constitute the three objective elements of indirect co-perpetration, according to the ICC.

That Chamber found that there were substantial reasons to believe that **Mr Muthaura** and **Mr Kenyatta** were criminally responsible as **indirect co-perpetrators** pursuant to Article 25(3)(a) of the Statute for crimes against humanity by way of murder (within the meaning of Article 7(1)(a) of

[551] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 346-351; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", para. 297.

the Statute), deportation or forcible transfer of the population (within the meaning of Article 7(1)(d) of the Statute), rape (Article 7(1)(g) of the Statute), as well as other inhumane acts (Article 7(1)(k) of the Statute), and persecution (within the meaning of Article 7(1)(h) of the Statute).[552] The Pre-Trial Chamber was satisfied that **Muthaura** and **Kenyatta** were criminally responsible pursuant to Article 25(3)(a) of the Statute as **indirect co-perpetrators** for the crimes committed in and around Nakuru and Naivasha.[553]

The Pre-Trial Chamber held that to establish the criminal responsibility of the accused, it must be shown that the **objective elements** and the **subjective elements** of crimes are present.

Concerning the **objective elements** of the crimes, three criteria must be satisfied:

Firstly, it must be proven that there was **a common plan** between **Muthaura**, **Kenyatta** and the other co-perpetrators for the purpose of committing the crimes in Nakuru and Naivasha. The Chamber recalls to this effect that the first prerequisite of indirect co-perpetration is the existence of a common plan to commit the alleged crimes. The Chamber likewise recalled that, according to the Court's case-law, **the common plan must encompass an element of criminality**. In other words, it must involve **the commission of a crime that the accused was tasked with committing**. Furthermore, the Chamber clarified that the agreement did not need to be explicit and that its existence could be inferred from concerted action with the other co-perpetrators.[554]

Secondly, it must be shown that **Muthaura** and **Kenyatta** made an **essential contribution to the commission of the crimes in and around Nakuru and Naivasha**. The second prerequisite for indirect co-perpetration is the proof that Muthaura and Kenyatta made a coordinated, essential contribution resulting in the realisation of the material elements of the crime.[555] The Chamber

[552] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 346-351; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", para. 298.
[553] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 346-351; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", para. 398.
[554] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 346-351; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute"; para. 399.
[555] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 346-351; *The Prosecutor v. Francis Kirimi Muthaura,*

recalled, in keeping with the Court's case-law, that where persons committed crimes acting through other persons, their contribution must be essential and consist of activation of mechanisms enabling them to be in direct contact with those executing the crimes. This aspect is important because it differs from JCE 3 at least by the fact that there has to be contact with those carrying out the crimes.

One should also note that the Pre-Trial Chamber spelled out the key issue of contribution:

(i) establishing links, through intermediaries, between the coalition and the PNU Mungiki for purposes of committing the crimes;

(ii) seeking financial contributions from politicians and Mungiki leaders to support the commission of the crimes;

(iii) mobilising the co-perpetrators who were members of the Mungiki sect in order to conduct attacks in Nakuru and Naivasha; and

(iv) placing the members of the Mungiki sect under the operational command of local politicians for the entire time that the crimes were committed.[556]

Thirdly, the Chamber found that **Muthaura** and **Kenyatta wielded control over the Mungiki** for the purposes of committing crimes in and around Nakuru and Naivasha.

The Chamber recalled that the **three final objective elements of indirect co-perpetration** require that:

(i) the accused exercise control over the organisation;

(ii) the organisation have an organised, hierarchical political apparatus; and

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Uhuru Muigai Kenyatta and Mohammed Hussein Ali (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", para. 401.

[556] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 346-351; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", para. 406.

(iii) the execution of the crimes be ensured by the almost automatic compliance with the orders issued by the accused.[557]

Regarding the subjective elements, the Pre-Trial Chamber states that beyond the objective elements, individual criminal responsibility by means of indirect co-perpetration requires demonstration of **certain subjective elements**, namely:

(i) the accused must satisfy the subjective elements of the crimes;

(ii) the accused must be mutually aware of one another and accept that the implementation of the common plan will result in the realisation of the material elements of the crimes; and

(iii) the accused must be aware of the factual circumstances that will enable them to exercise joint control over the commission of the crime through the agency of another person.[558]

The Chamber recalls that Article 30 of the [Rome] Statute sets forth the ***mens rea*** required to establish individual criminal responsibility for crimes falling within the jurisdiction of the Court. Specifically, Article 30 of the Statute requires that the physical elements of the crimes be committed with **intent** and with **knowledge**. This provision specifies that intent requires that the accused must have the means to engage in the conduct of the criminal plan. The Chamber adds in this regard that two alternative options may be envisaged with regard to the consequences of such conduct:

(i) the person means to cause such consequences (*dolus directus* in the first degree); or

(ii) the person is aware that the consequences will occur "in the ordinary course of events" (*dolus directus* in the second degree).[559]

[557] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 346-351; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", para. 407.
[558] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 346-351; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", para. 410.
[559] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 346-351; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC), "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", para. 411.

As a result, whilst the first alternative cites intent in respect of the material elements of the crime, the second alternative states that it is sufficient that the person be aware that the material elements of the crimes will be the almost inevitable outcome of his acts or omissions.[560]

This decision is very interesting in several respects, because it addresses the issue of indirect co-perpetration and raises the key issue, which is **control**.

For this reason, it seems that there will be a problem with the evidence because **control** over the perpetrators of the crime must be established, and the door will be left open for a variety of ways of defining this control. Does this involve **overall control** or **effective control** more thoroughgoing than the previous form?

Now that I have looked into German practice and the practice at the ICC, I will turn to the jurisprudence of the Cambodian Courts with regard to JCE.

Jurisprudence of the Cambodian Courts and the ECC

In its Decision on the Appeals Against the **Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)** dated 20 May 2010, the Preliminary Appeals Chamber of the Extraordinary Chambers in the Courts of Cambodia reviewed **category 3 of JCE**. The Appellants argued that the finding in the *Tadić* Appeals Judgement, i.e. that form 3 of JCE firmly based on customary international law was unfounded and ran contrary to the rule that customary international law can be determined only on the basis of established and widespread State practice and *opinio juris*. Therefore, according to the judges, its application at the Extraordinary Chambers in the Courts of Cambodia (ECCC) would violate the principle of legality.[561] One of the Appellants, moreover, stated that the *Tadić* Appeals Judgement relied on precedents such as the *Borkum Island* and *Essen Lynching* cases, in which the military tribunals did not venture into an in-depth discussion of the law relating to the **common criminal plan** or to collective violence. He argued that the *Tadić* Appeals Judgement turned, to a large extent to unpublished cases adjudicated primarily in Italy. According to him, among these Italian cases, only the case of *Ottavio et al.* could be cited in

[560] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", paras 358-359.
[561] Case No° 002/19-09-2007-CETC-CP/BCJI (CP 38) n° D97/15/9 (ECCC), "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE) ("Decision on JCE Form 3 of 20 May 2010"), para. 75.

support of category 3 of JCE. He cites the following passage devoted to the Italian cases in the *Amicus Curiae* Brief by Kai Ambos: "[i]n this trial – in contrast to the trials before British and U.S. American military tribunals – no international law was relied upon, but exclusively the national law [of Italy] was applied. In addition, this case-law is not uniform since the Italian Supreme Court […] has adopted two dissenting decisions".[562]

The Co-Prosecutors responded to this argument, saying "many advanced jurisdictions" recognised modes of criminal participation that resemble category 3 of JCE. They cite *inter alia* the **Felony Murder Doctrine**, *association de malfaiteurs* and conspiracy. According to them, the argument whereby the finding in the *Tadić* Appeals Judgement as to whether JCE exists under customary international law was based on too few cases from too few courts, and failed to take into account substantial evidence in support of the ICTY Appeals Chamber finding.[563]

Having reviewed the jurisprudence of the ruling of the *Tadić* Appeals Judgement in relation to the expanded category of JCE, the Chamber considers that category 3 relied on settled practice and *opinio juris* of the States at the time of the facts relevant to Case File No. 002 and found, for the reasons set out below, that it had not been recognised as a form of responsibility applicable to violations of international humanitarian law (IHL).[564]

The Chamber noted that neither the Nuremberg Statute nor Control Council Law No. 10 provide specific evidence in support of the existence of category 3 of JCE. **It found, moreover, that the two international instruments referred to in the *Tadić* Appeals Judgement, which did not exist at the time of the events relevant to Case File No. 002, could not be used to establish the existence of the expanded category of JCE in customary international law between 1975 and 1979.**[565]

In respect of the jurisprudence, the Chamber referred each in turn to the cases the ICTY Appeals Chamber had relied on in the *Tadić* Appeals Judgement, namely the cases of *Borkum Island* and the *Essen Lynching,* and several other cases brought before Italian courts following the Second World War. Among the accused in the first case were senior officers, soldiers, the mayor of *Borkum*, police officers, a civilian, and the official of the Reich's Labour Service (*Reichsarbeitsdienst*). All

[562] Kai AMBOS, "Amicus Curiae Concerning Criminal Case File No. 001/18-07-2007-ECCC.OCIJ (PTC 02)", 4 November 2008, p. 33.
[563] Decision on JCE form 3 of 20 May 2010, para. 76.
[564] Decision on JCE form 3 of 20 May 2010, para. 77.
[565] Decision on JCE form 3 of 20 May 2010, para. 78.

had to answer charges of war crimes, specifically for both "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing" of the airmen and for "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the assaults" on the airmen.

The ICTY Appeals Chamber assumed that the military tribunal had "upheld the common design doctrine, but in a different form, for it found some defendants guilty of both the killing and the assault charges while others were only found guilty of assault".[566] Concerning the second case, the same Appeals Chamber stated that it could "assume" that the court had accepted the argument whereby all of the accused found guilty had taken part, in varying degrees, in the killing; not all of them intended to kill, but all intended to participate in the mistreatment inflicted upon the prisoners of war. Nevertheless, they were all convicted of murder, because they were all "concerned in the killing".[567]

The Chamber noted that these two cases might in fact contain aspects directly touching upon the applicability of the expanded JCE. However, absent a reasoned judgement in these cases, one cannot say with certainty which form of responsibility was actually applied.[568]

As for the cases brought before the Italian courts, these involved **war crimes** committed between 1943 and 1945 by civilians or by members of the armed forces of the *Repubblica Sociale Italiana* (RSI). The latter was a *de facto* government under German control that was set up by the fascist authorities in Central and Southern Italy following Italy's declaration of war against Germany on 13 October 1943. The victims of these crimes were prisoners of war, Italian resistance fighters, and members of the Italian Army who were fighting against the Germans and the RSI.[569]

The Chamber held that it was unable to consider these cases valid precedents for describing the status of customary international law. According to the Chamber, these cases did not fall within international jurisprudence because they were adjudicated under domestic law.[570]

For the foregoing reasons, the Chamber held that the precedents used in the *Tadić* Appeals Judgement, and consequently in the disputed Order, did not constitute a sufficiently solid

[566] Decision on JCE form 3 of 20 May 2010, para. 79.
[567] Decision on JCE form 3 of 20 May 2010, para. 81.
[568] Decision on JCE form 3 of 20 May 2010, para. 79.
[569] Decision on JCE form 3 of 20 May 2010, para. 82.
[570] Decision on JCE form 3 of 20 May 2010, para. 82.

foundation for finding that Expanded JCE existed under customary international law at the time of the events touching directly upon Case No. 002.[571]

In the *Tadić* Appeals Judgement, while considering that it could not turn to domestic law and jurisprudence for the purpose of identifying international principles and rules that would help explain the status of the JCE in customary law, the Appeals Chamber relied on national statutes and cases and concluded that the doctrine of JCE was enshrined in the national laws of several States. The Chamber noted variations from one country to the other, as to the mental element required for the accused to incur criminal responsibility for a crime carried out by a person who acted in concert with him but who went beyond the intent of the accused.[572]

In that same judgement, the Appeals Chamber once more underscored that it had only referred to domestic statutes or case-law for the purpose of proving that the notion of a common purpose was supported in numerous domestic systems.[573] The Chamber considered that it was not required to decide whether a number of national legal systems regarded as representative of the world's major legal systems recognise that a mental element less stringent than direct intent could be applied to crimes committed outside the common criminal purpose that amount to commission.[574] Even if this were in fact the case and the Chamber were to find that category 3 of JCE sufficed for responsibility to attach for international crimes, the Chamber would nonetheless not be satisfied that the persons indicted could have foreseen, between 1975 and 1979, that they would incur such responsibility, in other words, that crimes falling outside the common purpose, but which were the natural and foreseeable consequence of the fulfilment of that purpose, could entail their responsibility as co-perpetrators. **Given that category 3 of JCE allows holding the accused responsible for crimes outside the common purpose that were the natural consequence of its realisation and whose commission was foreseeable to the accused, the principle of legality runs contrary to its application in proceedings before the ECCC.**[575]

As a result, the Chamber granted the appeals insofar as they refuted the applicability of category 3 of JCE before the ECCC.[576]

[571] Decision on JCE form 3 of 20 May 2010, para. 83.
[572] Decision on JCE form 3 of 20 May 2010, para. 84.
[573] Decision on JCE form 3 of 20 May 2010, para. 85.
[574] Decision on JCE form 3 of 20 May 2010, para. 87.
[575] Decision on JCE form 3 of 20 May 2010, para. 87.
[576] Decision on JCE form 3 of 20 May 2010, para. 88.

The Trial Chamber at the ECCC on 12 September 2011 ruled on a request filed by the Co-Prosecutors for the Chamber to consider confirming category 3 of JCE as a mode of participation for which the accused in Trial No. 002 might incur criminal responsibility. It likewise ruled on another motion filed by **IENG Sary** on 24 February 2011 seeking to strike the Closing Order due to defects in several parts thereof.[577]

The Co-Prosecutors argued that **IENG Sary** incorrectly interpreted the Closing Order, inasmuch as the facts presented therein lead to the reasonable inference that he shared the intent to commit crimes in the context of the implementation of a JCE. **They contend that, during the period covered by the Closing Order, the JCE in all of its forms was considered a mode of participation within customary international law that holds the offender criminally responsible.**[578]

It should therefore be noted that the Prosecution wished to call into question the Decision of 20 May 2010.

With respect to the applicable law, the Trial Chamber notes that in the case of a crime requiring specific intent, instead of merely showing that the accused had the intent to commit the underlying crime or crimes, it is necessary to show that he had the specific intent that is a required element of the crime.[579] The Chamber notes, moreover, that JCE is a mode of participation, not a crime in itself. As a result, to confirm the responsibility of an accused as a participant in a JCE, it is sufficient to demonstrate that he participated in the common plan in some way that amounted to the commission of a crime falling within the jurisdiction of the court in question, whether by committing one of the crimes or by providing aid or a contribution in furtherance of the **common plan**. It is clear from the settled precedents of other international tribunals in this regard that the plan constituting an integral part of the JCE need not necessarily be criminal in nature as such, so long as the crimes are contemplated as a means of bringing the common plan to fruition.[580] In the case of *Brima et al.*, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) determined that the common plan, design or purpose of a criminal enterprise must either have as its objective a crime or contemplate crimes as the means of achieving its objective.' In the *Kvočka* Case, the ICTY Appeals Chamber held, in similar fashion, that the Prosecution's case relied on the existence of a

[577] Case No. 002/19-09-2007-ECCC.TC, "Decision on the Applicability of Joint Criminal Enterprise", 12 September 2011, paras 2 and 3.
[578] *Ibid.*, para. 10.
[579] *Ibid.*, para. 16.
[580] *Ibid.*, para. 17.

JCE, the common purpose of which was allegedly the "**creation of a Serbian State within the former Yugoslavia**".[581]

Concerning the nature of the common plan, as alleged in Case No. 002, the Closing Order was fully consistent with the above-mentioned jurisprudence, which removes any basis for the argument that charging IENG Sary under the "committing" mode of participation would rely solely on the fact that he took part in a non-criminal common plan.[582]

The Co-Prosecutors essentially based their case on category 1 of JCE. **They also sought to retain category 3 of JCE as a possible mode of participation, but only if, for certain acts charged in connection with Case File No. 002, the nexus between these criminal acts and the accused could not be established through the application of category 1 of JCE.**[583] They essentially argue that there is a possibility, however remote, that a very limited number of criminal events alleged in the Closing Order might not fall within the scope of the common criminal plan as originally conceived. Should this be true, they ask the Trial Chamber to apply its discretion in such matters, and rule that the Accused may have to answer for this very limited number of acts for which they have been charged as participants in category 3 of JCE.[584]

It is appropriate to note that the Prosecution position is that JCE 3 should be considered a supplemental means to prosecuting certain accused in the event that it does not have enough evidence to bring against them under form 1. For the Prosecution, this is just an opportunity to dispose of an array of modes of responsibility which would enable it to proceed in any direction depending on the evidence at hand. It might be said that the less evidence there is, the more one ought to use form 3.

The Trial Chamber held that the Co-Prosecutors' Motion for Re-Characterisation violates neither the right of the Accused to be adequately informed of the nature of the charges against them nor any other principle of a fair trial. Therefore, the Trial Chamber denied the late motion of **IENG Sary** seeking re-characterisation solely on grounds of admissibility.[585]

[581] *Ibid.*, para. 17.
[582] *Ibid.*, paras 18 and 19.
[583] *Ibid.*, para. 23.
[584] *Ibid.*, para. 23.
[585] *Ibid.*, para. 25.

Concerning the merits of the Co-Prosecutors' Motion, the Trial Chamber noted at the outset that the applicability of the theory of the third category of JCE had been **extensively litigated** before the ECCC. The issue had also previously been examined on appeal by the Pre-Trial Chamber during Case No. 002. Although the Trial Chamber does not hear appeals against decisions of the Pre-Trial Chamber, it did note that the motion it was asked to rule on was largely similar to the one previously before the Pre-Trial Chamber. That Chamber had reviewed in detail – in its Decision Concerning the JCE – the legal instruments in effect prior to 1975, including the Nuremberg Charter and Control Council Law No. 10. The Trial Chamber held, as did the Trial Chamber in the *Duch* Judgement, that the first and second categories of JCE constituted modes of participation recognised in customary international law during the period relevant to the Closing Order. However, it did point out that these international instruments did not specifically acknowledge JCE 3.

The Trial Chamber also examined the post-Second World War cases referred to in the *Tadić* Appeals Judgement, such as *Borkum Island* and the *Essen Lynching*, to determine whether, at the time of the events charged in connection with Case No. 002, the expanded JCE was among the concepts recognised in customary international law as entailing the criminal responsibility of an accused. The Chamber found that the cases adjudicated pursuant to Allied Control Council Law No. 10 did not support the finding that the accused found guilty had been convicted because they participated in an expanded JCE. The Pre-Trial Chamber further noted that several cases adjudicated by national courts and cited in the *Tadić* Appeals Judgement to justify the application of category 3 of JCE did not provide sufficient evidence that this third category arose out of established practice of States or a widespread *opinio juris* at the time of the events relevant to Case File No. 002.[586]

Lastly, it examined whether **category 3 of JCE** could be retained as a mode of participation for which the Accused might incur criminal responsibility due to the fact that it formed part of the "general principles of law recognized by civilized nations" at the time of the events charged.

The Pre-Trial Chamber first noted the finding of the ICTY Appeals Chamber in the *Tadić* Appeals Judgement, namely that a single concept of common purpose liability was not adopted by most domestic legal systems. It then held that it would serve no purpose for it to determine whether the expanded form of JCE amounted to a general principle of law between 1975 and 1979, on the

[586] *Ibid.*, para. 27.

grounds that, in any case, it was not satisfied that, it was sufficiently foreseeable to the Accused at that time that the crimes exceeding the scope of the common purpose may result in the Accused incurring responsibility as co-perpetrators or that the relevant statutes for convicting them were sufficiently accessible to them, given that there was no basis for category 3 JCE in Cambodian domestic law.[587]

The Trial Chamber basically subscribed to the Pre-Trial Chamber's analysis of the above-mentioned Post-Second World War cases. Beyond this, it examined certain other relevant cases mentioned in a recent decision by the **Special Tribunal for Lebanon** issued after the Pre-Trial Chamber's decision concerning the JCE. This involved two cases: ***United States v. Ulrich and Merkle***, and ***United States v. Wuelfert et al.,*** that were heard by the United States Military Tribunal at Dachau. These cases implicated businessmen who owned factories near the Dachau concentration camp and employed prisoners for forced labour. They were held responsible for acts of mistreatment inflicted on the prisoners at the Dachau camp and in the factories, including murder, beating, torture and starvation.

It must be noted that in its preliminary decision on jurisdiction, **the Special Tribunal for Lebanon** only cited appellate review judgements that do not provide the underlying grounds for upholding the convictions. These cases appear to fall into the first or category 2 of JCE, given that the accused was part of the concentration camp system and personally took part in the mistreatment of the prisoners. By contrast, the events to which these cases are directed make it difficult to affirm the theory of responsibility resulting from participation in an expanded JCE, namely responsibility for crimes which did not fall under the common plan but which were nevertheless a natural and foreseeable consequence thereof.[588]

The Trial Chamber found that this theory could not be considered a general principle of law between 1975 and 1979.[589]

As for whether expanded JCE could be included among the general principles of law at the time of the events relevant to the Closing Order, the Trial Chamber did not rule on this issue. It agreed with the ICTY Appeals Chamber and the *Tadić* Appeals Judgement that the practice of States with

[587] *Ibid.*, para. 28.
[588] *Ibid.*, para. 34.
[589] *Ibid.*, para. 35.

regard to the concept of common purpose was not sufficiently uniform to be able to consider this concept a general principle of law.[590]

The Trial Chamber held that the Co-Prosecutors did not succeed in establishing that category 3 of JCE formed part of customary international law between 1975 and 1979. It thus denied the request for re-characterisation by the Co-Prosecutors seeking the application of the expanded JCE theory to the facts of the case.[591]

To be thorough, I must however refer to the substance of the **Amicus Curiae** Brief filed in this case at the invitation of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC), in its decision dated 25 September 2008. The McGill Centre for Human Rights and Legal Pluralism (Canada) filed an *amicus curiae* brief.[592]

This Brief retraced the development of the theory of Joint Criminal Enterprise (JCE) since 1945 and examined both national and international legal doctrine and jurisprudence on the applicability of JCE as a form of responsibility at the ECCC.[593]

The principle of *nullum crimen sine lege* is both a fundamental principle of criminal law and a norm of customary international law. According to this principle, a person may be found guilty of a crime in respect of certain acts only if these constituted a violation of the law at the time they were committed.[594]

According to the ICTY Trial Chamber in the *Hadžihasanović* Case, above all else attention must be paid to the actual conduct of the accused at the time the acts were committed:

"In order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to

[590] *Ibid.*, para. 37.
[591] *Ibid.*, para. 38.
[592] McGill Centre for Human Rights and Legal Pluralism, *Amicus Curiae* Brief in "The Matter of the Co-Prosecutors' Appeal of the Closing Order against Kaing GUEK EAV "DUCH" dated 8 August 2008", received on 3 November 2008, para. 1.
[593] *Ibid.*, paras 7, 8 and 9.
[594] *Ibid.*, para. 10.

criminal responsibility, disciplinary responsibility or other sanctions is not of material importance".[595]

Two sets of issues arise concerning how this principle is to be applied in the context of JCE. The first set involves knowing whether the conduct adjudicated regarding the JCE mode of responsibility was in fact punishable under national law and international law at the time the crime was committed.[596] The second questions goes to the requirements of foreseeability and accessibility of this principle. As indicated above, the requirement of foreseeability is met if it can be shown that a potential perpetrator knew and was able to foresee that his conduct was punishable at the time of the events.[597]

In that case, the requirement related to the principle of *nullum crimen sine lege* will be met if it is shown that the JCE was accepted as a mode of participation, either in the eyes of international law or of Cambodian law during the period under consideration (1975-1979).[598]

In the *Tadić* Case, the ICTY Appeals Chamber relied for the most part on the jurisprudence after the Second World War to establish that "the notion of common design as a form of accomplice liability is firmly established in customary international law". The facts of the cases cited in support of JCE 3 (expanded) remotely resemble the scenarios with which the latter category is most frequently associated.[599]

The facts of the ***Almelo* Trial** present a classic JCE scenario: three individuals, each playing a different role in two murders: one fired the fatal shot, the other gave the order, and a third stayed close to the vehicle to prevent people from getting close. The military prosecutor ("Judge-Advocate"), concluding that these three individuals knew what they were doing and that each of them was present in order to kill the victim, said:

"[i]f people are all present together at the same time taking part in a common enterprise which is unlawful, each one in their [...] own way assisting the common purpose of all, they are all equally guilty in point of law".[600]

[595] *Ibid.*, para. 11.
[596] *Ibid.*, para. 12.
[597] *Ibid.*, para. 13.
[598] *Ibid.*, para. 14.
[599] *Ibid.*, para. 15.
[600] *Ibid.*, para. 18.

Although each of the accused was found guilty, those who ordered or fired the gunshots were sentenced to death. The others were sentenced to fifteen years in prison. This underscores that convictions may vary based on the role an individual plays in a JCE.[601] I agree entirely with the approach taken in the **Almelo Case**: each of the participants played a role but the sanctions had to be varied in light of their roles.

In the cases of ***Michael Seifert*** **and** ***Heinrich Nordhorn***, respectively, that were heard by the Verona Military Tribunal in 2000 and the Military Tribunal of La Spieza in 2006, the military courts emphasised the fact that the crimes had been committed through "many actions executed under the same criminal design, in concurrency with other members of the military of the same rank". In the case of ***Gerhard Sommer et al.*** in 2005, the Military Tribunal of La Spezia found that ten officers who were part of the SS were "guilty of complicity in multiple murders for having deliberately conceived, planned and executed the massacre" of 560 civilians.[602]

For me, the question that must be raised in relation to this case is whether the SS officers conceived and planned or simply carried out the orders of a plan conceived and designed by others?

Certain sources tend to confirm that category 3 of JCE was already in existence, broadly speaking, as early as the initial years following the Second World War.

Responsibility flowing from participation in a common plan has existed in one form or another in the national laws of many countries since at least the nineteenth century (among others, the first version of the French Penal Code, adopted in 1810,[603] the Indian Penal Code of 1860,[604] and the Canadian Criminal Code of 1893[605]); aspects of domestic criminal law common to many legal systems appear as an essential instrument for highlighting international criminal norms and identifying the general principles of international law. The notion of individual responsibility based on a common enterprise or a common plan developed within a number of national systems after the Second World War. This development, observed within a number of national systems, continued during the years covering the period under consideration by the ECCC, thereby tending to support

[601] *Ibid.*, para. 18.
[602] *Ibid.*, para. 19.
[603] *Ibid.*, para. 26.
[604] *Ibid.*, para. 31.
[605] *Ibid.*, para. 32.

the general concept that a JCE can be applied as a mode of responsibility at the ECCC for crimes committed during the period 1975-1979.[606]

The criminal law in force during the time period under consideration was the *Code Pénal et Lois Pénales* of 1956, published by the Ministry of Justice of the Kingdom of Cambodia. No comprehensive, reliable update of this code was done prior to 1975, and there was no jurisprudence to define its scope.[607] No clear legal basis for a JCE appears in the Cambodian Penal Code of 1956. Some of its articles allude to the concept of a common plan. They provide that indirect participation and complicity presuppose the commission of prior acts by means of instigation, instructions, provision of means, or aiding and abetting.[608]

National legal systems continued to develop the notion of criminal responsibility based on a common plan after the Second World War, but it was the *Tadić* Decision that enshrined the notion in contemporary international criminal law. It was further clarified through decisions rendered by the various international criminal tribunals.[609]

Since it was introduced in the *Tadić* Appeals Judgement, the JCE doctrine has attracted frequent criticism from scholars and accused appearing before international criminal tribunals. Disagreements concerning the application of this doctrine also appeared in the case-law of various international criminal tribunals. The controversy linked to the JCE doctrine relates to the uncertainty surrounding its legal elements, to the principle of *nullum crimen sine lege* and to the rights of the defence.[610]

Among the criticisms of the doctrine of category 3 of JCE are those expressed by **Machteld Boot**. She explains how the Appeals Chamber has turned to customary international law in its attempt to identify the mental and physical elements (*mens rea* and *actus reus*) of the collective criminal action in the language of Article 7(1) of the ICTY Statute. She does not dispute the reasoning of the Appeals Chamber concerning categories 1 and 2 of JCE but examines in depth the controversy surrounding the third category. According to her, the Chamber's finding that the notion of common design, as a form of responsibility for co-perpetrators, which is well established in customary international law is "rather far-fetched". **Boot** finds that (a) it is based on too few cases; (b) that the

[606] *Ibid.*, para. 25.
[607] *Ibid.*, para. 38.
[608] *Ibid.*, para. 39.
[609] *Ibid.*, para. 40.
[610] *Ibid.*, para. 41.

domestically adjudicated cases which the Appeals Chamber cites were not sufficiently uniform; and that (c) the domestic law that tended to support the new form of responsibility "did not incorporate customary international humanitarian law" as recommended in the UN Secretary-General's report on the ICTY Statute. What is more, **the two treaties relied on by the Appeals Chamber (the *International Convention for the Suppression of Terrorist Bombing* and the *Rome Statute*) entered into force only after the *Tadić* Appeals Judgement.**[611]

In its conclusion, **the McGill Centre** found that the doctrine of JCE was recognised under international criminal law during the time period under consideration (1975-1979). As such, JCE could be applied by the ECCC without contradicting the principle of *nullum crimen sine lege*.

As we can see, the Amicus Curiae brings to the fore some of the criticisms, specifically those expressed by **Machteld Boot**, but does not himself draw the conclusion that form 3 was not accepted under customary law.

As far as I am concerned, after a lengthy study, I have concluded, as did the Cambodian courts, that JCE 3 does not validly exist and must be discarded.

By contrast, with regard to forms 1 and 2 of JCE, I adhere to the position expressed by many, particularly by the Judges of the Appeals Chamber, but I apply it to the form of responsibility set out in Article 7 of the Statute: "**whoever planned**". Due to this, it was not necessary to create this concept which, instead of providing Judges and parties with a lucid, precise instrument, greatly complicates their task, leading the Judges, over time, to continually adjust it, to the detriment of legal certainty.

For this reason, in the future, it would be appropriate to adopt the position of the ICC, which is called on to play a major role in international justice over time, whereas the ICTY and the ICTR will become less important, being reduced to a **residual mechanism** before vanishing from the field of international justice.

[611] *Ibid.*, para. 44.

Judge Cassese's Point of View

To be thorough and to be fair, I must set forth the view of the **late President Cassese** which appears in an article entitled "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise".[612]

JCE, as a mode of responsibility in international criminal law, is a concept widely upheld by international jurisprudence.

The doctrine of JCE as a mode of criminal responsibility was first adopted by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in its Appeals Judgement in the *Tadić* Case in 1999. It was invoked by the same Tribunal and other international criminal tribunals so much so that it may be considered, despite the controversies, as a solid notion within international criminal law. This "darling notion" of the Prosecutor's[613] as the author of the article puts it, denotes a mode of criminal responsibility particularly well suited for placing all participants in a common criminal plan into the same basket of criminal responsibility.

It is now widely accepted by the international criminal tribunals that, in a case where several persons engage in the furtherance of a common plan or pursuance of a common criminal design, all of the participants in this common plan may be held criminally responsible for the perpetration of the criminal act, even if they did not physically participate in the commission of that act. In addition, they may also be held responsible in light of a certain number of well defined requirements for criminal conduct which although not initially foreseen in the common criminal design, was undertaken by one of the participants and may in some sense be considered as the natural and foreseeable consequence of such a common plan.

It is widely acknowledged, at the international level, that this mode of criminal responsibility may assume three different forms. **Judge Cassese** addresses these three forms: responsibility for a common intentional purpose, responsibility for participation in an institutionalised common criminal plan, and incidental criminal responsibility based on foresight and voluntary assumption of risk.

[612] A. CASSESE, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise", in *Journal of International Criminal Justice*, Vol. 5, 2007, pp. 109-133.
[613] *Ibid*., p. 110.

Under the first form, each one of the participants shares the same intent to commit a crime, and all are responsible, regardless of their role and position in carrying out the common criminal plan (even if they did nothing more than vote in an assembly or in a group, in favour of the implementation of such a plan). Beyond shared intent, *dolus eventualis* (which is to say, recklessness or deliberate recklessness) may be enough to consider all of the participants in the common plan criminally responsible.

For the second mode of responsibility, no previous plan is required. Nevertheless, one may legitimately hold that each participant in the criminal institution (a concentration camp, for example) is not only aware of the crimes in which the institution or its members are engaging, but also, that he or she implicitly or expressly shares the criminal intent to commit such crimes. It cannot be otherwise, because each person discharging a task of some significance within the institution, could refrain from taking part in its criminal activity by leaving it (exceptions must be made for those who, for example, merely sweep the streets or do the laundry, for they do not make a substantial contribution to implementing the common criminal purpose).

As for form 3, which concerns those participants who have agreed to the primary objective of the common criminal plan (for example, the forcible deportation of civilians from an occupied territory) but do not share the intent of one or more members of the group who further entertain the idea of committing crimes related to the main concerted offence (for example, killing or wounding some of the civilians during the process of deportation). This mode of responsibility applies only if the participant not intending to commit the "incidental" offence, nevertheless finds himself in a position to foresee its commission and deliberately takes the risk.

According to Cassese, JCE detractors support the view that this doctrine was not expressly contemplated in the ICTY Statute. They claim that Article 7(1) does nothing more than mention well-defined categories (commission, planning, ordering, instigating, aiding and abetting). Thus, adding another mode of criminal responsibility not explicitly contemplated in the Statute, constitutes unwarranted judicial creativity. The mere fact that he mentions detractors points to the fact, as I see it, that he admits that the ***Tadić*** **Decision** is far from being a matter of consensus within the International Legal Community, and that he feels the need to come to the rescue of this theory. The author of this article considers that the Appeals Chamber rightly emphasised that the task of clarifying this doctrine in greater detail is mandated by, or at least accords with the purpose of the Statute, which is to prosecute all of those responsible for serious crimes committed in the

former Yugoslavia. Thus, instead of embarking on judicial creativity, the Tribunal fulfilled its duty to discover and interpret the law in such a way as to apply it to the case before it.

Form 3 of JCE which, as indicated above, **Cassese** calls "incidental criminal liability based on foresight and voluntary assumption of risk", has attracted much criticism. There have been comments that the standard of foreseeability is unreliable. Admittedly, it is not easy for a tribunal to ascertain whether the criminal conduct of a person participating in a JCE, which lies beyond the scope of the common plan, was foreseeable by another participant and whether this other participant deliberately assumed the risk that the conduct might be realised. It would be up to the Prosecution to prove that the participant had knowledge of a *specific* fact or a circumstance attesting to the probability that the other participant might commit a crime not previously agreed upon. It would likewise fall to the Prosecution to prove that the overall circumstances surrounding the commission of the agreed crime were likely to render it highly probable, and thus foreseeable, that other "incidental" crimes would be committed.

The Prosecution must also prove that, in addition to having this knowledge, the participant in question knowingly assumed the risk that the foreseeable scenario might occur. Once again, this could be inferred from an entire range of factual circumstances.

According to the author, if the Prosecutor does not succeed in proving all of this, the charge should be denied. It would run counter to the principles of a fair trial to transfer the burden of proof onto the Defence and to require it to prove that the Accused did not know the relevant facts, did not foresee the crime and did not deliberately take the risk that the crime would be committed.

Antonio Cassese argues, at the conclusion of his article, that the latitude afforded to Judges by this concept should encourage them to proceed with caution and the greatest care when assessing evidence and establishing both the *actus reus* and the *mens rea*. According to **Cassese**, when in doubt, the Judges should be inclined to enter a finding of not guilty. As one may observe**,** while defending the *Tadić* jurisprudence, **Judge Cassese** calls on the Judges to demonstrate caution, and when in doubt, to acquit.

One question that comes to mind after reading Judge Cassese's article is whether it was absolutely necessary for the ICTY Appeals Chamber to resort to this judicial construction, which was not provided for in the Statute.

The Issue Raised in the Case of Duško Tadić

What in fact was the issue raised before the Appeals Chamber that led it to this jurisprudential concept, presented by some as landmark jurisprudence, and by others as heresy?

The issue was relatively simple and was set out in Chapter V of the Appeals Chamber's Judgement of 15 July 1999 with regard to the finding of inadequate evidence to support the Accused **Duško Tadić**'s participation in the massacre at Jaskići.

Duško Tadić was born on 1 October 1955, in Kozarac.[614] In 1990, he joined the Serbian Democratic Party (SDS).[615] In 1990 or in early 1991, he opened a cafe in Kozarac.[616] On 15 August 1992, he was elected President of the local Council of the SDS in his home town.[617]

In connection with his trial before the International Criminal Tribunal for the former Yugoslavia, *inter alia* for the crime of murdering five Bosnian Muslim men who were found dead in the village of Jaskići after an attack on the village by an armed group that included Tadić,[618] the Accused argued in his defence that he had lived continuously in Banja Luka and that he did not leave that town after returning there on the evening of 4 June 1992, following the second of two visits to Kozarac to collect his personal belongings from his home and in his café and prior to leaving for Prijedor on the morning of 15 June 1992.[619]

He was found criminally responsible by the ICTY pursuant to Article 7(1) of the Statute. Although the Trial Chamber found him guilty of several other counts of violation of the laws or customs of war and of crimes against humanity, and despite its finding that Tadić had been a member of an armed group, the Chamber found that it could not **"on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men or any [others at Jaskići]"**.[620]

The Trial Chamber stated as follows:

[614] *The Prosecutor v. Tadić*, Judgement, 14 July 1997 ("*Tadić* Judgement"), para. 180.
[615] *Tadić* Judgement, para. 182.
[616] *Tadić* Judgement, para. 181.
[617] *Tadić* Judgement, para. 188.
[618] *The Prosecutor v. Tadić*, Second Indictment, 14 December 1995, para. 12.
[619] *Tadić* Judgement, para. 364.

> "*The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part; it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible, that caused their death.*"[621]

Based on this, the Trial Chamber had ruled that the Accused was not guilty because it found no evidence that might permit it to attribute some role to the Accused in the murders of any one or of all five of the men from this village. The Prosecution appealed this fact, indicating in its ground of cross-appeal (*cf. paragraph 172 of the Appeals Judgement*) that:

> "*[t]he Trial Chamber, in paragraph 373, page 132 [of the Judgement], erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part of the killing of the five men or any of them, from the village of Jaskići.*"

What is of interest here is finding out the basis on which the Prosecution lodged its appeal.

The Prosecution submitted that the core principle of the common purpose doctrine is that if a person knowingly participates in a criminal act in the company of others, he or she may be held responsible for any unlawful act that is the natural consequence of the common purpose (*cf.* paragraph 175).

By using this approach, the Prosecution is placing itself beyond the view of the Trial Chamber, inviting the Appeals Chamber to follow its *theory of common purpose*.

The Defence responded by arguing that it was necessary to establish that the common purpose in which the appellant allegedly took part envisaged murder (whereas ethnic cleansing could have been carried out by other means) (*cf.* paragraph 177). In paragraph 181, the Judges of the Appeals Chamber worked from the observation that five individuals were found dead after the departure of the armed troops, adding that nothing else was known about the circumstances surrounding these murders. Out of simple logic, the Appeals Chamber should have found that the Prosecution had not established **beyond a reasonable doubt** that the murders were attributable to the members of the

[620] *Tadić* Judgement, para. 373.

groups in which Duško Tadić took part and that, for this reason, the benefit of the doubt should have gone to the Accused.

The Appeals Chamber did not follow this approach in that case because it "evaded" this point and focussed on the question at hand which was knowing whether in international criminal law, the appellant could be held criminally responsible for the murder of five men at Jaskići even though nothing proved that he personally killed any particular one of them (*cf.* paragraph 185).

After raising that question, the Appeals Chamber relied on Article 7(1) of the Statute, which defines the criteria for individual criminal responsibility, to indicate that, bearing in mind the general principles of law, it is appropriate to determine whether criminal responsibility for participation in a criminal purpose falls within the ambit of Article 7(1) of the Statute. It should be noted that this assertion is not supported by a single footnote, with the Appeals Chamber stating simply: "[proceeding on] the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all of the [other] members of the group". (*cf.* paragraph 195).

The Appeals Chamber then continued its reasoning, correctly noting that many international crimes are committed in wartime and that most of them "*do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design*. *Although only some members of the group may physically perpetrate the criminal act ... the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question*". (*cf.* paragraph 191).

The Judges added that "*[u]nder these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act [is tantamount to disregarding] the role as co-perpetrators of all those who in some way made it possible for the perpetrator [to physically] carry out that criminal act*" (*cf.* paragraph 192) and "*[a]t the same time, depending on the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility*".

[621] *Tadić* Trial Judgement, para. 373.

Does this conclusion imply that the Appeals Chamber holds that the perpetrator, the accessory and the instigator have the same criminal responsibility?

I am unable to agree with this observation, because the appropriate manner to punish criminal conduct depends on the **specific role** played by the Accused.

Starting with the concern that anyone who has committed a crime should be prosecuted, the Appeals Chamber then states that "*[t]his interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design*" (*cf.* paragraph 193). Without any context, the Appeals Chamber upholds the need to target a group, and on this basis, proceeds to hold that the members of the group to which Duško Tadić belonged were acting with a *common purpose*.

I find it unfortunate that in order to punish at any cost the participant in a group for which there is no evidence, the Appeals Chamber resorted to this **intellectual construction** whereas it would have been far simpler to **solely concentrate on** those forms of responsibility contemplated under Article 7(1) of the Statute, placing the case of Duško Tadić within the classic modes of responsibility contemplated within that article.

(i) *Did he actually plan the murders of the five men in this locality?* This should have been established by the evidence.

(ii) *Did this Accused incite fellow group members to commit these five murders?* It was up to the Prosecution to try to establish this through the evidence it had.

(iii) *Did the Accused Tadić issue orders, as a witness in fact reported?* Once more, it was up to the Prosecution to establish this.

(iv) *Did the Accused physically commit the murders?* It fell to the Prosecution to determine through a ballistics analysis whether the projectiles came from a single weapon or various weapons. It fell to the Prosecution to do this work – which it evidently did not do – which would have made the work of the Judges easier from the outset.

Lastly, it appears that the breadth of this concept would accrue to the benefit of a weak Prosecution; this, in my opinion, is not the role of the Judge, who must be **strictly** limited to the application of the very specific forms of responsibility contemplated under the Statute, not to construct theories or hypotheses to fill a void in the investigation.

It should also be noted that the Accused was convicted for an entirely different set of counts and that it was not necessary to "polarise" this event despite its being serious as it led to the death of five victims.

The approach of the Appeals Chamber in the *Tadić* Case, further to the Prosecution's written submission concerning the theory of the common plan, developed this jurisprudence to make sure that a person will not lie beyond the reach of prosecution in the event his conduct does not fall within one of the modes of responsibility defined under Article 7(1) of the Statute.

The approach of the Judges of the Appeals Chamber was therefore rooted in their concern to avoid conferring impunity on a participant in the crimes defined in Articles 2, 3, 4 and 5 of the Statute. At first glance, one can only embrace such an approach if there is a legal vacuum because crimes must not go **unpunished**.

From my point of view, the "hitch" in this approach is more or less that **a group** is prosecuted to the detriment of **individual criminal responsibility**, while a lax approach is taken to the evidence.

However, if one examines this jurisprudence thoroughly, one realises that the Judges of the Appeals Chamber created a **form of "umbrella responsibility"** not contemplated by the Statute (JCE) which encompasses the various modes of responsibility related to planning, instigating to commit, ordering, commission, and aiding and abetting.

This "umbrella responsibility" derives from the idea – a point of view I agree with – that committing a crime on the ground, in most cases, is merely the result of a common plan initiated much earlier at the **planning stage**, of a media relay instigating commission, of orders given to military or civilian authorities, and of crimes being committed by order-takers generally quite remote from the instigators and/or through aiding and abetting by other persons acting as accomplices.

Though I can follow the way in which the Appeals Chamber **conceptualises** this mode of responsibility, I **part ways** when it comes to tying this mode of responsibility to commission. If it had to be assigned to a specific mode of responsibility, it ought to have been **planning**. If there is a criminal plan, at the outset there can only be a principal instigator, assisted in his thinking by other "brains", who can be persuaded to elaborate the plan in all its political, administrative, media and military dimensions. As a general rule, the "brain trust" will be led by a mastermind who will be the *charismatic leader* of the group (Hitler, for example). The instigator cannot do everything alone, he needs people who can transmit information and execute orders, which is why the members of the JCE are positioned at various echelons.

There will be some who approve the plan before the media and those concerned (incitement to commit); there will be others who issue orders to the administrative and military authorities – these will be primarily the ministers or generals; and then, during an armed conflict, the plan will be implemented on the ground, meaning military operations that do not result merely from mistakes, but from the commission of crimes that are part of the common plan (murders, forcible transfers, inhuman treatment, etc)..

At the same time, it may be that at certain stages of the implementation of the plan, there will be a need for others to take over in order to achieve it through acts of aiding and abetting.

It seems to me, therefore, that the theory set out by the *Tadić* Chamber, which I will recall started with the best of intentions, was poorly applied, because it was applied to the level of commission, whereas it should have been implemented, in my view, at the level of planning, meaning that it was unnecessary to create an "umbrella" form of responsibility; it was enough to say that the **common plan** could be devised only within the context of a "rudimentary planning process", and that the participants in this **rudimentary planning process** were members of a joint criminal enterprise (JCE), if crimes were committed in furtherance of the common plan; on that basis, it would have been possible to charge **each member of the JCE** with individual responsibility under planning, provided that they participated in developing the common plan in some material way.

3. International Armed Conflict

The application of Article 2 of the Statute to the grave breaches of the **Geneva Conventions** of 1949 implies an **international armed conflict.**

The Tribunal's jurisprudence has defined the scope of the legal concept of international armed conflict.[622]

There is an **international armed conflict** when there are belligerent parties, pitting State A against State B through their respective armed forces.[623] Paragraphs 27 *et seq.* of the Judgement in the *Hadžihasanović and Kubura* Case[624] raise the issue of international or non-international armed conflict. The Appeals Chamber, in a decision taken during the pre-trial conference on 21 February 2003, had held that the armed conflict in the case before it (*Hadžihasanović and Kubura*) was, by default, internal in nature.[625] The Appeals Chamber at that time left the door open for the Prosecution if it wished to plead in favour of an international armed conflict, which it did not do. The *Hadžihasanović and Kubura* Chamber, working from that Indictment, found that there had been no reference to an **international armed conflict** in Central Bosnia in 1993.

As such, if a Judgement vested with the authority of the matter adjudicated found that there was no international armed conflict in Central Bosnia in 1993 at a time when the ABiH and the HVO were fighting each other on the ground, can one take an opposite stand? All the more so because the evidence adduced by the Prosecution was supplied by that very same Prosecution – by definition a unique occurrence at this Tribunal.

According to the Prosecution, there was an armed conflict between the Croats and the Muslims which was of an international nature because the HV was participating directly in the conflict alongside the HVO; Croatia, in its view, wielded overall control, arguing that **General Praljak**, who wielded control over the armed forces of the HZ-HB, was in reality working on behalf of Croatia. I do not intend to address the issue of the Prosecution's argument regarding the **Accused Praljak** because I share the opinion of the Chamber which held that he had no effect whatsoever on the character of that conflict. What I propose is to focus solely on the **Croatian Army's participation in the conflict** and **the issue of the extent to which it may have wielded control**. It is appropriate to go back and analyse the *Blaškić, Kordić* and *Naletilić* cases in succession.

[622] ICTY, *Tadić* Appeals Judgement, 15 July 1999.
[623] *Tadić* Appeals Judgement, para. 84, "an armed conflict is international if it takes place between two or more States".
[624] ICTY, *The Prosecutor v. Enver Hadžihasanović,* Judgement, 15 March 2006, para. 27.
[625] ICTY, *The Prosecutor v. Enver Hadžihasanović*, Decision Pursuant to Rule 72 on the Validity of the Appeal, 21 February 2003.

In the *Blaškić* Case, there was a finding of international armed conflict. In that case, at paragraph 75 *et seq.* of its Judgement, the Chamber found that Croatia had intervened in Bosnia and Herzegovina, and that the presence of soldiers had been established.[626]

Soldiers allegedly entered Livno, Tomislavgrad, after indications that **General Praljak** had been seen in Mostar.[627] The *Blaškić* Trial Chamber referred to a complaint lodged by the government of Bosnia and Herzegovina on **13 May 1993** against the armed aggression on its territory, insisting that the units of the State of Croatia be immediately withdrawn from the territory of Bosnia. In paragraph 89, the Trial Chamber referred, furthermore, to the existence of a document providing details of the presence of HVO forces in Bosnia and Herzegovina (*cf.* Resolutions 752 of 15 May 1992 and 787 of 16 November 1992). Likewise, the Secretary-General of the United Nations informed the Security Council on 17 February 1993 of Croatia's report to the HVO on the support provided in terms of equipment and weapons supply. It should be noted that the evidence in this letter refers to the limited support provided to some individuals and to several units of volunteers.

Likewise paragraph 92 mentions that Colonel **Miro Andrić** is being sent to the south by Minister of Defence **Gojko Šušak.**[628] The *Blaškić* Trial Chamber then describes in paragraphs 95 *et seq.* an indirect intervention by the HV, which wielded indirect control over the HVO and the HZ-HB. The Appeals Chamber was seized when an appeal contesting the international character of the conflict was lodged and thus came to examine this issue. In paragraph 167 it described the position of the appellant, who contested the existence of an international armed conflict.[629] After recalling in paragraph 170 that the general requirements for the application of Article 2 of the Statute were established in the Tribunal's case-law, the Appeals Chamber set out its reasons in paragraphs 185 *et seq.*, dismissing the theory of relations between the Republic of Croatia and the belligerents. In paragraph 181, it addressed Croatia's involvement in the conflicts and referred to the order given by **General Roso**; the HB intervention against the ABiH being unlawful, as it followed a concerted plan. The Appeals Chamber did not pursue this analysis further.

In the *Kordić* Case, the Trial Chamber developed in greater detail the matter of Croatia's intervention in the conflict. It studied the military observer reports, which are UN reports.[630] In paragraph 84, mention is made of several witnesses who took part in military observation bodies

[626] ICTY, *The Prosecutor v. Tihomir Blaškić*, Trial Judgement, 3 March 2000, paras 75-84.
[627] ICTY, *The Prosecutor v. Tihomir Blaškić*, Trial Judgement, 3 March 2000, para. 86.
[628] ICTY, *The Prosecutor v. Tihomir Blaškić*, Trial Judgement, 3 March 2000, para. 92.
[629] ICTY, *The Prosecutor v. Tihomir Blaškić*, Appeals Judgement, 29 July 2004, para. 167.
[630] ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez,* Judgement, 26 February 2001, para. 80.

and who testified to the presence in Bosnia and Herzegovina of troops from the Croatian Army.[631] It should be noted that the Chamber found that there was no evidence establishing the presence of the Croatian Army in Central Bosnia… Brigadier General **Alistair DUNCAN** told of the presence of soldiers along the Route Triangle (a segment of the road between Tomislavgrad and Prozor). On one occasion, Major **RULE** saw insignia of the HV unit type.[632] **A. WILLIAMS** encountered a group from the Croatian Army[633] (the insignia were from the HV fourth brigade) **in Prozor**. A witness along the Route Triangle saw a convoy of 50 vehicles carrying a battalion of HV soldiers headed for Prozor (Witness 4D T(F), p. 13048).

The *Kordić* Trial Chamber referred to internal UN reports, specifically a letter dated 28 January 1994 addressed to the President of the Security Council by the Permanent Representative of Bosnia and Herzegovina; the letter reported the presence of 12 brigades. It should be noted that the representative's response did not deny that there was presence of troops along the border in compliance with the agreements signed by both countries. On 17 February 1994, the President of the Security Council reported the withdrawal and that there were over 5,000 soldiers left in Bosnia and Herzegovina. He added that these soldiers removed their insignia and replaced them with those of the HVO. There is mention, moreover, of several HVO documents referring to the involvement of Croatian Army troops in the conflict,[634] particularly an order from the HVO headquarters[635] requesting that the members of the HVO remove their insignia. **The *Kordić* Trial Chamber** considered that this withdrawal reflected "not only the presence of Croatian Army soldiers participating in the conflict in Bosnia and Herzegovina between the Bosnian Croats and the Bosnian Muslims, but also an attempt to conceal that presence".[636] It should be noted in connection with this matter that the Defence argued that **Major Filip FILIPOVIĆ**, who testified under oath, claimed that no member of any unit of the Croatian Army had fought in Central Bosnia.

The *Kordić* Trial Chamber found that no troops from the Croatian Army had been seen in Central Bosnia but, that Croatian soldiers had been observed in the neighbouring areas and were thus providing strategic support; this led the Chamber to find that there was a conflict between Croats and Muslims in Bosnia and Herzegovina that was of an international character, due to the

[631] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Judgement, 26 February 2001, para. 84.
[632] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Judgement, 26 February 2001, para. 87.
[633] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Judgement, 26 February 2001, para. 88.
[634] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Judgement, 26 February 2001, para. 97.
[635] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Judgement, 26 February 2001, para. 92.
[636] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Judgement, 26 February 2001, para. 98.

intervention of Croatian troops in the conflict.[637] The *Kordić* Trial Chamber then examined the second criterion for establishing the international status of the conflict, namely, **overall control**. For the Chamber, Croatia assisted the HVO with logistical support. As for the core of this jurisprudence, planning and coordination, the *Kordić* Trial Chamber noted that the Prosecution produced 143 exhibits but that their weak probative value involved no description of Croatia's expansionist aims in Herzegovina; this allowed it to find that there was overall control.[638]

It thus appears that the ***Kordić* Trial Chamber** based its findings on the presence of HV soldiers, which was not contested by the various Accused in the *Prlić* Chamber; however, their presence in the south of Croatia was explained by the activity of Serbian forces and by the protection of the Croatian territory, not by the expansion of Croatia into Bosnia and Herzegovina. As far I am concerned, the fact that the documents highlight the soldiers changing insignia from the HV to the HVO is not a subject of dispute because the HVO had insignia and a flag that were distinct from those of Croatia.

Concerning the international documents which are especially important, it should be noted that the United Nations Secretary-General himself spoke of "several individuals" wearing HVO insignia. The Appeals Chamber Judgement of 17 December 2004 in the said case is striking with regard to the matter of international armed conflict.[639] The Appeals Chamber states that there is no evidence to indicate the presence of Croatian troops in Central Bosnia.[640] In doing so, the Appeals Chamber thereby ruled that the orders issued by the various HVO units were conclusive.[641] In paragraph 361, it addressed the heart of *Tadić* jurisprudence, namely, the participation, coordination and organisation of military operations.[642]

In the following paragraph, the Appeals Chamber recalled what the ***Kordić* Trial Chamber** found and concluded paragraph 369 with the following sentence "The Chamber finds on the basis of the evidence set out above a reasonable trier of fact could have found beyond reasonable doubt that Croatia exercised **overall control** over the HVO at the relevant time", thereby finding that Croatia wielded control, while referring, in footnote 574, to the *Blaškić* jurisprudence at paragraph 175. If one reads paragraph 175 of the *Blaškić* Appeals Judgement, there is no answer to that question, save

[637] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Judgement, 26 February 2001, para. 109.
[638] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Judgement, 26 February 2001, para. 145.
[639] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Appeals Judgement, 17 December 2004.
[640] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Appeals Judgement, 17 December 2004, para. 355.
[641] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Appeals Judgement, 17 December 2004, para. 359.
[642] ICTY, *The Prosecutor v. Dario Kordić and Mario Ċerkez*, Appeals Judgement, 17 December 2004, para. 361.

for the reference "[g]iven that the HVO was operating *de facto* as Croatia's armed forces [....]". In my view, the reasoning of the *Kordić* Trial Chamber and of the Appeals Chamber establishing the planning of military operations is debatable because there is not one decisive piece of evidence. The *Tadić* jurisprudence was not concretely put into practice. There seems to be confusion between **the planning of military operations and logistics**, which is not the same thing. In my opinion, the operations by the Croatian Army in Zagreb would have had to target an offensive attack in Bosnia and Herzegovina. We have no such evidence. As the ***Blaškić*** and ***Kordić*** jurisprudence is not persuasive, we must examine the ***Naletilić*** **Case**.

In the ***Naletilić and Martinović*** Case, it should be noted that the Chamber stated (paragraph 18) that Croatia and "the BH Muslims organised a joint defence against the Serb forces (…). The Muslims formed their own military units that were under the overall command of the HVO. This meant that while opposing the Serb forces, the Croats and the Muslims fought under the joint command of the HVO".[643] **The *Naletilić* Trial Chamber**, as we did, reviewed the general requirements for the application of Article 2 of the Statute. This is laid out in paragraphs 177 *et seq.* The Trial Chamber recalls the jurisprudence of the Appeals Chamber and then addresses the direct intervention of the Croatian Army in paragraph 189, stating that the *Naletilić* Defence argued that Croatia intervened in 1992 to fight against the Serbian forces, not during the 1993 conflict between the HVO and the ABiH (Defence Final Trial Brief, para. 95).

Concerning the presence of the HV on the territory of Central Bosnia, the Defence for the Accused Martinović stated that this involved soldiers or officers present in the territory of Bosnia and Herzegovina who were members of the HV and willingly joined the HVO once the war in Croatia had ended. **The *Naletilić* Trial Chamber** observes, as in the ***Kordić*** **Case**, that witnesses saw troops from the HV in several locations (these are international witnesses). **The *Naletilić* Trial Chamber** observes, in paragraph 195, that witnesses for the Defence testified that the soldiers from the HV were volunteers who had returned to defend their homeland.[644] **The *Naletilić* Trial Chamber** did not accept this view of the facts. The issue of control is analysed in paragraph 198, which explores the ties with the Bosnian Croats, obtaining Croatian passports and nationality facilitated, and the right to vote in Croatia. The Trial Chamber was satisfied that Croatia purchased military hardware for the HVO, with the requests being addressed to **Gojko Šušak.** It should be noted that the ***Naletilić*** **Trial Chamber** did not at any time address the matter of the planning of military operations.

[643] ICTY, *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, Trial Judgement, 31 March 2003, para. 18.

Here is my conclusion: regarding the first layer of irrefutable evidence, there were **Resolutions by the Security Council** calling for Croatia to withdraw its forces in 1992 and the sudden emergence of Croatian forces is connected to the incidents with the Serbs. It appears that the **Republic of Croatia** formally disputed the view of the representative of Bosnia and Herzegovina, and that the Secretary-General of the United Nations remained cautious, pushing aside the problem by referring to the presence of "certain individuals". Admittedly, international witnesses saw either vehicles or soldiers. It is regrettable that the international experts were unable to take advantage of the assistance of photographers to take pictures of soldiers and their insignia with a zoom lens. Notwithstanding this, I have my doubts: weren't the said vehicles and soldiers integrated into the HVO troops, hence the changes of insignia cited by various witnesses?

Indisputably, the material and logistical assistance to the HVO do not suffice to be characterised as **overall control**; that also requires **the planning of military operations**, and with respect to this criterion, no evidence from anyone was able to establish it. The only exhibit admitted into evidence, which is undated, refers to the 5th Tactical Group, without further detail. It may be that this document concerns the 1992 period pitting Croatia against the Serbian forces; it would not then be relevant. As a reasonable Judge, I must be satisfied beyond a **reasonable doubt** that an intervention by the Croatian Army took place. The fact that this intervention amounted to General Praljak or Petković sending officers from the Croatian Army is not enough to say that the HVO was under the **total control** of the HV.

Although there is limited evidence to confirm the presence of members of the Croatian Army, these documents must be placed in the context of the times, and the question must be scrutinised from every angle.

A document I deem important in this regard is Exhibit P 00361.

This document is an order from **General Bobetko** on 3 August 1992. It is indisputable that this order concerns Herzegovina, but what does it say? It asks the HVO to take over, and for purposes of this takeover, it identifies the localities as well as the positions of the HVO units, from left to right. The date is significant: 3 August 1992. It is important to know that there was a conflict between the Croatian Army and the Serbs not far from there, in Dubrovnik, from 1 October 1992 to 26 May

[644] ICTY, *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, Trial Judgement, 31 March 2003, para. 195.

1992. The Croatian Army was deployed as part of this conflict, and it was entirely logical and natural for it to be present in Herzegovina, just as it was logical for it to leave the territory of Herzegovina pursuant to the Security Council Resolutions, which is how this document came about.

However, this document goes much further as to the "disappearance" of the HV and its replacement by the HVO. Paragraph 1.3 (c), which pertains to the artillery, indicates that the artillery units, from the 116th and the 114th Brigades of the Croatian Army had to join the HVO. So the HVO "absorbed" Croatian units, and the HV brigades were dissolved.

The jurisprudence of this Tribunal, starting with *Tadić* Cases I and II, determined that as regards the Serbs (and not the Croats) the Federal Republic of Yugoslavia *via* the JNA, and later the VJ, controlled Bosnian Serb forces (VRS). The Trial Chamber applied the effective control test, derived from the jurisprudence of the ICJ, whereas the Appeals Chamber used the overall control test. The Appeals Chamber did in fact hold that for group actions with a hierarchical structure, the "overall" criterion had to be applied, specifying that in addition to equipment and financing, there had to be planning and coordination of military activities. Thus, overall control goes beyond technical and financial aspects and must encompass aspects of planning and monitoring military operations (*cf.* paragraph 145 of the Appeals Judgement).

Can we say in this case that Document P 00361 is a document about military operational planning when in fact it concerns the changing of these units?

I would have reached the opposite conclusion had I possessed irrefutable evidence, particularly military documents. Admittedly, these could have been destroyed or covered up, but one is bound to conclude that the majority of combatants from Croatia were originally from the Republic of Bosnia and Herzegovina. They had dual nationality in some sense and **all of them** declared themselves as volunteers. The Prosecution theory is based on the initial postulate that the HVO was merely an organ of the HV army. Taking this approach, this Chamber should be able to find traces of this in the presidential transcripts. We do have several of these transcripts which mention meetings in Zagreb with Tuđman and certain leading figures from the HVO or political authorities of the HZ-HB (Mate Boban).

These read and decrypted snippets of conversation do not in any way attest to a direct intervention in military operations, with debriefing and orders. We do not have this at any point in time.

However, we do possess abundant evidence to the contrary. For instance, on the day following the events at **Stupni Do**, there was a meeting in Zagreb with **Tuđman**, who learned about the incident by asking what had happened and appeared to be utterly unaware of the military operation. In view of this, what are we to make of a Commander in Chief of the Armed Forces who is not in the know? Moreover, as the Chamber rightly indicated, in the list of conflicts pitting the ABiH against the HVO: there was an armed conflict between the HVO and the ABiH: in Prozor in October, in Gornji Vakuf, in Mostar, in the towns of Stolac and Čapljina (…).

All these events are only supported by documents referred to in the footnotes. If the Croatian Army is indeed behind every single one of these conflicts, documents must exist, but on analysing documents admitted into evidence, one observes no ongoing offensive, but instead **conflicts spread out over time** and the International Community constantly intervening to obtain ceasefires. Does this mean that all these events were coordinated and planned from Zagreb? In that case, there ought to be at least **one document**, which we do not have. Without going into the the Defence's arguments which dispute the contemporaneous armed conflict, and especially the existence of a conflict connected to an overall plan, it appears that some of these events might be considered as reactions to the ABiH offensive. There is no statement anywhere that a sizeable ABiH offensive took place in Central Bosnia, but according to the theory of international armed conflict, it must have been dicussed in Zagreb, given the intervention of the Croatian Army in response to the unfolding ABiH offensive. Could the Croatian Army also possibly be a routed army even though it had military weapons and equipment?

Furthermore, it could be paradoxical for the **Republic of Croatia** at the very moment it had an enormous problem on its territory with the existence of Serbian *Krajina*, which it did not resolve until Operation Storm in 1995, to mobilise its armed forces in Bosnia and Herzegovina, which does not appear to have been its primary objective from a military perspective. The danger facing Croatia, which was the subject of much comment during the hearings, was the attack of the Serbian forces on **Dubrovnik**, which forced the Croatian Army to use the strip of land along the coast to strike back and to remain in that area with an armed force to prevent any repetition of the Serbian offensive. From all of this, it is clear that the Prosecutor was unable to prove beyond a reasonable doubt that the Croatian Army intervened militarily in Bosnia and Herzegovina, that it wielded overall control over the HVO and that it planned all the military operations itself.

To find that there was an international armed conflict, the Prosecution would have had to produce **irrefutable evidence**. I cannot take that position, particularly as the Indictment itself does not stress

the concept of international armed conflict, offering a mere two lines in paragraph 37, where it says, "[i]n early July, Herceg-Bosna/HVO forces, supported by (and involving) the government and armed forces of the Republic of Croatia, launched a massive campaign to attack, arrest and cleanse Bosnian Muslims from areas claimed to be part of Herceg-Bosna (including the municipalities of Mostar, Prozor, Stolac, Čapljina and Ljubuški)".

It should be noted that paragraph 37 limits Croatia's participation to a very short period – July – and that at no other juncture in the Indictment is the role of the Croatian Army mentioned. Moreover, in its Pre-Trial Brief, the Prosecution might have explored this issue in detail, using footnotes regarding documents, comments and statements. There are no footnotes whatsoever. The first footnote is 141 which concerns the **Fourth Mazowiecki Report** on the confinement of Bosnian Muslims. The Prosecution's own argument contains no reference to this.

Moreover, during the Prosecutor's case, did he call witnesses from the Croatian Army who said that there was in fact an ongoing intervention by the Croatian Army that included planning? It must be noted that the Prosecution did not stress this point. Of course, during cross-examination, the international witnesses, with a few exceptions, said that they saw vehicles, but I did not draw the conclusion that they automatically belonged to the Croatian Army because a vehicle may be seen in the Republic of Bosnia and Herzegovina with the emblem of the Croatian Army without being driven by a member of that army or belonging to that unit. It could have been made available to the HVO. This is what happens with vehicles belonging to international missions, which are always painted in white but which sometimes, when paint is in short supply, preserve their original colour, leading to confusion.

On several occasions, the international observers saw soldiers from the Croatian Army in the Republic of Bosnia and Herzegovina. Two reports refer to this: the **Garrod Report** (1D 00815) and the **Beese Report** (P 02620).

The **Garrod** Report says:

- in late January and in February, several reports spoke of the arrival of HV forces in support of the HVO. Despite Croatian denials, the members of the HV were seen by the ECMM and UNPROFOR, going in the direction of Prozor and Gornji Vakuf. Prlić admitted that certain volunteers from the HV were there to defend their country. We never knew clearly whether the arrival of HV troops was offensive or defensive in nature. Had it been offensive in nature, it could

have hit the Prozor/Gornji Vakuf zone in three different ways, which never happened. It is possible that the threat of sanctions against Croatia gave rise to a certain reticence to intervene militarily in a major way in Bosnia.

- in late February, a ceasefire was declared officially between the HVO and the ABiH.
- in early March, various attempts were made to take humanitarian aid to Maglaj. During the last week of March, a joint operation by the ABiH and the HVO led to the recapture of Maglaj.
- During that same week, Tuzla Airport was opened.

The **Beese Report** says:

"The existence and extent of HV involvement has always been difficult to define and the many reports provided by the ABiH have seldom been confirmed by ECMM, UNMOs or UNPROFOR. However, the trickle of confirmed proof and particular circumstances continue to add weight to the knowledge that the HV military have been [...] involved in the conflict between the HVO and the ABiH, or in holding the line against the Serbs while the relieved HVO forces moved against [the Muslims]. In Gornji Vakuf, in January 1993 for example, ABiH resistance [hastened the HVO's departure] despite the arrival of T55 and M47 tanks and recently manufactured ammunition which the HVO were thought not to possess.

"Military engagements confirm that:

- [...] troops in Tomislavgrad, Ljubuški and Čapljina [were seen] wearing HV badges [around their arms or on their HVO insignia].
- [military vehicles carrying HV registration plates, including tanks, mobile generators and trucks, were seen freely crossing the border between Croatia and BiH.
- [...] troops in Tomislavgrad [...] were admitted to being the Filipović Brigade from Zagreb and to having taken part in the HVO offensive against Jablanica.

"HV connections with Herzegovina are strong for reasons of geography, religion and culture [...] the relationship is cemented by the high political and military offices held in Zagreb by Croatians from Herzegovina. The Minister of Defence [...] and his Chief of Staff **[Slobodan] Praljak** are both from Herzegovina [and have frequently] visited Mostar. [The two countries are likewise united on the ground.] They have open borders [...] [with a single police force] and troops with identical uniforms [...]. Their forces use the same weaponry [...] quite unavailable in Yugoslavia before the

conflict. [Arms dealers, often from Germany, frequent the office of Bruno Stojić, HVO Minister of Defence.]

"[It is not in the interest of the HV to be seen in Bosnia and in practice] there is much that can be done to hide their activity. The ECMM does not operate at night, which [provides much cover for the movement of military units] particularly insofar as the HVO's typical tactic has been to initiate offensive actions at night [...] for the safety of international observers. A recent case of this is the offensive against Jablanica from Prozor.]

"[The] recent [...] discovery [of a convoy transporting a helicopter and Croatian dinars suggests that HV support [...] continues. The sympathies of the Croatian people for the HVO stance [...] ensure that support continues at every level [...].

"Evidence for HV involvement exists. It has had a considerable impact on the military balance in favour of the HVO."

Proceeding further with this analysis, it is appropriate to note that the Indictment charges the Accused with grave breaches of the Geneva Conventions as contemplated under Article 2 of the Statute.

While a strict reading of this article may suggest at first glance that the elements of these offences could be met in the event of an armed conflict, the Appeals Chamber in the ***Tadić*** Case ruled in favour of its application **solely** in cases of **international armed conflict.**

In the instant case, the conflict pitting the **HVO** against the **ABiH** was an international armed conflict pitting Croatia – through the HVO (the military organisation of the Croatian Defence Council) – against the Republic of Bosnia and Herzegovina?

Before this question can be answered, it is necessary to go over the history of precedents resulting from a conflict within a State with an armed group aided or assisted by a foreign State.

In the case of Nicaragua against the United States of America concerning military and paramilitary activities in Nicaragua, the Court found: "the United States of America, by producing in 1983 a manual entitled *Las Operaciones sicologicas en guerra de guerillas*, and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of

humanitarian law, but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America".[645]

The Court explains that: (a) the evidence available to it would indicate that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but are insufficient to demonstrate their complete dependence on United States aid and that it was impossible to equate the *contra* force with the forces of the United States for legal purposes;[646] (b) the Court cannot establish the exact extent of dependency on the United States authorities;[647] (c) even if preponderant or decisive, the assistance under various guises by the United States is still insufficient in itself, on the basis of the information in the possession of the Court, to attribute to the United States the acts committed by the *contras* during their military or paramilitary operations in Nicaragua;[648] (d) even the overall control by them over a force with a high degree of dependency on it does not mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law;[649] (e) for the United States to incur legal responsibility, it would in principle be necessary to prove that the United States had effective control of the military or paramilitary operations during which the violations in questions were committed; (f) the Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they might have committed are imputable to that State. For this reason, the Court found that the *contras* remained responsible for their actions and that the United States was not obliged to answer for them.[650]

It should be noted that the ICJ emphasises the concept of **effective control** of operations; thus, it is not enough to assist, it is required to direct – that is to say, to have authority over – the military operations.

The Court recalls that *Common* Article 3 of the four Geneva Conventions of 12 August 1949 lays down certain rules that must be applied in the case of armed conflicts that are not of an international character. According to the Court, no doubt remains that, in cases of international armed conflicts,

[645] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*(ICJ), Merits, Judgment of 27 June 1986, paras 215 to 220.
[646] *Ibid.*, para. 110.
[647] *Ibid.*, para. 112.
[648] *Ibid.*, para. 115.
[649] *Ibid.*

these rules also constitute a threshold distinct from the more elaborate rules that also apply to such conflicts; these are "elementary considerations of humanity;"[651] applicable to the contentious proceedings at hand.[652]

The Court affirms that the conflict between the *contra* forces and the government of Nicaragua is an armed conflict "**not of an international character**" and that the actions of the *contras* against the Government of Nicaragua are governed by the law applicable to such conflicts. By contrast, the actions of the United States in Nicaragua and against it fall under the legal rules germane to international conflicts. According to the Court, identical threshold rules applicable to international armed conflicts and to conflicts lacking this character render any attempt to decide whether the actions at issue must be assessed in connection with the rules for one or the other category pointless. The relevant principles are to be sought in Article 3, drafted with identical language in each of the four Conventions of 12 August 1949, which are explicitly directed towards armed conflicts of a non-international character.[653]

Unquestionably, the ICJ confirmed that the conflict in the case before it was of a non-international character, notwithstanding the assistance of the United States of America.

In ruling on whether there was an armed conflict with an international or a non-international character in the case of *Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II of the ICC initially noted that neither the Court's legal instruments nor international humanitarian law provided an overall definition of the concept of armed conflict with an international character or a non-international character.[654] It turned to the Rome Statute,[655] to the applicable treaties,[656] to the jurisprudence of the Court,[657] as well as to the case-law of the ICTY[658] and the ICTR.[659] Thus, after having reviewed the totality of the evidence presented, "the Chamber finds that the armed conflict on the CAR territory

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[650] *Ibid.*, para. 116.
[651] *The Corfu Channel Case* (ICJ), "Appeals Judgment", 4 April 1949, Reports 1949, p. 22 (French), para. 215.
[652] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v. United States of America*) (ICJ), Merits Judgment of 27 June 1986, para. 218.
[653] *Ibid.*, para. 219.
[654] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, paras 215, 220 and 224.
[655], Article 8(2)(e) and (f) of the Rome Statute specifically refers to Common Article 3 of the Geneva Conventions of 1949.
[656] The Chamber referred to the Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977.
[657] *The Prosecutor v. Thomas Lubanga Dyilo* (ICC), "Decision on the Confirmation of Charges" (Pre-Trial Chamber I), 29 January 2007, para. 209.
[658] *The Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, para. 70.

was not of an international character. No information on the involvement of foreign States, which would characterise the conflict as international, is available in the Disclosed Evidence".[660]

A limited number of foreign troops, such as soldiers from the MLC,[661] mercenaries from Chad and Libyan soldiers, were present on Central African territory, for the purpose of supporting the CAR government authorities[662] as they struck back at the organised, armed group run by François Bozizé, and not for the purpose of going after the State or the CAR authorities.[663]

It should therefore be noted that the ICC considered that the presence of a limited number of foreign troops supporting the government authorities did not meet the requirements for characterisation of an international armed conflict.

Through the case involving *Armed Activities on the Territory of the Congo*, a dispute concerning "acts of armed aggression perpetrated by Uganda on the Territory of the Democratic Republic of Congo (DRC)",[664] the International Court of Justice addressed the issue of wartime occupation.[665] Having heard the parties and examined the evidence, the ICJ found in its Judgment that Uganda had violated the principle of non-resort to force in international relations as well as the principle of non-intervention.[666] It also found "admissible the claim submitted by the Democratic Republic of the Congo relating to alleged violations by the Republic of Uganda of its obligations under international human rights law and international humanitarian law in the course of hostilities between Ugandan and Rwandan military forces in Kisangani".[667]

The ICC Pre-Trial Chamber I, in the case of ***Thomas Lubanga Dyilo***,[668] held that certain exhibits admitted at the confirmation of charges hearing concerning the role of Rwanda in the conflict in Ituri after 1 July 2002 indicated that that State was supporting the UPC[669] and was involved in the

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[659] *The Prosecutor v. Akayesu* (ICTR), "Judgement", 2 September 1998, para. 620.
[660] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC) , "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, para. 246.
[661] *Mouvement de libération du Congo* [*M*ovement for the Liberation of Congo/Registry translation], led by Jean-Pierre Bemba Gombo.
[662] Central African Republic.
[663] *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC), "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, para. 246.
[664] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (ICJ), Application Instituting Proceedings, 23 June 1999, p. 4.
[665] *Armed Activities on the Territory of the Congo* (ICJ), Judgement, 19 December 2005, paras 166 to 180.
[666] *Ibid.*, p. 229.
[667] *Ibid.*, p. 229.
[668] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC.
[669] *Union des patriotes congolais* [Union of Congolese Patriots], led by Thomas Lubanga Dyilo.

innermost workings of the UPC. Apparently, Rwanda was sending not just ammunition and weapons to the UPC but soldiers as well.[670] The exhibits admitted at the confirmation of charges hearing likewise contained indicia that Rwanda was advising the UPC.[671] The Chamber also had several exhibits saying that Uganda stopped supporting the UPC due to its alliance with Rwanda.[672]

Nevertheless, the ICC Pre-Trial Chamber found that "***in light of the paucity of evidence before it, the Chamber is not in a position to find that there is sufficient evidence to establish substantial grounds to believe that Rwanda played a role that can be described as direct or indirect intervention in the armed conflict in Ituri***".[673]

It is appropriate then to examine in-depth the relations between the belligerents under the auspices of the ICRC in light of Common Article 3 of the four Geneva Conventions of 12 August 1949.

The Agreement of 22 May 1992, a public document,[674] was signed in Geneva between the various factions in the conflicts in the Republic of Bosnia and Herzegovina, under the auspices of the **International Committee of the Red Cross (ICRC)**, and at its invitation. The agreement was based on Common Article 3 of the Geneva Conventions of 1949, which, in addition to setting out the rules that govern internal armed conflicts, provides **in paragraph 3 that the parties to those conflicts may agree to apply the provisions of the Geneva Conventions that are generally only applicable to international armed conflicts.** The parties committed to compliance with the basic rules of internal armed conflicts featured in Common Article 3, and further agreed, in reliance on paragraph 3 of Common Article 3, to apply certain relevant provisions of the Geneva Conventions pertaining to international armed conflicts.

This Agreement shows that the concerned parties regarded the armed conflicts in which they were participating as internal armed conflicts, but that, in view of their magnitude, they agreed to apply to those conflicts certain relevant provisions of the Geneva Conventions of

[670] *See Lubanga* Decision; p. 65, para. 221.
[671] International Crisis Group, Africa Report, Congo Crisis: Military Intervention in Ituri, DRC-OTP 0003-0437, p. 8; MONUC, *Rapport special sur les évènements de l'Ituri*, January 2002-December 2003, DRC-OTP29-0343, para. 29; Human Rights Watch, *Le Fléau de l'or*, DRC-OTP-0163-0368, p. 2; Human Rights Watch, *Ituri Couvert de Sang*, DRC-OTP-0163-0304, p. 11; JOHNSON, D., Shifting Sands: Oil Exploration in the Rift Valley and the Congo Conflict, DRC-OTP-0043-0016.
[672] JOHNSON, D, Shifting Sands: Oil Exploration in the Rift Valley and the Congo Conflict, DRC-OTP-0043-0036, p. 23. See *Lubanga* Decision, p. 65, para. 221.
[673] *Lubanga* Decision, p. 66, para. 226.
[674] This agreement was much alluded to in the separate opinion of Judge Abi-Saab (*The Prosecutor v. Duško Tadić*, Appellate Decision of 2 October 1995).

1949 ordinarily applicable only to international armed conflicts.[675] Moreover, the Agreement of 22 May 1992 made it possible to legally categorise detained persons into two categories: **on the one hand, prisoners with military status, and, on the other hand, prisoners with a civilian status.**

Beyond the Geneva Agreement of 22 May 1992, which in turn refers to The Hague Agreement of 5 November 1991, the parties to the conflicts signed a further agreement on 23 May 1992, creating modalities for the implementation of the Agreement of 22 May 1992. The parties agreed as follows: (1) taking into account the emergency of the situation, each party agrees to forward to the ICRC no later than 29 May 1992 at 24h00, the name of one liaison officer. The liaison officers appointed by each party [will] meet as soon as possible: (2) the Commission established under the Agreement of 22 May 1992 [will] consist of four liaison officers and will function under the auspices of the ICRC; decisions will be taken by consensus. The Commission was to assume the following tasks: **(a) exchange lists of prisoners and take the necessary steps with a view to the release of prisoners; (b) take the necessary measures in order to enable a temporary evacuation of persons in danger, without discrimination and on a voluntary basis on the entire territory of Bosnia-Herzegovina**; (c) to envisage with the ICRC the opening of humanitarian corridors for the supply of humanitarian assistance to the populations, as well as the evacuation of the wounded, without discrimination; (d) each party undertook to provide security guarantees to the ICRC in the accomplishment of its humanitarian activities.

At the ICRC's invitation, the parties met once more in Geneva on 4, 5 and 6 June 1992. Opening remarks to the discussions were made by Mr Cornelio Sommaruga, ICRC President. The work was carried out under the supervision of Mr Thierry Germond, ICRC General Delegate to the European Union, in the presence of observers from the Federal Republic of Yugoslavia (FRY), the Republic of Croatia and observers from the United Nations High Commission for Refugees (UNHCR). The parties approved the action plan for Bosnia and Herzegovina proposed by the ICRC. This action plan involved three points, namely: factors of insecurity in Bosnia and Herzegovina that posed barriers to carrying out humanitarian work, the security requirements for implementation of the action plan and the ICRC aid programme.

Following this Agreement of 22 May 1992 the various parties agreed with one another to comply with the rules governing **internal armed conflicts**. Going down the avenue of **international armed conflict** was therefore out of the question.

[675] *Tadić* Appeals Judgement, para. 85.

Using this observation as a starting point, what was the position of the **ICTY Appeals Chamber**?

In its interpretation of the **Tribunal Statute**, the Appeals Chamber considered that the Trial Chamber had erroneously construed the reference to the Geneva Conventions in this phrase of Article 2: "persons or property protected under the provisions of the relevant Geneva Convention". According to the Appeals Chamber, it was clear that these provisions of the Geneva Conventions apply to protected persons and property only insofar as they were caught up in an international armed conflict.[676] The Appeals Chamber found that in the current state of the law, Article 2 of the Statute applies only to those crimes committed within the context of international armed conflicts.[677]

Regarding the application of Article 3 of the Tribunal Statute, the Appeals Chamber found that, pursuant to Article 3, the International Tribunal has jurisdiction to hear the violations alleged in the Indictment, whether committed during an internal or an international armed conflict.[678]

As for the application of Article 5 of the Tribunal Statute, the Chamber considered that this provision can be invoked to establish jurisdiction over crimes committed in either internal or international conflicts.[679]

Thus, in its 2 October 1995 Decision on the Defence's Motion for Interlocutory Appeal the Appeals Chamber affirmed that Article 2 of the Statute applies solely to crimes committed in the context of international armed conflicts.

In his separate opinion, **Judge Abi-Saab** acknowledged having difficulty endorsing the entire legal reasoning contained in the Appeals Chamber's Decision regarding the third ground of appeal,

[676] ICTY, *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 81. For the Appeals Chamber, the above interpretation is borne out by what one might consider part of the preparatory work on the Statute of the International Tribunal, namely, the Report of the Secretary-General. Reference is made therein to "international armed conflicts" in the introduction and explanation of the meaning and purpose of Article 2 – as well as in respect of the "grave breaches" regime of the Geneva Conventions (Report of the Secretary-General at para. 37).
[677] ICTY, *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 84.
[678] ICTY, *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 137.
[679] ICTY, *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 142.

particularly its construction of Article 2 of the Tribunal Statute in respect of the "grave breaches" of the Geneva Conventions of 1949.[680]

After addressing one of the merits of the Appeals Chamber's Decision – the finding that the "grave breaches" were covered by the "serious violations of the laws or customs of war" – the Judge nevertheless noted that the "division of labour" between Articles 2 and 3 of the Statute featured in the said decision was rather artificial. Based on the material presented in the Decision itself, he considered that a strong case might instead be made for the application of Article 2, even when the incriminated act takes place in an internal conflict.[681]

According to **Judge Abi-Saab,** the growing practice and *opinio juris* of both States and international organisations has established the principle of personal criminal responsibility for the acts set out in the articles on grave breaches as well as for other serious violations of the *jus in bello*, even when they are committed in the course of an internal armed conflict; the purpose is to bring the acts committed in internal conflicts within the ambit of the grave breaches regime of the Geneva Conventions, and consequently of Article 2 of the Statute.[682]

Judge Abi-Saab likewise considered that Article 2 of the Tribunal Statute applies, as do Articles 3, 4 and 5, in both international and internal armed conflicts. According to the judge, this construction of Article 2 is supported by the fact that it coincides with the manner in which the parties to the conflict themselves understood the legal situation. Thus, in their Agreement of 1 October 1992 concerning the implementation of the earlier Agreement of 22 May 1992, which they specifically concluded in Geneva within the framework of Common Article 3 of the four Geneva Conventions, they excluded from the obligation the release of prisoners and those "accused of or sentenced for

[680] ICTY, *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, p. 1.
[681] ICTY, *The Prosecutor v. Duško Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, p. 4. The Judge observes that the Appeals Chamber's decision nuances the modern tendency to acknowledge the essential unity of the "grave breaches" legal regime and the "serious violations of the laws and customs of war" regime in such a way as to continue to preserve an autonomous scope of application for Article 2 of the Tribunal Statute in relation to Article 3.
[682] *The Prosecutor v. Duško Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction.

grave breaches (…)".[683] In so doing, they recognised the applicability of the regime of grave breaches in their on-going conflict, which they had already characterised as internal.[684]

I find it interesting to examine the position of the **United States** on this matter.

