

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

Case No. IT-04-74-T

IN TRIAL CHAMBER III

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

Registrar: Mr. John Hocking

Date filed: 31 March 2011

**THE PROSECUTOR
v.
JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
and BERISLAV PUŠIĆ**

PUBLIC

**FINAL BRIEF ON BEHALF
OF BERISLAV PUŠIĆ
(PUBLIC REDACTED VERSION)**

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I. INTRODUCTION

A. General Summary of Defence Case

1. Berislav PUŠIĆ is not guilty of the offences with which he has been charged. A careful analysis of the evidence presented in this trial merely establishes that PUŠIĆ was a low ranking civil servant involved in a technical and administrative capacity in the exchange and release of prisoners with no *de jure* or *de facto* powers to give orders to anyone else or to interfere in the operation of Croatian Defence Council (“HVO”) detention centres. PUŠIĆ principally “rubber stamped” decisions taken by other HVO bodies and officials. PUŠIĆ was a small and disposable cog in the bureaucratic wheel, not an independent decision-maker who could exert control over the policies and practices of the HVO.

2. PUŠIĆ is charged on a 26 count indictment alleging war crimes, crimes against humanity and grave breaches of the Geneva Conventions. The Prosecution evidence presented at trial links PUŠIĆ not to any HVO military operations but with HVO practices in connection with Bosnian Muslim detainees including prisoner exchanges, releases, forced labour and the functioning of HVO detention centres.

3. However, the Prosecution’s case is that PUŠIĆ is criminally responsible for all the crimes on the Indictment because he held a leadership position in the Joint Criminal

Enterprise (“JCE”)¹ and positions of responsibility within various HVO organisations, most notably the HVO Service for Exchange, involved in the arrest, detention and expulsion of the Bosnian Muslim population from Bosnia and Herzegovina (“BiH”). Furthermore, it is alleged that PUŠIĆ used his authority and influence² to effect the unlawful detention and mistreatment of detainees and to bring about the expulsion and deportation of Bosnian Muslims from BiH.³

4. The Defence submit that the evidence led by the Prosecution and adduced during this trial has not proved that PUŠIĆ participated in any of the crimes alleged. Nor has the Prosecution proved that he ordered, authorised or condoned any of these crimes. PUŠIĆ was not a party to the alleged or any JCE, nor did he ‘act in concert’ with his co-accused or anyone else in relation to any criminal acts. The decision to exclude PUŠIĆ from liability for certain crimes on the Indictment whilst at the same time maintaining that he was a member of the JCE cannot be sustained in law. Moreover, the Prosecution has failed to prove the existence of any JCE involving any of the Accused.

5. PUŠIĆ’s lack of authority over the HVO civilian or military apparatus was succinctly summarised by Marijan BIŠKIĆ, the HVO Assistant Minister for Security in the Department of Defence and an important witness for the Prosecution. When asked to comment on the extent of PUŠIĆ’s authority BIŠKIĆ testified that:

He [PUŠIĆ] could not issue an order to me or to anybody else, I believe.⁴

6. BIŠKIĆ’s conclusion is not an isolated and one- sided example of selective testimony that has been taken out of context. It is symptomatic of profound deficiencies in the Prosecution’s case. These deficiencies arise because many of the witnesses called by the Prosecution to testify about PUŠIĆ concurred with BIŠKIĆ’s characterisation.

7. [REDACTED]:

¹ Indictment, para.17.6. The terms “JCE” and “common plan” are both used to denote the Joint Criminal Enterprise.

² OTP 98bis, T.27119-49.

³ OTP Opening, T.881-3.

⁴ Biškić T.15326. *See*, Part IX.

[REDACTED]⁵

8. As shall become plain from the contents of this Brief, [REDACTED] applies not just to prisoner exchanges but to every sphere of activity PUŠIĆ was involved in.

9. The testimony of BIŠKIĆ, [REDACTED] cannot be reconciled with the Prosecution's claim that PUŠIĆ was one of the "most powerful men in the whole Herceg-Bosna project"⁶ and a "leader" of the HVO and the Joint Criminal Enterprise. Even a cursory examination of the facts reveal that PUŠIĆ did not feature in the HVO Croatian Community Herceg-Bosna ("HZ H-B") cabinet, nor was he part of any department required to report to it.

10. Moreover, PUŠIĆ does not appear in the HVO military chain of command. He is not mentioned by name by a host of senior international community representatives called to testify by the Prosecution. It is not clear exactly what post he held in the Military Police from 1992 to early 1993. In addition, there is no evidence that PUŠIĆ had any knowledge of or connection with the majority of the crimes cited in the Indictment.

11. The Prosecution place great emphasis on PUŠIĆ's position as Head of the HVO Service for the Exchange of Prisoners ("Service for Exchange"). PUŠIĆ was appointed to this office on 5th July 1993. The Service for Exchange was a civilian body and therefore not part of the military administration. Its powers were strictly defined by official mandate and limited to the provision of administrative support to other HVO agencies involved in the exchange of prisoners.

12. In his capacity as Head of the Service for Exchange, or indeed in any other post he held, PUŠIĆ had no decisional autonomy, no identified subordinates, no powers to give orders to other HVO personnel and could not direct, shape or dictate HVO policy.

13. In particular, no weight should be attached to evidence of PUŠIĆ's connection to the HVO Commission to "take charge of all Herceg-Bosna/HVO prisons and detention facilities holding prisoners of war and detainees"⁷ created on 6 August 1993 ("6 August 1993

⁵ [REDACTED]

⁶ OTP Opening T.880.

⁷ Indictment, para.13.

Commission”). The Prosecution witness JOSIP PRALJAK who was also appointed to the Commission categorically stated that this body never met, took effect or functioned. PUŠIĆ’s behaviour and duties did not seem to change at all after his purported appointment. He seems to have enjoyed no new authority, nor taken on any broader responsibility or more ambitious projects.

14. The secret Indictment against PUŠIĆ was unsealed in 2004. The decision to indict PUŠIĆ came as a surprise to one of his co-accused, SLOBODAN PRALJAK who confessed that he had never met PUŠIĆ before 2004.⁸ Although he recalled the existence of a Service for the Exchange of Prisoners during the time of the conflict SLOBODAN PRALJAK could not remember who was in charge of it.⁹ Another co-accused, PETKOVIĆ accepted that he rarely had contact with PUŠIĆ during the period of the conflict. PETKOVIĆ stated that he did not recognise PUŠIĆ when they met in the United Nations Detention Unit.¹⁰

15. SLOBODAN PRALJAK testified that for several years before the charges were made public there had been constant speculation as to who would be indicted by the Tribunal:

and then one day in 2004 the indictment arrived for five people, five individuals, and I could count the five *but I didn't know who the sixth one was*. And then I called up the minister of justice. I knew her because she was an advisor in President Tudjman's office. *I asked her who is the sixth man, and she said it's Berislav Pusic*. And then I asked around for a telephone number so I could inform

⁸ S.Praljak T. 41502-3.

⁹ S.Praljak T.41503-4. The witness testified,: “JUDGE ANTONETTI: [Interpretation] There was a specific organ in charge of exchanging prisoners, finding people. Did you know or did you not know? A. Yes, *I did know that there was a service for the exchange of prisoners*. JUDGE ANTONETTI: [Interpretation] And you didn't know that Mr. Pusic was one of the persons responsible for this, in charge? A. ... *I did know that the service existed, but nothing more than that.*” [emphasis added]

¹⁰ Petković T.49799. The witness testified, “JUDGE ANTONETTI: [Interpretation] I'm going to pass on to Mr. Pusic now. When did you meet him for the first time? A. Judge Trechsel -- I mean, Judge Antonetti, the Presiding Judge, the first time I had direct contacts with Mr. Pusic, I think, was in Jablanica in -- well, the 4th and 5th of May, when I met with Halilović in that area. I don't know whether it was perhaps the last contact I had with Mr. Pusic, because, to be quite honest, *when I met him here in detention, I didn't recognise him, I didn't know who he was*. So the first time that I came into direct contact with him, with Mr. Pusic, was, as I say, when we attended talks in Jablanica with Halilović. That was the 4th and 5th of May, 1993...and, to be quite frank, I don't know where Mr. Pusic had his office in Mostar, if he was in Mostar. JUDGE ANTONETTI: [Interpretation] Very well. Then there's no point in my asking you whether he referred to Greater Croatia, et cetera, talking to you, because you just said you hardly ever saw him, so the question doesn't arise.” [emphasis added]

him, because I thought this would be a surprise to him. Well, it was a surprise for all of us, but for him too.¹¹ [emphasis added]

16. When framing the Indictment, it is clear that the Prosecution sought to put the HVO HZHB and Croatian Republic of Herceg-Bosna (“HR H-B”) on trial. The Prosecution identified five individuals they believed represented the leaders of the HVO administration and indicted them. Desperately seeking to pin responsibility for the operation of HVO detention centres on a sixth defendant, they erroneously assumed that as Head of the Service for Exchange and the defunct 6 August 1993 Commission PUŠIĆ must be responsible for overseeing all dealings with military and civilian detainees during the conflict. The evidence presented at trial shows that they picked the wrong man.

B. Burden of Proof and Legal Issues

17. The Accused must be presumed innocent until he is proven guilty of all charges.¹² The burden of proof rests on the Prosecution. In respect of the JCE and the individual counts on the Indictment the Prosecution must prove each and every element of their case beyond reasonable doubt. If there is any ambiguity or doubt as to the guilt of the Accused, any determination must be in favour of the Accused pursuant to the principle of *in dubio pro reo*.¹³ Where the Chamber suspects that the guilt of an Accused may have been proved on the balance of probabilities rather than beyond reasonable doubt it must acquit.¹⁴

¹¹ S.Praljak T.41502-3. The witness testified, “JUDGE ANTONETTI: [Interpretation] Now let's speak about Mr. Pusic, Berislav. When did you meet Mr. Pusic? A. Your Honours, as to Mr. Pusic from the war and after the war, *I can't tell you anything because I never actually met him*. There were at least seven or eight people with the surname Pusic that I had heard about, and I knew that there was this man called Berislav Pusic, but I only met him, I think, in 2004, before we set out for the Hague. And each year, at least twice a year, they would say, "Yes, he's going to The Hague. There's a secret indictment raised." That happened at least twice a year six or seven years before the year 2004. And then one day in 2004 the indictment arrived for five people, five individuals, and I could count the five *but I didn't know who the sixth one was*. And then I called up the minister of justice. I knew her because she was an advisor in President Tudman's office. *I asked her who is the sixth man, and she said it's Berislav Pusic*. And then I asked around for a telephone number so I could inform him, because I thought this would be a surprise to him. Well, it was a surprise for all of us, but for him too. And I happened to find him in hospital. He was in Ljubljana, lying in hospital after an operation, and he said -- and I said, "Listen. So that they don't arrest you as you fugitive, if you're at all able, and even in a wheelchair, come to Zagreb and give yourself up like the rest of us did." And that's all I know about Berislav Pusic, except for the prison term, and I can have course tell you another story about our life in prison.” [emphasis added]

¹² Article 21(3) of the Statute.

¹³ *Prosecutor v. Blagojević and Jokić*, Trial Judgement, Case No: IT-02-60-T, 17 January 2005. (Blagojević TJ) para.18. *Prosecutor v. Halilović*, Trial Judgement, Case No: IT-01-48-T, 16 November 2005. (Halilović TJ) para.12.

¹⁴ *Prosecutor v. Milutinović et al.* Trial Judgement, Case No: IT-05-87-T, 26 February 2009. (Milutinović TJ) para.115.

18. Where the Prosecution seek to discharge the burden of proof by relying on circumstantial evidence and more than one inference is reasonably open on facts, one of which is consistent with innocence, an acquittal must be entered. The Appeals Chamber in Delalić held that:

A circumstantial case consists of evidence of a number of different circumstances, which taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the Accused did what is alleged against him...Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available from the evidence. If there is another conclusion which is also reasonably open from that evidence, and which is inconsistent with the innocence of the Accused he must be acquitted.¹⁵
[emphasis added]

19. PUŠIĆ elected, as is his right not to give evidence during the course of this trial. In accordance with Article 21(4)(g) of the Statute and Rule 85(C), no adverse inference should be drawn from PUŠIĆ's decision not to give evidence. This extends not only to consideration of the silence of the Accused in the determination of guilt or innocence but also to an inference being drawn in the determination of sentence.¹⁶

20. In a joint trial it is the duty of the Trial Chamber to consider the case against each Accused separately and to consider each count in the Indictment separately.¹⁷

C. Structure of Brief

21. This Closing Brief is divided into eleven sections.

¹⁵ *Prosecutor v. Delalić et al*, Appeal Judgement, Case No: IT-96-21-A, 20 February 2001, (Delalić AJ) para.458.

¹⁶ Delalić AJ para.781 and 783.

¹⁷ *Prosecutor v. Kordić and Čerkez*, Trial Judgement, Case No: IT-95-14/2-T, 26 February 2001. (Kordić TJ) para.16.

22. Part II examines those counts on the Indictment where no evidence has been presented to link PUŠIĆ or any purported subordinates to any crimes committed in the course of military operations, crimes of destruction or sexual offences said to have been perpetrated by HVO soldiers.

23. Part III contains Defence submissions concerning the existence of a JCE and addresses allegations that PUŠIĆ participated as a leader or in any other capacity in the JCE.

24. Parts IV to Part X address the generic evidence of PUŠIĆ's participation in the JCE examining the testimony of international community representatives (Part IV) followed by evidence of PUŠIĆ's involvement in prisoner exchanges (Part V), prisoner releases (Part VI), the operation of detention centres (Part VII), forced labour (Part VIII) and deportation and other associated issues (Part X).

25. Part IX addresses the evidence of BIŠKIĆ and analyses the evidence of events following BOBAN's 10 December 1993 decision to shut down all HVO detention centres.

26. Part XI addresses legal issues and criminal responsibility under Articles 7(1) and 7(3).

II. NO LINK BETWEEN CONDUCT OF PUŠIĆ AND SPECIFIED ALLEGATIONS

A. Introduction

27. In the context of this 26 count multi-accused "mega-trial" where evidence of crimes from at least 70 different crime bases has been adduced, the evidence called by the Prosecution primarily concerns his alleged role in relation to the treatment of HVO military and civilian detainees. As one of the so-called "leaders" of the HVO, PUŠIĆ is said to have exercised "effective control" and/or at the very least "substantial influence" over prisoner exchanges, deportations, forced labour and the conditions of detention for HVO prisoners.¹⁸

¹⁸ Indictment, para.14.

28. It is submitted that there is no link between the conduct of PUŠIĆ and any of the crimes committed in the course of military operations, crimes of destruction or sexual offences said to have been perpetrated by HVO soldiers.¹⁹ PUŠIĆ's potential criminal liability for these crimes rests on the application of the extended JCE doctrine, where these crimes are said to have occurred as natural and foreseeable consequences arising from the execution of the common plan. The purpose of this section of the Final Brief is to identify those allegations where there is no link between the conduct of PUŠIĆ and the crimes alleged. Allegations of commission through participation in an extended JCE generally are dealt with in Section III of this Brief.

29. PUŠIĆ's alleged involvement in any of the remaining counts on the Indictment is considered in Sections III to XI of this Brief.

B. Exclusion Clause

30. Evidently, the Prosecution uncovered no evidence to connect PUŠIĆ to the commission of crimes in the Gornji Vakuf municipality in January 1993 and Prozor municipality in October 1992²⁰ hence the decision to include a clause ("Exclusion Clause") excluding PUŠIĆ from any criminal liability for these crimes.

C. No Link Between Conduct of PUŠIĆ and Allegations Cited

1. No Link Between the Conduct of PUŠIĆ And Crimes Alleged in Counts 4, 5, 19 to 26 inclusive

31. In respect of Count 4, 5, 19 and counts 19 to 26 (inclusive) of the Indictment it is submitted that the Prosecution have not established any connection between PUŠIĆ and the perpetrators of these crimes or adduced any evidence that PUŠIĆ participated in, ordered, authorised, instigated, condoned or otherwise aided and abetted any of these crimes.

¹⁹ OTP 98bis, T. 27148-9, "that the role and the contribution of Mr. Pusic to this criminal -- joint criminal enterprise and the crimes that he did personally commit in furtherance of it *related not to destruction, military operations, and rapes committed by individual soldiers*. Pusic's role related to the prisoners and the civilians, using them for forced labour and the procedures and the practices that he employed to ultimately bring about their departure from HVO territory in the so-called Herceg-Bosna." [emphasis added]

²⁰ Indictment para. 230.

2. No Link Between the Conduct of PUŠIĆ And Crimes Alleged in Counts 1, 2, 3, 12, 13, 14, 15, 16 and 17

32. In respect of each of the allegations specified below it is submitted that the Prosecution have not established any connection between PUŠIĆ and the perpetrators of these crimes or adduced any evidence that PUŠIĆ participated in, ordered, authorised, instigated, condoned or otherwise aided and abetted any of these crimes.

i.Count 1: Persecutions.

33. Prozor,²¹ Gornji Vakuf,²² Sovići and Doljani,²³ Stolac,²⁴ Čapljina²⁵ and Vareš.²⁶

ii. Counts 2 and 3: Murder and Wilful Killing

34. Prozor, Gornji Vakuf,²⁷ Sovići and Dojani,²⁸ Stolac,²⁹ Čapljina³⁰ and Vareš.³¹

iii.Counts 12, 13 and 14: Inhumane Acts, Inhumane Treatment and Cruel Treatment (Conditions of Confinement)

35. Prozor³² and Sovići and Doljani.³³

iv.Counts 15 16 and 17: Inhumane Acts, Inhuman Treatment and Cruel Treatment

36. Prozor,³⁴ Stolac,³⁵ Čapljina³⁶ and Vareš.³⁷

²¹ Indictment paras. 44, 50, 51, 53, 56, 57, 58.

²² Indictment paras. 61, 62-63.

²³ Indictment paras. 73-6, 82-6.

²⁴ Indictment paras. 154-6, 158, 159, 160-66, 167, 170

²⁵ Indictment paras. 172-3, 176-181.

²⁶ Indictment para. 211.

²⁷ Indictment para. 66.

²⁸ Indictment paras. 77 and 80.

²⁹ Indictment paras. 161 and 169.

³⁰ Indictment paras. 176-7.

³¹ Indictment para. 211.

³² Indictment para. 57.

³³ Indictment paras. 71 and 79.

³⁴ Indictment paras. 51, 53, 56-8.

³⁵ Indictment paras. 161-7.

³⁶ Indictment paras. 176-7.

III JOINT CRIMINAL ENTERPRISE

A.Introduction

37. To establish the existence of a JCE, the Prosecution must prove the following:
- a. a plurality of persons,
 - b. the existence of a common purpose that amounts to or involves the commission of crime and the
 - c. participation of the Accused in the common purpose.³⁸
38. If the Prosecution cannot bring direct evidence to prove the legal requirements of the JCE, any inferences drawn must be the only reasonable inferences available on the evidence.³⁹
39. The common plan advanced by the Prosecution alleges that:

From on or before 18 November 1991 to about April 1994 and thereafter, various persons established and participated in a joint criminal enterprise to politically and militarily subjugate, permanently remove and ethnically cleanse Bosnian Muslims and other non-Croats who lived in areas on the territory of the Republic of Bosnia and Herzegovina which were claimed to be part of the Croatian Community (and later Republic) of Herceg-Bosna, and to join these areas as part of a Greater Croatia.⁴⁰

40. Based on the evidence presented at trial the Defence submits the Prosecution have failed to prove beyond reasonable doubt (i) the existence of the JCE, (ii) even if, *ex hypothesi*, a JCE has been established, that PUŠIĆ was a member of the JCE and/or (iii) that he participated in the common plan or (iv) was aware of its existence.

³⁷ Indictment paras. 207, 209 and 211.

³⁸ *Prosecutor v Brđanin*, Appeal Judgement, Case No: IT-99-36-A, 03 April 2007, (Brđanin AJ) paras 364 and 427.

³⁹ Delalić AJ, para.458.

⁴⁰ Indictment para. 15.

B. JCE Did Not Exist

41. The summary of the ambit of the JCE⁴¹ contained in the Indictment does not clearly explain how the Prosecution intend to prove the common plan arose and how they intend to prove that the accused became party to it or members of it. One inference that could be reasonably drawn from this is that the Prosecution wishes to be able to “mould its case in a substantial way during the trial, according to how its evidence actually turns out”⁴²

42. In particular, at no point in the Indictment do the Prosecution specify whether the common plan is express or whether it is to be inferred from the actions of the accused.

1. Direct Evidence of JCE

43. It is submitted that no direct or positive evidence has been adduced of an express agreement between the Accused and the other alleged members of the JCE to bring about the twin objectives of the JCE; namely the (i) ethnic cleansing of the parts of BiH claimed by the HVO of Muslims and non-Croats and (ii) the annexation of those areas to the Republic of Croatia to create a Greater Croatia.

2. Indirect Evidence of JCE

44. In the absence of any evidence of an express agreement to carry out the crimes on the Indictment the Prosecution can only invite the Chamber to infer the existence of such a plan from the circumstantial evidence.⁴³

45. The inference that the Prosecution asks the Chamber to draw is based on a highly subjective, selective and myopic interpretation of the totality of the evidence encompassing hundreds of crimes over a period of more than three years across a vast territorial expanse.

⁴¹ Indictment paras. 15 to 17.

⁴² This was the reasoning of the Trial Chamber in *Prosecutor v. Brđanin and Talić*, Case No: IT-99-36-PT, when considering the Prosecution’s refusal to provide full details of its case in the Decision on Form of Further Amended Indictment and Prosecution Application to Amend, dated 26 June 2001. paras. 8-11,

⁴³ *Prosecutor v. Tadić*, Appeal Judgement, Case No: IT-94-1-A, 15 July 1999 (Tadić AJ), para. 227. subsection (ii). Tribunal jurisprudence recognises that: “there is no necessity for this plan, design or purpose to have been previously arranged or formulated. A common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons *acts in unison* to put into effect a joint criminal enterprise.” [emphasis added]

The Prosecution claim that the *only* reasonable inference available to a trier of fact from this evidence is that the crimes enumerated on the Indictment were the product of a massive top down JCE⁴⁴ instigated by Franjo TUDMAN and with the backing and full support of the Republic of Croatia incorporating all members, known and unknown, of the HVO HZ HB apparatus. Working together, as a “seamless”⁴⁵ unit, all the actors in this drama shared the same goals and objectives at all times i.e. the expulsion of all Muslims and non-Croats.

46. There is a considerable body of historical evidence presented during the course of this trial that contradicts the Prosecution’s thesis. It is not the intention of the PUŠIĆ Defence or the purpose of this brief to prepare a detailed analysis of this material which would entail a lengthy historical treatise on the possible myriad interpretations of the reasons for the Croat – Muslim conflict.⁴⁶

47. In the ultimate analysis, the Prosecution’s case theory is simplistic and inappropriate because it views the HVO apparatus as an instrument in the hands of the leaders of the JCE that is manipulated to achieve the goals of the common plan. While this thesis may have some appeal to conspiracy theorists, the Prosecution face an impossible task in proving this to be true to the required legal standard. Given the preponderance of evidence to the contrary

⁴⁴ OTP 98bis, T. 27026.

⁴⁵ Ibid.

⁴⁶ The assumption underlying the Prosecution’s thesis is that the HVO HZ H-B was a criminal organisation dedicated to achieving the goals of the JCE from the moment it was conceived in late 1991 by Franjo Tudman. The Defence contend that this theory is not supported by the evidence and identify three important considerations in this respect: (A) The Prosecution’s thesis does not take account of the complex political, social and economic environment which existed in late 1991-2. The SFRY (“Socialist Federal Republic of Yugoslavia”) was in a process of dissolution raising difficult questions of international law as to how and whether any new successor states should be recognised. The Badinter Commission Opinions illustrated this problem (4D00540). (B) Furthermore, the Prosecution’s case theory conflicts with evidence demonstrating that Croat representatives and the HZHB fully engaged with the SRBiH’s application for state recognition in the period before 1992 and in the referendum ordered by the Badinter Commission. This referendum was a precondition for the international recognition of SRB-H in light of the opposition of Serbian members of the Presidency. (1D00394). This evidence suggests that the HVO HZ H-B came into existence not as a consequence of a criminal plan but as a defensive reaction to Serb military aggression. Support for the HVO HZ H-B crystallised when Croat representatives realised that (i) the Serbs were implacably opposed to the existence of the SRB-H and (ii) the institutions of the SRB-H were not able to effectively protect the population. (C) Finally, the laws of the Federation of B-H do not retrospectively characterise the HVO HZ H-B as an illegal and criminal enterprise as is implicit from *inter alia* (i) the Law on the Armed Forces of the Federation of B-H adopted in August 1996 which defines the composition of the armed forces of B-H to include former HVO military units (4D00826); (ii) the Law on the rights of defenders and members of their families adopted in June 2004, which includes and explicitly refers to HVO members “who participated in the defence of Bosnia and Herzegovina (the beginning of the aggression against the municipality of Ravno) between 18 September 1991 and 23 December 1996” (2D00628) and (iii) the Law on the recognition of official documents in the territory of the Federation of Bosnia and Herzegovina adopted in January 1998, which gives legal status to official documents issued by between 6 April 1992 and 14 October 1997 by the HZ H-B/HR H-B. (6D00014) *See*, also Defence Pre-trial Brief of Berislav Pusic Pursuant to Rule 65ter(F), dated 15 February 2006.

demonstrating that the actions of the HVO were motivated by necessity and short term expedience, the inferences the Prosecution seek to draw are too broad and sweeping to be proved beyond reasonable doubt in the absence of any evidence of an express agreement between the Accused.⁴⁷

48. JCE liability is a mode of liability that applies to specific crimes. However, the Prosecution's application of JCE liability transforms a legal theory of individual criminal liability into a vehicle for an exercise in historical revisionism. This cannot be permitted.

C. Membership and Contribution to the JCE

49. JCE theory applies to large-scale cases as well as small-scale cases.⁴⁸ The present case obviously falls into the former category as the Prosecution have defined the JCE in extraordinarily broad terms in all respects including the following: (i) territorial scope, (ii) time frame, (iii) variety of crimes, (iv) membership and (v) objectives.

50. The decision to frame the Indictment in this manner was calculated to maximise the Prosecution's chances of conviction as it follows that the broader the canvas upon which the JCE is alleged, the more likely it is that evidence can be adduced of an individual making some contribution to its ultimate purpose. However, it has been recognized that the overly broad application of JCE theory can lead to injustice by bringing low-level participants (who should not incur JCE liability) within the scope of the JCE.

51. In order to address this possibility the Appeals Chamber has held that JCE theory is not "an open-ended concept that permits convictions based on guilt by association."⁴⁹ Tribunal jurisprudence holds that to prove participation in a JCE the Prosecution must prove that the Accused did "far more than merely associate with criminal persons."⁵⁰

⁴⁷ In *Blaškić* the Appeals Chamber considered the Accused's individual criminal responsibility under Article 7(1) for ordering crimes in Lončari and Očehnići. The Appeals Chamber found that the assertions made by the Prosecution were "too broad and sweeping" to draw an adverse inference from in the absence of an express agreement between the accused as they were based on facts that were inconsistent with the case advanced by the Prosecution. *Prosecutor v. Blaškić*, Appeal Judgement, Case No: IT-95-14-A, 29 July 2004. (*Blaškić* AJ), paras.518-9, 521-3.

⁴⁸ *Brđanin* AJ, para. 428.

⁴⁹ *Ibid.*

⁵⁰ *Brđanin* AJ, para. 422.

52. Furthermore, the participation or contribution of an accused to the common criminal purpose should at least be a significant contribution to “the crimes for which the accused is to be found responsible.”⁵¹ as “not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability.”⁵²

53. The requirement for an Accused to make a significant contribution to the JCE is not satisfied in the case of PUŠIĆ. Nor has the allegation that PUŠIĆ participated in the JCE as a “leader”⁵³ been proved beyond reasonable doubt. An exhaustive consideration of the facts relied on by the Prosecution is set out below and in Sections IV to X of this Brief.

D. Improper Application of JCE Liability

1. Exclusion Clause

54. As one of the leaders of the JCE, the Prosecution allege that PUŠIĆ is criminally responsible for all crimes committed in furtherance of the common criminal plan or JCE. As stated by the Appeals Chamber in Brđjanin:

liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a nationwide government organised system of cruelty and injustice.⁵⁴

55. At para. 230. of the Indictment it is stipulated that PUŠIĆ is excluded for any liability for crimes committed in Prozor Municipality in October 1992 and in Gornji Vakuf Municipality in January 1993.⁵⁵ The Prosecution’s decision to exclude PUŠIĆ from liability for certain crimes designed to achieve the forced transfer and ethnic cleansing of Bosnian

⁵¹ Brđjanin AJ, para. 430.

⁵² Brđjanin AJ, para. 427.

⁵³ Indictment Para.17. OTP Opening T.888. “Each of the accused charged in this indictment plainly fits the standard of a senior responsible person. Each of them was a senior political or military actor in the Croatian Community of Herceg-Bosna and the HVO. The evidence will show that each of them played a key and essential role or roles in or concerning the commission of the crimes charged in the indictment. OTP Opening T.905. “These men were among the most powerful men in the whole Herceg-Bosna project. They had power, plenty of power.”

⁵⁴ Brđjanin AJ, para. 423.

⁵⁵ Indictment, para. 230.

Muslims cannot be reconciled with the notion that he took part in or was a leader of a JCE designed to achieve the same goal.

56. The presence of the exclusion clause in the Indictment therefore indicates that the Prosecution have (i) misunderstood the essential elements of JCE liability and (ii) consequently failed to correctly apply the law in deciding to charge PUŠIĆ pursuant to this mode of liability.

i. The Crimes Cited in the Exclusion Clause Are “Original” Crimes

57. The Prosecution have defined the goals or objectives of the JCE as the HVO’s intention to remove Bosnian Muslims and non-Croats from the Herceg-Bosna so as to facilitate the creation of a Croat dominated state. This deliberate policy of ethnic cleansing on the part of the HVO therefore lies at the heart of the Prosecution’s JCE case theory.

58. There can be no dispute that the crimes cited in the exclusion clause fall within the scope of the JCE. These crimes include allegations that Bosnian Muslims were expelled from their homes by HVO forces in Prozor in October 1992 so as to make Prozor town “ethnically pure.”⁵⁶ Muslims detained by HVO forced in Gornji Vakuf in January 1993 were told to leave and go to live in the Army of BiH (“ABiH”) controlled areas⁵⁷ and the HVO actions resulted in hundreds of Muslim civilians leaving the area.⁵⁸ Therefore, these crimes are properly regarded as “original”⁵⁹ rather than “extended” crimes as they are directed at the core purpose of the JCE i.e. the ethnic cleansing and displacement of the Bosnian Muslim population.

ii. Submissions - JCE I and II

59. JCE category I and category II liability requires that the Accused share a common criminal intent before they can be found criminally responsible for all crimes that fall within

⁵⁶ Indictment, para.49. Pre-trial Brief, para.30, “There are accounts of ethnic cleansing being carried out by Croat forces in the area of Prozor towards the end of 1992. Clashes between Muslim and Croat forces resulted in as many as 3,000 Muslims fleeing into the mountains in October 1992.”

⁵⁷ Indictment, para.69 and 71.

⁵⁸ OTP Pre-trial Brief, para.67.

⁵⁹ *Prosecutor v. Krajišnik*, Appeals Chamber Judgement, Case No: IT-00-39-A, 17 March 2009 (Krajišnik AJ), para. 16, 166 and 1770.

the common design. On this basis the Accused may be deemed liable for all the crimes arising from the execution and realisation of the common design.

60. In this context, whilst on the one hand maintaining that PUŠIĆ was party to and indeed a leader of the common plan, the Prosecution have decided, on the other hand, to exclude PUŠIĆ from liability for certain crimes on the Indictment that clearly fall within the scope of the common plan.

61. The two propositions are mutually exclusive. As an architect of the common plan PUŠIĆ must be liable for all crimes committed with the intention of furthering its objectives. If PUŠIĆ is not liable for certain “original” crimes at the heart of the JCE, the proposition that he is also an architect of or member of the common plan or common design is absurd and cannot be sustained. This dichotomy is a clear indication that JCE theory is an improper vehicle of liability by which to frame the alleged acts and conduct of PUŠIĆ.

iii. Submissions - JCE III

62. In *Kvočka* the Appeals Chamber held that in the course of a systemic form of extended JCE, with many participants performing distinct roles, an Accused would not be necessarily responsible for *all* the crimes committed beyond the common design. The Appeals Chamber justified this decision on the grounds that:

what is natural and foreseeable to one person participating in a whole JCE, might not be natural and foreseeable to another, depending on the information available to them.⁶⁰

63. Any attempt to advance the argument that the crimes that feature in the exclusion clause may not have appeared as natural and foreseeable consequences of participation in the JCE to PUŠIĆ must fail. The crimes that feature in the exclusion clause are original crimes compliant with the key objectives of the JCE, rather than offences that arise extemporaneously and are beyond the common design.

⁶⁰ *Kvočka* AJ, para.86

2. Second Variant or Systemic JCE

64. A review of the relevant case law reveals that the second category of JCE is normally applied in cases where concentration camps and comparable systems have been operated and crimes committed by military or administrative units.⁶¹ This category of JCE is an illustration of how JCE category 1 may be engaged in a particular case. In order to establish liability under this second category (“JCE category 2”) the Prosecution must prove the existence of a system of repression and the active participation of the Accused therein.⁶²

65. Allegations of detainee abuses at HVO detention camps do feature in the Indictment and are incorporated in the particulars of the common plan, but the common plan, as pleaded by the Prosecution, encompasses a wider range of crimes than the system of repression that is normally regarded as the foundation of the second variant of JCE.⁶³ The Defence have no choice but to address this allegation of JCE participation but nevertheless submit that the Prosecution have applied the second variant of JCE liability to a case that is founded on the existence of a common plan of far broader scope than that envisaged by the Tadić Appeals Chamber in their discussion of JCE category 2 liability.⁶⁴ The real question in this trial is how (and if) category 1 or category 3 JCE applies to these particular facts.

⁶¹ *Prosecutor v. Haradinaj et al.* Trial Chamber Judgement, Case No: IT-04-84-T, 03 April 2008. (Haradinaj TJ) para.136. Kvočka AJ, para. 82. His Honour Judge Hunt questioned whether the “Appeals Chamber in the Tadić Conviction Judgement demonstrated a sufficiently firm basis” for the recognition of systematic JCE liability based on their analysis of a number of cases where the organisations in charge of the concentration camps were declared to be criminal organisations by the Nuremberg Tribunal so that participation of the accused in the JCE could be inferred from their membership of that organisation. *Prosecutor v. Milutinović et al.*, Case No:IT-99-37-AR72, Judge Hunt’s dissenting opinion, Appeals Chamber Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, dated 21 May 2003. para. 30.

