**UNITED NATIONS**

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-15-96-A

Date: 13 October 2022

Original: English

**IN THE APPEALS CHAMBER**

**Before:** **Judge Graciela Gatti Santana**
**Judge Lee G. Muthoga**
**Judge Aminatta Lois Runeni N'gum**
**Judge Yusuf Aksar**
**Judge Claudia Hoefer**

**Registrar:** **Mr. Abubacarr Tambadou**

**Date:** **13 October 2022**

**PROSECUTOR**

**v.**

**JOVICA STANIŠIĆ**
**FRANKO SIMATOVIĆ**

***PUBLIC***

# NOTICE OF FILING OF PUBLIC REDACTED VERSION OF STANIŠIĆ APPEAL BRIEF

**The Office of the Prosecutor:**
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1. Stanišić Defence hereby files a public redacted version of its Appeal Brief.[1]

Respectfully submitted,

Wayne Jordash QC

Counsel for Jovica Stanišić

Date: 13 October 2022

Word count: 33

[1] *Prosecutor v. Stanišić and Simatović*, Case No. MICT-15-96-A, Stanišić Defence Appeal Brief, 22 November 2021.

**UNITED NATIONS**

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-15-96-A

Date: 22 November 2021

Original: English

**IN THE APPEALS CHAMBER**

**Before:** **Judge Carmel Agius**
**Judge Lee G. Muthoga**
**Judge Aminatta Lois Runeni N'gum**
**Judge Yusuf Aksar**
**Judge Claudia Hoefer**

**Registrar:** **Mr. Abubacarr Tambadou**

**Date:** **22 November 2021**

**PROSECUTOR**

**v.**

**JOVICA STANIŠIĆ**
**FRANKO SIMATOVIĆ**

***PUBLIC REDACTED VERSION***
***WITH PUBLIC ANNEXES A AND B***

# STANIŠIĆ DEFENCE APPEAL BRIEF

**The Office of the Prosecutor:**
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1. Mr. Stanišić hereby files his appeal against the International Residual Mechanism for Criminal Tribunals ("Mechanism") Trial Chamber's ("TC") Judgement of 30 June 2021 ("Judgement"), pursuant to Rule 138 of the Rules of Procedure and Evidence ("Rules").

## APPEAL AGAINST CONVICTION

## I. GROUND 1

2. The TC erred in law in determining that the "organisation of training of Unit members and local Serb forces at the Pajzoš camp and their deployment during the takeover" was capable of amounting to practical assistance which had an effect, substantial or otherwise, on the perpetration of the crimes of persecution, murder, and forcible displacement by Unit members and local Serb forces.[1]

### A. THE SPECIFIC ERRORS OF LAW - *ACTUS REUS*

3. The TC found that Stanišić's *actus reus* consisted of the provision of training and deployment of men and that these had a substantiantal effect on the crimes.[2] Yet, the TC erred in law by failing to assess relevant factors, including the chain of command and reporting, that would have allowed them to assess Stanišić's acts and his remoteness from the crimes. Accordingly, the TC failed to reach principled findings on the existence of the requisite culpable *actus reus* link.

4. In failing to conduct a proper assessment, the TC ignored its own findings. The training amounted to two or three weeks of fitness and basic military training.[3] As the JNA and others were in command of all the men (other than two, Crni and Vuk) prior to the training and the JNA was in command immediately after Mr. Simatović's briefing,[4] the "deployment" found established was nothing more than a momentary act of authority of no significance to their *actual* deployment and overall command *by the JNA* during the takeover and crimes. Both acts of assistance were remote from the later crimes and separated by a myriad of JNA/Bosanski Šamac civilian authorities' planning and command.[5] Although Stanišic was found to have "consented" to the training and by extension the "deployment" of the trained men, he was not present at the training or the deployment.. On the facts found, his role in both the training and

[1] *Stanišić&Simatović*, Case No. MICT-15-96-T, Stanišić Defence Notice of Appeal, 6 September 2021 ("Notice"), para.16. All decisions referred to relate to MICT-15-96-T unless specificed otherwise.
[2] Judgment, 30 June 2021 ("Judgment"), para.605.
[3] Judgment, para.416; Stanišić Defence Final Trial Brief, 12 March 2021 ("Stanišić FTB"), paras 1016,1032,1053.
[4] Judgment, paras 416-420.
[5] *See e.g.*, Judgment, paras 211-234.

the "deployment" amounted to acquiescence inferred from nothing more than his prior control over the Pajzoš and Ležimir training camps.[6] Stanišić was not in direct contact with any of the principal perpetrators, nor any of the trained men or at the scene of any of the crimes.

5. Even without these factors showing remoteness, the TC's findings at their highest show that Stanišić's contribution to the crimes committed in Bosanski Šamac amounted to basic fitness and military training and the limited deployment of 50 men to join a contingent of 6,700 JNA units[7] (that were equipped with tanks and armoured personnel carriers) and a myriad of police and other local Serb forces.[8] Whilst some of the crimes were committed within days of the deployment, the most egregious crimes were committed several weeks after the men left Ležimir.[9] Some of the crimes were committed months later.[10]

6. The analysis of Stanišić's individual criminal responsibility is fundamentally flawed by the absence of any attempt to assess this manifest remoteness from the principal perpetrators or the (individual) crimes. In light of the fact that Stanišić was not present and did not actively participate, and the attenuated link between the training and deployment and the crimes, a reasonable inference arose that Stanišic's acts (the provision of training and the deployment) were in furtherance of legitimate military operations and thus were contrary to the furtherance of the crimes. The TC erred by failing to assess Stanišić's acts and their remoteness from the crimes, which was the minimum required to assess his individual criminal responsibility.

## B. APPLICABLE LAW

7. The *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial affect on the perpetration of the crime".[11] The *mens rea* requirement, which will be dealt with in Grounds 3 and 4, requires "that the aider and abettor knew that his acts or omissions assisted the commission of the *specific* crime by the principal, and that the aider and abettor was aware of the essential elements of the crime, which was ultimately committed, including the intent of the principal perpetrator".[12]

[6] Judgment, paras 409,418.
[7] Judgment, para.413; P01938, p.254.
[8] Judgment, para.215.
[9] *See e.g.,* Judgment, paras 225-234.
[10] Judgment, fn.1041, relying on P02752 and P02751.
[11] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998 ('*Furundžija*TJ'), para.249; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, 25 February 2004 ('*Vasiljević*AJ'), para.102; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004 ('*Blaškić*AJ'), para.46.
[12] Judgment, para.602 (emphasis added).

8. Distinct from perpetration, aiding and abetting provides a mechanism by which the law can establish responsibility for the consequences caused by the acts of another person, *i.e.,* the principal, acting under his own free will. This includes fixing responsibility where the actions of the accomplice have remote consequences.[13] However, in such cases, the risks that responsibility is attached in breach of the principle of culpability, are manifold and self-evident.[14]

9. The *actus reus* requirement that the accused's conduct has a *substantial effect* on the commission of the crime, coupled with the *mens rea* requirements that the accused act with knowledge that crimes will be committed and of the essential elements of offence, including the intent of the principal perpetrators, safeguard the principle of culpability.[15] They act in unison and must be assessed together.[16] For example, it is a settled rule of evidence that proximity to a crime is a basis to infer knowledge.[17] The corollary of that is that remoteness from a crime requires further evidence to establish knowledge, the probative value of which rising in proportion with the level of remoteness of the accused's acts. Accordingly, the practice of the *ad hoc* tribunals in assessing complicity liability indicates that an "equilibrium must be maintained between the level of contribution of the accused and his knowledge of the crime".[18] Where there is a strong indication of the Accused's mental state (*i.e.,* on account of their

[13] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001 ('*Delalić*AJ'), para.352; *Blaškić*AJ, para.48; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgment, 7 July 2006 ('*Ntagerura*AJ'), para.372; *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006 ('*Simić*AJ'), para.85; *Prosecutor* v. *Kondewa and Fofana*, Case No. SCSL-04-14-A, Judgment, 28 May 2008 ('*Kondewa*AJ'), paras 71-72; *Prosecutor v. Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ('*Mrkšić&Šljivančanin*AJ'), para.81; *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-A, Judgment, 20 October 2010 ('*Kalimanzira*AJ'), fn.238; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgment Volume II, 14 December 2015 ('*Nyiramasuhuko*AJ, Volume II'), para.3332.

[14] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999 ('*Tadić*AJ'), para.229; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ('*Aleksovski*AJ'), para.163; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgment, 23 October 2001 ('*Kupreškić*AJ'), paras 254,283; *Vasiljević*AJ, paras 102(i),134-135; *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case Nos ICTR-96-10-A and ICTR-96-17-A, Judgment, 13 December 2004 ('*Ntakirutimana*AJ'), para.530; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ('*Kvočka*AJ'), para.89; *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007 ('*Blagojević*AJ'), para.127; *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-A, Judgment, 21 May 2007 ('*Muhimana*AJ'), para.189; *Prosecutor v. Seromba*, Case No. ICTR-01-66-A, Judgment, 12 March 2008 ('*Seromba*AJ'), para.139; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-A, 29 August 2008 ('*Muvunyi*AJ'), para.79; *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-A, Judgment, 20 October 2010 ('*Kalimanzira*AJ'), para.74.

[15] *See e.g., Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgement, 28 February 2013 ('*Perišić*AJ'), Joint Separate Opinion of Judges Meron and Agius, paras 2–4.

[16] Maria Aksenova, *Complicity in International Criminal Law* (Oxford University Press, 2016) ('Aksenova'), pp. 126-127.

[17] See e.g., *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-A, Judgment, 4 December 2012 ('*Lukić*AJ'), paras. 440,444-446, 460.

[18] Aksenova, pp.126-127, citing *Furundžija*TJ, paras 273-274.

presence at the crime scene), a weaker conduct requirement may be accepted (*i.e.*, a contribution inferred from the authority of the accused).[19] The reverse is also true.

## 1. Principle of Culpability - Concerns Underlying the Specific Direction Debate

10. There has been significant uncertainty in relation to the *actus reus* of aiding and abetting, specifically in relation to the specific direction requirement. As the following review of jurisprudence demonstrates, the challenge has been calibrating the approach to *actus reus*, in the face of changing and uncertain standards of knowledge, whilst maintaining the culpability equilibrium. However, the apparent legal uncertainty over specific direction has masked what is a steadfast principle: the need to be satisfied of a robust culpability link to ensure respect for individual criminal responsibility and the principle of personal culpability, *particularly in remote cases*.

11. In *Tadić*, the AC explained the safeguards applicable to aiding and abetting in circumstances where, in comparison with joint criminal enterprise, aiding and abetting requires no agreement between the accused and co-members of a criminal enterprise. In fact, the principal need not even be aware of the accomplice's assistance to the commission of crimes. The risk of remoteness is therefore heightened. Against that background the AC explained that:

> The aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime […] and this support has a substantial effect upon the perpetration of the crime.[20]

12. *Tadić* was followed in *Kupreškić*, *Vasiljević*, *Simić*, *Ntakirutimana*, *Kvočka*, *Kalimanzira*, *Rukundo* and *Ntawukulilyayo*.[21]

13. In *Mucić*, the AC explained the rationale behind the *Tadić* rule, indicating that its utility is in ensuring culpability between acts and remote crimes in accessorial liability by underscoring its redundancy in cases of direct perpetration. The definition in *Tadić*,

> although broadly expressed, appears to have been intended to refer to liability for aiding and abetting or all forms of accomplice liability […] In the case of primary or direct responsibility, where the accused himself commits the relevant act or omission, the qualification that his participation must "directly and substantially affect the commission of the offence" is an unnecessary one.[22]

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[19] Aksenova, pp.126-127, citing *Furundžija*TJ, paras 273-274.
[20] *Tadić*AJ, para.229. See also *Perišić*AJ, para.27.
[21] *Blagojević*AJ, para.127. See also *Aleksovski*AJ, para.163; *Kupreškić*AJ, paras 254 and 283; *Vasiljević*AJ,paras. 102(i) and 134–135; *Simić*AJ,para.85; *Ntakirutimana*AJ, para.530; *Kvočka*AJ, para.89; *Kalimanzira*AJ, para.74; *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, Judgment, 20 October 2010, Judgment ('*Rukundo*AJ'), para. 52;, and *Prosecutor v. Ntawukulilyayo*, Case No. ICTR-05-82-A, Judgment, 14 December 2011 ('*Ntawukulilyayo*AJ'), para.214.
[22] *Delalić*AJ, para.345 (emphasis added).

14. The AC in *Blagojević* found that the application within the jurisprudence of specific direction requirement had been inconsistent. It found that *Tadić* had "not been explicitly departed from",[23] but "specific direction has not always been included as an element of the *actus reus* of aiding and abetting" because such a finding will often be implicit that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime."[24] Significantly, it noted that where specific direction was an implicit component of the *actus reus*, it could be no defence that assistance that substantially affected the commission of an offence "amounted to no more than his or her 'routine duties'", which should also be understood to be lawful duties. It is apparent from the corollary of this finding, that the AC considers that where, as in this case, the Accused's contributions to crimes are nothing more than his lawful and routine actions, remoteness arises, threatening the principle of personal culpability and that in those circumstances it is appropriate to insert an implicit requirement that the Accused specifically directed his actions towards the crime into the *actus reus* of aiding and abetting.

15. This aspect of *Blagojević* has not been overruled.[25] In fact, the *Perišić* AC held that "[w]here an accused aider and abettor is remote from relevant crimes, evidence proving other elements of aiding and abetting may not be sufficient to prove specific direction. In such circumstances, the AC […] holds that explicit consideration of specific direction is required".[26]

16. In *Perišić*, the AC majority found that specific direction was implicit within aiding and abetting in some cases but in remote cases it would require explicit consideration.[27] The majority explained that 'specific direction' "establishes a culpable link between assistance provided by an accused individual and the crimes of principal perpetrators".[28] In explaining the effect of remoteness on liability, the AC stated that:

> The factors indicating that acts of an accused aider and abettor are remote from the crimes of principal perpetrators will depend on the individual circumstances of each case. However, some guidance on this issue is provided by the AC's jurisprudence. In particular, [the] significant temporal distance between the actions of an accused individual and the crime he or she allegedly assisted decreases the likelihood of a connection between that crime and the accused individual's actions. The same rationale applies, by analogy, to other factors separating the acts of an individual accused

[23] *Blagojević*AJ,para.189.
[24] *Blagojević*AJ,para.189.
[25] *See e.g., Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Judgment, 23 January 2014 ('*ŠainovićAJ*'),para.1625.
[26] *Perišić*AJ,para.39.
[27] *Ibid*,para.37 (emphasis added).
[28] *Ibid*.

> of aiding and abetting from the crimes he or she is alleged to have facilitated. Such factors may include, but are not limited to, geographic distance.[29]

17. Unsurprisingly, Chambers have found the following (non-exhaustive) fact patterns indicative of remoteness:

i. Temporal distance between the act of aisstance and the crimes;[30]
ii. Spatial and geographic distance;[31] and
iii. Where the acts of assistance are routine and lawful duties and do not suggest planning or foresight of criminal operations.[32]

18. *Perišić* was followed by the *Taylor* Appeals Judgment at the SCSL which considered that the "substantial effect" requirement ensured that there is a sufficient causal or "culpable link" – "a criminal link – between the accused and the commission of the crime before an accused's conduct may be adjudged criminal", and "is sufficient to ensure distinctions between those who may have had an effect on non-criminal activity and those who had a substantial effect on crimes, when applied to the facts of a given case […] in accordance with principles of personal culpability".[33]

19. As is well known, the AC in *Šainović* found that specific direction was not a requirement of aiding and abetting. However, the concerns expressed in *Perišić* about remoteness and the need to establish a culpable link remain valid.

20. *Šainović* relied on *Blagojević* as authority for the proposition that specific direction is not an essential element of the *actus reus* of aiding and abetting.[34] This is of course true but, it is submitted, inapposite. The principal point that *Blagojević* makes is that the reason that specific direction is not an explicit requirement of aiding and abetting is that it "will often be implicit".[35] *Šainović* went onto conclude that "specific direction is not an element of the *actus reus* of aiding and abetting, while the substantial contribution of the aider and abettor is".[36]

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[29] *Perišić*AJ, para.40 (emphasis added), citing *Kupreškić*AJ, paras275-277 (finding that a six-month delay between an appellant being observed unloading weapons and a subsequent attack reduced the likelihood that these weapons were directed towards assisting in this attack).
[30] *Ibid*.
[31] *Ibid*.
[32] *Blagojević*AJ,para.189.
[33] *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, 26 September 2013 ('*Taylor*AJ'),para.391.
[34] *Šainović*AJ,para.1625.
[35] *Blagojević*AJ,para.189.
[36] *Šainović*AJ,para.1625.

Whilst also true, it is also not mutually exclusive with the central observation in *Blagojević* that specific direction may be implicit within the substantial contribution element.

21. Finally, the AC's survey of customary international law also provided no basis to discount the possibility that specific direction may be implicit in other essential elements. Notably, the AC drew out of the judgments it reviewed, essential questions amounting to establishing a culpability link. In the *Stalag Luft III* case, the British Military Court convicted 18 defendants of "being concerned in the killing" of unlawfully executed British prisoners of war. The Court required the defendants to be shown to have had knowledge and in addition that the concerned act "had some real bearing on the killings" which the Judge equated with a "performance which went on directly to achieve the killing".[37] In the *Zyklon B* case, the focus of the analysis, according to the AC, was on "whether each defendant had influence over the supply of gas" to concentration camps, "and knew of its unlawful purpose".[38] In the *Pig-cart parade* case, the German Supreme Court applied a standard amounting to causation: "[t]he court found that [the defendants] caused in part what the two victims suffered".[39] In the *Roechling* case, the French Military Tribunals convicted a defendant of accessorial liability focussing their analysis, in terms of culpability, on "the impact that each defendant could exert on the principal's offences".[40]

22. Whilst these cases may not have applied the specific direction requirement *per se*, the common denominator in every case, as well as at the heart of the AC's consideration each time it visits the issue, is the need to apply a robust safeguard, in whatever formulation, to ensure the principle of culpability.

23. Whether express or implied, Stanišić's convictions for aiding and abetting would not survive the application of these principles to the facts of this case. For example, had the TC could not have applied the *Stalag Luft III* standard, that Stanišić's actions "had some real bearing" on the Bosanski Šamac crimes, since the remoteness of Stanišić's acts (training and provision of men), when considered alongside the timing, nature and overwhelming command of the JNA, meant in reality that Stanišić's acts had no meaningful bearing on the actions of any perpetrators. If it had applied the *Roechling* standard, it would have assessed "the impact that [Stanišić] could exert on the principal's offences" as zero, since on the TC's own findings,

[37] *Šainović*AJ,para.1631.
[38] *Ibid*,para.1628.
[39] *Ibid*,para.1633.
[40] *Ibid*,para.1634.

the principals were members of or subordinated to the JNA at the time the offences were committed.[41] Had it inquired as to "whether [Stanišić] had influence" over or (partially) "caused" the crimes, applying the standards in *Zyklon B* and the *Pig-cart parade* case respectively, for reasons outlined above, no conviction would have been possible.

24. Indeed, what the *Šainović* review of customary international law most aptly demonstrates is that, where there should be development and refinement, the Judgment in this case in fact represents a considerable regression, in the standards of individual criminal responsibility, since the World War II cases.

### 2. Other relevant legal considerations

25. As is clear from the above analysis, a proper assessment of the link or connection between the accomplice's conduct and the crimes that the conduct is said to have substantially contributed to, is inherently a "fact-based inquiry".[42] In other words, the substantiality of the accomplice's contribution to the crimes must depend on the facts of the case. Underscoring the importance of a fact-sensitive approach to ensure the principle of culpability, *Taylor* found that:

> this case-by-case assessment ensures both that the culpable are properly held responsible for their acts and that the innocent are not unjustly held liable for the acts of others. Merely providing the means to commit a crime is not sufficient to establish that an accused's conduct was criminal. Where the crime is an isolated act, the very fungibility of the means may establish that the accused is not sufficiently connected to the commission of the crime.[43]

### 3. Conclusions on the applicable law

26. Throughout the ebbs and flows of the debate concerning specific direction, the sanctity of the principles of individual criminal responsibility and personal culpability have never been questioned. Whilst at the ICC, respect for the principle of personal culpability in the application of aiding and abetting liability has concretised by inclusion of a purposive requirement within the Rome Statute,[44] the *ad hoc* tribunals have not had the comfort of that statutory certainty and the manner in which culpability is determined, particularly in remote cases, has been the subject of contentious debate. However, the majority of the debate and disagreement has been around phraseology and formulation, rather than principle. As Judge Afande noted:

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[41] Judgment,para.590.
[42] *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-A, Judgment, 29 September 2014 ('*Nzabonimana*AJ'), para.489; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgment, 3 April 2007 ('*Brđanin*AJ'), para.151.
[43] *Taylor*AJ, para.391.
[44] ICC Statute,Art.25.3(c).

> [I]t 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. '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.[45]

27. It is submitted that regardless of the formulation of the test, what is indispensable in every case is a fact-sensitive application of standards that properly assess and determine culpability. In other words, if specific direction is to be rejected in remote cases, then the application of the substantial effect requirement should be read strictly and with certitude of a causal *and* culpable link.

C. ANALYSIS

28. As will be discussed below, it is submitted that the TC made the correct predicate findings concerning Stanišić's remoteness from both the assistance provided and the crimes but failed to consider either Mr, Stanišić's remoteness from the assisting acts or the remoteness of the training and the deployment from the crimes. The TC then failed to consider the culpable link with this remoteness in mind.

### 1. Chronology of Relevant Events

29. The trained men arrived in Bosanski Šamac on 11 April.[46] The takeover commenced on 17 April,[47] six days later. No crimes were found to have been committed during this period. As discussed in Ground 3-4, the TC's findings during this period are consistent with preparation for a military takeover, not the commission of crimes. The takeover occurred in the course of a single day and "without significant resistance", it involved the "seizure of key facilities within the town" as well as repelling an attack by "Croatian forces along with paramilitary formations" on 17 and 18 April.[48]

30. Whilst the TC cited to evidence that the deployed men played a "significant role" in the takeover,[49] the JNA area command had organised their training at Pajzoš and Ležimir,[50] and the men were under the command of the JNA,[51] as they had been from the moment they arrived

[45] *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-A, Judgement, 9 December 2015 ("*Stanišić*AJ"), Dissenting Opinion of Judge Afanđe, para.25.
[46] Judgment,para.209.
[47] Judgment,para.215.
[48] Judgment,para.217.
[49] Judgment,para.216.
[50] Judgment,para.418.
[51] Judgment,paras 216,218.

in Bosanski Šamac.[52] As outlined above, the significance of the role of the deployed men must also be seen in light of the limited deployment of 50 men who joined 6,700 JNA men[53] (equipped with tanks and armoured personnel carriers) and a myriad of Serbian police and TO units.[54]

31. The offending that commenced following the takeover, included "arbitrary arrests, looting, raping, and the destruction of religious buildings and cultural artifacts" and abuses in detentions.[55] The TC did not make any findings that showed that these specific crimes were planned prior to the provision of the training nor the arrival of the trained men in Bosasnki Šamac nor *a fortiori* that Stanišić was a party to such a plan. Indeed, in acquitting him of membership of the JCE,[56] the TC rejected the allegation that Stanišić was party to any plan to commit crimes at any point in the indictment period, including during the Bosanski Šamac takeover.

