

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

**Case No: IT-05-87/1-A**

**IN THE APPEALS CHAMBER**

Before: Judge Carmel Agius, Pre-Appeal Judge  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Andrézia Vaz

Registrar: Mr. John Hocking

Date: 24 May 2011

**THE PROSECUTOR**

**v.**

**VLASTIMIR ĐORĐEVIĆ**

*Public*

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**VLASTIMIR ĐORĐEVIĆ'S NOTICE OF APPEAL**

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**The Office of the Prosecutor**

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Mr. Veljko Đurđić

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
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1. Pursuant to Article 25 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("Statute") and Rule 108 of the Rules of Procedure and Evidence ("Rules"), Mr. Vlastimir Đorđević, by and through his Counsel, respectfully submits the following Notice of Appeal setting forth his grounds of appeal against the Judgement of Trial Chamber II in the case of *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, dated 23 February 2011 (the "Trial Judgement").
2. Vlastimir Đorđević was convicted of five counts of crimes in Kosovo in 1999: (1) deportation; (2) forcible transfer; (3) murder as a crime against humanity; (4) murder as a war crime; and (5) persecutions on racial grounds. He was convicted pursuant to Article 7(1) as both a participant in a JCE and as an aider and abettor. He was sentenced to 27 years of imprisonment.
3. By its decision of 16 March 2011, the Appeals Chamber (Pre-Appeal Judge Carmel Agius) granted *Vlastimir Đorđević's Motion for an Extension of Time to File a Notice of Appeal* and ordered that the parties file their respective notices of appeal no later than 24 May 2011.
4. As a translation of the Trial Judgement is not yet available, Vlastimir Đorđević reserves the right to raise any and all errors of law or fact that may become apparent to him when a full translation is available. Such application for variation or amendment would be made pursuant to the rights established in Articles 20 and 21 of the Statute and the provisions set forth in Rule 108 and the *Practice Direction on Formal Requirements for Appeals from Judgement*.

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**GROUND 1 – 8: THE TRIAL CHAMBER’S APPROACH TO JCE IN  
GENERAL**

**I. GROUND 1: ERRORS OF LAW AND FACT WHEN INFERRING THE  
EXISTENCE OF A JCE**

**(i) Alleged errors of law and fact**

5. The Trial Chamber erred (i) when assessing the intention of alleged JCE members and (ii) when concluding that there existed a widespread and systematic attack directed against the civilian population because it failed to weigh, adequately or at all:
  - a. the vitiatory breach of the October Agreements by the KVM;
  - b. the nature of the KLA threat;
  - c. the nature of the NATO threat; and
  - d. the combined effect of the above.
  
6. The pervasive effect of these errors impugns the Trial Chamber’s assessment of:
  - a. alleged violations of the October Agreements, such as the build-up and use of force;
  - b. the arming of the non-Albanian population and the disarming of KLA areas;
  - c. the coordinated use of the MUP and the VJ; and
  - d. the “disproportionate” use of force found to have been used by those forces in anti-terrorist actions.
  
7. The Trial Chamber’s conclusions in relation to the above underpinned its findings that (i) a JCE existed and (ii) there existed a widespread and systematic attack against the civilian population. In so concluding, the Trial Chamber erred in the following ways:
  - a. The Trial Chamber erred in its assessment of events after the October Agreements by ignoring the failure on the part of KVM to ensure that the KLA did not take advantage of the FRY’s compliance.

- b. The Trial Chamber systematically erred in its assessment of the size and nature of the KLA threat, before and during the NATO bombing campaign.
  - c. The Trial Chamber failed to assess the build-up to the NATO bombing campaign, its unjustified commencement and the imminent threat of land invasion.
  - d. The Trial Chamber failed to consider the combined KLA and NATO threats as a joint threat to the territorial integrity of the FRY.
8. Instead of considering the reality of the situation faced by the FRY in general and Dorđević in particular, the Trial Chamber assessed the evidence in an artificial vacuum. By persistently finding that the FRY violated the October Agreements or introduced armed forces into Kosovo in order to implement a criminal plan, the Trial Chamber did not consider the reality of the situation: a massive domestic insurgency coupled with a NATO bombardment which killed hundreds, injured thousands and devastated both military and civilian infrastructure. Further, no consideration is given to the effect of the threat of a land invasion.
9. No reasonable Trial Chamber would ignore this reality when assessing the actions and intentions of alleged JCE members. A reasonable Trial Chamber, considering this reality, would have left open benign interpretations for acts that it deemed criminal.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

10. The alleged error pervades the entire judgement making it difficult to identify all affected paragraphs, however:
- a. The failure to consider the KVM's vitiatory breach of the October Agreements directly impacts paragraphs 348-447 (p.129-164) and 2010-2026 (p.792-803).
  - b. The failure to assess the KLA threat is evident because the Trial Chamber focused it under the criteria for the applicability of Article 3 of the Statute

(paragraphs 1521-1584, p.609-630). This issue was of wider significance. Sporadic references to the KLA elsewhere in the Trial Judgement, for example paragraphs 2052-2069 (p.814-821), do not demonstrate that the Trial Chamber considered the reality of the KLA threat. In any event, at paragraph 2061 (p.818) the Trial Chamber underestimated the nature of the KLA threat in a manner that no reasonable Trial Chamber would have.

- c. The failure to consider the nature of the NATO threat in the lead up to the commencement of bombing on 24 March 1999, the effect of the bombing and the threat of land invasion directly impacts paragraphs 157-176 (p.61-67), 348-447 (p.129-164), 655 (p.252), 796-801 (p.316-318), 812 (p.321), 2010-2022 (p.792-800), 2026 (p.802-803) and 2135-2136 (p.852).
- d. No paragraph considers the combined effect of KLA and NATO and their cooperation together. This failure is most evident in the Trial Chamber's assessment of the proportionality of FRY actions in paragraphs 2052-2069 (p.814-821).

### **(iii) Precise relief sought**

- 11. The Appeals Chamber is invited to quash Đorđević's convictions on the basis that no reasonable Trial Chamber would gloss over the relevant context of the indicted events. The error of the Trial Chamber has occasioned a miscarriage of justice.

## **II. GROUND 2: ERRORS OF LAW IN HOLDING THAT JCE EXISTS IN CUSTOMARY INTERNATIONAL LAW**

### **(i) Alleged errors of law and fact**

- 12. While the Trial Chamber was bound to apply the jurisprudence of the Appeals Chamber's successive decisions that JCE exists in customary international law and that it is implicit as a form of commission within Article 7(1) of the Statute, compelling reasons exist for the Appeals Chamber to revisit this issue again and depart from its previous jurisprudence.

13. Three alternative positions will be adopted:
- a. First, on a proper analysis, in particular a comparison of the approach of the International Criminal Court, JCE was not clearly established as a mode of liability at the time of the Indictment events;
  - b. Second, JCE III does not exist as a mode of liability in customary international law; or,
  - c. Third, properly understood, JCE is not a form of commission implicit within Article 7(1) of the Statute. In particular, participation in a JCE cannot be described as “commission” when the physical perpetrator of a crime is not a member of the JCE.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

14. The Trial Chamber’s summary of the elements of JCE is at paragraphs 1857-1868 (p.720-724). The Trial Chamber sought to apply JCE throughout the Trial Judgement.
15. The Trial Chamber’s summary of the extended form of JCE is at paragraphs 1865 and 1867 (p.722-723). The Trial Chamber’s alternative findings of liability pursuant to JCE III is at paragraphs 2139, 2141, 2145, 2147, 2153 and 2158 (p.853-860).
16. The Trial Chamber’s holding that JCE is a form of commission is at paragraph 1860 (p.720). Its holding that the perpetrators do not need to be members of the JCE is at paragraphs 1866-1868 (p.723-724). No consideration was given to whether Đorđević could properly be said to have “committed” a crime perpetrated by a non-JCE member either when (i) the perpetrator was “used” by a JCE member or (ii) such a crime was merely foreseeable.

**(iii) Precise relief sought**

17. The Appeals Chamber is invited to:



- a. re-assess the merits of the Appeals Chamber's analysis in *Tadić* and quash all of Đorđević's convictions to the extent that they rely on JCE; alternatively,
- b. quash any of Đorđević's convictions that (pursuant to other grounds of appeal) rely upon JCE III rather than JCE I; alternatively,
- c. clarify that JCE is a form of accomplice liability rather than a form of commission so that Đorđević's responsibility is properly characterised and his sentence accordingly reduced.

### **III. GROUND 3: ERRORS OF LAW AND FACT AS TO THE NATURE, TIMING AND MEMBERS OF THE ALLEGED JCE**

#### **(i) Alleged errors of law and fact**

18. The Trial Judgement is impermissibly vague as to:
- a. the nature of the common plan;
  - b. the point in time at which it existed; and
  - c. its constituent members.
19. The Trial Chamber's findings are incoherent such that it was not entitled to conclude that a common objective existed between Đorđević and the other alleged members of the JCE.
20. As to the **nature of the common plan**:
- a. on the one hand the Trial Chamber held that the purpose of the JCE was to alter the ethnic balance of Kosovo so as to ensure Serbian control over the province; however,
  - b. on the other hand the Trial Chamber held that the nature of the JCE "evolved" throughout the armed conflict that commenced on 24 March 1999.

