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-03-69-A
		Date:	9 December 2015
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Carmel Agius
Judge Liu Daqun
Judge Arlette Ramaroson
Judge Koffi Kumelio A. Afande

Registrar: **Mr. John Hocking**

Judgement of: **9 December 2015**

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

JUDGEMENT

The Office of the Prosecutor:
Ms. Michelle Jarvis
Mr. Mathias Marcussen
Ms. Barbara Goy
Ms. Grace Harbour

Counsel for the Defence:
Mr. Wayne Jordash and Mr. Scott Martin for Mr. Jovica Stanišić
Mr. Mihajlo Bakrač and Mr. Vladimir Petrović for Mr. Franko Simatović

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I. INTRODUCTION

1. The Appeals Chamber of the 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 ("Appeals Chamber" and "Tribunal" respectively) is seised of the appeal filed by the Office of the Prosecutor ("Prosecution") against the Judgement rendered by Trial Chamber I of the Tribunal ("Trial Chamber") on 30 May 2013 in the case of *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T ("Trial Judgement").

A. Background

2. Jovica Stanišić ("Stanišić") was born on 30 July 1950 in Ratkovo in the Autonomous Province of Vojvodina, Republic of Serbia.[1] He began working in the State Security Service ("SDB")[2] of the Ministry of Interior ("MUP") of the Republic of Serbia in 1975.[3] He held the position of deputy chief of the Serbian SDB throughout 1991 and chief of the Serbian SDB from 31 December 1991 to 27 October 1998.[4]

3. Franko Simatović ("Simatović"), also known as "Frenki",[5] was born on 1 April 1950 in Belgrade, Republic of Serbia.[6] Simatović began working as a MUP operative on 29 June 1979.[7] On 1 February 1980, he was employed as a junior inspector in the SDB Administration of the Serbian Republican Secretariat of the Interior.[8] From at least 18 December 1990, Simatović started to work in the Second Administration of the Serbian SDB in Belgrade.[9] On 29 April 1992, Stanišić appointed Simatović to the post of deputy chief of the Second Administration of the Serbian SDB under the title of senior inspector, effective as of 1 May 1992.[10] On 12 May 1993, Stanišić

[1] *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Prosecution Submission on Agreed Facts, 15 June 2007 ("Prosecution Submission on Agreed Facts"), para. 9.
[2] The Appeals Chamber notes that the Trial Chamber also referred to the State Security ("DB") and the State Security Department ("RDB") in the Trial Judgement. The Trial Chamber noted that, in its understanding, the references to "DB", "RDB", and "SDB" by witnesses and in documentation referred to the same structures. See Trial Judgement, fn. 1. The Appeals Chamber also understands these acronyms to be interchangeable but will use the acronym "SDB".
[3] Trial Judgement, para. 1272, referring to Prosecution Submission on Agreed Facts, para. 9.
[4] Trial Judgement, para. 1279. See also Trial Judgement, para. 1272, referring to Prosecution Submission on Agreed Facts, para. 9.
[5] Trial Judgement, paras 1311, 1418.
[6] Prosecution Submission on Agreed Facts, para. 10.
[7] Trial Judgement, para. 1284, referring, *inter alia*, to Prosecution Submission on Agreed Facts, para. 10.
[8] Trial Judgement, para. 1284, referring to Ex. P02384, "R. Serbia, Republican Secretariat of the Interior, State Security Service Administration for Belgrade, Franko Simatović Employment Evaluation 1980-1993", pp. 1-3, 9-11.
[9] Trial Judgement, paras 1284, 1286.
[10] Trial Judgement, paras 1284, 1286.

appointed Simatović as a special adviser in the SDB, which became effective as of 1 May 1993.[11] Simatović retired from his employment with the MUP on 30 December 2001.[12]

4. The events giving rise to this appeal took place between April 1991 and 31 December 1995 in the Serbian Autonomous Area ("SAO") of Krajina ("SAO Krajina") and the Serbian Autonomous Area of Slavonia, Baranja, and Western Srem ("SAO SBWS") in Croatia as well as in the municipalities of Bijeljina, Bosanski Šamac, Doboj, Sanski Most, Trnovo, and Zvornik in Bosnia and Herzegovina. The Prosecution charged Stanišić and Simatović with committing crimes in these localities through their participation in a joint criminal enterprise ("JCE") which allegedly came into existence no later than April 1991 and continued until at least 31 December 1995.[13] The alleged common criminal purpose of the JCE was the forcible and permanent removal of the majority of non-Serbs, principally Croats, Bosnian Muslims, and Bosnian Croats from large areas of Croatia and Bosnia and Herzegovina.[14] The Indictment alleged that this involved the commission of murder as a violation of the laws or customs of war under Article 3 of the Statute of the Tribunal ("Statute") and as a crime against humanity under Article 5 of the Statute as well as deportation, other inhumane acts (forcible transfer), and persecution (through murder, deportation, and other inhumane acts (forcible transfer)) as crimes against humanity under Article 5 of the Statute.[15] Alternatively, the Indictment alleged that the objective of the JCE involved deportation and forcible transfer, while murder and persecution were reasonably foreseeable to Stanišić and Simatović.[16]

5. In addition to the charges of individual criminal responsibility for committing crimes as part of a JCE, Stanišić and Simatović were charged with having planned, ordered, and/or otherwise aided and abetted in the planning, preparation, and/or execution of the crimes alleged in the Indictment.[17]

6. The Trial Chamber found that many of the crimes alleged in the Indictment were indeed perpetrated by various Serb Forces[18] in the above-mentioned localities in Croatia and Bosnia and Herzegovina.[19] However, the Trial Chamber, Judge Picard dissenting, found neither Stanišić nor

[11] Trial Judgement, paras 1285-1286.
[12] Trial Judgement, para. 1285.
[13] Trial Judgement, para. 5; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Third Amended Indictment, 10 July 2008 ("Indictment"), paras 10-11.
[14] Trial Judgement, para. 5; Indictment, para. 13.
[15] Trial Judgement, para. 5; Indictment, paras 25, 63, 66.
[16] Trial Judgement, para. 5; Indictment, para. 14.
[17] Trial Judgement, para. 6; Indictment, para. 17.
[18] The Trial Chamber referred to one or more forces listed in paragraph 6 of the Indictment as "Serb Forces". See Trial Judgement, p. 8. The Appeals Chamber also uses the term "Serb Forces" in the same manner.
[19] Trial Judgement, paras 46-1253.

Simatović responsible for committing these crimes pursuant to JCE,[20] as it found that it was not established beyond reasonable doubt that they possessed the requisite *mens rea* for JCE liability.[21] The Trial Chamber also found that it was not proven beyond reasonable doubt that Stanišić or Simatović planned and/or ordered these crimes.[22] Further, the Trial Chamber, Judge Picard dissenting, found that the *actus reus* elements for aiding and abetting liability were not established and thus that neither Stanišić nor Simatović was responsible for aiding and abetting these crimes.[23] Consequently, the Trial Chamber, Judge Picard dissenting, concluded that Stanišić and Simatović were not guilty on all counts in the Indictment.[24]

B. The Appeal

7. The Prosecution challenges the Trial Judgement on three grounds.[25]

8. Under its first ground of appeal, the Prosecution argues that the Trial Chamber erred in law and in fact in finding that the *mens rea* of Stanišić and Simatović for JCE liability was not established.[26] The Prosecution requests that the Appeals Chamber: (i) overturn the acquittals of Stanišić and Simatović; (ii) apply the correct legal standards to the evidence and find that a common criminal purpose existed to forcibly remove the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina through the commission of the crimes listed under counts 1 through 5, that Stanišić and Simatović – together with others – shared the intent to further this common criminal purpose, and that – through their acts and omissions as found by the Trial Chamber and, in addition, as set out in its third ground of appeal – Stanišić and Simatović made significant contributions to the common criminal purpose; (iii) convict Stanišić and Simatović pursuant to Article 7(1) of the Statute based on their participation in, and contributions to, the JCE alleged in the Indictment for the crimes listed under counts 1 through 5; and (iv) sentence Stanišić and Simatović accordingly.[27]

9. Under its second ground of appeal, the Prosecution submits that the Trial Chamber erred in law and in fact in finding that the *actus reus* of aiding and abetting liability was not met with respect to Stanišić's and Simatović's conduct in relation to the crimes committed in the municipalities of Bosanski Šamac and Doboj in Bosnia and Herzegovina as well as in the SAO

[20] Trial Judgement, paras 2362-2363, read together with Trial Judgement, paras 2336, 2354.
[21] Trial Judgement, paras 2336, 2354.
[22] Trial Judgement, para. 2355.
[23] Trial Judgement, paras 2357-2361.
[24] Trial Judgement, paras 2362-2363.
[25] See Prosecution Notice of Appeal.
[26] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras 12-126.
[27] Prosecution Notice of Appeal, para. 9; Prosecution Appeal Brief, para. 126.

Krajina.[28] The Prosecution requests that the Appeals Chamber: (i) overturn the acquittals of Stanišić and Simatović; (ii) find that – through their acts and omissions as found by the Trial Chamber and, in addition, as set out in its third ground of appeal – Stanišić and Simatović substantially contributed to the commission of the crimes listed under counts 1 through 5; (iii) find that Stanišić and Simatović knew of the commission of one or more of these crimes and that their acts or omissions would assist the commission of one or more of these crimes; (iv) find, if required, that Stanišić and Simatović specifically directed their acts and omissions towards the commission of these crimes; (v) convict Stanišić and Simatović pursuant to Article 7(1) of the Statute for aiding and abetting these crimes; and (vi) sentence Stanišić and Simatović accordingly.[29]

10. Alternatively, with respect to both its first and second grounds of appeal, the Prosecution requests that the Appeals Chamber find that the errors as alleged by the Prosecution are established and "remand the case to a bench of the Tribunal" to apply the correct legal standard to the trial record, and to determine the liability of Stanišić and Simatović as alleged in the Indictment.[30]

11. Under its third ground of appeal in part, the Prosecution submits that the Trial Chamber erred in fact in failing to find that Stanišić significantly contributed to the implementation of the common criminal purpose of the JCE in the SAO SBWS and the municipalities of Bijeljina and Zvornik in Bosnia and Herzegovina and that Stanišić and Simatović significantly contributed to the implementation of the common criminal purpose of the JCE in the municipality of Sanski Most in Bosnia and Herzegovina.[31] The Prosecution requests that the Appeals Chamber: (i) apply the correct legal standard to the evidence and find that Stanišić significantly contributed to the implementation of the common criminal purpose in the SAO SBWS and the municipalities of Bijeljina, Zvornik, and Sanski Most and that Simatović significantly contributed to the implementation of the common criminal purpose in the municipality of Sanski Most; (ii) take these findings into account in convicting Stanišić and Simatović pursuant to Article 7(1) of the Statute for their participation in the JCE under its first ground of appeal; and (iii) sentence Stanišić and Simatović accordingly.[32]

12. Under the remaining part of its third ground of appeal, the Prosecution argues in the alternative that the Trial Chamber erred in fact in failing to find that Stanišić substantially contributed to one or more of the crimes committed in the SAO SBWS and the municipalities of Bijeljina and Zvornik, that both Stanišić and Simatović substantially contributed to one or more of

[28] Prosecution Notice of Appeal, para. 11; Prosecution Appeal Brief, paras 128-194.
[29] Prosecution Notice of Appeal, para. 15; Prosecution Appeal Brief, paras 128-130, 153-154, 193-194.
[30] Prosecution Notice of Appeal, paras 10, 16; Prosecution Appeal Brief, paras 11, 127, 195.
[31] Prosecution Notice of Appeal, para. 17; Prosecution Appeal Brief, paras 196-198, 200-250.
[32] Prosecution Notice of Appeal, para. 18; Prosecution Appeal Brief, paras 277-278.

the crimes committed in the municipality of Sanski Most, and that they therefore aided and abetted these crimes.[33] The Prosecution requests that the Appeals Chamber: (i) apply the correct legal standard to the evidence and find that Stanišić substantially contributed to one or more of the crimes committed in the SAO SBWS and the municipalities of Bijeljina, Zvornik, and Sanski Most and that Simatović substantially contributed to one or more of the crimes committed in the municipality of Sanski Most; (ii) take these findings into account in convicting Stanišić and Simatović pursuant to Article 7(1) of the Statute as aiders and abettors under its second ground of appeal; and (iii) sentence Stanišić and Simatović accordingly.[34]

13. Stanišić and Simatović respond that the Prosecution's appeal should be dismissed in its entirety and that any conviction on appeal would violate their fair trial right to have their conviction reviewed.[35] Simatović further submits that, although he disputes most of the Trial Chamber's findings which are not in his favour, he raises only a few challenges with respect to those findings in his response brief as his "response is not the appropriate instrument to argue against such findings".[36] He requests that the Appeals Chamber return the case to a "bench of the Tribunal", should it grant the Prosecution's appeal.[37]

C. Appeal Hearing

14. The Appeals Chamber heard oral submissions from the parties regarding this appeal on 6 July 2015.[38] Having considered their written and oral arguments, the Appeals Chamber hereby renders its Judgement.

[33] Prosecution Notice of Appeal, para. 17; Prosecution Appeal Brief, paras 199-200, 251-276.
[34] Prosecution Notice of Appeal, para. 18; Prosecution Appeal Brief, paras 277-278.
[35] Stanišić Response Brief, paras 5-7, 311; Simatović Response Brief, paras 8-13, 47-48.
[36] Simatović Response Brief, paras 8-13, 47-48, 230, 285.
[37] Simatović Response Brief, para. 13. At the appeal hearing, Stanišić submitted a similar argument with respect to the Prosecution's sub-ground of appeal 1(B). He stated that, if the Appeals Chamber finds that the Prosecution's sub-ground of appeal 1(B) "has merits, then all that is left for the Appeals Chamber to do […] is [to] remit the case to the Trial Chamber for [it] to consider all these factual findings in light of the correct legal standard and apply the standard and burden of proof to the factual findings already made." See AT. 48.
[38] AT. 1-102.

II. STANDARD OF REVIEW

15. The Appeals Chamber recalls that an appeal is not a trial *de novo*.[39] On appeal, parties must limit their arguments to errors of law that invalidate the decision of the trial chamber and to factual errors that result in a miscarriage of justice.[40] These criteria are set forth in Article 25 of the Statute and are well established in the jurisprudence of both the Tribunal and the International Criminal Tribunal for Rwanda ("ICTR").[41] In exceptional circumstances, the Appeals Chamber will also hear appeals in which a party has raised a legal issue that would not lead to the invalidation of the trial judgement but that is nevertheless of general significance to the Tribunal's jurisprudence.[42]

16. A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.[43] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[44] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude for other reasons that there is an error of law.[45] It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments that an appellant submits the trial chamber omitted to address and to explain why this omission invalidated the decision.[46]

17. The Appeals Chamber reviews the trial chamber's findings of law to determine whether or not they are correct.[47] Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[48] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself

[39] *Furundžija* Appeal Judgement, para. 40; *Kupreškić et al.* Appeal Judgement, para. 22. See also *Kordić and Čerkez* Appeal Judgement, para. 13.
[40] *Vasiljević* Appeal Judgement, para. 5. See also *Popović et al.* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 19.
[41] *Vasiljević* Appeal Judgement, para. 5. See also *Popović et al.* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 19.
[42] *Tadić* Appeal Judgement, para. 247; *Kupreškić et al.* Appeal Judgement, para. 22. See also *Popović et al.* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 19.
[43] *Krnojelac* Appeal Judgement, para. 10. See *Popović et al.* Appeal Judgement, para. 17; *Šainović et al.* Appeal Judgement, para. 20.
[44] *Krnojelac* Appeal Judgement, para. 10. See also *Popović et al.* Appeal Judgement, para. 17; *Šainović et al.* Appeal Judgement, para. 20.
[45] *Kupreškić et al.* Appeal Judgement, para. 26, quoting *Furundžija* Appeal Judgement, para. 35. See also *Popović et al.* Appeal Judgement, para. 17; *Šainović et al.* Appeal Judgement, para. 20.
[46] *Kvočka et al*. Appeal Judgement, para. 25. See also *Popović et al.* Appeal Judgement, para. 17; *Šainović et al.* Appeal Judgement, para. 20.
[47] *Krnojelac* Appeal Judgement, para. 10. See also *Popović et al.* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 21.
[48] *Blaškić* Appeal Judgement, para. 15. See also *Popović et al.* Appeal Judgement, para. 18; *Šainović et al.* Appeal

convinced beyond reasonable doubt as to the factual finding challenged by an appellant before the finding is confirmed on appeal.[49] The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the trial chamber in the body of the trial judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.[50]

18. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness.[51] In reviewing the findings of the trial chamber, the Appeals Chamber will only substitute its own finding for that of the trial chamber when no reasonable trier of fact could have reached the original decision.[52] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[53] Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the trial chamber.[54]

19. In determining whether or not a trial chamber's finding was reasonable, the Appeals Chamber will not lightly disturb findings of fact by a trial chamber.[55] The Appeals Chamber recalls, as a general principle, that:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[56]

20. The same standard of reasonableness and the same deference to factual findings applies when the Prosecution appeals against an acquittal.[57] Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it

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Judgement, para. 21.

[49] *Blaškić* Appeal Judgement, para. 15. See also *Popović et al.* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 21.

[50] *Kordić and Čerkez* Appeal Judgement, para. 21, fn. 12. See also *Popović et al.* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 21.

[51] *Tadić* Appeal Judgement, para. 64; *D. Milošević* Appeal Judgement, para. 15. See also *Popović et al.* Appeal Judgement, para. 19; *Šainović et al.* Appeal Judgement, para. 22.

[52] *Tadić* Appeal Judgement, para. 64; *Kvočka et al*. Appeal Judgement, para. 18. See also *Popović et al.* Appeal Judgement, para. 19; *Šainović et al.* Appeal Judgement, para. 22.

[53] *Galić* Appeal Judgement, para. 9, referring, *inter alia*, to *Stakić* Appeal Judgement, para. 220. See also *Popović et al.* Appeal Judgement, para. 19; *Šainović et al.* Appeal Judgement, para. 22.

[54] *Furundžija* Appeal Judgement, para. 37. See also *Popović et al.* Appeal Judgement, para. 19; *Šainović et al.* Appeal Judgement, para. 22.

[55] *Furundžija* Appeal Judgement, para. 37, referring to *Tadić* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63. See also *Popović et al.* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 23.

[56] *Kupreškić et al.* Appeal Judgement, para. 30. See also *Popović et al.* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 23.

[57] *Brdanin* Appeal Judgement, para. 14; *Bagilishema* Appeal Judgement, para. 13. See also *Popović et al.* Appeal Judgement, para. 21; *Šainović et al.* Appeal Judgement, para. 24.

determines that no reasonable trier of fact could have made the impugned finding.[58] Considering that it is the Prosecution that bears the burden at trial of proving the guilt of an accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal from a defence appeal against conviction.[59] An accused must show that the trial chamber's factual errors create a reasonable doubt as to his guilt.[60] The Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of the accused's guilt has been eliminated.[61]

21. The Appeals Chamber recalls that it has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and may dismiss arguments which are evidently unfounded without providing detailed reasoning.[62] Indeed, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically, and exhaustively.[63] The appealing party is also expected to provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenges are being made.[64] The Appeals Chamber will not consider a party's submissions in detail when they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[65]

22. When applying these basic principles, the Appeals Chamber recalls that it has identified the types of deficient submissions on appeal which need not be considered on the merits.[66] In particular, the Appeals Chamber will dismiss without detailed analysis: (i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the trial chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence

[58] *Brdanin* Appeal Judgement, para. 14, referring to *Bagilishema* Appeal Judgement, para. 13. See also *Popović et al.* Appeal Judgement, para. 21; *Šainović et al.* Appeal Judgement, para. 24.
[59] *Bagilishema* Appeal Judgement, para. 14. See also *Limaj et al*. Appeal Judgement, para. 13; *Popović et al.* Appeal Judgement, para. 21; *Šainović et al.* Appeal Judgement, para. 24.
[60] *Bagilishema* Appeal Judgement, para. 14. See also *Limaj et al*. Appeal Judgement, para. 13; *Popović et al.* Appeal Judgement, para. 21; *Šainović et al.* Appeal Judgement, para. 24.
[61] *Bagilishema* Appeal Judgement, para. 14. See also *Limaj et al*. Appeal Judgement, para. 13; *Popović et al.* Appeal Judgement, para. 21; *Šainović et al.* Appeal Judgement, para. 24.
[62] *Kunarac* Appeal Judgement, paras 47-48; *Krnojelac* Appeal Judgement, para. 16. See also *Popović et al.* Appeal Judgement, para. 22; *Šainović et al.* Appeal Judgement, para. 26.
[63] *Kunarac et al.* Appeal Judgement, para. 43. See also *Popović et al.* Appeal Judgement, para. 22; *Šainović et al.* Appeal Judgement, para. 26.
[64] Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002 ("Practice Direction"), paras 1(c)(iii)-(iv), 4(b)(ii). See *Vasiljević* Appeal Judgement, para. 11. See also *Popović et al.* Appeal Judgement, para. 22; *Šainović et al.* Appeal Judgement, para. 26.
[65] *Kunarac et al*. Appeal Judgement, para. 43. See also *Popović et al.* Appeal Judgement, para. 22; *Šainović et al.* Appeal Judgement, para. 26.
[66] *D. Milošević* Appeal Judgement, para. 17, referring, *inter alia*, to *Krajišnik* Appeal Judgement, para. 17. See also *Popović et al.* Appeal Judgement, para. 23; *Šainović et al.* Appeal Judgement, para. 27.

could have reached the same conclusion as the trial chamber; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber; (viii) allegations based on material not on the record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate an error; and (x) mere assertions that the trial chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.[67]

[67] *D. Milošević* Appeal Judgement, para. 17, referring, *inter alia*, to *Krajišnik* Appeal Judgement, paras 17-27. See also *Popović et al.* Appeal Judgement, para. 23; *Šainović et al.* Appeal Judgement, para. 24.

III. FIRST GROUND OF APPEAL: WHETHER STANIŠIĆ AND SIMATOVIĆ SHARED THE INTENT FOR JCE LIABILITY

A. Introduction

23. The Trial Chamber, Judge Picard dissenting, found neither Stanišić nor Simatović responsible for committing any of the crimes charged in the Indictment through participation in a JCE on the ground that it was not established that, from April 1991 through 1995, either of them shared the intent to further the alleged common criminal purpose of forcibly and permanently removing the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina.[68]

24. Under its first ground of appeal, the Prosecution submits that the Trial Chamber erred in failing to find that Stanišić and Simatović shared the intent for JCE liability.[69] In support of this contention, the Prosecution asserts that "the JCE analysis is entirely absent from the [Trial] Judgement", that "[t]he core issue in the case is undecided", and that without this analysis the Trial Judgement is "not fair, not valid, and not reasonable".[70] The Prosecution presents three sub-grounds of appeal which "examine three different but related facets of [the error in the Judgement]" and argues that, while they are mutually supporting, reversal of the case is warranted if the Appeals Chamber is satisfied of any one of the three.[71]

25. Under its first two sub-grounds of appeal, the Prosecution submits that the Trial Chamber erred in law in: (i) failing to adjudicate and/or provide a reasoned opinion on essential elements of JCE liability – in particular, the existence of a common criminal purpose and Stanišić's and Simatović's contributions to it – (sub-ground of appeal 1(A));[72] and (ii) considering evidence in a piecemeal manner rather than in its totality and thereby misapplying the relevant legal standard to its assessment of the evidence, invalidating its analysis of Stanišić's and Simatović's *mens rea* (sub-ground of appeal 1(B)).[73] The Prosecution submits that the Appeals Chamber should correct these errors of law, apply the correct legal standard, and find that Stanišić and Simatović had the *mens rea* for JCE liability.[74] The Prosecution asserts that, if the Appeals Chamber finds that the Trial Chamber erred in law as submitted in its sub-grounds of appeal 1(A) or 1(B), it would require the

[68] Trial Judgement, paras 2362-2363, read together with Trial Judgement, paras 2336, 2354. The Appeals Chamber notes that Judge Picard dissented to the Trial Chamber's various findings underlying this conclusion. As they are nevertheless findings made by the Trial Chamber, the Appeals Chamber will generally not indicate that they were made by majority.
[69] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, p. 5 (title of the first ground of appeal).
[70] Prosecution Appeal Brief, para. 13.
[71] Prosecution Appeal Brief, para. 14.
[72] Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, paras 15, 17, 19, 28. See also AT. 11-32.
[73] Prosecution Notice of Appeal, paras 6-7; Prosecution Appeal Brief, paras 16-17, 29, 43. *Cf.* AT. 11-12, 15-16, 22.
[74] Prosecution Appeal Brief, paras 17, 44, 105.

Appeals Chamber to conduct a *de novo* review of the Trial Chamber's factual findings and trial record.[75] The Prosecution therefore provides "an extended remedy section" which sets out the evidence and the Trial Chamber's findings which, according to the Prosecution, show the existence of the common criminal purpose, Stanišić's and Simatović's contributions to it, and their shared intent to further that common criminal purpose.[76]

26. In addition or in the alternative, the Prosecution argues that, given the Trial Chamber's findings and the evidence as summarised in its appeal brief, no reasonable trial chamber could have found that Stanišić or Simatović did not share the intent to further the common criminal purpose of the JCE.[77] Thus, under its last sub-ground of appeal, the Prosecution submits that the Trial Chamber erred in fact in failing to find that Stanišić or Simatović shared the intent to further the common criminal purpose of the JCE (sub-ground of appeal 1(C)).[78]

B. Sub-ground of appeal 1(A): Alleged failure to adjudicate and/or to provide a reasoned opinion on essential elements of JCE liability

1. Trial Chamber's Findings

27. The Trial Chamber was not satisfied that the only reasonable inference from the evidence was that, at the relevant time, Stanišić or Simatović possessed the requisite *mens rea* for JCE liability.[79] As a result, the Trial Chamber found neither of them responsible for committing the crimes charged in the Indictment pursuant to JCE liability.[80]

28. In reaching this conclusion, the Trial Chamber first assessed the crimes committed in Croatia and in Bosnia and Herzegovina. It found that various Serb Forces, including a unit of the Serbian SDB which Stanišić and Simatović formed ("Unit"),[81] the police forces of the SAO Krajina ("SAO Krajina Police"), the Territorial Defence ("TO") of the SAO Krajina ("SAO Krajina TO"), the Serbian Volunteer Guard ("SDG"), the Skorpions, the police and TO of the SAO SBWS ("SBWS police" and "SBWS TO", respectively), the Zvornik TO, and the Yugoslav People's Army ("JNA"), committed many of the crimes against non-Serbs charged in the Indictment[82] in the SAO Krajina and the SAO SBWS in Croatia and in the municipalities of Bijeljina, Bosanski Šamac,

[75] Prosecution Appeal Brief, para. 17.
[76] Prosecution Appeal Brief, para. 17. See also Prosecution Appeal Brief, paras 44-105.
[77] Prosecution Appeal Brief, paras 18, 106; AT. 30-32.
[78] Prosecution Appeal Brief, paras 18, 106, 125.
[79] Trial Judgement, paras 2336, 2354.
[80] Trial Judgement, paras 2362-2363, read together with Trial Judgement, paras 2336, 2354.
[81] Trial Judgement, paras 1421-1423.
[82] See Indictment, paras 22-66.

Doboj, Sanski Most, Trnovo, and Zvornik in Bosnia and Herzegovina during the period between 1991 and 1995.[83] In particular, the Trial Chamber found that:

a) Between April and September 1992, members of **the Unit** committed the crimes of deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity in one location in Bosanski Šamac municipality, the crimes of murder and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war in another location in Bosanski Šamac municipality,[84] and the crimes of deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity in several locations in Doboj municipality,[85] all in Bosnia and Herzegovina;

b) The **SAO Krajina Police** and/or other Serb Forces committed the crimes of murder, deportation, and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war in numerous locations in the SAO Krajina between April 1991 and April 1992.[86] The SAO Krajina Police continued to commit the crimes of deportation and persecution as crimes against humanity in the SAO Krajina during the period between May 1992 and the end of 1994;[87]

c) The **SAO Krajina TO** and/or other Serb Forces participated in the commission of the crimes of murder, deportation, and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war in a number of locations in the SAO Krajina between April 1991 and April 1992;[88]

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[83] Trial Judgement, paras 46-1253. In addition, the Trial Chamber found, *inter alia*, that "**Karaga's men**", a paramilitary group, and members of the Army of the Serbian Republic of Bosnia and Herzegovina ("**VRS**") perpetrated looting, and that the "**Mićе group**", another paramilitary group, perpetrated looting and killings, all of which were part of violent actions committed by various Serb Forces in Doboj municipality that resulted in the departure of Muslims and Croats in 1992. However, the Trial Chamber found that the evidence was insufficient to establish that the acts perpetrated by those constituting these groups were committed with the specific intent to forcibly displace Muslims and Croats who left Doboj and therefore did not find that these groups committed the crime of deportation as a crime against humanity. See Trial Judgement, paras 741-742, 744, 748, 777, 1130-1131, 1136, 1138.

[84] Trial Judgement, paras 611, 615, 649-650, 654, 670, 990, 1081, 1086, 1248, 1253.

[85] Trial Judgement, paras 718, 722, 729, 747-748, 775-777, 781-782, 1099, 1106, 1111, 1130-1131, 1138, 1253.

[86] Trial Judgement, paras 56-57, 60, 63-64, 102-104, 136, 145-147, 180, 206-209, 211, 214, 218, 242, 258, 260-261, 264, 308, 312-314, 348-349, 363, 368, 373-374, 387, 390, 392, 398, 400, 404, 990, 997, 1003, 1248, 1253. Specifically, the Trial Chamber found that: (i) in certain locations, members of the SAO Krajina Police *or* other Serb Forces perpetrated the crimes, but without being able to identify precisely which Serb Forces perpetrated the crimes (see Trial Judgement, paras 63-64, 102-104, 136, 208, 211, 313-314); (ii) in some other locations, members of the SAO Krajina Police *and* other Serb Forces perpetrated the crimes (see Trial Judgement, paras 180, 206-209, 242, 258, 260-261, 308, 312-313, 363, 368, 387, 390); and (iii) in the remaining locations, the perpetrators were members of the SAO Krajina Police alone (see Trial Judgement, paras 56-57, 60, 145-147, 214, 348-349, 373-374, 392, 398).

[87] Trial Judgement, paras 211, 399-400, 406, 1010, 1015, 1253.

[88] Trial Judgement, paras 63-64, 102-104, 131-132, 134, 136, 206-209, 211, 218, 258, 261-262, 264, 308, 312-314, 317, 387, 400, 404, 990, 997, 1003-1004, 1009, 1248, 1253. Specifically, the Trial Chamber found that: (i) in certain locations, members of the SAO Krajina TO *or* other Serb Forces perpetrated the crimes, but without being able to identify precisely which Serb Forces perpetrated the crimes (see Trial Judgement, paras 63-64, 102-104, 132, 134, 136, 208, 211, 261, 313-314); (ii) in some other locations, members of the SAO Krajina TO *and* other Serb Forces

d) The **SDG** committed the crimes of murder, other inhumane acts (forcible transfer), deportation, and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war in several locations in the SAO SBWS in 1991 and 1992.[89] The SDG and/or other Serb Forces committed the crimes of murder, other inhumane acts (forcible transfer), deportation, and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war in several locations in the context of operations conducted in Bijeljina and Zvornik municipalities in Bosnia and Herzegovina in 1992.[90] In September 1995, members of the SDG further committed the crimes of murder and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war in two locations in Sanski Most municipality in Bosnia and Herzegovina as well as the crimes of other inhumane acts (forcible transfer) and persecution as crimes against humanity of a Muslim inhabitant of Sanski Most;[91]

e) The **Skorpions** were responsible for the crimes of murder and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war in one location in Trnovo municipality in Bosnia and Herzegovina in July 1995;[92]

f) The **SBWS police and TO** committed the crimes of deportation and persecution as crimes against humanity in a number of locations in the SAO SBWS in 1991 and 1992;[93]

g) The **Zvornik TO** committed the crimes of deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity in a number of locations in Zvornik municipality in Bosnia and Herzegovina in 1992;[94] and

h) The **JNA** and/or other Serb Forces were responsible for the crimes of murder, deportation, and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war in a number of locations in the SAO Krajina between April 1991 and April 1992.[95] The

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perpetrated the crimes (see Trial Judgement, paras 131, 206-207, 209, 258, 261, 308, 312-313, 317, 387); and (iii) in the remaining location, the perpetrators were members of the SAO Krajina TO alone (see Trial Judgement, para. 262).

