

UNITED
NATIONS



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

Case No. IT-05-87-A
Date: 23 January 2014
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IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Arlette Ramaroson
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. John Hocking

Judgement of: 23 January 2014

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

JUDGEMENT

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Mr. Aditya Menon and Mr. Todd Schneider re: Mr. Nebojša Pavković;
Mr. Mathias Marcussen re: Mr. Vladimir Lazarević;
Ms. Daniela Kravetz and Mr. Kyle Wood re: Mr. Sreten Lukić;
Ms. Michelle Jarvis and Mr. Nema Milaninia re: Prosecution Appeal

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Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the appeals filed by Nikola Šainović (“Šainović”), Nebojša Pavković (“Pavković”), Vladimir Lazarević (“Lazarević”), Sreten Lukić (“Lukić”) (collectively, “Appellants”), and the Office of the Prosecutor (“Prosecution”) against the Judgement rendered by Trial Chamber III of the Tribunal (“Trial Chamber”) on 26 February 2009 in the case of *Prosecutor v. Milan Milutinović et al.* (“Trial Judgement”).¹

A. Background

2. Šainović was born on 7 December 1948 in Bor, Serbia, and was active in the Socialist Party of Serbia.² He held several positions within the governments of Serbia and the Federal Republic of Yugoslavia (“FRY”), including Prime Minister of Serbia and Deputy Prime Minister of the FRY.³ He served as one of a number of Deputy Prime Ministers of the FRY from February 1994 until on or about 4 November 2000, when a new Federal Government was formed.⁴

3. Pavković was born on 10 April 1946 in Senjski Rudnik, Serbia, and held numerous positions in the Yugoslav People’s Army (“JNA”) and the Army of Yugoslavia (“VJ”).⁵ In 1994, he was assigned to the Priština Corps, where he served in various positions in the command staff until he was appointed Commander of the Corps on 9 January 1998.⁶ Pavković was appointed Commander of the 3rd Army of the VJ on 28 December 1998, and took up this position on 13 January 1999, in which he remained until early 2000.⁷ He was appointed Chief of the General Staff of the VJ in February 2000.⁸

¹ Dragoljub Ojdanić (“Ojdanić”) also filed an appeal against the Trial Judgement, but subsequently withdrew his appeal. The Prosecution also withdrew its appeal in relation to Ojdanić. See Final Decision on “Notice of Withdrawal of Dragoljub Ojdanić’s [*sic*] Appeal Against the Judgement of Trial Chamber III Dated 26 February 2009” and “Notice of Withdrawal of Prosecution’s Appeal Against the Judgement of Trial Chamber III Dated 26 February 2009 in Relation to the Accused Dragoljub Ojdanić”, 31 January 2013 (“Decision of 31 January 2013”). The Trial Chamber found Milan Milutinović (“Milutinović”) not guilty of the crimes alleged in Counts 1 to 5 of the Indictment (see Trial Judgement, vol. 3, para. 1207), thereby acquitting him entirely. The Prosecution did not appeal against this verdict.

² Trial Judgement, vol. 3, para. 285; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order on Agreed Facts, 11 July 2006 (“Order on Agreed Facts”), p. 11.

³ Trial Judgement, vol. 3, para. 285.

⁴ Trial Judgement, vol. 3, para. 285.

⁵ Trial Judgement, vol. 3, para. 636; Order on Agreed Facts, pp. 13-14.

⁶ Trial Judgement, vol. 3, para. 636; Order on Agreed Facts, p. 13.

⁷ Trial Judgement, vol. 3, para. 636.

⁸ Trial Judgement, vol. 3, para. 636; Order on Agreed Facts, p. 14.

4. Lazarević was born on 23 March 1949 in Grnčar, Serbia.⁹ He held numerous positions in the JNA and VJ and was appointed Chief of Staff of the Priština Corps in January 1998.¹⁰ On 25 December 1998, Lazarević was appointed Commander of the Priština Corps and held that position until 28 December 1999, when he was appointed Chief of Staff of the 3rd Army.¹¹ On 13 March 2000, Lazarević was appointed Commander of the 3rd Army and, in early 2002, he became the Assistant for Ground Forces within the General Staff of the VJ, a position which he held until the end of his military career in October 2004.¹²

5. Lukić was born on 28 March 1955 in Višegrad, Bosnia and Herzegovina.¹³ After graduating from the Belgrade military academy, he served in various posts within the Ministry of Interior (“MUP”).¹⁴ In 1991, Lukić was appointed to the position of Deputy Head of the Secretariat of the Interior of the City of Belgrade.¹⁵ In June 1998, he was appointed to serve as the Head of the MUP Staff in Priština/Prishtina.¹⁶ Upon the completion of his assignment in Kosovo he was appointed the Head of the Border Police Administration and, in 2001, he was promoted to the position of Head of the Public Security Department of the MUP.¹⁷

6. The events giving rise to this case took place between March and June 1999 and concern the forcible displacement¹⁸ of the Albanian population in Kosovo.¹⁹ The Trial Chamber found that during that time, the following crimes were committed: deportation as a crime against humanity;²⁰

⁹ Trial Judgement, vol. 3, para. 791; Order on Agreed Facts, p. 14.

¹⁰ Trial Judgement, vol. 3, para. 791; Order on Agreed Facts, p. 14.

¹¹ Trial Judgement, vol. 3, para. 791; Order on Agreed Facts, p. 14.

¹² Trial Judgement, vol. 3, para. 791; Order on Agreed Facts, p. 14.

¹³ Trial Judgement, vol. 3, para. 936.

¹⁴ Trial Judgement, vol. 3, para. 936.

¹⁵ Trial Judgement, vol. 3, para. 937.

¹⁶ Trial Judgement, vol. 3, para. 945.

¹⁷ Trial Judgement, vol. 3, para. 937.

¹⁸ In discussing the underlying offences of deportation and other inhumane acts (forcible transfer) as crimes against humanity in the Trial Judgement, the Trial Chamber employed the phrase “forcible displacement” as an umbrella term to refer to both deportation and forcible transfer. See Trial Judgement, vol. 1, para. 163. The Appeals Chamber will do likewise throughout this Judgement.

¹⁹ Indictment, paras 71-77. In addition to crimes purportedly committed in March 1999 and thereafter, the Indictment alleges that crimes were committed in Račak/Rečak in January 1999 (see Indictment, para. 75(a)). However, pursuant to Rule 73 bis (D) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), the Trial Chamber refused to allow evidence to be led in relation to the charge in paragraph 75(a) of the Indictment. Although the Trial Chamber stated that this charge still existed and that all accused in the case remained charged in relation thereto (*Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Application of Rule 73 bis, 12 July 2006 (signed on 11 July 2006)), the evidence led at trial concerning the underlying crimes was limited to the specific incidents which had occurred from March 1999. In the Trial Judgement, the Trial Chamber made no finding as to the charge in paragraph 75(a) of the Indictment. Subsequent to the delivery of the Trial Judgement, and after hearing the Prosecution’s views, the Trial Chamber declared that there remained no outstanding charges against the accused before the Tribunal (*Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order Regarding Prosecution’s Submission with respect to Rule 73 bis (D), 7 April 2009; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Prosecution Submission with Respect to Rule 73bis (D) Decision of 11 July 2006, 12 March 2009). See also Trial Judgement, vol. 1, para. 16; *ibid.*, vol. 3, para. 1213.