21. As to the **point in time the JCE existed**:
- a. on the one hand, the Trial Chamber held that the JCE came into existence no later than January 1999 and that Đorđević and others used the bombardment of Serbia from 24 March 1999 onwards as a window of opportunity in which to implement the JCE; however,
  - b. on the other hand, the Trial Chamber found it necessary to direct itself to jurisprudence that a JCE can arise on the spur of the moment (“extemporaneously”).
22. As to the **constituent members of the JCE**:
- a. on the one hand the Trial Chamber identified certain specified individuals including Đorđević; however,
  - b. on the other hand, the Trial Chamber made vague references to the plan existing among “senior political, military and police leadership”. The Trial Chamber further concluded that other individuals were members of the JCE but said that it was “unable to make an exact determination as to who were participants and who were perpetrators”.
23. The Trial Chamber therefore erred by deploying a fluid concept of JCE that is not supported by customary international law and violates the principle of legality. Neither the Appeals Chamber nor the parties can be required to engage in speculation on the meaning of the Trial Chamber’s findings in relation to an element so central to Đorđević’s individual responsibility as the scope of the alleged JCE.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

24. As to the **nature of the common plan**, the imprecise finding that the JCE evolved is at paragraph 2007 (p.790-791). General conclusions as to the nature of a plan are found throughout the Judgement and in Section XII(B)(2)(a), with the contradictory

findings at paragraphs 2003-2121 (p.789-845), 2126 (p.847), 2128-2130 (p.848-849), 2134 (p.851), 2136 (p.852).

25. As to the **point in time the JCE existed**, the Trial Chamber's finding that it had been formed by mid-January 1999 is at paragraphs 2025-2026 (p.801-803) and 2134 (p.859). The Trial Chamber's direction that the common plan can arise extemporaneously is at paragraph 1862 (p.721); the subsequent finding in this regard is at paragraph 2007 (p.790-791).
26. As to the **constituent members of the JCE**, the Trial Chamber summarised the members at paragraphs 2126-2127 (p.847-848) but introduced uncertainty as to who were participants and who were perpetrators in paragraph 2128 (p.848).

**(iii) Precise relief sought**

27. The Appeals Chamber is invited to quash Đorđević's convictions pursuant to JCE on the basis that the Trial Chamber's findings were impermissibly vague on fundamental aspects of the alleged JCE and such imprecision occasioned a miscarriage of justice.

**IV. GROUND 4: ERRORS OF LAW AND FACT IN FINDING THAT A "PLURALITY OF PERSONS" EXISTED**

**(i) Alleged errors of law and fact**

28. The Trial Chamber held that a JCE existed amongst the "senior political, military and police leadership" and identified certain specific individuals as comprising the JCE. Save for an isolated and unexplained finding that JCE members acted "in unison" in various bodies, the Trial Chamber failed to establish the required "joint action" in order to show that individual JCE members acted in a cohesive and coordinated manner with the necessary criminal intent. Viewed as a whole, the Trial Chamber instead focused on instances of coordination amongst the physical perpetrators as being determinative of the existence of the JCE. It failed to establish whether and/or how the alleged JCE members acted together.

29. Finally, the Trial Chamber identified individuals as being members of the JCE whose innocence in this respect has already been established by the Tribunal and accepted by the Office of the Prosecutor.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

30. The Trial Chamber's description of the "plurality of persons" is at paragraphs 2122-2128 (p.845-848). Its unreasoned finding that JCE members acted "in unison" is at paragraph 2128 (p.848). That the Trial Chamber focused on instances of coordination amongst physical perpetrators is evident throughout its assessment of the crimebase (paragraphs 448-1261 (p.165-500)). That the Trial Chamber would focus on physical perpetrators was evident from paragraph 6 (p.2) of the Trial Judgement where it simplistically grouped all perpetrators together as "Serbian forces".
31. The challenged finding that Ojdanić and Lazarević were members of any JCE is at paragraphs 2127 (p.846) and 2211 (p.877).

**(iii) Precise relief sought**

32. The Appeals Chamber is invited to quash Đorđević's convictions pursuant to JCE on the basis that the Trial Chamber failed to establish the necessary joint action on the part of alleged JCE members. The error of the Trial Chamber has occasioned a miscarriage of justice.

**V. GROUND 5: FAILURE TO ESTABLISH THE ALLEGED SHARED COMMON PURPOSE**

**(i) Alleged errors of law and fact**

33. The Prosecution alleged that a JCE existed, the purpose of which was to modify the ethnic balance of Kosovo in order to ensure continued Serbian control over the province. Whereas the Appeals Chamber has held that the crime of deportation does not require the demonstration of an intention to expel on a permanent (as opposed to

temporary) basis, such an intention therefore *had* to be proved in this case. It was not and there are no findings to that effect.

34. Furthermore, the Trial Chamber made no finding as to how displacement of an internal and/or temporary nature was consistent with the alleged JCE.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

35. The Trial Chamber's finding as to the purpose of the JCE is at paragraphs 2005-2007 (p.789-791), 2126 (p.847) and 2136 (p.852). Its holding that the crime of deportation does not require an intention to deport on a permanent basis is at paragraph 1604(5) (p.636).

**(iii) Precise relief sought**

36. The Appeals Chamber is invited to quash all of Đorđević's convictions on the basis that the Prosecution failed to establish, and the Trial Chamber failed to make necessary findings, on an essential element of the pleaded JCE.

**VI. GROUND 6: ERRORS OF LAW AND FACT WHEN ATTRIBUTING PERPETRATORS' CRIMES TO JCE MEMBERS**

**(i) Alleged errors of law and fact**

37. The Trial Chamber applied a standard, recently established by the Appeals Chamber, whereby crimes could be attributed to Đorđević when at least one member of the JCE *used* the perpetrators in accordance with the common plan.
38. There are compelling reasons for departing from such a standard. There is no basis for it as a form of JCE under customary international law. It is at odds with the Appeals Chamber's earlier jurisprudence in the *Stakić* case when such indirect perpetration was rejected as a mode of liability.

39. Further and alternatively, the Trial Chamber failed to apply its own standard. It failed to establish how physical perpetrators were *used* by JCE members in order to implement the JCE. Simply highlighting the affiliation (e.g. MUP, VJ, etc.) of a perpetrator of any particular crime was insufficient. The Trial Chamber failed to identify the roles of those it designated as JCE members and establish that the physical perpetrators were instrumentalised or used as tools to carry out the *actus reus* of crimes by those JCE members.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

40. The Trial Chamber's statement of the challenged legal standard is at paragraph 1866 (p.723). The Trial Chamber failed to apply that standard throughout the Trial Judgement.

**(iii) Precise relief sought**

41. The Appeals Chamber is invited to quash all of Đorđević's convictions on the basis that he was convicted upon a flawed formulation of JCE; alternatively, Đorđević's convictions should be quashed because the Trial Chamber failed to demonstrate how each physical perpetrator was *used* by a JCE member to commit the underlying crimes.

**VII. GROUND 7: ERRORS OF LAW AND FACT WHEN FINDING THAT MURDERS AND PERSECUTIONS FELL WITHIN JCE I**

**(i) Alleged errors of law and fact**

42. The Trial Chamber erred when holding that the crimes of murder (Counts 3 & 4) and persecutions (Count 5) fell within JCE I. There was an inadequate evidentiary basis upon which to make such a finding. The Trial Chamber failed to establish that each member of the JCE shared the necessary *mens rea* either in January 1999 or at all. Further and alternatively, the Trial Chamber failed to explain how any JCE member *used* each physical perpetrator to commit murders and persecutions.

43. The Trial Chamber's findings were also inconsistent. On the one hand, the Trial Chamber held that murder *per se* fell within the scope of JCE I. On the other hand, the Trial Chamber held that the large-scale killing of men and boys was an intended part of the common plan but no such finding was made in relation to the killing of women and/or children that occurred.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

44. The Trial Chamber erroneously found that the following crimes fell within the scope of JCE I:
- a. persecution by forcible transfer and deportation at paragraphs 1774-1778 (p.699-701);
  - b. murder at paragraphs 1709-1753 (p.678-693);
  - c. persecution by murder at paragraphs 1779-1790 (p.701-703); and
  - d. persecution by wanton destruction at paragraphs 1798-1855 (p.705-719).
45. The overall conclusion regarding the persecution findings is at paragraph 1856 (p.719).
46. The challenged findings as to the purpose of the JCE are at paragraphs 1707 (p.677), 2013-2014 (p.793-794), 2017-2021 (p.796-800), 2025-2026 (p.801-803), 2034-2035 (p.807-808), 2051 (p.813-814), 2055-2056 (p.816-817), 2062 (p.818-819), 2066 (p.820-821), 2069 (p.821), 2102-2105 (p.836-838), 2126-2153 (p.847-858), 2158 (p.860), 2193 (p.871) and 2230 (p.883).