[89] Trial Judgement, paras 419, 432, 451, 454, 468, 479, 510-511, 524, 528, 538, 573, 576-578, 925, 927, 942, 990, 1025, 1030, 1049, 1054, 1248, 1253.

[90] For Bijeljina: see Trial Judgement, paras 587, 596, 1056, 1061-1062, 1067, 1253. For Zvornik: see Trial Judgement, paras 889-890, 917-919, 921, 923, 925, 927, 942, 990, 1183, 1188, 1195, 1200-1201, 1206, 1225, 1230, 1248, 1253. Specifically, the Trial Chamber found that: (i) in some locations, members of the SDG *or* other Serb Forces perpetrated the crimes, but without being able to identify precisely which Serb Forces perpetrated the crimes (see Trial Judgement, paras 889-890, 921); and (ii) in the other locations, members of the SDG *and* other Serb Forces perpetrated the crimes (see Trial Judgement, paras 587, 596, 917-919, 923, 925, 927, 942).

[91] Trial Judgement, paras 795, 804-805, 864, 866-867, 877, 990, 1176, 1181, 1248, 1253. See also Trial Judgement, paras 872, 875.

[92] Trial Judgement, paras 883, 990, 1248.

[93] Trial Judgement, paras 509-510, 527-528, 537-538, 573, 576-578, 1019, 1024, 1033, 1038, 1049, 1054, 1253.

[94] Trial Judgement, paras 917-918, 921, 928, 931, 935, 947, 1183, 1188, 1207, 1212-1213, 1218-1219, 1224, 1231, 1236, 1253.

[95] Trial Judgement, paras 63-64, 78, 85, 104, 132, 134, 136, 207-209, 211, 216, 218, 225, 227, 242, 258, 261, 264, 308, 312-314, 317-319, 339, 363, 368, 387, 389-390, 400, 404, 990, 997, 1003-1004, 1009, 1248, 1253. Specifically, the

JNA also committed the crimes of deportation and persecution as crimes against humanity in various locations in the SAO SBWS in 1991 and 1992.[96] The JNA and/or other Serb Forces further committed the crimes of deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity in the municipalities of Bosanski Šamac, Doboj, Sanski Most, and Zvornik in Bosnia and Herzegovina in 1992.[97]

29. The Trial Chamber found that, although crimes were committed throughout the areas covered by the Indictment over the course of many years, there was a concentration of crimes in the fall of 1991 in the SAO Krajina and the SAO SBWS, and between April and September 1992 in Bosnia and Herzegovina.[98]

30. The Trial Chamber found that, as a result of violent actions of various Serb Forces in the SAO Krajina, including the crimes enumerated above: (i) from April 1991 to April 1992, between 80,000 and 100,000 Croat and other non-Serb civilians fled the SAO Krajina (and subsequently that portion of the Republic of Serbian Krajina ("RSK")),[99] mainly to Croatia and, to a lesser extent, to other countries;[100] and (ii) between May 1992 and the end of 1994, approximately 8,000 Croat and other non-Serb civilians did the same.[101] The Trial Chamber also found that, as a result of violent actions of various Serb Forces in the SAO SBWS, including the crimes enumerated above, "many thousands" of Croats and non-Serbs fled the area of the SAO SBWS between 1991 and 1992.[102] The Trial Chamber further found that, between 1992 and 1995, due to violent actions of various Serb Forces in Bosnia and Herzegovina, including the crimes enumerated above, thousands of

Trial Chamber found that: (i) in certain locations, members of the JNA *or* other Serb Forces perpetrated the crimes, but without being able to identify precisely which Serb Forces perpetrated the crimes (see Trial Judgement, paras 63-64, 104, 132, 134, 136, 208, 211, 261, 313-314); (ii) in some other locations, members of the JNA *and* other Serb Forces perpetrated the crimes (see Trial Judgement, paras 78, 85, 207, 209, 227, 242, 258, 261, 308, 312-313, 317-319, 363, 368, 387, 390); and (iii) in the remaining locations, the perpetrators were members of the JNA alone (see Trial Judgement, paras 216, 225, 339, 389).

[96] Trial Judgement, paras 508, 510, 526, 537-538, 553-554, 573, 576-578, 990, 1041, 1046, 1054, 1248, 1253, 1490.

[97] Trial Judgement, paras 649, 654, 658, 662, 718-723, 733, 745-746, 781-782, 825, 828-830, 857-858, 860, 862-863, 917-918, 921, 1081, 1086, 1094, 1099, 1118, 1123, 1142, 1147, 1154, 1159, 1166, 1171, 1183, 1188, 1253. Specifically, the Trial Chamber found that: (i) in some locations, members of the JNA *or* other Serb Forces perpetrated the crimes, but without being able to identify precisely which Serb Forces perpetrated the crimes (see Trial Judgement, paras 828-830, 857-858, 860, 862-863); and (ii) in the other locations, members of the JNA *and* other Serb Forces perpetrated the crimes (see Trial Judgement, paras 649, 654, 658, 662, 718-723, 733, 745-746, 781-782, 825, 862-863, 917-918, 921).

[98] Trial Judgement, para. 971.

[99] The Trial Chamber found that the RSK was proclaimed by the Assembly of the SAO Krajina on 19 December 1991 and included the SAO SBWS and the Serbian Autonomous Area of Western Slavonia from February 1992. See Trial Judgement, paras 149-150.

[100] Trial Judgement, paras 404, 997, 1003.

[101] Trial Judgement, paras 406, 1010, 1015.

[102] Trial Judgement, paras 578, 1049, 1054.

Muslims, Croats, and other non-Serbs were displaced from each of the above-mentioned municipalities in Bosnia and Herzegovina, with the exception of Trnovo municipality.[103]

31. The Trial Chamber then turned to examine the criminal responsibility of Stanišić and Simatović.[104] It noted that, according to the Indictment, Stanišić and Simatović participated in a JCE, the object of which was the forcible and permanent removal of the majority of non-Serbs, principally Croats, Bosnian Muslims, and Bosnian Croats, from large areas of Croatia and Bosnia and Herzegovina through the commission of murder, deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war.[105] It further noted that, alternatively, according to the Indictment, the common criminal purpose only included the crimes of deportation and other inhumane acts (forcible transfer) as crimes against humanity, and the crimes of persecution and murder as crimes against humanity as well as murder as a violation of the laws or customs of war were reasonably foreseeable to Stanišić and Simatović as a possible consequence of the execution of the JCE.[106] The Trial Chamber also noted that the Indictment alleges that the common criminal purpose came into existence no later than April 1991 and continued until at least 31 December 1995.[107] In addition, the Trial Chamber recalled various acts of Stanišić and Simatović, as alleged in the Indictment, through which they purportedly participated in the JCE.[108] It then stated that it would assess whether Stanišić and Simatović in fact carried out these acts.[109] The Trial Chamber stated that it would thereafter assess whether Stanišić and Simatović "shared the intent of the alleged [JCE] to forcibly and permanently remove the majority of non-Serbs from large areas of Croatia and Bosnia-Herzegovina, through the commission of murder, deportation, forcible transfer, and persecution."[110]

32. Subsequently, the Trial Chamber commenced its analysis of the relevant evidence. It first assessed the positions and powers of Stanišić and Simatović within the SDB of the Serbian MUP.[111] In this context, the Trial Chamber noted the evidence that the Serbian MUP consisted of two services – the State Security Service, also known as the SDB, and the Public Security Service ("SJB")[112] – and that the SDB had the task of protecting the legal and social order, doing

[103] See Trial Judgement, paras 970, 1055-1236.
[104] Trial Judgement, chapters 5 and 6.
[105] Trial Judgement, para. 1265, referring to Indictment, para. 13.
[106] Trial Judgement, para. 1265, referring to Indictment, para. 14.
[107] Trial Judgement, para. 1265, referring to Indictment, para. 11.
[108] Trial Judgement, paras 1266-1269, referring to Indictment, paras 7, 15.
[109] Trial Judgement, paras 1266-1269.
[110] Trial Judgement, para. 1270. See also Indictment, para. 14.
[111] Trial Judgement, paras 1272-1286.
[112] Trial Judgement, para. 1273.

intelligence work, and dealing with political crimes, terrorism, and extremism, while the SJB dealt with ordinary crimes.[113]

33. The Trial Chamber found that Stanišić held the position of deputy chief of the Serbian SDB in 1991 and chief of the Serbian SDB as of 31 December 1991 throughout the remainder of the period relevant to the Indictment[114] and that, while his responsibility was "not to check or know of each and every payment made by the [Serbian SDB]", the tasks of the Chief of the Serbian SDB "included making decisions on how to employ assets and methods."[115] The Trial Chamber further found that, during the period relevant to the Indictment, Simatović was employed in the Second Administration of the Serbian SDB and became its deputy chief from 1 May 1992.[116] According to the evidence noted by the Trial Chamber, this administration dealt with intelligence matters outside of Serbia.[117] The Trial Chamber also found that he was appointed as a special adviser in the Serbian SDB on 1 May 1993.[118] However, the Trial Chamber could not infer from Simatović's positions alone that he was responsible for certain acts attributed generally to the Serbian SDB.[119]

34. After having examined the positions and powers of Stanišić and Simatović, the Trial Chamber turned to examine whether Stanišić's and Simatović's alleged involvement with various Serb Forces as described in the Indictment was in fact established.[120]

35. With respect to the Unit,[121] the Trial Chamber found that Stanišić and Simatović: (i) formed the Unit between May and August 1991;[122] (ii) were in command of the Unit and controlled its deployment and training activities from at least September 1991;[123] and (iii) organised the Unit's involvement in various operations in the SAO Krajina in July 1991, in the SAO SBWS in September 1991 and 1995, and in Bosnia and Herzegovina from 1992 to 1995, during which they also financed the Unit, provided logistical and other support to it, and/or organised the training of Unit members in the context of these operations.[124] According to the Trial Chamber, Unit members

[113] Trial Judgement, para. 1273.
[114] Trial Judgement, para. 1279. See also Trial Judgement, para. 1272.
[115] Trial Judgement, para. 1279.
[116] Trial Judgement, para. 1286. See also Trial Judgement, para. 1284.
[117] Trial Judgement, para. 1284.
[118] Trial Judgement, para. 1286. See also Trial Judgement, para. 1285.
[119] Trial Judgement, para. 1286.
[120] Trial Judgement, chapters 6.3-6.7. See also Indictment, paras 7, 15-16; Trial Judgement, paras 1266-1268.
[121] Trial Judgement, chapters 6.3, 6.5.3, 6.5.4. Within the Serbian SDB, the Unit was formalised as the Unit for Anti-terrorist Operations ("JATD") in August 1993. See Trial Judgement, paras 1443, 1445.
[122] Trial Judgement, paras 1421-1423, 2318.
[123] Trial Judgement, paras 1489, 2318. See also Trial Judgement, para. 1445.
[124] Trial Judgement, paras 1366, 1369, 1426, 1443, 1445, 1489-1490, 1492, 1534, 1536, 1538, 1569-1570, 1600-1602, 1639, 1674, 1677-1679, 1702-1704, 1718, 1727, 1749, 2006, 2011, 2059, 2067, 2080, 2090, 2318, 2321, 2323-2328, 2335, 2353. See also Trial Judgement, para. 1267, stating that the Trial Chamber understands the phrase in the Indictment, "organized [the] involvement" of certain units, to refer "to deploying the units to certain military operations (including any relevant preparations for such deployment), where the units may have been incorporated into the command structure of other military forces".

became training instructors themselves and trained other Serb Forces at various training camps.[125] However, the Trial Chamber did not find that Stanišić or Simatović personally directed the involvement of the Unit in the operations between 1991 and 1995,[126] with the exception that Simatović directed the Unit during a few operations in the SAO Krajina and in the SAO SBWS in June, August, and September 1991.[127]

36. As for Stanišić's and Simatović's conduct with respect to the SAO Krajina Police,[128] the Trial Chamber found that they directed and organised its formation from late August 1990 until late May 1991 in cooperation with Milan Martić ("Martić")[129] who, as SAO Krajina Minister of Defence from May 1991 and Minister of Interior from June 1991, had authority over the SAO Krajina Police.[130] The Trial Chamber further found that Stanišić and Simatović directed and organised: (i) logistical support for the SAO Krajina Police, *inter alia*, in the form of the delivery of arms and ammunition between December 1990 and May or June 1991;[131] (ii) the financing of the SAO Krajina Police between December 1990 and around September 1991;[132] and (iii) the training of members of the SAO Krajina Police between late April and July or August 1991.[133] Subsequent to these periods, neither Stanišić nor Simatović was found to have provided any assistance to the SAO Krajina Police.[134]

37. With regard to the SDG,[135] the Trial Chamber found that Stanišić and Simatović: (i) financed and supported, including through the provision of ammunition, the SDG's involvement in operations in Bosnia and Herzegovina in 1994 and 1995 and in operations in the SAO SBWS in

[125] Trial Judgement, paras 1369, 1393-1394, 1421, 1446, 1488, 1493, 1533-1534, 1539, 1568, 1571, 1597, 1600, 1604, 1639, 1672-1674, 1680, 1699, 1701-1702, 1705, 1719, 1727, 1746, 2327. The various training camps referred to in these paragraphs of the Trial Judgement were located in the SAO Krajina and the SAO SBWS as well as in Serbia and Bosnia and Herzegovina. As regards the training of other Serb Forces, see also *infra*, paras 36, 39.
[126] Trial Judgement, paras 1426, 1490, 1537, 1569, 1603, 1676, 1703, 2006, 2056-2057, 2322, 2335, 2353. See also Trial Judgement, para. 1266, stating that the Trial Chamber understands the phrase in the Indictment, "directed [the] involvement" of certain units in particular operations, to refer "to ordering or commanding the units in military operations".
[127] Trial Judgement, paras 1426, 1490, 2352.
[128] Trial Judgement, chapters 6.3.2, 6.6.
[129] Trial Judgement, paras 2159, 2331. See also Trial Judgement, para. 1266, stating that the Trial Chamber understands the phrase in the Indictment, "directed and organized the formation" of certain units, to refer "to the founding of or the process of founding these units".
[130] Trial Judgement, paras 2153, 2332. See also Trial Judgement, paras 2137-2139, 2152.
[131] Trial Judgement, paras 2154, 2208, 2331. In addition, Stanišić and Simatović were found to have supplied the communication equipment to the SAO Krajina Police at least once in April 1991. See Trial Judgement, paras 2156, 2211, 2213.
[132] Trial Judgement, paras 2153, 2155, 2199, 2201-2202. See also Trial Judgement, para. 2331. The Trial Chamber found that Simatović and Stanišić directed and organised the financing of the SAO Krajina Police; Simatović on at least two occasions during the period between December 1990 and May or June 1991 and Stanišić in January 1991 and around September 1991. See Trial Judgement, paras 2153, 2155, 2199, 2201-2202.
[133] Trial Judgement, paras 1369, 1426, 2197-2198, 2327, 2330.
[134] See Trial Judgement, para. 2212. The Trial Chamber also found that the evidence was insufficient to conclude that Stanišić or Simatović directed or organised the training for the SAO Krajina Police after July 1991. See Trial Judgement, para. 2198.
[135] Trial Judgement, chapters 6.4, 6.5.3-6.5.4.

1995;[136] and (ii) directed and organised, between 1994 and 1995 and outside of particular operations, the financing of SDG members and support for the SDG by arranging medical care for its members.[137] The Trial Chamber further found that Simatović organised the SDG's involvement in some of the operations in Bosnia and Herzegovina in 1994 and 1995 and that Željko Ražnatović also known as Arkan ("Arkan"), the founder of the SDG,[138] remained in regular telephone contact with Simatović during these operations.[139] In contrast, the Trial Chamber found that the evidence was insufficient to establish that Stanišić and Simatović: (i) directed or organised the SDG's formation in October 1990;[140] or (ii) directed or organised the SDG's involvement in operations in the SAO SBWS in 1991 and 1992 and in certain municipalities in Bosnia and Herzegovina in 1991 and 1992, or financed, supplied, or supported the SDG in the context of these operations.[141]

38. As to the Skorpions,[142] the Trial Chamber was satisfied that, at least on one occasion, Stanišić and Simatović provided them with ammunition during an operation in Bosnia and Herzegovina in 1995.[143] It was, however, unable to conclude that Stanišić or Simatović supported, directed, organised, or financed their involvement in this operation.[144] The Trial Chamber also found that the evidence was insufficient to conclude that Stanišić or Simatović: (i) directed or organised the formation of the Skorpions in late 1991 or early 1992;[145] (ii) supported, directed, organised, or financed the involvement of the Skorpions in any other specific operations;[146] or (iii) directed or organised financing, training, logistical support, or other substantial assistance for the Skorpions outside of the time-period of these operations.[147]

39. Concerning other Serb Forces,[148] the Trial Chamber found that between 1991 and 1995, Stanišić and Simatović organised the training of members of various other armed groups, such as the MUP of the SAO SBWS ("SBWS MUP"), the VRS, the Skelani TO, the Serbian Army of

[136] Trial Judgement, paras 1880, 2006, 2037, 2039, 2068, 2084, 2087, 2092, 2333 (in particular, fn. 5006).
[137] Trial Judgement, paras 1911-1912, 2333 (in particular, fn. 5006).
[138] Trial Judgement, paras 1759, 1762.
[139] Trial Judgement, paras 2005, 2010 (Operation Pauk), 2035, 2039 (Treskavica/Trnovo operation). See also Trial Judgement, para. 2353. In these operations, Stanišić was not found to have organised the SDG's involvement. See Trial Judgement, paras 2010, 2039. With regard to the rest of the operations in Bosnia and Herzegovina in 1994 and 1995 (*i.e.* the Banja Luka operations) and the operations in the SAO SBWS in 1995, the Trial Chamber found that the evidence was insufficient to conclude that Stanišić or Simatović organised the involvement of the SDG. See Trial Judgement, paras 1879, 2058. The Trial Chamber was also unable to conclude that Stanišić or Simatović directed the involvement of the SDG in any of the operations in 1994 and 1995. See Trial Judgement, paras 1813, 2006, 2037, 2056-2057.
[140] Trial Judgement, para. 1762.
[141] Trial Judgement, paras 1789, 1791, 1800, 1839-1840, 1857-1860.
[142] Trial Judgement, chapter 6.5.
[143] Trial Judgement, paras 2068, 2334.
[144] Trial Judgement, paras 2034, 2041, 2069, 2073, 2334.
[145] Trial Judgement, para. 1937. See also Trial Judgement, para. 1935.
[146] Trial Judgement, paras 2006, 2008, 2034, 2041, 2056-2058, 2069, 2073.
[147] Trial Judgement, paras 2073, 2104.
[148] Trial Judgement, chapters 6.3.2- 6.3.3, 6.6- 6.7.

Krajina ("SVK"), the JNA, and the paramilitary groups known as "Karaga's men" and the "Miće group".[149] The Trial Chamber further found that: (i) Stanišić and Simatović organised the training of members of the SAO Krajina TO between April and July or August 1991;[150] and (ii) Stanišić organised logistical support in the form of providing weapons for the SAO Krajina TO from late 1991 to April 1992.[151] The Trial Chamber was, however, unable to conclude that Stanišić or Simatović directed or organised the financing of, or any other support to, the SAO Krajina TO.[152] With respect to the SBWS police and TO,[153] formed between mid-July and August 1991,[154] the Trial Chamber found that the evidence was insufficient to establish that Stanišić or Simatović directed or organised the formation of, logistical support to, the financing of, or the training of, these armed groups, with the exception that they organised the training of a group of the SBWS MUP from May 1992.[155] The Trial Chamber was also unable to conclude that Stanišić or Simatović had control over the SBWS TO.[156] With regard to the Zvornik TO,[157] formed in April 1992,[158] the Trial Chamber also found that the evidence was insufficient to establish that Stanišić or Simatović directed or organised the formation of, logistical support to, the financing of, or the training of, this TO.[159]

40. In reaching these findings concerning Stanišić's and Simatović's conduct vis-à-vis various Serb Forces, the Trial Chamber also considered evidence concerning political ties between the Serb leadership in Serbia, including Stanišić and Simatović, and the Serb leadership in Croatia and Bosnia and Herzegovina, and made some findings in this regard.

41. In particular, in relation to the SAO Krajina, the Trial Chamber accepted the evidence of Milan Babić ("Babić"), then Prime Minister of the SAO Krajina,[160] that a "parallel structure" of power and authority: (i) began to be formed by the Serbian SDB in the SAO Krajina in August 1990, started its activities in April 1991, and operated in conjunction with the Secretariat of Internal Affairs ("SUP") and the MUP of the SAO Krajina; (ii) consisted of members of the Serbian SDB and Serbian SJB, police officers from Serb municipalities in Croatia, and members of the Serb Democratic Party ("SDS"), and was run by Slobodan Milošević ("Milošević"), the

[149] Trial Judgement, paras 1426, 1493, 1539, 1571, 1604, 1680, 1705, 1719, 2255, 2328.
[150] Trial Judgement, paras 1369, 1426, 2197-2198, 2327.
[151] Trial Judgement, para. 2210.
[152] Trial Judgement, paras 2204, 2214.
[153] Trial Judgement, chapters 6.3.3, 6.4.4, 6.7.
[154] Trial Judgement, para. 2232.
[155] Trial Judgement, paras 1493, 2235-2236, 2254-2255, 2257-2260.
[156] Trial Judgement, paras 1837, 2233, 2253.
[157] Trial Judgement, chapter 6.7.
[158] Trial Judgement, para. 2270.
[159] Trial Judgement, paras 2273, 2285-2287.
[160] See Trial Judgement, paras 155, 2111, 2222.

President of Serbia,[161] and the Serbian SDB; (iii) was not subordinated to the SAO Krajina Government and rather operated in a parallel manner to the SAO Krajina authorities, imposing decisions on the authorities through force; (iv) involved Stanišić as its central figure, followed by Simatović and Martić, among others; and (v) "introduced discriminatory practices against the Croats and provoked conflicts, trying to establish control over the Krajina".[162] In the context of this parallel structure, the Trial Chamber considered Stanišić's and Simatović's acts related to the formation of, and assistance to, the SAO Krajina Police and their cooperation with Martić in this regard.[163] In addition, the Trial Chamber found that: (i) from late April or early May to July 1991, Simatović, Martić, and Dragan Vasiljković also known as Captain Dragan ("Captain Dragan"),[164] among others, cooperated in the establishment and operation of a training camp at Golubić in the SAO Krajina;[165] (ii) Stanišić and Simatović financed the training at the Golubić camp;[166] and (iii) Stanišić and Simatović organised the training, *inter alia*, of Unit members and SAO Krajina Police and TO members at this camp and at the Knin fortress camp in the SAO Krajina between April and July or August 1991.[167]

42. In contrast, with regard to the SAO SBWS, the Trial Chamber was unable to conclude from the relevant evidence that Stanišić controlled or influenced decisions of Goran Hadžić ("Hadžić"), the President of the SAO SBWS,[168] in relation to the setting up of the SBWS police and TO in 1991.[169] The Trial Chamber reached this conclusion as well as the other conclusions on the non-involvement of Stanišić and Simatović with the SBWS police and TO,[170] despite its findings that: (i) those who were employed by, or affiliated with, the Serbian SDB or SJB – such as Ilija Kojić ("Kojić"), Radoslav (or Radovan/Ante) Kostić ("Kostić"), and Radovan Stojičić also known as

[161] See Trial Judgement, paras 2004, 2074, 2247, 2300; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 January 2010, taking judicial notice of certain facts listed in *Prosecutor v Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Second Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 12 December 2008, Annex, Proposed Facts ("Adjudicated Facts III"), no. 11.
[162] Trial Judgement, paras 2120, 2150.
[163] See *supra*, para. 36. See also Trial Judgement, paras 2120, 2150, read together with Trial Judgement, paras 2151-2159.
[164] See Trial Judgement, para. 1302. With regard to Captain Dragan, the Trial Chamber found that, from May through August 1991, he commanded members of the Unit at the Golubić and the Knin fortress camps and during the operations in Glina and Struga in July 1991. It also found that, from the creation of the Unit until at least August 1991, he cooperated closely with and reported directly to Simatović, but operated with more independence than other Unit members. See Trial Judgement, paras 1398, 1425. See also Trial Judgement, para. 1368. The Trial Chamber also found that Captain Dragan ceased to be a member of the Unit and left the SAO Krajina in July or August 1991. See Trial Judgement, paras 1370, 1566-1567, 2287. See also Trial Judgement, paras 180, 182-185, 377, 387, 1001, fn. 854, read together with Trial Judgement, para. 404, fns 872, 875.
[165] Trial Judgement, paras 1366, 2327. See also Trial Judgement, paras 1365, 1367-1368, 1421, 2332.
[166] Trial Judgement, paras 1366, 2327, in which the Trial Chamber also found that Simatović brought fuel, vehicle, supplies, and equipment to the Golubić camp. See also Trial Judgement, paras 1422, 2332.
[167] Trial Judgement, paras 1369, 1426, 2197-2198, 2327.
[168] See Trial Judgement, paras 2235, 2298, read together with Trial Judgement, para. 2222.
[169] Trial Judgement, para. 2235. See also Trial Judgement, paras 1837, 2298, 2303.
[170] See *supra*, para. 39.

Badža ("Badža") – headed, worked for, and/or transferred weapons to, the SBWS police and/or TO;[171] and (ii) SJB members from the Serbian MUP gave training to members of the SBWS police and TO, following a meeting in Belgrade on the sending of SJB officers and policemen, attended by Stanišić.[172] Further, it rejected as unfounded a witness testimony that: (i) Hadžić went to Belgrade a number of times in and around 1991 for meetings with Milošević and Stanišić with regard to the formation and administration of the SAO SBWS Government; and (ii) this witness's impression was that Milošević controlled Hadžić through Arkan, who was also active in the SAO SBWS, and through Badža and that Stanišić was the link between Milošević, on one hand, and Arkan and Badža, on the other hand.[173]

43. The Trial Chamber did not make any specific finding on the political influence exerted by Stanišić and Simatović over the Serb leadership in Bosnia and Herzegovina. The Trial Chamber only considered and made some findings on: (i) Stanišić's interactions with Radovan Karadžić ("Karadžić"),[174] the President of the Serbian Republic of Bosnia and Herzegovina ("Bosnian-Serb Republic"),[175] including through their intercepted conversations and a meeting attended, *inter alios*, by Milošević, Stanišić, and Karadžić; and (ii) Simatović's presence at a meeting attended, *inter alios*, by Ratko Mladić ("Mladić"), both of which will be summarised in more detail below.[176]

44. In addition to the above-mentioned assessment of Stanišić's and Simatović's involvement with various Serb Forces, the Trial Chamber also assessed their alleged provision of channels of communication between and among the core members of the JCE, which the Prosecution also alleged to be part of the acts of contribution to the JCE.[177] In this context, on the basis of the evidence concerning Stanišić's and Simatović's contacts with other alleged members of the JCE,[178] including Martić,[179] Babić,[180] Hadžić,[181] Karadžić,[182] and/or Mladić,[183] the Trial Chamber first

[171] Trial Judgement, paras 1437, 1502, 1837, 2222, 2224, 2231-2234, 2246-2248, 2253, 2257. See also Trial Judgement, paras 2299, 2314-2315; *infra*, para. 50, with regard to Stanišić's visit to Dalj in the SAO SBWS on 19 or 20 September 1991 ("September 1991 Visit to Dalj").
[172] Trial Judgement, para. 2254. See also Trial Judgement, paras 2240-2241.
[173] Trial Judgement, paras 1837, 2222, 2235, 2298, 2303. See also Trial Judgement, para. 1789, referred to in Trial Judgement, para. 2303. With regard to the SDG, including Arkan, being active in the SAO SBWS, see, in particular, Trial Judgement, paras 1759, 1774-1785, 1789-1791, 1816-1831, 1836, 2258.
[174] See, *e.g.*, Trial Judgement, paras 2295, 2307-2312.
[175] See Trial Judgement, para. 1862, referring to Karadžić as the "Bosnian-Serb Republic President". The Trial Chamber noted that on 12 August 1992 the name of the Bosnian-Serb Republic was officially changed to *Republika Srpska* ("RS"). See Trial Judgement, p. 7.
[176] See *infra*, paras 44, 48-49, 54.
[177] Trial Judgement, chapter 6.8. See also Trial Judgement, para. 1269; Indictment, para. 15(a).
[178] See, in particular, Trial Judgement, chapter 6.8.
[179] See, *e.g.*, Trial Judgement, paras 324, 1365-1366, 2110, 2122, 2153-2154, 2199, 2231-2232, 2340, 2354.
[180] See, *e.g.*, Trial Judgement, paras 325, 1297, 1317, 1334, 2142, 2294, 2308. See also Trial Judgement, para. 2295, fn. 4916.
[181] See, *e.g.*, Trial Judgement, paras 2222, 2233, 2235, 2248, 2298-2299, 2303, 2313-2315. See also Trial Judgement, para. 1837.
[182] See, *e.g.*, Trial Judgement, paras 2295, 2307-2312.
[183] See, *e.g.*, Trial Judgement, paras 2310-2312, 2350-2351.

found that Stanišić and Simatović "were in direct and frequent contact with many of these members".[184] The Trial Chamber then turned to Stanišić's and Simatović's specific roles in providing channels of communication between and among the core members of the JCE. With regard to Stanišić, the Trial Chamber found that he acted, on occasion, in a liaison capacity at least between Milošević and Martić as well as between Milošević and Karadžić, passing on messages and information.[185] However, the Trial Chamber found that the evidence indicated that Milošević was also in direct contact with both Martić and Karadžić, without any involvement by Stanišić, and that Milošević and Babić had regular direct contact.[186] Concerning Stanišić's alleged role in linking Milošević and Hadžić, the Trial Chamber did not find the evidence in this regard reliable.[187] Thus, the Trial Chamber found that it could not conclude that Stanišić enabled, or even greatly facilitated, contact between these alleged members of the JCE.[188] With regard to Simatović, while the Trial Chamber found that he was "in direct and frequent contact with many of [the other alleged JCE] members"[189] and "received intelligence from various sources",[190] it found that it was unable to conclude that he acted "as a channel of communication between and among core members" of the JCE.[191]

45. After having conducted this analysis of the evidence and made findings of fact as described above in relation to the crimes committed in Croatia and in Bosnia and Herzegovina and with respect to Stanišić's and Simatović's positions and powers as well as their conduct, the Trial Chamber did not determine whether a JCE existed, what its common criminal purpose was,[192] and who participated in it.[193] Neither did the Trial Chamber examine whether Stanišić and Simatović significantly contributed to the common criminal purpose of the JCE. Without examining or making any findings on these elements of JCE liability, the Trial Chamber immediately proceeded to assess Stanišić's and Simatović's *mens rea* for JCE liability.[194]

46. In determining whether the *mens rea* for JCE liability was fulfilled, the Trial Chamber noted that it would first review the evidence on the specific "actions taken, or words uttered" by Stanišić and Simatović, which the Prosecution had identified in its final trial brief as demonstrating their

[184] Trial Judgement, para. 2302. See also Trial Judgement, para. 2291.
[185] Trial Judgement, para. 2302.
[186] Trial Judgement, para. 2302.
[187] Trial Judgement, para. 2303.
[188] Trial Judgement, paras 2302-2303. See also Trial Judgement, paras 2306, 2335.
[189] Trial Judgement, para. 2302.
[190] Trial Judgement, para. 2304.
[191] Trial Judgement, para. 2304. See also Trial Judgement, para. 2338.
[192] Indictment, paras 11, 13-14.
[193] Indictment, para. 12. On numerous occasions, the Trial Chamber referred to "alleged members of the joint criminal enterprise" without determining whether the individuals referred to as such were in fact members of the JCE. See, *e.g.*, Trial Judgement, paras 2290-2291, 2302.
[194] Trial Judgement, paras 2305-2354.

mens rea.[195] The Trial Chamber stated that it would then proceed to analyse what can be inferred with regard to Stanišić's and Simatović's intent from their actions which it had previously assessed in the Trial Judgement.[196]

47. In particular, the Trial Chamber considered the following examples with respect to Stanišić: (i) an intercepted telephone conversation between him and Karadžić on 22 January 1992 ("22 January 1992 Intercepted Conversation");[197] (ii) his remarks at a meeting in Belgrade on 13 and 14 December 1993 ("Remarks During the December 1993 Meeting");[198] and (iii) his September 1991 Visit to Dalj.[199]

48. According to the Trial Chamber, in the 22 January 1992 Intercepted Conversation:

> Karadžić informed Stanišić that they had had talks with the Croats who, according to him, were also worried about the plebiscite and a sovereign Bosnia-Herzegovina. Karadžić had informed the Croats that "we do not want any division of [Bosnia-Herzegovina], because it is both unpopular and unnecessary". Karadžić stated that he had told a man close to Tudman that the Serbs and Croats might resolve their contentious issues within a month or two. He continued: "With elasticity and goodwill they could settle their disagreement. Otherwise, they are in for thirty years of torture. With the Blue Helmets, with disagreements, with all sorts of things …". Stanišić then said: "With killings." and continued: "No. We'll then have to push them to go to Belgrade, you know! […] There is nothing else left for us to do. […] Or we'll exterminate them completely so let's see where we'll end up." Karadžić agreed. Stanišić added: "No, if they want it, they'll have it. Then they'll have an all-out war. […] Better do it like decent people".[200]

The Trial Chamber observed that the exchange between Stanišić and Karadžić "appear[ed] to have been about the conflict in Croatia, and the difficulties and risks should there be no agreement between the conflicting parties."[201] Consequently, the Trial Chamber considered Stanišić's reference to killings and his remark about extermination in this conversation "too vague to be construed as support for the allegation that Stanišić shared the intent to further the alleged common criminal purpose".[202]

49. As to Stanišić's Remarks During the December 1993 Meeting, the Trial Chamber noted that, according to the evidence, the meeting was attended, among others, by Milošević, Momčilo

[195] Trial Judgement, paras 2306-2315, 2338-2351.
[196] Trial Judgement, paras 2306, 2338, referring to Trial Judgement, chapters 6.3-6.8.
[197] Trial Judgement, paras 2307-2309. This intercepted conversation is Ex. P00690 "Intercepted conversation between Radovan Karadžić and Jovica Stanišić".
[198] Trial Judgement, paras 2310-2312.
[199] Trial Judgement, paras 2313-2315.
[200] Trial Judgement, para. 2307 (internal references omitted), referring to Ex. P00690, "Intercepted conversation between Radovan Karadžić and Jovica Stanišić", pp. 5-7.
[201] Trial Judgement, para. 2309.
[202] Trial Judgement, para. 2309. See also Trial Judgement, para. 2316.