32. The most heinous crimes committed in Bosanski Šamac were arguably the killings of 16 men at Crkvine.[57] These occurred around 7 May 1992,[58] several weeks after the men had been deployed and absorbed within the JNA's chain of command. Throughout that time, they had been operating under the JNA's command. Whilst some of these men were amongst the perpetrators, so too were the TO.[59]

33. Amongst other crimes which it found Stanišić responsible for, the TC relied on evidence of killings committed as late as 29 July 1992[60] and in "about May or June" 1992.[61] It relied on evidence of exchanges of non-Serb prisoners to Croatia in September 1992.[62] The TC also relied upon the "local Serb leadership's enactment of "discriminatory measures".[63] A range of perpetrators are indicated including the JNA, local police, local paramilitaries, local civilians

[52] Judgment,para.211.
[53] Judgment,para.413; P01938, p.254.
[54] Judgment,para.215.
[55] See Judgment,paras 221-222.
[56] Judgment,para.598.
[57] Judgment,paras225-229.
[58] Judgment,para.225.
[59] Judgment,para.227.
[60] See Judgment,para.222, fn.984, relying on [redacted]; see also [redacted]
[61] Judgment,fn.984; P01867,p.3.
[62] Judgment,fn.1041, relying on P02752 and P02751.
[63] Judgment,para.222.

and the TO throughout this time.[64] These perpetrators, crimes and misconduct plainly had no link to the training and barely any relevant link to the deployment of the men.

### 2. Failure to Establish Substantial Contribution and Culpable Link

#### a. Stanišić's Remoteness from the Acts of Assistance

34. The TC found that Stanišić aided and abetted crimes in Bosanski Šamac because he "organis[ed] the training of Unit members and Serb forces at the Pajzoš camp".[65] However, this legal finding is made in direct contrast to the Chamber's earlier factual finding that "the organization of [that] training occurred at various levels of the JNA area command and officials in Belgrade and included transport provided by the JNA" and that Stanišić was merely "aware and consented to this arrangement".[66]

35. In any event, on close analysis, the finding that Stanišić both deployed and trained the 50 men, comes down to one impoverished finding: his prior control over Ležimir and Pajzoš camps.[67]

36. The only other finding linking Stanišić to the training and deployment was Simatović's address to the Unit members before their departure to Bosanski Šamac.[68] As discussed in Ground 2, however, the Prosecution did not allege, and the TC did not find, that Stanišić requested Simatović to deliver that address or even that he knew anything about it. The TC did not find Stanišić was present at either the training or the deployment and the finding that he was "aware and consented"[69] to it is consistent with a finding that he was not present and played no active part in either the deployment or training. That being the case, Stanišić's responsibility for the training and deployment, and for the totality of the aiding and abetting convictions, rests upon his authority and control over Pajzoś and Ležimr camps and his *actus reus* amounts to no more than acquiescence.

37. The TC also failed to distinguish between the cases against the two accused, even though they were fundamentally different.[70] Whereas the Prosecution alleged that Simatović

[64] Judgment,paras 222-234
[65] Judgment,para.605.
[66] Judgment,para.418.
[67] Judgment,para.409.
[68] Judgemnt,para.417.
[69] Judgment,para.418.
[70] See Ground 2.

was present at Pajzoš as commanding officer,[71] the prosecution against Stanišić was limited to a remote case.[72] Despite those differences, the TC's assessment of their responsibility was identical, a fault which is symptomatic of a failure to search for the requisite culpable link standard.

38. Moreover, as explained in Ground 2(b), it is clear that the "deployment" refers to the specific moment in time when Mr. Simatović was found to have briefed the men and allowed them to be dispatched to Bosanski Šamac. It does not refer to any continuing authorisation to use the men, since the TC accepted that Stanišić exercised no control over them from the moment they left Ležimir.[73]

39. In particular, the 50 men who were deployed were made up of 30 former police from SBWS and 20 men from Bosanski Šamac. Aside from Crni and Vuk,[74] who had previously been connected to the Nascent Unit, none of the others had any prior knowledge or relationship with either of the accused.[75] The 20 men from Bosanski Šamac were never formally incorporated into the Unit.[76] In relation to the 30 former police from SBWS, regardless of their incorporation into the Unit, they were under the authority of he Accused only *prior* to their deployment to Bosanski Šamac (*i.e.*, during their training only).[77]

40. Accordingly, whatever minimal authority Stanišić may have exercised over the deployed men prior to their deployment, it was from a geographic distance from the assistance and the crimes and was made irrelevant by the JNA's command from the moment they arrived in Bosanski Šamac.[78]

41. In sum, it was the the JNA area command and officials in Belgrade- not Stanišić- that organised the training and transport.[79] The men were flown in JNA helicopters to Bosanski Šamac and were received there by JNA officials.[80] They were immediately formally subordinated to the JNA[81] and remained under JNA command throughout. Stanišić exercised

[71] ProsecutionPTB,paras 59,82.
[72] ProsecutionPTB, para. 95.
[73] Judgement,para.424.
[74] See P01938,pp.256,257; OFS-07, 17-December-2019, p.12; P00846,p.3.
[75] Judgment,para.419. See P01938,pp.256-257; OFS-07,17-December-2019,pp.12-14. See also P00846,p.3.
[76] Judgment,para.416.
[77] Judgment,paras 419,424.
[78] Judgment,para.211.
[79] Judgment,para.418.
[80] Judgment,para.211.
[81] Judgment,para.211.

no control or authority over the men from the moment they departed from Ležimir[82] and there is no evidence that the men returned to Stanišić's control, nor that he or Simatović did anything following the "deployment" to facilitate the commission of crimes or in anyway direct or support them.

**b. Remoteness of the Assistance from the Crimes**

42. The findings that the training and deployment amounted to "practical assistance" which had a substantial effect on the perpetration all of the relevant crimes[83] was made without distinguishing between the accused or explaining how Stanišić's remote acts could conceivably have had an effect, substantial or otherwise, on the commission of those crimes.

43. In so doing, the TC failed to account for the obvious remoteness between Stanišić's conduct and each of the specific crimes. There is no focused assessment of factors such as: temporal remoteness,[84] spatial and geographic distance,[85] the accused's position in the aiding chain of command, and whether the acts of assistance were routine and lawful duties.[86]

44. Absent *a fortiori* is any attempt at a crime-by-crime assessment of a culpable link between them and Stanišić's assistance (training and deployment prior to the commencement of the crimes) as is clearly required in law.[87]

45. It is plain that the training bore no relationship whatsoever to the heinous crimes. The training was not unlawful *per se*. Applying the logic of *Blagojević*,[88] express consideration of specific direction would be required in these circumstances. At a minimum a clear culpable link is required to be assessed and reasons provided. The reasons are obvious: there is a high risk that the lawful conduct of armed conflict will become criminalised. Few acts are more routine in the waging of lawful armed conflict than the provision of military training of the type provided at Pajzoš and Ležimir and subsequent briefings by training commanders at passing out parades. The notion that these acts *without more* gives rise to criminal liability for months of subsequent war crimes and crimes against humanity must be examined with a great deal of care.

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[82] Judgment,para.424
[83] Judgment, fn.2359. The TC adopted the entirety of the factual findings in sections II.C.3 and V.D.2(a).
[84] *Perišić*AJ, para.40, citing *Kupreškić*AJ, paras275-277.
[85] *Ibid.*
[86] *Blagojević*AJ,para.189.
[87] See Applicable Law, *supra* paras 7-27.
[88] *Ibid*.

46. The TC should have examined the nature and circumstances of the training in order to analyse its relationship with the crimes. [redacted] There is nothing to suggest that the training was designed to further, or was in anticipation of, criminal operations. Rather the training was consistent with preparation for being subordinated into a military chain of command and participation in a military operation such as the takeover, in which the men played a "significant role", under the command of the JNA.[92]

47. This evident lack of analysis is manifest in the TC's finding that "[t]he fact that, once deployed, the Unit members were resubordinated to the JNA is immaterial".[93] This finding makes it clear that the TC did not merely fail to attach adequate weight, it rejected the relevance of a clear indicia of remoteness to its assessment of the Stanišić's individual criminal responsibility. The men trained and deployed were never under Stanišić's command during the crimes and *could* have been commanded in a manner contrary to Stanišić's awareness or intent.

48. The TC's errors are equally clear from the absence of any attempt to appreciate that logically the substantial effect of any assistance upon the commission of crimes, and therefore culpability, must attenuate over time and geographic space.[94] Other indicia of remoteness that the TC failed to consider include the JNA's role in organising the training,[95] the involvement of other personnel in the commission of the crimes, the geographic distance between Stanišić and the crimes,[96] the fact that Simatović not Stanišić delivered the address to the men prior to departure[97] and the fact (as discussed in Ground 2) that the crimes that they participated in bore no relation to the training or the reason for their "deployment".[98]

49. For example, the Crkvine massacre of 16 civilians is arguably the gravest of the crimes that Stanišić was found to be responsible for. Yet the circumstances of it demonstrate an absence

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[89] Judgment,para.416.
[90] [redacted].
[91] [redacted]
[92] Judgment,para.216.
[93] Judgment,para.605.
[94] See *Perišić*AJ,paras 38-39, referring to the impact of temporal (and other) remoteness on culpability.
[95] See Relevant Chronology, supra paras. 29-33.
[96] *Ibid.*
[97] Judgment,para.417.
[98] Judgment,para.416; Stanišić FTB, paras1016,1032,1053.

of any link between his acts and the crimes, brutal as they were.[99] It amounted to arbitrary killings of detained civilians, [redacted][100] by a Debeli on around 7 May 1992.[101] Quite how the training that happened in March 1992 and the return of the men to the JNA for assistance in the military takeover had anything but the most attenuated link to these horrific crimes is difficult to see or know.[102] The TC made no effort to explain, suggesting that the required culpable link was not assessed.

50. Had the TC assessed remoteness, it would have concluded that neither the training or the deployment could be shown to be linked to the crimes in any meaningful way, let alone have any effect, substantial or otherwise, on their execution. Stanišić was exceedingly remote from the assistance and the assistance was, in turn, vanishingly and increasingly remote from the crime. The TC erred in law in failing to consider, assess and reason these issues and wrongly, thus, found established a culpable *actus reus* link between Stanišić and the crimes.

## II. GROUND TWO: THE TRIAL CHAMBER ERRED IN FACT AS TO THE ACTUS REUS OF AIDING AND ABETTING

### A. INTRODUCTION

51. In addition to the legal errors addressed above, the TC made a number of factual errors in its determination of the *actus reus* of aiding and abetting. Specifically, the TC failed to properly assess and analyse the totality of evidence on the organisation of the training and deployment of the Unit members and local Serb forces, including failing to consider Stanišić's responsibility as distinct from that of Simatović.

52. The TC was duty bound to identify Stanišić's acts and conduct that led to his providing assistance to the crimes, find them proven beyond a reasonable doubt and explain them in the Judgment. However, the TC consistently conflated the two Accused, including when finding that "the Accused's contribution consisted of training and making those forces available during the takeover, and not in directing them during the operation".[103] No reasonable trier of fact would have assessed Stanišić's individual responsibility in this manner.

[99] Judgment,para.620.
[100] [redacted]
[101] Judgment, paras225-229.
[102] See also Ground 2(c).
[103] Judgement,para.605.

53. Moreover, no reasonable trier of fact could have concluded that the training of the Unit members and local Serb forces and/or their initial deployment had a substantial effect on the entirety of the crimes.[104]

## B. SUB-GROUND 2(A): FAILURE TO IDENTIFY AND ASSESS ANY ACTS OR CONDUCT THAT, DISTINCT FROM SIMATOVIĆ'S, ESTABLISHED STANIŠIĆ'S RESPONSIBILITY FOR ORGANISING TRAINING

54. The Trial Chamber's identification of the arrangements for the training consisted of the following findings:

1) at the end of March 1992, a group of around 20 men from Bosanski Šamac were trained by members of the Unit at Ležimir and Pajzoš. Also around this time, a group of former police from the SAO SBWS, including Lugar, Debeli, and Witness RFJ-035, received similar training by Unit members;[105]
2) members of the Unit trained locals from Bosanski Šamac at Ležimir and Pajzoš. The organisation of this training occurred at various levels of the JNA area command and officials in Belgrade and included transport provided by the JNA. In view of Stanišić's and Simatović's authority over the Unit and the Ležimir and Pajzoš camps, the TC could only conclude that they were aware and consented to this arrangement. The Accused would have been aware in allowing the use of their facilities and trainers that they would be supporting military action and, in the context of the conflict at the time, the commission of crimes by these forces;[106] and
3) the training provided to the new members of the Unit, the approximately 20 locals from Bosanski Šamac, and their deployment to Bosanski Šamac provided practical assistance that had a substantial effect on the commission of crimes there.[107]

55. The TC appears to have premised its conclusions that Stanišić was involved in the training of the 50 men on the most tenuous of bases, making a gargantuan leap. Having found that "Ležimir and Pajzoš operated as camps under the Accused's authority and control at least in the first part of 1992, until at least March or April",[108] the TC drew the expansive conclusion

[104] Judgement,paras.424,605.
[105] Judgement,para.416.
[106] Judgement,para.418; Note: The Trial Chamber most probably made an omission when referring only to "locals" in the paragraph 418. The said arrangement was not restricted to locals. The documentary evidence ([redacted]) that the TC used as reference is clear on this.
[107] Judgement,para.424.
[108] Judgement,para.409.

that, accordingly, the training conducted there was "done at the Accused's direction, with their authorization, as well as their financial and logistical support".[109]

56. The point is succinctly made by another of the TC's finding which contradicts the above conclusion that the Accused directed and provided financial support to the training. In relation to the training of the 50 men, it provided that, in light of the Accused authority over the Unit and the Ležimir and Pajzoš camps the TC could "only conclude that they were aware and consented to" the training organised by the "JNA area command and officials in Belgrade". The Accused were merely "aware in allowing the use of their facilities and trainers that they would be supporting military action."[110] No reasonable trier of fact could have reached both conclusions beyond a reasonable doubt.

57. In addition, as further explained in Ground 2(b), the TC erred in failing to distinguish between Stanišić and Simatović and their role in the training. This distinction is clearly represented in the parties' respective cases concerning their involvement and presence in Pajzoš, which clearly show a distinction in the roles. First, the Prosecution's case acknowledges that, whilst both accused established Pajzoš, it was the result of Simatović's - not Stanišić's - plans.[111] [redacted],[112] but did not present evidence of Stanišić's presence. In his FTB, Simatović argued that he was present in Pajzoš but only for the purpose of intelligence gathering[113] and that "Simatović did not participate in any of the stages of referral and stay of persons from training in the area of Bosanski Šamac."[114] The Stanišić FTB argued that "while there is some evidence that the training of men prior to the Bosanski Šamac operation involved some of the men from the Serbian MUP and DB, including Simatović, "there is no reliable evidence to show that this was at the behest of Stanišić or with his support, acquiescence, or knowledge".[115] Stanišić was not present at any point during the training.[116] Further, the training at Ležimir and Pajzoš and deployment of men to Bosanski Šamac was not in furtherance of crimes.[117]

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[109] Judgement,para.409.
[110] Judgement,para.418.
[111] ProsecutionFTB,para.283.
[112] [redacted]
[113] SimatovićFTB,para.511.
[114] SimatovićFTB,para.681.
[115] StanišićFTB,para.820. See also paras 1025-1030.
[116] StanišićFTB,paras1025-1030.
[117] StanišićFTB,paras1015, 1016-1024.

58. Accordingly, no reasonable trier of fact would have failed to address the two Accused distinctly or indeed have reached exactly the same conclusion concerning their acts and conduct. It was necessary for the TC to differentiate between them, in order to make a proper factual assessment of the evidence, and to examine all the necessary factors in order to reach a conclusion on Stanišić's *individual* criminal responsibility.

59. As a consequence of the failure to distinguish between the Accused, the TC failed to consider how, if at all, Stanišić had been shown to be responsible for Simatović's acts. First, the TC had to assess whether Simatović was responsible; then Stanišić's acts and conduct had to be assessed to ascertain whether any of those acts could be attributed to him.

60. Had this analysis been undertaken, it would have revealed an absence of any relevant or probative evidence of any act by Stanišić that caused or facilitated the training (or deployment). It is impossible to infer, beyond reasonable doubt, any relevant act by Stanišić based solely on his *de jure* relationship with Simatović and/or his previous authority over the nascent Unit. The TC's findings fail to address any factual basis for the conclusion that Stanišić's authority over the nascent Unit led to relevant orders, consent or acquiescence over alleged members of the Unit at the time of the training (and deployment). It is there impossible to ascertain what the TC considered Stanišić's role was in facilitating the training and how it came to this conclusion. There is no evidence of Stanišić communicating let alone instructing Simatović at the relevant period of time, or allowing training in any sense.[118]

61. Accordingly, it is unclear from either the TC's findings or the evidence, how the training was done at Stanišić's "direction, with [his] authorization, as well as [his] financial and logistical support"[119] or even that he was "aware and consented to this arrangement."[120] Neither is there relevant findings or evidence of Stanišić's authority over the Unit (or Unit members) or his authority over the Ležimir and Pajzoš camps at the relevant time.

62. Indeed, Stanišić's assumed authority over Pajzoš rests on the impricise finding that "Ležimir and Pajzoš operated as camps under the Accused's authority and control at least in the first part of 1992 until at least March or April."[121] However, this finding itself raises a reasonable doubt in relation to the TC's presmine that Stanišić's and Simatović's authority over the Unit and the Ležimir and Pajzoš camps was sufficient to attribute responsibility to Stanišić

[118] StanišićFTB,paras1025-1030.
[119] Judgement,para.409.
[120] Judgement,para.418.
[121] Judgement,para.409.

for both the training and deployment. First, since the training began on the end of March,[122] the Trial Chamber was not convinced itself that Stanišić retained authority throughout the training and through the deployment.

63. Second, even if Stanišić had authority over the camps and the men, this generalised authority cannot – without more – be the basis for a finding beyond a reasonable doubt that Stanišic was "aware and consented to this arrangement."[123] This is plainly an inference too far.

64. Indeed, regarding authority over the Unit, the TC made only one relevant finding, which did not establish authority at the relevant time: "the Accused had authority over this force and determined its use and deployment until at least mid-April 1992".[124] The TC made no reference to this finding.

65. What the Trial Chamber should have committed to was a highly scrutinised analysis of evidence regarding each of the Accused in order to determine each of the Accused's relationship with the relevant Unit members, not with the Unit as such. Stanišić's or Simatović's previous authority over the nascent Unit cannot be a basis for the conclusion of their authority at the time of the training (or deployment). This commitment was not fulfilled. There is no examination of evidence or acknowledgment of the lack of evidence of Stanišić's authority over the Unit members involved in the training or Bosanski Šamac events in general.

66. Moreover, the TC failed to determine with precision which members of the Unit Stanišić had authority over at this time. While the TC speaks generally of the Accused's authority over the Unit until at least mid-April 1992,[125] the evidence is clear that the only members of the nascent Unit who subsequently went to Bosanski Šamac were Crni and Aleksandar Vuković aka Vuk.[126] As such, according to the TC's reasoning, Stanišić's authority could only have extended to them and could therefore not be inferred from the above findings. Nonetheless, the TC failed to explore Crni or Vuk's involvement in the training and, more importantly, any acts of the Accused which facilitated their training.

67. There is no evidence of Stanišić being in charge or control of any of the ex-Unit members at the time of the training and "deployment" on which the entirety of the aiding and abetting convictions rest. His liability cannot be inferred from previous relationships and de

[122] Judgement,paras407, 416.
[123] Judgement,para.418.
[124] Judgement,para.388.
[125] Judgement,para.388.
[126] See P01938,pp.256-257.

jure positions. Accordingly, given the lack of any other direct or circumstantial evidence that Stanišić was aware of training of locals or Debeli's unit, the Trial Chamber erred in fact in concluding that, at the critical period, that he consented to and therefore was responsible for, the organisation of the training.[127]

## C. GROUND 2(B): NO REASONABLE TRIAL CHAMBER WOULD HAVE FOUND STANIŠIĆ WAS RESPONSIBLE FOR DEPLOYING THE UNIT MEMBERS AND LOCAL SERB FORCES

68. The Trial Chamber found that:

1) through organising the training of the Unit members and local Serbs forces at Pajzoš camp, near Ilok, Croatia, and through their subsequent deployment during the takeover of Bosanski Šamac municipality in April 1992, Stanišić and Simatović provided practical assistance, which had a substantial effect on the perpetration of the crimes of persecution, murder, and forcible displacement by Unit members and local Serb forces;[128] and
2) the fact that, once deployed, the Unit members were re-subordinated to the JNA is immaterial, as *the Accused's* contribution consisted of training and making those forces available during the takeover, and not in directing them during the operation.[129]

69. The Trial Chamber's reasoning appears apparent from the following additional conclusions:

1) *the Accused* had authority over this force and determined its use and deployment until at least mid-April 1992;[130]

2) members of the Unit could not participate in combat operations without the approval of *the Accused*;[131]

3) around 10 April 1992, Simatović addressed the Unit members, including Debeli, Lugar, and Witness RFJ-035, and the trainees from Bosanski Šamac at Pajzoš and

[127] Judgement,para.418.
[128] Judgement,para.605.
[129] Judgement,para.605 (with a reference to the entire Bosanksi Šamac factual section).
[130] Judgement,para.388.
[131] Judgement,para.419.

informed them of their deployment to the Bosanski Šamac municipality in Bosnia and Herzegovina;[132]

4) on or around 11 April 1992, after being briefed by Simatović at Pajzoš, paramilitaries flew in JNA helicopters from an airstrip at Ležimir and arrived in Batkuša, a Serbian village near Bosanski Šamac, and that, among the group of around 50 men, 30 came from Serbia while the remaining 18 to 20 were from Bosanski Šamac;[133] and

5) given that this was a significant contingent, that they were briefed by Simatović personally prior to departure, and that they departed from Pajzoš, the Trial Chamber is convinced that this deployment was authorized by *the Accused*."[134]

70. As obvious from the above findings, the Trial Chamber repeatedly failed to distinguish the individual responsibility of Simatović and Stanišić.

## 1. The Trial Chamber's Failure to Assess "Deployment" against Command over the Crimes

### a. Momentary Command

71. No reasonable TC could have found Stanišić responsible for any deployment or concluded that any deployment amounted to more than a momentary intervention in the overall command of the trained men.

72. In light of the TC's findings, at worst, Simatović's briefing amounted to making the Unit and locals trained at Pajzoš and Ležimir available prior to the takeover for the purpose of the takeover (which according to evidence and findings lasted for 37 minutes only[135]). The briefing was a fleeting command of little or no consequence to the crimes eventually committed and was not shown to be linked to Stanišic's acts or conduct.

73. The Trial Chamber made the following relevant findings:

1) the 20 local men from Bosanski Šamac were not formally incorporated into the Unit;[136]

[132] Judgement,para.417.
[133] Judgement,para.209.
[134] Judgement,para.419.
[135] P02040,p.1.
[136] Judgement,para.416.