On 17 July 1995, the United States of America, acting through its representative at the United States Embassy at The Hague, **Mr Stephen Mathias**,[685] filed with the Judges of the Court hearing the *Duško Tadić* Case a motion in response to the arguments of the *Tadić* Defence contesting the international character of the armed conflict in the former Yugoslavia as well as the jurisdiction of the Tribunal.

After recalling its ***interest in acting***, as a permanent member of the Security Council and a member that participated in the adoption of the ICTY Statute, the United States decided first to recall the jurisdiction of the Security Council pursuant to Chapter VII of the United Nations Charter to determine whether or not international peace and security were threatened and to take the appropriate measures if necessary.

As part of many resolutions, the United States pointed out that the Security Council expressly asked the actors in the conflict, pursuant to *Chapter VII* of the Charter, to end the repeated violations of international humanitarian law. Taking into account the goal of re-establishing peace in the region, it was decided to establish an independent and impartial Tribunal tasked with determining the guilt of the individuals responsible for the atrocities committed at the time of the events in question. In this regard, Security Council **Resolution 827** established and lent support for the idea of creating an international criminal tribunal assigned to adjudicate the individual responsibility of those responsible for the crimes committed in the former Yugoslavia.

According to the United States, the Accused contested the use of international humanitarian law by the recently created international criminal tribunal. According to the United States, every organ of the United Nations must comply with and enforce international humanitarian law, citing the

[683] Article 3 of the Agreement of 22 May 1992.
[684] *The Prosecutor v. Duško Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, p. 5.
[685] **Mr Stephen Mathias** is currently Assistant Secretary-General of the United Nations for Legal Affairs (SGUN SG/A/1261, 1 September 2010).

example of its repeated calls for compliance with the rules and principles thereof in connection with past conflicts.

Taking its argument a step further, the Defence essentially asserted that Articles 2 through 5 of the ICTY Statute, which define the Court's jurisdiction *ratione materiae*, must be construed to exclude any possible application to the circumstances in the former Yugoslavia. According to the United States of America, however, adopting this posture would run contrary to the objectives and purposes of the Security Council when the Statute of the Tribunal was adopted, thereby determining the Accused's arguments to be incorrect.

In the instant case, the members of the Security Council considered that the situation in the former Yugoslavia threatened international peace and security, persuaded to this effect by the reports of the United Nations Secretary-General that were transmitted by the General Assembly. In responding to the arguments put forward by the *Tadić* Defence, the government of the United States pointed out the substantial military and civilian losses and the role of States in providing material support to military operations against their neighbours on various occasions.

Moreover, Article 41 of the United Nations Charter does not refer to international armed conflict as such but to "threats against international peace and security", and the United States stated: "we believe that the conflict in the former Yugoslavia has been, and continues to be, of an **international character**". The international character, as expressed, is understandable in light of the various interventions on the ground by States or the international community.

In connection with the jurisdiction of the Security Council under Chapter VII, the *Tadić* Defence asserted that the authority of the Security Council was restricted to international armed conflicts. According to the Accused *Tadić*, the events relevant to the Indictment against him occurred within the context of an internal, not an international armed conflict.

Taking up the chronological sequence of events, the United States proceeded to survey the situation in the former Yugoslavia since 1991, citing the presence of forces present in that territory. According to the US, the fighting demonstrated once and for all the reality of an international armed conflict characterised by the presence of the regular armed forces of States within the territory. **In many instances, the presence of irregular forces from a combatant State under the effective command of the regular armed forces of another State is mentioned.**

Whereas the *Tadić* Defence attempts to isolate a series of combat operations within a more global armed conflict, the United States has, for its part, developed a wider approach to events, considering them as a whole. Taking up the letter of the provisions of the Geneva Conventions, it is clear that the applicability requirements for the said provisions regarding international armed conflict have been met, as the Conventions are meant to apply in their entirety. Put differently, the distinction drawn by the Defence appears artificial given the various elements, particularly the presence of three major actors in the conflict during the period at issue who never respected the limits of their national borders.

In this respect, the findings of the ***United Nations Commission of Experts*** responsible for deciding whether there really was an international armed conflict in the former Yugoslavia ultimately concluded that the character and complexity of the armed conflicts, combined with the agreements of the belligerents with regard to international humanitarian law, justified **applying the law of armed conflicts to the territory of the former Yugoslavia.** The Commission shared the view that the conflicts in the former Yugoslavia were international in nature.

Regarding the grave breaches of the Geneva Conventions of 1949 more specifically, the United States began by recalling the international character of the conflict in the former Yugoslavia. Somewhat later, taking a more comprehensive approach and following the letter of Articles 130 of the Third Geneva Convention and Common Article 3 of the four Geneva Conventions, the United States contended that the provisions contained in **Article 2 of the ICTY Statute applied to international and internal armed conflict alike.** In other words, under this approach, treaties of international humanitarian law must be interpreted according to the ordinary meaning prevailing when the treaty was agreed, taking into account both the overall context and the subject and purpose of the treaty. **At this stage, the position of the United States contrary to that of the ICTY Appeals Chamber should be noted.**

In the same vein, according to the United States regarding Article 3 of the Statute, which refers to the laws and customs of war, *Common* Article 3 of the Geneva Conventions brings together all the obligations pursuant to agreements under international humanitarian law in force on the territory of the former Yugoslavia at the time the acts were committed.

Finally, concerning Article 5 of the ICTY Statute, the **United States** drew an analogy with the articles that precede it, inasmuch as the said article covers the crimes committed in connection with both an internal and an international armed conflict.

The position of the United States shows that the provisions of Article 2 of the Statute apply to both international and internal armed conflicts.

I embrace this position wholeheartedly.

Despite this position taken by one of the main countries on the Security Council, **the Appeals Chamber** has maintained that Article 2 of the Statute is not applicable to internal armed conflicts.

In the ***Aleksovski* Appeals Judgement**, the Appeals Chamber had to rule on the issue of whether Article 2 of the Tribunal Statute was applicable. The Appeals Chamber first recalled that the "global control" test set forth in the *Tadić* Appeals Judgement set out the applicable law and held that, inasmuch as this criterion afforded better protection to the civilian victims of armed conflict, the different, less strict standard was in complete harmony with the fundamental purpose of the Fourth Geneva Convention, which was to "ensure protection of civilians to the minimum extent possible".[686]

The Appeals Chamber supports the Prosecution's argument whereby if the international aspect of the conflict is established due to Croatia's participation, it logically follows that the Bosnian Muslim victims had fallen into the hands of Croatia, a party to the conflict of which they were not nationals. Article 4 of the Fourth Geneva Convention is therefore applicable in that case. It also confirmed the finding of the *Tadić* Appeals Judgement whereby "in certain circumstances, Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors".[687]

The Appeals Chamber held that this more expansive interpretation of Article 4 met the object and purpose of the Fourth Geneva Convention and was particularly apposite in the context of present-day inter-ethnic conflicts.[688] By way of conclusion, it found that the Trial Chamber applied the wrong legal test to determine the nature of the armed conflict and the status of the protected persons and of the victims within the meaning of Article 2 of the Statute.[689]

[686] *Aleksovski* Appeals Judgement, para. 164; *Tadić* Appeals Judgement, para. 168.
[687] *Tadić* Appeals Judgement, para. 168; *Aleksovski* Appeals Judgement, para. 151.
[688] *Aleksovski* Appeals Judgement, para. 152.
[689] *Ibid.*, para. 154.

In the ***Blaškić*** **Case**, in respect of the application of Article 2 of the Tribunal Statute, it was held that the applicability requirements therefor are analysed in sufficient depth in the Tribunal's case-law. According to the said appeals judgement, Article 2 empowers the Tribunal to prosecute the authors of grave breaches of the Geneva Conventions.[690] The Appeals Chamber asserts that the offences enumerated in Article 2 must be committed against persons or objects protected under Article 4(1) of the Fourth Convention.[691] It cites the *Tadić* Appeals Judgement, which found that "even if [...] the perpetrators and the victims are to be regarded as possessing the same nationality, Article 4 would still be applicable".[692]

According to the Appeals Chamber, the Bosnian Muslims were held captive by the HVO and owed no allegiance to Croatia. Given that the HVO was an armed group acting *de facto* on Croatia's behalf, the Muslim victims from Bosnia found themselves in the hands of a party to the conflict of which they were not nationals.[693]

The Appeals Chamber held as groundless the Appellant's argument that if the criterion of "allegiance" were applied, the Bosnian Croats held captive by the Bosnian Muslims would not meet the requisite conditions for being considered "protected persons".[694] The Appeals Chamber considered that there was no violation of the principle of legality by engaging in an "expansive interpretation" of Article 4 of the Fourth Geneva Convention and that there was "nothing in that principle that prohibit[ed] the interpretation of the law through decisions of a court and the reliance on those decisions in subsequent cases".[695] The Appeals Chamber held, in conclusion, that the Appellant did not persuade the Chamber that there existed cogent reasons in the interest of justice to depart from precedent, and that it saw no error in the Trial Chamber's determination; hence, its conclusion to deny that sub-ground of appeal.[696]

In the ***Kordić and Čerkez*** **Case**, for the purpose of determining whether the armed conflict is international, the Appeals Chamber referred to the judgement rendered by the Trial Chamber, which in turn applied the overall control test described in the *Tadić* Appeals Judgement which held that an armed conflict becomes international when a foreign state wields overall control over the

[690] *Blaškić* Appeals Judgement, para. 170; *see* also *Tadić* Appeals Judgement, para. 80; *Aleksovski* Appeals Judgement, para. 113.
[691] *Blaškić* Appeals Judgement, para. 172; *Tadić* Appeals Judgement, paras 166 and 168.
[692] *Tadić* Appeals Judgement, para. 169. *See* also *Aleksovski* Appeals Judgement, paras 150 and 151; *Čelebići* Appeals Judgement, para. 83.
[693] Fourth Geneva Convention, Article 4. (1); *see* also *Tadić* Appeals Judgement, para. 167.
[694] *Blaškić* Appeals Judgement, para. 176; *Čelebići* Appeals Judgement, para. 83.
[695] *Blaškić* Appeals Judgement, para. 181; *Aleksovski* Appeals Judgement, paras 126 and 127.

armed forces of one of the belligerents.[697] According to the Appeals Chamber, there is no reason to depart from the jurisprudence of the *Aleksovski* Appeals Judgement, which affirmed that the effective control test discerned by the ICJ in the *Nicaragua* Case was unpersuasive.[698]

The Appeals Chamber held that the Trial Chamber did not commit an error of law by applying the overall control test in finding that the armed conflict that took place in Central Bosnia was international in character.[699]

According to the Appeals Chamber, the Trial Chamber's reasoning squares with the purpose of the Geneva Conventions. It states that whenever an armed conflict becomes international in character, the Geneva Conventions apply throughout the belligerents' respective territories. Therefore, the Trial Chamber did not commit any error in taking into account the circumstances in other regions of Bosnia and Herzegovina that were linked to the armed conflict in Central Bosnia in order to find that the armed conflict was international in character.[700]

Regarding its determination of the status of the "protected persons", the Appeals Chamber relied, as did the *Aleksovski* Appeals Judgement, on the allegiance test discerned in the *Tadić* Appeals Judgement to determine whether the victims had the status of protected persons.[701]

Lastly, the Appeals Chamber held that the Trial Chamber did not commit an error of any kind when it found that the Bosnian Muslims were protected persons within the meaning of Article 4 of the Fourth Geneva Convention.[702]

To justify the joint motion challenging jurisdiction with regard to the Prosecutor's Amended Indictment in the ***Hadžihasanović and Kubura*** **Case,** the Defence structured its argument around three points. First, it mentioned that at the time of the events, international law did not contemplate charging the criminal responsibility of superiors in a non-international armed conflict. Then, the Defence states that Article 7(3) of the Tribunal's Statute does not contemplate a superior's criminal responsibility for those crimes committed prior to the existence of the superior-subordinate

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[696] *Blaškić* Appeals Judgement, para. 182.
[697] *Kordić and Čerkez* Appeals Judgement, para. 299; *Kordić and Čerkez* Judgement, paras 111 to 115.
[698] *Kordić and Čerkez* Appeals Judgement, para. 307; *Aleksovski* Appeals Judgement, paras 131 to 134. This finding was upheld by the Appeals Chamber in the *Čelebići* case, para. 26.
[699] *Kordić and Čerkez* Appeal Judgment, para. 313.
[700] *Ibid.*, para. 321.
[701] *Ibid.*, para. 331; *Aleksovski* Appeals Judgement, para. 152; *Blaškić* Appeals Judgement, paras 172, 173 and 175.
[702] *Ibid.*, para. 377.

relationship. For this reason, the Prosecution's theory does not rely on the Statute or the Additional Protocols of 1977, let alone customary international law.[703] Lastly, the Defence argued that Article 7(3) does not contemplate the individual criminal responsibility of the superior for failing to prevent or punish the planning and commission of offences by his subordinates.[704]

The Prosecution argued that the doctrine of superior responsibility formed part of customary international law prior to 1994, and that it was cited no later than 1 January 1991.[705] It recalled the application of this doctrine during the "trials of war criminals following World War II", as well as its later codification in Additional Protocols I and II of 1977, the ICT Statutes, and the ICC Statute.[706] The Prosecution also relied on the Report of the Secretary-General on the establishment of the ICTY which stated that although superior responsibility is based on customary law it need not also be based on treaty law.[707]

Finding no satisfaction in the Joint Challenge to Jurisdiction brought before the Trial Chamber,[708] the Accused jointly lodged an appeal with the Appeals Chamber. They challenged the jurisdiction of the Tribunal over criminal superior responsibility for crimes committed by subordinates in the context of a **non-international armed conflict**. The Appeals Chamber found that, in substance, following the withdrawal of two counts under Article 2 of the Statute, and of the initial indictment's express statement that the armed conflict was international in character, the Prosecution should not be authorised to rely on the written submissions made at the time, which lacked specificity, to assert that the armed conflict was international in character; in order to clarify matters, the Prosecution would once more need to amend its Indictment.[709] Thus, the Appeals Chamber ruled that the joint appeal by the three Accused was valid insofar as it went, on the one hand, to the responsibility of the superior for the acts of his subordinates in connection with an armed conflict that lacked an international character, and on the other, to the responsibility of the superior for acts committed

[703] *The Prosecutor v. Hadžihasanović and Kubura*, "Decision on Joint Challenge to Jurisdiction", 21 February 2002, pp. 3 and 4, paras 9 to 14.
[704] *Ibid.*, p. 5, paras 17 to 18.
[705] Final Trial Brief of the Prosecution in the case of *Hadžihasanović and Kubura*, para. 4.
[706] *Ibid.*, para. 7.
[707] Prosecution Response, paras 12 to 15.
[708] *The Prosecutor v. Hadžihasanović and Kubura*, "Decision on Joint Challenge to Jurisdiction", 21 February 2002, p. 69, para. 211.
[709] *The Prosecutor v. Hadžihasanović and Kubura*, "Decision on Defence Motion Regarding Cross-Examination of Witnesses by the Prosecution", 9 December 2004, p. 5, referring to the "Decision Pursuant to Rule 72(E) as to Validity of Appeal", 21 February 2003, para. 12.

before he entered office. However, the Appeals Chamber partially denied the Defence's appeal contesting the admission of these terms in the Amended Indictment.[710]

For reasons of judicial economy, the Prosecution deleted all counts related to Article 2 of the Tribunal Statute from the Indictment. Thus, the Indictment from that time forward said that an "**armed conflict existed on the territory of Bosnia and Herzegovina**".[711] According to the Kubura Defence, the Indictment was amended so as to charge the accused Kubura ("the accused"), under Article 7(3) of the Tribunal's Statute, for the crimes allegedly committed at Miletići,[712] and amended paragraphs 61 and 66 sought to charge the accused with criminal responsibility on the basis of Article 7(1) of the Statute.

Although the counts of the Indictment related to Article 2 of the Statute were withdrawn, it should be noted that the Prosecution concluded that there was **a conflict** on the territory of Bosnia and Herzegovina.

How would the **evidence** establish that there was an **international armed conflict**? To answer this question, I have listed several significant documents I describe below, classifying them in chronological order, whereby it should be noted that I must reach a formal finding beyond a reasonable doubt.

I did, however, previously analyse document **P 00361** above, **which** must be added to this list.

1. P 00205 (15 May 1992).

This is **Security Council Resolution 725** adopted **15 May 1992**. This Resolution calls for the cessation of all forms of outside interference in Bosnia and Herzegovina, including units of the JNA and the Croatian Army.

2. P 00361 (3 August 1992).

Comments were provided above.

[710] *The Prosecutor v. Hadžihasanović and Kubura*, "Decision Pursuant to Rule 72(E) as to Validity of Appeal", para. 18.
[711] Amended Indictment, para. 11.
[712] *The Prosecutor v. Hadžihasanović and Kubura*, "Decision on Joint Challenge to Jurisdiction", 21 February 2002, para. 205.

3. P 03990 (6 August 1992).

This is a letter from the UN Secretary-General dated **6 August 1992**, addressed to the President of the Security Council. The letter is interesting because in paragraph 37 it says that there was intense fighting in Central Bosnia after an offensive mounted by the Bosnian government.

4. P 00798 (24 November 1992).

This is a document from **Milivoj Petković** ordering members of the HVO units to wear HVO insignia and none other, justifying in paragraph 3 the fact that the display of these insignia of the Croatian Army is feeding accusations against the Republic of Croatia.

5. P 00854 (3 December 1992).

This is a report from the **UN Secretary-General** to the General Assembly concerning the situation in Bosnia and Herzegovina dated **3 December 1992**. In para. 9 of the said report, it states that Resolution 46/242 called for soldiers of the Croatian Army in Bosnia and Herzegovina either to be withdrawn or to be placed under the authority of the government of Bosnia and Herzegovina or to be disbanded or disarmed, under effective monitoring by the international community. It should be noted that the document raises the possibility of placing soldiers of the Croatian Army under the authority of the Republic of Bosnia and Herzegovina provided that such soldiers were present.

6. P 06757 (19 November 1993).

This document was addressed to **Bruno Stojić**, Minister of Defence, on **27 January 1993**, seeking payment for the 12 members of the Croatian Army reservists who had been temporarily assigned to the southern front on the order of **General Praljak**. It is noteworthy that the document reports of soldiers from the reserve forces who, according to the document, were incorporated into the medical corps.

7. P 01662 (14 March 1993).

This is a document from the **Republic of Croatia** addressed to **General Bobetko.** It is a very technical document concerning the plan of engagement and command of the southern sector with

regard to the Fourth HVO Battalion. It is somewhat surprising that the document concerns a unit of the HVO but comes from the Croatian Army. A possible solution may be found on page 14, where it is stated that the soldiers must be paid according to the standards of the Croatian Army, and the document specifically mentions the situation with respect to the Chetniks.

8. P 02254 (10 May 1993).

This is a note from the President of the Security Council, condemning the offensives mounted by Croatian paramilitary units.

9. P 02627 (3 June 1993).

This is a document from the European Community, entitled "HV Involvement in BH". The document clearly indicates that the forces of the HVO carried out military operations as they received support during the fighting. The document indicates that the Croatian Army offered assistance even though the amount of assistance is difficult to determine accurately. The document describes the conflict in Gornji Vakuf, and mentions that the troops were wearing HV armbands, were seen pinning or had pinned HVO insignia on their uniforms; according to the document, there were ties between the Croatian Army and the HVO. It raises the theory that it would not lie in the interest of any of the parties to have Croatian Army (HV) troops be seen in Bosnia, and that, in practice, proper planning would easily allow them to hide their activities. For this reason, the HVO's tactic consisted in mounting offensives at night given that international observers were not then present.

10. P 02738 (13 June 1993).

This document is interesting because it originates from the **ECMM** and is dated **13 June 1993**. The subject is the Croatian Army establishing itself in Bosnia and Herzegovina. The document describes a recent discussion with **General Praljak**, during which he allegedly acknowledged that the Croatian Army had provided **logistical support** to HVO forces while at the same time disputing the Croatian Army's involvement in the fighting.

11. P 00701 (24 July 1993).

This is a letter sent by **General Petković** to the **UNPROFOR** Commander concerning the alleged presence of the Croatian Army in the Republic of Bosnia and Herzegovina. In the document, he explains that, due to Serbian aggression, volunteers took part in the fighting, and that men from the Republic of Croatia gradually returned to their localities of origin and joined the units of the HVO.

12. P 03818 (30 July 1993).

This document originates from the VOS (Military Intelligence Service) and concerns Colonel Poljak of the Croatian Army who reached the front with 300 to 400 soldiers on 6 August 1993.

13. P 04295 (19 August 1993).

This is an important document because it originated from the Minister of Defence **Šušak**, was approved by **General Bobetko** and was sent to the 5th Motorised Brigade commander. The document is entitled "**Sending Volunteers to the Southern Front**" and requests that volunteers be dispatched there, detailing the port of embarkation and the details related to logistics; however, in paragraph 5, it says that the volunteers from the 5th Motorised Brigade must be placed under the command of the HVO.

14. P 05216 (20 September 1993).

This document dated **20 September 1993** is from the Croatian Ministry of Defence and recounts the fact that a battalion included Croatians born in Croatia as well as those born in Herceg Bosna.

15. P 07535 (9 January 1994).

This is a document dated **9 January 1994** from **Colonel Šiljeg** and addressed to **Ivan Ančić**, requesting that he intensify checks of vehicles and persons wearing the insignia of the Croatian Army.

16. P 07587 (14 January 1994).

This is a document from the UNMO dated **14 January 1994** about the presence of the Croatian Army in Bosnia and Herzegovina. The document is particularly interesting because paragraph 1 states: "It is very difficult to confirm the presence of regular HV units in Bosnia Herzegovina".

Paragraph 2 states that they have some information concerning the presence of individuals in Bosnia and Herzegovina, and paragraph 4 notes the presence of trucks and personal vehicles of soldiers with a Croatian licence plate. Trucks were also spotted in the mountains.

17. P 07789 (3 February 1994).

This is a declaration by the President of the Security Council dated **3 February 1994** in which the Security Council asks the Republic of Croatia to withdraw all Croatian Army soldiers. The document thus confirms that some soldiers from the Croatian Army were present in February 1994.

18. P 008107 (23 March 1994).

This is a document from the ***Ludvig Pavlović*** **Battalion**, addressed to **General Bobetko** and requesting the payment of soldiers' salaries.

This collection of documents shows beyond a shadow of a doubt that the Croatian Army had troops present in the Republic of Bosnia and Herzegovina – this is established by several documents. However, a number of documents assert that some units were under HVO command. For instance, operational leadership was under the HVO, not under the Croatian Army, which seems important to me in light of the *Tadić* jurisprudence on the control and planning of military operations. There was therefore a conflict of an internal nature between the Bosnian Croats and the Muslims rallying around Alija Izetbegović. This internal conflict came to be part of a broader international conflict due to the involvement of the international community and to the conflict with the Bosnian Serbs "assisted" by Serbia.

The essential issue deriving from this character is whether the victims were protected within the meaning of the Geneva Conventions.

I will, however, part ways with the ***Tadić*** Trial Chamber, which indicates at paragraph 608 of its Judgement of 7 May 1995 that:

"*The consequence of this finding, as far as this trial is concerned, is that, since Article 2 is applicable only to acts committed against* "*protected persons*" *within the meaning of the Geneva Conventions, and since it cannot be said that any of the victims, all of whom were civilians, were at any relevant time in the hands of a party to the conflict of which they were not nationals, the*

accused must be found not guilty of the counts which rely upon that Article, namely Counts 2, 5, 8, 9, 12, 15, 18, 21, 24, 27, 29 and 32".

On this point, I share the point of view of **Judge Gabrielle Kirk McDonald**, who says in the dissenting opinion she annexed to that Judgement that the victims of the crimes were persons protected because of Security Council Resolution 752 of 15 May 1992.

In paragraph 20 of her opinion, the aforementioned Judge rightly states that: "*Article 4 of this Convention defines protected persons in terms which include those who are living in occupied territory, but does not so restrict them*".

One must also consult the commentary cited in this paragraph to Article 6 of the Fourth Geneva Convention, which states: "*[t]he Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons.* ***No loophole is left***" **in the system established by the Convention.**

4. The Area of Responsibility

General Praljak referred to the scope of a military commander's responsibility in the field, claiming that such responsibility was geographically confined to a combat area that might be less than a few kilometres. Beyond such an area, the local civilian authorities should exercise jurisdiction, in particular, over offences committed by civilians or soldiers who should be under the jurisdiction of the local civilian courts.

Thus, when giving oral testimony on **26 and 27 August 2009**, he stated the following upon cross-examination by the Prosecution, in answer to the Judges' questions:

Q: [Very well]. So you're fighting. You're the commander of the HVO military – excuse me – the HVO Main Staff – and you're fighting. Are you telling us, [General], that because you're [...] fighting, you can legitimately avoid undertaking [all of] the other responsibilities that fall to the highest-ranking officer of the HVO military, responsibilities such as looking after civilian populations in areas under the command of you and your subordinates?

A: The civilian population was not under my command, and I am not responsible for the civilian population. Other people are responsible for that.[713]

Q: Yesterday you told us that you didn't have any responsibility [...] for HVO prisoners of war during the time that you were commander of the HVO Main Staff. Now you're telling us that in addition to that, you bear no responsibility – you have no obligations in respect of [the fate of] civilians who find themselves within zones under HVO military control. Is that your testimony [...]?

A: What is [a zone under military control or] a military zone? I am not an occupier. I didn't [occupy] a certain territory or a captured territory and then [...] administered that territory. A military commander has [a line to defend at a given point in time], and the territory behind him is not under his command, as far as I am familiar with international [...] law.[714]

Q: So you're only responsible for what is happening on the front line, and you're not responsible, as the commander, for the general area that's controlled by the HVO military behind the front lines. Is that what you're telling us?

A: Why are you saying that [this zone is behind the lines held by the HVO military]? [The HVO was not holding this zone.] The HVO [forces] reached the front lines. It [holds] a narrow belt [of territory immediately] behind it, but it is not controlling [...] Rama Municipality, because the positions towards the army are in Uskoplje.[715]

Q: (JUDGE PRANDLER): You mentioned in your previous answer that the HVO [...] had front lines towards the Army of Republika Srpska in the west and [...] towards the Army of Bosnia and Herzegovina [elsewhere]. [So that was in certain parts of the Municipality of Prozor.] And [you said that the HVO] was responsible to keep order on those lines. If those lines are close to a village, or are close to villages, in a village, [...], [the HVO] are responsible to make sure that HVO troops in those villages and those houses do not commit something that is contrary to [...] law, end of quotation. So now I really do not understand that – at the same time, now [...] you say that you do not understand [...] the question of the Prosecution, [and I find it difficult to understand that you say] that [...] you were not there to [bear the responsibility for maintaining] order on those lines. So then what happened? Was there a vacuum, [a gap]? Were [there completely deserted villages where] there were no people, [where there was] no [civil] order. So, really I believe that the question which the Prosecution asked [is] to be answered. Thank you.

A: Your Honour Judge Prandler, I don't know how [...] [this] was interpreted. I said that along those lines [...] the Command of the HVO is responsible, [...] [so] the commander is responsible [for this area], and his [...] [subordinates bear this responsibility]. I said that [the HVO] [was] responsible [at the front line], but the rear [extends] for hundreds of kilometres [...], and for the whole depth of that territory outside the [front] lines [...] and immediately behind the [front] lines, the HVO is not responsible. [In any event], as far as I know, not in any army or any law that I have read are they held responsible. Except if [there is a force of occupation].[716]

Q: JUDGE ANTONETTI: [...] [I shall try] to assist in understanding this, because it's very complicated. Let us imagine that we are in Prozor. We're going to transpose Prozor into this courtroom. Let us say that the HVO front line [...] [is represented by] Mr Karnavas, Mr Khan and Ms Nožica. That is the HVO [front] line. And where the Judges are is the front line of the Army of

[713] T(F), p. 43950.
[714] T(F), p. 43951.
[715] *Ibid.*
[716] T(F), p. 43963.

Bosnia and Herzegovina. Does that mean that, according to what you say, [...] the civilians behind the front line, Madam Alaburić for instance, she's a civilian, [...] does not belong to the zone of responsibility of the HVO because she's outside the front line. Is that what you wish to tell us?

A: Quite so, Judge Antonetti. There are civilian authorities, the civilian police. Of course there is control over troops that may do something, but the [military command] is responsible for the front line. You saw my document, [which I drafted], about the village of Pridriš [phonetic], which was precisely on the front line. [...] [One cannot make the commander responsible for] [...] villages [which are 50 kilometres away, and then another 50 kilometres away, etc.] [...]. As far as I am familiar with the rules, [that is not the case].[717]

Q: (JUDGE TRECHSEL): I just want to take another aspect [of the question], Mr Praljak. The troops of the HVO under [the command] of the General Staff were divided [into a number of] operation zones [...], not [into] lines. The zone is a surface [whose limits] you could draw on [a] map. [A zone is a sector, not a line.] Am I wrong?

A: [Not at all] [...] The zones [- as we understand them - embody the limits of the lines] [...] [When one talks about] the front line, [one traces the line and] one says: [it includes such and such an elevation, it includes such and such a topographical feature, and then one draws the line from one end to the other].[718]

A: [So in this case we are not talking about zones that correspond to territories or areas.] [We are talking about perfectly circumscribed zones, and one says that] up to this village such and such is in command.[719]

A: [That's what one calls zones.] [...] [A zone is not an area of several hundred] square kilometres.[720]

A: A gun that [is] behind a hill [etc.][...] is linked by [...] observation points to the operational zone [etc.].[721]

Q: (JUDGE MINDUA): [A]ccording to your own experience, when you were on the front line [or] within your operational zone, the civilian authorities, did they continue to function?

A: Yes, all the structures of civilian authority were operational in all the municipalities which were behind the front lines held by the HVO, be it facing the Army of Republika Srpska or the Army of Bosnia and Herzegovina when the conflict started (...) for a time, [a military] commander [...] that has captured the territory is also responsible for that territory. (T(F), 27 August 2009, p. 43966) (...) [P]hotographs were shown [of the men who were killed by the ABiH] ten or fifteen kilometres into the rear. [In such cases, it is a matter of the depth of the terrain being infiltrated by small groups of terrorists who can kill [civilians]. Then the situation is different.[722]

Q: (JUDGE MINDUA): Thank you very much. So my understanding is that this may vary between 200 metres, [in the case of a hill, for example,] to 15 kilometres, [as in the case of] the killing of the HVO soldiers. [Is that correct?]

[717] T(F), p. 43964.
[718] T(F), pp. 43964-43965.
[719] T(F), p. 43965.
[720] *Ibid.*
[721] *Ibid.*
[722] T(F), p. 43967.

A: You can't control 15 kilometres [...]. [These were men] who [...] broke through [far into the depth]. This can happen.[723]

A: [T]here was no [defence of any kind in the rear, none at all.][724]

A: I claim that this is written in [all] army rules. The commander in the field may control an [access] road [...] [up to] his [front] line.[725]

A: *[T]he operative zone only covers the zone that the army is occupying as part of the front line.*[726]

Q: (JUDGE TRECHSEL): I think a correction imposes itself. It says in the transcript [...] – Mr Praljak said that his responsibility is for the zone, but I think that you say that your responsibility is for the front line, which is not the same.

Q: (JUDGE ANTONETTI): Yes, Mr Praljak, your responsibility is for the front line, that is to say, the zone covered by the front line, even if it's only a few metres or a few hundred metres. That's all [...], [...] not for the hinterland. (Ibid.)

A: That's correct. [Only for] the front line [...]. The front line, [...], the zone, it's the same [...]. That's [simply] what it's called.[727]

Q: (Prosecution): General, it's absurd, isn't it, to suggest that [...] - your only responsibility as a military commander was for the small area of the front line, and that you, as the commander of the HVO Main Staff, bore no responsibility for the areas under HVO military control behind the front line?

A: No it's not Mr Stringer. If your theory were applicable, 150 high-ranking American officers would be sitting here because they were unable to control the situation in Iraq that they had taken by military force. These are well known facts today. What controlling [...] means is well known. When [one establishes] a government [...] [in some place, who is responsible for the situation]? Are [the Americans] responsible for [all those who have been] killed there?[728]

The Prosecution set out its arguments regarding the occupied territory in its Final Trial Brief. I believe it is important to quote these submissions **in full**.[729]

Submissions on "Occupied Territory"

1. A substantial number of the crimes alleged in the Indictment occurred in occupied territory. The Croatia/Herceg-Bosna side was an Occupying Power in the claimed Herceg-Bosna territories where the crimes occurred as it was in a position to replace the BiH State authorities and armed forces in those territories.

[723] T(F), p. 43968.
[724] *Ibid.*
[725] *Ibid.*
[726] T(F), pp. 43970-43971.
[727] T(F), p. 43971.
[728] T(F), p. 43973.
[729] Prosecution Final Trial Brief, paras 85 to 92.

2. The rules on occupied territory are relevant for several reasons. First, as indicated above, crimes directed against civilians and civilian objects found in occupied territory may constitute grave breaches under Article 2. Second, a commander of occupied territory has a duty to protect the civilian population and civilian objects found inside occupied territory. A commander's failure to carry out this duty may give rise to criminal liability for aiding and abetting by omission. Third, displacement of civilians from occupied territory is sufficient to amount to deportation.[730]

A Territory is Occupied when the Occupying Power has the Ability to Exercise its Authority

3. Occupation requires that the Occupying Power (a) has rendered the occupied authorities incapable of functioning publicly or of controlling the area, and (b) is in a position to exercise its authority over the territory. Article 43 of the Hague Regulations provides that the duty to protect arises when "[t]he authority of the legitimate power [has] in fact passed into the hands of the occupant".[731] *Article 42 of the Hague Regulations provides that: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."*[732]

4. Whether the Occupying Power is in such a position is a question of fact to be determined on a case-by-case basis.[733] *It is not necessary to show that the Occupying Power in fact exercised its authority over the territory, but only that it was in position to do so. The Naletilić Trial Chamber identified the following "guidelines" to determine whether "the authority of the Occupying Power [had] been actually established" over the territory:*

> *- the Occupying Power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;*
>
> *- the enemy's forces have surrendered, been defeated or withdrawn […];*
>
> *- the Occupying Power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;*
>
> *- a temporary administration has been established over the territory;*

[730] Prosecution Final Trial Brief, para. 86, citing *Stakić* Appeals Judgement, para. 300.
[731] Prosecution Final Trial Brief, para. 87, referring to idea that Territory is occupied whether or not an armed conflict has preceded the establishment of occupation. Article 2 of the Fourth Geneva Convention; Commentary to the Fourth Geneva Convention, Art. 6, p. 60.
[732] Prosecution Final Trial Brief, para. 87, referring to *Naletilić* Judgement, para. 217; *Congo v. Uganda* Case, Appeals Judgement, 2005, International Law Commission Report, p. 168, paras 172 and 173 and Separate Opinion of Judge Koojimans, paras 42-49; *United States Army Field Manual*, 1956, para. 355; *U.K. Military Manual*, 1958, para. 503; Canada, *Law of Armed Conflict at the Operational and Tactical Level*, 2001, paras 1203(4) and (5). *See* also *Naletilić* Judgement, paras 216-218; *Brđanin* Judgement, para. 638. *See* Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, 2004, p. 5; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, paras 96-100, 130; Kelly, Michael J., *Peace Operations*: *Tackling the Military Legal and Policy Challenges*, Australian Government Publishing Service, 1997, para. 412; Adam Roberts, *What is Military Occupation*?, 1984, 55 British Yearbook of International Law, 249, p. 300; Gerhard von Glahn, *The Occupation of Enemy Territory*, The University of Minnesota Press, 1957, p. 29.
[733] Prosecution Final Trial Brief, para. 88, referring to *Hostages* Case, p.1243.

- the Occupying Power has issued and enforced directions to the civilian population.[734]

5. The term "guidelines" indicates that it is not required that each of the indicators are met. This is confirmed by the fact that, were they cumulative, some of them would be redundant.[735] *In fact, the Trial Chamber in Naletilić did not find it necessary to consider the application of each indicator to the facts.*[736]

6. Applying the above factors, the Naletilić Trial Chamber held that the law of occupation applied to the area of Sovići and Doljani upon the completion of "mopping up" operations by the HVO on 23 April 1993, irrespective of whether any formal administration had been established by that date.[737]

Military Control over the Area does not Require Troops to be Stationed in All Occupied Areas

7. The requirement to have military control over the area does not require that troops be stationed in all occupied areas.[738] *Military control requires the presence of a sufficient force following on the cessation of local resistance,*[739] *or an ability to send troops in a reasonable amount of time.*[740]

Territory Remains Occupied Despite Ongoing Resistance

8. Ongoing armed resistance or pockets of resistance do not negate occupation,[741] *provided the Occupying Power has the ability to exercise control over the relevant territory.*[742] *Areas which can be administered by the Occupying Power despite armed resistance are occupied.*[743] *This includes areas behind battle lines if the Occupying Power can exert its authority in that zone to the exclusion of the occupied authorities, despite sporadic combat activity. When battle-lines are established, the area behind such lines is occupied.*[744] *PRALJAK's assertion that the areas under HVO-control that were behind the front-lines were not occupied territory should thus be rejected.*[745]

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[734] Prosecution Final Trial Brief, para. 88, citing *Naletilić* Judgement, para. 217.
[735] Prosecution Final Trial Brief, para. 89, citing: For example, requirement four ("temporary administration has been established") necessarily assumes the first requirement ("the occupying power must be in a position to substitute its own authority for that of the occupied authorities which must have been rendered incapable of functioning publicly").
[736] Prosecution Final Trial Brief, para. 89, referring to *Naletilić* Judgement, paras 217 to 222.
[737] Prosecution Final Trial Brief, para. 90, citing *Naletilić* Judgement, para. 587.
[738] Prosecution Final Trial Brief, para. 91, citing Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, paras 98 to 100.
[739] Prosecution Final Trial Brief, para. 91, referring to *Naletilić* Judgement, para. 217; Canada, *Law of Armed Conflict at the Operational and Tactical Level*, 2001, para. 1203(5), *United Kingdom Military Manual*, 2004, para. 11.3.2; *United Kingdom Military Manual*, 1958, para. 506.
[740] Prosecution Final Trial Brief, para. 91, referring to *Naletilić* Judgement, para. 217; *Hostages* Case, p. 1243; *U.S. Army Field Manual*, para. 356.
[741] Prosecution Final Trial Brief, para. 92, referring to *United States Army Field Manual*, 1956, para. 356; Canada, *Law of Armed Conflict at the Operational and Tactical Level*, 2001, para. 1203(7); *United Kingdom Military Manual*, 2004, paras 11.3.2 and 11.13; *United Kingdom Military Manual*, 1958, para. 509. *See also* 1988 JNA Regulations, para. 270.
[742] Prosecution Final Trial Brief, para. 92, referring to *Hostages* Case, pp.1243-4.
[743] Prosecution Final Trial Brief, para. 92, referring to *United Kingdom, Military Manual*, 2004, para. 11.3.2.
[744] Prosecution Final Trial Brief, para. 92, referring to Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, para. 88.
[745] Prosecution Final Trial Brief, para. 92, referring to T. pp. 44629-44634. *See also* 3D03724, map 11, submitted by PRALJAK, showing areas under HVO control on 30 July 1993.

In order to determine the **precise** responsibility of a commander in a zone of combat, it is appropriate to examine the **applicable law** on the subject.

International Humanitarian Law is an edifice built to strike a balance between the competing concepts of "humanitarian considerations" and "military necessity". The development of the role of international law on human rights alongside international humanitarian law points to the paramount importance of "the protected person" in armed conflicts.[746] It is therefore advisable to constantly bear in mind the fact that there is a conflict and that the armed force in this conflict has certain rights under the law on armed conflicts and that, therefore, it is not merely the rights of the individual that must be taken into consideration.

The problem of the **area of responsibility**,[747] which is linked to the broader theme of the **zone of occupation**, is a multifaceted subject that concerns different areas of the law. The rules and principles of international humanitarian law, international human rights law as well as the law of the United Nations all come into play through this issue. The inherent complexities of the relation between international law on human rights and the law of armed conflicts have always been acknowledged.

Article 42 of the Hague Regulations of 1907 states that, "*territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to territory where such authority has been established and can be exercised*". The wording of Article 42 is sufficiently explicit. The definition of occupation is not based on the subjective perception of a situation by the parties concerned, but on an objectively comprehensible reality: **the *de facto* submission of a territory and its population to the authority of an enemy army**. The Fourth Geneva Convention of 1949[748] proceeds to elaborate on and broaden this definition in Article 2, para. 1: *"The principle of effectiveness implies that the case of military occupation shall be applicable regardless of whether or not the state of war is recognised by the belligerents."*

The notion of an **area of responsibility** and more specifically, of an **area of jurisdiction**, hinges on this notion of effectiveness and was developed in relation to it. In the trials of the leading members of the *Wehrmacht* and the SS marking the epilogue of the Second World War, the Military Tribunal

[746] D. CAMPANELLI, "The Law of Military Occupation Put to the Test of Human Rights", *International Review of the Red Cross*, 30 September 2009, pp. 6-7.
[747] I would like to thank **Pierre FICHTER**, ESQ. for his contribution to this opinion.
[748] Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *The Geneva Conventions of 1949*, International Committee of the Red Cross, 1949.

of the United States of America applied the doctrine of command responsibility such as it had been developed in the *Yamashita* Case.[749] In the *US v. Pohl* Judgement,[750] the Tribunal explicitly referred to the *Yamashita* Case and stated that "*[t]he law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his Power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war*".

The doctrine of "*command responsibility*" – which has since been reaffirmed by several international courts, such as the International Criminal Tribunal for the Former Yugoslavia – states that a command position entails certain responsibilities including, in particular, **control** and **supervision** of the said area of jurisdiction. According to this doctrine, if violations are committed within this area of responsibility, the officer in charge has the duty to intervene. If despite his "*de facto* knowledge" of events, he fails to meet this obligation, he is responsible for criminal omission. There is no such responsibility to control and prevent in the case of the **effective loss** of command. As a result, these rules apply to a commanding general, and even to an officer who has effective command.[751]

As one can see, the issue arises as to how to define the extent of the area of jurisdiction with precision.

As **O. Debbasch** put it: "[*Military occupation is only a temporary state, which cannot establish a definitive law. However, it generates a certain number of duties for the occupier.*]" [752] It subsequently obliges him to establish a sufficient force to enable him to exercise real authority. In language borrowed from classical civil law, he has to preserve the *corpus* without having the *animus*. Occupation is an **issue of fact** and not of **intent**. Admittedly, the military authority is not required to have troops deployed throughout the territory, but it must establish the forces necessary to maintain **public order** in the territory. In addition, the Occupying Power has the duty to proclaim which territories are considered to be occupied and, above all, what the obligations of the inhabitants will be.[753]

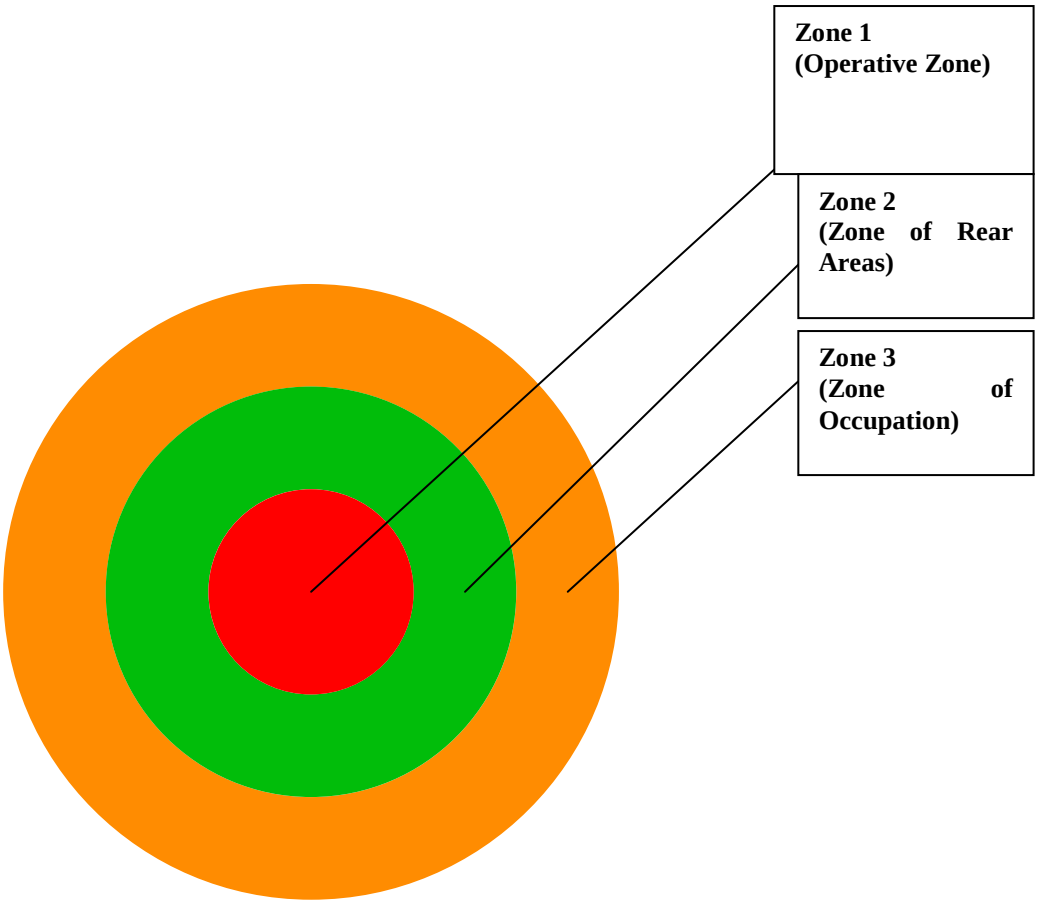
[749] *See* the *Yamashita* Case, 327, U.S. 1-81, 13-14 (1945).
[750] *See U.S. v. Pohl et al.*, 1011.
[751] Kai AMBOS, "Individual Criminal Responsibility in International Criminal Law. A Jurisprudential Analysis – From Nuremberg to The Hague", *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol.1, pp. 11-12.
[752] *See* O. DEBBASCH, "*L'occupation militaire; pouvoirs reconnus aux forces armées hors de leur territoire national*", *Librairie Générale de Droit et de Jurisprudence*, Paris, 1962, p. 324.
[753] *Ibid*., pp. 325-326.

It is interesting to dwell for a moment on the concept of "**territorialisation**" of the **occupied area**. This concept takes us back to the past and, more specifically, back to the German occupation of **Belgium**. This occupation was the result of dividing the territory into three parts. The Occupying Powers created **three zones**.

A first zone, called "the operative zone" (Zone 1), consisted of a small swathe of territory at the heart of which the fighting continued to rage and in which the military powers **alone** exercised authority and imposed strict martial law. **A second zone**, literally called **"the zone of rear areas" (Zone 2),** had supply warehouses and vital communication lines. This zone was placed under **combined** military administration, with police who had powers at the executive, administrative and legislative levels. **The third and last zone** was called the "**zone of occupation"** (Zone 3), and consisted of the remaining parts of occupied **Belgium**. The latter zone was administered by a **quasi-civilian German authority** under the command of a governor general based in Brussels.[754]

The table below provides an overview of the system set up by the German authorities:

[754] BISSHOP, "German War Legislation in the Occupied Territory of Belgium", *TGS*, 1919, p. 110; *see* also Clifton Child in "Administration", *Toynbee*, pp. 93-118.



The legal, administrative and political order outlined in the specific case of the German occupation of **Belgium** prompts us to examine the concept of "territorialisation" and especially to devote further consideration to the area of responsibility of the Occupying Power and, more specifically, that of the military commander.

The issue that will serve as the central thread of our subject is closely tied to the letter of Article 43 of the Hague Regulations of 1907 which provides that "*[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country*".

Particular importance was attached to the issue of determining the furthest extent of an Occupying Power's duty to restore and maintain **public order** in occupied territory and how far an Occupying

Power can go in changing the local legislation and pre-existing institutions in the occupied territory. Article 43 of the Hague Regulations attempts to provide an answer and its wording merits close examination. The text of Article 43 seems to address the issue of the Occupying Power in respect of local legislation only, in view of restoring and ensuring public order and civil life. Despite this, legislative history and current practice show that this article constitutes a general law regarding the Occupying Power's authority to legislate.[755]

Maintaining **public order** and security and **legislative action** by the Occupying Power are closely linked. Human rights and the rule of law require that maintaining order be based on law. An Occupying Power responsible for maintaining public order faces a major issue: determining the legal grounds upon which it can rely in order to arrest, detain or punish persons who are causing disturbances or breaching public order and the extent to which it may change local legislation for that purpose.

According to **M. Sassoli,** this obligation is "***an obligation of means and not of result***". Under the general law set out in Article 43 of the English version of the Hague Regulations, the expressions "**all measures in his power**" and "**as far as possible**" confirm that public order and civil life are not outcomes that an Occupying Power is required to guarantee but simply objectives that must be pursued by all available, lawful and proportionate means. It should be noted that the **Occupying Power** is not sovereign, and therefore its legislative authority is limited.[756] I would qualify this view by saying that in **Zone 1**, which is where the fighting is taking place, it is the military authority **alone** that applies and enforces, in this case, martial law.

The traditional way to restore public order is through **criminal prosecution** of those who breach it, but such proceedings must comply with the judicial guarantees set out in the Fourth Geneva Convention.[757] The Fourth Geneva Convention offers the Occupying Power with the option of subjecting certain persons – with safeguards in place – to assigned residence or internment for compelling security reasons. According to M. Sassoli, *"this security is not only that of the occupying forces, but, due to the obligation to restore and maintain public order, also that of the*

[755] E. H. SCHWENK, "Legislative Power of the Military Occupant Under Article 43", *Yale Law Journal*, ISSN 0044-0094, Vol. 54 (1945), pp. 393-416.
[756] C. GREENWOOD, "The Administration of Occupied Territory in International Law", *International Law and the Administration of the Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press-Oxford, ed. E. PLAYFAIR, pp. 243-245; *see* O. DEBBASCH, "*L'occupation militaire; pouvoirs reconnus aux forces armées hors de leur territoire national"*, *Librairie Générale de Droit et de Jurisprudence*, Paris, 1962, pp. 340-355.
[757] *See* Articles 66-74.

inhabitants of the territory".[758] In my opinion, this is also the case when an army has elements within it that might turn against it at any point in time.

An understanding of Article 43 of the Hague Regulations and, especially, of Article 64, para. 2 of the Fourth Geneva Convention, hinges on this "**security nexus**".

The literal wording of Article 43 of the Hague Regulations of 1907 prohibits the Occupying Power from imposing its own legislation on occupied territory or acting as a "sovereign legislator". According to this principle, it must respect the laws in force in the occupied territory at the beginning of the occupation. The phrasing of this article shows one facet of the conservative approach to international humanitarian law on belligerent occupation, which some have criticised as being excessively rigid.[759] The expression "the laws in force in the country" covers not only the laws in the narrow sense of the term, but also the Constitution, decrees, orders, jurisprudence and administrative regulations and other executive orders. Whereas this rule applies to the system of law as a whole, the exceptions apply only to the individual provisions covered by the exceptions authorising an Occupying Power to legislate. I can agree with this interpretation of Article 43 of the Hague Regulations of 1907 only to the extent that Zone 1, the so-called "**combat zone**", must be considered an exception. Could one imagine for an instant a civilian who had just been arrested in this combat zone requesting the assistance of a lawyer on the basis of the constitutional principle of his state? Of course not.

Article 64 of the Geneva Convention of 1949 provides as follows:

"*The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws."*

As one sees, Article 64 of the Geneva Convention suspends the laws of the occupied territory in the event of a threat to its security.

[758] M. SASSOLI, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *The European Journal of International Law*, Vol. 16, No. 4, pp. 664-665, 2005.
[759] *See*, for example, *From Warrior to Police*, Human Rights Watch, note 22.

"*The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration and likewise of the establishments and lines of communication used by them."*

These provisions are found in the portion of the Convention devoted to criminal law.[760]

This article supplements the provisions of Article 43 of the Hague Regulations of 1907. If one examines the literal wording of the two paragraphs of Article 64, it is interesting to note that while the first paragraph refers explicitly to "penal laws", no such restrictive qualification is made of the "provisions" referred to in the second paragraph.

The wording of the second paragraph of Article 64 seems to allow for the introduction of new legislation in order *"to maintain the orderly government of the territory*", whereas the first paragraph does not allow the repeal or suspension of the penal legislation in force for this purpose.

The terms "*restore and maintain ... order and civil life*" can be taken to mean that it is only possible for the Occupying Power to take legislative measures relating to this area – for example, "the common interest or the interest of the population".[761] However, as confirmed by Article 64 of the Fourth Geneva Convention, as well as by the history of the drafting of the Hague Regulations, an Occupying Power can also legislate in order to promote its own military interests.

The obligation to restore and maintain order and civil life is limited *rationae temporis*[762] to the period of effective occupation. Indeed, any legislative changes made by the Occupying Power must be evaluated in relation to the transitory and temporary nature of the occupation. In other words, occupation does not signify transfer of sovereignty. As a result, according to Article 43 of the Hague Regulations, maintenance of the existing legislation must be a matter of **priority** for the Occupying Power and thus constitute an effective limit to the changes it makes.

[760] *See* J. PICTET, "The Geneva Conventions of 12 August 1949. Commentary on Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War", 1958, p. 335.
[761] C. MEURER, "*Die Volkerrechtliche Stellung der vom Feind besetzen Gebiete*", 1915, p. 23.
[762] J. OPPENHEIM, "*International Law – A Treatise", Disputes, War and Neutrality*, Vol. 2, 7th edition, ed. by H. LAUTERPACHT, 1952.

The meaning of the exception "*unless absolutely prevented*" is a matter of controversy. Some authors, among them W. SCHWENK, suggest that this expression is referring to the concept of "*military necessity*".[763]

Other authors merely require that circumventing local law be "*sufficiently justified*".[764] Finally, there are some who consider that "*absolutely prevented means necessity*" and therefore that the adverb "*absolutely*" has an entirely relative importance.

A number of authors have adopted an intermediary position and claim that, in light of the Fourth Geneva Convention, it is not just **the interests of the occupying army** that must be taken into consideration but also **those of the local civilian population**, who can prevent the Occupying Power from enforcing national legislation. A broader interpretation would correspond to the practice of the Allied occupation in the Second World War. At the very least, the risk of abuse that this broader interpretation illustrates cannot be discounted, as it falls to the Occupying Power to decide whether a legislative act is necessary, and its interpretation is not subject to review during the period of occupation.

The most controversial "legislative case", in terms of both Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention, is the introduction by an Occupying Power of an **essential legislative act** in order to ensure its own security.[765] However, such legislation should not prescribe measures that are in violation of international humanitarian law.[766]

Various writers deal with possible changes to the institutions in the occupied territory separately, as if they were governed by a specific norm. It has been stipulated that the occupant's competence to establish and operate processes of governmental administration in the occupied territory should not go beyond the reconstruction of fundamental institutions in the occupied area.

According to M. Sassoli, "*except for the lex specialis on changes affecting courts, judges and public officials,*[767] *the legal parameter is always Article 43 because local institutions of the occupied country are established by and operate under the law. Institutions and the constitutional*

[763] R. BENHARDT (ed.), *Encylopedia of International Public Law*, 1997, Vol. 3, pp. 395-397.
[764] E. H. FEILCHENFELD, "*The International Economic Law of Belligerent Occupation*", *Monograph Series of the Carnegie Endowment for International Peace, Division of International Law,* 1942.
[765] When legislation is insufficient for ensuring security, an Occupying Power has significant discretionary power to decide what is essential for its security.
[766] *Cf.* Articles 33 (1), 49 (1) and 53 of the Fourth Geneva Convention of 1949.

order are only one aspect of the laws in force in the country. The exception 'unless absolutely prevented' applies here, too. The active transformation and remodelling of the power and other value processes of the occupied country admittedly goes much further than simple legislation. An occupying power will only very exceptionally be 'absolutely prevented' from not undertaking it. It may not, for example, transform a democratic republic into an absolute monarchy, or change the regional or racial organisations of an occupied country, or even transform a liberal into a communist economy".[768]

An exception to the **Fauchille theory**,[769] which prohibits any changes to institutions in occupied territory, recognises that if a political system poses a permanent threat to the maintenance and security of the occupying military forces, it is then absolutely necessary to abolish it.[770]

Cases after the Second World War regarding the occupation of Germany and Japan must not be interpreted as establishing acceptable precedents for changes to institutions. Although each country usually chooses its political, economic and social system, a people's right to self-determination prevents an Occupying Power from making such choices.

After the Second World War, unconditional surrenders were always held to terminate the application of the enemy's law of occupation;[771] this is obviously no longer the case today, as Articles 6(3) and (4) of the Fourth Geneva Convention extend the applicability of the Convention beyond the general clause on military operations.[772]

Article 47 of the present Convention refers to institutional changes made by the Occupying Power. This article stipulates as follows:

"*Protected persons who are in occupied territory shall not be deprived in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institution or government of the said territory, nor by*

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[767] *See* Articles 64, 66 and 54 of the Fourth Geneva Convention of 1949.
[768] M. SASSOLI, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *The European Journal of International Law*, Vol.16, No. 4, p. 671, 2005.
[769] P. FAUCHILLE, *Traité de Droit International Public* (1921), p. 228 ("As the situation is temporary in the extreme, it must not drastically change the institutions of the country").
[770] E. H. SCHWENK, "Legislative Power of the Military Occupant Under Article 43", *Yale Law Journal*, ISSN 0044-0094, Vol. 54, 1945, pp. 393-416.
[771] *See* O. DEBBASCH, "*L'occupation militaire: pouvoirs reconnus aux forces armées hors de leur territoire national*", *Librairie Générale de Droit et de Jurisprudence*, Paris, 1962.

any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

This provision is sometimes misunderstood as prohibiting changes of this kind – annexation, for example.[773] Nevertheless, such a prohibition poses a problem in relation to *jus ad bellum*, as *jus in bello* simply continues to apply.[774] In its commentary, the ICRC affirms that "*certain changes might conceivably be necessary and even an improvement; (...) the text in question is of an essentially humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such*".[775]

In Iraq, the coalition established a **Provisional Governing Council**, thereby laying the foundation for a federal constitutional system, abolishing the Ba'ath party and its system of government, and attempting to introduce a market economy. This effort was not considered a violation of international humanitarian law.

Public order is restored through police operations which are subject to national law and international human rights law, and not through controlled military operations which are subject to international humanitarian law on the conduct of hostilities. The police operations undertaken do not target combatants (or civilians directly participating in the hostilities) but rather civilians who are guilty of crimes or are proven threats to public order. Whereas military operations seek to weaken the enemy's military potential, the purpose of police operations is to apply the law and maintain public order. Police operations are subject to more restrictions than operations while hostilities are ongoing.

The issue can become more complicated if, in the absence of local police forces, the army carries out operations to restore public order by "tapping" its troops and, in particular, the military police. It can thus be difficult to distinguish between a police operation and a military one, as in the case envisaged, the military police may act as the local police.

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[772] Article 3(b) of Additional Protocol I to the Geneva Conventions relative to the Protection of Victims of International Armed Conflicts, 8 June 1977.
[773] *See* O. DEBBASCH, "*L'occupation militaire: pouvoirs reconnus aux forces armées hors de leur territoire national*", *Librairie Générale de Droit et de Jurisprudence*, Paris, 1962, pp. 333-340.
[774] R. GILARDI, "The *Jus ad Bellum/Jus in Bello* Distinction and the Law of Occupation", *The Israel Law Review*, Vol. 41, issues 1-2, pp. 246-301/2008.
[775] J. PICTET, "The Geneva Conventions of 12 August 1949. Commentary on Geneva Convention IV relative to the Protection of Civilian Persons in Time of War", 1958.

A distinction between the conduct of hostilities against those directly participating in the resistance, on the one hand, and police operations for maintaining law and order that are directed against civilians involved in criminal activities, on the other, is for this reason very difficult to establish.

Applying international law to police operations raises the question of whether this branch of law is applicable to all persons in occupied territory. International law is thus applicable to armed conflicts,[776] but if these armed conflicts occur in a situation that poses a threat to the life of the nation, a number of these guarantees may be suspended under certain conditions. The practice of the United Nations and judicial decisions clearly indicate that the Occupying Power is bound by the norms of international human rights law to respect the population of the occupied territory, although the United States of America and Israel do not accept this.[777]

International law on the conduct of police operations, in particular on the use of firearms, may not be suspended, even in a situation threatening the life of the nation for as far as it protects the right to life, a non-derogable right.

According to M. Sassoli, "*under the aforementioned conditions, an occupying power may derogate from certain human rights obligations if necessary to restore and maintain public order in an occupied territory. Even a serious disruption of civil life in an occupied territory could sometimes be considered as threatening the life of the [...] nation".*[778]

The occupant has the right to suspend certain laws in the area under belligerent occupation, but also the right to legislate within set limits. In practice, four main kinds of criminal cases can occur under an occupation:

- offences committed by inhabitants against other inhabitants;
- offences committed by the occupying military forces against their own military regulations;

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[776] *See* the United Nations Committee on Human Rights, Commentary No. 29 (CCPR/C21/Rev.1/Add. 11, of 31 August 2001), para. 3 and No. 31 (CCPR/C.74/CPR.4/Rev.6 of 28 April 2004), para. 11; "*Legal Consequences of the Construction of a Wall*", (ICJ), note 6, paras 102-106; "Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons" (ICJ), 1996, Rep. 226, para. 25.

[777] "*Legal Consequences of the Construction of a Wall*", (ICJ), note 6, paras 107-112; *see* also W. KALIN, "Report on the Situation of Human Rights in Kuwait under Iraqi Occupation", UN Doc. E/CN.4/1992/26, 16 January 1992, paras 50-59; "Concluding Observations of the Human Rights Committee: Israel", UN Doc. CCPR/C.79/Add.93, 18 August 1998, para. 10.

[778] M. SASSOLI, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *The European Journal of International Law*, Vol. 16, No. 4, p. 667, 2005.

- offences committed by members of the armed forces of the Occupying Power against national law or the inhabitants originating from the territory in question;
- offences committed by the inhabitants against the occupier and its armed forces.

The first of the four above-mentioned categories of offences is ordinarily tried by **national tribunals** under national laws in force provided that such tribunals have been able to continue functioning in spite of the conflict. All of the remaining categories of criminal offence are usually tried by the military courts and tribunals of the Occupying Power, and these crimes are usually tried under the occupant's **martial law**.

Martial law consists of "[a body of rules that have been adopted at the Commander in Chief's discretion in a given area, which supplement or replace, completely or partially, the laws that are usually in force in the region]".[779] The occupant has the right to promulgate such laws, and to classify them as laws establishing new crimes and new offences in a state of war, which are required in order to control the country and protect the army.[780]

The commander of the occupying forces is limited only by the laws and customs of war when exercising his **discretionary authority** to administer martial law. Sentences should be imposed only after an impartial investigation by the **Military Tribunal** established for this purpose. After martial law has been declared in a given region, it will apply to all civilians in the area, regardless of their nationality, with the exception of diplomats and neutral countries. If the Military Tribunal so decides, convicted persons can be expelled from the occupied territory, although such a decision can be taken even without a specific verdict from the Tribunal, on the authority of the officer in charge of civilian affairs in the region and in accordance with modern military practice.

The Second World War produced a long list of proclamations of martial law and numerous examples providing a very clear idea of the offences and other types of sentences commonly found in cases recording the occupation of the Axis forces.[781]

[779] HOLLAND, "The Laws of War on Land", *JAGS*, No. 11, p. 15.
[780] LAURENTIE, *Les lois de la guerre*, pp. 48-49, expresses the contrary view and states that the occupant cannot impose martial law in occupied territory. This view is contrary to the opinions of other authors and does not follow past and current practice.
[781] *Chicago Sun*, 27 October 1943. For other declarations on the same subject, *see* SPAIGHT, "War Rights on Land", pp. 341-343, 345-346; ARIGA, "*La Guerre sino-japonaise au point de vue du droit international*", pp. 205-207, and in particular, pp. 210-214.

International humanitarian law regulates the legal environment of the occupied territories on the basis of the general concept of "*the national legal system*", with the law and the judiciary remaining in place, as they were before the occupation.[782] This reflects a fundamental concept of international humanitarian law, namely, that the occupation is a temporary situation and the Occupying Power is not sovereign over the territory.

A significant part of the Fourth Geneva Convention of 1949 deals with the trials of native offenders in occupied territory (Article 5, Articles 64 to 78).

International law does not specify the administrative structure that must govern in occupied territory, in the sense that it does not contain an outline for the occupation government. The treaties concerning the law of armed conflict do not contain express provisions on the structure of the administration. However, an Occupying Power enjoys considerable freedom to choose the administrative structure. Limits to this freedom are not to be found in the express provisions of various treaties but rather in the general principles, from which certain inferences can be made regarding the form that the administration of an Occupying Power must take.

Nevertheless, it appears that even though an Occupying Power chooses its own administration, it will choose a military government as far as the essential issues are concerned. According to the "**United States Field Manual**":

> "*Whether the Government in enemy territory consists of a military, civilian or mixed administration is immaterial. Its nature and source of authority are the same. It is a Government that has been imposed by force and the legality of its acts is determined by the laws of war.*"[783]

The administrative structure must be compatible with the principle that a belligerent occupant acquires only temporary authority over an occupied territory and is not authorised to annex the territory. The Occupying Power must then adopt an administrative structure enabling it to discharge its duties efficiently pursuant to Article 43 of the Hague Regulations and, likewise, to appoint a government for the territory in accordance with its responsibilities arising from the Fourth Geneva

[782] Article 43 of the Hague Regulations annexed to the Convention of The Hague on Laws and Customs of War on Land (No. II of 1899 and No. IV of 1907) and Article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.
[783] *US Field Manual*, para. 368. *See also British Manual*, para. 518.

Convention. Finally, the form of administration must not be such that it might violate the specific requirements of international law, in particular those relating to occupations, which include the obligation to respect the existing laws.

With regard to this specific issue, Professor **J. M. Mossner** states:

> "*The occupying power has the right to choose the organizational structure which seems best to fit its needs. Under international law, both military and civilian governments in occupied territories derive their rights and duties from the occupying power, which in turn is based on the military authority within the relevant territory. For that reason military government is sometimes defined as the exercise of supreme power in an occupied territory by the occupying power irrespective of whether in concreto it is exercised through military or civilian persons.*"[784]

There is no general requirement in international law that the administrative structure adopted by the occupant include provisions for all types of democratic participation. An Occupying Power may have sound political and military reasons to consult the local population. By proceeding in this way, it makes it easier to defend a change to the law as beneficial to the population. In addition, in cases in which a democratic structure already existed in the territory, the occupant may be obliged to preserve part of that structure for as long as it does not endanger the occupant's position. However, there is no general principle saying that the administration of an Occupying Power must operate along democratic lines, and the general assumption seems to be that this will not be the case.

In his article entitled "Handbook on the Law of War for Armed Forces", published by the International Committee of the Red Cross, **F. de Mulinen** states: "*The law of war requires a minimum cooperation between the Occupying Power and the inhabitants of the occupied territory.*"[785]

One may inquire regarding the extent of the responsibility derived from compliance with existing legislation pursuant to Article 43 of the Hague Regulations. Does this responsibility comprise an obligation for the occupant to maintain the existing administrative and legislative institutions?

[784] J. M. MOSSNER, "Military Government", *Encyclopédie de droit International*, ed. by R. Bernhardt, 1997, pp. 391-395.
[785] F. DE MULINEN, "Handbook on the Law of War for Armed Forces", *International Review of the Red Cross*, Geneva, 1987.

Unfortunately, the compendia of articles and the military handbooks offer no clear answer. On the one hand, numerous compendia of authoritative articles suggest that the Occupying Power must administer the territory in accordance with "*the existing rules of the administration and minimum alterations should be made to the existing administration*".[786]

Although there are clearly some uncertainties about the relationship between the existing administrative structure and the Occupying Power, the law is nevertheless clearer than what certain contradictory statements might suggest. The beginning of the occupation means legislative and executive power in the occupied territory passes *de facto* into the hands of the occupant.

According to *The British Manual of Military Law*:

"The public authorities cease to exercise legislative, executive and administrative functions at the general, regional and local level from the outset of military occupation."[787]

The occupant will probably make use of the existing administrative institutions to govern the territory. However, if the administrative institutions are maintained, they will derive their authority from the occupant. Furthermore, the Occupying Power is not obliged to keep the existing officials in place. Article 54(2) of the Fourth Geneva Convention expressly recognises the right of the occupant to remove public officials from their posts, a right that the ICRC describes in its commentaries on the Convention as "*a right of very long standing which the occupation authorities may exercise in regard to any official or judge, for reasons of their own*".[788]

When there is no viable administrative structure or when the structure is incapable of providing an adequate government under the particular circumstances of belligerent occupation, in view of what is needed, the occupant has the right to create new administrative bodies. It thus seems to me that **Herceg-Bosna** no longer had an administrative structure answering to the central Government, that is, to **Sarajevo** which was under siege. It was thus incumbent on either the civilian or military component of the HVO – depending on the circumstances – to establish these structures and maintain order for the purpose of protecting the civilian population.

[786] G. I. A. D. DRAPER, *The Red Cross Conventions* (London, 1958), 39; McNAIR and WATTS, *The Legal Effects of War*, 369.
[787] *British Manual*, para. 516.

The principles emphasised above confer upon the occupant a quasi-discretionary possibility to modify the administrative structure already in place. Nevertheless, the occupant must bear in mind the fact that the temporary nature of military authority in the occupied territory means that it is unlawful for an occupant to attempt to introduce permanent changes to the government in the occupied territory. The existing administrative and legislative structures as well as the political process may be suspended for the duration of the occupation, but the Occupying Power will be overstepping its authority if it attempts, for example, to create a new state, to change a monarchy into a republic or a federal state into a unitary government. It follows that the occupant can[789] suspend or circumvent the existing administrative structure in **the case of legitimate necessity**. In my opinion, given the absence of officials from the Republic of Bosnia and Herzegovina, there was a legitimate need to establish an administrative structure in the areas referred to in the Indictment.

The Fourth Geneva Convention, and Articles 64 to 78 in particular, has clarified the situation with respect to the functioning of tribunals in the occupied territory. The law in force in the occupied territory will comprise international law, the law in force prior to the occupation and the laws of occupation promulgated by the Occupying Power. In principle, the Occupying Power must allow the local courts to continue functioning and applying national law, and the occupant must not alter the judges' status.[790]

Nevertheless, Article 64(1) of the Fourth Geneva Convention stipulates that for the local courts to function, they are required to "ensure an effective administration of justice". Moreover, the occupant has the right to dismiss judges in the same manner in which it can dismiss officials. It follows from this that the occupant can appoint judges of its own nationality.

The local courts authorised to function during the occupation repeatedly insisted on the fact that it was their responsibility to ensure that such orders and regulations of the occupant were respected, as is shown by the extent of its powers under Article 43 of the Hague Regulations.[791] In almost all known cases, such legal orders and legislation were upheld, not only during the occupation, but also after liberation.

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[788] J. PICTET, *The Geneva Conventions of 12 August 1949, Commentary of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War*, 1958, 308.
[789] STONE, *Legal Controls of International Conflict* at 698.
[790] The Fourth Geneva Convention, Articles 64 and 54.
[791] *See* the interesting decision *The Public Prosecutor v. X* (East Java, 1948), quoted in MORGENSTERN, "Validity of the Acts of the Belligerent Occupant", 28 *BYIL* 1951, p. 297, no. 1.

Article 66 of Hague Convention IV of 1949 which covers the commission of offences promulgated by the occupant pursuant to the provisions of Articles 64 and 65 of the said Convention, appears controversial.[792] According to this Article, "*[i]n case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country*". The obvious objective of these provisions is, as in the case of the discussions of the 3rd Committee at the Geneva Conference of 1949, an attempt to prevent the occupant from imposing its own judicial system (and thereby its own legal system) on the territory under belligerent occupation.

Article 66 of the Fourth Geneva Convention establishes a list of three requirements related to the functioning of military courts in occupied territory: they must be "*properly constituted*", "*non-political*" and must sit in the occupied country.

According to the United Nations special rapporteur on the independence of judges and lawyers, military tribunals present serious problems as far as equitable, independent and impartial administration is concerned. Whilst the Covenant does not prohibit such tribunals, the requirements it establishes nevertheless clearly indicate that civilians should rarely be tried by such tribunals.[793] Military tribunals are often used to try civilians. With regard to this issue, the United Nations rapporteur on the independence of judges and lawyers came to the conclusion that "***[i]nternational law is developing a consensus on the need to restrict drastically, or even prohibit, that practice***".[794]

The conclusion I have reached in accordance with this analysis is that the military commander has **full authority** in the zone of combat and the right to replace the administrative structure in place, if any. In my opinion, this zone of combat is **strictly confined** to a few kilometres **at most.**

[792] Article 65 of the Fourth Geneva Convention: "The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive."
[793] General Comment 13, Article 14 of the International Covenant on Civil and Political Rights, United Nations Human Rights Committee, 12 April 1984.
[794] United Nations Special Rapporteur, UN Doc. E/CN.4/1998/39/Add.1, para. 78, quoted in F. ANDREU-GUZMAN, "Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations", Vol. 1, *International Commission of Jurists/Colombian Commission of Jurists*, Geneva, 2004, p. 1.

However, the laws of the occupied territory have precedence in the other zones, except under exceptional circumstances falling within the ambit of Article 64 of the Geneva Convention of 1949.

In the particular case raised by General Praljak, I agree with his view that a military commander is responsible only for the front line area and an area extending between several hectometres and several kilometres at most from the area in which the fighting is taking place.

Beyond this area, it will be up to the local authorities, to the extent they exist, to exercise jurisdiction. If they no longer exist, it is incumbent on the Occupying Power to take the necessary measures, although it will not be obliged to produce a given outcome.

5. Command Responsibility

Command responsibility was referred to as early as **the year 500 B.C.** by the **Chinese General Sun Tzu**.[795]

A superior's negligence was referred to by Charles VII in 1439 in France in his *Lettres pour obvier aux pilleries et vexations des Gens de guerre*.[796]

In the English tradition of law, this principle was set out in the *Massachusetts Articles of War* of 1775.[797]

Command responsibility appears in **the Hague Convention of 1907**, a document of international scope.[798]

The American Military Commission's decision of 7 October 1945 regarding **General Yamashita** recognised the criminal responsibility of a commander.[799]

[795] Sun TZU, *The Art of War*, translated by Lionel Giles, Dover, 2002, Article X, "Classification of Terrain", p. 77.
[796] M. de VILEVAULT and M. de BRÉQUIGNY, *Ordonnances des rois de France de la troisième race*, Vol. 13, Paris, Imprimerie royale, 1782, Ordonnance de Charles VII, Orleans, 2 November 1439, pp. 306 and 308, para. 18.
[797] *American Articles of War*, 5 April 1775, Article 11.
[798] Convention IV concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 3.
[799] *United States v. Yamashita*, United States Military Commission, Manila, 7 December 1945. This decision is reproduced in 4 L.R.T.W.C. 1, as well as in Leon Friedman, *The Law of War: A Documentary History*, New York,

The Supreme Court of the United States stated in its **majority judgement** that, under international law, he was responsible for failing to prevent his subordinates from committing crimes.[800]

Some interpreted this appeals judgement as establishing an absolute responsibility.[801]

This concept was applied to certain civilian leaders at **Nuremberg**. The *High Commander* Case established the principle that **criminal negligence** could give rise to liability.[802]

According to what is stated in the *Hostages Case*, a commander must be in possession of complete information, and in the case of dereliction of duty, he cannot plead his own turpitude.[803]

The **Tokyo Tribunal** considered that omission and failure to ensure that prisoners are treated well give rise to liability.[804]

These various Judgements have given rise to numerous commentaries on this doctrine, enabling one to say that the applicable standard for command responsibility is **negligence** ("should have known").[805]

However, the above-mentioned standard has not received the endorsement of the ICTY Appeals Chamber.[806]

The question was again raised by the **Rome Statute**, which envisaged a rule concerning knowledge that varies according to whether the superior-subordinate relationship is of a civilian or military character.[807]

Random House, 1972, Vol. II., p. 1596. Major Michael L. SMIDT, "Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations", 164 *Mil. L. Rev.* 155 (2000).

[800] *In Re Yamashita*, 327 U.S. 1, 15 (1945).

[801] *See* in particular A. Frank REEL, "The Case of General Yamashita", Chicago University Press, Chicago, 1949, p. 181.

[802] *The Secretariat of the International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg.

[803] *United States v. Wilhelm List et al.*, in Nuremberg Military Tribunals, Vol. XI, p. 1230.

[804] R. John PRITCHARD and Sonia Magbanua ZAIDE, ed., *The Tokyo War Crimes Trial*, Vol. 20, "*Judgement and Annexes*", New York and London, Garland Publishing, 1981, pp. 48444 and 48445.

[805] *See The Tokyo Trial*, International Conciliation, 1950, a very detailed article by Solis HORWITZ, who was a member of the Prosecution team; Annette WIEVIORKA, ed., *The Nuremberg and Tokyo Trials*, Brussels, Editions Complexe, 1996; Roger S. CLARK, *Nuremberg and Tokyo in Contemporary Perspective*, in Timothy L.H. MCCORMACK and Gerry J. SIMPSON, ed., *The Law of War Crimes*: *National and International Approaches*, The Hague, Kluwer Law International, 1997, Chap. 7, p. 171.

It therefore seems that the standard of dereliction for a military commander is **negligence** and that for a civilian, it is **wilful blindness**.

The Rome Stature therefore codified negligence as the standard of dereliction.[808]

It thus seems that the Rome Statute did not introduce a true mode of responsibility for others, which is what the ICTY confirmed in the *Halilović* Case in relation to Article 7(3) of the ICTY Statute.[809]

At issue therefore is a mode of participation in an offence which makes it possible to convict a superior with **effective control** who failed to prevent or punish crimes committed by his subordinates, although he knew, should have known or deliberately neglected to take into account relevant information.

In the present case, the issue that arises for the soldiers is the matter of the individual criminal responsibility under Article 7(3) of the Statute of **General Praljak**, who replaced **General Petković** *de jure* as the Chief of the HVO Main Staff on 24 July 1993.

If it emerges that the crimes were committed under the *de jure* command of **General Petković** and that **General Praljak** took no measures against the perpetrators of these crimes on the basis of his responsibility as a superior, *can he be held responsible for the said crimes?*

There is not much in this field that would offer a clear perspective, outside of para. 198 of the *Hadžihasanović and Kubura* Judgement,[810] which refers to a decision by the Appeals Chamber on a preliminary challenge to jurisdiction.[811] As the question of a superior's criminal responsibility is a new subject in proceedings before International Justice, it is appropriate to point out that several articles have recently appeared on the subject.[812]

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[806] *The Prosecutor v. Zejnil Delalić*, Appeals Judgement, para. 229.
[807] *See* C. BASSIOUNI, ed., *The Statute of the International Court: A Documentary History, Ardsley (NY), Transnational Publishers*, 1998; Roy S. LEE, ed., *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, from p. 202.
[808] Rome Statute, Article 28.
[809] *The Prosecutor v. Sefer Halilović*, Judgement, 2005, para. 54.
[810] *The Prosecutor v. Enver Hadžihasanović et al.*, Judgement, 15 March 2006.
[811] *The Prosecutor v. Enver Hadžihasanović et al.*, "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility", 16 July 2003.
[812] *See* in particular N. ZAKR, "*La responsabilité du supérieur hiérarchique devant les tribunaux pénaux internationaux*", *Revue internationale de droit pénal*, 2002, 1-2 (Vol. 73), 376 p, pp. 59-80; A.-M. BOISVERT, H. DUMONT, M. PETROV, "*Quand les crimes des sous-fifres engagent la responsabilité de leur chef: la doctrine de la*

The Appeals Chamber considered by a majority that there was not any state practice or any *opinio juris* confirming that a superior can incur responsibility for crimes committed by a subordinate prior to the existence of the superior-subordinate relationship.[813]

It so happens that the Appeals Chamber adopted this position by a narrow majority of three Judges against two, with the two dissenting Judges considering it necessary to draft a dissenting opinion on the issue;[814] this suggests that the question deserves closer examination and that, depending on its composition, the future findings of the Appeals Chamber may vary.

In this spirit, and for the sake of greater clarity, let us set out the arguments of (I) the majority in the Appeals Chamber as well as those of (II) the minority judges.

I. The Position of the Majority of the Appeals Chamber

The Appeals Chamber held that a superior could not incur liability for crimes committed by his subordinates prior to assuming command, as (A) no such practice existed in the national law of states. The Appeals Chamber relied on (B) various provisions of customary international law to support its argument, and (C) thus, ultimately found that recognising this mode of responsibility would constitute a serious violation of the principle of legality.

A. The Absence of Practice and of *Opinio Juris* in *Foro Domestico*

The Appeals Chamber began by stating that "no practice can be found, nor is there any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes

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responsabilité du supérieur hiérachique en droit pénal international", 2004, 9. Canadian Criminal Law Review, pp. 93-135, ed. by Thomson Carswell; S. BOURGON, "*La doctrine de la responsabilité du commandement et la notion de lien de subordination devant le Tribunal pénal international pour l'ex-Yougoslavie*", *Revue québécoise de droit international*, 2006, special edition, pp. 95-118; M. P. ROBERT "*L'évolution de la responsabilité du supérieur hiérarchique en droit pénal international*", *La revue du barreau*, 2007-2008, Vol. 67, pp. 1-39; "*La responsabilité du supérieur hiérarchique basée sur la négligence en droit pénal international*", *Les cahiers du droit*, Vol. 49, No. 3, 2008, pp. 413-453; A. H. KHALIFA, "*Les conditions préalables à la responsabilité du supérieur hiérarchique devant les juridictions pénales internationales*", *Revue de science criminelle et de droit pénal comparé*, No. 4, 2010, from p. 773, Paris.

[813] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, paras 16, 32-33; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Shahabuddeen, paras 18-25; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Liu, para. 32; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Schomburg, para. 12.

[814] Judges Shahabuddeen and Hunt attached two dissenting opinions.

committed by a subordinate prior to the commander's assumption of command"[815] and that "[i]t is telling that the dissenting opinions do not mention a single direct and explicit statement in a military manual, or in a commentary to a military manual, or in the case law, or in the abundant literature on command responsibility, suggesting that the customary law principle of command responsibility imposes on a military commander criminal responsibility for crimes committed by his subordinates before he has assumed command".[816]

International criminal law is a branch of international public law and, therefore, necessarily rests on the foundation of international law. The fact that a rule does not exist in national law has no bearing on the international order. This principle was established in 1926 by the Permanent Court of International Justice in its renowned Appeals Judgement *Certain German Interests in Polish Upper Silesia*[817] in which it stated that "[f]rom the standpoint of international law [...] municipal laws are merely facts..."[818] At this point, it is not possible to appeal to the fact that no rules exist in national law in order to claim that a superior cannot incur responsibility for acts committed before he assumed command.

The Appeals Chamber then considered that this mode of responsibility would contravene customary international law.

B. Superior Responsibility is Contrary to Customary International Law

In support of its arguments, **the majority in that Chamber** relied on various provisions of customary law which, in its opinion, clearly ran counter to this possibility.

It considered that Article 28 of the Rome Statute,[819] Article 86(2) of Additional Protocol I,[820] Article 6 of the Draft Code of Crimes Against the Peace and Security of Mankind adopted by the

[815] *The Prosecutor v. Enver Hadžihasanović et al.,* "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility", 16 July 2003, para. 45.
[816] *Ibid*., para. 53.
[817] *Case on Certain German Interests in Polish Upper Silesia*, Merits, Judgement No. 7, 1926.
[818] *Ibid*., p. 19.
[819] Article 28 of the Rome Statute provides as follows: "(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces **were committing or about to commit such crimes**; and
(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

International Law Commission in 1996[821] and the ***Kuntze*** Case brought before the Nuremberg Military Tribunals[822] required the existence of a **superior-subordinate** relationship and **effective control** over the subordinate at the time crimes were committed in order for the superior to be held liable for omission.