²⁰ Trial Judgement, vol. 2, paras 1183, 1186, 1191, 1196, 1200, 1203, 1208, 1216, 1222, 1228, 1231, 1239, 1243, 1248, 1252, 1255, 1257, 1261.

other inhumane acts (forcible transfer) as a crime against humanity;²¹ murder as a crime against humanity;²² sexual assault,²³ murder,²⁴ and the destruction of or damage to religious property²⁵ as forms of persecution as a crime against humanity; and murder as a violation of the laws or customs of war.²⁶

7. The Trial Chamber further found that “during the time of the crimes alleged in the Indictment” a joint criminal enterprise (“JCE”) existed, the common purpose of which was to ensure continued control by the FRY and Serbian authorities over Kosovo, which was to be achieved by criminal means.²⁷ It determined that “[t]hrough a widespread *and* systematic campaign of terror and violence, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo.”²⁸ The Trial Chamber further concluded that while the crimes of deportation and forcible transfer were within the ambit of the common purpose, the crimes of murder, sexual assault, and destruction of cultural property fell outside the common purpose.²⁹

8. The Trial Chamber found that Šainović possessed the intent to forcibly displace the Kosovo Albanian population and contributed significantly to the JCE.³⁰ As the members of the JCE used VJ and MUP forces in furtherance of their common purpose, the crimes committed by these forces in the course of implementing the common purpose were found to be imputable to Šainović.³¹ As regards the crimes falling outside the common purpose, the Trial Chamber held that the murders of Kosovo Albanians and the destruction of or damage to religious property were reasonably foreseeable to Šainović, while the occurrence of sexual assaults was not.³² The Trial Chamber convicted Šainović of committing, through participation in the JCE, deportation, other inhumane acts (forcible transfer), murder, and persecution as crimes against humanity and murder as a violation of the laws or customs of war, pursuant to Articles 3, 5(a), 5(d), 5(h)-(i), and 7(1) of the Statute of the Tribunal (“Statute”).³³ Šainović was sentenced to a single term of 22 years of imprisonment.³⁴

²¹ Trial Judgement, vol. 2, paras 1183, 1186, 1191, 1196, 1200, 1203, 1208, 1216, 1222, 1228, 1231, 1233, 1239, 1243, 1248, 1252, 1255, 1257, 1261.

²² Trial Judgement, vol. 2, paras 1192, 1197, 1211, 1213, 1217, 1223, 1236, 1262.

²³ Trial Judgement, vol. 2, paras 1188, 1224.

²⁴ Trial Judgement, vol. 2, paras 1193, 1198, 1211, 1213, 1217, 1223, 1237, 1262.

²⁵ Trial Judgement, vol. 2, paras 1209, 1218, 1234, 1249.

²⁶ Trial Judgement, vol. 2, paras 1192, 1197, 1211, 1213, 1217, 1223, 1235, 1262.

²⁷ Trial Judgement, vol. 3, paras 95-96.

²⁸ Trial Judgement, vol. 3, para. 95.

²⁹ Trial Judgement, vol. 3, para. 94. Although the Trial Chamber referred to “cultural property”, the Appeals Chamber understands the reference to be to “cultural or religious property”.

³⁰ Trial Judgement, vol. 3, paras 466-467.

³¹ Trial Judgement, vol. 3, para. 468.

³² Trial Judgement, vol. 3, paras 470-473.

³³ Trial Judgement, vol. 3, paras 475-477, 1208.

³⁴ Trial Judgement, vol. 3, para. 1208.

9. The Trial Chamber found that Pavković shared the intent to forcibly displace the Kosovo Albanian population and contributed significantly to the JCE.³⁵ As the members of the JCE used VJ and MUP forces in furtherance of their common purpose, the crimes committed by these forces in the course of implementing the common purpose were found to be imputable to Pavković.³⁶ The Trial Chamber further found that the crimes falling outside the common purpose were reasonably foreseeable to Pavković.³⁷ The Trial Chamber convicted Pavković of committing, through participation in the JCE, deportation, other inhumane acts (forcible transfer), murder, and persecution as crimes against humanity and murder as a violation of the laws or customs of war, pursuant to Articles 3, 5(a), 5(d), 5(h)-(i), and 7(1) of the Statute.³⁸ Pavković was sentenced to a single term of 22 years of imprisonment.³⁹

10. The Trial Chamber found that it had not been established that Lazarević shared the intent of the members of the JCE and could accordingly not be held responsible under this mode of liability.⁴⁰ Instead, the Trial Chamber found Lazarević to have aided and abetted the crimes of deportation and forcible transfer in which the VJ was involved.⁴¹ The Trial Chamber convicted Lazarević of aiding and abetting deportation and other inhumane acts (forcible transfer) as crimes against humanity, pursuant to Articles 5(d), 5(i), and 7(1) of the Statute.⁴² Lazarević was sentenced to a single term of 15 years of imprisonment.⁴³

11. The Trial Chamber found that Lukić shared the intent to forcibly transfer the Kosovo Albanian population and that he made a significant contribution to the JCE.⁴⁴ As the members of the JCE used VJ and MUP forces in furtherance of their common purpose, the crimes committed by these forces in the course of implementing the criminal enterprise were found to be imputable to Lukić.⁴⁵ With regard to the crimes falling outside the common purpose, the Trial Chamber found that the murders of Kosovo Albanians and the destruction of or damage to religious property were reasonably foreseeable to Lukić, whereas the occurrence of sexual assaults was not.⁴⁶ The Trial Chamber convicted Lukić of committing, through participation in the JCE, deportation, other inhumane acts (forcible transfer), murder, and persecution as crimes against humanity and murder

³⁵ Trial Judgement, vol. 3, paras 781-782.

³⁶ Trial Judgement, vol. 3, para. 783.

³⁷ Trial Judgement, vol. 3, paras 785-786.

³⁸ Trial Judgement, vol. 3, paras 788, 1210.

³⁹ Trial Judgement, vol. 3, para. 1210.

⁴⁰ Trial Judgement, vol. 3, para. 919.

⁴¹ Trial Judgement, vol. 3, paras 927, 930, 932.

⁴² Trial Judgement, vol. 3, paras 935, 1211.

⁴³ Trial Judgement, vol. 3, para. 1211.

⁴⁴ Trial Judgement, vol. 3, paras 1130-1131.

⁴⁵ Trial Judgement, vol. 3, para. 1132.

⁴⁶ Trial Judgement, vol. 3, paras 1134-1136.

as a violation of the laws or customs of war, pursuant to Articles 3, 5(a), 5(d), 5(h)-(i), and 7(1) of the Statute.⁴⁷ Lukić was sentenced to a single term of 22 years of imprisonment.⁴⁸

B. The appeals

12. Šainović presents seven grounds of appeal challenging his convictions and sentence.⁴⁹ He requests that the Appeals Chamber reverse his convictions and enter acquittals⁵⁰ or, in the alternative, order a new trial⁵¹ or, if any conviction is upheld, determine that the sentence of 22 years of imprisonment imposed by the Trial Chamber is excessive and impose a more lenient sentence.⁵² The Prosecution responds that none of Šainović's challenges demonstrate any error on the part of the Trial Chamber and that his appeal should be accordingly dismissed in its entirety.⁵³

13. Pavković sets out 12 grounds of appeal challenging the fairness of the trial proceedings, his convictions, and sentence.⁵⁴ He requests that the Appeals Chamber reverse the Trial Judgement and enter an acquittal on all charges or, if any of his convictions is upheld, reduce the sentence of 22 years imposed on him by the Trial Chamber.⁵⁵ In response, the Prosecution submits that Pavković's appeal is without merit and should be rejected.⁵⁶

14. Lazarević advances four grounds of appeal challenging his convictions and sentence.⁵⁷ He requests that the Appeals Chamber reverse his convictions or order a re-trial.⁵⁸ In the alternative, Lazarević submits that his sentence of 15 years of imprisonment should be reconsidered and reduced.⁵⁹ The Prosecution responds that Lazarević's appeal is unfounded and should be dismissed in its entirety.⁶⁰

15. Lukić sets out 37 grounds of appeal challenging the fairness of the trial proceedings, his convictions, and sentence.⁶¹ Lukić requests that the Appeals Chamber enter a verdict of acquittal on

⁴⁷ Trial Judgement, vol. 3, paras 1138-1140, 1212.

⁴⁸ Trial Judgement, vol. 3, para. 1212.

⁴⁹ Šainović's Notice of Appeal, paras 10-69, 73-90; Šainović's Appeal Brief, paras 7-21, 23-271, 274-503, 506-527.

⁵⁰ Šainović's Notice of Appeal, para. 91; Šainović's Appeal Brief, paras 273, 350-351, 395-396, 403-404, 409-410, 505, 528.

⁵¹ Šainović's Notice of Appeal, para. 91; Šainović's Appeal Brief, para. 528.

⁵² Šainović's Notice of Appeal, para. 92; Šainović's Appeal Brief, para. 529.