2) in March 1992, following their training at the camps by the Unit, Debeli, Lugar, and [redacted] were incorporated into the Unit, and they were under the authority of *the Accused* prior to their deployment;[137]
3) Crni, Debeli, and Lugar were part of this group, with Crni in charge of the men from Serbia, which, according to documentary evidence, had been legalised at the level of Šamac Municipality and at the highest level in Serbia and Yugoslavia;[138] and
4) it was unconvinced that the Accused directed or had command and control over the members of the Unit in the course of the operations or the commission of crimes in Bosanski Šamac.[139]

74. Only two out of 30 men alleged to be members of the Unit had any connections to the nascent Unit, namely Crni and Vuk, hence indirectly with Stanišić and the MUP in general.[140] Although the Trial Chamber found that Debeli's Unit was "incorporated into" the Unit, [141] this conclusion must be examined with care. None of these men, according to the evidence and the TC's findings, had any prior relationship with either of the Accused.[142] On the TC's own findings, Stanišić ceased to exercise any control over all 50 men once they departed from Ležimir.[143] They were immediately subordinated to the JNA for the week before the crimes and throughout their commission.[144] In line with the evidentiary situation acknowledged by the TC, there is no conclusive evidence on the existence of the nascent Unit at the time of Debeli's men's deployment in Bosanski Šamac.[145] In other words, any incorporation into the DB Unit was notional and had no impact on the JNA's command. It does not amount to real authority, let alone operable command.

75. Thus, any command over the 50 men could only have been momentary at best, *i.e.,* at the time of Simatović's briefing. No reasonable trier of fact could have concluded otherwise.

**b. Briefing by Simatović was not a Military Command**

76. The second bases upon which the TC concluded that Stanišić had deployed the men to Bosanski Šamac was on the basis that around 10 April 1992, Simatović *addressed* the group of

[137] Judgement,para.419.
[138] Judgement,para.209.
[139] Judgement,para.424.
[140] See P01938,pp.256-257; OFS-07,17-December-2019,pp.12-14. See also P00846,p.3.
[141] Judgement,para.419.
[142] Judgement,paras.407,419.
[143] Judgment,para.424
[144] Judgement,para.422.
[145] Judgment,para.389.

trainees at Pajzoš "and informed them of their deployment to the Bosanski Šamac municipality in Bosnia and Herzegovina."[146] Subsequently, the TC – [redacted] – upgraded this stating that "they were *briefed* by Simatović personally".[147]

77. Simatović's personal address cannot amount to a "deployment" in the way the term is generally understood, let alone a deployment by Stanišić. The briefing done by Lieutenant Colonel Nikolić aka Kriger and Debeli on the night of the takeover is a perfect example of a meaningful military briefing wherein operable command, tasks and organisation of the military operation is discussed in detail.[148]

78. [redacted]

79. [redacted]

80. Clearly, Simatović's address was no more than a minimal contribution to any military deployment. It contained no military instructions, let alone instructions to commit crimes. It was, at worst, a passing out parade of those recently trained.

81. The TC failed to appreciate its own findings about the time when new members joined the Unit,[151] as well as the finding on lack of command and control upon their arrival to Batkuša.[152] The deployment can only have meant that the men were under Simatović's command for an extremely limited period, and that the real command was in the hands of the JNA (prior to the training) and Lieutenant Colonel Nikolić aka Kriger (after the training). No reasonable trier of fact could have found otherwise. No reasonable trier of fact could have

[146] Judgement,para.417.
[147] Judgement,para.419.
[148] [redacted].
[149] [redacted].
[150] [redacted].
[151] Judgement,para.416.
[152] Judgement,para.424.

presumed on the basis of Stanišić's *de jure* relationship with Simatović, Crni and Vuk (see paragraph 74 above) that Simatović's briefing amounted to Stanišić' deployment.

### 2. The Trial Chamber's Failure to Consider Stanišić's Acts and Conduct

82. As a result of the lack of differentiation between the two Accused, the Trial Chamber erred by wrongly attributing Simatović's acts to Stanišić. The Prosecution case was, as summarised in the Judgment, that "Simatović personally deployed from Pajzoš to Bosanski Šamac a mixed group of Unit members and Bosanski Šamac locals, who had undergone training by Unit members at Pajzoš in March 1992."[153]

83. The Prosecution also alleged that "[f]rom late 1991, at the Pajzoš SDB camp Simatović commanded the Unit training Serb Forces that would be deployed to remove non-Serbs from Serb-claimed areas of Croatia and BiH."[154] In addition, "[o]n 16-17 April, at Simatović's order, the Unit trained at Ležimir (Serbia) and Pajzoš (Croatia) attacked Bosanski Šamac, co-ordinating with the JNA, RSMUP and other Serb Forces."[155]

84. The Prosecution case against Stanišić, however, was limited to a remote case and did not involve his presence at the training or the deployment: "[t]he Accused deployed the Unit, under Unit member Dragan Djordjević aka Crni, to take over Bosanski Šamac in April 1992 and forcibly remove the non-Serb population."[156]

85. The respective cases of the Accused also differed as to their roles. According to Simatović his visits to Pajzoš are directly related to the co-operation that existed between the Second and Seventh RDB Administrations. Pajzoš was a centre for radio reconnaissance and a place of interaction between the operatives of the two Administrations that were there on the same task – gathering intelligence within the intelligence centre on Pajzoš. In addition, Simatović "argues that he played no role in bringing the individuals who arrived from Bosanski Šamac for training at Ležimir and Pajzoš and in no way controlled their actions upon their return."[157]

[153] Judgement,para.411(emphasis added).
[154] ProsecutionPTB,para.59.
[155] ProsecutionPTB,para.82.
[156] ProsecutionPTB,para.95.
[157] Judgement,para.415.

86. Stanišić "argues that none of these former members, including Crni, were deployed from Pajzoš as members of an elite Serbian State Security Service unit under his command."[158] Stanišić did not command men located in Ležimir or Pajzoš between spring 1992 and late 1993. There is no evidence of Stanišić at any time using those men in those locations to arm, train, equip myriad Serb Forces, and repeatedly deploy those units into ethnic cleansing operations across Croatia and BiH.[159] [redacted][160] In March 1992, Stanišić ordered the Nascent Unit to disband.[161] Stanišić was not involved in the recruitment and deployment of men or planning of the Bosanski Šamac operation.[162]

87. Despite these different cases, and the TC's acknowledgment of the significance of assessing Stanišić's authority on a case-by-case basis, and specifically "to examine how […] power and authority manifested themselves in relation to the specific events charged in the Indictment",[163] they failed to apply it in Bosanski Šamac.

88. Ignoring their own admonishment, the TC found that both Accused "authorized" the deployment and made "those forces available during the takeover" without differentiation as to the conclusion, the underlying analysis or the evidence and facts relied upon.[164]

89. The TC relied on the finding that "this was a significant contingent, that they were briefed by Simatović personally prior to departure, and that they departed from Pajzoš" in finding that the deployment was authorised by the Accused.[165] This was enough for the generic inference that the Accused (no differentiation) authorised deployment.

90. Moreover, the finding that "members of the Unit could not participate in combat operations without the approval of the Accused"[166] [redacted].[168] The TC

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[158] Judgement,para.412.
[159] StanišićFTB,para 435.
[160] [redacted]
[161] StanišićFTB, para.713.
[162] StanišićFTB, para.1027.
[163] Judgement, para.350.
[164] Judgement, para.605.
[165] Judgement, para.419.
[166] Judgement, para.419.
[167] Judgement, para.419, fn.1679; [redacted].
[168] [redacted].

appears to have extrapolated from this evidence and unreasonably inferred that it spoke to the specific roles of both Stanišić and Simatović, then and months later. A careful review of the evidence shows that no reasonable trier of fact would have done so.

91. [redacted] In other words, consistent with Stanišić's defence, even though he had some overarching authority over the men, he was remote from their day-to-day activities. The only evidence relied upon by the Trial Chamber relating to the issuance of actual orders concerned Simatović, not Stanišić. No reasonable trier of fact could have analysed the parties' respective cases or the evidence without making these relevant distinctions. Even if the TC was satisfied that Simatović was present and participated in the training and deployment, the TC had to be satisfied that this was done at the express behest of Stanišić. As the TC's findings show, this analysis was not done.

## D. SUB-GROUND 2(C): NO REASONABLE TRIER OF FACT COULD HAVE CONCLUDED THAT THE TRAINING AND THE DEPLOYMENT HAD A SUBSTANTIAL EFFECT ON THE TOTALITY OF THE CRIMES

92. The *actus reus* of aiding and abetting consists of acts or omissions[171] which assist, encourage or lend moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime.172 Whether an act or omission had a substantial effect on the commission of a crime is a fact-based inquiry in light of all the evidence as a whole.[173]

93. The TC concluded that Stanišić and Simatović provided practical assistance, through training and deployment, which had a substantial effect on the perpetration of the crimes of persecution, murder, and forcible displacement by Unit members and local Serb force.[174] The

169 [redacted].
170 [redacted].
171 *Nahimana*AJ,para.482; *Ntagerura*AJ,para.370; *Blaškić*AJ,para.47.
172 *Nahimana*AJ,para.482; *Blagojević&Jokić*AJ,para.127; *Ndindabahizi*AJ,para.117; *Simić*AJ,para.85; *Ntagerura* J,para.370,fn.740; *Blaškic*AJ,paras 45,48; *Vasiljević*AJ,para.102; *Čelebići*AJ,para.352; *Tadić*AJ,para.229.
173 *Blagojević&JokićAJ*,para.134 (*see also,* paras.197–199); *Muvunyi*AJ,para.80; *Mrkšić&Šljivančanin*AJ, para.200; *Kalimanzira*AJ, para.86; *Rukundo*AJ,para.52; *Ntawukulilyayo*AJ,para.214; *Lukić&Lukić*AJ,para.438; *Taylor*AJ,para.370; *Nzabonimana*AJ,para.489*; Popović*AJ,para.1741; *Nyiramasuhuko*AJ,para.3332.
174 Judgment,para.605. *See also,* para.424.

Accused's contribution consisted of training and making those forces available during the takeover, and not in directing them during the operation.[175]

94. The TC's conclusions on substantiality were remarkably scant. Indeed, in the entire factual findings part of the Trial Judgment regarding Bosanski Šamac (Crimes II. C.3. and Joint Criminal Enterprise - V.D.2. (a)), the word "substantial" was used once when the TC concluded in paragraph 424 that "the training provided to the new members of the Unit, the approximately 20 locals from Bosanski Šamac, and their deployment to Bosanski Šamac provided practical assistance that had a substantial effect on the commission of crimes there."[176] As a fair reading of the relevant sections show, no explanation is provided that would allow Stanišić to know how his assessment was reached.

95. This lack of particularity reflects the TC's failure to perform a fact-based inquiry[177] on the substantiality of the practical assistance on the crimes for which Stanišić has been convicted. There is no basis in the Judgment for a conclusion that two and a half-weeks of fitness and military training and a de minimis deployment had a substantial effect on the entirety of crimes.

96. The TC's analysis appears to be limited to the conclusion that the 30 men from Serbia played a significant role.[178] [redacted] No reasonable trier of fact would have extrapolated this finding or concluded that the link between the training and the deployment and the crimes established a sufficient culpable links between Stanišić and the crimes.

## 1. Training

97. The TC made curiously inconsistent findings on the nature of the training received by Debeli's unit and locals from Bosanski Šamac. The TC referred to it in contradictory ways: as both "special" training[181] (without making any explanation on why it reached that conclusion)

[175] *Ibid.*
[176] Judgment, para.424.
[177] *Blagojević&Jokić*AJ,para.134. *See also*, *Muvunyi*AJ,para.80.
[178] Judgment,para.216.
[179] Judgment,para.216.
[180] [redacted]
[181] Judgment,paras 214,422.

and thereafter simply as "training".[182] As a review of the evidence relied upon shows, no reasonable trier of fact would have concluded that it was special. It was in fact predominantly fitness training with some elements of military training.

98. [redacted]

99. [redacted]

100. [redacted]

101. [redacted]

102. Accordingly, there was nothing to indicate planning or preparation for any of the crimes subsequently committed in Bosanski Šamac or indeed any obvious causal link to the crimes. The nature of the training, together with the reality of the conflict in Bosanski Šamac (that the Trial Chamber failed to assess) gave rise to at least a strong, competing inference – that the training was a contribution to the legitimate preparation for defence of the Bosanski Šamac Serbs and/or their legitimate war effort, due to the existing war threats from Croatia and with

[182] Judgment,paras 411,415,416,418,419,424.
[183] [redacted]
[184] [redacted]
[185] [redacted]
[186] [redacted]
[187] [redacted]
[188] [redacted]
[189] [redacted]
[190] [redacted]

the BiH Muslims and Croats undergoing war preparations.[191] Demographic statistics are consistent with the threat posed to the Bosnian Serbs in Bosanski Šamac. Of the 208 deaths in Bosanski Šamac in 1992, the majority 123 were Serbs and 12 were Muslims, 30 were Croats, 17 were of other ethnicity and 26 of unknown ethnicity.[192]

103. Moreover, the TC expressly found that the Accused "trained and deployed Unit members and locals from Bosanski Šamac to assist in the takeover operation of Bosanski Šamac".[193] The takeover lasted for 37 minute,194 with no reported casualties. The crimes occurred thereafter.

104. As for the evidence of what happened after the takeover, the detail of the crimes does not reflect the training. Had the crimes involved an express or implied reliance upon some aspect of the training, a reasonable trier of fact could have found established a causal link that showed the training had some effect on the crimes. [redacted].[195] In conclusion, absent this express reasoning, it is not obvious or discernible how the TC could or did identify a link, let alone a significant or substantial effect.

## 2. Deployment

105. As already discussed in the G2(b) section, according to the Trial Chambers findings,[196] the deployment was limited to a brief passing out parade to the men who had arrived pursuant to JNA command and were immediately returned to JNA command. The trained men (except two) were not even loaned, but merely trained and returned to the JNA. Deployment was nothing more than returning the men to the JNA after they had been trained.

106. There are no findings or evidence of more than two men (among 6700 strong Serb forces in Bosanski Šamac[197]) having a relationship with Stanišić prior to the training or deployment.[198] Moreover, when the men left the training camp, they travelled in JNA helicopters[199] and

[191] [redacted]
[192] P02068,p.43.
[193] Judgment,para.419.
[194] P02040,p.1.
[195] [redacted]; AF1126; [redacted]
[196] Judgment,paras 417-419,424.
[197] Judgment,para. 413.
[198] See Grounds 2(a) and (b).
[199] Judgment,paras 209,417.

immediately upon arrival were subordinated to the JNA local command, i.e., Kriger.[200] Accordingly, the deployment was, at best, command over the men during the training, and momentary authority over the men as they exited the training base at Ležimir.[201] Accordingly, in the midst of such continuing command by the JNA before, and immediately after the training, and throughout the commission of the crimes, it is difficult to ascertain how a reasonable trier of fact could have considered, except in the most remote way, how Simatović's briefing and/or the return of the men to the JNA, could have caused or contributed to the crimes.

107. The evidence also supports this de minimis interpretation of deployment and no reasonable trier of fact could have disregarded it. [redacted][202]

### 3. The Trial Chamber failed to Assess the Assistance and its Alleged Link to the Crimes in Bosanski Šamac

108. The TC acknowledged that they received evidence on the different criminal activity of Serb forces against the non-Serb population throughout the municipality of Bosanski Šamac, including arbitrary arrests, looting, raping, and the destruction of religious buildings and cultural artifacts, murders, torture and other mistreatment of the non-Serb detainees in at least six detention facilities throughout Bosanski Šamac.[203]

109. However, the TC made only three findings on the commission of crimes beyond a reasonable doubt in Bosanski Šamac:

1) The 7 May 1992 Crkvine massacre - killing of 16 men at the Crkvina detention facility in Bosanski Šamac;[204]

2) The detention of non-Serb men by Serb forces, and that those forces, including members of the paramilitaries that arrived in Batkuša and others under their command, engaged in criminal activities, such as subjecting detainees to severe abuse and killings in various detention facilities throughout Bosanski Šamac;[205] and

[200] Judgment,paras 422,424.
[201] See Grounds 2(a) and (b).
[202] [redacted]
[203] Judgment,paras 221,222.
[204] Judgment,para.232.
[205] *Ibid.*

3) That the acts of violence committed by Serb forces during and after the takeover forced a significant number of non-Serbs to leave the municipality of Bosanski Šamac.[206]

110. The latter is perceived as result of the prior two, so we will primarily analyse the first two. The number of people that left Bosanski Šamac during 1992 amounted only to 92, while 129 people left Bosanski Šamac between 1992 and 1995.[207]

**a. Crkvine massacre**

111. The TC's analysis was remarkably scant and failed to show, expressly or impliedly, how either the training or the deployment was linked to the crime. Although the TC assessed the identity of the perpetrators and the cruelty involved, it neglected to consider this vital issue. The crime was assessed in the Judgment as "a Murder as a Crime Against Humanity (Count 2) and as a Violation of the Laws or Customs of War (Count 3)" section, where it was concluded that "on or about 7 May 1992, 16 non-Serbs were intentionally killed at the Crkvina detention facility, in Bosanski Šamac, by members of the Serb forces".[208]

112. The TC found that Lugar and Tralja/Goran Simović, participated in the beating of non-Serb detainees as well as the killing of 16 Muslim or Croat men at the detention facility.[209] In addition, the TC found "that the record reflects that a person by the name of Debeli Musa also participated in the events that took place in Crkvina", the TC did "not, however, consider that the Prosecution has supported its claim that Laki and Avram participated in the massacre."[210]

113. [redacted]

[206] Judgment,para.234.
[207] P02068,p.45.
[208] Judgment,para.234.
[209] Judgment,para.229.
[210] *Ibid.*
[211] [redacted].
[212] [redacted].
[213] [redacted].

[redacted][214]

114. In sum, even though the TC assessed the Crkvine massacre for the purposes of sentence as a crime that "stands out with its brutality",[215] they neglected to conduct any assessment or reasoning that would explain how the training or deployment had any effect on the commission of this crime. The killings in Crkvine occurred almost a month after the completion of training and deployment and did not require any specialist skills or depend upon command, even it would seem the JNA command. Other than the fact that Lugar, Tralja and Debeli Musa were trained and were momentarily briefed by Simatović, no link is discernable or obvious. The training does not manifest or even echoe in the crime. The deployment was a miniscule moment in the overall pattern of command.

### b. Severe abuse and killings in various detention facilities throughout Bosanski Šamac[216]

115. For the second group of crimes, the TC made various findings in relation to severe abuse and killings in detention centre including crimes committed by "the "specials". [217]

116. Additionally, an examination of the underlying evidence does not disclose any manifest link or nexus to the assistance. The evidence in paragraph 222 ofarbitrarily detained Muslims and Croats, leads to a conclusion that the number of detainees in the first month after takeover was more than five times lower than in the summer of 1992, when it rose drastically.[218] Additionally, at the beginning of the conflict, after takeover, "a number of prisoners were released".[219] The detainees would be categorised after the interrogation, and some of them would be released, some placed in the collection centers, and some categorised as [redacted][220] or political prisoners[221] etc. There is evidence that Serb men, including including Crni and other men from Serbia engaged in extorting money from detainees in exchange for release.[222]

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[214] [redacted]
[215] Judgment,para.620.
[216] Judgment,para.233.
[217] Judgment,para.223-224.
[218] AF1116.
[219] P02731,p.20.
[220] [redacted]
[221] P01867,pp.2,3; P02731,pp.32,33.
[222] [redacted] P01865,p.12.

117. The TC found that prisoners were mistreated by some of the members of "paramilitary forces" from Serbia, local policemen, a (few) members of the JNA.[223] [redacted][224]

118. In sum, the TC's findings again neglect to consider, let alone find, how the training and/or deployment effected the crimes. Based on the findings and the evidence, the majority of the crimes discussed involve one of the men who received training in Pajzoš – Slobodan Miljković aka Lugar. Nothing more can be discerned concerning any causal link or otherwise effect on the crimes.

**c. Killings (other than Crkvine)**

119. Similar deficits are evident in the TC's lack of assessment of referenced evidence on other killing incidents, and of Lugar's conduct more generally. Based on the referenced evidence in paragraphs 222 and 223 of murders and beatings of detainees that resulted in death, there are 6 or 8 other killing incidents, spanning between 26 April 1992 and 29 July 1992. Due to the scarcity of evidence for two incidents, it is not possible to conclude with any degree of certainty the precise number. Taken at its highest, based on the referenced evidence, the total number of civilians killed during the relevant period was 12.[225] The evidence is discussed below.

120. The first killing in Bosanski Šamac occurred on 26 April 1992. A man called Mijo Lubina and his mother (Kata Lubina) were killed "at their yard"[226] in a village called Jelas /Donji Hasić and there is a reasonable inference that the perpetrator was Lugar, since he "was bragging how he had killed an older lady and her son, and calling her an old hag…"[227]

121. On the same day, 26 April 1992, Lugar killed a Croat named Anto Brandić aka Dikan, in the TO HQ Bosanski Šamac.[228] [redacted]

[223] Judgment,para.222. *See also*,AF1127.
[224] [redacted]
[225] *See e.g.,*Judgment,fn.985,995,1001.
[226] P02731,p.28; [redacted]
[227] P02731,p.28.
[228] P01865,p.12; [redacted]; P01867,p.3; P02732,pp.1687,1698; [redacted]; P02731,p.28; AF1137.
[229] [redacted].

[redacted][231] Following Simo Zarić's request, Lieutenant-Colonel Nikolić immediately sent a group of his men with vehicles and the same night, around midnight, transferred detainees to Brčko.[232]

122. In May or June 1992, Lugar was responsible for killing 2 of 3 men/prisoners in the gym in the Bosanski Šamac Technical College.[233] At the end of June 1992, Lugar killed two Croat civilians [redacted] and one person at SM Šamac (most likely refrerring to Stanica Milicije – Police station Šamac).[235]

123. [redacted]

124. [redacted]

125. [redacted]

230 [redacted].
231 [redacted].
232 P02732,p.1697,1698; [redacted].
233 P01867,p.3.
234 [redacted].
235 P01953,p.2.
236 [redacted] P02731,p.35; P02731,p. 35.
237 [redacted].
238 [redacted].
239 [redacted].
240 [redacted]

126. Accordingly, none of the evidence or the findings manifest a link between the training and the deployment and the crimes. A reasonable trier of fact would have carefully studied this apparent dearth of any meaningful nexus and explained why, notwithstanding, it determined, not only that the training and deployment did impact the crime and in a substantial way.

## III. GROUND THREE

### A. ERRORS OF LAW - KNOWLEDGE

127. The TC erred in law as to the *mens rea* of aiding and abetting. Each error of law, singularly or in combination, invalidates the guilty findings under Counts 1 to 5 of the Indictment for aiding and abetting the crimes of persecution, murder, deportation and inhumane acts (forcible transfer) (the crimes) committed in Bosanski Šamac.

128. In this regard, as evident from the critical findings, the TC's approach to assessing *mens rea* findings is flawed in law. As a consequence of only assessing prior pattern evidence and JCE intent, the Chamber failed to assess Stanišić's knowledge of the *specific* crimes in Bosanski Šamac at the time he provided the assistance.