**(iii) Precise relief sought**

47. The Appeals Chamber is invited to quash Đorđević's convictions under JCE I for murder under Counts 3 and 4 and persecutions under Count 5 because it was not established that those crimes fell within JCE I.

48. On the basis of Ground 2, above, no convictions are available on the basis of JCE III. Alternatively, on the basis of Grounds 8 and 18(B), below, no convictions under Count 5 are available.

49. Alternatively, the Appeals Chamber is invited to substitute convictions pursuant to JCE I with convictions pursuant to JCE III. Such a reassessment is required because a category 1 JCE including murder (and persecution) is less grave than a category 1 JCE not including those crimes. Thus a reassessment is relevant to sentencing.

**VIII. GROUND 8: ERROR OF LAW WHEN ALLOWING LIABILITY FOR SPECIFIC INTENT CRIMES PURSUANT TO JCE III**

**(i) Alleged errors of law and fact**

50. The Trial Chamber erred in law when allowing liability for specific intent crimes such as persecution to be established via JCE III.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

51. The alternative convictions for specific intent crimes via JCE III are based on paragraphs 2139, 2141, 2145, 2147, 2153 and 2158 (p.853-860). The Trial Chamber failed to direct itself to this issue when considering the legal elements of JCE III in paragraphs 1865-1868 (p.722-724).

**(iii) Precise relief sought**

52. The Appeals Chamber is invited to quash any of Đorđević's convictions for specific intent crimes that, subject to the success of other grounds of appeal, rely upon JCE III. In any event, the Appeals Chamber is invited to clarify this issue on the basis that it is a point of law of general importance.



**FOUNDATIONS 9-10: THE TRIAL CHAMBER’S APPROACH TO JCE AND  
ĐORĐEVIĆ IN PARTICULAR**

**IX. FOUNDATION 9: ERRORS OF LAW AND FACT WHEN ASSESSING  
ĐORĐEVIĆ’S PARTICIPATION IN THE JCE**

**a. SUB-FOUNDATION 9(A): THE TRIAL CHAMBER ERRED IN LAW AND FACT AS TO ITS  
ASSESSMENT OF THE STRUCTURE OF THE MUP AND ĐORĐEVIĆ’S ROLE WITHIN IT**

**(i) Alleged errors of law and fact**

53. The Trial Chamber reached conclusions on the structure of the MUP unsupported by the evidence. No reasonable Trial Chamber could find that Đorđević’s exercised effective control over the perpetrators of crimes. Đorđević’s role in 1999 differed fundamentally from his role in 1998. The Trial Chamber erred in law and fact in its assessment of *de jure* and *de facto* effective control over MUP forces perpetrating crimes in 1999. Further, by using such a test the Trial Chamber conflated liability under Article 7(3) with Article 7(1) of the Statute.
54. No reasonable Trial Chamber could have found that Đorđević’s role remained unaltered by the creation of the MUP Staff on 16 June 1998. No reasonable Trial Chamber could fail to address the difference between Đorđević’s role in 1998 compared to that during the period of the Indictment crimes. The Trial Chamber’s error resulted from an erroneous application of the legal standard for effective control.
55. The Trial Chamber unreasonably inflated its findings as to Đorđević’s membership of the MUP Collegium and the reporting structures within the MUP during the relevant time period. It erred when applying its findings from 1998 to the period of the Indictment crimes.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

56. The Trial Chamber made multiple erroneous findings regarding the MUP structure and forces, MUP Collegium, MUP Staff, MUP reporting and MUP disciplinary procedures at paragraphs 36-143 (p.14-56). There followed unreasonable conclusions as to Đorđević's role and the functioning of the MUP in paragraphs 331 (p.123), 351-352 (p.135-136), 385-386 (p.142), 436 (p.160), 439 (p.162), 1342 (p.534-535), 1353 (p.539-540), 1356 (p.541), 1892-1903 (p.733-740), 1906-1929 (p.741-752), 1936 (p.755-756), 1942-1943 (p.760-761), 1945 (p.762), 1947 (p.763), 1955 (p.767-768), 1958 (p.770), 1963 (p.742-773), 1966 (p.773-774), 1969 (p.774-775), 1971 (p.776-777), 1976 (p.778), 1978-1979 (p.778-780), 1985 (p.781), 1988-1989 (p.783-784), 1991-1993 (p.784-785), 1995 (p.785-786), 1999 (p.787), 2013-2014 (p.793-794), 2020-2021 (p.798-800), 2051 (p.813-814), 2079 (p.825-826), 2087-2088 (p.829-830), 2108 (p.840-841), 2118 (p.844), 2126 (p.847), 2148 (p.857-858), 2154-2158 (p.859-860), 2162-2163 (p.861-862), 2171-2177 (864-866), 2178-2184 (p.867-868), 2194 (p.871) and 2210-2211 (p.876-877).

**(iii) Precise relief sought**

57. The Appeals Chamber is invited to quash all of Đorđević's convictions pursuant to JCE on the basis that the Trial Chamber erred in fundamental respect as to its findings of Đorđević's participation. Alternatively, the Appeals Chamber should reduce his sentence.

**b. SUB-GROUND 9(B): THE TRIAL CHAMBER ERRED IN LAW AND FACT AS TO ITS ASSESSMENT OF THE JOINT COMMAND AND ĐORĐEVIĆ'S PARTICIPATION THEREIN**

**(i) Alleged errors of law and fact**

58. The Trial Chamber unreasonably erred as to the nature, purpose and functioning of a so-called 'Joint Command'. It further erred as to the 'Joint Command's' members and scope. No reasonable Trial Chamber could conclude that Đorđević was a 'member' of a Joint Command in 1999.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

59. The Trial Chamber made multiple erroneous findings regarding the nature, purpose and functioning of the so-called ‘Joint Command’ at paragraphs 224-264 (p.86-103). This led to unreasonable conclusions at paragraphs 1897-1899 (p.735-737), 1901-1907 (p.738-742), 1910 (p.742-743), 1913 (p.744), 1915 (p.745), 1925 (p.749-750), 1988 (p.783), 2051 (p.813-814), 2108 (p.840-841), 2116 (p.843-844), 2124-2128 (p.846-848), 2134 (p.851), 2154 (p.859) and 2162-2163 (p.861-862).

**(iii) Precise relief sought**

60. The Appeals Chamber is invited to quash all of Đorđević’s convictions pursuant to JCE on the basis that the Trial Chamber erred in fundamental respect as to its findings of Đorđević’s participation. Alternatively, the Appeals Chamber should reduce his sentence.

**c. SUB-GROUND 9(C): THE TRIAL CHAMBER ERRED IN LAW AND FACT BY USING ĐORĐEVIĆ’S ACTIONS IN 1998 AS A BASIS FOR JCE LIABILITY FOR 1999**

**(i) Alleged errors of law and fact**

61. The Indictment crimes took place from 24 March - 20 June 1999. The Trial Chamber relied to a great extent on Đorđević’s earlier conduct in 1998 and early 1999. Such a bifurcated approach to participation in crimes is a further and unjustified extension of JCE. Findings of participation in crimes in 1999 on the basis of conduct in 1998 should have been specifically alleged and litigated. To rely on crimes that allegedly occurred in 1998, those crimes should have been indicted and proved to the requisite standard. Instead the Trial Chamber made incoherent findings that Đorđević made a significant contribution to crimes from 24 March - 20 June 1999 because of earlier events.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

62. The Trial Chamber made multiple erroneous findings regarding 1998 and the conclusions as related to 1999 at paragraphs 271-393 (p.105-145), 1899-1907 (p.737-742), 1916-1919 (p.746-747), 1988-1991 (p.783-785), 2037 (p.808-809), 2083 (p.827), 2133 (p.850-851), 2154 (p.859), 2162 (p.861), 2163 (p.861-862), 2178-2179 (p.867) and 2182-2185 (p.868-869).

**(iii) Precise relief sought**

63. The Appeals Chamber is invited to review the Trial Chamber's findings in the absence of bifurcated findings in relation to 1998. Subject to the combined effect of this and Đorđević's other grounds of appeal, all of his convictions should be quashed or his sentence should be reduced accordingly.

**d. SUB-GROUND 9(D): THE TRIAL CHAMBER ERRED IN LAW AND FACT AS TO THE ASSESSMENT OF ĐORĐEVIĆ'S ROLE IN ARMING LOCAL SERBS AND DISARMING KOSOVO ALBANIANS**

**(i) Alleged errors of law and fact**

64. The Trial Chamber found that the arming of the local Serb population was an element of the Plan for the Suppression of Terrorism in Kosovo. The Trial Chamber erred in law and fact when holding that such arming bore any relation to a JCE. Its own findings do not support that conclusion. Such arming was defensive, legal and necessary in the circumstances.
65. Likewise, the Trial Chamber erred in law and fact when it held that the disarming of KLA areas was indicative of a JCE.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

66. The Trial Chamber's consideration of Đorđević's role in this regard is at paragraphs 92-97 (p.35-37), 221 (p.85-86), 1899 (p.737), 1903 (p.740), 1908-1915 (p.742-745), 1990 (p.784), 2012 (p.793), 2154 (p.859) and 2163 (p.861-862).

