

Sunlight & Electric Light on the ICTY: DID THE TRIBUNAL FIND FRANJO TUĐMAN RESPONSIBLE FOR ETHNIC CLEANSING IN BOSNIA AND HERZEGOVINA?*

“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”

Louis D. Brandeis, Justice of the United States Supreme Court,
from his book,
Other People's Money and How the Bankers Use It (1914)

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On 29 November 2017, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) issued its final judgment in the case of *Prosecutor v. Jadranko Prlić, et al.* The ICTY’s end was shocking for numerous reasons, not least of which was the in-court suicide of one of the accused, Slobodan Praljak, during the reading of the judgment. Shock waves have also resulted from the judgment’s suggestion that the leadership of Croatia – including specifically Croatian President Franjo Tuđman, were part of a joint criminal

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enterprise (“JCE”) in Bosnia-Herzegovina. Indeed, ICTY prosecutor Serge Brammertz remarked afterwards that, “*The Appeals Chamber upheld the Trial Chamber’s findings that key members of Croatia’s then-leadership, including President Franjo Tuđman, Defence Minister Gojko Šušak, and Janko Bobetko, a senior General in the Croatian Army, shared the criminal purpose to ethnically cleanse Bosnian Muslims and contributed to realizing that goal.*”¹

As I explain below, Brammertz’s conclusion is misleading. The ICTY’s Trial and Appeals Chambers have not identified any evidence to support the conclusions against Tuđman that Brammertz advances. In the *Gotovina* case, the Prosecution used certain ambiguous statements in the now famous *Brioni Transcript*, as well as Tuđman’s public statements in speeches and elsewhere, to build a case that Tuđman had criminal intent to ethnically cleanse Serbs in Operation Storm. In *Prlić*, no “*Brioni Transcript*” exists. The Appeals Chambers does not identify a single statement by Tuđman that is even arguably ambiguous and could suggest intent to “*ethnically cleanse Bosnian Muslims.*” The same applies to Minister Šušak and General Bobetko. It is therefore troubling that Brammertz would issue a press release identifying as JCE members individuals who were not parties to the case, who were not given the opportunity to defend themselves or have others defend them, and who remain presumed innocent by the ICTY.²

Just as troubling is that the ICTY is closing its doors without ever having established that the leadership of Serbia was involved in a JCE in Bosnia-Herzegovina. Just the week prior to the *Prlić* Appeals Judgement, the Trial Chamber in the case of Ratko Mladić concluded that, “*The evidence received by the Trial Chamber did not show that Slobodan Milošević, Jovica Stanišić, Franko Simatović, Željko Ražnatović, or Vojislav Šešelj participated in the realization*” of the Bosnian Serb JCE in Bosnia-Herzegovina.³ The result is an implausible historical legacy left by the ICTY: the leadership of Croatia was involved in crimes in Bosnia-Herzegovina, but the leadership of Serbia was not. Under no

1 *Statement of the Office of the Prosecutor in relation to the judgement in the case Prosecutor vs. Jadranko Prlić et al.*, 29 November 2017, as found at: <http://www.icty.org/en/press/statement-of-the-office-of-the-prosecutor-in-relation-to-the-judgement-in-the-case-prosecutor>

2 *Prosecutor v. Jadranko Prlić, Decision on Application By The Republic of Croatia For Leave to Appear As Amicus Curiae And To Submit Amicus Curiae Brief*, at paragraph 9 (19 July 2016).

3 *Prosecutor v. Ratko Mladić, Trial Judgement*, Volume IV, page 2090, footnote 15357.

objective legal criteria could the ICTY deem the evidence insufficient to establish Serbia's role in crimes in Bosnia-Herzegovina, but sufficient to establish Croatia's. Predictably, the implications against Tuđman have poured gasoline over the already combustible relations between Serbs, Croats and Bosnian Muslims.

Observers of the ICTY's work know that high-profile judgments almost always result in allegations that the Tribunal is influenced by politics. When Serb defendants are convicted, Serbs allege that the Tribunal is a NATO court designed to unjustly defame the Serb nation. When non-Serbs are convicted, it is because the Tribunal has the political objective of balancing the ethnic composition of its convicted persons so as to avoid allegations of anti-Serbian bias. And, much as they like to pretend that they are better than the "Balkan nationalists" they look down upon, various NGO's, "human rights organizations," and their media allies (including media allies stationed inside the ICTY building) allege that some of the higher profile ICTY acquittals (*Gotovina, Perišić*) were the result of political interference from Western powers. All of these groups share something in common: very few, if any, are familiar with the actual findings of the ICTY in specific cases, and even fewer have actually looked at the evidence to come to their own conclusions about the legitimacy of the ICTY's judgments.

