IT-05-87-A
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11 December 2009

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-05-87-A

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Date Filed: 11 December 2009

THE PROSECUTOR

v.

NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
NEBOJSA PAVKOVIC
VLADIMIR LAZAREVIC
SRETEN LUKIC

Public with Confidential Annex

GENERAL OJDANIC'S MOTION SUBMITTING AMENDED APPEAL BRIEF

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Mr. Mihaljo Bakrac and Mr. Duro Cepic for Vladimir Lazarevic
Mr. Branko Lukic and Mr. Dragan Ivetic for Mr. Sreten Lukic

1. On 4 December 2009, the Appeals Chamber granted in part *General Ojdanic's Motion to Amend his Amended Notice of Appeal of 29 July 2009*.[1] The Appeals Chamber ordered General Ojdanic to file an amended appellant's brief consisting of no more than 48,000 words no later than 11 December 2009.[2]

2. Pursuant to the Appeals Chamber's Decision, General Ojdanic hereby submits his Amended Appeal Brief and a Supplemental Book of Authorities.

3. The Appeals Chamber emphasized that the amendments must be clearly identified and strictly limited to the incorporation of the newly advanced ground of appeal.[3]

4. Annex A to this Motion is a document comparison clearly identifying the amendments made to General Ojdanic's original Appeal Brief as filed on 23 September 2009.

5. The amendments are strictly limited to the incorporation of the newly advanced ground of appeal authorized by the Appeals Chamber in its Decision. In summary, the amendments made are:

    a. The inclusion of the new Sub-ground 3(D) titled: "the Trial Chamber failed to apply the purpose standard for the *mens rea* of aiding and abetting established by international law". This new Sub-ground appears at paragraphs [280 a-cc] of the Amended Appeal Brief. Whilst inserting this new Sub-ground in what is considered to be the appropriate place, General Ojdanic has retained the paragraph numbering of his original Appeal Brief in order to facilitate the prosecution's response and the Appeals Chamber's determination of all subsequent grounds of appeal. Footnotes to Ground 4(A) onwards have been renumbered in light of the insertion of the new Sub-ground 3(D).

[1] *Prosecutor v Sainovic et al,* Case No. IT-07-87-A, *Decision on Dragoljub Ojdanic's Second Motion to Amend his Notice of Appeal* (4 December 2009) ("Appeals Chamber Decision").
[2] Appeals Chamber Decision, para. 22.
[3] Appelas Chamber Decision, para. 21.

b. The amendment of the contents pages to reflect the insertion of Sub-Ground 3(D) and consequential amendments to page numbers.

c. The amendment of the date and word count, to reflect the new word count of 47,927.

6. Annex B to this Motion is a clean version of General Ojdanic's Amended Appeal Brief.

Relief sought

7. Having complied with the Appeals Chamber's Decision, General Ojdanic respectfully requests that the Appeals Chamber accept as validly filed the Amended Appeal Brief which appears as Annex B to this Motion.

Dated: 11 December 2009
Word Count: 519

Respectfully submitted,

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Annex A

THE INTERNATIONAL CRIMINAL TRIBUNAL
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GENERAL OJDANIĆ'S
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I. INTRODUCTION

On 26 February 2009, General Dragoljub Ojdanić was convicted by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (the **"Tribunal"**) in its judgment (IT-05-87-T) (the **"Trial Judgment")** on two counts of crimes against humanity: deportation and forcible transfer, and sentenced to 15 years' imprisonment. He was acquitted of two counts of murder and one count of persecutions.[1]

During the period of the Indictment crimes, General Ojdanić was Chief of Staff of the Yugoslav Army (the **"VJ"**). General Ojdanić was shown at the trial to be a correct and professional soldier and an honourable man who went to great lengths to avoid war, and to ensure that crimes would not be committed by his army. The Trial Chamber found that General Ojdanić did not participate in a joint criminal enterprise to expel Albanians from Kosovo—a finding the prosecution has not appealed.

However, the Trial Chamber held that General Ojdanić was responsible for aiding and abetting deportation and forcible transfer (**"forcible displacements"**) in certain locations throughout Kosovo where members of the VJ were found to have participated in the Indictment crimes.

General Ojdanić was found guilty by virtue of non-criminal acts which were not directed at assisting crimes, but which were necessary for defending his country. The Trial Chamber found criminal knowledge and intent based on facts of which he was not aware and propaganda from his country's enemies which he could not be expected to believe. If General Ojdanić's convictions are sustained, then every war-time

[1] References to paragraphs in the four-volume Trial Judgment appear in the form **TJ [volume number/paragraph number]**.

commander of any army can be found responsible for crimes committed by his troops simply by continuing to prosecute the war. Therefore, the outcome of this appeal is not only of great importance to General Ojdanić, but also to commanders of armies throughout the world.

Ojdanić filed his Notice of Appeal on 27 May 2009. On 2 September 2009, the Appeals Chamber granted Ojdanić's Motion to Amend Ground 7 of his Notice of Appeal dated 29 July 2009 and accepted as validly filed the amended Notice of Appeal attached to Ojdanić's motion as Annex B.[2]

General Ojdanić appeals against the Trial Judgment on the grounds set out below.[3] General Ojdanić appreciates the tremendous effort by the Trial Chamber and its staff that went into its judgment. Nevertheless, he stands convicted for crimes he did not commit.

[2] *Decision on Dragoljub Ojdanić's Motion to Amend Ground 7 of his Notice of Appeal* (2 September 2009), para. 18.

[3] The Interlocutory Decisions relevant to Ojdanić's appeal are: *Decision on Ojdanić Motion for Stay of Proceedings* (9 June 2006); (b) *Decision on Ojdanić's Second Motion for Stay of Proceedings* (19 October 2006); (c) *Decision on Ojdanić Third Motion for Stay of Proceedings* (27 August 2007); (d) *Decision on Provision Release* (30 October 2002); (e) *Decision on Applications of Nikola Šainović and Dragoljub Ojdanić for Provisional Release* (26 June 2002); (f) *Decision on Second Applications for Provisional Release* (29 May 2003); and (g) *Decision on Joint Defence Motion for Provisional Release during Winter Recess* (5 December 2006).

II. GROUND ONE: THE TRIAL CHAMBER ERRED IN LAW AS TO THE ACTUS REUS *OF AIDING AND ABETTING*

Introduction

The Trial Chamber held that General Ojdanić's *actus reus* consisted of:

> issuing orders for VJ participation in joint operations with the MUP in Kosovo during the NATO air campaign;
>
> mobilising the forces of the VJ to participate in these operations;
>
> furnishing the MUP with VJ military equipment;
>
> issuing orders allowing the VJ to be in the locations where the crimes were committed;
>
> refraining from taking effective measures at his disposal, such as specifically enquiring into the forcible displacements; and
>
> his role in arming the non-Albanian population and ordering its engagement in 1999.[4]

Never in the history of this Tribunal has an accused been convicted of aiding and abetting based on such generalised acts so removed from the crimes themselves and otherwise necessary to defend one's country during a war. If it is a crime to do one's duty in a war knowing that some participants may commit crimes, then it has become a crime simply to participate in a war.

[4] TJ [3/626]

Sub-Ground 1(A): the Trial Chamber failed to require that General Ojdanić's acts be specifically directed toward the indictment crimes

Alleged error of law invalidating the decision

The Trial Chamber did not require that General Ojdanić's acts and omissions were *specifically directed* towards the specific Indictment crimes in order to satisfy the *actus reus* of aiding and abetting.[5] This constitutes an error of law invalidating the Trial Judgment: none of General Ojdanić's acts or omissions were specifically directed toward any specific Indictment crime; therefore, the Trial Chamber's error was highly prejudicial to Ojdanić.

In its recent judgement in the *Mrkšić* case, the Appeals Chamber held that specific direction "is not an essential ingredient of the *actus reus* of aiding and abetting."[6] General Ojdanić contends that while this rule may apply to persons on or near the scene of the crimes, it cannot apply to top level leaders like General Ojdanić, a Chief of Staff, located hundreds of metres underground, several hundred kilometres and eight levels away in the chain of command from the perpetrator.

Otherwise, innocent acts, or acts which are performed for a reason completely unrelated to the crimes, become criminalized.

A review of the Appeals Chamber's jurisprudence reveals that the concept of specific direction has only been considered in cases where the perpetrators were at or near the scene of the crime—and even then with a lack of consistency.

Argument

The Trial Chamber cited the Appeals Chamber's judgments in *Blaskić* and *Vasiljević* in support of its definition of the *actus reus* of aiding and abetting.[7] However, both of those cases state that acts must be specifically directed towards the specific crime in order to satisfy the *actus reus* of aiding and abetting.

[5] *See* TJ [3/620].
[6] *Mrkšić* AJ, para. 159.
[7] TJ [1/89] citing *Blaskić* AJ, para. 46; *Vasiljević* AJ, para. 102.

In the first case, *Vasiljević*, the Appeals Chamber distinguished the *actus reus* of aiding and abetting from participation in a joint criminal enterprise:

> "The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design."[8]

In requiring *specific direction* in order for acts to satisfy the *actus reus* of aiding and abetting, the *Vaslijevic* Appeals Chamber followed the reasoning of the Appeals Chamber in *Tadić.*[9] When the Appeals Chamber applied this legal standard in *Vasiljević*, it held that the appellant knew that seven Muslim men were to be killed (by others) and that he pointed a gun at them to prevent their escape. The Appeals Chamber held that the acts of the appellant were "specifically directed to assist the perpetration of the murders". The Appeals Chamber therefore upheld the appellant's conviction for aiding and abetting murder.[10]

In the second case, *Blaskić,* the Appeals cited the above *Vasiljević* definition and stated that "there are no reasons to depart from this definition".[11] However, in the next paragraph of the *Blaskić* Appeal Judgment (cited by the Trial Chamber in this case) the Appeals Chamber further described the *actus reus* of aiding and abetting as "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime"[12] without reference to *specific direction.* Therefore, in one paragraph the *Blaskić* Appeals Chamber required *specific direction* whereas in the next it did not mFention that requirement. In General Ojdanić's case, the Trial Chamber relied upon the latter definition but made no mention of the former definition.

Crucially, however, the discussion in *Blaskić* was completely *obiter*. The Appeals Chamber noted that the Trial Chamber had not held Blaskić responsible for aiding and

[8] *Vasiljević* AJ, para. 102(i).
[9] *Tadić* AJ, para. 229(iii).
[10] *Vasiljević* AJ, paras. 134-135.
[11] *Blaskić* AJ, para. 45.
[12] *Blaskić* AJ, para. 46, quoting *Blaskić* TJ, para. 283 which in turn quotes *Furundžija* TJ, para. 249.

abetting the crimes at issue, and further considered "that this form of participation was insufficiently litigated on appeal" and held in any event that it was not fairly encompassed in the indictment. The *Blaskić* Appeals Chamber expressly declined to consider the *actus reus* of aiding and abetting any further.[13]

In an Appeals Chamber judgment after *Blaskić*, the Appeals Chamber continued to include the requirement of specific direction for the *actus reus* of aiding and abetting.[14] Likewise, in an ICTR judgment shortly after *Blaskić*, the Appeals Chamber also included the specific direction requirement.[15]

Unlike *Blaskić,* the question of whether *specific direction* is required of the *actus reus* of aiding and abetting was litigated before the Appeals Chamber in *Blagojević and Jokić.* That case concerned the aftermath of the take-over of the Srebrenica "safe-area" by the Army of the Republika Srpska (**"VRS"**) in July 1995. The appellant Jokić was Chief of Engineering (and served as Duty Officer on key dates) of the Zvornik Brigade of the VRS Drina Corps. The Trial Chamber found that Jokić knew about the detention and impending mass murder of Bosnian Muslim prisoners at Grbavci School, Pilica School and Kozluk. Jokić was found to have subsequently permitted the resources of the Zvornik Brigade (both equipment and personnel) to be sent and used to dig mass graves. Therefore, Jokić was convicted of aiding and abetting murder as war crime and aiding and abetting extermination and persecutions as crimes against humanity.

On appeal, Jokić argued that any assistance which principal perpetrators may have derived from his ordering a particular member of the Zvornik Brigade Engineering Company to go with equipment to a particular place at a particular time was too remote to have had a substantial effect on the commission of the crime. Jokić argued that consequently his acts were not *specifically directed* to assist the perpetration of the crime. Jokić further argued that he merely performed normal or routine duties in a routine structure which, as such, could not be acts *specifically directed* to assist the perpetration of a crime.

[13] *Blaskić* AJ, para. 51.
[14] *Kvočka* AJ, para. 89.
[15] *Ntakirutimana* AJ, para. 530.

The Appeals Chamber dismissed Jokić's appeal and upheld all of his convictions. The Appeals Chamber stated that *Tadić* "does not purport to be a complete statement of the liability of the person charged with aiding and abetting." In making this statement, and without considering the *ratio decidendi* of *Vasiljević,* the Appeals Chamber relied upon the "contextual nature" of *Tadić,* namely that it contrasted aiding and abetting liability "with the liability of a person charged with acting pursuant to a common purpose or design with another person. …"[16] The Appeals Chamber then held that "while the *Tadić* definition has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting.[17]"

In support of the proposition that specific direction has not always been included as an element of the *actus reus* of aiding and abetting, the Appeals Chamber cited its judgments in *Krnojelac* and the *Čelebići* case. However, both of those cases cite the *Tadić/Vasiljević* definition of aiding and abetting - which requires *specific direction.* Moreover, in *Krnojelac* the Appeals Chamber held that the *Tadić* Appeals Judgment made a "clear distinction" between acting in pursuance of a common purpose and aiding and abetting, the latter requiring "acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime…"[18] The "contextual nature" of the *Krnojelac* Appeals Judgment was whether or not the accused should be convicted as member of a JCE or, alternatively, as an aider and abettor. Therefore, *Krnojelac* and *Čelebići* both support the view that the *Tadić/Vasiljević* statement of aiding and abetting liability is authoritative.

In any event, whilst (mistakenly) holding that *specific direction* has not always been included as an element of the *actus reus* of aiding and abetting, the *Blagojević* Appeals Chamber held that "such a finding [of specific direction] will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime." The Appeals Chamber then held in relation to the appellant Jokić that,

> "to the extent specific direction forms an implicit part of the *actus reus* of aiding and abetting, where the accused knowingly participated in the

[16] *Aleksovski* AJ, para. 163.
[17] *Blagojević and Jokić* AJ, para. 189.
[18] *Krnojelac* AJ, para. 33, quoting *Tadić* AJ, para. 229 in full.

> commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her 'routine duties' will not exculpate the accused."[19]

The *Blagojević* Appeals Chamber therefore allowed for *specific direction* to be an implicit part of the *actus reus* of aiding and abetting, whilst finding that Jokić's acts substantially contributed to the commission of the offence. The Appeals Chamber did not hold that *specific direction* was not a requirement.

Cases decided by the Appeals Chamber immediately after *Blagojević* continued to apply the *specific direction* requirement to the *actus reus* of aiding and abetting:

In *Nahimana,* the ICTR Appeals Chamber held that the *actus reus* of aiding and abetting is "aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime, and which substantially contributed to the perpetration of the crime."[20]

In *Orić*, the Appeals Chamber held the *actus reus* of aiding and abetting "must be directed to assist, encourage or lend moral support to the perpetration of a crime and have a substantial effect upon the perpetration of the crime."[21]

In *Seromba*, the Appeals Chamber held that "[i]t must be proven that the alleged aider and abettor committed acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime ."[22]

Two Trial Judgments of the Special Court for Sierra Leone decided after *Blagojević* both held that the *actus reus* of aiding and abetting requires sp*ecific direction.*[23]

Orić is a particularly instructive case. The accused was convicted on the basis of Article 7(3). On appeal, Orić argued that the trial judgment was unclear as to what theory of criminal liability the Trial Chamber had applied to his subordinates. Therefore, the Appeals Chamber had to address the basis of liability for Orić's only identified

[19] *Blagojević and Jokić*, para. 189.
[20] *Nahimana* AJ, para. 482.
[21] *Orić* AJ, para. 43.
[22] *Seromba* AJ, para. 44.
[23] *CDF* TJ, para. 229; *RUF* TJ, para. 277.

culpable subordinate, Atif Krdzic, in order to decide whether Orić's conviction under Article 7(3) could stand.

The prosecution argued that the Trial Chamber had found Krdzic responsible for omissions which aided and abetted murders and cruel treatments committed by guards and others. Crucially, the Appeals Chamber held that in order for Krdzic to be liable, his *actus reus* had to have been "directed to assist, encourage or lend moral support to the perpetration of a crime…." The Appeals Chamber held that just because Krdzic's omissions coincided with an increase in crimes, it did not follow that those omissions had a "substantial effect" thereupon. Therefore, in *Orić* the Appeals Chamber applied the *specific direction* requirement: the Appeals Chamber found that Krdzic could not be found responsible and it followed that Orić's convictions under Article 7(3) could not stand.[24]

The question of whether or not *specific direction* is required for acts to satisfy the *actus reus* of aiding and abetting was most recently considered by the Appeals Chamber in the *Mrkšić* case. Šljivančanin appealed his conviction for aiding aiding and abetting the torture of prisoners of war by failing to discharge his legal duty to protect those prisoners. Šljivančanin contended that the Trial Chamber had misconstrued the *mens rea* of aiding and abetting and that since his omission had to be "specifically directed to assist, encourage or lend moral support" to the perpetration of the crime, a conviction for omission could only follow "wilful failure to discharge a duty, which implies the culpable intent of the accused."[25]

The Appeals Chamber dismissed Šljivančanin's appeal, holding that the fact that an omission must be directed to assist, encourage or lend moral support to the perpetration of a crime" forms part of the *actus reus* not the *mens rea* of aiding and abetting.[26] The Appeals Chamber rejected the elevated *mens rea* standard for which Šljivančanin contended, but then stated that it had "confirmed" in *Blagojević and Jokić* that specific direction "is not an essential ingredient of the *actus reus* of aiding and abetting."[27]

[24] *Orić* AJ, paras. 44-49.
[25] *Mrkšić* AJ, para. 157.
[26] *Mrkšić* AJ, para. 159, citing *Orić* AJ, para. 43.
[27] *Mrkšić* AJ, para. 159.

Unlike the acts of Šljivančanin and Jokić, where specific direction has not been required for persons on the scene, the acts of General Ojdanić did not provide the kind of concrete, practical assistance to the perpetrators that was sufficiently linked to the crimes themselves so as to constitute the *actus reus* of aiding and abetting.

Therefore, General Ojdanić submits that *specific direction*, whether explicit or implicit, must be part of the *actus reus* of aiding and abetting in certain cases, particularly leadership cases where an accused is geographically and temporally separated from the crime base. The *specific direction* requirement is necessary in such cases in order to attribute responsibility to the appropriate leaders without subjecting top military commanders to liability for broad orders which merely coincide with the commission of crimes.

The Trial Chamber's failure to require the prosecution to prove specific direction as part of General Ojdanić's *actus reus*, or at least to evaluate his contribution to the crime in the framework of specific direction, invalidates its finding that General Ojdanić satisfied the *actus reus* of aiding and abetting. Had the Trial Chamber applied the correct legal standard, it could not have held that General Ojdanić aided and abetted forcible displacements. In fact none of his acts were specifically directed towards forcible displacements. They were all directed towards the dual threats of a NATO invasion and a massive domestic insurgency.

Relief sought

General Ojdanić respectfully requests that the Appeals Chamber find that the Trial Chamber committed reversible error when it found that his acts satisfied the *actus reus* of aiding and abetting forcible displacements and vacate his convictions.

Sub-ground 1(B): the acts which the Trial Chamber held to satisfy the *actus reus* of aiding and abetting were acts that General Ojdanić had to perform for reasons unrelated to any crimes such that the Trial Chamber imposed a standard of criminal liability that no reasonable Trial Chamber should impose

Alleged error of law invalidating the decision

General Ojdanić contends that the legal standard for the *actus reus* of aiding and abetting includes a consideration of whether an accused could reasonably be expected to forego the acts performed. The law requires such a consideration before acts can be held to be criminal. The law cannot impose criminal responsibility for acts which a military commander *has* to perform to defend his country from attack. Rather, the law must factor in the necessity and reasonableness of a military commander's actions in the circumstances.

This argument is unrelated to the defences of self-defence or necessity. Such defences admit that acts were wrong, but exclude liability on the basis that acts are justified. General Ojdanić's argument is that under the correct legal standard for aiding and abetting, the law does not consider his acts to have been wrong. To hold that the acts which a wartime military commander must take to defend his country satisfy the *actus reus* of aiding and abetting constitutes an error of law invalidating the Trial Judgment.

In the *Orić* case, the Trial Chamber acquitted the accused of charges of aiding and abetting[28] and instigating[29] wanton destruction of property in Ježestica on 7 and 8 January 1993. The Trial Chamber held that Orić could only be held responsible for the wanton destruction in Ježestica "if [he] could have been fairly expected to forgo the attacks." However, Orić "could not be fairly expected to refrain from taking action."[30] Accordingly, Orić was acquitted. There was no doubt that Orić's acts had had a substantial effect on the commission of crimes: without his acts Ježestica would not have been attacked and he "was aware that Bosnian Muslims, primarily civilians who followed the Bosnian Muslim fighters during attacks, destroyed Bosnian Serb

[28] *Orić* TJ 686 – 688.
[29] *Orić* TJ, para. 676.
[30] *Orić* TJ, para. 687.

property."[31] However, in considering Orić's responsibility for aiding and abetting, the Trial Chamber factored in the necessity and reasonableness of Orić's conduct in the circumstances.

The Office of the Prosecutor appealed the *Orić* Trial Chamber's reasoning, seeking a reversal of Orić's acquittal for instigating wanton destruction. The Office of the Prosecutor argued that the Trial Chamber had erred in law, arguing that the law required Orić to halt "attacks until he was in a position to ensure that the crimes of wanton destruction would not recur. The fact that Orić elected not to suspend the attack even though he knew the substantial likelihood that crimes would occur renders him liable."[32] Therefore, the Office of the Prosecutor recognised that the *Orić* Trial Chamber's approach went to the legal standard of responsibility under Article 7(1).

However, "on further review", the prosecution withdrew this ground of appeal.[33] Consequently, so far as General Ojdanić has been able to establish, this is the first time that this issue has reached the Appeals Chamber. General Ojdanić contends that the *Orić* Trial Chamber adopted the correct legal standard. This Tribunal must apply the same legal standard to General Ojdanić's acts as it applied to Orić's acts.

Post World War 2 caselaw supports the submission that the Trial Chamber applied the wrong test

World War 2 cases support General Ojdanić's contention. In the *Ministries* case, decided by the US Military Tribunal sitting at Nurnberg, Karl Rasche, a banker who had facilitated large loans to a fund at the personal disposal of Heinrich Himmler (head of the SS), was found not guilty of aiding and abetting crimes against humanity. The Tribunal held that "[l]oans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime."[34] The Tribunal further explained its analogy by describing commodities as

[31] *Orić* TJ, para. 682.
[32] Prosecution Appeal Brief in *Orić,* paras. 205-223.
[33] *Prosecution Notice of Withdrawal of its Third Ground of Appeal* (7 March 2008)
[34] Trials of War Criminals before the Nurernberg Military Tribunals under Control Council Law No. 10 (October 1946- April 1949) p. 622

"supplies or raw materials" provided to a builder of a house which the seller knows will be used for an unlawful purpose."[35]

Therefore, even though Rasche had the necessary *mens rea,* and his acts assisted crimes, the Tribunal apparently decided that acts of that nature were not criminal.

In the *Zyklon B* case, the British Military Court sitting at Hamburg acquitted Joachim Drosihn, the senior gassing technician in the firm which supplied poison gas used for extermination in concentration camps. The Judge Advocate set out the issue of Dosihn's complicity turning on,

> "whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was put could make him guilty."[36]

Therefore, the Judge Advocate argued that the circumstances in which Dosihn acted were such that his undoubted contribution to the crimes should not result in liability. This case was considered by the Trial Chamber in *Furundžija:*

> "This clearly requires that the act of the accomplice has at least a substantial effect on the principal act – the use of the gas to murder internees at Auschwitz - in order to constitute the *actus reus.* The functions performed by Drosihn in his employment as a gassing technician were an integral part of the supply and use of the poison gas, but this alone could not render him liable for its criminal use even if he was aware that his functions played such an important role in the transfer of gas. Without influence over this supply, he was not guilty. In other words, *mens rea* alone is insufficient to ground a criminal conviction."[37]

With respect, it is hard to conceive of how the senior gassing technician who played an "integral part" in the supply and use of poison gas, and who had the requisite *mens rea,* could be considered not to have had a "substantial effect" on the deaths of individuals in gas chambers. Rather, *Zyklon B* confirms that the *actus reus* of aiding and abetting is not captured solely by the "substantial effect" standard.

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[35] Trials of War Criminals before the Nurernberg Military Tribunals under Control Council Law No. 10 (October 1946- April 1949) , p. 622.
[36] *Trial of Bruno Tesch and Two Others*, British Military Court, Hamburg, 1-8 March 1946, Vol. I, Law Reports, p. 93.
[37] *Furundžija* TJ, para. 223.

The International Military Tribunal (**"IMT"**) acquitted Hjalmar Schacht, President of the Reichsbank until 1939 and Minister Without Portfolio until 1943:

> "It is clear that Schacht was a central figure in Germany's rearmament programme, and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power, But rearmament of itself is not criminal under the Charter. To be a crime against peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars."[38]

Therefore, the IMT considered the circumstances in which Schacht acted before considering whether or not his acts were criminal. The IMT held that the case against Schacht depended on the inference that he knew of the Nazi plans for aggressive war and that this "necessary inference" was not established beyond reasonable doubt. However, Schacht's acquittal could not have depended only upon his *mens rea*. He remained as Minister Without Portfolio in Hitler's government until 1943. Just as Schacht was found to have not carried out rearmament as part of the Nazi plans to wage aggressive wars, General Ojdanić did not perform any acts to assist the Indictment crimes. Just as Schacht remained in Nazi government without being an accomplice to crimes, General Ojdanić remained in the FRY's military.

The circumstances in which General Ojdanić acted are *more compelling* than those surrounding Rasche, Drosihn or Schacht. General Ojdanić was a wartime military commander engaged in the legitimate defence of his country against the KLA and NATO. The Trial Chamber should have considered whether it was open to General Ojdanić to forego the acts which made up his *actus reus*. Had the Trial Chamber applied the correct test – the test correctly applied in *Orić* – the Trial Chamber would not have found that General Ojdanić's acts satisfied the *actus reus* of aiding and abetting.

The Trial Chamber's error in relation to General Ojdanić

At **TJ [3/626]** the Trial Chamber held that General Ojdanić's contributions had a substantial effect on the commission of crimes because they "provided assistance in

[38] *Nazi Conspiracy and Aggression*, Opinion and Judgment, Office of United States Chief of Counsel for Prosecution of Axis Criminality (1947) pp135-136.

terms of soldiers on the ground to carry out the acts, and encouragement and moral support by granting authorization within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes." This constitutes a clear error of law: General Ojdanić was subject to a massive aerial bombardment coupled with a massive domestic insurgency and the threat of a land invasion. The Trial Chamber failed to consider whether General Ojdanić could be expected to forego authorising soldiers to be on the ground in Kosovo. According to the Trial Chamber's legal standard, the only way General Ojdanić could avoid liability was to order a full-scale withdrawal from Kosovo and capitulate to a NATO invasion. No military manual suggests such a course of action. In the circumstances of this case, international law does not impose such an onerous standard.

Rather, at times international law must recognise the grim realities of military necessity. Overly expansive interpretations of which acts incur individual criminal responsibility criminalises any actions that contribute to individual suffering; this tends to effectively criminalise the unfortunate consequences of military operations."[39] International criminal law imposes clear standards of what necessary and reasonable measures a military commander must take to avoid liability under Article 7(3). This Tribunal must not ignore the realities of conflict when assessing criminal responsibility.

In General Ojdanić's case, the Trial Chamber held that he aided and abetted the Indictment crimes by providing troops on the ground and granting authorisation within the VJ chain of command for the VJ to operate in Kosovo. The Trial Chamber held that General Ojdanić issued orders "allowing the VJ to be in the locations" where forcible displacements took place. The Trial Chamber further held that General Ojdanić issued orders for VJ participation in joint operations with the MUP in Kosovo during the NATO bombing and that he mobilised the VJ to participate in these operations.[40]

The acts which the Trial Chamber found were committed by General Ojdanić were acts he could not be expected to forego. General Ojdanić had to uphold his duty to defend

[39] Payam Akhavan, Reconciling Crimes against Humanity with the Laws of War, 6 J. INTL. CRIM. J 21 (2008).
[40] TJ [3/626]

his country. The Trial Chamber erred in finding that these acts formed the basis for a criminal conviction.

General Ojdanić's duty to defend his country

At the Supreme Defence Council session on 23 March 1999, it was decided to defend the FRY in case it was attacked.[41]

Article 1 of the FRY Law on the Armed Forces provided that the Army of Yugoslavia was "an armed force defending the sovereignty, territory, independence, and constitutional system of the [FRY]".[42] Articles 5 and 6 provided that the Chief of Staff "shall" perform his duties in implementing the decisions of the President.[43]

Article 7 of the FRY Law on Defence provided that in the case of an attack on the country, the Army of Yugoslavia had to act according to its wartime assignment and duties as determined by the Defence Plan of the Country or extract from that plan and the decisions and measures of the Federal Government."[44]

Article 10 of the FRY Law on Defence provided that no one had the right "to prevent citizens from fighting an enemy who has attacked the country."[45]

Article 16 of the FRY Law on Defence provided that:

> "the Army of Yugoslavia is the main armed force and organiser of the armed struggle and all other forms of armed resistance to the enemy. The Army of Yugoslavia shall unite all participants in the armed struggle and command all combat activities."[46]

Article 115 of the Criminal Code of the SFRY provided that any citizen accepted or recognised the occupation of the SFRY or any part thereof "shall" be punished by no less than ten years in prison or by the death penalty."[47] Article 117 criminalised bringing the SFRY into a "position of subordination" to a foreign country.[48] Article

[41] P1577 (Minutes of 9th SDC session, 23 March 1999), p. 1.
[42] P984 (FRY Law on the VJ).
[43] P984 (FRY Law on the VJ).
[44] P985 (FRY Law on Defence).
[45] P985 (FRY Law on Defence).
[46] P985 (FRY Law on Defence).
[47] P1736 (Criminal Code of the FRY).
[48] P1736 (Criminal Code of the FRY).

118 criminalised preventing citizens of the SFRY or its allies from fighting against the enemy.[49]

The evidence before the Trial Chamber was that, when the FRY was attacked, the "only option" available to General Ojdanić "was to defend his country against the outside aggression and against the armed rebellion from inside the country."[50] General Ojdanić had sworn an oath: "I swear by my honour and my life that I shall defend the sovereignty, territory, independence, and constitutional order".[51]

To hold that General Ojdanić aided and abetted forcible displacements by defending his country as required by law is absurd. To apply the Trial Chamber's standard means that a military commander is precluded from responding to severe threats. The Appeals Chamber must reverse this approach lest the jurisprudence of this Tribunal unjustifiably hinder legitimate and necessary action by military commanders of all nations.

Error in holding that General Ojdanić assisted crimes by issuing orders "allowing the VJ to be in locations where crimes were committed"

The Trial Chamber did not cite any evidence to support its finding that General Ojdanić's *actus reus* was established by issuing orders allowing the VJ to be in locations where crimes were committed. In any event, such a finding is vague imposes an impossible standard. The VJ *had* to operate in Kosovo during the NATO bombing: to respond to the grave threats posed to the FRY by the KLA and NATO. Elsewhere in the Trial Judgment, the Chamber noted that, on or around 11 March 1999, General Ojdanić explained to General Clark, Supreme Commander of the NATO forces, that additional troops in the region were a "necessary response to the build-up of NATO forces and the actions of the KLA."[52]

Every single one of General Ojdanić's orders targeted those threats. To hold that General Ojdanić's aided and abetted crimes by "allowing" the VJ to be in Kosovo imposes a standard of criminal liability that this Tribunal cannot credibly uphold.

[49] P1736 (Criminal Code of the FRY).
[50] T.15755.
[51] T.15756.
[52] TJ [3/519]

Error in relying upon orders for VJ participation in joint operations with the MUP in Kosovo

The Trial Chamber cited General Ojdanić's Grom 3 Directive of 16 January 1999, issued more than three months before the Indictment crimes.[53] Grom 3 was a plan "for the engagement of the VJ to prevent the introduction of a multinational brigade into Kosovo." It listed the enemy forces as the KLA within Kosovo, the KLA in Albania, and the NATO forces in the region, notably civilians based upon ethnicity. Grom 3 provided the basis for VJ operations against both the NATO threat and against the KLA in the interior of Kosovo.[54]

Grom 3 comprised two stages, both expressly aimed at (i) repelling the introduction of a NATO force from Macedonia with a simultaneous attack by the KLA and (ii) the introduction of further terrorists from Albania. The first stage was to take measures to prevent NATO from entering Kosovo and, in co-ordination with the MUP, to "block" the KLA in Kosovo. The objective of the second stage was to crush and destroy the NATO and KLA forces, in co-ordination with the MUP.[55] Notably, the explicit aim of the Directive was the *destruction* of the KLA, not the expulsion of either it or civilians. Simply because VJ units engaged in operations alongside the MUP in Kosovo on the basis of General Ojdanić's Grom 3 Directive[56] does not permit the conclusion that General Ojdanić's acts had a substantial effect on the Indictment crimes. General Ojdanić was legally obligated to defend his country using all of the resources available, including the MUP. Article 16 of the FRY Law on Defence, cited above, provided that the Army of Yugoslav "shall unite all participants in the armed struggle and command all combat activities."[57]

Indeed, during the NATO bombing General Ojdanić unsuccessfully attempted to resubordinate the MUP to the VJ.[58] Given the direct threats faced, General Ojdanić could not fairly be expected to forego complying with his legal duty to defend his

[53] TJ [3/626, fn 1507]
[54] TJ [3/531]
[55] TJ [3/531]
[56] TJ [3/532]
[57] P985 (FRY Law on Defence).
[58] TJ [1/1189]

country. No reasonable Trial Chamber could adopt such an approach in relation to General Ojdanić's Grom 3 Directive, or any other order.

Error in relying upon mobilisation of the VJ to participate in operations

No evidence cited by the Trial Chamber at **TJ [3/623]** provides any support for the finding that General Ojdanić's *actus reus* was established by mobilising VJ forces to participate in operations with the MUP. In any event, as above, no reasonable Trial Chamber could conclude that any such mobilisation satisfied the *actus reus* of aiding and abetting. General Ojdanić could not be expected to forego mobilising the VJ.

Elsewhere, the Trial Chamber held that during the lead-up to late March 1999, General Ojdanić mobilised extra units from the Military Detachments in Priština/Prishtina, Kosovska Mitrovica/Mitrovica, Peć/Peja and Prizren.[59]

However, Kosovac explained that this order was issued on the basis of the defence plan for the country and that General Ojdanić adopted a strategy of selective, partial and secret mobilisation to address the threats faced.[60] Similarly, Radinović explained that the mobilisation of the wartime establishment of Military Territorial Units was necessary for defence against NATO's aggression.[61] Considering the threats that he faced, no reasonable Trial Chamber could properly conclude that General Ojdanić became an accomplice to the Indictment crimes by mobilising the forces at his disposal.

Conclusions

The Trial Chamber accepted that grave threats were faced by General Ojdanić when he was Chief of Staff of the VJ. The Trial Chamber found that he was not a member of any joint criminal exercise: he acted to "counter the perceived NATO and KLA threat, rather than a desire to prepare for a widespread campaign of forcible displacement in Kosovo."[62] Indeed, on 15 and 22 March 1999, General Clark directly threatened

[59] TJ [3/538]
[60] T. 15797-8
[61] Radovan Radinović, 3D1116 (Radovan Radinović's Expert Report), paras. 117-118.
[62] TJ [3/617]

General Ojdanić that NATO would "destroy" the VJ.[63] No reasonable Trial Chamber could expect General Ojdanić to forego the acts he took to destroy the KLA and tackle the NATO threat. To ignore this context and find that General Ojdanić's acts had a substantial effect on the Indictment crimes is a miscarriage of justice.

Relief sought

General Ojdanić respectfully requests that the Appeals Chamber find that the Trial Chamber committed a reversible error when it found that his necessary acts satisfied the *actus reus* of aiding and abetting forcible displacements and vacate his convictions.

[63] See TJ [3/258]; 3D706 (Record of telephone conversation between Wesley Clark and Dragoljub Ojdanić, 15 March 1999); 3D707 (Record of telephone conversation between Wesley Clark and Dragoljub Ojdanić, 22 March 1999).

Sub-ground 1(C): the Trial Chamber reversed the burden of proof and placed an insurmountable burden upon General Ojdanić by requiring his actions to have been "sufficient" to remedy problems in subordinate commands and thereby holding that "insufficiency" resulted in criminal liability

Alleged error of law invalidating the decision

At **TJ [3/627]** the Trial Chamber held that General Ojdanić failed to take "sufficient" or "effective" measures to remedy an established problem of underreporting crimes by subordinate commands. The Trial Chamber held that:

> "Ojdanić did take certain measures in response to Pavković's actions, including sending members of his Security Administration to find out more information and initiating the 17 May 1999 meeting with Milošević. However, these actions were insufficient to remedy the problem…."

The Trial Chamber further held that "Ojdanić's request for a response from Pavković was insufficient." The Trial Chamber further held that "Ojdanić's failure to take effective measures against Pavković provided practical assistance, encouragement, and moral support to members of the VJ who perpetrated crimes in Kosovo, by sustaining the culture of impunity surrounding the forcible displacement of the Kosovo Albanian population…."[64]

Therefore, while holding General Ojdanić criminally responsible for an omission (a failure to discipline General Pavković), the Trial Chamber found that General Ojdanić did take certain measures against General Pavković. However, the Trial Chamber applied a standard whereby, because General Ojdanić's acts did not solve the reporting problem in the 3rd Army, General Ojdanić bore criminal responsibility for the Indictment crimes. The Trial Chamber cited no authority for such an onerous and impossible standard.

There is no support for the proposition that measures have to be "effective" in remedying a problem or crime lest criminal liability follow. Article 7(3) requires that a superior take "necessary and reasonable" measures. If a superior adopts measures that were

[64] TJ [3/627]

reasonable in the circumstances, even though others measures were available, criminal responsibility does not necessarily follow.

For example, in the *Hadžihasanović* case, the Appeals Chamber held that a superior may discharge his duty to punish by reporting matters to a competent authority. [65] The Trial Chamber in *Boškoski* adopted the same approach.[66] There was no requirement in either *Hadžihasanović* or *Boškoski* that such action has to be "effective" in remedying a problem or punishing a perpetrator. Criminal law does not impose such a standard.

Therefore, the Trial Chamber erred in two fundamental respects.

First, the Trial Chamber reversed the burden of proof by requiring that General Ojdanić demonstrate that he took "sufficient" measures to remedy problems in subordinate commands. This error was compounded because the Trial Chamber gave no definition of sufficiency in this context. In any event, by calling General Pavković to explain himself directly to the Supreme Commander (and others) on 17 May 1999, General Ojdanić deployed one of the most severe sanctions available to him.

Secondly, by requiring that General Ojdanić's actions be "effective" in remedying problems with General Pavković, the Trial Chamber placed an insurmountable burden upon General Ojdanić. No reasonable Trial Chamber can require that criminal liability follows simply because attempts to resolve a problem are unsuccessful. There is no support for such a proposition.

Relief sought

General Ojdanić respectfully requests that the Appeals Chamber reverse the Trial Chamber's finding that any failure to resolve reporting problems within the VJ constituted aiding and abetting the Indictment crimes. The Trial Chamber's finding in this regard depended upon a flawed legal standard.

[65] *Hadžihasanović* AJ, paras. 152-4; *See Hadžihasanović* TJ, paras. 1052-5; 1061-2.
[66] *Boškoski* TJ, paras. 529-36.

Sub-ground 1(D): the Trial Chamber failed to apply the correct standard in relation to acts performed after the Indictment crimes

Alleged error of law invalidating the decision

The Trial Chamber correctly stated the legal principle that the *actus reus* of aiding and abetting can occur before, during, or after the underlying crimes.[67] This legal principle has been confirmed by the Appeals Chamber[68] and numerous Trial Chambers.[69] Notwithstanding various chambers' relatively consistent statement of this principle, General Ojdanić respectfully submits that the Trial Chamber failed to apply the correct legal standard in relation to acts found to have occurred *after* the underlying crimes.

The distinction between the legal standard for acts after – compared to before or during - the underlying crimes has rarely arisen at international criminal tribunals. By contrast, national legal systems often have specific and separate provisions to govern any liability for acts after the crimes. Nonetheless, successive first instance decisions before this Tribunal show that in relation to acts performed after the underlying crimes, a different test exists a different test exists for the *actus reus* of aiding and abetting.

In *Aleksovski,* the Trial Chamber held that aiding and abetting may occur before, during or after the act is committed. However, the Trial Chamber clarified this statement by explaining that "[i]t can, for example, consist of providing the means to commit the crime or promising to perform certain acts once the crime has been committed…"[70] Therefore, the Trial Chamber held that acts performed after the crime must be promised to the perpetrator beforehand in order to constitute aiding and abetting.

The next case where the distinction arose was *Blagojević and Jokić*. In that case, the prosecution had alleged that the accused organised a reburial operation, thereby aiding and abetting earlier murders. The Trial Chamber, presided over by Judge Liu, held

[67] TJ [1/91] citing *Blaskić* AJ, para. 48.
[68] *Blagojević and Jokić* AJ, para. 127; *Simić* AJ, para. 85; *Nahimana* AJ, para. 482.
[69] *Orić* TJ, para. 282; *Strugar* TJ, para. 249; *Blagojević and Jokić* TJ, para. 726; *Kvočka* TJ, para. 256; *Vasiljević* TJ, para. 70; *Kajelijeli* TJ, para. 766; *Kamuhanda* TJ, para. 597. Note, however, that some Trial Chambers mention assistance "before or during" but do not mention "after": see *Semanza* TJ, para. 385.
[70] *Aleksovski* TJ, para. 62.

that Blagojević could not be held responsible for mass executions at Srebrenica by permitting the use of personnel and resources for the subsequent reburial of victims.

The Trial Chamber found that the reburial operation had only occurred *after* subsequent scrutiny of events in Srebrenica by the international community; it had not been agreed upon at the time of the planning, preparation or execution of the crimes. The Trial Chamber held that "[i]t is required for *ex post facto* aiding and abetting that at the time of the planning, preparation or execution of the crime, a prior agreement exists between the principal and the person who subsequently aids and abets in the commission of the crime."[71] Therefore, the Trial Chamber in *Blagojević* required a prior agreement between the aider and abettor and the principal perpetrator in order for acts performed after the underlying crime to constitute aiding and abetting. Applying the correct legal standard, the Trial Chamber found that any involvement on the part of Blagojević in the reburial operation could not amount to aiding and abetting murder.[72] Notably, the Office of the Prosecutor did not appeal this finding.

The next case where the distinction arose was *Strugar,* decided less than two weeks after *Blagojević*. In *Strugar,* the prosecution alleged that the accused had failed to subsequently punish his troops for shelling the Old Town of Dubrovnik and that this amounted to aiding and abetting unlawful shelling. The Trial Chamber rejected the prosecution's argument, holding that it was not satisfied that conduct of this nature "well after the offences were committed" could have direct and substantial effect on the commission of the earlier offences, and thus declined to convict Strugar as an aider and abettor under Article 7(1) of the Statute.[73] Strugar was instead convicted under Article 7(3).

Therefore, three different trial judgments involving nine different judges have recognised that a different legal standard exists for acts performed *after* the underlying crimes. The above cases demonstrate that the correct legal standard in order for acts performed after the underlying crimes to satisfy the *actus reus* of aiding and abetting

[71] *Blagojević and Jokić* TJ, para. 731.
[72] *Blagojević and Jokić* TJ, paras. 731, 745. The Special Court for Sierra Leone recently adopted the same approach, see *RUF* TJ, para. 278: "If the aiding and abetting occurs after the crime, it must be established that a prior agreement existed between the principal and the person who subsequently aided and abetted in the commission of the crime."
[73] *Strugar* TJ, para. 355.

requires (i) that a prior agreement existed between the accused and the physical perpetrator (such that the accomplice would perform those acts) or (ii) an explicit demonstration that subsequent acts directly affected the perpetration of the earlier crime.

This submission finds support in the drafting history of the ICC Statute. The International Law Commission's Commentary concerning *ex post facto* assistance states as follows:

> "The Commission concluded that complicity could include aiding, abetting or assisting *ex post facto*, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime."[74]

This Commentary was considered by the Trial Chamber in *Furundžija*, which held that it "implies that action which decisively encourages the perpetrator is sufficient to amount to assistance: the knowledge that he will receive assistance during or after the event encourages the perpetrator in the commission of the crime.[75] This suggests that, in order for *ex post facto* assistance to constitute aiding and abetting the earlier crime, the principal perpetrator must know beforehand that the accomplice will assist him after the underlying crimes

In this case, the Trial Chamber found that General Ojdanić aided and abetted deportation and forcible transfer in various locations in Kosovo in March, April and May 1999. For the convenience of the Appeals Chamber, set out in the Appendix is a table showing the dates and locations of the underlying crimes that General Ojdanić was convicted of aiding and abetting.

The Trial Chamber held that General Ojdanić aided and abetted the above crimes in a number of ways.[76] A significant number of General Ojdanić's acts were performed *after* some or all of the Indictment crimes. There was no evidence of a prior agreement. No reasonable Trial Chamber could conclude that these acts assisted the earlier crimes. Instances where the Trial Chamber erred include:

[74] *Report of the I.L.C.*, on the work of its forty-eighth session, G.A. Supp. No. 10 (A/51/10) 1996, p.24; cited in *Furundžija* TJ, para. 229.
[75] *Furundžija*TJ, para. 230.
[76] TJ [3/626]

Ordering VJ participation in joint operations with the MUP in Kosovo by virtue of General Ojdanić's Suggestions to the 3rd Army Command on 17 April 1999.[77]

Furnishing the MUP with VJ military equipment by ordering that significant amounts of weaponry, including rifles, ammunition, and anti-aircraft guns be made available to the MUP, subject to approval from the Federal Ministry of Defence on 12 May 1999.[78] Of the 24 crimes-sites General Ojdanić was convicted of, 23 occurred before 12 May 1999. Only Dubrava, Kacanik municipality, occurred afterwards – on 25 May 1999. No reasonable Trial Chamber could possibly have concluded that General Ojdanić's 12 May order assisted earlier crimes. No reasonable Trial Chamber, without more information such as whether General Ojdanić's order was actually implemented, could conclude that it assisted a crime in Dubrava on 25 May. There was no evidence of any other order whereby General Ojdanić furnished forces with VJ military equipment.

Refraining from taking effective measures at his disposal, such as specifically enquiring into the forcible displacements, despite his awareness of these incidents.[79]

Ordering the engagement of the armed non-Albanian population by virtue of General Ojdanić's Suggestions to the 3rd Army Command on 17 April 1999.[80]

Insufficient actions to remedy the problem of General Pavković's misreporting thus sustaining the "culture of impunity" surrounding the forcible displacement. The Trial Chamber held that on 8 June 1999 General Ojdanić stuck to his approach of calling for reports and issuing orders to enhance the operation of the military courts.[81]

The Trial Chamber relied upon General Ojdanić's "general order for the preparation for a possible land invasion by NATO" dated 29 May 1999: "[i]n

[77] TJ [3/626]; P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999) (referring to P1878 (Joint Command Order, 15 April 1999)).
[78] *See* TJ [3/626] and [3/536] citing 3D744 (Supreme Command Staff approval, 12 May 1999).
[79] TJ [3/626]
[80] TJ [3/626]; P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999).
[81] TJ [3/626-628]; 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999), p.1.

this order he directed the Priština Corps to provide artillery support to MUP units engaging the KLA outside of the Priština Corp's area of responsibility."[82] The last crime that General Ojdanić was convicted of occurred on 25 May 1999. No reasonable Trial Chamber could possibly conclude that an order to provide artillery support on 29 May assisted a crime that took place on 25 May, or earlier crimes.

General Ojdanić challenges the above findings on various bases elsewhere in this appeal. However, even assuming that they are correct both in fact and in law, the Trial Chamber failed to perform any analysis of the timing of those acts relative to the crimes for which General Ojdanić was convicted. A number of the above acts (or omissions) were held to have occurred *after* the underlying crimes. No prior agreement existed between General Ojdanić and the perpetrators of the crimes, nor did General Ojdanić's subsequent acts have a direct effect on the perpetration of the earlier crimes. The Trial Chamber erred in holding that those acts aided and abetted the earlier crimes without applying the correct legal standard to those subsequent acts.

Relief sought

General Ojdanić respectfully requests that the Appeals Chamber correct the Trial Chamber's error of law as to the legal standard for act performed *after* the underlying crimes and apply the correct test.

Even if the Appeals Chamber holds that General Ojdanić's convictions for aiding and abetting should stand on another basis (for example acts performed before or during the underlying crimes), the Appeals Chamber is invited to clarify the correct legal standard and find that General Ojdanić's subsequent acts did not aid or abet earlier crimes. This remedy is necessary to properly establish General Ojdanić's degree of participation in the underlying offences and is thus relevant to sentencing.

[82] TJ [3/537]

Sub-ground 1(E): the Trial Chamber applied the wrong standard in holding that omissions can constitute the actus reus of aiding and abetting

Alleged error of law invalidating the decision

The Trial Chamber held that an accused may aid and abet not only by means of positive actions, but also through omissions and that, in addition to "approving spectator" cases, this encompasses,

> "culpable omissions, where (a) there is a legal duty to act, (b) the accused has the ability to act, (c) he fails to act either intending the criminal consequences or with awareness and consent that the consequences will ensure, and (d) the failure to act results in the commission of the crime."[83]

The Trial Chamber found that General Ojdanić "was obliged to ensure that VJ members who committed offences and infractions against VJ military discipline were held responsible as soon as possible during a state of war."[84]

The Trial Chamber proceeded to hold that General Ojdanić failed to take "effective" measures against General Pavković and that this provided practical assistance, encouragement, and moral support to members of the VJ who perpetrated crimes in Kosovo by sustaining a "culture of impunity" surrounding the forcible displacement of the Kosovo Albanian population, and by allowing the Commander of the 3rd Army to continue to order operations in Kosovo during which the forcible displacement took place.[85]

General Ojdanić contends that the Trial Chamber failed to apply the correct legal standard in order to be entitled to hold that any omission contributed to the *actus reus* of aiding and abetting.

The Appeals Chamber recently addressed whether omissions can satisfy the *actus reus* of aiding and abetting in the *Mrkšić* case. That case concerned events in Vukovar in

[83] TJ [1/90]; [3/620]
[84] TJ [3/627], citing P984 (FRY Law on the VJ), articles 159, 180, 181; 4D532 (VJ Rules on Service, 1 January 1996), articles 291, 313, 314.
[85] TJ [3/627]

1991, specifically the mistreatment and execution of Croat and other non-Serb prisoners taken from Vukovar hospital on 20 November 1991. The accused Mrkšić was a colonel in the JNA and commanded Serb forces in the area. The accused Šljivančanin was a major in the JNA and head of a security organ. Both were convicted of aiding and abetting crimes in Vukovar. In particular, the Trial Chamber convicted Šljivančanin of aiding and abetting the torture of prisoners of war by failing to discharge his legal duty to protect those prisoners. Šljivančanin appealed his conviction on various grounds, including an argument that the duty to act which forms the basis of omission liability must stem from a rule of criminal law and cannot be a general duty.[86]

The Appeals Chamber dismissed Šljivančanin's appeal. He was found to have breached the legal duty to protect prisoners of war imposed by the laws and customs of war, in particular Article 13 of Geneva Convention III - such breaches give rise to individual criminal responsibility.[87] Therefore, the Appeals Chamber found that it was not necessary to address "whether the duty to act, which forms part of the basis of aiding and abetting by omission, must stem from a rule of criminal law."[88] Notably, the position of the Office of the Prosecutor was that the "question remains open as to whether the duty to act must be based on criminal law, or may be based on a general duty."[89]

The Appeals Chamber is now invited to resolve this issue. General Ojdanić submits that the duty must be one imposed by criminal law in order for criminal liability to flow from an omission proper.

The duty to act must be imposed by criminal law

This Appeals Chamber has held that Article 7(1) covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.[90]

[86] *Mrkšić* AJ, para. 148.
[87] *Mrkšić* AJ, para. 151; *Blaskić* AJ, para. 663, fn. 1384.
[88] *Mrkšić* AJ, para. 151.
[89] *Mrkšić* AJ, para. 149.
[90] *Tadić* AJ, para. 188.

In *Ntagerura,* the Trial Chamber held that, in order to hold an accused criminally responsible for an omission as a principal perpetrator, the duty to act had to be "mandated by a rule of criminal law".[91] In relation to the accused Bagambiki, a Prefet, the Trial Chamber observed that any legal duty to act incumbent upon him was not mandated by a rule of criminal law. Thus, any omission of this legal duty under Rwandan law, even if proven, did not result in criminal liability under Article 6(1) of the ICTR Statute.[92] The prosecution appealed Bagambiki's acquittal but was unsuccessful, albeit because it had not identified what measures were within Bagambiki's *capacity to act.*[93]

The omission must have a decisive effect to give rise to liability

Further, there is authority to suggest that for a failure to act to entail criminal responsibility as an aider and abettor, the omission must have a *decisive effect* on the underlying crimes. In *Blaskić*, the Trial Chamber held that aiding and abetting might be perpetrated by omission "provided this failure to act had a decisive effect on the commission of the crime."[94] The *Blaskić* Appeals Chamber noted this and left open "the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting."[95] Whether or not an omission must have a decisive effect to constitute the *actus reus* of aiding and abetting was touched upon but not addressed by the Appeals Chamber in *Mrkšić*.[96]

Conclusion

General Ojdanić contends that in order for a breach of duty to entail criminal responsibility for aiding and abetting, the legal duty to act must be based upon criminal law rather than any more general obligation. General Ojdanić further contends that the omission must have a decisive effect on the commission of the underlying crime. In assessing whether omissions can constitute the *actus reus* of aiding and abetting, the Trial Chamber failed to identify any criminal law duty to act which General Ojdanić breached such as to render any omission culpable under

[91] *Ntagerura* TJ, para. 659.
[92] *Ntagerura* TJ, para. 660.
[93] *Ntagerura* AJ, para. 334-335.
[94] *Blaskić* TJ, para. 284.
[95] *Blaskić* AJ, para. 47.
[96] *Mrkšić* AJ, para. 155: "Šljivančanin also appears to propose that the failure to act must have a 'decisive effect' on the commission of the crime, but fails to elaborate on this point."

Article 7(1) of the Statute. It is denied that General Ojdanić breached any obligation to ensure that those who committed offences or infractions of VJ military discipline were held responsible as soon as possible. However, even if he did breach this duty – it was a duty mandated by VJ military discipline rather than the criminal law. Thus it should not provide any basis for liability under Article 7(1). Further and alternatively, no such breach had a decisive effect on the underlying crimes.

Relief sought

General Ojdanić's omissions could not aid and abet the underlying crimes of deportation and forcible transfer. General Ojdanić respectfully requests that the Appeals Chamber correct the Trial Chamber's error, apply the correct legal standard for omissions and find that in the circumstances of this case, any omission by General Ojdanić did not violate a criminal law obligation or have a decisive effect on the commission of any crime.

III. GROUND TWO: THE TRIAL CHAMBER ERRED IN FACT AS TO THE ACTUS REUS *OF AIDING AND ABETTING*

Introduction

In addition to the legal errors detailed above, the Trial Chamber made a number of factual errors in its determination of the *actus reus* of aiding and abetting. Specifically, the Trial Chamber failed to consider favourable evidence that negated General Ojdanić's responsibility for the forcible displacements, the necessity of the acts which it deemed to be part of the *actus reus*, and made errors of fact in its conclusions concerning arming the non-Albanian population and appointment and removal of subordinates.

Sub-ground 2(A): the Trial Chamber failed to give appropriate weight to evidence which demonstrated that General Ojdanić did not aid and abet forcible displacements

Introduction

The Trial Chamber erred by failing to give appropriate weight to evidence which demonstrated that General Ojdanić did not aid and abet forcible displacements. Having properly considered this evidence, no reasonable Trial Chamber could have concluded beyond reasonable doubt that General Ojdanić was an accomplice to the Indictment crimes.

A Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence." Such disregard is shown when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning.[97] In the instant case, when addressing General Ojdanić's *actus reus* the Trial Chamber failed to consider, adequately or at all, clear evidence that General Ojdanić's acts hindered rather than assisted crimes.

General Ojdanić's "failure" to discipline Pavković

[97] *Limaj* AJ, para. 86; *Kvočka* AJ, para. 25.

The Trial Chamber held that General Ojdanić failed to discipline Pavković in relation to two issues:

in February 1999 Pavković brought the 72nd Special Brigade unit into the interior of Kosovo in breach of the October Agreements, in contravention of General Ojdanić's orders to keep it at the border with Albania;[98] and

problems with combat reports from the 3rd Army omitting information relating to serious violent crimes including murders.[99]

The Trial Chamber seriously erred in its assessment of General Ojdanić's conduct *vis a vis* Pavković. No reasonable Trial Chamber could conclude that General Ojdanić failed to discipline Pavković. The conclusion that General Ojdanić is criminally responsible for a "culture of impunity" was unreasoned, unreasonable and manifestly unfair.

General Ojdanić and the 72nd Special Brigade

On 19 February 1999, General Ojdanić ordered that First Battalion the 72nd Special Brigade be resubordinated to the 3rd Army "for the purpose of carrying out anti-terrorist and anti-sabotage tasks".[100] General Ojdanić ordered that it be kept at the border with Albania, but Pavković brought it into the interior of Kosovo, in contravention of General Ojdanić's orders and in breach of the October Agreements.[101]

At the Collegium meeting on 25 February 1999, Dimitrijević expressed disapproval that the 72nd Special Brigade, which was a powerful military police unit, had been sent into Kosovo. General Ojdanić was unaware that the unit had been moved into Kosovo as he had only ordered that it be moved to the edge of Kosovo.[102]

[98] TJ [3/518]; [3/599]
[99] TJ [3/602]
[100] TJ [3/518]; P1948 (VJ General Staff Order for Resubordination, 19 February 1999).
[101] TJ [3/599]
[102] TJ [1/970]

The Trial Chamber held that, despite acknowledging the problem and assuring the members of the collegiums that he would do something about the issue of the 72nd Special Brigade, there is no evidence that General Ojdanić took any actions in this respect.[103] The evidence cited by the Trial Chamber in support of this finding is the Collegium of 18 March 1999. The 72nd Special Brigade did not arise at any point during that Collegium. It offers no support for the Trial Chamber's conclusion.

Rather, the minutes of the Collegium on 25 February 1999 are pertinent. General Ojdanić is recorded discussing the 72nd Special Brigade as follows:

> "… the proposal came from the commander of the Third Army, not for them to go to Nis but to Kosovo. I disagreed and responded, **in general terms, that for the time being the units should be deployed at the edges of Kosovo and not inside Kosovo.** However, most probably, I have unfortunately learned just now that they were transferred there…"[104]

Partly on this basis, the Trial Chamber correctly held that Ojdanić was not a member of the joint criminal enterprise.[105] However, the issue of the 72nd Special Brigade did not provide a sufficient basis for the Trial Chamber to hold that Ojdanić should have disciplined Pavković lest he be an accomplice to the Indictment crimes. The breach, if any, related only to a single battalion – not a complete Brigade. Elsewhere in the Trial Judgment, the Trial Chamber recognised that at the Collegium of 11 March 1999, Ojdanić told those present that they knew "quite well why we had to violate" the October Agreement prohibition on bringing troops into Kosovo: heightened numbers of NATO forces on the FRY's borders and the KLA threat. Ojdanić recounted a conversation with Clark where he had told Clark that the VJ actions were a *necessary* response to the build-up of NATO forces and the actions of the KLA.[106]

The Trial Chamber accepted the grave threats faced by Ojdanić when he was Chief of Staff of the VJ. The Trial Chamber found that he was not a member of any joint criminal exercise: he acted to "counter the perceived NATO and KLA threat, rather than a desire to prepare for a widespread campaign of forcible displacement in

[103] TJ [3/599]
[104] P941 (Minutes of the Collegium of the General Staff of the VJ, 25 February 1999), p. 25.
[105] TJ [3/617]
[106] TJ [3/519]

Kosovo."[107] Indeed, on 15 and 22 March 1999, General Clark directly threatened Ojdanić that NATO would "destroy" the VJ.[108]

Therefore, while Ojdanić had not approved the deployment of the 72nd Special Brigade into the interior of Kosovo, his perspective following the Collegium on 25 February 1999 was that Pavković *had* to bring a unit from the 72nd Special Brigade into Kosovo in order to deal with the KLA. This is consistent with the Trial Chamber's conclusions at **TJ [2/1017 – 1019]** that a KVM monitoring report for 26 February and 4 March 1999 the KLA had "taken the fight to the Serbs" in a number of ambushes and attacks...."[109]

In these circumstances, it was simply not established that General Ojdanić should have disciplined Pavković.

Moreover, there was no evidence – and the Trial Chamber did not conclude - that the 72nd Special Brigade committed any crimes when brought into the interior of Kosovo in February 1999 or at any time thereafter. Therefore, no reasonable Trial Chamber could find that General Ojdanić assisted any Indictment crime by failing to discipline Pavković on this issue.

General Ojdanić and misreporting by subordinate commands

Despite the 3rd Army being obliged to report crimes and unlawful events to the General Staff, and General Ojdanić ordering it to do so on 2 April and 15 April 1999, reports of violent crimes committed by members of the VJ were not included in reports from the 3rd Army.[110] The Trial Chamber held that the 3rd Army under-reported criminal activities throughout 1998 and 1999. However, the Trial Chamber held that General Ojdanić "refrained" from taking disciplinary measures against Pavković[111] and that this failure led to a "culture of impunity" which assisted the Indictment crimes.[112]

[107] TJ [3/617]
[108] See TJ [3/258]; 3D706 (Record of telephone conversation between Wesley Clark and Dragoljub Ojdanić, 15 March 1999); 3D707 (Record of telephone conversation between Wesley Clark and Dragoljub Ojdanić, 22 March 1999).
[109] TJ [2/1017]
[110] TJ [3/600 – 601]
[111] TJ [3/602]
[112] TJ [3/627]

The Trial Chamber simply made the vague finding that General Ojdanić failed to discipline Pavković. Such a conclusion was not reasonably available to the Trial Chamber: there was clear evidence of steps General Ojdanić took against Pavković on the issue of inadequate reporting. The Trial Chamber simplistically concluded the General Ojdanić's actions were not "effective", instead of properly considering the actions that General Ojdanić took. No reasonable Trial Chamber could hold General Ojdanić individually responsible for a "culture of impunity", or find that he contributed to such a culture.

General Ojdanić ordered that Pavković's subordinates report directly to the General Staff

General Ojdanić had the power to request reports directly from secondary levels of subordination, including the Priština Corps.[113] During the NATO campaign, General Ojdanić exercised this power and ordered that reports from the Priština Corps be sent to the Supreme Command Staff (as well as the 3rd Army). This practice continued from 12 April 1999 until the end of the conflict.[114] General Ojdanić's demand to see the reports which went to Pavković was a significant step: a demand by a superior officer to see the reports which form the basis of that subordinate's reports is an embarrassing sanction, especially given that one of General Ojdanić's first orders after the NATO bombing commenced was a "warning on the delivery of accurate and confirmed reports."[115] The Trial Chamber ignored this evidence when assessing General Ojdanić's conduct in relation to Pavković.

