THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz

Registrar: Mr. John Hocking

Date: 15 August 2011

THE PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

REDACTED PUBLIC VERSION

VLASTIMIR ĐORĐEVIĆ'S APPEAL BRIEF

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INTRODUCTION

1. Pursuant to Article 25 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("Statute") and Rule 111(A) of the Rules of Procedure and Evidence ("Rules"), Mr. Vlastimir Đorđević, by and through his Counsel, respectfully submits the following Appellate Brief 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").[1]

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. On the basis of the grounds set out below, Đorđević invites the Appeals Chamber to reverse the Trial Judgement in whole or in part. Alternatively, Đorđević asks the Appeals Chamber to reduce the manifestly excessive sentence that the Trial Chamber imposed on him.

4. During the Indictment period, Đorđević was Chief of the RJB and an Assistant Minister of the Interior. In 1999, his role in relation to Kosovo was peripheral. This limited role is shown by the Trial Chamber's own findings Đorđević did not plan, order or instigate a single crime in Kosovo.[2] Instead, he remained in Belgrade during this period of war and focused on attending to the pressing security situation brought on by the NATO bombing campaign over the whole of the FRY. Bearing the totality of the record, the Trial Judgement grossly overstates Đorđević's involvement in the Indictment crimes and unfoundedly links his actions to a JCE. On the basis of the following grounds of appeal, the Appeals Chamber is invited to correct these errors of law and rectify a miscarriage of justice.

[1] Vlastimir Đorđević reserves the right to raise any and all additional errors of law or fact that may become apparent to him when an official translation, into his own language, becomes available.
[2] TJ, paras.2167-2168.

5. In the following grounds, where reference is made to an error of law, it is one that, individually or cumulatively, invalidates the verdict. Where reference is made to an error of fact, it is an error that no reasonable Trial Chamber would have made and one that, individually or cumulatively, occasioned a miscarriage of justice.

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

6. The Trial Chamber erred in law and fact when (i) assessing the intentions 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.

7. 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.

8. 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. The Trial Chamber failed to consider the reality of the situation faced by the FRY, in general, and by Đorđević, in particular. Instead, the Trial Chamber drew its conclusions in an artificial vacuum. It failed to assess the shortcomings of the KVM and the nature of a NATO threat that ultimately killed hundreds, injured thousands and devastated military and civilian infrastructure. While the Trial Chamber did touch upon the nature of the KLA threat in greater (but still inadequate) detail, its findings in this regard are wholly erroneous and confounded by

the evidence. The Trial Chamber should not have drawn conclusions as to the intentions of JCE members, the targets and proportionality of military and police actions, without an assessment of the threats that the FRY faced. Proportionality cannot be determined otherwise. In these circumstances, the Trial Chamber's conclusion that the entire Kosovo Albanian population came to be viewed as the enemy cannot be sustained.[3]

FAILURE TO CONSIDER THE VITIATORY BREACH OF THE OCTOBER AGREEMENTS BY THE KVM

9. The October Agreements of 1998 were signed by the FRY but not by the KLA. The KLA did not respect them. The Trial Judgement does not suggest that it did. Rather, the KLA "used ... the partial withdrawal of VJ and MUP units following the October Agreements to regroup, regain control over, and launch attacks in ... Kosovo."[4] Additionally, after the October Agreements, the KLA came to hold more territory.[5] The failure of the KVM to prevent this occurring is properly characterised as a vitiatory breach – the FRY should not have been considered to be bound by its side of the bargain just to allow the KLA to pour into the gaps left under the noses of the KVM. The October Agreements themselves reserved the right to respond to KLA activities.[6]

10. This error impacted the Trial Chamber's assessment of the FRY's conduct. The Trial Chamber erroneously assessed the FRY's actions against the October Agreements, characterising actions as "breaches" of those agreements thus evidence of a JCE.[7] In reality, the October Agreements were soon dead in the water. The international community recognised as much by forcing further negotiations in Rambouillet and

[3] TJ, para.2018.
[4] TJ, para.2016.
[5] TJ, para.382.
[6] P837, Art.III.
[7] Section XII.B.2(ii) considered 10 factors as indicative of a JCE. One of these (disproportionately occupying 10 out of the 56p.) was characterised as the "violation" of the October Agreements by the FRY. *See also* TJ, para.430(occupation of observation posts described as a "breach"); TJ, para.2016(VJ and MUP operations in Podujevo in December 1998 described as a "breach" despite TJ, para.392, noting the KLA killed the last Serb living there); TJ, para.418(the Račak operation described as a "watershed" despite being a KLA headquarters at TJ, para.401, with a continuing "overt" KLA presence at para.410); TJ, para.430(comparing the 27 observation posts then occupied by the MUP with the nine supposedly "authorised"); TJ, para.435(comparing 15 VJ companies deployed by 3 March 1999 with the three supposedly "allowed"); TJ, para.438(characterising the introduction of new equipment to Kosovo as a "violation").

Paris.[8] The Trial Chamber criticised the FRY's conduct at the time of negotiations as being indicative of a JCE.[9] No reasonable Trial Chamber would assess the FRY's conduct against such a yardstick without sufficient evidence as to what actually happened during these negotiations. The *Milutinović et al.* Trial Chamber, with more of the relevant evidence before it, recognised that these negotiations were biased against the FRY.[10]

WHOLLY ERRONEOUS CONSIDERATION OF THE KLA THREAT

Size

11. The Trial Chamber seriously erred in its assessment of the size and nature of the KLA threat. The Trial Chamber concluded that in the second half of March 1999, the KLA had approximately 10,000 members. To reach this conclusion it preferred the evidence of Ciaglinski (an international observer) to Zyrapi (the KLA's Chief of Staff). Zyrapi's evidence was that the KLA had 17,000-18,000 soldiers.[11]

12. No reasonable Trial Chamber could have preferred Ciaglinski's evidence to Zyrapi on this issue. The Trial Chamber failed to consider that Ciaglinski said that he found it "almost impossible" to estimate the numbers of KLA in Kosovo. He plucked the number of 10,000 as an example figure when put on the spot in the *Milošević* trial.[12] By contrast, given his position, no witness was better placed than Zyrapi to give an accurate figure. The Trial Chamber rejected Zyrapi's evidence on the basis that he "may" have had an interest in presenting a higher figure.[13] This rationale was unexplained and flawed: in fact, Zyrapi would have had an interest in presenting a lower figure than the reality in order to imply that the FRY's actions were disproportionate. Finally, the Trial Chamber failed to consider the evidence of international observers other than Ciaglinksi, whose evidence was that the KLA's

[8] TJ, paras.432-434.
[9] *See* TJ, paras.2017,2020[to the effect that planning to "clear the territory of terrorists" in the event of a NATO attack was significant because international diplomatic negotiations were continuing].
[10] *Milutinović* TJ,para.410.
[11] TJ, para.1540.
[12] P833(T.3336:5-6).
[13] TJ, para.1540.

membership was potentially unlimited.[14] The Trial Chamber's conclusion that the VJ and MUP outnumbered the KLA by more than 7:1[15] was therefore wholly erroneous.

Tactics

13. Equally importantly, the Trial Chamber failed to consider the KLA's tactics when assessing the FRY's actions and inferring a JCE. The KLA controlled 50% of the territory in Kosovo.[16] The Trial Chamber relied on KVM observations that the KLA used "small calibre weapons".[17] In its final analysis, it ignored evidence that the KLA possessed anti-tank weapons, heavy machine guns, RPG's, Zoljas and 82- and 120-millimetre mortars among other things.[18] The Trial Chamber also ignored evidence that the KLA made it almost impossible for FRY forces to differentiate between civilians and fighters. The Trial Chamber cited evidence that victims protested "We are simple farmers. We are not KLA".[19] It failed to consider the evidence of an international observer (Drewienkiewicz) that the KLA was opportunistic – proclaiming to be farmers by day but actually being KLA by night.[20] He explained that the KLA operated from civilian areas but, when FRY forces responded, it would disappear to make it seem that there was no KLA presence. A "big claim" could then be made that civilians were being attacked.[21]

14. No consideration was given to Drewienkiewicz's evidence that the KLA declared that 1999 was to be the year of independence for Kosovo.[22] His evidence was that during the Rambouillet discussions (in February 1999), Serb activities "declined significantly" whereas KLA actions declined "much less appreciably."[23] Moreover, the KLA became "more opportunistic" during this time.[24] Drewienkiewicz's notebook of 1 March 1999 described the impact of the return of the KLA leadership

[14] *See* [REDACTED].
[15] TJ, para.2061.
[16] TJ, para.1557.
[17] TJ, para.368.
[18] TJ, para.1567. No comparison was performed in Section XII.B.2(a)(ii)(e): "*The disproportionate use of force in 'anti-terrorist actions'*".
[19] TJ, paras.468,1600.
[20] T.6378:16-17.
[21] P997(T.7878:7-10).
[22] P996, para.114.
[23] P996, para.189.
[24] *Id.*

from the negotiations, how KLA actions were becoming "increasingly unrestrained" including activity in areas which had previously been peaceful.[25]

15. No consideration was given to the evidence of Maisonneuve (another international observer) that by 23 January 1999 the KLA had completed plans for a more general resumption of hostilities.[26] During the Rambouillet discussions, acts of provocation came mainly from the KLA.[27] Maisonneuve described how he had earlier been told by a KLA commander that the KLA was coordinated and had a strategy.[28] Maisonneuve's evidence was that the KLA informed the KVM that taking their campaign into towns was an "active element" in the next military step of the KLA.[29] David Wilson, a British Army officer who Maisonneuve described as a "fairly astute guy," wrote in an assessment, dated 15 March 1999 addressed to Drewienkiewicz, that the KLA would return to "full scale violence" and take the fight into towns and cities if the Serb side failed to sign an agreement.[30] In the end, as the Trial Chamber noted, neither side signed the agreement.[31] Maisonneuve conceded that there was greater KLA recruitment during the Rambouillet discussions and that the KLA was positioning itself for future action.[32] The Trial Chamber considered none of this when assessing the intentions of JCE members and when holding that FRY action was disproportionate.

FAILURE TO CONSIDER THE NATO THREAT AND ITS COMBINED EFFECT WITH THE KLA

16. The Trial Judgement contains no assessment of the NATO threat. NATO dropped at least 23,614 bombs[33] (i.e. over 3000 explosions per day, including cluster munitions). At least 500 civilians were killed as a result.[34] It is surprising that the Trial Chamber considered it appropriate to assess the proportionality of FRY actions devoid of any consideration of the threat that the FRY actually faced. By way of example, the Trial

[25] D374.
[26] P853 (T.11119:8-12); P873, p.3.
[27] *Id.* (T.11120:16-19).
[28] *Id.* (T.11044:10-12).
[29] *Id.* (T.11119:13-14).
[30] *Id.* (T.11126:14-11127:3).
[31] TJ, para.433.
[32] P853 (T.11121:7-11).
[33] ICTY Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para.54.
[34] *Id.*

Chamber failed to consider evidence that NATO had decided to support the KLA and "regime change" in Serbia and that the KLA was a tool to make this happen.[35] The FRY suspected, and the suspicion was a reasonable one, that the NATO and KLA threats were closely related.[36] It was thought that the KLA sought to secure areas in order to facilitate the supply of weapons to it by NATO.[37] There was credible evidence that, during the NATO bombing campaign, NATO forces were secretly on the ground in Kosovo fighting alongside the KLA.[38] To assess the actions of FRY forces and impose criminal liability upon Đorđević on the basis that actions were disproportionate, without considering the evidence of the threat faced, is a fatal flaw in the Trial Chamber's reasoning.

RESULTING ERRORS IN FINDING THAT A JCE EXISTED AND THAT AN ATTACK WAS DIRECTED AGAINST THE CIVILIAN POPULATION

17. The plans in early 1999, which the Trial Chamber characterised as indicative of a JCE,[39] were explicitly limited and contingent plans to be activated in the event of an attack by NATO. Such planned operations were proportionate and necessary to defend the territorial integrity of the FRY before NATO gained a stranglehold such as to wrest Kosovo from the FRY's grasp. They targeted particular areas in order to prevent the introduction of NATO ground troops.[40] The Trial Judgement fails to establish otherwise.[41] The Trial Chamber failed to consider the possibility that military plans and actions, that it considered to be indicative of a widespread and systematic attack against a civilian population, were equally consistent with a necessary blitz against the KLA in the most difficult of circumstances.

18. A crucial step in the Trial Chamber's reasoning that the attack was directed against the civilian population, so as to engage Article 5 of the Statute, was that "the vast

[35] [REDACTED].
[36] D767; *see generally* P1335, pp.3-10.
[37] D750, para.21.
[38] D170; D549; D545.
[39] TJ, paras.2020-2026.
[40] For TJ, paras.2020-2026: *see* D179(VJ General Staff Directive of 16 January 1999-explicitly targeted to prevent the introduction of a multinational NATO brigade); D343(3rd Army Order of 27 January 1999-explicitly to prevent the forceful introduction of a NATO Brigade); P889(Priština Corps order of 16 February 1999:explicitly targeted to break up KLA forces in three strategic areas); P85(Head of Staff presented three mopping-up operations in same three strategic areas as P889, *see* TJ, fn.4677).
[41] *Contra* TJ, paras.2020-2026.

majority of the acts of the Serbian forces in the period of March to June 1999 were civilians".[42] Respectfully, this sentence, in a crucial part of the Trial Judgement, does not make sense. Elsewhere, the Trial Chamber relied on what it described as the "disproportionate use of force in 'anti-terrorist' operations". It held that civilian casualties were "grossly excessive" which weighed "convincingly against a finding" that attacks were proportionate or necessary or directed against the KLA.[43] But without any assessment of the threats the FRY faced, no conclusion as to the proportionality of FRY actions should have been drawn. The Trial Chamber's conclusion that the civilian population was the "primary target" is therefore unsustainable.[44]

CONCLUSIONS AND RELIEF SOUGHT

19. The consequences of the Trial Chamber's failure to consider the threats faced by the FRY, in general, and Đorđević, in particular, invalidates its conclusion that a JCE existed and that an attack was directed against the civilian population. The Appeals Chamber is invited to quash all of Đorđević's convictions: the vacuum in which the Trial Chamber performed its analysis renders the verdict unsustainable.

[42] TJ, para.1599.
[43] TJ, para.2055; *see* TJ, paras.915,980,1593,1707,1923,2007-2008,2010,2016,2052-2069,2083-2085,2154, 2178,2180.
[44] TJ, para.1600.

GROUND 2: ERRORS OF LAW IN HOLDING THAT JCE EXISTS IN CUSTOMARY INTERNATIONAL LAW

20. While the Trial Chamber was bound to apply the jurisprudence of the Appeals Chamber's 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, cogent reasons exist for the Appeals Chamber to revisit this issue again and depart from its previous jurisprudence.

21. The common thread running throughout the following submissions is that the foundations of JCE identified in *Tadić* are shallow and uncertain. They did not support all of the levels of JCE identified in that case. Nor do they support the subsequent extension of JCE to leadership cases when an accused is structurally and geographically remote from a crime and the physical perpetrator is not a member of the JCE. Lest the jurisprudence of this Tribunal be marginalised in other fora and in future generations, a root and branch review is necessary.

STANDARD FOR THE APPEALS CHAMBER TO DEPART FROM PREVIOUS DECISIONS

22. Đorđević respectfully asks the Appeals Chamber to depart from previous decisions, most notably the *Tadić* Appeal Judgement that JCE exists in the form described therein and the refusal in *Milutinović et al.* and *Krajišnik* to revisit that decision.

23. The Appeals Chamber may depart from its previous decisions according to, what President Robinson recently termed, the *Aleksovski* principle.[45] In *Aleksovski*, the Appeals Chamber held that it should normally follow its previous decisions, but that it should be free to depart from them for cogent reasons in the interests of justice.[46] Instances where cogent reasons require a departure from a previous decision include cases where the previous decision was decided on the basis of a wrong legal principle

[45] *Stanišić Appeal Decision*, Separate Opinion of Judge Robinson, para.21.
[46] *Aleksovski* AJ, para.107.

or made through a lack of care, usually because the judges were ill-informed about the applicable law.[47]

24. In *Kordić and Čerkez*, the Appeals Chamber (by a majority of 3:2) departed from previous decisions holding that Article 5 of the Statute did not permit convictions for both an underlying crime and persecution by that same crime.[48] The Appeals Chamber held that cogent reasons warranted a departure from the previous jurisprudence because they had applied the relevant legal test incorrectly.[49]

25. In *Semanza*, the Appeals Chamber departed from a previous ruling on when the time limit for provisional detention of a suspect begins to run because the previous decision relied on a version of the ICTR Rules which had since been amended.[50]

26. In *Zigić*, the Appeals Chamber (by majority) departed from a previous ruling that it had the power to reconsider an Appeal Judgement because the right recognised therein had been abused with a frivolous motion.[51]

27. In *Stanišić and Župljanin*, while dismissing a motion as moot through the passage of time, President Robinson explained that he would have granted an appeal against a refusal of provisional release and departed from a previous decision of the Appeals Chamber because its assessment of the principles was "problematic" and attached too much weight in its reasoning to the dismissal of a 98*bis* motion as a reason to refuse provisional release.[52]

28. Applying the above standards below, it is respectfully submitted that cogent reasons exist for the Appeals Chamber to depart from its previous jurisprudence on JCE.

[47] *Id.*, para.108.
[48] *See infra* Ground 18(B).
[49] *Kordić* AJ, para.1040.
[50] *Semanza* Appeal Decision, paras.92-97; *see also, Id.*, Separate Opinion of Judge Shahabuddeen, para.38.
[51] *Žigić* Appeal Decision, para.9.
[52] *Stanišić* Appeal Decision, Separate Opinion of Judge Robinson, para.16.

THE METHODOLOGY IN TADIĆ WAS PROBLEMATIC

29. The methodology used in *Tadić* in order to divine rules of customary international law was fundamentally flawed. *Tadić* relied on certain similarly worded provisions of two international treaties: Article 25(3)(d) of the Rome Statute[53]and Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombing.[54] It relied on eight post-World War II cases in support of the existence of JCE I and JCE II, two post-World War II cases in support of JCE III, as well as a number of unpublished decisions of the Italian Court of Cassation.

30. The Appeals Chamber's approach in *Tadić* was challenged in *Milutinović et al*. As noted above, the Appeals Chamber refused to depart from its previous decision. It is respectfully observed, however, that the Appeals Chamber declined to review the methodology in *Tadić*. It preferred to simply state that it was satisfied that the state practice and *opinio juris* reviewed in *Tadić* was sufficient to "permit the conclusion" that JCE exists in customary law.[55] The same conclusion was reached recently in *Krajišnik* when, disposing of arguments made by JCE Counsel, the Appeals Chamber approved of the "detailed reasoning" in *Tadić*.[56] (The Appeals Chamber additionally cited two post-World War cases (*Einsatzgruppen* and *Justice*) to support the conclusion that JCE applies to large-scale cases.)

31. But a rule of customary international law is demonstrated by uniformity and consistency of state practice together with *opinio juris*.[57] As is well known, decisions of international or perhaps even national tribunals may provide some evidence of custom. But *Tadić* failed to explain how–even if it correctly assessed the authorities it considered–they could establish a rule of criminal liability in customary international law. Moreover, many of the cases *Tadić* relied on were not published at all or only relatively obscurely. Even if they were published, their legal reasoning (if there was any) was scarce such that the basis on which they imposed liability was often unclear

[53] Adopted on 17 July 1998 with 120 votes in favour, 7 against and 21 abstentions.
[54] Adopted by consensus by General Assembly Resolution 52/164, 15 December 1997.
[55] *Ojdanić* JCE Decision, para.29.
[56] *Krajišnik* AJ, para.659.
[57] Brownlie, pp.7-8.

or even contradictory between cases.[58] A contrast of the Appeals Chamber's methodology in *Tadić* with its approach in *Erdemović* is striking.[59]

THE TADIĆ APPEALS CHAMBER WAS ILL-INFORMED ABOUT THE APPLICABLE LAW AND SUBSEQUENT CASES HAVE ATTACHED TOO MUCH WEIGHT TO QUESTIONABLE FACTORS

32. Three submissions are made. First, the *Tadić* Appeal Judgement failed to consider the approach of the International Military Tribunal at Nuremberg ("IMT"). Second, subsequent developments show that the *Tadić* Appeals Chamber misunderstood the Rome Statute. Third, the Appeals Chamber has repeatedly misdirected itself as to the weight to be placed on the cases relied upon.

Tadić's Failure to Consider the Judgement of the IMT

33. The *Tadić* Appeals Chamber did not consider the approach of the most authoritative post-World War II trial of them all, the IMT. The *Rwamakuba* Appeals Chamber, perhaps alert to this oversight, relied on the language of the London Charter and the indictment presented to the IMT, which it said had "much in common with the language of the *Tadić* Appeal Judgement".[60] The Appeals Chamber has never, however, grappled with the approach of the IMT's judgement.

34. The London Charter for the IMT was signed on 8 August 1945 by four victorious powers. Nineteen other States signed onto the Charter thereafter.[61] Unlike the later Control Council Law No. 10 (discussed below and hereinafter "CCL10") it was an international agreement. Article 6 of the London Charter provided in relevant part as follows:

[58] *See* Boas, Bischoff & Reid, Vol.I/p.20; Danner & Martinez, p.110,fn.141.
[59] *See* the summary by Kreβ, p.662, concluding that "*Erdemović* stands out for the sincere, transparent and therefore most stimulating attempt of five appellate judges to cope with the fundamental methodological problem of how to determine the applicable law where the sources of international law do not in their entirety provide afor a clear cut answer."
[60] *Rwamakuba* JCE Decision, para.24.
[61] Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, Paraguay.

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> **(a) CRIMES AGAINST PEACE**: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, ***or participation in a common plan or conspiracy*** for the accomplishment of any of the foregoing;
>
> **(b) WAR CRIMES**: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> **(c) CRIMES AGAINST HUMANITY**: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or ***execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan***. (emphasis added)

35. It can therefore be seen that Article 6 criminalised "participation in a common plan" in relation to crimes against the peace. Importantly, no such wording appeared in relation to war crimes or crimes against humanity.

36. What though should be made of the final paragraph, especially that part underlined above, which imposes responsibility on those participating in a common plan or conspiracy to commit "any of the foregoing crimes"?

37. A clear answer was given in the IMT's judgement:

> "In the opinion of the Tribunal *these words do not add a new and separate crime to those already listed. The words are designed to*

> *establish the responsibility of persons participating in a common plan.* The Tribunal will therefore disregard the charges […] that the defendants conspired to commit war crimes and crimes against humanity *and will consider only the common plan to prepare, initiate and wage aggressive war.*"[62]

38. Therefore, the IMT explicitly rejected the application of "common plan" liability to war crimes and crimes against humanity. Contrary to the Appeals Chamber's reasoning in *Rwamakuba*, the IMT actually rejected that aspect of the Nuremberg Indictment which sought to apply conspiracy to all of the offences identified in the Charter.

39. It might be tempting to try to answer this submission by saying that the IMT equated the concept of liability for participation in a "common plan" with the distinct crime of "conspiracy". The answer would go that, although the IMT rejected the separate crimes of conspiracy to commit war crimes or crimes against humanity, it did not reject common plan liability for participation in underlying crimes.

40. Such an answer is unsustainable. As academics have observed:

> The use of 'conspiracy' in this regard is misleading as it is apt to cause confusion between this type of liability and the separate (common law) offence of conspiracy, which is an agreement to commit an offence, and does not require that any further action is taken in pursuance of that agreement. […] The Nuremberg and Tokyo IMTs, whilst both using the term conspiracy, were dealing with the situation where plans were put into effect.[63]

41. In other words, when rejecting conspiracy as applied to crimes against humanity and war crimes, the IMT rejected common plan liability as well. In this vein, Professor Osiel has explained that the IMT's verdict was "cautious" and displayed "sensitivity to restricting criminal liability within bounds of moral culpability that the ICTY would do well to retain and more closely observe… [i]t is often a pure fiction to contend that a far flung array of people, engaged in highly disparate activities, ever really reached an agreement shared by all."[64]

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[62] Nuremberg NMT Judgement and Sentence (1947) 41 AJIL 172, 224 (emphasis added).
[63] Cryer, Friman, Robinson & Wilmshurst, pp.304-305.
[64] Osiel, pp.1793-4.

42. Nor is this a recent observation limited to academics or those who represent Đorđević. Henri Donnediue de Vabres, one of the four judges at the IMT, later explained that conspiracy had been "designed only as a *form of participation* in crime[s] against [the] peace".[65] He continued that the sole purpose of the language in the final paragraph of Article 6 was to "identify the categories of the persons responsible" (i.e. rationae personae).[66]

43. Therefore, the IMT explicitly declined to rely on JCE or anything similar in order to convict accused of war crimes or crimes against humanity. It eschewed imposing such sweeping liability. The Appeals Chamber was ill-informed in *Rwamakuba* when saying that the defendants at Nuremberg were convicted on a "basis equivalent" to JCE.[67]

44. In any event, on no analysis does the IMT support JCE as a form of principal liability. The London Charter did not distinguish between principal and accessorial liability. As Héctor Olásolo has observed, the IMT judgement "has very little to do with the notion of co-perpetration based on [JCE]."[68] On no basis does the IMT Judgement support a conclusion that JCE is a form of commission.

45. There is, therefore, nothing in the London Charter or IMT Judgement that supports JCE as applied by the Appeals Chamber. The most authoritative WWII tribunal declined to utilise JCE or anything similar.

Tadić Misunderstood the Rome Statute

46. The *Tadić* Appeals Chamber misunderstood the Rome Statute and misapplied Article 25(3)(d) (and the similarly worded provision in the Terrorism Convention).

47. Article 25(3) of the Rome Statute sets out punishable forms of liability. Article 25(3)(a) refers to a person who "commits" a crime "whether as an individual, jointly

[65] Donnedieu de Vabres, p.249(emphasis added).
[66] *Id.*, p.250.
[67] *Rwamakuba* JCE Decision, para.15.
[68] Olásolo-*Criminal Responsibility*, p.213.

with another or through another person". Article 25(3)(b) covers the individual who "orders, solicits or induces the crime". Article 25(3)(c) deals with the person who "aids, abets or otherwise assists". Article 25(3)(d) provides that a person shall be criminally responsible if that person:

> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime.

48. The above structure distinguishes "perpetration" of a crime giving rise to liability as a principal (Article 25(3)(a)) from "participation" in a crime committed by a third person giving rise to accessorial [...] liability" (Articles 25(3)(b)-(d)).[69]

49. On 29 January 2007, an ICC Pre-Trial Chamber in *Lubanga* rejected the *Tadić* Appeals Chamber's conclusion that Article 25(3)(d) of the Rome Statute supports principal liability on the basis of the subjective intent of a JCE member.[70] *Lubanga* instead based the distinction between principal and accessorial liability on the notion of control of the crime.[71] *Lubanga* held that Article 25(3)(d) was "closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY" but defined it as a "residual form of accessory liability".[72] The *Lubanga* Pre-Trial Chamber explained that:

> Not having accepted the objective and subjective approach for distinguishing between principals and accessories to a crime, the Chamber considers, as does the Prosecution, unlike the jurisprudence of the Ad hoc tribunals, that the Statute embraces the

[69] *See* Olásolo-*Criminal Responsibility*, p.26.
[70] *Lubanga* Confirmation Decision, para.338.
[71] *Id.*, paras.333-334.
[72] *Id.*, paras.335-337.

> third approach, which is based on the concept of control of the crime.[73]

50. The ICC adopted the same approach in *Katanga and Ngudjolo,*[74] *Bemba*[75] and *Bashir*.[76]

51. Olásolo explains the ICC's approach in the following way:

> [I]n those cases in which a plurality of persons are involved in the commission of a crime, only those who share the control of the crime as a result of the essential character of their contributions […] are considered to be co-perpetrators [pursuant to Article 25(3)(a)]. The rationale behind this notion is that those individuals in charge of essential tasks can 'frustrate' the implementation of the common plan by not carrying out their contributions and, therefore, each of them retains joint control over the commission of the crime.[77]

52. By contrast, sub-paragraphs 25(3)(b)-(d) "provide for several forms of participation which give rise to accessorial (as opposed to principal) liability."[78] Article 25(3)(d) does not embrace a subjective approach to the distinction between principals and accessories to a crime.[79]

53. Therefore, the ICC has decisively rejected JCE as a form of principal liability in the way that it has been applied at the ICTY and ICTR. This undermines the Appeals Chamber's previous reliance on the Rome Statute as support for JCE as form of commission.

54. Moreover, Article 25(3)(d) differs from JCE in other ways not explicitly acknowledged by ICC Pre-Trial Chamber in *Lubanga*.

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[73] *Id.*, para.338.
[74] *Katanga* Confirmation Decision, paras.478.
[75] *Bemba* Confirmation Decision, paras.348-351.
[76] *Bashir* Decision, para.210.
[77] Olásolo-*Criminal Responsibility*, p.268, *citing Lubanga* Confirmation Decision, paras.342,347 and *Katanga* Confirmation Decision, para.525.
[78] *Id.*, p.26, *citing Lubanga* Confirmation Decision, para.320, and *Katanga* Confirmation Decision, paras.466-467.
[79] *Id.*, pp.53-54.

a. First, Article 25(3)(d) does not require JCE members to share the common criminal purpose of the group. It only requires them to be aware of the common criminal purpose. Article 25(3)(d) therefore provides for a residual and broader form of accessorial liability than JCE.

b. Second, Article 25(3)(d) excludes JCE III because Article 30 predicates criminal responsibility on intent and knowledge. The *dolus eventualis* standard inherent in JCE III is inadequate.

55. It is, therefore, difficult to sustain the *Tadić* Appeals Chamber's conclusion that Article 25(3)(d) of the Rome Statute supports JCE as a form of principal liability or at all.

The Appeals Chamber has Repeatedly Misdirected Itself as to the Weight to be Placed on Certain Post-WWII Cases

56. The *Tadić* Appeals Chamber relied on post-WWII cases in support of JCE without considering whether those cases should be relied on and/or what weight, if any, they should be given. Since *Tadić*, the Appeals Chamber has placed particular reliance on the *Einsatzgruppen*, *Justice* and *RuSHA* cases to support its application of JCE to large-scale cases, again without any consideration of what weight they should be given.[80]

57. Professors Danner and Martinez have observed that the cases relied upon in *Tadić* broadly fall into two groups: instances of mob violence or prison camps. They argue, it is submitted correctly, that in the cases relied on as support for JCE I, the accused appear to have been very closely involved in the perpetration of the *actus reus* of the crime. These cases are actually examples of co-perpetration in the sense of joint commission in Article 25(3)(a) the Rome Statute. They do not support the sprawling JCE that has been employed by this Tribunal.[81]

[80] In particular *see*: *Rwamakuba* JCE Decision, paras.15-21; *Karemera* JCE Decision, para.14; *Brđanin* AJ, para.404; *Krajišnik* AJ, para.659.
[81] Danner & Martinez, p.110.

58. The *Kupreskic* Trial Chamber, presided by Judge Cassese, concluded that "great value" could be put on the decisions of courts operating under CCL10 (such as *Einsatzgruppen*, *Justice* and *RuSHA*). Indeed, he seemingly put them on a par with the IMT.[82]

59. But in *Erdemović*, Judge McDonald and Judge Vohrah rejected a defence of duress, even though it had been held in *Einsatzgruppen*, that "[n]o court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever." They said that the *Einsatzgruppen* judgement was of "questionable" international character and had applied American law instead of "purely international law".[83] They therefore declined to apply it. Judge Cassese dissented.

60. By contrast with Judge McDonald and Judge Vohrah, the *Tadić* Appeals Chamber relied on *Einsatzgruppen* as an example of JCE I. But the Appeals Chamber actually cited the prosecution's opening and closing argument rather than the actual judgement.[84] The Appeals Chamber's approach is therefore inconsistent and flawed.