⁶² Kvočka AJ, para.190. There are conflicting authorities in the Tribunal’s case law as to whether in cases alleging a systematic JCE there are additional requirements for (i) the Accused’s participation in the operation of the camp to be significant or (ii) for the Accused to make substantial contribution to the overall operation of the camp if they can be deemed an “opportunistic visitor.” For the former proposition see *Prosecutor v. Kvočka et al.* Trial Judgement, Case No:IT-98-30/1-T, 02 November 2001 (Kvočka TJ), para. 309. and *Prosecutor v. Simić et al. Trial Chamber, Case No: IT-95-9-T, 17 October 2003, (Simić TJ)*, para. 28. In the latter case see Kvočka AJ, para. 599. and Krajišnik AJ, para.675-7.

⁶³ In *Kvočka* the JCE was limited to “persecute(ing) and subjugat(ing) non Serb detainees” within a particular camp, Kvočka TJ, para.320.

⁶⁴ Tadić, AJ, para.196.

E. Genesis of the JCE

66. Remarkably, PUŠIĆ's name is conspicuously absent from the Prosecution's narrative account of the genesis of the JCE. There is no reference to PUŠIĆ in any of the key milestones in the history of the JCE highlighted in the Indictment, Pre-trial brief, Prosecution Opening or Rule 98*bis* submissions. For example, no evidence has been adduced that PUŠIĆ was aware of, or aligned himself at any time with the objectives of the JCE as articulated by TUĐMAN in 17 December 1991⁶⁵ or at any other time.⁶⁶ Nor has any evidence been presented to link PUŠIĆ to any of critical meetings in the formation of the HZ H-B and HR H-B highlighted by the Prosecution or any of the HVO military operations throughout the entire Indictment period.⁶⁷

67. Consequently, there is a dearth of evidence connecting PUŠIĆ to the creation and development of the JCE. The little we do know, on the basis of the facts presented by the Prosecution, of PUŠIĆ's whereabouts in 1992 suggests that PUŠIĆ was a policeman of unspecified rank and responsibility in the Military Police in Mostar.⁶⁸

1. PUŠIĆ's Background

68. It follows that the Chamber has heard little if any evidence of PUŠIĆ's schooling, training, early employment history and family history. The Prosecution's failure to adduce any significant evidence of PUŠIĆ's background is compounded by the fact the Chamber has only been presented with the barest details of PUŠIĆ's history of service in the Military Police prior to the 5th July 1993.

69. The paucity of material proving PUŠIĆ's political views and affiliations in 1991-4 and the preceding period indicates there is scant evidence to support the Prosecution's theory that PUŠIĆ was a member or indeed, leader, of the JCE.

⁶⁵ Indictment, para.24.

⁶⁶ OTP Pre-trial Brief, para.16.21-16.53.

⁶⁷ *Ibid.*

⁶⁸ OTP Opening, T. 881-3, "A bit more background on Mr. Pusic: In 1992, he became an officer in the HVO military police in Mostar, held a command position in 1993."

F. Direct Evidence of JCE Membership

70. The Prosecution have failed to show that PUŠIĆ had any contact with many of the key “leaders” of the JCE, including Franjo TUDMAN, Gojko ŠUŠAK, Janko BOBETKO, Mate BOBAN, Dario KORDIĆ, Tihomir BLAŠKIĆ and Mladen NALETILIĆ. Furthermore, the two co-accused Slobodan PRALJAK and PETKOVIĆ who gave evidence during this trial made no meaningful reference to PUŠIĆ.

G. Leadership Participation

71. This section addresses Prosecution claims that PUŠIĆ was one of the “leaders” of the HVO by examining PUŠIĆ’s powers and functions in connection with:

- (i) PUŠIĆ’s position in the HVO chain of command,
- (ii) PUŠIĆ’s position vis-a-vis the HVO HZ H-B and-or HR H-B,
- (iii) PUŠIĆ’s appointment as an Officer in the Military Police from 1992-3,
- (iv) PUŠIĆ’s appointment as Head of the Service for Exchange from 5 July 1993 and
- (v) PUŠIĆ’s appointment as President of the 6 August 1993 Commission.

72. Contrary to the allegations made by the Prosecution, the evidence discloses that PUŠIĆ had no *de jure* or *de facto* authority over any limb of the HVO civilian or military apparatus as a result of any of these appointments. The evidence connected to PUŠIĆ’s alleged *de facto* authority in regard to prisoner releases, exchanges, forced labour, detention centres, deportations and other matters is examined addressed in Sections IV to X of the Brief.

73. One of the key characteristics of a leader is that he or she should possess some degree of unilateral decision making authority. However, many of the Prosecution’s key witnesses including BIŠKIĆ and [REDACTED] and WITNESS DV testified that they believed PUŠIĆ had no such powers and could only act pursuant to the instructions of his superiors. Their testimony wholly contradicts Prosecution claims that PUŠIĆ could exercise effective control or substantial influence over any limb of the HVO military or civilian structure. The evidence of WITNESS DZ, WITNESS DV and BIŠKIĆ is considered in Parts IV and IX respectively.

1. HVO Chain of Command

74. One of the many inconsistencies in the Prosecution's case against PUŠIĆ stems from their abject failure to properly define PUŠIĆ's position in the HVO chain of command. As the Prosecution claim that PUŠIĆ is one of the leaders of the HVO, it is extraordinary that the evidence presented by the Prosecution setting out the HVO military and civilian of command does not clearly set out his position therein. Nor does this material further enlighten the Chamber as to the precise nature of PUŠIĆ's relationship with his alleged superiors.

75. Consequently, it is unclear from the evidence produced by the Prosecution how PUŠIĆ features in the hierarchy of the Military Police or Defence Department in respect of any of his appointments and how the chain of command operates in connection with his alleged superiors. In addition, the Prosecution have failed to specify who PUŠIĆ's subordinates were, an omission which further undermines the contention that PUŠIĆ was one of the leaders of the HVO.

2. HVO HZ HB

76. Contrary to the assertion that PUŠIĆ was an "instrumental high-level official" within the HVO HZ-HB administration, the evidence shows that PUŠIĆ never held the post of minister, deputy minister, department head or assistant department head within the HVO HZ-HB-HR H-B as confirmed by the Prosecution's expert witness TOMLJANOVICH.⁶⁹

77. According to TOMLJANOVICH, PUŠIĆ only attended one meeting on the 21 September 1993 and there is no record of any contribution from PUŠIĆ in the minutes of that meeting.⁷⁰

3. Officer in the Military Police from 1992-3

i. Position Within the Military Police 1992-3

⁶⁹ Tomljanovich T.6402-3. P09545, p.123 and 127 and Appendices B and C. References to PUŠIĆ occupying a ministerial post are factually incorrect. *See* Part IV.

⁷⁰ Tomljanovich T.6403.

78. In 1992 the Prosecution state that PUŠIĆ “became an officer in the HVO Military Police in Mostar, and held a *command position* in the Military Police in 1993.”⁷¹ The Prosecution have failed to define the term “command position” or identify its relevance to the charges on the Indictment.⁷²

79. Notwithstanding this, the evidence does not establish with any clarity the precise role held by PUŠIĆ prior to 5 July 1993 and the nature and extent, if any, of his *de jure* powers. No internal HVO records from the Military Police have been adduced that show PUŠIĆ’s ranking or commission save for references to PUŠIĆ occupying the post of “control officer.” This job title certainly did not confer PUŠIĆ with the right to attend any meetings of the HVO Military Police Administration section heads at the relevant time⁷³ as no reference is made to him in any of the minutes of these meetings. Accordingly, the evidence does not establish beyond reasonable doubt that PUŠIĆ held a *de jure* command position within the Military Police.

ii. 1st April 1993- Removed from List of Military Police Employees

80. To further confuse matters the Prosecution have also adduced a document confirming that PUŠIĆ was removed from the list of Military Police employees on the 1st of April, 1993.⁷⁴

iii. HVO Military Police Participant in Exchanges – 22 April 1993

81. Leaving to one side any issues arising from this document, a short time later, on 22 April 1993 Valentin ĆORIĆ issued an order⁷⁵, pursuant to various earlier high level agreements between the HVO and ABiH⁷⁶ that purports to appoint PUŠIĆ to “participate” on behalf of the Military Police Administration in prisoner exchanges. It does not confer PUŠIĆ

⁷¹ Indictment, para.13.

⁷² Insofar as the Prosecution is referring to command responsibility, this is addressed in Part XI.

⁷³ Tomljanovich T. 6135-6. P03663.

⁷⁴ P01773. It should be noted that after removing Pusic from the list of Military Police employees, this document nominates Pusic to become “an officer of control at the administration of the military police or officer for cooperation and liaison with the opposite side in connection with exchange of prisoners.” Josip Praljak testified that he was not aware of this appointment. J.Praljak T.14916-7.

⁷⁵ P02020.

⁷⁶ [REDACTED]. See, also Part X.

with any decision making authority or any wider authority to act on behalf of the Military Police or HVO HZ H-B.

iv. Permanent liaison officer with UNPROFOR from 11 May 1993

82. On 11 May 1993 the Prosecution claim that PUŠIĆ was appointed as a *permanent* liaison officer to UNPROFOR⁷⁷ based on an “order” purportedly issued by STOJIĆ dated 11 May 1993. This is patently incorrect and flatly contradicted by the evidence of the Prosecution’s witness WITNESS BJ.

83. WITNESS BJ testified that the 11 May 1993 “permission” granted by STOJIĆ⁷⁸ did not appoint PUŠIĆ as a permanent liaison officer but put him in charge of contact with UNPROFOR in one particular instance.⁷⁹

84. WITNESS BJ understood STOJIĆ’s authorisation to be a written “permission” to facilitate the delivery of blood to the Mostar hospital. With the corrected translation from the CLSS, the document in question states:

*Mr Berislav PUŠIĆ shall liaise with UNPROFOR.*⁸⁰ [emphasis added]

85. WITNESS BJ also testified that Božo RAGUŽ was appointed as the liaison officer to UNPROFOR on 22 March 1993.⁸¹ Furthermore, a flowchart of the HVO organisational structure referred to by WITNESS BJ in his testimony indicates that Božo RAGUŽ held this post.⁸²

86. In addition, WITNESS BJ testified that there may have been other liaison officers in addition to Božo RAGUŽ, but all these candidates ranked as Colonels.⁸³ There is no allegation made that PUŠIĆ ever held this rank.

⁷⁷ Indictment para.13, “Bruno STOJIĆ appointed Berislav PUŠIĆ as an HVO liaison officer to UNPROFOR.”

⁷⁸ P02291.

⁷⁹ Witness BJ T.5667-8.

⁸⁰ P02291.

⁸¹ 6D00033, [REDACTED] See, also [REDACTED], 4D0550, 4D00741,

⁸² Witness BJ T.5664-5.

⁸³ [REDACTED]. Witness BJ 5665-7.

4. Head of the Service for Exchange

87. The powers attributed to the Service for Exchange by the Prosecution, and therefore to PUŠIĆ, have been greatly exaggerated. The remit of the Service for Exchange was strictly limited by the terms of its mandate. The Service for Exchange was created pursuant to a decision of 5 July 1993 and as part of the civilian administration, it had no *de jure* authority over any limb of the military apparatus or any military personnel.

88. In any event, the mandate of the Service for Exchange did not extend PUŠIĆ with the authority to govern prisoner exchanges, prisoner detention and prisoner relocation.⁸⁴ Indeed, the mandate did not confer PUŠIĆ with any powers over any other HVO body. Instead, by mandate, the remit of the Service for Exchange was limited to the provision of technical and administrative support to other HVO bodies involved in the prisoner exchange process.

i. Mandate of Service for Exchange

89. The mandate of the Service for Exchange as defined in Article 2 of the Decision to establish the Service for the Exchange of Prisoners and Other Persons (“the mandate”) states that:

the Service shall perform professional and administrative-technical work for the needs of the HVO HZ H-B, and particularly for the needs of the Commission for the Exchange of Prisoners and Other Persons, to:

1. Set up and update the database (PC data) on prisoners and other persons in connection with exchange:
2. Establish relations with /word illegible/ sides in connection with the exchange of prisoners and other persons:
3. /?Prepare/ proposals /illegible/ conditions and method of exchange:
4. Cooperate with international organisations /?and/ bodies of the HZ H-B in connection with the tasks that fall within the ambit of exchange:
5. Perform other tasks as well.⁸⁵

⁸⁴ P03191.

⁸⁵ Ibid.

90. The Prosecution expert TOMLJANOVICH confirmed that the Service for Exchange's remit was strictly defined at the time it was founded. He stated that the organisation was “charged with providing the technical support for the HVO HZH-B, in particular the Commission for the Exchange of Prisoners and Other persons”⁸⁶ and “it was mandated to *set up databases, establish relations with the opposing side in exchanges and co-operate with international bodies.*”⁸⁷ [emphasis added]

91. Contrary to allegations made by the Prosecution, it is clear that the mandate of the Service for Exchange does not confer PUŠIĆ with any decision making authority over the transfer and deportation of detainees, their conditions of detention and other areas related to their confinement such as forced labour.

92. Subsequent to the founding of the Service for Exchange, the Prosecution alleges that a proposal for its re-organisation⁸⁸ was drafted. The Prosecution also allege that PUŠIĆ was the author of this document. The Defence question the authenticity and provenance of this document as it is not hand-signed by PUŠIĆ, it is not dated and there is no protocol reference, and no stamp of the Croatian archives.⁸⁹

93. The Prosecution allege that this document illustrates the remit of the Service for Exchange and PUŠIĆ’s effective control the prisoner exchange process.⁹⁰ However, the Prosecution’s expert witness TOMLJANOVICH⁹¹ confirmed that this document was a *proposal* for the organisation of the Service for Exchange. No evidence has been adduced of any response to this proposal. This document simply confirms that the Service for Exchange played some role in the prisoner exchange process. Whether PUŠIĆ exercised decision making powers in this process is a matter for the Chamber to decide in light of all the evidence.

⁸⁶ P09545, p.61-62, para 162.

⁸⁷ Ibid.

⁸⁸ P03052. Tomljanovich T.6102-4.

⁸⁹ Tomljanovich T.6103. The Prosecution Expert Tomljanovich claims the proposal was written “... most likely right after the foundation of the office” but did not clarify the basis for this assertion, and the Defence submits this constitutes nothing more than speculation on his part.

⁹⁰ OTP 98 bis, T.27119-49.

⁹¹ Tomljanovich T.6102-5.

ii. Status of the Service for Exchange

94. The mandate of the Service for Exchange did not make it accountable to any limb of the HVO military or defence structure. Nor did it fall under the authority of the HVO HZH-B or any HVO department. For example, the mandate did not require the Head of the Service for Exchange to report to the HZ H-B. This is consistent with the role envisaged for it at inception and clearly stated in the mandate i.e. as a body providing information and technical support to other HVO agencies.

5. The 6 August 1993 Commission

95. In theory the 6 August 1993 Commission was given sweeping powers over HVO detention centres and detainees. In reality, the 6 August 1993 Commission existed on paper only. This is the only reasonable inference that can be drawn from the evidence concerning the 6 August 1993 Commission presented at trial.

i. Testimony of JOSIP PRALJAK

96. JOSIP PRALJAK was extensively questioned on his knowledge and participation in the 6 August Commission by all parties. He confirmed in no uncertain terms that the Commission never functioned or operated.

97. JOSIP PRALJAK testified that PUŠIĆ appeared to know nothing of the Commission on the first and only occasion they spoke about it:

...Q. But let me go back. When you received this order, you said that you talked to Mr. Pusic over the telephone about the work of that commission and that Mr. Pusic said, "We'll do the work."

A. Yes.

Q. After that, you had no further contact with Mr. Pusic in respect to this commission, did you, nor do you mention this in your diary at all? I find no entry to that effect.

A. *No, we never had a meeting.*⁹² [emphasis added]

98. JOSIP PRALJAK said that he had no further contact with PUŠIĆ regarding the Commission⁹³ and never wrote to him about its work.⁹⁴ JOSIP PRALJAK also said he never spoke to or met with any of the other members of the Commission in an official capacity.⁹⁵

99. When shown a document referring to the Commission dated 12 August 1993 (see *supra*), JOSIP PRALJAK confirmed that he had never seen this before.⁹⁶ JOSIP PRALJAK also clarified that he never attended any meetings of the Commission and had no knowledge that it had ever met.⁹⁷ On 24 November 1993, over three months after the Commission was set up, JOSIP PRALJAK made a note in his diary referring to the fact that the Commission had not met. Notably, the Prosecution failed to question challenge JOSIP PRALJAK on this aspect of his testimony.

100. In the autumn and winter of 1993 JOSIP PRALJAK and BOŽIĆ notified a number of HVO officials of a variety of complaints regarding the operation of the Heliodrom. These reports detailed matters that, in theory, would have been directly relevant to the remit of the 6 August 1993 Commission.⁹⁸ These reports were not circulated to PUŠIĆ or any of the other

⁹² J.Praljak T.14974.

⁹³ Ibid.

⁹⁴ J.Praljak T.14968-9. The witness testified, "Q. You also confirmed that in that period, on the 5th of August, in fact, you received the order a couple of days later, *you never wrote to the person who was supposed to be the chairman of that commission, Mr. Pusic. A. Yes.*" [emphasis added]

⁹⁵ J.Praljak T.14969-9. The witness testified, "Q. I would like to start off from the end so that we put an end to this story about the commission that you have been questioned by the Prosecution, the Stojic Defence, and partly, the ĆORIĆ Defence. You know which document I'm talking about. It's that order from August 1993.P 03395 You keep stressing, Mr. Praljak, that you were the fifth member of the commission. I know Mr. Pusic was supposed to be the chairman, and you were supposed to be the fifth member. What about the other members? Were they all equal or were you somehow ranked one, two, three, four? A. *Apart from Mr. Pusic, I didn't know any of those officials, and I thought of myself as fifth in order...*Q. When I say "commission," I think of it as a collective body that's supposed to meet and discuss something. You said a moment ago that except for Mr. Pusic, who was supposed to be the chairman, you didn't know anybody else, Jokić, Barbaric, or Musa.A. I saw Zeljko only once during the war, and I actually properly met him after the war.Q. What I'm trying to say is this: If you don't know those people, you don't mention in your diary that you contacted the other members of the commission in any way from the day you received the order.A. *I didn't have contact with anybody.*" [emphasis added]

⁹⁶ J.Praljak T.14781-2. The witness testified, "Can you simply tell us, did you in fact ever attend a meeting of this commission on the 12th of August, 1993? A. *Never.* Q. And until -- until you saw this document in the last several days, were you ever aware that the commission had issued such a document or taken such an action around that time? A. *I did not know.*" [emphasis added]

⁹⁷ J.Praljak T.14968-9 The witness testified, "Q. You said to Mr. Scott, to the Stojic Defence, and to the Judges that *you don't know about a single meeting of that commission, and you were never present if they met: is that correct?* A. *Yes.*"

⁹⁸ See, P05008. Pušić and the 6 August 1993 Commission is also not mentioned various general reports on detention centres including P04921, P05222, P05225 and P06729. In addition Biškić made no reference to

members of the Commission. Nor was the Commission mentioned in any of this correspondence.

101. The fact that JOSIP PRALJAK and BOŽIĆ failed to address many of their complaints either to PUŠIĆ directly or to the 6 August 1993 Commission is inconsistent with JOSIP PRALJAK's claims that PUŠIĆ had responsibility for the operation of HVO detention centre⁹⁹ and is further and compelling evidence that the 6 August 1993 Commission never took effect.

ii. Lack of Documentary Evidence Relating to the Commission

102. The existence or operation of the 6 August 1993 Commission was never discussed in any meetings or mentioned in HVO HZ H-B or HR H-B correspondence. Even at the 11 August 1993 cabinet meeting, there was no mention of PUŠIĆ or the Commission set up just five days earlier.¹⁰⁰ Nor was any reference made to the Commission in any other cabinet meetings including the minutes of the HVO HZHB working meeting dated 18 August 1993¹⁰¹ and 6 September 1993.¹⁰²

103. Furthermore, the 6 August 1993 Commission was never mentioned in the minutes of any meetings of the Heads of the Defence Department including the minutes of the Defence Department collegium on the 2 September 1993.¹⁰³

104. Even though he was notionally Head of the purported Commission, there is no evidence that PUŠIĆ attended any of these meetings after 6 August 1993.

105. The Prosecution Expert TOMLJANOVIC testified that he found no documents related to the Commission in the Croatian State Archives.¹⁰⁴ TOMLJANOVICH also noted that he would be very surprised if a Commission of this nature had been established and did not

the 6 August 1993 Commission and created another set of Commissions after the 13 December 1993 meetings in Posušje, as detailed in Part X. *See*, also Part VIII, Section B(5) and Part IX.

⁹⁹ *See*, Part V.

¹⁰⁰ P04111.Tomljanovich T.6407-8, P09545 Tomljanovich report para 266. and Appendix E.

¹⁰¹ P04841.

¹⁰² P04275.

¹⁰³ P04756.

¹⁰⁴ Tomljanovich T.6410.

produce any paperwork.¹⁰⁵ The paucity of documentation produced by the 6 August 1993 Commission is startling given the “sweeping powers”¹⁰⁶ allegedly attributed to it and is further evidence that the Commission was defunct, and existed in name only. Notwithstanding TOMLJANOVICH's comments, it is submitted that the Prosecution have clearly failed to discharge their evidential burden to establish the existence of the 6 August Commission beyond reasonable doubt.

iii. PUŠIĆ's note of 12 August 1993

106. The authenticity of this document¹⁰⁷ is disputed by the Defence. In any event, no evidence has been led of any action taken by any HVO official in response to this document. Accordingly no evidential weight should be attached to this item. Taken at its highest, the document is proof that a proposal was made for the reform of the system for registering and classifying detainees at the Heliodrom. It does not establish, as the Prosecution allege, that PUŠIĆ had the power to establish and organise “processes for the classification and registration of detainees and also the release of detainees.”¹⁰⁸ The evidence also suggests that PUŠIĆ did not become involved in these procedures which were the responsibility of other HVO agencies.¹⁰⁹

iv. Testimony of PETKOVIĆ

107. PETKOVIĆ's evidence does not establish that the Commission was an effective operating body. Whilst PETKOVIĆ acknowledged that he was aware of the formation of the Commission¹¹⁰ he had no knowledge of the work that it did. Furthermore PETKOVIĆ

¹⁰⁵ Tomljanovich T.6406-7, T.6409-11.

¹⁰⁶ Ibid. Tomljanovich described the 6 August 1993 as having theoretically “sweeping powers” to take charge of all detention units and prisons in which PoWs and military detainees were held.

¹⁰⁷ P04141.

¹⁰⁸ Indictment, para.17.6(g).

¹⁰⁹ See, Part VI.

¹¹⁰ Petković T. 50771. The witness testified, “JUDGE TRECHSEL: “Just one question with regard to this last document. Mr. Petkovic, do you know whether this commission ever actually accomplished the task assigned to it by the minister of defence or the chief of the Defence Department? THE WITNESS: [Interpretation] I know that the commission started working. *As for the period during which it worked, I don't know.* I know that Mr. Praljak, as a member of the commission in November, wrote a certain report in his capacity as the fifth member of the commission. *It wasn't my duty to follow the work of the commission.*” [emphasis added]

conceded that he had very little contact with PUŠIĆ during the Indictment period and made no reference to PUŠIĆ's work as Head of the Service for Exchange.¹¹¹

v. Other Prosecution Witnesses

108. WITNESS DZ, BIŠKIĆ, WITNESS DV and other International community representatives failed to make any reference to the Commission, further reinforcing submissions that the Commission took no practical effect after it was notionally created.

H. Liability for Omissions As a Member of the JCE

109. An Accused can be held criminally liable for an omission to act as a member of the JCE, as long as the failure to act amounts to a significant contribution to the JCE. Liability for omission extends to all three variants of JCE.¹¹² In Galić, the Appeals Chamber stated that an omission may lead to criminal responsibility under article 7(1) where there is a legal duty to act.¹¹³ In the instant case, the Defence submit that PUŠIĆ did not have a legal duty arising from any of the offices he held and in the absence of any *de jure* or *de facto* powers. Moreover, PUŠIĆ's contribution by way of omission can not be said to have been significant given his complete lack of authority over the HVO forces alleged to have been responsible for the crimes in question.

IV. INTERNATIONAL WITNESSES

A. Introduction

110. This section of the Brief reviews the evidence of the international community witnesses called by the Prosecution who form an important component of the case against PUŠIĆ. Viewed globally, the evidence of these witnesses in relation to PUŠIĆ's role and functions and influence is often vague, inconsistent and contradictory. On some occasions, when confronted with evidence that contradicted their accounts, a number of international witnesses

¹¹¹ Petković T.49799.

¹¹² Milutinović TJ para.103.

¹¹³ Galić AJ para.175.

confessed that their testimony concerning PUŠIĆ may have been incorrect or was entirely based on hearsay. The Prosecution have conveniently chosen to gloss over these deficiencies in the presentation of their case. However, the Defence submit that sections of the testimony of some international community witnesses such as (but not limited to) [REDACTED] is unreliable and should not form the basis of any finding of fact.

111. For example, it is impossible to reconcile the evidence of WITNESS DZ and WITNESS DV in connection with PUŠIĆ's powers and responsibilities with that of witnesses BB, BC and BD. WITNESS DZ and WITNESS DV maintained that, in their opinion, PUŠIĆ had no decision making autonomy whereas BB, BC and BD implied the opposite.

112. It is clear that some international witnesses, principally [REDACTED] and WITNESS DV [REDACTED]. Where the testimony of these witnesses is in conflict, it is submitted that the evidence of those [REDACTED] should be preferred.

B. Senior International Community Representatives Failed to Refer to PUŠIĆ

113. In light of the Prosecution's grandiose description of PUŠIĆ as a "senior political or military actor in the Croatian Community of Herceg-Bosna and the HVO" with a "key and essential role or roles in or concerning the commission of the crimes charged in the indictment"¹¹⁴ it would not be unreasonable to expect the Prosecution to produce extensive evidence of contact between PUŠIĆ and many of the senior international community representatives in Bosnia during the Indictment period. However, Peter GALBRAITH, Bo PELLNAS, Herbert OKUN, Cedric THORBERRY, and [REDACTED]¹¹⁵ all failed to mention PUŠIĆ during their testimony. Their failure to refer to PUŠIĆ is a clear indication of his lack of influence.

C. Testimony of WITNESS DZ

¹¹⁴ OTP Opening T.906.

¹¹⁵ In addition Witness DW could not recall if he had ever had any dealings with Pušić, "Q. And I wonder if you had any dealings with that person, Mr. Pusic? A. I do not recall. I don't think so. But we may have met at some point." Witness DW T.23141.

1. PUŠIĆ Compiled Prisoner Exchange Lists

114. [REDACTED].¹¹⁶

115. [REDACTED].¹¹⁷

116. [REDACTED]¹¹⁸ [REDACTED].¹¹⁹

117. [REDACTED].¹²⁰

2. PUŠIĆ Had No Decision Making Powers

118. As highlighted *infra*, in response to [REDACTED], WITNESS DZ [REDACTED] confirmed that, in his view, PUŠIĆ had no independent decision making authority.¹²¹ WITNESS DZ reiterated this opinion on several occasions during his testimony.¹²² For example, [REDACTED].¹²³

... [REDACTED]¹²⁴

3. Detention Centres And Forced Labour

119. [REDACTED].

4. PUŠIĆ Was Prone to Exaggerate The Extent Of His Authority.

120. [REDACTED]:

[REDACTED]¹²⁵

¹¹⁶ [REDACTED]

¹¹⁷ [REDACTED]

¹¹⁸ [REDACTED]

¹¹⁹ [REDACTED]

¹²⁰ [REDACTED]

¹²¹ *See*, Part I.

¹²² [REDACTED]

¹²³ [REDACTED]

¹²⁴ [REDACTED]

121. [REDACTED]. [REDACTED].¹²⁶

122. [REDACTED]. [REDACTED]. [REDACTED]:

[REDACTED].¹²⁷

123. [REDACTED].

5. PUŠIĆ's Role In Medical Evacuations and Humanitarian Aid

124. [REDACTED].¹²⁸ The evidence concerning HVO policy and practice in this area is considered in Part X, Sections D-E of this Brief.

125. [REDACTED]¹²⁹ [REDACTED].¹³⁰ [REDACTED]. During the course of the trial the Chamber noted that [REDACTED]:

[REDACTED].¹³¹

126. [REDACTED]. This omission is significant given that the [REDACTED].¹³²

127. PUŠIĆ's lack of influence over HVO policy in connection with medical evacuations and the provision of humanitarian aid is discussed in more detail in Part X of this Final Brief and in relation to [REDACTED] allegations, *supra*.

6. WITNESS DZ's [REDACTED]

128. [REDACTED] conclusions [REDACTED]¹³³ are wholly inconsistent [REDACTED]. Accordingly, it is suggested that little weight should be attached to [REDACTED].

¹²⁵ [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ [REDACTED].

¹²⁸ [REDACTED].

¹²⁹ [REDACTED].

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

¹³² [REDACTED] *See*, also Part X.

D. WITNESS DV AND TESTIMONY FROM [REDACTED]

1. WITNESS DV

129. WITNESS DV stated that he contacted PUŠIĆ whenever they were involved [REDACTED] as he believed PUŠIĆ was Head of the HVO Office for the Exchange of prisoners. WITNESS DV represented [REDACTED] and on occasion [REDACTED] in prisoner exchange negotiations with PUŠIĆ, often as an observer. WITNESS DV shared WITNESS [REDACTED] opinion of PUŠIĆ:

[REDACTED].¹³⁴

130. WITNESS DV was invited to comment [REDACTED]:

[REDACTED]¹³⁵

131. It is therefore apparent from WITNESS DV's testimony that he shared [REDACTED] that PUŠIĆ could not act without consulting his superiors and was incapable of executing any order based solely on his own authority.

2. Medical Evacuations

132. WITNESS DV did not name PUŠIĆ amongst the HVO negotiators he dealt with in his discussions concerning [REDACTED]. WITNESS DV testified that he normally [REDACTED]. He said that BAGARIĆ was in charge of the hospital in Mostar [REDACTED] and described BAGARIĆ as representing the "medical part" of the HVO.

133. WITNESS DV also stated that, in his experience the HVO never obstructed any medical evacuations from East Mostar¹³⁶ and HVO representatives were always available to discuss the evacuation of the wounded.¹³⁷

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

134. Like [REDACTED], WITNESS DV does not refer to PUŠIĆ having any responsibility for the operation of detention facilities or for ordering forced labour assignments.

3. [REDACTED]

135. [REDACTED] attended by PUŠIĆ confirms that he had no decision making authority at these negotiations. ABiH and HVO representatives discussed the situation in Mostar and PUŠIĆ is part of a HVO delegation with Brigadier MARIĆ (Chief of Staff of the Eastern Herzegovina Operative Zone) and Brigadier PULJIĆ (Deputy Command of the Eastern Herzegovina Operative Zone). The attendees, including PUŠIĆ, are not endowed with the power to take any decisions as the [REDACTED]:

[REDACTED].¹³⁸

E. Testimony of ECMM Witnesses

1. KLAUS NISSEN

136. NISSEN rarely had any contact with PUŠIĆ. NISSEN explained that when dealing with exchange issues PUŠIĆ was not normally his first point of contact within the HVO.¹³⁹ Furthermore, NISSEN conceded that the European Community Monitoring Mission (“ECMM”) were under strict instructions not to become involved in any dealings related to detention centres and deferred to the International Committee of the Red Cross (“ICRC”) in this area.¹⁴⁰

137. NISSEN’s recollection of PUŠIĆ’s role and function was, as he accepts, uncertain and muddled. When asked about his knowledge of PUŠIĆ in late May 1993, NISSEN admitted that he knew who PUŠIĆ was but could not be sure what his area of responsibility was¹⁴¹ and

¹³⁶ Witness DV T.23060-1.

¹³⁷ Witness DV T.23062-3.

¹³⁸ [REDACTED].

¹³⁹ Nissen T.20494.

¹⁴⁰ Nissen T.20508-9.

¹⁴¹ Nissen T.20475. The witness testified, “Q. Did you take stage -- did you take stage know who Mr. Pusic was already? A. Yes. At that point I did know, although the distribution of the actual task was something I

the same applied to his state of knowledge of PUŠIĆ's precise remit in 1994.¹⁴²

138. NISSEN also accepted that he was clearly mistaken in his testimony about PUŠIĆ's role in the events of the 25-6 May 1993.¹⁴³ NISSEN gave evidence of a civilian transfer he observed where PUŠIĆ was present on 26 May 1993. The Prosecution mistakenly claimed this event may have been connected with [REDACTED] and [REDACTED] of evictions of Muslims from Mostar and the south of BiH.¹⁴⁴ In fact the civilian transfer observed by NISSEN had been agreed at the meeting in Mostar on the 25 May 1993. The agreement provided for the release of civilians to be carried out the following day, 26 May 1993 at 1500 hours.

139. NISSEN conceded that he stumbled upon the transfer of civilians by chance¹⁴⁵ having just returned from annual leave on that date. He complained that his deputy MILVERTON had failed to inform him of the proposed transfer of civilians. In his testimony-in-chief he described seeing five buses with Muslim families, women, children, and elderly people and indicated that PUŠIĆ was in charge of their passage.¹⁴⁶ He felt that PUŠIĆ's reaction to his presence made it clear to him that he was unwelcome at the scene.

140. NISSEN's account of PUŠIĆ's role in the 26 May 1993 transfer of civilians was entirely inaccurate. During cross – examination NISSEN was presented with [REDACTED] which described the event as a “smooth” pre-arranged transfer of civilians between the HVO and ABiH. NISSEN responded by stating that the account he gave during his testimony in chief may have been different if he had previously have cognisant of this information.¹⁴⁷ It follows

wasn't sure about. Sometimes it was about displaced persons. Sometimes it was prisoners of war, sometimes refugees. *So it wasn't quite clear how sharply delineated this was* [emphasis added]

¹⁴² Nissen T.20475. When asked to comment on a reference made by [REDACTED] he replied, “I was under the impression, and this was confirmed in 1994 when I heard the name again, *that the area of responsibility of Mr. Pusic was not clearly defined from -- I myself didn't quite understand the definition. So he was responsible for displaced persons, then refugees. That's what I heard as well, I seem to remember. And in 1994 he said he was also responsible for prisoners of war. Hence it was never quite clear to me.*” [emphasis added]

¹⁴³ Nissen T.20655-9.

¹⁴⁴ Nissen T.20432.

¹⁴⁵ Nissen T.20656.