General Ojdanić hauled Pavković to Belgrade to report to the highest state officials

Vasiljević testified that on 13 May 1999, following further reports of criminal activities in Kosovo, General Ojdanić telephoned Pavković. Vasiljević overheard General Ojdanić ask: "Commander, what is going on down in your area?"[116] General Ojdanić then ordered that Pavković come to Belgrade to explain the situation directly to Milošević.[117] The main topic of the meeting was war crimes and other breaches of international law in Kosovo. General Ojdanić told those present (including Pavković) that war crimes had to be "urgently investigated and documented and, if it was

[113] TJ [1/472]
[114] TJ [1/489]
[115] P1469 (warning on delivery of accurate and confirmed reports, 25 March 1999).
[116] Aleksandar Vasiljević, P2594 (witness statement dated 26 October 2006), paras.59-60 (under seal); T.8748-49; T.8889-90.
[117] TJ [3/575]

established that somebody had committed such a crime, that person should be arrested immediately and the matter reported to the Supreme Command Staff.[118]

Hauling Pavković to Belgrade to report directly to the President in front of numerous high level officials from the VJ and MUP was one of the most serious sanctions available to General Ojdanić. The Trial Chamber simplistically held that General Ojdanić's action in "initiating the 17 May Meeting with Milošević" was "insufficient to remedy the problem". General Ojdanić's action may not have remedied the problem, but no reasonable Trial Chamber could conclude that General Ojdanić refrained from taking action.

General Ojdanić demanded a response from Pavković when allegations were made

Around 2 May 1999, General Ojdanić received a letter dated 26 March 1999 from Tribunal Prosecutor, Louise Arbour, informing him of her grave concern at the commission of serious breaches of international humanitarian law in Kosovo.[119] Arbour's letter was a single page. It did not detail the specifics of any crimes. The Trial Chamber held that after General Ojdanić received this letter, a meeting took place on 4 May 1999 involving Milošević, Pavković, General Ojdanić and others, to discuss events in Kosovo, including crimes.[120] Following this meeting, General Ojdanić issued an order "strongly emphasizing the need to prevent violations of international humanitarian law".[121] General Ojdanić "warned that officers would also be held responsible if they knew that violations had been committed and they failed to take appropriate actions against the perpetrators." There was an annex attached to this order, outlining criminal liability for war crimes and other violations of the international laws of war, which commanders of units were ordered to review with their units.[122]

Despite having seen Pavković on 4 May 1999, General Ojdanić demanded a formal response to Arbour's letter on 10 May 1999. Also on 10 May 1999, General Ojdanić:

[118] TJ [3/575]
[119] TJ [3/556]
[120] TJ [3/557]
[121] TJ [3/560]
[122] TJ [3/560]

> "issued an order strongly emphasising the need to prevent violations of international humanitarian law.... He warned that officers would also be held responsible if they knew that violations had been committed and they failed to take appropriate actions against the perpetrators. There was an annex attached to this order, outlining criminal liability for war crimes and other violations of the international laws of war, which commanders of units were ordered to review with their units."[123]

Gojović testified that he had drafted this order and that it was distributed to all units to ensure that they obeyed international humanitarian law and ensure that commanders prevented and punished crimes.[124]

General Ojdanić received Pavković's reply on 27 May 1999, addressing Arbour's allegations and stating that all of his actions had been "proper". Pavković stated that he had always informed his superior commands of the activities of his units and had disseminated information to subordinates on their obligation to adhere to international humanitarian law.[125]

Calling a subordinate to account to explain their actions is a disciplinary measure. The Trial Chamber failed to give adequate weight to this step. The Trial Chamber simply held that General Ojdanić's request for a response from Pavković was "insufficient".[126] However, the Trial Chamber's reasoning at **TJ [3/627]** is confused: it found General Ojdanić's request to be insufficient "in light" of events which happened later, such as the publication of the first indictment at the end of May, or meetings held on 16 and 17 May. No reasonable Trial Chamber could hold that General Ojdanić's request of Pavković on 10 May 1999 was "insufficient" on the basis of allegations or information which came to light much later. The Trial Chamber's back-to-front reasoning reveals its unreasonable and imprecise approach when assessing General Ojdanić's conduct in relation to Pavković.

No reasonable Trial Chamber, having considered the true chronology of events, would so belittle General Ojdanić's demand for an account from Pavković

General Ojdanić's further steps in relation to problems with reporting

[123] TJ [3/560]
[124] Tr.16674. *See* Exhibit 3D483; Tr.8876.
[125] TJ [3/595]
[126] TJ [3/627]

The Trial Chamber was blind to General Ojdanić's conundrum: General Ojdanić received indications that reports from subordinate commands were inaccurate, but could not be certain that Pavković was at fault. The Trial Chamber ignored Radinović's evidence on precisely this point: he said that General Ojdanić had to acknowledge Pavković's position that the 3rd Army was acting properly, but also acknowledge that serious crimes appeared to have been committed against civilians. Radinović explained that General Ojdanić's tackled the conundrum by sending top members of his Security Administration – including prosecution witness Vasiljević – into the field to "ascertain on the spot facts relating to war crimes against the civilian population."[127] Vasiljević and Gajić were sent to Kosovo *after* the meeting with Milošević on 17 May 1999. The Trial Chamber held that this mission took place, but concluded that it was merely the "usual control that was carried out into the work of the security organs." The Trial Chamber ignored Vasiljević's testimony that he and Gajić were ordered to go to Kosovo because General Ojdanić "wanted to check out what the situation was, what we could learn on the ground."[128] The Gajić/Vasiljević mission was a clear attempt by General Ojdanić to illuminate and tackle the problem of under-reporting in the 3rd Army.

The Trial Chamber held after the Gajić/Vasiljević mission General Ojdanić "stuck to his approach of calling for reports and issuing orders to enhance the operation of the military reports."[129] The Trial Chamber incorrectly, indeed almost dishearteningly, wrongly interpreted the evidence which it cited for this proposition: General Ojdanić ordered that prosecutions of violations of the provisions of international law were to be the **top priority** of the military justice system.[130]

General Ojdanić took further steps to illuminate and tackle under-reporting and criminal activitity. On 17 May 1999, he proposed to Milošević a state commission to establish responsibility for crimes in Kosovo.[131] He arranged a meeting on 9 July 1999 between Farkaš and Radomir Markovic from the MUP to discuss a common approach to the investigation of crimes.[132] The Trial Chamber weighed this in General Ojdanić's

[127] Radovan Radinović, 3D1116 (Radovan Radinović's Expert Report), p. 212, para. 357.
[128] T.8790.
[129] TJ [3/627]
[130] TJ [3/627] fn 1513. *See* 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999).
[131] TJ [3/576]
[132] TJ [3/617]

favour in finding that he was not a member of the joint criminal enterprise. It was of equal relevance to the Trial Chamber's unreasonable conclusion that General Ojdanić did not respond to reporting problems and crimes in Kosovo. Further, the VJ continued to investigate war crimes perpetrated in Kosovo after the cessation of hostilities.[133] A report of the Security Administration of 3 August 1999 emphasised that the documentation and prosecution of war crimes "is an exceptionally important, complicated and large-scale task."[134]

Conclusion

Accurate reporting by subordinate commands was of great importance to General Ojdanić. The Trial Chamber's own witness in this case, General Dimitrijević, testified that "[e]very time a question was table concerning which we were unsure of whether reports were good or not, [General Ojdanić] usually insisted that we use all possible lines to inquire."[135] General Dimitrijević testified that there was "no doubt" that General Ojdanić was sincere in his efforts to get accurate information as to conduct of the VJ in Kosovo.[136] There was simply no evidence that General Ojdanić's attitude changed during the war.

The Trial Chamber completely failed to consider the circumstances in which General Ojdanić found himself. He could not dismiss Pavković from the army. That power lay with Milošević.[137] More fundamentally, General Ojdanić did not have sufficient proof that Pavković was the cause of under-reporting. Genera Ojdanić could not discipline Pavkovic until he was fully aware of the facts. Nonetheless, General Ojdanić took numerous steps to address reporting problems in general and Pavković in particular. General Ojdanić strove to enforce acceptable patterns of conduct and reporting, and called Pavković to account. General Ojdanić's actions may have been insufficient to remedy the problem in the 3rd Army, but that is irrelevant.

Further, no reasonable Trial Chamber could conclude that General Ojdanić's failure to take effective measures against Pavković gave encouragement and moral support to

[133] TJ [1/536]
[134] Exhibit 3D1063.
[135] T 26725.
[136] T.26730.
[137] TJ [3/126]

members of the VJ who perpetrated crimes in Kosovo.[138] The Appeals Chamber in *Brđanin* held that "[e]ncouragement and moral support could only have a substantial effect on the commission of the crime if the perpetrators were aware of it."[139] There was no evidence that the perpetrators of the crimes had any awareness of General Ojdanić's conduct in relation to Pavković. Therefore, no reasonable Trial Chamber could hold that General Ojdanić supported or encouraged those crimes. No reasonable Trial Chamber could conclude that General Ojdanić sustained a "culture of impunity".

Error in failing to consider the significance of establishing the military justice system and massively enhancing its capability

The Trial Chamber held that at the "outset of the NATO air campaign, Ojdanić issued an order to all VJ commands to mobilize the wartime military courts and prosecutors."[140] On 25 March, General Ojdanić issued an order to all commands to mobilize wartime military courts and wartime military prosecutors within the organization structure of the commands and units of the VJ, as well as the supreme military courts and the supreme military courts, and to begin work immediately.[141] The Trial Chamber noted that on 29 March 1999, General Ojdanić stated that the military courts were not working properly and that, as a response, 125 new judges and prosecutors were appointed in a short period of time.[142] At the Supreme Command Staff Briefing on 11 April 1999, General Ojdanić was informed that the response of the military judicial organs had been "100 percent".[143]

The Trial Chamber completely failed to appreciate the significance of General Ojdanić's steps and his massive investment in the apparatus for tackling *any* criminal acts. Further, towards the end of the conflict, when the extent of crimes in Kosovo became clear, General Ojdanić issued an order that the prosecution of violations of international law should be the **top priority** of the military judicial organs.[144] Further, General Ojdanić paid careful attention to the functioning of the military justice system throughout the conflict and afterwards, as detailed in General Ojdanić's Closing

[138] TJ [3/627]
[139] *Brđanin* AJ, para. 277.
[140] TJ [3/603]
[141] TJ [1/524]
[142] TJ [1/603]
[143] 3D728, p. 2, para. 4.
[144] TJ [3/607]

Brief.[145] The Trial Chamber failed to give any weight to these facts in assessing whether General Ojdanić was an accomplice to the Indictment crimes.

Rather, the Trial Chamber held that the military justice system was not effective in investigating, prosecuting and punishing those responsible for committing serious crimes against the civilian population.[146] The system failed due to a combination of internal problems over which certain VJ commanders "may have had control", and external factors which "were outside of their control".[147] No reasonable Trial Chamber could hold General Ojdanić criminally responsible for a military justice system which, despite his massive investment, failed to deliver enough convictions for crimes against civilians. Such a standard is not applied to military commanders of other nations.

Error in failing to consider *bona fide* attempts to recruit ethnic Albanians to the VJ and issue them weapons

Shortly after NATO attacked the FRY and while facing intense battles with the KLA, on 31 March 1999, General Ojdanić ordered the creation of a special military territorial detachment consisting of ethnic Albanians. This was a clear attempt, in extremely difficult circumstances, to recruit ethnic Albanians into the ranks of the VJ. Moreover, General Ojdanić's attempt was serious and *bona fide*: a deadline (of 10 April) was set; a specific individual was named as responsible for implementation;[148] sufficient uniforms and weapons were made available;[149] and General Ojdanić checked up on the progress of implementation.[150] However, General Ojdanić was unsuccessful because ethnic Albanians would simply not join the VJ at that time.[151]

This point was considered by the Trial Chamber but limited to the consideration of the discriminatory arming of the non-Albanian population: the Trial Chamber held that General Ojdanić's attempt to recruit and arm Albanians during the NATO bombing

[145] Closing Brief, paras. 305 – 306.
[146] TJ [1/569]
[147] TJ [1/569]
[148] P1471 (Order of Supreme Command Staff, 31 March 1999).
[149] T.7250.
[150] Exhibit 3D719, p. 3.
[151] T.7251.

had no bearing on that issue because the prosecution's allegation concerned "attempts to create an atmosphere in which crimes would be committed by Serb civilians against Kosovo Albanians…."[152]

However, the evidence of General Ojdanić's attempt to recruit and arm ethnic Albanian is of far greater significance: it shows that Ojdanc acted to keep Albanians in Kosovo, indeed within the VJ. The Trial Chamber failed to consider this point when assessing General Ojdanić's *actus reus.*

Error in failing to consider General Ojdanić's call for Kosovo Albanians to stay in Kosovo

General Ojdanić was informed that it was the KLA which was encouraging the movement of the civilian population in a "planned withdrawal".[153] On 7 April 1999, Ojdanić issued a personal plea exhorting Kosovo Albanians to stay in Kosovo and return to their homes. General Ojdanić's words were along the lines of:

> "Albanians, only life together without hatred and contempt leads to a happier future, a carefree childhood for our children, regardless of religion or nation. Let us all together make an effort to restore peace to these parts of ours. Return to your homes and your everyday work. Do so today."[154]

Therefore, General Ojdanić acted to encourage Kosovo Albanians to stay in Kosovo rather than assist their expulsion. The Trial Judgment does not address this announcement. No reasonable Trial Chamber could ignore this crucial evidence.

Moreover, the Trial Chamber noted that the VJ did nothing to prevent refugees from returning to Kosovo and that while tackling the refugee problem was outside the realm of responsibility of the General Staff, the General Staff pressed federal bodies to address the matter.[155] The Trial Chamber failed to consider this evidence when assessing whether General Ojdanić assisted the forcible displacement of Kosovo Albanians.

[152] TJ [3/511]
[153] P929 (Minutes of the Collegium of the General Staff of the VJ for 9 April 1999), pp.33-4.
[154] Exhibit 3D753, p.2; Exhibit 3D1120; T.16818; T.16904-5.
[155] TJ [3/569]

Error in relation to General Ojdanić's Directive of 9 April 1999

The Trial Chamber relied upon General Ojdanić's Directive of 9 April 1999: "a general directive to the commands of the Strategic Groups of the VJ, to mobilise and prepare for combat use, to secure the border, and to destroy the KLA."[156] The Trial Chamber held that the "3rd Army was specifically tasked *inter alia* to 'smash and destroy' the KLA, and to organise for the reception of 'refugees' at the border, including through the direction to 'offer assistance to organs of the Government for their [the refugees'] future care."[157] The Trial Chamber selectively quoted and misquoted this Directive. General Ojdanić specifically directed that the VJ apply "in whole the provisions of the Geneva Conventions regarding international war and humanitarian law."[158] The Directive tasked the 3rd Army with refugees with "further" (not future) care. Further, the Trial Chamber weigh unchallenged and uncontradicted evidence that General Ojdanić's direction to apply in whole IHL was placed in a *more prominent position* at General Ojdanić's insistence such that subordinates would be instantly aware of the serious with which General Ojdanić viewed international humanitarian law.[159]

No reasonable Trial Chamber could rely upon this Directive as evidence of General Ojdanić's *actus reus.* A consideration of the surrounding circumstances demonstrates the Trial Chamber's error: the Directive was issued to amend Grom 3, which had prioritised the possibility of an air-borne assault by NATO forces from Macedonia.[160] The Collegium of 9 April 1999 is clear that VJ units were protecting the state border, crushing terrorist forces and blocking their axes from Albania and Macedonia.[161] Indeed, the Trial Chamber had concluded that the aim of Ojdanić's plans was to counter the NATO threat.[162]

Error in relation to General Ojdanić's Suggestions document of 17 April 1999

[156] TJ [3/533]
[157] TJ [3/533]
[158] P1481 (Supreme Command Staff directive for engagement of VJ in defence against the NATO, 9 April 1999), p. 5.
[159] T.15489.
[160] T.15484.
[161] P929 (Minutes of the Collegium of the General Staff of the VJ for 9 April 1999), pp .9-10; p.13.
[162] TJ [1/1012]

The Trial Chamber held that General Ojdanić's Suggestions document of 17 April 1999 ordered VJ participation in joint operations with the MUP in Kosovo, thereby assisting the Indictment crimes.[163] The Trial Chamber's conclusion is devoid of any factual basis.

General Ojdanić's Suggestions related to a specific operation in the Rugovo Gorge area of Kosovo. General Ojdanić's suggestion was that those involved in this operation should *prevent* the withdrawal of terrorists so that the goal of *destruction* of the KLA could be achieved. To hold that a suggestion to *prevent* the escape of terrorists aided and abetted the *expulsion* of civilians out of that area is nonsense. The Trial Chamber failed to consider clear evidence that the operation took place without any reference to General Ojdanić's Suggestions – they were received too late.[164] Moreover, no crimes were alleged by the prosecution to have occurred in the Rugovo Gorge area on or around 17 April 1999. There was no basis to find that General Ojdanić's Suggestions aided and abetted any Indictment crime.

Relief sought

No reasonable Trial Chamber, having properly considered the above evidence, could have concluded beyond reasonable doubt that General Ojdanić's provided practical assistance, encouragement, and moral support to members of the VJ who were involved in the commission of forcible displacements in the specific crime sites where the VJ participated, or that his conduct had a substantial effect on the commission of those crimes. General Ojdanić respectfully requests that the Appeals Chamber consider the above evidence and arguments as to weight and reverse General Ojdanić's convictions.

[163] TJ [3/626, fn 1507]
[164] 4D420 (Communication from Pavković to Supreme Command Staff re Resubordination of the MUP, 20 April 1999).

Ground 2(B): the Trial Chamber failed to consider that the acts General Ojdanić performed were acts that he had to perform to defend his country

Alleged error of fact which occasioned a miscarriage of justice

General Ojdanić has challenged the Trial Chamber's approach as an error of law in Ground 1(B), above. Should the Appeals Chamber consider that the Trial Chamber did not err in law, General Ojdanić nonetheless contends that the Trial Chamber erred in fact. The arguments made above in Ground 1(B) apply equally here. No reasonable Trial Chamber would have convicted General Ojdanić on the basis of acts that he could not have been expected to forego.

Relief sought

General Ojdanić respectfully requests that the Trial Chamber erred in fact when it found that his necessary acts satisfied the *actus reus* of aiding and abetting forcible displacements and vacate his convictions.

Sub-ground 2(C): the Trial Chamber erred by holding that General Ojdanić was involved in the arming of the non-Albanian civilian population and reached unreasonable conclusions

Alleged error of fact which has occasioned a miscarriage of justice

The Trial Chamber held that General Ojdanić "contributed to the commission of crimes in Kosovo by the VJ through his role in arming the non-Albanian population and ordering its engagement in 1999."[165] The Trial Chamber's finding was wholly erroneous: there was no evidence that General Ojdanić (i) had any role in arming the non-Albanian population, or (ii) that he ordered its engagement in 1999. No reasonable trier of fact would have so found.

Error in finding that General Ojdanić played a role in arming the non-Albanian population

The Trial Chamber found that by July 1998 over 54,000 citizens from local villages and towns in Kosovo had been armed by the VJ and MUP and that this number continued

[165] TJ [3/626]

to grow to about 60,000.[166] The Trial Chamber held that the armed Serb population was organised into units, which were known as Reserve Police Detachments or Reserve Police Squads (RPOs) and included both VJ and MUP reservists who were not [at that time] actively engaged in wartime units.[167] The main task of these units was the defence of their villages and towns in the event of an attack by the KLA.[168]

There was no evidence, and the Trial Chamber did not conclude, that any weapons were issued to non-Albanian civilians after General Ojdanić became Chief of Staff (on 27 November 1998). Rather, the evidence showed that weapons were issued from several sources during 1998. VJ reservists were armed and organised into RPOs pursuant to a Priština Corps order dated 26 June 1998.[169] The Trial Chamber further held that whilst "individuals with wartime assignments in the VJ, MUP, and civil defence and civil protection units were issued weapons through their wartime units and then sent back to their villages when not on active duty, citizens without such wartime assignments were issued weapons on the basis of a Ministry of Defence order dated 21 May 1998.[170]

Therefore, the Trial Chamber held that weapons were issued by the VJ, MUP and Ministry of Defence in early 1998. There was no evidence of arms being distributed to the non-Albanian civilian population in 1999, by General Ojdanić or anybody else. Indeed, the only evidence of the attempted distribution of weapons in 1999 was General Ojdanić's unsuccessful attempt to form an Albanian Military Territorial Detachment.[171] A prosecution witness, Colonel Pešić, testified that he received the order (from General Ojdanić) that a sufficient number of weapons were provided for the purpose of forming this unit.[172]

With the beginning of mobilisation for war with NATO and the KLA in March 1999, most of the RPOs were disbanded because their members joined their wartime assignments in the MUP or VJ reserve forces.[173] After most VJ and MUP reservists were mobilised and called up to their respective wartime assignments, there remained

[166] TJ [1/764]
[167] TJ [1/765]
[168] TJ [1/765]
[169] TJ [1/766]
[170] TJ [1/766]
[171] TJ [3/509]
[172] Zlatomir Pešić, P2502 (witness statement dated 30 January 2004), para.11; T.7250.
[173] TJ [1/768]

approximately 6,000 RPO members.[174] The clear implication is that these 6,000 people were those who had been issued weapons on the basis of the Ministry of Defence order dated 21 May 1998.

There was simply no evidence that General Ojdanić had any role in arming non-Albanian population civilians – be they VJ reservists or anybody else. The issuance of weapons occurred in the summer of 1998. It did not take place under General Ojdanić's authority.

Moreover, General Ojdanić did not know that any arming had taken place until after he became Chief of Staff.[175] At a collegium meeting of the VJ General Staff on 2 February 1999, General Ojdanić mentioned that he had heard that there were "50,000 armed Serbs". Samardžić, who at that stage was the Head of the VJ Inspectorate but formerly commanded the Third Army, replied that the number was 47,000. General Ojdanić asked Samardžić, "[w]hat are the assignments of those armed Serbs and what is the plan for including them in the units."[176] General Ojdanić was plainly concerned to ensure that arms had been properly distributed through official channels to those with defined wartime roles; General Ojdanić was concerned to prevent a deterioration in the security situation and the possibility of a more widespread inter-ethnic conflict in Kosovo.[177]

Samardžić explained that he had ordered that weapons be distributed in 1998.[178] This was corroborated by the evidence of Momir Stojanovic (Chief of the Security Section of the Priština Corps), who testified that the weapons were issued in 1998 following orders from the Commander of the Priština Corps.[179] Samardžić informed General Ojdanić that the role of the armed Serbs was to "defend their villages and participate together with army units in any operations in the immediate vicinity."[180] These were plainly defensive tasks aimed at the KLA.

[174] TJ [1/776]
[175] *See* TJ [3/507]
[176] TJ [3/507]
[177] TJ [3/626]. *See* 3D685 (VJ General Staff evaluation of security information, February 1999), p.16, para.4 ; Branko Gajic T.15252-3 (7 September 2007); Dimitrejevic T.26634 – 26635 (8 July 2008).
[178] TJ [1/779]
[179] Momir Stojanovic T.20072 – 20073 (12 December 2007). This was further corroborated by the evidence of a prosecution witness, Adnan Merovci T.8439 (17 January 2007).
[180] TJ [3/507]

Crucially, Samardžić explained the operation of the RPOs:

> "We have to carry out military and police operations, it can't be done in any other way, and at this moment there are enough army and MUP/Ministry of Interior/ members to do their part of the job if it should come to that."[181]

The Trial Chamber was correct in holding that General Ojdanić knew of "VJ involvement in the arming of the non-Albanian population in Kosovo."[182] However, the Trial Chamber was unable to conclude whether such arming in 1998 was illegal.[183] Therefore, no reasonable Trial Chamber could make any adverse finding against General Ojdanić on the basis of his discovery of this arming. There was no evidence that General Ojdanić had been involved in such arming and the Trial Chamber erred in attributing the arming of the non-Albanian population to General Ojdanić's *actus reus*.

Error in finding that General Ojdanić ordered that the non-Albanian population be engaged in VJ operations

The Trial Chamber held that on 17 April 1999 General Ojdanić "directed the Priština Corps, together with the 'armed non-Siptar population,'" to support the MUP in breaking up and destroying the "STS" [Siptar Terrorist Forces] in the Rugovo Gorge sector.[184]

To establish that General Ojdanić "directed" the use of the "armed non-Siptar population" the Trial Chamber relied upon a "Suggestions" document sent by General Ojdanić to the Priština Corps on 17 April 1999. But General Ojdanić's Suggestions document contains no mention of using the "armed non-Siptar population".[185] Rather, General Ojdanić's Suggestions merely referred to an earlier Joint Command order dated 15 April 1999 which provided that the Priština Corps together with the "armed non-Siptar population" should support the MUP in destroying the KLA in the Rugovo sector.[186] General Ojdanić's Suggestion to the 3rd Army was that this operation be

[181] P931 (Minutes of the Collegium of the General Staff of the VJ for 2 February 1999), p. 23 (last sentence).
[182] TJ [3/511]
[183] TJ [3/56]
[184] TJ [3/510]
[185] P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999).
[186] P1878 (Joint Command Order, 15 April 1999).

"delayed" and reorganised in cooperation with the 2nd Army in order to prevent a "new spill out" of KLA from the sector.[187]

There was no evidence that General Ojdanić saw the actual Joint Command order or its reference to using the "armed non-Siptar population". The detailed evidence of Curcin explained the provenance of General Ojdanić's Suggestions: it was issued on the basis of an A3 map showing combat operations in the Rugovo, rather than the Joint Command Order.[188] Curcin testified that he had typed up General Ojdanić's Suggestions without seeing or referring to the written Joint Command order.[189] Curcin's uncontested evidence was that General Ojdanić had simply bumped into Pavković, who had been with President Milošević and then showed General Ojdanić the A3 map.[190]

Further, a report from the 3rd Army after the operation had concluded listed the units which participated[191]: the armed non-Albanian population were not identified.[192] No reasonable Trial Chamber could conclude that General Ojdanić's Suggestions document assisted any Indictment crime: as noted above, no Indictment crimes took place in the Rugovo Gorge sector on or around 17 April 1999, and certainly none perpetrated by the armed non-Albanian population at the behest of the VJ. The Trial Chamber failed to consider clear evidence that the operation took place without any reference to General Ojdanić's Suggestions – they were received too late.[193] Further, the Trial Chamber ignored unchallenged evidence that the armed non-Albanian population were not engaged in this operation in any shape or form.[194]

Relief sought

The Trial Chamber's findings that General Ojdanić was involved in arming the non-Albanian population and that he directed the use of the armed non-Albanian

[187] P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999).
[188] TJ [1/1119]. *See* also T.16971 – 16972; T.17025.
[189] T.17027.
[190] T.16972-16973.
[191] 2nd Battalion of the 58th lpbr/Light Infantry Brigade/. The 1st/?and/2nd KAG/Corps Artillery Group/of the PrK/Pristina Corps/ and some of the units of the 2nd Army.
[192] 4D420 (Communication from Pavković to Supreme Command Staff re Resubordination of the MUP, 20 April 1999).
[193] 4D420 (Communication from Pavković to Supreme Command Staff re Resubordination of the MUP, 20 April 1999).
[194] *See* 4D420 (Communication from Pavković to Supreme Command Staff re Resubordination of the MUP, 20 April 1999).

population thereby assisting the Indictment crimes was wholly erroneous. The Appeals Chamber is respectfully requested to reverse these findings and, combined with the other errors alleged, reverse General Ojdanić's convictions. Alternatively, the Appeals Chamber is respectfully requested to reverse these findings and reduce General Ojdanić's sentence in light of his lessened degree of participation in the Indictment crimes.

Sub-ground 2(D): the Trial Chamber reached unreasonable conclusions regarding the replacement of high-level VJ personnel

Alleged error of fact which has occasioned a miscarriage of justice

The Trial Chamber committed a clear error of fact by finding that General Ojdanić supported the appointment of personnel to high level posts who either supported the (criminal) activities of the VJ in Kosovo or did not raise objections to such activities, most notably in the case of Pavković.[195] The Trial Chamber held that high-level officials were "carefully positioned" as the crisis in Kosovo escalated, but that this was demonstrated only in relation to the appointment of General Ojdanić and Pavković.[196]

No reasonable Trial Chamber could find that General Ojdanić was carefully positioned in order to facilitate crimes. No reasonable Trial Chamber could have concluded that General Ojdanić supported the appointment of personnel to high level posts who either supported (illegal) activities of the VJ in Kosovo or did not raise objections to this involvement. The Trial Chamber adopted an irrational approach to General Ojdanić's actions, most notably in the case of Pavković.

Error in relation to Pavković's appointment as Commander of the Third Army, replacing Samardžić

Milošević, over the objections of Montenegrin President Đukanović, replaced Samardžić with Pavković, "after Pavković and Samardžić had clashed over the intensification of

[195] TJ [3/528]
[196] TJ [3/85]

the VJ presence in Kosovo without strict adherence to the chain of command."[197] The Trial Chamber held that Pavković was intentionally positioned by Milošević "in order to facilitate the implementation of the common purpose."[198]

The appointment of Pavković was "proposed in writing to the Supreme Defence Council by General Ojdanić at the meeting of 25 December 1998."[199] The Trial Chamber held that General Ojdanić "positively supported"[200] the SDC decision to replace Samardžić with Pavković "[d]espite the concerns raised by the President of Montenegro, Milo Đukanović, that the Priština Corps was not always operating in accordance with the constitutional role of the VJ and the decisions of the VJ, Milošević appointed Pavković as Commander of the 3rd Army.[201] The Trial Chamber held that "Ojdanić was made aware of concerns expressed by Đukanović, due to the alleged misuse of the VJ in Kosovo. Nonetheless, Ojdanić actively supported this appointment."[202]

Therefore, the Trial Chamber concluded that General Ojdanić "actively supported" the careful positioning of an individual who would implement the common purpose. This finding coloured the Trial Chamber's assessment of General Ojdanić's *mens rea*. This finding was plainly unreasonable, for three reasons.

First, the Trial Chamber's reasoning was illogical and contradictory. The Trial Chamber held that General Ojdanić proposed the removal of a hindrance to the common criminal purpose. The prosecution pointed to evidence that Samardžić had challenged Pavković in 1998 in the following way: "[w]e cannot fight terrorism by torching; it's a disgrace [...] I am asking you to impress this upon your men."[203] The Trial Chamber held that that General Ojdanić proposed the promotion of Pavković to replace somebody opposed to the "intensification" of the VJ presence in Kosovo in 1998.[204]

However, the Trial Chamber completely ignored the reality of the evidence. Pavković's promotion only arose out of the chain of staff movements following General

[197] TJ [3/85]
[198] TJ [3/85]
[199] TJ [3/523]
[200] TJ [3/523]
[201] TJ [3/524]
[202] TJ [3/528]
[203] 4D97 (Minutes from the briefing of the commanders of the PrK and 3rd Army, 7 August 1998), p.3. See the Prosecution's Closing Brief, para. 888.
[204] TJ [3/85]

Ojdanić's move to become Chief of Staff.[205] Crucially, Samardžić was not relegated or emasculated in favour of Pavković. Rather, General Ojdanić promoted Samardžić to become a member of the General Staff. It was only then that the post of Commander of the 3rd Army became vacant. Samardžić was promoted to the prestigious position of Chief of Inspections. There was no challenge to Fezer's evidence that this was a "very important position"[206] Radinović – a military expert – explained that Samardžić's post sat directly under the Chief of Staff.[207] Radinović also explained the significance of inspections within the VJ: "It is one of the very important process functions of control and command. It establishes the degree of the practical realisation of issued orders, commands and directives, i.e. of the planned activities of subordinate units and commands."[208] The Trial Chamber's focus on Pavković blinded it to the fact that General Ojdanić promoted an individual who (the Trial Chamber had found) was opposed to unnecessary force in Kosovo. Moreover, Samardžić's role was to monitor and inspect the activities of subordinate commands (Pavković's 3rd Army, among others)– no reasonable Trial Chamber would ignore the significance of this promotion.

Secondly, the Trial Chamber held that General Ojdanić "actively supported" the promotion of Pavković. However, General Ojdanić spoke about Samardžić and Pavković in similar terms. The evidence of the SDC meeting on 25 December 1999 was as follows:

> "General Dragoljub OJDANIĆ considered it necessary to give a more detailed statement of reasons for the five generals in the most responsible posts – Lieutenant-General Svetozar MARJANOVIĆ, Colonel-General Dušan SAMARDŽIĆ, Lieutenant-General Dr. Vidoje PANTELIĆ, Major-General Spasoje SMILJANIĆ and Lieutenant-General Nebojša PAVKOVIĆ. The Chief of the General Staff talked about each of the five generals in turn and gave them high marks for their work to date and their development in the military service."[209]

There was no sense in which General Ojdanić sought to denigrate Samardžić in favour of Pavković. The Trial Chamber adopted a wholly unreasonable approach by placing great weight upon General Ojdanić's comments in relation to Pavković but no weight upon the identical comments he made in support of Samardžić's promotion.

[205] See Exhibit 3D731 and T.16477.
[206] T.16477 (9 July 2007) Fezer
[207] Radovan Radinović, 3D1116 (Radovan Radinović's Expert Report), p. 85.
[208] Radovan Radinović, 3D1116 (Radovan Radinović's Expert Report), p. 169, para. 251.
[209] P1000 (Minutes of 8th SDC session, 25 December 1998), p.9.

Thirdly, the Trial Chamber erred by finding that General Ojdanić actively supported Pavković's promotion *despite* concerns raised by Đukanović. Đukanović 's objection to the appointment of Pavković was raised *after* Ojadnic had spoken and put forward Pavković's (and Samardžić's) name. Thereafter, the debate rested with the voting members of the SDC (Milošević, Milutinović and Đukanovic); the decision rested with Milošević.[210] It is manifestly unjust for the Trial Chamber to have held the appointment of Pavković against General Ojdanić but not against Milutinović, who was acquitted of all charges: "even if Milutinović had sided with Đukanovic" in relation to the appointment of Pavković "the outcome would not have been any different since the appointments of VJ Generals were exclusively within Milošević's jurisdiction."[211] The same reasoning should have applied to General Ojdanić, who was not a member of the SDC but merely attended its meetings.[212]

Therefore, the Trial Chamber failed to consider the significance of the appointment of Samardžić to the General Staff; General Ojdanić did not "actively support" the appointment of Pavković as Samardžić's replacement after hearing the objections of Đukanovic. No reasonable Trial Chamber could have held that the appointment of Pavković went to General Ojdanić's *actus reus.*

Error in relation to General Ojdanić's appointment as Chief of Staff

The Trial Chamber held that the appointment of General Ojdanić as Chief of Staff "did not bear directly upon [his] individual criminal responsibility for the crimes alleged in the indictment."[213] Elsewhere, however, the Trial Chamber's assessment of General Ojdanić's appointment tainted its assessment of his subsequent actions.

The Trial Chamber held that General Ojdanić was "intentionally placed" and "carefully positioned" by Milošević in order to facilitate the implementation of the joint criminal enterprise.[214] The Trial Chamber held that

> "Although most of the evidence on this issue is circumstantial, there is in fact some direct evidence that Milošević removed people of independent

[210] TJ [3/524]
[211] TJ [3/126]
[212] TJ [1/437]
[213] TJ [3/497]
[214] TJ [3/85]

> judgement from key posts and carefully positioned "yes-men" [including General Ojdanić] prior to the implementation of the common purpose."[215]

On the other hand, the Trial Chamber held that Milošević replaced Perišić with General Ojdanić "in an effort to have a more malleable Chief of Staff."[216] The nuance is important: "intentionally placed" or "carefully positioned" suggests that Milošević selected General Ojdanić in particular as Perišić's replacement because he knew that he was getting a "yes-man". However, "in an effort have a more malleable Chief of Staff" suggests a far lesser degree of certainty – for example, whereby Milošević simply wanted to get rid of Perišić but knew little of General Ojdanić.

The facts demonstrate that the latter position was the only reasonable conclusion available to the Trial Chamber. The Minutes the Supreme Defence Council meeting on 24 November 1998 reveal that Milošević did not know General Ojdanić well: Milošević stated that he was "less well-acquainted" with Ojdanić and but that, as second in command to General Perišić, he was the logical replacement.[217]

Moreover, the Trial Chamber accepted that General Ojdanić's approach to the use of the VJ in Kosovo was "similar" to Perišić.[218] The Trial Chamber noted that it was Perišić, despite his apparent opposition, who had prepared a plan for the use of the VJ in Kosovo in 1998.[219] General Ojdanić was not involved in the formation of this plan nor was he enthusiastic for its implementation.[220] General Ojdanić consistently and passionately called for the resolution of the Kosovo crisis by peaceful means, as detailed in his Closing Brief.[221]

Therefore, no reasonable Trial Chamber could conclude that General Ojdanić was a carefully positioned "yes-man". The most the evidence established was that Milošević removed Perišić in an effort to have a more malleable Chief of Staff. The Trial Chamber was entitled to so-hold, but no further. The Trial Chamber's finding that General Ojdanić was "carefully positioned" and a "yes-man" should be reversed as it was plainly unreasonable and tainted the assessment of General Ojdanić's subsequent actions, including the promotion of Pavković as discussed above.

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[215] TJ [3/78]
[216] TJ [3/85]
[217] P1576 (Minutes of 7th SDC session, 24 November 1998), p. 4.
[218] TJ [3/494]
[219] TJ [3/494]
[220] TJ [3/497]
[221] Closing Brief, paras. 153-154.

Error in relation to Lazarević's appointment as Commander of the Priština Corps

General Ojdanić proposed the appointment of Lazarević as commander of the Priština Corps of the 3rd Army (Pavković's recently-vacated post).[222] The Trial Chamber held that Lazarević's promotion did not "fit the pattern" of Perišić and Pavković.[223] The Trial Chamber held that the evidence did not support the prosecution's submission that Lazarević was appointed because he was "more compliant" than other VJ officers: "[t]he reasons for Lazarević being appointed as the Commander of the Priština Corps were his experience, particularly as Chief of Staff of the Priština Corps, and his qualities as an officer."[224] Lazarević "did not appear to have been one of Milošević's 'yes-men' at the time when he was appointed at the end of 1998."[225]

Despite these clear findings, the Trial Chamber held that Lazarević's promotion "could be seen as consistent with the approach of rewarding those who did not express concerns about the legality of the use of the VJ in Kosovo."[226] There was no evidence to support such a conclusion. It amounts to sheer speculation on the part of the Trial Chamber.

Error in relation to Dimitrijević's removal

On 25 March 1999, Geza Farkaš replaced Dimitrijević as Head of the VJ Security Administration, pursuant to a decree of Milošević.[227] The Trial Chamber found that the dismissal of Dimitrijević was founded "on the corresponding disapproval of those who questioned the legality of VJ activities in Kosovo". Crucially, however, the Trial Chamber held that this was ordered by Milošević and "there was no evidence that Ojdanić prompted it."[228] Therefore, there was no basis upon which the dismissal of Dimitrijević could be held against General Ojdanić. Indeed, General Dimitrijević

[222] TJ [3/523]
[223] TJ [3/85]
[224] TJ [3/798]
[225] TJ [3/918]
[226] TJ [3/528]
[227] TJ [3/82]
[228] TJ [3/528]

testified that there was "no doubt" that General Ojdanić was sincere in his efforts to get accurate information as to conduct of the VJ in Kosovo.[229]

Error in failing to consider General Ojdanić's appointment of Vasiljević

The Trial Chamber relied heavily upon the evidence of Alexander Vasiljević, a prosecution witness. The Trial Chamber held that General Ojdanić "ordered Vasiljević out of retirement on 27 April 1999, appointed him Deputy Head of the Security Administration, and tasked him to investigate and report to the Supreme Command Staff about crimes being committed in Kosovo."[230] The Trial Chamber held that Vasiljević was a "generally reliable witness"[231] Vasiljević discovered that a decision had been taken by the 3rd Army Command not to report the occurrence of certain crimes in the regular combat reports.[232] However, Trial Chamber gave General Ojdanić no credit for the appointment of Vasiljević to investigate crimes in Kosovo.

Error in relation to Grahovac's removal

In April 1999, General Grahovac was removed from his post as Assistant Chief of Staff for the Airforce and the Anti-Aircraft Defence. The Trial Chamber highlighted that Grahovac had, in late 1998 and early 1999, "exhibited concern that the VJ had acquired helicopters in breach of embargo on the acquisition of arms from foreign sources placed upon them in March 1998 by UNSCR 1160.[233] However, the Trial Chamber failed to consider that General Ojdanić had seconded Grahovac's concern.[234] No reasonable Trial Chamber could link Grahovac's dismissal to these comments, or General Ojdanić to Grahovac's dismissal.

In any event, the Trial Chamber held that Grahovac's dismissal was ordered by Milošević and "there was no evidence that General Ojdanić had prompted it."[235] Therefore, there was no basis upon which the dismissal of Grahovac could be held against General Ojdanić.

[229] T.26730.
[230] TJ [3/571]
[231] TJ [3/572]
[232] TJ [3/601]
[233] TJ [3/526]
[234] Exhibit 3D557, pp.19-20.
[235] TJ [3/528]

Error in relation to Obradović appointed as Commander of the Second Army

In April 1999, pursuant to the decision of Milošević, Milorad Obradović was appointed Commander of the 2nd Army and Jagos Stevanović was appointed his Chief of Staff. The Trial Chamber held that while there was no evidence of any complaints regarding Obradović, his promotion "can be seen as consistent with the approach of rewarding those who did not express concerns about the legality of the use of the VJ in Kosovo."[236]

This suggestion was not put to Obradović when he testified. There was no evidence that General Ojdanić prompted Obradović's appointment. Therefore, there was no basis upon which the appointment of Obradović could be held against General Ojdanić.

Conclusion

No reasonable Trial Chamber could conclude that General Ojdanić was "carefully positioned" to facilitate the implementation of any common criminal purpose. The Trial Chamber irrationally held that General Ojdanić supported the appointment of personnel who supported the activities of the VJ in Kosovo or did not raise objections to this involvement.[237] The Trial Chamber completely ignored General Ojdanić's appointment of Vasiljević. The Trial Chamber itself found that General Ojdanić had no role in the dismissal of Dimitrijević or Grahovac or the appointment of Obradovic; the Trial Chamber held that the appointment of Lazarević did not fit any pattern. The Trial Chamber's own analysis is reduced to the appointment of Pavković, in relation to whom the Trial Chamber ignored the simultaneous promotion of Samardžić to a key role monitoring the conduct of the VJ.

Relief sought

No reasonable Trial Chamber could conclude that General Ojdanić assisted the Indictment crimes by supporting the appointment of personnel who supported illegal activities by the VJ.

[236] TJ [3/528]
[237] TJ [3/528]

Sub-ground 2(E): the Trial Chamber erred by holding that General Ojdanić approved breaches of the October Agreements

Withdrawal of ground

The Trial Chamber found that General Ojdanić's motivation to breach the October Agreements was his "fear of a genuine threat from NATO and the KLA, rather than a desire to prepare for a widespread campaign of forcible displacement in Kosovo."[238] The Trial Chamber stated that it did not consider General Ojdanić's conduct in relation to the October Agreements in assessing his responsibility for aiding and abetting the indictment crimes.[239] Accordingly, General Ojdanić hereby withdraws this Sub-ground of appeal.

[238] TJ [3/521]
[239] TJ [3/620 - 631]

IV. GROUND THREE: THE TRIAL CHAMBER ERRED IN LAW AS TO THE MENS REA *OF AIDING AND ABETTING*

Introduction

The Trial Chamber held that the mental elements of aiding and abetting are established by proof that (a) the accused intentionally performed an act with the knowledge that such act would lend practical assistance, encouragement or moral support to the commission of a crime or underlying offence; and (b) that the accused was aware of the essential elements of the crime or underlying offence for which he is charged with responsibility, including the mental state of the physical perpetrator or intermediary perpetrator.[240]

At **TJ [1/93]** the Trial Chamber held that an accused "must have knowledge that his acts or omissions assist the principal perpetrator or intermediary perpetrator in the commission of the crime or underlying offence." The Trial Chamber omitted this element when setting out the *mens rea* of aiding and abetting in relation to General Ojdanić.[241]

General Ojdanić contends that the Trial Chamber erred in law as to the *mens rea* of aiding and abetting in a number of respects.

[240] TJ [1/93]
[241] TJ [3/620]

Sub-Ground 3(A): the Trial Chamber failed to require that General Ojdanić had knowledge of the specific crimes for which he was convicted

Alleged error of law invalidating the decision

General Ojdanić contends the *mens rea* of aiding and abetting requires knowledge of the specific crime perpetrated in order for criminal responsibility to follow. Otherwise, a finding of criminal responsibility loses all proportion to the knowledge (and guilt) of an accused. The Trial Chamber held that General Ojdanić satisfied the *mens rea* of aiding and abetting such as to hold him responsible for crimes in nine municipalities encompassing 23 different towns and villages. In failing to apply correct standard for *mens rea*, the Trial Chamber committed a reversible error. There was no proof of General Ojdanić's specific knowledge of the Indictment crimes. Therefore, the Appeals Chamber must reverse General Ojdanić's convictions.

The correct *mens rea* standard for aiding and abetting requires *specific knowledge*

In *Tadić,* the Appeals Chamber held that the requisite mental element of aiding and abetting is "knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal."[242] The *Tadić* Appeals Chamber distinguished aiding and abetting from joint criminal enterprise liability. As is well-known, the extended form of joint criminal enterprise liability permits convictions for foreseeable crimes in locations which may not be specifically known to an accused. By contrast, aiding and abetting liability requires that an accused know of the specific crime that his acts aid and abet.

This step in the Appeals Chamber's reasoning is crucial. Tadić could only have been held responsible for the killing of five men in the village of Jaskici on the basis of the extended form of joint criminal enterprise liability: it had not been proved that Tadić had *specific knowledge* of the killings and therefore aiding and abetting liability did not attach. It was the distinction between knowledge of the general and foreseeable situation, as opposed to the specific crime, which allowed the Appeals Chamber to enunciate joint criminal enterprise liability. Compared to aiding and abetting, the

[242] *Tadić* AJ, para. 229(iv).

advantage of JCE III liability is its ability to convict individuals of specific crimes that were foreseeable but unknown.

The *Vasiljević* case was limited to the first form of JCE liability. Nonetheless, in substituting Vasiljević's conviction as a principal perpetrator for one of aiding and abetting, the Appeals Chamber mirrored *Tadić* by distinguishing the two forms of liability:

> "In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose."[243]

Vasiljević was convicted of aiding and abetting murder because he "knew that the seven Muslim men were to be killed."[244] In other words, his *mens rea* was established because he knew about the specific crime.

In *Kvočka,* the Appeals Chamber (unlike the Trial Chamber) applied the *Vasiljević* definition of the *mens rea* of aiding and abetting and considered that:

> "whether an aider and abettor is held responsible for assisting an individual crime committed by a single perpetrator or for assisting in all the crimes committed by the plurality of persons involved in a joint criminal enterprise depends on the effect of the assistance and on the knowledge of the accused... the requisite mental element applies equally to aiding and abetting a crime committed by an individual or a plurality of persons. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however, accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.[245]

Crucially, the *Kvočka* Appeals Chamber, including Judges Pocar and Guney, did not hold that an aider and abettor is responsible for foreseeable crimes (which he does not specifically know about) which flow from a joint criminal enterprise. The Appeals

[243] *Vasiljević* AJ, para. 102(ii).
[244] *Vasiljević* AJ, para. 134.
[245] *Kvočka* AJ, para. 90.

Chamber's reasoning was sound: the contrary would mean holding that it is possible to aid and abet a joint criminal enterprise – which would be nonsense. Aiding and abetting a JCE is not a valid form of liability at the ICTY.[246] Rather, whether a joint criminal enterprise exists or not, the requisite mental element of aiding and abetting is the same: it requires specific knowledge of the individual crime.

General Ojdanić submits that the logic of *Tadić*, *Vasiljević* and *Kvočka* is clear and should be followed. Similarly in Bagilishema, the Appeals Chamber held that knowledge of a general matrix of events and conduct does not suffice to constitute knowledge or notice."[247] Also in Orić, the Appeals Chamber held that it is not sufficient to have known of crimes generally: a superior must be shown to know that his subordinates are involved in the commission of the specific crimes.[248]

However, the Trial Chamber in *Simić* identified a conflict in the jurisprudence as to the level of knowledge required to satisfy the *mens rea* of aiding and abetting:

> The Trial Chambers in *Kunarac* and *Krnojelac* explained the *mens rea* of aiding and abetting as consisting of the knowledge (or awareness) that the acts performed by the aider and abettor assist in the commission of a specific crime by the principal. The Trial Chambers in *Furundžija, Blaskić, Kvočka*, and *Naletilic*, however, took the view that it is not necessary that the aider and abettor know the precise crime that was intended or which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually perpetrated. The Trial Chamber finds the stricter definition set out in *Kunarac* and *Krnojelac* persuasive and endorses it. Further, the aider and abettor must have been aware of the essential elements of the crime ultimately committed by the principal, including his *mens rea*.[249]

Therefore, the *Simić* Trial Chamber considered the conflict in the jurisprudence, and held that aiding and abetting liability requires knowledge of the specific crime.

In *Kunarac*, the Trial Chamber held that the *mens rea* of aiding and abetting "consists of the knowledge that the acts performed by the aider and abettor assist in the

[246] *Prosecutor v Prlic et al*, No. IT-04-74-AR72.3, *Decision on Petkovic's Appeal on Jurisdiction* (23 April 2008) at para. 21
[247] *Bagilishema* AJ, para. 42.
[248] *Orić* AJ, paras. 52; 55-60; 169-174.
[249] *Simić* TJ, para. 163. (emphasis from original)

commission of a specific crime by the principal."[250] In *Kunarac,* two women (AS and FWS-87) were held against their will in one of the accused's (Kovac's) apartments for a four month period and raped repeatedly. Kovac was convicted of raping FWS-87. Moreover, he was aware that another man named Kostic repeatedly raped AS. In Kovac's absence from the apartment, Kostic would also rape FWS-87. Nevertheless, in applying the (correct) *mens rea* standard the Trial Chamber did not convict Kovac of aiding and abetting the rape of FWS-87 by Kostic:

> "The Trial Chamber notes that it has not been established beyond reasonable doubt that the accused Kovac aided and abetted the rape of FWS-87 by Jagos Kostic. The evidence indicates that the fact that Jagos Kostic raped FWS-87 was hidden from Kovac. Considering the two men's relationship and Jagos Kostic's threats to FWS-87, it seems very unlikely that Kovac could have envisaged the possibility that Jagos Kostic would rape FWS-87."[251]

The horrific facts of this case reinforce the strict level of specific knowledge of the crime required in order to enter a conviction for aiding and abetting.

In *Krnojelac,* the Trial Chamber, including Judge Liu, held that the *mens rea* of aiding and abetting "requires that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender."[252] Krnojelac was held responsible under Article 7(3) for beatings inflicted by his subordinates upon detainees at the KP Dom detention facility. However, Krnojelac was not held responsible for aiding and abetting beatings inflicted by others, such as policemen and other individuals, because it was not established that Krnojelac "knew that those individuals, as opposed to the guards at KP Dom, were taking part in the beatings."[253] Even though the accused knew that outsiders were entering KP Dom to conduct interrogations, "[t]hat would not suffice, in the absence of evidence that he had actual knowledge, as opposed to mere suspicions concerning their part therein, to hold him responsible for aiding and abetting those who were not guards."[254]

[250] *Kunarac* TJ, para. 392.
[251] *Kunarac* TJ, para. 761.
[252] *Krnojelac* TJ, para. 90.
[253] *Krnojelac* TJ, para. 319.
[254] Ibid.

Like *Kunarac,* the *Krnojelac* judgment demonstrates the strict level of specific and actual knowledge knowledge required in order to enter a conviction for aiding and abetting.

In *Blagojević,* the Trial Chamber, presided over by Judge Liu, held that an aider and abettor must know "that his or her own acts assisted in the commission of the specific crime by the principal offender."[255] Applying that standard, the Trial Chamber held that in order to find Blagojević guilty of aiding and abetting murder, the prosecution had to establish knowledge of the specific murder operation.[256] The Trial Chamber found that in relation to a number of murder operations, this specific knowledge was not established.[257]

The *Blagojević* Appeals Chamber, including Judges Guney, Vaz and Meron, stated: "The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator."[258] This statement, with its emphasis on knowledge of the specific crime by the principal perpetrator, again demonstrates the high degree of specific knowledge required.

On the facts, when dismissing Blagojević's Appeal for aiding and abetting murder, persecutions, and inhumane acts relating to forcible transfers out of Srebrenica and the detention, mistreatment, and murders in and around a school in Bratunac town, the Appeals Chamber relied upon detailed factual findings of Blagojević's specific knowledge of those crimes.[259] If a lesser standard of knowledge was sufficient, there was no need for the Appeals Chamber to analyse Blagojević's knowledge of specific crimes.

Moreover, the Appeals Chamber reversed Blagojević's conviction for complicity in genocide. While he knew about specific deportations and other crimes, he did not have specific knowledge of mass killings and thus the specific intent of the principal perpetrators.[260] Once again, this demonstrates the high degree of specific knowledge necessary for accomplice liability.

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[255] *Blagojević* TJ, para. 727.
[256] *Blagojević* TJ, para. 729.
[257] *Blagojević* TJ, para. 744.
[258] *Blagojević* AJ, para. 127.
[259] *Blagojević* AJ, para. 129; see in particular footnote 352 and the sections of the Appeal Judgment referred to therein.
[260] *Blagojević* AJ, para. 123.

Authorities which do not appear to require specific knowledge are unpersuasive and/or distinguishable

However, as indicated by the Trial Chamber in *Simić,* there are authorities which appear to suggest that the *mens rea* of aiding and abetting does not require specific knowledge of the indictment crime.

The Trial Chamber in *Furundžija* held that:

> "it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[261]

General Ojdanić contends that this does not weaken the *mens rea* standard of aiding and abetting in any material way: an accomplice must still know that the specific crime which eventuates was, as it were, on the menu of possibilities. *Furundžija* still requires that an aider and abettor have knowledge of the specific indictment crime.

In any event, the statement in *Furundžija* was *obiter*. On the facts, Furundžija was present at the scene of the crime. He knew about the specific indictment crime. Unlike in *Kunarac* (discussed above), the *Furundžija* Trial Chamber did not have to consider whether a lack of specific knowledge still permits a conviction for aiding and abetting.

In *Blaskić,* the Trial Chamber merely cited the *Furundžija* formulation of the mental element of aiding and abetting.[262] The *Blaskić* Trial Chamber did not go any further: the accused was convicted of ordering the crimes in question[263] and/or under Article 7(3).[264] Moreover, while *Blaskić* Appeals Chamber approved the *Furundžija* definition (which does not require specific knowledge)[265] it also approved the *Vasiljević* definition (which, as discussed above, does require knowledge of the

[261] *Furundžija* TJ, para. 246.
[262] *Blaskić* TJ, para. 287.
[263] See *Blaskić* TJ, paras. 495, 531, 649, 661
[264] *See Blaskić* TJ, paras. 531, 592
[265] *Blaskić* AJ, para. 50.

specific crime).[266] Crucially, the Appeals Chamber confirmed that Blaskić had not been held responsible as aider and abettor and considered that this form of participation had been "insufficiently litigated" on appeal.[267] Therefore, *Blaskić* does not establish that specific knowledge is unnecessary.

In *Naletilic,* the Trial Chamber paraphrased the *Furundžija* formulation: "[t]he abettor need not have known the precise crime being committed as long as he was aware that one of a number of crimes would be committed, including the one actually perpetrated."[268] However, the Trial Chamber also required that an aider and abettor be aware of the essential elements of the crime, "which also means the necessary *mens rea* on the part of the principal."[269] Knowledge of the *mens rea* of the principal necessarily involves a detailed knowledge of the circumstances of the specific crime.

In a footnote the *Naletilic* Trial Chamber cited paragraph 163 of the *Aleksovski* Appeal Judgment for the following proposition:

> "The finding in the *Tadić* Appeal Judgement, para 229, that it has to be shown that the aider and abettor knew that he was assisting the specific crime committed is not contradictory because it has to be read only in the context of contrasting aiding and abetting with the participation in a common purpose or design."[270]

Therefore, the *Naletilic* Trial Chamber relied upon *Aleksovski* to ignore the *Tadić* requirement of specific knowledge. However, the *Aleksovski* Appeal Judgment did not suggest that the *Tadić* requirement could be ignored: it merely stated that *Tadić* "does not purport to be a complete statement of the liability of the person charged with aiding and abetting."[271] Even if *Tadić* was not a "complete statement" of aiding and abetting liability, this did not permit the *Naletilic* Trial Chamber to simply ignore the unequivocal requirement of specific knowledge set out in *Tadić.*

Moreover, the *Aleksovski* Appeal Judgment quoted in full the mental elements of aiding and abetting established by *Tadić,* including the requirement of specific knowledge.[272] The Trial Chamber in *Kordic* confirmed that the *Aleksovski* Appeals Chamber accepted the *Tadić* Appeals Chamber's formulation.[273] The *Aleksovski* Appeals

[266] *Blaskić* AJ, para. 45.
[267] *Blaskić* AJ, para. 52.
[268] *Naletilic* TJ, para. 63.
[269] *Ibid.*
[270] *Naletilic* TJ, para. 63, fn 170.
[271] *Aleksovski* AJ, para. 163.
[272] *Ibid.*
[273] *Kordic* TJ, para. 400.

Chamber even applied the requirement of specific knowledge, including the appellant's knowledge of specific instances of the inhumane treatment of prisoners, in order to find him guilty of aiding and abetting that inhumane treatment. The Appeals Chamber found that the appellant's (specific) knowledge was implicit in the Trial Chamber's findings.[274]

In the *Simić* case, the Appeals Chamber recited the *Furundžija* formulation while citing the *Blaskić* Appeals Judgment.[275] As in *Blaskić,* this statement was *obiter*: the *Simić* Appeals Chamber overturned Blagoje Simić's conviction for aiding and abetting cruel and inhumane treatment in the form of torture and beatings of detainees in Bosanski Samac municipality on the basis that the *actus reus* was not established.[276] Simić's *mens rea* was not determined on this point.

On another point, the Appeals Chamber upheld Simić's conviction for aiding and abetting persecutions for the confinement under inhumane conditions of non-Serb prisoners.[277] The Appeals Chamber did not have to consider whether the mental element of aiding and abetting would be satisfied had Simić not had specific knowledge of the confinement of detainees in Bosanski Samac since it was shown that he did have such knowledge.

In *Brđanin,* the Trial Chamber found the accused to be criminally responsible primarily on the basis of aiding and abetting. As in *Naletilic,* the Trial Chamber paraphrased the *Furundžija* formulation of the mental element of aiding and abetting.[278] Applying the law to the facts of that case, the Trial Chamber found that Brđanin aided and abetted: killings in various locations,[279] torture in various locations,[280] wanton destruction not justified by military necessity,[281] and deportation and forcible transfer.[282] At first sight, as a leadership case, *Brđanin* appears to be analogous to Ojdanić's case and undermine his argument.

[274] *Aleksovski* AJ, para. 169.
[275] *Simić* AJ, para. 86.
[276] *Simić* AJ, para. 131.
[277] *Simić* AJ, para. 138.
[278] *Brđanin* TJ, para. 272.
[279] *Brđanin* TJ, para. 476.
[280] *Brđanin* TJ, para. 535 – 538.
[281] *Brđanin* TJ, paras. 667 – 669.
[282] *Brđanin* TJ, paras. 576 – 583.

In reality, the *Brđanin* Trial Chamber applied a test of specific knowledge of the indictment crimes. The Trial Chamber found that the accused had "detailed knowledge that, during the time and in the area relevant to the Indictment, crimes were being executed in execution of the Strategic Plan."[283] In the case of each crime site, Brđanin's responsibility turned upon the Trial Chamber's finding that "the attacks by the Bosnian Serb forces on non-Serb towns, villages and neighbourhoods constituted an essential part of the implementation of the Strategic Plan in the ARK."[284] On the facts, Brđanin was found to have the required specific knowledge in relation to each crime because of the factual nature of the Strategic Plan. This distinguishes *Brđanin* from Ojdanić's case because General Ojdanić knew of no such plan.

In *Strugar,* the Trial Chamber cited the *Blaskić* Appeal Judgment: "It is not necessary that the aider and abettor know the precise crime that was intended or actually committed, as long as he was aware that one or a number of crimes would probably be committed, and ones of these crimes was in fact committed."[285]

However, applying the law to the facts, the *Strugar* Trial Chamber convicted the accused under Article 7(3) rather than Article 7(1). Crucially, the Trial Chamber was not satisfied that Strugar had aided and abetted the shelling of the Old Town of Dubrovnik specifically, as opposed to nearby Srd – which he had ordered be attacked.[286] Implicit in the Trial Chamber's approach is that Strugar did not have specific and actual knowledge of the shelling of the Old Town at the necessary time. Rather, the Trial Chamber found that during the course of the attack on Srd, Strugar had reason to know that the Old Town was being shelled.[287] This, together with the other necessary elements, led to Strugar's conviction under Article 7(3).[288] That the level of knowledge under Article 7(3), with its "have reason to know" standard, was insufficient for aiding and abetting under Article 7(1), supports General Ojdanić's submission that the *mens rea* requirement for aiding and abetting is one of specific knowledge.

[283] *Brđanin* TJ, para. 335.
[284] *Brđanin* TJ, para. 473, 532, 667.
[285] *Strugar* TJ, para. 350.
[286] *Strugar* TJ, para. 356.
[287] See *Strguar* TJ, paras 422 – 423.
[288] *Strugar* TJ, para. 446.

In *Orić,* the Trial Chamber held that the mental element of aiding and abetting "does neither require that the aider and abettor already foresees the place, time and number of the precise crimes which may be committed in consequence of his supportive contributions, nor that a certain plan or concerted action with the principal perpetrator must have existed."[289] This statement appears to undermine General Ojdanić's argument. However, it is unpersuasive: the authorities cited by the *Orić* Trial Chamber (*Furundžija, Blaskić, Kvočka, Brdanin)* do not support such a proposition and have been addressed above. Further, the *Orić* Trial Chamber recognised that authorities require knowledge of the specific crime (*Kunarac, Krnojelac, Simić, Blagojević*) but did not explain why they should not be followed. Crucially, the *Orić* Trial Chamber did not seek to apply its expanded *mens rea* standard to the facts of the case because, on the facts, the *actus reus* of aiding and abetting was not established.[290]

In *Nahimana,* the Appeals Chamber held that it is "not necessary for the accused to know the precise crime which was intended and in the event committed...."[291] For that proposition, the *Nahimana* Appeal Judgment relied upon the *Blaskić* and *Simić* Appeal Judgments, both of which have been explained above. However, the Appeals Chamber did not apply any expanded standard for the *mens rea* of aiding and abetting. For example, in relation to the accused Nahimana, who was Director of the Rwandan Office of Information a member of the steering committee of the radio station RTLM, the Appeals Chamber overturned his conviction for instigating the commission of genocide. The Appeals Chamber held that the facts did not support a conviction for aiding and abetting genocide.[292] A general knowledge of crimes in Rwanda was held to be insufficient.

In *Mrkšić*, the Appeals Chamber held that: "While it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed, if he is aware that one of a number of crimes will probably be committed and one of those crimes is committed, he has intended to facilitate the commission of that crime...."[293]

[289] *Orić* TJ, para.288.
[290] *Orić* TJ, 684 – 688.
[291] *Nahimana* AJ, para. 482.
[292] *Nahimana* AJ, para. 996.
[293] *Mrkšić* AJ, para.159.

As above, the accused had to know that the specific crime was, as it were, on the menu of possibilities. In any event, the Appeals Chamber did not need to apply any expanded standard of the *mens rea* of aiding and abetting: Šljivančanin personally witnessed mistreatment[294] and Mrkšić knew about the (specific) intention of the perpetrators (TOs and paramilitaries) to punish and kill prisoners of war held at the Ovcara camp. Therefore, on the facts, both Šljivančanin and Mrkšić had the necessary specific knowledge.[295]

Conclusion

General Ojdanić contends that the correct legal standard for aiding and abetting forcible displacement demands that it be proved that he knew about the specific indictment crimes before he can be held responsible for them. The Trial Chamber ignored a clear line of authorities which establishes that knowledge of the specific crime is required. Authorities which appear to suggest that knowledge of the specific crime is not required are unpersuasive or distinguished from General Ojdanić's case.