61. Crucially, as to the status of the CCL10 cases, the *Kunarac* Appeals Chamber affirmed the approach of Judges McDonald and Vohrah over that of Judge Cassese. The *Justice case* had suggested that a policy or plan was indeed a necessary element of a crime against humanity. The *Kunarac* Appeals Chamber rejected that approach. It held that the attack under a crime against humanity does not need to be supported by a policy or plan.[85] The Appeals Chamber held, relying on a decision of the High Court of Australia in *Polyukhovich*, that the *Justice* case did not state or establish customary international law.[86]

62. By contrast, the *Brđanin* Appeals Chamber relied on the *Justice* case to hold that physical perpetrators do not need to be members of the JCE. But the *Justice* case did not clearly apply JCE. For example, it did not demand proof of a common *mens rea*

[82] *Kupreškić* TJ, para.541.
[83] *Erdemović* AJ, Joint Separate Opinion of Judges McDonald and Vohrah, paras.53-54.
[84] *Tadić* AJ, para.200,fn.245. This point was picked up by Dr. Kevin Jon Heller, *see* "*An Egregious Error in Tadic*", published 8 July 2010:http://opiniojuris.org/2010/07/08/an-egregious-error-in-tadic/(last accessed 15 August 2011).
[85] *Kunarac* AJ, para.98.
[86] *See Kunarac* AJ, fn.114, *citing Polyukhovich*, Opinion of Justice Brennan, para.62.

between alleged JCE members – being "connected" with criminal plans was enough under the specific wording of CCL10. Further, the defendants were not convicted of individual crimes sites as is the practice of this Tribunal. Rather, the defendants were convicted of taking part in a "system of cruelty and injustice". Again, the Appeals Chamber's use of the *Justice* case has been inconsistent and flawed.

63. Finally, the Appeals Chamber has relied upon the *RuSHA* case to support large-scale JCE convictions. The *RuSHA* enterprise of Germanization extended throughout the Nazi empire: a government policy that "was put into practice in all of the countries, twelve in number, as they were ruthlessly overrun by Hitler's armed forces."[87] On closer analysis, however, even if the *RuSHA* case is considered authoritative, it does not support JCE as applied by the Appeals Chamber. The *RuSHA* case suggested a number of interlocking vertical joint enterprises connecting perpetrators to the accused. The *RuSHA* indictment alleged, for example, that the defendants had participated in the Nazis' "systematic program of genocide" through their connection to "plans and enterprises" involving, *inter alia*, kidnapping the children of Eastern workers, Germanization of enemy nations, and persecuting Jews.[88] Moreover, the *RuSHA* tribunal limited criminal responsibility to the specific enterprise in which a defendant participated rather than a broader all-encompassing JCE. Creutz, for example, was convicted of participating in kidnapping alien children, forced resettlement, forced Germanization, and slave labor, but not held responsible for the overarching "systematic program of genocide."[89]

64. Dicta in the post-WWII cases themselves is instructive as to the caution with which they should be treated. Whereas the *Justice* and *Ministries* cases held that the tribunals were based on international authority and retained international characteristics,[90] in *Farben* (tried by the same tribunal as the *Justice, Einsatzgruppen and RuSHA* cases), one of the judges observed that "this Tribunal is an American Court constituted under American Law".[91] Moreover, the Chief Prosecutor in the *Justice* case told the tribunal that "[a]lthough this Tribunal is internationally

[87] RuSHA, V TWC 96.
[88] *See* Heller, p.282, *citing* RuSHA, Indictment, para.2, IV TWC 609.
[89] Heller, p.283, *citing* RuSHA V TWC 155.
[90] *Justice* III TWC 958, Art.II; *Ministries* Order of 29 December 1947, XV TWC 325.
[91] *See* Heller, p.110.

constituted, it is an American court. The obligations which derive from these proceedings are, therefore, particularly binding on the United States."[92] In the *Ministries* case, Judge Power (dissenting) argued forcefully that some of the convictions in that case were "incomprehensible", devoid of legal reasoning and "not justified by the law or the facts." [93] Academics too have noted that the judgements can be hard to follow and often do not clearly set out the bases of liability.[94]

65. Whereas the London Charter under which the IMT took place was international and subsequently approved by the consensus of the General Assembly, the Allied CCL10 was a mere agreement among the four victorious powers. It was never confirmed by the U.N. or any other international body. Article II(2) of Allied CCL10 provided as follows:

> Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein ***or (d) was connected with plans or enterprises involving its commission*** or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country. (emphasis added)

66. Therefore CCL10 distinguished principal liability from each of accessory liability and "being connected with plans or enterprises". This plain language creates a broader and residual form of responsibility. Contrary to the Appeals Chamber's analysis in *Rwamakuba*,[95] CCL10 does not support JCE as a form of principal liability.[96]

67. In any event, the caselaw decided under CCL10 did not in practice distinguish between principals and accessories.[97] Therefore, to the extent that any post-WWII

[92] *See* Heller, p.110.
[93] *Ministries*, p.878.
[94] *See* Heller, p.252 and authorities discussed therein.
[95] *Rwamakuba* JCE Decision, para.18.
[96] Olásolo-*Criminal Responsibility*, p.209.
[97] Olásolo-*JCE*, p.272.

cases applied anything thought to resemble JCE[98], the liability it gave rise to was not *per se* principal or accessorial and cannot be transposed to leadership cases such as Đorđević. The caselaw must be viewed as turning on the particular wording of CCL10.

COGENT REASONS IN THE INTEREST OF JUSTICE TO ABOLISH JCE III

68. The frailty of the Appeals Chamber's reliance on post-WWII cases is most evident in relation to the existence of JCE III. This issue arises for the Appeals Chamber's consideration in two ways. First, the Trial Chamber relied on JCE III as an alternative to JCE I for some specific crime sites[99] and more generally.[100] Secondly, the Prosecution, in its appeal, asks the Appeals Chamber to use JCE III to enter additional convictions for rape as a form of persecution. Therefore, even if Đorđević's appeal is unsuccessful such that his convictions remain undisturbed on the basis of JCE I, this challenge to existence of JCE III has to be decided in order to dispose of the Prosecution's appeal.

69. The Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia recently rejected the *Tadić* Appeals Chamber's methodology and conclusion as to the existence of JCE III.[101] That Chamber concluded that the authorities relied on in *Tadić* did not constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law.[102] The Appeals Chamber is respectfully invited to revisit its analysis in *Tadić* and follow the ECCC's lead.

70. In order to hold that JCE III exists, *Tadić* relied on two British cases: *Essen Lynching* and *Borkum Island*. The authority of each case is questionable. There is not even a reasoned judgement in *Borkum Island.* Indeed, the case was decided by military officers rather than anyone legally qualified.[103] In *Essen Lynching* there is no

[98] It is noted that the discussion of U.S. cases and the single British case of *Schonfeld* in the 1949 Law Report of the UN War Crimes Commission summing up at Volume XV, p.96, contains certain similarities to JCE.
[99] TJ, paras.2139,2141,2145,2147,2153,2158.
[100] TJ, para.2158.
[101] It approved of the *Tadić* Appeals Chamber's conclusions as to the existence of JCE I and II.
[102] ECCC Decision, para.83.
[103] *See* Koessler, p.190, where he explains that in this case it was composed of seven officers, none of whom had legal training.

indication that the prosecution relied on common design and there were no conclusions by a Judge Advocate so it is unclear what *mens rea* standard the Tribunal applied. The authorities relied upon in *Tadić* do not demonstrate consistent state practice or *opinion juris* in order to establish that JCE III exists in customary international law.

71. Nor is there any support in the Nuremberg Charter, Judgement or CCL10 for JCE III. Moreover, the ICC Statute (relied upon in *Tadić*) explicitly rejects JCE III as noted above. There are therefore compelling and cogent reasons to revisit the Appeals Chamber's previous decisions[104] as to the existence of JCE III in customary international law.

JCE CANNOT BE A FORM OF COMMISSION IN LEADERSHIP CASES

72. In *Milutinović et al.* the Appeals Chamber held that JCE is a form of commission giving rise to principal (as opposed to accessorial) liability.[105] It is submitted that the development of JCE since *Tadić* has led to conceptual confusion in the prosecutions of high-level accused. Consequently, Đorđević has been convicted of *committing* the Indictment crimes, thus receiving a higher sentence than would have been the case had his liability been characterised as that of a secondary party.

73. By contrast to its conclusion in *Milutinović et al.*, in *Brđanin*, the Appeals Chamber noted as follows:

> The jurisprudence of the Tribunal traditionally equates a conviction for JCE with the mode of liability of "committing" under Article 7(1). The Appeals Chamber declines at this time to address whether this equating is still appropriate where the accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.[106]

74. Most recently, the *Krajišnik* Appeals Chamber noted that *Brđanin* had "left open" the question of whether equating JCE with "commission" is appropriate where the

[104] For example, *Karemera* JCE Decision.
[105] *Ojdanić* JCE Decision, paras.20,31.
[106] *Brđanin* AJ, fn.891.

accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was "used by a member of the JCE".[107] But the Appeals Chamber declined to consider the point any further on the basis the Trial Chamber did not err in convicting him under Article 7(1) so JCE Counsel had failed "to demonstrate how the alleged error invalidated the Trial Judgement."[108]

75. The suggestion in *Brđanin* and *Krajišnik* is inconsistent with *Tadić* and *Milutinović et al*. This incoherence supports Đorđević's submission that JCE is not clearly established in customary international law in line with the principle of legality, in particular in leadership cases where the physical perpetrators are not members of the JCE. The *Justice*, *RuSHA* and *Einsatzgruppen* cases alone are an inadequate basis to sustain JCE liability in leadership cases for the reasons given above.

76. Finally, by erroneously holding that Đorđević committed the Indictment crimes, the Trial Chamber mischaracterised Đorđević's liability and, in all probability, imposed a higher sentence than would have been the case had such liability been more accurately characterised.

CONCLUSIONS AND RELIEF SOUGHT

77. Since *Tadić* and the interlocutory decision in *Milutinović et al.*, the Appeals Chamber has repeatedly relied on those two decisions to hold that JCE is a theory of co-perpetration giving rise to principal liability as a form of commission under Article 7(1) of the Statute. Academics and practitioners have noted a "very evident reluctance" to re-examine the purported sources of custom in *Tadić* and have described this as "certainly unfortunate" and a "great pity".[109] Writing in a separate opinion in *Milutinović et al.*, Judge Shahbuddeen acknowledged that the reasoning in *Tadić* (on which he sat as well) could "bear improvement".[110] But the majority could not be tempted into improving that reasoning. Đorđević was erroneously convicted

[107] *Krajišnik* AJ, para.664.
[108] *Id.*, para.665.
[109] Boas, Bischoff & Reid, p.25, citing Powles, p.615.
[110] *Ojdanić* JCE Decision, Separate Opinion of Judge Shahabuddeen, para.1.

and sentenced on the basis that he *committed* the Indictment crimes.[111] The Appeals Chamber is respectfully invited to:

a. re-assess the merits of its 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 are found to (pursuant to other grounds of appeal) rely upon JCE III; 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.

[111] TJ, para.2230.

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

78. Any finding of a common purpose necessarily requires clarity as to:

a. the nature of the common plan;
b. the point in time at which it existed; and
c. its constituent members.

79. If any one of these factors is absent, it is impossible to sustain a finding that a JCE existed. That is why each of these elements (and others) are material facts which must be clearly pleaded in an indictment.[112]

80. In relation to (a) the nature of the common plan, as a matter of logic there must be a meeting of minds for there to be a common purpose. There must, therefore, be total clarity as to the nature of the plan in order to establish a common state of mind.[113]

81. In relation to (b) the *Krajišnik* Appeals Chamber quashed numerous convictions under JCE I because of a lack of clarity as to when further "expanded" crimes came within the object of the JCE.[114]

82. In relation to (c), in *Krajišnik* the Appeals Chamber held that the Trial Chamber's identification of "rank and file" JCE members was impermissibly vague.[115]

APPLICATION TO ĐORĐEVIĆ'S CASE

83. In Đorđević's case, the Trial Chamber's findings are impermissibly vague in relation to each of (a), (b) and (c). Therefore, the Trial Chamber was not entitled to conclude that a JCE existed.

[112] *See Simić* AJ, para.22; *Gacumbitsi* AJ, paras.163,167; *Krnojelac* AJ, paras.116-117; *Kvočka* AJ, paras.28,42; *Stakić* AJ, para.66.
[113] *Krajišnik* AJ, para.707.
[114] *Id.*, para.169
[115] *Id.*, para.157.

84. As to the **nature of the common plan**, in one place the Trial Chamber held that the purpose of the JCE was to alter the ethnic balance of Kosovo so as to "ensure continued Serbian control over the province".[116] Then it held that the purpose of the JCE was to "regain control over the territory of Kosovo".[117] These findings are inconsistent. The second presumes that control has been lost. The first does not. Which was it? Did different people have different purposes as regards different areas of Kosovo depending on whether control had been lost or not?

85. The clarity of the Trial Chamber's findings deteriorated further. It held that the objectives of the JCE "evolved" throughout the armed conflict from revenge to retaliation to destroying the KLA once and for all.[118] This is too loose a peg on which to hang criminal responsibility. In *Krajišnik* the Appeals Chamber required that any evolution be agreed upon by the JCE members.[119]

86. As to the **point in time that the JCE existed**, in one place 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.[120] On the other hand, the Trial Chamber directed itself to authority to the effect that a JCE can arise extemporaneously.[121] These approaches are contradictory. Either the expulsion of hundreds of thousands of civilians was pre-planned or it was not. Without a clear finding as to which, no conviction should be sustained.

87. As to the **constituent members of the JCE**, on the one hand the Trial Chamber identified certain specified individuals including Đorđević[122]; on the other hand, the Trial Chamber made vague references to the plan existing among "senior political, military and police leadership".[123] The latter finding is no better than the "rank and file" rejected as impermissibly vague in *Krajišnik*.[124] But the Trial Chamber

[116] TJ, para.2003.
[117] TJ, para.2005.
[118] TJ, para.2007.
[119] *Krajišnik* AJ, para.163.
[120] TJ, paras.2025-2026,2134.
[121] TJ, paras.1862,2007.
[122] TJ, para.2127.
[123] TJ, para.2051,2126.
[124] *Krajišnik* AJ, para.157.

introduced yet further uncertainty by concluding that it was "unable to make an exact determination as to who were participants and who were perpetrators".[125] With respect, what a criminal conviction demands is a clear finding as to who is in a JCE and who is not. In the circumstances, and subject to Đorđević's other grounds of appeal, the Appeals Chamber should restrict the Trial Chamber's findings as a matter of law to the individuals it was able to specifically identify.

CONCLUSIONS AND RELIEF SOUGHT

88. The Trial Chamber 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 as to the nature, timing and members of the central basis of criminal liability used to convict Đorđević. Convictions cannot be sustained on such a basis and, thus, they must be quashed.

[125] TJ, para.2128.

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

89. It is well-established law that a JCE requires that a plurality of persons act together pursuant to an agreement. The agreement may, of course, be inferred.[126]

90. The caselaw provides the test to ascertain whether a number of people are a JCE as opposed to disparate individuals acting on their own or pursuing divergent purposes. The test is a demonstration of joint action whereby the JCE members act in unison in pursuit of the common end.[127] This allows the inference that a common purpose exists.

91. It is respectfully suggested that the above test involves two stages. First, did a plurality of persons act in unison? If yes, was that joint action in pursuit of a criminal purpose or involve the commission of the indicted crimes.

92. In this case, the Trial Chamber identified certain specific individuals as comprising the JCE.[128]

d. Within the "political component" the Trial Chamber identified:
    i. Slobodan Milošević, President of the FRY;
    ii. Nikola Šainović, Deputy Prime Minister of the FRY responsible for Kosovo.

e. Within the "MUP membership" the Trial Chamber identified:
    i. Vlajko Stojiljković, Minister of the Interior;
    ii. the Accused Vlastimir Đorđević, Chief of the RJB;
    iii. Radomir Marković, Chief of the RDB;
    iv. Sreten Lukić, head of the MUP Staff for Kosovo;
    v. Obrad Stevanović, chief of the RJB Police Administration; and

[126] *Stakić* AJ, para.64; *Vasiljević* AJ, para.100.
[127] *See Krajišnik* AJ, fn.418; *Brđanin* AJ, para.418; *Kvočka* AJ, paras.96,117; *Vasiljević* AJ, paras.100,108-109; *Krnojelac* AJ, para.31; *Tadić* AJ, para.227; *Furundzija* AJ, para.119.
[128] TJ, paras.2127.

vi. Dragan Ilić, chief of the RJB Crime Police.

f. Within the "VJ component" the Trial Chamber identified:
   i. Dragolub Ojdanić, Chief of the VJ General Staff/Supreme Command Staff;
   ii. Nebojša Pavković, Commander of the VJ 3d Army;
   iii. and Vladimir Lazarević, Commander of the Priština Corps.

93. But the Trial Chamber erred in law and fact when assessing whether the above individuals acted in unison; and even if they did act in unison, whether such joint action was in pursuit of a shared criminal purpose.

DID THE IDENTIFIED INDIVIDUALS ACT "IN UNISON"?

94. The Trial Chamber correctly noted that, despite the scheme required by the relevant legislation and orders issued by the Chief of the General Staff and President Milošević, the MUP was not re-subordinated to the VJ.[129] The Trial Chamber failed to consider this important finding when considering whether the VJ, MUP and civilian leadership acted "in unison".[130]

95. It is submitted that the conflict demonstrated by the refusal to resubordinate the MUP to the VJ, even subject to an order from President Milošević, fatally undermines the Trial Chamber's conclusion that the leadership acted in unison. The clear evidence before the Trial Chamber was that they did not. The finding that MUP and VJ forces were nevertheless coordinated by the Joint Command[131] does not alter this submission. Coordination can fall short of unison.

96. Moreover, the Trial Chamber identified Ojdanić and Lazarević as being members of the JCE, but their innocence, in this respect, has already been established by the Tribunal;[132] the Office of the Prosecutor did not appeal this decision.[133] No

[129] TJ, paras.261-263.
[130] TJ, para.2126.
[131] TJ, para.264.
[132] *Milutinović* TJ, Vol.3/paras.618,919.
[133] *Milutinović et al.*, Public Redacted Brief filed 21 August 2009.

reasonable Trial Chamber could have concluded that Ojdanić and Lazarević acted in unison with other JCE members.[134] There was no more evidence before the Trial Chamber in Đorđević's trial than was before the Trial Chamber in *Milutinović et al.*, yet the Trial Chamber in that case held that the Prosecution had failed to establish that Ojdanić and Lazarević acted in unison with JCE members. A different result could not reasonably be reached in Đorđević's case. A lower standard of proof should not be applied to the membership of Ojdanić and Lazarević in any JCE in Đorđević's case than was applied in their own case. In any event there was no adequate basis upon which to reach a different conclusion.

WAS ANY JOINT ACTION IN PURSUIT OF A COMMON CRIMINAL PURPOSE OR INVOLVING THE COMMISSION OF THE INDICTMENT CRIMES?

97. The Trial Chamber held that each of the alleged JCE members acted pursuant to a common criminal objective. It is submitted that, on an issue as central as the joint action in pursuit of a common purpose, the approach of any Trial Chamber must be to assess the conduct of each person in detail, compare it with the conduct of the other alleged JCE members in order to conclude whether that person acted in pursuit of the common purpose.[135] The Trial Judgement fails in this respect.

98. The Trial Chamber did refer to the establishing of the Joint Command and the planning of military operations at the VJ Collegium, Supreme Defence Council, VJ General Staff, MUP Collegium and Ministerial Staff for Kosovo[136] and also referred to the involvement of some JCE members in the concealment of crimes. There are difficulties with the Trial Chamber's approach. In relation to the preparations for military action in early 1999, these equally support joint action in pursuit of legitimate targets, namely the KLA or NATO. Indeed, the *Milutinović et al.* Trial Chamber was unable to conclude that the actions of Ojdanić and Lazarević[137] at that time reflected a

[134] TJ, paras.2127,2211.
[135] For example, compare the approach of the Appeals Chamber in *Krajišnik* , which separately assessed the conduct of General Ratko Mladić (paras.250-262); Gojko Kličković (paras.263-264); Jovan Mijatović (paras. 265-267); Vojin Vučković (paras.268-270); Vojo Kuprešanin (paras.271-272); Radislav Brđanin (paras.273-275); Ljubiša Savić (paras.276-278); Veljko Milanković (paras.279-282).
[136] TJ, paras.2126-2128.
[137] *Milutinović* TJ, Vol.3/paras.618(Ojdanić),919(Lazarević).

shared criminal purpose. In relation to the concealment of crimes,[138] the *Đorđević* Trial Chamber was unable to conclude that the actions of Lukić established that he shared that aspect of a criminal purpose.[139] The Trial Chamber's approach did not satisfy a test of joint action in pursuit of a JCE. A higher threshold is necessary in order for criminal liability to be imposed.

CONCLUSIONS AND RELIEF SOUGHT

99. The Appeals Chamber is invited to quash Đorđević's JCE convictions on the basis that the Trial Chamber failed to establish the necessary joint action on the part of all those individuals that it concluded were members of the JCE.

[138] *See infra* Sub-ground 9(G).
[139] TJ, para.2120,[REDACTED].

GROUND 5: FAILURE TO ESTABLISH THE ALLEGED SHARED COMMON PURPOSE

100. The purpose of the JCE alleged by the Prosecution was the modification of the ethnic balance of Kosovo in order to ensure Serb control of the province.[140] This necessarily required proof that the JCE members, including Đorđević, intended to expel Kosovo Albanians on a *permanent* basis. Anything less, such as an intention to expel on a temporary basis, would be insufficient. A temporary shift in the ethnic balance would not achieve the stated purpose because, on the Prosecution's own analysis, Serb control would be lost the moment Kosovo Albanians returned.

101. While 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,[141] in this case, in order to find the purpose of the JCE as alleged, Đorđević and the other JCE members had to be proven to possess intentions of a permanent nature.

FAILURE TO FIND THE NECESSARY SHARED PURPOSE BETWEEN JCE MEMBERS

102. The Trial Chamber prefaced its analysis by explaining that its findings were persuasive evidence of a "common plan by the leadership of the FRY and Serbia ... to modify the ethnic balance in Kosovo."[142] The Trial Chamber identified seven "critical elements" as evidence of that common purpose.[143]

103. While the seizing and destruction of IDs was found to be the strongest indication of a plan to prevent the Kosovo Albanians from returning,[144] the Trial Chamber seriously erred in its analysis. A review of the crimebase witness evidence shows that numerous witnesses did not even mention such practice and, even more significantly, the Trial Chamber found at least eight witnesses – from six different municipalities –

[140] Fourth Amended Indictment, para.19.
[141] Despite other Indictments before the ICTY alleging JCEs involving the permanent removal of a permanent group, this appears to be the first time that an argument has been framed in this way before the Appeals Chamber: compare *Krajišnik* Indictment, para.4, and the decision of the Appeals Chamber in *Krajišnik* AJ, para.304.
[142] TJ, para.2007.
[143] TJ, para.2008.
[144] TJ, para.2080.

did not have their IDs taken when leaving.[145] These findings undermine the Trial Chamber's conclusion as to the widespread and systematic nature of this activity. The Trial Chamber failed to consider and exclude the possibility that the instances of destruction of identification documents was equally consistent with a relatively frequent hostility and ill-discipline amongst low ranking members of the VJ and/or MUP in the border areas rather than proof of a policy at a higher level.

104. The Trial Chamber's findings are inconsistent and inadequately reasoned. Instead of scrutinising the intentions of the alleged JCE members, its approach throughout was to make imprecise references to "senior leadership"[146] or, as above, "FRY and Serbian governments". Elsewhere, the Trial Chamber rightly held that a senior leadership role did not necessarily mean that any given individual shared any common purpose. For instance, it rightly held that membership of the Joint Command did not equate to membership of the JCE.[147]

105. Finally, the Trial Chamber made no finding as to how the intentional displacement of Kosovo Albanians on an internal and/or temporary basis supported the conclusion that the purpose of the JCE was to permanently alter the ethnic balance of Kosovo.

106. There is, therefore, a gap in the Trial Chamber's analysis of its "critical elements" in that it did not establish that the identified JCE members shared an intention to permanently expel Kosovo Albanians. Moreover, the Trial Judgement did not scrutinise the alleged members' states of mind to establish that they indeed intended to kill and persecute Kosovo Albanians. Such scrutiny would have been a necessary step before concluding that the JCE was actually established.

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[145] TJ, fn.1857(Orahovac-Albanian border:"*[t]he witness's identification card was not taken from her*"); TJ, para.643(Srbica-Qafe e Prushit crossing: "*no documents or money were demanded*"); para.724 (Suva Reka-Albanian border: at the border there were men wearing uniforms that said 'police', the *people were not searched* and "*no identification papers were taken from them*."); para.777(Kosovoska Mitrovica-Montenegro crossing: *witness and others allowed to keep IDs*); para.822(Priština-Đeneral Janković crossing: there was *no evidence that the witness was forced to hand over his identification documents*); para.1075(Uroševac-Đeneral Janković crossing: witness "*testified that his personal documents were not taken from him*."); para.1095(Uroševac-Đeneral Janković crossing: "*policemen checked a few of the identification documents and handed them back to the people*"); para.1099(Uroševac-FRYOM border:"*[n]o identification documents were taken from them.")*.

[146] *See*, e.g., TJ, para.2051.

[147] TJ, para.2124.

CONCLUSIONS AND RELIEF SOUGHT

107. The Trial Chamber did not establish a common purpose shared by the alleged JCE members to permanently expel Kosovo Albanians from Kosovo. Đorđević's JCE convictions should therefore be quashed.

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

THE TRIAL CHAMBER'S APPROACH

108. The Trial Chamber did not seek to identify whether the physical perpetrators of crimes were members of the JCE. Indeed, it said that it was "unable to make an exact determination as to who were the participants and who were perpetrators," although it was "clear that certain members" of units "worked together in the implementation of the common purpose."[148] Instead, the Trial Chamber sought to apply aspects of the recent Appeals Chamber judgements in *Brđanin* and *Krajišnik:* it held that crimes could be attributed to Đorđević when at least one member of the JCE *used* the physical perpetrators in accordance with the common plan.[149]

109. Two submissions are made below.

110. First, even if JCE liability exists in some form in customary international law, it does not exist in leadership cases in the form described by the Appeals Chamber in *Brđanin, Martić* and *Krajišnik.* There are compelling reasons to either (i) depart from or (ii) clarify the approach in those cases.

111. Second, and in any event, the Trial Chamber did not apply the standard it espoused. It simply imputed crimes to Đorđević on the basis of the affiliation of perpetrators (MUP, VJ, etc.). Such an approach is erroneous and unjustifiably magnifies Đorđević's criminal responsibility.

THE APPEALS CHAMBER SHOULD DEPART FROM *BRĐANIN*, *MARTIĆ* AND *KRAJIŠNIK*

112. In *Stakić,* the Trial Chamber rejected JCE liability. Instead it applied a mode of liability which it termed "co-perpetratorship" (committing "jointly with another person" by virtue of being in control of the crime). The Appeals Chamber reversed

[148] TJ, para.2128.
[149] TJ, para.1866.

the *Stakić* Trial Chamber *sua sponte*. It then applied and substituted convictions on the basis of JCE.[150]

113. Meanwhile, the Prosecutor sought to amend the indictment in *Milutinović et al.* (at that stage the operative indictment against Đorđević) in light of the *Stakić* Trial Judgement. It sought to allege a mode of liability which it described as "indirect co-perpetration". Paragraph 22 of the proposed Indictment alleged that the accused were liable as indirect co-perpetrators based on their "joint control" of the physical perpetrators of crimes. The *Milutinović et al.* Trial Chamber rejected any theory of "indirect co-perpetration" as not being established in customary international law.[151]

114. Turning to the *Brđanin* case, the Trial Chamber, presided over by Judge Agius, was particularly concerned about the link between high-level accused and physical perpetrators being too attenuated in leadership cases. It considered that JCE was not an appropriate mode of liability because of the "extraordinarily broad" nature of that case where the accused was structurally remote from the underlying crimes.[152] It held that there must be an understanding or agreement between the perpetrator and the leader.[153]

115. On the back of the *Brđanin* Trial Judgement, General Ojdanić challenged the Tribunal's jurisdiction to hold a defendant liable for participation in a JCE which did not include the physical perpetrators. The *Milutinović et al.* Trial Chamber declined to decide the jurisdictional challenge in the same decision mentioned above. But in a Separate Opinion, Judge Bonomy suggested that *Brđanin* had been wrongly decided at first instance. He outlined his view that no binding decision of the Appeals Chamber would prevent a participant in a JCE being found guilty as a co-perpetrator for crimes committed by other persons. He reasoned on the basis of his assessment of the *Justice* and *RuSHA* cases.[154] He did not consider what weight he could properly place on those authorities.

[150] *Stakić* AJ, para.62.
[151] *Ojdanić* Indirect Co-Perpetration Decision, para.37.
[152] *Brđanin* TJ, para.355.
[153] *Id.*, para.344.
[154] *See Ojdanić* Indirect Co-Perpetration Decision, Separate Opinion of Judge Bonomy, paras.15,31.

116. The *Brđanin* Appeals Chamber followed Judge Bonomy's assessment of the *Justice* and *RuSHA* cases and, reversing the Trial Chamber held that no specific agreement is necessary between the accused and physical perpetrators.[155] Curiously, however, the Appeals Chamber rationalised JCE liability in these circumstances on the basis of control over the crime.[156] The Appeals Chamber held that those individuals who physically commit the crimes do not need to be members of the JCE if those senior political and military leaders participating in such an enterprise use them as mere "tools" to carry out the crimes.[157] The Appeals Chamber further held that:

> [I]t has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – ***when using a principal perpetrator*** – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.[158]

117. It is respectfully submitted that the Appeals Chamber's approach in *Brđanin* is inconsistent with its earlier decision in *Stakić.* The mode of liability applied in *Brđanin* is indirect co-perpetration by another name. The leadership JCE is liable because of its control over the physical perpetrators. This is precisely what the Appeals Chamber rejected in *Stakić.* The inconsistency between *Stakić* and *Brđanin* is a cogent reason not to rely on the latter case.[159]

118. Another reason is that Judge Cassese, one of the fathers of JCE jurisprudence, has written extra-judicially that to extend criminal liability to instances where there was no agreement or common plan is to "excessively broaden" the notion.[160] For Judge Cassese, JCE should not be relied on for senior political and military leaders when the prosecution alleges "'vast criminal enterprises' where the fellow participants may be 'structurally or geographically remote from the accused'".[161] Another of the fathers

[155] *Brđanin* AJ, para.418.
[156] *Id.*, para.410,412-413.
[157] *Id.*, para.412.
[158] *Id.*, paras.413(emphasis added).
[159] Olásolo-*Criminal Responsibility*, p.202, describes the approach of the *Brđanin* Appeals Chamber as embracing the notion of "joint criminal enterprise at the leadership level" and creating a "sui generis variant of 'indirect co-perpetration'"
[160] Cassese-JCE, p.126.
[161] *Id.*, p.133.

of JCE jurisprudence, Judge Shahabuddeen, also sat in *Brđanin.* He dissented from the majority's novel application of JCE.[162]

ALTERNATIVELY, THE APPEALS CHAMBER SHOULD CLARIFY *BRĐANIN*, *MARTIĆ* AND *KRAJIŠNIK*

Brđanin Appeal Judgement

119. As noted above, the *Brđanin* Appeals Chamber relied on perpetrators being used as "tools", implying a high degree of control over the individual crimes. Deep uncertainty exists in leadership cases as to the nature of the link that must be established between a high-level accused and the physical perpetrators of crimes. What does it mean for a JCE member to *use* the physical perpetrator to commit a crime? Judge Meron sought to provide some guidance in a separate opinion, but his views were not adopted by the majority.[163] It is submitted that to use perpetrators as tools to commit a crime requires a demonstration of a high degree of control over the crime: the physical perpetrator is used to commit the crime.

Martić Appeal Judgement

120. In *Martić* the Appeals Chamber approved the following formulation put forward by the Trial Chamber in the same case:

> It is not required that the principal perpetrators of the crimes which are part of the common purpose be members of a JCE. An accused or another member of a JCE may use the principal perpetrators to carry out the *actus reus* of a crime. However, "an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question ***forms part of the common criminal purpose***." This may be inferred, *inter alia*, from the fact that "the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose."[164]

[162] *See Brđanin* AJ, Partially Dissenting Opinion of Judge Shahabuddeen, para.18.
[163] *Id.*, Separate Opinion of Judge Meron.
[164] *Martić* AJ, para.68(emphasis added), approving *Martić* TJ, para.438.

The *Martić* Appeal Chamber held that the Trial Chamber had failed to make an explicit finding on how members of the JCE *used* physical perpetrators. This was an error but, on the facts of that case, it did not invalidate the judgement.[165] However, the Appeals Chamber held that no link was established between JCE members and some armed structures and paramilitary units.[166] The *Martić* Appeals Chamber held that the approach of the *Stakić* Appeals Chamber was instructive to considering whether it is reasonable to impute certain crimes to an accused, in short, whether crimes committed by forces "under the control" of JCE members.[167] This appears to undermine the submission above.