¹⁴⁶ Nissen T.20429-20431. The witness testified, “[s]ome HVO soldiers were guarding these buses, and the man who was -- who look after these soldiers, who was in command, was Mr. Pusic.” According to Nissen, Pusic told them to move away from the area because it was none of their business. When asked whether Pusic was in command, Nissen testified: “Yes, that could be recognised, the way in which he behaved, like a leader of the few HVO soldiers who obeyed him. He was obviously the leader, the one who said what they should do.”

¹⁴⁷ Nissen T.20658. [REDACTED]

that PUŠIĆ's alleged conduct in the civilian transfer on the 26 May 1993 can not in any way be construed as obstructive or confrontational.

2. VAN DER GRINTEN

141. PUŠIĆ was a peripheral figure for VAN DER GRINTEN and their paths crossed on few occasions. VAN DER GRINTEN's tour of duty in the region began in May 1993 and ended in August 1993. However, having claimed that he met PUŠIĆ from "time to time"¹⁴⁸ he only testified of three specific meetings with PUŠIĆ, on the 27 May 1993, 11 May 1993 and 16 May 1993.

142. It is revealing that VAN DER GRINTEN made no mention in his testimony of PUŠIĆ's role in dealing with prisoner exchanges and no reference to his appointment as Head of the Service for Exchange on 5 July 1993.

143. VAN DER GRINTEN's account of a meeting with PUŠIĆ on 16 June 1993 does not establish that PUŠIĆ had any decision making authority. VAN DER GRINTEN meets with PUŠIĆ and ĆORIĆ and later encounters STOJIĆ.¹⁴⁹ His notes of the meeting are brief, and his recall of the matters discussed vague. For example, in cross-examination VAN DER GRINTEN stated that he could not remember if the meeting took place in any particular official's office. All he could recall was that it took place in the same building as his meeting with STOJIĆ and he also could not remember if ĆORIĆ spoke English or used an interpreter.¹⁵⁰ He also could not specifically recall if the meeting was arranged in advance but claimed they normally made appointments for such meetings.¹⁵¹

144. [REDACTED] does not contain a contemporaneous account of any of the conversations VAN DER GRINTEN had. In summary, VAN DER GRINTEN claims he raised the same issues concerning the expulsions of Muslims from West Mostar in both meetings with all three men and was given the same answers i.e. this had been carried out by criminal elements without the approval of the HVO leadership. He does not attribute any specific comments to PUŠIĆ. Given these circumstances and the fact that PUŠIĆ is the lowest ranking of the three

¹⁴⁸ Van Der Grinten T.21028.

¹⁴⁹ Van Der Grinten T.21047 and T.21129-30. [REDACTED].

¹⁵⁰ Van Der Grinten T.21129.

¹⁵¹ Van Der Grinten T.21128.

HVO officials present, it is submitted that this evidence does not shed any further light on PUŠIĆ's position and powers at the time.

145. [REDACTED] VAN DER GRINTEN, as Chairman of the Joint Commission, noted the true reasons for the failure of the HVO and ABiH to execute the terms of the various agreements between the two sides following the events of May 1993. VAN DER GRINTEN concluded that after four weeks of negotiation the ECMM and United Nations Military Observers ("UNMO") agree that implementation of the 12 May 1993 agreement was not possible because of preconditions set by both sides and the general situation in B-H – and that "higher political pressure" is needed to reach a solution.¹⁵² PUŠIĆ is not on the list of attendees for the Joint Commission.

146. During cross-examination VAN DER GRINTEN was asked to comment on a plaque presented to PUŠIĆ by Jesus Amatrain, VAN DER GRINTEN's colleague, in October 1993.¹⁵³ The plaque was addressed to PUŠIĆ with "the deepest gratitude for all the help he gave us in the completion of our tasks." VAN DER GRINTEN confirmed that Amatrain had a positive relationship with PUŠIĆ and that "we had as team also a good relationship with Mr. Pusic."¹⁵⁴

3. PUŠIĆ's Job Title

147. Like NISSEN, VAN DER GRINTEN was also clearly mistaken and confused about the position held by PUŠIĆ. VAN DER GRINTEN ascribed conflicting job titles to PUŠIĆ. [REDACTED] VAN DER GRINTEN claims that PUŠIĆ held the post of Deputy Military Commander¹⁵⁵ but said that PUŠIĆ was introduced to him as Deputy Head of the Military Police during their encounter on 16 May 1993. However, VAN DER GRINTEN could not confirm who introduced PUŠIĆ with that title.¹⁵⁶

¹⁵² [REDACTED].

¹⁵³ 6D00606.

¹⁵⁴ Van Der Grinten T.21151.

¹⁵⁵ [REDACTED].

¹⁵⁶ Van Der Grinten T.21127.

148. [REDACTED].¹⁵⁷ The Prosecution does not allege that PUŠIĆ held any of the posts mentioned by VAN DER GRINTEN or NISSEN or MILVERTON. The evidence demonstrates that LAVRIĆ was appointed Deputy Head of the Military Police on the 28 June 1993.¹⁵⁸ PUŠIĆ's name was not mentioned in a proposal nominating officers to this position written by ĆORIĆ on the 26 June 1993.¹⁵⁹

4. PHILIP WATKINS

i. WATKINS is Mistaken About PUŠIĆ's Dealings With Displaced Persons

149. WATKINS was mistaken about the nature of PUŠIĆ's office. In an account of his first meeting with PUŠIĆ, WATKINS states that he believed that PUŠIĆ held the office of Minister for Prisoner of War exchanges. The Prosecution do not allege that PUŠIĆ ever held the office of Minister.¹⁶⁰ WATKINS also claimed that PUŠIĆ was Head of *all* dealings with refugees and displaced persons.¹⁶¹ He also said that he dealt with PUŠIĆ on issues of humanitarian aid¹⁶² until RAGUŽ¹⁶³ took over responsibility for this and implied he had some influence over population movements.

150. WATKINS appears to have confused PUŠIĆ with RAGUŽ. WATKINS modified his testimony during cross-examination, stating that the office he dealt with regarding the movement of persons was headed by RAGUŽ. WATKINS also confessed that he was unsure of the precise delineation of authority between PUŠIĆ and RAGUŽ. He thought that RAGUŽ was responsible for all other movement of people while PUŠIĆ dealt primarily with prisoner of war exchanges.

151. WATKINS produces no evidence to corroborate his claims that PUŠIĆ had authority over humanitarian aid and population movements and his conclusions are not supported by the evidence. Although he said PUŠIĆ appeared knowledgeable about the movement of displaced persons in Central Bosnia, WATKINS admitted that he did not know if PUŠIĆ had

¹⁵⁷ [REDACTED].

¹⁵⁸ P02985.

¹⁵⁹ P02693

¹⁶⁰ Watkins T.18188-9.

¹⁶¹ Watkins T.18762.

¹⁶² Watkins T.18770.

¹⁶³ All references to Raguž are to Martin Raguž. Božo Raguž is referred by his full name in this brief.

any authority in this area.¹⁶⁴ WATKINS wrongly assumes that knowledge infers power from his discussions with PUŠIĆ on the topic of population movements.

152. POGARČIĆ tells WATKINS of plans by BOBAN and his advisors to create a number of government departments in the new government structure.¹⁶⁵ WATKINS initially states that PUŠIĆ was to become Head of the Office for Displaced Persons and Refugees (“ODPR”), but later he concedes that he cannot be sure whether he was told this¹⁶⁶ or whether he was informed that PUŠIĆ was merely one of a number of candidates for this post. RAGUŽ was another candidate.¹⁶⁷ RAGUŽ had been Deputy Head of the ODPR and was appointed as Head on 1 December 1993.¹⁶⁸ WATKINS produces no evidence to corroborate his account which should not therefore form the basis of any finding of fact by the Chamber.

ii. WATKINS Testimony on PUŠIĆ's Role in Prisoner Releases

153. Philip WATKINS testimony in connection with BOBAN's 10 December 1993 order underlies how progress with regard to prisoner exchanges and releases required intervention from the highest levels of the HVO:

What Mate Boban's statement was, was a very clear statement and a good move in terms of sending the right signals to the international community that regardless of cooperation and linkages, he was going to release prisoners from -- from the detention centres. So those releases, the international community still hoped, would encourage the armija forces to reciprocate, and when they didn't, of course, that gave the Bosnian Croats even more kudos in terms of we're doing it, they're not.¹⁶⁹

154. On several occasions WATKINS commented on PUŠIĆ's positive relations with the ECMM and his constructive role in trying to bring about the release of all detainees from HVO custody. For example, when asked to comment on a message from PUŠIĆ requesting

¹⁶⁴ Watkins T.19035-6.

¹⁶⁵ [REDACTED]

¹⁶⁶ Watkins T.18790

¹⁶⁷ Watkins T.19032

¹⁶⁸ P07005

¹⁶⁹ Watkins T.18883-4.

ECMM assistance in the transfer of POWs from Jablanica to Gabela to effect their release on the 16 December 1993, WATKINS testified that:

*Mr. Pusic is keen to push on and to see more prisoners of war released, and he's looking to UNPROFOR rather than ICRC, and we've offered ECMM presence, I notice, in the comment below. So I think what is happening here is Mr. Pusic is delivering on and looking to continue the -- the prisoner of war exchange and one announced by Mate Boban. I think it's an important signal being sent by Mate Boban about cooperation with the international community.*¹⁷⁰ [emphasis added]

155. [REDACTED] confirm that PUŠIĆ was simply acting as a conduit for information to the international community on forthcoming prisoner releases. [REDACTED].¹⁷¹ WATKINS suggested that this was:

a further indication of the continuing, that time, implementation of Mate Boban's statement, and it also gives us a forward indication of the planning behind this because it's giving us a future date and a number.

Q. Mr. Pusic, was he able to provide statistics beforehand of people who would be released? A. Well, he has on this occasion, yes.¹⁷²

...Yes, checking the date 20th of December so we're very much into, in fact towards the end, I think, of the release of prisoners by HVO unilateral as declared by Mate Boban and *as delivered in terms of activity by Mr. Pusic.*¹⁷³ [emphasis added]

156. PUŠIĆ continued in this role, furnishing information to the international community about prisoner releases into 1994 as demonstrated by [REDACTED].¹⁷⁴

5. [REDACTED]

¹⁷⁰ Watkins T.18824-5. *See*, also part IX.

¹⁷¹ [REDACTED].

¹⁷² Watkins T:18826-7.

¹⁷³ Watkins T:18866.

¹⁷⁴ [REDACTED]

157. PUŠIĆ's lack of decision making authority is highlighted in a number of reports from [REDACTED] attending prisoner exchange negotiations. In reference to a meeting [REDACTED] that PUŠIĆ advised those present he did not have the authority to sign the agreement reached on behalf of the HVO for access to the Heliodrom.¹⁷⁵

6. GRANT FINLAYSON

158. FINLAYSON admitted that he had a "few dealings"¹⁷⁶ with PUŠIĆ but at no point in his testimony did he mention his appointment as Head of the Service for Exchange.¹⁷⁷ FINLAYSON also conceded that he could not clearly recall PUŠIĆ's precise role and function.¹⁷⁸ The evidence reflects that FINLAYSON had little contact with PUŠIĆ and believed his main area of responsibility lay in dealing with body exchanges.¹⁷⁹

159. During cross-examination FINLAYSON was shown a HVO notice appointing Božo RAGUŽ as liaison officer to United Nations Protection force ("UNPROFOR") dated 22 March 1993, two days prior to GERRITSEN'S arrival in the area. FINLAYSON accepted that he was mistaken in believing that PUŠIĆ held this post at that time.¹⁸⁰

160. It bears highlighting that, although FINLAYSON had frequent recourse to the diary he kept contemporaneously when testifying, he accepted that the diary contained no references to PUŠIĆ. This omission is significant considering that FINLAYSON made no mention of PUŠIĆ in diary entries that dealt with events that he believed to be within PUŠIĆ's authority, such as the exchange of corpses on Serb territory on the 20 May 1993.

F. Testimony of Witnesses [REDACTED]

¹⁷⁵ [REDACTED]. See, Part VII.

¹⁷⁶ Finlayson T.18278.

¹⁷⁷ Finlayson T.18058.

¹⁷⁸ Finlayson T.18057. The witness testified: "Q. You mention a person named Berko Pusic. Who is Mr. Berko Pusic? What was his function? A. He had a range -- at one stage in the early pieces he was assigned as the liaison person, from memory. This was the case very much in my earlier days in BH South. I think his role as -- as liaison remained but with a presence in East Mostar a lot of that was taken over by Mr. Raguz as the direct contact. He -- I'm struggling to -- to get the correct term that we understood him to -- to have, but it was I think to do with misplaced people. I -- yeah. I -- probably it will come to me."

¹⁷⁹ Finlayson T.18058. The witness testified, "He dealt a lot with the body exchanges. With -- at that point most of the body exchanges were happening between -- well, at the early stages most of the body exchanges were past ones with the Serbs, but then, of course, later on as the Mostar situation developed it -- we also had both body exchanges and prisoner exchanges with -- between the east and west."

¹⁸⁰ Finlayson T.18279

1. Testimony of WITNESSES BB and BC [REDACTED]

161. On the basis of the testimony of witnesses BB and BC, the Prosecution claim that PUŠIĆ's office was responsible for issuing the travel documents that were required in June 1993 to enable Muslims to leave the country.¹⁸¹ However, neither WITNESS BB nor WITNESS BC produced any documentary evidence to support this contention. Nor has the Prosecution adduced any transit papers that can be attributed to PUŠIĆ.

162. In addition, no corroborative evidence has been presented to show that PUŠIĆ had the *de jure* authority to issue such permissions. As a matter of common sense, in regards to movement within HVO held territory only a HVO official with the ability to exert control over the HVO military personnel stationed at checkpoints could issue this type of authorisation. The evidence shows that this type of documentation was normally issued by other HVO bodies.

163. The evidence of WITNESS BB and WITNESS BC on this issue is not corroborated by the testimony of [REDACTED] including BEESE,¹⁸² NISSEN and WATKINS of the ECMM¹⁸³ and other evidence that indicates that the HVO military apparatus was in charge of managing checkpoints. Furthermore, neither RAGUŽ, REBIĆ nor KRAJŠEK, who were far more intimately involved dealings with displaced persons than Witnesses BB and BC, mention PUŠIĆ's role in this aspect.

164. [REDACTED].¹⁸⁴ [REDACTED].¹⁸⁵ [REDACTED].¹⁸⁶

165. Contrary to the allegations made by WITNESS BB, the evidence reflects that the ODP and NIKIĆ played an instrumental role in the production of transit visas, not PUŠIĆ, as discussed in PART X *supra*.

¹⁸¹ OTP 98bis T.27119-49 and [REDACTED].

¹⁸² Beese T.3210. Beese gave evidence that if the ECMM wished to move to an area, they would have to gain a pass from other HVO bodies.

¹⁸³ See, Part VI.

¹⁸⁴ [REDACTED].

¹⁸⁵ [REDACTED].

¹⁸⁶ [REDACTED].

166. Even taken at its highest, [REDACTED]:

a. [REDACTED].

b. [REDACTED]. Therefore, both WITNESS BB and WITNESS BC may have attributed more influence to PUŠIĆ than was actually the case.

c. [REDACTED].

d. [REDACTED].¹⁸⁷

e. [REDACTED]:

[REDACTED]¹⁸⁸

167. This episode is further evidence of PUŠIĆ's general lack of authority within the HVO.

168. [REDACTED].¹⁸⁹ [REDACTED]¹⁹⁰ [REDACTED].¹⁹¹ [REDACTED].

169. [REDACTED]. This evidence is not directly relevant to the charges on the Indictment. However, it should be noted that the evidence does demonstrate [REDACTED] as discussed in Part V of this Brief.

2. Testimony of Witness BB [REDACTED]

170. [REDACTED]¹⁹² [REDACTED] by PUŠIĆ to GRANIĆ.¹⁹³ It is submitted that [REDACTED] should not form the basis of any finding of fact as.

¹⁸⁷ [REDACTED].

¹⁸⁸ [REDACTED].

¹⁸⁹ [REDACTED].

¹⁹⁰ [REDACTED].

¹⁹¹ [REDACTED].

¹⁹² P05884.

¹⁹³ P05877. [REDACTED].

171. [REDACTED].¹⁹⁴ It is submitted that no weight should be attached to WITNESS BB's testimony for the reasons advanced below:

- a. [REDACTED].
- b. [REDACTED]. [REDACTED]:

[REDACTED].¹⁹⁵

- c. [REDACTED].
- d. [REDACTED].
- e. [REDACTED].

3. Conclusion

172. [REDACTED].

V. PRISONER EXCHANGE

A. Introduction

173. Parts V and VI of the Brief examine the Prosecution's allegations of PUŠIĆ's powers over the release and exchange of both civilian detainees and prisoners of war. In Part V the Defence examines PUŠIĆ's role in prisoner exchange negotiations during the Indictment period. In Part VI the evidence concerning allegations that PUŠIĆ had the powers to order the release of detainees from HVO custody are considered.

B. Prisoner Exchange Negotiations In Context

¹⁹⁴ [REDACTED]. P05884.

¹⁹⁵ [REDACTED].

1. PUŠIĆ Was Primarily Involved in Local, Not National Level Prisoner Exchange And Release Initiatives

174. An important distinction has to be drawn between prisoner exchange and release negotiations taking place at a local level and negotiations at a higher level. This distinction was highlighted by the ECMM representative WATKINS who explained that:

there was at a -- at a *high level attempts by the ICRC to broker large-scale exchanges of prisoners of war*, but there were always *local exchanges* going on, some of which were sanctioned by ICRC, some of them overseen by ECMM, some of them not involving us at all, just discussions between the warring elements... [T]he fact that [exchange] was happening is -- was not an unusual event.¹⁹⁶ [emphasis added]

175. By failing to draw this distinction the Prosecution have mischaracterised PUŠIĆ's role in the prisoner release and exchange process. The "large scale exchanges" and "high-level attempts" mentioned by WATKINS are references to negotiations between senior representatives of the HVO, ABiH and international community. PUŠIĆ did not have any significant involvement in these talks.

176. Rather, the evidence reflects that PUŠIĆ attended some meetings at a local level where representatives of the ABiH and the international community were present and prisoner exchanges, and other related matters were discussed. In 1994 PUŠIĆ was involved in talks related to the exchange and/or release of those detainees remaining in custody following implementation of BOBAN's 10 December 1993 order. The significance of PUŠIĆ's conduct at these meetings has been greatly exaggerated by the Prosecution as the evidence shows that PUŠIĆ did not have any unilateral powers to make binding agreements on behalf of the HVO.

177. Furthermore, MAŠOVIĆ's testimony contradicts Prosecution claims that PUŠIĆ obstructed and sabotaged efforts directed at achieving prisoner exchanges in the lower level negotiations he was involved in. When referring to these low level local exchanges in his

¹⁹⁶ Watkins T.18822.

testimony, MAŠOVIĆ, as Head of State Commission for Exchanges for the ABiH, said that he had no cause to meet PUŠIĆ before 29 December 1993 and to become involved in these negotiations until the Autumn of 1993 because contact between the parties was generally proceeding smoothly:

Q. So you received reports from time to time, but there were no problems, no major problems with respect to the exchanges between the HVO and these local commissions?

A. Well, that's right. But I'd like to say that they were exchanges of *a lesser intensity and -- involving fewer people. So lower-level exchanges.* Mostly they were a number of wounded from both sides, members of the two sides' armies, or the exchange of bodies of people who had been killed in combat, and also in part POW exchanges.¹⁹⁷ [emphasis added]

178. MAŠOVIĆ referred to another series of low level negotiations in Mostar that PUŠIĆ had been involved in before they met in December 1993. MAŠOVIĆ noted that these negotiations were partly successful:

Q. I wanted to go back because you may have misunderstood my last question so perhaps I could just direct your attention to the third paragraph of the document that's in front of you there in which Mr. Pusic is writing that the republican commission of the ABiH have not been fully informed. He's saying that there is another meeting that is scheduled in shortly after beginning of January and so I just wanted to ask you briefly again, this indicates that there had been some negotiations between Mr. Pusic and others prior to your involvement. And I just wanted to ask you if that is -- corresponds to what you said earlier about negotiations in the Mostar area that had been taking place at a lower level with Mr. Pusic?

A. Precisely so. The third paragraph is correct. *The negotiations took place at the local level, between the east and west part of Mostar. They were partly successful.* They resulted in some exchanges of prisoners, some handovers of the

¹⁹⁷ Mašović T.25117.

fallen soldiers or civilians, up to the moment of the blockade which was the reason for my going to Međugorje.¹⁹⁸ [emphasis added]

2. Many Different Agencies and Individuals Represented the HVO

In Prisoner Exchange Negotiations

179. As a general observation the evidence suggests that no single individual or HVO agency represented the HVO in connection with prisoner exchange and/or release negotiations. In fact, a variety of actors purported to represent the HVO in this process. According to the Prosecution Expert TOMLJANOVICH “the multitude of groups engaging in exchanges presented problems.”¹⁹⁹

180. As noted below, a number of organisations represented the HVO in prisoner exchange negotiations in the period prior to and after 5th July 1993, as noted below. Furthermore, it should be noted that PUŠIĆ was not the sole representative but part of a delegation of HVO representatives at the prisoner exchange meetings he attended, even after his appointment to the Service for Exchange on 5 July 1993.

181. [REDACTED].²⁰⁰

182. The evidence suggests that HVO participation in prisoner exchanges in 1993 was not effectively coordinated and there was no direction from the centre. This situation was neatly depicted in a report from the Deputy Commander for Security of the 1st HVO Domagoj Brigade Žara PAVLOVIĆ²⁰¹ dated 25 August 1993. The order concerns the release from prison of Dr. Muhamed Duraković and notes that:

An inadequately developed system about the ways and the procedure, priorities, and question as to whether to release from prison at all has not been dealt with or defined either by the operative zone of South-eastern Herzegovina or the

¹⁹⁸ Mašović T.25018-9.

¹⁹⁹ P09545 p.61, para 160.

²⁰⁰ [REDACTED].

²⁰¹ All refereneses to Pavlović are to Božo Pavlović. Žara Pavlović is referred by his full name in this brief.

ministry. Because of the lack of such instructions, we were forced to make our own decisions at the level of local HVO presidencies and brigade commands.²⁰²

183. The problems that [REDACTED], TOMLJANOVICH and Žara PAVLOVIĆ allude to suggest that it is over-simplistic to claim that any one HVO official, let alone PUŠIĆ, had the ability to control or obstruct the prisoner release or exchange negotiation process in a meaningful way. It is also over-simplistic to claim, as the Prosecution imply, that PUŠIĆ or the HVO took a fixed position against all for all exchanges whilst the ABiH was in favour of their unconditional release at all times.

184. Similar considerations applied to the ABiH. MAŠOVIĆ stated that for some time after March 1993, ABiH participation in prisoner releases and exchanges was not centrally controlled. The ABiH were represented in local level negotiations by a number of exchange commissions that were attached to the Corps of the ABiH and existed independently of the State Commission. They reported to the State Commission about their work.²⁰³ The evidence demonstrates that PUŠIĆ's counterpart at most of the "local" or "low" level meetings he attended with the ABiH was not MAŠOVIĆ, but junior regional representatives such as Alija ALIKADIĆ.²⁰⁴

3. ABiH and HVO Policies In Context

i. Overview

185. The Prosecution is simply wrong when it claims that PUŠIĆ was one of the chief architects and proponents of HVO prisoner exchange policy that advocated "one for one" or conditional prisoner exchanges that contravened international humanitarian law. As noted above, many of the Prosecution's most important witnesses in respect of PUŠIĆ testified that (i) PUŠIĆ participated mainly in low level local exchanges, (ii) PUŠIĆ could not make any decisions and (iii) PUŠIĆ appeared to be acting on instructions from higher up. The evidence of [REDACTED], BIŠKIĆ and WITNESS DV to this effect therefore entirely refutes the

²⁰² P04496.

²⁰³ Mašović T.25012.

²⁰⁴ Watkins T.19037. The witness testified that Džihović and Alikadić also participated in negotiations concerning the exchange of prisoners of war.

Prosecution case assertion that PUŠIĆ exercised control or could substantially influence HVO prisoner exchange policy and practice.

ii. “One for One” HVO Exchange Policy

186. It is inaccurate to describe the position of the HVO as inflexibly advocating “one for one” exchanges in violation of international humanitarian law, whilst in contrast the ABiH insisted on “all for all” releases. In reality, neither party had a monolithic stance towards prisoner exchanges and releases throughout 1993-4. Both sides fluid negotiating positions changed over time. For example, on a number of occasions in 1993-4 the HVO unilaterally released large numbers of detainees and there were many other instances of all for all exchanges.

187. Moreover, at certain times the ABiH advocated one for one or conditional releases and obstructed all for all releases. It is necessary to briefly examine the practices employed by the ABiH not in an attempt to justify any conduct on grounds of *tu quoque* but in order for the Chamber to have a proper understanding of the background and context in which prisoner exchange negotiations took place.²⁰⁵

²⁰⁵ The Defence adopts the submissions advanced by Counsel for Stojić, “First of all, in response to Mr. Scott’s point about *tu quoque*, I think he misses an important distinction. The -- the Prosecution, I think, would like the Trial Chamber to look at this case in a vacuum or in a -- in a very black and white way, to say that we can focus only on acts which were committed, or apparently committed, by members of the HVO and to ignore the context in which the conflict was taking place, and that’s really [...] a very naive way to look at the case, because this is a very complex situation. The Prosecution’s allegations are not confined to a series of individual crimes committed by one side or the other: in this case, the Bosnian Croats. The Prosecution’s allegation is that there was a wide-ranging joint criminal enterprise which, if I understand it, involves nothing less than effectively the annexation by the Bosnian Croats or the attempted annexation of a significant portion of the territory of Bosnia and Herzegovina with the ultimate aim of ethnically cleansing that territory and perhaps even causing it to be joined in some manner with Republic of Croatia in due course. That’s -- that’s the scope of this case. And against that, we must be free to invite the Trial Chamber to look at what the HVO was facing, what the government, as it were, of Herceg-Bosna was facing, what the military situation was, what the political situation was. And just to focus on one or two examples, that -- [...] when you’re looking at an allegation of reverse ethnic cleansing or an alleged plan to -- to -- for the Bosnian Croats to remove their own population from A to B in pursuance of redesigning the ethnicity of Bosnia and Herzegovina, and the Trial Chamber is then suddenly confronted with the fact of military activity on the part of the ABiH which completely explains the movement of population, but incidentally involves the commission of what may be crimes by individual members of the *armija*. That’s something that we have to look at. It’s not to do with *tu quoque*. Nobody’s saying, at least STOJIĆ Defence is certainly not saying that if one side did it, it’s all right for the other side to do it. What we’re saying is that you have to look at this situation holistically. You have to put yourself in the position of those accused and say, what was the situation they were facing here? Because this case is not about individual perpetrators. We’re not -- we’re not doing the Tuta and Stela case here. We’re doing -- none of these men went out and personally committed crimes. The issue here is one of political and military leaders, and you have to understand the whole situation.” Gerritsen T.19300-2.

C. Unreliable Witnesses: ĆUPINA and MAŠOVIĆ

1. Credibility

188. The Prosecution has placed great reliance on the evidence of ĆUPINA and MAŠOVIĆ. Before considering their evidence in detail the Defence wishes to make two general observations concerning their credibility. Firstly, it is submitted that the nature of their connection to one of the parties in the conflict is plainly relevant in assessing their independence. Both men claimed to act on behalf of the ABiH in prisoner exchange negotiations with PUŠIĆ and both gave evidence that was often vague, unspecific and generalised. Coming from an adversary to the conflict, evidence of this nature is prone to bias and should be approached with great caution.²⁰⁶

189. Furthermore, the Chamber is asked to balance carefully the allegations made by ĆUPINA and MAŠOVIĆ of PUŠIĆ's powers against the evidence of some of the [REDACTED] and WITNESS DV. If any weight is attached to the conclusions of [REDACTED] and WITNESS DV, the adverse inferences the Prosecution ask the Chamber draw from the testimony of ĆUPINA and MAŠOVIĆ concerning PUŠIĆ's authority and influence cannot be the only reasonable conclusions available from the evidence.

2. Testimony of ĆUPINA

190. ĆUPINA's evidence is incapable of belief. The Chamber has expressed serious reservations about his credibility in acknowledging that ĆUPINA gave incoherent, contradictory and confused statements regarding "the existence of BH Army prisons and the documents bearing the HVO insignia, which he had allegedly signed"²⁰⁷ and the sending of documents to the Constitutional Court. In conclusion, that Chamber noted that these matters may "seriously affect the reliability of his testimony."²⁰⁸

²⁰⁶ Delalić AJ para.630.

²⁰⁷ *Prosecutor v. Prlic et al.* Decision on Slobodan Praljak's Request for Investigation of Witness for False Testimony, dated 03 November 2006,

²⁰⁸ *Ibid.*

191. In addition, it is clear that ČUPINA misled the Chamber when testifying, in particular in his account of his purported appointment to the position of Chief of Military Police,²⁰⁹ President of the ABiH Commission for Exchange and of PUŠIĆ's role, responsibilities and functions. ČUPINA's demeanour²¹⁰ was also inconsistent with that of a reliable and truthful witness.²¹¹ Accordingly, no weight should be attached to his testimony.²¹²

i. President of BIH Commission for Exchange

192. The evidence suggests that ČUPINA misled the Chamber about (i) his appointment to the post of President of the Commission for Exchange of Prisoners of the 4th Corps: (ii) the circumstances connected to the formation of the Commission and (iii) that he forged a document in his own hand that purported to confirm this appointment.

193. ČUPINA explained that he learnt of his appointment to the post of President on 28 May 1993 from PAŠALIĆ but during cross-examination conceded that he never received confirmation in writing of this.²¹³ When asked to comment on a document described as an "order" setting up the Commission, dated 28 May 1993, ČUPINA agreed that he had drafted this document and signed it in his own hand.²¹⁴

²⁰⁹ Čupina T.4942. Čupina gave conflicting testimony and was unable to clarify whether he held the post of co-ordinator, operative worker or Commander of the Military Police from July 1992. Despite his claim to be a Commander of the Military Police he said he did not have any subordinates (Čupina T.4795.) and no office and no address to work from. He also described his post as "practically fictitious" in that he had no power to give orders to any military personnel (Čupina T.4960).

²¹⁰ The assessment of a the weight and credibility of a witness testimony depends on multiple factors including demeanour, plausibility and clarity, consistency with other evidence, prior examples of false testimony, motivation to lie, and the process of cross-examination. *See, Prosecutor v. Nchamihigo*, Appeals Judgement, Case No: ICTR-2001-63-A, 18 March 2010 (Nchamihigo AJ), para.47, *Prosecutor v. Nahimana et al.* Appeals Judgement, Case No: ICTR-99-52-A, 28 November 2007. (Nahimana AJ), para.194. Also *Prosecutor v. Kalimanzira*, Appeals Judgement, Case No: ICTR-05-88-A, 20 October 2010. (Kalimanzira AJ) His Honour Judge Pocar Dissenting Opinion para.4. *See, also* Part IX, Section (B)(1).

²¹¹ It is accepted that submissions regarding a witnesses demeanour rely on a subjective interpretation of his/her conduct when testifying. However, throughout his evidence, and particularly during cross-examination, Čupina refused to look directly at Counsel and appeared uncomfortable and strangely subdued when confronted with evidence directly contradicting his account.

²¹² Čupina T.4967-71. During cross examination it was suggested to Čupina that shortly after the publication of his book, various organisations representing former combatants and wartime activists in Mostar paid for an advertisement in Dneni Avaz newspaper on 7 July 2006. The advertisements characterised the contents of Cupina's book as a series of "inappropriate statements, half-truths and untruths" written with the intent of securing Cupina "a place in the history of Mostar, which he does not deserve" for his own aggrandisement and to bolster his political career. *See, also* 2D00072.

²¹³ Čupina T.4979.

²¹⁴ 6D00006, Čupina T.4980-1.

194. Concerning the Commission, ČUPINA claimed at one point that he and PAŠALIĆ had both been asked to set it up,²¹⁵ then conceded that PAŠALIĆ had appointed him as “the person in charge.”²¹⁶ When pressed in cross-examination ČUPINA further conceded that in reality PAŠALIĆ held the post of President and that he stood in as a replacement when PAŠALIĆ was unavailable.²¹⁷

ii. Evidence Concerning PUŠIĆ

195. ČUPINA’s at times grandiose account of PUŠIĆ’s powers and functions is equally implausible given his evident dishonesty and tendency towards self-promotion and exaggeration. ČUPINA’s account also presupposes that he had an in-depth knowledge of the workings of the HVO. This is inherent unlikely given ČUPINA’s position.

196. Interestingly, MAŠOVIĆ made no reference to ČUPINA in his testimony, notwithstanding that MAŠOVIĆ held the post of Head of the ABiH State Exchange Commission during the currency of ČUPINA’s supposed tenure.

197. It also bears highlighting that ČUPINA made no reference to PUŠIĆ in his report²¹⁸ on the work of the ABiH Commission produced at the end of June. In his 750 page book on the conflict,²¹⁹ ČUPINA mentions PUŠIĆ incidentally, in a section where the Indictment against the accused is transcribed. Moreover, and perhaps most revealingly, when ČUPINA’s brother was arrested, ČUPINA approached other HVO officials and not PUŠIĆ to secure his release.²²⁰

198. Leaving this aside, ČUPINA’s testimony does not establish that PUŠIĆ had any decision making powers. Referring to prisoner exchange negotiations that he claimed to have attended, ČUPINA commented that PUŠIĆ was not one of the HVO negotiators “sitting down at the negotiating table” and that “everybody came to these meetings, everybody who was anybody in Mostar, who occupied HVO posts or HZ HB posts.”²²¹ At best all ČUPINA could

²¹⁵ Čupina T.4980.

²¹⁶ Čupina T.4981.

²¹⁷ Čupina T.4978

²¹⁸ Čupina T.4992.

²¹⁹ Čupina T.4993-4.

²²⁰ Čupina T.4994.

²²¹ Čupina T.4854.

say was that PUŠIĆ was “on the premises when the negotiations were taking place.”²²² Moreover, at the prisoner exchange meetings he attended with PAŠALIĆ, ČUPINA said that MARIĆ and PULJIĆ, not PUŠIĆ usually represented the HVO.

199. Although he claimed to have attended many meetings during his period in office ČUPINA’s report of his activities²²³ only makes reference to one exchange meeting held on 25 May 1993. ČUPINA claimed that PUŠIĆ attended this event. However ČUPINA could not explain whether his own attendance was in any official capacity given that the purported ‘order’ setting up the ABiH Commission did not come into effect until three days later. ČUPINA also could not explain why PUŠIĆ did not sign the agreement made on the 25 May 1993:

JUDGE ANTONETTI: [Interpretation] Generally speaking, a chief, a head, signs documents. So how would you explain the fact that this document hasn't been signed by him?