Given the amount of attention that has been given to the *Prlić* Appeals Judgement and its implications for the legacy of President Tuđman, this blog post is an effort to explain the concept of joint criminal enterprise to the lay observer, and to show that the Appeals Chamber in the *Prlić* case did not identify any evidence that would support Brammertz's claims that Croatian officials "*shared the criminal purpose to ethnically cleanse Bosnian Muslims and contributed to realizing that goal.*" There is no rule that says judgments of the ICTY cannot be subjected to scrutiny. On the contrary, each of the six accused in the *Prlić* case had a fundamental right to a public trial. They had a right to a reasoned opinion in writing that explains the basis of their convictions. The purpose of these rights is to ensure the individual that the proceedings are not conducted in a corrupt or unjust way, and to ensure the delivery of a sound and fair trial through the observance of the public.

I. *What is a Joint Criminal Enterprise?*

In order to understand the Tribunal's findings about Tuđman's alleged involvement in a JCE, one first needs to understand what the prosecution needs to prove in order to establish a person's responsibility for participation in a JCE. In order to establish a JCE, the prosecution needs to prove:

1. **Plurality of persons.** A joint criminal enterprise exists when a plurality of persons participates in the realization of **a common criminal objective.**

2. **Common criminal purpose (“mens rea”).** A joint criminal enterprise requires a common objective which amounts to or involves the commission of a **crime provided for in the Statute.** The *mens rea* (i.e. the person's intent) required is that the JCE participants, including the accused person, had a common state of mind, namely the state of mind that the **statutory crime(s)** forming part of the objective should be carried out.

3. **Participation of the accused in the objective's implementation (“actus reus”).** This is achieved by the accused's commission of a crime forming part of the common objective (and provided for in the Statute) (known in legal terms as the “*actus reus*”). Alternatively, instead of committing the intended crime as a principal perpetrator, the accused's conduct may satisfy this element if it involved procuring or giving assistance to the execution of a crime forming part of the common objective. A contribution of an accused person to the JCE need not be, as a matter of law, necessary or substantial, but it should at least be a **significant contribution to the crimes** for which the accused is found responsible.⁴

To summarize, in order to prove that Tuđman, Šušak, and Bobetko were members of a JCE, the prosecution was required to prove that (1) they joined with each other or with a larger group of persons, (2) with the intent of committing a crime identified in the Statute of the ICTY (crimes which are euphemistically referred to as “ethnic cleansing”), and (3) actually committed a crime under the ICTY Statute or assisted others in committing such a crime. All three elements must be present in order for the prosecution to have proven the participation of Croatian officials in a JCE.

⁴ Prosecutor v. Ante Gotovina, *Trial Judgement*, Volume II, paragraph 1953.

Unfortunately, in discussing the alleged JCE in the *Prlić* case, the Tribunal introduced a new concept: the so-called “*Ultimate Purpose of the JCE.*” I have not been able to find any other case at the ICTY in which reference is made to an “*Ultimate Purpose*” of the JCE. Instead, the focus of the ICTY’s jurisprudence on JCE until now has always been on establishing the second point above, i.e. the “common criminal purpose” (“CCP” for short). Public confusion has resulted from the ICTY’s injection of the new term “*Ultimate Purpose,*” with many assuming that proof of Tuđman’s alleged desire to partition Bosnia (the “*Ultimate Purpose*”) is sufficient to establish his participation in a JCE. It is not.

The ICTY’s distinction in the *Prlić* case between “*Ultimate Purpose*” and the “common criminal purpose” is very important. Proof of the “common criminal purpose” required proof that Tuđman, Šušak, and Bobetko intended to commit ethnic cleansing. Proof that Tuđman, Šušak, and Bobetko shared in the “*Ultimate Purpose*” of the JCE did not require proof that they intended to commit ethnic cleansing. Indeed, it did not require proof that they intended to commit any illegal act at all under the ICTY Statute. The result is that both the Trial and Appeals Chambers devoted enormous amounts of time discussing the evidence of Tuđman’s “*Ultimate Purpose,*” i.e. his alleged desire to partition Bosnia-Herzegovina (which is not a crime under the ICTY Statute and therefore not sufficient to establish his participation in the JCE), but spent very little time discussing the evidence of Tuđman’s alleged intent to participate in the common criminal purpose, namely his alleged intent to commit ethnic cleansing of the Bosnian Muslim population.