⁵³ Prosecution's Response Brief (Šainović), para. 4.

⁵⁴ Pavković's Notice of Appeal, grounds 1-13; Pavković's Appeal Brief, paras 19-94, 96-186, 189-374. The Appeals Chamber notes that Pavković withdrew sub-ground 1(e) and ground 4 of his appeal (see Pavković's Appeal Brief, paras 95, 187).

⁵⁵ Pavković's Notice of Appeal, para. 5; Pavković's Appeal Brief, para. 377.

⁵⁶ Prosecution's Response Brief (Pavković), para. 5.

⁵⁷ Lazarević's Notice of Appeal, paras 8-116; Lazarević's Appeal Brief, paras 1-612.

⁵⁸ Lazarević's Notice of Appeal, para. 120; Lazarević's Appeal Brief, para. 613.

⁵⁹ Lazarević's Notice of Appeal, para. 121; Lazarević's Appeal Brief, para. 614.

⁶⁰ Prosecution's Response Brief (Lazarević), paras 7-11.

⁶¹ Lukić's Notice of Appeal, grounds A-B, D-K, N-Z, AA-KK; Lukić's Appeal Brief, paras 10-842.

all counts or order a re-trial.⁶² In the alternative, Lukić requests that the Appeals Chamber reduce his sentence of 22 years of imprisonment.⁶³ In response, the Prosecution contends that Lukić fails to explain or establish how the Trial Chamber erred in law or fact and submits that Lukić's appeal should be rejected.⁶⁴

16. The Prosecution presents six grounds of appeal against the Trial Judgement. In particular, it requests that the Appeals Chamber convict: (i) the Appellants of persecution as a crime against humanity through forcible transfer and deportation;⁶⁵ (ii) Lazarević for aiding and abetting murder and persecution through murder as crimes against humanity and murder as a violation of the laws or customs of war for the killings at Korenica/Korenice, Meja/Mejë, and Dubrava/Lisnaja;⁶⁶ (iii) Šainović and Lukić for persecution as a crime against humanity for the sexual assaults in Beleg and Ćirez/Qirez;⁶⁷ (iv) Šainović, Pavković, and Lukić for persecution as a crime against humanity for the sexual assaults in Priština/Prishtina;⁶⁸ and (v) Lazarević for aiding and abetting deportation and other inhumane acts (forcible transfer) as crimes against humanity with respect to certain locations.⁶⁹ The Prosecution submits that the sentences of the Appellants should be increased in the event that these convictions are entered. The Prosecution submits that, in any event, the sentences imposed by the Trial Chamber were too low and should be increased.⁷⁰

17. In response, Šainović,⁷¹ Pavković,⁷² Lazarević,⁷³ and Lukić⁷⁴ oppose the Prosecution's appeal insofar as they are individually concerned.

C. Appeal hearing

18. The Appeals Chamber heard oral submissions of the parties regarding their appeals from 11 to 15 March 2013. Having considered their written and oral arguments, the Appeals Chamber hereby renders its Judgement. The Appeals Chamber will not necessarily address the grounds of appeal in the order presented by the parties, but group them by subject matter where appropriate.

⁶² Lukić's Notice of Appeal, p. 39; Lukić's Appeal Brief, p. 189.

⁶³ Lukić's Notice of Appeal, p. 39; Lukić's Appeal Brief, p. 189.

⁶⁴ Prosecution's Response Brief (Lukić), para. 5.

⁶⁵ Prosecution's Notice of Appeal, paras 2-3; Prosecution's Appeal Brief, paras 3-34.

⁶⁶ Prosecution's Notice of Appeal, paras 4-7; Prosecution's Appeal Brief, paras 35-39, 47-59.

⁶⁷ Prosecution's Notice of Appeal, paras 8-11; Prosecution's Appeal Brief, paras 60-82.

⁶⁸ Prosecution's Notice of Appeal, paras 12-13; Prosecution's Appeal Brief, paras 83-104.

⁶⁹ Prosecution's Notice of Appeal, paras 14-22; Prosecution's Appeal Brief, paras 105-119.

⁷⁰ Prosecution's Notice of Appeal, paras 23-24; Prosecution's Appeal Brief, paras 120-198.

⁷¹ Šainović's Response Brief, paras 187-188.

⁷² Pavković's Response Brief, para. 12.

⁷³ Lazarević's Response Brief, paras 127-128.

⁷⁴ Lukić's Response Brief, p. 66.

II. STANDARD OF REVIEW

19. On appeal, parties must limit their arguments to legal errors that invalidate the decision of the trial chamber and to factual errors that result in a miscarriage of justice.⁷⁵ These criteria are set forth in Article 25 of the Statute and are well established in the jurisprudence of both the Tribunal and the International Criminal Tribunal for Rwanda (“ICTR”).⁷⁶ In exceptional circumstances, the Appeals Chamber will also hear appeals in which a party has raised a legal issue that would not lead to the invalidation of the trial judgement but that is nevertheless of general significance to the Tribunal’s jurisprudence.⁷⁷

20. A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.⁷⁸ An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.⁷⁹ However, even if the party’s arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude for other reasons that there is an error of law.⁸⁰ It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments that an appellant submits the trial chamber omitted to address and to explain why this omission invalidated the decision.⁸¹

21. The Appeals Chamber reviews the trial chamber’s findings of law to determine whether or not they are correct.⁸² Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.⁸³ In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself

⁷⁵ *Perišić* Appeal Judgement, para. 7; *Lukić and Lukić* Appeal Judgement, para. 10; *Haradinaj et al.* Appeal Judgement, para. 9.

⁷⁶ *Perišić* Appeal Judgement, para. 7; *Lukić and Lukić* Appeal Judgement, para. 10; *Haradinaj et al.* Appeal Judgement, para. 9; *Mugenzi and Mugiraneza* Appeal Judgement, para. 11; *Gatete* Appeal Judgement, para. 7; *Hategekimana* Appeal Judgement, para. 6.

⁷⁷ *Perišić* Appeal Judgement, para. 7; *Lukić and Lukić* Appeal Judgement, para. 10; *Haradinaj et al.* Appeal Judgement, para. 9.

⁷⁸ *Perišić* Appeal Judgement, para. 8; *Lukić and Lukić* Appeal Judgement, para. 11; *Haradinaj et al.* Appeal Judgement, para. 10.

⁷⁹ *Perišić* Appeal Judgement, para. 8; *Lukić and Lukić* Appeal Judgement, para. 11; *Haradinaj et al.* Appeal Judgement, para. 10.

⁸⁰ *Perišić* Appeal Judgement, para. 8; *Lukić and Lukić* Appeal Judgement, para. 11; *Haradinaj et al.* Appeal Judgement, para. 10.

⁸¹ *Perišić* Appeal Judgement, para. 9; *Lukić and Lukić* Appeal Judgement, para. 11; *Haradinaj et al.* Appeal Judgement, para. 10.

⁸² *Lukić and Lukić* Appeal Judgement, para. 12; *Haradinaj et al.* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *D. Milošević* Appeal Judgement, para. 14.

⁸³ *Perišić* Appeal Judgement, para. 9; *Lukić and Lukić* Appeal Judgement, para. 12; *Haradinaj et al.* Appeal Judgement, para. 11.

convinced beyond reasonable doubt as to the factual finding challenged by an appellant before the finding is confirmed on appeal.⁸⁴ The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the trial chamber in the body of the trial judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.⁸⁵

22. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness.⁸⁶ In reviewing the findings of the trial chamber, the Appeals Chamber will only substitute its own finding for that of the trial chamber when no reasonable trier of fact could have reached the original decision.⁸⁷ The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.⁸⁸ Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the trial chamber.⁸⁹

23. In determining whether or not a trial chamber's finding was reasonable, the Appeals Chamber will not lightly disturb findings of fact by a trial chamber.⁹⁰ The Appeals Chamber recalls, as a general principle, that:

Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.⁹¹

24. The same standard of reasonableness and the same deference to factual findings applies when the Prosecution appeals against an acquittal.⁹² Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it

⁸⁴ *Perišić* Appeal Judgement, para. 9; *Lukić and Lukić* Appeal Judgement, para. 12; *Haradinaj et al.* Appeal Judgement, para. 11.