The notion of "**effective control**" can be interpreted in various ways.

The **narrow interpretation** might lead to the conclusion that the soldiers who committed crimes were not under the effective control of the successor; taking this path would lead International Justice to a dead end.

The **broader interpretation** might lead to the conclusion that by virtue of assuming command, the successor had **effective control** over his troops and that **prior acts** committed by his subordinates fall within the scope of such effective control as a result of having maintained the **continuity** of military activity on a permanent basis. From this point of view, the successor assumes command of a functioning unit and, in certain cases, even of a unit fully engaged in combat.

C. The Principle of Legality

The Appeals Chamber thus considered that holding a superior responsible for failing to punish his subordinates for crimes they allegedly committed before he assumed command would violate the **principle of legality**.[823]

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[820] According to Article 86(2) of Protocol I, "[t]he fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude **in the circumstances at the time**, that he **was committing or was going to commit such a breach** and if they did not take all feasible measures within their power to prevent or repress the breach".

[821] Article 6 of the Draft Code of Crimes Against the Peace and the Security of Mankind provides as follows: "The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility if they knew or had reason to know, **in the circumstances at the time**, that the subordinate **was committing or was going to commit such a crime** and if they did not take all necessary measures within their power to prevent or repress the crime".

[822] In relation to the *Kuntze* Case (*In the matter of the United States v. Wilhlem List et al*., Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. XI, p. 1230 ("the *Kuntze* Case")), the *Hadžihasanović* Chamber (*Hadžihasanović* Decision, para. 50) confines its remarks to stating that this case "*also constitutes an indication that would run contrary to the existence of a customary rule establishing command responsibility for crimes committed before a superior's assumption of command over the perpetrator*" and it added that "*[w]hile it is clear that this judgement recognises a responsibility for failing to prevent the recurrence of killings after an accused has assumed command, it contains no reference whatsoever to a responsibility for crimes committed prior to the accused's assumption of command*". *See Hadžihasanović* Decision, footnote 65.

The reasoning of the Appeals Chamber calls for two introductory comments.

- First, the Judges stated that "*[i]n considering the issue of whether command responsibility exists in relation to crimes committed by a subordinate prior to an accused's assumption of command over that subordinate, the Appeals Chamber observes that it has always been the approach of this Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to* ***ascertain the state of customary law in force at the time the crimes were committed***".[824]

In denying that the successor superior incurs responsibility, the Appeals Judges relied on two provisions that did not exist at the time of the events. It was not until 1998 that the Statute of the International Criminal Court was adopted (entering into force in 2002), and the Draft Code of Crimes Against the Peace and Security of Mankind was not adopted until 1996. As the acts in this case occurred prior to these dates, the two provisions are not applicable and the Appeals Chamber could not rely on them as the "**customary law in force at the time the crimes were committed**".

- Although one might consider that the two provisions cited above reflect customary law in force at the time insofar as they did no more than codify what had already been accepted, there is nothing in the provisions to suggest that a superior-subordinate relationship with a duty to punish must exist at the time the crimes are committed. The same applies to all of the provisions cited by the Appeals Chamber and, above all, to Article 7(3) of the Tribunal. As nothing in this article clearly suggests that the successor superior cannot incur responsibility, this leaves the Judge with latitude for interpretation that does not in any way contravene the principle of legality.

The Chamber therefore considered that "absence of authority suggesting that command responsibility does not apply to crimes committed before the assumption of command does not establish the conclusion that **such criminal responsibility** does exist".[825] And holding the successor superior responsible would therefore violate the principle of legality and the rights of the accused.[826]

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[823] *The Prosecutor v. Enver Hadžihasanović et al.,* "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility", 16 July 2003, para. 55.
[824] *Ibid*., para. 44.
[825] *Ibid*., para. 54.
[826] *Ibid*., para. 55.

Two questions immediately spring to mind. Why did the majority of the Judges in the Appeals Chamber refer to the **principle of legality**? Were they holding that successor superior responsibility is a new kind of offence?

In criminal law, the principle of the legality of crimes and punishments states that criminal conviction for a crime is possible only on the basis of clearly established textual support. This is the sacrosanct ***nullum crimen, nulla poena sine lege*** principle enshrined in numerous international texts on human rights.[827]

The majority of the Judges referred to Article 22, para. 2 of the ICC Statute which provides that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy [...]" As this provision states, the principle of legality applies to the offences and not to the mode of responsibility.

By referring to the **principle of legality** in order to reject a finding of **successor superior responsibility**, the majority of the Appeals Chamber Judges implied that a crime not covered by any provisions of law was at issue. But in my opinion, this is not the case. What is at issue is in fact a mode of responsibility – as the Judges themselves underscored[828] – and, therefore, the principle of legality does not enter into consideration.

However, if this mode of responsibility proves to be a new and distinct crime, how can one justify its establishment, since, as has been shown, it has no textual support?

In Nuremberg, the accused were tried for crimes against humanity, an offence that did not exist at the time the crimes were committed. The judges justified this non-compliance with the principle of legality in the name of the fight against impunity and, above all, by the fact that the perpetrators of the crimes necessarily knew that their acts were not lawful.

It is therefore possible to apply this reasoning to the current problem and, in fact, the minority of the Judges presented a similar theory in their dissenting opinions.

[827] *See* for example Article 71 of the European Convention on Human Rights, Article 11, paragraph (e) of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights.
[828] *See* note no. 16, above.

II. The Position of the Minority Judges

The arguments put forward by the minority Judges in their dissenting opinions in support of the responsibility of the new superior can be summarised as follows:

(A) The customary principle of command responsibility makes it possible to hold the new superior responsible for crimes committed prior to his assumption of command and (B) the sources of customary law taken into account by the majority Judges in ruling out the responsibility of the new superior were misinterpreted.

A. The Customarily-Established Principle of Superior Responsibility May Encompass the Case of a New Superior

If it is not possible to hold a superior responsible for crimes committed prior to his assumption of command, no one will be responsible for these crimes[829] and this **situation of impunity** would encourage subordinates to perpetrate other crimes.[830]

Furthermore, the minority Judges considered that the principle of command responsibility does not require proof of a causal connection between the commander's failure to exercise his powers and the perpetration of a crime by his subordinates.[831]

The superior's two duties – to **prevent** and **punish** – are two distinct duties and, therefore, the time when effective control must be proven varies depending on the obligation in question. Applying the finding of the *Hadžihasanović* Decision would be tantamount to calling into question the Tribunal's case law, according to which the obligation to prevent crimes must be distinguished from the obligation to punish the perpetrators. If the superior had reason to know of crimes in time to prevent their commission, he commits an offence by failing to take measures to prevent them and – according to the case law – cannot make good that failure by subsequently punishing the subordinates who committed the offences.[832]

[829] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, para. 14.
[830] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, para. 15.
[831] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, paras 16, 32-33; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Shahabuddeen, paras 18-25; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Liu, para. 32; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Schomburg, para. 12.
[832] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, para. 23; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Schomburg, paras 9, 22-26.

Finally, the Judges held that an interpretation of Article 7(3) of the Tribunal's Statute supports the argument that a new superior bears responsibility.[833] According to the text of the article, the existence of a superior-subordinate relationship does not need to be established at the same time for both crimes that have already been committed and crimes about to be committed: in the event the commander knew or had reason to know that the subordinate was committing or about to commit a crime, the superior-subordinate relationship obviously existed at the time the act was committed; however, when the subordinate has already committed the crime, it is not necessary for the superior-subordinate relationship to exist at the exact moment of commission – it is sufficient for this relationship to exist at the time it is discovered by the commander.[834]

Article 7(3) of the Statute represents the Security Council's interpretation of international customary law at the time the Tribunal Statute was adopted; to claim the contrary would be to say that Article 7(3) is *ultra vires* and therefore invalid.[835]

B. The Majority Misinterpreted the Sources of Customary Law

The minority Judges hold that it is necessary to read Article 86(2) of Additional Protocol I, in conjunction with Article 87(3), which supplements Article 86(2) and the duties it imposes on commanders. The majority observed that Article 86(2) provides that "the fact that a grave breach of the Conventions was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility if they knew, or had reason to know, in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take measures to prevent or repress it".

The majority argues that this wording imposes prosecution only when there was a nexus between the commander and the perpetrator of the offence at the time of the offence. However, the minority Judges recall that under Article 87(3) of Protocol I, States must make the commanders of their forces responsible, among other things, to punish violations of the Conventions. The minority

[833] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, paras 27-35; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Liu, para. 29; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Schomburg, paras 13-15.
[834] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, para. 28; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Liu, paras 2, 31.
[835] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, paras 30-31.

Judges find that Article 87(3) establishes an area of responsibility which is more extensive than that of Article 86(2).[836]

The minority Judges also consider that Article 87(3) does not only reflect the obligations imposed on states, as the majority contends. According to the majority, while Article 86(2) expressly refers to the individual responsibility of superiors, Article 87 addresses the obligations of states which are party to the Conventions. The minority, however, is of the opinion that the two articles are integral parts of the same scheme.[837]

The minority Judges point to the majority's misinterpretation of the expression "the circumstances at the time" that appears in the Draft Code of Crimes Against the Peace and Security of Mankind and in the Rome Statute, which, according to the minority Judges, is only applicable to a superior who must prevent crimes; the minority Judges emphasised the fact that if this were the case, a superior could not incur responsibility even for crimes committed after he had taken up his post and of which he became aware after their commission.[838]

In the ***Kuntze*** **Case**, the minority Judges considered that the accused had been indicted not for his responsibility as a superior, but for having been a direct perpetrator of the crimes.[839]

Last, the minority Judges observe that, in the *Hadžihasanović* Decision,[840] the majority Judges changed the requirement whereby a new situation – in this case, the responsibility of a new superior – falls within the scope of the customary principle of command responsibility.[841]

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[836] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, paras 22-25; *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Hunt, paras 20-24; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Liu, paras 16-19, 21; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Schomburg, paras 18-19. According to Article 87(3) of Protocol I, "*[t]he High Contracting Parties and Parties to the conflict shall require* ***any commander who is aware that subordinates*** *or other persons under his control are going to commit* ***or have committed a breach*** *of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof*". (emphasis added)

[837] *Hadžihasanović* Decision, para. 53; *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, paras 22-25; *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Hunt, paras 20-24; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Liu, paras 16-19, 21; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Schomburg, paras 18-19.

[838] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, para. 20; *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Hunt, para. 17; *Orić* Appeals Judgement, Partial Dissenting Opinion of Judge Schomburg, para. 21.

[839] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, paras 3-7; *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Hunt, paras 15-19.

[840] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, paras 18-26; *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Hunt, paras 14-32; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Liu, paras 16-25.

In fact, the majority Judges, having stated that "where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle",[842] nevertheless held that "this Tribunal can impose criminal responsibility only if the crime charged was clearly established under customary law at the time the events in issue occurred".[843]

There is evidently a contradiction between these two findings since, as **Judge Hunt** pointed out, the general requirement for application of the principle of command responsibility to a new superior would seem to have changed "within the space of forty paragraphs" in the Decision from "reasonably" to "clearly".[844]

As far as I am concerned – taking into account the position of the minority Judges – I will set out the reasons for which command responsibility is **necessarily** incurred for acts committed **before** the assumption of command.

What is the situation in this particular case? We know that **General Praljak** assumed his *de jure* position on 24 July 1993. **General Praljak** is no military *philistine* – he was Assistant Minister of Defence of the Republic of Croatia and also fought as a volunteer in the Republic of Bosnia and Herzegovina. He knew **General Petković** very well, and when he became his superior, he could not ignore the past.

It would therefore be paradoxical if **General Praljak** had no information or evidence whatsoever concerning the fact that there were imprisoned civilians and Muslim HVO soldiers who had been removed from the regular forces and, for the most part, imprisoned in the *Heliodrom*, all the more so since in my opinion, he had been the ***de facto* Chief of the Main Staff** for a long time.

In this case, was there ***a change of superior*** *on 24 July 1993?* I do not think so, since **General Praljak** was actually attached to an existing Main Staff by virtue of the fact that he became the ***de jure* Commander** of the Main Staff and **General Petković** became his deputy. A reasonable Judge

[841] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Hunt, paras 37-38; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Schomburg, paras 13-15.
[842] *Hadžihasanović* Decision, para. 12 (emphasis added).
[843] *Hadžihasanović* Decision, para. 51 (emphasis added).
[844] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Hunt, para. 38.

may therefore find that there was **continuity** and that given such continuity, **General Praljak** could **not have been** unaware of the existence of previous crimes.

In military terms, when a commander succeeds another commander, there is, as a general rule, *a handover of power ceremony* and at least a discussion between the outgoing and incoming commander. In the course of this handover of power, the outgoing commander sums up the situation and must usually inform his successor of the existence of crimes committed under his command.[845] The outgoing commander may "play down" his own responsibility and fail to inform his successor of the reality of the situation he is leaving to him, thereby keeping the commission of the said crimes concealed. The incoming commander might thus not be informed of the reality of the situation, and it would not be possible to charge him with any offence in relation to the crimes previously committed by his subordinates.

This is a hypothesis that must of course be verified by both the Prosecution and the Defence and Judges in order to highlight any evidence supporting a finding that the incoming commander had no reason to believe that crimes had been committed by his subordinates.

On the other hand, if in the event of a handover of power, the successor was informed of certain criminal acts, he must take action. *Why?*

It is because, as the ICRC rightly says in its commentaries, **there can be no impunity.** Given the affirmation of this principle, the *rule on succession in command* must always take into consideration **the key question of impunity**. The successor on taking up his command must ask himself whether or not certain matters were kept secret from him; these are the basics of the trade, as it is almost certain that, as part of the handover of power, almost all of the subordinates will be maintained in their positions, and the successor will have to assemble his officers, review and evaluate the situation and reach conclusions about the exact situation he inherits. Failure to do this could mean that crimes will remain unpunished. In a certain sense, the successor has to **take stock of the situation** and give serious consideration to the question of whether any crimes were committed, especially in a state of war, before he took up his post.

Article 87(3) of Protocol I of 1977 provides that *"[t]he High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his*

control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof".[846]

Accordingly, a reading of these provisions makes it possible to claim that a "Successor Commander" who learns that the subordinates **now under his authority** have committed a grave breach of International Humanitarian Law is **obliged to take punitive steps** against them, failing which he could incur liability under Article 86(2) of Protocol I.[847]

In the present case, there are two HVO bodies that would ordinarily have knowledge of the actual crime situation in the field: the SIS and the military police. The new commander must therefore liaise with the heads of these two bodies to evaluate the situation. Similarly, he must consult the **Military Prosecutor** to evaluate all of the ongoing and forthcoming proceedings. The new commander's failure to do this work constitutes dereliction, which will amount to **professional negligence** and will be a factor contributing to the commission of an offence; such negligence should be punished by international justice.[848]

The reasoning of the three majority Judges of the Appeals Chamber thus raises various issues, because it allows a situation of impunity to continue, which I cannot condone and which is prohibited under international law. The prohibition of international crimes such as genocide, crimes against humanity, war crimes and the crime of aggression is in fact considered to form part of *jus cogens.*[849] Moreover, the Tribunal itself has conceded that this rule is mandatory.[850] The Inter-

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[845] The ICRC commentary on Article 86(2) of Protocol I of 1997 states that "it seems to be established that a superior cannot plead ignorance of reports addressed to him", para. 3545.
[846] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8/6/1977, Article 87(3), UNTS No. 1-17512.
[847] *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Shahabuddeen, paras 22-25; *Hadžihasanović* Decision, Partially Dissenting Opinion of Judge Hunt, paras 20-24; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Liu, paras 16-19, 21; *Orić* Appeals Judgement, Partially Dissenting Opinion of Judge Schomburg, paras 18-19. The Judges held that failure to respect Article 87(3) would result in a superior being held responsible pursuant to Article 86(2). This is a point of view not shared by the drafting team which believes that these are two distinct rules which should not be read together; *see* "Memorandum on the State of Jurisprudence in Relation to the Responsibility of a Commander for Crimes Committed before He Assumed Command", 29 March 2011, p. 6.
[848] The Appeals Chamber in the *Čelebići* Appeals Judgement held that the "[argument] that a breach of the duty of a superior to remain constantly informed of his subordinates' actions will necessarily result in criminal liability comes close to the imposition of criminal liability on a strict or negligence basis", *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Appeals Judgement, 20 February 2001, para. 226. With regard to a commander's responsibility for negligence, *see* Marc Henzelin, "*les raisons de savoir du supérieur hiérarchique qu'un crime va être commis ou a été commis par un subordonné*", in Tavernier (ed.), **Actualité de la jurisprudence pénale internationale à l'heure de la mise en place de la Cour pénale internationale**, Bruylant, Brussels, 2004, pp. 81-126, 2004.
[849] *See*, for example, *The Attorney General of the Government of Israel v. Adolph Eichmann*, 1962, 36 ILR, 277; European Court of Human Rights, *Kolk and Kislyiy v. Estonia*, Decision on Admissibility, 17 January 2006.
[850] *The Prosecutor v. Zoran Kupreškić et al.*, Appeals Judgement, 14 January 2000, para. 520.

American Court of Human Rights has stated that the commission of such crimes requires that those responsible be punished under customary international law.[851]

The task of International Criminal Law – which arises when international humanitarian law has been violated – is to establish a secondary legal rule (the international responsibility of individuals) in order to sanction the violation of a primary rule (the prohibition of international crimes). The customary rule according to which the responsibility of the superior is incurred when he or she is guilty of an omission[852] is therefore part of the general obligation to punish international crimes and must be interpreted so as to ensure that no crime goes unpunished.

Para. 446 of the *Kordić and Čerkez* Case[853] states the following:

"*The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself. Civilian superiors would be under similar obligations, depending upon the effective powers exercised and whether they include an ability to require the competent authorities to take action.*"

The Tribunal, or at least some of the Judges, was therefore already inclined to hold a superior responsible for failing to punish subordinates who had committed crimes **before** he assumed command.

It should nevertheless be recalled that the Nuremberg Tribunal established the principle according to which international individual criminal responsibility exists for a crime against international law even when such provisions are lacking under the national law of states. This principle, as well as all the principles identified in the Nuremberg Judgement, were confirmed by the United Nations General Assembly in 1946[854] and codified in 1950 by the International Law Commission.[855]

[851] International Court of Human Rights, Case of *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Expenses, Appeals Judgement of 26 September 2006, Series C, No. 154, paras 105 and 152.
[852] The customary nature of command responsibility for omission has been recognised by the Tribunal in the Čelebići ***cases,* Ibid. *No. 7, para. 383; and*** *The Prosecutor v. Tihomir Blaškić (the Lašva Valley)*, Judgement, 3 March 2000, para. 290.
[853] *Kordić and Čerkez* Judgement (*Kordić* Judgement), 26 February 2001.
[854] UN General Assembly Resolution 95(1), "Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal", adopted on 11 December 1946.

The reasoning of the majority of the Appeals Chamber in the *Hadžihasanović* Case is therefore far from persuasive, as it contains the major flaw of leaving crimes unpunished by "protecting" the successor from being held liable due to his lack of effective control over the perpetrators of the crimes. This idea disregards the real responsibility of a **successor** which, in my opinion, must be viewed within the framework of **continuity of command**; it is a successor's duty to at least obtain information on measures taken by his predecessor, as stated in Article 87(3) of Additional Protocol I to the Geneva Conventions of 1949, which contains the words "***have committed***". It is only after having taken the necessary steps, that is to say, after having sought and failed to obtain information, that the successor can be absolved, even if crimes were committed, as there is nothing he can be accused of if, in spite of all his efforts, he remained **completely unaware.**

In any event, given the fact that **Slobodan Praljak** actually took up his post on 24 July 1993, he is liable under Article 7(3) of the Statute, as he must have been informed of the situation with respect to military subjects and if not, it was his duty to request that information be gathered.

On the other hand – and this is my personal opinion – **Slobodan Praljak** was the *de facto* Chief of the Main Staff since arriving in Bosnia and Herzegovina; although this was General Petković's title, he was only second in command and, therefore, **Slobodan Praljak** incurs responsibility for some of the Counts under Article 7(3) of the Statute.

(6) Aiding and Abetting as a Mode of Liability and the *Momčilo Perišić* Case Law

As I have considered **aiding and abetting** to be the most appropriate mode of responsibility for **Bruno Stojić, Valentin Ćorić and Berislav Pušić**, and given the Appeals Chamber's recent case law in the *Momčilo Perišić* case, I must make a few comments on the **applicable law**.

(a) The Applicable Law Prior to the *Perišić* Appeals Judgement

The statutes of the ICTY and the ICTR define an **accessory**, that is, someone who aids the principal perpetrator of a crime, in terms of the concept of **aiding and abetting**. Whereas the statutes of the international criminal tribunals consider the two terms coextensive, the statute of the ICC tends to

[855] "Principles of International Law recognized by the Charter of the Nuremberg Tribunal and by the Judgement of the Tribunal", International Law Commission's Report covering the second session from 5 June to 29 July 1950, Official Documents of the 5th Session, Supplement No. 12(a/1316), United Nations, New York, 1950, pp. 12-16.

make a distinction between them. In fact, the provisions on aiding and abetting of Article 25(3) of the Rome Statute provide as follows:

"*In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*
[…]
b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."

The Statute thus makes a distinction between **complicity through collaboration, that is to say, through aiding, abetting or assisting (paragraph (c)) and inducing in the sense of inciting, which therefore amounts to instigation under Article 25(3)(b)**.[856]

This facilitates making a clear distinction between **aiding and abetting** and **inciting,** in the sense that an accessory who aids and assists supports the **principal perpetrator** who already had the intention of committing a crime, and is only **abetting him**. On the other hand, the instigator "*induces*" the commission of the crime, which means that **the principal perpetrator did not necessarily possess the clear intent to commit the crime before being incited to do so by the instigator, even though he may have already entertained the idea**.[857]

Article 7(1) of the Statute of the ICTY provides that "*[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime*". The same provisions are contained in ICTR Article 6(1). However, in the ***Akayesu* Judgement**, the Trial Chamber made a distinction between aiding and abetting. It thus stated the following: "*Aiding and abetting, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto. The issue here is whether the individual criminal responsibility provided for in Article 6(1) is incurred only where there was aiding and abetting at the same time.*

[856] O. de FROUVILLE, "*Droit international pénal. Sources, Incriminations, Responsabilité*", published by A. Pedone, 2012, p. 390.
[857] *Ibid*., p. 391.

The Chamber is of the opinion that either aiding or abetting alone is sufficient to render the perpetrator criminally liable."[858]

Subsequent case law, however, made it possible to clearly distinguish between aiding and abetting and instigation as modes of participation and to establish the *mens rea* and *actus reus* required to incur such responsibility.

The ***Orić*** Judgement is quite clear concerning the distinction between aiding and abetting and inciting to commit. The idea that the Trial Chamber develops in the Judgement is that instigation, contrary to aiding and abetting, must be more than merely facilitating the perpetration of the primary offence. Although the plan to commit the crime is not necessarily generated by the instigator, the principal perpetrator is finally moved to take action as a result of instigation. On the other hand**, in the case of aiding and abetting, the principal perpetrator has already decided to commit the crime, and the accomplice does no more than provide him with moral or logistical support**.[859] It further states that **aiding and abetting** is as a rule considered a less grave mode of participation.[860] In addition, the Chamber makes clear that so long as the principal perpetrator is not definitely determined to commit the crime, any acts of requesting, convincing or encouraging commission of the crime may constitute instigation (and even qualify as ordering if a superior-subordinate relationship exists). If **the principal perpetrator** is already prepared to commit the crime but may still need or appreciate moral support, assistance in carrying out the crime or aid in its planning, preparation or execution, thus making the crime possible or at least facilitating it, such [acts] constitute aiding and abetting.[861]

In the ***Akayesu*** Case, the Trial Chamber declared that **it is necessary to prove the commission of a crime by the principal perpetrator**, as aiding and abetting is an accessory mode of liability.[862] It is therefore necessary to establish beyond reasonable doubt that a crime was committed in order to subsequently hold **the accessory responsible.** However, the Chamber makes clear that **the accessory can be tried even if the guilt of the principal perpetrator has not been proven** or if he or she has not been found.[863] It further observes that what follows from this conclusion is that the same person cannot be both the **accessory** and the **principal perpetrator**. The Trial Chamber states: *"An act with which an accused is being charged cannot, therefore, be characterized both as*

[858] *The Prosecutor v. Jean-Paul Akayesu*, Judgement, 2 September 1998, para. 484.
[859] *The Prosecutor v. Naser Orić*, Judgement, 30 June 2006, para. 271.
[860] *Ibid*., para. 281.
[861] *Ibid.*
[862] *The Prosecutor v. Jean-Paul Akayesu*, Judgement, 2 September 1998. para. 529.

an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act.''[864]

In the ***Tadić*** **Case**, the Trial Chamber raised the question of the definition of the physical element in aiding and abetting. The Trial Chamber first focused on the required degree of participation,[865] relying *inter alia* on the Draft Code of Crimes of the International Law Commission and its commentary[866] as well as on the examination of certain post-Second World War cases.[867] It thus declared that **the accessory's participation must be substantial and must have an effect on the perpetration of the crime**.[868] The Trial Chamber observed that if the accused had not provided such **substantial assistance** in the cases it referred to, the crimes would probably not have been committed in the same way. The Trial Chamber noted that "*[e]ven in these cases, where the act in complicity was significantly removed from the ultimate illegal result, it was clear that the actions of the accused had a substantial and direct effect on the commission of the illegal act, and that they generally had knowledge of the likely effect of their actions*".[869] The Chamber then addressed the physical *actus* proper, which consists of **assistance by words or acts that lend encouragement or support to the principal perpetrator of the crime**.[870] It further stated that it is not necessary for the assistance to have been provided at the time the crime was committed and that the actual physical presence at the time the crime was perpetrated is not necessary to incur responsibility for aiding and abetting.[871] **However, mere physical presence may be considered aiding and abetting if it is proven that it had a substantial effect on the commission of the crime**.[872]

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[863] *Ibid*., para. 531.
[864] *Ibid*., para. 532.
[865] *The Prosecutor v. Duško Tadić,* Judgement, 7 May 1997, paras 681-689.
[866] Article 2(3)(d) of the ILC Draft Code of Crimes against the Peace and Security of Mankind of 1996: "*An individual shall be responsible for a crime in article 17, 18, 19 or 20 if that individual* ***knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime****, including providing the means for its commission*.", (emphasis added). The commentary notes that "*the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way",* ILC Draft Code, p. 24.
[867] For example, a German tribunal in the *Auschwitz* trial considered that the fact that the accused Robert Mulka obtained Zyklon B gas and participated in the construction of the gas chambers – thereby providing substantial assistance making the mass extermination of the Jews possible – made him an accomplice in murder by incineration. *See* Vol. II, *War Crimes Reports*, p. 418. Similarly, a French tribunal considered that by providing a list of names to the German authorities, a Nazi party administrator made a substantial contribution to the perpetration of a war crime. *Gustav Becker, Wilhelm Weber and 18 Others*, Vol. VII, *Law Reports* 67, 70.
[868] *The Prosecutor v. Duško Tadić*, Judgement, 7 May 1997, para. 688.
[869] *Ibid.*
[870] *Ibid*., para. 689.
[871] *Ibid*., paras 691-692.
[872] *Ibid*., paras 689-690.

In the ***Furundžija*** Case, the Trial Chamber more closely examined the notion of a **causal link** between the aid and assistance provided by an accessory and the commission of the crime by the principal perpetrator. It stated that it was thus necessary for **the acts of the Accused to be such that they significantly influence the perpetration of the crimes by their principal perpetrators.**[873] Nevertheless, there is no requirement that assistance constitute a *sine qua non* condition of the crime. Therefore, the Chamber found that the *actus reus* of aiding and abetting consists of material aid, encouragement or moral support that has a **significant effect** on the commission of the crime.[874]

The ***Mrkšić*** Appeals Judgement focuses more particularly on the **psychological element** of aiding and abetting in relation to **complicity by omission**. The Appeals Chamber stated that the fact that omission must be directed to assist, encourage or lend moral support to the perpetration of a crime forms part of the *actus reus* and not the *mens rea* of aiding and abetting.[875] It thus found that the *mens rea* required for complicity by omission implies that **the accessory knows that his omission facilitates the commission of the crime** of the principal perpetrator and that he must **be aware of the essential elements of the offence** which was ultimately committed by the principal. However, the Chamber further noted that it is not necessary for the accessory to know the precise crime that was intended and was actually committed. It the Accused was aware that one of a number of crimes would probably be committed, and one of those crimes is ultimately committed, he has the intent to facilitate the commission of that crime and, therefore, will be found guilty for aiding and abetting.[876]

The Appeals Chamber further recalls that it had previously rejected an elevated *mens rea* requirement for aiding and abetting, namely, the proposition that the accessory needs to have intended to provide assistance, or at a minimum, accepted that such assistance was possible and would be foreseeable consequence of his conduct.[877]

(b) The *Perišić* Case Law

General Perišić was the Commander of the 13th Corps of the JNA (renamed the "Army of Yugoslavia" or the "VJ" in May 1992), commencing in January 1992. In June 1992, he was appointed **Chief of Staff** and Deputy Commander of the 3rd Army, whose commander he became in

[873] *The Prosecutor v. Anto Furundžija*, Judgement, 10 December 1998, para. 233.
[874] *Ibid.*, para. 235.
[875] *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Judgement, 5 May 2009, para. 159.
[876] *Ibid.*
[877] *Ibid.*

April 1993. He became **Chief of the VJ General Staff** on **26 August 1993**, which made him **the highest-ranking officer** in the VJ with **authority and responsibility** for all operations. Given his high-ranking position, he was then subordinate only to the **President of the FRY** (Federal Republic of Yugoslavia) **and** to the **Supreme Defence Council** (SDC) of the FRY, which consisted of the President of the FRY and the presidents of its two constituent republics, Serbia and Montenegro.

Accordingly, **Perišić** had extensive and significant powers. He had, in particular, **authority** over military and civilian personnel; he **made and implemented decisions** for the General Staff and **transferred VJ personnel** to the Army of Republika Srpska (VRS) and the Army of Serbian Krajina (SVK).[878] Furthermore, he made decisions on the **disposition of material assets** (weapons, food, medical supplies, etc.).[879] He also had authority for "***ordering, supervising, monitoring and disciplining*** *all personnel and units that comprised VJ*",[880] including members of regular VJ units, members seconded to the VRS and the SVK and former JNA members who had become members of the SVK and of the VRS whom the VJ continued to remunerate and over whom it retained its authority.[881]

The Prosecution holds **Perišić** responsible under Article 7(1) of the Tribunal's Statute for having **aided and abetted** in the planning, preparation or commission of the crimes referred to in Articles 3 and 5 of the Statute.

The Indictment makes the contention that the assistance provided by **Perišić** was first of all material and consisted of supplying large quantities of weapons, ammunition, logistical supplies and VJ troops: all these actions contributed to the commission of crimes, and were even the cause of an increase in crime.[882] The Prosecution stresses that in spite of the fact that the Accused knew that crimes were being committed, he continued to provide covert assistance, thereby contravening the United Nations Security Council resolutions.[883]

With regard to the **supply of troops**, it is alleged that in November 1993 **Perišić** established special personnel centres (the "30th and 40th Personnel Centres") the purpose of which was to provide VJ

[878] *The Prosecutor v. Momčilo Perišić*, Second Amended Indictment, 5 February 2008, para. 3.
[879] *Ibid*., para. 4.
[880] *Ibid*., para. 6.
[881] *Ibid*., paras 6-7.
[882] *Ibid*., para. 9.
[883] *Ibid.*

officers to serve in the ranks of the VRS and the SVK. **Perišić** personally issued orders for these officers to join the VRS or the SVK and established, in part, the criteria for their selection.[884]

According to the Indictment, the co-ordination "*was so close that the political leaders of the Republika Srpska and General Ratko Mladić could request that particular VJ officers be placed under their operational command or be retired via the 30th Personnel Centre*".[885]

The VJ was responsible for the promotion of officers serving in the ranks of the SVK and the VRS. In the case in point, the role of **Perišić** was to make a final determination on the recommendations he received from superior officers for promotions to the rank of lieutenant colonel or to lower ranks.[886]

With regard to **material and logistical assistance**, **Perišić** continued to implement the policy of the **Supreme Defence Council**, which was to provide large quantities of weapons, fuel, ammunition, medical supplies, treatment and facilities for the wounded, foodstuffs and uniforms, spare parts, testing facilities, materials and communications systems for the three armies; **Perišić** did this through his own acts and through his subordinates.[887] For example, he personally responded to some requests for logistical support from Mladić, and he suggested providing the VRS with an air defence weapons system.[888] All this material and logistical support was necessary and a decisive factor in the commission of crimes.

The Prosecution also emphasises **Perišić's** responsibility for aiding and abetting as a result of the **climate of impunity** that prevailed at the time. For **Perišić** was responsible for ensuring that discipline was maintained by his subordinates when engaged in combat in the VRS and the SVK:[889] "*He had the legal and professional duty to take all necessary measures to prevent or punish the commission of crimes by his subordinates in the 30th and 40th Personnel Centres of the VJ General Staff.*"[890] **Perišić** knew that his subordinates had violated international criminal law on a number of occasions, and failed to take action. Similarly, his subordinates knew that he had not taken measures to punish them for crimes they had perpetrated, which made it possible for them to

[884] *Ibid.*, paras 10 to 13.
[885] *Ibid.*, para. 14.
[886] *Ibid.*, para. 19.
[887] *Ibid.*, paras 24 to 28.
[888] *Ibid.*, para. 26.
[889] *Ibid.*, para. 29.
[890] *Ibid.*

believe that they were free to continue perpetrating crimes with impunity.[891] **Perišić** thereby aided and abetted in the commission of crimes.

Finally, and more specifically, with regard to the **knowledge** that **Perišić** had regarding the provision of troops and logistical and material support, the Indictment relies on the fact that Perišić had his own intelligence apparatus responsible for gathering information on the conflict in Bosnia and Herzegovina and Croatia. This apparatus provided him with regular situation reports.[892] Moreover, **Perišić** had access to the reports from VJ officers to the SVK and the VRS, as well as to the reports and declarations from NGOs and the media referring to criminal conduct, and he had regular contact with the Serbian leaders.[893] In addition, the ICTY, which was established in 1993, had issued public indictments relating to serious crimes, some of which had been committed by personnel assigned to the 30th and 40th Personnel Centres of the VJ General Staff from 1994.[894]

Perišić therefore incurred responsibility for **Sarajevo** under Article 7(1) for having, between August 1993 and November 1995, **aided and abetted the planning, preparation and execution** of a military campaign of artillery and mortar shelling of civilian sections of Sarajevo and for the actions of snipers directed against its population, as well as for unlawful killings, inhumane acts and attacks on the civilian population (**Counts 1 to 4**).[895] With full knowledge of the facts, he exercised his authority as Chief of the VJ General Staff to provide and pay the officers responsible for crimes committed during the siege of Sarajevo and to provide weapons and ammunition used to perpetrate the crimes; and he failed to prevent or punish the perpetrators of the crimes and deployed troops to support the siege of Sarajevo.[896] According to the Indictment, he is thus responsible for aiding and abetting **murder**, a crime against humanity (Count 1), **murder**, a violation of the laws or customs of war (Count 2), **inhumane acts**, a crime against humanity (Count 3) and **attacks on civilians**, a violation of the laws or customs of war (Count 4).[897]

Perišić likewise incurred responsibility for **Srebrenica** under Article 7(1) for having **aided and abetted** the attack on the enclave of Srebrenica, during which crimes were committed against the Muslim population, in particular, persecution, forcible transfer and murder (**Counts 9 to 13**).[898] Thus, in July 1995, thousands of Muslim men were captured by the Serbian forces and thousands of

[891] *Ibid.*, para. 31.
[892] *Ibid.*, para. 33.
[893] *Ibid.*
[894] *Ibid.*
[895] *Ibid.*, paras 40 and 44.
[896] *Ibid.*, para. 44.
[897] *Ibid.*, para. 46.

prisoners were executed.[899] **Perišić** was aware of the plan for the attack and knew about the "six strategic objectives".[900] He aided and abetted the commission of unlawful killings, inhumane acts and forcible transfers by providing – with the knowledge of the purpose for which it was used – the assistance needed for the commission of these acts, in particular, by exercising his authority as Chief of the General Staff to provide and pay the officers responsible for crimes, by providing weapons and ammunition used to perpetrate these crimes, by allowing VJ officers to assist in the planning and preparation of the takeover of the enclave of Srebrenica, by ordering officers to report to the VJ General Staff for assignments in Bosnia, and in Srebrenica in particular, by providing covert training to the members of the 10th Sabotage Detachment in Yugoslavia responsible for numerous murders, by protecting the border between Serbia and Bosnia in order to prevent the Srebrenica Muslims from escaping into Serbia; and, finally, by failing to prevent or punish the perpetrators of the crimes.[901] He was also aware of the discriminatory intent of the perpetrators of the crimes.[902] Thus **Perišić** committed **murder**, a crime against humanity (Count 9), **murder**, a violation of the laws or customs of war (Count 10), **inhumane acts**, a crime against humanity (Count 11), **persecutions on political, racial or religious grounds**, a crime against humanity (Count 12), and **extermination**, a crime against humanity (Count 13).[903]

In its final public brief, the Prosecution first addressed the fact that **Perišić** provided **substantial assistance** to the VRS and the SVK. He supplied **logistical and technical assistance, personnel, financial and substantial materiel assistance** which was used directly for the commission of crimes.[904] **Perišić** was behind the creation of the 30th and 40th Personnel Centres in order to regulate the role of the VJ officers transferred to the VRS and the SVK. The Prosecution relies on the following statement by **Perišić**:

"*The adoption of the proposed decision or order would help to eliminate in advance all suspicions regarding loyalty and patriotism of a large number of professional soldiers and civilians serving in the [VJ], either by having them carry out their obligation or relieving them of duty in the VJ, and at the same time this would provide a far greater selection of professional military personnel for the [VRS and SVK] and make replacement and equal encumbrance of the entire system possible*."[905]

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[898] *Ibid*., para. 56.
[899] *Ibid*., para. 57.
[900] *Ibid*., para. 56.
[901] *Ibid*., para. 60.
[902] *Ibid.*
[903] *Ibid*., para. 62.
[904] *The Prosecutor v. Momčilo Perišić*, "Prosecution Final Trial Brief", confidential, 4 March 2011, para. 45.
[905] *Ibid*., para 146.

Thus **Perišić** played a **central role** in the creation and development of the Personnel Centres. He is described as having played an active role, and he was **personally involved** in the establishment of these centres and their effective functioning.[906] **Perišić** suggested that officers who refused transfer should be punished,[907] and he became personally involved in cases of disobedience by obliging the officers concerned to appear before him and explain their actions, and by terminating their service in the VJ if they continued to refuse.[908] **Perišić** had the authority to appoint and transfer all VJ officers to the SVK and the VRS, up to the rank of colonel, while generals fell under the authority of the President of the FRY.[909] Once they had been assigned, these officers remained **under the authority of Perišić**. Thus, throughout the period relevant to the Indictment, the Accused personally **issued orders** for a large number of VJ members **to be transferred** to the VRS and the SVK – including the highest levels of the command structure – by way of the Personnel Centres.[910] With regard to Sarajevo, **Perišić** provided the VRS with high-ranking VJ officers, who were mainly responsible for the perpetration of crimes in Sarajevo, namely, Mladić, Galić, D. Milošević and the Chief of Staff, Colonel Sladoje.[911] In addition, he prepared certain military operations in Sarajevo and gave his approval for VJ units to be sent there to fight.[912] With regard to Srebrenica, he transferred officers responsible for crimes committed in Srebrenica, such as Mladić, Miletić, Gvero, Popović, Blagojević, Tolimir, etc.,[913] to the VRS. The Prosecution establishes a direct link between the above-mentioned individuals – and therefore **Perišić –** and the crimes committed at these two locations.[914] These officers, as well as the VRS members, are in fact held responsible for crimes committed in Sarajevo and Srebrenica, in particular, for the sniping and shelling against civilians in Sarajevo and the killings and forcible transfer of thousands of Bosnian Muslims following the VRS takeover of Srebrenica in July 1995.[915]

Logistical support initially consisted of establishing **coordination** between the VJ, the VRS and the SVK, in particular by holding monthly meetings where the needs for personnel, materiel and finance were discussed.[916] During the meetings, **war strategies**[917] and **operations in the field** were

[906] *Ibid*., para. 148.
[907] *Ibid*., para. 154.
[908] *Ibid*., para. 160.
[909] *Ibid*., para. 169.
[910] *Ibid*., para. 173.
[911] *Ibid*., para. 463.
[912] *Ibid*., paras 482 to 497.
[913] *Ibid*., para. 503.
[914] *Ibid*., para. 62.
[915] *Ibid*., paras 80 to 81.
[916] *Ibid*., para. 241.
[917] *Ibid*., paras 243 to 245.

also developed. For example, **Perišić** ordered the VJ units to deploy in Sarajevo in order to assist the VRS on Mount Žuć.[918]

Perišić was also responsible for **providing** the 30th and 40th Personnel Centres with **materiel and technical equipment** drawn from VJ resources.[919] Thus, a significant quantity of weapons and ammunition – the Prosecution mentions 3,640 tonnes – was provided to the VRS and the SVK on the direct orders of the Accused.[920] Assistance was also provided in the form of repairs and maintenance, medical training, communications equipment, materiel testing, fuel and other miscellaneous assistance,[921] such as, for example, air bombs and rocket motors for the manufacturing of modified air bombs.[922] The Prosecution challenges the statements of the Accused in his interview who allegedly lied when he said that he had never authorised such assistance.[923] It underscores that, in view of the evidence, which consists of his written instructions, requests for assistance bearing his signature, orders he issued directly, etc., he was directly involved in supplying the Personnel Centres.[924]

The Prosecution further stresses the **knowledge** that **Perišić** had of the crimes perpetrated by **VRS** and **SVK** officers. He had access to an extensive network of information, including detailed and regular reports from the VJ Secret Services concerning events taking place in BiH and Croatia, analyses and summaries of information disseminated by the media provided by the VJ Administration, multiple contacts with FRY political leaders as well as with the VRS and SVK Command with whom he could communicate through secure lines, diplomatic sources at the UN and in embassies who were his "eyes and ears" abroad, keeping him informed about the course of events in BiH and Croatia. He also had access to television and newspapers.[925] Through all these bodies and means of communication, **Perišić** received combat reports, emails and diplomatic cables, and he participated in meetings, was visited by VRS and SVK officers and had personal contact with General Mladić.[926] This made him one of the persons best informed about the situation in Yugoslavia.

[918] *Ibid*., para. 247.
[919] *Ibid*., para. 253.
[920] *Ibid*., para. 257.
[921] *Ibid*., para. 262.
[922] *Ibid*., paras 278 to 281.
[923] *Ibid*., para. 287.
[924] *Ibid*., paras 288 to 292.
[925] *Ibid*., para. 83.
[926] *Ibid*., paras 85 to 140.

The Prosecution stated that the Accused Momčilo **Perišić knew not only that the perpetrators had the intent to commit crimes but also that they had discriminatory intent**.[927] This in fact concerns the notorious **campaign of ethnic cleansing** carried out in BiH that systematically targeted the non-Serbian population and was the subject of many United Nations Security Council resolutions and reports of which **Perišić** and the Serbian leaders were aware.[928] According to the Prosecution, for the Accused, the events happening in Sarajevo and Srebrenica were neither **impossible to anticipate nor isolated,** given that he had access to detailed information on the political and military situation in Bosnia and Croatia throughout the relevant period.[929] The Prosecution concluded that the ongoing VRS campaign of shelling and sniping of civilians in Sarajevo was known throughout the world since, from the outset, the FRY authorities were **aware of the crimes** committed from media reports, diplomatic cables and the VJ's international intelligence system.[930] As a result of the position he held, **Perišić** also had **access to all this information.** He was **directly informed** of the attack on the civilians in Sarajevo and Srebrenica.[931] The Prosecution added that at the time the crimes were committed in Srebrenica, **Perišić,** who was aware of the situation as he had discussed it with **Mladić**, could have instructed the members of the 30th Personnel Centre to comply with their obligations under international humanitarian law. He could have warned them that if they failed to do so, he would curtail the assistance they were receiving from the VJ. When the atrocities commenced, he could have recalled the officers who had committed the crimes, which he never did.[932]

The Defence points out that the majority of the officers serving in the **VRS** and the **SVK** were in place before **Perišić** assumed his duties and that the armies also started receiving logistical assistance prior to his arrival.[933]

When he became Chief of Staff, **Perišić** did not have unlimited authority. With regard to his responsibility for assigning VJ personnel to the VRS and the SVK, the Defence stated that **Perišić** conveyed **proposals from the VRS and the SVK** for assigning and promoting personnel **to the FRY Supreme Defence Council** (SDC). **He had neither *de jure* nor *de facto* authority** to determine the issue of these decisions.[934]

[927] *Ibid*., para. 563.
[928] *Ibid*., para. 566.
[929] *Ibid*., para. 596.
[930] *Ibid*., para. 635.
[931] *Ibid*., paras 635 and 684 to 689.
[932] *Ibid*., para. 686.
[933] *The Prosecutor v. Momčilo Perišić*, "M. Perišić's Final Brief", confidential, 4 March 2011, paras 590 and 595.

The Defence further stressed that **Perišić,** having neither the authority nor the power, could not be held responsible for the policies put in place by the competent FRY authorities at the time. In fact, the **Ministry of Defence** was responsible for obtaining material and financial resources for the VJ. It was the owner of military grounds, and the VJ only had the right to use them.[935] The VRS informed the Ministry directly of the materiel it needed since **the SDC was responsible for decisions** about the kind and quantity of ammunition to be allocated.[936] Furthermore, according to the Defence, it should be noted that a review of the evidence shows that **it is not possible to find that the VJ provided assistance with the intention of supporting the commission of crimes** but, on the contrary, shows that **it was given in order to ensure the security of the FRY in a situation of armed conflict**.[937]

Furthermore, the Defence denies the existence of a communications system between the VJ and the VRS.[938]

With regard to the Accused's participation in the training of the personnel from the Personnel Centres, the Defence submitted that **no proof had been adduced establishing that the training provided by the VJ had a substantial and direct effect on the perpetration of these crimes** by the VRS, and that **Perišić** knew that the training the VJ provided would assist in the commission of such crimes.[939] Moreover, it pointed out that the SDC, and not **Perišić**, had exclusive authority to take decisions on providing training for VRS personnel.[940] Nevertheless, Perišić may have had to implement these policies, without however having done so in a criminal manner since the evidence clearly demonstrates that the training provided was lawful military assistance.[941] Finally, according to the Defence, the training the VJ provided to the VRS in no way contributed to the commission of the crimes in the sense that the Prosecution **did not uncover any nexus** between the two.[942] Thus, it noted that there is no evidence suggesting that the specialised training by the VJ entailed more than **standard military training and exercises**[943] and that **Perišić** could therefore not incur individual criminal responsibility.

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[934] *Ibid*., para. 601.
[935] *Ibid*., para. 614.
[936] *Ibid*., para. 633.
[937] *Ibid*., para. 619.
[938] *Ibid*., para. 778.
[939] *Ibid*., para. 780.
[940] *Ibid*., para. 782.
[941] *Ibid*., para. 783.
[942] *Ibid*., para. 786.
[943] *Ibid*., para. 794.

Finally, the Defence pointed out that even if **Perišić** authorised certain military operations, such as operation *Pancir-2*, no nexus has been established between this operation and the campaign of sniping and shelling of civilians in Sarajevo, nor is there any proof showing that the troops who participated in this operation were also present in Sarajevo.[944]

With regard to the presence of VJ personnel during the events in Srebrenica, the Defence pointed out that only three officers were there on 17 July 1995 and that there is **no evidence that Perišić was in any way involved in their assignment**.[945] The Defence then refers to the training that **Perišić** allegedly provided to members of the 10th Sabotage Detachment in Yugoslavia. According to the Defence, it was not just that there was a complete lack of proof that he exercised any authority with regard to this training, but that, furthermore, **it was not possible to establish a connection between the members of this unit –** with the exception of Erdemović – **and the events in Srebrenica**.[946] Moreover, as their training consisted of learning how to handle weapons and explosives and how to plant explosives correctly, it is reasonable to consider that such skills were part of a **normal training curriculum** and were not taught for the purpose of facilitating the commission of crimes.[947] In addition, the Defence claims that **Perišić** cannot be connected to the closing of the border with Serbia in order to prevent the Muslims from fleeing from Srebrenica. It relied on a witness who claimed that there were no VJ men in Srebrenica in July 1995 and that individuals attempting to flee were apprehended by the "Serbian police", but it is not known whose authority they were under.[948]

As for the *mens rea*, the Defence claimed that none of the UN Security Council resolutions issued during **Perišić's** tenure **described criminal conduct of any kind** by the members of the VRS. It noted that the resolutions referred to wrongful conduct generally attributed to **Bosnian Serb paramilitaries**.[949] Moreover, the fact that the VRS used or cooperated with paramilitaries does not mean that the VRS itself was engaged in criminal operations or that **Perišić** had knowledge of criminal conduct in Sarajevo.[950]

Perišić acknowledged that he received periodic reports on the situation in Bosnia and Croatia from the VRS and through the VJ intelligence apparatus and that he had direct communications with its

[944] *Ibid*., para. 815.
[945] *Ibid*., paras 1091-1092.
[946] *Ibid*., paras 1094 to 1096.
[947] *Ibid*., para. 1098.
[948] *Ibid*., para. 1102.
[949] *Ibid*., para. 820.
[950] *Ibid*., para. 821.

officers, Mladić in particular. However, this does not in any way prove that these exchanges were referring to these crimes – there is no evidence in support of such a conclusion.[951] **Perišić** also admitted that he had regular meetings with the leaders of the FRY but claimed that **none of these contacts was about the commission of crimes**.[952] Furthermore, the Prosecution was not able to prove that **Perišić** followed media reports and what they were saying or that international news reports were provided to him. Even if this had been the case, at the time, such information was considered **unreliable and biased – a matter of propaganda, which is common practice in wartime,** and especially so in the war in the former Yugoslavia.[953] In fact, the news reports depicted the belligerents as the "**good Muslims**" on one side, and the "**bad Serbs**" on the other and viewed the situation from just a single perspective. Thus, the Bosnian Serbs even created their own television service so as not to have to "put up" with this **profoundly anti-Serbian reporting**.[954] The Defence claimed that in normal times, a military commander places little reliance on media reports and, therefore, in the context of war – particularly in the context of the war in the former Yugoslavia – even less reliance is placed on reports.[955]

As far as the reports issued by the United Nations are concerned, the Defence noted that the **Prosecution** claimed that the FRY leaders read and rejected them, considering them to be impartial and based on unverified information. Moreover, the Prosecution failed entirely to link **Perišić** to these reports, and **their simple availability in the public sphere does not prove that he was aware of them**.[956]

In its Judgement of 6 September 2011, the Trial Chamber first recalled that in order for **Perišić** to be held responsible for aiding and abetting crimes, it must be proven beyond reasonable doubt "***that Perišić provided practical assistance, encouragement, or moral support to the principal perpetrator of the crime, which had a substantial effect on the perpetration of the crime***".[957] This is the *actus reus*. It then defines the *mens rea* by stating that it must be proven that the Accused "***knew that his acts assisted the commission of the crime by the principal perpetrator and that he was aware of the 'essential elements' of the crime, including the state of mind of the principal perpetrator***".[958]

[951] *Ibid*., paras 823-824.
[952] *Ibid*., para. 827.
[953] *Ibid*., paras 829 to 831.
[954] *Ibid*., para. 834.
[955] *Ibid.*, para. 838.
[956] *Ibid.*, para. 842.
[957] *The Prosecutor v. Momčilo Perišić*, Judgement, 6 September 2011, para. 1580.

Reacting positively to the Defence submissions at first, the Chamber stated that **Perišić** could not incur responsibility for the climate of impunity that prevailed at the time unless he was a superior. It therefore decided to consider this issue only in respect of **Article 7(3) of the Statute**, and not Article 7(1), as the Prosecution had requested.[959]

The Chamber first considered that assistance provided to wage a war did not constitute criminal conduct *per se*. Nevertheless, it noted that **crimes against civilians were part of the VRS strategy** and, as in the case of military operations, were an integral part of their objective.[960] The crimes included **a campaign of shelling and sniping, which made no distinction between civilian and military targets, and were done to intimidate the population of Sarajevo in order to further the siege**.[961] In Srebrenica, **the objective was to isolate the Bosnian Muslims and then eliminate them**.[962]

According to the Chamber, **Perišić** was aware of the strategic objectives of the Bosnian leaders, one of which was the partition of Sarajevo.[963] Once he had assumed his position, **he oversaw the military assistance provided to the VRS**, in particular the provision of weapons, ammunition, fuel, etc., which assistance was provided to VRS members responsible for the crimes perpetrated.[964] Furthermore, the Chamber found that, on a number of occasions, he directly requested that the SDC continue to provide the VRS with this assistance free of charge.[965] It found that the VRS depended mainly on the VJ for both logistical assistance and personnel in order to be capable of waging a war. Thus, by providing logistical and technical assistance on which the VRS depended heavily, and given that the VRS's strategy included the perpetration of crimes, **the Accused Perišić facilitated the commission of the said crimes**.[966]

With regard to the supply of personnel, the Chamber noted that the troops serving in the VRS through the 30th Personnel Centre remained members of the VJ.[967] It stated that Momčilo "***Perišić** carefully devised and implemented the plan to create the Personnel Centres*".[968] Thus, the highest-ranking officers in the VRS like **Mladić, Milovanović, Gvero, Đukić, Tolimir, Beara, Miletić,**

[958] *Ibid.*
[959] *Ibid*., paras 1586-1587.
[960] *Ibid*., para. 1588.
[961] *Ibid*., para. 1590.
[962] *Ibid*., para. 1591.
[963] *Ibid*., para. 1589.
[964] *Ibid*., para. 1594.
[965] *Ibid*., para. 1595.
[966] *Ibid*., para. 1602.
[967] *Ibid*., para. 1607.

Galić, Dragomir Milošević, Popović, etc., who were already VRS members before **Perišić** became Chief of the General Staff, became members of the 30th Personnel Centre after the Accused had assumed his position, thereby legally acquiring their status as VJ members. For this reason, he **allowed these officers to continue serving in the VRS**.[969] The Chamber further stated that **Perišić** allowed other VJ military personnel to be made available to the VRS and the SVK by **making the transfers almost compulsory** since any refusal led to early retirement.[970] This is how the material assistance provided by the Accused has been described. The Chamber further recalled that the officers, namely Mladić, Galić, Milošević, Gvero, Krstić, Tolimir and Popović, committed criminal acts and that by keeping them in their positions, **Perišić** facilitated the commission of the crimes in Sarajevo and Srebrenica.[971] In addition, it held that he provided **moral support** to the perpetrators of the crimes through his direct involvement in their promotion and the salaries paid to them.[972]

The Chamber therefore found that **Perišić used his authority to assist the VRS**, thereby facilitating the commission of the criminal acts. However, it considered that there was no requirement to prove a causal connection between **Perišić**'s conduct and the perpetration of the crimes, nor that his actions served as a condition precedent to, or a condition *sine qua non* for, their commission.[973]

With regard to the *mens rea*, the Chamber first emphasised the fact that as **Perišić** had access to information, he knew that crimes had been committed against civilians and that it was **highly probable** that other crimes would be committed and yet continued to provide assistance to the VRS, despite this.[974] Perišić **received information** through international cables, his intelligence and security services and media coverage.[975] It was therefore impossible for him not to know about the sniping campaign in Sarajevo. The Chamber stressed that even though the Accused may have seen the information as biased, incomplete or even anti-Serbian, this did not call into question his knowledge of the perpetration of crimes in Sarajevo and, therefore, **he knew that his conduct assisted in their commission**.[976]

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[968] *Ibid*., para. 1609.
[969] *Ibid*., paras 1608-1609.
[970] *Ibid*., para. 1610.
[971] *Ibid*., para. 1613.
[972] *Ibid*., para. 1615.
[973] *Ibid*., para. 1627.
[974] *Ibid*., para. 1632.
[975] *Ibid*., para. 1633.
[976] *Ibid*., para. 1635.

The Chamber also found that **Perišić** knew that the VRS would probably forcibly transfer the Muslims of Srebrenica. He was in fact aware of certain crimes committed by the VRS in Srebrenica **thanks to international documents**, such as reports, United Nations Security Council resolutions, diplomatic cables, daily reports from his intelligence organs and media coverage.[977] **Despite what he knew about the situation, he continued to provide assistance to the VRS**, thereby facilitating the commission of crimes.

However, the Chamber, relying on extensive testimony, did not consider it proven beyond reasonable doubt that at the time he was providing assistance to the VRS, the Accused knew that thousands of Muslims would be systematically killed. The Chamber noted that certain witnesses stated that the scale of the murders in Srebrenica was not foreseeable.[978] **It therefore did not hold him responsible for aiding and abetting the commission of the crime of extermination** (Count 13).

The Chamber therefore found **Perišić** guilty under Article 7(1) of the Statute of aiding and abetting the crimes to which the following counts were directed: Count 1 (murder, a crime against humanity), Count 2 (murder, a violation of the laws and customs of war), Count 3 (inhumane acts, injuring and wounding civilians, a crime against humanity), Count 4 (attacks on civilians, a violation of the laws and customs of war), Count 9 (murder, a crime against humanity), Count 10 (murder, a violation of the laws and customs of war), Count 11 (inhumane acts, forcible transfer, injuring and wounding civilians, a crime against humanity) and Count 12 (persecution, a crime against humanity). He was sentenced to 27 years in prison.

Judge Moloto dissented from the Majority's finding as to **Perišić**'s individual criminal responsibility under Article 7(1) of the Statute in relation to Counts 1 to 4 and 9 to 12 of the Indictment. Concerning the **physical element**, his argument relied on the fact that the provision of assistance to the VRS to wage war was **too remote** from the crimes committed in the course of the war. In **Judge Moloto's opinion, this amounted to nothing more than simply waging war**.

[977] *Ibid*., para. 1637.
[978] *Ibid*., para. 1645.

The Judge noted: *[I]t raises the question: where is the cut-off line. For instance, would a manufacturer of weapons who supplies an army with weapons which are then used to commit crimes during a war also be criminally responsible?*"[979]

He considered that for a person to be held individually criminally responsible for aiding and abetting, that person must have aided and abetted the commission of crimes, and not simply provided military assistance.[980] According to the Judge, the Chamber in this case declared that aiding and abetting need not have been "**specifically directed**" at the crimes committed, although the ICTY had always stated the contrary. **Judge Moloto** held that the assistance provided by the Accused was too remote from the crimes.[981] The orders **Perišić** gave to provide assistance to the VRS were not specifically directed at the commission of crimes in Sarajevo and Srebrenica – they did no more than **support the war effort**.[982] The Judge added: "*I note that the question is not whether the VRS substantially depended upon the VJ's support to function as an army, but rather, whether the support of **Perišić** had a substantial effect on the perpetration of crimes.*"[983] The Judge also disputed the ***mental element*** of aiding and abetting. In his opinion, there is no evidence that the reports drafted by the UN Special Rapporteur and the Security Council resolutions on **ethnic cleansing** and the **crimes committed** were passed on to, let alone read by, **Perišić,** despite being public in nature.[984] He thus noted: *"I find pertinent to this issue what was stated in the **Delić Case**: open source documents are in principle accessible to an accused. However, without evidence that the accused was ever provided with a copy of the document, or that the information contained therein was brought to his attention, it cannot be presumed that the information contained in an open source document was 'available' to him, let alone – I add – that he had knowledge of it.*"[985] **Furthermore, he noted that the United Nations documents made no reference to discriminatory intent in the commission of the crimes which they considered could be attributed to unidentified paramilitary groups**.[986] In the Judge's opinion, **Perišić was not aware of the VRS's propensity to commit crimes** whether through diplomatic cables, media coverage of the events or documents from the international community.

The **Appeals Chamber** examined the notion of "[acts] **specifically directed** [...] **to the perpetration of a** [...] **crime**", which they defined as a constituent element of aiding and abetting

[979] *The Prosecutor v. Momčilo Perišić*, "Separate Opinion of Judge Moloto", 6 September 2011, para. 3.
[980] *Ibid*., para. 5.
[981] *Ibid*., paras 9 to 14.
[982] *Ibid*., para. 17.
[983] *Ibid*., para. 27.
[984] *Ibid*., para. 44.
[985] *Ibid*., para. 45.
[986] *Ibid*., para. 46.

responsibility. It relied on the ***Tadić*** **Judgement** in which a distinction was made – on the basis of **specific direction** – between the modes of responsibility of aiding and abetting and that of a joint criminal enterprise (JCE): "*The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime*."[987] Furthermore, the Chamber noted that not a single Appeals Judgement appears to have adopted the contrary view, even if the formulations used may have differed and that the ICTR and other tribunals have also adopted the case law on specific direction.[988] Thus, the Chamber first established that **the notion of "specific direction" constitutes the necessary link between assistance provided by an accused and the crime committed by the principal perpetrators**.[989] It follows that a finding of guilt for aiding and abetting is not possible if **specific direction** has not been proven beyond **reasonable doubt**.

The Chamber further noted that previous appeals judgements did not necessarily conduct an in-depth analysis of specific direction. However, it noted that this may be explained by the fact that prior convictions for aiding and abetting **involved acts that were geographically very proximate to the crimes committed by the principal perpetrators**, which implicitly demonstrated the existence of specific direction. Where an Accused is not physically present at, or proximate to, the scene of a crime, **the Chamber held that explicit consideration of specific direction was required**.[990] In such cases, it is necessary to consider the **individual circumstances of the case**, although the Chamber's jurisprudence does offer some guidance such as, for example, the significant temporal distance between the actions of the Accused and the crime he or she allegedly assisted. This does in fact decrease the likelihood of a connection between the crime and the accused individual's actions.[991]

In this case, the Appeals Chamber considered that the Trial Chamber committed an **error of law** when it failed to examine whether specific direction had been proven.[992] The Chamber noted that **the assistance provided by Perišić was remote from the relevant crimes** committed by the principal perpetrators. The VRS was independent of the VJ, and the two armies were based in two

[987] *The Prosecutor v. Momčilo Perišić*, Appeals Judgement, 28 February 2013, para. 26.
[988] *Ibid*., paras 28-29.
[989] *Ibid*., para. 37.
[990] *Ibid*., paras 38-39.
[991] *Ibid*., para. 40.
[992] *Ibid*., para. 41.

separate geographical regions.[993] In addition, the Trial Chamber did not prove that **Perišić** was physically present at the scene of the crimes. Accordingly, the Chamber ought to have conducted **an explicit analysis** to prove that there was specific direction.[994]

The Appeals Chamber noted that the Trial Chamber found that the VRS was not *de jure* or *de facto* subordinated to the VJ, as it had a separate command structure.[995] It accepted that **Perišić** was the highest-ranking officer in the VJ and was responsible for combat preparations and organising VJ operations. However, he was subordinated to the President of the FRY, and it was the SDC that took the final decisions concerning the VJ.[996] Accordingly, the SDC took the decision to provide VJ assistance to the VRS even before **Perišić** assumed the position of Chief of the General Staff, but also during the entire period of his tenure. The Accused actively participated in the meetings and had the authority to administer assistance to the VRS although the authority to decide on the provision of assistance rested with the SDC.[997]

Nevertheless, the Appeals Chamber acknowledged that all of these findings did not in themselves exempt **Perišić** from criminal liability. It considered that it was necessary to analyse the SDC policy of assisting the VRS in order to figure out whether this facilitated the commission of criminal acts.[998] It first noted that the Trial Chamber ultimately concluded that **the VRS was not a criminal organisation** but an army fighting a war. Although the VRS strategy was linked to crimes against civilians, not all of its activities were criminal in nature.[999] In the light of these elements, the Appeals Chamber considered that **a policy of providing assistance to the VRS's overall war effort did not in and of itself demonstrate that assistance provided by Perišić was specifically directed at facilitating the commission of crimes** by the VRS in **Sarajevo and Srebrenica**.[1000]

The Appeals Chamber noted that while the Trial Chamber took the **volume** of assistance provided to the VRS into consideration, this does not necessarily allow one to infer that it was specifically directed at the commission of crimes.[1001] Volume is an element of circumstantial evidence that may show that crimes were facilitated, but **a reasonable interpretation would be that large-scale military assistance was provided to support the war effort**, not crimes. Thus, the claim that the

[993] *Ibid*., para. 42.
[994] *Ibid.*
[995] *Ibid*., para. 46.
[996] *Ibid*., para. 49.
[997] *Ibid*., para. 50.
[998] *Ibid*., para. 51.
[999] *Ibid*., para. 53.
[1000] *Ibid.*

assistance tended to go towards or was specifically directed at the commission of the crimes cannot be the only possible finding.[1002]

The Appeals Chamber then addressed the exact role of **General Perišić** in order to determine whether he confined himself to implementing the SDC policy of assisting the VRS or took separate measures, independently of the SDC, directed at facilitating the crimes. The Appeals Chamber noted that the evidence does not suggest that he recommended that the assistance provided should be specifically directed at facilitating the crimes. At SDC meetings, he spoke out in favour of sustaining aid to the VRS and of adopting financial measures to facilitate this aid, but there is no evidence that he supported the provision of assistance specifically directed at facilitating VRS criminal activities. The Appeals Chamber thus found that **Perišić's intention was to assist the overall VRS war effort**.[1003] Although he enjoyed considerable discretion in providing VJ assistance, and could have used this power to direct this aid towards VRS criminal activities, after reviewing the evidence, the Appeals Chamber held that **Perišić** quite simply directed assistance towards the war effort within the parameters set by the SDC.[1004]

In its review of the precise categories of aid provided by the Accused, the Appeals Chamber found that **neither** the secondment of soldiers **nor** the provision of logistical aid seemed incompatible with the conduct of lawful military operations. Although the Accused was behind the establishment of the 30th Personnel Centre, which provided practical assistance to the VRS and facilitated the integration of personnel, according to the Appeals Chamber, there is no evidence showing that this assistance was provided for the specific purpose of facilitating the commission of crimes.[1005] Similarly, even if the VJ provided the VRS with substantial aid in the form of materiel and military equipment, as well as with military training and communications assistance – all of which was administered by **Perišić** – the Appeals Chamber held that **evidence proving a substantial contribution does not necessarily prove that there was a specific link to the commission of crimes**.[1006] The evidence in fact suggests that **Perišić** reviewed the requests from the VRS as a whole, and that the aid the VJ provided was distributed to numerous locations in Bosnia and Herzegovina in order to aid the overall VRS war effort.[1007] The Chamber also noted that **Perišić** refused requests for assistance submitted outside of official channels and urged the SDC to punish

[1001] *Ibid*., para. 56.
[1002] *Ibid*., paras 57-58.
[1003] *Ibid*., para. 60.
[1004] *Ibid*., para. 61.
[1005] *Ibid*., para. 63.
[1006] *Ibid*., para. 65.

VJ personnel who were providing unauthorised assistance.[1008] The Appeals Chamber thus found that the Prosecution had failed to identify any evidence suggesting that **Perišić** provided aid specifically directed towards VRS crimes committed in Sarajevo and Srebrenica.[1009] Finally, the Appeals Chamber recalled that **proving knowledge of the crimes does not by itself establish specific direction**. In its opinion, the indicia demonstrating that **Perišić** knew of the VRS crimes in Sarajevo and Srebrenica may serve as circumstantial evidence of specific direction, however, a finding of specific direction must be the sole reasonable inference after reviewing the totality of the evidence.[1010] In the light of this evidence, it considered that **Perišić** may have known of crimes committed by the VRS, but the VJ aid he supported was directed towards the overall war effort rather than towards the commission of these crimes.[1011]

The Appeals Chamber thus found that the assistance that one army provides to another army's war efforts is insufficient in itself to trigger individual criminal responsibility for individuals who provided such aid absent proof that it was specifically directed towards the commission of crimes.[1012] **As specific direction is an element of the *actus reus* of aiding and abetting liability, it is necessary to establish an adequate nexus between an individual's acts of aiding and abetting and the crimes committed if an accused individual is to be held criminally liable**.[1013] With regard to **Perišić**'s acts, the existence of such a link has not been proven beyond reasonable doubt. Therefore, the Chamber did not hold **Perišić** liable for aiding and abetting. Counts 1, 2, 3, 4, 9, 10, 11 and 12 were dismissed on the basis of an absence of legal grounds.[1014]

What thus follows from the *Perišić* jurisprudence is that an **adequate nexus** must be established between the acts of **Bruno Stojić, Valentin Ćorić** and **Berislav Pušić** and the **crimes committed**.

With regard to the key issue of **effective control,** the Appeals Chamber began by presenting the requirements of Article 7(3) as set out in the ***Halilović* Judgement** for the individual criminal responsibility of a superior to be incurred, namely:

- the existence of a superior-subordinate relationship;

[1007] *Ibid*., para. 66.
[1008] *Ibid*., para. 67.
[1009] *Ibid.*
[1010] *Ibid*., para. 68.
[1011] *Ibid*., para. 69.
[1012] *Ibid*., para. 72.
[1013] *Ibid*., para. 73.
[1014] *Ibid*., para. 74.

- the superior knew or had reason to know that the criminal act was about to be committed or had been committed; and
- the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[1015]

The Appeals Chamber noted that a superior cannot be held liable for acts committed by his subordinates in the absence of proof that he had **effective control** over them.[1016] In order to determine whether **Perišić** had effective control, it first made a distinction between the duty to prevent and the duty to punish, holding that the ability to prevent a crime is not necessarily a prerequisite for establishing effective control.[1017]

The Appeals Chamber then turned to the Trial Chamber's analysis of the testimony and pointed out that its analysis of the evidence was inadequate. In order to find that the Accused had effective control over the perpetrators of the crimes, it relied on the testimony of witnesses **Rašeta** and **Orlić** who were Head of the SVK Security Department and Head of the SVK Intelligence Department respectively. Their official roles enabled them to have direct contact with the VJ and SVK chains of command and to know what **Perišić's** disciplinary powers were.[1018] The Appeals Chamber finds fault with the Trial Chamber for not having detected that there were **gaps** between the testimonies of the two witnesses. On the contrary, its reasoning relied almost entirely on these two witnesses, without having other corroborating evidence or demonstrating a relevant connection to the Accused.[1019] Moreover, the Appeals Chamber noted that the Trial Chamber acknowledged that there was relatively limited evidence about **Perišić's** ability to issue orders or punish VJ soldiers seconded through the 40th Personnel Centre.[1020] It thus observed that the Trial Chamber confined its analysis to only one portion of the evidence, which prevented it from providing a sufficiently reasoned decision. Therefore, in its opinion, the Trial Chamber failed to address the relevant portions of the testimony and the evidence in its analysis of **Perišić's** responsibility as a superior, which constituted **an error of law, due to its failure to provide a reasoned opinion**.[1021] It therefore had to review the relevant evidence in the case once more.

[1015] *Ibid*., para. 86.
[1016] *Ibid*., para. 87.
[1017] *Ibid*., para. 88.
[1018] *Ibid*., para. 93.
[1019] *Ibid*., para. 94.
[1020] *Ibid.*
[1021] *Ibid*., paras 95-96.

This analysis led it to the conclusion that, as noted by the Trial Chamber, the shelling of Zagreb was conducted under the command of **Čeleketić** – a high-ranking VJ officer seconded through the 40th Personnel Centre – and on orders from the **RSK** President, **Martić**. The Chamber pointed out that **Čeleketić** ignored the order he received from **Perišić** not to proceed with the shelling.[1022] This suggests that **Perišić did not have effective control** over **Čeleketić**, which he himself acknowledged, as demonstrated by an intercepted conversation he had with **Milošević**.[1023] Nonetheless, the crimes with which **Perišić** was charged for failure to punish occurred during the shelling of Zagreb. The Appeals Chamber found that **Perišić**'s inability to control the actions of **Čeleketić** demonstrates that he did not have effective control over VJ personnel.[1024] The remaining evidence cited by the Tribunal Chamber includes *inter alia* the fact that witnesses **Rašeta** and **Orlić** testified that they had not received any orders from Perišić while he was serving in the SVK;[1025] that other witnesses reported that **Perišić** addressed officers in non-coercive terms, which shows that he **was not giving orders, but making requests**;[1026] **Milošević's** acknowledgement that **Perišić's** role was simply to pass on orders; the fact that **Čeleketić** carried out orders by addressing **Milošević** directly, thereby bypassing **Perišić**;[1027] and, finally, the lack of evidence that orders allegedly given by **Perišić** were executed.[1028] On the basis of this evidence, the Appeals Chamber could not find that **Perišić** had effective control over the VJ members seconded to the 40th Personnel Centre.

With regard to **Perišić's** ability to punish the VJ members who were brought into the VRS, the Appeals Chamber recalled that witness **Rašeta** stated that **Perišić had no coercive power over the members of the 40th Personnel Centre**.[1029] The Trial Chamber observed that **Perišić** had taken disciplinary measures from August 1995, thereby proving that he still had such authority, but the Appeals Chamber noted that after the fall of the RSK, the SVK members were placed under direct VJ control again.[1030] **As a superior is not responsible for punishing the perpetrators of crimes if the crimes were committed before he assumed authority**, the Appeals Chamber could not find that **Perišić** failed to use his ability to punish the individuals responsible for the crimes.[1031]

[1022] *Ibid*., paras 98-99.
[1023] *Ibid*., para. 100.
[1024] *Ibid*., para. 101.
[1025] *Ibid*., para. 102.
[1026] *Ibid*., para. 103.
[1027] *Ibid*., para. 104.
[1028] *Ibid*., para. 105.
[1029] *Ibid*., para. 108.
[1030] *Ibid*., para. 109.
[1031] *Ibid*., para. 110.

Finally, although the Appeals Chamber did indeed refer to some evidence showing that **Perišić** had certain powers, **it found** that **Perišić**[1032] was able to **influence the perpetrators of the crimes, but not that he had effective control**. In the absence of evidence of such control, the Appeals Chamber did not hold **Perišić** responsible as a superior. Counts 5, 6, 7 and 8 were dismissed.[1033]

Inasmuch as I hold the Accused **Bruno Stojić, Valentin Ćorić** and **Berislav Pušić** responsible for aiding and abetting, it is necessary to establish, on the basis of that jurisprudence, that they had **effective control** over the perpetrators of the crimes.

Judge Liu, dissenting, considered that in the light of the Tribunal's previous jurisprudence, aiding and abetting responsibility may be established without requiring that the acts of the accused be specifically directed to the commission of crimes.[1034] He therefore did not consider specific direction to be an essential element of the *actus reus* of responsibility for aiding and abetting. In his opinion, **given that specific direction had not been strictly applied in earlier case law, the Appeals Chamber was raising the threshold for such responsibility in that case, which thus posed a risk, as it could make it easier for those responsible for serious crimes to avoid conviction**.[1035] In **Judge Liu's** opinion, the Trial Chamber did not commit an error in its analysis of the Accused's responsibility. According to Judge Liu, **Perišić's** acts – namely the provision of considerable and comprehensive aid – facilitated the large-scale crimes of the VRS. For the Judge, this constituted an example of aiding and abetting conduct for which liability ought to attach.[1036] Furthermore, he noted that even if one made the assumption that specific direction was a required element of aiding and abetting responsibility, he was not satisfied that an acquittal was justified in that case, given the magnitude, critical importance and continued nature of the assistance **Perišić** provided to the VRS.[1037]

7) **The Concept of *De Facto* Borders**

The Judgement in the ***Stakić*** **Case** was delivered on 31 July 2003. The Trial Chamber's findings with regard to the ***de facto*** **border** are set out in paragraphs 671 to 685 of that judgement.

[1032] He could exercise influence over the promotion or termination of VJ officers seconded to the VRS and assist SVK operations. *Ibid.*, paras 112-113.
[1033] *Ibid*., para. 120.
[1034] *The Prosecutor v. Momčilo Perišić*, "Partially Dissenting Opinion of Judge Liu", 28 February 2013, para. 2.
[1035] *Ibid.*, para. 3.
[1036] *Ibid.*, para. 9.
[1037] *Ibid*.

The Trial Chamber began by recalling that the **Tribunal's jurisprudence** makes a **distinction between deportation under Article 5(d) of the Statute and forcible transfer under Article 5(i).** According to the distinction made in the ***Krstić and Krnojelac*** **Judgement**, **deportation presumes transfer beyond State borders, whereas forcible transfer occurs within the borders of a State**.[1038] Deportation (*expulsion* in French) has been historically defined as the displacement of persons from the area they inhabit, thereby depriving them of the protection of the authorities in that area.[1039]

The Chamber noted that many conflicts, and in particular the conflict in the former Yugoslavia, are connected with **territorial claims**, which makes it very difficult to establish the exact location of a border at the time of the **events charged**.[1040] **The Chamber holds that the physical element of forcible removal is constituted by uprooting an individual and not by the destination to which he is sent**.[1041]

The Chamber found that Article 5(d) of the Statute must be interpreted as encompassing forced displacements across internationally recognised borders, but also across *de facto* borders, such as constantly changing front lines, which are not recognised internationally.[1042]

The Chamber considered that the crimes of deportation and forcible transfer are in fact one and the same crime, as suggested by Article 7 of the ICC Statute and the fact that customary international law has long penalised these two crimes.[1043] Moreover, it claimed that forcible removal – whether or not it occurs across an internationally recognised border – was already punishable under public international law at the time of the events.[1044] Furthermore, it relied on the jurisprudence of the Nuremberg Tribunals which described deportations as crimes against humanity even when victims had been internally displaced.[1045]

The Appeals Chamber held that deportation presupposes the removal of persons across borders.[1046] Nevertheless, it considered that **customary international law** also recognises removal from "**occupied territory**" as set out in Article 49 of the Fourth Geneva Convention. The Appeals

[1038] *Stakić* Judgement, paras 671, 672; *Krstić* Judgement, para. 521.
[1039] *Stakić* Judgement, para. 674.
[1040] *Stakić* Judgement, para. 676.
[1041] *Stakić* Judgement, para. 677.
[1042] *Stakić* Judgement, para. 679.
[1043] *Stakić* Judgement, para. 680.
[1044] *Stakić* Judgement, para. 684.
[1045] *Stakić* Judgement, para. 684.

Chamber thus held that under certain circumstances, removal **across a *de facto* border may be sufficient to amount to deportation**.[1047] Nevertheless, the Appeals Chamber considered that displacement across "**constantly changing front lines"** does not amount to **deportation**.[1048] It held that the Trial Chamber failed to justify how this notion was supported by a rule of customary international law. By proceeding in this manner, it gave broader scope to the notion of deportation than exists under customary international law, thereby violating the principle of legality. Moreover, the Appeals Chamber considered that this approach was not necessary, as individuals who are displaced across "constantly changing front lines" within the boundaries of a state are protected by the concept of forcible transfer which **does not require crossing an international border**.[1049]

I find the Appeals Chamber's approach to this concept particularly pertinent as, on the one hand, it underscores the fact that front lines are constantly changing and therefore that **deportations** may occur, but, on the other hand, it is possible to retain the concept of **forcible transfer** within the boundaries of a country because it is not necessary to cross an international border in such cases.

[1046] *Stakić* Appeals Judgement, para. 300.
[1047] *Stakić* Appeals Judgement, para. 300.
[1048] *Stakić* Appeals Judgement, para. 303.
[1049] *Stakić* Appeals Judgement, paras 301-303.

D) The Crimes

1. **The "Siege" of Mostar**

During the attack on **9 May 1993** and the first operations that followed in May 1993, as well as during the alleged siege of East Mostar (from June 1993 to April 1994), **the artillery** wounded or killed numerous victims and caused extensive damage.

The conclusion that can be drawn from the testimony of a number of witnesses, which is supported by documents, is that the town of East Mostar was shelled.

According to **Jovan Rajkov**, a surgeon in the 1st ABiH Mostar Battalion Medical Corps,[1050] the HVO started shelling the town of Mostar[1051] on 9 May 1993 while calling on the ABiH to surrender its arms.[1052] According to the Institute of Hygiene's register of patients, a number of individuals who had sustained bullet or shrapnel wounds were registered on 9 May 1993,[1053] and a number of wounded civilians and soldiers were treated between 9 and 11 May 1993.[1054]

After 9 May 1993, the building of the Institute of Hygiene bore traces of small calibre bullets and had two large holes in it caused by shells fired from the north - north-east and the west of the town.[1055] Several sheets bearing the sign of the Red Cross had been placed on the building. Nevertheless, they were not very visible from beyond the street in which the building was located.[1056] During the same period, **Dr Čandžić** was shot and wounded and subsequently died,[1057] and **Dr Konjhodžić** was wounded by a shell. A number of Civilian Protection members carrying stretchers were also wounded. Two nurses and Agim Morina, who kept the register of individuals, were killed – Agim Morina by a shell.

An HVO press release on 24 August 1993 indicated that the Muslim Armed Forces had launched an attack in the Mostar area in order to cut off the HVO units deployed along the left bank of the

[1050] Jovan Rajkov, T(F), p. 12974.
[1051] Jovan Rajkov, T(F), p. 12896.
[1052] Jovan Rajkov, T(F), p. 12896.
[1053] Jovan Rajkov, T(F), p. 12897.
[1054] Jovan Rajkov, T(F), p. 12899 ; P 02786.
[1055] Jovan Rajkov, T(E), p. 12930.
[1056] Jovan Rajkov, T(F), p. 13024.
[1057] 3D 00378.

Neretva from the rest of the armed forces.[1058] The press release mentions heavy losses on the Muslim side. The fighting was allegedly particularly heavy in the Bulevar, Santić Street in Mostar and at the Old Bridge of Mostar.[1059]

Furthermore, it has been established that on the morning of 11 September 1993, the HVO shelled the Muslim neighbourhood of Mostar, killing three and wounding twenty people.[1060] On 13 September 1993, 60 grenades and two anti-tank shells fell on the Muslim neighbourhood in Mostar, killing three and wounding two people.[1061]

Evidence from the international community confirms the statements made by the inhabitants.

On 21 August 1993, **Cedric Thornberry**, Deputy Chief of the UNPROFOR mission, observed that not a single building in East Mostar had been spared by the shelling.[1062]

An **UNMO** report of 27 September 1993 refers to sixteen artillery shells, fired from the area under HVO control that hit East Mostar, killing five and wounding 13 people.[1063]

Larry Forbes stated that the artillery fired on the hospital on the night of 4 to 5 October 1993.[1064] He also stated that three people were wounded in this attack, including a doctor from the hospital.[1065]

Several witnesses reported fire from various directions.

Jovan Rajkov, a surgeon in the ABiH 1st Mostar Battalion Medical Corps,[1066] stated that there was sniper fire coming from the secondary school, the primary school and the building called "the Glass Bank" located near Tito Street.[1067]

On 14 June 1993, **UNMO** witnessed the murder of a woman and child killed by sniper fire in East Mostar.[1068]

[1058] P 04468.
[1059] P 04468.
[1060] Witness CB, T(F), pp. 10158-10159; P 04995 under seal, p. 5.
[1061] Witness CB, T(F), p. 10159; P 04995 under seal, p. 5.
[1062] Cedric Thornberry, T(F), pp. 26184, 26186 and 26187, 26193; P 03858, p. 6.
[1063] P 05428, pp. 4-5; Cedric Thornberry, T(F), p. 26250 (part of the document not discussed with the witness).
[1064] Larry Forbes, T(F), p. 21295; P 05625, p. 6.
[1065] Larry Forbes, T(F), p. 21295; P 05625, p. 6.
[1066] Jovan Rajkov, T(F), p. 12974.
[1067] Jovan Rajkov, T(F), pp. 12931 and 12932.

