

**UNITED
NATIONS**



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

Case No. IT-00-39-A
Date: 17 March 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Judgement of: 17 March 2009

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

JUDGEMENT

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CONTENTS

I. INTRODUCTION	1
A. MOMČILO KRAJIŠNIK	1
B. TRIAL JUDGEMENT AND SENTENCE	1
C. THE APPEALS	2
1. Krajišnik.....	2
2. <i>Amicus Curiae</i>	4
3. Prosecution.....	5
II. APPELLATE REVIEW	5
A. STANDARD FOR APPELLATE REVIEW	5
B. STANDARD FOR SUMMARY DISMISSAL.....	7
1. Arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings.....	8
2. Mere assertions that the Trial Chamber must have failed to consider relevant evidence.....	8
3. Challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding	9
4. Arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence.....	9
5. Arguments contrary to common sense.....	10
6. Challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the Appellant.....	10
7. Mere repetition of arguments that were unsuccessful at trial	10
8. Allegations based on material not on record.....	10
9. Mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate error	10
10. Mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.....	11
III. GROUNDS OF APPEAL RAISED BY <i>AMICUS CURIAE</i>	12
A. ALLEGED VIOLATIONS OF THE RIGHT TO A FAIR TRIAL (GROUND 1).....	12
1. Relevant background	12
2. Additional evidence on appeal.....	15
3. Alleged ineffective assistance of counsel (sub-ground 1(A)).....	15
(a) Submissions.....	15
(b) Analysis.....	16
(i) Alleged failures of Counsel Brashich	17
(ii) Alleged failures of the Stewart team	19
a. Commencing a case when manifestly unprepared	19
b. Failure to utilise the pre-trial resources allocation properly.....	20
c. Failure to review disclosure materials adequately.....	22
d. Failure to work full time on the case during the trial period	23
e. Failure to develop or implement a defence strategy	24
f. Failure to test Prosecution evidence adequately	25
g. Failure to properly select witnesses to be called on behalf of Krajišnik	25
h. Failure to appeal significant decisions	25
i. Resignation of key Defence team members.....	26
j. Conclusion.....	26
4. Adequate time and facilities for the preparation of the Defence (sub-ground 1(B)).....	26
(a) Submissions.....	26
(b) Analysis.....	29
(i) Time for pre-trial preparation	30

(ii) Rejection of First Motion for Adjournment.....	30
(iii) Procedural decisions based on irrelevant considerations.....	32
(iv) Failure to investigate fair trial issues raised by Defence Counsel	33
(v) Time to prepare the final brief	33
(vi) Conclusion	34
5. Restrictions on the conduct of the Defence (sub-ground 1(C))	35
(a) Submissions.....	35
(b) Analysis.....	36
(i) Time to prepare for and to cross-examine Prosecution witnesses	36
(ii) Insufficient time for the preparation of the Defence case.....	37
(iii) Time to investigate properly the calling of experts	38
(iv) Time allotted to call Defence witnesses	38
(v) Cross-examination of Trial Chamber witnesses	41
(vi) Krajišnik's participation in the proceedings	43
a. Decision denying self-representation	43
b. Krajišnik's participation in cross-examinations	44
(vii) Conclusion	44
6. Replacement of Judge El Mahdi by Judge Hanoteau (sub-ground 1(E))	45
(a) Submissions.....	45
(b) Analysis.....	46
7. Alleged failure to deliberate properly (sub-ground 1(F))	47
(a) Submissions.....	47
(b) Analysis.....	48
8. Concluding remark.....	49
B. ALLEGED FAILURE TO PROVIDE A REASONED OPINION (GROUND 2)	49
1. Submissions	49
2. Analysis.....	51
(a) The requirement to provide a reasoned opinion.....	51
(b) Whether the Trial Chamber erred in using an "illustrative approach"	52
(c) Whether the Trial Chamber failed to give sufficient reasons in relation to witnesses with "adverse credibility issues"	54
C. ALLEGED ERRORS RELATING TO THE JOINT CRIMINAL ENTERPRISE (GROUND 3).....	57
1. Identification of members of JCE (sub-ground 3(A)).....	57
(a) Submissions.....	57
(b) Analysis.....	57
2. Beginning of Krajišnik's criminal liability (sub-ground 3(B)).....	59
(a) Submissions.....	59
(b) Analysis.....	59
(i) Whether the Trial Chamber made findings to the effect that Krajišnik's responsibility for the first commissions of expanded crimes arose under JCE Category 3	61
(ii) Whether the Trial Chamber made findings as to how and when the expanded crimes were added to the common objective of the JCE.....	63
3. Conclusion of the JCE (further sub-ground 3(B))	66
(a) Submissions.....	66
(b) Analysis.....	66
4. Type of JCE (sub-ground 3(C))	66
5. Common objective (sub-ground 3(D)(i)).....	67
(a) Submissions.....	67
(b) Analysis.....	68
6. Original objective (sub-ground 3(D)(ii))	69
(a) Submissions.....	69
(b) Analysis.....	69
7. "Fluid concept of JCE" (sub-ground 3(D)(iii)).....	70
8. Proof of common objective (sub-ground 3(D)(iv))	70
(a) Submissions.....	70
(b) Analysis.....	71

