

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

**Case No. IT-08-91-A**

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**IN THE APPEALS CHAMBER**

**Before: Judge Theodor Meron, Pre-Appeal Judge  
Judge Carmel Agius  
Judge Patrick Robinson  
Judge Liu Daqun  
Judge Arlette Ramaroson**

**Registrar: Mr. John Hocking**

**Date Filed: 19 August 2013**

**THE PROSECUTOR**

**v.**

**MIĆO STANIŠIĆ  
and  
STOJAN ŽUPLJANIN**

***PUBLIC***

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**APPELLANT'S BRIEF ON BEHALF OF MIĆO STANIŠIĆ**

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**Mr. Dragan Krgović and Mr. Tatjana Čmerić for Stojan Župljanin**

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**ABBREVIATIONS USED THROUGHOUT THE BRIEF**

AC	Appeals Chamber
AJ	Appeals Judgment
ARK	Autonomous Region of Krajina
BiH	Bosnia and Herzegovina
BiH-MUP	Ministry of Interior for Bosnia and Herzegovina
BSA	Bosnian Serb Assembly/Assembly of the Serb People in BiH
BSL	Bosnian Serb Leadership
CIL	Customary International Law
CSB	Regional Security Services Centre
ECMM	European Community Monitor Mission
EU	European Union
HDZ	Croatian Democratic Union
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IMT	International Military Tribunal
JCE	Joint Criminal Enterprise
JCE I	Joint Criminal Enterprise Category I
JCE III	Joint Criminal Enterprise Category III
JNA	Yugoslav People's Army
LIA	Law on Internal Affairs
MOD	Ministry of Defence
MOJ	Ministry of Justice
NSE	National Security Council
PW	Prisoner of War
RS	<i>Republika Srpska</i>
RSMUP	Ministry of the Interior of <i>Republika Srpska</i>
SDA	Party of Democratic Action
SDB	State Security Service
SDS	Serbian Democratic Party
SJB	Public Security Station/Public Security Service
SOS	Serb Defence Forces
SRBiH	Socialist Republic of Bosnia and Hercegovina
SRK	Republic of Serb Krajina (Croatia)
SSUP	Federal Ministry of Interior
TC	Trial Chamber
TJ	Trial Judgment
TO	Territorial Defence
UNPROFOR	United Nations Protection Force
VRS	Army of <i>Republika Srpska</i>



## PROCEDURAL BACKGROUND

1. The Indictment against Mr. Stanišić ("Stanišić") was confirmed on 25 February 2005 and Stanišić immediately surrendered voluntarily on 10 March 2005.
2. On 14 March 2005, Stanišić pleaded not guilty to all counts in the Indictment.
3. From 16-21 July 2007, before trial, Stanišić consented to being interviewed by the Prosecution pursuant to Rule 63. The transcript of the interview was admitted into evidence at the Prosecution's request.
4. Stanišić was tried jointly with Stojan Župljanin pursuant to the Prosecution's Second Amended Consolidated Indictment, dated 23 November 2009.
5. The trial commenced on 14 September 2009 and ended on 1 June 2012.
6. The TC's Judgement was delivered on 27 March 2013; Stanišić was found guilty of Counts 1, 4 and 6, pursuant to JCE I and III.
7. According to the principles relating to cumulative convictions, the TC found Stanišić responsible but did not enter convictions for Counts 3, 5, 7, 8, 9 and 10.
8. Significantly, Stanišić was acquitted of Count 2, extermination, pursuant to all modes of criminal responsibility.
9. The TC imposed on Stanišić a single sentence of 22 years' imprisonment.
10. Stanišić's Notice of Appeal was filed on 13 May 2013.<sup>1</sup>
11. On 1 July 2013, Stanišić filed a Rule 115 application seeking admission of additional evidence on appeal, as well as a motion seeking leave to amend his notice of appeal in respect of Grounds 1 *bis*, 4 and 10. Both motions are pending.<sup>2</sup>

<sup>1</sup> Župljanin filed his Notice of Appeal on the same day.

<sup>2</sup> The Prosecution did not oppose the amendments requested for Stanišić's 4<sup>th</sup> and 10<sup>th</sup> Grounds of appeal, which accordingly have been incorporated and briefed herein subject to the AC's approval. As for Stanišić's new Ground of appeal 1 *bis*, it will be briefed if the AC grants Stanišić leave to do so.

12. Stanišić and Župljanin are filing their respective Appellant's Briefs on this day. Should any of Župljanin's grounds of appeal be granted, the results thereof should apply to Stanišić where appropriate.
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## GENERAL OVERVIEW

13. Stanišić hereby appeals the Judgement by which he was found guilty of three counts for persecutory acts purportedly committed as a member of a JCE and sentenced to 22 years' imprisonment.
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14. **Stanišić's appeal is based on the premise** that the evidence adduced at trial makes it clear that Stanišić:
- a. was neither a member of the SDS nor involved in the politics of the conflict;
  - b. neither intended nor supported the commission of crimes;
  - c. did his utmost, under the prevailing circumstances, to fulfill his role as Minister of the Interior within the parameters of the law;
  - d. took multiple measures to prevent crimes, identify the perpetrators and arrest them; and
  - e. by his actions, actually frustrated the implementation of the purported JCE.
15. Had the TC correctly assessed the evidence, and not committed multiple errors of fact and law, **Stanišić would undoubtedly have been acquitted.**
16. The TC committed fundamental errors of law and fact by, *inter alia*:
- a. failing to properly consider the contents of the Prosecution interview of Stanišić conducted before Trial;
  - b. inappropriately pre-judging Stanišić's membership in the JCE on the basis of his *prima facie* association with the so-called 'BSL';
  - c. wrongly conflating the legitimate political goal of Serbs to live together in one state with the intention to forcibly transfer or deport non-Serbs;
  - d. failing to consider the voluminous evidence clearly demonstrating that he neither intended nor supported the commission of crimes;
  - e. drawing the incorrect inference that Stanišić shared the *mens rea* to forcibly transfer and/or deport non-Serbs, thereby ignoring other reasonable inferences available on the basis of the evidence;

- f. wrongly applying the principles of omission liability and finding on this basis that he contributed to the purported JCE by not doing 'enough' to prevent the commission of crimes;
  - g. implicitly finding that Stanišić was a member of the purported JCE; and
  - h. concluding that the crimes committed outside the scope of the JCE were foreseeable to Stanišić.
- 
17. Stanišić's appeal also places significant emphasis on the manifestly unreasonable and excessive sentence imposed on him by the TC.
  18. Having found that Stanišić was a member of a JCE, the TC utterly failed to consider the form and degree of his participation as well as, more importantly, the fact that Stanišić's actions as Minister of the Interior actually frustrated the furtherance of the JCE.
  19. As a result of this appeal, Stanišić should be **ACQUITTED OF ALL COUNTS**.
  20. In the alternative, **A MUCH LOWER SENTENCE** must be imposed on Stanišić.

**GROUND OF APPEAL 1BIS****THE TC VIOLATED STANIŠIĆ'S RIGHT TO A FAIR HEARING BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL**

21. Stanišić's application seeking leave to add Ground 1*bis* is presently pending before at AC.<sup>3</sup> Since the Prosecution opposed the requested amendment, Stanišić will submit his arguments for this Ground as soon as the AC grants him leave to do so.

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<sup>3</sup> Stanišić Rule 108 Motion, paras.5-7; 30-35.

## 1<sup>ST</sup> GROUND OF APPEAL

### **THE TC ERRED BY FAILING TO PROVIDE A REASONED OPINION IN SUPPORT OF ITS FINDINGS PURSUANT TO JCE I AND JCE III**

22. The TC convicted Stanišić of counts 1, 4 and 6 pursuant to JCE I and JCE III without providing a reasoned opinion in support of its findings.<sup>4</sup> Notably, the TC also failed to pronounce of the decisive issue of re-subordination, which permeates all of its findings.

#### **I. OVERVIEW**

23. First, the TC failed to pronounce on whether the military or civilian authorities were responsible for the investigation and prosecution of crimes against Muslims and Croats, which may have been committed by policemen re-subordinated to the military. The TC blatantly failed to explain why it was unable to do so. The TC's inconclusive finding pronounce impacts on all of its findings related to Stanišić's liability.

24. Second, the TC inferred that Stanišić possessed the *mens rea* pursuant to JCE I<sup>5</sup> without providing a reasoned opinion as to why it failed to consider significant exculpatory evidence, clearly demonstrating that other reasonable inferences compatible with Stanišić's innocence could be drawn. The TC also failed to provide a reasoned opinion by failing to consider the crucial testimony of Prosecution witness Davidović, thereby erroneously limiting its analysis to a select segment of the relevant evidentiary record.<sup>6</sup>

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<sup>4</sup> In the absence of explicit findings, many of the findings are categorized as 'implicit'.

<sup>5</sup> Judgement, Volume II, para.769.

<sup>6</sup> *Perišić-AJ*, para.95.

25. Third, in finding implicitly that Stanišić furthered the JCE it found to have existed, the TC relied on JCE by omission liability without setting out the applicable law. The TC also failed to expressly find that Stanišić furthered, let alone significantly contributed<sup>7</sup> to the purported JCE. Also, while the TC reviewed and summarized voluminous evidence on this issue, it failed to explain how this evidence demonstrated Stanišić's purported contribution to the JCE.
26. Lastly, the TC failed to enter specific findings that crimes charged in Counts 3-8 were foreseeable to Stanišić. The TC also failed to explain why and how the crimes charged in counts 3-8 were either a natural and foreseeable consequence of the execution of the JCE or subjectively foreseeable to Stanišić.

## II. ARGUMENT

### A. THE TC FAILED TO PRONOUNCE ON RE-SUBORDINATION

27. The TC held that it was "*unable to find whether it was the military or the civilian authorities which may have been responsible for the investigation and prosecution of crimes (...) committed by policemen re-subordinated to the military*"; and that "*the question of the accused's responsibility for the actions of re-subordinated policemen is primarily of importance for their responsibility pursuant to Article 7(3) of the Statute*"<sup>8</sup>. On this basis, the TC concluded that it was not necessary to make any further findings on this issue.
28. The TC's failure and/or inability to pronounce on the re-subordination issue is critical for the adjudication of this appeal as it underpins all of the TC's findings relied upon to establish Stanišić's *mens rea* and *actus reus*. It gravely impeded Stanišić's ability to effectively exercise his right of appeal. More importantly, it fatally hinders the AC's capacity to understand and review the TC's findings and evaluation of the evidence.<sup>9</sup>

<sup>7</sup> Judgement, Volume I, para.103

<sup>8</sup> Judgement, Volume II, para.342.

<sup>9</sup> *Naletelić-Martinović-AJ*, para.603.

29. Firstly, the TC's ambivalence regarding the issue of re-subordination transcends Article 7(3) liability as it goes to the heart of Stanišić's criminal responsibility. Indeed, considering that most of the underlying crimes in this case can be attributed to policemen who were re-subordinated to the military, the TC's inconclusive finding is highly significant. In fact, it is unfathomable how the TC was able to find Stanišić guilty beyond a reasonable doubt when it was unable to conclude whether he was responsible for the investigation and prosecution of these crimes.
30. Secondly, despite the absence of findings on the issue of re-subordination, the TC nonetheless proceeded to find that "*Stanišić had overall command and control over the RS MUP police forces and of all other internal affairs organs (...)*".<sup>10</sup> The TC's finding is evidently contradictory to its inability to pronounce on the re-subordination issue. More importantly, the TC neither addressed nor provided reasons for this contradiction.
31. Thirdly, even though the TC was unable to determine whether military or civilian authorities were responsible for the investigation and prosecution of crimes committed by policemen re-subordinated to the military, it nevertheless relied on Stanišić's purported failure to investigate or prosecute these crimes to find implicitly that he contributed to the JCE. Not only is the TC's reasoning flawed, it strikes at the core of its assessment of Stanišić's responsibility.
32. Lastly, the TC's description of the manner in which it determined Stanišić's criminal responsibility, despite its inconclusive finding, displays its misunderstanding and abuse of the doctrine of JCE.

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<sup>10</sup> Judgement, Volume II, para.736



33. Having (i) made clear that it was unable to determine whether Stanišić (civilian authorities) was responsible for investigating and prosecuting crimes committed by re-subordinated policemen; and (ii) noted the defence claim that “(...) policemen, (...) were re-subordinated to the military at the time of the commission of the crimes”<sup>11</sup>, the TC then revealed its indirect and erroneous approach to establish Stanišić’s guilt. The TC began by saying that in the subsequent sections of the Judgement, it “finds (...) that the Accused were members of this enterprise” and that, for this reason, it “will therefore consider whether the actions of policemen (...) can be imputed to a member of the JCE and ultimately to the Accused”.<sup>12</sup>
34. What makes this approach patently flawed and unfair is that in the “subsequent sections of the Judgement”, the TC relied upon and actually attributed the actions of the re-subordinated policemen to Stanišić for the purpose of establishing his membership in the purported JCE. The TC thus prejudicially relied on its inconclusive finding to pronounce on Stanišić’s responsibility.
35. No reasoned opinion is provided by the TC in support of its circular reasoning and backdoor approach, which invalidates the Judgement.
- B. THE TC WRONGLY INFERRED THAT STANIŠIĆ POSSESSED THE MENS REA PURSUANT TO JCE I WITHOUT PROVIDING A REASONED OPINION**
36. In Perišić-AJ, the AC held that “in certain circumstances, insufficient analysis of evidence on the record can amount to a failure to provide a reasoned opinion.”<sup>13</sup>
37. In no more than 4 paragraphs that fail to refer specifically to other findings,<sup>14</sup> the TC drew the inference that Stanišić possessed the required *mens rea* for the JCE it found to have existed.

<sup>11</sup> Judgement, Volume II, para.342.

<sup>12</sup> *Idem.*

<sup>13</sup> Perišić-AJ, para.92

<sup>14</sup> Judgement, Volume II, paras.766-769 include no footnotes.

38. While this is not, in and of itself, decisive, it is significant that a thorough examination of the paragraphs concerning Stanišić's individual criminal responsibility<sup>15</sup> does *not* make it possible to understand the TC's reasoning. While the TC summarized a large quantity of evidence, it subsequently failed to provide a reasoned opinion supporting its inference that Stanišić possessed the required *mens rea*.
39. More importantly, in drawing this inference, the TC provided no reasons for failing to consider voluminous exculpatory evidence<sup>16</sup> which clearly demonstrates that other reasonable inferences compatible with Stanišić's innocence could be drawn.
40. It appears evident that the TC erroneously relied, mainly, if not exclusively, on Stanišić's knowledge of crimes to infer the he possessed the necessary *mens rea*. Moreover, on the sole occurrence where the TC apparently examined Stanišić's acts and conduct to draw its erroneous inference, it failed to address serious inconsistencies in the evidence without providing a reasoned opinion for this.<sup>17</sup>
41. While the TC found on the basis of Davidović's testimony in the Krajišnik case that "*Stanišić, albeit opposed to the presence of some paramilitary groups in BiH, approved the operation of Arkan's Men in Bijeljina and Zvornik and allowed Arkan to remove whatever property in exchange for 'liberating' the territories*"<sup>18</sup> it failed to consider Davidović's testimony in this case, which fatally undermines his prior testimony in relation to an alleged deal between Stanišić and Arkan.<sup>19</sup> The TC failed to explain why it overlooked critical parts of Davidović's testimony and failed to provide a reasoned opinion justifying its finding.

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<sup>15</sup> Judgement, Volume II, paras.532-728.

<sup>16</sup> See *infra*, 4<sup>th</sup> Ground of Appeal, section F.

<sup>17</sup> *Haradinaj-TJ*, para.134.

<sup>18</sup> Judgement, Volume II, para.768.

<sup>19</sup> Davidović, T.13625-13626.

**C. THE TC WRONGLY FOUND THAT STANIŠIĆ CONTRIBUTED TO THE JCE WITHOUT PROVIDING A REASONED OPINION**

42. Firstly, the TC convicted Stanišić for contributing to the purported JCE without entering an express finding that he contributed, let alone significantly contributed, to the JCE. The TC's failure to enter an explicit finding on such an essential element, hampered Stanišić's ability to appeal his conviction pursuant to JCE I.

43. Secondly, the TC found that Stanišić contributed to the JCE on the basis of purported omissions without setting out the applicable law for JCE omission liability. The TC's failure to set out the applicable law further impeded Stanišić's effective ability to challenge the TC's finding from a legal standpoint.

44. Thirdly, in finding that Stanišić contributed to the JCE in paragraphs 729-765, the TC failed to refer specifically to other findings,<sup>20</sup> which also hindered Stanišić's ability to appeal this finding.

45. More importantly – although the absence of footnotes might not be a decisive issue – it is striking that a detailed review of the paragraphs in the Judgement concerning Stanišić's criminal responsibility<sup>21</sup> do not allow him to understand the TC's rationale for which he was found to have contributed to the JCE.

46. Once again the TC summarized a large quantity of evidence but failed to explain how this evidence established Stanišić's responsibility. Consequently, Stanišić had to challenge almost every single finding possibly linked to his contribution to the JCE, despite the limited number of words available to him for this purpose.

**D. THE TC FAILED TO PROVIDE A REASONED OPINION FOR ITS FINDING THAT COUNTS 3-8 WERE A NATURAL AND FORESEEABLE CONSEQUENCE OF THE JCE OR SUBJECTIVELY FORESEEABLE TO STANIŠIĆ**

47. Firstly, having found Stanišić guilty of forcible transfer and deportation as persecutory acts under Count 1, the TC proceeded to find Stanišić guilty of the other persecutory acts included in Count 1 - pursuant to JCE III.

<sup>20</sup> Judgement, Volume II, paras.729-765 comprise no footnotes.

<sup>21</sup> Judgement, Volume II, paras.531-798.

48. However, the TC failed to provide any reasons in support of its findings that the possibility that the other persecutory acts in Count 1 could be committed was sufficiently substantial.<sup>22</sup> The TC's failure to provide a reasoned opinion constitutes an error of law.
49. Secondly, in respect of Counts 3 to 8 – bearing in mind that Stanišić was convicted for Counts 4 and 6 and found responsible for Counts 3, 5, 7 and 8 – the TC failed to even enter express findings that the possibility that these crimes could be committed was sufficiently substantial as to be foreseeable to Stanišić.<sup>23</sup>
50. Moreover, the TC failed to provide any reasons in support of its implicit findings that the possibility that the crimes charged in Counts 3-8 could be committed was sufficiently substantial so as to be foreseeable to Stanišić. In fact, the TC plainly recalled previous findings that do not exist.<sup>24</sup>
51. Consequently - by failing to enter explicit findings and to justify its implicit findings that the crimes charged in Counts 3-8 were objectively and/or subjectively foreseeable to Stanišić - the TC failed to provide a reasoned opinion, thereby committing an error of law.
52. The AC held that “*on such a crucial element of the accused's criminal responsibility (...) the Appeals' Chamber emphasizes that neither the parties nor the Appeals' Chamber can be required to engage in this sort of speculative exercise*”.<sup>25</sup>

## RELIEF SOUGHT

53. As a result of the TC's failure to provide a reasoned opinion - which permeates all of its findings - Counts 1, 4 and 6 must be quashed.
54. Consequently the AC must order a trial *de novo* or assess Stanišić's individual responsibility *de novo* on the basis of the evidence adduced at trial.

<sup>22</sup> Judgement, Volume II, paras.770-774, 776-779.

<sup>23</sup> See *infra*, 9<sup>th</sup> Ground of Appeal, section B.

<sup>24</sup> See *infra*, 9<sup>th</sup> Ground of Appeal, section A.

<sup>25</sup> *Orić-AJ*, para.56.

## **2<sup>ND</sup> GROUND OF APPEAL**

### **STANIŠIĆ WAS ERRONEOUSLY FOUND TO BE A MEMBER OF THE JCE DUE TO HIS PURPORTED MEMBERSHIP IN THE BOSNIAN SERB LEADERSHIP ('BSL')**

55. The TC erred in law and in fact by convicting Stanišić under JCE I on the basis of his purported membership in the entity known as the “Bosnian Serb leadership”.

#### **I. OVERVIEW**

56. The TC arbitrarily defined an entity, the ‘BSL’, without factual or legal basis for its construction. The TC then erred by equating belonging to the ‘BSL’ with membership in the JCE it found to have existed, thereby inappropriately imposing collective liability or guilt by association. The TC further erred by finding that Stanišić was a member of the JCE on the basis of his *prima facie* association to the ‘BSL’ as Minister of Interior, thereby violating his presumption of innocence.

#### **II. ARGUMENT**

##### **A. THE ‘BSL’ IS A FALSE CONSTRUCTION ARBITRARILY DEFINED BY THE TC**

57. The TC erroneously constructed an entity which it termed the ‘BSL’. The TC defined the ‘BSL’ during the Indictment period as consisting of “*leading members of the SDS and those who occupied important posts in the RS*”, with the important organs of the RS being the Presidency, the Government, the NSC, and the BSA.<sup>26</sup> While the term “Bosnian Serb leadership” was referred to by the Prosecution in the Indictment when alleging the existence of a JCE,<sup>27</sup> the TC arbitrarily proceeded to construct a definition of the term without any evidential basis or justification.

<sup>26</sup> Judgement, Volume II, para.131.

<sup>27</sup> *Stanišić-Župljanin-Indictment*, para.8.

58. Such an amalgamate of individuals as the 'BSL' never existed as an identifiable group in reality, nor was the TC's construction of the 'BSL' a *de facto* or *de jure* association of people. Instead, the TC put this vaguely identified group together by virtue only of the posts that individuals held or their membership in a political party.

59. Despite the absence of any factual or legal basis for grouping individuals together in this manner, the TC proceeded to impute the statements and actions of certain individuals to the 'BSL' as a whole,<sup>28</sup> variously referring to "*the numerous statements of the Bosnian Serb leadership*",<sup>29</sup> "*the policies of the Bosnian Serb leadership*",<sup>30</sup> and "*they all shared and worked towards the same goal under the Bosnian Serb leadership.*"<sup>31</sup> The TC therefore effectively created an organized association where there was none, with Karadžić as the central decision maker<sup>32</sup> and spokesperson,<sup>33</sup> and the commission of crimes as the *raison d'être* of the group.<sup>34</sup>

**B. THE TC ERRED BY EQUATING BELONGING TO THE 'BSL' WITH MEMBERSHIP IN THE JCE**

**i. The TC improperly defined and established the essential elements of the JCE by reference to the 'BSL' as a group**

60. The TC defined the existence of the common plan, its objective,<sup>35</sup> and implementation,<sup>36</sup> by reference to the actions and statements of the 'BSL'.<sup>37</sup>

<sup>28</sup> Judgement, Volume II, paras.308-312, 767, 769.

<sup>29</sup> Judgement, Volume II, para.311.

<sup>30</sup> Judgement, Volume II, para.769.

<sup>31</sup> Judgement, Volume II, para.311.

<sup>32</sup> Judgement, Volume II, para.132.

<sup>33</sup> Judgement, Volume II, paras.167-170.

<sup>34</sup> Judgement, Volume II, paras.311-313.

<sup>35</sup> Judgement, Volume II, paras.131-206.

<sup>36</sup> Judgement, Volume II, paras.310-311.

<sup>37</sup> See, *inter alia*, Judgement, Volume II, paras.308-312.

61. In arriving at its conclusions regarding the existence of a JCE, the TC found that the violent actions to take over the municipalities occurred as a result of the 'BSL's aim to establish a state "*as ethnically 'pure' as possible*"<sup>38</sup> through the commission of crimes.<sup>39</sup> The TC therefore erred by establishing the *actus reus* and *mens rea* of the JCE by reference to the 'BSL' as a group.

**ii. The TC erred in law by imposing collective responsibility on all those purported to be part of the 'BSL'**

62. The TC found that the "goal" of the 'BSL' was "*the establishment of a Serb state, as ethnically 'pure' as possible, through the permanent removal of the Bosnian Muslims and Bosnian Croats.*"<sup>40</sup> The TC found that this "goal" was worked towards in the municipalities by the Serb Forces, SDS party structure, Crisis Staffs and the RS Government, all of whom were under the control of the 'BSL'.<sup>41</sup>

63. The Chamber also found that the "*true aims of the majority of the Bosnian Serb leadership*"<sup>42</sup> were not reflected in the statements of certain Bosnian Serb leaders that were contrary to the desire for an ethnically pure state, or which called for respect of provisions of international humanitarian law.<sup>43</sup>

64. Consequently, the TC considered the minority to have the intent to commit crimes despite acknowledging evidence to the contrary. This clearly demonstrates that the JCE was proved for the whole of the group known as the 'BSL' by reference solely to the aims of the "*majority*".<sup>44</sup> The TC thereby erred by imposing collective responsibility upon all those considered to be members of the 'BSL'.

<sup>38</sup> Judgement, Volume II, para.311.

<sup>39</sup> Judgement, Volume II, paras.311-313.

<sup>40</sup> Judgement, Volume II, para.311.

<sup>41</sup> *Idem.*

<sup>42</sup> Judgement, Volume II, para. 312 (emphasis added).

<sup>43</sup> *Idem.*

<sup>44</sup> Judgement, Volume II, paras.311-313.

65. The result of the TC's approach is that the *actus reus* and *mens rea* of the JCE was pre-judged for all individuals considered part of the 'BSL' by reference only to the "majority".<sup>45</sup> This conclusion amounts to the impermissible imposition of guilt by association by the TC.<sup>46</sup>
66. International law expressly disavows the notion of collective responsibility. It is a fundamental rule of CIL that no one may be convicted of an offence except on the basis of individual criminal responsibility.<sup>47</sup> Indeed, the purpose of the International Tribunal "is to punish individuals and not to decide on the responsibility of states, organizations or associations" and therefore "any idea of collective responsibility, shifting the blame from individuals to associations or organizations and deducing criminal responsibility from membership in such associations or organizations, must be rejected as [...] *ultra vires*."<sup>48</sup> Moreover, the Secretary General made it clear that collective liability had no place in the International Tribunal at the time of its creation.<sup>49</sup>
67. The TC therefore committed a fundamental error of law by imposing responsibility on all individuals within a group by virtue of their being in the group, without making any assessment of each individual's responsibility.

<sup>45</sup> Judgement, Volume II, paras.311-313.

<sup>46</sup> Though the TC goes on to list a number of individuals that it found were members of the JCE, it is clear that this is an additional finding to that made with respect to the 'BSL'. The TC clearly notes that this list is "further" to its findings on the 'BSL'. Moreover, it is a confirmation by the TC of the participation in the JCE of individuals who were named in the Indictment, and persons considered by the Chamber to have been members of the JCE at municipal level. See, Judgement, Volume II, para.314.

<sup>47</sup> See ICRC Customary Rules on IHL, Rule 102.

<sup>48</sup> Judge Schomburg Sep-Opinion-*Martić-AJ*, para.5 (emphasis added).

<sup>49</sup> Secretary General's Report of 3 May 1993, para.51.



iii. **The TC erred in law by criminalizing membership in the ‘BSL’**

68. The TC’s findings identifying the ‘BSL’ as a collective that had as its aim the commission of crimes,<sup>50</sup> effectively made the ‘BSL’ criminal as a group. A criminal organization implies the existence of a stable organizational structure directed at the commission of crimes.<sup>51</sup> The TC found that the ‘BSL’, with Karadžić as its main decision maker,<sup>52</sup> was “*in charge*” of events in the municipalities through its “*control*” over the SDS party structure, Crisis Staffs, the RS Government and Serb forces.<sup>53</sup> The TC further found that the ‘BSL’ was working towards the establishment of an ethnically pure state through the permanent removal of the Bosnian Muslims and Bosnian Croats.<sup>54</sup> The TC’s findings therefore evidently equate the ‘BSL’ as a group to a criminal organization.

69. The TC’s criminalization of the ‘BSL’, a group which neither *de facto* nor *de jure* existed, by finding that its aims were the commission of crimes,<sup>55</sup> concomitantly made participation in the ‘BSL’ criminal. Such a categorization circumvents the proper standard for determining individual criminal responsibility under Article 7(1) of the Statute in situations involving collective action. International criminal law is premised on individual, not collective, responsibility. As set down in Tadić-AJ, “*nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (nulla poena sine culpa)*.”<sup>56</sup>

<sup>50</sup> See, *inter alia*, Judgement, Volume II, paras.311-313.

<sup>51</sup> Milutinović-OTP Response, para.15.

<sup>52</sup> Judgement, Volume II, para.132.

<sup>53</sup> Judgement, Volume II, para.311.

<sup>54</sup> *Idem*.

<sup>55</sup> See, *inter alia*, Judgement, Volume II, paras.311-313.

<sup>56</sup> Tadić-AJ, para.186.

**C. THE TC'S FINDINGS MADE STANIŠIĆ A *DE FACTO* MEMBER OF THE JCE BY HIS ASSOCIATION WITH THE 'BSL'**

70. The TC found that during the Indictment period the so-called 'BSL' was comprised, *inter alia*, of "those who occupied important posts in the RS".<sup>57</sup> The TC listed the main figures in the Government of RS as including Stanišić.<sup>58</sup> Further, the TC considered that "Stanišić was a key member of the decision-making authorities from early 1992 onwards"<sup>59</sup> and that the Ministry of Interior was "an instrumental organ" of the Bosnian Serb authorities.<sup>60</sup> Thus, from the outset, the TC's findings clearly place Stanišić within the 'BSL' solely by virtue of his ministerial position.
71. A finding of belonging to the 'BSL', which the TC found to have been part of the JCE, therefore impermissibly amounts to a presumption, that Stanišić significantly contributed to the furtherance of the common plan, and that he shared the intent to commit persecutory crimes. This represents a presumption of guilt and an unacceptable reversal of Stanišić's right to be presumed innocent.
72. The presumption of innocence enshrined in Article 21(3) of the Statute is a fundamental tenet of criminal law.<sup>61</sup> The principle that no guilt can be presumed until the charge has been proven beyond reasonable doubt is the core value upon which a fair judicial system is built. By forcing Stanišić to prove that he was not a member of the 'BSL', and therefore not a member of the JCE, thus requiring him to prove his innocence, the TC failed to respect this right.
73. As will be demonstrated fully, the TC committed further errors by impermissibly relying on its findings relating to the 'BSL' to establish the *mens rea* and *actus reus* for Stanišić. In improperly doing so, the TC manifestly failed to determine whether Stanišić was a member of the JCE, found to have existed, on the basis of his individual acts and conduct.<sup>62</sup>

<sup>57</sup> Judgement, Volume II, para.131.

<sup>58</sup> Judgement, Volume II, para.141.

<sup>59</sup> Judgement, Volume II, para.732.

<sup>60</sup> Judgement, Volume II, para.742.

<sup>61</sup> See, *inter alia*, Art. 14(2) ICCPR.

<sup>62</sup> See, *infra*, 4<sup>th</sup> Ground of Appeal, Section E, 6<sup>th</sup> Ground of Appeal, Section B.

### III. RELIEF SOUGHT

74. As a result of the TC's legal and factual errors, the AC must assess *de novo* Stanišić's individual responsibility on the basis of his acts and conduct and not his purported membership in the 'BSL'.
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### **3<sup>RD</sup> GROUND OF APPEAL**

#### **THE TC WRONGLY CONFLATED THE LEGITIMATE POLITICAL GOAL OF SERBS TO LIVE TOGETHER IN ONE STATE WITH THE REQUIRED *MENS REA* FOR JCE I**

75. The TC erred in law by finding that Stanišić's support for a legitimate political goal was determinative of his intent to commit the persecutory crimes of deportation and forcible transfer.

#### **I. OVERVIEW**

76. The TC erroneously conflated the legitimate political goal of "*Serbs to live in one state with other Serbs in the former Yugoslavia*",<sup>63</sup> with what it found to be the objective of the JCE, "*to permanently remove Bosnian Muslims and Bosnian Croats from the territory of the planned Serbian State through the commission of the crimes of (...)*".<sup>64</sup> The TC then erred in assessing Stanišić's *mens rea* by improperly substituting an analysis of whether Stanišić intended to commit the alleged crimes with a review of his political views.

#### **II. ARGUMENT**

##### **A. THE TC ERRED IN LAW BY CONFLATING A LEGITIMATE POLITICAL GOAL WITH A CRIMINAL OBJECTIVE**

##### **i. The TC improperly equated support for a legitimate political aim with intent to commit persecutory crimes**

77. The TC erred by failing to consider whether an individual could have supported the goal for Serbs to live in one state with other Serbs without intending this to occur by the commission of forcible transfer and deportation. The TC's failure to make a distinction between support for a political goal and criminal intent amounts to an error of law which invalidates the Judgement.

<sup>63</sup> Judgement, Volume II, para.309.

<sup>64</sup> Judgement, Volume II, para.313.