It is interesting to note that Witness ***Grant Finlayson*** stated that "[the Serbian forces] were shelling [Mostar too, especially from] up by the dam (...)."[1069]

Džemal Baraković, a Muslim inhabitant of East Mostar and driver in the Mostar Fire Brigade from the end of August 1993,[1070] testified that the Fire Brigade distributed water to the population mainly at night, as this work was too dangerous during the day because of HVO snipers opening fire at the fire engines.[1071] This situation made the population of East Mostar fearful.[1072] ***Džemal Baraković*** stated that snipers often targeted people walking down Ale Čišića Street – which rises from Maršal Tito Street towards Braće Lakišića Street in the Mazoljice neighbourhood in East Mostar after they had obtained water supplies from the Fire Brigade located opposite the Razvitak building between Maršal Tito Street and the Tito Bridge in East Mostar.[1073] According to ***Džemal Baraković,*** **Ale Čišića** Street was within the line of vision of the Glass Bank Building from where snipers would open fire.[1074]

Suad Čupina, the first Commander of the Mostar "Independent Battalion" composed of (mainly Bosniak) reserve policemen[1075] during the conflict between 1992 and 1993, stated that the HVO had positioned snipers in numerous locations in Mostar, and that these snipers killed many civilians.[1076]

Finally, **Ratko Pejanović**, Commander of a fire fighter unit and of the Civilian Protection in Mostar,[1077] testified that the conflict between the HVO and ABiH broke out on 9 May 1993. On that same day, a sniper fired at the East Mostar Fire Fighters' fire truck.[1078] Other snipers also opened fire on a number of buildings in Mostar, including the fire station, the police station,[1079] the War Hospital[1080] and the cinema.[1081] Some buildings came under artillery fire. According to the witness, **the Croats and the Serbs as well as the Muslims used snipers.**[1082] During this same period, the HVO opened fire on one of the fire trucks of the East Mostar fire fighters.[1083]

[1068] Grant Finlayson, T(F), p. 18045; P 02751, p. 2.
[1069] Grant Finlayson, T(F), pp. 18223 and 18244.
[1070] P 09855, p. 2.
[1071] P 09855, p. 3; Džemal Baraković, T(F), p. 13908.
[1072] Džemal Baraković, T(F), p. 13908.
[1073] P 09855, pp. 2-3.
[1074] P 09855, p. 3.
[1075] Suad Čupina, T(E), pp. 4830, 4893. In July 1992, the Mostar "Independent Battalion" became an integral part of the "Mostar Brigade", which in turn became an integral part of the ABiH 4th Corps (Suad Čupina, T(F), p. 4829).
[1076] Suad Čupina, T(F), pp. 4860, 4863 to 4866; IC 00026 (Map of Mostar: Witness Suad Čupina indicated the location of the sniper sites in Mostar on this map).
[1077] Ratko Pejanović, T(F), pp. 1229 and 1230.
[1078] Ratko Pejanović, T(F), p. 1251.
[1079] Ratko Pejanović, T(F), pp. 1251 and 1253. The shots fired at the police station came from Hum Hill (Ratko Pejanović, T(F), p. 1253).
[1080] The War Hospital was also damaged by missiles (Ratko Pejanović, T(F), pp. 1253 and 1254).
[1081] Ratko Pejanović, T(F), p. 1255. The cinema was close to the demarcation line between the HVO and the ABiH.
[1082] Ratko Pejanović, T(F), pp. 1319, 1362 and 1363.
[1083] Ratko Pejanović, T(F), pp. 1263 and 1264.

I find it extremely interesting that this witness, who was a member of the Muslim community and was in charge of the fire fighters and the Civilian Protection, asserted that the Croats, Serbs and Muslims used snipers, which only makes the exact identification of the snipers even more uncertain.

Before conducting a more precise analysis of the consequences of the sniper fire for the civilian population, it seems important to me to bear in mind **the estimated number of victims** during the conflict in East Mostar.
For this purpose, I rely entirely on **expert Tabeau's work** for an estimate of the victims wounded or killed.

With regard to the victims in Mostar, the Prosecution's expert, **Ewa Tabeau**, stated that **539** people died between **May 1993** and **April 1994** during the period she describes as "**the Siege of Mostar**." According to Ewa Tabeau, **49.5%** were civilians, and **50.5%** soldiers. On the basis of this observation, we must focus exclusively on half of the 539 people who were civilian victims, that is, around **269** people. The expert stated that **87.5%** of these people were Muslims, which brings down the number of deceased civilians to approximately **242**. The expert stated that from this number, **45.3%** died as a result of the shelling, **10.4%** were killed by fire arms, and **42.3%** died a violent death the cause of which was not established

Considering that 45.3% of people died as a result of the shelling, we arrive at the figure of approximately **120** deceased Muslim **civilians**. Thus, for a one year period following the shelling, **ten** persons a **month** were allegedly victims of that shelling. While recognising the fact that even one victim is one victim too many, is the number of ten victims a month a sufficiently representative number in a conflict on such a scale?

The expert stated that the percentage of **sniper victims** was around **10.4%**, which amounts to **24** victims out of the **242** civilians in **one year**, that is, **two victims per month.** In this case too, should one not have questions about the fact that one victim who was undeniably a civilian was hit by a shot fired by a sniper whose unit remains unidentified? The number of 539 deaths was arrived at with the help of the East Mostar War Hospital registers for the period from 9 May 1993 to 25 May 1994, and the military archives of the ABiH, the HVO and the VRS for the period from April 1992 to December 1995. The expert provided an important piece of information, which is that out of this number of 539, she identified **472** deaths in **East Mostar** in the registers of the East Mostar War Hospital between 9 May 1993 and 25 May 1994.

These kinds of statistics can always give rise to discussions about the tools used and the facts of the matter. In this instance too, it is necessary to be precise, and registers, like death certificates, are **incontrovertible** documents, especially if the cause of death is indicated in the register, which seems to be the case. As far as I am concerned, irrespective of the Defence's challenge to expert Tabeau's work, and despite the horrific events, I consider that statements and numbers tend to "relativise" the number of victims temporally, even if the final number of victims may have been greater, since I cannot rule out the possibility that some could have been missed by the statistics.

I believe it is interesting to examine the position of the artillery:

- **ABiH**

The **ABiH** was positioned in East Mostar.

According to Witness **Miro Salčin**, Commander of an ABiH company in Donja Mahala in West Mostar in 1993,[1084] the ABiH had sabotage units which used hand grenades.[1085] The soldiers of the ABiH company in Donja Mahala under the command of ***Miro Salčin***[1086] had light weapons such as 7.62 calibre rifles and some rocket launchers.[1087] The ABiH company in Donja Mahala had neither guns nor tanks with which to open fire.[1088]

According to ***Martin Mol***, a Dutch soldier and member of the ECMM in East Mostar from 20 August 1993 to 29 October 1993,[1089] the HVO complained about the ABiH placing a mortar near the War Hospital in East Mostar.[1090] However, ***Martin Mol***, who regularly visited the War Hospital, never saw any mortars at this location before that.[1091] According to ***Martin Mol***, the United Nations military observers ("UNMO") in East Mostar were not aware of the presence of a mortar near the War Hospital either.[1092]

[1084] P 09834, paras 7 and 8; Miro Salčin, T(F), pp. 14171 and 14172.
[1085] Miro Salčin, T(F), p. 14324.
[1086] P 09834, paras 7 and 8; Miro Salčin, T(F), pp. 14171 and 14172.
[1087] P 09834, para. 8.
[1088] Miro Salčin, T(F), p. 14189.
[1089] P 10039, paras 1, 3 and 45.
[1090] P 10039, para. 31.
[1091] P 10039, para. 31.
[1092] P 10039, para. 31.

However, there is evidence suggesting that the ABiH had placed mortars in the vicinity of the East Mostar hospital.[1093]

- **HVO**

The HVO was deployed in **West Mostar**.

On 31 August 1993 in the morning, Martin Mol, a Dutch soldier and member of the ECMM in East Mostar from 20 August 1993 to 29 October 1993,[1094] saw an HVO rocket launcher in a bend, overlooking the town of Mostar, on the Široki Brijeg to West Mostar road.[1095] ***Martin Mol*** stated that when the convoy passed down the same road a few hours later, the rocket launcher had disappeared.[1096]

Around 18 September 1993,[1097] he noticed that the HVO had placed two heavy artillery guns on the hill behind the ECMM building in Široki Brijeg,[1098] and that they would fire on Mostar at night.[1099]

According to witness **Miro Salčin**, commander of an ABiH company in **Donja Mahala** in West Mostar in 1993,[1100] the **Serbs** shelled 10 %, whereas the **Croats** shelled 90% of Donja Mahala.[1101]

Moreover, ***Miro Salčin*** pointed out that other snipers under the control of the HVO opened fire from the top of Mount Hum.[1102]

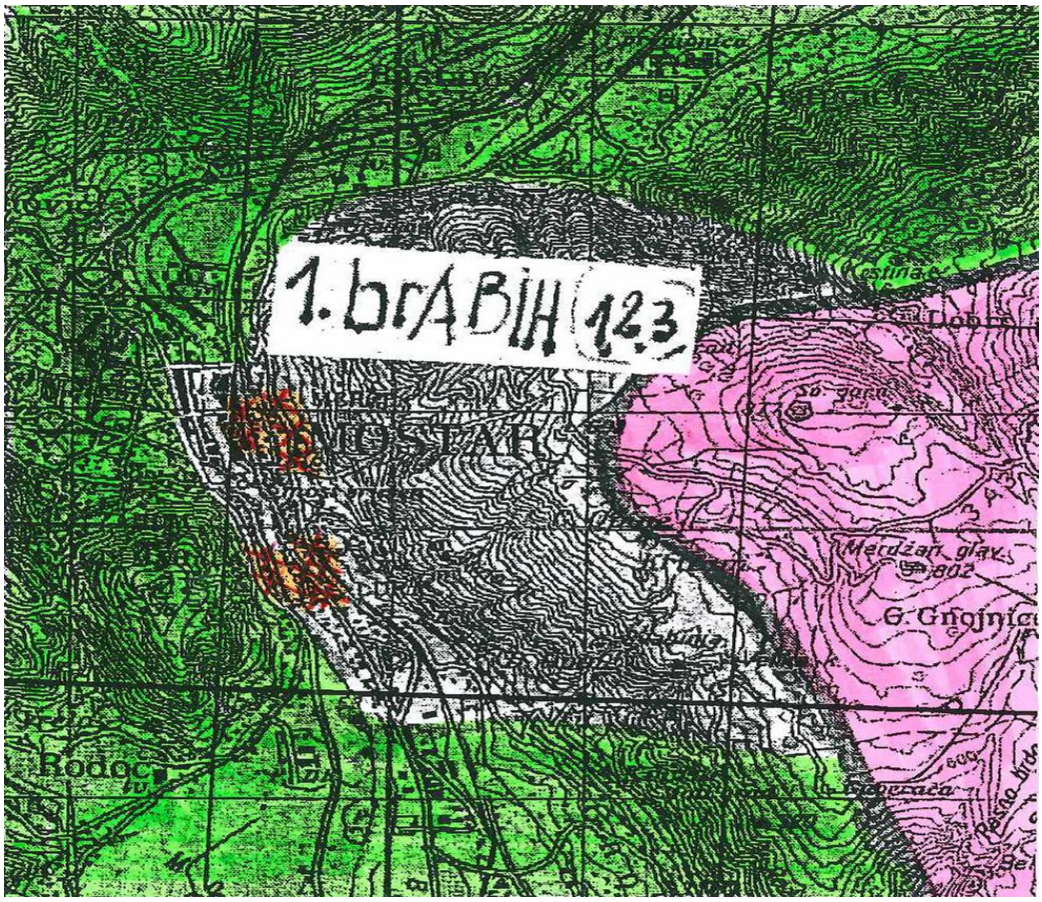
- **Serbs**

The Serbian forces were deployed in the hills.
Evidence suggests that from April 1992 to April 1995, Mostar very often came under sniper fire, mortar fire and tank fire from either the HVO or the Serbs holding positions in the hills.[1103]

[1093] Witness DW, T(F), pp. 23226 and 23227; Grant Finlayson, T(F), p. 18042; P 07771, under seal, p. 2.
[1094] P 10039, paras 1, 3 and 45.
[1095] P 10039, para. 28.
[1096] P 10039, para. 28.
[1097] P 10039, paras 1, 3 and 45.
[1098] Located in West Mostar; IC 00002.
[1099] P 10039, para. 38.
[1100] P 09834, paras 7 and 8; Miro Salčin, T(F), pp. 14171 and 14172.
[1101] Miro Salčin, T(F), pp. 14170 and 14171.
[1102] P 09834, paras 11 and 13; Miro Salčin, T(F), p. 14196.
[1103] P 09863 under seal (preliminary statement of Witness DC, 29 June 2001), pp. 2 and 3.

Map 4D 00621 clearly shows that Mostar is located in a basin between the mountains. The HVO was deployed on Mount Hum, while the Serbs were in the hills on the other side.

I believe it would be useful to insert the map of Mostar drawn by **General Petković** which shows the distribution of the three enemy forces in the field.



According to **Milivoj Gagro**, the President of the Municipal Assembly and of the Mostar Crisis Staff,[1104] on 19 September 1991, the Serbian forces of the JNA, called the Titograd and Užice Corps, entered Mostar and deployed around the airport, the Heliodrom and North Camp as well as in the hills above the town.[1105] The Serbian forces arrived in Mostar accompanied by thousands of refugees.[1106] It was only much later that they occupied the centre of town for one to two months.[1107] **They then took up position in the hills on the right bank of the Neretva in the direction of Čitluk and Široki Brijeg.**[1108] At the end of the winter of 1991, or in the spring of 1992, the conflict

[1104] Milivoj Gagro, T(F), p. 2677.
[1105] Milivoj Gagro, T(F), pp. 2695 and 2746.
[1106] Milivoj Gagro, T(F), p. 2744.
[1107] Milivoj Gagro, T(F), p. 2844.
[1108] Milivoj Gagro, T(F), p. 2746.

escalated and the Serbian forces moved into position in **Široki Brijeg, Žitomislići and other areas around Mostar.**[1109] They subsequently surrounded **Stolac** and the **Dubrava** Plateau.[1110]

According to **Bo Pellnas**, Head of the UNMO from November 1992 to January 1995,[1111] the Serbian forces were in position in the mountains to the east of Mostar; the HVO occupied the ridge of the mountains to the west of Mostar and the western part of the town, and the ABiH was positioned in East Mostar.[1112]

According to **Witness CB**, a member of an international organisation, when there were calm intervals, Spabat could observe fire being opened on one part of the town or the other, which seemed to be coming from the lines of the Serbs who were occupying a hill overlooking the town of Mostar.[1113] According to what **Witness CB** observed, this fuelled the conflict between the HVO and the ABiH.[1114]

- **Artillery Fire**

According to ***Jovan Rajko***, the HVO shelled Mostar on 9 May, wounding a number of persons. As the Serbs were still present on this date, one cannot rule out the possibility that they caused these wounds. ***CT*** testified to the same effect, stating that a man was killed in the library of the University of Mostar on 9 May at 1800 hours during fighting between the HVO and the ABiH.

Furthermore, the report drafted by European Community monitors on 7 June 1993,[1115] states that "*the Bosnian Serbs who have used all opportunities in the past weeks to sow mistrust among Croats and Muslims, are now openly attacking very sensitive areas*."[1116] Witness ***Božo Perić*** confirmed this information in the testimony on 8 December 2009.

Furthermore, some of the testimonies confirm that the Serbs opened fire on Mostar during the period prior to 9 May 1993 (*cf.* below). Therefore this proves that East Mostar was shelled, and consequently, that although the position of the artillery did not change in 1993, they may also have

[1109] Milivoj Gagro, T(F), p. 2696.
[1110] Milivoj Gagro, T(F), p. 2747.
[1111] Bo Pellnas, T(F), p. 19463.
[1112] Bo Pellnas, T(E), p. 19717, [**the T(F) contains an error**]; IC 00596 (Map of Mostar showing the positions of the forces present, not dated).
[1113] Witness CB, T(F), p. 10155.
[1114] Witness CB, T(F), p. 10155.
[1115] P 02636.
[1116] Božo Perić, T(F), p. 47959.

opened fire on East Mostar during this period, which means that there would be some uncertainty as to who fired.

Thus, according to Witness ***Božo Perić,*** shells very often fell on the town of Mostar and its surroundings, for example, in the Bijelo Polje area, up until April 1993.[1117]

During his cross-examination, the witness was shown a number of documents[1118] confirming the shelling of Mostar by the Serbs in January and February 1993. The Serbs targeted the villages of Bijelo Polje, Sveta Gora, Raštani, Podveležje, Stijena and the Mostar hydroelectric power station.

The witness confirmed the following information:

"Mr Perić, can you confirm that, as it says here, both in January and in February shelling continued, shelling by the Serbs, the shelling of the Mostar area and its environs?

A. Yes, I can confirm that, and I experienced some of that shelling when I went to see my parents [..]. [...] the system of shelling [was such as described in the documents.] They [started by targeting] the dam. Then they went to the opposite side [to give the impression that there was no precise order of targets and that they were firing indiscriminately. But in fact there was in-depth shelling, [too], not only along the positions held by the army."*[1119]*

On 19 April 1992, General Perišić, the Serb commander of the Bileća Corps in Mostar, ordered the artillery units to attack the neighbourhoods of Cim, Ilići, Donji Brijeg, Bijeli Brijeg and Donja Mahala.[1120]

Christopher Beese, an ECMM monitor from 2 January to 21 July 1993[1121] testified that around 15 January 1993, relations between the ABiH and the HVO in Mostar were tense on account of the regular shelling of the town by the Serbs.[1122] The HVO controlled the ABiH exits from the town of Mostar.[1123]

[1117] Božo Perić, T(F), pp. 47887 and 47888.
[1118] 2D 3071; 2D 3072; 2D 3073.
[1119] Božo Perić, T(F), pp. 47887, 47955 and 47956.
[1120] Milivoj Gagro, T(F), pp. 2822 and 2823; 5D 01091 (the order issued by Momčilo Perišić, Commander of the Bileća Corps in Mostar, to the artillery units to attack targets in the town of Mostar, 19 April 1992.)
[1121] Christopher Beese, T(F), p. 3054. Christopher Beese stated that he went on leave outside the former Yugoslavia on two occasions, one of which was from about 9 to 23 May 1993, Christopher Beese, T(F), pp. 3159 and 3168.
[1122] Christopher Beese, T(F), pp. 3075 and 3076.
[1123] Christopher Beese, T(F), p. 3076.

According to **Grant Finlayson**, a member of the UNMO in BiH from March 1993 to March 1994,[1124] when he arrived in Mostar in March 1993,[1125] he could see extensive damage to the town caused by the attacks of the Serbian forces.[1126]

With regard to the issue of the "Siege of East Mostar," one should be extremely cautious because the evidence suggests that the ABiH forces and civilians could leave Mostar while others arriving from Sarajevo and elsewhere could enter East Mostar, and furthermore that the Serbs used artillery to shell the Muslim positions.

- **Sniper Fire**

The majority of the Chamber ascribes half of the alleged shots to the HVO.

As a reasonable trier of fact who must make a ruling **beyond reasonable doubt**, I must be **absolutely certain** that the victim was hit by a bullet fired by an HVO soldier obeying an order from a superior. I must take into account the fact that in these conflicts related to the dismantling of a political structure there may have been individuals acting outside of any control who decide to "take pot shots" at civilians or soldiers.

Admittedly, it would have been easier if **the Chamber** had written orders from the HVO positioning snipers in such and such a building, but unfortunately we do not have such orders, let alone traces of any verbal orders. We must therefore proceed **by deduction** and by formulating hypotheses of which the most attractive one here is that an HVO soldier opened sniper fire from **Sotina's House** which was in an **area under** HVO **control**. However, this reasoning comes up against a certain number of factors that may suggest the contrary.

First of all, analysis of the map makes it possible to note that there was a Serb-controlled area adjoining the Donja Mahala sector and, as a result, a victim hit inside this area could have been shot from Stotina Hill or a neighbouring Serb-held hill; it should be added that, as far as the range of a

[1124] Grant Finlayson, T(F), pp. 17998, 18003, 18067; T(E), pp. 18003 and 18004; IC 00536 (diagram of the UNMO organisation in BiH prepared by Grant Finlayson, 7 May 2007); Grant Finlayson was deployed at the UNMO headquarters in BiH in Medjugorje in March 1993. He then became Chief of the UNMO team in East Mostar in June 1993 and took over the job of Chief of the UNMO for South BiH in September 1993.
[1125] Grant Finlayson, T(F), pp. 18004 and 18005.
[1126] Grant Finlayson, T(F), p. 18103, private session; 2D 00451, under seal, p. 1.

sniper rifle is concerned, an excellent marksman can hit his target from a distance of about two kilometres.

Furthermore, snipers had allegedly taken cover in the Stotina House. According to witnesses, it appears that this house was well known for having harboured snipers. However, the belligerent forces (the ABiH and the HVO) were facing each other, and it nevertheless seems incredible that the ABiH took no action to destroy the house, which was not far from the Muslim forces, by using conventional means such as howitzers.

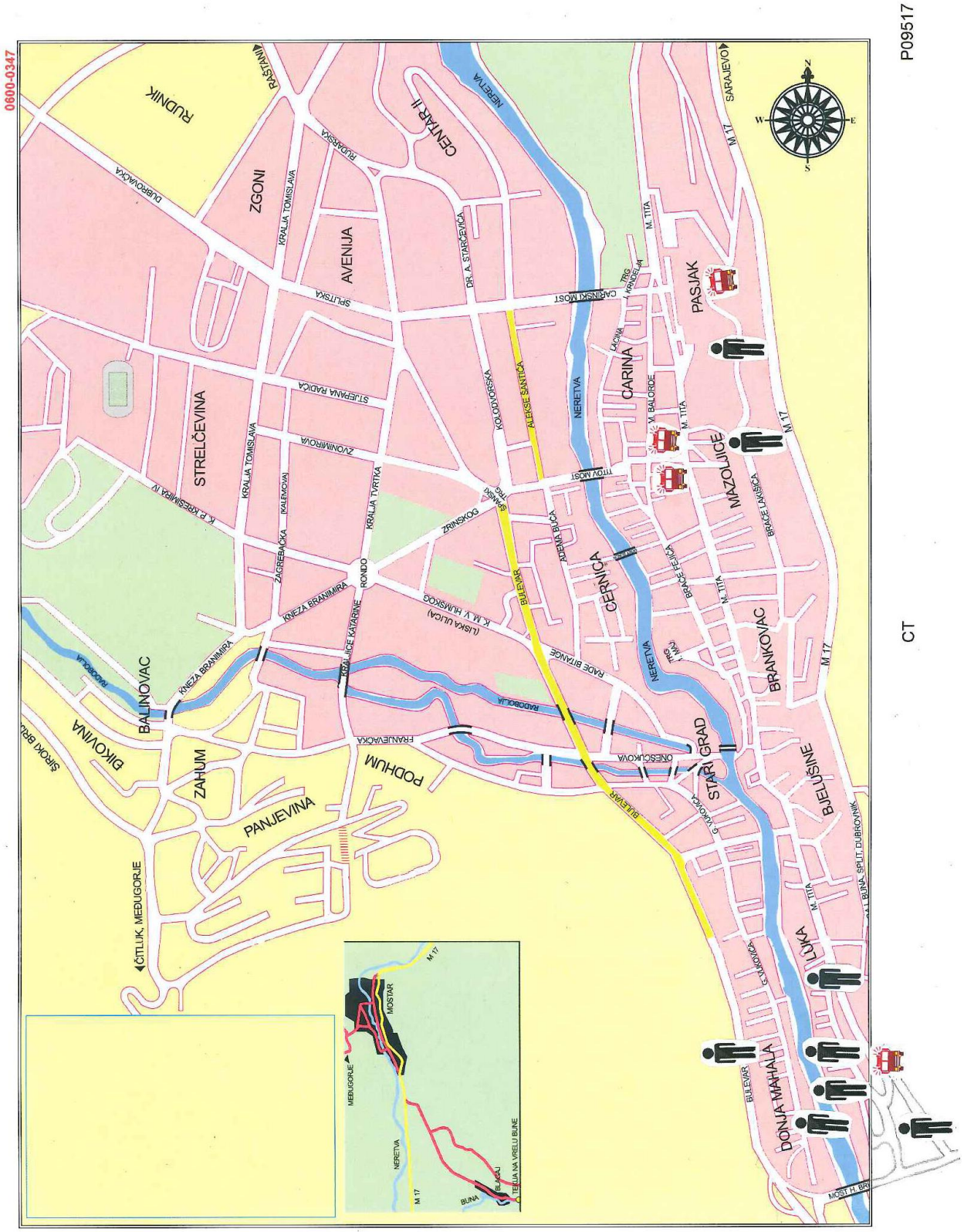
Moreover, according to certain witnesses, it was common knowledge that there had been a number of victims as a result of these shots. Insofar as both the ABiH and the HVO had a liaison officer in the Spanish Battalion, how is it that the ABiH did not use its liaison officer to lodge a complaint with the international force about this house harbouring snipers?

The majority's finding however does not eliminate the possibility of having precise knowledge of the sniper belonging to a specific HVO unit.

According to various witness statements, including that of the expert witness, sniper fire came from HVO-held positions – from Stotina Hill, to the south of Mount Hum (*cf.* sniping incidents nos 1 and 2).

In other situations, it was difficult to determine whether the shots came from the HVO, the ABiH (*cf.* sniping incident no. 3) or the Serbs (*cf.* sniping incident no. 9) (and *cf.* above-mentioned examples).

Exhibit P 09517 seems very useful to me for an understanding of the events that occurred, and I have marked the positions of the individual victims  and fire trucks  hit by shots on the map.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MOST H. BR.
BULEVAR
KNEZA BRANIMIRA
KRALJA TOMISLAVA
SPLITSKA
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DUBROVAČKA
RASTANJE
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KRALJICE KATARINE
FRANJEVAČKA
RADOBOLJA
ONESCUKOVA
ADEMA BUĆA
BRAĆE FELICA
BRAĆE LAVŠIĆA
M. TITA
CARINSKI MOST
TITOV MOST
ALEKSE ŠANTIĆA
KOLODVORSKA
DR. A. STARČEVIĆA
TRG J. KRNDELJA
M. BALORDE
G. LAKOVIĆA
A. TEŠIJA NA VRELU BUNE

- **Concerning Victim Enes Vukotić (Incident no. 1)**

The evidence adduced established that the person in question, a victim of sniper fire on 13 May 1993 at about 1600 hours, was hit in the right knee.[1127]

The photographs in exhibit 3D 00846 show that the victim was near a wall and, as the expert says, could have been wounded in the right knee by a shot coming from Stotina[1128] 760 metres away but could also have come from a different direction, and even from the opposite direction and that only determining the bullet's entry and exit points could provide any certainty.

Unfortunately, as this information does not seem available, I am not able to decide one way or the other.

The second element of doubt concerns his actual appearance on the day of the events. He admitted to being a member of the ABiH but said that he was wearing civilian clothing without giving any further details. There is thus uncertainty as to his actual status on the day of the incident; however, one should bear in mind that it was difficult to distinguish the soldiers from the civilians, as the civilians were often dressed the same way.

- **Concerning Victims Anel Heljić and Nihad Burić (Incident no. 2)**

The evidence in the record establishes that these two children were sitting in a water truck parked in Gojka Vokovića Street.[1129] Furthermore, in view of the **contradictory testimony**, it has been established that there is uncertainty about whether one shot or several shots were fired.[1130] The testimony received and the statements made suggest that several shots were fired. This is beyond doubt, as is the fact that the victims were hit.

The key question is where did the shots come from?

[1127] P 09864 under seal p. 3; Enes Vukotić, T(F), pp. 13673-13674 and 13686; P 09140.
[1128] Patrick van der Weijden, T(F), pp. 13781 and 13782.
[1129] P 09860, p. 3; Anel Heljić, T(F), pp. 13409 and 13414-13415; IC 00313.
[1130] P 10044, p. 3; P 09140; Anel Heljić, T(F), pp. 13423-13425; IC 00316; IC 00317; P 09860, pp. 3-4; the bullet's point of impact on the windscreen was about 2.20 metres from the ground.

Given the position of the vehicle, the shot could only have come from in front of the vehicle (to the right, from the front, to the left). According to the map drawn by the expert, the house was located at a distance of 426 metres and was at an angle of 172 degrees.[1131]

This opinion was challenged by the **Praljak Defence** on the ground that the top floor of the house was not built until after the war – as can be seen from the bullet traces on the house – and that for this reason the marksman could not have been positioned in one of the three openings in these rooms. The attached photograph 3D 00845 shows that the top floor is in fact recent because, unlike the lower level, it shows no traces of bullets. If the marksman had been in position in the house, he could only have been in one of the two rooms with a window.

The question is the following: if a sniper was in position by the windows on the lower floor, would the truck have been in his sights?

This is what is claimed by the expert[1132] and disputed by the Defence.[1133] It is not possible to have a clear view of the situation because of a house that was later built between the position of the truck and the Stotina House. Faced with this technical impossibility, I cannot be certain and cannot reach a conclusion one way or the other.

- **Concerning Victim Arzemina Alihodžić (Incident no. 3)**

The evidence in the record establishes that this victim was killed on 6 October 1993 at around 1700 hours by a bullet to the head while she was on the terrace of her house in the Tekija area.[1134]

There is no doubt that for a sniper, **the victim was a civilian**. This terrace faced west and was opposite Stotina Hill as well as part of Mount Hum. The victim was found lying on her back, with her head towards the west, that is, towards Stotina Hill and Mount Hum, whereas her feet were opposite the rear wall of the house and were facing east.[1135]

[1131] Patrick van der Weijden, T(F), pp. 13783 and 13784; P 09808 (Van der Weijden Report), pp. 12 and 13.
[1132] Patrick van der Weijden, T(F), pp. 16267-16269.
[1133] Slobodan Praljak, T(F), p. 41291; Patrick van der Weijden, T(F), pp. 16266 and 16267. *See also* IC 00321 and IC 00322; 3D 00765, p. 1.
[1134] P 09859, p.3; Dževad Hadžizukić, T(F), pp. 13336 and 13339.
[1135] P 09859, p. 3; Dževad Hadžizukić, T(F), p. 13354. Regarding the position of the victim at the time of the events, *see* P 09140; Dževad Hadžizukić, T(F), pp. 13351 and 13352; IC 00307; Dževad Hadžizukić, T(F), pp. 13373-13375 and 13395-13397; IC 00308.

According to her husband, he saw a bullet wound behind his wife's left ear and a bruise on her face,[1136] although the death certificate refers to the right side.[1137] The husband may have made a mistake as he was emotionally distraught. If the bullet penetrated the right side of the head, it seems to me that the victim, who had to go down the stairs, was hit at the bottom of the first flight of stairs or when she started going down the second flight of stairs.

This is a valid assumption only if she was going down the stairs. On the other hand, if she was going up the stairs, she could have been hit on the right side. We have no information indicating whether the victim **was going up** or **down** the stairs.

While it is true that when going up she could have been hit by a sniper who was, as the expert plan shows, 420 metres away in Stotina and at an angle of 208 degrees,[1138] nevertheless, if the victim was going down, the shot could not have come from this direction. **There is thus some uncertainty.**

The question of whether the bullet hit the left or the right of her head is important insofar as in both cases she could have been going up or down the stairs. However, we have no evidence indicating whether she was going up or down the stairs.

In the absence of more precise evidence, it is difficult to find with certainty and beyond reasonable doubt that the shot came from **Stotina Hill** or **Mount Hum.**

- **Concerning Victim Arif Gosto (Incident no. 4)**

The evidence in the record shows that on 27 July 1993 while the victim was attempting to assist the fire fighters to extinguish a fire,[1139] he was hit by a bullet in the right lower leg.[1140]

[1136] Dževad Hadžizukić, T(F), p. 13378.
[1137] P 02655.
[1138] Patrick van der Weijden, T(F), p.13785; P 09808, p. 14. The witness specified that the GPS coordinates indicated on this page of his report were wrong and could be a "typo", Patrick van der Weijden, T(F), pp. 16285 -16286.
[1139] Regarding the fire fighters' intervention in Sarić Harem, *see also* Ratko Pejanović, T(F), pp. 1327 and 1328.
[1140] P 10046, p. 2.

According to the expert, the shot came from Stotina 583 metres away,[1141] but he admits that he was unable to place the victim in the cemetery,[1142] as the victim provided no information in this respect. I cannot reach a definitive conclusion regarding the position of the victim on the basis of the testimony of other witnesses. There is in fact some uncertainty, and I fully agree with the Trial Chamber's analysis.

- **Concerning Victim Omer Dilberović (Incident no.6)**

The evidence in the record shows that victim Omer Dilberović was wounded in the right leg near the Razvitak building while returning from a visit to the grave of his son who had been killed by a sniper.[1143]

According to the expert, the shot was fired from the Ledera building approximately 677 metres from the victim.[1144] The expert stated that the sniper was on the upper floors of the building.[1145] In the light of the evidence adduced, there seems to be no doubt that the shot came from this building, as no other place provided a sufficiently good line of sight to hit the victim, all the more so since, according to **Omer Dilberović's** testimony, this route was notoriously dangerous as snipers would shoot at the people crossing it.[1146] The witness claimed that the snipers usually targeted men, and, to a lesser extent, women and children.[1147]

With this observation as a starting point, I feel it is necessary to know which unit or HVO sniper was in position, as the evidence does not allow me to identify precisely the soldier or civilian who was shooting on that day. The Prosecution could have easily reviewed all the HVO orders positioning unit snipers in strategic places. As this was not done, the evidence adduced does not allow a **reasonable trier of fact** to categorically find that an HVO soldier was present and operating within a command hierarchy.

[1141] P 09808, p. 16.
[1142] Patrick van der Weijden, T(E), p.13786; *See also* Praljak Defence Final Trial Brief, para. 290.
[1143] P 09854, p.3; Omer Dilberović, T(F), pp.13233-13248, 13263-13264. Regarding the position of the witness at the time of the shot, *see* P 09140; IC 00279; P 09139.
[1144] Patrick van der Weijden, T(F), pp. 13795-13797; P 09808, pp. 20 and 21.
[1145] Patrick van der Weijden, T(F), pp. 13795-13797, P 09808, pp. 20 and 21.
[1146] P 09854, p. 2; Omer Dilberović, T(F), p. 13250.
[1147] P 09854, p. 3.

Furthermore, I am very uncertain about his **civilian** or **military status**. The Trial Chamber has an incontrovertible exhibit from the **Military Medical Commission** which determined a disability of 20% in 1997. Under such conditions, the assumption is that he was a **soldier** at the time he was shot, and that his wound must therefore be viewed in the context of the conflict between the HVO and the ABiH.

- **Concerning Victim Alija Jakupović (Incident no. 7)**

The evidence in the record shows that the victim was hit in the back of the head while he was driving a yellow **fire-truck** down Lakišića Street.[1148]

According to the expert, the shot was fired from a building 586 metres from the victim.[1149] The photographs taken from the roof of the building show that the truck was visible, and the expert added that at the time of the events, there was probably a very clear view of the incident site from the alleged shooting position.[1150] He added that the truck was advancing at a speed of about 20 km/h,[1151] which gave the sniper a time span of about 20 seconds to fire at the truck,[1152] which is rather long for firing numerous times, even with a rifle. Furthermore, according to the testimony received, it appears that the HVO fired several shots in the direction of the fire fighters and that mortar shells exploded all around the house.[1153] There is no doubt that it seems that, as in the previous case, the marksman was positioned in the building, but the testimony according to which the shots were fired by the HVO is not sufficient to establish the presence of an HVO soldier taking part in a specific military operation.

The fact that a witness mentioned a mortar shell being fired should have prompted the Prosecution to conduct additional examinations to find traces of mortars present at the site. I have no irrefutable evidence allowing me to find with certainty that the shooter was an HVO soldier positioned in the building pursuant to a written or oral order that he prevent the fire fighters from taking any action.

[1148] P 09857, p. 3; Elvir Demić, T(F), p. 13993; IC 00398; P 09140.
[1149] Patrick van der Weijden, T(F), pp. 13796 and 13798; P 09808 (Van der Weijden Report), pp. 23 and 24.
[1150] P 09808, p. 24.
[1151] P 09808, p. 24; Patrick van der Weijden, T(F), pp. 13797 and 13798.
[1152] P 09808, p. 24; Patrick van der Weijden, T(F), pp. 13797 and 13798.
[1153] P 09857, p. 3.

- **Concerning Victim DB (Incident no. 8)**

The evidence in the record shows that on 29 September 1993, the victim, a **fire fighter**, was hit in the right shoulder in Brkića Street[1154] while trying to help Refik Šanić, who was in civilian clothing and had been wounded by sniper fire several minutes earlier.[1155]

According to the expert, it seems that the shot was fired from the Spanish Square about 625 metres away.[1156] The expert stated that the view from this square is not sufficiently clear unless a sniper were to climb onto a 1.80-metre-high **platform** - as a platform of that kind was present at the site at the time.[1157] The expert claimed that such a shot is not possible, as this type of position does not have the stability required for a long distance shot (over 600 metres). He therefore finds it unlikely that a platform of this kind was used.[1158] The expert is inclined to believe that a raised **platform** between the trees on the western side of the Spanish Square was used.[1159]

The **Praljak Defence** challenged the expert's opinion and stated that the building in question was held by the **ABiH** at the time of the events.[1160] While it is possible that the shots came from the Spanish Square, the Prosecution did not provide categorical proof that an HVO unit or soldier was carrying out orders to shoot, although it should be noted that the Accused Praljak was unable to produce any documents attesting to the presence of an ABiH unit at the site.

I fully agree with the Trial Chamber's analysis and its factual findings.

[1154] IC 00287; Witness DB, T(F), pp. 13316, 13318, 13320-13322, private session; IC 00288, IC 00289; IC 00290.
[1155] P 09858 under seal, p. 3; P 07775 under seal. With regard to the victim's position and the impact of the bullet, *see* P 09140 and P 09139.
[1156] Patrick van der Weijden, T(F), p. 13800, private session. *See* the photograph of this platform, P 09808, p. 26 and the view of the incident site from this position, P 09808, p. 27.
[1157] P 09808, pp. 25-26.
[1158] Regarding the possibility that the sniper had taken up position on an elevator truck, Patrick van der Weijden stated that this type of platform would not provide the stability necessary for shooting; *see* P 09808, p. 26; Patrick van der Weijden, T(F), p. 13800, private session; furthermore, Patrick van der Weijden indicated that this possibility was suggested to him by "witnesses", but provided no further details; *see* P 09808, p. 26.
[1159] Patrick van der Weijden, T(F), p. 13802, private session, P 09808, p. 26.
[1160] Slobodan Praljak, T(F), p. 41294.

- **Concerning Victims Damir Katica and Neno Mačkić (Incident no. 9)**

The evidence in the record shows that the victims were hit and wounded by various types of sniper shots while they were crossing Oručevića Street in the residential area of **Donja Mahala**.[1161]

According to the expert, the shot was fired from Stotina from a distance of approximately 470 metres from the victim.[1162] The expert also claims that it was only possible to hit the victims from the houses in Stotina.[1163] The expert's theory clashes with the Ćorić Defence theory that claims that the distance between the two houses was no more than three metres, that it was impossible for a sniper to hit a moving target within a three-metre space and that the victims were hit by stray bullets.

While the **Ćorić Defence**'s theory may seem attractive, it nevertheless fails to take into account the fact that a sniper may first mark out the sites and, despite the short distance, fire on all moving targets or bodies, even if moving rapidly, and fire at random.

The **Praljak Defence** put forward a different scenario, according to which, given the bullet's entry point and the position of the victim, it could not have come from Stotina.[1164]

All these combined factors suggest that there is no relevant evidence allowing one to decide one way or the other. Whatever the case, the Prosecution was unable to produce any evidence establishing the presence of a regular HVO unit in Stotina. In my opinion, it is not sufficient to simply state that Stotina was under HVO control, and therefore I cannot share the point of view the Chamber expressed in its factual findings after a very detailed analysis of the incident.

- **Concerning Victim Munib Klarić (Incident no. 10)**

The evidence in the record shows that the victim was hit in the left heel[1165] while he was on his way from the Neretva river to Podharemi in Mejdan.[1166]

[1161] P 09861, p. 4; P 09140; P 09220, p.19 and IC 00331; Damir Katica, T(F), pp. 13455-13457.
[1162] P 09808, pp. 28 and 29; Patrick van der Weijden, T(F), pp. 13787 and 13788.
[1163] P 09808, p. 29; Patrick van der Weijden, T(F), p. 13787.
[1164] Praljak Defence Final Trial Brief, para. 295.
[1165] P 09862, p. 2; Munib Klarić, T(F), pp. 13508 and 13548; P 09220 and IC 00339; P 09140.

According to the expert, the shot was fired from Stotina approximately 449 metres from the victim.[1167] The Praljak Defence has challenged the expert's account.[1168] The photograph in Exhibit 3D 00769 shows that the bullet penetrated the heel. On the basis of this incontrovertible evidence, a reasonable trier of fact can find that, given the depth of the wound, the bullet entered the heel perpendicularly and that in any event, the bullet did not come from a direction to the right of the leg, and therefore, it did not come from Stotina.

Furthermore, the Prosecution did not produce incontrovertible evidence that an HVO unit was present at the site at that time. I agree with the Trial Chamber's factual findings.

- **Concerning Victims Enver Džiho and Stojan Kačić (Incident no. 11)**

The evidence in the record shows that on 30 October 1993,[1169] Victim Enver Džiho was shot while crossing a road near the Razvitak building.[1170] The other victim, Stojan Kačić, was wounded in the leg while trying to move Enver Džiho on a stretcher to an ambulance.[1171]

According to the expert, the shot was fired from a position close to the Glass Building, about 743 metres away.[1172] The evidence suggests that Enver Džiho was an ABiH soldier wearing a military shirt[1173] and that Stojan Kačić was also an ABiH soldier wearing civilian and military clothes.[1174] This evidence might suggest that they were the victims of shots whose origin has not been determined with precision because they were **combatants**.

There is thus some uncertainty, and in addition, I would recall that the Prosecution was unable to produce any documents on the basis of which the position of the HVO unit in the Glass Building could be determined. I fully agree with the point of view expressed in the factual findings.

[1166] Munib Klarić, T(F), pp. 13560-13561 and T(E), p. 13561.
[1167] P 09808, pp. 30 and 31; Patrick van der Weijden, T(F), pp. 13789 and 13790.
[1168] *See* Patrick van der Weijden, T(F), pp. 16291-16293; *see* also Slobodan Praljak's analysis of the incident, Slobodan Praljak, T(F), pp. 41929 and 41930.
[1169] Džemal Baraković, T(F), p. 13909; P 06263; P 08457; P 05853.
[1170] P 09855, p. 3; Džemal Baraković, T(F), p. 13899. *See also* P 06263; P 08457.
[1171] P 09855, p. 4; Džemal Baraković, T(F), pp. 13903, 13911, 13926 and T(E), p. 13912; IC 00389; P 09140; P 05853.
[1172] P 09808, pp. 32-33; Patrick van der Weijden, T(F), p. 13805.
[1173] P 09855, p. 3, Džemal Baraković, T(F), pp. 13914 and 13918.
[1174] Džemal Baraković, T(F), p. 13917.

- **Concerning Victim Orhan Beriša (Incident no. 13)**

The evidence in the record shows that the **young victim** was killed by a bullet while he was playing in front of a residential building in the Teklija area.[1175]

According to the expert, the shot was fired from Stotina.[1176] It appears that witnesses claimed that the snipers could have been positioned on the summit of Mount Hum.[1177]

While it seems that it was common knowledge that the HVO had positioned snipers on Stotina Hill,[1178] the Prosecution was unable to prove this, as hearsay in this case does not allow me to make a finding one way or the other.

The **Praljak Defence** argument that there were ABiH soldiers on the hill, was not corroborated by any decisive evidence although according to witness **Miro Salčin**, the **ABiH** had occupied part of the hill since he stated that he had observed HVO snipers from the *Crvena* Cave. The photograph produced by the **Praljak Defence** (3D 00843) shows that it was possible to hit the victim from a sniper's position on the neighbouring hill.[1179] The question is which unit was on the hill and who was the sniper.

Although no one can remain indifferent to this child's tragic fate, nevertheless, even if the shot had been fired from Stotina, the question that arises concerns the identity of the HVO unit present, which is something the Prosecution was unable to determine. I therefore have no evidence enabling me to find beyond reasonable doubt that the Prosecution's theory is correct.

- **Concerning Victim Uzeir Jugo (Incident no. 14)**

The evidence in the record shows that the victim, the driver of a red **fire truck**, was hit in the chest and killed while repairing his truck in front of the fire station in Brkića Street.[1180]

According to the expert, the shot was fired from a platform on the Spanish Square.[1181]

[1175] P 09856, p. 3. The date of 2 February 1994 is also confirmed by exhibit P 05853, p. 198.
[1176] P 09808, p. 36; Patrick van der Weijden, T(F), p. 13791.
[1177] P 09808, p. 36. The Chamber noted that Patrick Van der Weijden did not mention the identity of the said "witnesses".
[1178] P 09856, p. 2; Belkisa Beriša, T(F), p. 13938; *see also* P 10045, p. 2, para. 3.
[1179] *See* Patrick Van der Weijden, T(F), pp. 16294-16296; *see also* 3D 00843, pp. 1, 3 and 4.
[1180] P 10042, para. 15; P 09863, under seal, p. 3.
[1181] P 09808, p. 39; Patrick van der Weijden, T(F), pp. 13801 and 13803, private session.

According to the **Praljak Defence, the ABiH** had had the area of the Spanish Square under its control since April 1993.

It should be noted that Witness DC stated that the hotels near the square were under the control of the ABiH.[1182]

Considering these observations, I must find that **there is no doubt** that an HVO soldier was present at the site on 2 March 1994 but must note that fire could have **also** been opened from Fortica Hill which was occupied by the Serbian forces.

I agree with the Chamber's analysis and its factual findings, but note that it would have been preferable to also find that the area of the Spanish Square was under ABiH control.

2. Destruction of the Old Bridge in Mostar

The **Old Bridge in Mostar (*Stari Most*)**, for years a symbol of the meeting between the east and the west, between Islam and Christianity, came to symbolise the war in Bosnia. "[The "Old Bridge" made it possible for the town to develop and prosper. It was the town's *raison d'etre*.]" [1183]

Everyone seems to regard it as a symbol.[1184] Although its destruction was also symbolic, it should be noted that in its Pre-Trial Brief, ("Prosecution Pre-Trial Brief", 19 January 2006), the Prosecution devotes only one paragraph[1185] and one footnote to it.[1186] As for the Indictment, it

[1182] Witness DC, T(F), pp. 13615 and 13616, private session; IC 00360; Witness DC, T(F), pp. 13614 and 13615, private session. The witness added that the scenario according to which a sniper could have opened fire on Uzeir Jugo from the Hotel Bristol was not realistic since in that case someone would have shot at his "brother", Witness DC, T(F), pp. 13616-13618, private session.
[1183] Website http://portal.unesco.org/culture/fr/, "The Old Bridge in Mostar, *Stari Most."*
[1184] I would like to thank lawyer, **Elsa Larrue**, for her assistance with this issue.
[1185] Prosecution Pre-Trial Brief, para. 116. As part of and in the course of the East Mostar siege, the Herceg-Bosna/HVO forces deliberately destroyed or significantly damaged the following mosques or religious properties in East Mostar: Sultan Selim Javuz Mosque (also known as the Mesdjid Sultan Selimov Javuza Mosque), Hadži Mehmed-Beg Karadjoz Mosque, Koski Mehmed-Paša Mosque, Nesuh Aga Vučjaković Mosque, Ćejvan Ćehaja Mosque, Hadži Ahmed Aga Lakišić Mosque, Roznamedžija Ibrahim Efendija Mosque, Jahja Hodža Mosque (also known as the Džamiha Ćose Jahja Hodžina Mosque), the Hadži Kurto or Tabačica Mosque, and the Hadži Memija Cernica Mosque. **On 9 November 1993, the Herceg-Bosna/HVO forces destroyed the Stari Most ("Old Bridge"), a famous world landmark that crossed the Neretva River between East and West Mostar.**
[1186] Prosecution Pre-Trial Brief, footnote 212: "The drive to eliminate ethnic diversity has in some areas been accompanied by efforts to obliterate all traces of minority culture. A famous 16th century mosque was destroyed in Croat-held Počitelj on 23 August 1993 [...]. On 9 November 1993 **the historical Ottoman bridge in Mostar was destroyed by military action. It had been registered with UNESCO as a monument of major cultural importance and was also the only means by which water could be obtained by people in the eastern part of the town."** P 060697, para. 69.

reproduces paragraph 116 of the Prosecution's Pre-Trial Brief.[1187] Thus, in spite of the bridge's symbolism and the importance it seems to have, the Prosecution does not elaborate much on this subject. Furthermore, the Prosecution places the destruction of the Bridge within the context of the destruction during the siege of East Mostar, that is, within the context of the destruction of mosques and religious properties.

With regard to the question of heritage, some indictments have taken into account certain aspects such as secular cultural heritage.[1188]

Seven counts refer to para. 116 of the Indictment, four of which adopt the traditional grounds for the offence of destruction of a cultural heritage:

- **Count 1**, persecutions on political, racial and religious grounds, *a crime against humanity*, punishable under Article 5(h) of the Statute;
- **Count 19**, extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, *a grave breach of the Geneva Conventions*, punishable under Article 2(d) of the Statute;
- **Count 20**, wanton destruction of cities, towns or villages, or devastation not justified by military necessity, *a violation of the laws or customs of war,* punishable under Article 3(b) of the Statute;
- **Count 21**, destruction or wilful damage done to institutions dedicated to religion or education, *a violation of the laws or customs of war*, punishable under Article 3(d) of the Statute.

The heading of **Count 21** does not cite Article 3(d) of the Statute in full. This is not merely an abbreviated citation of the article,[1189] but a choice made by the Prosecution. Thus, Article 3(d) of the Statute, the most explicit ground[1190] for the charge of destruction of cultural heritage, is not cited in full, and the Indictment fails to characterise the ***Stari Most*** as a "cultural landmark" under Article 3(d).

[1187] Indictment, para. 116.
[1188] In relation to the destruction of the Old Town of Dubrovnik, listed as a UNESCO world heritage site, *see The Prosecutor v. Pavle Strugar,* Third Amended Indictment, 10 December 2003, para. 22; ABTAHI, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 Harv. Hum. Rts. J. 2001, 2.
[1189] As is customary in the case of the other counts, the heading of the count cites only the relevant part of the article. Count 22 for example is entitled "Appropriation of Property not Justified by Military Necessity (...)", whereas the benchmark article of the Statute is Article 2(d) which refers to "destruction and appropriation."
[1190] ABTAHI, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 Harv. Hum. Rts. J. 2001, 5.

Three counts which refer to para. 116 of the Indictment describe the destruction of the *Stari Most* in a broad sense as an attack against civilians, terror and cruel treatment:

- **Count 24**, unlawful attack on civilians (Mostar), *a violation of the laws or customs of war*, punishable under Article 3 of the Statute;
- **Count 25**, unlawful infliction of terror on civilians (Mostar), *a violation of the laws or customs of war*, punishable under Article 3(d) of the Statute;
- **Count 26**, cruel treatment (Mostar siege), *a violation of the laws or customs of war*, punishable under Article 3 of the Statute.

It should be noted that the destruction of the ***Stari Most*** is alleged on all conceivable grounds, including Article 2 of the Statute, which is without precedent in the case of the destruction of cultural heritage. It is surprising to note that the destruction of the ***Stari Most*** **was not alleged in a separate paragraph, given its importance at the time of the events and its fame following its inclusion on the UNESCO World Heritage List.** Basically, in spite of its description as "an international landmark," the fact that it appears in para. 116 of the Indictment basically raises the difficult question of whether the ***Stari Most*** is primarily a religious monument comparable to the mosques referred to mainly in this paragraph. Within the meaning of Article 3(d) of the Statute, **the Indictment alleges that the bridge was destroyed as "an institution dedicated to religion or education" and not as "a historic monument.**" The Prosecution did not place any specific emphasis on the (secular) character of a historic monument which is one of the most symbolic cultural sites affected by the conflict in the Balkans.

With regard to the ground on which crimes against humanity have been alleged, the Prosecution must demonstrate discriminatory intent. In the *Blaškić* Case,[1191] such proof was adduced by demonstrating "the particular significance for the Muslim community in Bosnia" of a destroyed village that "Muslims in Bosnia considered [...] to be a holy place" and "symbolised Muslim culture in Bosnia." In my opinion, its particular significance *for the Muslim community in Bosnia* has still not been convincingly proven.

[1191] *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, p. 411.

More than merely a bridge, the ***Stari Most*** was a symbol connecting the different communities, a "symbol of reconciliation."[1192] The ceremony held to celebrate the reconstruction of the bridge shows the full symbolic dimension of its destruction and reconstruction. The very teleology of the international system for the protection of cultural heritage is that **the restoration of the *Stari Most,*** made possible by the international community, has no bearing on guilt.[1193] This also follows *a fortiori* from the *Jokić* Chamber's decision not to take into account the possibility of the edifice being restored when determining the sentence.[1194]

In April 2006, one of the Accused in the *Prlić et al.* Case wrote a book about the destruction of the bridge in which he sought for the factual truth about the destruction of the Old Bridge by means of various documents (expert reports, photographs, interviews).[1195] The book specifically mentions that an investigation was ordered by **Mate Boban** and promptly conducted by the Mostar Prosecutor as soon as it was destroyed in 1993. Despite the expert reports, the investigation did not produce any relevant results, because if had, the issue would no longer arise for the Chamber in the *Prlić et al.* Case. [1196]

History of the Mostar Bridge

Mostar was founded in the 15th century and developed over the following four centuries under the rule of the Ottoman Empire. The Neretva river runs through the town of Mostar. Since 1566, a bridge has been suspended over the river – the *Stari Most*.

Mostar gets its name from this bridge. In fact "Mostar" means "bridge keeper" (the person to whom a toll had to be paid to cross over).

The Old Bridge in Mostar was built in 1566 by Hayruddin, an architect (*mimar*) in the service of the Ottoman Empire. This stone bridge connected the two banks of the Neretva. The bridge, formed of a single arch 27.30 metres long and 20 metres high, was flanked by a tower at either end.[1197]

From 1566, the core of the Muslim town developed around this bridge. The Old Bridge was so strong that it withstood the Nazi tanks that crossed over it in the Second World War.[1198] Prior to its

[1192] Jacques Paul Klein, Special Representative of the UN Secretary General, Kofi Annan.
[1193] Document of the International Bank, report no. 32713.
[1194] *The Prosecutor v. Jokić*, Sentencing Judgement, 18 March 2004, para. 48.
[1195] 3D 00374.
[1196] 3D 00374, pp. 11, 12, 37-38, 39-40 and 44-45.

destruction in 1993, UNESCO had warned that the main danger to the bridge was erosion caused by humidity, but this process of deterioration was kept successfully under control.[1199]

The Old Bridge in Mostar was shelled on 9 November 1993. UNESCO invited tenders for its reconstruction in March 1994. An identical bridge was reconstructed (under the auspices of UNESCO) in 2004 using much of the original stonework and the technique of the Ottoman period.[1200] The *Stari Most* and its neighbourhood in the old town of Mostar were included on the UNESCO World Heritage List in 2005.

Various bridges destroyed in the past

Bridges are of **strategic importance** in wartime. Many bridges were destroyed in the two world wars. From the point of view of military strategy, bridges represent very important choices. The destruction of one or several bridges may have significant consequences for the enemy (*cf.* Operation *Market Garden).* One could for example mention the *Vieux Moulin* Bridge in Niderviller, Moselle, France, which was destroyed by the advancing allied troops on 21 November 1944, or the Sainte Maxence Bridge (Somme, France) destroyed in 1915, and also the Choisy-au-Bac Bridge in Oise (Picardy). The German Army dynamited several bridges in Lyon on 1 and 2 September 1944. In Europe, the Nazis destroyed all the bridges in Florence, Italy, with the exception of the Ponte Vecchio. The bridge over the River Kwai in Thailand was also destroyed by American bombing, although it has since been reconstructed by the Japanese. Numerous bridges were destroyed or simply damaged in the conflict in the Balkans. One could mention the Iron Bridge (*Željezni Most)* in Čapljina, the Čapljina Bridge, the Vojno Bridge, the Tito Bridge, etc.[1201] During the conflict in Lebanon, 92 bridges were partially damaged or destroyed.[1202]

Was the Old Bridge protected under international law?

The decision to include the *Stari Most* and part of the old town of Mostar on UNESCO's World Heritage List – which was postponed in 2003 pending completion of the restoration work[1203] – was

[1197] Encyclopédie universalis, http://www.universalis-edu.com.
[1198] Website http://portal.unesco.org/culture/fr/, "The Old Bridge in Mostar, *Stari Most*".
[1199] Website http://portal.unesco.org/culture/fr/, "The Old Bridge in Mostar, *Stari Most*".
[1200] Document of the International Bank, report no. 32713.
[1201] 3D 00374, p. 8.
[1202] Nada ABDUL-RAHiM, *Bilan de la Guerre avec Israël*, Beirut, October 2006, p. 10.
[1203] Decision 27. COM 8C.33 of the World Heritage Committee, 27th session, Paris, June/July 2003.

taken by the World Heritage Committee on 15 July 2005.[1204] In the 1990s, UNESCO – with the help of international funding – established an international committee of experts for the reconstruction of the Old Bridge and the old town of Mostar. The work commenced in 2001 and was completed in 2004.

Thus, at the time of its destruction, the *Stari Most* was not listed on the UNESCO World Heritage List. However, the Security Council, UNESCO and the Council of Europe were informed of the risk of destruction in a letter dated **9 July 1993**, in which the Government of the Republic of Bosnia and Herzegovina requested that the destruction of the *Stari Most* be prevented and that a UNESCO committee of experts be sent to ensure its protection.[1205]

At its 50th session, the United Nations Commission on Human Rights stated in its report on "The Situation of Human Rights in the Territory of the Former Yugoslavia" that at the time of its destruction, the *Stari Most* had been registered "with UNESCO as a monument of major cultural importance and was also the only means by which water could be obtained by people in the eastern part of the town."[1206] However, this alleged inscription by UNESCO is not corroborated by other documents.

At national law level, the law of 1985 on the protection and use of the cultural, historical and natural heritage of Bosnia and Herzegovina (*Official Gazette*, 20/85), may have conferred on the historic town of Mostar, including the *Stari Most*, a special protected status. This protection was in place at the time it was included on the UNESCO World Heritage List in 2005,[1207] but there is no reference to it for the preceding period.

A. The System of Legal Protection for Cultural Heritage

a) The Philosophy behind the Legal Protection of Cultural Heritage

[1204] Decision 29. COM 8B.49 of the World Heritage Committee, 15 July 2005, Recommendations to include cultural property on the World Heritage List (The Old Bridge neighbourhood of the town of Mostar). According to the Decision, "[w]ith the "renaissance" of the Old Bridge and its surroundings, the symbolic power and meaning of the City of Mostar – as an exceptional and universal symbol of coexistence of communities from diverse cultural, ethnic and religious backgrounds – has been reinforced and strengthened, underlining the unlimited efforts of human solidarity for peace and powerful co-operation in the face of overwhelming catastrophes."
[1205] Security Council, "*Letter dated 11 November 1993 from the Permanent Representative of Bosnia and Herzegovina addressed to the President of the Security Council*", 12 November 1993, UN Doc. S/26729, Annex.
[1206] P 06697, p. 10.
[1207] Assessment by ICOMOS of the file nominating the *Stari Most* for the inclusion on the World Heritage List. http://whc.unesco.org/p_dynamic.sites/passfile.cfm?filename=946rev&filetype=pdf&category=nominations.

The destruction of cultural heritage, by desecrating the losing side's prestigious sites, has traditionally been a sign of triumph granted to the victor.[1208] Following the Second World War, the proliferation of international texts on the protection of cultural heritage, in particular the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* ("The Hague Convention") of 1954, reveals a change of philosophy.[1209] The preamble to the Hague Convention stipulates that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."[1210]

The experience of the conflict in the former Yugoslavia, during which numerous sites were deliberately destroyed by all the parties involved,[1211] is considered one of the most striking examples of the need for legal protection of cultural heritage. The former Socialist Federal Republic of Yugoslavia was a contracting party to the Hague Convention from 1956, as were the Republic of Croatia and the Republic of Bosnia and Herzegovina – by way of succession – from the day they gained independence.[1212] Under such conditions, one can emphasise the fact that **the Old Bridge in Mostar was protected under the Hague Convention.**

b) Protection Mechanism for Cultural Heritage Under International Treaty Law Like the Hague Convention of 1954

The Hague Convention of 1954 reflects the idea of the intrinsic value of cultural heritage which is to be protected in time of war.[1213] This is the first international convention which actually employs the term "**cultural heritage.**" Cultural heritage includes, *inter alia*, "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular, archaeological sites: (...)."[1214]

[1208] DELTING, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 Maryland J Int'l Law and Trade 1993, 43; ABTAHI, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 Harv. Hum. Rts. J. 2001, 1.

[1209] ABTAHI, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 Harv. Hum. Rts. J. 2001, 7.

[1210] Judge Meron has underscored the role of the Tribunal as representative of this philosophy: "*By firmly placing the offences against cultural property not only among the wrongs leading to state responsibility but also among crimes punishable by international law as affecting the interests of the world community, and by holding individuals responsible for them accountable, our Tribunal has made a significant contribution to the protection of the cultural property in armed conflict*." in MERON, *The Protection of Cultural Property in the Event of Armed Conflict within the Case-law of the International Criminal Tribunal for the Former Yugoslavia*, Museum International, Dec. 2005, no. 228, pp. 55 and 56.

[1211] V. DELTING, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 Maryland J Int'l Law and Trade 1993, 67 *et* seq.

[1212] *The Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, 26 February 2001, para. 359.

[1213] Whereas the Hague Convention protects cultural heritage in the event of armed conflict, the UNESCO Convention provides for the conservation of property in normal times, *see* MERRYMAN, *Two Ways of Thinking about Cultural Property*, 80 AMJIL 1986, 846.

[1214] Article 1 of the Hague Convention of 1954.

The Convention provides for the protection of cultural property in peace time and **respect for such property in time of armed conflict** (Article 2). The **general system** of protection is supplemented by a **special protection** system.[1215]

The second paragraph provides that these obligations may be waived "only in cases where military necessity imperatively requires [such a waiver]."[1216]

A limited amount of cultural property of great importance is accorded special protection under Article 8, provided it meets the condition of not being used for military purposes within the meaning of Article 8.1 of the Convention, and if the property has been entered in an international register. The signatory states can thus influence the decision to grant special or general protection by challenging the notion of great importance for the cultural heritage of peoples.

Lifting the immunity of cultural property under special protection is subject to the stricter condition of "**unavoidable military necessity" (Article 11.2).**

Under **Article 6 of the Convention marking cultural property within the meaning of Article 4 is optional,** while property under special protection must be marked with a distinctive emblem (Article 10).

Accordingly, the **Old Bridge in Mostar** was not marked with any distinctive emblem conferring special protection upon it. However, as Article 6 of the Convention grants protection even in the

[1215] Within the context of general protection, the signatory states commit themselves to **a threefold obligation in respect of the cultural property in question** (Article 4):
1. "The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.
3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.
4. They shall refrain from any act directed by way of reprisals against cultural property."
[1216] The notion of military necessity was clarified in the Second Protocol to the Hague Convention, dated 26 March 1999: "Article 6, Respect for Cultural Property with the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:
a) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
i. that cultural property has, by its function, been made into a military objective; and
ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;
b) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;
c. the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;

absence of a distinctive emblem, **it would therefore seem that the Old Bridge in Mostar was a cultural monument protected under the Hague Convention of 1954.**

Nevertheless, it is necessary to ask whether **this protection would include immunity.** Would it not have been possible to consider the **Old Bridge in Mostar** a **military target?** In order to answer this question, it is necessary to examine the case law.

B. Protection of Cultural Property at the Tribunal

a) Statutory Provisions

In accordance with its mandate to prosecute grave breaches of international humanitarian law, the Tribunal has the power to sanction the destruction of cultural heritage on the ground of *the violations of the laws or customs of war* (Article 3(d) of the Statute) and, more generally, on the grounds of *grave breaches of the Geneva Conventions of 1949* (Article 2(d)) of the Statute) and *crimes against humanity* (Article 5(h) of the Statute).

The destruction of the *Stari Most* is **alleged on the basis of all these statutory provisions.**

aa) *Violations of the laws or customs of war* as a legal basis

As no accepted definition of the term "cultural heritage" can be found in the international legal instruments, it is not expressly put in the Tribunal's Statute. The Statue lists the elements of cultural heritage under Article 3(d). Recent jurisprudence refers to Article 3(d) as protection of "cultural heritage."[1217] According to the introductory paragraph of Article 3 of the Statute, the list is not exhaustive.

Article 3: Violations of the laws or customs of war

"The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

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d. in the case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit."

[1217] *The Prosecutor v. Strugar*, Judgement, 31 January 2005, para. 307.

c) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science. "

Article 3(d) of the Statute reproduces in substance Articles 27[1218] and 56[1219] of the Regulations concerning the Laws and Customs of War on Land annexed to Geneva Convention IV of 1949 which has the character of customary international law.[1220] Thus, the destruction referred to under Article 3(d) can be described as war crimes.

bb) G*rave breaches of the Geneva Conventions of 1949* as a legal basis

Article 2(d) of the Statute may constitute a second basis on which the destruction of cultural heritage may be punished.

Article 2 - Grave Breaches of the 1949 Geneva Conventions

"The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; "

To date, the Tribunal's jurisprudence has given priority to Article 3(d) of the Statute, a norm which sets out the various components of cultural heritage more specifically than Article 2 ("property"). No conviction for the destruction of cultural property has been entered under Article 2(d). Apart from the specific nature of Article 3(d), this can be explained by the fact that, according to the Appeals Chamber in the *Tadić* Case,[1221] Article 3 applies to both national and international

[1218] "In sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes."
[1219] "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."
[1220] Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (ICJ), 14 July 2004, para. 89.
[1221] *The* P*rosecutor v. Duško Tadić*, "Decision on Defence Motion for Interlocutory Appeal on Jurisdiction," 2 October 1995, para. 137; CASSESE, *International Criminal Law*, 2008, p. 81.

conflicts, whereas Article 2 requires an international conflict and a sufficient link between the alleged crimes and the said conflict.[1222]

cc) C*rimes against humanity* as a legal basis

Provided that the destruction of cultural heritage is part of "widespread or systematic crimes directed against a civilian population, and that the [perpetrator knew] that his acts fitted into such a pattern",[1223] it can be charged under Article 5(h) of the Statute.

Article 5 - Crimes against Humanity

"*The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (h) persecutions on political, racial and religious grounds."*

Although no explicit reference is made to cultural heritage in this provision, it has been used to sanction the destruction of cultural property and has the advantage of also being applicable in peacetime. This is of particular importance as the Hague Convention of 1954 relates only to wartime.[1224]

b) Judicial Application

About a dozen judgements handed down by the Tribunal to date address the issue of the destruction of cultural heritage as a war crime and as a crime against humanity. They focus more on elements relating to the destruction of cultural heritage and less on the contextual elements specific to the various categories of crime.

[1222] MERON, *The Protection of Cultural Property in the Event of Armed Conflict within the Case-law of the International Criminal Tribunal for the Former Yugoslavia*, Museum International, Dec. 2005; no. 228, p. 44.
[1223] *The Prosecutor v. Duško Tadić*, Appeal Judgement, 15 July 1999, para. 248, *The Prosecutor v. Radislav Krstić*, Appeal Judgement, 19 April 2004, para. 223.
[1224] *See* MERON, *The Protection of Cultural Property in the Event of Armed Conflict within the Case-law of the International Criminal Tribunal for the Former Yugoslavia*, Museum International, Dec. 2005, no. 228, p. 45.

aa) *Violations of the laws or customs of war* as a legal basis

Whereas the destruction of cultural heritage may constitute crimes within the meaning of Article 3(b), (c), (d) and (e), the direct reference to cultural heritage in Article 3(d) makes it the most relevant one. The first precedent was established in the *Blaškić* Case.[1225]

According to the Chamber in the ***Blaškić* Case**, the "damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education ...". [1226] The criterion of being clearly identifiable as dedicated to religion or education is also applicable to the other categories covered by Article 3(d) of the Statute.[1227]

Since the *Kordić and Čerkez* Trial Judgement,[1228] property protected within the meaning of Article 3(d) of the Statute has been determined in view of Article 1 of the Hague Convention of 1954 and applies to all "movable or immovable property of great importance to the cultural heritage of every people." **The Chamber recalled that the former Socialist Federal Republic of Yugoslavia had been a contracting party since 1956, as were the Republic of Croatia and of Bosnia and Herzegovina by way of succession.**[1229]

In the *Strugar* Case, as concerns the destruction of the **Old Town of Dubrovnik**, the Trial Chamber conducted an in-depth analysis of the sources in customary international law and treaty law criminalising the destruction of cultural heritage in order to determine the elements of the crime. The Chamber considered Article 27[1230] of the Regulations on the Laws and Customs of War on Land, annexed to Hague Convention IV of 1907, Article 4[1231] of the Hague Convention of 1954,

[1225] *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000. Concerning previous international case-law, *see United States v. Göring*, (Rosenberg Judgement), 1, International Military Tribunal: Trial of the Major War Criminals 293, 295 (1946), *United States v. Göring*, (Streicher Judgement), 1, International Military Tribunal: Trial of the Major War Criminals 301, 301 (1946); *Attorney General of the Government of Israel v. Adolf Eichmann*, 361 I.L.R. 5, para. 57 (Dist. Ct. of Jerusalem 1961).
[1226] *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, para. 185.
[1227] ABTAHI, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 Harv. Hum. Rts. J. 2001, 13.
[1228] *The Prosecutor v. Kordić and Čerkez*, Judgement, 26 February 2001, para. 360.
[1229] *Ibid.* para. 359.
[1230] Article 27: "In sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.
It is the duty of the besieged to indicate the place of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand."
[1231] Article 4, Respect for Cultural Property: "1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.
2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

Article 53[1232] of Additional Protocol I and Article 16[1233] of Additional Protocol II to the Geneva Conventions of 1949. It held that despite the terminological differences, the texts share a similar notion of cultural heritage. Accordingly, property considered protected within the meaning of Article 3(d) of the Statute is all property alternatively protected within the meaning of one of the above-mentioned instruments.[1234]

According to the Trial Chamber in the ***Kordić and Čerkez*** **Case**,[1235] the charge of seizure of, or destruction or wilful damage done to, cultural heritage within the meaning of Article 3(d) of the Statute is the *lex specialis* relative to the charge of unlawful attacks on civilian objectives within the meaning of Article 3 of the Statute.[1236] The Chamber notes that Article 52 of the Protocol Additional to the Geneva Conventions of 1949[1237] grants "general protection" to civilian property, whereas Article 53 grants "enhanced protection" to the property concerned.

In the *Jokić* Case, the Accused was convicted by the Chamber for the destruction of the **Old Town of Dubrovnik,** inscribed on UNESCO's World Heritage List in 1975.[1238] Of all the cases before the Tribunal, **the destruction of Dubrovnik** is – in terms of its **symbolic character –** the attack directed against cultural heritage that most resembles the **destruction of the *Stari Most.*** Following the Accused's guilty plea, the Chamber ruled that the possibility of restoring the buildings destroyed

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3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.
4. They shall refrain from any act directed by way of reprisals against cultural property.
5. No High Contracting Party may evade the obligations incumbent upon it under the present Article in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3."

[1232] Article 53, Protection of cultural objects and of places of worship. "Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
b) to use such objects in support of the military effort;
c) to make such objects the object of reprisals."

[1233] Article 16, Protection of cultural objects and of places of worship: "Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort."

[1234] *The Prosecutor v. Strugar*, Judgement, 31 January 2005, para. 307.

[1235] *The Prosecutor v. Kordić and Čerkez*, Judgement, 26 February 2001, para. 361.

[1236] The Chamber considers that unlawful attacks on civilian objects under Article 52(1) of the Additional Protocol to the Geneva Conventions of 1949 form part of the non-exhaustive list of offences under Article 3 of the Statute. *See The Prosecutor v. Kordić and Čerkez*, Judgement, 26 February 2001, para. 326; confirmed on appeal, *The Prosecutor v. Kordić and Čerkez*, Judgement, 17 December 2004, para. 167.

[1237] Article 52, General Protection of Civilian Objects: "1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be strictly limited to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers **a definite military advantage.**
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."

[1238] *The Prosecutor v. Jokić*, Sentencing Judgement, 18 March 2004, para. 48.

does not constitute mitigating circumstances to be taken into account in determining the sentence.[1239] The main criteria considered by the Chamber are the level of legal protection for the heritage and the extent of the damage to the protected heritage.[1240]

bb) C*rimes against humanity* as a legal basis.

The first time that destruction of cultural heritage was considered constituent of a crime against humanity and persecution – with all other crimes – was in the *Blaškić* Case.[1241] The destruction of symbolic buildings, perpetrated with discriminatory intent, is comparable to a physical offence committed against the population concerned.[1242] This represents a major judicial contribution by the Tribunal to the protection of cultural heritage.[1243]

The *Blaškić* Chamber stated that: "[However], *persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind. [P]ersecution may thus take the form of confiscation or destruction of [...] symbolic buildings [...] belonging to the Muslim population of Bosnia-Herzegovina.*"[1244]

"In the context of the crime of persecution, the destruction of property must be construed to mean the destruction of towns, villages and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily."[1245] It should be noted that it introduces two important factors:

- **extensive;**
- **not justified by military necessity.**

[1239] *Ibid.* para. 52.
[1240] *The Prosecutor v. Jokić,* Sentencing Judgement, 18 March 2004, para. 53.
[1241] *The Prosecutor v. Tihomir Blaškić,* Judgement, 3 March 2000.
[1242] For property that does not constitute cultural heritage in the strict sense of the term, *see The Prosecutor v. Dragan Obrenović,* Sentencing Judgement, 10 December 2003, para. 64, footnote 95; *The Prosecutor v. Momir Nikolić*, Sentencing Judgement, 2 December 2003, para. 104, footnote 148. In *The Prosecutor v. Biljana Plavšić*, Sentencing Judgement, 27 February 2003. para. 31, a conviction for the destruction of a number of monuments and religious sites in Foča, Višegrad and Zvornik was pronounced on the basis of a guilty plea. The theoretical lesson is therefore limited.
See MERON, *The Protection of Cultural Property in the Event of Armed Conflict within the Case-law of the International Criminal Tribunal for the Former Yugoslavia,* Museum International, Dec. 2005, no. 228, p. 46.
[1243] *See* ABTAHI. *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 Harv. Hum. Rts. J. 2001, 28, which characterised the perspective adopted by this jurisprudence as "anthropocentric."
[1244] *The Prosecutor v. Blaškić*, Judgement, 3 March 2000, para. 227.
[1245] *Ibid.* para. 234.

The Chamber provided detailed examples of the judicial grounds on which this view is based in the ***Kordić and Čerkez*** Case[1246] by referring to the IMT and the International Law Commission. According to the Chamber, destruction of religious institutions "amounts to an attack on the very religious identity of a people [...] [and] manifests a nearly pure expression of the notion of 'crimes against humanity'".[1247] The question that may arise in the present case is whether this bridge has a religious connotation. This is conceivable for a place of worship but extending this to a bridge is a step I cannot take.

i) The discriminatory nature of the destruction

In order to demonstrate the discriminatory nature of the destruction of a Muslim village in Bosnia and Herzegovina, the Trial Chamber in the ***Blaškić*** **Case**[1248] took into account the "particular significance for the Muslim community of Bosnia" of a village that was destroyed and that "Muslims in Bosnia considered [...] to be a holy place" which "symbolised Muslim culture in Bosnia." The Chamber inferred from "[t]he methods of attack and the scale of the crimes [...] that the attack was aimed at the Muslim civilian population."[1249] I can subscribe to this view only if the Old Bridge symbolised Muslim culture.

ii) The cultural objects concerned

The nature of the objects whose destruction may constitute a crime against humanity was first specified in the *Blaškić* Appeals Judgement,[1250] without however specifically referring to cultural heritage.

"There may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds [...] unless [the property] constitutes an indispensable and vital asset to the owner."

[1246] *The Prosecutor v. Kordić and Čerkez*, Judgement, 26 February 2001, para. 206.

[1247] *Ibid.* para. 207. This is accepted by the established precedents, *see inter alia*, *The Prosecutor v. Stakić*, Judgement, 31 July 2003, para. 766.

[1248] *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, p. 411.

[1249] *Ibid.* p. 425.

[1250] *The Prosecutor v. Tihomir Blaškić*, Judgement, 29 July 2004, para. 146.

The question can arise as to whether the **Old Bridge** was indispensable and vital. This can perhaps be claimed from the point of view of symbolism.

Although not all destruction of cultural heritage committed with the requisite discriminatory intent amounts to persecution as a crime against humanity, this threshold is reached if the acts constitute "a denial of or infringement upon a fundamental right laid down in international customary law"[1251] and are separately or in conjunction with other acts "of gravity equal to the other crimes listed in Article 5 of the Statute."[1252]

cc) Waiver in case of use for military purposes

The protection of cultural objects remains subject to their military use. A variation on the doctrine of "military necessity", a principle frequently used in international humanitarian law, limits the protection of cultural objects under the above-mentioned treaties.[1253] Such an exception was first discussed in *Blaškić* in relation to the war crime of the destruction of property within the meaning of Article 2(d) of the Statute, which expressly provides for a waiver ("not justified by military necessity"). Although Article 3(d) of the Statute does not contain a clause of this kind, the judicial reasoning on using cultural heritage for military purposes no longer makes a distinction between the legal bases for war crimes and for crimes against humanity.[1254]

In the ***Blaškić*** **Case**[1255] the Chamber set out a double negative condition: property must not be "used for military purposes at the time of the acts." And, in addition, the "institutions must not be in the immediate vicinity of military objectives."[1256] While the first condition was affirmed in the *Naletilić and Martinović* Case,[1257] the second restriction was expressly lifted in this case.[1258]

The ***Strugar*** **Judgement**[1259] confirmed the lifting of this condition in that **mere proximity** to military objectives does not justify destruction. The Chamber conducted a detailed study of the

[1251] *The Prosecutor v. Kordić and Čerkez*, Judgement, 17 December 2004, para. 103.
[1252] *Ibid.* para. 104.
[1253] FORREST, "*The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts"*, California Western International Law Journal, 2007, 177, p. 182 *et seq.*, Protocol 1 Additional to the Geneva Conventions of 1949 (1977) referred specifically to the principle, thereby increasing its importance in international humanitarian law.
[1254] *The Prosecutor v. Strugar*, Judgement, 31 January 2005, para. 310.
[1255] *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000.
[1256] *Ibid.* para. 185.
[1257] *The Prosecutor v. Naletilić and Martinović*, Judgement, 31 March 2003, para. 603.
[1258] *Ibid.* para. 604.
[1259] *The Prosecutor v. Strugar*, Judgement, 31 January 2005, para. 310.

sources of the waiver in international law. The notion is already found in the Regulations annexed to Hague Convention IV of 1907 and is set out in Article 4.2 of the Hague Convention of 1954.

"4.2 *The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity* ***imperatively*** *requires such a waiver.*"

The Chamber noted **that the additional Protocols to the Geneva Conventions of 1949 do not refer to the notion of military necessity.** However, given the supplementary nature of the Protocols, this does not challenge the fact that international law generally provides for a waiver in the case of military necessity.[1260]

Nevertheless, the exact scope of this waiver is not specified. The Hague Convention of 1954 does not clarify the scope of the criterion of "imperative necessity." Protocol II to the Convention of 1999 provides a clarification.[1261] According to the Second Protocol, **"imperative necessity" may be invoked only when the property has been made into a military objective and no similar military advantage can be obtained without targeting the protected object. Article 1(f)** of the Protocol defines a **"military objective" as "an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage."**

It does not seem certain that, should the need arise, the definitions of the Protocol would be applied to the letter and would serve as the main reference point. In the ***Strugar*** **Case**, the Chamber did not have to rule on the question of whether the waiver within the meaning of the Hague Convention ("imperative") is to be more narrowly construed than the waiver in the Regulations of 1907.[1262] The

[1260] *The Prosecutor v. Strugar*, Judgement, 31 January 2005, para. 309; O'KEEFE in Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, 2008, para. 902.
[1261] The notion of military necessity was clarified in the Second Protocol to the Hague Convention, dated 26 March 1999. "Article 6, Respect for Cultural Property with the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:
a. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
i. that cultural property has, by its function, been made into a military objective; and
ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;
b. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;
c. the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;
d. in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit."
[1262] *The Prosecutor v. Strugar*, Judgement, 31 January 2005, para. 309.

concept of "use for military purposes" may thus not have the same extension as that of "military necessity."

Was the Old Bridge considered a military objective?

The entire issue is to determine whether the **Old Bridge in Mostar** had a civilian or military character. There is a general prohibition on attacking civilian property.[1263] Nevertheless, this prohibition does not apply to military works or "military objectives."

a) Protecting the *Stari Most* because of its character as a cultural heritage

According to the ***Strugar* Judgement**, for the ***Stari Most*** to be considered part of the cultural heritage within the meaning of Article 3(d) of the Statute, it should also be protected under one of the instruments referred to.[1264] At the time of its destruction, the *Stari Most* had not yet been put on the **UNESCO** World Heritage List nor was there any indication that it had been placed under special protection.[1265] This does not necessarily rule out protection under the Hague Convention of 1954 according to which bearing an emblem is not mandatory (Article 6). It is highly probable that the *Stari Most* was granted protection under Article 1 of the Hague Convention. Nevertheless, it was necessary for the BiH Government to recognise that the *Stari Most* was of "great importance to the cultural heritage of people." However, on 24 September 1992, and within the context of the reconstruction of the town of Mostar, Boro Puljić[1266] issued a decision appointing a temporary committee for the protection of cultural objects in HZ HB.[1267] Item 2 of this Decision states that the

[1263] According to Article 23 of the Hague Regulations, it is forbidden "to destroy or seize the enemy's property" unless absolutely necessary.
[1264] *The Prosecutor v. Strugar*, Judgement, 31 January 2005, para. 307. This concerns Article 27 of the Regulations on the Laws and Customs of War on Land, annexed to Hague Convention IV of 1907, Article 4 of the Hague Convention of 1954, Article 53 of Additional Protocol I and Article 16 of Additional Protocol II to the Geneva Conventions of 1949.
[1265] P 09834, paras 7 and 8; Miro Salčin, T(F), pp. 14171 and 14172.
[1266] Boro Puljić, director of the public enterprise for the reconstruction of Mostar.
[1267] 3D 00974, p. 20. Document 1D 02644, used on 16 September 2008, pp. 32231 to 32233 and 32238: "Q. Okay. Go on to the next document, ID 02644. This is a decision. We see your name at the bottom of it, [next to the date of] 24 September 1992, and of course, you're [saying]: "The following shall be appointed [as] member[s] of [this] committee for [the] [...] protection of cultural heritage buildings." If we look at number one and number two, it appears that they are Muslims - there is a construction supervisor and someone in charge of contract services. A: "Number 1, that's a Muslim, [...], number 2 is a Muslim [too], and number 3 is a Serb." Q. "Okay." [...] under Article number 3 [..] you say: "The [committee] may hire external consultants, professionals in specific fields, and they shall have [complete] freedom [...] to hire contractors for [the] specific work [required]." A: "These are [...] engineers who can provide [...] advisory services [exclusively, and their task was to provide the teams responsible for the temporary protection of cultural heritage in the public enterprise for the reconstruction of Mostar with information on the extent of destruction, the extent of damage to the Old Bridge.]" But also, they were able to perhaps use some funds to do something to protect the Old Bridge; [...] they could have [perhaps provided] advice [...] [to other institutions that were trying to protect the Old Bridge.]" They could have assisted them by providing advice [...]" Q. All right. Before we move on to the next document, can you tell us whether the Old Bridge - whether attempts had been made to protect it during the events with the Serbs? A. [You] couldn't approach the Old Bridge [at the time] because it was under fire. Q. What about afterwards? A. Afterwards, the bridge was shelled. [...] in order to be able to still use the bridge as a pedestrian bridge - I think [...] the HVO engineers protected it by placing tyres and planks on it. As far as I can recall, these people [...] who are mentioned here as engineers provided advice to the engineers [...] on the best way to protect the

duty of the committee is to determine the state of the Bridge (which had already been damaged in other attacks) and to protect it. This may lead one to believe that the BiH Government was aware of the exceptional cultural heritage that the Old Bridge in Mostar represented. I fully agree with this approach.

b) Justifying the destruction on grounds of military necessity?

According to the testimony, the *Stari Most* was **useful for the ABiH troops** who controlled it and used it to transport troops and military materiel.[1268] The **ABiH** used the ***Stari Most*** for supplying weapons and food.[1269] There is no textual support for the claim that use for military purposes – in the sense of military necessity – must be the *only* or even main mode of use.