⁸⁵ *Lukić and Lukić* Appeal Judgement, para. 12; *Haradinaj et al.* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 12; *D. Milošević* Appeal Judgement, para. 14.

⁸⁶ *Perišić* Appeal Judgement, para. 10; *Lukić and Lukić* Appeal Judgement, para. 13; *Haradinaj et al.* Appeal Judgement, para. 12.

⁸⁷ *Perišić* Appeal Judgement, para. 10; *Lukić and Lukić* Appeal Judgement, para. 13; *Haradinaj et al.* Appeal Judgement, para. 12.

⁸⁸ *Lukić and Lukić* Appeal Judgement, para. 13; *Haradinaj et al.* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13.

⁸⁹ *Perišić* Appeal Judgement, para. 10; *Lukić and Lukić* Appeal Judgement, para. 13; *Haradinaj et al.* Appeal Judgement, para. 12.

⁹⁰ *Perišić* Appeal Judgement, para. 10; *Boškoski and Tarčulovski* Appeal Judgement, para. 14; *D. Milošević* Appeal Judgement, para. 15.

⁹¹ *Kupreškić et al.* Appeal Judgement, para. 30. See also *Boškoski and Tarčulovski* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.

⁹² *Boškoski and Tarčulovski* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.

determines that no reasonable trier of fact could have made the impugned finding.⁹³ Considering that it is the Prosecution that bears the burden at trial of proving the guilt of an accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal from a defence appeal against conviction.⁹⁴ An accused must show that the trial chamber's factual errors create a reasonable doubt as to his guilt.⁹⁵ The Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of the accused's guilt has been eliminated.⁹⁶

25. The Appeals Chamber recalls that, where additional evidence has been admitted on appeal and an alleged error of fact is raised, but there is no error in the legal standard applied in relation to the factual finding, the following two-step standard will apply:

(i) The Appeals Chamber will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law.

(ii) If, however, the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt, then the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.⁹⁷

26. The Appeals Chamber recalls that it has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and may dismiss arguments which are evidently unfounded without providing detailed reasoning.⁹⁸ Indeed, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically, and exhaustively.⁹⁹ The appealing party is also expected to provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenges are being made.¹⁰⁰ The Appeals Chamber will not consider a party's submissions in

⁹³ *Boškosi and Tarčulovski* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.

⁹⁴ *Boškosi and Tarčulovski* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.

⁹⁵ *Boškosi and Tarčulovski* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.

⁹⁶ *Boškosi and Tarčulovski* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.

⁹⁷ *Lukić and Lukić* Appeal Judgement, para. 14; *Krajišnik* Appeal Judgement, para. 15; *Kvočka et al.* Appeal Judgement, para. 426; *Blaškić* Appeal Judgement, para. 24(c).

⁹⁸ *Perišić* Appeal Judgement, para. 12; *Boškosi and Tarčulovski* Appeal Judgement, para. 17; *D. Milošević* Appeal Judgement, para. 16.

⁹⁹ *Boškosi and Tarčulovski* Appeal Judgement, para. 17; *D. Milošević* Appeal Judgement, para. 16; *Krajišnik* Appeal Judgement, para. 16; *Martić* Appeal Judgement, para. 14.

¹⁰⁰ Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, paras 1(c)(iii)-(iv), 4(b)(ii). See also *Perišić* Appeal Judgement, para. 12; *Boškosi and Tarčulovski* Appeal Judgement, para. 17.

detail when they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.¹⁰¹

27. When applying these basic principles, the Appeals Chamber recalls that it has identified the types of deficient submissions on appeal which need not be considered on the merits.¹⁰² In particular, the Appeals Chamber will dismiss without detailed analysis: (i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the trial chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the trial chamber; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber; (viii) allegations based on material not on the record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate an error; and (x) mere assertions that the trial chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.¹⁰³

¹⁰¹ *Perišić* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 17. See also *D. Milošević* Appeal Judgement, para. 16.

¹⁰² *Blaškić* Appeal Judgement, para. 13. See also *Lukić and Lukić* Appeal Judgement, para. 15; *Haradinaj et al.* Appeal Judgement, para. 13; *Boškoski and Tarčulovski* Appeal Judgement, para. 18; *D. Milošević* Appeal Judgement, para. 17.

¹⁰³ *Lukić and Lukić* Appeal Judgement, para. 15; *Haradinaj et al.* Appeal Judgement, para. 13; *Boškoski and Tarčulovski* Appeal Judgement, para. 18; *D. Milošević* Appeal Judgement, para. 17.

III. ALLEGED ERRORS IN RELATION TO FAIR TRIAL

A. Introduction

28. Pavković and Lukić present a number of challenges in relation to alleged violations of their right to a fair trial.¹⁰⁴ Pavković argues that he suffered from “procedural unfairness” as a result of the lack of adequate time and facilities for the preparation of his defence.¹⁰⁵ Lukić submits that his right to a fair trial was violated as a result of: (i) the lack of adequate time and facilities for the preparation of his defence; (ii) a violation of the principle of equality of arms; (iii) the appearance of bias on the part of the Presiding Judge; and (iv) the lack of a reasoned opinion in the Trial Judgement.¹⁰⁶

29. The Appeals Chamber recalls that, where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the trial chamber violated a provision of the Statute and/or the Rules and that this caused prejudice to the alleging party, such as to amount to an error of law invalidating the trial judgement.¹⁰⁷ Trial chambers enjoy considerable discretion in relation to the management of the proceedings before them.¹⁰⁸ Decisions concerning the joinder of cases¹⁰⁹ and the scheduling of trials¹¹⁰ are discretionary decisions to which the Appeals Chamber accords deference.¹¹¹ In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in prejudice to that party.¹¹² The Appeals Chamber will only overturn a trial chamber’s discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber’s discretion.¹¹³ The Appeals Chamber will also consider whether the trial chamber has given weight

¹⁰⁴ Pavković’s Notice of Appeal, pp. 17-18; Lukić’s Notice of Appeal, pp. 4-6, 9-10.

¹⁰⁵ Pavković’s Appeal Brief, para. 317 *et seq.* The Appeals Chamber notes that although these arguments are presented as the twelfth ground of appeal in Pavković’s Notice of Appeal, they appear under the eleventh ground in Pavković’s Appeal Brief.

¹⁰⁶ Lukić’s Appeal Brief, paras 10-76, 183-191.

¹⁰⁷ *Haradinaj et al.* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 28, referring to *Kordić and Čerkez* Appeal Judgement, para. 119.

¹⁰⁸ *Lukić and Lukić* Appeal Judgement, para. 17, referring to *Krajišnik* Appeal Judgement, paras 81, 99.

¹⁰⁹ *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal Against Decision on Joinder of Accused, 27 January 2006, para. 5; *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 24 January 2006 (“*Pandurević* Decision on Joinder”), para. 5.

¹¹⁰ See, e.g., *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.5, Decision on Radovan Karadžić’s Appeal of the Decision on Commencement of Trial, 13 October 2009 (“*Karadžić* Decision of 13 October 2009”), para. 6.

¹¹¹ *Haradinaj et al.* Appeal Judgement, para. 17, and references therein.

¹¹² *Lukić and Lukić* Appeal Judgement, para. 17, referring to *Krajišnik* Appeal Judgement, para. 81.

¹¹³ *Lukić and Lukić* Appeal Judgement, para. 17, referring to *Krajišnik* Appeal Judgement, para. 81.

to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹¹⁴

B. Alleged violation of the right to have adequate time and facilities for the preparation of the defence

30. The right of the accused to have adequate time and facilities for the preparation of his defence is enshrined in Article 21(4)(b) of the Statute and embodied in numerous human rights instruments.¹¹⁵ The Appeals Chamber recalls that what constitutes adequate time and facilities cannot be assessed in the abstract, but depends on the circumstances of each case,¹¹⁶ including the preparation time available during trial.¹¹⁷ When analysing allegations related to a violation of the right to have adequate time and facilities for the preparation of a defence, the Appeals Chamber must assess whether the defence as a whole, and not any individual counsel, was deprived of adequate time and facilities.¹¹⁸ In this context, the Appeals Chamber recalls that:

[a] Trial Chamber ‘shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case’. However, it is for the accused who alleges a violation of his right to have adequate time and facilities for the preparation of his defence to draw the Trial Chamber’s attention to what he considers to be a breach of the Tribunal’s Statute and Rules; he cannot remain silent about such a violation, then raise it on appeal in order to seek a new trial.¹¹⁹

31. Both Pavković and Lukić assert that their right to have adequate time and facilities for the preparation of their defence cases was violated when the Trial Chamber joined their case¹²⁰ with the *Milutinović et al.* case,¹²¹ and scheduled the trial knowing that they had been given insufficient time

¹¹⁴ *Lukić and Lukić* Appeal Judgement, para. 17, referring to *Krajišnik* Appeal Judgement, para. 81.