78. The TC's initial finding regarding the existence of a JCE was that "*the aim of the Bosnian Serb leadership [...] was for Serbs to live in one state with other Serbs in the former Yugoslavia*".<sup>65</sup> The TC then found that in late 1991 the 'BSL' intensified the process of territorial demarcation through the setting up of separate and parallel Bosnian Serb institutions,<sup>66</sup> and initiated the process of establishing Serb municipalities.<sup>67</sup> These findings, either individually or collectively, do not amount to anything other than a legitimate political goal, in line with the Cutileiro plan designed by the international community, for Bosnian Serbs to have an entity within the territory of BiH over which they would have some measure of sovereignty.<sup>68</sup>
79. The TC then noted that "*[w]hat followed were the violent takeovers of those municipalities and systematic campaign of terror and violence resulting in crimes that the Chamber has found to have been committed.*"<sup>69</sup> The TC fails, however, to explain how the pursuit of a legitimate political goal which occasioned crimes, means that the commission of those crimes was an intended aim of this political goal. Instead, the TC proceeds to deliver its findings on the basis that the commission of crimes was an intended aim of those seeking to support a political goal in line with the Cutileiro plan.
80. This amounts to a clear error of law. The TC, without basis or explanation for doing so, conflates the pursuit of a legitimate political goal, with the intention to commit the persecutory crimes of forcible transfer and deportation.
81. In effect, this means that those who shared the legitimate political goal of the creation of a separate Serbian entity within BiH, and worked towards the realization of what they considered to be a political course recognized and mandated by the international community, as Stanišić did,<sup>70</sup> were quite improperly considered and found by the TC to have intended to commit crimes.

<sup>65</sup> Judgement, Volume II, para.309.

<sup>66</sup> Judgement, Volume II, para.310.

<sup>67</sup> *Idem.*

<sup>68</sup> Exh. P2200, Sect. A, para.3.

<sup>69</sup> Judgement, Volume II, para.311 (emphasis added).

<sup>70</sup> Judgement, Volume II, para.552, referring to P2301, p.5-6.

ii. **Based on the TC's reasoning, any support for the political goal could be equated with the intent to commit crimes**

82. As noted by the TC, the International Commission set down the Cutileiro Plan around late February 1992, which proposed the creation of three constituent units based on ethnicity within BiH, with each ethnic unit realizing "*their sovereign rights*" through their respective constituent unit and through BiH.<sup>71</sup>

83. The TC's flawed reasoning led to the erroneous conclusion that the goal of all Serb political figures deemed part of the so-called 'BSL' – to live in one state with other Serbs – necessarily encapsulated a desire to establish a state "as ethnically 'pure' as possible" through the commission of crimes.<sup>72</sup> This is clear from the fact that individuals within the 'BSL' who supported the establishment of a Serb state were considered by the TC to have intended the persecutory crimes of forcible transfer and deportation despite making statements that an ethnically pure state was not their aim.<sup>73</sup>

84. Based on the TC's improper rationale, the EU, by virtue of having supported the establishment of sovereign ethnic constituent units would *ipso facto* be considered to have satisfied the *mens rea* for JCE I. The TC's failure to consider that support for the political goal of a separate Serbian entity within BiH could exclude intent to commit persecutory crimes, means that the EU's public endorsement and support for the creation of ethnic constituent units in BiH would be sufficient to find that the EU shared the intent to commit crimes.

85. Moreover, any individual reading a newspaper or watching television and finding themselves agreeing with the espousal of the objective to create a separate Serbian entity would, by the TC's flawed reasoning, be considered to have shared the intent to deport and forcibly transfer Bosnian Muslims and Bosnian Croats.

86. Such conclusions are patently incorrect. However, it serves to demonstrate how obviously flawed the TC's approach was in the Judgement.

<sup>71</sup> Judgement, Volume II, para.553.

<sup>72</sup> Judgement, Volume II, para.311 (emphasis added).

<sup>73</sup> Judgement, Volume II, para.312. See generally, *supra*, 2<sup>nd</sup> Ground of Appeal .

**B. THE TC ERRED IN LAW BY FINDING THAT STANIŠIĆ'S SUPPORT FOR A LEGITIMATE POLITICAL GOAL WAS SUFFICIENT TO PROVE HIS MENS REA TO COMMIT CRIMES**

87. As previously set down by the Appeals Chamber, a TC must, *inter alia*, make a finding that the criminal purpose is "*common to all of the persons acting together within a joint criminal enterprise*".<sup>74</sup>

88. The TC blatantly failed to make any such finding.<sup>75</sup> Instead, its findings make clear that the group it termed as the 'BSL', which included Stanišić, were considered to necessarily share the same criminal purpose by virtue of their grouping as an identifiable association.<sup>76</sup> This conclusion was reached by the TC without examining whether the individuals it placed within this association, including Stanišić,<sup>77</sup> individually possessed the intent to commit crimes, or rather merely supported a legitimate political goal.

89. As previously noted, the intent element of a membership crime must be judged *strictissimi juris*:

*for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.*<sup>78</sup>

90. On 18 July 1992, Stanišić sent a letter to Prime Minister Đerić reiterating his request for the issuance of a legal instrument "*to prevent breaches of approved provisions of international law which may result in consequences resembling genocide or war crimes*".<sup>79</sup> Stanišić requested that such a legal instrument be passed in order to "*present a clear and civilized implementation of, what I believe are, just political goals of the Serbian people*".<sup>80</sup>

<sup>74</sup> *Brđanin-AJ*, para.430; *Stakić-AJ*, para.69.

<sup>75</sup> Judgement, Volume II, paras.308-316, 766-769.

<sup>76</sup> See, *inter alia*, Judgement, Volume II, para.312.

<sup>77</sup> Judgement, Volume II, paras.766-769.

<sup>78</sup> *Noto Case*, paras.299-300.

<sup>79</sup> Exh. P190, referred to in Judgement, Volume II, para.636.

<sup>80</sup> *Idem* (emphasis added).

91. A number of things are clear from the contents of this letter. First, Stanišić's opposition to the commission of crimes is demonstrated by his purposefully seeking the creation of a proper legislative framework in order to address crimes. Second, Stanišić is seeking political will and support from the RS government, the RS President and the SSUP to ensure that legitimate political goals were pursued lawfully.
92. This is direct evidence that Stanišić did not possess the *mens rea* to commit crimes. Indeed, it makes clear that he was opposed to the commission of crimes and that he sought the attainment of legitimate political goals through lawful means. Yet, the TC incorrectly found that Stanišić's support for a legitimate political goal evinced the exact opposite - intent to commit crimes.<sup>81</sup>
93. The TC's erroneous approach in failing to separate support for a political goal with intent to commit crimes is further shown by the TC's failure to consider that Stanišić's "*conduct, presence at key meetings, attendance at sessions of the BSA, acceptance of the position of Minister of Interior*"<sup>82</sup> demonstrated his support for the creation of a separate Bosnian Serb entity along the lines accepted by the international community in the Cutileiro plan. Despite finding that Stanišić's involvement as a Government Minister "*indicate[s] his voluntary participation in the creation of a separate Serb entity by the ethnic division of the territory*",<sup>83</sup> which was in line with the Cutileiro plan, the TC incorrectly found that Stanišić intended the commission of crimes.<sup>84</sup>

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<sup>81</sup> Judgement, Volume II, para.766-769.

<sup>82</sup> These erroneous findings of the TC will also be challenged in the 4<sup>th</sup> Ground of Appeal, Section C.

<sup>83</sup> Judgement, Volume II, para.734.

<sup>84</sup> Judgement, Volume II, para.766-769.



94. The TC's assessment of Stanišić's state of mind evinces his political views. Yet, the TC inexplicably takes this as showing intent to commit crimes, improperly disregarding that the evidence actually shows that Stanišić sought to pursue a legitimate political course<sup>85</sup> which was supported by the international community.<sup>86</sup> The TC's flawed approach demonstrates its erroneous conflation of a legitimate political goal with the required *mens rea* for JCE I liability and serves to invalidate the Judgement.

### III. RELIEF SOUGHT

95. The TC's finding that Stanišić possessed the *mens rea* for JCE I liability must be reversed and the findings of guilt for Counts 1, 4, and 6 quashed.

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<sup>85</sup> Exh. P190.

<sup>86</sup> Exh. P2200.

#### **4<sup>th</sup> GROUND OF APPEAL**

#### **THE TC ERRED IN LAW AND IN FACT BY DRAWING THE INFERENCE THAT STANIŠIĆ POSSESSED THE REQUIRED *MENS REA* FOR THE JCE**

96. The TC erred in law and in fact by finding that the only reasonable inference on the basis of the evidence is that Stanišić “*was aware of the persecutorial intentions of the Bosnian Serb leadership to forcibly transfer and deport Muslims and Croats from territories of BiH and that Stanišić shared the same intent*”.<sup>87</sup>
97. The TC’s errors invalidate the Judgement and occasioned a miscarriage of justice.

#### **I. OVERVIEW**

98. The TC’s inference that Stanišić shared the so-called ‘BSLs’ persecutorial intent is evidently not the sole reasonable inference available on the basis of the evidence. Relying exclusively on circumstantial evidence related to Stanišić’s knowledge of the commission of crimes and his conduct and statements in relation to the political stances of the BSA and SDS (the so-called ‘BSL’), the TC failed to identify other reasonable inferences available on the basis of the evidence.
99. First, having previously acknowledged that the “*true aims of the majority of the Bosnian Serb leadership*” were the permanent removal of Bosnian Muslims and Bosnian Croats through the commission of crimes,<sup>88</sup> the TC erroneously failed to consider that there was also a minority within the ranks of the so-called ‘BSL’ who did not intend the permanent removal of non-Serbs through the commission of crimes.<sup>89</sup>

<sup>87</sup> Judgement, Volume II, para.769.

<sup>88</sup> Judgement, Volume II, paras.311-313 (emphasis added).

<sup>89</sup> Judgement, Volume II, paras.766-769.

100. In this regard, the TC also failed to recognize that Stanišić's individual acts, conduct and statements actually demonstrate that he shared the intent of the minority of the so-called 'BSL' to abide by the law and achieve their aim without committing crimes.
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101. Second, the TC made a series of legal and factual errors leading it to draw the impermissible inference that Stanišić had the *mens rea* to commit the persecutory crimes of forcible transfer and deportation.<sup>90</sup>
102. The TC's erroneous inference rests on paragraphs, 766-769<sup>91</sup> in which the TC committed discernible errors in its assessment of Stanišić's *mens rea*.
103. None of these paragraphs, taken individually or collectively serve to demonstrate that Stanišić possessed, let alone shared, the *mens rea* to commit crimes.
104. In **paragraph 766**, the TC's improper reliance on Stanišić's knowledge of the commission of crimes amounts to an error of law. This error permeates the TC's assessment of Stanišić's *mens rea* in paragraphs 767 and 768, where the TC impermissibly applied a "knowledge" standard when determining Stanišić's *mens rea* rather than assessing whether his acts and conduct revealed that he had the intent to commit persecutory crimes.<sup>92</sup>
105. In **paragraph 767**, the TC erred in fact in assessing Stanišić's "*conduct and statements*" regarding the "*political stances of the SDS and the BSA*" preceding the Indictment;<sup>93</sup> by incorrectly relying on (a) the erroneous assertion that Stanišić was a member of the BSA; and (b) SDS meetings at which Stanišić was not present or did not participate.

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<sup>90</sup> Judgement, Volume II, para.769.

<sup>91</sup> As argued in Stanišić's 1<sup>st</sup> Ground of Appeal, The TC's reasoning and how it came to its conclusion regarding Stanišić's *mens rea* is virtually incomprehensible. See, *supra*, 1<sup>st</sup> Ground of Appeal, Section B.

<sup>92</sup> Judgement, Volume II, paras.766-769.

<sup>93</sup> Judgement, Volume II, para.767.

106. The TC further erred in fact by relying on Stanišić's imputed knowledge of the six strategic objectives based on their presentation at a BSA meeting which Stanišić did not attend.
107. Finally, the TC erred in fact by incorrectly assessing Stanišić's participation in the Council of Ministers.<sup>94</sup>
108. In **paragraph 768**, the TC made a number of factual errors that undermine every facet of its review of the evidence. The TC erred in fact by incorrectly relying on: (i) Stanišić's purported support for Arkan's operations; (ii) Stanišić's presence at RS Government sessions; (iii) Stanišić's presence at 11 July Collegium; and (iv) the reporting by the Chief of the Višegrad SJB of a "*lack of professionalism*" of certain police officers to the RSMUP.
109. Further, the TC erred in law and in fact in **paragraph 769** by improperly relying on (i) Stanišić's "*position*"; (ii) Stanišić's "*close relationship with Radovan Karadžić*"; and (iii) Stanišić's support and participation "*in the implementation of the policies of the Bosnian Serb leadership and SDS*". With regard to the TC's reliance on Stanišić's participation in the 'BSL', the TC committed a legal error by improperly relying on its findings in relation to the 'BSL' and failing to assess whether Stanišić possessed the intent to commit persecutory crimes.<sup>95</sup>
110. Third and lastly, the TC's cursory assessment of Stanišić's *mens rea* entirely failed to assess the considerable exculpatory evidence that Stanišić did not possess the intent to commit persecutory crimes.<sup>96</sup>

<sup>94</sup> Judgement, Volume II, para.767.

<sup>95</sup> See, *supra*, 2<sup>nd</sup> Ground of Appeal, Section C.

<sup>96</sup> See, *supra*, 1<sup>st</sup> Ground of Appeal, Section B.

111. In sum, given the absence of any direct evidence that Stanišić intended the crimes of deportation and forcible transfer and that he specifically intended the commission of those crimes with a discriminatory intent, the TC was faced with an entirely circumstantial case. Despite the voluminous evidence that Stanišić's acts, conduct and statements did not demonstrate any general or specific intent to deport and forcibly transfer Muslims and Croats from the territory of the RS, the TC erroneously ignored other reasonable inferences available.

## II. ARGUMENT

### A. STANIŠIĆ DID NOT SHARE THE INTENT OF THE "MAJORITY OF THE BOSNIAN SERB LEADERSHIP" TO COMMIT CRIMES

#### i. The TC's findings with regard to the 'BSL' acknowledge that there was a minority of Serb leaders who did not intend the commission of crimes

112. As already addressed, the TC erred by arbitrarily grouping together individuals on the basis of their position or their membership in a political party into a single group referred to as the 'BSL'. The TC further erred by attributing the conduct and statements of certain identified individuals to the 'BSL' as a whole.<sup>97</sup>

113. The TC erroneously disregarded evidence that some leaders of the 'BSL' made statements opposed to the establishment of an ethnically "pure" state,<sup>98</sup> on the basis that such statements "*do not reflect the true aims of the majority of the Bosnian Serb leadership.*"<sup>99</sup>

114. This clearly shows that there existed a minority within the 'BSL' who did not share the requisite intent to be considered part of the JCE.

<sup>97</sup> See, *supra*, 2<sup>nd</sup> Ground of Appeal, Section A.

<sup>98</sup> Judgement, Volume II, paras.311-312.

<sup>99</sup> Judgement, Volume II, para.312.

iii. **The TC erred by not considering that Stanišić shared the aim of the ‘BSL’ minority to respect the law and not commit crimes**

115. Bearing in mind the existence of a minority within the ‘BSL’ who did not share the intent of the “majority” to commit persecutory crimes, the proper analysis of Stanišić’s conduct leads to a reasonable inference that Stanišić did not intend to commit any persecutory act.

116. Stanišić’s numerous orders for the prevention and investigation of crimes and his repeated statements that the RSMUP were to respect domestic and international law in their duties<sup>100</sup> lead to the reasonable inference that Stanišić actually shared the aim of the minority of the ‘BSL’ to achieve their legitimate aim without committing crimes.

**B. THE TC ERRED IN LAW BY ASSESSING STANIŠIĆ’S MENS REA BY RELYING ON HIS ALLEGED KNOWLEDGE OF CRIMES**

i. **The TC erred in law by applying a “knowledge” standard rather than the correct legal standard of “intent” when assessing Stanišić’s mens rea**

117. It is clear from the four paragraphs of findings regarding Stanišić’s mens rea that the TC assessed his knowledge of the commission of crimes rather than whether he intended the commission of the crimes. In its assessment of Stanišić’s state of mind, the TC “first considered evidence on Stanišić’s knowledge of the commission of crimes.”<sup>101</sup> In the following paragraph, the TC continued its assessment of Stanišić’s mens rea stating that “[a]side from evidence on Mićo Stanišić’s knowledge, the Trial Chamber [...] also reviewed” Stanišić’s conduct and statements in relation to the political stances of the SDS and the BSA.<sup>102</sup>

<sup>100</sup> Exhs. P198; P508; P2307; 1D633; P163; P2312; P397.02; P397.03; P708; P2192; P2193; P2194; P2301; P2195; P643; 1D54; 1D569; 1D570; P853; 1D46; 1D61; 1D634; 1D91; 1D64; P160; 1D58; 1D59; P2060; 1D190; 1D191; 1D176; P1269; P427.08; P240; P1428; P155; P432.12; P427.08; P633; P866; P748; 1D334; 1D76; P1073; P1476; P427.18; P191; 1D56; 1D57; 1D563; 1D479; 1D55; P2049; P165; 1D666; P855; 1D48; P2462; P2461; 1D516; 1D518; P2438; P2443; P2349; 1D557; P2086; P1416; P1341; 1D796; P2066; P2349; P2097; 1D258; 1D54; 1D186; 1D184; 1D185; P245; P428; P400; 1D93; 1D183; 1D94; P627; 1D183; P627; 1D579; 1D184; 1D187; 1D173; P568; 1D572; 1D49; P2309; P1073; P1476; P240; 1D173; P586; P1091; P628; 1D176; P631; P1502; P1557.04; 1D558; P1557.01; 1D646; 1D97; 1D554; P591; P2053; 1D567; P400; 1D665; 1D60; 1D671; 1D522.

<sup>101</sup> Judgement, Volume II, para.766 (emphasis added).

<sup>102</sup> Judgement, Volume II, para.767 (emphasis added).

118. The rest of the TC's findings clearly show that Stanišić's *mens rea* continued to be improperly assessed by reference to his purported knowledge of the commission of crimes.
119. The TC's reliance, *inter alia*, on (i) discussion about the creation of territorial boundaries at meetings which Stanišić attended;<sup>103</sup> (ii) his presence at meetings where the movement of individuals was mentioned;<sup>104</sup> and (iii) general reports of ill-discipline amongst the RSMUP,<sup>105</sup> might be relevant for the purpose of assessing Stanišić's knowledge of crimes committed in certain municipalities. However, such findings do not go to assessing whether Stanišić possessed and shared the *intent* to commit crimes as is required by the applicable law on JCE 1 liability as set down in the Tribunal's jurisprudence.<sup>106</sup>
120. The TC further erred by failing to make conclusive findings regarding the extent of Stanišić's knowledge about the Indictment crimes and when during the Indictment period Stanišić could be considered to have had such knowledge of the Indictment crimes.
121. The TC erroneously asserted that Stanišić "*was regularly informed throughout 1992 about crimes and actions being taken to investigate them.*"<sup>107</sup> The "*relevant entries*" of the Communications Logbook of RSMUP Headquarters and CSB Sarajevo, the sole basis of the TC's incorrect finding,<sup>108</sup> clearly shows that the *earliest* relevant report sent to the RSMUP is dated 19 July 1992.<sup>109</sup> The TC then erroneously referred to "*[d]aily, weekly, and quarterly reports [...] in addition to security reports on a periodic basis.*"<sup>110</sup> Again, of the evidence relied on by the TC to base this assertion, the earliest report relevant to the Indictment crimes is dated 17 July 1992.<sup>111</sup>

<sup>103</sup> Judgement, Volume II, para.767.

<sup>104</sup> Judgement, Volume II, para.768.

<sup>105</sup> *Idem*.

<sup>106</sup> See, *inter alia*, *Brđanin-AJ*, paras.365, 411.

<sup>107</sup> Judgement, Volume II, para.690.

<sup>108</sup> Judgement, Volume II, fn.1771.

<sup>109</sup> Exh. P1428, log 76, p.5.

<sup>110</sup> Judgement, Volume II, para.690.

<sup>111</sup> Exh. P427.08.

122. When referring to reports prepared by the Miloš Group prior to July 1992,<sup>112</sup> the TC improperly failed to consider the evidence of witness Radulović, a leader of the Miloš Group, who testified that Stanišić did not receive reports in 1992.<sup>113</sup>
123. It is patently clear, therefore, that the TC erroneously relied on Stanišić's knowledge of crimes without ever conclusively finding when Stanišić had such knowledge or the extent of such knowledge.
124. Moreover, the TC's assessment of Stanišić's *mens rea* by reference to his purported knowledge of the commission of crimes, rather than if he possessed the intent to commit the persecutory crimes, amounts to a fundamental error of law.

### C. NOTHING IN PARAGRAPH 767 DEMONSTRATES STANIŠIĆ'S INTENT

#### i. **Stanišić's conduct and statements regarding the political stances of the BSA and SDS preceding the Indictment period do not demonstrate intent to commit persecutory crimes**

##### a. *No reasonable TC could have found that Stanišić was a member of the BSA*

125. Stanišić was not a member of the BSA.<sup>114</sup> Indeed, as a sitting minister, Stanišić could not also have been a member of both the legislature and the executive.<sup>115</sup> As noted by the TC, the BSA was to consist of 120 representatives, direct elected for a term of four years.<sup>116</sup> As is patently evident from the TC's findings, Stanišić was not an elected representative. The TC further acknowledged that the members of the Government, therefore comprising Stanišić, "*were accountable to the BSA*",<sup>117</sup> and that periodically, "*the BSA instructed the RS Government*".<sup>118</sup>

<sup>112</sup> Judgement, Volume II, fn.1768.

<sup>113</sup> Radulović, T.11205-11209.

<sup>114</sup> Judgement, Volume II, para.767.

<sup>115</sup> See Judgement, Volume II, para.165: "The role of the BSA was to pass laws, regulations, and general enactments."

<sup>116</sup> Judgement, Volume II, para.165.

<sup>117</sup> Judgement, Volume II, para.138.

<sup>118</sup> Judgement, Volume II, para.182.



126. There is therefore no basis in the evidence for the TC's entirely erroneous claim that Stanišić was a member of the BSA. Consequently, the TC erred in relying on this incorrect assertion when assessing Stanišić's *mens rea*.

**b. No reasonable TC could have found that Stanišić was present at the sessions of the BSA or the meetings of the SDS relied on by the TC**

127. When assessing Stanišić's *mens rea*, the TC improperly referred to highly prejudicial and emotive statements of unnamed figures within the so-called 'BSL'.<sup>119</sup> Firstly, the TC referred to the statement that the occurrence of war would include the "*forcible and bloody transfer of minorities*".<sup>120</sup> While this statement is not referenced by the TC, it is referred to earlier in the Judgment as having been made by Karadžić during a speech given at the BSA on 11 March 1992.<sup>121</sup> However, there is no conclusive evidence on the trial record that Stanišić was present at this particular BSA session when this statement was made.<sup>122</sup> The TC's reliance on the expression of this view by Karadžić<sup>123</sup> when assessing Stanišić's *mens rea* is therefore entirely misplaced.

128. In the Judgment, there are only two references to Stanišić in the context of the BSA during the Indictment period. These relate to his election by the BSA as Minister of Interior in 1992<sup>124</sup> and his participation in one session in November 1992 where the government fell and Stanišić was sacked. The sole other reference is to a session of the BSA in 1993, outside the Indictment period.<sup>125</sup>

<sup>119</sup> Judgment, Volume II, para.767.

<sup>120</sup> *Idem*.

<sup>121</sup> Judgment, Volume II, para.179.

<sup>122</sup> *Idem*.

<sup>123</sup> The TC improperly attributed the statement to the 'BSL' as a whole, see, *supra*, 2nd Ground of Appeal, Section A.

<sup>124</sup> Judgment, Volume II, paras.531, 549, 558.

<sup>125</sup> Judgment, Volume II, para.596.

129. During the November 1992 session, Stanišić participated in order to respond to the erroneous claim of Prime Minister Derić that he was bypassing the Government.<sup>126</sup> Stanišić also referred to the impact of the infiltration of criminal reserve police on the work of the RSMUP.<sup>127</sup> In this regard, the TC improperly and prejudicially cited Stanišić's speech, mischaracterizing Stanišić's words as an admission that he had been involved in the acceptance of "*thieves and criminals*" into the reserve police.<sup>128</sup> Even the Prosecution acknowledged during trial proceedings that this mischaracterization of Stanišić's speech was based on a translation error.<sup>129</sup> The correct translation of Stanišić's words makes clear that he had no involvement in the acceptance of criminal elements into the reserve police. Finally, at that November 1992 session, Stanišić was also attacked by Plavšić for arresting paramilitaries.<sup>130</sup>
130. Indeed, despite a heading in the Judgement claiming to detail his "[a]ttendance at sessions of RS Government, NSC, and BSA",<sup>131</sup> no finding is made of Stanišić attending any sessions of the BSA.<sup>132</sup>

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<sup>126</sup> Judgement, Volume II, paras. 570, 595, 600.

<sup>127</sup> Judgement, Volume II, paras. 600, 743.

<sup>128</sup> Judgement, Volume II, para. 600.

<sup>129</sup> Mandić, T.9566.

<sup>130</sup> Exh. P400, p.20; Mandić, T.9724-9726.

<sup>131</sup> Judgement, Volume II, p.195.

<sup>132</sup> Judgement, Volume II, paras.572-575.

131. The TC then improperly referred to the statement “*that joint life with Muslims and Croats was impossible*”.<sup>133</sup> Again, the TC failed to refer to the provenance of this statement, with the only reference included earlier in the Judgement.<sup>134</sup> From that earlier reference, it is apparent that the statement was made by Todor Dutina on 15 October 1991 at an SDS Party Council meeting.<sup>135</sup> As found by the TC, this meeting was attended by SDS members of: the Executive Committee; the BiH Presidency; the SRBiH Government; and the President of the SDS party.<sup>136</sup> The individuals expressly named by the TC as being in attendance were Karadžić, Krajišnik, Koljević, and Plavšić.<sup>137</sup> Neither the TC,<sup>138</sup> nor the minutes of the actual meeting<sup>139</sup> make any reference to Stanišić being present. Moreover, the meeting comprised of representatives of the SDS party and as the evidence shows, Stanišić was not a member of the SDS party, nor did he hold any position within the SDS.<sup>140</sup>
132. Consequently, in seeking to establish his *mens rea*, the TC erred by relying on a meeting held outside the Indictment period at which Stanišić was not even in attendance.<sup>141</sup>

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<sup>133</sup> Judgement, Volume II, para.767.

<sup>134</sup> Judgement, Volume II, para.162.

<sup>135</sup> *Idem.*

<sup>136</sup> *Idem.*

<sup>137</sup> *Idem.*

<sup>138</sup> *Idem.*

<sup>139</sup> Exh. P14.

<sup>140</sup> Exh. P2305, p.21-25.

<sup>141</sup> Judgement, Volume II, para.162.

ii. **The TC incorrectly imputed knowledge of the six strategic objectives to Stanišić based on their presentation at a meeting at which Stanišić was not present**

133. When assessing Stanišić's *mens rea*, the TC also erred by imputing to Stanišić knowledge of six strategic objectives based on their presentation to the BSA in May 1992.<sup>142</sup> As noted above regarding the lack of findings on Stanišić's presence at sessions of the BSA, when the TC referred to the 12 May BSA session at which the six strategic objectives were presented by Karadžić, there is no evidence that Stanišić was present at that meeting.<sup>143</sup> Further, when discussing the six strategic objectives, the TC noted that prior to their presentation on 12 May 1992, the six strategic objectives were discussed at a meeting attended by, *inter alia*, Mladić, Krajišnik, and Karadžić.<sup>144</sup> Again, there is no mention of Stanišić being present or even aware of the occurrence of this meeting.<sup>145</sup> The TC also noted that the six goals were not published in the RS Official Gazette until over a year later, on 26 November 1993.<sup>146</sup>

134. The TC incorrectly found that the six strategic objectives were "*set by, among others, the RS Government*".<sup>147</sup> This assertion is based on nothing other than Karadžić declaring as much when addressing the BSA.<sup>148</sup> The TC's reliance on a politician's speech rather than the minutes of the 1992 RS government sessions, which are all in the trial record and clearly show that the six strategic objectives were never discussed, demonstrates the utterly flawed approach of the TC to the assessment of the Stanišić's *mens rea*. There is, therefore, no evidence on the trial record as to what Stanišić knew of the six strategic objectives, let alone his own views regarding any of them.

135. Consequently, no reasonable TC could have relied on the six strategic objectives when assessing Stanišić's *mens rea*.

<sup>142</sup> Judgement, Volume II, para.767.

<sup>143</sup> Judgement, Volume II, para.190. See also, *inter alia*, Exhs. P2304, p.42; P2310, p.30; P2311, p.10.

<sup>144</sup> Judgement, Volume II, para.189.

<sup>145</sup> *Idem*.

<sup>146</sup> *Idem*.

<sup>147</sup> Judgement, Volume II, para.767.

<sup>148</sup> See Judgement, Volume II, para.190.

**iii. No reasonable TC could have found participation in the work of the Council of Ministers demonstrated Stanišić's intent to commit persecutory crimes**

136. When assessing Stanišić's *mens rea*, the TC erred by relying on Stanišić's attendance at the first meeting of the Council of Ministers of the BSA at which "*boundaries of ethnic territory and the establishment of government organs in the territory were determined to be priorities*".<sup>149</sup> First, defining of ethnic territory clearly refers to no more than the defining of territory inhabited by the Serbian people. It does not connote the forcible and permanent removal of Muslims and Croats. Second, the formation of government organs in the territory – in conformity with the Cutileiro plan proposed and endorsed by the international community – was the necessary and practical approach for the creation of a separate entity within BiH for the Serbian people.<sup>150</sup>
137. Moreover, in wrongly seeking to rely on this evidence to assess Stanišić's *mens rea*, the TC also failed to refer to Stanišić's evidence that he viewed the creation of the Council of Ministers as a centrally organized authority for the RS by the Serbs as fulfilling the conditions for the Cutileiro plan to deal with the problem in BiH.<sup>151</sup> Further, the TC failed to refer to the evidence that Stanišić refused to take part in or contribute to the work of the Council of Ministers, because it was incompatible with his work as Secretary of the Sarajevo SUP.<sup>152</sup>
138. Lastly, the TC's reliance on Stanišić's presence at the first meeting of the Council of Ministers and the stated priorities of the Council of Ministers during that first meeting amounts to an error. Presence at a meeting is not indicative of intent to commit persecutory crimes.<sup>153</sup> Significantly, the legitimate priorities propagated at that same meeting do not demonstrate any intent for the commission of criminal and persecutorial acts. Nothing in this evidence demonstrates any intent, or any basis upon which a reasonable TC could infer Stanišić's intent to commit persecutory crimes.

<sup>149</sup> Judgement, Volume II, para.767.

<sup>150</sup> Exh. P2200, p.1-2.

<sup>151</sup> Exh. P2301, p.5-6.

<sup>152</sup> Exh. P2301, p.17-20.

<sup>153</sup> See, *inter alia*, *Simatović-TJ*, paras.2312, 2315, 2340, 2354. See also *Moloto-Dissent-Perišić-TJ*, paras.61, 75.

**D. NOTHING IN PARAGRAPH 768 DEMONSTRATES STANIŠIĆ'S INTENT**

**i. No reasonable TC could have found that Stanišić approved of Arkan's operations**

139. The TC erred by relying on witness Davidović's testimony in the *Krajišnik* case,<sup>154</sup> which was actually the sole basis for the TC's erroneous finding that Stanišić approved of Arkan's operation in Bijeljina and Zvornik and allowed Arkan to remove any property that he wished.<sup>155</sup> The TC entirely ignores Davidović's testimony in this case, in which it is clear that the statement about Stanišić making a 'deal' with Arkan is uncorroborated hearsay.<sup>156</sup>

140. Davidović testimony's in this case directly and totally contradicted his evidence in the *Krajišnik* case<sup>157</sup> as well as the contents of his witness statement in the *Krajišnik* case,<sup>158</sup> both of which were improperly relied upon by the TC in coming to its erroneous finding.<sup>159</sup> In this case, Davidović testified that he had heard about the alleged 'deal' between Stanišić and Arkan from Ratko Mladić at the Lukavica garrison at an unspecified time.<sup>160</sup> He further testified that Mladić had said that Stanišić had called members of Arkan's Guard to Sarajevo and "gave them certain rights".<sup>161</sup> There is therefore absolutely no indication of when Mladić was alleged to have heard of this 'deal' and whether Mladić supposedly heard it himself or whether it was second or third-hand hearsay, or even more remote. Consequently, this uncorroborated hearsay is manifestly unreliable. Further, there is nothing on the trial record that could serve to corroborate this hearsay statement. Thus, the TC erred by relying on this statement when seeking to assess Stanišić's *mens rea*.

<sup>154</sup> Judgement, Volume II, paras.710-712.

<sup>155</sup> Judgement, Volume II, paras.768, 710.

<sup>156</sup> Davidović, T.13625-13626.

<sup>157</sup> Davidović, Exh. P1557.04, T.14253-14254.

<sup>158</sup> P1557.01, p.31-32.

<sup>159</sup> Judgement, Volume II, para.710, fn.1821.

<sup>160</sup> Davidović, T. 13625-13626.

<sup>161</sup> *Idem*.

141. What is more, despite the unreliability of this part of Davidović's testimony, the TC failed to give any explanation as to why it chose to rely on certain aspects of this witness's testimony from the *Krajišnik* case and omit any reference to contradictory statements made by him when testifying in this case.<sup>162</sup>
142. For example, in the *Krajišnik* case, Davidović testified that he informed Stanišić about the takeover of Bijeljina SUP by Arkan's men and that Stanišić was aware of that fact.<sup>163</sup> However, in this case, Davidović testified that he did not have any conversation with Stanišić about the presence of Arkan and his men and what they were doing in Bijeljina and that he only assumed that Stanišić knew about these occurrences.<sup>164</sup>
143. Further, when testifying in this case, Davidović initially stated that when he spoke to Stanišić about disarming the paramilitaries, Stanišić told him that Arkan's men could not be opposed.<sup>165</sup> However, later in his testimony, Davidović stated that: (i) there was no hindrance from Stanišić with regard to taking action against Arkan; (ii) Stanišić never said do not arrest Arkan or Arkan's forces; and (iii) he would have arrested Arkan if he had an opportunity.<sup>166</sup> Indeed, Davidović's contemporaneous report to the Federal MUP is unequivocal, clearly stating that he was appointed with "all powers" to act by Stanišić.<sup>167</sup>

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<sup>162</sup> Judgement, Volume II, paras.709-712.