9. <i>Mens rea</i> (sub-ground 3(E) and Ground 7).....	72
(a) Submissions.....	72
(b) Analysis.....	74
10. Material contribution to the JCE (sub-ground 3(F)).....	77
(a) Submissions.....	77
(b) Analysis.....	79
11. Use of principal perpetrators as “tools” by a member of the JCE (sub-ground 3(G)).....	81
(a) Submissions.....	81
(b) Analysis.....	84
(i) Applicable law	84
(ii) Findings of the Trial Chamber.....	84
(iii) Findings on crimes committed by JCE members without having used principal perpetrators	86
(iv) Findings on crimes committed by principal perpetrators used by JCE members.....	87
a. Did the Trial Chamber use an erroneous legal standard of JCE liability?.....	87
b. Did the Trial Chamber fail to make findings on JCE members’ use of non-JCE members committing crimes?.....	88
c. The Trial Chamber’s general findings regarding the Bosnian-Serb leadership’s relation to the VRS, crisis staffs, war presidencies, war commissions and paramilitary groups.....	88
d. The Trial Chamber’s findings regarding the use of principal perpetrators by individual JCE members.....	91
i. General Ratko Mladić	92
(a) Findings on Ratko Mladić’s responsibilities and role as VRS commander	92
(b) Findings on Ratko Mladić’s general involvement in crimes.....	92
(c) Crimes committed by VRS troops.....	93
ii. Gojko Kličević.....	95
iii. Jovan Mijatović.....	96
iv. Vojin (Žučo) Vučković	97
v. “Vojo” Kuprešanin.....	97
vi. Radoslav Brđanin	98
vii. Ljubiša (Mauzer) Savić.....	99
viii. Veljko Milanković	100
(c) Conclusion.....	101
12. Sufficient notice of JCE (sub-ground 3(H)).....	102
(a) Submissions.....	102
(b) Analysis.....	102
D. DEPORTATION (GROUND 4).....	103
1. Submissions	104
2. Analysis.....	106
(a) Displacements not authorised under international law.....	107
(b) Displacements across a border	108
(c) Alleged failure to make the relevant findings in relation to each municipality	109
(d) Alleged errors of the Trial Chamber in finding that the elements of deportation had been found beyond reasonable doubt	109
(i) Review of the findings for each municipality.....	110
(ii) Were the displacements forced?	111
(e) Alleged errors of fact.....	111
3. Conclusion	111
E. FORCIBLE TRANSFER (GROUND 5)	112
1. Submissions	112
2. Analysis.....	113
(a) Alleged error regarding the threshold of seriousness required for forcible transfer as other inhumane acts	113
(b) Alleged error regarding the failure of the Trial Chamber to make the predicate findings for the crime of forcible transfer	115

(c) Alleged error of fact	115
3. Conclusion	115
F. KRAJIŠNIK'S HIERARCHICAL POSITION (GROUND 6)	115
1. Submissions	115
2. Analysis.....	118
(a) Alleged dearth and unreliability of evidence	119
(b) Whether the impugned conclusions contradict other findings of the Trial Chamber	121
(c) Alleged failure to explain contradictory evidence	121
(d) Alleged vagueness and generalisation of terms	122
3. Conclusion	123
G. ALLEGED BREACH OF RULE 90(H)(II) (GROUND 8)	123
1. Submissions	123
2. Analysis.....	124
(a) General	124
(b) Application of Rule 90(H)(ii) to Krajišnik as a witness	125
(c) Parts of Krajišnik's testimony that were not specifically challenged in cross-examination	126
H. ASSESSMENT OF KRAJIŠNIK'S EVIDENCE (GROUND 9).....	127
1. Submissions	127
2. Analysis.....	128
I. CUMULATIVE CONVICTIONS (GROUND 10)	129
1. Submissions	130
2. Analysis.....	131

IV. THE APPEAL OF MOMČILO KRAJIŠNIK 133

A. ARGUMENT RAISED IN THE INTRODUCTION OF KRAJIŠNIK'S APPEAL BRIEF	133
B. ALLEGED VIOLATION OF THE RIGHT TO A FAIR TRIAL	133
1. Counsel's preparedness.....	135
2. Counsel's management of the case	135
3. Counsel's alleged failure to secure information from his team and from Krajišnik.....	137
4. Counsel's alleged disinterest in the case.....	138
5. Counsel's alleged lack of knowledge of the case	138
6. Counsel's alleged failure to test Prosecution evidence	139
7. Counsel's alleged failure to conduct an effective defence case.....	140
8. Conclusion	141
C. ALLEGED ERROR IN FINDING THAT KRAJIŠNIK WAS A JCE MEMBER AND ALLEGED FAILURE TO PROPERLY IMPUTE CRIMES BY NON-JCE MEMBERS.....	141
D. ALLEGED ERRORS OF FACT	142
1. Challenges to findings on events preceding the crimes (mainly Part 2 of the Trial Judgement)	143
(a) Political precursors	144
(i) Creation of Serb autonomous regions and districts (Section 2.4).....	144
(ii) Creation of Bosnian-Serb Assembly (Section 2.5).....	147
(iii) SDS Instructions of 19 December 1991 ("Variant A and B Instructions")	149
(iv) Proclamation of Bosnian-Serb Republic.....	152
(v) Establishment of Bosnian-Serb Republic	157
(b) Krajišnik's participation in the establishment of Bosnian-Serb organs	158
(i) State, party, regional and local structures	158
(ii) Crisis staffs	159
(iii) War presidencies and war commissions.....	160
(iv) Ministry of Internal Affairs ("MUP").....	160
(c) Preparations leading up to the take-over of municipalities	161
(i) Consolidation of Bosnian-Serb central authority.....	161
(ii) Expansionism and the pursuit of ethnically recomposed territories	162
(iii) Knowledge of and support for arming activities	164
(d) Conclusion	165