¹¹⁵ See Article 14(3)(b) of the International Covenant on Civil and Political Rights (“ICCPR”), Article 6(3)(b) of the European Convention on Human Rights (“ECHR”); Article 8(2)(c) of the American Convention on Human Rights (“ACHR”); *Kornev and Karpenko v. Ukraine*, European Court of Human Rights (“ECtHR”), no. 17444/04, 21 October 2010, para. 66; *Galstyan v. Armenia*, ECtHR, no. 26986/03, 15 November 2007, para. 84; Human Rights Committee (“HRCee”), General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14), 04/13/1984, para. 9; *Perkins v. Jamaica*, Communication No. 733/1997, UN Doc. CCPR/C/63/D/733/1997 (1998), para. 11.5. The ECtHR has held that the right of the accused to adequate time and facilities for the preparation of his defence implies that “the substantive defence activity on his behalf may comprise everything which is “necessary” to prepare the main trial” (see *Kornev and Karpenko v. Ukraine*, ECtHR, no. 17444/04, 21 October 2010, para. 66; *Natunen v. Finland*, ECtHR, no. 21022/04, 31 March 2009, para. 42; *Moiseyev v. Russia*, ECtHR, no. 62936/00, 9 October 2008, para. 220; *Galstyan v. Armenia*, ECtHR, no. 26986/03, 15 November 2007, para. 84).

¹¹⁶ *Lukić and Lukić* Appeal Judgement, para. 20, referring to *Krajišnik* Appeal Judgement, para. 80, *Nahimana et al.* Appeal Judgement, para. 220.

¹¹⁷ *Lukić and Lukić* Appeal Judgement, para. 20, referring to *Karadžić* Decision of 13 October 2009, para. 24.

¹¹⁸ *Krajišnik* Appeal Judgement, para. 80; *Nahimana et al.* Appeal Judgement, para. 220.

¹¹⁹ *Nahimana et al.* Appeal Judgement, para. 220, citing *Tadić* Appeal Judgement, para. 52.

¹²⁰ *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-03-70-PT (“*Pavković et al.* case”).

¹²¹ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT (“*Milutinović et al.* case”).

to prepare. Pavković and Lukić contend that their right in this regard was also violated by the decisions taken by the Trial Chamber in relation to the management of the trial proceedings.¹²²

1. Alleged deficiencies in the decisions concerning joinder

(a) Background

32. On 8 July 2005, the Trial Chamber granted the Prosecution's request to join the three accused in the case of *Prosecutor v. Milan Milutinović, Dragoljub Ojdanić, and Nikola Šainović* with the four accused in the case of *Prosecutor v. Nebojša Pavković, Vladimir Lazarević, Vlastimir Đorđević, and Sreten Lukić*.¹²³ The Trial Chamber ordered the Prosecution to submit a consolidated indictment against the seven accused.¹²⁴

33. On 16 August 2005, Pavković filed a motion requesting that the Joinder Decision be set aside or, in the alternative, that his case be severed.¹²⁵ The Trial Chamber denied the motion on 7 September 2005.¹²⁶ On 7 November 2005, Pavković renewed his request for severance of his case or, in the alternative, a delay in the commencement of the trial.¹²⁷ Lukić joined Pavković's Second Motion and presented additional submissions in this regard.¹²⁸ The Trial Chamber rendered its decision on 2 December 2005, dismissing the Second Motion as premature since no trial date had been set.¹²⁹

¹²² Pavković's Appeal Brief, Ground 11; Lukić's Appeal Brief, Ground A.

¹²³ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT and *Prosecutor v. Nebojša Pavković et al.*, Case Nos. IT-99-37-PT, IT-03-70-PT, Decision on Prosecution Motion for Joinder, 8 July 2005 ("Joinder Decision"). See also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT and *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-03-70-PT, Prosecution Motion for Joinder, 1 April 2005 ("Motion for Joinder"). A prior motion for joinder filed by the Prosecution on 5 November 2003 was denied by the Trial Chamber as premature given that the Trial Chamber was not seized of the *Nebojša Pavković et al.* case and that none of the accused in that case had surrendered to the Tribunal at that time (*Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT, Decision on Prosecution Motion for Joinder, 4 December 2003, p. 2).

¹²⁴ Joinder Decision, p. 5.

¹²⁵ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Pavković Motion to Set Aside Joinder Order or in the Alternative to Grant a Severance, 16 August 2005 (with Addendum filed on 19 August 2005) ("First Motion").

¹²⁶ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Decision on Pavković Motion to Set Aside Joinder or in the Alternative to Grant Severance, 7 September 2005 ("Decision of 7 September 2005"), p. 4.

¹²⁷ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance, 7 November 2005 ("Second Motion").

¹²⁸ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Sreten Lukić's [*sic*] Response in Support of Pavković's [*sic*] Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance, 8 November 2005 ("Lukić's Response of 8 November 2005").

¹²⁹ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Decision on Nebojša Pavković's Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance, 2 December 2005 ("Decision of 2 December 2005"), p. 2. Pavković did not seek leave to appeal the Trial Chamber's Decision of 2 December 2005. Rather, he sought leave to appeal the Trial Chamber's denial of his renewed request in relation to the same issue after the Trial Chamber had scheduled a date for the commencement of the trial (see *infra*, para. 49).

34. On 5 April 2006, the Trial Chamber scheduled the Pre-Trial Conference for 7 July 2006 and ordered that the trial begin on 10 July 2006.¹³⁰

(b) Submissions of the parties

35. Pavković and Lukić aver that they suffered prejudice as a result of the joinder of their case¹³¹ to the *Milutinović et al.* case.¹³²

(i) Pavković's appeal

36. Pavković submits that the Joinder Decision was rendered “with no input from nor notice to [his] new counsel”.¹³³ He also contends that the Trial Chamber failed to provide a reasoned opinion in support of its conclusion that there was no obstacle for the trial to commence “as early as December 2005 or January 2006.”¹³⁴ He further notes that his First and Second Motions seeking either severance of the case or delay in the commencement of the trial were denied by the Trial Chamber.¹³⁵ He reiterates the arguments he presented to the Trial Chamber that, in order to prepare adequately, his team had to review 200 CDs, three large databases of material available through the Electronic Disclosure Suite (“EDS”) containing at least 250,000 pages as well as all the exhibits and witness testimonies from the *S. Milošević* case¹³⁶ dealing with Kosovo.¹³⁷ Pavković recalls that at the time of his First Motion, filed on 16 August 2005, he had estimated that his Defence team could be ready for trial by September 2007.¹³⁸ By the time of his Second Motion, filed on 7 November 2005, the quantity of the relevant material disclosed by the Prosecution had reached 1,755,372 pages and still only the public transcripts from the *S. Milošević* case had been disclosed but not the exhibits or closed session transcripts.¹³⁹ Pavković claims that it was not feasible for him to be ready for trial before mid-2007, “even if absolutely heroic preparation work were carried out.”¹⁴⁰

37. The Prosecution responds that Pavković fails to show any error in the Trial Chamber's relevant decisions.¹⁴¹ It claims that Pavković simply repeats the arguments contained in his Second

¹³⁰ See *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Pre-Trial Order and Appended Work Plan, 5 April 2006 (“Order of 5 April 2006” and “Pre-Trial Work Plan”, respectively). See also Prosecution Opening Statement, 10 Jul 2006, T. 414.