121. Moreover, the approach in *Martić* is at odds with the *Limaj* Appeal Judgement, which held that under JCE III the perpetrators need to be members of the JCE. In *Limaj*, the accused Bala was not convicted of crimes in a camp because they were committed by "outsiders". Therefore, even if Bala was a member of a JCE he could not be held responsible for their crimes.[168] In *Martić*, the Appeals Chamber adopted a much broader approach to impute crimes on the basis of JCE III. Curiously, the *Martić* Appeal Chamber did not cite or consider the *Limaj* Appeal Judgement on this point, although it considered it elsewhere in relation to peripheral issues.

122. For the above reasons, the *Martić* Appeal Judgement is of limited assistance. The Trial Chamber therefore erred by relying on it for this aspect of JCE liability,[169] as did the Appeals Chamber itself in *Krajišnik*.[170]

Krajišnik Appeal Judgement

123. In *Krajišnik* the Appeals Chamber held that the establishment of a link between the crime and a member of the JCE is a matter to be assessed on a case-by-case basis. It said that,

[165] *Id.*, para.181.
[166] *Id.*
[167] *Id.*, para.169.
[168] *Limaj* AJ, paras.118-119.
[169] TJ, para.1866.
[170] *Krajišnik* AJ, para.235.

> Factors indicative of such a link include evidence that the JCE member ***explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime***.[171]

The Appeals Chamber found that the Trial Chamber did not explicitly state that JCE members procured or used principal perpetrators to commit specific crimes in furtherance of the common purpose, but in the circumstances of the case this did not invalidate the judgement "because the Trial Chamber otherwise established a link between JCE members and principal perpetrators".[172]

124. At trial in *Krajišnik*, the Prosecution had indicated factors to distinguish the situation where a perpetrator committed a crime pursuant to a JCE as opposed to on his own. The Trial Chamber had applied a standard of whether the JCE member had "procured" the perpetrator to commit the crime. The Appeals Chamber held that this standard corresponded in substance to that outlined in *Brđanin.*[173]

125. The *Krajišnik* Appeals Chamber proceeded to review the Trial Chamber's findings in order to see whether the link was established and whether perpetrators were *used by* JCE members. It quashed Krajišnik's convictions in relation to a significant number of crime sites. The specific connections to the actual executors were examined and convictions for crimes which had not been committed by JCE members using principal perpetrators in furtherance of the common purpose were quashed.[174]

THE TRIAL CHAMBER FAILED TO APPLY *BRĐANIN*, *MARTIĆ* AND *KRAJIŠNIK*

126. Applying the above to Đorđević's case, the crimebase section of the Trial Judgement merely highlights the affiliation of physical perpetrators (e.g. MUP or VJ or even more broadly "Serbian forces" where there was insufficient evidence regarding which specific forces were involved[175]). The Trial Chamber failed to demonstrate how each physical perpetrator was *used* to commit the crimes that they committed. The Trial

[171] *Krajišnik* AJ, para.226(emphasis added).
[172] *Id.*, para.237.
[173] *Id.*, para.236.
[174] *Id.*, paras.249-283.
[175] TJ, para.6.

Chamber extended Đorđević's liability far beyond that envisaged in *Brđanin* and *Krajišnik*. The Trial Judgement contains no explanation otherwise as to how all the crimes that were committed in Kosovo were fairly attributed to Đorđević.

127. Towards the end of its Judgement, the Trial Chamber concluded that "... the VJ, MUP and associated Serbian forces were used by JCE members, in coordination, to implement the common plan."[176] It suggested that the purpose of all operations "was to perpetuate the crimes established."[177] It held that the overall common plan was directed by at least the core members of the JCE pursuant to a plan to alter the demographic balance of Kosovo by a campaign of terror and violence.[178] It implied that the crimes were committed in the course of pre-planned and coordinated actions by Serbian forces, and that the vague language of these orders *encouraged* an interpretation that they should be implemented by criminal means.[179]

128. The Trial Chamber's approach was itself too vague. Ambiguous language falls far short of using perpetrators as tools. The Trial Chamber failed to demonstrate that perpetrators were used by a JCE member and how for each crime site. Its ultimate suggestion that "the vast majority"[180] (i.e., not *all*) of crimes were part of the common design reveals that it failed to perform this necessary step. If another individual encouraged crimes through ambiguity, it is difficult to see how that is fairly attributable to Đorđević.

CONCLUSIONS AND RELIEF SOUGHT

129. The Appeals Chamber is invited to quash all of Đorđević's convictions on the basis that he was convicted upon a flawed extension of JCE; alternatively, the Appeals Chamber is invited to quash Đorđević's convictions because the Trial Chamber failed to scrutinise and attribute responsibility by showing how each crime was committed by tools of JCE members.

[176] TJ, para.2051.
[177] TJ, para.2069.
[178] TJ, para.2128.
[179] TJ, para.2132.
[180] TJ, para.2136.

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

130. The Trial Chamber erred when concluding that all of the crimes established were "clearly within the object of the JCE"[181] and holding that the crimes of murder[182] (Counts 3 & 4) and persecution[183] (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*.

131. This error invalidated the Trial Judgement because a JCE that plans to murder and persecute is more serious than one in which instances of those crimes are merely foreseeable. The mode of liability by which Đorđević was convicted is thus relevant to his sentence.[184]

132. For liability pursuant to JCE I, the members must act "pursuant to a common purpose" and "possess the same intent to commit a crime or underlying offence."[185] The Appeals Chamber has held that, "as far as the basic form of JCE is concerned, an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question *forms part of the common criminal purpose*."[186]

133. Further, as relevant to persecution convictions, "where the criminal object consists of a crime requiring specific intent, the Prosecution must prove not only that the accused shared with others the general intent to commit the underlying offence [...] ***but also that he shared with the other joint criminal enterprise members the specific intent required of the crime or underlying offence***."[187]

[181] TJ, para.2152; *but cf.* para.2153: 'alternative' finding that Counts 3-5 were only a 'natural and foreseeable' consequence.
[182] TJ, para.2137.
[183] TJ, para.2149 (deportation/forcible transfer); para.2151 (wanton destruction).
[184] *See Vasiljević* AJ, para.182.
[185] *Tadić* AJ, paras.197,220; *Brđanin* AJ, para.365.
[186] *Brđjanin* AJ, para.418(emphasis added).
[187] *Milutinović* TJ, Vol.1/para.109(emphasis added); *see also Kvočka* AJ, para.110.

MURDERS AND PERSECUTION BY MURDER WERE NOT INTENDED WITHIN THE JCE

134. The Trial Chamber held that the crime of murder was established in 10 locations in Kosovo resulting in the death of not less than 724 individuals[188] and this lead to a clear inference that murder was an intended part of the JCE. It is respectfully submitted, however, that these numbers alone fall far short of showing that murder was within a JCE plan. While not a happy submission to make, had murder been a central plank of the alleged JCE, far larger numbers would have been killed throughout Kosovo and this, coupled with the relative rarity of mass killings in Kosovo compared to other conflicts, leaves open the inference that murder was not within the aim of the alleged JCE.

135. Consider that the findings of murder occurred in only seven out of 14 municipalities considered, and most appear to have taken place in villages rather than major cities.[189] Two locations (Izbica and the Carragojs valley) account for nearly 60% of the total murder victims of the Trial Chamber's findings. These facts are inconsistent with a wide-ranging plan to kill Kosovo Albanians.

136. The Trial Chamber in *Milutinović et al.* recognised as much when, on virtually identical facts[190], it held that the crimes committed in Kosovo during the Indictment period followed "a clear pattern of displacement of the Kosovo Albanian population, but not of murder, sexual assault, and destruction of cultural property."[191] This is an important finding as the Đorđević Trial Judgement makes no analysis of the intent of the other members of the JCE. It fails to outline the "essential requirement" that JCE members share the intent for the agreed crimes.[192]

[188] TJ, para.1780.
[189] Murders occurred in 7 municipalities (Orahovac, Srbica, Suva Reka, Đakovica, Kačanik, Vučitrn, Podujevo) out of 14 and mostly in the villages (except in Đakovica town, Podujevo and Suva Reka; in Vučitrn not in a town itself, but in a convoy). There was not any murder in relation to major cities (also nothing in the municipalities) of: Priština, Prizren, Peć, Kosovska Mitrovica, Uroševac, Gnjilane municipality and Dečani municipality.
[190] Of the above-listed murders, nearly all were also established in *Milutinović et al*.
[191] *Milutinović* TJ, Vol.3/para.94; *see* TJ, fn.7435: the Trial Chamber recognized these findings, but only in consideration of sentencing.
[192] *Brđanin* AJ, para.418.

137. In principle, this has lead to some unsustainable results not only for the Trial Judgement, but for this Tribunal. While the *Milutinović et al.* Trial Chamber could not conclude that any of Pavković, Lukić, Lazarević, Ojdanić or Šainović intended to kill, the Đorđević Trial Chamber has utilized the orders and commands of these men to manifest an inference of intention to murder that was then transferred to the JCE and Đorđević.[193] Most notably, Lazarević's was found to have commanded the Carragojs valley operation ("Operation Reka"), as mentioned in the previous paragraph.[194] There is no finding of his intent of murder in either his trial or in the *Đorđević* trial, yet this operation was a critical basis for imputing murder to the JCE. Such findings cannot comport with a showing that all JCE members possessed the same intent.[195]

138. Even on the Trial Chamber's own findings the inference remained that Đorđević and other alleged did not intend to kill.[196] The Appeals Chamber should ensure that Đorđević is given the benefit of that inference.[197]

139. Further, the Trial Chamber failed to establish that individuals were killed *because* they were Kosovo Albanian in relation to every crime site for which it entered convictions for persecution by murder. As a specific intent crime, such analysis was required for any conviction of persecution.[198] With regard to murder, it performed the necessary analysis of the perpetrators' *mens rea* in only six of the 10 crime sites for which it entered convictions of persecution by murder.[199] Even if the Trial Chamber's findings remain undisturbed on appeal, Đorđević's convictions for persecution by murder must be quashed for the remaining four murder sites.

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[193] TJ, paras.2018-2026,2034-2035,2051,2056,2062,2066,2069,2126,2129,2130,2132,2134-2135,2138-2152.
[194] TJ, para.948.
[195] *Kvočka* AJ, para.82.
[196] That the Trial Chamber made alternative findings as to Đorđević's *mens rea* suggesting that it was not sure that he indeed intended to kill: *see* TJ, paras.2139,2141,2145,2147,2153,2158.
[197] As per *Kvočka* AJ, para.237.
[198] *See Simić* TJ, para.156(holding that a first-category joint criminal enterprise accused charged with persecutions must have had discriminatory intent), para.997(finding Simić guilty of persecution after concluding that he "shared the intention of other participants in the joint criminal enterprise to arrest and detain non-Serb civilians"); *Krnojelac* TJ, para.487 (finding that the Prosecution had not adequately established the accused's "conscious intention to discriminate", that "the Accused did not share the intent to commit any of the underlying crimes charged as persecution pursuant to any joint criminal enterprise", and that therefore "the crime of persecution cannot be established on the basis of any of these underlying crimes as part of a joint criminal enterprise in which the Accused was involved"); *see also Krnojelac* AJ, para.111; *Kvočka* AJ, para.110; *Milutinović* TJ, Vol.1/para.109.
[199] *See* TJ, paras.1780-1790.

DEPORTATION AND/OR FORCIBLE TRANSFER AS PERSECUTIONS

140. The Trial Chamber held the crimes of deportation and forcible transfer established in the Trial Judgement also supported convictions for persecution by way of those same underlying crimes.[200] However, the Trial Chamber failed to adequately assess whether each instance of deportation and/or forcible transfer could support an additional conviction for persecution on the facts.

141. Instead, the Trial Chamber held that the "overwhelming majority" of those forcibly displaced were targeted specifically *because* they were Kosovo Albanian and referred to remarks made "on a number of occasions" to the effect that individuals were being targeted "on the basis of their ethnicity".[201] It is respectfully submitted that such generalised findings are inadequate. Rather, convictions for persecution in relation to each crime site should only have been entered following a specific finding that individuals in each specific crime site were targeted because of their ethnicity. The Trial Judgement fails in this respect.

142. The weakness in the Trial Chamber's approach is tellingly revealed by its reliance on seemingly ominous evidence that a VJ unit deployed to Orahovac on 24 March 1999 received an order that "not a single Albanian ear" was to remain in Kosovo.[202] The evidence did not attribute this order (or intention behind it) to any particular JCE member. Yet, more importantly, the Trial Chamber omitted to mention the crucial point that the witness in question clarified his evidence in cross examination, accepting that the order may well have been that "not a single **terrorist ear"** was to remain in Kosovo.[203]

WANTON DESTRUCTION OF RELIGIOUS SITES WAS NOT INTENDED

143. The Trial Chamber held that the wanton destruction of Kosovo Albanian religious sites was part of the common plan.[204] But even on the Trial Chamber's own findings,

[200] *See infra* Sub-ground 18(B).
[201] TJ, para.1777.
[202] TJ, para.2056.
[203] P1274 [REDACTED]; [REDACTED].
[204] TJ, para.2151.

only eight mosques were damaged throughout the entirety of Kosovo during the conflict. No reasonable Trial Chamber could conclude on this basis that the destruction of mosques was part of the common plan. Had it been, a far greater number would have been damaged.

144. Moreover, important to the Trial Chamber's finding in this regard was that the mosques were targeted using explosives and detonating equipment. But this is only applied in relation to five of the eight mosques: three[205] were damaged by fires in the relevant part of town rather than specifically targeted explosions.

145. There was, therefore, an inadequate evidentiary basis upon which to conclude that the destruction of mosques was an intended aim of the JCE. No such conviction for persecution under JCE I can be sustained.

CONCLUSIONS AND RELIEF SOUGHT

146. The Appeals Chamber is invited to quash Đorđević's JCE I convictions for murder and persecutions as it was not established that the JCE members, or Đorđević, shared the requisite intent for these crimes. On the basis of Ground 2, no convictions are available under JCE III. Alternatively, on the basis of Grounds 8 and 18(B), no convictions under Count 5 are available. Finally, if the Appeals Chamber were to conclude that convictions under JCE III should be substituted, a lower sentence is merited to reflect a reduced *mens rea*.

[205] Hadum Mosque in Đakovica municipality(TJ, paras.1830-1832); Vlaštica mosque in Gnjilane municipality (TJ, paras.1838-1840); Charshi mosque in Vučitrn municipality(TJ, paras.1848-1850).

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

147. This issue arises for the Appeals Chamber's consideration because (i) the Trial Chamber relied on JCE III as an alternative to JCE I for some crime sites;[206] and, more generally, (ii) because the Prosecution's appeal relies on JCE III when it asks the Appeals Chamber to enter convictions for rape as a form of persecution on the basis that rape was foreseeable.

148. The Appeals Chamber has previously held that JCE III applies to specific intent crimes.[207] It has held that a person can be convicted of committing genocide via JCE III. The Appeals Chamber considered that JCE III "is no different from other forms of criminal liability which do not require proof of intent to commit a crime...".[208] The *Brđanin* Appeals Chamber held that the Trial Chamber had improperly conflated the *mens rea* of genocide with the mental element of a form of responsibility.[209] The Appeals Chamber affirmed that an accused may be convicted of any crime pursuant to JCE III notwithstanding his lack of intent that such a crime be committed, provided the prosecution establish his "awareness that the commission of [the] agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise."[210]

149. But this issue split the Appeals Chamber at the time. Judge Shahabuddeen dissented. He reasoned that a person cannot be convicted of a specific intent crime as a principal perpetrator unless he possesses the specific intent:

> The third category of *Tadić* does not, because it cannot, vary the elements of the crime; it is not directed to the elements of the crimes; it leaves them untouched. The requirement that the accused be shown to have possessed a specific intent to commit genocide is an element of that crime. The result is that specific intent always has to be shown; if it is not shown, the case has to be dismissed.[211]

[206] *See* TJ, para.2158.
[207] *Rwamakuba* JCE Decision, para.9.
[208] *Brđanin* Interlocutory Appeal, para.7.
[209] *Id.*, para.10.
[210] *Id.*, para.5.
[211] *Id.*, Dissenting Opinion of Judge Shahabuddeen, para.4.

150. It is respectfully submitted that Judge Shahabuddeen's approach is to be preferred. The definition of some crimes contain a mental state with which a person must act in order to commit that crime. If JCE is indeed a form of commission, a person must be shown to have the *mens rea* required by the definition of the crime.

151. Indeed, it is questionable whether *Brđanin* is still good law. The *Krstić* Appeals Chamber appears to have approved of Judge Shahabuddeen's approach by reversing convictions for genocide pursuant to JCE I and JCE III on the basis that General Krstić did not possess the necessary special intent for genocide.[212]

152. Moreover, the Appeals Chamber has never actually established that customary international law supports JCE III liability for special intent crimes. The Appeals Chamber in *Rwamakuba* noted as much.[213] It held that a genocide conviction is possible pursuant to JCE but did not distinguish or address JCE III specifically. Neither of the two primary cases that the *Tadić* Appeals Chamber relied on for the existence of JCE III (*Essen Lynching* and *Borkum Island*) involved specific intent crimes.[214] Indeed, the facts of *Essen Lynching* suggest that JCE III cannot be used to convict an accused of a crime that involves a greater *mens rea* than the original plan (murder versus ill-treatment of detainees).[215]

153. Finally, Judge Cassese, writing extra judicially, has cautioned against using JCE III for special intent crimes because of the "distance" between the subjective elements.[216] The Appeals Chamber of the Special Tribunal for Lebanon, presided over by Judge Cassese, recently held that

> …while the case law of the ICTY allows for convictions under JCE III for genocide and persecution as a crime against humanity, even though these crimes require special intent… the better approach under international law is not to allow convictions under JCE for special intent crimes.[217]

[212] *Krstić* AJ, para.134.
[213] *Rwamakuba* JCE Decision, para.9.
[214] *Tadić* AJ, para.205.
[215] *Id.*, paras.207-209.
[216] Cassese-JCE, p.121.
[217] STL Interlocutory Decision, para.249.

154. Thus, according to the STL Appeals Chamber, customary international law does not allow for convictions as a principal perpetrator for specific intent crimes on the basis of a *mens rea* standard of foreseeability and risk-taking.

CONCLUSIONS AND RELIEF SOUGHT

155. There are compelling reasons for the Appeals Chamber to clarify that JCE III does not support convictions for specific intent crimes. The Appeals Chamber should decline from entering any convictions against Đorđević for persecutions solely on the basis of JCE III.

GROUND 9: ERRORS OF LAW AND FACT WHEN ASSESSING ĐORĐEVIĆ'S PARTICIPATION IN THE JCE

INTRODUCTION

156. The sub-grounds below address errors that, individually and cumulatively, led the Trial Chamber to erroneously conclude that Đorđević participated in the alleged JCE. Despite listing some 11 factors,[218] not one of these was linked to a criminal plan. Rather, these factors reflect the Trial Chamber's erroneous premise that Đorđević exercised effective control over the perpetrators of crimes. For the reasons outlined below, the Trial Chamber has made critical errors in law and fact such as to mischaracterise Đorđević's conduct and unfoundedly link it to a JCE. Thus, the finding that Đorđević participated in a JCE should be quashed and his convictions should be vacated.

SUB-GROUND 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

OVERVIEW OF ĐORĐEVIĆ'S APPEAL

157. The conclusion that Đorđević exercised effective control over the members of the RJB who perpetrated these crimes is a miscarriage of justice. In 1998, the Minister of the Interior took sole control of and focused his power on the situation in Kosovo. The Ministerial Staff[219] that he created on 16 June 1998 was *the* key MUP body in relation to MUP actions in Kosovo. On the Trial Chamber's own findings, the Joint Command coordinated MUP and VJ actions[220] and Šainović was sent to Kosovo to be Milošević's man on the ground.[221] As others took the fore in late 1998, Đorđević was marginalised. He remained in Belgrade and entered the fray only rarely and in an

[218] TJ, paras.2154-2157.
[219] *See* TJ, para.123: the Trial Chamber continued to refer this new body as the "MUP Staff for Kosovo".
[220] TJ, para.252.
[221] TJ, para.238.

extremely limited capacity.[222] The Trial Judgement fundamentally misunderstood and overstated Đorđević's role in Kosovo in 1999.

ĐORĐEVIĆ'S CASE AT TRIAL

158. Three central aspects of the Defence case at trial were that (i) Đorđević's role changed when Minister Stojilković created a Ministerial Staff on 16 June 1998; (ii) other Assistant Ministers' spheres of responsibility curtailed Đorđević's responsibility - they were directly responsible to the Minister rather than Đorđević; and (iii) the Minister's Collegiums which Đorđević attended were not a forum where combat activities in Kosovo were discussed.

159. The Trial Chamber rejected the Defence case.

(i) It held that the Ministerial Staff did not affect the normal "chain of authority" because it was a mere "conduit for the orders and directions of the senior leadership" in Belgrade, including Đorđević. In the Trial Chamber's view, the Ministerial Staff was nothing but a "useful coordination body" – Đorđević remained in effective control over the police in Kosovo.[223]

(ii) It held that as Đorđević was an Assistant Minister and Chief of the RJB and a Colonel-General – one of highest ranking members of the MUP – consequently, he was a superior to the other Assistant Ministers.[224]

(iii) It held that anti-terrorist activities must have been discussed at the Ministerial Collegiums and the argument that they did not was not credible.[225]

[222] T.14054:12-19(Mišić); T.4215:20-4216:17(Braković); T.13959:16-13960:18(Čanković); T.14216:21-14217:18(Spasić); T.9082:16-23(Trajković).
[223] TJ, para.124.
[224] TJ, paras.42-43,1976.
[225] TJ, para.101.

ĐORĐEVIĆ'S ARGUMENTS ON APPEAL

160. Đorđević seeks to revisit these issues on appeal because the Trial Chamber fundamentally misconstrued the evidence. Its reasoning was flawed and its conclusions do not withstand scrutiny.

THE MINISTERIAL STAFF UNDENIABLY CHANGED ĐORĐEVIĆ'S ROLE

161. The Trial Chamber rightly observed that on 11 June 1998, Đorđević appointed members to the then-named 'MUP Staff'.[226] However, on 16 June 1998, the Minister *invalidated* Đorđević decision and created his own interdepartmental Ministerial Staff to control the MUP in Kosovo and be directly to responsible him.[227] By the Minister's decision, this Ministerial Staff was:

> ... to plan, organize and control the work and engagement of organizational units of the Ministry, and also sent and attached units, in suppressing terrorism in the AP of Kosovo and Metohija. In addition, the staff's task is to plan, organize, direct and coordinate the work of the organizational units of the Ministry in Kosovo and Metohija in carrying out complex special security operations.[228]

Đorđević was not appointed as a member of this Ministerial Staff.

162. Whereas the Trial Chamber held that the Ministerial Staff "effectively expanded the membership of the MUP Staff,"[229] in fact, the Ministerial Staff initially contained one less member[230] and sacked four (almost a third) of Đorđević's appointees.[231] Crucially, the new Ministerial Staff also included named members from the RDB and all of the heads of organizational units of the RDB in Kosovo.[232] The Trial Chamber failed to consider the necessary implication of this change: that Đorđević could not control the Ministerial Staff. The merger of the RJB and RDB chains of command

[226] TJ, para.106.
[227] TJ, para.108, P57 *contra* TJ, para.1895.
[228] P57, Item 2.
[229] TJ, para.108.
[230] P57.
[231] TJ, fn.394.
[232] P57, Item 1: David Gajić from the RDB was Deputy Head of the Staff and Milorad Luković was Assistant Head for Special Operations.

under the command of the Minister, via his Ministerial Staff, meant that the respective heads of the RJB and RDB were excluded and the direct superior to both departments was the Minister, who delegated his responsibilities to the Head of Staff Sreten Lukić. No other conclusion was available on the evidence.

163. Đorđević retained the titular role as Head of the RJB, but given the new Ministerial Staff, which included RDB members, he could not exercise command or control as previous to the Decision. The Minister retained this control and delegated all command over these forces to the Head of Staff, Lukić. The latter's previous role within the RJB was an irrelevant consideration in this new structure.

164. The Defence argument did not rest on a "thin"[233] or "weak thread"[234] that responsibilities changed. Rather, the Trial Chamber failed to appreciate and properly analyze the two distinct provisions under Item 3 of the Minister's Decision – 1. "The Head of Staff shall ***report*** to the Minister..." and 2. "...[***inform***] the Minister about...".[235] These are two separate provisions including both a responsibility to the Minister and a function of providing reports. As it only undertook analysis of the 'reporting' function of this decision (in the sense of 'making reports to' or 'informing'), the Trial Chamber has failed to appreciate the meaning of the original language used in the Serbian text.

165. By the phrase, "The Head of Staff shall ***report*** to the Minister...", the original Serbian version is clear that the Head of the Ministerial Staff was "responsible to" the Minister, and no one else, by its use of the term 'odgovora' ('shall answer to').[236] This sense of the word is confirmed by the Minister's decision of 31 May 1999 which extended his decision of 16 June 1998, stating: "... the Head of the Staff ***shall answer*** for his own work, that of the Staff and the security situation to the Minister ...".[237]

166. Both decisions contain an *additional* provision in the latter half of the sentence that requires the type of 'reporting' as found by the Trial Chamber in the term 'izveštava'

[233] TJ, para.115.
[234] TJ, para.112.
[235] P57.
[236] *Id.*, Item 3.
[237] P67, Item 3(emphasis added); this language, in the original, is identical to P57, Item 3.

('informing').[238] Such use of both words in one provision would be redundant if they had the exact same meaning. Thus, it is clear that the Ministerial Staff fundamentally restructured the hierarchy and functioning of the MUP by requiring that the Head of Staff directly answer to him and *additionally* inform him about security-related developments, measures taken and the effects of those measures. The Ministerial Staff necessarily eradicated Đorđević's former role in an obvious way and totally rerouted responsibility directly from the Minister down to the Head of MUP Staff. This Minister's decision meant that the Ministerial Staff was the only MUP body to plan, organise and direct anti-terrorist actions in Kosovo of all organizational and sent-and-attached units of the MUP in Kosovo (RJB and RDB).[239]

167. Despite a finding of "ongoing support and maintenance from Belgrade,"[240] this is not equivalent to exercising effective control through an uninterrupted chain of command.

168. The Trial Chamber struggled to maintain its conclusion that the creation of the Ministerial Staff did not affect Đorđević's role by finding that the new formation of the Staff was a mere conduit for orders from Belgrade and did not interrupt or affect the "authority" of Đorđević.[241] This approach to the Ministerial Staff depended on the evidence-in-chief of Ljubinko Cvetić, who was the chief of one of the seven SUPs based in Kosovo.[242] But there was no foundation to rely on Cvetić because he had no direct knowledge of the relationship between the Ministerial Staff and Belgrade. Moreover, the Trial Chamber failed to acknowledge the change in Cvetić's evidence upon being confronted with the Minister's decision for the first time.[243] Crucially, Cvetić acknowledged that he was mistaken and that the relationship between Kosovo and Đorđević had changed with the creation of the Ministerial Staff.[244]

[238] *See* P57, Item 3; P67, Item 3.
[239] P57; P67; P345, p.8; P764, p.3-4, Item 2; P771, pp.11-12; P1048; D107; D108; D239; D248; D423; D432, p.4-5 Items II-III; D443; D852; T.4093:10-25/T.4114:16-4115:1(Braković); T.6805:22-6806:2/T.6696:22-24/T.6874:2-7(Cvetić); [REDACTED]; T.1619-1620:4/T.1626:1-4(K25); T.9064:17-19/T.9065:21/T.9072:14-25(Trajković); T.13942:18-13943:12(Čanković); T.14035:15-14036:17/T.14038:9-15/T.14143:14-17(Mišić); T.13243:20-13244:19(Mirčić);T.13575:5-17/T.13576:5-10/T.13578:16-13579:17/T.13579:21-25/T.13580:1-10(Simović); T.13772:3-13774:6(Stalević); T.12627:18-22/T.12852:24-25/T.12876:16-20(Mitić).
[240] TJ, para.113.
[241] TJ, para.124.
[242] T.6588:15-6589:4.
[243] T.6789:15-6790:10.
[244] T.6790:4-10.

169. The Trial Chamber further based its conclusion that Đorđević retained control over the Ministerial Staff and Sreten Lukić[245] on the hearsay evidence and subjective inferences of Shaun Byrnes (an international observer) and the inaccurately summarised testimony of Slobodan Borišavljević (Đorđević's *chef de cabinet*).[246] The latter document, from another court, was not even admitted into evidence. The Appeals Chamber is invited to clarify that no reasonable Trial Chamber would draw such important conclusions on such a feeble basis.

170. Rather, the example of the transfer of Momčilo Stojanović should have been decisive of this change in hierarchy. When the Minister appointed Stojanović to the Ministerial Staff in Priština, it was specified that he would answer for his work to the Head of Staff Lukić and the Minister.[247] Contrary to the findings of the Trial Chamber, this is a clear example limiting Đorđević's control. The Trial Chamber failed to acknowledge the power of this example given that Stojanović had previously been Đorđević's assistant.[248]

171. The conclusion that Đorđević appointed and dismissed Chiefs of SUPs was also flawed.[249] This was within the Minister's sole discretion.[250] There is no evidence whatsoever indicating that Đorđević appointed any of the chiefs of SUPs in the territory of Serbia. Đorđević could act in this limited capacity only in relation to termination of activities or tasks of certain chiefs of SUPs on the Minister's specific instruction and explicit authorisation.[251]

172. Further, as correctly noted by the Trial Chamber, "Đorđević did not have the power to appoint members to the Ministerial Staff."[252] His role, in appointing and dismissing RJB members to and from the Staff , was strictly limited to the mere regulation of that individual employment rights based on authorisations of the Minister.[253] In any event,

[245] TJ, para.1897.
[246] TJ, fn.6502.
[247] D99, Item III.
[248] *See* TJ, para.40.
[249] TJ para.48.
[250] *See, e.g.,* P75; P78; D38; D400.
[251] *See* P77 ("…and on the Minister's authorisation…") and P79 ("…and on the authority of the Minister…").
[252] TJ, para.120.
[253] Đorđević merely implemented the Minister's decisions as to the membership of the Staff via Article 72 of the Law on Internal Affairs, *see* P57, Item 5, and P66, Art.72; *see, e.g.*, P80; P147; P1044.

this limited role bore no relation to being "actively engaged" in the actual functioning of the Staff until the end of the war.[254]

THE IMPACT OF THE CHANGE

173. The effect of the creation of the Ministerial Staff on Đorđević's control over events in Kosovo was instantaneous. It was wholly erroneous to conclude that Đorđević "actively participated" in Ministerial Staff meetings in 1998.[255] The evidence shows he hardly attended any of these meetings.[256] Đorđević's role in Kosovo was, however, greater in 1998 than 1999 because, as recognised by the Trial Chamber he was on the ground in Kosovo for three months.[257] But as 1998 wore on, his involvement waned. The contrast with 1999 is stark. In 1999, Đorđević was in Kosovo on only a handful of occasions, as found by the Trial Chamber:[258]

a. His alleged presence and involvement in Račak in mid-January 1999 is addressed under Sub-ground 9(E).

b. His presence at a Ministerial Staff meeting in Kosovo on 17 February 1999. The Appeals Chamber will note that Đorđević was merely present (with the Minister) and he did not "actively participate". He barely contributed. In a meeting lasting more than two hours he is recorded as barely speaking – only describing the promotion of five officers.[259] The only available construction of the minutes of this meeting is that Sreten Lukić was the individual in control on the Minister's behalf. On no analysis could this meeting be evidence of Đorđević being in effective control of events on Kosovo. Quite the opposite.