According to the Second Protocol to the Hague Convention (1999), whose relevance to the case in 1993 should of course be based on customary law, imperative military necessity within the meaning of Article 4.2 of the Hague Convention of 1954 has a twofold condition: **making property into a military objective** and the absence of a "feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective."[1270]

The definition **of a military objective is complex and is an essential component of the mechanism for the protection of civilians in time of conflict.** It appears to be an essentially negative definition.

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bridge. Q. "All right. Do you know who the engineers were [...], the HVO engineers, and [...] - who they were subordinated to? A. They were not engineers [...], they were [employees] in the engineering section [...]. I [...] [remember] one of them was called Božo Pehar, but they were part of the HVO."
JUDGE ANTONETTI: "Before we move to the last topic, Witness, I'd like to go back to the Old Bridge. We've seen documents establishing that the HVO had taken the necessary measures to protect the Old Bridge. And you [...] provided a detail that I didn't know; that it was your employees under the supervision of your engineers who protected the Old Bridge with tyres, planks and so on. We know, in document 1D 2951, we learn in that document that you've shown - [I was going to say] the world, or at least the UNESCO organisation in Paris - [about] the damage caused in Mostar during the conflict with the Serbs. This leads me to the following question: In 1993, there was a conflict in Mostar between the HVO and the ABiH, and at one stage, we [saw video] evidence [showing] a tank apparently under HVO control [firing] in the direction of the Old Bridge. The Old Bridge collapsed. We're trying to determine why the [Old] Bridge collapsed. But at any rate, at one particular stage, we see a tank belonging apparently to the HVO shooting at the bridge. How can you explain this particular event? THE WITNESS: I also saw the tank on television. Perhaps I saw it on television. [...] In what sense are you seeking my explanation? JUDGE ANTONETTI: [Very well]. Just like everyone else, you saw this tank shooting at the bridge. You see this on television. According to you - I mean, you were living in Mostar at the time - [were] there any reasons to fire at that bridge? Was there a reason behind this, or was it just madness? Was it totally illogical? THE WITNESS: I was sorry that they fired at the Old Bridge. "
[1268] Enes Delalić, T(F), pp. 18707-18708 and 18717-18718.
[1269] Miro Salčin, T(F) p. 14251.
[1270] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999, Article 6(a), *cf.* footnote 76, GPI, Article 52 in Françoise BOUCHET-SAULNIER, *Dictionnaire pratique du droit humanitaire*, p. 312.

According to Hague Convention IX of 1907 concerning Bombardment by Naval Forces in Time of War: "The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden [...]. Military works, military or naval establishments, depots of arms or war materiel, workshops or plants which could be used for the needs of the hostile fleet or army [...] are not, however, included in this prohibition."[1271] These rules are accompanied by provisions on warnings that must precede the attacks. They have hardly been applied, but give an idea of what military objectives were taken to mean in 1907.

In 1922, the Commission of Jurists,[1272] assigned the task of examining a partial amendment to the laws of warfare, prepared a draft. Article 24 focused on providing the definition of civilian property and military objectives. According to this article, a military objective is **"an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent."** The purpose of the attack makes it possible to distinguish a military objective from civilian property. The attempt to provide a definition was not subsequently codified, and although the two Geneva Conventions of 1929 relative to the wounded and sick and prisoners of war make a distinction between civilian property and military objectives, none of their provisions relate to this definition.

When the four Geneva Conventions were drafted in 1949, although they refer explicitly to military objectives,[1273] they did not include a clear definition. Thus, during the Second World War, although the states had generally accepted that attacks should not be directed against military objectives, no definition of such military objectives existed. The belligerents thus defined the meaning of "military objective' as they saw fit. The definition they provided often differed depending on the various situations with which they were faced. It was essential to provide an objective and definite definition.

A **military objective** can very often be distinguished from civilian property on the basis of its external features. However, the jurisprudence of the Second World War identified certain general criteria which were subsequently used to define this notion. In the *List* Case (*the Hostages Trial*), the American Military Tribunal in Nuremberg placed the emphasis on the possibility of using property for military purposes:

[1271] Articles 1 and 2 of Hague Convention IX of 1907.
[1272] This commission was set up following a resolution of the Washington Conference on the Limitation of Armaments (1922). Its purpose was to establish draft rules on aerial warfare and the use of radio in time of war. It was composed of experts from the following countries: USA, France, Italy, Japan, the Netherlands and the United Kingdom.
[1273] Article 19 of Convention I and Article 18 of Convention IV.

"The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication or any other property that might be utilised by the enemy. Private homes and churches even may be destroyed if necessary for military operations."[1274]

It is on the basis of these criteria that the Tribunal found that under the circumstances in this case the destruction of villages, roads, bridges, port facilities and all the means of transport and communication ordered by the Accused to slow down the advance of the Soviet forces while the German Army was retreating from Norway was not a crime.

In the ***von Lewinski*** **Case** (*alias von Manstein)*, the Judge advocate showed that the advantages obtained by destruction were not sufficient to justify it. An additional requirement according to Article 23(g) of the Hague Regulations is that such destruction be **a real necessity**:

"Now the first and obvious comment on the wording of this article is that the requirement is "necessity" and not "advantage." The second is that that necessity must be an imperative one. For a retreating army to leave devastation in its wake may afford many obvious disadvantages to the enemy and corresponding advantages to those in retreat. That fact alone, if the words in this article mean anything at all, cannot afford a justification."[1275]

In 1954, Article 8 of the Hague Convention for the Protection of Cultural Property provided a partial and restrictive definition of a "military objective."[1276]

In 1956, the ICRC presented its Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in time of war. Article 7 of the draft provided a definition of "military objective". According to this Article, "[i]n order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives.

[1274] The *List* Case, *Hostages Trial*, 19 February 1948.
[1275] British Military Tribunal, the *von Lewinski* Case, alias *von Manstein*, 19 December 1949, Hamburg.
[1276] "There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:
a) are situated at an adequate distance from any large industrial centre or from any **important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;**

Only **objectives belonging to one of the categories of objectives which, in view of their very nature, are generally acknowledged to be of military importance**, may be considered as military objectives. **Those categories are listed in an annex to the present rules.**

However, even if they belong to one of those categories, **"they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage."**

This definition comprises two cumulative elements. For a target to be considered a military objective, it must be acknowledged to be of military importance, and its destruction must offer a military advantage. However, a list, subject to modification, delimited the notion of "military objective."[1277]

In 1969, the Institute for International Law also provided a fairly similar definition of the notion of "military objective." Thus, the Institute of International Law "included [in its definition of] military objectives only those which by their very **nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance**, such

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b) are not used for military purposes."

[1277] Here is the list drawn up by the ICRC with the help of military experts and presented as a model, subject to modification. List of Categories of Military Objectives according to Article 7, paragraph 2:
"I. The objectives belonging to the following categories are those considered to be of generally recognized military importance:
(1) Armed forces, including auxiliary or complementary organisations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting.
(2) Positions, installations or constructions occupied by the forces indicated in sub-paragraph 1 above, as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces).
(3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defence, Supply) and other organs for the direction and administration of military operations.
(4) Stores of arms or military supplies, such as munition dumps, stores of equipment or fuel, vehicles parks.
(5) Airfields, rocket launching ramps and naval base installations.
(6) Those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.
(7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance.
(8) Industries of fundamental importance for the conduct of the war:
(a) industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material.
(b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces;
(c) factories or plants constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military;
(d) storage and transport installations whose basic function it is to serve the industries referred to in (a)-(c);
(e) installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.
(9) Installations constituting experimental, research centres for experiments on and the development of weapons and war material.
II. The following however, are excepted from the foregoing list:
(1) Persons, constructions, installations or transports which are protected under the Geneva Conventions I, II, III, of August 12 1949;
(2) Non-combatants in the armed forces who obviously take no active or direct part in hostilities."

that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them."

The ICRC also proposed a mixed definition[1278] for the draft Protocol in 1970-1971. According to this draft, "[a]ttacks shall be strictly limited to military objectives, **namely, to those objectives which are, by their nature, purpose or use, recognized to be of military interest and whose total or partial destruction, in the circumstances ruling at the time, offers a distinct and substantial military advantage.**

Consequently, objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used mainly in support of the military effort."

The diplomatic conference that established the notion of "military objectives" declared that immunity was conferred on civilian property, which it then defined in contrast with "military objectives." This was the first time that an international treaty provided a definition of the notion of "military objective." The definition adopted at the conference was to a large extent inspired by the previous documents.

Thus, according to the definition that appears in the Second Protocol to the Hague Convention, a "military objective" consists of two elements. The target is considered a military objective as soon as both these elements are present.

According to the first condition, such objects must be "**objects which by their nature, location, purpose or use make an effective contribution to military action.**" This element refers to objects that by their "nature" make an effective contribution to military action. All property directly used by the armed forces – weapons, equipment, means of transport, fortifications, depots, edifices sheltering the armed forces, staffs, communication centres, etc. – is included in this category.

The requirement for fulfilling the second condition is that "**total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.**" The second criterion concerns "the location" of objects. It is obvious that there are objects which, although not military by nature, make an effective contribution to military action as a result of their

location. For example, such an object could be a bridge or some other construction; it could also be, as noted above, an area of particular importance for military operations on account of its location whether because the objective is to take it, to prevent the enemy from occupying it, or to force the enemy to abandon it. It should be noted that the Working Group of Commission III introduced the criterion of location without providing any reasons.

The criterion of "purpose" relates to the future and current "use" of property. Most property that is civilian by nature can be transformed into property useful to the armed forces. For example, a school or a hotel are civilian property but become military objectives if used to accommodate troops or staffs. We will see, in relation to paragraph 3, that in case of doubt, they are presumed to be civilian property.

Other establishments or edifices dedicated to the production of civilian property can also be used to the advantage of the military; in such cases this refers to mixed property which has value both to the civilian population and to the soldiers. In such situations, the time and place of the attack must be considered together with the expected military advantage on the one hand, and the expected loss of human life among the civilian population and the damage that will be caused to civilian property on the other hand.

Last, the destruction, capture or neutralisation must offer a "definite military advantage" under the prevailing spatial and temporal circumstances. In other words, it is not lawful to launch an attack that offers only indefinite or potential advantages. Those ordering or carrying out the attack must have sufficient intelligence to allow them to take this requirement into account; in the case of doubt, safeguarding the population – which is the Protocol's objective – is what must be considered.

In respect of the two elements constituting a military objective according to the commonly accepted definition, the conclusion that can be drawn from the testimony is that because of the *Stari Most's* location and use, it made an effective contribution to ABiH military action during the period preceding its destruction. The fact that the *Stari Most* was one of the two remaining bridges still intact in Mostar must be taken into account.

The **Old Bridge** in Mostar allowed the ABiH to transport supplies and personnel and was the only route through which one part of East Mostar was resupplied with military materiel. By destroying

[1278] The term "mixed definition" is used because the ICRC definition covers both civilian objects that can not be attacked and

the Old Bridge, the HVO cut off the supply route for food and ammunition, which gave it **a military advantage**. The Old Bridge in Mostar was therefore a military objective for the HVO.

An analysis of the video footage[1279] did not make it possible for the Chamber to determine beyond reasonable doubt who caused the final collapse of the *Stari Most*. This may be a matter of characterising the continuous tank fire before the *Stari Most* collapsed which damaged but did not destroy it.[1280]

Similarly, a video shows the impact of a shot which, according to an answer given to a question from the **Accused Petković,** came from the Serbian lines.

In this scenario, a distinction between the various grounds for the allegation in para. 116 of the Indictment must be made. Article 3 of the Statute refers explicitly to "wilful damage" in addition to destruction, whereas Article 2 refers only to destruction. With regard to crimes against humanity, it is necessary to determine whether the gravity of causing damage is equal to the gravity of destroying "an indispensable and vital asset to the owner."[1281]

In conclusion, I believe that the identity of the person who fired the shot that caused the **Old Bridge to collapse** was not categorically established by the Prosecution.

As far as the damage is concerned, there is no doubt that the tank fire could have damaged the Old Bridge, but it had already been damaged as a result of the conflict with the Serbs. It is therefore difficult to attribute the damage to either of the parties with certainty. In any event, to my mind, the **Old Bridge** was a **legitimate military objective** whose destruction gave the HVO a definite military advantage by cutting off communications and the supply of food.

I fail to see how the **principle of proportionality** could be applicable in this case. If the **Old Bridge** was a military objective, it quite simply had to be destroyed. In any event, there is no such thing as proportionate destruction.

3. Deportation and Forcible Transfer

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military objectives that can be attacked.
[1279] Videos number: P 01040, IC 00574, IC 00820, IC 00821.
[1280] One could object that the Indictment alleges only the "destruction" of the *Stari Most* and that this reasoning goes beyond the allegation. This objection requires an analysis of the relationship between the terms "destruction" and "causing damage."
[1281] *The Prosecutor v. Tihomir Blaškić*, Judgement, 29 July 2004, para. 146.

In paragraph 7 of its Final Trial Brief, the Prosecution states:

> *"At its core, the objective of the Herceg-Bosna JCE was to establish and maintain Croat autonomy and control over the territory claimed as Herceg-Bosna, or as much of it as possible, by bringing about population movements through persecution, deportation and forcible transfer (as charged in Counts 1, 6-9. "*

According to the Prosecution, the system of deportation was based on **"letters of guarantee."**[1282]

Accordingly, persecution, deportation and forcible transfer were committed in order to achieve the objective of the Herceg-Bosna JCE.

The objective of the JCE is defined in paragraph 7 of the Prosecution Final Trial Brief. This objective was "to engineer the political and ethnic map of these areas so that they would be Croat-dominated, both **politically** and **demographically**".

According to the Prosecution, the sole purpose of the crimes covered under Counts 1, 6, 7, 8 and 9 was to enable the Croats to establish political and demographic domination.

In support of its submission, the Prosecution asserts that the conduct, statements, omissions and writings of the accused – and of Tuđman, Mate Boban, Anto Valenta and others – resulted in reductions of the Muslim populations in Prozor, Gornji Vakuf, West Mostar, Ljubuški, Stolac and Čapljina.[1283]

In its Final Brief, the Prosecution estimates that several thousand people were deported or forcibly transferred.[1284] The Prosecution relied on the report of its expert witness, **Ewa Tabeau**, to support this estimate. The Defence called its own expert to discredit the Tabeau report. This expert, **Svetlana Radovanović,** criticised the data matching method used by Ewa Tabeau to consolidate data from the 1991 census and data from the Voter Registers for 1997-1998 in order to obtain a single database. She considered that it was methodologically wrong to consolidate the data from two sources that do not contain the same type of information.

[1282] Prosecution Final Trial Brief, para. 24.
[1283] Prosecution Final Trial Brief, para. 8.
[1284] Prosecution Final Trial Brief, paras 1, 17 and 274.

Without entering into this expert debate, it should nevertheless be pointed out that those experts testified in several cases before the ICTY and that the Trial Chamber in the *Blagoje Simić* Case thus found that it was not possible to draw any conclusions from the **Ewa Tabeau** and **Svetlana Radovanović** expert reports on the allegations of ethnic cleansing, forcible displacement of people and population movements during the period relevant to the Indictment.[1285]

The Trial Chamber's position was endorsed by the Appeals Chamber, which did not challenge the assessment of the expert reports.

Expert reports in the area of demographics always contain subjects of contention. However, with regard to the actual displacement of people during the conflict, I note that the Prosecution expert, **Ewa Tabeau**, compared the ethnic composition of **231,610 individuals** domiciled in Herceg-Bosna in 1991 and the ethnic composition of **118,792 individuals** entered into the Voter Registers in 1997-1998 in Herceg-Bosna whom she considered domiciled in **Herceg-Bosna** in 1997-1998. The conclusions she reached are important. According to Ewa Tabeau, the Croats in **Vareš Municipality** formed a **relative majority** in 1991, whereas, the Muslims formed an **absolute majority** in 1997- 1998**.** The conclusion to be drawn in relation to this municipality is simple: the Croats no longer formed a majority after the war.

With regard to the municipalities of Gornji Vakuf and Jablanica, the Croats continued to form an absolute majority between 1991 and 1997-1998. Nothing therefore changed, as the Croats still formed the majority.

The Croats continued to form a majority in **the municipalities of Prozor, Ljubuški and Čapljina**, as had been the case in 1991. No demographic changes occurred in these three municipalities on account of ethnicity and as a result of the events.

With regard to Mostar, the expert stated that between 1991 and 1997-1998, the areas of the municipality maintained their Croatian and Muslim majorities, with the exception of the "Mostar Srpski Mostar" area in which the Muslims formed an absolute majority, whereas in 1997-1998, it was the Serbs who formed an absolute majority.

[1285] *The Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Judgement, 17 October 2003, para. 33.

Lastly, the conclusions of this expert show an undeniable change only in the case of the **Municipality of Stolac** where the Croats now form a majority, whereas in 1991, the Municipality of Stolac had a Muslim majority. If **ethnic cleansing** did occur, in terms of demographics, it could only have been in the **Municipality of Stolac.**

In her report (which, as I have said, was criticised by the Defence), **Ewa Tabeau** analysed the pattern of changes of residence between 1991 and 1997-998 of the **142,204** people domiciled in Herceg-Bosna. The people taken into account – whether domiciled in Herceg-Bosna, other parts of BiH or abroad in 1997-1998 – appear in the 1997-1998 voter registers. If we understand her reasoning correctly, she took into account the 142,204 people while noting that they could have various places of residence. In her assessment, she described any person residing abroad in 1997, who used to reside in BiH in 1991, as **"internally displaced"**, and considered that these people did not return to BiH before 1998, perhaps because of the conflict. She reached the conclusion that **54,394** out of the 142,204 people were Muslims, **17,183** of whom were described as internally displaced and **9,480**, as refugees, whereas 27,732 individuals had not changed their place of residence. With regard to the Muslims, it therefore appears that we have a total of 17,183 + 9,480 = **26,663** people who allegedly changed their place of residence. On the basis of this number, a reasonable trier of fact can find that some of the Muslims were deported or forcibly transferred while also noting that some had voluntarily left their place of residence for a variety of reasons.

With regard to the Croats, it is interesting to note that she indicated that of the **62,276,**
10,410 were described as internally displaced and **5,303,** as refugees, and that **46,563** Croats had not changed their place of residence between 1991 and 1997-1998. As in the case of the Muslims, a smaller number of Croats were therefore either internally displaced or described as refugees.

Nevertheless, do these figures make it possible to say there was migration on an extraordinarily large-scale as a result of the conflict in BiH, which is what the expert stated in her report and when she testified.

It seems to me that 9,480 Muslims went abroad. This number certainly includes some who had been released on the basis of letters of guarantee and who did not come back to BiH in 1997, that is, several years after the conflict, although they were still on the Voters' Register. It would be interesting to know their exact number today.

On a political level, the Prosecution submissions run counter to the conclusions of the Vance-Owen Plan of 1993, whose objective was to create cantons with a Croatian majority (cantons 3, 8 and 10). That being the case, why expel the Muslims in order to obtain ethnic majorities given that the ethnic majorities were the reason for establishing the cantons? One might have thought that acts of deportation and forcible transfer would have been carried out mainly in other cantons with a Muslim majority in order to upset the ethnic majority, but this was not the case.

In terms of demography, there is incontrovertible data obtained from the 1991 census which were taken into account by the international community:

1. ***Population in the Ten Provinces of the Vance Owen Plan***

	Croats	**Muslims**	**Serbs**	Yugoslavs	Others	**Total**
Province I (Bihać)	5,580	46,737	12,689	4,356	1,370	70,732
	(7.88%)	(66.07 %)	(17.93 %)	(6.15 %)	(1.97 %)	
Province 2 (Banja Luka)	29,026	28,558	106, 826	23, 656	7,626	195,692
	(14.83 %)	(14.59 %)	(54.61%)	(12.08 %)	(3.89 %)	
Province 3 (Bosanski Brod)	13,993	4,088	11,389	3,664	1,004	34,138
	(40.98 %)	(11.97 %)	(33.36 %)	(10.73 %)	(2.96 %)	
Province 4 (Bijeljina)	429	30,929	57,389	4,426	4,452	96,988
	(0.50 %)	(31.16 %)	(59.17 %)	(4.56 %)	(4.61 %)	
Province 5 (Tuzla)	20,398	62,669	20,271	21,995	6,285	131,618
	(15.49 %)	(47.61 %)	(15.40 %)	(16.71 %)	(4.79 %)	
Province 6 (Nevesinje)	210	3,313	10,711	123	91	14,448
	(1.45 %)	(22.93%)	(74.13%)	(0.85 %)	(0.64 %)	
Province 7 (Sarajevo)	34,873	259,470	157,143	56,470	19,093	527,049
	(6.62 %)	(49.23%)	(29.82 %)	(10.71 %)	(3.62 %)	
Province 8 (Mostar)	43,037	43,856	23,846	12,768	3,121	126,628
	(33.98 %)	(34.63 %)	(18.83 %)	(10.08 %)	(2.48 %)	
Province 9 (Zenica)	22,510	80,359	22,433	15,354	4,561	145,517
	(15.46 %)	(55.22 %)	(15.41 %)	(10.75 %)	(3.16 %)	
Province 10 (Travnik)	26,118	31,813	7,777	3,743	1,296	70,747
	(36.91 %)	(44.96 %)	(10.99 %)	(5.29 %)	(1.85 %)	

The following irrefutable conclusion can be drawn from an examination of the table:

- It is undeniable that provinces 1, 5, 7 and 9 have a Muslim majority.
- It is undeniable that provinces 2, 4 and 6 have a Serbian majority.
- It is undeniable that province 3 has a Croatian majority.

Provinces 8 and 10 which the Vance-Owen plan "granted" to the Croats are problematic:

- Province 8 could be considered to have a Croatian majority if some of those described as Yugoslavs (10.08%) and those described as "others" (8.48%) are added to the 33.98%.
- Province 10 (Travnik) has a declared Muslim majority of 31,813 people (44.96%). The number of Croats is lower (2,618). If one adds the "Yugoslavs" and the "others", the figure arrived at is slightly lower than the number of Muslims (31,157 people). However, taking the 3,743 Serbs into account shows that the Muslims did not form a majority.

2. Population in Eight Municipalities in the Indictment

	Croats	Muslims	Serbs	Others	**Total**
1. Čapljina	12,467 (53.8 %)	6,252 (27 %)	3,231 (19.9 %)	1,235 (5.3 %)	23,185
2. Gornji Vakuf	8,529 (42.8%)	11,052 (55.4 %)	102 (0.5 %)	264 (1.3 %)	19,947
3. Jablanica	1,881 (18.6 %)	7,205 (71.1 %)	419 (4.1 %)	628 (6.2 %)	10,133
4. Ljubuški	22,026 (92.2 %)	1,345 (5.6 %)	62 (0.3 %)	462 (1.9 %)	23,895
5. Mostar	35,637 (34 %)	36,510 (34.8 %)	20,021 (19.1 %)	12,612 (12 %)	104,780
6. Prozor	9,700 (62.2 %)	5,675 (36.4 %)	39 (0.3 %)	180 (1.2 %)	15,594
7. Stolac	5,150 (33 %)	6,619 (42.3 %)	3,452 (22 %)	425 (2.7 %)	15,646
8. Vareš	7,478 (40.6 %)	5,493 (29.8 %)	3,169 (17.2 %)	2,290 (12.4 %)	18,430

The conclusion that can be drawn from an examination of the municipalities is that the Croats had a majority in Čapljina, Ljubuški, Prozor and Vareš, whereas the Muslims had a majority in Gornji Vakuf, Jablanica and Stolac.

However, the figures show some uncertainty about the majority in Mostar:

- Croats (34%)
- Muslims (34.8%)

Bearing in mind the fact that the former President of Yugoslavia, Marshall Tito, was a Croat, the fact that 12,612 people, or 12% of the population, declared themselves to be "Yugoslav" could lead one to believe that there were **more Croats than Muslims** among them. Thus, the Municipality of Mostar could be considered Croatian, which would explain why province 8 was given to the Croats, although this is not absolutely certain.

An excerpt from the **ODPR Report**[1286] shows how the Croatian and Muslim population changed in the towns of Ljubuški, Čapljina, Široki Brijeg and Stolac between January, September and October 1993.

It thus appears that **between September and October 1993**, the number of **Muslims** fell from **8,093 to 0 in Stolac, from 10,760 to 3,852 in Čapljina and from 1,631 to 826 in Ljubuški** in the same period**.**

There is no doubt that there was a **significant** drop in the Muslim population in **Stolac, Čapljina and Ljubuški.**

The Report[1287] of 15 November 1993 shows population movements **from** and **to** Western Herzegovina from November 1992 to November 1993. The author first recalls the general difficulty of obtaining reliable statistics during this period on account of the political and military conditions and the manipulation of the official figures for political reasons.

[1286] IC 00833.
[1287] P 09851 under seal.

According to the 1991 census, **Mostar**[1288] had a total population of **126,067 inhabitants**, of whom **35%** declared themselves to be Muslim, **34%**, Croat, and 19%, Serb.

The majority of the Serbian population left Mostar after the Serbian Army attack in April 1992 where there were still about 2,000 Serbs.

Prior to the events of 9 May 1993, the majority of the refugees and displaced persons were Muslims (**17,890 Muslims, 1,194 Croats, 112 Serbs**), and came from eastern Herzegovina. The report pointed out that following the events between the HVO and the ABiH on 9 May, the Muslim population was **deported** or **voluntarily** fled to the ABiH-held eastern part of town or to the area the ABiH controlled in the western part. It also indicates that some Muslims fled to Croatia or to third countries after having obtained authorisation from the HVO. Finally, the report notes that some were detained and transferred to the Heliodrom and other detention centres in Western Herzegovina. It thus does not make a clear distinction between those who left voluntarily and those who were forced to leave Mostar.

With regard to this issue, the report states that following the ABiH attack of 29 June, there was a sharp increase in the number of arrests, detentions and deportations. However, it was difficult to assess population movements as the international organisations were prohibited from entering Mostar. 10,000 Muslim men from Mostar, Čapljina and Stolac were allegedly detained in a number of detention centres at some time. The ICRC allegedly registered about **5,000 detainees**. The ABiH refers to 2,500 detained men who were not taken into account.

Prior to the attack on 29 June, according to an estimate made by ABiH representatives, the population of Mostar was between 26,000 and 30,000, although they said that it was impossible to obtain exact statistics. Since the attack, this figure dropped to **55,000, and between 2,000 and 5,000 Muslim civilians** remained in West Mostar. It would appear that the majority of the Croatian civilians in Mostar were transferred to the west in civilian exchanges between the HVO and ABiH in June. The report indicated that the increase in the population of Mostar was the result of the arrival of Muslims – in particular, the families of detainees – who had been expelled from **West Mostar** and the Čapljina and Stolac region. There was also (limited) population movement between east Mostar and the region of Jablanica and central Bosnia.

[1288] P 09851 under seal, pp. 1-3.

As one can see, there are uncertainties in this report. However, it is necessary to bear in mind the fact that there was an **influx** of Muslims into Mostar and that, curiously, **5,000** Muslims allegedly remained in West Mostar. It should be noted that according to the 1991 census, the town of Mostar had 75,865 inhabitants. This is tantamount to observing that if the Croats represented 34%, there would have been 5,000 Muslims for 25,000 Croats, that is, Muslims would have made up 20% which, given the events, would be a huge percentage.

With regard to **Western Herzegovina** in general,[1289] the 1991 census indicates that the population outside Mostar was mainly comprised of Croats (90% or more in certain municipalities), with the exception of the municipalities of Čapljina and Stolac.

After 1992, the majority of the Serbian population of Mostar and the majority of the municipalities fled. The escalation of the conflict between the HVO and the ABiH caused the same population movements of Muslims in Western Herzegovina as had been caused in Mostar.

As far as the Municipality of **Stolac**[1290] is concerned, according to the 1991 census, it had a population of 18,845, of whom 44% were Muslims, 33% Croats, and 22% Serbs. The population of **Čapljina** was 27,852, of whom 54% were Croats, 28% Muslims, and 14% Serbs.

Reports were received about Muslims who were arrested and detained in this region from April onwards, indicating that some of their family members had fled to Croatia and third countries. Others were expelled by the HVO to ABiH-held areas in East Mostar or Jablanica. The majority of the Muslim population allegedly left. According to the official statistics, 8,093 Muslims remained in Stolac (the local population) in September and 14,085 (of whom 10,760 were local people), in Čapljina. According to the official statistics for October-November, not a single Muslim remained in Stolac, while 3,852 remained in Čapljina.

As far as the Municipality of **Ljubuški** is concerned,[1291] according to the 1991 census, it had a population of 28,000, of whom 6 % were Muslims and 2 % Serbs. In September, the number of Muslim inhabitants was 2,381 (of whom 1,631 were local people), and in October-November, the number of Muslims was 826.

[1289] P 09851 under seal, p. 3.
[1290] P 09851 under seal, p. 4.
[1291] P 09851 under seal, p. 4.

According to the 1991 census, 95% of the 16,659 inhabitants of **Posušje**[1292] were Croats. At one point in time, Muslims fleeing Serbian persecution in Prijedor/Banja Luka were accommodated in Posušje before settling in third countries. A group of 104 Muslim women, children and elderly people accommodated in Posušje were expelled by the HVO in June 1993 and resettled in Italy (thanks to the efforts of NGOs). According to the most recent ODPR statistics, there is only one Muslim remaining in Posušje.

With regard to the **Livno/Tomislavgrad** region,[1293] about 400 Muslims were expelled from Livno to an ABiH-held region in central Bosnia in October. Apart from this, most of the Muslims who left these municipalities for Croatia or third countries did so voluntarily.

According to the 1991 census, the population of Livno was 39,526, of whom 72% were Croats, 15% Muslims, and 10% Serbs. In September, the number of Muslims was 7,858 (5,927 of whom were local people), while in October-November, the number of Muslims was 3,987.

According to the 1991 census, the population of Tomislavgrad was 29,261, of whom 87% were Croats, 11%, Muslims, and 3%, Serbs. In September, the number of Muslims was 4,216 (3,166 of whom were local people), while in October-November, the number of Muslims was 2,383.

Following the attack of the Serbian Army in 1992, Serbian civilians in the region were detained and then transferred to Serbian zones by way of prisoner exchanges. The women, children and elderly people were detained in the village of Rašćani (a few kilometres from the town of Tomislavgrad) for one year. In June 1993, the HVO released and transferred the entire population to territory held by the Serbian Army, without taking their wishes into account.

An influx of displaced Muslims arrived in the municipalities of **Jablanica,**[1294] Konjic and Tarčin after April 1993.

With regard to the influx of **displaced Croats** from Central Bosnia to Western Herzegovina,[1295] the ODPR indicated that in January 1993, there were **25,453 Croatian displaced persons** accommodated in Western Herzegovina, and **75,907 persons** in October-November.

[1292] P 09851 under seal, p. 4.
[1293] P 09851 under seal, p. 4.
[1294] P 09851 under seal, p. 6.

There were three major influxes of Croats displaced by the HVO from central Bosnia to Western Herzegovina. On 12 June, about **1,500 Croats** from the Travnik region arrived in Western Herzegovina and were accommodated in the region. Previous convoys in the same evacuation operation went to Croatia, which led to several families being separated. 4,500 to 5,500 Croats from Bugojno – about 1,500 elderly men – arrived in Western Herzegovina at the end of July. They were mobilised and had to return to the front line. Finally, on 18 October**,** about **6,000 Croats from Vareš were transferred to Western Herzegovina and accommodated in the region, and approximately 1,750 of them were immediately transported to Croatia.**

At this point, it should be noted that not only Muslims were "transported" to Croatia.

Other population movements of Croats took place on 23 September from Vareš, from Bugojno at the beginning of October, from Konjic on 13 October and from Bugojno on 7 November.

Another population movement was the **return of one thousand Croatian refugees** from Croatia to secure areas in Western Herzegovina in October-November 1993.[1296] This population movement followed the Croatian Government's implementation of a return policy, and apparently, the Croatian population did not always comply with it voluntarily.

Finally, it appears that the Croatian government did not always respect **the principle of non-refoulement**, in particular in the case of elderly Serbian and Muslim men. According to the report, from July 1993, at least 120 Muslims were refused entry to Croatia and were held in detention in Western Herzegovina.

The **Tabeau Report** entitled "Ethnic Composition, Internally Displaced Persons and Refugees from Eight Municipalities of Herceg-Bosna, 1991 to 1997-98" concerns eight municipalities in Bosnia and Herzegovina: Čapljina, Gornji Vakuf, Jablanica, Ljubuški, Mostar, Prozor, Stolac and Vareš. Ewa Tabeau pointed out that data from the 1991 census concerning persons born after 1980 were excluded from her analysis, as they were not likely to be on the voter register for 1997-1998, which the demographer used for her analysis.[1297]

[1295] P 09851 under seal, p. 5.
[1296] P 09851 under seal, p. 5.
[1297] P 09836, pp. 33 and 89.

First of all, with regard to the **ethnic composition of the population** in each municipality between 1991 and 1997-1998, **Ewa Tabeau** reached the conclusion that major population movements occurred in this area during the conflict in Herceg-Bosna between 1991 and 1994.[1298]

She came to the conclusion that:

- in 1991, the Croats in **Vareš** Municipality formed a relative majority, while in 1997-1998, the Muslims formed an absolute majority;[1299]
- in 1991, the Muslims in **Stolac** Municipality formed a relative majority, while in 1997-1998, the Croats formed an absolute majority;[1300]
- the Muslims maintained an absolute majority in the municipalities of **Gornji Vakuf** and **Jablanica** between 1991 and 1997 - 1998;[1301]
- the Croats maintained an absolute majority in **the municipalities of Prozor, Ljubuški and Čapljina** between 1991 and 1997 - 1998;[1302]
- between 1991 and 1997-1998, the areas of the Municipality of **Mostar** maintained their absolute majorities – either Croatian or Muslim majorities – with the exception of the "Mostar Srpski Mostar" area in which the Muslims had an absolute majority, whereas in 1997-1998, it was the Serbs who had an absolute majority.[1303]

Ewa Tabeau pointed out that when at least 50% of the population in a municipality was composed of one ethnic group, it had an **absolute majority**, whereas a **relative majority** was formed by the largest group among the population, provided that it was 5% larger than the second largest group.[1304]

Furthermore, concerning **the pattern of changes of residence**, she came to the conclusion that of the 142,204 people recorded in the 1991 census as domiciled in "Herceg-Bosna" and also registered in the 1997-98 voter registers, regardless of whether they were domiciled in "Herceg-Bosna", in other regions of BiH or abroad in 1997-1998:[1305]

[1298] P 09836, pp. 32 and 33.
[1299] P 09836, pp. 33, 38 and 39.
[1300] P 09836, pp. 33, 38 and 39.
[1301] P 09836, p. 38.
[1302] P 09836, p. 39.
[1303] P 09836, pp. 37 and 40.
[1304] Ewa Tabeau, T(F), p. 21513.
[1305] P 09836, pp. 24, 25 and 42-46.

- 16, 814 were Serbs, of whom 10,492 were described as "internally displaced", 4,122 as "refugees", and 2,200 had not changed their place of residence between 1991 and 1997-1998;[1306]

- 54,395 were Muslims of whom 17,183 were described as "internally displaced", 9,480 as "refugees" and 27,732 had not changed their place of residence between 1991 and 1997-1998;[1307]

- 62,276 were Croats of whom 10,410 were described as "internally displaced", 5,303 as "refugees" and 46,563 had not changed their place of residence between 1991 and 1997-1998;[1308]

- - 8,719 declared themselves to be "others", of whom 2,444 were described as "internally displaced", 2,053 as "refugees" and 4,222 had not changed their place of residence between 1991 and 1997-1998.[1309]

Thus, **Ewa Tabeau** pointed out that any person residing in 1997-1998 in a municipality different from the one in which that person was residing in 1991 was described as an "internally displaced person"[1310] and any person residing abroad in 1997-1998, who was resident in BiH in 1991, was described as a "refugee."[1311]

She concluded that the migratory phenomena observed were explained by the conflict in BiH.[1312]

Finally, she calculated **the ethnic composition of all the persons identified as "internally displaced persons" and "refugees"**, that is, of 61,487 people out of the analysed sample of 142,204, and concluded that 43.4 % were Muslims, 25.6% Croats, 23.8% Serbs and 7.3% of a different ethnicity.[1313]

However, she indicated that the figure of **101,107** was a more complete estimate of this population.[1314]

[1306] P 09836, pp. 26 and 46.
[1307] P 09836, pp. 26 and 46.
[1308] P 09836, pp. 26 and 46.
[1309] P 09836, pp. 26 and 46.
[1310] P 09836, p. 10.
[1311] P 09836, pp. 9, 11 and 24.
[1312] P 09836, pp. 10, 11 and 34.
[1313] P 09836, pp. 42 to 46.
[1314] P 09836, pp. 33 and 47-51.

Lastly, **Ewa Tabeau** estimated that the total number of "refugees" and "internally displaced persons" throughout BiH amounted to **1,306,377 people**.[1315] She applied the method of proportionality to identify the ethnic composition of the "refugees" and "internally displaced persons" in the territory of BiH[1316] and concluded that the **non-Croats were the most affected** by the conflict in that they accounted for most of the "internally displaced persons" and "refugees."[1317]

In order to reinforce its position, the Prosecution stated in paragraph 68 of its Final Trial Brief that the JCE referred to in paragraph 225 of the Indictment (deportation/forcible transfer) commenced on **1 July 1993** when the HVO and the accused launched a vast campaign of arrests of Muslim men in Bosnia. One should bear in mind the fact that this action was no more than the result of the ABiH attack on the "Northern Barracks" on 30 June 1993, which the Prosecution acknowledges in paragraph 252 of its Final Trial Brief.

According to the Prosecution, a system of deportation was put in place which allowed prisoners to be released provided they leave BiH with their families. At the same time, the HVO took advantage of the fact that the men were imprisoned in order to deport the women, children and vulnerable people in West Mostar, Stolac, Čapljina and Ljubuški.

This JCE came into being on **1 July 1993**, although the Prosecution submits in paragraph 69 of its Brief that it was an integral part of the expanded Herceg-Bosna JCE and that deportation and forcible transfer are the core crimes of the JCE and are referred to in paragraph 15 of the Indictment.

I do not agree with the Prosecution's point of view for numerous reasons.

In legal terms, under the Geneva Conventions, a belligerent has the possibility of moving the civilian population. Thus, Article 49 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 provides that:

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

[1315] P 09836, pp. 52-54.
[1316] P 09836, pp. 52-54.

> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve **the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."**

In addition, in the present case, the imprisoned Muslim HVO soldiers would have represented a potential danger if their **number had increased** as they were likely to join the ABiH.[1318]

Accordingly, the military reasoning was to release them and be certain that they would not fight in the future. Therefore, releasing them and deporting them to third countries was quite justified for a **military reason**.

The civilian populations may be transferred for security reasons or imperative military reasons.[1319] However, I find the Accused guilty on these Counts since, from my point of view, the HVO authorities – and therefore, the Accused – did not take the necessary measures to implement the evacuations.

First of all, they should not have **forced** the civilians to leave their place of residence overnight. They should have offered them the choice of leaving or staying there at their own risk. As this was not done, the displacements of civilians in West Mostar, Stolac, Čapljina and Ljubuški constituted crimes under Counts 1, 6, 7, 8 and 9 of the Indictment.

With regard to the HVO's Muslim prisoners, there is no doubt that the potential danger they represented allowed the HVO to transfer them to third countries (Croatia or other countries). However, the authorities should have obtained their **written** consent for such releases informing them that the prisoner could choose between being released or remaining in detention. This was not done.

[1317] P 09836, p. 34.
[1318] P 03019; Milivoj Petković, T(F), pp. 49574-49580; Slobodan Praljak, (T)F, pp. 44272-44274; Božo Pavlović, T(F), pp. 46855, 46856, 46860, 46911, 46912, 46919 and 46920, private session; 5D 05110, under seal, para. 12; P 10133 under seal, paras 36, 79 and 80; Milan Gorjanc, T(F), p. 46315, private session; 4D 01731, para. 138. Witness OO, P 10224 under seal, *Naletilić & Martinović* Case, T(F), pp. 5935-5936.
[1319] Article 49 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

Furthermore, if a detainee consented, he should have had the possibility of returning home to gather his belongings and take care of routine matters as well as of leaving with his family. It is obvious that for security reasons, prisoners could have been kept under surveillance during this stage. It must be noted that this was not done and that, on the contrary, the prisoners were "transferred" to Croatia overnight, which was not acceptable and was, to say the least, a breach of the Preamble to the Hague Regulations referred to in paragraph 159 of the Prosecution's Final Trial Brief.

As of 1 July 1993, **Jadranko Prlić's government** undeniably took measures to implement the transfers and deportations by obliging, by decree, all adults to have identity cards,[1320] by planning the occupation of abandoned flats,[1321] and by creating a commission for prisoner exchanges presided over by **Berislav Pušić.**[1322]

Similarly, at the military level, **General Petković** issued an order to disarm and isolate the Muslim men.[1323]

The Military Police was called on to arrest the persons concerned.[1324]

In conclusion, it is clear to me that the displacements of non-Croats within the **Republic of Bosnia and Herzegovina** were **forced transfers** in terms of the ***Stakić* jurisprudence**. If the departures of the **non-Croats** to Croatia or third countries was not voluntary – and provided that **only civilians were concerned** – they constituted **deportations** under Article 5 of the ICTY Statute. As a result, it is necessary to make a distinction between **civilians** and ABiH **soldiers** who went abroad when they were released from military prisons. In my opinion, they were "released," not "deported."

In this respect, it is necessary to bear in mind the second paragraph of Article 21 of Geneva Convention III which provides that:

"Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend. Such measures shall be taken particularly in cases where this may contribute to the improvement of their state of health. No prisoner of war shall be compelled to accept liberty on parole or promise."

[1320] P 09545, para. 255.
[1321] P 03089; P 09545, para. 255.
[1322] 1D 01669; item 6, P 03191.
[1323] P 03019, p. 1.

It therefore follows from the above that a prisoner of war may be released on condition that he is not compelled to accept release on parole or promise. **Compulsion** in fact is designed to obtain a prisoner of war's promise or a commitment to no longer take part in combat. There is no other possible interpretation of the meaning of compulsion.

Moreover, it is necessary to point out that Article 111 of this Convention provides for the possibility of a prisoner of war being interned in a neutral country until the end of hostilities. If internment has been planned, it is clear that they can find themselves in a more favourable situation, that is, liberty, if the parties to Convention III are in agreement. Furthermore, Article 118 of the said Convention provides that prisoners of war shall be released without delay after the cessation of **active hostilities**.

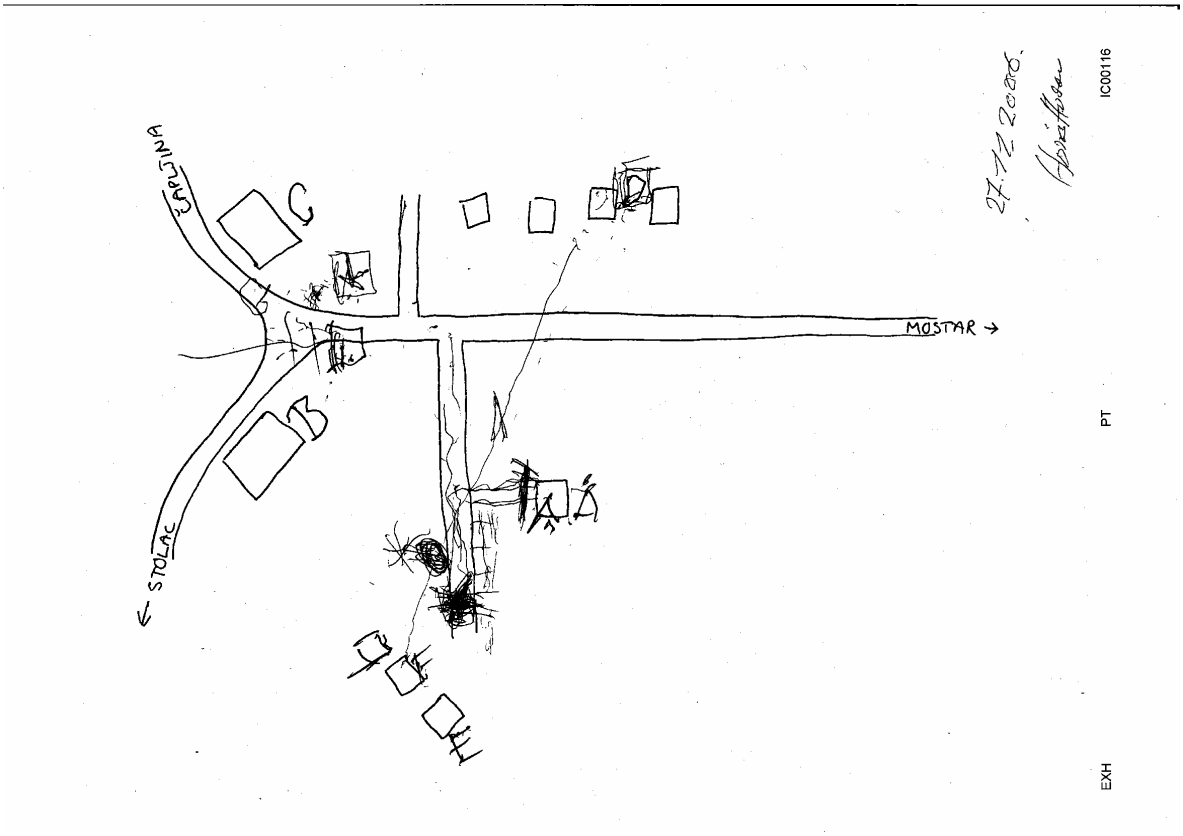
In the present case, when did active hostilities cease? After the ceasefires imposed by the international community or after the Washington Agreement? I myself am inclined to decide on a case by case basis provided that probative evidence is available.

4. **The Deaths of Sanela Hasić and Dženita Hasić in Domanovići on 13 July 1993 (Municipality of Čapljina)**

HVO troops are accused of having used one or several snipers to kill the young women **Dženita Hasić and Sanela Hasić** in **Domanovići** on **13 July 1993**. The father of the victims allegedly heard a dull noise, and when he ran to the site, he found the three girls who had been shot, two fatally, while the third had been hit in the ligaments of a knee. He claimed that the shots had been fired at around 1700 or 1800 hours. At this point, it seems to me that the witness' statement establishes the HVO presence in this village, in particular at the checkpoint at the crossroads and that the HVO soldiers appear to have spread out and were in an office building serving as a barracks (point C in the drawing), in the cafe at the crossroads (point A in the drawing) and in the school (point B in the drawing). According to this witness, the shots could have come only from the **crossroads** where the HVO had taken up position.

[1324] *See* for example: P 03075, p. 1; P 03057, p. 3; P 03230, p. 1; P 03121, pp. 1 and 2; P 03134, p. 3; P 03307; P 03347, p. 2; P 03326.

The following drawing prepared by the witness at the request of the Prosecution provides a general view of the situation.



Another witness, **Sabira Hasić,**[1325] whose 92 *bis* statement was admitted into evidence, stated that the mother of the two young women wanted to go to her house at a time when some people were hiding in the woods, and she was making her way there with **Nermina**, her six-month old granddaughter and **Sanela's daughter** in her arms**.** A few metres further along her way, sniper shots were fired around her as she was approaching Hajo Hasić's house and was next to Mujica Hasić's house.

According to this witness, the three girls were hit, and Sanela fell into the canal by the road before the path leading to Hakija Hasić's house, fatally wounded, but still breathing, while Dženita fell lifeless to the ground on the road in front of Mujica Hasić's house. Ramiza, the mother of the young girls, then ran to Hajro's house to leave the baby there and return to her daughters. Later on,

[1325] P 09931

the father Hasan told her that he had heard cries, left his home and saw the tragedy. A comparison of the evidence on the key issue of whether **the shots fired were visible** shows that Hasan, the father, did not tell Witness Sabira Hasić that he had **seen** the shots but that he ran out because he had **heard** the shots.

The father's lengthy testimony in court has not made the exact position of the snipers clear to me. According to Witness **Sabira Hasić**, the situation was far from peaceful, since part of the population was hiding in the woods and the conflict was therefore still ongoing, all the more so because at the beginning of his testimony, the father said that shots were coming from the neighbouring village. In my opinion, under such conditions, a **reasonable doubt** subsists, as I cannot be absolutely certain that the shots were fired by the HVO soldiers in the village, especially since it is difficult to understand why the soldiers would have shot at the inhabitants, given that the father said he had taken his wounded daughter to the café in which HVO soldiers were present on the following day. Why did he wait until the following day? And why did he keep the bodies for over 24 hours? Was the fighting still continuing and had the HVO imposed a general ban on movement for the inhabitants, a ban that may have been violated by the family consisting of the mother, three daughters and the granddaughter?

Furthermore, there is an additional question arising from a **technical issue** which regards the view an HVO soldier positioned at the crossroads, the barracks or the cafe could have had, given that the father has indicated the presence of a very large oak tree and an orchard. Moreover, one of the girls was hit in the **heart**, which means that the shot could not have come from the crossroads, as the three girls, having made a left turn, had **their backs** to the shooter positioned at the crossroads or in the vicinity of the cafe or in the barracks. In fact, the bullet could only have penetrated through the back, which is not what the father indicated, as he claimed that the wound was to the heart.

Another element of concern is the exact time and date of the events. First of all, he said that he heard a hiss[1326] and explosions[1327] around 1000 hours. He said that the incident involving his daughters occurred around 1700 or 1800 hours.[1328] As night was falling, the bodies were taken to the house of his neighbour, who was his first cousin,[1329] and they stayed there overnight. This is all the more surprising as the third girl had been hit in the knee and was waiting for immediate

[1326] Hasan Hasić, T(F), p. 10725, l. 28.
[1327] Hasan Hasić, T(F), p. 10726, l. 3.
[1328] Hasan Hasić, T(F), p. 10729, l. 3.
[1329] Hasan Hasić, T(F), p. 10731, l. 3.

treatment, yet they waited until the following day for treatment provided by the HVO in the café.[1330] The café is marked by the letter K in the sketch.

Curiously enough, he volunteered the information[1331] that when he went to obtain his daughters' **death certificates**, he noticed that they indicated that they had been killed in the Municipality of Tasić, seven kilometres from his home. This factor makes the version recounted a matter of additional concern.

This raises a serious question about the exact time of the events, all the more so since, according to the witness, there was no fighting in this village. Why then would the HVO have put snipers in position?

Moreover, if one follows the witness' account of the events, it is impossible for two of the three girls to have been wounded from the front, as the shot could not have come from the crossroads (letter G in the sketch), but only from some other direction.

The fact that the other witness stated that the inhabitants were hiding in the woods shows that there was military activity in the surroundings, which could explain the fact that the three girls were shot, perhaps not between 1700 and 1800 hours on 13 July 1993, but rather, in the morning or even during the night of 13 to 14 July 1993.

On the basis of all of the evidence presented above, I am not able to find beyond reasonable doubt that the Prosecution has proven that on 13 July 1993, one or several HVO snipers belonging to the 1st *Knez Domagoj* Brigade or military policemen from the 3rd Company of the 5th Battalion shot these two young Muslim women dead.

[1330] Hasan Hasić, T(F), p. 10744, l. 20.
[1331] Hasan Hasić, T(F), p. 10753, l. 19.

E) Criminal Responsibility

1) Reasonable Doubt

The principle of the **presumption of innocence** in criminal trials assumes that an individual shall be convicted only if proven guilty. A Judge who is making a ruling must be certain, beyond reasonable doubt, of the guilt of an accused individual before handing down a custodial sentence.

This notion was raised by the **Prlić Defence** in its written submissions and Final Trial Brief (*cf.* para. 7 *et seq*.):

> *Article 21(3) of the Statute presumes the innocence of the Accused until proven guilty. In a joint trial, it is the duty of the Trial Chamber to consider the case against each Accused separately and to consider each count in the Indictment separately.*[1332]
>
> *Pursuant to Rule 87(A), the Office of the Prosecutor must prove the case alleged against Dr. Prlić beyond reasonable doubt. The Čelebići Trial Chamber cited English authority with approval in defining the burden of "beyond reasonable doubt" as follows:*
>
> > *It need not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, 'Of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice.*[1333]
>
> *If, at the conclusion of the proceedings, there is any doubt that the OTP has established the case against Dr. Prlić, and there is another reasonable conclusion which is also reasonably open from that evidence, Dr. Prlić is entitled to the benefit of the doubt and he must be acquitted.*[1334] *The OTP must prove each and every element of each offence charged, as defined with respect to the relevant mode of liability, beyond reasonable*

[1332] *Kupreškić* Judgement, para. 339(b).
[1333] *Čelebići* Judgement, para. 600, referring to *Miller v. Minister of Pensions*, 1947, 1 All ER 372, 373-4.

doubt.[1335] *Any ambiguity or doubt must be resolved in favour of Dr. Prlić pursuant to the principle of* in dubio pro reo.[1336]

The Judge who is to rule must be absolutely **certain** of the Accused's guilt, and must resolve even the slightest doubt in favour of the Accused.

Criminal evidence is thus of paramount importance, as a Judge will rely on evidence admitted in the course of the trial, or the lack thereof, to determine the guilt or innocence of the Accused.

In the civil law system, a Judge has considerable powers when assessing the evidence and "[has the discretion to attribute to the evidence what he or she considers to be its appropriate value and weight, in accordance with the dictates of **his or her conscience**.]"[1337] Article 427 of the French Code of Criminal Procedure provides that "*offences may be proved by any mode of evidence and the Judge decides according to his intimate conviction*." The Judge's intimate conviction is therefore the key element in civil law criminal proceedings,[1338] and it is on this basis that an Accused will be found guilty or not guilty of an offence.

In the **common law system**, guilt has to be proven **beyond reasonable doubt**, which is the "[substantive rule according to which at the time of delivering a Judgement, the Crown must have proven, beyond reasonable doubt, that the Accused is guilty, not innocent.]"[1339]

The Tribunal has adopted this approach, and Article 87(A) of its Rules of Procedure and Evidence provides that: "A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."

It should be noted that no reference is made to the issue in Article 23 of the Statute, which only states that the sentence is delivered by a majority.

There is no doubt that the Judges who drafted the Rules of Procedure and Evidence opted for the common law system, but which one – the Canadian, British or American system?

[1334] *Čelebići* Judgement, paras 458 and 601 to 603; *Brđanin* Judgement, para. 23; *Galić* Appeals Judgement, para. 218; *Limaj* Judgement, para. 10.
[1335] *Stakić* Appeals Judgement, para. 219.
[1336] *Blagojević* Judgement, para. 18; *Halilović* Judgement, para. 12.
[1337] Anne-Marie LA ROSA, "La preuve", in Hervé ASCENSIO, Emmanuel DECAUX, Alain PELLET (editors), **Droit International Pénal,** PEDONE Editions, Paris, 2000, p. 765.
[1338] With regard to innermost conviction, *see* Henry LECLERC, "L'intime conviction du juge : norme démocratique de la preuve" ; FAYOL-NOIRETERRE, "L'intime conviction, fondement de l'acte de juger", *Informations sociales*, 7/2005 (no. 127), pp. 46, 47.
[1339] Frédéric MEGRET, *Droit pénal*, 2007, David Laflamme editions.

It is useful to differentiate between the three major common law systems in order to identify the similarities and differences that can be found in these countries[1340] and to examine the ECHR's interpretation of this notion.

1) The Canadian System

The Canadian Supreme Court considered that the expression reasonable doubt "has a specific meaning in the legal context" and [...] that "**the standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence**, the basic premise which is fundamental to all criminal trials, and [...] the burden of proof rests with the prosecution throughout the trial and never shifts to the accused."[1341] Thus, according to Canadian criminal law, the Prosecution must prove that the accused is guilty and the accused does not have to prove his or her innocence, and any doubt should be resolved in favour of the accused.[1342]

A trier of fact - whether a single Judge or a jury - must therefore review all the evidence and infer from that evidence that the accused may be found guilty beyond a reasonable doubt. Similarly, if criminal law is not sufficiently clear and the Judge is uncertain as to its interpretation, the accused shall be entitled to the benefit of the doubt.[1343]

In 1994, the Supreme Court of Canada issued guidelines that a trier of fact must follow in order to interpret the notion of reasonable doubt:[1344]

1) - first, if the trier of fact believes **the testimony of the accused**, the accused should be acquitted;

2) - if the trier of fact does not believe the statements made by the accused but has a reasonable doubt as to the accused's guilt, the accused should be acquitted;

[1340] For a full analysis *see* Donald POIRIER, "Quelques points de comparaison entre la procédure pénale française et celle de common law", *Revue de la Common law en français*, 2005, vol.7, p. 265; PENGPENG SHI, *Le jury Criminel, l'étude comparée en Angleterre*, France et Chine, 2010, Editions universitaires européennes, 308 p.
[1341] *R. v. Lifchus* (1997) 3 R.C.S. 320. 18 September 1997.
[1342] In the *R v. W (D)* Appeals Judgement, (1991), 1 R.C.S. 742, the Supreme Court of Canada considered that "the burden is on the Crown to prove beyond a reasonable doubt, while the defence need only create a reasonable doubt."
[1343] *Quebec (Commission de la santé et de la sécurité du travail) v. Acibec (la rose) inc.*, (1998) R.J.Q. 80 (Q.C.C.A.)
[1344] *R. v. W.(D.)*, (1991) 1 R.C.S. 742, 757-758.

3) - if the trier of facts has no doubt about the testimony of the accused, he or she must then decide whether the accused's guilt has been proven beyond reasonable doubt.

This requires that the trier of fact follow a **three-step procedure** in order to determine beyond reasonable doubt whether or not the accused is guilty.

When the accused is tried by jury, whatever the verdict reached, it must be rendered **unanimously by the members of the jury**. In the event of a deadlock, the Presiding Judge has the possibility of dissolving the jury and ordering a retrial.[1345]

It is interesting to note that there are two types of verdict in jury trials:

1) - **jury verdicts**: the 12 jurors must reach a **unanimous** decision as to the guilt of the accused;

2) - **verdicts directed by the Judge**: at the end of the Prosecution case, the Judge presiding over the trial may consider that there is **a total lack of evidence** proving that the accused is guilty. In such cases, the Judge orders the jurors to reach a verdict of acquittal.[1346]

As one can see, there is a real difference between the Canadian system and the ICTY system in that a **unanimous** verdict must be reached in a jury trial – which is not the case in The Hague – and in that the accused has an important role by virtue of his testimony, which could lead to an acquittal, whereas **Article 84 *bis* (B) of the Rules** provides that: "*The Trial Chamber shall decide on the probative value, if any, of the statement.*"

2) The American System

In the **United States**, the central and prevailing idea in criminal trials concerns determining the credibility of witnesses. The jury's assessment of the guilt of the accused rests in part on the oral and written testimony of witnesses. The prevailing principle is "**no witness, no case.**" Thus, the parties often call expert witnesses, as their testimony is considered to have more probative value than the testimony of ordinary witnesses.

[1345] *See* Canadian Criminal Code, Article 653.
[1346] *The United States of America v. Shephard*, (1977), 2 R.C.S. 1067.

The criminal trial seeks to find evidence and circumscribe the subject of the case.[1347] The jurors must base their decision on the evidence alone. If there is not enough evidence to prove the guilt of the accused, the accused must be acquitted, even if the jurors believe the accused to be guilty.

The Prosecution has the burden of proving beyond reasonable doubt that the accused is guilty, while the defendant does not have to prove his innocence[1348] and therefore is under **no obligation to testify or call witnesses**.

A trial jury is composed of twelve citizens chosen by the parties at a stage called **voir dire or jury impanelling**,[1349] ***who must reach a unanimous decision*** as to whether the Accused should be found guilty beyond reasonable doubt.

There are significant differences here too as the **rule of unanimity** is applied in full, and in addition, the American system rests almost exclusively on witness testimony whereas in international trials documents are produced in addition to witness testimony and there is no rule of unanimity because having a majority is sufficient.

3) The English System

In **Great Britain,** juries are present only in criminal cases and only before the Crown Court.

The Crown Court is composed of 12 jurors and a professional judge. However, if the Accused pleads guilty, the case will be heard by a single judge as there can be no doubt about the guilt of the accused.

The task of the citizen jury is to determine the facts, while the Judge must determine the law in relation to the facts analysed by the jurors.

After the Prosecution witnesses have been heard, the jury and the Judge may decide that the proceedings should be halted because of insufficient evidence.

[1347] These are the Federal Rules of Evidence of 2004 on the presentation of evidence before federal courts in the United States.
[1348] Nevertheless, it is interesting to note that this rule only applies at trial level. *See* for example the Troy Davis Case, in which at a federal hearing to review the evidence, Judge Moore did not try to determine whether the State could provide irrefutable proof of Troy Davis' guilt, but whether Troy Davis could prove "**by clear and convincing evidence, that no reasonable juror would have convicted him in the light of new evidence**" that was provided after his trial for murder in 1991. As Troy Davis' lawyers failed to produce any proof of his innocence, the trial level verdict of guilty beyond reasonable doubt was confirmed.
[1349] With regard to jury selection in the United States *see* Eliane LIDDELL, "Représentativité et impartialité aux Etats-Unis. L'exemple de la sélection des jurys de process", Revue de recherche en civilisation américaine, 2009.

The Judge does not take part in the deliberations, and his or her role is confined to summarising the evidence and discussing the credibility of the witnesses in order to provide the jury with all the arguments necessary to reach a decision. At the end of the deliberations, the jurors must be in a position to reach a **unanimous decision** beyond reasonable doubt as to whether the accused is guilty. However, if a unanimous decision has not been reached following a deliberation for a period of time the Judge considers "*reasonable having regard to the nature and the complexity of the case*", and which may not be less than two hours, a **majority of ten votes** is sufficient.[1350]

It is not necessary to provide a reasoned conviction as the decision reached by the jury is supposed to be beyond reasonable doubt.

The English system also differs from the system in other countries (United States and Canada) and at the ICTY as no statement of reasons is provided and the rule of unanimity is not absolute as a majority of ten votes may suffice. A statement of reasons is not obligatory as the decision reached is beyond reasonable doubt.

4) The European Court of Human Rights

The European Court of Human Rights considered that proof beyond reasonable doubt must be adduced before an accused can be convicted.[1351]

The ECHR considered that "the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution [...] to adduce evidence sufficient to convict him."[1352]

It is therefore always the Prosecution that must adduce proof beyond reasonable doubt as to the guilt of an accused, since the accused is presumed innocent until a verdict of guilt is delivered under Article 6, para. 2 of the Convention.[1353] The only case in which the burden of proof can shift is under Article 3 of the Convention which refers to the prohibition of torture and inhuman and degrading treatment. Thus, in the *Tomasi v. France* Judgement of 27 August 1992, the Court

[1350] 1964 Act of the British Parliament establishing a 10/11 majority or a consolidated majority of 12 in certain cases.
[1351] *Ireland v. the United Kingdom*, ECHR, Judgement, 18 January 1978, series A, no. 25, paras 160-161. *See also* the *Wolf-Song v. Turkey* Judgement, ECHR, Application no. 6458/03, 8 June 2010, para. 63.
[1352] *Barbera, Messegué and Jabardo v. Spain* (ECHR), Judgement, 1989, A 146, para. 77.
[1353] Article 6, para. 2 of the ECHR Convention relative to a fair trial provides that: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

considered that if allegations of mistreatment have been made, the applicant did not have the burden of adducing proof of mistreatment but rather that, the burden was on the State to prove the contrary, as the individual was *de facto* considered as being in a position of inferiority.[1354]

With regard to the probative character of evidence, the Court considered that "proof beyond reasonable doubt" [...] "may follow from the **coexistence of sufficiently strong, clear and concordant inferences**"[1355] and that States must give priority to physical evidence, such as medical certificates and written documents, rather than to oral testimony, in particular, the allegations made by the applicants which are not sufficient in themselves if they are not supported by other evidence**.**[1356] Thus, the Court considered that an applicant's allegations may lack credibility on account of inconsistencies between the testimony and other physical evidence.[1357] Therefore, in certain cases the conduct of the parties may be taken into consideration in order to adduce proof beyond a reasonable doubt.[1358]

The purpose of the notion of a *conviction beyond reasonable doubt* which is derived from the Common Law system is to ensure that the presumption of innocence is respected and that no doubts remain at the time the sentence is delivered.

The Judge's role seems diminished, as the conduct of the proceedings is left in the hands of the parties and a guilty verdict is reached by a citizen jury.

To sum up, the guarantees provided to ensure that this task is successfully carried out can be divided into three categories:

1) - the **unanimous** decision the jurors are required to reach (subject to waivers that may appear in English and American law);

2) - the jurors' obligation to rely exclusively on the **evidence and not on their own intuition** (a condition which may however be criticised, especially in the American system where testimony is considered to be evidence with the highest probative value);

[1354] *Tomasi v. France* (ECHR), Judgement, series A, no. 241-A, 27 August 1992. *See also Ribtsch v. Austria* (ECHR), series A, no. 336-A, 4 December 1995 and *Selmouni v. France* (ECHR), 28 July 1999, Application no. 25803/94.
[1355] *Selmouni v. France*, (ECHR), 28 July 1999, para. 88; *Ireland v. The United Kingdom*, (ECHR), 18 January 1978, series A, no. 25, pp. 64-65, para. 161, *Aydin v. Turkey* (ECHR), 25 September 1997, Publication 1997-VI, p. 1889, para. 73.
[1356] *Martinez Sala et al. v. Spain*, (ECHR), 4th Section, 2 November 2004, paras 145 and 146.
[1357] *Seyhan v. Turkey*, (ECHR), Grand Chamber, 2 November 2004, para. 80.
[1358] *Abdurrahman Orak v. Turkey* (ECHR), para. 69, 14 February 2002, and *Mansuroğlu v. Turkey* (ECHR), 26 February 2008, para. 76.

3) - the principle according to which "the Accused should always have the benefit of the doubt" according to which an Accused must be acquitted if his or her guilt has not been proven with certainty.

At the ICTY, the principle of judgement of an accused beyond reasonable doubt is thus enshrined in the Tribunal's Rules of Procedure and Evidence. The trial Judges must therefore be certain that **the guilt of the Accused has been proven beyond reasonable doubt** before finding the Accused guilty.

Rule 98 *bis*, rather than the Judgements handed down, seems to provide a fairly clear expression of this notion.

Thus, in the *Jelisić* Case, the trial Judges considered that: "[to justify a conviction, there must be sufficient evidence to prove guilt beyond reasonable doubt];"[1359] this principle was confirmed in the *Kunarac* Case, in which the Judges considered that "**[the evidence admitted** must be such that a reasonable Judge could be **satisfied** beyond reasonable doubt of the guilt of the Accused.]"[1360]

However, it is not necessary for the evidence to be sufficient to determine guilt beyond reasonable doubt at the end of the Prosecution case. At this stage of the proceedings, "the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence (if accepted), **but whether it could**."[1361] In the *Jelisić* Case, the trial Judges considered that at the close of the Prosecution's case, the Prosecution had not adduced sufficient evidence to prove beyond reasonable doubt the guilt of the Accused for specific intent to commit genocide[1362] and therefore acquitted the Accused under Rule 98 *bis* of the Rules of Procedure and Evidence.[1363]

The Appeals Chamber held that the Judges had committed an error of law by requiring that the Prosecution determine the guilt of the Accused beyond reasonable doubt at the close of its case.[1364] This was acknowledged by the Trial Chamber in the *Kordić* Case, in which the Judges stated that "[i]mplicit in Rule 98 *bis* proceedings is the distinction between the determination

[1359] *The Prosecutor v. Goran Jelisić* , 14 December 1999, para. 108, page 37.
[1360] *The Prosecutor v. Dragoljub Kunarac et al*., "Decision on Motion for Acquittal", 3 July 2000, ("*Kunarac*" Decision), para. 3, p. 4.
[1361] *The Prosecutor v. Goran Jelisić,* Appeals Judgement, 5 July 2001, para. 37.
[1362] *The Prosecutor v. Goran Jelisić,* 14 December 1999, para. 108, page 37.
[1363] Rule 98 *bis* of the Rules of Procedure and Evidence provides that "[a]t the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction."
[1364] *The Prosecutor v. Goran Jelisić,* Appeals Judgement, 5 July 2001, para. 37.

made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case, on the basis of proof beyond a reasonable doubt."[1365]

Therefore, the notion of reaching a decision beyond reasonable doubt is applicable to this stage of the proceedings but only in relation to the evidence reviewed and not in relation to determining the guilt or innocence of the Accused.[1366]

Furthermore, this reasoning is consonant with the practice found in common law jurisdictions when the defence files a no case to answer motion. Thus, Judge McIntyre held that "it is also not for the trial judge to draw inferences of fact from the evidence before him [at the close of the Prosecution case.]"[1367]

Appeals Judges are triers of law, not of fact. However, they held that this principle can be challenged given that it is within their discretion to admit new evidence and determine if such evidence "could have been a decisive factor in reaching the decision at trial."[1368]

In the ***Stakić*** **Case**, the Judges did indeed avail themselves of this prerogative as "no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt"[1369] without such additional evidence. This sentence therefore seems to suggest that the appeals Judges gave themselves the possibility of becoming triers of fact, as **the accused's right to a conviction beyond reasonable doubt takes precedence over all other formal or substantial considerations.** The Appeals Chamber itself confirmed this interpretation when it stated, further on, that "if it were to apply a lower standard [no conclusion of guilt would be reached beyond reasonable doubt.]"[1370]

[1365] T*he Prosecutor v. Dario Kordić and Mario Čerkez*, "Decision on Defence Motions for Judgement of Acquittal", 6 April 2000, para. 11. The Judges even added that if this "decision [taken] on its own particular facts [...] was purporting to establish a standard of proof, the Trial Chamber in the instant case declines to follow it", para. 17.
[1366] *The Prosecutor v. Goran Jelisić,* Appeals Judgement, 5 July 2001, paras 35 and 36.
[1367] *Monteleone v. The Queen*, (1987), 25.C.R.154.
[1368] Rule 115 of the Tribunal's Rules of Procedure and Evidence.
[1369] *The Prosecutor v. Stakić,* Appeals Judgement, 22 March 2006, para. 10.
[1370] *The Prosecutor v. Stakić,* Appeals Judgement, 22 March 2006, para. 23. With regard to the admission of additional evidence on appeal before the International Criminal Tribunals *see* Linda E. CARTER, "*The Importance of Understanding Criminal Justice Principles in the Context of International Criminal Procedure: The Case of Admitting Evidence on Appeal*" in Gabrielle VENTURINI; Stefania BARIATTI (editors), Liber Fausto POCAR: *Individual Rights And International Justice*, Giuffre Editor, 2009. *See* also Linda E. Carter, "Developing International Criminal Procedure: The Challenge of Blending Civil and Common Law Legal Systems", Sheikh Anta Diop University, Faculty of Legal and Political Science, Laboratory of Legal and Political Studies (LEJPO), 2 May 2009.

Generally speaking, the Appeals Chamber focuses exclusively on points of law, as the facts have already been determined by the trial Judges, unless it considers that the probative value of the evidence is insufficient to determine the guilt of the accused beyond reasonable doubt.

A thorough analysis of this issue in the light of the practice in common law countries and the jurisprudence of the ICTY Appeals Chamber makes it possible to find that guilt may be determined only if the Judge is **virtually certain** and that any doubt must benefit the Accused. In my opinion, "virtual certainty" is not to be presumed, but is demonstrated in the Judgement's statement of reasons by weighing the evidence and examining all the possible alternatives.

THE ACCUSED AND THE JCE

a) The Prosecution's Position

In paragraph 15 of the **Indictment** under the heading "**Joint Criminal Enterprise**" (**hereinafter JCE**), the Prosecution provides a very precise definition of the JCE, and although it does not circumscribe an exact time period, nevertheless indicates a time-frame from 18 November 1991 to April 1994, while also pointing out that it may have existed **prior** to and **after** these dates.

The conclusion that can be drawn from a careful examination of this paragraph is that various persons allegedly: "established and participated in a joint criminal enterprise to politically and militarily subjugate, permanently remove and ethnically cleanse Bosnian Muslims and other non-Croats who lived in areas on the territory of the Republic of Bosnia and Herzegovina which were claimed to be part of the Croatian Community (and later Republic) of Herceg-Bosna, and to join these areas as part of a "Greater Croatia," whether in the short-term or over time and whether as part of the Republic of Croatia or in close association with it, by force, fear or threat of force, persecution, imprisonment and detention, forcible transfer and deportation, appropriation and destruction of property and by other means, which constituted or involved the commission of crimes which are punishable under Articles 2, 3, and 5 of the Tribunal Statute,"[1371] and that, in the opinion of the Prosecution, the purpose of the JCE was to establish a territory with the borders of the Croatian Banovina.

At this point, I can only observe that the Prosecution refers to a multifaceted **JCE**, and I can list **four** of its subdivisions which may in fact be different from each other. Accordingly, political or military subjugation is possible even in the absence of the other forms (expelling the Muslims and non-Croats from Bosnia, ethnic cleansing or the creation of a Greater Croatia). Similarly, one of these forms may exist without the others.

According to the Prosecution, the objective of all these enterprises was to establish a territory with the borders of the Banovina, and therefore, a "**Greater Croatia"** could in actual fact have been composed of the Republic of Croatia and a part of Herzegovina.

In conclusion, it is interesting to note the potential existence of another JCE: the redrawing of the political and ethnic map in such a way that these regions would be dominated by the Croats both politically and demographically. As one can see, given the overlapping of the various JCEs, it is very difficult to see clearly what the **actual purpose** of the JCE was. To add to the **confusion**, it seems to me that paragraphs 224 and 225 of the Indictment also allege the existence of two other form-2 JCEs which may be completely different: establishing a widespread system of mistreatment by means of camps, sexual assaults, deprivations and abuse and forced labour along with a system of deportation and transfers.

Furthermore, in **paragraph 227**, the Prosecution alleges that, in addition or in the alternative, there was a form-3 JCE comprising crimes not within the objective of the JCE but which were its natural and foreseeable consequence.

Having provided this general overview, it seems to me that a problem may arise in relation to **the rights of the Defence**, as the **Defence** cannot know precisely what falls within the Prosecution's ambit, since it is confronted with a multitude of very different enterprises.

Unless one considers that there is a "**JCE umbrella,"** which, as paragraph 15 of the Indictment states, could be the creation of a "**Greater Croatia,"** and that this "JCE umbrella" encompasses an entire series of secondary JCEs, which is in fact what the Prosecution seems to be suggesting. There would thus be a **main JCE** which could be expanded to encompass other forms at a given point in time.

[1371] Indictment, para. 15.

The conclusion I can draw from the above is that there is some confusion at the level of the Prosecution with regard to the purpose of the main JCE: was it the creation of a "**Greater Croatia**"? Was it **ethnic cleansing in BiH?** It is obvious to everyone that a "Greater Croatia" is possible without ethnic cleansing, just as ethnic cleansing is possible for reasons other than that of a "Greater Croatia," even if it is only the Bosnian Croats taking political or military control in certain areas.

The **Prosecution's Final Trial Brief** refers to **three Joint Criminal Enterprises:**

- the first and main one is described in paragraphs 15 to 17 of the Indictment. It is a form-1 JCE called "**the Herceg-Bosna Criminal Enterprise**" whose purpose was to recreate an autonomous entity with a Croatian majority in the territory of BiH which was to be subsequently attached to the Republic of Croatia. This Herceg-Bosna JCE **was expanded from 1 July 1993**, which led to the commission of other crimes not originally planned, as well as of crimes that were the natural and foreseeable consequence of the implementation of the Herceg-Bosna JCE.

- the second one is described in paragraph 224 of the Indictment and is a **form-2 JCE - known as a "prisoner" JCE -** which covers Counts 10 to 18 of the Indictment. This JCE was created on **1 July 1993** and the Office of the Prosecutor pointed out that although it was being treated separately, **it was an integral part of the expanded Herceg-Bosna JCE**;

- the third one is described in paragraph 225 of the Indictment and is a **JCE 2 known as a "deportation and forcible transfer"** JCE which covers Counts 6 to 9 of the Indictment. This JCE came into being on **1 July 1993,** and the Office of the Prosecutor pointed out that although it was being treated separately, **it was an integral part of the expanded Herceg-Bosna JCE**.

I. The Herceg-Bosna Joint Criminal Enterprise[1372]

A. "Principal" or Originally Planned Crimes

a) Persecution, Deportation and Forcible Transfer (Counts 1 and 6-9)

[1372] Prosecution Final Trial Brief, pp. 13-33.

The original purpose of the Herceg-Bosna JCE was to displace the population so that the territory would be Croat-dominated. According to the Prosecution, the evidence shows that the Accused knew that these crimes were being committed and wanted them to be perpetrated. The substantial decrease in the number of Muslims in certain municipalities at the end of 1993 and the increase in the number of Croats who had arrived from certain municipalities of Herzegovina provides support for the Prosecution's theory.[1373]

The Prosecution considered that from April 1992, persecution occurred at every level: the use of Croatian symbols, Croat-dominated governments, discrimination in employment, etc.[1374]

When the Accused realised that persecution was not sufficient to induce the Muslims to leave, they resorted to – or had others resort to – deportation and forcible transfer (forcible displacement).[1375] The evidence shows that a plan to divide BiH into two parts was perfected with the Bosnian Serbs: one part belonging to the Croats, and the other to the Serbs.[1376]

b) Extensive Destruction of Property (Counts 19-20)

The campaigns launched against **Prozor** (October 1992 and April 1993), **Gornji Vakuf** (January 1993) and **Sovići and Doljani** (April 1993) led to the destruction of Muslim property and were intended to induce the Muslim population to flee and leave the territory of Herceg-Bosna.[1377]

The Office of the Prosecutor considered these crimes to be part of the **form of the main JCE**, as they had been planned from the outset in order to implement the main plan. However, if the Trial Chamber were to hold that this was not the case, the Prosecution requested that they consider them part of the form-3 JCE; in my opinion, this "invitation" to the Trial Chamber to fall back on a form-3 JCE shows the Prosecution's uncertainty with regard to the JCE.

[1373] Prosecution Final Trial Brief, para. 8; P 09836; IC 00833 and Martin Raguž, T, p. 3 1475; IC 00834; P 09844.
[1374] Prosecution Final Trial Brief, para. 9; P 00772; P 09731, p. 2; P 08538; P 08973, p. 29.
[1375] Prosecution Final Trial Brief, para. 11; P 00279; P 00524, pp. 17-18.
[1376] Prosecution Final Trial Brief, para. 11; P 11376; P 11380.
[1377] Prosecution Final Trial Brief, para. 16; P 10239, p. 17, P 11376; P 11380.

B. Crimes Committed as Part of the Expanded JCE

a) Imprisonment and Unlawful Confinement (Counts 10 and 11)

The Prosecution holds that the HVO placed the Muslims in detention as part of a campaign of ethnic cleansing. Such systematic detention was followed by the deportation and forcible transfer of the population.

Thus, the main JCE was allegedly expanded on 1 July 1993, since following the campaign of arrests in Mostar on 9 and 10 May 1993 (Heliodrom), the Accused realised that forced imprisonment was causing a wave of departures of the population. From 1 July 1993, the HVO proceeded to make arrests on the grounds of ethnicity alone.[1378]

The establishment of an exchange service and the introduction of letters of guarantee provide support for this submission.

To sum up, from 1 July 1993, the HVO practised unlawful imprisonment as part of the main expanded JCE, and these crimes are attributable to the Accused in relation to form 1.

b) Inhumane Conditions and the Treatment Inflicted on Prisoners (Counts 12-17)

The Accused intended that prisoners be subjected to inhumane and degrading conditions in order to force them to leave.

- **Prior to 1 July 1993**, forced labour and inhumane conditions of detention were the natural and foreseeable consequence of the implementation of the Herceg-Bosna JCE. These crimes are therefore attributable to the Accused as part of the JCE 3.
- **After 1 July 1993**, these crimes form part of the main expanded JCE.

c) Unlawful Labour (Count 18)

As early as 1992, unlawful labour was a common practice to which prisoners were subjected regularly between April and June 1993.[1379]

[1378] Prosecution Final Trial Brief, para. 22; P 03075; P 03270.
[1379] Prosecution Final Trial Brief, p. 24.

- **Prior to 1 July 1993**, unlawful labour was the natural and foreseeable consequence of the implementation of the Herceg-Bosna JCE. These crimes are therefore attributable to the Accused as part of the JCE 3.
- **After 1 July 1993**, these crimes formed part of the main expanded JCE. Prisoners were encouraged to leave on the basis of letters of guarantee.

d) Appropriation and Plunder (Counts 22-23)

The Prosecution considers that these crimes were **an integral part of the expanded JCE from 15 June 1993 onwards.** These crimes must be viewed together with the deportations in mid-June 1993 which led to the HVO appropriating Muslim property.[1380] Housing was appropriated to secure accommodation for Croats. This was a widespread and systematic practice, and it was impossible for the Accused not to know about it. [1381]

e) Counts Relating to the Campaign of Terror and the Siege of East Mostar (Counts 24-26)

The Prosecution considers that from 1 June 1993, the JCE was expanded to include a campaign of terror and unlawful attacks against civilians in East Mostar in order to force them to leave.[1382]

C. JCE 3 Crimes as the Natural and Foreseeable Consequence of Pursuing the Common Purpose

a) Murders, Wilful Killings, Rapes and Sexual Assaults (Counts 2-5)

The Prosecution claims that murder/wilful killing, rape and sexual assault, as charged under Counts 2 to 5, were the natural and foreseeable consequence of the implementation of the Herceg-Bosna JCE.

b) Destruction or Wilful Damage Done to Institutions Dedicated to Culture or Religion (Count 21)

[1380] Prosecution Final Trial Brief, para. 48; P 05091, paras 12-14; P 02804.
[1381] Prosecution Final Trial Brief, para. 48; P 03672.
[1382] Prosecution Final Trial Brief, p. 30-31.

The Accused knew that Muslim property was at risk of being destroyed as a result of deportation and forcible transfer. According to the Prosecution, these crimes were therefore the natural and foreseeable consequence of the implementation of the Herceg-Bosna JCE.[1383]

II. The Enterprise Described in Paragraph 224 of the Indictment (Prisoners)[1384]

Muslim prisoners were subjected to a widespread system of mistreatment. "Thousands" of Bosnian Muslims were the victims of this system. This form-2 enterprise was established on 1 July 1993, and although it is dealt with separately in the Prosecution's Brief, the Prosecutor pointed out that it was an integral part of the expanded Herceg-Bosna JCE.

III. The Enterprise Described in Paragraph 225 of the Indictment (Deportation and Forcible Transfer)[1385]

From 1 July 1993, the widespread system of mistreatment led to deportations and forcible transfers. This form-2 enterprise was established on 1 July 1993, and although it is dealt with separately in the Prosecution's Brief, the Prosecutor pointed out that it was an integral part of the expanded Herceg-Bosna JCE.

[1383] Prosecution Final Trial Brief, p. 32-33.
[1384] Prosecution Final Trial Brief, p. 33-34.
[1385] Prosecution Final Trial Brief, p. 33-35.

Given the level of **complexity**, it seems necessary to me to provide a **summary table:**

Form 1		**Form II**		**Form III**
paras 15-17 of the Indictment		**para. 224 of the Indictment**	**para. 225 of the Indictment**	**para. 227 of the Indictment**
Includes the Hercg-Bosna JCE or the main JCE and the expanded JCE Covers the entire Indictment period		"Prisoner" JCE	"Deportation and Forcible Transfer" JCE	Includes the crimes committed before 1 July 1993, which were the consequence of the main JCE, and the crimes committed after 1 July 1993, which were the consequence of the expanded JCE
The Main JCE Counts 1 and 6 to 9.	**Expanded JCE:** From 1 July 1993: Counts 10 to 11, 12 to 17 and 18. From 15 June 1993: Counts 22 and 23 From 1 June 1993: Counts 24 to 26	From 1 July 1993: Counts 10 to 18	From 1 July 1993: Counts 6 to 9	Counts 2 to 5 Count 21

In conclusion, the Indictment refers to **three joint criminal enterprises**: **the first one, also known as the main JCE**, which covers the entire Indictment and which was expanded from 1 July 1993;

The second one, also known as the "prisoner" JCE, was established on 1 July 1993 and **the last one, known as the** "**deportation and forcible transfer" JCE,** which was also established from 1 July 1993.