<sup>163</sup> Exh. P.1557.3, p.14220-14221.

<sup>164</sup> Davidović, T.13544.

<sup>165</sup> Davidović, T.13545-13546.

<sup>166</sup> Davidović, T.13625-13626.

<sup>167</sup> Exh. 1D646, p.1.

144. The TC further erred by relying solely on Davidović's testimony in the *Krajišnik* case for its finding that Stanišić attended a meeting at Bosanska Vila with, *inter alia*, Karadžić, Krajišnik, and Arkan in which "certain tasks were distributed".<sup>168</sup> First, as noted during the *Krajišnik* case, despite its significance in relation to the accused Krajišnik's responsibility, Davidović had not made a single reference to this purported meeting during an 11 day interview with the Prosecution when producing a very detailed witness statement.<sup>169</sup> Second, Davidović's evidence about this meeting is again directly at odds with Davidović's testimony in this case. Yet again, however, the TC remained silent on the incongruity of Davidović's evidence regarding Arkan. In this case, Davidović testified that upon arriving in Bijeljina – which was where Arkan's men were based –

*Stanišić talked to me, as did Ćedo Kljajic, and they said to me then that, regardless of name, gender, everything that had happened, wherever it is my assessment that the paramilitaries took power and did unlawful things, I could arrest them and so on.*<sup>170</sup>

145. These inconsistencies serve to fundamentally undermine the reliability of Davidović's testimony regarding Arkan. More importantly, the TC's reliance on Davidović's uncorroborated hearsay regarding Stanišić's 'deal' with Arkan is manifestly erroneous and is not corroborated by any other evidence. The TC consequently erred by relying on it to base its erroneous finding that the only available inference was that Stanišić intended to commit persecutory crimes.
146. Quite to the contrary, the incorrect assertion that Stanišić approved of Arkan's operations is contradicted by the direct evidence regarding Stanišić's attempts to deal with the problems of paramilitaries committing crimes,<sup>171</sup> as well as the fact that he was publicly criticized in the RS Assembly by Plavšić for arresting and breaking up paramilitary groups and other formations.<sup>172</sup>

<sup>168</sup> Judgement, Volume II, para.711.

<sup>169</sup> Davidović, Exh. P.1557.05, T.14362.

<sup>170</sup> Davidović, T.13624.

<sup>171</sup> Bjelosević, T.19711-19712; ST161, T.3456 (confidential); Pejić, T.12202-12204; Andan, T.21421, 21460-21464, 21503-21505, 21538-21541, 21545-21546, 21697-21698, 21701-21702; ST215, T.15002-15003; Davidović, T.13531-13533, 13564-13566, 13590, 13613-13616, 13623-13630; Davidović, P1557.04, T.14292-14293; Exhs. 1D76; P2309; P1476; 1D567; 1D557; 1D558; 1D173; 1D646; 1D97; 1D554; P339; P591; P1557.01, p.26-27.

<sup>172</sup> Exh. P400, p.20; Mandić, T.9724-9726.



ii. **No reasonable TC could have found that presence at RS Government sessions demonstrated Stanišić's intent to commit persecutory crimes**

147. The TC erred in relying on two sessions of the RS Government to infer Stanišić's *mens rea*.<sup>173</sup> First, the TC wrongly relied upon the 4 July 1992 session at which the RSMUP was tasked with "*preparing information on this issue [Muslims moving out of the RS] that the Government would consider and take the appropriate standpoint*".<sup>174</sup> As is clear from the minutes of the session in question, the RS Government did not have "a point of view on this matter" and therefore required information as to what was occurring.<sup>175</sup> Further, Đerić testified that the issue related to either voluntary movement for security reasons or movement due to fear.<sup>176</sup> The bare tasking of the RSMUP with gathering information on the movement of Muslims from the territory of the RS does not provide any basis upon which the TC could infer Stanišić's *mens rea* and the TC's attempt to do so amounts to an error.

148. Second, the TC wrongly relied upon the 29 July 1992 session.<sup>177</sup> While the agenda of the session refers to the assessment of the needs of refugees and displaced persons, the minutes of the session only note that "[t]he Government reviewed the submitted material", and that "*effort should be invested to gather true information, which is presented in the material, hereby using the information from the Interior and Defence ministries*".<sup>178</sup> The minutes then note that special attention was paid to the issue of "*the large numbers of socially deprived persons*" and "*highlighting the need for all the responsible organs and organisations to tackle problem*" of the status of the socially deprived.<sup>179</sup> The minutes of this session are therefore inconclusive regarding the role of the RSMUP and what exactly it was tasked to do. It is clear, however, that the TC wrongly attributed a greater role to the RSMUP in relation to the assessment of the needs of refugees and displaced persons than suggested on the face of the exhibit on which the TC relied.

<sup>173</sup> Judgement, Volume II, para.768.

<sup>174</sup> Exh. P236, p.4-5.

<sup>175</sup> Exh. P236, p.4.

<sup>176</sup> T.2361-2363.

<sup>177</sup> Judgement, Volume II, para.768.

<sup>178</sup> Exh. P242, p.2, 6.

<sup>179</sup> Exh. P242, p. 7.

149. Moreover, the tasking of the RSMUP to provide the RS Government with information about what was occurring in relation to refugees and displaced persons does not serve as a basis upon which any reasonable trial chamber could infer Stanišić's *mens rea* to commit persecutory crimes.<sup>180</sup>

**iii. No reasonable TC could have found that presence at 11 July Collegium demonstrated Stanišić's intent to commit persecutory crimes**

150. When seeking to infer Stanišić's *mens rea*, the TC erred by relying on the 11 July Collegium. The TC improperly mischaracterizes the evidence noting only that "*the relocation of citizens and entire villages was discussed*" at the 11 July Collegium.<sup>181</sup> Quite to the contrary, the Collegium minutes reveal that this information was raised as a problem having a direct impact on the activities of the internal affairs organs, with the army and crisis staffs gathering Muslims and thereafter trying to place responsibility on the RSMUP for them.<sup>182</sup> Subsequently, the conclusions of the Collegium shows the focus to be "*resolving the issue of the moving out of some inhabitants, villages, etc., for which the MUP is not responsible, but for which the MUP is being blamed*".<sup>183</sup> Stanišić subsequently provided information to the President and the Prime Minister on this problem, placing special emphasis on the need for a meeting between the RSMUP and the army "*because this does not fall within the competence of the MUP although efforts are being made to link it to the MUP.*"<sup>184</sup>

151. The TC's selective summary of the evidence improperly represents the minutes of the 11 July Collegium in a prejudicial manner.

<sup>180</sup> Judgement, Volume II, para.768.

<sup>181</sup> Judgement, Volume II, para.768.

<sup>182</sup> Exh. P160, p.7.

<sup>183</sup> Exh. P160, p.25-26.

<sup>184</sup> Exh. P427.8, p.2-3, 6.

152. Furthermore, when assessing Stanišić's *mens rea* by analysis of this evidence, the TC failed to make any reference to the rest of the contents of the 11 July Collegium,<sup>185</sup> in which numerous and repeated reference is made to the prevention, documentation and detecting of crimes and the protection of citizens, irrespective of ethnicity.<sup>186</sup>

iv. **No reasonable TC could have found that the reporting – by the Chief of the Višegrad SJB to the RSMUP – of “lack of professionalism” of certain police officers demonstrates Stanišić’s intent to commit persecutory crimes**

153. The TC erred by relying on a report by the Chief of the SJB Risto Perišić to infer Stanišić's *mens rea*.<sup>187</sup> The TC erroneously characterized the document of 13 July 1992 as reporting to the RSMUP that “*certain police officers were exhibiting a lack of professionalism while over 2,000 Muslims moved out of the municipality.*”<sup>188</sup> The TC erred in two ways when assessing this document. First, the TC erroneously suggested that the reported lack of professionalism was linked to the movement of Muslims.<sup>189</sup> The document makes it clear that the suggested lack of professionalism on the part of unidentified policemen affected “*consistency in the performance of duties in their jurisdiction*”, and the difficulties lay, *inter alia*, with the unidentified policemen “*trying not to antagonise anybody*”.<sup>190</sup> The TC therefore improperly suggested a persecutory disposition on the part of certain policemen, where none is evident from the report relied upon.

154. Second, the TC failed to consider that the movement of over 2,000 Muslims out of the municipality, in an organized manner, occurred “*with the help of the Red Cross*”.<sup>191</sup> Further, the report notes that “[*t*]here is continued interest in moving out, so that this process [*movement with the help of the Red Cross*] should be continued in a coordinated way”.<sup>192</sup>

<sup>185</sup> Judgement, Volume II, para.768.

<sup>186</sup> Exh. P160, see, *inter alia*, Conclusions 1, 6, 7, 10, 12, 13, 14, 17.

<sup>187</sup> Judgement, Volume II, para.768.

<sup>188</sup> *Idem*.

<sup>189</sup> *Idem*.

<sup>190</sup> Exh. P633, p.2-3.

<sup>191</sup> Exh. P633, p.3.

<sup>192</sup> *Idem*.

155. Moreover, the main thrust of the report deals with the “*fierce fighting*” that had been ongoing in the Višegrad municipality with paramilitaries and other factions.<sup>193</sup> The TC therefore erred in relying on a report in which reference was made to ill-discipline on the part of unidentified RSMUP members – at a time when there was fierce fighting in the municipality – with the consequent organized movement of civilians out of the area with international assistance.<sup>194</sup> No reasonable trial chamber could have sought to rely on such a report to infer Stanišić’s *mens rea* to commit persecutory crimes.

**E. NOTHING IN PARAGRAH 769 DEMONSTRATES STANIŠIĆ’S INTENT**

**i. No reasonable TC could have found that Stanišić’s position demonstrates his intent to commit persecutory crimes**

156. The TC erred by “[c]onsidering [Stanišić’s] position at the time” when coming to the conclusion that the only reasonable inference was that Stanišić shared the *mens rea* to commit crimes.<sup>195</sup> The fact alone that Stanišić occupied a position in the Government as Minister of Interior does not and cannot, in and of itself, serve as a basis to infer intent to commit persecutory crimes.

157. Such flawed reasoning is impermissibly based on Stanišić’s purported association with those found to have been members of the JCE.<sup>196</sup>

**ii. No reasonable TC could have found that Stanišić had a close relationship with Karadžić**

158. The TC erred by arbitrarily considering the fact that Stanišić, who at the material time was a Minister in the RS Government and therefore obliged and required to interact with the President of the RS Karadžić, as a basis for its finding that Stanišić and Karadžić had a “*close relationship*”.<sup>197</sup>

<sup>193</sup> Exh. P633, p.1.

<sup>194</sup> Judgement, Volume II, para.768.

<sup>195</sup> Judgement, Volume II, para.769.

<sup>196</sup> See, *supra*, 2<sup>nd</sup> Ground of Appeal, Section B and C.

<sup>197</sup> Judgement, Volume II, para.769.

159. The TC further erred by considering this allegedly close relationship between the sitting Minister Stanišić and the President Karadžić was capable of demonstrating that Stanišić shared the *mens rea* to commit crimes.<sup>198</sup>
160. The TC's erroneous conclusion regarding the relationship between Stanišić and Karadžić appears to emanate from an earlier finding in the Judgement in which the TC wrongly stated that "*Stanišić shared a close relationship with Karadžić*" and that "[t]he two spoke frequently, at times calling each other at home."<sup>199</sup>
161. To support this incorrect finding, the TC relied on intercepted conversations. The TC relied on a total of nine intercepts of conversations between Stanišić and Karadžić in the Judgement.<sup>200</sup> Of those intercepts,<sup>201</sup> only two were initiated by Stanišić.<sup>202</sup> Strikingly, four occurred between June and August 1991,<sup>203</sup> and therefore outside the Indictment period.
162. Of the five intercepts relied on by the TC – which occurred during the Indictment period – one was a conversation which included SDS member Jovo Jovanović.<sup>204</sup> The remaining four conversations between Stanišić and Karadžić took place between April and June 1992.<sup>205</sup> Two of these involved the same issue and occurred on the same day.<sup>206</sup>
163. It should also be noted, as is clear from the intercepts, that Stanišić and Karadžić address each other in a formal manner throughout the conversations, further belying the notion of a "close relationship". Moreover, none of the conversations contained any details or even mention of anything related to the movement of individuals out of the territory of RS or the commission of persecutory crimes.

<sup>198</sup> Judgement, Volume II, para.769.

<sup>199</sup> Judgement, Volume II, para.565.

<sup>200</sup> Judgement, Volume II, paras.565-567.

<sup>201</sup> Exhs. P1135, P1149, P1108, P1152, P1110, P1162, P1120, P1147, P1155.

<sup>202</sup> Exhs. P1135, P1152.

<sup>203</sup> Exhs. P1135, P1149, P1108, P1152.

<sup>204</sup> Exh. P1110.

<sup>205</sup> Exhs. P1162, P1120, P1147, P1155.

<sup>206</sup> Exhs. P1162, P1155.

164. The TC consequently erred by (i) finding that Stanišić and Karadžić shared a close relationship; and (ii) relying on this erroneous finding when assessing Stanišić's *mens rea*.

**iii. The TC erred in finding that Stanišić supported and participated "in the implementation of policies of the Bosnian Serb leadership and the SDS"**

165. Firstly, the TC failed to indicate which policies of the so-called 'BSL' and the SDS it considered that Stanišić supported and participated in the implementation of. Further, there is no information provided by the TC as to what this support and participation amounted to, how it was manifested, or for how long it occurred.<sup>207</sup> Instead, the TC made a bare and unreferenced assertion which no reasonable trial chamber could have considered as the basis of an inference as to Stanišić's *mens rea*.<sup>208</sup>

166. If – as the subsequent erroneous conclusion that Stanišić shared the *mens rea* to commit crimes suggests – "the policies" mentioned by the TC were intended to refer to the deportation and forcible transfer of Muslims and Croats, then the TC erroneously considered that Stanišić supported and participated in such policies.<sup>209</sup> As previously addressed in this ground, each and every one of the points relied on by the TC regarding Stanišić's involvement and interaction with the BSA and the RS Government failed to demonstrate support or implementation of persecutory policies.<sup>210</sup>

167. Moreover, the TC's error in finding that Stanišić supported and implemented persecutory policies is clear from its failure to even make reference to the evidence showing that Stanišić's acts, conduct and statements ran directly contrary to the common purpose of the JCE found to have existed.

<sup>207</sup> Judgement, Volume II, para.769.

<sup>208</sup> *Idem*.

<sup>209</sup> *Idem*.

<sup>210</sup> See, *supra*, Section C, D and E.

iv. **The TC erred by relying on its findings on the ‘BSL’ to prove Stanišić’s *mens rea***

168. The TC erred by finding that Stanišić “*was aware of*” and “*shared*” the intent of the ‘BSL’ by reference to his support of and participation in the ‘BSL’,<sup>211</sup> without properly assessing whether Stanišić personally possessed the requisite intent to commit crimes.

169. It therefore impermissibly inferred that Stanišić shared the intent of the ‘BSL’ to commit crimes, having already been found to be part of the ‘BSL’, and having had his intent proven by reference to his participation in the ‘BSL’.<sup>212</sup>

170. The TC thereby improperly circumvented the requirement to prove the *mens rea* for Stanišić by relying on the intention to commit crimes of the group to which Stanišić was considered a part of.

**F. THE TC FAILED TO CONSIDER EVIDENCE CLEARLY DEMONSTRATING THAT STANIŠIĆ DID NOT INTEND THE COMMISSION OF CRIMES**

i. **The TC erred by ignoring evidence of Stanišić’s acts and conduct which makes clear he did not possess the intent to commit persecutory crimes**

171. No reasonable trial chamber could have failed to make reference to the numerous and repeated measures which Stanišić took in order to ensure that the RSMUP carried out its work in accordance with the law.

<sup>211</sup> Judgement, Volume II, para.769.

<sup>212</sup> See, *supra*, 2<sup>nd</sup> Ground of Appeal, Section C.

172. For instance, Stanišić issued orders from the beginning of the Indictment period seeking to ensure public safety, crime prevention and detection.<sup>213</sup> In response to the severe wartime disruptions to all communication between the Ministry and CSBs, Stanišić sent inspectors into the field to find out what was happening and provide guidance to CSBs and SJBs. This assistance was aimed particularly at public security by taking measures to prevent and detect crimes as well as to locate and apprehend perpetrators regardless of ethnicity.<sup>214</sup> In the face of the gravity of the security situation, Stanišić also sought federal assistance,<sup>215</sup> which helped in taking action to arrest, detain and interrogate criminal elements in the RS.<sup>216</sup> The SSUP unit that arrived to assist in RS was authorized by Stanišić to arrest and institute criminal proceedings against paramilitaries.<sup>217</sup>
173. The TC failed to consider that Stanišić amended the law regarding the disciplinary measures of the RSMUP, *inter alia*, introducing disciplinary offences of “*discrimination on religious or national grounds*” and “*failure to file disciplinary complaint against fellow officer*”, as well as simplifying the disciplinary process and extending the statute of limitations so that disciplinary offences were not left unpunished.<sup>218</sup>
174. Further, Stanišić set up the Crime Prevention Administration to prevent and detect crimes and monitor the work of crimes prevention services at CSBs and SJBs.<sup>219</sup> He also emphasized the imperative of preventing criminal activities not only of citizens, but also of soldiers, active and reserve police and members of the internal affairs organs.<sup>220</sup> These orders were repeated several times throughout the Indictment period.<sup>221</sup>

<sup>213</sup> Exhs. 1D61; P792; 1D634; P1252; Orašanin, T.2163-2165; Mačar, T.22862-22863; Mandić, T.9728-9729.

<sup>214</sup> Exhs. 1D328, p.2, 8; P427.8, p.3; Andan, T.21573-21576; P993, Tuševljak, T.22314-22315; Mačar, T.22968-22974, 23352-23354.

<sup>215</sup> Exh. 1D646.

<sup>216</sup> Exh. P1557.2, para.46; Exh. P1557.3, p.14189, 14211-14212; T.13532-13534.

<sup>217</sup> Davidović, T.13586-13591, 13623-13630; Exh. P1557.1, paras.84-85; P1557.4, p.14260.

<sup>218</sup> Exh. 1D54.

<sup>219</sup> Judgement, Volume II, para.46.

<sup>220</sup> P160, p.15; P1252; Škipina, T. 8315-8317; Mačar, T.22865-22866; Tutuš, T. 7865; Orašanin, T. 21908-21920, 22118-22123; Exhs. P553; 1D356; 1D357.

<sup>221</sup> Judgement, Volume II, paras.640-641, 644, 674, 680. See also: Exhs.1D58, 1D59, 1D176, P163, p.8, P1269, p.1, 3.



175. The TC further failed to consider that Stanišić insisted on the investigation of all war crimes, regardless of the ethnicity of the perpetrator or the victim.<sup>222</sup>
176. The TC failed to consider that when Stanišić became aware of the commission of a crime, his response was prompt and unequivocal, either through the issuance of orders and instructions, or the taking of personal steps where possible.<sup>223</sup> The evidence adduced also shows that the RSMUP gathered substantial and reliable material during the investigation of crimes which involved victims and alleged perpetrators of all ethnicities, which subsequently formed the basis of prosecutions of accused Serb and non-Serb individuals in BH.<sup>224</sup>
177. The TC failed to consider that Stanišić issued many orders requesting information on camps and detention of prisoners,<sup>225</sup> as well as orders for the immediate release of all detained persons if not detained within existing regulations and orders for the free movement of civilians.<sup>226</sup> The latter imposed personal responsibility on police commanders for the well-being of detainees and for the prevention of any form of abuse, and was accompanied by provisions for disciplinary measures against those who did not comply.<sup>227</sup>
178. The TC also failed to consider that the ranks of the RSMUP were purged by Stanišić, with the issuance of orders for the dismissal of all members of the RSMUP who had committed crimes or had proceedings commenced against them.<sup>228</sup> Measures were also taken by Stanišić to discipline members of the RSMUP who had been implicated in criminal activity.<sup>229</sup>

<sup>222</sup> Njeguš, T.11475-11477; Exhs. 1D63; P160, p.22 Conclusion 6; P427.8, p.3, 6.

<sup>223</sup> Njeguš, T.11475-11476; Škipina, T.8339-8364; Planojević, T.16411-16412, 16537-16539; Mačar, T.23473-23474; Tutuš, T.7707-7712; P628; P847.

<sup>224</sup> Exhs. 1D595-1D601; Tuševljak, T.22434-22451.

<sup>225</sup> Judgement, Volume II, para. 748.

<sup>226</sup> Judgement, Volume II, paras.664, 667, 673.

<sup>227</sup> *Idem.*

<sup>228</sup> Judgement, Volume II, para.749.

<sup>229</sup> Judgement, Volume II, paras.687-688, 698-708.

179. Furthermore, the TC failed to consider that Stanišić insisted on resolving issues of jurisdiction with the army in relation to combatting crime and the criminal activity of paramilitaries.<sup>230</sup> Stanišić encountered fierce opposition at the municipal level when he ordered the dismissal of all illegally formed “special police units”.<sup>231</sup> His orders against paramilitary formations throughout the territory put him in confrontation with individuals such as Plavšić,<sup>232</sup> considered by the TC to be a leading member of the JCE.<sup>233</sup> Stanišić also clashed with Crisis Staffs regarding the appointments of RSMUP personnel without the consent and knowledge of the RSMUP.<sup>234</sup>
180. The TC did not refer to, analyze, or explain why it didn’t consider that Stanišić oversaw the issuance of orders for the investigation of war crimes as early as 5 June 1992.<sup>235</sup> He also issued compulsory instruction requesting detailed reports of war crimes and victims of such crimes including the ethnicity of both the perpetrator and the victim.<sup>236</sup>
181. Further still, two of the conclusions of the 11 July Collegium organized by Stanišić designated as priorities for the RSMUP the non-discriminatory investigation of all crimes, including war crimes, in accordance with the law.<sup>237</sup> Witnesses testified that these conclusions reflected Stanišić’s insistence to investigate and file criminal reports on crimes, including war crimes, without any distinction being made on the basis of the ethnicity of the perpetrator or victim.<sup>238</sup>
- ii. The TC also erred by ignoring evidence of Stanišić’s statements that show he did not possess the intent to commit persecutory crimes**
182. The TC erred by failing to refer to the direct evidence that Stanišić frequently made statements contrary to the idea of a common purpose to commit persecutory crimes.

<sup>230</sup> Judgement, Volume II, paras.592, 594, 637, 642, 720. See also Exh. 1D76; P160, p.24-25 Conclusion 13.

<sup>231</sup> Judgement, Volume II, paras.606-607.

<sup>232</sup> Judgement, Volume II, para.719.

<sup>233</sup> Judgement, Volume II, para.314. Plavšić pleaded guilty and was convicted for her participation in a JCE in BiH. See *Plavšić-SJ*.

<sup>234</sup> Judgement, Volume II, para.681. See also Judgement, Volume II, paras. 684, 733.

<sup>235</sup> Judgement, Volume II, para.621.

<sup>236</sup> See, *inter alia*, Exh. 1D63; Tutuš, T.7914-7915; Planojević, T.16569; Tuševljak, T.22276-22278.

<sup>237</sup> Exh. P160, p.22-23, Conclusions 6, 7.

<sup>238</sup> Tutuš, T.7914-7915; Planojević, T.16569; Tuševljak, T.22276-22278; Exhs. 1D328, p.5 Conclusion 6; 1D189; 1D63.

183. For instance, Stanišić's public speeches throughout the Indictment period were non-discriminatory and aimed at the promotion of the rule of law, as well as the professionalism of the police and the protection of life and property of all citizens.<sup>239</sup> He also made publicly known his unequivocal support for a peaceful solution to the problem in BiH in accordance with the Cutileiro Plan.<sup>240</sup>
184. Moreover, on 18 July 1992, Stanišić wrote a letter to the Prime Minister Đerić, copied to the President of the RS and the SSUP, *reiterating* his request for the adoption of a legislative instrument to prevent breaches of international law.<sup>241</sup> Stanišić also stated in the letter that he issued orders and instructions to RSMUP members to abide by international law and the criminal code, as well as informing Đerić that the RSMUP was "*working on the collection and documentation of war crimes [...] regardless of the perpetrators and their ethnicity*".<sup>242</sup>
185. In this letter to the highest authorities in the RS Government, individuals who were deemed by the TC to be part of the so-called 'BSL' and therefore members of the JCE,<sup>243</sup> Stanišić criticizes the RS Prime Minister for failing to disassociate the RS government from all groups and individuals whose intentions are different from the legitimate political goals of the Serbian people.<sup>244</sup> Despite this clear articulation and expression of Stanišić's view which matched in every respect his actions, conduct and statements, and clearly ran contrary to the criminal purpose found by the TC, the TC impermissibly drew the inference that Stanišić shared the intent to commit persecutory crimes.<sup>245</sup>
186. On the basis, *inter alia*, of the evidence noted above and omitted by the TC in its findings on his *mens rea*, it is abundantly clear that Stanišić's acts, conduct and statements do not demonstrate either a general intent to commit crimes or a specific intent that those crimes be committed with a discriminatory intent.

<sup>239</sup> Judgement, Volume II, paras.558, 560, 609. See Exh. P160, p.4.

<sup>240</sup> Judgement, Volume II, paras.557, 560, 562.

<sup>241</sup> Exh. P190.

<sup>242</sup> *Idem* (emphasis added).

<sup>243</sup> Judgement, Volume II, para.769.

<sup>244</sup> Exh. P190.

<sup>245</sup> Judgement, Volume II, para.769.

### III. RELIEF SOUGHT

187. Based on the foregoing, “*no reasonable tribunal could have found that the only reasonable inference from the evidence was that*”<sup>246</sup> Stanišić by his actions intended the commission of persecutory crimes. On the basis of the totality of the evidence, there was clearly another reasonable available consistent with Stanišić’s innocence. In light of the TC’s errors, the AC must quash Stanišić’s convictions under Counts 1, 4, and 6.

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<sup>246</sup> *Vasiljević-AJ*, paras,121, 131.

## 5<sup>TH</sup> GROUND OF APPEAL

### **STANIŠIĆ WAS WRONGLY FOUND TO HAVE FURTHERED THE JCE ON THE BASIS OF PURPORTED OMISSIONS.**

188. The TC erred in law by implicitly finding that Stanišić furthered the JCE it found to have existed on the basis of purported omissions.

#### **I. OVERVIEW**

189. Firstly, while the TC relied on JCE I liability by omission in assessing Stanišić's *actus reus*, it erred in law by failing to set out the applicable law for this mode of liability.

190. Secondly, the TC erred in law by implicitly<sup>247</sup> finding that Stanišić furthered the JCE it found to have existed on the basis of purported omissions, which do not meet the minimum requirements for liability to be incurred pursuant to JCE I liability by omission under Article 7(1) of the Statute.

#### **II. ARGUMENT**

##### **A. THE TC FAILED TO SET OUT THE LAW APPLICABLE TO JCE LIABILITY BY OMISSION.**

191. In *Stanišić-Župljanin-Decision-FI*, the TC held that "*an accused can be held responsible for participation in a JCE by committing an act or an omission which contributes to the common criminal purpose.*"<sup>248</sup> However, the TC did not state the applicable law for JCE I liability by omission.

<sup>247</sup> The word 'implicitly' is used because the TC failed to find expressly that Stanišić contributed to the purported JCE; See *infra*, Ground 6 generally.

<sup>248</sup> *Stanišić-Župljanin-Decision-FI*, para.39.

192. In the Judgement, the TC provided even less information with respect to the applicable law. In fact, the TC defined the *actus reus* of JCE I liability - without even mentioning the possibility of liability by omission - as follows: “*an accused must have participated in furthering the common purpose at the core of the joint criminal enterprise (...) [and his contribution] should at least be a significant contribution to the crimes for which the accused is to be found responsible.”<sup>249</sup>*
193. This amounts to a legal error because the TC, having failed to set out the law applicable to JCE I liability by omission, nonetheless proceeded to find implicitly that Stanišić furthered the JCE it found to have existed, by way of purported omissions.
194. Having correctly set out and applied the applicable law to JCE I liability by omission, no reasonable trial chamber could have found, that Stanišić furthered the JCE by way of purported omissions.<sup>250</sup>

**B. THE LAW APPLICABLE TO JCE I LIABILITY BY OMISSION.**

195. It is well established in the jurisprudence of the Tribunal that responsibility for participating in a JCE falls within the ambit of Article 7(1) of the Statute,<sup>251</sup> under the heading ‘committing’.<sup>252</sup> The participant therein is thus liable as a co-perpetrator of the crime(s).<sup>253</sup>
196. Although the word ‘omission’ is not found in Article 7(1), the Tribunal’s jurisprudence nevertheless dictates that the word ‘committed’ in Article 7(1) covers not only the physical perpetration of a crime by the offender himself, but also the culpable omission of an act that was mandated by a rule of criminal law.<sup>254</sup>
197. It thus appears, even though the AC has yet to pronounce specifically on this issue, that an accused may be found to have participated in a JCE not only by positive acts but also by way of a culpable omission of an act that was mandated by criminal law.

<sup>249</sup> Judgement, Volume I, para.103.

<sup>250</sup> Judgement, Volume II, Paras.745, 746, 751, 753, 754, 757, 759, 761.

<sup>251</sup> *Tadić-AJ*, paras.187-188. *Krajišnik-AJ*, para.662, *Kvočka-AJ*, para.556 (JCE II), *Tolimir-TJ*, para.885.

<sup>252</sup> *Vasiljević-AJ*, para.95, *Milutinović-Decision-MCJ*, para.20.

<sup>253</sup> *Vasiljević-AJ*, para.102.

<sup>254</sup> *Tadić-AJ*, paras.187-188.

198. *Tolimir-TJ*, recently acknowledged that pursuant to JCE I, it is sufficient – for the *actus reus* to be proved – that the accused acted or failed to act.<sup>255</sup> It stressed however that in the context of common purpose liability, responsibility by omission can only be established where the requirements for a culpable omission under Article 7(1) are met:

*Omission may lead to individual criminal responsibility under 7(1) where there is legal duty to act (...) The requirements for criminal responsibility for an omission include "(a) the accused must have had a duty to act mandated by a rule of criminal law; (b) the accused must have had the ability to act; (c) the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (d) the failure to act resulted in the commission of the crime"*<sup>256</sup>

199. It follows that participation in a joint criminal enterprise by way of omission can only be established where the purported omission of an accused arises from a legal duty to act mandated by a rule of criminal law **and only** if the accused had the ability to act.
200. These requirements are distinct from proof, pursuant to the TC's reading of the law, that the omission of the accused furthered the common purpose at the core of the joint criminal enterprise and amounted to a significant contribution to the crimes.<sup>257</sup>
201. Should the AC confirm that omission liability applies to JCE, Stanišić submits that for the following reasons, this standard should govern its application.
202. Firstly, considering that in both cases an accused would be liable as a (co)perpetrator,<sup>258</sup> it would be incorrect to apply a different standard for omission liability under Article 7(1) and omission liability in the context of a JCE, which is also included in Article 7(1).

<sup>255</sup> *Tolimir-TJ*, para.894.

<sup>256</sup> *Tolimir-TJ*, para.894, fn.3528; citing *Brđanin-AJ*, para.274, *Galić-AJ*, para.175, *Blaškić-AJ*, para.663 and *Ntagerura-AJ*, para.333.

<sup>257</sup> Judgement, Volume I, para.103.

<sup>258</sup> *Vasiljević-AJ*, para.102.

203. Secondly, the fundamental difference between a positive act and an omission justifies the requirement that only omissions arising from a legal duty to act should be considered. Indeed, while a positive act is necessarily attributable to the person committing the act, in the case of an omission it can only be attributed to the person who omitted to act, if a clear legal duty to act was incumbent on that person.
204. Thirdly, attributing criminal responsibility on the basis of an omission that does not fulfill these requirements would make it possible to consider *any omission*, in *any circumstances*, thereby depriving the *actus reus* component of JCE liability of any meaning. Indeed, if this were the case, any accused shown to possess the required *mens rea* would automatically be a member of the JCE, regardless of his actions or omissions. This would of course amount to a form of strict liability, which is impermissible.
205. Lastly, relying on omissions - other than culpable omissions mandated by a rule of criminal law where the accused has an ability to act – to establish the *actus reus* for JCE, would allow for convictions based on participation in a JCE by negligence, which is antithetical to the purpose of JCE I, which requires that the accused share the intent of the other members of the JCE.

**C. STANIŠIĆ'S PURPORTED OMISSIONS DO NOT MEET THE MINIMUM REQUIREMENTS PURSUANT TO JCE LIABILITY BY OMISSION.**

206. At paragraphs 729-765, the TC reviewed Stanišić's acts and conduct with a view to determining whether he contributed to the JCE it found to have existed. While the TC failed to adopt an express finding that Stanišić did contribute to the JCE, it nonetheless implicitly concluded that he acted in furtherance of the common purpose.
207. In doing so, the TC erred in law by relying on Stanišić's purported omissions or 'failures to act',<sup>259</sup> which do not meet the minimum requirements for JCE I liability by omission because Stanišić's purported omissions do not arise from a duty mandated by a rule of criminal law and/or because Stanišić did not have the ability to act.