Moreover, the Trial Chamber acquitted General Ojdanić of aiding and abetting murders that occurred in Kosovo:

> "it has not been proved that Ojdanić was aware that VJ and MUP forces were going into the specific crime sites referred to above in order to commit killings, sexual assaults, or the destruction of religious and cultural property. Consequently, in General Ojdanić's case, the mental element of aiding and abetting has not been established in relation to counts 3, 4, and 5."[296]

Therefore, the Trial Chamber applied the correct *mens rea* standard in relation to aiding and abetting the crime of murder, but failed to apply that same standard to the crimes of forcible displacement. The Trial Chamber did this without even recognising the extensive jurisprudence highlighted above: it simply applied the weakest possible standard for *mens rea* in relation to the crimes of forcible displacement

There are good reasons why the prosecution must prove knowledge of the specific crimes in large scale cases such as this: if the *actus reus* of aiding and abetting is defined broadly and is unrelated to the individual crime sites; only the *mens rea* can provide

[294] *Mrkšić* AJ, para. 193.
[295] *Mrkšić* AJ, para. 333.
[296] TJ [3/629]

the proper boundaries of criminal liability. If knowledge of the specific crime is not a requirement of the *mens rea* of aiding and abetting, the result is that an accused is held criminally responsible for a host crimes about which he had no knowledge. This undermines the presumption of innocence. The prosecution had to prove that General Ojdanić contemplated the specific crimes in the specific locations charged in the Indictment.

Relief sought

By failing to require that standard of proof, the Trial Chamber committed a reversible error. In the absence of proof of General Ojdanić's specific knowledge of the Indictment crimes, General Ojdanić respectfully requests that the Appeals Chamber convictions.

Sub-Ground 3(B): the Trial Chamber applied the wrong legal standard by equating knowledge of instances of crimes against the civilian population with knowledge of deportation and forcible transfer

Alleged error of law invalidating the decision

In addition to the error alleged under Sub-Ground 3(A), the Trial Chamber further erred in its characterisation and application of its second mental element (b) of aiding and abetting.[297] The Trial Chamber correctly stated the principle that the *mens rea* of aiding and abetting requires that an accused be aware of the "essential elements" of the underlying crime ultimately committed.[298] This principle is well-established.[299] However, the Trial Chamber failed to apply the correct test as to what constitutes knowledge of the essential elements of forcible displacement. Therefore, when finding that General Ojdanić's knowledge satisfied the *mens rea* of aiding and abetting, the Trial Chamber committed a reversible error.

The Appeals Chamber is invited to clarify the correct test for knowledge of the essential elements of the underlying crime, apply that test to General Ojdanić's case, and enter an acquittal on Counts 1 and 2 of the Indictment.

Knowledge of the "essential elements" of deportation and forcible transfer

When outlining the elements of the underlying offences, the Trial Chamber held that the *actus reus* of forcible displacement is:

> (a) the displacement of persons by expulsion or other coercive acts;
>
> (b) from an area in which they are lawfully present;
>
> (c) without grounds permitted under international law.[300]

The Trial Chamber elaborated that an "essential element" is the involuntary nature of the displacement which may be inferred from threatening and intimidating acts that

[297] *See* para. 198, above.
[298] TJ [1/93]
[299] *Brđanin* AJ, para. 484; *Krnojelac* AJ, para. 51; *Aleksovski* AJ, para. 162; *Simić et al* AJ, para. 86; *Nahimana* AJ, para. 482; *Orić* TJ, para. 288; *Strugar* TJ, para. 349; *Blagojević* TJ, para. 727; *Brđanin* TJ, para. 273; *Simić* TJ, para. 160; *Naletilic and Martinovic* TJ, para. 631 *Vasiljević* TJ, para. 150; *Krnojelac* TJ, para. 90; *Kvočka* TJ, para. 255; *Kunarac* TJ, para. 392; *Semanza* TJ, para. 388; *Bisengimana* TJ, para. 36.
[300] TJ [1/164]

are calculated to deprive the population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of or the threat to commit other crimes calculated to terrify the population and make them flee the area with no hope of return.[301]

The *mens rea* of forcible displacement is intent to displace the victims. The Trial Chamber held that this intent may be either that of the physical perpetrator or the planner, orderer, or instigator of the physical perpetrator's conduct, or a member of the joint criminal enterprise.[302]

In addition to the *actus reus* and *mens rea*, in order for deportation and forcible transfer to qualify as crimes against humanity, under Article 5(d) and 5(i) respectfully, the *chapeau* elements of Article 5 must be established.[303]

In relation to forcible transfer under Article 5(i), specifically, in order to constitute an inhumane act as a crime against humanity, the following must additionally be satisfied:

the conduct must cause serious mental or physical suffering to the victim or constitute a serious attack upon human dignity;

the conduct must be of equal gravity to the conduct enumerated under Article 5;

the physical perpetrator must have performed the act or omission deliberately;

with the intent to inflict serious physical or mental harm upon the victim or commit a serious attack upon human dignity or with the knowledge that his act or omission would probably cause serious physical or mental harm to the victim or constitute a serious attack upon human dignity.[304]

For a military commander to be held criminally responsible, the commander must have known that the acts of his subordinates fell within the definition of the crime with which he is charged.[305] For example, in *Krnojelac,* the Appeals Chamber held that it was not sufficient for the accused to have known that his subordinates had committed

[301] TJ [1/165]
[302] TJ [1/167]
[303] TJ [1/168]; [1/172]
[304] TJ [1/170]
[305] See *Krnojelac* AJ, para. 146.

acts of beating (which could qualify for the crime against humanity of "cruel treatment") to convict him of the crime of "torture" if the accused did not know of the prohibited purpose behind the beatings which forms part of the definition of torture.[306] Similarly, in General Ojdanić's case the Trial Chamber should have established that General Ojdanić knew that the elements of forcible displacement were satisfied.

The standard applied by the Trial Chamber failed to require that General Ojdanić knew about the essential elements of forcible displacements

In order to find that General Ojdanić knew about the essential elements of the Indictment crimes, the prosecution had to prove that that he knew that each element of forcible displacements was established. If General Ojdanić did not know that each of the above elements was satisfied, he did not know that deportations or forcible transfers were being perpetrated. However, when finding that General Ojdanić satisfied the *mens rea* of aiding and abetting at **TJ [3/625]**, the Trial Chamber did not consider the essential elements of the underlying crimes or General Ojdanić's knowledge thereof. The Trial Chamber simply concluded that General Ojdanić was "aware of the general campaign of forcible displacements that was conducted by the VJ and MUP throughout Kosovo during the NATO air campaign."[307] Before reaching this conclusion, the Trial Chamber failed to properly perform the crucial step: applying the correct test to establish whether or not General Ojdanić knew about each of the essential elements of the underlying crimes.

In the absence of an explicit consideration of General Ojdanić's knowledge of the essential elements of forcible displacement, it is necessary to consider whether the Trial Chamber's reasoning implied that such knowledge was established. Therefore, for the convenience of the Appeals Chamber, the Trial Chamber's reasoning is addressed under three headings: (i) General Ojdanić's knowledge of crimes committed against civilians; (ii) General Ojdanić's knowledge of VJ involvement with the movement of the civilian population; and (iii) General Ojdanić's knowledge of the VJ's involvement in forcible displacements.

[306] *Krnojelac* AJ, para. 155.
[307] TJ [3/625]

The wrong standard: General Ojdanić's knowledge of crimes committed against civilians

The Trial Chamber held that it was "established that General Ojdanić possessed knowledge of the commission of crimes by his subordinates in the VJ in Kosovo along with crimes committed by members of the MUP."[308] General Ojdanić did not dispute this at trial. Indeed, the Trial Chamber held that General Ojdanić "took a number of steps in relation to the criminal activities of members of the VJ and MUP in Kosovo…" such that he was not a member of the joint criminal enterprise.[309] However, knowledge of crimes committed against civilians does not equate to knowledge of forcible displacement. The Trial Chamber erred in law by equating knowledge of instances of other crimes or "widespread criminal activity"[310] with knowledge of the essential elements of forcible displacement.

The mere fact that General Ojdanić received information of widespread crimes such as arson theft, and looting[311] does not satisfy the *mens rea* for the crimes of deportation or forcible transfer.[312] Great care must be exercised when ascribing knowledge on the basis of circumstantial evidence: the precise content, veracity and timing of knowledge has to be examined scrupulously.[313] Indeed, the Trial Chamber held that the reports General Ojdanić received minimised criminal activity by VJ members.[314] Therefore, the fact that General Ojdanić learned about widespread criminal activity around 4 May 1999[315] does not satisfy the *mens rea* for aiding and abetting crimes that occurred in March and April 1999. Moreover, knowledge of widespread criminal activity around 4 May 1999 does not establish knowledge of forcible displacements on that date.

The wrong standard: General Ojdanić's knowledge of VJ involvement with the movement of the civilian population

[308] TJ [3/609]
[309] TJ [3/617]
[310] TJ [3/611]; [3/627]
[311] TJ [3/625]
[312] The evidence demonstrated that when he received information about these crimes, General Ojdanić took action to prevent or punish them.
[313] See *Blagojević* AJ, paras. 229 – 236.
[314] TJ [3/625]
[315] TJ [3/573]

The Trial Chamber held, indeed it was not disputed, that General Ojdanić knew that large numbers of people left Kosovo during the NATO bombing.[316] The Trial Chamber also held that it was satisfied that "the VJ was involved with the movement of the civilian population and that Ojdanić was aware of this involvement."[317] Even if those findings were correct, they do not satisfy the *mens rea* test for aiding and abetting forcible displacement. For example, these findings do not establish that General Ojdanić knew that the VJ expelled people from areas where they were lawfully present without grounds permitted under international law. They do not establish that General Ojdanić knew that a widespread and systematic attack was being perpetrated on the civilian population, a necessary element of Article 5. They do not establish that General Ojdanić knew that amidst the NATO bombing the VJ engaged in attacks "calculated to terrify the population and make them flee the area with no hope of return." [318]

Error in holding General Ojdanić's knowledge of the VJ's involvement in forcible displacements was established

There was scant direct evidence that General Ojdanić knew about criminal forcible displacements – and the Trial Chamber's factual findings in this regard are challenged below. Consequently, the Trial Chamber had to rely upon circumstantial evidence to infer that the "only reasonable conclusion" was that General Ojdanić "knew of the campaign of terror, violence, and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians."[319]

The Trial Chamber relied upon General Ojdanić's (i) knowledge of crimes committed against civilians; combined with (ii) knowledge of VJ involvement with the movement of the civilian population; in order to infer (iii) knowledge of VJ involvement in forcible displacements. However, neither (i) nor (ii) established the essential elements of forcible displacements, as argued above. The Trial Chamber failed to test its inference against the essential elements of the underlying crimes.

Had the Trial Chamber applied the correct test to the pieces of circumstantial evidence upon which it relied, while considering the context in which information came to

[316] TJ [3/568]
[317] TJ [3/566]. Ojdanić challenges these findings in Ground 4(A) below.
[318] TJ [1/165]
[319] Tj [3/625]

General Ojdanić, other reasonable inferences plainly remained open to the Trial Chamber: General Ojdanić believed that the movement of the population was at the instance of the KLA and to escape NATO bombing, and that instances of VJ-initiated movement of the population was to remove them temporarily from the theatre of combat operations.

Relief sought

The Trial Chamber misunderstood the requirement that General Ojdanić know of the "essential elements" of the underlying crimes. The Trial Chamber failed to consider and establish that General Ojdanić knew about each element of the crimes of forcible displacement. Such knowledge of not established on the facts. The Trial Chamber erred in law by equating General Ojdanić's knowledge of instances of crimes against the civilian population with knowledge of forcible displacement. This invalidates the Trial Judgment. Accordingly, the Appeals Chamber must reverse General Ojdanić's convictions.

Sub-ground 3(C): the Trial Chamber failed to apply any legal standard in finding that excessive force was used by the VJ in 1998 such that General Ojdanić was on notice of likely deportation and forcible transfer should the VJ be used in Kosovo in 1999

Alleged error of law invalidating the decision

The Trial Chamber did not find that General Ojdanić (or any other member of the General Staff) was aware of any plan to forcibly expel civilians from Kosovo.[320] For example, the Chamber's own witness – General Dimitrijević – testified that he was not aware of any plan to expel the Albanian population from Kosovo.[321] Rather, the Trial Chamber held that General Ojdanić was provided with information of serious criminal acts committed against ethnic Albanians and excessive use of force in Kosovo in 1998 such that he was aware that "forcible displacements were likely to occur if he ordered the VJ into Kosovo in 1999."[322]

The Trial Chamber failed to apply any legal standard to its 1998 findings so as to be entitled to hold that General Ojdanić knew that the Indictment crimes were likely to occur in 1999. This error invalidates the Trial Chamber's finding that General Ojdanić knew that forcible displacements were "likely to occur if he ordered the VJ into Kosovo in 1999". Together with the other errors alleged in this appeal, this invalidates the Trial Chamber's finding that General Ojdanić possessed the *mens rea* of aiding and abetting.

The correct standard for knowledge based upon past crimes

The Trial Chamber offered no legal standard by which knowledge of past crimes establishes knowledge of likely future crimes. This is unsurprising because the authorities demonstrate the Trial Chamber's error.

It is plainly insufficient to hold that General Ojdanić is criminally responsible for aiding and abetting because he was aware of the risk that crimes would be committed if he ordered the VJ into Kosovo in 1999. Such a standard would prevent any military

[320] Given the overwhelming evidence outlined in Ojdanić's Closing Brief, such a finding was not available to the Trial Chamber. *See* Ojdanić's Closing Brief paras. 13–16.
[321] T.26731.
[322] TJ [3/623]

commander - American, British, Chinese, Russian or any other nation - conducting necessary military operations: armed conflict always carries the risk of crimes. International law requires far greater specificity if criminal liability is to be imposed.

Important guidance as to the circumstances in which knowledge of past crimes establishes knowledge of likely future crimes can be found in authorities concerning Article 7(3) – with its "had reason to know" standard. It must be remembered, however, that Article 7(1) requires a higher standard of knowledge than Article 7(3): whereas the "had reason to know" standard is satisfied by mere notice of the risk of crimes such as to indicate the need for additional investigations;[323] knowledge of future crimes for the purposes planning,[324] instigating,[325] and ordering[326] under Article 7(1) requires actual knowledge of the substantial likelihood that the crime will result.

In *Krnojelac,* the Appeals Chamber held that knowledge by a superior that his subordinates had beaten prisoners of war did not satisfy the "reason to know" standard of a separate crime, in that case torture.[327] The *mens rea* must comprise the *actus reus* of a crime. Similarly, the Appeals Chamber held in *Naletilic* that:

> """The principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence… for a conduct to entail criminal liability, it must be possible for an individual to determine *ex ante,* based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal."[328]

In *Hadžihasanović*, the prosecution sought to argue that the accused was on notice of the indictment crimes because of his prior knowledge of criminal acts of the same nature committed by subordinates, regardless of whether they were the same group of subordinates who committed the indictment crimes. This amounted to placing upon a commander an onerous general duty to know, which the Appeals Chamber had rejected decisively in both *Čelebići*[329] and *Blaskić*[330] The Trial Chamber in *Hadžihasanović* held that the prosecution's argument:

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[323] *Čelebići* AJ, para.241
[324] TJ [1/81]
[325] TJ [1/83]
[326] TJ [1/ 85]
[327] *Krnojelac* AJ, para. 155.
[328] *Naletilic* AJ, para. 114.
[329] *Čelebići* AJ, para. 230.

> "would amount to saying that since the Accused Hadžihasanović had knowledge of the existence of a brigade's criminal conduct, this would put him on notice of the risk that other brigades were about to commit similar criminal acts. To adopt such a misconstrues the reasoning of the Krnojelac Appeals Chamber, in that it is silent about taking into account one same group of subordinates and the geographical aspects related to that group...."[331]

Rather, the weight to be attributed to prior knowledge must be interpreted narrowly in that it derives from a situation of "recurrent criminal acts and from circumstances where those acts could not be committed in isolation by a single identifiable group of subordinates."[332] Where the prosecution relies upon previous similar acts as providing notice of future crimes, it must be "limited to the acts of subordinates who form part of an 'identifiable group', some members of which have already committed similar acts."[333] Based upon the structure of the armed forces in *Hardzihasanovic,* the "identifiable group of subordinates" was limited to "a specific brigade operating in the same limited geographical area and to detention centres which fall under the authority and control of the same supervisory power"[334]

The *Hadžihasanović* Trial Chamber rejected the prosecution's attempt to extend the principle of notice to crimes committed by all subordinates, regardless of whether they belong to the same group.[335] Therefore, notice that certain crimes will be committed in the future is only possible, as a matter of law, where that same identifiable group of subordinates had already committed such acts in the past.[336]

Consequently, the accused's knowledge of crimes committed by troops in detention centres in the first half of 1993 did not establish knowledge that subordinates "were about to commit crimes of mistreatment in the detention centres subsequently set up in [a different area] in the second half of 1993."[337] The facts, including the time gap, removed any sense of there being recurrent criminal acts which could not have been committed by a single identifiable group of subordinates.

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[330] *Blaskić* AJ, paras. 61-2.
[331] *Hadžihasanović* TJ, para. 115.
[332] *Hadžihasanović* TJ, paras. 118; 1749.
[333] *Hadžihasanović* TJ, paras 164; 1749.
[334] *Hadžihasanović* TJ, paras. 169; 1749.
[335] *Hadžihasanović* TJ, para. 164.
[336] *Hadžihasanović* TJ, para. 169.
[337] *Hadžihasanović* TJ, para. 1750.

Notably, the prosecution did not appeal the legal principle enunciated by the Trial Chamber in *Hadžihasanović*.

In dealing with *Hadžihasanović's* appeal, the Appeals Chamber applied an even stricter test for knowledge based on past crimes. While the Trial Chamber had held that earlier crimes did not provide notice of subsequent crimes in a different area, it had also held that Hadžihasanović knew about future crimes in the Bugojno Detention Facilities as of 18 August 1993 because he then knew about and failed to take the adequate measures required to punish those responsible for the murder of Mladen Havranek and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon (one of the Bugojno Detention Facilities) on 5 August 1993.

The Appeals Chamber reversed the Trial Chamber's finding that the accused failed to punish the 5 August crimes.[338] The Appeals Chamber then had to assess whether Hadžihasanović was nonetheless on notice of subsequent crimes in the Bugojno Detention Facilities. Crucially, the Appeals Chamber held that despite the Hadžihasanović's knowledge of the earlier crimes, and even though the detention centres were in "geographical proximity to one another" and were "administered and controlled by the same 307th Brigade Leaders" this was "insufficient to demonstrate Hadžihasanović's knowledge."[339]

The erroneous approach adopted by the Trial Chamber in General Ojdanić's case

General Ojdanić was not charged with responsibility for any crimes committed in 1998. Nonetheless, the Trial Chamber rightly held that for the prosecution to rely upon possible crimes committed in 1998 (as potential sources of notice of future crimes), it had to prove that those crimes were committed.[340] The Trial Chamber noted that despite serious allegations about numerous events in 1998, the prosecution "brought very little additional evidence in relation to some of those 'crimes'". While the Trial Chamber was "left with a general impression of significant violence and destruction in 1998"[341] it found that only four crimes in 1998 were established:

[338] *Hadžihasanović* AJ, para. 164.
[339] *Hadžihasanović* AJ, para. 163.
[340] TJ [1/844]
[341] TJ [1/849]

violations of international humanitarian law by MUP and VJ forces engaged in operations against the KLA near Glođane/Gllogjan in late August 1998;[342]

excessive force to combat the KLA in Mališevo/Malisheva in late July 1998;[343]

excessive and indiscriminate force during operations in the Drenica area in late July and early August 1998;[344] and

killings committed by the forces of the FRY and Serbia in Gornje Obrinje/Abri e Epërme at the end of September 1998.[345]

The Trial Chamber did not systematically address whether or not General Ojdanić knew about these crimes. Instead, in order to hold that General Ojdanić was on notice of the Indictment crimes, the Trial Chamber relied upon: (i) UN Security Council Resolutions in 1998; (ii) the killings at Gornje Obrinje/Abri e Epërme in late September 1998; and (iii) allegations made by British Military Attaché John Crosland in the summer of 1998.[346]

Error in relation to UN Security Council Resolutions

The Trial Chamber relied upon two UN Security Council Resolutions. Resolution 1160, passed on 31 March 1998, and Resolution 1199, passed on 23 September 1998, which noted its "grave concern" at "excessive and indiscriminate force by the MUP and VJ" which had resulted in "numerous civilian casualties and ... the displacement of over 230,000 people from their homes."[347] Under the correct legal standard outlined above, references to crimes in general as opposed to crimes committed by specific units or individuals are insufficiently precise to put General Ojdanić on notice of the Indictment crimes. Moreover, while the Trial Chamber held that the excessive use of force was at least part of the cause of the displacement of tens of thousands of Kosovo

[342] TJ [1/881]
[343] TJ [1/886]
[344] TJ [1/894]
[345] TJ [1/912]
[346] TJ [3/542-546]
[347] TJ [3/542]

Albanians in 1998, the Trial Chamber simultaneously noted that General Ojdanić was informed that the KLA was responsible for some of the population movement.[348]

Error in relation to Gornje Obrinje/Abri e Epërme

The Trial Chamber held "Ojdanić was provided with specific information in relation to the killing of a number of civilians in Gornje Obrinje/Abri e Epërme in late September 1998...."[349] The prosecution's allegation was of deliberate killings of civilians at close quarters: "all the bodies found in the woods were dressed in civilian clothes, and exhibited gunshot wounds, knife cuts and mutilations."[350] The VJ General Staff requested information about an alleged massacre, "however following internal investigations it was reported that no massacre had been committed by the VJ and the ~~Priština~~Priština Corps security department reported that members of the MUP were responsible."[351]

The Trial Chamber noted that "the General Staff was informed by Pavković that VJ units did not commit a massacre but that there was no reliable information about the MUP.[352] The Trial Chamber held that it was unable to determine whether the VJ or MUP was responsible, and thus found that the killings were committed by the Forces of the FRY and Serbia.[353] The Trial Chamber accepted in relation to Milutinović that this incident was reported as propaganda by the international community.[354] The same analysis should have applied to General Ojdanić.

Given that it was not established that any unit or individual of the VJ had committed any crime in Gornje Obrinje/Abri e Epërme, there was no basis upon which General Ojdanić's knowledge of this crime could provide notice of VJ involvement in the Indictment crimes committed by the VJ some six months later in 1999. There is no

[348] TJ [3/542]
[349] TJ [3/543]
[350] TJ [1/902]
[351] TJ [1/912]
[352] TJ [3/543]
[353] TJ [1/912]
[354] TJ [3/629]

sense in which Gornje Obrinje/Abri e Epërme meets the test established by *Hadžihasanović*.

Error in relation to Crosland's allegations

The Trial Chamber held that information "relating to excessive force by the VJ in Kosovo was also personally conveyed to Ojdanić in 1998."[355] Crosland initially testified that he made a video of VJ shelling villages and handed the video to General Ojdanić and confronted him with it. On cross-examination, Crosland changed his story, admitting that he did not give any video to General Ojdanić. Consequently, the Trial Chamber did not rely upon Crosland's account but held that it was "satisfied that information regarding excessive uses of force by the VJ in 1998 was passed on by Crosland orally to Ojdanić."[356]

Crosland testified that "[h]e told Ojdanić about his observation of four hours of direct and indirect fire on the villages of Prilep/Prelep, Junik, Rznic/Rziq and Glođane/Gllogjan, in the areas of Štimlje/Shtima, and Mališevo/Malisheva."[357] Crosland asserted that General Ojdanić did not refute the facts but attempted to explain what Crosland had seen, stating that the VJ was operating in Kosovo to protect lines of communication. General Ojdanić responded that "force would be met with [appropriate] force."[358]

Crosland did not identify individual units or commanders. The Trial Chamber did not find that General Ojdanić knew which units were involved or whether those same units committed crimes seven months later in 1999. There is no sense in which evidence of Crosland's allegations meets the test established by *Hadžihasanović*.

Conclusion

The Trial Chamber erred in law by failing to apply the correct legal standard in order to be entitled to hold that crimes in 1998 put General Ojdanić on notice of the Indictment crimes. The Trial Chamber erred in law when holding that General Ojdanić was aware of likely forcible displacements based upon his knowledge of

[355] TJ [3/544]
[356] TJ [3/545]
[357] TJ [3/544]
[358] TJ [3/544]

events in 1998. The 1998 crimes established by the Trial Chamber did not put General Ojdanić on notice of a widespread campaign of forcible displacement in 1999. The Trial Chamber failed to establish that General Ojdanić knew about the 1998 crimes. The correct standard for notice requires knowledge of repeated acts of a similar nature committed by the same identifiable group of subordinates. The Trial Chamber's findings in relation to 1998 fall way below this standard.

Relief sought

General Ojdanić respectfully requests that the Appeals Chamber apply the correct legal standard for knowledge based upon past crimes to the 1998 crimes as found by the Trial Chamber. General Ojdanić requests that the Appeals Chamber find that he did not know that the Indictment crimes would be committed and overturn his convictions.

Sub-ground 3(D): the Trial Chamber failed to apply the purpose standard for mens rea of aiding and abetting established by international law

[280]

Introduction

a. For many years now, the ICTY Appeals Chamber has held that mere *knowledge* is sufficient to establish the *mens rea* for aiding and abetting.[359] Aided by a recent decision of the United States Court of Appeals for the Second Circuit, which adopted a position taken by the United States Department of Justice and now-ICJ Judge Christopher Greenwood of the United Kingdom, General Ojdanić respectfully contends that customary international law requires not only *knowledge*, but proof that the *purpose* of the alleged aider and abettor is to assist the principal's crime. In this case, the Trial Chamber convicted General Ojdanić solely on the basis of his *knowledge* rather than his *purpose*. Indeed, it found that he lacked the requisite purpose when absolving him of joint criminal enterprise liability. Therefore, when applying the correct test for the *mens rea* of aiding and abetting, the Appeals Chamber must enter a judgment acquittal for General Ojdanić.

The *mens rea* of aiding and abetting in international law requires *purpose*

b. It is now axiomatic that this Tribunal must apply customary international law as it stood at the time of the Indictment events - March to May 1999. The *mens rea* standard applied must be sufficiently defined and accessible so as to form part of customary international law beyond any doubt.[360] A lesser standard violates the principles of legality and *nullem crime sine lege*.

[359] *Vasiljević* AJ, para 102; *Blaskić* AJ, para. 49, *Krstić* AJ, paras. 139-141, 143, *Mrkšić* AJ, para. 159.

[360] *See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704 (3 May 1993), para. 34; *Prosecutor v. Tadić*, IT-94-1-AR72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, (2 October 1995), para. 94; *Galić* AJ, para. 83; *Vasiljević* TJ, para. 193; *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, *Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise* (21 May 2003); ICL 442 (ICTY 2003); paras. 9-10; *Rwamakuba v Prosecutor*, No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide* (22 October 2004), para. 14.

c. The sources of international law to which the Appeals Chamber must have regard are: (1) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; (2) international custom, as evidence of a general practice accepted as law; (3) general principles of law recognized by civilized nations; and (4) judicial decisions and teachings of highly regarded commentators of the various nations.[361]

d. Article 25(3)(c) of the ICC Statute provides the clearest expression of the *mens rea* of aiding and abetting in international law. Article 25(3)(c) of the ICC Statute explicitly requires that any person charged with aiding and abetting before that Tribunal be proved to have acted "[f]or the purpose of facilitating the commission" of the underlying crime. The ordinary meaning of this language is unequivocal: knowledge alone does not result in criminal liability.

e. The purpose standard within Article 25(3)(c) was chosen instead of a standard of mere knowledge.[362] Professor Kai Ambos, a member of the German delegation at the Rome Conference, has explained that the purpose test was imported from the US Model Penal Code.[363] Professor Ambos notes that "it is clear that purpose generally requires a specific subjective requirement stricter than mere knowledge".[364] He has emphasised that the wording of Article 25(3)(c) "introduce[d] a subjective threshold which goes beyond the ordinary *mens rea* requirement within the meaning of Article 30... subparagraph [25(3)](c) provide[s] for a relatively low objective threshold but relatively high subjective threshold".[365]

f. Another member of the German delegation, and former *ad litem* judge of this Tribunal, has similarly explained that under Article 25(3)(c) "the aider and abettor

[361] Statute of the ICJ, Article 38.
[362] D. Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts', 6(2) *Northwestern Journal of International Human Rights* (2008) 304, at p310.
[363] §2.06 (1985). *See* Paul H Robinson and Markus H Dubber, 'The American Model Penal Code: a Brief Overview', 10(3) *New Criminal Law Review* (2007), p. 337: "Following an intervention by one of America's most prominent judges, Judge Learned Hand, the American Law Institute rejected the drafters' proposal to extend accomplice liability to a person who was merely aware of his contribution to the principal's criminal act."
[364] K. Ambos, 'General Principles of Criminal Law in the Rome Statute', 10(1) *Criminal Law Forum* (1999) 1 at p10.
[365] K. Ambos, 'Individual Criminal Responsibility, Article 25 Rome Statute' in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing, 2nd ed., 2008).

must act with '*purpose*' … this means more than the mere knowledge that the accomplice aids the commission of the offence."[366]

g. The ICC Statute was adopted on 17 July 1998 by 120 of the 148 States represented at the Rome Conference. It entered into force on 1 July 2002. To date, 139 States have become signatories, with 110 ratifications.

h. The *purpose* standard within the ICC Statute is the clear expression of the practice and *opinio juris* of the overwhelming majority of the international community. As the ICJ has emphasised, "[i]t is, of course, axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States".[367] The ICC Statute is rooted in the actual conduct of states: "the text [of the ICC Statute] is supported by a great number of States and may be taken to express the legal position i.e. *opinio juris* of those States".[368] This Tribunal must respect the clear legal position contained within the ICC Statute.

i. Significantly, on 2 October 2009, the US Court of Appeals for the Second Circuit delivered its judgment in the *Talisman* case.[369] The Second Circuit, applying international law, unanimously held that "the *mens rea* standard for aiding and abetting liability... is purpose rather than knowledge alone."[370] The Second Circuit rejected a mere knowledge standard as inconsistent with customary international law, holding that only the purpose standard has the requisite "acceptance among civilised nations".[371]

j. A treaty provision may be declaratory of a rule of customary law.[372] The State parties to the ICC Statute were concerned to reflect custom because the Statute would affect nationals of non-parties since the ICC was given jurisdiction on the basis of the *locus*

[366] A. Eser in A. Cassese (ed), 'The Rome Statute of the International Criminal Court: A Commentary' (2002), p. 801.
[367] *Continental Shelf (Libya v Malta)*, 1985 ICJ 13, para. 27.
[368] *Tadić* AJ, para. 223.
[369] *Presbyterian Church of Sudan and Others v. Talisman Energy Inc. and Republic of Sudan*, ___ F.3d ___, #07-0016-cv (2nd Cir. 10/2/09).
[370] *Talisman* , p. 42.
[371] *Talisman*, p. 43.
[372] *See North Sea Continental Shelf* (*F.R.G. v. Den.; F.R.G. v Neth.*), 1969 ICJ 3 (Feb. 20).

of a crime irrespective of whether it was committed by a national of a State party.[373] The US is not a party to the ICC. Thus, the decision in *Talisman* did not derive from any treaty obligation particular to it; nor did it turn upon a standard of national law. Rather, *Talisman* is a decision of a respected appellate court in a country which has declined to join the ICC, applying the *purpose* standard because it represents customary international law.

k. The claim in *Talisman* was brought under the Alien Tort Statute (28 U.S.C. § 1350) ("ATS") and related to events occurring at a similar time to the crimes in this case. The ATS is merely a jurisdictional vehicle for the enforcement of accepted universal norms. Therefore, the outcome in *Talisman* should not differ from the result that would be reached under analogous jurisdictional provisions in other nations, such as Belgium, Canada or Spain. The Appeals Chamber is bound to apply the same standard in this case. Indeed, it would be incongruous for a higher standard of *mens rea* to be applied to civil liability of a corporation, where only money is at stake, than to the individual criminal liability of an accused person, whose very liberty is at stake.

l. A number of countries – including, Denmark[374], Ireland[375], South Africa[376] and the United Kingdom[377] – have incorporated the provisions of the Rome Statute into domestic law *en masse*. Therefore, these States recognise the *purpose* standard of aiding and abetting in international law.

m. Another treaty which defines the *mens rea* for aiding and abetting is the Council of Europe Convention on Cybercrime. This has been ratified by 23 countries, signed by a further 20 and provides a basis for domestic legislation in another 10 states. It provides for criminal liability where a person aids and abets the commission of an offence, but only where he does so "with intent that such offence be committed".[378]

[373] *See* Professor Greenwood's *Amicus Brief* in *Talisman*, p. 27.
[374] Act No. 342 of 16 May 2001 on the International Criminal Court.
[375] International Criminal Court Act 2006 (No. 30 of 2006).
[376] Implementation of the Rome Statute of the International Criminal Court Act 2002 (Act No. 27, 2002).
[377] International Criminal Court Act 2001(2001, Chapter 17).
[378] Council of Europe Convention on Cybercrime (23 November 2001), E.T.S. No. 185, Article 11.

n. The domestic criminal law of numerous countries provides for a higher *mens rea* standard than mere knowledge.

o. In the US, the leading case of *United States v. Peoni* held that an accomplice must "participate in [the crime] as in something that he wishes to bring about, that he seek by his action to make it succeed".[379]

p. The US Model Penal Code – the basis for Article 25(3)(c) of the ICC Statute- reflects how federal courts have construed the federal aiding and abetting statute: 18 USC 2, discussed in *United States v. Reifler* 446 F.3d 65, 79-80 (2nd Cir 2006) (quoting *United States v Hamilton*, 334 F.3d 170, 180 (2nd Cir 2003)): it must be proven that the "defendant *knew* of the crime, and that the defendant *acted with the intent to contribute* to the success of the underlying crime".

q. Some US States that have incorporated the Model Penal Code interpret it as requiring that the principal and accomplice possess the same *mens rea*. For example, one court held that 'it is essential that [both the accomplice and the principal] shared in the intent which is the crime's basic element...."[380] Another court held that the accomplice "must share the criminal intent of the party who actually committed" the underlying crime.[381]

r. English law does not recognise a clear distinction between joint enterprise and aiding and abetting in the same way as the jurisprudence of this Tribunal.[382] While certain authorities suggest that knowledge is sufficient for accomplice liability[383], others do not. In *Gillick v West Norfolk and Wisbesch Health Authority* [1986] 1 AC 112 the House of Lords held that the accused, a doctor who prescribed contraception to a girl under the age of 16 without parental consent, was not guilty of aiding and abetting unlawful sexual intercourse because he lacked the requisite "guilty mind".

[379] *United States v. Peoni*, 100 F.2d. 401 (1938).
[380] *State v. White* 98 NJ 122, 484 A.2d 691.
[381] *Augustine v. Commonwealth* 226 Va. 120, 306 S.E.2d 886 (1983).
[382] *See* Archbold §§ 17-67 to 17-73.
[383] *National Coal Board v Gamble* (1959) 1 Q.B. 11; *Maxwell v DPP for Northern Ireland* (1978) 3 All E.R. 1140.

s. Similarly, English cases where the accused is not a member of a joint enterprise show that mere knowledge is insufficient for the imposition of accomplice liability. Authorities concerning bystanders to crimes hold that the prosecution must establish an intention to encourage the crime.[384]

t. The Canadian Criminal Code provides that a person will be party to a crime if he "does or omits to do anything for the *purpose* of aiding any person to commit it".[385] For serious crimes, including crimes against humanity and war crimes, the Canadian Charter of Rights and Freedoms demands that the *mens rea* requirement be tightened to ensure that "the additional stigma and opprobrium" that attaches to the crime is proportionate to the degree of fault.[386] The Supreme Court of Canada has held that the *mens rea* for aiding and abetting is the same as the *mens rea* that applies to the principal perpetrator, unless otherwise provided for in legislation.[387]

u. Therefore, it simply cannot be said that customary international law supports the proposition that a person can be convicted of aiding and abetting based on a *mens rea* standard of mere knowledge.

ICTY Jurisprudence

v. While the ICTY Appeals Chamber has stated that a standard of knowledge rather than purpose suffices for the *mens rea* of aiding and abetting under Article 7(1), it has done so without a detailed analysis of customary international law. In contrast, a significant number of authorities hold that an *intention to facilitate* the crime is an element of the *mens rea* of aiding and abetting.[388] Moreover, the *Furundžija* Trial Judgment – one of the first judgments at this Tribunal to hold that the standard is knowledge rather than purpose – was flawed. It failed to consider the ICC Statute and, when considering post

[384] *Coney* (1982) 8 QBD 534; *Wilcox v Jeffrey* [1951] 1 All E.R. 464; *Clarkson* [1971] 3 All E.R. 344.
[385] Canadian Criminal Code, R.S.C. 1985, c. C-46, Article 21.
[386] *R v Finta* [1994] 1 SCR 701, 815.
[387] *R v Hibbert* [1995] 2 SCR 973, para. 31.
[388] *See Kvočka* TJ, para. 255; *Kamuhanda* TJ, para. 597; *Kajelijeli* TJ, para. 766; *Bagilishema* TJ, para. 32. *Tadić* TJ, para. 674; *Čelebići* TJ, para. 326; *Aleksovski* TJ, para. 61.

World War 2 jurisprudence, it cited but then ignored the *Hechingen Deportation* case, which required that the accomplice share the principal's *mens rea*.[389]

w. One scholar has asserted that the Appeals Chamber has adopted a "pick and choose" approach, selecting cases which could help support its views without giving sufficient reasons for its selection: "This is particularly evident... in the holdings regarding the accomplices' *mens rea*".[390] In *Krstić* the Appeals Chamber considered a few domestic provisions or cases from the criminal law of France, Germany, the UK, Canada and Australia. However, as indicated above, other provisions and cases in those jurisdictions are to the contrary. The Appeals Chamber has never expressly determined whether customary international law supported the mere knowledge standard for aiding and abetting. This is the case in which it must now confront that issue head on in light of *Talisman*.

x. In *Orić*, the Trial Chamber carefully considered the jurisprudence supporting the proposition that the mental element of aiding and abetting is satisfied by mere awareness.[391] The *Orić* Chamber addressed the Appeals Chamber's judgments in *Blaskić* and *Vasiljević* and concluded that "the aider and abettor must have 'double intent', namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator".[392] Notably, the prosecution did not challenge this approach on appeal.

y. Therefore, the ICTY jurisprudence, while sometimes supporting the mere knowledge test, has never directly decided the issue of whether such a test is consistent with customary international law. The *Talsiman* decision, ICC Statute, *Council of Europe Convention on Cybercrime*, and national jurisprudence discussed above, demonstrate that it is not—and that a showing of purpose is also required.

The Trial Chamber's error in this case

[389] *Furundžija* TJ, para. 248.
[390] Flavia Zirzi Giustiniani, 'The responsibility of accomplices in the case-law of the *ad hoc* tribunals' 20(4) *Criminal Law Forum* (2009) 417, at 445.
[391] *See Orić* TJ, paras. 268-288.
[392] *Orić* TJ, para. 288.

z. It was contrary to General Ojdanić's interests for the civilian population to leave Kosovo for that cleared the way for a NATO invasion. He pleaded for ethnic Albanians to stay in Kosovo.[393] He took repeated steps to tackle criminality, including ordering that prosecutions of violations of the provisions of international law were to be the top priority of the military justice system. [394] In the longest Trial Judgment in the history of this Tribunal, and despite having before it detailed contemporaneous records of secret meetings of the General Staff in the build up to and throughout the war, the Trial Chamber did not identify *any* evidence that General Ojdanić intended to assist the Indictment crimes.

aa. Instead, the Trial Chamber considered Ojdanić's "Knowledge of crimes in Kosovo after 23 March 1999".[395] To the extent the Trial Chamber considered Ojdanić's purpose, it held that he did not share the intent of the joint criminal enterprise members.[396] The Trial Chamber did not consider Ojdanić's purpose in relation to aiding and abetting liability.

bb. At **TJ [3/620]** the Trial Chamber held that in order for General Ojdanić to be held responsible for aiding and abetting, it "must be shown that he intentionally provided [the] assistance and that he was aware of the essential elements of that crime or underlying offence, including the mental state of the physical or intermediary perpetrator". However, the Trial Chamber reduced its analysis of Ojdanić's intention to whether his acts were "voluntary".[397] The Trial Chamber failed to consider Ojdanić's purpose or, in the words of the *Orić* Chamber, whether Ojdanić intended the furthering effect of his contribution and the intentional completion of the crimes. Instead, Ojdanić was convicted on the basis of the inference that "he *knew* of the campaign of terror, violence, and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians."[398] Therefore, the Trial Chamber erred in law.

Relief sought

[393] *See* paras. 145-147.
[394] *See* Grounds 2(A) and 4(C); for example 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999).
[395] TJ [3/548-611]
[396] TJ [3/616]
[397] TJ [3/628]
[398] TJ [3/625]

cc. General Ojdanić respectfully requests that the Appeals Chamber: (i) hold that the *mens rea* of aiding and abetting in international law requires proof of *purpose* rather than *mere knowledge*; (ii) apply that standard; and (iii) reverse the Trial Chamber's judgment and enter an acquittal.

V. GROUND FOUR: THE TRIAL CHAMBER ERRED IN FACT AS TO THE MENS REA *OF AIDING AND ABETTING*

Ground 4(A): no reasonable Trial Chamber could have found that the only reasonable inference based upon the evidence was that General Ojdanić knew of either (i) a campaign of terror, violence and forcible displacement being carried out by VJ and MUP forces or (ii) the requisite intent of any principal or intermediary perpetrator

Introduction

The Trial Chamber's own standard for the *mens rea* of aiding and abetting required that General Ojdanić knew of the widespread campaign of terror, violence and forcible displacement carried out by VJ and MUP forces and the mental state of the physical or intermediary perpetrator.[~~359~~399] The Trial Chamber concluded that the only reasonable inference was that General Ojdanić knew of the campaign of terror, violence, and forcible displacement.[~~360~~400] The Trial Chamber made no explicit finding as to whether General Ojdanić knew of the intent of any principal or intermediary perpetrator. Absent this finding, no reasonable Trial Chamber could conclude that General Ojdanić's *mens rea* was established. On this point alone, the Appeals Chamber is invited to reverse General Ojdanić's conviction.

General Ojdanić's convictions can conceivably only stand if General Ojdanić's knowledge of the perpetrator's intent is necessarily implicit in its finding that General Ojdanić knew of the "general campaign" carried out VJ and MUP forces. However, the Trial Chamber also erred in finding that General Ojdanić knew of any such campaign: it failed to consider relevant facts and adopted an unreasonable approach to the facts that it did consider when assessing General Ojdanić's knowledge. Kosovo was a war zone. General Ojdanić faced the most severe threats imaginable: a KLA uprising, massive NATO bombardment and the imminent possibility of a land invasion. Publicly and privately, he favored Albanians staying in Kosovo. The

[~~359~~399] TJ [3/620]
[~~360~~400] TJ [3/625]

General Staff believed that it was the KLA which was encouraging the civilian population to move in a "planned withdrawal" in order pave the way for NATO invasion.[361401] The more reasonable inference is that he believed that the movement of the population was at the instance of the KLA and to escape NATO bombing, and that instances of VJ-initiated movement of the population was to remove them temporarily from the theatre of combat operations. No reasonable Trial Chamber could conclude that General Ojdanić knew of a general campaign to expel Kosovo Albanian civilians.

Errors of fact which have occasioned a miscarriage of justice

While the Trial Chamber found that neither General Ojdanić nor any member General Staff was aware of any plan to launch a campaign of terror, violence and forcible displacement, it failed to recognise the significance of its finding

In his Closing Brief, General Ojdanić set out the unanimous evidence that nobody in the General Staff had the remotest knowledge of any plan to forcibly displace the Kosovo Albanian civilian population.[362402] The prosecution did not challenge witnesses from the General Staff on this point. The Trial Chamber did not hold that the General Staff knew of such a plan in its Judgment. However, the Trial Chamber failed to weigh the significance of this when assessing General Ojdanić's knowledge of the forcible displacements committed in Kosovo.

The Trial Chamber held that General Ojdanić was made aware of forcible displacements through internal sources of information such as briefings of the Supreme Command Staff.[363403] However, no citation is given for that proposition and not a single Supreme Command Staff Briefing contains any reference, explicit or implicit, to Kosovo Albanians being forcibly expelled from Kosovo by the VJ or anyone else. Indeed, elsewhere the Trial Chamber noted the "lack of reporting of forcible displacement in combat reports" but held that it did not create "any doubt as to Ojdanić's knowledge of the commission of forcible displacement in Kosovo."[364404] Together with the fact that nobody in the General Staff knew of any plan to expel civilians from Kosovo, no reasonable Trial Chamber could ignore the doubt that this lack of reporting causes.

[361401] P929 (Minutes of the Collegium of the General Staff of the VJ for 9 April 1999), pp.3-4.
[362402] Closing Brief, paras. 13-16.
[363403] TJ [3/625]
[364404] TJ [3/609]

Errors in findings that General Ojdanić "knew that the VJ was involved with the movement of the civilian population"

The "Intensify Controls" Report (Exhibit 3D802)

The Trial Chamber held that General Ojdanić knew that the VJ was "controlling the movement of the civilian population" on the basis of a Supreme Command Staff combat report dated 28 March 1999.[~~365~~405] The Trial Chamber relied upon this exhibit to conclude that "from the opening days of the conflict in 1999, Ojdanić knew of MUP and VJ involvement in the movement of Kosovo Albanians".[~~366~~406]

This exhibit was not put to a single witness to comment on its language. The report addressed the general security situation in the FRY as a whole: not Kosovo in particular. None of the towns mentioned in the relevant section (Banovci, Rakovica, Sremcica, Cuprija) are in Kosovo. NATO's bombardment forced the VJ to disperse from barracks to secret locations. Anti-aircraft units on the whole territory of the FRY were engaged daily in combat operations against NATO. Uncontrolled movement of the population in such circumstances risks revealing the location of such units, as well increasing the risk of casualties. The exhibit further states:

> "in order to prevent the deterioration of the security situation, it is necessary to intensify controls of the movement of the population and motor vehicles in coordination with MUP, as well as to prohibit the movement and stay of foreigners in areas of combat operations, unit redeployment areas and areas of installations of important for the defence of the country...."[~~367~~407]

This language plainly indicates a desire to *prevent* population movement, rather than encourage it. The Trial Chamber stretched and perverted this clear wording to conclude that it established General Ojdanić's knowledge of VJ involvement in the "movement" of Kosovo Albanians in Kosovo.[~~368~~408] No reasonable Trial Chamber

[~~365~~405] TJ [3/565]
[~~366~~406] TJ [3/625]
[~~367~~407] 3D802 (General Staff Combat Report, 28 March 1999), p. 4.
[~~368~~408] TJ [3/625]

could interpret the exhibit in this way, especially absent evidence from relevant witnesses.[~~369~~409]

The "Channeling the Population" Report (Exhibit) P2930

The Trial Chamber also relied upon a "31 March 1999 report from the Priština Corps" which stated that "MUP and military territorial units were controlling the movement of the Kosovo Albanian population and 'channelling' them towards the border."[~~370~~410]

In fact, this was a report from the Priština Corps command group to the Priština Corps operations centre. It never reached the General Staff. The only evidence before the Trial Chamber was that General Ojdanić never saw it.[~~371~~411] This point was addressed during closing oral submissions.[~~372~~412] No reasonable Trial Chamber could conclude that this report established that General Ojdanić knew the VJ was involved in the movement of the civilian population. The Trial Chamber's irrational approach is highlighted by the fact that it noted a VJ Combat Report dated 24 March 1999, which General Ojdanić did receive, "indicated that the displaced people were being directed by the VJ to stay in Kosovo."[~~373~~413]

Targeting male Kosovo Albanians (Exhibit 3D846)

The Trial Chamber relied upon a Supreme Command Staff Combat Report in holding that "[o]n 11 May 1999 Ojdanić reported to Milošević and *inter alios* Serbian President Milutinović that the VJ had captured around 600 Kosovo Albanian men from the villages of Dvorane, Ruhot, and Nabrde, and 'directed' around 10,000 civilians to the towns of Peć/Peja and Klina."[~~374~~414] The Trial Chamber considered that this was "indicative of the approach of the VJ and MUP of targeting male Kosovo Albanians,

[~~369~~409] This is particularly true in light of other evidence that demonstrated that Ojdanić urged the population to remain in their homes (see below) and that he and the General Staff viewed the movement of the population as a KLA tactic to foster a humanitarian crisis and international intervention (see below).
[~~370~~410] TJ [3/566]
[~~371~~411] T.16545
[~~372~~412] T.27513
[~~373~~413] TJ [3/566]
[~~374~~414] TJ [3/570]

irrespective of whether they were KLA members or not."[~~375~~415] The Trial Chamber misinterpreted this exhibit, which was not put to any witnesses.

The Trial Chamber failed to consider whether the prosecution had proven that the population movement was without grounds permitted under international law. The towns of Pec and Klina are next door to the villages of Dvorane, Ruhot and Nabrde and the area was in the theatre of combat operations. There was no suggestion that the displaced people could not return once combat operations had ceased. Indeed, relative to those villages, Klina is located further into Kosovo, rather than towards Albania; this militates against the suggestion that General Ojdanić knew that people were being forcibly expelled from Kosovo rather than being temporarily removed from combat areas.

Manifestly unreasonable weight give to Drewienkiewicz's press statement (Exhibit P2542)

Exhibit P2542 was admitted into evidence through Drewienkiewicz, a prosecution witness. Drewienkiewicz was Chief of Operations and Deputy Head of the KVM.[~~376~~416] Exhibit P2542 is a four page document which may or may not have been a speaking note used by Drewienkiewicz at some form of press conference:

> 17 Q. Thank you. Now, I'd like to show you the next exhibit on our list
> 18 which is P2542. You might remember this document while we are getting it
> 19 up. It's -- I believe it's a press statement that you gave or your note
> 20 for a statement you gave after your meeting with the foreign secretary is
> 21 now [indiscernible]. Is that correct?
> 22 A. Yes, that is correct.
> 23 Q. In this briefing, if we look at pages -- at the bottom of page 3
> 24 or maybe we can just go to the last page, actually. Sorry.
> 25 There you refer to some numbers of refugees. Am I correct that
>
> 1 Kstands for kilo, a thousand?
> 2 A. Yes, that's correct. We were at this stage measuring refugees in
> 3 thousands. We had -- obviously when we said 7.000 we had seen 7.000.
> 4 Q. So you also consider these refugee numbers as being a correct
> 5 reflection of what was going on on the ground?
> 6 A. Yes.
> 7 Q. Did you return to Kosovo later on in 1999?
> 8 A. Yes. I accompanied the NATO force when it re-entered Kosovo on

[~~375~~415] TJ [3/570]
[~~376~~416] TJ [2/1019]

D-Day. [377][417]

This was the only time that Exhibit P2452 was referred to at trial. There was no evidence of its provenance or, crucially, its distribution. The prosecution failed even to establish that Drewienkiewicz actually delivered the entire contents of his speaking note.

In its closing brief, the prosecution placed emphasis upon Exhibit P2542 and its date in seeking to establish General Ojdanić's knowledge:

> "On 1 April 1999, Drewienkiewicz gave a press statement on crimes committed against Kosovo Albanian civilians (deportation, theft, looting, property damage). He noted that Podujevo was "almost deserted", and stated that around 1500 women, children, old and infirm were put on a train in Priština and taken south. They were told by Serb forces, "Macedonia is that way [...] do not come back or you will be killed." He also reported that 6,000-8,000 refugees entered Macedonia the previous day, 50,000 refugees were waiting to cross the border and that on that day, another 7,000 refugees arrived by train. He added that these refugees were lucky as they had escaped."[378][418]

The prosecution did not put Exhibit P2542 to *any* defence witnesses, or indeed any other prosecution witnesses, who might have been able to give important evidence about its provenance, distribution or crucially whether General Ojdanić was aware of its contents.

Nevertheless, in its Trial Judgment the Trial Chamber placed great emphasis upon Exhibit P2542, citing it on 10 occasions (three times in relation to General Ojdanić).[379][419]

> "In relation to displaced people and crimes being committed in Kosovo, Drewienkiewicz gave a press statement on 2 April 1999 at the latest. He reported large numbers of displaced Kosovo Albanians arriving at the borders, and conveyed reports of widespread crimes committed by the VJ and MUP, including deportation from Kosovo. He stated that 6,000 to 8,000 displaced Kosovo Albanians had left for Macedonia the day before and 7,000 were seen leaving on a train that day, along with 50,000 more waiting to cross the border. He specifically referred to crimes by FRY/Serbian forces committed against Kosovo Albanians and their property in Peć/Peja and Prizren, and

[377][417] T 7815 - 7816 (4 December 2006).

[378][418] Prosecution Closing Brief, para. 801). The prosecution also relied upon Exhibit P2542 in relation to *Sainovic*: para. 708.

[379][419] See TJ [3/567, fn 1218]; [3/597, fn 1438]; [3/625, fn 1503] in relation to General Ojdanić. See also TJ [3/754, fn 1923]; [3/754, fn 1924]; [3/775, fn 1973]; [3/853, fn 2169]; [3/855, fn 2175], [3/855, fn 2177]; [3/855, fn 2178] in relation to Generals Pavković and Lazarevic.

> "systematic looting" and the forcible removal of Kosovo Albanians from Priština/Prishtina."[~~380~~420]

The Trial Chamber then, without further evidence, concluded:

> The Intelligence Administration was charged with informing Ojdanić of such accounts, as described in Section VI.A. Given the relevance of the topic and Drewienkiewicz's involvement in Kosovo prior to the NATO air campaign, the Chamber is satisfied that this press release was provided to Ojdanić.[~~381~~421]

The Trial Chamber further relied upon Exhibit P2542 to establish the following:

> "Ojdanić was informed of the "systematic looting" and the exodus of Kosovo Albanians from Priština/Prishtina, which the Chamber has found to have been an organised process, carried out by VJ and MUP forces, involving thousands of Kosovo Albanians."[~~382~~422]

The Trial Chamber further relied upon Exhibit P2542 in holding that:

> "From the opening days of the conflict in 1999, Ojdanić knew of MUP and VJ involvement in the movement of Kosovo Albanians, and that this involved criminal acts by VJ and MUP forces including forcible displacement."[~~383~~423]

The Trial Chamber therefore relied upon the contents of Exhibit P2542 in order to establish that General Ojdanić knew about the indictment crimes of forcible displacement, above and beyond either (i) any general knowledge that the population was moving to escape the conflict or (ii) knowledge of specific instances of isolated crimes committed by members of the VJ in Kosovo.

However, there was no evidence to establish that the Intelligence Administration actually monitored Drewienkiewicz's press statement. Contrary to the above-quoted assertion, section VI.A of the Trial Judgment does not contain an explanation of the operation of the Intelligence Administration such as to establish that it would have monitored a press statement made by a former KVM officer. Crucially, beyond the Trial Chamber's sheer speculation that Drewienkiewicz's press statement would have been provided to General Ojdanić because of its author and topic, there was no evidence that General Ojdanić knew anything about it. Indeed, the preponderance of the evidence shows that it General Ojdanić was not aware of it: none of the relevant

[~~380~~420] TJ [3/567]
[~~381~~421] TJ [3/567]
[~~382~~422] TJ [3/597]fn 1438
[~~383~~423] TJ [3/625], also citing 3D802 (General Staff Combat Report, 28 March 1999), p. 4.

General Staff reports from early April 1999 make any reference to it, either express or implied.[384][424]

If the prosecution sought to rely upon Drewienkiewicz's press statement in order to establish the proposition that General Ojdanić had knowledge of its contents, that proposition should have been put to important witnesses from the General Staff. Neither the prosecution nor the Trial Chamber asked a single witness from the General Staff – and there were 22 whether they were aware of Drewienkiewicz's press statement. For example, Krga testified on General Ojdanić's behalf. He was the head of the Intelligence Administration at the relevant time. The prosecution completely failed to put Exhibit P2542 to him or any related proposition.

Therefore, the Trial Chamber's conclusion that Exhibit P2542 serves to establish General Ojdanić's knowledge was not tested at trial and is inherently unreliable. No reasonable Trial Chamber would have relied upon Exhibit P2542 and permitted such weak and unreliable evidence to provide any basis to infer General Ojdanić's knowledge of forcible displacements.

In relying upon Exhibit P2542 the Trial Chamber erred in law or, alternatively, adopted an approach to the evidence that no reasonable Trial Chamber would adopt. The Trial Chamber's reliance upon Exhibit P2542, combined with its other errors elsewhere, undermines its findings as to General Ojdanić's knowledge.

Manifestly unreasonably weight given to the May 1999 indictment (Exhibit P968)

General Ojdanić was initially indicted by this Tribunal towards the end of May 1999. In its closing brief, the prosecution asserted that the initial indictment put General Ojdanić on notice of the crimes alleged therein:

> "On 24 May 1999 after the ICTY Indictment against Milošević *et. al,* was made public. Ojdanić was put on notice of the charges against him, the specific crimes being alleged and their widespread nature. These charges overlap with those in the Indictment in the present case."[385][425]

[384][424] *See* the General Staff Briefings of 1 April 1999 (3D719); 3 April (3D721); 4 April (3D722). See also the Intelligence Administration Reports of 1 April 1999 (3D906); 3 April (3D911) and (3D882); 4 April (3D913).
[385][425] Prosecution Closing Brief, para. 802.

> "Following the meeting on 17 May 1999, Ojdanić sent Gajić and Vasiljević to Kosovo to investigate the crimes. However, they reported on only 42 crimes committed by the VJ and the MUP. This figure is significantly lower than indicated by the widespread and systematic nature of the serious crimes alleged in the *Prosecutor v. Slobodan Milošević et al*."~~386~~426

The prosecution did not put Exhibit P968 to *any* defence witnesses, or indeed any prosecution witnesses (such as Vasiljević) who might have been able to give important evidence about whether or not General Ojdanić was in fact on notice of the specific contents of the original indictment against him.

Nevertheless, in its Trial Judgment the Trial Chamber placed great emphasis upon Exhibit P968, citing it on seven occasions (four times in relation to General Ojdanić).~~387~~427 The Trial Chamber relied upon Exhibit P968 as establishing General Ojdanić's knowledge of forcible displacements:

> The fact that Ojdanić was informed of allegations of VJ involvement in forcible displacements and other crimes in the first indictment against him, but did not take any actions specifically in relation to these allegations, supports the contention that he was already aware of them. These forcible displacements included several discussed in Section VII above, which the Chamber found to have been committed by VJ and/or MUP forces, those being from Peć/Peja town and out of Kosovo on 27 and 28 March, from Pirane/Pirana in Prizren in late March, from Đakovica/Gjakova town starting in April and continuing into May, from Prilepnica/Përlepnica in Gnjilane/Gjilan on 13 April, from Sojevo/Sojeva in Uroševac/Ferizaj in April, from Celina in Orahovac/Rahovec on 25 March, and the shelling of Turićevac/Turiçec in late March and April.~~388~~428

The Trial Chamber further relied upon Exhibit P968 as establishing General Ojdanić's knowledge of Indictment crimes in Priština:

> "Ojdanić was also informed of the VJ involvement in the forcible displacement from Priština/Prishtina starting in April by the original indictment against him."~~389~~429

~~386~~426 Prosecution Closing Brief, para. 839.
~~387~~427 See TJ [3/595, fn 1432]; [3/596, fn 1437]; [3/597, fn 1438]; [3/625, fn 1506] in relation to Ojdanić. See TJ [3/453, fn 991]; [3/755, fn 1927]; [3/766, fn 1955] in relation to Sainovic and Pavković.
~~388~~428 TJ [3/596]
~~389~~429 TJ [3/597, fn 1438]

In holding that General Ojdanić possessed the requisite *mens rea* for aiding and abetting, the Trial Chamber again relied upon Exhibit P968:

> He was made aware of allegations of the widespread nature of such criminal activity, including forcible displacements, through internal sources of information, such as briefings of the Supreme Command Staff, and through external sources, such as through the publication of the first indictment against him, which specifically referred to the widespread campaign of forcible displacements being conducted by VJ and MUP forces in Kosovo, and named a number of specific sites at which these forcible displacements were perpetrated.[~~390~~430]

The Trial Chamber therefore relied upon the fact of the initial indictment against General Ojdanić and the detailed contents of Exhibit P968 as establishing General Ojdanić's knowledge of the widespread campaign of forcible displacements.

However, there was no evidence to establish that General Ojdanić had any knowledge of the Indictment beyond mere knowledge that it had been issued. Indeed, there was no evidence that it had even been translated into a language he could understand. Establishing that General Ojdanić was aware that an indictment had been issued against him – in circumstances where (rightly or wrongly) it was described to him as "western propaganda" and intended to "stall peace initiatives"[~~391~~431] – falls short of establishing General Ojdanić's actual knowledge of the crimes alleged therein. Indeed, it is noteworthy that the indictment also names Milutinović, and it was established that he had seen the Indictment.[~~392~~432] Despite this, the Trial Chamber acquitted Milutinović because he was told: that crimes were being dealt with; or displacement had been caused by the KLA and NATO.[~~393~~433] The Trial Chamber's irrationally failed to apply the same standard to General Ojdanić.

For the Trial Chamber to be entitled to rely upon Exhibit P968 as establishing General Ojdanić's detailed knowledge of the crimes alleged therein, that proposition had to be put to relevant witnesses from the General Staff. However, there was no evidence that General Ojdanić actually knew of the contents of the Indictment.

[~~390~~430] TJ [3/625]
[~~391~~431] TJ [3/595]
[~~392~~432] TJ [3/267]
[~~393~~433] TJ [3/281]

A reasonable Trial Chamber might be able to conclude that the May 1999 indictment was relevant to the "had reason to know" standard under Article 7(3). No reasonable Trial Chamber could conclude that General Ojdanić actually knew of the contents of the May 1999 indictment – the standard for a conviction under Article 7(1).

No reasonable Trial Chamber could have placed such emphasis upon the original indictment in this case.

Insufficient weight given General Ojdanić's reaction to Vasiljević

On 13 May 1999 General Ojdanić was informed of details of crimes in Kosovo by Vasiljević. Vasiljević's evidence was that General Ojdanić seemed "very taken aback" by this information, and that he immediately telephoned Milošević to inform him that he had just received information concerning rapes and killings by VJ members, and organised a meeting with Milošević.[394]434 The Trial Chamber held that General Ojdanić had previously been informed of "numerous" crimes, including killings, being committed by VJ members, inter alia at a meeting on 4 May. The Trial Chamber concluded that General Ojdanić's reaction to Vasiljević did not indicate that he was learning of such criminal activity for the first time.[395]435

It was therefore established that General Ojdanić knew about numerous crimes in Kosovo, including murders and rapes. However, this does not establish that General Ojdanić knew that there was a general campaign directed against the Kosovo Albanian population. Indeed, the fact that General Ojdanić was "taken aback" by the individual crimes reported by Vasiljević – whether he was hearing of those types of crimes for the first time or not – was important evidence that he did not know of such a general campaign. The Trial Chamber simply dismissed the significance of Vasiljević's evidence in this regard. No reasonable Trial Chamber could adopt such an approach.

Unreasonable and unsubstantiated reliance upon General Ojdanić's daily meetings with Milošević

[394]434 TJ [3/573]
[395]435 TJ [3/573]

During the war, General Ojdanić met daily with Milošević to "clarify issues arising from combat reports that were sent in summary form to Milošević."[396436] This is routine practice for any military. However, the Trial Chamber relied upon the fact of these meeting as evidence that General Ojdanić was "aware of the general campaign of forcible displacements".[397437] There was no evidence that this was ever discussed by General Ojdanić and Milošević. No reasonable Trial Chamber would draw such an unsubstantiated conclusion.