THE WITNESS: [Interpretation] *Well -- well, I really don't know*²²⁴ [emphasis added]

3. Testimony of MAŠOVIĆ

200. MAŠOVIĆ’s testimony in relation to (i) ABiH exchange policy, (ii) any alleged violations of international humanitarian law by the ABiH and (iii) the role and powers of PUŠIĆ cannot be safely relied upon by the Chamber for the reasons advanced below.

i. The ABiH Advocated “One For One” Exchanges

201. MAŠOVIĆ claimed that the BiH Government did not follow a “one for one” exchange or conditional release policy at any time, despite pressure from the HVO to do so. Accordingly, the Sarajevo government was:

²²² Čupina T.4991.

²²³ P02882

²²⁴ Čupina T.4837.

faced with a *moral dilemma*, whether to agree to release from prison a HVO member, for example, who had been captured, and in reciprocity to have a Bosniak released by the other side. Some international organisations such as the high commission for refugees, exerted direct pressure on the government in Sarajevo to undertake this. [emphasis added]²²⁵

202. As head of the ABiH State Commission for exchanges, it was plainly in MAŠOVIĆ's interests to claim that the ABiH always complied with international humanitarian law by, for instance, advocating unconditional releases. To state otherwise would amount to self-incrimination.

203. The evidence presented at trial does not support MAŠOVIĆ's contention. MAŠOVIĆ was confronted in cross-examination with an order from the office of IZETBEGOVIĆ dated 25 September 1993.²²⁶ The order relayed IZETBEGOVIĆ's views that the same number of HVO and ABiH prisoners should be released on a "one for one" basis. MAŠOVIĆ challenged the authenticity of the document because it was not signed by IZETBEGOVIĆ but the proof of the true provenance of this order lies in the fact that it was signed by IZETBEGOVIĆ's Chef de Cabinet and, most tellingly, communicated by Paket link.

204. MAŠOVIĆ also could not explain why Deputy Commander ŠIBER, from the Supreme Command Staff of the ABiH, circulated an order dated 25 August 1993 stating that a one for one exchange of 150 persons should be carried out.²²⁷

205. MAŠOVIĆ maintained that the exchanges referred to in the orders from IZETBEGOVIĆ and ŠIBER were carried out on an entirely different basis than that proposed.²²⁸ Nevertheless, these documents demonstrate that at various times the ABiH leadership insisted on "one for one" exchanges in the course of their negotiations with the HVO.

206. MAŠOVIĆ was questioned by the Chamber as to whether the ABiH held some prisoners in reserve to be released at some convenient point after the 24 March 1994

²²⁵ Mašović T.25034.

²²⁶ 6D00580.

²²⁷ 6D00762.

²²⁸ Mašović T.25132.

negotiations in Gornji Vakuf. MAŠOVIĆ did not answer the question directly, but effectively confirmed this was the case, stating that there were other prisoners designated for what he described as the “second stage of release”.²²⁹

ii. Testimony of International Witnesses

207. The testimony of WITNESS DZ and the evidence from [REDACTED] contradicts MAŠOVIĆ’s claims regarding ABiH exchange policy.

208. For example, [REDACTED] states that the:

[REDACTED].²³⁰

209. In the case of Dario RAIĆ, a HVO soldier kept captive at the 4th elementary school in Mostar, the evidence suggests he was used as a bargaining chip by the ABiH as he was not released until March 19 1994.²³¹ RAIĆ was not the only example of this practice.²³²

210. [REDACTED] notes that in the course of talks with ABiH representatives in Bugojno, the attitude of the ABiH “[REDACTED].²³³

211. [REDACTED] also notes that the ABiH had failed to respond to BOBAN’s decision to close all HVO detention facilities.²³⁴

212. [REDACTED].²³⁵ [REDACTED]:

[REDACTED].²³⁶

iii. MAŠOVIĆ’s Testimony on The Exchange, Detention and Evacuation of Croat Civilians Was Evasive

²²⁹ Mašović T.25047.

²³⁰ [REDACTED]

²³¹ 4D01056.

²³² See, for example, 4D01058, 4D01060 and 4D01062.

²³³ [REDACTED].

²³⁴ [REDACTED].

²³⁵ [REDACTED].

²³⁶ [REDACTED].

213. MAŠOVIĆ accepted that he was involved in the exchange of civilians as well as POWs held by the ABiH although he obliquely referred to the former as “persons deprived of liberty.”²³⁷

214. The evidence reflects that a significant number of Croat civilians as well as POWs were in fact held in detention by the ABiH.²³⁸

215. During cross-examination MAŠOVIĆ was confronted with this and other evidence of the existence of ABiH detention centres that housed Croat civilians. In response MAŠOVIĆ either (i) attempted to evade providing an answer by for example referring to the ICRC,²³⁹ (ii) claimed that HVO lists of civilian detainees held by the ABiH were unreliable,²⁴⁰ (iii) denied any knowledge of the matter,²⁴¹ (iv) failed to answer the question or (iv) provided an explanation that was largely incomprehensible.²⁴²

216. MAŠOVIĆ also claimed that the ABiH had a policy not to evacuate or displace Croat civilians. MAŠOVIĆ was asked whether he knew of the arrest and detention of the Croat inhabitants of an entire village near Doljani at the Museum of Jablanica. He queried the designation of those civilians as evacuees rather than detainees before claiming he did not have sufficient knowledge to comment further.

iv. MAŠOVIĆ Is Biased And Exaggerated the Extent of PUŠIĆ’S Influence Over HVO Policy In 1994

217. As MAŠOVIĆ confessed that he first encountered PUŠIĆ on 29 December 1993 and that prior to that date exchanges between the ABiH and HVO functioned well, his evidence of PUŠIĆ’s allegedly obstructionist interventions can only apply to their meetings after this date.

²³⁷ Mašović T.25037-8, T.25017 and T.25011-2.

²³⁸ 6D00580.

²³⁹ Mašović T.25156-7. His Honour JUDGE ANTONETTI intervened during Mašović’s testimony, “... trying to avoid answering this question. Whenever the counsel asks you whether you knew whether the ABiH would arrest civilians whether they be women or children you also by mentioning ICRC. That is not the question. The question is whether you knew the ABiH would arrest civilians just say whether you knew or you didn’t. Don’t try to involve the ICRC in this matter.”

²⁴⁰ Mašović T.25157.

²⁴¹ Mašović T.25154-5.

²⁴² Mašović T.25163 and T.25150-1.

218. MAŠOVIĆ claimed that he had many meetings with PUŠIĆ after their Međugorje negotiations and before the Dayton accord was signed where they mainly talked about missing persons and the release of POWs. In the course of their dialogue MAŠOVIĆ claimed that PUŠIĆ called for ABiH to put into practice one for one exchanges. MAŠOVIĆ also claimed that PUŠIĆ took the view all Muslim men between 18 and 65 years of age should be incarcerated in camps or prisons as they were, potentially, in his eyes, all soldiers.²⁴³

219. The allegation that PUŠIĆ could block or obstruct prisoner exchanges is disputed. This aspect of the Prosecution's case is not supported by the evidence. From 10 December 1993 onwards, the evidence shows that PUŠIĆ played an administrative role in implementing BOBAN's order for the unconditional release of all Muslim civilians.²⁴⁴ PUŠIĆ earned credit for his efforts from international witnesses such as WATKINS.²⁴⁵ Moreover PUŠIĆ and MAŠOVIĆ signed agreements which included all for all exchanges.

220. On 12 February 1994 for instance an agreement is made at the premises of SPABAT in Međugorje²⁴⁶ as confirmed in their joint statement afterwards for an "all for all" release to be conducted as soon as possible.²⁴⁷

221. The terms of an agreement reached on 7 March 1994 as recorded in an UNMO report dated 19 March 1994 warrants close attention. The terms of the agreement are complex and illustrate the variety of interrelated issues canvassed by both sides, as was the case throughout 1993-4. The agreement²⁴⁸ states that on 22 March 1994 the HVO promises to release all the remaining prisoners from all prisons under the HVO control in Hercegovina except prisoners in the Heliodrom and others, while the ABiH army releases six prisoners from prisons in

²⁴³ Mašović T.25032.

²⁴⁴ See, Part, IX.

²⁴⁵ See, Part IV, Section E(4).

²⁴⁶ Mašović T.25125. The witness testified, "I can confirm that the meeting took place on the 12th of February, 1994, and the participants were Mr. Pusic and myself, and this took place on the premises of the Spanish Battalion in Međjugorje. And I can also confirm that what it says here in the report reflects the totality of the essence of what we had agreed."

²⁴⁷ Mašović T.25126. 6D00499 The witness testified, "Q. Let's just make a distinction. Mr. Pusic's report is what he drafted, and this here is your joint statement, and here we also have an indication that in the shortest possible time -- possible time everybody will be released -- released according to the all-for-all principle. A. Yes. The first paragraphs in Mr. Pusic's report are the reflection of what had been agreed."

²⁴⁸ P08084.

Gornji Vakuf. Hardly indicative of PUŠIĆ insisting on a conditional or “one for one” agreement.

222. The agreement provided for both sides to meet again on 24 March 1994 in Gornji Vakuf, to discuss the release of all the remaining prisoners in ABiH army and HVO prisons. MAŠOVIĆ confirmed that this agreement was executed successfully.²⁴⁹

223. MAŠOVIĆ’s commentary on the allegedly obstructionist stance taken by PUŠIĆ should not form the basis of any finding of fact by Chamber regarding PUŠIĆ’s authority. Even if MAŠOVIĆ’s claims of the views expressed by PUŠIĆ are taken to be reliable, the evidence suggests that he had little influence over HVO policy as all for all exchanges were agreed in any event. This interpretation of the evidence concurs with the conclusions reached by [REDACTED] and WITNESS DV regarding PUŠIĆ lack of authority in the course of prisoner exchanges generally. In contrast to MAŠOVIĆ, these witnesses had no axe to grind and provide a truer picture of PUŠIĆ as a man without any decision making powers who could not, by definition, therefore block or obstruct negotiations. The evidence also shows that MAŠOVIĆ is an unreliable witness capable of misleading the Chamber and that he may harbour some degree of enmity towards PUŠIĆ.

224. Furthermore, MAŠOVIĆ’s conclusions regarding the extent of PUŠIĆ’s authority in prisoner exchange negotiations does not square with the evidence of BIŠKIĆ. As well as stating that PUŠIĆ had no decision making powers, BIŠKIĆ testified that no HVO non-civilian detainees could be released without the consent of the HVO Military Prosecutor, Mladen JURIŠIĆ. The evidence shows that PUŠIĆ had to seek the approval of the District Military Prosecutor’s office before the release of any prisoners featuring in exchange agreements could take place.²⁵⁰

²⁴⁹ Mašović T.25158. The witness testified, “Q.But it was P 08084, the 17th of March agreement, just for the record. A. Yes. According to that agreement, the HVO freed about 19 well, around the 19th and 20th or 22nd of March about 750 prisoners from Heliodrom and the military remand prison at Ljubuški. The BH army freed that group of 73 members of the HVO and HV from Mostar, and it also freed 294 members of the Croatian Defence Council from Bugojno. And on the 22nd of March, it freed six members of the Croatian Defence Council from Gornji Vakuf.”

²⁵⁰ P07985. *See*, also Part V, Section F(3).

225. When asked to explain the reasons for the delays in releasing prisoners after the talks in Mostar on 24 March 1993, MAŠOVIĆ did not cite PUŠIĆ's purported intransigence as a cause. The delays were actually due to the fact that neither party trusted the other by this time:

Q. Do you remember what the issues were that were delaying the release of these prisoners who had come from the Central Bosnia areas? A. The only reason, as far as I recall, was a *certain lack of confidence and trust that prevailed between the two sides or between us as the heads of the commission, whether the other side would abide by what had been agreed and put it into practice, in view of certain previous agreements which had not been implemented and our experience there.* So the only reason that I can remember is that quite simply we needed to see how the release would function of the 19th and 22nd of March. So that the last stage of the release to be effected.²⁵¹ [emphasis added]

226. It bears highlighting that negotiations over prisoner exchanges throughout 1993-4 were intertwined and interlinked with other issues and were therefore, far from straightforward. So, for example, by the 29 December 1993 talks in Međugorje, MAŠOVIĆ testified that the release of Croats held in East Mostar became linked to the fate of detainees from Vranica, the [REDACTED] and the helicopter evacuations in Međugorje.²⁵² Croat civilians intervened to prevent the helicopters taking off in the autumn of 1993 while Muslim civilians in East Mostar prevented the release of detained Croats.²⁵³ Progress could not be made on any one issue without concessions on some or all of the other outstanding matters.

227. At this juncture it is prescient to note that MAŠOVIĆ conceded that the ABiH entered negotiations with their own agenda and that he, like PUŠIĆ was simply trying to do his best to advance the interests of the party he represented:

Q: Mr. PUŠIĆ said your cooperation with him was mostly proper and correct? A. Within the frameworks of the negotiations that took place, I do believe that he

²⁵¹ Mašović T.25045.

²⁵² [REDACTED]

²⁵³ P06168

tried to represent the interests of the party and the side that he represented, just as I tried to represent the interests of my side and the government in Sarajevo.”²⁵⁴

228. Although MAŠOVIĆ refused to concede that he had limited authority to make decisions unilaterally, the evidence suggests otherwise. The talks that took place between PUŠIĆ and MAŠOVIĆ must be seen in the wider context of the ongoing negotiation process at a higher level that culminated in the Washington Agreement and Dayton Accords. So, for example, the purpose of the meetings between MAŠOVIĆ and PUŠIĆ in March 1994 was, ostensibly, to implement higher level agreements made between HVO and ABiH leaders such as ROSO and DELIĆ. The agreement signed by PUŠIĆ and MAŠOVIĆ on 17 March 1994²⁵⁵ can therefore only be properly understood in light of the 12 March 1994 accord for the protection and release of prisoners and 26 March 1994 agreement signed by ROSO and DELIĆ for inspection teams to organise the disbanding of HVO detention centres, prisoner releases and exchanges. PUŠIĆ is not mentioned in either agreement.²⁵⁶ Furthermore, in connection with [REDACTED] MAŠOVIĆ confirmed [REDACTED].²⁵⁷

D.Prisoner Exchange Negotiations Prior to 5 July 1993

1. Overview

229. The Prosecution claim that PUŠIĆ began exercising authority over prisoner exchanges following his appointment on 22 April 1993 as the Military Police representative or participant in exchanges. It is worth reiterating that the precise wording of the 22 April 1993 order states that PUŠIĆ is charged only to “participate” in negotiations on behalf of the HVO Military Police. No decision making authority is vested in him.²⁵⁸

230. Various organisations represented the HVO in prisoner exchange negotiations prior to 5th July 1993 including:

²⁵⁴ Mašović T.25099

²⁵⁵ P08084

²⁵⁶ 4D01300

²⁵⁷ [REDACTED].

²⁵⁸ P02020.

- a) The HVO Exchange Commission headed by MARIĆ (“MARIĆ Commission”). The MARIĆ Commission had been in existence since 1992.²⁵⁹ MARIĆ attended a session of the HZHB cabinet on 15 February 1993²⁶⁰ in his capacity as Head of the Commission. MARIĆ also attended HZ H-B meetings on 17 May 1993²⁶¹ and 18 June 1993.²⁶²
- b) The Joint Commission formed on 26 March 1993²⁶³ comprising of two teams of three delegates each from the ABiH and HVO. The HVO delegation included PULJIĆ. PULJIĆ subsequently signed a number of agreements on behalf of the HVO including two agreements with PAŠALIĆ on 25 May 1993²⁶⁴ and 8 June 1993²⁶⁵
- c) A Commission created by PETKOVIĆ on 31 May 1993²⁶⁶ to deal with exchanges and releases of civilians in the Konjic area. A report produced by the Commission also confirms that the ODPH were involved in the release and exchange procedure for civilians.²⁶⁷
- d) During local level negotiations in the Mostar region, another HVO Commission was involved in talks with the Muslims after 25 May 1993. Tihomir MARIĆ was charged to deal with civilian issues in a decree issued by Jadran TOPIĆ.²⁶⁸

231. A careful analysis of the evidence reveals that prior to PUŠIĆ’s 5 July 1993 appointment to the Service for Exchange PUŠIĆ did not have any significant involvement in prisoner exchange negotiations either at a local level or higher level. At a local or lower level the HVO was represented in exchange negotiations by the HVO exchange commissions established for this purpose and at a higher level. PETKOVIĆ principally led the HVO in talks with HALILOVIĆ or DELIĆ.

2. Events of 22 April 1993

²⁵⁹ P00921.

²⁶⁰ P01439.

²⁶¹ 1D01666.

²⁶² 1D01275.

²⁶³ 4D00554, 2D00643, 2D00644.

²⁶⁴ P02512.

²⁶⁵ P02680.

²⁶⁶ 2D00635.

²⁶⁷ Ibid.

²⁶⁸ P02507.

232. On the same date as PUŠIĆ is appointed to participate in negotiations on behalf of the HVO Military Police, PETKOVIĆ issues an order²⁶⁹ calling for all HVO troops to ensure detainees are treated in compliance with the requirements of international humanitarian law. PETKOVIĆ orders HVO troops to ascertain and report the identity of all detainees to the ICRC. PETKOVIĆ confirmed during his testimony that HVO units were engaged in preparing lists of detainees.

3. 4 – 5 May 1993 Jablanica Meeting

233. PUŠIĆ attended a meeting in Jablanica on the 4 – 5 May 1993 where an agreement is reached for the unconditional evacuation of the civilian population from Doljani and Sovići.²⁷⁰ PUŠIĆ's role in these talks was wholly insignificant as PETKOVIĆ stated that PUŠIĆ's role was restricted to dealing with the sick and injured from Sovići and Doljani.²⁷¹

4. Events After the 12 May 1993 PETKOVIĆ HALILOVIĆ Agreement

234. Immediately after the military operations of the 9 May 1993 negotiations begin between the HVO and ABiH. PETKOVIĆ and HALILOVIĆ sign an agreement (“12 May 1993 Agreement”)²⁷² calling for the “all for all” release of all detainees and for the freedom of movement of all convoys.

235. Following on from the 12 May 1993 agreement a series of high level meetings are held to discuss the implementation of the terms agreed. PUŠIĆ does not feature in any meaningful way in any of these talks. On 18 May 1993, for instance, a meeting is held in Međugorje between TUĐMAN, IZETBEGOVIĆ and BOBAN.²⁷³ The next day most of the detainees in the Heliodrom are released.²⁷⁴

²⁶⁹ P02038.

²⁷⁰ 4D00447.

²⁷¹ Petković T.49501. *See*, also PART I.

²⁷² P02344.

²⁷³ 1D2404.

²⁷⁴ 4D00307. Petković writes to Valgren, the UNPROFOR General in Zagreb and Morillon on the progress made towards implementation of the Međugorje agreement stating that HVO has allowed all the civilians who were in the barracks to go. Petković complains that the ABiH failed to attend the 19 May 1993 mixed commission.

236. PUŠIĆ attends a meeting chaired by the ICRC a few days later on 23 May 1993. The [REDACTED] present notes that PUŠIĆ advised the gathering that he did not have the authority to sign the agreement reached on behalf of the HVO.²⁷⁵

237. PUŠIĆ is not a signatory to the agreement signed at a meeting in Mostar²⁷⁶ held on 25 May 1993 of the Joint Commission created on 26 March 1993 called to discuss delays in the implementation of the earlier 12 May 1993 Agreement.²⁷⁷ A note produced by the MARIĆ Commission dated 25 May 1993²⁷⁸ confirms PUŠIĆ's limited role in prisoner exchange negotiations during this time frame. MARIĆ signs the document as President of the Commission while both ĆORIĆ (as Head of the Military Police) and PUŠIĆ are named as the two representatives from the Military Police representatives amongst its 8 members. The MARIĆ Commission was later enlarged with the addition of two more members.²⁷⁹

238. Following on from the 25 May 1993 agreement, negotiating teams led by PULJIĆ and PAŠALIĆ sign another agreement on the 8 June 1993²⁸⁰ designed to implement the terms of the 12 May 1993 Agreement. Two days later, on 10 June 1993²⁸¹ PETKOVIĆ and DELIĆ made another agreement reconfirming terms of the 12 May 1993 Agreement. On 15 June 1993 PETKOVIĆ, DELIĆ and MLADIĆ sign an agreement brokered by the UN where they agree, *inter alia*, to (i) follow all previous agreements they have signed, (ii) order their forces to comply with the Geneva Conventions in all operations, (iii) provide lists of all prisoners of war and dead persons and (iv) guarantee freedom of movement for UN representatives.²⁸²

239. The issues discussed at the meetings held on 8 June 1993, 10 June 1993 and 15 June 1993 (and elsewhere) are all said to be within PUŠIĆ's remit by the Prosecution yet PUŠIĆ does not significantly feature in these negotiations.

5. International Community Reports

²⁷⁵ See, Part IV, Section E.

²⁷⁶ P02512.

²⁷⁷ P02344, Referred to by Nissen T.20453.

²⁷⁸ P02520.

²⁷⁹ See, P02585 for a list of members sitting on the HVO Commission for Exchange.

²⁸⁰ P02680.

²⁸¹ P02726.

²⁸² 4D00863.

240. PUŠIĆ is rarely mentioned in the reports compiled by international community representatives of prisoner exchange meetings, further underscoring his lack of influence. For example there is scant reference made to PUŠIĆ's role in (i) [REDACTED]²⁸³ (ii) [REDACTED]²⁸⁴ (iii) [REDACTED]²⁸⁵ and (iv) [REDACTED]²⁸⁶

E. Prisoner Exchange Negotiations 5 July 1993 – December 1993

1. Overview

241. A review of the prisoner exchange negotiations in the period *after* PUŠIĆ's appointment to the Service for Exchange on 5 July 1993 to 10 December 1993 reveals that PUŠIĆ did not have any decisive input in the high level negotiations referred to by WATKINS and that PUŠIĆ's role in the low level local exchanges he did attend does not demonstrate that he had any decision making powers.

242. PUŠIĆ's involvement in prisoner exchange negotiations in this time frame must also be seen against the wider context of high level talks between the parties. PUŠIĆ's role is clearly insignificant when his position and rank is properly delineated and a panoramic overview of events is taken.

243. [REDACTED],²⁸⁷ while on the same date IZETBEGOVIĆ issues a decision for the release of all captured soldiers and civilians.²⁸⁸ [REDACTED]²⁸⁹ [REDACTED]. Daily visits by the ICRC could be made to those remaining. [REDACTED]. PUŠIĆ does not feature in this communication which is important because it demonstrates how decisions regarding detainees and detention centres were reached at the highest levels.

244. The TUĐMAN-IZETBEGOVIĆ joint statement of 14 September 1993 ("TUĐMAN-IZETBEGOVIĆ agreement") is a major milestone in the course of the negotiations between the HVO and ABiH. The agreement contained a wide ranging provision calling for the

²⁸³ [REDACTED]

²⁸⁴ [REDACTED].

²⁸⁵ [REDACTED].

²⁸⁶ [REDACTED].

²⁸⁷ [REDACTED].

²⁸⁸ 4D01586.

²⁸⁹ [REDACTED].

closure of all detention facilities and the release of all detainees²⁹⁰ and appointed GRANIĆ (for TUĐMAN) and SILAJDŽIĆ (for IZETBEGOVIĆ) as special envoys. Based on the Joint Declaration of 14 September 1993 PETKOVIĆ orders the release of all prisoners on 17 September 1993.²⁹¹

245. The day after the TUĐMAN-IZETBEGOVIĆ agreement BOBAN issues an order²⁹² to ensure the conditions at detention centres are compatible with the requirements of international humanitarian law and for the ICRC to have access to all facilities. The path of onward transmission for this order does not include PUŠIĆ. BOBAN's order is forwarded to all soldiers in the Operative Zone of South East Herzegovina.²⁹³ On 18 September 1993 SLOBODAN PRALJAK issues a notice to all operative zones stating that all units and commands at all levels must follow the order issued by BOBAN.²⁹⁴ On 19 September 1993 LASIĆ forwards BOBAN's order and SLOBODAN PRALJAK's directive to other HVO military personnel.²⁹⁵

2. 20 September 1993 Meeting at Grude

246. Seen against the backdrop of high level talks and international community opprobrium of HVO conduct, PUŠIĆ is plainly a minor player in the HVO delegation attending a meeting at Grude to discuss the implementation of the TUĐMAN-IZETBEGOVIĆ agreement. The attendees include GRANIĆ, PRLIĆ, POGARČIĆ and STOJIĆ. [REDACTED]. In addition [REDACTED].²⁹⁶ [REDACTED].

247. [REDACTED].²⁹⁷

248. [REDACTED]. Even if accurate, PUŠIĆ may have been expressing his own opinions and this evidence does not establish that PUŠIĆ had any influence over HVO policy. The fact that Dretelj was closed shortly afterwards after the unilateral release of most of the detainees held there suggests quite the opposite.

²⁹⁰ P05051.

²⁹¹ P05138.

²⁹² P5104.

²⁹³ 1D01704.

²⁹⁴ P05188

²⁹⁵ 4D01067

²⁹⁶ [REDACTED].

²⁹⁷ [REDACTED].

249. [REDACTED] did not testify at trial and it is therefore important that his evidence concerning PUŠIĆ's alleged intervention should not be read in isolation. The remarks he attributes to PUŠIĆ can only be interpreted fairly in light of the evidence of BIŠKIĆ, WITNESS DV, [REDACTED] and other ECMM observers who all comment on PUŠIĆ's lack of unilateral decision making authority.²⁹⁸

3. 1-2 October 1993 Međugorje Agreement

250. PUŠIĆ is a signatory to the agreement [REDACTED]. The objective of this agreement was to realise at a local level the terms of recent major national initiatives undertaken by the HVO and ABiH leadership.²⁹⁹ Most of the provisions agreed were incorporated because they had featured in these previous high level agreements.

251. It is apparent that neither PUŠIĆ nor the ABiH signatory ALIKADIĆ were drawn from the higher echelons of their respective organisations. The evidence therefore indicates that neither had the necessary authority over the HVO or ABiH military apparatus to make good the undertakings given at the agreement, particularly the ceasefire clause. Accordingly, [REDACTED] cannot be a realistic proposition in the circumstances and does not tally with other aspects of his testimony and that of BIŠKIĆ and WITNESS DV.

F. Role of District Military Prosecutor In Prisoner Exchanges and Releases

1. Overview

252. The evidence demonstrates that the District Military Prosecutor's office had an important role in authorising the exchange and release of prisoners throughout the Indictment period. PUŠIĆ could not interfere in the work of this body. After the decision was taken to close all HVO detention centres in December 1993, no HVO detainees could be released save with the consent of the District Military Prosecutor's office. Every HVO body involved in

²⁹⁸ See, Part IV.

²⁹⁹ P05571. The preamble to the agreement makes clear reference to "prior commitments to military constraint" namely the 14 September 1993 agreement, Delić and Petković's agreement of 17 September 1993, a previous agreement made on the 30 July 1993 and Delić's call for a unilateral ceasefire on 30 September 1993.

prisoner exchanges, including PUŠIĆ, therefore required the authorisation of the District Military Prosecutor's office in any dealings regarding prisoner exchanges from this time.

2. Role of the District Military Prosecutors Office Before 10 December 1993

253. Pursuant to a 17 October 1992 HVO Decree on District Military Courts³⁰⁰ ("the decree") the Military Judiciary was lawfully empowered to deal with all HVO prisoners of war. The decree established a system of courts to deal with these detainees and also stipulated that all military commanders had an obligation to take all reasonable measures to prevent any perpetrators from avoiding detention. PUŠIĆ had no *de jure* powers to interfere in the work of the Military Prosecutor's office and in any dealings with this particular category of detainee.

254. The decree refers to the Criminal Procedure Code³⁰¹ which defines the procedure for filing of criminal complaints, requests to conduct and commence investigations. The evidence reflects that this procedure was widely observed and criminal complaints filed and proceedings initiated.³⁰² Many HVO members of Muslim ethnicity arrested in 1993 were made subject to this procedure, as confirmed in a report on the work of the District Military Prosecutor's office in Mostar for the year 1993.³⁰³ The District Military Prosecutor also reported to the Ministry of Justice with details of the criminal reports filed at his office against members of the ABiH.³⁰⁴

3. Role of the District Military Prosecutor's Office After 10 December 1993

255. The role of the District Military Prosecutor's office in prisoner releases was discussed at meetings in Posušje on 11 and 13 December 1993, as detailed in Part IX of the Final Brief. The purpose of the Posušje meetings was to set in place procedures to implement BOBAN's order of 10 December 1993 to close down all HVO detention centres. The evidence shows that in the weeks after the 10 December 1993 all civilians in HVO custody were released. From this point onwards, it is submitted that the prisoners that remained in detention could only be released on the authority of the Military Prosecutor office.

³⁰⁰ P00592.

³⁰¹ 4D01105.

³⁰² 5D04288. Božić produced daily reports on all aspects of the Heliodrom including data on detainees under investigation, *See*, for example P07378.

³⁰³ 2D00138.

³⁰⁴ P06873.

256. Towards the end of 13 December 1993 Posušje meeting BIŠKIĆ ordered that responsibility for all remaining detainees pending criminal investigation lay with the Security Sector and the Ministry of Defence, and that these individuals should be exchanged later.³⁰⁵ BIŠKIĆ testified that criminal charges should be raised against all those remaining in custody (if this had not already been done) by the military prosecutor in cooperation with the military police and civilian police and this was agreed at the 11 December 1993 meeting.³⁰⁶

257. JOSIP PRALJAK confirmed that the Military Prosecutor's office had the decisive word in prisoner releases from one point in time:

Q. In your diary -- in fact, you mentioned Mladen Jurisic yesterday. A. Yes. Q. In that period, he was military prosecutor, as far as I know. A. That's the same thing I know. Q. You mentioned in your diary that at a certain point you were informed that releases from Heliodrom are allowed only with the approval of the military prosecutor: is that correct? A. Yes.³⁰⁷

258. From December 1993 onwards the evidence shows that PUŠIĆ had to obtain the approval of the District Military Prosecutor before a detainee could be exchanged or released. For example, PUŠIĆ writes to the District Military Prosecutor on 27 February 1994³⁰⁸ asking for JURIŠIĆ to order the release of prisoners to be exchanged in Jablanica. The District Military Prosecutor's office replies on 1 March 1994 approving the exchange and the order states that:

These persons are subject to a criminal report because of the crime of having served in an enemy army... These persons may be prosecuted and tried in absentia, and there are therefore no criminal and procedural obstacles that would prevent the exchange of these prisoners.³⁰⁹

³⁰⁵ P07148.

³⁰⁶ Biškić T.15099.

³⁰⁷ J.Praljak T.14981-2

³⁰⁸ P07975.

³⁰⁹ P07985.

259. On 13 December 1993 BIŠKIĆ sent a letter to local Red Cross and to PUŠIĆ enclosing a list of 1119 detainees against whom criminal reports had been filed. In a report dated 18 December 1993 BIŠKIĆ records that 978 reports had been filed against POWS.³¹⁰ It is submitted that these individuals could not be exchanged without the approval of the District Military Prosecutor. PUŠIĆ later confirmed that the exchange of the prisoners referred to in BIŠKIĆ's note on 18 December 1993 had taken place.³¹¹

260. [REDACTED]. [REDACTED],³¹² [REDACTED].

VI. PRISONER RELEASE

A. Introduction

1. Overview

261. In every system of government, the responsibility for determining whether a person who has been detained in custody should be released is normally taken with the approval of the various state law enforcement agencies, including the detaining authority. It follows that once a decision has been taken to release a detainee, the necessary discharge papers must be prepared.³¹³ This generalisation can fairly be applied to the procedure adopted by the HVO

³¹⁰ P07234.

³¹¹ [REDACTED].

³¹² [REDACTED].

³¹³ Sl.Božić T.36603-4. The distinction between the release of an individual who has been subject to due process and a situation where someone is allowed to leave in other circumstances was drawn by Judge Antoinetti, "JUDGE ANTONETTI: [Interpretation] In the paragraph before last in English, but you don't know English, but it says that these people can be released, and we have the word "release" twice in the text, because Mr. Pusic can also release these persons. So what is the word used in your own language, in this document, of course? THE WITNESS: [Interpretation] In the document, the word "liberate" is not being used, because as lawyers, it would mean that somebody is serving a sentence. So in this case, they're referring to "otpustanje." If somebody was isolated for security reasons, then he is released. So it doesn't mean "liberation." We lawyers would use "release" if there was a judgement of acquittal. Here the word used is "otpustanje" in the B/C/S. JUDGE ANTONETTI: [Interpretation] Very well. So they're released, let go, whereas in English it's "release," but in English you can only be released if you've been detained, whether if you're let go, it's a bit different. I just wanted this to be noted down, and I believe that everybody should reflect on this now."

262. Where PUŠIĆ had any involvement in the release of detainees from the Heliodrom, the evidence shows that his duties were akin to that of a low ranking civil servant tasked with (i) communicating orders taken from higher-up, (ii) liaising with HVO law enforcement agencies in the military and security apparatus prior to communicating their approvals and instructions to Heliodrom wardens and (iii) producing discharge papers or certificates to some of those released.

2. Prisoner Releases in Context

263. The Defence wishes at the outset to make three general observations concerning the evidence led in connection with PUŠIĆ's involvement in any matters related to the operation of HVO detention centres and incorporating allegations of detainee releases and forced labour. Firstly, the evidence presented concerning PUŠIĆ's involvement in prisoner releases, forced labour (Part VIII) and any other related detention centre issues (Part VII) primarily concerns the Heliodrom facility.³¹⁴ Parts VI, VII and VIII of this brief therefore primarily focus on arrangements at the Heliodrom facility although, in addition, in each respective section of the Final Brief the Defence also advance submissions that the Prosecution have failed to demonstrate that PUŠIĆ exercised centralised control over other HVO detention facilities including Ljubuški, Otok-Vitina, Gabela and Dretelj.

264. Secondly, it is submitted that no evidence has been led that PUŠIĆ had *de jure* or *de facto* authority over any HVO military personnel responsible for the arrest and detention of Muslim soldiers and civilians at the Heliodrom or elsewhere. Nor does the evidence show that PUŠIĆ had any *de jure* authority over any staff at any of the HVO detention facilities.

265. Finally, regarding the Heliodrom, Josip PRALJAK was the only "insider" Prosecution witness to testify in connection with PUŠIĆ's purported *de facto* authority and influence over Heliodrom staff and, by implication, the military personnel stationed there. His evidence is considered below.

B. Unreliable Witness: JOSIP PRALJAK And Prisoner Releases in May 1993

³¹⁴ This includes transfers of detainees to and from the Heliodrom to other facilities including Ljubuški.