<sup>259</sup> Judgement, Volume II, paras.745-746, 751, 753-754, 757, 759, 761.



208. The TC also erred in law by relying on instances where, in its view, Stanišić did not do enough<sup>260</sup> to fulfill a general duty. Obviously, failure ‘to do enough,’ *per se*, in particular in the absence of a duty mandated by a rule of criminal law, does not amount to a culpable omission pursuant to Article 7(1) of the Statute.
209. For instance, at paragraph 753, the TC found that Stanišić “*failed to use the powers available to him under the law to ensure the full implementation*<sup>261</sup> of these orders despite being aware of the limited action taken subsequent to his orders.”
210. To begin with, while the TC found that Stanišić’s motivation for issuing certain orders was triggered by external pressure, this is plainly irrelevant.<sup>262</sup>
211. More importantly, even though the TC acknowledged that Stanišić did issue orders to initiate criminal reports against perpetrators of crimes,<sup>263</sup> it utterly failed to take into account the severe difficulties encountered by Stanišić and therefore his objective inability to do more than what he in fact did.<sup>264</sup>
212. In addition, failure to ensure “full implementation” of orders is certainly not a ‘culpable omission’. Hence, Stanišić’s purported failure to ensure full implementation of his orders is not an omission that can serve to establish his contribution to the JCE.
213. In Volume II paragraph 696, the TC recalled, in relation to disciplining reserve police officers, that “*the procedure was short: he could have been taken off the duty roster immediately, stripped of his weapons, and placed at the disposal of the MOD, which would then decide what to do with the individual.*”

<sup>260</sup> Judgement, Volume II, paras.746; 751; 753; 757; 759; 761.

<sup>261</sup> Emphasis added.

<sup>262</sup> See *inter alia* *Brđanin-AJ*, Para.430.

<sup>263</sup> See *inter alia*, Judgement, Volume II, paras.635-637, 640-641, 644.

<sup>264</sup> See *inter alia*, Judgement, Volume II, paras.581-583, 697.

214. In spite of this, the TC goes on to find at paragraph 751 that:

*(...) even though the placing of errant reserve policemen at the disposal of the army was in accordance with the applicable disciplinary procedures, **it was not sufficient** to fulfill his duty to protect the Muslim and Croat population.*

215. Certainly, taking disciplinary actions in accordance with applicable disciplinary procedures is not an ‘omission’, especially if the measure taken is the most serious sanction as well as the only one available.

216. Moreover, a duty to protect the Muslim and Croat population at large is not a duty mandated by a rule of criminal law. While Stanišić’s general ministerial responsibilities included the duty to uphold the law in general, failure to carry out this type of responsibility – sufficiently – does not give rise to individual criminal responsibility. This must be distinguished from a duty of care ascribed to an agent of the state in relation to prisoners in his custody whereas such duty may give rise to criminal liability if the agent fails to prevent the mistreatment of the prisoners.<sup>265</sup>

217. Furthermore, it is significant that Stanišić took all feasible measures in the circumstances, which was actually acknowledged by the TC in addition to the fact that Stanišić acted pursuant to the only applicable disciplinary procedure available at that time for reserve policemen.<sup>266</sup>

218. Accordingly, the requirements to trigger omission liability have clearly not been satisfied in such circumstances, and cannot constitute a basis for a finding that Stanišić contributed to the JCE.

219. In paragraph 754, the TC stated that Stanišić was under a duty under RS and international law to “*discipline and dismiss the personnel of his Ministry*” and that he “*violated his professional obligation to protect and safeguard the civilian population.*”

220. Stanišić’s professional obligation in this regard is not a culpable omission.

<sup>265</sup> See, *inter alia*, *Limaj-TJ*, para .652: Defendant *Bala* was found guilty of cruel treatment by omission for failing to satisfy the basic needs of detainees under his control.

<sup>266</sup> See, *inter alia*, *Judgement*, Volume II, paras.43, 342, 696-697; See *also*, *Tutuš*, T-7750.

221. Additionally, the TC failed to consider the actions taken by Stanišić, as best as he could in the circumstances, to reform the disciplinary system he inherited, including sacking large numbers of personnel.<sup>267</sup> The TC also failed to give appropriate weight to the measures taken by Stanišić against named individuals, regardless of his purported motivation for doing so<sup>268</sup> or the time physically required to implement the major reforms he had initiated.<sup>269</sup> It is significant in this regard that the disciplinary measures initiated necessarily require time be completed.
222. The TC failed to take account that Stanišić acted as efficiently as he could to reform the disciplinary system he inherited,<sup>270</sup> taking an active role in disciplinary processes despite opposition<sup>271</sup> and taking action against and effecting the dismissal of thousands of individuals.<sup>272</sup>
223. At paragraphs 755-757, the TC found that “*efforts [were] made by Stanišić to quell the theft of vehicles*”<sup>273</sup> and that whilst being “*opposed to the use of paramilitaries*”,<sup>274</sup> “**Stanišić failed to act in the same decisive manner** with regard to the other crimes.”<sup>275</sup>
224. Once again there is no suggestion that a failure to act in a decisive manner amounts to an omission in breach of a duty mandated by criminal law. The TC also entirely failed to take into account the practical differences between the ability to counteract thefts and other more serious crimes, often taking place near the frontline, where the perpetrators are more likely to shoot back rather than be arrested. Instead the TC erroneously applied the same standard across the board regardless of the difficulty of preventing the specific crime in question.

<sup>267</sup> See, *inter alia*, Exh. P1252; P553; P1013; P571; P427.8; P855; 1D58; 1D59; P592.

<sup>268</sup> See, *inter alia*, Judgement, Volume II, paras.698, 700-702, 755.

<sup>269</sup> *Contra*, Judgement, Volume II, para.754.

<sup>270</sup> Judgement, Volume II, paras.42, 582, 647, 698.

<sup>271</sup> Judgement, Volume II, para.694.

<sup>272</sup> See *inter alia*, Exh. P1252; P553; P1013; P571; P427.8; P855; 1D58; 1D59; P592; 1D64; 1D662.

<sup>273</sup> Judgement, Volume II, para.755.

<sup>274</sup> Judgement, Volume II, para.756.

<sup>275</sup> Judgement, Volume II, para.757, emphasis added.

225. Moreover, the TC recognised that Stanišić did take decisive action against paramilitaries and that he was firmly opposed to their use.<sup>276</sup> A failure to act in a similarly decisive manner with regard to other crimes simply is not the correct test upon which to base a finding that an omission giving rise to criminal responsibility has occurred. This is especially true when considering that dealing with more serious crimes was inherently much more difficult.
226. In Paragraph 759, the TC states that Stanišić “took insufficient action to put an end”<sup>277</sup> to crimes, permitting RS MUP forces to be involved in joint operations with other Serb forces involved in the commission of crimes, particularly the JNA/VRS and TO.
227. It is necessary to recall here that the TC failed to make a conclusive finding that Stanišić had responsibility to investigate and prosecute crimes committed by policemen while re-subordinated to the army.<sup>278</sup> Furthermore, taking ‘insufficient action’ is patently not the correct legal test allowing for a finding that Stanišić contributed to the JCE by omission.
228. At Volume II paragraph 761, the TC found that the RS MUP shared responsibility with the MOJ and VRS for detention facilities and that Stanišić failed to take decisive action to withdraw RS MUP forces from involvement.<sup>279</sup>
229. The TC again erred, in particular because Stanišić could not withdraw personnel who had been re-subordinated to the army<sup>280</sup> and therefore had no ability to act.

<sup>276</sup> Judgement, Volume II, paras.756, 768.

<sup>277</sup> Emphasis added.

<sup>278</sup> Judgement, Volume II, Para.342

<sup>279</sup> Judgement, Volume II, para.761.

<sup>280</sup> See, *inter alia*, Judgement, Volume II, para.320; L1 Art. 104; Kovačević T.23720-23723; T.23739-23740; T.24316; Exh. P411.13; P1787; P1802; P1887.

230. At Volume II paragraph 746, the TC states that orders to curb looting and misappropriation of property by Stanišić's subordinates were "not carried out to the extent possible."<sup>281</sup> This finding takes no account of the fact, accepted by the TC, that orders for arrests and prosecutions were passed down to RSMUP members after being issued by Stanišić.<sup>282</sup> Significantly, in addition to the fact that these orders were acted upon in some instances,<sup>283</sup> the fact that Stanišić's orders were not being carried out to the extent possible by RSMUP members lower down, actually shows lack of *de facto* capability to do more, rather than an omission.
231. What is more, the TC evidently held Stanišić to an erroneous and unreasonable standard by requiring him to demonstrate that orders made in good faith were carried out to the extent possible. This amounts to a reversal of the burden of proof and is certainly manifestly unfair.
232. In sum, the TC erred by taking into consideration purported omissions which cannot be used to determine that Stanišić contributed to the JCE.
233. It is highly significant in this regard, that discounting the findings in Volume II, paragraphs 746, 751, 753, 754, 757, 759 and 761, it is evident, as will be seen in Ground 6, that no reasonable TC could have found that Stanišić's contributed, let alone significantly contributed, to the purported JCE.

### III. RELIEF SOUGHT

234. As a result of the TC's error, Stanišić's convictions for counts 1, 4 and 6 must be quashed.

<sup>281</sup> Judgement, Volume II, para.746. (Emphasis added)

<sup>282</sup> Judgement, Volume II, para.752

<sup>283</sup> Judgement, Volume II, para.746.

## **6<sup>TH</sup> GROUND OF APPEAL**

### **THE TC ERRED IN ITS ASSESSMENT OF WHETHER STANIŠIĆ MET THE REQUIRED *ACTUS REUS* FOR JCE I LIABILITY**

#### **I. OVERVIEW**

235. In its assessment of the *actus reus*, the TC failed to make any specific findings as to whether and how Stanišić contributed, let alone significantly contributed, to furthering the JCE it found to have existed.<sup>284</sup>
236. The TC made a series of errors in its assessment of the evidence resulting in the improper reliance on incorrect findings. The TC further erred by not taking into account the voluminous evidence which contradicts the implicit finding that the *actus reus* was established in Stanišić's case.
237. The TC committed errors of fact in its assessment of Stanišić's purported role in: (i) the creation of Bosnian Serb bodies and policies; (ii) the RSMUP Forces involvement in combat activities and takeovers of Municipalities; (iii) prevention, investigation and documentation of crimes; and (iv) unlawful arrest and detentions.
238. No reasonable trial chamber, having properly assessed the totality of the evidence, could have concluded beyond reasonable doubt that Stanišić significantly contributed to the furtherance of the JCE.

#### **II. ARGUMENT**

##### **A. THE TC FAILED TO MAKE SPECIFIC FINDINGS ON STANIŠIĆ'S CONTRIBUTION TO THE JCE IT FOUND TO HAVE EXISTED**

239. The section of the Judgement devoted to Stanišić's purported contribution to the JCE outlined a series of findings without any conclusion that those findings furthered the common purpose of the JCE.<sup>285</sup>

<sup>284</sup> Judgement, Volume II, paras.729-765.

240. The TC merely summarized the evidence, in the majority of instances incorrectly.
241. The TC committed an error of law by not providing any indication of the evidence relied upon or excluded, and by not coming to any express conclusion as to how the requisite evidentiary threshold was met.<sup>286</sup>
242. As a result, Stanišić is forced to challenge each and every one of the TC's numerous erroneous findings.

**B. THE TC COMMITTED MULTIPLE ERRORS OF FACT LEADING IT TO THE ERRONEOUS CONCLUSION THAT STANIŠIĆ CONTRIBUTED TO THE JCE**

**i. The TC made a series of errors regarding Stanišić's "role in the creation of Bosnian Serb bodies and policies"**

243. The TC erred by finding that Stanišić "*was involved in the establishment of the SDS.*"<sup>287</sup> As is shown by the evidence, Stanišić was a member of the preparatory committee of the Democratic Party of BiH and not of the Serbian Democratic Party.<sup>288</sup> The TC's assertion that Stanišić showed discontent and attempted to intervene regarding Serb representation in the BiH-MUP is also erroneous.<sup>289</sup> Instead, Stanišić sought to have the distribution of personnel expressly agreed upon between the SDS, SDA and HDZ, upheld and followed.<sup>290</sup>

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<sup>285</sup> Judgement, Volume II, paras.729-765.

<sup>286</sup> See, *supra*, 1<sup>st</sup> Ground of Appeal, Section C.

<sup>287</sup> Judgement, Volume II, para.729.

<sup>288</sup> Exh. P1999, p.56-57; Škipina, T.8295,8453; Zepinić, T.5707-5708; Njeguš, T.11308.

<sup>289</sup> Judgement, Volume II, para.729.

<sup>290</sup> Exh. 1D115.

244. As already noted, the suggestion that Stanišić and Karadžić “*shared a close relationship*” is mistaken.<sup>291</sup> The TC additionally erroneously asserted that Stanišić “*did not report through the designated channels of the RS Government*”.<sup>292</sup> Rather, as the TC had itself earlier noted, the RSMUP compiled and sent 150 daily bulletins to the President and Prime Minister about its daily activities in 1992,<sup>293</sup> and an additional 90 reports on security issues were sent to the President and the Prime Minister.<sup>294</sup> The TC further noted that in May 1992, the RSMUP was tasked with preparing a complete report on the security situation by the RS Government.<sup>295</sup> The TC also heard evidence that several such exhaustive and scrupulous reports were prepared by the RSMUP.<sup>296</sup> Moreover, the suggestion made by Đeric that Stanišić did not attend government meetings<sup>297</sup> is directly contradicted by the TC’s finding that Stanišić attended a majority of the sessions of the RS Government.<sup>298</sup>
245. In relation to the Variant A and Variant B Instructions adopted by the SDS, the TC erred by finding that Stanišić “*was aware of these Instructions*” because the police played a central role in their implementation.<sup>299</sup>

<sup>291</sup> See, *supra*, 4<sup>th</sup> Ground of Appeal, Section E.

<sup>292</sup> Judgement, Volume II, para.730.

<sup>293</sup> Judgement, Volume II, paras.66, 568; Exh. P625, p.23.

<sup>294</sup> Judgement, Volume II, para. 66; Exh. P625, p.23. This same information is inexplicably omitted from para. 568 of the Judgement.

<sup>295</sup> Judgement, Volume II, para.47.

<sup>296</sup> Trbojević, T.11752-11754, Exh. P427.05.

<sup>297</sup> Judgement, Volume II, para. 570; P400, p. 10-12.

<sup>298</sup> Judgement, Volume II, para.572.

<sup>299</sup> Judgement, Volume II, para.731.



246. First, the purpose, issuance, and implementation of the Variant A and B Instructions were inextricably bound to the SDS.<sup>300</sup> As found by the TC, the Instructions were issued by “*the Main Board of the SDS*” as a “*result of the SDS Main Committee’s concern*” that BiH was seceding.<sup>301</sup> Pursuant to the Instructions, “*SDS municipal committees were to form Crisis Staffs*” to be comprised, *inter alia*, of “*SDS nominees*”.<sup>302</sup> The TC noted that “*the Instructions further provided that the activities entailed therein could only be applied upon an order of the President of SDS in BiH according to a secret procedure*”.<sup>303</sup> Tellingly, all of the TC’s findings on the contemporaneous implementation of the Instructions referred to the SDS.<sup>304</sup>
247. The TC also failed to consider that Stanišić played no role in the SDS<sup>305</sup> and was not present at any meetings at which the Instructions were discussed.<sup>306</sup>
248. Moreover, the Crisis Staffs were a conflicting authority that usurped the powers of the RS Government<sup>307</sup> and the implementation of the Instructions at the level of the Crisis Staffs did not mean that Stanišić was aware of the Instructions. The TC found that the establishment of the Crisis Staffs “*was the main instrument used in the implementation of the Variant A and B Instructions.*”<sup>308</sup> Yet, Prosecution witness Đerić testified that the Crisis Staffs had nothing to do with the RS Government because they were formed and worked on behalf of the SDS.<sup>309</sup> This was corroborated by evidence that in some instances Crisis Staffs became the *de facto* superior body of SJBs, and SJBs did not inform CSBs or the RSMUP of the situation on the ground.<sup>310</sup> As noted by the TC, the RSMUP did not exert its own influence until August or September 1992.<sup>311</sup>

<sup>300</sup> Judgement, Volume II, paras.227-244.

<sup>301</sup> Judgement, Volume II, paras.228.

<sup>302</sup> Judgement, Volume II, para.229.

<sup>303</sup> Judgement, Volume II, para.231 (emphasis added).

<sup>304</sup> Judgement, Volume II, paras.234-241.

<sup>305</sup> See, *supra*, 4<sup>th</sup> Ground of Appeal, Section C.

<sup>306</sup> Exh. P2306, p.1-2, 6.

<sup>307</sup> Đerić, T.2417, 2436.

<sup>308</sup> Judgement, Volume II, para.244.

<sup>309</sup> Judgement, Volume II, para.253, referring to Đerić, T.2433.

<sup>310</sup> Judgement, Volume II, para.251, referring to Mačar, T.23102, 22289-22900.

<sup>311</sup> Judgement, Volume II, para.251, referring to Mačar, T.23102, 22896-22898.

249. As is clear from Stanišić's own evidence, he was not aware of the Instructions at the time,<sup>312</sup> and no evidence to the contrary has been adduced.
250. Second, and crucially, the TC entirely fail to address or even refer to the critical issue of resubordination of RSMUP forces to the army.<sup>313</sup> By failing to enter a conclusive finding on the issue of resubordination,<sup>314</sup> there could be no legally correct assessment of whether Stanišić had command and control over these RSMUP forces. As a result, all findings in this respect are fundamentally flawed and should be quashed.
251. Stanišić was not "*a key member of the decision-making authorities from early 1992 onwards.*"<sup>315</sup> The TC's erroneous conclusion is "[b]ased on the minutes and agenda of the meetings of" the NSC, the RS Government and the BSA.<sup>316</sup> As already noted, reference to any participation of Stanišić in the sessions of the BSA is limited to two occasions in the Indictment period.<sup>317</sup>
252. Stanišić's presence at meetings of the NSC and the RS Government were mandated by his official function and capacity as Minister. The TC does not cite a single specific reference for minutes of joint sessions of the NSC and the RS Government, regular sessions of the RS Government or sessions of the BSA.<sup>318</sup> Nor is there any analysis of the minutes or agendas of any of these meetings or how Stanišić's attendance was sufficient to justify the extremely prejudicial and erroneous conclusion that he was a key decision maker.<sup>319</sup>

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<sup>312</sup> Exh. P2306, p.1-7, 13-14.

<sup>313</sup> Judgement, Volume II, paras.729-765.

<sup>314</sup> Judgement, Volume II, para.342.

<sup>315</sup> Judgement, Volume II, para.732.

<sup>316</sup> Judgement, Volume II, para.732.

<sup>317</sup> See, *supra*, 4th Ground of Appeal, Section C.

<sup>318</sup> Judgement, Volume II, para.732.

<sup>319</sup> Judgement, Volume II, para.732.

253. The TC made a number of errors in relation to Stanišić's powers of appointment and discipline.<sup>320</sup> Stanišić had a duty as Minister to appoint people to posts in the Ministry as it was being set up.<sup>321</sup> However, instead of Stanišić making the "majority of key appointments", the chiefs of the CSBs that existed in BiH were appointments already made by the Minister of the BiH MUP Delimustafić who retained their positions.<sup>322</sup> Stanišić only nominated the chiefs of the newly formed CSB's of Bijeljina and Sarajevo. Even then, Jesurić had already been appointed by Delimustafić as chief of the SJB Bijeljina and was only promoted to chief of the CSB.<sup>323</sup> All appointments were temporary<sup>324</sup> and were made on the basis of the policy agreed at the BiH-MUP Collegium on 1 April 1992 upon the split of the MUP.<sup>325</sup> Though the TC accepted that appointments of the SJB chiefs were made "upon the recommendation of the regional authorities",<sup>326</sup> the TC failed to take into account that a number of SJB chiefs were appointed by municipal organs without the approval or sometimes even the knowledge of Stanišić and the RSMUP.<sup>327</sup>
254. The TC further erred by finding that Stanišić "had the sole authority" to discipline and dismiss the chiefs of the CSBs and the SJBs.<sup>328</sup> This is contradicted by the relevant applicable law at the time.<sup>329</sup> It is further contradicted by the TC's own finding that the statutory duty to initiate disciplinary proceedings lay with the SJB or CSB chief and the Minister was vested with appellate authority.<sup>330</sup> Consequently, if no disciplinary proceedings were initiated, there was no basis for Stanišić to wield appellate authority. Moreover, when Stanišić did have authority to act in disciplinary cases, the severest sanction was imposed in the majority of proceedings.<sup>331</sup>

<sup>320</sup> Judgement, Volume II, para.733.

<sup>321</sup> See, *inter alia*, Judgement, Volume II, fns.1502-1511.

<sup>322</sup> ST-214, T.12952-12953, 13050-13052; ST-155, T. 12582-12584, 12574-12575.

<sup>323</sup> Mačar, T.23119-23120.

<sup>324</sup> See, *inter alia*, SZ-007, T.26105; Exhs. P1408; P1410; P1414; P1416; P384.

<sup>325</sup> Exh. P2320.

<sup>326</sup> Judgement, Volume II, para. 736.

<sup>327</sup> Mačar, T. 22884-22885, 23192-23194.

<sup>328</sup> Judgement, Volume II, para.733.

<sup>329</sup> Exh. P510.

<sup>330</sup> Judgement, Volume II, para.695.

<sup>331</sup> See, *inter alia*, Exhs. P1288, 1D796.

255. The TC also erred by relying on the finding that Stanišić “*had the sole authority for establishing special police units and the authority to decide when and how a special unit could be used.*”<sup>332</sup> In reality, the unauthorized creation of special police units was a problem which Stanišić addressed by ordering their disbandment.<sup>333</sup> Despite omitting this evidence, the TC accepted that Stanišić and the RSMUP were “*not informed of the establishment of some special police units by local organs.*”<sup>334</sup> The TC thereby erred by accepting evidence but not factoring this evidence into its ultimately flawed findings.<sup>335</sup>
256. Further, when analysing Stanišić’s alleged contribution, the TC erred by supplementing evidence regarding Stanišić’s acts and conduct with its findings on the ‘BSL’, of which Stanišić was found to be a member.<sup>336</sup>
257. First, the TC improperly found that the “*local police leadership*” was part of the formulation and implementation of “*decisions taken by the Crisis Staffs, which were in accordance with instruction from the RS Presidency, MUP, and the SDS.*”<sup>337</sup> The TC failed to analyze Defence evidence of interference by local Crisis Staffs and other entities or organs in police appointments through the prism of Stanišić’s personal acts and conduct.<sup>338</sup> Instead, the TC’s evaluation of the evidence is impermissibly tainted by reference to its previous finding that the ‘BSL’ “*was in charge of the events taking place in the municipalities through its control over [...] Crisis Staffs*”, and that the decisions of the Crisis Staffs were therefore in accordance with instruction from the RS Presidency, RSMUP, and the SDS.<sup>339</sup>

<sup>332</sup> Judgement, Volume II, para.733.

<sup>333</sup> Exh. ID176.

<sup>334</sup> Judgement, Volume II, para.733.

<sup>335</sup> Judgement, Volume II, para.729-765.

<sup>336</sup> See, *supra*, 2<sup>nd</sup> Ground of Appeal, Section C.

<sup>337</sup> Judgement, Volume II, para.735.

<sup>338</sup> *Idem.*

<sup>339</sup> *Idem.*

258. The TC's logic is circular and is patently incorrect. Evidence of Stanišić not having authority was superseded by the finding that authority was wielded throughout the municipalities by an entity (the 'BSL') of which Stanišić was found to be a member. The TC's assessment of the evidence is therefore manifestly prejudicial and erroneous.
259. Second, the TC improperly held that "*Stanišić had overall command and control over the RSMUP police forces*".<sup>340</sup> This finding is made by "*taking into account the role played by municipal bodies*",<sup>341</sup> thereby implicitly acknowledging the interference by the Municipal bodies in the work of RSMUP. This finding is also made in spite of the TC's inability to make a conclusive finding regarding authority over policemen who were re-subordinated to the military.<sup>342</sup> As a result, Stanišić was considered to wield overall command and control over all RSMUP forces, irrespective of his lack of *de facto* authority over forces which had been re-subordinated or due to interference by other organs, by virtue of the overarching control of the 'BSL', of which he was found to be a part.<sup>343</sup>
260. The cumulative effect of the TC's repeated errors is the total contradiction of its finding that Stanišić "*participated in the enunciation and implementation of the Bosnian Serb policy, as it evolved*."<sup>344</sup>

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<sup>340</sup> Judgement, Volume II, para.736.

<sup>341</sup> *Idem*.

<sup>342</sup> Judgement, Volume II, para.342.

<sup>343</sup> Judgement, Volume II, para.736.

<sup>344</sup> Judgement, Volume II, para.734.

ii. **The TC made a series of errors regarding the “role of RSMUP Forces in combat activities and takeovers of Municipalities”**

261. The TC erred by finding that the introduction of a solemn declaration for employees upon the RSMUPs establishment was “*to provide a pretext to dismiss and disarm non-Serbs from the RSMUP.*”<sup>345</sup> As recognized by the TC, the requirement to take a solemn declaration upon assumption of duties is common to law enforcement agencies<sup>346</sup>. Yet the TC improperly imputes a persecutory dimension to the solemn declaration.<sup>347</sup> The TC fails to consider that (i) the solemn declaration was mandatory for all authorized RSMUP officials as proscribed by the law, irrespective of their ethnicity; and (ii) the declaration itself is non-discriminatory, requiring, *inter alia*, execution of duties “*in a conscientious manner, to adhere to the Constitution and the Law*”.<sup>348</sup>
262. The TC improperly dismissed Stanišić’s statement that the RSMUP was not consulted regarding the reassignment of police forces by incorrectly assessing two documents.<sup>349</sup>
263. First, the TC refers to Stanišić’s order that RSMUP forces be organized into “*wartime units*”. The TC fails to note that this order was made pursuant to and was required by the Law on All People’s Defence.<sup>350</sup> Second, the TC incorrectly refers to Karadžić’s “request” of 1 July 1992.<sup>351</sup> As noted in another part of the Judgement, “*Karadžić ordered Stanišić to transfer 60 specially trained policemen [...] and place them under the military command of the SRK.*”<sup>352</sup> Karadžić was the Supreme Commander of the Armed Forces according to the Constitution.<sup>353</sup>

<sup>345</sup> Judgement, Volume II, para.738.

<sup>346</sup> *Idem.*

<sup>347</sup> *Idem.*

<sup>348</sup> Exh. P530, Article 41.

<sup>349</sup> Judgement, Volume II, para.739.

<sup>350</sup> Exhs. L1, Art.207; P1977, p.2; Trbojević, T.4175-4176; Žepinić, T.5933; Šćekić, T.6567-6568; Njeguš, T.11422-11426; Gajić T.12799-12800, 12849-12850; 1D662, paras.233-245; Bajagić, T.20182-20184.

<sup>351</sup> Judgement, Volume II, para.739.

<sup>352</sup> Judgement, Volume II, para.591.

<sup>353</sup> Exh. L126, Art.106.

264. With regard to the purported reliance of the RS Government and the VRS on RSMUP forces for combat activities, the TC again erroneously came to a conclusion on the basis of an incorrect assessment of the evidence.<sup>354</sup>
265. The TC improperly found that Stanišić “*issued orders for police forces [...] to participate in ‘coordinated action with the armed forces’*”.<sup>355</sup> First, the evidence shows that Stanišić issued an order providing that the use of RSMUP units “*in coordinated action with the armed forces [...] may be ordered by the minister of the interior, commander of the police detachment of the Ministry [...] and chief of the CSB of the Ministry*”.<sup>356</sup> Second, the order makes clear that while engaged in such action, RSMUP units “*shall be subordinated to the command of the armed forces*”.<sup>357</sup>
266. The TC further erred by asserting that Stanišić “*facilitated the arming of the RSMUP forces*” by seeking support from the SSUP.<sup>358</sup> Instead, the evidence relied on by the TC shows that the SSUP had a surplus of uniforms and weapons which it sent to the RSMUP in Pale, and in June 1992 the SSUP ordered Davidović’s unit to leave their equipment etc. with the RSMUP before returning to Belgrade.<sup>359</sup> The latter comprised the weapons of the 17 members of the SSUP unit and three all-terrain vehicles only.<sup>360</sup> In relation to the assistance of the SSUP to train a unit under Stanišić’s command, this special police unit was engaged in crime prevention and detection.<sup>361</sup> Moreover, the SSUP unit arrived in RS for this very purpose upon Stanišić’s request.<sup>362</sup>

<sup>354</sup> Judgement, Volume II, para.740.

<sup>355</sup> *Idem*.

<sup>356</sup> Exh.1D46, para.7 (emphasis added).

<sup>357</sup> *Idem* (emphasis added).

<sup>358</sup> Judgement, Volume II, para.740.

<sup>359</sup> Judgement, Volume II, para.587.

<sup>360</sup> Exh.1D646, p.2.

<sup>361</sup> Judgement, Volume II, para.602.

<sup>362</sup> Exh.1D646, p.1.

267. The TC erred by finding that “[a]s the highest commander of the RSMUP forces”, Stanišić received reports of the involvement of the police forces in combat activities.<sup>363</sup> There is nothing conclusive in the evidence to suggest that the reports received by Stanišić contained information other than statistics *i.e.* number of police forces that were re-subordinated to the army.<sup>364</sup>
268. Stanišić did not seek “*recognition [...] for the contributions and achievements of the RSMUP in combat activities*”.<sup>365</sup> Instead, as referred to elsewhere in the Judgement: (i) at the BSA session during which he was sacked, Stanišić merely “noted” the percentage of RSMUP involved in operations;<sup>366</sup> and (ii) at the 11 July Collegium, Stanišić referred to the “immediate cooperation” of the RSMUP with the army. In this regard, a conclusion of 11 July Collegium was “*coordinated action of the army and the MUP on crime prevention*”.<sup>367</sup>
269. The TC erred in finding that Stanišić “*consistently approved the deployment of the RSMUP forces to combat activities*”.<sup>368</sup> The TC failed to consider that by law, the VRS was entitled to call up active or reserve members of the RSMUP and resubordinate them.<sup>369</sup> The TC committed a further error in finding that Stanišić “*only sought to withdraw regular policemen from combat activities towards the end of 1992*”.<sup>370</sup> On the contrary, it is clear that Stanišić consistently raised the issue to the highest authorities in the RS about the effects of resubordination on the ability of the RSMUP to fulfill its duties in accordance with the law at least from the beginning of July 1992.<sup>371</sup>

<sup>363</sup> Judgement, Volume II, para.741.

<sup>364</sup> Exhs. 1D571; P158; P169; P621; P669; P731; P1888; P1928.

<sup>365</sup> Judgement, Volume II, para.742.

<sup>366</sup> Judgement, Volume II, para.595.

<sup>367</sup> Exh. P160, conclusion 13.

<sup>368</sup> Judgement, Volume II, para.743.

<sup>369</sup> Exh. L1 Art.104; Exhs. 1D390; 1D405; 1D406; 1D409-1D411; 1D264; 1D266; 1D267; 1D390; 1D543; 1D468; 1D472; 1D641; 1D723; 1D729; 1D765; 1D800; 2D119; 2D120; P411.13; P1787; P1802; P1813; P1887; Kovačević, T.23647-23648,23681, 23684-23685, 23714-23715, 23759, 23806, 23811-23812, 24124-24125, 23719-23720, 24203; Lisica, T.26969-26970.

<sup>370</sup> Judgement, Volume II, para.743.

<sup>371</sup> Exhs. P160, p. 4, 14-15; P427.8, p.2, 4, 5.



270. Furthermore, the TC erred in its interpretation of the request sent by Stanišić to Karadžić seeking the return of the policemen who had been resubordinated pursuant to Karadžić's order.<sup>372</sup> Contrary to the TC's erroneous assertion that Stanišić sought to have the police in question "replaced" with members of the army, the evidence clearly shows that Stanišić requested their return "*so that the police members may perform*" their duties and tasks.<sup>373</sup>
271. Had Stanišić possessed the authority to withdraw members of the RSMUP from their re-subordination, such requests to the RS hierarchy would have been entirely unnecessary.
272. Contrary to the erroneous finding about appointments to the RSMUP, all of the individuals listed were not "*directly appointed by Stanišić*".<sup>374</sup> Rather, the evidence clearly shows that (i) Koroman was appointed Chief of Pale SJB by Delimustafić;<sup>375</sup> (ii) Todorović was appointed Chief of Bosanski Šamac SJB by the municipal Assembly;<sup>376</sup> and (iii) Drljača was appointed Chief of the Prijedor SJB by the Prijedor Crisis Staff.<sup>377</sup> The TC also erroneously omitted that the appointments of Bjelošević,<sup>378</sup> Savić,<sup>379</sup> and Župljanin<sup>380</sup> - who were all appointed by Minister of the BiH-MUP Delimustafić prior to the formation of the RSMUP - were temporary appointments made by Stanišić.