[254] *Contra* TJ, paras.120-121.
[255] TJ, para.1901.
[256] *See*, those attended by Đorđević: P768(22 July 1999) and P770(5 November 1998, attending with the Minister); *but see*, those not attended by Đorđević: P687(23 July 1998); P688(28 July 1998); P769(26 October 1998); P690(2 November 1998); P689(2 December 1998); P1043(21 December 1998).
[257] TJ, para.1901.
[258] TJ, para.1925.
[259] P85, p.4.

c. His presence at a Ministerial Staff meeting on 8 March 1999, based on the evidence of Ljubinko Cvetić.[260] This meeting is clearly chaired by the Minister and Head of MUP Staff; Đorđević did not contribute.

d. His travel to Kosovo on 16 (with the Minister of Interior) and 18 April 1999. From the findings of the Trial Chamber, it is evident that his role was minor, related only to the termination of the duties of two SUP chiefs (on the Minister's explicit authorisation[261]). He then met with Sreten Lukić and Obrad Stevanović, among others, to discuss the limited subject of the failure to subordinate the MUP to the VJ. This issue was not resolved. Again, this evidence is a long way from Đorđević being in effective control of the MUP through individuals on the ground in Kosovo as Đorđević took no part in the decisions of those individuals as to the use of the MUP in Kosovo.

e. His alleged presence at a Joint Command meeting on 1 June 1999 is dealt with under Sub-ground 9(B).

f. His presence at a meeting on 10 June 1999 pertaining to the withdrawal of MUP forces from Kosovo.[262]

"ENGAGING" PJP UNITS AND "DEPLOYING" SAJ UNITS

174. In relation to the PJP, paragraphs 61 and 124 of the Trial Judgement are key. There, the Trial Chamber concluded that Đorđević *deployed* PJP units and that he usually *engaged* them, so he therefore retained *authority* in relation to their combat activities.

175. Đorđević merely implemented Minister's decision in relation to the engagement of PJP units and dispatched them to Kosovo.[263] His role ended there. Once in Kosovo, all such units were controlled by the Ministerial Staff – not Đorđević. Elsewhere, the Trial Chamber correctly held that SUP Chiefs were *commanded* by the Ministerial

[260] TJ, para.1925.
[261] *See* P77(re:the SUP Chief of Kosovska Mitrovica); P79(re:SUP Chief of Priština).
[262] TJ, para.1925,fn.6608.
[263] T.14088:3-14090:5(Mišić); T.9451:3-9452:2/T.9463:8-11/T.9459:15-9460:9/T.9463:6-9(Đorđević); T.12627:1-3(Mitić); T.12174:6-13(Pantelić); T.14196-14198/T.14230-14231/T.14241-14242(Spasić); *see also*, for SAJ, T.13573:21-25/T.13605:18-22(Simović); T.13772:1-2(Stalević).

Staff.[264] Moreover, it was the Ministerial Staff that established and commanded Operational Sweep Groups[265] and mobilised reserve forces in the territory of Kosovo.[266]

176. In relation to the SAJ, paragraph 72 of the Trial Judgement is key. As with the PJP, it held that Đorđević's role in *deployment* amounted to *authority*. Again, this falls short of effective control.

177. Đorđević did not admit members into reserve forces and deploy them as found by the Trial Chamber – this is an erroneous conclusion.[267] The evidence clearly demonstrated that all decisions of this nature were taken by the Minister and such decisions communicated by Đorđević.[268] The Trial Chamber concluded otherwise based almost entirely on the evidence of the one unit to Podujevo; however, even in that instance, had Đorđević been authorised to decide on admittance and deployment of the reserve force in Kosovo, including their re-engagement, he would have communicated such a decision immediately to Trajković, rather than informing him several days later of the decision made by the Minister.[269]

178. In short, mobilising or dispatching PJP and/or SAJ units to Kosovo was a distinct issue compared to the question of whether Đorđević exercised effective control over them during combat operations. In relation to MUP actions, Đorđević was marginalised – merely effectuating Minister's decision as to the *numbers* of RJB forces in Kosovo but playing no role in their combat tasks (or conduct) once there.

179. In summary, Đorđević's submission on appeal is that there was no evidence that he exercised control of the RJB *qua* actions against the KLA albeit he retained a degree

[264] TJ, para.49.
[265] TJ, para.68.
[266] TJ, para.439.
[267] TJ, paras.1928,1943,1946-1947,1953,1955,1989,2158,2163.
[268] *See* D101; D102; D103; D238, Item 2; T.6740(Cvetić); T.9102-9103(Trajković); T.9402-9405(Đorđević); T.13582/13751(Simović); T.13890-13891(Stalević); T.12460(Mladenović); T.12621(Mitić); T.14143-14144(Mišić); *see also*, P66, Art.28, Item 1.
[269] TJ, para.1936; *see* T.9696[REDACTED]/ T.9708:2-T.9709:10(Đorđević); T.9087-9089/T.9101:17-T.9103:2(Trajković); T.13581-T.13582/ T.13593:3-25/T.13680:22-T.13681:2(Simović); T.13787:13-13788:4/T.13890-13891(Stalević).

of authority *qua* other matters (specifically logistics support to the RJB where specifically instructed by the Minister on a limited basis).

THE REPORTING SYSTEM WITHIN THE MUP

180. The only evidence before the Trial Chamber was that Đorđević was not privy to reports on MUP operations (past or future) in Kosovo.[270]

181. The SUPs sent some reports to both the Ministerial Staff and Belgrade. Exhibit P1060 is a typical example. These reports did not cover the conduct of MUP action against the KLA.

182. By contrast, SUP reports covering planned and implemented police actions were sent to the Ministerial Staff in Priština but were not sent to Belgrade. A comparison of the topics covered in the different reports is telling in this regard.[271] The MUP Staff's order of 21 October 1998[272] was irrelevant to the question of the contents of SUP reports to Belgrade.[273] Per that order, the reports were sent by SUPs exclusively to the MUP Staff and those topics were discussed only between the SUPs and the MUP Staff. The RJB Chief did not receive such reports relating to ATAs.

183. The MUP Staff in Priština provided a daily overview of important security events which did not contain reports on the activities of the MUP Staff in Priština or reports on antiterrorist activities of the SUPs in the territory of Kosovo.[274]

184. Given these two sets of reports, the creation of the Ministerial Staff therefore had a marked change on the reporting patterns with the MUP. No reasonable Trial Chamber could reject Đorđević's evidence that he was not informed about MUP operations in Kosovo.

[270] *See infra* Ground 10(*re:*TJ, para.1985).
[271] D274(SUP to MUP Staff) *contra* D275(SUP to MUP Staff/Belgrade); D277(SUP to MUP Staff) *contra* D278(SUP to MUP Staff/Belgrade); D413(SUP to MUP Staff) *contra* D415(SUP to MUP Staff/Belgrade).
[272] P1041.
[273] *Contra* TJ, para.132.
[274] D283-D305; P691-P701; P718-P724; P1570.

185. The Trial Chamber found that if the written reports did not concretely provide accurate information, then Đorđević could rely on knowledge garnered through telephone calls and personal contact;[275] however, this is in error in relation to the period of the Indictment. While the telephone lines (civilian and special) and telegraph lines were in place before the NATO intervention, these communications lines were quickly eradicated in the early phase of the bombing. So while communicating in this fashion may have been regular in 1998 and early 1999, as stated by Cvetić and cited by the Trial Chamber,[276] after 24 March 1999, all communication systems suffered hits and news from the field was severely hampered.[277] Thus, without a showing that Đorđević actually received such information during this time period, knowledge of the events on the ground cannot be inferred as it is mere conjecture.

THE AREAS OF RESPONSIBILITY OF THE ASSISTANT MINISTERS

186. There were five other Assistant Ministers in addition to Đorđević: three from the RJB and two from the RDB.[278] The Trial Chamber found that Đorđević was the superior of the three RJB Assistant Minister, but not superior to the RDB Assistant Ministers including Radomir Marković.[279] However, all Assistant Ministers were directly *responsible* to the Minister, not Đorđević.[280] Whether or not an Assistant Minister was also a member of the RJB and apparently of lower rank was irrelevant. There was simply no evidence that any Assistant Minister was responsible to Đorđević in any capacity.

187. The Trial Chamber focused on Đorđević's rank to determine his status *vis a vis* other Assistant Ministers. It erred in doing so. Unlike a military hierarchy, a superior rank did not decide superior control in the MUP. Contrary to the Trial Chamber's conclusion, the principle of hierarchy in relation to rank was not well-respected

[275] TJ, para.1986-1987.
[276] TJ, para.1986.
[277] *See* D927; D928; T.14207-14209/T.14235-14238(Spasić); T.13951-13953(Čanković), T.3303-3304/3323-3324(Deretić).
[278] TJ, para.38; D208.
[279] TJ, para.43.
[280] P258, Art.18; P263; D208.

throughout the MUP structure.[281] This was recognised by the Trial Chamber in *Milutinović et al*.[282] The same conclusion should have been inevitable in this case.[283]

188. The evidence of Vasiljević, a General in the VJ, was irrelevant to this issue.[284] Đorđević's status as a Colonel General did not mean that he controlled other Assistant Ministers of lower rank or the Ministerial Staff via Sreten Lukić and, through him, the perpetrators of crimes. No reasonable Trial Chamber could so conclude.

189. While the Chamber correctly noted "that any limitation to Đorđević's power by reason of the allocation of an area of responsibility to another Assistant Minister would only arise where there is an overlap between the specific responsibility of another Assistant Minister and the general authority of Đorđević as Chief of the RJB",[285] it then disregarded evidence of exactly this. For example, Petar Zeković, as Assistant Minister, had no other role in the MUP. There was no evidence whatsoever that he was "head of the Administration of Joint Affairs."[286] His responsibility clearly overlapped in two spheres of operations of the RJB.[287]

190. Similarly, Obrad Stevanović was an Assistant Minister but had no other role in the MUP.[288] The Trial Chamber frequently and erroneously suggested that he was Head of Police Administration in the RJB.[289] There was no evidence to that effect. Rather, Stevanović frequently attended Ministerial Staff meetings to relay the Minister's orders directly.[290] Đorđević was out of this loop.

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[281] *See* TJ, para.43.
[282] *Milutinović* TJ, Vol.3/para.943-944.
[283] T.9770:18-23/[REDACTED].
[284] *See* TJ, para.43,fn.117; *contra* T.5844/5887(Vasiljević). The Trial Chamber failed to weigh Vasiljević's concession that he was unfamiliar with the MUP structure.
[285] TJ, para.43.
[286] *Contra* TJ, paras.1342,1353,1356.
[287] TJ, para.38,99,fn.365; P263 [Zeković was in charged for the field of work within the responsibility of 1. the Administration for Joint Services and 2. the Sustenance and Accommodation Administration; Gojko Todorović was head of the Administration for Joint Affairs in the MUP (D208.p.4);
[REDACTED].
[288] TJ, paras.38,99,fn.365, P263 [His responsibilities overlapped with matters within the responsibility of 1.the Police Administration 2. the operations centre and 3. the Internal Affairs College, the Internal Affairs High School, and the Police Academy].
[289] *Contra* TJ, paras.41,60,100,2051,2127[all respective administrations within RJB had their heads (*see* D208, p.4)].
[290] P769; P764, p.4; P771, pp.10-11; P345, pp.7-8.

THE MINISTERIAL COLLEGIUM

191. While the Trial Chamber found that it was "incredible that the Collegium did not discuss or make decisions about the situation in Kosovo in 1998 or 1999"[291], all evidence confirmed that the Minister's Collegium merely relayed the general security situation in Kosovo and implemented the Minister's Decisions related to logistics support without any discussion of plans or reports of the specific ATAs.[292] The Decision of 4 December 1998[293] gave Minister sole power to take ***all*** decisions.[294] And here was virtually no evidence as to what transpired at these meetings. Therefore, the Trial Chamber's conclusion that these meetings were used to discuss and plan MUP engagements in Kosovo during the Indictment period was speculative, and illogical given that the Ministerial Staff in Kosovo was the centre of power.[295]

192. The extent of the "documentary evidence" relied on by the Trial Chamber was a purported diary entry that was not even admitted into evidence.[296] This evidence can do nothing to support the Chamber's assumption, especially as this specific passage put to a witness was rejected.[297]

THE OCTOBER AGREEMENTS

193. Finally, Đorđević's participation in the October Agreements in 1998[298] cannot amount to effective control at the time of the Indicted incidents. The Chamber ignored the testimony that, even at these meetings in 1998, his decision was not absolute[299] and he was the signing member of an entire delegation authorised to sign on the behalf of the Republic of Serbia.[300] Further, it failed to analyze the October Agreements for what

[291] TJ, para.101.
[292] T.14032/14040/T.14053-14054/T.14087-14090/14094-14096(Mišić); T.14196-14198/T.14230-14231/T.14241-14242(Spasić).
[293] D208.
[294] D208, Art.V.
[295] *Contra* TJ, para.103.
[296] TJ, para.102.
[297] TJ, para.102, *see also* T.14099-14100(Mišić).
[298] TJ, paras.1916-1917.
[299] T.8241-8242(Byrnes); P1214(T.12158).
[300] TJ, para.358; T.9648-9653.

they were – intent of the FRY, with Đorđević's participation, to peacefully resolve the crisis in Kosovo.[301]

CONCLUSIONS AND RELIEF SOUGHT

194. The Trial Judgement massively overstates Đorđević's role in Kosovo in 1999 on the basis of a wholly erroneous evaluation of the impact of Ministerial Staff, his rank *vis a vis* other Assistant Ministers and the nature of the Ministerial Collegium. These findings invalidate the Trial Chamber's conclusions as to the extent of Đorđević's effective control over the RJB and participation in any JCE. 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.

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

195. The Trial Chamber concluded that the Joint Command was "the overarching body composed of senior political, military and police officials that coordinated the actions of the VJ, MUP and associated forces in Kosovo before and during the Indictment period".[302]

196. The Trial Judgement concluded that the legal order of the FRY and the Republic of Serbia did not authorise the functioning of a Joint Command.[303] But nothing precluded such coordination between the VJ and MUP. A Joint Command was properly within the discretion of the President of the FRY and the Trial Judgement provides no basis to conclude otherwise. No inference of impropriety arose. In any event, as the Trial Chamber acknowledged, membership of the Joint Command was not equivalent to membership of a JCE.[304]

197. Crucially, there was no evidence, and the Trial Chamber was not entitled to conclude, that Đorđević was a member of the Joint Command during the Indictment period.

[301] T.9651.
[302] TJ, para.2051.
[303] TJ, paras.231,252.
[304] TJ, para.2124.

The Trial Chamber's conclusion as to the membership of the Joint Command was based exclusively on the basis of notes taken during the summer of 1998.[305] The evidence as to the future membership of the Joint Command was inconclusive.[306]

198. Relevant to the Indictment period there were 16 orders bearing the heading "Joint Command for KiM".[307] The Trial Chamber failed to weigh that each one of these orders was registered in the logbook for the Priština Corps.[308] Similarly, the amendment to the Joint Command Order dated 22 March 1999 was signed by the Commander of the Priština Corps.[309] There was no evidentiary basis upon which to conclude that Đorđević played any role in the operation of the Joint Command during the Indictment period.

199. Indeed, the Trial Chamber concluded that the Joint Command operated from the Priština area.[310] There was no evidence that Đorđević was even in Kosovo during the Indictment period except for a handful of occasions.[311] It is incongruous for Đorđević to have been a member of the Joint Command in 1999 if the was not even there.

200. The Trial Chamber's conclusions as to Đorđević's attendance at a single meeting of the Joint Command on 1 June 1999 did not establish membership or any role in the operation of the Joint Command during the Indictment period.[312] Nothing in Vasiljević's evidence suggested as much – indeed Vasiljević's presence at the same meeting did not mean that he was a member of the Joint Command.

CONCLUSIONS AND RELIEF SOUGHT

201. No reasonable Trial Chamber could conclude that Đorđević was a member of a Joint Command in 1999 or that this bore any relation to his alleged membership of a JCE. No reasonable Trial Chamber could rely on this issue as indicative of Đorđević's

[305] TJ, paras.238-239.
[306] TJ, para.233, considering P87, p.12-15.
[307] TJ, paras.236,241,fn.837.
[308] T.7945:19-7946:15/8067:23-8068:15(Djaković).
[309] D105 amending D104.
[310] TJ, paras.241,236.
[311] *See* Sub-ground 9(A).
[312] *Contra* TJ, para.1925.

participation in a JCE[313] 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.

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

202. This point is short, but no less important.

203. The Indictment crimes for which Đorđević was convicted took place from 24 March - 20 June 1999. The Trial Chamber appeared to conclude that the JCE came into existence around January 1999.[314] Yet vast swathes of the Trial Judgement rely on events in 1998 and early 1999 as demonstrating Đorđević's "knowledge and intent" in relation to the Indictment crimes. It further held that there was a pattern of excessive force and a lack of investigation of crimes in 1998 and early 1999.

204. It is respectfully submitted that the Trial Chamber's approach was inherently unfair and should be discouraged by the Appeals Chamber. Đorđević was charged with criminal responsibility for identified crimes in 1999. In order to be entitled to rely on events in 1998 or others, like Račak (dealt with in Sub-ground 9(E)), those events should have been specifically alleged, litigated and proved beyond reasonable doubt. Instead, the Trial Judgement is polluted with findings in relation to 1998 and 1999 that were not charged or properly litigated. Indeed, during the trial the Presiding Judge emphasised the Trial Chamber's "*... constant call both to the Prosecution and to the Defence … to concentrate on the period of the indictment, and to not be misled by the possible relevance of the general picture ...*".[315]

205. The *Milutinović* Trial Judgement recognised this point. It rightly held that in order for the Prosecution to rely on crimes in 1998, it had to prove that those crimes were committed.[316] No such caution was displayed by the Trial Chamber in this case.

[313] *Contra* TJ, paras.1897,1898,2154,2162.
[314] TJ, paras.2025-2026.
[315] T.11715:9-11.
[316] *Milutinović* TJ, Vol.1/para.844.

206. The result is a dangerous and unjustified extension of JCE whereby Đorđević is alleged to have *participated* in crimes during the Indictment period by means of his knowledge and conduct in relation to much earlier events. But those earlier events have not been proven to the requisite standard. The Trial Chamber's approach introduces a gap between the *actus reus* and *mens rea* of participation in a crime and, with it, huge uncertainty into the law.

CONCLUSIONS AND RELIEF SOUGHT

207. The Appeals Chamber is invited to review the Trial Chamber's findings in the absence of bifurcated findings in relation to 1998 and early 1999. 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.

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

208. The Trial Chamber erred when holding that the separate actions of 'arming' and 'disarming' were related to a JCE rather than being reasonable steps to combat and defend against the KLA. It further erred by relying on these matters as relevant to Đorđević's participation in a JCE.[317] Knowledge of such actions on the part of Đorđević did not establish participation in a JCE.[318]

DISARMING

209. The 'disarming of Kosovo Albanian villages' found by the Chamber is erroneously linked to a JCE plan where there is no showing of any such intention. These actions were carried out in 1998, at a time when the KLA had achieved a sufficiently organized armed force of terrorists so as to be capable of lending to an internal armed conflict.[319] The criminal actions of the KLA in 1998 are the subject of prosecutions before this Tribunal. Weapons were continually smuggled across the porous border

[317] TJ, para.2154.
[318] *Contra* TJ, para.2154.
[319] TJ, para.1578; *see infra* Ground 1.

from Albania to Kosovo.[320] The evidence before the Trial Chamber was that the KLA wanted to arm the *entire population from the age of 16*[321] and possessed "impressive weapons depots".[322] In such circumstances, there was nothing criminal in seeking to remove weapons from the reach of the KLA whilst doing everything possible to defend those in danger.

210. The example of Istinić in 1998[323] shows the misinterpretation of the evidence in this regard as none of it details removal of weapons from *villagers* in Istinić, but rather the return of refugees[324] and, separately, the surrender of KLA weapons. These actions of disarming were legal.[325] The Chambers did not refer to any legal enactment that would prevent the State from taking legally prescribed measures against those in possession of illegal weapons, nor did it distinguish between these actions as taken against criminal, not civilian, actors. The inference remained that disarming was a necessary and legal measure to disarm a growing terrorist threat.

211. In any event, the conclusion that Đorđević was *de jure* responsible for the disarming of Kosovo Albanian villages was wholly erroneous. The Trial Chamber relied on documentation from the Joint Command, Priština Corps and individual SUPs.[326] This bore no relation to Đorđević. The SUPs in Kosovo were controlled by the Ministerial Staff in Priština, as the Trial Chamber acknowledged elsewhere.[327] Exhibit D244, as referenced by the Trial Chamber,[328] shows that the MUP Staff in Priština exercised effective control over the SUPs in the region with no link to the Đorđević. The evidence, then, does not point to a solid conclusion that the Đorđević was even informed of the disarming, much less that he held *de jure* control.

[320] TJ, paras.277,308,854,1566, fn.1299. *See also* T.9215-9216/T.9224(Crosland), [REDACTED]; T.8765/T.8827(Phillips); T.5333-5334(Ciaglinski), P834 (T.6923-6924); T.2479-2482(Zyrapi), [REDACTED] (T.5977/T.5979-5981); [REDACTED]; T.11692-11693(Stojanović); D57; D58; D571; D320; D725; D726; D727; D728; D733; D734; D787; D788; D789; D790; D791; D911.
[321] P431, p.5(document)/p.2(eCourt).
[322] TJ, para.1566.
[323] TJ, para.1910.
[324] D429.
[325] P1049, Art.33.
[326] TJ, para.1910.
[327] TJ, para.49.
[328] TJ, fn.6559.

ARMING

212. The RPOs were created in 1998[329] (before the alleged JCE came into existence[330]) for the sole purpose of defending against terrorist forces. The RPOs were civilians who operated as a volunteer territorial defence, as maintained by many countries, whilst keeping their regular jobs.[331]

213. The Trial Chamber concluded that the decision to form and arm these units "was made by the MUP headquarters in Belgrade, passed to the MUP Staff and implemented by the SUPs."[332] But the only citation for this finding was witness Cvetić.[333] There was no other evidence, documentary or testimonial, to corroborate this assertion as to the role of "MUP headquarters in Belgrade". Cvetić's statement is, however, consistent with all other findings and evidence which point to the RPOs being established by the MUP Staff in Priština[334] reporting directly to the Minister at his request.[335] There was no evidence, and Cvetić would not have known in any event, whether Đorđević was involved.[336] Any further communications were delivered directly to the Minister by his Ministerial Staff[337] and the Minister himself communicated with the VJ and MUP Staff.[338] There was no evidence to suggest that Đorđević played any role.

214. In attempting to impute first-hand knowledge of RPO offensive actions, the Chamber focused on Čičavica in September 1998.[339] But Đorđević was not physically present - he was on the other side of the mountain.[340] Secondly, the information given by Lazarević at the Joint Command meeting Đorđević attended was limited to stating that a plan had been prepared for Čičavica.[341] Finally, the passage of testimony cited

[329] P901; P1052; P1054; P1355.
[330] TJ, para.2000,2026.
[331] T.6742.
[332] TJ, para.92; *see also* para.1911.
[333] T.6713.
[334] TJ, para.92,fn.333.
[335] P688, p.8.
[336] *Id.*, p.1.
[337] *See* P85(while Đorđević was present at this meeting, it was the Minister who was being briefed and there is no evidence that the full report of 16 February 1999 (P1055) was submitted to the RJB).
[338] D449-D451.
[339] TJ, para.1903.
[340] T.9863.
[341] P886, p.103.

by the Chamber actually states that during Đorđević time in the field "armed villagers never joined the police or the army forces to act jointly, to take part with them in anti-terrorist activities, never ever."[342]

215. Despite this limited evidence, the Trial Chamber erroneously concluded that Đorđević had sweeping knowledge of 'the arming of the Serb civilian population in Kosovo' not only in 1998 but until the end of the Indictment period in 1999."[343] Such all-encompassing breadth of knowledge is simply not shown on the evidence, in particular, in 1999.

CONCLUSIONS AND RELIEF SOUGHT

216. The cumulative error is that the Trial Chamber equates these erroneous findings of knowledge with some kind of effective control[344] which, it finds, goes to a 'significant contribution' to the JCE.[345] There was no explanation how any knowledge in 1998 (of plainly legitimate activities) could translate into an *actus reus* of a significant contribution to the common purpose in 1999. While Đorđević was found to be in charge of the RJB, none of the RJB dispatches in evidence concern the issues of arming or disarming of the population.

217. The Trial Chamber concluded that arming was done in a discriminatory way beyond an espoused aim of self-defence.[346] The evidence did not support that conclusion. The Trial Chamber failed to eliminate legitimate reasons for the arming of a limited number of Kosovo Serbs and attempts to remove sources of weapons from the KLA. In those circumstances, Đorđević's knowledge of such actions was irrelevant. Further, on the evidence, any such actions taken cannot be imputed to the Đorđević. 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.

[342] T.9863.
[343] TJ, para.1915.
[344] TJ, para.1899.
[345] TJ, para.2154.
[346] TJ, para.1915.

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

218. The Prosecution withdrew the Račak incident from the Indictment as a crime site, stating that it did not intend to lead evidence on this charge at trial.[347] Its relevance was limited to Đorđević's alleged *mens rea* by paragraph 64(g) of the Fourth Amended Indictment, as reminded by the Trial Chamber.[348]

THE TRIAL CHAMBER'S ERRONEOUS APPROACH

219. The Trial Chamber's conclusions were not established by its own findings or by the evidence. The Trial Chamber erroneously concluded that 45 Kosovo Albanian civilians were killed in Račak on 15 January 1999.[349]

220. The Trial Chamber impermissibly concluded that Račak established "coordinated action" between the MUP and the VJ pursuant to a JCE and that it went towards Đorđević's *actus reus*.[350] Such an approach is inherently unfair. Insufficient notice was given and this matter has not been litigated fully. The Trial Chamber's use of Račak should be reversed. Findings in relation to Račak outside of those strictly regarding Đorđević's *mens rea* should be quashed, particularly the findings that Račak was a "joint action"[351] ordered by the Joint Command[352]; that 45 civilians were killed; and that Đorđević was "responsible" for whatever occurred, including a supposedly staged misrepresentation of bodies on 18 January 1999.[353]

221. In fact, the evidence was that on 15 January 1999 KLA had sole control of the scene,[354] while denying access to Serbian authorities by firing upon the investigative teams who tried to enter.[355] The KLA remained an "overt" presence.[356] The verifiers

[347] *Prosecution's Motion for Leave to Amend the Third Amended Joinder Indictment with Annexes A, B, and C*, 2 June 2008, para.23, granted by *Decision on Prosecution's Motion for Leave to Amend the Third Amended Joinder Indictment*, 7 July 2008, paras.47,51.
[348] *Decision on Prosecution's Motion for Admission of Video-Recording MFI P1575*, 30 March 2010, para.9.
[349] TJ para.416. Elsewhere, the Trial Chamber suggested that the number was as high as 60 (*see* TJ, para.2134).
[350] TJ, paras.1923-1925,1992,2154.
[351] TJ, para.2134.
[352] TJ, fn.1387.
[353] TJ paras.257,1924.
[354] *See* T.6521:18-25; P1575; D932.
[355] TJ, para.411; *see also* T.13075-13076; D149.

who arrived did not have personnel or equipment, were not authorised to carry investigation and did not secure the area.[357] KVM Representative Maisonneuve saw no casings at the scene.[358] Prior to Ambassador Walker and General Drewienkiewicz leaving, villagers moved the bodies into the mosque" and US-KDOM remained in the village overnight.[359] When a Serbian Investigation Team was finally able to investigate, that investigation was supervised by the OSCE.[360] Forensic tests revealed bodies of various ages[361], not mostly over 50 years old as suggested by the Trial Chamber.[362] Crucially, 37 of the 40 bodies had gunpowder residue on them and there were no traces of gunpowder explosion in the areas of wounds such as to suggest that the individuals were shot at point-blank range.[363]

222. The Trial Chamber failed to consider these forensic reports.[364] It did not consider that weapons, including artillery weapons, were recovered from the KLA in Račak.[365] The Chamber failed to consider further evidence of KLA activity, that the KLA was in the village on 15 January,[366] including a KLA headquarters,[367] that the wounded were treated at military hospitals[368] and that those who perished were buried in accordance with KLA military rules.[369]

223. The Trial Chamber rejected the evidence of the Investigating Judge on the basis that she had been set up: the Trial Chamber suggested that bodies shown in the video were

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[356] TJ, paras.407,410,415. *See* T.13061:9-14: P1575(23:40-23:58) where Mr. David Brown, who identifies himself as with the KVM as the "mission medical coordinator" states they "have been taken by local KLA and villagers" with the assumption that is a mass execution."; D932(17:13-17:30) clips of same video showing members of the KLA present; *see also* T.6515:13-15(Drewienkiewicz).
[357] *See* T.6520-6522 (Drewienkiewicz).
[358] T.5536.
[359] TJ, para.408.
[360] TJ, para.412.
[361] *See* D895–List of victims showing age distribution of the 40 victims listed, 1 girl ('body No.36') was 22-years of age–a daughter of Bajram Mehmeti who is on the same list as a KLA member ('body No.40'); T.12892:5-11(Marinković).
[362] TJ, paras.407,416.
[363] D895; D898; D900; D899, T.12980-12981(Marinković).
[364] D899 confirms that autopsies were performed on 40 bodies, 16 of them in the presence and with participation of two experts from Belarus and 24 together with forensic experts from Finland; that the findings and conclusions of these expert teams were consistent (10, 12); that the procedure began in the presence of two OSCE representatives (2); that gunshot wounds were localised on different parts of the body (6); that examination revealed that all, save two, were not shot at close range, but from a distance (9).
[365] D149; D148; D757, p.4; D896; T.11739(Stojanović).
[366] T.5539(Maisonneuve).
[367] TJ, paras.401,412.
[368] P872; T.5544-5545(Maisonneuve).
[369] T.12500(Mladenović).

not the same as those the Judge saw in the mosque.[370] However, no reasonable Trial Chamber could make such a finding of a 'staged scene' as there is absolutely no evidence to support this and does not account for how this would even be possible given the chain of custody and close observation by verifiers during this period of time.[371] In fact, the representatives of the OSCE were present during the on-site investigation[372] and certainly would have noticed if there had been such tampering. This suggestion of a 'staged scene' surely does not explain where substituted victims[373] may have come from and, in turn, where the actual victims had gone. Given the totality of the evidence, it is unreasonable to believe that the MUP could, even if it wanted to, manipulate the scene this greatly, especially with KVM/OSCE and US-KDOM spread throughout the village in this time and, as shown in the evidence, monitoring the investigation. In fact, the verifiers claim that there were 'no MUP or VJ' even in the village of Račak in the intervening period.[374]

224. Further, the Trial Chamber found that Đorđević "led MUP efforts to conceal evidence of grossly excessive force and present it as a legitimate anti-terrorist operation."[375] At trial, there was no evidence to support this scenario and no accusation of a 'cover-up' was ever put to him in his testimony for him to refute. As shown above, there was simply no basis upon which to draw any conclusion as such a 'staged scene', much less was there any basis upon which to conclude that Đorđević 'set up' the Investigating Judge. More relevant in this regard were the repeated attempts to investigate the scene after 15 January 1999 and the attempt to involve an independent Finnish team of investigators.[376]

225. More likely than Serb forces arranging the bodies in the mosque was a scenario whereby the KLA set up the initial scene observed by the KVM on 15 January following a heavy firefight.

[370] TJ, paras.415,425.
[371] T.5467(Maisonneuve).
[372] D148.
[373] TJ, para.415.
[374] T.5535(Maisonneuve); P852(T.5779/T.5862).
[375] TJ, para.1924.
[376] TJ, para.413.

CONCLUSIONS AND RELIEF SOUGHT

226. The Trial Chamber seriously erred by relying on Račak against Đorđević. The Appeals Chamber is invited to exclude Račak entirely from any evaluation of Đorđević's criminal responsibility for the Indictment crimes and quash his convictions or reduce his sentence accordingly.

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

227. Six submissions are made challenging the Trial Chamber's approach. The first five relate to the atrocity committed in Podujevo on 28 March 1999 when members of SAJ reserve forces murdered a group of Kosovo Albanian civilians. The sixth challenges the extension of this atrocity to hold Đorđević responsible for crimes of other paramilitaries in Kosovo.[377]

PODUJEVO

228. First, there was no basis (other than guesswork supported by hindsight) to hold that the incorporation of a reserve forces into the SAJ and its deployment to Podujevo was criminal from Đorđević's perspective when those decisions were taken.

a. There was no evidentiary basis to support the conclusion that, in March 1999, Đorđević realised that the 'Scorpions' were "widely known as a paramilitary formation that had participated in crimes during the fighting in Croatia in the early to mid 1990s".[378] To say that Đorđević "could not but have known" of the 'Scorpions' crimes, including the now infamous massacre at Trnovo, Bosnia, in 1995, was speculative.