129. In sum, the TC's knowledge findings were limited to concluding that:

(a) Prior military operations in Croatia were conducted with the objective of establishing Serb control, expelling the non-Serb inhabitants of towns and villages, and intimidating, arbitrarily detaining, and subjecting any remaining non-Serb civilians in the area to various crimes and acts of violence;[241]
(b) Shortly before the attack on Bosanski Šamac, Serb forces attacked Bijeljina and Zvornik and widespread looting, destruction of property, sexual assaults, and killings of non-Serbs, in particular Bosnian Muslim civilians, took place;[242] and
(c) The campaign of forcible displacement targeting non-Serbs in Croatia and Bosnia and Herzegovina (involving murder, deportation, forcible transfer, and persecution) and of the shared intent of the members of the joint criminal enterprise.[243]

130. Accordingly, instead of assessing Stanišić culpable link to *specific* crimes and the specific intent of principal perpetrators in Bosanski Šamac, the TC's assessment was confined

[241] Judgment,para.606.
[242] *Ibid.*,para.607.
[243] *Ibid.*,para.207.

to an assessment of whether Stanišić knew of prior crimes and was aware of a general probability of future crimes occurring in Serb military operations. [244]

131. The correct approach in law should have involved, first and foremost, an assessment of Stanišić's awareness of the principal perpetrators planning and preparation for the crimes in Bosanski Šamac and any manifest intent. These were the essential facts that provided an insight into what Stanišić could have known, and did know. Had the TC made these predicate findings, prior pattern and JCE intent evidence may have become relevant and probative – but only to the extent that it corroborated these predicate findings. Anything less lowered the *mens rea* requirement to awareness of the probability of *some* crimes *possibly* being committed by *somebody*.

B. APPLICABLE LAW

132. As correctly enumerated by the TC, the *mens rea* requirement for convictions for aiding and abetting is: "that the aider and abettor knew that his acts or omissions assisted the commission of the *specific* crime by the principal, and that the aider and abettor was aware of the essential elements of the crime, which was ultimately committed, including the intent of the principal perpetrator".[245]

133. With respect to the 'specific crime' requirement: (i) the accused must have been "aware of the essential elements of the crime" which was ultimately committed, including the intent of the principal perpetrator;[246] (ii) where the aider and abettor "is not certain which of a number of crimes will ultimately be committed", if he "is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[247]

134. As the jurisprudence shows, the risk of lowering the knowledge standard (the "specific crime" element) to the awareness of probability standard (the "number of crimes" element) is omnipresent. Arguably, this is an error that the AC made in *Popović*.[248] The SCSL Appeals and TCs certainly made this error, concluding that, aside from knowledge, an 'awareness of the

[244] *Ibid.*,paras 363-379,411-424,548-572,573-596,606-607.
[245] *Ibid.*,para.602(emphasis added).
[246] *Vasiljević*TJ,para.71; *Blagojević&Jokić*AJ,para.221; *Krnojelac*AJ,para.51; *Aleksovski*AJ,para.162; *Furundžija*TJ,para.245; *Lukić&Lukić*AJ,paras 428,440,450; *Šainović*AJ,para.1772; *Simić*AJ,para.86. *Vasiljević*AJ,para.143.
[247] *Blaškić*AJ, para.50; *Furundžija*TJ, para.246; *Simić*AJ, para.86; *Haradinaj*AJ, para.58.
[248] *Popović*AJ,paras 1749-1751; *Popović*TJ: Volume I,paras 1561,1989-1990.

substantial likelihood' of the commission of crimes would suffice to satisfy the *mens rea* standard.[249]

135. Any TC needs to be alive to this slippery slope risk: it risks lowering the required *mens rea* standard to a 'recklessness' standard, a lower *mens rea* standard than 'knowledge' as required by ICTY and ICTR jurisprudence.[250] Recklessness and concepts like 'possibility' and 'foreseeability' do not alter the requirement that the accused must have knowledge that a crime would be committed – "they merely clarify the conditions under which knowledge exists when the accused's actions can result in the facilitation of numerous unspecified crimes, since 'it appears practically impossible to demand accomplices to possess the exact knowledge about the future crime committed by someone else'".[251]

136. No case at the various international criminal tribunals has ever explicitly and unequivocally adopted the alternate formulation for aiding and abetting adopted by the SCSL when defining the *mens rea* generally.[252] In fact, the *Blaškić* AC expressly rejected the *Blaškić* TC's conclusion that an accused could be found guilty if he "accepted the possibility that some unspecified crime was a 'possible or foreseeable consequence' of his conduct", and held that the correct *mens rea* standard was 'knowledge'.[253] The law has been correctly stated in all other cases. ICTY benches and scholars confirm the understanding of the two-pronged nature of the *mens rea*, and that 'knowledge' is the requisite standard.[254]

137. In certain cases, the AC has even gone so far to establish a stricter knowledge of the 'virtual certainty' of the crimes.[255] In the *Orić* Trial Judgement, the TC, having heard the Prosecution's 'substantial likelihood' argument, stated:

> Taking notice of these positions and developments, the TC follows the same line as it was taken with regard to *mens rea* for instigation. This means that (i) aiding and abetting must be intentional; (ii) the aider and

[249] *Brima*TJ,para.776; *Brima*AJ,paras 242-243; *Sesay*AJ,para.546; *Taylor*AJ,para.438.
[250] *Blaškić*AJ, paras 49-50; *Furundžija*TJ, para.245; *Simić*AJ, para.86; *Haradinaj*AJ, para.58. See Manuel Ventura, 'Aiding and Abetting', in Jérôme de Hemptinne et al, *Modes of Liability in International Criminal Law* (Cambridge University Press 2019)('Ventura'), pp.224-225; Kevin J Heller, 'The SCSL's Incoherent – and Selective – Analysis of Custom' (Opinio Juris, 27 September 2013), available at: http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom/ (last accessed on 22 November 2021).
[251] Ventura,p.227; Aksenova,p.106.
[252] Ventura,p.227.
[253] *Blaškić*AJ,paras 49-50.
[254] *Orić*TJ,para.288; *Furundžija*TJ, paras 245-246; *Blaškić*AJ, para.50; *Simić*AJ, para.86; *Blagojević&Jokić*AJ, para.222; *Karera*AJ,para.321; *Mrkšić&Šljivančanin*AJ, para.159; *Haradinaj*AJ,paras 58-61; *Ngirabatware*AJ, para.158; *Milutinović*TJ: Volume 3, paras 628-629, 927-928; *Lukić&Lukić*AJ, para.440. *See also,* Albin Eser, "Individual Criminal Responsibility", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, eds., The Rome Statute of the International Criminal Court: A Commentary, vol. I (Oxford: Oxford University Press, 2002), p.801.
[255] *Blagojević&JokićAJ*,para.223, citing *Kvočka*AJ, paras 89-90.

> abettor must have 'double intent', namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator; (iii) the intention must contain a cognitive element of knowledge and a volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not; and (iv) with regard to the contents of his knowledge, the aider and abettor must at the least be aware of the type and the essential elements of the crime(s) to be committed.[256]

138. The requirement for demonstration of this clear culpability link between the accused's assistance and the commission of the crimes (and the avoidance of this slippery slope into recklessness) was at the heart of the contentious 'specific direction' debate particularly with regard to concerns that "[w]here an accused aider and abettor is remote from relevant crimes, evidence proving other elements of aiding and abetting may not be sufficient to prove specific direction".[257] As is well known, this debate was not confined to concerns about the content of the *actus reus* of aiding and abetting. Several leading jurists, including Judges Meron and Agius, opined in the *Perišić* appeal that 'specific direction' could readily be part of the *mens rea* of aiding and abetting, since both the *mens rea* and *actus reus* of aiding were vital aspects of the 'culpability link' "sufficient to justify holding the accused aider and abettor criminally responsible for relevant crimes".[258]

139. Judge Afanđe in his Dissenting Opinion in the *Stanišić and Simatović* Appeal Judgment was equally hesitant in assessing specific direction as only part of the *actus reus*: in sum, Judge Afande concluded that it ought to be considered as "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)".[259] Accordingly, whether *mens rea* or *actus reus*, specific direction was a device "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."[260]

140. Some commentators go further, arguing, not only that specific direction was introduced in the context of the absence of a well-defined causation standard in the ICTY jurisprudence, in order to expressly establish the link between the accused's contribution and the crimes committed, in cases where the accused is "removed from the offence",[261] but that in fact the required causal link between the aider and abettor and the crime is constructed through the

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[256] *Orić*TJ,para.288.
[257] *Perišić*AJ,para.39; *Perišić*AJ, Joint Separate Opinion of Judges Meron and Agius, paras 2-4; *Nyiramasuhuko*AJ, Dissenting and Separate Opinion of Judge Agius, para.44. *See also*, Ventura, p.193.
[258] *Perišić*AJ, Joint Separate Opinion of Judges Meron and Agius, paras 2–4. *Perišić*AJ, Separate Opinion of Judge Ramaroson, para.9.
[259] *Stanišić&Simatović*AJ, Dissenting Opinion of Judge Afanđe, para.25.
[260] *Ibid.*
[261] *Ibid.*,p.123.

mental state of the aider and abettor. The (*mens rea*) "connection stems from the risk that the secondary party envisages and undertakes rather than the actual harm that his actions cause".[262] It is "the mental state of the accomplice that grounds his relationship to the offence rather than his conduct".[263]

141. As is plain, each of these jurists, indeed all proponents of the specific direction element, were correctly concerned that where, owing to spatial and temporal gaps between the accused's conduct and the crimes and the scale of criminality involved, it is difficult to assess the link between the aider and abettor's contribution and the crimes committed by the principal perpetrator. Accordingly, the *mens rea* requirement and/or the *actus reus* requirement should be enhanced to protect the principle of culpability.[264] In the end, "complicity's derivative quality must convincingly reside at least in either *mens rea* or *actus reus* components...diminution in demands on the *mens rea* side have repercussions for the causal element as part of the *actus reus*; and vice-versa".[265]

142. Putting aside the specific direction debate, as the ICTY jurisprudence shows an assessment of the knowledge 'culpability link' thus demands an assessment of the following factors:

(a) The relevant principal perpetrators and their intended actions upon which the existence of the accused' knowledge was purportedly assessed;[266]
(b) The context of the attack, including the existence or lack of planning and preparation of, or agreement, to commit the crimes by the principal perpetrators, and the extemporaneous nature of the crimes committed;[267]

[262] *Ibid.*,p.124.
[263] *Ibid.*
[264] See Kevin J Heller, 'Why the ICTY's "Specifically Directed" Requirement Is Justified' (*Opinion Juris*, 2 June 2013), available at: https://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/ (last accessed on 15 November 2021); Dov Jacobs, 'ICTY orders retrial of acquitted defendants in unconvincing Judgment' (16 December 2015), available at: https://dovjacobs.com/2015/12/16/icty-orders-retrial-of-acquitted-defendants-in-unconvincing-judgment/ (last accessed on 15 November 2021); *Stanišić and Simatović*AJ, Dissenting Opinion of Judge Afanđe, paras 24-30; *Nyiramasuhuko et al.*AJ, Dissenting and Separate Opinion of Judge Agius, para.44.
[265] Aksenova,p.127, citing KJM Smith, A Modern Treatise on the Law of Criminal Complicity (Oxford University Press, 1991),p.195.
[266] *Milutinović*TJ: Volume 3, para.281; *Simić*TJ, paras 1018-1019; *Vasiljević*AJ, para.143; *Kunarac*TJ, paras 651-652,670; *Krnojelac*TJ, para.319, 491-492; *Lukić&Lukić*AJ, paras 440,460.
[267] See relevance of planning in relation to the accused's *mens rea*: *Brđanin*TJ, paras 532-533,582,667.

(c) The temporal and physical proximity, as well as the scale and type of practical assistance when assessing the degree of knowledge of the crimes required and that could be inferred;[268]

(d) The nature, scope and extent of the knowledge that the accused purportedly possessed in advance of his assistance, including whether the accused was within the circle of knowledge in relation to the impending crimes;[269]

(e) Whether the accused, at the time that the assistance was provided, may have believed that crimes were unlikely to occur as a consequence of his assistance;[270]

(f) The accused's knowledge existed at the specific time of the assistance provided, or whether it only came after the provision of the assistance/commission of crimes, including by an examination of the chain of command and communications to determine the existence of such knowledge;[271] and

(g) Whether the accused possessed the knowledge, at any time, of each of the essential elements of the crimes committed.[272]

143. As will be further argued below, the TC failed to assess any of these essential factors. Instead of an examination of the relevant perpetrators, and their preparation and planning for crimes and any manifest intent (including persecutory intent) and Stanišić's awareness of these factors *at the time of the assistance* – the *mens rea* culpable link – the TC assessed only a risk of crimes more generally. Accordingly, all that could – and was – assessed was Stanišić awareness that there was a risk or remote foresight that the assistance *might* be used for crimes that *might* be committed by future, unspecified perpetrators in Bosanski Šamac.

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[268] *Lukić&Lukić*AJ, paras 440,444-446,460; *Blagojević&Jokić*AJ, paras 112,172; *Kunarac*TJ, paras 651,741; *Haradinaj*AJ,paras 59-61; *Popović*TJ: Volume I,paras 1560-1561; *Popović*AJ, paras 1799,1801; *Šainović*AJ, para.1667; *Đorđević*TJ, paras 2162-2163.

[269] *Blagojević&Jokić*AJ, paras 150,154-157,172,174,244; *Haradinaj*TJ, para.242; *Mrkšić&Šljivančanin*AJ, para.59; *Lukić&Lukić*AJ, paras 451; *Kunarac*TJ, para.651; *Popović*TJ: Volume I, paras 1560-1562; *Popović*AJ, paras 1799-1802; *Brđanin*TJ, paras 536-537,667.

[270] *Mrkšić&Šljivančanin*AJ, para.59; *Blagojević&Jokić*AJ, para.223; *Popović*TJ: Volume I, para.1562; *Šešelj*TJ, paras 355-356.

[271] *Blagojević&Jokić*AJ, paras 166-168,229,239; *Popović*TJ: Volume I, paras 1499,1494; *Popović*AJ, paras 1796-1798; *Šainović*AJ, para.1667; *Mrkšić&Šljivančanin*AJ, paras 59-63.

[272] *Šainović*TJ: Volume 3, paras 629, 928; *Popović*TJ: Volume I, paras 1560,1498-14999,1492-1494; *Simić*TJ, paras 1018-1019; *Vasiljević*AJ, para.191; *Lukić&Lukić*AJ, paras 440,447,451.

## C. GROUND 3(A): FAILURE TO SUFFICIENTLY IDENTIFY THE RELEVANT JCE AND/OR PRINCIPAL PERPETRATORS AND THEIR INTENDED ACTIONS UPON WHICH THE EXISTENCE OF STANIŠIĆ'S KNOWLEDGE WAS PURPORTEDLY ASSESSED[273]

144. As the Prosecution had to prove that Stanišić knew that his acts assisted the commission of the specific crime by the principal, and that he was aware of the essential elements of the crime, including the intent of the principal perpetrator,[274] it was paramount (indeed, a *sine qua non)* of any knowledge finding that the TC: (i) identify the relevant JCE member and/or principal perpetrators and (ii) identify their preparation or planning upon which Stanišić was purportedly based.

145. However, the TC failed to identify, or find, that any of the JCE members was involved in the Bosanski Šamac takeover and crimes, let alone that Stanišić was aware of their intended involvement. As found by the TC, the principal perpetrators who were involved in the Bosanski Šamac crimes, to the extent that they were identified at all, were Blagoje Simić; Crni; Srećko Radovanović (Debeli) and Lugar (under the command of Crni); Lieutenant Colonel Stevan Nikolić (Kriger); Predrag Lazarević (Laki); Živomir Avramović (Avram); Stevan Todorović; Debeli Musa; Beli; Lucky; "Major Bokan"; Zvezdan Jovanović, Nebojša Stanković (Cera); and Goran Simović (Tralja).[275] As found by the TC, none of these were JCE members.[276]

146. Moreover, although the TC concluded that Stanišić was "aware and consented" to the JNA's "arrangement", and "would have been aware in allowing the use of their facilities and trainers that [he] would be supporting military action and, in the context of the conflict at the time, the commission of crimes by these forces",[277] nothing more was found concerning his relationship with the principal perpetrators at *the time of his assistance*. Indeed, as discussed below, the TC failed to identify any relationship that Stanišić had with the principal perpetrators, their preparation and planning of crimes or any manifest intent, that showed that they considered these assessments as vital to the assessment of *mens rea*.

147. As argued more fully in Ground 4, had this assessment been foremost in the minds of the TC, the TC would have been duty bound to consider the defining relevance of its own findings, namely that: no JCE member was involved in the Bosanski Šamac operation; none of

[273] Judgement,paras 411-424,548-572.
[274] *Ibid.*,para.602.
[275] *Ibid*,paras 211,214,216-218,223,225,227,229,422,604.
[276] *Ibid.*,para.380.
[277] *Ibid*,para.418.

the principal perpetrators in Bosanski Šamac were found to have been involved in any of the prior so-called pattern of crimes in Croatia or takeovers in BiH; and none of the DB Unit members, Serbian recruits or local men, involved in the Bosanski Šamac takeover, had been found to have been involved in any of the previous criminal operations/takeovers or criminal conduct more generally.

## D. GROUND 3(B): FAILURE TO CONSIDER THE CONTEXT OF THE ATTACK, INCLUDING THE LACK OF PLANNING AND PREPARATION OF, OR AGREEMENT TO COMMIT, THE CRIMES BY JCE MEMBERS, OR PRINCIPAL PERPETRATORS, AND THE EXTEMPORANEOUS NATURE OF THE CRIMES COMMITTED[278]

148. As concerns the TC's relevant findings concerning Stanišić's, any member of the JCE or any principal perpetrators' planning, preparation and agreement to commit crimes, they were notable by their almost complete absence.

149. As for planning or preparation, the TC failed to examine any of its own findings. The TC made no findings that showed that there was planning or preparation for crimes. There "was evidence of an increase of ethnic tensions in Bosanski Šamac starting in 1991 and leading up to its takeover in April 1992, including the passing of laws and the creation of separate police forces that divided the municipality across ethnic lines, the positioning of military equipment and soldiers by the JNA on roads, at checkpoints, and in Serb villages, and with the JNA and others carrying out a series of activities to create an atmosphere of fear and panic among non-Serbs within the municipality".[279] But, little if anything, to suggest that the takeover was intended to be a persecutory campaign involving murder and forcible transfer.

150. Indeed, as found by the TC, less than two months before the training began in late March 1992, on 5 January 1992, Lieutenant Colonel Stevan Nikolić (Kriger), Commander of the JNA's 17th Tactical Group, and the principal perpetrator in Bosanski Šamac, had issued an order establishing the 4th Detachment, whose area of responsibility was exclusively the town of Bosanski Šamac and whose stated purpose was to prevent inter-ethnic conflicts and the spread of war from Croatia.[280]

151. As for the specific arrangements discussed by the TC, there was nothing in the arrangements to train (at the "level of the Šamac Municipality and at the highest level in Serbia

[278] *Ibid.*,paras 411-424.
[279] *Ibid.*,para.208.
[280] *Ibid.*

and Yugoslavia"), the training itself, the deployment of the men to Bosanski Šamac on the 11th April 1992 or their immediate subordination to the JNA's 17th Tactical Group, that suggested, or could have suggested, that Kriger or other perpetrators intended persecution, murder and/or forcible transfer.[281] As for the arrival of the trained men, the findings were equally devoid of any relevant and probative indication of an intention to commit crimes. The arrival of the men was anticipated on the 12 April 1992. Crni told Djukić that he brought in "ten Chetniks and one officer as well as some other individuals".[282]

152. Indeed, the TC found that the principal planning for the Bosanski Šamac operation (and an implicit threat of crimes) took place *only* on 13 April 1992, weeks after the training began and days after it had ended. Blagoje Simić, the President of the Serbian Democratic Party in Bosanski Šamac, convened a meeting of municipality representatives from the area of Posavina and made implicit threats concerning a forcible takeover.[283] The discussion how this might be achieved appears to have taken place later on the 15th April 1992, when, as the TC found, the Crisis Staff was appointed in Bosanski Šamac, Blagoje Simić became its President, and "that same day, Simić met with Todorović, Crni, and others and discussed the plan for the takeover of Bosanski Šamac as well as the inclusion of the 50 men, 30 from Serbia and approximately 20 locals from Bosanski Šamac, who had undergone special training in Pajzoš, within the existing local JNA brigade".[284] The takeover began only two days later, on the 17 April 1992, six days after Mr. Simatović's briefing.[285] The TC did not find these discussions involved Stanišić or that he was aware of them, or that any of the men were then under his command or authority or reporting to him.

153. As outlined, the most relevant and probative conclusion concerning Stanišić's knowledge was the TC's finding that Stanišić and Simatović were aware and consented to the JNA arrangements to train the men. As found, the "Accused would have been aware in allowing the use of their facilities and trainers that they would be supporting military action and, in the context of the conflict at the time, the commission of crimes by these forces".[286] Plainly, this is not sufficient analysis and in any event the TC did not claim to have relied upon it in assessing knowledge.

[281] *Ibid.*,paras 209-211.
[282] *Ibid.*,para.212.
[283] *Ibid.*,para.213.
[284] *Ibid.*,para.214.
[285] *Ibid.*,paras 215-221.
[286] *Ibid.*,para.418.

154. Had the TC done so, it would have been driven to the conclusion that nothing in actual planning or preparation of the takeover was proven to have put Stanišić on notice of the specific crimes and the intention of the perpetrators. Stanišić was not found to be present in or around Bosanski Šamac. He was not found to be within the planner's circle or chain of command. There was no planning or preparation for crimes until after the assistance had been provided.

155. Instead of drawing the only reasonable the conclusion that, thus, it was highly unlikely that there was little or nothing in these events that could have put Stanišić on notice that his assistance would support crimes, the TC fell back on the generalities of pattern evidence and the intent of JCE members (who were not involved in the take-over of Bosanski Šamac).

## E. GROUND 3(D): FAILURE TO TAKE INTO ACCOUNT THE TIMING, SCALE AND TYPE OF PRACTICAL ASSISTANCE WHEN ASSESSING THE DEGREE OF KNOWLEDGE OF THE CRIMES REQUIRED AND THAT COULD BE INFERRED[287]

156. As outlined above, it was incumbent upon the TC to assess Stanišić's temporal and physical proximity to the crimes, as well as the scale and type of practical assistance, when assessing the degree of knowledge of the crimes required and that could be inferred.[288]

157. The TC's assessments failed to conduct this essential analysis. As discussed in Grounds 1-2, the TC found that between the end of March 1992-11 April 1992, Stanišić provided assistance to the principal perpetrators in Bosanski Šamac which assisted the crimes that occurred between 17 April 1992-31 July 1992.[289] As found by the TC, the assistance was training and deployment.[290] The training took place at the end of March 1992.[291] The TC appears to have found that the deployment consisted of (i) Mr. Simatović's briefing prior to the men's departure from Pajzoš (to Bosanski Šamac) on 11 April 1992;[292] and (ii) the giving of the men throughout the operation.[293]

158. As argued above at Grounds 1-2, there was nothing express or implicit in either the training or deployment that allowed any inference of knowledge to be drawn. The training was

[287] *Ibid.*,paras 411-424, 548-572, 606-607.
[288] *Lukić&Lukić*AJ, paras 440,444-446,460; *Blagojević&Jokić*AJ, paras 112,172; *Kunarac*TJ, paras 651,741; *Haradinaj*AJ, aras 59-61; *Popović*TJ: Volume I, paras 1560-1561; *Popović et al.*AJ, paras 1799, 1801; *Šainović*AJ, para.1667; *Đorđević*TJ, paras 2162-2163.
[289] Judgement, paras 202,215,222,225,416-417,424.
[290] *Ibid.*,para.416.
[291] *Ibid.*,para.416.
[292] *Ibid.*,paras 417,419.
[293] *Ibid.*,para.419.

predominantly fitness training with some elements of military training.[294] Mr. Simatović's briefing was limited, vague and non-descript, without any discussion or instructions given on how the takeover should be conducted or otherwise exhortation to crime.[295] As found by the TC, upon arrival in Bosanski Šamac, the trained recruits were immediately subordinated to the JNA and there received their specific orders and instructions in relation to the takeover.[296]

159. In sum, there was nothing in the training that involved any degree of specialism to commit crime or otherwise express or implied exhortations to commit the crimes. There was nothing in Mr. Simatović's briefing that included or suggested any indication of anticipated or intended crime. There were no features apparent in the men loaned (*e.g.,* no proven history or propensity to commit crime) or the loan itself (*e.g.,* any arrangement or communication indicating an agreement to allow them to be used for crime) that could have satisfied the TC that crimes were intended *and* Stanišić's knew that his assistance would support them.