Perišić, Mile Mrkšić ("Mrkšić"), and Stanišić from Serbia and by Karadžić, Momčilo Krajišnik, and Mladić from the Bosnian-Serb Republic.[203] According to the Trial Chamber, at this meeting:

> Stanišić noted that the meeting was scheduled on the Bosnian-Serb Republic delegation's initiative and set out the purpose of the meeting: "it is because of your initiative that we are meeting in order to improve /your/ operational and tactical position and see about help from Serbia". Karadžić observed that the conditions at the time were most favourable for them as they were holding 75 per cent of the territory and they were willing to end the war. He acknowledged that part of that territory would have to be returned because of the demands of the international community. He set out their strategic goals, and indicated that the one about having a part of Sarajevo was a priority. The strategic goals also included "border separation of the state from the other two national communities" and to establish territorial control over a number of areas. On the second day of the meeting, Stanišić stated: "we can spare 100 to 120 men and Karišik". He added that their combat group was ready to set out the following day.[204]

The Trial Chamber found that this meeting "was about the practical and logistical possibilities for Serbia to provide military assistance to the Bosnian-Serb Republic" and that "Stanišić neither initiated nor chaired [this meeting]."[205] Consequently, the Trial Chamber did not consider that "Stanišić's seemingly limited participation shows that he shared the intent to further the alleged common criminal purpose."[206] It also found that it could not infer from the context of the meeting or discussions therein a "link between Stanišić's offer to send 100 to 120 men for activities around Sarajevo and the forcible and permanent removal, through deportation and forcible transfer, of non-Serbs from areas of Croatia and Bosnia-Herzegovina".[207]

50. Further, with regard to Stanišić's September 1991 Visit to Dalj, the Trial Chamber considered evidence that, during this visit, he began yelling at people because Vukovar had not yet surrendered and that he subsequently met with other people, including Hadžić, Kostić, and Kojić, to discuss the situation of Vukovar.[208] However, the Trial Chamber noted that it did not receive evidence on the content of the meeting.[209] The Trial Chamber therefore stated that, from Stanišić's presence at the meeting or from his frustrations that Vukovar had not surrendered yet, it was unable to infer "that he shared the common criminal purpose".[210] It further considered "that Stanišić's actions in relation to Vukovar can also reasonably be interpreted as [indicating] that his intent was limited to support for the Serb forces' successful military take-over of Vukovar".[211]

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[203] Trial Judgement, para. 2310.
[204] Trial Judgement, para. 2310 (internal references omitted), referring to Ex. P02532, "Excerpt from Mladić's Diary", pp. 1-2, 8, Ex. P00942, "Decision regarding the strategic goals of Serbian people in Bosnia and Herzegovina. Signed by Momčilo Krajišnik".
[205] Trial Judgement, para. 2312.
[206] Trial Judgement, para. 2312. See also Trial Judgement, para. 2316.
[207] Trial Judgement, para. 2312.
[208] Trial Judgement, para. 2314, referring, *inter alia*, to Ex. P00401 (JF-032, witness statement) (confidential), Ex. P00402 (JF-032, *Slobodan Milošević* transcript) (confidential). See also Trial Judgement, para. 2299.
[209] Trial Judgement, para. 2315.
[210] Trial Judgement, para. 2315. See also Trial Judgement, para. 2316.
[211] Trial Judgement, para. 2315.

51. With respect to Simatović, the Trial Chamber examined the following examples of "actions taken, or words uttered": (i) his personal participation in the attack on Lovinac in the SAO Krajina in June 1991;[212] (ii) his personal participation in the attack on Vukovar in the SAO SBWS in November 1991;[213] and (iii) his participation in the planning of Operation Udar in Bosnia and Herzegovina and his involvement in related operations in Bratunac and Skelani in 1993.[214]

52. As to Simatović's personal participation in the attack on Lovinac in June 1991, the Trial Chamber found that, prior to this attack, Simatović, Martić, and Dušan Orlović discussed its objective to have as much of the local population leave as possible in order to establish a purely Serb territory[215] and that Simatović was thus at least aware of Martić's intent to forcibly remove Croat civilians from Lovinac, and "may have shared" it.[216] However, the Trial Chamber was not able to establish the details of this discussion or to what extent Simatović agreed with the objectives that were discussed.[217] The Trial Chamber further found that Simatović participated in and directed Unit members during this attack and that, in particular, he planned and participated in the use of an armoured train in the Lovinac area.[218] However, on the basis of the evidence before it, the Trial Chamber was unable to determine with sufficient certainty that he participated in the use of this train in the Lovinac area with the specific objective of intimidating villagers into leaving.[219] Finally, the Trial Chamber also noted that the evidence did not establish with sufficient certainty whether any persons left Lovinac during or immediately following the June 1991 attack.[220]

53. With regard to Simatović's personal participation in the attack on Vukovar in November 1991, the Trial Chamber considered evidence that Simatović attended a meeting before the attack on Vukovar and a celebration after the attack and that, among others, Hadžić and Mrkšić were also present on both occasions.[221] However, the Trial Chamber noted that no details about what was discussed on these occasions or about Simatović's participation in these discussions were

[212] Trial Judgement, paras 2340-2342, 2354.
[213] Trial Judgement, paras 2343-2345.
[214] Trial Judgement, paras 2346-2351.
[215] Trial Judgement, paras 2340, 2354. The Appeal Chamber notes that, elsewhere in the Trial Judgement, the Trial Chamber recalled that there were "instances" in which it had found specific attacks aimed at forcing the local population to leave "in order to establish a purely Serb territory". See Trial Judgement, para. 1250. However, the attack on Lovinac in June 1991 is the only attack in relation to which the Trial Chamber explicitly found certain participants had such an objective. See Trial Judgement, paras 335, 2340, 2354. The Appeals Chamber also notes that, in paragraphs 335 and 1397 of the Trial Judgement, the Trial Chamber refers to Babić instead of Martić as a participant in this discussion. However, the Appeals Chamber considers it to be an inadvertent mistake in light of the evidence on which the Trial Chamber relied and its findings elsewhere. See Trial Judgement, paras 324, 2340, 2354.
[216] Trial Judgement, para. 2354.
[217] Trial Judgement, para. 2340.
[218] Trial Judgement, para. 2341. See also Trial Judgement, paras 335, 337, 1426.
[219] Trial Judgement, para. 2341.
[220] Trial Judgement, para. 2342. See also Trial Judgement, para. 338.
[221] Trial Judgement, para. 2344.

provided.[222] The Trial Chamber also found that, while "crimes were committed during and after the attack on Vukovar in November 1991, namely the deportation of many non-Serbs from the SAO SBWS, including from Vukovar", there was insufficient evidence to establish whether Unit members participated in the attack on Vukovar.[223] Thus, the Trial Chamber concluded that Simatović's presence on those two occasions did not "indicate that he shared the intent to forcibly and permanently remove the non-Serbs from Vukovar" and "could also reasonably be interpreted to indicate that his intent was limited to support for the Serb forces' successful military take-over of Vukovar."[224]

54. In relation to Simatović's participation in the planning of Operation Udar in 1993, the Trial Chamber considered documentary evidence and found that, on 28 February 1993, Simatović took part in a planning meeting for Operation Udar, an operation which lasted from 14 February to 25 April 1993.[225] The Trial Chamber noted evidence that this meeting was also attended by Mladić, who had decided in a directive he had sent in November 1992 that the VRS forces should force the enemy to leave the Birač, Žepa, and Goražde areas together with the Muslim population.[226] The Trial Chamber found that the evidence did not establish in detail what was discussed in the 28 February 1993 meeting in relation to the objectives of Operation Udar or the scope of Simatović's participation in that discussion.[227] The Trial Chamber also held that, while Simatović organised the Unit's involvement in combat operations in and around Bratunac between February and August 1993 and in combat operations in the Skelani area in March and April 1993, both being part of Operation Udar, the Prosecution did not allege and it did not find that any crimes were committed during or as part of Operation Udar.[228] In light of the above, the Trial Chamber found the evidence concerning "Simatović's actions with regard to Operation Udar, in itself or in light of the totality of the evidence regarding [Stanišić and Simatović]", insufficient "to establish beyond reasonable doubt that he shared the intent to drive the Muslim population out of eastern Bosnia-Herzegovina or to create an ethnically pure corridor in the Drina river valley".[229]

55. Accordingly, the Trial Chamber found that the evidence regarding the above-mentioned examples of Stanišić's and Simatović's "actions taken, or words uttered" which the Prosecution had identified in its final trial brief did not demonstrate their *mens rea* for JCE liability.[230]

[222] Trial Judgement, para. 2345.
[223] Trial Judgement, para. 2345.
[224] Trial Judgement, para. 2345.
[225] Trial Judgement, paras 2349-2351.
[226] Trial Judgement, paras 2347, 2350.
[227] Trial Judgement, para. 2351.
[228] Trial Judgement, para. 2351.
[229] Trial Judgement, para. 2351.
[230] Trial Judgement, paras 2307-2316, 2339-2351. See also Trial Judgement, para. 2354.

56. Having considered that there was no direct evidence indicating that Stanišić and Simatović shared the intent to further the alleged common criminal purpose of forcibly and permanently removing the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina,[231] the Trial Chamber proceeded to examine whether such intent could be inferred from their other actions during the Indictment period.[232] In particular, the Trial Chamber decided to consider Stanišić's and Simatović's acts with respect to various Serb Forces "as well as whether the Serb Forces committed crimes which are part of the objective of the alleged joint criminal enterprise."[233]

57. In this context, the Trial Chamber in particular found that: (i) Stanišić and Simatović organised the Unit's involvement in the Doboj operations in 1992, even though they were aware that Unit members had previously committed crimes in Bosanski Šamac and it "may have been reasonably foreseeable to [them] that Unit members would commit crimes in Doboj";[234] (ii) "it [is] likely that Stanišić would have been aware of" the intent of Mrkšić and Mladić to force non-Serbs to leave, but still deployed Unit members in operations, including in Skelani in 1993 in the context of Operation Udar, in which they cooperated with the VRS and the Yugoslav Army and were subordinate to Mrkšić;[235] (iii) Stanišić and Simatović continued to support the SAO Krajina Police and cooperate closely with Martić despite their knowledge of his intent to deport non-Serbs from the SAO Krajina and of the crimes committed by the SAO Krajina Police between April 1991 and April 1992;[236] and (iv) "[i]n light of the crimes committed by the SDG in 1991 and 1992 in the SAO SBWS, Bijeljina and Zvornik, […] it was reasonably foreseeable to [Stanišić and Simatović] that the SDG would commit murders in Sanski Most municipality" in the context of the Banja Luka operations in 1995, during the period that they financed the SDG.[237]

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[231] Trial Judgement, para. 2317. See also Trial Judgement, paras 2309, 2312, 2315-2316, 2342, 2345, 2351.
[232] Trial Judgement, paras 2317-2336, 2352-2354.
[233] Trial Judgement, para. 2317. With regard to Simatović, see Trial Judgement, para. 2353, referring to Trial Judgement, chapter 6.9, which includes Trial Judgement, para. 2317. See also Trial Judgement, paras 2306, 2338, referring to Trial Judgement, chapters 6.3-6.8.
[234] Trial Judgement, paras 2323, 2326.
[235] Trial Judgement, paras 2324, 2326. See also Trial Judgement, para. 2335. The Trial Chamber, however, found that it was not established that Unit members committed any crimes during these operations. See Trial Judgement, para. 2325. The Trial Chamber found that Operation Udar comprised, in part, operations in Skelani and Bratunac in 1993. See Trial Judgement, paras 1676, 1703, 2350-2351. The Trial Chamber is silent about Simatović's awareness of the intent of Mrkšić and Mladić. See Trial Judgement, paras 2347, 2350-2351. As regards Mrkšić's position at this time, the Trial Chamber found that he commanded the "Tactical Group 1" during the Skelani operations and that the Unit was part of this tactical group. See Trial Judgement, paras 1676, 2324.
[236] Trial Judgement, paras 2331-2332. See also Trial Judgement, para. 2335. The Trial Chamber also found that, in so doing, Stanišić took the risk that the SAO Krajina Police would commit crimes when establishing and maintaining Serb control over large areas of Croatia. See Trial Judgement, para. 2332. The Appeals Chamber understands the Trial Chamber to have found the same also with regard to Simatović. See Trial Judgement, para. 2353, referring to Trial Judgement, chapter 6.9. According to the Trial Chamber's findings, Stanišić's and Simatović's support to the SAO Krajina Police continued until September 1991 while there was a concentration of crimes in the SAO Krajina in the fall of 1991. See Trial Judgement, paras 971, 2331. See also *supra*, para. 36.
[237] Trial Judgement, para. 2333. The Trial Chamber also found that, in financing the SDG over a period of time between 1994 and 1995, Stanišić took the risk that the SDG would commit murders during this period. See Trial Judgement,

58. However, the Trial Chamber was not satisfied that the evidence concerning Stanišić's and Simatović's respective actions vis-à-vis the Unit, the SAO Krajina Police, or the SDG,[238] in itself, or in light of the totality of the evidence regarding Stanišić and Simatović, was sufficient to establish beyond reasonable doubt that they shared the intent to further the alleged common criminal purpose through the commission of crimes.[239] The Trial Chamber was also not satisfied that the evidence on Stanišić's and Simatović's provision of ammunition to the Skorpions on one occasion in the Treskavica/Trnovo operation in 1995 was sufficient to establish such intent beyond reasonable doubt since the evidence did not demonstrate whether this ammunition was provided before or after the commission of the murders by the Skorpions.[240] Moreover, the Trial Chamber found that such intent was not established beyond reasonable doubt on the basis of the evidence regarding Stanišić's and Simatović's actions in relation to the training of Serb Forces, such as the Unit, the SAO Krajina Police, the SAO Krajina TO, the SBWS MUP, police units, the VRS, the Skelani TO, the SVK, the JNA, and paramilitary groups known as "Karaga's men" and the "Mićе group", in itself or in light of the totality of the evidence regarding Stanišić and Simatović.[241] The Trial Chamber also found that, overall, the intent to further the alleged common criminal purpose could not be inferred beyond reasonable doubt from any of their actions in relation to the Serb Forces.[242]

59. In reaching these conclusions, the Trial Chamber in particular took into account the facts that: (i) a number of operations in which Stanišić organised, and Simatović directed and organised, the Unit's involvement were military actions directed against opposing Croat forces;[243] (ii) Unit members were placed within other command structures when Stanišić and Simatović organised their involvement in numerous military operations;[244] and (iii) no crimes were found to have been committed in a number of military operations in which Stanišić and Simatović organised or supported the involvement of the Unit and/or the SDG.[245] The Trial Chamber also considered its own finding that the training of various Serb Forces, which Stanišić and Simatović organised, was "of a military nature",[246] except, on one occasion, when Unit members were trained in the use of human shields in the context of the Doboj operations in 1992.[247] The Trial Chamber further

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para. 2333. The Appeals Chamber understands the Trial Chamber to have found the same also with regard to Simatović. See Trial Judgement, para. 2353, referring to Trial Judgement, chapter 6.9.
[238] Trial Judgement, paras 2333, 2353.
[239] Trial Judgement, paras 2326, 2332-2333, 2335, 2352-2353. See also Trial Judgement, para. 2351.
[240] Trial Judgement, paras 2334, 2353.
[241] Trial Judgement, paras 2327-2328, 2330, 2353.
[242] Trial Judgement, paras 2335, 2353.
[243] Trial Judgement, paras 2325, 2335, 2352-2353.
[244] Trial Judgement, paras 1267, 2335, 2353.
[245] Trial Judgement, paras 2325, 2333, 2335, 2351, 2353.
[246] Trial Judgement, paras 1369, 1680, 2329-2330, 2353 (the Trial Chamber found that the training included weapons and ambush training, tactical exercises, and how to treat prisoners of war).
[247] Trial Judgement, paras 1600, 2329-2330, 2353. See also Trial Judgement, para. 1579.

considered, *inter alia*, that: (i) it was unable to conclude that Stanišić directed, *i.e.* commanded, any of the Serb Forces in any military operations, including when crimes were committed;[248] (ii) while Simatović only directed, *i.e.* commanded, the Unit in a few early operations in 1991, no crimes were committed during these operations;[249] and (iii) the evidence did not establish to what extent Stanišić and Simatović determined the specific content of the training of various Serb Forces.[250]

60. The Trial Chamber was also not satisfied that Stanišić's and Simatović's intent could be inferred as the only reasonable conclusion available from their interaction and cooperation with other persons, including alleged JCE members.[251]

61. On the basis of these considerations, the Trial Chamber ultimately found that it was unable to establish beyond reasonable doubt that, from April 1991 through 1995, Stanišić and Simatović shared the intent to further the common criminal purpose of forcibly and permanently removing the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina, through the commission of murder as a crime against humanity and as a violation of the laws or customs of war as well as deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity (or through only deportation and other inhumane acts (forcible transfer) as crimes against humanity).[252]

2. Submissions

62. The Prosecution submits that the Trial Chamber erred in law by finding that it was not established that Stanišić and Simatović shared the intent to further the common criminal purpose, without adjudicating or providing a reasoned opinion on the existence of, and Stanišić's and Simatović's participation in, a common criminal purpose, which are "essential elements" of JCE liability.[253] In the view of the Prosecution, without making findings on the existence of a common criminal purpose, its scope, members who shared it, and the conduct which contributed to it, and

[248] Trial Judgement, para. 2335. See also Trial Judgement, para. 2322.
[249] Trial Judgement, paras 2325, 2340-2342, 2352, fn. 871.
[250] Trial Judgement, para. 2330.
[251] Trial Judgement, paras 2335, 2353-2354.
[252] Trial Judgement, paras 2336, 2354.
[253] Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, paras 19, 28. See also AT. 8, 14, 21-24, 31, 37, 96. In particular, at the appeal hearing, the Prosecution submitted that the Trial Chamber erred in law by failing to adjudicate "essential issues" in the case, namely: (i) the existence and nature of the common criminal purpose; and (ii) Stanišić's and Simatović's knowledge of that purpose, including whether they knew that taking over and maintaining control of Serb territory in Croatia and Bosnia and Herzegovina inherently involved the commission of crimes and that their actions contributed to that common criminal purpose. See AT. 14, 21, 23-24, 31, 34. See also AT. 8.

without a reasoned opinion on these essential elements, the Trial Chamber could not correctly decide on Stanišić's and Simatović's shared intent to further the common criminal purpose.[254]

63. In support of this argument, the Prosecution submits that a shared intent requires a demonstration that the JCE members had the common "state of mind that the statutory crime(s) forming part of the *objective* should be carried out".[255] It argues that this objective and the persons with whom the accused had the common state of mind are "predicate determination[s] to inferring shared intent".[256] The Prosecution further argues that the Trial Chamber's "occasional references to the 'alleged common criminal purpose'" and to JCE members Martić, Mrkšić, and Mladić "do not make up for the missing analysis and reasoning on the elements of JCE", such as: (i) whether there was a common purpose; (ii) the content of the common purpose; (iii) when the common purpose came into existence; (iv) who shared the common purpose; (v) which crimes formed part of the common purpose; and (vi) how the JCE members contributed to the common purpose.[257] According to the Prosecution, these are "predicate findings" as the "intent may often be inferred from knowledge of the common criminal purpose and continued contribution to it".[258] The Prosecution also avers that no other "JCE leadership case" was decided without findings on whether a common criminal purpose existed.[259]

64. The Prosecution further submits that the Trial Chamber's failure to address the common criminal purpose and to analyse Stanišić's and Simatović's intent through the "common criminal purpose lens" is illustrated by the Trial Chamber's: (i) "compartmentalised assessment which has obscured the coherence of the circumstantial evidence adduced by the Prosecution",[260] including its assessment of Stanišić's and Simatović's actions as contributions to certain crimes but not as contributions to the common criminal purpose;[261] and (ii) finding that Stanišić and Simatović

[254] Prosecution Appeal Brief, paras 19-22. See also AT. 8, 14, 21-24. At the appeal hearing, the Prosecution added that the Trial Chamber failed to analyse the contributions and statements of Stanišić and Simatović "through the lens of the common criminal purpose". See AT. 11-12. See also AT. 8, 14, 21-22. The Prosecution argued that this failure to address essential issues led the Trial Chamber to miss essential evidence in its assessment of the intent. See AT. 8, 15, 22, 31, 97. The Prosecution further specified that, "[w]hether the [Trial] Chamber made a finding [on the common criminal purpose] as step number 1 or whether it factored it into the intent analysis, the analysis had to be done as part of the adjudication of this case." See AT. 96. In its view, this failure constitutes a failure to provide a reasoned opinion, which is an error of law. See AT. 14-15, 24, 31, 97, referring, *inter alia*, to *Perišić* Appeal Judgement, para. 96, *Gotovina and Markač* Appeal Judgement, para. 12, *Kvočka et al.* Appeal Judgement, para. 23.
[255] Prosecution Appeal Brief, para. 20 (emphasis in the original), quoting *Krajišnik* Appeal Judgement, para. 200.
[256] Prosecution Appeal Brief, para. 20. See also Prosecution Appeal Brief, para. 22.
[257] Prosecution Appeal Brief, para. 21, quoting Trial Judgement, paras 2309, 2312, 2316-2317, 2324, 2326, 2330, 2332-2335, 2354.
[258] Prosecution Appeal Brief, para. 22, referring to *Krajišnik* Appeal Judgement, para. 697. See also Prosecution Appeal Brief, para. 20. See further AT. 8, 14, 21-22, 24, 34. At the appeal hearing, the Prosecution specified that Stanišić's and Simatović's knowledge of the common criminal purpose coupled with their repeated contributions to the common criminal purpose provides a compelling foundation for inferring shared intent, which was completely ignored by the Trial Chamber. See AT. 14, 21-22, 24, 34.
[259] Prosecution Appeal Brief, para. 22.
[260] AT. 11-12. See also AT. 15-16, 22.
[261] Prosecution Appeal Brief, para. 23; AT. 16.

"might simply have intended lawful military activity" and have only been aware of a risk of crimes happening in the course of gaining territorial control, while the very nature of the common criminal purpose made crimes a certainty, not a risk.[262] According to the Prosecution, it is an essential feature of a JCE that conduct which may appear lawful when viewed in isolation is exposed as criminally culpable when viewed in context.[263]

65. Further, the Prosecution argues that the Trial Chamber's failure to address the common criminal purpose is also illustrated by the lack of any discussion or reference in the Trial Judgement to evidence clearly relevant to aspects of the JCE, such as: (i) the historical and political goals, including ambitions for a "Greater Serbia" based on ethnic discrimination, which underpinned the common criminal purpose of the JCE in Bosnia and Herzegovina and Croatia; (ii) the development of these goals into the common criminal purpose; (iii) the execution of this purpose through a pattern of violent crimes; (iv) the criminal intent of JCE members, including those with whom Stanišić and Simatović closely cooperated; and (v) the close interactions between Stanišić and Simatović, on one hand, and core JCE members, on the other hand, as well as the role or contributions of Stanišić and Simatović.[264]

66. The Prosecution also argues that further evidence relevant to the membership and existence of the JCE was disregarded.[265] In particular, the Prosecution asserts that the Trial Chamber disregarded the plea agreement of alleged JCE member Babić, which: (i) confirms that he knew of the common purpose to create a unified Serb state by force and that he shared the intent to forcibly remove non-Serbs from Croatia; (ii) details the close cooperation between him and other JCE members, setting out how he met frequently with Milošević, Martić, and Karadžić in furtherance of the common goal; and (iii) describes other participants in the common plan, including Hadžić, Vojislav Šešelj, Stanišić, and Simatović, along with members of the JNA, local TO forces, MUP forces, the SDB, and the SAO Krajina Police.[266] The Prosecution adds that the Trial Chamber

[262] AT. 11-14, 20, 23, referring to Trial Judgement, paras 2323, 2332-2333. The Prosecution further specified that, "if it really were the case that these accused only intended lawful military activity and did not intend the ethnic cleansing component of the equation of territorial control, [it] would expect to see the accused repudiating the crimes and the displacement of the non-Serb population. Instead, we see their continued support for the implementation of the common criminal purpose over a period of years through their contributions to the Serb forces committing crimes." See AT. 12-13.
[263] AT. 15-16.
[264] Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, para. 24; AT. 8, 15, 22, 31, 95-96. See also AT. 24-30.
[265] Prosecution Appeal Brief, paras 25-27; AT. 22, 25, 27, 96.
[266] Prosecution Appeal Brief, para. 25, referring to Ex. P02057, "Milan Babić plea agreement at the ICTY. Dated 22 January 2004", paras 17, 30-31 (uncited). See also Prosecution Reply Brief, para. 12.

"generally overlooked" the significance of Babić's contacts and interactions with Stanišić and Simatović.[267]

67. In addition, the Prosecution argues that the Trial Chamber disregarded evidence showing Karadžić's criminal intent, Stanišić's awareness thereof, and their close cooperation.[268] In particular, the Prosecution refers to two speeches which Karadžić purportedly gave before the RS Assembly on 14 October and 21 December 1991 and in which he allegedly mentioned the "possible extinction" of Muslim people if it came to a war, predicting the deaths of several thousand people, complete destruction of several hundred towns, and massive population displacements.[269] According to the Prosecution, evidence shows that Stanišić approved Karadžić's statement, thereby demonstrating the shared intent of Stanišić and Karadžić.[270]

68. The Prosecution also submits that the Trial Chamber improperly disregarded adjudicated facts which were relevant to the existence of a common criminal purpose. In particular, the Prosecution refers to adjudicated facts which allegedly show not only that the "clearly recognisable pattern" of criminal activity in Bosnia and Herzegovina reflected the plan of the Bosnian Serb leadership to permanently remove non-Serbs, but also that the Bosnian Serb leadership knew that the take-over of municipalities would necessarily entail "the use of force and fear".[271]

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[267] Prosecution Appeal Brief, para. 25, fn. 17, referring to Ex. P01877 (Milan Babić, *Martić* transcript), T. 1545-1546 (17 February 2006), Ex. P01878 (Milan Babić, *Slobodan Milošević* transcript), T. 13082-13083 (20 November 2002), T. 13175, 13184-13186 (21 November 2002), Trial Judgement, paras 2294-2295, fn. 4916 (which, in turn, refers to Ex. P00631, "Intercepted conversation of Jovica Stanišić and Radovan Karadžić regarding Milan Babić and general situation" (confidential), Ex. P00683, "Intercepted conversation of Jovica Stanišić and Radovan Karadžić" (confidential)), Ex. P00686, "Intercepted conversation of Jovica Stanišić & Radovan Karadžić".

[268] Prosecution Appeal Brief, para. 26; AT. 27. See also Prosecution Reply Brief, para. 13.

[269] Prosecution Appeal Brief, para. 26, referring to Ex. P00940, "Clip from video V000-0270. Documentary film sponsored by the Bosnia and Herzegovina government. Radovan Karadžić in the Bosnia and Herzegovina Assembly before the war speaking about the independence and sovereignty of Bosnia and Herzegovina", pp. 1-2 (uncited), Ex. P01483, "Expert report of Robert Jay Donia entitled 'Thematic Excerpts from the Assembly of Republika Srpska, 1991-1996' dated 17 March 2008. Report was prepared for Stanišić and Simatović Case IT-03-69", p. 87. See also AT. 27.

[270] Prosecution Appeal Brief, para. 26, referring to Ex. P00678, "Intercepted conversation between Jovica Stanišić and Radovan Karadžić" (confidential), p. 1 (uncited). In this intercept, Stanišić told Karadžić that he saw the RS Assembly broadcast of 21 December 1991 and stated that it looked good. See Ex. P00678, "Intercepted conversation between Jovica Stanišić and Radovan Karadžić" (confidential), p. 1 (uncited). See also AT. 27.