1. Overview

266. Based primarily on the testimony of Josip PRALJAK and other evidence produced by him and BOŽIĆ, the Prosecution alleges that PUŠIĆ had (i) the power to order the release of Heliodrom detainees, (ii) general authority over detainees³¹⁵ and (iii) the power to approve or order forced labour assignments.³¹⁶ In this section the Defence examines JOSIP PRALJAK's testimony and the Prosecution evidence concerning PUŠIĆ's alleged role in the release of prisoners from the Heliodrom in May 1993

267. Submissions advanced in connection to JOSIP PRALJAK's credibility and the weight to be attached to self-serving documents prepared by JOSIP PRALJAK and BOŽIĆ are expanded upon in Part VIII (forced labour) of this Brief.³¹⁷ The evidence shows that JOSIP PRALJAK and BOŽIĆ used PUŠIĆ as a convenient foil to detract from their own potential criminal liability. Accordingly JOSIP PRALJAK's testimony concerning matters that could implicate him or present him in an unfavourable light should be treated with the utmost caution and no weight should be attached to this evidence.

2. Political Context

268. Any thorough analysis of the procedures employed in the release of detainees must begin with some reference to the wider political context at the time. As a starting point it would be wrong to assume that PUŠIĆ was involved in authorising the release of all the detainees incarcerated after the 9 May 1993 in the Heliodrom.³¹⁸ Most of these detainees were released by the 19 May 1993, following high level negotiations that continued throughout 1993. JOSIP PRALJAK also stated that other agencies and individuals, not just PUŠIĆ, made direct requests (including Security and Information Service ("SIS") and the Crime Prevention Department ("CPD"))³¹⁹ for the release of detainees³²⁰ in May 1993 that he had to comply with.

³¹⁵ See, Part VII.

³¹⁶ See, Part VIII.

³¹⁷ See, Part VIII, Section B.

³¹⁸ For example Pušić played no role in release of [REDACTED] See, also P2289, P2330, P2406, P2325 and P2443.

³¹⁹ Crime Prevention Department (CPD) also refers to Crime Investigation Department as both terms were used interchangeable during the trial and exhibits tendered

³²⁰ J.Praljak T.14690. J.Praljak testified that Marcinko and Vidović had detainees released as well as other HVO officials. See, also T.14925 and T.14928.

3. PUŠIĆ Did Not Sign Any Orders For Release

269. JOSIP PRALJAK made no reference to PUŠIĆ having any involvement in prisoner exchanges prior to May 1993. Shortly after 9 May 1993 JOSIP PRALJAK testified that he began receiving telephone calls from PUŠIĆ. He said PUŠIĆ would read out to him a list of names of detainees to be released from the Heliodrom. Subsequently, JOSIP PRALJAK and BOŽIĆ produced typed notes of these conversations prior to processing the release of the detainees named.

270. The Prosecution has mischaracterised the typed notes produced by BOŽIĆ and JOSIP PRALJAK as “orders” from PUŠIĆ and on the basis of this evidence and the allegations made by JOSIP PRALJAK,³²¹ they claim that PUŠIĆ had the authority to select the identities of those individuals to be released. In support of this thesis the Prosecution place great emphasis on an “Official Note” dated 10 May 2010 (“10 May 1993 Note”) produced by BOŽIĆ and co-signed by JOSIP PRALJAK. The 10 May 1993 Note states:

On 9 May 1993, following the attack on town of Mostar by MOS /Muslim armed forces/ a decision was issued that all ethnic Muslim citizens from the right bank of the Neretva were to be quarantined in the SVZ /Central Military Prison/ in the Heliodrom. Berislav PUŠIĆ, Biljana Mikic (sic) and Marko BEVANDA, officials of the Centre for Social Welfare, were authorised regarding their release, since the matter concerned persons who were caught up and to whom the SVZ offered its premises. Mr Berislav PUŠIĆ issued an order, over a telephone connection that had been established, for the release of the persons caught up.
³²²[emphasis added]

271. This document, and other similar “orders” produced by JOSIP PRALJAK and BOŽIĆ cannot be relied upon to support the inference the Prosecution ask the Chamber to draw. The 10 May 1993 note and the other “orders” for release attributed to PUŠIĆ from this time period

³²¹ J Praljak T.14690. The witness testified:“To make it more precise, since the distance between Heliodrom and Berislav Pusic was great and in order for the releases to be legally valid and all these messages to Biljana Nikic and Marko Bevanda to be in due form, he [BOŽIĆ] made this Official Note, citing me and Mrs. Snjezana Cvitanovic as witnesses, confirming that Mr. Berislav Pusic did in fact say that on the telephone.”

³²² P02260.

are not signed by PUŠIĆ. Both BOŽIĆ and JOSIP PRALJAK had a motive for stating that they acted on orders from PUŠIĆ: namely to deflect attention from their own responsibility for allegations of detainee abuse at the Heliodrom.³²³ JOSIP PRALJAK's testimony that PUŠIĆ telephoned the Heliodrom with orders to release prisoners should not therefore be regarded as *prima facie* reliable without further corroboration.

272. SLOBODAN BOŽIĆ was asked to comment on an "order" dated 14 May 1993³²⁴ he is said to have authorised (together with PUŠIĆ) the release of all sick civilians to their homes. SLOBODAN BOŽIĆ said that BOŽIĆ should not have recorded that he and PUŠIĆ issued this order as this was wholly inaccurate:

A. I never issued this order. I remember this document very well, and we have had an extensive discussion about it when you investigated me as a suspect, and I told you that it was an example of an *illogical order* or decision, whichever you like. In the heading, we see "The Central Military Investigating Prison," the number and the date, and it says "Order." What order: oral, written, telephone, fax? *And then he sign it himself.* So as to avoid any error in the interpretation, I never communicated with Mr. Stanko Bozic by telephone, in writing, or orally. I told you then and I repeat now that this is an order that he gave himself. *For what reason he mentions the name of Mr. Pusic and myself, only he knows, because I didn't have such competences, nor could I have given such an order.*³²⁵[emphasis added]

273. Furthermore, assuming *arguendo*, that JOSIP PRALJAK's account of telephone calls received from PUŠIĆ is reliable, the Prosecution cannot exclude the possibility that PUŠIĆ was the messenger rather than the decision maker in this scenario, as discussed *supra* .

4. Unreliable Evidence: JOSIP PRALJAK on Prisoner Releases

³²³ See, Part VIII, Section A(9).

³²⁴ P02380.

³²⁵ Sl. Božić T.36596-7.

274. A precise examination of the evidence does not support the conclusions advanced by JOSIP PRALJAK and casts doubt on the reliability of his evidence as well as highlighting inconsistencies in the Prosecution's case.

i. Lack of Evidence of HVO Internal Procedures or PUŠIĆ's Chain Of Command

275. JOSIP PRALJAK gave no indication that he knew how the lists purportedly communicated by PUŠIĆ were compiled.³²⁶ Furthermore, a close reading of the 10 May 1993 Note discloses that BOŽIĆ does not identify the person responsible for the decision issued on 9 May 1993 authorising PUŠIĆ and others to deal with release of detainees. JOSIP PRALJAK was not asked by the Prosecution to identify who had issued this order, an omission where the Prosecution have abjectly failed to question a witness on an issue germane to the alleged criminal responsibility of PUŠIĆ.

276. The absence of any evidence of the internal procedures followed by PUŠIĆ in the exchange or release process in May 1993 or thereafter represents a lacunae in the Prosecution's case. Bearing in mind the testimony of BIŠKIĆ and other Prosecution witnesses including [REDACTED]³²⁷ the evidence indicates that PUŠIĆ lacked unilateral powers and would therefore have been forwarding orders from above. The Prosecution's thesis that PUŠIĆ could decide who was to be released and when cannot therefore be the only reasonable interpretation of the evidence.

ii. PUŠIĆ was Part of a Team of People Dealing with Prisoner Releases

277. SLOBODAN BOŽIĆ³²⁸ explained that, on occasions in May 1993 he "would convey to"³²⁹ PUŠIĆ the names of detainees that he wished to be considered for release. SLOBODAN BOŽIĆ maintained that he contacted PUŠIĆ because he was part of a *team of people* who dealt with prisoner releases:

³²⁶ J.Praljak T.14921. Josip Praljak testified that Nikić and Bevanda took down names of those arriving at the Heliodrom in May 1993.

³²⁷ See, Part IV.

³²⁸ All references to Božić are to Stanko Božić. Slobodan Božić is referred to by his full name in this brief.

³²⁹ Sl.Božić T.36587.

Q. You called Mr. Pusic or contacted Mr. Pusic because you knew at the time that he was someone who was closely involved with the release of people being held by the HVO: correct A. Well, I can't really say that I knew Mr. Pusic was someone who was closely involved in all that, *but I knew that he worked in a team of people who dealt with those affairs as well.*³³⁰ [emphasis added]

278. SLOBODAN BOŽIĆ explained that although he gave guarantees for the people named on the list his word was not sufficient to trigger their release. The release of those individuals he proposed would only occur “if there were no other obstacles coming from any other organs who were involved in checking these people out.”³³¹

279. SLOBODAN BOŽIĆ also corrected a reference in his interview to PUŠIĆ’s presence during a conversation he had with BOBAN concerning the release of Muslims civilians from the Heliodrom. SLOBODAN BOŽIĆ confirmed that PUŠIĆ was not present when this discussion took place.³³²

280. BOŽIĆ’s note of 10 May 1993, taken at its highest, confirms that PUŠIĆ was one of a team of people dealing with releases as SLOBODAN BOŽIĆ described. The 10 May 1993 Note confirms that PUŠIĆ is jointly assigned by a higher authority within the HVO to administer the release of detainees from the Heliodrom together with officials from the ODPR, namely, NIKIĆ and BEVANDA. All three individuals are evidently acting on orders from their superiors.

iii. PUŠIĆ Was Not JOSIP PRALJAK’s Superior

281. PUŠIĆ was not employed at the Heliodrom and therefore did not feature in his chain of command. There is therefore no evidence that PUŠIĆ had any *de jure* authority over JOSIP PRALJAK.

282. Although JOSIP PRALJAK claims that PUŠIĆ had the *de facto* power to give him orders JOSIP PRALJAK does not specifically state that PUŠIĆ had the power to prevent or

³³⁰ Ibid.

³³¹ Ibid.

³³² Sl.Božić T.36583-4.

punish his conduct and the Defence reject any suggestion that PUŠIĆ's ability to do so can be inferred from the evidence. No evidence has been presented of PUŠIĆ acting in such a manner.

iv. JOSIP PRALJAK Did Not Know What Post PUŠIĆ Held

283. Despite claiming that PUŠIĆ's *de facto* authority to issue orders for release and his obligation to report matters to him stemmed from PUŠIĆ's position within the Military Police, JOSIP PRALJAK was unable to identify the post held by PUŠIĆ.

284. By way of illustration, JOSIP PRALJAK was entirely mistaken when claiming that PUŠIĆ had been appointed Head of the CPD³³³ replacing Dragan BARBARIĆ prior to the 5th July 1993. No evidence has been led to corroborate this allegation. Moreover, the Prosecution do not allege that PUŠIĆ held this post at any time.

285. VIDOVIĆ directly contradicted JOSIP PRALJAK's account. VIDOVIĆ said that he was employed as an operative in the Mostar Military Police CPD in the spring of 1993 and that PUŠIĆ was also employed in the Military Police CPD at this time. VIDOVIĆ testified that MARČINKO was Head of the CPD and his superior officer.³³⁴

286. VIDOVIĆ also said that MARČINKO's immediate superior was the Head of the Battalion to whom the Military Police were attached. Thus, it is clear from VIDOVIĆ's account that there were several layers of authority above VIDOVIĆ and PUŠIĆ in the Military Police in the spring of 1993. JOSIP PRALJAK also confirmed that BARBARIĆ and MARČINKO occupied superior positions to PUŠIĆ in the HVO chain of command.³³⁵

³³³ J.Praljak T.14920. He testified, "JUDGE ANTONETTI: [Interpretation] Just a little question from me. The document that we see now before us concerning the release of Muhiba Jugo, it says it was done at the intervention of Mr. Berko Pusic and Mr. Valentin Ćoric. So on the 5th of July, 1993, he was head of service for exchange of prisoners. So prior to his appointment to that post, what position did Mr. Pusic occupy? In what capacity exactly did he intercede for somebody to be released, do you know? THE WITNESS: [Interpretation] Upon the departure of the chief of the criminal prevention service of the military police, Dragan Barbaric was his name, I learnt that in his place Berislav Pusic arrived, and that was when he was in this post within the administration of the military police."

³³⁴ Vidović T.51441, T.51623, T.51651 and T.51613. Drljević also testified that Marčinko was a high ranking Military Police officer. Drljević T.1051-2.

³³⁵ J.Praljak T.14974-5.

287. JOSIP PRALJAK's error in identifying PUŠIĆ as the Head of CPD is alarming given both the extent of CPD involvement in the operation of the Heliodrom and the fact JOSIP PRALJAK was in regular contact with the CPD throughout his term in office. The evidence shows that JOSIP PRALJAK mentioned BARBARIĆ, on several occasions in entries in his personal diary predating May 1993.³³⁶

v. PUŠIĆ Forwarded Instructions From More Senior HVO Officials

288. In addition to the 10 May 1993 Note the Prosecution also relied on a release “order” produced by BOŽIĆ dated 12 May 1993³³⁷ as further evidence that PUŠIĆ had authority to approve the release of prisoners from the Heliodrom. In the first instance, the Defence do not accept that the evidence of PUŠIĆ's involvement in “approving” this order is reliable given the bias of the author.

289. Assuming, *arguendo*, that a *prima facie* case can be made for the reliability of this document the inference the Prosecution seek to draw is not the only reasonable interpretation of the evidence. This document contains a reference to another order issued by Žara KVESIĆ that has the "approval" of PUŠIĆ and MARĆINKO. No evidence has been presented to show that PUŠIĆ had the authority to approve an order from Žara KVESIĆ. Furthermore, according to VIDOVIĆ, MARĆINKO was PUŠIĆ's immediate superior in May 1993. The notion that PUŠIĆ and MARĆINKO were of equal status and that PUŠIĆ could approve an order from or with MARĆINKO cannot therefore be sustained.

5.11 May 1993 – List of 106 Detainees

290. In support of their claim that PUŠIĆ had the power to review “lists of prisoners, indicating specifically which ones could be released and which ones would have to stay in detention”³³⁸ the Prosecution rely on a document dated 13 May 1993 containing a list of 106 employees (and their families) of the regional war hospital. The author is KVESIĆ. JOSIP PRALJAK testified that he endorsed this list in his handwriting after speaking to PUŠIĆ noting that:

³³⁶ J.Praljak T.14975. P00352.

³³⁷ P02332

³³⁸ OTP 98 bis T 27119-49

as per order of Berko Pusic, nobody can release [release] persons whose names are circled. Josip Praljak [signed].”³³⁹

291. Given JOSIP PRALJAK’s bias against PUŠIĆ the evidence connecting PUŠIĆ to this document should not be viewed as *prima facie* reliable. In fact it is submitted that there is insufficient evidence for the Chamber to reach any finding of fact in regard to PUŠIĆ’s powers and influence from this document, particularly in light of JOSIP PRALJAK’s lack of knowledge of this document. As he was Deputy Warden at the time, and given the status of those mentioned in the list, it would not be unreasonable to expect that JOSIP PRALJAK would have a clear memory of the actions he took as a consequence of receiving this letter. However, JOSIP PRALJAK confirmed that he could not tell the Chamber very much about the list or the people on it. Importantly, JOSIP PRALJAK could not confirm whether the 106 individuals named therein had ever been taken into custody. All he could say was that he recognised one name on the list of an individual whom he could categorically clarify had never been detained at the Heliodrom.³⁴⁰

292. KVESIĆ testified that he drew up the list not knowing the whereabouts of those named on it. It follows that KVESIĆ did not know if those named on it had been detained in the Heliodrom. KVESIĆ’s motive in drafting this document was to ensure that if those named were detained they should be released.³⁴¹

293. Furthermore, the Prosecution have failed to prove that any action was taken to enforce the instructions attributed to PUŠIĆ in the letter. Nor, accepting at face value the contents of the document, has any evidence been produced of the internal procedures PUŠIĆ had to follow. Given the evidence of PUŠIĆ’s lack of decision making powers, the Prosecution cannot rule out the possibility that PUŠIĆ may have been communicating instructions from on high.

C. Prisoner Releases After 30 June 1993

³³⁹ P02315.

³⁴⁰ J.Praljak T.14700-1. The witness testified, “Well, all the people on the list, the ones who are circled or not, we didn’t know whether they were in prison or not. It was the people who listed them who knew and who took care of them. This is just a list of names circled. But whether they were there or not I can’t say. I gave you an example of one man who I knew was not there.”

³⁴¹ Kvesić T.37445-8.

1. Overview

294. As discussed previously PUŠIĆ did not significantly feature in the high level negotiations that dictated the release of detainees held HVO from July 1993 onwards. For example, [REDACTED] and urged BOBAN to begin releasing the Bosnian Muslim men of military age in HVO custody, [REDACTED].³⁴² The evidence demonstrates that an ongoing process commenced after 20 July 1993 resulted in BOBAN's order of 10 December 1993.³⁴³ In the interim, as described by MAŠOVIĆ, there were many local level prisoner exchanges and other prisoners were released intermittently.

2. PUŠIĆ Issued Discharge Papers Based On Approvals From Other HVO Law Enforcement Agencies

295. The Prosecution's interpretation of a number of documents they claim represent "orders" signifying PUŠIĆ's authority to decide upon the release of those Muslims detained at the Heliodrom after the 30 June 1993 is disputed. The evidence shows that PUŠIĆ did not have the power to unilaterally decide who could be released and that he merely issued discharge papers based on the approval of other HVO agencies.

i. Role of SIS and the CPD

296. As stated previously, in the HVO structure an administrative procedure had to be followed, as in any prison system, before a detainee could be released. The evidence indicates that PUŠIĆ assumed an administrative function in respect of the release of detainees arrested after 30 June 1993. PUŠIĆ role in this procedure entailed (i) obtaining approval for the release of a detainee from the relevant law enforcement agencies, in this case the SIS and/or CPD before (ii) issuing discharge papers for their release.

297. For example, on the 31 August 1993 the Service for Exchange issued discharge papers for the release of detainee named Zijo DROCE.³⁴⁴ Prior to issuing this certificate the Service

³⁴² [REDACTED].

³⁴³ P07096.

³⁴⁴ P04686.

for Exchange had obtained permission for the release of DROCE from the CPD in the form of a certificate signed by VIDOVIĆ noting that no criminal proceedings were pending against DROCE.³⁴⁵ SIS MOSTAR also gave their consent³⁴⁶ issuing a certificate stating they had no objection to DROCE's release from the Heliodrom.

298. A similar procedure was followed on the 12 September 1993 for a detainee named BAŠIĆ with documentation produced that clearly stated that BAŠIĆ was to be released on the basis of permission from MIROSLAV MUSIĆ of SIS and VIDOVIĆ of the CPD.³⁴⁷

299. The Prosecution's expert witness TOMLJANOVICH stated that confirmation from SIS that they had no reason to keep a detainee in detention was required prior to release:

Q. In view of this, would I be correct in concluding that in connection with Heliodrom because it's the only place you have mentioned so far, *the criminal processing of prisoners was done not just by military policemen but also by the SIS and the criminal service?*

A. Yes, although with -- I believe I mentioned Gabela as well and not just the Heliodrom, *but in general I know that the SIS had a role in processing prisoners and have seen documents to that effect.*

JUDGE TRECHSEL: Could you please explain what the verb "processing" means in this context.

THE WITNESS: Well, I'm not entirely sure what it does mean in this context. What I would understand it to mean, based on the fact I've seen records of SIS officers going into the camps and taking statements from prisoners, that it would be in regards to their bureaucratic processing. What exactly that would entail, I'm not sure from this context. *But I do know that the SIS agents did have a role in dealing with these prisoners, and I also seem to remember that generally speaking before somebody could be released, the SIS would also have to give its say so that they had no reason to want to keep that person in detention.*³⁴⁸ [emphasis added]

³⁴⁵ 6D00169.

³⁴⁶ J.Praljak T. 14978-80. 6D00168.

³⁴⁷ P04799.

³⁴⁸ Tomljanovich T.6384-5.

300. RIZVANBEGOVIĆ confirmed that many of the Bosnian Muslim detainees at the Heliudrom were also aware of the critical role SIS and other HVO bodies played in the release process.³⁴⁹

301. [REDACTED].³⁵⁰

ii. Testimony of JOSIP PRALJAK

302. JOSIP PRALJAK verified that in practice it was necessary to have the approval of SIS and the CPD before a detainee could be released. He was shown the documents relating to the release of DROCE and agreed that PUŠIĆ's office could only issue a certificate *after* the approval of SIS and CPD had been secured. PUŠIĆ could not release any detainee unilaterally:

Q. What approvals were required, to your knowledge, to have a prisoner released from the Heliudrom in July, August 1993? You can just walk us through whatever steps were taken, if you can help us, please. The document that would reach us in the prison was formulated like this, approximately: "There is no reason to hold the prisoner of war such-and-such," and *it would be signed by Miroslav Pusic on behalf of the SIS and Zvonko Vidovic on behalf of the crime investigation service. They would issue approvals enabling Mr. Berko Pusic to release somebody. I believe without these two signatures above, Mr. Berislav Pusic would have been unable to release anyone.*"³⁵¹ [emphasis added]

303. During cross -examination JOSIP PRALJAK further reiterated the role of SIS and CPD in this procedure and clarified that the normal procedure was for SIS and CPD approval to be obtained *before* PUŠIĆ would issue a certificate for the release of an inmate.³⁵²

³⁴⁹ Rizvanbegović T. 2388.

³⁵⁰ [REDACTED]

³⁵¹ J.Praljak T.14713.

³⁵² J.Praljak T.14978. The witness testified, "Q You explained to us how the procedure to release persons was put into practice, and you speak about that in the diary. First of all, there had to be permission granted from SIS, then from the crime prevention department, and finally Mr. Pusic had -- once he had received all those documents, would give authorisation and permission for people to leave the prison: is that right? Yes.....Q. Now, as I understand the situation, it was like this: The permission given by Mr. Pusic, finally, is a piece of paper which takes note that on the basis of previous procedure the person was allowed to leave prison. If it was not an order, it was permission and authorisation following on from the procedure taken by SIS, the crime prevention department, et cetera, and the office for the exchanges: is that right? Yes."

iii. Testimony of VIDOVIĆ

304. VIDOVIĆ also confirmed that the CPD had to produce documents confirming that a detainee had no criminal record before they could be released.³⁵³ As one example, VIDOVIĆ confirmed that he issued an approval for the release of Haris TANOVIĆ on the 19th July 1993.³⁵⁴

305. In answer to a question from the Chamber VIDOVIĆ said:

JUDGE ANTONETTI: [Interpretation] Sir, what I don't understand is why you were involved in this process in the first place. THE WITNESS: [Interpretation] It's like this: We were duty-bound, on orders from the operative zone, to issue certificates, as the Crime Department. JUDGE ANTONETTI: [Interpretation] Very well, I understand better. In other words, if this person or individual was the subject of an investigation, you would have then stood in the way of his departure: is that what you're saying? THE WITNESS: [Interpretation] If we were conducting an investigation at that point in time, then, yes. In any other situation, the person would have no interest, as far as we were concerned.³⁵⁵

306. VIDOVIĆ made no mention of PUŠIĆ when pressed on who had the authority to release those detained at the Heliodrom.

(J.Praljak T.14979) , Josip Praljak also explained: “Q. Mr. Scott showed you one such document as representative example, P 04686. If you could look at it again. Have you found it? Yes.Q. Could you just try now. It's the same person. We have a document 6D 00169, which is a certificate from the crime prevention department, signed by Zvonko Vidovic, and he notes there are no criminal proceedings under way, and the certificate is issued for purposes of release of Zijo Droco from Heliodrom. And we have 6D 00168, a certificate from SIS Mostar saying that there is no problem with releasing Zijo Droco from Heliodrom. It's just as you said before. Everybody would give their approvals first and then Mr. Pusic. It's the same person, isn't he? These documents were also representative, as Mr. Scott called them. We have lots of such documents, and we will use the same procedure to tender them. A moment ago, when I asked you whether it was the right procedure, the SIS, the military police department, and then Mr. Pusic, you gave an answer, but it wasn't recorded. A. Yes, was the answer. “ See, also J.Praljak T.14979-80.

³⁵³ Vidovic T.51654. The witness testified, “Q. Mr. Vidovic, so it appears that in regard to the Heliodrom, you were involved, at least at the beginning, for the registration. Is it also true that when people were released, you were involved to a certain extent of signing off that they had no criminal record and they could be released? Is that right? A. We were requested to submit such certificates, that's correct.”

³⁵⁴ P03572.

³⁵⁵ Vidović T.51690-1.

iv. Powers To Order Releases

307. The evidence demonstrates that VIDOVIĆ, LAVRIĆ and OBRADOVIĆ as well as other military personnel had the power to unilaterally order prisoner releases. For instance, VIDOVIĆ often intervened to release detainees on medical grounds based on medical reports from the HVO Main medical staff board.³⁵⁶ VIDOVIĆ was also responsible for unilaterally ordering the release of a number of detainees who have transit visas and papers issued by the ODPR of Croatia.³⁵⁷

308. On 4 July 1993 VIDOVIĆ issued an order based on instructions from LAVRIĆ for the release of all detainees under the age of 16 and over the age of 60.³⁵⁸ VIDOVIĆ referred to the progress made in implementing this order in a special report addressed to the Military Police Administration (“MPA”) on the 5 July 1993 and an order issued on 12 July 1993.³⁵⁹ VIDOVIĆ refers to LAVRIĆ’s approval for the release of 14 members of the MSD party and notes that 58 individuals were released on medical grounds.³⁶⁰

309. On the same date that PUŠIĆ was appointed as Head of the Service for Exchange, OBRADOVIĆ issued an order prohibiting the release of (and any visits to) any Heliodrom detainee without his authorisation.³⁶¹ This letter was sent to the wardens of the Heliodrom, Ljubuški, Gabela and Dretelj. It was not forwarded to PUŠIĆ. In response to OBRADOVIĆ’s order, VIDOVIĆ, Head of the CPD, who had been tasked with registering detainees at the Heliodrom, sent a letter requesting further instructions from the Military Police Administration.³⁶² On 6 July 1993 ANČIĆ issues an order stating that OBRADOVIĆ is in charge of access to the Heliodrom and prisoner releases.³⁶³ As noted in Part VII of the Brief, OBRADOVIĆ convenes a meeting on the 6 July 1993 to discuss detainee releases and other matters.³⁶⁴

³⁵⁶ P03193

³⁵⁷ P03577, P03618, P04015, P04017, P04096.

³⁵⁸ P03167

³⁵⁹ P03864

³⁶⁰ P03193

³⁶¹ P03201. [REDACTED]

³⁶² P03238.

³⁶³ P03232.

³⁶⁴ 5D03008.

310. OBRADOVIĆ exercises his powers not only over detainee releases but in respect of all aspects connected to the operation of detention centres throughout the remainder of 1993. For instance, on 11 September 1993 Žara PAVLOVIĆ sends a request to OBRADOVIĆ for the release of those detainees with letters of guarantee and transit visas from Dretelj. OBRADOVIĆ approved the request.³⁶⁵

311. Furthermore, PUŠIĆ does not feature in a number of reports pertaining to the operation of detention centres and detainee releases throughout the Indictment period as discussed in Part VII.

v. PRALJAK Was Mistaken About PUŠIĆ's Role in Lizde's Release

312. JOSIP PRALJAK admitted he was wrong in attributing responsibility for the release of LIZDE to a decision taken by PUŠIĆ.³⁶⁶ LIZDE was released on the 19 October 1993. JOSIP PRALJAK admitted he was away on sick leave when this occurred and made an error in his recollection of the circumstances surrounding LIZDE's release. LIZDE was released together with Bojana MUJANOVIĆ, Selma DIZDAR, Sejo BEŠLAGIĆ and Džemal HAMZIĆ when, according to POGARČIĆ,³⁶⁷ the "competent authorities of Herceg-Bosna decided unconditionally and unilaterally, in an act of goodwill," to let them leave custody in accordance with the terms of the 14 September 1993 Joint Agreement.

D.Ljubuški and Otok-Vitina

1.Introduction

313. Another limb of the Prosecution's case is the allegation that PUŠIĆ frequently ordered the transfer of prisoners from one facility to another and could decide where they were housed.³⁶⁸ However, the evidence suggests that PUŠIĆ's involvement in prisoner transfers was limited to movements of detainees to and from the Heliodrom. As would be expected in the case of a civil servant, PUŠIĆ could not act unilaterally in such matters, and these transactions were normally approved by higher ranking HVO officials.

³⁶⁵ P04941.

³⁶⁶ P06170. J.Praljak T.14980-1

³⁶⁷ 6D00349.

³⁶⁸ OTP 98bis, T.27184.

2. Testimony of WITNESS E

i. Overview

314. [REDACTED]. [REDACTED]. [REDACTED]:

[REDACTED].³⁶⁹

315. [REDACTED].

316. [REDACTED]:

[REDACTED].³⁷⁰

317. [REDACTED]. Moreover PUŠIĆ did not feature in the [REDACTED]. [REDACTED]. [REDACTED].³⁷¹ [REDACTED].

ii. Transfer and Release of Prisoners

318. [REDACTED].³⁷²

319. [REDACTED]. [REDACTED].³⁷³

320. ŠANTIĆ's report of the 27 May 1993³⁷⁴ referred not to the release but to the transfer of prisoners from Ljubuški to the Heliodrom on the order of ĆORIĆ and PUŠIĆ.³⁷⁵ ĆORIĆ is described in the order as the Military Police Chief. No reference is made to the post held by

³⁶⁹ [REDACTED].

³⁷⁰ [REDACTED].

³⁷¹ [REDACTED].

³⁷² [REDACTED].

³⁷³ P03664.

³⁷⁴ P02541.

³⁷⁵ P02535.

PUŠIĆ. ĆORIĆ was clearly superior to PUŠIĆ and both men are named in other orders requesting the transfer of prisoners to or from the Heliodrom in this time frame.³⁷⁶

321. [REDACTED].³⁷⁷ [REDACTED].³⁷⁸

iii. Role of SIS and CPD

322. Many of the documents [REDACTED] emanate from SIS, the CPD or the Main Staff and contain no reference to PUŠIĆ or the Service for Exchange. An examination of this material suggests that [REDACTED] once the approval of SIS and /or the CPD had been obtained as was the case with the transfer of prisoners documented above in relation to ŠANTIC's daily report of 27 May 1993.

323. Another example can be found in a note [REDACTED].³⁷⁹ [REDACTED]³⁸⁰

324. [REDACTED].³⁸¹ [REDACTED].³⁸²

325. [REDACTED]:

[REDACTED].³⁸³

iv. WITNESS E's [REDACTED]

326. [REDACTED].³⁸⁴ [REDACTED]³⁸⁵ and [REDACTED].³⁸⁶

v. PUŠIĆ Requested Prisoner Lists

³⁷⁶ P02535. P02541.

³⁷⁷ [REDACTED].

³⁷⁸ [REDACTED].

³⁷⁹ [REDACTED].

³⁸⁰ [REDACTED].

³⁸¹ [REDACTED].

³⁸² [REDACTED].

³⁸³ [REDACTED].

³⁸⁴ [REDACTED].

³⁸⁵ [REDACTED].

³⁸⁶ [REDACTED].

327. [REDACTED]. [REDACTED].

328. [REDACTED]. [REDACTED]³⁸⁷ and on another occasion [REDACTED]³⁸⁸ Importantly, there is no evidence linking PUŠIĆ to any subsequent decision by the [REDACTED].³⁸⁹

329. If true, [REDACTED] simply confirm that PUŠIĆ was performing duties consistent with the mandate for the Service for Exchange.

vi. WITNESS E Lacks Credibility

330. [REDACTED]³⁹⁰ the Chamber should exercise caution before making any finding of fact on the basis of the evidence of WITNESS E.

3. 15 September 1993 List of Detainees Transferred to Ljubuški

331. After the TUDMAN – IZETBEGOVIĆ agreement of the 14 September 1993³⁹¹ PUŠIĆ's office produced a list of detainees that had been transferred from the Heliodrom to Ljubuški. This document is simply a list of detainees, not an order for their release as alleged by the Prosecution.³⁹²

E. Gabela, Dretelj and Vojno

1. Overview

332. The evidence does not disclose that PUŠIĆ could unilaterally order prisoner releases or transfers from Gabela or Dretelj, thereby rebutting Prosecution allegations that PUŠIĆ had the power to control the fate of every HVO detainee. For example, VIDOVIĆ features in an order for the transfer of transfer 200 detainees from the Heliodrom to the prison in Dretelj dated 1

³⁸⁷ [REDACTED].

³⁸⁸ [REDACTED].

³⁸⁹ [REDACTED].

³⁹⁰ [REDACTED].

³⁹¹ P05051.

³⁹² P05083.

July 1993.³⁹³ The document is created by BOŽIĆ and endorsed as taking effect on the order of PUŠIĆ but signed by VIDOVIĆ and BOŽIĆ. At the time VIDOVIĆ was Head of the CPD, thereby occupying a superior post to PUŠIĆ. The notion that this order is an example of PUŠIĆ's authority is not therefore the only reasonable interpretation of this evidence.

333. JOSIP PRALJAK confirmed that other HVO Officials had the power to order the release of detainees at a local level from Čapljina. For example, JOSIP PRALJAK testified that he was told by BOŽIĆ that Žara PAVLOVIĆ had the power to order the release of prisoners from Čapljina area.

334. PUŠIĆ is not cited as having any authority for the release of prisoners in a number of reports documenting inspections of Gabela, Dretelj or Ljubuški.³⁹⁴ TUCAK describes the general situation in Ljubuški and Dretelj and states that 6 detainees have been released on the order of OBRADOVIĆ in his report of 11 July 1993.³⁹⁵ In respect of Dretelj, on 5 October 1993 ANČIĆ despatches a report to the MPA stating that the Brigade SIS, not PUŠIĆ, was responsible for compiling lists of detainees and organizing their release.³⁹⁶

2. TOMO ŠAKOTA

335. Tomo ŠAKOTA was appointed as co-ordinator for inmates and POWs by BOBAN. ŠAKOTA produced a report on his activities for the period 22 July 1993 to 25 December 1993. ŠAKOTA was involved in the release of prisoner and implementation of BOBAN's 10 December 1993 order. ŠAKOTA's report sheds some light on prisoner releases from the Dretelj camp. ŠAKOTA fails to mention PUŠIĆ in a report which documents the release of 450 detainees for Korčula.³⁹⁷

336. In relation to Dretelj the evidence also confirms that OBRADOVIĆ had the sole authority to release detainees. For example, OBRADOVIĆ orders the release of a number of

³⁹³ P03055.

³⁹⁴ P04253, P04921, P05222, P05225 and P06729.

³⁹⁵ P03377.