## F. CONCLUSION

160. The TC erred in law in purporting, but failing, to assess any culpable *mens rea* link that established Stanišić knowledge. The TC was correct at paragraph 603 when asserting that the knowledge required to satisfy the *mens rea* is lower when aiding and abetting a single individual perpetrator as compared to assessing the aiding and abetting of a group of individuals.[297] In other words, the TC had an even more onerous task: identifying those parts of the planning and preparation of the crimes that provided Stanišić with the knowledge that his acts were assisting, not one, but an array of principal perpetrators. Irrespective, by relying only upon mere pattern evidence with no demonstrable link to the particular principal perpetrators or preparation and planning of Bosasnki Šamac, the TC failed in both respects. Accordingly, the TC's assessment was confined to an assessment of whether Stanišić knew of prior crimes and was aware of a general probability of future crimes occurring in Bosanski Šamac. In the end, the TC assessed nothing more than risk, not the knowledge required to establish a culpable *mens rea* link between Stanišić's acts and the crimes.

[294] *Ibid.*,para.416. *See* Ground 2(a).
[295] *Ibid.*,para.417. *See Ground* 2(b).
[296] *Ibid.,*paras 211,413,605.
[297] *Ibid.*,para.603.

## IV. GROUND FOUR

161. The TC erred in fact as to the *mens rea* of aiding and abetting. The TC's reliance upon a pattern of crimes in Croatia in 1991 and early 1992 and Bijeljina and Zvornik was wholly misplaced.

162. As discussed, it was incumbent on the TC to examine the totality of the evidence. The starting point was an examination of the *known* essential features of the operation (planning, preparation and execution), not the existence of a contemporaneous CCP or otherwise pattern evidence.

163. Accordingly, at best, the pattern evidence relied upon was capable in law of amounting to corroboration evidence and then only if the planning, preparation or execution of the Bosanski Šamac operation involved compelling similarities (of JCE members or perpetrators or planning or preparation) with the previous pattern. Absent these similarities, even this minimal relevance and probative value would have been precluded.

164. Absent these similarities or patterns, no reasonable TC could have concluded that the crimes in Bosanski Šamac were even highly likely, let alone intended. The TC's reasoning was tantamount to concluding, on the basis of purported pattern evidence only, that any and all Serbian military activity in Croatia and Bosnia in 1992 was criminal and Stanišić's awareness of these *prior* facts was sufficient.

165. Had the totality of the evidence been properly assessed, no reasonable TC could have found, beyond a reasonable doubt, that Stanišić knew that his acts assisted in the commission of the crimes of persecution, murder, and inhumane acts (forcible displacement), and was aware of the essential elements of the crimes, including the intent of the perpetrators.[298] Each error of fact, singularly or in combination, occasioned a miscarriage of justice.

[298] Judgement,para.606.

A. GROUND 4(A): THE TC PLACED UNDUE WEIGHT ON THE CRIMES THAT HAD OCCURRED IN CROATIA IN 1991 AND 1992. THESE HAD LITTLE OR NO RELEVANCE TO THE QUESTION OF STANIŠIĆ'S KNOWLEDGE OF THE CRIMES, OR THE INTENT OF ANY RELEVANT PRINCIPAL PERPETRATOR, IN BOSANSKI ŠAMAC[299]

166. First, as argued above, none of the JCE members found to have been in command, authority or otherwise procuring crimes in Croatia, were found responsible for any planning, preparation or execution of the crimes in Bosanski Šamac. The only common factor was the JNA as an institution, not individual perpetrators.

167. The crimes in the SAO Krajina were found to have been perpetrated by elements of the 9th Corps of the JNA, commanded on occasion by JCE member Mladić), the Milicija Krajina (under JCE member Martić), and, on occasion by other local forces, such as the local State Security Service (e.g. the Plaški Territorial Defence brigade) and local Serb volunteers.[300]

168. As concluded by the TC in relation to these attacks, "starting with the attack on the Croat village of Kijevo on 26 August 1991 and continuing at least until December 1991, Serb forces, including members of the JNA, the SAO Krajina police and Territorial Defence, launched a series of attacks on Croat villages on the territory of the SAO Krajina, in the course of which they committed various crimes and acts of violence against non-Serb civilians, including killings, arbitrary arrests and detention, beatings, looting of private property, destruction of Catholic churches, and burning of houses. It has been established beyond reasonable doubt that these crimes and acts of violence targeted almost exclusively non-Serb civilians, forcing them to leave the area".[301]

169. The TC found that this attack "marked the sharp escalation of the conflict in the SAO Krajina, and the commencement of what constituted a pattern of attacks by Serb forces in the area, including the JNA and units of the Milicija Krajina and local Territorial Defence, on Croat-majority villages in the SAO Krajina, resulting in the massive exodus of the non-Serb population from the area. Those who escaped the violence in the SAO Krajina left the area and did not return until the retake of the territory by the Croatian forces in 1995".[302]

[299] *Ibid.*,paras 363-379,607,585-589,594-595.
[300] *Ibid.*,paras 30-33,39-45,47,53-54,56-60,63-64,72-79,81,90-91,97.
[301] *Ibid.*,para.102.
[302] *Ibid.*,para.311.

170. As for SBWS, a similar pattern emerged, but with largely different perpetrators and JCE members. As found by the TC in Section II.B, "attacks on Croat-majority villages in the SAO SBWS started in late spring 1991, but intensified from early August 1991 with the takeover by Serb forces, including the JNA, the local Territorial Defence and paramilitary groups, of towns and villages, including the villages of Dalj and Erdut and their surroundings in Eastern Slavonia, and almost the entirety of Baranja. Shelling of towns and villages around the city of Vukovar in Western Srem also started in August 1991 and intensified further in the fall of 1991".[303] The TC concluded that subsequently, Serb forces, including the SAO SBWS Territorial Defence, local police, Arkan's Serbian Volunteer Guard, Serbian National Security, and the JNA, killed, arbitrarily arrested and detained non-Serbs, looted non-Serb property, burned Catholic churches, and subjected non-Serbs to forced labour, harassment, and other forms of discrimination, which forced the non-Serb population of Western Srem to flee the area once they saw "the JNA, as well as paramilitary and volunteer units, gathering in the vicinity".[304]

171. The TC found that the JNA transferred its powers in SBWS to the civilian authorities in January 1992 and thus were not found to have been involved in crimes after this date ("the situation became more difficult for the non-Serbs who had stayed in the region").[305]

172. The TC identified members of the JCE[306] as being involved in the commission of crimes in the SAO SBWS, namely Goran Hadžić and Željko Ražnatović (Arkan),[307] along with the Serbian National Security[308] and local Territorial Defence units (e.g. such as the Beli Manastir's Secretariat of Internal Affairs, and the SAO SBWS Territorial Defence).[309]

173. Moreover, no pattern could be discerned from the involvement of the so-called Red Berets, before or after joining the Nascent Unit (in August 1991). None of those present in Bosanski Šamac were found by the TC to have been involved in the commission of any crimes in the SAO Krajina, the SAO SBWS, (or BiH) until their deployment in Bosanski Šamac. The TC examined the role played by units under the command of Captain Dragan and "Future Unit members" (prior to joining the Unit in September 1991), in attacks on police stations in Glina, Ljubovo and Struga in July 1991, and in Lovinac in August 1991, and found that the capture of

[303] *Ibid.*,para.312.
[304] *Ibid.*,paras 119,168,312,374.
[305] *Ibid.*,paras 165-166.
[306] *Ibid.*,para.380.
[307] *Ibid.,*paras 120,122,124,131,146,168-169.
[308] *Ibid.,*para.131.
[309] *Ibid.,*paras 111,113,116,119,153,156,169.

Glina as well as the attacks in Ljubovo, Struga and Lovinac did not target non-Serb civilians.[310] The TC also examined the involvement of the 'Red Berets', following their joining the Unit, in military operations in parts of Western Srem (fall 1991),[311] and in Ilok (early 1992),[312] however found that these Unit members did not participate in the commission of crimes.[313]

174. In other words, none of the JCE members or principal perpetrators in Croatia (other than JNA units – not found to be a member of the JCE) were involved in the preparation, planning, or execution of the crimes in Bosanski Šamac. In light of this lack of any meaningful pattern of JCE members, principal perpetrators or direct perpetrators, no reasonable trier of fact could, have considered this pattern of the crimes as providing anything other than the most minimal of corroboration of any knowledge findings already made.

## B. GROUND 4(B): THE TC PLACED UNDUE WEIGHT ON THE CRIMES OF LOOTING, DESTRUCTION OF PROPERTY, SEXUAL ASSAULTS AND KILLINGS OF NON-SERBS IN BIJELJINA AND ZVORNIK IN EARLY 1992. THESE HAD LITTLE OR NO RELEVANCE TO THE QUESTION OF STANIŠIĆ'S KNOWLEDGE OF THE CRIMES, OR THE INTENT OF ANY RELEVANT PERPETRATOR, IN BOSANSKI ŠAMAC[314]

175. Although more relevant than the remote crimes in Croatia, the crimes in Bijeljina and Zvornik were relevant only to a probability of a risk of crimes being committed in Bosanski Šamac, not confirmation of Stanišić's knowledge of the intention of any specific principal perpetrator to commit specific crimes in Bosanski Šamac April 1992.

176. No reasonable trier of fact would have placed such weight upon them to assess what Mr, Stanišić knew about the principal perpetrators' intent in Bosanski Šamac. Indeed, what was particularly relevant to the vital question of actual knowledge was not the similarities but the dissimilarities, particularly in the identity of the principal perpetrators. Had the TC focused on these relevant issues, the TC would have concluded that they evinced a pattern that proffered little by way of even corroboration of any knowledge findings already made.

177. As found by the TC, in both Bijeljina and Zvornik, Arkan – the most notorious of principal perpetrators – played the leading and most critical role in the takeovers and the crimes. As regards Bijeljina, the first municipality in BiH to be taken over, the TC found that the

[310] *Ibid.,*paras 24-29.
[311] *Ibid.*,para.162.
[312] *Ibid.*,para.166.
[313] *Ibid.*,paras 162, 166.
[314] *See e.g., ibid.*, paras 607,363-379,548-572.

principal perpetrators were Arkan and an array of local and Serbian paramilitaries, the Whites Eagles and Serbian National Guard.[315] The JNA were not involved. Indeed, Arkan refused to allow them to take over the town, allowing the paramilitaries to commit crimes with impunity in the ensuing months.[316]

178. As regards Zvornik, found to be the second municipality to be taken over in BiH, Arkan was again found to be the most instrumental principal perpetrator. Whilst JNA units participated, their role remained secondary to Arkan.[317] On or about 8 April 1992, Serb forces attacked Zvornik town pursuant to Arkan's order.[318] JNA units participated along with Zvornik Territorial Defence units and volunteers identified as the White Eagles, Šešelj's men, Yellow Wasps, volunteers under Mauzer, among others. [319]

179. In sum, the most obvious and probative pattern discernible from the first two military takeovers in BiH was the command of each operation by Arkan, commanding or exercising authority over an array of military (JNA) and paramilitary units. No JCE member, including Arkan, or any of the Bosanski Šamac paramilitaries, were involved in the Bosanski Šamac operations in the planning, preparation or execution of the crimes. At most, thus, if Stanišić was aware of these two takeover operations in BiH prior to the takeover of Bosanski Šamac, he would have been put on notice that takeovers involving Arkan were highly likely to involve crimes. No reasonable TC could have identified Arkan's involvement and concluded that all takeovers, even without his malign involvement, were the same or held the same risks.

## C. GROUND 4(C): THE TC PLACED UNDUE WEIGHT ON THE FINDING THAT "THE ACCUSED WERE UNDOUBTEDLY AWARE OF THE CAMPAIGN OF FORCIBLE DISPLACEMENT TARGETING NON-SERBS IN CROATIA AND BOSNIA AND HERZEGOVINA AND OF THE SHARED INTENT OF THE MEMBERS OF THE JOINT CRIMINAL ENTERPRISE".[320] THIS KNOWLEDGE HAD LITTLE OR NO RELEVANCE TO THE QUESTION OF STANIŠIĆ'S KNOWLEDGE OF THE CRIMES, OR THE INTENT OF ANY RELEVANT PERPETRATOR, IN BOSANSKI ŠAMAC[321]

180. As outlined above, the takeover of Bosanski Šamac did not involve in the preparation or planning or execution stages of the crime any JCE member. To this extent the intent of the

[315] *Ibid.*,paras 175-176,181
[316] *Ibid.*,paras 177-179.
[317] *Ibid.*,paras 187-188.
[318] *Ibid.*,paras 188-189.
[319] *Ibid.*,paras 189-200.
[320] *Ibid.*, para.607.
[321] *See e.g., ibid.*,paras 607,363-379,548-572.

JCE, whilst not irrelevant, was probative of little, let alone the *mens rea* of aiding and abetting. Generic patterns evincing a prior campaign[322] could not substitute for an assessment of what Stanišić knew about the intent of the specific perpetrators and specific crimes. Instead, a reasonable trier of fact would have concluded that the absence of any involvement of any JCE member in Bosanski Šamac was probative of a lower risk of crime, not knowledge of the intent of the different perpetrators in Bosanski Šamac.

## D. GROUND 4(D) THE TC FAILED TO PLACE DUE WEIGHT ON THE ENTIRETY OF THE EVIDENCE SHOWING THE COMMAND, THE PARTICIPANTS, THE NATURE OF THE PLANNING, PREPARATION AND EXECUTION OF THE TAKEOVER IN BOSANSKI ŠAMAC. THESE WERE THE CRITICAL CIRCUMSTANCES OF RELEVANCE TO THE QUESTION OF STANIŠIĆ'S KNOWLEDGE OF THE LIKELIHOOD OF THE CRIMES, OR THE INTENT OF ANY RELEVANT PERPETRATOR, IN BOSANSKI ŠAMAC[323]

181. By focusing on a purported pattern of crimes (and not even perpetrators), the TC failed to consider the most relevant evidence – command, participants, the nature of the planning and the manner in which the crimes were executed. No reasonable trier of fact would have disregarded these critical features when purporting to assess Stanišić's knowledge.

182. As a preliminary consideration, the TC ought to have considered, as other TCs have done, that: (i) the recruitment and subsequent deployment of volunteers "could have been legal activities" undertaken for the "protection of the Serbian population in Croatia and BiH", and that alone they cannot establish knowledge on the part of the Accused about the crimes committed by volunteers;[324] and (ii) since a forcible takeover "is a political move to overthrow an existing government by force, and does not necessarily encompass all the elements and the gravity associated with an attack on cities, towns or villages",[325] mere knowledge of the principal perpetrator's intention to conduct a takeover operation cannot establish an intent to commit crimes or knowledge thereof. In light of the ostensibly lawful act of training and deployment and the absence of indications of intent to commit crimes in the planning and preparation, this was a reasonable inference that could not be ignored.

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[322] *See e.g., ibid*,paras 293,295,296,313,314.
[323] *See e.g., ibid.*,paras 202-234,411-424,604-605.
[324] *Šešelj*TJ,paras 241-242,245,355.
[325] *Simić*TJ,para.55, using Black's Law Dictionary, 6th Edition, 1990. *See also,* Ventura,p. 14: "[I]t does not follow that all military action pursuant to an unlawful objective are automatically unlawful. Take an aggressive war. Just because such a conflict has an unlawful objective, this does not mean that all military operations pursuant to such a conflict are *per se* unlawful. This would be to impermissibly mix *jus ad bellum* with *jus in bello.*"

183. At the very least, the TC should have examined its own findings that suggested, at most that whilst "there was evidence of an increase of ethnic tensions in Bosanski Šamac starting in 1991 and leading up to its takeover in April 1992, including the passing of laws and the creation of separate police forces that divided the municipality across ethnic lines, the positioning of military equipment and soldiers by the JNA on roads, at checkpoints, and in Serb villages, and with the JNA and others carrying out a series of activities to create an atmosphere of fear and panic among non- Serbs within the municipality",[326] there were nothing to suggest that at the time of the assistance the takeover was intended to be a persecutory campaign.

184. As for the specific arrangements discussed by the TC, there was nothing in the arrangements to train (at the "level of the Šamac Municipality and at the highest level in Serbia and Yugoslavia"), the training itself, the deployment of the men to Bosanski Šamac on the 11th April 1992 or their immediate subordination to the JNA's 17th Tactical Group, that suggested, or could have suggested, that Kriger or other perpetrators intended persecution, murder and/or forcible transfer.[327] As argued above, the principal planning for the takeover took place only on 13 April 1992.[328] The takeover began only two days later, on 17 April 1992, six days after Mr. Simatović's briefing.[329] The TC did not find these discussions involved Stanišić or that he was aware of them, or that any of the men were then under his command or authority.[330]

E. CONCLUSION

185. Accordingly, the TC erred in law and fact in failing to examine the predicate conclusions that were essential for a fair and reasoned assessment of Stanišić's actual knowledge that his acts assisted the commission of the crimes of persecution, murder, and forcible displacement, and was aware of the essential elements of the crimes, including the intent of the perpetrators.

186. In light of the presumption of innocence and the principle of culpability, no reasonable trier of fact would have presumed that this assessment could be conducted without cogent evidence of Stanišić's awareness of the principal perpetrators planning and preparation for the crimes. Had the TC made these predicate findings, prior pattern and JCE intent evidence may have been relevant and probative – but only to the extent that it corroborated these predicate findings.

[326] Judgement,para.208.
[327] *Ibid.*,paras 209-211.
[328] *Ibid.*,paras 213-214.
[329] *Ibid.*,paras 215-221.
[330] *Ibid.*,paras 424,605.

## APPEAL AGAINST SENTENCE

### I. GROUND FIVE

187. The Defence submits that the TC erred in fact and in law and abused its discretion when it sentenced Stanišić to 12 years imprisonment.[331] The fact that some mitigation was afforded to Stanišić indicates that the starting point of the sentence imposed was, in fact, in excess of 12 years. Such an excessive sentence is manifestly unreasonable, particularly taking into account the gravity of the crimes committed in Bosanski Šamac and the nature, form and degree of Stanišić's alleged participation in them.

188. ICTY and ICTR sentencing jurisprudence supports this assertion. Even though the TC's lack of reasoning as to how it arrived at 12 years imprisonment as an appropriate sentence for Stanišić risks obscuring its erroneous application of principle and excessiveness, having properly assessed the totality of the evidence and the sentencing practice of the Tribunal, no reasonable trier of fact could have imposed this manifestly severe and disproportionate sentence.

#### A. THE TC FAILED TO PROVIDE A REASONED OPINION IN RELATION TO THE SENTENCE IT IMPOSED ON STANIŠIĆ

189. As an overarching and fundamental problem, the Defence submits the TC failed to provide sufficient reasoning for the sentence imposed on Stanišić: five paragraphs only to assess aggravating and mitigating circumstances is plainly insufficient.[332] It amounts to no more than listing the factors, omitting real assessment and explanation as to how the identified factors shaped the ultimate sentence.[333]

190. Likewise, the TC noted that it had "considered" the sentences imposed in four previous cases before this Tribunal in determining Stanišić's sentence without explaining how they informed its ultimate decision.[334] A convicted person is entitled to understand any sentence of imprisonment, not be forced to determine the relevance of these factors and purported precedent to sentence.

[331] *Ibid.*,p.270.
[332] *Ibid.*,paras 619-621, 626-627.
[333] *Ibid.*,para.627.
[334] *Ibid.*,para.634.

191. The approach taken by the TC falls considerably short of the Tribunal's general practice of providing detailed reasoning on sentencing. Indeed, TCs seized of various cases before the Tribunal in the past have generally engaged in a detailed assessment of: (i) the nature, scale and any other relevant features of the crimes (such as numbers of victims, the scale of the crimes etc.); (ii) the particulars and degree of their roles in the commission of such crimes; and (iii) any aggravating and mitigating personal circumstances.[335]

192. By failing so, the TC obscured both the erroneous starting point for determination of Stanišić's sentence and its lack of proportionality. The following sub-sections will outline the correct approach.

## B. THE TC FAILED TO PROPERLY ASSESS THE NATURE, SCALE AND ANY OTHER RELEVANT FEATURES OF THE CRIMES

193. In the section of the Judgment where the events in Bosanski Šamac are discussed, the TC omitted to provide any meaningful assessment of the scale of the crimes committed. Instead, the TC provided only generalised and vague findings that misled the Chamber.[336]

194. The Chamber also made generalised and over encompassing references to statistical expert evidence. In particular, the TC found that "there were around 2,333 Muslims… in the municipality in 1991 and that, by 1997, only 266 Muslims… remained… [T]here were 14,731 Croats… in the municipality in 1991 and that, by 1997, 2,047 Croats… remained." The TC further noted that "between 1992 and 1995, 279 persons died or went missing in Bosanski Šamac, with 1992 alone seeing 208 people missing or dead."[337] However, the TC failed to assess or particularise the crimes that were relevant to Stanišić's conviction for aiding and abetting. The only specific particularisation was in relation to the number of victims of the 7 May 1992 Crkvnia detention centre crime, namely, "between 30 and 40 prisoners were detained in the detention facility and, in the evening, non-Serb civilians of Croat and Muslim ethnicity were beaten or killed by Lugar and two other perpetrators."[338] Taking in to account the available evidence, the TC found that 16 persons were killed at this detention facility.[339]

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[335] *See e.g., Popović*TJ, paras 2157-2226; *Karadzić*TJ,paras 6045-6068; *Mladić*TJ,paras 5184-5204; *Blagojević&Jokic*TJ, paras 831-860; *Milutinović*TJ: Volume III,paras 1169-1205; *Stanišić&Zupljanin*TJ: Volume II, paras 919-952; *Brdanin*TJ,paras 1098-1140.
[336] See Judgment,paras 221-222,231,233-234.
[337] *Ibid.*,para.231.
[338] *Ibid.*,para.225.
[339] *Ibid.*,para.232.

195. This generalised approach to assessing the scale and gravity of the crimes that took place in Bosanski Šamac is misleading and flawed. As a consequence, the TC failed to appreciate the true gravity of the *relevant* crimes in its determination of Stanišić's sentence.