[377] *Contra* TJ, para.1929,2155.
[378] TJ, para.1953. The Chamber itself noted at TJ, para.195,fn.6726, that Medić stood trial in 2003 for the killings committed in Trnovo. All witnesses who testified in this case confirmed that nobody knew of those crimes until video footage was shown during the *Milošević* trial: [REDACTED]; T.9100:21-9101:1(Trajković); T.13699:1-9(Simović); T.13789:15-20(Stalević); T.9710:5-18(Đorđević). Also, Đorđević had never been in the territory of SBZS (*Croatia*) *see* [REDACTED].

b. The Trial Chamber itself recognised that only a fraction (15 or 16 out of 128) of the SAJ reserve forces deployed to Podujevo were former 'Scorpions'.[379] Beyond this, the evidence accepted by the Trial Chamber was that Đorđević knew that up to 50% of those recruited had no combat experience.[380] Such a finding was consistent with Đorđević's case that the individuals were needed in a support capacity for the Belgrade and Priština SAJ units.[381]

c. When holding that background checks were not conducted on the new recruits, the Trial Chamber failed to consider evidence demonstrating that checks were indeed undertaken and came back negative.[382] After the atrocity on 28 March 1999 further (broader) investigations suggested that some did have convictions in other countries.[383] It was not established that Đorđević should have discovered those convictions earlier.

229. Second, there was no evidence, and the Trial Chamber did not conclude, that Đorđević played any part in a criminal order for the 'Scorpions' to clear up the part of the town of Podujevo not yet under Serbian control.[384] The evidence cited by the Trial Chamber was vague but to the effect that the 'Scorpions' received that instruction while en route from Prolom Banja to Podujevo on the morning of 28 March 1999.[385] There was no suggestion that Đorđević was the source. By contrast, the orders for operations in that area at that time focused on actions against the KLA in villages surrounding Podujevo.[386] In any event, the evidence noted by the Trial Chamber was that the 'Scorpions' arrived in an area of Podujevo already firmly under Serbian control: many houses were unoccupied[387] and there were large numbers of

[379] TJ, para.1951.
[380] TJ, para.1951.
[381] TJ, para.1939.
[382] T.9089:3-8(Trajković); T.13693:23-25/T.13696:1-3(Simović); T.13846:1-9/T.13890:16-22(Stalević); *see also*, P40, p.1; P41, p.1; P1594, pp.1-4 (Đukić and Medić had no criminal convictions; Cvetan and Šolaja no criminal conviction prior the events); T.2845(Stoparic) (Cvjetan and Demirović had not been members of the 'Scorpions' prior); T.13713-T.13716(Simović) (access to criminal records from Croatia were not possible in 1999 without judicial order; background checks were done at the local SUP level).
[383] TJ, fn.6728; indeed Vasiljević's evidence as to the further checks conducted was that this was a general estimate, rather than any ability to run comprehensive checks on individuals. *See* T.5670-5671/T.5915-5916/T.5931-5932 that it was just an overall estimate. But no individual security checks were carried out.
[384] TJ, para.1944,2142.
[385] TJ, para.1238,1938.
[386] D104; D105; P889(22 March 1999); TJ, fn.4677.
[387] TJ, para.1938.

VJ, PJP and SAJ units already there.[388] The most likely explanation was that a fraction of the 128 SAJ reservists deployed to Podujevo went off on a horrific frolic of their own.

230. Third, immediately after the atrocity all 128 'Scorpions' were removed from Kosovo and criminal investigations begun. The Trial Chamber failed to explain how, if Đorđević (or others) sought to use the 'Scorpions' to commit atrocities, they would be withdrawn rather than sent on to find further victims. The victims were administered the first aid by police and transported to hospitals in Priština and Belgrade.[389] Instead, Đorđević ordered that all reservists should be disarmed.[390]

231. Fourth, the Trial Chamber placed an unfair burden on Đorđević in relation to the investigation of this atrocity. An investigate judge performed an on-site investigation in Podujevo on 30 March 1999.[391] This led to a criminal report on 23 May 1999 against two individuals and they were detained.[392] The prosecutions continued and both were convicted.[393] A further case followed in 2008 against another four 'Scorpions'.[394] In a perfect world, proceedings would move much more quickly. But this Tribunal should recognise that such a pace of Prosecution, especially during wartime, is understandable. In any event, Đorđević had no role once judicial investigations began.

232. Fifth, the Trial Chamber erred when considering the redeployment of the SAJ reservists in April 1999. Only 108 of the 128 were redeployed to Kosovo. A clear inference existed that the suspected perpetrators of the Podujevo atrocity were not or were not thought to be in their number.[395] In any event, it was not established to an adequate standard that any later crimes were committed by those redeployed. Had the Prosecution wanted to rely on events in the Jezersko mountain area those events

[388] *Id.*
[389] TJ, paras.1255-1256; T.1944:6-20(F.Bogujevci); T.2840(Stoparić), *see also* P493(para.59); [REDACTED]; T.13784(Stalević); T.13588(Simović) [all were at the scene and described that medical help was provided by members of the SAJ and the SAJ doctor Dragan Marković].
[390] TJ, para.1963.
[391] TJ, para.1959; D411.
[392] TJ, para.1962; P1592; P1593.
[393] TJ, para.1962.
[394] TJ, para.1962.
[395] T.9102:10-T.9109:21(Trajković), T.13593:3-T.13594:3(Simović); T.13889:1-16(Stalević).

should have been alleged and proven.[396] The circumstances of operations in that area in May 1999 were not explored at trial and it was outwith the Trial Chamber's discretion to rely on them.

233. Therefore, no reasonable Trial Chamber could conclude that Đorđević participated in a JCE by vice of any involvement in the deployment of a handful of 'Scorpions' deployed to Podujevo among SAJ reservists. Their crime in Podujevo is not disputed. But no reasonable Trial Chamber could, in fairness, attribute their crime to Đorđević.

PARAMILITARIES GENERALLY

234. Turning to the sixth submission. The Trial Chamber unjustifiably extended Đorđević's involvement in the deployment of the 'Scorpions' to entail criminal responsibility for the acts of all paramilitaries operating in Kosovo. Other than the 'Scorpions', there was no evidentiary basis to conclude that paramilitaries were incorporated into the ranks of the RJB. The Trial Chamber's analysis of Arkan's Tigers, the White Eagles and Pauk Spiders was inadequate. Even construing Đorđević's dispatch of 18 February 1999 against him, there was no evidentiary basis upon which to conclude that paramilitaries were incorporated into the MUP and VJ and used by those forces. Even if Arkan's Tigers were "associated with the RDB"[397] or White Eagles seen "coordinating their actions"[398] with MUP forces or Pauk Spiders were "absorbed into the VJ" (for a brief period)[399] such findings fall short of being "used by" JCE members as required in order for criminal responsibility to attach to Đorđević.

235. But the Trial Chamber was not entitled to construe Đorđević's dispatch of 18 February 1999 against him. The Trial Chamber noted that Đorđević sent a dispatch to all SUPs in Serbia and the RDB (to the Chief, for information only) requesting them to "establish complete control over volunteer and paramilitary units and their members".[400] The Defence case at trial was that this sought to preclude the

[396] *Contra* TJ, para.1948.
[397] TJ, para.210.
[398] TJ, para.212.
[399] TJ, para.216.
[400] TJ, para.195.

widespread incorporation of paramilitaries into Kosovo, consistent with preventative steps Đorđević took in 1998.[401] The Trial Chamber rejected this argument, holding that this dispatch was "quite clearly an instruction to implement" the Minister's order given at the Ministerial Staff the previous day to "engage volunteers".[402] But the evidence of Cvetić relied upon by the Trial Chamber[403] was that Đorđević's order was understood by the SUP's to be an order to prevent the introduction of volunteers. If the Trial Chamber wished to reach a different conclusion, it had to reject Cvetić's evidence and explain why. It did not.[404]

CONCLUSIONS AND RELIEF SOUGHT

236. The Trial Chamber overstated Đorđević's role in the deployment of 'Scorpions' to Podujevo and understated his response to their crimes. The Trial Chamber erroneously extended its assessment of Podujevo to imply that Đorđević bore wider responsibility for the crimes of all paramilitaries. Further, the Trial Chamber failed to apply the necessary test to attribute the crimes of paramilitaries to any JCE member. The Appeals Chamber is invited to exclude this issue for any assessment of Đorđević's liability and reduce his sentence accordingly.

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

237. The Trial Chamber erred when it concluded that a plan existed to conceal the bodies of Kosovo Albanian civilians killed during the Indictment period and that Đorđević was an active contributor to that plan. Đorđević challenges these findings on four bases: (i) the concealment of bodies did not necessarily contribute to a JCE; (ii) the Trial Chamber improperly relied upon the Working Group evidence; and, (iii) the Trial Chamber overstated Đorđević's role based on improper findings; and (iv) the Trial Chamber applied an unfair standard when assessing Đorđević's involvement.

[401] P709, *see* TJ, para.1928.
[402] TJ, para.2021.
[403] TJ, fn.6943, referring to T.6677-6679(Cvetić).
[404] *See* TJ, paras.1928-1929, where the Trial Chamber noted Cvetić's position but did not reject it.

238. At trial, Đorđević accepted and admitted his role in the burial of bodies at Batajnica and that he was told about bodies discovered in Lake Perucac. He candidly acknowledged that he should pay a price. On appeal, it is respectfully submitted that the Trial Chamber overstated the nature of Đorđević's involvement and unfoundedly linked such admissions to the JCE.

THE CONCEALMENT OF BODIES DID NOT NECESSARILY CONTRIBUTE TO THE JCE

239. A first and preliminary point taken on appeal is that the Trial Chamber made insufficient findings as to how the concealment of the bodies of Kosovo Albanian civilians furthered the JCE. The Trial Chamber's approach appears to have been that the concealment of bodies furthered the JCE by hindering investigations into the circumstances of the deaths of those individuals.[405]

240. However, concealment of a crime after the fact does not contribute to the earlier crime in law or fact. Concealment, similar to failure to investigate[406] is an *ex post facto* action. It is not a form of participation in the perpetrators' earlier crimes, which can create culpability under 7(3) but cannot be attributable to crimes under 7(1) JCE. International criminal law recognises a distinction: command responsibility is, among other things, criminal responsibility for a failure to punish subordinates' crimes. The culpability under Article 7(3) of the Statute is a *sui generis* failure to punish. Similarly, in order for later actions to aid or abet an earlier crime, an accomplice must have agreed in advance with the physical perpetrator that such assistance would be provided.[407] The Trial Chamber's approach in Đorđević's case blurs these distinctions.

241. The Trial Chamber found that there was a "conspiracy of silence" at all levels of the MUP and VJ based on alternative bases: it speculated that either evidence of such a conspiracy was destroyed *or else* it had been avoided in the first place.[408] However, the Trial Chamber's findings in the same paragraph negate the suggestion that

[405] TJ, paras.2025-2026,2146,2086-2121.
[406] *See infra* Sub-ground 9(H).
[407] *See Aleksovski* TJ, para.62; *Blagojević* TJ, paras.731,745.
[408] TJ, para.2108.

evidence was not written down or that it was destroyed and the written records in evidence did not suggest the inference of such a conspiracy.

242. Antithetical to any concealment master-plan, on the Trial Chamber's own findings, investigations were undertaken into these matters. Following the discovery of the refrigerated lorry in the Danube at Tekija, a municipal investigative judge, a deputy municipal prosecutor, and a coroner were called to the scene.[409] Thereafter, the district prosecutor in Negotin was informed.[410]

243. Given this and that the Trial Chamber was unable to make specific findings against "other specific senior political, MUP and VJ officials" on this matter,[411] there is a missing evidentiary link as to how this was an agreed part of the JCE. The exception to these submissions is the suggestion of a March 1999 meeting which is based solely on the highly unreliable evidence of the Working Group, addressed below.

THE TRIAL CHAMBER'S USE OF THE WORKING GROUP EVIDENCE

244. The Trial Chamber erred when it placed substantial weight on the Working Group evidence in order to have any evidence to link the separate concealment actions to the JCE. Based on Working Group information made public, the Trial Chamber held that, in March 1999, a meeting took place in President Milosevic's office when Stojiljković was instructed to conceal the bodies of Kosovo Albanian civilians and that at a subsequent MUP Collegium meeting, Minister Stojiljković issued an order to the Đorđević to carry out that task.[412] The Working Group, and thus the Trial Chamber, concluded that Minister Stojilković and Đorđević sought to cover-up the discovery of the refrigerated truck at Tekija and launched an operation named Dubina II to achieve this. On appeal, Đorđević seeks to reopen the Trial Chamber's reliance on the Working Group evidence on the basis that no reasonable Trial Chamber could place any reliance upon it.

[409] TJ, para.1293-1296.
[410] TJ, para.1294.
[411] TJ, para.2119.
[412] TJ, paras.2112-2117.

245. The Working Group was set up in May 2001 in order to report to the then Minister of Interior following the publication of a newspaper article about the bodies found at Tekija in April 1999. The Working Group made its findings public in two press releases described as 'information'[413] (which the Trial Chamber characterised as "reports") dated 25 May 2001 and 26 June 2001. The Working Group interviewed a number of individuals and all of the "Official Notes" of the interviews were admitted as evidence against Đorđević.

246. The Trial Chamber erred in identifying the timing of the Working Group. It asserted that the Working Group published its first report a mere few days after the indictment of Milosevic (in May 1999);[414] similarly elsewhere the Trial Chamber suggests that the Working Group began its work in May 1999.[415] In another part, the Trial Chamber suggests (rightly) that the Working Group was set up in May 2001.[416] It is respectfully submitted that fundamental errors such as these undermine the deference which the Appeals Chamber might otherwise pay a Trial Chamber in its discretion to assess the evidence before it.

247. More critically, however, the "Official Notes" lacked any basic indicia of reliability sufficient for them to have been afforded *any* weight:

- There is no reference number and no date and place of interview;[417]
- There is no signature of the person who prepared the Official Note or the person responsible for its content; in most of the cases there is not even a signature of the person who allegedly provided the information contained in the note;[418] and
- The person interviewed had no opportunity to review or even know what would be written in the Official Notes.[419]

[413] [REDACTED].
[414] *See* TJ, para.1371; *see Prosecutor v. Milošević*, Case No. IT-99-37, Indictment, 22 May 1999 (made public on 27 May 1999).
[415] *See* TJ, para.1982.
[416] TJ, paras.1289,1369.
[417] [REDACTED].
[418] [REDACTED].
[419] [REDACTED].

248. Nor did it need the Trial Chamber need to rely on these "Official Notes". A significant proportion of the individuals who spoke to the Working Group also testified before the Trial Chamber.[420] However, when testifying before the Tribunal, many of the witnesses shown their "Official Note" challenged the alleged statements contained therein or said that [REDACTED] expressed pressure on them to falsely incriminate Đorđević.[421]

249. The unreliability of the Working Group's methods is critical because the ***only*** evidence of the alleged March 1999 Milosevic meeting and subsequent MUP Collegium was the Working Group's information release of 25 May 1999. The underlying basis for the suggestion that such meetings occurred was said to be a statement provided by Radomir Marković (the former RDB head) to RDB members. The Working Group did not have Marković's actual statement.[422] Rather, notes were supposedly taken of its contents. However, even these secondary notes were not submitted as evidence against Đorđević. Instead, the extent of the evidence of these two key meetings was the suggestion in the press release "Information' which is not supported by any primary source".[423]

250. Moreover, [REDACTED] testified that neither he nor the Working Group found any evidence to indicate that the removal of bodies from Kosovo was discussed at any MUP Collegium or any such meeting with Milošević.[424] He also testified that Borišavljević (Đorđević's chef de cabinet) had never said that these things were discussed at any MUP Collegium.[425]

251. While hearsay evidence is admissible before this Tribunal, it is respectfully submitted that the Trial Chamber's approach on this issue should be discouraged. The suggestion that these two meetings took place rested on the flimsiest of foundations. No reasonable Trial Chamber should have placed any weight on the suggestion by the

[420] Boško Radojković, Časlav Golubović, K87, K88, K93.
[421] [REDACTED]; T.14165-T.14172(K87); *see also* T.1808-1811(Radojković); [REDACTED].
[422] TJ, para.2112.
[423] TJ, para.2117: The Chamber was "well aware" that there was no first-hand evidence about the meeting allegedly held in March 1999 (in the office of President Milošević)
[424] [REDACTED]

[425] [REDACTED].

Working Group that these meetings either occurred or as to what happened at them as done in this Trial Judgement.[426] The prejudicial effect of this evidence far outweighed its probative value.

ĐORĐEVIĆ'S ROLE IN THE CONCEALMENT OF BODIES

252. With regard to concealment operations, the Trial Chamber relied on Đorđević's role in three areas:

(i) The concealment of approximately 80 bodies discovered on 4 April 1999 in the back of a refrigerated lorry which had been deliberately driven into the Danube river near **Tekija**, eastern Serbia.[427] The bodies were transferred to a SAJ base at Batajnica and buried there.[428] There followed a number of further burials at Batajnica in which the Trial Chamber held Đorđević was also involved.[429]

(ii) The burial of approximately 48[430] (or 84[431] – the Trial Judgement is inconsistent as to which) bodies next to **Lake Perucac** in western Serbia, near the border with Bosnia. Bodies were spotted floating in the lake in mid April 1999. A submerged container of bodies was then discovered. It concluded that Đorđević knew these were Kosovo Albanians and that his instinctive reaction was to ensure that they would not be discovered or investigated.[432]

(iii) Two deliveries of bodies to a PJP training facility at **Petrovo Selo** in eastern Serbia in April 1999. There was no direct evidence that Đorđević was involved in this. Instead the Trial Chamber held that these incidents were closely related to those at Batajnica and Lake Perucac such that, by inference, Đorđević also knew about what happened at Petrovo Selo.[433]

[426] *Contra* TJ, para.2025.
[427] TJ, paras.1290,1320.
[428] TJ, paras.1312,1326,1334.
[429] TJ, paras.1337-1352.
[430] *See* TJ, paras.1459,1518,fn.5563.
[431] *See* TJ, paras.1460,1519,2027. The uncertainty in this regard should have been resolved in Đorđević's favour, i.e. the lesser of the two figures should have been used.
[432] TJ, para.1336.
[433] TJ, paras.1980-1981.

253. There was no evidence that Đorđević was involved in concealment operations *inside* Kosovo. Indeed, the Trial Chamber accepted that Đorđević was surprised upon hearing about the Tekija bodies for the first time.[434] The extent of Đorđević's involvement was strictly limited to a subsequent cover-up, when bodies surfaced in Serbia proper. The Trial Chamber failed to consider that the evidence showed two separate cover-ups: (i) botched attempts to move bodies from Kosovo into Serbia proper; then (ii) the concealment of bodies once discovered in Serbia proper. Đorđević's involvement in (ii) did not establish his involvement in (i), yet the Trial Chamber inflated Đorđević's responsibility to suggest that nobody played a greater role in (i) than him.[435]

254. Đorđević played no part in the original burials, disinterment or clandestine transportation of bodies into Serbia proper from Kosovo. The Trial Judgement is riddled with the implication that Đorđević played a far greater role in an overall concealment plan, hence the Trial Chamber's reliance on the Working Group evidence addressed earlier. The Trial Chamber inflated Đorđević's responsibility.

Tekija

255. Đorđević was surprised when contacted about the finding of bodies near Tekija.[436] This surprise and delayed reaction showed Đorđević's lack of prior knowledge about these matters. That he did not arrange the transport of bodies from Tekija to Batajnica is further showed that he did not control this operation. The first truck was arranged by the Minister - Đorđević was unaware of its final destination;[437] the second truck was arranged by the Minister's direct subordinate, Assistant Minister Petar Zekovic.[438]

256. The Trial Chamber made a series of impermissible findings on this matter, including that while "**none of the evidence demonstrates directly** that he had knowledge that

[434] TJ, para.1301.
[435] TJ, para. 2211.
[436] TJ, para.1301; T.1706/T.1748-1749; *see also, infra,* Ground 10.
[437] P352, p.4; P353(T.7413-7414/T.7423).
[438] [REDACTED].

the specific location to where these bodies were to be brought was the Batajnica SAJ Centre, the Chamber considers that in the context of events, **the only inference to make is that he had such knowledge**."[439] This is an unreasonable and unsupported inference.

257. Further, the Trial Chamber mischaracterised the evidence, which lead to erroneous conclusions. In particular, the Trial Chamber found that K87 was contacted by Đorđević and told *in advance* about the arrival of each trucks.[440] However, the testimony relied upon in footnote 5145 actually states that Đorđević used to called him *after*.[441]

258. Such erroneous assessment of the evidence, coupled with unsubstantiated speculation created gross errors in the Trial Chamber's findings as to Đorđević's involvement. Its conclusions do not account for Đorđević's repeated requests to the Minister to investigate the discovery of bodies at Tekija. While these steps did not lead to judicial investigations, there was no finding that Đorđević precluded those investigations or that he could have done so. There is therefore an evidentiary gap which the Trial Chamber failed to bridge - it was not entitled to conclude that Đorđević's involvement in the concealment of the Tekija bodies furthered the JCE.

Lake Perucac

259. No reasonable Trial Chamber would have relied on the evidence of Kerić that Đorđević ordered the burial of bodies found at Lake Perucac.[442] At trial Kerić asserted, for the first time, that Đorđević gave such an order. None of his previous evidence contained such a suggestion.[443] Kerić's testimony varied.[444] Where his current testimony conflicted with prior testimony, the Chamber found that several of his answers contained unsatisfactory explanations.[445] Yet in all of this, it selected to believe only his most recent trial testimony as truthful, despite previous statement and

[439] TJ, para.1347.
[440] TJ, para.1337.
[441] T.14175:11-18(K87); P1415, para.21.
[442] TJ, paras.1357-1365.
[443] T.7761-7762; *but cf.* D316; P1212.
[444] TJ, para.1357.
[445] TJ, para.1365,fn.5255.

testimony in 2001 and 2005 (the latter under sworn oath). The Chamber irrationally took the one piece of evidence that does not match up with his earlier statements, much closer to the event and made that the basis of findings of culpability beyond reasonable doubt.[446] This level of certainty cannot be found on such unreliable evidence.

260. The manner in which the Trial Chamber selected parts of Kerić's evidence is utterly unclear. While noting that "[a] significant factor may well be a concern not to implicate him himself in criminal conduct or to place ultimate responsibility for it on someone else,"[447] this does not explain why he would implicate himself in criminal conduct before the War Crimes Chamber in Belgrade. When this was put to the witness in cross-examination, he became increasingly incoherent.[448]

261. Finally, the Trial Chamber drew an unreasonable inference that "therefore, that Vlastimir Đorđević knew that these were, yet again bodies of ethnic Kosovo Albanians killed in Kosovo during the Indictment period, and the instinctive reaction was to ensure that the bodies would not be discovered or further investigated."[449] There was no evidence to establish that Đorđević knew or was on notice of the identity of the victims at that time. Even Kerić stated that the origin of the bodies was unknown to him, that he did not inform Đorđević about that, that there had been no indication that the bodies were Kosovo Albanian civilians. Indeed, he thought that the bodies originated from Bosnia and Herzegovina.[450]

Petrovo Selo PJP Centre

262. There was no evidence directly implicating Đorđević in relation to the reburials at the Petrovo Selo PJP Centre. His involvement was inferred on the basis that this was part of the same plan.[451] No such inference should have been drawn because it was not the only inference available. The Trial Chamber noted that there were connecting features between events at the Petrovo Selo PJP Centre and Batajnica SAJ Centre: MUP

[446] TJ, para.1364-1365.
[447] TJ, para.1358.
[448] T.7849-7852.
[449] TJ, para.1366
[450] T.7763/T.7822.
[451] TJ, para.1975.

individuals were involved in both; one of the trucks used to transport bodies from Kosovo to the Petrovo Selo PJP was subsequently brought to Batajnica in order to "bring earth" and "spread sand"; Peter Zeković, a member of the MUP Collegium and Assistant Minister, ordered actions in relation to both sites[452]; the refrigerated truck from Tekija was destroyed at the (nearby) Petrovo Selo PJP Centre; and Đorđević visited Petrovo Selo PJP Centre sometime before July 1999 together with the Minister. But these connecting features did not exclude the reasonable possibility that Đorđević knew nothing about the concealment of bodies at Petrovo Selo PJP Centre. For example, the Petrovo Selo PJP Centre is very close to Tekija – yet the bodies from Tekija were transported much further afield to the Batajnica SAJ Centre near Belgrade. This strongly suggests that different individuals, perhaps those with a closer affiliation with the Petrovo Selo PJP facility, orchestrated events there and had no role in (or knowledge of) the discovery at Tekija.

263. Moreover, no reasonable Trial Chamber would rely on Đorđević's role in the arrest and transfer of the Bytiqi brothers to the Petrovo Selo PJP Centre and his visit to that centre "sometime before July 1999" (after the Indictment period) as sufficient to establish involvement in a clandestine reburial operation at that location – which was not shown to take place at the same time.[453] Finally, in relation to events at Lake Perucac, those bodies were buried locally rather than transported to a MUP property. Rather than being "closely related", the events at each location had distinct features suggesting that there was no overarching plan made in advance.

ERROR AS TO LEGAL STANDARDS GOVERNING ĐORĐEVIĆ'S OBLIGATIONS

264. The Trial Chamber applied an unfair standard when assessing Đorđević's involvement in the concealment of bodies. The Trial Chamber rightly left open the possibility that Đorđević acted pursuant to the Minister's orders to conceal bodies.[454] But the Trial Chamber failed to give Đorđević the benefit of that finding. By contrast, the Trial Chamber absolved Kerić for not taking further actions because he was

[452] *See infra* Sub-ground 9(A).
[453] TJ, para.1978.
[454] TJ, para.1970.

"under superior orders",[455] Moreover, the Trial Chamber failed to weigh Đorđević's attempts to investigate the bodies discovered at Tekija.[456]

265. As noted above, the discovery of the bodies at Tekija was reported to the judicial authorities, yet the Trial Chamber unfairly attributed their failure to investigate to Đorđević. The Trial Chamber failed to consider whether, subject to the command of the Minister, it was not within Đorđević's actual power to do anything more than he did.[457]

266. Therefore, 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 had no knowledge of anything related to these issues until the trucks with bodies appeared in the Danube and Lake Perucac and that he reported everything he learned to his superior. His call for investigations shows he did not act pursuant to a JCE. If there was found a conspiracy of silence Đorđević acted against as it would be illogical, then, for him to call for investigation and/or express surprise to pre-planned crimes.

267. In sum total, there is nothing to show that Đorđević's sporadic involvement in these three instances amounted to a 'significant contribution' to the JCE. The main bases for that finding in this regard was the improper use of the unreliable hearsay evidence of the Working Group. The Trial Chamber's own description of events following the discovery of the bodies at Tekija and burials in other locations is of a haphazard and ill-considered afterthought rather than a pre-conceived plan. Đorđević has been unjustly held criminally responsible for the actions of his superior in these matters and the breakdown of an entire system.

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

268. The Trial Chamber erred in law and fact when holding that Đorđević did not take any measures to ensure the investigation of crimes and that this could be part of his

[455] TJ, para.1366.
[456] T.9727-9728.
[457] *See infra* Sub-ground 9(H) relating to investigations.

'significant contribution' to a JCE.[458] Rather, the evidence was that Đorđević reported everything he knew to his superiors and/or that authorities were informed of the crimes.

269. As relates to a JCE, the Trial Chamber found that there was a lack of reporting and investigation from 1998 until at least June 1999[459] that demonstrated a 'pattern'.[460] Part of this analysis included critical examination of D888, "a 789-page document ...of thousands of summaries of offences that were committed in Kosovo from July 1998 to June 1999".[461] However, the Trial Chamber did not recall or consider that D888 was not admitted into evidence in its entirety *because* of its sheer volume, which clearly cuts against a general pattern of non-reporting.

270. Regardless, here attribution to Đorđević is extremely attenuated. Leaving aside the specific examples of concealment[462], the Trial Chamber largely makes vague findings of a duty to investigate *all* crimes[463] related to Đorđević in light of an Article 7(3) command responsibility liability – that he had 'effective control' and should have punished.[464]

271. However, the investigative measures required of Đorđević should have been those "within his material possibility": a commander is not obliged to perform the impossible so, for example, the duty to punish crimes may, in certain circumstances, be satisfied by reporting the matter to the competent authorities.[465] Moreover, in the *Boškoski* case, the Trial Chamber held that when reports were made to the appropriate authorities by an accused's subordinates, the failure of those authorities to conduct a serious investigation could not be attributed to the accused. [466]

[458] TJ, paras.2154-2158.
[459] TJ, para.2102.
[460] TJ, para.2103.
[461] *See* [REDACTED].
[462] *See infra* Sub-ground 9(G).
[463] TJ, paras.2191,2194.
[464] *See* TJ, paras.2174-2185,2191; the Defence notes that a full appeal on 7(3) is not open to the Defence as there was no conviction and, therefore, no relief to be sought.
[465] *See Boškoski* AJ, para.230; *Hadžihasanović* AJ, para.154; *Strugar* TJ, para.373; *Halilović* TJ, para.72; *Limaj* TJ, paras.526-27.
[466] *Boškoski* TJ, para.536.

272. Here, the 'pattern' established by the Trial Chamber was made up primarily of incidents from 1998 and early 1999[467], incidents that were not listed in MUP Staff reports[468] and incidents where an on-site investigation *was* performed by the local SUPs or VJ organs[469]. Leaving aside 1998 as not relevant to his *actus reus* in 1999, there is no evidence that Đorđević knew or had reason to know of those items not listed in the MUP Staff reports or SUP reports, so there could be no duty to investigate.

273. For those crimes where an investigation was performed, the Trial Chamber failed to consider the hierarchy of the MUP and what investigation and punishment was within Đorđević's actual authority. The Trial Chamber does not account for the fact that once the judicial organs took the case, the MUP could no longer have any influence on investigation and prosecutorial discretion. It appeared, rather, that the Trial Chamber was not assessing any *attempt* at investigation that may be within Đorđević's actual authority, but instead, analyzed the *quality* of the investigation. This standard is apparent in relation to Tekija. The Trial Chamber completely failed to assess that the MUP's responsibility ended with the contact of the Investigating Judge and Prosecutor and Đorđević cannot be held responsible for the standard of their work. Further, the Trial Chambers standards ignore the plights of wartime conditions on the ability to effectively conduct any such investigations undertaken.

274. Further, the only findings of 'actively trying to obstruct' are referred to in relation to aiding and abetting liability[470] and seemingly based only on those incidents of 'concealment' as dealt with in Sub-ground 9(G).

CONCLUSIONS AND RELIEF SOUGHT

275. Thus, the Trial Chamber applied an unfair standard when assessing Đorđević's conduct, unreasonably overstating his responsibility and ability to deal with investigations in general. More importantly, it has made no findings that can support how, generally, any lack of investigations by Đorđević can be linked to the JCE,

[467] TJ, paras. 2083-2085,2178-2179,2182.
[468] TJ, paras.2093,2097-2098,2100.
[469] TJ, paras.1959(Podujevo),2091(Trnje),2092(Izbica),2094(Pusto Selo),2096(Kotlina).
[470] TJ, paras.2162-2163,2194.

much less construed as a 'significant contribution' to said same. The Appeals Chamber is invited to exclude this issue for any assessment of Đorđević's liability and reduce his sentence accordingly.

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

NO INTENTION TO PERMANENTLY ALTER THE ETHNIC BALANCE OF KOSOVO

276. The reasonable inference remained that Đorđević did not share the intent of the alleged JCE. The Trial Chamber failed to establish that Đorđević intended to permanently alter the ethnic balance of Kosovo. The Trial Chamber's assessment of Đorđević's "knowledge and intent"[471] falls short in this respect. There needed to be explicit findings that Đorđević intended to expel Kosovo Albanians on a permanent basis. There are none. Therefore, no conviction on the basis of JCE can be sustained.