<sup>372</sup> Judgement, Volume II, para.591.

<sup>373</sup> Exh.1D100.

<sup>374</sup> Judgement, Volume II, para.744.

<sup>375</sup> Mačar, T.23119-23120.

<sup>376</sup> ST-121, 1D606, 9005-9006, 9009-9010, Lukač, P2159, p. 1611-1612.

<sup>377</sup> Exh. P2462; ST-161, T.3439-3443; Kovač, T.27240-27241, 27251-27252. See also Mačar, T.22977-22978; Stakić-TJ, para.64.

<sup>378</sup> Exh. P1410.

<sup>379</sup> Exh. P1414.

<sup>380</sup> Exh. P1408.

iii. **The TC made a series of errors regarding Stanišić's "role in prevention, investigation, and documentation of crimes"**

273. In wrongly finding that the police and civilian prosecutors failed to function in an impartial manner,<sup>381</sup> the TC improperly relied on witness Gaćinović despite noting that the methodology adopted by Gaćinović in reviewing the prosecutor logbooks covering the 20 municipalities "*could obfuscate the data.*"<sup>382</sup> Furthermore the TC disregarded Gaćinović's evidence about the number of criminal complaints for serious crimes committed against Muslims and Croats by unknown perpetrators.<sup>383</sup> In analyzing the reporting of crimes that occurred during the Indictment period, the TC further erred by relying solely on the information contained in the logbooks ("KU register").<sup>384</sup> Even Prosecution witness Vasić, Director of the RS police, agreed that the KU register could not be viewed in isolation to get a complete picture of the reporting of crimes, but additionally the log-book of daily events and the register of on-site investigations would be necessary.<sup>385</sup>

274. Paragraph 724 of the Judgement reveals another of the TC's errors in this regard. Indeed, its finding that Stanišić "*specifically directed that numbers on losses suffered by the Serb side be inflated*"<sup>386</sup> is an utterly misleading portrayal of the underlying evidence in which there is no mention whatsoever of Stanišić directing that Serb casualties be inflated. Clearly, the TC's finding is not supported by any reasonable interpretation of the intercept from which it is made. A correct interpretation of the underlying evidence undermines any notion that Stanišić contributed to the purported JCE. Equally, the TC erred to the extent that it relied upon this incorrect finding to draw the erroneous inference that Stanišić had the *mens rea* to commit discriminatory crimes.<sup>387</sup>

<sup>381</sup> Judgement, Volume II, para.745.

<sup>382</sup> Judgement, Volume II, fn.313.

<sup>383</sup> Judgement, Volume II, fn.320, referring to P1609.01, p.18.

<sup>384</sup> Judgement, Volume II, para.93.

<sup>385</sup> Vasić, T.13678-13679,13730.

<sup>386</sup> Judgement, Volume II, para.724, citing P1171, p.3-4.

<sup>387</sup> See generally, *supra*, 4<sup>th</sup> Ground of Appeal.

275. The TC erred by finding that Stanišić's orders of 8, 10, 17 and 24 August to gather information concerning the treatment of war prisoners and conditions of life of detainees were prompted by "*international attention*".<sup>388</sup> Earlier in the Judgement, the TC referred to a 24 July facsimile from UNPROFOR in Belgrade to ECMM Belgrade regarding detention camps,<sup>389</sup> and a 25 July ICRC report criticizing the conditions in the camps.<sup>390</sup> Rather than reacting to this information, Stanišić had already reported to the highest authorities of the RS on 17 July and requested a meeting with MOJ and VRS to resolve the issue of detention camps so that the RSMUP could perform its duties in compliance with the law.<sup>391</sup> The TC fails to even refer to this evidence.<sup>392</sup>
276. In addition, Stanišić issued an order on 19 July requesting information on procedures for arrest, treatment of prisoners, conditions of collection camps, and Muslim prisoners detained by the army at "undefined camps" without proper documentation.<sup>393</sup> This order of 19 July was a result of Stanišić becoming aware of detention camps at the 11 July Collegium,<sup>394</sup> and not in response to international attention. Further, the TC erred by noting that the mistreatment in the camps continued and imputing it to Stanišić,<sup>395</sup> given the clear evidence that the RSMUP did not have authority or jurisdiction over the camps or detainees.<sup>396</sup>
277. Despite this lack of authority or jurisdiction, Stanišić ordered that information be gathered about the camps and expressing the need for conditions to comply with international law.<sup>397</sup>

<sup>388</sup> Judgement, Volume II, para.753.

<sup>389</sup> Judgement, Volume II, fn.1692.

<sup>390</sup> Judgement, Volume II, para.651.

<sup>391</sup> Exh.P427.8, p.3,6.

<sup>392</sup> Judgement, Volume II, paras.745-759.

<sup>393</sup> Exh. 1D76.

<sup>394</sup> Exh. P2309, p.18-19.

<sup>395</sup> Judgement, Volume II, para.753.

<sup>396</sup> Mandić, T.9481-9482, 9554; Mačar, T.23534-23537; Trbojević, T.4095; Exh. P2310, p.9.

<sup>397</sup> See, *inter alia*, Exhs.1D563;1D55;1D56;1D57.

278. While the TC referred to some examples of the orders issued by Stanišić which ran contrary to the furtherance of the common purpose,<sup>398</sup> it failed to make any assessment of the significance of these orders. Moreover, the TC further failed to consider or even refer to numerous other similar orders issued by Stanišić.
279. Consequently, the TC did not properly assess the totality of the evidence on the trial record. The TC made no reference to Stanišić reporting to the President and the Prime Minister upon his becoming aware of the issue of detention camps and seeking a meeting with MOJ and VRS to resolve this issue.<sup>399</sup> Significantly, the TC make only cursory reference Stanišić's letter of 18 July to the RS President, Prime Minister and the Federal SUP, *inter alia*, reiterating a request for regulations to be issued to prevent breaches of international law, and informing Đeric that he had instructed the RSMUP to record war crimes regardless of the ethnicity of perpetrators.<sup>400</sup>
280. The TC erroneously interpreted evidence of the dismissal of five individuals by Stanišić as demonstrating his "*ability as the highest authority to investigate and punish*".<sup>401</sup> Instead, the instances referred to by the TC were ones in which disciplinary proceedings had already begun and therefore Stanišić was able to exercise his appellate power to dismiss the individuals in question.
281. Moreover, as noted by the TC, these dismissals by Stanišić occurred despite "*opposition from others in the Bosnian Serb leadership*".<sup>402</sup> Consequently, these dismissals show that Stanišić used his disciplinary powers irrespective of opposition from individuals found to be members of the JCE.<sup>403</sup>

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<sup>398</sup> Judgement, Volume II, paras.747-750.

<sup>399</sup> Exh. P427.08.

<sup>400</sup> Exh. P190.

<sup>401</sup> Judgement, Volume II, para.755.

<sup>402</sup> Judgement, Volume II, para.755.

<sup>403</sup> See, *supra*, 2<sup>nd</sup> Ground of Appeal, Section B.

282. In relation to Stanišić's actions against paramilitaries from outside BiH, the TC erred in finding that such actions were only undertaken due to the paramilitaries "*refusal to submit to the command of the army*" and their commission of crimes against Serbs".<sup>404</sup>
283. As early as May 1992, Stanišić sought assistance from the SSUP to tackle the worsening security situation including the issue of paramilitaries.<sup>405</sup> Stanišić appointed Davidović from the SSUP to act "*as a police chief in the [RSMUP] with all powers while he was in the BH area*".<sup>406</sup> This power was used by Davidović and his unit "*in the disarming and suppression of the criminal and in some cases inhumane activities*" of, *inter alia*, the Serbian Volunteer Guard [Arkan's Men], the Red Beret's, and the Yellow Wasps.<sup>407</sup>
284. Davidović and Andan were initially sent by Stanišić to Bijeljina to restore law and order.<sup>408</sup> In Brčko, the unit under Davidović and Andan took part in actions to arrest and eliminate paramilitaries.<sup>409</sup> They were also given full authority by Stanišić to uncover any kind of criminal acts and took such actions in Bijeljina and Zvornik.<sup>410</sup> Moreover, contemporary notes taken by Andan detail the steps taken by Stanišić against paramilitaries in Brčko, Zvornik, Foča, Rudo, Višegrad, and Trebinje.<sup>411</sup>
285. It is consequently a selective misreading of the evidence to assert that Stanišić was motivated to act against paramilitaries solely on the basis of stolen vehicles and harassment of Serbs.<sup>412</sup>

<sup>404</sup> Judgement, Volume II, para.756.

<sup>405</sup> Davidović, T.13563-13567.

<sup>406</sup> Exh. 1D646, p.1 (translation from original).

<sup>407</sup> Exh. 1D646, p.6.

<sup>408</sup> Exhs. 1D97, p.3; 1D646, p.9.

<sup>409</sup> Andan, T.21456-21466, 21472-21473, 21666-21674.

<sup>410</sup> Davidović, T.13565-13566, 13614-13615; Andan, T.21687-21688; Exh. P317.22.

<sup>411</sup> Exh. 1D557; 1D539; 1D650; 1D651.

<sup>412</sup> Judgement, Volume II, para.756.

286. The TC erred by finding that Stanišić “*focused primarily on [war crimes] committed against Serbs*”.<sup>413</sup> The TC’s erroneous conclusion ignores the voluminous evidence that Stanišić continuously reiterated that investigations into crimes, including war crimes, was to be on a non-discriminatory basis.<sup>414</sup>
287. The TC further erred by finding that Stanišić “*permitted RSMUP forces under his overall control to continue to participate in joint operations in the Municipalities with other Serb Forces*”.<sup>415</sup> Again, the TC disregards its own inconclusive finding on the issue of resubordination and whether Stanišić actually retained any authority or control over such forces.<sup>416</sup>
288. The errors occasioned by the TC’s legal and factual analysis of omissions attributed to Stanišić<sup>417</sup> are fully addressed in Stanišić’s 5<sup>th</sup> Ground of Appeal.<sup>418</sup>
- iv. The TC made a series of errors regarding Stanišić’s “role in unlawful arrest and detentions”**
289. When assessing whether Stanišić fulfilled the *actus reus* for JCE I liability, the TC improperly relied on findings in relation to detention camps, many of which are manifestly incorrect.
290. The TC failed to make a conclusive finding whether Luka camp in Brčko was “*controlled by either the SDS in Bijeljina or Brčko police*”.<sup>419</sup>

<sup>413</sup> Judgement, Volume II, para.758.

<sup>414</sup> See, *inter alia*, Exhs. P427.08 p. 5-7; 1D63; 1D572; 1D328.

<sup>415</sup> Judgement, Volume II, para.759.

<sup>416</sup> Judgement, Volume II, para.342.

<sup>417</sup> Judgement, Volume II, paras.746,751,753-754,757,759.

<sup>418</sup> See, *supra*, 5<sup>th</sup> Ground of Appeal, Section C.

<sup>419</sup> Judgement, Volume II, para.760 (emphasis added).

291. The TC failed to make any specific findings upon which it based its conclusion that the RSMUP had “*joint authority*” over the Sušica camp; “*guarded*” the Gymnasium in Pale; and “*controlled*” the Power Station Hotel in Gacko.<sup>420</sup> Instead, there is one general finding, that these municipalities were taken over in April/June 1992 through “*joint action*” of the RSMUP and other Serb forces.<sup>421</sup> In this regard, the evidence shows that when coordinated action between the RSMUP and the army took place, the RSMUP forces were resubordinated to the command of the army.<sup>422</sup>
292. The TC erred by finding that the RSMUP had “*joint authority*” with the Crisis Staff over the Sušica camp in Vlasenica.<sup>423</sup> Rather, “*MUP headquarters had no influence over*” the Crisis Staff in, *inter alia*, Vlasenica in mid-1992,<sup>424</sup> prompting efforts by the Serb leadership to end their “*apparent independence and autonomy*”.<sup>425</sup> This failed, however, with Đokanović testifying that nothing changed except the name of the Crisis Staff.<sup>426</sup>
293. The TC erred in relation to the Gymnasium in Pale by failing to consider that the Pale Crisis Staff was controlled by the SDS.<sup>427</sup> Further, the TC fails to consider that Stanišić took measures to remove Chief of the Pale SJB Koroman,<sup>428</sup> head of the police guarding the Gymnasium, but was unsuccessful due to the strong support Koroman received locally.<sup>429</sup> Witness Marković also testified that while working on prisoner exchanges in Pale, Stanišić told him that prisoners should be treated in accordance with the Geneva Conventions even though the exchanges were under the authority of the MOJ and the VRS and that Stanišić had no power in this regard.<sup>430</sup>

<sup>420</sup> Judgement, Volume II, para.760.

<sup>421</sup> Judgement, Volume II, paras.737, 741.

<sup>422</sup> Kovačević, T. 24316; Lisica, T. 26933-26934, 26999.

<sup>423</sup> Judgement, Volume II, para.760.

<sup>424</sup> Judgement, Volume II, para.54.

<sup>425</sup> Judgement, Volume II, para.260.

<sup>426</sup> Judgement, Volume II, para.262, referring to Đokanović, Exh. P397.02, T. 10576; Exh P397.04, T. 10773-10774.

<sup>427</sup> Judgement, Volume II, para.852.

<sup>428</sup> Exh. P2461.

<sup>429</sup> Judgement, Volume II, paras.698, 700, 852; Kovač, T. 27226-27227; ST127, T.11924-11925.

<sup>430</sup> Judgement, Volume II, para.617; referring to Marković, T.12674-12675, 12690, 12730.

294. In relation to Gacko, the TC erred by failing to consider its earlier finding regarding the difficulties with communications,<sup>431</sup> and that SJB Chief Popović told the government commission for detention facilities that there were no prisoners in Gacko.<sup>432</sup>
295. The TC failed to consider that Ključ was taken over in late July 1992 by cooperated action between a police detachment and the VRS<sup>433</sup> through resubordination of the police under the army command.<sup>434</sup> The evidence further shows that it was reported to RSMUP in August that there were no camps in the municipality.<sup>435</sup>
296. The TC erred in its conclusion on the Omarska camp by failing to consider that it was established by a decision of SJB Prijedor Chief Drljača as ordered by the Prijedor Crisis Staff, in clear contravention of his competence and authority.<sup>436</sup> As already noted, Drljača was appointed by the Prijedor Crisis Staff.<sup>437</sup>
297. The TC failed to refer to the evidence that the detention centre in Vogošća was run by Brano Vlačo, who was appointed by the military authorities,<sup>438</sup> and that the MOJ was *de facto* and *de jure* in charge of the detention centre.<sup>439</sup> The TC also failed to consider that the problem of autonomous local authorities disregarding the RSMUP was particularly pronounced in Vogošća.<sup>440</sup> Indeed, the failure of SJB chief Maksimović to follow orders and only take instruction from the Crisis Staff led to his removal by Stanišić and the filing of a criminal complaint against him by the RSMUP.<sup>441</sup>

<sup>431</sup> Judgement, Volume II, para.74; referring to Krulj, T.1992.

<sup>432</sup> Judgement, Volume II, para.673; Exh. P165.

<sup>433</sup> Judgement, Volume II, paras.405, 502.

<sup>434</sup> Kovačević, T. 24316; Lisica, T. 26933-26934, 26999.

<sup>435</sup> Judgement, Volume II, para.426; Exh.P972.

<sup>436</sup> Judgement, Volume II, paras.422, 856; Exhs. P1560;1D166.

<sup>437</sup> Exh. P2462; ST-161, T.3439-3443; Kovač, T. 27240-27241, 27251-27252.

<sup>438</sup> Mandić, T. 9535-9536. Despite this evidence, the TC are unable to make a conclusive finding whether Vlačo was a member of the police or a MOJ official. See Judgement, Volume II, para.879.

<sup>439</sup> P1318.30; P1318.31; P1318.33; P1872; P1308. P1475, Marković, T.12673-12675.

<sup>440</sup> Borovčanin, T.6772.

<sup>441</sup> Exhs. 1D106; 1D182; 1D184; 1D186.



298. The TC further failed to refer to the evidence of witness Radulović, who compiled contemporary reports on detention centres that Stanišić had not been informed in 1992 about events that occurred in, *inter alia*, Prijedor, Teslić, Omarska.<sup>442</sup>
299. Furthermore, the TC's erroneous finding that Stanišić had authority over RSMUP forces who were involved in detention centres<sup>443</sup> is tainted by the TC's improper reliance on its findings in relation to the 'BSL'. As already addressed, Stanišić did not have the power to withdraw RSMUP forces from their re-subordination.<sup>444</sup> Yet again, however, the TC improperly attributes the criminal conduct of re-subordinated forces to Stanišić in the absence of any express finding that he actually had authority over these forces.<sup>445</sup> The TC thereby incorrectly based its conclusion that Stanišić had authority over these forces on the underlying finding that the "BSL" was in control over events taking place in the municipalities. The TC therefore filled Stanišić's authority and control gap by reference to the "BSL" of which he was found to be a part.
300. No reasonable TC could have been satisfied on the basis of these incorrect findings that Stanišić contributed to the "continued existence and operation" of the detention camps.<sup>446</sup>

### III. RELIEF SOUGHT

301. The TC's numerous errors serve to both undermine its erroneous implicit finding that Stanišić significantly contributed to the furtherance of the common purpose, and actually demonstrates that Stanišić's actions were evidently contrary to the furtherance of any shared plan to commit crimes. The AC must therefore quash the convictions entered against Stanišić under Counts 1, 4 and 6.

<sup>442</sup> Radulović, T.11205-11209.

<sup>443</sup> Judgement, Volume II, para.761.

<sup>444</sup> See, *supra*, para.269.

<sup>445</sup> Judgement, Volume II, para.342. See, *supra*, 1<sup>st</sup> Ground of Appeal, generally.

<sup>446</sup> Judgement, Volume II, para.761.

## **7<sup>th</sup> GROUND OF APPEAL**

### **THE TC FAILED TO PROPERLY EVALUATE AND ACCORD APPROPRIATE PROBATIVE VALUE TO STANIŠIĆ'S INTERVIEW**

302. The TC committed a mixed error of law and fact in its evaluation of Stanišić's interview adduced in evidence by the Prosecution. Having properly assessed this evidence, no reasonable trial chamber could have found that Stanišić was a member of the JCE the TC found to have existed.

#### **I. OVERVIEW**

303. The TC failed to consider that Stanišić's interview was adduced in evidence by the Prosecution. Considering that the evidence provided by Stanišić was *not* contradicted by other reliable evidence, the TC was required to attach it full probative weight. While the Prosecution's challenge directed at the weight to be attributed to Stanišić's interview was without merit, it is significant that Stanišić's evidence was abundantly corroborated.

304. More importantly, the TC failed to attribute the correct probative value fitting the information provided by Stanišić. Having properly assessed Stanišić's evidence, no reasonable trial chamber could conclude that Stanišić was a member of the purported JCE.

#### **II. ARGUMENT**

##### **A. THE TC FAILED TO CONSIDER THAT STANIŠIĆ'S INTERVIEW WAS ADDUCED IN EVIDENCE BY THE PROSECUTION FOR THE TRUTH OF ITS CONTENTS**

305. The weight to be attributed to the contents of the interview to which Stanišić consented before trial was extensively debated during final oral arguments in this case. Yet, when referring to Stanišić's evidence, adduced by the Prosecution, the TC failed to pronounce on this issue.

306. In fact, other than for finding that its review of Stanišić's interview does not reveal any substantial cooperation with the Prosecution,<sup>447</sup> again without providing any justification, the TC failed to even mention that Stanišić's interview was adduced in evidence by the Prosecution.
307. Before the beginning of trial, Stanišić waived his right to remain silent and consented to being questioned by the Prosecution pursuant to Rule 63. The Prosecution's interview lasted six full days. The Prosecution had every opportunity to raise any topic deemed relevant, to which Stanišić voluntarily responded in good faith. Properly cautioned at the beginning of each day, Stanišić clearly understood that the content of his interview could be used against him at trial. Indeed, Stanišić stated: "*And I will say that every word that I say here can be used (...)*"<sup>448</sup>
308. Significantly, Stanišić consented to this interview without the benefit of having heard any of the witness evidence later admitted at trial.
309. Detailed six-day interviews like that provided by Stanišić before trial are exceptional. Such statements are extremely helpful for the Prosecution, whether to obtain a conviction, if they contain inculpatory evidence, or to focus their investigation and/or presentation of their case.
310. While an accused may oppose the admission into evidence of a statement he provided, he cannot request that his statement be admitted. Only the Prosecution can introduce such a statement in evidence, which is a discretionary decision. The Prosecution must live with the consequences of its decision. Once an accused's statement is admitted at the Prosecution's request, it becomes evidence, as any other evidence adduced during trial. Hence, unless the evidence provided by the accused is rebutted by other reliable evidence, it must be attributed full probative value.

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<sup>447</sup> Whether Stanišić's interview amounts to substantial cooperation is an entirely different matter, addressed in the 14<sup>th</sup> Ground of Appeal.

<sup>448</sup> Exh. P2307, p.3, ln.10-12.

311. In this case, having relied extensively on the contents of the interview it conducted with Stanišić - in its Pre-trial Brief,<sup>449</sup> its opening statement<sup>450</sup> and during the trial<sup>451</sup> - the Prosecution decided to adduce the contents of the interview in evidence for the truth of its contents *via* a bar table motion.<sup>452</sup>
312. Addressing the applicable law regarding bar table motions, the Prosecution posited *inter alia*: “[t]he jurisprudence of the Tribunal allows for the admission into evidence of documents from the bar table where the trial chamber is satisfied that the proposed documents are authentic, and the evidence included in them is reliable”<sup>453</sup> and “(...) the moving party must establish the relevant and probative value of each document”<sup>454</sup> and “the moving party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case”<sup>455</sup>
313. Addressing the specifics of its case, the Prosecution further asserted “[t]he Prosecution has analysed the remaining documents on its exhibit list and where possible has discarded documents which did not provide sufficiently probative evidence relating to issues in this case.”<sup>456</sup> More particularly, the Prosecution added: “the interview conducted under caution with the accused, Mićo Stanišić provides evidence of his position on many issues of relevance to this Trial”<sup>457</sup>
314. The entire interview was admitted into evidence as exhibits P2300-P2313.
315. Considering that most, if not all, of the evidence provided by Stanišić was neither contradicted nor rebutted by the Prosecution at trial, the TC erred in law by failing to accord full probative value to the contents thereof.

<sup>449</sup> Prosecution-PTB, fn.2-4, 170.

<sup>450</sup> T.247-251.

<sup>451</sup> T.21357-21359; T.23485-23487.

<sup>452</sup> Prosecution-BTM.

<sup>453</sup> Prosecution-BTM, para.8, fn.9. (emphasis added).

<sup>454</sup> Prosecution-BTM, para.9, fn.12 (emphasis added).

<sup>455</sup> Prosecution-BTM, para.9, fn.13 (emphasis added).

<sup>456</sup> Prosecution-BTM, para.20 (emphasis added).

<sup>457</sup> Prosecution-BTM, Annex A, p.12 (emphasis added).

**B. The Prosecution's Submissions on the Weight to Be Attributed to Stanišić's Interview Are Without Merit. In Any Event, Stanišić's Evidence Is Abundantly Corroborated.**

316. The TC erred in law by neither addressing nor referring to the parties' arguments concerning the weight to be attributed to Stanišić's evidence. Consequently, the AC must now pronounce on this issue.
317. The Prosecution's submission that "*the TC should give weight to (Stanišić's) incriminating statements, but should reject his numerous self-serving statements unless corroborated by other credible evidence*"<sup>458</sup> is without foundation and must be disregarded. In any event, Stanišić's evidence is overwhelmingly corroborated by credible evidence in the form of witness testimony, most of whom were called by the Prosecution, and documentary evidence, most of which was adduced by the Prosecution.
318. Firstly, from a legal standpoint, the manner in which Stanišić's evidence had to be assessed is entirely contrary to the Prosecution's submission. The Prosecution ignored the fact that the information provided by Stanišić was admitted at its request on the basis that it was reliable and deserving of probative value. Hence, in the absence of a specific challenge successfully refuting and/or disproving the information provided by Stanišić, his evidence had to be attributed maximum weight, which the TC failed to do.
319. Secondly, the Prosecution blatantly ignored the fact that most, if not all, of the information provided by Stanišić in respect of his acts and conduct at the relevant times, is indubitably corroborated, if only by the numerous orders he issued, which have been admitted in evidence.

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<sup>458</sup> Prosecution-FTB, paras.12-14.

320. The following table highlights numerous orders which powerfully corroborate Stanišić's evidence regarding his acts and conduct at the relevant times.

<b>What Stanišić Said (References from his interview)</b>	<b>Corroborating Exhibits</b>	<b>These Exhibits Fully Confirm Stanišić's Interview/Evidence as indicated in the first column</b>
P2303, p.14 (19-24)	1D56	Stanišić ordered all members of the RSMUP to treat war prisoners and refugees in accordance with law and international conventions.
P2303, p.14 (19-24)	ID73, P1420, P1013, P1472, 1D48, P564, 1D52	Stanišić ordered that information on the background and the conduct of RSMUP members be gathered to ensure that none of them hold a criminal or misdemeanor record.
P2303, p.14 (19-24)	P192, 1D563, 1D56, 1D77, 1D57	Stanišić issued orders requesting information on the concrete situation in prisons, camps and other detention centers; emphasizing the need to abide by international law and including the obligation to submit mandatory reports on any violation that may occur in such establishments.
P2303 p.14 (26-34)	1D634, P1004, P173, P581, P582, 1D55, 1D640, 1D64, 1D651	Stanišić issued orders to ensure that measures were taken to prevent crime, punish the perpetrators and report on any criminal behavior such as terrorism and war crimes.
P2303 p.14 (26-34)	1D61, P792, P1252, P553, P57	Stanišić issued orders to ensure that rigorous measures would be taken for criminal offences discovered or reported and stated that all offences must be prosecuted.
P2303 p.14 (26-34)	1D62, P856, 1D91, P190, 1D58, 1D59, 1D176, 1D94, P2349, P2348, 1D572	Stanišić issued orders to report on all crimes <u>regardless of the ethnicity of perpetrators</u> and to take measures in order for these crimes to be punished, whether by initiating disciplinary procedures or turning over the culprits.
P2303 p.18 (13-21)	P543, P545	Stanišić issued orders to all CSBs and SJBs to submit daily bulletins/reports on people employed by the RSMUP regardless of their ethnicity.
P2307 p.22-23 (26-34, 1-23)	P534	Stanišić issued orders to all CSBs and SJBs to avoid misinformation and act according to the law.

P2308 p.27-28 (1-5, 27-34, 1-2).	1D57.	Stanišić ordered that all RSMUP send data on prisons, camps and other detention centers to the Ministry of Health in due time.
P2309 p.10-11 (25-27; 32-34; 1-10)	ID73, P1420, P1013, P582, P581, P580, 1D58, 1D59	Stanišić ordered the gathering of information on the background and the conduct of RSMUP members in order to ensure that they do not hold a criminal or misdemeanor record.
P2309 p. 18-19 (24-34; 1-15)	P192, 1D56, 1D77, 1D563	Stanišić issued orders with the aim of obtaining information on the concrete situation in prisons, camps and other detention centers; emphasizing the need to abide by international law including the obligation to submit mandatory reports on any violation that may occur in such establishments.
P2310 P.14-15 (29-34; 1-3)	1D76, 1D58, 1D59, 1D176	Stanišić issued orders to convey information about RSMUP members who committed crimes and to turn them over to the VRS.

321. What is more, Stanišić's interview/evidence is also forcefully corroborated by a vast quantity of witness and documentary evidence.

322. Thirdly, the TC neither addressed nor referred to the Prosecution's challenge to the weight to be attributed to Stanišić's interview during final arguments.<sup>459</sup> That said, even if the TC had addressed these arguments, it would have made no difference as they are baseless.

323. The Prosecution's main contention appears to have been that Stanišić, "*answered some questions but didn't answer all questions. He said there were some matters he didn't want to talk about.*"<sup>460</sup> This is plainly not what Stanišić's interview reveals. For six full days, Stanišić did his utmost to cooperate with the Prosecution. Stanišić provided information on every topic raised by the Prosecution. While he did refer to additional documents on which he preferred not to comment to avoid revealing every aspect of his defence case, this does not minimize in any way the weight to be attributed to his interview as a whole.

<sup>459</sup> T.27383-27388, T.27411, T.27456-27459, T.27646-27649.

<sup>460</sup> T.27648.

324. More importantly, the Prosecution failed to raise any meaningful argument directed at relevant and/or significant issues, which might have justified discarding specific parts of the information Stanišić provided.<sup>461</sup>

**C. The TC Failed to Attribute the Correct Probative Value to Stanišić's Evidence, which Clearly Demonstrates that He Was Not a Member of the JCE**

325. It is highly significant that the case for the Defence matched in every point the information Stanišić provided to the Prosecution during his interview. Accordingly, Stanišić did not oppose the Prosecution's application for the contents of the entire interview to be admitted in evidence.

326. It is also noteworthy that Stanišić's Defence strategy, which was based on the contents of his interview, remained unchanged throughout the proceedings. Stanišić did not even hesitate to call witnesses in his defense who were initially Prosecution witnesses but who were withdrawn.

327. Significantly, Stanišić's detailed interview took place before trial and without the benefit of having heard any witness evidence.

328. Had the TC correctly evaluated Stanišić's evidence taking the above into consideration, it could not have found that Stanišić was aware of and shared the persecutorial intentions of the so-called 'BSL', to forcibly transfer and deport Muslims and Croats from BiH and that Stanišić contributed to this JCE.

329. The TC erred in fact and in law by failing to grasp the thrust of the information provided to the Prosecution by Stanišić and by failing to attribute the correct probative value to this evidence.

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<sup>461</sup> T.27274-27467.



330. Indeed, the TC failed to appreciate the following aspects of Stanišić's acts and conduct, clearly revealed by his evidence:

- (i) Stanišić did not participate in the creation of the SDS,<sup>462</sup> he was not a member of the SDS<sup>463</sup> and despite his position as Minister of the Interior, his ability to influence in any way SDS party decisions was at best minimal,<sup>464</sup> due largely to his tense relationships with members of the Presidency;<sup>465</sup>
- (ii) Stanišić supported the Cutileiro Plan<sup>466</sup> and all of his acts and conduct at the relevant times were consistent with and directed at achieving this goal through a peaceful transition;<sup>467</sup>
- (iii) Stanišić was not involved in the politics of the conflict<sup>468</sup> and he never sought to be elected to a political position,<sup>469</sup> in particular after the creation of the SDS.<sup>470</sup>
- (iv) Stanišić was not close to Karadžić<sup>471</sup> and did not share his views.<sup>472</sup> As Minister of the Interior, he was of course required to entertain a formal relationship with the President<sup>473</sup> but had limited contact with him,<sup>474</sup> due mainly to the fact that he was not an SDS member;<sup>475</sup>
- (v) During Stanišić's tenure as Minister of the Interior in 1992, his ability to communicate with the various CSBs and SJBs and other persons was extremely limited;<sup>476</sup>

<sup>462</sup> Exh.P2300, p.6-9, 51; P2302, p.52; P2305, p.24.

<sup>463</sup> Exh.P2300, p.55; P2300, p.56, P2302, p.50.

<sup>464</sup> Exh.P2301, p.8; P2300, p.58; P2302, p.36-37.

<sup>465</sup> Exh.P2301, p.8, P2302, p.36-37; P2302, p.37-38; P2302, p.49; P2310, p.24-25.

<sup>466</sup> Exh.2301, p.15.

<sup>467</sup> Exh.P2301, p.15, ln.1-4; P2306, p.34, ln.11-19.

<sup>468</sup> Exh.P2300, p.56, ln.6-18; P2302, p.36-37, ln.31-34, 1-5; P2305, p.22, ln.2-19; P2305, p.25, ln.4-16.

<sup>469</sup> Exh.P2300, p.56, ln.6-18; P2305, p.22, ln.2-19; P2305, p.25, ln.4-16.

<sup>470</sup> Exh.P2300, p.51, ln.1-23; P2305, p.24, ln.2-5.

<sup>471</sup> Exh.P2304, p.44, ln.6-13; P2310, p.26, ln.5-31; P2310, p.29, ln.4-15.

<sup>472</sup> Exh.P2305, p.26-27, ln.5-33, 1-2; P2310, p.29, ln.4-15.

<sup>473</sup> Exh.P2310, p.26, ln.5-31.

<sup>474</sup> Exh.P2303, p.12, ln.8-11; P2304, p.44, ln.6-13; P2310, p.26, ln.5-31.

<sup>475</sup> Exh.P2300, p.55, ln.11-15; P2300, p.56, ln.6-18; P2302, p.50, ln.7-12.