Unreasonable weight given to General Ojdanić's knowledge of the "broad discriminatory context of the conflict"

The Trial Chamber relied upon a VJ General Staff evaluation of the security situation in Kosovo from February 1999 to establish that General Ojdanić was aware of the "broad discriminatory context of the conflict" and hence that General Ojdanić was aware of the general campaign of forcible displacements.[398438] The Appeals Chamber is invited to consider this document.[399439] It provides no basis to conclude that General Ojdanić was aware of a "discriminatory context". It provides no basis to conclude that General Ojdanić was aware of a general campaign of forcible displacement. No reasonable Trial Chamber could draw such a conclusion.

Conclusions

No reasonable Trial Chamber could conclude that the only reasonable inference was that General Ojdanić knew of a campaign against of terror, violence and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians. The Trial Chamber itself held that Pavković, a member of the joint criminal enterprise, minimised reports of crimes by VJ members that were sent to General Ojdanić and met with Milošević without informing General Ojdanić.[400440] General Ojdanić believed that the KLA planned a large-scale withdrawal of Kosovo Albanians from

[396436] TJ [3/487]; TJ [3/530]
[397437] TJ [3/625]
[398438] TJ [3/625]
[399439] 3D685 (VJ General Staff Evaluation of security-information and security threat to the FRY).
[400440] TJ [3/617]

Kosovo in order to precipitate a humanitarian crisis.[401441] The Trial Chamber failed to weigh that possibility when assessing General Ojdanić's knowledge.

Moreover, crucial evidence relied upon the Trial Chamber to establish General Ojdanić's knowledge crumbles upon analysis. To hold that General Ojdanić knew of a general campaign of forcible displacement, the Trial Chamber relied upon documents that General Ojdanić did not see and press statements that he did not hear.

Relief sought

General Ojdanić respectfully requests that the Appeals Chamber reverse the Trial Chamber's finding that the only reasonable inference was that he knew about a campaign of terror, violence and forcible transfer being carried out by VJ an MUP forces or the requisite *mens rea* of any principal or intermediary perpetrator. Accordingly, General Ojdanić requests that his convictions be overturned.

[401441] P929 (Minutes of the Collegium of the General Staff of the VJ for 9 April 1999), pp.33-4.

Ground 4(B): the Trial Chamber erred by failing to weigh adequately or at all acts whereby General Ojdanić sought to avoid expulsions, which cast reasonable doubt on the finding that he had the requisite *mens rea* to aid and abet deportation and forcible transfer

Error of fact which occasioned a miscarriage of justice

The Trial Chamber held that General Ojdanić "knew that his conduct assisted in the commission of [the Indictment] crimes.[~~402~~442] No evidence was cited in support of this conclusion; indeed it is the only mention in the entire Trial Judgment of whether General Ojdanić knew that his acts assisted the Indictment crimes. The Trial Chamber failed to weigh evidence whereby General Ojdanić sought to avoid crimes against Kosovo Albanian civilians. These acts strike reasonable doubt through the Trial Chamber's bare statement that General Ojdanić knew that his conduct assisted the Indictment crimes. No reasonable Trial Chamber, having considered this evidence, could conclude that General Ojdanić knew that his acts assisted forcible displacement.

The Trial Chamber's failure to consider facts which cast doubt on whether General Ojdanić knew that his acts assisted the Indictment crimes is revealed by its inconsistent description of the *mens rea* of aiding and abetting:

> At **TJ [1/93]** the Trial Chamber held that the mental element of aiding and abetting requires that the accused "intentionally performed an act **with the knowledge that such act** would lend practical assistance, encouragement, or moral support to the commission of a crime or underlying offence;" and that the accused "was aware of the essential elements of the crime or underlying offence for which he is charged with responsibility, including the mental state of the physical perpetrator or intermediary perpetrator."

> At **TJ [3/620]**, in relation to General Ojdanić specifically[~~403~~443], the Trial Chamber held that aiding and abetting requires that General Ojdanić "intentionally

[~~402~~442] TJ [3/628]

[~~403~~443] The Trial Chamber repeated its error at **TJ [3/921]** in relation to Lazarevic.

> provided [the] assistance and that he was aware of the essential elements of [the] crime or underlying offence, including the mental state of the physical or intermediary perpetrator."

The difference between these two descriptions is that the first requires knowledge on the part of the accused that his acts assist the underlying crimes, whereas on its face the second does not. The Trial Chamber erred in fact when considering General Ojdanić's responsibility by failing to weigh evidence which demonstrated that General Ojdanić did not know that his acts assisted the Indictment crimes. This evidence demonstrates that General Ojdanić thought that his acts assisted the fight against NATO and the KLA, whilst hindering any crimes.

For the Trial Chamber to be entitled to conclude that General Ojdanić *knew* that his acts assisted crimes, this must be the only reasonable inference available.[~~404~~444] An inference must be narrowly construed, and inferences based upon inferences should be rejected.[~~405~~445] The Appeals Chamber must consider whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime – General Ojdanić's knowledge that his acts assisted forcible displacements – was not proven.[~~406~~446]

General Ojdanić's challenge to the Trial Chamber's approach

The Trial Chamber inferred that General Ojdanić knew of the commission of forcible displacements in Kosovo.[~~407~~447] The Trial Chamber held that General Ojdanić's "reaction to this information amounted primarily to ordering adherence to international humanitarian law, relying on the continued operation of the military justice system, and dispatching information gathering missions by members of his Security Administration. Nonetheless, he continued to order the VJ to participate in military operations with the MUP in Kosovo, as discussed above."[~~408~~448] However, this does not establish that General Ojdanić knew that his acts were assisting the

[~~404~~444] *Vasiljević* AJ, para. 128; *Kristic* AJ, para. 41.
[~~405~~445] *Hadžihasanović* TJ, para. 309
[~~406~~446] *See Stakic* AJ, para. 219.
[~~407~~447] TJ [3/609]
[~~408~~448] TJ [3/610]

Indictment crimes. Moreover, the Trial Chamber failed to consider General Ojdanić's conduct as whole.

The Trial Chamber held that General Ojdanić was not a member of any joint criminal enterprise: he did not share the necessary intent. The Trial Chamber held that General Ojdanić's motivation was to "counter the perceived NATO and KLA threat, rather than a desire to prepare for a widespread campaign of forcible displacement in Kosovo."[409]449 There was no evidence that General Ojdanić's motivation changed and the Trial Chamber. There was no evidence that General Ojdanić knew that his acts were assisting forcible displacements.

The Trial Chamber erred by failing to consider General Ojdanić other actions, including those detailed in this Appeal Brief relevant to Ojdanic's *mens rea* as an accomplice. The Trial Chamber ignored Ojdanic's reaction to information of crimes in Kosovo. General Ojdanić orgnanised seminars in international humanitarian law.[410]450 He ensured that VJ volunteers were screen thoroughly.[411]451 He banned the operation of paramilitary groups in Kosovo.[412]452 As outlined above: he sought out information whenever he could; he made pleaded for Albanians to stay in Kosovo; he ordered investigations into crimes and advocated a state commission.

These actions strike reasonable doubt through any inference that General Ojdanić engaged the VJ in Kosovo knowing hat his acts assisted forcible displacement. A reasonable Trial Chamber could not exclude the reasonable inference that General Ojdanić did not know that his acts were assisting the Indictment crimes; rather he thought that his acts assisted the fight against the KLA and NATO whilst minimising the possibility of crimes against civilians. No reasonable Trial Chamber could find that General Ojdanić knew that his acts assisted forcible displacements. General Ojdanić's convictions for aiding and abetting must therefore be reversed.

Relief sought

[409]449 TJ [3/617]
[410]450 TJ [3/547]
[411]451 TJ [1/648]; [3/562-563]
[412]452 TJ [3/564]

General Ojdanić respectfully requests that the Appeals Chamber reverse the Trial Chamber's finding that he was aware that his acts assisted the Indictment crimes. Accordingly, General Ojdanić requests that his convictions be overturned.

Ground 4(C): the Trial Chamber erred by failing to properly address the times at which acquired knowledge of deportation and forcible transfer relative to the crimes for which he was convicted

Alleged error of fact which has occasioned a miscarriage of justice

The Trial Chamber further erred by failing to consider the point in time General Ojdanić learned about instances of crimes, or even "widespread criminal activity". It is a general principle of law that that *mens rea* and *actus reus* of an offence must be contemporaneous. For example, in *Naletilic* the Appeals Chamber held:

> "The principle of individual guilt requires that an accused can only be convicted for a crime if his mens rea comprises the actus reus of the crime. To convict him without proving that he know of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence… for a conduct to entail criminal liability, it must be possible for an individual to determine ex ante, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal."~~413~~453

Therefore, in *Krajisnik,* the Appeals Chamber held that the Trial Chamber had not made the necessary findings with respect to the JCE members' *mens rea* in relation to the expanded crimes:

> "The Trial Chamber did not find, however, at which point in time the leading members of the JCE became aware of the various expanded crimes. Similarly, there are no findings as to when the members of the local component became aware of the expanded crimes. In the absence of such findings, the Appeals Chamber as found that the Trial Chamber committed a legal error by convicting Krajisnik for the expanded crimes."~~414~~454

The *mens rea* basis for General Ojdanić's conviction for aiding and abetting was that he was "aware of the general campaign of forcible displacements that was conducted by

~~413~~453 *Naletilic* AJ, para. 114.
~~414~~454 *Krajisnik* AJ, para. 203.

the VJ and MUP throughout Kosovo during the NATO air campaign."[~~415~~455] General Ojdanić was consequently convicted of assisting crimes of forcible displacements which occurred from 24 March up to 25 May 1999. Set out in the Appendix is a Table compiled for the convenience of the Appeals Chamber, summarising the dates of the Indictment crimes for which General Ojdanić was convicted.

A crucial question inadequately addressed by the Trial Chamber was the point in time General Ojdanić acquired knowledge of the "general campaign of forcible displacements". Even according to the Trial Chamber's own *mens rea* standard, it was only from that point in time could General Ojdanić's conduct could be considered criminal. General Ojdanić could only be convicted of aiding and abetting crimes committed from then onwards. No reasonable trial chamber could convict General Ojdanić of crimes committed before he acquired such knowledge.

General Ojdanić has challenged the evidence relied upon by the Trial Chamber to establish his knowledge of any general campaign of forcible displacement. Even so, the earliest piece of evidence the Trial Chamber could find to establish *any* knowledge of forcible displacement (as opposed to individual crimes) was Drewienkiewicz's press statement dated 2 April 1999. The Trial Chamber's reliance upon this exhibit is fundamentally flawed, as discussed above. Perhaps alert to the paucity of direct evidence of General Ojdanić's *mens rea,* the Trial Chamber stretched its reliance upon this exhibit even further, asserting that it established General Ojdanić's knowledge of forcible displacement of civilians from Priština/Prishtina and holding that because General Ojdanić "did not take any actions specifically in relation to this crime" it supported "the contention that he was already aware of it".[~~416~~456]

If General Ojdanić's challenge to this exhibit succeeds, the Trial Chamber's finding that General Ojdanić was "already aware" of forcible displacements from Priština/Prishtina falls away. Even if General Ojdanić's challenge to this exhibit does not succeed, it does not establish knowledge of a "general campaign" of forcible displacements throughout Kosovo. Accordingly, General Ojdanić's convictions in relation to other crime site prior to that date must still be reversed.

[~~415~~455] TJ [3/625]
[~~416~~456] TJ [3/597]

Similarly, in relation to the May 1999 Indictment, the Trial Chamber held that General Ojdanić's failure to "take actions specifically in relation to these allegations, supports the contention that he was already aware of them."[~~417~~457] The Trial Chamber held that "[i]n response to the issuance of the first indictment, the General Staff/Supreme Command Staff reported that western propaganda continued to be spread, but did not refer to any special enquiries or commissions undertaken to ascertain the veracity of the allegations set out in that indictment."[~~418~~458]

General Ojdanić has challenged the Trial Chamber's finding that General Ojdanić knew of the contents of the May 1999 Indictment, compared to knowledge of the mere fact that it had been issued. Therefore, the indictment provided no basis for the conclusion that General Ojdanić already knew of a general campaign forcible displacement throughout Kosovo. However, even if General Ojdanić's challenge to the May 1999 Indictment is unsuccessful, it was incorrect to hold that General Ojdanić failed to take actions in relation to allegations of crimes against civilians. General Ojdanić ordered that prosecutions of violations of the provisions of international law were to be the **top priority** of the military justice system.[~~419~~459] Further, by criticising General Ojdanić for not referring to any special commissions, the Trial Chamber unreasonably ignored its own holding that on 17 May 1999 General Ojdanić had proposed to Milošević a state commission to establish responsibility for crimes in Kosovo.[~~420~~460] Similarly, after the war General Ojdanić arranged a meeting between Farkaš and the Head of the RDB, Radomir Marković, to discuss a common approach to the investigation of crimes, which took place on 9 July 1999.[~~421~~461]

Therefore, no reasonable Trial Chamber could hold that General Ojdanić failed to respond to allegations of crimes. No reasonable Trial Chamber could hold that a failure to establish a commission in response meant that General Ojdanić already knew of those crimes. No reasonable Trial Chamber could hold that the only

[~~417~~457] TJ [3/596]
[~~418~~458] TJ [3/595]
[~~419~~459] TJ [3/627] fn 1513. *See* 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999).
[~~420~~460] TJ [3/576]
[~~421~~461] TJ [3/608]; [3/617]

reasonable inference was that General Ojdanić was already aware of the Indictment crimes.

Other than Drewienkiewicz's press statement and the May 1999 Indictment, the Trial Chamber relied upon General Ojdanić's attendance at meetings with MUP, VJ and FRY leaders on 4, 16 and 17 May 1999. However, these meetings show that General Ojdanić was trying to tackle criminality. Further, the Trial Chamber unreasonably failed to consider that these meetings do not establish knowledge of earlier crimes (for example in March and April) at the time necessary to make General Ojdanić criminally responsible for those crimes.

The Trial Chamber also relied upon the regular VJ command and communication system. General Ojdanić avers that this did not reveal any general campaign of forcible displacements. The Trial Chamber itself noted that Pavković sought to minimise reports of criminal activity by VJ members. The reasonable inference remained that this source of information did not provide General Ojdanić with the requisite knowledge at the relevant time.

Finally, the Trial Chamber relied upon "Ojdanić's general knowledge of the widespread displacement of Kosovo Albanians in the course of VJ operations." The Trial Chamber cited no evidence to support such a proposition. In any event, the reasonable inference remained, no matter if or when General Ojdanić acquired such knowledge, that General Ojdanić considered that civilians were either evacuated while combat operations against the KLA continued, or left Kosovo for other reasons (such as direct orders from the KLA).

Conclusions

The Trial Judgment is vague as to the point in time when General Ojdanić acquired knowledge of the general campaign of forcible displacements. The Trial Chamber sought to infer that General Ojdanić was aware of Drewienkiewicz's press statement and the contents of the May Indictment. The Trial Chamber then further inferred that General Ojdanić's supposed inaction means that he was already aware of the campaign of forcible displacements. This chain of inferences is an inadequate basis to

hold beyond reasonable doubt that General Ojdanić knew of the Indictment crimes from March 1999. No reasonable Trial Chamber could conclude that General Ojdanić had the requisite knowledge at the relevant time.

Relief sought

General Ojdanić respectfully requests that the Appeals Chamber reverse the Trial Chamber's finding that he knew about the Indictment crimes at the time necessary to make his conduct criminal. Accordingly, General Ojdanić requests that the Appeals Chamber reverse his convictions.

VI. GROUND FIVE: THE TRIAL CHAMBER ERRED BY FAILING TO STAY PROCEEDINGS UNTIL THE DEFENCE COULD INVESTIGATE IN KOSOVO

Introduction

Unfortunately, General Ojdanić was unable to mount an adequate defence because he was unable to investigate the crimes in Kosovo for which the prosecution alleged that he bore responsibility. General Ojdanić repeatedly and consistently protested about this unfairness and the prejudice which it caused him. On three occasions he requested that his trial be stayed until his defence team could properly investigate in Kosovo.[~~422~~462] On each occasion, the Trial Chamber denied his request.[~~423~~463] The Trial Chamber erred by insisting on an expeditious trial over a fair one. General Ojdanić was thus convicted of crimes that his defence team was unable to investigate by the most basic methods: visiting the sites, gathering information and insight, and speaking to potential witnesses who could challenge the prosecution's version of events.

The complex lengthy and history to this issue is set out in *General Ojdanić's Third Motion for Stay of Proceedings*[~~424~~464] and the Trial Chamber's *Decision on Ojdanić's Third Motion for Stay of Proceedings*.[~~425~~465] Therefore, the relevant facts are only summarised here.

The Trial Chamber's First Decision

[~~422~~462] *General* Ojdanić*'s Motion for Stay of Proceedings* (1June 2006); *General* Ojdanić*'s Second Motion for Stay of Proceedings* (31 July 2006); *General* Ojdanić*'s Third Motion for Stay of Proceedings* (23 July 2007) (**"Third Motion"**).

[~~423~~463] *Decision on* Ojdanić *Motion for Stay of Proceedings* (9 June 2006) (**"First Decision"**); *Decision on General* Ojdanić*'s Second Motion for Stay of Proceedings* (19 October 2006) (**"Second Decision"**); *Decision on Third* Ojdanić *Motion for Stay of Proceedings* (27 August 2007) (**"Third Decision"**). .

[~~424~~464] Third Motion, paras. 2-44.

[~~425~~465] Third Decision, paras. 1 – 29.

General Ojdanić's defence team requested access to travel to Kosovo to view alleged crime scenes and interview witnesses on 6 December 2004.[426][466] On 8 April 2005, UNMIK advised that, due to the dangerous security situation in Kosovo, a visit could not be accommodated at that time.[427][467]

UNMIK agreed to facilitate a mission in May 2006. This trip was undertaken. However, during the mission, Ojdanić's defence team and UNMIK personnel were attacked when their convoy was surrounded in Mala Krusa/Krushe e Vogel in the Prizren Municipality on 25 May 2006.[428][468] It was a life threatening attack: three UNMIK policemen and more than 30 citizens were injured. General Ojdanić's defence team narrowly escaped injury, but their interpreter was injured and hospitalized.[429][469] Consequently, the mission was aborted.[430][470] UNMIK withdrew political clearance for General Ojdanić's visit, which prohibited any future visit.[431][471]

General Ojdanić's trial was then due to start on 10 July 2006. On 2 June 2006, General Ojdanić filed his *Motion for Stay of Proceedings* until his defence team was able to safely investigate in Kosovo.[432][472] The Trial Chamber denied General Ojdanić's request, holding that while UNMIK had been unable to provide the security necessary for the team to conduct and complete its investigations, this did not mean that UNMIK would continue indefinitely to be able to do so. The Trial Chamber requested that UNMIK take all reasonable and necessary measures to assist Defence teams in their investigations in Kosovo for the preparation of their defence.[433][473]

The Trial Chamber's Second Decision

There followed thereafter a period of back and forth between General Ojdanić's defence team and UNMIK, with interventions from the Trial Chamber, to try to facilitate access to Kosovo. On 28 July 2006, an UNMIK representative requested new information from General Ojdanić's team:

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[426][466] Third Decision, para. 2.
[427][467] Third Decision, para. 2.
[428][468] Third Decision, para. 3.
[429][469] Third Motion, para. 9.
[430][470] Third Decision, para. 3.
[431][471] First Motion, Annex G.
[432][472] Third Decision, para. 5.
[433][473] Third Decision, para. 6.

> "UNMIK will require detailed information on what the intentions of the team are in each of the locations, i.e. are the members of the team intending to walk around on site, take photographs, do they intend to enter any premises, how much time will be spent in each location etc. Note: we would like to have your confirmation that you do not intend to interview any witnesses during this visit."~~434~~474

On 31 July 2006, when the prosecution was about to begin calling its crime-base witnesses, General Ojdanić filed his *Second Motion for Stay of Proceedings*. On 30 August 2006, UNMIK indicated that it would be able to facilitate visits to six out of eleven locations requested by General Ojdanić's team. UNMIK set out stringent conditions in relation to the six locations, and stated that it was unable at that time to facilitate visits to four of the requested sites.~~435~~475

On 6 September 2006, after careful consideration, General Ojdanić's defence team responded to UNMIK that the restrictions made a visit to Kosovo of little value, and did not justify the substantial risk to the safety of defence team members.~~436~~476 On 19 October 2006, the Trial Chamber denied *Ojdanić's Second Motion for Stay*.

The Trial Chamber's Third Decision

On 15 March 2007, anticipating a break in the trial upon the scheduled conclusion of the prosecution's case in late March 2007, the Ojdanić team contacted UNMIK again. There followed a further period of back and forth between General Ojdanić's defence team and UNMIK, with interventions from the Trial Chamber.

On 23 July 2007, General Ojdanić filed his *Third Motion for Stay of Proceedings*. On 27 August 2007, the Trial Chamber denied this motion, holding that UNMIK had made sufficient efforts to provide the defence with adequate time and facilities for the preparation of its defence. The Trial Chamber held that UNMIK had taken all necessary and reasonable efforts to facilitate a visit to Kosovo.~~437~~477

~~434~~474 Second Motion, para. 14.
~~435~~475 Third Decision, para. 16.
~~436~~476 Third Motion, para. 36.
~~437~~477 Third Decision, para. 41.

The Right to a Fair Trial

Article 20(1) of the Statute of the Tribunal states:

> "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

Article 21 of the Statute provides that "[a]ll persons shall be equal before the International Tribunal" and that an accused shall be entitled to the following minimum guarantee, among others:

> "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

The Appeals Chamber has held that the principle of equality of arms between the accused and the prosecution is a component of the right to a fair trial.[438478] The principle of equality of arms goes to the heart of the fair trial guarantee.[439479] This obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.[440480] While equality of arms does not mean equality of resources, each party must have a reasonable opportunity to defend its interests under conditions which do not put him under a substantial disadvantage vis-à-vis his opponent.[441481]

Cassesse has explained that "equality of the parties is an essential ingredient of the adversarial structure of proceedings, based on the notion of the trial as a contest between two parties. Under this approach, it is indispensible for both parties to the proceedings to have the same rights; otherwise, there is no fair fight between the two 'contestants', and the spectators will not be convinced of the outcome."[442482]

[438478] *Rutaganda* AJ, para. 44; *Kayishema & Ruzindana* AJ, para. 67.
[439479] *Tadić* AJ, para. 44
[440480] *Kordic & Cerkez* AJ, paras. 175-76; *Kayishema & Ruzindana* AJ, para. 69; *Prosecutor v Milutinovic et al*, No. IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003), para. 23.
[441481] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.9, *Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents* (4 September 2008), para. 29
[442482] *Cassesse* (2008), p. 384.

In assessing an equality of arms challenge by an accused, a judicial body must ask two basic questions: (1) was the Defence put at a disadvantage *vis-à-vis* the Prosecution, taking into account the "principle of basic proportionality" and (2) was the accused permitted a fair opportunity to present his case.[~~443~~483]

Ojdanić's right to a fair trial was violated

The Trial Chamber found that the VJ participated in a widespread campaign of forcible displacements. However, General Ojdanić was not given the opportunity to find crucial witnesses, particularly Kosovo Albanian witnesses remaining in Kosovo, or obtain other material from the field which could help to clarify the circumstances of VJ operations in Kosovo and demonstrate that the VJ was not part of any organised campaign of forcible displacements. General Ojdanić's defence team was prevented from visiting crime sites and speaking to locals who may have been able to offer crucial insight into the circumstances surrounding the alleged crimes, even if they were unwilling to testify.

General Ojdanić was able to call witnesses from General Staff and other VJ witnesses. They testified that there was no plan in the General Staff to launch any campaign targeted at Kosovo Albanian civilians. Despite this unanimous evidence, the Trial Chamber inferred from the crime base that a widespread campaign of forcible displacement took place. Ojdanić was prevented from seeking out potentially crucial evidence to counter that inference – witnesses who may have been able to demonstrate that the VJ did not operate as part of such a campaign but rather targeted the KLA and NATO.

The prosecution had access to all of the crimes scenes, interviewed hundreds of witnesses in Kosovo, and was unhindered in its opportunity to investigate. By contrast, General Ojadnic's defence team was attacked when it tried to conduct the most basic trial preparation – viewing the scenes of crimes and locating and interviewing potential

[~~443~~483] *Stakic* AJ, para. 149

witnesses relevant to the crime base. The Trial Chamber started General Ojdanić's trial and permitted the prosecution to call witnesses when General Ojdanić's team could not properly cross-examine them. The Trial Chamber forced General Ojdanić to present his case when he had not been able to seek out witnesses in Kosovo. General Ojdanić did not have the opportunity to fairly present his case.

General Ojdanić's rights were breached despite UNMIK's efforts

In the *Orić* case, the Appeals Chamber held that the principle of equality of arms was violated by restrictions imposed by the Trial Chamber on the number of witnesses and time allowed to the defence.[~~444~~484] The violation of equality of arms was far more serious General Ojdanić's case: he was prevented from identifying and locating witnesses to the crimes in the first place. He was not even in a position to call such witnesses, let alone in proportion to the number of witnesses called by the prosecution. He was unable to seek valuable insight from witnesses on the ground (even on an off the record basis).

The issue of the scope of the doctrine of equality of arms was addressed by the Appeals Chamber in the *Tadić* case. There, the accused claimed that his right to a fair trial was breached by the failure of the government of Republika Srpska to cooperate with the defence. [~~445~~485] The Appeals Chamber acknowledged that it "can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings." It ruled that the failure of the defence to request this remedy precluded relief on appeal.[~~446~~486] General Ojdanić sought to have his trial stayed on three separate occasions so is entitled to relief on appeal.

[~~444~~484] *Prosecutor v Orić,* No. IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005),
para. 9.
[~~445~~485] *Tadić* AJ, paras. 29-36.
[~~446~~486] *Tadić* AJ, para. 55

The *Tadić* Appeals Chamber also considered the fact that the Tribunal had limited authority to compel a State to cooperate with it, and that the principle of equality of arms did not extend to "an external, independent entity" not subject to the control of the court.[447][487] At the ICTR, the Appeals Chamber likewise held in the *Kayishema & Ruzindana* case that the failure of the government of Rwanda to cooperate with the defence was not sufficient to establish inequality of arms.[448][488]

However, these cases are distinguishable from General Ojdanić's case: unlike Republika Srpska and Rwanda, the territory of Kosovo was administered by the United Nations, the same body which administers this Tribunal. In General Ojdanić's case, the same United Nations which tried and convicted General Ojdanić was responsible for security in the areas to which his defence team needed access. Under these circumstances, the Trial Chamber cannot shift the responsibility for a fair trial away from its own institution—the United Nations. Instead, given UNMIK's inability to guarantee security for basic defence investigation, the Trial Chamber erred by failing to stay General Ojdanić's Trial.

The Trial Chamber held that UNMIK made "reasonable efforts" to accommodate the Ojdanić team's requests to investigate Kosovo. The Trial Chamber held that UNMIK had to balance its obligation to cooperate with the Tribunal with its other obligations under UNSCR 1244.[449][489] However, the circumstances in which UNMIK operated were an irrelevant consideration: Ojdanić's right to a fair trial by a United Nations Tribunal should not have been balanced or downgraded because of UNMIK's obligations under UNSCR 1244. The Trial Chamber blurred the issue: Ojdanić was unable to adequately investigate and call crucial witnesses in his favour because of the inability of the body trying him to ensure that he could properly test the evidence against him. Under this approach there was no "fair fight between two contestants." The answer to UNMIK's difficulties with guaranteeing security was not reduce Ojdanić's right to a fair trial, but rather to grant a stay.

The Trial Chamber held that the cooperation "between UNMIK, the Tribunal, and the Defence is a developing, dynamic process" from which the Ojdanić defence

[447][487] *Tadić* AJ,para. 49-50.
[448][488] *Kayishema & Ruzindana* AJ, paras. 72-73.
[449][489] Third Decision, para. 41.

"unilaterally withdrew".[450][490] In fact, for three years the Ojdanić defence team repeatedly attempted to investigate in Kosovo, risking the lives of its members. It only refused to risk the lives of members of its defence team by returning to Kosovo when UNMIK placed such restrictions on the meeting of potential witnesses that it appeared that no useful information could be obtained in such circumstances.

General Ojdanić's trial started and witnesses were called who his Counsel were unable to properly challenge. The right to cross-examine witnesses is a fundamental right recognised under international human rights law.[451][491] In relation to the crime base evidence in General Ojdanić's trial, that right was rendered illusory. Cross-examination of prosecution "crime base" witnesses proceeded when Ojdanić's Counsel was unable to investigate or understand the situation on the ground.

In 2007, when it was abundantly clear that the security situation remained too dangerous, the Ojdanić team abandoned its persistent attempts to investigate in Kosovo. Subsequent events proved that this assessment was right:

In the *Haradinaj et al* trial, completed in January 2008, the Trial Chamber itself noted that "the difficulty in obtaining evidence was a prominent feature in this trial,"[452][492] and that "a high proportion of prosecution witnesses in this case expressed a fear of appearing before the Trial Chamber to give evidence."[453][493]

The Trial Chamber specified that:

> "...throughout the trial, the Trial Chamber encountered significant difficulties in securing the testimony of a large number of witnesses. Many witnesses cited fear as a prominent reason for not wishing to appear before the Trial Chamber to give evidence. The Trial Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe. This was due to a number of factors specific to Kosovo/Kosova, for example, Kosovo's/Kosova's small communities and tight family and community networks which make guaranteeing anonymity difficult. The parties themselves agreed that an unstable security situation existed in Kosovo/Kosova that was particularly unfavourable to witnesses."[454][494]

[450][490] Second Decision, para. 10, cited in the Third Decision, para. 21.
[451][491] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.2, *Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross Examination by Defence and Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief* (4 July 2006) at p. 2
[452][492] *Haradinaj* TJ, para.28.
[453][493] *Haradinaj* TJ, para.22.
[454][494] *Haradinaj* TJ, para.6.

The Office of the Prosecutor has appealed from the judgment in *Haradinaj* on the grounds that it did not receive a fair trial. The Office of the Prosecutor contends that it was denied a fair trial when the Chamber, notwithstanding the prevailing circumstances of intimidation and fear of witnesses, failed to take reasonable steps to secure the testimony of crucial witnesses."[~~455~~495] If the prosecution contends that it, with the weight of the international community and its substantial resources behind it, could not get witnesses in Kosovo to testify on behalf of Serbs, how could General Ojdanić's Serbian defence team possibly be expected to do the same?

Relief sought

The Trial Chamber held that General Ojdanić was responsible for the Indictment crimes because, among other things, he did not investigate them sufficiently. However, the Trial Chamber held that General Ojdanić's trial was fair despite his defence team's inability to investigate those same crimes.

General Ojdanić trial was unfair by virtue of being placed at a substantial disadvantage to the prosecution and being deprived of the opportunity to present his case in full. A fair trial was not possible, despite the efforts of the Trial Chamber to facilitate investigations. The Trial Chamber erred by declining to stay proceedings on three separate occasions. Therefore, General Ojdanić requests that his convictions be overturned.

[~~455~~495] Prosecution Appeal Brief in *Haradanaj,* para. 1.

VII. GROUND SIX: THE TRIAL CHAMBER ERRED BY SYSTEMATICALLY RELYING UPON EXHIBITS TO ESTABLISH PROPOSITIONS WHICH WERE NOT PUT TO IMPORTANT WITNESSES

Withdrawal of ground

General Ojdanić hereby withdraws this ground of appeal.

VII. GROUND SEVEN: THE TRIAL CHAMBER IMPERMISSIBLY EXPANDED THE DEFINITION OF CRIMES AGAINST HUMANITY

Introduction

It is well established that the *chapeau* elements of crimes against humanity under Article 5 of the Statute require knowledge of the attack on the civilian population and knowledge that the perpetrator's acts are part of that attack.[456496] This requirement of knowledge is in addition to the requisite *mens rea* of the underlying offence (such as deportation and murder) and serves to distinguish crimes against humanity from domestic crimes.[457497]

General Ojdanić contends that the Trial Chamber erred by weakening the knowledge requirement under Article 5, thereby expanding the definition of crimes against humanity. In particular, General Ojdanić contends that the Trial Chamber erred by:

finding that the knowledge requirement could be satisfied by evidence that the person "took the risk" that his acts were part of the attack (recklessness standard);

finding that some "intermediary perpetrator" could satisfy the knowledge requirement, even where the physical perpetrator and the accused lacked knowledge that the act was part of the attack;

finding that any member of a joint criminal enterprise could satisfy the knowledge requirement; and

finding the *mens rea* requirement satisfied without identifying that person or his or her role in the offence.

[456496] *Kunarac* AJ, para. 99; *Blaškić* AJ, paras. 121-7; *Kordić and Čerkez* AJ, para. 99. *See* also *Limaj* TJ, para. 181.

[457497] *See Kordić and Čerkez* AJ, para. 99 and *Blaškić* AJ, para. 123.

As a result of those errors, it is respectfully contended that General Ojdanić's convictions for crimes against humanity must be reversed.

The Trial Chamber erred in finding that the Chapeau's *mens rea* requirement could be satisfied by recklessness

The Trial Chamber held that the chapeau's *mens rea* requirement was satisfied when a designated individual (perpetrator, intermediary perpetrator, or accused) "knows or **takes the risk** that the conduct of the physical perpetrator comprises part of that attack."[458]498

The Trial Chamber cited three Appeals Chamber judgments for this proposition.[459]499 The Trial Chamber cited the *Kunarac* case, decided in 2002. In *Kunarac,* the Appeals Chamber approved the wording of the *Kunarac* Trial Chamber, which had in turn relied on the *Blaškić* Trial Chamber, for the standard that the Accused "must have known that there is an attack on the civilian population and that his acts comprise part of that attack, or at least take the risk that his acts were part of the attack."[460]500 However, the *mens rea* requirement was not at issue before the Appeals Chamber in *Kunarac.*

The *mens rea* requirement was at issue in the *Blaškić* appeal, decided some two years later.[461]501 There, without citing its decision in *Kunarac*, the Appeals Chamber directly repudiated the notion that the knowledge requirement could be satisfied by a "taking the risk" standard. The Appeals Chamber held that:

> "In relation to the *mens rea* applicable to crimes against humanity, the Appeals Chamber reiterates its case law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required. The Trial Chamber, in stating that it "suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan," did not correctly articulate the *mens rea* applicable to crimes against humanity. Moreover, as stated above, there is no legal requirement of a plan or policy, and the Trial Chamber's statement is misleading in this regard."[462]502

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[458]498 TJ [1/160]

[459]499 *Kordić and Čerkez* AJ, para. 99; *Blaškić* AJ, paras. 124–125; *Kunarac et al.* AJ, paras. 99, 102–103.

[460]500 *Kunarac* AJ at para. 102 approving *Kunarac* TJ, para. 434 which in turn relied upon the *Blaškić* TJ, paras. 247 and 251.

[461]501 *Blaškić* AJ, para. 121.

[462]502 *Blaškić*, AJ, para. 126.

Curiously, the Trial Chamber cited the *Blaškić* Appeal Judgment in support of its recklessness standard, but only referenced paragraphs 124-125, where the Appeals Chamber reproduced the statements from the *Blaškić* Trial Judgment.[463]~~503~~ However, the Trial Chamber apparently failed to notice the very next paragraph, 126, where the Appeals Chamber held that the *Blaškić* Trial Chamber erred in using the recklessness standard.

The third Appeals judgment cited by the Trial Chamber was the *Kordić* case. But that judgment simply stated that:

> The Appeals Chamber reiterates its case law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required.[464]~~504~~

No mention was made in that decision about a lower standard of knowledge, such as "taking the risk".

In recently upholding the acquittal on the charges of crimes against humanity in the *Mrkšić* case, the Appeals Chamber repeated the requirement that actual knowledge that the act is part of an attack on the civilian population was required.[465]~~505~~ In affirming the acquittal of the accused based upon the fact that it was not established that the attack was directed against the civilian population, the *Mrkšić* Appeals Chamber applied the actual knowledge requirement, not a standard of "taking the risk". It stated that:

> "the perpetrators of the crimes in Ovčara acted in the understanding that their acts were directed against members of the Croatian armed forces. The fact that they acted in such a way precludes that they intended that their acts form part of the attack against the civilian population of Vukovar and renders their acts so removed from the attack that no nexus can be established."[466]~~506~~

Other Trial Chambers of the ICTY have also eschewed the recklessness standard adopted by the Trial Chamber in this case. In its judgment, the Trial Chamber in *Limaj* stated that "[i]t does not suffice that an accused knowingly took the risk of participating in

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[463]~~503~~ TJ [1/160]
[464]~~504~~ *Kordić and Čerkez* AJ, para. 100.
[465]~~505~~ *Mrkšić* AJ, para. 41.
[466]~~506~~ *Mrkšić* AJ, para. 42.

the implementation of a policy."[467][507] In the *Šešelj* case, the Trial Chamber specifically rejected the prosecution's effort to include the "taking the risk" language in its indictment, citing the *Blaškić* Appeals Judgment for the proposition that the standard "does not reflect the current state of the law".[468][508]

Trial Chambers at the ICTR have also required actual knowledge of the context of the attack on the civilian population: "the Prosecutor must prove … that the accused acted with knowledge of the broader context of the attack and with knowledge that his acts formed part of the attack."[469][509]

Further, the Special Court for Sierra Leone has followed the approach of the *Blaškić* Appeals Chamber, namely that it "does not suffice that an accused knowingly took the risk of participating in the implementation of a policy, plan, or ideology."[470][510]

Therefore, the Trial Chamber's holding is in direct conflict with the Appeals Chamber's judgment in *Blaškić* and must be reversed. There is no recklessness standard for the chapeau's *mens rea* requirement.[471][511]

The Trial Chamber Erred in Finding that Some "Intermediary Perpetrator" Could Satisfy the Chapeau's Mens Rea Requirement

The Trial Chamber recognized that the Appeals Chamber had held that the person whose *mens rea* counts when determining if the *chapeau mens rea* element is satisfied is the physical perpetrator.[472][512] In the *Tadić* judgment, where the accused was the physical perpetrator, the Appeals Chamber stated that:

> The Appeals Chamber agrees [with the prosecution] that it may be inferred from the words "directed against any civilian population" in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of

[467][507] *Limaj* TJ, para. 190, citing the *Blaškić* AJ. The issue was not raised on appeal by the prosecution.
[468][508] *Prosecutor v Šešelj*, No. IT-03-67-PT, *Decision on Prosecution's Motion for Leave to File an Amended Indictment* (14 September 2007) at para. 33.
[469][509] *Ntagerura* TJ, para. 698. *See* also *Semanza* TJ paras. 327-332.
[470][510] *Brima et al* TJ, para. 222.
[471][511] It is noted that Article 7 of the ICC Statute specifies that a crime against humanity must be committed "with knowledge of the attack".
[472][512] TJ [1/154]

widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fit into such a pattern.[~~473~~513]

In the *Kunarac* judgment, where the accused was also the physical perpetrator, the Appeals Chamber held that the *chapeau mens rea* requirement for crimes against humanity was that "the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern".[~~474~~514]

In the *Vasiljević* judgment, where the accused was also the physical perpetrator, one of the Accused challenged the Trial Chamber's finding that he had the requisite knowledge in order for a crime against humanity to have been committed. The Appeals Chamber addressed the evidence of actual knowledge held by the Accused and held that "the Appellant knew about the on-going attack against the Muslim civilian population in Visegrad."[~~475~~515] Neither the Trial Chamber nor the Appeals Chamber sought to rely upon the knowledge of any other individual.

In *Krajisnik,* where the accused was not the physical perpetrator, the Trial Chamber considered the *mens rea* of the perpetrators rather than the accused or any intermediary perpetrator, and found beyond reasonable doubt that "the perpetrators knew about the attack and that their acts were part thereof."[~~476~~516] The Trial Chamber had considered the standard to be that "[t]he perpetrator must know that there is a widespread or systematic attack directed against a civilian population and that his or her acts are part of that attack."[~~477~~517]

In the *Mrkšić* case, where the accused was not the physical perpetrator, the Appeals Chamber also focused on the *mens rea* of the perpetrator.[~~478~~518] Indeed, when finding that the perpetrators did not have the requisite knowledge or intent, the Appeals Chamber never looked to the *mens rea* of any intermediary perpetrators, or even of the accused. Had the standard been as the Trial Chamber has stated it in this case, one

[~~473~~513] *Tadić* AJ, para. 248; *Blaškić* AJ, para. 124.
[~~474~~514] *Kunarac* AJ, paras. 85, 99.
[~~475~~515] *Vasiljević* AJ, para. 30.
[~~476~~516] *Krajisknik* TJ, para. 711.
[~~477~~517] *Krajisnik* TJ, para. 706(e). *See* also *Blagojević* TJ, paras 547-548; *Brđanin* TJ, para. 130, 138.
[~~478~~518] *Mrkšić, et al* AJ, para. 42.

would have thought that the prosecution, and the Appeals Chamber, would have analyzed the intent of others involved in the offence.

Therefore, there is no support whatsoever in the Appeals Chamber jurisprudence for the Trial Chamber's injection of an "intermediary perpetrator" into the *mens rea* inquiry for the *chapeau* elements of a crime against humanity.

The Trial Chamber's formulation of a situation where the physical perpetrator who lacks the *mens rea* can be used by an intermediary perpetrator as a tool for committing a crime against humanity smacks of the "indirect co-perpetration" theory soundly rejected by the Appeals Chamber in *Stakić*.[479519]

There is also no support for the Trial Chamber's formulation in the judgments of other Trial Chambers. In *Kupreskić*, the Trial Chamber held that a required element of crimes against humanity was that "the perpetrator had knowledge of the wider context in which his act occurs".[480520] In *Kunarac*, the Trial Chamber likewise held that the element was that "the perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack.[481521] In *Krajisnik,* the Trial Chamber likewise held that "the perpetrator must know that there is a widespread or systematic attack directed against a civilian population and that his or her acts are part of that attack."[482522] In applying that test, the Trial Chamber found that "the perpetrators knew about the attack and that their acts were part thereof."[483523] The Trial Chamber did not look to the knowledge of any intermediary perpetrator or even the Accused.

At the ICTR, the Trial Chamber in *Bagosora* held that "the perpetrator must have acted with knowledge of the broader context and knowledge that his acts formed part of the attack"; the Trial Chamber went on to hold that "[i]t is inconceivable that the principal perpetrators as well as the Accused did not know that their actions formed part of this attack."[484524] While the knowledge of an accused is relevant to his individual criminal

[479519] *Stakic* AJ, para. 62.
[480520] *Kupreskic* TJ, para. 544.
[481521] *Kunarac* TJ, paras. 410, 435.
[482522] *Krajisnik* TJ, para. 706(e).
[483523] *Krajisnik* TJ, para. 711.
[484524] *Bagosora* TJ, para. 2166-7.

responsibility, it is notable that the Trial Chamber emphasised the knowledge of "principal perpetrators" in establishing that the chapeau elements of crimes against humanity were satisfied.

Similarly in *Semanza,* the Trial Chamber focused on the physical perpetrators (rather than the accused or any "intermediary perpetrator") when finding that "the attackers at Musha church were aware that their actions in murdering Tutsi refugees formed part of the widespread attack"; and therefore that "the principal perpetrators committed murder as a crime against humanity."~~485~~525

Not surprisingly then, the Trial Chamber cited absolutely no authority when it stated that:

> [I]f the non-accused physical perpetrator is not aware of the context of his crimes, but his superior or an intermediary perpetrator is, these crimes would still constitute crimes against humanity, provided the other general requirements of crimes against humanity are satisfied as well.~~486~~526

The Trial Chamber simply made up its intermediary perpetrator standard out of whole cloth. While it is admirable that the Trial Chamber would be creative in deigning what the law ought to be, it was required to apply the law as it is. And that law is that the perpetrator must have the *mens rea* to satisfy the *chapeau* requirement for an underlying offence to be a crime against humanity.

The Trial Chamber recognized that its new test, dispensing with the requirement that the physical perpetrator have the requisite *mens rea*, was too broad, so it drew some further lines on the blank slate upon which it was writing. It limited the "intermediary perpetrator" whose *mens rea* could be substituted for the physical perpetrator's, to those persons who planned, ordered, instigated, or was a joint criminal enterprise member.~~487~~527 Again, not a shred of authority was cited for this statement of the law.

Whatever the merits of the Trial Chamber's legislative proposals for crimes against humanity, it failed to apply existing law to General Ojdanić's case. In so doing, it committed reversible error.

~~485~~525 *Semanza* TJ, para. 447, 452.
~~486~~526 TJ [1/156]
~~487~~527 TJ [1/158]

The Trial Chamber Erred in Extending its "Intermediary Perpetrator" Formulation to all JCE Members

Alternatively, if the Appeals Chamber decides to accept the Trial Chamber's "intermediary perpetrator" standard, it should find that the Trial Chamber erred in including all members of a joint criminal enterprise as among those whose *mens rea* could be used to fulfill the *chapeau* requirement.

The Trial Chamber promulgated a standard that in order for an intermediary perpetrator's *mens rea* to be used to satisfy the *chapeau* element, the relationship between the individual and the commission of an offence must be "sufficiently direct and proximate".[488528] It held that this test would be satisfied by any one of four forms of liability in which there is a requirement that the individual intended that the offence be committed. The Chamber said:

> "...an underlying offence may qualify as a crime against humanity...even if the physical perpetrator lacks knowledge of the context in which his conduct occurs, where the planner, orderer, instigator of that conduct, or member of the joint criminal enterprise knows that it forms part of the attack."[489529]

General Ojdanić contends that the Trial Chamber erred in including joint criminal enterprise among these forms of liability. Under JCE III, a member of a joint criminal enterprise need not have intended that the crime be committed.[490530] Such an individual can hardly be said to have a sufficiently direct and proximate relationship to the commission of the underlying offence such as to meet the *mens rea* standard for crimes against humanity. When creating its formulation, the Trial Chamber appears not to have taken this into account.

The Trial Chamber erred in Finding the Mens Rea Requirement Satisfied Without Identifying that Person or his or her Role in the Offence

When applying its novel test to the crimes committed in the various municipalities in this case, the Trial Chamber frequently concluded that the *mens rea* requirement for crimes against humanity was satisfied by either "the physical perpetrator or the person

[488528] [TJ 1/158]
[489529] TJ [1/158]
[490530] *Tadić* AJ, para 204; *Kvočka et al* AJ, para. 83; *Stakic* AJ, para. 65.

at whose behest he is acting."[491][531] However, the Trial Chamber failed to identify that person or the requisite form of liability used to tie that individual to the crimes. For example:

> Prizren: "The actions of these forces were part of the broader attack on the civilian population, and the physical perpetrators involved in this attack, or those at whose behest they were acting, were undoubtedly aware that they were acting in the context of the larger attack upon the Kosovo Albanian population in that region."[492][532]
>
> Orahovac (Celina): "The actions of these forces were part of the broader attack on the civilian population, and the physical perpetrators involved in this attack, or those at whose behest they were acting, were undoubtedly aware that they were acting in the context of the larger attack upon the Kosovo Albanian population in that region."[493][533]
>
> Srbica: "The actions of the forces involved were part of the broader attack on the civilian population and, given the scale of the actions in the municipality and throughout at least 13 municipalities of Kosovo, these physical perpetrators, or the persons at whose behest they were acting, were undoubtedly aware that they were acting in the context of the larger attack upon the Kosovo Albanian population."[494][534]
>
> Gnjilane: "The actions of the forces in question were part of the broader attack on the civilian population and these physical perpetrators, or the persons at whose behest they were acting, were undoubtedly aware that they were acting in the context of a broad attack upon the Kosovo Albanian population in the villages in question."[495][535]
>
> Kacanik (Kotlina): "The actions of the forces involved were part of the broader attack on the civilian population, and these physical perpetrators, or the persons at whose behest they were acting, were aware that they were acting in the context of the larger attack upon the Kosovo Albanian population in that region."[496][536]
>
> Kacanik (Kacanik town): "The actions of these forces were part of the broader attack on the civilian population, and the physical perpetrators, or those at whose behest they were acting, were aware that they were acting in the context of the larger attack."[497][537]

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[491][531] Presumably, the latter formulation refers to the Trial Chamber's "intermediary perpetrator".
[492][532] TJ [2/1199]
[493][533] TJ [2/1206]
[494][534] TJ [2/1220]
[495][535] TJ [2/1246]
[496][536] TJ [2/1253]
[497][537] TJ [2/1256]

> Kacanik (Dubrava): "The VJ and MUP forces involved in the attack, or the people at whose behest they were acting, were aware that they were acting in the context of the larger attack upon the Kosovo Albanian population."[~~498~~538]

The Trial Chamber therefore relied upon the purported knowledge (or recklessness) of unidentified individuals, at whose behest the physical perpetrators allegedly acted, in order to establish that crimes against humanity were committed in a number of municipalities. In each case, the Trial Chamber failed to identify whose knowledge it was using in order to find that the *chapeau* elements of crimes against humanity had been satisfied.

In the *Orić* case, the Appeals Chamber held that the failure of the Trial Chamber to identify the underlying crime committed by a subordinate resulted in reversal of a conviction on the basis superior responsibility.[~~499~~539] Likewise, the Trial Chamber's failure to identify the person who had the *mens rea* for crimes against humanity, and his or her connection to the offence, requires that General Ojdanić's convictions for crimes against humanity be reversed.

Similarly, in the *Krajisnik* case, the Appeals Chamber held that the failure of the Trial Chamber to make findings on whether and when JCE members became aware of the commission of expanded crimes, and therefore imputed liability to Krajisnik for those crimes, required reversal.[~~500~~540] Likewise, in our case, the Trial Chamber's failure to make findings as to the person who had the *mens rea* for crimes against humanity, and his or her connection to the offence, requires that General Ojdanić's convictions for crimes against humanity be reversed.

Conclusion

The labeling of a crime as a crime against humanity brings with it international criminal jurisdiction and the opprobrium of the world. As a result, the *chapeau* elements are of great significance in providing a high bar between ordinary crimes prosecutable in a

[~~498~~538] TJ [2/1259] The same findings were also made for a number of events of which General Ojdanić was not convicted (some of which are subject to the prosecution's appeal): Orahovac (Bella Crkva) TJ [2/1210]; Orahovac (Mala Krusa) TJ [2/1212]; Suva Reka TJ [2/1217]; Kosovska Mitrovica TJ [2/1230]; Vuciturn town TJ [2/1233]; Vuciturn municipality TJ [2/1236]

[~~499~~539] *Orić* AJ, para. 47.

[~~500~~540] *Krajisnik* AJ, para. 171.

domestic jurisdiction, such as murder and forcible transfer, and serious international crimes which can give rise to universal jurisdiction or be prosecutable at a Tribunal such as this one. In the Canadian case of *R v Finta*[~~501~~541], the Supreme Court acknowledged the "additional stigma and opprobrium" that will be suffered by an individual whose conduct has been held to constitute crimes against humanity (or war crimes). Accordingly, Justice Cory for the majority held that the relevant knowledge was an additional "essential element" of crimes against humanity (and war crimes) over and over and above those of the underlying offences (of manslaughter, unlawful confinement, robbery and kidnapping). The absence of such knowledge meant that Finta's acquittal on all counts was confirmed.

In this case, the decision of the Trial Chamber on the *mens rea* element unnecessarily, unprecedentedly, and unconventionally expands the definition of crimes against humanity beyond that of a perpetrator who knows the context of his act to a myriad group of actors behaving recklessly. The lack of consistency in applying JCE III to this group, and the failure to make appropriate findings concerning the culpable individuals in this group, highlight the inappropriateness of such an expansion.

Relief sought

For all of the above reasons, the convictions of General Ojdanić for crimes against humanity should be reversed.

[~~501~~541] [1994] 1 SCR 701

IX. GROUND EIGHT: SENTENCING

Introduction

While a Trial Chamber has considerable discretion in sentencing,[~~502~~542] an appeal against sentence lies where a "discernible error" is made.[~~503~~543] It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.[~~504~~544]

Sub-ground 8(A): the Trial Chamber's assessment of gravity as an aggravating factor

A discernible error such as to justify the intervention of the Appeals Chamber

The Trial Chamber correctly stated the principle that the determination of the gravity of an offence requires a consideration of the particular circumstances of the case and the crimes for which the person was convicted, as well as the *form and degree of participation* of the convicted person in those crimes.[~~505~~545] The Trial Chamber subsequently took General Ojdanić's *form* of responsibility into account when determining sentence.[~~506~~546]

However, the Trial Chamber failed to take any account of General Ojdanić's *degree* of participation in the underlying crimes. The Appeals Chamber has consistently held that degree of participation is relevant to the gravity of the offence.[~~507~~547]

Had the Trial Chamber considered the degree of General Ojdanić's participation in the underlying crimes, a shorter sentence of imprisonment would have been imposed. The Trial Chamber thus abused its discretion so as to justify the intervention of the Appeals Chamber.

[~~502~~542] *Krnojelac* AJ, para. 11.
[~~503~~543] *Nikolic* AJ, para.9; *Babic* AJ, para. 7.
[~~504~~544] *Čelebići* AJ, para. 725; *Jokić*, *Judgement on Sentencing Appeal* (30 August 2005), para. 8; *Nikolic*, *Judgement on Sentencing Appeal* (8 March 2006), para. 8
[~~505~~545] TJ [3/1147]
[~~506~~546] TJ [3/1175]
[~~507~~547] *Babić* AJ, at para. 88 and authorities cited therein; *Aleksovski* AJ, para. 182; *Čelebići* AJ, para. 39.

General Ojdanić's participation in the underlying crimes was limited, as indicated by the Trial Chamber's own findings on General Ojdanić's *actus reus*.[~~508~~548] The Trial Chamber could only establish General Ojdanić's *mens rea* by inference.[~~509~~549] There was no direct evidence that General Ojdanić knew of or approved of any campaign of forcible displacement carried out by VJ and MUP forces.

As Chief of Staff, General Ojdanić had a duty to organise the Army's response to massive aerial bombardment and the threat of invasion by NATO forces, coupled with a domestic insurgency which threatened the territorial integrity of his country. General Ojdanić participated in the necessary response to those threats: not a campaign of violence against civilians. To the extent that General Ojdanić's conduct assisted the Indictment crimes, his degree of participation was necessarily incidental to those legitimate goals.

Relief sought

The precise relief sought is that the Appeals Chamber consider General Ojdanić's degree of participation in the underlying crimes and reduce any sentence of imprisonment accordingly.

[~~508~~548] TJ [3/626]
[~~509~~549] TJ [3/625]

Sub-ground 8(B): abuse of superior position as an aggravating factor

A discernible error such as to justify the intervention of the Appeals Chamber

The Trial Chamber committed a discernible error in holding that General Ojdanić abused his superior position by continuing to issue orders displaying an awareness of VJ operations, in cooperation with the MUP, despite his knowledge of crimes committed against Kosovo Albanians during previous joint operations. The Trial Chamber failed to consider the particular circumstances in which General Ojdanić found himself. What else was he supposed to do? General Ojdanić could not halt the fight against the KLA and NATO. General Ojdanić had to defend his country – he did not abuse his superior position, he fulfilled his duty.

While the Trial Chamber recognised that General Ojdanić faced a "complicated situation", this grossly underestimated the KLA threat, the impact of the NATO bombing (which killed over 500 civilians)[~~510~~550] and ignores the expected land invasion of NATO forces from Albania and Macedonia working in tandem with the KLA.

To find that General Ojdanić abused his position the Trial Chamber relied upon General Ojdanić's "knowledge" of crimes committed in previous joint operations. The Trial Chamber held that General Ojdanić (i) received, by 29 April 1999 at the latest, a letter from Tribunal Prosecutor alleging criminal acts by his subordinates; and (ii) received the original indictment charging him for crimes in Kosovo on 27 May 1999.[~~511~~551]

As regards the Arbour letter:

First, General Ojdanić had not received the Arbour letter by 29 April 1999. As the Trial Chamber held at **TJ [3/556]**, he did not receive this letter until 2 May 1999.

Secondly, this single page letter contains no mention of crimes committed in joint VJ/MUP operations. This letter provides no basis for the conclusion that

[~~510~~550] ICTY Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 90.
[~~511~~551] TJ [3/1185]

General Ojdanić abused his position by assisting the MUP in the fight against the KLA and NATO.

Thirdly, the only Indictment crime to occur after General Ojdanić received the Arbour letter was in the village of Dubrava. Therefore, General Ojdanić's knowledge of the Arbour letter could only be of limited relevance as a factor aggravating General Ojdanić's crimes.

As regards the May 1999 Indictment:

First, there was no evidence that Ojdnanic "received" the May indictment. Rather, as the Trial Chamber held at **TJ [3/595]**, he was merely aware of its publication on or around 27 May 1999.

Secondly, the final Indictment crime was committed in the village of Dubrava on 25 May 1999. General Ojdanić's knowledge of the May indictment on 27 May 1999 and was therefore of limited relevance in determining whether General Ojdanić abused his superior position.

Further, the Trial Chamber ignored important evidence that Ojanic utilized his position to tackle criminality rather than assist it. After General Ojdanić received the Arbour letter in May 1999, he set the prosecution of war crimes as the top priority of the military justice system. Together with Pavković, he suggested to Milošević that a commission be set up to establish responsibility for war crimes. He organized meetings with the MUP to try to agree a joint approach to the investigation and prosecution of war crimes.

Relief sought

The precise relief sought is that the Appeals Chamber should reduce any sentence of imprisonment accordingly.

Sub-ground 8(C): voluntary surrender as a mitigating factor

A discernible error such as to justify the intervention of the Appeals Chamber

The Trial Chamber held that the circumstances of General Ojdanić's surrender to the Tribunal were not a mitigating factor.[~~512~~552] The Trial Chamber pointed to an Appeals Chamber decision (concerning an application by General Ojdanić for provisional release) which held that General Ojdanić's surrender was not voluntary;[~~513~~553] the Trial Chamber had followed that decision when deciding subsequent applications for provisional release.[~~514~~554]

General Ojdanić surrendered to this Tribunal in 25 April 2002, after the FRY adopted the Law on Cooperation with the Tribunal on 11 April 2002. General Ojdanić was the first official to surrender to the Tribunal after the FRY adopted of this law. The US State Department applauded General Ojdanić's "courageous decision and his show of leadership".[~~515~~555]

Nevertheless in October 2002, the Appeals Chamber, including Judges Guney, Pocar and Meron, found that General Ojdanić's surrender was not voluntary when deciding upon a pre-trial application for provisional release. The Appeals Chamber placed significance on the fact that General Ojdanić was publicly indicted in May 1999 but "surrendered" only in April 2002.

However, the Trial Chamber held that General Lazarević's surrender was voluntary, even though he surrendered on 3 Feburary 2005 having been indicted on 2 October 2003 (18 months after the FRY Law on Cooperation was adopted).

In addition, the standard of proof applied by the Appeals Chamber in its decision was higher than the standard applicable to mitigating factors on sentence. Mitigating factors are demonstrated on the balance of probabilities.[~~516~~556] Moreover, voluntary

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[~~512~~552] TJ [3/1189]

[~~513~~553] *Prosecutor v Sainovic and Ojdanić,* Case No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002).

[~~514~~554] *Decision on Second Applications for Provisional Release* (29 May 2003); and *Decision on Joint Defence Motion for Provisional Release during Winter Recess* (5 December 2006).

[~~515~~555] TJ [3/1189]

[~~516~~556] TJ [3/1150]

surrender applies as a mitigating factor despite the possibility that surrender could be described as an obligation.[~~517~~557] This applies even in circumstances of delayed surrender.[~~518~~558] By contrast, as explained by Judge Shahabuddeen in his Separate Opinion to the Appeals Chamber's Decision, when deciding upon an application for provisional release under Rule 65(B) the Tribunal has to be "satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."[~~519~~559] Following a strikingly thorough consideration of wide range of authorities, Judge Shahabuddeen concluded that this requires a Chamber to "satisfy itself of prescribed matters by something more than a preponderance of probability though less than proof beyond a reasonable doubt."[~~520~~560]

Therefore, the Trial Chamber erred in giving automatic effect to the Appeals Chamber's 2002 determination, in the context of provisional release, that General Ojdanić did not voluntarily surrender.

Relief sought

General Ojdanić voluntarily surrendered to this Tribunal. He did not go into hiding, as others have. He was not arrested. Accordingly, on the balance of probabilities he must be given significant credit for his show of leadership and any sentence of imprisonment should be reduced accordingly.

[~~517~~557] *Mrkšić* TJ, para.698.
[~~518~~558] *Blaskić* AJ, para.700 and *Blaskić* TJ, para.776.
[~~519~~559] Rule 65(B).
[~~520~~560] *Prosecutor v Sainovic and Ojdanić,* Case No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002), *See* Separate Opinion of Judge Shahabuddeen, para. 41.

Sub-ground 8(D): age and health as a mitigating factor

A discernible error such as to justify the intervention of the Appeals Chamber

[See Confidential Annex]

[See Confidential Annex]

Relief sought

General Ojdanić respectfully requests that the Appeals Chamber consider the likely effect of a sentence of 15 years' imprisonment and on a 68 year old man with General Ojdanić's condition and reduce his sentence accordingly.

Sub-ground 8(E): excessive and disproportionate sentence

A discernible error such as to justify the intervention of the Appeals Chamber

When imposing a sentence of 15 years' imprisonment, the Trial Chamber committed a discernible error by failing to give weight to General Ojdanić's conduct before, during, and after the war. In all the circumstances, including a comparison of the sentences imposed on those of his co-accused who were found guilty of Indictment crimes, the sentence that the Trial Chamber imposed on General Ojdanić was disproportionate and excessive.

The culpability of an aider and abettor may be lessened if he does not share the intent of the main offenders. This may serve as a mitigating factor.[~~521~~561] General Ojdanić did not share the intent to commit the crimes that were encompassed by the joint criminal enterprise.[~~522~~562] The Trial Chamber committed a discernible error by failing to mitigate General Ojdanić's sentence in line with his *mens rea.*

General Ojdanić was sentenced to 15 years' imprisonment for aiding and abetting deportation and forcible transfer in nine municipalities, encompassing 19 towns and villages.

[~~521~~561] *See Vasiljević* TJ, para. 71; *Brđanin* TJ, para. 274.
[~~522~~562] TJ [3/617]

The Trial Chamber sentenced those accused found to have participated in the joint criminal enterprise to 22 years' imprisonment. Compared to General Ojdanić, accused were additionally convicted of:

deportation and forcible transfer in further locations;
murder as crimes against humanity in various locations;
persecutions (murder) as crimes against humanity in various locations;
murder as a violation of the laws and customs of war in various locations;
persecutions (destruction or damage to religious property) as a crime against humanity.

In addition, Pavković was also convicted for persecutions as a crime against humanity for sexual assaults.

In sentencing General Ojdanić, the Trial Chamber only granted a one-third reduction in sentence compared to those individuals convicted of far graver crimes. General Ojdanić respectfully submits that a far greater differential in sentence is appropriate.

Relief sought

General Ojdanić respectfully requests that the Appeals Chamber consider: the totality of his conduct, including his *mens rea;* and the sentences imposed on his co-accused; and reduce his sentence accordingly.

X. CONCLUSION AND OVERALL RELIEF SOUGHT

The Trial Chamber's judgement that General Ojdanić was guilty of crimes against humanity represents the repeated banging of a square peg into a round hole. It took acts far removed from the crimes and which General Ojdanić was required to perform and characterized them as the *actus reus* of aiding and abetting. It found *mens rea* from information which General Ojdanić didn't have, and which came from sources he could not be expected to believe.

The Trial Chamber drew evidence of the commission of crimes from a well from which General Ojdanić was not allowed to drink—his defence team having been driven from Kosovo by rock wielding assailants. And it failed to establish the requisite *mens rea* by the requisite actors for the crimes it found were committed in Kosovo.

When sentencing General Ojdanić, the Trial Chamber failed to give him appropriate credit for the good things he did during the war and afterwards, such as when he voluntarily surrendered. It failed to give adequate consideration to his advanced age and poor health, and to the proportion between his sentence and the sentence it imposed on persons convicted of far more serious offences.

The Trial Chamber's judgement does an injustice to General Ojdanić, a correct and compassionate leader who fought a war he did not welcome and whose only crime, according to the Trial Chamber, was to implement those measures necessary to defend his country.

The Appeals Chamber is requested to remedy this injustice by reversing the judgement of the Trial Chamber and entering findings of NOT GUILTY on the remaining two counts.