VAGUENESS AS TO ĐORĐEVIĆ'S *MENS REA* FOR THE INDICTMENT CRIMES

277. To convict Đorđević, the Trial Chamber had to establish that he intended that the Indictment crimes be perpetrated (for a conviction under JCE I) or that crimes were foreseeable and he willingly took that risk. But the Trial Judgement is impermissibly vague as to Đorđević's *mens rea*. It found that he "acted with the requisite intent" for JCE I[472] without any consideration of whether he intended the Indictment crimes. It then confused the matter further by stating that,

> Alternatively, had the Chamber been not able to be satisfied that the Accused acted with the requisite intent, it would have been satisfied that the Accused acted with the intent to further the campaign of terror and extreme violence by Serbian forces against Kosovo Albanians and that he was aware that the crimes established in this Judgement might be committed by Serbian forces in Kosovo and willingly took this risk.[473]

278. This lack of concrete findings on Đorđević's *mens rea* is compounded by an additional conviction for aiding and abetting (a third *mens rea* for the same crimes) as it 'better reflects the totality of the accused's conduct'.[474] Such multiple and

[471] TJ, paras.1983-1999.
[472] TJ, para.2158.
[473] *Id.*
[474] TJ, para.2194; *see also*, paras.2160-2164,

competing findings violate the a Trial Chamber's duty to make clear findings established by the evidence and held beyond reasonable doubt.[475]

279. The reason for the variety of *mens rea* findings is that Đorđević did not possess the intent of the JCE. There is absolutely ***no*** direct evidence of a shared intent or knowledge of any such plan. Đorđević clearly expressed that he "never heard either the minister or any top people issue any tasks that would call for crimes against the Albanian civilian population, that would incite MUP personnel to commit crimes or to the effect that their crimes would be tolerated."[476] Further stating:

> I did not hear from a single politician of any intention or of any plan or of any activity or of anyone who was supposed to carry out that plan if there was any such thing in relation to the expulsion of Albanians from Kosovo and Metohija.[477]

280. Unfortunately, the Chamber did not even analyze these statements in the Judgement. Instead of this direct evidence, the Chamber relies on inferences. While the jurisprudence establishes that state of mind can be found by inference, ***it must be the only reasonable inference on the evidence.***[478] Here the Chamber has ignored the other reasonable inferences that would suggest that Đorđević did not possess the requisite intent of JCE I and thereby violated the established principle that ***any*** benefit of the doubt must be made in favour of an accused.[479]

281. In any event, no findings were made to the effect that Đorđević shared the persecutory intent necessary for a conviction for persecution pursuant to JCE I.[480] In order to be found guilty of persecution via JCE I, the Trial Chamber is required to make findings not only that Đorđević shared the general intent to commit the underlying offence, but that he shared in the discriminatory policy[481] and had consciously intended to discriminate.[482]

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[475] ICTY Rule 87(A).
[476] T.238:5-8.
[477] T.10145:20-24.
[478] *Brđanin* AJ, para.429.
[479] *Kvočka* AJ, para.237.
[480] There is a potential conundrum here that if it is only established that each JCE member's *mens rea* amounted to JCE III, there was no common criminal purpose.
[481] *Kordić* TJ, para.220.
[482] *Vasiljević* TJ, para.248.

ĐORĐEVIĆ'S INTENTION IN 1999

282. Đorđević's knowledge of events in 1998 was irrelevant to the Indictment crimes. The Trial Chamber places an improper emphasis on Đorđević's knowledge of and action in1998 as forming the basis for his knowledge and/or intent in 1999.[483] Such a leap is inappropriate given that the events of 1998 are not indicative of 1999 and occur before a series of significant events, such as the October Agreements, Rambouillet and, most importantly, air strikes by NATO and responsive declaration of war. Further, nothing in 1998 showed that Đorđević would be prone to such criminal intent or harbour any discriminatory feelings that would lend to his involvement in crimes in 1999.

283. As for reporting structures in 1999 that could provide information of crimes being committed, the Trial Chamber improperly relied on 1998 to assume what information would be available in 1999.[484] In doing so, the Trial Chamber failed to adequately weigh (i) the lack of reporting of crimes through regular channels; (ii) the inability to travel or use phone lines during the Indictment period; and (iii) the media sources available to Đorđević.

Lack Of Reporting

284. The Trial Chamber noted that the lack of reporting of serious crimes "might be taken as evidence that the Accused would not have had knowledge that such crimes were committed by MUP forces."[485] It continued, however, that crimes were reported to Đorđević "through other means"[486] This approach implies that Đorđević did not know the full extent of criminal acts in Kosovo.

285. The "other means" were held to be knowledge garnered through telephone calls and personal contact.[487] But as discussed in Sub-ground 9(A), after 24 March 1999, all communication systems suffered hits and news from the field was severely

[483] *See* Sub-ground 9(C).
[484] TJ, para.1985.
[485] *Id.*.
[486] *Id.*
[487] TJ, para.1986-1987.

hampered.[488] Thus, without a showing that Đorđević actually received such information during this time period, knowledge of the events on the ground should not have been speculatively inferred.

286. Even with regard to the period before the bombing, the Trial Chamber makes complete assumptions of how and what information was delivered to Đorđević. The Chamber relied on a scenario of Shaun Byrnes (an international observer) telling Sreten Lukić (Head of the Ministerial Staff) about forced expulsions in 1998 and then moves to the generality that as "Lukić reported to Đorđević...he would have known about such expulsions."[489] There was no evidence of this or any other type of information regularly travelling in this manner. Speculation of this sort cannot suffice to create an inference of knowledge or intent. Similarly, the Trial Chamber's finding that "the only reasonable inference is that [ATA] operations were discussed in detail" at MUP Collegium meetings is based on assumption rather than evidence.[490] The only evidence on this matter negates this assumption.[491]

Orders

287. Regarding "orders" that Đorđević issued as being relevant to his *mens rea*,[492] only five dispatches (not 'orders') were cited and none show any indication of the specific planning or acts on the ground in Kosovo.[493] These dispatches do not contain any specific tasks; they were each plainly a formality related only to resources for PJP. None suggests a criminal purpose.

[488] *See also*, D927; D928; T.14207-14209/T.14235-14238(Spasić); T.13951-13953(Čanković); T.3303-3304/3323-3324(Deretić).
[489] TJ, para.1991.
[490] TJ, para.1989.
[491] [REDACTED]; T.14032/T.14040/T.14053-14054/T.14087-14090/14094-14096(Mišić); T.14196-14198/T.14230-14231/T.14241-14242(Spasić).
[492] TJ, para.1989.
[493] P136(4 February 1999), P1182(5 January 1999), P1185(1 February 1999), P1189(2 March 1999), P711(21 March 1999); the Trial Chamber simultaneously cites to P1193, P1195, P1487, P1196 and P1488 to show that the units were actually dispatched.

Media

288. The Trial Chamber bizarrely relied on English-speaking media and human rights groups as establishing Đorđević's *mens rea*.[494] But:

a. Internet was not widely available at that time.

b. Đorđević does not understand any English.

c. Frederick Abrahams of Human Rights Watch admitted that they had no confirmation of delivery of HRW reports sent to the Ministry[495] and, thus, no way of knowing if anyone (least of all Đorđević) ever saw them. The MUP did not have e-mail addresses at that time and Abrahams does not know which address they may have been sent to.[496] None of the posted pieces were addressed to Đorđević[497] and those addressed to the Minister were not confirmed as received,[498] much less shown to have an internal routing that would indicate that Đorđević saw them.

d. Đorđević read *local* newspapers on a daily basis during the war.[499] Serbian reporting did not suggest that crimes were committed in Kosovo.

KNOWLEDGE IN RELATION TO THE CRIMES

289. The Trial Chamber held that Đorđević's actions showed that he possessed the requisite intent by (i) concealing crimes of Serbian forces;[500] (ii) deploying paramilitary units to Kosovo[501] and (iii) failing to the ensure investigation and sanction of MUP personnel for crimes in Kosovo.[502]

[494] TJ, para.1986-1999.
[495] T.4009-4012.
[496] T.4008-4009.
[497] P1511; P1513; P1525.
[498] T.4008.
[499] TJ, para.1996.
[500] TJ, para.1994,2158.
[501] TJ, para.1993,2158.
[502] TJ, para.1999,2158.

Concealment And Investigations

290. Concealment of crimes and failure to investigate are actually similar in nature. Both concealment and failure to investigate are *ex post facto* actions.[503]

291. The evidence of Đorđević's participation in the concealment of bodies was of impromptu reactions on the basis of lack of prior knowledge. It did not reveal a cohesive common purpose shared by him. In fact, the evidence with regard to the crimes of concealment shows the very opposite. As noted by Golubović, Đorđević was "surprised" when contacted about the finding of the bodies in Serbia.[504] This surprise and delay – having to call Golubović back 10-15 minutes later – negates the suggestion that Đorđević was party to a plan. Further, the Trial Chamber fails to account for the fact that Đorđević requested an investigation, but these efforts were blocked by the Minister.[505]

292. With regard to investigations generally, the Trial Chamber itself found that the Đorđević did not have full information in reports.[506] Đorđević stated he had not heard of many of these trial incidents. The Trial Chamber rejected this evidence without any reasoning as to why it was not accepted.[507]

Paramilitaries

293. The Trial Chamber inferred Đorđević's intention on the basis that he deployed "members of a known paramilitary unit to Podujevo to assist the SAJ forces".[508] As discussed in detail at Sub-ground 9(F), the evidence in this regard was limited and did not establish the conclusion that Đorđević intended the Indictment crimes:

[503] *See Blagojević* TJ, paras.730-731.
[504] TJ, para.1301; T.1706-1707/T.1748:22-1749:1.
[505] T.9723-9724/T.9729-9730/[REDACTED]/T.9977/T.10002-10003/T.10009-10010; TJ, para.1970, the Chamber "leaves open" the possibility that Đorđević was told by the Minister to not investigate "in order to prevent NATO from using the discovery for 'propaganda purposes'"– such reasoning further goes against any intent, as found by the Trial Chamber, to participate in a JCE to deport, forcibly transfer and murder.
[506] TJ, para.1985.
[507] TJ, para.1996,fn.6849.
[508] TJ, para.1993.

a. Đorđević did not know that there were former criminals in this group until after the atrocity in Podujevo;
b. The 'Scorpions' only became notorious after the war - this was not known in 1999;
c. The 'Scorpions' actually referred to 15-16 men in a police force of thousands;
d. Their crime was immediately tackled and all reservists withdrawn.

294. None of this shows an intent to murder or expel a population. It is entirely distinguishable from a plan to commit the Indictment crimes.

CONCLUSIONS AND RELIEF SOUGHT

295. The inference remained open to the Trial Chamber that Đorđević did not intend to permanently expel hundreds of thousands of Kosovo Albanians or commit the Indictment crimes. He should have the benefit of that inference and his convictions quashed.

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

296. The right of an accused under Article 23(2) to a reasoned opinion is an aspect of the fair trial requirement of Articles 20 and 21.[509] Only a reasoned opinion allows an individual to exercise their right of appeal[510] and the Appeals Chamber to review a Trial Chamber's findings.[511]

297. In this case, the Trial Chamber failed to give an adequately reasoned opinion when it additionally convicted Đorđević pursuant to aiding and abetting.[512] The Trial Judgement only contains one paragraph as to Đorđević's knowledge[513] and one paragraph as to his conduct[514] in relation to aiding and abetting. While the Appeals Chamber has held that inferences should not be drawn about the quality of a judgement or part of a judgement from its length,[515] the exceptional brevity of the Trial Chamber's assessment in its 975-page judgement is indicative of a failure to apply the elements of aiding and abetting liability.[516] The Appeals Chamber has held that a failure to make findings regarding each element of a crime is an error.[517] By analogy, the same must apply to the elements of a mode of liability.

298. The Trial Chamber's failure to apply the elements of aiding and abetting liability prejudices Đorđević on appeal because he is precluded from demonstrating that the Trial Chamber misapplied the established standards[518] or otherwise erred in law or fact.

299. The Trial Chamber found that Đorđević "had knowledge of crimes committed by MUP personnel in Kosovo during the Indictment period."[519] However, knowledge of crimes during a specific period does not satisfy the *mens rea* required for an accused

[509] *Babić* SAJ, para.17; *Naletilić* AJ, para.603; *Furundžija* AJ, para.69.
[510] *Naletilić* AJ, para.603.
[511] *Kunarac* AJ, para.41.
[512] TJ, para.2164; *see infra* Ground 18(A): aiding and abetting was charged as an *alternative* form of liability.
[513] TJ, para.2162.
[514] TJ, para.2163.
[515] *Kvočka* AJ, para.23.
[516] *See* TJ, paras.1873-1876.
[517] *Kordić* AJ, paras.383-387.
[518] TJ, para.1873-1876.
[519] TJ, para.2162.

to be convicted for aiding and abetting. For example, the Trial Chamber failed to consider whether Đorđević knew that his conduct would assist in the commission of crimes. Nor did the Chamber consider whether he was aware of the essential elements of the crimes committed or of the perpetrators' *mens rea*.

300. Moreover, had the Trial Chamber sought to apply the standard it summarised, namely that an aider and abettor need not have intended to provide assistance to the principal perpetrator, Đorđević would have vigorously challenged such a standard on appeal. As it is, Đorđević is precluded from doing so because there is no indication that the Trial Chamber actually applied that standard.

301. In relation to the Đorđević's *actus reus* for aiding and abetting, the Trial Chamber mentioned only two things: his role in MUP efforts to conceal crimes and his role in the deployment of paramilitaries to Podujevo and their later redeployment. The Trial Chamber held that there was no "effective investigation" into the 'Scorpions' crimes but did not explain how or why that is the relevant standard for aiding and abetting liability to attach. There is no explanation as to how Đorđević's action in relation to Podujevo had a substantial effect on other Indictment crimes in other locations.[520]

302. The failure of the Trial Chamber to consider Đorđević's knowledge as to the fact that his conduct would result in the continued perpetration of crimes, or whether he was aware of essential elements of these crimes, in addition to its failure to establish a "substantial effect" in relation to *each* crime Đorđević was found to aid and abet fatally undermines the Trial Chamber's reliance on aiding and abetting liability.

CONCLUSIONS AND RELIEF SOUGHT

303. The lack of reasoned conclusions invalidates Đorđević's convictions as an aider and abettor because it remains unclear how or why the Trial Chamber considered that the specific legal elements of aiding and abetting liability were satisfied. The Trial Chamber's failure to apply the elements of aiding and abetting liability forecloses the ability to mount a challenge to the Trial Chamber's approach. In these circumstances,

[520] Should it be suggested that the first sentence of TJ, para.2162, was sufficient, that approach would be challenged on the basis of Ground 9, above.

the only remedy available to the Appeals Chamber is to quash all of Đorđević's convictions under Article 7(1) for aiding and abetting and reduce his sentence accordingly.

GROUND 12: ERRORS OF LAW AND FACT AS TO THE DEFINITION OF CIVILIAN

304. As submitted in Ground 1, the Trial Judgement erred as to the size and tactics of the KLA (and NATO) threats before concluding that a widespread and systematic attack was targeted against the *civilian* population. Those submissions are adopted and developed further here.

305. The Trial Judgement is unclear as to whether the Indictment period was properly characterised as an international or internal armed conflict. It considered that an international armed conflict existed between the FRY and NATO.[521] As between the FRY and the KLA, there is no explicit classification of the Indictment period. The Trial Chamber did, however, conclude that, as of May 1998, an internal armed conflict existed.[522] Moreover, it appears from its assessment of the applicable legal standards during the Indictment period, namely Additional Protocol II ("AP II") rather than Additional Protocol I ("AP I"), that the Trial Chamber considered the standards governing the conflict between the FRY and the KLA to be those relevant to internal armed conflicts.

306. Two important questions of principle arise from the Trial Chamber's approach.

307. First, the nature of the presumption of civilian status is less clearly established in internal armed conflicts than international armed conflicts. The Trial Chamber noted that Article 13 of AP II does not contain an explicit presumption in cases of doubt. This contrasts with Article 50(1) of AP I. The Trial Chamber rightly noted that the ICRC's Customary International Humanitarian Law Study stopped short of finding a rule of customary international law that the same presumption applies in cases of doubt in internal armed conflicts.[523]

308. Despite this, the Trial Chamber preferred the view that the same principle nevertheless applies in internal armed conflicts.[524] The Trial Chamber erred in this

[521] TJ, para.1580.
[522] TJ, para.1578
[523] *See* TJ, para.2066,fn.7110.
[524] *Id.*

approach because the Tribunal cannot apply a standard that is not clearly established in customary international law.[525] The rejection of such a standard by the ICRC should have been decisive. Instead, the Trial Chamber applied an over-expansive definition of civilian whereby individuals were presumed to be civilians when they should not have been. This undermines the Trial Chamber's conclusion that the FRY's attack was directed against the civilian population.

309. There are good policy reasons why the same presumption of civilian status does not apply to both international and internal armed conflicts. As shown by the tactics of the KLA in Kosovo, domestic insurgencies often utilise doubt as to the status of fighters to their benefit. The States party to AP I, recognising the differences between international and internal armed conflicts, understandably avoided a legal framework which benefits belligerent parties.

310. Secondly, the Trial Chamber applied an overly onerous standard whereby an individual was not considered to be directly participating in hostilities unless they had a "continuous combat function".[526] The Chamber held that such considerations might be relevant to determining the legality of targeting a particular individual in certain circumstances but held this did not apply to persons in detention and was a distinct question from the proportionality of certain actions. This merits careful consideration.

311. The Trial Chamber's assessment of targeting was polluted by its suggestion that an individual is protected in an internal armed conflict unless their continuous function is to take a direct part in hostilities. This standard is not clearly established in customary international law. A study conducted in 2005 by the International Committee for the Red Cross on Customary International Humanitarian Law affirms that "[a] precise definition of the term 'direct participation in hostilities' does not exist."[527] While the international community has continued its attempts to define this concept, as noted in the Chamber's reference to the *Interpretive Guidance* published by the ICRC in 2009, such efforts and concepts remain hotly debated. Indeed, "[a]spects of the draft circulated to the experts were so controversial that a significant number of them asked

[525] *See Ojdanić* JCE Decision, paras.10-11.
[526] TJ, para.2054, relying on the *Interpretive Guidance*, p.27.
[527] Henckaerts & Doswald-Beck, Vol.I/p.22.

that their names be deleted as participants, lest inclusion be misinterpreted as support for the Interpretative Guidance's propositions."[528]

312. To expect a clear distinction between civilians and combatants in a conflict characterised by terrorists, insurgents and irregular forces is unrealistic. The consequence of the Trial Chamber's approach was the great emphasis it put on the clothing worn by those killed during FRY attacks. But the *Interpretative Guidance* itself states that membership of irregularly armed groups is "not consistently expressed through uniforms, fixed distinctive signs, or identification cards".[529]

313. Drewienkiewicz explained that a Kosovo Albanian in civilian clothes might be a KLA member who had simply taken his uniform off.[530] There was overwhelming evidence before the Trial Chamber that the KLA frequently operated in civilian clothing, or wore it under uniforms in order to switch between the two.[531] The Trial Chamber's repeated references to the *clothing* alleged victims wore was therefore wholly erroneous.[532] No reasonable Trial Chamber could put any weight on clothing in order to suggest that individuals were civilian victims of a JCE rather than KLA casualties of a legitimate fight.

314. Further, the Trial Chamber erroneously suggested that the question of "continuous combat function" was distinct from the proportionality of attacks. The presence of large numbers of individuals who fought for or assisted the KLA, but who did not have a continuous combat function, should indeed have been relevant to the question of the proportionality of an attack and whether such an attack could properly be said to have been directed at civilians.

315. In summary, the Trial Chamber applied an over-expansive definitive of civilian. The failure to apply a clear legal standard of civilian jeopardises the conclusions that a

[528] Schmitt, p.5-6.
[529] *Interpretative Guidance*, pp.32-33.
[530] P997(T.7835:16-17).
[531] T.2616:2-6(Kickert); T.3392:7-3393:2(Halit Berisha); D761, para.2.4; T.3432:4-10(Zogaj); T.4324:3-6(Hajrizi); T.5547:25-5548:2(Maisonneuve); T.6813:22-24(Cvetić); [REDACTED]; T.8936:3-12(K72).
[532] *See* TJ, paras.416,527,fn.1930,532,553,627,678,708-709,976,987,990-991,1111,1138,1268,1270,1277-1278,1281-1282,1300,1353,1355,1431,1504,1511,1747,2096.

JCE existed and that the FRY's attack was indeed directed against civilians rather than legitimate military targets.

IMPACT ON THE TRIAL CHAMBER'S FINDINGS

Deportation and Forcible Transfer

316. A consequence of the Trial Chamber's over-expansive definition of civilian was that it applied too strict a standard of military targeting and reversed the burden of proof by requiring Đorđević to establish that actions were not targeted against civilians. The Trial Chamber frequently held that crimes were established because people fled out of fear of Serb forces, or because of shelling without properly establishing that an attack was directed against civilians in the area. For example:

a. Orahovec municipality:
    i. in Bela Crkva on 25 March 1999 - firing over the tops of houses causing villagers to flee.[533]
    ii. Mala Kruša on 25 March 1999 - shelling and shooting at the village causing 400 to 500 to flee towards a forest.[534]
    iii. Velika Kruša on 25 March 1999 the mere stationing of tanks in an area causing 3,000-4,000 to flee.[535]
    iv. Celina on 25 March 1999 – shelling the village.[536]

b. Prizren municipality:
    i. Pirane on 25 March 1999 – shelling the village and burning 16 properties causing the majority of the population to leave.[537]
    ii. Landovica on 26 March 1999 – shelling by the VJ causing residents to flee.[538]

[533] TJ, paras.1617-1618.
[534] TJ, paras.1619-1620.
[535] TJ, para.1622.
[536] TJ, para.1623.
[537] TJ, para.1628.
[538] TJ, para.1628.

c. Srbica municipality:
    i. Leocina on 25 and 26 March 1999 – shelling causing residents to flee.[539]
    ii. Brocna on 25 March 1999 – Serbian forces "took positions" whereon villagers left.[540]
    iii. Izbica on 27 and 28 March 1999 – shooting and shelling not directed at military targets.[541]
    iv. Kladernica on 25 March 1999 and 12 April 1999 – shelling.[542]
    v. Turicevac on 26 March 1999 – village shelled causing residents to leave out of fear on that day.[543]
    vi. Tušilje on 29 March 1999 – "shooting and injuring people" without establishing their status.[544]

d. Suva Reka municipality:
    i. Pecane on 20-21 March 1999 – shelling, when the attack began villagers fled.[545]
    ii. Belanica on 1 April 1999 – villagers fled following the killing of three men, with no finding as to whether or not they were KLA fighters.[546]

e. Kosovska Mitrovica municipality: the upper part of Zabare village on 14 April 1999 – villagers left when Serbian forces were shooting with machine guns, with no finding as to the target of the attack.[547]

f. Gnjilane municipality:
    i. Vladovo on 29 March 1999 – villagers left merely because of a Serbian military presence nearby.[548] On 2 April 1999 three people who sought to return were killed with no finding as to whether they were KLA or

[539] TJ, paras.1630-1631.
[540] TJ, paras.1630-1631.
[541] TJ, paras.1630-1631.
[542] TJ, paras.1630-1631,1634.
[543] TJ, para.1632.
[544] TJ, para.1632.
[545] TJ, para.1639.
[546] TJ, para.1641.
[547] TJ, para.1647.
[548] TJ, para.1661.

reasonably thought to be KLA.[549]

ii. Nosalje on 6 April 1999 and the attack on the surrounding area with no finding as to the reason for the attack.[550]

g. Uroševac municipality: Mirosavlje on 8 April 1999 – villagers left merely because of the sound of shelling and weapon fire.[551]

h. Kačanik municipality:

i. Kotlina on 24 March 1999 – fleeing following shelling and Serbian forces entering the village, with no finding as to the absence of KLA.[552]

ii. Kačanik town on 27 March 1999 – shelling and shooting causing villagers to leave, the Trial Chamber presuming that there were no military targets.[553]

iii. Vata on 13 April 1999 – villagers leaving because of the sound of shooting and the Trial Chamber only considering the absence of KLA in the village on that particular day.[554]

i. Vučitrn municipality:

i. Donji Svracak on 27 March 1999 – people leaving merely having heard the results of conflict in a neighbouring villages.[555]

ii. Donja Sudimlja on 28 March 1999 – initial shelling causing people to flee.[556]

iii. Vesekovce and Slakovce on 2 May 1999 – shelling following which the KLA ordered the civilian population to leave.[557]

[549] TJ, para.1661.
[550] TJ, para.1662.
[551] TJ, para.1667.
[552] TJ, para.1669.
[553] TJ, para.1670.
[554] TJ, para.1671.
[555] TJ, para.1675.
[556] TJ, para.1676.
[557] TJ, paras.1676-1677.

Murder

317. To establish murder under Article 3 or Article 5, it must be proved "that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant."[558] While not a sufficient factor on its own, the fact that a victim is participating in the hostilities is a strong factor to establish membership in armed forces.[559] Other relevant factors include "the activity, whether or not the victim was carrying weapons, clothing, age, and gender of the victims at the time of the crime."[560] Moreover, such determinations are to be made on a case-by-case basis, and in situations of doubt, "a careful assessment has to be made *under the conditions and restraints governing the particular situation*."[561] A look at State practice shows that 'direct participation' is interpreted in many different ways, including serving as intelligence or a lookout or guard position.[562]

318. The Trial Chamber relieved the Prosecution of its burden of proving civilian status of victims. It erred in relation to specific crime sites:

j. Orahovac municipality:
   i. Bela Crkva on 25 March 1999:
      1. the death of 13 fleeing villagers shot by MUP forces with no findings as to whether they could reasonably have been thought to be combatants.[563]
      2. the death of six men in a channel 70-85 metres from the Belaja Bridge when relying on an over-expansive interpretation of "taking part in hostilities at the time". The attackers might reasonably have considered that the men were KLA.[564]

   ii. Mala Kruša on 25 and 26 March 1999: the death of nine victims during

[558] *Galić* TJ, para.55.
[559] *Halilović* TJ, para.34.
[560] *Id.*
[561] Henckaerts & Doswald-Beck, Vol.I/p.24(emphasis added).
[562] *Id.*, Vol.I./p.22; *see also* Vol.II/pp.115-127 (regarding actual state and international practice as to defining 'direct participation').
[563] TJ, para.1710.
[564] TJ, paras.473,1712.

the course of an attack without findings as to their civilian status or whether killing was intended.[565]

k. Đakovica municipality:
    i. Meja on 27-28 April 1999: the death of all 281 individuals during Operation Reka with no attempt to determine their civilian status or individual circumstances of their deaths.[566]
    ii. Meja on 27-28 April 1999: the death of Kole Duzhmani where the evidence was of an intention kill a combatant, although identification was mistaken.[567]

l. Vučitrn municipality on 2/3 May 1999: the death of four individuals at night in a convoy when there were KLA fighters in the convoy and consideration was given to whether the attackers might reasonably have targeted KLA fighters.[568]

m. Kačanik municipality:
    i. Kotlina on 24 March 1999: the death of 22 individuals at the wells when civilian clothing is not decisive and the evidence of capture was too weak to be relied upon.[569]
    ii. Slatina and Vata on 13 April 1999: the death of four men in Vata when the only evidence of detention was a hearsay account.[570]

CONCLUSIONS AND RELIEF SOUGHT

319. The Appeals Chamber is invited to quash Đorđević's convictions on the basis that the Trial Chamber applied an overly broad definition of civilian that cannot support its conclusions and reduce his sentence accordingly.

[565] TJ, paras.485,1715.
[566] TJ, paras.1736-1739.
[567] TJ, para.1737.
[568] TJ, paras.1184,1197,1742.
[569] TJ, paras.1744-1745,1753.
[570] TJ, paras.1747,1138-1139.

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

320. Unlike the crime of forcible transfer, deportation requires displacement across a *de jure* or *de facto* border between different international states. Given the sovereignty and territorial integrity of the FRY in 1999, the Chamber incorrectly held that this element was satisfied by the displacement of individuals from one part of the FRY to another, particularly from Kosovo to Montenegro.

321. It is well established in customary international law, as well as Tribunal jurisprudence, that the crime of deportation only applies to those incidents where persons are forcibly displaced to another country or outside occupied territory.[571] The Trial Chamber correctly laid forth the elements of deportation under Article 5(d) of the Statute;[572] however, it failed to properly assess the fourth element, that "there is displacement of individuals across a *de jure* state border, or, in certain circumstances, which must be examined on a case-by-case basis and in light of customary international law, a *de facto* border."[573]

322. The Trial Chamber erred categorically in uncited reference, stating: "the Tribunal's jurisprudence has firmly established that the offence of deportation may be established if there is a displacement across a *de facto* border."[574] While discussed in a handful of cases,[575] the concept of deportation across a *de facto* border is certainly not 'firmly established'.[576] As introduced in the *Stakić* Trial Judgement, in addition to *de jure* borders, "internationally recognised borders [or] *de facto* boundaries, such as constantly changing frontlines" can be used to fulfil the required element.[577] However, such situations should be assessed on a case-by-case basis given the circumstances and customary international law.[578] The ultimate test is one of control,

[571] *See Stakić* AJ, paras.290-299; *Milošević* Decision, paras.49-68.
[572] TJ, para.1604.
[573] *Id.*
[574] *Id*., para.1683.
[575] *See generally, e.g.*, *Krnojelac* AJ, *Stakić* AJ, *Naletilić* AJ, *Krajišnik* AJ, *Militunović* TJ.
[576] *See Naletilić* AJ, Separate and Partly Dissenting Opinion of Judge Schomburg.
[577] *Stakić* TJ, para.679.
[578] *Stakić* AJ, para.300.

i.e. were the persons moved "from an area in which they are lawfully present to an area under the control of another party."[579]

323. The *Đorđević* Chamber then engaged in a brief and flawed analysis of the circumstances resulting in the erroneous conclusion that movements from Kosovo to Montenegro met the elements of deportation, holding:

> Considering the previous degree of autonomy enjoyed by Kosovo and Montenegro's status as a republic, and its findings made earlier that an armed conflict between forces of the FRY and Serbia on one hand and the KLA on the other existed during the material time, the Chamber accepts that displacement to Montenegro constitutes a displacement across a *de facto* border and thus meets the requirement for deportation.[580]

324. What is lacking in this finding, and critical to many aspects of this case, is that, in 1999, the FRY was a sovereign nation consisting of the two republics of *Serbia* and *Montenegro* and two autonomous provinces – *Vojvodina* and *Kosovo and Metohija*. This nation possessed one federal government that maintained sovereignty over this entire territory. Article 3 of the 1992 FRY Constitution set forth a single entity with unchanging boundaries, save by express agreement.[581]

325. This is reinforced by U.N. Resolution 1244/99, which clearly shows that, on 10 June 1999, Kosovo was still considered a part of the sovereign territory of the FRY – which includes both Serbia and Montenegro.[582] Further, the language reaffirms that, in reality and in the perception of the U.N. member states, the FRY was a sovereign nation preserving its territorial integrity.[583]

326. The Trial Chamber did not take the above factors into account in making the assertion of a *de facto* border, but instead cited to other factors, such as serious hardship and ease of control of Kosovo. Neither of these factors are found as elements of a proper consideration on *de facto* border or statehood, much less are they requirements for a

[579] *Stakić* TJ, para.679.
[580] TJ, para.1683.
[581] P129.
[582] P3.
[583] *Id.*, p.1.

showing of deportation. The presence or absence of a border – *de facto* or *de jure* – is an element in and of itself and is not reliant upon the level of hardship faced.

327. ICTY jurisprudence distinguishes between international and internal movements to differentiate the specific crime of deportation from forcible transfer.[584] As stated in the *Stakić* Appeals Judgement "the application of the correct definition of deportation would not leave individuals without the protection of the law"[585] as "[t]he same protected interests underlie the criminalisation of acts of forcible transfer, an 'other inhuman act' pursuant to Article 5(i) of the Statute."[586] At the same time, it is inappropriate and dangerous precedent for a chamber to find a *de facto* border where there is none for the sake of making something 'deportation' where it did not occur.

CONCLUSIONS AND RELIEF SOUGHT

328. Given the above, no reasonable Trial Chamber could to find a *de facto* border at that time simply for the purposes of categorizing the population movements as 'deportation'. As such, the Appeals Chamber is invited to quash the finding of a *de facto* border between Montenegro and Kosovo in 1999 and further quash any finding of deportation to Montenegro under Counts 1 and 5 – specifically those of Peć and Kosovska Mitrovica.[587]

[584] *Naletilić* AJ, Separate and Partly Dissenting Opinion of Judge Schomburg, para.4.
[585] *Stakić* AJ, para.302.
[586] *Id.*, para.277.
[587] TJ, paras.1642,1646.