<sup>476</sup> Exh.P2302, p.15, ln.13-18; P2303, p.7, ln.7-16; P2303, p.9-10, ln.28-34, 1-3; P2303, p.20, ln.15-22. 2304, p.51-52, ln.32-34, 1-5; P2311, p.18-19, ln.18-33, 1-7; P2311, p.20, ln.11-25; P2311, p.24-25, ln.33-35, 1-2;

- (vi) The Ministry of the Interior and Stanišić in his capacity as Minister, had no jurisdiction over the creation and/or operation of prisons, camps and other detention facilities.<sup>477</sup> The information available to him in this regard was very limited.<sup>478</sup> For this reason, he issued a series of orders requesting that the Ministry be informed;<sup>479</sup>
- (vii) Stanišić was opposed to the presence and actions of paramilitary groups in BiH<sup>480</sup> and he took multiple measures to prevent and report crimes committed by such groups and to arrest them,<sup>481</sup> in particular the Yellow Wasps,<sup>482</sup> the Red Berets and Arkan's Tigers.<sup>483</sup> Stanišić's position in this regard resulted in a clash with members of the Presidency, in particular with Biljana Plavsic;<sup>484</sup> and
- (viii) At all times relevant to the Indictment, Stanišić took every possible measure with a view to investigating,<sup>485</sup> reporting<sup>486</sup> and arresting perpetrators of<sup>487</sup> crimes committed against the civilian population, regardless of the ethnicity of the perpetrators.<sup>488</sup>

331. Having attributed appropriate weight to Stanišić's evidence, along with all other evidence admitted, no reasonable trial chamber could have concluded that Stanišić was a member of the purported JCE.

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P2312, p.11, ln.16-20; P2312, p.13, ln.2-14; P2312, p.32-33, ln.32-35, 1-7; P2313, p.1-2, ln.32-36, 1-11, 28-32.

<sup>477</sup> Exh. P2308, p.20, ln.20-30; P2308, p.23-24, ln.18-34, 1-3; P2308, p.25-26, ln.29-34, 1-2; P2308, p.28-29, ln.31-34, 1-14; P2308, p.31, ln.16-25; P2308, p.32, ln.21-27; P2308, p.37, ln.22-28; P2309, p.13, ln.12-21; P2309, p.19, ln.17-24; P2309, p.20-21, ln.29-33, 1-2; P2309, p.23, ln.31-34; P2309, p.33, ln.22-26; P2309, p.34, ln.16-23; P2310, p.9, ln.20-28.

<sup>478</sup> Exh. P2308, p.26, ln.22-33; P2308, p.28, ln.10-20; P2308, p.36-37, ln.32-33, 1-2.

<sup>479</sup> Exh. P2308, p.36, ln.5-11; P2309, p.18-19, ln.32-34, 1-8.

<sup>480</sup> Exh. P2303, p.45-46, ln.27-34, 1-31; P2312, p.5, ln.10-25.

<sup>481</sup> Exh. P2303, p.46, ln.6-31; P2312, p.5, ln.10-25.

<sup>482</sup> Exh. P2303, p.45-46, ln.27-34, 1-31.

<sup>483</sup> Exh. P2312, p.5, ln.19-25.

<sup>484</sup> Exh. P2310, p.25, ln.1-30.

<sup>485</sup> Exh. P2302, p.44-45, ln.29-34, 1-8; P2303, p.14, ln.26-34; P2307, p.23, ln.12-23; P2308, p.11, ln.25-30; P2309, p.24, ln.11-34; P2310, p.14-15, ln.29-34, 1-3; P2310, p.18-19, ln.31-34, 1-3; P2310, p.21, ln.5-9; P2310, p.22, ln.22-32.

<sup>486</sup> Exh. P2302, p.51, ln.15-18; P2307, p.23, ln.12-23; P2308, p.27, ln.27-33; p2309, p.18-19, ln.32-34, 1-24; P2309, p.30, ln.1-7; P2309, p.31, ln.18-30; P2309, p.32, ln.25-29.

<sup>487</sup> Exh. P2303, p.40, ln.1-7; P2307, p.23, ln.12-23; P2309, p.32, ln.25-29; P2310, p.18-19, ln.31-34, 1-3.

<sup>488</sup> Exh. P2303, p.40, ln.1-7; P2310, p.18-19, ln.31-34, 1-3.

**III. RELIEF SOUGHT**

332. As a result of the TC's error of law and fact, Stanišić's convictions for Counts 1, 4 and 6 must be quashed.

## 8<sup>TH</sup> GROUND OF APPEAL

### **NO CONVICTION MAY BE ENTERED PURSUANT TO JCE III FOR CRIMES WHICH REQUIRE PROOF OF A SPECIFIC INTENT (*DOLUS SPECIALIS*)**

333. The TC erred by erroneously convicting Stanišić of persecutory acts pursuant to JCE III.

#### **I. OVERVIEW**

334. Stanišić was convicted of eight different persecutory acts pursuant to JCE III. While *Brđanin*-IAD provides that a defendant may be convicted of a special intent crime under JCE III, there are cogent reasons to depart from this holding based on (i) ICTY jurisprudence; (ii) recent pronouncements before other Tribunals; and (iii) a review of the relevant customary international law.

#### **II. ARGUMENT**

335. The following authorities clearly support Stanišić's contention that there are cogent reasons to depart from *Brđanin*-IAD.

##### **A. ICTY CASE LAW**

336. Firstly, it is firmly established in the Tribunal's case law that to be convicted as a perpetrator for a specific intent crime, the *mens rea* requirement *dolus specialis* must be proved.<sup>489</sup>

337. For instance, an accused can only be convicted of committing genocide as a perpetrator if it is proved that he possessed the specific "*intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.*"<sup>490</sup> Thus, an accused cannot be found guilty of committing genocide as a perpetrator by proving a lesser form of *mens rea* such as *dolus eventualis*.<sup>491</sup>

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<sup>489</sup> *Stakić-AJ*, para.328.

<sup>490</sup> Statute Art. 4(2).

<sup>491</sup> *Krstić-AJ*, para.134.

338. ICTY appellate judgements, both before and after *Brđanin*-IAD, have emphasised the requirement for specific intent (*dolus specialis*) to be proved when convicting persons of crimes such as persecution<sup>492</sup> or genocide.<sup>493</sup>
339. For example, *Stakić*-AJ affirmed the *mens rea* requirements for persecution, including the requirement for discriminatory intent *i.e. dolus specialis*:
- (...) the *mens rea* for persecutions consists of the intent to commit the underlying act and the intent to discriminate on political, racial or religious grounds.<sup>494</sup> The discriminatory intent requirement amounts to a '*dolus specialis*'.<sup>495</sup>
340. Thus, the necessary requirements to prove the *mens rea* for persecution, which is a specific intent crime, comprise the intent to commit the underlying act (general intent) and the intent to discriminate on political, racial or religious grounds (*dolus specialis*).
341. Secondly, as held in *Tadić*-AJ, "[Article 7(1)] covers first and foremost the physical perpetration of a crime by the offender himself (...) However, the commission of one of the crimes (...) might also occur through participation in the realisation of a common design or purpose."<sup>496</sup>
342. Accordingly, JCE as a mode of criminal liability falls squarely under Article 7(1) of the Statute. Moreover, an accused convicted pursuant to this mode of liability is found guilty as a (co)perpetrator.
343. Indeed, the AC has held that "[p]articipation in a joint criminal enterprise is a form of 'commission' under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s)."<sup>497</sup>

<sup>492</sup> *Krnojelac*-AJ, para.111, *Stakić*-AJ, para. 328, *Kvočka*-AJ, para.110.

<sup>493</sup> *Jelisić*-AJ, para.49, *Krstić*-AJ, para. 134.

<sup>494</sup> Emphasis added.

<sup>495</sup> *Stakić*-AJ, para.328, Emphasis added.

<sup>496</sup> *Tadić*-AJ, para.188, Emphasis added.

<sup>497</sup> *Vasiljević*-AJ, para.102.

344. This is the case regardless of whether the conviction is entered pursuant to JCE I or JCE III,<sup>498</sup> even though the required *mens rea* is different for JCE I and JCE III. While JCE I requires proof that the accused shared the intent to commit the crimes included in the common purpose, JCE III - which deals with crimes committed outside the common purpose - requires only that it was foreseeable that such a crime could be perpetrated and that the accused willingly took that risk (*dolus eventualis*).
345. Thirdly, it follows from the above that: (i) proof of *dolus specialis* is required for a conviction as a perpetrator of a specific intent crime; and (ii) an accused convicted pursuant to JCE III is found guilty as a perpetrator and the required *mens rea* is solely *dolus eventualis*.
346. Consequently, an accused cannot be convicted for committing a specific intent crime (as a perpetrator) pursuant to JCE III, because this mode of liability only requires proof of *dolus eventualis*.
347. Indeed, allowing convictions for the specific intent crime of persecution, without proving both discriminatory intent and the intent to commit the underlying act - by way of *dolus eventualis* under JCE III - would defeat the purpose of the *dolus specialis* requirement.
348. As was held compellingly in *Stakić-TJ*, affirmed on appeal<sup>499</sup>, the same reasoning applies to the specific intent crime of genocide:
- (...) the application of a mode of liability cannot replace a core element of a crime (...) Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the dolus specialis being so watered down that it is extinguished.*<sup>500</sup>

<sup>498</sup> *STL-Interlocutory Decision on the Applicable Law*, paras.248-249.

<sup>499</sup> *Stakić-AJ*, para.328.

<sup>500</sup> *Stakić-TJ*, para.530.

349. Further support for the proposition that *dolus specialis* - being an inherent requirement and therefore a constituent part of the crime - cannot be varied by a mode of liability, is found in Judge Shahabuddeen's partially dissenting opinion in *Brdanin-IAD*:

*[t]he third category of Tadić does not, because it cannot, vary the elements of the crime; it is not directed to the elements of the crime; it leaves them untouched. The requirement that the accused be shown to have possessed a specific intent to commit genocide is an element of that crime. The result is that that specific intent always has to be shown; if it is not shown, the case has to be dismissed.*<sup>501</sup>

350. ICTY jurisprudence thus clearly provides cogent reasons to depart from the isolated *Brdanin-IAD*.

#### B. RECENT PRONOUNCEMENTS BEFORE OTHER TRIBUNALS

351. The STL Appeals Chamber, Judge Antonio Cassese presiding,<sup>502</sup> specifically addressed the problem associated with convicting an accused lacking the *dolus specialis* as a perpetrator for crimes of specific intent:

*[u]nder international law, when a crime requires special intent (dolus specialis), its constitutive elements can only be met and the accused consequently be found guilty, if it is shown beyond reasonable doubt that he specifically intended to reach the result in question (...) A problem arises from the fact that for a conviction under JCE III, the accused need not share the intent of the primary offender. This leads to a serious legal anomaly: if JCE III liability were to apply, a person could be convicted as a (co)perpetrator for a dolus specialis crime without possessing the requisite dolus specialis (...) the better approach under international law is not to allow convictions under JCE III for special intent crimes (...).*<sup>503</sup>

352. The STL-AC thus confirms, that an accused convicted pursuant to JCE III is found guilty as a perpetrator and that, for this reason, it would be a serious legal anomaly to allow convictions under JCE III – which requires no more than *dolus eventualis* - for crimes which require proof of a specific intent (*dolus specialis*).

<sup>501</sup> *Brdanin-DIA, Separate Opinion of Judge Shahabuddeen*, para. 4.

<sup>502</sup> The late Judge Cassese is certainly the principal architect of the modern doctrine of JCE.

<sup>503</sup> *STL-Interlocutory Decision on the Applicable Law*, paras.248-249.

353. Strikingly, when addressing the specific intent crime of terrorising the civilian population of Sierra Leone,<sup>504</sup> the SCSL Trial Chamber in the case of Charles Taylor followed the rationale of the STL Appeals Chamber. The Trial Chamber agreed that a legal anomaly would result if an individual were to be convicted under JCE III for a crime requiring specific intent:

*[t]he Trial Chamber concurs with the reasoning of the STL Appeals Chamber and accordingly finds that the Accused may not be held liable under the third form of JCE for specific intent crimes such as terrorism.*<sup>505</sup>

354. Recent STL and SCSL pronouncements thus forcefully provide cogent reasons to depart from *Brđanin*-IAD.

### C. CUSTOMARY INTERNATIONAL LAW

355. As noted in *Tadić-AJ*<sup>506</sup> the notion of common plan has been upheld by at least two international treaties: the International Convention for the Suppression of Terrorist Bombing<sup>507</sup> and the ICC Statute.<sup>508</sup> Neither treaty supports the idea that CIL permits a defendant to be convicted of a specific intent crime *via* a mode of liability such as JCE III.
356. Regarding the Terrorist Bombing Convention, which deals with a specific intent crime, it stems from Article 2 that an accused can only be convicted as a perpetrator if it is proved that he possessed the *dolus specialis*.<sup>509</sup>
357. While the Terrorist Bombing Convention also provides for the possibility of an accused being convicted (of a specific intent crime) as an accomplice,<sup>510</sup> this is, of course, entirely different from a conviction pursuant to JCE III before the ICTY, where the accused is found guilty as a perpetrator.

<sup>504</sup> *Prosecutor v Taylor*, Second Amended Indictment, p.2.

<sup>505</sup> *Prosecutor v Taylor-TJ*, para.468.

<sup>506</sup> *Tadić-AJ*, paras.221-223.

<sup>507</sup> Cited in *Tadić-AJ*, para.221.

<sup>508</sup> Cited in *Tadić-AJ*, para.222 fn.280.

<sup>509</sup> Terrorist Bombing Convention Art. 2(1).

<sup>510</sup> Terrorist Bombing Convention Art. 2(3)(c).



358. In any event, the required *mens rea* for a conviction as an accomplice pursuant to that Convention is an intentional contribution either (i) made with the aim of furthering the general criminal activity or purpose of the group or (ii) made in the knowledge of the intention of the group to commit the offence or offences concerned.<sup>511</sup> In both cases therefore, a higher form of *mens rea* than *dolus eventualis* (the requirement pursuant to JCE III) must be proved.
359. This further highlights the unsolvable problem associated with the potential conviction of an accused for a specific intent crime pursuant to JCE III (as a perpetrator). Indeed, considering that this mode of liability requires no more than *dolus eventualis*, the result is a serious legal anomaly.
360. The ICC Statute goes even further.
361. While the ICC Statute Article 25(3) largely mirrors Article 2 of the Terrorist Bombing Convention, its application is broader because it applies to all crimes which fall under the material jurisdiction of the ICC and not only to specific intent crimes.
362. Hence, the ICC Statute does not even allow for a conviction by proving *dolus eventualis* alone. Regardless of the crime charged – whether it is a specific intent crime or not – or the mode of criminal liability pleaded – commission as a perpetrator, contribution as an accomplice or other – proof of *dolus eventualis* is insufficient for an accused to incur individual criminal responsibility.
363. Considering that the ICC Statute “*may be taken to express the legal position i.e. opinion iuris of [those] States,*”<sup>512</sup> this is a powerful indicator that no CIL norm allows for the conviction of an accused for a specific intent crime pursuant to JCE III.
364. A review of some of the leading WWII cases dealing with the notion of common purpose leads to the same conclusion.<sup>513</sup>

<sup>511</sup> Terrorist Bombing Convention Art. 2(3)(c).

<sup>512</sup> *Tadić-AJ*, para.223.

<sup>513</sup> See, *inter alia*, IMT-Judgement, Volume XXII, p. 527 (Goering); p. 540 (Rosenburg); ‘Justice case’ Volume III, p.1156 (Rothaug); ‘RuSHA Case’, Volume V, p.154-155 (Griefelt).

365. Whilst these cases provide support for the existence of JCE liability as a norm of CIL, they do not support in any way the proposition that an accused may be found guilty of a specific intent crime – as a perpetrator pursuant to JCE III – by proving that he possessed solely the *dolus eventualis mens rea*.
366. In fact, these cases involved a common purpose whose special objective was the commission of genocide: “a plan for exterminating the Jews” at the IMT,<sup>514</sup> a “systematic program of genocide” in the ‘RuSHA Case’,<sup>515</sup> and “a plan for the persecution and extermination of Jews and Poles” in the ‘Justice Case’.<sup>516</sup> In each case, defendants convicted of genocidal acts clearly participated in the relevant common purpose with the special intent that genocide requires.<sup>517</sup>
367. It follows that no support can be found in CIL for the proposition that pursuant to JCE III, a conviction may be entered for a crime that requires proof of a specific intent (*dolus specialis*).

### III. RELIEF SOUGHT

368. In light of the above, the AC must depart from *Brđanin*-IAD and hold that pursuant to JCE III, no conviction may be entered for specific intent crimes.
369. Accordingly, Stanišić’s convictions for persecutory acts under JCE III must be quashed.

<sup>514</sup> IMT-Judgement, Vol. XXII, p.491.

<sup>515</sup> ‘RuSHA Case’, Volume IV, p.609.

<sup>516</sup> ‘Justice Case’, Vol. III, p.1063.

<sup>517</sup> See, *supra*, fn.513.

## **9<sup>TH</sup> GROUND OF APPEAL**

### **THE TC WRONGLY CONVICTED STANIŠIĆ OF COUNTS 4 AND 6 AND WRONGLY FOUND HIM RESPONSIBLE FOR COUNTS 3, 5, 7 AND 8 BY FAILING TO ENTER THE REQUIRED JCE III LIABILITY FINDINGS**

370. The TC erred in law by failing to make specific findings that the possibility that the crimes in Counts 3-8 could be committed was sufficiently substantial as to be foreseeable to Stanišić and that he willingly took that risk. Yet the TC convicted Stanišić of Counts 4 and 6 and found him responsible for Counts 3, 5, 7 and 8.

#### **I. OVERVIEW**

371. The TC failed to enter the necessary specific findings on Stanišić's liability pursuant to JCE III for Counts 4, and 6, for which he was convicted, and Counts 3, 5, 7 and 8, for which he was found responsible. The TC's JCE III liability findings for persecutory acts included in Count 1 cannot make up for the absence of JCE III liability findings for Counts 3-8. The absence of such findings constitutes an error of law which invalidates the convictions for Counts 4 and 6 and the findings of responsibility for Counts 3, 5, 7 and 8.

#### **II. ARGUMENT**

##### **A. THE TC FAILED TO ENTER THE ESSENTIAL JCE III LIABILITY FINDINGS PURSUANT TO COUNTS 3-8**

372. In the section of the Judgment dealing with Stanišić's purported responsibility for crimes outside the scope of the JCE,<sup>518</sup> there are no findings regarding Stanišić's *mens rea* for counts 3-8.

373. The only findings on JCE III liability in the Judgment refer solely and expressly to Stanišić's responsibility for persecutory acts included in Count 1.<sup>519</sup>

<sup>518</sup> Judgment, Volume II, paras.770-774; 776-779.

<sup>519</sup> The TC's conclusions in Volume II, paragraphs 770-774 and 776-779 are factually incorrect; see generally, *infra*, 11<sup>th</sup> Ground of Appeal.

374. Whilst in respect of each of the municipalities, the TC recalled “*its finding that all of the remaining crimes (except extermination) were foreseeable consequences of the execution of the common plan and that Mićo Stanišić willingly took the risk that these crimes might be committed,*”<sup>520</sup> the TC in fact recalled findings that do not exist.

375. Hence, the TC failed to give any reasons as to why the crimes in counts 3-8 were either objectively foreseeable or subjectively foreseeable to Stanišić, with regard to the specific facts or circumstances within his knowledge at that time, and that he willingly took the risk that they could be committed.<sup>521</sup> The obligatory assessment of Stanišić’s *mens rea* under JCE III for Counts 3-8 is therefore entirely absent.

376. *Orić-AC* emphasised that where the TC made no explicit finding on facts pivotal to Orić’s conviction,<sup>522</sup> an error of law had been committed.<sup>523</sup> Indeed the AC held that:

*[o]n such a crucial element of the accused’s criminal responsibility (...) the Appeals Chamber emphasises that neither the Parties nor the Appeals Chamber can be required to engage in this sort of speculative exercise.*<sup>524</sup>

377. In *Krajišnik-AJ*, general findings by the TC on the awareness of the accused that “*armed conflict between the ethnic groups would have devastating consequences*” were considered inadequate in satisfying the *mens rea* for JCE III. Indeed, the presence of a “*broad, summary finding (...) that Krajišnik “had the mens rea required for the commission of the crimes which the Chamber (...) has found were committed”*”<sup>525</sup> was insufficient to demonstrate liability under JCE III.

<sup>520</sup> Judgment, Volume II, paras. 804; 809; 813; 818; 822; 827; 831; 836; 840; 844; 849; 854; 858; 863; 868; 873; 877; 881; 885 (The words “Except extermination” omitted in municipalities where it does not apply).

<sup>521</sup> See, *inter alia*, *Kvočka-AJ*, para. 83, *Vasiljević-AJ*, para. 101; *Martić-AJ*, para. 83; See also, A. Cassese, Proper Limits of Individual Responsibility under the Doctrine of JCE, p. 116-117.

<sup>522</sup> *Orić-AJ*, para.52.

<sup>523</sup> *Orić-AJ*, para.60.

<sup>524</sup> *Orić-AJ*, para.56.

<sup>525</sup> *Krajišnik-AJ*, para.168.

378. Consequently, in the absence of the essential findings required to establish liability pursuant to JCE III – *i.e.* that Counts 3-8 were foreseeable consequences of the execution of the common plan and that Stanišić willingly took the risk that these crimes might be committed – convictions and findings of responsibility have been entered without any legal basis.

**B. The TC’s JCE III Liability Findings for Persecutory Acts Included in Count 1 Cannot Make Up for the Absence of Findings for Counts 3-8**

379. The TC’s JCE III liability findings relating to the persecutory acts included under Count 1 cannot make up for the absence of findings for Counts 3-8.

380. Crimes against humanity in Counts 3, 5, 7 and 8 (crimes other than persecutory acts), as well as war crimes in Counts 4 and 6, are distinct offences each comprising specific and essential elements that must be examined independently.

381. For instance, for the crime of murder as a violation of the laws and customs of war, the Prosecution must prove the death of a victim that has “*taken no active part in the hostilities*”,<sup>526</sup> an essential element that does not exist for killings as a crime against humanity.

382. When assessing whether the possibility that a crime could be committed is sufficiently substantial so as to be foreseeable, all of the essential elements of this crime must be taken into consideration.

383. Hence, a finding that the possibility that killings as a crime against humanity could be committed is sufficiently substantial so as to be foreseeable to an accused is evidently distinct from a finding that the possibility that murder as a violation of the laws and customs of war could be committed is sufficiently substantial so as to be foreseeable.

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<sup>526</sup> Judgement, Volume I, para.37.

384. *Brđanin-AJ*, addressing concerns over the application of JCE, clearly emphasised the necessity of finding that each of the specific elements of JCE are satisfied and noted that JCE is not an “*open ended concept*.”<sup>527</sup> The AC further added that “*a conviction based on the doctrine of JCE can occur only where the Chamber finds all necessary elements satisfied beyond a reasonable doubt*”<sup>528</sup> and that “*the accused must possess the requisite intent*.”<sup>529</sup>
385. Similarly *Tadić-AJ*, considering the extent of liability under JCE III, clearly restricted its application to situations where specific findings had been made on each of the crimes in question. The AC stated unequivocally that “*it is appropriate to apply the notion of ‘common purpose’ only where the (...) requirements concerning mens rea are fulfilled*.”<sup>530</sup>
386. In this case the TC’s findings for persecutory acts included in Count cannot replace the absence of findings for Counts 3-8.

### III. RELIEF SOUGHT

387. The TC’s error invalidates the Judgement. The convictions for Counts 4 and 6 and findings of responsibility for Counts 3, 5, 7 and 8 must be quashed.

<sup>527</sup> *Brđanin-AJ*, para.428.

<sup>528</sup> *Idem* (emphasis added).

<sup>529</sup> *Brđanin-AJ*, para.429 (emphasis added).

<sup>530</sup> *Tadić-AJ*, para.220 (emphasis added).

## 10<sup>TH</sup> GROUND OF APPEAL

### **THE TC WRONGLY CONVICTED STANIŠIĆ OF COUNTS 4 AND 6 AND WRONGLY FOUND HIM RESPONSIBLE FOR COUNTS 3, 5, 7 AND 8 PURSUANT TO JCE III LIABILITY**

388. The TC committed errors of fact by implicitly finding that commission of the crimes charged in Counts 3-8 was a foreseeable consequence of the execution of the common plan and that Stanišić willingly took that risk.

#### **I. OVERVIEW**

389. As shown in Stanišić's 9<sup>th</sup> Ground of Appeal, the TC erred in law by failing to make specific findings that the possibility that the crimes in Counts 3-8 could be committed was sufficiently substantial as to be foreseeable to Stanišić and that he willingly took that risk.<sup>531</sup>

390. This ground addresses the TC's factual errors in its assessment of the evidence related to Stanišić's liability pursuant to JCE III for Counts 3-8.

391. Firstly, from an objective point of view, the possibility that the crimes in Counts 3-8 could be committed was not a natural and foreseeable consequence of the execution of the JCE.

392. Secondly, Stanišić obtained very limited information from CSBs and SJBs regarding the commission of crimes, such that the possibility that these crimes could be committed was not foreseeable to him.<sup>532</sup>

393. Thirdly, when Stanišić did obtain limited information regarding the possibility that the crimes in Counts 3-8 could be committed, he took measures which demonstrate that he did not willingly take that risk.

<sup>531</sup> See generally, *supra*, 9<sup>th</sup> Ground of Appeal.

<sup>532</sup> See, *inter alia*, Judgement, Volume II, paras.581, 583, 588, 589, 604, 617, 637, 648.

394. Consequently no reasonable trial chamber, having properly assessed the evidence, could have found that the possibility that the crimes charged in Counts 3-8 could be committed, was sufficiently substantial as to be foreseeable to Stanišić and that he willingly took that risk.

## II. ARGUMENT

### A. FROM AN OBJECTIVE POINT OF VIEW, THE POSSIBILITY THAT THE CRIMES IN COUNTS 3-8 COULD BE COMMITTED WAS NOT A NATURAL AND FORESEEABLE CONSEQUENCE OF THE EXECUTION OF THE JCE

395. In addition to the fundamental errors of fact made by the TC, the crimes outside the scope of the JCE were not objectively foreseeable – that is, a natural and foreseeable consequence of the execution of the JCE.<sup>533</sup>

396. The foreseeability of crimes outside the scope of the JCE must be examined on the basis of the prevailing circumstances at the time and cannot be viewed with the benefit of hindsight of a further three years of war, or of twenty years of examination and analysis of the crimes that subsequently occurred.

397. The ‘Lisbon Agreement’ had been signed by all sides on March 18<sup>th</sup> 1992,<sup>534</sup> providing a genuinely realistic prospect of a peaceful resolution to the break-up of a long existing country. Moreover, the ensuing conflict, along with the crimes that occurred, was a situation completely unprecedented in Europe since the end of World War II. Indeed, the expectation by both sides that the situation would improve rather than get worse was mentioned by Stanišić in his interview to the Prosecution: “*We [Stanišić and Pušina] thought that this would not last long, that these were the incidents that will cease.*”<sup>535</sup>

<sup>533</sup> See, *inter alia*, *Stakić-AJ*, para. 87, *Kvočka-AJ*, para. 83, *Vasiljević-AJ*, para.99.

<sup>534</sup> P2200; P2203; 1D134.

<sup>535</sup> P2301; P54.



398. This was not taken into account by the TC. Instead findings are made, for example, that an “*ethnically charged atmosphere*”<sup>536</sup> existed, denoting that the possibility of certain crimes was sufficiently substantial so as to be foreseeable. However, there is such a drastic difference between an ‘ethnically charged atmosphere’ and the crime of killings, that the idea that the latter are a reasonably foreseeable result of the former is a *non-sequitur*.

399. Further, given an objective view of the context at that time, and in view of the fact that it is not necessarily foreseeable to an accused that opportunistic killings would result from the forcible transfer of members of the population,<sup>537</sup> the TC’s conclusion that the crimes in counts 3-8 were a natural and foreseeable consequence of the execution of the JCE simply cannot be sustained.

**B. STANIŠIĆ OBTAINED VERY LIMITED INFORMATION FROM CSBS AND SJBS REGARDING THE COMMISSION OF CRIMES**

400. The TC committed fundamental errors of fact with regard to Stanišić’s purported knowledge of the commission of crimes.

401. As held in *Krnojelac-AJ*, such errors can be shown by reference to, *inter alia*, a trial chamber’s erroneous assessment of witness evidence, its failure into take account parts of the evidence and contradictions in its reasoning.<sup>538</sup>

402. In this case, when noting Stanišić’s position as the commander of the RS MUP Staff,<sup>539</sup> the TC failed to properly take into account; (i) the lack of information received by Stanišić about the commission of crimes; (ii) Stanišić’s *de facto* inability to obtain such information on numerous occasions; and (iii) the fact that data being received by the Ministry inaccurately stated that crimes were not being committed.

<sup>536</sup> Judgement, Volume II, para.774.

<sup>537</sup> *Popović et al-TJ*, para.1830.

<sup>538</sup> *Krnojelac-AJ*, para.22.

<sup>539</sup> Judgement, Volume II, para.581.

403. For example, Mačar testified that “*For the most part, heads of the SJBs did not inform the CSBs or the MUP of situations—even where they were required to do so.*”<sup>540</sup>
404. Significantly, this was corroborated by Prosecution witness Mandić who agreed with the proposition that in some places, “*individuals (...) ran out of control completely, (...) [and] were practically creating their own little states.*”<sup>541</sup> Mandić also stated that “*(...) communications broke down. Both telecommunications and roads were cut off, and it was very difficult to keep in touch (...).*”<sup>542</sup>
405. It is noteworthy that even though Mandić – who was relied upon by the TC<sup>543</sup> – expressly detailed a critical breakdown in communication between the central government and the municipalities, the TC failed to take any proper account of this when assessing Stanišić’s liability pursuant to JCE III. Indeed, the dire situation regarding communication was corroborated by Prosecution witnesses Pejić, who confirmed that “*there were no appropriate means of communications that the MUP of the RS could use*”<sup>544</sup> and by Kezunović, who testified at length as to the severity of the communications breakdown, including that there was “*(...) a complete disruption, breakdown in communications from the source of events to the seats of organisational units.*”<sup>545</sup>
406. The TC also stated that, although Davidović could not confirm whether Stanišić was informed of the killings of several families, Davidović “*testified that the killings (...) were a ‘generally known thing’ [and] that ‘he understood that the leading structures of the MUP wanted to cover the murder.*”<sup>546</sup>

<sup>540</sup> Judgement, Volume II, para 251.

<sup>541</sup> Mandić, T.9588. See also Judgement, Volume II, para.253.

<sup>542</sup> Mandić, T.9588.

<sup>543</sup> See, *inter alia*, Judgement, Volume II, paras.253, 576, 585, 623, 623, 660.

<sup>544</sup> Pejić T.12192. See also T.12175, 12179.

<sup>545</sup> Kezunović, T.11538, 11540, 11542, 11544, 11692-11693; See also, Pejić, T.12192.

<sup>546</sup> Judgement, Volume II, para.603.

407. Strikingly however, Davidović actually testified that:

*it was clear that the local leadership (...) didn't want to make it public and I think that they consciously covered up (...) everybody tried not to inform Mićo Stanišić of that (...) I didn't say that Mićo Stanišić was, indeed, informed of the murder.*<sup>547</sup>

408. Thus, Davidović's testimony, in which he directly contradicts the conclusion drawn by the TC, strengthens the proposition that the TC did not consider the totality of the evidence.

409. Furthermore, numerous additional examples are found in the Judgement where evidence directly related to Stanišić's lack of knowledge and/or information for various reasons – including failures in communication, misinformation and absence of information being provided – was obviously not considered by the TC.<sup>548</sup>

410. Nonetheless, despite its erroneous assessment of witness evidence and its failure to take into account crucial parts of the evidence, the TC implicitly concluded, erroneously, that the crimes charged in Counts 3-8 were foreseeable to Stanišić.

**C. WHEN STANIŠIĆ DID OBTAIN LIMITED INFORMATION REGARDING THE POSSIBILITY THAT THE CRIMES IN COUNTS 3-8 COULD BE COMMITTED, HE TOOK MEASURES WHICH DEMONSTRATE THAT HE DID NOT WILLINGLY TAKE THAT RISK**

411. The evidence demonstrates that during his tenure as Minister of the Interior in 1992, Stanišić was actively taking numerous positive measures to prevent, investigate, report and have punished those who committed crimes.<sup>549</sup> Once again, the TC committed factual errors by neglecting to consider vital evidence in concluding implicitly that Stanišić willingly took the risk that the crimes charged in Counts 3-8 could be committed.

<sup>547</sup> Davidović T.13622-13623.

<sup>548</sup> See, *inter alia*, Judgement, Volume II, paras.581; 583; 588; 589; 604; 617; 637.

<sup>549</sup> See, *supra*, 4<sup>th</sup> Ground of Appeal, para 116.

412. Even though members of the Yellow Wasps paramilitary group were involved in committing the crimes in Counts 3-8, and indeed were accused of genocide,<sup>550</sup> the TC instead erroneously focused on other issues such as the charges of vehicle theft, and mischaracterised efforts to bring them to justice:

*(...) Members of the Yellow Wasps were released from detention on 28 August 1992 and an indictment against them was only issued in 1999.*<sup>551</sup>

413. Firstly, this is factually inaccurate. It is simply incorrect to say that an indictment was only issued in 1999. In fact the paramilitaries were sent back to Serbia after their arrest and on the basis of the information provided by Andan<sup>552</sup> the leaders of the Yellow Wasps were indicted in Serbia in 1993 and convicted and sentenced in 1994.<sup>553</sup>
414. Secondly, Andan details that the leaders of the Yellow Wasps were arrested, despite the risk of armed resistance,<sup>554</sup> handed over to Serbian authorities, despite difficulties in prosecuting them<sup>555</sup> and that other paramilitaries were also arrested and prosecuted.<sup>556</sup> Indeed, Andan's contemporaneous record from the time reveals Stanišić's "acknowledgement for the work done so far in fighting crime,"<sup>557</sup> that disarming/expelling paramilitaries was considered a "matter of life and death"<sup>558</sup> and that paramilitaries were pursued due to crimes, including killings and mutilations.<sup>559</sup>

<sup>550</sup> ID75.