[271] Prosecution Appeal Brief, para. 27, referring to *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 25 November 2009, taking judicial notice of certain facts listed in *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Prosecution's Notification on Motion for Judicial Notice of Adjudicated Facts, 14 May 2007, Annex A, Prosecution's Proposed Adjudicated Facts ("Adjudicated Facts I"), nos 236 (uncited), 129 (uncited), Trial Judgement, para. 584, fn. 1207 (which, in turn, refers to *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Third Prosecution's Motion for Judicial Notice of Adjudicated Facts, 26 July 2010, taking judicial notice of certain facts listed in *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Third Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 5 January 2010, Public Annex, Prosecution's Proposed Adjudicated Facts ("Adjudicated Facts IV"), no. 255). See also, AT. 22, 25, 27, 96, referring, *inter alia*, to Adjudicated Facts I, nos 142 (uncited), 236 (uncited).

69. The Prosecution avers that the above-mentioned evidence only constitutes a few examples of the evidence which is clearly relevant to the existence of the common criminal purpose and disregarded by the Trial Chamber[272] and lists other relevant evidence allegedly disregarded by the Trial Chamber in an annex to its appeal brief.[273] In the Prosecution's view, by "completely disregarding such central, relevant evidence", the Trial Chamber failed in its obligation to adjudicate and provide a reasoned opinion on material elements of JCE liability.[274]

70. Stanišić responds that the Prosecution erroneously asserts that the Trial Chamber was obliged to enter findings on the precise scope of the common criminal purpose.[275] According to Stanišić, the existence of a common criminal purpose need only be assessed and defined to the extent necessary to determine his and Simatović's contribution and criminal intent.[276] Stanišić avers that, although the significance of the contribution to the crimes has to be examined against the scope of the common criminal purpose in order to assess accurately the alleged shared criminal intent, it was not necessary to set out every aspect of the common criminal purpose as the Trial Chamber found that his contributions were minimal.[277] According to Stanišić, the Prosecution conflates its own obligations to plead and prove the scope of the common criminal purpose (including the nature of the contribution of the accused) with a trial chamber's obligation to determine and provide a reasoned opinion on the accused's role and responsibility for criminal conduct.[278]

71. Stanišić further argues that the Trial Chamber adequately considered the scope of the common criminal purpose and assessed its own factual findings concerning his role as demonstrated by its consistent deferral to the Prosecution's definition of the scope of the common criminal purpose in the Indictment.[279] He also avers that the Trial Chamber adjudicated the totality of the crimes alleged to be within the common criminal purpose and how his actions related to them,[280] and that this was the "essential analysis" for "an accurate assessment of responsibility pursuant to JCE".[281] He submits that, based on this factual analysis, the Trial Chamber further assessed whether

[272] Prosecution Appeal Brief, para. 28.
[273] Prosecution Appeal Brief, para. 27, referring to Prosecution Appeal Brief, Annex. B. The Prosecution notes that further discussion of this evidence is found in section II.D of its appeal brief as well as in its sub-ground of appeal 1(C). See Prosecution Appeal Brief, paras 27-28, fns 22-23.
[274] Prosecution Appeal Brief, para. 28.
[275] Stanišić Response Brief, para. 10.
[276] Stanišić Response Brief, para. 10.
[277] Stanišić Response Brief, paras 11, 16.
[278] Stanišić Response Brief, para. 12.
[279] Stanišić Response Brief, para. 13.
[280] At the appeal hearing, Stanišić specified that the Trial Chamber adjudicated his contribution to crimes in the sense of contribution to "criminal means of the JCE alleged" and not just specific crimes or criminal events. See AT. 45-46, 56.
[281] Stanišić Response Brief, para. 14; AT. 45-46, 56.

he shared the intent to further the common criminal purpose by acting pursuant to it.[282] In Stanišić's view, the Trial Judgement contains "scores and scores of findings that remain untouched", including those concerning his contribution to criminal means, and shows that the Trial Chamber "had the raw building blocks for a reasoned assessment of JCE liability".[283] He contends that, even if the Trial Chamber erred in failing to provide a sufficiently reasoned definition of the scope of the common criminal purpose, the error could not have been critical to the assessment of his JCE liability, nor could it have led to a miscarriage of justice.[284]

72. Simatović responds that, in asserting that the Trial Chamber erred in failing to adjudicate on the "physical elements" of JCE liability before deciding on the shared intent, the Prosecution attempts to introduce a hierarchy of JCE elements.[285] He argues that the Prosecution's only legal source for this assertion is the *Krajišnik* Appeal Judgement, which it misinterprets in this respect.[286] Simatović asserts that the Trial Chamber found that there was no mental element of JCE that could be attributed to him and, therefore, that there was no legal reason for the Trial Chamber to establish whether the "physical elements" of JCE existed.[287] Simatović also argues that, in the judgements that the Prosecution cites to support its submission that no other JCE case has been decided without findings on the existence of a common criminal purpose, the accused were found guilty of participation in the JCE except in the *Boškoski and Tarčulovski* Trial Judgement, in which one of the accused was found not to have shared the intent. With regard to the *Boškoski and Tarčulovski* Trial Judgement, however, Simatović avers that one cannot infer that the Trial Chamber made a conclusion about the existence of the JCE.[288] He contends that, in any event, the Trial Chamber considered all the important and necessary elements of JCE liability listed in the Indictment in the present case.[289]

73. Simatović further submits that it is not clear why the Trial Chamber should have analysed the issue of "Greater Serbia" in relation to him, who, at the relevant time, was incapable of exerting

[282] Stanišić Response Brief, para. 14; AT. 46-47, 56-57. Stanišić also argues that, even though the Prosecution disputes the Trial Chamber's factual conclusions, it accepts that the Trial Chamber applied the correct legal standard for JCE. See Stanišić Appeal Brief, para. 14. See also Stanišić Appeal Brief, para. 15.
[283] AT. 45-47. See also AT. 48, 56-58. Regarding Stanišić's submission that "scores and scores of findings […] remain untouched", see further AT. 44, 47-57, 61-67; *infra*, para. 115.
[284] Stanišić Response Brief, para. 17; AT. 45.
[285] Simatović Response Brief, paras 18-19; AT. 73-74.
[286] Simatović Response Brief, para. 19, referring to *Krajišnik* Appeal Judgement, para. 200. Simatović argues that, while this paragraph of the *Krajišnik* Appeal Judgement requires that "[the JCE participants] had a common state of mind, namely the state of mind that the statutory crime(s) forming part of the objective should be carried out", nowhere does it state that "the *objective* is a predicate determination to inferring shared intent". See Simatović Response Brief, para. 19 (emphasis added).
[287] Simatović Response Brief, paras 20-22, 31; AT. 73-74.
[288] Simatović Response Brief, para. 26.
[289] Simatović Response Brief, paras 23-25; AT. 74-75.

any influence on the political or historical goals of either political or military leadership.[290] He further asserts that the Prosecution's "insistence" on the disregarded plea agreement of JCE member Babić shows the complete absence of any testimonial or documentary evidence that a JCE, which he, Simatović, had been part of, really existed.[291] With respect to the list of allegedly "clearly relevant" exhibits which the Trial Chamber disregarded, Simatović argues that these are just a very small portion of the totality of the Prosecution's trial exhibits and that a trial chamber need not refer to the testimony of every witness or every piece of evidence.[292] Simatović also states that 13 of those allegedly disregarded exhibits are not even mentioned in the Prosecution's final trial brief, which shows that the Prosecution wishes to present new arguments based on evidence which was never presented to the Trial Chamber.[293]

74. The Prosecution replies that, even if the Trial Chamber assumed *arguendo* that the common criminal purpose existed, this was insufficient, as it "gave no expressed reasoned consideration" to the existence of the common criminal purpose or its membership.[294] It submits that it does not assert that the Trial Chamber erred in failing to sufficiently define the scope of the common criminal purpose but rather by failing to make any findings on the existence of the common criminal purpose, including its membership.[295]

75. The Prosecution reiterates that, without determining the existence of a common criminal purpose, including its membership, a chamber cannot determine whether an accused "*shared* the necessary intent".[296] Further, in the view of the Prosecution, the requisite *mens rea* for their JCE liability is that Stanišić and Simatović intended to further the common criminal purpose and not whether the facts of the case show that they intended particular crimes.[297] It further argues that, without determining the common criminal purpose, a chamber cannot determine whether an accused significantly contributed to that common purpose.[298] The Prosecution adds that Stanišić mistakes the applicable law when he argues that contributions to particular crimes are "essential" to

[290] Simatović Response Brief, para. 27; AT. 74.
[291] Simatović Response Brief, para. 28. See also AT. 74. Simatović also argues that the Trial Chamber quoted Babić's testimony several times. See Simatović Response Brief, para. 28.
[292] Simatović Response Brief, para. 29, referring, *inter alia*, to Prosecution Appeal Brief, Annex B, *Perišić* Appeal Judgement, para. 92, *Limaj et al.* Appeal Judgement, para. 86. See also AT. 74-75.
[293] Simatović Response Brief, para. 30; AT. 75.
[294] Prosecution Reply Brief, para. 9; AT. 22-23, 95. At the appeal hearing, the Prosecution clarified that, in its view, the Trial Chamber "did not credit *arguendo* the common criminal purpose", because, if it had, it would have had to assume that the crimes were an inherent part of all take-overs of Serb-claimed territory in Croatia an Bosnia and Herzegovina and therefore that there was a certainty – not merely a risk – that crimes would be committed. The Prosecution then added that, even if it had, its approach was not valid. See AT. 22-23, 95.
[295] Prosecution Reply Brief, para. 9.
[296] Prosecution Reply Brief, para. 10 (emphasis in the original).
[297] Prosecution Reply Brief, para. 10.
[298] Prosecution Reply Brief, para. 11.

the determination of a JCE.[299] The Prosecution submits that, contrary to Stanišić's argument, JCE liability can be established by evidence showing that an accused shared the intent to further the common criminal purpose and significantly contributed to it, even if the accused's conduct was not directly related to particular crimes.[300] The Prosecution also argues that the Trial Chamber made no finding that Stanišić's and Simatović's contributions to the JCE were "minimal" but rather halted its analysis before determining this question.[301]

76. Finally, the Prosecution avers that the context demonstrated by the necessary findings would have transformed the Trial Chamber's interpretation of key evidence.[302] For instance, the Prosecution asserts that, notwithstanding the possibility that some military actions may have been legitimate, the determination of the existence of a common criminal purpose would have shown how *prima facie* lawful activities were subverted to JCE members' interests.[303] Similarly, the Prosecution refers to the 22 January 1992 Intercepted Conversation between Karadžić and Stanišić, which the Trial Chamber explicitly addressed in reaching its finding on the *mens rea*,[304] and argues that no reasonable trier of fact could have assessed such a conversation without taking into account a "finding (or assumption) that one of the participants intended the permanent and forcible removal of thousands of non-Serbs".[305]

3. Analysis

77. The Appeals Chamber recalls that the *actus reus* for the first and third categories of JCE liability consists of: (i) a plurality of persons; (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; and (iii) the participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.[306] The *mens rea* element for the first category of JCE liability is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).[307] For the third category, it is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the JCE or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one

[299] Prosecution Reply Brief, para. 11.
[300] Prosecution Reply Brief, para. 11, referring, *inter alia*, to *Krajišnik* Appeal Judgement, paras 215, 218, 695. See also AT. 16.
[301] Prosecution Reply Brief, para. 11.
[302] Prosecution Reply Brief, para. 13; AT. 8, 15, 21-22, 24-30, 95-96.
[303] Prosecution Reply Brief, para. 13; AT. 16.
[304] Trial Judgement, paras 2307-2309.
[305] Prosecution Reply Brief, para. 13, referring to Exhibit P00690, "Intercepted Conversation between Radovan Karadžić and Jovica Stanišić". As for the content of Ex. P00690, see *supra*, para. 48.
[306] *Tadić* Appeal Judgement, para. 227. See also *Stakić* Appeal Judgement, para. 64; *Brdanin* Appeal Judgement, para. 364.

agreed upon in the common plan arises only 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.[308]

78. The Appeals Chamber further recalls that pursuant to Article 23(2) of the Statute and Rule 98*ter*(C) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), trial chambers are required to give a reasoned opinion in writing.[309] In order to provide a reasoned opinion, a trial chamber should set out in a clear and articulate manner "the legal and factual findings on the basis of which it reached the decision to convict or acquit an individual".[310] In particular, a trial chamber is required to make findings on those facts which are essential to the determination of guilt on a particular count.[311] The absence of any relevant legal findings in a trial judgement also constitutes a manifest failure to provide a reasoned opinion.[312] A reasoned opinion in the trial judgement is essential, *inter alia*, for allowing a meaningful exercise of the right of appeal by the parties and enabling the Appeals Chamber to understand and review the trial chamber's findings as well as its evaluation of the evidence.[313]

79. The Trial Chamber found neither Stanišić nor Simatović responsible for committing the crimes charged in the Indictment pursuant to JCE liability, on the ground that it was unable to conclude beyond reasonable doubt that Stanišić or Simatović shared the intent to further the common criminal purpose of the JCE.[314] Before arriving at this conclusion on their *mens rea*, the Trial Chamber did not first adjudicate whether the elements of the *actus reus* of JCE liability – namely, the existence of a common criminal purpose, a plurality of persons, and Stanišić's and Simatović's contribution – were fulfilled.[315]

80. For the reasons set out below, the Appeals Chamber, Judge Afande dissenting, finds that, in so doing, the Trial Chamber erred in law by failing to adjudicate, and to provide a reasoned opinion on, essential elements of JCE liability.

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[307] *Tadić* Appeal Judgement, para. 228. See also *Stakić* Appeal Judgement, para. 65; *Brđanin* Appeal Judgement, para. 365; *Krajišnik* Appeal Judgement, paras 200-208, 707.
[308] *Tadić* Appeal Judgement, para. 228. See also *Stakić* Appeal Judgement, para. 65; *Brđanin* Appeal Judgement, paras 365, 411; *Šainović et al.* Appeal Judgement, para. 1557.
[309] *Kvočka et al.* Appeal Judgement, para. 23. See also *Popović et al.* Appeal Judgement, paras 1123, 1367, 1771; *Hadžihasanović and Kubura* Appeal Judgement, para. 13; *Kunarac et al.* Appeal Judgement, para. 41.
[310] *Hadžihasanović and Kubura* Appeal Judgement, para. 13; *Bizimungu* Appeal Judgement, para. 18. See also *Popović et al.* Appeal Judgement, para. 1906; *Haradinaj et al.* Appeal Judgement, paras 77, 128.
[311] *Popović et al.* Appeal Judgement, para. 1906, referring to *Hadžihasanović and Kubura* Appeal Judgement, para. 13.
[312] *Cf. Bizimungu* Appeal Judgement, para. 19.
[313] *Bizimungu* Appeal Judgement, para. 18, referring, *inter alia*, to *Hadžihasanović and Kubura* Appeal Judgement, para. 13. See also *Popović et al.* Appeal Judgement, paras 1367, 1771; *Kunarac et al.* Appeal Judgement, para. 41.
[314] Trial Judgement, paras 2336, 2354, read together with Trial Judgement, paras 2362-2363. See also *supra*, paras 27, 61.
[315] Trial Judgement, paras 2305-2354. See also *supra*, para. 45.

81. The Appeals Chamber observes that the Trial Chamber found that there was no direct evidence establishing Stanišić's and Simatović's intent.[316] However, the Appeals Chamber recalls that the requisite intent for a conviction under JCE liability can be inferred from circumstantial evidence, such as a person's knowledge of the common criminal purpose or the crime(s) it involves, combined with his or her continuing participation in the crimes or in the implementation of the common criminal purpose.[317] In the circumstances of the present case, the Appeals Chamber, Judge Afanđe dissenting, is of the view that the Trial Chamber could only adjudicate, and provide a reasoned opinion on, Stanišić's and Simatović's *mens rea* under JCE liability after having established the existence and scope of the common criminal purpose shared by a plurality of persons and having assessed whether Stanišić's and Simatović's acts contributed to this common criminal purpose.

82. In the view of the Appeals Chamber, Judge Afanđe dissenting, determining the existence and scope of a common criminal purpose shared by a plurality of persons (including its geographical and temporal limits) was a necessary prerequisite to determining whether the acts performed by Stanišić and Simatović (including those not directly involving the commission of a crime) were related, and contributed, to the perpetration of the common criminal purpose. The Trial Chamber was therefore required to examine whether Stanišić's and Simatović's shared intent to further that common criminal purpose could be inferred from their knowledge combined with their acts as well as from their words and interactions with other individuals, after having established the existence and scope of the common criminal purpose shared by a plurality of persons. In other words, without making findings on the existence and scope of the common criminal purpose shared by a plurality of persons, the Trial Chamber could not assess Stanišić's and Simatović's words in the context of that purpose and whether their acts contributed to that purpose and, consequently, it could not properly adjudicate whether Stanišić's and Simatović's *mens rea* for JCE liability could be inferred from the circumstances.

83. As indicated above,[318] the Trial Chamber stated that, according to the Indictment, Stanišić and Simatović participated in a JCE, the object of which was the forcible and permanent removal of the majority of non-Serbs, principally Croats, Bosnian Muslims, and Bosnian Croats, from large

[316] See Trial Judgement, paras 2317, 2354. See also *supra*, paras 55-56.
[317] See, *e.g.*, *Popović et al.* Appeal Judgement, para. 1369; *Đorđević* Appeal Judgement, para. 512. See also, *e.g.*, *Krajišnik* Appeal Judgement, paras 202, 697; *Blagojević and Jokić* Appeal Judgement, paras 272-273; *Kvočka et al.* Appeal Judgement, para. 243. *Cf.*, *e.g.*, *Tolimir* Appeal Judgement, paras 378, 380, 390-391, 396-397, 404-405, 413-414; *Popović et al.* Appeal Judgement, paras 937, 942-1028, 1363, 1370-1397; *Đorđević* Appeal Judgement, para. 513; *Šainović et al.* Appeal Judgement, paras 995, 1004, 1048-1052, 1180, 1183, 1242, 1250, fn. 3862; *Krajišnik* Appeal Judgement, paras 200, 204.
[318] See *supra*, para. 31.

areas of Croatia and Bosnia and Herzegovina.[319] Apart from making this statement, the Trial Chamber did not make any determination as to whether the allegations in the Indictment regarding the common criminal purpose of the JCE or the plurality of persons participating in the JCE were proven. Further, it did not determine the scope of the common criminal purpose or the plurality of persons composing the JCE.[320] It merely assessed Stanišić's and Simatović's conduct which the Prosecution alleged constituted acts of contribution to the JCE, such as: (i) their alleged involvement with the Unit, the SAO Krajina Police, the SDG, the Skorpions, and other Serb Forces; and (ii) their alleged provision of channels of communication between and among the alleged core members of the JCE.[321] Subsequently, without finding whether Stanišić and Simatović significantly contributed to the common criminal purpose of the JCE through their conduct, the Trial Chamber proceeded to assess their *mens rea*.[322]

84. The Appeals Chamber observes that the approach taken by the Trial Chamber was to consider the "common criminal purpose of forcibly and permanently removing the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina, through the commission of murder, deportation, forcible transfer, and persecution (or through only deportation and forcible transfer)"[323] as alleged by the Prosecution[324] and to examine whether the only reasonable inference available from the evidence was that Stanišić and Simatović shared the intent to further this *alleged* common criminal purpose.[325] The Trial Chamber found that this was not the case.

[319] Trial Judgement, para. 1265, referring to Indictment, para. 13. The Trial Chamber also noted that, according to the Indictment, "[t]he crimes charged […] (murder, deportation, forcible transfer, and persecution) were within the object of the [JCE]". The Trial Chamber further noted that, alternatively, according to the Indictment, the common criminal purpose only included the crimes of deportation and forcible transfer, and the crimes of persecution and murder were reasonably foreseeable to Stanišić and Simatović as a possible consequence of the execution of the JCE. In addition, the Trial Chamber noted that the Indictment alleges that the common criminal purpose came into existence no later than April 1991 and continued until at least 31 December 1995. See Trial Judgement, para. 1265, referring to Indictment, paras 11, 13-14.

[320] The Appeals Chamber notes that the Trial Chamber's findings on the pattern of crimes committed in the relevant regions are not clear and precise enough to determine whether – and, if so, when and among whom – the crimes were committed as a means to forcibly and permanently removing the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina. The Appeals Chamber further notes that the Trial Chamber only made a limited number of findings on the political context in the relevant regions and did not thoroughly assess the activities of purported JCE members in light of the crimes committed. See *supra*, paras 28-30, 36-37, 40-44, 47-54, 57. In the view of the Appeals Chamber, this further indicates that the Trial Judgement does not contain, even in an implicit manner, any analysis or findings on the existence and scope of the common criminal purpose or the plurality of persons. In this regard, the Appeals Chamber considers that, on such crucial elements, neither the parties nor the Appeals Chamber can be required to engage in a speculative exercise to discern findings from vague statements by the Trial Chamber. *Cf. Orić* Appeal Judgement, para. 56.

[321] Trial Judgement, paras 1266-1269, chapters 6.3-6.8. See also *supra*, paras 34-44.

[322] Trial Judgement, paras 2305-2354. See also *supra*, paras 45-61.

[323] Trial Judgement, paras 2336, 2354.

[324] Trial Judgement, paras 2305, 2337, referring to Indictment, paras 11, 14.

[325] The Trial Chamber's repeated references to the common purpose as alleged in the Indictment as well as its examinations as to whether various pieces of evidence are sufficient to establish Stanišić's and Simatović's intent to further "the *alleged* common criminal purpose" (emphasis added) are indicative of this approach taken by the Trial Chamber. See Trial Judgement, paras 2305, 2309, 2312, 2316, 2326, 2330, 2332-2335, 2337, 2354.

85. As part of this assessment, the Trial Chamber considered several discrete "examples of actions taken, or words uttered" by Stanišić and Simatović, which the Prosecution had specifically identified in its final trial brief as demonstrating their *mens rea*.[326] Having considered that the evidence in this regard was insufficient to establish their intent to further the alleged common criminal purpose,[327] the Trial Chamber proceeded to examine whether such intent could be inferred from their other conduct, such as their actions vis-à-vis various Serb Forces as well as from their interactions and cooperation with alleged JCE members.[328] The Trial Chamber assessed this conduct in light of whether those Serb Forces committed crimes and its findings on Stanišić's and Simatović's knowledge thereof, as well as its findings on their knowledge of the intent of some of the alleged JCE members, namely Martić, Mrkšić, and Mladić.[329] Ultimately, the Trial Chamber found that it was unable to establish beyond reasonable doubt that Stanišić and Simatović shared the intent to further the common criminal purpose of the JCE as alleged in the Indictment.[330]

86. The Trial Chamber devoted two chapters of the Trial Judgement to its analysis of the *mens rea* of Stanišić and Simatović, wherein it presented its assessment as to which evidence and facts it found were indicative of Stanišić's and Simatović's intent and whether their intent could, in fact, be inferred beyond reasonable doubt from such evidence and facts.[331] On the basis of this analysis, the Trial Chamber found that the requirements in relation to Stanišić's and Simatović's *mens rea* were not met.[332] However, before turning to its assessment of the *mens rea*, the Trial Chamber failed to make any similar analysis or findings on the existence of a common criminal purpose shared by a plurality of persons. More specifically, the Trial Chamber did not assess which evidence and facts it found were indicative of the existence or scope of a common criminal purpose or of a plurality of persons, and it made no findings as to whether these elements were fulfilled on the basis of such evidence and facts. In addition, while it assessed the acts and conduct of Stanišić and Simatović which the Prosecution alleged to have constituted their contributions to the purported common criminal purpose, it did not examine whether these acts or conduct amounted to a contribution to an actual common criminal purpose established by the evidence. Further, the Trial Chamber's consideration of the common criminal purpose and the plurality of persons as alleged in the Indictment does not show that it allowed for the possibility that, based on the trial record, Stanišić's and Simatović's *mens rea* could have comprised a temporally and/or geographically reduced common criminal purpose or a smaller number of participants to the JCE.

[326] Trial Judgement, paras 2306-2315, 2338-2351. See also *supra*, para. 46.
[327] Trial Judgement, paras 2309, 2312, 2315-2316, 2342, 2345, 2351.
[328] Trial Judgement, paras 2306, 2317-2336, 2338, 2352-2354. See also *supra*, paras 56-60.
[329] Trial Judgement, paras 2320, 2323-2324, 2326, 2331-2335, 2351, 2353.
[330] Trial Judgement, paras 2336, 2354.
[331] Trial Judgement, chapters 6.9-6.10.
[332] Trial Judgement, paras 2336, 2354.

87. In the absence of a thorough analysis and prior findings on the existence and scope of a common criminal purpose shared by a plurality of persons as well as on Stanišić's and Simatović's contribution to it, the Trial Chamber could not have properly adjudicated Stanišić's and Simatović's *mens rea*.

88. Accordingly, the Appeals Chamber, Judge Afanđe dissenting, finds that the Trial Chamber erroneously failed to make findings on the existence and scope of a common criminal purpose shared by a plurality of persons, prior to finding that the *mens rea* of Stanišić and Simatović for JCE liability was not met. In so doing, the Trial Chamber failed to adjudicate, and to provide a reasoned opinion on, essential elements of JCE liability. Without the circumstances provided by the findings on the existence and scope of a common criminal purpose shared by a plurality of persons as well as the assessment of Stanišić's and Simatović's words and acts in light of this purpose, the Trial Chamber could not have determined whether it was able to infer beyond reasonable doubt Stanišić's and Simatović's *mens rea* from these circumstances and whether it should ultimately convict or acquit them.

89. With regard to the submissions of the Prosecution that the failure of the Trial Chamber to address the common criminal purpose is illustrated by its lack of discussion or reference to numerous pieces of clearly relevant evidence[333] and that evidence relevant to the membership and existence of the JCE was disregarded,[334] the Appeals Chamber, Judge Afanđe dissenting, recalls that the Trial Chamber erred in law in failing to make findings on the existence and scope of a common criminal purpose shared by a plurality of persons. This error encompasses not only the lack of such findings themselves, but also the lack of the analysis as to which evidence in the trial record and facts as found by the Trial Chamber would be indicative of these respective elements and whether such evidence and facts would in fact establish these elements and their scope. The Trial Judgement neither contains a chapter, nor a paragraph presenting such findings or analysis. Their non-existence is so evident that it does not need to be further elucidated through examination of each and every alleged failure of the Trial Chamber to discuss specific evidence which, according to the Prosecution, would have established the existence and scope of a common criminal purpose shared by a plurality of persons.[335] Thus, the Appeals Chamber will not further consider whether the Trial Chamber's failure to assess specific evidence constitutes an error.

[333] Prosecution Appeal Brief, para. 24.
[334] Prosecution Appeal Brief, paras 25-27.
[335] See also *supra*, fn. 320. Furthermore, even if the Trial Chamber had made references to such evidence, in the absence of its explanation as to which evidence it relied upon to determine whether these elements were fulfilled, the Appeals Chamber would not be able to discern what the Trial Chamber eventually found with regard to these elements.

4. Conclusion

90. In light of the foregoing, the Appeals Chamber, Judge Afande dissenting, concludes that the Trial Chamber erred in law by failing to adjudicate, and provide a reasoned opinion on, essential elements of JCE liability. Accordingly, the Appeals Chamber grants sub-ground 1(A) of the Prosecution's appeal. The Appeals Chamber will assess the impact of this finding in Section V below.

C. Conclusion

91. In light of its conclusion on the Prosecution's sub-ground of appeal 1(A), the Appeals Chamber, Judge Afande dissenting, need not consider the Prosecution's arguments under its sub-grounds of appeal 1(B) and 1(C)[336] and dismisses them as moot.

[336] See *supra*, paras 24-26.

IV. SECOND GROUND OF APPEAL: WHETHER STANIŠIĆ AND SIMATOVIĆ ARE RESPONSIBLE FOR AIDING AND ABETTING CRIMES

A. Introduction

92. The Trial Chamber found that it was not established that Stanišić or Simatović aided and abetted the crimes of murder, deportation, other inhumane acts (forcible transfer), or persecution as crimes against humanity as well as murder as a violation of the laws or customs of war committed by the Unit in Bosanski Šamac municipality in Bosnia and Herzegovina, or the crimes of deportation, other inhumane acts (forcible transfer), or persecution as crimes against humanity committed by the Unit in Doboj municipality in Bosnia and Herzegovina in 1992[337] as their "assistance to the Bosanski Šamac and Doboj operations and to the Unit generally was not specifically directed towards" the commission of those crimes.[338] Further, the Trial Chamber was unable to conclude that Stanišić or Simatović aided and abetted the crimes committed by the SAO Krajina Police, the SDG, or other Serb Forces in various other locations between 1991 and 1995, as it was not satisfied that, apart from the provision of general assistance to these forces, Stanišić or Simatović played "any more specific role in providing assistance" in the incidents where these forces committed crimes.[339]

93. Under its second ground of appeal, the Prosecution submits that the Trial Chamber erroneously acquitted Stanišić and Simatović of aiding and abetting the crimes committed in the municipalities of Bosanski Šamac and Doboj in Bosnia and Herzegovina and in the SAO Krajina.[340] It submits that the Trial Chamber erred in law in requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime and that, had the Trial Chamber not erred, it would have concluded that Stanišić and Simatović aided and abetted the crimes committed in Bosanski Šamac and Doboj municipalities and in the SAO Krajina (sub-ground of appeal 2(A)).[341] In addition or in the alternative, the Prosecution submits that the Trial Chamber erred in fact as no reasonable trial chamber could have found that Stanišić and Simatović did not aid and abet the crimes in Bosanski Šamac or Doboj municipality or in the SAO Krajina, even if it were accepted

[337] Trial Judgement, paras 975, 990, 1086, 1092, 1099, 1111, 1248, 1253, 2359-2360.
[338] Trial Judgement, para. 2360.
[339] Trial Judgement, para. 2361, read together with Trial Judgement, para. 2360.
[340] Prosecution Appeal Brief, para. 128.
[341] Prosecution Appeal Brief, paras 129, 153, fn. 376. As to the potential impact of this alleged error of law, the Appeals Chamber understands the Prosecution to argue that the Trial Chamber erred in failing to find that Stanišić and Simatović were responsible for aiding and abetting the crimes committed in the SAO Krajina as well as in Bosanski Šamac and Doboj municipalities in Bosnia and Herzegovina. See Prosecution Appeal Brief, paras 129, 153-154, fn. 376.

that specific direction constitutes an element of the *actus reus* of aiding and abetting (sub-ground of appeal 2(B)).[342]

B. Sub-ground of appeal 2(A): Alleged error of law in requiring specific direction as an element of aiding and abetting liability

1. Trial Chamber's Findings

94. The Trial Chamber held that aiding and abetting liability "may be incurred by assisting, encouraging or lending moral support to the commission of a crime where this support has a substantial effect on the perpetration of the crime."[343] Principally relying on the *Perišić* Appeal Judgement, the Trial Chamber further held that, "[w]hen assessing whether the acts carried out by the aider and abettor have a substantial effect on the perpetration of a crime, the Trial Chamber must find that they are specifically directed to assist, encourage, or lend moral support to the perpetration of that crime."[344] It also found that "[t]he element of specific direction may be considered explicitly or implicitly in the context of analyzing the substantial effect", but that it "must be analyzed explicitly in cases where the person is remote from the crimes he or she is alleged to have aided and abetted."[345] The Trial Chamber added that "[s]pecific direction may involve considerations that are closely related to questions of *mens rea*" and that "evidence regarding an individual's state of mind may serve as circumstantial evidence that assistance he or she facilitated was specifically directed towards charged crimes."[346]

95. In light of the above, the Trial Chamber found that it was not established that Stanišić or Simatović aided and abetted the crimes committed by the Unit, the SAO Krajina Police, the SDG, or other Serb Forces in various locations between 1991 and 1995, since their assistance to these forces "was not specifically directed towards the commission of [those] crimes".[347]

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[342] Prosecution Appeal Brief, para. 130.
[343] Trial Judgement, para. 1264.
[344] Trial Judgement, para. 1264, referring to *Tadić* Appeal Judgement, para. 229, *Perišić* Appeal Judgement, para. 36, fn. 97.
[345] Trial Judgement, para. 1264, referring to *Blagojević and Jokić* Appeal Judgement, para. 189, *Perišić* Appeal Judgement, paras 36, 39, fn. 97. Reiterating the holdings of the *Perišić* Appeal Judgement, the Trial Chamber further stated that, "in most cases, the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators", and that "[p]roof of specific direction in such circumstances requires evidence establishing a direct link between the aid provided by an accused and the relevant crimes committed by principal perpetrators." See Trial Judgement, para. 1264, referring to *Perišić* Appeal Judgement, para. 44.
[346] Trial Judgement, para. 1264, referring to *Perišić* Appeal Judgement, para. 48.
[347] Trial Judgement, paras 2360-2361. See also *supra*, para. 92.