Word Count: ~~44,916~~47,927

Respectfully submitted,

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Co-Counsel for General Ojdanic

XI. APPENDIX

Date(s)	Municipality	Location
24 March 1999	Kacanik	Kotlina
24 March 1999 through to May 1999	Dakovica	Dakovica Town
25 to 28 March 1999	Prizren	Pirane
27 and 28 March 1999	Pec	Pec Town
27 and 28 March 1999	Kacanik	Kacanik
Late March and April 1999	Dakovica	Korenica
Late March 1999	Orahovac	Celina
Late March 1999	Orahovac	Srbica
Late March 1999	Orahovac	Turicevac
Late March 1999	Orahovac	Izbica
Late March 1999	Orahovac	Tusilje
Late March 1999	Orahovac	Cirez
Late March 1999	Pristina	Pristina Town
Late March 1999	Gnjilane	Zegra
Late March 1999	Gnjilane	Vladovo
Early April 1999	Urosevac	Sojevo
5 April 1999	Urosevac	Staro Selo
8 April 1999	Urosevac	Mirosavlje
13 April 1999	Gnjilane	Prilepnica
27 April 1999	Dakovica	Dobros
27 and 28 April 1999	Dakovica	Ramoc
27 April 1999	Dakovica	Meja
27 and 28 April 1999	Dakovica	Other villages in the Reka Valley
25 May 1999	Kacanik	Dubrava

Annex B

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-05-87-A

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Date Filed: 11 December 2009

THE PROSECUTOR

v.

NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

Public with Confidential Annex

GENERAL OJDANIĆ'S AMENDED APPEAL BRIEF

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Mr. Mihaljo Bakrač and Mr. Đuro Čepic for Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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I. INTRODUCTION

1. On 26 February 2009, General Dragoljub Ojdanić was convicted by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (the **"Tribunal"**) in its judgment (IT-05-87-T) (the **"Trial Judgment")** on two counts of crimes against humanity: deportation and forcible transfer, and sentenced to 15 years' imprisonment. He was acquitted of two counts of murder and one count of persecutions.[4]

2. During the period of the Indictment crimes, General Ojdanić was Chief of Staff of the Yugoslav Army (the **"VJ"**). General Ojdanić was shown at the trial to be a correct and professional soldier and an honourable man who went to great lengths to avoid war, and to ensure that crimes would not be committed by his army. The Trial Chamber found that General Ojdanić did not participate in a joint criminal enterprise to expel Albanians from Kosovo—a finding the prosecution has not appealed.

3. However, the Trial Chamber held that General Ojdanić was responsible for aiding and abetting deportation and forcible transfer (**"forcible displacements"**) in certain locations throughout Kosovo where members of the VJ were found to have participated in the Indictment crimes.

4. General Ojdanić was found guilty by virtue of non-criminal acts which were not directed at assisting crimes, but which were necessary for defending his country. The Trial Chamber found criminal knowledge and intent based on facts of which he was not aware and propaganda from his country's enemies which he could not be expected to believe. If General Ojdanić's convictions are sustained, then every war-time commander of any army can be found responsible for crimes committed by his troops

[4] References to paragraphs in the four-volume Trial Judgment appear in the form **TJ [volume number/paragraph number]**.

simply by continuing to prosecute the war. Therefore, the outcome of this appeal is not only of great importance to General Ojdanić, but also to commanders of armies throughout the world.

5. Ojdanić filed his Notice of Appeal on 27 May 2009. On 2 September 2009, the Appeals Chamber granted Ojdanić's Motion to Amend Ground 7 of his Notice of Appeal dated 29 July 2009 and accepted as validly filed the amended Notice of Appeal attached to Ojdanić's motion as Annex B.[5]

6. General Ojdanić appeals against the Trial Judgment on the grounds set out below.[6] General Ojdanić appreciates the tremendous effort by the Trial Chamber and its staff that went into its judgment. Nevertheless, he stands convicted for crimes he did not commit.

[5] *Decision on Dragoljub Ojdanić's Motion to Amend Ground 7 of his Notice of Appeal* (2 September 2009), para. 18.

[6] The Interlocutory Decisions relevant to Ojdanić's appeal are: *Decision on Ojdanić Motion for Stay of Proceedings* (9 June 2006); (b) *Decision on Ojdanić's Second Motion for Stay of Proceedings* (19 October 2006); (c) *Decision on Ojdanić Third Motion for Stay of Proceedings* (27 August 2007); (d) *Decision on Provision Release* (30 October 2002); (e) *Decision on Applications of Nikola Šainović and Dragoljub Ojdanić for Provisional Release* (26 June 2002); (f) *Decision on Second Applications for Provisional Release* (29 May 2003); and (g) *Decision on Joint Defence Motion for Provisional Release during Winter Recess* (5 December 2006).

II. GROUND ONE: THE TRIAL CHAMBER ERRED IN LAW AS TO THE *ACTUS REUS* OF AIDING AND ABETTING

Introduction

7. The Trial Chamber held that General Ojdanić's *actus reus* consisted of:

   a. issuing orders for VJ participation in joint operations with the MUP in Kosovo during the NATO air campaign;

   b. mobilising the forces of the VJ to participate in these operations;

   c. furnishing the MUP with VJ military equipment;

   d. issuing orders allowing the VJ to be in the locations where the crimes were committed;

   e. refraining from taking effective measures at his disposal, such as specifically enquiring into the forcible displacements; and

   f. his role in arming the non-Albanian population and ordering its engagement in 1999.[7]

8. Never in the history of this Tribunal has an accused been convicted of aiding and abetting based on such generalised acts so removed from the crimes themselves and otherwise necessary to defend one's country during a war. If it is a crime to do one's duty in a war knowing that some participants may commit crimes, then it has become a crime simply to participate in a war.

[7] TJ [3/626]

A. Sub-Ground 1(A): the Trial Chamber failed to require that General Ojdanić's acts be specifically directed toward the indictment crimes

Alleged error of law invalidating the decision

9. The Trial Chamber did not require that General Ojdanić's acts and omissions were *specifically directed* towards the specific Indictment crimes in order to satisfy the *actus reus* of aiding and abetting.[8] This constitutes an error of law invalidating the Trial Judgment: none of General Ojdanić's acts or omissions were specifically directed toward any specific Indictment crime; therefore, the Trial Chamber's error was highly prejudicial to Ojdanić.

10. In its recent judgement in the *Mrkšić* case, the Appeals Chamber held that specific direction "is not an essential ingredient of the *actus reus* of aiding and abetting."[9] General Ojdanić contends that while this rule may apply to persons on or near the scene of the crimes, it cannot apply to top level leaders like General Ojdanić, a Chief of Staff, located hundreds of metres underground, several hundred kilometres and eight levels away in the chain of command from the perpetrator.

11. Otherwise, innocent acts, or acts which are performed for a reason completely unrelated to the crimes, become criminalized.

12. A review of the Appeals Chamber's jurisprudence reveals that the concept of specific direction has only been considered in cases where the perpetrators were at or near the scene of the crime—and even then with a lack of consistency.

Argument

[8] *See* TJ [3/620].
[9] *Mrkšić* AJ, para. 159.

13. The Trial Chamber cited the Appeals Chamber's judgments in *Blaskić* and *Vasiljević* in support of its definition of the *actus reus* of aiding and abetting.[10] However, both of those cases state that acts must be specifically directed towards the specific crime in order to satisfy the *actus reus* of aiding and abetting.

14. In the first case, *Vasiljević*, the Appeals Chamber distinguished the *actus reus* of aiding and abetting from participation in a joint criminal enterprise:

> "The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design."[11]

15. In requiring *specific direction* in order for acts to satisfy the *actus reus* of aiding and abetting, the *Vaslijevic* Appeals Chamber followed the reasoning of the Appeals Chamber in *Tadić.*[12] When the Appeals Chamber applied this legal standard in *Vasiljević*, it held that the appellant knew that seven Muslim men were to be killed (by others) and that he pointed a gun at them to prevent their escape. The Appeals Chamber held that the acts of the appellant were "specifically directed to assist the perpetration of the murders". The Appeals Chamber therefore upheld the appellant's conviction for aiding and abetting murder.[13]

16. In the second case, *Blaskić,* the Appeals cited the above *Vasiljević* definition and stated that "there are no reasons to depart from this definition".[14] However, in the next paragraph of the *Blaskić* Appeal Judgment (cited by the Trial Chamber in this case) the Appeals Chamber further described the *actus reus* of aiding and abetting as "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime"[15] without reference to *specific direction.* Therefore, in one paragraph the *Blaskić* Appeals Chamber required *specific direction* whereas in the next it did not mFention that requirement. In General Ojdanić's case, the Trial

[10] TJ [1/89] citing *Blaskić* AJ, para. 46; *Vasiljević* AJ, para. 102.
[11] *Vasiljević* AJ, para. 102(i).
[12] *Tadić* AJ, para. 229(iii).
[13] *Vasiljević* AJ, paras. 134-135.
[14] *Blaskić* AJ, para. 45.
[15] *Blaskić* AJ, para. 46, quoting *Blaskić* TJ, para. 283 which in turn quotes *Furundžija* TJ, para. 249.

Chamber relied upon the latter definition but made no mention of the former definition.

17. Crucially, however, the discussion in *Blaskić* was completely *obiter*. The Appeals Chamber noted that the Trial Chamber had not held Blaskić responsible for aiding and abetting the crimes at issue, and further considered "that this form of participation was insufficiently litigated on appeal" and held in any event that it was not fairly encompassed in the indictment. The *Blaskić* Appeals Chamber expressly declined to consider the *actus reus* of aiding and abetting any further.[16]

18. In an Appeals Chamber judgment after *Blaskić*, the Appeals Chamber continued to include the requirement of specific direction for the *actus reus* of aiding and abetting.[17] Likewise, in an ICTR judgment shortly after *Blaskić*, the Appeals Chamber also included the specific direction requirement.[18]

19. Unlike *Blaskić,* the question of whether *specific direction* is required of the *actus reus* of aiding and abetting was litigated before the Appeals Chamber in *Blagojević and Jokić*. That case concerned the aftermath of the take-over of the Srebrenica "safe-area" by the Army of the Republika Srpska (**"VRS"**) in July 1995. The appellant Jokić was Chief of Engineering (and served as Duty Officer on key dates) of the Zvornik Brigade of the VRS Drina Corps. The Trial Chamber found that Jokić knew about the detention and impending mass murder of Bosnian Muslim prisoners at Grbavci School, Pilica School and Kozluk. Jokić was found to have subsequently permitted the resources of the Zvornik Brigade (both equipment and personnel) to be sent and used to dig mass graves. Therefore, Jokić was convicted of aiding and abetting murder as war crime and aiding and abetting extermination and persecutions as crimes against humanity.

20. On appeal, Jokić argued that any assistance which principal perpetrators may have derived from his ordering a particular member of the Zvornik Brigade Engineering Company to go with equipment to a particular place at a particular time was too remote to have had a substantial effect on the commission of the crime. Jokić argued that consequently his acts were not *specifically directed* to assist the perpetration of

[16] *Blaskić* AJ, para. 51.
[17] *Kvočka* AJ, para. 89.
[18] *Ntakirutimana* AJ, para. 530.

the crime. Jokić further argued that he merely performed normal or routine duties in a routine structure which, as such, could not be acts *specifically directed* to assist the perpetration of a crime.

21. The Appeals Chamber dismissed Jokić's appeal and upheld all of his convictions. The Appeals Chamber stated that *Tadić* "does not purport to be a complete statement of the liability of the person charged with aiding and abetting." In making this statement, and without considering the *ratio decidendi* of *Vasiljević,* the Appeals Chamber relied upon the "contextual nature" of *Tadić,* namely that it contrasted aiding and abetting liability "with the liability of a person charged with acting pursuant to a common purpose or design with another person. …"[19] The Appeals Chamber then held that "while the *Tadić* definition has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting.[20]"

22. In support of the proposition that specific direction has not always been included as an element of the *actus reus* of aiding and abetting, the Appeals Chamber cited its judgments in *Krnojelac* and the *Čelebići* case. However, both of those cases cite the *Tadić/Vasiljević* definition of aiding and abetting - which requires *specific direction.* Moreover, in *Krnojelac* the Appeals Chamber held that the *Tadić* Appeals Judgment made a "clear distinction" between acting in pursuance of a common purpose and aiding and abetting, the latter requiring "acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime…"[21] The "contextual nature" of the *Krnojelac* Appeals Judgment was whether or not the accused should be convicted as member of a JCE or, alternatively, as an aider and abettor. Therefore, *Krnojelac* and *Čelebići* both support the view that the *Tadić/Vasiljević* statement of aiding and abetting liability is authoritative.

23. In any event, whilst (mistakenly) holding that *specific direction* has not always been included as an element of the *actus reus* of aiding and abetting, the *Blagojević* Appeals Chamber held that "such a finding [of specific direction] will often be implicit in the finding that the accused has provided practical assistance to the

[19] *Aleksovski* AJ, para. 163.
[20] *Blagojević and Jokić* AJ, para. 189.
[21] *Krnojelac* AJ, para. 33, quoting *Tadić* AJ, para. 229 in full.

principal perpetrator which had a substantial effect on the commission of the crime." The Appeals Chamber then held in relation to the appellant Jokić that,

> "to the extent specific direction forms an implicit part of the *actus reus* of aiding and abetting, where the accused knowingly participated in the commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her 'routine duties' will not exculpate the accused."[22]

24. The *Blagojević* Appeals Chamber therefore allowed for *specific direction* to be an implicit part of the *actus reus* of aiding and abetting, whilst finding that Jokić's acts substantially contributed to the commission of the offence. The Appeals Chamber did not hold that *specific direction* was not a requirement.

25. Cases decided by the Appeals Chamber immediately after *Blagojević* continued to apply the *specific direction* requirement to the *actus reus* of aiding and abetting:

26. In *Nahimana,* the ICTR Appeals Chamber held that the *actus reus* of aiding and abetting is "aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime, and which substantially contributed to the perpetration of the crime."[23]

27. In *Orić*, the Appeals Chamber held the *actus reus* of aiding and abetting "must be directed to assist, encourage or lend moral support to the perpetration of a crime and have a substantial effect upon the perpetration of the crime."[24]

28. In *Seromba*, the Appeals Chamber held that "[i]t must be proven that the alleged aider and abettor committed acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime ."[25]

29. Two Trial Judgments of the Special Court for Sierra Leone decided after *Blagojević* both held that the *actus reus* of aiding and abetting requires sp*ecific direction.*[26]

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[22] *Blagojević and Jokić*, para. 189.
[23] *Nahimana* AJ, para. 482.
[24] *Orić* AJ, para. 43.
[25] *Seromba* AJ, para. 44.
[26] *CDF* TJ, para. 229; *RUF* TJ, para. 277.

30. *Orić* is a particularly instructive case. The accused was convicted on the basis of Article 7(3). On appeal, Orić argued that the trial judgment was unclear as to what theory of criminal liability the Trial Chamber had applied to his subordinates. Therefore, the Appeals Chamber had to address the basis of liability for Orić's only identified culpable subordinate, Atif Krdzic, in order to decide whether Orić's conviction under Article 7(3) could stand.

31. The prosecution argued that the Trial Chamber had found Krdzic responsible for omissions which aided and abetted murders and cruel treatments committed by guards and others. Crucially, the Appeals Chamber held that in order for Krdzic to be liable, his *actus reus* had to have been "directed to assist, encourage or lend moral support to the perpetration of a crime…." The Appeals Chamber held that just because Krdzic's omissions coincided with an increase in crimes, it did not follow that those omissions had a "substantial effect" thereupon. Therefore, in *Orić* the Appeals Chamber applied the *specific direction* requirement: the Appeals Chamber found that Krdzic could not be found responsible and it followed that Orić's convictions under Article 7(3) could not stand.[27]

32. The question of whether or not *specific direction* is required for acts to satisfy the *actus reus* of aiding and abetting was most recently considered by the Appeals Chamber in the *Mrkšić* case. Šljivančanin appealed his conviction for aiding aiding and abetting the torture of prisoners of war by failing to discharge his legal duty to protect those prisoners. Šljivančanin contended that the Trial Chamber had misconstrued the *mens rea* of aiding and abetting and that since his omission had to be "specifically directed to assist, encourage or lend moral support" to the perpetration of the crime, a conviction for omission could only follow "wilful failure to discharge a duty, which implies the culpable intent of the accused."[28]

33. The Appeals Chamber dismissed Šljivančanin's appeal, holding that the fact that an omission must be directed to assist, encourage or lend moral support to the perpetration of a crime" forms part of the *actus reus* not the *mens rea* of aiding and abetting.[29] The Appeals Chamber rejected the elevated *mens rea* standard for which

[27] *Orić* AJ, paras. 44-49.
[28] *Mrkšić* AJ, para. 157.
[29] *Mrkšić* AJ, para. 159, citing *Orić* AJ, para. 43.

Šljivančanin contended, but then stated that it had "confirmed" in *Blagojević and Jokić* that specific direction "is not an essential ingredient of the *actus reus* of aiding and abetting."[30]

34. Unlike the acts of Šljivančanin and Jokić, where specific direction has not been required for persons on the scene, the acts of General Ojdanić did not provide the kind of concrete, practical assistance to the perpetrators that was sufficiently linked to the crimes themselves so as to constitute the *actus reus* of aiding and abetting.

35. Therefore, General Ojdanić submits that *specific direction*, whether explicit or implicit, must be part of the *actus reus* of aiding and abetting in certain cases, particularly leadership cases where an accused is geographically and temporally separated from the crime base. The *specific direction* requirement is necessary in such cases in order to attribute responsibility to the appropriate leaders without subjecting top military commanders to liability for broad orders which merely coincide with the commission of crimes.

36. The Trial Chamber's failure to require the prosecution to prove specific direction as part of General Ojdanić's *actus reus*, or at least to evaluate his contribution to the crime in the framework of specific direction, invalidates its finding that General Ojdanić satisfied the *actus reus* of aiding and abetting. Had the Trial Chamber applied the correct legal standard, it could not have held that General Ojdanić aided and abetted forcible displacements. In fact none of his acts were specifically directed towards forcible displacements. They were all directed towards the dual threats of a NATO invasion and a massive domestic insurgency.

Relief sought

37. General Ojdanić respectfully requests that the Appeals Chamber find that the Trial Chamber committed reversible error when it found that his acts satisfied the *actus reus* of aiding and abetting forcible displacements and vacate his convictions.

[30] *Mrkšić* AJ, para. 159.

B. Sub-ground 1(B): the acts which the Trial Chamber held to satisfy the *actus reus* of aiding and abetting were acts that General Ojdanić had to perform for reasons unrelated to any crimes such that the Trial Chamber imposed a standard of criminal liability that no reasonable Trial Chamber should impose

Alleged error of law invalidating the decision

38. General Ojdanić contends that the legal standard for the *actus reus* of aiding and abetting includes a consideration of whether an accused could reasonably be expected to forego the acts performed. The law requires such a consideration before acts can be held to be criminal. The law cannot impose criminal responsibility for acts which a military commander *has* to perform to defend his country from attack. Rather, the law must factor in the necessity and reasonableness of a military commander's actions in the circumstances.

39. This argument is unrelated to the defences of self-defence or necessity. Such defences admit that acts were wrong, but exclude liability on the basis that acts are justified. General Ojdanić's argument is that under the correct legal standard for aiding and abetting, the law does not consider his acts to have been wrong. To hold that the acts which a wartime military commander must take to defend his country satisfy the *actus reus* of aiding and abetting constitutes an error of law invalidating the Trial Judgment.

40. In the *Orić* case, the Trial Chamber acquitted the accused of charges of aiding and abetting[31] and instigating[32] wanton destruction of property in Ježestica on 7 and 8 January 1993. The Trial Chamber held that Orić could only be held responsible for the wanton destruction in Ježestica "if [he] could have been fairly expected to forgo the attacks." However, Orić "could not be fairly expected to refrain from taking action."[33] Accordingly, Orić was acquitted. There was no doubt that Orić's acts had had a substantial effect on the commission of crimes: without his acts Ježestica would not have been attacked and he "was aware that Bosnian Muslims, primarily civilians who followed the Bosnian Muslim fighters during attacks, destroyed Bosnian Serb

[31] *Orić* TJ 686 – 688.
[32] *Orić* TJ, para. 676.
[33] *Orić* TJ, para. 687.

property."[34] However, in considering Orić's responsibility for aiding and abetting, the Trial Chamber factored in the necessity and reasonableness of Orić's conduct in the circumstances.

41. The Office of the Prosecutor appealed the *Orić* Trial Chamber's reasoning, seeking a reversal of Orić's acquittal for instigating wanton destruction. The Office of the Prosecutor argued that the Trial Chamber had erred in law, arguing that the law required Orić to halt "attacks until he was in a position to ensure that the crimes of wanton destruction would not recur. The fact that Orić elected not to suspend the attack even though he knew the substantial likelihood that crimes would occur renders him liable."[35] Therefore, the Office of the Prosecutor recognised that the *Orić* Trial Chamber's approach went to the legal standard of responsibility under Article 7(1).

42. However, "on further review", the prosecution withdrew this ground of appeal.[36] Consequently, so far as General Ojdanić has been able to establish, this is the first time that this issue has reached the Appeals Chamber. General Ojdanić contends that the *Orić* Trial Chamber adopted the correct legal standard. This Tribunal must apply the same legal standard to General Ojdanić's acts as it applied to Orić's acts.

Post World War 2 caselaw supports the submission that the Trial Chamber applied the wrong test

43. World War 2 cases support General Ojdanić's contention. In the *Ministries* case, decided by the US Military Tribunal sitting at Nurnberg, Karl Rasche, a banker who had facilitated large loans to a fund at the personal disposal of Heinrich Himmler (head of the SS), was found not guilty of aiding and abetting crimes against humanity. The Tribunal held that "[l]oans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime."[37] The Tribunal further explained its analogy by describing commodities

[34] *Orić* TJ, para. 682.
[35] Prosecution Appeal Brief in *Orić,* paras. 205-223.
[36] *Prosecution Notice of Withdrawal of its Third Ground of Appeal* (7 March 2008)
[37] Trials of War Criminals before the Nurernberg Military Tribunals under Control Council Law No. 10 (October 1946- April 1949) p. 622

as "supplies or raw materials" provided to a builder of a house which the seller knows will be used for an unlawful purpose."[38]

44. Therefore, even though Rasche had the necessary *mens rea,* and his acts assisted crimes, the Tribunal apparently decided that acts of that nature were not criminal.

45. In the *Zyklon B* case, the British Military Court sitting at Hamburg acquitted Joachim Drosihn, the senior gassing technician in the firm which supplied poison gas used for extermination in concentration camps. The Judge Advocate set out the issue of Dosihn's complicity turning on,

> "whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was put could make him guilty."[39]

46. Therefore, the Judge Advocate argued that the circumstances in which Dosihn acted were such that his undoubted contribution to the crimes should not result in liability. This case was considered by the Trial Chamber in *Furundžija:*

> "This clearly requires that the act of the accomplice has at least a substantial effect on the principal act – the use of the gas to murder internees at Auschwitz - in order to constitute the *actus reus.* The functions performed by Drosihn in his employment as a gassing technician were an integral part of the supply and use of the poison gas, but this alone could not render him liable for its criminal use even if he was aware that his functions played such an important role in the transfer of gas. Without influence over this supply, he was not guilty. In other words, *mens rea* alone is insufficient to ground a criminal conviction."[40]

47. With respect, it is hard to conceive of how the senior gassing technician who played an "integral part" in the supply and use of poison gas, and who had the requisite *mens rea,* could be considered not to have had a "substantial effect" on the deaths of individuals in gas chambers. Rather, *Zyklon B* confirms that the *actus reus* of aiding and abetting is not captured solely by the "substantial effect" standard.

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[38] Trials of War Criminals before the Nurernberg Military Tribunals under Control Council Law No. 10 (October 1946- April 1949) , p. 622.
[39] *Trial of Bruno Tesch and Two Others*, British Military Court, Hamburg, 1-8 March 1946, Vol. I, Law Reports, p. 93.
[40] *Furundžija* TJ, para. 223.

48. The International Military Tribunal (**"IMT"**) acquitted Hjalmar Schacht, President of the Reichsbank until 1939 and Minister Without Portfolio until 1943:

> "It is clear that Schacht was a central figure in Germany's rearmament programme, and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power, But rearmament of itself is not criminal under the Charter. To be a crime against peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars."[41]

49. Therefore, the IMT considered the circumstances in which Schacht acted before considering whether or not his acts were criminal. The IMT held that the case against Schacht depended on the inference that he knew of the Nazi plans for aggressive war and that this "necessary inference" was not established beyond reasonable doubt. However, Schacht's acquittal could not have depended only upon his *mens rea*. He remained as Minister Without Portfolio in Hitler's government until 1943. Just as Schacht was found to have not carried out rearmament as part of the Nazi plans to wage aggressive wars, General Ojdanić did not perform any acts to assist the Indictment crimes. Just as Schacht remained in Nazi government without being an accomplice to crimes, General Ojdanić remained in the FRY's military.

50. The circumstances in which General Ojdanić acted are *more compelling* than those surrounding Rasche, Drosihn or Schacht. General Ojdanić was a wartime military commander engaged in the legitimate defence of his country against the KLA and NATO. The Trial Chamber should have considered whether it was open to General Ojdanić to forego the acts which made up his *actus reus*. Had the Trial Chamber applied the correct test – the test correctly applied in *Orić* – the Trial Chamber would not have found that General Ojdanić's acts satisfied the *actus reus* of aiding and abetting.

The Trial Chamber's error in relation to General Ojdanić

51. At **TJ [3/626]** the Trial Chamber held that General Ojdanić's contributions had a substantial effect on the commission of crimes because they "provided assistance in

[41] *Nazi Conspiracy and Aggression*, Opinion and Judgment, Office of United States Chief of Counsel for Prosecution of Axis Criminality (1947) pp135-136.

terms of soldiers on the ground to carry out the acts, and encouragement and moral support by granting authorization within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes." This constitutes a clear error of law: General Ojdanić was subject to a massive aerial bombardment coupled with a massive domestic insurgency and the threat of a land invasion. The Trial Chamber failed to consider whether General Ojdanić could be expected to forego authorising soldiers to be on the ground in Kosovo. According to the Trial Chamber's legal standard, the only way General Ojdanić could avoid liability was to order a full-scale withdrawal from Kosovo and capitulate to a NATO invasion. No military manual suggests such a course of action. In the circumstances of this case, international law does not impose such an onerous standard.

52. Rather, at times international law must recognise the grim realities of military necessity. Overly expansive interpretations of which acts incur individual criminal responsibility criminalises any actions that contribute to individual suffering; this tends to effectively criminalise the unfortunate consequences of military operations."[42] International criminal law imposes clear standards of what necessary and reasonable measures a military commander must take to avoid liability under Article 7(3). This Tribunal must not ignore the realities of conflict when assessing criminal responsibility.

53. In General Ojdanić's case, the Trial Chamber held that he aided and abetted the Indictment crimes by providing troops on the ground and granting authorisation within the VJ chain of command for the VJ to operate in Kosovo. The Trial Chamber held that General Ojdanić issued orders "allowing the VJ to be in the locations" where forcible displacements took place. The Trial Chamber further held that General Ojdanić issued orders for VJ participation in joint operations with the MUP in Kosovo during the NATO bombing and that he mobilised the VJ to participate in these operations.[43]

54. The acts which the Trial Chamber found were committed by General Ojdanić were acts he could not be expected to forego. General Ojdanić had to uphold his duty to

[42] Payam Akhavan, Reconciling Crimes against Humanity with the Laws of War, 6 J. INTL. CRIM. J 21 (2008).
[43] TJ [3/626]

defend his country. The Trial Chamber erred in finding that these acts formed the basis for a criminal conviction.

(1) General Ojdanić's duty to defend his country

55. At the Supreme Defence Council session on 23 March 1999, it was decided to defend the FRY in case it was attacked.[44]

56. Article 1 of the FRY Law on the Armed Forces provided that the Army of Yugoslavia was "an armed force defending the sovereignty, territory, independence, and constitutional system of the [FRY]".[45] Articles 5 and 6 provided that the Chief of Staff "shall" perform his duties in implementing the decisions of the President.[46]

57. Article 7 of the FRY Law on Defence provided that in the case of an attack on the country, the Army of Yugoslavia had to act according to its wartime assignment and duties as determined by the Defence Plan of the Country or extract from that plan and the decisions and measures of the Federal Government."[47]

58. Article 10 of the FRY Law on Defence provided that no one had the right "to prevent citizens from fighting an enemy who has attacked the country."[48]

59. Article 16 of the FRY Law on Defence provided that:

> "the Army of Yugoslavia is the main armed force and organiser of the armed struggle and all other forms of armed resistance to the enemy. The Army of Yugoslavia shall unite all participants in the armed struggle and command all combat activities."[49]

60. Article 115 of the Criminal Code of the SFRY provided that any citizen accepted or recognised the occupation of the SFRY or any part thereof "shall" be punished by no less than ten years in prison or by the death penalty."[50] Article 117 criminalised bringing the SFRY into a "position of subordination" to a foreign country.[51] Article

[44] P1577 (Minutes of 9th SDC session, 23 March 1999), p. 1.
[45] P984 (FRY Law on the VJ).
[46] P984 (FRY Law on the VJ).
[47] P985 (FRY Law on Defence).
[48] P985 (FRY Law on Defence).
[49] P985 (FRY Law on Defence).
[50] P1736 (Criminal Code of the FRY).
[51] P1736 (Criminal Code of the FRY).

118 criminalised preventing citizens of the SFRY or its allies from fighting against the enemy.[52]

61. The evidence before the Trial Chamber was that, when the FRY was attacked, the "only option" available to General Ojdanić "was to defend his country against the outside aggression and against the armed rebellion from inside the country."[53] General Ojdanić had sworn an oath: "I swear by my honour and my life that I shall defend the sovereignty, territory, independence, and constitutional order".[54]

62. To hold that General Ojdanić aided and abetted forcible displacements by defending his country as required by law is absurd. To apply the Trial Chamber's standard means that a military commander is precluded from responding to severe threats. The Appeals Chamber must reverse this approach lest the jurisprudence of this Tribunal unjustifiably hinder legitimate and necessary action by military commanders of all nations.

(2) Error in holding that General Ojdanić assisted crimes by issuing orders "allowing the VJ to be in locations where crimes were committed"

63. The Trial Chamber did not cite any evidence to support its finding that General Ojdanić's *actus reus* was established by issuing orders allowing the VJ to be in locations where crimes were committed. In any event, such a finding is vague imposes an impossible standard. The VJ *had* to operate in Kosovo during the NATO bombing: to respond to the grave threats posed to the FRY by the KLA and NATO. Elsewhere in the Trial Judgment, the Chamber noted that, on or around 11 March 1999, General Ojdanić explained to General Clark, Supreme Commander of the NATO forces, that additional troops in the region were a "necessary response to the build-up of NATO forces and the actions of the KLA."[55]

64. Every single one of General Ojdanić's orders targeted those threats. To hold that General Ojdanić's aided and abetted crimes by "allowing" the VJ to be in Kosovo imposes a standard of criminal liability that this Tribunal cannot credibly uphold.

[52] P1736 (Criminal Code of the FRY).
[53] T.15755.
[54] T.15756.
[55] TJ [3/519]

(3) Error in relying upon orders for VJ participation in joint operations with the MUP in Kosovo

65. The Trial Chamber cited General Ojdanić's Grom 3 Directive of 16 January 1999, issued more than three months before the Indictment crimes.[56] Grom 3 was a plan "for the engagement of the VJ to prevent the introduction of a multinational brigade into Kosovo." It listed the enemy forces as the KLA within Kosovo, the KLA in Albania, and the NATO forces in the region, notably civilians based upon ethnicity. Grom 3 provided the basis for VJ operations against both the NATO threat and against the KLA in the interior of Kosovo.[57]

66. Grom 3 comprised two stages, both expressly aimed at (i) repelling the introduction of a NATO force from Macedonia with a simultaneous attack by the KLA and (ii) the introduction of further terrorists from Albania. The first stage was to take measures to prevent NATO from entering Kosovo and, in co-ordination with the MUP, to "block" the KLA in Kosovo. The objective of the second stage was to crush and destroy the NATO and KLA forces, in co-ordination with the MUP.[58] Notably, the explicit aim of the Directive was the *destruction* of the KLA, not the expulsion of either it or civilians. Simply because VJ units engaged in operations alongside the MUP in Kosovo on the basis of General Ojdanić's Grom 3 Directive[59] does not permit the conclusion that General Ojdanić's acts had a substantial effect on the Indictment crimes. General Ojdanić was legally obligated to defend his country using all of the resources available, including the MUP. Article 16 of the FRY Law on Defence, cited above, provided that the Army of Yugoslav "shall unite all participants in the armed struggle and command all combat activities."[60]

67. Indeed, during the NATO bombing General Ojdanić unsuccessfully attempted to resubordinate the MUP to the VJ.[61] Given the direct threats faced, General Ojdanić could not fairly be expected to forego complying with his legal duty to defend his

[56] TJ [3/626, fn 1507]
[57] TJ [3/531]
[58] TJ [3/531]
[59] TJ [3/532]
[60] P985 (FRY Law on Defence).
[61] TJ [1/1189]

country. No reasonable Trial Chamber could adopt such an approach in relation to General Ojdanić's Grom 3 Directive, or any other order.

(4) Error in relying upon mobilisation of the VJ to participate in operations

68. No evidence cited by the Trial Chamber at **TJ [3/623]** provides any support for the finding that General Ojdanić's *actus reus* was established by mobilising VJ forces to participate in operations with the MUP. In any event, as above, no reasonable Trial Chamber could conclude that any such mobilisation satisfied the *actus reus* of aiding and abetting. General Ojdanić could not be expected to forego mobilising the VJ.

69. Elsewhere, the Trial Chamber held that during the lead-up to late March 1999, General Ojdanić mobilised extra units from the Military Detachments in Priština/Prishtina, Kosovska Mitrovica/Mitrovica, Peć/Peja and Prizren.[62]

70. However, Kosovac explained that this order was issued on the basis of the defence plan for the country and that General Ojdanić adopted a strategy of selective, partial and secret mobilisation to address the threats faced.[63] Similarly, Radinović explained that the mobilisation of the wartime establishment of Military Territorial Units was necessary for defence against NATO's aggression.[64] Considering the threats that he faced, no reasonable Trial Chamber could properly conclude that General Ojdanić became an accomplice to the Indictment crimes by mobilising the forces at his disposal.

Conclusions

71. The Trial Chamber accepted that grave threats were faced by General Ojdanić when he was Chief of Staff of the VJ. The Trial Chamber found that he was not a member of any joint criminal exercise: he acted to "counter the perceived NATO and KLA threat, rather than a desire to prepare for a widespread campaign of forcible displacement in Kosovo."[65] Indeed, on 15 and 22 March 1999, General Clark directly

[62] TJ [3/538]
[63] T. 15797-8
[64] Radovan Radinović, 3D1116 (Radovan Radinović's Expert Report), paras. 117-118.
[65] TJ [3/617]

threatened General Ojdanić that NATO would "destroy" the VJ.[66] No reasonable Trial Chamber could expect General Ojdanić to forego the acts he took to destroy the KLA and tackle the NATO threat. To ignore this context and find that General Ojdanić's acts had a substantial effect on the Indictment crimes is a miscarriage of justice.

Relief sought

72. General Ojdanić respectfully requests that the Appeals Chamber find that the Trial Chamber committed a reversible error when it found that his necessary acts satisfied the *actus reus* of aiding and abetting forcible displacements and vacate his convictions.

[66] See TJ [3/258]; 3D706 (Record of telephone conversation between Wesley Clark and Dragoljub Ojdanić, 15 March 1999); 3D707 (Record of telephone conversation between Wesley Clark and Dragoljub Ojdanić, 22 March 1999).

C. Sub-ground 1(C): the Trial Chamber reversed the burden of proof and placed an insurmountable burden upon General Ojdanić by requiring his actions to have been "sufficient" to remedy problems in subordinate commands and thereby holding that "insufficiency" resulted in criminal liability

Alleged error of law invalidating the decision

73. At **TJ [3/627]** the Trial Chamber held that General Ojdanić failed to take "sufficient" or "effective" measures to remedy an established problem of underreporting crimes by subordinate commands. The Trial Chamber held that:

> "Ojdanić did take certain measures in response to Pavković's actions, including sending members of his Security Administration to find out more information and initiating the 17 May 1999 meeting with Milošević. However, these actions were insufficient to remedy the problem…."

74. The Trial Chamber further held that "Ojdanić's request for a response from Pavković was insufficient." The Trial Chamber further held that "Ojdanić's failure to take effective measures against Pavković provided practical assistance, encouragement, and moral support to members of the VJ who perpetrated crimes in Kosovo, by sustaining the culture of impunity surrounding the forcible displacement of the Kosovo Albanian population…."[67]

75. Therefore, while holding General Ojdanić criminally responsible for an omission (a failure to discipline General Pavković), the Trial Chamber found that General Ojdanić did take certain measures against General Pavković. However, the Trial Chamber applied a standard whereby, because General Ojdanić's acts did not solve the reporting problem in the 3rd Army, General Ojdanić bore criminal responsibility for the Indictment crimes. The Trial Chamber cited no authority for such an onerous and impossible standard.

76. There is no support for the proposition that measures have to be "effective" in remedying a problem or crime lest criminal liability follow. Article 7(3) requires that a superior take "necessary and reasonable" measures. If a superior adopts measures

[67] TJ [3/627]

that were reasonable in the circumstances, even though others measures were available, criminal responsibility does not necessarily follow.

77. For example, in the *Hadžihasanović* case, the Appeals Chamber held that a superior may discharge his duty to punish by reporting matters to a competent authority. [68] The Trial Chamber in *Boškoski* adopted the same approach.[69] There was no requirement in either *Hadžihasanović* or *Boškoski* that such action has to be "effective" in remedying a problem or punishing a perpetrator. Criminal law does not impose such a standard.

78. Therefore, the Trial Chamber erred in two fundamental respects.

79. First, the Trial Chamber reversed the burden of proof by requiring that General Ojdanić demonstrate that he took "sufficient" measures to remedy problems in subordinate commands. This error was compounded because the Trial Chamber gave no definition of sufficiency in this context. In any event, by calling General Pavković to explain himself directly to the Supreme Commander (and others) on 17 May 1999, General Ojdanić deployed one of the most severe sanctions available to him.

80. Secondly, by requiring that General Ojdanić's actions be "effective" in remedying problems with General Pavković, the Trial Chamber placed an insurmountable burden upon General Ojdanić. No reasonable Trial Chamber can require that criminal liability follows simply because attempts to resolve a problem are unsuccessful. There is no support for such a proposition.

Relief sought

81. General Ojdanić respectfully requests that the Appeals Chamber reverse the Trial Chamber's finding that any failure to resolve reporting problems within the VJ constituted aiding and abetting the Indictment crimes. The Trial Chamber's finding in this regard depended upon a flawed legal standard.

[68] *Hadžihasanović* AJ, paras. 152-4; *See Hadžihasanović* TJ, paras. 1052-5; 1061-2.
[69] *Boškoski* TJ, paras. 529-36.

D. Sub-ground 1(D): the Trial Chamber failed to apply the correct standard in relation to acts performed after the Indictment crimes

Alleged error of law invalidating the decision

82. The Trial Chamber correctly stated the legal principle that the *actus reus* of aiding and abetting can occur before, during, or after the underlying crimes.[70] This legal principle has been confirmed by the Appeals Chamber[71] and numerous Trial Chambers.[72] Notwithstanding various chambers' relatively consistent statement of this principle, General Ojdanić respectfully submits that the Trial Chamber failed to apply the correct legal standard in relation to acts found to have occurred *after* the underlying crimes.

83. The distinction between the legal standard for acts after – compared to before or during - the underlying crimes has rarely arisen at international criminal tribunals. By contrast, national legal systems often have specific and separate provisions to govern any liability for acts after the crimes. Nonetheless, successive first instance decisions before this Tribunal show that in relation to acts performed after the underlying crimes, a different test exists a different test exists for the *actus reus* of aiding and abetting.

84. In *Aleksovski,* the Trial Chamber held that aiding and abetting may occur before, during or after the act is committed. However, the Trial Chamber clarified this statement by explaining that "[i]t can, for example, consist of providing the means to commit the crime or promising to perform certain acts once the crime has been committed…"[73] Therefore, the Trial Chamber held that acts performed after the crime must be promised to the perpetrator beforehand in order to constitute aiding and abetting.

85. The next case where the distinction arose was *Blagojević and Jokić.* In that case, the prosecution had alleged that the accused organised a reburial operation, thereby aiding

[70] TJ [1/91] citing *Blaskić* AJ, para. 48.
[71] *Blagojević and Jokić* AJ, para. 127; *Simić* AJ, para. 85; *Nahimana* AJ, para. 482.
[72] *Orić* TJ, para. 282; *Strugar* TJ, para. 249; *Blagojević and Jokić* TJ, para. 726; *Kvočka* TJ, para. 256; *Vasiljević* TJ, para. 70; *Kajelijeli* TJ, para. 766; *Kamuhanda* TJ, para. 597. Note, however, that some Trial Chambers mention assistance "before or during" but do not mention "after": see *Semanza* TJ, para. 385.
[73] *Aleksovski* TJ, para. 62.

and abetting earlier murders. The Trial Chamber, presided over by Judge Liu, held that Blagojević could not be held responsible for mass executions at Srebrenica by permitting the use of personnel and resources for the subsequent reburial of victims.

86. The Trial Chamber found that the reburial operation had only occurred *after* subsequent scrutiny of events in Srebrenica by the international community; it had not been agreed upon at the time of the planning, preparation or execution of the crimes. The Trial Chamber held that "[i]t is required for *ex post facto* aiding and abetting that at the time of the planning, preparation or execution of the crime, a prior agreement exists between the principal and the person who subsequently aids and abets in the commission of the crime."[74] Therefore, the Trial Chamber in *Blagojević* required a prior agreement between the aider and abettor and the principal perpetrator in order for acts performed after the underlying crime to constitute aiding and abetting. Applying the correct legal standard, the Trial Chamber found that any involvement on the part of Blagojević in the reburial operation could not amount to aiding and abetting murder.[75] Notably, the Office of the Prosecutor did not appeal this finding.

87. The next case where the distinction arose was *Strugar,* decided less than two weeks after *Blagojević*. In *Strugar,* the prosecution alleged that the accused had failed to subsequently punish his troops for shelling the Old Town of Dubrovnik and that this amounted to aiding and abetting unlawful shelling. The Trial Chamber rejected the prosecution's argument, holding that it was not satisfied that conduct of this nature "well after the offences were committed" could have direct and substantial effect on the commission of the earlier offences, and thus declined to convict Strugar as an aider and abettor under Article 7(1) of the Statute.[76] Strugar was instead convicted under Article 7(3).

88. Therefore, three different trial judgments involving nine different judges have recognised that a different legal standard exists for acts performed *after* the underlying crimes. The above cases demonstrate that the correct legal standard in order for acts performed after the underlying crimes to satisfy the *actus reus* of aiding

[74] *Blagojević and Jokić* TJ, para. 731.
[75] *Blagojević and Jokić* TJ, paras. 731, 745. The Special Court for Sierra Leone recently adopted the same approach, see *RUF* TJ, para. 278: "If the aiding and abetting occurs after the crime, it must be established that a prior agreement existed between the principal and the person who subsequently aided and abetted in the commission of the crime."
[76] *Strugar* TJ, para. 355.

and abetting requires (i) that a prior agreement existed between the accused and the physical perpetrator (such that the accomplice would perform those acts) or (ii) an explicit demonstration that subsequent acts directly affected the perpetration of the earlier crime.

89. This submission finds support in the drafting history of the ICC Statute. The International Law Commission's Commentary concerning *ex post facto* assistance states as follows:

> "The Commission concluded that complicity could include aiding, abetting or assisting *ex post facto*, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime."[77]

90. This Commentary was considered by the Trial Chamber in *Furundžija*, which held that it "implies that action which decisively encourages the perpetrator is sufficient to amount to assistance: the knowledge that he will receive assistance during or after the event encourages the perpetrator in the commission of the crime.[78] This suggests that, in order for *ex post facto* assistance to constitute aiding and abetting the earlier crime, the principal perpetrator must know beforehand that the accomplice will assist him after the underlying crimes

91. In this case, the Trial Chamber found that General Ojdanić aided and abetted deportation and forcible transfer in various locations in Kosovo in March, April and May 1999. For the convenience of the Appeals Chamber, set out in the Appendix is a table showing the dates and locations of the underlying crimes that General Ojdanić was convicted of aiding and abetting.

92. The Trial Chamber held that General Ojdanić aided and abetted the above crimes in a number of ways.[79] A significant number of General Ojdanić's acts were performed *after* some or all of the Indictment crimes. There was no evidence of a prior agreement. No reasonable Trial Chamber could conclude that these acts assisted the earlier crimes. Instances where the Trial Chamber erred include:

[77] *Report of the I.L.C.*, on the work of its forty-eighth session, G.A. Supp. No. 10 (A/51/10) 1996, p.24; cited in *Furundžija* TJ, para. 229.
[78] *Furundžija*TJ, para. 230.
[79] TJ [3/626]

- Ordering VJ participation in joint operations with the MUP in Kosovo by virtue of General Ojdanić's Suggestions to the 3rd Army Command on 17 April 1999.[80]

- Furnishing the MUP with VJ military equipment by ordering that significant amounts of weaponry, including rifles, ammunition, and anti-aircraft guns be made available to the MUP, subject to approval from the Federal Ministry of Defence on 12 May 1999.[81] Of the 24 crimes-sites General Ojdanić was convicted of, 23 occurred before 12 May 1999. Only Dubrava, Kacanik municipality, occurred afterwards – on 25 May 1999. No reasonable Trial Chamber could possibly have concluded that General Ojdanić's 12 May order assisted earlier crimes. No reasonable Trial Chamber, without more information such as whether General Ojdanić's order was actually implemented, could conclude that it assisted a crime in Dubrava on 25 May. There was no evidence of any other order whereby General Ojdanić furnished forces with VJ military equipment.

- Refraining from taking effective measures at his disposal, such as specifically enquiring into the forcible displacements, despite his awareness of these incidents.[82]

- Ordering the engagement of the armed non-Albanian population by virtue of General Ojdanić's Suggestions to the 3rd Army Command on 17 April 1999.[83]

- Insufficient actions to remedy the problem of General Pavković's misreporting thus sustaining the "culture of impunity" surrounding the forcible displacement. The Trial Chamber held that on 8 June 1999 General Ojdanić stuck to his approach of calling for reports and issuing orders to enhance the operation of the military courts.[84]

[80] TJ [3/626]; P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999) (referring to P1878 (Joint Command Order, 15 April 1999)).
[81] *See* TJ [3/626] and [3/536] citing 3D744 (Supreme Command Staff approval, 12 May 1999).
[82] TJ [3/626]
[83] TJ [3/626]; P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999).
[84] TJ [3/626-628]; 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999), p.1.

- The Trial Chamber relied upon General Ojdanić's "general order for the preparation for a possible land invasion by NATO" dated 29 May 1999: "[i]n this order he directed the Priština Corps to provide artillery support to MUP units engaging the KLA outside of the Priština Corp's area of responsibility."[85] The last crime that General Ojdanić was convicted of occurred on 25 May 1999. No reasonable Trial Chamber could possibly conclude that an order to provide artillery support on 29 May assisted a crime that took place on 25 May, or earlier crimes.

93. General Ojdanić challenges the above findings on various bases elsewhere in this appeal. However, even assuming that they are correct both in fact and in law, the Trial Chamber failed to perform any analysis of the timing of those acts relative to the crimes for which General Ojdanić was convicted. A number of the above acts (or omissions) were held to have occurred *after* the underlying crimes. No prior agreement existed between General Ojdanić and the perpetrators of the crimes, nor did General Ojdanić's subsequent acts have a direct effect on the perpetration of the earlier crimes. The Trial Chamber erred in holding that those acts aided and abetted the earlier crimes without applying the correct legal standard to those subsequent acts.

Relief sought

94. General Ojdanić respectfully requests that the Appeals Chamber correct the Trial Chamber's error of law as to the legal standard for act performed *after* the underlying crimes and apply the correct test.

95. Even if the Appeals Chamber holds that General Ojdanić's convictions for aiding and abetting should stand on another basis (for example acts performed before or during the underlying crimes), the Appeals Chamber is invited to clarify the correct legal standard and find that General Ojdanić's subsequent acts did not aid or abet earlier crimes. This remedy is necessary to properly establish General Ojdanić's degree of participation in the underlying offences and is thus relevant to sentencing.

[85] TJ [3/537]

E. Sub-ground 1(E): the Trial Chamber applied the wrong standard in holding that omissions can constitute the actus reus of aiding and abetting

Alleged error of law invalidating the decision

96. The Trial Chamber held that an accused may aid and abet not only by means of positive actions, but also through omissions and that, in addition to "approving spectator" cases, this encompasses,

> "culpable omissions, where (a) there is a legal duty to act, (b) the accused has the ability to act, (c) he fails to act either intending the criminal consequences or with awareness and consent that the consequences will ensure, and (d) the failure to act results in the commission of the crime."[86]

97. The Trial Chamber found that General Ojdanić "was obliged to ensure that VJ members who committed offences and infractions against VJ military discipline were held responsible as soon as possible during a state of war."[87]

98. The Trial Chamber proceeded to hold that General Ojdanić failed to take "effective" measures against General Pavković and that this provided practical assistance, encouragement, and moral support to members of the VJ who perpetrated crimes in Kosovo by sustaining a "culture of impunity" surrounding the forcible displacement of the Kosovo Albanian population, and by allowing the Commander of the 3rd Army to continue to order operations in Kosovo during which the forcible displacement took place.[88]

99. General Ojdanić contends that the Trial Chamber failed to apply the correct legal standard in order to be entitled to hold that any omission contributed to the *actus reus* of aiding and abetting.

100. The Appeals Chamber recently addressed whether omissions can satisfy the *actus reus* of aiding and abetting in the *Mrkšić* case. That case concerned events in

[86] TJ [1/90]; [3/620]
[87] TJ [3/627], citing P984 (FRY Law on the VJ), articles 159, 180, 181; 4D532 (VJ Rules on Service, 1 January 1996), articles 291, 313, 314.
[88] TJ [3/627]

Vukovar in 1991, specifically the mistreatment and execution of Croat and other non-Serb prisoners taken from Vukovar hospital on 20 November 1991. The accused Mrkšić was a colonel in the JNA and commanded Serb forces in the area. The accused Šljivančanin was a major in the JNA and head of a security organ. Both were convicted of aiding and abetting crimes in Vukovar. In particular, the Trial Chamber convicted Šljivančanin of aiding and abetting the torture of prisoners of war by failing to discharge his legal duty to protect those prisoners. Šljivančanin appealed his conviction on various grounds, including an argument that the duty to act which forms the basis of omission liability must stem from a rule of criminal law and cannot be a general duty.[89]

101. The Appeals Chamber dismissed Šljivančanin's appeal. He was found to have breached the legal duty to protect prisoners of war imposed by the laws and customs of war, in particular Article 13 of Geneva Convention III - such breaches give rise to individual criminal responsibility.[90] Therefore, the Appeals Chamber found that it was not necessary to address "whether the duty to act, which forms part of the basis of aiding and abetting by omission, must stem from a rule of criminal law."[91] Notably, the position of the Office of the Prosecutor was that the "question remains open as to whether the duty to act must be based on criminal law, or may be based on a general duty."[92]

102. The Appeals Chamber is now invited to resolve this issue. General Ojdanić submits that the duty must be one imposed by criminal law in order for criminal liability to flow from an omission proper.

The duty to act must be imposed by criminal law

103. This Appeals Chamber has held that Article 7(1) covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.[93]

[89] *Mrkšić* AJ, para. 148.
[90] *Mrkšić* AJ, para. 151; *Blaskić* AJ, para. 663, fn. 1384.
[91] *Mrkšić* AJ, para. 151.
[92] *Mrkšić* AJ, para. 149.
[93] *Tadić* AJ, para. 188.

104. In *Ntagerura,* the Trial Chamber held that, in order to hold an accused criminally responsible for an omission as a principal perpetrator, the duty to act had to be "mandated by a rule of criminal law".[94] In relation to the accused Bagambiki, a Prefet, the Trial Chamber observed that any legal duty to act incumbent upon him was not mandated by a rule of criminal law. Thus, any omission of this legal duty under Rwandan law, even if proven, did not result in criminal liability under Article 6(1) of the ICTR Statute.[95] The prosecution appealed Bagambiki's acquittal but was unsuccessful, albeit because it had not identified what measures were within Bagambiki's *capacity to act.*[96]

The omission must have a decisive effect to give rise to liability

105. Further, there is authority to suggest that for a failure to act to entail criminal responsibility as an aider and abettor, the omission must have a *decisive effect* on the underlying crimes. In *Blaskić*, the Trial Chamber held that aiding and abetting might be perpetrated by omission "provided this failure to act had a decisive effect on the commission of the crime."[97] The *Blaskić* Appeals Chamber noted this and left open "the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting."[98] Whether or not an omission must have a decisive effect to constitute the *actus reus* of aiding and abetting was touched upon but not addressed by the Appeals Chamber in *Mrkšić*.[99]

Conclusion

106. General Ojdanić contends that in order for a breach of duty to entail criminal responsibility for aiding and abetting, the legal duty to act must be based upon criminal law rather than any more general obligation. General Ojdanić further contends that the omission must have a decisive effect on the commission of the underlying crime. In assessing whether omissions can constitute the *actus reus* of aiding and abetting, the Trial Chamber failed to identify any criminal law duty to act which General Ojdanić breached such as to render any omission culpable under

[94] *Ntagerura* TJ, para. 659.
[95] *Ntagerura* TJ, para. 660.
[96] *Ntagerura* AJ, para. 334-335.
[97] *Blaskić* TJ, para. 284.
[98] *Blaskić* AJ, para. 47.
[99] *Mrkšić* AJ, para. 155: "Šljivančanin also appears to propose that the failure to act must have a 'decisive effect' on the commission of the crime, but fails to elaborate on this point."

Article 7(1) of the Statute. It is denied that General Ojdanić breached any obligation to ensure that those who committed offences or infractions of VJ military discipline were held responsible as soon as possible. However, even if he did breach this duty – it was a duty mandated by VJ military discipline rather than the criminal law. Thus it should not provide any basis for liability under Article 7(1). Further and alternatively, no such breach had a decisive effect on the underlying crimes.

Relief sought

107. General Ojdanić's omissions could not aid and abet the underlying crimes of deportation and forcible transfer. General Ojdanić respectfully requests that the Appeals Chamber correct the Trial Chamber's error, apply the correct legal standard for omissions and find that in the circumstances of this case, any omission by General Ojdanić did not violate a criminal law obligation or have a decisive effect on the commission of any crime.

III. GROUND TWO: THE TRIAL CHAMBER ERRED IN FACT AS TO THE *ACTUS REUS* OF AIDING AND ABETTING

Introduction

108. In addition to the legal errors detailed above, the Trial Chamber made a number of factual errors in its determination of the *actus reus* of aiding and abetting. Specifically, the Trial Chamber failed to consider favourable evidence that negated General Ojdanić's responsibility for the forcible displacements, the necessity of the acts which it deemed to be part of the *actus reus*, and made errors of fact in its conclusions concerning arming the non-Albanian population and appointment and removal of subordinates.

A. Sub-ground 2(A): the Trial Chamber failed to give appropriate weight to evidence which demonstrated that General Ojdanić did not aid and abet forcible displacements

Introduction

109. The Trial Chamber erred by failing to give appropriate weight to evidence which demonstrated that General Ojdanić did not aid and abet forcible displacements. Having properly considered this evidence, no reasonable Trial Chamber could have concluded beyond reasonable doubt that General Ojdanić was an accomplice to the Indictment crimes.

110. A Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence." Such disregard is shown when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning.[100] In the instant case, when addressing General Ojdanić's *actus reus* the Trial Chamber failed to consider, adequately or at all, clear evidence that General Ojdanić's acts hindered rather than assisted crimes.

[100] *Limaj* AJ, para. 86; *Kvočka* AJ, para. 25.

(1) General Ojdanić's "failure" to discipline Pavković

111. The Trial Chamber held that General Ojdanić failed to discipline Pavković in relation to two issues:

a. in February 1999 Pavković brought the 72nd Special Brigade unit into the interior of Kosovo in breach of the October Agreements, in contravention of General Ojdanić's orders to keep it at the border with Albania;[101] and

b. problems with combat reports from the 3rd Army omitting information relating to serious violent crimes including murders.[102]

112. The Trial Chamber seriously erred in its assessment of General Ojdanić's conduct *vis a vis* Pavković. No reasonable Trial Chamber could conclude that General Ojdanić failed to discipline Pavković. The conclusion that General Ojdanić is criminally responsible for a "culture of impunity" was unreasoned, unreasonable and manifestly unfair.

General Ojdanić and the 72nd Special Brigade

113. On 19 February 1999, General Ojdanić ordered that First Battalion the 72nd Special Brigade be resubordinated to the 3rd Army "for the purpose of carrying out anti-terrorist and anti-sabotage tasks".[103] General Ojdanić ordered that it be kept at the border with Albania, but Pavković brought it into the interior of Kosovo, in contravention of General Ojdanić's orders and in breach of the October Agreements.[104]

114. At the Collegium meeting on 25 February 1999, Dimitrijević expressed disapproval that the 72nd Special Brigade, which was a powerful military police unit, had been sent into Kosovo. General Ojdanić was unaware that the unit had been moved into Kosovo as he had only ordered that it be moved to the edge of Kosovo.[105]

[101] TJ [3/518]; [3/599]
[102] TJ [3/602]
[103] TJ [3/518]; P1948 (VJ General Staff Order for Resubordination, 19 February 1999).
[104] TJ [3/599]
[105] TJ [1/970]

115. The Trial Chamber held that, despite acknowledging the problem and assuring the members of the collegiums that he would do something about the issue of the 72nd Special Brigade, there is no evidence that General Ojdanić took any actions in this respect.[106] The evidence cited by the Trial Chamber in support of this finding is the Collegium of 18 March 1999. The 72nd Special Brigade did not arise at any point during that Collegium. It offers no support for the Trial Chamber's conclusion.

116. Rather, the minutes of the Collegium on 25 February 1999 are pertinent. General Ojdanić is recorded discussing the 72nd Special Brigade as follows:

> "… the proposal came from the commander of the Third Army, not for them to go to Nis but to Kosovo. I disagreed and responded, **in general terms, that for the time being the units should be deployed at the edges of Kosovo and not inside Kosovo.** However, most probably, I have unfortunately learned just now that they were transferred there…"[107]

117. Partly on this basis, the Trial Chamber correctly held that Ojdanić was not a member of the joint criminal enterprise.[108] However, the issue of the 72nd Special Brigade did not provide a sufficient basis for the Trial Chamber to hold that Ojdanić should have disciplined Pavković lest he be an accomplice to the Indictment crimes. The breach, if any, related only to a single battalion – not a complete Brigade. Elsewhere in the Trial Judgment, the Trial Chamber recognised that at the Collegium of 11 March 1999, Ojdanić told those present that they knew "quite well why we had to violate" the October Agreement prohibition on bringing troops into Kosovo: heightened numbers of NATO forces on the FRY's borders and the KLA threat. Ojdanić recounted a conversation with Clark where he had told Clark that the VJ actions were a *necessary* response to the build-up of NATO forces and the actions of the KLA.[109]

118. The Trial Chamber accepted the grave threats faced by Ojdanić when he was Chief of Staff of the VJ. The Trial Chamber found that he was not a member of any joint criminal exercise: he acted to "counter the perceived NATO and KLA threat,

[106] TJ [3/599]
[107] P941 (Minutes of the Collegium of the General Staff of the VJ, 25 February 1999), p. 25.
[108] TJ [3/617]
[109] TJ [3/519]

rather than a desire to prepare for a widespread campaign of forcible displacement in Kosovo."[110] Indeed, on 15 and 22 March 1999, General Clark directly threatened Ojdanić that NATO would "destroy" the VJ.[111]

119. Therefore, while Ojdanić had not approved the deployment of the 72nd Special Brigade into the interior of Kosovo, his perspective following the Collegium on 25 February 1999 was that Pavković *had* to bring a unit from the 72nd Special Brigade into Kosovo in order to deal with the KLA. This is consistent with the Trial Chamber's conclusions at **TJ [2/1017 – 1019]** that a KVM monitoring report for 26 February and 4 March 1999 the KLA had "taken the fight to the Serbs" in a number of ambushes and attacks...."[112]

120. In these circumstances, it was simply not established that General Ojdanić should have disciplined Pavković.

121. Moreover, there was no evidence – and the Trial Chamber did not conclude - that the 72nd Special Brigade committed any crimes when brought into the interior of Kosovo in February 1999 or at any time thereafter. Therefore, no reasonable Trial Chamber could find that General Ojdanić assisted any Indictment crime by failing to discipline Pavković on this issue.

General Ojdanić and misreporting by subordinate commands

122. Despite the 3rd Army being obliged to report crimes and unlawful events to the General Staff, and General Ojdanić ordering it to do so on 2 April and 15 April 1999, reports of violent crimes committed by members of the VJ were not included in reports from the 3rd Army.[113] The Trial Chamber held that the 3rd Army under-reported criminal activities throughout 1998 and 1999. However, the Trial Chamber held that General Ojdanić "refrained" from taking disciplinary measures against

[110] TJ [3/617]
[111] See TJ [3/258]; 3D706 (Record of telephone conversation between Wesley Clark and Dragoljub Ojdanić, 15 March 1999); 3D707 (Record of telephone conversation between Wesley Clark and Dragoljub Ojdanić, 22 March 1999).
[112] TJ [2/1017]
[113] TJ [3/600 – 601]

Pavković[114] and that this failure led to a "culture of impunity" which assisted the Indictment crimes.[115]

123. The Trial Chamber simply made the vague finding that General Ojdanić failed to discipline Pavković. Such a conclusion was not reasonably available to the Trial Chamber: there was clear evidence of steps General Ojdanić took against Pavković on the issue of inadequate reporting. The Trial Chamber simplistically concluded the General Ojdanić's actions were not "effective", instead of properly considering the actions that General Ojdanić took. No reasonable Trial Chamber could hold General Ojdanić individually responsible for a "culture of impunity", or find that he contributed to such a culture.

General Ojdanić ordered that Pavković's subordinates report directly to the General Staff

124. General Ojdanić had the power to request reports directly from secondary levels of subordination, including the Priština Corps.[116] During the NATO campaign, General Ojdanić exercised this power and ordered that reports from the Priština Corps be sent to the Supreme Command Staff (as well as the 3rd Army). This practice continued from 12 April 1999 until the end of the conflict.[117] General Ojdanić's demand to see the reports which went to Pavković was a significant step: a demand by a superior officer to see the reports which form the basis of that subordinate's reports is an embarrassing sanction, especially given that one of General Ojdanić's first orders after the NATO bombing commenced was a "warning on the delivery of accurate and confirmed reports."[118] The Trial Chamber ignored this evidence when assessing General Ojdanić's conduct in relation to Pavković.

General Ojdanić hauled Pavković to Belgrade to report to the highest state officials

125. Vasiljević testified that on 13 May 1999, following further reports of criminal activities in Kosovo, General Ojdanić telephoned Pavković. Vasiljević overheard General Ojdanić ask: "Commander, what is going on down in your area?"[119] General Ojdanić then ordered that Pavković come to Belgrade to explain the situation directly

[114] TJ [3/602]
[115] TJ [3/627]
[116] TJ [1/472]
[117] TJ [1/489]
[118] P1469 (warning on delivery of accurate and confirmed reports, 25 March 1999).
[119] Aleksandar Vasiljević, P2594 (witness statement dated 26 October 2006), paras.59-60 (under seal); T.8748-49; T.8889-90.

to Milošević.[120] The main topic of the meeting was war crimes and other breaches of international law in Kosovo. General Ojdanić told those present (including Pavković) that war crimes had to be "urgently investigated and documented and, if it was established that somebody had committed such a crime, that person should be arrested immediately and the matter reported to the Supreme Command Staff.[121]

126. Hauling Pavković to Belgrade to report directly to the President in front of numerous high level officials from the VJ and MUP was one of the most serious sanctions available to General Ojdanić. The Trial Chamber simplistically held that General Ojdanić's action in "initiating the 17 May Meeting with Milošević" was "insufficient to remedy the problem". General Ojdanić's action may not have remedied the problem, but no reasonable Trial Chamber could conclude that General Ojdanić refrained from taking action.