The following analogy demonstrates the issues at stake. Suppose a group of ten people lives in a house on a small property. They decide that they need to expand their property, and would like to acquire part of their neighbor’s property (the so-called “*Ultimate Purpose*”). At this point, the *Ultimate Purpose* could be achieved lawfully or unlawfully. Now suppose that seven of the group of ten (the “*plurality of persons*”) go to the neighbors’ property with the intent to violently expel the neighbors from the property in order to acquire it (the “common criminal purpose”, or “*mens rea*”), and in fact commit violent acts that expel the neighbors (the “*actus reus*”). The prosecution would in this scenario be able to prove that seven of the original ten who shared in the “*Ultimate Purpose*” were involved in a JCE.

But what about the three people that shared in the Ultimate Purpose but did not go to the neighbors' property? The Prosecution would have to prove, beyond reasonable doubt, that they (1) joined with the group of seven (the plurality of persons), (2) that they intended to violently expel the neighbors from the property in order to acquire it and thus shared in the common criminal purpose, and (3) that they participated in the commission of violent acts either directly or by providing assistance to those that were committing the violent acts (the "*actus reus*").

In the *Prić* case, Tuđman, Šušak, and Bobetko are like the group of three in the above analogy that stayed at home. If the Prosecution hoped to prove that Tuđman, Šušak, and Bobetko "*shared the criminal purpose to ethnically cleanse Bosnian Muslims and contributed to realizing that goal,*" it needed to do much more than prove that Tuđman intended to partition Bosnia (the "Ultimate Purpose," i.e. to acquire his neighbors' property). It needed to prove beyond reasonable doubt that they intended to acquire their neighbors' property through ethnic cleansing, and that they in fact committed acts or assisted others in committing acts of ethnic cleansing.

What follows below is a discussion of the Appeals Chambers' assessment of whether the Prosecution proved each of these elements with respect to Tuđman, Šušak, and Bobetko. I emphasize that this blog is a discussion about the ICTY's findings only concerning Tuđman, Šušak, and Bobetko. It is not an assessment of the Tribunal's findings concerning the six accused in the case, which would take me a significantly longer amount of time to review. For purposes of the analysis in this blog post, we start from the Tribunal's conclusion that it proved beyond reasonable doubt that the six accused in the case formed a "plurality of persons" to commit the crimes in the JCE. The question for the Tribunal, therefore, was whether Tuđman, Šušak, and Bobetko joined this alleged plurality of persons by (1) sharing in the common criminal purpose ("*mens rea*") to ethnically cleanse Bosnian Muslims, and (2) committing acts of ethnic cleansing or assisting others in committing acts of ethnic cleansing (the "*actus reus*").

II. *The Trial and Appeals Chambers Do Not Identify Any Evidence that Tuđman, Šušak, and Bobetko Shared in the Common Criminal Purpose to Commit Ethnic Cleansing*

The Appeals Chamber notes in its Judgement that the “Ultimate Purpose” of the JCE was to “*set up a Croatian entity that reconstituted, at least in part, the borders of the Banovina, thereby facilitating the reunification of the Croatian people; and (2) such entity was either supposed to be annexed to Croatia directly or to become an independent State within BiH with close ties to Croatia*”.⁵ It then devotes 62 pages of the Appeals Judgement to confirm that Tuđman had this intent. But this “Ultimate Purpose” is not a crime under the ICTY Statute, and therefore cannot constitute the basis of a finding that Tuđman was a participant in a JCE. All that the Tribunal has found is that Tuđman intended to acquire his neighbor’s property. What is required to establish Tuđman’s liability as a JCE participant is evidence that Tuđman intended to achieve his political objectives through ethnic cleansing (i.e. the common criminal purpose). The Appeals Chamber emphasizes this distinction.⁶ Even if Tuđman had the alleged goal of unifying Herceg-Bosna to Croatia, it does not necessarily follow that he could only achieve this through ethnic cleansing.⁷