³⁹⁶ *see also* P05647

³⁹⁷ P07341 and 2D00973.

detainees on the 6 August 1993³⁹⁸ and 44 detainees on or around the 11th of September 1993.³⁹⁹ [REDACTED].⁴⁰⁰

F. Release of RIZVANBEGOVIĆ AND WITNESS CU

337. RIZVANBEGOVIĆ and [REDACTED]. The discharge papers for RIZVANBEGOVIĆ (and LIZDE)⁴⁰¹ were signed by PUŠIĆ and the Prosecution rely on these documents as evidence of PUŠIĆ's authority to release detainees. In fact, in each of these cases, the evidence conclusively demonstrates that PUŠIĆ merely issued the paperwork for their release, rubber stamping decisions taken at a more senior level. The protracted negotiations preceding the release of [REDACTED], RIZVANBEGOVIĆ and [REDACTED] LIZDE further highlight the complexity of the release process and how little influence PUŠIĆ wielded.

1. RIZVANBEGOVIĆ

338. RIZVANBEGOVIĆ was detained in Dretelj and later in Ljubuški, before being released on 10 December 1993. Although the witness was a highly educated man who was familiar with the significant figures in the Bosnian government, he had never heard of PUŠIĆ. Furthermore, while his discharge letter was signed by PUŠIĆ, the witness testified that Perica JUKIĆ provided the actual authorization for his release, and that POGARČIĆ, acting on behalf of BOBAN issued a letter to JUKIĆ and LUČIĆ, who was Head of the Information Service of the Department of Defence, approving the release.⁴⁰²

339. Following a letter from POGARČIĆ, on 4 December 1993 LUČIĆ asked for enquiries to be made to find out if RIZVANBEGOVIĆ was a member of the MOS and if not, for arrangements to be made for his release.⁴⁰³ The events preceding RIZVANBEGOVIĆ's release therefore confirm that PUŠIĆ could only provide a discharge certificate after obtaining approval from SIS and/or CPD.

³⁹⁸ 5D02184.

³⁹⁹ P04941.

⁴⁰⁰ [REDACTED].

⁴⁰¹ See, Part VII, Section C(2)(v).

⁴⁰² Rizvanbegović T.2263-9.

⁴⁰³ 6D00002

340. During cross-examination RIZVANBEGOVIĆ confirmed that PUŠIĆ had little involvement in the decision to authorise his release:

Q. Would you agree, then, Professor, that the decision to release you was taken long before my client, Mr. Pusic, signed that serve approval on the 10th of December?

A. It was certainly taken before in Zagreb, and it reached your client, but I believe *that his role in that matter is wholly insignificant.*⁴⁰⁴ [emphasis added]

2. WITNESS CU

341. [REDACTED]. [REDACTED]. [REDACTED].

342. [REDACTED].⁴⁰⁵

343. [REDACTED].

344. [REDACTED]⁴⁰⁶. [REDACTED]. [REDACTED]⁴⁰⁷ [REDACTED].⁴⁰⁸

345. [REDACTED]:

[REDACTED].⁴⁰⁹

G. Conclusion: Releasing Prisoners Is Not A War Crime

346. Assuming arguendo, that PUŠIĆ did have some decision making powers in this period of time, the Defence does not concede that PUŠIĆ's involvement in prisoner exchanges and releases constituted criminal conduct. As noted by the Presiding Judge when questioning

⁴⁰⁴ Rizvanbegović T.2236 and T.2263-9.

⁴⁰⁵ [REDACTED].

⁴⁰⁶ [REDACTED].

⁴⁰⁷ [REDACTED].

⁴⁰⁸ See, Part V, Section F.

⁴⁰⁹ [REDACTED].

JOSIP PRALJAK there was nothing extraordinary about the HVO releasing civilian detainees held at the Heliodrom in May 1993.⁴¹⁰ JOSIP PRALJAK agreed with this conclusion:

Q. Thank you. Now I'd like to go back to another area, another subject. The 9th of May is the date, 1993, and P 02260 is the document. It is an Official Note compiled by Mr. Bozic - we've already looked at that - about the release of people who were at Heliodrom. A. Yes.

Q. I just want to throw light on this document from another angle. Were those people supposed to be there in the first place, and *did Mr. Pusic act quite correctly if this was noted in the Official Note when he says, "release those people, let them go home, back to their homes"*? A. Those people who arrived on the 9th of May were civilians, women and children, men, too, and the reason for their coming was well-known, why they were displaced and the -- according -- and Biljana Nikic and Marko Bevanda said that this was just a place where these displaced persons were taken in.

Q. What I'm saying is, if Mr. Pusic acted as is written down in the Official Note, was that the right decision when he said let the people go home? They have no place to be here. A. *Well, not only those people, but none of the other people either should have been there.*

Q. And then you testified that the people left Heliodrom very quickly after that, these people? A. Yes.⁴¹¹ [emphasis added]

VII. DETENTION CENTRES

A. Introduction

1. Overview

347. Based primarily on JOSIP PRALJAK's testimony the Prosecution alleges that PUŠIĆ had the power to oversee HVO prisons and detention camps⁴¹² and therefore that he had

⁴¹⁰ J.Praljak T.14692-3.

⁴¹¹ J.Praljak T.14974-5.

effective command and control over HVO military units and personnel that had Muslim prisoners and displaced persons in their custody.⁴¹³ Given that PUŠIĆ was not employed at the Heliodrom and no evidence has been led that he had any authority over any of the other military or civilian personnel stationed there, it is submitted that JOSIP PRALJAK's testimony should not form the basis of any finding of fact in regard to PUŠIĆ's criminal responsibility.

348. JOSIP PRALJAK and BOŽIĆ had good reason to want to deflect blame for any crimes that occurred during their period in office towards PUŠIĆ. JOSIP PRALJAK's testimony is therefore unreliable for the reasons advanced below and discussed elsewhere in the Brief. Defence submissions concerning the extent of PUŠIĆ's authority over the operation of detention centres also apply to allegations of his involvement in forced labour practices considered in Part VIII, *supra*.

349. In order to avoid confusion, it is important to distinguish Berislav PUŠIĆ from other individuals with the same surname. MILE PUŠIĆ, for instance, was the first warden of the Heliodrom and BOŽIĆ's predecessor. IVICA PUŠIĆ was Deputy Commander of the 3rd Brigade and Head of SIS and has also been mentioned in connection with the Heliodrom.

2. Responsibility for Operation of HVO Detention Centres

350. As a general submission the Defence assert that while there remains some disagreement as to which HVO agency had responsibility for detained Bosnian Muslims and non-Croats in the period 1993-4, the evidence shows that PUŠIĆ did not have authority over the detainees held at any HVO detention centres.

3. HVO HZ/HR HB Meetings

351. The allegations made by JOSIP PRALJAK must be seen in light of the broader context and framework of the JCE advanced by the Prosecution. It is therefore relevant that PUŠIĆ is not cited in the minutes of any HVO HZ H-B meetings as a responsible authority for detention centres including those cabinet meetings held after the creation of the 6 August

⁴¹² OTP 98bis, T. 27119-49.

⁴¹³ OTP 98bis, T. 27119-49

1993 Commission. Nor is PUŠIĆ present at a meeting in Ljubuški on 22 July 1993 of the section heads within the Military Police including VIDOVIĆ where the detention of a number of civilians in the Heliodrom is discussed.⁴¹⁴

352. At many of these meetings the issue of detention centres is raised with discussions focusing on the need to ensure that the facilities are run in accordance with international conventions. At a HVO HZ H-B working meeting on 18 August 1993 for instance conclusions are adopted charging various departments with responsibility for ensuring detention centres observe procedures consistent with international law.⁴¹⁵ After a 6 September 1993⁴¹⁶ working meeting a similar resolution is adopted in regard to the detention of POWs and various HVO departments are tasked with ensuring that the conclusions are complied with. Detention centres are also discussed during meetings on 11 August 1993⁴¹⁷ and 2 September 1993.⁴¹⁸ The HVO Defence Minister JUKIĆ addresses the HR H-B on this issue on 1 December 1993.⁴¹⁹

B. Testimony of JOSIP PRALJAK

353. JOSIP PRALJAK claimed that PUŠIĆ had general authority over detainees⁴²⁰ and that he was therefore obliged to report everything not only to PUŠIĆ but also to VIDOVIĆ.⁴²¹ However, as discussed *infra*, the evidence shows that PUŠIĆ was not his superior and he was therefore under no obligation to report to him.⁴²²

354. The evidence indicates that in the course of 1993 a practice developed at the Heliodrom where reports of detainee mistreatment were documented and forwarded to a number of HVO officials including PUŠIĆ. VIDOVIĆ testified that JOSIP PRALJAK wrote to him non-stop

⁴¹⁴ P03663.

⁴¹⁵ P04275.

⁴¹⁶ P04841.

⁴¹⁷ P04111.

⁴¹⁸ P04756.

⁴¹⁹ P07000.

⁴²⁰ J.Praljak T.14714. The witness testified, "Mr. Berislav Pusic, as head of that office for exchange, took care of the prisoners of war and was aware of each and every prisoner of war who was brought to Heliodrom or was already held there"

⁴²¹ J.Praljak T.14741. P03171. The witness testified, "[we] had to report everything to the chief of the military police, the chief of the crime prevention service, Mr. Zvonko Vidovic, and Mr. Berislav Pusic, as the officer in charge of control of the military police administration."

⁴²² J.Praljak T.14702.

regarding matters outside his area of operative responsibility.⁴²³ A similar situation applied to PUŠIĆ and the evidence does not show that PUŠIĆ had any powers to remedy the problems raised by JOSIP PRALJAK or BOŽIĆ.

355. For example, PUŠIĆ is one of the recipients of a report signed by BOŽIĆ and JOSIP PRALJAK recording an incident that took place on the 5 July 1993.⁴²⁴ PUŠIĆ lacked the authority to intervene to punish those responsible for this incident. JOSIP PRALJAK testified that on arriving at the Heliodrom the next morning he immediately informed the deputy commander of the 3rd Brigade, Mile PUŠIĆ as well as the brigade police. The 3rd Brigade was tasked with identifying and apprehending the culprits.⁴²⁵

356. VIDOVIĆ testified that although he was head of the CPD at the time he had no memory of this incident. However he acknowledged that the CPD would have been under a duty to investigate this type of incident.⁴²⁶ He made no reference to PUŠIĆ.

357. It is therefore hardly surprising that JOSIP PRALJAK obtained no relief from PUŠIĆ in response to the complaints of poor sanitary and medical conditions in the Heliodrom recorded in JOSIP PRALJAK's letter of 30 September 1993. BAGARIĆ testified that doctors from the local military district or brigades within that area together with detainees who were physicians provided care for those that were in custody.⁴²⁷ He also said that other doctors within the HVO medical section took action to improve the medical conditions at the HVO detention centres.⁴²⁸

358. Moreover, although JOSIP PRALJAK claims that he was under a duty to report to PUŠIĆ, no evidence has been presented that PUŠIĆ pro-actively issued any orders to him regarding the conditions of detention of detainees. This also applies to the forced labour notifications sent to PUŠIĆ. This evidence does not tally with the conventional notion of and legal requirements for a superior-subordinate relationship.

⁴²³ Vidovic T.51666.

⁴²⁴ P03209.

⁴²⁵ J.Praljak T.14733-6 and T.14937-8. The witness testified, "Everything was sent out by the book as it should have been so that the deputy commander, Mr. Mile Pusic, with his brigade police force, should find the perpetrators and punish them. Whether he actually did find them and punish them, I don't know."

⁴²⁶ Vidović T.51652-3.

⁴²⁷ Bagarić T.39045.

⁴²⁸ Bagarić T.39211-2.

359. The only legitimate reason that JOSIP PRALJAK had to report any matter to PUŠIĆ would concern PUŠIĆ's responsibility for maintaining records of those in custody, consistent with the mandate of the Service for Exchange. JOSIP PRALJAK acknowledged this when testifying about a report he sent dated 25 August 1993 to the Service for Exchange, concerning a list of detainees from Doljani and Sovići, at least 3 of whom were receiving medical treatment. When asked why he sent this report to PUŠIĆ, JOSIP PRALJAK explained:

[a]s the representative of the office for exchange, he had to have all the information about every detainee who was in prison, and here we have a list of detainees from Doljani and Sovići who were at that time doing labour or were in hospital for treatment on that particular day.⁴²⁹

C. Role of the ODPR In May 1993

360. Shortly after the 9 May 1993 two civilian ODPR employees, Biljana NIKIĆ and Marko BEVANDA, were sent by Darinko TADIĆ from the ODPR to assume the task of registering the new arrivals at Heliodrom.⁴³⁰ JOSIP PRALJAK said that he knew that TADIĆ was:

in charge of the displaced persons and refugees attached to the ministry as the number one man for that.⁴³¹

361. Contrary to Prosecution claims that PUŠIĆ was responsible for classifying and registering detainees⁴³² JOSIP PRALJAK testified that the 578 refugees registered by the ODPR in the period of 14-18 May were the same people who arrived at Heliodrom on 9 May 1993.⁴³³

362. On 11 May 1993 FINLAYSON visits the Heliodrom and meets TADIĆ. He describes TADIĆ as the HVO humanitarian representative.⁴³⁴ TADIĆ tells him he is trying to get food and medical care organised for the internees. He notes that the initial arrest and movement of

⁴²⁹ J.Praljak T.14783-4. P04500.

⁴³⁰ J.Praljak T.14685-9, T.14721-2 and T.14919-22.

⁴³¹ J.Praljak T.14686.

⁴³² Indictment, para.17.6(g).

⁴³³ J.Praljak T.14685-9, 14721-2, 14919-20 and 14921-22.

⁴³⁴ P02293, para.7.

civilians was ordered by LASIĆ⁴³⁵ and meets Mile PUŠIĆ at the facility. He makes no mention of PUŠIĆ.

363. A letter dated 9 May 1993 signed by TADIĆ clarifies that the ODPR and TADIĆ had responsibility for those arrested in early May 1993 and detained at the Heliodrom. The letter states that “for safety reasons we have looked after 1.500 persons, mostly Muslims in Heliodrom near Mostar...”⁴³⁶

364. PETKOVIĆ also confirmed that all the civilians taken to the Heliodrom were dealt with by the ODPR.⁴³⁷

365. The ODPR continued to play an important role in respect of how detainees were treated after the departure of those arrested in May 1993. [REDACTED]. TADIĆ’s deputy, HERCEG [REDACTED].⁴³⁸

366. At a 6 September 1993 working meeting of the HR H-B cabinet the conditions of detention at the Heliodrom and other detention facilities were discussed. Certain specific assignments were ordered. The ODPR, for example, was tasked to ensure the necessary quantities of food, personal hygiene items, equipment and material needed for accommodation at the detention centres⁴³⁹

D. Management of the Heliodrom After 30 June 1993

1. Role of Military Police and SIS

367. The evidence shows that PUŠIĆ played no role in the registration and classification⁴⁴⁰ of the disarmed HVO Muslim soldiers brought to the Heliodrom after the 30 June 1993. Unlike the May 1993 arrests, where the ODPR was responsible for detainees, the Military Police and SIS took responsibility for registering detainees interned after the 30th of June 1993. JOSIP PRALJAK stated that:

⁴³⁵ P02293, para.6.

⁴³⁶ 5D 01004. *see also* [REDACTED].

⁴³⁷ Petković T.49911-2.

⁴³⁸ [REDACTED].

⁴³⁹ P04841.

⁴⁴⁰ Indictment, para.17.6(g).

we never established the number of people who arrived, because that job, the job of taking them in and registering them, registering those who were arriving, was done by 10 to 12 employees of the MUP, of the military police, of the SIS, with Zvonko VIDOVIĆ at its head.⁴⁴¹

368. VIDOVIĆ disputed that he was the head of this operation but agreed that he was ordered by his military police battalion to report to the Heliodrom. He had been asked to make a list of all the detainees who were disarmed HVO members of Muslim ethnicity. VIDOVIĆ stated that this order was received from the commanders of his operative zone. VIDOVIĆ took down the names and surnames and other “basic details” of those arrested together with other Military Police Officials and workers from SIS and the Heliodrom.⁴⁴² VIDOVIĆ clarified that Ivica PUŠIĆ was the SIS representative that assisted him in this process.

369. In a report to a Meeting of the Heads of the Military Police on 22 July 1993, VIDOVIĆ stated that his department had conducted over 2,000 interviews of those detained at the Heliodrom and that none of those questioned were of interest to them.⁴⁴³

370. On 12 July 1993, JOSIP PRALJAK testified that new procedures were put in place concerning detainees at the Heliodrom. No evidence has been led that PUŠIĆ was involved in generating these new procedures.⁴⁴⁴

2. Testimony of PETKOVIĆ and SLOBODAN PRALJAK

⁴⁴¹ J.Praljak T. 14708.

⁴⁴² Vidović T.51520-1. The witness testified, “Q. Would you pause there for a moment. Let me just ask you, you said it came in through the battalion. Was the order issued to you by the battalion? A. The battalion received the order via the operative zone, and it just forwarded it on to me -- to us based on some hierarchy or chain of command. Q. You said that you made a list, drew up a list. What kind of list was that? A. On the premises of the Military Remand Prison of Heliodrom, we took down the basic details of the persons there: names, surname, and where they were from, just the basics. And we did that together with the MUP and SIS and some workers from the Heliodrom Prison itself.” Vidović T.51621. Vidović further clarified his role thus: “A. It was like this: I and the service that I worked for never took part in taking people away to Heliodrom. We were involved in writing down and registering them. And they were disarmed members of the HVO of Muslim ethnicity, and what we did was -- under orders from the operative zone, for a few days we would take down basic information about them: their names, and surnames, and the units they belonged to. So let me repeat. We did not participate, I and my service, in any taking of people to Heliodrom.”

⁴⁴³ P03651

⁴⁴⁴ J.Praljak T.14725-7. P03411

371. Neither PETKOVIĆ nor SLOBODAN PRALJAK mentioned PUŠIĆ in connection with the management of the Heliodrom. PETKOVIĆ denied having any authority over the Heliodrom.⁴⁴⁵ SLOBODAN PRALJAK also claimed the HVO brigades had no authority over the detention centres and he did not know who was in charge of them.⁴⁴⁶

3. PUŠIĆ Was Not Responsible For The Failure To Separate POWs From Civilians In The Heliodrom

372. After the 30 June 1993 influx JOSIP PRALJAK admitted the prisoners of war detained at Heliodrom were not separated from civilians. JOSIP PRALJAK confirmed that only the SIS and the CPD could distinguish the POWs from the civilian detainees.⁴⁴⁷

4. Interrogation of Detainees At the Heliodrom

373. There is no evidence that PUŠIĆ had any involvement in the interrogation of suspects at the Heliodrom.

E. Other Detention Centres

374. The evidence presented at trial does not demonstrate that PUŠIĆ had control over the operation and conditions of detention of inmates at any other HVO detention facility.⁴⁴⁸

1. Dretelj

375. In relation to Dretelj for example, the evidence indicates that on 6 July 1993 Ivan ANČIĆ, Assistant Commander of the 3rd Battalion, forbade all visits to prisoners in the Dretelj barracks and denied all journalists access to the facility.⁴⁴⁹ ANČIĆ was acting on an order issued by OBRADOVIĆ three days earlier.⁴⁵⁰ [REDACTED].⁴⁵¹ On the 6 July 1993 ANČIĆ attended a meeting with OBRADOVIĆ, PRIMORAC, Žara PAVLOVIĆ and Ivica

⁴⁴⁵ Petković T.50672.

⁴⁴⁶ S.Praljak T.44185.

⁴⁴⁷ J.Praljak T.14707-8.

⁴⁴⁸ See, also Part VIII, Section B.

⁴⁴⁹ P03232.

⁴⁵⁰ P03161

⁴⁵¹ [REDACTED].

PUŠIĆ of SIS and others where guidelines are set down for the use of prisoners for work and the manner in which prisoners are to be released.⁴⁵²

2. Reports on the Operation of HVO Detention Centres

376. It is extremely significant, in that it goes some way to rebutting the Prosecution's case⁴⁵³ that PUŠIĆ does not feature in a number of reports on the operation of HVO detention centres for the latter half of 1993. A report by the Assistant Chief of Security TUCAK dated 29 July 1993 on conditions in Dretelj makes no reference to PUŠIĆ⁴⁵⁴ and a report from SIS dated 20 September 1993 notes that Tomo ŠAKOTA is in charge of administration, logistics and security at the facility.⁴⁵⁵

377. In fact, the Assistant chief of Security TUCAK does not mention PUŠIĆ in any of the reports he prepares concerning the conditions at and operation of Ljubuški, Dretelj and Gabela detention facilities such as his 10 September 1993 report.⁴⁵⁶ Earlier, on 29 May 1993 TUCAK had prepared a report on the situation in Dretelj prison.⁴⁵⁷

378. Nor is PUŠIĆ mentioned in numerous other reports on the operation of HVO detention centres.⁴⁵⁸

3. PUŠIĆ's Visit to Čapljina Municipality

379. The Chamber is invited to carefully scrutinise the evidence concerning PUŠIĆ's participation in a working group established on 19 July 1993 at the 46th session of the HVO HZ H-B to visit Čapljina.⁴⁵⁹ The other members of the working group, BUNTIĆ and TADIĆ outranked PUŠIĆ in the HVO administration. BUNTIĆ was Head of Justice Department and

⁴⁵² 5D03008.

⁴⁵³ See, also allegations made by Lavrić in his letter of 22 November 1993 (P06805) examined at Part IX, Section B(2).

⁴⁵⁴ P03794.

⁴⁵⁵ P05222.

⁴⁵⁶ P04921.

⁴⁵⁷ P03794.

⁴⁵⁸ P04253 is a HVO SIS report noting Brigadier Džanko's visit to Gabela dated 17 August 1993. P05222 is a report dated 20 September 1993 on security and conditions in military detention camp Dretelj. P05225 is a report dated 20 September 1993 regarding security and conditions in Gabela. P06729 is a report from Citanovic dated 18 November on the conditions of detention in Gabela and Heliodrom See Part IX, Section B(1).

⁴⁵⁹ P03560.

TADIĆ was head of the ODPB. BUNTIĆ said that he had only met PUŠIĆ once before this event.⁴⁶⁰

380. BUNTIĆ testified that the working group did not actually visit either Gabela or Dretelj:

Correct. We did not go to Gabela or Dretelj ourselves because I refused to go to Gabela and Dretelj...All that we learned, therefore, was from Mr. Kordic and his assistants.⁴⁶¹

381. It was BUNTIĆ, not PUŠIĆ, who reported back to the cabinet on 20 July 1993⁴⁶² after the visit to Čapljina. PUŠIĆ did not attend that cabinet meeting or the earlier meeting on the 19 July 1993. PUŠIĆ was not mentioned in any of the recommendations made by the cabinet after the meeting.

382. There is no evidence of any specific pronouncements by PUŠIĆ concerning the proposals advanced to the HZ H-B on 20 July 1993 and BUNTIĆ's testimony suggests he had a marginal role in the activities of the working group. Accordingly, it is submitted that no finding of fact should be made in connection with PUŠIĆ's criminal responsibility on the basis of this evidence.

F. Providing False Information About Detention Conditions to Deny and Minimize Crimes

383. The Prosecution alleges PUŠIĆ gave false or inaccurate information to representatives of international organizations and the press about the conditions of detention at Heliodrom and Dretelj in order to deny and minimize the crimes.⁴⁶³ The evidence does not support these assertions.

384. VULLIAMY testified that at a press conference held in Međugorje between 7 - 9 September 1993, PUŠIĆ:

⁴⁶⁰ Buntić T.30578.

⁴⁶¹ Ibid.

⁴⁶² P03573. Buntić T.30575-8. *See*, also Tomljanovich T.6405-6.

⁴⁶³ Indictment paragraph 17.6 (j).

implicitly disputed what Mr. Zubak had said [about breaches of international standards with respect to the conditions in Dretelj]. He implied or said outright -- *I think he did say outright that the conditions in Dretelj did meet international standards and were within the Geneva Conventions.* [emphasis added]⁴⁶⁴

385. The Chamber is asked to note that, assuming VULLIAMY's record is accurate, PUŠIĆ was not necessarily saying something at this meeting that he knew to be false or inaccurate regarding the conditions at Dretelj. PUŠIĆ was disputing whether the legal conclusion reached by the international community was correct – in his view it was not. PUŠIĆ was not, as Vulliamy makes clear, justifying the conditions at Dretelj or attempting to deny them:

I don't know what influence [PUŠIĆ] did or didn't have. But *he did seek to not justify the conditions in Dretelj* but he did *seek to persuade the conference that they fell within the requirements of international law of war.*⁴⁶⁵ [emphasis added]

386. Moreover, PUŠIĆ could not have misled the international community representatives or journalists present at this meeting as they were fully aware of the conditions at Dretelj as a consequence of their own inspections. The ICRC had already begun their inspection of Dretelj which commenced on 6 September 1993. Between the 6 - 15 September 1993 the ICRC registered and made lists of the names of all the prisoners.

387. International organisations conducted inspections at HVO facilities throughout the Indictment period. WATKINS for instance confirmed that the ICRC had the lead role in visiting detention camps and that the ECMM based their conclusions on their reports.⁴⁶⁶

G. Powers to Grant Access to Detention Centres

388. A review of the rules governing the inspection of HVO detention centres by international representatives and of the HVO orders granting them access does not support

⁴⁶⁴ Vulliamy T.1595-6.

⁴⁶⁵ Vulliamy T.1593-6. and T.1729-21

⁴⁶⁶ Watkins T.18873-4.

Prosecution claims that PUŠIĆ was the primary HVO point of contact responsible for granting access to the Heliodrom for international community representatives.⁴⁶⁷

389. In theory, the warden of each detention facility could decide whether to allow any international organisation or journalist access. On 11 February 1992 the HVO issued instructions for the operation of prisons stating that international community representatives and journalists could enter with permission from the administrator.⁴⁶⁸

390. In principle international community representatives were to have unfettered access to HVO detention centres as confirmed in an order of the HVO Operative Zone dated 21 April 1993. This order reiterated that ICRC representatives were to have free access to civilians in all areas and to all detainees.⁴⁶⁹

391. Following this, complaints about obstructions to visits from the ICRC to the Heliodrom were addressed to Mile PUŠIĆ who guaranteed that the ICRC and UNHCR would be allowed to visit the Heliodrom on 11 May 1993.⁴⁷⁰

392. [REDACTED]. [REDACTED].⁴⁷¹ [REDACTED] and VAN DER GRINTEN's report do not support the inference that that PUŠIĆ had the power to grant access to any detention facility⁴⁷² given PUŠIĆ's position vis a vis the other HVO representatives named therein and the fact that PUŠIĆ had no *de jure* powers to grant access to any detention facilities.⁴⁷³

393. [REDACTED].⁴⁷⁴ [REDACTED]. PAŠALIĆ had already given permission for the [REDACTED] entry to inspect ABiH camps and [REDACTED]:

[REDACTED].⁴⁷⁵

⁴⁶⁷ OTP 98bis. Watkins T.18820.

⁴⁶⁸ P01474.

⁴⁶⁹ 5D04379.

⁴⁷⁰ P02293.

⁴⁷¹ [REDACTED].

⁴⁷² P02601.

⁴⁷³ See, Part III.

⁴⁷⁴ [REDACTED].

⁴⁷⁵ [REDACTED].

394. [REDACTED]. [REDACTED] PUŠIĆ was a Minister, WITNESS BB's evidence should not be taken as decisive proof of PUŠIĆ's powers. Bearing in mind the conclusions of [REDACTED] and WITNESS DV, even if the matter was canvassed with PUŠIĆ it is likely that the decision to grant access was taken higher up.

395. There were obviously conflicting views within the HVO as to whether international community organisations should be granted access to detention facilities through the summer to autumn of 1993. One common thread is the lack of evidence linking PUŠIĆ to this debate. On 3 July 1993 OBRADOVIĆ issues an order forbidding all visits and access to all prisoners directed to the wardens of Heliodrom, Gabela, Ljubuški and Dretelj⁴⁷⁶ and on 12 July 1993 VIDOVIĆ sends instructions to BOŽIĆ and JOSIP PRALJAK stating that visits to detainees are not allowed without his permission.⁴⁷⁷

396. Meanwhile decisions are made to allow the ICRC to inspect Ljubuški on 6 July 1993⁴⁷⁸ and Dretelj, Ljubuški and Heliodrom on [REDACTED].⁴⁷⁹ At a 20 July 1993 session the HVO HZ H-B concludes that the ICRC should be given access to all detention facilities.⁴⁸⁰ On 23 July 1993. [REDACTED].⁴⁸¹ VEGAR also noted that when he organised for journalists and members of the ICRC to visit the Heliodrom he spoke to BOŽIĆ.⁴⁸²

397. It also bears highlighting that reports produced for TUCAK on the operation of Dretelj and Gabela⁴⁸³ by SIS dated 20 September 1993 record that only OBRADOVIĆ and the Head of the Brigade SIS can grant access to these facilities. Regarding Dretelj, VEGAR testified that he asked ŠAKOTA for permission for a group of journalists to visit the facility.⁴⁸⁴

398. Any involvement PUŠIĆ had in arranging for the ICRC and other international community organisations to have access to the Heliodrom or other detention centres in December 1993 or thereafter must be seen in light of the evidence of WATKINS⁴⁸⁵ and

⁴⁷⁶ P03161.

⁴⁷⁷ P03411.

⁴⁷⁸ P03250.

⁴⁷⁹ [REDACTED].

⁴⁸⁰ P03573.

⁴⁸¹ [REDACTED].

⁴⁸² Vegar T.37103 and T.39642.

⁴⁸³ P04921.

⁴⁸⁴ Vegar T.36943.

⁴⁸⁵ *See*, Part IV.

BIŠKIĆ.⁴⁸⁶ PUŠIĆ was clearly in a transparent manner trying to ensure that BOBAN's order of 10 December 1993 was executed as quickly as possible.

VIII. FORCED LABOUR

A. The Case Against PUŠIĆ

1. Introduction

399. The Prosecution claim that PUŠIĆ had the power to order or authorise the use of detainees in forced labour assignments based on his position in the Military Police and that he exercised this power frequently.⁴⁸⁷ This conduct is further cited as evidence of his general authority over detainees.⁴⁸⁸

400. The case against PUŠIĆ insofar as it relates to allegations of his authority over forced labour largely rests on the evidence of JOSIP PRALJAK and BOŽIĆ. The Prosecution rely on a number of documents prepared by JOSIP PRALJAK, BOŽIĆ and other Heliodrom staff that have been mischaracterised as "orders" (or to be more accurate "notifications") for forced labour assignments.

401. A proper analysis of this evidence reveals that while PUŠIĆ may have received notice of some forced labour assignments at the Heliodrom PUŠIĆ had no power to authorise or prevent this practice or punish those responsible for carrying it out. As noted previously, PUŠIĆ had no *de jure* authority by virtue of any the offices he held to issue orders for forced labour.⁴⁸⁹

2. Forced Labour - 1992

⁴⁸⁶ See, Part IX.

⁴⁸⁷ Indictment paragraph 17.6 (f), (h) and (d) Forced labour. "Mr. President, Berislav Pusic had the power to authorise the use of prisoners for forced labour, and he exercised this power frequently. Josip Praljak who was the deputy warden of the Heliodrom prison facility testified that Pusic exercised this power as a member of the military police. That's page 1470 -- actually, it may be 14741 of the transcript. I will double-check that reference." OTP 98bis T.27135.

⁴⁸⁸ Indictment paragraph 17.6 (e)

⁴⁸⁹ See, Part III.

402. The Prosecution rely on a report from SIS dated 13th November, 1992, as evidence of the HVO practice of using detainee for work assignments.⁴⁹⁰ In this report JOSIP PRALJAK confirmed that they had recorded every instance when prisoners were taken out to work but there is no reference made to PUŠIĆ.

3. WITNESS NO and PAVLOVIĆ [REDACTED]

403. [REDACTED].⁴⁹¹ [REDACTED]:

[REDACTED].⁴⁹²

404. [REDACTED]. PAVLOVIĆ, who was in charge of the 3rd Brigade [REDACTED] issued a large number of these orders.

405. Normally, an order from [REDACTED]. JOSIP PRALJAK made no reference to PUŠIĆ's role in this procedure:

[REDACTED].⁴⁹³

406. After receiving [REDACTED] PAVLOVIĆ, JOSIP PRALJAK claimed that PUŠIĆ had to be contacted and asked to “approve” the use of prisoners for labour.⁴⁹⁴ JOSIP PRALJAK testified that whoever spoke to PUŠIĆ would document this conversation, either in the form of a memorandum or with a note in the Heliodrom log book.

407. In reality, there was no reason for JOSIP PRALJAK to contact PUŠIĆ and his motivation for doing so is examined *supra*.

⁴⁹⁰ OTP 98bis T. 27102-3.

⁴⁹¹ [REDACTED].

⁴⁹² [REDACTED].

⁴⁹³ [REDACTED].

⁴⁹⁴ [REDACTED].

408. By way of example, [REDACTED] ordered that 40 POWs from Heliodrom should be taken out to work by the 1st Light Attack Military Police Battalion on 7 July 1993.⁴⁹⁵ [REDACTED], as was [REDACTED] normal practice,⁴⁹⁶ appoints an individual, in this case Luka BAREŠIĆ, as having personal responsibility for taking over these prisoners. PUŠIĆ is not mentioned in [REDACTED] order but he is referred to by BOŽIĆ in his report about this particular assignment dated 8 July 1993.⁴⁹⁷ BOŽIĆ cited [REDACTED]. The purported “request” was endorsed to the effect that PUŠIĆ had given approval for [REDACTED]. The inference the Prosecution seek to draw from this document and a large number of similar documents generated by BOŽIĆ and JOSIP PRALJAK is that PUŠIĆ had the power to grant forced labour assignments. On examination, the evidence presented at trial does not support such a finding beyond reasonable doubt.

409. The notion that PUŠIĆ had the authority to approve [REDACTED], is wholly unsubstantiated. No evidence has been led to prove a superior –subordinate relationship between PUŠIĆ and [REDACTED] anyone else responsible for ordering forced labour assignments. In particular, JOSIP PRALJAK could not explain why PUŠIĆ had the power to approve forced labour requests from [REDACTED].

410. [REDACTED]. [REDACTED].⁴⁹⁸ [REDACTED].

411. PAVLOVIĆ accepted that he gave permission for the use for detainees for work but that any such assignments took place where the 3rd Brigade were posted and not on the frontline or elsewhere. According to the Prosecution, PAVLOVIĆ derived the authority to order these assignments not from PUŠIĆ but from PETKOVIĆ and the Main Staff, as illustrated by PETKOVIĆ’s order of the 14 October 1993.⁴⁹⁹ It is not clear how or where PUŠIĆ features in this analysis, if this is indeed the Prosecution's case.