196. A proper assessment of the evidence relied upon and cited by the TC in the relevant parts of the Judgment appears to show that, during the relevant time period in Bosanski Šamac, approximately:

- 540 to 1,100 persons were arbitrarily detained[340] and held under poor and unhygienic conditions;[341]
- 28 persons were killed (16 during the Crkvina Massacre and 12 in various other incidents);[342]
- 225 to 485 persons were mistreated (77 subjected to beatings,[343] 31 to 41 to torture,[344] and 117 to 367 to cruel, inhuman or degrading treatment);[345]
- 18 persons were subjected to forced labour;[346]
- 9 persons were subjected to sexual assault;[347]
- 18 incidents of looting and destruction of cultural property;[348] and
- 1322 victims of forcible displacement.[349] It should be noted that this figure is contradicted by the expert evidence which indicates that 95 individuals were forcible displaced in 1992.[350]

197. It is important to note as a caveat that these are approximate figures. The vague and imprecise nature of the Prosecution's evidence cited by the TC in the relevant sections of the Judgment renders it an impossible task to ascertain the exact figures in relation to the scale of the crimes committed in Bosanski Šamac. The Defence invites the AC to carry out its own assessment of this evidence to satisfy itself on this matter in its determination of Stanišić's

[340] *Ibid.*,paras 222-223,fns.983,992.
[341] *Ibid.*,para.222, fn.984.
[342] *Ibid.*,paras 222,225,226,228,232, fns.985,1001,1006,1015,1046.
[343] *Ibid.*,paras 222-226,229, fns.986,995,997,1001,1005,1035.
[344] *Ibid.*,para.222, fn.986.
[345] *Ibid.*,para.222, fn.987.
[346] *Ibid.*,para.222, fn.989.
[347] *Ibid.*,paras 221-222, fns.981,988.
[348] *Ibid.*,para.221, fn.981.
[349] *Ibid.*, paras 213,221,230,231, fns.959,981,1040-1042,1045,1046,1048.
[350] P02069,p.45, Table18.

appeal on the sentencing. Nonetheless, the Defence will rely on these approximations in making its submissions regarding the gravity of the crimes and comparing Stanišić's case to those.

### C. THE TC FAILED TO PASS A SENTENCE COMMENSURATE WITH THE NATURE, SCOPE AND DEGREE OF STANIŠIĆ'S CONTRIBUTION TO THE CRIMES COMMITTED IN BOSANSKI ŠAMAC

198. The sentence passed by the TC does not adequately reflect the fact that Stanišić was found guilty of aiding and abetting, not perpetrating, the crimes of which he was convicted. Moreover, his contribution to the crimes, even though found to be substantial, was in the overall context of the crimes, limited, remote and at the lower end of the scale.

199. As a general proposition, direct or physical perpetration attracts more severe sentences when compared to indirect involvement such as aiding and abetting.[351] As found by the Krstić TC, "[a]n act of assistance to a crime is a form of participation in a crime often considered less serious than personal participation or commission as a principal and may, depending on the circumstances, warrant a lighter sentence than that imposed for direct commission."[352] In line with this jurisprudence, the TC correctly recognised that aiding and abetting is "a lower form of liability than committing through participation in a joint criminal enterprise, and may as such attract a lesser sentence…"[353]

200. The rationale behind this general principle was explained by the Krnojelac TC: "[t]he seriousness of what is done by a participant in a [JCE] who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender. That is because a person who merely aids and abets the principal offender need only be aware of the intent with which the crime was committed by the principal offender, whereas the participant in a [JCE] with the principal offender must share that intent."[354] Accordingly, in the Vasiljević case, the AC reduced Vasiljević's sentence from twenty to fifteen years on the basis that the Appellant was responsible as an aider and abettor of the crimes, rather than a participant in the JCE.[355] Similarly, in the Krnojelac case, the AC substituted Krnojelac's responsibility for

[351] *Kvočka*TJ,para.717; *Ntakirutimana*TJ,para.897; *Vasiljević*AJ,paras 102,181-182; *Krstić*AJ,paras 272-273. *Babić*AJ,para.43; *Serugendo*TJ,para.87; *Semanza*AJ,para.388; *Nchamihigo*TJ,para.388.
[352] *Krstić*TJ,para.714; *See also, Krstić*AJ, fn.408 which cites *Kajelijeli*TJ para.962 with approval.
[353] Judgment,para.617; *Vasiljević*AJ,para.182; *See also*,NzabirindaTJ,para.110.
[354] *Krnojelac*TJ,para.75(emphasis added); *Vasiljević*TJ,para.71; *Brđanin*TJ,para.274.
[355] *Vasiljević*AJ,para.181.

the crimes he was convicted of from aiding and abetting to JCE and increased his sentence from seven-and-half to fifteen years' imprisonment.[356]

201. The TC, however, failed to recognise that aiding and abetting viewed as the "weakest form of complicity",[357] is one of the least grave modes of participation under the Statute. The Mrkšić AC affirmed this in finding that "aiding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and may as such attract a lesser sentence…"[358] Therefore, as found by the AC, "a higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice in genocide and on one who orders rather than *merely* aids and abets exterminations."[359]

202. Of course, while the gravity of the underlying crimes that the accused aided and abetted remains a critical concern,[360] the Chamber must *always* balance this against the "form and degree of the accused's participation in the crime"[361], i.e. the accused's underlying acts/omissions, and their specific role in the commission of the crimes.[362] TCs have an "overriding obligation to individualise the penalty, with the aim that the sentence be proportional to the gravity of the offence and the degree of responsibility of the offender."[363]

203. Indeed, as the AC has previously held, "[c]onsideration of the gravity of the *conduct of the accused* is normally the starting point for consideration of an appropriate sentence. […] [T]he sentences to be imposed must reflect the inherent gravity of the *criminal conduct of the accused*."[364] As such, the remoteness of the responsibility of an accused person is also a crucial factor to be taken into account in discerning the degree of their participation in the crime.[365] In other words, "generally, the closer a person is to actual participation in the crime, the more serious the nature of his crime."[366] Similarly, the limited nature of the actual involvement, or the personal impact of an accused charged with aiding and abetting on the crimes, as well as his/her lack of presence on the ground during their commission should be taken into account in

[356] *Krnojelac*AJ,para.264 and pp.113-115.
[357] Kai Ambos, 'Article 25: Individual Criminal Responsibility' in O. Trifterer & K. Ambos *The Rome Statute of the International Criminal Court: A Commentary* (*3rd ed*, C.H. Beck – Hart – Nomos 2016), p.1003.
[358] *Mrkšić*AJ,para.407.
[359] *Semanza*AJ,para.388(emphasis added).
[360] Judgment,para.617.
[361] *Ibid.*,para.617.
[362] *Tadić* Sentencing Appeal Judgment,para.55; *Blagojević*TJ,para.833.
[363] *Ntakirutimana*TJ,para.773; *Deronjić* Sentencing Judgment,para.154; *Sikirica et al.* Sentencing Judgment, para.231; *Delalić*AJ, para.717; *Krnojelac*TJ, para.507; *Aleksovski*AJ, para.182.
[364] *Aleksovski*AJ, para.182 (emphasis added).
[365] *Strugar*AJ,para.354.
[366] *Furundžija*AJ,para.227.

mitigation of the sentence.[367] Indeed, indirect participation in the crimes have generally been accepted as an important mitigating circumstance.[368]

204. The TC failed to apply these minimum requirements. The crimes for which Stanišić was convicted spanned 15 weeks and was geographically confined to a single municipality - Bosanski Šamac. The assistance provided was prior to the crimes with no involvement in the planning or execution of them. In particular, Stanišić had no involvement in the establishment or organization of the 4th Detachment (which was exclusively responsible for Bosanski Šamac), which was established by Lieutenant Colonel Stevan Nikolić (Commander of the JNA's 17th Tactical Group) on 5 January 1992.[369] Stanišić had no involvement in the preparatory meeting on 13 April 1992, wherein Blagoje Simić threatened the municipality representatives;[370] the buildup of JNA armament,[371] the appointment of the Crisis Staff or the 15th April plans (involving Simić, Todorović, Crni and others) to takeover Bosanski Šamac.[372] Stanišić was not involved in any aspect of the takeover that took place on 17 April 1992, including any management or command over the Serb forces, the men deployed from Ležimir, the Serb police, the Territorial Defence or the JNA 17th Tactical Group.[373] All the men, including those deployed from Ležimir were under the command of the JNA's 17th Tactical Group.[374]

205. In sum, Stanišić's contribution to the crimes committed in Bosanski Šamac was found to be limited to *consenting* to the organisation of training for 50 individuals at the Ležimir and Pajzoš which lasted for only two and a half weeks and consisted of basic fitness, weapon handling and tactical training.[375] Stanišić was also found to have played a role in the subsequent deployment of these men during the takeover of Bosanski Šamac.[376] As argued in Grounds 1-4, the deployment was nothing more than anothing more than a momentary command by Simatović, not Stanišić, which was a lawful activity for pursuing military objectives, involving the lending and re-subordination of men to the JNA.

[367] *Krstić*AJ,paras 272-273.
[368] *Strugar*AJ,para.381; *Blaškić*AJ, para.696.
[369] Judgment,para.208.
[370] *Ibid.*,para. 213.
[371] *Ibid.*,para.213.
[372] *Ibid.*,para.214.
[373] *Ibid.*,para.215.
[374] *Ibid.*,paras 216-218
[375] *Ibid.*,para.418; StanišićFTB,para.1016.
[376] *Ibid.*,para.621.

206. In sentencing him to 12 years of imprisonment, the TC failed to give sufficient weight to a number of factors in delineating the gravity of Stanišić's conduct and, thus, his level of culpability in the crimes committed in Bosanski Šamac.

207. This contribution to the crimes should have been viewed as a remote contribution to the preparation for the takeover and the crimes - at the lower end of the substantial contribution threshold. First, Stanišić was not found to be a principal decision maker in the training and deployment of the men. The request for military assistance was made by Mr. Todorović (the head of the Bosanski Šamac municipality) to the Serbian government. The subsequent decision to train the 50 men in question and deploy them to Bosanski Šamac was also taken by other Serbian government officials. More specifically, the organisation of the training in Leimir and Pajzoš "occurred at various levels of the JNA area command and officials in Belgrade and included transport provided by the JNA."[377] As found by the TC, Stanišić consented to these arrangements.[378] At worst, Stanišić implemented a decision made by individuals higher up in the Serbian government.

208. As discussed in Grounds 1-4, Stanišić was not found to have trained the men on how to commit crimes, or to have personally/directly ordered the deployment of the Unit members to go to Bosanski Šamac, let alone commit criminal acts there. The TC found that Mr. Simatović gave the briefing (prior to the men leaving Pajzoš), not Stanišić.[379]

209. Moreover, as argued above, the training and the deployment consisted of little more than the temporary engagement with the trained men (other than 2) that lasted for three weeks. As found by the TC, the men who were trained and deployed to Bosanski Šamac were subordinated to the JNA once they arrived in Bosanski Šamac. As recognised by the TC, Stanišić did not "exercise control over the perpetrators or directed them during the commission of the crimes."[380] There is no evidence indicating that these individuals reported back to Stanišić after their subordination or returned back to him once the military operation in Bosanski Šamac was over.[381] Indeed, the TC was not convinced that "the Accused actively directed or controlled the deployed members of the Unit [during and after the takeover of Bosanski Šamac] and the extent to which [Crni and Debeli] in fact remained a part of the Unit."[382]

[377] *Ibid.*, para.418.
[378] *Ibid.*, para.418.
[379] *Ibid.*, para.417.
[380] *Ibid.*, para.621.
[381] *Ibid.*, paras 420-423.
[382] *Ibid.*, para.423.

210. In sum, Stanišić's responsibility was limited to authorising and allowing the DB's (training) resources and two men, Crni and Vuk, to be used (see Ground 2). In this sense, Stanišić's contribution to the crimes as an aider and abettor was remote and minimal compared to any principle perpetrator or authority in the crimes.

211. The Defence submits that the TC's imposition of 12 years of imprisonment on Stanišić indicates that it has failed to sufficiently take into account these factors.

### 1. The TC misled itself by relying on crimes and sentences that bore little or no relationship to Stanišić's conviction for aiding the Bosanski Šamac crimes

212. The TC indicated that "in determining the appropriate sentence for the Accused, the TC took into account the sentences imposed in the cases of *Prosecutor v. Blagoje Simić* and *Prosecutor v. Stanišić and Župljanin*, to the extent that these cases held the accused responsible for crimes committed in Bosanski Šamac."[383] Further, the TC held that it "has considered also the sentences imposed in the case of *Prosecutor v. Blagojević and Jokic,* to the extent that one of the accused in that case was convicted of aiding and abetting the crimes of murder, persecution and forcible transfer, as well as in the case of *Prosecutor v. Milutinović et al.,* where two of the accused were held responsible for aiding and abetting the crime of forcible displacement, albeit on a larger scale than in the present case."[384] Within these cases, the TC took into account the sentences imposed on six individuals previously convicted by this Tribunal: *Stojan Župljanin, Mićo Stanišić, Blagoje Simić, Vidoje Blagojević, Dragoljub Ojdanić* and *Vladimir Lazarević*.[385]

213. The Defence submits that, although the TC was entitled to take these cases into account when determining sentence, it had to approach them with due caution and express reasoning. As found by the AC, looking at the sentencing practice for past cases is only helpful to the extent that the offence is the same and the circumstances substantially similar.[386] The cases may be comparable through "[…] the number, type and gravity of the crimes committed, the personal circumstances of the convicted person, and the presence of mitigating and aggravating circumstances […]".[387] However, the relevance of previous cases is restricted by the principle

[383] Judgment, para.634.
[384] *Ibid.*, para.634.
[385] *Ibid.*, para. 34, fns. 2423,2424,2425.
[386] See e.g., *Delalić*AJ paras 719-720; *Kamuhanda*AJ, paras 361-362; *Strugar*AJ, paras 336,348; *Furundžija*AJ, para.250; *Martić*AJ, para.330.
[387] *Strugar*AJ, para.348. *Delalić*AJ, para.717; *Krstić*AJ, para.241; *Jelisić*AJ, paras 96,101; *Nikolić*AJ para.19; *Furundžija*AJ, paras 248-249.

of individualisation of sentences.[388] Instead of exercising this caution, the TC erred in fact and law by failing to appreciate the substantial difference between the gravity of the crimes and the conduct under consideration in those cases and those factors in relation to Stanišić and then, inexplicably, relying upon those cases to increase the appellant's sentence. Indeed, there are vast differences between the respective degrees of culpability and gravity of the conduct of these six individuals and that of Stanišić.

### a. Stojan Župljanin

214. As indicated above, the TC considered the sentences imposed in the *Stanišić and Župljanin* case to the extent that the accused were held responsible for crimes committed in Bosanski Šamac during the period covered by the Indictment in the present case.[389] The TC, however, inexplicably cited paragraphs relevant to Mr. Župljanin's criminal responsibility in the Judgment even though he was not convicted of any crimes that took place in Bosanski Šamac.[390] The cited paragraphs indicate that the AC affirmed all of Župljanin's convictions for the crimes committed in eight ARK municipalities[391] and upheld the TC's conclusions on "his responsibility for participation in the JCE… and on his responsibility for ordering the crime of persecutions through the underlying act of plunder of property"[392] as well as "his sentence of 22 years of imprisonment."[393] No explanation is provided by the TC as to how the sentencing of Mr Župljanin to 22 years informed its decision about the sentencing of the Accused in the present case.[394] It appears that the case of Župljanin is completely irrelevant to the sentencing of Stanišić. By taking the 22 years imprisonment imposed for participation in a JCE into account, the TC misled itself and imposed an overly severe sentence on Stanišić.

### b. Mićo Stanišić

215. Mićo Stanišić's degree of participation in and responsibility for the crimes he was convicted incomparably higher than that of Stanišić.[395] It is unclear why the TC considered Mićo Stanišić's case in determining Stanišić's sentence. The only plausible similarity between

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[388] *Furundžija*AJ, para.250; *Delalić*AJ, paras 719,721,756-757; *Kvočka*AJ, para.681; *Strugar*AJ, para.348; *Kupreškić*AJ, para.443.
[389] Judgment, para.634.
[390] *See ibid.*, fn.2423 where the Trial Chamber refers to the *Stanišić&Župljanin*AJ, para.1192 which exclusively relates to Mr. Župljanin.
[391] *Stanišić&Župljanin*AJ, para.6; *Stanišić&Župljanin*TJ: Volume I, para.9 and Volume: II, paras 805,832,845,850, 859,864,869.
[392] *Stanišić&Župljanin*AJ, para.1192.
[393] *Ibid.,*para.1192.
[394] *Ibid.,*para.1192.
[395] See Annex A,(b) Mićo Stanišić.

his case and Stanišić's is that Bosanski Šamac was one of these 20 municipalities. Notwithstanding these stark differences, the TC relied on this case to determine Stanišić' sentence. This was a discernable error on the part of the TC which inevitably had an impact on the starting point of the sentence imposed on Stanišić. This is clear in the fact, despite his high level of culpability, Mićo Stanišić received 22 years imprisonment as a sentence, less than double the sentence that was imposed on Stanišić.

**c. Blagoje Simić**

216. As may be seen in the Stanišić Judgment, Blagoje Simić might properly be regarded as one of the leading principal perpetrators having being in charge of the meeting that triggered the whole takeover and the crimes. [396] Regardless of this significant participation in the crimes he was convicted of,[397] Simić was sentenced to 15 years.[398] The fact that Simić - the highest-ranking civilian in Bosanski Šamac Municipality after its takeover - received merely three years more than the sentence imposed on Stanišić is demonstrative of the TC's failure to appropriately weigh the Stanišić's contribution to the crimes.

**d. Vidoje Blagojević**

217. The TC considered the sentences imposed in the case of *Prosecutor v. Blagojević and Jokić* to the extent that Blagojević was convicted of aiding and abetting the crimes of murder, persecution and forcible transfer.[399] Blagojević was sentenced to 15 years imprisonment, a mere three years lower than the sentence imposed on Stanišić.[400] Blagojević was afforded some mitigation due to the fact that "he was not one of the major participants in the commission of the crimes"[401] and due to his role in the demining process after the end of the war.[402] However, the scale of the crimes and the "very large" number of victims of the crimes of Blagojević were taken into consideration as an aggravating factor.[403] In light of the scale and gravity of the crimes of which Blagojević was convicted as well as his proximity to their commission,[404] no reasonable TC could have relied upon this case as indicative of an appropriate sentence, other than to distinguish it and ensure that Stanišić's sentence was significantly lower. Stanišić's

[396] Judgment, para.213.
[397] See Annex A,(c) Blagoje Simić.
[398] *Ibid.*, para.300.
[399] Judgment,para.634.
[400] *Blagojević&Jokić*AJ, p.137.
[401] *Blagojević&Jokić*TJ, para.835,
[402] *Ibid.*, para.858.
[403] *Ibid.*, para.841.
[404] See Annex A,(d) Vidoje Blagojević.

contribution to the crimes was significantly more limited and remote, and the scale of the crimes (including number of victims) in Stanišić's case was substantially lower when compared to Blagojević's case.

**e. Dragoljub Ojdanić**

218. The TC also considered the case of *Prosecutor v. Milutinović et al.* since two of the accused (i.e., Ojdanić and Lazarević) "were held responsible for aiding and abetting the crime of forcible displacement, albeit on a larger scale than in the present case."[405] The Defence submits that no reasonable TC could have assessed the scale of the crimes committed in this case and the degree of Ojdanić's participation in them[406] in the determination of Stanišić's sentence and concluded that the latter deserved imprisonment for only three years' fewer than the former. Indeed, the gravity of the crimes in Stanišić's case, and the degree of his participation, is miniscule in comparison.

**f. Vladimir Lazarević**

219. Lazarević was found to have aided and abetted the deportation and forcible transfer hundreds of thousands of victims in a number of towns/villages across a vast geographical area[407] through a widespread and systematic campaign of terror and violence carried out against Kosovar civilians.[408] He was ultimately sentenced to 14 years imprisonment.[409] The Defence submits that no reasonable trier of fact could have compared the factual circumstances and the degrees of responsibility of Lazarević's case[410] to that of Stanišić and concluded that Stanišić ought to receive a sentence of 12 years.

220. Thus, the Defence submits that the TC's assessment of these cases was manifestly flawed and/or wrong in principle. It led to an error in the determination of the starting point for Stanišić's sentence. No reasonable trier of fact could have compared the respective positions and degrees of contribution to the crimes of these accused, as well as the scale of crimes in which they were implicated with those of Stanišić and came to a conclusion that the latter deserved 12 years imprisonment after mitigation.

[405] Judgment, para.634.
[406] See Annex A,(e) Dragoljub Ojdanic.
[407] *Milutinović*TJ: Volume III, para.930; *Šainović*AJ, p.741.
[408] *Milutinović*TJ: Volume III, paras 923-924,1173.
[409] *Šainović*AJ, p.741.
[410] *See* Annex A, (f) Vladimir Lazarevic.

### 2. The TC disregarded the fact that a number of persons convicted before the Tribunal whose responsibility was significantly higher than that of Stanišić's received lower or similar sentences

221. In addition to its failure in properly assessing the cases enumerated above, in determining the starting point for Stanišić's sentence, the TC has also failed to take into account the cases of a number of other individuals who have received sentences similar to or lower than 12 years imprisonment from the Tribunal, notwithstanding the fact that their degree of participation and responsibility in the commission of the crimes they were convicted of were significantly higher compared to Stanišić. While it is difficult to draw direct analogies between any two cases, the Defence submits that if the TC found it appropriate to consider the cases of six accused persons outlined above in determining Stanišić's sentence,[411] it should have also considered the following cases. Indeed, if the TC has taken the sentencing range of the Tribunal in these cases into consideration, its starting point for the determination of Stanišić's sentence would have been more lenient.

#### a. Dragan Jokić

222. In the *Blagojević and Jokić* case, the TC did not take into account the lower sentence imposed on Blagojević's co-accused Dragan Jokić for aiding and abetting murder. He was found not to be in a command position.[412] In this sense, similar to Stanišić, Jokić's degree of participation in the crimes was remote and limited. In line with his limited participation, Jokić was sentenced only to nine years of imprisonment.[413] The Defence submits that due to the similarities between the respective degrees of their limited and remote participation in the crimes as well as their lack of command position which translates into a lack of control over the commission of the crimes, Jokić's 9-year sentence should have been upper most in the TC's determination of Stanišić's sentence.

#### b. Berislav Pušić

223. Pušić was found to have contributed to a wide range or crimes including persecution, imprisonment, inhumane acts, cruel treatment, extensive destruction of property, wanton destruction of cities, towns and villages, unlawful infliction of terror and attack on civilians, deportation, murder, unlawful labour, unlawful transfer of civilians, through a JCE spanning

[411] Judgment, para.634.
[412] *Ibid.*, para.518.
[413] *Ibid.*, para.861.

from December 1991 to April 1994 aimed at domination of the Croatian Republic of Herzeg-Bosna by Croats through the ethnic cleansing of the Muslim population.[414] Despite "the key role [he played] in the commission of the crimes by virtue of his functions and powers within the Military Police and the Exchange Commission"[415] and the massive scale of the crimes that he was directly implicated in, Pušić received a sentence of 10 years imprisonment.[416] Pušić's 10-year sentence should have been uppermost in the TC's determination of Stanišić's sentence.