2. Challenges to factual findings regarding the Bosnian-Serb leadership	165
(a) Introduction	165
(b) Arguments related to the administration of the Bosnian-Serb Republic (Part 3 of the Trial Judgement)	165
(i) Alleged errors in the findings on the Bosnian-Serb Assembly (Section 3.1)	165
(ii) Alleged errors in the findings on the Bosnian-Serb government and judiciary (Section 3.2)	168
(iii) Alleged errors in the findings regarding the Bosnian-Serb Presidency (Section 3.3)	169
(iv) Alleged errors in the findings regarding the armed forces (Section 3.4)	174
(v) Alleged errors in the findings regarding the Ministry of Internal Affairs (MUP) (Section 3.5)	179
(vi) Alleged errors in the findings regarding crisis staffs, war presidencies and war commissions	181
(c) Arguments related to Krajišnik's responsibility (Part 6 of the Trial Judgement)	191
(i) Alleged errors in the findings on Krajišnik's support for armed forces (Section 6.10)....	191
(ii) Alleged errors in the findings regarding Krajišnik's style of leadership (Section 6.11) .	196
(iii) Alleged errors in the findings regarding information flows (Section 6.12)	201
(iv) Alleged errors in the findings regarding Krajišnik's knowledge of and support of detention of civilians (Section 6.14)	203
(v) Alleged errors in the findings regarding Krajišnik's responsibility (Section 6.17)	203
(d) Other summary dismissals	204
(e) Conclusion	206
3. Challenges to findings concerning Krajišnik's knowledge of crimes committed	206
4. Challenges to findings concerning JCE liability	206
(a) Membership in the JCE	207
(b) Common objective	209
(i) Submissions related to the taking over of territory	209
(ii) The crimes committed were allegedly not part of any common objective	210
(iii) Submissions that crimes were either not committed, or that they were investigated	211
(iv) Statements were allegedly not indicative of the existence of a common objective	211
(v) Krajišnik's support for ethnic recomposition	214
(vi) Statements regarding Muslim nationhood	219
(c) Connection between Krajišnik and the crimes/physical perpetrators of the crimes	221
(i) Challenges related to specific instances of involvement	221
(ii) Challenges related to activities of paramilitary groups	221
(d) Challenges to findings concerning Krajišnik's contribution to the JCE	221
(e) Other assertions dismissed summarily	222
E. SUPPLEMENTARY LEGAL CHALLENGES RELATING TO JCE	226
1. Legitimacy of JCE liability (Ground 1)	226
(a) Statutory basis for JCE (sub-ground 1(A))	227
(i) Submissions	227
(ii) Analysis	227
(b) Basis for JCE in customary international law (sub-ground 1(B))	228
(i) Submissions	228
(ii) Analysis	229
(c) JCE as a form of "commission" (sub-ground 1(C))	229
(i) Submissions	229
(ii) Analysis	230
(d) JCE and the <i>nullum crimen sine lege</i> principle (sub-ground 1(D))	232
(i) Submissions	232
(ii) Analysis	232
2. Krajišnik's contribution to the JCE (Ground 2)	234
(a) Allegation that the contribution must be substantial (sub-ground 2(A))	234
(i) Submissions	234
(ii) Analysis	234
(b) Alleged failure to consider the contribution in assessing <i>mens rea</i> (sub-ground 2(B))	235

(i) Submissions	235
(ii) Analysis	236
(iii) Did the Trial Chamber err in finding that Krajišnik's political activity formed part of his contribution to the JCE?.....	237
3. Consistency and coherence of JCE as applied to Krajišnik (Ground 3)	241
(a) Alleged vagueness of the Indictment and the Trial Judgement with respect to JCE (sub-ground 3(A))	241
(i) Submissions	241
(ii) Analysis	243
a. Common objective.....	243
b. <i>Actus reus</i> and <i>mens rea</i>	244
c. Members of the JCE and principal perpetrators	245
(b) Alleged inconsistencies in the Trial Chamber's application of JCE (sub-ground 3(B)).....	247
(i) Submissions	247
(ii) Analysis	248
(c) Arguments related to the Prosecution's presentation of JCE (sub-ground 3(C)).....	250
(i) Submissions	250
(ii) Analysis	251
4. Conclusion	251