<sup>551</sup> Judgement, Volume II, para.715.

<sup>552</sup> Andan, T.21688; 21690-21692.

<sup>553</sup> P1979.

<sup>554</sup> Andan, T.21683-21695.

<sup>555</sup> Andan, T.21688, 21700-21702.

<sup>556</sup> Andan, T.21690-92, 21700-21702.

<sup>557</sup> ID557, p.8.

<sup>558</sup> *Idem.*

<sup>559</sup> ID557, p.6-8.

415. The TC also mischaracterises Andan's evidence in finding that "*similar operations to deal with paramilitaries (...) never occurred because Davidović 'returned to Serbia' and Andan was removed from the RS MUP.*"<sup>560</sup> In fact, as the TC subsequently accepted, they were unable to re-deploy to counter paramilitaries in Foča because the MUP of Serbia and Montenegro would not allow them to cross onto their territory with armaments and further operations were therefore temporarily cancelled.<sup>561</sup>

416. Thirdly, other evidence including the Report of the Police Crime Directorate demonstrates that measures taken to counter paramilitary activity resulted from their involvement in other serious crimes and not just thefts:

*(...) the information obtained (...) indicate[s] that Dušan Vučković aka Repić, was committing massacres – genocide over citizens of the Serb Republic Bosnia Herzegovina of the Muslim ethnicity.*<sup>562</sup>

417. It is therefore clear from the evidence that effective and decisive steps were taken by Stanišić to oppose, for genuine reasons, those persons committing the crimes in Counts 3-8, even though wartime conditions made it extremely difficult to do so. This negates any suggestion that he willingly took the risk that such crimes could occur. Indeed the findings by the TC in this regard are an erroneous and wholly unfair mischaracterisation of the totality of the evidence.

418. In addition to making factual errors in its assessment of the evidence, the TC also acknowledged many examples where Stanišić specifically drew attention to the possibility that war crimes could be committed and took actions to counter the same. For example, Stanišić ordered that "*legal measures be taken against all members of the MUP who committed crimes (...)*"<sup>563</sup> and informed Đeric that the MUP was "*following the law regulating conduct in war and 'working on the collection and documentation of war crimes, i.e., genocide, regardless of the perpetrators and their ethnicity.*"<sup>564</sup>

<sup>560</sup> Judgement, Volume II, para.716.

<sup>561</sup> Judgement, Volume II, para.718, Andan, T.21547-21548.

<sup>562</sup> ID75, p.3

<sup>563</sup> Judgement, Volume II, para.640.

<sup>564</sup> Judgement, Volume II, para.636.

419. What is more, the TC accepted that Stanišić took a large number measures and issued numerous orders, which as the evidence shows he made in good faith, and which were acted upon in a number of instances.<sup>565</sup> This was done by Stanišić even when facing significant difficulties regarding the implementation of his orders. Nonetheless, the TC disregarded this evidence whilst at the same time concluding, without any appropriate explanation, that in spite of these orders, Stanišić willingly took the risk that such crimes could be committed.
420. There is a substantial amount of evidence showing that Stanišić did whatever he could, bearing in mind his position as Minister of the Interior, to prevent and punish the commission of crimes.<sup>566</sup> Hence the TC's conclusion that Stanišić willingly took the risk that the crimes in counts 3-8 could be committed is inherently contradictory to the evidence. No reasonable Trial Chamber, having properly assessed the evidence could have come to the same conclusion.
421. Furthermore the burden and standard of proof dictates that it is for the Prosecution to prove, beyond a reasonable doubt, that the accused willingly took the risk and not for the Defendant to prove that he did not willingly take the risk.
422. Lastly, the TC ignored voluminous evidence showing that the crimes were not foreseeable to Stanišić and that when he did learn of such crimes, he did everything that he could reasonably have done in the circumstances to counter them.<sup>567</sup>

### III. RELIEF SOUGHT

423. In light of the above, Stanišić's convictions for counts 4 and 6 and the TC's findings of responsibility for counts 3, 5, 7 and 8 must be quashed.

<sup>565</sup> See, *inter alia*, Judgement, Volume II paras.635-637, 640-641, 644-645, 647-648 and 698.

<sup>566</sup> See, *supra*, 4<sup>th</sup> Ground of Appeal, para.116.

<sup>567</sup> See, *inter alia*, 1D61; P792; P1252; P1323; P847; 1D94; 1D62; P553; P1013; P571; 1D58; 1D59; 1D49; P855.

## **11<sup>TH</sup> GROUND OF APPEAL**

### **STANIŠIĆ WAS WRONGLY CONVICTED OF THE UNDERLYING CRIMES IN COUNT 1 PURSUANT TO JCE III**

424. No reasonable TC, having properly assessed the totality of the evidence, could have found that the possibility that underlying acts of persecution in Count 1<sup>568</sup> was sufficiently substantial so as to be foreseeable to Stanišić and that he willingly took that risk.

#### **I. OVERVIEW:**

425. As argued in Stanišić's 8<sup>th</sup> Ground of Appeal, the TC erred in law by entering convictions for persecutory acts pursuant to JCE III.<sup>569</sup> However, should the AC hold that convictions for specific intent crimes are possible pursuant to JCE III, the fact remains that the possibility that the underlying crimes in Count 1 could be committed was not sufficiently substantial so as to be foreseeable to Stanišić. Furthermore, Stanišić did not willingly take that risk.

426. Firstly, from an objective point of view, these crimes were not a natural and foreseeable consequence of the execution of the JCE.

427. Secondly, the TC committed errors of fact regarding the information available to Stanišić concerning the underlying crimes in Count 1.

428. Third and lastly, none of the underlying crimes in Count 1, outlined in Sub-Grounds of Appeal 11.1-11.6, were sufficiently substantial so as to be foreseeable to Stanišić.

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<sup>568</sup> Leaving aside deportation and forcible transfer

<sup>569</sup> See generally, *supra*, 8<sup>th</sup> Ground of Appeal.

## I. ARGUMENT

### A. THE CRIMES WERE NOT OBJECTIVELY FORESEEABLE

429. In order for liability under JCE III to attach, the crimes outside the scope of the JCE must be a “*natural and foreseeable consequence of that enterprise.*”<sup>570</sup> This is the objective element of JCE III liability, which does not depend upon the accused’s state of mind. Objective foreseeability depends on the prevailing circumstances at the time assessed from the point of view of a reasonable person.

430. To establish this element, the TC was duty bound to assess the evidence with the aim of setting out clearly why, at this early point of the conflict, without any recent prior history of war crimes or crimes against humanity having been committed, the crimes charged in Counts 3-8 were objectively foreseeable.

431. Not only did the TC fail to do so, no analysis or conclusions in this regard are found in the Judgement. The TC’s reference to the “*ethnically charged atmosphere*”<sup>571</sup> was entirely insufficient.

### B. THE TC COMMITTED ERRORS OF FACT REGARDING THE INFORMATION AVAILABLE TO STANIŠIĆ CONCERNING THE UNDERLYING CRIMES IN COUNT 1

432. At paragraphs 770-774 and 776-779 of the Judgement, the TC held that in order for liability to attach under JCE III, the possibility of crimes outside the scope of the JCE must be sufficiently substantial so as to be foreseeable to Stanišić and that he must willingly take that risk.<sup>572</sup>

433. Accordingly, Stanišić must have been shown to have fulfilled both the subjective and objective elements of JCE III: (i) that the crime was a natural and foreseeable consequence of the execution of the JCE and (ii) that he was aware that the resulting crime was a possible consequence of the JCE and participated with that awareness.<sup>573</sup>

<sup>570</sup> *Brđanin-DFAI*, para.30.

<sup>571</sup> Judgement, Volume II, para.774.

<sup>572</sup> See *inter alia*, *Tadić-AJ*, paras.204, 220, 228, *Vasiljević-AJ*, paras. 99, 101, *Stakić-AJ*- paras 65, 87, *Kvočka, AJ*, para 83 .

<sup>573</sup> *Krajišnik-TJ*, para.882.



434. However, the TC made fundamental errors of fact regarding the information available to Stanišić at the time.<sup>574</sup> It is clear upon a correct assessment of the information available to Stanišić at the time, that the TC abused its discretion in finding that the possibility that crimes outside the scope of the JCE under Count 1 was sufficiently substantial so as to be foreseeable to Stanišić and that he willingly took that risk.
435. In paragraphs 689 and 764 of the Judgement, the TC purports to rely heavily on the evidence of Radulović, an officer in the SNB and head of the Miloš Group intelligence team, when finding that information on crimes being committed was available to Stanišić.
436. Although the Miloš Group reports do include coverage of crimes,<sup>575</sup> the TC largely disregarded the actual testimony of Radulović, who expressly stated that the Miloš Group reports were neither sent to the RS MUP nor to Stanišić himself. Indeed Radulović categorically confirms that the reports bypassed the RS MUP completely, going directly to Belgrade,<sup>576</sup> and that not one them made it to Stanišić.<sup>577</sup>
437. Similarly Sajinović, another member of the Miloš Group whose testimony was also relied on in the Judgement<sup>578</sup> confirms that the Miloš Group reports were sent straight to Belgrade and not to the RS MUP.<sup>579</sup>
438. The fact that this information was sent directly to Belgrade and not received by the RS MUP is further substantiated by the testimony of SNB Chief Škipina, upon whom the TC also relies.<sup>580</sup> Škipina testified that no reports or information were received by him from Radulović<sup>581</sup> and goes on to state that the Miloš Group was operating outside the rules of service, was an illegal and unacceptable organisation and that such a thing would not have happened had he had normal communication at that time.<sup>582</sup>

<sup>574</sup> See *inter alia*: Tolimir-TJ para.1139, Milutinovic-TJ, Volume I, para.111.

<sup>575</sup> See *inter-alia* Radulović T-10751; 10755-10756, 10824, 10844; 10800-10801; 10809, 10811; 10853.

<sup>576</sup> Radulović T.11016-11017.

<sup>577</sup> Radulović T.11016, See *also*: T.11014-11018; 11073-11074; 11188-11189; 11199-11201; 11205-11209; 11213-11214.

<sup>578</sup> Judgement, Volume II, para.689, fn.1768.

<sup>579</sup> Sajinović T.25120; T.25220. See *also* T.25121-3, 25165-25166, 25176- 25177, 25182 – 25183, 25212-3, 25218.

<sup>580</sup> Judgement, Volume II, para.689.

<sup>581</sup> Škipina, T.8413-8415.

<sup>582</sup> Škipina, T.8415.

439. The TC relied on Prosecution witnesses Radulović and Škipina. Their credibility was not challenged at trial by any of the parties, and nor was defence witness Sajinović. Their evidence demonstrates expressly that both Stanišić and the head of the SNB were not privy to the information the Miloš Group produced, and that such information did not make it to Stanišić. Given the testimony of these three witnesses, no reasonable trier of fact could have held that the only reasonable conclusion in the circumstances was that this information was available to Stanišić. Nevertheless the TC inexplicably drew the opposite conclusion, using it as a basis for finding that the possibility that crimes could be committed was sufficiently substantial so as to be foreseeable to Stanišić.
440. In Volume II paragraph 690, the TC relies extensively on analysis of the Communications Logbook<sup>583</sup> and daily reports to show Stanišić's knowledge of crimes being committed. However the TC's analysis is again fundamentally flawed.
441. The TC erred firstly by relying on Logbook entries, which do not show that Stanišić himself was informed about crimes and actions being taken to investigate them. Moreover, the entries cited by the TC are overwhelmingly comprised of requests for information regarding crimes and measures being taken for their prevention, which were sent either by CSB Sarajevo (which is separate from the Ministry at the seat) or the RS MUP headquarters, and did not receive a response.<sup>584</sup>
442. The TC erred secondly by relying on the Logbook as the entries themselves contain no detail and instead demonstrate a paucity of information. Even on the limited occasions when a SJB/CSB reply is noted, the information recorded is extremely brief. The entries cannot therefore be relied on to describe what was happening in any detail.<sup>585</sup>

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<sup>583</sup> P1428.

<sup>584</sup> See, *inter alia*, P1428, entries 74, 76, 241, 242, 302, 309, 311, 342, 362, 421, 889, 892, 894.

<sup>585</sup> See, *inter alia*, P1428, entries 312, 477, 478, 802, 1141, 1231.

443. This information must also be viewed in the context of the chronic breakdown in communications, acknowledged by the TC,<sup>586</sup> which resulted in the number of dispatches between the Ministry and the CSB/SJB's being reduced from an average of 300,000 a year before the conflict,<sup>587</sup> to just under 9,000 from April-December 1992.<sup>588</sup>
444. Thirdly, the TC's reliance on the testimony of Krulj to support the contention that Stanišić was kept regularly informed *via* reports<sup>589</sup> is erroneous, as the TC disregarded Krulj's evidence, in which he confirmed that he could not verify who actually received such reports.<sup>590</sup>
445. In Volume II paragraph 612 of the Judgement the TC finds that Stanišić was made aware of crimes being committed against Muslims:
- Radomir Kojić informed Stanišić that a certain "Zoka" had arrested Muslims in Sokolac for 'messing up with the weapons'. Kojić agreed with 'Zoka' that the arrested people would be brought to Vrace (...)*<sup>591</sup>
446. This finding is based on a clear mistake in the TC's interpretation of the evidence. In the relevant intercept Stanišić is informed that Zoka "arrested *all* of those who were messing up with the weapons up there,"<sup>592</sup> without any mention of Muslims. Sokolac was a predominantly Serbian town<sup>593</sup> and the TC has acknowledged in the Judgement that Serbs were provided with weapons by the JNA<sup>594</sup> and were involved in selling these weapons to Muslims on the black market.<sup>595</sup>
447. Given that (i) no mention is made of Muslims, (ii) Sokolac is a predominantly Serb town, and (iii) Serbs were selling weapons on the black market, it is more likely that this conversation refers to Serbs being arrested for "messing up with the weapons" by supplying them on the black market – a very serious crime during a time of war. In any event, the idea that this conversation refers to Muslims is surely not the only reasonable inference from the evidence.

<sup>586</sup> See, *inter alia*, Judgement, Volume II, paras.62; 67-70; 103.

<sup>587</sup> T.11685.

<sup>588</sup> Exh. P625, p. 23. See Judgement, Volume II, para.61 (fn. 203).

<sup>589</sup> Judgement -Vol. II para 690.

<sup>590</sup> T-1986 ln.11-17.

<sup>591</sup> Emphasis added.

<sup>592</sup> P1115-p.1-2.

<sup>593</sup> 1D541, p.219.

<sup>594</sup> See, *inter alia* Judgement, Volume II, paras.269-272.

<sup>595</sup> Judgement, Volume I, para.1585.

448. Accordingly, it is evident that fundamental errors were made by the TC when assessing the amount of information available to Stanišić, and that these errors were relied upon by the TC in determining Stanišić's level of knowledge. When the evidence is assessed accurately, it is clear that Stanišić did not possess the level of knowledge attributed to him by the TC, and therefore that the findings on the possibility of crimes being sufficiently substantial so as to be foreseeable to Stanišić are incorrect.

**C. NONE OF THE UNDERLYING CRIMES IN COUNT 1 WERE SUFFICIENTLY SUBSTANTIAL SO AS TO BE FORESEEABLE TO STANIŠIĆ.**

449. Even if some or all of the crimes are held to have been objectively foreseeable, there must be a voluntary assumption by the accused of that risk,<sup>596</sup> *i.e.* that the crime must be shown to have been foreseeable to the accused in particular<sup>597</sup> and he participated with that awareness.<sup>598</sup> “

450. In addition, no references are provided for the findings where responsibility is found for crimes outside the scope of the JCE III in the municipalities. The TC simply follows its incorrect reasoning from paragraphs 771-774 and 776-779.

451. Furthermore, the TC makes errors of fact when finding that there was a voluntary assumption by Stanišić of such a risk regarding crimes in the municipalities, particularly given the voluminous evidence of Stanišić's acts and conduct to the contrary, including that he was one of the only people interested in addressing the issue of war crimes. The TC accepted that

*[Dokanovic and Stanišić] were the only people in the RS Government who were interested in addressing the issue of war crimes since the RS Government was 'completely under the influence of the SDS, and there was no justice and no desire to fight crime any longer.' Many people could not wait to see Stanišić step down as minister.*<sup>599</sup>

<sup>596</sup> *Tadić-AJ*, para.228.

<sup>597</sup> *Stakić-AJ*, para.65.

<sup>598</sup> *Krajišnik-TJ*, para.882.

<sup>599</sup> *Judgement*, Volume II, para.694.

i. **11.1 – KILLINGS IN DETENTION CENTRES AND IN THE MUNICIPALITIES**

452. Stanišić's orders<sup>600</sup> – acknowledged in the Judgement - demonstrate that he issued strict instructions for the purpose of safeguarding the lives of people in the detention centres and that:

*Stanišić stressed that detentions should be carried out 'exclusively within existing regulations' and that the security of collection centres was the direct responsibility of the army, who could be assisted by reserve police, if needed. The order stated that **Stanišić would hold SJB personnel personally responsible for the lives of the people in detention, prevention of any form of abuse, and health and hygiene conditions.** Stanišić also ordered that disciplinary and other measures be taken against those who didn't follow this order.*<sup>601</sup>

453. Similarly, Stanišić issued orders to counter serious crimes as soon as practicable when presented with such information. For example, in response to a report that “‘criminal gangs’ (...) were committing serious crimes against all citizens, Stanišić demanded vigorous action by the SJBs and the CSBs”.<sup>602</sup>

454. Accordingly, Stanišić did not willingly take the risk that killings could be committed.

ii. **11.2 – IMPOSITION AND MAINTENANCE OF RESTRICTIVE AND DISCRIMINATORY MEASURES**

455. The TC accepted that Stanišić issued orders and took action when presented with information on restrictive and discriminatory measures.<sup>603</sup> Significantly, Stanišić issued orders that “legal measures be taken against all members of the MUP who committed crimes”<sup>604</sup> and sent orders to the Chiefs of CSB's to dismiss members of the RS MUP who were the subject of criminal proceedings.<sup>605</sup>

<sup>600</sup> Exh. 1D55.

<sup>601</sup> Judgement, Volume II, para.667. Emphasis added.

<sup>602</sup> Judgement, Volume II para.649.

<sup>603</sup> See, *inter alia*, Judgement, Volume II, paras. 610, 635, 682, 746.

<sup>604</sup> Judgement, Volume II para.640.

<sup>605</sup> Judgement, Volume II para.641.

456. The TC also committed numerous errors when finding that the civilian law enforcement apparatus failed to function in an impartial manner.<sup>606</sup> This finding fails to take into account that Police investigations were often initiated, but the success of such investigations was dependent on other bodies over which Stanišić had no control, such as the Ministry of Justice, prosecutors and investigative judges.<sup>607</sup>
457. Additionally, the TC's examination of civilian law enforcement<sup>608</sup> is prejudicially selective and clearly incorrect.
458. The TC's finding that only one crime committed by Serbs against non-Serbs was reported in Doboj<sup>609</sup> is factually mistaken, as the Prosecution and Defence at trial stipulated that six additional such reports were entered into the Doboj logbook.<sup>610</sup>
459. Furthermore, the TC's assessment of the prosecutor's logbooks<sup>611</sup> concerning the reporting of crimes committed by Serbs against non-Serbs<sup>612</sup> disregards highly significant material.
460. The TC ignored Gaćinović's evidence regarding 15 KTA entries of serious crimes including murders, rape and destruction of a Mosque where onsite investigation reports have been compiled and the crimes committed are against Muslims and Croats.<sup>613</sup> This clearly shows that investigations were being conducted by the police into such crimes but that the perpetrators – whether Serbian or not – could not be identified at the time. This is a common problem for any law enforcement institution, and is fundamentally different to the assertion that crimes committed by Serbs against non-Serbs were going unreported, and is a mischaracterisation of the evidence by the TC.
461. Such evidence clearly shows that Stanišić could not be said to have willingly taken the risk of the imposition and maintenance of restrictive and discriminatory measures.

<sup>606</sup> Judgement, Volume II para.745.

<sup>607</sup> Judgement, Volume II paras.87-89.

<sup>608</sup> Judgement, Volume II paras.91-94.

<sup>609</sup> Judgement, Volume II, para.94.

<sup>610</sup> T.21087.

<sup>611</sup> Judgement, Volume II, paras.91-94.

<sup>612</sup> Judgement, Volume II, para.94.

<sup>613</sup> Judgement, Volume II, para.94, fn.320, P1609.01, p.18.

iii. **11.3 – UNLAWFUL DETENTION**

462. The findings on unlawful detention failed to take into account that Stanišić issued a number of orders requesting information on conditions of the “unidentified camps.”<sup>614</sup> The TC acknowledged that Stanišić issued numerous orders requiring all CSB and SJB chiefs to obtain information on the treatment and conditions of people within their municipalities and initiate criminal reports for perpetrators of crimes. These orders were transmitted down and each CSB set up its own commission,<sup>615</sup> leading to inspections<sup>616</sup> and reports that there were no prison camps in certain municipalities.<sup>617</sup>
463. Such orders demonstrate that Stanišić was doing what he could to combat crimes, rather than willingly taking the risk they could be committed.
464. The TC also erroneously characterises Stanišić’s purported knowledge of unlawful detention as a result of his conversations with Marković.<sup>618</sup>
465. The TC’s findings simply do not correspond to the underlying evidence. Stanišić was speaking to Marković regarding the commission for prisoner exchange encompassing PWs, detainees and bodies,<sup>619</sup> which were being conducted under the supervision of the ICRC and UNPROFOR.<sup>620</sup> Marković states that Stanišić told him to ensure that treatment was “*in line with the Geneva conventions (...) even though it all came under the Ministry of Justice and the VRS (...).*”<sup>621</sup>
466. A general comment by Stanišić to ensure proper treatment cannot be used to infer that he was aware of improper treatment and willingly took that risk. Indeed a proper assessment of the evidence shows that Stanišić did not willingly taking the risk that such crimes could be committed.

<sup>614</sup> Judgement, Volume II, para.748.

<sup>615</sup> Judgement, Volume II, para.752, ID57.

<sup>616</sup> Judgement, Volume II, para.673, P165.

<sup>617</sup> Judgement, Volume II, para.676; Exh. 2D95, P165, P671, P679.

<sup>618</sup> Judgement, Volume II, para.764.

<sup>619</sup> In particular that one prisoner be exchanged for 3 Serbian families and bodies of dead soldiers: Marković T.12674-12675.

<sup>620</sup> Exh. P179.18.

<sup>621</sup> Marković T.12674-12675, Emphasis added.

**iv. 11.4 – TORTURE, CRUEL TREATMENT, AND OTHER INHUMANE ACTS**

467. The findings on torture, cruel treatment, and other inhumane acts disregard Stanišić's orders to CSB chiefs to abide by the laws of war and international conventions regarding the treatment of PWs and civilians, and for senior staff in SJBs to immediately release and allow free movement of the civilian population.<sup>622</sup> Stanišić also requested that the Ministry be informed where treatment violated internal and international standards and ordered that criminal reports be filed against perpetrators.<sup>623</sup>
468. Similarly, Stanišić forwarded to all CSBs and SJBs requests from the Ministry of Health, Work, and Social Security regarding the collection of data, including the names and locations of camps, detainees, authorities who set them up and who ordered arrests.<sup>624</sup>
469. Stanišić even reiterated requests to CSBs to submit questionnaires on criminal reports filed in cases of war crimes,<sup>625</sup> and that such reports were to be processed irrespective of ethnicity, in addition to inspections and 'blitz visits' being conducted by RSMUP.<sup>626</sup>
470. Therefore, Stanišić clearly did not willingly take the risk that torture, cruel treatment, and other inhumane acts could be committed.

**iii. 11.5 – LOOTING, SEARCH AND SEIZURE, APPROPRIATION, AND PLUNDER OF THE MOVEABLE AND IMMOVEABLE PROPERTY**

471. The TC failed to take proper account of the fact that Members of MUP, were complaining about Army looting at a meeting on 11 July and that positive action was taken by the MUP within several weeks.<sup>627</sup> This is in addition to the TC's own finding that "[a]s early as 15 April 1992, Stanišić issued an order to curb looting and misappropriation of property (...)." <sup>628</sup>

<sup>622</sup> Judgement, Volume II, para.445; Exh. 1D563.

<sup>623</sup> Judgement, Volume II, para.668; Exh. 1D56.

<sup>624</sup> Judgement, Volume II, para.675; Exh. 1D57.

<sup>625</sup> Judgement, Volume II, para.682; Exh. 1D572, 1D63.

<sup>626</sup> Judgement, Volume II, para.48; Exh. 1D63, 1D84, 1D328, P568, P989, T.22771-22773, T.22754 -22755.

<sup>627</sup> Judgement, Volume II, para.631, fn.1653; Exh. P160.

<sup>628</sup> Judgement, Volume II, para.746.



472. Consequently, Stanišić clearly did not willingly take the risk that such could be crimes committed.

**iv. 11.6 – WANTON DESTRUCTION AND DAMAGE OF RELIGIOUS AND CULTURAL PROPERTY**

473. Whilst the TC made findings that wanton destruction and damage to religious and cultural property were sufficiently substantial so as to be foreseeable to Stanišić<sup>629</sup> the TC failed to mention any evidential basis in the Judgement on which to conclude that the offence was sufficiently substantial so as to be foreseeable to Stanišić or that he willingly took that risk.

474. In view of the abovementioned orders issued by Stanišić aimed at preventing crimes including wanton destruction and damage of religious and cultural property,<sup>630</sup> the TC's implicit finding offends the principle of *in dubio pro reo* and cannot be sustained.

475. Thus, Stanišić evidently did not willingly take the risk that such crimes could be committed.

**IV. RELIEF SOUGHT**

476. As a result of the TC's errors, it is necessary to quash the findings and return a not guilty verdict for JCE III convictions under Count 1.

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<sup>629</sup> Judgement, Volume II, paras.778, 818, 827, 831, 836, 840, 844, 849, 854, 858, 863, 877, 885.

<sup>630</sup> See, *inter alia*, Exh. 1D61, P792, 1D634, P1252, P1323, 1D84.

## 12<sup>TH</sup> GROUND OF APPEAL

### THE SENTENCE IMPOSED ON STANIŠIĆ IS MANIFESTLY EXCESSIVE

477. The TC committed discernible errors and abused its sentencing discretion by imposing on Stanišić a manifestly unreasonable and excessive sentence of 22 years imprisonment.

#### I. OVERVIEW

478. In addition to the TC's errors demonstrated in Grounds of Appeal 13, 14, and 15, the TC abused its sentencing discretion by failing to adequately assess the gravity of Stanišić's conduct, the "*primary consideration*" in the imposition of sentence.<sup>631</sup>

479. The TC manifestly failed to individualise Stanišić's sentence based on a proper assessment of the form and degree of Stanišić's participation in the JCE.

480. The TC also failed to take into account extensive findings demonstrating that Stanišić's contribution to the furtherance of the common purpose to deport and forcibly transfer was very limited.

481. Moreover, the TC erred by failing to consider that Stanišić's acts and conduct actually resulted in impeding the furtherance of the JCE, thereby further minimalizing Stanišić's contribution.

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<sup>631</sup> Judgement, Volume II, para.892, citing *Blaškić-AJ*, para.683; *Galić-AJ*, para.442.

## II. ARGUMENT

### A. THE TC FAILED TO PROPERLY ASSESS THE GRAVITY OF STANIŠIĆ'S CONDUCT

482. As found in Stakić-AJ, relied on by the TC, “[t]he determination of the gravity of the crimes requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.”<sup>632</sup>

483. The TC improperly focused almost exclusively on the objective gravity of the crimes.<sup>633</sup> The TC referred to (i) the nature of the crimes; (ii) the effect of the crimes upon the victims; (iii) the vulnerability of the victims, and (iv) the widespread nature of the crimes.<sup>634</sup> Consequently, the TC placed prejudicial emphasis and afforded undue consideration to the crimes.

484. The TC’s flagrantly inadequate assessment of Stanišić’s participation amounted to the cursory findings that (i) Stanišić was “a high level police official at the time of the commission of the crimes”;<sup>635</sup> and (ii) Stanišić was found “to have committed these crimes through his participation in a JCE”.<sup>636</sup>

485. The mere listing of these two circumstances without any explanation whatsoever amounts to a perfunctory and arbitrary conclusion.

486. In doing so, the TC failed to follow the “over-riding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime”.<sup>637</sup>

#### i. The TC erred by merely noting that Stanišić was a police officer when assessing gravity

487. The TC committed a discernible error by referring only to the position that Stanišić held at the time of the commission of crimes.

<sup>632</sup> *Stakić-AJ*, para.380 (emphasis added).

<sup>633</sup> Judgement, Volume II, para.927.

<sup>634</sup> *Idem*.

<sup>635</sup> *Idem*.

<sup>636</sup> Judgement, Volume II, para.928.

<sup>637</sup> *Delalić-AJ*, para.717.

488. The mere fact that Stanišić, as Minister of Interior, happened also to be a police official, does not explain the form and degree of his participation in the crimes whatsoever.<sup>638</sup>
489. It is a central tenet of international criminal law that sentences are imposed on the basis of the individual conduct of the Accused<sup>639</sup> and not on the basis of their official position.
490. It is clear from the focus only on his position, that Stanišić's harsh sentence stems from his affiliation to the 'BSL' and is not related to the individual conduct of the Accused.
- ii. **The TC erred by merely noting that Stanišić was held responsible under JCE liability when assessing gravity**
491. Whereas the AC has previously looked at whether a trial chamber has taken care in a Judgement "*to explain the relevance of the role of the Appellant in the implementation of the common criminal goal*",<sup>640</sup> the TC in this case considered membership in the JCE alone, sufficient to impose the most severe sentence.
492. The mere recital that Stanišić was found responsible under JCE liability does not in any way address the form or degree of his participation. As the AC has previously noted, the level of contribution of those convicted under JCE liability can vary widely.<sup>641</sup> Within a finding of membership in a JCE, an individual's contribution could be absolutely pivotal to the furtherance of a common purpose, or indeed, an individual's contribution could be found to just meet the threshold of significant contribution.
493. The TC therefore committed an egregious error when assessing Stanišić's form and degree of participation by necessarily imposing a high sentence solely on the basis of a conviction under JCE liability.

<sup>638</sup> Judgement, Volume II, para.927.

<sup>639</sup> *Delalić-AJ*, para.717; *Krnjelac-TJ*, para.507.

<sup>640</sup> *Stakić-AJ*, para.380.

<sup>641</sup> See *Tadić-SAJ*, paras.56-58.

**B. THE TC FAILED TO CONSIDER ITS EXTENSIVE FINDINGS SHOWING STANIŠIĆ'S MINIMAL ROLE IN THE JCE**

**i The TC's findings show that Stanišić's role in the JCE was very limited**

494. Despite holding a high-level position as Minister in the RS Government, Stanišić's acts and conduct actually evince a very limited level of participation in the JCE.

495. Firstly, there were no findings that Stanišić issued any orders directly aimed at the commission of crimes, or orders related to the military activity of the RSMUP. All of the orders issued by Stanišić related to police activities of the RSMUP and not military activities.

496. It was within the latter context that the vast majority of Indictment crimes took place.

497. Stanišić's order of 15 May, addressed in numerous paragraphs of the Judgment,<sup>642</sup> exclusively addresses the matter of re-subordination of police forces to the army as envisaged by relevant laws, and does not refer to any military activity whatsoever. In any case, the Trial Chamber was unable to enter the finding on issue of re-subordination.<sup>643</sup>

498. However, none of this is reflected in the grossly unfair sentence of 22 years imprisonment.

499. The TC's findings clearly demonstrate the limited nature of Stanišić's participation in the furtherance of the common purpose to commit crimes.

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<sup>642</sup> Judgment, Volume II, paras.330, 581, 588,

<sup>643</sup> Judgment, Volume II, paras.342.

500. The TC accepted, *inter alia*, that:

- (i) Stanišić's public speeches throughout the Indictment period were non-discriminatory, aimed at promoting rule of law, professionalism of police, and protection of life and property of all citizens;<sup>644</sup>
- (ii) Stanišić expressed unequivocal public support for a peaceful solution in accordance with the internationally mandated Cutileiro Plan;<sup>645</sup>
- (iii) Stanišić produced documents aimed at the prevention of crimes;<sup>646</sup>
- (iv) Stanišić issued orders aimed at preventing criminal conduct and disorder;<sup>647</sup>
- (v) Stanišić provided information and sent a letter to the highest authorities in RS aimed at informing them about, as well as preventing, breaches of international law;<sup>648</sup>
- (vi) Stanišić issued orders requesting information on camps and detention of prisoners without the proper documentation;<sup>649</sup>
- (vii) Stanišić issued orders to prepare reports regarding conditions at camps;<sup>650</sup>
- (viii) Stanišić issued orders to initiate criminal reports and obtain information which resulted in the establishment of commissions to look into crimes.<sup>651</sup>

<sup>644</sup> Judgement, Volume II, paras.558,560, 609.

<sup>645</sup> Judgement, Volume II, paras.557, 560, 562.

<sup>646</sup> Judgement, Volume II, paras.52, 628.

<sup>647</sup> Judgement, Volume II, paras.610, 635, 679, 746.

<sup>648</sup> Judgement, Volume II, paras.633, 636, 642 747.