### c. Vinko Pandurević

224. Pandurević was found guilty of aiding and abetting murder, persecution, forcible transfer and extermination.[417] He was also found guilty pursuant to his superior responsibility for the participation of his subordinates in the persecution, cruel treatment, extermination and murder of thousands of Bosnian prisoners.[418] Pandurević was found to have participated in the Krivaja-95 Operation as the Commander of the Zvornik Brigade (a senior command position within the VRS) "with the knowledge of the criminal plan to forcibly remove the Bosnian Muslim populations of the enclaves and with the knowledge that his acts provided practical assistance to the commission of forcible transfer of the Bosnian Muslim population of the Srebrenica enclave."[419] As such, his contribution to the crimes he was convicted of as well as the scale of such crimes[420] was more significant than that of Stanišić. Ultimately, Pandurević was sentenced to 13 years of imprisonment.[421] The TC should have taken his case and the relatively low sentence he received in light of these facts into consideration in sentencing Stanišić.

### d. Elizaphan Ntakirutimana

225. Ntakirutimana was convicted of aiding and abetting genocide by killing and causing serious bodily or mental harm and extermination of large number of men, women and children, who were predominantly Tutsi.[422] Despite the large scale nature of his crimes, his high degree of participation as well as his proximity to them (i.e. his presence at the crime scene),[423] he was

[414] *Ibid.*, paras 41-73, 1211; *Prlić*AJ, Volume II, paras 592,2796,2802,2806-2812,2818-2821.
[415] *Prlić*TJ: Volume IV, para.1381.
[416] *Prlić*AJ: Volume III, p.1409.
[417] See Annex A,(i) Vinko Pandurević.
[418] *Popović*AJ, paras 1906-1916,1925-1947
[419] *Ibid.*, para.2212,2216.
[420] See Annex A,(i) Vinko Pandurević.
[421] *Popović*AJ, p.716.
[422] *Ntakirutimana*AJ, paras 567-570.

ultimately sentenced to 10 years imprisonment.[424] It should be noted that genocide is generally regarded in the jurisprudence as inherently graver than crimes against humanity.[425]

226. By failing to take these cases into account in a reasoned and principled manner, the TC has failed to determine the appropriate starting point for Stanišić's sentence, unjustifiably diverged from the sentencing practice of the Tribunal and imposed an unreasonably and manifestly severe, disproportionate and excessive sentence on Stanišić. The Defence submits that, if the TC had not erred in this respect, the starting point of Stanišić's sentence would have been somewhere around 8 to 9 years before taking into account the extraordinary mitigating factors which will be outlined below.

## II. GROUND SIX

227. The TC erred in law by recognising the length of the proceedings – 18 years, a quarter of Stanišić's life – as an "extraordinary" circumstance and then declining to take it into account as a mitigating factor.[426]

228. Specifically, the TC found that "[b]earing in mind that it was the ICTY AC that made [the retrial] decision, it is beyond the remit of this TC to take it into account in sentencing, and the TC, therefore declines to do so."[427] In characterising the proceedings against the Accused as "lengthy" and "extraordinary",[428] the TC recognised the protracted nature of the trial process as a mitigating factor but then disregarded this compelling, extraordinary circumstance. No legal principle or authority prevented or even favoured the disregard of this mitigating factor on this basis and the TC was unable to cite to any. This was manifestly unreasonable, illogical and wrong in law.

229. In fact, this finding of the TC appears to contravene the established jurisprudence of the AC indicating that TCs have "a wide discretion in determining sentence…"[429] and "are vested

[424] *Ntakirutimana*AJ, paras 567-570.
[425] *See e.g., Niyitegeka*AJ, para.53; *Kambanda* Sentencing Judgement, para.16; *Tadić* Sentencing Judgement, paras 28–29; *Krštić*TJ, para.700; *Krštić*AJ, paras 36-37,275; *Akayesu*TJ, paras 3-11; *Rutaganda*TJ, para.450; *Musema*TJ, para.981; *Serushago* Sentencing Judgment, paras 12-16; *Kayishema and Ruzidana*TJ, para.9; *Bikindi* TJ, para.448; *Zigiranyirazo*TJ, para.457; *Rukundo*TJ, para.597.
[426] Judgment, para.632.
[427] *Ibid.*, paras 631-632. It should be noted that this is not the first time the Trial Chamber has recognized the extraordinarily protracted nature of Mr. Stanišić's trial process. In the past, it has recognised "the exceptional nature of hits case; a retrial on all counts of the indictment following nearly 14 years of proceedings, largely prolonged as a result of delays and limited sitting schedules owing to Stanišić's medical conditions, conditions which continue to impact on the scheduling and length of the present proceedings (Decision on Modalities for Trial, 13 April 2017, para. 13).
[428] Judgment, paras 631-632.
[429] *Vasiljević*AJ, para.161.

with a broad discretion in determining an appropriate sentence, due to their obligation to individualize the penalties to fit the circumstances of the accused..."[430] Indeed, TCs enjoy "considerable discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to the factors identified."[431] While TCs ultimately determine the weight to be given to particular mitigating factors,[432] it is required - as a matter of law - to take account of mitigating circumstances.[433]

230. Accordingly, the Defence submits that the lengthy nature of the proceedings constituted an "extraordinary" circumstance that should have been taken into account as a significant mitigating factor in determining a reasonable and commensurate sentence. The 18 year-long trial process is exceptional and arguably violated Stanišić's right to an expeditious trial. This delay was not caused by Stanišić and no basis existed for discounting the extraordinarily long process or otherwise drawing adverse inferences due to his conduct.[434] Conversely, no authority can be found indicating that a delay caused by the AC cannot be taken into account by the TC.

231. In recognising the possible detrimental effects of a lengthy trial on an accused, the AC has found that "[s]tigmatisation may be the consequence of pending criminal allegations and any stress resulting from disruption of social life and work, or uncertainty as to the outcome, may remain until the completion of the proceedings. Articles 20(1) and 21(4)(c) of the Statute ensure that proceedings before the International Tribunal are fair and held within a reasonable time, so that any stigma and stress are brought to an end within a reasonable period of time."[435] Similarly, in finding a five year trial to be excessive and unreasonable,[436] the ECtHR found that "much was at stake for the applicant as he suffered feelings of uncertainty about his future for a protracted period of time, bearing in mind that he risked a criminal conviction…Article 6 is

[430] *Karadžić*AJ, para.749; *Prlić*AJ: Volume III, para.3204.
[431] *Mladić*AJ, para.553. See, e.g., *Karadžić*AJ, para.753; *Stanišić&Župljanin*AJ, para.1130; *Nyiramasuhuko*AJ, para.3394; *Ngirabatware*AJ, para.265. *See also Delalic*AJ, para.780.
[432] *Blaškić*AJ, para.696; *Blagojević&Jokić*TJ, para.840; *Deronjić*TJ, para.155.
[433] *Kordić&Čerkez*AJ, para.1051.
[434] For example by: (i) filing numerous motions (*Blaškić* Order Denying a Motion for Provisional Release, para.7; *Ndindiliyimana*AJ, para.45); (ii) causing the suspension of proceedings through contemptuous conduct (*Šešelj* Decision on Oral Request of the Accused for Abuse of Process, para. 29); asking a Judge's recusal (*Šešelj* Appeal Decision of 6 June 2014, para.65); (iii) asking for an assessment of the Defendant's own fitness to take part in proceedings (*Gbagbo* Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, paras 39-43); (iv) any other similar conduct causing delays to proceedings (*Kajelijeli*TJ, para. 253; *Nyiramasuhuko*AJ, para.49. See also ECtHR *Grishin v. Russia* Judgment, para. 175; ECtHR *Idalov v. Russia* Judgment, para.189; ECtHR *Sałapa v. Poland* Judgment, para.90; ECtHR *Trzaska v. Poland* Judgment, para. 89; HRC *Brown v. Jamaica*, para. 6.11; see generally: S Trechsel, *Human Rights in Criminal Proceedings* (OUP 2006), pp.142-144.
[435] *Prosecutor v. Halilovic*, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006, para.19.
[436] ECtHR *Grigoryan v. Armenia* Judgment, paras 131-132.

designed to avoid a person charged remaining too long in a state of uncertainty about the outcome of the proceedings."[437]

232. As argued below, this length of process, even if not characterised as undue delay, cannot be ignored. It is no small matter to put a man with chronic illnesses (see Ground Seven, below) on trial for a quarter of his life with the constant anxiety, interference and threat of a life sentence hanging over every moment. During that time, Stanišić was detained for almost six years.[438] [redacted][440] As such, unable to visit his friends or family living outside of Belgrade, go abroad, or go on for holidays with his family, Belgrade was in effect a larger prison. No reasonable trier of fact would have failed to acknowledge the restriction, stress, stigma, and degradation suffered by Stanišić in the course of his 18-year long trial and thereafter refuse to take them into account on the curious basis that these were caused by the trial proceedings, that is the AC's decisions.

## III. GROUND SEVEN

233. The TC committed a discernible error in law when it failed to give appropriate weight to Stanišić's age and the ill health as a significant mitigating factor. While the TC recognised these as mitigating factors, it erred in law by according them only "limited weight in mitigation."[441] The effects of this error are observable in the excessive sentence imposed upon Stanišić despite his advanced and chronic health problems existing throughout the course of his 18 year-long trial process.

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[437] *Ibid.*, para.129. See also ECtHR *Nakhmanovich v. Russia* Judgment, para.89; and ECtHR *Hajibeyli v. Azerbaijan* Judgment, para.51; Similarly, the Human Rights Committee has found that the purpose of the right to be tried without undue delay is to "avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice." Human Rights Committee, General Comment No. 32, para.35.

[438] Judgment, para.636.

[439] [redacted].

[440] [redacted]

[441] Judgment, para.627.

234. The advanced age of accused persons is a factor taken into consideration as a mitigating factor by the TCs of ICTY and ICTR in passing sentences.[442] The policy reasons behind doing so has been astutely explained by the TC in the sentencing decision of Plavšić (who was 72 years of age at the time)[443] with the following words:

> The TC considers that it should take account of the age of the accused and does so for two reasons: First, physical deterioration associated with advanced years makes serving the same sentence harder for an older than a younger accused. Second…an offender of advanced years may have little worthwhile life left upon release.[444]

235. Poor health has also been taken into account for in mitigation, in exceptional and rare cases,[445] especially in circumstances where the accused's life expectancy would be affected. [446] In the *Milutinović* case, for instance, the TC considered Lazarević's "serious health problems while in detention which continue to plague him" to be mitigating and reduced his sentence accordingly.[447] Similarly, in the *Rutaganda* case, the TC noted that the accused "is in poor health and has had to seek medical help continuously."[448] In the *Simić* case, on the other hand, while the TC declined to take into account the fact that the accused was paraplegic as a mitigating factor[449] it nevertheless found itself obliged "for reasons of humanity, to accept that Milan Simić's medical condition ought to be a consideration in sentencing, as a special circumstance."[450] Accordingly, a lesser sentence was imposed on Simić.[451]

236. Importantly, when advanced age and poor health coincide in an accused, they have been particularly deemed as "important mitigating circumstances."[452] In the *Ntakirutimana* case, for instance, the TC noted that, "78 years of age at the time of sentencing, the Accused has spent more than four years in detention. His wife, among other witnesses, has testified about his frail health, due to a condition from which he has suffered for years. His poor health was evident throughout the trial proceedings. Considered together, the Chamber finds that these are *important* mitigating circumstances...[emphasis added]".[453] In a similar vein, the *Strugar* TC took into consideration that "[t]he Accused is 71 years old and in poor health; he suffers in

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[442] See for instance, *Krnojelac*TJ, para.533; *Erdemović* Sentencing Judgment, para.16; *Simić*TJ, para.1099; *Ntakirutimana*TJ, para.898; *Plavšić* Sentencing Judgement, paras 105-106.
[443] *Plavšić* Sentencing Judgement, para.10.
[444] *Ibid.*, paras 105-106; See also *Krnojelac*TJ, para.533.
[445] *Kvočka*AJ, paras 719-720.
[446] *Simić* Sentencing Judgment, para.99.
[447] *Milutinović*TJ: Volume III, para.1199.
[448] *Rutaganda*TJ, para.472.
[449] *Simić* Sentencing Judgment, para.95-101.
[450] *Simić* Sentencing Judgment, para.116.
[451] *Ibid*.
[452] *Ntakirutimana*TJ, para.898; See also *Bisengimana*TJ, para.175.
[453] *Ntakirutimana*TJ, para.898.

particular from some degree of vascular dementia and depression and experiences memory losses…"[454] The *Ntawukulilyayo* TC similarly considered that the accused is "almost 70 years of age and has spent almost three years in detention" as well as the fact that he has "diabetes, which requires management" as factors require mitigation in his sentence.[455] Lastly, in the *Milutinovic et al.* case, the TC considered Ojdanic's poor medical condition and relatively advanced age "as serious enough to warrant some mitigation of the sentence."[456]

237. Jovica Stanišić was born on 30 July 1950 and is now 71 years old. He suffered and continues to suffer numerous and well-documented health issues, both physical and mental, throughout his 18 years long trial before this Tribunal.[457] Inevitably, Stanišić's experience of the trial has been much profoundly impacted by having to endure it through the difficulties of constant physical and mental illness. No other accused in international criminal law has had to endure such a long trial with this array of serious medical conditions.

238. [redacted][459] He was able to only sit in the courtroom for two or three days a week and needed regular (every hour or so) breaks due to the physical discomfort and pain caused by his illnesses.[460] In 2009, for instance, the Reporting Medical Officer (RMO) at the time concluded that Stanišić was "not able to participate in the proceedings if sitting for more than 10 minutes

[454] *Strugar* TJ, para.469. *See also, Rutaganira* TJ, para.136.
[455] *Ntawukulilyayo* TJ, para.476.
[456] *Milutinović* TJ: Volume III, para.1188.
[457] Decision on Start of Trial and Modalities for Trial, 29 May 2009, paras11-23; Third Decision Amending Modalities for Trial, 17 September 2010, paras 3-4; Decision on Modalities for Trial, 13 April 2017, para.2.
[458] [redacted]
[459] [redacted]
[460] Decision on Start of Trial and Modalities for Trial, 29 May 2009, para. 13, Annex, para. 1; Second Decision Amending Modalities for Trial, 1 September 2009, Annex A, para.1; Third Decision Amending Modalities for Trial, 17 September 2010, Annex A, para.1; Decision on Modalities for Trial, 13 April 2017, Annex, paras 1-2.

is required."[461] Similarly, during the early parts the retrial, an independent medical expert noted concern that Stanišić "cannot endure hearings over long hours."[462]

239. [redacted][465]

240. [redacted][470]

241. [redacted][471] Indeed, enduring an 18 yearlong trial process with the possibility of receiving a life sentence would cause significant psychological (in the form of stress and anxiety) and physical strain on a healthy

[461] Decision on Start of Trial and Modalities for Trial, 29 May 2009, paras 18-19.
[462] Decision on Modalities for Trial, 13 April 2017, para.22.
[463] [redacted]
[464] [redacted]
[465] [redacted]
[466] [redacted]
[467] [redacted]
[468] [redacted]
[469] [redacted].
[470] *Ibid.*, n.2,34.
[471] [redacted] Urgent Motion on Behalf of Jovica Stanišić for Provisional Release, 18 December 2015, paras 10-13.

individual, let alone someone like Stanišić's who has been suffering from an array of long-term chronic illnesses.

242. Accordingly, the Defence submits that Stanišić's ongoing health problems constitute exceptional grounds that warrant serious mitigation. The excessive length of his trial before this Tribunal was one of the main causes of the exacerbation of Stanišić's physical and mental health. His health problems will certainly make his sentence harder than the equivalent time would for a healthier man.

243. The AC must intervene and pronounce a significantly reduced sentence to ensure that Stanišić's health issues are not exacerbated by further detention. Indeed, the sentence as it currently stands would almost definitely further aggravate both his physical symptoms and mental health issues, possibly affecting his life-expectancy.

## IV. GROUND EIGHT

244. The TC erred in law and committed a discernible error by failing to take into consideration, and weigh appropriately as a mitigating factor, the entirety of Stanišić's acts and conduct in relation to his cooperation with the international community during the war in Croatia and Bosnia in furtherance of peace and saving lives.

245. First, the TC solely noted Stanišić's "assistance in the release of 300 UNPROFOR hostages, captured French pilots, and an American journalist in Bijeljina, as well as his role at the Dayton Peace Conference in November 1995" as mitigating circumstances,[472] meaning that it limited its assessment to these discreet events that took place in 1995.[473] In doing so, the TC failed to take into account the *undisputed* evidence before it demonstrating Stanišić's broader efforts to achieve peace through cooperation with the US government and international community between 1991 and 1995 as mitigating circumstances.[474] In fact, the TC trivialised Stanišić's efforts for peace by finding that he "did, *on occasion*, demonstrate willingness to resolve the conflict, worked towards peace, and facilitated the provision of humanitarian assistance during the relevant period."[475]

246. While the TC noted the Defence evidence in relation to "Stanišić's interactions with the [US] intelligence community, particularly the [CIA], and involvement in events during the

[472] Judgment, para.627.
[473] StanišićFTB, para.1626.
[474] StanišićFTB, paras 166-177.
[475] Judgment, para.596(emphasis added).

Indictment period",[476] in another section of the Judgment, it failed to recognise the significance of this evidence for the mitigation of Stanišić's sentence. Indeed, this *undisputed* Defence evidence indicates that Stanišić was regarded by the US Government as a key peacemaker due to his significant contributions from 1991 onwards to resolving the crisis in BiH.[477] [redacted] The evidence also indicates that Stanišić:

i) Steered SDB policy from 1992 onwards towards providing support to peace efforts and negotiations.[480] [redacted][481] He further stated that the objective of the SDB from September 1992 onwards in establishing cooperation with other intelligence services was to "introduce peace and stability in the Balkans."[482]

ii) Facilitated the arrest of the Vučković brothers, the heads of the Yellow Wasps.[483] [redacted][484] and noted that [redacted][485] and

iii) Convinced Babic and the RSK Serbs to accept the Vance plan in 1991.[486] Stanišić used Karadžić to dissuade the Bosnian Serbs from impeding the peace negotiations, and ultimately cajoled the RSK Serbs into signing.[487]

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[476] *Ibid.*, para.349.
[477] See StanišićFTB, paras 165-177.
[478] [redacted].
[479] [redacted] StanišićFTB, para.168.
[480] Stanišić FTB, para.167.
[481] [redacted].
[482] RJS-11, 17-October-2019, pp.48-49.
[483] StanišićFTB, paras 1319-1323.
[484] [redacted]
[485] [redacted]
[486] StanišićFTB, para.175.
[487] StanišićFTB, paras 693-699.

247. By focusing solely on events that transpired in 1995, the TC ignored the fact that Stanišić's contribution to peace was recurring and ongoing during the Indictment Period.

248. [redacted]

i) [redacted]

ii) [redacted]

iii) [redacted]

iv) [redacted]

[redacted]

488 [redacted]

489 [redacted]

v) [redacted]

vi) [redacted]

vii) [redacted]

249. [redacted]

250. [redacted]

497 [redacted]

501 [redacted]

[redacted]

251. [redacted]

252. [redacted]. It reflected the extent of his cooperation with foreign intelligence services in furtherance of peace, saving lives, and accountability for international crimes. No reasonable TC could have excluded RSJ-01's evidence and/or determined it was relevant only to Stanišić's intent and participation in a JCE (and not for mitigation of the sentence). This was a discernable legal error which had a significant effect on the sentence imposed.

253. Overall, the TC erred by failing to recognise the full scope of significant contributions made by Stanišić to peace efforts. By focusing solely on the incidents which took place in 1995 and failing to take into account the evidence which indicated a much wider range of activities that promoted peace, accountability and the saving of lives spanning from 1991 to 1995, the

503 [redacted]

504 [redacted]

505 [redacted]

506 [redacted]

TC came to a myopic conclusion regarding how much mitigation should be accorded to Stanišić for his contributions to peace.

254. Accordingly, the TC erred by concluding that Stanišić's contributions to peace efforts was worthy of only "some limited weight in mitigation."[507] No reasonable TC would have considered Stanišić's efforts in furtherance of peace worthy of only "limited weight in mitigation."

255. In the *Plavšić* case, for instance, the TC found that "Mrs. Plavšić was instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska. As such, she made a considerable contribution to peace in the region and is entitled to pray it in aid in mitigation of sentence. The TC gives it *significant* weight."[508] The *Jokić* TC agreed with this finding and qualified the post-conflict conduct of an accused as an important mitigating factor.[509] Accordingly, the Chamber considered: (i) Jokić's instrumental role in ensuring that a comprehensive ceasefire was agreed upon and implemented;[510] (ii) Jokić's reputation as a willing, sincere and genuine negotiator;[511] and (iii) Jokić's participation in political activities programmatically aimed at promoting a peaceful solution to the conflicts in the region[512] as significant mitigating factors.

256. The TC should have followed this jurisprudence and accorded significant and not "limited weight", to the crucial role played by Stanišić's contributions to peace in former Yugoslavia between 1991 and 1995 as a mitigating factor.

**RELIEF SOUGHT**

257. For the foregoing reasons, the Appeals Chamber should

a. GRANT Grounds 1-4 and quash Stanišić's convictions for aiding and abetting Counts 1-5; or, in the alternative

b. GRANT Grounds 1-5 and quash the sentence imposed by the Trial Chamber and impose a new and appropriate (and considerably lower) sentence.

[507] Judgement, pp.266-267, para.627.
[508] *Plavšić*TJ, para.94 (emphasis added).
[509] *Jokić*TJ, para.90.
[510] *Ibid.*, para.90.
[511] *Ibid.*, para.90.
[512] *Ibid.*, para.91.

Respectfully submitted,

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Counsel for Jovica Stanišić

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**THE INTERNATIONAL RESIDUAL MECHANISM FOR THE CRIMINAL TRIBUNALS**

**CASE NO. MICT-15-96-A**

**PROSECUTOR**

**V.**

**STANIŠIĆ &**
**SIMATOVIĆ**

**PUBLIC ANNEX**

***ANNEX A: FACTUAL CIRCUMSTANCES OF COMPARED CASES***

# Annex A: Factual Circumstances of Compared Cases

## a. Stojan Župljanin

1. Not applicable

## b. Mićo Stanišić

2. Mićo Stanišić was a police official at the highest level and, later, the Minister of Interior of Republika Srpska (RS).[513] He was found to have "had overall command and control over the RS MUP police forces and all other internal affairs organs [in RS]…"[514] and a "a key member of the decision-making authorities in RS from early 1992 onwards."[515] In this role, he was found "responsible for massive crimes in… 20 municipalities [(one of which was Bosanski Šamac)] alleged in the Indictment, including murder, torture, forcible displacement and persecution [against thousands of victims]...[committed] part of a widespread and systematic campaign of terror and violence."[516] The crimes spanned over nine months.[517] As recognised by the TC, the crime base was significantly larger compared to the case of Stanišić.[518] He was found to have significantly contributed to these crimes through participation in a JCE alongside a number of Serbian leaders aimed at "the establishment of a Serb state, as ethnically pure as possible, through the permanent removal of the Bosnian Muslims and Bosnian Croats."[519] Ultimately, he was convicted and sentenced to 22 years.[520] He was accorded limited mitigation based on his voluntary surrender to the Tribunal and compliance with the terms and conditions of his provisional release.[521]

3. He was found to have, *inter alia*, (i) been "involved in establishing Bosnian Serb institutions in BiH, including the SDS and RS MUP", (ii) "made the majority of key appointments in the RS MUP from 1 April 1992 onwards", (iii) "participated in the enunciation and implementation of the Bosnian Serb policy, as it evolved"[522] (v) "ordered RS MUP forces to be organised into "wartime units..." (vi) "deployed police forces in joint combat operations with the military in furtherance of the decisions of the Bosnian Serb authorities", (vi)

[513] *Stanišić&Župljanin*TJ, Volume II, paras 537-543.
[514] *Ibid.*, para. 736.
[515] *Stanišić& Župljanin*AJ, para. 360.
[516] *Stanišić&Župljanin*TJ, Volume II, para. 927.
[517] *Ibid.*, para. 930.
[518] Judgment, para. 634, fn.2423.
[519] *Stanišić&Župljanin*TJ, Volume II, para. 311.
[520] *Stanišić& Župljanin*AJ, p. 496.
[521] *Stanišić&Župljanin*TJ, Volume II, paras 933-934.
[522] *Stanišić& Župljanin*AJ, para. 360.