General Ojdanić demanded a response from Pavković when allegations were made

127. Around 2 May 1999, General Ojdanić received a letter dated 26 March 1999 from Tribunal Prosecutor, Louise Arbour, informing him of her grave concern at the commission of serious breaches of international humanitarian law in Kosovo.[122] Arbour's letter was a single page. It did not detail the specifics of any crimes. The Trial Chamber held that after General Ojdanić received this letter, a meeting took place on 4 May 1999 involving Milošević, Pavković, General Ojdanić and others, to discuss events in Kosovo, including crimes.[123] Following this meeting, General Ojdanić issued an order "strongly emphasizing the need to prevent violations of international humanitarian law".[124] General Ojdanić "warned that officers would also be held responsible if they knew that violations had been committed and they failed to take appropriate actions against the perpetrators." There was an annex attached to this order, outlining criminal liability for war crimes and other violations of the international laws of war, which commanders of units were ordered to review with their units.[125]

[120] TJ [3/575]
[121] TJ [3/575]
[122] TJ [3/556]
[123] TJ [3/557]
[124] TJ [3/560]
[125] TJ [3/560]

128. Despite having seen Pavković on 4 May 1999, General Ojdanić demanded a formal response to Arbour's letter on 10 May 1999. Also on 10 May 1999, General Ojdanić:

> "issued an order strongly emphasising the need to prevent violations of international humanitarian law.... He warned that officers would also be held responsible if they knew that violations had been committed and they failed to take appropriate actions against the perpetrators. There was an annex attached to this order, outlining criminal liability for war crimes and other violations of the international laws of war, which commanders of units were ordered to review with their units."[126]

129. Gojović testified that he had drafted this order and that it was distributed to all units to ensure that they obeyed international humanitarian law and ensure that commanders prevented and punished crimes.[127]

130. General Ojdanić received Pavković's reply on 27 May 1999, addressing Arbour's allegations and stating that all of his actions had been "proper". Pavković stated that he had always informed his superior commands of the activities of his units and had disseminated information to subordinates on their obligation to adhere to international humanitarian law.[128]

131. Calling a subordinate to account to explain their actions is a disciplinary measure. The Trial Chamber failed to give adequate weight to this step. The Trial Chamber simply held that General Ojdanić's request for a response from Pavković was "insufficient".[129] However, the Trial Chamber's reasoning at **TJ [3/627]** is confused: it found General Ojdanić's request to be insufficient "in light" of events which happened later, such as the publication of the first indictment at the end of May, or meetings held on 16 and 17 May. No reasonable Trial Chamber could hold that General Ojdanić's request of Pavković on 10 May 1999 was "insufficient" on the basis of allegations or information which came to light much later. The Trial Chamber's back-to-front reasoning reveals its unreasonable and imprecise approach when assessing General Ojdanić's conduct in relation to Pavković.

[126] TJ [3/560]
[127] Tr.16674. *See* Exhibit 3D483; Tr.8876.
[128] TJ [3/595]
[129] TJ [3/627]

132. No reasonable Trial Chamber, having considered the true chronology of events, would so belittle General Ojdanić's demand for an account from Pavković

General Ojdanić's further steps in relation to problems with reporting

133. The Trial Chamber was blind to General Ojdanić's conundrum: General Ojdanić received indications that reports from subordinate commands were inaccurate, but could not be certain that Pavković was at fault. The Trial Chamber ignored Radinović's evidence on precisely this point: he said that General Ojdanić had to acknowledge Pavković's position that the 3rd Army was acting properly, but also acknowledge that serious crimes appeared to have been committed against civilians. Radinović explained that General Ojdanić's tackled the conundrum by sending top members of his Security Administration – including prosecution witness Vasiljević – into the field to "ascertain on the spot facts relating to war crimes against the civilian population."[130] Vasiljević and Gajić were sent to Kosovo *after* the meeting with Milošević on 17 May 1999. The Trial Chamber held that this mission took place, but concluded that it was merely the "usual control that was carried out into the work of the security organs." The Trial Chamber ignored Vasiljević's testimony that he and Gajić were ordered to go to Kosovo because General Ojdanić "wanted to check out what the situation was, what we could learn on the ground."[131] The Gajić/Vasiljević mission was a clear attempt by General Ojdanić to illuminate and tackle the problem of under-reporting in the 3rd Army.

134. The Trial Chamber held after the Gajić/Vasiljević mission General Ojdanić "stuck to his approach of calling for reports and issuing orders to enhance the operation of the military reports."[132] The Trial Chamber incorrectly, indeed almost dishearteningly, wrongly interpreted the evidence which it cited for this proposition: General Ojdanić ordered that prosecutions of violations of the provisions of international law were to be the **top priority** of the military justice system.[133]

135. General Ojdanić took further steps to illuminate and tackle under-reporting and criminal activitity. On 17 May 1999, he proposed to Milošević a state

[130] Radovan Radinović, 3D1116 (Radovan Radinović's Expert Report), p. 212, para. 357.
[131] T.8790.
[132] TJ [3/627]
[133] TJ [3/627] fn 1513. *See* 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999).

commission to establish responsibility for crimes in Kosovo.[134] He arranged a meeting on 9 July 1999 between Farkaš and Radomir Markovic from the MUP to discuss a common approach to the investigation of crimes.[135] The Trial Chamber weighed this in General Ojdanić's favour in finding that he was not a member of the joint criminal enterprise. It was of equal relevance to the Trial Chamber's unreasonable conclusion that General Ojdanić did not respond to reporting problems and crimes in Kosovo. Further, the VJ continued to investigate war crimes perpetrated in Kosovo after the cessation of hostilities.[136] A report of the Security Administration of 3 August 1999 emphasised that the documentation and prosecution of war crimes "is an exceptionally important, complicated and large-scale task."[137]

Conclusion

136. Accurate reporting by subordinate commands was of great importance to General Ojdanić. The Trial Chamber's own witness in this case, General Dimitrijević, testified that "[e]very time a question was table concerning which we were unsure of whether reports were good or not, [General Ojdanić] usually insisted that we use all possible lines to inquire."[138] General Dimitrijević testified that there was "no doubt" that General Ojdanić was sincere in his efforts to get accurate information as to conduct of the VJ in Kosovo.[139] There was simply no evidence that General Ojdanić's attitude changed during the war.

137. The Trial Chamber completely failed to consider the circumstances in which General Ojdanić found himself. He could not dismiss Pavković from the army. That power lay with Milošević.[140] More fundamentally, General Ojdanić did not have sufficient proof that Pavković was the cause of under-reporting. Genera Ojdanić could not discipline Pavkovic until he was fully aware of the facts. Nonetheless, General Ojdanić took numerous steps to address reporting problems in general and Pavković in particular. General Ojdanić strove to enforce acceptable patterns of conduct and reporting, and called Pavković to account. General Ojdanić's actions may have been insufficient to remedy the problem in the 3rd Army, but that is irrelevant.

[134] TJ [3/576]
[135] TJ [3/617]
[136] TJ [1/536]
[137] Exhibit 3D1063.
[138] T 26725.
[139] T.26730.
[140] TJ [3/126]

138. Further, no reasonable Trial Chamber could conclude that General Ojdanić's failure to take effective measures against Pavković gave encouragement and moral support to members of the VJ who perpetrated crimes in Kosovo.[141] The Appeals Chamber in *Brđanin* held that "[e]ncouragement and moral support could only have a substantial effect on the commission of the crime if the perpetrators were aware of it."[142] There was no evidence that the perpetrators of the crimes had any awareness of General Ojdanić's conduct in relation to Pavković. Therefore, no reasonable Trial Chamber could hold that General Ojdanić supported or encouraged those crimes. No reasonable Trial Chamber could conclude that General Ojdanić sustained a "culture of impunity".

(2) Error in failing to consider the significance of establishing the military justice system and massively enhancing its capability

139. The Trial Chamber held that at the "outset of the NATO air campaign, Ojdanić issued an order to all VJ commands to mobilize the wartime military courts and prosecutors."[143] On 25 March, General Ojdanić issued an order to all commands to mobilize wartime military courts and wartime military prosecutors within the organization structure of the commands and units of the VJ, as well as the supreme military courts and the supreme military courts, and to begin work immediately.[144] The Trial Chamber noted that on 29 March 1999, General Ojdanić stated that the military courts were not working properly and that, as a response, 125 new judges and prosecutors were appointed in a short period of time.[145] At the Supreme Command Staff Briefing on 11 April 1999, General Ojdanić was informed that the response of the military judicial organs had been "100 percent".[146]

140. The Trial Chamber completely failed to appreciate the significance of General Ojdanić's steps and his massive investment in the apparatus for tackling *any* criminal acts. Further, towards the end of the conflict, when the extent of crimes in Kosovo became clear, General Ojdanić issued an order that the prosecution of violations of

[141] TJ [3/627]
[142] *Brđanin* AJ, para. 277.
[143] TJ [3/603]
[144] TJ [1/524]
[145] TJ [1/603]
[146] 3D728, p. 2, para. 4.

international law should be the **top priority** of the military judicial organs.[147] Further, General Ojdanić paid careful attention to the functioning of the military justice system throughout the conflict and afterwards, as detailed in General Ojdanić's Closing Brief.[148] The Trial Chamber failed to give any weight to these facts in assessing whether General Ojdanić was an accomplice to the Indictment crimes.

141. Rather, the Trial Chamber held that the military justice system was not effective in investigating, prosecuting and punishing those responsible for committing serious crimes against the civilian population.[149] The system failed due to a combination of internal problems over which certain VJ commanders "may have had control", and external factors which "were outside of their control".[150] No reasonable Trial Chamber could hold General Ojdanić criminally responsible for a military justice system which, despite his massive investment, failed to deliver enough convictions for crimes against civilians. Such a standard is not applied to military commanders of other nations.

(3) Error in failing to consider *bona fide* attempts to recruit ethnic Albanians to the VJ and issue them weapons

142. Shortly after NATO attacked the FRY and while facing intense battles with the KLA, on 31 March 1999, General Ojdanić ordered the creation of a special military territorial detachment consisting of ethnic Albanians. This was a clear attempt, in extremely difficult circumstances, to recruit ethnic Albanians into the ranks of the VJ. Moreover, General Ojdanić's attempt was serious and *bona fide*: a deadline (of 10 April) was set; a specific individual was named as responsible for implementation;[151] sufficient uniforms and weapons were made available;[152] and General Ojdanić checked up on the progress of implementation.[153] However, General

[147] TJ [3/607]
[148] Closing Brief, paras. 305 – 306.
[149] TJ [1/569]
[150] TJ [1/569]
[151] P1471 (Order of Supreme Command Staff, 31 March 1999).
[152] T.7250.
[153] Exhibit 3D719, p. 3.

Ojdanić was unsuccessful because ethnic Albanians would simply not join the VJ at that time.[154]

143. This point was considered by the Trial Chamber but limited to the consideration of the discriminatory arming of the non-Albanian population: the Trial Chamber held that General Ojdanić's attempt to recruit and arm Albanians during the NATO bombing had no bearing on that issue because the prosecution's allegation concerned "attempts to create an atmosphere in which crimes would be committed by Serb civilians against Kosovo Albanians…."[155]

144. However, the evidence of General Ojdanić's attempt to recruit and arm ethnic Albanian is of far greater significance: it shows that Ojdanc acted to keep Albanians in Kosovo, indeed within the VJ. The Trial Chamber failed to consider this point when assessing General Ojdanić's *actus reus.*

(4) Error in failing to consider General Ojdanić's call for Kosovo Albanians to stay in Kosovo

145. General Ojdanić was informed that it was the KLA which was encouraging the movement of the civilian population in a "planned withdrawal".[156] On 7 April 1999, Ojdanić issued a personal plea exhorting Kosovo Albanians to stay in Kosovo and return to their homes. General Ojdanić's words were along the lines of:

> "Albanians, only life together without hatred and contempt leads to a happier future, a carefree childhood for our children, regardless of religion or nation. Let us all together make an effort to restore peace to these parts of ours. Return to your homes and your everyday work. Do so today."[157]

146. Therefore, General Ojdanić acted to encourage Kosovo Albanians to stay in Kosovo rather than assist their expulsion. The Trial Judgment does not address this announcement. No reasonable Trial Chamber could ignore this crucial evidence.

[154] T.7251.
[155] TJ [3/511]
[156] P929 (Minutes of the Collegium of the General Staff of the VJ for 9 April 1999), pp.33-4.
[157] Exhibit 3D753, p.2; Exhibit 3D1120; T.16818; T.16904-5.

147. Moreover, the Trial Chamber noted that the VJ did nothing to prevent refugees from returning to Kosovo and that while tackling the refugee problem was outside the realm of responsibility of the General Staff, the General Staff pressed federal bodies to address the matter.[158] The Trial Chamber failed to consider this evidence when assessing whether General Ojdanić assisted the forcible displacement of Kosovo Albanians.

(5) Error in relation to General Ojdanić's Directive of 9 April 1999

148. The Trial Chamber relied upon General Ojdanić's Directive of 9 April 1999: "a general directive to the commands of the Strategic Groups of the VJ, to mobilise and prepare for combat use, to secure the border, and to destroy the KLA."[159] The Trial Chamber held that the "3rd Army was specifically tasked *inter alia* to 'smash and destroy' the KLA, and to organise for the reception of 'refugees' at the border, including through the direction to 'offer assistance to organs of the Government for their [the refugees'] future care."[160] The Trial Chamber selectively quoted and misquoted this Directive. General Ojdanić specifically directed that the VJ apply "in whole the provisions of the Geneva Conventions regarding international war and humanitarian law."[161] The Directive tasked the 3rd Army with refugees with "further" (not future) care. Further, the Trial Chamber weigh unchallenged and uncontradicted evidence that General Ojdanić's direction to apply in whole IHL was placed in a *more prominent position* at General Ojdanić's insistence such that subordinates would be instantly aware of the serious with which General Ojdanić viewed international humanitarian law.[162]

149. No reasonable Trial Chamber could rely upon this Directive as evidence of General Ojdanić's *actus reus*. A consideration of the surrounding circumstances demonstrates the Trial Chamber's error: the Directive was issued to amend Grom 3, which had prioritised the possibility of an air-borne assault by NATO forces from

[158] TJ [3/569]
[159] TJ [3/533]
[160] TJ [3/533]
[161] P1481 (Supreme Command Staff directive for engagement of VJ in defence against the NATO, 9 April 1999), p. 5.
[162] T.15489.

Macedonia.[163] The Collegium of 9 April 1999 is clear that VJ units were protecting the state border, crushing terrorist forces and blocking their axes from Albania and Macedonia.[164] Indeed, the Trial Chamber had concluded that the aim of Ojdanić's plans was to counter the NATO threat.[165]

(6) Error in relation to General Ojdanić's Suggestions document of 17 April 1999

150. The Trial Chamber held that General Ojdanić's Suggestions document of 17 April 1999 ordered VJ participation in joint operations with the MUP in Kosovo, thereby assisting the Indictment crimes.[166] The Trial Chamber's conclusion is devoid of any factual basis.

151. General Ojdanić's Suggestions related to a specific operation in the Rugovo Gorge area of Kosovo. General Ojdanić's suggestion was that those involved in this operation should *prevent* the withdrawal of terrorists so that the goal of *destruction* of the KLA could be achieved. To hold that a suggestion to *prevent* the escape of terrorists aided and abetted the *expulsion* of civilians out of that area is nonsense. The Trial Chamber failed to consider clear evidence that the operation took place without any reference to General Ojdanić's Suggestions – they were received too late.[167] Moreover, no crimes were alleged by the prosecution to have occurred in the Rugovo Gorge area on or around 17 April 1999. There was no basis to find that General Ojdanić's Suggestions aided and abetted any Indictment crime.

Relief sought

152. No reasonable Trial Chamber, having properly considered the above evidence, could have concluded beyond reasonable doubt that General Ojdanić's provided practical assistance, encouragement, and moral support to members of the VJ who were involved in the commission of forcible displacements in the specific crime sites where the VJ participated, or that his conduct had a substantial effect on the

[163] T.15484.
[164] P929 (Minutes of the Collegium of the General Staff of the VJ for 9 April 1999), pp .9-10; p.13.
[165] TJ [1/1012]
[166] TJ [3/626, fn 1507]
[167] 4D420 (Communication from Pavković to Supreme Command Staff re Resubordination of the MUP, 20 April 1999).

commission of those crimes. General Ojdanić respectfully requests that the Appeals Chamber consider the above evidence and arguments as to weight and reverse General Ojdanić's convictions.

B. Ground 2(B): the Trial Chamber failed to consider that the acts General Ojdanić performed were acts that he had to perform to defend his country

Alleged error of fact which occasioned a miscarriage of justice

153. General Ojdanić has challenged the Trial Chamber's approach as an error of law in Ground 1(B), above. Should the Appeals Chamber consider that the Trial Chamber did not err in law, General Ojdanić nonetheless contends that the Trial Chamber erred in fact. The arguments made above in Ground 1(B) apply equally here. No reasonable Trial Chamber would have convicted General Ojdanić on the basis of acts that he could not have been expected to forego.

Relief sought

154. General Ojdanić respectfully requests that the Trial Chamber erred in fact when it found that his necessary acts satisfied the *actus reus* of aiding and abetting forcible displacements and vacate his convictions.

C. Sub-ground 2(C): the Trial Chamber erred by holding that General Ojdanić was involved in the arming of the non-Albanian civilian population and reached unreasonable conclusions

Alleged error of fact which has occasioned a miscarriage of justice

155. The Trial Chamber held that General Ojdanić "contributed to the commission of crimes in Kosovo by the VJ through his role in arming the non-Albanian population and ordering its engagement in 1999."[168] The Trial Chamber's finding was wholly erroneous: there was no evidence that General Ojdanić (i) had any role in arming the non-Albanian population, or (ii) that he ordered its engagement in 1999. No reasonable trier of fact would have so found.

Error in finding that General Ojdanić played a role in arming the non-Albanian population

156. The Trial Chamber found that by July 1998 over 54,000 citizens from local villages and towns in Kosovo had been armed by the VJ and MUP and that this

[168] TJ [3/626]

number continued to grow to about 60,000.[169] The Trial Chamber held that the armed Serb population was organised into units, which were known as Reserve Police Detachments or Reserve Police Squads (RPOs) and included both VJ and MUP reservists who were not [at that time] actively engaged in wartime units.[170] The main task of these units was the defence of their villages and towns in the event of an attack by the KLA.[171]

157. There was no evidence, and the Trial Chamber did not conclude, that any weapons were issued to non-Albanian civilians after General Ojdanić became Chief of Staff (on 27 November 1998). Rather, the evidence showed that weapons were issued from several sources during 1998. VJ reservists were armed and organised into RPOs pursuant to a Priština Corps order dated 26 June 1998.[172] The Trial Chamber further held that whilst "individuals with wartime assignments in the VJ, MUP, and civil defence and civil protection units were issued weapons through their wartime units and then sent back to their villages when not on active duty, citizens without such wartime assignments were issued weapons on the basis of a Ministry of Defence order dated 21 May 1998.[173]

158. Therefore, the Trial Chamber held that weapons were issued by the VJ, MUP and Ministry of Defence in early 1998. There was no evidence of arms being distributed to the non-Albanian civilian population in 1999, by General Ojdanić or anybody else. Indeed, the only evidence of the attempted distribution of weapons in 1999 was General Ojdanić's unsuccessful attempt to form an Albanian Military Territorial Detachment.[174] A prosecution witness, Colonel Pešić, testified that he received the order (from General Ojdanić) that a sufficient number of weapons were provided for the purpose of forming this unit.[175]

159. With the beginning of mobilisation for war with NATO and the KLA in March 1999, most of the RPOs were disbanded because their members joined their wartime assignments in the MUP or VJ reserve forces.[176] After most VJ and MUP

[169] TJ [1/764]
[170] TJ [1/765]
[171] TJ [1/765]
[172] TJ [1/766]
[173] TJ [1/766]
[174] TJ [3/509]
[175] Zlatomir Pešić, P2502 (witness statement dated 30 January 2004), para.11; T.7250.
[176] TJ [1/768]

reservists were mobilised and called up to their respective wartime assignments, there remained approximately 6,000 RPO members.[177] The clear implication is that these 6,000 people were those who had been issued weapons on the basis of the Ministry of Defence order dated 21 May 1998.

160. There was simply no evidence that General Ojdanić had any role in arming non-Albanian population civilians – be they VJ reservists or anybody else. The issuance of weapons occurred in the summer of 1998. It did not take place under General Ojdanić's authority.

161. Moreover, General Ojdanić did not know that any arming had taken place until after he became Chief of Staff.[178] At a collegium meeting of the VJ General Staff on 2 February 1999, General Ojdanić mentioned that he had heard that there were "50,000 armed Serbs". Samardžić, who at that stage was the Head of the VJ Inspectorate but formerly commanded the Third Army, replied that the number was 47,000. General Ojdanić asked Samardžić, "[w]hat are the assignments of those armed Serbs and what is the plan for including them in the units."[179] General Ojdanić was plainly concerned to ensure that arms had been properly distributed through official channels to those with defined wartime roles; General Ojdanić was concerned to prevent a deterioration in the security situation and the possibility of a more widespread inter-ethnic conflict in Kosovo.[180]

162. Samardžić explained that he had ordered that weapons be distributed in 1998.[181] This was corroborated by the evidence of Momir Stojanovic (Chief of the Security Section of the Priština Corps), who testified that the weapons were issued in 1998 following orders from the Commander of the Priština Corps.[182] Samardžić informed General Ojdanić that the role of the armed Serbs was to "defend their villages and participate together with army units in any operations in the immediate vicinity."[183] These were plainly defensive tasks aimed at the KLA.

[177] TJ [1/776]
[178] *See* TJ [3/507]
[179] TJ [3/507]
[180] TJ [3/626]. *See* 3D685 (VJ General Staff evaluation of security information, February 1999), p.16, para.4 ; Branko Gajic T.15252-3 (7 September 2007); Dimitrejevic T.26634 – 26635 (8 July 2008).
[181] TJ [1/779]
[182] Momir Stojanovic T.20072 – 20073 (12 December 2007). This was further corroborated by the evidence of a prosecution witness, Adnan Merovci T.8439 (17 January 2007).
[183] TJ [3/507]

163. Crucially, Samardžić explained the operation of the RPOs:

> "We have to carry out military and police operations, it can't be done in any other way, and at this moment there are enough army and MUP/Ministry of Interior/ members to do their part of the job if it should come to that."[184]

164. The Trial Chamber was correct in holding that General Ojdanić knew of "VJ involvement in the arming of the non-Albanian population in Kosovo."[185] However, the Trial Chamber was unable to conclude whether such arming in 1998 was illegal.[186] Therefore, no reasonable Trial Chamber could make any adverse finding against General Ojdanić on the basis of his discovery of this arming. There was no evidence that General Ojdanić had been involved in such arming and the Trial Chamber erred in attributing the arming of the non-Albanian population to General Ojdanić's *actus reus*.

Error in finding that General Ojdanić ordered that the non-Albanian population be engaged in VJ operations

165. The Trial Chamber held that on 17 April 1999 General Ojdanić "directed the Priština Corps, together with the 'armed non-Siptar population,'" to support the MUP in breaking up and destroying the "STS" [Siptar Terrorist Forces] in the Rugovo Gorge sector.[187]

166. To establish that General Ojdanić "directed" the use of the "armed non-Siptar population" the Trial Chamber relied upon a "Suggestions" document sent by General Ojdanić to the Priština Corps on 17 April 1999. But General Ojdanić's Suggestions document contains no mention of using the "armed non-Siptar population".[188] Rather, General Ojdanić's Suggestions merely referred to an earlier Joint Command order dated 15 April 1999 which provided that the Priština Corps together with the "armed non-Siptar population" should support the MUP in destroying the KLA in the Rugovo sector.[189] General Ojdanić's Suggestion to the 3rd Army was that this operation be

[184] P931 (Minutes of the Collegium of the General Staff of the VJ for 2 February 1999), p. 23 (last sentence).
[185] TJ [3/511]
[186] TJ [3/56]
[187] TJ [3/510]
[188] P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999).
[189] P1878 (Joint Command Order, 15 April 1999).

"delayed" and reorganised in cooperation with the 2nd Army in order to prevent a "new spill out" of KLA from the sector.[190]

167. There was no evidence that General Ojdanić saw the actual Joint Command order or its reference to using the "armed non-Siptar population". The detailed evidence of Curcin explained the provenance of General Ojdanić's Suggestions: it was issued on the basis of an A3 map showing combat operations in the Rugovo, rather than the Joint Command Order.[191] Curcin testified that he had typed up General Ojdanić's Suggestions without seeing or referring to the written Joint Command order.[192] Curcin's uncontested evidence was that General Ojdanić had simply bumped into Pavković, who had been with President Milošević and then showed General Ojdanić the A3 map.[193]

168. Further, a report from the 3rd Army after the operation had concluded listed the units which participated[194]: the armed non-Albanian population were not identified.[195] No reasonable Trial Chamber could conclude that General Ojdanić's Suggestions document assisted any Indictment crime: as noted above, no Indictment crimes took place in the Rugovo Gorge sector on or around 17 April 1999, and certainly none perpetrated by the armed non-Albanian population at the behest of the VJ. The Trial Chamber failed to consider clear evidence that the operation took place without any reference to General Ojdanić's Suggestions – they were received too late.[196] Further, the Trial Chamber ignored unchallenged evidence that the armed non-Albanian population were not engaged in this operation in any shape or form.[197]

Relief sought

169. The Trial Chamber's findings that General Ojdanić was involved in arming the non-Albanian population and that he directed the use of the armed non-Albanian

[190] P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999).
[191] TJ [1/1119]. *See* also T.16971 – 16972; T.17025.
[192] T.17027.
[193] T.16972-16973.
[194] 2nd Battalion of the 58th lpbr/Light Infantry Brigade/. The 1st/?and/2nd KAG/Corps Artillery Group/of the PrK/Pristina Corps/ and some of the units of the 2nd Army.
[195] 4D420 (Communication from Pavković to Supreme Command Staff re Resubordination of the MUP, 20 April 1999).
[196] 4D420 (Communication from Pavković to Supreme Command Staff re Resubordination of the MUP, 20 April 1999).
[197] *See* 4D420 (Communication from Pavković to Supreme Command Staff re Resubordination of the MUP, 20 April 1999).

population thereby assisting the Indictment crimes was wholly erroneous. The Appeals Chamber is respectfully requested to reverse these findings and, combined with the other errors alleged, reverse General Ojdanić's convictions. Alternatively, the Appeals Chamber is respectfully requested to reverse these findings and reduce General Ojdanić's sentence in light of his lessened degree of participation in the Indictment crimes.

D. Sub-ground 2(D): the Trial Chamber reached unreasonable conclusions regarding the replacement of high-level VJ personnel

Alleged error of fact which has occasioned a miscarriage of justice

170. The Trial Chamber committed a clear error of fact by finding that General Ojdanić supported the appointment of personnel to high level posts who either supported the (criminal) activities of the VJ in Kosovo or did not raise objections to such activities, most notably in the case of Pavković.[198] The Trial Chamber held that high-level officials were "carefully positioned" as the crisis in Kosovo escalated, but that this was demonstrated only in relation to the appointment of General Ojdanić and Pavković.[199]

171. No reasonable Trial Chamber could find that General Ojdanić was carefully positioned in order to facilitate crimes. No reasonable Trial Chamber could have concluded that General Ojdanić supported the appointment of personnel to high level posts who either supported (illegal) activities of the VJ in Kosovo or did not raise objections to this involvement. The Trial Chamber adopted an irrational approach to General Ojdanić's actions, most notably in the case of Pavković.

Error in relation to Pavković's appointment as Commander of the Third Army, replacing Samardžić

172. Milošević, over the objections of Montenegrin President Đukanović, replaced Samardžić with Pavković, "after Pavković and Samardžić had clashed over the intensification of the VJ presence in Kosovo without strict adherence to the chain of

[198] TJ [3/528]
[199] TJ [3/85]

command."[200] The Trial Chamber held that Pavković was intentionally positioned by Milošević "in order to facilitate the implementation of the common purpose."[201]

173. The appointment of Pavković was "proposed in writing to the Supreme Defence Council by General Ojdanić at the meeting of 25 December 1998."[202] The Trial Chamber held that General Ojdanić "positively supported"[203] the SDC decision to replace Samardžić with Pavković "[d]espite the concerns raised by the President of Montenegro, Milo Đukanović, that the Priština Corps was not always operating in accordance with the constitutional role of the VJ and the decisions of the VJ, Milošević appointed Pavković as Commander of the 3rd Army.[204] The Trial Chamber held that "Ojdanić was made aware of concerns expressed by Đukanović, due to the alleged misuse of the VJ in Kosovo. Nonetheless, Ojdanić actively supported this appointment."[205]

174. Therefore, the Trial Chamber concluded that General Ojdanić "actively supported" the careful positioning of an individual who would implement the common purpose. This finding coloured the Trial Chamber's assessment of General Ojdanić's *mens rea*. This finding was plainly unreasonable, for three reasons.

175. First, the Trial Chamber's reasoning was illogical and contradictory. The Trial Chamber held that General Ojdanić proposed the removal of a hindrance to the common criminal purpose. The prosecution pointed to evidence that Samardžić had challenged Pavković in 1998 in the following way: "[w]e cannot fight terrorism by torching; it's a disgrace [...] I am asking you to impress this upon your men."[206] The Trial Chamber held that that General Ojdanić proposed the promotion of Pavković to replace somebody opposed to the "intensification" of the VJ presence in Kosovo in 1998.[207]

176. However, the Trial Chamber completely ignored the reality of the evidence. Pavković's promotion only arose out of the chain of staff movements following

[200] TJ [3/85]
[201] TJ [3/85]
[202] TJ [3/523]
[203] TJ [3/523]
[204] TJ [3/524]
[205] TJ [3/528]
[206] 4D97 (Minutes from the briefing of the commanders of the PrK and 3rd Army, 7 August 1998), p.3. See the Prosecution's Closing Brief, para. 888.
[207] TJ [3/85]

General Ojdanić's move to become Chief of Staff.[208] Crucially, Samardžić was not relegated or emasculated in favour of Pavković. Rather, General Ojdanić promoted Samardžić to become a member of the General Staff. It was only then that the post of Commander of the 3rd Army became vacant. Samardžić was promoted to the prestigious position of Chief of Inspections. There was no challenge to Fezer's evidence that this was a "very important position"[209] Radinović – a military expert – explained that Samardžić's post sat directly under the Chief of Staff.[210] Radinović also explained the significance of inspections within the VJ: "It is one of the very important process functions of control and command. It establishes the degree of the practical realisation of issued orders, commands and directives, i.e. of the planned activities of subordinate units and commands."[211] The Trial Chamber's focus on Pavković blinded it to the fact that General Ojdanić promoted an individual who (the Trial Chamber had found) was opposed to unnecessary force in Kosovo. Moreover, Samardžić's role was to monitor and inspect the activities of subordinate commands (Pavković's 3rd Army, among others)– no reasonable Trial Chamber would ignore the significance of this promotion.

177. Secondly, the Trial Chamber held that General Ojdanić "actively supported" the promotion of Pavković. However, General Ojdanić spoke about Samardžić and Pavković in similar terms. The evidence of the SDC meeting on 25 December 1999 was as follows:

> "General Dragoljub OJDANIĆ considered it necessary to give a more detailed statement of reasons for the five generals in the most responsible posts – Lieutenant-General Svetozar MARJANOVIĆ, Colonel-General Dušan SAMARDŽIĆ, Lieutenant-General Dr. Vidoje PANTELIĆ, Major-General Spasoje SMILJANIĆ and Lieutenant-General Nebojša PAVKOVIĆ. The Chief of the General Staff talked about each of the five generals in turn and gave them high marks for their work to date and their development in the military service."[212]

178. There was no sense in which General Ojdanić sought to denigrate Samardžić in favour of Pavković. The Trial Chamber adopted a wholly unreasonable approach by placing great weight upon General Ojdanić's comments in relation to Pavković but no weight upon the identical comments he made in support of Samardžić's promotion.

[208] See Exhibit 3D731 and T.16477.
[209] T.16477 (9 July 2007) Fezer
[210] Radovan Radinović, 3D1116 (Radovan Radinović's Expert Report), p. 85.
[211] Radovan Radinović, 3D1116 (Radovan Radinović's Expert Report), p. 169, para. 251.
[212] P1000 (Minutes of 8th SDC session, 25 December 1998), p.9.

179. Thirdly, the Trial Chamber erred by finding that General Ojdanić actively supported Pavković's promotion *despite* concerns raised by Đukanović. Đukanović 's objection to the appointment of Pavković was raised *after* Ojadnic had spoken and put forward Pavković's (and Samardžić's) name. Thereafter, the debate rested with the voting members of the SDC (Milošević, Milutinović and Đukanovic); the decision rested with Milošević.[213] It is manifestly unjust for the Trial Chamber to have held the appointment of Pavković against General Ojdanić but not against Milutinović, who was acquitted of all charges: "even if Milutinović had sided with Đukanovic" in relation to the appointment of Pavković "the outcome would not have been any different since the appointments of VJ Generals were exclusively within Milošević's jurisdiction."[214] The same reasoning should have applied to General Ojdanić, who was not a member of the SDC but merely attended its meetings.[215]

180. Therefore, the Trial Chamber failed to consider the significance of the appointment of Samardžić to the General Staff; General Ojdanić did not "actively support" the appointment of Pavković as Samardžić's replacement after hearing the objections of Đukanovic. No reasonable Trial Chamber could have held that the appointment of Pavković went to General Ojdanić's *actus reus*.

Error in relation to General Ojdanić's appointment as Chief of Staff

181. The Trial Chamber held that the appointment of General Ojdanić as Chief of Staff "did not bear directly upon [his] individual criminal responsibility for the crimes alleged in the indictment."[216] Elsewhere, however, the Trial Chamber's assessment of General Ojdanić's appointment tainted its assessment of his subsequent actions.

182. The Trial Chamber held that General Ojdanić was "intentionally placed" and "carefully positioned" by Milošević in order to facilitate the implementation of the joint criminal enterprise.[217] The Trial Chamber held that

> "Although most of the evidence on this issue is circumstantial, there is in fact some direct evidence that Milošević removed people of independent

[213] TJ [3/524]
[214] TJ [3/126]
[215] TJ [1/437]
[216] TJ [3/497]
[217] TJ [3/85]

> judgement from key posts and carefully positioned "yes-men" [including General Ojdanić] prior to the implementation of the common purpose."[218]

183. On the other hand, the Trial Chamber held that Milošević replaced Perišić with General Ojdanić "in an effort to have a more malleable Chief of Staff."[219] The nuance is important: "intentionally placed" or "carefully positioned" suggests that Milošević selected General Ojdanić in particular as Perišić's replacement because he knew that he was getting a "yes-man". However, "in an effort have a more malleable Chief of Staff" suggests a far lesser degree of certainty – for example, whereby Milošević simply wanted to get rid of Perišić but knew little of General Ojdanić.

184. The facts demonstrate that the latter position was the only reasonable conclusion available to the Trial Chamber. The Minutes the Supreme Defence Council meeting on 24 November 1998 reveal that Milošević did not know General Ojdanić well: Milošević stated that he was "less well-acquainted" with Ojdanić and but that, as second in command to General Perišić, he was the logical replacement.[220]

185. Moreover, the Trial Chamber accepted that General Ojdanić's approach to the use of the VJ in Kosovo was "similar" to Perišić.[221] The Trial Chamber noted that it was Perišić, despite his apparent opposition, who had prepared a plan for the use of the VJ in Kosovo in 1998.[222] General Ojdanić was not involved in the formation of this plan nor was he enthusiastic for its implementation.[223] General Ojdanić consistently and passionately called for the resolution of the Kosovo crisis by peaceful means, as detailed in his Closing Brief.[224]

186. Therefore, no reasonable Trial Chamber could conclude that General Ojdanić was a carefully positioned "yes-man". The most the evidence established was that Milošević removed Perišić in an effort to have a more malleable Chief of Staff. The Trial Chamber was entitled to so-hold, but no further. The Trial Chamber's finding that General Ojdanić was "carefully positioned" and a "yes-man" should be reversed as it was plainly unreasonable and tainted the assessment of General Ojdanić's subsequent actions, including the promotion of Pavković as discussed above.

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[218] TJ [3/78]
[219] TJ [3/85]
[220] P1576 (Minutes of 7th SDC session, 24 November 1998), p. 4.
[221] TJ [3/494]
[222] TJ [3/494]
[223] TJ [3/497]
[224] Closing Brief, paras. 153-154.

Error in relation to Lazarević's appointment as Commander of the Priština Corps

187. General Ojdanić proposed the appointment of Lazarević as commander of the Priština Corps of the 3rd Army (Pavković's recently-vacated post).[225] The Trial Chamber held that Lazarević's promotion did not "fit the pattern" of Perišić and Pavković.[226] The Trial Chamber held that the evidence did not support the prosecution's submission that Lazarević was appointed because he was "more compliant" than other VJ officers: "[t]he reasons for Lazarević being appointed as the Commander of the Priština Corps were his experience, particularly as Chief of Staff of the Priština Corps, and his qualities as an officer."[227] Lazarević "did not appear to have been one of Milošević's 'yes-men' at the time when he was appointed at the end of 1998."[228]

188. Despite these clear findings, the Trial Chamber held that Lazarević's promotion "could be seen as consistent with the approach of rewarding those who did not express concerns about the legality of the use of the VJ in Kosovo."[229] There was no evidence to support such a conclusion. It amounts to sheer speculation on the part of the Trial Chamber.

Error in relation to Dimitrijević's removal

189. On 25 March 1999, Geza Farkaš replaced Dimitrijević as Head of the VJ Security Administration, pursuant to a decree of Milošević.[230] The Trial Chamber found that the dismissal of Dimitrijević was founded "on the corresponding disapproval of those who questioned the legality of VJ activities in Kosovo". Crucially, however, the Trial Chamber held that this was ordered by Milošević and "there was no evidence that Ojdanić prompted it."[231] Therefore, there was no basis upon which the dismissal of Dimitrijević could be held against General Ojdanić. Indeed, General Dimitrijević testified that there was "no doubt" that General Ojdanić

[225] TJ [3/523]
[226] TJ [3/85]
[227] TJ [3/798]
[228] TJ [3/918]
[229] TJ [3/528]
[230] TJ [3/82]
[231] TJ [3/528]

was sincere in his efforts to get accurate information as to conduct of the VJ in Kosovo.[232]

Error in failing to consider General Ojdanić's appointment of Vasiljević

190. The Trial Chamber relied heavily upon the evidence of Alexander Vasiljević, a prosecution witness. The Trial Chamber held that General Ojdanić "ordered Vasiljević out of retirement on 27 April 1999, appointed him Deputy Head of the Security Administration, and tasked him to investigate and report to the Supreme Command Staff about crimes being committed in Kosovo."[233] The Trial Chamber held that Vasiljević was a "generally reliable witness"[234] Vasiljević discovered that a decision had been taken by the 3rd Army Command not to report the occurrence of certain crimes in the regular combat reports.[235] However, Trial Chamber gave General Ojdanić no credit for the appointment of Vasiljević to investigate crimes in Kosovo.

Error in relation to Grahovac's removal

191. In April 1999, General Grahovac was removed from his post as Assistant Chief of Staff for the Airforce and the Anti-Aircraft Defence. The Trial Chamber highlighted that Grahovac had, in late 1998 and early 1999, "exhibited concern that the VJ had acquired helicopters in breach of embargo on the acquisition of arms from foreign sources placed upon them in March 1998 by UNSCR 1160.[236] However, the Trial Chamber failed to consider that General Ojdanić had seconded Grahovac's concern.[237] No reasonable Trial Chamber could link Grahovac's dismissal to these comments, or General Ojdanić to Grahovac's dismissal.

192. In any event, the Trial Chamber held that Grahovac's dismissal was ordered by Milošević and "there was no evidence that General Ojdanić had prompted it."[238] Therefore, there was no basis upon which the dismissal of Grahovac could be held against General Ojdanić.

[232] T.26730.
[233] TJ [3/571]
[234] TJ [3/572]
[235] TJ [3/601]
[236] TJ [3/526]
[237] Exhibit 3D557, pp.19-20.
[238] TJ [3/528]

Error in relation to Obradović appointed as Commander of the Second Army

193. In April 1999, pursuant to the decision of Milošević, Milorad Obradović was appointed Commander of the 2nd Army and Jagos Stevanović was appointed his Chief of Staff. The Trial Chamber held that while there was no evidence of any complaints regarding Obradović, his promotion "can be seen as consistent with the approach of rewarding those who did not express concerns about the legality of the use of the VJ in Kosovo."[239]

194. This suggestion was not put to Obradović when he testified. There was no evidence that General Ojdanić prompted Obradović's appointment. Therefore, there was no basis upon which the appointment of Obradović could be held against General Ojdanić.

Conclusion

195. No reasonable Trial Chamber could conclude that General Ojdanić was "carefully positioned" to facilitate the implementation of any common criminal purpose. The Trial Chamber irrationally held that General Ojdanić supported the appointment of personnel who supported the activities of the VJ in Kosovo or did not raise objections to this involvement.[240] The Trial Chamber completely ignored General Ojdanić's appointment of Vasiljević. The Trial Chamber itself found that General Ojdanić had no role in the dismissal of Dimitrijević or Grahovac or the appointment of Obradovic; the Trial Chamber held that the appointment of Lazarević did not fit any pattern. The Trial Chamber's own analysis is reduced to the appointment of Pavković, in relation to whom the Trial Chamber ignored the simultaneous promotion of Samardžić to a key role monitoring the conduct of the VJ.

Relief sought

196. No reasonable Trial Chamber could conclude that General Ojdanić assisted the Indictment crimes by supporting the appointment of personnel who supported illegal activities by the VJ.

[239] TJ [3/528]
[240] TJ [3/528]

E. Sub-ground 2(E): the Trial Chamber erred by holding that General Ojdanić approved breaches of the October Agreements

Withdrawal of ground

197. The Trial Chamber found that General Ojdanić's motivation to breach the October Agreements was his "fear of a genuine threat from NATO and the KLA, rather than a desire to prepare for a widespread campaign of forcible displacement in Kosovo."[241] The Trial Chamber stated that it did not consider General Ojdanić's conduct in relation to the October Agreements in assessing his responsibility for aiding and abetting the indictment crimes.[242] Accordingly, General Ojdanić hereby withdraws this Sub-ground of appeal.

[241] TJ [3/521]
[242] TJ [3/620 - 631]

IV. GROUND THREE: THE TRIAL CHAMBER ERRED IN LAW AS TO THE *MENS REA* OF AIDING AND ABETTING

Introduction

198. The Trial Chamber held that the mental elements of aiding and abetting are established by proof that (a) the accused intentionally performed an act with the knowledge that such act would lend practical assistance, encouragement or moral support to the commission of a crime or underlying offence; and (b) that the accused was aware of the essential elements of the crime or underlying offence for which he is charged with responsibility, including the mental state of the physical perpetrator or intermediary perpetrator.[243]

199. At **TJ [1/93]** the Trial Chamber held that an accused "must have knowledge that his acts or omissions assist the principal perpetrator or intermediary perpetrator in the commission of the crime or underlying offence." The Trial Chamber omitted this element when setting out the *mens rea* of aiding and abetting in relation to General Ojdanić.[244]

200. General Ojdanić contends that the Trial Chamber erred in law as to the *mens rea* of aiding and abetting in a number of respects.

[243] TJ [1/93]
[244] TJ [3/620]

A. Sub-Ground 3(A): the Trial Chamber failed to require that General Ojdanić had knowledge of the specific crimes for which he was convicted

Alleged error of law invalidating the decision

201. General Ojdanić contends the *mens rea* of aiding and abetting requires knowledge of the specific crime perpetrated in order for criminal responsibility to follow. Otherwise, a finding of criminal responsibility loses all proportion to the knowledge (and guilt) of an accused. The Trial Chamber held that General Ojdanić satisfied the *mens rea* of aiding and abetting such as to hold him responsible for crimes in nine municipalities encompassing 23 different towns and villages. In failing to apply correct standard for *mens rea*, the Trial Chamber committed a reversible error. There was no proof of General Ojdanić's specific knowledge of the Indictment crimes. Therefore, the Appeals Chamber must reverse General Ojdanić's convictions.

The correct *mens rea* standard for aiding and abetting requires *specific knowledge*

202. In *Tadić,* the Appeals Chamber held that the requisite mental element of aiding and abetting is "knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal."[245] The *Tadić* Appeals Chamber distinguished aiding and abetting from joint criminal enterprise liability. As is well-known, the extended form of joint criminal enterprise liability permits convictions for foreseeable crimes in locations which may not be specifically known to an accused. By contrast, aiding and abetting liability requires that an accused know of the specific crime that his acts aid and abet.

203. This step in the Appeals Chamber's reasoning is crucial. Tadić could only have been held responsible for the killing of five men in the village of Jaskici on the basis of the extended form of joint criminal enterprise liability: it had not been proved that Tadić had *specific knowledge* of the killings and therefore aiding and abetting liability did not attach. It was the distinction between knowledge of the general and foreseeable situation, as opposed to the specific crime, which allowed the Appeals Chamber to enunciate joint criminal enterprise liability. Compared to aiding and

[245] *Tadić* AJ, para. 229(iv).

abetting, the *advantage* of JCE III liability is its ability to convict individuals of specific crimes that were foreseeable but unknown.

204. The *Vasiljević* case was limited to the first form of JCE liability. Nonetheless, in substituting Vasiljević's conviction as a principal perpetrator for one of aiding and abetting, the Appeals Chamber mirrored *Tadić* by distinguishing the two forms of liability:

> "In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose."[246]

205. Vasiljević was convicted of aiding and abetting murder because he "knew that the seven Muslim men were to be killed."[247] In other words, his *mens rea* was established because he knew about the specific crime.

206. In *Kvočka,* the Appeals Chamber (unlike the Trial Chamber) applied the *Vasiljević* definition of the *mens rea* of aiding and abetting and considered that:

> "whether an aider and abettor is held responsible for assisting an individual crime committed by a single perpetrator or for assisting in all the crimes committed by the plurality of persons involved in a joint criminal enterprise depends on the effect of the assistance and on the knowledge of the accused... the requisite mental element applies equally to aiding and abetting a crime committed by an individual or a plurality of persons. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however, accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.[248]

207. Crucially, the *Kvočka* Appeals Chamber, including Judges Pocar and Guney, did not hold that an aider and abettor is responsible for foreseeable crimes (which he does not specifically know about) which flow from a joint criminal enterprise. The

[246] *Vasiljević* AJ, para. 102(ii).
[247] *Vasiljević* AJ, para. 134.
[248] *Kvočka* AJ, para. 90.

Appeals Chamber's reasoning was sound: the contrary would mean holding that it is possible to aid and abet a joint criminal enterprise – which would be nonsense. Aiding and abetting a JCE is not a valid form of liability at the ICTY.[249] Rather, whether a joint criminal enterprise exists or not, the requisite mental element of aiding and abetting is the same: it requires specific knowledge of the individual crime.

208. General Ojdanić submits that the logic of *Tadić*, *Vasiljević* and *Kvočka* is clear and should be followed. Similarly in Bagilishema, the Appeals Chamber held that knowledge of a general matrix of events and conduct does not suffice to constitute knowledge or notice."[250] Also in Orić, the Appeals Chamber held that it is not sufficient to have known of crimes generally: a superior must be shown to know that his subordinates are involved in the commission of the specific crimes.[251]

209. However, the Trial Chamber in *Simić* identified a conflict in the jurisprudence as to the level of knowledge required to satisfy the *mens rea* of aiding and abetting:

> The Trial Chambers in *Kunarac* and *Krnojelac* explained the *mens rea* of aiding and abetting as consisting of the knowledge (or awareness) that the acts performed by the aider and abettor assist in the commission of a specific crime by the principal. The Trial Chambers in *Furundžija, Blaskić, Kvočka*, and *Naletilic*, however, took the view that it is not necessary that the aider and abettor know the precise crime that was intended or which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually perpetrated. The Trial Chamber finds the stricter definition set out in *Kunarac* and *Krnojelac* persuasive and endorses it. Further, the aider and abettor must have been aware of the essential elements of the crime ultimately committed by the principal, including his *mens rea*.[252]

210. Therefore, the *Simić* Trial Chamber considered the conflict in the jurisprudence, and held that aiding and abetting liability requires knowledge of the specific crime.

[249] *Prosecutor v Prlic et al*, No. IT-04-74-AR72.3, *Decision on Petkovic's Appeal on Jurisdiction* (23 April 2008) at para. 21
[250] *Bagilishema* AJ, para. 42.
[251] *Orić* AJ, paras. 52; 55-60; 169-174.
[252] *Simić* TJ, para. 163. (emphasis from original)

211. In *Kunarac*, the Trial Chamber held that the *mens rea* of aiding and abetting "consists of the knowledge that the acts performed by the aider and abettor assist in the commission of a specific crime by the principal."[253] In *Kunarac,* two women (AS and FWS-87) were held against their will in one of the accused's (Kovac's) apartments for a four month period and raped repeatedly. Kovac was convicted of raping FWS-87. Moreover, he was aware that another man named Kostic repeatedly raped AS. In Kovac's absence from the apartment, Kostic would also rape FWS-87. Nevertheless, in applying the (correct) *mens rea* standard the Trial Chamber did not convict Kovac of aiding and abetting the rape of FWS-87 by Kostic:

> "The Trial Chamber notes that it has not been established beyond reasonable doubt that the accused Kovac aided and abetted the rape of FWS-87 by Jagos Kostic. The evidence indicates that the fact that Jagos Kostic raped FWS-87 was hidden from Kovac. Considering the two men's relationship and Jagos Kostic's threats to FWS-87, it seems very unlikely that Kovac could have envisaged the possibility that Jagos Kostic would rape FWS-87."[254]

212. The horrific facts of this case reinforce the strict level of specific knowledge of the crime required in order to enter a conviction for aiding and abetting.

213. In *Krnojelac,* the Trial Chamber, including Judge Liu, held that the *mens rea* of aiding and abetting "requires that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender."[255] Krnojelac was held responsible under Article 7(3) for beatings inflicted by his subordinates upon detainees at the KP Dom detention facility. However, Krnojelac was not held responsible for aiding and abetting beatings inflicted by others, such as policemen and other individuals, because it was not established that Krnojelac "knew that those individuals, as opposed to the guards at KP Dom, were taking part in the beatings."[256] Even though the accused knew that outsiders were entering KP Dom to conduct interrogations, "[t]hat would not suffice, in the absence of evidence that he had actual knowledge, as opposed to

[253] *Kunarac* TJ, para. 392.
[254] *Kunarac* TJ, para. 761.
[255] *Krnojelac* TJ, para. 90.
[256] *Krnojelac* TJ, para. 319.

mere suspicions concerning their part therein, to hold him responsible for aiding and abetting those who were not guards."[257]

214. Like *Kunarac,* the *Krnojelac* judgment demonstrates the strict level of specific and actual knowledge knowledge required in order to enter a conviction for aiding and abetting.

215. In *Blagojević,* the Trial Chamber, presided over by Judge Liu, held that an aider and abettor must know "that his or her own acts assisted in the commission of the specific crime by the principal offender."[258] Applying that standard, the Trial Chamber held that in order to find Blagojević guilty of aiding and abetting murder, the prosecution had to establish knowledge of the specific murder operation.[259] The Trial Chamber found that in relation to a number of murder operations, this specific knowledge was not established.[260]

216. The *Blagojević* Appeals Chamber, including Judges Guney, Vaz and Meron, stated: "The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator."[261] This statement, with its emphasis on knowledge of the specific crime by the principal perpetrator, again demonstrates the high degree of specific knowledge required.

217. On the facts, when dismissing Blagojević's Appeal for aiding and abetting murder, persecutions, and inhumane acts relating to forcible transfers out of Srebrenica and the detention, mistreatment, and murders in and around a school in Bratunac town, the Appeals Chamber relied upon detailed factual findings of Blagojević's specific knowledge of those crimes.[262] If a lesser standard of knowledge was sufficient, there was no need for the Appeals Chamber to analyse Blagojević's knowledge of specific crimes.

218. Moreover, the Appeals Chamber reversed Blagojević's conviction for complicity in genocide. While he knew about specific deportations and other crimes,

[257] Ibid.
[258] *Blagojević* TJ, para. 727.
[259] *Blagojević* TJ, para. 729.
[260] *Blagojević* TJ, para. 744.
[261] *Blagojević* AJ, para. 127.
[262] *Blagojević* AJ, para. 129; see in particular footnote 352 and the sections of the Appeal Judgment referred to therein.

he did not have specific knowledge of mass killings and thus the specific intent of the principal perpetrators.[263] Once again, this demonstrates the high degree of specific knowledge necessary for accomplice liability.

Authorities which do not appear to require specific knowledge are unpersuasive and/or distinguishable

219. However, as indicated by the Trial Chamber in *Simić,* there are authorities which appear to suggest that the *mens rea* of aiding and abetting does not require specific knowledge of the indictment crime.

220. The Trial Chamber in *Furundžija* held that:

> "it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[264]

221. General Ojdanić contends that this does not weaken the *mens rea* standard of aiding and abetting in any material way: an accomplice must still know that the specific crime which eventuates was, as it were, on the menu of possibilities. *Furundžija* still requires that an aider and abettor have knowledge of the specific indictment crime.

222. In any event, the statement in *Furundžija* was *obiter*. On the facts, Furundžija was present at the scene of the crime. He knew about the specific indictment crime. Unlike in *Kunarac* (discussed above), the *Furundžija* Trial Chamber did not have to consider whether a lack of specific knowledge still permits a conviction for aiding and abetting.

223. In *Blaskić,* the Trial Chamber merely cited the *Furundžija* formulation of the mental element of aiding and abetting.[265] The *Blaskić* Trial Chamber did not go any

[263] *Blagojević* AJ, para. 123.
[264] *Furundžija* TJ, para. 246.
[265] *Blaskić* TJ, para. 287.

further: the accused was convicted of ordering the crimes in question[266] and/or under Article 7(3).[267] Moreover, while *Blaskić* Appeals Chamber approved the *Furundžija* definition (which does not require specific knowledge)[268] it also approved the *Vasiljević* definition (which, as discussed above, does require knowledge of the specific crime).[269] Crucially, the Appeals Chamber confirmed that Blaskić had not been held responsible as aider and abettor and considered that this form of participation had been "insufficiently litigated" on appeal.[270] Therefore, *Blaskić* does not establish that specific knowledge is unnecessary.

224. In *Naletilic,* the Trial Chamber paraphrased the *Furundžija* formulation: "[t]he abettor need not have known the precise crime being committed as long as he was aware that one of a number of crimes would be committed, including the one actually perpetrated."[271] However, the Trial Chamber also required that an aider and abettor be aware of the essential elements of the crime, "which also means the necessary *mens rea* on the part of the principal."[272] Knowledge of the *mens rea* of the principal necessarily involves a detailed knowledge of the circumstances of the specific crime.

225. In a footnote the *Naletilic* Trial Chamber cited paragraph 163 of the *Aleksovski* Appeal Judgment for the following proposition:

> "The finding in the *Tadić* Appeal Judgement, para 229, that it has to be shown that the aider and abettor knew that he was assisting the specific crime committed is not contradictory because it has to be read only in the context of contrasting aiding and abetting with the participation in a common purpose or design."[273]

226. Therefore, the *Naletilic* Trial Chamber relied upon *Aleksovski* to ignore the *Tadić* requirement of specific knowledge. However, the *Aleksovski* Appeal Judgment did not suggest that the *Tadić* requirement could be ignored: it merely stated that *Tadić* "does not purport to be a complete statement of the liability of the person charged with aiding and abetting." [274] Even if *Tadić* was not a "complete statement" of aiding and abetting

[266] See *Blaskić* TJ, paras. 495, 531, 649, 661
[267] *See Blaskić* TJ, paras. 531, 592
[268] *Blaskić* AJ, para. 50.
[269] *Blaskić* AJ, para. 45.
[270] *Blaskić* AJ, para. 52.
[271] *Naletilic* TJ, para. 63.
[272] *Ibid.*
[273] *Naletilic* TJ, para. 63, fn 170.
[274] *Aleksovski* AJ, para. 163.

liability, this did not permit the *Naletilic* Trial Chamber to simply ignore the unequivocal requirement of specific knowledge set out in *Tadić.*

227. Moreover, the *Aleksovski* Appeal Judgment quoted in full the mental elements of aiding and abetting established by *Tadić,* including the requirement of specific knowledge.[275] The Trial Chamber in *Kordic* confirmed that the *Aleksovski* Appeals Chamber accepted the *Tadić* Appeals Chamber's formulation.[276] The *Aleksovski* Appeals Chamber even applied the requirement of specific knowledge, including the appellant's knowledge of specific instances of the inhumane treatment of prisoners, in order to find him guilty of aiding and abetting that inhumane treatment. The Appeals Chamber found that the appellant's (specific) knowledge was implicit in the Trial Chamber's findings.[277]

228. In the *Simić* case, the Appeals Chamber recited the *Furundžija* formulation while citing the *Blaskić* Appeals Judgment.[278] As in *Blaskić,* this statement was *obiter*: the *Simić* Appeals Chamber overturned Blagoje Simić's conviction for aiding and abetting cruel and inhumane treatment in the form of torture and beatings of detainees in Bosanski Samac municipality on the basis that the *actus reus* was not established.[279] Simić's *mens rea* was not determined on this point.

229. On another point, the Appeals Chamber upheld Simić's conviction for aiding and abetting persecutions for the confinement under inhumane conditions of non-Serb prisoners.[280] The Appeals Chamber did not have to consider whether the mental element of aiding and abetting would be satisfied had Simić not had specific knowledge of the confinement of detainees in Bosanski Samac since it was shown that he did have such knowledge.

230. In *Brđanin,* the Trial Chamber found the accused to be criminally responsible primarily on the basis of aiding and abetting. As in *Naletilic,* the Trial Chamber paraphrased the *Furundžija* formulation of the mental element of aiding and

[275] *Ibid.*
[276] *Kordic* TJ, para. 400.
[277] *Aleksovski* AJ, para. 169.
[278] *Simić* AJ, para. 86.
[279] *Simić* AJ, para. 131.
[280] *Simić* AJ, para. 138.

abetting.[281] Applying the law to the facts of that case, the Trial Chamber found that Brđanin aided and abetted: killings in various locations,[282] torture in various locations,[283] wanton destruction not justified by military necessity,[284] and deportation and forcible transfer.[285] At first sight, as a leadership case, *Brđanin* appears to be analogous to Ojdanić's case and undermine his argument.

231. In reality, the *Brđanin* Trial Chamber applied a test of specific knowledge of the indictment crimes. The Trial Chamber found that the accused had "detailed knowledge that, during the time and in the area relevant to the Indictment, crimes were being executed in execution of the Strategic Plan."[286] In the case of each crime site, Brđanin's responsibility turned upon the Trial Chamber's finding that "the attacks by the Bosnian Serb forces on non-Serb towns, villages and neighbourhoods constituted an essential part of the implementation of the Strategic Plan in the ARK."[287] On the facts, Brđanin was found to have the required specific knowledge in relation to each crime because of the factual nature of the Strategic Plan. This distinguishes *Brđanin* from Ojdanić's case because General Ojdanić knew of no such plan.

232. In *Strugar,* the Trial Chamber cited the *Blaskić* Appeal Judgment: "It is not necessary that the aider and abettor know the precise crime that was intended or actually committed, as long as he was aware that one or a number of crimes would probably be committed, and ones of these crimes was in fact committed."[288]

233. However, applying the law to the facts, the *Strugar* Trial Chamber convicted the accused under Article 7(3) rather than Article 7(1). Crucially, the Trial Chamber was not satisfied that Strugar had aided and abetted the shelling of the Old Town of Dubrovnik specifically, as opposed to nearby Srd – which he had ordered be attacked.[289] Implicit in the Trial Chamber's approach is that Strugar did not have specific and actual knowledge of the shelling of the Old Town at the necessary time.

[281] *Brđanin* TJ, para. 272.
[282] *Brđanin* TJ, para. 476.
[283] *Brđanin* TJ, para. 535 – 538.
[284] *Brđanin* TJ, paras. 667 – 669.
[285] *Brđanin* TJ, paras. 576 – 583.
[286] *Brđanin* TJ, para. 335.
[287] *Brđanin* TJ, para. 473, 532, 667.
[288] *Strugar* TJ, para. 350.
[289] *Strugar* TJ, para. 356.

Rather, the Trial Chamber found that during the course of the attack on Srd, Strugar had reason to know that the Old Town was being shelled.[290] This, together with the other necessary elements, led to Strugar's conviction under Article 7(3).[291] That the level of knowledge under Article 7(3), with its "have reason to know" standard, was insufficient for aiding and abetting under Article 7(1), supports General Ojdanić's submission that the *mens rea* requirement for aiding and abetting is one of specific knowledge.

234. In *Orić,* the Trial Chamber held that the mental element of aiding and abetting "does neither require that the aider and abettor already foresees the place, time and number of the precise crimes which may be committed in consequence of his supportive contributions, nor that a certain plan or concerted action with the principal perpetrator must have existed."[292] This statement appears to undermine General Ojdanić's argument. However, it is unpersuasive: the authorities cited by the *Orić* Trial Chamber (*Furundžija, Blaskić, Kvočka, Brdanin)* do not support such a proposition and have been addressed above. Further, the *Orić* Trial Chamber recognised that authorities require knowledge of the specific crime (*Kunarac, Krnojelac, Simić, Blagojević*) but did not explain why they should not be followed. Crucially, the *Orić* Trial Chamber did not seek to apply its expanded *mens rea* standard to the facts of the case because, on the facts, the *actus reus* of aiding and abetting was not established.[293]

235. In *Nahimana,* the Appeals Chamber held that it is "not necessary for the accused to know the precise crime which was intended and in the event committed...."[294] For that proposition, the *Nahimana* Appeal Judgment relied upon the *Blaskić* and *Simić* Appeal Judgments, both of which have been explained above. However, the Appeals Chamber did not apply any expanded standard for the *mens rea* of aiding and abetting. For example, in relation to the accused Nahimana, who was Director of the Rwandan Office of Information a member of the steering committee of the radio station RTLM, the Appeals Chamber overturned his conviction for

[290] See *Strguar* TJ, paras 422 – 423.
[291] *Strugar* TJ, para. 446.
[292] *Orić* TJ, para.288.
[293] *Orić* TJ, 684 – 688.
[294] *Nahimana* AJ, para. 482.

instigating the commission of genocide. The Appeals Chamber held that the facts did not support a conviction for aiding and abetting genocide.[295] A general knowledge of crimes in Rwanda was held to be insufficient.

236. In *Mrkšić*, the Appeals Chamber held that: "While it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed, if he is aware that one of a number of crimes will probably be committed and one of those crimes is committed, he has intended to facilitate the commission of that crime...."[296] As above, the accused had to know that the specific crime was, as it were, on the menu of possibilities. In any event, the Appeals Chamber did not need to apply any expanded standard of the *mens rea* of aiding and abetting: Šljivančanin personally witnessed mistreatment[297] and Mrkšić knew about the (specific) intention of the perpetrators (TOs and paramilitaries) to punish and kill prisoners of war held at the Ovcara camp. Therefore, on the facts, both Šljivančanin and Mrkšić had the necessary specific knowledge.[298]

Conclusion

237. General Ojdanić contends that the correct legal standard for aiding and abetting forcible displacement demands that it be proved that he knew about the specific indictment crimes before he can be held responsible for them. The Trial Chamber ignored a clear line of authorities which establishes that knowledge of the specific crime is required. Authorities which appear to suggest that knowledge of the specific crime is not required are unpersuasive or distinguished from General Ojdanić's case.