The Appeals Chamber confirmed the Trial Chamber’s conclusion that the Common Criminal Purpose necessary to trigger JCE liability was not the alleged desire to partition Bosnia, but rather the desire for “*domination by the HR H-B Croats through ethnic cleansing of the Muslim population*.”⁸ According to the Appeals Chamber, the Trial Chamber found that this common criminal purpose “*came into existence only by mid-January 1993, because the evidence was insufficient to reach a finding as to its*

5 Prosecutor v. Jadranko Prlić, Appeals Judgement, Volume II, paragraph 592.

6 Prosecutor v. Jadranko Prlić, Appeals Judgement, Volume II, paragraph 836.

7 For example, in the 1994 Washington Agreement, Croatia and the Federation of Bosnia and Herzegovina (which included both Muslim and Croat portions of Bosnia) agreed to enter into a confederation. Further, in the *Perišić* case, the ICTY concluded that the provision of weapons by Serbia to the Bosnian Serbs, in furtherance of the political aims of the Bosnian Serbs, did not amount to participation in ethnic cleansing.

8 Prosecutor v. Jadranko Prlić, Appeals Judgement, Volume II, paragraph 828.

*existence at an earlier stage.*⁹ It therefore found that the Joint Criminal Enterprise did not come into existence until mid-January 1993, because the Common Criminal Plan did not exist before that time.¹⁰ It also found that the mid-January 1993 JCE was created in order to implement the prior Ultimate Objective, which had been formed earlier.¹¹

So did Tuđman share in the Common Criminal Purpose to ethnically cleanse the Muslim population? While the Appeals Chamber devotes 62 pages to discussion of Tuđman's desire to partition Bosnia, it devotes precious little space to any analysis of the much more critical question of Tuđman's intent to commit ethnic cleansing. What is the "Brioni Transcript" of this case? The Appeals Chamber does not identify it.

The Appeals Chamber first explains that the Trial Chamber "*concluded that as of December 1991, the leaders of the HZ(R) H-B, including Boban, and leaders of Croatia, including Tuđman, believed that in order to achieve the Ultimate Purpose of the JCE, it was necessary to change the ethnic make-up of the territories claimed to form part of the HZ H-B.*"¹² But this finding by the Trial Chamber is based on the Trial Chamber's interpretation of Exhibit P00089 (a Presidential Transcript from 27 December 1991), and Exhibit P00021 (a book authored by a Bosnian Croat named Anto Valenta).¹³ The Appeals Chamber reviewed the Presidential Transcript and concluded, "*The relevant parts of the Presidential Transcripts do not, as a whole, reflect a clear consensus regarding a political purpose that would have ethnic cleansing as its logical corollary.*"¹⁴ As for Mr. Valenta's book, the Appeals Chamber concluded that although the book calls for the relocation of Muslims to central Bosnia, "*his book does not support the broader proposition that JCE members held this belief in December 1991.*"¹⁵

9 Prosecutor v. Jadranko Prlić, *Appeals Judgement*, Volume II, paragraph 842.

10 Prosecutor v. Jadranko Prlić, *Appeals Judgement*, Volume II, paragraph 783.

11 Prosecutor v. Jadranko Prlić, *Appeals Judgement*, Volume II, paragraph 783.

12 Prosecutor v. Jadranko Prlić, *Appeals Judgement*, Volume II, paragraph 783.

13 Prosecutor v. Jadranko Prlić, *Trial Judgement*, Volume IV, paragraph 43.

14 Prosecutor v. Jadranko Prlić, *Appeals Judgement*, Volume II, paragraph 841.

15 Prosecutor v. Jadranko Prlić, *Appeals Judgement*, Volume II, paragraph 841.

Accordingly, the evidence upon which the Trial Chamber relied in its Judgement does not, according to the Appeals Chamber, support the conclusion that Tuđman, or anyone else, intended to commit ethnic cleansing starting in December 1991.