V. APPEALS AGAINST SENTENCE 252

A. APPLICABLE LAW AND STANDARD OF REVIEW.....	252
B. <i>AMICUS CURIAE</i> 'S APPEAL AGAINST SENTENCE (GROUND 11).....	253
C. KRAJIŠNIK'S APPEAL AGAINST SENTENCE.....	254
1. Introduction.....	254
2. Submissions	254
3. Analysis.....	255
4. Conclusion	258
D. PROSECUTION'S APPEAL AGAINST SENTENCE	258
1. Sub-ground 1: Sentencing principles, gravity of the criminal conduct	259
(a) Submissions.....	259
(b) Analysis.....	264
(i) Findings of the Trial Chamber.....	265
a. Gravity of the crimes	265
b. Krajišnik's role in the commission of the crimes.....	267
(ii) Discussion.....	267
2. Sub-ground 2.....	268
(a) Alleged error in failing to consider aggravating circumstances separately from the gravity of the offence	268
(i) Submissions	268
(ii) Analysis	269
(b) Alleged error in considering irrelevant and extraneous factors in mitigation.....	270
(i) Submissions	270
(ii) Analysis	272
3. Conclusion	273
E. CONSIDERATIONS OF THE APPEALS CHAMBER	273
1. The adequate sentence for Krajišnik.....	274
(a) The applicable purposes of sentencing.....	274
(i) Retribution	275
(ii) Deterrence.....	275
(iii) Rehabilitation.....	275
(iv) Individual and general affirmative prevention.....	276
(b) Article 24 of the Statute and Rule 101 of the Rules.....	276
(i) The general practice regarding prison sentences in the courts of the former Yugoslavia	276
(ii) The gravity of the crime(s) of the totality of an accused's conduct	277

(iii) The individual circumstances of an accused, including aggravating and mitigating circumstances.....	277
(iv) Credit to be given for any time spent in detention pending transfer to the International Tribunal, trial, or appeal	278
2. Conclusion	278
VI. DISPOSITION	279
VII. SEPARATE OPINION OF JUDGE SHAHABUDDEEN	281
A. PRELIMINARY	281
B. THE GENERAL DOCTRINE OF JCE.....	283
1. The Appellant’s general attack on JCE.....	283
2. JCE is not an additional mode of liability but is part of an existing mode of liability	283
3. The fact that the Statute does not mention JCE does not show that JCE is not permitted as a form of “commission”	284
4. JCE does not render nugatory the other prescribed modes of liability	285
5. JCE is not a crime of membership of a designated criminal organisation.....	285
6. JCE is distinguishable from conspiracy	286
7. The arguments of counsel in another case are admissible in proving what is customary international law	286
8. The size of victim groups is not determinative of what was customary international law ..	287
9. The control test makes no difference	287
10. Commingling of civil law and common law concepts does not detract from the soundness of JCE	287
11. Cassese did not later resile from his support for JCE	288
C. CATEGORY III OF JCE	288
1. Assuming that proof of intent is required, the secondary offender may acquire the intent of the primary offender to commit the additional crime and be convicted for it.	289
2. In the alternative, the normal requirement to prove intent is removed by the law relating to accessories or by the objects of the criminal law	293
D. CONCLUSION.....	296
VIII. ANNEX A: PROCEDURAL BACKGROUND	298
A. COMPOSITION OF THE APPEALS CHAMBER	298
B. REPRESENTATION OF KRAJIŠNIK.....	298
C. NOTICES OF APPEAL AND BRIEFS	301
1. Prosecution’s Appeal	301
2. Krajišnik’s Appeal and <i>Amicus Curiae</i> ’s Appeal	302
(a) Appeal of <i>Amicus Curiae</i>	303
(b) Appeal of Krajišnik.....	304
D. MOTIONS RELATED TO CONDITIONS OF SELF-REPRESENTATION AND MODALITIES OF <i>AMICUS CURIAE</i> ’S ROLE	307
E. IMPORTANT FILINGS PURSUANT TO RULE 115 OF THE RULES.....	311
F. OTHER MOTIONS RELATING TO EVIDENCE	315
G. STATUS CONFERENCES.....	317
H. HEARING OF THE APPEALS.....	317
I. EVIDENTIARY HEARINGS.....	317
IX. ANNEX B: GLOSSARY AND LISTS OF REFERENCES	320
A. LIST OF CITED COURT DECISIONS	320
1. ICTY	320
2. ICTR	324
B. ARTICLES	326
C. LIST OF ABBREVIATIONS	326

through the commission of crimes, and that he had the required *mens rea* and contributed to it.¹⁷⁰⁵ The Appeals Chamber thus dismisses this sub-ground of appeal.

E. Supplementary legal challenges relating to JCE

648. Through the JCE counsel, Krajišnik challenges the Trial Chamber's application of JCE on three legal grounds. He argues that: (1) JCE is not a legitimate theory of liability; (2) the Trial Chamber erred in not requiring a substantial contribution of Krajišnik to the JCE; and (3) JCE, as applied to Krajišnik, is an inconsistent and incoherent theory of liability.

649. The Appeals Chamber notes that these submissions to some extent overlap with those Krajišnik presents in his *pro se* brief. JCE counsel submit that the brief on behalf of Krajišnik does not contradict any of Krajišnik's *pro se* legal arguments regarding JCE, but aims to flesh out, complement or expand these legal arguments.¹⁷⁰⁶ The Appeals Chamber finds it appropriate to deal with all the arguments presented by JCE counsel on behalf of Krajišnik separately in this section.

1. Legitimacy of JCE liability (Ground 1)

650. On 9 April 2008, the Prosecution filed a motion to strike Ground 1 of the Dershowitz Brief as going beyond Krajišnik's Notice of Appeal.¹⁷⁰⁷ On 11 April 2008, the Appeals Chamber explained that "the prudent course is to preserve all possible remedies to the alleged problem and does not find it apposite, at this juncture, to strike a portion of the Dershowitz Brief".¹⁷⁰⁸

651. The Appeals Chamber observes that Ground 1 goes beyond Krajišnik's Notice of Appeal and is contrary to the directives given to Mr. A. Dershowitz on 11 March 2008.¹⁷⁰⁹ Indeed, Krajišnik's Notice of Appeal does not assert that JCE liability is not legitimate, but only that the Trial Chamber erred in finding Krajišnik liable as a JCE member.¹⁷¹⁰ Krajišnik has not filed any motion to amend his Notice of Appeal. However, the Appeals Chamber notes that Krajišnik is self-represented and that at the time of filing of the Notice of Appeal, he was not yet assisted by JCE counsel. Furthermore, the question of whether or not JCE exists goes to very heart of the case

¹⁷⁰⁵ For the temporal scope of the common objective, the identity of the JCE members and the crimes comprised by the common objective *see supra* III.C.11.