412. JOSIP PRALJAK evidence in connection with PUŠIĆ’s responsibility for forced labour practices was also inconsistent. JOSIP PRALJAK made no reference to PUŠIĆ in his

⁴⁹⁵ [REDACTED]

⁴⁹⁶ [REDACTED].

⁴⁹⁷ [REDACTED].

⁴⁹⁸ [REDACTED].

⁴⁹⁹ P05873.

overview of the differing procedures regulating the use of forced labour in 1992-3 confirming that [REDACTED]:

[REDACTED]⁵⁰⁰

4. PUŠIĆ Never Signed Any “Orders” for Forced Labour

413. During cross-examination, JOSIP PRALJAK confirmed that PUŠIĆ never signed any of these purported “orders” for forced labour:

[REDACTED].⁵⁰¹

414. JOSIP PRALJAK’s general testimony concerning PUŠIĆ’s powers, functions and responsibility is considered in Part VI, Section (B)(4).

5. Causation

415. To establish criminal liability for ordering as a form of participation, the Prosecution must show a nexus between the order issued and the offence committed – in other words it must be shown that the offence would not have been committed “but for” the order.⁵⁰² As the evidence demonstrates that PUŠIĆ [REDACTED] was powerless to stop or approve, the Defence do not accept that the *actus reus* of ordering has been established. This analysis applies to the “orders” or “notifications” purported to have been approved by PUŠIĆ and the records of forced labour assignments purportedly approved by PUŠIĆ in the Heliodrom log books.

6. BIŠKIĆ on Forced Labour

416. During his testimony in chief BIŠKIĆ described at some length the procedure he discovered in relation to forced labour assignments at the Heliodrom. In his view the warden of the Heliodrom could not refuse a request from an authorised official of the Main Staff to

⁵⁰⁰ [REDACTED].

⁵⁰¹ [REDACTED].

⁵⁰² *Prosecutor v Strugar*, Case No: IT-01-42-T, Trial Judgement, 31 January 2005 (Strugar TJ) para.332. (See, also PART XI, Section B(3).

take detainees out for work even if they were to be sent to the front line. PUŠIĆ did not fall within the definition of an authorised official described by BIŠKIĆ and PUŠIĆ was not mentioned by BIŠKIĆ:

[i]f the Heliodrom warden had good grounds to believe prisoners would be taken out to perform labour at the front line, he could not have refused the request for detainees if there was authorisation from an authorised official... The practice was that, if the request for *detainees to perform labour came from the Main Staff*, then the warden of Heliodrom *automatically complied* with the order.⁵⁰³
[emphasis added]

7. Lack of Corroboration

417. It is also highly significant that no other witness testified that forced labour orders were within PUŠIĆ's sphere of responsibility. WITNESS DZ, BIŠKIĆ, WITNESS BB and WITNESS BC, not to mention VIDOVIĆ, WITNESS NO and PAVLOVIĆ were never asked by the Prosecution to comment on PUŠIĆ's alleged involvement in this area. The Prosecution's failure to put these matters to these witnesses must give rise to a serious doubt as to whether the Prosecution have discharged their burden of proof. Thus, the lack of corroboration for the evidence of JOSIP PRALJAK and BOŽIĆ means that their allegation cannot properly form the basis of any findings of fact.

418. No evidential weight should be attached to the contents of LAVRIĆ's report of 22 November 1993 for the reasons advanced in Part IX.⁵⁰⁴

8. Reports of Detainee Abuses

419. PUŠIĆ had no authority to punish or intervene or take action against any of the military personnel involved in the misconduct highlighted in the reports produced by JOSIP PRALJAK⁵⁰⁵ or BOŽIĆ. For example, PUŠIĆ is sent a report by BOŽIĆ dated 4th July 1993⁵⁰⁶ stating that two detainees were wounded during a labour assignment. The report is directed

⁵⁰³ Biškić T.15243 and T.15245.

⁵⁰⁴ See, Part IX, Section B(2).

⁵⁰⁵ Josip Praljak denies knowledge of some detainee abuses, See, Part VI, Section B(5)(ii)..

⁵⁰⁶ P3171.

not only to PUŠIĆ but also to ĆORIĆ and VIDOVIĆ. Both men outrank PUŠIĆ. Moreover, the report notes that the assignment was undertaken at the request of the 7th Battalion of the 3rd Brigade.

420. PUŠIĆ had no power to control the conduct of the military personnel involved in this incident or the events of the 12 July 1993 recorded in another note from BOŽIĆ dated 13 July 1993.⁵⁰⁷ On that occasion a prisoner had been wounded by the ABiH working on a forced labour assignment [REDACTED] and said to have been approved by PUŠIĆ.

421. It is plain that only the military authority responsible for ordering the forced labour assignments could discipline the soldiers responsible for any abuses. [REDACTED]. [REDACTED]:

[REDACTED].⁵⁰⁸

422. VIDOVIĆ also testified that he would have responsibility for investigating cases where detainees against whom criminal complaints had been filed were injured or otherwise mistreated on forced labour assignments.⁵⁰⁹ VIDOVIĆ claimed that he wrote to ĆORIĆ about these incidents and that prosecutions were initiated against those responsible.⁵¹⁰ VIDOVIĆ denied that HVO general policy was not to prosecute soldiers responsible for harming detainees on forced work assignments.⁵¹¹

B. Credibility of JOSIP PRALJAK and BOŽIĆ

1. Overview

423. The Tribunal has recognised that, as a matter of common sense, certain witnesses, such as those with an interest to serve, may be of doubtful credibility as they may seek to inculcate others and exculpate themselves.⁵¹² The Chamber should treat their evidence with caution. The

⁵⁰⁷ P3414.

⁵⁰⁸ [REDACTED].

⁵⁰⁹ Vidović T.51664.

⁵¹⁰ Vidović T.51666-7.

⁵¹¹ Vidović T.51673.

⁵¹² Delalić AJ para.630. *See*, also discussion on relevant case law in regard to testimony of Ćupina at Part IV, Section C(2)(i).

ICTR Appeals Chamber in *Niyitegeka* held that, “considering that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to carefully consider the totality of the circumstances in which it was tendered”.⁵¹³

424. The Chamber should subject JOSIP PRALJAK’s testimony to the most searching scrutiny. JOSIP PRALJAK’s evidence was tainted by his self interested desire to deny any potentially incriminating conduct or knowledge by, for instance deflecting responsibility towards PUŠIĆ⁵¹⁴ or misleading the Chamber concerning his knowledge of allegations of detainee abuses.

425. JOSIP PRALJAK’s evidence was also inconsistent and unconvincing.⁵¹⁵ While claiming on the one hand that he and BOŽIĆ had to defer to PUŠIĆ, both JOSIP PRALJAK and BOŽIĆ conspicuously fail to mention PUŠIĆ in their reports documenting the situation in Helidrom and their concerns over the treatment of detainees.

426. Consequently, in the absence of any witness testimony corroborating JOSIP PRALJAK’s account of PUŠIĆ’s authority, his evidence should not be used as a foundation to convict PUŠIĆ for responsibility for prisoner releases, forced labour practices and other allegations of detainee abuses.

2. JOSIP PRALJAK’s Denial of Knowledge of Detainee Abuses

427. JOSIP PRALJAK’s denial of knowledge of detainee abuses conclusively demonstrates that he cannot be relied upon to give a full and honest account in connection with any evidence that could possibly incriminate him. JOSIP PRALJAK claimed to have no knowledge of any abuse or mistreatment of detainees at the Helidrom throughout 1993:

⁵¹³ “As a corollary, a Trial Chamber should at least briefly explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused: in this way, a Trial Chamber shows its cautious assessment of this evidence.” *Prosecutor v. Niyitegeka*, Appeal Judgement, Case No:ICTR-96-14-A, 09 July 2004. (Niyitegeka AJ) para. 98. *See*, also Nahimana AJ para. 439; *Prosecutor v. Ntagerura et al.* Appeal Judgement, Case No:ICTR-99-46-A, 07 July 2006 (Ntagerura AJ) paras 204 and 206, and *Prosecutor v. Blagojević and Jokić*, Appeal Judgement, Case No: IT-02-60-A, 09 May 2007. (Blagojević AJ) para. 82.

⁵¹⁴ *See*, Part VI, Section(B) and Part VII, Section (A-B).

⁵¹⁵ *Ibid.*

Q. Thank you. Now, sir, did you know or were aware of that anybody during that period of time when you worked at Heliodrom, which is the relevant material time, that anybody abused or mistreated the detainees?

A. I wasn't aware of that. I didn't know about that, and if I had, I would have written it down.⁵¹⁶

428. Regarding forced labour practices JOSIP PRALJAK acknowledged that prisoners were taken from Heliodrom to perform labour but claimed that he did not know about any prisoners injured or wounded or killed while performing work. He said that most of the prisoners who were taken out for labour would be returned to the facility after four o'clock in the afternoon, which was when he left work.⁵¹⁷

429. In relation to the isolation cells at the Heliodrom, JOSIP PRALJAK claimed he had no say in who was placed in isolation cells and this was the responsibility of SIS and the crime prevention service.⁵¹⁸ JOSIP PRALJAK also denied hearing or knowing about any inmates concealed in isolation cells during the ICRC visits of 10, 11, 12 August 1993.⁵¹⁹ However, JOSIP PRALJAK must have been aware that this practice has been previously noted and condemned by the ICRC in May 1993 as noted by BOŽIĆ:

In the course of the month of May, we had regular visits from the Red Cross. Representatives of the ICRC notified us that they were satisfied with the correct conduct of employees, but we also received a complaint that isolation cells were inadequate and that we should not place a single prisoner inside them.⁵²⁰

430. JOSIP PRALJAK's evidence cannot be reconciled with that of another Prosecution witness, Mustafa HADROVIĆ. HADROVIĆ said that the commanders of the guards at the Heliodrom were SMILJANIĆ and BOŽIĆ and that both men knew about the conditions of detention and mistreatment of detainees. Given his position as Deputy Warden, it is entirely implausible that JOSIP PRALJAK would not have been privy to the mistreatment that

⁵¹⁶ J.Praljak T.14851.

⁵¹⁷ J.Praljak T.14740.

⁵¹⁸ J.Praljak T.14843. *See*, also Part VII, Section (D5).

⁵¹⁹ J.Praljak T.14846.

⁵²⁰ P 02853. J.Praljak T.14704-5. and T.14932.

HADROVIĆ describes during a critical period when the ICRC, UNHCR and other international community organisations were closely following developments at the facility.

3. JOSIP PRALJAK's Self Interest

431. When asked why his superior BOŽIĆ had produced the 10 May 1993 Note, JOSIP PRALJAK replied that BOŽIĆ had produced the document in order to “protect himself”:

JUDGE ANTONETTI: [Interpretation] You signed a document on the 10th of May. We see your name, the name of the secretary, and Mr. BOŽIĆ. It's a rather unusual document in itself. You were not a novice in matters of the prison. You had already worked in the civilian sector administrating penitentiary institutions. You said that after the MOS attack on town those civilians had been brought to Heliodrom. So far so good. At that moment, Mr. PUŠIĆ calls to get some of them released. Very well, but why did you find it necessary to draw up this document? For what purpose? To protect you in the future? Or to indicate to the military police hierarchy that you had obeyed orders? There must have been a purpose. You declared that you will speak the whole truth. Could you please explain the purpose of this document, because Mr. BOŽIĆ made you co-sign it. He didn't take just anybody. He took the deputy, because you were on record as the deputy. Why did you co-sign it, to protect yourself, or for what reason? Because every signature implies some responsibility. It entails some consequences, and you must know that since you worked in prisons. Explain to us, please, why you signed this document.

THE WITNESS: [Interpretation] I did not write this document. It was written by Mr. Stanko BOŽIĆ. He knows why he wrote it. And I know that I was present throughout that time in one office, because our office was being used by Mr. Marko Bevanda, and we were together all the time in Snjezana's office. *In my opinion, Mr. Stanko BOŽIĆ was trying to protect himself.* [emphasis added]⁵²¹

432. JOSIP PRALJAK's eagerness to shift responsibility for any violations of international law away from himself is further evident from his answer to a question concerning the key

⁵²¹ J.Praljak T.14692.

issue of why displaced Muslim civilians were placed in a prison facility rather than elsewhere in the Heliodrom complex in May 1993. He explained:

I couldn't answer that question. I think only Stanko Bozic, who was then warden could answer it. And Marko Bevanda and Biljana Nikic.⁵²²

433. JOSIP PRALJAK's testimony was, at the very least, disingenuous on these points. JOSIP PRALJAK's explanation as to why he had to notify PUŠIĆ of forced labour assignments was also implausible. JOSIP PRALJAK said he called PUŠIĆ because he was a representative of the Military Police and the person they normally called whenever they needed something. In relation to a 5 July 1993 request for five prisoners to be taken to "build bunkers between the new bank and the grammar school" JOSIP PRALJAK said this was:

approved by Berko Pusic and taken over by Miro Bevanda against his signature....All I know is that the request had to be approved by the military police administration, that is Berko Pusic, and he approved it... it's that the prison as not able to let these people go out without the approval of the military police administration, in other words, Mr. Berko Pusic, and *he was the one we called most often whenever we needed something.*⁵²³ [emphasis added]

434. What JOSIP PRALJAK and BOŽIĆ really "needed" was a scapegoat. They contacted PUŠIĆ so that they could subsequently claim they were only following his "orders" in any dealings they had with detainees. In reality, the release "orders" of May 1993 and forced labour notifications produced by BOŽIĆ and JOSIP PRALJAK served as an insurance policy to protect themselves against any potential individual criminal liability. In retrospect, this strategy has paid dividends for both BOŽIĆ and JOSIP PRALJAK. It explains why the Deputy Warden and Warden have escaped prosecution for the crimes allegedly perpetrated under their watch at the Heliodrom.

4. JOSIP PRALJAK and BOŽIĆ Feared Prosecution

⁵²² J.Praljak T.14688.

⁵²³ J.Praljak T.14749-51, 14752-3. P 03194,

435. JOSIP PRALJAK and BOŽIĆ had good reason to fear prosecution. They did not stop detainees being taken out to work by HVO military personnel or prevent any of the other allegations of detainee abuse at the Heliodrom. Furthermore, both JOSIP PRALJAK and BOŽIĆ were responsible for handing over detainees who were in their custody to HVO military units⁵²⁴ for forced labour assignments and could therefore have been culpable for violating international humanitarian law.

436. Despite his protestations to the contrary, the evidence reviewed above suggests that JOSIP PRALJAK must have been acutely aware that he could be held to account at some future date for these transgressions. BOŽIĆ certainly was. On 20 August 1993 BOŽIĆ wrote a report concerning the results of an ICRC visit where the use of detainees for forced labour had been highlighted as a breach of the Geneva Conventions. BOŽIĆ noted that:

Although, as the warden, I do not decide on taking detainees to work, as these authorities are handed over to Vladimir Primorac, *I will be held responsible before the International Tribunal.*⁵²⁵ [emphasis added]

437. [REDACTED].⁵²⁶ [REDACTED]. BOŽIĆ refers to an ongoing order of PAVLOVIĆ of 16 August 1993.⁵²⁷ [REDACTED].⁵²⁸

5. Inconsistent Evidence

438. PUŠIĆ was not mentioned in reports produced by BOŽIĆ and JOSIP PRALJAK documenting their concerns over the treatment of detainees in the Heliodrom. In fact, BOŽIĆ's letter of 10 October 1993 and JOSIP PRALJAK's letter of 24 November 1993 reveal the true state of affairs regarding forced labour activities at the Heliodrom as documented below.

⁵²⁴ [REDACTED].

⁵²⁵ P04352. On 9 September 1993, Božić issues an order banning forced labour. (P04902.) Pavlović testified that prison staff selected the detainees used for forced labour assignments, Pavlović T.47034-5, "Q. And just one more question about this topic. If you were to approach the prison director to give you a number of detained persons to carry out some work, who was it that selected the persons to carry out that work as requested by you? A. I truly do not know who decided on who was to go. Somebody from the prison. But I know that after a certain time, those who had filed a request would ask to be given the same men again because they had, in the meantime, become friends or at least they were known persons."

⁵²⁶ [REDACTED].

⁵²⁷ [REDACTED].

⁵²⁸ [REDACTED].

439. On 10 October 1993 BOŽIĆ writes to BOBAN⁵²⁹ complaining that (i) detainees are being mistreated: (ii) forced labour practices continue: (iii) there is a lack of clear supervising authority at the Heliodrom and that consequently he does not know who is in charge of the facility and (iv) that SIS are working with detainees without written authorization from any other HVO authority.

440. Specifically, BOŽIĆ states that “detainees are beaten at work by some units that use detainees at work and are responsible for providing security and guaranteeing their safety.” And that some “authority should be appointed to issue orders related to the use of detainees for work.” BOŽIĆ’s letter included an appeal to TOLE to use his influence to help solve the problems.

441. JOSIP PRALJAK writes to General ROSO, LAVRIĆ and JUKIĆ on 24 November 1993 asking for steps to be taken to improve the functioning of the Heliodrom.⁵³⁰ One of his main concerns was for the HVO to finally clear up who was approved to authorise the release of prisoners to work and who had authority over the central military prison of Mostar. This letter was not circulated to PUŠIĆ. No mention or complaint is made of PUŠIĆ’s alleged role in the procedure adopted to date at the Heliodrom.⁵³¹

442. JOSIP PRALJAK and BOŽIĆ’s letters directly contradict the conclusions arrived at by LAVRIĆ in his report to BIŠKIĆ of 22 November 1993. LAVRIĆ’s report is considered in detail in Section IX.

C. Responsibility For Forced Labour Practices Within the HVO

443. A probing analysis of the evidence reveals that, in actuality, no single body within the HVO had centralised control over the use of detainee on work assignments as a number of different HVO officials and agencies had the power to regulate this practice. Unlike PUŠIĆ,

⁵²⁹ P05792.

⁵³⁰ P06848. *See*, also Part IX, Section B(2).

⁵³¹ P04233. On 16 August 1993 Josip Praljak writes to Zarko Tole whom he thinks is “probably” head of the Main Staff highlighting the lack of progress in addressing various concerns he has previously raised over, inter alia, the use of forced labour at the Heliodrom. He did not send a copy of the letter to Pušić.

all these bodies could be said to have some degree of *de jure* and/or *de facto* authority over HVO military personnel.

444. By way of illustration, on 1 April 1993, PETKOVIĆ issues a “demand” to all operative zones to treat captured soldiers and civilians in a humane manner and afford them adequate treatment.⁵³² PETKOVIĆ is contacted by the ICRC on 25 June 1993 in a letter that is not circulated to PUŠIĆ but is sent to BLAŠKIĆ, BOBAN, KORDIĆ, GELIĆ and SKOPLJAK warning all of illegal forced labour practices by HVO soldiers.⁵³³

445. OBRADOVIĆ issues an order to the wardens of Gabela and Dretelj on 2 September 1993 that further indicates that authority over forced labour practices on the ground lay with military personnel over whom PUŠIĆ had no influence. OBRADOVIĆ issued guidelines for the treatment of prisoners that are taken for work stating that:

All commanders of units, prison warden and commanders of Military Police and Civil Police are responsible for the execution of the order.⁵³⁴

446. BIŠKIĆ also testified that the Chief of the Main Staff, ROSO, had the power to permit the use of detainees for forced labour.⁵³⁵

447. By December 1993 it is apparent that HVO attempts to regulate the practice of HVO military units taking out detainees for forced labour had not been successful. This topic is raised in the second Posušje meeting of 13 December 1993 and at various meetings and in ICRC correspondence throughout the early part of 1994. It is submitted that PUŠIĆ was powerless to stop this practice. The testimony of BIŠKIĆ and the evidence concerning HVO efforts to curb the use of detainees for forced labour is examined in Part IX.

D. Testimony of HADROVIĆ

⁵³² P02038.

⁵³³ P02950.

⁵³⁴ P04450. The contents of a SIS report on Dretelj dated 20 September 1993 states that "Detainees in Dretelj VIZ go to work only with written approval of Colonel Obradović or Head of SIS Zara Pavlović." P05222.

⁵³⁵ Biškić T.15151 and T.15240.

448. On 6 January 1994 BOŽIĆ sent a letter to PUŠIĆ listing persons, civilians, and POWs who had died during work assignments.⁵³⁶ When asked to comment on this letter by the Prosecution during his testimony-in-chief, HADROVIĆ confirmed he knew many of those named in this list but refused to ascribe any blame to PUŠIĆ for their deaths:

JUDGE ANTONETTI: [Interpretation] Sir, a question from me. This document is addressed to Mr. Berislav Pusic, and he was in charge of the prisoner exchange. Since these people are apparently dead, we don't see whether there could have been an exchange of any kind except to exchange bodies, corpses. So how can you interpret this, this list addressed to the prisoner exchange office? Do you have an explanation for that or not?

THE WITNESS: [Interpretation] Your Honour, I'll have to apologise greatly later on precisely to this person, as far as this person is concerned, *but it was more other people who asked about this and wondered rather than Berislav Pusic.* Sagolj wondered more and so did the others as far as I saw it. Now, I'll tell you of a misunderstanding that came about later on. Now, this man here with his name and surname, well, I might even sort of in a way be grateful to him perhaps for something. I don't want -- or, rather, I want to be able to look everyone straight in the eyes, because tomorrow my child will have to live in that town, Mostar, with all of us together. So I don't want to inflict evil on anyone without cause. Other people can't look me in the eyes because they killed my people and issued orders for people to be incarcerated like me, and I became very ill as a result.⁵³⁷

[emphasis added]

449. HADROVIĆ expressed his profound gratitude to PUŠIĆ and implored the judges to be sympathetic to PUŠIĆ:

It was Berislav PUŠIĆ, and I can frankly say that this will remain with me for as long as I live, and I can thank him for being alive today. And I have every confidence in you, Your Honours, that you will make your rulings according to

⁵³⁶ P07498.

⁵³⁷ Hadrović T.14594-5.

justice and that you know what I experienced and all the hardships I went through.⁵³⁸

IX. TESTIMONY OF MARIJAN BIŠKIĆ AND EVENTS AFTER 10 DECEMBER 1993

A.Introduction

450. Shortly after his arrival in Bosnia in November 1993 BIŠKIĆ testified that he began looking into the work of the Military Police, SIS and the operation and management of HVO detention centres.⁵³⁹ It is submitted that BIŠKIĆ's findings, the actions he implemented and oversaw and his testimony concerning PUŠIĆ confirms that PUŠIĆ had no decision making authority and no powers over deportations, detention centres and forced labour.

B.Testimony of BIŠKIĆ

1. Overview

451. BIŠKIĆ was unaware of the existence of the Service for Exchange before his arrival in Bosnia.⁵⁴⁰ One of BIŠKIĆ's first tasks was to gather information about the HVO detention centres, the conditions of detention for those held there and identify which HVO agency was responsible for their operation.⁵⁴¹ To this end he asked various bodies to provide an overall assessment of the accommodation of POWs, the security, logistic supplies, conduct with the POW and measures needed to resolve any problems at the various HVO detention facilities.

452. On 18 November 1993,⁵⁴² CVITANOVIĆ, a Military Police adviser sends a report to BIŠKIĆ in response to his request for information on the organization and conditions of detention in Gabela and Heliodrom. CVITANOVIĆ made no reference to PUŠIĆ in his despatch.

⁵³⁸ Hadrović T.14617-8.

⁵³⁹ Biškić T.15046-7 and T.15053.

⁵⁴⁰ Biškić T.15317.

⁵⁴¹ Biškić T.15053.

⁵⁴² P06729.

2. LAVRIĆ's Letter of 22 November 1993

453. LAVRIĆ also replied on 22 November 1993.⁵⁴³ It is submitted that LAVRIĆ's report contained a wholly inaccurate description of PUŠIĆ's role and responsibilities.

454. LAVRIĆ's contention that PUŠIĆ was solely responsible for organising and conducting prisoner exchanges and approving the use of forced labour in November 1993 is not borne out by the evidence.⁵⁴⁴ In addition, the claim made by LAVRIĆ that PUŠIĆ could choose those to be exchanged in consultation with the Defence Department is not corroborated by any other witness.

455. LAVRIĆ fails to identify his sources and it is unclear how the responsibilities alleged by LAVRIĆ came to be "decreed"⁵⁴⁵ or which decree he is referring to. Moreover, as the primary source witness was not called by the Prosecution there is no means of testing or evaluating the credibility of the information in this report.

456. LAVRIĆ's conclusions lack corroboration. Two days after LAVRIĆ's report JOSIP PRALJAK produced his own analysis of the problems besetting the Heliodrom including the issue of forced labour practices. LAVRIĆ's conclusions conflict with the statements made by JOSIP PRALJAK in his letter of 24 November 1993⁵⁴⁶ and also by BOŽIĆ's in his letter of 10 October 1993.⁵⁴⁷

457. LAVRIĆ's analysis is also at odds with the evidence of BIŠKIĆ, as discussed *supra*. In describing the arrangements in place at the Heliodrom BIŠKIĆ did not mention PUŠIĆ and his description cannot be reconciled with LAVRIĆ's assertions:

[t]he processing of detainees is being performed by SIS officials and the crime department officials. Wardens in prisons have been appointed and they're

⁵⁴³ P06805.

⁵⁴⁴ Ibid. A correction of translation is requested. In the BCS version, para.5. Reads "*Ovlašćeni Berislav Pušić, Mijo Jelić zapovjednik brigade.*" which is incorrectly translated as "Berislav Pusic was authorised, while Mijo Jelic was the brigade commander", and should be replaced by "Berislav Pusic, Mijo Jelic, brigade commander were authorised".

⁵⁴⁵ Ibid. para.5.

⁵⁴⁶ P06848. See, also Part VIII, Section A(9).

⁵⁴⁷ P05792. See, also Part VIII, Section A(9).

responsible for all tasks that include coordination. The military police have the task of providing security for the detainees.⁵⁴⁸

458. BIŠKIĆ's testimony for the Prosecution, taken in context with that of WITNESS DZ and WITNESS DV, must be preferred to the contents of a hearsay document from LAVRIĆ.

459. The evidence also reflects that BIŠKIĆ failed to act on LAVRIĆ's recommendations. BIŠKIĆ contacted JUKIĆ and ROSO after 22 November 1993 and they issued orders forbidding the use of detainees for work.⁵⁴⁹ No evidence has been led that these order were forwarded to PUŠIĆ. Nor is there any evidence that BIŠKIĆ spoke to or sought to curtail the powers attributed by LAVRIĆ to PUŠIĆ in any of the actions he took thereafter.

460. LAVRIĆ like JOSIP PRALJAK had reason to implicate PUŠIĆ. LAVRIĆ was involved in the operation of the Heliodrom and other HVO detention facilities both in his capacity as ČORIĆ's deputy and as ČORIĆ's successor.⁵⁵⁰

461. In conclusion, no weight should be attached to LAVRIĆ's report as, in all the circumstances, it cannot be considered to be reliable.

C. BIŠKIĆ on PUŠIĆ's Powers

462. BIŠKIĆ made plain his views about the powers of PUŠIĆ and the Service for Exchange in a letter he sent to ŠUŠAK on 7 December 1993. BIŠKIĆ advocated the creation of a Commission at ministerial level to deal with "organisational omissions" in the operation of the HVO detention centres.⁵⁵¹ BIŠKIĆ described the Service for Exchange as a toothless body and implied that PUŠIĆ had no authority within the HVO. BIŠKIĆ said the Service for Exchange:

⁵⁴⁸ J.Praljak T.15270-15273.

⁵⁴⁹ Biškić T.15088.

⁵⁵⁰ P03167. *See*, also P04348. On 20 August 1993. Josip Praljak sends a report to Lavrić referring to an earlier telephone order received from Lavrić banning the use of prisoners in Ljubuški for work dated 16 August 1993. *See*, also Part VI, Section C(2)(iv) for evidence of Lavrić's involvement in prisoner releases.

⁵⁵¹ P07064.

does not consist of *people who occupy the most responsible positions in the HR HB*. Nobody controls the work of the Commission, nor is it competent to realise such a responsible task.⁵⁵² [emphasis added]

463. BIŠKIĆ also catalogued a series of failings which indicated that no single HVO agency was in effective control of the Heliodrom and other facilities. For instance, BIŠKIĆ complained that POWs (and therefore all) detainees were not properly categorised.⁵⁵³ Entry into the detention centres and the use of detainees for work was not regulated which meant they could be freely used for forced labour.⁵⁵⁴

464. BIŠKIĆ did not say that the Service for Exchange or PUŠIĆ had any authority over forced labour.

465. On 8 December 1993 BIŠKIĆ issued an order forbidding the use of prisoners for labour without the permission of the Security Sector. From this point on BIŠKIĆ understood that no prisoners could be taken away for work without his approval.⁵⁵⁵ Notably, given LAVRIĆ's comments, BIŠKIĆ's order is not circulated to PUŠIĆ.⁵⁵⁶

D. BOBAN's 10 December 1993 Order

466. BOBAN's unilateral order of the 10 December 1993 calling for the closure of all detention centres in HR H-B, was the catalyst for the large scale unconditional release of Muslim detainees held by the HVO. It is therefore plain that progress towards large scale releases only occurred after intervention from the very highest levels of the HVO. Thus, the suggestion that PUŠIĆ was a significant obstacle to the HVO's adoption of an unconditional prisoner release policy does not have any basis in reality, nor does the contention that PUŠIĆ had any part in shaping this decision.

467. The evidence suggests that in the immediate aftermath of BOBAN's 10 December 1993 order PUŠIĆ's role did not change. PUŠIĆ continued compiling lists of detainees in an effort

⁵⁵² Ibid.

⁵⁵³ Ibid.

⁵⁵⁴ Ibid.

⁵⁵⁵ P07075.

⁵⁵⁶ Biškić T.15089-90. P07075.

to ensure BOBAN's initiative was expedited as quickly as possible. PUŠIĆ also co-operated fully with the international community to bring about the release and exchange of all those Bosnian Muslim civilians still in detention.⁵⁵⁷

1. First Posušje Meeting 11 December 1993

468. BIŠKIĆ convenes the first Posušje Meeting to discuss implementing BOBAN's Order.⁵⁵⁸ Also present at this meeting were the Minister of Defence Perica JUKIĆ, the wardens of Ljubuški, Gabela and the Heliodrom camps and representatives of the military prosecutors office who were to take responsibility for the release of all remaining HVO detainees. In contrast to PUŠIĆ, almost all those present occupied posts within the HVO military chain of command. They also all outranked PUŠIĆ.

469. PUŠIĆ apparently informed those present that detention centres were operating in Čapljina, Gabela, Mostar, Heliodrom, Tomislavgrad, Šujica, Livno, Prozor and Ljubuški. PUŠIĆ said that only the wardens of these institutions would have precise figures of how many detainees were in custody as they were often taken out to work. PUŠIĆ's acknowledgment that this practice persisted does not signify that he had the ability to prevent it. PUŠIĆ said he did not have this data⁵⁵⁹ and later in the meeting calls for similar information to be provided from the Gabela facility.⁵⁶⁰

470. From the statements attributed to PUŠIĆ it can be inferred that the Service for Exchange could only estimate the number of prisoners who were part of the Muslim armed forces. It is also unclear whether PUŠIĆ's estimate applies to all HVO detention facilities or a particular detention centre.⁵⁶¹

⁵⁵⁷ P07096. Tomljanovich T.6160-1. and 6165. Tomljanovich testified that the prisoners were not actually all released by 17 December 1993. Josip Praljak said that: "Larger groups that left the prison were subject to a procedure involving officials of the office for exchanges and the International Red Cross. The ICRC was present at all those large releases. Everybody was released in that period except for those prisoners against whom criminal reports were filed, and they remained and were moved to the prison building." (J.Praljak T.14808), By the end of December Biškić said that he believed the decision had been fully implemented although this fact is disputed. (Biškić T.15074-15075.), *See*, also Part IV, Section E(4) for the testimony of Watkins concerning Pušić's co-operation with the international community.

⁵⁵⁸ P07148.

⁵⁵⁹ P07124 (or P07148). *See*, also Tomljanovich T.6161-3 and T.6168-9.

⁵⁶⁰ P07124, page 9.

⁵⁶¹ *Ibid* page 5.

471. In the course of the discussion that followed those present expressed opposing views on whether prisoner of wars should be released and in what circumstances. LAVRIĆ stated that POWs from LIVNO and Čapljina should not be released for instance.⁵⁶² BIŠKIĆ states that BOBAN's order did not apply to POWs.⁵⁶³

472. In this context, PUŠIĆ's call for all civilian and POWs detainees to be released unconditionally and for the Municipal Red Cross to be engaged⁵⁶⁴ can hardly be seen as evidence that PUŠIĆ obstructed and blocked releases or that he viewed every Muslim detainee as potential currency to be used in exchanges.

473. PUŠIĆ's remarks about third country releases⁵⁶⁵ or references to sending Muslims over 50 years old to the left bank must be viewed in light of the analysis outlined above. In short, the evidence shows that PUŠIĆ had no ability to influence HVO policy.

474. The results of this meeting further reinforce this conclusion. PUŠIĆ was not appointed to any of the commissions tasked by BIŠKIĆ to make enquiries of all the HVO detention centres. These commissions had the authority to decide (i) who should be released, (ii) who would be handed over to the opposing side, (iii) who would go abroad and (iv) who should remain in custody.⁵⁶⁶ It also bears highlighting that the military judiciary was represented in all these commissions.

2. Second Posušje Meeting 13 December 1993

475. BIŠKIĆ convenes the second Posušje meeting to discuss BOBAN's order having required all attending the 11 December 1993 meeting to return to report back on their progress.⁵⁶⁷ On this occasion POGARČIĆ is present from the HR H-B President's office. POGARČIĆ addresses the meeting stating that the issue of detention centres was a "crucial political question" that the governments of Croatia and HR H-B had made several efforts to resolve and called for "everything to be done"⁵⁶⁸ to execute BOBAN's order. POGARČIĆ's

⁵⁶² Ibid page 7 and 9.

⁵⁶³ Ibid page 7-8.

⁵⁶⁴ Ibid page 3. *See*, also Biškić T.15319-22.

⁵⁶⁵ P07148. page 5.

⁵⁶⁶ P07148 *See*, also Biškić T.15319-20.

⁵⁶⁷ P07143

⁵⁶⁸ Ibid page 4.

commentary illustrates once again that HVO policies regarding releases, exchanges and detention centres were dictated at a level far above PUŠIĆ's modest station.