Nevertheless, the Appeals Chamber attempts to rehabilitate the Trial Chamber's conclusion about Tuđman's ethnic cleansing intent by claiming that the Trial Chamber made "findings elsewhere" in the Trial Judgement that support such a conclusion:

The Trial Chamber made a number of findings elsewhere demonstrating that the HZ(R) H-B leaders and Tuđman acquired the intention to change the ethnic make-up of the territories claimed to form part of the HZ(R) H-B - namely to ethnically cleanse the Muslims from the territory claimed as Croatian - before the JCE came into being in mid-January 1993. These are not challenged by Petkovic in this sub-ground of appeal. In any event, the Appeals Chamber observes that the Trial Chamber expressly found that the CCP came into existence only by mid-January 1993, because the evidence was insufficient to reach a finding as to its existence at an earlier stage. The Appeals Chamber considers therefore that Petkovic fails to demonstrate that **ambiguities in the evidential basis proffered by the Trial Chamber** would have any impact on his conviction.¹⁶

But the Appeals Chamber does not identify any specific "findings elsewhere" in the Trial Judgement where the Trial Chamber demonstrated Tuđman, Šušak, or Bobetko's criminal intent. The Appeals Chamber identifies paragraphs 9-24, 44 and 1232 of the Trial Judgement as the "findings elsewhere" where the Trial Chamber demonstrated Tuđman's criminal intent.¹⁷ However, these paragraphs of the Trial Judgement cite no evidence of Tuđman's intent to commit ethnic cleansing:

- Paragraphs 9-24 of the Trial Judgement address Tuđman's desire to partition Bosnia (the "Ultimate Purpose"), not his alleged desire to commit ethnic cleansing (the "common criminal purpose").

¹⁶ *Prosecutor v. Jadranko Prlić, Appeals Judgement, Volume II, paragraph 842.*

¹⁷ *Prosecutor v. Jadranko Prlić, Appeals Judgement, Volume II, paragraph 842, footnote 2674.*

- Paragraph 44 of the Trial Judgement provides no evidence that Croatian officials intended to commit ethnic cleansing. Instead, it states:

“The evidence demonstrates that from mid-January 1993, the leaders of the HVO and certain Croatian leaders aimed to consolidate HVO control over Provinces 3, 8 and 10, which under the Vance-Owen Plan, were attributed to the BiH Croats, and, **as the HVO leaders interpreted it**, to eliminate all Muslim resistance within these provinces and to “ethnically cleanse” the Muslims so that the provinces would become majority or nearly exclusively Croatian.”¹⁸

Accordingly, the Trial Chamber concluded that it was the HVO leaders who intended to commit ethnic cleansing, without an express finding that Croatian leaders shared the same intent. Furthermore, paragraph 44 of the Trial Judgement cites no evidence from which such a finding against Croatian officials could be supported.¹⁹

- Finally, paragraph 1232 of the Trial Judgement makes no reference to Tuđman, Šušak, or Bobetko, and therefore cannot support the Appeals Chamber’s claim that the Trial Chamber made “findings elsewhere” to support the conclusion that they shared the common criminal purpose to commit ethnic cleansing.²⁰

Accordingly, after concluding that the Trial Chamber was wrong to rely on the Presidential Transcript of 27 December 1991, and Mr. Valenta’s book, as evidence of Tuđman’s intent to ethnically cleanse, the Appeals Chamber is unable to identify any other evidence in the evidentiary record that would support such a conclusion. The same applies for

¹⁸ Emphasis added.

¹⁹ In paragraph 783 of the Appeals Judgement, the Appeals Chamber also states that the Trial Chamber made a finding in paragraph 44 of the Trial Judgement that “leaders of the HVO and certain Croatian leaders aimed to consolidate HVO control over Provinces 3, 8 and 10, and to ‘ethnically cleanse’ the Muslims so that the provinces would become in ‘majority or nearly exclusively Croatian.’” However, as noted above, paragraph 44 of the Trial Judgement made no such finding concerning the intent of “Croatian officials.” Instead, the Trial Chamber found that HVO leaders and “Croatian officials” wanted to establish control over certain Provinces, and the HVO leaders interpreted this objective as requiring the ethnic cleansing of Muslims.

²⁰ The Appeals Chamber may have intended to reference paragraph 1231 (which does reference Tuđman, Šušak, and Bobetko) of the Trial Judgement and erroneously cited to paragraph 1232. Even if so, a review of paragraph 1231 reveals that no evidence is cited by the Trial Chamber to support the conclusion that Tuđman, Šušak, or Bobetko intended to ethnically cleanse the Bosnian Muslims.