¹⁷⁰⁶ Addendum to the Brief on Joint Criminal Enterprise of Alan M. Dershowitz, Submitted Pursuant to the Decision and Order Dated 11 April 2008, 16 April 2008 ("Dershowitz Addendum"), paras 5-6.

¹⁷⁰⁷ Prosecution's Motion to Strike Ground 1 from Brief on Joint Criminal Enterprise and to Order Counsel to Comply with the Appeals Chamber's Order.

¹⁷⁰⁸ Decision on Prosecution's Motion to Strike Ground 1 of the Dershowitz Brief and Order Counsel to Comply with the Decision of 11 March 2008, p. 1.

¹⁷⁰⁹ Decision on Prosecution's Motion for Clarification and Reconsideration of the Decision of 28 February 2008, 11 March 2008, para. 10 ("The Appeals Chamber will remind Mr. Dershowitz, however, that the arguments he advances must be within the ambit of issues that Mr. Krajišnik set forth in his notice of appeal").

¹⁷¹⁰ Krajišnik's Notice of Appeal, paras 14 *et seq.*

against him. Hence, the Appeals Chamber finds that in the circumstances of this case, it is in the interests of justice to consider this ground of appeal as validly filed.

(a) Statutory basis for JCE (sub-ground 1(A))

(i) Submissions

652. JCE counsel submit that the Trial Chamber erred in finding that JCE was the appropriate theory of liability for determining Krajišnik's guilt.¹⁷¹¹ First, they contend that JCE is without any textual basis in the Statute.¹⁷¹² Second, JCE counsel contend that JCE was created and developed by the Tribunal's Judges as an improper expansion of criminal liability beyond that contemplated by the Statute's drafters and in circumvention of Article 7(3) of the Statute.¹⁷¹³ They also argue that JCE expands cognate domestic doctrines of vicarious liability – purportedly risking the United States' rejection of the Tribunal's work – and indiscriminately combines both civil and common law concepts.¹⁷¹⁴

653. The Prosecution responds that JCE is part of “committing” under Article 7(1) of the Statute¹⁷¹⁵ and argues that it does not follow from the sole fact that Articles 7(2) and 7(3) of the Statute apply to heads of state that such persons are excluded from Article 7(1) liability.¹⁷¹⁶

(ii) Analysis

654. As a preliminary matter, the Appeals Chamber notes that Krajišnik did not raise the issue of the statutory basis for JCE at trial. As such, he may be deemed to have waived his right to raise this issue on appeal.¹⁷¹⁷

655. In any event, the Appeals Chamber considers that JCE counsel advance no cogent reason¹⁷¹⁸ why it should depart from its holding that “the Statute provides, albeit not explicitly, for joint criminal enterprise as a form of criminal liability”.¹⁷¹⁹ First, they do not address the teleological interpretation of the Statute as applied by the Tribunal that extends jurisdiction over all those responsible for serious violations of international humanitarian law, including those who did not

¹⁷¹¹ Dershowitz Brief, para. 1.

¹⁷¹² Dershowitz Brief, paras 2-9; AT. 204. JCE counsel submit that Article 7(1) of the Statute is exhaustive. They also refer to the Secretary-General's Report, paras 55-56.

¹⁷¹³ Dershowitz Brief, paras 5, 6, 10.

¹⁷¹⁴ Dershowitz Brief, paras 53-55. Although presented by JCE counsel under Ground 3, this argument is materially closer to Ground 1, and so the Appeals Chamber deals with it under Ground 1.

¹⁷¹⁵ Prosecution's Response to Dershowitz, paras 4, 6.

¹⁷¹⁶ Prosecution's Response to Dershowitz, para. 6.

¹⁷¹⁷ See *Blaškić* Appeal Judgement, para. 222; *Niyitegeka* Appeal Judgement, para. 200; *Akayesu* Appeal Judgement, para. 361; *Furundžija* Appeal Judgement, para. 174.

¹⁷¹⁸ *Galić* Appeal Judgement, para. 117; *Aleksovski* Appeal Judgement, para. 107.

¹⁷¹⁹ *Ojdanić* Decision on Joint Criminal Enterprise, para. 21. See also *Tadić* Appeal Judgement, paras 187-193.

actually carry out the *actus reus* of the crimes, and that this may amount to “committing” under Article 7(1) of the Statute. Second, the fact that Articles 7(2) and 7(3) of the Statute apply to government officials and others who might be removed from the actual crime does not mean that these persons are exempted from other forms of liability under the Statute. Indeed, quite the contrary to JCE counsel’s claim, the Secretary-General’s Report explicitly called for individual criminal responsibility for “*all* persons who *participate*” in the planning, preparation or execution of crimes under the Statute.¹⁷²⁰ As such, there is also no merit to JCE counsel’s argument that JCE “circumvents” Article 7(3) of the Statute. Finally, because JCE does not go beyond the Statute and forms part of custom as explained below, JCE counsel’s claim that the Judges “created” this form of liability fails.