**(iii) Precise relief sought**

67. The Appeals Chamber is invited to exclude this issue from any assessment of Đorđević's liability, quash his convictions or reduce his sentence accordingly.

**e. SUB-GROUND 9(E): THE TRIAL CHAMBER ERRED IN LAW AND FACT IN ITS ASSESSMENT OF THE RAČAK INCIDENT AND ĐORĐEVIĆ'S ROLE THEREIN**

**(i) Alleged errors of law and fact**

68. The Prosecution withdrew the Račak incident from the Indictment as a crime site, limiting its relevance to Đorđević's *mens rea* (Fourth Amended Indictment, paragraph 64(g)). Nonetheless, the Trial Chamber proceeded to make detailed findings in relation to that incident and Đorđević's role therein as relevant to his *actus reus*. Such an approach is inherently unfair. In any event, the Trial Chamber erred in law and fact as to the events in Račak in January 1999 and irrationally concluded that Đorđević played a "leading role", including in efforts to limit "any independent investigation". Such conclusions were not supported by the Trial Chamber's own findings.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

69. The Trial Chamber concluded that Đorđević "participated" in the JCE by means of his "leading role" in relation to Račak at paragraph 2154. The Trial Chamber's erroneous findings as to Račak are included at paragraphs 396-425 (p.146-156), 1920-1924 (p.747-749), 1992 (p.785), 2063 (p.819), 2084 (p.828), 2134 (p.851), 2163 (p.861-862) and 2180 (p.867).

**(iii) Precise relief sought**

70. The Appeals Chamber is invited to exclude this issue from any assessment of Đorđević's liability, quash his convictions or reduce his sentence accordingly.

**f. SUB-GROUND 9(F): THE TRIAL CHAMBER ERRED IN LAW AND FACT AS TO ĐORĐEVIĆ'S ALLEGED ROLE IN THE CRIMES OF PARAMILITARIES IN KOSOVO**

**(i) Alleged errors of law and fact**

71. The Trial Chamber's findings in relation to Đorđević's limited involvement with reservists (referred to as the "Scorpions") did not support its conclusion that Đorđević thereby contributed to a JCE.

- a. First, the Trial Chamber erred as to what it concluded to be Đorđević's role in the engagement, attachment and dispatch of the "Scorpions" to Podujevo in March 1999. In any event, only a fraction of that group had fought as "Scorpions" in previous conflicts and it was not established to a proper standard that they were infamous and known to Đorđević to be such.
- b. Second, there was no evidence that Đorđević had any role in this group's deployment to "clear the half of the town not yet under Serbian control". In any event, such an alleged order was inconsistent with the actual evidence of their crimes, which took place in an area under Serbian control. No reasonable Trial Chamber could fail to consider these inconsistencies.
- c. Third, upon learning of the crimes of the individuals in Podujevo, the entire unit was withdrawn immediately. This is inconsistent with any finding of a plan to murder and/or expel a population.
- d. Fourth, the Trial Chamber placed an insurmountable burden upon Đorđević for the investigation of the crimes by these individuals. The evidence did not establish that they were sent home so as to avoid an investigation. In fact, the Trial Chamber found that investigations proceeded unhindered and individuals were arrested.
- e. Fifth, the Trial Chamber erred by relying upon the redeployment of the reservists in April 1999. A clear inference existed that the suspected perpetrators of the earlier Podujevo crimes were not or were not thought to be

in their number. In any event, it was not established to an adequate standard that any later crimes were committed by those men who were redeployed.

- f. Sixth, without justification, the Trial Chamber extended Đorđević's responsibility from a single specific instance with the "Scorpions" to responsibility for all paramilitaries found to be operating in Kosovo.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

72. The Trial Chamber's erroneous conclusions regarding Đorđević's role in the crimes of paramilitaries are found at paragraphs 191-223 (p.73-86), 1222-1261 (p.479-500), 1896 (p.735), 1926-1966 (p.750-774), 1993 (p.785), 1999 (p.787), 2021 (p.799-800), 2108 (p.840-841), 2142-2145 (p.855-856), 2155 (p.859), 2158 (p.860), 2162-2163 (p.861-862), 2173 (p.865), 2180 (p.867), 2185 (p.868-869) and 2188-2190 (p.869-870).

**(iii) Precise relief sought**

73. The Appeals Chamber is invited to exclude this issue from any assessment of Đorđević's liability, quash his convictions or reduce his sentence accordingly.

**g. SUB-GROUND 9(G): THE TRIAL CHAMBER ERRED IN LAW AND FACT AS TO ĐORĐEVIĆ'S ROLE IN THE CONCEALMENT OF CRIMES**

**(i) Alleged errors of law and fact**

74. The Trial Chamber found that a plan existed to conceal the bodies of Kosovo Albanians killed during the Indictment period. The Trial Chamber further found that Đorđević was an active contributor to that plan and that he thus participated in the alleged JCE. A number of challenges will be advanced to the Trial Chamber's approach.

- a. First, the Trial Chamber made insufficient findings as to how concealment furthered the JCE. Concealing bodies, even assuming those victims were unlawfully killed, did not necessarily contribute to the alleged JCE.
- b. Second, no reasonable Trial Chamber could put any weight on the Working Group evidence. There was no foundation to the Trial Chamber's conclusion that Milošević directed there to be a cover-up in March 1999. Conversely, the Trial Chamber failed to give any weight to evidence that demonstrated that there was no master plan to cover up crimes.
- c. Third, the Trial Judgement is irrational as to Đorđević's participation in the cover-up, over-stating its conclusions in a manner unsupported by its earlier assessment of the evidence. Đorđević played no part in the original burials, disinterment or clandestine transportation of bodies to Serbia. This submission applies to each of:
  - i. the Trial Chamber's conclusions as to Đorđević's conduct in relation to bodies found in the half-submerged lorry at Tekija;
  - ii. the Trial Chamber's conclusions as to Đorđević's conduct in relation to bodies found in Lake Perucac; and
  - iii. the Trial Chamber's unreasonable inference that Đorđević played any role in relation to the concealment of bodies at the Petrovo Selo PJP Centre.
- d. Fourth, the Trial Chamber applied an unfair standard when assessing Đorđević's conduct, unreasonably overstating his responsibility. The Trial Chamber erroneously shifted the burden to Đorđević to demonstrate his lesser participation/knowledge and/or assumed that Đorđević knew that the victims were civilians when such knowledge was not positively established in fact. The Trial Chamber was not entitled to reject Đorđević's evidence that it was not within his power to do anything further.



**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

75. Dealing with each of the above errors in turn:

- a. The Trial Chamber considered the concealment of bodies as contributing to the alleged JCE at paragraphs 142-143 (p.56), 1980-1981 (p.780), 2025-2026 (p.801-803), 2146 (p.856-858) and 2086-2121 (p.829-845). It appears that such concealment was found to assist the JCE because it hindered investigations into those perpetrating crimes. This logic is challenged. As to Đorđević's participation in concealment, the paragraphs challenged are 1899 (p.737), 1994 (p.785), 1967-1982 (p.774-781), 2156 (p.859-860), 2158 (p.860), 2163 (p.861-862), 2181 (p.867-868), 2186-2187 (p.869) and 2194 (p.871).
- b. The Trial Chamber considered and relied upon Working Group documents at paragraphs 1289 (p.511-512), 1302 (p.518-519), 1367-1380 (p.547-552), 1979-1982 (p.779-781); 2025 (p.801-802), 2112-2117 (p.841-844) and 2181 (p.867-868). The Trial Chamber identified evidence that showed there was no master plan at paragraphs 1266-1286 (p.502-510) but irrationally declined to give it any weight.
- c. The paragraphs challenged are 1266-1286 (p.502-510), 1975-1976 (p.777-778), 1994 (p.785) and 2163 (p.861-862). In addition:
  - i. in relation to Tekija, the Trial Chamber's conclusions are at paragraphs 1287-1352 (p.510-539).
  - ii. in relation to Lake Perucac the conclusions challenged are at paragraphs 1357-1366 (p.541-546) whereas it held that it could make no findings as to the cause of death of these individuals at paragraph 1519 (p.608).
  - iii. in relation to Petrovo Selo PJP Centre, the inferences challenged are at paragraphs 1378 (p.551-552), 1976-1979

(p.777-779), 1981 (p.780) compared with findings at paragraph 1975 (p.777) that there was no evidence that Đorđević was involved or was aware of the concealment of bodies at this site. Overall consideration of the evidence in relation to Petrovo Selo PJP Centre is in paragraphs 1353-1356 (p.539-541).