2. Submissions

96. The Prosecution asserts that the Trial Chamber erred in law by following the *Perišić* Appeal Judgement and requiring that the acts of an aider and abettor be specifically directed to assist the commission of a crime.[348] More specifically, the Prosecution argues that: (i) the specific direction requirement has no basis under customary international law;[349] (ii) the *Perišić* Appeal Judgement mischaracterised the Tribunal's prior case-law when finding that specific direction is an element of the *actus reus* of aiding and abetting;[350] (iii) the *Perišić* Appeal Judgement introduced vague concepts which create considerable uncertainty and practical difficulties and make decisions on when acts may lead to criminal liability unpredictable;[351] and (iv) the specific direction requirement undermines the principles of and respect for international humanitarian law.[352] The Prosecution submits that, independently or together, these constitute cogent reasons that require the Appeals Chamber to depart from the *Perišić* Appeal Judgement with respect to specific direction.[353]

97. During the appeal hearing, the Prosecution noted that, in the *Šainović et al.* Appeal Judgement and the *Popović et al.* Appeal Judgement issued subsequent to the *Perišić* Appeal Judgement, the specific direction requirement had been found to be inconsistent with customary international law and that the Trial Chamber's analysis of aiding and abetting and the resultant acquittals were "tainted by the now rejected specific direction requirement".[354]

98. Stanišić responds that the Prosecution has failed to show cogent reasons to depart from the *Perišić* Appeal Judgement, which affirms that specific direction is an element of aiding and abetting.[355] He maintains that the *Perišić* Appeal Judgement was decided correctly and that the Prosecution's submissions are devoid of merit.[356] In particular, Stanišić submits that the

[348] Prosecution Appeal Brief, paras 129, 131, referring to Trial Judgement, para. 1264.
[349] Prosecution Appeal Brief, paras 132-137; AT. 9.
[350] Prosecution Appeal Brief, paras 132, 138-142. See also Prosecution Appeal Brief, paras 134-137.
[351] Prosecution Appeal Brief, paras 132, 143-149. In particular, the Prosecution avers that, while the *Perišić* Appeal Judgement states that specific direction establishes a "culpable link" between the assistance provided by the aider and abettor and the crimes of the principal perpetrators, it does not provide any further guidance as to its meaning. See Prosecution Appeal Brief, para. 144. The Prosecution also submits that, by requiring specific direction as an element of the *actus reus* of aiding and abetting in cases where the accused was "remote", the *Perišić* Appeal Judgement effectively requires evidence on the state of mind of the accused. According to the Prosecution, the analysis of the evidence in the *Perišić* Appeal Judgement further suggests that this state of mind needs to be higher than the *mens rea* of knowledge required for aiding and abetting, and therefore blurs the distinction between aiding and abetting and JCE. See Prosecution Appeal Brief, paras 145-147.
[352] Prosecution Appeal Brief, paras 132, 150-152.
[353] Prosecution Appeal Brief, paras 129, 132, 137-138, 142-143, 149, 152. See also Prosecution Reply Brief, paras 26-51.
[354] AT. 18. See also AT. 9, 99-100, referring to *Šainović et al.* Appeal Judgement, para. 1649, *Popović et al.* Appeal Judgement, para. 1758.
[355] Stanišić Response Brief, paras 104-105, 109, 111, 161. Stanišić also contends that the Prosecution is "forum shopping" as the submissions are similar to the arguments it advanced in the *Perišić* case, which were rejected by the Appeals Chamber. See Stanišić Response Brief, paras 109-110, 161.
[356] Stanišić Response Brief, paras 105, 111, 161.

jurisprudence of the Tribunal and the ICTR as well as customary international law have required specific direction as an element of aiding and abetting[357] and that the Prosecution has failed to prove that the Appeals Chamber in the *Perišić* case "mischaracterised" the previous decisions of the Tribunal and "overstated" the significance of specific direction.[358] Stanišić further asserts that the specific direction element establishes the "culpable link between assistance provided by an accused individual and the crimes of principal perpetrators" and that whether specific direction is best characterised as an element of the *actus reus* or the *mens rea* is, for this purpose, "of lesser importance".[359]

99. At the appeal hearing, Stanišić submitted that, even assuming that the Trial Chamber erred in law in requiring that specific direction is an essential element of the *actus reus* of aiding and abetting, this error would not invalidate his acquittal.[360] In his view, regardless of whether specific direction is required as a distinct element, "[t]he Trial Chamber's analysis encompassed all factors that could have been examined as specific direction, but without a shadow of doubt, according to the jurisprudence of this Tribunal, had to be considered by any reasonable Trial Chamber in deciding substantial effect".[361] Stanišić further submitted that, having considered all these factors, the Trial Chamber's analysis that "the kind of assistance" he and Simatović provided did not have "the required [substantial] effect on the perpetration of the crimes" is "eminently reasonable".[362]

100. Simatović responds that customary international law as well as the jurisprudence of the Tribunal and the ICTR recognise specific direction as an integral element of the *actus reus* of aiding and abetting; an approach that has been consistently taken by the Appeals Chamber since it was first articulated in the *Tadić* Appeal Judgement.[363] Simatović also submits that abandoning the concept of specific direction would create difficulties and vagueness in establishing the *actus reus* of aiding and abetting.[364] He further avers that the *mens rea* standard for aiding and abetting, which is derived from customary international law, requires the existence of a "purpose" or "aim" and that

[357] Stanišić Response Brief, paras 112-123, 129-153, Public Annex I.
[358] Stanišić Response Brief, paras 124-128. Stanišić also submits that the element of specific direction neither introduces vague concepts nor undermines respect for international humanitarian law, but rather supports the goals of international humanitarian law by ensuring certainty and specificity in the attribution of responsibility. See Stanišić Response Brief, paras 155-160.
[359] Stanišić Response Brief, para. 106, referring to *Perišić* Appeal Judgement, para. 37. See also Stanišić Response Brief, paras 107-108.
[360] AT. 58-59.
[361] AT. 60.
[362] AT. 59-61, referring to Trial Judgement, paras 2359-2361.
[363] Simatović Response Brief, paras 190-191, 223; AT. 73, 83. See also Simatović Response Brief, paras 194-201. Simatović also asserts that the *Perišić* Appeal Judgement correctly established the concept of "culpable link" between assistance provided by the aider and abettor and the crimes of the principal perpetrators. See Simatović Response Brief, paras 204-205, referring to *Perišić* Appeal Judgement, paras 37-38.
[364] Simatović Response Brief, paras 202-203.

"mere awareness" is not sufficient.[365] Simatović adds that the Appeals Chamber in the present case "must take into account not only the notion of specific direction as an element of *actus reus* of aiding and abetting but also the generally adopted standard of customary international law which foresees the existence of a purpose-aim as a *sine qua non* element of aiding and abetting."[366]

101. In reply, the Prosecution submits that neither Stanišić nor Simatović has demonstrated that specific direction is grounded in customary international law.[367] It also argues that, by acknowledging their uncertainty as to whether specific direction is an element of the *mens rea* or the *actus reus*, both Stanišić and Simatović "lend credence to" the Prosecution's contention that the notion of "specific direction" introduces vague concepts.[368] The Prosecution adds that both Stanišić and Simatović have violated the Tribunal's "practice requirements" by failing to file a book of authorities with their respective response briefs and that, for this reason alone, their arguments relying on authorities other than the jurisprudence of the Tribunal and the ICTR should be disregarded.[369]

102. Finally, with regard to Stanišić's argument that the Trial Chamber's error would have had no impact on his acquittal, the Prosecution replied that the Trial Chamber considered that his and Simatović's assistance did not have a substantial effect because their acts were not specifically directed at the crimes, and therefore that his acquittal was a direct result of "this erroneous requirement".[370]

3. Analysis

103. As a preliminary matter, the Appeals Chamber first turns to the Prosecution's argument that, in light of Stanišić's and Simatović's failure to submit their respective book of authorities, their submissions relying on authorities other than the jurisprudence of the Tribunal and the ICTR should

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[365] Simatović Response Brief, para. 206. In this context, Simatović also argues that the "purpose – aim" standard for the *mens rea* of aiding and abetting is reflected in Article 25(3)(c) of the Rome Statute of the International Criminal Court ("ICC Statute"), which required that the accused acted with the aim of facilitating the commission of a crime. See Simatović Response Brief, paras 206-213, 216, 219. He also argues that this standard has been accepted by States not party to the ICC Statute, including the United States. See Simatović Response Brief, paras 214-215, referring to *Presbytarian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, para. 259 (2nd Cir. 2009), *Aziz v. Alcolac, Inc.*, 658 F.3d 388, para. 401 (4th Cir. 2011). He further asserts that the Tribunal's case-law relating to the *mens rea* of aiding and abetting is inconsistent and that it should be revised along the lines of customary international law. See Simatović Response Brief, paras 216-222.

[366] Simatović Response Brief, para. 223.

[367] Prosecution Reply Brief, para. 25. See also Prosecution Reply Brief, paras 28, 33-42, 47, 49-51.

[368] Prosecution Reply Brief, paras 25, 43. According to the Prosecution, Stanišić also relies on domestic sources discussing the *mens rea* of aiding and abetting liability to support the *Perišić* Appeal Judgement. It also points out that, similarly, Simatović argues in favour of specific direction as a requirement of the *actus reus* and then drifts into an unpersuasive argument to change the *mens rea* standard from "knowledge" to "purpose". See Prosecution Reply Brief, paras 25, 37-38, 48.

[369] Prosecution Reply Brief, para. 25.

[370] AT. 99-100.

be disregarded. The Practice Direction requires that a book of authorities be attached to a response brief, containing a separate compilation setting out clearly all authorities relied upon, a table of contents, and an authorised version of all authorities other than those of the Tribunal and the ICTR, with an English or French translation when necessary.[371] The Appeals Chamber observes that, while both Stanišić and Simatović cited numerous authorities other than those of the Tribunal and the ICTR in support of their arguments on specific direction,[372] neither of them provided a book of authorities as required by the Practice Direction. Stanišić did provide a table of authorities,[373] but without copies of the texts attached.[374] Stanišić and Simatović have therefore failed to comply with the Practice Direction. However, since both Stanišić and Simatović refer sufficiently clearly to the authorities relied upon in their respective response briefs, this failure did not materially prejudice the Prosecution.[375] The Appeals Chamber therefore dismisses the Prosecution's argument in this respect.[376]

104. Turning to the question of specific direction, the Appeals Chamber recalls that, in the *Šainović et al.* Appeal Judgement, which was issued subsequent to the *Perišić* Appeal Judgement, it clarified that specific direction is not an element of aiding and abetting liability.[377] In arriving at this conclusion, it carefully reviewed the jurisprudence of the Tribunal and the ICTR in this regard[378] and re-examined the elements of aiding and abetting liability under customary international law.[379]

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[371] Practice Direction, paras 7-9.
[372] See, *e.g.*, Stanišić Response Brief, fns 191, 220-224; Simatović Response Brief, fns 247, 252-253.
[373] Stanišić Response Brief, Public Annex III.
[374] The public annex I to the Stanišić Response Brief, which allegedly sets out State practice and *opinio juris* on aiding and abetting, gives extracts from relevant national laws and jurisprudence. See Stanišić Response Brief, paras 131, 161, Public Annex I. Although it includes some of the authorities cited in the Stanišić Response Brief itself, it does not include all of them. Compare Stanišić Response Brief, fns 191, 220-224 with Stanišić Response Brief, Public Annex I. In addition, the passages contained in this annex seem to have been typed out by Stanišić's counsel from various sources and cannot be considered authorised versions, *i.e.* photo-copies of the actual authorities.
[375] See Prosecution Reply Brief, paras 32, 37-38, 49-50, responding to Stanišić's and Simatović's arguments on the jurisprudence other than that of the Tribunal and the ICTR with references to the contents of such jurisprudence.
[376] The Appeals Chamber recalls that the Practice Direction endows it with discretion as to whether, and if so, how to sanction a party on failure to comply with its requirements. See Practice Direction, para. 17.
[377] *Šainović et al.* Appeal Judgement, para. 1649.
[378] *Šainović et al.* Appeal Judgement, paras 1623-1625, referring to *Tadić* Appeal Judgement, para. 229, *Aleksovski* Appeal Judgement, para. 163, *Gotovina and Markač* Appeal Judgement, para. 127, *Brđanin* Appeal Judgement, para. 151, *Krstić* Appeal Judgement, para. 137, *Čelebići* Appeal Judgement, para. 352, *Blaškić* Appeal Judgement, paras 45-46 (quoting *Blaškić* Trial Judgement, para. 283, in turn quoting *Furundžija* Trial Judgement, para. 249), *Krnojelac* Appeal Judgement, paras 33, 37, *Kvočka et al.* Appeal Judgement, paras 89-90, *Blagojević and Jokić* Appeal Judgement, paras 127, 186, 189, 191, 193-194, *Simić* Appeal Judgement, para. 85, *Orić* Appeal Judgement, para. 43, *Vasiljević* Appeal Judgement, paras 102, 134-135, *Kupreškić et al*. Appeal Judgement, paras 254, 283, *Karera* Appeal Judgement, para. 321, *Nahimana et al.* Appeal Judgement, paras 482, 672, *Kalimanzira* Appeal Judgement, para. 74, *Ntawukulilyayo* Appeal Judgement, paras 214, 216, *Rukundo* Appeal Judgement, para. 52, *Muvunyi I* Appeal Judgement, para. 79, *Seromba* Appeal Judgement, para. 139, *Muhimana* Appeal Judgement, para. 189, *Ntagerura et al.* Appeal Judgement, para. 370, *Ntakirutimana* Appeal Judgement, para. 530. See also *Šainović et al.* Appeal Judgement, paras 1619, 1650, referring to *Mrkšić and Šljivančanin* Appeal Judgement, para. 159, *Lukić and Lukić* Appeal Judgement, para. 424. See further *Šainović et al.* Appeal Judgement, para. 1622.
[379] *Šainović et al.* Appeal Judgement, paras 1626-1648. The Appeals Chamber examined the jurisprudence derived from cases which dealt with crimes committed during the Second World War and found that, in none of these relevant cases, was "specific direction" required as a distinct element. See *Šainović et al.* Appeal Judgement, paras 1627-1642. The Appeals Chamber also reviewed national law and held that requiring specific direction for aiding and abetting liability

The Appeals Chamber then observed that, neither in the jurisprudence of the Tribunal and the ICTR nor under customary international law, had specific direction been considered to be an element of aiding and abetting liability.[380] As a result, it rejected the approach adopted in the *Perišić* Appeal Judgement, which required specific direction as an element of the *actus reus* of aiding and abetting,[381] and held that this approach was "in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law".[382] The Appeals Chamber re-affirmed that, "under customary international law, the *actus reus* of aiding and abetting 'consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime'" and that "[t]he required *mens rea* is 'the knowledge that these acts assist the commission of the offense'."[383]

105. Subsequently, in the *Popović et al.* Appeal Judgement, the Appeals Chamber re-affirmed that "'specific direction' is not an element of aiding and abetting liability under customary international law".[384]

106. Accordingly, the Appeals Chamber, Judge Agius and Judge Afande dissenting, finds that the Trial Chamber erred in law in requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime. This also means that the Trial Chamber erred in law in making a finding on a substantial effect of the contributory acts contingent upon establishing specific direction, by holding that, when assessing whether the acts carried out by the aider and abettor have a substantial effect on the perpetration of a crime, the Trial Chamber must find that they are specifically directed to assist that crime.[385]

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is not a general, uniform practice in national jurisdictions. See *Šainović et al.* Appeal Judgement, paras 1643-1646. Finally, the Appeals Chamber examined international instruments (the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996 and the ICC Statute) and found no support for the proposition that specific direction is an element of aiding and abetting liability under customary international law. See *Šainović et al.* Appeal Judgement, paras 1647-1648. See also *Šainović et al.* Appeal Judgement, para. 1622.

[380] *Šainović et al.* Appeal Judgement, paras 1623-1625, 1649.

[381] *Perišić* Appeal Judgement, para. 36.

[382] *Šainović et al.* Appeal Judgement, para. 1650.

[383] *Šainović et al.* Appeal Judgement, para. 1649, quoting *Blaškić* Appeal Judgement, para. 46, in turn quoting *Blaškić* Trial Judgement, para. 283, in turn quoting *Furundžija* Trial Judgement, para. 249. Accordingly, the Appeals Chamber confirmed that "the *Mrkšić and Šljivančanin* and *Lukić and Lukić* Appeal Judgements stated the prevailing law in holding that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting, accurately reflecting customary international law and the legal standard that has been constantly and consistently applied in determining aiding and abetting liability". See *Šainović et al.* Appeal Judgement, para. 1650 (internal references omitted).

[384] *Popović et al.* Appeal Judgement, para. 1758, quoting *Šainović et al.* Appeal Judgement, para. 1649. See also *Popović et al.* Appeal Judgement, paras 1764, 1783.

[385] Trial Judgement, para. 1264. In this regard, the Appeals Chamber notes that the Trial Chamber took a slightly different approach from the *Perišić* Appeal Judgement, which considered substantial contribution by an aider and abettor to be a requirement independent from, and in addition to, specific direction, and stated that substantial contribution may be one of the factors for determining whether specific direction is established. See *Perišić* Appeal Judgement, paras 38-39. In the present case, the Prosecution asserts that, even accepting that specific direction constitutes an element of the *actus reus* of aiding and abetting, the Trial Chamber misapplied the legal test for aiding

107. The Appeals Chamber is not persuaded by Stanišić's argument that, even if the Trial Chamber erred in law in requiring that specific direction is an essential element of the *actus reus* of aiding and abetting, this error would have no impact on its conclusion that the substantial effect requirement was not fulfilled and, in turn, would not invalidate his acquittal. The Trial Chamber found that the substantial effect requirement was not met because the evidence did not establish specific direction.[386] This means that, had the Trial Chamber not made the finding on substantial contribution contingent upon specific direction, it might have found that the evidence establishes that the contributory acts had a substantial effect on the crimes even if it was insufficient to establish specific direction.

4. Conclusion

108. In light of the foregoing, the Appeals Chamber, Judge Agius and Judge Afanđe dissenting, concludes that the Trial Chamber erred in law by requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime. Accordingly, the Appeals Chamber, Judge Agius and Judge Afanđe dissenting, grants sub-ground 2(A) of the Prosecution's appeal. The Appeals Chamber will assess the impact of this finding in Section V below.

C. Conclusion

109. In light of its conclusion on the Prosecution's sub-ground of appeal 2(A), the Appeals Chamber, Judge Agius and Judge Afanđe dissenting, need not consider the Prosecution's arguments under its sub-ground of appeal 2(B)[387] and dismisses them as moot.

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and abetting as set out in the *Perišić* Appeal Judgement, by making a finding of substantial contribution contingent upon establishing specific direction. See Prosecution Appeal Brief, para. 161. See also Prosecution Appeal Brief, paras 154-155. Given that the Appeals Chamber has found that specific direction is not an element of aiding and abetting liability, the Prosecution's argument is moot to the extent that it concerns the Trial Chamber's misapplication of the legal test as set out in the *Perišić* Appeal Judgement.

[386] See Trial Judgement, para. 2360. See also Trial Judgement, para. 2361.

[387] See *supra*, para. 93.

V. IMPLICATIONS OF THE APPEALS CHAMBER'S FINDINGS AND REMEDY SOUGHT

110. The Appeals Chamber has found, Judge Afanđe dissenting, that the Trial Chamber erred in law in failing to make the necessary findings on the existence and scope of a common criminal purpose shared by a plurality of persons before making a finding on the *mens rea* of JCE liability ("Error on JCE Liability").[388] The Appeals Chamber has also found, Judge Agius and Judge Afanđe dissenting, that the Trial Chamber erred in law in requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime ("Error on Aiding and Abetting Liability").[389] The Appeals Chamber will now turn to discuss the implications of these conclusions.

A. Submissions

111. With regard to the Error on JCE Liability, the Prosecution submits that, as a result of this error of law, the Appeals Chamber would be required "to conduct a *de novo* review of the [Trial] Chamber's factual findings and evidence in the record".[390] More specifically, the Prosecution argues that the Appeals Chamber should correct the Trial Chamber's error, review the relevant findings of the Trial Chamber, apply the correct legal standard to the evidence on the record, and find that: (i) the alleged common criminal purpose of the JCE existed; (ii) members of this JCE included (in addition to Stanišić and Simatović) at least Milošević, Martić, Babić, Hadžić, Karadžić, Mladić, Veljko Kadijević, Badža, and Arkan; (iii) Stanišić and Simatović significantly contributed to the common criminal purpose through their acts and omissions, as found by the Trial Chamber, and in addition, as set out in the Prosecution's third ground of appeal;[391] and (iv) Stanišić and Simatović shared the intent to further the common criminal purpose.[392] The Prosecution contends that "the Appeals Chamber has the authority to correct the errors in this case and to make the necessary findings to enter convictions" and that it has exercised such authority in other cases.[393] The Prosecution further submits that, on the basis of these findings, the Appeal Chamber should convict Stanišić and Simatović on all counts in the Indictment for the crimes of murder, deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity as well as

[388] See *supra*, paras 88, 90.
[389] See *supra*, paras 106, 108.
[390] Prosecution Appeal Brief, para. 17; AT. 38. See also AT. 32-36.
[391] With respect to the Prosecution's third ground of appeal, see *supra*, paras 11-12.
[392] Prosecution Appeal Brief, paras 17, 44, 100, 105, 126. See also Prosecution Appeal Brief, paras 200, 277-278. The Appeals Chamber notes that, in paragraph 126 of its appeal brief, the Prosecution requests the Appeals Chamber to find, in the following order: (i) the common criminal purpose; (ii) the intent of Stanišić and Simatović to further this common criminal purpose; and (iii) their significant contribution. However, in light of the other portions of the Prosecution Appeal Brief, the Appeals Chamber understands that the Prosecution does not mean to request that Stanišić's and Simatović's intent be found before their significant contribution. See, *e.g.*, Prosecution Appeal Brief, paras 19-22, 100.
[393] AT. 32-33, referring to *Bizimungu* Appeal Judgement.

murder as a violation of the laws or customs of war that the Trial Chamber found proven, and sentence them accordingly.[394] With respect to entering convictions against the accused on appeal, the Prosecution contends that "the Appeals Chamber has consistently taken the position that it does have that power and that it is appropriate to do so."[395]

112. The Prosecution argues that it "should not necessarily [be] assume[d] that the extent of the fact-finding or the nature of the fact-finding required in this case would be unacceptably extensive or complicated."[396] The Prosecution submits that, "[e]ven applying its erroneous, incomplete and overly narrow approach to the assessment of evidence, the [Trial] Chamber still accepted the vast majority of the Prosecution case" and that this is "a compelling argument" for the Appeals Chamber to agree with the majority of these findings, to enter additional findings as necessary, and to convict Stanišić and Simatović accordingly.[397] In order to "assist the Appeals Chamber" in conducting this exercise,[398] the Prosecution sets out in an "extended remedy section" of its appeal brief (Section II.D) the evidence presented to the Trial Chamber and, where appropriate, the Trial Chamber's findings on this evidence.[399]

113. With respect to the Error on Aiding and Abetting Liability, the Prosecution submits that, had the Trial Chamber not erred in requiring specific direction, it would have concluded that the *actus reus* of aiding and abetting is met with regard to the crimes committed in Bosanski Šamac and Doboj municipalities in Bosnia and Herzegovina as well as in the SAO Krajina.[400] It also argues that the Trial Chamber's findings and the evidence on the record show that Stanišić and Simatović possessed the requisite *mens rea* for aiding and abetting these crimes.[401] Accordingly, the Prosecution avers that, but for this error of law, the Trial Chamber would have concluded that they aided and abetted these crimes.[402] It requests that the Appeals Chamber correct the Trial Chamber's error, apply the correct legal standard to the evidence, find Stanišić and Simatović responsible for aiding and abetting the crimes committed in Bosanski Šamac and Doboj municipalities as well as in the SAO Krajina, and convict them accordingly.[403] In addition, the Prosecution requests that the Appeals Chamber apply the correct legal standard to the evidence as set out in its third ground of

[394] Prosecution Appeal Brief, paras 28, 44, 105, 126; AT. 38, 101.
[395] AT. 32, 100-101, referring to *Đordević* Appeal Judgement, para. 9[2]8, *Popović et al.* Appeal Judgement, para. 539, *Gatete* Appeal Judgement, para. 265.
[396] AT. 33.
[397] Prosecution Appeal Brief, para. 44. See also AT. 34-35.
[398] Prosecution Appeal Brief, para. 44.
[399] Prosecution Appeal Brief, paras 17, 44-105.
[400] Prosecution Appeal Brief, paras 129, 153, fn. 376, referring to the Prosecution's arguments under its sub-ground of appeal 2(B) in relation to Stanišić's and Simatović's alleged substantial contribution. See also *supra*, fn. 341.
[401] Prosecution Appeal Brief, paras 129, 153, fn. 376, referring to the Prosecution's arguments under its sub-ground of appeal 2(B) in relation to Stanišić's and Simatović's alleged *mens rea*.
[402] Prosecution Appeal Brief, paras 129, 153, fn. 376.
[403] Prosecution Appeal Brief, paras 128-129, 153, 194, fn. 376. See also AT. 38.

appeal,[404] find Stanišić responsible for aiding and abetting the crimes committed in the SAO SBWS and in the municipalities of Bijeljina, Zvornik, and Sanski Most in Bosnia and Herzegovina, find Simatović responsible for aiding and abetting the crimes committed in the municipality of Sanski Most, and convict Stanišić and Simatović accordingly.[405] The Prosecution submits that the fact-finding exercise required by the Appeals Chamber need not be extensive in light of the Trial Chamber's existing findings on aiding and abetting.[406]

114. Alternatively, both with respect to the Error on JCE Liability and the Error on Aiding and Abetting Liability, the Prosecution submits that "the Appeals Chamber should exercise its discretion to remand the case to a bench of the Tribunal to apply the correct legal standards to the trial record, and to determine the liability of Stanišić and Simatović as alleged in the Indictment".[407] At the appeal hearing, it emphasised that this would not be a retrial but "a process of remitting for re-adjudication based on the evidence already adduced at trial" and that it would be important for the Appeals Chamber to provide precise instructions to the remand bench on "the nature of the Trial Chamber's errors and the correct procedure for [it] to follow."[408] Further, the Prosecution submitted that a retrial is not the most appropriate remedy in this case. In its view, as the problem is one of a failure to properly adjudicate the evidence already on the record, not a problem with the existing evidentiary record, the interests of justice militate away from a time and resource-intensive retrial.[409] Finally, the Prosecution submitted that in order for the promise of justice for the victim community and the international community to be fulfilled, the fatal errors in the Trial Chamber's analysis must not be left uncorrected.[410]

115. Stanišić responds that, with respect to the Error on JCE Liability, the Prosecution's attempted *de novo* review in Section II.D of its appeal brief disregards the appellant's obligation to identify and demonstrate errors in factual findings.[411] He asserts that the Prosecution "seeks to have innumerable findings overturned (and new findings entered) on the basis of summaries of testimony in the [Trial] Judgement, evidence of questionable relevance when seen in context, and witness

[404] With respect to the Prosecution's third ground of appeal, see *supra*, paras 11-12.
[405] Prosecution Appeal Brief, paras 199-200, 277-278. See also Prosecution Notice of Appeal, para. 18.
[406] AT. 35-36.
[407] Prosecution Appeal Brief, paras 127, 195. See also Prosecution Appeal Brief, para. 11; AT. 36-37.
[408] In relation to the Error on JCE Liability, the Prosecution requested that the Appeals Chamber relay instructions to any newly constituted bench that it should specifically consider: "whether the alleged common criminal purpose existed, and, if so, its nature and scope; the key JCE members; the tools used by the JCE [members] to commit the crimes; and, most importantly, what the accused knew about the common criminal purpose, the crimes involved, the tools used, and the crimes committed in furtherance of it." See AT. 36-37.
[409] AT. 37.
[410] AT. 37.
[411] Stanišić Response Brief, para. 40; AT. 44-45, 47-49, 53-54, 56. Stanišić also submits that the Prosecution merely assembles factual findings convenient for its case, together with apparently incriminatory evidence from the trial record, and disregards factual findings which are inconvenient for its case without showing any errors in those findings. See AT. 44, 47-57, 66-67. See also AT. 61-65.

testimony and exhibits found to lack credibility in the [Trial] Judgement, without attempting [to reverse] (or even referencing) the findings that would need to be overturned for its appeal to be successful."[412] Stanišić argues that, in seeking to have the Appeals Chamber replace the Trial Chamber's findings with its own without showing an error in each finding, the Prosecution violates the *non bis in idem* principle and attempts to seek a second prosecution of Stanišić.[413] He adds that a *de novo* review would put the Appeals Chamber "in the invidious position of having to rule on core issues of culpability […] without the benefit of a balanced view of 4.843 exhibits and effectively several years of trial testimony."[414] Stanišić also asserts that entering new convictions on appeal as a result of the reversal of the case against him in its entirety would violate his fair trial right to have his conviction and sentence reviewed.[415] Stanišić further avers that, by stating that the Trial Chamber accepted the vast majority of its case, the Prosecution misrepresents the Trial Judgement.[416] According to him, it is clear from the Trial Judgement, which found his "lack of contribution to crime and actions in furtherance of the alleged common criminal purpose", that the Trial Chamber accepted the Defence case.[417] For these reasons, he requests that the Prosecution's arguments be summarily dismissed.[418]

116. With regard to the Error on Aiding and Abetting Liability, Stanišić also argues that it would be "an insurmountable burden" for the Prosecution to demonstrate "that the Trial Chamber could, in view of its factual findings, have reasonably come to only one conclusion; namely, that [his and Simatović]'s acts, done knowingly, had a substantial effect on the crimes."[419] Stanišić submits that, in attempting to do so, the Prosecution failed to confront the relevant factual findings which are not convenient to its case.[420]

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[412] Stanišić Response Brief, paras 6, 40; AT. 48-49, 53-54, 56. In addition, Stanišić submits that the Prosecution introduces a novel legal threshold to circumvent the appellate threshold by arguing that the fact that the Trial Chamber accepted the vast majority of the Prosecution's case is a "compelling argument" for the Appeals Chamber to agree with the majority of these findings, "*to enter additional findings as required by the evidence*, and to convict Stanišić". See Stanišić Response Brief, para. 45 (emphasis in the original). See also AT. 48-50, 67-68.
[413] Stanišić Response Brief, paras 6, 40; AT. 40, 48-50.
[414] AT. 51. While only in relation to the error alleged under the Prosecution's sub-ground of appeal 1(B), rather than its sub-ground of appeal 1(A), Stanišić submitted at the appeal hearing that, if the Appeals Chamber finds that the Trial Chamber erred, "then all that is left for the Appeals Chamber to do […] is [to] remit the case to the Trial Chamber for [it] to consider all these factual findings in light of the correct legal standard and apply the standard and burden of proof to the factual findings already made." See AT. 48.
[415] Stanišić Response Brief, para. 41. See also Stanišić Response Brief, paras 5-6, referring to International Covenant on Civil and Political Rights ("ICCPR"), Article 14(5). See also AT. 41-43.
[416] Stanišić Response Brief, para. 42.
[417] Stanišić Response Brief, para. 42. Stanišić also argues that the Trial Chamber accepted the Defence case that, even if Stanišić was involved in the war, a reasonable interpretation of his role is that he took his actions pursuant to legitimate military objectives. See Stanišić Response Brief, para. 43; AT. 50-51.
[418] Stanišić Response Brief, paras 39, 44-45. See also AT. 58, 68.
[419] AT. 59.
[420] AT. 61-66.