"consistently approved the deployment of the RS MUP forces to combat activities along with the other Serb forces despite being aware of the commission of crimes", (vii) "directly appointed… JCE members [who] were involved in the widespread and systematic takeovers of municipalities"[523] (viii) "had the authority to investigate and punish members of the RS MUP involved in crimes but failed to comply with his professional obligation to protect and safeguard the civilian population in the territories under his control",[524] (ix) "contributed to the continued existence and operation of detention and penitentiary facilities [where numerous detention-related crimes were committed] by failing to take decisive action to close these facilities, or, at the very least by failing to withdraw the RS MUP forces from their involvement in these detention centres."[525]

**c. Blagoje Simić**

4. Blagoje Simić was the President of the SDS Municipal Board and President of the Crisis Staff (later named the War Presidency) in Bosanski Šamac after its takeover,[526] the highest-ranking civilian in the Bosanski Šamac Municipality..."[527] In this role, he "oversaw the key objectives of the Crisis Staff that included consolidating Serb institutions and coordinating the functions of the authorities in Bosanski Šamac, and presided over meetings of the Crisis Staff where operations of authorities in the Municipality were discussed… [including] the situations of arrests and detention in Bosanski Šamac".[528] Although he did not have authority over the police, he was in a position of "strong influence and control as the President of the Crisis Staff" over the arrest and detention of individuals.[529]

5. Specifically, Simić was found to have aided and abetted the persecution of non-Serb prisoners in Bosanski Šamac from 17 April 1992 to at least 31 December 1993 by (i) working together with the police, paramilitaries, and JNA to maintain the system of arrests and detention of approximately 1000 non-Serb civilians [through his] important/strong influence and control over the unlawful arrests and detention"[530], (ii) deliberately denying adequate medical care to detainees and, thus, contributing to the creation of inhumane conditions in various detention

[523] *Ibid.*, para. 361.
[524] *Ibid.* para. 362.
[525] *Ibid.*, para. 363.
[526] *Simić* TJ, para. 994.
[527] *Simić*AJ, para. 3.
[528] *Simić et al.* TJ, para. 994.
[529] *Ibid.*
[530] *Simić*AJ, para. 115; *Simić*TJ, para. 994-995.

facilities in Bosanski Šamac,[531] (iii) failing to use his authority to impede the continuation of the forced labour programme which sent at least 150 to 180 non-Serb civilians to work in dangerous or humiliating conditions,[532] and (iv) appointing the civilian Exchange Committee responsible for exchange of prisoners, participating in the exchange procedure with the ability to express authoritative opinions in relation thereto and creating a coercive environment which led to the deportation of 17 non-Serbs.[533] Accordingly, he was found guilty of "aiding and abetting the crime of persecutions through the unlawful arrest and detention of non-Serb civilians, the confinement under inhumane conditions on non-Serb prisoners, the forced labour of Bosnian Croat and Bosnian Muslim civilians, and the forcible displacements of non-Serb civilians" in Bosanski Šamac.[534] Simić was sentenced to 15 years[535] after mitigation based on his age, family circumstances, lack of prior convictions, good conduct while in UNDU and his choice to testify.[536]

**d. Vidoje Blagojević**

6. Blagojević was the commander of the Bratunac Brigade of VRS and was convicted for aiding and abetting murder, persecutions and other inhumane acts (forcible transfer) after the fall of Srebrenica.[537] Blagojević had command and control over and the authority to issue orders to the forces under the Bratunac Brigade that contributed to the commission of these crimes.[538] Under his command, the men aided and abetted the commission of the following crimes: (i) the murder of more than fifty Bosnian Muslim men detained in Bratunac between 12 and 14 July 1995 – his men guarded the victims, ensured their further detention and eventually allowed the murders to take place;[539] (ii) the persecution of 20,000 to 30,000 non-Serbs in Potočari and Bratunac through the underlying acts of terror, cruel and inhumane treatment;[540] creating inhumane conditions from 11 to 14 July 1995 through shelling and shooting at civilians and guarding 2,000 to 3,000 detainees in Bratunac town from 12 to 14 July;[541] and (iii) the forcible transfer of at least 9,000 to 10,0000 Bosnian Muslim men, women

[531] *Simić* AJ, para. 134.
[532] *Simić* AJ, para. 154-155; *Simić*TJ, paras 804-806.
[533] *Simić* AJ, para. 182-184.
[534] *Ibid.*, para. 189.
[535] *Ibid.*, para.300.
[536] *Ibid.*, para.266; *Simić*TJ, paras 1086, 1088, 1089, 1090.
[537] *Blagojević&Jokić* AJ, para.3, p.137.
[538] *Ibid.*, paras 87-88, 131.
[539] *Ibid.*, para. 95, 98, 132.
[540] *Ibid.*, para. 114; *Blagojević&Jokić*TJ, paras 605-609, 755-756;
[541] *Blagojević&Jokić*AJ, para.132; *Blagojević&Jokić*TJ, paras 271-272.

and children.[542] Blagojević was sentenced to 15 years imprisonment.[543] Blagojević was afforded some mitigation due to the fact that "he was not one of the major participants in the commission of the crimes"[544] and due to his role in the demining process after the end of the war.[545]

### e. Dragoljub Ojdanić

7. Ojdanić was the Deputy Chief of General Staff of the VJ between July 1996 and November 1998.[546] In this position, he was in *de jure* and *de facto* command and control of all VJ forces.[547] He was found criminally responsible for aiding and abetting forcible displacement across a vast geographic area, comprising nine locations and numerous towns and villages in a large geographic area.[548] Ultimately, Ojdanić was found guilty of aiding and abetting the forcible displacement of hundreds of thousands of Kosovo Albanians committed part of a widespread and systematic campaign of terror and violence over a period of just over two months.[549]

8. Ojdanić substantially contributed to these crimes by: (i) ordering and mobilizing the VJ forces as well as non-Albanian Kosovar population to participate in operations with the MUP in Kosovo during the NATO air campaign; (ii) furnishing them with military equipment; (iii) granting authorisation within the VJ chain of command for these forces to continue to operate in Kosovo despite the occurrence of these crimes; and (iv) refraining from taking effective measures at his disposal to prevent and suppress the commission of crimes.[550] Despite his command position, extensive contribution to and extremely direct involvement (which one might say borders ordering and/or direct commission) in the crimes committed in Kosovo, Ojdanić was sentenced to 15 years of imprisonment.[551] Some mitigation was afforded to Ojdanić on the account of his good behaviour at the UNDU, during provisional release and trial,[552] good character,[553] his poor health and advanced age,[554] and the measures he took to

[542] *Blagojević&Jokić*AJ, para.132; *Blagojević&*JokićTJ, paras 189, 267, 284, 758.
[543] *Blagojević&Jokić*AJ, p.137.
[544] *Blagojević&Jokić*TJ, para.835,
[545] *Ibid.*, para.858.
[546] *Milutinović* TJ, Volume III, para. 478.
[547] *Ibid.*, para. 625.
[548] *Ibid.*, para. 630.
[549] *Ibid.*, para. 1173.
[550] *Ibid.*, para. 626.
[551] *Ibid.*, para. 1209.
[552] *Ibid.*, para. 1178
[553] *Ibid.*, para. 1186
[554] *Ibid.*, para. 1188.

reduce human suffering during the conflict.[555] On the other hand, the TC took the "high level of gravity" of the crimes he was convicted of as well as his position as the "most senior military official in the FRY"[556] as aggravating factors.[557]

### f. Vladimir Lazarević

9. Lazarević was the Commander of the Priština Corps of the VJ with *de jure* and *de facto* authority over all its members.[558] In this position, he had the authority and power to plan the VJ activities and operations in Kosovo.[559] He was physically present in Kosovo when large numbers of Kosovo Albanian civilians were forcibly displaced by Serb forces from Priština in an organised manner.[560]

10. Lazarević was found to have aided and abetted the deportation and forcible transfer hundreds of thousands of victims in a number of towns/villages across a vast geographical area[561] through a widespread and systematic campaign of terror and violence carried out against Kosovar civilians.[562] He significantly contributed to in the planning and execution of the joint operations conducted by the VJ, acting solely or in co-ordination with the MUP, on the ground in Kosovo from March to June 1999.[563] His contribution consisted of: (i) ordering the implementation of large-scale plans for military operations which sent the VJ into Kosovo;[564] (ii) providing VJ forces under his command to the joint operations of the MUP and the VJ in Kosovo in 1999, during which numerous criminal acts were committed; (iii) facilitating the organisation and equipping of VJ units; and (iv) providing them with weaponry, including tanks.[565] He also provided encouragement and moral support by granting authorisation within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the crimes committed by VJ members.[566] Similar to Ojdanić, he played a key role in the crimes committed in Kosovo in his position "as the Commander of the Priština Corps, a high-level position in the VJ."[567]

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[555] *Ibid.*, para. 1187.
[556] *Ibid.*, para. 1185.
[557] *Ibid.*, para. 1174.
[558] *Ibid.*, para.925.
[559] *Ibid.*, para.925.
[560] *Ibid.*, para.924.
[561] *Milutinović*TJ, Volume III, para.930; *Šainović et al.* AJ, p.741.
[562] *Milutinović*TJ, Volume III, paras 923-924, 1173.
[563] *Ibid.*, para.925.
[564] *Šainović*AJ, paras 1655, 1667.
[565] *Milutinović*TJ: Volume III, para.926.
[566] *Ibid.*, para.926.
[567] *Ibid.*, para.1195.

11. After being granted some mitigation due to his good character, the fact that he gave an interview to the Prosecutor during the pre-trial phase, the illness of his family members and difficult family living circumstances, his voluntary surrender, and serious health problems while in detention,[568] Lazarević was ultimately sentenced to 14 years imprisonment.[569]

**g. Dragan Jokić**

12. Jokić (the Chief of Engineering and the Engineering Company Commander in the VRS)[570] was found guilty of aiding and abetting the mass executions of 2,700 to 4,200 victims in three localities[571] constituting murder, extermination and persecution by coordinating. His contribution to the crimes consisted of sending and monitoring the deployment of Zvornik Brigade resources and equipment to the mass execution sites between 14-17 July to excavate burial sites.[572] Jokić was sentenced only to nine years of imprisonment. He was afforded with some limited mitigation due to the fact that he gave some assistance to some victims, he is the guardian of his teenage son, he fully complied with the conditions of his provisional release, voluntarily surrendered to the Tribunal, he appeared for two interviews with the Prosecutor and he participated in the demining efforts after the war.[573]

**h. Berislav Pušić**

13. Pušić was a military policeman and, subsequently, the head of the Exchange Service and the president of the Commission for HVO Prisons and Detention Centres.[574] In this role, he had "substantial power to keep Muslim HVO detainees in detention or to release them, power over the conditions in which they were held and power to represent HVO before the international community and also before the leadership of Croatia and BiH in negotiations regarding exchanges and the movement of people."[575] Specifically, Pušić had authority to "take charge of all detention units and prisons in which detainees of war and military detainees were held" in the Herceg-Bosna between April 1993 and April 1994.[576] As such, he had the power to organise the registration and classification of HVO detainees,[577] negotiate/organise prisoner

[568] *Ibid.*, paras 1196-1200.
[569] *Šainović et al.* AJ, p.741.
[570] *Blagojević&Jokić*TJ, para.516.
[571] *Ibid.*, paras 357, 567(j), 763, 766-767 and 769.
[572] *Ibid.*, para.770-775.
[573] *Ibid.*, para.854-860.
[574] *Prlić*TJ, Volume IV, para.1031.
[575] *Ibid.*, para.1201.
[576] *Ibid.*, para.1031, 1202.
[577] *Ibid.*, para.1046.

exchanges, to authorise or prevent visits to the detention centres,[578] determine which detainees would be exchanged,[579] transfer them between prisons, resolve problems related to conditions of confinement/mistreatment,[580] send them to perform labour,[581] or release them.[582] He also had the *de facto* and *de jure* authority in relation to humanitarian evacuations of civilians[583] and to represent the HVO before the international community on matters related to the exchange and release of Muslim detainees held in HVO prisons.[584]

14. Pušić was found to have contributed to a wide range or crimes including persecution, imprisonment, inhumane acts, cruel treatment, extensive destruction of property, wanton destruction of cities, towns and villages, unlawful infliction of terror and attack on civilians, deportation, murder, unlawful labour, unlawful transfer of civilians, through a JCE spanning from December 1991 to April 1994 aimed at domination of the Croatian Republic of Herzeg-Bosna by Croats through the ethnic cleansing of the Muslim population.[585] The TC found that the crimes by the Accused in this case "were committed in eight municipalities in BiH during a period of approximately one and a half years, between the autumn of 1992 and early 1994, and resulted in thousands of victims."[586]

15. Pušić's contribution consisted of: (i) continuing to perform his functions in the knowledge of mistreatment of detainees in detention centres under his authority;[587] (ii) sending detainees to work on the front lines and be used as human shields;[588] (iii) facilitating the deportation of Muslim detainees to third countries;[589] (iv) obstructing the humanitarian evacuation Muslims from East Mostar who were terrorized and subjected to extremely harsh living conditions (due to continuous shooting, shelling, destruction of property and murder) during the HVO siege which lasted from June 1993 to April 1994;[590] (v) denying access of international observers to the HVO detention centres;[591] and (vi) concealing the responsibility of the HVO for the crimes committed in the detention centres and forcible displacement of

[578] *Ibid.*, para.1052.
[579] *Ibid.*, para.1063.
[580] *Ibid.*, para.1056.
[581] *Ibid.*, para.1054.
[582] *Ibid.*, para.1050.
[583] *Ibid.*, para.1067.
[584] *Ibid.*, para.1081.
[585] *Ibid.*, paras 41-73, 1211; *Prlić*AJ, Volume II, paras 592, 2796, 2802, 2806-2812, 2818-2821.
[586] *Prlić*TJ: Volume IV, para.1297.
[587] *Ibid.*, para.1203.
[588] *Ibid.*, para.1151, 1203; *Prlić*AJ: Volume II, para.2783.
[589] *Prlić*TJ: Volume IV, paras 1133, 1166, 1179, 1184,1203-1204.
[590] *Ibid.*, para. 1122-1123; *Prlić*AJ: Volume II, para.2797.
[591] *Prlić*TJ: Volume IV, para.1155.

Bosnian Muslims.[592] Overall, he was found to have lent support to the system for deporting the Muslim population by means of, *inter alia*, murder and destruction of property during military attacks, as well as murders related to the nearly systematic use of detainees on the front lines for labour or as human shields.[593]

16. Pušić received a sentence of 10 years imprisonment.[594] He was granted limited mitigation due to his voluntary surrender to the Tribunal, compliance with the conditions of his provisional release and good behaviour in UNDU.[595]

**i. Vinko Pandurević**

17. Pandurević was the commander of Višegrad Brigade from June to late December 1991 and assumed the command of the Zvornik Brigade in December 1992.[596] He was found guilty of aiding and abetting: (i) the murder and persecution of ten wounded prisoners by ordering their transfer to the custody of one of the other accused in the knowledge that they would be killed;[597] (ii) the forcible transfer and persecution of thousands of Bosnian Muslims in Srebrenica by participating with his forces in the military attack that led to its takeover;[598] (iii) the murder, extermination and persecution of 2,000 to 3,000 Bosnian Muslim prisoners by permitting forces under his command and authority to facilitate the perpetration of the killings and failing to prevent his troops from assisting the commission of these crimes including by guarding, executing and burying the prisoners.[599] Additionally, he was also found guilty pursuant to his superior responsibility for the participation of his subordinates in the persecution, cruel treatment, extermination and murder of thousands of Bosnian prisoners.[600]

18. Pandurević was sentenced to 13 years of imprisonment.[601] In assessing the gravity of the crimes to determine the sentences to be imposed on the Accused in this case, the TC noted that "[t]he calculated destruction of the Bosnian Muslims of Srebrenica in July 1995 stands out as one of the worst crimes committed in Europe after the Second World War. The extermination of the Bosnian Muslim males from Srebrenica, accompanied by the forcible transfer and

[592] *Ibid.*, para. 1201.
[593] *Prlić*AJ: Volume II, para.2783.
[594] *Prlić*AJ: Volume III, p.1409.
[595] *Prlić*TJ: Volume IV, paras 1382-1384.
[596] *Popović*TJ: Volume IV, para.1839.
[597] *Ibid.*, para. 1981-1991; *Popović et al.* AJ, para.1817.
[598] *Popović*TJ: Volume IV, paras 760, 2009-2012, 2098-2099.
[599] *Popović*TJ, paras 2017-2018; *Popović et al.* AJ, paras 1790-1804.
[600] *Popović* AJ, paras 1906-1916, 1925-1947
[601] *Popović*AJ, p.716.

persecution of the Bosnian Muslim populations from the Srebrenica and Žepa enclaves all together encompass the gravest crimes under international criminal law."[602] As mitigating circumstances, the TC noted the good behaviour of the Pandurević during trial and the UNDU, the fact that he had no prior criminal record,[603] his voluntary surrender to the Tribunal,[604] his good character,[605] and his family situation.[606] The Chamber also gave significant weight to the fact that Pandurević "was not a participant in the JCE to forcibly remove" or "present in Potočari during the transfer operation, nor was he involved in any respect in the planning and design of the operation"[607] and that he, in contravention of the orders from his superiors, made a "decision to… enable the safe passage of thousands of Bosnian Muslim men…"[608]

### j. Elizaphan Ntakirutimana

19. Ntakirutimana was convicted of aiding and abetting genocide by killing and causing serious bodily or mental harm and extermination of large number of men, women and children, who were predominantly Tutsi.[609] His contribution included transporting armed attackers who were chasing the victims to the crime scene on multiple occasions, pointing out the victims to the perpetrators while they were singing "exterminate them" and facilitating the hunting down and killing of victims hiding in a church.[610] His presence at the scene of attack was taken as an aggravating factor in his sentencing.[611] On the other hand, he was afforded some mitigation on account of his good character, family situation, the fact that he did not play a leading role in the attacks or personally participate in the fillings, as well as his advanced age and ill-health.[612]

[602] *Popović*TJ, para.2148.
[603] *Ibid.*, paras 2155-2156.
[604] *Ibid.*, para.2005
[605] *Ibid.*, para.2223.
[606] *Ibid.*, para.2225.
[607] *Ibid.*, para.2211.
[608] *Ibid.*, para.2219.
[609] *Ntakirutimana*AJ, paras 567-570.
[610] *Ntakirutimana*AJ, para.566.
[611] *Ntakirutimana*AJ, para.904.
[612] *Ntakirutimana*TJ, paras 895-898.

**THE INTERNATIONAL RESIDUAL MECHANISM FOR THE CRIMINAL TRIBUNALS**

**CASE NO. MICT-15-96-A**

**PROSECUTOR**

**V.**

**STANIŠIĆ &**
**SIMATOVIĆ**

**PUBLIC ANNEX**

***ANNEX B: TABLE OF AUTHORITIES***

# Annex B: Table of Authorities

| Abbreviation used | Full Citation |
|---|---|
| | ***Books and Articles*** |
| Aksenova | Maria Aksenova, *Complicity in International Criminal Law* (OUP, 2016) |
| | KJM Smith, A Modern Treatise on the Law of Criminal Complicity (OUP, 1991) |
| Ventura | Manuel Ventura, 'Aiding and Abetting', in Jérôme de Hemptinne et al, *Modes of Liability in International Criminal Law* (CUP, 2019) |
| | Kevin J Heller, 'The SCSL's Incoherent — and Selective — Analysis of Custom' (*Opinio Juris*, 27 September 2013) |
| | Kevin J Heller, 'Why the ICTY's "Specifically Directed" Requirement Is Justified' (*Opinio Juris*, 2 June 2013) |
| | Dov Jacobs, 'ICTY orders retrial of acquitted defendants in unconvincing Judgment' (16 December 2015) |
| | Manuel Ventura, 'Farewell 'Specific Direction' - Aiding and Abetting War Crimes and Crimes Against Humanity in Perišić, Taylor, Šainović et al., and US Alien Tort Statute Jurisprudence', in Stuart Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013* (2014) |
| | K. Ambos, 'Article 25: Individual Criminal Responsibility' in O. Trifterer & K. Ambos *The Rome Statute of the International Criminal Court: A Commentary* (*3rd ed*, C.H. Beck-Hart-Nomos, 2016) |
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| | ***Case Laws*** |
| | *Prosecutor v. Brima et al*., Case No. SCSL-04-16-T, Judgement, 20 June 2007 |
| | *Prosecutor v. Brima et al*., Case No. SCSL-04-16-A, Judgement, 22 February 2008 |
| | *Prosecutor v. Sesay et al*., Case No. SCSL-04-15-A, Judgment, 26 October 2009 |

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| | *Prosecutor* v. *Kondewa and Fofana*, Case No. SCSL-04-14-A, Judgment, 28 May 2008 |
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| | *The Prosecutor v. Laurent Gbagbo*, ICC, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11, 3 June 2013 |
| | *Grishin v. Russia,* ECtHR, Judgment, Application No. 14807/08, 24 July 2012 |
| | *Idalov v. Russia,* ECtHR, Judgment, Application No. 5826/03, 22 May 2012 |
| | *Sałapa v. Poland,* ECtHR, Judgment, Application No. 35489/97, 19 December 2002 |
| | *Trzaska v. Poland,* ECtHR, Judgment, Application No. 25792/94, 11 July 2000 |
| | *Brown v. Jamaica,* HRC, Views, Communication No. 775/1997, UN Doc CCPR/C/65/D/775/1997, 23 March 1999 |
| | *Grigoryan v. Armenia,* ECtHR, Judgment, Application No. 3627/06, 17 December 2012 |
| | *Nakhmanovich v. Russia,* ECtHR, Judgment, Application No. 55669/00, 2 March 2006 |
| | *Hajibeyli v. Azerbaijan,* ECtHR, Judgment, Application No. 16528/05, 10 July 2008 |

UNITED NATIONS
International Residual Mechanism
for Criminal Tribunals

NATIONS UNIES
Mécanisme international appelé à exercer
les fonctions résiduelles des Tribunaux pénaux

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