- d. The Trial Chamber overstated Đorđević's responsibility throughout, most noticeably at paragraph 2108. The shift in the burden is apparent in paragraphs 1315 (p.523-524), 1348 (p.537), 1366 (p.546), 1975 (p.777-778). The overstatements of Đorđević's responsibility compared to earlier findings are at paragraphs 1967-1982 (p.774-781), 2025-2026 (p.801-803), 2103 (p.838), 2108-2109 (p.840-841), 2156 (p.859-860), 2158 (p.860), 2163 (p.861), 2181 (p.867-868), 2186-2187 (p.869) and 2194 (p.871).

**(iii) Precise relief sought**

76. In relation to the first error alleged, the relief sought is a reversal of Đorđević's convictions so far as they depend upon the logic that the concealment of bodies furthered the expulsion of Kosovo Albanians. A reduction in sentence should follow in any event.
77. In relation to the second error alleged above, the relief sought is a finding that there was no master-plan to conceal bodies and any sentence should be reduced to reflect such diminished criminality.
78. In relation to the third and fourth errors, the relief sought is a reduction in sentence in light of the Trial Chamber's inflated conclusion as to Đorđević's participation in any cover up.

**h. SUB-GROUND 9(H): THE TRIAL CHAMBER ERRED IN LAW AND FACT WHEN HOLDING THAT ĐORĐEVIĆ FAILED TO TAKE ANY MEASURES TO ENSURE THE INVESTIGATION OF CRIMES**

**(i) Alleged errors of law and fact**

79. The Trial Chamber erred in law and fact when holding that Đorđević did not take any measures to ensure the investigation of crimes or the punishment of those involved in their commission. The evidence was that Đorđević reported everything he knew to his superiors and/or that authorities were informed of crimes. Đorđević has been unjustly held responsible for the breakdown of an entire system.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

80. The Trial Chamber's erroneous conclusions regarding investigations are found at paragraphs 1906 (p.741), 1924 (p.749), 1956-1966 (p.769-774), 1970 (p.775), 1983-199 (p.781-787), 2083-2108 (p.827-841), 2146 (p.856-857), 2154-2158 (p.859-860), 2162-2163 (p.861-862), 2174-2185 (865-869), 2190-2192 (p.870-871) and 2194 (p.871).

**(iii) Precise relief sought**

81. Subject to other grounds of appeal, the Appeals Chamber is invited to exclude this issue from any assessment of Đorđević's liability, quash his convictions or reduce his sentence accordingly.

**X. GROUND 10: ERRORS OF LAW AND FACT WHEN FINDING THAT ĐORĐEVIĆ SHARED THE NECESSARY INTENT**

**(i) Alleged errors of law and fact**

82. The reasonable inference remained that Đorđević did not share the necessary *mens rea* found to have been shared by other members of the JCE. The Trial Chamber relied upon unsatisfactory sources in order to establish Đorđević's knowledge of crimes and infer his intent therefrom, including improperly relying on events in 1998 that were irrelevant to his knowledge in 1999.

- a. The evidence of Đorđević's participation in the concealment of bodies – including his own admissions – was of impromptu reactions on the basis of

imperfect knowledge. It did not reveal a cohesive common purpose shared by Đorđević. The Trial Chamber erred in law and fact when equating such after-the-event conduct with the *mens rea* for the earlier crimes.

- b. The evidence of Đorđević's participation in the deployment of the "Scorpions" to Kosovo – an area where the KLA was active – could not establish the *mens rea* necessary for their crime or any other crimes.
- c. The Trial Chamber's conclusions as to Đorđević's failure to investigate crimes inflated his *mens rea* to the level of sharing the intention of perpetrators.

83. The inference remained open to the Trial Chamber that Đorđević did not intend to expel hundreds of thousands of Kosovo Albanians by means of the Indictment crimes and Đorđević should have had the benefit of that inference.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

84. The standard applied by the Trial Chamber is found in paragraphs 1864-1865 (p.722) and 1867 (p.723). The findings challenged in relation to Đorđević's *mens rea* are at paragraphs 1929 (p.751-752), 1983-1999 (p.781-787), 2142 (p.855), 2158 (p.860), 2178-2184 (p.867-868) and 2227, n.7435 (p.882).

**(iii) Precise relief sought**

85. The Appeals Chamber is invited to conclude that no reasonable Trial Chamber could hold that Đorđević possessed the requisite *mens rea*. His convictions should be quashed.

**XI. GROUND 11: ERRORS OF LAW AND FACT IN RELATION TO AIDING AND ABETTING**

**(i) Alleged errors of law and fact**

86. The Trial Chamber failed to give an adequately reasoned opinion when additionally convicting Đorđević pursuant to aiding and abetting liability. The Trial Judgement only contains one paragraph as to Đorđević's knowledge and one paragraph on his conduct in relation to aiding and abetting. The Trial Chamber failed to apply the elements of aiding and abetting liability that it had summarised earlier in its judgement. It is unjust to impose liability on such a basis. A fully reasoned opinion is essential to enable an appellant to challenge a Trial Chamber's approach on appeal. In any event, the findings as to knowledge and conduct as an aider and abettor do not support sweeping liability for all of the Indictment crimes.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

87. The Trial Chamber's summary of the elements of aiding and abetting is at paragraphs 1873-1876 (p.725-726). The finding as to Đorđević's knowledge is at paragraph 2162 (p.861). The finding as to Đorđević's conduct is at paragraph 2163 (p.861-862). The conclusions challenged are at paragraphs 2194 (p.871), 2214 (p.878) and 2230 (p.883).

**(iii) Precise relief sought**

88. The Appeals Chamber is invited quash Đorđević's convictions pursuant to aiding and abetting and reduce his sentence accordingly.

**FOUNDATIONS 12-15: ERRORS OF LAW AND FACT AS TO THE  
ELEMENTS OF CRIMES**

**XII. FOUNDATION 12: ERRORS OF LAW AND FACT AS TO THE DEFINITION OF  
CIVILIAN**

**(i) Alleged errors of law and fact**

89. The Trial Chamber erred in law and fact as to the applicable definition of civilian and civilian objects during the period of the Indictment crimes. The Trial Chamber applied an over-expansive definition of civilian and failed to adequately consider whether the presence and tactics of the KLA deprived surrounding populations or targets of their civilian character. The Trial Chamber was not entitled to extend a finding that an international armed conflict existed between the FRY and NATO to the rules regulating the FRY's conflict with the KLA.

90. The Trial Chamber erred in two related respects:

a. First, as regards the crimes of **deportation and forcible transfer** the Trial Chamber erred by concluding that actions such as the mere movement of forces towards KLA areas and/or shelling were directed against the civilian population as distinguished from the KLA. The Trial Chamber's error undermines its assessment of proportionality and distinction and its findings that the crimes of deportation and/or forcible transfer were established at certain crime sites. The Trial Chamber applied too strict a standard of military target and reversed the burden of proof by requiring Đorđević to establish legitimate targeting.

b. Second, as regards the crimes of **murder** under Articles 3 and 5 of the Statute the Trial Chamber applied too broad a definition of civilian and reversed the burden of proof by requiring Đorđević to establish that victims were active KLA: the burden should have remained on the prosecution to establish that victims were truly civilians. Finally, the Trial Chamber failed to apply the

necessary context element under Article 5 of the Statute before finding that the killing of actual or suspected KLA members was a crime against humanity.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

91. In relation to the crimes of **deportation and forcible transfer**, the Trial Chamber erred throughout its assessment of the crimebase from paragraphs 448-1261 (p.165-500) by simplistically finding that people fled out of fear of Serb forces or because of shelling. The conclusions challenged are at paragraphs 1701 (p.675) (deportation) and 1702 (p.675-676) (forcible transfer) and generally paragraph 2065 (p.820). The specific crime sites where the point arises are:

a. Orahovec municipality:

- i. Bela Crkva on 25 March 1999 at paragraphs 1617-1618 (p.641-642);
- ii. Mala Kruša on 25 March 1999 at paragraphs 1619-1620 (p.642);
- iii. Velika Kruša on 25 March 1999 at paragraph 1622 (p.643); and
- iv. Celina on 25 March 1999 at paragraph 1623 (p.643-644).

b. Prizren municipality:

- i. Pirane on 25 March 1999 at paragraph 1628 (p.645-646); and
- ii. Landovica on 26 March 1999 at paragraph 1628 (p.645-646).

c. Srbica municipality:

- i. Leocina on 25 and 26 March 1999 at paragraphs 1630-1631 (p.646-647);
- ii. Brocna on 25 March 1999 at paragraphs 1630-1631 (p.646-647);
- iii. Kladernica on 25 March 1999 at paragraphs 1630-1631 (p.646-647) and 12 April 1999 at paragraph 1634 (p.648);
- iv. Izbica on 27 and 28 March 1999 at paragraphs 1630-1631 (p.646-647);
- v. Turicevac on 26 March 1999 at paragraph 1632 (p.647) and 1 April 1999 at paragraph 1633 (p.647-648); and
- vi. Tušilje on 29 March 1999 at paragraph 1632 (p.647).

d. Suva Reka municipality:

- i. Pecane on 20-21 March 1999 at paragraph 1639 (p.650); and
    - ii. Belanica on 1 April 1999 at paragraphs 1640-1641 (p.650-651).
  - e. Kosovska Mitrovica municipality: the upper part of Zabare village on 14 April 1999 at paragraph 1647 (p.653).
  - f. Gnjilane municipality:
    - i. Vladovo on 29 March 1999 and 2 April 1999 at paragraph 1661 (p.659); and
    - ii. Nosalje on 6 April 1999 at paragraph 1661 (p.659).
  - g. Uroševac municipality: Mirosavlje on 8 April 1999 at paragraph 1667 (p.661-662).
  - h. Kačanik municipality:
    - i. Kotlina on 24 March 1999 at paragraph 1669 (p.663);
    - ii. Kačanik town on 27 March 1999 at paragraph 1670 (p.663);
    - iii. Vata on 13 April 1999 at paragraph 1671 (p.663-664).
  - i. Vučitrn municipality:
    - i. Donji Svracak on 27 March 1999 at paragraph 1675 (p.665);
    - ii. Donja Sudimlja on 28 March 1999 at paragraph 1676 (p.665-666); and
    - iii. Vesekovce and Slakovce on 2 May 1999 at paragraph 1677 (p.666).
92. In relation to **murder** under Article 3 of the Statute, the Trial Chamber set out the requirements of Common Article 3 of the Geneva Conventions at paragraph 1583 (p.630) but applied a broader definition of civilian throughout the crimebase section and in relation to specific crime sites identified below.
93. In relation to **murder** under Article 5 of the Statute, the Trial Chamber characterised *hors de combat* as determining civilian status at paragraph 1593 (p.632-633) and relieved the prosecution of its burden of proving civilian status and failed to consider the impact and tactics of the KLA on the civilian character of a population or target



throughout the crimebase section and also at paragraphs 1593 (p.632-633), 1599-1601 (p.635) and 2052-2069 (p.814-821). It erred in relation to specific crime sites:

- a. Orahovac municipality:
  - i. Bela Crkva on 25 March 1999:
    - 1. the death of 13 fleeing villagers shot by MUP forces at paragraph 1710 (p.678); and
    - 2. the death of six men in a channel 70-85m from the Belaja Bridge at paragraphs 473 (p.177-178) and 1712 (p.679).
  - ii. Mala Kruša on 25 and 26 March 1999: the death of nine victims during the course of an attack: paragraphs 485 (p.182-183) and 1715 (p.679-680).
  
- b. Đakovica municipality:
  - i. Meja on 27-28 April 1999: the death of all 281 individuals during Operation Reka at paragraphs 1736-1739 (p.687-689) when their civilian status was not established.
  - ii. Meja on 27-28 April 1999: the death of Kole Duzhmani at paragraph 1737 (p.688) where the evidence was of an intention kill a KLA member.
  
- c. Vučitrn municipality on 2/3 May 1999: the death of four individuals at night in a convoy at paragraphs 1184 (p.467), 1197 (p.471-472) and 1742 (p.689-690).
  
- d. Kačanik municipality:
  - i. Kotlina on 24 March 1999: the death of 22 individuals at the wells at paragraphs 1744-1746 (p.690-691) and 1753 (p.693) when civilian clothing is not decisive and the evidence of capture was too weak to be relied upon.
  - ii. Slatina and Vata on 13 April 1999: the death of four men in Vata at paragraphs 1747 (p.691), 1138-1139 (p.452-453) when the only evidence of detention was a hearsay account.

**(iii) Precise relief sought**

94. The Appeals Chamber is invited to quash Đorđević's convictions on the basis that the Trial Chamber applied an overly broad definition of civilian such that a necessary element of Article 3 and 5 of the Statute was not established.

**XIII. GROUND 13: ERROR OF LAW AS TO AN ELEMENT OF THE CRIME OF DEPORTATION**

**(i) Alleged errors of law and fact**

95. The Trial Chamber erred in law as to an element of the crime of deportation. Unlike the crime of forcible transfer, deportation requires displacement across a *de jure* or *de facto* border between different international states. The Trial Chamber incorrectly held that this element was satisfied by the displacement of individuals from one part of the FRY to another, most noticeably displacement from Kosovo to Montenegro. This error also impacts the Trial Chamber's findings in relation to the crime of persecution by means of deportation.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

96. The Trial Chamber erred at paragraphs 1604(4) (p.636) and 1683 (p.668) in general terms and most noticeably in relation to displacement from Peć and Kosovska Mitrovica at: paragraphs 1642 (p.651-652), 1646 (p.653), 1701 (p.675), 1704 (p.676) and 2043 (p.811) under Count 1 and paragraphs 1774 (p.699-700), 1776-1778 (p.701) and 1856 (p.719) under Count 5. The Trial Chamber further erred in relation to other crime sites by failing to distinguish displacement within the FRY from displacement to outwith the FRY.

**(iii) The precise relief sought**

97. The Appeals Chamber is invited to quash Đorđević's convictions under Counts 1 and 5 to the extent that they did not satisfy a necessary element of the crime of deportation.

**XIV. GROUND 14: ERROR OF LAW AS TO A NECESSARY ELEMENT OF THE MENS REA OF MURDER**

**(i) Alleged errors of law and fact**

98. The Trial Chamber erred in law as to a necessary element of murder. It is submitted that an additional element of premeditation is required in order for a murder to violate Article 3 or Article 5 of the Statute. Premeditation requires the prosecution to establish a deliberate plan to kill on the part of the perpetrator(s). Forming the intention simultaneously with the deadly act is insufficient. The findings do not establish premeditation in relation to certain crime sites.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

99. Premeditation was not established in relation to the following murders:

- a. Bela Crkva on 25 March 1999:
  - i. the death of 13 fleeing villagers shot by MUP forces at paragraph 1710 (p.678); and
  - ii. the death of six men in the channel, 70-85 metres from Belaja Bridge at paragraph 1712 (p.679).
- b. Mala Kruša on 25 March 1999: the death of nine victims burned to death inside their houses during the course of an attack at paragraph 1715 (p.679-680) and 485 (p.182-183).
- c. Suva Reka on 26 March 1999: the death of four additional members of the Berisha family in unknown circumstances at paragraph 1724 (p.683-684).
- d. Đakovica on 1/2 April 1999: the death of 20 civilians at 157 Miloš Gilić Street at paragraphs 1731 (p.686) and 886-898 (p.353-359).

- e. Korenice and Meje on 27-28 April 1999: the death of a proportion of the 281 individuals found to have been killed during Operation Reka on 27-28 April 1999 at paragraphs 1738 (p.688-689) and 940-980 (p.377-397).

**(iii) Precise relief sought**

100. The Appeals Chamber is invited to quash Đorđević's convictions for murder under Articles 3 and 5 to the extent that the necessary element of premeditation was not established.

**XV. GROUND 15: ERRORS OF LAW AND FACT IN HOLDING THAT WANTON DESTRUCTION OF RELIGIOUS SITES WAS ESTABLISHED AS A CRIME AGAINST HUMANITY**

**(i) Alleged errors of law and fact**

101. The Trial Chamber erred by holding that wanton destruction is a crime against humanity (as a form of persecution) and by holding that such a crime could be committed recklessly. Such a crime is neither provided for in customary international law nor is it in the Statute. Its contours are too uncertain. By contrast, wanton destruction as a war crime is well-established but was not charged.
102. Alternatively, the Trial Chamber erred by failing to assess adequately or at all the level of gravity necessary in order for the destruction of a religious site to amount to a crime against humanity. Further, the Trial Chamber failed to link any destroyed mosques to a widespread and systematic attack directed against the civilian population.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

103. The Trial Chamber erred as to the legal standard at paragraphs 1770-1773 (p.698-699).

104. The Trial Chamber applied an erroneous legal standard in holding Đorđević responsible for persecution committed through wanton destruction or damage to the religious sites as summarised at paragraphs 1854-1855 (p.719). The specific findings challenged are as follows:

- a. the mosque in Celina in Orahovac municipality on 28 March 1999 at paragraphs 1804-1805 (p.706-707) and 1809-1811 (p.707-708);
- b. the mosque in Bela Crkva in Orahovac municipality on 28 March 1999 at paragraphs 1806-1811 (p.707-708);
- c. the mosque in Landovica in Prizren municipality on 26-27 March 1999 at paragraphs 1817-1819 (p.710);
- d. Xhamia-e-Bardhe (White Mosque) in Suva Reka town in Suva Reka municipality on 26 March 1999 at paragraphs 1820-1825 (p.711-712);
- e. Hadum Mosque in Đakovica municipality on 24-25 March 1999 at paragraphs 1830-1832 (p.713);
- f. the mosque in Rogovo in Đakovica municipality on 28 March 1999 at paragraphs 1833-1837 (p.713-715);
- g. the mosque in Vlačica in Gnjilane municipality on 6 April 1999 at paragraphs 1838-1840 (p.715); and
- h. the market mosque (Charshi Mosque) in Vučitrn municipality on 27 April 1999 at paragraphs 1848-1850 (p.717-718).