117. Simatović responds, with respect to the Error on JCE Liability, that the Prosecution's arguments in Section II.D of its appeal brief grossly overstep the boundary of its notice of appeal, which contains no basis for presenting the arguments contained in Section II.D of its appeal brief.[421] Simatović also argues that the Prosecution's arguments in Section II.D of its appeal brief should be summarily dismissed as it presents its case without indicating where the error of the Trial Chamber lies.[422] He further avers that Section II.D of the Prosecution's appeal brief is in essence a recapitulation of the portions of the Trial Judgement in favour of the Prosecution's case, most of which he does not accept and would have appealed, had the Trial Chamber convicted him.[423] He submits that he only mentions some of the Trial Chamber's findings he would have contested, without any intention to address all of them in an exhaustive manner, since "it is simply not in line with the expected contents of the response to the appeal".[424] He adds that, should the Appeals Chamber accept the Prosecution's arguments in Section II.D of its appeal brief, he and Stanišić would be sentenced on the basis of the Trial Chamber's findings which they were unable to refute in the appellate proceedings.[425]

118. As for the Error on Aiding and Abetting Liability, Simatović also recalls his right to a fair trial and to "a two-instance procedure".[426] He adds that there is no other case where an accused was acquitted on all counts of an indictment and subsequently convicted and sentenced on appeal only because the law or jurisprudence relied upon by a different bench of the Appeals Chamber changed.[427]

119. In view of these circumstances, Simatović submits that, with respect to both the Error on JCE Liability and the Error on Aiding and Abetting Liability, should the Appeals Chamber find the Prosecution's appeal to be grounded, "the only decision [it] could render would be to return the case to […] a special bench of the Tribunal for reconsideration with the application of the appropriate legal standard".[428] In relation to the Error on the Aiding and Abetting Liability, Simatović submitted at the appeal hearing that, if the jurisprudence or law changed with regard to the interpretation of specific direction, the interpretation which is the most favourable to him must be applied in accordance with the principle of *lex mitior*.[429]

[421] Simatović Response Brief, paras 45, 49; AT. 76-77.
[422] Simatović Response Brief, para. 46; AT. 77-78.
[423] Simatović Response Brief, paras 47-48. See also Simatović Response Brief, paras 8-9, 49; AT. 69.
[424] Simatović Response Brief, para. 49, read together with Simatović Response Brief, paras 9-10. See also AT. 69-70.
[425] Simatović Response Brief, paras 47-48. See also Simatović Response Brief, para. 12; AT. 69-70.
[426] Simatović Response Brief, para. 12; AT. 69-70.
[427] AT. 70-71. See also Simatović Response Brief, para. 12.
[428] Simatović Response Brief, para. 13; AT. 70. See also AT. 72, referring to ICCPR, Article 14(5).
[429] AT. 84-85.

120. The Prosecution replies that Stanišić and Simatović misapprehend and confuse its arguments on remedy for the legal error.[430] It argues that, in a case such as this where an error of law that tainted the entirety of the reasoning of the Trial Judgement is established, "the Appeals Chamber's settled practice" is to undertake a *de novo* review, relying on those existing findings which are not tainted by the error and otherwise applying the correct legal standard to the evidence in the record, and that no further showing of error by the applicant is required in this process.[431] The Prosecution argues that the fact that Stanišić disagrees with its view of the evidence and findings does not mean that the Prosecution misrepresents them.[432] The Prosecution also contends that the fact that Simatović does not personally accept the factual findings in the Trial Judgement does not mean that the Prosecution is not entitled to urge the Appeals Chamber to consider them.[433] It adds that, although a respondent is entitled to support an acquittal on additional grounds, he or she should properly articulate such arguments before the Appeals Chamber.[434]

121. The Prosecution further argues that the relief sought in its appeal is consistent with the fundamental rights of Stanišić and Simatović as well as Articles 21 and 25 of the Statute.[435] It also submits that the Appeals Chamber could follow the example of the ICTR Appeals Chamber in the *Bizimungu* case whereby it "ordered additional written briefings by the parties in order to provide them with a full and focused opportunity to address the sufficiency of the Trial Chamber's findings and the evidence on the record".[436] Moreover, the Prosecution submits that "*because* it was mindful of [Stanišić's and Simatović's] fair trial rights", including their right to appeal, it framed its requested remedy in the alternative, primarily seeking the Appeals Chamber to revise the Trial Judgement and enter the necessary findings with the assistance of the parties, and alternatively seeking "the remand of the case to a bench of the Tribunal to apply the law to the trial record".[437] The Prosecution also avers that Stanišić's complaint that its appeal amounts to a second prosecution lacks merit, as "the rule against double jeopardy does not proscribe the continuation of the original proceedings, including appeals, retrials, and remands".[438]

[430] Prosecution Reply Brief, para. 17.
[431] Prosecution Reply Brief, paras 17-18, referring to *Perišić* Appeal Judgement, para. 9, *Gotovina and Markač* Appeal Judgement, paras 109-110. See also Prosecution Reply Brief, para. 19; AT. 32-33.
[432] Prosecution Reply Brief, para. 19.
[433] Prosecution Reply Brief, para. 21.
[434] Prosecution Reply Brief, para. 21, referring to Practice Direction, para. 5.
[435] Prosecution Reply Brief, para. 5; AT. 32, 101.
[436] AT. 36, referring to *Bizimungu* Appeal Judgement, para. 24.
[437] Prosecution Reply Brief, para. 6 (emphasis in the original). See also AT. 36.
[438] Prosecution Reply Brief, para. 6.

B. Analysis

122. The Appeals Chamber recalls that it has found, Judge Afande dissenting, that the Trial Chamber erred in law in failing to make the necessary findings on the existence and scope of a common criminal purpose shared by a plurality of persons.[439] The Appeals Chamber further recalls that it has found, Judge Agius and Judge Afande dissenting, that the Trial Chamber erred in requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime.[440] In accordance with the well-established standard of appellate review, where the Appeals Chamber finds an error of law in the trial judgement arising from the application of a wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[441]

123. In light of the nature and scale of the errors of law identified by the Appeals Chamber in this case, Judge Agius dissenting with respect to the Error on Aiding and Abetting Liability and Judge Afande dissenting with respect to the Error on JCE Liability and the Error on Aiding and Abetting Liability, were the Appeals Chamber to conduct its own review of the relevant factual findings of the Trial Chamber, applying the correct legal standards, it would first have to turn to the Error on JCE Liability and make findings on the existence and scope of a common criminal purpose shared by a plurality of persons and then proceed to assess Stanišić's and Simatović's contribution and intent for JCE liability. Depending on the result of such an analysis, the Appeals Chamber might then have to turn to the Error on Aiding and Abetting Liability.

124. However, the Appeals Chamber, Judge Afande dissenting, is of the view that it would be inappropriate to conduct this analysis as it would have to analyse the entire trial record without the benefit of having directly heard the witnesses in order to determine whether it is itself satisfied with respect to the requirements of JCE liability and, depending on the result of such an analysis, with respect to the requirements of aiding and abetting liability. Indeed, the evidence on which the Prosecution relies to establish the common criminal purpose and the *mens rea* for JCE liability is of a circumstantial nature[442] and it would not be sufficient for the Appeals Chamber to focus on limited pieces of evidence or the existent findings in the Trial Judgement, which do not thoroughly address the evidence relevant to the common criminal purpose or the plurality of persons.[443] In this

[439] See *supra*, paras 80, 88, 90.
[440] See *supra*, paras 106, 108.
[441] See *supra*, para. 17.
[442] See Prosecution Appeal Brief, paras 44-101, 104.
[443] See *supra*, paras 27-61, 83, fn. 320. The Appeals Chamber further stresses that the Prosecution relies on the evidence "in its totality". See, *e.g.*, Prosecution Appeal Brief, paras 100, 104. In addition, due to the circumstantial nature of the evidence, the same impediment would arise if the Appeals Chamber were to assess the requirements of aiding and abetting liability.

regard, the Appeals Chamber also notes the scale and complexity of the case, with a trial record containing 4,843 exhibits[444] and the testimony and/or written statements of 133 witnesses,[445] the contents of which span wide swaths of Croatia and Bosnia and Herzegovina over a four and a half year time period (April 1991 – 31 December 1995) and pertain to multiple statutory crimes, numerous armed groups, and various high-ranking alleged JCE members.[446] Assessing this trial record in its entirety without having directly heard the witnesses would not allow the Appeals Chamber to fairly and accurately determine Stanišić's and Simatović's criminal responsibility.

125. In light of the above, in determining the subsequent course of action, the Appeals Chamber may exercise a certain discretion.[447] In accordance with Rule 117(C) of the Rules, the Appeals Chamber may order a retrial in appropriate circumstances.[448] In addition, the Appeals Chamber also has an inherent power to control its proceedings in such a way as to ensure that justice is done by remitting limited issues to be determined by either the original or a newly composed trial chamber.[449]

126. The Appeals Chamber notes that, of the three judges of the original Trial Chamber, who directly heard the witnesses at trial, Judge Picard and Judge Gwaunza no longer hold office at the Tribunal. Therefore, it is impractical to remit the case to the original Trial Chamber composed of the same three Judges, who would have been best placed to make the necessary findings on the basis of the original trial record. Should the case be remitted to a newly composed trial chamber to do this exercise solely on the basis of the original trial record, it would encounter similar difficulties to those which would be encountered by the Appeals Chamber as a result of not having directly heard the witnesses.

127. Accordingly, and recalling that an appeal is not a trial *de novo*,[450] the Appeals Chamber, Judge Afande dissenting, finds that this case gives rise to appropriate circumstances for a retrial pursuant to Rule 117(C) of the Rules. The Appeals Chamber stresses that an order for retrial is an exceptional measure to which resort must necessarily be limited. While the Appeals Chamber is well aware that Stanišić and Simatović have spent nearly five years and four years and eight months, respectively, in detention, it is of the view that the alleged offences are of the utmost

[444] Trial Judgement, para. 12.
[445] Trial Judgement, paras 8-10.
[446] See, *e.g.*, *supra*, paras 4, 28.
[447] *Jelisić* Appeal Judgement, para. 73.
[448] *Haradinaj et al.* Appeal Judgement, paras 50, 377; *Muvunyi I* Appeal Judgement, paras 148, 171. *See also Orić* Appeal Judgement, para. 187; *Jelisić* Appeal Judgement, para. 73.
[449] *Čelebići* Appeal Judgement, paras 711, 713, p. 306 (Disposition, items nos 2-4); *Mucić et al.* Appeal Judgement on Sentence, paras 3, 9-10, 16-17.
[450] See *supra*, para. 15.

gravity and considers, Judge Afanđe dissenting, that, in the circumstances of this case, the interests of justice would not be well served if a retrial were not ordered.

128. Finally, Judge Afanđe dissenting, if the new trial chamber were to examine the responsibility of Stanišić and Simatović for aiding and abetting the crimes, the Appeals Chamber, Judge Agius and Judge Afanđe dissenting, instructs it to apply the correct law on aiding and abetting liability as set out above, which does not require that the acts of the aider and abettor be specifically directed to assist the commission of a crime.[451] In this regard, the Appeals Chamber notes that the principle of *lex mitior*, as alleged by Simatović, is not applicable to the present case. Whereas this principle applies to situations where there is a change in the concerned applicable law,[452] as noted above, it has been established that specific direction has never been part of the elements of aiding and abetting liability under customary international law, which the Tribunal has to apply.[453] Accordingly, the Appeals Chamber dismisses Simatović's argument in this respect.[454]

C. Conclusion

129. For the foregoing reasons, the Appeals Chamber, Judge Afanđe dissenting, orders that Stanišić and Simatović be retried on all counts.

[451] See *supra*, paras 104-106.
[452] *Deronjić* Appeal Judgement, para. 96; *D. Nikolić* Appeal Judgement, para. 81.
[453] See *supra*, paras 104-105.
[454] See *supra*, para. 119.

VI. THIRD GROUND OF APPEAL: WHETHER STANIŠIĆ AND SIMATOVIĆ ARE RESPONSIBLE FOR CRIMES COMMITTED IN THE SAO SBWS, BIJELJINA, ZVORNIK, AND SANSKI MOST

130. The Appeals Chamber recalls that it has granted the Prosecution's sub-grounds of appeal 1(A) and 2(A) and, accordingly, determined that it need not consider the Prosecution's arguments under its sub-grounds of appeal 1(B), 1(C), and 2(B).[455] In light of this conclusion and as a result of the course of action chosen to address these errors outlined in Section V above, the Appeals Chamber, Judge Agius and Judge Afanđe dissenting,[456] need not consider the Prosecution's third ground of appeal[457] and dismisses it as moot.

[455] See *supra*, paras 90-91, 108-109.
[456] Judge Agius's dissenting opinion relates to the dismissal of the Prosecution's third ground of appeal insofar as it concerns aiding and abetting liability.
[457] See *supra*, paras 11-12, 111, 113.

VII. DISPOSITION

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

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules,

NOTING the respective written submissions of the parties and the arguments they presented at the appeal hearing on 6 July 2015;

SITTING in open session;

GRANTS, Judge Afande dissenting, the Prosecution's sub-ground of appeal 1(A) and **QUASHES**, Judge Afande dissenting, the Trial Chamber's decision to acquit Stanišić and Simatović for committing, through their participation in a JCE, murder as a violation of the laws or customs of war and murder, deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity under all counts of the Indictment;

GRANTS, Judge Agius and Judge Afande dissenting, the Prosecution's sub-ground of appeal 2(A) and **QUASHES**, Judge Agius and Judge Afande dissenting, the Trial Chamber's decision to acquit Stanišić and Simatović for aiding and abetting murder as a violation of the laws or customs of war and murder, deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity under all counts of the Indictment;

ORDERS, Judge Afande dissenting, pursuant to Rule 117(C) of the Rules that Stanišić and Simatović be retried on all counts of the Indictment;

ORDERS, Judge Agius and Judge Afande dissenting, the trial chamber composed for retrial, should it consider aiding and abetting liability, to apply the correct law on aiding and abetting liability as affirmed herein, which does not require that the acts of the aider and abettor be specifically directed to assist the commission of a crime;

DISMISSES the Prosecution's appeal in all other respects; and

PURSUANT TO Rules 64, 107, and 118 of the Rules,

ORDERS, Judge Afande dissenting, the detention on remand of Stanišić and Simatović and **ENJOINS**, Judge Afande dissenting, the Commanding Officer of the United Nations Detention Unit in The Hague to detain them until further order.

Done in English and French, the English text being authoritative.

_____	_____	_____
Fausto Pocar Presiding Judge	Carmel Agius Judge	Liu Daqun Judge

_____	_____
Arlette Ramaroson Judge	Koffi Kumelio A. Afanđe Judge

Judge Carmel Agius appends a separate and partially dissenting opinion.

Judge Koffi Kumelio A. Afanđe appends a dissenting opinion.

Dated this ninth day of December 2015,
at The Hague,
The Netherlands.

[Seal of the Tribunal]

VIII. SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE CARMEL AGIUS

A. Introduction

1. In relation to the Prosecution's sub-ground of appeal 1(A), the Majority finds that the Trial Chamber erred in law in failing to make the necessary findings on the existence and scope of a common criminal purpose shared by a plurality of persons before making a finding on the *mens rea* of JCE liability ("Error on JCE Liability").[1] In relation to the Prosecution's sub-ground of appeal 2(A), the Majority finds that the Trial Chamber erred in law in requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime ("Error on Aiding and Abetting Liability").[2] In light of these errors, the Majority concludes that it would be inappropriate for the Appeals Chamber "to conduct its own review of the relevant factual findings of the Trial Chamber, applying the correct legal standards".[3] Subsequently, the Majority finds that the alleged offences are of the "utmost gravity" and that, "in the circumstances of this case, the interests of justice would not be well served if a retrial were not ordered".[4] The Majority therefore: (i) grants the Prosecution's sub-ground of appeal 1(A) and quashes the Trial Chamber's decision to acquit Stanišić and Simatović with respect to their alleged responsibility through participation in a joint criminal enterprise; and (ii) grants the Prosecution's sub-ground of appeal 2(A) and quashes the Trial Chamber's decision to acquit Stanišić and Simatović with respect to their alleged responsibility for aiding and abetting the crimes alleged.[5]

2. With respect to the Prosecution's sub-ground of appeal 1(A), I find myself in an uncomfortable position: while I agree that the Trial Chamber has erred by failing to provide a reasoned opinion,[6] I have serious misgivings about the approach taken by the Majority.[7] My

[1] Judgement, paras 88, 90. See Judgement, paras 110, 122.
[2] Judgement, paras 106, 108. See Judgement, paras 110, 122.
[3] Judgement, para. 123. See Judgement, para. 124.
[4] Judgement, para. 127.
[5] Judgement, Disposition.
[6] See Judgement, paras 88, 90.
[7] See Judgement, para. 110, where the Majority characterises this error as a "failure to make the necessary findings on the existence and scope of a common criminal purpose shared by a plurality of persons before making a finding on the *mens rea* of JCE liability". In my view, the Trial Chamber: (i) failed to demonstrate that it had addressed the case presented to it; (ii) failed to demonstrate it had fulfilled its duty to adjudicate all relevant evidence; and consequently (iii) failed to demonstrate that it had considered the evidence upon which it relied in the context of a host of other evidence it received that was potentially relevant to the assessment of the *actus reus* elements of JCE in relation to which it made no separate analysis and entered no legal or factual findings. I fully acknowledge the possibility, if not likelihood, that the Trial Chamber carefully and diligently considered each element of joint criminal enterprise liability, but chose to only provide written reasons pertaining to those elements *it* considered essential to demonstrating its own reasoning. Nonetheless, the Trial Chamber's reasoning ultimately fell short of satisfying its duty under Article 23(2) of the Statute of the Tribunal ("Statute") to provide a reasoned opinion, in my view, limiting both the Prosecution's ability to appeal and the Appeals Chamber's ability to carry out its appellate functions under Article 25 of the Statute.

intention, first and foremost, is to address my concerns regarding the Majority's decision not to conduct, or attempt to conduct, a review of the Trial Chamber's findings, after having identified an error of law by failing to provide a reasoned opinion.[8] However, the Majority's approach leaves me with little option other than to distance myself from the reasoning throughout the Judgement.

3. In this respect, I wish to simply point out in this Introduction that, given the ramifications of the Judgement, it is unfortunate that the Majority's approach contains a number of shortcomings. Not only is it difficult to identify and understand the Majority's reasons from the text of Judgement, but in its limited discussion, I respectfully submit that the Majority: (i) misstates the applicable law;[9] (ii) fails to reconcile its analysis, in any meaningful fashion, with the learned submissions advanced by counsel for the parties;[10] and (iii) takes the practice of the Appeals Chamber dramatically out of context when applying it to the circumstances of this case.[11] As I will emphasise further below,[12] it is this lack of transparency in the Majority's approach that I find particularly troubling, in light of its own obligation to provide a reasoned judgement in writing under the Rules of Procedure and Evidence of the Tribunal ("Rules").[13]

4. Overall, I have considered it even more important to turn my mind to what, in light of the Majority's decision not to conduct a review, is a legally appropriate remedy in the totality of the

[8] See Judgement, paras 123-124, 127; See *infra*, Section C.
[9] See Judgement, para. 78. With respect to the Majority's reliance upon paragraph 19 of the *Bizimungu* Appeal Judgement, I consider that the Appeals Chamber's statement in that case, that "the absence of any relevant legal findings in *the* Trial Judgement constitutes a manifest failure to provide a reasoned opinion" is not a statement of applicable law, but rather relates to the nature of the particular error in that case (*Bizimungu* Appeal Judgement, para. 19 (emphasis added) See *Bizimungu* Appeal Judgement, paras 16-18. *Cf. Tolimir* Appeal Judgement, para. 53; *Popović et al.* Appeal Judgement, paras 305, 1771, 1906; *Haradinaj et al.* Appeal Judgement, paras 77, 128; *Krajišnik* Appeal Judgement, para. 139; *Hadžihasanović and Kubura* Appeal Judgement, para. 13; *Limaj et al.* Appeal Judgement, para. 81, referring to *Naletelić and Martinović* Appeal Judgement, para. 603, *Kunarac et al.* Appeal Judgement, para. 41; *Kordić and Čerkez* Appeal Judgement, para. 382).
[10] See *e.g.* Judgement, paras 77-88, 91, 122-127. I note, by contrast, that limited analysis of the parties' submissions is undertaken at paragraphs 89, 103, 107 and 128 of the Judgement.
[11] Compare Judgement, para. 78 (referring to *Bizimungu* Appeal Judgement, para. 19) and fn. 320 (referring to *Orić* Appeal Judgement, para. 56) with *Bizimungu* Appeal Judgement, paras 16-19 and *Orić* Appeal Judgement, paras 52-60. With respect to the Majority's reliance on paragraph 56 of the *Orić* Appeal Judgement, I note that the *Orić* Appeals Chamber undertook a detailed assessment of the impugned trial chamber findings, based on a holistic reading of the *Orić* Trial Judgement. It was this analysis that underpinned the *Orić* Appeals Chamber's conclusion that the deficiency in the trial chamber's reasoning amounted to an error of law and that the Appeals Chamber should not be required to engage in a "speculative exercise to discern findings from vague statements by the Trial Chamber" in order to remedy such an error (*Orić* Appeal Judgement, para. 56. See *Orić* Appeal Judgement, paras 52-57, 60). With respect to the Majority's reliance on the *Bizimungu* Appeal Judgement, see *supra*, fn. 9.
[12] See *infra*, para. 10.
[13] See Rule 98 *ter* (C) of the Rules, which applies *mutatis mutandis* to proceedings in the Appeals Chamber by virtue of Rule 107 of the Rules. Such an obligation is not unique to the Appeals Chamber of this Tribunal (see Rules 88(C) and 107 of the ICTR Rules of Procedure and Evidence; Rules 122 and 131 of the Rules of Procedure and Evidence of the Residual Mechanism for International Tribunals; Rules 101(1)(a) and 104*bis* of the Extraordinary Chambers of the Courts of Cambodia Internal Rules (Rev. 9); Rules 168(B) and 176(B) Rules of Procedure and Evidence of the Special Tribunal for Lebanon. See also Stefan Trechsel, *Human Rights in Criminal Proceedings* (2005), p. 108, referring to *X v. Germany* Application 1035/61 (1963) 10 CD 12, 6 Yb 181, *Firestone Tire and Rubber Co and the International Synthetic Rubber Co Ltd v. United Kingdom* Application 5460/72 (1973) 43 CD 99, 16 Yb 152. *Cf.* Rules 88(C) and

circumstances of this case. It is for these reasons that I have ultimately joined the Majority in ordering a retrial.[14]

5. I will now address, in turn: (i) the reasons why I respectfully cannot agree with the Majority's decision to grant the Prosecution's second ground of appeal (Section B); and (ii) my concerns with the Majority's decision not to conduct a review after having identified the Trial Chamber's failure to provide a reasoned opinion (Section C).

B. Majority's decision to grant the Prosecution's sub-ground of appeal 2(A)

6. In the *Perišić* Appeal Judgement, the majority (of which I was part) set out why "specific direction" had always been an element of aiding and abetting liability pursuant to the jurisprudence of this Tribunal.[15] I note that, as correctly observed by the Majority, appeal judgements have subsequently been issued in the *Šainović et al.* and the *Popović et al.* cases, departing from the approach adopted in the *Perišić* case.[16] However, I remain of the opinion that the decision in the *Perišić* Appeal Judgement was the correct one, and am not convinced by the reasoning expressed in these subsequent cases. Therefore, I must also express my disagreement with the opinion of the Majority, which finds that "the Trial Chamber erred in law in requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime".[17]

7. For these reasons, I would dismiss the Prosecution's sub-ground of appeal 2(A).

C. The Majority's decision not to exercise discretion to conduct a review

8. It is not contentious that the Appeals Chamber possesses wide discretion in how it addresses errors of law committed by a trial chamber, depending on the specifics of a given case.[18] However, this discretion is not absolute.[19] In this respect, the jurisprudence of the Appeals Chambers of the ICTY and ICTR provide ample guidance: it must be exercised on proper judicial grounds, balancing multiple factors including fairness to the accused, the interest of justice, and the circumstances of

106 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and the Residual Special Court for Sierra Leone).
[14] See *infra*, para. 11.
[15] See *Perišić* Appeal Judgement, paras 25-40. See also *Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theordor Meron and Carmel Agius.
[16] See Judgement, paras 104-105.
[17] Judgement, para. 106.
[18] See Article 25(2) of the Statute; *Šainović et al.* Appeal Judgement, para. 1604, fn. 5269, citing *Jelisić* Appeal Judgement, para. 73, which states that: "the choice of remedy lies within [the] discretion [of the Appeals Chamber]. Article 25 of the Statute (relating to appellate proceedings) is wide enough to confer such a faculty". *Cf. Aleksovski* Appeal Judgement, paras 153-154, 192; *Jelisić* Appeal Judgement, para. 77.
[19] See also Judgement, para. 125.

the case in hand, as well as considerations of public interest.[20] Moreover, the Tribunal's jurisprudence specifies that, upon identifying a failure to provide a reasoned opinion, the Appeals Chamber may apply the correct legal standard to the evidence contained in the trial record and determine whether it is itself convinced beyond reasonable doubt as to the factual findings challenged by the appellant, and where necessary, enter legal findings.[21] However, in the present case, the Majority appears to reason that it would not be in the interests of justice to conduct a review.[22]

9. I am not persuaded that the Majority has demonstrated that the "nature and scale of the errors of law" in this case prevent the Appeals Chamber from conducting a review.[23] In my view, the Majority conflates the issues at hand by finding that in order to conduct a review, the Appeals Chamber would first have to turn to the Error on JCE Liability and make findings on the existence and scope of a common criminal purpose, and, depending on the result, turn to the Error on Aiding and Abetting Liability.[24] Having identified the Error on JCE Liability, a failure to provide a reasoned opinion, the Appeals Chamber ought to consider whether that error invalidated the Trial Chamber's decision.[25] As above, it is the Appeals Chamber's practice to do so by conducting a review to determine whether a reasonable trier of fact could reach the same conclusion.[26] Thus, the exercise of conducting a review has intrinsic value in enabling the Appeals Chamber to assess the extent and effect of a trial chamber's error.

10. I respectfully believe that it is most unfortunate that the Majority neither attempts to conduct a review, nor offers any explanation as to how the Trial Chamber's error invalidated its findings with respect to Stanišić's and Simatović's *mens rea*.[27] In this respect, I wish to acknowledge the possibility that the circumstances of this case *may* give rise to circumstances in which the judicious

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[20] See *Šainović et al.* Appeal Judgement, para. 1604, fn. 5269. *Cf. Aleksovski* Appeal Judgement, paras 153-154, 192; *Jelisić* Appeal Judgement, paras 73, 77.
[21] See *Tolimir* Appeal Judgement, para. 433; *Popović et al.* Appeal Judgement, para. 1065; *Đordević* Appeal Judgement, paras 832-834; *Perišić* Appeal Judgement, para. 96; *Kordić and Čerkez* Appeal Judgement, paras 384-388; *Ndindiliyimana et al.* Appeal Judgement, paras 293, 316. *Nzabonimana* Appeal Judgement, paras 383-384; *Bizimungu* Appeal Judgement, paras 23, 37, 65; *Ndindiliyimana et al.* Appeal Judgement, paras 56, 71; *Bagosora and Nsengiyumva* Appeal Judgement, para. 683; *Kalimanzira* Appeal Judgement, paras 100, 200; *Zigiranyirazazo* paras 29-51, 68-75. I note in this respect that the majority of the ICTR Appeals Chamber in the *Ndindiliyimana et al.* case considered "that the Trial Chamber's failure to make *mens rea* and *actus reus* findings" in relation to a mode of liability permitted it to "consider the relevant evidence and factual findings in order to determine whether a reasonable trier of fact could have found beyond reasonable doubt that the requisite *actus reus* and *mens rea* were established" (*Ndindiliyimana et al.* Appeal Judgement, paras 293, 316).
[22] I note in this respect that, after determining that a review would be "inappropriate" (Judgement, para. 124), the Majority finds that "the interests of justice would not be well served if a retrial were not ordered" (Judgement, para. 127).
[23] *Contra* Judgement, para. 123.
[24] Judgement, para. 123.
[25] See *Kvočka et al*. Appeal Judgement, para. 25. See also Judgement, para. 16; *Popović et al.* Appeal Judgement, para. 17; *Šainović et al.* Appeal Judgement, para. 20.
[26] See *supra*, para. 8.
[27] *Cf*. Judgement, paras 87-88.

exercise of the Appeals Chamber's discretion as to remedy ought to lead to the conclusion that a review is inappropriate.[28] However, it is incumbent upon the Majority to identify such circumstances with clear reasoning.[29] As a review of the Trial Chamber's findings need not take place in a vacuum, but can be guided instead by the submissions of the parties,[30] I am not persuaded that in order to conduct a review, the Appeals Chamber would need to "analyse the review of the *entire trial record* without the benefit of having directly heard the witnesses".[31] Likewise, the Majority provides no reasoning in support of its conclusion that the "scale and complexity of [this] case" distinguishes it from those cases where the Appeals Chamber has undertaken such an exercise.[32] In light of the nature of the Trial Chamber's Error on JCE Liability, the Majority's approach is curious: not only does it fail to accord with the Tribunal's jurisprudence set out above,[33] but falls short of fulfilling the Appeals Chamber's responsibility to provide reasons for its opinion.[34]

11. At this stage of the Tribunal's mandate, and with one member of this Bench only mandated to serve until the end of the year, I am fully aware that there is no time for the Appeals Chamber to conduct the exercise of review itself even if I were to convince my Colleagues that such an exercise was a preferable and appropriate exercise of the Appeals Chamber's powers. I also find myself in the absolute minority on this issue. It is for these reasons, after having given due consideration to matters such as fairness to the accused, the interest of justice, the circumstances of the case in hand, and considerations of public interest,[35] that I join the Majority in ordering a retrial in this case.[36]

[28] *Cf. supra*, para. 8.
[29] *Cf. Ndindiliyimana et al*. Appeal Judgement, Partly Dissenting Opinion of Judge Tuzmukhamedov, paras 3-6; *Nahimana et al.* Appeal Judgement, Partly Dissenting Opinion of Judge Meron, p. 1.
[30] See *e.g. Bizimungu* Appeal Judgement, paras 196-197, 272-273, 278-279, 309-310, 315-316, 343-344, 349-350. Indeed in light of the absence of legal findings in the *Ndindiliyimana et al*. Trial Judgement, the Appeals Chamber in the *Ndindiliyimana et al.* case ordered: (i) the severance of the case against Augustin Bizimungu ("Bizimungu") from the remainder of the case; (ii) the Prosecution to file further submissions addressing the evidentiary basis for certain convictions and how it supports the constituent legal elements of particular crimes; and (iii) Bizimungu to file any further submissions in response (see *Ndindiliyimana et al. v. The Prosecutor*, Case No. ICTR-00-56-A, Order for Further Submissions and Severance, 7 February 2014, pp 2-3).
[31] *Contra* Judgement, para. 124 (emphasis added). In this respect, I simply cannot agree with the Majority's reliance upon the total number of exhibits and volume of witness testimony on the trial record, given the absence of any submission from any of the parties that the Appeals Chamber would be required to assess the entirety of the trial record. See also Judgement, paras 126-127.
[32] *Contra* Judgement, para. 124. For example, in the *Kordić and Čerkez* case, the Appeals Chamber conducted a review in circumstances that the trial chamber had failed to "discuss *all* constituent elements of *all* crimes charged" (*Kordić and Čerkez*, paras 383, 387-388). In the *Bizimungu* case, the ICTR Appeals Chamber considered a review to be an appropriate remedy in circumstances where it faced a failure to provide a reasoned opinion, the magnitude of which was "unprecedented in the history of the Tribunal" (see *Bizimungu* Appeal Judgement, paras 19, 24).
[33] See *supra*, para. 8.
[34] See *supra*, fn. 13.
[35] See *Šainović et al.* Appeal Judgement, para. 1604, fn. 5269. *Cf. Aleksovski* Appeal Judgement, paras 153-154, 192; *Jelisić* Appeal Judgement, paras 73, 77.
[36] See Judgement, para. 125, Disposition.