¹³¹ *Pavković et al.* case.

¹³² See Pavković's Appeal Brief, paras 321-333; Lukić's Appeal Brief, paras 10-33.

¹³³ Pavković's Appeal Brief, para. 321.

¹³⁴ Pavković's Appeal Brief, para. 321.

¹³⁵ Pavković's Appeal Brief, paras 322-326.

¹³⁶ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54 (“*S. Milošević* case”).

¹³⁷ Pavković's Appeal Brief, paras 322-323.

¹³⁸ Pavković's Appeal Brief, para. 324.

¹³⁹ Pavković's Appeal Brief, paras 326, 328.

¹⁴⁰ Pavković's Appeal Brief, para. 328.

¹⁴¹ Prosecution's Response Brief (Pavković), paras 129-134.

Motion, without showing that the Trial Chamber committed any error or that he suffered prejudice.¹⁴²

(ii) Lukić's appeal

38. Lukić argues that in the Joinder Decision the Trial Chamber erroneously dismissed his arguments opposing joinder and failed to consider the level of preparation of his defence when setting the anticipated date for the start of the trial.¹⁴³ Lukić further asserts that the Trial Chamber's subsequent Decisions of 7 September 2005 and 2 December 2005 failed to recognise the significant problems the Defence was facing.¹⁴⁴ He argues that the joinder of the cases resulted in less time being accorded to the presentation of the defence cases at trial and in a less personalised approach when considering the respective mitigating circumstances of the co-accused.¹⁴⁵ Lukić purports to illustrate the prejudice he suffered from an overall lack of adequate time and facilities for the preparation of his defence by referring to the fact that his co-accused who had more time for such preparation, have either been acquitted or received lesser sentences.¹⁴⁶

39. In response, the Prosecution argues that, considering the way in which the entirety of the proceedings were managed, the Trial Chamber acted well within its discretion in ordering joinder while protecting Lukić's right to adequate time and facilities to prepare his defence.¹⁴⁷ It further contends that, since Lukić did not join Pavković's First Motion, he cannot argue on appeal that the Decision of 7 September 2005 denying the First Motion was erroneous.¹⁴⁸

(c) Analysis

40. At the outset, the Appeals Chamber recalls that:

it is appropriate for a Trial Chamber deciding a motion for joinder pursuant to Rule 48 to consider and weigh the following: "(1) protection of the rights of the accused pursuant to Article 21 of the Statute; (2) avoidance of any conflict of interests that might cause serious prejudice to an accused; and (3) protection of the interests of justice." Factors that a Trial Chamber may look to in the interests of justice include "(1) avoiding the duplication of evidence; (2) promoting judicial economy; (3) minimising hardship to witnesses and increasing the likelihood that they will be available to give evidence; and, (4) ensuring consistency of verdicts."¹⁴⁹

¹⁴² Prosecution's Response Brief (Pavković), para. 134.

¹⁴³ Lukić's Appeal Brief, paras 13-14.

¹⁴⁴ Lukić's Appeal Brief, para. 15(a)-(b).

¹⁴⁵ Lukić's Appeal Brief, paras 25-27, 29-33.

¹⁴⁶ Lukić's Appeal Brief, para. 28.

¹⁴⁷ Prosecution's Response Brief (Lukić), para. 14 *et seq.* See also *ibid.*, paras 20-22, 24-25, referring, *inter alia*, to Order of 5 April 2006, Rule 65 *ter* Conferences of 23 August 2005, 8 November 2005, 30 March 2006, 26 April 2006, 17 May 2006, 21 June 2006.

¹⁴⁸ Prosecution's Response Brief (Lukić), para. 18.

¹⁴⁹ *Prosecutor v. Ante Gotovina et al.*, Case Nos. IT-01-45-AR73.1; IT-03-73-AR73.1; IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 17 (internal references omitted); *Pandurević* Decision on Joinder, para. 8, fn. 20.

41. The Appeals Chamber notes that, at trial, Lukić argued that, “given the substantial differences in the levels of preparation of the two cases”, joinder would cause him prejudice¹⁵⁰ and result in a long trial, which would violate his right to a fair and expeditious trial.¹⁵¹ In particular, Lukić referred to the “nascent stage” of the *Pavković et al.* case and to the amount of disclosed material that was still to be reviewed.¹⁵² He further argued that the accused in the *Milutinović et al.* case had an interest to proceed to trial as soon as possible, whereas the accused in the *Pavković et al.* case required time to adequately prepare and thus a “substantial time period” was necessary before the trial could be scheduled.¹⁵³ According to Lukić, this constituted a conflict of interests militating against joinder.¹⁵⁴ Lukić concluded that to “‘catch up’ in a case in mere months, where the other accused have had the benefit of three years of preparation, would be unjust and prejudicial” to his rights and those of his co-accused.¹⁵⁵

42. In granting the Prosecution’s Motion for Joinder, the Trial Chamber explicitly considered:

(iii) that the joinder of the Accused would avoid duplication of the presentation of evidence related to underlying crimes and to some extent to the criminal responsibility of several of the Accused; minimise hardship to witnesses; and would be in the interests of judicial economy, since, on the basis of the Prosecution’s submissions, the length of one joint trial is likely to be significantly shorter than the combined period for two separate trials;

(iv) that no basis has been identified for concluding that joinder would create a conflict of interest or otherwise prejudice the right of any of the Accused to a fair and expeditious trial, and no basis has been advanced to persuade the Trial Chamber that it is not able to manage the conduct of a joint trial adequately; moreover, the Trial Chamber is confident that by applying existing Rules of Procedure and Evidence, it will be able to ensure to the Accused a fair and expeditious trial.¹⁵⁶

43. The Appeals Chamber notes that, in exercising its discretion, the Trial Chamber considered Lukić’s arguments before concluding that it would be able to ensure a fair and expeditious trial to all accused.¹⁵⁷ Furthermore, while the Trial Chamber stated that “there [was] no indication that a joint trial could not start in December 2005 or January 2006”,¹⁵⁸ it did not fix a date for the commencement of the trial at that time. In fact, the trial did not start until 10 July 2006,¹⁵⁹ a year after the joinder of the two cases.

44. With regard to Pavković’s argument on appeal that he was prejudiced by the Joinder Decision, the Appeals Chamber notes that, in his First Motion, Pavković opposed the joinder

¹⁵⁰ *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-03-70-PT, Defendant, Sreten Lukić’s [sic] Response Brief in Opposition to Motion for Joinder, 7 June 2005 (“Lukić’s Motion of 7 June 2005”), paras 12-18.

¹⁵¹ Lukić’s Motion of 7 June 2005, paras 20-24.

¹⁵² Lukić’s Motion of 7 June 2005, paras 7, 12-15.

¹⁵³ Lukić’s Motion of 7 June 2005, para. 18.

¹⁵⁴ Lukić’s Motion of 7 June 2005, para. 18.

¹⁵⁵ Lukić’s Motion of 7 June 2005, para. 16.

¹⁵⁶ Joinder Decision, pp. 4-5 (internal references omitted).

¹⁵⁷ Joinder Decision, pp. 3, 5.

¹⁵⁸ Joinder Decision, p. 5.

arguing that he was not prepared for trial starting in December 2005 or January 2006, and that such an early trial date would violate the principle of equality of arms.¹⁶⁰ He stated that he had “just begun to scratch the surface of the voluminous discovery provided”, which included 200 CDs, three large databases containing more than 250,000 pages, and all the witness testimony and exhibits concerning the Kosovo charges in the *S. Milošević* case.¹⁶¹ Pavković also claimed that he would need time to “conduct a thorough investigation of the charges”, which he could not start before he became familiar with the disclosed material.¹⁶²

45. On 7 September 2005, the Trial Chamber denied Pavković’s First Motion, considering, *inter alia*, that he would have adequate time and facilities for the preparation of his defence and that no conflict of interest leading to prejudice had been demonstrated in connection with the joinder.¹⁶³ The Trial Chamber emphasised that no trial date had been set and that it would ensure that all the accused in the joint trial had adequate time and facilities for preparation.¹⁶⁴ It is therefore clear that the Trial Chamber intended to address Pavković’s specific concerns as the proceedings progressed in order to facilitate his team’s proper preparation for trial.