(b) The Defence Positions

Rather than list the respective positions regarding the JCE, Defence by Defence, I thought it would be more useful to attempt to assemble their common viewpoints and then distinguish, to the extent possible, their differences.

The **Prlić Defence** claims that the mode of responsibility of joint criminal enterprise has not been acknowledged under customary international law.[1386] It says further that, although JCE I and II do resemble co-perpetration to some extent, the third category of JCE has absolutely no basis under customary international law.[1387] They contend that, before the Appeals Chamber delimited the JCE in the *Tadić* Appeals Judgement, there was no consistent and uniform practice on the part of states, nor any *opinio juris.*[1388]

In support of this contention, the **Prlić Defence** returns to the decision by the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia which unanimously found that JCE III was not a mode of liability under customary international law.[1389] In this respect, they underscore the fact that Judge Wolfgang Schomburg, a former Judge at the ICTY, commented on this decision – responding favourably to it while stressing the need to delve more deeply and re-label the first and second categories of the JCE.[1390] They add that numerous jurists responded favourably to the decision, as many of them have called into question the customary nature of the third category of JCE. For instance, they cite the ***Stakić*** **Judgement** and the Decision on the Confirmation of Charges in the ***Lubanga*** **Case** at the ICC.[1391] The Pre-Trial Chambers at the ICC have construed Article 25(3)(d), even though it is used in the ***Tadić*** **Appeals Judgement** to establish the customary nature of the JCE, as joint commission through co-perpetration by the accessory, rather than the principal.[1392]

[1386] Prlić Defence Final Trial Brief, para. 35.
[1387] Prlić Defence Final Trial Brief, para. 35.
[1388] Prlić Defence Final Trial Brief, para. 35.
[1389] Prlić Defence Final Trial Brief, para. 36; *The Prosecutor v. Nuon Chea et al.*, "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)", 20 May 2010.
[1390] Prlić Defence Final Trial Brief, para. 37.
[1391] Prlić Defence Final Trial Brief, para. 37; *The Prosecutor v. Stakić*, Judgement, 31 July 2003; *The Prosecutor v. Lubanga Dyilo* (ICC), "Decision on the Confirmation of Charges", 29 January 2007.
[1392] Prlić Defence Final Trial Brief, para. 38.

The **Prlić Defence** contends that the concept of a JCE is not applicable here and that it must be set aside in favour of **co-perpetration**, which it views as the mode applicable to a group of persons who have committed crimes collectively.[1393] According to them, this would violate **Jadranko Prlić**'s right to a fair trial.[1394] In this regard, the **Prlić Defence** stresses the fact that the principle of precedent is not absolute and that the Pre-Trial Chamber may depart from the principles delimited in the decisions of the Appeals Chamber.[1395]

If, however, the Chamber were to deem itself bound by the jurisprudence of the ICTY, the Defence sets three boundaries for the application of the JCE. The participant's **contribution** to the common criminal purpose must be **substantial**. Furthermore, JCE III is not applicable to crimes requiring **specific intent**. Finally, the JCE cannot be applied when the physical perpetrators of the crimes were not privy to the common plan and committed the crimes unaware of its existence.[1396]

The **Ćorić Defence** criticises the very concept of a JCE. They say that, for the past 10 years, international tribunals such as the ICC or the Extraordinary Chambers in the Cambodian Courts have refused to apply the theory of a JCE. This rejection was likewise expressed in the care taken by States Parties to the Rome Treaty when they drafted the modes of responsibility and rejected the JCE in favour of a functional theory based on commission: co-perpetration.[1397] The various national systems of law likewise do not maintain a JCE as a valid mode of criminal responsibility for international crimes; certain Judges and Chambers, even at the ICTY, have expressed their misgivings regarding this theory.[1398]

Broadly speaking, the Defence teams for all of the Accused deny the very existence of a JCE.

The **Stojić Defence** alleges that the Prosecution has not proven beyond a reasonable doubt that there was a JCE, and specifically, a **common plan** designed to drive the Muslims out of Herceg-Bosna in order to create a Greater Croatia.[1399] The Ćorić Defence likewise contends that there was no common criminal plan designed to drive out all non-Croats from the territory of the HZ (R) H-

[1393] Prlić Defence Final Trial Brief, paras 35, 39.
[1394] Prlić Defence Final Trial Brief, para. 41.
[1395] Prlić Defence Final Trial Brief, para. 42.
[1396] Prlić Defence Final Trial Brief, para. 43.
[1397] Ćorić Defence Final Trial Brief, paras 140, 141.
[1398] Ćorić Defence Final Trial Brief, para. 141; *see inter alia The Prosecutor v. Martić*, Appeals Judgement, Separate Opinion of Judge Schomburg, 8 October 2008, paras 3 to 9; *The Prosecutor v. Simić et al.*, Judgement, Separate and Partially Dissenting Opinion of Judge Per-Johan Lindholm, 17 October 2003, para. 4; *The Prosecutor v. Stakić*, Judgement, 31 July 2003, paras 437 to 442.
[1399] Stojić Defence Final Trial Brief, paras 5, 221, 222.

B.[1400] The testimonies and the documentary evidence make it possible to refute this theory.[1401] **Colonel Nissen,**[1402] for instance, addressed the matter thus:

> Q. Tell me, please, to the best of your knowledge the HVO never prepared itself for a situation in which they would have so many Muslims arrested or anybody else, for that matter. You didn't report on this, that the HVO was building detention centres or getting ready for any mass arrests. There were no preparations for any mass arrests [of] Muslims […], [nothing of the sort was ever observed] nor did you ever notice anything of that kind? And I'm referring to the situation up to the 1st of July, 1993.
>
> A. We had no knowledge of anything like this taking place.
>
> Q. [Can you conclude from the information you have – and]. [i]f it's just speculation tell me so - but […] if there were no activities towards opening any detention centres or any preparations for mass arrests, and if the arrests on the 1st of July were a consequence of [mutiny], of treachery on the part of the Muslim soldiers within the HVO ranks, would it be well-founded to conclude that there was no plan on the part of the HVO to imprison Muslims on the territory of Herceg-Bosna?
>
> A. Well, I can only refer to what we discussed before. The HVO presumably assumed that [they could be sure about] the Muslim soldiers […] because they had fought on their sides, and the situation was the reverse in the north. [These] soldiers [had fought in the] *armija*. [So we were sure about that. There was no need to make any particular preparations for this matter. I'm referring to these soldiers that we were talking about.]
>
> Q. Let me be [concrete] [Can we say that] […] on the 30th of June we have the treachery of the Muslim [soldiers], and […] on the 1st of July the HVO makes a decision to disarm and arrest the Muslims within the HVO? [T]hen it would be well founded to conclude that there was [only a] […]criminal plan [to arrest the] Muslims among [the] HVO ranks. Do you agree with [this conclusion] […]?
>
> [...] I assume that this plan did not exist, [given] the events, because if […] [there] had [been] […] a plan to prevent the loss of [towns], then they could have intervened at an earlier stage […].

General **Andrew Pringle**[1403] likewise testified to this effect:

> Q. Absolutely so. Precisely.

[1400] Ćorić Defence Final Trial Brief, para. 153.
[1401] Ćorić Defence Final Trial Brief, paras 154, 162.
[1402] Ćorić Defence Final Trial Brief, para. 155; Klaus Johan Nissen, T(F), pp. 20649-20650.
[1403] Ćorić Defence Final Trial Brief, para.156; Andrew Pringle, T(F), p. 24259.

> [General], I agree with your conclusion on the need to ensure logistical support, but I'd like to ask you the following question. The fact that something like that was done without previously […] securing any […] buildings or […] security or food storage space, does not all that go to show that there was no plan in place for incarcerating and isolating Muslim soldiers in the HVO? In your opinion would that be the logical conclusion?
> A. Yes. In my opinion, at that time, from the document I read, there didn't appear to be a preplan to do that. That's my opinion.

Radmilo Jasak,[1404] an officer in the Croatian Army, **General Praljak**[1405] and **Dragan Ćurčić**[1406] likewise all stated that they were unaware of any such **prior plan**.

What is more, the **Pušić Defence** criticises the Prosecution for failing to establish the existence of an **explicit agreement** between the Accused, and that as a consequence, the conclusions drawn concerning the existence of a common plan are overly broad.[1407] At the same time, the **Petković Defence** contends that the date of 18 November given by the Prosecution for the alleged launch of the JCE is not based on any specific incident.[1408] They say that there was no JCE at the time of the events, and in particular, there is nothing to support a finding that a JCE existed prior to 30 June 1993.[1409] There is therefore no evidence to establish a precise date on which the JCE saw the light of day.[1410] The **Ćorić Defence** considers, moreover, that the JCE is described too broadly in the Indictment, and that the four years of trial proceedings did not make it possible to define its scope.[1411] The **Pušić Defence** likewise criticises the Prosecution for having employed an overly broad definition of a JCE in order to increase its chances of obtaining a conviction.[1412] In this respect, they recall various ICTY judgements restricting the scope of JCE.[1413]

The **Praljak Defence** contends that if the alleged common purpose existed, the supposed members of the JCE would not have called upon the Croats to vote in favour of ABiH independence. On the

[1404] Ćorić Defence Final Trial Brief, para. 157; Radmilo Jasak, T(E), p. 48682, line 21 to p. 48683, line 22 and T(E), p. 48684, line 7, to p. 48685, line 25.
[1405] Ćorić Defence Final Trial Brief, para. 158; Slobodan Praljak, T(E), p. 41832.
[1406] Ćorić Defence Final Trial Brief, para. 158; Dragan Ćurčić, T(E), p. 45809, lines 18 and 19.
[1407] Pušić Defence Final Trial Brief, para. 47.
[1408] Petković Defence Final Trial Brief, para. 521.
[1409] Petković Defence Final Trial Brief, para. 526.
[1410] Petković Defence Final Trial Brief, para. 522.
[1411] Ćorić Defence Final Trial Brief, paras 147, 148.
[1412] Pušić Defence Final Trial Brief, para. 50.
[1413] Pušić Defence Final Trial Brief, para. 51.

other hand, the HDZ of BiH always maintained its support for BiH independence.[1414] The HZ H-B was therefore not created with the intention of establishing an autonomous State, as demonstrated by the documents received, which do not call into question the sovereignty of BiH and do not proclaim its independence.[1415] For example, when taking oath, the Judges of the HZ H-B acknowledged that the BiH Constitution was authoritative.[1416]

The **Ćorić Defence** contends that there was no discriminatory policy towards Muslims because some of them held administrative posts at every level of the HZ H-B.[1417] Additionally, the HVO was cooperating with the ABiH and the central political authority of BiH.[1418] The HVO cooperated in this manner with the ABiH, which demonstrates the absence of discrimination towards Muslims.[1419]

Several of the Defence teams contend that there exist **alternative explanations** to the one advanced by the Prosecution. HVO policy was different from what was described under the common plan of the Prosecution, and it was lawful – as its aim was to defend Bosnian Croats from attacks mounted by the Serbs.[1420] The **Ćorić Defence** says that the HZ H-B was created in response to aggression and that the HVO was created to protect the Croatian population of BiH.[1421]

The **Petković** Defence contends that the common criminal plan was not the **only** interpretation that could reasonably be inferred from the case file and that the crimes committed were possibly the side effects of war.[1422] It is appropriate to distinguish between the conduct of a legitimate war and taking part in a common enterprise.[1423] They ask the Chamber to distinguish between those who took part in a legitimate war and those who took part in unlawful criminal actions.[1424] They criticise the Prosecution for including every aspect of the conflict within the "blurry" theory of JCE, thereby criminalising any and all participation in the conflict.[1425]

[1414] Ćorić Defence Final Trial Brief, paras 165, 167, 168.
[1415] Ćorić Defence Final Trial Brief, para. 170; P 00081; P 00543; Ribičić, T, p. 25462, line 22 to p. 25463, line 5.
[1416] Ćorić Defence Final Trial Brief, para. 183; P 01264.
[1417] Ćorić Defence Final Trial Brief, paras 180, 181; 1D 00442; P 00672; P 00824.
[1418] Ćorić Defence Final Trial Brief, para. 177.
[1419] Stojić Defence Final Trial Brief, para. 7.
[1420] Stojić Defence Final Trial Brief, paras 7, 10, 11, 112, 153.
[1421] Ćorić Defence Final Trial Brief, para. 163; P 00152; P 00079; P 00081.
[1422] Petković Defence Final Trial Brief, para. 524.
[1423] Petković Defence Final Trial Brief, para. 513.
[1424] Petković Defence Final Trial Brief, para. 525.
[1425] Petković Defence Final Trial Brief, para. 519.

Every facet of this history makes it possible to show that there was a reasonable explanation for the incidents in the Indictment.[1426] The **Pušić Defence** criticises the Prosecution for employing a legal theory as an instrument of historical revisionism in this instance.[1427]

On the other hand, **several of the Defence teams** have insisted upon the necessity of distinguishing between **local authority** and the **central authority** in the HZ H-B. They likewise insist upon the fact that the conflict was allegedly driven by the ABiH and that the HVO was defending the population. Thus, the **Ćorić Defence** contends that, after the start of the war in 1992, political authority passed from the State to the municipalities, which led to the adoption of legislation at the local level, rendering the situation considerably more complicated.[1428] The **Stojić Defence** agrees that there were conflicts with the ABiH but alleges that they were due to isolated incidents that happened as a consequence of ABiH attacks.[1429] These crimes may therefore be attributable to certain individuals or municipal authorities, but not to the alleged members of the JCE acting in furtherance of a common criminal plan.[1430] Prior to the ABiH setting in motion its military campaign in March and April 1993, the clashes were allegedly simply the result of isolated skirmishes.[1431] For instance, the incidents that took place **in Prozor**[1432] in October 1992 and in **Gornji Vakuf**[1433] in January 1993 were simply due to ABiH attacks and the escalation of the conflict was due simply to certain orders from local HVO commanders. Later clashes were allegedly due to the implementation of the ABiH plan to conquer territories where the HVO had fought alongside the ABiH.[1434]

Concerning the method employed, the **Petković and Pušić Defence teams** criticise the Prosecution for relying on **assumptions** alone and not on **direct evidence**.[1435] The **Ćorić Defence** contends that the Prosecution did not present any evidence that would enable one to identify the group of persons who took part in the JCE[1436] because it only named the governmental structure of the HZ (R) H-B[1437] *in toto* as a member of the group that took part in the JCE. Furthermore, it did not explain

[1426] Praljak Defence Final Trial Brief, para. 30.
[1427] Pušić Defence Final Trial Brief, para. 48.
[1428] Ćorić Defence Final Trial Brief, para. 166.
[1429] Stojić Defence Final Trial Brief, paras 7, 111.
[1430] Stojić Defence Final Trial Brief, paras 8, 128.
[1431] Stojić Defence Final Trial Brief, para. 116.
[1432] Stojić Defence Final Trial Brief, paras 127, 128.
[1433] Stojić Defence Final Trial Brief, paras 129-132.
[1434] Stojić Defence Final Trial Brief, paras 133, 141, 142, 149, 150.
[1435] Petković Defence Final Trial Brief, para. 524; Pušić Defence Final Trial Brief, para. 43.
[1436] Ćorić Defence Final Trial Brief, para. 139.
[1437] Ćorić Defence Final Trial Brief, para. 149.

which of the crimes fell within the framework of the JCE and which were its foreseeable consequences.[1438]

(c) JCE in the Other Cases Involving Croatians

I believe it is necessary to examine, as a point of consideration, the **Indictments** involving **Croats** in the other cases, to see if they have already mentioned a **JCE** of any kind.

1. The *Aleksovski* Case (IT-95-14/1)

The Indictment in the ***Aleksovski*** Case was confirmed on **10 November 1995**. There is no mention of a JCE (a concept that did not yet exist) in the Indictment, nor is there any reference to the concept of a group or a common purpose.

2. The *Blaškić* Case (IT-95-14)

The Indictment in the ***Blaškić*** Case was confirmed on **25 April 1997**. There is no mention of a JCE (a concept that did not yet exist) in the Indictment, nor is there any reference to the concept of a group or a common purpose.

3. The *Kupreškić* Case (IT-95-16)

The Indictment in the ***Kupreškić*** Case was confirmed on **9 February 1998**. There is no mention of JCE (a concept that did not yet exist) in the Indictment, nor is there any reference to the concept of a group or a common purpose.

Regarding the genesis of the Croat-Muslim conflict (October 1992-March 1994), in the *Zoran Kupreškić et al.* Case, the Prosecution indicates as follows (cf. paragraph 38 of the Judgement):

The Bosnian Muslims and Croats initially resisted the attack launched by the Serbs in 1991. They maintained a front line in Central Bosnia. But, "[a]s the conflict with the Serbs wore on, however, '**ethnic cleansing**' by Serb forces[…] drove Croat and Bosnia[k] refugees into the interior of

[1438] Ćorić Defence Final Trial Brief, para. 149.

Bosnia, creating overcrowding and tension between the two nationalities and leading to a conflict between these former allies".

As one may observe, the Prosecution's contention based on ethnic cleansing attributes it to **overcrowding**, which led to tension that gave rise to a conflict. I am in complete agreement with this view of the matter.

However, the Prosecution, not being convinced of this view, argues that the campaign of ethnic cleansing sought to create ethnically homogeneous regions that could be united in an independent Croatian State of Bosnia; that region was supposed to be annexed later to the Republic of Croatia as part of a "Greater Croatia", mirroring the plan for a "Greater Serbia".

As one can see, the Prosecution is submitting scenarios without reaching formal conclusions, leaving the **range of possibilities** open.

One is bound to note that the Prosecution has submitted an entire series of reasons in a number of cases involving Croats in order to explain the **reasons** for the conflict. One is compelled to observe that there is no support for some of the theories, whereas others may be argued more or less persuasively on the evidence.

Thus, it is undeniable that the arrival of refugees in great numbers - whether they were **Croats or Muslims** – significantly affected the conduct of local Croat-Muslim entities, as one observes in the ***Kupreškić* Case**. The issue of **reasonable doubt** concerning **ethnic cleansing** then comes sharply into focus.

*Was this **ethnic cleansing** that fit into a comprehensive plan likely to fall within the scope of a JCE? Or did this only involve the unplanned effects of a new situation created by the influx of refugees who by their very presence upset the demographic equilibrium between the ethnicities?*

In this regard, one must bear in mind what the **Tabeau Report** says about this subject, which is not incompatible with this hypothesis (cf. page 391 *et seq*. of my opinion).

4. The *Furundžija* Case (IT-95-17/1)

The Indictment in the ***Furundžija* Case** was confirmed on **2 June 1998**. There is no mention of a JCE (a concept that did not yet exist) in the Indictment, nor is there any reference to the concept of a group or a common purpose.

5. The *Kordić and Čerkez* Case (IT-95-14/2)

The Indictment in the ***Kordić and Čerkez*** Case was confirmed on **30 September 1998**.

There is no mention of a JCE (a concept that did not yet exist) in the Indictment. However, it is alleged that:

"From approximately November 1991 to March 1994, various persons and groups associated or directed, instigated, supported or aided or abetted by the HDZ, the HDZ-BiH, the HZ H-B/HR H-B and HVO and various of their political, municipal and administrative bodies, armed forces, police, paramilitary and special units, caused, planned, prepared, instigated, supported, directed and engaged in a campaign of persecutions and ethnic cleansing […]".[1439]

In the Judgement, which came out on 26 February 2001, the Trial Chamber did not make any mention of a JCE. However, the concept of a **common purpose or design** did surface:

"The Trial Chamber inferred from the evidence […] that there was by this time a **common design or plan** conceived and executed by the Bosnian Croat leadership to **ethnically cleanse** the Lašva Valley of Muslims. **Dario Kordić**, as the local political leader, was part of this design or plan, his principal role being that of **planner** and **instigator** of it".[1440]

It seems worthy of note that the common plan or design was just the ethnic cleansing of the **Lašva Valley** and that **Dario Kordić was its planner**. In this case we do not observe any connection to Franjo Tuđman, Mate Boban, Prlić, etc… Moreover, if I have followed the logic of the *Kordić and Čerkez* Chamber correctly, this plan was strictly confined to the **Lašva Valley**. One might then infer from the above that there may have been multiple **primary** or **secondary** plans. Pursuing this reasoning to its extreme, one could then infer that two individuals in a given place may,

[1439] *The Prosecutor v. Kordić and Čerkez*, Second Amended Indictment, 30 September 1998, para. 6.

independently of other plans and at a particular instant, create their own plan that may or may not fall within a broader purpose of which they were completely unaware.

6. The *Naletilić and Martinović* Case (IT-98-34)

The Indictment in the ***Naletilić*** **Case** was confirmed on 28 September 2001. There is no mention of a JCE. They were charged individually on the basis of Article 7(1) and on the basis of command responsibility.

7. The *Ivica Rajić* Case (IT-95-12)

The Indictment in the ***Rajić*** **Case** was confirmed on **13 January 2004**. There is no mention of a JCE. Ivica Rajić was charged on the basis of command responsibility. One rightly notes that this person was the military commander of the operation conducted in Stupni Do, which falls under the heading of joint criminal enterprise.

8. The *Miroslav Bralo* Case (IT-95-17)

The Indictment in the ***Bralo*** **Case** was confirmed on **19 July 2005**. There is no mention of a JCE. Miroslav Bralo was charged on the basis of Article 7(1) of the Statute.

9. The *Gotovina, Markać and Čermak* Case (IT-06-90)

The Indictment in the ***Gotovina*** **Case** was confirmed on **12 March 2008**. The three Accused were charged on the basis of a **joint criminal enterprise** inaugurated in **1995**, that is to say, after the events recounted in this Indictment.

"From at least July 1995 to 30 September 1995, **Ante Gotovina**, **Ivan Čermak** and **Mladen Markač**, along with other persons described below, participated in a **JCE**, the common purpose being the permanent removal of the Serbian population from the Krajina region by force, fear or threat of force, persecution, forced displacement, forced transfer and deportation, appropriation and destruction of property or other means. These constituted or involved the commission of crimes punishable under Articles 3 and 5 of the Tribunal Statute, as further described herein. In addition to

[1440] *The Prosecutor v. Kordić and Čerkez*, Judgement, 26 February 2001, para. 642.

the crimes which were set out above as part of the joint criminal enterprise, it was foreseeable that the crimes of murder, inhumane acts and cruel treatment were a possible consequence in the execution of the enterprise".[1441]

Among the **other members of this JCE,** the Prosecution cites **Franjo Tuđman, Gojko Šušak, Janko Bobetko** and **Zvonimir Červenko**.

At the same time, the existence of this JCE was denied by the Appeals Chamber, which found the Accused not guilty in its Appeals Judgement of 16 November 1992.

One may note that this JCE is utterly unrelated to the one in the *Prlić* Case, because it happened two years after the acts charged in the *Prlić* Case.

It should be observed that, in almost all of the cases charging Croats, there was no reference to a joint criminal enterprise of any kind. An informed observer might have drawn the conclusion that crimes were committed sporadically, without any link to one another.

The conclusion is simple: in nine cases involving Croats from the Republic of Bosnia and Herzegovina or the Republic of Croatia, the Prosecution did not at any time refer to the existence of a **comprehensive common plan**.

There is good reason to note that in the ***Kordić*** Case, which was not mentioned by the Prosecution, the Trial Chamber found that there was **a plan** but that it had been instigated and planned by **Kordić**, who was an important local political leader. At no time is there any mention whatsoever of a comprehensive plan in which reference was made to **Mate Boban** or the other leaders concerned in this case.

This observation does not constitute evidence, although the Prosecution has referred on many occasions to the cases involving Croats that were adjudicated by the Tribunal. Its only merit is to offer a comprehensive, non-compartmentalised view of the facts.

[1441] Amended Joinder Indictment in the case of *The Prosecutor v. Gotovina*, para. 12.

(d) Franjo Tuđman's Position with Regard to the JCE

The issue of whether there was a **JCE** lies at the very heart of the charges against the six Accused.

The question that must be asked is:

Did the several Accused act in connection with the implementation of a common plan by knowingly committing certain crimes? Were these crimes caused by reasons other than the implementation of one or all three of the alleged JCEs?

To answer this question is to take an interest in the actions of one of the members of the JCE, who by virtue of his position as **President of the Republic of Croatia**, could be none other than the Supreme Commander and **principal mastermind** of the JCE. Unfortunately, he did not make an appearance, and was therefore unable to defend himself; the Judges of the Chamber have at their disposal only that evidence admitted to the record in which his name appears as well as the statements he made during the period covered by the Indictment.

In a previous chapter entitled "Background" I analysed in depth the various statements made by **Franjo Tuđman** during meetings convened with senior international leaders, or those from Croatia or Herzegovina.

An in-depth study of these statements has enabled me to make a number of observations which go to establishing that **Franjo Tuđman** did not dispute the **Security Council Resolutions** and approved of the **Vance-Owen Plan**, while opposing any dismantling of the Republic of Bosnia and Herzegovina; this did not rule out the possibility that Herzegovina might be annexed to the Republic of Croatia **in the event** that the Serbian part of the Republic of Bosnia and Herzegovina were annexed to Serbia.

Regarding this hypothesis, President **Franjo Tuđman** always spoke out in favour of **maintaining the borders recognised by the international community** and of recognizing the Republic of Bosnia and Herzegovina with **three constituent peoples.** This oft-repeated position runs counter to the Prosecution's main argument. The Prosecution did admittedly submit that **Franjo Tuđman** played **a double game**, but how was he able to play a double game with high-level interlocutors such as **Lord Owen, Cyrus Vance, Alija Izetbegović and Slobodan Milošević**? Was he likewise capable of playing a double game during **Security Council** debates? I do not believe this version,

particularly inasmuch as we possess evidence consisting of a series of discussions in a narrow circle where he was surrounded only by his close associates, such as **Bobetko** and **Šušak**, to whom he repeated the same statements he was making in other circles.

I am compelled to enumerate some of the evidence that was characteristic in this regard:

- For instance, in November 1991, he mentioned the fact that several municipalities decided to get together to organise local defence against **the Serbs**. Obviously, this meeting in the municipalities was not engineered following the express instructions of Franjo Tuđman **(P 00068)**;

- **Tuđman**, moreover, stated that Croatia had recognised the independence of the Republic of Bosnia and Herzegovina **(P 00167)**. For me it is clear that if **Franjo Tuđman** had had the expansionist intent to annex the Banovina to Croatia, he would not have accepted independence;

- **Tuđman** likewise stated that the borders of Bosnia and Herzegovina and those of Croatia needed to remain as recognised by the international community **(P 00336)**. It is appropriate to note in this respect that the Republic of Croatia never recognised **the Republic of Herceg-Bosna**!

- **Tuđman** recalled the need to organise Bosnia and Herzegovina into three constituent nations **(P 00498)**;

- At the same time, he recalled Croatia's **duty of loyalty** toward the international order **(P 01297)**;

- He likewise recalled that Bosnia and Herzegovina ought to remain independent as a nation consisting of three constituent peoples **(P 01544)**.

- Regarding the Muslims of Bosnia and Herzegovina, Franjo **Tuđman** reminded **Mate Boban** that they needed to **cooperate** with the Muslims to prevent conflict (P 01539);

- On 27 April 1993, he recalled that the world would not allow **ethnic cleansing** to be conducted **(P 02122)**;

- On 11 May 1993, that is, two days after the incidents in **Mostar**, he indicated that the Muslims were populating areas with refugees but that for the sake of the viability of Bosnia and Herzegovina, it was necessary to respect the existence of the three constituent peoples **(P 02302)**;

- On 2 June 1993, he stated, in the presence of **Lord Owen and Stoltenberg**, that there were no HV forces in Central Bosnia **(P 02613)**;

- During the 14th session of the Defence Council, **Tuđman** spoke out against the creation of three States in Bosnia and Herzegovina **(P 03112)**. This position was indisputably a critique of the action conducted by **Mate Boban**;

- On 15 July 1993, he asserted that the HV was not present in Croatia and proposed international border controls **(P 04267)**;

- On 5 November 1993 he recalled that his objective was to implement the **Vance-Owen Plan** and reaffirmed the ties between the Croats of Bosnia and Herzegovina and the Muslims, both of whom would later be incorporated into a **Confederation (P 06454)**;

- On 4 December 1993, he recalled that Croatia could only deploy volunteers, not Croatian Armed Forces, in the Travnik-Vitez-Mostar zone **(P 07131)**.

All of these statements abundantly attest to my view of the fact that **Franjo Tuđman**'s **perspective diverged** from that of the Croats of the Republic of Bosnia and Herzegovina and that his ultimate objective, within the strict confines of the **Vance-Owen Plan,** might have been **the creation of a confederation following a referendum**. At no time did I find any trace of statements by **Franjo Tuđman** tending to exhibit disdain for the borders or establish a geographic area labelled the **Republic of Croatia** incorporating Herzegovina, disregarding the borders recognised by the International Community.

Furthermore, **Security Council Resolution 819 (1993)** reaffirmed the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina. Point 12 of the Resolution specified that a mission had been dispatched to the Republic of Bosnia and Herzegovina to evaluate the situation and to prepare a report on this subject.

The mission report (S/25700) was accompanied by four annexes. **Annex III** which concerns what followed a meeting between **Mate Boban** and **Alija Izetbegović** in Zagreb on 24 April 1993 is of interest to this case.

Regarding the resumption of hostilities between the ABiH and the HVO, **Mate Boban** and **Alija Izetbegović** instructed all units of the HVO and the ABiH to cease fire and end hostilities immediately. A **joint communiqué** indicated that the conflicts were contrary to the policies of the representatives of these two peoples and tended to compromise the fulfilment of their political objectives: **the independence and territorial integrity of the Republic of Bosnia and Herzegovina.**

It is thus evident, from my point of view, that there was no JCE and that, moreover, a process of "distancing" between politicians and soldiers was underway.

Under these circumstances, how is one to believe in the existence of a JCE, particularly inasmuch as a joint command structure had been put in place? One rightly notes that point 3 of the communiqué refers explicitly to the legality of the **ABIH** and the **HVO**.

(a) Jadranko Prlić's Position at his Opening Statement

It would be interesting to know what the personal position of the Accused **Jadranko Prlić** was with regard to this concept. We know his position from his **opening statement**, which was was made over the course of two days. I think it is proper to mention his position, particularly insofar as Rule 84 *bis* of the Rules provides that "**the Trial Chamber shall decide on the probative value, if any, of the statement**".

Jadranko Prlić made an opening statement before the Trial Chamber on 5 and 6 May 2008. **Jadranko Prlić** was given **five hours** to present his position before the Chamber.[1442]

Jadranko Prlić began his presentation by rejecting the existence of a joint criminal enterprise and his personal involvement in this supposed JCE.[1443]

[1442] Jadranko Prlić, T(F), p. 27457.
[1443] Jadranko Prlić, T(F), p. 27457.

By way of introduction, he recalled how the former Yugoslavia functioned before its dissolution.[1444] He reminded the Chamber, for instance, that there were three levels of authority at that time: the **Federation**, the **Republics** and the **municipalities**.[1445]

The federal authorities were entrusted with foreign policy as well as defence, security and monetary policy; the Socialist Republics were given economic affairs in general on their respective territories, and the municipalities acted in local matters.[1446]

Jadranko Prlić started his presentation with the year 1990, after the fall of the Berlin Wall.[1447] As that event led to inflation since the Socialist Republics were faced with rising prices, the Federation launched a programme to fight inflation.[1448] The Executive Council of the Assembly of the Socialist Republic of BiH opted for a European perspective, the objective being to establish a multi-party system in order to liberalise the economy.[1449] **Jadranko Prlić** cited, in support of his argument, a Defence document (1D 0226) which is the transcript of a meeting he chaired, in which the BiH Executive Council decided to curtail its contributions to the Federation budget.[1450]

Jadranko Prlić believed he had done everything he could to promote the economic interests of BiH at a time when the Serbs were beginning to cause nationalist tension in the former Yugoslavia.[1451]

During the collapse of the former Yugoslavia, the Accused was in Mostar, where he took part in a number of studies focusing on the economic transformation of BiH.[1452] He recalled that the Croatian Community of Herceg-Bosna was created against a backdrop of the territory serving as a launching point for attacks on Croatia.[1453] According to the Accused, the Presidential transcripts clearly show that there was no JCE and that, on the contrary, everything was being done to enable BiH to gain independence and negotiate with the European Community.[1454] **Jadranko Prlić** spoke of a **secret agreement** purportedly reached between **Tuđman** and **Izetbegović**, proving that

[1444] Jadranko Prlić, T(F), pp. 27460-27462.
[1445] Jadranko Prlić, T(F), p. 27460.
[1446] Jadranko Prlić, T(F), pp. 27460-27462.
[1447] Jadranko Prlić, T(F), p. 27463.
[1448] Jadranko Prlić, T(F), p. 27463.
[1449] Jadranko Prlić, T(F), p. 27464.
[1450] Jadranko Prlić, T(F), p. 27464.
[1451] Jadranko Prlić, T(F), pp. 27465-27466.
[1452] Jadranko Prlić, T(F), p. 27469.
[1453] Jadranko Prlić, T(F), pp. 27469-27471.

Croatia wanted to cooperate with the Muslims and help a Muslim Republic gain recognition.[1455] There was thus no basis to show that Croatia took part in a JCE.[1456] BiH was recognised as independent thanks to the support of Croatia and the HDZ.[1457]

Jadranko Prlić returned to the **Graz Agreement**, between the Serbs and the Croats, pertaining to the partition of BiH.[1458] He recalled that the meeting took place on the recommendations of the international community, and that Croatia offered to submit the problem to an international panel of arbitration, as no agreement had been reached.[1459] Moreover, he added that the following week, a meeting between the Muslims and the Croats was convened on the same topic in **Split**.[1460]

Concerning the creation of the **HVO** by **Mate Boban** on 7 April 1992, the Accused believes that this occurred simply because BiH did not have an army and it was necessary to respond to an urgent need, besides the fact that crisis staffs had already been set up.[1461] He then recalled that the Army was an integral part of the Republic of BiH and that there was no discrimination in practice; disability pensions are paid out nowadays to both Croats and Muslims.[1462]

Jadranko Prlić recounted all of the events leading up to the creation of Herceg-Bosna, which in his view justified the actions undertaken.[1463] The Accused reached East Mostar on **10 April 1992** where he observed the guns pounding the city.[1464] At the time, as a member of the Municipal Territorial Defence Staff, he went to the Territorial Defence HQ, but it was no longer functioning.[1465] He then became an **HVO volunteer** and he was given a uniform and weapons.[1466] He was subsequently appointed a member of the Council, responsible for publishing economic reports.[1467]

[1454] Jadranko Prlić, T(F), p. 27471.
[1455] Jadranko Prlić, T(F), pp. 27472-27473.
[1456] Jadranko Prlić, T(F), pp. 27465-27466.
[1457] Jadranko Prlić, T(F), p. 27475.
[1458] Jadranko Prlić, T(F), p. 27477.
[1459] Jadranko Prlić, T(F), p. 27477.
[1460] Jadranko Prlić, T(F), p. 27477.
[1461] Jadranko Prlić, T(F), p. 27478.
[1462] Jadranko Prlić, T(F), p. 27479.
[1463] Jadranko Prlić, T(F), pp. 27480-27521.
[1464] Jadranko Prlić, T(F), p. 27489.
[1465] Jadranko Prlić, T(F), p. 27490.
[1466] Jadranko Prlić, T(F), p. 27490.
[1467] Jadranko Prlić, T(F), p. 27490.

According to **Jadranko Prlić**, the **HVO** had to defend **Mostar from the JNA** in June 1992,[1468] but at the time, the Muslim leaders did not want the HVO to be on equal footing with the ABiH.[1469] It was not until 21 July 1992, following a friendship treaty between BiH and Croatia, that the HVO was incorporated into the army.[1470]

Jadranko Prlić laid great stress upon the **temporary nature** of the organs of Herceg-Bosna,[1471] especially as the Community of Herceg-Bosna never had its own statutes or a Constitution.[1472] The HVO was a temporary body - the Presidency of the HZ H-B did not become the sole functioning civilian executive organ until 14 August 1992. Prior to that time it was a legislative organ.[1473]

This temporary executive organ had no real authority.[1474] The real President of the HVO was **Mate Boban** who took all of the decisions.[1475]

According to the Accused, all the defence measures taken by municipalities were simply the implementation of the All-People's Defence system.[1476] It was chaos, particularly with regard to the currency[1477] – the ultimate objective was to bring BiH into conformity with the principles of the European Community by having three fully represented national units.[1478]

Moreover, a struggle against crime began to be organised,[1479] with a Commission created on **18 December 1993** to try war crimes.[1480] The HR-H-B even launched "Operation Spider" in **June 1994**, aiming to hunt down war criminals.[1481]

As to the **refugees**, in late 1992 there was an attempt to put in place a system to remedy the humanitarian problems. There was never any discrimination[1482] nor did the HZ H-B ever block humanitarian convoys.[1483]

[1468] Jadranko Prlić, T(F), p. 27490.
[1469] Jadranko Prlić, T(F), pp. 27480-27481.
[1470] Jadranko Prlić, T(F), p. 27491.
[1471] Jadranko Prlić, T(F), p. 27485.
[1472] Jadranko Prlić, T(F), p. 27481.
[1473] Jadranko Prlić, T(F), p. 27485.
[1474] Jadranko Prlić, T(F), p. 27499.
[1475] Jadranko Prlić, T(F), p. 27485.
[1476] Jadranko Prlić, T(F), p. 27501.
[1477] Jadranko Prlić, T(F), pp. 27502-27509.
[1478] Jadranko Prlić, T(F), p. 27504.
[1479] Jadranko Prlić, T(F), pp. 27512-27514.
[1480] Jadranko Prlić, T(F), p. 27516.
[1481] Jadranko Prlić, T(F), p. 27516.
[1482] Jadranko Prlić, T(F), p. 27518.

The ultimatum of 15 January 1993 was an order from **Mate Boban**.[1484] It was in fact not an ultimatum, but the result of the **Geneva Agreement** signed by **Boban**.[1485] **Mate Boban**, moreover, subsequently ordered that this order not be implemented.[1486]

Concerning the prisons, **Prlić** stated that the buildings were transformed into detention centres without approval of any kind from the senior authorities; the Accused had no authority in this matter.[1487] He did, however, demand compliance with the **Geneva Conventions** and that the **ICRC** be permitted to carry out visits,[1488] even though he had no authority over the operation of the detention centres.[1489] During a meeting, the Accused allegedly insisted that the detention centres be dismantled, threatening to leave office if they were not.[1490] It was, however, **Mate Boban** who took the decision to close them on **10 December 1993**, which indeed proves that **Jadranko Prlić** had no authority in the matter.[1491]

In the final part of his statement, **Jadranko Prlić** focused more specifically upon the charges against him and his responsibility.[1492] He stated that **Mate Boban** was the real decision-maker and that he did everything he could at his level to try to find a peaceful solution to the conflict.[1493]

As the President of the HR H-B Government, **Jadranko Prlić** made a statement on 20 November 1993 in which he recalled that the objective of the HR H-B was to have the three peoples (Serbs, Croats and Muslims) living together peacefully.[1494]

Jadranko Prlić went back over his **interview with the Prosecutor**, given in 2001,[1495] and wished to clarify certain points. To do this, he took up the Indictment, and refuted point by point, the arguments the Office of the Prosecutor made against him.

[1483] Jadranko Prlić, T(F), p. 27518.
[1484] Jadranko Prlić, T(F), p. 27532.
[1485] Jadranko Prlić, T(F), p. 27537.
[1486] Jadranko Prlić, T(F), p. 27539.
[1487] Jadranko Prlić, T(F), p. 27549.
[1488] Jadranko Prlić, T(F), p. 27549.
[1489] Jadranko Prlić, T(F), pp. 27549-27551.
[1490] Jadranko Prlić, T(F), p. 27552.
[1491] Jadranko Prlić, T(F), p. 27552.
[1492] Jadranko Prlić, T(F), pp. 27554-27577.
[1493] Jadranko Prlić, T(F), p. 27554.
[1494] Jadranko Prlić, T(F), p. 27554.
[1495] Jadranko Prlić, T(F), p. 27555; P 09078.

He reiterated that he had **no authority whatsoever** over the **army** or the **military police**.[1496] **Mate Boban** was the Supreme Commander.[1497] There were **three HVO**s: the army, the executive bodies within the municipalities **and the Provisional Executive Organ** (PIO).[1498]

The Accused wielded authority over the last branch only.[1499] He had no real decision-making power. He was used by persons who needed him to establish a functioning economy.[1500]

He had no authority over **Milivoj Petković** or **Slobodan Praljak**, or even over **Bruno Stojić**.[1501] **Mate Boban was their superior**.[1502]

Jadranko Prlić did not wield any authority at all over **Valentin Ćorić** either.[1503] He did not have access to detention centres, to the criminal courts or to the Department of Justice.[1504]

The crimes which were committed were all committed by soldiers and conscripts – it was the HVO (its military wing) that constituted the supreme body for defence. The Accused had no authority because the temporary organ did not handle military matters.[1505]

Concerning "Croatisation", **Jadranko Prlić** recalled that this was a term which did not exist, and that all of the decrees adopted were necessary because life needed to be organised in a territory where the authorities of the Republic no longer functioned.[1506] There was never any discrimination.[1507]

Jadranko Prlić says that, in his capacity as a member of the Provisional Executive Organ he had no decision-making authority over appointments or dismissals.[1508] These decisions were taken **unanimously**, **and his voice was by no means the one that carried the most weight**.[1509]

[1496] Jadranko Prlić, T(F), p. 27561.
[1497] Jadranko Prlić, T(F), p. 27561.
[1498] Jadranko Prlić, T(F), p. 27561.
[1499] Jadranko Prlić, T(F), p. 27561.
[1500] Jadranko Prlić, T(F), p. 27562.
[1501] Jadranko Prlić, T(F), p. 27564.
[1502] Jadranko Prlić, T(F), pp. 27563-27564. "[They] were responsible to the […] the President of the [Republic] or […] the political parties and the [Parliament]".
[1503] Jadranko Prlić, T(F), p. 27565.
[1504] Jadranko Prlić, T(F), p. 27565.
[1505] Jadranko Prlić, T(F), p. 27566.
[1506] Jadranko Prlić, T(F), pp. 27568-27570.
[1507] Jadranko Prlić, T(F), pp. 27568-27570.
[1508] Jadranko Prlić, T(F), p. 27571.
[1509] Jadranko Prlić, T(F), p. 27571.

Jadranko Prlić brought up the issue of the importation of goods from **Croatia**. He recalled that this was not a crime, as goods from BiH were treated in the same way in the other direction.[1510] This was merely an illustration of what occurs in a free trade area, as in the case of the European Community or the FTA in North America.[1511]

Concerning the nature of the conflict, **Jadranko Prlić** considered it to be an **internal conflict**,[1512] as the crimes committed were not committed in connection with a **JCE** but were isolated acts; the Accused never took part in these crimes.[1513] Furthermore, he made a number of statements to the international community in which he condemned these actions.[1514]

He ended his statement by recalling that, for five years after the war, he represented BiH (and its entire population) as Minister of Foreign Affairs[1515] and resided for many years in Sarajevo, a Muslim-majority city in which he felt at home.[1516]

As to the **probative value** to be assigned to this statement, I consider that the portion of his statement regarding the **JCE** is persuasive, inasmuch as it is concordant with my findings in relation to what **Franjo Tuđman** said. On the other hand, I do not agree with **Jadranko Prlić** concerning the crimes committed and the precise extent of his responsibility.

(f) Greater Croatia and the *Banovina*

The Prosecution alleges that, between 18 November 1991 and April 1994,[1517] a number of persons had the **political objective** to create a Croatian territory encompassing a large swathe of Bosnia and Herzegovina with the borders of the ***Hrvatska Banovina***,[1518] an entity that existed between 1939 and 1941.[1519] The purpose was to create an autonomous entity, **Herceg-Bosna**, with the **long-term objective** of annexing it to the Republic of Croatia.[1520] The Prosecution further contends that the

[1510] Jadranko Prlić, T(F), pp. 27571-27572.
[1511] Jadranko Prlić, T(F), pp. 27571-27572.
[1512] Jadranko Prlić, T(F), p. 27572.
[1513] Jadranko Prlić, T(F), p. 27576.
[1514] Jadranko Prlić, T(F), p. 27576.
[1515] Jadranko Prlić, T(F), p. 27576.
[1516] Jadranko Prlić, T(F), p. 27576.
[1517] Indictment, para. 15.
[1518] Prosecution Final Trial Brief, para. 163.
[1519] Indictment, para. 15.
[1520] Prosecution Final Trial Brief, para. 163.

Boban-Kordić-Boras faction of the HDZ of BiH was a branch of the Croatian HDZ and that the HVO Government and Army were merely an extension of the Croatian Government and Army.[1521] It alleges that in his capacity as the leader of the HDZ, **Tuđman** selected the presidents of the HDZ in Bosnia and oversaw their decisions.[1522] He likewise chose the members of the **Herceg-Bosna** Government as well as the head of its army, with whom he met regularly.[1523] According to the Prosecution, **Tuđman** therefore had total control over the military and political apparatus.[1524] Throughout this period, the command of the HVO lay in the hands of certain high-ranking officers from the HV.[1525] Furthermore, Croatia proper and the HV were purportedly engaged, indirectly through material and logistical support,[1526] and directly on the ground, in the war pitting the Bosnian Croats against the Bosnian Muslims.[1527]

The Prosecution alleges that **Franjo Tuđman**'s objective was, **by agreement** with **Milošević**, to **divide Bosnia** into three zones: **a Serbian zone, a Croatian zone** and a **small Muslim zone around Sarajevo**.[1528] For instance, **Franjo Tuđman** allegedly declared that the survival of Bosnia would be contrary to Croatian interests, characterising it as harmful.[1529] Zagreb's plan thus involved creating the **Herceg-Bosna** entity for the purpose of drawing new, more extensive borders for Croatia through subsequent annexation.[1530] The Accused were alleged to have employed a wide variety of means in order to subjugate the BiH Muslims living on the territory of Herceg-Bosna, for the purpose of establishing a Croatian community.[1531] The Prosecution alleges that, in order to establish this community, the members of the JCE carried out **ethnic cleansing** in these regions in order to drive out the Muslims and replace them with Croats.[1532] The Accused thus enforced the policies decided in Zagreb, particularly Tuđman's strategy with regard to politics and territorial goals.[1533] To this effect, the Prosecution speaks of Tuđman's "**two-track policy**", which allegedly consisted of publicly supporting an independent BiH while in reality trying to divide and destroy it.[1534]

[1521] Prosecution Final Trial Brief, para. 163.
[1522] Prosecution Final Trial Brief, para. 173.
[1523] Prosecution Final Trial Brief, para. 173.
[1524] Prosecution Final Trial Brief, para. 174.
[1525] Prosecution Final Trial Brief, para. 178.
[1526] Prosecution Final Trial Brief, para. 179.
[1527] Prosecution Final Trial Brief, para. 177.
[1528] Prosecution Final Trial Brief, paras 164, 165, 166; P 00037, pp. 5, 38 and 39; P 00089, pp. 31-34.
[1529] Prosecution Final Trial Brief, para. 167; P 00089, p. 99.
[1530] Prosecution Final Trial Brief, paras 168, 169.
[1531] Indictment, para. 15.
[1532] Indictment, para. 15.
[1533] Prosecution Final Trial Brief, paras 169 to 173.
[1534] Prosecution Final Trial Brief, para. 173.

Confronted with these very detailed arguments, I am compelled to reframe the issue around the key topic of the ***Banovina***. The Croatian ***Banovina*** was created in 1939 under the **Cvetković-Maček** Agreement uniting several provinces of Yugoslavia. It included the territory of present-day Croatia as well as parts of Bosnia and Serbia with a Croat-majority. It ceased to exist in 1941 with the German occupation.[1535]

For **Franjo Tuđman**, President of the Republic of Croatia from 1991 onwards and a historian by training, the ***Banovina***, and more specifically the situation of the Croats of Bosnia and Herzegovina, was a matter of particular importance.[1536] According to him, Bosnia was historically Croatian,[1537] and annexing it to form a Greater Croatia was a dream of his.[1538] Witness AR mentioned the fact that during the election campaign, **Tuđman** spoke of returning to the natural borders of Croatia.[1539] According to him, Bosnia historically formed part of Croatia and the majority of Muslims considered themselves Croats.[1540]

However, this idea appears to have been nothing more than a dream. For **Tuđman** enjoyed neither the support of the international community nor the support of his own camp to realise this dream.

On the one hand, the international community, particularly the **United States**, was opposed to the idea of partitioning BiH and of annexing the Croat-majority parts to the Republic of Croatia.[1541] On the other hand, **Tuđman** was isolated within his own camp. **Šušak** for example had the idea of a Croatia that would include Herzegovina alone.[1542] Furthermore, **Mate Granić**, Minister of Foreign Affairs, **Josip Manolić** and **Stipe Mesić** were opposed to reconstituting Greater Croatia because they were aware of how this might affect the young Republic on the international stage.[1543]

By contrast, **Tuđman** enjoyed the support of the Bosnian Croats, who felt threatened by Serbia, on the one hand, and by the existing regime in BiH on the other. Tuđman laid special emphasis upon the fact that he could offer them protection.[1544] He was even pressured by them.[1545] Against the backdrop of war, the break-up of Yugoslavia and uncertainty concerning the viability of Bosnia and

[1535] Herbert Okun, T(F), pp. 16660, 16662.
[1536] Witness AR, P10027 under seal; Peter Galbraith, T(F), p. 6432.
[1537] Peter Galbraith, T(F), pp. 6454, 6455.
[1538] Peter Galbraith, T(F), p. 6580.
[1539] Witness AR, P 10027 under seal, T(F), p. 4712.
[1540] Witness AR, P 10027 under seal.
[1541] Peter Galbraith, T(F), pp. 6429, 6430-6432; Herbert Okun, T(F), pp. 16883, 16885.
[1542] Peter Galbraith, T(F), p. 6429.
[1543] Peter Galbraith, T(F), pp. 6435, 6436.
[1544] Witness AR, P 10027 under seal.

Herzegovina, the Bosnian Croats aspired to establish Herceg-Bosna so that it could eventually be annexed to the Republic of Croatia.[1546]

(1) The Ambiguity Concerning the Idea of Partitioning BiH and the Origins Thereof

It was this specific context that led **Tuđman** and **Milošević** to meet in 1991. **Witness AR** and **Herbert Okun** spoke of these meetings when they testified.[1547] The first one mentioned by **Tuđman** took place in April 1991.[1548] **Tuđman** set out for these two witnesses the plan they had developed for partitioning Serbia into **three zones**: a Serbian zone attached to Serbia, a Croatian zone attached to Croatia and a zone that remained Muslim.[1549]

Over time, **Tuđman** increasingly came to favour the partitioning of Bosnia as a solution,[1550] and in particular, with the Serbs retaining a larger part than the Croats.[1551] As for the Muslims, they would have the right to a small region, even though they accounted for 43% of the population.[1552] On the other hand, no arrangements were made for them to take part in the discussions and negotiations on partition.[1553]

As to the origin of the idea to divide BiH, some claim that **Milošević** was originally behind this plan, whereas according to an American source, it was **Tuđman** who supposedly came up with this idea.[1554]

In view of the evidence, it is thus impossible to affirm beyond a reasonable doubt that **Tuđman** was originally behind the plan to divide BiH between the Serbs and the Croats. On the other hand, it is likewise difficult to establish with certainty whether **Tuđman** would have carried out this division under different political circumstances. The political situation in Yugoslavia in 1990 and the years that followed was extremely difficult and the views Tuđman expressed must be seen within that context.

[1545] Witness AR, P 10027 under seal.
[1546] Herbert Okun, T(F), pp. 16687, 16688, 17041, 17042.
[1547] Witness AR, P 10027 under seal; Herbert Okun, T(F), p. 16663.
[1548] Witness AR, P 10027 under seal.
[1549] Witness AR, P 10027 under seal, Herbert Okun, T(F), p. 16713.
[1550] Witness AR, P 10027 under seal.
[1551] Witness AR, P 10027 under seal.
[1552] Witness AR, P 10027 under seal.
[1553] Witness AR, P 10027 under seal.
[1554] Witness AR, P 10027 under seal.

At a meeting on 6 May 1990, **Tuđman** said that his vision of the future Bosnia also depended on the political and military pressure applied by the Serbs on BiH territory. If Serbia continued to put pressure on Bosnia and Herzegovina, Croatia would need to defend its interests.[1555] If the Serbs exerted political pressure on behalf of Bosnian Serb interests, Croatia would need to follow suit in order to protect the Croats.[1556] In other words, if the Serbs embarked on the creation of a "**Greater Serbia**", the Croats would need to strike back, by setting up a parallel solution, namely, by incorporating Croat-majority territories into the Republic of Croatia.[1557] If they did not, **Tuđman** stated that he had no objection to Bosnia retaining its status as an independent Republic.[1558]

In September 1990, **Tuđman** again referred to Bosnia's highly strategic situation, describing it as "**the flash point" in Yugoslavia**.[1559] According to **Tuđman**, the Bosnian Muslim State was a creation of Serbia, whose objective was to weaken Croatia in Bosnia, and, over time, to create a "**Greater Serbia**".[1560]

He again mentioned Serbian pressure on Bosnia and the military and political implications of a possible annexation of part of Bosnia by the Serbs: such a situation would lead to conflict.[1561]

The situation developed into a conflict between Serbia and Croatia in particular.[1562] The Serbian threat was thus indeed present, despite the international community's intervention and the adoption of a ceasefire.[1563]

At a meeting on **23 April 1991,** as the situation between **Croatia** and **Serbia** was becoming ever more critical**, Tuđman** mentioned a meeting with **Milošević** at which the problem of **Bosnia** took centre stage. **Tuđman** said there that he would readily support the territorial integrity of Bosnia, yet not if it harmed the Croats living there.[1564] This could be done by dividing Bosnia into three entities: the first would join Serbia, the second would join Croatia, and the third would consist of an

[1555] Witness AR, P 10027 under seal.
[1556] Witness AR, P 10027 under seal.
[1557] Witness AR, P 10027 under seal.
[1558] Witness AR, P 10027 under seal.
[1559] Witness AR, P 10027 under seal.
[1560] Witness AR, P 10027 under seal.
[1561] Witness AR, P 10027 under seal.
[1562] Herbert Okun, T(F), p. 16997.
[1563] Herbert Okun, T(F), p. 16998.
[1564] Witness AR, P 10027 under seal.

autonomous Muslim zone.[1565] **Tuđman**'s concept envisaged Mostar as the capital of the Croatian part,[1566] whilst the Muslim part would track the Sarajevo-Tuzla-Zenica-Sarajevo line.[1567]

At the same time, at a meeting on **20 April 1992**, in other words at the time when Croatia had just recognised the independence of Bosnia and Herzegovina, **Tuđman** appeared to move more towards a negotiated solution for the Bosnian Croats. He added that **Tuđman** even attempted to dissuade them from unilaterally establishing an independent territory.[1568]

As **Judge Riad** has emphasised, this evidence appears to feature two diametrically opposed arguments.[1569] The first idea was to divide Bosnia, with a Croat-majority part attached to Croatia. The second was a Croatian intervention in Bosnia for the purpose of protecting the Croats in the event of excessive pressure from Serbia.[1570] On this point, the witness repeated several times that he did not know what **Tuđman**'s ultimate objective was.[1571] He mentioned the fact that using Serb pressure to justify an intervention in Bosnia could be nothing other than a pretext for annexing part of this territory to Croatia. However, he added that it was impossible for him to know what **Tuđman** would have done in the absence of Serb pressure and whether he would have set in motion the plan to divide Bosnia.[1572]

In other words, it is impossible to affirm beyond a reasonable doubt, that Tuđman would have carried out a plan to divide Bosnia in the absence of pressure from the Serbs.

(2) The Limited Role of the *Banovina* in Tuđman's Political Agenda and that of the HDZ[1573]

Franjo Tuđman was one of the principal founders of the **HDZ** or "Croatian Democratic Union" in 1989. This party ran in the first multi-party elections for the Croatian Parliament, **the *Sabor***, in May 1990. Its party platform reveals the nature of Tuđman's political ideas. Prior to the independence of Croatia, this party's primary objective was to galvanise the nation around historic Croatian values and symbols. This was the first party to reject the use of the official socialist emblem in favour of the traditional tricolour emblem and coat of arms. It likewise spoke out in favour of a return to

[1565] Witness AR, P 10027 under seal.
[1566] Peter Galbraith, T(F), p. 6427.
[1567] Herbert Okun, T(F), p. 16714.
[1568] Witness AR, P 10027 under seal.
[1569] Witness AR, P 10027 under seal.
[1570] Witness AR, P 10027 under seal.
[1571] Witness AR, P 10027 under seal.
[1572] Witness AR, P 10027 under seal.

traditional Christian morality and values. Among the newly formed parties, the **HDZ**[1574] was the one that best promoted the idea of forming a Croatian State and achieving self-determination by following the path of a pluralist democracy. At this time, the **HDZ**[1575] envisaged self-determination as greater independence within the federal Yugoslav state. However, this platform was squarely in opposition to Serb hegemony and expansion. He also spoke out in favour of the return of Croatian emigrants to Croatian territory. The party adopted a nationalist and populist position, and encountered tremendous success particularly among Croatian emigrants, the majority of whom supported the idea of strong nationalism advanced by older movements, like that of the fascist *Ustashas*. Sympathisers of this movement were, moreover, invited to the party's first general conference in 1990. Croatian emigrants likewise contributed to its financing in the early days of its existence. During a meeting on 6 May 1990, just after the **HDZ** won the elections in the *Sabor*, but before Tuđman became president, Tuđman spoke with Witness AR about his vision for the future of Croatia. The witness mentioned that **Tuđman** spoke of going back to "Croatia's natural borders".[1576] According to him, Bosnia was historically part of Croatia and the Bosniaks even considered themselves Croats. Nevertheless, he then spoke of the political context of the times and particularly of the pressure the Serbs were exerting on Bosnia.[1577] According to him, if this pressure ceased, Bosnia could retain its status as an independent Republic.[1578]

After having won the first multi-party elections in May 1990, the **HDZ** took control of the State, and particularly of its media apparatus. Standing in the majority in Parliament, its domination was likewise ensured by the deep divisions that existed within the opposition, which was splintered into numerous centrist and communist parties. It is nevertheless important to note that, in the summer of 1991, when Serb pressure on Croatia was strongest, **Tuđman** decided to form a coalition government including all of the opposition parties.

In addition, the party in power adopted a more offensive strategy favouring Croatian independence, in clear opposition to federal Yugoslavia. The widely known platform, elucidated in ten points by **Tuđman** during his inaugural address to the *Sabor,* illustrates these priorities:

[1573] I should like to thank the lawyer, Ms **Margaux PORTIER,** for her contribution.
[1574] P 10402.
[1575] 3D 00320 ("The Truth about Bosnia-Herzegovina").
[1576] Witness AR, P 10027 under seal.
[1577] Witness AR, P 10027 under seal.
[1578] Witness AR, P 10027 under seal.

1. The new Croatian constitution shall be based on the model of European and American democracies, and shall be free in terms of its ideological substance.
2. Croatian sovereignty must be guaranteed within a Yugoslav confederation consisting of sovereign States.
3. Croatia must become more European and join the European Union in order to accelerate its development.
4. The rule of law must be developed and the administration must be modernised. Separation of the three powers must be guaranteed, as well as a fully independent judiciary.
5. Spiritual renewal must make it possible to overcome poisonous divisions.
6. Economic policy must change radically. It is particularly necessary to end nationalisation and re-privatise businesses.
7. Demographics must be controlled by putting an end to emigration and controlling the birth rate.
8. Croatian émigrés must return to the territory and their integration must be facilitated.
9. The primary public service sectors must be improved (culture, education, health, etc. ...).
10. Traditional values and moral standards must be revived in families and schools in order to end the corruption and decay caused by socialism.

The 1992 elections, the first in Croatia following its independence, saw the **HDZ** win in both parliament and the presidential election, boosted by its military victory and international recognition of the country's independence.

After Croatia's independence, **Tuđman**'s principal priority[1579] appeared thenceforth to be his wish for recognition as a State on the international stage. During a meeting on 20 April 1992, he laid particular emphasis on the economic and diplomatic ties that could be created between Zagreb and Washington.[1580] He also hoped for economic aid from the United States and the International Monetary Fund.[1581]

[1579] P 08632 ("Balkan Odyssey" by Lord David Owen, 1995).
[1580] Witness AR, P 10027 under seal.
[1581] Witness AR, P 10027 under seal.

All of these factors make it possible to show what little weight **Tuđman** assigned to the *Banovina* as a **political objective**. This also manifests itself in the **Croatian Constitution**, adopted in December 1990. The ***Banovina*** is mentioned there within the context of history, and not as a constituent element of the Constitution, which demonstrates, yet again, that the value Tuđman assigned to the ***Banovina* was historical, rather than political.** Under such circumstances, I find it difficult, as a reasonable Judge, to follow the Prosecution's line in relation to a JCE based on the restoration of the *Banovina* in furtherance of a "Greater Croatia".

(g) The JCE Put to the Factual Test

The alleged JCE includes three senior Croatian leaders: **Franjo Tuđman, Janko Bobetko and Gojko Šušak**.[1582] The Prosecution alleges that the **JCE** was formed prior to 1991.[1583] This leads me to believe that when the Tribunal was created in 1993, and the first Prosecutor took office, assisted by a staff of Deputy Prosecutors, they were able to collect evidence to characterise this JCE as run by these three senior public figures, inasmuch as the Prosecution had ample time prior to compiling the Indictment to carry out a detailed investigation of these senior leaders.

One is compelled to note, however, that the Indictment was not filed until **4 March 2004**, that is to say, almost ten years after the creation of the Tribunal and nearly five years after the Appeals Judgement in the ***Tadić* Case**, where the Prosecution set forth the doctrine of common purpose as a ground for appeal.[1584] Thus, the Prosecutor took years to "get into gear" in the domain of JCE, despite the ***Tadić* Appeals Judgement** being rendered on 15 July 1999. Moreover, it is interesting to delve into the individual situation of these three senior leaders, who might ordinarily have been prosecuted alongside the other members of the JCE cited in the Indictment. It would seem that these senior leaders died, each in turn:

- **Franjo Tuđman on 10 December 1999;**
- **Janko Bobetko on 29 April 2003;**
- **Gojko Šušak on 3 May 1998.**

It is surprising to realise that the Prosecution waited for these deaths to compile the Indictment, because they occurred in 1998, 1999 and 2003. An attentive observer cannot fail to ask whether the timing chosen for the Indictment shows that the Prosecution was not willing to place certain senior

[1582] Indictment, para. 16.1.
[1583] Indictment, para. 15.

Croatian leaders in the position of potential Accused? There is no evidence to support a finding one way or the other, but the question is worth asking, as I see it.

It would thus seem that the Prosecutor took an "inclusive approach" by including the dead within its JCE theory, knowing that they would not be able to defend themselves. Of course, a JCE planned in Zagreb might have existed, but then issues inherent to the Croatian constitutional order would arise, and one must recall that the Constitution[1585] was modelled on the French Constitution of the Fifth Republic. In that constitutional framework, the Head of State, elected by the people, does not hold all powers, because he must reckon with the existence of a Parliament (the *Sabor*, in this case). Thus, even though he leads and conducts the political course of the nation, he does so under a "contract of trust" based on universal suffrage. He therefore cannot conduct foreign or domestic policy contrary to the voters' aspirations, contrary to the will of the parliamentary majority or contrary to his election promises.

The gist of the Prosecutor's logic appears to be that the alleged JCE in which the three senior leaders were involved actually derives from the will of the Croatian people, which the Prosecutor has failed to establish. Is it even conceivable that **Franjo Tuđman** would have been able to conceal his own politics from the Croatian people at a time when Croatia was deeply involved on the international stage at the UN and European level, and in various international conferences?[1586] Moreover, by dispatching "volunteers", the matter of direct or indirect aid to the Croats in the neighbouring republic was an open secret.[1587] For this reason, there was apparently a national consensus concerning this aid without any official involvement by the Republic of Croatia,[1588] but the said consensus lasted only briefly due to the fact that there were deaths among the volunteers, which led to it being rejected. The Prosecutor put forward the theory of a double game by **Franjo Tuđman**.[1589] Can we sincerely envision, in such high-level political matters – under constant oversight by public opinion and the media – that a responsible politician would venture down the path of a double game? I do not think so, particularly inasmuch as the Presidential transcripts establish one **constant feature** in the statements by **Franjo Tuđman** to the effect that **Croatia**

[1584] *Tadić* Appeals Judgement, 15 July 1999, para. 175.
[1585] P 00019.
[1586] P 03346; P 02441; 1D 01543; P 01391; 1D 01314.
[1587] P 02719, paras 21 and 22; 1D 00815; P 07762; P 03827.
[1588] P 00068, pp. 57 and 58; P 00353, pp. 23 and 24; P 04740, p. 21.
[1589] Prosecution Final Trial Brief, para. 173.

recognised the **Republic of Bosnia and Herzegovina**[1590] and that **Security Council** Resolution 819[1591] expressly acknowledged the **inviolability** of the Republic of Bosnia and Herzegovina.

For this reason, it seems impossible to hold that the purpose of **ethnic cleansing** was "remote controlled" from **Zagreb** because this purpose, if it did indeed exist, would have had significant consequences for the Croatian economy via the massive influx of refugees, which caused problems domestically; it should be noted that these refugees were already quite numerous, because there was an estimated 400,000 of them at least.[1592] Was the game somehow "worth the candle", in other words, did it benefit the Croats in Herzegovina by motivating them to drive out the Muslims who then had to be dealt with and managed administratively, economically and socially? I must acknowledge that I have difficulty accepting this logic because what advantage would there have been for the Republic of Croatia to have new and quite different problems outside of its own territory which had problems of its own? It appears to me that the **Republic of Croatia** was not able to bear such a merger economically. By way of example, the German Federal Republic (FRG) was able to absorb the German Democratic Republic (GDR) because of its economic power, but this did not hold true for the Republic of Croatia.

Moreover, one ought likewise to bear in mind that the **Republic of Croatia** was **weakened** by domestic Serbian movements that had constituted administrative entities (Serbian Krajina) over which Zagreb wielded no authority.[1593] Therefore, this leads me to envisage an entirely different scenario, which is that there was a JCE limited to just **Mate Boban, Jadranko Prlić** and some of the Accused. An examination of the Presidential transcripts and the contact that **Franjo Tuđman** had with these leaders reveal that there was **no unity of perspective**[1594] which was attested to, moreover, by the final discussions between **Tuđman** and **Jadranko Prlić** in 1995 when **Franjo Tuđman** examined with **Prlić** the reasons for the situation prevailing at the time.[1595]

Furthermore, one ought likewise to bear in mind the fact that the Croatian leaders from Herzegovina enjoyed only **modest support** from **Franjo Tuđman**, who did not hesitate to incite the departure of **Mate Boban**.[1596] On the other hand, and particularly when the **Old Bridge of Mostar** was destroyed, shocking the international community, he dismissed **Slobodan Praljak**, his

[1590] P 00167, p. 6; P 00336, pp. 42, 45; P 01544, p. 24.
[1591] P 02150.
[1592] P 00414, p. 19; 1D 00397.
[1593] P 10528.
[1594] P 06930, pp. 34-37.
[1595] P 08848, p. 23.

personal representative in the Republic of Bosnia and Herzegovina, as well as the Minister of Defence, **Bruno Stojić.** One may explain these departures by the fact that **Franjo Tuđman** never approved of the acts committed by the supposed members of the Herceg-Bosna JCE. The sanctions imposed after the crimes were committed provide the best evidence for this. Moreover, each time that incidents broke out in Bosnia and Herzegovina of which **Franjo Tuđman** was unaware, he demanded detailed explanations. This was particularly the case with the destruction of the **Old Bridge**[1597] and the incidents in **Stupni Do**.[1598]

For this reason, if we consider that a small group headed by **Mate Boban** undertook collective action for the purpose of **ethnic cleansing**, it would be incumbent upon us to distinguish them from the three senior Croatian leaders. Does this vision of things square with the reality on the ground? I do not think so, because the reality on the ground was entirely different. Although from my point of view there was a common plan and purpose, how could these materialise with the ongoing presence of the international community on the ground?[1599] For instance, various NGOs, the ICRC, and the UNHCR were all on site and were relentless in notifying local authorities **by letter** when an incident occurred.[1600] Under such conditions, how does one put together a plan given that there will be obstacles at every moment, and, particularly insofar as the objective pursued, which was to obtain the recognition of a homogeneous geographic area, had already been realised under the **Vance-Owen Plan**?[1601] Was it necessary to commit to going down that road, with all of its obstacles, when the purpose had already been achieved, as it had been approved of by **the Vance-Owen Plan**?[1602] In reality, was the situation not entirely different, resembling the one described in the submissions of the Defence, alleging that HVO political and military authority was disputed by **local potentates** who conducted a local policy within their municipalities with goals that differed from **Mate Boban**'s?[1603]

The best proof of this is that, throughout this time, there were never any **standing conflicts,** but rather, **only sporadic conflicts** here and there, and that, on the days and hours that followed, the international community intervened to enforce the ceasefire. Unfortunately, one rightly notes that crimes were committed during these **sporadic conflicts**. The Defence, moreover, does not contest

[1596] P 07485, p. 7.
[1597] P 06581, p. 20.
[1598] P 06581, pp. 9-11.
[1599] P 02746; P 07834; P 09899 under seal; P 03900 under seal.
[1600] P 08014; P 07636; P 05967; P 09708 under seal.
[1601] P 01043.
[1602] P 01043.
[1603] Stojić Defence Final Trial Brief, paras 8, 116, 128.

this, explaining that the crimes could have occurred due to the poor training of HVO soldiers - who were not professional soldiers, but rather, locals -[1604] to the lack of command authority and to the game played by local political leaders[1605] as we were able to observe in **Stupni Do**, where three of them were arrested.[1606]

For this reason, if there was neither a JCE managed from Zagreb, nor a JCE launched and initiated by **Mate Boban**, are we not confronted with a **classic internal conflict** where local political aspirations, the egos of some, and political ambition led to **unmanageable situations** in terms of **authority** and **command**? The Prosecutor does recognise this to some extent. However, he ascribes no weight to the existence of an ABiH offensive seeking to conquer territory and gain access to the sea, which it had not been formally granted under the Vance-Owen Plan.[1607] Moreover, it must be noted that the Muslim offensive was successful, and that, over time, the influence of the HVO diminished to the extent that it was only in a position to dominate in limited areas.[1608]

Faced with a situation of this type, can we seriously consider – at a time when the HVO defence lines had been thoroughly penetrated and there was no military relief – that there was still a willingness and an ability to implement this plan? Particularly in that the **ethnic make-up,** which seems to me to be a **determining factor**, meant that with **16%** of the population, the HVO was not capable of extending its authority throughout all of Bosnia and Herzegovina, with the exception of certain strategic territories defined in the **Vance-Owen Plan**.[1609]

Proceeding from this observation, there may have been the start of a plan in May 1992, but during the half-year that followed, the very involvement of the **Badinter Commission**[1610] and the work done as part of the **London Conference**,[1611] meant that this outline was no longer viable. In the end, the only plan that could have unfolded would have been **an advance implementation of the Vance-Owen Plan**. Yet does that mean that there was a criminal purpose behind its implementation? It would be interesting to know at that very moment which crimes were to accompany this implementation and characterise the JCE. It is obvious that from mid-January 1993 to November 1993, an entire spate of crimes was committed; however, examining each of these

[1604] Praljak Defence Final Trial Brief, para. 47.
[1605] Petković Defence Final Trial Brief, paras 26-29.
[1606] P 06026, p. 3.
[1607] P 01043.
[1608] 4D 00560; 4D 00561; 4D 00562; 4D 00563; 4D 00564; 4D 00565; 4D 00566.
[1609] P 01043.
[1610] 4D 00540; P 00109.
[1611] P 09536, pp. 46-47.

crimes enables us to connect a portion of them to the fighting between the ABiH and the HVO (Gornji Vakuf, Jablanica, Prozor, Mostar, Vareš) and to the existence of the camps (in reality, detention sites that were only labelled camps), at a time when there were no penitentiary structures conforming to international norms. Furthermore, during the prior conflict between the Serbs, the Croats and the Muslims, certain persons were detained and mistreated, but perhaps for reasons other than ones related to the implementation of **a plan**.

The ethnic cleansing that is charged[1612] may have other causes than the achievement of this purpose. There may have been other reasons based upon **population exchange and**, **providing security for the civilian population.** Facilitating the release of civilians or their departure abroad made it possible to reduce the number of problems that had to be dealt with. In this context, it was in everyone's interest, since the departures were coordinated by the ICRC and UNPROFOR participated in these departures by lending trucks, logistics and personnel.[1613]

Can we for one second imagine that, with full knowledge of the facts, the international community would have assisted with **ethnic cleansing**? If **UNPROFOR** had not provided support, it would have been impossible for the HVO to release prisoners. Therefore, I am likewise persuaded that the majority of these forcible transfers and departures might also have been caused by the **need to protect civilian populations** and to offer them another, more peaceful living environment by allowing them to take up residence in Croatia or a third country.

Finally, I find it also necessary to highlight the fact that the HVO was not set up as an entity directed **against** the Muslims and **President Izetbegović**, but as an entity directed **against** the Serbs, as attested by the Preamble:[1614]

"Faced with the ruthless aggression of the Yugoslav Army and Chetniks against the Republic of Bosnia and Herzegovina and the Republic of Croatia, with the tremendous number of lives lost, with the suffering and pain, with the fact that age-old Croatian territories and goods are being coveted, with the destruction of the Republic of Bosnia and Herzegovina and its legally elected bodies, the Croatian people of Bosnia and Herzegovina, in these difficult moments of their history when the last Communist army of Europe, united with the Chetniks, is endangering the existence of

[1612] Prosecution Final Trial Brief, para. 262.
[1613] P 07188 under seal; P 10287 under seal, para. 70; Witness DW, T(F), p. 23087; P 07238; P 05219 under seal.
[1614] P 00078; P 08973, pp. 44, 45.

the Croatian people and the Republic of Bosnia and Herzegovina, are deeply aware that their future lies with the future of the entire Croatian people".

This is obscured from view by the Prosecution, which fails to raise the matter, leaving us to assume that the Croatian Community of Bosnia and Herzegovina was constituted in order to secede with the Muslim part of the Republic of Bosnia and Herzegovina. Moreover, from a legal point of view, it seems that such a creation was possible under the provisions of the Constitution of the Republic of Bosnia and Herzegovina. The annulment of legislative texts from this entity by the Constitutional Court was based on issues of procedural compliance because Herceg-Bosna was created without parliamentary approval.[1615]

(3) Selecting the Mode of Responsibility

Bearing in mind the vast number of choices presented to the Judges by the Prosecution for determining the mode of responsibility for each of the Accused, I thought it necessary to shed some light on the mode of responsibility upheld for each of the Accused, with the exception of the JCE mode of responsibility, which I do not maintain.

As I have set aside that mode of responsibility, I was compelled to examine the **most suitable** mode of responsibility taking into account the evidence provided by the parties. Selecting the mode of responsibility falls to the Judges of the Chamber, as recalled by the ***Milutinović*** **Chamber.**

In the ***Milutinović*** **Case**, the Prosecution chose to charge the six Accused under every mode of responsibility in Articles 7(1) and 7(3) of the Statute.[1616] The Chamber is therefore under the duty to select a **single mode** of responsibility, in order to make a finding concerning the responsibility of each of the Accused for every one of the Counts in the Indictment.[1617] The Chamber is not bound to examine **every** mode of responsibility for all of the crimes and counts in the Indictment. The Chamber may, on the contrary, choose to convict only for those it considers most faithfully match the conduct of the Accused.[1618] On this point, the Trial Chamber in the ***Krstić*** **Case** added that the Chamber was free to choose within the bounds of the Indictment and noted that the Accused had

[1615] P 00505; P 08060.
[1616] *Milutinović* Judgement, paras 75-76.
[1617] *Milutinović* Judgement, para. 76.
[1618] *Milutinović* Judgement, para. 76, referring to the *Krstić* Judgement, para. 602; *Kunarac et al.* Judgement, paras 388-389.

been duly informed of the charges against him.[1619] Moreover, the ***Milutinović*** **Chamber** adds that the Chamber must observe certain principles when deciding about the mode of responsibility it deems most appropriate.[1620]

First of all, when the Chamber decides to convict an Accused for committing a crime under Article 7(1), it can elect to consider the fact of having planned, instigated or ordered the crime as an aggravating factor in sentencing. Nevertheless, an Accused may not be held responsible under several modes of responsibility in Article 7(1) for the same crime.

On the contrary: if the Chamber's findings enable it to hold the Accused responsible under both modes of responsibility in Article 7(3), the Chamber may elect to convict him under either or both of these modes.[1621]

Moreover, a Chamber may not sentence an Accused pursuant to an Article 7(1) mode of responsibility **and** an Article 7(3) mode of responsibility. When the criteria pertaining to these two distinct modes of responsibility are met, the Trial Chamber must then enter a conviction under Article 7(1) and consider the position as a superior to be an aggravating factor when determining the sentence.[1622]

In the ***Blaškić*** **Case**, the Appeals Chamber found that, generally speaking, the mode of responsibility under Article 7(1) takes precedence over Article 7(3).[1623] Article 7(1) most frequently addresses the direct responsibility of the Accused, whereas Article 7(3) addresses more indirect modes of responsibility.[1624] At the same time, the ***Blaškić*** Appeals Chamber and Trial Chamber held that certain modes of responsibility under Article 7(1) may also, under certain circumstances, be considered indirect by omission.[1625] The Trial Chamber stated the following, which was confirmed by the Appeals Chamber:

"It will be illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them.

[1619] *Krstić* Judgement, para. 602.
[1620] *Milutinović* Judgement, para. 76.
[1621] *Milutinović* Judgement, para. 78, referring to the *Strugar* Judgement, para. 373; *Blagojević* Judgement, para. 793.
[1622] *Milutinović* Judgement, para. 78, referring to the *Blaškić* Appeals Judgement, paras 91-92; *Kajelijeli* Appeals Judgement, paras 81, 82, 91; *Čelebići* Appeals Judgement, para. 745.
[1623] *Milutinović* Judgement, para. 79, referring to the *Blaškić* Appeals Judgement, para. 91.
[1624] *Milutinović* Judgement, para. 79, referring to the *Blaškić* Appeals Judgement, para. 91; *Blagojević* Judgement, para. 683.

However, as submitted by the Prosecution, the failure to punish past crimes, which entails the commander's responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to the fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of further crimes".[1626]

The *Milutinović* Trial Chamber thus construes the ***Blaškić* Appeals Judgement** as not assigning priority to Article 7(1) omission modes over Article 7(3) omission modes.[1627] As a result, the Trial Chamber held that the ***Blaškić* Appeals Judgement** found that Article 7(1) modes of responsibility - entailing a positive act on the part of the Accused - take precedence. On the other hand, the responsibility of an Accused for an omission may at the same time be charged pursuant to Article 7(3) and Article 7(1) for instigation or aiding and abetting.[1628]

In the *Prlić* Case, the Prosecution has made the choice to charge the responsibility of the various Accused under the mode of responsibility of participation in a **joint criminal enterprise**. Despite this, in the Indictment, it invariably looks to **all** of the modes of responsibility under Article 7(1) and Article 7(3).[1629] The Prosecution, for instance, invokes planning, ordering and instigation[1630] as well as aiding and abetting[1631] for failing to meet their duties.

Regarding aiding and abetting by omission (cf. paragraph 136 *et seq*. of the Final Trial Brief), the Prosecution says that there are three kinds of **duties incumbent** upon the representatives of the State controlling a given territory: the duty to protect prisoners (the *Mrkšić* duty), the duty to protect civilian detainees and to release them if they do not constitute a threat to security (the *Čelebići* duty) and the general duty to protect civilians in occupied territories.[1632]

[1625] *Milutinović* Judgement, para. 79, referring to the *Blaškić* Appeals Judgement, para. 664.
[1626] *Blaškić* Appeals Judgement, para. 89, referring to the *Blaškić* Judgement, para. 337.
[1627] *Milutinović* Judgement, para. 79.
[1628] *Milutinović* Judgement, para. 79.
[1629] Prosecution Final Trial Brief, para. 107.
[1630] Prosecution Final Trial Brief, paras 129-132.
[1631] Prosecution Final Trial Brief, paras 133-138.
[1632] Prosecution Final Trial Brief, para. 301.

(a) The Duty to Protect Prisoners (the *Mrkšić* Duty)

As agents of the Detaining Power, every one of the Accused had the duty to protect the prisoners in their custody.[1633] The jurisprudence in respect of this duty was elucidated in the ***Mrkšić* Appeals Judgement**, in which the Appeals Chamber specified that agents of States have the duty to protect those prisoners for whom they are responsible, whether *de jure* or *de facto*. The Prosecution contends that **Jadranko Prlić and Bruno Stojić**, as civilian leaders of the HZ H-B Government, were responsible for the HVO prisoner camps and that they had knowledge of the **poor conditions of confinement**.[1634] **Slobodan Praljak and Milivoj Petković**, as commanding officers of the HVO Main Staff, took part in **assigning** the prisoners to **forced labour**. They likewise approved of the crimes committed by the HVO units subordinated to them.[1635]

(**b) The Duty to Protect Civilian Detainees (the *Čelebići* Duty)**

Every one of the Accused likewise had the duty to protect civilian detainees and to **release them if there was no reason to think they constituted a threat to security or if they had not been afforded the relevant procedural guarantees.**[1636]

The Prosecution contends that the **Muslim civilian prisoners** detained by the HVO did not constitute a threat **to security**.[1637] The two campaigns of arrests in Mostar – in May 1993 and the one that commenced on 30 June 1993 demonstrate that the mass arrests of **Muslim civilians** were motivated by **ethnic** and not **security considerations**.[1638] For instance, during the campaign of arrests ordered by **Milivoj Petković on 30 June 1993**, the HVO imprisoned civilians, **including women, children and elderly persons who could not constitute a threat because there were not fit for combat**.[1639] The Accused had knowledge of this. During a meeting with **Valentin Corić**, for example, the military police acknowledged that the civilians had been arrested indiscriminately, without representing a threat.[1640]

[1633] Prosecution Final Trial Brief, para. 302.
[1634] Prosecution Final Trial Brief, para. 304.
[1635] Prosecution Final Trial Brief, para. 305.
[1636] Prosecution Final Trial Brief, para. 309.
[1637] Prosecution Final Trial Brief, para. 301.
[1638] Prosecution Final Trial Brief, paras 311-313.
[1639] Prosecution Final Trial Brief, para. 313.
[1640] Prosecution Final Trial Brief, para. 313; P 03663.

On the other hand, the detainees were not afforded **procedural guarantees** to determine whether they could be released by the HVO. The HVO did not proceed to conduct the necessary evaluations in order to determine whether they constituted a threat to security.[1641] They were not afforded any periodic review of their situation and the criteria for release were arbitrary.[1642]

Finally, the **civilians were not separated from the prisoners of war**, making it impossible to distinguish between them.[1643] The commission for resolving the status of detainees and their release, created by **Bruno Stojić** in August 1993 and directed by **Berislav Pušić**, was in reality, the Prosecution says, charged with setting up a **procedure for deportation, not one for release**.[1644] That commission **never convened**, **either**.[1645]

By failing to release those prisoners who did not constitute a threat or whose situation was not regulated, the Prosecution contends that every one of the Accused is guilty of having committed the crimes charged under Counts 10 and 11.

(c) The General Duty to Protect Civilians in Occupied Territory

Finally, the Prosecution contends that **Milivoj Petković**, and then **Slobodan Praljak** after 24 July 1993, had the duty to protect **civilians in HVO-occupied territory**.[1646] This duty was thus applicable to the territories of Prozor, Gornji Vakuf, Sovići and Doljani, West Mostar, Ljubuški, Stolac and Čapljina. **Prozor had in fact fallen under HVO control by 25 October 1992**.[1647] That control extended to the areas around Grevići, Toščanica and Gornja Slatina in April 1993.[1648] The crimes committed in Prozor after these dates were **therefore committed in HVO-occupied territory.** It fell to their Chief of the Main Staff, **Milivoj Petković** and later **Slobodan Praljak**, to protect the civilians and property victimised by these crimes. The Prosecution contends that by not meeting this general duty, they are **guilty of aiding and abetting these crimes by omission**.