656. JCE counsel’s additional assertion that JCE expands cognate domestic doctrines and combines different legal concepts is, apart from the unsubstantiated assertion that this might lead to the U.S. rejecting the Tribunal’s work, undeveloped and dismissed. This sub-ground is dismissed.

(b) Basis for JCE in customary international law (sub-ground 1(B))

(i) Submissions

657. JCE counsel contest the finding in the *Tadić* Appeal Judgement that JCE existed under customary international law.¹⁷²¹ Relying on two scholarly articles,¹⁷²² they first submit that *Tadić* “simply inferred” the grounds for conviction from “isolated statements by the prosecutors” in the WWII cases it referred to when a clear judicial statement was unavailable.¹⁷²³ They also argue that these cases do not provide a legal basis for the large-scale JCEs used in later Tribunal cases such as Krajišnik’s case. Second, they contend that the *Tadić* Appeals Chamber did not develop JCE disinterestedly; rather, they claim, it “molded” precedents to fit a theory that would permit convicting Duško Tadić. Lastly, JCE counsel argue that JCE shares features of criminal-organisation and conspiracy-based forms of liability, but that the former was explicitly rejected by the Secretary-General’s Report and that the latter only exist in the Statute for the crime of genocide, of which Krajišnik was not found guilty.¹⁷²⁴

¹⁷²⁰ *Tadić* Appeal Judgement, para. 190, citing Secretary-General’s Report, para. 54.

¹⁷²¹ Dershowitz Brief, paras 11, 18; AT. 205.

¹⁷²² Dershowitz Brief, paras 13-15, 18, referring to Jenny S. Martinez & Allison Marston Danner, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75 (2005); Steven Powles, *Joint Criminal Enterprise, Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. Int’l Crim. Just. 606 (2004).

¹⁷²³ Dershowitz Brief, paras 12, 15.

¹⁷²⁴ Dershowitz Brief, paras 15-17.

658. The Prosecution responds, first, that JCE counsel fail to provide any cogent reasons why the *Tadić* Appeals Chamber was wrong to recognise JCE as part of customary international law, or why JCE is not applicable to his case. Second, the Prosecution contends that JCE counsel refers to a “scholarly consensus”, but merely cites two articles. Lastly, it submits that *Tadić* relied on the *RuSHA* and *Justice* cases, both of which it argues are large-scale cases and have been held to recognise JCE liability.¹⁷²⁵

(ii) Analysis

659. The Appeals Chamber recalls that it provided a detailed reasoning for inferring the grounds for conviction in the WWII cases it cited in *Tadić*.¹⁷²⁶ JCE counsel do not address this reasoning. The Appeals Chamber further recalls that both the *Einsatzgruppen* and *Justice* cases show that JCE apply to large-scale cases,¹⁷²⁷ and that JCE is legally distinct from conspiracy and organisational liability.¹⁷²⁸ JCE counsel address neither one of these holdings. Their further claim that the *Tadić* Appeals Chamber “molded” precedent to convict the accused is unsubstantiated. This sub-ground is dismissed.

(c) JCE as a form of “commission” (sub-ground 1(C))

(i) Submissions

660. JCE counsel submit that the Trial Chamber erred in finding that JCE is a form of “commission” under Article 7(1) of the Statute.¹⁷²⁹ They argue, first, that such an interpretation would render nugatory the other modes of liability enlisted in Article 7(1) of the Statute.¹⁷³⁰ Second, JCE counsel submit that Krajišnik’s contribution as described by the Trial Chamber was at least two levels removed from the actual commission of the crimes.¹⁷³¹ Third, they argue that the *Brdanin* Appeal Judgement implicitly recognised the impropriety of locating JCE within “commission” in cases of high-level actors such as Krajišnik, and where the principal perpetrators of the crimes are not JCE members.¹⁷³² Finally, JCE counsel contend that, “[g]iven how the [Trial Chamber] incorporated certain crimes into JCE liability”, it essentially found that Krajišnik “committed” crimes which were neither part of his initial objective nor necessary to the objectives of the JCE,

¹⁷²⁵ Prosecution’s Response to Dershowitz, para. 5.

¹⁷²⁶ *Tadić* Appeal Judgement, paras 195-219; see more particularly paras 202-203, 208-209, 212-213.

¹⁷²⁷ *Brdanin* Appeal Judgement, paras 422-423; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004 (“*Rwamakuba* Appeal Decision”), para. 25.

¹⁷²⁸ *Ojdanić* Decision on Joint Criminal Enterprise, paras 23, 25-26.

¹⁷²⁹ Dershowitz Brief, para. 19, referencing Trial Judgement, paras 877, 1078.

¹⁷³⁰ Dershowitz Brief, para. 20.

¹⁷³¹ Dershowitz Brief, paras 23-24, referencing Trial Judgement, paras 1120-1121.