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

329. The following submissions are primarily based on the observations in *Boas, Bischoff and Reid, International Criminal Law Practitioner Volume II* (2008) pages 58–60 and 273-275. The same point has been raised as a preliminary matter by *Radovan Karadzic*.[588]

330. 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. It is submitted that the findings do not establish premeditation in relation to certain crime sites.

331. Article 5(a) of the French version of the ICTY and ICTR Statute both use the term "*assassinat*". This invokes a requirement of premeditation. By contrast, the term used in Article 5(a) of the English version of those Statutes is "murder". It is respectfully submitted that any uncertainty has to be resolved in an accused's favour. The Statutes therefore require premeditation in order for a murder to amount to a crime against humanity. By analogy, the same standard should apply to murder as a war crime.

332. So far as those representing Đorđević have been able to ascertain, this discrepancy has not been resolved by the Appeals Chamber. Instead, there are divergent decisions by various trial chambers.

THE ICTR JURISPRUDENCE

333. The discrepancy in the ICTR Statute was noted by the *Akayesu* Trial Chamber. It put the difference down to a translation error and favoured the English text. It did not consider, however, the higher *mens rea* requirement implied by the French text.[589]

[588] *See* Karadžić Pre-Trial Brief, paras.17-23.
[589] *Akayesu* TJ, para.588.

334. Following *Akayesu*, the English text was applied in the *Rutaganda*[590] and *Musema*[591] trial judgements.

335. By contrast, a different trial chamber in *Kayishema and Ruzindana* considered that the difference between the French and English versions of the Statute should be decided in the accused's favour. This required the inclusion of the additional element of premeditation meaning a higher *mens rea* standard.[592] It held that a result is premeditated when the actor formulated his intent after a cool moment of reflection.[593]

336. This approach was approved in *Muhimana*[594], *Semanza*[595] and *Bagilishema.*[596] The *Semanza* trial chamber explained that "[p]remeditation requires that, at a minimum, the [physical perpetrator] held a deliberate plan to kill prior to the act causing death, rather than forming the intention simultaneously with the act … a cool moment of reflection is sufficient."[597] The *Semanza* trial chamber also explained its preference for the French version of the Statute on the basis of the well-established principle of interpretation embodied in Article 33(4) of the Vienna Convention on the Law of Treaties, which directs that when interpreting a bilingual instrument the meaning which best reconciles the equally authoritative texts shall be adopted. The *Semanza* held that *assassinat* is a more precise form of murder requiring premeditation and so harmonisation is best achieved by relying on the more precise text. This accords with well-established principle that criminal statutes should be strictly construed and any ambiguity should be interpreted in favour of the accused.[598] Further, the difference in Article 5 is unlikely to be a mere translation error given that Article 4 uses "*meurtre*" in relation to genocide.

[590] *Rutaganda* TJ, para.79.
[591] *Musema* TJ, para.214.
[592] *Kayishema* TJ, paras.137-140.
[593] *Id.*, para.139.
[594] *Muhimana* TJ, para.569.
[595] *Semanza* TJ, paras.334-339.
[596] *Bagilishema* TJ, para.84.
[597] *Semanza* TJ, para.339.
[598] *Id.*, para.337.

337. Indeed, the Office of the Prosecutor at the ICTR appears to have adopted the higher *mens rea* standard.[599]

THE ICTY JURISPRUDENCE

338. Only the *Kupreskic* Trial Chamber has held that "the standard of *mens rea* required is intentional and premeditated killing"[600] and required a cool moment of reflection. The Appeals Chamber approved a conviction on that basis.[601]

339. Other ICTY trial judgements have expressly rejected premeditation as a requirement for murder. In *Kordić and Čerkez* the Trial Chamber held that it was "settled" that premeditation was not required[602] The Appeals Chamber approved a conviction on that basis.[603]

340. There a significant number of other Trial Judgements at the ICTY that have not required premeditation.[604]

341. It is respectfully submitted that the Appeals Chamber should prefer the approach of certain Trial Chambers at the ICTR for the reasons given above.

IMPACT ON THE TRIAL JUDGEMENT

342. Turning to the impact of such a standard in this case, it is conceded that the Trial Chamber made findings amounting to premeditation in relation to a number of crime sites. In others, however, the evidence either did not establish premeditation or there was no evidence of the circumstances of death such that premeditation could not be established for certain. In short, in relation to certain crimes sites there was no cool moment of reflection or evidence of a deliberate plan to kill on the part of the physical

[599] *See Bizimungu* Decision on Defence Motions, paras.65-68.
[600] *Kupreškić* TJ, para.561.
[601] *See Kupreškić* AJ.
[602] *Kordić* TJ, para.235.
[603] *Kordić* AJ, para 113.
[604] *See Brđanin* TJ, paras.381-386; *Stakić* TJ, para.587*; Čelebici* TJ, paras.437-439; *Blaškić* TJ, para.216; *Jelisić* TJ, para.51; *Blagojević* TJ, para.556; *Orić* TJ, para.348.

perpetrators. The crime sites where Đorđević contends there was no clear evidence of premeditation are as follows:

a. Bela Crkva on 25 March 1999

i. For the 13 villagers initially shot by MUP forces, the Trial Chamber's finding was that these individuals were fleeing[605] Although others were killed in Bela Crkva that day, this was the first event. Although it is accepted that the findings at TJ 464 are adverse to this submission, it is submitted that the circumstances did not necessarily reveal a deliberate plan to kill with a cool moment of reflection. Rather, the order to shoot and comments about NATO could suggest anger and a lack of forethought.

ii. As for the six bodies found in a channel some 70-85 metres from Belaja Bridge, the evidence was that this occurred after the events at Belaja Bridge. The circumstances of the deaths are unclear because there was no eyewitness. Rather one witness described hearing shots from the relevant direction.[606] It is submitted that this does not provide sufficient evidence of premeditation.

b. Mala Kruša on 25 March 1999 where nine victims burned to death inside their houses during the course of an attack. There was no clear evidence that they were herded into houses in a premeditated fashion or that their presence was known or suspected. Rather they died in the area during the course of an attack.[607] This does not reveal a cool moment of reflection before killing. In this respect, the deaths at Mala Kruša are very different from those in the Batusha Barn, where explosive were found to be present.[608]

[605] TJ, para.1710.
[606] TJ, paras.473,1712.
[607] TJ, para.485,1715.
[608] TJ, para.495.

c. Suva Reka on 26 March 1999: the death of four additional members of the Berisha family in unknown circumstances.[609] There was no evidence of premeditation for the killing of these individuals compared, for example, to those killed in the pizzeria.[610]

d. Đakovica on 1/2 April 1999: the death of 20 civilians at 157 Miloš Gilić Street. The finding was that this operation began as a search for KLA but descended into killing 20 people in a basement. This raises the question of the moment at which premeditation must arise and whether it was satisfied on the facts.[611]

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. There was no evidence led as to the circumstances of the death of a large number of these people such that, it is submitted, the element of premeditation was not established.[612]

CONCLUSIONS AND RELIEF SOUGHT

343. The Appeals Chamber is invited to hold that premeditation is a requirement for murder as a crime against humanity and war crime and quash Đorđević's convictions in relation whichever crime sites it agrees this element was not established. A reduction in sentence should follow.

[609] TJ, para.1724.
[610] TJ, paras.676,1722.
[611] TJ, paras.886-888,1731.
[612] TJ, paras.940-980,1738.

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

344. While destruction of religious sites may amount to persecution as a crime against humanity in some cases, the Trial Chamber erred by holding that such a crime could be committed recklessly and failed to assess whether the equal gravity requirement was met in each case. Further, the Trial Chamber failed to link any destroyed mosques to a widespread and systematic attack directed against the civilian population or to the JCE.

RECKLESSNESS IS INSUFFICIENT FOR SPECIFIC INTENT CRIMES

345. In the present case, wanton destruction was charged as persecution under Article 5. Persecution is a crime of specific intent. It cannot be committed recklessly. A crime of persecution must consist of an act or omission which not only "discriminates in fact" but "was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics."[613] As highlighted by the Chamber, such findings would require "wilful damage" of religious sites, "coupled with the requisite discriminatory intent".[614] The Trial Chamber misapplied this principle when it held that destruction or damage occasioned by recklessness is sufficient for persecutory wanton destruction.[615]

346. For this standard, the Chamber cited the *Krajišnik* Trial Judgement which iterates a standard of 'recklessness' as being sufficient for persecution by wanton destruction.[616] But none of the authorities cited by the *Krajišnik* Trial Chamber[617] suggest that recklessness is a suitable standard for Article 5(h); in fact, all of them highlight the need to find "the requisite discriminatory intent"[618] While the *Brđanin* Trial Chamber

[613] TJ, para.1755.
[614] TJ, para.1771.
[615] TJ, para.1773.
[616] *Krajišnik* TJ, para.782.
[617] *Kordić* TJ, paras.206-207,362; *Stakić* TJ, paras.765-7; *Brđanin* TJ, paras.599,1021,1023; *Strugar* TJ, paras.308-11.
[618] Strugar was not charged with Article 5 persecutions; *see also Kordić* TJ, para.207; *Stakić* TJ, paras.765-768; *see generally, Blaškić* TJ, para.183.

found that "reckless disregard" would suffice for the Article 3 crimes[619], it separately analysed the specific intent requirement for the separate charges under Article 5(h) in a separate section dealing with the crime of wanton destruction by persecution.[620] There appears to be some confusion in the jurisprudence caused by the recasting of destruction of property as a war crime (for example under Article 3(b)) into Article 5(h) of the Statute.[621] The case law, however, is clear that standard of recklessness cannot suffice for the crime of wanton destruction under Article 5(h).

347. The Trial Chamber's error invalidates aspects of the Trial Judgement. The Trial Chamber applied a recklessness standard for four of the eight damaged mosques.[622] That the Trial Chamber found it necessary to apply a recklessness standard implies that it was unable to establish whether the perpetrators specifically targeted the mosque. This error relates to the following locations:

f. **Hadum Mosque** in **Đakovica** municipality on 24-25 March 1999. The Chambers inferred[623], that the historic centre of Djakovica was deliberately set on fire[624] There was no finding that the mosque was specifically targeted or even known by the perpetrators to be there.

g. The mosque in **Vlaštica** in **Gnjilane** municipality on 6 April 1999. The finding was that various buildings were burned. Although the Chamber found that the mosque was set on fire first[625] this finding is uncited.[626] Further, this evidence is uncorroborated and based on one witness watching from the mountains.[627] It is respectfully submitted that, even if the mosque was burned first, the Chamber could not eliminate the prospect that it was not specifically targeted given that other buildings were burned at the same time and the only witness was far away. Therefore the necessary specific intent of the perpetrators was not made out.

[619] *Brđanin* TJ, para.599.
[620] *Id.*, paras.1021-1024.
[621] *See Kordić* AJ, para.74, discussing Article 3(b).
[622] *See* TJ, para.1854.
[623] TJ, para.1831.
[624] TJ, paras.1830-1832.
[625] TJ para.1839.
[626] TJ, para.1055.
[627] K81/T.4535:19-21.

h. The **market mosque (Charshi Mosque)** in **Vučitrn** municipality on 27 April 1999. This mosque was damaged in a fire that included the goldsmith market.[628] There was deliberate damage to tombstones and more modern buildings were undamaged. Nevertheless, the Trial Chamber did not eliminate the prospect that this mosque was not specifically targeted. Therefore the specific intent of the perpetrators was not established.

i. The **Landovica mosque** in **Prizren** on 27 March 1999. This mosque was damaged in shelling and fire that damaged houses and buildings in the village. For specific targeting of the mosque, the Chamber relied on the uncorroborated 92*qtr* evidence of Halil Morina to suggest that the mosque was set on fire by VJ soldiers.[629] When the prosecution's expert examined the mosque in October 1999, however, he found a toppled minaret that crashed into the dome creating a hole, but "otherwise, the building looked intact except for the windows being gone."[630] Given the destruction of other buildings in the village by shelling and fire, there was no reliable evidence to show that the mosque was specifically targeted in a discriminatory way.

EQUAL GRAVITY REQUIREMENT INADEQUATELY ASSESSED

348. The Chamber inadequately applied an equal gravity test in relation to the eight mosques that it found were destroyed so as to amount to persecution as a crime against humanity. The Chamber correctly stated the law that whether the destruction of property meets the equal gravity requirement depends on the nature and extent of destruction.[631] In *Milutinović,* the Trial Chamber explained that the equal gravity requirement of the destruction/damage must be proved such that "the impact of the deprivation of destroyed/damaged property [is] serious, such as where the property is indispensible, a vital asset to the owners, or the means of existence of a given

[628] TJ, para.1849.
[629] TJ, para.1817: nothing corroborates 92*qtr* testimony evidence of Halil Morina as required (*see Milutinović* 92*qtr* Decision, para.13).
[630] T.7537; any other contribution to his report is based on untested hearsay "according to Islamic community" (*see* P.1124).
[631] TJ, para.1771.

population."[632] It might be argued that the destruction of a place of worship automatically satisfies the equal gravity requirement, but that was not the Trial Chamber's approach: it recognised that destruction of a religious site "may" (not must) amount to an act of persecution.[633]

349. In practice, to assess the equal gravity requirement would involve a careful assessment of the importance of the place of worship to a particular community, for example how long it had been there and whether it was used regularly or not. The Chamber failed to ask such questions, although it did note the age of some of the mosques damaged and whether they included other facilities. The generalised statement that mosques are of significant importance was inadequate.[634] The test was not applied to each site so the Chamber was not entitled to conclude that the crime of persecution was established in relation to any of the eight crime sites relevant under this ground.

FAILURE TO LINK CRIMES TO A JCE

350. Finally, the Chamber failed to establish that the eight damaged mosques created a pattern sufficient to permit the inference that wanton destruction was part of the JCE plan or foreseeable. The Trial Chamber barely touched upon this issue, only referring in one place to "systematic damage".[635] This is insufficient. The Trial Chamber failed to consider the hundreds of unharmed mosques (and Catholic churches[636]). The Trial Chamber did not establish how perpetrators were used by JCE members in relation to the eight mosques.

CONCLUSIONS AND RELIEF SOUGHT

351. The Trial Chamber's conclusions to link these eight incidents to a JCE is based on insufficient inferences which lack the requisite specific intent. As such, the Appeals Chamber is invited to quash all of Đorđević's convictions under Count 5 for

[632] *Milutinović* TJ, Vol.1/para.207.
[633] TJ, para.1771.
[634] TJ, para.1810.
[635] TJ, para.1855.
[636] *See* TJ, para.1810: the Trial Chamber suggested prejudice based on "a religious divide" which does not recognise that a significant number of Kosovo Albanians are Catholic.

persecution committed through wanton destruction and reduce his sentence accordingly.

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

352. The Trial Chamber erred in law by convicting Đorđević of crimes that were not alleged in the Indictment. The Appeals Chamber is invited to quash Đorđević's convictions in relation to the crime sites identified below. An accused has no reason to litigate a crime site that is not alleged against him. This issue is of general importance.

THE RELEVANT LEGAL STANDARDS

353. The Prosecution is required to plead all material facts underpinning charges in the Indictment.[637] The specificity required of an indictment is a question of degree. The Appeals Chamber has held that precise details need not be pleaded if "the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters."[638] That said, the Indictment is the primary accusatory document and the Prosecution cannot add charges or material facts amounting to charges that were not pled in the indictment.[639] In situations of vagueness or ambiguity, the Appeals Chamber can consider whether an accused has nevertheless been accorded a fair trial such that any defect in an Indictment has been cured by clear, consistent information detailing the factual basis of the charges.[640]

APPLICATION TO ĐORĐEVIĆ'S CASE

354. In Đorđević's case, there was no question of it being "impractical" to identify the specific crime sites for which the prosecution alleged him to be criminally responsible for. The Fourth Amended Indictment specifically identified lots of locations and dates of crimes which the Prosecution alleged he was responsible.[641] Moreover, the Fourth Indictment was filed just one week before the Office of the Prosecutor filed its closing

[637] *Naletilić* AJ, para.23; *Simić* AJ, para.20.
[638] *Kupreškić* AJ, para.89; *see also*, *Ntakirutimana* AJ, para.25; *Niyitegeka* AJ, paras.193,240; *Ndindiliyimana* Indictment Decision, para.25.
[639] *See Kalimanzera* Indictment Decision, para.6; *Bikindi* Indictment Decision, para.7.
[640] *Kvočka* AJ, para.33; *Kordić* AJ, para.142.
[641] *See* Fourth Amended Indictment, paras.72-77.

brief in *Milutinović* (following the completion of that trial).[642] No question of vagueness capable of being cured arises. As noted above, the Fourth Amended Indictment is specific as to the locations and dates of crimes with which Đorđević was alleged to be responsible. The Trial Chamber therefore erred in fact and law by reaching beyond the allegations in the Indictment to hold Đorđević criminally responsible for a host of crimes with which he had not been charged.

355. In *Kordić and Čerkez* the Trial Chamber found Čerkez guilty in relation to specific locations that the Indictment had not charged. The Appeals Chamber quashed certain convictions as a result.[643] Similarly, the Appeals Chamber in *Renzaho* quashed rape convictions on the basis that the accused was not provided with enough specific information; the Appeals Chamber noted that the prosecution was in a position to include the allegations in the Indictment and should have done so if it wanted to hold the accused criminally responsible for specific crimes.[644] The same result is inevitable in Đorđević's case.

356. The instances where the Trial Chamber erred by entering convictions for the following locations even though they were not alleged against Đorđević.

Deportation

357. In relation to **deportation**:

a. Prizren municipality:
   i. Dušanovo, on 28 March 1999.[645]
   ii. Srbica, from 9 to 16 April 1999.[646]

b. Srbica municipality, Kladernica, from 12 to 15 April 1999.[647]

c. Đakovica municipality, Žub, from 27 to 28 April 1999.[648]

[642] *Id.*; *see Milutinović* TJ, Vol.1/para.32: FB filed on 15 July 2008.
[643] *Kordić* AJ, paras.1027-1028.
[644] *Renzaho* AJ, paras.128-129.
[645] TJ, paras.1626-1627,1701,1704.
[646] TJ, paras.1629,1701,1704.
[647] TJ, paras.1634,1701,1704.

d. Suva Reka municipality, Suva Reka Town, from 7 to 21 May 1999.[649]

e. Gnjilane municipality, Vlaštica, 6 April 1999.[650]

f. Uroševac municipality, Uroševac Town, on 27 April 1999.[651]

Forcible Transfer

358. In relation to **forcible transfer**:

a. Orahovac municipality:
   i. Bela Crkva on 25 March 1999.[652]
   ii. Mala Kruša from 25-27 March 1999.[653]
   iii. Velika Kruša on 25 March 1999 and days thereafter.[654]

b. Prizren municipality, Landovica, on 26 March 1999.[655]

c. Srbica municipality:
   i. Brocna, on 25-26 March 1999.[656]
   ii. Tušilje, on 29 March 1999.[657]

d. Đakovica municipality, Žub, in early April 1999.[658]

e. Suva Reka municipality:
   i. Suva Reka, on 3 April 1999.[659]

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[648] TJ, para.1701.
[649] TJ, paras.1638,1701,1704.
[650] TJ, paras.1663,1701,1704.
[651] TJ, paras.1665,1701,1704.
[652] TJ, paras.1618,1702-1704.
[653] TJ, paras.1619-1621;1702-1704.
[654] TJ, paras.1622,1702-1704.
[655] TJ, paras.1628,1702-1704.
[656] TJ, paras.1631,1702-1704.
[657] TJ, paras.1632,1702-1704.
[658] TJ, paras.1655,1702-1704.
[659] TJ, paras.1637,1702-1704.

ii. Pecane on 20-21 March 1999.[660]

f. Peć municipality, Čuška, on 14 May 1999.[661]

g. Dečani municipality, Drenovac, on 26 March 1999.[662]

Murder

359. In relation to **murder**, the Trial Chamber's erroneous approach is at paragraphs 1706 and 2232. It erred in relation to the following specific locations.

a. Đakovica municipality, Đakovica town, the murder of four members of the Cana family at 80 Miloš Gilić on 1 April 1999.[663]

b. Podujevo municipality, Podujevo town, the murder of two elderly Kosovo Albanian men.[664]

c. Orahovac municipality, Mala Kruša, 25 March 1999.[665]

d. Suva Reka municipality, Suva Reka town, the shooting of two elderly members of the Berisha family on 26 March 1999.[666]

Persecutions

360. 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, 1789-1790 and 1856 of the Trial Judgement.

[660] TJ, paras.1639,1702-1704.
[661] TJ, paras.1643-1644,1702-1704.
[662] TJ, paras.1672,1702-1704.
[663] TJ, paras.1732,1734,1753.
[664] TJ, paras.1751-1753,1956,2143.
[665] TJ, paras.1715,1719,1753.
[666] TJ, paras.1721.

b. In relation to persecution by murder, the Trial Chamber erroneously included Pusto Selo.[667]

c. The Trial Chamber erroneously and unjustifiably added to Count 5 other murders beyond those in Counts 3 and 4. These further murders were not charged.[668]

d. In relation to persecution by forcible transfer, the Indictment does not allege such a crime: paragraph 77(a) of the Fourth Amended Indictment includes only paragraph 7 by reference. Therefore, no conviction for persecution by forcible transfer should have been entered. The Trial Chamber ignored this limitation.[669]

CONCLUSIONS AND RELIEF SOUGHT

361. The Appeals Chamber is requested to quash Đorđević's convictions in relation to the above crime sites and reduce his sentence accordingly.

[667] TJ, paras.541,1779-1784,1790,1856.
[668] TJ, paras.1264,2232, fn.4872.
[669] TJ, paras.1763,1775-1778,1856.

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

362. 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 evidence did not support the Trial Chamber's findings.

363. These submissions are based in part on a comparison of the Trial Chamber's approach in *Milutinović et al*. While recognising that different Trial Chambers are entitled to reach different conclusions on the basis of the evidence they hear, where the evidence is essentially identical the findings in *Milutinović et al* support the submission that reasonable doubt could not be eliminated in Đorđević's case.

Deportation

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

365. Suva Reka municipality, Belanica, on 1 April 1999.[670] The KLA were in and/or near Belanica. The Trial Chamber's suggestion that shortly before the FRY's attack the KLA withdrew from the village to the mountain[671] was irrelevant. The KLA were still in the area and those attacking may not have known of the withdrawal. Moreover, the Trial Chamber accepted that the KLA ordered the civilian population to withdraw with it.[672] No reasonable Trial Chamber could attribute the population movement from Belanica to the FRY forces.[673]

366. Kačanik municipality, Vata, on 14 April 1999.[674] The Trial Chamber emphasised the discovery of bodies causing villagers to flee.[675] But there is no evidence that these were civilians killed by the FRY forces or that the attack on Vata was not legitimately directed at KLA in the area.

[670] TJ, paras.1640-1641,1701,1704; *see Milutinović* TJ, Vol.2/paras.550-555.
[671] TJ, fn.2645.
[672] TJ, para.716.
[673] TJ, para.723.
[674] TJ, paras.1671,1701,1704; *see Milutinović* TJ, Vol.2/para.1258.
[675] TJ, para.1139.

Forcible Transfer

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

368. Srbica municipality, Leocina, on 25-26 March 1999.[676] The Trial Chamber failed to consider or eliminate the probability that KLA were present in the village and legitimately targeted.

369. Đakovica municipality, Guska, on 27 March 1999.[677] There was no evidence of force or violence in this village precipitating the departure of the villagers. No reasonable Trial Chamber could conclude that they were "expelled".

370. Gnjilane municipality:

i. Prilepnica on 6 April 1999.[678] The inference remained that these villagers were evacuated rather than expelled. The Trial Chamber found that KLA were in the area.

ii. Nosalje, on 6 April 1999.[679] There was no evidence as to what, if anything, took place in this village.

Murder

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

372. Orahovac municipality, Mala Kruša, on 25 and 26 March 1999:

i. The death of nine victims burned to death inside houses during the course of an attack.[680] No reasonable Trial Chamber could conclude that these individuals were murdered because there was no evidence as

[676] TJ, paras.1630-1631,1702-1704.
[677] TJ, paras.1653,1702-1704; *see Milutinović* TJ, Vol.2/para.162.
[678] TJ, paras.1658,1702-1704.
[679] TJ, paras.1662,1702-1704; *see Milutinović* TJ, Vol.2/para.974.
[680] TJ, paras.485,1715; *see Milutinović* TJ, Vol.2/para.420.

to the circumstances of their death, whether it was intended, or whether they were KLA fighters.

ii. The death of Hyseni Ramadani and Hysni Hajdari and one additional person from the Batusha barn.[681] The appeal in relation to Hyseni Ramadani and one additional person is withdrawn. In relation Hysni Hajdair, he escaped the barn but was found dead later on. There was no evidence as to the circumstances of his death.

373. Suva Reka municipality, Suva Reka town, on 26 March 1999: the death of four other Berisha family members.[682] There was no evidence as to their cause of death.

374. Đakovica municipality, Meja, on 27-28 April 1999: finding of murder for all 281 individuals during Operation Reka in the Carragojs Valley.[683] The circumstances of their individual deaths were not established and murder should not be presumed, particularly because on the Trial Chamber's own findings the KLA were in the area.[684]

375. Vučitrn municipality on 2/3 May 1999: the death of four individuals at night in a convoy.[685] The evidence did not establish that these individuals were detained and the Trial Chamber found that KLA were in the convoy.[686]

376. Kačanik municipality:

iii. Kotlina, on 24 March 1999: the death of 22 individuals at the wells.[687] No reasonable Trial Chamber would put decisive weight on the evidence of an eyewitness 600 metres away in order to conclude that these individuals were detained when killed.

iv. Slatina and Vata, on 13 April 1999: the death of four men in Vata.[688] Again, the only evidence that they had been detained was a hearsay

[681] TJ, paras.1716,1718; *see Milutinović* TJ, Vol.2/para.434, Vol.4/para.515.
[682] TJ, paras.683,1491,1724.
[683] TJ, paras.1736-1739.
[684] TJ, para.975.
[685] TJ, paras.1742,1184,1197.
[686] TJ, para.1197-1199,1742-1743.
[687] TJ, paras.1744-1746,1753; *see Milutinović* TJ, Vol.2/paras.1067-1078.
[688] TJ, paras.1747,1138-1139.

account which should not have been given decisive weight.

Persecution

377. 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 Celina, Bela Crkva (Orahovac municipality) [689] and Rogovo (Đakovica municipality) [690] on 28 March 1999. There was a lack of direct evidence as to the perpetrators. All three of these mosques were found to be destroyed by "Serb forces" on the basis of the testimony of Sabri Popaj who was uncertain when testifying,[691] was biased as a KLA supporter[692] and conflicted with the testimony of another witness[693] His testimony as to the Celina mosque was used to create an inference that two other mosques destroyed were also attributable to 'Serb forces'. But there were no eyewitnesses.

b. The mosque in Landovica in Prizren municipality on 26-27 March 1999.[694] No reasonable Trial Chamber would have relied on the evidence of Rule 92 *quarter* evidence alone.

c. Hadum Mosque in Đakovica municipality on 24-25 March 1999.[695] No reasonable Trial Chamber could have excluded the possibility that the fire that damaged the mosque was started as a result of NATO bombing. Contrary to the Trial Chamber's conclusion, there was no direct evidence that the town centre was set on fire by Serb police.[696] The Trial Chamber's exclusion of NATO being the cause, on the basis that the VJ barracks were not in the historic old town, was plainly erroneous given the well-known incidents of

[689] TJ, paras.1806-1811.
[690] TJ, paras.1833-1837.
[691] *See* TJ, fns:1605-1606,1638,1688,1850(*see also* T.7415-7417 *cf.* D317, para.5),1934,3620,6279,6318-6319.
[692] T.7396.
[693] *See* TJ, fn.1934,6279; *see also* TJ, para.932.
[694] TJ, paras.1817-1819.
[695] TJ, paras.1830-1832.
[696] *See* TJ, para.863-872.

missed targets.[697] No reliance could reasonably be placed on the suggestion by a Human Rights Watch researcher that buildings had been "set fire from inside".[698] Had the Prosecution wanted to establish this, proper forensics evidence should have been led.

378. Finally, the above alleged errors in relation to deportation, forcible transfer and murders resulted in parallel erroneous findings under Count 5.[699]

CONCLUSIONS AND RELIEF SOUGHT

379. 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.

[697] TJ, para.868.
[698] TJ, para.869.
[699] TJ, paras.1774-1790,1856.

GROUND 18: ERRORS OF LAW WHEN ENTERING MULTIPLE CONVICTIONS

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

380. The Chamber erred in law by convicting Đorđević twice for the same crimes - once for 'committing' them through a JCE and again for aiding and abetting them. Such duplicate convictions under 7(1) are impermissible and logically incompatible. This conviction by two irreconcilable modes of liability further shows a lack of clear reasoning on the part of the Trial Chamber which violates Đorđević's rights and invalidates the Trial Judgement. Alternatively, his conviction pursuant to one of the two modes of liability should be quashed and his sentence reduced accordingly.

THE TRIAL CHAMBER'S ERROR[700]

381. The Trial Chamber erroneously concluded that commission by JCE and aiding and abetting the same crimes are not mutually exclusive modes of liability.[701] It held that it could maintain a conviction for aiding and abetting as well as under JCE "in order to fully encapsulate the Accused's criminal conduct."[702]

382. In support of this double conviction, the Trial Chamber relied on three ICTR Appeals Judgements[703]: *Nahimana*[704], *Ndindabahizi*[705] and *Kamuhanda.*[706] None of those cases dealt with concurrent convictions for commission via JCE participation and aiding and abetting; indeed, none even addressed convictions for JCE in analyzing the 'totality of the accused's conduct.' Further, none of the ultimate outcomes of these three cases resulted in concurrent convictions for the same underlying crimes, so their

[700] Given the varying terms utilized by the Chambers of the ICTY and ICTR and relevant treatises, in the following submissions, the Defence adopts the approach used in *Milutinović et al.* and "follow[s] the practice of the Appeals Chamber in using the term "concurrent convictions" to describe simultaneous convictions pursuant to different forms of responsibility enshrined in Articles 7(1) and 7(3), reserving the term "cumulative convictions" to describe simultaneous convictions for more than one substantive crime in respect of the same conduct." [*Milutinović* TJ, Vol.1/para.76].
[701] TJ, para.2194.
[702] *Id.*
[703] TJ, fn.7385.
[704] *See Nahimana* AJ, para.477-478: JCE not considered because it was not charged.
[705] *See Ndindabahizi* AJ, para.123: JCE was not contemplated on the facts.
[706] *See Kamuhanda* AJ, para.77: aiding and abetting subsumed by ordering; JCE not considered.

comments are strictly *obiter*. What *is* clear from these three Appeals Chambers Judgements is that the law on concurrent convictions is far from settled—between them, there are no less than six separate and/or partially dissenting opinions of varying degrees relating to the contours of cumulative and concurrent convictions.[707]

383. The notion of 'fully encapsulating the Accused's conduct' referenced by the Trial Chamber and these ICTR cases traces back to *Akayesu*. There, it was held that "[o]n the basis of national and international law and jurisprudence, the Chamber concludes that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: … (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did."[708] However, in the very same paragraph, the Trial Chamber in *Akayesu* found "it is not justifiable to convict an accused of two offences in relation to the same set of facts where:

> "(a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) **where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide**."[709]

384. Thus, it was envisioned from the start that this type of concurrent conviction – for both perpetrator and accomplice liability – should be impermissible. Rather, an accused must be identified as a participant in the JCE or as an aider and abettor. The ICTR jurisprudence relied upon by the Chamber did not alter the premise that one person cannot be both a perpetrator and aider or abettor of the same crimes.