<sup>649</sup> Judgement, Volume II, paras.637, 655, 668, 675, 748.

<sup>650</sup> Judgement, Volume II, para.750.

<sup>651</sup> Judgement, Volume II, para.752.

- (ix) Stanišić insisted on the reporting of war crimes and issued a compulsory instruction requesting detailed information of war crimes and victims of such crimes in a questionnaire where, *inter alia*, both nationality of perpetrator and victim was requested;<sup>652</sup> and
- (x) Stanišić insisted on resolving issues of jurisdiction with the army in relation to preventing crimes and tackling the issue of paramilitaries in the territory.<sup>653</sup>

**ii. The TC's findings show that despite his official position Stanišić's acts and conduct actually resulted in impeding the JCE**

501. Further demonstrating that Stanišić's participation in the JCE was limited, the TC also accepted evidence showing that Stanišić's acts and conduct actually served to hinder the common purpose to "*permanently remove Bosnian Muslims and Bosnian Croats from the territory of the planned Serbian state through the commission*" of the persecutory crimes of deportation and forcible transfer.<sup>654</sup>

502. The TC accepted that:

- (i) Stanišić amended the pre-existing law in respect to disciplinary matters in RSMUP;<sup>655</sup>
- (ii) Stanišić set up the Crime Prevention Administration;<sup>656</sup>
- (iii) Stanišić issued orders for the immediate release of all persons detained contrary to applicable regulations as well as free movement of civilians, together with imposition, in this respect, of personal liability upon police commanders to discipline and take other legal measures against perpetrators.<sup>657</sup>

<sup>652</sup> Judgement, Volume II, paras.682.

<sup>653</sup> Judgement, Volume II, paras.592, 642, 720.

<sup>654</sup> Judgement, Volume II, para.313.

<sup>655</sup> Judgement, Volume II, paras.42, 695.

<sup>656</sup> Judgement, Volume II, para.46.

<sup>657</sup> Judgement, Volume II, paras.664, 667.

- (iv) Stanišić issued orders that all members of the MUP who had committed crimes or who had had proceedings commenced against them should be dismissed;<sup>658</sup>
- (v) Stanišić took measures to discipline members of RSMUP;<sup>659</sup>
- (vi) Stanišić issued orders from 5 June 1992 regarding the investigation of war crimes;<sup>660</sup>
- (vii) Stanišić declared the investigation of war crimes committed by Serbs to be a priority of RSMUP;<sup>661</sup>
- (viii) Stanišić supported Chiefs of SJBs in the arrest of perpetrators who were police members, irrespective of political or other pressures;<sup>662</sup>
- (ix) Stanišić issued an order on 27 July 1992 for the dismissal of all illegally formed so-called "special police units"<sup>663</sup> which was fiercely opposed at the municipality levels;<sup>664</sup>
- (x) Stanišić issued orders for action to be taken against paramilitary formations throughout territory of RS, resulting in arrests and/or expelling of such units;<sup>665</sup>
- (xi) Stanišić's actions against paramilitaries led to confrontation with leading members of JCE such as Plavšić;<sup>666</sup>
- (xii) Stanišić clashed with Crisis Staffs regarding the appointments of RSMUP personnel without consent and knowledge of RSMUP;<sup>667</sup>

<sup>658</sup> Judgement, Volume II, paras.749, 613.

<sup>659</sup> Judgement, Volume II, paras.687, 688, 698-704, 706-708, 755.

<sup>660</sup> Judgement, Volume II, para.621.

<sup>661</sup> Judgement, Volume II, para.632.

<sup>662</sup> Judgement, Volume II, para.488.

<sup>663</sup> Judgement, Volume II, paras.605-606, 609.

<sup>664</sup> Judgement, Volume II, paras.606, 607.

<sup>665</sup> Judgement, Volume II, paras.714, 717, 718.

<sup>666</sup> Judgement, Volume II, para.719.

<sup>667</sup> Judgement, Volume II, paras.681, 684, 733.



- (xiii) Stanišić's conflicts with Plavšić, Koljević and Đeric, who all were members of extended presidency of RS in 1992<sup>668</sup> – resulting in his removal from the Ministry – were a result, *inter alia*, of his addressing the issue of war crimes;<sup>669</sup> and
- (xiv) Many people “*could not wait to see Stanišić step down as minister*” because of his stance against the commission of war crimes.<sup>670</sup>

503. The TC transgressed recognised principles of sentencing by accepting, but failing to consider, numerous corroborated pieces of evidence which show that Stanišić's acts and conduct actually resulted in limiting the implementation of the common purpose. The cumulative effect of all of this evidence was the substantial minimalizing of Stanišić's contribution to the JCE.

### III. RELIEF SOUGHT

- 504. The TC improperly sentenced Stanišić solely on the basis his position and the mode of liability under which he was convicted. Consequently, the TC impermissibly imposed an individual sentence of imprisonment upon Stanišić without actually looking at his individual acts and conduct.
- 505. The TC also “*failed to give weight or sufficient weight to relevant considerations*”,<sup>671</sup> namely, the abundance of corroborated evidence – which the TC itself accepted – clearly showing that Stanišić played a minimal role in the JCE to commit crimes.
- 506. As a result, even if the Judgement remained unchanged despite the numerous grounds of appeal argued herein, Stanišić's sentence must be quashed and replaced by a much lower sentence reflecting his minimal contribution to the JCE.

<sup>668</sup> Judgement, Volume II, paras.568, 569.

<sup>669</sup> Judgement, Volume II, para.569.

<sup>670</sup> Judgement, Volume II, para.694.

<sup>671</sup> *Galić-AJ*, para.394.

## **13<sup>TH</sup> GROUND OF APPEAL**

### **THE TC ERRED IN ITS ASSESSMENT OF AGGRAVATING FACTORS**

507. The TC committed discernible errors by considering as aggravating circumstances: (i) Stanišić's official position; (ii) the duration of time during which crimes were committed; and (iii) Stanišić's education and background.

#### **I. OVERVIEW**

508. First, Stanišić's official position in and of itself cannot be considered as an aggravating factor without demonstrating how he abused his official position and that such alleged abuse amounted to an aggravating circumstance. Second, the TC erred in assessing the relevant duration of time during which crimes were committed as well as in considering the duration of time as an aggravating factor. Third and lastly, the TC erred in finding that Stanišić's education and background aggravated his responsibility.

509. No reasonable trial chamber could have considered that these circumstances were proven beyond reasonable doubt to be aggravating.

#### **II. ARGUMENT**

##### **A. THE TC ERRED IN LAW BY CONSIDERING THAT STANIŠIĆ'S OFFICIAL POSITION WAS AN AGGRAVATING FACTOR**

510. The TC committed a discernible error by finding that Stanišić's official position as Minister of the Interior itself constituted an aggravating circumstance.<sup>672</sup> As previously noted by the AC, "[a] high rank in the military or political field does not, *in itself*, merit a harsher sentence."<sup>673</sup> Instead, of relevance is not the superior position alone, "but that position coupled with the manner in which the authority is exercised."<sup>674</sup>

<sup>672</sup> Judgement, Volume II, para.929.

<sup>673</sup> *Babić-SAJ*, para.80 (emphasis added).

<sup>674</sup> *Babić-SAJ*, para.80; *Kayishema & Ruzinda-AJ*, paras.358-359.

511. The TC failed to consider Stanišić's purported behavior in his official capacity, or how he allegedly used his superior position to further the JCE.<sup>675</sup> Instead, the TC committed a discernible error by merely noting that Stanišić's "*participation in the JCE was undertaken in his official capacity*" and that "[t]his constitutes an abuse of his superior position".<sup>676</sup>
512. In the absence of any consideration as to how Stanišić allegedly abused his official position such that it was deemed to warrant a higher sentence,<sup>677</sup> it is clear that the TC's finding of the existence of an aggravating factor was based on Stanišić's status rather than on any facts.

**B. THE DURATION OF TIME IN WHICH CRIMES WERE COMMITTED WAS ERRONEOUSLY CONSIDERED BY THE TC TO BE AN AGGRAVATING FACTOR**

513. The mere length of time during which crimes are committed is not itself a sufficient basis for consideration as an aggravating circumstance. Rather, the aggravating factor in the duration of crime commission relates specifically to "*the length of time during which the crime [for which the Accused is responsible] continued*",<sup>678</sup> and not the length of the period of time in which crimes *are* committed. The distinction is crucial. Automatically finding that the duration of time in which crimes are committed is an aggravating factor leads to sentences being improperly increased, even if crimes are sporadic and isolated but committed during an extended period of time, potentially over many years.

<sup>675</sup> Judgement, Volume II, para.929. See *Babić-SAJ*, para.81. See also *Aleksovski-AJ*, para.183; *Rukundo-AJ*, para.250.

<sup>676</sup> Judgement, Volume II, para.929.

<sup>677</sup> *Idem*.

<sup>678</sup> *Blaškić-AJ*, para.686 (emphasis added). See also *Ndahimana-TJ*, para.857; *Kunarac-AJ*, para.356; *Todorović-TJ*, para.63.

514. On this basis, the TC committed a discernible error by considering that “*the length of time during which the crimes for which Stanišić has been found guilty were committed*” constituted an aggravating factor.<sup>679</sup> While not seeking to undermine the seriousness of the crimes, the TC’s finding that crimes were committed “*during nine months*” serves to incorrectly suggest that the crimes were *being* committed for nine months, which on the basis of the applicable jurisprudence could justify consideration as an aggravating factor. To properly serve as an aggravating circumstance, a TC should consider the length of time in which the criminal conduct “*lasted*”,<sup>680</sup> as opposed to the length of time in which the criminal conduct *occurred*.
515. It is clear that while a certain number of crimes were found to have occurred at times throughout the nine month period, the vast majority of crimes occurred during a concentrated period of five months, from April to September 1992.<sup>681</sup>
516. The TC further erred in considering the commission of crimes within a period of nine months to be aggravating given its lack of conclusive findings regarding Stanišić’s knowledge of crimes. The evidence relied upon by the TC suggests that the earliest Stanišić could be said to be receiving information on the commission of crimes relevant to the Indictment was June 1992.
517. On this basis, the TC should have considered a period of three months as the duration of time in which the crimes which Stanišić was aware lasted. The improper assessment of the length of time by the TC when assessing aggravating factors led to the imposition of a disproportionately high sentence.
518. The increase of Stanišić’s sentence on the flawed assertion that the commission of crimes “*during nine months*” was to be considered as an aggravating circumstance therefore amounts to a discernible error.<sup>682</sup>

<sup>679</sup> Judgement, Volume II, para.930 (emphasis added).

<sup>680</sup> See *Akayesu-TJ*, para.26.

<sup>681</sup> Judgement, Volume II, paras.215-216, 281, 332, 343, 345, 457-459, 484-485, 490, 688-691, 693-696, 698, 700, 808, 810, 868-871, 876, 878, 880, 1037, 1041, 1099-1110, 1114, 1177-1178, 1188, 1231-1232, 1238, 1243, 1245-1246, 1279-1280, 1284, 1353, 1397, 1399, 1402, 1411, 1476-1480, 1483, 1489, 1490, 1494, 1495, 1539-1543, 1547, 1633-1642, 1644, 1647-1661, 1663-1664, 1666-1668, 1670, 1673, 1675, 1677-1681, 1683, 1686, 1688.

<sup>682</sup> Judgement, Volume II, para.930.

**C. STANIŠIĆ'S EDUCATION AND PRIOR POLITICAL EXPERIENCE WERE INCORRECTLY CONSIDERED AS AN AGGRAVATING FACTOR**

519. To be properly considered as such, aggravating factors can only be circumstances “*directly related to the crime or crimes*” for which the accused has been convicted.<sup>683</sup> The TC committed a discernible error by considering that an education which included a domestic law degree and previous experience in politics in a peace-time situation was directly related to the commission of the persecutory crimes of deportation and forcible transfer in the context of an armed conflict.<sup>684</sup>
520. Further, the TC committed a discernible error by failing to give a reasoned opinion as to the appropriateness of using factors from outside the Indictment period in aggravation. The TC erroneously failed to explain how a domestic legal university education and experience in politics attained prior to the Indictment period, and in a peace-time context when Yugoslavia remained intact, amounted to “*full insight into the context in which the crimes were committed and a thorough legal understanding of the nature of the crimes.*”<sup>685</sup> The AC has previously held that it is an error for a TC to use, in aggravation, factors concerning events outside the scope of the indictment, without providing a reasoned opinion as to why it is appropriate in the circumstances.<sup>686</sup>
521. Moreover, the TC committed a discernible error by considering Stanišić's good education as an aggravating factor.<sup>687</sup> Instead, the TC could<sup>688</sup> and should have considered it as a mitigating factor. In *Hadžihadsanović-TJ*, the TC considered good education in the context of the accused having a character capable of rehabilitation, looking at other factors such as lack of a prior criminal record, prior good reputation, and testimony attesting to his professionalism and conscientiousness.<sup>689</sup> All of these circumstances are relevant to Stanišić's case.

<sup>683</sup> *Kunarac-TJ*, para.850; *Hadžihadsanović-TJ*, para.2069.

<sup>684</sup> Judgement, Volume II, para.931. See also Judgement, Volume I, para.132; Judgement, Volume II, para.537.

<sup>685</sup> Judgement, Volume II, para.931.

<sup>686</sup> *Stakić-AJ*, para.423.

<sup>687</sup> Judgement, Volume II, para.931.

<sup>688</sup> *Hadžihadsanović-AJ*, para.328.

<sup>689</sup> *Hadžihadsanović-TJ*, para.2080.

522. In light of the evidence of Stanišić's good character heard by the TC, such as him being a "*hard-working professional*", "*a disciplined and model officer*", and "*a well-known, well-regarded, and honest citizen*";<sup>690</sup> the TC erred by considering good education as an aggravating factor and thereby disregarding that Stanišić has a character capable of rehabilitation.

### III. RELIEF SOUGHT

523. As a result of the discernible errors committed by the TC, the sentence imposed on Stanišić must be quashed and the AC should impose a new and lower sentence.

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<sup>690</sup> Judgement, Volume II, para.936.

## **14<sup>TH</sup> GROUND OF APPEAL**

### **THE TC ERRED IN ITS ASSESSMENT OF THE MITIGATING FACTORS RELEVANT TO THE DETERMINATION OF STANIŠIĆ'S SENTENCE**

524. The TC committed a discernible error and abused its discretion by improperly and unduly considering the evidence in mitigation.

#### **I. OVERVIEW**

525. In addition to failing to properly evaluate and accord the appropriate probative value to Stanišić's interview provided to the Prosecution before the beginning of proceedings,<sup>691</sup> the TC abused its sentencing discretion by incorrectly considering that Stanišić's voluntary and extensive interview "*does not reveal any substantial co-operation with the Prosecution.*"<sup>692</sup> The TC also committed a discernible error by wrongly considering that the voluminous evidence of Stanišić's good personal and professional character "*has little weight as a mitigating factor.*"<sup>693</sup> Lastly, the TC manifestly erred by failing to consider the multitude of orders issued by Stanišić in attempting to uphold law and order in mitigation.<sup>694</sup>

#### **II. ARGUMENT**

##### **A. THE TC ERRED BY FINDING THAT STANIŠIĆ'S INTERVIEW DID NOT AMOUNT TO "SUBSTANTIAL COOPERATION" WITH THE PROSECUTION**

526. The TC erred by not finding that on the balance of probabilities,<sup>695</sup> Stanišić's six day voluntary interview admitted in its entirety into evidence at the request of the Prosecution amounted to substantial cooperation with the Prosecution.<sup>696</sup>

<sup>691</sup> See generally, *supra*, 7th Ground of Appeal.

<sup>692</sup> Judgement, Volume II, para.935.

<sup>693</sup> Judgement, Volume II, para.936.

<sup>694</sup> Judgement, Volume II, paras.932-936.

<sup>695</sup> *Babić-SAJ*, para.43; *Čelebići-AJ*, para.590.

<sup>696</sup> Judgement, Volume II, para.935.

527. In *Nikolić-SJ*, having reviewed *in camera* the transcripts of two days of an interview provided by the accused who pled guilty, the TC admitted that it was “not able to judge” whether Nikolić’s cooperation was substantial, “but decided to resolve any doubt in favour of the Appellant and not to his detriment.”<sup>697</sup> The Nikolić-TC went on to note that “even this small portion of testimony shows that information provided [...] will assist the Prosecutor of the ICTY [...]”.<sup>698</sup> On appeal, the AC upheld the TC’s decision not to request additional material before deciding on there being substantial cooperation.<sup>699</sup>
528. In this case, that Stanišić’s extensive interview was beneficial to the Prosecution is clear in light of the Prosecution’s own admission that the content of the interview “provides evidence of [Stanišić’s] position on many issues of relevance to this Trial”.<sup>700</sup> Strikingly, the Prosecution relied on Stanišić’s interview throughout the proceedings, in the Prosecutions Pre-Trial Brief, the Prosecutions opening statement, during trial proceedings, as well as in the Prosecution’s Final Trial Brief.<sup>701</sup>
529. The TC wrongly considered that the “quality and quantity” of the information contained in Stanišić’s interview did not amount to “substantial co-operation”.<sup>702</sup> As already shown, the abundant corroboration of the contents of Stanišić’s interview patently demonstrates the quality of the information contained therein.<sup>703</sup>

<sup>697</sup> *Nikolić-SAJ*, para.62, citing *Nikolić-SJ*, para.259.

<sup>698</sup> *Idem*.

<sup>699</sup> *Nikolić-SAJ*, para.63.

<sup>700</sup> Prosecution-BTM, p.12.

<sup>701</sup> Prosecution-PTB, fns.2-4,170; T.247-251, 21357-21359; 23485-23487; Prosecution-FTB, paras.10-12.

<sup>702</sup> Judgement, Volume II, para.935.

<sup>703</sup> See, *supra*, 7th Ground of Appeal, Section B.



530. Further, the AC has held that when assessing the quality of information provided, “*special regard will be given to the Prosecution’s use of the material, as an objective indication of its quality.*”<sup>704</sup> As already noted, the Prosecution in this case relied heavily on the content of Stanišić’s interview during its case. The information contained in Stanišić’s interview was also used in the case against Stojan Župljanin.<sup>705</sup> In this regard, the AC has previously held that use of information provided by an accused in proceedings against another accused is “*a significant indication of the value of this information*”.<sup>706</sup> Finally, substantial cooperation has been established even where an accused by virtue of his position only provided “*limited information*” to the Prosecution.<sup>707</sup> The TC consequently abused its discretion by finding that Stanišić’s voluntary and extensive interview did not amount to “substantial cooperation” with the Prosecution.<sup>708</sup>
531. Moreover, the TC erred by failing to consider that Stanišić’s cooperation, even if not substantial, should have been afforded weight in mitigation.<sup>709</sup> The AC has expressly set down that “***an accused’s cooperation need not be substantial for it to be taken into account as a mitigating circumstance.***”<sup>710</sup> The AC has stressed that in assessing cooperation “*special regard must be had to the accused’s willingness to cooperate as underlined by his actions and evidenced, in particular, by his earnestness when providing information to the Prosecution.*”<sup>711</sup> It has also been held that the fact of agreeing to be interviewed demonstrates willingness to co-operate.<sup>712</sup>
532. Here, Stanišić’s interview, amounting to 581 pages of evidence forming the basis of the Defence case and which the Prosecution requested to have admitted into evidence, was evidently worth of consideration in mitigation. The TC consequently erred in law and abused its discretion by failing to afford *any* weight to Stanišić’s interview when determining his sentence.<sup>713</sup>

<sup>704</sup> *Bralo-SAJ*, para. 54.

<sup>705</sup> See, *inter alia*, Prosecution-FTB, paras. 9-12.

<sup>706</sup> *Bralo-SAJ*, para. 52.

<sup>707</sup> *Bralo-SAJ*, para. 52, citing *Banović-SJ*, para. 59.

<sup>708</sup> Judgement, Volume II, para. 935.

<sup>709</sup> Judgement, Volume II, para. 935.

<sup>710</sup> *Bralo-SAJ*, para. 51 (emphasis added). See also *Zelenović-SAJ*, para. 25.

<sup>711</sup> *Bralo-SAJ*, para. 63.

<sup>712</sup> *Banović-SJ*, para. 61.

<sup>713</sup> Judgement, Volume II, para. 935.

**B. THE TC FAILED TO ATTACH APPROPRIATE WEIGHT TO STANIŠIĆ'S GOOD AND PROFESSIONAL CHARACTER**

533. The TC abused its discretion by failing to give appropriate weight to the extensive evidence of Stanišić's good and professional character.<sup>714</sup> The jurisprudence of the International Tribunal clearly shows that "*good character with no prior criminal convictions*" is a recognized factor considered in mitigation.<sup>715</sup> Further, evidence of "*professional approach to [the accused's] work*" has previously been considered in mitigation.<sup>716</sup> Though evidence of good character is considered to warrant limited weight in most cases,<sup>717</sup> it is submitted that the extensive evidence of good character<sup>718</sup> coupled with the evidence of Stanišić's professional approach in carrying out his duties at all times<sup>719</sup> deserved maximum weight in mitigation.

534. For example, the TC heard evidence that Stanišić was, *inter alia*, "*a hard-working professional*"; "*held in high esteem [...] and a disciplined and model officer*"; as well as being a "*well-regarded, and honest citizen.*"<sup>720</sup> The TC consequently abused its discretion by failing to give appropriate weight to this evidence in mitigation.<sup>721</sup>

**C. THE TC ERRED BY FAILING TO CONSIDER IN MITIGATION THE MULTITUDE OF ORDERS ISSUED BY STANIŠIĆ IN ATTEMPTING TO UPHOLD THE LAW**

535. The TC committed a discernible error and abused its sentencing discretion by failing to take into account the volume and content of the measures which Stanišić sought to implement in order to prevent and deter crimes and uphold the law.<sup>722</sup>

536. The AC has previously considered particular circumstances of an accused in relation to crimes as warranting mitigation of sentence.<sup>723</sup>

<sup>714</sup> Judgement, Volume II, para.936.

<sup>715</sup> *Babić-SAJ*, para.43.

<sup>716</sup> *Kupreškić-AJ*, para.459.

<sup>717</sup> *Seromba-AJ*, para.235.

<sup>718</sup> Judgement, Volume II, para.936.

<sup>719</sup> *Idem*.

<sup>720</sup> *Idem*.

<sup>721</sup> *Idem*.

<sup>722</sup> Judgement, Volume II, paras.932-936.

<sup>723</sup> See, *inter alia*, *Krstić-AJ*, paras.272-273.

537. In this case, *inter alia*, (i) Stanišić did not actively facilitate, enable or engage in the deportation and forcible transfer of Muslims and Croats; (ii) Stanišić was never present nor witnessed the occurrence of crimes; (iii) Stanišić never encouraged expressly or implicitly the commission of crimes; and (iv) the Judgement is replete with references to orders made by Stanišić to (a) prevent and deter the commission of crimes;<sup>724</sup> (b) investigate the commission of crimes;<sup>725</sup> (c) request information on camps and order the free movement of civilians and immediate release of those not detained pursuant to valid regulations;<sup>726</sup> (d) discipline members of the RS MUP for involvement in criminal activity;<sup>727</sup> and (e) take action against paramilitary formations throughout the territory of RS.<sup>728</sup>
538. The TC erred by failing to consider this extensive evidence demonstrating Stanišić's steadfast attempts to prevent and punish the commission of crimes.<sup>729</sup>

### III. RELIEF SOUGHT

539. The TC's discernible errors and abuse of its sentencing discretion in assessing the existence and weight to be afforded to mitigating circumstances warrant appellate intervention.

<sup>724</sup> Judgement, Volume II, paras.42, 46, 52, 630, 640-641, 644, 674, 680, 746-747.

<sup>725</sup> Judgement, Volume II, paras.610, 621, 630, 632, 636, 682, 694, 708, 747, 752, 794, 797.

<sup>726</sup> Judgement, Volume II, paras.488, 664, 667, 673, 748, 750.

<sup>727</sup> Judgement, Volume II, paras.687-708, 749, 755.

<sup>728</sup> Judgement, Volume II, paras.714, 717-718.

<sup>729</sup> See, *supra* 12<sup>th</sup> Ground of Appeal, Section B.

## **15<sup>TH</sup> GROUND OF APPEAL**

### **THE TC IMPERMISSIBLY CONSIDERED STANIŠIĆ'S PURPORTED ABUSE OF HIS OFFICIAL POSITION ON MULTIPLE OCCASIONS**

#### **I. OVERVIEW**

540. The TC committed a discernible error and abused its sentencing discretion by considering Stanišić's purported abuse of his official position as Minister of Interior on three separate occasions. The TC impermissibly double-counted Stanišić's purported abuse of official position when assessing the gravity of the offence,<sup>730</sup> and as an aggravating circumstance.<sup>731</sup> The TC then improperly considered Stanišić's purported abuse of his official position on a third occasion as a factor minimizing the weight to be given to mitigating circumstances.<sup>732</sup>

#### **II. ARGUMENT**

##### **A. THE TC ERRED IN LAW BY IMPERMISSIBLY DOUBLE-COUNTING STANIŠIĆ'S PURPORTED ABUSE OF HIS OFFICIAL POSITION**

541. In assessing the gravity of the crimes, the TC considered, *inter alia*, that "*Stanišić was a high level police official at the time of the commission of the crimes.*"<sup>733</sup> As the TC had already noted, Stanišić was Minister of Interior during the Indictment period and it was his "*acts and conduct [...] during the tenure of this office [that] are the subject of this case.*"<sup>734</sup> Consequently, the official position which Stanišić held at the time of the commission of the crimes, namely, as Minister of Interior – and therefore head of the police – was found by the TC to be an abuse of his position when assessing the gravity of the crimes.

<sup>730</sup> Judgement, Volume II, para.927.

<sup>731</sup> Judgement, Volume II, para.929.

<sup>732</sup> Judgement, Volume II, para.936.

<sup>733</sup> Judgement, Volume II, para.927.

<sup>734</sup> Judgement, Volume II, para.542.

542. The TC then proceeded to impermissibly consider Stanišić's purported abuse of position when assessing the aggravating factors in his case. The TC found that Stanišić abused his superior position on the basis that his participation in the JCE "was undertaken in his official capacity as Minister of Interior."<sup>735</sup> As a result, the TC again factored Stanišić's purported abuse of his official position into its assessment of sentence.
543. As previously noted by the AC, "factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and vice versa."<sup>736</sup> Despite noting this fundamental consideration of the law applicable to sentencing,<sup>737</sup> the TC erred by impermissibly double-counting Stanišić's purported abuse of official position when determining his sentence.
544. What is more, that the TC referred to two different aspects of Stanišić's position (high level police official and Minister of Interior) when assessing gravity and aggravating circumstances does not negate the fact that the same underlying fact was double-counted, namely Stanišić's purported abuse of his official position.
545. The AC has expressly held "that relying on different aspects of the same fact" is impermissible. Rather, the AC found that "[i]n weighing a fact, either as an aspect of the gravity of the crime or an aggravating circumstance, the Trial Chamber is required to consider and account all of its aspects and implications on the sentence in order to ensure that no double-counting occurs."<sup>738</sup>

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<sup>735</sup> Judgement, Volume II, para.929.

<sup>736</sup> *Deronjić-SAJ*, para.106

<sup>737</sup> Judgement, Volume II, para.894.

<sup>738</sup> *D.Milošević-AJ*, para.309.

**B. THE TC ABUSED ITS SENTENCING DISCRETION BY FURTHER CONSIDERING STANIŠIĆ'S PURPORTED ABUSE OF HIS POSITION ON A THIRD OCCASION**

546. As well as impermissibly double-counting Stanišić's purported abuse of official position, the TC committed a further discernible error by considering Stanišić's purported abuse of official position on a third occasion when assessing the existence of mitigating factors.<sup>739</sup>
547. Having reviewed the evidence regarding Stanišić's good character, the TC decided to afford little weight to this evidence as a mitigating factor, on the basis, *inter alia*, that Stanišić "*failed to use the powers available to him under the law*" for the protection of the civilian population.
548. By again taking into consideration an aspect intrinsically related to Stanišić's purported abuse of his official position, the TC improperly gave undue consideration to this single factor, thereby allowing one aspect of the facts to have a prejudicial and wholly unjustified influence on the assessment of the appropriate sentence.

**III. RELIEF SOUGHT**

549. The TC's errors directly impacted all facets of the assessment of Stanišić's sentence. As a result, the AC should quash Stanišić's sentence and impose a new and much lower sentence.

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<sup>739</sup> Judgement, Volume II, para.936.

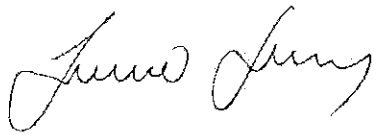
**OVERALL RELIEF SOUGHT**

550. On the basis of the grounds of appeal argued herein, either individually or collectively, Stanišić respectfully requests the AC to:
- A. **QUASH** the guilty findings for Counts 1, 4 and 6 and **PRONOUNCE A FULL ACQUITTAL**; and/or
  - B. If necessary, **QUASH** the 22 years' imprisonment sentence imposed on him and **IMPOSE** a more appropriate and **MUCH LOWER SENTENCE**.

Word Count: 39,423.

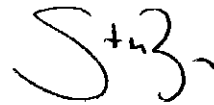
**RESPECTFULLY SUBMITTED ON THIS 19<sup>TH</sup> DAY OF AUGUST 2013**

**COUNSEL FOR THE APPLICANT**



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**Slobodan Zečević**



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**Stéphane Bourgon**

**ANNEX A: TABLE OF CASES**

**ICTY**

***Aleksovski-AJ***

*Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000

***Babić-SAJ***

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***Banović-SJ***

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***Blaškić-AJ***

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***Bralo-SAJ***

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***Brđanin-DFAI***

*Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001

***Brđanin-LAD***

*Prosecutor v. Radoslav Brđanin*, IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004

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***Celibići-TJ***

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***Celibići-AJ***

*Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001

***D. Milošević-AJ***

*Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Judgement, 12 November 2009



***Deronjić-SAJ***

*Prosecutor v. Miroslav Deronjić*, IT-02-61-A, Sentencing Appeal Judgement, 20 July 2005

***Furundzija-AJ***

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***Gotovina-AJ***

*Prosecutor v. Gotovina et al.*, IT-06-90-A, Judgement, 16 November 2012

***Hadžihadsanović-TJ***

*Prosecutor v. Hadžihadsanović et al.*, IT-01-47-T, Judgement, 15 March 2006

***Hadžihadsanović-AJ***

*Prosecutor v. Hadžihadsanović et al.*, IT-01-47-A, Judgement, 22 April 2008

***Jelisić-AJ***

*Prosecutor v. Goran Jelisić*, IT-95-10-A, Judgement, 5 July 2001

***Krajišnik-TJ***

*Prosecutor v. Momčilo Krajišnik*, IT-00-39-T, Judgement and Sentence, 27 September 2006

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*Prosecutor v. Momčilo Krajišnik*, IT-00-39-A, Judgement, 17 March 2009

***Krnojelac-AJ***

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***Krstić-AJ***

*Prosecutor v. Radislav Krstić*, IT-98-33-A, Appeal Judgement, 19 April 2004

***Kunarac-TJ***

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*Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002

***Kupreškić-AJ***

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***Kvočka-AJ***

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***Limaj-TJ***

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***Martić-AJ***

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***Milutinović-Response-MDLJ***

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***Milutinović Decision-MCJ***

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***Milutinović-TJ***

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***Moloto-Dissent-Perišić-TJ***

*Prosecutor v. Momčilo Perišić*, IT-04-81-T, Judgement, 6 September 2011, Dissenting Opinion of Judge Moloto on Counts 1 to 4 and 9 to 12

***Naletelić-Martinović-AJ***

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***Nikolić-SJ***

*Prosecutor v. Momir Nikolić*, IT-02-60/1-S, Sentencing Judgement, 2 December 2003

***Nikolić-SAJ***

*Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006

***Orić-AJ***

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***Perišić-AJ***

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***Plavšić-SJ***

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***Stakić-TJ***

*Prosecutor v. Milomir Stakić*, IT-97-24-T, Judgement, 31 July 2003

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*Prosecutor v. Milomir Stakić*, IT-97-24-A, Judgement, 22 March 2006

***Stanišić-Župljanin -Decision-FI***

*Prosecutor v. Stanišić and Župljanin*, IT-08-91-PT, Decision on Mićo Stanišić and Stojan Župljanin's Motion on Form of the Indictment, 19 March 2009

***Stanišić-Župljanin-Indictment***

*Prosecutor v. Stanišić and Župljanin*, IT-08-91-PT, Second Amended Consolidated Indictment, 23 November 2009

***Stanišić Rule 108 Motion***

*Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Motion on behalf of Mićo Stanišić Seeking Leave to Amend Notice of Appeal with Annexes A, B and C, 2 July 2013

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***Todorović-SJ***

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***Tolimir-TJ***

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***Vasiljević-AJ***

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***Zelenović-SAJ***

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***Kayishema & Ruzinda-AJ***

*The Prosecutor v. Kayishema et al.*, ICTR-95-1-A, Judgement (Reasons), 1 June 2001

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***Ntagerura-AJ***

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***Rukundo-AJ***

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***Seromba-AJ***

*The Prosecutor v. Athanase Seromba*, ICTR-2001-66-A, Judgement, 12 March 2008

**ANNEX B: BOOK OF AUTHORITIES**

(SEPARATE FILING)