[1641] Prosecution Final Trial Brief, paras 317; P 03663; P 09078.
[1642] Prosecution Final Trial Brief, paras 315, 318, 319.
[1643] Prosecution Final Trial Brief, paras 315, 320.
[1644] Prosecution Final Trial Brief, para. 318.
[1645] Prosecution Final Trial Brief, para. 319; Josip Praljak, T, pp. 14779, 14780.
[1646] Prosecution Final Trial Brief, para. 324.
[1647] Prosecution Final Trial Brief, paras 326-330.
[1648] Prosecution Final Trial Brief, para. 331.

In the Municipality of Gornji Vakuf, HVO forces occupied the villages of Ždrimci, Strmica, Ždrince and Palači commencing on **21 January 1993** at the latest.[1649] **Sovići and Doljani** were occupied by the HVO from 17 April 1993 onward.[1650] The Prosecution claims that **Milivoj Petković**, in his capacity as an HVO commander in these occupied villages at a time when the crimes were committed, is therefore guilty **of having aided and abetted these crimes by omission**.[1651]

West Mostar fell under HVO control no later than 9 and 10 May 1993. The areas of Ljubuški, Stolac and Čapljina were occupied by the HVO starting in **July 1993**.[1652] The crimes committed after this date that targeted the civilian populations and property in **West Mostar, Ljubuški, Stolac and Čapljina can therefore be attributed to Milivoj Petković** and then **Slobodan Praljak** because they did not meet their general duty to protect civilians. They are therefore guilty, the Prosecution says, of having aided and abetted these crimes by omission.[1653]

The Indictment thus explicitly refers to other modes of responsibility. In the ***Gotovina* Appeals Judgement**, the Appeals Chamber decided to examine the other modes of responsibility.

In the ***Gotovina* Appeals Judgement,** rendered on **16 November 2012**, the Appeals Chamber **reversed** the decision of the Trial Chamber, which had found that there was a **joint criminal enterprise designed to drive out the Serbs from Krajina by force or the threat of force.** The Chamber then decided to examine whether the responsibility of the accused could be upheld under other modes of responsibility.

The appellants contended that the **Appeals Chamber** could not examine other modes of responsibility because this did not form **part of their requests, which were restricted to JCE**.[1654] Moreover, **Gotovina** contended that this would deprive them **of their right to lodge an appeal** in the event of conviction on the basis of an **alternate mode of responsibility**.[1655] Furthermore, this option was ruled out by the principles of *res judicata* and *non bis in idem.*[1656]

[1649] Prosecution Final Trial Brief, para. 335.
[1650] Prosecution Final Trial Brief, paras 338, 341.
[1651] Prosecution Final Trial Brief, para. 337.
[1652] Prosecution Final Trial Brief, para. 349.
[1653] Prosecution Final Trial Brief para. 348.
[1654] *Gotovina* Appeals Judgement, para. 100.
[1655] *Gotovina* Appeals Judgement, para. 101.
[1656] *Gotovina* Appeals Judgement, para. 101.

The Prosecutor responded to this argument by saying that the Appeals Chamber had **already examined charges in other cases on the basis of alternate modes of responsibility, doing so in the absence of express arguments by the Prosecution or any supplemental pleading from the parties**.[1657] **The Prosecution deemed this to fall within the discretion of the Appeals Chamber.**[1658]

The Appeals Chamber says that this practice is derived from **Article 25(2) of the Statut**e, which provides that **the Appeals Chamber may revise the judgements rendered by Trial Chambers.**[1659] **Concerning the rights of the Accused, the Appeals Chamber holds that they are not undermined by this practice.**[1660] This notwithstanding, the Chamber is to examine **alternative modes of responsibility** in keeping with the rights of the Accused.[1661]

Regarding **Gotovina**, the Appeals Chamber found that there was nothing in the findings of the Trial Chamber that could constitute **an *actus reus*** on which to base a conviction pursuant to **alternate modes of responsibility**.[1662]

Concerning **Markač**, the Appeals Chamber noted that it had on several occasions revised judgements by entering convictions based on alternate modes of responsibility to those in the Indictment. **The Appeals Chamber points out, however, that in those cases, the errors of the Trial Chamber were of limited impact. At the same time, the Appeals Chamber, in these other cases never reversed the legal findings underpinning the Trial Chamber's determination that the various Accused took part in a JCE**.[1663]

In the ***Simić* Case,** for example, the Appeals Chamber reached the conclusion that the Indictment **was sufficiently defective as to render the trial unfair**, because the Accused was not put on notice of the fact that he was charged **under the JCE mode of responsibility** until the end of the Prosecution case. Having made these findings, the Appeals Chamber then examined whether **the Accused could be responsible for aiding and abetting persecution pursuant to Article 7(1).** The Appeals Chamber then found he was responsible under this new mode of responsibility.[1664]

[1657] *Gotovina* Appeals Judgement, para. 103.
[1658] *Gotovina* Appeals Judgement, para. 103.
[1659] *Gotovina* Appeals Judgement, paras 105, 106.
[1660] *Gotovina* Appeals Judgement, para. 107.
[1661] *Gotovina* Appeals Judgement, para. 108.
[1662] *Gotovina* Appeals Judgement, para. 135.
[1663] *Gotovina* Appeals Judgement, para. 155.
[1664] *Simić* Appeals Judgement, paras 79-191, 301.

In **the *Krstić* Case**, the Appeals Chamber voided the pronouncement of **Krstić**'s guilt for taking part in a **joint criminal enterprise with the purpose of committing genocide. The Appeals Chamber then examined the aiding and abetting mode of responsibility, entering a verdict of guilty for aiding and abetting genocide.**[1665]

In the ***Vasiljević* Case**, the Appeals Chamber decided that – having taken into account the evidence and the circumstances of the case at hand - the finding that the Accused shared in the intent to kill seven Muslims was not the only possible inference. Therefore, the Appeals Chamber says that the Accused cannot be held responsible as a co-perpetrator in connection with a JCE. Having examined the other modes of responsibility, the Appeals Chamber found the Accused guilty of **aiding and abetting murder and persecution**.[1666]

Concerning the Accused **Markač**, the Trial Chamber determined that he was responsible on the basis of two elements: the unlawfulness of the attack on the town of Gračac and his failure to act. The Appeals Chamber recalls that it reversed the findings regarding the artillery attack on the town of Gračac. The Appeals Chamber then held that **Markač**'s failure to act did not satisfy the criteria for the modes of responsibility under Article 7(3) or under aiding and abetting.[1667] The Chamber therefore held that there was no other evidence to support a finding of guilt on the basis of alternate modes of responsibility.[1668]

Judge Meron joined a separate opinion to that Appeals Judgement. He notes that the Judgement in question was creating a precedent by inviting the parties to submit their observations concerning a review of alternate modes of responsibility. On the other hand, this Judgement has clarified the relevant jurisprudence.[1669] **He then proceeds to acknowledge that the Appeals Chamber does have the authority to examine other modes of responsibility, particularly if it lies in the interests of justice to do so**.[1670] Nevertheless, the Appeals Chamber cannot resolve every error committed by the Prosecutor or the Trial Chamber. Its authority must be exercised selectively in order to avoid violating the rights of the Defence or opening a second trial in place of revising the

[1665] *Krstić* Appeals Judgement, paras 134-144.
[1666] *Vasiljević* Appeals Judgement, paras 115-135, 139-143, 147.
[1667] *Gotovina* Appeals Judgement, para. 156.
[1668] *Gotovina* Appeals Judgement, para. 156.
[1669] Separate Opinion of Judge Meron in the *Gotovina* Appeals Judgement, para. 3.
[1670] Separate Opinion of Judge Meron in the *Gotovina* Appeals Judgement, para. 7.

Trial Judgement.[1671] This assessment must be made on a case-by-case basis, but generally the Judge considers that the Appeals Chamber lacks the authority to conduct comprehensive revision of the approaches adopted or decisions taken by a Trial Chamber:

"*As a general matter, I do not believe that the Appeals Chamber's authority serves as a licence for wholesale reconstruction or revision of approaches adopted or decisions taken by a trial chamber*".

Accordingly, he recalls the jurisprudence in this regard. The Appeals Chamber has thus never examined alternate modes of responsibility when reversal was due to substantive errors in the indictment. The Appeals Chamber has only proceeded in this manner after discovering **technical errors**, or after having found that the appellant **did not share the common purpose of a JCE.**[1672] He then cites the three appeals judgements already invoked by the majority in the Appeals Chamber in the ***Gotovina*** **Appeals Judgement**. He notes that in the ***Krstić*** Appeals Judgement, the Appeals Chamber did not reverse the finding that a JCE existed. The Appeals Chamber found that **Krstić** did not have the intent to commit genocide but that he possessed knowledge of the crimes committed in connection with that genocide. He noted that the existence of the crimes themselves was never questioned in the ***Dragomir Milošević*** Appeals Judgement. The Appeals Chamber thus found that the evidence did not support a finding that **Dragomir Milošević** ordered these crimes directly, but on the other hand, he was responsible as a superior. Lastly, concerning the ***Simić*** Case, **Judge Meron** noted that the Appeals Chamber did indeed reverse the Trial Chamber's findings concerning the existence of a JCE on the basis that the verdict undermined the rights of the Defence. However, he notes that the aiding and abetting mode of responsibility had been extensively discussed by the parties, both at trial and on appeal.

According to him, the Appeals Chamber ought not to have conducted an analysis of the alternate modes of responsibility, even though he agrees with its ultimate findings. He notes that discussions revolving around alternate modes of responsibility were almost entirely absent in the Judgement and appeal briefs. Moreover, he recalls that the Appeals Chamber reversed the Trial Chamber's main finding, including the finding that a JCE existed. Accordingly, he considers that engaging in an analysis of this sort is **unfair** to the Appellant, because had the Chamber's analysis been different, he would have been sentenced for crimes quite different from those with which he had been charged at trial and on appeal.[1673]

[1671] Separate Opinion of Judge Meron in the *Gotovina* Appeals Judgement, para. 4.
[1672] Separate Opinion of Judge Meron in the *Gotovina* Appeals Judgement, para. 5.
[1673] Separate Opinion of Judge Meron in the *Gotovina* Appeals Judgement, para. 6.

This dissenting opinion, while representing the views of its author alone, has the advantage of providing a clear outline of the ***Krstić, Simić*** and ***Dragomir Milošević*** jurisprudence. It then follows from the above that an alternate mode of responsibility may be determined by the Appeals Chamber **only** in the event of **technical errors** or if the appellant did not share in the common purpose of the JCE.

Judge Pocar likewise joined a dissenting opinion to the ***Gotovina*** **Appeals Judgement**. Concerning the other modes of responsibility, he limits his dissenting opinion to explaining the reasons why he rejects the Majority's reasoning from a purely legal perspective.[1674] According to him, the Chamber's analysis is based on a legal confusion, specifically when it refers to entering a new conviction on appeal. According to him, revising a conviction by examining an alternate mode of responsibility is different from entering a new conviction.

Contrary to the Majority's reasoning, revising an appellant's conviction for a certain crime from one mode of liability to another is not equivalent to entering a new conviction on appeal.[1675]

He notes, for instance, that in the three cases cited above, the Appeals Chamber simply questioned the mode of responsibility and not the conviction for the crime itself.[1676] In these cases, the Appeals Chamber **re-characterised** the Trial Chamber's verdict, finding the Accused guilty of the same crimes but on the basis of a mode of responsibility better suited to him.[1677]

He thus concludes, that, in his view, the Appeals Chamber lacks the authority to introduce new charges at the appellate stage, in keeping with the fundamental principles whereby a person accused of and sentenced to a crime must be afforded the right to have his conviction reviewed by a higher tribunal.[1678]

Judge Pocar's opinion shows that what matters is **the crime** and the verdict of guilt with regard to that crime. I am completely in agreement with him, on this point.

[1674] Dissenting Opinion of Judge Pocar in the *Gotovina* Appeals Judgement, para. 31.
[1675] Dissenting Opinion of Judge Pocar, annexed to the *Gotovina* Appeals Judgement, para. 33.
[1676] Dissenting Opinion of Judge Pocar in the *Gotovina* Appeals Judgement, para. 33.
[1677] Dissenting Opinion of Judge Pocar in the *Gotovina* Appeals Judgement, para. 33.
[1678] Dissenting Opinion of Judge Pocar in the *Gotovina* Appeals Judgement, para. 37.

He then states that the Appeals Chamber does not have the right to introduce new grounds for conviction during the appellate phase. I agree with this statement, too, but does the fact of altering the mode of responsibility then constitute **new grounds for conviction**? I do not, for my part, believe this. The basis for conviction is **the crime** *per se*, as defined in Article 2 (Serious Breaches of the Geneva Conventions of 1949), Article 3 (Violations of the Laws or Customs of War), Article 4 (Genocide) and Article 5 (Crimes against Humanity). The applicable mode of responsibility derives from the circumstances described in Article 7 of the Statute; it should be noted that membership in a JCE is not mentioned ....

In my opinion, if the mode of responsibility is changed *in fine*, there can be no question of introducing new grounds for a conviction.

The Accused is responsible for a crime under a mode yet to be defined. It is surely worthy of note that the Prosecution took such meticulous care to indicate that the Accused could be pronounced **guilty** under **every one of** the modes of participation referred to in Article 7(1), including commission through participation in a JCE. The Prosecution goes so far as to indicate that an Accused may be found guilty under several modes of responsibility for the same act when more than one mode of responsibility is needed to fully account for his criminal conduct.[1679]

Concerning the criminal responsibility referred to in Article 7(3) of the Statute, the Prosecution states that the scope of **superior responsibility** extends beyond operational command responsibility to both civilian and military superiors.[1680]

Concerning the Prosecution's analysis, I am compelled to express a reservation regarding **cumulative** modes of responsibility. From my point of view, one cannot simultaneously be a planner, instigator, order-giver, and executor by commission, as well as an accomplice. It falls to the Judges to indicate specifically what the **precise role** of the Accused was, using the modes of responsibility contemplated under Article 7 of the Statute.

(4) Individual Criminal Responsibility of the Accused

To make it easier to grasp the **core** portion of my opinion, which is the portion concerning the **individual criminal responsibility** of each Accused, I am compelled to provide some explanation

[1679] Prosecution Final Trial Brief, para. 107.

as to the manner in which I proceeded before reaching my final conclusion on the **culpability of each Accused**.

In the first place, it seemed absolutely necessary to me to summarise the arguments of the Prosecution and of the Defence in order to have their arguments ready at hand in the background.

These arguments were not developed in random order. They obey the classic rules governing proof of argument, and that is why I have insisted on citing the documents and transcript passages relating to them in footnotes.

After completing this in-depth work, I then **maintained** or **dismissed** each one of the arguments before reaching a final conclusion.

In this way, the final conclusion *beyond a reasonable doubt* could be inferred with ease after reviewing each argument.

Once the exact role of each Accused had been established, it was my duty to ascribe to those roles one of the forms of responsibility under Statute Article 7 without resorting to the theory of a JCE.

Thus, having established that there was not a single **common purpose,** but rather, a **multitude** of such purposes, I was led to the conclusion that in order to act in furtherance of the purposes defined in Paragraph 17 of the Indictment, there must have been advance **planning** in which the **Accused Prlić** played a role alongside **Mate Boban and Franjo Tuđman** and a portion of **Franjo Tuđman's** military entourage (**Šušak and Bobetko**) and that, on this basis, he is responsible for the crimes charged under the Counts of the Indictment.

I placed **those giving military orders** at the second level, and maintained this mode of responsibility for Generals **Petković and Praljak**. I believe that the Minister of Defence, **Bruno Stojić,** should be held responsible under the *aiding and abetting* mode of responsibility, which in my opinion, corresponds to the action he personally undertook, which consisted of providing combat units with logistical support.

[1680] Prosecution Final Trial Brief, para. 162.

As far as **Valentin Ćorić** is concerned**,** I consider him, too, responsible pursuant to the mode of responsibility of aiding and abetting, because, like his minister, he supplied military police brigades and also provided security for military prisons.

Finally, I consider that the aiding and abetting mode of responsibility is also applicable to **Berislav Pušić,** who was responsible for prisoner exchanges.

Consequently, I have followed this order, *in decreasing order of responsibility*:

1. **Jadranko Prlić**
2. **Slobodan Praljak**
3. **Milivoj Petković**
4. **Bruno Stojić**
5. **Valentin Ćorić**
6. **Berislav Pušić**

My approach, although it occasionally overlaps with that of my other colleagues, nevertheless differs **significantly** from it, because they have focused on the JCE form of responsibility, as committing, which is not how I see matters, for the **legal reasons** set forth in the portion devoted to the JCE.

In any event, both of these approaches lead to the same conclusion: **each one of the Accused is guilty of the Counts referred to in the Indictment.**

Analysis of Jadranko Prlić's Criminal Responsibility

(a) Jadranko Prlić's Criminal Responsibility

According to the Prosecution, **Jadranko Prlić**, in his capacity as **President** and later **Prime Minister** of the HVO/Herceg-Bosna, wielded *de jure* and *de facto* authority and effective and/or substantial control over the governments and the armed forces.[1681]

The Prosecution alleges that **Jadranko Prlić** organised political meetings for the purpose of redrawing the borders of BiH, with the aim of returning to the **Banovina of 1939**, took part in drafting and passing the statutes for which he is charged with crimes, and participated in the takeover of various municipalities by supervising the work of the municipal governments. He is also accused of having collaborated, in his official capacity, with the **Republic of Croatia** with the aim of defining and acting in furtherance of the objectives of H-B.[1682]

It submits that **Jadranko Prlić** himself acknowledged, at the time of his interview with the Prosecution, that there was a "plan, which was adopted, and proclaimed and supported by Zagreb", for the purpose of establishing the Croatian Community of Herceg-Bosna "to defend [its] territory and possibly also 'attach' it to the Republic of Croatia".[1683] The Prosecution supports these statements with the fact that on 5 October 1992, **Jadranko Prlić** met with **Ratko Mladić** in the presence of the Accused **Stojić** and **Praljak**, and that during this meeting he clearly stated that his objective was the Banovina of 1939.[1684]

According to the Prosecution, **Jadranko Prlić** wielded substantial authority over the HVO leadership corps, because he had sweeping powers of appointment and dismissal concerning the heads of departments and other organs.[1685] In his capacity as Head of the HVO/Herceg-Bosna Government, between September 1992 and June 1994, he signed at least 173 appointments, after having participated in the selection process, and dismissed at least 27 officials.[1686]

The Prosecution considers that the evidence shows that **Jadranko Prlić** held direct authority which he exercised over organs such as the **ODPR**[1687] and the **Exchange Service**,[1688] which played a

[1681] Prosecution Final Trial Brief, pp. 154 *et seq*.
[1682] Prosecution Final Trial Brief, pp. 154 *et seq*.
[1683] Prosecution Final Trial Brief, para. 365.
[1684] Prosecution Final Trial Brief, para. 368; P 11376, pp. 2 to 5.
[1685] Prosecution Final Trial Brief, para. 383.
[1686] Prosecution Final Trial Brief, para. 383; P 09545, paras 309 to 312 and Annex A (pp. 118 to 122).
[1687] Prosecution Final Trial Brief, para. 385; P 09545, paras 144 and 145, citing P 00846.

fundamental role in the implementation of the policy covering the deportations, the forcible transfers and how the Muslim population in the Banovina were to be managed, as well as having substantial influence over the Department of the Defence and the HVO armed forces, because he was responsible for defining and implementing the programme and strategy of Herceg-Bosna in its war against the ABiH and the Muslims of Bosnia.[1689]

The Prosecution also alleges that **Jadranko Prlić** had substantial influence over the Department of the Interior, including the MUP, the civilian police and the Department of Justice, as he had authority over appointments and regulations as well as in financial matters.[1690]

Concerning the crimes, **Jadranko Prlić** was aware of the crimes because he was frequently in physical proximity to the crimes and, moreover, made statements in which he endorsed them.[1691] In his speeches, he lent his official and personal support to Croatian domination of **Herceg-Bosna** and to the systematic campaign of "Croatisation" of the Banovina territory claimed by Herceg-Bosna.[1692]

The Prosecution considers that the evidence shows that **Jadranko Prlić** played a significant role in **the deportation** and **the forcible transfer**. In support of its allegations, the Prosecution submits that on 27 November 1992, it was the **Prlić Government** which issued the decree creating the **ODPR**,[1693] an organ that issued instructions for the deportation of refugees.

The Prosecution considers that the evidence shows that **Jadranko Prlić** contributed to the operation of the camps[1694] and to the forced labour by personally taking part in the establishment or the reopening of the camps at **Dretelj**[1695] and at **Gabela**,[1696] at key moments in the war Herceg-Bosna was conducting against the Muslims, thereby making a direct contribution to the Herceg-Bosna joint criminal enterprise.

[1688] Prosecution Final Trial Brief, para. 385; P 09545, para. 162, citing P 03191.
[1689] Prosecution Final Trial Brief, para. 404.
[1690] Prosecution Final Trial Brief, paras 422 *et seq*.; P 03791, PRLIĆ appointed at least 25 individuals to posts in the fields of justice and the police. P 09545, Annex A (pp. 118 to 122); 1D 00190; 1D 00193; 1D 02123.
[1691] Prosecution Final Trial Brief, para. 429; P 01184.
[1692] Prosecution Final Trial Brief, para. 436.
[1693] Prosecution Final Trial Brief, para. 441; P 00846; P 09545, para. 144.
[1694] Prosecution Final Trial Brief, para. 464.
[1695] Prosecution Final Trial Brief, para. 465; P 01802; P 09754 under seal.
[1696] Prosecution Final Trial Brief, para. 466; P 02674; P 02679. On 8 June 1993 (that is, well before the ABiH offensive of 30 June), Prlić's Government, in two decrees he signed, set up the prison at Gabela and appointed its warden.

The Accused sought the destruction and the appropriation of Muslim property and contributed to this, because he knew about it through reports and did nothing to prevent the HVO from committing these crimes or to punish them.[1697]

Jadranko Prlić contributed to the manipulation of **humanitarian aid**. The Accused's sphere of authority and responsibility included *inter alia* HVO policy and practice regarding the distribution of humanitarian aid[1698] which was routed through the ODPR; he was therefore responsible for the discriminatory policy practised by that organ against Muslim refugees.[1699]

The Prosecution alleges that **Jadranko Prlić** was informed about the **murders** and the **rapes**.[1700]

The Prosecution considers that **Jadranko Prlić** was guilty of not punishing the perpetrators of the crimes and that, on the contrary, he allowed them to happen. To cite just a single example, the Prosecution considers that the evidence shows that during the mass arrests in early July 1993, **the Prlić Government** and its armed forces knowingly arrested thousands of Muslims indiscriminately, fully aware that they were unable to care for them adequately.[1701]

Jadranko Prlić lied to the international community. For example, after the massacre by the HVO at **Stupni Do** on 23 October 1993, the Accused reported to the international community that "**General Petković** had removed all local commanders and an investigation was underway".[1702] **Witness EA**, however, testified that the HVO leadership never dismissed him, but, instead attempted to cover up the crimes, casting blame on an alter ego, and then commended and promoted him.[1703]

According to the Defence, the BiH Croatian leaders spoke out in favour of a referendum on the independence of BiH[1704] and did all they could to protect the territorial integrity of BiH,[1705] in particular, by signing the peace agreements without formulating any reservations.

[1697] Prosecution Final Trial Brief, paras 490, 491.
[1698] Prosecution Final Trial Brief, para. 493.
[1699] Prosecution Final Trial Brief, para. 494.
[1700] Prosecution Final Trial Brief, para. 499.
[1701] Prosecution Final Trial Brief, paras 506 *et seq*.
[1702] Prosecution Final Trial Brief, para. 509.
[1703] Prosecution Final Trial Brief, para. 509.
[1704] Prlić Defence Final Trial Brief, para. 322; 1D 00394.
[1705] Prlić Defence Final Trial Brief, para. 322; P 00031; P 00047; P 00058; P 00060.

Concerning the authority of the Accused over the organs of a military nature, the Defence considers that the evidence shows that, from 17 October 1992, **President Prlić** no longer had any control whatsoever over any organ of a military nature.[1706]

The Defence considers that the facts reveal that the creation of the HZ H-B happened subsequent to the incidents in BiH and not as part of a JCE. First, the JNA was attacking Croatia because of its independence; soon it would be BiH's turn. Second, the JNA was attacking Croatia from BiH with the tacit support of its Muslim leaders, and finally, the Croatian village of Ravno had been razed without the BiH authorities intervening. The creation of the HZ H-B was thus a predictable, reasonable and necessary reaction;[1707] as the BiH government could no longer carry out its essential functions, the HZ H-B was obliged to do this in its stead, but the HZ H-B had no intention whatsoever of establishing a "State within a State".

The evidence shows that **Croatia** was arming and training the BiH Muslims.[1708] **Alija Izetbegović**, President of the SDA and President of the **BiH Presidency, clandestinely established the Patriotic League and the Green Berets** within the military wing of the SDA. **Safer Halilović**, a Muslim officer in the JNA originally from Serbia, later to become the Chief of the ABiH, played a key role in developing the defence strategy of the Muslim political leaders.[1709] But Izetbegović was secretly arming the Muslims, solely for their defence and protection. His passive approach, superbly instantiated by the Presidency's failure to act, and his widely recalled statement – "this is not our war" – made after the Croatian village of Ravno was destroyed, gave the BiH Croats reason to distrust him and the BiH Presidency, and to arm themselves.[1710]

The creation of the **HZ H-B** was not intended to reconstitute the borders of the Banovina of 1939 because those borders never existed.[1711]

As for the **crimes**, there was **never any plan** involving **ethnic cleansing.** The movement of the Croatian and Muslim populations was due to the fact that the VRS was gaining ground. The Defence submits, on the contrary, that the Mujahideen were encircling the Croatian population

[1706] Prlić Defence Final Trial Brief, para. 322.
[1707] Prlić Defence Final Trial Brief, para. 322; T, pp. 29277 to 29279.
[1708] Prlić Defence Final Trial Brief, para. 322.
[1709] Prlić Defence Final Trial Brief, para. 322.
[1710] Prlić Defence Final Trial Brief, para. 322; T, pp. 29277 to 29279.
[1711] Prlić Defence Final Trial Brief, para. 322 (e).

which was forced to flee.[1712] The Defence considers that the evidence shows that Prlić and the HVO HZ H-B took actions and decisions that would ultimately protect the fundamental rights of the Muslims.[1713]

The Defence considers that the evidence shows that **Jadranko Prlić** and the HVO HZ H-B/the government of the HR H-B did not take part in any way in the **forcible transfer** or the **deportation** of anyone residing in BiH to other countries or other regions of BiH not under HZ/HR H-B control.[1714]

As to the Prosecutor's allegations of "Croatisation", the Defence considers that a Muslim language simply did not exist.[1715] As for the currency, the BiH currency was not sufficiently strong, and the most convenient currency was the Croatian dinar, or the German mark, or the American dollar; in addition, most goods were imported from Croatia – the Office of the Prosecutor failed to prove this was not so.

The Defence claims that the Accused never gave orders to the Main Staff or to its units and that he wielded neither any power nor any influence – *de jure* or *de facto* – over **General Praljak** or **General Petković** or their units.

The Defence acknowledges that the **Accused Prlić** admittedly did participate in meetings, due to his responsibilities in Zagreb with the Croatian leaders, but none of the evidence indicates in any way that he was granted any special status or preferential treatment.[1716] **Jadranko Prlić**'s powers within the HVO HZ H-B, which operated as a collegial body, were limited.[1717]

The Defence considers that the evidence shows that neither **Jadranko Prlić** nor the **HVO HZ H-B** wielded any authority or control over the creation and management of the detention centres. Once it became aware of the existence of these centres, **the HVO HZ H-B/Government of the HR H-B** in fact attempted to regulate these problems to the extent possible, all the while acknowledging that it

[1712] Prlić Defence Final Trial Brief, para. 322 (d).
[1713] Prlić Defence Final Trial Brief, para. 326 (c).
[1714] Prlić Defence Final Trial Brief, para. 326 (i).
[1715] Prlić Defence Final Trial Brief, para. 326 (e).
[1716] Prlić Defence Final Trial Brief, para. 327 (b).
[1717] T, pp. 30284 to 30288.

was not really able to control the authorities responsible for the confinements and the detention centres.[1718]

None of the evidence adduced shows that **Jadranko Prlić** or the **HVO HZ H-B/Government of the HR H-B** ever took part, directly or indirectly, in activities related to the destruction of cultural, religious or private property. In fact, the evidence adduced shows the opposite. Substantial effort was expended to protect such property and to rebuild what had been destroyed, particularly what belonged to the cultural and historic heritage of every ethnic group.[1719]

Before entering into the details of the acts for which the Accused has been charged, I find it necessary to refer briefly to the mode of responsibility best fitted to him – planning under Article 7(1) of the Statute.

Article 7(1) of the Statute provides: "[a] person who planned [...] a crime referred to in Articles 2 to 5 of the present Statute is individually responsible for the crime".

The ***physical element*** of "planning" assumes that one or more persons designed the criminal conduct characterising one or more of the crimes punishable under the Statute, both at the stage of preparation as well as at the stage of execution.[1720] It is enough to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[1721]

The criminal conduct must have been committed later in time, by some other person, because the same person cannot be found responsible for committing a crime and for planning that same crime.[1722]

[1718] Prlić Defence Final Trial Brief, para. 327 (n).
[1719] 1D 02705E; 1D 02703; 1D 02706.
[1720] *The Prosecutor v. Jean-Paul Akayesu*, Judgement, 2 September 1998, para. 480; *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, para. 279; *The Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, 26 February 2001, para. 386; *The Prosecutor v. Radislav Krstić*, Judgement, 2 August 2001, para. 601; *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgement, 31 March 2003, para. 59; *The Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, 17 December 2004, para 26; *The Prosecutor v. Radoslav Brđanin*, Judgement, 1 September 2004, para. 268.
[1721] *The Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, 17 December 2004, para. 26; *The Prosecutor v. Radoslav Brđanin*, Judgement, 1 September 2004, para. 268.
[1722] *The Prosecutor v. Jean-Paul Akayesu* (ICTR), Judgement, 2 September 1998, para. 473; *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, para. 278; *The Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, 26 February 2001, para. 386; *The Prosecutor v. Stanislav Galić*, Judgement, 5 December 2003, para. 168; *The Prosecutor v. Radoslav Brđanin*, Judgement, 1 September 2004, para. 268; *The Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, 17 December 2004, para. 26.

Although the commission of the crime did not constitute the sole objective of the planned operation, it must have been the predominant objective.[1723]

The **element of intent** required to establish this mode of participation is the direct intent of the person who planned the crime.[1724] The Appeals Chamber, however, has decided that, in order to possess the requisite *mental element*, it is sufficient that the person or persons who plan an act or an omission be aware of the substantial likelihood that a crime will be committed while carrying out that plan. The Appeals Chamber held that planning with awareness of such a substantial likelihood constituted acceptance of the ensuing crime.[1725]

Jadranko Prlić was the most senior political leader in Herceg-Bosna, after **Mate Boban**. In that capacity, he **planned** the implementation of the campaign of persecution that victimised the Muslims throughout the period covered by the Indictment. The objective of this policy was **either** to succeed eventually in reconstituting the borders of the Banovina of 1939 for the purpose of creating a "Greater Croatia", pursuant to the views expressed on several occasions by **Franjo Tuđman**, **or** to implement the **Vance-Owen Plan** hastily, at a time when consensus with respect to this plan could not be presumed due to the differing points of view expressed by the various sides with regard to this question. I tend to favour the **second hypothesis** because it is abundantly clear from the *presidential transcripts* that this plan for a "Greater Croatia" could not be realised unless the international community intervened in the conflicts.[1726]

It is clear that **Franjo Tuđman** longed for the "**Banovina**"[1727] but his preferences notwithstanding, he showed clear-mindedness by continually mentioning the need for teamwork between the Muslims and the Croats, as well as the instrumental role of the international community.[1728] It must be borne in mind that the **Republic of Croatia** had an enormous problem on its territory: Serbs were present in the Republic of Croatia, claiming a border along the Karlobag-Ogulin-Karlovac-Virovitica line that constituted "Greater Serbia".

[1723] *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Appeal Judgement, 19 May 2010, para. 138.
[1724] *The Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, 17 December 2004, para. 29; *The Prosecutor v. Dragomir Milošević*, Appeal Judgement, 12 November 2009, para. 268.
[1725] *The Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, 17 December 2004, para. 31; *The Prosecutor v. Dragomir Milošević*, Appeal Judgement, 12 November 2009, para. 268.
[1726] P 01297, p. 31; P 02122, p. 16.
[1727] P 03279, pp. 21 and 22; Peter Galbraith, T(F), pp. 6432, 6454, 6455.
[1728] P 00498, pp. 70-73; P 00524, p. 10; P 01158, p. 45; P 01622, p. 9; P 01893, p. 109.

I believe that **Franjo Tuđman** was quite clear on this point, because to claim a "**Greater Croatia**" was *ipso facto* to accept a "**Greater Serbia**" at a time when **Franjo Tuđman**'s primary objective was to maintain the territorial integrity of the **Republic of Croatia.** It is obvious that a *rapprochement* with **Herceg-Bosna** under any guise (annexation, confederation, federation) would certainly have posed problems for the Serbian parts of Croatia, which then could have been annexed or placed into a confederation with Serbia. From my perspective, it is clear that at the political level this was simply not worthwhile and that, for this reason, it is obvious that the plan was doomed to fail, particularly as **Franjo Tuđman** was not elected on the basis of this issue.

This is especially enlightening, knowing that, on many occasions **Franjo Tuđman** exhorted the Croats of Herzegovina to cooperate with the Muslims and end the fighting.[1729]

It is therefore clear to me that **Jadranko Prlić** did not execute a joint criminal enterprise in Herzegovina, let alone take part in creating the said enterprise. I consider that he was initially confronted with a serious situation resulting from the absence of state-level structures run from Sarajevo. Once he and others set up this structure comprising an army (HVO) and a political and administrative structure, he should have moved closer to the Sarajevo Presidency, instead of sending messages in January 1993 making clear that he intended to implement **the Vance-Owen Plan** hastily by taking control of the army.

There is ample evidence to show that the Accused participated in political meetings. For this reason, he met with the President of Croatia, **Franjo Tuđman**, in Zagreb on 17 September 1992,[1730] as well as with **General Mladić** on two occasions that same year, accompanied by the Accused **Praljak**, **Petković** and **Stojić**.[1731]

The arguments of the Defence whereby the creation of **Herceg-Bosna** happened as a consequence of the situation in BiH and of the fact that the JNA was attacking Croatia from BiH[1732] may appear relevant here. However, the creation of **Herceg-Bosna** turned out to be a means of consolidating his power base in Cantons 3, 8 and 10 under the **Vance-Owen Plan**, after which, commencing in January and April 1993, ultimatums were sent to the Muslims concerning the anticipated implementation of the Vance-Owen Plan, at a time when overall consensus was lacking.

[1729] P 00498, pp. 70-73; P 00524, p. 10; P 01158, p. 45.
[1730] P 00498, pp. 27-30.
[1731] P 11380 (27 October 1992).
[1732] Prlić Defence Final Trial Brief, paras 99-101.

Given his position as the leader of Herceg-Bosna, **Jadranko Prlić** had the **status** and **authority** to take decisions and used these in matters concerning customs,[1733] taxes,[1734] border control,[1735] refugees and displaced persons,[1736] detention centres[1737] and housing.[1738]

Jadranko Prlić, moreover, nurtured a **climate of hatred** toward the Muslims by making comments and by issuing official statements that showed he was in agreement with the campaign of persecution that had been introduced.[1739] For example, on 18 January 1993, during a meeting of the HVO HZ H-B, he expressed himself thus:

> […] it is obvious that the Muslim forces are intending to take over the rule, to [spark reprisals by the HVO], and then, by applying terror, to cause an exodus of the Croatian people from that area […] You are not alone and you will not be left at the mercy of the Muslim extremists, who [...] have armed themselves for settling accounts with the Croatian people […] The Croatian Defence Council and the entire Croatian Community of Herceg-Bosna are with you.[1740]

In that sentence, he mentions the matter of "**reprisals by the HVO**". It is therefore clear that he agreed with the principle *per se* of committing crimes in connection with reprisals. As the political leader, he, more than anyone else, had an obligation to pay attention to comments that were made, particularly when in a wartime context.

Continuing in this manner, he implemented and led the campaign to "Croatise" Herceg-Bosna. He issued every one of the **decrees** mandating the use of the Croatian flag,[1741] and of the Croatian dinar[1742] as well as the one pertaining to the **University of Mostar**, undoubtedly the most telling in respect of this policy:[1743] they are signed in his own hand. The Defence, however, considers foremost that a Muslim language simply did not exist.[1744] As for the currency, the BiH currency

[1733] P 00408.
[1734] P 00407; P 00412.
[1735] P 00736; P 01560; P 01834.
[1736] P 00553.
[1737] P 03565.
[1738] P 03089.
[1739] P 01184; P 09601 under seal; P 02021; P 02094; P 03673; William Tomljanovich, T(F), p. 6126.
[1740] P 01184.
[1741] P 00772.
[1742] P 00447.
[1743] P 00714.
[1744] 1D 00430; 1D 00468; 1D 00469; 1D 00470.

was not sufficiently strong, and the most convenient currency was the Croatian dinar, or the German mark, or the American dollar; in addition, most goods were imported from Croatia and the Office of the Prosecutor failed to prove this was not so. These arguments cannot be taken into account because there was indisputably a campaign of forced Croatisation that went beyond merely changing the communist system.

Jadranko Prlić personally played a role in the **deportations** and the **forcible transfers** of the Muslims of Herceg-Bosna, because it was he who signed the Decrees on the Status of Refugees and Displaced Persons on 7 October 1992[1745] as well as the one pertaining to the creation of the **ODPR** on 1 December 1992.[1746] On 27 November 1992, Prlić appointed **Darinko Tadić** to head that organisation,[1747] which from 17 December 1992 routinely gave reports at the meetings of the HVO HZ H-B.[1748] The evidence shows that the ODPR **discriminated** when distributing humanitarian aid involving the Muslims and the Croats, and that **Jadranko Prlić** was in control of that organ.[1749]

On 1 February 1993, the **Prlić Government** set up a commission responsible for population movements, appointing as its president **Anto Valenta**, a fervent Croatian nationalist.[1750] He could not have been unaware of this man's ideas. That commission came under the direct authority of **Jadranko Prlić**.[1751] Moreover, it is perfectly clear that the measures taken were detrimental to the Muslims. Concerning the **ODPR**, **Jadranko Prlić** does not contest his authority over this organ, but the Defence argues that the measures taken at the time must be understood in context, namely that the Bosnian Croats were deported and discriminated against.[1752] The **Prlić Government** had therefore decided at the time to take care of the Croatian refugees and displaced persons with a view to re-settling them on Croatian territory.[1753] Although the Croats were also in fact victims of the Serbs and the Muslims, this does not mean that Jadranko Prlić had the authority to go and do likewise. As I see it, this argument cannot be taken into account.

[1745] P 00553; P 09545.
[1746] P 00846.
[1747] P 00848.
[1748] P 09545, para. 145.
[1749] P 01602; P 03394.
[1750] P 03451; P 06817.
[1751] P 09545, para. 147, citing P 01388.
[1752] 1D 01652, statutory texts made public by the HR H-B/letter from Jadranko Prlić to the Co-Chairmen of the International Conference on the former Yugoslavia regarding the media, 24 April 1993. Prlić Defence Final Trial Brief, paras 193 to 222.
[1753] Prlić Defence Final Trial Brief, paras 193 *et seq*.

Jadranko Prlić also made certain that the border checkpoints were intensified,[1754] in order to be able to control population flows, which shows his intention to put in place a **policy of large-scale deportations and transfers**, contingent on making a distinction between civilians who should never have been deported or transferred and ABiH soldiers who, from my point of view, could be moved for security reasons. The number of Muslim refugees who arrived in **Croatia** was especially large.

In making this assessment, I am giving consideration to the fact that the ethnic Muslim men between 18 and 60 years of age were capable of taking up arms and that it was therefore decided that they would either be transferred elsewhere or taken to the eastern borders. However, I note that these forced departures were carried out under highly questionable circumstances, as the persons in question had **no freedom of choice whatsoever** or the time required to put their personal affairs in order with the local authorities. As an important political leader, he was obliged to demonstrate prudence in this matter. He should have thus ensured that all of the departures to Croatia and to third countries (even if in certain cases some of these were warranted) were "freely" consented to by the persons involved and not "forced", as several exhibits clearly demonstrate.

The evidence also shows that **Jadranko Prlić** played a major role in the creation of the camps and that, even if he did not intend the crimes that were committed against the Muslims, he did at the very least tolerate them. It was **Jadranko Prlić who set up Gabela Prison**[1755] **and appointed its warden**.[1756] He was aware of the discriminatory mass arrests and even ordered them.[1757] A report from the **ICRC** shows that he was likewise informed of the mistreatment in the camps, as well as of the forced labour.[1758] The Defence's argument that neither **Jadranko Prlić** nor the HVO HZ H-B wielded any authority or control over the creation and management of the detention centres[1759] must therefore be rejected. Someone had to have overseen the detention centres and, until proven otherwise, in every democratic state, it is the standing authorities who are responsible for such oversight.

Admittedly, the government of Herceg-Bosna was obliged to create detention centres because these were needed in a state governed by the rule of law. However, the purpose of these detention centres

[1754] P 01560; P 01580; P 09844 under seal, para. 2.
[1755] P 02679.
[1756] P 02674.
[1757] P 09846 under seal.
[1758] P 02950.
[1759] Prlić Defence Final Trial Brief, paras 232 *et seq*.

was not responsible accommodation of the detainees by the political authorities in compliance with international standards regarding conditions of confinement. This is particularly serious insofar as **Jadranko Prlić** had high-level contacts, and eventually met with the representatives of the international community and the NGO workers, as well as the ICRC and the UNHCR, who invariably drew his attention to the problems they encountered. He knew better than anyone that the international media would report on the "detainees" and the people "released", and that he would sooner or later have to answer for what was done in connection with these detentions, particularly because the international community had recalled these facts *inter alia* in the Security Council resolutions.

It is also apparent from various exhibits that **Jadranko Prlić** was aware of the **destruction** and the **looting** that targeted Muslim property.[1760] According to one witness, **Jadranko Prlić** said with respect to the mortar shells and the injuries inflicted upon civilians in Mostar that the HVO was conducting a deliberate campaign to force them to leave the city by terrorising them.[1761]

Although from my point of view, **Jadranko Prlić** did not have any operational power or authority over military activities, it is nevertheless true that his political role should have led him to raise the matter with **Mate Boban**. Particularly so because the international media were reporting shots and shelling sometimes causing death or injury to civilian victims, who while not specifically targeted, might nevertheless find themselves near military targets or becoming collateral victims.

Jadranko Prlić "manipulated" humanitarian assistance through the ODPR office in order to pressure the Muslims to leave Herceg-Bosna, and make these territories ethnically pure. One can thus appreciate the fact that, at the outset, when the Croats and the Muslims were fighting together against the Serbs, humanitarian assistance was distributed more or less equitably but as tensions continued to mount, Muslim refugees discovered that a discriminatory policy was being applied against them.[1762] Accordingly, it is clear from several testimonies of humanitarian workers that they were constantly prevented through every conceivable means by the **Prlić Government** from going about their work.[1763]

[1760] P 05554.
[1761] P 10367 under seal, para. 21.
[1762] P 09712 under seal, para. 14; P 01894; P 09840 under seal.
[1763] P 09712 under seal; Witness BC, T(F), pp. 18363-18365; P 10367 under seal.

On this point, the Defence submits that on 8 July 1993 at **Makarska** (Republic of Croatia), the HVO HZ H-B and the Government of BiH, whose members came primarily from the SDA, signed an agreement that followed up on an initiative by the BiH Croats. The purpose of this agreement was to facilitate free movement, cooperation and the organisation of humanitarian convoys. It provided for the creation of a joint working group.[1764] Procedures were put in place for checking the loads of the humanitarian convoys while allowing the continuing flow of humanitarian aid to actually reach its destination.[1765] This argument carries weight, but the fact that the subject was raised attests to the fact that it was significant and that therefore **everything** had to be done to **remove any hindrance** to the movement of humanitarian convoys.

Finally, even if **Jadranko Prlić** did not himself commit the crimes that were perpetrated against the Muslims as part of a joint criminal enterprise, he is nevertheless responsible for the **planning** aspect because he was the **principal decision-maker** signing the **decrees** used for the deportation and transfer of the Muslims. Likewise, he was informed of this on several occasions[1766] and did nothing to have the people under his authority take concrete measures punishing the perpetrators of the crimes and putting an end to the violence. Even though he was aware of the existence of the crimes, he declared that his government had nothing to do with them, and that therefore no measures needed to be taken to remedy them.[1767] This argument must be rejected, because the primary trait of a leader is to take measures in compliance with the standards of the international and domestic community.

One must also bear in mind that the entity thus created had an armed force at its disposal that was placed under the control of the political authorities. **Jadranko Prlić** was second in rank in that political authority, after **Mate Boban**. On this basis, he could influence the course set by **Mate Boban** at a political level, even if he lacked the legal leverage to do this, apart from tendering his resignation on grounds of principled disagreement. Admittedly, he did mention his feelings about the policy being followed. However, he did not call his mandate into question. Being in the government, he gave tacit consent to what was happening.

The Defence argues that **Jadranko Prlić** and the HVO HZ H-B/Government of the HR H-B did everything in their power to prevent criminal activities and to punish the perpetrators. They made

[1764] 1D 01590.
[1765] P 03346 under seal; Prlić Defence Final Trial Brief, para. 208.
[1766] P 08079 under seal; P 07636; P 07660; P 07937; P 00284.
[1767] P 04841, p. 2.

efforts to establish functioning criminal courts, to appoint judges and to adjudicate criminal cases.[1768] As, for example, with "Operation Spider", which started going after organised crime as soon as circumstances permitted.[1769] This position is not credible on the whole because, although certain crimes were in fact prosecuted, a great many were ignored. Admittedly, during troubled times, the powers in place may not have every means at their disposal to enforce law and order but certain crimes cannot be ignored. Thus, **Jadranko Prlić** had an obligation to act, which he clearly did not do.

It appears useful, in my view, to explore how he viewed his role when he was heard as a suspect on 13 and 14 December 2001 **by the Office of the Prosecutor**.

According to **Jadranko Prlić**, it was **Mate Boban** who created the HVO on 8 April 1992 as the supreme defence body of the HZ H-B.[1770] Mate Boban was the President of the HZ H-B, the President of the Presidency of the HZ H-B and the President of the HVO.[1771] The Presidency of the HZ H-B was the legislative organ of the HZ H-B,[1772] and it was this organ that was competent to adopt decrees and statutes.[1773]

Jadranko Prlić specified that there were **two HVO**s: the first was the Supreme Defence Body, established on 8 April 1992 by a decision of the presidency of HZ H-B with **Mate Boban** as its President,[1774] and the second was the HVO organ for executive and civilian authority.[1775]

The PIO (Temporary Executive Organ) was set up in late 1992.[1776] The President of the HZ H-B authorised the "PIO" to adopt certain decrees temporarily.[1777] The decrees were published in the *Narodni List* but had to be submitted to the Presidency of the HZ H-B for approval.[1778] The Accused therefore stated that he was actually not the President of the HVO but of the PIO and that his function was restricted to signing the decisions adopted.[1779]

[1768] 1D 01181; P 01511; P 01703; P 02575; P 02606; 2D 01272; P 04008; 1D 01675; P 04275; P 04276; P 04343; 2D 00854; P 05799; P 07200.
[1769] 1D 02576; 1D 01249; 1D 01256; 1D 01252. Prlić Defence Final Trial Brief, para. 326 (k).
[1770] P 09078, p. 32.
[1771] P 09078, p. 34.
[1772] P 09078, pp. 33-34.
[1773] P 09078, p. 33.
[1774] P 09078, p. 32.
[1775] P 09078, p. 32.
[1776] P 09078, p. 41.
[1777] P 09078, p. 41.
[1778] P 09078, p. 41.
[1779] P 09078, pp. 36-38.

The PIO was not, according to **Jadranko Prlić**, a government in the proper sense of the word because the HVO departments and committees took decisions autonomously within their respective areas of competence.[1780]

Jadranko Prlić was named President of the HVO on 14 August 1992,[1781] but he was in fact the President of the PIO. That legal text conferred on him only the authority to sign decisions that were drafted and proposed by the departments of the HVO.[1782] **Mate Boban** was the President of the HVO, even after 14 August 1992.[1783]

I cannot accept this analysis, because **Jadranko Prlić** is engaging in wordplay by raising the existence of a temporary organ – the "PIO" – for which he served as President. He draws a subtle distinction between the military HVO, led by **Mate Boban**, and the PIO, which had civilian jurisdiction. Contrary to what he is arguing, there was **one entity** – **the HVO** – which operated like the government of a State, albeit as one without a Ministry of Foreign Affairs and a Ministry of Economy and Finance.

Mate Boban was also the Commander-in-Chief of the armed forces.[1784] It was **Mate Boban** who provided direct guidance to the HVO brigades, and it was he who directed the Main Staff.[1785] The setting up of the armed forces therefore, according to the Accused, fell within the competence of **Mate Boban** as President of the HZ H-B.[1786] **Jadranko Prlić** thus declared that the HVO brigades present in the municipalities had been put in place by **Mate Boban** and **Gojko Šušak** and the **HV**.[1787] This is accurate, but it seems to me that, by virtue of his position in the hierarchy, he could act either in **Zagreb** or with **Mate Boban** to influence questionable policy.

As for the Department of Defence, the Accused stated that he was under the authority of the President of the HZ H-B, that he was assigned to the military domain and was autonomous in respect of the executive organ.[1788] The Accused said for this reason that he had no authority

[1780] P 09078, p. 35.
[1781] P 09078, p. 30.
[1782] P 09078, pp. 36-38.
[1783] P 09078, pp. 30-31.
[1784] P 09078, pp. 30-31.
[1785] P 09078, p. 71.
[1786] P 09078, p. 52.
[1787] P 09078, p. 71.
[1788] P 09078, pp. 51-52.

whatsoever over **Bruno Stojić**.[1789] As for the detention centres and the prisons, this fell under the Department of Defence, and that domain lay under the supervision of the military organs.[1790]

Concerning this aspect, I am in agreement with his statements because it was **Mate Boban** who, as President of the HZ H-B, was in charge of the army. By the same measure, I agree that he lacked authority over the Minister of Defence, **Bruno Stojić**, for purposes of military operations. Nonetheless, it seems to me that **Jadranko Prlić** did have the authority to establish the **budget of the Ministry of Defence** and to appoint certain officials through the budgetary process, and that he was thus in a position to control **Bruno Stojić**.

Jadranko Prlić said that **Zagreb** was the **decision-making centre**, particularly with regard to the plan to annex a portion of BiH to Croatia.[1791] **Franjo Tuđman** supported **Mate Boban**,[1792] who was nonetheless relieved of his duties in February 1994.[1793] It seems to me that this part of his statement must be put in its proper context.

Jadranko Prlić said that he was frequently in contact with **Mate Granić**, the Minister of Foreign Affairs of Croatia, and that they worked together to reduce the number of crimes committed.[1794] In mid-July 1993, particularly, **Jadranko Prlić** asked **Mate Granić** to speak to **Franjo Tuđman**, the President of Croatia in order for him to persuade **Mate Boban**, President of the HZ H-B, to end the deportations and arbitrary detention of Muslims.[1795] This is believable in view of the fact that the deportations and detentions continued; **Jadranko Prlić**, however, remained in office.

The Accused said that Zagreb's **principal objective** was to achieve **a Croatia** settled within internationally recognised borders,[1796] but he also said that the secondary objective was to integrate part of BiH into Croatian territory **if** BiH were ever poised to break apart.[1797]

In these comments, the Accused appears to be distancing himself from **Zagreb**, arguing that there was a plan to annex part of BiH to Croatia. It must be noted that he does not provide very many details concerning the existence of that plan. Moreover, in his interview, he appears to reverse

[1789] P 09078, pp. 51-52 and 97-98.
[1790] P 09078, pp. 97-98.
[1791] P 09078, pp. 65 and 125.
[1792] P 09078, pp. 34 and 125.
[1793] P 09078, p. 125.
[1794] P 09078, p. 76.
[1795] P 09078, pp. 124-126.
[1796] P 09078, p. 65.

course because he states that the **principal objective** was to achieve a Croatia within recognised borders, which seems legitimate, but adds that there was a secondary objective, which was to join BiH **if** it were ever **poised to break apart**. This condition invalidates his earlier statement – something that is worth exploring in greater depth.

Concerning the joint criminal enterprise aspect, at their initial meeting in the summer of 1992 in Grude, **Jadranko Prlić** said that **Mate Boban** told him that Herceg-Bosna had been set up to defend the BiH population against the Serbian aggressors because the Muslim forces lacked the ability to do so.[1798] The objective in creating Herceg-Bosna was to protect the Bosnian Croats.[1799] It is therefore evident that the purpose was to defend the Bosnian Croats, not to create a "Greater Croatia" or go back to the Banovina. Concerning this point, I find him accurate, because it is this statement which appears in the document creating Herceg-Bosna.

Jadranko Prlić stated that he was "used" by **Mate Boban**, **Franjo Tuđman**, **Gojko Šušak**, **Bruno Stojić and others** because his appointment as President of the HVO did not vest him with the slightest authority.[1800] The Accused believes that this appointment came about solely because of his popularity with the public, whereas in fact it was Mate Boban who held all authority.[1801] Some might find it surprising that such an intelligent person could be manipulated or even used. The story he offered to the Office of the Prosecutor in his own defence must apparently be treated with caution on certain points.

The Accused stated that he did not have access to confidential information. He stated that he never received military or secret information while he was President of the PIO and that he learned of these crimes through the media.[1802] The twice-yearly reports from the HVO did not contain any secret or confidential information, and thus, the Accused was not aware of anything.[1803] **Bruno Stojić** supplied him only with general intelligence concerning the attacks and concerning the military situation.[1804] Some might find it surprising that he could have no knowledge of anything when the international community, the media outlets and the Croatian media, etc., were present on site. The mark of a leader is to be informed and well informed. If the Accused found himself in that

[1797] P 09078, p. 65.
[1798] P 09078, pp. 25-26.
[1799] P 09078, pp. 25-26.
[1800] P 09078, pp. 38, 72, 120-122.
[1801] P 09078, pp. 38, 72, 120-122.
[1802] P 09078, pp. 55-56 and 74.
[1803] P 09078, pp. 55-56 and 93.
[1804] P 09078, pp. 94-95.

situation, he had an obligation to remedy it, because his office gave him access to all the information he needed at his level.

Even assuming that he had no evidence in his possession, how would one then explain the fact that there were shots, victims and deaths, and that the least of these events should have led him to ask for explanations about the deaths of some of the civilians …

All the evidence thus shows that Jadranko Prlić planned the implementation of the decisions taken by the "government" of the HVO, with a view to gaining control over some of the cantons designated as Croatian under the Vance-Owen Plan. This control over ethnic cantons was supposed to come about through the combined effect of several decisions so that there would be one controlling Croatian authority with no role for any Muslim minority.

In this context, any voluntary or forced departure of the Muslims made it possible to attain the objective that was set. The mass incarceration of Muslim men was consistent with this so that all hostile forces on the ground would be "eradicated". It seems to me accepted and proven by the Prosecution that the departure of Muslims to Croatia or to third countries strongly favoured the realisation of this intended objective.

The collection of laws adopted and published is rather impressive, considering that the country was then in conflict. Further evidence of this objective is the correspondence sent to Alija Izetbegović in January and February 1993 to claim leadership of the government through the office of Prime Minister and the takeover of the armed forces in the Croatian cantons.

He has therefore incurred criminal responsibility under Article 7(1) of the Statute for planning certain acts that gave rise to the commission of crimes defined in the Statute of the Tribunal.

By the same measure, it is clear to me that, in his capacity as Head of Government, he was informed via reports of the incidents taking place on HVO territory. Therefore, in that capacity, he was able to institute sanctions against the perpetrators of the crimes, either by asking the Minister of Defence to formally refer matters to the Military Prosecutor or by recalling military officials, or at the very least by requesting that Mate Boban recall them,

which he did not do. He likewise incurred criminal responsibility under Article 7(3) of the Statute.

I conclude that **Jadranko Prlić** is criminally responsible under Article 7(3) of the Statute on Counts 2, 3, 4 and 5. As the Prosecution rightly says in its Final Brief at paragraph 162: "*Superior responsibility [...] extends beyond traditional command responsibility to both military and civilian superiors who have effective control*", meaning that the superior has the material ability to prevent or punish the crimes committed by his subordinates.

The case-law of the Appeals Chamber is particularly clear in this respect, as it had many opportunities to specify the exact form of the said superior responsibility, particularly in the *Čelebići* Appeal Judgement at paragraph 196 and in the *Aleksovski* Appeal Judgement at paragraph 176. Concerning Counts 2, 3, 4 and 5 more specifically, the Prosecution, at paragraph 519 of its Final Brief, indicates that **Jadranko Prlić** was likewise guilty of rape and sexual assault under Article 7(3) of the Statute. I fully embrace the Prosecution's point of view concerning this criminal responsibility. It seems to me that as President of the HVO government and then President of the Government of the HR H-B, **Jadranko Prlić** led a government consisting of vice-presidents and ministers. As he had significant political authority over the ministers or heads of departments, it was his duty to be informed of events taking place on HVO-held territory, through his minister of the interior or the minister of defence.

This principle is inherent to high-level political office. In this respect, he was bound to have very specific information, via the Ministry of Defence or the SIS which had been created in July 1992, coming from four local centres in Mostar, Tomislavgrad, Travnik and Derventa. He could also obtain additional intelligence through the military police administration, directed by **Valentin Ćorić**. Inasmuch as there was also a Department of the Interior, later to become the Ministry of the Interior, he could also obtain additional intelligence from other services, particularly from the local civilian police forces.

For this reason, although I am persuaded that **Jadranko Prlić** did not at any time possess the intent to commit murders or aggravated sexual abuse, it is nevertheless true that he must bear responsibility pursuant to Article 7(3) of the Statute for Counts 2, 3, 4 and 5, which were addressed in various reports and communications, as attested by the evidence. In the unlikely scenario where no reports or communications existed, as a senior political leader, he was nevertheless obliged to verify *through* the chain of command that such crimes had not taken place during or after the

fighting. As a consequence, **Jadranko Prlić** cannot hide behind his lack of knowledge; this never ceases to amaze, because inasmuch as he was in almost constant contact with the representatives of the international organisations, he had to know that crimes had taken place. For this reason, therefore, I conclude that he is responsible under Article 7(3) of the Statute.

The matter of **effective control** which arises under case-law is resolved by the natural authority of the political commander, that is, by his level of command over the military authorities. Because of his ministerial position, he exercised effective control over the ministers who must exercise effective control over the lower echelons. Even in the extremely unlikely scenario that a military unit lay beyond the effective control of the head of government (which might have been the case for the *Convicts' Battalion* had it been placed under the direct authority of **Mate Boban**), **Jadranko Prlić**, once he was informed that crimes had been committed by the members of the *Convicts' Battalion,* ought to have raised the matter with **Mate Boban** because the commission of these crimes was bound to spill over onto the entire government of which **Jadranko Prlić** was the leading figure. And concerning these crimes, the question inevitably arose as to whether the President of the Government should have continued to take part in these activities which were tainted by crimes committed under the authority of the Head of State. This becomes all the more evident since when one examines how the HR H-B and the HZ H-B functioned, one is forced to conclude that the political authorities **all** stemmed from the same election and that they therefore bore **collective responsibility at the political level**.

In my view, Jadranko Prlić is guilty pursuant to Article 7(1) of the Statute on Counts 1, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25, and guilty pursuant to Article 7(3) on Counts 2, 3, 4, and 5.

The following chart provides a complete view of the counts for which Jadranko Prlić's guilt has been established pursuant to Article 7(1) and Article 7(3) of the Statute.

RESPONSIBILITY OF JADRANKO PRLIĆ

COUNTS	POSITION OF PROSECUTION					POSITION OF DEFENCE	FINDINGS BY JUDGE ANTONETTI		FINDINGS BY THE MAJORITY		DISPOSITION	
	JCE Form I	JCE Form II (§ 224)	JCE Form II (§ 225)	JCE Form III	Other Forms	All Forms	Art. 7(1)	Art. 7(3)	JCE Form I	JCE Form III	Unanimity	Majority
1	X				X	NG	X		X		X	
2				X	X	NG		X	X	X		X
3				X	X	NG		X	X	X		X
4				X	X	NG		X		X		X
5				X	X	NG		X		X		X
6	X		X		X	NG	X		X		X	
7	X		X		X	NG	X		X		X	
8	X		X		X	NG	X		X		X	
9	X		X		X	NG	X		X		X	
10	X	X			X	NG	X		X		X	
11	X	X			X	NG	X		X		X	
12	X	X			X	NG	X		X		X	
13	X	X			X	NG	X		X		X	
14	X	X			X	NG	X		X			
15	X	X			X	NG	X		X		X	
16	X	X			X	NG	X		X		X	
17	X	X			X	NG	X		X			
18	X	X			X	NG	X		X		X	
19	X				X	NG	X		X		X	
20	X				X	NG	X		X			
21				X	X	NG	X		X	X	X	
22	X				X	NG	X			X	X	
23	X				X	NG	X			X	X	
24	X				X	NG	X		X		X	
25	X				X	NG	X		X		X	
26	X				X	NG						

Legend

- Position of Prosecution
- Position of Defence
- Findings by Judge Antonetti
- Findings by the Majority
- Disposition
- NG — Acquittal
- Count does not exist under Statute's provisions
- Counts for which a conviction may not be entered due to prohibition on cumulative convictions

Analysis of Slobodan Praljak's Criminal Responsibility

(b) Slobodan Praljak's Criminal Responsibility

According to the Prosecution, Slobodan Praljak took part in the alleged JCE as a leader and *de jure*[1805] or *de facto*[1806] commander of the armed forces of H-B/HVO and commander of the Main Staff.

Slobodan Praljak was one of the members of the joint criminal enterprise of **Herceg-Bosna** as early as September 1992, as demonstrated by his meetings with **Franjo Tuđman** and senior Croatian officials, as well as by statements made on these occasions.[1807]

Slobodan Praljak served as a conduit for conveying information,[1808] instructions and requests between the leaders of the Republic of Croatia and the H-B authorities. The Accused was therefore in frequent contact with the Minister of Defence, **Gojko Šušak**.[1809]

The Prosecution alleges that **Slobodan Praljak** ordered, directed, facilitated and supported H-B/HVO's dominance over the Bosnian Muslims and the perpetration of crimes.[1810] He allegedly issued orders, administrative bulletins, directives and instructions, and delivered ultimatums.[1811] To cite just one example, the Prosecution alleges that, in January 1993 at **Gornji Vakuf**, and in April 1993, the Accused insisted that **ABiH** troops be subordinated to the **HVO**.[1812]

The Accused facilitated, planned, approved, prepared, ordered and directed these operations and military actions, during which and in connection with which the crimes were committed.[1813] For example, the Prosecution considers that the evidence shows that **Slobodan Praljak** directed the operation at **Raštani** on 24 August 1993, during which certain crimes were committed.[1814]

[1805] Prosecution Final Trial Brief, paras 676, 677; after 24 July 1993: P 00289; P 00588.
[1806] Prosecution Final Trial Brief, para. 664.
[1807] Prosecution Final Trial Brief, para. 659; P 00466, pp. 52, 53, 54; P 11376, p. 2; P 11380.
[1808] Prosecution Final Trial Brief, paras 703-709.
[1809] Prosecution Final Trial Brief, para. 675; P 01622, pp. 18, 42, 36; P 01739, p. 27; P 06485, p. 24.
[1810] Prosecution Final Trial Brief, paras 718 *et seq*.
[1811] Prosecution Final Trial Brief, paras 718 *et seq*.
[1812] Prosecution Final Trial Brief, para. 718; P 01146; Slobodan Praljak, T(F), pp. 44054-55.
[1813] Prosecution Final Trial Brief, paras 718 *et seq*.
[1814] Prosecution Final Trial Brief, para. 722 and P 04719.

The Prosecution alleges further that **Slobodan Praljak** directed, facilitated, and supported the operations and activities of the **HVO** Military Police by means of which the various purposes of the **JCE** were pursued, and he closed his eyes to the crimes committed by his subordinates.[1815] The Prosecution specifically alleges that, in October 1992, the Accused was aware of the acts of destruction and looting engaged in by the **HVO** against Muslim property, and that the Military Police stole cars belonging to Muslims in **Prozor**.[1816]

Slobodan Praljak contributed to obstructing humanitarian aid, including towards East Mostar, through his failure to act in July and August 1993.[1817]

The Accused intended, approved and tolerated the forcible removal of the Muslims, the seizures of movable and immovable property, and the transfer of property to the H-B.[1818]

The Prosecution alleges that the Accused contributed to the widespread system of mistreatment by approving and condoning the introduction of a system of prisons, concentration and detention camps, and assignments to forced labour.[1819] The Prosecution specifically alleges that the Accused approved and condoned the crimes related to the siege of Mostar, offering as an example the sniping incidents targeting civilians.[1820]

The Prosecution alleges that the Accused approved the destruction of cultural and religious property not justified by military necessity as well as the looting, and that the Accused played a significant role, as the Commander of the Main Staff, in the destruction of *Stari Most*.[1821]

According to the Defence, there was **no joint criminal enterprise**. The Prosecution failed to show the existence of the joint criminal enterprise specifically alleged in the Indictment

[1815] Prosecution Final Trial Brief, paras 718 *et seq*.
[1816] Prosecution Final Trial Brief, para. 750.
[1817] Prosecution Final Trial Brief, paras 758 *et seq*.; P 02464 under seal, p. 3.
[1818] Prosecution Final Trial Brief, paras 769 *et seq*. *See* also P 00466, pp. 52-54; P 00524, pp. 17-18.
[1819] Prosecution Final Trial Brief, paras 789 *et seq*.; regarding the Accused's knowledge of these crimes, *see*, for example, P 05104.
[1820] Prosecution Final Trial Brief, paras 808 *et seq*.
[1821] Prosecution Final Trial Brief, paras 821-838 *et seq*.

and did not prove that the alleged criminal purpose was held by any of the alleged members of the JCE, especially the deceased persons who were not able to defend themselves.[1822]

According to the Defence, **Slobodan Praljak** had no authority whatsoever over the detention centres, not over their creation,[1823] their operation,[1824] or their maintenance.

The Defence also asserts that **Slobodan Praljak** served in the army and had no authority over the civilian branch of the HVO. He served in the army: (a) from **10 April until 15 May 1992**, and (b) **from 24 July until 7:30 a.m. on 9 November 1993**.[1825] The alleged crimes committed before and after these periods cannot be attributed to him. **Slobodan Praljak** committed no crime, and his **responsibility as a superior is limited**.[1826]

According to the Defence, the core of the Prosecution's case amounts to a wholly untenable theory of ***res ipsa loquitur*** **which means** "**the thing speaks for itself**"; this common law tort concept is entirely out of place in a criminal case requiring proof beyond a reasonable doubt. The events do not "speak for themselves" – they require context to be properly understood.[1827] The evidence clearly demonstrates that some of the actions alleged to be predicate offenses charged against **Slobodan Praljak** involved totally random, unplanned violence of a sort that was common on both sides.[1828] Nor were they a product of any kind of JCE.[1829]

According to the Defence, all armament of the HVO, the TO and the ABiH was either delivered *directly by* or *through* Croatia. A very small portion of armament was obtained from TO stores or was taken from JNA barracks.[1830]

[1822] The names of the deceased individuals are listed in paragraph 16 of the Indictment, Summary of the Praljak Defence Final Trial Brief, p. 7, para. 2.
[1823] Praljak Defence Final Trial Brief, para. 4.
[1824] Praljak Defence Final Trial Brief, para. 4.
[1825] Praljak Defence Final Trial Brief, para. 5.
[1826] Praljak Defence Final Trial Brief, para. 5.
[1827] Praljak Defence Final Trial Brief, para. 13.
[1828] Praljak Defence Final Trial Brief, para. 13.
[1829] Praljak Defence Final Trial Brief, para. 13.
[1830] Praljak Defence Final Trial Brief, para. 21 (B).

The Defence argues that the evidence central to the Prosecution's case is **not only hearsay evidence** but often **multiple layers of the most dubious sort of hearsay**, which is a critical flaw.[1831]

It also disputes some of the evidence that supposedly incriminates the Accused, *inter alia* the destruction of the **Višići Mosque**,[1832] because the evidence examined is not sufficient to support a finding that there was any linkage of the Accused with the destruction of the mosque.[1833] For the Defence, Witness **Mustafa Hadrović** erroneously claimed he saw **Slobodan Praljak** at the Heliodrom,[1834] and Document P 06937 is a forgery.[1835]

The Defence disputes **the forced labour by the detainees**; the **obstruction of the humanitarian convoys**; the **confiscation of property** and even **the plunder of private property**.[1836]

Concerning the incidents at **Prozor**, the Defence considers that the nexus between the crimes alleged to have been committed at **Prozor** in 1992 and an international conflict was not established, that this involved strictly local incidents, and that there is nothing to prove that the Muslims did not accept the proposal of the HZ H-B/HVO on 23 October 1992 made by **Mijo Jozić**, President of the Municipality of Prozor.[1837] The Defence also considers that nothing proves that the HVO incurred guilt for any extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly, three elements for which Count 19 requires evidence.[1838]

Concerning the events at **Gornji Vakuf**, the Defence acknowledges that the Accused was in the sector between 16 and 22 January 1993, where he attempted to ease tensions between TO/ABiH units and the HVO.

[1831] Praljak Defence Final Trial Brief, para. 39.
[1832] Indictment, para. 181.
[1833] Praljak Defence Final Trial Brief, pp. 49 to 50, para. 102.
[1834] Praljak Defence Final Trial Brief, p. 50, para. 103.
[1835] This document has two signatures. Praljak Defence Final Trial Brief, para. 104.
[1836] Praljak Defence Final Trial Brief, paras 44 to 100.
[1837] Indictment, para. 45.
[1838] Praljak Defence Final Trial Brief, paras 173 to 184.

Concerning the events at **Mostar**, **Slobodan Praljak** never wielded *de jure* authority, except for the periods from 10 April to 15 May 1992 and from 24 July to the early morning of 9 November 1993. There are no charges involving **Mostar** before 9 May 1993. At no time during the period between 24 July and 9 November 1993 did **Praljak** exercise *effective control* over *all of the* HVO troops in the Mostar sector and he was thus unable to exert any leadership or command over Croatian individuals or groups operating independently or not under the HVO Main Staff, such as the Military Police,[1839] the Convicts' Battalion or other similar groups.[1840]

Concerning the Office of the Prosecutor's allegations pertaining to the destruction of the mosques, the Defence considers that ample evidence exists to show that the mosques were destroyed by the JNA/VRS at the beginning of 1992[1841] and that there is not one single piece of evidence that would even remotely show that the H-B/HVO deliberately destroyed any mosques in the Mostar area, let alone various other objects of property.[1842] The Defence likewise states that **Slobodan Praljak** did not order the destruction of the **Old Bridge** and that, on the contrary, he protected it at risk to his troops, and that he was no longer in command when this structure was destroyed.[1843]

According to the Defence, there is no evidence that would support a finding that, in his capacity as the Commander of the HVO Main Staff, **Slobodan Praljak** could have known anything at all about the forcible deportations of Muslims from the **Čapljina-Stolac** area.[1844]

Before examining his criminal responsibility in detail, I must review the **applicable law** concerning the form of responsibility related to **ordering** (this legal section is also applies to **General Petković**).

Before entering into detail concerning the charges for which Slobodan Praljak was indicted, I find it necessary to discuss the mode of responsibility best adapted to his

[1839] Praljak Defence Final Trial Brief, paras 251 to 255.
[1840] Praljak Defence Final Trial Brief, paras 251 to 255; 4D 01456.
[1841] Praljak Defence Final Trial Brief, para. 315; 3D 00784.
[1842] Praljak Defence Final Trial Brief, para. 315.
[1843] Praljak Defence Final Trial Brief, paras 353 to 357.
[1844] Praljak Defence Final Trial Brief, para. 385.

responsibility, namely, ordering pursuant to Article 7(1) of the Statute; responsibility deriving from Article 7(3) of the Statute was analysed in Chapter C, Point 5.

The ***physical element*** required to establish this mode of participation consists of one person in a position of authority (the order-giver) giving an order to another person (the person who executes the order) to commit an offence.[1845]

The position of authority of the person who gives the orders need not be *de jure* but may be simply *de facto*.[1846] It is sufficient to show that the Accused possessed the necessary *de facto* authority to give orders,[1847] albeit temporary.[1848]

The order may be express or implied, verbal or written (the order may be established by circumstantial evidence), [1849] but must always result from a positive act or from instruction.[1850] Thus, according to the Appeals Chamber, there can be no order by omission without a prior positive act. [1851] At the same time, the person may order either the commission of an act or an omission.

The order need not be given directly to the perpetrator of the crime by the superior,[1852] let alone by the order's original drafter. Each person who conceived of the order initially or transmitted it may therefore incur responsibility.[1853]

[1845] *The Prosecutor v. Jean-Paul Akayesu* (ICTR), Judgement, 2 September 1998, para. 483; *The Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, 17 December 2004, para. 28; *The Prosecutor v. Ferdinand Nahimana et al.* (ICTR), Appeal Judgement, 28 November 2007, para. 481.
[1846] *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement, 10 July 2008, para. 400; *The Prosecutor v. Mile Mrkšić et al.*, para. 550; *The Prosecutor v. Vlastimir Đorđević*, Judgement, 23 February 2011, para. 1871.
[1847] *The Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, 26 February 2001, para. 388; *The Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, 17 December 2004, para. 28; *The Prosecutor v. Laurent Semanza*, Appeal Judgement, 20 May 2005, para. 363; *The Prosecutor v. Stanislav Galić*, Appeal Judgement, 30 November 2006, para. 176.
[1848] *The Prosecutor v. Laurent Semanza* (ICTR), Appeal Judgement, 20 May 2005, para. 363; *The Prosecutor v. Milan Milutinović et al.*, Judgement, 26 February 2009, para. 86.
[1849] *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, para. 281; *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Appeal Judgement, 19 May 2010, para. 160.
[1850] *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, para. 281.
[1851] *The Prosecutor v. Tihomir Blaškić*, Appeal Judgement, 29 July 2004, paras 660 *et seq*.; *The Prosecutor v. Stanislav Galić*, Appeal Judgement, 30 November 2006, para. 176; *The Prosecutor v. Vlastimir Đorđević*, Judgement, 23 February 2011, para. 1871.
[1852] *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, para. 282.
[1853] *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Appeal Judgement, 19 May 2010, para. 167.

The ***element of intent*** required to establish this mode of participation is the direct intent of the person ordering the crime.[1854]

The Appeals Chamber, however, decided that in order to have the requisite *mental element*, it is sufficient for the person or persons giving the order to be aware of the substantial likelihood that a crime will be committed while carrying it out. The Appeals Chamber considers that this fact constitutes an acceptance of the ensuing crime.[1855]

It is sufficient to show that the order had a direct, substantial effect upon the commission of the unlawful act.[1856] It is not necessary to prove that the crime would not have been committed *but for* the order.[1857]

In his Final Brief, the Accused **Praljak** stated repeatedly that he could not be held responsible for certain periods in the Indictment, acknowledging at paragraph 45 that he exercised *de jure* command from 10 April 1992 to 15 May 1992 and from 24 July 1993 to 9 November 1993. However, he acknowledges that he played a limited, constructive role throughout the period during which he did not command *de jure*. **I absolutely do not agree with this view**, because the limited role he claims to have played was not quite so limited, and I am fully persuaded that he was in reality the **sole** HVO military commander, with **Milivoj Petković** being only Number 2, even if on paper Petković was the Commander of the HVO.

The evidence unambiguously establishes that he was sent by the **President of the Republic of Croatia** to the Republic of Bosnia and Herzegovina to play a military role. At the time he left for Bosnia and Herzegovina, he was the **Deputy Minister** of Defence. This is not surprising despite the fact that he was a talented intellectual because history is filled with examples of persons who became military commanders even though they had no innate

[1854] *The Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, 17 December 2004, para. 29; *The Prosecutor v. Vlastimir Đorđević*, Judgement, 23 February 2011, para. 1872.
[1855] *The Prosecutor v. Tihomir Blaškić*, Appeal Judgement, 29 July 2004, para. 42; *The Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, 17 December 2004, para. 30.
[1856] *The Prosecutor v. Stanislav Galić*, Judgement, 5 December 2003, para. 169; *The Prosecutor v. Ferdinand Nahimana et al.* (ICTR), Appeal Judgement, 28 November 2007, para. 492; *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Appeal Judgement, 19 May 2010, para. 160; *The Prosecutor v. Vujadin Popović et al.*, Appeal Judgement, 10 June 2010, para. 1013.
[1857] *The Prosecutor v. Vujadin Popović et al.*, Appeal Judgement, 10 June 2010, para. 1013.

talent for it. The most celebrated contemporary example is that of Professor **Giàp** (a history professor who some think became the greatest military strategist of the last century through the battle he won at Diên Biên Phu).

General **Praljak** could have played a role in the shadows. That is not the path he chose: by October 1992, he was out on the front line, coming to **Prozor** to restore calm. Beyond this insurmountable fact that he acknowledges, there is a collection of documents testifying to his authority even though he did not hold any particular office within the HVO military command at the time. For instance, we have the Order of 14 November 1992 that he sent to the Military Police Administration.[1858] On 6 November 1992, he sent an order to the HVO and the ABiH with the stamp "Joint Command" in which he ordered searches at certain checkpoints he provided in a list.[1859] On 10 November 1992, he appointed military commanders such as Blaškić and Pašalić.[1860] On 18 January 1993, at a time when he did not have any *de jure* authority, he sent an order to the South OZ Commander, asking him to send five multiple grenade launchers (MGL).[1861] Along the same lines, on 7 December 1992 he signed an order jointly with **Ćorić** and **Stojić** regarding the checkpoints.[1862] All these documents – there are others – **unambiguously** establish that he was the **HVO military commander**. For this reason, he incurred criminal responsibility between **10 April 1992 and 9 November 1993**.

The evidence shows that **Slobodan Praljak**, through his orders, acted in furtherance of the purpose of deporting and persecuting the Muslims of Bosnia as the leader and *de jure*[1863] or *de facto*[1864] commander of the armed forces of H-B/HVO and as commander of the Main Staff. That the Accused took part is evident as of September 1992, because as of that date he attended meetings with **Franjo Tuđman** and other senior Croatian leaders.[1865]

[1858] 3D 00424.
[1859] P 00708.
[1860] P 00727.
[1861] P 01202.
[1862] P 00875.
[1863] After 24 July 1993: P 00289; P 00588.
[1864] Before 24 July 1993, the Accused acknowledged this himself; Slobodan Praljak, T(F), pp. 43454, 43457, 43935; P 08838, p. 4.
[1865] P 00466, pp. 52, 53, 54; Slobodan Praljak T(F), p. 41260; P 11376, p. 2; P 11380.

Furthermore, he participated in all of the meetings that purported to create an alliance with the Serbs against the Muslims.[1866]

From my point of view, **Slobodan Praljak** had a two-fold role. On the one hand, he was **Franjo Tuđman**'s standing envoy to the Republic of Bosnia and Herzegovina, tasked with informing the Croatian President of what was going on or with taking action if needed, as at Prozor in October 1992. On the other hand, he assumed formal command of the army of Herceg-Bosna, taking over exactly the same job held by his predecessor, **General Milivoj Petković**, starting on 24 July 1993, although I think he was exercising command informally from the moment he arrived in the Republic of Bosnia and Herzegovina.

Given the fact that he was sent to the Republic of Bosnia and Herzegovina by Franjo Tuđman, the question that arises is whether he was the *de facto* commander of the military HVO.

One might answer this in the affirmative if relying solely on the events of October 1992 in Prozor, when he arrived in person to soothe tempers.

It has been established beyond any doubt that he **alone** could make decisions because we have no trace of evidence that might enable us to define the role of **General Petković** or the role of the commander of the operative zone.

However, this involvement does not fit into a combat process. He did not come to organise an offensive or counter-offensive. On the contrary, he is there to impose a **ceasefire**.

This action obviously runs counter to the Prosecution's theory concerning the JCE – how else could we explain the compatibility of this theory with the peace-building initiative by **General Praljak** and the release of the Muslim prisoners?

From my point of view, his involvement can be understood only in the context of the position taken by **Franjo Tuđman** who, vacillating between the Serbs and the Muslims, little by little came to believe that a large-scale conflict in BiH was not possible with full

[1866] P 11376; P 11380.

deployment of Croatian forces and that the only way to do this was to reinforce the military HVO logistically and to dispatch volunteers.

Since **Praljak** was apparently aware of the military reports,[1867] did he have the authority to enforce compliance by **General Petković**?[1868]

The answer is provided in several documents establishing that **Slobodan Praljak**, who, while lacking any official title, nevertheless gave written orders to the military HVO.

As for his *de jure* authority after 24 July 1993, this, too, is clear from the evidence, because the Accused made use of it immediately and did so until he was again forced to resign on 9 November 1993.[1869] For instance, he issued orders in matters of discipline[1870] and organisation[1871] as well as various routine orders.[1872] It is likewise apparent that he held command authority over **Milivoj Petković**[1873] as well as over **Valentin Ćorić**.[1874]

His responsibility therefore attaches for the entire period relevant under the Indictment, and it would be difficult to endorse the Defence arguments that the Accused served in the army: (a) from **10 April until 15 May 1992** and (b) **from 24 July until 9 November 1993 at 7:30 am**,[1875] and that he cannot be held responsible for the crimes alleged to have been committed before and after these dates.

It thus appears that he is the person who launched the military operations during which the crimes were committed. Thus, for example, it was **Slobodan Praljak** who launched the Prozor operation on 25 July 1993.[1876] In January 1993, at **Gornji Vakuf**, and in April 1993, the Accused insisted that ABiH troops be subordinated to the HVO.[1877] He himself acknowledged this since he said he was in the sector between 16 and 22 January 1993,

[1867] P 00840.
[1868] 3D 00424; P 07892; P 00708; P 00927; P 00933; P 02823; P 01202; P 09838 under seal; P 00875.
[1869] P 00289; P 03700; P 09835; P 04967; P 04260; P 04508; P 04719; P 05402; P 05407; P 05692.
[1870] P 03706.
[1871] P 03947.
[1872] P 03912.
[1873] P 03700.
[1874] P 03829; P 00876; P 00927; P 03829; P 05376; P 03934; P 05235; P 04260.
[1875] 3D 00280; P 06556.
[1876] P 03706.
[1877] P 01146; Slobodan Praljak, T(F), pp. 44054-55.

when he attempted to ease tensions between the TO/ABiH units and the HVO. However, he is the person who subsequently launched the operation against **Gornji Vakuf** on 4 August 1993.[1878]

Slobodan Praljak likewise directed the operation at **Raštani** on 24 August 1993, during which crimes were committed.[1879]

The Accused was concerned by the events at **Vareš** on 23 October 1993, because he dispatched a report concerning the situation on the ground to the armed forces of Herceg-Bosna.[1880]

Slobodan Praljak was aware of the crimes that were committed against the local civilian population because reports were sent to him about this.[1881] He intended, approved and condoned the forcible removal of Muslims, the seizures of movable and immovable property, and the transfers of property to Herceg-Bosna.[1882] He contributed to the widespread system of mistreatment by approving and tolerating the introduction of a network of prisons, concentration and detention camps, and assignments to forced labour.[1883] The evidence shows that he approved and condoned the crimes related to the **siege of Mostar**, such as, for example, the sniping incidents targeting the civilians.[1884] Even if the evidence does not enable one to characterise these incidents as incriminating for the HVO, he nonetheless failed to act in this matter.

Concerning the events at Mostar, the Defence submits that **Slobodan Praljak** never wielded *de jure* authority, except for the periods from 10 April until 15 May 1992 and from 24 July until the early morning of 9 November 1993. There are no accusations that concern him directly regarding the events at Mostar prior to 9 May 1993. However, in my view, Praljak did, in light of his position, exercise *effective control* over *all of the* HVO troops in the Mostar sector and was therefore able to exercise command and control over Croatian

[1878] P 03934.
[1879] P 04719.
[1880] P 06028.
[1881] P 05772.
[1882] P 00466, pp. 52-54; P 00524, pp. 17-18.
[1883] Regarding the knowledge of the Accused concerning these crimes, *see* for example P 05104.
[1884] *See* Slobodan Praljak T(F), pp. 42893-94; P 03912.

individuals or groups operating independently or not subordinate to the HVO Main Staff, such as the Military Police,[1885] the Convicts' Battalion and other similar groups.[1886] Even if assumptions have been made that the Convicts' Battalion may have acted under a parallel chain of command, it is nevertheless true that, due to his special relationship with **Franjo Tuđman**, he was able to intervene to prevent the commission of criminal acts.