**(iii) Precise relief sought**

105. The Appeals Chamber is invited to quash Đorđević's convictions under Count 5 for persecution committed through wanton destruction and reduce his sentence accordingly.

**GROUND 16-17: ERRORS OF LAW AND FACT IN RELATION TO  
SPECIFIC CRIME SITES**

**XVI. GROUND 16: IMPERMISSIBLE CONVICTIONS ENTERED ON THE BASIS  
OF EVENTS AND/OR CRIMES NOT ALLEGED IN THE INDICTMENT**

**(i) Alleged errors of law and fact**

106. The Trial Chamber erred in law by convicting Đorđević on the basis of crimes that were not alleged in the Indictment.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

107. The instances where the Trial Chamber erred are as follows.

108. In relation to **deportation**, the Trial Chamber erroneously made findings of criminal responsibility when no such crime was alleged in the indictment:

a. Prizren municipality:

i. Dušanovo, on 28 March 1999: paragraphs 1626-1627 (p.645), 1701 (p.675) and 1704 (p.676); and

ii. Srbica, from 9 to 16 April 1999: paragraphs 1629 (p.646), 1701 (p.675) and 1704 (p.676).

b. Srbica municipality, Kladernica, from 12 to 15 April 1999: paragraphs 1634 (p.648), 1701 (p.675) and 1704 (p.676).

c. Đakovica municipality, Žub, from 27 to 28 April 1999: paragraph 1701 (p.675).

d. Suva Reka municipality, Suva Reka Town, from 7 to 21 May 1999: paragraphs 1638 (p.649-650), 1701 (p.675) and 1704 (p.676).

- e. Gnjilane municipality, Vlačica, 6 April 1999: paragraphs 1663 (p.660), 1701 (p.675) and 1704 (p.676).
  - f. Uroševac municipality, Uroševac Town, on 27 April 1999: paragraphs 1665 (p.661): 1701 (p.675) and 1704 (p.676).
109. In relation to **forcible transfer**, the Trial Chamber erroneously made findings of criminal responsibility when no such crime was alleged in the indictment:
- a. Orahovac municipality:
    - i. Bela Crkva on 25 March 1999: paragraphs 1618 (p.641-642) and 1702-1704 (p.675-676);
    - ii. Mala Kruša from 25-27 March 1999: paragraphs 1619-1621 (p.642-643) and 1702-1704 (p.675-676); and
    - iii. Velika Kruša on 25 March 1999 and days thereafter: paragraphs 1622 (p.643) and 1702-1704 (p.675-676).
  - b. Prizren municipality, Landovica, on 26 March 1999: paragraphs 1628 (p.645-646) and 1702-1704 (p.675-676).
  - c. Srbica municipality:
    - i. Brocna, on 25-26 March 1999: paragraphs 1631 (p.646-647) and 1702-1704 (p.675-676); and
    - ii. Tušilje, on 29 March 1999: paragraphs 1632 (p.647) and 1702-1704 (p.675-676).
  - d. Đakovica municipality, Žub, in early April 1999: paragraphs 1655 (p.656) and 1702-1704 (p.675-676).
  - e. Suva Reka municipality:
    - i. Suva Reka, on 3 April 1999: paragraphs 1637 (p.649) and 1702-1704 (p.675-676); and

- ii. Pecane on 20-21 March 1999: paragraphs 1639 (p.650) and 1702-1704 (p.675-676).
  - f. Peć municipality, Čuška, on 14 May 1999: paragraphs 1643-1644 (p.652) and 1702-1704 (p.675-676).
  - g. Dečani municipality, Drenovac, on 26 March 1999: paragraphs 1672 (p.664) and 1702-1704 (p.675-676).
110. In relation to **murder**, the Trial Chamber's erroneous approach is at paragraphs 1706 (p.676-677) and 2232 (p.885). It made findings of criminal responsibility when no such crime or victim was alleged in the Indictment:
- a. Đakovica municipality, Đakovica town, the murder of four members of the Cana family at 80 Miloš Gilić on 1 April 1999: paragraphs 1732 (p.686-687), 1734 (p.687) and 1753 (p.693).
  - b. Podujevo municipality, Podujevo town, the murder of two elderly Kosovo Albanian men: paragraphs 1751-1753 (p.692-693), 1956 (p.769) and 2143 (p.855).
  - c. Orahovac municipality, Mala Kruša, 25 March 1999: paragraphs 1715 (p.679-680), 1719 (p.681) and 1753 (p.693).
  - d. Suva Reka municipality, Suva Reka town, the shooting of two elderly members of the Berisha family on 26 March 1999: paragraph 1721 (p.682).
111. In relation to **persecutions**:
- a. The above errors in relation to each of deportation, forcible transfer and murder apply again as found at paragraphs 1774-1783 (p.699-702), 1789-1790 (p.703) and 1856 (p.719).



- b. In relation to persecution by murder, erroneous findings relating to Pusto Selo are at paragraphs 541 (p.211), 1779-1784 (p.701-703), 1790 (p.703) and 1856 (p.719).
- c. The Trial Chamber erroneously and unjustifiably added to Count 5 other murders beyond those in Counts 3 and 4 and not specifically charged. The Trial Chamber's erroneous approach is at paragraphs 1264 (p.501-502) and 2232 (p.885) and footnote 4872 (p.502).
- d. In relation to persecution by forcible transfer, the Indictment does not allege such a crime: paragraph 77(a) of the Fourth Amended Indictment does not include paragraph 73 by reference. Therefore, no conviction for persecution by forcible transfer should have been entered. The Trial Chamber ignored this limitation in paragraphs 1763 (p.695-696), 1775-1778 (p.700-701) and 1856 (p.719) of the Trial Judgement.

**(iii) Precise relief sought**

112. Such convictions occasion a miscarriage of justice. The Appeals Chamber is invited to quash Đorđević's convictions for crimes that were not alleged in the Indictment and reduce his sentence accordingly.

**XVII. GROUND 17: ERRORS OF LAW AND FACT WHEN FINDING THAT CRIMES WERE ESTABLISHED IN CERTAIN LOCATIONS**

**(i) Alleged errors of law and fact**

113. The Trial Chamber erred in law and fact when finding that the Indictment crimes were made out in relation to certain specific crime sites. The Trial Chamber's findings did not support its conclusions.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

114. The Trial Chamber erroneously concluded that the crime of **deportation** had been

established in relation to the following crime sites:

- a. Suva Reka municipality, Belanica, on 1 April 1999: paragraphs 1640-1641 (p.650-651), 1701 (p.675) and 1704 (p.676).
- b. Kačanik municipality, Vata, on 14 April 1999: paragraphs 1671 (p.663-664), 1701 (p.675) and 1704 (p.676).

115. The Trial Chamber erroneously concluded that the crime of **forcible transfer** had been established in relation to the following crime sites:

- a. Srbica municipality, Leocina, on 25-26 March 1999: paragraphs 1630-1631 (p.646-647) and 1702-1704 (p.675-676).
- b. Đakovica municipality, Guska, on 27 March 1999: paragraphs 1653 (p.655-656) and 1702-1704 (p.675-676).
- c. Gnjilane municipality:
  - i. Prilepnica on 6 April 1999: paragraphs 1658 (p.657-658) and 1702-1704 (p.675-676); and
  - ii. Nosalje, on 6 April 1999: paragraphs 1662 (p.659-660) and 1702-1704 (p.675-676).

116. The Trial Chamber erred in certain respects at paragraph 1753 (p.693) by concluding that **murder** had been established at certain crime sites. The following crime sites are challenged:

- a. Orahovac municipality, Mala Kruša, on 25 and 26 March 1999:
  - i. the death of nine victims during the course of an attack: paragraphs 485 (p.182-183) and 1715 (p.679-680); and
  - ii. the death of Hyseni Ramadani and Hysni Hajdari and one additional person from the Batusha barn: paragraphs 1716 (p.680) and 1718 (p.681).

- b. Suva Reka municipality, Suva Reka town, on 26 March 1999: the death of four other Berisha family members at paragraphs 683 (p.266-267) and 1724 (p.683-684) when there was no evidence as to their cause of death.
- c. Đakovica municipality, Meja, on 27-28 April 1999: the death of all 281 individuals during Operation Reka in the Carragojs Valley at paragraphs 1736-1739 (p.687-689) when the circumstances of all of their individual deaths were not established.
- d. Vučitrn municipality on 2/3 May 1999: the death of four individuals at night in a convoy at paragraphs 1742 (p.689-690), 1184 (p.467) and 1197 (p.471-472).
- e. Kačanik municipality:
  - i. Kotlina, on 24 March 1999: the death of 22 individuals at the wells at paragraphs 1744-1746 (p.690-691) and 1753 (p.693) when no reasonable Trial Chamber would put decisive weight on the evidence of an eyewitness 600 metres away.
  - ii. Slatina and Vata, on 13 April 1999: the death of four men in Vata at paragraphs 1747 (p.691), 1138-1139 (p.452-453) when the only evidence that they had been detained was a hearsay account.