46. Similarly, having considered subsequent submissions by Pavković and Lukić challenging the Joinder Decision and the Decision of 7 September 2005,¹⁶⁵ in its Decision of 2 December 2005 the Trial Chamber concluded that their requests to delay the commencement of the trial or, in the alternative, to order severance of their cases were premature in light of the fact that: (i) no trial date had been set at that point in time; (ii) no order pursuant to Rule 65 *ter*(E) of the Rules had been issued by the Trial Chamber; and (iii) no Pre-Trial Conference required by Rule 73 *bis*(A) of the

¹⁵⁹ See Trial Judgement, vol. 1, para. 17. See also Prosecution Opening Statement, 10 Jul 2006, T. 414.

¹⁶⁰ First Motion, paras 10-11, 16. The Appeals Chamber observes that in its Joinder Decision, the Trial Chamber explicitly noted that, except for Lukić, none of the accused in the *Pavković et al.* case had filed a response to the Prosecution’s Motion for Joinder (Joinder Decision, p. 3). In his First Motion, however, Pavković stated that the Motion for Joinder had not been served upon duty counsel and that, when permanent counsel was appointed, he was not advised that such a motion was pending. As he was unaware of the motion, he could not file a response thereto (First Motion, para. 3). The Appeals Chamber notes that the issue of whether adequate notice had been given to Pavković was extensively discussed during the status conference on 25 August 2005 (Status Conference, 25 Aug 2005, T. 57-61). As a result of those discussions, Pavković agreed that, instead of ordering the Prosecution to file a new motion requesting joinder so that he would have the opportunity to respond, the Trial Chamber could consider his First Motion requesting to set aside the Joinder Decision as an “opposition” to the joinder and decide upon it in a subsequent decision (Status Conference, 25 Aug 2005, T. 60). In its Decision of 7 September 2005, the Trial Chamber did indeed consider Pavković’s arguments raised in his First Motion and its Addendum as well as his additional oral submissions made during the status conference on 25 August 2005 (Decision of 7 September 2005, pp. 2-3). The Trial Chamber was further satisfied that, had the arguments put forward by Pavković opposing joinder been submitted prior to the issuance of the Joinder Decision, they would not have altered its outcome (Decision of 7 September 2005, p. 4).

¹⁶¹ First Motion, paras 11-13.

¹⁶² First Motion, para. 14.

¹⁶³ Decision of 7 September 2005, p. 4.

¹⁶⁴ Decision of 7 September 2005, p. 4.

¹⁶⁵ Second Motion; Lukić’s Response of 8 November 2005.

Rules had taken place.¹⁶⁶ Thus, it was obvious at that stage that despite the time-frame mentioned in the Joinder Decision, the trial was not going to start in December 2005 or January 2006.

47. Considering that, in the Joinder Decision and in the Decision of 7 September 2005, the Trial Chamber properly considered the arguments of Pavković and Lukić and consistently indicated that it would take the necessary measures to ensure that they would be afforded adequate time and facilities to prepare their defence,¹⁶⁷ the Appeals Chamber finds that joining the case of *Milutinović et al.* with that of *Pavković et al.* was within the reasonable exercise of the Trial Chamber's discretion. The Appeals Chamber will determine whether Pavković and Lukić indeed had sufficient time and facilities to prepare their defence on the basis of a holistic assessment of the Trial Chamber's management of the proceedings.¹⁶⁸

2. Alleged error in scheduling the commencement of the trial

(a) Background

48. On 5 April 2006, the Pre-Trial Judge issued an order with an appended pre-trial work plan, announcing, *inter alia*, that the trial would commence on 10 July 2006.¹⁶⁹ On 13 April 2006 Pavković renewed his request for a delay in the commencement of the trial or, in the alternative, for severance of his case.¹⁷⁰ Milutinović, Ojdanić, and Lazarević all joined Pavković's motion in part requesting a delay in the commencement of the trial and Lukić presented additional submissions seeking, in the alternative, a severance of his case.¹⁷¹ On 28 April 2006, the Trial Chamber dismissed the submissions, emphasising that, despite the identified difficulties, all accused would have adequate time and resources to prepare for the trial to commence as scheduled.¹⁷²

¹⁶⁶ Decision of 2 December 2005, p. 2.

¹⁶⁷ Joinder Decision, p. 5; Decision of 7 September 2005, p. 4.

¹⁶⁸ Cf. *Krajišnik* Appeal Judgement, paras 84, 135. See *infra*, sub-section III.B.5.

¹⁶⁹ Order of 5 April 2006, p. 5. The Pre-Trial Judge concluded that the problems identified by the parties in terms of their insufficient pre-trial preparation did not warrant a postponement of the trial at that stage and specifically invited the parties to seek his assistance as regards their difficulties in performing investigations in Kosovo (*ibid.*, pp. 2-3).

¹⁷⁰ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Renewal of and Supplement to 7 November Pavković "Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance", 13 April 2006 ("Third Motion").

¹⁷¹ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Mr. Milutinović's Joinder in the Renewed Motion Filed by Nebojša Pavković on 12 April 2006 to Delay Start of Trial, 18 April 2006; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Defence Motion Joining: "Renewal of and Supplement to 7 November Pavković 'Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance'", 18 April 2006; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, General Ojdanić Joinder in Pavković Motion, 20 April 2006; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Sreten Lukić's Motion to Delay Start of Trial or in the Alternative to Grant a Severance of the Proceedings Against This Accused, 25 April 2006 ("Lukić's Motion of 25 April 2006").

¹⁷² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Second Decision on Motions to Delay Proposed Date for Start of Trial, 28 April 2006 ("Decision of 28 April 2006"), paras 4-6.

49. A subsequent motion filed by Pavković and joined by Milutinović, Šainović, Lazarević, and Ojdanić seeking leave to appeal the Decision of 28 April 2006¹⁷³ was denied by the Trial Chamber on the ground that it failed to “meet the standards set out in the Rules of Procedure and Evidence and jurisprudence of the Tribunal for either certification or reconsideration”.¹⁷⁴

(b) Processing disclosed material

(i) Submissions of the parties

a. Pavković’s appeal

50. Pavković asserts that due to the death of Slobodan Milošević, which “freed up substantial resources at the Tribunal”, the Pre-Trial Judge scheduled the start of the trial for 10 July 2006, thus violating his right to a fair trial.¹⁷⁵ He argues that the Order of 5 April 2006 setting the trial date was issued in full awareness of him not being prepared for trial and was premised upon an erroneous interpretation of Rule 68 of the Rules.¹⁷⁶ In this respect, Pavković challenges a statement by the Pre-Trial Judge which, in his view, erroneously suggested that “because the Prosecution violates Rule 68 by providing excessive and irrelevant information” counsel need not review all the material disclosed pursuant to that Rule.¹⁷⁷ He reiterates that he had insufficient time to review a significant amount of newly disclosed Rule 68 material as well as over 1,700 documents from the *S. Milošević* case disclosed pursuant to Rule 66 of the Rules,¹⁷⁸ and insists that “fundamental fairness does not simply require adherence by the prosecutor to Rule 68 but also that the accused then be given time and facilities to become familiar with that material and make proper judgements regarding its use.”¹⁷⁹

¹⁷³ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Motion for Leave to Appeal Second Decision on Motions to Delay Proposed Dated for Start of Trial, 5 May 2006; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Submission by Mr. Milan Milutinović to Join the Motion for Leave to Appeal Second Decision on Motions to Delay Proposed Date for Start of Trial, 8 May 2006; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Joint Defence Motion: Submission by Mr. Nikola Šainović and Mr. Vladimir Lazarević to Join the Motion for Leave to Appeal Second Decision on Motions to Delay Proposed Date for Start of Trial, 9 May 2006; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, General Ojdanić’s [sic] Joinder in Pavković [sic] Application for Certification to Appeal, 10 May 2006.

¹⁷⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Decision on Defence Request for Certification of an Interlocutory Appeal of Second Decision Denying Motion for Delay of Trial, 12 May 2006 (“Decision of 12 May 2006”), p. 2.

¹⁷⁵ Pavković’s Appeal Brief, para. 331.