Done in English and French, the English text being authoritative.

Dated this ninth day of December 2015,
at The Hague,
The Netherlands.

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Judge Carmel Agius

[Seal of the Tribunal]

IX. DISSENTING OPINION OF JUDGE KOFFI KUMELIO A. AFANĐE

1. I humbly dissent from the Majority's approach in this Judgement,[1] with regard to Ground One (Joint Criminal Enterprise) and Ground Two (Aiding and Abetting)

2. With regards to Ground One, the Majority finds that the Trial Chamber erred in law by failing to adjudicate, and to provide a reasoned opinion on essential elements of JCE liability.[2] In Ground Two, the Majority finds that the Trial Chamber erred in law in requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime.[3]

3. The gravamen of my dissent is that the Majority, without providing any convincing reasoned opinion, deviated from the well established jurisprudence of the Tribunal on deference to trial chambers. Concretely, instead of making a holistic reading of the Trial Judgement, the Majority rather unreasonably questions in a piecemeal manner the approach which the Trial Chamber has taken to examine the evidence before it. Needless to recall, but I feel compelled to given the Majority's approach, the overarching principle well established within the jurisprudence of this Tribunal on the deference afforded to trial chambers. According to that principle, a trial chamber is entitled to rely on the evidence it finds most convincing.[4] A trial chamber also need not refer to the testimony of every witness or every piece of evidence on the trial record.[5] Furthermore, not every inconsistency which a trial chamber fails to discuss renders its opinion defective.[6] Central to my dissent is that should the Majority have properly applied this axiomatic and self-evident (allow me the tautologies) principle of deference, so diligently followed by the Appeals Chamber in previous cases, Ground One and Ground Two of the Prosecution's appeal would fail.

Ground One - Joint Criminal Enterprise (JCE)

4. Initially, under sub-ground 1(A) in its Appeal Brief, the Prosecution appeared to be arguing that the Trial Chamber's approach of examining the *mens rea* of JCE first was an error of law, since the Trial Chamber failed to follow the classic steps of sequentially examining the plurality of persons, the existence of a common purpose, the contribution to that purpose and only then the *mens rea*.[7] However, at the Appeal Hearing, and as reflected in the Judgement's

[1] *See Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-A, Appeal Judgement, 15 December 2015 ("Judgement").
[2] Judgement, paras 80, 90, 110, 131.
[3] Judgement, paras 106, 108, 110, 131.
[4] *Perišić* Appeal Judgement, para. 92 *referring to Kvočka et al*. Appeal Judgement, para. 23.
[5] *Perišić* Appeal Judgement, para. 92; *Limaj et al*. Appeal Judgement, para. 86.
[6] *Perišić* Appeal Judgement, para. 92 *referring to Kvočka et al*. Appeal Judgement, para. 23. *See also Gatete* Appeal Judgement, para. 65.
[7] Judgement, paras 62-63.

summary of the Prosecution's submissions, albeit in footnotes rather than the main body of the text,[8] the Prosecution made a shift in its case, seemingly abandoning the submission that failure to follow the steps mentioned above was in itself a legal error *per se*. The Prosecution instead submitted that the Trial Chamber erred in law by failing to provide a reasoned opinion since it failed to adjudicate on essential elements of JCE liability – in particular, the existence of a common criminal purpose and Stanišić's and Simatović's contributions to it.[9] The Prosecution suggested that analysis of Stanišić's and Simatović's intent can only be done through the "common criminal purpose lens".[10] I note that according to the Tribunal's jurisprudence unless specifically authorised by the Appeals Chamber, parties should not raise new arguments during an appeal hearing that are not contained in their written briefs.[11] Alone the Prosecution's shift is therefore questionable, since it consists of a "new argument" that the Prosecution brought forth without the required authorization by the Appeals Chamber.[12] In particular, the newness of the argument exists on two levels. Firstly, it is temporally new, having not existed in the Appeal Brief but appearing in the Appeal Hearing. It is also substantially new, since the Prosecution's initial argument in its Appeal Brief was essentially sequential (the plurality of persons first, etc), whereas the argument raised for the first time in the Appeal Hearing was a criticism of the Trial Chamber's methodological approach. The reasons are not clear why the Majority has overlooked that factor of newness of argument which undermines its validity, but instead proceeded to address it on its merit in addition to the Prosecution initial argument of the failure to follow a sequence of the elements of the JCE. Particularly, I recall that the Prosecution attempted during the Appeal Hearing to explain that that argument is not new, but a continuation of its first argument on failure to follow a specific sequential step in finding the elements of JCE, was a mere statement but not sufficiently demonstrative to reach the threshold required to convince.[13]

5. According to the Prosecution, in its new argument, that common criminal purpose "lens" requires a prior finding on the existence of the common criminal purpose as well as on Stanišić's and Simatović's contribution to that purpose, and that such failure to make these

[8] *See* Judgement, fns 253-254.
[9] Judgement, para. 25. *See also* Prosecution Appeal Brief, paras 13, 15, 19-28; Prosecution Reply Brief, paras 9-13.
[10] *See* Appeal Hearing, 6 July 2015 pp. 8, 11-12, 14, 21-22. *See also* Judgement, fn. 254.
[11] *See Haradinaj et al*. Appeal Judgement, para. 19.
[12] *See Haradinaj et al*. Appeal Judgement, para. 19 *referring to Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Prosecution's Motion to Strike and on Appellant's Motion for Leave to File Response to Prosecution Oral Arguments, 5 March 2007, para. 15 ("Bralo Decision"). I note that neither the *Haradinaj et al*. Appeal Judgement or the *Bralo* Decision provides a definition of the term "new arguments", although in *Haradinaj et al*. the Appeals Chamber considered raising arguments "for the first time during the Appeal Hearing" to be "new arguments" and declined to consider the impugned submission. To my mind "new arguments" can therefore be properly defined as arguments raised for the first time during the Appeal Hearing.
[13] *See* Appeal Hearing, 6 July 2015 pp. 96-98.

prior findings amounts to failure to provide a reasoned opinion.[14] The Prosecution then goes on to point to evidence and absent findings that in its view would have clearly been relevant to making a finding on the existence of the JCE.[15]

6. The Judgement appears to suggest that the Trial Chamber could make a proper inferential finding on intent only after having made initial findings on the *actus reus* elements of JCE.[16] The Judgement therefore appears to take the position that the Trial Chamber's approach of assessing the evidence and considering first the *mens rea*, rather than the *actus reus*, constitutes a failure by the Trial Chamber to provide a reasoned opinion. By doing so, the Judgement seems to agree with the Prosecution's initial arguments outlined above, according to which the Trial Chamber should have followed the sequence of *actus reus* and then *mens rea* and hence it committed an error of law for not having done so and also failed to provide reasoned opinion. I am not convinced that this is in fact the case.

7. First of all, it imports to recall that where a finding is based on an inference, the Tribunal's jurisprudence refers to inference based on circumstantial *evidence* and not on findings, which are themselves evidence-based.[17] Therefore, the Tribunal's jurisprudence does not support the approach, as seems to be taken by the Majority in the Judgement, that a trial chamber must make *actus reus findings* in order to draw an inference on intent from those findings. Indeed, a trial chamber may wish to consider the same evidence that it used to find *actus reus* elements again to infer intent. However, a trial chamber may equally choose to consider other evidence that it did not use to find *actus reus* elements, but which can support an inference on intent.[18] Accordingly, unless the Appeals Chamber wishes to amend the Tribunal's approach to inferential findings, which should be clearly stated according to the Tribunal's jurisprudence on departing from a previous established position,[19] this approach does not accurately reflect the jurisprudence of the Tribunal.

[14] Judgement, para. 64, fns 254, 258. *See also* Appeal Hearing, 6 July 2015 pp. 11-14.
[15] Judgement, paras 65-69.
[16] Judgement, para. 81.
[17] This is a well established premise which is found in most Tribunal judgements. *See e.g. Čelebići* Appeal Judgement, para. 458; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Ntagerura et al*. Appeal Judgement, para. 306.
[18] In support of this position I recall that in *Krstić* the Appeals Chamber considered each of the many findings made by the Trial Chamber from which it inferred *Krstić's* intent to commit genocide as part of the JCE. It also reviewed Trial Chamber findings that militate against intent being proved. *See Krstić* Appeal Judgement, paras 80-134.
[19] It is well established in the jurisprudence of the Tribunal that in the interests of certainty and predictability the normal rule is that previous decisions are to be followed, but may exceptionally depart from them for cogent reasons but that departure is the exception. The Appeals Chamber will therefore only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts. The Appeal Chamber has found that the notion of "cogent reasons" encompasses considerations that are "clear and compelling". *See Đordević* Appeal Judgement, paras 23-24; *Aleksovski* Appeal Judgement, paras 107-109; *Galić* Appeal Judgement, para. 117.

8. Furthermore, regarding the Prosecution's initial argument that a trial chamber must, as a matter of law, consider the *actus reus* elements of JCE before the *mens rea* elements, the Judgement's lack of reference to or discussion of this specific argument appears to confirm that there is indeed no legal requirement to that effect. Undeniably, when considering previous chambers' approaches it is clearly noticeable that a trial chamber is not legally bound to consider first the *actus reus* and only then the *mens rea* elements of JCE. In support of this conclusion, an analysis of previous judgements demonstrates that trial chambers have taken, and the Appeals Chamber confirmed, a flexible approach when assessing both the evidence before it and the order of the elements of JCE to be considered. For example, in *Prlić et al.*, the Trial Chamber considered first the existence of the common criminal purpose,[20] then the *mens rea*,[21] then the significant contribution,[22] and finally the plurality of persons.[23] In *Popović et al.*, the Trial Chamber considered *Borovčanin's* JCE responsibility by plurality of persons,[24] then the existence of common purpose,[25] then the *mens rea*.[26] Having found that the required intent was not established, the Trial Chamber did not assess the contribution. For *Pandurević*, the Trial Chamber also made findings on the intent before making findings on the contribution; an approach that was upheld on appeal.[27] Whilst in *Milutinović et al.*, the Trial Chamber considered the existence of the common criminal purpose,[28] then the intent,[29] followed by the significant contribution.[30] Given the flexible approach followed by other trial chambers before it, this Trial Chamber cannot be found to have committed a legal error *per se* in electing to approach the *mens rea* first. It appears incontestable through the above analysis that the Tribunal has never required its trial chamber's to follow a strict sequence. Accordingly, I believe that the Majority would have helped clarify its position had it provided reasons why it is diverging from the Tribunal's established position according to which a trial chamber is not required to start with the "plurality of persons", then the "existence of a common criminal purpose", then the "contribution to the common criminal purpose" and only then the intent.

[20] *Prlić et al*. Trial Judgement, Vol. 4 paras 41-73.
[21] *Prlić et al*. Trial Judgement, Vol. 4 paras 428, 627, 817.
[22] *Prlić et al*. Trial Judgement, Vol. 4 paras 429, 628, 818.
[23] *Prlić et al*. Trial Judgement, Vol. 4 paras 1231-1232.
[24] *Popović et al*. Trial Judgement, paras 1049-1080, 1503.
[25] *Popović et al*. Trial Judgement, paras 1049-1080, 1503.
[26] *Popović et al*. Trial Judgement, paras 1507-1541.
[27] *Popović et al*. Appeal Judgement, paras 1397-1398.
[28] *Milutinović et al*. Trial Judgement, Vol 3 paras 95-96.
[29] *Milutinović et al*. Trial Judgement, Vol 3 paras 462, 466, 772, 1117, 1130.
[30] *Milutinović et al*. Trial Judgement, Vol 3 paras 467, 782, 1131.

9. I also am not convinced by the Majority's approach to the law on reasoned opinion.[31] I agree that the jurisprudence that should apply in the present case is that a trial chamber is required to make findings on those facts which are essential to the determination of guilt on a particular count.[32] The key question therefore is whether the Trial Chamber's approach failed to make findings on the essential facts.

10. In my view, it did not fail to do so. As discussed above, it is true that the Trial Chamber did not organise its consideration of the evidence in the expected, but not compulsory, manner of first the "plurality of persons", then the "existence of a common criminal plan", then the "contribution to the common criminal plan" and then the intent. But, as also elaborated on above, trial chambers have consistently adopted a flexible approach to assessing *actus reus* elements before pivoting to *mens rea* elements and sometimes back to *actus reus*.[33] In the present case, the Trial Chamber appears to have considered the evidence as one without the benefit of the classical and expected categorisation. However, it cannot be said that this option not to organise its consideration of the evidence in the expected manner equates to it failing to consider the evidence and make a number of essential findings.

11. The Judgement gives the impression that there is a tendency to absolutely find that the Trial Chamber failed to make findings on essential elements of JCE. For example, the Majority expressed the view in footnote 320 that the Trial Judgement does not contain, even in an implicit manner, any analysis or findings on the existence and scope of the common criminal purpose or the plurality of persons. Then in the same footnote referring to paragraph 56 of the *Orić* Appeal Judgement, the Majority recalls that, on such crucial elements, neither the parties nor the Appeals Chamber can be required to engage in a speculative exercise to discern findings from vague statements by the Trial Chamber. Whilst I can agree with the reference from the *Orić* Appeal Judgement that the Appeals Chamber should not engage in speculative findings, I regret that I must disagree with the rather speculative manner in which the Majority places this reference out of context. Follow my reasoning: paragraph 56 in the *Orić* Appeal Judgement follows the crucial paragraph 52 in which the Appeals Chamber, after having concluded that the Trial Judgement did not explicitly make findings, proceeded to an "holistic reading" of the Trial Judgement as a whole in order to find out whether it contains implicit findings. It is this very "holistic" analysis that the Majority fails to do in this

[31] Judgement, para. 78.
[32] *See* Judgement, fn. 311 *referring to Popović et al*. Appeal Judgement, para. 1906, *referring to Hadžihasanović* and *Kubura* Appeal Judgement, para. 13. *See also Krajišnik* Appeal Judgement, para. 139 which takes a similar approach ("As a general rule, a Trial Chamber "is required only to make findings on those facts which are essential to the determination of guilt on a particular count").
[33] *See above*, para. 5.

particular case. In my view that holistic reading of the Trial Judgement should aim at identifying not only issues that may be construed to find that the Trial Chamber failed to make such findings on essential elements of JCE, but, essentially, also those which may well establish that it did make those findings, albeit not encapsulated under specific sections. Unfortunately, this comprehensive and holistic analysis is missing in the Majority's Judgement. It is certain that, had that holistic analysis of the Trial Chamber's findings been thoroughly done, it would have demonstrated that the findings on the essential elements of JCE are contained within the Trial Judgement, only some of which are referred to in the Judgement.[34] In order to clarify my position further, I proceed in the following developments with the holistic analysis which the Majority failed to conduct.

12. First of all, and with regard to the plurality of persons, the Trial Chamber did clearly consider the actions of Stanišić and Simatović[35] as well as the actions of others who were alleged to have been members of the JCE, albeit under the sphere of *mens rea*. On this point, I add that whilst the Trial Chamber assessed the matter concerning Stanišić and Simatović only, it cannot be criticized for having failed to consider activities of, and meetings between, other members of the alleged JCE, whom the Trial Chamber were not seized, as the Majority appears to do in the Judgement.[36] It should be noted that some of these other alleged JCE members are in fact still on trial before other Trial Chambers of the Tribunal and are presumed innocent until proven guilty.[37] It would have been unfair toward any other alleged members of the JCE, and I question the approach of other trial chambers that have made such findings, if the Trial Chamber in this case had made a finding on their participation in the purported JCE, without them being part of the proceedings to defend themselves as of right. Therefore, as a matter of consequence and principle, this Trial Chamber was right to have limited its findings to Stanišić and Simatović, the case of whom it was seized. In any event, in contradiction of the Majority's criticism of the Trial Chamber for not "thoroughly assessing" the activities of purported members of the JCE in light of the crimes committed, a review of the Trial Judgement demonstrates that the Trial Chamber did in fact consider the actions of other purported members of the JCE such as Martić,[38] Arkan,[39] Karadžić,[40] Plavišić,[41] Mladić

[34] Judgement, paras 27-61.
[35] *See* Trial Judgement, Chapters 6.2-6.8.
[36] *See* Judgement, fn. 320.
[37] I note for example that findings were made on the actions of both Karadžić and Mladić, both of whom still have cases pending before the Tribunal. *See e.g.* Trial Judgement, paras 878-889, 990, 1879, 2039, 2333 (on Karadžić's alleged actions) *and* paras 2324, 2347, 2350-2352 (on Mladić's alleged actions).
[38] Trial Judgement, paras 404, 1003.
[39] Trial Judgement, paras 411, 416, 419, 432, 449, 571, 901, 923, 1200.
[40] Trial Judgement, paras 878-889, 990, 1879, 2039, 2333.
[41] Trial Judgement, paras 1845-1846, 1848-1849, 1858, 1860.

and Mrkšić.[42] The Majority fails to articulate how these numerous findings on the activities of other alleged members of the purported JCE do not amount to a "thorough assessment". My position also finds in the jurisprudence of the Tribunal a support which the Majority does not have when it concludes that the Trial Chamber failed to make findings on the other alleged participants in the context of the plurality of persons. Indeed, and the Tribunal's jurisprudence is unequivocal on the point, whilst a trial chamber should identify the plurality of persons making up the JCE, this plurality of persons can be sufficiently identified by referring to "categories or groups of persons", and it is not necessary to name each of the individuals involved,[43] nor as a matter of law is a trial chamber required to make findings on the actions of each member of a JCE in order to establish that a plurality of persons acted together in implementing a common purpose.[44]

13. In addition, a JCE is foremost a "joint enterprise", which is then considered at the second level to be "criminal", if the intent of the members is to further a "common criminal purpose". It is that very *mens rea* which clearly distinguishes JCE liability from another enterprise such as a "Joint Warfare Enterprise" (JWE). In a JWE, there is a plurality of persons making contributions, whether significant or not, to a common plan, who have the intent to further not a criminal purpose, but rather a legal "warfare purpose" which is common to them. On this point, I recall that when a trial chamber is confronted with the task of determining if it can infer from the acts of an accused, whether he or she shared with other persons the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inference.[45] In the scenario of the impugned case discussed above a reasonable inference could be a JWE,[46] as demonstrated below relating to the intent.

14. Secondly then, concerning the intent, a closer analysis of the Trial Judgement demonstrates that the Unit was engaged in several operations in Bosnia and Herzegovina which could be considered part of a JWE, rather than a JCE, since criminal actions are not the only reasonable inference, for example the Operations in Bosanski Šamac, Doboj, Brčko, Udar and Pauk.[47] It is true that the Trial Chamber found that crimes were committed in the Bosanski Šamac and Doboj Operations, thus possibly moving from JWE to JCE.[48] However, the same Trial

[42] Trial Judgement paras 2324, 2347, 2350-2352.
[43] *See Đordević* Appeal Judgement, para. 141; *Krajišnik* Appeal Judgement, para. 156.
[44] *See Đordević* Appeal Judgement, para. 141.
[45] *See Vasiljević* Appeal Judgement, para. 131. An approach I note in passing has been recently followed by the International Criminal Court. *See e.g. The Prosecutor v. Bemba et al.*, Narcisse Arido's Submissions on the Elements of Article 70 Offences and the Applicable Modes of Liability (ICC-01/05-01/13-T-8-CONF-ENG), Case No. ICC-01/05-01/13, 1 June 2015, para. 51.
[46] *See Vasiljević* Appeal Judgement, para. 131.
[47] Judgement, para. 35.
[48] Judgement, para. 28 (a).

Chamber also found that following these operations, changes were made to the Unit's personnel, and this can reasonably be seen as attempt to bring in personnel who kept the intent of the operations within the sphere of JWE. Furthermore, the arming of the SDG can also be seen as part of a JWE, even though the Trial Chamber found that the SDG did commit crimes in SAO SBWS and Bosnia and Herzegovina in 1991 and 1992.[49] The reason is that according to the Trial Chamber's finding, Stanišić and Simatović were involved in assisting the SDG in 1994 and 1995,[50] but it was only in September 1995 that the SDG committed crimes in the Sanski Most municipality of Bosnia and Herzegovina.[51] Therefore, there were no findings by the Trial Chamber that the SDG committed crimes in 1993, and Stanišić and Simatović provided assistance from 1994 to September 1995 without any crimes being committed. Whilst Stanišić and Simatović may well have known about SDG crimes in 1991 and 1992, they must also have known that the SDG had committed no crimes in 1993. Moreover, due to their close involvement in 1994 with the SDG, Stanišić and Simatović would also have known that no crimes were committed by the SDG in 1994 and the first half of 1995. It may well be that Stanišić and Simatović had assisted the SDG because, due to their knowledge that the SDG has committed no crimes for such a long period, they found an assurance that no crimes would be committed with the assistance provided, but that assistance would be used only for warfare purpose. This again demonstrates that another reasonable inference from the totality of the evidence before the Trial Chamber was that Stanišić and Simatović participated in a JWE, and not in a JCE. There is no need at all to mention that, where the JCE is not established, it is inconsistent to envisage an extended form thereof, namely JCE III, for the simply logical reason that other crimes could not be a natural and foreseeable consequence of that non existing JCE or its common purpose. Accordingly, JCE III convictions cannot be entered.[52] Furthermore, whilst the Tribunal has stated that there is no express time frame included in the foreseeability standard in cases of the JCE III,[53] it remains that after such a long period during which the SDG has not committed crimes, it could also logically not have been reasonably foreseeable to Stanišić and Simatović that it would commit crimes in the Banja Luka Operation in September 1995.[54] Combined, this confirms that the Trial Chamber's approach of considering the plurality of persons within the *mens rea* section,

[49] Judgement, para. 28 (d) *referring to* Trial Judgement, paras 419, 432, 451, 454, 468, 479, 510-511, 524, 528, 538, 573, 576-578, 925, 927, 942, 990, 1025, 1030, 1049, 1054, 1248, 1253.
[50] Judgement, para. 37 *referring to* Trial Judgement, paras 1880, 1911-1912, 2006, 2037, 2039, 2068, 2084, 2087, 2092, 2333 (in particular, fn. 5006).
[51] Judgement, para. 28 (d) *referring to* Trial Judgement, paras 883, 990, 1248.
[52] *See Gotovina and Markač* Appeal Judgement, para. 97.
[53] *See Popović et al*. Appeal Judgement, para. 1696.
[54] I note that the Trial Chamber made a finding that it was reasonably foreseeable to Stanišić and Simatović that the SDG would commit crimes in the Banja Luka Operation in September 1995. *See* Trial Judgement, para. 2333. It is my

and ultimately finding the *mens rea* not proved beyond reasonable doubt, does not constitute a discernable error.

15. Thirdly, as to the existence of a common criminal purpose, as the Judgement recognizes, the Trial Chamber took the common criminal purpose as pleaded in the Indictment; that is at the Prosecution's case at its highest.[55] I stress that this Trial Chamber is not the first, and may well not be the last, to take this approach and consider the existence of the common criminal purpose as alleged in the Indictment. For example, in *Boškoski and Tarčulovski*, the Trial Chamber assessed the accused's contribution to the common criminal purpose as alleged in the Indictment.[56] In *Setako*, the Trial Chamber found that there was insufficient evidence to show that the accused participated in a common criminal purpose as alleged in the Indictment. As a result the Trial Chamber considered whether he was responsible for a smaller number of incidents than alleged in the Indictment and, on the basis of the modality of his participation as established by the evidence, convicted him of ordering the crimes committed in these incidents.[57] Neither case was subject to criticism from the Appeals Chamber.

16. Furthermore, in order to determine the existence of the common criminal purpose, the Trial Chamber assessed the crimes committed in SAO Krajina, SAO SBWS and Bosnia and Herzegovina.[58] It found that many of the crimes alleged in the Indictment were in fact committed.[59] The Trial Chamber also considered the temporal and geographical scope of the crimes which it found occurred and were alleged to comprise the realisation of the common criminal purpose, in particular noting the concentration of crimes in the fall of 1991 in the SAO Krajina and SAO SBWS and between April and September 1992 in Bosnia and Herzegovina.[60] Moreover, the Trial Chamber in particular found that from April 1991 to April 1992, between 80,000 and 100,000 Croat and non-Serb civilians fled the SAO Krajina and that between 1992 and 1995, due to the violent actions of various Serb Forces in Bosnia and Herzegovina tens, if not hundreds, of thousands of non-Serbs were displaced.[61] The assessment of the crimes underpinning the common criminal purpose to determine its existence is again a standard approach employed by trial chambers and the Appeals Chamber in order to determine the existence of a common criminal purpose, since there rarely exists direct evidence which sets out its existence. For example, in *Stakić*, the Appeals Chamber

view however that such crimes could not have been logically reasonably foreseeable to Stanišić and Simatović given the time period in question.
[55] Judgement, para. 31.
[56] *See e.g. Boškoski and Tarčulovski* Trial Judgement, paras 580-585.
[57] *See Setako* Trial Judgement, paras 455-457.
[58] Judgement, para. 28.
[59] Judgement, para. 28 (a)-(h).
[60] Judgement, para. 29.

considered the existence of a common criminal purpose and found that the "campaign", which was the common criminal purpose, consisted of *criminal acts* prescribed in the Tribunal's Statute.[62] In *Martić* and *Šainović et al.*, the Appeals Chamber affirmed the use of evidence of *crimes* to determine the existence of the common criminal purpose.[63]

17. Moreover, the Tribunal's jurisprudence is also clear that there is no need for *evidence* proving the existence of a prior agreement between alleged members of the JCE, again suggesting the underpinning crimes can be used to determine the existence of the common criminal purpose itself.[64] It is my understanding that the Trial Chamber limited itself, and rightly so, to the analysis *in bello* of the context of the situation, suggesting that the war itself is not necessarily waged in violation of international law and customs of war. Therefore the war cannot be seen as *criminal* enterprise *per se*, and failing any evidence establishing that the war operations were conducted with the contribution and intent of Stanišić and Simatović which were criminal, it cannot be inferred beyond reasonable doubt that they are criminally liable for crimes committed during the war. Conversely, the Prosecution's view, apparently supported by the Majority, claiming that the Trial Chamber committed an error of law in not finding Stanišić and Simatović liable for JCE, seems to be erroneously based rather on an *ad bellum* analysis of the situation suggesting that the war was *per se* a criminal enterprise, hence illegal, and Stanišić and Simatović have contributed to it as JCE members, alongside others. In the same vein, I would also point out that, whilst the Prosecution argues that the Trial Chamber failed to make findings on the political objective of Milošević and Croatian and Bosnian Serb leaders, which it argues would have allowed the Trial Chamber to find that a common criminal plan existed,[65] the Trial Chamber was not required to make this finding. The reason being that, since such findings do not relate to Stanišić and Simatović, they are not relevant to the issue of Stanišić's and Simatović's intent, which the Trial Chamber elected to examine first.

18. As to Stanišić's and Simatović's contribution to the common criminal purpose, the Trial Chamber recalled that the Indictment alleged various acts of Stanišić and Simatović through which they would have contributed to the JCE.[66] The Trial Chamber then went on to assess whether Stanišić and Simatović did in fact carry out these acts.[67] In doing so the Trial

[61] Judgement, para. 30.
[62] *Stakić* Appeal Judgement, para. 73.
[63] *Martić* Appeal Judgement, paras 102, 106; *Šainović et al.* Appeal Judgement, paras 653-654, 664.
[64] *See e.g. Furundžija* Appeal Judgement, para. 120; *Kvočka et al.* Appeal Judgement, para. 117.
[65] *See* Prosecution Appeal Brief, paras 27-28, 53, 55, 73, 79 and Annex B.
[66] Judgement, para. 31.
[67] Judgement, para. 31.

Chamber considered the positions Stanišić and Simatović occupied,[68] but found that it could not infer from Simatovic's positions alone that he was responsible for acts generally attributed to the Serbian SDB.[69] The Trial Chamber then examined Stanišić's and Simatović's alleged involvement in various Serb Forces as described in the Indictment.[70]

19. In conclusion, based on the holistic analysis as presented above, it is clear that the Trial Chamber did in fact consider evidence relating to all the essential elements for the *actus reus* of JCE and made appropriate findings either before or during its assessment of the *mens rea*. I wish to again recall the deference afforded to a trial chamber in the assessment of evidence, and in particular the Appeals Chamber's consistent approach that a trial chamber is best placed to assess the evidence before it and that a trial judgement must be considered in its totality.[71] This deference combined with the lack of jurisprudence requiring a trial chamber to approach the elements of JCE in a particular order or sequence, and recalling the "essential factors" test in *Krajišnik*,[72] I am not convinced that the Trial Chamber's approach, albeit not in the expected, but not legally required manner, amounts to a failure to provide a reasoned opinion.

20. Simply put, other than to organize its findings under specific sections as outlined above - which is not required by law, and is not even routinely followed by other trial chambers without the Appeals Chamber criticizing them - what else could the Trial Chamber have done?

21. I stress that the requirement of reasoned opinion imposed on chambers and the principle of deference followed by the Appeals Chamber to a trial chambers' findings are not constructions that require from chambers a mere academic or rhetorical exercise in judgements and decisions, failing which the Appeals Chamber can allow itself to withhold its deference and find that the Trial Chamber failed to provide a reasoned opinion. Taken together, the exigency of reasoned opinion and the principle of deference are obviously meant to ensure the substantial and procedural fairness as well as the expeditiousness of the proceedings, so as to ensure that cases reached finality or that their normal progress is not frustrated by protracted proceedings. And this is exactly the result which the Majority's Judgement fails to achieve. Therefore, in this case where it is easily perceivable that the Trial Chamber made findings on all essential elements of the JCE, a mere statement by the

[68] Judgement, paras 32-33.
[69] Judgement, para. 33.
[70] Judgement, para. 34.
[71] *See above,* para. 3 r*eferring to Perišić* Appeal Judgement, para. 92.
[72] *See above,* fn. 32.