238. Moreover, the Trial Chamber acquitted General Ojdanić of aiding and abetting murders that occurred in Kosovo:

> "it has not been proved that Ojdanić was aware that VJ and MUP forces were going into the specific crime sites referred to above in order to commit killings, sexual assaults, or the destruction of religious and cultural property.

[295] *Nahimana* AJ, para. 996.
[296] *Mrkšić* AJ, para.159.
[297] *Mrkšić* AJ, para. 193.
[298] *Mrkšić* AJ, para. 333.

> Consequently, in General Ojdanić's case, the mental element of aiding and abetting has not been established in relation to counts 3, 4, and 5."[299]

Therefore, the Trial Chamber applied the correct *mens rea* standard in relation to aiding and abetting the crime of murder, but failed to apply that same standard to the crimes of forcible displacement. The Trial Chamber did this without even recognising the extensive jurisprudence highlighted above: it simply applied the weakest possible standard for *mens rea* in relation to the crimes of forcible displacement

239. There are good reasons why the prosecution must prove knowledge of the specific crimes in large scale cases such as this: if the *actus reus* of aiding and abetting is defined broadly and is unrelated to the individual crime sites; only the *mens rea* can provide the proper boundaries of criminal liability. If knowledge of the specific crime is not a requirement of the *mens rea* of aiding and abetting, the result is that an accused is held criminally responsible for a host crimes about which he had no knowledge. This undermines the presumption of innocence. The prosecution had to prove that General Ojdanić contemplated the specific crimes in the specific locations charged in the Indictment.

Relief sought

240. By failing to require that standard of proof, the Trial Chamber committed a reversible error. In the absence of proof of General Ojdanić's specific knowledge of the Indictment crimes, General Ojdanić respectfully requests that the Appeals Chamber convictions.

[299] TJ [3/629]

B. Sub-Ground 3(B): the Trial Chamber applied the wrong legal standard by equating knowledge of instances of crimes against the civilian population with knowledge of deportation and forcible transfer

Alleged error of law invalidating the decision

241. In addition to the error alleged under Sub-Ground 3(A), the Trial Chamber further erred in its characterisation and application of its second mental element (b) of aiding and abetting.[300] The Trial Chamber correctly stated the principle that the *mens rea* of aiding and abetting requires that an accused be aware of the "essential elements" of the underlying crime ultimately committed.[301] This principle is well-established.[302] However, the Trial Chamber failed to apply the correct test as to what constitutes knowledge of the essential elements of forcible displacement. Therefore, when finding that General Ojdanić's knowledge satisfied the *mens rea* of aiding and abetting, the Trial Chamber committed a reversible error.

242. The Appeals Chamber is invited to clarify the correct test for knowledge of the essential elements of the underlying crime, apply that test to General Ojdanić's case, and enter an acquittal on Counts 1 and 2 of the Indictment.

Knowledge of the "essential elements" of deportation and forcible transfer

243. When outlining the elements of the underlying offences, the Trial Chamber held that the *actus reus* of forcible displacement is:

> (a) the displacement of persons by expulsion or other coercive acts;
>
> (b) from an area in which they are lawfully present;

[300] *See* para. 198, above.
[301] TJ [1/93]
[302] *Brđanin* AJ, para. 484; *Krnojelac* AJ, para. 51; *Aleksovski* AJ, para. 162; *Simić et al* AJ, para. 86; *Nahimana* AJ, para. 482; *Orić* TJ, para. 288; *Strugar* TJ, para. 349; *Blagojević* TJ, para. 727; *Brđanin* TJ, para. 273; *Simić* TJ, para. 160; *Naletilic and Martinovic* TJ, para. 631 *Vasiljević* TJ, para. 150; *Krnojelac* TJ, para. 90; *Kvočka* TJ, para. 255; *Kunarac* TJ, para. 392; *Semanza* TJ, para. 388; *Bisengimana* TJ, para. 36.

(c) without grounds permitted under international law.[303]

The Trial Chamber elaborated that an "essential element" is the involuntary nature of the displacement which may be inferred from threatening and intimidating acts that are calculated to deprive the population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of or the threat to commit other crimes calculated to terrify the population and make them flee the area with no hope of return.[304]

244. The *mens rea* of forcible displacement is intent to displace the victims. The Trial Chamber held that this intent may be either that of the physical perpetrator or the planner, orderer, or instigator of the physical perpetrator's conduct, or a member of the joint criminal enterprise.[305]

245. In addition to the *actus reus* and *mens rea*, in order for deportation and forcible transfer to qualify as crimes against humanity, under Article 5(d) and 5(i) respectfully, the *chapeau* elements of Article 5 must be established.[306]

246. In relation to forcible transfer under Article 5(i), specifically, in order to constitute an inhumane act as a crime against humanity, the following must additionally be satisfied:

a. the conduct must cause serious mental or physical suffering to the victim or constitute a serious attack upon human dignity;

b. the conduct must be of equal gravity to the conduct enumerated under Article 5;

c. the physical perpetrator must have performed the act or omission deliberately;

d. with the intent to inflict serious physical or mental harm upon the victim or commit a serious attack upon human dignity or with the knowledge that his act

[303] TJ [1/164]
[304] TJ [1/165]
[305] TJ [1/167]
[306] TJ [1/168]; [1/172]

or omission would probably cause serious physical or mental harm to the victim or constitute a serious attack upon human dignity.[307]

247. For a military commander to be held criminally responsible, the commander must have known that the acts of his subordinates fell within the definition of the crime with which he is charged.[308] For example, in *Krnojelac,* the Appeals Chamber held that it was not sufficient for the accused to have known that his subordinates had committed acts of beating (which could qualify for the crime against humanity of "cruel treatment") to convict him of the crime of "torture" if the accused did not know of the prohibited purpose behind the beatings which forms part of the definition of torture.[309] Similarly, in General Ojdanić's case the Trial Chamber should have established that General Ojdanić knew that the elements of forcible displacement were satisfied.

The standard applied by the Trial Chamber failed to require that General Ojdanić knew about the essential elements of forcible displacements

248. In order to find that General Ojdanić knew about the essential elements of the Indictment crimes, the prosecution had to prove that that he knew that each element of forcible displacements was established. If General Ojdanić did not know that each of the above elements was satisfied, he did not know that deportations or forcible transfers were being perpetrated. However, when finding that General Ojdanić satisfied the *mens rea* of aiding and abetting at **TJ [3/625]**, the Trial Chamber did not consider the essential elements of the underlying crimes or General Ojdanić's knowledge thereof. The Trial Chamber simply concluded that General Ojdanić was "aware of the general campaign of forcible displacements that was conducted by the VJ and MUP throughout Kosovo during the NATO air campaign."[310] Before reaching this conclusion, the Trial Chamber failed to properly perform the crucial step: applying the correct test to establish whether or not General Ojdanić knew about each of the essential elements of the underlying crimes.

[307] TJ [1/170]
[308] See *Krnojelac* AJ, para. 146.
[309] *Krnojelac* AJ, para. 155.
[310] TJ [3/625]

249. In the absence of an explicit consideration of General Ojdanić's knowledge of the essential elements of forcible displacement, it is necessary to consider whether the Trial Chamber's reasoning implied that such knowledge was established. Therefore, for the convenience of the Appeals Chamber, the Trial Chamber's reasoning is addressed under three headings: (i) General Ojdanić's knowledge of crimes committed against civilians; (ii) General Ojdanić's knowledge of VJ involvement with the movement of the civilian population; and (iii) General Ojdanić's knowledge of the VJ's involvement in forcible displacements.

(1) The wrong standard: General Ojdanić's knowledge of crimes committed against civilians

250. The Trial Chamber held that it was "established that General Ojdanić possessed knowledge of the commission of crimes by his subordinates in the VJ in Kosovo along with crimes committed by members of the MUP."[311] General Ojdanić did not dispute this at trial. Indeed, the Trial Chamber held that General Ojdanić "took a number of steps in relation to the criminal activities of members of the VJ and MUP in Kosovo…" such that he was not a member of the joint criminal enterprise.[312] However, knowledge of crimes committed against civilians does not equate to knowledge of forcible displacement. The Trial Chamber erred in law by equating knowledge of instances of other crimes or "widespread criminal activity"[313] with knowledge of the essential elements of forcible displacement.

251. The mere fact that General Ojdanić received information of widespread crimes such as arson theft, and looting[314] does not satisfy the *mens rea* for the crimes of deportation or forcible transfer.[315] Great care must be exercised when ascribing knowledge on the basis of circumstantial evidence: the precise content, veracity and timing of knowledge has to be examined scrupulously.[316] Indeed, the Trial Chamber held that the reports General Ojdanić received minimised criminal activity by VJ

[311] TJ [3/609]
[312] TJ [3/617]
[313] TJ [3/611]; [3/627]
[314] TJ [3/625]
[315] The evidence demonstrated that when he received information about these crimes, General Ojdanić took action to prevent or punish them.
[316] See *Blagojević* AJ, paras. 229 – 236.

members.[317] Therefore, the fact that General Ojdanić learned about widespread criminal activity around 4 May 1999[318] does not satisfy the *mens rea* for aiding and abetting crimes that occurred in March and April 1999. Moreover, knowledge of widespread criminal activity around 4 May 1999 does not establish knowledge of forcible displacements on that date.

(2) The wrong standard: General Ojdanić's knowledge of VJ involvement with the movement of the civilian population

252. The Trial Chamber held, indeed it was not disputed, that General Ojdanić knew that large numbers of people left Kosovo during the NATO bombing.[319] The Trial Chamber also held that it was satisfied that "the VJ was involved with the movement of the civilian population and that Ojdanić was aware of this involvement."[320] Even if those findings were correct, they do not satisfy the *mens rea* test for aiding and abetting forcible displacement. For example, these findings do not establish that General Ojdanić knew that the VJ expelled people from areas where they were lawfully present without grounds permitted under international law. They do not establish that General Ojdanić knew that a widespread and systematic attack was being perpetrated on the civilian population, a necessary element of Article 5. They do not establish that General Ojdanić knew that amidst the NATO bombing the VJ engaged in attacks "calculated to terrify the population and make them flee the area with no hope of return."[321]

(3) Error in holding General Ojdanić's knowledge of the VJ's involvement in forcible displacements was established

253. There was scant direct evidence that General Ojdanić knew about criminal forcible displacements – and the Trial Chamber's factual findings in this regard are challenged below. Consequently, the Trial Chamber had to rely upon circumstantial evidence to infer that the "only reasonable conclusion" was that General Ojdanić

[317] TJ [3/625]
[318] TJ [3/573]
[319] TJ [3/568]
[320] TJ [3/566]. Ojdanić challenges these findings in Ground 4(A) below.
[321] TJ [1/165]

"knew of the campaign of terror, violence, and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians."[322]

254. The Trial Chamber relied upon General Ojdanić's (i) knowledge of crimes committed against civilians; combined with (ii) knowledge of VJ involvement with the movement of the civilian population; in order to infer (iii) knowledge of VJ involvement in forcible displacements. However, neither (i) nor (ii) established the essential elements of forcible displacements, as argued above. The Trial Chamber failed to test its inference against the essential elements of the underlying crimes.

255. Had the Trial Chamber applied the correct test to the pieces of circumstantial evidence upon which it relied, while considering the context in which information came to General Ojdanić, other reasonable inferences plainly remained open to the Trial Chamber: General Ojdanić believed that the movement of the population was at the instance of the KLA and to escape NATO bombing, and that instances of VJ-initiated movement of the population was to remove them temporarily from the theatre of combat operations.

Relief sought

256. The Trial Chamber misunderstood the requirement that General Ojdanić know of the "essential elements" of the underlying crimes. The Trial Chamber failed to consider and establish that General Ojdanić knew about each element of the crimes of forcible displacement. Such knowledge of not established on the facts. The Trial Chamber erred in law by equating General Ojdanić's knowledge of instances of crimes against the civilian population with knowledge of forcible displacement. This invalidates the Trial Judgment. Accordingly, the Appeals Chamber must reverse General Ojdanić's convictions.

[322] Tj [3/625]

C. Sub-ground 3(C): the Trial Chamber failed to apply any legal standard in finding that excessive force was used by the VJ in 1998 such that General Ojdanić was on notice of likely deportation and forcible transfer should the VJ be used in Kosovo in 1999

Alleged error of law invalidating the decision

257. The Trial Chamber did not find that General Ojdanić (or any other member of the General Staff) was aware of any plan to forcibly expel civilians from Kosovo.[323] For example, the Chamber's own witness – General Dimitrijević – testified that he was not aware of any plan to expel the Albanian population from Kosovo.[324] Rather, the Trial Chamber held that General Ojdanić was provided with information of serious criminal acts committed against ethnic Albanians and excessive use of force in Kosovo in 1998 such that he was aware that "forcible displacements were likely to occur if he ordered the VJ into Kosovo in 1999."[325]

258. The Trial Chamber failed to apply any legal standard to its 1998 findings so as to be entitled to hold that General Ojdanić knew that the Indictment crimes were likely to occur in 1999. This error invalidates the Trial Chamber's finding that General Ojdanić knew that forcible displacements were "likely to occur if he ordered the VJ into Kosovo in 1999". Together with the other errors alleged in this appeal,

[323] Given the overwhelming evidence outlined in Ojdanić's Closing Brief, such a finding was not available to the Trial Chamber. *See* Ojdanić's Closing Brief paras. 13–16.
[324] T.26731.
[325] TJ [3/623]

this invalidates the Trial Chamber's finding that General Ojdanić possessed the *mens rea* of aiding and abetting.

The correct standard for knowledge based upon past crimes

259. The Trial Chamber offered no legal standard by which knowledge of past crimes establishes knowledge of likely future crimes. This is unsurprising because the authorities demonstrate the Trial Chamber's error.

260. It is plainly insufficient to hold that General Ojdanić is criminally responsible for aiding and abetting because he was aware of the risk that crimes would be committed if he ordered the VJ into Kosovo in 1999. Such a standard would prevent any military commander - American, British, Chinese, Russian or any other nation - conducting necessary military operations: armed conflict always carries the risk of crimes. International law requires far greater specificity if criminal liability is to be imposed.

261. Important guidance as to the circumstances in which knowledge of past crimes establishes knowledge of likely future crimes can be found in authorities concerning Article 7(3) – with its "had reason to know" standard. It must be remembered, however, that Article 7(1) requires a higher standard of knowledge than Article 7(3): whereas the "had reason to know" standard is satisfied by mere notice of the risk of crimes such as to indicate the need for additional investigations;[326] knowledge of future crimes for the purposes planning,[327] instigating,[328] and ordering[329] under Article 7(1) requires actual knowledge of the substantial likelihood that the crime will result.

262. In *Krnojelac,* the Appeals Chamber held that knowledge by a superior that his subordinates had beaten prisoners of war did not satisfy the "reason to know" standard of a separate crime, in that case torture.[330] The *mens rea* must comprise the *actus reus* of a crime. Similarly, the Appeals Chamber held in *Naletilic* that:

[326] *Čelebići* AJ, para.241
[327] TJ [1/81]
[328] TJ [1/83]
[329] TJ [1/ 85]
[330] *Krnojelac* AJ, para. 155.

> """The principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence… for a conduct to entail criminal liability, it must be possible for an individual to determine *ex ante,* based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal."[331]

263. In *Hadžihasanović*, the prosecution sought to argue that the accused was on notice of the indictment crimes because of his prior knowledge of criminal acts of the same nature committed by subordinates, regardless of whether they were the same group of subordinates who committed the indictment crimes. This amounted to placing upon a commander an onerous general duty to know, which the Appeals Chamber had rejected decisively in both *Čelebići*[332] and *Blaskić*[333] The Trial Chamber in *Hadžihasanović* held that the prosecution's argument:

> "would amount to saying that since the Accused Hadžihasanović had knowledge of the existence of a brigade's criminal conduct, this would put him on notice of the risk that other brigades were about to commit similar criminal acts. To adopt such a misconstrues the reasoning of the Krnojelac Appeals Chamber, in that it is silent about taking into account one same group of subordinates and the geographical aspects related to that group...."[334]

264. Rather, the weight to be attributed to prior knowledge must be interpreted narrowly in that it derives from a situation of "recurrent criminal acts and from circumstances where those acts could not be committed in isolation by a single identifiable group of subordinates."[335] Where the prosecution relies upon previous similar acts as providing notice of future crimes, it must be "limited to the acts of subordinates who form part of an 'identifiable group', some members of which have already committed similar acts."[336] Based upon the structure of the armed forces in *Hardzihasanovic,* the "identifiable group of subordinates" was limited to "a specific brigade operating in the same limited geographical area and to detention centres which fall under the authority and control of the same supervisory power"[337]

265. The *Hadžihasanović* Trial Chamber rejected the prosecution's attempt to extend the principle of notice to crimes committed by all subordinates, regardless of

[331] *Naletilic* AJ, para. 114.
[332] *Čelebići* AJ, para. 230.
[333] *Blaskić* AJ, paras. 61-2.
[334] *Hadžihasanović* TJ, para. 115.
[335] *Hadžihasanović* TJ, paras. 118; 1749.
[336] *Hadžihasanović* TJ, paras 164; 1749.
[337] *Hadžihasanović* TJ, paras. 169; 1749.

whether they belong to the same group.[338] Therefore, notice that certain crimes will be committed in the future is only possible, as a matter of law, where that same identifiable group of subordinates had already committed such acts in the past.[339]

266. Consequently, the accused's knowledge of crimes committed by troops in detention centres in the first half of 1993 did not establish knowledge that subordinates "were about to commit crimes of mistreatment in the detention centres subsequently set up in [a different area] in the second half of 1993."[340] The facts, including the time gap, removed any sense of there being recurrent criminal acts which could not have been committed by a single identifiable group of subordinates.

267. Notably, the prosecution did not appeal the legal principle enunciated by the Trial Chamber in *Hadžihasanović.*

268. In dealing with *Hadžihasanović's* appeal, the Appeals Chamber applied an even stricter test for knowledge based on past crimes. While the Trial Chamber had held that earlier crimes did not provide notice of subsequent crimes in a different area, it had also held that Hadžihasanović knew about future crimes in the Bugojno Detention Facilities as of 18 August 1993 because he then knew about and failed to take the adequate measures required to punish those responsible for the murder of Mladen Havranek and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon (one of the Bugojno Detention Facilities) on 5 August 1993.

269. The Appeals Chamber reversed the Trial Chamber's finding that the accused failed to punish the 5 August crimes.[341] The Appeals Chamber then had to assess whether Hadžihasanović was nonetheless on notice of subsequent crimes in the Bugojno Detention Facilities. Crucially, the Appeals Chamber held that despite the Hadžihasanović's knowledge of the earlier crimes, and even though the detention centres were in "geographical proximity to one another" and were "administered and controlled by the same 307th Brigade Leaders" this was "insufficient to demonstrate Hadžihasanović's knowledge."[342]

[338] *Hadžihasanović* TJ, para. 164.
[339] *Hadžihasanović* TJ, para. 169.
[340] *Hadžihasanović* TJ, para. 1750.
[341] *Hadžihasanović* AJ, para. 164.
[342] *Hadžihasanović* AJ, para. 163.

The erroneous approach adopted by the Trial Chamber in General Ojdanić's case

270. General Ojdanić was not charged with responsibility for any crimes committed in 1998. Nonetheless, the Trial Chamber rightly held that for the prosecution to rely upon possible crimes committed in 1998 (as potential sources of notice of future crimes), it had to prove that those crimes were committed.[343] The Trial Chamber noted that despite serious allegations about numerous events in 1998, the prosecution "brought very little additional evidence in relation to some of those 'crimes'". While the Trial Chamber was "left with a general impression of significant violence and destruction in 1998"[344] it found that only four crimes in 1998 were established:

a. violations of international humanitarian law by MUP and VJ forces engaged in operations against the KLA near Glođane/Gllogjan in late August 1998;[345]

b. excessive force to combat the KLA in Mališevo/Malisheva in late July 1998;[346]

c. excessive and indiscriminate force during operations in the Drenica area in late July and early August 1998;[347] and

d. killings committed by the forces of the FRY and Serbia in Gornje Obrinje/Abri e Epërme at the end of September 1998.[348]

271. The Trial Chamber did not systematically address whether or not General Ojdanić knew about these crimes. Instead, in order to hold that General Ojdanić was on notice of the Indictment crimes, the Trial Chamber relied upon: (i) UN Security Council Resolutions in 1998; (ii) the killings at Gornje Obrinje/Abri e Epërme in late September 1998; and (iii) allegations made by British Military Attaché John Crosland in the summer of 1998.[349]

[343] TJ [1/844]
[344] TJ [1/849]
[345] TJ [1/881]
[346] TJ [1/886]
[347] TJ [1/894]
[348] TJ [1/912]
[349] TJ [3/542-546]

(1) Error in relation to UN Security Council Resolutions

272. The Trial Chamber relied upon two UN Security Council Resolutions. Resolution 1160, passed on 31 March 1998, and Resolution 1199, passed on 23 September 1998, which noted its "grave concern" at "excessive and indiscriminate force by the MUP and VJ" which had resulted in "numerous civilian casualties and ... the displacement of over 230,000 people from their homes."[350] Under the correct legal standard outlined above, references to crimes in general as opposed to crimes committed by specific units or individuals are insufficiently precise to put General Ojdanić on notice of the Indictment crimes. Moreover, while the Trial Chamber held that the excessive use of force was at least part of the cause of the displacement of tens of thousands of Kosovo Albanians in 1998, the Trial Chamber simultaneously noted that General Ojdanić was informed that the KLA was responsible for some of the population movement.[351]

(2) Error in relation to Gornje Obrinje/Abri e Epërme

273. The Trial Chamber held "Ojdanić was provided with specific information in relation to the killing of a number of civilians in Gornje Obrinje/Abri e Epërme in late September 1998...."[352] The prosecution's allegation was of deliberate killings of civilians at close quarters: "all the bodies found in the woods were dressed in civilian clothes, and exhibited gunshot wounds, knife cuts and mutilations."[353] The VJ General Staff requested information about an alleged massacre, "however following internal investigations it was reported that no massacre had been committed by the VJ and the Priština Corps security department reported that members of the MUP were

[350] TJ [3/542]
[351] TJ [3/542]
[352] TJ [3/543]
[353] TJ [1/902]

responsible."[354]

274. The Trial Chamber noted that "the General Staff was informed by Pavković that VJ units did not commit a massacre but that there was no reliable information about the MUP.[355] The Trial Chamber held that it was unable to determine whether the VJ or MUP was responsible, and thus found that the killings were committed by the Forces of the FRY and Serbia.[356] The Trial Chamber accepted in relation to Milutinović that this incident was reported as propaganda by the international community.[357] The same analysis should have applied to General Ojdanić.

275. Given that it was not established that any unit or individual of the VJ had committed any crime in Gornje Obrinje/Abri e Epërme, there was no basis upon which General Ojdanić's knowledge of this crime could provide notice of VJ involvement in the Indictment crimes committed by the VJ some six months later in 1999. There is no sense in which Gornje Obrinje/Abri e Epërme meets the test established by *Hadžihasanović.*

(3) Error in relation to Crosland's allegations

276. The Trial Chamber held that information "relating to excessive force by the VJ in Kosovo was also personally conveyed to Ojdanić in 1998."[358] Crosland initially

[354] TJ [1/912]
[355] TJ [3/543]
[356] TJ [1/912]
[357] TJ [3/629]
[358] TJ [3/544]

testified that he made a video of VJ shelling villages and handed the video to General Ojdanić and confronted him with it. On cross-examination, Crosland changed his story, admitting that he did not give any video to General Ojdanić. Consequently, the Trial Chamber did not rely upon Crosland's account but held that it was "satisfied that information regarding excessive uses of force by the VJ in 1998 was passed on by Crosland orally to Ojdanić."[359]

277. Crosland testified that "[h]e told Ojdanić about his observation of four hours of direct and indirect fire on the villages of Prilep/Prelep, Junik, Rznic/Rziq and Glođane/Gllogjan, in the areas of Štimlje/Shtima, and Mališevo/Malisheva."[360] Crosland asserted that General Ojdanić did not refute the facts but attempted to explain what Crosland had seen, stating that the VJ was operating in Kosovo to protect lines of communication. General Ojdanić responded that "force would be met with [appropriate] force."[361]

278. Crosland did not identify individual units or commanders. The Trial Chamber did not find that General Ojdanić knew which units were involved or whether those same units committed crimes seven months later in 1999. There is no sense in which evidence of Crosland's allegations meets the test established by *Hadžihasanović.*

Conclusion

279. The Trial Chamber erred in law by failing to apply the correct legal standard in order to be entitled to hold that crimes in 1998 put General Ojdanić on notice of the Indictment crimes. The Trial Chamber erred in law when holding that General Ojdanić was aware of likely forcible displacements based upon his knowledge of events in 1998. The 1998 crimes established by the Trial Chamber did not put General Ojdanić on notice of a widespread campaign of forcible displacement in 1999. The Trial Chamber failed to establish that General Ojdanić knew about the 1998 crimes. The correct standard for notice requires knowledge of repeated acts of a similar nature committed by the same identifiable group of subordinates. The Trial Chamber's findings in relation to 1998 fall way below this standard.

[359] TJ [3/545]
[360] TJ [3/544]
[361] TJ [3/544]

Relief sought

280. General Ojdanić respectfully requests that the Appeals Chamber apply the correct legal standard for knowledge based upon past crimes to the 1998 crimes as found by the Trial Chamber. General Ojdanić requests that the Appeals Chamber find that he did not know that the Indictment crimes would be committed and overturn his convictions.

Sub-ground 3(D): the Trial Chamber failed to apply the purpose standard for mens rea of aiding and abetting established by international law

[280]

Introduction

dd. For many years now, the ICTY Appeals Chamber has held that mere *knowledge* is sufficient to establish the *mens rea* for aiding and abetting.[362] Aided by a recent decision of the United States Court of Appeals for the Second Circuit, which adopted a position taken by the United States Department of Justice and now-ICJ Judge Christopher Greenwood of the United Kingdom, General Ojdanić respectfully contends that customary international law requires not only *knowledge*, but proof that the *purpose* of the alleged aider and abettor is to assist the principal's crime. In this case, the Trial Chamber convicted General Ojdanić solely on the basis of his *knowledge* rather than his *purpose.* Indeed, it found that he lacked the requisite purpose when absolving him of joint criminal enterprise liability. Therefore, when applying the correct test for the *mens rea* of aiding and abetting, the Appeals Chamber must enter a judgment acquittal for General Ojdanić.

The *mens rea* of aiding and abetting in international law requires *purpose*

ee. It is now axiomatic that this Tribunal must apply customary international law as it stood at the time of the Indictment events - March to May 1999. The *mens rea* standard applied must be sufficiently defined and accessible so as to form part of customary international law beyond any doubt.[363] A lesser standard violates the principles of legality and *nullem crime sine lege*.

[362] *Vasiljević* AJ, para 102; *Blaskić* AJ, para. 49, *Krstić* AJ, paras. 139-141, 143, *Mrkšić* AJ, para. 159.
[363] *See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704 (3 May 1993), para. 34; *Prosecutor v. Tadić*, IT-94-1-AR72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, (2 October 1995), para. 94; *Galić* AJ, para. 83; *Vasiljević* TJ, para. 193; *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, *Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise* (21 May 2003); ICL 442 (ICTY 2003); paras. 9-10; *Rwamakuba v Prosecutor*, No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide* (22 October 2004), para. 14.

ff. The sources of international law to which the Appeals Chamber must have regard are: (1) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; (2) international custom, as evidence of a general practice accepted as law; (3) general principles of law recognized by civilized nations; and (4) judicial decisions and teachings of highly regarded commentators of the various nations.[364]

gg. Article 25(3)(c) of the ICC Statute provides the clearest expression of the *mens rea* of aiding and abetting in international law. Article 25(3)(c) of the ICC Statute explicitly requires that any person charged with aiding and abetting before that Tribunal be proved to have acted "[f]or the purpose of facilitating the commission" of the underlying crime. The ordinary meaning of this language is unequivocal: knowledge alone does not result in criminal liability.

hh. The purpose standard within Article 25(3)(c) was chosen instead of a standard of mere knowledge.[365] Professor Kai Ambos, a member of the German delegation at the Rome Conference, has explained that the purpose test was imported from the US Model Penal Code.[366] Professor Ambos notes that "it is clear that purpose generally requires a specific subjective requirement stricter than mere knowledge".[367] He has emphasised that the wording of Article 25(3)(c) "introduce[d] a subjective threshold which goes beyond the ordinary *mens rea* requirement within the meaning of Article 30... subparagraph [25(3)](c) provide[s] for a relatively low objective threshold but relatively high subjective threshold".[368]

ii. Another member of the German delegation, and former *ad litem* judge of this Tribunal, has similarly explained that under Article 25(3)(c) "the aider and abettor

[364] Statute of the ICJ, Article 38.
[365] D. Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts', 6(2) *Northwestern Journal of International Human Rights* (2008) 304, at p310.
[366] §2.06 (1985). *See* Paul H Robinson and Markus H Dubber, 'The American Model Penal Code: a Brief Overview', 10(3) *New Criminal Law Review* (2007), p. 337: "Following an intervention by one of America's most prominent judges, Judge Learned Hand, the American Law Institute rejected the drafters' proposal to extend accomplice liability to a person who was merely aware of his contribution to the principal's criminal act."
[367] K. Ambos, 'General Principles of Criminal Law in the Rome Statute', 10(1) *Criminal Law Forum* (1999) 1 at p10.
[368] K. Ambos, 'Individual Criminal Responsibility, Article 25 Rome Statute' in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing, 2nd ed., 2008).

must act with '*purpose*' … this means more than the mere knowledge that the accomplice aids the commission of the offence."[369]

jj. The ICC Statute was adopted on 17 July 1998 by 120 of the 148 States represented at the Rome Conference. It entered into force on 1 July 2002. To date, 139 States have become signatories, with 110 ratifications.

kk. The *purpose* standard within the ICC Statute is the clear expression of the practice and *opinio juris* of the overwhelming majority of the international community. As the ICJ has emphasised, "[i]t is, of course, axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States".[370] The ICC Statute is rooted in the actual conduct of states: "the text [of the ICC Statute] is supported by a great number of States and may be taken to express the legal position i.e. *opinio juris* of those States".[371] This Tribunal must respect the clear legal position contained within the ICC Statute.

ll. Significantly, on 2 October 2009, the US Court of Appeals for the Second Circuit delivered its judgment in the *Talisman* case.[372] The Second Circuit, applying international law, unanimously held that "the *mens rea* standard for aiding and abetting liability... is purpose rather than knowledge alone."[373] The Second Circuit rejected a mere knowledge standard as inconsistent with customary international law, holding that only the purpose standard has the requisite "acceptance among civilised nations".[374]

mm. A treaty provision may be declaratory of a rule of customary law.[375] The State parties to the ICC Statute were concerned to reflect custom because the Statute would affect nationals of non-parties since the ICC was given jurisdiction on the basis of the *locus* of a crime irrespective of whether it was committed by a national of a State

[369] A. Eser in A. Cassese (ed), 'The Rome Statute of the International Criminal Court: A Commentary' (2002), p. 801.
[370] *Continental Shelf (Libya v Malta),* 1985 ICJ 13, para. 27.
[371] *Tadić* AJ, para. 223.
[372] *Presbyterian Church of Sudan and Others v. Talisman Energy Inc. and Republic of Sudan,* ___ F.3d ___, #07-0016-cv (2nd Cir. 10/2/09).
[373] *Talisman* , p. 42.
[374] *Talisman,* p. 43.
[375] *See North Sea Continental Shelf* (*F.R.G. v. Den.; F.R.G. v Neth.*), 1969 ICJ 3 (Feb. 20).

party.[376] The US is not a party to the ICC. Thus, the decision in *Talisman* did not derive from any treaty obligation particular to it; nor did it turn upon a standard of national law. Rather, *Talisman* is a decision of a respected appellate court in a country which has declined to join the ICC, applying the *purpose* standard because it represents customary international law.

nn. The claim in *Talisman* was brought under the Alien Tort Statute (28 U.S.C. § 1350) ("ATS") and related to events occurring at a similar time to the crimes in this case. The ATS is merely a jurisdictional vehicle for the enforcement of accepted universal norms. Therefore, the outcome in *Talisman* should not differ from the result that would be reached under analogous jurisdictional provisions in other nations, such as Belgium, Canada or Spain. The Appeals Chamber is bound to apply the same standard in this case. Indeed, it would be incongruous for a higher standard of *mens rea* to be applied to civil liability of a corporation, where only money is at stake, than to the individual criminal liability of an accused person, whose very liberty is at stake.

oo. A number of countries – including, Denmark[377], Ireland[378], South Africa[379] and the United Kingdom[380] – have incorporated the provisions of the Rome Statute into domestic law *en masse*. Therefore, these States recognise the *purpose* standard of aiding and abetting in international law.

pp. Another treaty which defines the *mens rea* for aiding and abetting is the Council of Europe Convention on Cybercrime. This has been ratified by 23 countries, signed by a further 20 and provides a basis for domestic legislation in another 10 states. It provides for criminal liability where a person aids and abets the commission of an offence, but only where he does so "with intent that such offence be committed".[381]

qq. The domestic criminal law of numerous countries provides for a higher *mens rea* standard than mere knowledge.

[376] *See* Professor Greenwood's *Amicus Brief* in *Talisman*, p. 27.
[377] Act No. 342 of 16 May 2001 on the International Criminal Court.
[378] International Criminal Court Act 2006 (No. 30 of 2006).
[379] Implementation of the Rome Statute of the International Criminal Court Act 2002 (Act No. 27, 2002).
[380] International Criminal Court Act 2001(2001, Chapter 17).
[381] Council of Europe Convention on Cybercrime (23 November 2001), E.T.S. No. 185, Article 11.

rr. In the US, the leading case of *United States v. Peoni* held that an accomplice must "participate in [the crime] as in something that he wishes to bring about, that he seek by his action to make it succeed".[382]

ss. The US Model Penal Code – the basis for Article 25(3)(c) of the ICC Statute- reflects how federal courts have construed the federal aiding and abetting statute: 18 USC 2, discussed in *United States v. Reifler* 446 F.3d 65, 79-80 (2nd Cir 2006) (quoting *United States v Hamilton*, 334 F.3d 170, 180 (2nd Cir 2003)): it must be proven that the "defendant *knew* of the crime, and that the defendant *acted with the intent to contribute* to the success of the underlying crime".

tt. Some US States that have incorporated the Model Penal Code interpret it as requiring that the principal and accomplice possess the same *mens rea.* For example, one court held that 'it is essential that [both the accomplice and the principal] shared in the intent which is the crime's basic element...."[383] Another court held that the accomplice "must share the criminal intent of the party who actually committed" the underlying crime.[384]

uu. English law does not recognise a clear distinction between joint enterprise and aiding and abetting in the same way as the jurisprudence of this Tribunal.[385] While certain authorities suggest that knowledge is sufficient for accomplice liability[386], others do not. In *Gillick v West Norfolk and Wisbesch Health Authority* [1986] 1 AC 112 the House of Lords held that the accused, a doctor who prescribed contraception to a girl under the age of 16 without parental consent, was not guilty of aiding and abetting unlawful sexual intercourse because he lacked the requisite "guilty mind".

vv. Similarly, English cases where the accused is not a member of a joint enterprise show that mere knowledge is insufficient for the imposition of accomplice liability. Authorities concerning bystanders to crimes hold that the prosecution must establish an intention to encourage the crime.[387]

[382] *United States v. Peoni,* 100 F.2d. 401 (1938).
[383] *State v. White* 98 NJ 122, 484 A.2d 691.
[384] *Augustine v. Commonwealth* 226 Va. 120, 306 S.E.2d 886 (1983).
[385] *See* Archbold §§ 17-67 to 17-73.
[386] *National Coal Board v Gamble* (1959) 1 Q.B. 11; *Maxwell v DPP for Northern Ireland* (1978) 3 All E.R. 1140.
[387] *Coney* (1982) 8 QBD 534; *Wilcox v Jeffrey* [1951] 1 All E.R. 464; *Clarkson* [1971] 3 All E.R. 344.

ww. The Canadian Criminal Code provides that a person will be party to a crime if he "does or omits to do anything for the *purpose* of aiding any person to commit it".[388] For serious crimes, including crimes against humanity and war crimes, the Canadian Charter of Rights and Freedoms demands that the *mens rea* requirement be tightened to ensure that "the additional stigma and opprobrium" that attaches to the crime is proportionate to the degree of fault.[389] The Supreme Court of Canada has held that the *mens rea* for aiding and abetting is the same as the *mens rea* that applies to the principal perpetrator, unless otherwise provided for in legislation.[390]

xx. Therefore, it simply cannot be said that customary international law supports the proposition that a person can be convicted of aiding and abetting based on a *mens rea* standard of mere knowledge.

ICTY Jurisprudence

yy. While the ICTY Appeals Chamber has stated that a standard of knowledge rather than purpose suffices for the *mens rea* of aiding and abetting under Article 7(1), it has done so without a detailed analysis of customary international law. In contrast, a significant number of authorities hold that an *intention to facilitate* the crime is an element of the *mens rea* of aiding and abetting.[391] Moreover, the *Furundžija* Trial Judgment – one of the first judgments at this Tribunal to hold that the standard is knowledge rather than purpose – was flawed. It failed to consider the ICC Statute and, when considering post World War 2 jurisprudence, it cited but then ignored the *Hechingen Deportation* case, which required that the accomplice share the principal's *mens rea*.[392]

zz. One scholar has asserted that the Appeals Chamber has adopted a "pick and choose" approach, selecting cases which could help support its views without giving sufficient reasons for its selection: "This is particularly evident... in the holdings regarding the

[388] Canadian Criminal Code, R.S.C. 1985, c. C-46, Article 21.
[389] *R v Finta* [1994] 1 SCR 701, 815.
[390] *R v Hibbert* [1995] 2 SCR 973, para. 31.
[391] *See Kvočka* TJ, para. 255; *Kamuhanda* TJ, para. 597; *Kajelijeli* TJ, para. 766; *Bagilishema* TJ, para. 32. *Tadić* TJ, para. 674; *Čelebići* TJ, para. 326; *Aleksovski* TJ, para. 61.
[392] *Furundžija* TJ, para. 248.

accomplices' *mens rea*".[393] In *Krstić* the Appeals Chamber considered a few domestic provisions or cases from the criminal law of France, Germany, the UK, Canada and Australia. However, as indicated above, other provisions and cases in those jurisdictions are to the contrary. The Appeals Chamber has never expressly determined whether customary international law supported the mere knowledge standard for aiding and abetting. This is the case in which it must now confront that issue head on in light of *Talisman*.

aaa. In *Orić,* the Trial Chamber carefully considered the jurisprudence supporting the proposition that the mental element of aiding and abetting is satisfied by mere awareness.[394] The *Orić* Chamber addressed the Appeals Chamber's judgments in *Blaskić* and *Vasiljević* and concluded that "the aider and abettor must have 'double intent', namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator".[395] Notably, the prosecution did not challenge this approach on appeal.

bbb. Therefore, the ICTY jurisprudence, while sometimes supporting the mere knowledge test, has never directly decided the issue of whether such a test is consistent with customary international law. The *Talsiman* decision, ICC Statute, *Council of Europe Convention on Cybercrime*, and national jurisprudence discussed above, demonstrate that it is not—and that a showing of purpose is also required.

The Trial Chamber's error in this case

ccc. It was contrary to General Ojdanić's interests for the civilian population to leave Kosovo for that cleared the way for a NATO invasion. He pleaded for ethnic Albanians to stay in Kosovo.[396] He took repeated steps to tackle criminality, including ordering that prosecutions of violations of the provisions of international law were to be the top priority of the military justice system. [397] In the longest Trial Judgment in

[393] Flavia Zirzi Giustiniani, 'The responsibility of accomplices in the case-law of the *ad hoc* tribunals' 20(4) *Criminal Law Forum* (2009) 417, at 445.
[394] *See Orić* TJ, paras. 268-288.
[395] *Orić* TJ, para. 288.
[396] *See* paras. 145-147.
[397] *See* Grounds 2(A) and 4(C); for example 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999).

the history of this Tribunal, and despite having before it detailed contemporaneous records of secret meetings of the General Staff in the build up to and throughout the war, the Trial Chamber did not identify *any* evidence that General Ojdanić intended to assist the Indictment crimes.

ddd. Instead, the Trial Chamber considered Ojdanić's "Knowledge of crimes in Kosovo after 23 March 1999".[398] To the extent the Trial Chamber considered Ojdanić's purpose, it held that he did not share the intent of the joint criminal enterprise members.[399] The Trial Chamber did not consider Ojdanić's purpose in relation to aiding and abetting liability.

eee. At **TJ [3/620]** the Trial Chamber held that in order for General Ojdanić to be held responsible for aiding and abetting, it "must be shown that he intentionally provided [the] assistance and that he was aware of the essential elements of that crime or underlying offence, including the mental state of the physical or intermediary perpetrator". However, the Trial Chamber reduced its analysis of Ojdanić's intention to whether his acts were "voluntary".[400] The Trial Chamber failed to consider Ojdanić's purpose or, in the words of the *Orić* Chamber, whether Ojdanić intended the furthering effect of his contribution and the intentional completion of the crimes. Instead, Ojdanić was convicted on the basis of the inference that "he *knew* of the campaign of terror, violence, and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians."[401] Therefore, the Trial Chamber erred in law.

Relief sought

fff. General Ojdanić respectfully requests that the Appeals Chamber: (i) hold that the *mens rea* of aiding and abetting in international law requires proof of *purpose* rather than *mere knowledge*; (ii) apply that standard; and (iii) reverse the Trial Chamber's judgment and enter an acquittal.

[398] TJ [3/548-611]
[399] TJ [3/616]
[400] TJ [3/628]
[401] TJ [3/625]

V. GROUND FOUR: THE TRIAL CHAMBER ERRED IN FACT AS TO THE *MENS REA* OF AIDING AND ABETTING

A. Ground 4(A): no reasonable Trial Chamber could have found that the only reasonable inference based upon the evidence was that General Ojdanić knew of either (i) a campaign of terror, violence and forcible displacement being carried out by VJ and MUP forces or (ii) the requisite intent of any principal or intermediary perpetrator

Introduction

281. The Trial Chamber's own standard for the *mens rea* of aiding and abetting required that General Ojdanić knew of the widespread campaign of terror, violence and forcible displacement carried out by VJ and MUP forces and the mental state of the physical or intermediary perpetrator.[402] The Trial Chamber concluded that the only reasonable inference was that General Ojdanić knew of the campaign of terror, violence, and forcible displacement.[403] The Trial Chamber made no explicit finding as to whether General Ojdanić knew of the intent of any principal or intermediary perpetrator. Absent this finding, no reasonable Trial Chamber could conclude that General Ojdanić's *mens rea* was established. On this point alone, the Appeals Chamber is invited to reverse General Ojdanić's conviction.

282. General Ojdanić's convictions can conceivably only stand if General Ojdanić's knowledge of the perpetrator's intent is necessarily implicit in its finding that General Ojdanić knew of the "general campaign" carried out VJ and MUP forces. However, the Trial Chamber also erred in finding that General Ojdanić knew of any such campaign: it failed to consider relevant facts and adopted an unreasonable approach to the facts that it did consider when assessing General Ojdanić's knowledge. Kosovo was a war zone. General Ojdanić faced the most severe threats imaginable: a KLA uprising, massive NATO bombardment and the imminent possibility of a land invasion. Publicly and privately, he favored Albanians staying in Kosovo. The General Staff believed that it was the KLA which was encouraging the

[402] TJ [3/620]
[403] TJ [3/625]

civilian population to move in a "planned withdrawal" in order pave the way for NATO invasion.[404] The more reasonable inference is that he believed that the movement of the population was at the instance of the KLA and to escape NATO bombing, and that instances of VJ-initiated movement of the population was to remove them temporarily from the theatre of combat operations. No reasonable Trial Chamber could conclude that General Ojdanić knew of a general campaign to expel Kosovo Albanian civilians.

Errors of fact which have occasioned a miscarriage of justice

(1) While the Trial Chamber found that neither General Ojdanić nor any member General Staff was aware of any plan to launch a campaign of terror, violence and forcible displacement, it failed to recognise the significance of its finding

283. In his Closing Brief, General Ojdanić set out the unanimous evidence that nobody in the General Staff had the remotest knowledge of any plan to forcibly displace the Kosovo Albanian civilian population.[405] The prosecution did not challenge witnesses from the General Staff on this point. The Trial Chamber did not hold that the General Staff knew of such a plan in its Judgment. However, the Trial Chamber failed to weigh the significance of this when assessing General Ojdanić's knowledge of the forcible displacements committed in Kosovo.

284. The Trial Chamber held that General Ojdanić was made aware of forcible displacements through internal sources of information such as briefings of the Supreme Command Staff.[406] However, no citation is given for that proposition and not a single Supreme Command Staff Briefing contains any reference, explicit or implicit, to Kosovo Albanians being forcibly expelled from Kosovo by the VJ or anyone else. Indeed, elsewhere the Trial Chamber noted the "lack of reporting of forcible displacement in combat reports" but held that it did not create "any doubt as to Ojdanić's knowledge of the commission of forcible displacement in Kosovo."[407] Together with the fact that nobody in the General Staff knew of any plan to expel

[404] P929 (Minutes of the Collegium of the General Staff of the VJ for 9 April 1999), pp.3-4.
[405] Closing Brief, paras. 13-16.
[406] TJ [3/625]
[407] TJ [3/609]

civilians from Kosovo, no reasonable Trial Chamber could ignore the doubt that this lack of reporting causes.

(2) Errors in findings that General Ojdanić "knew that the VJ was involved with the movement of the civilian population"

The "Intensify Controls" Report (Exhibit 3D802)

285. The Trial Chamber held that General Ojdanić knew that the VJ was "controlling the movement of the civilian population" on the basis of a Supreme Command Staff combat report dated 28 March 1999.[408] The Trial Chamber relied upon this exhibit to conclude that "from the opening days of the conflict in 1999, Ojdanić knew of MUP and VJ involvement in the movement of Kosovo Albanians".[409]

286. This exhibit was not put to a single witness to comment on its language. The report addressed the general security situation in the FRY as a whole: not Kosovo in particular. None of the towns mentioned in the relevant section (Banovci, Rakovica, Sremcica, Cuprija) are in Kosovo. NATO's bombardment forced the VJ to disperse from barracks to secret locations. Anti-aircraft units on the whole territory of the FRY were engaged daily in combat operations against NATO. Uncontrolled movement of the population in such circumstances risks revealing the location of such units, as well increasing the risk of casualties. The exhibit further states:

> "in order to prevent the deterioration of the security situation, it is necessary to intensify controls of the movement of the population and motor vehicles in coordination with MUP, as well as to prohibit the movement and stay of foreigners in areas of combat operations, unit redeployment areas and areas of installations of important for the defence of the country...."[410]

This language plainly indicates a desire to *prevent* population movement, rather than encourage it. The Trial Chamber stretched and perverted this clear wording to conclude that it established General Ojdanić's knowledge of VJ involvement in the

[408] TJ [3/565]
[409] TJ [3/625]
[410] 3D802 (General Staff Combat Report, 28 March 1999), p. 4.

"movement" of Kosovo Albanians in Kosovo.[411] No reasonable Trial Chamber could interpret the exhibit in this way, especially absent evidence from relevant witnesses.[412]

The "Channeling the Population" Report (Exhibit) P2930

287. The Trial Chamber also relied upon a "31 March 1999 report from the Priština Corps" which stated that "MUP and military territorial units were controlling the movement of the Kosovo Albanian population and 'channelling' them towards the border."[413]

288. In fact, this was a report from the Priština Corps command group to the Priština Corps operations centre. It never reached the General Staff. The only evidence before the Trial Chamber was that General Ojdanić never saw it.[414] This point was addressed during closing oral submissions.[415] No reasonable Trial Chamber could conclude that this report established that General Ojdanić knew the VJ was involved in the movement of the civilian population. The Trial Chamber's irrational approach is highlighted by the fact that it noted a VJ Combat Report dated 24 March 1999, which General Ojdanić did receive, "indicated that the displaced people were being directed by the VJ to stay in Kosovo."[416]

Targeting male Kosovo Albanians (Exhibit 3D846)

289. The Trial Chamber relied upon a Supreme Command Staff Combat Report in holding that "[o]n 11 May 1999 Ojdanić reported to Milošević and *inter alios* Serbian President Milutinović that the VJ had captured around 600 Kosovo Albanian men from the villages of Dvorane, Ruhot, and Nabrde, and 'directed' around 10,000 civilians to the towns of Peć/Peja and Klina."[417] The Trial Chamber considered that this was "indicative of the approach of the VJ and MUP of targeting male Kosovo

[411] TJ [3/625]
[412] This is particularly true in light of other evidence that demonstrated that Ojdanić urged the population to remain in their homes (see below) and that he and the General Staff viewed the movement of the population as a KLA tactic to foster a humanitarian crisis and international intervention (see below).
[413] TJ [3/566]
[414] T.16545
[415] T.27513
[416] TJ [3/566]
[417] TJ [3/570]

Albanians, irrespective of whether they were KLA members or not."[418] The Trial Chamber misinterpreted this exhibit, which was not put to any witnesses.

290. The Trial Chamber failed to consider whether the prosecution had proven that the population movement was without grounds permitted under international law. The towns of Pec and Klina are next door to the villages of Dvorane, Ruhot and Nabrde and the area was in the theatre of combat operations. There was no suggestion that the displaced people could not return once combat operations had ceased. Indeed, relative to those villages, Klina is located further into Kosovo, rather than towards Albania; this militates against the suggestion that General Ojdanić knew that people were being forcibly expelled from Kosovo rather than being temporarily removed from combat areas.

(3) Manifestly unreasonable weight give to Drewienkiewicz's press statement (Exhibit P2542)

291. Exhibit P2542 was admitted into evidence through Drewienkiewicz, a prosecution witness. Drewienkiewicz was Chief of Operations and Deputy Head of the KVM.[419] Exhibit P2542 is a four page document which may or may not have been a speaking note used by Drewienkiewicz at some form of press conference:

> 17 Q. Thank you. Now, I'd like to show you the next exhibit on our list
> 18 which is P2542. You might remember this document while we are getting it
> 19 up. It's -- I believe it's a press statement that you gave or your note
> 20 for a statement you gave after your meeting with the foreign secretary is
> 21 now [indiscernible]. Is that correct?
> 22 A. Yes, that is correct.
> 23 Q. In this briefing, if we look at pages -- at the bottom of page 3
> 24 or maybe we can just go to the last page, actually. Sorry.
> 25 There you refer to some numbers of refugees. Am I correct that
>
> 1 Kstands for kilo, a thousand?
> 2 A. Yes, that's correct. We were at this stage measuring refugees in
> 3 thousands. We had -- obviously when we said 7.000 we had seen 7.000.
> 4 Q. So you also consider these refugee numbers as being a correct
> 5 reflection of what was going on on the ground?
> 6 A. Yes.
> 7 Q. Did you return to Kosovo later on in 1999?
> 8 A. Yes. I accompanied the NATO force when it re-entered Kosovo on

[418] TJ [3/570]
[419] TJ [2/1019]

9 D-Day.[420]

292. This was the only time that Exhibit P2452 was referred to at trial. There was no evidence of its provenance or, crucially, its distribution. The prosecution failed even to establish that Drewienkiewicz actually delivered the entire contents of his speaking note.

293. In its closing brief, the prosecution placed emphasis upon Exhibit P2542 and its date in seeking to establish General Ojdanić's knowledge:

> "On 1 April 1999, Drewienkiewicz gave a press statement on crimes committed against Kosovo Albanian civilians (deportation, theft, looting, property damage). He noted that Podujevo was "almost deserted", and stated that around 1500 women, children, old and infirm were put on a train in Priština and taken south. They were told by Serb forces, "Macedonia is that way [...] do not come back or you will be killed." He also reported that 6,000-8,000 refugees entered Macedonia the previous day, 50,000 refugees were waiting to cross the border and that on that day, another 7,000 refugees arrived by train. He added that these refugees were lucky as they had escaped."[421]

294. The prosecution did not put Exhibit P2542 to *any* defence witnesses, or indeed any other prosecution witnesses, who might have been able to give important evidence about its provenance, distribution or crucially whether General Ojdanić was aware of its contents.

295. Nevertheless, in its Trial Judgment the Trial Chamber placed great emphasis upon Exhibit P2542, citing it on 10 occasions (three times in relation to General Ojdanić).[422]

> "In relation to displaced people and crimes being committed in Kosovo, Drewienkiewicz gave a press statement on 2 April 1999 at the latest. He reported large numbers of displaced Kosovo Albanians arriving at the borders, and conveyed reports of widespread crimes committed by the VJ and MUP, including deportation from Kosovo. He stated that 6,000 to 8,000 displaced Kosovo Albanians had left for Macedonia the day before and 7,000 were seen leaving on a train that day, along with 50,000 more waiting to cross the border. He specifically referred to crimes by FRY/Serbian forces committed against Kosovo Albanians and their property in Peć/Peja and Prizren, and

[420] T 7815 - 7816 (4 December 2006).
[421] Prosecution Closing Brief, para. 801). The prosecution also relied upon Exhibit P2542 in relation to *Sainovic*: para. 708.
[422] See TJ [3/567, fn 1218]; [3/597, fn 1438]; [3/625, fn 1503] in relation to General Ojdanić. See also TJ [3/754, fn 1923]; [3/754, fn 1924]; [3/775, fn 1973]; [3/853, fn 2169]; [3/855, fn 2175], [3/855, fn 2177]; [3/855, fn 2178] in relation to Generals Pavković and Lazarevic.

> "systematic looting" and the forcible removal of Kosovo Albanians from Priština/Prishtina."[423]

296. The Trial Chamber then, without further evidence, concluded:

> The Intelligence Administration was charged with informing Ojdanić of such accounts, as described in Section VI.A. Given the relevance of the topic and Drewienkiewicz's involvement in Kosovo prior to the NATO air campaign, the Chamber is satisfied that this press release was provided to Ojdanić.[424]

297. The Trial Chamber further relied upon Exhibit P2542 to establish the following:

> "Ojdanić was informed of the "systematic looting" and the exodus of Kosovo Albanians from Priština/Prishtina, which the Chamber has found to have been an organised process, carried out by VJ and MUP forces, involving thousands of Kosovo Albanians."[425]

298. The Trial Chamber further relied upon Exhibit P2542 in holding that:

> "From the opening days of the conflict in 1999, Ojdanić knew of MUP and VJ involvement in the movement of Kosovo Albanians, and that this involved criminal acts by VJ and MUP forces including forcible displacement."[426]

299. The Trial Chamber therefore relied upon the contents of Exhibit P2542 in order to establish that General Ojdanić knew about the indictment crimes of forcible displacement, above and beyond either (i) any general knowledge that the population was moving to escape the conflict or (ii) knowledge of specific instances of isolated crimes committed by members of the VJ in Kosovo.

300. However, there was no evidence to establish that the Intelligence Administration actually monitored Drewienkiewicz's press statement. Contrary to the above-quoted assertion, section VI.A of the Trial Judgment does not contain an explanation of the operation of the Intelligence Administration such as to establish that it would have monitored a press statement made by a former KVM officer. Crucially, beyond the Trial Chamber's sheer speculation that Drewienkiewicz's press statement would have been provided to General Ojdanić because of its author and topic, there was no evidence that General Ojdanić knew anything about it. Indeed, the preponderance of the evidence shows that it General Ojdanić was not aware of it:

[423] TJ [3/567]
[424] TJ [3/567]
[425] TJ [3/597]fn 1438
[426] TJ [3/625], also citing 3D802 (General Staff Combat Report, 28 March 1999), p. 4.

none of the relevant General Staff reports from early April 1999 make any reference to it, either express or implied.[427]

301. If the prosecution sought to rely upon Drewienkiewicz's press statement in order to establish the proposition that General Ojdanić had knowledge of its contents, that proposition should have been put to important witnesses from the General Staff. Neither the prosecution nor the Trial Chamber asked a single witness from the General Staff – and there were 22 whether they were aware of Drewienkiewicz's press statement. For example, Krga testified on General Ojdanić's behalf. He was the head of the Intelligence Administration at the relevant time. The prosecution completely failed to put Exhibit P2542 to him or any related proposition.

302. Therefore, the Trial Chamber's conclusion that Exhibit P2542 serves to establish General Ojdanić's knowledge was not tested at trial and is inherently unreliable. No reasonable Trial Chamber would have relied upon Exhibit P2542 and permitted such weak and unreliable evidence to provide any basis to infer General Ojdanić's knowledge of forcible displacements.

303. In relying upon Exhibit P2542 the Trial Chamber erred in law or, alternatively, adopted an approach to the evidence that no reasonable Trial Chamber would adopt. The Trial Chamber's reliance upon Exhibit P2542, combined with its other errors elsewhere, undermines its findings as to General Ojdanić's knowledge.

(4) Manifestly unreasonably weight given to the May 1999 indictment (Exhibit P968)

304. General Ojdanić was initially indicted by this Tribunal towards the end of May 1999. In its closing brief, the prosecution asserted that the initial indictment put General Ojdanić on notice of the crimes alleged therein:

> "On 24 May 1999 after the ICTY Indictment against Milošević *et. al,* was made public. Ojdanić was put on notice of the charges against him, the specific crimes being alleged and their widespread nature. These charges overlap with those in the Indictment in the present case."[428]

[427] *See* the General Staff Briefings of 1 April 1999 (3D719); 3 April (3D721); 4 April (3D722). See also the Intelligence Administration Reports of 1 April 1999 (3D906); 3 April (3D911) and (3D882); 4 April (3D913).
[428] Prosecution Closing Brief, para. 802.

> "Following the meeting on 17 May 1999, Ojdanić sent Gajić and Vasiljević to Kosovo to investigate the crimes. However, they reported on only 42 crimes committed by the VJ and the MUP. This figure is significantly lower than indicated by the widespread and systematic nature of the serious crimes alleged in the *Prosecutor v. Slobodan Milošević et al*."[429]

305. The prosecution did not put Exhibit P968 to *any* defence witnesses, or indeed any prosecution witnesses (such as Vasiljević) who might have been able to give important evidence about whether or not General Ojdanić was in fact on notice of the specific contents of the original indictment against him.

306. Nevertheless, in its Trial Judgment the Trial Chamber placed great emphasis upon Exhibit P968, citing it on seven occasions (four times in relation to General Ojdanić).[430] The Trial Chamber relied upon Exhibit P968 as establishing General Ojdanić's knowledge of forcible displacements:

> The fact that Ojdanić was informed of allegations of VJ involvement in forcible displacements and other crimes in the first indictment against him, but did not take any actions specifically in relation to these allegations, supports the contention that he was already aware of them. These forcible displacements included several discussed in Section VII above, which the Chamber found to have been committed by VJ and/or MUP forces, those being from Peć/Peja town and out of Kosovo on 27 and 28 March, from Pirane/Pirana in Prizren in late March, from Đakovica/Gjakova town starting in April and continuing into May, from Prilepnica/Përlepnica in Gnjilane/Gjilan on 13 April, from Sojevo/Sojeva in Uroševac/Ferizaj in April, from Celina in Orahovac/Rahovec on 25 March, and the shelling of Turićevac/Turiçec in late March and April.[431]

307. The Trial Chamber further relied upon Exhibit P968 as establishing General Ojdanić's knowledge of Indictment crimes in Priština:

> "Ojdanić was also informed of the VJ involvement in the forcible displacement from Priština/Prishtina starting in April by the original indictment against him."[432]

308. In holding that General Ojdanić possessed the requisite *mens rea* for aiding and abetting, the Trial Chamber again relied upon Exhibit P968:

[429] Prosecution Closing Brief, para. 839.
[430] See TJ [3/595, fn 1432]; [3/596, fn 1437]; [3/597, fn 1438]; [3/625, fn 1506] in relation to Ojdanić. See TJ [3/453, fn 991]; [3/755, fn 1927]; [3/766, fn 1955] in relation to Sainovic and Pavković.
[431] TJ [3/596]
[432] TJ [3/597, fn 1438]

> He was made aware of allegations of the widespread nature of such criminal activity, including forcible displacements, through internal sources of information, such as briefings of the Supreme Command Staff, and through external sources, such as through the publication of the first indictment against him, which specifically referred to the widespread campaign of forcible displacements being conducted by VJ and MUP forces in Kosovo, and named a number of specific sites at which these forcible displacements were perpetrated.[433]

309. The Trial Chamber therefore relied upon the fact of the initial indictment against General Ojdanić and the detailed contents of Exhibit P968 as establishing General Ojdanić's knowledge of the widespread campaign of forcible displacements.

310. However, there was no evidence to establish that General Ojdanić had any knowledge of the Indictment beyond mere knowledge that it had been issued. Indeed, there was no evidence that it had even been translated into a language he could understand. Establishing that General Ojdanić was aware that an indictment had been issued against him – in circumstances where (rightly or wrongly) it was described to him as "western propaganda" and intended to "stall peace initiatives"[434] – falls short of establishing General Ojdanić's actual knowledge of the crimes alleged therein. Indeed, it is noteworthy that the indictment also names Milutinović, and it was established that he had seen the Indictment.[435] Despite this, the Trial Chamber acquitted Milutinović because he was told: that crimes were being dealt with; or displacement had been caused by the KLA and NATO.[436] The Trial Chamber's irrationally failed to apply the same standard to General Ojdanić.

311. For the Trial Chamber to be entitled to rely upon Exhibit P968 as establishing General Ojdanić's detailed knowledge of the crimes alleged therein, that proposition had to be put to relevant witnesses from the General Staff. However, there was no evidence that General Ojdanić actually knew of the contents of the Indictment.

312. A reasonable Trial Chamber might be able to conclude that the May 1999 indictment was relevant to the "had reason to know" standard under Article 7(3). No reasonable Trial Chamber could conclude that General Ojdanić actually knew of the contents of the May 1999 indictment – the standard for a conviction under Article 7(1).

[433] TJ [3/625]
[434] TJ [3/595]
[435] TJ [3/267]
[436] TJ [3/281]

313. No reasonable Trial Chamber could have placed such emphasis upon the original indictment in this case.

(5) Insufficient weight given General Ojdanić's reaction to Vasiljević

314. On 13 May 1999 General Ojdanić was informed of details of crimes in Kosovo by Vasiljević. Vasiljević's evidence was that General Ojdanić seemed "very taken aback" by this information, and that he immediately telephoned Milošević to inform him that he had just received information concerning rapes and killings by VJ members, and organised a meeting with Milošević.[437] The Trial Chamber held that General Ojdanić had previously been informed of "numerous" crimes, including killings, being committed by VJ members, inter alia at a meeting on 4 May. The Trial Chamber concluded that General Ojdanić's reaction to Vasiljević did not indicate that he was learning of such criminal activity for the first time.[438]

315. It was therefore established that General Ojdanić knew about numerous crimes in Kosovo, including murders and rapes. However, this does not establish that General Ojdanić knew that there was a general campaign directed against the Kosovo Albanian population. Indeed, the fact that General Ojdanić was "taken aback" by the individual crimes reported by Vasiljević – whether he was hearing of those types of crimes for the first time or not – was important evidence that he did not know of such a general campaign. The Trial Chamber simply dismissed the significance of Vasiljević's evidence in this regard. No reasonable Trial Chamber could adopt such an approach.

(6) Unreasonable and unsubstantiated reliance upon General Ojdanić's daily meetings with Milošević

316. During the war, General Ojdanić met daily with Milošević to "clarify issues arising from combat reports that were sent in summary form to Milošević."[439] This is routine practice for any military. However, the Trial Chamber relied upon the fact of these meeting as evidence that General Ojdanić was "aware of the general campaign

[437] TJ [3/573]
[438] TJ [3/573]
[439] TJ [3/487]; TJ [3/530]

of forcible displacements".[440] There was no evidence that this was ever discussed by General Ojdanić and Milošević. No reasonable Trial Chamber would draw such an unsubstantiated conclusion.