As shown above, **Slobodan Praljak** wielded **authority** over the military police. The Defence arguments regarding this must therefore be rejected; it is apparent that the Accused was present in Mostar and that he contributed to the siege of Mostar and thus, to the blockade of humanitarian convoys.[1887]

The Accused is also guilty of the destruction of cultural and religious objects unwarranted by military necessity, as well as of plunder. Although as Commander of the Main Staff he could be accused of having played a significant role in the destruction of *Stari Most*,[1888] I am persuaded that the evidence does not show that he took part directly. However, even if he had been concerned, I believe that the Old Bridge was a **legitimate military target**.

As I see it, Slobodan Praljak is guilty pursuant to Article 7(1) of the Statute on Counts 1, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, and 25. Under Article 7(3), he should be found guilty of Counts 2, 3, 4, and 5, as well as 22 and 23, although I note here that I do not share the opinion of the majority which found that he was not guilty on Counts 4 and 5 under Article 7(1) and under Article 7(3).

Like Milivoj Petković, he has incurred criminal responsibility pursuant to Article 7(3) of the Statute for the murders, killings, rapes, sexual offences, appropriations and plunder under the mode of superior responsibility because he should have taken measures to prevent these crimes and, at the very least, should have punished the perpetrators of the crimes, which he did not do.

[1885] P 02626; 5D 01013; P 04645; 3D 02617; 3D 01171; P 03960; 3D 02766, P 05478; T(F), pp. 1700-1702.
[1886] 4D 01456; Praljak Defence Final Trial Brief, paras 251 to 255.
[1887] P 03912; P 05402; P 05407; P 05692; P 06200; P 01172; P 01202; P 04792.
[1888] P 00343; P 01909; P 05402; P 05692; P 06990; P 07868.

The following chart offers a concise overview of the Counts attributable to this Accused.

RESPONSIBILITY OF SLOBODAN PRALJAK

COUNTS	POSITION OF PROSECUTION					POSITION OF DEFENCE	FINDINGS BY JUDGE ANTONETTI		FINDINGS BY THE MAJORITY		DISPOSITION	
	JCE Form I	JCE Form II (§ 224)	JCE Form II (§ 225)	JCE Form III	Other Forms	All Forms	Art. 7(1)	Art. 7(3)	JCE Form I	JCE Form III	Unanimity	Majority
1	X				X	NG	X		X		X	
2				X	X	NG		X	X			X
3				X	X	NG		X	X			X
4				X	X	NG		X		NG		NG
5				X	X	NG		X		NG		NG
6	X		X		X	NG	X		X		X	
7	X		X		X	NG	X		X		X	
8	X		X		X	NG	X		X		X	
9	X		X		X	NG	X		X		X	
10	X	X			X	NG	X		X		X	
11	X	X			X	NG	X		X		X	
12	X	X			X	NG	X		X		X	
13	X	X			X	NG	X		X		X	
14	X	X			X	NG	X		X			
15	X	X			X	NG	X		X		X	
16	X	X			X	NG	X		X		X	
17	X	X			X	NG	X		X			
18	X	X			X	NG	X		X		X	
19	X				X	NG	X		X		X	
20	X				X	NG	X		X			
21				X	X	NG	X		X		X	
22	X				X	NG		X		X		X
23	X				X	NG		X		X		X
24	X				X	NG	X		X		X	
25	X				X	NG	X		X		X	
26	X				X	NG						

Legend

- Position of Prosecution
- Position of Defence
- Findings by Judge Antonetti
- Findings by the Majority
- Disposition
- NG — Acquittal
- Count does not exist under Statute's provisions
- Counts for which a conviction may not be entered due to prohibition on cumulative convictions

Analysis of Milivoj Petković's Criminal Responsibility

(c) Milivoj Petković's Criminal Responsibility

According to the Prosecution, from April 1992 until August 1994, **Milivoj Petković** was, as **military head** of the armed forces of H-B, one of the key members of the JCE.[1889]

The Prosecution alleges, in particular, that he participated repeatedly in political meetings with the leaders of Croatia and H-B,[1890] such as the one in July 1992 (where he issued the decree on the armed forces of the HVO)[1891] and the one in August 1993 (where H-B proclaimed its existence).[1892]

According to the Prosecution, **Franjo Tuđman** considered him to be one of the leaders of H-B[1893] and the evidence points to the role played by the Accused in cooperation between the HVO and the Serbs.[1894]

According to the Prosecution, the evidence shows that he continued to maintain relations with Croatia and was even paid by the Republic of Croatia. When **Slobodan Praljak** replaced him in July 1993, he continued to play a leading role in the HVO Main Staff.[1895]

The Prosecution alleges that **Milivoj Petković** was perfectly aware of the extensive network of crime that was set up.[1896] The Prosecution alleges, in particular, that the Accused played a role in the events of May 1993 in **Mostar**.[1897]

On 8 August 1993, **Milivoj Petković** ordered forced labour for the prisoners at the **Heliodrom** and used derogatory and insulting language.[1898]

[1889] Prosecution Final Trial Brief, paras 861 *et seq*.
[1890] Prosecution Final Trial Brief, para. 863.
[1891] Prosecution Final Trial Brief, para. 863; 1D 01670; P 00880; P 05799; 1D 01609.
[1892] Prosecution Final Trial Brief, para. 863; P 01032; Milivoj Petković, T, p. 50495.
[1893] Prosecution Final Trial Brief, para. 866; P 03112, p. 54.
[1894] Prosecution Final Trial Brief, paras 870 *et seq.*; P 02909; P 05110; P 08341; P 02953; P 02962; P 09963; P 03212; P 09965; P 03403; P 03460; P 10153; P 04907; P 05101; P 05389.
[1895] Prosecution Final Trial Brief, paras 875 *et seq*.
[1896] Prosecution Final Trial Brief, paras 876 *et seq*.
[1897] Prosecution Final Trial Brief, para. 877; P 06365; Luka Perić, T, pp. 47872, 47882; Raymond Lane, T, pp. 23712-13.
[1898] Prosecution Final Trial Brief, para. 878; P 04020.

According to the Prosecution, **Milivoj Petković** is guilty of having created, endorsed and instigated a command climate that allowed crimes against Muslims.[1899]

Concerning the events which took place at **Prozor** in 1992, the Prosecution alleges that **Milivoj Petković** took part in this and that he was kept informed, as demonstrated by the fact that he was receiving reports from his troops every three hours.[1900]

Concerning the events which took place at **Gornji Vakuf** in January 1993, the Prosecution considers that the evidence clearly shows that **Mario Šiljeg** informed the Accused of the **ethnic cleansing** operations conducted by the HVO immediately after the deadline set by the HVO lapsed.[1901]

Concerning the events at **Sovići** and **Doljani**, the Prosecution considers that the evidence shows that the Accused was aware of the crimes[1902] and that he prevented the international observers from travelling to that area.[1903]

Milivoj Petković knowingly took part in a massive campaign to cover up the atrocities committed at **Stupni Do**.[1904] The Prosecution alleges that the Accused ordered these crimes by sending **Ivica Rajić** and his troops there on 23 October 1993 and that the investigation he ordered was simply play-acting.[1905]

The Accused took part in the campaign to arrest thousands of Muslims in July 1993.[1906] The Prosecution alleges that **Milivoj Petković** had in fact been taking part in the system of imprisonment since 1992.[1907]

Milivoj Petković allegedly took part in and approved the assignment to forced labour of Muslims and non-Croats.[1908]

[1899] Prosecution Final Trial Brief, para. 881; P 09549, para. 68.
[1900] Prosecution Final Trial Brief, para. 882; P 00644.
[1901] Prosecution Final Trial Brief, para. 883; P 01249.
[1902] Prosecution Final Trial Brief, para. 886.
[1903] Prosecution Final Trial Brief, para. 887; P 02066.
[1904] Prosecution Final Trial Brief, paras 895 *et seq*.
[1905] Prosecution Final Trial Brief, paras 895 *et seq*.
[1906] Prosecution Final Trial Brief, paras 916 *et seq*.
[1907] Prosecution Final Trial Brief, para. 919.

Milivoj Petković knowingly contributed to the destruction of Muslim property and religious objects and intended to participate therein.[1909]

It is alleged by the Prosecution that **Milivoj Petković** knowingly made a substantial contribution to the plunder and unlawful appropriation of Muslim property.[1910]

The Accused intended the siege of **East Mostar** and the terrorising of its population.[1911]

According to the Defence, war – which is legitimate – cannot be likened to a conspiracy or a criminal enterprise,[1912] and the acts of the Accused are those of a soldier acting for the benefit of his country.

The Prosecution did not prove the date on which the JCE saw the light of day, and there is no direct evidence of a criminal agreement among the members of the alleged JCE.[1913]

The Defence considers that the Indictment is silent as to how the Accused learned of the criminal plan.[1914] The evidence shows, on the contrary, that the Accused was completely unaware of the common plan: he did not participate in the meeting of November 1991 (the date on which the JCE began).[1915] Counsel for the Prosecution did not question the Accused during cross-examination concerning the date and the place when he allegedly learned of the existence of the alleged enterprise or the circumstances in which he learned of it. Under the Rules, a party is obliged to put its case to the witness of the other party. This was not done, and the Chamber must draw the necessary inferences from the Prosecution's failure to abide by the Rules in that regard.[1916]

[1908] Prosecution Final Trial Brief, para. 933; P 09868, p. 7; P 01418; P 04039; P 04020.
[1909] Prosecution Final Trial Brief, paras 942 *et seq*. *See*, for example, P 00679; with respect to this document the Prosecution states that the Accused was merely embarrassed that the foreign media were present and that he had no intention of putting an end to these crimes, as confirmed by a witness: Andrew Pringle, T, pp. 24131-32.
[1910] Prosecution Final Trial Brief, paras 954 *et seq*.; *see*, for example, P 00648.
[1911] Prosecution Final Trial Brief, paras 959 *et seq*.; *see*, for example, P 01307 and P 01437.
[1912] MM. LARNAUDE and LAPRADELLE, *Journal de droit international privé*, 1919, p. 157; *see* Petković Defence Final Trial Brief, para. 513.
[1913] Petković Defence Final Trial Brief, para. 522.
[1914] Petković Defence Final Trial Brief, paras 523 and 527 *et seq*. for everything concerning the JCE.
[1915] Petković Defence Final Trial Brief, para. 530 (i).

The Defence stresses the fact that the Accused at one time fought alongside the BiH Army.[1917]

According to the Defence, the Accused did not share in the common design. On the contrary, his relations with Croatia were not what the Prosecution wishes us to believe. He did not enjoy the complete trust of President **Mate Boban** and did not attend the most important meetings.[1918]

The Defence stresses that **Milivoj Petković**[1919] consistently made public appeals for peace and negotiation, and that he ordered his troops to comply with IHL.[1920]

It acknowledges that the Accused was aware of certain crimes but disputes the Accused's knowledge of the plan in its totality.[1921]

According to the Defence, the Accused planned only a single operation, "Bura" in 1992, and did not participate in any operations against the BiH Army.[1922]

The Accused did not order, plan or participate in the seizure of property in violation of the laws of war and never took part in any seizure of property in furtherance of a JCE. Concerning the destruction of religious heritage, the Defence submits that it has not been proved either that the underlying act or acts were committed in connection with the alleged joint criminal enterprise.[1923]

[1916] Petković Defence Final Trial Brief, para. 530 (ii).
[1917] Petković Defence Final Trial Brief, para. 530, Annex 2: HVO and ABiH: Joint Commands; Annex 3: HVO Plans: Alliance with the ABiH; Annex 5: Petković's Orders Concerning Tensions and Conflicts between the HVO and ABiH; Annex 8: Petković's Whereabouts in 1993.
[1918] Petković Defence Final Trial Brief, para. 537. 5 November 1993: Exhibit P 06454.
[1919] *Ibid.*; Exhibits 4D 00100 and 4D 01355.
[1920] *Ibid.*; Annex 7: Petković's Orders Concerning Humanitarian law and the Customs of War.
[1921] Petković Defence Final Trial Brief, para. 538.
[1922] Annex 6: *Petković's Combat Orders.* General Petković spoke as follows: "Your Honours, it would be a good idea if the Prosecutor had mentioned specific military operations, when they started, when they were completed, and how they evolved. There were no military operations that the HVO carried out against members of the [ABiH] in the sense of military operations. The HVO did clash with members of the ABiH in a number of locations from Central Bosnia down to the Neretva River Valley, but these were not operations that were initiated by the HVO. And in the course of such defensive assignments, I did issue orders and I advised my commanders, which it is my duty to do". T, pp. 49813 and 49814.
[1923] General Petković spoke as follows: "Your Honours, I do not deny that there was destruction of certain facilities and even certain properties as a result of combat activities, and even intentional destruction. But Milivoj Petković did not encourage such methods, but in his orders cautioned and warned his subordinates to treat property, civilians, and facilities in accordance with the regulations recognised by international law". T, p. 49816.

The Defence believes that the ***mental element*** of the crime of forcible transfer has not been proved and that the Defence was not able to prepare itself appropriately because the Prosecution failed to specify the (guilty) role that Petković allegedly played in relation to the transfer of civilians or in relation to the transfers (other than those at Sovići-Doljani and Prozor) in which he was alleged to have taken part.[1924]

Concerning the use of the word "***Balija***" by the Accused, the Defence recalls that this term is not a crime under international law and that, even if quite offensive, the Accused was not charged with this, and that, in addition, this does not herald participation in a JCE.[1925]

Concerning the cover-up of the crimes at **Prozor** and the Prosecution's allegations in respect of Exhibit P 04188 (the order given on 14 August 1993), the Defence says that **Milivoj Petković**'s order was not intended to conceal traces of crimes (nor was it proved that the detainees in question were victims of crimes, the traces of which were, moreover, still apparent), but actually somehow to prevent the observers from thinking that the situation of those they would meet was worse than it really was under the circumstances at that time.

In conclusion, the Defence considers that the Prosecution did not prove that each crime was foreseeable and that the Accused was able to foresee them.[1926]

Before going into detail about the criminal responsibility of the Accused, I must mention the mode of responsibility that I am assigning to him and that seems most appropriate: this is the one listed third under Article 7(1) of the Statute: "who ... ordered".

This portion was detailed in respect of Slobodan Praljak, and for this reason, I will not raise it again here.

Likewise, I hold him responsible under Article 7(3) of the Statute, the legal scope of which was detailed in the part devoted to superior responsibility.

[1924] Petković Defence Final Trial Brief, para. 553.
[1925] Petković Defence Final Trial Brief, paras 558 *et seq*.

Milivoj Petković was the **military head** of the armed forces of Herceg-Bosna, at least until 27 July 1993, the date of his *de facto* replacement by **Slobodan Praljak**. Even if he was the *de facto* No. 1 on paper for a time, it is apparent that for the entire **temporal scope** of the Indictment, he was in reality **No. 2**. At that same time, in that capacity his powers were identical to those **Slobodan Praljak** had for giving orders incurring criminal responsibility. In this capacity, he had the authority to proceed to appoint members of the armed forces,[1927] set up training programmes[1928] or to produce reports as well.[1929] It is the Accused who organised the HVO forces into operative zones in the territory of Herceg-Bosna on 31 August 1992,[1930] and who proceeded to form units on 9 December 1992,[1931] and to re-organise them that very same day.[1932] On 8 December 1992, **Milivoj Petković** determined the ranks in the HVO. These various documents show that **Milivoj Petković** put the structure of the armed forces in place.

Milivoj Petković was directly responsible for the armed forces under his command, and he was the person who at all times relevant to the Indictment gave the orders that led to the commission of the crimes. **Milivoj Petković** was perfectly aware of the systemic, widespread crime that occurred. He himself ordered the assignment to forced labour of the detainees at the **Heliodrom** on 8 August 1993,[1933] and he both submitted and received several reports mentioning the crimes committed against Muslims in various municipalities.[1934] The Defence acknowledges that the Accused was aware of certain crimes but disputes the Accused's knowledge of an over-arching plan.[1935] This argument cannot be accepted because when one analyses the various exhibits, it is apparent that **Milivoj Petković** was kept informed about what was happening throughout the territory of Herceg-Bosna. Bearing in mind his position within the hierarchy, he had to have known about each incident.

[1926] Petković Defence Final Trial Brief, paras 569 *et seq*.
[1927] *See*, for example, P 00173.
[1928] P 00441.
[1929] P 00237.
[1930] P 00416.
[1931] P 00886.
[1932] P 02040.
[1933] P 04020.
[1934] P 00679; P 01249; P 01281; 4D 01078.
[1935] Petković Defence Final Trial Brief, para. 538.

The Accused thus took part in the campaign to cover up the atrocities committed at **Stupni Do**; the investigation he ordered was simply play-acting.[1936]

The evidence shows that **Milivoj Petković** took part in the campaign to arrest thousands of Muslims in July 1993.[1937] **Milivoj Petković** had in fact been taking part in the system of imprisonment since 1992.[1938] He thus issued a series of orders that launched the indiscriminate campaign to arrest thousands of Muslims – soldiers and civilians alike – that was conducted by the HVO in July 1993.[1939] In his Defence Brief, **Petković** acknowledges that, in his capacity as Chief of the Main Staff, he had the authority to order arrests and detentions, on orders from Supreme Commander **Mate Boban**. However, he declared that he had neither the authority nor the power to place the persons arrested or detained in detention pursuant to the orders given; nor was he able to review the lawfulness of their detention.[1940] Although this assertion may be taken as true, it is equally certain that **Milivoj Petković**, in his capacity as Military Chief, was expected to be familiar with the **Geneva Conventions** which prohibit arresting individuals without consideration of whether they enjoy civilian or military status. That did not appear to be his concern, because on several occasions he ordered the arrest of Muslim men, irrespective of whether they were members of the armed forces. To cite just one example, on 30 June 1993, his orders to the South-East Operative Zone were that all Muslim men, whether members of the ABiH or not, were to be disarmed, in the case of the former, and "isolated", in the case of those that remained, throughout the entire sector.[1941] However, he spared the women and children, which shows that he knew he did not have the right to arrest them. Other exhibits show that he himself ordered that detainees be sent to do forced labour. The Defence's argument amounts to saying that he no longer had any authority over the detainees[1942] once they were detained.

The Defence seeks to exonerate the Accused of any responsibility with regard to the forced labour assignments involving at least two orders that he was alleged to have given. On 15 July

[1936] Milivoj Petković, T, p. 49619, closed session; P 09895; Witness EA, T, pp. 24476-79, closed session.
[1937] Prosecution Final Trial Brief, pp. 353 *et seq*.
[1938] P 00644; P 01462; P 00279.
[1939] P 03019; P 03128; P 03149.
[1940] Petković said that his responsibility and authority were restricted to handing over men who had been detained and isolated to the detention centres, and that his authority extended no further: T, pp. 50672 and 50673. Petković Defence Final Trial Brief, para. 211.
[1941] P 03019.
[1942] P 04039.

1993, after the sabotage operations conducted by the BiH Army on the Dubava Plateau, in the municipalities of Stolac and Čapljina,[1943] and the failure of the HVO's "South" military operation,[1944] **Milivoj Petković** gave the order to every unit in the South-East Herzegovina Operative Zone to hold the defence lines and to "organise immediately the fortification and barricading of defence lines reached and in the zone depth by engaging engineering equipment, prisoners and detainees".[1945]

On 20 July 1993, **Milivoj Petković** gave the order to speed up this move so that "[between now and tomorrow, 21 July 1993 by 2400 hours]", the defensive line would be reinforced. His orders were to "[use] the prisoners and available machinery in the completion of this task".[1946] The second order **was not carried out either**. Even though these directives were not carried out, the fact that the Accused knowingly intended to place prisoners into **forced labour**, fully aware that they risked being injured or killed – that is enough for him to incur responsibility.

The Prosecution states that the Accused knowingly participated in the campaign to destroy Muslim property and religious objects, intending to take part in it[1947] as well as in the **appropriation** of property and in the **looting**. However, upon reading the evidence, I conclude that he cannot be convicted of Counts 22 and 23 under Article 7(1) but that, instead, he must be convicted of these Counts under Article 7(3) of the Statute.

As a superior, he was required to take appropriate measures to prevent the commission of these crimes or at least to punish the perpetrators. By the same measure, concerning the murders, killings, rapes, and sexual offences cited in Counts 2, 3, 4 and 5, he also needed to take appropriate measures – which he did not do – or at the very least punish the perpetrators of these crimes.

[1943] P 10145; P 09935; 4D 01042; 4D 01096 and 4D 01101.
[1944] An operation set in motion by the HVO under the command of Brigadier General Luka Džanko, appointed by Mate Boban, in which Petković did not participate: 4D 01695 (members of the operational command) and P 03048; Beneta, T, pp. 46629 and 46630; Milivoj Petković, T, pp. 49598 to 49600. Petković Defence Final Trial Brief, paras 369 *et seq*.
[1945] P 03474.
[1946] P 03592.
[1947] Prosecution Final Trial Brief, para. 942 *et seq*. *See* for example P 00679: Concerning this document, the Prosecution says that, in fact, the Accused was simply embarrassed by the presence of the foreign media and he had no intention of putting an end to the crimes, as confirmed by a witness: Andrew Pringle, T, pp. 24131-32.

The following chart affords a complete overview of his responsibility under Article 7(1) of the Statute for giving orders and also under Article 7(3) of the Statute for not having taken appropriate measures to punish the perpetrators of the crimes of which he was aware.

He is thus guilty on Count 1, Count 6, Count 7, Count 8, Count 9, Count 10, Count 11, Count 12, Count 13, Count 14, Count 15, Count 16, Count 17, Count 18, Count 19, Count 20, Count 21, Count 24, and Count 25, under Article 7(1) of the Statute. By the same measure, he is guilty under Article 7(3) on Count 2, Count 3, Count 4, Count 5, Count 22, and Count 23.

The following chart affords an overview of his criminal responsibility:

RESPONSIBILITY OF MILIVOJ PETKOVIĆ

COUNTS	POSITION OF PROSECUTION					POSITION OF DEFENCE	FINDINGS BY JUDGE ANTONETTI		FINDINGS BY THE MAJORITY		DISPOSITION	
	JCE Form I	JCE Form II (§ 224)	JCE Form II (§ 225)	JCE Form III	Other Forms	All Forms	Art. 7(1)	Art. 7(3)	JCE Form I	JCE Form III	Unanimity	Majority
1	X				X	NG	X		X		X	
2				X	X	NG		X	X			X
3				X	X	NG		X	X			X
4				X	X	NG		X		X		X
5				X	X	NG		X		X		X
6	X		X		X	NG	X		X		X	
7	X		X		X	NG	X		X		X	
8	X		X		X	NG	X		X		X	
9	X		X		X	NG	X		X		X	
10	X	X			X	NG	X		X		X	
11	X	X			X	NG	X		X		X	
12	X	X			X	NG	X		X		X	
13	X	X			X	NG	X		X		X	
14	X	X			X	NG	X		X			
15	X	X			X	NG	X		X		X	
16	X	X			X	NG	X		X		X	
17	X	X			X	NG	X		X			
18	X	X			X	NG	X		X		X	
19	X				X	NG	X		X		X	
20	X				X	NG	X		X			
21				X	X	NG	X		X	X	X	
22	X				X	NG		X		X		X
23	X				X	NG		X		X		X
24	X				X	NG	X		X		X	
25	X				X	NG	X		X		X	
26	X				X	NG						

Legend

- Position of Prosecution
- Position of Defence
- Findings by Judge Antonetti
- Findings by the Majority
- Disposition
- NG — Acquittal
- Count does not exist under Statute's provisions
- Counts for which a conviction may not be entered due to prohibition on cumulative convictions

Analysis of Bruno Stojić's Criminal Responsibility

(d) Bruno Stojić's Criminal Responsibility

According to the Prosecution, Bruno Stojić was one of the primary members of the JCE and he wanted a "**Greater Croatia**", as shown by his conversation on 5 May 1992 with **Branko Kvesić**, his Bosnian Croat comrade, and their former Serbian colleagues from the BiH Ministry of the Interior, **Momčilo Mandić** and **Mićo Stanišić**.[1948]

On 9 June 1993, **Bruno Stojić** sent a communiqué to all of the HVO Brigades in Central Bosnia, in which he reminded the Bosnian Croat soldiers that they all formed part of one indivisible Croat nation, that whoever opened fire on them was their enemy, and that they were to respond.[1949]

Bruno Stojić was the most senior H-B government official with direct responsibility over the armed forces, and he played a key role in logistics and the supply of weapons and ammunition.[1950] He wielded *de jure* and/or *de facto* authority, effective control and substantial influence over every aspect of HVO military and defensive operations.[1951]

The Prosecution alleges that **Bruno Stojić** played a **significant and essential role** by laying down and enforcing the laws of Herceg-Bosna, its policies, its programmes and its strategy, and in particular, by overseeing the implementation of these policies and strategies by the military branch of the HVO.[1952] In this respect, the Prosecution considers that the evidence shows that **Prlić** was clearly the Accused's superior, as Witness BH confirmed,[1953] and that out of the 88 HVO government meetings held in 1992 and 1993, **Bruno Stojić** took part in at least 52 of them.[1954]

[1948] P 00185.
[1949] P 02690.
[1950] Stjepan Kljuić, T(F), pp. 7971 and 7972.
[1951] Prosecution Final Trial Brief, para. 534; P 09712 under seal, para. 17; Witness BH, T(F), pp. 17492-17493, closed session; P 10217 under seal, para. 27; van der Grinten, T(F), p. 21027; Witness BF, T(F), p. 25784, closed session.
[1952] Prosecution Final Trial Brief, para. 525.
[1953] Witness BH, T(F), pp. 17557 to 17559, closed session.
[1954] Prosecution Final Trial Brief, Confidential Annex F.

The Prosecution observes that **Bruno Stojić** was the official above **Milivoj Petković**, which illustrates his place in the chain of command.[1955]

The Prosecution alleges that it was **Bruno Stojić** who ordered implementation of the decree issued subsequent to the **HVO ultimatum** of **15 January 1993**, which ordered the ABiH troops to subordinate themselves to the HVO Main Staff in Provinces 3, 8 and 10, in connection with the **Vance-Owen Peace Plan**, or otherwise to depart from these provinces.[1956]

According to the Prosecution, the Accused held full authority within the Department of Defence, particularly as concerns appointments and dismissals in the military and defence areas, orders and the implementation of decrees.[1957]

It submits that in practice the Accused regularly issued orders to the HVO armed forces, even if this did not fit within his prerogatives.[1958]

The Prosecution considers that the evidence shows that the Accused had control over the human, financial and logistical resources of the HVO.[1959]

Bruno Stojić controlled the HVO military police and had the authority to appoint the chiefs of the general military police (including the traffic police) and the criminal military police, as well as the commanders of the five military police battalions.[1960]

Concerning these crimes, the Prosecution alleges that **Bruno Stojić** intended to and did play a role in the persecution, forcible transfer and deportation of the Bosnian Muslims.[1961]

[1955] Milivoj Petković, T(F), pp. 50347 and 50348.
[1956] P 01146.
[1957] Prosecution Final Trial Brief, paras 541 *et seq*.; P 03274; P 00309; P 00502; Andrew Pringle, T(F), p. 24101; P 02477; P 04211; P 05249; P 00796; P 00849; P 00938; P 01081.
[1958] Prosecution Final Trial Brief, para. 547; Davor Marijan, T(F), pp. 35873, 35874.
[1959] Prosecution Final Trial Brief, para. 552; Davor Marijan, T(F), p. 35659; P 00289; P 09545.
[1960] Prosecution Final Trial Brief, para. 561; P 01466 (appointing **Mijo Jelić** Commander of the 1st Active Battalion of Military Police in Mostar); P 02985 (appointing **Radoslav Lavrić** Deputy Chief of the Military Police Administration); P 02993 (appointing **Branimir**0**Tucak** Assistant Chief of the Military Police Administration for Security); P 03002 (appointing **Paško Ljubičić** Assistant Chief of the Military Police Administration for the Central Bosnia Operative Zone); P 03487 (appointing **Mijo Jelić** Assistant Chief of the Military Police Administration for the South-East Herzegovina Operative Zone).
[1961] Prosecution Final Trial Brief, paras 566 *et seq*.; P 00653; P 00687.

The Prosecution considers that the Accused contributed to the operation of the camps, to the incarceration of the Muslims, and to the **forced labour**, in particular through his authority over the camps.[1962]

Bruno Stojić contributed to the unlawful destruction of property and intended this.[1963]
Bruno Stojić contributed to the looting[1964] and ordered the seizure of Muslim property and apartments in Mostar.[1965]

Bruno Stojić knowingly contributed to the **siege of East Mostar** and to terrorising the population and he exercised substantial control over humanitarian aid convoys.[1966]

The Prosecution considers that the Accused knew about the **rapes** and the **killings** and did nothing.[1967]

According to the Stojić Defence, there was **no JCE** and the Prosecution did not show that there was a national policy of discrimination.[1968] The Prosecution did not prove beyond a reasonable doubt that there was a JCE, and particularly, a **common plan** designed to drive the Muslims out of Herceg-Bosna in order to create a Greater Croatia.[1969] The objectives pursued were legitimate. The HVO thus allegedly cooperated with the ABiH, which shows that there was no discrimination towards Muslims.[1970] Furthermore, it allegedly cooperated with the humanitarian organisations,[1971] stopping and searching them for security reasons alone.[1972] HVO policy was different from what was described in the Prosecution's common plan and it was legitimate, because it sought to defend the Bosnian Croats against the attacks mounted by the Serbs.[1973]

[1962] Prosecution Final Trial Brief, para. 598; P 05812, p. 1.
[1963] Prosecution Final Trial Brief, para. 613; P 01351; P 01357, p. 6; P 01989.
[1964] Prosecution Final Trial Brief, para. 616; P 01351.
[1965] Prosecution Final Trial Brief, paras 617-619.
[1966] Prosecution Final Trial Brief, para. 621; P 01316; P 02419 under seal; P 04527; P 04529; Witness DV, T(F), pp. 22903 and 22904.
[1967] Prosecution Final Trial Brief, para. 625; P 02594; P 02597; P 04177, p. 3; P 02169.
[1968] Stojić Defence Final Trial Brief, para. 5.
[1969] Stojić Defence Final Trial Brief, paras 5, 221, 222.
[1970] Stojić Defence Final Trial Brief, para. 7.
[1971] Stojić Defence Final Trial Brief, paras 7, 92, 102-107.
[1972] Stojić Defence Final Trial Brief, paras 88, 108-110.
[1973] Stojić Defence Final Trial Brief, paras 7, 10, 11, 112, 153.

The **Stojić Defence** agrees that there were conflicts with the ABiH, but says that they were caused by isolated incidents or were the result of ABiH attacks.[1974] The crimes committed might therefore be attributable to individuals or to municipal authorities but not to the alleged members of the JCE acting in furtherance of a common criminal plan.[1975] Before **the ABiH** launched its military campaign in March and April 1993, these clashes were thus simply the result of isolated skirmishes.[1976] The incidents that happened at Prozor[1977] in October 1992 and at Gornji Vakuf[1978] in January 1993 were therefore merely resulted from ABiH attacks, and the conflict only escalated because of orders from local HVO commanders. Subsequent clashes resulted from the ABiH implementing their plan to conquer those territories where the HVO had fought alongside them.[1979]

The persons who committed the alleged crimes did not fall under the authority of the HVO.[1980]

There was no common plan among the leaders of H-B, and there was no plan for a "Greater Croatia".[1981]

Concerning **Bruno Stojić**'s participation in **the JCE**, the Defence considers that he was not responsible for having taken part in a JCE. The Defence alleges that he did not substantially contribute to the crimes and did not intend to further the JCE.[1982] The Defence submits that the Accused's functions were administrative and logistical in nature, and that he did not in any way participate in military operations or political decisions.[1983] Most of the time, he was unaware of the crimes with which he is charged, and when he did know, he attempted to take measures by setting up commissions, which did not function due to his lack of authority.[1984]

[1974] Stojić Defence Final Trial Brief, paras 7, 111.
[1975] Stojić Defence Final Trial Brief, paras 8, 128.
[1976] Stojić Defence Final Trial Brief, para. 116.
[1977] Stojić Defence Final Trial Brief, paras 127, 128.
[1978] Stojić Defence Final Trial Brief, paras 129-132.
[1979] Stojić Defence Final Trial Brief, paras 133, 141, 142, 149, 150.
[1980] Stojić Defence Final Trial Brief, para. 7.
[1981] Stojić Defence Final Trial Brief, paras 175 *et seq*.
[1982] Stojić Defence Final Trial Brief, para. 224.
[1983] Stojić Defence Final Trial Brief, para. 223.
[1984] Stojić Defence Final Trial Brief, para. 224.

Furthermore, according to the Defence, he did not take part in the enforcement of an oppressive system of detention centres.[1985]

Lastly, the Defence considers that the Prosecution did not make a showing of the Accused's specific intent to discriminate against Muslims, which is a requirement.[1986]

Regarding the form 2 of JCE, the Defence submits that the Accused had no authority concerning the victims referred to in the Indictment; he had authority over the Serbian prisoners only.[1987] He was cut off from the **detention centre**, which is thus in keeping with the case-law of the Tribunal which teaches *inter alia* that this type of responsibility is most appropriate for those who work *within* a detention centre.[1988]

Concerning the conversation (between the Accused, **Mandić**, **Kvesić** and **Mićo Stanisić)** advocating going back to the Banovina,[1989] the Defence considers that this was just "banter" or "ribbing" between old colleagues. Moreover, the Prosecution did not make use of this conversation in its entirety, whereas certain statements might have exonerated the Accused.[1990] If the Chamber chooses to rely on the trustworthiness of this conversation, it must ultimately decide that the conversation exonerates the Accused.[1991]

[1985] Stojić Defence Final Trial Brief, para. 226.

[1986] Stojić Defence Final Trial Brief, para. 225; *The Prosecutor v. Kvočka et al.*, Judgement, 2 November 2001, para. 288, confirmed in *The Prosecutor v. Kvočka et al.,* Appeal Judgement, 28 February 2005, para. 110. *See* also *The Prosecutor v. Stakić*, Appeal Judgement, 22 March 2006, para. 327, in which the Appeals Chamber found that, for there to be persecutions, the requisite elements for all crimes against humanity punishable under the Statute must be established and that, moreover, this must involve an act or an omission that (1) discriminates in fact and which denies or infringes a fundamental right recognised in international customary or treaty law (the *actus reus* or physical element of the crime); and (2) was carried out deliberately with the intention to discriminate on one of the prohibited grounds, specifically racial, religious or political (the *mens rea* or mental element of the crime). Moreover, "[i]t is not sufficient that the accused was merely aware that he is in fact acting in a discriminatory way" [...] "the accused must consciously intend to discriminate for persecution to be established". In addition, the act must be discriminatory in fact; discriminatory intent by itself is not sufficient. *The Prosecutor v. Krnojelac*, Judgement, 15 March 2002, paras 435 and 432; *The Prosecutor v. Vasiljević*, Judgement, 29 November 2002, paras 248 and 245.

[1987] Stojić Defence Final Trial Brief, para. 225.

[1988] Stojić Defence Final Trial Brief, para. 226; Kvočka, as the duty officer at the Omarska camp, was considered to play a key role in the administration and operation of the camp. *See The Prosecutor v. Kvočka et al.,* Judgement, 2 November 2001, paras 404 to 407. Krnojelac was the warden of the prison and the highest-ranking official at the KP Dom. *See The Prosecutor v. Krnojelac*, Judgement, 15 March 2002, para. 97.

[1989] P 00185.

[1990] Stojić Defence Final Trial Brief, para. 231; The Prosecution was careful, during the trial, not to mention certain things that Stojić said to Stanišić: P 00185: "Talk to that fool of yours ... he's really out of his mind", and that Karadžić should get "pipe dreams" out of his head. If any weight at all were to be assigned to the intercepted conversation, a fair and impartial prosecutor would have mentioned Stojić's reaction to other absurd remarks by Stanišić ("Stop it already, what's wrong with you?") and his determined refusal to respond to the other insulting

Before entering into Bruno Stojić's criminal responsibility, I believe it would be useful to discuss the mode of responsibility for aiding and abetting, which, in my opinion, is the responsibility of the Accused.

The Statute contemplates the following mode of responsibility: "otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the Statute". The first question which arises is whether the terms "aided" and "abetted" describe two situations or describe only one. Some consider[1992] the expression to comprise aiding (*aider*) as well as abetting (*encourager*), thereby encompassing two situations, whereas in common law practice, they form an indivisible whole.

As far as I am concerned, I consider this as forming a whole, and the **accessory** gives the principal perpetrator aid, active support and assistance, which he can also provide by failing to act. However, someone who abets or who incites or provokes a crime falls under another mode of responsibility which is defined in Article 7(1): "instigates".

Aiding and abetting translates into the concept of complicity in International Criminal Law. In the Common Law tradition, this also corresponds to "*aiding and abetting*", which has the meaning that we find in Article 7(1) of the Statute.[1993]

Complicity is a form of accessory liability, which means that it must be shown that there was a crime committed by the **principal perpetrator**, in this case **Jadranko Prlić**, due to his involvement as Head of Government in planning this; it then had to be executed.[1994]

The Tribunal's case-law concerning the **physical element** affords a proper grasp of this concept:[1995]

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comments made about the Muslims or to express his approval of them. Moreover, at one point Stojić clearly distanced himself from Stanišić, who had just expressed extreme views and declared that the Serbs would end up going after the Muslims: "well, I leave that to you, those recessions /sic/ between you".

[1991] Stojić Defence Final Trial Brief, para. 230.

[1992] Olivier de FROUVILLE, *Droit international pénal*, Editions Pedone, 2012.

[1993] The *Akayesu* Judgement makes a distinction between the two concepts:
"*L'aide et l'encouragement* [aiding and abetting] which may appear to be synonymous, are indeed different. 'Aiding' means giving assistance to someone. 'Abetting', on the other hand, would involve facilitating the commission of an act by being sympathetic thereto", para. 384.

- there must be a connection linking the aid or assistance provided and the commission of the crime by its principal perpetrator (the case-law does not require that the aid have constituted the *sine qua non* condition of the crime);

- it is sufficient that the aid or assistance made a substantial contribution to or had a substantial effect upon the commission of the crime for it to be chargeable;[1996]

- the aid or assistance need not necessarily be provided at the moment the crime is committed;

- it is not required that the accessory be present at the moment the crime is committed by the principal perpetrator, but the mere fact of his presence may be enough to characterise complicity if this can be proved to have had a substantial effect upon the commission of the crime.

Aiding and abetting may be done by means of an **action** but also by means of an **omission** when the accessory has a legal duty to act, and particularly when he is a superior.[1997]

The *mens rea* resides in a two-fold awareness, according to case-law:

- the accessory must be aware of the fact that his action or omission assists in the commission of the crime by the principal perpetrator;

- the accessory must be aware of the essential elements of the crime committed or supposed to be committed by the principal perpetrator.[1998] If several crimes are envisaged, an awareness of even one of these crimes is sufficient for the accessory to incur responsibility if the accessory had the intent to facilitate its commission.[1999]

[1994] *Akayesu* Judgement, para. 529.
[1995] *Tadić* Judgement, paras 688-692, 673-687; *Furundžija* Judgement, paras 190 *et seq*.
[1996] *Tadić* Appeal Judgement II, para. 229; *Furundžija* Judgement, para. 233; *Ntakirutimana* Appeal Judgement, paras 532-533.
[1997] *Blaškić* Appeal Judgement, para. 47.
[1998] *See Orić* Appeal Judgement, para. 43; *Mrksić and Šljivančanin* Appeal Judgement, para. 159.
[1999] *Blaškić* Appeal Judgement, para. 50.

Bruno Stojić was the most senior H-B government official with direct responsibility over the armed forces and played a key role in military logistics and in supplying weapons and ammunition.[2000] He wielded *de jure* and/or *de facto* authority, effective control and substantial influence over every aspect of HVO military and defence operations.[2001]

Bruno Stojić was appointed to head the Department of Defence by **Mate Boban** on 3 July 1992,[2002] and, as shown by the decree on the organisation and responsibilities, of the Department of Defence, the **Minister of Defence** enjoyed full authority over the military apparatus in defence of Herceg-Bosna.[2003]

Bruno Stojić controlled the financial resources of Herceg-Bosna. He had signing authority over the accounts opened in the name of the Republic,[2004] and regularly lodged requests to disburse funds,[2005] and it was he who had the authority to redistribute them subsequently in the field.[2006] The Defence stated that it was the HVO HZ H-B, not the Department of Defence, which was responsible for the financial resources of the armed forces. For example, on 5 July 1993, the HVO HZ H-B authorised the Department of Finance to review what funding was necessary for defence purposes.[2007] Meanwhile, loans were made available for the Department of the Defence and it appears that the Accused had decision-making authority in matters of expenditure and lending. In fact, on 22 March 1993, Mladen Naletilić dispatched a personal request to him asking him to disburse funds for his battalion. For this reason, Bruno Stojić cannot evade his responsibility in such matters.

Bruno Stojić controlled the arms factories in BiH[2008] as well as weapons supply lines on the ground.[2009] The Chamber has documents proving that the Accused engaged in transactions

[2000] Stjepan Kljuić, T(F), pp. 7971 and 7972.
[2001] Witness BA, P 09712 under seal; Witness BH, T(F), pp. 17492-17493, closed session; P 10217 under seal, para. 27; van der Grinten, T(F), p. 21027; Witness BF, T(F), p. 25784, closed session.
[2002] P 00297.
[2003] P 00440.
[2004] P 00098.
[2005] P 01701.
[2006] P 02615.
[2007] 1D 01669, point 8, p. 3.
[2008] P 00526; P 00527; P 07978.
[2009] P 00316; P 01164, para. 3.

with the VRS[2010] and with arms dealers in Germany[2011] so that Herceg-Bosna would be supplied on a regular basis.

Bruno Stojić also had a certain amount of **control** over the HVO Military Police. For instance, he had a power of appointment conferred upon him under the internal regulations of the Ministry of Defence,[2012] a power that he used on several occasions.[2013] He also proceeded to restructure the military police units on the ground on several occasions.[2014] The Defence submitted that the operational branches of the military police and the SIS were, in reality, under the authority of the HVO armed forces and they maintained purely administrative relations with the Department of the Defence;[2015] generally speaking, *de jure* authority over the security sector was a problem since the internal structure was not clearly set in place in the October decree[2016] which gave rise to disagreements concerning the extent of the competence of each of these sub-divisions.[2017] It is nevertheless true that **Bruno Stojić** had control over **administrative matters** involving the military police, and that, for this reason, he helped the operational units by sending military police units to the Brigades.

Regarding the **deportations** and the **forcible transfers**, the evidence shows that although the Accused did not directly order these crimes, he was aware of what was occurring on the ground and did nothing to prevent it from unfolding. He was perfectly aware of what was happening in Prozor in 1992.[2018] The Accused even issued two direct orders concerning the incidents at Prozor. He initially ordered a restructuring of the soldiers in the field on 29 October 1992,[2019] and then, on 1 November 1992, ordered that a report be given to him

[2010] P 09820.
[2011] P 02620.
[2012] P 02477.
[2013] P 03002; P 03487.
[2014] P 00875; P 03124; P 03146.
[2015] Stojić Defence Final Trial Brief, para. 364; 2D 01333, appointment of Valentin Ćorić to the post of Assistant Commander for the Security and Information Service, signed by Mate Boban (13 April 1992); 2D 02000, Davor Marijan: Expert's Report, para. 30 (going to the fact that Boban appointed Ćorić in April 1992 to the post of "Assistant Commander of the HVO Main Staff responsible for the Security and Information Service", thereby placing all of the HVO Military Police units under his responsibility).
[2016] Stojić Defence Final Trial Brief, para. 365; P 00588.
[2017] Stojić Defence Final Trial Brief, para. 365. Expert Witness Marijan recounted an episode during which the attempt to subordinate a battalion of military police to the assistant commander in charge of the SIS ultimately led to an objection from the SIS administration. P 01678 is a communiqué signed by Valentin ĆORIĆ, addressed to the commander of the North-West Herzegovina Operative Zone, concerning the conclusions of the meeting in the North-West Herzegovina Operative Zone at Tomislavgrad on 9 March 1993 (17 March 1993).
[2018] P 00619; P 00653.
[2019] P 00670.

concerning what was happening in Prozor,[2020] which proves that he knew what was happening and that he was personally involved. However, as the Defence observed, it would seem that the Prosecution did not succeed in showing that **Bruno Stojić** had the specific intent to persecute the Muslims and to mete out discriminatory treatment to them. It appears in fact that the Accused did not directly issue any **orders** concerning deportations or transfers; however, within the meaning of Article 7(1) of the Statute, he assisted the units that were active in the field by providing personnel and materiel logistics.

Bruno Stojić implemented the decree issued subsequent to the **HVO ultimatum** of 15 January 1993 which ordered the subordination of the ABiH troops to the HVO Main Staff in Provinces 3, 8 and 10, in connection with the **Vance-Owen Peace Plan**, or their departure from these provinces[2021] and it is possible that he also incurred responsibility for the **arrests** and **deportations** at **Mostar** because there were several such orders issued by the Ministry of Defence;[2022] he thus helped to carry out this measure by transmitting it to the operational units in the field.

Bruno Stojić was responsible for the operation of the HVO camps, and specifically for the treatment of prisoners of war.[2023] He personally took part in the implementation and the operation of the camps, particularly at **Dretelj**[2024] and at the **Heliodrom**.[2025] The Accused himself issued the **Decree establishing the Heliodrom Prison**.[2026] In my opinion, by enacting these legal texts, he implemented the plan adopted at the senior level by **Mate Boban** and **Jadranko Prlić**, thereby substantially aiding its realisation by means of the assistance he provided.

On 11 February 1993, it was the Accused who enacted the **Decree** regulating the treatment of prisoners of war in the camps and ordering compliance with the Geneva Conventions;[2027] a decree which evidently had no effect, something which the Accused knew because he

[2020] P 00799.
[2021] P 01146.
[2022] P 03181.
[2023] P 00292.
[2024] P 00893.
[2025] P 01818; P 01615.
[2026] P 00452.
[2027] P 01474.

personally received a number of reports describing mistreatment,[2028] as well as forced labour,[2029] which proves that he had knowledge of these crimes. The Defence stated that the Accused had authority over the Serbian prisoners only,[2030] which is false in light of the decree concerning the treatment of the prisoners of war[2031] – it was not only the Serbs. It is not clear why he would have been competent solely in respect of **Serbian** prisoners.

It also appears that **Bruno Stojić** was aware of the **unlawful destruction** of property[2032] – a report by the **ICRC** was addressed to him personally in order to make him aware of these crimes.[2033] It also appears that he ordered the seizure of Muslim property and apartments in Mostar.[2034] The Defence argued that, with respect to the situation in **Mostar**, the witnesses for the Prosecution and Defence alike described the situation in Mostar at that time as "chaotic".[2035] To accommodate the greatest number of refugees possible, it was necessary to regulate the procedure for allocating deserted flats. Although this argument may be accepted in part, given that the authorities may requisition apartments in the event of a conflict, such requisitions must be open to challenge in court, which was not the case.

Concerning the responsibility of the Accused, the Defence considers that, in actual fact, **Stojić** assisted in drafting the decree regarding the provisional use of apartments by the HZ H-B army. This decree specifies the steps to follow for the provisional assignment of vacant, vacated or abandoned apartments to the families of soldiers. He required that detailed contact information of the new occupant be provided to the former occupant, whose rights were protected because the law did not assign any rights whatsoever to the new occupant.[2036] The text of the decree clearly indicated that the Muslim occupants were not specifically targeted and that it was applicable to everyone.

I do not share this point of view, given his position of **authority** at the head of the **Department of Defence**.

[2028] P 02425; P 02458.
[2029] P 03381, p. 7.
[2030] Defence Final Trial Brief, para. 225.
[2031] P 00292.
[2032] P 01351; P 01357, p. 6; P 01989.
[2033] P 01989.
[2034] Prosecution Final Trial Brief, paras 617-619.
[2035] Martin Raguz, T, p. 31552; Milivoj Gagro, T, p. 2749.

Concerning **Bruno Stojić's** criminal responsibility for Counts 2, 3, 4, 5, 19, 20, 22 and 23, I believe that the evidence does not make it possible for us to connect him with these crimes on the basis of aiding and abetting. It is obvious to me that none of the evidence supports a finding beyond a reasonable doubt that he provided logistical support to the perpetrators of the crimes, knowing that they would commit murders, killings, rapes, sexual offences, destruction of property, appropriation and plunder.

I do not hold him responsible on the basis of Article 7(3) of the Statute because he had no **direct disciplinary authority** over the perpetrators of these crimes, who fell under the jurisdiction of the Brigade Commander or the Operative Zone Commander or even the HVO Chief of Staff.

Therefore, Bruno Stojić must be found guilty pursuant to Article 7(1) of the Statute on Counts 1, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 24, and 25. However, he must be acquitted on Counts 2, 3, 4, 5, 19, 20, 21, 22, and 23.

The following chart provides an overview of Bruno Stojić's criminal responsibility:

[2036] 2D 00993: a letter bearing a seal and signed by Bruno STOJIĆ, included with the draft decree on the temporary use of military apartments in the HZ H-B region (20 January 1993), paras 1, 11 and 12.

RESPONSIBILITY OF BRUNO STOJIĆ

COUNTS	POSITION OF PROSECUTION					POSITION OF DEFENCE	FINDINGS BY JUDGE ANTONETTI	FINDINGS BY THE MAJORITY		DISPOSITION	
	JCE Form I	JCE Form II (§ 224)	JCE Form II (§ 225)	JCE Form III	Other Forms	All Forms	Art. 7(1)	JCE Form I	JCE Form III	Unanimity	Majority
1	X				X	NG	X	X		X	
2				X	X	NG	NG	X	X		X
3				X	X	NG	NG	X	X		X
4				X	X	NG	NG		X		X
5				X	X	NG	NG		X		X
6	X		X		X	NG	X	X		X	
7	X		X		X	NG	X	X		X	
8	X		X		X	NG	X	X		X	
9	X		X		X	NG	X	X		X	
10	X	X			X	NG	X	X		X	
11	X	X			X	NG	X	X		X	
12	X	X			X	NG	X	X		X	
13	X	X			X	NG	X	X		X	
14	X	X			X	NG	X	X			
15	X	X			X	NG	X	X		X	
16	X	X			X	NG	X	X		X	
17	X	X			X	NG	X	X			
18	X	X			X	NG	X	X		X	
19	X				X	NG	NG	X			X
20	X				X	NG	NG	X			
21				X	X	NG	NG	X			X
22	X				X	NG	NG		X		X
23	X				X	NG	NG		X		X
24	X				X	NG	X	X		X	
25	X				X	NG	X	X		X	
26	X				X	NG					

Legend

- Position of Prosecution
- Position of Defence
- Findings by Judge Antonetti
- Findings by the Majority
- Disposition
- NG — Acquittal
- Count does not exist under Statute's provisions
- Counts for which a conviction may not be entered due to prohibition on cumulative convictions

Analysis of Valentin Ćorić's Criminal Responsibility

(e) Valentin Ćorić's Criminal Responsibility

According to the Prosecution, his actions, his statements and his orders, as well as his inaction and the fact that **Valentin Ćorić** closed his eyes to the widespread crimes directed against the Muslims in Herceg-Bosna, constitute evidence establishing beyond a reasonable doubt that the Accused subscribed to the overall purpose of creating a territory of Herceg-Bosna under Croatian domination by means of the crimes committed in connection with the joint criminal enterprise.[2037]

It alleges that on **13 April 1992**, all HZ H-B Military Police units were placed under the orders of the Accused, and that until **31 May 1992**, **Valentin Ćorić** held the title of **Chief of the Military Police Administration**.[2038] He made certain that the people he recruited to the HVO Military Police were "**men loyal to the Croatian idea and homeland**".[2039]

Valentin Ćorić held various political offices and was appointed **Minister of the Interior of the HR H-B** in late November 1993,[2040] a member of the HR H-B Presidential Council on 16 February 1994,[2041] **Deputy Prime Minister** of the HR H-B on 23 August 1995,[2042] and Chief of the Military Police[2043] responsible for maintaining law and order within HVO ranks and for investigating offenders.[2044]

The Prosecution alleges that during the summer of 1993, **Valentin Ćorić** was personally notified that HVO checkpoints were being used to arrest and detain Muslims.[2045] **On 20 July 1992**, **Valentin Ćorić** gave the order to establish checkpoints between **Čapljina and**

[2037] Prosecution Final Trial Brief, p. 377, para. 981.
[2038] Prosecution Final Trial Brief, para. 984; P 00956, p. 3; P 00234, p. 10; 2D 01333.
[2039] Prosecution Final Trial Brief, para. 993; P 08550, p. 2.
[2040] Prosecution Final Trial Brief, para. 982; P 06837; P 06581, pp. 26 to 29.
[2041] Prosecution Final Trial Brief, para. 986; P 07876.
[2042] Prosecution Final Trial Brief, para. 986; P 09053, pp. 5 and 6; P 10657, p. 2. On 25 May 1993, Ćorić was likewise proposed as HVO representative to the Government of Province 8 in connection with the Vance-Owen Peace Plan: P 02509.
[2043] Prosecution Final Trial Brief, para. 988; P 01053; T(F), p. 50954 (Zdenko Andabak); as Chief of the Military Police Administration, Ćorić held a rank equivalent to that of Brigadier/Major General: *see* P 00978, p. 2.
[2044] Prosecution Final Trial Brief, para. 987; P 00588, p. 41, Art. 137.
[2045] Prosecution Final Trial Brief, paras 1000-1014; Witness BB, T, pp. 17293 and 17294, closed session.

Ljubuški in order to ensure "continuous control of [points of] entry and exit from the Croatian Community of Herceg-Bosna".[2046]

The Prosecution alleges that **Valentin Ćorić** closed his eyes to the crimes committed by the HVO Convicts' Battalion.[2047] The link between the Military Police and the Convicts' Battalion enabled soldiers from these two battalions to behave with complete impunity, ensuring predictable consequences for their victims.[2048]

The Accused intended and condoned the criminal system wherein the Bosnian Muslims were unlawfully confined and mistreated, and controlled the HVO prison network where these Muslims were detained. The HVO detention centres operated in a systematic way, as a network of prisons under the oversight of **Valentin Ćorić**.[2049]

The Prosecution alleges that **Valentin Ćorić** controlled prisoner transfers between the HVO prisons, as well as prisoner releases, and that under his leadership, the HVO prisons operated as a unified system.[2050] **Valentin Ćorić** personally ordered the release of individual prisoners from the Heliodrom,[2051] from Ljubuški[2052] and from Gabela.[2053] No detainee could leave the Heliodrom without the knowledge of the military police or without his approval.[2054]

According to the Defence, the Military Police battalions were established at the level of the municipalities or the operative zones. Pursuant to the normative structure of the HVO system, there was no *de facto* command-superior relationship between the Military Police Administration and the Military Police battalions in the operative zones.[2055] **Valentin Ćorić**, appointed Assistant Commander of the Security and Information Service (SIS) on

[2046] Prosecution Final Trial Brief, para. 1008; P 00335.
[2047] Prosecution Final Trial Brief, para. 1016.
[2048] Prosecution Final Trial Brief, para. 1027; *see* P 01517, P 03928.
[2049] Prosecution Final Trial Brief, para. 1062; P 00677; P 00837, Item (U), p. 8, P 04921; P 05117.
[2050] Prosecution Final Trial Brief, paras 1078 and 1079. When he cross-examined **Josip Praljak**, the Accused acknowledged having the authority to release the prisoners, T, p. 14963; Prosecution Final Trial Brief, para. 1080.
[2051] Prosecution Final Trial Brief, para. 1081; P 02285.
[2052] Prosecution Final Trial Brief, para. 1081; P 03753.
[2053] Prosecution Final Trial Brief, para. 1081; P 10187.
[2054] Prosecution Final Trial Brief, para. 1081; P 09872 under seal; P 03411; P 00352, p. 27.
[2055] Ćorić Defence Final Trial Brief, paras 17 and 18.

13 April 1992,[2056] had his title changed, becoming "**Chief of the Military Police Administration**". **Valentin Ćorić** concentrated on exercising the responsibilities linked to the application of that organ's "administrative cadre policy" toward the military police units active in the operative zones, whereas the military commanders of those zones assumed "operative command" of the HVO Military Police battalions for both policing missions as well as standard combat missions.[2057]

The Prosecution failed to show **over whom** the Accused exercised **command-superior control**, and he did not wield **effective control** over either the Brigade Military Police or the members of the Military Police who were active in the operative zones and subordinated to the commanders thereof.[2058]

The Defence observes that the Prosecution may not raise crimes under Article 7(3) of the Statute for crimes committed **after** his departure from office (November 1993), despite the Prosecution's argument that he knew that they were going to be committed. The Defence argues further that the Accused was not their superior because no superior-subordinate relationship existed between the Accused and the Brigade Military Police.[2059]

The Prosecution did not adduce evidence of the persons who took part in the JCE or of the specific crimes for which the Accused could be charged as the natural and foreseeable consequence of his acts.

There was no **common plan**. Various witnesses said that there was not a common plan designed to lock up all of the Muslims.[2060]

According to the Defence, the HZ H-B was constituted in compliance with a decree adopted on 18 November 1991, not as part of any criminal plan, but as a provisional community created in response to aggression.[2061]

[2056] 2D 01333.
[2057] Ćorić Defence Final Trial Brief, paras 17 and 18.
[2058] Ćorić Defence Final Trial Brief, paras 57 to 58.
[2059] Ćorić Defence Final Trial Brief, para. 85.
[2060] Ćorić Defence Final Trial Brief, paras 154-156; Andrew Pringle T(F), pp. 20649, 20650, 24259; 5D 00110, para. 10.
[2061] Ćorić Defence Final Trial Brief, paras 162 *et seq*.; P 00079; P 00081.

The Defence believes that the evidence shows that the HVO did not develop any sort of plan to attack the Muslims of Bosnia. According to the Defence, throughout the entire period in question, close cooperation with the BH army was stressed, such that the HVO was considered to form an integral part of the armed forces of Bosnia and Herzegovina.[2062]

Other evidence shows that the Bosnian Muslims were not stigmatised or subjugated but held posts at every level of the HZ H-B administration.[2063]

According to the Defence, **Valentin Ćorić** instituted a professional training course for the military police which consisted of learning the Geneva Conventions.[2064]

Concerning the Accused's responsibility for the checkpoints, the Defence submits that **Valentin Ćorić** actually attempted to reach an agreement with the Red Cross designed to assist humanitarian convoys in passing through the checkpoints on HZ H-B territory.[2065]

Concerning the responsibility of the Accused for the prisons, the Defence considers that the evidence shows that he made *bona fide* efforts within the scope of his limited authority to make the prisons operate in compliance with the law.[2066]

Before entering into detail concerning his criminal responsibility, I must briefly mention the most appropriate mode of responsibility under which to convict him, which is aiding and abetting, for having assisted Jadranko Prlić, the main perpetrator. This mode of responsibility was the same as that assigned to Bruno Stojić and Berislav Pušić. Consequently, referring to the pages of my opinion where I discuss this mode of responsibility will be sufficient.

As of 13 April 1992, all HZ H-B Military Police units were placed under the orders of the **Accused**, and until 31 May 1992, **Valentin Ćorić** had the title of Chief of the Military

[2062] Ćorić Defence Final Trial Brief, para. 177; 1D 02432; P 00339; 1D 00507; 4D 00410.
[2063] Ćorić Defence Final Trial Brief, para. 181; 1D 00442; P 00672; P 00824.
[2064] Ćorić Defence Final Trial Brief, para. 192; 5D 05109.
[2065] Ćorić Defence Final Trial Brief, para. 202; 5D 00524.
[2066] Part VII of the Ćorić Defence Final Trial Brief.

Police Administration.[2067] He ensured that the people he recruited to the HVO Military Police were "men loyal to the Croatian idea and homeland".[2068] **Valentin Ćorić** held various political offices and was appointed **Minister of the Interior of the HR H-B** in late November 1993,[2069] a member of the HR H-B Presidential Council on 16 February 1994,[2070] **Deputy Prime Minister of the HR H-B** on 23 August 1995,[2071] and Chief of the Military Police[2072] responsible for maintaining law and order within HVO ranks and investigating offenders.[2073]

As one can observe, this accused's **career advancement** was rather remarkable because starting from the post of Chief of the Military Police Administration, he became Deputy Prime Minister in 1995. This path between various high-level offices attests to the fact that **Valentin Ćorić** possessed adequate intellectual capabilities for exercising these responsibilities.

The military police were placed directly under the responsibility and authority of **Bruno Stojić**,[2074] to whom the Accused was supposed to dispatch daily reports concerning the situation of the Military Police battalions on the ground.[2075]

Valentin Ćorić wielded **authority** over the military police. He was the person who defined essential policies for the units. It is therefore the Accused who put in place the structure of the military police and who **personally** handled the recruitment of its members.[2076]

The Chamber has numerous exhibits in its possession showing that **Valentin Ćorić** personally established the various border checkpoints and blocked humanitarian aid. Thus, on 7 December 1992, acting **on the orders of Slobodan Praljak and Bruno Stojić**, the

[2067] P 00956, p. 3; P 00234, p. 10; 2D 01333.
[2068] P 08550, p. 2.
[2069] P 06837; P 06581, pp. 26 to 29.
[2070] P 07876.
[2071] P 09053, pp. 5 and 6; P 10657, p. 2. On 25 May 1993, Valentin **Ćorić** was also proposed as the HVO representative for the Government of Province 8 in connection with the Vance-Owen Peace Plan: P 02509.
[2072] P 01053; T(F), p. 50954 (Zdenko Andabak); in his capacity as Chief of the Military Police Administration, the Accused held a rank equivalent to that of Brigadier/Major General: see P 00978, p. 2.
[2073] P 00588, p. 41, Art. 137.
[2074] P 01635.
[2075] P 01053.

Accused established checkpoints guarded by men who came from the military police.[2077] This kind of operation was introduced on several occasions during the period relevant to the Indictment.[2078] **Valentin Ćorić** on numerous occasions ordered blockades of humanitarian convoys bound for the ABiH and for civilians thereafter.[2079] Concerning the responsibility of the Accused for the checkpoints, the Defence argues that **Valentin Ćorić** made sincere efforts to reach an agreement with the **Red Cross** designed to assist humanitarian convoys in passing through checkpoints on the HZ H-B territory.[2080] The Chamber indeed has an order from the Accused allowing the passage of humanitarian convoys on 9 February 1993.[2081]

It is the Accused who ordered the deployment of the military police in combat operations by means of **re-subordination**[2082] and the Chamber has evidence in its possession showing that **Valentin Ćorić** did not react when crimes were committed by the HVO Convicts' Battalion.[2083] These two battalions acted with **utter impunity**.[2084] According to the Defence, the Military Police battalions were established at the municipal level or at the level of the operative zones. In accordance with the intended workings of the normative structure of the HVO, there was no *de facto* command-subordinate relationship between the Military Police Administration and the Military Police battalions in the operative zones.[2085] According to the Defence, the Prosecution did not show over whom the Accused wielded **command-superior control**, and he did not wield **effective control** over either the Brigade Military Police or the members of the Military Police who were active in the operative zones and subordinated to the commanders thereof.[2086]

Although two documents (P 02991 and P 08550) do establish a link with the brigades, I nevertheless believe that **disciplinary authority** fell to the **operative zones**, both at the level of the operative zone commander as well as of the brigade commander; accordingly,

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[2076] P 02991; P 00960; P 01362; P 00475.
[2077] P 00876.
[2078] P 01673; P 01331; P 01517.
[2079] P 01134; P 05497, pp. 4-7; P 05863.
[2080] 5D 00524.
[2081] 5D 00524.
[2082] P 02991; P 08550.
[2083] Prosecution Final Trial Brief, para. 1016.
[2084] Prosecution Final Trial Brief, para. 1027; *see* P 01517; P 03928.
[2085] Ćorić Defence Final Trial Brief, paras 17 and 18.
[2086] Ćorić Defence Final Trial Brief, paras 57 to 58.

the Accused cannot be held responsible under **Article 7(3) of the Statute**. Concerning the activities of the Convicts' Battalion in particular, it has not been proved that he had **any sort of authority** over it; I should add that it appears obvious to me that this unit fell directly under the authority of **Mate Boban** or at least the commander of the operative zone or the brigade to which it was re-assigned. I set forth that same reasoning on behalf of his superior, **Bruno Stojić**.

The fact that **Valentin Ćorić** was informed on several occasions that crimes had been committed by members of the military police – for example, he received a report that told him that atrocities had been committed at Mostar on 23 June 1993,[2087] and he subsequently put out reports concerning crime prevention in the municipalities of Herceg-Bosna[2088] – is inadequate to justify holding him responsible, because he did not have **direct authority** over these military police officers, who had been placed under another command. It fell to their direct supervisor in the chain of command, to whom their actions had been subordinated.

The Accused nevertheless intended and condoned the system wherein the Bosnian Muslims were unlawfully confined and mistreated, and he controlled the network of HVO military prisons where the Muslims were detained. The HVO detention centres operated in a systematic way as a network of prisons under the control of **Valentin Ćorić**.[2089] He controlled prisoner transfers between the HVO prisons, as well as prisoner releases, and under his leadership the HVO prisons operated as a unified system.[2090] **Valentin Ćorić personally** ordered the release of individual prisoners from the **Heliodrom**,[2091] from **Ljubuški**[2092] and from **Gabela**.[2093] No detainee could leave the **Heliodrom** without the knowledge of the military police or without his approval.[2094]

[2087] P 03672.
[2088] P 04058; P 04276.
[2089] P 00677; P 00837, Item (U), p. 8; P 04921; P 05117.
[2090] When cross-examining Josip Praljak, the Accused acknowledged that he had the authority to release prisoners, T, p. 14963 (J. Praljak).
[2091] P 02285.
[2092] P 03753.
[2093] P 10187.
[2094] P 09872 under seal, p. 77; P 03411; P 00352, p. 27.

Furthermore, there is abundant evidence to show that it was the Military Police who could authorise the release of detainees[2095] and the Chamber has documents in which it appears that **Valentin Ćorić** personally ordered the release of certain detainees.[2096] On 6 July 1993, **Valentin Ćorić** informed the Commander of Sector South, **Neđelko Obradović**, that the Military Police had the exclusive authority to release the detainees.[2097] This proves therefore that **Valentin Ćorić** had some authority over the prisons and detainees. The Chamber even has documents showing that the Accused set up and took part in the system of "**letters of guarantee**".[2098] It was likewise the Accused who had the authority to issue passes giving humanitarian organisations access to the camps.[2099]

However, it is unfortunate that the parties did not think about further exploring the **links between the Military Police and the military and civilian prosecutors**, because ordinarily a Military Police investigation would be conducted first under the authority of the Prosecutor and then that of the Investigating Judge. Under such conditions, a detainee in the custody of the military police had to be indicated to the **competent Prosecutor** authorised to issue any required orders concerning the fate of that detainee.

Some of the evidence establishes the participation of the Military Police in the plunder and destruction of Muslim property and the deportations.[2100] Certain reports directly incriminate members of the Military Police for the destruction of Muslim houses. For example, on 27 January 1993, the 3rd Brigade from the Department of Defence put out a report in which it was stated that certain villages were set on fire by members of the Military Police.[2101] However, from my perspective, the Military Police officers who perpetrated these acts were under brigade command and, at the time the acts were committed, **Valentin Ćorić** did not have **effective control**. On 21 June 1993, **Valentin Ćorić** personally authorised members of the Military Police to occupy apartments belonging to civilians.[2102]

[2095] P 03201; P 02285.
[2096] P 03216; P 02285.
[2097] P 03220.
[2098] P 10187.
[2099] P 03292 under seal; P 02601.
[2100] P 09677 under seal.
[2101] P 01330.

Therefore, Valentin Ćorić must be found guilty on Count 1, Count 6, Count 7, Count 8, Count 9, Count 10, Count 11, Count 12, Count 13, Count 14, Count 15, Count 16, Count 17, Count 18, as well as on Counts 24 and 25 of aiding and abetting. However, he must be acquitted on Count 2, Count 3, Count 4, Count 5, Count 19, Count 20, Count 21, Count 22, and Count 23 under Article 7(1) of the Statute.

The following chart makes it possible to more appropriately categorise his criminal responsibility under Article 7(1) of the Statute, with the clarification that he cannot be found guilty under any mode of responsibility pursuant to Article 7(3) inasmuch as, when they were in the field, the military police were under the exclusive authority of the Brigade Commander who was obliged to punish the perpetrators of the crimes.

[2102] P 02879; *see* also P 06232.

RESPONSIBILITY OF VALENTIN ĆORIĆ

COUNTS	POSITION OF PROSECUTION					POSITION OF DEFENCE	FINDINGS BY JUDGE ANTONETTI	FINDINGS BY THE MAJORITY			DISPOSITION	
	JCE Form I	JCE Form II (§ 224)	JCE Form II (§ 225)	JCE Form III	Other Forms	All Forms	Art. 7(1)	JCE Form I	JCE Form III	Art. 7(3)	Unanimity	Majority
1	X				X	NG	X	X			X	
2				X	X	NG	NG	X	X			X
3				X	X	NG	NG	X	X			X
4				X	X	NG	NG		X			X
5				X	X	NG	NG		X			X
6	X		X		X	NG	X	X			X	
7	X		X		X	NG	X	X			X	
8	X		X		X	NG	X	X			X	
9	X		X		X	NG	X	X			X	
10	X	X			X	NG	X	X			X	
11	X	X			X	NG	X	X			X	
12	X	X			X	NG	X	X			X	
13	X	X			X	NG	X	X			X	
14	X	X			X	NG	X	X				
15	X	X			X	NG	X	X		X	X	
16	X	X			X	NG	X	X		X	X	
17	X	X			X	NG	X	X		X		
18	X	X			X	NG	X	X			X	
19	X				X	NG	NG	X		X		X
20	X				X	NG	NG	X		X		
21				X	X	NG	NG	X				X
22	X				X	NG	NG		X			X
23	X				X	NG	NG		X	X		X
24	X				X	NG	X	X			X	
25	X				X	NG	X	X			X	
26	X				X	NG						

Legend

- Position of Prosecution
- Position of Defence
- Findings by Judge Antonetti
- Findings by the Majority
- Disposition
- NG — Acquittal
- Count does not exist under Statute's provisions
- Counts for which a conviction may not be entered due to prohibition on cumulative convictions

Analysis of Berislav Pušić's Criminal Responsibility

(f) Berislav Pušić's Criminal Responsibility

According to the Prosecution, the evidence shows that **Berislav Pušić** had the authority to decide **who** would be held in the HVO detention centres, coordinated detainee exchanges, and worked ruthlessly to promote the territorial and demographic goals of the Herceg-Bosna JCE through the commission of crimes.[2103]

The evidence shows that the accused **Prlić, Stojić and Ćorić** trusted the Accused to implement their shared agenda.[2104]

According to the Prosecution, prior to July 1993, **Berislav Pušić** wielded substantial authority over prisoner exchanges.[2105] Commencing on 22 April 1993, after the HVO offensives in Central Bosnia and at Sovići/Doljani, **Valentin Ćorić** appointed the Accused to participate, on behalf of the HVO Military Police in the exchange of all "arrested persons".[2106] He wielded tremendous authority within the HVO. He was seen to be the right-hand man of **Valentin Ćorić**.[2107]

In August 1993, the Accused was appointed **Head of the Commission** created by **Bruno Stojić** "to take charge of all detention units and prisons in which prisoners of war and military detainees are held".[2108]

Berislav Pušić held decision-making authority concerning which Muslim would be detained, driven out or deported,[2109] and he did not observe any distinctions between civilians and military personnel.

[2103] Prosecution Final Trial Brief, para. 1190; P 08431 (B. PUŠIĆ stated that, "[a]ccording to [the Vance Owen Peace Plan, the] Croats have got their share of the territory, and they have put it under their control […]").
[2104] Prosecution Final Trial Brief, para. 1192; Witness DZ, T, p. 26513, closed session.
[2105] Prosecution Final Trial Brief, paras 1195, 1196; P 00352, p. 17; P 01514.
[2106] Prosecution Final Trial Brief, para. 1196; P 02020, p. 2.
[2107] Prosecution Final Trial Brief, para. 1198; P 02601; Antoon van der Grinten, T, p. 21028; P 02806 under seal.
[2108] Prosecution Final Trial Brief, para. 1203; P 03995.
[2109] Prosecution Final Trial Brief, para. 1209; P 04312; P 02535; P 03121; P 05083; P 06982; P 00352, p. 31. *See* Confidential Annex K.

The Prosecution considers that the evidence shows that **Berislav Pušić** knew, tolerated, condoned and encouraged the mistreatment, the forced labour and the inhumane conditions.[2110]

The Prosecution alleges that he ordered and condoned the forcible transfer of numerous H-B Muslims to third countries or to ABiH-held territory by means of "letters of guarantee".[2111]

The Prosecution puts forward the "one-for-one" exchange policy put into practice by **Berislav Pušić** to prove his participation in and contribution to the JCE.[2112]

According to the Defence, there was **no JCE**. The Prosecution did not provide any direct proof of an express agreement between the Accused and the other members in furtherance of the alleged two-fold purpose, therefore the Prosecution is resorting to indirect evidence and attempting to re-write a complex history it does not fully understand.[2113]

The form ascribed to the JCE by the Prosecution is far too broad and sweeping.[2114]

The Defence considers that the Prosecution either does not properly apply the law or does not know it, because by excluding the responsibility of the Accused for certain crimes of form 1 and form 2 of JCE where criminal intent must be common, the Prosecution is making a mistake of law. The excluded crimes fall within the common plan.[2115]

According to the Defence, there is no evidence linking **Berislav Pušić** to the genesis and set up of the JCE. The Prosecution was not even able to provide information on the Accused's personal and professional background between 1991 and 1994.[2116]

[2110] Prosecution Final Trial Brief, para. 1221.
[2111] Prosecution Final Trial Brief, para. 1230.
[2112] Prosecution Final Trial Brief, paras 1249-1250.
[2113] Pušić Defence Final Trial Brief, paras 41 *et seq*.
[2114] Pušić Defence Final Trial Brief, paras 49 *et seq*.
[2115] Pušić Defence Final Trial Brief, paras 55 *et seq*.
[2116] Pušić Defence Final Trial Brief, paras 66 *et seq*.

The Prosecution was unable to demonstrate clearly the Accused's position in the **HVO** chain of command, and he never held political office within the **HVO HZ H-B**.[2117]

Concerning the role of the Accused in the Military Police in 1992 and 1993, the Defence considers that the evidence shows only that he was a "**control officer**". However, this office conferred no authority upon him, and the Prosecution did not in any event prove anything in this respect. Moreover, the Prosecution itself provided a document showing that he was removed from the Military Police on 1 April 1993.[2118]

The Defence considers that the status of the Accused in the Exchange Service did not give him any authority over prisoner exchanges, detentions or transfers.[2119] This was a **civilian organ** without any *de jure* or *de facto* authority over the military apparatus.

For the Defence, the Prosecution did not prove that the Commission of 6 August 1993 ever existed or was in operation, other than on paper. This is the only reasonable inference that one may draw from the evidence adduced over the course of the trial with respect to the Commission of 6 August 1993.[2120]

Concerning the Note of 12 August 1993[2121] pertaining to the detainees and their release, it is a forgery – no one in the HVO ever acted on it.

Prior to addressing his criminal responsibility in detail, I think the mode of responsibility most appropriate to his situation should be mentioned, which is aiding and abetting under Article 7(1) of the Statute. This mode of responsibility was analysed previously in the part devoted to the responsibility of Bruno Stojić and Valentin Ćorić.

[2117] William Tomljanovich, T(F), pp. 6402 and 6403. P 09545, pp. 123 and 127 and Annex B.
[2118] P 01773. It should be noted that this document orders that Pušić be removed from the list of Military Police employees and appointed him "control officer with the Military Police Administration or officer for cooperation and contact with the opposite side regarding prisoner exchanges". Josip Praljak testified that he had not been informed of this appointment. Josip Praljak, T(F), pp. 14916 and 14917.
[2119] P 03191.
[2120] Pušić Defence Final Trial Brief, para. 95.
[2121] P 04141.

Berislav Pušić held *de jure* authority over the removal and confinement of Muslims.[2122] Thus, he had the authority to select which prisoners would be exchanged.[2123] On 22 April 1993, **Valentin Ćorić** in fact appointed him to head the service for the exchange of "all persons arrested".[2124] The evidence shows that he used this authority, particularly in respect of women, children and corpses.[2125]

On 11 May 1993, **Bruno Stojić** appointed him as the HVO-UNPROFOR liaison officer;[2126] he was ultimately appointed as Head of the Exchange Service by **Jadranko Prlić** on 5 July 1993.[2127]

It therefore seems that prior to July 1993, **Berislav Pušić** wielded significant authority over the exchange of prisoners,[2128] particularly after 22 April 1993, following the HVO offensives in Central Bosnia and at Sovići/Doljani, when **Valentin Ćorić** appointed him to take part, on behalf of the HVO Military Police, in the exchange of all the "arrested persons".[2129] He enjoyed broad authority within the HVO because he was seen to be the right-hand man of **Valentin Ćorić**.[2130]

The Defence considers that the status of the Accused on the Exchange Service did not give him any authority over prisoner exchanges, detentions or transfers.[2131] It was a civilian organ which had no *de jure* or *de facto* authority over the military apparatus.

Concerning the role of the Accused in the Military Police in 1992 and 1993, the Defence submits that the evidence shows only that he was a "control officer". However, this office conferred no authority on him, and, in any event, the Prosecution proved nothing in this

[2122] P 01393; P 01605; P 01773; P 02020; P 02291.
[2123] P 01514.
[2124] P 02020, p. 2.
[2125] P 03652.
[2126] P 02291.
[2127] P 03208; P 03052.
[2128] P 00352, p. 17; P 01514.
[2129] P 02020, p. 2.
[2130] P 02601; Antoon van der Grinten, T, p. 21028; P 02806 under seal.
[2131] P 03191.

respect. Moreover, the Prosecution itself provided a document showing that he was removed from the Military Police on 1 April 1993.[2132]

The Defence arguments cannot, from my point of view, be preferred because the Chamber has many documents proving that **Berislav Pušić** made use of his authority over the Muslim detainees. For instance, he issued reports,[2133] and on several occasions ordered the transfer of prisoners from one detention centre to another.[2134] The evidence shows, moreover, that he had **some authority** over the HVO detention centres because he was appointed to sit on Bruno Stojić's Commission on 8 August 1993.[2135] For instance, he acted so that certain detainees would be set free,[2136] specifically by means of the notorious "**letters of guarantee**". This procedure was set up by the Accused, who thereby freed certain detainees who were able to prove that they were married to Croatian women, and were then forced to leave the territory of Herceg-Bosna.[2137]

The evidence thus shows that **Berislav Pušić** directly contributed to the mass **deportation** of Muslims to third countries.[2138] Concerning **Berislav Pušić**'s alleged participation in this policy of "ethnic cleansing", the Defence argues that while the Accused did admittedly issue the discharge certificates required for the release of detainees, he had no decision-making authority whatsoever in this process.[2139] According to the written submissions of **Berislav Pušić**, the latter did not get involved in procuring **letters of guarantee** or issuing transit visas. The evidence shows that it was the ODPR of the HZ H-B, working together with the ODPR of the Republic of Croatia and the ICRC, which took care of displaced persons needing **transit visas**. This argument cannot be accepted because a review of the evidence shows that **he** was the person who decided which detainees would benefit from the letters of guarantee, and **he** was the person who authorised or denied release. Admittedly, even though I consider that such letters of guarantee were not in themselves

[2132] P 01773. It should be noted that this document orders the removal of Pušić from the list of military police employees, appointing him "control officer with the Military Police Administration or officer for cooperation and contact with the opposite side regarding exchanges of prisoners". Josip Praljak testified that he had not been informed of this appointment. Josip Praljak, T(F), pp. 14916 and 14917.
[2133] P 04312.
[2134] P 02535.
[2135] P 03995.
[2136] P 08202; P 05952; P 02260.
[2137] P 06816; P 06436; P 07185; Slobodan Praljak, T(F), pp. 14771-14772.
[2138] P 07468; P 07141; P 04158.
[2139] Part IV, Section C of the Defence Final Trial Brief.

prohibited, the Accused ought nonetheless to have made certain that the departures to Croatia were being carried out with the personal consent of the beneficiary and the members of his family from the outset.

The evidence thus shows that he instituted a policy of "**one for one**" exchange, which therefore proves that he had full authority over the detainees in the HVO centres.[2140] In addition, **Berislav Pušić** directly ordered detainees to be assigned to **forced labour**, on numerous occasions,[2141] and he knew that these detainees were being sent to the front lines and therefore knew that their lives were at risk.[2142] The arguments of the Defence that the responsibilities held by **Pušić** did not confer upon him any *de jure* authority to order assignment to forced labour and that the Prosecution had only oral testimony and lacked any documentation proving his guilt, must be placed in a proper perspective because it is undeniable that **Berislav Pušić** had the authority to release any detainee, as the reports he drafted in connection with exchanges with the Muslim party show.[2143]

For Count 1, I find no basis for any charge against him of involvement in discrimination of any kind because he was responsible only for taking care of Muslims, which means that he acted without discriminatory intent. For Counts 2, 3, 4, and 5, it is obvious to me that he did not have the intent required for the commission of these crimes. The same applies to Counts 19 to 25. Likewise, as he did not have command or disciplinary authority, he cannot be found responsible for any Count under Article 7(3) of the Statute.

Berislav Pušić must therefore be found guilty of Count 6, Count 7, Count 8, Count 9, Count 10, Count 11, Count 12, Count 13, Count 14, Count 15, Count 16, Count 17, and Count 18.

By contrast, he should be acquitted on Count 1, Count 2, Count 3, Count 4, Count 5, Count 19, Count 20, Count 21, Count 22, Count 23, Count 24, and Count 25.

[2140] P 06929; P 09848 under seal; P 07411.
[2141] P 02921 under seal; P 01514; P 06805; P 03596; P 02918.
[2142] P 03171.
[2143] Part III of the Pušić Defence Final Trial Brief; P 07411.

The following chart provides a comprehensive overview of the Counts to be applied against him and those for which he should, in my view, be found not guilty:

RESPONSIBILITY OF BERISLAV PUŠIĆ

COUNTS	POSITION OF PROSECUTION					POSITION OF DEFENCE	FINDINGS BY JUDGE ANTONETTI	FINDINGS BY THE MAJORITY	DISPOSITION	
	JCE Form I	JCE Form II (§ 224)	JCE Form II (§ 225)	JCE Form III	Other Forms	All Forms	Art. 7(1)	JCE Form I	Unanimity	Majority
1	X				X	NG	NG	X		X
2				X	X	NG	NG	X		X
3				X	X	NG	NG	X		X
4				X	X	NG	NG	NG	NG	
5				X	X	NG	NG	NG	NG	
6	X		X		X	NG	X	X	X	
7	X		X		X	NG	X	X	X	
8	X		X		X	NG	X	X	X	
9	X		X		X	NG	X	X	X	
10	X	X			X	NG	X	X	X	
11	X	X			X	NG	X	X	X	
12	X	X			X	NG	X	X	X	
13	X	X			X	NG	X	X	X	
14	X	X			X	NG	X	X		
15	X	X			X	NG	X	X	X	
16	X	X			X	NG	X	X	X	
17	X	X			X	NG	X	X		
18	X	X			X	NG	X	X	X	
19	X				X	NG	NG	X		X
20	X				X	NG	NG	X		
21				X	X	NG	NG	X		X
22	X				X	NG	NG	NG	NG	
23	X				X	NG	NG	NG	NG	
24	X				X	NG	NG	X		X
25	X				X	NG	NG	X		X
26	X				X	NG				

Legend

- Position of Prosecution
- Position of Defence
- Findings by Judge Antonetti
- Findings by the Majority
- Disposition
- NG — Acquittal
- Count does not exist under Statute's provisions
- Counts for which a conviction may not be entered due to prohibition on cumulative convictions

This individual and partly dissenting opinion was made possible solely through the assistance of interning lawyers, working without a salary from the Tribunal, who were assigned to the Trial Chamber and placed with me. In this regard, I should like to thank Delphine Miller for her contribution to the final text.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-ninth day of May 2013
At The Hague, The Netherlands

[**Seal of the Tribunal**]