Majority to the contrary, without itself providing a reasoned opinion, may defeat the well established jurisprudence on deference and reasoned opinion referred to throughout this dissent as well as the approach of the Tribunal. In particular I again note the Majority's caution against undertaking a "speculative exercise" on "vague statements" with reference to the *Orić* Appeal Judgement.[73] I am of the view however, as already stated above, that the *Orić* Appeal Judgement rather supports my position. Specifically, a closer analysis of the this judgement reveals that whilst the Appeals Chamber did indeed state speculative exercises are not to be undertaken, a position I wholeheartedly support, it did so only after having found (1) that no explicit finding, in this case on certain elements of command responsibility, was made; and (2) crucially, that no implicit finding in this regard was made either. It imports to highlight again that the Appeals Chamber made that determination after having undertaken a "holistic reading" of the entire *Orić* Trial Judgement in order to see if the finding considered to be missing could be identified elsewhere in the Trial Judgement.[74] It is only after this two-step approach, and having completed a holistic reading, that the Appeals Chamber declines to undertake a speculative exercise. What the Majority in this case has failed to do is to undertake the "holistic reading" element for which the *Orić* Appeals Chamber advocates in order to determine whether the Trial Judgement as a whole provides the necessary findings. As demonstrated above, if the holistic reading is in fact done, all the findings are present.

Ground Two - Aiding and Abetting

22. Under Ground Two of its appeal the Prosecution submits that the Trial Chamber erred in law by requiring that the acts of the aider and abettor be "specifically directed" to assist the commission of the crime.[75] In particular, the Prosecution argues that the Trial Chamber erred in following the *Perišić* Appeal Judgement and requiring "specific direction" as an element of aiding and abetting, a requirement which it contends is not in line with previous chamber's approach to aiding and abetting or customary international law.[76] It submits that if the correct standard is applied, then Stanišić and Simatović should be convicted of aiding and abetting crimes in Bosanksi Šamac, Doboj and the SAO Krajina.[77]

23. The Judgement takes the position that the Trial Chamber did indeed err in its approach to aiding and abetting. Specifically, it finds that the Trial Chamber's position that "specific direction" is an element of aiding and abetting is an error of law.[78]

[73] Judgement, fn. 320.
[74] *Orić* Appeal Judgement, para. 52.
[75] Prosecution Appeal Brief, para. 129.
[76] Prosecution Appeal Brief, paras 131-153.
[77] Prosecution Appeal Brief, paras 154-193.
[78] Judgement, paras 103-108.

24. In support of its position the Majority points to the Tribunal's jurisprudential timeline, especially over the past two and a half years where the *Perišić* Appeal Judgement found that "specific direction" was an element of aiding and abetting, but the subsequent *Šainović et al.* Appeal Judgement and *Popović et al.* Appeal Judgement have found that it is not.[79] I have some sympathy for the approach taken by the Majority, if one is seeking answers to the question of whether "specific direction" is an element of aiding and abetting, however in my view the question itself is wrong. The more meaningful question in my view, which has been evaded or ignored throughout this longstanding discussion and jurisprudential battle, is a very simple one: "Whether, without making a finding on 'specific direction', a trier of fact can find beyond reasonable doubt that the contribution, supposed to be substantial (*actus reus*), and/or the intent (*mens rea*) of the alleged aidor and/or abettor (accessory) was set to aid and abet the crimes committed by another (principal)?" As is clearly demonstrated below, the question is preliminarily semantic and linguistic by nature, before becoming a legal issue at the second level. Therefore, it goes without contest that the key to the solution resides rather in the definition of both verbs "to aid" and "to abet". The dictionary Merriam-Webster provides the following very helpful, process-based, operational and dynamic definitions for both words: Whilst, "to aid" means "to provide what is useful or necessary in achieving an end", "to abet" means "to actively second and encourage (as an activity or plan) in order to assist or support in the achievement of a purpose".[80] It appears based on both operational definitions, that primarily there must be a link of causality or nexus, in the sense that "what is provided" shall aim at "achieving an end" or "achieving a purpose". Brought into the legal domain at the second level, this means that "what is provided" in terms of objective element (*actus reus*) or subjective element (*mens rea*) by aidor and/or abettor (accessory) shall aim at achieving the resulting "end" (the crimes committed by the principal). Therefore, it should be clearly demonstrated that the resulting crimes have occurred <u>specifically</u> because the aidor or abettor has provided such objective element (*actus reus*) and/or such subjective element (*mens rea*). This means that without such objective and subjective elements (*actus reus* and/or *mens rea*) on the part of the aidor and/or abettor, being **<u>specifically directed</u>** to achieve the resulting crimes, these could not have been committed.

[79] Judgement, paras 104-105.
[80] I note that this semantic and linguistic exercise can be expanded further when considering national level approaches. For example accomplice liability under English law refers to anyone who aids or abets, but also "counsels" or "procures", demonstrating the wide range of approaches at the national level. *See* Andrew Ashworth, *Principles of Criminal Law* (2nd edn, OUP 1995) p. 410.

25. Therefore, I believe that it is irrelevant to argue, as has been done so far, whether "specific direction" is a part of the *actus reus* or the *mens rea* of aiding and abetting liability.[81] "Specific direction" is rather a methodological threshold for the test of certainty about the nexus between an accused's contribution and/or intent and the alleged resulting crime(s). It is meant to reduce, confirm or clear the doubt, in order to prevent any error in concluding that the contribution may or may not have been meant for criminal purposes. I note that the Majority refers to the *Šainović et al.* Appeal Judgement in order to satisfy itself that "specific direction" is not an element of aiding and abetting. Undeniably criminal law at the national level can be a source of international law,[82] and the *Šainović et al.* Appeal Judgement's national level analysis of the jurisprudence of thirty one countries is very helpful on whether "specific direction" is a required element of aiding and abetting. However, experience shows comparative law is not an exact science and undertaking a comparative analysis of national legal systems involving subtleties of the jurisprudence is never an exact science, unless explanation is provided on the methodology including the parameters resorted to in assessing the conclusions drawn from any comparative exercise. However, another reading of the analysis in the *Šainović et al.* Appeal Judgement, far from demonstrating that "specific direction" is *not* a requirement, rather goes to prove that a degree of flexibility exists at the national level as to whether "specific direction" is required or not. This flexibility supports my position that the Trial Chamber is best placed to consider whether or not a finding on "specific direction" is required. But further analysis of the approach to aiding and abetting in some of the national legal systems mentioned in the *Šainović et al.* Appeal Judgement shows that such flexibility exists even within domestic jurisdiction itself. Taking at random three national jurisdictions mentioned in the *Šainović et al.* Appeal Judgement illustrates this flexibility in the approach as to whether "specific direction" is required or not. For example, under the USA 1962 Model Penal Code ("MPC") an accomplice satisfies the *actus reus* of aiding and abetting through the perpetrator's conduct by solicitation, adding or failing the legal duty to prevent the commission of an offence.[83] As a result, the mere knowledge of the crime does not satisfy the fault requirement for complicity, rather the accomplice must intend to participate in the crime's commission,[84] since the MPC makes clear that an accomplice acts with the "purpose of promoting or facilitating the commission of the offence" a similar standard as previously confirmed in *Nye and Nissen v United States*.[85] That standard is more

[81] *See e.g. Perišić* Appeal Judgement, Judge Meron and Judge Agius Separate Opinion pp. 2, 4 arguing against the Majority that specific direction should be considered under *mens rea*.
[82] *See* Article 38 (1), Statute of the International Court of Justice.
[83] MPC, s. 2.06 (2) (c), 3 (a).
[84] MPC, s. 2.06 (2) (c), (3) (a).
[85] *See* MPC, s. 2.06 (2), (3) (a); *Nye and Nissen v United States*, 336 US 613, 619 (1949).

recently elaborated on after the *Šainović et al.* Appeal Judgement in *Rosemond v United States* saying that the defendant must not just associate himself with the venture, but also participate in it "as something that he wishes to bring about and seek by his actions to make it succeed",[86] this second requirement being akin to "specific direction".

26. The US Supreme Court has also found that complicity requires an accused "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed".[87] Under the MPC the fault requirement (akin to level of contribution) is less than substantial or necessary and even a small degree of assistance suffices to satisfy that requirement.[88] And yet balanced against this established approach exists an apparent split within Appeals Courts in relation to the US Alien Tort Statute as to whether "purpose" (akin to specific direction) is a requirement under the *mens rea* of aiding and abetting at the international level.[89] The US Court of Appeals for the Second Circuit has held that purpose is a requirement,[90] whilst the Fourth Circuit has found that it is not.[91]

27. In German law, aiding and abetting involves any person who intentionally assists another in the intentional commission of an unlawful act.[92] Interestingly though, intent for aiding and abetting contains a double (*doppelter*) requirement. Firstly, the assistance must have a supportive effect on the commission of the offence. Secondly, and this element being in my view close to a specific direction requirement, the aider and abettor must *direct the act* towards the illegal action, although he does not need to detail every element of the offence.[93]

28. In French law, the accomplice either facilitates the perpetration or commission of the crimes by aid and assistance, or incites its commission by means of a gift, promise, threat, order, an abuse of authority or powers or gives the direction to commit it.[94] Here complicity requires a positive act, thus inaction is not sufficient,[95] appearing to remove the possibility of aiding and

[86] *Rosemond v United States*, 12-895 US, 1(c) (2014).
[87] *United States v Peoni*, 100 F 2d 401, 402 (2d Cir 1938).
[88] See *People v Durham*, 70 Cal 2d 171, 185 (1969); *Commonwealth v Murphy*, 844 A 2d 1228, 1234, (Pa 2004); *Commonwealth v Gladden*, 665 A 2d 1201, 1209 (Pa Super 1995).
[89] *See* Manuel J. Ventura, *Farewell to 'Specific Direction': Aiding and Abetting War Crime and Crimes Against Humanity in Perišić, Taylor, Šainović et al. and US Alien Tort Statute Jurisprudence*, The War Report: Armed Conflict, 2013, Geneva Academy of International Humanitarian Law and Human Rights, p. 27.
[90] *See* US Court of Appeals (Second Circuit), *Presbyterian Church of Sudan v Talisman Energy*, 582 F.3d 244, 2 October 2009, p. 259 as referred to in *Ventura* above, p. 28. *See also* US Court of Appeal (Second Circuit), *Kiobel* case p. 149.
[91] *Aziz v. Alcolac, 658 F.3d 388 (4th Cir. 2011).*
[92] German Penal Code, art. 27(1).
[93] Karl Lackner and Kristian Kühl, *Strafgesetzbuch:StGB Kommentar* (25th edn, C H Beck 2004), p. 195.
[94] French Penal Code, art. 121.7.
[95] Herve Pelletier and Jean Perfetti (eds), *Code Penal* (14th edn, Lexis Nexis 2002), p. 29.

abetting through omission which the Tribunal's jurisprudence supports.[96] It has been argued that the emphasis on French law is in fact on the mental element,[97] which presents us with the interesting approach in French law that it must be established that the accomplice furnished the aid with the knowledge that is supports the crime.[98]

29. This short analysis again demonstrates the flexibility given at the national level and shows that the *Šainović et al.* Appeal Judgement review of national law provides only a starting point for considering national practice. A far deeper analysis is required to fully understand each national legal system before it can be used to bolster a particular stance either "for" or "against" the element of "specific direction" although both, as I have discussed above, are seeking an answer to the wrong question.

30. As a result of this flexible approach in domestic legal systems, it appears that it is paramount that the "specific direction" be specifically looked for, in this particular case where there is no direct evidence establishing the objective and/or subjective link (*actus reus* and *mens rea*) between the contribution of Stanišić and Simatović and the crimes that the Trial Chamber found have been committed. Hence in my view, "specific direction" could be assessed in either the *actus reus* or the *mens rea*, but it is not required to be found in both before entering a conviction. This assessment is fact-based and can vary from one case or situation to another. Indeed, in the situations in which the "specific direction" is obvious and easily inferable from the *actus reus* or the *mens rea*, as established based on the evidence, there would be no need to further or specifically search for it. However, in situations where "specific direction" is not obvious and easily inferable, then there would be a need to further or specifically search for it. This approach allows trial chambers, who are best placed to assess the entirety of the evidence, a level of flexibility that allows them to tailor the requirements on a case-by-case basis.

31. The Trial Chamber here considered that "specific direction" was not obvious since the assistance provided by Stanišić and Simatović could be for legitimate purposes, not necessarily criminal purposes, which I refer to above as Joint Warfare Enterprise (JWE), as opposed to Joint Criminal Enterprise (JCE).[99] Since the Trial Chamber could not be certain that the contribution was for criminal rather than warfare purposes, it elected to examine "specific direction". In my view, the Trial Chamber was entitled to assess the "specific

[96] *See e.g. Popović et al.* Appeal Judgement, para. 1741; *Mrkšić and Šljivančanin* Appeal Judgement, para. 134; *Orić* Appeal Judgement, para. 43.
[97] Marina Askenova, *The Specific Direction Requirement for Aiding and Abetting*, Cambridge Journal of International and Comparative Law, 2015, Vol 4 Issue 1, p. 101.
[98] Yves Mayaud and Emmanuelle Allain (eds), *Code Penal*, (104th edn, Dalloz 2007) p. 126.
[99] *See above*, paras 8-9.

direction" as it did and I find no error in the Trial Chamber's approach. Indeed, whereas the objective element or the contribution of the accessory must be substantial (*actus reus*), it is not required for the subjective element (*mens rea*) that the aidor and/or the abettor shares the intent of the principal to commit the resulting crimes, but the aid and/or abettor must know that either or both of these objective and subjective elements is/are assisting the principal to commit those crimes.[100] And as explained above, the fact that, based on the Trial Chamber's findings, Stanišić and Simatović changed the personnel of the Unit after crimes have been committed, or started assisting the SDG only after a long period during which no crimes have been committed, lets us also reasonably infer that their *actus reus* and/or *mens rea* in assisting the forces was not "specifically directed" to aid and abet the crimes that were committed. This clearly shows that based on the findings of the Trial Chamber which examined the totality of the evidence before it, it would have been incorrect to find that the only reasonable inference is that the involvement of Stanišić and Simatović with the forces amount to aiding and abetting the crimes committed by those forces.

Conclusion

32. In conclusion, having carefully considered the Majority's approach, I cannot support the Judgement's position that the Trial Chamber erred in its approach to either Joint Criminal Enterprise or Aiding and Abetting. Therefore I am of the view that the acquittal of Jovica Stanišić and Franko Simatović, as pronounced by the Trial Chamber on 30 May 2013, should have been upheld.

Done in English and French, the English text being authoritative.

Dated this ninth day of December 2015,
at The Hague,
The Netherlands.

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Judge Koffi Kumelio A Afanđe

[Seal of the Tribunal]

[100] *See e.g. Lukić and Lukić* Appeal Judgement, paras 428, 440, 458 *referring to Blagojević and Jokić* Appeal Judgement, para. 221; *Aleksovski* Appeal Judgement, para. 162. *See also Rukundo* Appeal Judgement, para. 53; *Karera* Appeal Judgement, para. 321.

X. ANNEX A: PROCEDURAL HISTORY

A. Composition of the Appeals Chamber

1. On 3 July 2013, the President of the Tribunal at that time assigned the following Judges to form the Appeals Chamber's Bench in this case: Judge Theodor Meron, Judge Carmel Agius, Judge Fausto Pocar, Judge Liu Daqun, and Judge Khalida Rachid Khan.[1] On 9 October 2013, Judge Theodor Meron, who was elected to serve as Presiding Judge, designated himself as Pre-Appeal Judge.[2] On 16 December 2013, Judge Koffi Kumelio A. Afanđe was assigned to replace Judge Theodor Meron.[3] On 20 January 2014, Judge Fausto Pocar, who was elected to serve as Presiding Judge, designated himself as Pre-Appeal Judge.[4] On 28 November 2014, Judge Arlette Ramaroson was appointed to replace Judge Khalida Rachid Khan.[5] On 18 November 2015, the newly elected President of the Tribunal ordered that the Bench in this case shall not change in composition and that Judge Fausto Pocar shall remain the Presiding Judge of this case.[6]

B. Appeal

2. The Prosecution filed its notice of appeal on 28 June 2013[7] and its appeal brief on 11 September 2013.[8]

3. On 27 September 2013, the Prosecution filed a motion seeking leave to file excerpts of the *Taylor* Appeal Judgement,[9] rendered by the Appeals Chamber of the Special Court for Sierra Leone, as supplementary authority in its appeal.[10] On 15 November 2013, the Appeals Chamber granted the request and accepted the supplementary authority as validly filed.[11]

4. On 25 and 27 September 2013, respectively, Stanišić and Simatović filed a motion requesting an extension of time to file their response briefs.[12] On 9 October 2013, the Appeals

[1] Order Assigning Judges to a Case Before the Appeals Chamber, 3 July 2013.
[2] Order Designating a Pre-Appeal Judge, 9 October 2013.
[3] Order Replacing a Judge in a Case Before the Appeals Chamber, 16 December 2013.
[4] Order Designating a Pre-Appeal Judge, 20 January 2014.
[5] Order Replacing a Judge in a Case Before the Appeals Chamber, 28 November 2014.
[6] Order on the Composition of the Bench in a Case Before the Appeals Chamber, 18 November 2015.
[7] Prosecution's Notice of Appeal, 28 June 2013.
[8] Prosecution Appeal Brief, 11 September 2013 (confidential; public redacted version filed on 25 September 2013); Notice of Filing of Public Redacted Version of Prosecution Appeal Brief and Corrigendum, 25 September 2013.
[9] *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgement, 26 September 2013.
[10] Prosecution Request Seeking Leave to File Supplementary Authority and Supplementary Authority, 27 September 2013. See also Stanišić Defence Response to Prosecution Request Seeking Leave to File Supplementary Authority, 4 October 2013; Prosecution Reply in Support of Request Seeking Leave to File Supplementary Authority and Supplementary Authority, 8 October 2013.
[11] Decision on Prosecution's Request for Leave to File Supplementary Authority, 15 November 2013.
[12] Urgent Stanišić Defence Request for Extension of Time to File Response to Appellant Brief, 25 September 2013; Urgent Simatovic Defence Request for Extension of Time, 27 September 2013. See also Prosecution Response to Stanišić's and Simatović's Requests for Extension of Time to File Response Briefs, 4 October 2013; Stanišić Defence

Chamber granted the motion in part and ordered Stanišić and Simatović to file their response briefs no later than 5 November 2013. It also granted the Prosecution an extension of time and ordered it to file its brief in reply no later than 25 November 2013.[13] On 23 October 2013, Stanišić filed a motion requesting an extension of word limit for his response brief.[14] Simatović and the Prosecution responded to the motion on 25 October 2013, requesting extensions of word limit for their respective response brief and reply brief should Stanišić's motion be granted.[15] On 31 October 2013, the Appeals Chamber granted Stanišić and Simatović an increase of the word limit for their response briefs, not exceeding 5000 words, and granted the Prosecution an increase of the world limit for its reply brief, not exceeding 2000 words.[16]

5. Stanišić and Simatović filed their response briefs on 5 November 2013.[17] The Prosecution filed its reply brief on 25 November 2013[18] and a book of authorities to the reply brief on 26 November 2013.[19]

C. Other matters

6. On 25 June 2015, the Appeals Chamber granted the Prosecution's motion[20] to replace audiovisual files of witness Milan Babić's testimony and to lift the confidentially of a transcript excerpt.[21]

D. Appeal Hearing

7. The scheduling order for the appeal hearing was issued on 12 June 2015 ordering oral arguments to be held on 6 July 2015.[22] On 30 June 2015, the Appeals Chamber issued an order

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Reply to Prosecution Response to Urgent Stanišić Defence Request for Extension of Time to File Response to Appellant Brief, 7 October 2013; Simatovic Defence Joinder to Stanisic Defence Reply, 7 October 2013.

[13] Decision on Stanišić and Simatović Defence Motions for Extension of Time to File Responses to the Prosecution Appeal Brief, 9 October 2013.

[14] Stanišić Defence Urgent Request for Extension of Word Limit, 23 October 2013.

[15] Simatovic Defence Response to Stanisic Defence Urgent Request for Extension of Word Limit, 25 October 2013; Prosecution's Response to Stanišić's Urgent Request for Extension of Word Limit, 25 October 2013. See also Prosecution's Response Regarding Simatović's Response to Stanišić's Urgent Request for Extension of Word Limit, 28 October 2013.

[16] Decision on Stanišić's Urgent Request for Extension of Word Limit, 31 October 2013.

[17] Stanišić Response Brief, 5 November 2013 (confidential; public redacted version filed on 28 November 2013); Corrected Stanišić Response Brief, 8 November 2013 (confidential); Simatovic Defence Response to Prosecution Appeal Brief, 5 November 2013 (confidential; public redacted version filed on 9 December 2013).

[18] Consolidated Prosecution Reply Brief, 25 November 2013 (confidential; public redacted version filed on 29 November 2013); Notice of Filing of Public Redacted Version of Consolidated Prosecution Reply Brief and Corrigendum, 29 November 2013.

[19] Prosecution Book of Authorities to Consolidated Prosecution Reply Brief, 26 November 2013.

[20] Prosecution Motion to Replace Audiovisual Files of Witness Milan Babić's Testimony and to Lift Confidentially of Transcript Excerpt, 16 October 2014.

[21] Decision on Prosecution Motion to Replace Audiovisual Files of Witness Milan Babić's Testimony and to Lift Confidentially of Transcript Excerpt, 25 June 2015. See also Prosecution Notice of Compliance with Decision Regarding Audiovisual Files of Witness Milan Babić's Testimony, 30 June 2015.

[22] Scheduling Order for the Appeal Hearing, 12 June 2015.

amending the scheduling order, in which it modified the timetable for the appeal hearing.[23] The Appeals Chamber heard the oral arguments of all parties on 6 July 2015.[24]

[23] Order Amending the Scheduling Order for the Appeal Hearing, 30 June 2015.
[24] AT. 1-102.

XI. ANNEX B: GLOSSARY

A. Jurisprudence

1. Tribunal

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BLAGOJEVIĆ AND JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement")

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 (with corrigendum of 27 January 2005) ("*Blaškić* Appeal Judgement")

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000, ("*Blaškić* Trial Judgement")

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement")

DELALIĆ et al.

Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "PAVO"), Hazim Delić, and Esad Landžo (aka "ZENGA"), Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

DERONJIĆ

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Appeal Judgement")

ĐORĐEVIĆ

Prosecutor v. Vlastimir Đorđević, Case No. IT-05-87/1-A, Judgement, 27 January 2014 ("*Đorđević* Appeal Judgement")

FURUNDŽIJA

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000, ("*Furundžija* Appeal Judgement")

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement")

GALIĆ

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement")

GOTOVINA and MARKAČ

Prosecutor v. Ante Gotovina and Mladen Markač, Case No. IT-06-90-A, Judgement, 16 November 2012 ("*Gotovina and Markač* Appeal Judgement")

HADŽIHASANOVIĆ AND KUBURA

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement")

HARADINAJ et al.

Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A, Judgement, 19 July 2010 ("*Haradinaj et al.* Appeal Judgement")

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement")

KORDIĆ AND ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (with corrigendum of 26 January 2005) ("*Kordić and Čerkez* Appeal Judgement")

KRAJIŠNIK

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement")

KRNOJELAC

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

KRSTIĆ

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

KUNARAC et al.

Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković, Case Nos IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

KUPREŠKIĆ et al.

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al*. Appeal Judgement")

KVOČKA et al.

Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić, and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al*. Appeal Judgement")

LIMAJ et al.

Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu, Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement")

LUKIĆ AND LUKIĆ

Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-32/1-A, Judgement, 4 December 2012 ("*Lukić and Lukić* Appeal Judgement")

D. MILOŠEVIĆ

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009 ("*D. Milošević* Appeal Judgement")

MRKŠIĆ AND SLJIVANCANIN

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement")

MUCIĆ et al.

Prosecutor v. Zdravko Mucić, Hazim Delić, and Esad Landžo, Case No. IT-96-21-A*bis*, Judgment on Sentence Appeal, 8 April 2003 ("*Mucić et al.* Appeal Judgement on Sentence")

D. NIKOLIĆ

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*D. Nikolić* Appeal Judgement")

ORIĆ

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement")

PERIŠIĆ

Prosecutor v. Momčilo Perišić, Case No. IT-04-81-A, Judgement, 28 February 2013 ("*Perišić* Appeal Judgement")

POPOVIĆ et al.

Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, *Radivoje Miletić*, *and Vinko Pandurević*, Case No. IT-05-88-A, Judgement, 30 January 2015 ("*Popović et al. Appeal Judgement*")

ŠAINOVIĆ et al.

Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević, *and Sreten Lukić*, Case No. IT-05-87-A, Judgement, 23 January 2014 ("*Šainović* Appeal Judgement")

SIMIĆ

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement")

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 (with corrigendum of 16 November 2006) ("*Stakić* Appeal Judgement")

TADIĆ

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

TOLIMIR

Prosecutor v. Zdravko Tolimir, Case No. IT-05-88/2-A, Judgement, 8 April 2015 ("*Tolimir* Appeal Judgement")

VASILJEVIĆ

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

2. ICTR

BAGILISHEMA

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement, 3 July 2002 ("*Bagilishema* Appeal Judgement")

BIZIMUNGU

Augustin Bizimungu v. The Prosecutor, Case No. ICTR-00-56B-A, Judgement, 30 June 2014 ("Bizimungu Appeal Judgement")

GATETE

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2012 ("*Gatete* Appeal Judgement")

KALIMANZIRA

Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement")

KARERA

Francois Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement")

MUHIMANA

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 ("*Muhimana* Appeal Judgement")

MUVUNYI

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 29 August 2008 ("*Muvunyi I* Appeal Judgement")

NAHIMANA et al.

Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al*. Appeal Judgement")

NTAGERURA et al.

The Prosecutor (Appellant) v. André Ntagerura (Respondent), Emmanuel Bagambiki (Respondent), and Samuel Imanishimwe (Appellant and Respondent), Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al*. Appeal Judgement")

NTAKIRUTIMANA

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement")

NTAWUKULILYAYO

Dominique Ntawukulilyayo v. The Prosecutor, Case No. ICTR-05-82-A, Judgement, 14 December 2011 ("*Ntawukulilyayo* Appeal Judgement")

RUKUNDO

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-2001-70-A, Judgement, 20 October 2010 ("*Rukundo* Appeal Judgement")

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement")

3. Special Court for Sierra Leone

TAYLOR

Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-A, Judgment, 26 September 2013 ("*Taylor* Appeal Judgement")

B. Defined Terms and Abbreviations

Adjudicated Facts I	*Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 25 November 2009, taking judicial notice of certain facts listed in *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Prosecution's Notification on Motion for Judicial Notice of Adjudicated Facts, 14 May 2007, Annex A, Prosecution's Proposed Adjudicated Facts.
Adjudicated Facts III	*Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 January 2010, taking judicial notice of certain facts listed in *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Second Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 12 December 2008, Annex, Proposed Facts.
Adjudicated Facts IV	*Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Third Prosecution's Motion for Judicial Notice of Adjudicated Facts, 26 July 2010, taking judicial notice of certain facts listed in *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Third Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 5 January 2010, Public Annex, Prosecution's Proposed Adjudicated Facts.
Appeals Chamber	Appeals Chamber of the Tribunal
Arkan	Željko Ražnatović also known as Arkan
AT	Transcript of Appeal Hearing on 6 July 2015
Babić	Milan Babić
Badža	Radovan Stojičić also known as Badža
Bosnian-Serb Republic	Serbian Republic of Bosnia-Herzegovina; on 12 August 1992, the name of the republic was officially changed to *Republika Srpska*
Captain Dragan	Dragan Vasiljković also known as Captain Dragan
DB	*Državne Bezbednosti* – State Security[25]

[25] The Trial Chamber noted that, in its understanding, the references to "DB", "RDB", and "SDB" by witnesses and in documentation referred to the same structures. See Trial Judgement, fn. 1. The Appeals Chamber also understands these acronyms to be interchangeable but has used the acronym "SDB" in this Judgement.

Hadžić	Goran Hadžić
ICC Statute	Rome Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
Indictment	*Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Third Amended Indictment, 10 July 2008
JATD	*Jedinice za Antiteroristička Dejstva* – Unit for Anti-terrorist Operations formed in August 1993. See also entry for Unit.
JCE	Joint Criminal Enterprise
JNA	*Jugoslovenska Narodna Armija* – Yugoslav People's Army
Karadžić	Radovan Karadžić
Kojić	Ilija Kojić
Kostić	Radoslav (or Radovan/Ante) Kostić
Martić	Milan Martić
Milošević	Slobodan Milošević
Mladić	Ratko Mladić
Mrkšić	Mile Mrkšić
MUP	*Ministarstvo Unutrašnjih Poslova* – Ministry of Interior. See also entry for SUP.

Practice Direction	Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002
Prosecution	Office of the Prosecutor
Prosecution Appeal Brief	Prosecution Appeal Brief, 11 September 2013 (confidential; public redacted version filed on 25 September 2013)
Prosecution Notice of Appeal	Prosecution's Notice of Appeal, 28 June 2013
Prosecution Submission on Agreed Facts	*Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Prosecution Submission on Agreed Facts, 15 June 2007
Prosecution Reply Brief	Consolidated Prosecution Reply Brief, 25 November 2013 (confidential; public redacted version filed on 29 November 2013)
RDB	*Rezor Državne Bezbednosti* – State Security Department. See also entry for DB.
Remarks During the December 1993 Meeting	Stanišić's remarks at a meeting in Belgrade on 13 and 14 December 1993
RS	*Republika Srpska*. See also entry for Bosnian-Serb Republic.
Rules	Rules of Procedure and Evidence of the Tribunal
RSK	Republic of Serbian Krajina
SAO	*Srpska Autonomna Oblast* – Serbian Autonomous Area
SAO Krajina	Serbian Autonomous Area of Krajina
SAO Krajina Police	Police forces of the Serbian Autonomous Area of Krajina
SAO Krajina TO	Territorial Defence of the Serbian Autonomous Area of Krajina
SAO SBWS	Serbian Autonomous Area of Slavonia, Baranja, and Western Srem

SBWS MUP	Ministry of Interior of the Serbian Autonomous Area of Slavonia, Baranja, and Western Srem
SBWS police	Police of the Serbian Autonomous Area of Slavonia, Baranja, and Western Srem
SBWS TO	Territorial Defence of the Serbian Autonomous Area of Slavonia, Baranja, and Western Srem
SDB	*Služba Državne Bezbednosti* – State Security Service. See also entry for DB.
SDG	*Srpska Dobrovoljačka Garda* – Serbian Volunteer Guard
SDS	*Srpska Demokratska Stranka* – Serb Democratic Party
September 1991 Visit to Dalj	Stanišić's visit to Dalj in the Serbian Autonomous Area of Slavonia, Baranja, and Western Srem on 19 or 20 September 1991
Serb Forces	One or more forces referred to in paragraph 6 of the Indictment
Simatović	Franko Simatović
Simatović Response Brief	Simatovic Defence Response to Prosecution Appeal Brief, 5 November 2013 (confidential; public redacted version filed on 9 December 2013)
SJB	*Stanica Javne Bezbjednosti* – Public Security Service
Stanišić	Jovica Stanišić
Stanišić Response Brief	Corrected Stanišić Response Brief, 8 November 2013 (confidential; public redacted version filed on 28 November 2013)
Statute	Statute of the Tribunal
SUP	*Sekretarijat za Unutrašnje Poslove* – Secretariat of Internal Affairs

SVK	*Srpska Vojska Krajine* – Serbian Army of Krajina
TO	*Teritorijalna Odbrana* – Territorial Defence
Trial Chamber	Trial Chamber II of the Tribunal
Trial Judgement	*Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Judgement, 30 May 2013
Tribunal	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
Unit	Serbian MUP DB unit formed by the Accused in the period from May to August 1991, precursor to the JATD
VRS	*Vojska Srpske Republike Bosne i Herzegovine*, later *Vojska Republike Srpske* – Army of the Bosnian-Serb Republic
22 January 1992 Intercepted Conversation	An intercepted telephone conversation between Stanišić and Karadžić on 22 January 1992