(7) Unreasonable weight given to General Ojdanić's knowledge of the "broad discriminatory context of the conflict"

317. The Trial Chamber relied upon a VJ General Staff evaluation of the security situation in Kosovo from February 1999 to establish that General Ojdanić was aware of the "broad discriminatory context of the conflict" and hence that General Ojdanić was aware of the general campaign of forcible displacements.[441] The Appeals Chamber is invited to consider this document.[442] It provides no basis to conclude that General Ojdanić was aware of a "discriminatory context". It provides no basis to conclude that General Ojdanić was aware of a general campaign of forcible displacement. No reasonable Trial Chamber could draw such a conclusion.

Conclusions

318. No reasonable Trial Chamber could conclude that the only reasonable inference was that General Ojdanić knew of a campaign against of terror, violence and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians. The Trial Chamber itself held that Pavković, a member of the joint criminal enterprise, minimised reports of crimes by VJ members that were sent to General Ojdanić and met with Milošević without informing General Ojdanić.[443] General Ojdanić believed that the KLA planned a large-scale withdrawal of Kosovo Albanians from Kosovo in order to precipitate a humanitarian crisis.[444] The Trial Chamber failed to weigh that possibility when assessing General Ojdanić's knowledge.

319. Moreover, crucial evidence relied upon the Trial Chamber to establish General Ojdanić's knowledge crumbles upon analysis. To hold that General Ojdanić knew of a

[440] TJ [3/625]
[441] TJ [3/625]
[442] 3D685 (VJ General Staff Evaluation of security-information and security threat to the FRY).
[443] TJ [3/617]
[444] P929 (Minutes of the Collegium of the General Staff of the VJ for 9 April 1999), pp.33-4.

general campaign of forcible displacement, the Trial Chamber relied upon documents that General Ojdanić did not see and press statements that he did not hear.

Relief sought

320. General Ojdanić respectfully requests that the Appeals Chamber reverse the Trial Chamber's finding that the only reasonable inference was that he knew about a campaign of terror, violence and forcible transfer being carried out by VJ an MUP forces or the requisite *mens rea* of any principal or intermediary perpetrator. Accordingly, General Ojdanić requests that his convictions be overturned.

B. Ground 4(B): the Trial Chamber erred by failing to weigh adequately or at all acts whereby General Ojdanić sought to avoid expulsions, which cast reasonable doubt on the finding that he had the requisite *mens rea* to aid and abet deportation and forcible transfer

Error of fact which occasioned a miscarriage of justice

321. The Trial Chamber held that General Ojdanić "knew that his conduct assisted in the commission of [the Indictment] crimes.[445] No evidence was cited in support of this conclusion; indeed it is the only mention in the entire Trial Judgment of whether General Ojdanić knew that his acts assisted the Indictment crimes. The Trial Chamber failed to weigh evidence whereby General Ojdanić sought to avoid crimes against Kosovo Albanian civilians. These acts strike reasonable doubt through the Trial Chamber's bare statement that General Ojdanić knew that his conduct assisted the Indictment crimes. No reasonable Trial Chamber, having considered this evidence, could conclude that General Ojdanić knew that his acts assisted forcible displacement.

322. The Trial Chamber's failure to consider facts which cast doubt on whether General Ojdanić knew that his acts assisted the Indictment crimes is revealed by its inconsistent description of the *mens rea* of aiding and abetting:

a. At **TJ [1/93]** the Trial Chamber held that the mental element of aiding and abetting requires that the accused "intentionally performed an act **with the knowledge that such act** would lend practical assistance, encouragement, or moral support to the commission of a crime or underlying offence;" and that the accused "was aware of the essential elements of the crime or underlying offence for which he is charged with responsibility, including the mental state of the physical perpetrator or intermediary perpetrator."

b. At **TJ [3/620]**, in relation to General Ojdanić specifically[446], the Trial Chamber held that aiding and abetting requires that General Ojdanić "intentionally provided [the] assistance and that he was aware of the essential elements of [the] crime or underlying offence, including the mental state of the physical or intermediary perpetrator."

[445] TJ [3/628]
[446] The Trial Chamber repeated its error at **TJ [3/921]** in relation to Lazarevic.

323. The difference between these two descriptions is that the first requires knowledge on the part of the accused that his acts assist the underlying crimes, whereas on its face the second does not. The Trial Chamber erred in fact when considering General Ojdanić's responsibility by failing to weigh evidence which demonstrated that General Ojdanić did not know that his acts assisted the Indictment crimes. This evidence demonstrates that General Ojdanić thought that his acts assisted the fight against NATO and the KLA, whilst hindering any crimes.

324. For the Trial Chamber to be entitled to conclude that General Ojdanić *knew* that his acts assisted crimes, this must be the only reasonable inference available.[447] An inference must be narrowly construed, and inferences based upon inferences should be rejected.[448] The Appeals Chamber must consider whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime – General Ojdanić's knowledge that his acts assisted forcible displacements – was not proven.[449]

General Ojdanić's challenge to the Trial Chamber's approach

325. The Trial Chamber inferred that General Ojdanić knew of the commission of forcible displacements in Kosovo.[450] The Trial Chamber held that General Ojdanić's "reaction to this information amounted primarily to ordering adherence to international humanitarian law, relying on the continued operation of the military justice system, and dispatching information gathering missions by members of his Security Administration. Nonetheless, he continued to order the VJ to participate in military operations with the MUP in Kosovo, as discussed above."[451] However, this does not establish that General Ojdanić knew that his acts were assisting the Indictment crimes. Moreover, the Trial Chamber failed to consider General Ojdanić's conduct as whole.

[447] *Vasiljević* AJ, para. 128; *Kristic* AJ, para. 41.
[448] *Hadžihasanović* TJ, para. 309
[449] *See Stakic* AJ, para. 219.
[450] TJ [3/609]
[451] TJ [3/610]

326. The Trial Chamber held that General Ojdanić was not a member of any joint criminal enterprise: he did not share the necessary intent. The Trial Chamber held that General Ojdanić's motivation was to "counter the perceived NATO and KLA threat, rather than a desire to prepare for a widespread campaign of forcible displacement in Kosovo."[452] There was no evidence that General Ojdanić's motivation changed and the Trial Chamber. There was no evidence that General Ojdanić knew that his acts were assisting forcible displacements.

327. The Trial Chamber erred by failing to consider General Ojdanić other actions, including those detailed in this Appeal Brief relevant to Ojdanic's *mens rea* as an accomplice. The Trial Chamber ignored Ojdanic's reaction to information of crimes in Kosovo. General Ojdanić orgnanised seminars in international humanitarian law.[453] He ensured that VJ volunteers were screen thoroughly.[454] He banned the operation of paramilitary groups in Kosovo.[455] As outlined above: he sought out information whenever he could; he made pleaded for Albanians to stay in Kosovo; he ordered investigations into crimes and advocated a state commission.

328. These actions strike reasonable doubt through any inference that General Ojdanić engaged the VJ in Kosovo knowing hat his acts assisted forcible displacement. A reasonable Trial Chamber could not exclude the reasonable inference that General Ojdanić did not know that his acts were assisting the Indictment crimes; rather he thought that his acts assisted the fight against the KLA and NATO whilst minimising the possibility of crimes against civilians. No reasonable Trial Chamber could find that General Ojdanić knew that his acts assisted forcible displacements. General Ojdanić's convictions for aiding and abetting must therefore be reversed.

Relief sought

329. General Ojdanić respectfully requests that the Appeals Chamber reverse the Trial Chamber's finding that he was aware that his acts assisted the Indictment crimes. Accordingly, General Ojdanić requests that his convictions be overturned.

[452] TJ [3/617]
[453] TJ [3/547]
[454] TJ [1/648]; [3/562-563]
[455] TJ [3/564]

C. Ground 4(C): the Trial Chamber erred by failing to properly address the times at which acquired knowledge of deportation and forcible transfer relative to the crimes for which he was convicted

Alleged error of fact which has occasioned a miscarriage of justice

330. The Trial Chamber further erred by failing to consider the point in time General Ojdanić learned about instances of crimes, or even "widespread criminal activity". It is a general principle of law that that *mens rea* and *actus reus* of an offence must be contemporaneous. For example, in *Naletilic* the Appeals Chamber held:

> "The principle of individual guilt requires that an accused can only be convicted for a crime if his mens rea comprises the actus reus of the crime. To convict him without proving that he know of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence… for a conduct to entail criminal liability, it must be possible for an individual to determine ex ante, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal."[456]

331. Therefore, in *Krajisnik,* the Appeals Chamber held that the Trial Chamber had not made the necessary findings with respect to the JCE members' *mens rea* in relation to the expanded crimes:

> "The Trial Chamber did not find, however, at which point in time the leading members of the JCE became aware of the various expanded crimes. Similarly, there are no findings as to when the members of the local component became aware of the expanded crimes. In the absence of such findings, the Appeals Chamber as found that the Trial Chamber committed a legal error by convicting Krajisnik for the expanded crimes."[457]

332. The *mens rea* basis for General Ojdanić's conviction for aiding and abetting was that he was "aware of the general campaign of forcible displacements that was conducted by the VJ and MUP throughout Kosovo during the NATO air campaign."[458] General Ojdanić was consequently convicted of assisting crimes of forcible displacements which occurred from 24 March up to 25 May 1999. Set out in the Appendix is a Table compiled for the convenience of the Appeals Chamber,

[456] *Naletilic* AJ, para. 114.
[457] *Krajisnik* AJ, para. 203.
[458] TJ [3/625]

summarising the dates of the Indictment crimes for which General Ojdanić was convicted.

333. A crucial question inadequately addressed by the Trial Chamber was the point in time General Ojdanić acquired knowledge of the "general campaign of forcible displacements". Even according to the Trial Chamber's own *mens rea* standard, it was only from that point in time could General Ojdanić's conduct could be considered criminal. General Ojdanić could only be convicted of aiding and abetting crimes committed from then onwards. No reasonable trial chamber could convict General Ojdanić of crimes committed before he acquired such knowledge.

334. General Ojdanić has challenged the evidence relied upon by the Trial Chamber to establish his knowledge of any general campaign of forcible displacement. Even so, the earliest piece of evidence the Trial Chamber could find to establish *any* knowledge of forcible displacement (as opposed to individual crimes) was Drewienkiewicz's press statement dated 2 April 1999. The Trial Chamber's reliance upon this exhibit is fundamentally flawed, as discussed above. Perhaps alert to the paucity of direct evidence of General Ojdanić's *mens rea,* the Trial Chamber stretched its reliance upon this exhibit even further, asserting that it established General Ojdanić's knowledge of forcible displacement of civilians from Priština/Prishtina and holding that because General Ojdanić "did not take any actions specifically in relation to this crime" it supported "the contention that he was already aware of it".[459]

335. If General Ojdanić's challenge to this exhibit succeeds, the Trial Chamber's finding that General Ojdanić was "already aware" of forcible displacements from Priština/Prishtina falls away. Even if General Ojdanić's challenge to this exhibit does not succeed, it does not establish knowledge of a "general campaign" of forcible displacements throughout Kosovo. Accordingly, General Ojdanić's convictions in relation to other crime site prior to that date must still be reversed.

336. Similarly, in relation to the May 1999 Indictment, the Trial Chamber held that General Ojdanić's failure to "take actions specifically in relation to these allegations,

[459] TJ [3/597]

supports the contention that he was already aware of them."[460] The Trial Chamber held that "[i]n response to the issuance of the first indictment, the General Staff/Supreme Command Staff reported that western propaganda continued to be spread, but did not refer to any special enquiries or commissions undertaken to ascertain the veracity of the allegations set out in that indictment."[461]

337. General Ojdanić has challenged the Trial Chamber's finding that General Ojdanić knew of the contents of the May 1999 Indictment, compared to knowledge of the mere fact that it had been issued. Therefore, the indictment provided no basis for the conclusion that General Ojdanić already knew of a general campaign forcible displacement throughout Kosovo. However, even if General Ojdanić's challenge to the May 1999 Indictment is unsuccessful, it was incorrect to hold that General Ojdanić failed to take actions in relation to allegations of crimes against civilians. General Ojdanić ordered that prosecutions of violations of the provisions of international law were to be the **top priority** of the military justice system.[462] Further, by criticising General Ojdanić for not referring to any special commissions, the Trial Chamber unreasonably ignored its own holding that on 17 May 1999 General Ojdanić had proposed to Milošević a state commission to establish responsibility for crimes in Kosovo.[463] Similarly, after the war General Ojdanić arranged a meeting between Farkaš and the Head of the RDB, Radomir Marković, to discuss a common approach to the investigation of crimes, which took place on 9 July 1999.[464]

338. Therefore, no reasonable Trial Chamber could hold that General Ojdanić failed to respond to allegations of crimes. No reasonable Trial Chamber could hold that a failure to establish a commission in response meant that General Ojdanić already knew of those crimes. No reasonable Trial Chamber could hold that the only reasonable inference was that General Ojdanić was already aware of the Indictment crimes.

[460] TJ [3/596]
[461] TJ [3/595]
[462] TJ [3/627] fn 1513. *See* 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999).
[463] TJ [3/576]
[464] TJ [3/608]; [3/617]

339. Other than Drewienkiewicz's press statement and the May 1999 Indictment, the Trial Chamber relied upon General Ojdanić's attendance at meetings with MUP, VJ and FRY leaders on 4, 16 and 17 May 1999. However, these meetings show that General Ojdanić was trying to tackle criminality. Further, the Trial Chamber unreasonably failed to consider that these meetings do not establish knowledge of earlier crimes (for example in March and April) at the time necessary to make General Ojdanić criminally responsible for those crimes.

340. The Trial Chamber also relied upon the regular VJ command and communication system. General Ojdanić avers that this did not reveal any general campaign of forcible displacements. The Trial Chamber itself noted that Pavković sought to minimise reports of criminal activity by VJ members. The reasonable inference remained that this source of information did not provide General Ojdanić with the requisite knowledge at the relevant time.

341. Finally, the Trial Chamber relied upon "Ojdanić's general knowledge of the widespread displacement of Kosovo Albanians in the course of VJ operations." The Trial Chamber cited no evidence to support such a proposition. In any event, the reasonable inference remained, no matter if or when General Ojdanić acquired such knowledge, that General Ojdanić considered that civilians were either evacuated while combat operations against the KLA continued, or left Kosovo for other reasons (such as direct orders from the KLA).

Conclusions

342. The Trial Judgment is vague as to the point in time when General Ojdanić acquired knowledge of the general campaign of forcible displacements. The Trial Chamber sought to infer that General Ojdanić was aware of Drewienkiewicz's press statement and the contents of the May Indictment. The Trial Chamber then further inferred that General Ojdanić's supposed inaction means that he was already aware of the campaign of forcible displacements. This chain of inferences is an inadequate basis to hold beyond reasonable doubt that General Ojdanić knew of the Indictment crimes from March 1999. No reasonable Trial Chamber could conclude that General Ojdanić had the requisite knowledge at the relevant time.

Relief sought

343. General Ojdanić respectfully requests that the Appeals Chamber reverse the Trial Chamber's finding that he knew about the Indictment crimes at the time necessary to make his conduct criminal. Accordingly, General Ojdanić requests that the Appeals Chamber reverse his convictions.

VI. GROUND FIVE: THE TRIAL CHAMBER ERRED BY FAILING TO STAY PROCEEDINGS UNTIL THE DEFENCE COULD INVESTIGATE IN KOSOVO

Introduction

344. Unfortunately, General Ojdanić was unable to mount an adequate defence because he was unable to investigate the crimes in Kosovo for which the prosecution alleged that he bore responsibility. General Ojdanić repeatedly and consistently protested about this unfairness and the prejudice which it caused him. On three occasions he requested that his trial be stayed until his defence team could properly investigate in Kosovo.[465] On each occasion, the Trial Chamber denied his request.[466] The Trial Chamber erred by insisting on an expeditious trial over a fair one. General Ojdanić was thus convicted of crimes that his defence team was unable to investigate by the most basic methods: visiting the sites, gathering information and insight, and speaking to potential witnesses who could challenge the prosecution's version of events.

345. The complex lengthy and history to this issue is set out in *General Ojdanić's Third Motion for Stay of Proceedings*[467] and the Trial Chamber's *Decision on Ojdanić's Third Motion for Stay of Proceedings.*[468] Therefore, the relevant facts are only summarised here.

The Trial Chamber's First Decision

346. General Ojdanić's defence team requested access to travel to Kosovo to view alleged crime scenes and interview witnesses on 6 December 2004.[469] On 8 April 2005, UNMIK advised that, due to the dangerous security situation in Kosovo, a visit could not be accommodated at that time.[470]

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[465] *General* Ojdanić*'s Motion for Stay of Proceedings* (1June 2006); *General* Ojdanić*'s Second Motion for Stay of Proceedings* (31 July 2006); *General* Ojdanić*'s Third Motion for Stay of Proceedings* (23 July 2007) (**"Third Motion"**).
[466] *Decision on* Ojdanić *Motion for Stay of Proceedings* (9 June 2006) (**"First Decision"**); *Decision on General* Ojdanić*'s Second Motion for Stay of Proceedings* (19 October 2006) (**"Second Decision"**); *Decision on Third* Ojdanić *Motion for Stay of Proceedings* (27 August 2007) (**"Third Decision"**). .
[467] Third Motion, paras. 2-44.
[468] Third Decision, paras. 1 – 29.
[469] Third Decision, para. 2.
[470] Third Decision, para. 2.

347. UNMIK agreed to facilitate a mission in May 2006. This trip was undertaken. However, during the mission, Ojdanić's defence team and UNMIK personnel were attacked when their convoy was surrounded in Mala Krusa/Krushe e Vogel in the Prizren Municipality on 25 May 2006.[471] It was a life threatening attack: three UNMIK policemen and more than 30 citizens were injured. General Ojdanić's defence team narrowly escaped injury, but their interpreter was injured and hospitalized.[472] Consequently, the mission was aborted.[473] UNMIK withdrew political clearance for General Ojdanić's visit, which prohibited any future visit.[474]

348. General Ojdanić's trial was then due to start on 10 July 2006. On 2 June 2006, General Ojdanić filed his *Motion for Stay of Proceedings* until his defence team was able to safely investigate in Kosovo.[475] The Trial Chamber denied General Ojdanić's request, holding that while UNMIK had been unable to provide the security necessary for the team to conduct and complete its investigations, this did not mean that UNMIK would continue indefinitely to be able to do so. The Trial Chamber requested that UNMIK take all reasonable and necessary measures to assist Defence teams in their investigations in Kosovo for the preparation of their defence.[476]

The Trial Chamber's Second Decision

349. There followed thereafter a period of back and forth between General Ojdanić's defence team and UNMIK, with interventions from the Trial Chamber, to try to facilitate access to Kosovo. On 28 July 2006, an UNMIK representative requested new information from General Ojdanić's team:

> "UNMIK will require detailed information on what the intentions of the team are in each of the locations, i.e. are the members of the team intending to walk around on site, take photographs, do they intend to enter any premises, how much time will be spent in each location etc. Note: we would like to have your confirmation that you do not intend to interview any witnesses during this visit."[477]

[471] Third Decision, para. 3.
[472] Third Motion, para. 9.
[473] Third Decision, para. 3.
[474] First Motion, Annex G.
[475] Third Decision, para. 5.
[476] Third Decision, para. 6.
[477] Second Motion, para. 14.

350. On 31 July 2006, when the prosecution was about to begin calling its crime-base witnesses, General Ojdanić filed his *Second Motion for Stay of Proceedings.* On 30 August 2006, UNMIK indicated that it would be able to facilitate visits to six out of eleven locations requested by General Ojdanić's team. UNMIK set out stringent conditions in relation to the six locations, and stated that it was unable at that time to facilitate visits to four of the requested sites.[478]

351. On 6 September 2006, after careful consideration, General Ojdanić's defence team responded to UNMIK that the restrictions made a visit to Kosovo of little value, and did not justify the substantial risk to the safety of defence team members.[479] On 19 October 2006, the Trial Chamber denied *Ojdanić's Second Motion for Stay*.

The Trial Chamber's Third Decision

352. On 15 March 2007, anticipating a break in the trial upon the scheduled conclusion of the prosecution's case in late March 2007, the Ojdanić team contacted UNMIK again. There followed a further period of back and forth between General Ojdanić's defence team and UNMIK, with interventions from the Trial Chamber.

353. On 23 July 2007, General Ojdanić filed his *Third Motion for Stay of Proceedings.* On 27 August 2007, the Trial Chamber denied this motion, holding that UNMIK had made sufficient efforts to provide the defence with adequate time and facilities for the preparation of its defence. The Trial Chamber held that UNMIK had taken all necessary and reasonable efforts to facilitate a visit to Kosovo.[480]

The Right to a Fair Trial

354. Article 20(1) of the Statute of the Tribunal states:

> "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

[478] Third Decision, para. 16.
[479] Third Motion, para. 36.
[480] Third Decision, para. 41.

355. Article 21 of the Statute provides that "[a]ll persons shall be equal before the International Tribunal" and that an accused shall be entitled to the following minimum guarantee, among others:

> "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

356. The Appeals Chamber has held that the principle of equality of arms between the accused and the prosecution is a component of the right to a fair trial.[481] The principle of equality of arms goes to the heart of the fair trial guarantee.[482] This obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.[483] While equality of arms does not mean equality of resources, each party must have a reasonable opportunity to defend its interests under conditions which do not put him under a substantial disadvantage vis-à-vis his opponent.[484]

357. Cassese has explained that "equality of the parties is an essential ingredient of the adversarial structure of proceedings, based on the notion of the trial as a contest between two parties. Under this approach, it is indispensible for both parties to the proceedings to have the same rights; otherwise, there is no fair fight between the two 'contestants', and the spectators will not be convinced of the outcome."[485]

358. In assessing an equality of arms challenge by an accused, a judicial body must ask two basic questions: (1) was the Defence put at a disadvantage *vis-à-vis* the Prosecution, taking into account the "principle of basic proportionality" and (2) was the accused permitted a fair opportunity to present his case.[486]

[481] *Rutaganda* AJ, para. 44; *Kayishema & Ruzindana* AJ, para. 67.
[482] *Tadić* AJ, para. 44
[483] *Kordic & Cerkez* AJ, paras. 175-76; *Kayishema & Ruzindana* AJ, para. 69; *Prosecutor v Milutinovic et al*, No. IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003), para. 23.
[484] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.9, *Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents* (4 September 2008), para. 29
[485] *Cassesse* (2008), p. 384.
[486] *Stakic* AJ, para. 149

Ojdanić's right to a fair trial was violated

359. The Trial Chamber found that the VJ participated in a widespread campaign of forcible displacements. However, General Ojdanić was not given the opportunity to find crucial witnesses, particularly Kosovo Albanian witnesses remaining in Kosovo, or obtain other material from the field which could help to clarify the circumstances of VJ operations in Kosovo and demonstrate that the VJ was not part of any organised campaign of forcible displacements. General Ojdanić's defence team was prevented from visiting crime sites and speaking to locals who may have been able to offer crucial insight into the circumstances surrounding the alleged crimes, even if they were unwilling to testify.

360. General Ojdanić was able to call witnesses from General Staff and other VJ witnesses. They testified that there was no plan in the General Staff to launch any campaign targeted at Kosovo Albanian civilians. Despite this unanimous evidence, the Trial Chamber inferred from the crime base that a widespread campaign of forcible displacement took place. Ojdanić was prevented from seeking out potentially crucial evidence to counter that inference – witnesses who may have been able to demonstrate that the VJ did not operate as part of such a campaign but rather targeted the KLA and NATO.

361. The prosecution had access to all of the crimes scenes, interviewed hundreds of witnesses in Kosovo, and was unhindered in its opportunity to investigate. By contrast, General Ojadnic's defence team was attacked when it tried to conduct the most basic trial preparation – viewing the scenes of crimes and locating and interviewing potential witnesses relevant to the crime base. The Trial Chamber started General Ojdanić's trial and permitted the prosecution to call witnesses when General Ojdanić's team could not properly cross-examine them. The Trial Chamber forced General Ojdanić to present his case when he had not been able to seek out witnesses in Kosovo. General Ojdanić did not have the opportunity to fairly present his case.

General Ojdanić's rights were breached despite UNMIK's efforts

362. In the *Orić* case, the Appeals Chamber held that the principle of equality of arms was violated by restrictions imposed by the Trial Chamber on the number of witnesses and time allowed to the defence.[487] The violation of equality of arms was far more serious General Ojdanić's case: he was prevented from identifying and locating witnesses to the crimes in the first place. He was not even in a position to call such witnesses, let alone in proportion to the number of witnesses called by the prosecution. He was unable to seek valuable insight from witnesses on the ground (even on an off the record basis).

363. The issue of the scope of the doctrine of equality of arms was addressed by the Appeals Chamber in the *Tadić* case. There, the accused claimed that his right to a fair trial was breached by the failure of the government of Republika Srpska to cooperate with the defence. [488] The Appeals Chamber acknowledged that it "can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings." It ruled that the failure of the defence to request this remedy precluded relief on appeal.[489] General Ojdanić sought to have his trial stayed on three separate occasions so is entitled to relief on appeal.

364. The *Tadić* Appeals Chamber also considered the fact that the Tribunal had limited authority to compel a State to cooperate with it, and that the principle of equality of arms did not extend to "an external, independent entity" not subject to the control of the court.[490] At the ICTR, the Appeals Chamber likewise held in the *Kayishema & Ruzindana* case that the failure of the government of Rwanda to cooperate with the defence was not sufficient to establish inequality of arms.[491]

[487] *Prosecutor v Orić,* No. IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005), para. 9.
[488] *Tadić* AJ, paras. 29-36.
[489] *Tadić* AJ, para. 55
[490] *Tadić* AJ,para. 49-50.
[491] *Kayishema & Ruzindana* AJ, paras. 72-73.

365. However, these cases are distinguishable from General Ojdanić's case: unlike Republika Srpska and Rwanda, the territory of Kosovo was administered by the United Nations, the same body which administers this Tribunal. In General Ojdanić's case, the same United Nations which tried and convicted General Ojdanić was responsible for security in the areas to which his defence team needed access. Under these circumstances, the Trial Chamber cannot shift the responsibility for a fair trial away from its own institution—the United Nations. Instead, given UNMIK's inability to guarantee security for basic defence investigation, the Trial Chamber erred by failing to stay General Ojdanić's Trial.

366. The Trial Chamber held that UNMIK made "reasonable efforts" to accommodate the Ojdanić team's requests to investigate Kosovo. The Trial Chamber held that UNMIK had to balance its obligation to cooperate with the Tribunal with its other obligations under UNSCR 1244.[492] However, the circumstances in which UNMIK operated were an irrelevant consideration: Ojdanić's right to a fair trial by a United Nations Tribunal should not have been balanced or downgraded because of UNMIK's obligations under UNSCR 1244. The Trial Chamber blurred the issue: Ojdanić was unable to adequately investigate and call crucial witnesses in his favour because of the inability of the body trying him to ensure that he could properly test the evidence against him. Under this approach there was no "fair fight between two contestants." The answer to UNMIK's difficulties with guaranteeing security was not reduce Ojdanić's right to a fair trial, but rather to grant a stay.

367. The Trial Chamber held that the cooperation "between UNMIK, the Tribunal, and the Defence is a developing, dynamic process" from which the Ojdanić defence "unilaterally withdrew".[493] In fact, for three years the Ojdanić defence team repeatedly attempted to investigate in Kosovo, risking the lives of its members. It only refused to risk the lives of members of its defence team by returning to Kosovo when UNMIK placed such restrictions on the meeting of potential witnesses that it appeared that no useful information could be obtained in such circumstances.

368. General Ojdanić's trial started and witnesses were called who his Counsel were unable to properly challenge. The right to cross-examine witnesses is a

[492] Third Decision, para. 41.
[493] Second Decision, para. 10, cited in the Third Decision, para. 21.

fundamental right recognised under international human rights law.[494] In relation to the crime base evidence in General Ojdanić's trial, that right was rendered illusory. Cross-examination of prosecution "crime base" witnesses proceeded when Ojdanić's Counsel was unable to investigate or understand the situation on the ground.

369. In 2007, when it was abundantly clear that the security situation remained too dangerous, the Ojdanić team abandoned its persistent attempts to investigate in Kosovo. Subsequent events proved that this assessment was right:

370. In the *Haradinaj et al* trial, completed in January 2008, the Trial Chamber itself noted that "the difficulty in obtaining evidence was a prominent feature in this trial,"[495] and that "a high proportion of prosecution witnesses in this case expressed a fear of appearing before the Trial Chamber to give evidence."[496]

371. The Trial Chamber specified that:

> "...throughout the trial, the Trial Chamber encountered significant difficulties in securing the testimony of a large number of witnesses. Many witnesses cited fear as a prominent reason for not wishing to appear before the Trial Chamber to give evidence. The Trial Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe. This was due to a number of factors specific to Kosovo/Kosova, for example, Kosovo's/Kosova's small communities and tight family and community networks which make guaranteeing anonymity difficult. The parties themselves agreed that an unstable security situation existed in Kosovo/Kosova that was particularly unfavourable to witnesses."[497]

372. The Office of the Prosecutor has appealed from the judgment in *Haradinaj* on the grounds that it did not receive a fair trial. The Office of the Prosecutor contends that it was denied a fair trial when the Chamber, notwithstanding the prevailing circumstances of intimidation and fear of witnesses, failed to take reasonable steps to secure the testimony of crucial witnesses."[498] If the prosecution contends that it, with the weight of the international community and its substantial resources behind it, could not get witnesses in Kosovo to testify on behalf of Serbs, how could General Ojdanić's Serbian defence team possibly be expected to do the same?

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[494] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.2, *Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross Examination by Defence and Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief* (4 July 2006) at p. 2
[495] *Haradinaj* TJ, para.28.
[496] *Haradinaj* TJ, para.22.
[497] *Haradinaj* TJ, para.6.
[498] Prosecution Appeal Brief in *Haradanaj,* para. 1.

Relief sought

373. The Trial Chamber held that General Ojdanić was responsible for the Indictment crimes because, among other things, he did not investigate them sufficiently. However, the Trial Chamber held that General Ojdanić's trial was fair despite his defence team's inability to investigate those same crimes.

374. General Ojdanić trial was unfair by virtue of being placed at a substantial disadvantage to the prosecution and being deprived of the opportunity to present his case in full. A fair trial was not possible, despite the efforts of the Trial Chamber to facilitate investigations. The Trial Chamber erred by declining to stay proceedings on three separate occasions. Therefore, General Ojdanić requests that his convictions be overturned.

VII. GROUND SIX: THE TRIAL CHAMBER ERRED BY SYSTEMATICALLY RELYING UPON EXHIBITS TO ESTABLISH PROPOSITIONS WHICH WERE NOT PUT TO IMPORTANT WITNESSES

Withdrawal of ground

375. General Ojdanić hereby withdraws this ground of appeal.

VIII. GROUND SEVEN: THE TRIAL CHAMBER IMPERMISSIBLY EXPANDED THE DEFINITION OF CRIMES AGAINST HUMANITY

Introduction

376. It is well established that the *chapeau* elements of crimes against humanity under Article 5 of the Statute require knowledge of the attack on the civilian population and knowledge that the perpetrator's acts are part of that attack.[499] This requirement of knowledge is in addition to the requisite *mens rea* of the underlying offence (such as deportation and murder) and serves to distinguish crimes against humanity from domestic crimes.[500]

377. General Ojdanić contends that the Trial Chamber erred by weakening the knowledge requirement under Article 5, thereby expanding the definition of crimes against humanity. In particular, General Ojdanić contends that the Trial Chamber erred by:

a. finding that the knowledge requirement could be satisfied by evidence that the person "took the risk" that his acts were part of the attack (recklessness standard);

b. finding that some "intermediary perpetrator" could satisfy the knowledge requirement, even where the physical perpetrator and the accused lacked knowledge that the act was part of the attack;

c. finding that any member of a joint criminal enterprise could satisfy the knowledge requirement; and

d. finding the *mens rea* requirement satisfied without identifying that person or his or her role in the offence.

[499] *Kunarac* AJ, para. 99; *Blaškić* AJ, paras. 121-7; *Kordić and Čerkez* AJ, para. 99. *See* also *Limaj* TJ, para. 181.
[500] *See Kordić and Čerkez* AJ, para. 99 and *Blaškić* AJ, para. 123.

378. As a result of those errors, it is respectfully contended that General Ojdanić's convictions for crimes against humanity must be reversed.

(1) The Trial Chamber erred in finding that the Chapeau's *mens rea* requirement could be satisfied by recklessness

379. The Trial Chamber held that the chapeau's *mens rea* requirement was satisfied when a designated individual (perpetrator, intermediary perpetrator, or accused) "knows or **takes the risk** that the conduct of the physical perpetrator comprises part of that attack."[501]

380. The Trial Chamber cited three Appeals Chamber judgments for this proposition.[502] The Trial Chamber cited the *Kunarac* case, decided in 2002. In *Kunarac,* the Appeals Chamber approved the wording of the *Kunarac* Trial Chamber, which had in turn relied on the *Blaškić* Trial Chamber, for the standard that the Accused "must have known that there is an attack on the civilian population and that his acts comprise part of that attack, or at least take the risk that his acts were part of the attack."[503] However, the *mens rea* requirement was not at issue before the Appeals Chamber in *Kunarac.*

381. The *mens rea* requirement was at issue in the *Blaškić* appeal, decided some two years later.[504] There, without citing its decision in *Kunarac*, the Appeals Chamber directly repudiated the notion that the knowledge requirement could be satisfied by a "taking the risk" standard. The Appeals Chamber held that:

> "In relation to the *mens rea* applicable to crimes against humanity, the Appeals Chamber reiterates its case law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required. The Trial Chamber, in stating that it "suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan," did not correctly articulate the *mens rea* applicable to crimes against humanity. Moreover, as stated above, there is no legal requirement of a plan or policy, and the Trial Chamber's statement is misleading in this regard."[505]

[501] TJ [1/160]
[502] *Kordić and Čerkez* AJ, para. 99; *Blaškić* AJ, paras. 124–125; *Kunarac et al.* AJ, paras. 99, 102–103.
[503] *Kunarac* AJ at para. 102 approving *Kunarac* TJ, para. 434 which in turn relied upon the *Blaškić* TJ, paras. 247 and 251.
[504] *Blaškić* AJ, para. 121.
[505] *Blaškić*, AJ, para. 126.

382. Curiously, the Trial Chamber cited the *Blaškić* Appeal Judgment in support of its recklessness standard, but only referenced paragraphs 124-125, where the Appeals Chamber reproduced the statements from the *Blaškić* Trial Judgment.[506] However, the Trial Chamber apparently failed to notice the very next paragraph, 126, where the Appeals Chamber held that the *Blaškić* Trial Chamber erred in using the recklessness standard.

383. The third Appeals judgment cited by the Trial Chamber was the *Kordić* case. But that judgment simply stated that:

> The Appeals Chamber reiterates its case law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required.[507]

384. No mention was made in that decision about a lower standard of knowledge, such as "taking the risk".

385. In recently upholding the acquittal on the charges of crimes against humanity in the *Mrkšić* case, the Appeals Chamber repeated the requirement that actual knowledge that the act is part of an attack on the civilian population was required.[508] In affirming the acquittal of the accused based upon the fact that it was not established that the attack was directed against the civilian population, the *Mrkšić* Appeals Chamber applied the actual knowledge requirement, not a standard of "taking the risk". It stated that:

> "the perpetrators of the crimes in Ovčara acted in the understanding that their acts were directed against members of the Croatian armed forces. The fact that they acted in such a way precludes that they intended that their acts form part of the attack against the civilian population of Vukovar and renders their acts so removed from the attack that no nexus can be established."[509]

386. Other Trial Chambers of the ICTY have also eschewed the recklessness standard adopted by the Trial Chamber in this case. In its judgment, the Trial Chamber in *Limaj* stated that "[i]t does not suffice that an accused knowingly took the

[506] TJ [1/160]
[507] *Kordić and Čerkez* AJ, para. 100.
[508] *Mrkšić* AJ, para. 41.
[509] *Mrkšić* AJ, para. 42.

risk of participating in the implementation of a policy."[510] In the *Šešelj* case, the Trial Chamber specifically rejected the prosecution's effort to include the "taking the risk" language in its indictment, citing the *Blaškić* Appeals Judgment for the proposition that the standard "does not reflect the current state of the law".[511]

387. Trial Chambers at the ICTR have also required actual knowledge of the context of the attack on the civilian population: "the Prosecutor must prove … that the accused acted with knowledge of the broader context of the attack and with knowledge that his acts formed part of the attack."[512]

388. Further, the Special Court for Sierra Leone has followed the approach of the *Blaškić* Appeals Chamber, namely that it "does not suffice that an accused knowingly took the risk of participating in the implementation of a policy, plan, or ideology."[513]

389. Therefore, the Trial Chamber's holding is in direct conflict with the Appeals Chamber's judgment in *Blaškić* and must be reversed. There is no recklessness standard for the chapeau's *mens rea* requirement.[514]

(2) <u>The Trial Chamber Erred in Finding that Some "Intermediary Perpetrator" Could Satisfy the Chapeau's Mens Rea Requirement</u>

390. The Trial Chamber recognized that the Appeals Chamber had held that the person whose *mens rea* counts when determining if the *chapeau mens rea* element is satisfied is the physical perpetrator.[515] In the *Tadić* judgment, where the accused was the physical perpetrator, the Appeals Chamber stated that:

> The Appeals Chamber agrees [with the prosecution] that it may be inferred from the words "directed against any civilian population" in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of

[510] *Limaj* TJ, para. 190, citing the *Blaškić* AJ. The issue was not raised on appeal by the prosecution.
[511] *Prosecutor v Šešelj*, No. IT-03-67-PT, *Decision on Prosecution's Motion for Leave to File an Amended Indictment* (14 September 2007) at para. 33.
[512] *Ntagerura* TJ, para. 698. *See* also *Semanza* TJ paras. 327-332.
[513] *Brima et al* TJ, para. 222.
[514] It is noted that Article 7 of the ICC Statute specifies that a crime against humanity must be committed "with knowledge of the attack".
[515] TJ [1/154]

widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fit into such a pattern.[516]

391. In the *Kunarac* judgment, where the accused was also the physical perpetrator, the Appeals Chamber held that the *chapeau mens rea* requirement for crimes against humanity was that "the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern".[517]

392. In the *Vasiljević* judgment, where the accused was also the physical perpetrator, one of the Accused challenged the Trial Chamber's finding that he had the requisite knowledge in order for a crime against humanity to have been committed. The Appeals Chamber addressed the evidence of actual knowledge held by the Accused and held that "the Appellant knew about the on-going attack against the Muslim civilian population in Visegrad."[518] Neither the Trial Chamber nor the Appeals Chamber sought to rely upon the knowledge of any other individual.

393. In *Krajisnik,* where the accused was not the physical perpetrator, the Trial Chamber considered the *mens rea* of the perpetrators rather than the accused or any intermediary perpetrator, and found beyond reasonable doubt that "the perpetrators knew about the attack and that their acts were part thereof."[519] The Trial Chamber had considered the standard to be that "[t]he perpetrator must know that there is a widespread or systematic attack directed against a civilian population and that his or her acts are part of that attack."[520]

394. In the *Mrkšić* case, where the accused was not the physical perpetrator, the Appeals Chamber also focused on the *mens rea* of the perpetrator.[521] Indeed, when finding that the perpetrators did not have the requisite knowledge or intent, the Appeals Chamber never looked to the *mens rea* of any intermediary perpetrators, or even of the accused. Had the standard been as the Trial Chamber has stated it in this

[516] *Tadić* AJ, para. 248; *Blaškić* AJ, para. 124.
[517] *Kunarac* AJ, paras. 85, 99.
[518] *Vasiljević* AJ, para. 30.
[519] *Krajisknik* TJ, para. 711.
[520] *Krajisnik* TJ, para. 706(e). *See* also *Blagojević* TJ, paras 547-548; *Brđanin* TJ, para. 130, 138.
[521] *Mrkšić, et al* AJ, para. 42.

case, one would have thought that the prosecution, and the Appeals Chamber, would have analyzed the intent of others involved in the offence.

395. Therefore, there is no support whatsoever in the Appeals Chamber jurisprudence for the Trial Chamber's injection of an "intermediary perpetrator" into the *mens rea* inquiry for the *chapeau* elements of a crime against humanity.

396. The Trial Chamber's formulation of a situation where the physical perpetrator who lacks the *mens rea* can be used by an intermediary perpetrator as a tool for committing a crime against humanity smacks of the "indirect co-perpetration" theory soundly rejected by the Appeals Chamber in *Stakić*.[522]

397. There is also no support for the Trial Chamber's formulation in the judgments of other Trial Chambers. In *Kupreskić*, the Trial Chamber held that a required element of crimes against humanity was that "the perpetrator had knowledge of the wider context in which his act occurs".[523] In *Kunarac*, the Trial Chamber likewise held that the element was that "the perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack.[524] In *Krajisnik,* the Trial Chamber likewise held that "the perpetrator must know that there is a widespread or systematic attack directed against a civilian population and that his or her acts are part of that attack."[525] In applying that test, the Trial Chamber found that "the perpetrators knew about the attack and that their acts were part thereof."[526] The Trial Chamber did not look to the knowledge of any intermediary perpetrator or even the Accused.

398. At the ICTR, the Trial Chamber in *Bagosora* held that "the perpetrator must have acted with knowledge of the broader context and knowledge that his acts formed part of the attack"; the Trial Chamber went on to hold that "[i]t is inconceivable that the principal perpetrators as well as the Accused did not know that their actions formed part of this attack."[527] While the knowledge of an accused is relevant to his individual criminal responsibility, it is notable that the Trial Chamber emphasised the

[522] *Stakic* AJ, para. 62.
[523] *Kupreskic* TJ, para. 544.
[524] *Kunarac* TJ, paras. 410, 435.
[525] *Krajisnik* TJ, para. 706(e).
[526] *Krajisnik* TJ, para. 711.
[527] *Bagosora* TJ, para. 2166-7.

knowledge of "principal perpetrators" in establishing that the chapeau elements of crimes against humanity were satisfied.

399. Similarly in *Semanza,* the Trial Chamber focused on the physical perpetrators (rather than the accused or any "intermediary perpetrator") when finding that "the attackers at Musha church were aware that their actions in murdering Tutsi refugees formed part of the widespread attack"; and therefore that "the principal perpetrators committed murder as a crime against humanity."[528]

400. Not surprisingly then, the Trial Chamber cited absolutely no authority when it stated that:

> [I]f the non-accused physical perpetrator is not aware of the context of his crimes, but his superior or an intermediary perpetrator is, these crimes would still constitute crimes against humanity, provided the other general requirements of crimes against humanity are satisfied as well.[529]

401. The Trial Chamber simply made up its intermediary perpetrator standard out of whole cloth. While it is admirable that the Trial Chamber would be creative in deigning what the law ought to be, it was required to apply the law as it is. And that law is that the perpetrator must have the *mens rea* to satisfy the *chapeau* requirement for an underlying offence to be a crime against humanity.

402. The Trial Chamber recognized that its new test, dispensing with the requirement that the physical perpetrator have the requisite *mens rea*, was too broad, so it drew some further lines on the blank slate upon which it was writing. It limited the "intermediary perpetrator" whose *mens rea* could be substituted for the physical perpetrator's, to those persons who planned, ordered, instigated, or was a joint criminal enterprise member.[530] Again, not a shred of authority was cited for this statement of the law.

403. Whatever the merits of the Trial Chamber's legislative proposals for crimes against humanity, it failed to apply existing law to General Ojdanić's case. In so doing, it committed reversible error.

[528] *Semanza* TJ, para. 447, 452.
[529] TJ [1/156]
[530] TJ [1/158]

(3) The Trial Chamber Erred in Extending its "Intermediary Perpetrator" Formulation to all JCE Members

404. Alternatively, if the Appeals Chamber decides to accept the Trial Chamber's "intermediary perpetrator" standard, it should find that the Trial Chamber erred in including all members of a joint criminal enterprise as among those whose *mens rea* could be used to fulfill the *chapeau* requirement.

405. The Trial Chamber promulgated a standard that in order for an intermediary perpetrator's *mens rea* to be used to satisfy the *chapeau* element, the relationship between the individual and the commission of an offence must be "sufficiently direct and proximate".[531] It held that this test would be satisfied by any one of four forms of liability in which there is a requirement that the individual intended that the offence be committed. The Chamber said:

> "...an underlying offence may qualify as a crime against humanity...even if the physical perpetrator lacks knowledge of the context in which his conduct occurs, where the planner, orderer, instigator of that conduct, or member of the joint criminal enterprise knows that it forms part of the attack."[532]

406. General Ojdanić contends that the Trial Chamber erred in including joint criminal enterprise among these forms of liability. Under JCE III, a member of a joint criminal enterprise need not have intended that the crime be committed.[533] Such an individual can hardly be said to have a sufficiently direct and proximate relationship to the commission of the underlying offence such as to meet the *mens rea* standard for crimes against humanity. When creating its formulation, the Trial Chamber appears not to have taken this into account.

(4) The Trial Chamber erred in Finding the Mens Rea Requirement Satisfied Without Identifying that Person or his or her Role in the Offence

407. When applying its novel test to the crimes committed in the various municipalities in this case, the Trial Chamber frequently concluded that the *mens rea* requirement for crimes against humanity was satisfied by either "the physical

[531] [TJ 1/158]
[532] TJ [1/158]
[533] *Tadić* AJ, para 204; *Kvočka et al* AJ, para. 83; *Stakic* AJ, para. 65.

perpetrator or the person at whose behest he is acting."[534] However, the Trial Chamber failed to identify that person or the requisite form of liability used to tie that individual to the crimes. For example:

> Prizren: "The actions of these forces were part of the broader attack on the civilian population, and the physical perpetrators involved in this attack, or those at whose behest they were acting, were undoubtedly aware that they were acting in the context of the larger attack upon the Kosovo Albanian population in that region."[535]
>
> Orahovac (Celina): "The actions of these forces were part of the broader attack on the civilian population, and the physical perpetrators involved in this attack, or those at whose behest they were acting, were undoubtedly aware that they were acting in the context of the larger attack upon the Kosovo Albanian population in that region."[536]
>
> Srbica: "The actions of the forces involved were part of the broader attack on the civilian population and, given the scale of the actions in the municipality and throughout at least 13 municipalities of Kosovo, these physical perpetrators, or the persons at whose behest they were acting, were undoubtedly aware that they were acting in the context of the larger attack upon the Kosovo Albanian population."[537]
>
> Gnjilane: "The actions of the forces in question were part of the broader attack on the civilian population and these physical perpetrators, or the persons at whose behest they were acting, were undoubtedly aware that they were acting in the context of a broad attack upon the Kosovo Albanian population in the villages in question."[538]
>
> Kacanik (Kotlina): "The actions of the forces involved were part of the broader attack on the civilian population, and these physical perpetrators, or the persons at whose behest they were acting, were aware that they were acting in the context of the larger attack upon the Kosovo Albanian population in that region."[539]
>
> Kacanik (Kacanik town): "The actions of these forces were part of the broader attack on the civilian population, and the physical perpetrators, or those at whose behest they were acting, were aware that they were acting in the context of the larger attack."[540]

[534] Presumably, the latter formulation refers to the Trial Chamber's "intermediary perpetrator".
[535] TJ [2/1199]
[536] TJ [2/1206]
[537] TJ [2/1220]
[538] TJ [2/1246]
[539] TJ [2/1253]
[540] TJ [2/1256]

> Kacanik (Dubrava): "The VJ and MUP forces involved in the attack, or the people at whose behest they were acting, were aware that they were acting in the context of the larger attack upon the Kosovo Albanian population."[541]

408. The Trial Chamber therefore relied upon the purported knowledge (or recklessness) of unidentified individuals, at whose behest the physical perpetrators allegedly acted, in order to establish that crimes against humanity were committed in a number of municipalities. In each case, the Trial Chamber failed to identify whose knowledge it was using in order to find that the *chapeau* elements of crimes against humanity had been satisfied.

409. In the *Orić* case, the Appeals Chamber held that the failure of the Trial Chamber to identify the underlying crime committed by a subordinate resulted in reversal of a conviction on the basis superior responsibility.[542] Likewise, the Trial Chamber's failure to identify the person who had the *mens rea* for crimes against humanity, and his or her connection to the offence, requires that General Ojdanić's convictions for crimes against humanity be reversed.

410. Similarly, in the *Krajisnik* case, the Appeals Chamber held that the failure of the Trial Chamber to make findings on whether and when JCE members became aware of the commission of expanded crimes, and therefore imputed liability to Krajisnik for those crimes, required reversal.[543] Likewise, in our case, the Trial Chamber's failure to make findings as to the person who had the *mens rea* for crimes against humanity, and his or her connection to the offence, requires that General Ojdanić's convictions for crimes against humanity be reversed.

Conclusion

411. The labeling of a crime as a crime against humanity brings with it international criminal jurisdiction and the opprobrium of the world. As a result, the *chapeau* elements are of great significance in providing a high bar between ordinary crimes prosecutable in a domestic jurisdiction, such as murder and forcible transfer,

[541] TJ [2/1259] The same findings were also made for a number of events of which General Ojdanić was not convicted (some of which are subject to the prosecution's appeal): Orahovac (Bella Crkva) TJ [2/1210]; Orahovac (Mala Krusa) TJ [2/1212]; Suva Reka TJ [2/1217]; Kosovska Mitrovica TJ [2/1230]; Vuciturn town TJ [2/1233]; Vuciturn municipality TJ [2/1236]
[542] *Orić* AJ, para. 47.
[543] *Krajisnik* AJ, para. 171.

and serious international crimes which can give rise to universal jurisdiction or be prosecutable at a Tribunal such as this one. In the Canadian case of *R v Finta*[544], the Supreme Court acknowledged the "additional stigma and opprobrium" that will be suffered by an individual whose conduct has been held to constitute crimes against humanity (or war crimes). Accordingly, Justice Cory for the majority held that the relevant knowledge was an additional "essential element" of crimes against humanity (and war crimes) over and over and above those of the underlying offences (of manslaughter, unlawful confinement, robbery and kidnapping). The absence of such knowledge meant that Finta's acquittal on all counts was confirmed.

412. In this case, the decision of the Trial Chamber on the *mens rea* element unnecessarily, unprecedentedly, and unconventionally expands the definition of crimes against humanity beyond that of a perpetrator who knows the context of his act to a myriad group of actors behaving recklessly. The lack of consistency in applying JCE III to this group, and the failure to make appropriate findings concerning the culpable individuals in this group, highlight the inappropriateness of such an expansion.

Relief sought

413. For all of the above reasons, the convictions of General Ojdanić for crimes against humanity should be reversed.

[544] [1994] 1 SCR 701

IX. GROUND EIGHT: SENTENCING

Introduction

414. While a Trial Chamber has considerable discretion in sentencing,[545] an appeal against sentence lies where a "discernible error" is made.[546] It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.[547]

A. Sub-ground 8(A): the Trial Chamber's assessment of gravity as an aggravating factor

A discernible error such as to justify the intervention of the Appeals Chamber

415. The Trial Chamber correctly stated the principle that the determination of the gravity of an offence requires a consideration of the particular circumstances of the case and the crimes for which the person was convicted, as well as the *form and degree of participation* of the convicted person in those crimes.[548] The Trial Chamber subsequently took General Ojdanić's *form* of responsibility into account when determining sentence.[549]

416. However, the Trial Chamber failed to take any account of General Ojdanić's *degree* of participation in the underlying crimes. The Appeals Chamber has consistently held that degree of participation is relevant to the gravity of the offence.[550]

417. Had the Trial Chamber considered the degree of General Ojdanić's participation in the underlying crimes, a shorter sentence of imprisonment would have been imposed. The Trial Chamber thus abused its discretion so as to justify the intervention of the Appeals Chamber.

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[545] *Krnojelac* AJ, para. 11.
[546] *Nikolic* AJ, para.9; *Babic* AJ, para. 7.
[547] *Čelebići* AJ, para. 725; *Jokić*, *Judgement on Sentencing Appeal* (30 August 2005), para. 8; *Nikolic*, *Judgement on Sentencing Appeal* (8 March 2006), para. 8
[548] TJ [3/1147]
[549] TJ [3/1175]
[550] *Babić* AJ, at para. 88 and authorities cited therein; *Aleksovski* AJ, para. 182; *Čelebići* AJ, para. 39.

418. General Ojdanić's participation in the underlying crimes was limited, as indicated by the Trial Chamber's own findings on General Ojdanić's *actus reus*.[551] The Trial Chamber could only establish General Ojdanić's *mens rea* by inference.[552] There was no direct evidence that General Ojdanić knew of or approved of any campaign of forcible displacement carried out by VJ and MUP forces.

419. As Chief of Staff, General Ojdanić had a duty to organise the Army's response to massive aerial bombardment and the threat of invasion by NATO forces, coupled with a domestic insurgency which threatened the territorial integrity of his country. General Ojdanić participated in the necessary response to those threats: not a campaign of violence against civilians. To the extent that General Ojdanić's conduct assisted the Indictment crimes, his degree of participation was necessarily incidental to those legitimate goals.

Relief sought

420. The precise relief sought is that the Appeals Chamber consider General Ojdanić's degree of participation in the underlying crimes and reduce any sentence of imprisonment accordingly.

[551] TJ [3/626]
[552] TJ [3/625]

B. Sub-ground 8(B): abuse of superior position as an aggravating factor

A discernible error such as to justify the intervention of the Appeals Chamber

421. The Trial Chamber committed a discernible error in holding that General Ojdanić abused his superior position by continuing to issue orders displaying an awareness of VJ operations, in cooperation with the MUP, despite his knowledge of crimes committed against Kosovo Albanians during previous joint operations. The Trial Chamber failed to consider the particular circumstances in which General Ojdanić found himself. What else was he supposed to do? General Ojdanić could not halt the fight against the KLA and NATO. General Ojdanić had to defend his country – he did not abuse his superior position, he fulfilled his duty.

422. While the Trial Chamber recognised that General Ojdanić faced a "complicated situation", this grossly underestimated the KLA threat, the impact of the NATO bombing (which killed over 500 civilians)[553] and ignores the expected land invasion of NATO forces from Albania and Macedonia working in tandem with the KLA.

423. To find that General Ojdanić abused his position the Trial Chamber relied upon General Ojdanić's "knowledge" of crimes committed in previous joint operations. The Trial Chamber held that General Ojdanić (i) received, by 29 April 1999 at the latest, a letter from Tribunal Prosecutor alleging criminal acts by his subordinates; and (ii) received the original indictment charging him for crimes in Kosovo on 27 May 1999.[554]

424. As regards the Arbour letter:

(i) First, General Ojdanić had not received the Arbour letter by 29 April 1999. As the Trial Chamber held at **TJ [3/556]**, he did not receive this letter until 2 May 1999.

[553] ICTY Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 90.
[554] TJ [3/1185]

(ii) Secondly, this single page letter contains no mention of crimes committed in joint VJ/MUP operations. This letter provides no basis for the conclusion that General Ojdanić abused his position by assisting the MUP in the fight against the KLA and NATO.

(iii) Thirdly, the only Indictment crime to occur after General Ojdanić received the Arbour letter was in the village of Dubrava. Therefore, General Ojdanić's knowledge of the Arbour letter could only be of limited relevance as a factor aggravating General Ojdanić's crimes.

425. As regards the May 1999 Indictment:

(i) First, there was no evidence that Ojdnanic "received" the May indictment. Rather, as the Trial Chamber held at **TJ [3/595]**, he was merely aware of its publication on or around 27 May 1999.

(ii) Secondly, the final Indictment crime was committed in the village of Dubrava on 25 May 1999. General Ojdanić's knowledge of the May indictment on 27 May 1999 and was therefore of limited relevance in determining whether General Ojdanić abused his superior position.

426. Further, the Trial Chamber ignored important evidence that Ojanic utilized his position to tackle criminality rather than assist it. After General Ojdanić received the Arbour letter in May 1999, he set the prosecution of war crimes as the top priority of the military justice system. Together with Pavković, he suggested to Milošević that a commission be set up to establish responsibility for war crimes. He organized meetings with the MUP to try to agree a joint approach to the investigation and prosecution of war crimes.

Relief sought

427. The precise relief sought is that the Appeals Chamber should reduce any sentence of imprisonment accordingly.

C. Sub-ground 8(C): voluntary surrender as a mitigating factor

A discernible error such as to justify the intervention of the Appeals Chamber

428. The Trial Chamber held that the circumstances of General Ojdanić's surrender to the Tribunal were not a mitigating factor.[555] The Trial Chamber pointed to an Appeals Chamber decision (concerning an application by General Ojdanić for provisional release) which held that General Ojdanić's surrender was not voluntary;[556] the Trial Chamber had followed that decision when deciding subsequent applications for provisional release.[557]

429. General Ojdanić surrendered to this Tribunal in 25 April 2002, after the FRY adopted the Law on Cooperation with the Tribunal on 11 April 2002. General Ojdanić was the first official to surrender to the Tribunal after the FRY adopted of this law. The US State Department applauded General Ojdanić's "courageous decision and his show of leadership".[558]

430. Nevertheless in October 2002, the Appeals Chamber, including Judges Guney, Pocar and Meron, found that General Ojdanić's surrender was not voluntary when deciding upon a pre-trial application for provisional release. The Appeals Chamber placed significance on the fact that General Ojdanić was publicly indicted in May 1999 but "surrendered" only in April 2002.

431. However, the Trial Chamber held that General Lazarević's surrender was voluntary, even though he surrendered on 3 Feburary 2005 having been indicted on 2 October 2003 (18 months after the FRY Law on Cooperation was adopted).

432. In addition, the standard of proof applied by the Appeals Chamber in its decision was higher than the standard applicable to mitigating factors on sentence. Mitigating factors are demonstrated on the balance of probabilities.[559] Moreover, voluntary surrender applies as a mitigating factor despite the possibility that surrender

[555] TJ [3/1189]
[556] *Prosecutor v Sainovic and Ojdanić,* Case No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002).
[557] *Decision on Second Applications for Provisional Release* (29 May 2003); and *Decision on Joint Defence Motion for Provisional Release during Winter Recess* (5 December 2006).
[558] TJ [3/1189]
[559] TJ [3/1150]

could be described as an obligation.[560] This applies even in circumstances of delayed surrender.[561] By contrast, as explained by Judge Shahabuddeen in his Separate Opinion to the Appeals Chamber's Decision, when deciding upon an application for provisional release under Rule 65(B) the Tribunal has to be "satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."[562] Following a strikingly thorough consideration of wide range of authorities, Judge Shahabuddeen concluded that this requires a Chamber to "satisfy itself of prescribed matters by something more than a preponderance of probability though less than proof beyond a reasonable doubt."[563]

433. Therefore, the Trial Chamber erred in giving automatic effect to the Appeals Chamber's 2002 determination, in the context of provisional release, that General Ojdanić did not voluntarily surrender.

Relief sought

434. General Ojdanić voluntarily surrendered to this Tribunal. He did not go into hiding, as others have. He was not arrested. Accordingly, on the balance of probabilities he must be given significant credit for his show of leadership and any sentence of imprisonment should be reduced accordingly.

[560] *Mrkšić* TJ, para.698.
[561] *Blaskić* AJ, para.700 and *Blaskić* TJ, para.776.
[562] Rule 65(B).
[563] *Prosecutor v Sainovic and Ojdanić,* Case No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002), *See* Separate Opinion of Judge Shahabuddeen, para. 41.

D. Sub-ground 8(D): age and health as a mitigating factor

A discernible error such as to justify the intervention of the Appeals Chamber

435. *[See Confidential Annex]*

436. *[See Confidential Annex]*

Relief sought

437. General Ojdanić respectfully requests that the Appeals Chamber consider the likely effect of a sentence of 15 years' imprisonment and on a 68 year old man with General Ojdanić's condition and reduce his sentence accordingly.

E. Sub-ground 8(E): excessive and disproportionate sentence

A discernible error such as to justify the intervention of the Appeals Chamber

438. When imposing a sentence of 15 years' imprisonment, the Trial Chamber committed a discernible error by failing to give weight to General Ojdanić's conduct before, during, and after the war. In all the circumstances, including a comparison of the sentences imposed on those of his co-accused who were found guilty of Indictment crimes, the sentence that the Trial Chamber imposed on General Ojdanić was disproportionate and excessive.

439. The culpability of an aider and abettor may be lessened if he does not share the intent of the main offenders. This may serve as a mitigating factor.[564] General Ojdanić did not share the intent to commit the crimes that were encompassed by the joint criminal enterprise.[565] The Trial Chamber committed a discernible error by failing to mitigate General Ojdanić's sentence in line with his *mens rea.*

440. General Ojdanić was sentenced to 15 years' imprisonment for aiding and abetting deportation and forcible transfer in nine municipalities, encompassing 19 towns and villages.

[564] *See Vasiljević* TJ, para. 71; *Brđanin* TJ, para. 274.
[565] TJ [3/617]

441. The Trial Chamber sentenced those accused found to have participated in the joint criminal enterprise to 22 years' imprisonment. Compared to General Ojdanić, accused were additionally convicted of:

- deportation and forcible transfer in further locations;
- murder as crimes against humanity in various locations;
- persecutions (murder) as crimes against humanity in various locations;
- murder as a violation of the laws and customs of war in various locations;
- persecutions (destruction or damage to religious property) as a crime against humanity.

442. In addition, Pavković was also convicted for persecutions as a crime against humanity for sexual assaults.

443. In sentencing General Ojdanić, the Trial Chamber only granted a one-third reduction in sentence compared to those individuals convicted of far graver crimes. General Ojdanić respectfully submits that a far greater differential in sentence is appropriate.

Relief sought

444. General Ojdanić respectfully requests that the Appeals Chamber consider: the totality of his conduct, including his *mens rea;* and the sentences imposed on his co-accused; and reduce his sentence accordingly.

X. CONCLUSION AND OVERALL RELIEF SOUGHT

445. The Trial Chamber's judgement that General Ojdanić was guilty of crimes against humanity represents the repeated banging of a square peg into a round hole. It took acts far removed from the crimes and which General Ojdanić was required to perform and characterized them as the *actus reus* of aiding and abetting. It found *mens rea* from information which General Ojdanić didn't have, and which came from sources he could not be expected to believe.

446. The Trial Chamber drew evidence of the commission of crimes from a well from which General Ojdanić was not allowed to drink—his defence team having been driven from Kosovo by rock wielding assailants. And it failed to establish the requisite *mens rea* by the requisite actors for the crimes it found were committed in Kosovo.

447. When sentencing General Ojdanić, the Trial Chamber failed to give him appropriate credit for the good things he did during the war and afterwards, such as when he voluntarily surrendered. It failed to give adequate consideration to his advanced age and poor health, and to the proportion between his sentence and the sentence it imposed on persons convicted of far more serious offences.

448. The Trial Chamber's judgement does an injustice to General Ojdanić, a correct and compassionate leader who fought a war he did not welcome and whose only crime, according to the Trial Chamber, was to implement those measures necessary to defend his country.

449. The Appeals Chamber is requested to remedy this injustice by reversing the judgement of the Trial Chamber and entering findings of NOT GUILTY on the remaining two counts.

Word Count: 47,927

Respectfully submitted,

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XI. APPENDIX

Date(s)	Municipality	Location
24 March 1999	Kacanik	Kotlina
24 March 1999 through to May 1999	Dakovica	Dakovica Town
25 to 28 March 1999	Prizren	Pirane
27 and 28 March 1999	Pec	Pec Town
27 and 28 March 1999	Kacanik	Kacanik
Late March and April 1999	Dakovica	Korenica
Late March 1999	Orahovac	Celina
Late March 1999	Orahovac	Srbica
Late March 1999	Orahovac	Turicevac
Late March 1999	Orahovac	Izbica
Late March 1999	Orahovac	Tusilje
Late March 1999	Orahovac	Cirez
Late March 1999	Pristina	Pristina Town
Late March 1999	Gnjilane	Zegra
Late March 1999	Gnjilane	Vladovo
Early April 1999	Urosevac	Sojevo
5 April 1999	Urosevac	Staro Selo
8 April 1999	Urosevac	Mirosavlje
13 April 1999	Gnjilane	Prilepnica
27 April 1999	Dakovica	Dobros
27 and 28 April 1999	Dakovica	Ramoc
27 April 1999	Dakovica	Meja
27 and 28 April 1999	Dakovica	Other villages in the Reka Valley
25 May 1999	Kacanik	Dubrava