CONCURRENT CONVICTIONS CASE LAW

385. In addressing cumulative and concurrent convictions, it must be noted that international law and practice of the ICTY indicate that *cumulative charging*, or

[707] *See Nahimana* AJ*:* Partly Dissenting Opinion Of Judge Güney; *Ndindabahizi* AJ: Partially Dissenting Opinion Of Judge Güney; *Kamuhanda* AJ: Separate Opinion Of Presiding Judge Theodor Meron; Separate Opinion Of Judge Wolfgang Schomburg; Separate And Partially Dissenting Opinion Of Judge Mohamed Shahabuddeen; Separate Opinion Of Judge Inés Mónica Weinberg De Roca On Paragraph 77 Of The Judgement.
[708] *Akayesu* TJ, para.468.
[709] *Id.*, para.468.

charges in the alternative, are permissible.[710] Cumulative charging allows the Prosecution to frame the charges to reflect the totality of an accused's conduct, leaving it up to the Trial Chamber to make a determination as to what charges have been established.[711] However, in doing so, it is the duty of the Trial Chamber to ensure that only proper convictions are entered—"great care must be taken in sentencing that an offender convicted of different charges arising out of the same or substantially the same facts is not punished more than once for his commission of the individual acts (or omissions) which are common to two or more of those charges."[712] Concurrent or cumulative convictions are scrutinized "with the greatest caution"[713] as multiple convictions bear great risk of prejudice to an accused.[714]

386. With regard to concurrence in modes of liability, the most distinct case law arises out of the *Blaskić* Appeals Judgement and the prohibition of concurrent convictions under Article 7(1) and 7(3). In *Blaskić*, the Appeals Chamber found that the modes of liability contained in Article 7(1) and 7(3) were 'distinct modes of liability' that were incompatible in such a way that it would be inappropriate to convict for both under the same count.[715] With regard to concurrence of other modes of liability, the *Milutinović et al.* Trial Chamber determined that "where the Prosecution establishes the elements of both commission and another form of responsibility under Article 7(1) in respect of a crime, the Chamber must identify the most appropriate form of liability … an accused cannot be convicted for a crime through more than one form of responsibility in relation to the same conduct."[716]

387. It has long been held in the jurisprudence of this Tribunal that there are clear distinctions between participants in a JCE and aiders and abettors. As shown by the *Tadić* Appeals Chamber, the two modes of liability possess a disparate *actus reus* and *mens rea*.[717] As illustrated by the *Furundžija* Appeals Chamber, the two modes of liability "appear to have crystallised in international law—co-perpetrators who

[710] *Čelebici*, AJ, para.400; *Naletilić* AJ, para.103; *Kupreškić* AJ, para.385.
[711] *Čelebici*, AJ, para.400.
[712] *Krnojelac* Indictment Decision, para.10.
[713] *Kunarac* AJ, para.173.
[714] *Id.*, para.169; *see also Čelebici* AJ, Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna ('hereinafter 'Hunt/Bennouna Dissent'), para.23.
[715] *Blaškić* AJ, para.91.
[716] *Milutinović* TJ, Vol.1/para.77.
[717] *Tadic* AJ, paras.223,229.

participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other."[718]

388. In 2003, the Appeals Chamber held that for a finding of an Accused as a JCE participant, he must share the purpose of the JCE, not just know about it, as such he is not properly classified as a mere aider and abettor of the crime(s).[719] Judge Shahabuddeen, in a separate opinion, drew a clear distinction between perpetrator/co-perpetrators and aiders and abettors.[720] He described that it would be inaccurate to refer to a participant in a JCE as 'one who merely aids and abets.'[721] To do so, he stated, would contradict the distinction of categories laid forth in several instances.[722]

389. Shortly thereafter, the *Krnojelac* Appeals Chamber reiterated the alternative *mens rea* standards of aiding and abetting and co-perpetration.[723] Thereafter, the *Vasiljević*[724] and *Kvočka*[725] Appeals Judgements sought to clarify JCE co-perpetration and aiding and abetting. In *Kvočka*, the Appeals Chamber noted that, while it may be difficult to distinguish the aider and abettor from a co-perpetrator[726], there is indeed a difference, and cited the distinctions laid forth by the *Vasiljević* Appeals Chamber.[727] Applying those standards, the Appeals Chamber stated that to determine whether an Accused was one or the other was determined by "the effect of the assistance and on the knowledge of the accused."[728]

390. The *Krajišnik* Trial Chamber went on to highlight the incompatibility of JCE participation and aiding and abetting in that "a person's conduct either meets the conditions of JCE membership … in which case he or she is characterized as a co-

[718] *Furundžija* AJ, para.118, citing *Furundzija* TJ, paras.216,252.
[719] *Ojdanić* JCE Decision, para.20.
[720] *Id.*,Separate Opinion of Judge Shahabuddeen, para.13.
[721] *Id.*, para.28.
[722] *Id.*, para.12.
[723] *Krnojelac* AJ, para.122.
[724] *Vasiljević* AJ, Sec.V(A)(ii):"*Differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor*".
[725] *Kvočka* AJ, Sec.II(D)(2):"*What is the difference between co-perpetration and aiding and abetting?*".
[726] *Id.*, para.88.
[727] *Id.*, para.89.
[728] *Id.*, para.90.

perpetrator, or the conduct fails the threshold, in which case there is no JCE responsibility."[729]

391. Finally, in *Mpambara*, the ICTR Prosecution sought to prove '*criminal responsibility for commission by aiding and abetting the physical perpetrators in furtherance of a JCE*'. That Trial Chamber found this statement "legally incoherent", stating:

> [A]iding and abetting is a form of accomplice liability, whereas participation in a joint criminal enterprise is a form of direct commission, albeit with other persons. There are important differences in the mental and objective elements for each of these forms of participation…. The fact that the same material facts may prove both aiding and abetting and participation in a joint criminal enterprise does not diminish the importance of distinguishing between the two. To the extent that the Prosecution has, on some occasions in its submissions, suggested that the joint criminal enterprise is proven by aiding and abetting, the Chamber will ignore this legal characterization and consider whether the material facts show either that the Accused participated in a joint criminal enterprise, or that he aided and abetted others in the commission of crimes.[730]

392. As shown here, the jurisprudence clearly precludes concurrent convictions for JCE and aiding and abetting. The Trial Chamber's approach has unnecessarily blurred the carefully crafted lines drawn between the two modes of liability.[731]

PREJUDICE CAUSED TO ĐORĐEVIĆ

393. Here, by attempting to clarify Đorđević's conduct, the Trial Chamber has done just the opposite and created a scenario where it is impossible to determine whether they have found that he was a principal or an accomplice to the underlying crimes. These distinctions are further muddled by the Chamber's convictions 'in the alternative' for JCE III participation[732] and 7(3) command responsibility.[733] Far from 'showing the

[729] *Krajišnik* TJ, para.886.
[730] *Mpambara* TJ, para.37.
[731] *Blaškić* TJ, para.288; *see also*, *Ndindabahizi* AJ, Partially Dissenting Opinion of Judge Güney, para.4; *Gacumbitsi* AJ, paras 60-61.
[732] TJ, para.2158; with regard to the alternative purpose/intent of the JCE, see paras.2139,2141,2145,2153.
[733] TJ, para.2192.

totality', these supposedly simultaneous but differing *mens rea*[734] creates confusion and violates Đorđević's right to have a reasoned decision that unequivocally expresses his criminal liability and unambiguously identifies the mode(s) of liability for which he is convicted and the relation between them.[735]

394. The Trial Chamber further failed in its duty to ensure that alternative charges were assessed as such. In the present matter, the Prosecution clearly pleaded JCE and aiding and abetting in the alternative, the OTP Final Brief asserting: "*In the alternative to his liability as a member of the JCE, Đorđević is responsible for aiding and abetting the commission of crimes under Article 7(1) of the Statute.*"[736] While many ICTY Trial Chambers find it 'unnecessary' to examine other alternatively plead modes of liability after finding guilt as a participant in a JCE[737], the Trial Chamber, here, found both concurrent and alternative convictions. Such duplicity cannot stand as it does not specifically identify Đorđević's culpability – "[e]ither an accused person is guilty of different crimes constituted by different elements which may sometimes overlap (but never entirely), or the accused is convicted of that crime with the most specific elements, and the remaining counts in which those elements are duplicated are dismissed as impermissibly cumulative."[738]

395. While "finding that multiple methods had been used by the accused does not signify that he has been subjected to separate convictions for multiple crimes" necessarily,[739] in the present case, Đorđević was definitively ***convicted*** of two separate and incompatible modes of liability based on the same underlying actions – as a JCE participant and an aider and abettor.[740] These convictions are unequivocal.

396. That his sentence was increased due to this double conviction is also without question. In sentencing, the Chamber contemplated his sentence for JCE I, but then found:

[734] *See* TJ, para.2158: The Trial Chamber is satisfied that his actions and knowledge create the inference that Đorđević acted with the intent of a JCE I or "alternatively" that he acted with the intent of a JCE III participant; 2163,2184; *see also*, *infra*, Ground 10.
[735] *See Ndindabahizi* AJ, paras.121-123.
[736] OTP FB, para.1292(emphasis added) *cf.* TJ, para.2160: "The Indictment ***also*** alleges that Vlastimir Đorđević's [sic] is guilty of aiding and abetting the commission of the alleged crimes"(emphasis added).
[737] *See Gotovina* TJ, para.2375,2587; *Milutinović* TJ, Vol.3/paras.474,787,1137; similarly, in respect to perpetration versus aiding and abetting genocide, *see Krstić* TJ, paras.642-644; *Krstić* AJ, paras.143-144.
[738] *Blaškić* AJ, para.721.
[739] *Kamuhanda* AJ, Separate And Partially Dissenting Opinion of Judge Shahabuddeen, para.413.
[740] TJ, para.2194,2230.

"*However, as detailed in this Judgement, the Accused's conduct was such as to <u>also</u> render him liable to conviction <u>and punishment</u> for aiding and abetting the offences established.*"[741] The Appeals Chamber has held that "distinction between these two forms of participation is important, both to accurately describe the crime and to fix an appropriate sentence."[742]

397. The Appeals Chamber has held that "great care must be taken in *sentencing* so that an offender *convicted* of different charges arising out of the same or substantially the same facts is not *punished* more than once for his commission of the individual act (or omissions) which are common to two or more of those charges."[743] Multiple convictions should not "give even the impression of punishing an accused twice for the same conduct under two heads of liability."[744]

CONCLUSIONS AND RELIEF SOUGHT

398. The Trial Chamber's decision to convict Đorđević of participation in a JCE ***and*** aiding and abetting the same crimes constitutes a fundamental error in law. The inability of the Chamber to articulate the specific mode of liability as applied to the underlying crimes permeates the entirety of the Judgement and this error invalidates the Trial Judgement and requires a full acquittal. At the very least, one of the two modes of liability must fall away and Đorđević's sentence must be reduced accordingly to represent a singular conviction.

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

399. Đorđević's convictions for the underlying crimes of deportation, forcible transfer and murder (pursuant to Article 5 of the Statute) and additional convictions under Article 5 for persecutions by means of those same underlying crimes, are cumulative and unfair. Given the developing case law, there are compelling reasons for departing from previous jurisprudence.

[741] TJ, para.2214(emphasis added).
[742] *Kvočka* AJ, para.92; *see also Krstić* AJ, para.270.
[743] *Krnojelac* Indictment Decision, para 10.
[744] *Kamuhanda* AJ, Separate Opinion Of Judge Schomburg, para.389.

400. The *Čelebici* test, employed to determine permissible cumulative convictions, states that each statutory provision must require proof of an additional fact which the other does not.[745] Where this is not met, a Trial Chamber must choose for which offence it will enter a conviction.[746] The *Čelebici* test has been described as "deceptively simple" by the Appeals Chamber because "[i]n practice, it is difficult to apply in a way that is conceptually coherent and promotes the interests of justice."[747]

401. The Appeals Chamber has held that persecution requires the additional requirement of discriminatory intent and thus convictions for both persecution and the other Article 5 crimes are permissible.[748] However, previous to late 2004, such cumulative convictions under Article 5 were considered to be impermissible. In *Krstić* the Appeals Chamber held as follows:

> Where the charge of persecution is premised on murder or inhumane acts, and such charge is proven, the Prosecution need not prove any additional fact in order to secure the conviction for murder or inhumane acts as well. The proof that the accused committed persecution through murder or inhumane acts necessarily includes proof of murder or inhumane acts under Article 5. These offences become subsumed within the offence of persecution.[749]

402. A shift in this jurisprudence occurred in the split decision in *Kordić*. Two members of the panel – Judge Schomburg and Judge Güney – highlighted how this *Kordić* Appeals Judgement departed from existing case law and argued that such a finding was not in conformity with the *Čelebici* test.[750] These dissents explain how intra-Article 5 convictions were not at issue on the facts of *Čelebici*.[751] But they warned that there was no reason to depart from the settled jurisprudence based on "shifting majorities in the Appeals Chamber".[752]

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[745] *Čelebici* AJ, para.412.
[746] *Id.*, para.413.
[747] *Kunarac* AJ, para.172.
[748] *Stakić* AJ, paras.359-361; *Kordić* AJ, para.1040; *Krajišnik* AJ, para.389.
[749] *Krstić* AJ, para.232.
[750] *Kordić* AJ, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions (hereinafter "Schomburg/Güney Dissent"), paras.1-2.
[751] *Id.*, para.3.
[752] *Id.*, para.13.

403. It is respectfully submitted that the continuing dissents on this matter[753] and a recent decision of the ECCC provide cogent reasons to review this issue and return to the original jurisprudence which would prohibit cumulative Article 5 convictions. The ECCC, in considering the totality of jurisprudence of the ICTY, recently held that cumulative convictions for persecutions and the underlying crimes as crimes against humanity are impermissible.[754] The ECCC, using the language of the *Krstić* Appeals Chamber, and as outlined by the *Kordić* dissents of Judge Güney and Judge Schomburg, held that: "proof that the accused committed persecution through murder or inhumane acts necessarily includes proof of murder or inhumane acts."[755]

404. This approach affirms the pre-*Kordić* jurisprudence that adheres to the *Čelebici* test and emphasizes that "the fundamental consideration arising from charges relating to the same conduct is that an accused should not be penalised more than once for the same conduct"; that the purpose of the test is to determine if the conduct actually commits more than one crime.[756] Such temperance in multiple convictions underscores the warning issued by two members of the *Čelebici* panel that "[p]rejudice to the rights of the accused – or the very real risk of such prejudice – lies in allowing cumulative convictions."[757]

405. Đorđević was prejudiced by being convicted of several crimes under Article 5 arising from the same conduct. In cumulatively convicting under Article 5, the Trial Chamber did not provided adequate reasoning to show how these crimes are materially distinct or how the original counts are not subsumed by the more specific crimes as persecutions. It is respectfully submitted that the *Krstić* approach is more convincing and the approach of the narrow majority in *Kordić and Čerkez* was incorrect. Judge Güney has aptly characterised persecution as an "empty hull" – an accused cannot be convicted of persecution without identifying the underlying crime.[758] Simplistically

[753] *Stakić* AJ, Opinion Dissidente Du Juge Güney Sur Le Cumul De Declarations De Culpabilité; *Naletlić* AJ, Opinion Dissidente Conjointe Des Juges Güney Et Schomburg Sur Le Cumul De Déclarations De Culpabilité; *Nahimana* AJ, Partly Dissenting Opinion Of Judge Güney (in these dissents, Judge Güney and Judge Schomburg noted that silence on this matter in future cases should not be construed as acquiescence in this regard).
[754] *Duch* TJ, paras.563-565.
[755] *Id.*, para.565.
[756] *Čelebici* AJ, Hunt/Bennouna Dissent, para.26.
[757] *Id.*, para.23.
[758] *Kordić* AJ, Schomburg/Güney Dissent, para.6.

applying the *Čelebici* test fails to consider the particular circumstances of the crime of persecution and skews the balance too far in the Prosecution's favour.[759]

CONCLUSIONS AND RELIEF SOUGHT

406. The Appeals Chamber is invited to quash the Đorđević's multiple convictions pursuant to Article 5 of the Statute to the extent that they are cumulative and reflect the same conduct. Đorđević's sentence should be reduced accordingly.

[759] *See* Boas, Bischoff & Reid, Vol.II/p.347.

GROUND 19: ERRORS IN RELATION TO SENTENCING

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

407. The Trial Chamber erred when it utilized the same findings of Đorđević's role and position to serve as 1. the basis of his conviction, 2. as lending to the gravity of the crimes, and 3. as an aggravating factor. This accumulation has created impermissible 'double-counting' and has unjustifiably increased his sentence.[760]

408. With regard to aggravating factors, the Appeals Chamber has held that, if a particular circumstance has been included as an element of the offence, it cannot be regarded additionally as an aggravating factor.[761] Furthermore, factors considered in the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances and *vice versa*.[762] Such double-counting amounts to legal error.[763]

409. Here, the Trial Chamber erred by using the same findings three ways:
- First, that Đorđević made a 'significant contribution' to the JCE through his position and rank in the MUP hierarchy.[764]
- Second, that the same findings could support a conviction for 7(3) liability[765] and thus applied as an aggravating factor.[766]
- Third, that the gravity of the crimes should reflect "*...the sentence appropriate* ***for the leading and grave role*** *of the Accused….*"[767]

410. A high rank or position in and of itself does not merit a higher sentence, it is only by showing an ***abuse*** of that position that there can be a 7(3) aggravation based on position or role in the commission of a 7(1) mode of liability.[768] The Trial Chamber

[760] *See also* Ground 18(A); there is no analysis of how the aggravation and gravity findings further relate to the conviction of aiding and abetting or the interplay between them in sentencing.
[761] *Galić* AJ, para.408; *Kordić* AJ, para.1089.
[762] *Deronjić* AJ, para.106; *Lukić* TJ, para.1050; *Milutinović* TJ, Vol.3/para.1149.
[763] *D. Milošević* AJ, para.306-307.
[764] TJ, paras.2154-2158,2213; *see also, infra*, Ground 9.
[765] TJ, para.2192.
[766] TJ, para.2195,2220.
[767] TJ, para.2214(emphasis added); *see also,* 2210-2211.
[768] *D. Milošević* AJ, para.302.

did not make this analysis. On the contrary, it was only by virtue of his position that he was found to have met the *actus reus* of JCE participation at all.

CONCLUSIONS AND RELIEF SOUGHT

411. The Trial Chamber erred in taking the position/role of Đorđević into account in establishing culpability and then applying it to both the gravity of the offense and as an aggravating factor. This merits the intervention of the Appeals Chamber and a reduction in sentence.

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

412. The Trial Chamber simultaneously committed a discernible error in failing to address relevant mitigating factors that should have been considered in the overall sentence.

413. Under Rule 101(B)(ii) a Trial Chamber must take into account any mitigating circumstances.[769] Unlike the burden for aggravating factors, mitigating factors must be proven only by a preponderance of the evidence.[770]

414. The Trial Chamber makes a cursory analysis of mitigation in paragraph 2224, which fails to properly consider the following:

- **Comportment and behavior in trial**[771]: These are not considered despite the obvious ability of a Trial Chamber to take these factors into account. Đorđević's extraordinarily good behaviour when detained at the UNDU shows good rehabilitative prospects and should have been contemplated in mitigation, along with his obvious respectful behaviour at trial–attending every single day and contributing to the proceedings as required.

[769] *M. Jokić* SA, para.47 *citing Serushago* SA, para.22; *Musema* AJ, para.395.
[770] *Naletilić* AJ, para.592.
[771] *Cf. Milutinović* TJ, Vol.3/para.1152; *Hadžihasanović* AJ, para.325; *Kordić* AJ, para.1053; *Blaškić* AJ, para.696.

- **Cooperation**[772]: 'Cooperation with the Prosecution' does not have to be substantial in order to be a mitigating circumstance[773] and is "not to be 'construed narrowly and singularly'… what matters is that Trial Chambers fulfil their obligation under Rule 101(B)(ii) to consider all mitigating circumstances before them."[774] Despite admitting it as evidence, the Trial Chamber failed to give any consideration to assistance provided by the Đorđević in his testimony given before both this Tribunal and that of the War Crimes Chambers of Serbia which can be used in further trials in the region and help establish the truth of the events. It further failed to consider the work undertaken by Đorđević and his Defence team in working to establish agreed facts and exhibits to facilitate an expedient trial.[775]

- **Expressions of remorse**[776]: An accused need not admit participation in a crime to show remorse, but simply "acceptance of some measure moral blameworthiness for a personal wrongdoing, falling short of the admission of criminal responsibility or guilt."[777] The Trial Chamber completely overlooked Đorđević's statement of remorse from the beginning of the trial:

> *I'm sorry for all the victims in Kosovo and Metohija. I feel sorry for the families. I deeply sympathise with their pain. I would really wish to see this war, the war in Kosovo and Metohija, to be the last war ever waged there; and I would like to see all the problems being resolved by political means, by talks, and agreements.*[778]

The Trial Chamber further ignored expressions of remorse in his sworn testimony despite using these same findings to accord guilt[779] and did not consider expressions of sympathy for the victims [780] made through counsel on his behalf[781] as made throughout the trial.[782]

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[772] Rule 101(B)(ii).
[773] *Bralo* SA, para.51.
[774] *Id.*, para.37, *citing M. Simić* SJ, para.111.
[775] *Orić* TJ, para.750.
[776] *Strugar* AJ, para.365-366,370.
[777] *Id.*, para.365.
[778] T.242.
[779] *See* T.10006/T.10010; *see also*, TJ, paras.1280,2187.
[780] *Id.*, para.366.
[781] *See Orić* TJ, para.752.

- **Duress and superior orders**[783]: The Trial Chamber failed to consider the impact of superior orders[784] in a situation of duress[785] despite using the same evidence and findings to accord guilt.

- **'Harsh environment' of armed conflict**[786]: The Trial Chamber did not consider that Đorđević's decision were not taken 'with the luxury of peace and security and time for consideration' but rather in a 'climate of fear and uncertainty'.

CONCLUSIONS AND RELIEF SOUGHT

415. Despite that these mitigating factors presented at trial and established on the balance of probabilities, the Trial Chamber has failed to consider this evidence in determination of sentence. The Appeals Chamber should therefore consider these mitigating factors on appeal and grant Đorđević a reduction in sentence.

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

416. The Trial Chamber states that it "took into consideration" the decisions on sentence in *Milutinović et al.*, sentencing Đorđević to 27 years on the basis that his role was "more significant" than the accused in that case so that he deserved a "more severe" sentence.[787] No reasoning was given to support such a conclusion.

417. "The Appeals Chamber has held that sentences of like individuals in like cases should be comparable."[788] While the numerous factors of each case, must be considered "…a disparity between an impugned sentence and another sentence rendered in a like case

[782] T.8659(D.Caka); T.494(S.Berisha); T.5630(H.Hoxha); *see also* T.1901(S.Bogujevci); T.6541(M.Deda); T.4311(A.Hajrizi).
[783] *Bralo* SJ, para.53; TJ, para.1970, *cf.* ICTY Statute, Art.7(4).
[784] TJ, para.1970, *cf.* ICTY Statute, Art.7(4).
[785] T.10006-10.
[786] *Čelebici* TJ, para.1283.
[787] TJ, para.2227.
[788] *Strugar* AJ, para.348, *citing Kvočka* AJ, para.681

can constitute an error if the former is out of reasonable proportion with the latter."[789] This is buttressed by the principle outlined in the Statute at Article 21(1), that all accused should be considered equally.

418. The other participants in the same JCE in *Milutinović* received sentences of 22 years.[790] Absent explanation or justification, no reasonable Trial Chamber would have imposed a greater sentence on Đorđević.

419. Consider that Šainović, Pavković[791] and Lukić were all found to have abused their superior authority to aggravate their sentences[792] with little to no mitigation.[793] Šainović was further found to be an "important member of the joint criminal enterprise and wrongfully exercised his authority in order to commit the crimes."[794] There is nothing exemplifying how Đorđević deserved a sentence of five additional years especially considering the proximity of Šainović, Pavković and Lukić to the crimes on the ground in Kosovo in 1999, whereas Đorđević was found to have made only three visits that year.[795]

420. In fact, the Trial Chamber did not even attempt to provide a reasoned opinion as to how it came to find that Đorđević had a 'more significant' role than these co-Accused and the evidence points to him having a much less significant role. Đorđević was not found to have managed all Serb forces, nor did he have a political leadership role. In fact, statements of the internationals involved during the relevant time period show a complete absence of Đorđević from their radar[796] yet, at the same time, mention, with frequency, interactions and impressions of superior rank of other actors found to be in the JCE.[797]

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[789] *Strugar* AJ, para.349, *citing Jelisić* AJ, para.96.
[790] The *Milutinović et al.* Trial Chamber refused to find significant aggravating or mitigating factors to differentiate between any of these men and sentenced them according to mode of liability.
[791] In addition, Pavković was also convicted for persecutions as a crime against humanity for sexual assaults, which was not found in the present case.
[792] *See Milutinović* TJ, Vol.3/paras.1180,1190,1201.
[793] *Id.*, Vol.3/paras.1181-1184,1191-1194,1202.
[794] *Id.*, Vol.3/para.1180.
[795] *But see* Ground 18a.
[796] Aside from mention of the October Agreements, the following internationals fail to mention Đorđević in prior testimony or statement: Ciaglinski(P832-834); Maisonneuve(P851-853); Drewienkiewicz(P996-997); Kickert(P478-478); Vollabaek(P1071-1073); Crosland(P1400-1402); Phillips[REDACTED]; Abrahams(P738-740).
[797] *See, especially,* Ciaglinski:T.5285-5287,P832,P833(T.3165/T.3168-3169/T.3176/T.3182-3183/T.3162-3163);Maisonneuve:T.5480-5482,P851(paras.8-11),P853(T.11032-11033/T.11162-11163); Drewienkiewicz:

CONCLUSIONS AND RELIEF SOUGHT

421. While a comparable analysis is not appropriate with regard to every other case, comparison to those sentenced in relation to the same JCE highlights how 27 years is capricious and excessive for the crimes convicted.[798] The Appeals Chamber should therefore reduce Đorđević's sentence accordingly.

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

422. The Trial Chamber 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.

423. While the ICTY has determined that it is not bound to the parameters of sentencing practices at the time, it must do more than "merely recit[e] the relevant criminal code provisions of the former Yugoslavia."[799] When diverging from set standards, a Chamber should explain the sentence in reference to the sentencing practices of the former Yugoslavia.[800]

424. The Trial Chamber here did nothing more than to recite code.[801] There is no analysis or explanation to show as to why the convictions found should exceed the maximum penalty of 20 years.

425. Furthermore, the Trial Chamber cited the wrong code. First, it erred in applying the SFRY Criminal Code[802] which was supplanted by the FRY Criminal Code that came into effect with the FRY Constitution of 1992.[803] This FRY criminal code reflected

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T.6331/T.6340-6343/T.6358-6359,P996(paras.56,63-66,68,83,103,201),P997(T.7731/T.77747775/T.7988); Kickert:P478,P479(T.11235-11236);Vollabaek:P1071(T.8507-8509),P1073;Phillips:T.8686-8687/T.8691-8694/T.8705-8706/T.8760/T.8728,[REDACTED];Crosland:T.9147/T.9158/T.9181/T.9186-9187,P1400(paras.42, 48-59,67,69);[REDACTED](T.9789/T.9833); *see also* T.6252(journalist Baton Haxhiu had never heard of him).

[798] *Jelisić* TJ, para.24.

[799] *Krstić* AJ, para.260.

[800] *Id.*

[801] TJ, para.2226.

[802] TJ, paras.2225-2226.

[803] P129.

the abolition of the death penalty and imposed a maximum sentence of 20 years for crimes similar to those for which Đorđević was convicted. Second, it erred in reference to the Republic of Serbia Criminal Code which did not deal with the type of crimes alleged in this case.

CONCLUSIONS AND RELIEF SOUGHT

426. As the Trial Chamber failed to explain why, having taken account of the sentencing practices of the FRY, a sentence of 27 years could be justified, the Appeals Chamber is invited to reduce Đorđević's sentence to better take account of those sentencing practices.

OVERALL RELIEF SOUGHT

427. The Trial Chamber erred in law and fact when it found that Vlastimir Đorđević participated in a JCE to permanently alter the ethnic balance of Kosovo and that he aided and abetted the same crimes.

- The Appeals Chamber is invited to quash the Trial Chamber's verdict and disposition found at paragraph 2230 and enter findings of NOT GUILTY on all of Counts 1-5; or, alternatively,

- Should any of the verdicts recorded against Vlastimir Đorđević stand, the Appeals Chamber is invited to consider the discernible errors made by the Trial Chamber and significantly reduce the sentence imposed in paragraph 2231.

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RESPECTFULLY SUBMITTED ON THIS 15TH OF AUGUST 2011

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VLASTIMIR ĐORĐEVIĆ'S APPELLATE BRIEF

ANNEX A

COMMON ABBREVIATIONS

AJ	Appeal Judgement
API	Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
APII	Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977
ATAs	Anti-Terrorist Actions
CCL10	Control Council Law No. 10
CO	Civilian Defence
FB	Final Brief
FRY	Federal Republic of Yugoslavia
HQ	Headquarters
ICC Statute	Rome Statute of the International Criminal Court
ICRC	International Committee of the Red Cross
Indictment	Fourth Amended Indictment (9 July 2008)
JCE	Joint Criminal Enterprise
JSO	Special Operations Units
KDOM	Kosovo Diplomatic Observation Mission
APKiM / KiM	Autonomous Province of Kosovo and Metohija
KLA / UCK	Kosovo Liberation Army / Ushtria Çlirimtare e Kosovës
LDK	*Lidhja Demokratike e Kosovës* (Kosovo People's Movement)
MUP	*Ministrastvo unutrašnjih poslova* (Ministry of the Interior of the Republic of Serbia)

MUP Staff / Ministerial Staff	Staff of the Ministry of the Interior for Kosovo Metohija
NATO	North Atlantic Treaty Organization
October Agreements	Refers collectively to: the 'Agreement of Kosovo Verification Mission,' the 'NATO Air Surveillance Agreement' (Clark-Perisić Agreement), the 'Record of the meeting in Belgrade' (Clark-Naumann Agreement) and the 'Understanding Between KDOM and the Ministry of the Republic of Serbia' (Byrnes-Đorđević Agreement)
OPG	Operational Pursuit Group
OSCE	Organization for Security and Cooperation in Europe
OTP	Office of the Prosecutor
OUP	Department of the Interior
PJP	*Posebne Jedinice Policie* (Special Police Unit)
PrK	*Prištinski korpus* (Pristina Corps)
PS	Police Stations
PTB	Pre-Trial Brief
CRDB	Centres of the RDB
RDB	State Security Department
ORDB	RDB Sectors
RJB	Public Security Department
RPO	Reserve Police Squads
RS	Republic of Serbia
RSK	Republic of Serbian Krajina
SAJ	*Specijalna anti-teroristčka jedinica* (Special Anti-terrorist Units)
SBZS	Slavonija, Baranja and Zapadni Srem
SC	Supreme Command
SC Staff	Supreme Command Staff
SDC	Supreme Defence Council

SFRY	Socialist Federal Republic of Serbia
SPS	Socialist Party of Serbia
Statute	Statute of the International Criminal Tribunal for the former Yugoslavia
SUP	*Sekretarijat za Unutrašnja Poslove* (Secretariat of the Interior)
TJ	Trial Judgement
TO	Territorial Defence
UNHCR	United Nations High Commissioner for Refugees
VJ	Vojska Jugoslavije (Army of Yugoslavia)
VJC	VJ Collegium
VJ General Staff	General Staff of the Army of Yugoslavia

VLASTIMIR ĐORĐEVIĆ'S APPELLATE BRIEF

ANNEX B

TABLE OF AUTHORITIES

***Akayesu* TJ**	*Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998.
***Aleksovski* AJ**	*Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgement, 24 March 2000.
***Aleksovski* TJ**	*Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Trial Judgement, 25 June 1999.
***Bashir* Decision**	*Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-1/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahamd Al Bashir, 4 March 2009.
***Babić* SAJ**	*Prosecutor v. Babić*, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005.
***Bagilishema* TJ**	*Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgement, 7 June 2001.
***Bemba* Confirmation Decision**	*Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009.
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***Boškoski* TJ**	*Prosecutor v Boškoski & Tarčulovski*, Case No. IT-04-82-T, Trial Judgement, 10 July 2008.
***Bralo* SA**	*Prosecutor v. Bralo*, Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007.
***Bralo* SJ**	*Prosecutor v. Bralo*, Case No. IT-95-17-S, Sentencing Judgement, 7 December 2005.
***Brđanin* AJ**	*Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeal Judgement, 3 April 2007.
***Brđanin* Interlocutory Appeal**	*Prosecutor v Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004.
***Brđanin* TJ**	*Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Judgement, 1 September 2004.
Cassese–JCE	Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J Int'l Crim Just 110 (2007).
Čelebici AJ	*Prosecutor v. Delalić, Mucić, Delić, & Landžo (aka "Čelebici")*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001.
Čelebici TJ	*Prosecutor v. Delalić, Mucić, Delić, & Landžo (aka "Čelebici")*, Case No. IT-96-21-T, Trial Judgement, 16 November 1998.
Kreβ	Claus Kreβ, *Erdmonović*, in Antonio Cassese, THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE (Oxford: OUP, 2009).
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