¹⁷³² Dershowitz Brief, paras 25-26, referencing *Brdanin* Appeal Judgement, fn. 891.

and which were carried out by people with whom he had no contact and over whom he had no control.¹⁷³³

661. The Prosecution responds that the Tribunal's jurisprudence has characterised JCE liability as part of "committing" in Article 7(1) of the Statute. It posits that this does not render the other modes of liability under Article 7(1) of the Statute nugatory because the elements of JCE distinguish it from them.¹⁷³⁴ The Prosecution also argues that Krajišnik's individual contributions to the JCE need not amount to physical commission, or be direct or material.¹⁷³⁵ Finally, it contends that JCE is "committing" regardless of whether the principal perpetrators are part of the JCE. It avers that a group with a common purpose amounting to or involving the commission of crimes under the Statute poses a greater danger than individual perpetrators and merits a serious form of liability in the form of "commission".¹⁷³⁶

(ii) Analysis

662. The Appeals Chamber has consistently held that participation in a JCE is a form of "commission" under Article 7(1) of the Statute.¹⁷³⁷ Although the facts of a given case might establish the accused's liability under both JCE and other forms of liability under Article 7(1), the legal elements of JCE distinguish it from these other forms. In the first place, none of the other forms require a plurality of persons sharing a common criminal purpose. Moreover, whereas JCE requires that the accused intended to participate and contribute to such a purpose,¹⁷³⁸ an accused may be found responsible for planning, instigating or ordering a crime if he intended that the crime be committed or acted with the awareness of the substantial likelihood that a crime would be committed.¹⁷³⁹ In terms of *actus reus*, planning and instigating consists of acts "substantially contributing" to the perpetration of a certain specific crime¹⁷⁴⁰ and ordering means "instructing" a person commit an offence.¹⁷⁴¹ By contrast, JCE requires that the accused contributes to the common purpose in a way that lends a significant contribution to the crimes.¹⁷⁴² The differences between

¹⁷³³ Dershowitz Brief, para. 27.

¹⁷³⁴ Prosecution's Response to Dershowitz, paras 6-7.

¹⁷³⁵ Prosecution's Response to Dershowitz, para. 8, referencing *Tadić* Appeal Judgement, para. 277; *Brdanin* Trial Judgement, para. 263; *Rwamakuba* Appeal Decision, para. 25; *Brdanin* Appeal Judgement, para. 425.

¹⁷³⁶ Prosecution's Response to Dershowitz, para 9.

¹⁷³⁷ E.g. *Kvočka et al.* Appeal Judgement, paras 79-80; *Tadić* Appeal Judgement, paras 188; *Ojdanić* Decision on Joint Criminal Enterprise, para. 20.

¹⁷³⁸ *Kvočka et al.* Appeal Judgement, paras 82-83. In the case of JCE Category 3, it must also have been foreseeable to the accused that a crime other than the one agreed upon in the common objective might be perpetrated by a member of the JCE, or by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose, and the accused willingly took that risk by joining or continuing to participate in the enterprise.

¹⁷³⁹ *Nahimana et al.* Appeal Judgement, paras 479-481; *Kordić and Čerkez* Appeal Judgement, paras 30-32.

¹⁷⁴⁰ *Kordić and Čerkez* Appeal Judgement, paras 26-27.

¹⁷⁴¹ *Kordić and Čerkez* Appeal Judgement, para. 28.

¹⁷⁴² *Brdanin* Appeal Judgement, para. 430; *Kvočka et al.* Appeal Judgement, paras 96-97.

JCE and aiding and abetting are well-established and need not be repeated here.¹⁷⁴³ JCE counsel's argument that JCE renders the other forms of liability under the Article 7(1) nugatory is thus without merit.

663. The Appeals Chamber notes that the question of whether Krajišnik was removed from the actual commission of the crimes is legally irrelevant to his conviction under JCE.¹⁷⁴⁴ His remoteness *vis-à-vis* the crimes is also not directly relevant to whether his acts can be characterised as "commission" under JCE. As explained in *Kvočka et al.*, participation in a JCE as a form of "commission"

is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.¹⁷⁴⁵

664. JCE counsel argue that it is improper to locate JCE within "commission" where the principal perpetrators of the crime are not JCE members. In the *Brdanin* Appeal Judgement, the Appeals Chamber left open the question of whether equating JCE with "commission" is appropriate where the accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.¹⁷⁴⁶ In the present case, Krajišnik was indeed convicted at least in part on the basis of crimes committed by non-JCE members but imputed to JCE members.¹⁷⁴⁷

665. In any case, whether Krajišnik should be held responsible for having "committed" the crimes in question or pursuant to another mode of responsibility, it remains that the Trial Chamber did not err in convicting him under Article 7(1) of the Statute for these crimes. As such, JCE counsel fail to demonstrate how the alleged error invalidates the decision.

666. To the extent JCE counsel's unreferenced argument regarding "how the [Trial Chamber] incorporated certain crimes into JCE liability" refers to the Trial Chamber's findings concerning the expansion of the JCE over time, the Appeals Chamber notes that this issue has been dealt with

¹⁷⁴³ *Kvočka et al.* Appeal Judgement, paras 89-90; *Vasiljević* Appeal Judgement, para. 102.

¹⁷⁴⁴ See *Tadić* Appeal Judgement, para. 227(iii).

¹⁷⁴⁵ *Kvočka et al.* Appeal Judgement, para. 80, citing *Tadić* Appeal Judgement, para. 191.

¹⁷⁴⁶ *Brdanin* Appeal Judgement, fn. 891.

¹⁷⁴⁷ See *supra* III.C.11.

elsewhere.¹⁷⁴⁸ In remaining parts, insofar as it is developed, this argument appears to be simply another attempt by JCE counsel to distance Krajišnik from the crimes and thereby show the inappropriateness of qualifying his liability as “commission”. For reasons stated above, that argument fails. This sub-ground is dismissed.