476. The minutes of the 13 December 1993 meeting warrant close examination. The various commissions created by BIŠKIĆ on 11 December 1993 confirm they have completed their enquiries and clarify (i) the number of detainees at each facility, (ii) who is to be allowed to stay in the HR H-B, (iii) who remains in isolation, (iv) how many detainees will be transferred to MOS territory and (v) how many detainees will be transferred to third countries.⁵⁶⁹

477. It is plain that PUŠIĆ has no input in these decisions, and this document therefore comprehensively refutes many of the allegations which go to the heart of the Prosecution's case. Furthermore, BIŠKIĆ testified that by December 1993, authority over the newly established centres or accommodation facilities of POWs was in the hands not of the Service for Exchange but the Ministry of Defence, the Ministry of Justice and also the Ministry of Health.⁵⁷⁰

478. The minutes also refer to a discussion that reveals that detainees are still being taken out to work at the Heliodrom despite the interventions of PETKOVIĆ, BIŠKIĆ, LAVRIĆ and others.⁵⁷¹ Indeed, on the same date BOŽIĆ sends a report to LAVRIĆ⁵⁷² complaining of a lack of compliance with an order to return detainees from doing labour.⁵⁷³ This episode confirms that on the ground military and paramilitary personnel were taking prisoners on work assignments at will and would often keep detainees with their units without reporting to their superiors or returning detainees back to the detention facilities.⁵⁷⁴

479. In the course of a dispute concerning the precise number of detainees at the Heliodrom PUŠIĆ suggests that enquiries are made of the Red Cross from Međugorje asking for their data which BIŠKIĆ approves. Far from obstructing or hindering the release of detainees and the work of the international community, PUŠIĆ endeavours to elicit their help and assistance.⁵⁷⁵

⁵⁶⁹ Ibid pages 4 -6.

⁵⁷⁰ P07269. Biškić T.15093-5 and T.15379.

⁵⁷¹ P07143. page 7.

⁵⁷² P07153

⁵⁷³ Biškić T.15143.

⁵⁷⁴ See, letters from ICRC, supra.

⁵⁷⁵ P08070.

3. PUŠIĆ's Role After The Posušje Meetings

480. Following on from the Posušje meetings, PUŠIĆ sends a report dated 15 December 1993⁵⁷⁶ to BIŠKIĆ on the progress made in effecting the objectives agreed earlier. This document simply illustrates PUŠIĆ's role in communicating information to other HVO departments and maintaining lists of those in custody and logging their movements, as BIŠKIĆ confirmed.⁵⁷⁷ BIŠKIĆ also explained that PUŠIĆ was merely reporting on the progress made since the 11 December 1993 and was not advocating any proposals in this document.⁵⁷⁸

481. From 11 December until the end of the month, BIŠKIĆ testified that there were 4 or 5 similar reports at a minimum received from PUŠIĆ on the subject of detainee releases.⁵⁷⁹

482. PUŠIĆ also produces a note dated 14 December 1993⁵⁸⁰ citing a list of Heliudrom detainees required for an exchange with Croats in Jablanica. Contrary to the Prosecution's submissions,⁵⁸¹ and in light of the events at Posušje and the procedures in place requiring the authorisation of the District Military Prosecutor for the release of those remaining in custody, it is clearly outside of PUŠIĆ's control to dictate the fate of the prisoners referred to therein.

483. On 18 December 1993. PUŠIĆ's office issues a report⁵⁸² that provides further confirmation that the primary function of the Service for Exchange was to gather data for other HVO agencies. When asked to comment on this report BIŠKIĆ testified that he was not familiar with the work of the Service for Exchange, but can only assume based on the report

⁵⁷⁶ P07187.

⁵⁷⁷ Biškić T.15323. The witness testified, "A. As far as the description of the work of this service goes, I'm not familiar with it. I assume that they did have some records on the persons that were supposed to be exchanged, and obviously this report confirms that based on the data that they had and based on the reports of the teams. This is a collective report about the total number of detainees and where they were sent to eventually."

⁵⁷⁸ Biškić T.15323. The witness testified, "Q. He doesn't say anything about what should be done in the future. He just provides a report about the activities that had been taken in the previous period. A. Yes. Mr. Berislav Pusic reports on what was done between the 13th and the 15th of December and the report is dated the 15th of December."

⁵⁷⁹ Biškić T.15125.

⁵⁸⁰ P07158.

⁵⁸¹ OTP 98bis, T.327139.

⁵⁸² P07246.

produced that they had records on the persons that were supposed to be exchanged.⁵⁸³

484. On 6 January 1994, PUŠIĆ writes to BIŠKIĆ.⁵⁸⁴ Concerned at overcrowding at the Heliodrom, PUŠIĆ proposes that some POWs should be sent to Gabela to ease pressure of numbers in custody. PUŠIĆ's request demonstrates that PUŠIĆ could not order the transfer of detainees from one institution to another unilaterally. BIŠKIĆ confirmed that PUŠIĆ's proposal was well intentioned although it was rejected:

A. I should explain. The security company was established to guard the Heliodrom, and during the implementation of the decision of the president of the Croatian Republic of Herceg-Bosna it was decided that all the detainees should remain in the Heliodrom price and those who should be transferred to prison they should be taken to prison. In agreement with that I did not accept this proposal, although I believe, and I said it already before that *Mr. Berislav Pusic's proposal was well-meant because he wanted to improve the conditions at the Heliodrom by reducing the number of detainees there.* I've already told you that I myself believe that their number was excessive and that it surpassed the capacity of the facility. And I will -- will also repeat what I said to him that the exchanges are on the way and that very soon the number of detainees will reduce in the Heliodrom: that's why I was not in agreement, and also because of the security issues because it's much -- much more difficult to provide security into different places simultaneously.⁵⁸⁵ [emphasis added]

E.Forced Labour and PUŠIĆ's Letter to the ICRC of 15 March 1994

1. Non-return of Detainees by HVO Units

485. BIŠKIĆ testified that he received at least 10 letters from the ICRC in early 1994 referring mostly to the non-return of detainees who had been taken out for work from the detention centres.⁵⁸⁶ BIŠKIĆ assumed PUŠIĆ also received these letters because he was

⁵⁸³ Biškić T.15322-3.

⁵⁸⁴ P07494.

⁵⁸⁵ Biškić T.15325-6.

⁵⁸⁶ Biškić T.15163.

named as a recipient.⁵⁸⁷ The evidence reflects that PUŠIĆ lacked any authority to deal with this issue and this problem persisted beyond the date the Washington Agreement was signed.

486. This ongoing problem had been raised at the second Posušje meeting on 13 December 1993.⁵⁸⁸ On 20 December 1993, BIŠKIĆ acknowledges that concerns still exist as to who had authority over POWs in the detention centres and issues an order setting out guidelines for the treatment of POWs.⁵⁸⁹ BIŠKIĆ testified that:

I was not clear who was in charge and who was -- who had the authority of the lives and well-being of these people. And also in my conversation with the head of the information services, the prisoners of war were not interviewed as they should have been, and that's why yet once again I wanted to issue this instruction to inform everybody again how they should treat prisoners of war from the moment they are detained from -- to the moment when they are finally accommodated in the prisoner of war centre.⁵⁹⁰

487. Thereafter, it would appear that some HVO brigades apparently refused to comply with orders from the highest levels of the HVO including orders from the Defence minister JUKIĆ and ŠILJEG on 25 January 1994⁵⁹¹ and 27 January 1994⁵⁹² respectively for the return of detainees. Eventually, on the 2nd April 1994, ŠOLJIĆ, HVO Defence minister issued an order⁵⁹³ based on the Washington agreement for the return of detainees from HVO units where they were still held and used for forced labour.

2. PUŠIĆ's Letter of 15 March 1994

488. On 15 March 1994 PUŠIĆ wrote to a variety of organisations including the ICRC

⁵⁸⁷ Biškić T.15177-8.

⁵⁸⁸ P07143.

⁵⁸⁹ P07269.

⁵⁹⁰ Biškić T.15094.

⁵⁹¹ P07687.

⁵⁹² P07697. Furthermore, on 8 February 1994 Šiljeg issued a directive once again attempting to regulate this practice stating that all requests for forced labour require the written approval of HVO Main Headquarters and the Minister of Defence.(P07823) The order stated that the "military police is only responsible for securing the war prisoners in the facility, and it is not authorised to provide prisoners of war to perform labour in the units."

⁵⁹³ P08149.

acknowledging receipt of a large volume of correspondence from the ICRC.⁵⁹⁴ PUŠIĆ states that in reply to each one of the queries raised, the ICRC had been informed that (i) the Service for Exchange does not have information concerning the whereabouts of these detainees and (ii) prisoner housing issues did not fall within its competence. The evidence presented at trial corroborates the answers provided by PUŠIĆ, as it shows that PUŠIĆ did not have the power to address any of the problems described by the ICRC.

489. The letter ends on a positive note, with PUŠIĆ highlighting the constructive role played the Service for Exchange as he states that “the Service will continue to do all within its power to free detainees /prisoners? to find missing persons, and this continues to be our greatest and most noble goal.”⁵⁹⁵

X. DEPORTATIONS, MEDICAL EVACUATIONS AND HUMANITARIAN AID

A. Introduction

490. As a preliminary matter, it is submitted that the evidence in this case does not prove that a JCE existed whereby the HVO pursued a criminal policy of deportations or forcible population movements as described in the Indictment at any time during 1992-4.⁵⁹⁶ The movement of a population is permitted in international law if the security of the population so demands.⁵⁹⁷ The Prosecution excludes the possibility that population movements from territories held by both the ABiH and HVO arose as an unintended consequence of the conflict as Muslim and Croat civilians, as well as others, sought refuge from the war.⁵⁹⁸ The Republic of Croatia responded to this crisis by allowing displaced persons to enter Croatia on humanitarian grounds, as they were requested to by the international community, and providing them with financial and other assistance. Some individuals then travelled onto third

⁵⁹⁴ P08070.

⁵⁹⁵ Ibid.

⁵⁹⁶ Indictment, para.14.

⁵⁹⁷ Articles 15, 19 and 49 of Geneva Conventions II, III and IV respectively.

⁵⁹⁸ See, Part III.

countries, and the transportation of these refugees was normally organised at an international level.⁵⁹⁹

491. Furthermore, the evidence⁶⁰⁰ demonstrates that not all civilians and detainees left Bosnia for third countries as many returned to their place of residence or stayed in West Mostar.⁶⁰¹ There is no reason why the HVO would permit this if, as the Prosecution maintain, their objective was to ethnically cleanse the entire territory under their control. The Prosecution's case theory that the HVO in conjunction with the Republic of Croatia engineered a policy of mass deportations amounting to "ethnic cleansing" has not therefore been proved beyond reasonable doubt as it cannot be the only reasonable explanation of the evidence.

492. Regarding PUŠIĆ's alleged participation in this policy of "ethnic cleansing" it is submitted that while PUŠIĆ issued discharge certificates for the release of detainees he had no decision making powers in this process.⁶⁰² PUŠIĆ was not involved in obtaining letters of guarantee or issuing transit visas. The evidence demonstrates that the HZ H-B ODPB in conjunction with the ODPB of the Republic of Croatia dealt with displaced persons requiring transit visas.

B. Prisoner Releases

1. Overview

493. The evidence does not support the inference that PUŠIĆ had the power to dictate where a detainee was sent after he was released. Rather, PUŠIĆ's role was restricted to issuing discharge certificates based on approvals from other HVO law enforcement agencies, namely

⁵⁹⁹ Zorić T.27964-5.

⁶⁰⁰ See, for example P07226, P07222, P07143 and 1D02213. Witness DW also testified that some Heliudrom detainees were taken to West Mostar. Witness DW T.23137 and P08099.

⁶⁰¹ Perković T.32013-4. Perkovic testified that a larger number of Muslims remained in West Mostar by the end of the war than Croats residing in East Mostar, "I never went to East Mostar, but I do know something that was generally known to everyone living in Mostar and something that emerged at the end of the war. *At the end of the war on the side controlled by the HVO there remained between 5.000 and 6.000 Bosniak citizens. On the opposite riverbank under the BH army control there remained no more than 500 ethnic Croats. These are facts.* How did this state of facts come about? Now that is probably a different story and a long one to boot. I really don't know anything about detention centres in East Mostar or around East Mostar and I don't know where these people were being held. JUDGE ANTONETTI: [Interpretation] Fine. I note something in your answer, something that could be of relevance. You say that at the end of the war in Mostar west, in the area controlled by the HVO, there were between 5.000 and 6.000 Bosniak citizens. THE WITNESS: [Interpretation] Yes." [emphasis added]

⁶⁰² See, Part IV, Section C.

SIS and the CPD. PUŠIĆ's role in prisoner releases in general has been considered in detail in Part VI of this Brief.

2. Letters of Guarantee

494. JOSIP PRALJAK explained that the procedure for the release of a detainee intending to leave Bosnia differed only from the procedure outlined in Part VI in that a letter of guarantee was required. This was normally obtained by a friend or family member:

The certificate itself and the method of release is the same. It's just that somebody from the family or a friend had to bring the certificate to the prisoner and the prison so that the request be approved."⁶⁰³

495. Neither JOSIP PRALJAK nor RAGUŽ said that PUŠIĆ had any involvement in obtaining letters of guarantee.

3. Role of SIS and CPD

496. VIDOVIĆ confirmed that his office was responsible for carrying out criminal record checks on those detainees leaving for third countries:

Q. And number 5 says they departed Mostar on July 18th. So, sir, you will agree with me that on July 17th, we had the departure of 500 people that you spoke of in your report, and then July 18th we have the departure of another 500 people, as reflected here, and these people are departing from in front of the Mechanical Engineering building.

Mr. VIDOVIĆ, your role in their departure to third countries, as you testified, was to ensure that they didn't have any criminal -- outstanding criminal investigations: is that right?

A. That is right, yes.⁶⁰⁴

4. Testimony of WITNESS E AND WITNESS C

⁶⁰³ J. Praljak T.14770-1.

⁶⁰⁴ Vidović T..51694.

497. [REDACTED].

5. Testimony of WITNESS DZ

498. [REDACTED].⁶⁰⁵ [REDACTED]. [REDACTED].

C. Transit Visas

1. Role of Croatian ODPR

499. The allegations made by WITNESS BB and WITNESS BC concerning PUŠIĆ's [REDACTED].⁶⁰⁶ The evidence shows that the main route out of Bosnia at the time for those wishing to leave involved passage through the Republic of Croatia. It follows that transit visas were issued by the ODPR for the Republic for Croatia to whom applications had to be made.⁶⁰⁷ PUŠIĆ could not influence the operation of the ODPR in Croatia. Furthermore, the Prosecution have failed to produce any transit documents issued by PUŠIĆ.

500. Individuals such as NIKIĆ were involved in liaising with the Croatian ODPR to obtain the necessary paperwork and in performing security checks with HZHB law enforcement agencies such as SIS and the CPD. RAGUŽ described the procedure thus:

A. You see, we had a form, and every person would sign this request form. And this departure was possible, I repeat - I've already said this - only with a letter of guarantee from the country that the person was going to, because that was the procedure, and the people had to go via Croatia, *and this would be signed by the government of the Republic of Croatia. The office did not directly collect this. This was done either by the social welfare centres or by Red Cross bodies in the municipalities, and then we did forward those requests to the office in Zagreb, which authorised those visas.* That was the procedure.⁶⁰⁸ [emphasis added]

⁶⁰⁵ [REDACTED].

⁶⁰⁶ [REDACTED].

⁶⁰⁷ P10407.1D02631

⁶⁰⁸ M.Raguž T.31542. See, also 1D02593.

501. REBIĆ, as Head of the ODPR in the Republic of Croatia confirmed that he his office issued transit visas for travel in his country⁶⁰⁹ REBIĆ also said that international organisations played an important role in arranging for the travel of those leaving wishing to leave Bosnia.⁶¹⁰

2. Role of NIKIĆ and the ODPR

502. ODPR staff including NIKIĆ were responsible for registering and classifying the civilians detained in the Heliodrom after May 1993.⁶¹¹ The ODPR's strategic role in dealing with displaced persons continued throughout 1993.

503. NIKIĆ was the ODPR commissioner appointed by the Mostar municipality to work on issues of refugees and displaced persons. NIKIĆ acted as a liaison officer representing the Mostar municipality in communications with the ODPR for the Republic of Croatia.⁶¹² She was involved in registering detainees at the Heliodrom after the 9 May 1993 and received lists of detainees interned after 30 June 1993.⁶¹³

504. NIKIĆ was one of the HVO officials involved in the process of co-ordinating security checks on those applying for transit visas. On 23 September 1993, for example, NIKIĆ wrote to SIS asking for security checks to be carried out on seven individuals.⁶¹⁴ The following day a reply was sent by Miroslav MUSIĆ of SIS approving her request for all but one of the persons named.⁶¹⁵ NIKIĆ also made similar requests to the CPD, who also answered her queries.⁶¹⁶

D. Medical Evacuations

505. Contrary to the allegations made by WITNESS BB⁶¹⁷ the evidence strongly suggests that (i) PUŠIĆ was not one of the responsible figures within the HVO for medical evacuations

⁶⁰⁹ Rebić T.31399-400.

⁶¹⁰ Rebić T. 28300. 1D02593. *See*, also Zoric T.27964-5.

⁶¹¹ *See*, Part VI, Section B.

⁶¹² Raguž T.31564. Krajšek also said that she was familiar with Nikić who worked at the ODPR office in Mostar. Krajšek T.20025

⁶¹³ J.Praljak T.14923. *See* also Vidović T.51521.

⁶¹⁴ P5320.

⁶¹⁵ P5358.

⁶¹⁶ P05128. P05371.

⁶¹⁷ *See*, Part IV, Section F.

and (ii) HVO policy favoured medical evacuations but that the ABiH, for their own reasons, obstructed progress towards any agreement.

506. BAGARIĆ was Head of Health Department within the Defence Department and testified that he was involved in organising medical evacuations for the HVO in 1993-4. During his testimony BAGARIĆ said that he took part in high level talks at Sarajevo Airport between PETKOVIĆ and DELIĆ where General BRIQUEMONT was also present.⁶¹⁸ BAGARIĆ also commented on a report from ŠANDRK concerning negotiations for the evacuation of wounded persons from Nova Bila and Mostar organised by SPABAT that were held between 1 to 6 September 1993. PUŠIĆ was part of the HVO delegation.⁶¹⁹ On 16 September 1993 BAGARIĆ wrote to UNPROFOR and SPABAT representatives asking for their assistance in communicating his offer of accommodation and help for the wounded, especially women and children in the Mostar war hospital as well as other HVO hospitals, to the ABiH.⁶²⁰

507. BAGARIĆ claimed that it was not possible to reach any agreement on the subject of medical evacuations at these meetings despite all his efforts because of the intransigence of the ABiH representatives. BAGARIĆ primarily blamed ABiH commanders for this state of affairs. In a report dated 20 December 1993 BAGARIĆ said that the Muslim side always postponed negotiations concerning evacuations even though the HVO were prepared to accept all for all exchanges of the wounded.⁶²¹ In his report BAGARIĆ also noted that the ABiH held a greater number of injured Croats than the equivalent number of Muslims held by the ABiH.

508. BAGARIĆ's analysis was confirmed by international community representatives. A daily report from UNMO report dated 27 September 1993 referred to a meeting with PAŠALIĆ and recorded that:

Medical evacuation for women and children patients to the west hospital has been offered by the HVO. However it would appear they [BiH] are unlikely to take

⁶¹⁸ Bagarić T.38933. P04714.

⁶¹⁹ Bagarić T.38932-6. 2D00761. He also testified: "When we asked for some wounded to be transported, as a rule this would be delayed ad nauseam. I know that representatives of the international community were limited by the willingness of the Bosnian Muslim side." Bagarić T.38950-1.

⁶²⁰ 2D00455.

⁶²¹ 2D00502. *See*, also Bagarić T.38946-53.

advantage of this due to the political advantage that such an arrangement would give the HVO, the general mistrust, and the security offered by this type of casualty.⁶²²

509. KVESIĆ also refuted Prosecution allegations that the HVO were responsible for obstructing medical evacuations or failed to provide appropriate medical care to the wounded from the opposite side. KVESIĆ was director of the hospital in Mostar and produced a list of the Muslims that were treated there in 1993-4.⁶²³ He claimed that the hospital was open to all Bosniaks and also produced a list of wounded members of the ABiH army sent from the HVO hospital in Mostar to the hospital in Split. KVESIĆ said that ŠANDRK arranged their transportation.⁶²⁴ Neither KVESIĆ nor BAGARIĆ mentioned PUŠIĆ in connection with their activities.

E.Humanitarian Aid Convoys

1. Introduction

510. The allegation that PUŠIĆ had the authority to allow the free passage of humanitarian convoys or otherwise order the unhindered movement of international community representatives is not supported by the evidence. [REDACTED] and WITNESS DV did not allege that PUŠIĆ had any powers in this area. The evidence discloses that other HVO officials and agencies had the power to grant or deny permission for international organisations to travel through HVO territory.

2. International Meetings

511. The issue of humanitarian aid and free movement for international organisations had a prominent place on the agenda at many, if not all, the meetings and discussions between the HVO, BIH and international community representatives in 1993-4. PUŠIĆ does not make a significant contribution to the high level negotiations where these issues are discussed

⁶²² P05428. *See, also* Bagarić T.26250-3.

⁶²³ Kvesić T.37406. 2D00966.

⁶²⁴ Kvesić T.37411-3. 2D00566.

following events in May 1993 including the meetings held to discuss implementation of the 12 May 1993 agreement.⁶²⁵

512. The evidence of PUŠIĆ's participation in any subsequent meetings does not disclose that he possessed any decision making powers in respect of humanitarian aid or, indeed, any other matter.⁶²⁶ For instance, PUŠIĆ is not a signatory to the 10 July 1993 Agreement⁶²⁷ nor he was given any authority under the terms of the 16 December 1993 Protocol⁶²⁸ regarding the passage of humanitarian convoys.

3. HVO Policy

513. The evidence suggests that the HVO did not have a uniform policy to obstruct or block the movement of international organisations or humanitarian aid convoys. On 22 April 1993, for example, PETKOVIĆ ordered⁶²⁹ all HVO soldiers to permit the free movement of civilians and on 26 May 1993 PETKOVIĆ signs another order to all operative zones and the Military Police regarding freedom of movement and guaranteed safety for UNPROFOR and humanitarian organisations.⁶³⁰

514. Following negotiations in Geneva on 17 August 1993, PETKOVIĆ issued an order for all Operative zones to observe BOBAN's order calling for the unhindered movement of all UN forces in BiH.⁶³¹ On 26 August 1993, Ivan ANČIĆ issues an order to the 5th Military Police Battalion for free passage to all humanitarian organisations on all order border crossings provided they possess the required signed authorisation.⁶³²

515. The Joint Declaration of TUĐMAN and IZETBEGOVIĆ signed on 14 September 1993, includes clauses calling for the freedom of movement of convoys.⁶³³ Some time thereafter, on 23rd November 1993, an order from the Main Staff is despatched to the military districts and

⁶²⁵ P02344.

⁶²⁶ See, also Part V, Section E.

⁶²⁷ P03346. para 6.

⁶²⁸ 1D01854. See, discussion *supra*.

⁶²⁹ P02038.

⁶³⁰ P02527.

⁶³¹ P04251.

⁶³² P04527

⁶³³ P05051.

forward command post in Prozor allowing free passage for convoys carrying humanitarian aid.⁶³⁴

4. Role of ODPR

516. RAGUŽ testified that [REDACTED]⁶³⁵ the ODPR had responsibility for authorising humanitarian aid convoys requested by humanitarian organisations. He also confirmed that a procedure was established whereby the ODPR was authorised to approve requests from domestic and international humanitarian organisations for the passage of convoys.⁶³⁶ On 16 December 1993 a Joint Commission for Humanitarian Affairs was formed and the ODPR was given the responsibility for implementing the protocol relating to humanitarian issues on behalf of the HVO.⁶³⁷

517. RAGUŽ also confirmed that the ODPR had authority to give permission to humanitarian convoys before he became head of office. RAGUŽ claimed that he could not recall any instance where permission for a convoy was denied.⁶³⁸

PART XI: INDIVIDUAL CRIMINAL RESPONSIBILITY PURSUANT TO ARTICLE 7(1) AND ARTICLE 7(3)

A. Introduction

518. In this section the Defence addresses allegations that PUŠIĆ planned, instigated, ordered or otherwise aided and abetted the crimes on the indictment as well as his criminal responsibility under Article 7(3). The Defence incorporates by reference all the submissions

⁶³⁴ P06825.

⁶³⁵ [REDACTED].

⁶³⁶ 1D01360. *See*, also Raguž T.31353-4.

⁶³⁷ 1D01854. *See*, also Raguž T.31365-6.

⁶³⁸ Raguž T.31358. The witness testified, "Q. Just one point of clarification. You'd indicated that while you were the head of the office, to your knowledge not a single convoy that met the criteria of the protocol was ever denied permission. What about while you were the deputy head of office? Can you recall of any instance when a convoy met all the criteria but your predecessor denied giving access or permission for the convoy? I cannot remember any such cases. .

made in the foregoing review of the evidence concerning PUŠIĆ's alleged participation in the JCE.

B.Planning, Instigating and Ordering

1. Planning

519. Criminal responsibility for planning a crime is incurred where, acting alone or with others an Accused intentionally designs the criminal conduct constituting the crime with the awareness of a substantial likelihood that a crime or underlying offence will be committed in the execution of the design. The plan must be a substantial factor contributing to the perpetration of the crime.⁶³⁹

2. Instigating

520. Instigating means “urging, encouraging or prompting” another person to commit a crime.⁶⁴⁰ A causal link between the instigation and the commission of the crime must be proved.⁶⁴¹ The conduct alleged must be a “factor substantially contributing to the conduct of another person committing the crime.”⁶⁴² However, it need not be shown that the criminal conduct would not have occurred without the accuser’s involvement.⁶⁴³ The Accused must intend to provoke or induce the commission of the crime or act with the awareness of the substantial likelihood that a crime or underlying offence would be committed as a result of such prompting.⁶⁴⁴

3. Ordering

521. Ordering requires a positive act: it cannot be committed by omission. The Accused “must instruct another person to commit an offence”⁶⁴⁵ The Accused must intend to bring

⁶³⁹ *Prosecutor v. Kordić and Čerkez*, Appeals Judgement, Case No: IT-95-14/2-A, 17 December 2004 (Kordić AJ), paras.26 -31.

⁶⁴⁰ *Prosecutor v. Semanza*, Trial Judgement, Case No: ICTR-97-20-T, 15 May 2003 (Semanza TJ), para.381.

⁶⁴¹ *Prosecutor v. Bagilishema*, Trial Judgement, Case No:ICTR-95-1A-T, 07 June 2001 (Bagilishema TJ), para.30

⁶⁴² Kordić AJ, para.27.

⁶⁴³ Kordić Appeal para.27. Brdanin TJ para.269.

⁶⁴⁴ Kordić AJ, paras.27 -32.

⁶⁴⁵ Kordić AJ,para.28.

about the commission of a crime or have awareness of the substantial likelihood that a crime would be committed in the execution of the order.⁶⁴⁶ The Prosecution must establish that the offence would not have been committed “but for” the order.⁶⁴⁷ The Accused must possess the authority to order the commission of the offence, and this can be reasonably implied but there is no need for a formal superior–subordinate relationship.⁶⁴⁸

4. Submissions

522. Whether acting alone or with others, there is no evidence that PUŠIĆ planned any activity that was a factor substantially contributing to the commission of a crime. Nor is there any evidence that PUŠIĆ ever instigated a crime. As confirmed by the Prosecution witness BIŠKIĆ, PUŠIĆ did not have the *de facto* or *de jure* power to issue an order to anyone. There is no evidence that PUŠIĆ did issue an order for the commission of crime or was aware of anyone issuing any such order.

523. Furthermore, no evidence has been presented that PUŠIĆ had the necessary criminal intent for planning, instigating, ordering or committing any of the crimes on the Indictment.

C. Aiding and Abetting

1. Legal Requirements

524. Aiding and abetting requires an act of practical assistance, encouragement or moral support to the perpetration of crime.⁶⁴⁹ This conduct must have a substantial effect on the commission of the crime or underlying offence⁶⁵⁰ and can occur before, during or after the perpetration of a certain crime.⁶⁵¹ The aiding and abetting must be intentional and the Accused must act with the knowledge that his conduct will lend practical assistance, encouragement or moral support to the perpetration of crime or an underlying offence. The Accused must be

⁶⁴⁶ Strugar TJ, para.333 and 347.

⁶⁴⁷ Strugar, TJ, para.332.

⁶⁴⁸ *Prosecutor v. Kamuhanda*, Appeals Judgement, Case No: ICTR-99-54A-A, 19 September 2005. (Kamuhanda AJ), para.76 citing Kordić TJ para.388.

⁶⁴⁹ Blaškić AJ, para.45.

⁶⁵⁰ Blaškić AJ, para.46.

⁶⁵¹ Brđanin TJ, para.271, Blaškić AJ, para.48.

aware of the type and essential elements of the crime to be committed and of the mental state of the physical perpetrator or intermediary perpetrator.⁶⁵²

525. For the crime of persecution, the aider and abettor must be aware that the crime he is assisting is committed with discriminatory intent although he need not share this intent.⁶⁵³

2. Liability for Omissions

526. Tribunal jurisprudence holds that liability for aiding and abetting a crime on the basis of a failure to act can occur in the form of tacit approval from a spectator to a crime⁶⁵⁴ or by “omission proper”⁶⁵⁵ in certain circumstances. The Trial Chamber in *Milutinović* held that liability for an omission to act will only arise where the Accused has a legal duty to act and the accused has the ability to act and:

he fails to act either intending the criminal consequences or with the awareness and consent that the consequences will ensue and ...the failure to act results in the commission of a crime.⁶⁵⁶

3. Submissions

527. PUŠIĆ could not give orders to any HVO personnel or make decisions on behalf of the HVO. Accordingly, there is no evidence that PUŠIĆ provided practical assistance, encouragement or moral support to the perpetration of crime, whether by positive action or by commission and that this had a substantial effect on the commission of a crime. Nor did PUŠIĆ have a duty to act so as to trigger omission liability.⁶⁵⁷

D.Command Responsibility

1. Legal Requirements

⁶⁵² *Prosecutor v. Aleksovski*, Appeals Judgement, Case No: IT-95-14/1-A, 24 March 2000. (Alekovski AJ) para.162.

⁶⁵³ *Prosecutor v. Simić et al.* Trial Chamber, Case No: IT-95-9-T, 17 October 2003, (Simić TJ), para.164.

⁶⁵⁴ Aleksovski AJ, para.87

⁶⁵⁵ Brđanin AJ, paras.273-277.

⁶⁵⁶ Milutinović TJ para.89-94.

⁶⁵⁷ Galić AJ para.175. See, also Part III, Section I for submissions concerning Pušić’s *de jure* powers

528. To attribute criminal responsibility under Article 7(3) of the Statute the Prosecution must establish:

- a. the existence of a direct superior-subordinate relationship between the accused and the perpetrators:
- b. that the superior knew or had reason to know that his subordinate was about to commit a crime or had done so.
- c. that the superior failed to take the necessary and reasonable measures to prevent his subordinate's criminal conduct or punish his subordinate.⁶⁵⁸

529. The burden of proof is on the Prosecution to prove beyond a reasonable doubt these three elements. Thus, the Chamber must find that "there is no reasonable explanation of the evidence other than the guilt of the Accused."⁶⁵⁹

530. The Indictment contains references to PUŠIĆ exercising "substantial influence" over unidentified HVO personnel.⁶⁶⁰ As a matter of law, the exercise of nothing more than substantial influence over a subordinate cannot satisfy the legal requirements of a superior – subordinate relationship. This can only exist where a superior has "effective control" over his subordinate.

2. The Prosecution Failed to Identify PUŠIĆ's Culpable Subordinates.

531. In order to establish a superior–subordinate relationship the Accused's subordinates must be sufficiently identified. The principal perpetrators need not be named but the Prosecution must establish (i) the group or unit they belong to and (ii) prove that Accused had effective control over that group or unit.⁶⁶¹

532. The Prosecution has failed to identify any subordinates over whom PUŠIĆ exercised effective control. Allegations that PUŠIĆ exercised "effective control" over JOSIP

⁶⁵⁸ *Prosecutor v. Orić*, Appeal Judgement, Case No. IT-03-68-A, 03 July 2008. (Oric AJ) para. 18.

⁶⁵⁹ Delalić AJ, para.458.

⁶⁶⁰ Indictment, para.13-14.

⁶⁶¹ Oric AJ para.311. In Oric the Appeal Chamber emphasised the importance of establishing at a minimum, the existence of the culpable subordinates within that unit or group. In that case, the Trial Chamber's failure to identify a culpable subordinate, whether by name, membership of a unit or group under the accused's command, resulted in a reversal of the accused's conviction for command responsibility.

PRALJAK, BOŽIĆ or any other staff at the Heliodrom or any other detention centre are disputed and are dealt with *infra*.⁶⁶²

533. In light of the Prosecution's failure to prove that PUŠIĆ had any culpable subordinates Chamber must acquit him of all charges based on command responsibility pursuant to Article 7(3).

3. Liability for Omissions under Article 7(3)

534. The Prosecution alleges that PUŠIĆ is criminally responsible for failing to report and/or investigate crimes and to punish and discipline subordinates⁶⁶³ including his failure to intervene to remedy abuses and inadequate conditions at HVO detention centres.⁶⁶⁴ In addition it is alleged that PUŠIĆ "failed to intervene or stop or denounce the illegal practice of forced labor, despite being made aware of this practice."⁶⁶⁵

535. In the instant case, the Prosecution has introduced some evidence showing that PUŠIĆ was aware of forced labour practices and allegations of mistreatment in the detention centres.⁶⁶⁶ What matters for liability under Article 7(3) however is whether the Accused was aware of the criminal conduct of his alleged subordinates, *not* whether he was aware of the commission of the crime itself.⁶⁶⁷ These two factors are not interchangeable, and the latter does not necessarily imply the former.

536. As the Prosecution has failed to adduce evidence to prove to the required standard that PUŠIĆ had any subordinates responsible for the commission of the crimes on the Indictment, it has failed to carry its burden of establishing that PUŠIĆ had a duty to act pursuant to Article 7(3).

⁶⁶² See, (i) Part VI, Section B: (ii) Part VII, Section B and (iii) Part VIII, Section A.

⁶⁶³ Indictment, para.17(k).

⁶⁶⁴ Indictment, para.17(i).

⁶⁶⁵ Indictment, para.17(h).

⁶⁶⁶ See, (i) Part VII, Section: (ii) B, Part VIII, Section A and (iii) Part IX, Section E.

⁶⁶⁷ The Appeals Chamber in Orić stressed that the burden is on the Prosecution to show that the Accused was aware of the criminal activity of his subordinates and that a mere showing of the accused's awareness of the occurrence of a particular crime shall not suffice. Orić AJ, paras. 169-174.

CONCLUSION

The Chamber must acquit PUŠIĆ of all the counts on the Indictment for the reasons set out above.

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Respectfully submitted on 31 March 2011

A handwritten signature in black ink, appearing to be 'F. Ibrišimović', written in a cursive style.

Counsel for Berislav Pušić
Mr Fahrudin Ibrišimović