117. The Trial Chamber erroneously concluded that the offence of **persecution** by means of wanton destruction of religious sites was established in relation to the following sites:

- a. the mosque in Bela Crkva in Orahovac municipality on 28 March 1999 at paragraphs 1806-1811 (p.707-708);
- b. the mosque in Landovica in Prizren municipality on 26-27 March 1999 at paragraphs 1817-1819 (p.710);
- c. Hadum Mosque in Đakovica municipality on 24-25 March 1999 at paragraphs 1830-1832 (p.713);

d. the mosque in Rogovo in Đakovica municipality on 28 March 1999 at paragraphs 1833-1837 (p.713-715).

118. Finally, the above alleged errors in relation to deportation, forcible transfer and murders resulted in parallel erroneous findings under Count 5 at paragraphs 1774-1790 (p.699-703) and 1856 (p.719).

**(iii) Precise relief sought**

119. The Appeals Chamber is invited to quash Đorđević's convictions in relation to the above crime sites on the basis that no reasonable Trial Chamber could have concluded that the above crimes were established in fact.

**XVIII. GROUND 18: ERRORS OF LAW WHEN ENTERING MULTIPLE CONVICTIONS**

**a. SUB-GROUND 18(A): ERROR OF LAW WHEN ENTERING CONVICTIONS UNDER JCE AND AIDING AND ABETTING**

**(i) Alleged errors of law and fact**

120. The Trial Chamber erred in law when it convicted Đorđević twice for the same crimes – once for ‘committing’ the crimes through participation in a joint criminal enterprise and again for aiding and abetting the same crimes. Such duplicate convictions under 7(1) are impermissible and logically incompatible. The Trial Chamber misinterpreted the law and, in doing so, found Đorđević guilty of the same crimes twice, thus unjustifiably increasing his sentence.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

121. The Trial Chamber’s error is at paragraph 2194 (p.871). Associated errors are at paragraphs 2159-2164 (p.859-862); 2214 (p.878); 2229-2231 (p.883-884).

**(iii) Precise relief sought**

122. The Appeals Chamber is invited to quash Đorđević’s convictions under either JCE or aiding and abetting and reduce his sentence accordingly.

**b. SUB-GROUND 18(B): ERROR OF LAW WHEN ENTERING MULTIPLE CONVICTIONS UNDER ARTICLE 5 OF THE STATUTE**

**(i) Alleged error of law invalidating the decision**

123. Đorđević’s convictions for the underlying crimes of deportation, forcible transfer and murder pursuant to Article 5 of the Statute and further convictions under Article 5 for persecutions by means of those same underlying crimes are cumulative and unfair. There are compelling reasons for departing from previous decisions that such

convictions are not cumulative.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

124. The Trial Chamber's error when entering convictions for deportation, forcible transfer and murder then entering further convictions under Article 5 of the Statute for persecutions by means of the same crimes is at paragraphs 2196-2202 (p.872-873).

**(iii) Precise relief sought**

125. The Appeals Chamber is invited to quash Đorđević's convictions pursuant to Article 5 of the Statute to the extent that they are cumulative.

**XIX. GROUND 19: ERRORS IN RELATION TO SENTENCING**

**a. SUB-GROUND 19(A): THE TRIAL CHAMBER ERRED IN LAW AND FACT AS TO AGGRAVATING FACTORS**

**(i) Alleged errors of law and fact**

126. The Trial Chamber erred in law and fact when it utilized the same erroneous findings as the basis of conviction and as both lending to the gravity of the crimes and aggravating factors. The Trial Judgement failed to give a reasoned opinion as to how the same factors, most notably Đorđević's position and 'superior role', could be applied to increase his sentence multiple times. Further, in double convicting him on the same findings for JCE participation and aiding and abetting the same crimes, the Trial Chamber has additionally applied the same findings to unjustifiably increase his sentence.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

127. The consideration of Đorđević's position regarding the gravity of offence is generally found at paragraphs 2207-2216 (p.875-878). The additional consideration of his role as a superior is specifically considered at 2195 (p.871), 2209-2211 (p.876-877), 2214 (p.878) and 2220 (p.879). The challenged sentence of 27 years imprisonment is found at paragraph 2231 (p.883-884).

**(iii) Precise relief sought**

128. On the basis of all the grounds of appeal as set out above, the Trial Chamber committed various errors which affected the aggravating circumstances for determination of sentence and lacks a reasoned opinion as to justify Đorđević's heavy sentence. As such, his sentence should be reduced accordingly.

**b. SUB-GROUND 19(B): THE TRIAL CHAMBER FAILED TO CONSIDER MITIGATING FACTORS**

**(i) Alleged errors of law and fact**

129. The Trial Chamber erred in law and fact when it failed to consider and apply the proper mitigating factors to Đorđević's sentence. The Trial Chamber failed to take consider Đorđević's willingness to testify, his willingness to participate as a witness in an ongoing war crimes trial in the region, his good behaviour in the UNDU and the courtroom. Further, the Trial Chamber failed to consider that Đorđević acted pursuant to superior orders which, while not a defence, merits mitigation in sentence.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

130. The failure to consider mitigating factors impacts the Trial Chamber's assessment of sentence through paragraphs 2203-2228 (p.874-882). The sole paragraph that addresses any mitigation taken into consideration is 2224 (p.880). The challenged sentence of 27 years imprisonment is found at paragraph 2231 (p.883-884).

**(iii) Precise relief sought**

131. The Trial Chamber failed to properly consider mitigating circumstances in the determination of sentence. As such, his sentence should be reduced accordingly.

**c. SUB-GROUND 19(C): THE TRIAL CHAMBER ERRED IN RELATION TO THE SENTENCING PRACTICES OF THE ICTY**

**(i) Alleged errors of law and fact**

132. The Trial Chamber "took into consideration" the decisions on sentence in *Milutinović et al.* and increased Đorđević's sentence to 27 years on the basis that his role was "more significant" than the accused in that case such that he deserved a "more severe" sentence. No reasoning was given to support such a conclusion. The Trial Chamber did not fully consider or adjudicate upon the role of others. Unlike Lukić, Šainović



and Pavković, Đorđević was not in Kosovo. Even if the Trial Chamber's findings are not disturbed on appeal, Đorđević's role was peripheral compared to others. On no basis could Đorđević's role in events in Kosovo be said to have been more significant than Lukić, Šainović and Pavković. No reasonable Trial Chamber would impose a greater sentence than given to those individuals.

133. Further, the Trial Chamber did not take into account the general sentencing practices of the ICTY or sentences meted out for similar crimes in international criminal law. Compared to other cases, Đorđević's sentence is excessive.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

134. The comparison with the accused in *Milutinović et al.* is at paragraph 2227 (p.882) and general reference to other members of the JCE are outlined in sentencing at paragraphs 2210-2211 (p.876-877).
135. There is no comparison as to the general sentencing practices at the ICTY and in international criminal law, though a reference to this practice is found at paragraphs 2204-2206 (p.874-875).
136. The challenged sentence of 27 years imprisonment is found at paragraph 2231 (p.883-884).

**(iii) Precise relief sought**

137. As the Trial Chamber failed to consider the sentencing practices of the ICTY, on proper analysis, Đorđević's sentence should be reduced accordingly.

**d. SUB-GROUND 19(D): THE TRIAL CHAMBER ERRED AS TO THE SENTENCING PRACTICES OF THE FRY**

**(i) Alleged errors of law and fact**

138. In the Trial Chamber's sentencing analysis, it failed to properly consider the

sentencing practices of the former Yugoslavia in consonance with the laws and respective punishments for crimes as they existed in the FRY during the time period of the crimes of the Indictment. The Trial Chamber erred by quoting the wrong codes and further failed to give proper merit to these considerations in its overall sentence.

**(ii) Identification of the finding or ruling challenged in the Trial Judgement**

139. The analysis of the general practice in the former Yugoslavia is found at paragraphs 2225-2226 (p.880-882). The challenged sentence of 27 years imprisonment is found at paragraph 2231 (p.883-884).

**(iii) Precise relief sought**

140. As the Trial Chamber failed to accurately articulate or consider the sentencing practices of the former Yugoslavia, Đorđević's sentence should be reduced accordingly.

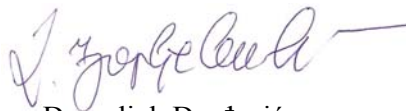
**OVERALL RELIEF SOUGHT**

141. Vlastimir Đorđević respectfully requests that, given the foregoing and full arguments to be contained in his Appellant Brief which will show, individually and cumulatively, errors of law that invalidated the Trial Judgement and errors of fact that created a miscarriage of justice:

- The Appeals Chamber should reverse the Trial Chamber's disposition at paragraph 2230 (p.883) and enter a verdict of NOT GUILTY in respect to Counts 1-5 of the Indictment; or,
- Should the Appeals Chamber consider that any of the verdicts recorded against Vlastimir Đorđević stand, consider the discernible errors as made by the Trial Chamber and reduce the overall sentence accordingly.

*Word Count: 12,248*

**RESPECTFULLY SUBMITTED ON THIS 24<sup>TH</sup> OF MAY 2011**



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