Minister Šušak and General Bobetko. There is no “Brioni Transcript” or similar evidence to suggest that Croatian officials intended to ethnically cleanse Bosnian Muslims. Without proof of their criminal intent to commit ethnic cleansing, President Tuđman, Minister Šušak and General Bobetko would have been acquitted of any allegation that they participated in a joint criminal enterprise.

III. The Trial and Appeals Chambers Made No Findings that Tuđman, Šušak, and Bobetko Participated In Acts of Ethnic Cleansing (No Actus Reus)

The third element of participation in a JCE requires proof that the accused person committed a crime under the ICTY Statute or assisted others in committing such a crime (the “*actus reus*” of JCE). It is not enough that you *intend* to commit a crime. You must actually *do something* to commit the crime or assist others in doing so. So what criminal acts did Tuđman, Šušak, and Bobetko commit in order to further the alleged goal of ethnically cleansing the Bosnian Muslims?

The Trial Chamber made no findings identifying such criminal acts by Tuđman, Šušak, and Bobetko. Without such findings, these Croatian officials could not have been found liable for participation in a JCE. During the appeal stage in the *Prlić* case, the Prosecution was unable to identify any such findings in the Trial Chamber Judgement. As a result, the Prosecution attempted to fill this hole in the Trial Chamber’s reasoning about Tuđman, Šušak, and Bobetko, by arguing that the Trial Chamber “*reasonably concluded that Tuđman was a JCE member*”²¹ even though it failed to make specific findings that Tuđman (or Šušak or Bobetko) committed any ethnic cleansing crimes. In the Prosecution’s view, evidence in the record supports the conclusion that Croatian officials assisted in the commission of ethnic cleansing by, *inter alia*, providing weapons to the HVO.²² Although the Appeals Chamber took note of the Prosecution’s position, it offers no indication in the Appeals Judgement that it agrees with the Prosecution’s arguments. Indeed, two of the judges in the *Prlić* Appeals

21 *Prosecutor v. Jadranko Prlić, Transcript of Proceedings* (21 March 2017), page 350, lines 23-24.

22 *Prosecutor v. Jadranko Prlić, Appeals Judgement*, Volume II, paragraph 1750, footnote 5775.

Chamber (Agius and Meron) were also judges in the case of Momčilo Perišić, and voted to overturn Perišić's conviction precisely because the provision of weapons – without evidence of specific intent to commit crime – is insufficient to establish criminal liability.

Neither the Trial nor Appeals Chambers, therefore, established that President Tuđman, Minister Šušak and General Bobetko committed (or assisted others in committing) any criminal acts, and therefore they could not be liable for participation in a joint criminal enterprise. The Appeals Chamber confirmed this point in its earlier Decision of 19 July 2016: “[t]he Trial Chamber made no explicit findings concerning [Tuđman's, Šušak's and Bobetko's] participation in the JCE and did not find them guilty of any crimes”.²³

IV. The Appeals Chamber Did Not Address the Responsibility of Croatian Officials

The Tribunal's inability to identify evidence that establishes the *mens rea* and *actus reus* requirements of JCE liability for Tuđman, Šušak and Bobetko demonstrates that these Croatian officials were not responsible for ethnic cleansing crimes in Bosnia and Herzegovina. Given the significant public interest in the Prosecution's allegation that Tuđman, Šušak and Bobetko were JCE members, the Appeals Chamber should have conclusively resolved this allegation. It failed to do so.

Faced with the specific request by the appellants to decide the question of the JCE participation of Croatian officials, the Appeals Chamber ruled that the appellants “fail[] to show how any alleged error regarding the JCE membership of Tuđman, Šušak, and Bobetko would affect the findings that”²⁴ the appellants were involved in a JCE. Furthermore, “the Appeals Chamber recalls that it is not required, as a matter of law, that a trial chamber make a separate finding on the intent of each member of a JCE,” and the Trial Chamber “was not required to examine the individual actions or scrutinise the intent of each JCE member who was not an

²³ *Prosecutor v. Jadranko Prlić*, Decision on Application By The Republic of Croatia For Leave to Appear As Amicus Curiae And To Submit Amicus Curiae Brief, at paragraph 9 (19 July 2016).

²⁴ *Prosecutor v. Jadranko Prlić, Appeals Judgement*, Volume II, paragraph 1911.