(d) JCE and the *nullum crimen sine lege* principle (sub-ground 1(D))

(i) Submissions

667. Given the “flaws” of JCE described in his previous sub-grounds, JCE counsel submit that Krajišnik lacked proper notice that he faced JCE liability.¹⁷⁴⁹ They argue that the acts or omissions underlying his conviction took place in 1992, while the concept of JCE liability did not arise until the *Tadić* Appeal Judgement in 1999,¹⁷⁵⁰ and that the concept has expanded beyond the low-level mob violence in *Tadić*, to include high-level officials with only tenuous connections to the crimes.¹⁷⁵¹ Therefore, JCE counsel argue, the imposition of JCE liability conflicts with the *nullum crimen sine lege* principle and is vulnerable to political influence.¹⁷⁵²

668. The Prosecution responds that the egregious nature of Krajišnik’s crimes, Article 26 of the Criminal Code of the Federal Republic of Yugoslavia, the extensive state practice noted in *Tadić* and the many domestic jurisdictions providing for such a form of liability under various names running parallel to custom, provided Krajišnik with notice that he would have incurred JCE liability.¹⁷⁵³

(ii) Analysis

669. As a preliminary matter, the Appeals Chamber notes that Krajišnik did not challenge but, in fact, expressly recognised at trial that the fact that *Tadić* was rendered after his alleged acts took place does not lead to a conflict between JCE and the *nullum crimen sine lege* principle.¹⁷⁵⁴ Therefore, as far as JCE counsel now argue that the *Tadić* Appeal Judgement violated that principle, Krajišnik may be deemed to have waived his right to bring this challenge on appeal.¹⁷⁵⁵ In any

¹⁷⁴⁸ See *supra* III.C.2.

¹⁷⁴⁹ Dershowitz Brief, para. 28; AT. 205.

¹⁷⁵⁰ Dershowitz Brief, paras 28, 30.

¹⁷⁵¹ Dershowitz Brief, para. 28; AT. 194-195.

¹⁷⁵² Dershowitz Brief, paras 29-30, citing Secretary-General’s Report, para. 34; AT. 234-235.

¹⁷⁵³ Prosecution’s Response to Dershowitz, para. 10, referencing *Ojdanić* Decision on Joint Criminal Enterprise, para. 43.

¹⁷⁵⁴ Defence Final Trial Brief, para. 134, referencing *Ojdanić* Decision on Joint Criminal Enterprise, para. 8.

¹⁷⁵⁵ See *Blaškić* Appeal Judgement, para. 222; *Niyitegeka* Appeal Judgement, para. 200; *Akayesu* Appeal Judgement, para. 361; *Furundžija* Appeal Judgement, para. 174.

event, JCE counsel fail to address the jurisprudence holding that the notion of JCE as established in *Tadić* does not violate the *nullum crimen sine lege* principle.¹⁷⁵⁶

670. Regarding JCE counsel's challenge that the alleged "expansion" of JCE after *Tadić* violates the principle, which challenge Krajišnik did raise at trial,¹⁷⁵⁷ the Appeals Chamber first recalls that when it interprets the JCE doctrine, it does not create new law. Instead, similarly to other provisions under the Statute, it merely identifies what the proper interpretation of that doctrine has always been, even though not previously expressed that way.¹⁷⁵⁸ This does not contravene the *nullum crimen sine lege* principle, which

"does not prevent a court from interpreting and clarifying the elements of a particular crime." Nor does it preclude the progressive development of the law by the court. But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification.¹⁷⁵⁹

671. Turning to the present case, the Appeals Chamber notes that, although *Tadić* concerned a relatively low-level accused, the legal elements of JCE set out in that case remain the same in a case where JCE is applied to a high-level accused. Therefore, JCE counsel are wrong to speak about an "expansion" of JCE to cases such as the one of Krajišnik. Moreover, the Appeals Chamber considers that, while pronounced in relation to acts allegedly committed in 1999, its holding in the *Ojdanić* Decision on Joint Criminal Enterprise applies also to Krajišnik in this case:

Article 26 of the Criminal Law of the Federal Republic of Yugoslavia, coupled with the extensive state practice noted in *Tadić*, the many domestic jurisdictions which provide for such a form of liability under various names and which forms of liability run parallel to custom, and the egregious nature of the crimes charged would have provided notice to anyone that the acts committed by the accused [...] would have engaged criminal responsibility on the basis of participation in a joint criminal enterprise.¹⁷⁶⁰

672. JCE counsel's additional argument that the imposition of JCE liability is vulnerable to political influence is unsupported and dismissed. This sub-ground is dismissed.

¹⁷⁵⁶ *Stakić* Appeal Judgement, para. 101; *Ojdanić* Decision on Joint Criminal Enterprise, para. 41.

¹⁷⁵⁷ Defence Final Trial Brief, para. 134(b).

¹⁷⁵⁸ See *Kordić and Čerkez* Appeal Judgement, para. 310; *Aleksovski* Appeal Judgement, para. 135.

¹⁷⁵⁹ *Ojdanić* Decision on Joint Criminal Enterprise, para. 38 (footnotes omitted).

¹⁷⁶⁰ *Ojdanić* Decision on Joint Criminal Enterprise, para. 43 (footnote omitted).