*accused in this case.*²⁵ As a result, the Appeals Chamber decided that the issue of the JCE responsibility of Tuđman, Šušak and Bobetko (or lack of JCE responsibility) was irrelevant to the appeals of the six defendants, and therefore need not be addressed by the Appeals Chamber.

The Appeals Chamber's decision not to resolve these important questions is unfortunate. The Appeals Chamber should have either emphasized that Croatian officials were not party to the case and therefore could not properly be labeled as JCE members, or else it should have addressed the merits of their JCE responsibility. Instead, the Appeals Chamber chose the worst of all options: it declined to review the question, thus letting stand the allegation that Tuđman, Šušak and Bobetko were JCE members even though the Tribunal (in the Appeals Chamber's own words) made **"no explicit findings concerning [Tuđman's, Šušak's and Bobetko's] participation in the JCE,"** i.e., the Tribunal did not make the necessary findings on *mens rea* and *actus reus* to establish their responsibility.

The Appeals Chamber's decision not to review the issue is even more troubling in light of the Appeals Chamber's obvious awareness that no official of the Republic of Serbia has been found by the ICTY to have been a participant in the numerous Bosnian Serb JCEs for which Ratko Mladić and Radovan Karadžić (among numerous others) have now been convicted. What did Tuđman, Šušak and Bobetko do in Bosnia that Slobodan Milošević did not? If arming the HVO with the intent to form Herceg-Bosna was sufficient to establish Tuđman's JCE responsibility for crimes committed by the HVO against Bosnian Muslims, why couldn't the ICTY establish that Milošević was a JCE member because he armed the Bosnian Serbs with the intent to form Republika Srpska, knowing that the Bosnian Serbs were committing crimes?

The ICTY had numerous opportunities to identify Milošević as a JCE member in Bosnia. The Prosecution identified him as such in indictments against Mladić, Karadžić, Momčilo Krajišnik, and others. In each case, the Trial Chamber declined to identify Milošević or any other official of the Republic of Serbia as a JCE member. In the case of Jovica Stanišić, who was charged specifically for membership in a JCE with Slobodan Milošević to commit crimes in Croatia and Bosnia, the Trial Chamber went out of its way in the

²⁵ *Prosecutor v. Jadranko Prlić, Appeals Judgement, Volume II, paragraph 1751.*

Trial Judgement to avoid addressing the question of whether the leadership of Serbia (including specifically Milošević) was involved in a JCE.²⁶ In the case of Momčilo Perišić, the Serbian former general who served as Chief of the General Staff of the Yugoslav Army, the Prosecution charged him with aiding and abetting the crimes of Bosnian Serbs by providing weapons from Serbia to the Bosnian Serbs. However, the Prosecution did not allege in the indictment that Perišić (or any other official of Serbia) was a member of a joint criminal enterprise with the Bosnian Serbs.

Questions of ICTY double standards are therefore legitimate. Whatever legal standards were applied to Serbia should have been applied to Croatia. However, as set forth above, the ICTY did not make explicit findings that Croatian officials were participants in a JCE. Regrettably, the Appeals Chamber chose not to make expressly clear that the evidence does not establish the *actus reus* and *mens rea* requirements necessary to establish the JCE liability of Tuđman, Šušak and Bobetko. The results from the Appeals Chamber's failure were predictable: outrage in Croatia, misguided sense of vindication in Serbia because "we were not involved in crimes in Bosnia but Croatia was," and a combination of both in Bosnia and Herzegovina.

Unfortunately, part of the ICTY's legacy is also that journalists, governments, victims and the public at large rarely read the judgments of the ICTY and the evidence that underlies them. Instead, impressions about ICTY judgments are formed in the minutes or hours after the judgments are pronounced, often based on judgement summaries or Prosecution press releases. But all judgments are public. Most of the evidence in ICTY cases is publicly available in the ICTY website.

The public has the right – perhaps even the obligation – to examine the judgments and the evidence. Sunlight on the *Prlić* judgment exposes that there is no convincing evidence that Tuđman, Šušak and Bobetko were liable for crimes committed in a joint criminal enterprise.

And the Tribunal did not make the necessary explicit findings that they were.

²⁶ *Prosecutor v. Jovica Stanišić, Appeals Judgement*, at pages 11-42.