¹⁷⁶ Pavković’s Appeal Brief, paras 340, 342-343.

¹⁷⁷ Pavković’s Appeal Brief, paras 339-340, citing Rule 65 *ter* Conference, 30 Mar 2006, T. 178-179 (closed session).

¹⁷⁸ Pavković’s Appeal Brief, paras 333, 340.

¹⁷⁹ Pavković’s Appeal Brief, para. 338. See also *ibid.*, paras 335-337, 339-340. Pavković adds that the Prosecution provided only summaries of Rule 68 material, rather than the material itself, as required by the Rules (Pavković’s Appeal Brief, para. 327).

51. Pavković further asserts that the Trial Chamber's Decision of 28 April 2006 dismissing his Third Motion adopted the Pre-Trial Judge's misinterpretation of Rule 68 of the Rules.¹⁸⁰ He also argues that, in denying his request for certification to appeal the Decision of 28 April 2006, the Trial Chamber failed to provide a reasoned opinion and misapplied the standard set forth in Rule 73(B) of the Rules.¹⁸¹ He claims that the prejudice to his right to a fair trial could have been avoided had he been allocated additional resources and/or had the start of the trial been delayed.¹⁸²

52. The Prosecution responds that the Trial Chamber reasonably denied Pavković's Third Motion.¹⁸³ In this regard, the Prosecution argues that Pavković erroneously concentrates his arguments on pre-trial preparation, whereas the time accorded for the preparation of his defence should be assessed with respect to pre-trial and trial as a whole.¹⁸⁴ In support of its arguments, the Prosecution emphasises that the Pre-Trial Judge and the Trial Chamber took all necessary measures to ensure that all the accused had sufficient time to prepare their defence, including offering assistance in the form of orders under Rule 54 *bis* of the Rules, overseeing compliance with disclosure obligations, and making adjustments to the court schedule.¹⁸⁵ The Prosecution asserts that Pavković's general arguments regarding the volume of disclosed material fail to show that he did not have sufficient time to prepare his defence.¹⁸⁶ The Prosecution further argues that the Trial Chamber's decision denying Pavković's request for certification to appeal the Decision of 28 April 2008 was reasonable.¹⁸⁷ Finally, it asserts that Pavković fails to show any prejudice suffered from the allegedly insufficient preparation.¹⁸⁸

b. Lukić's appeal

53. Lukić insists that the Trial Chamber failed to consider and address the concerns regarding the impact of the joinder and the early commencement of the trial on the preparation of the Defence teams.¹⁸⁹ Lukić refers to the alleged impact of Slobodan Milošević's death on the Tribunal's trial schedule and claims that the consequent arrangements resulted in the violation of his right to a fair

¹⁸⁰ Pavković's Appeal Brief, para. 343, referring to Decision of 28 April 2006.

¹⁸¹ Pavković's Appeal Brief, para. 345, referring to Decision of 12 May 2006.

¹⁸² Pavković's Appeal Brief, para. 341.

¹⁸³ Prosecution's Response Brief (Pavković), para. 135.

¹⁸⁴ Prosecution's Response Brief (Pavković), para. 135.

¹⁸⁵ Prosecution's Response Brief (Pavković), para. 136.

¹⁸⁶ Prosecution's Response Brief (Pavković), para. 137.

¹⁸⁷ Prosecution's Response Brief (Pavković), para. 139, referring to Decision of 12 May 2006.

¹⁸⁸ Prosecution's Response Brief (Pavković), paras 138, 140.

¹⁸⁹ Lukić's Appeal Brief, para. 19.

trial.¹⁹⁰ He further argues that it was for reasons related to the Tribunal's completion strategy that the trial commenced without the proper preparation of his Defence team.¹⁹¹

54. Lukić further refers to the amount of disclosed material and the significant difficulties he experienced in obtaining material from the *S. Milošević* case.¹⁹² He emphasises that it was only shortly before the start of the trial that the Registry complied with the order of the Pre-Trial Judge and provided him with all transcripts and exhibits (approximately 1,700 documents) from that case.¹⁹³ Finally, Lukić claims that the cumulative effect of all these factors was that his Defence was "ill-prepared to face the evidence of the Prosecution and thus fought a continual up-hill battle throughout the trial" and that, therefore, he was "denied a fair process and trial."¹⁹⁴

55. In response, the Prosecution contends that Lukić's request for a delay in the commencement of the trial was reasonably rejected in light of the pre-trial work plan, the Rule 65 *ter* conferences, and the status conferences at which Lukić's concerns were addressed.¹⁹⁵ It maintains that in issuing the pre-trial work plan the Trial Chamber specifically took into account the fact that Lukić had been transferred to the Tribunal more than a year before the scheduled Pre-Trial Conference and that he had been represented by counsel for a "significant" amount of time.¹⁹⁶ As regards the material from the *S. Milošević* case, the Prosecution contends that most of the public material from that case was made available through the Tribunal's Judicial Database ("JDB") in November 2005, including that related to the "Kosovo part" of the case.¹⁹⁷ It claims that the remaining documents were placed on the JDB between mid-October 2005 and 30 March 2006 and that the only reason for the delay was the inability of Lukić's Defence team to access the JDB remotely.¹⁹⁸ In the circumstances, the Prosecution claims that Lukić has not demonstrated any error in the Pre-Trial Judge's approach or prejudice occasioned as a result of the delayed access.¹⁹⁹

56. The Prosecution further argues that "Lukić had adequate time and facilities to prepare his defence prior to and during trial".²⁰⁰ In particular, it points out that over 15 months elapsed between the date of Lukić's initial appearance and the commencement of the trial, and that Lukić was able to

¹⁹⁰ Lukić's Appeal Brief, para. 18.

¹⁹¹ Lukić's Appeal Brief, para. 34.

¹⁹² Lukić's Appeal Brief, para. 17.

¹⁹³ Lukić's Appeal Brief, para. 40, fn. 39.

¹⁹⁴ Lukić's Appeal Brief, para. 41.

¹⁹⁵ Prosecution's Response Brief (Lukić), para. 25.

¹⁹⁶ Prosecution's Response Brief (Lukić), para. 23.

¹⁹⁷ Prosecution's Response Brief (Lukić), para. 45.

¹⁹⁸ Prosecution's Response Brief (Lukić), paras 46-47.

¹⁹⁹ Prosecution's Response Brief (Lukić), paras 47-48, fn. 144 submitting, *inter alia*, that all disclosure pursuant to Rule 66(A)(ii) of the Rules was completed, save for the statements of additional witnesses, on 30 June 2005.

²⁰⁰ Prosecution's Response Brief (Lukić), para. 6.

file a pre-trial brief and was represented throughout the proceedings.²⁰¹ The Prosecution also asserts that Lukić fails to show any prejudice resulting from the impugned Trial Chamber's decisions.²⁰²

57. In reply, Lukić argues that the fact that multiple status conferences were held on the issue of access to the material from the *S. Milošević* case shows that there were ongoing problems in this regard.²⁰³ In particular, he submits that it was conceded that it was the Registry's fault that his Defence team did not have remote access to the JDB and therefore the entirety of the material from the *S. Milošević* case can only be considered as having been made available to him on 30 March 2006.²⁰⁴

58. Lukić also asserts that the Prosecution misrepresents and attempts to confuse the procedural history of the case.²⁰⁵ He emphasises that the Prosecution unduly relies on the Trial Chamber's discretion in matters related to trial preparation and management because "if the Prosecution's logic were accepted, there would never be a basis for any appeal, for the final word of the Trial Chamber would be sacrosanct."²⁰⁶ Lukić further claims that the Prosecution takes his arguments out of context and attempts to prevent the Appeals Chamber from assessing "what constitutes 'adequate time and facilities' [...] in relation to the proceedings as a whole".²⁰⁷

(ii) Analysis

59. Having heard submissions from the parties regarding their difficulties in processing the disclosed material, in its Order of 5 April 2006 setting the trial date, the Pre-Trial Judge held that:

the large volume of ongoing disclosure, and the fact that the Prosecution has had more time than the Defence to prepare for trial, are characteristics of most proceedings and do not justify further delay here; the Prosecution's mere indication of an intention to propose additional witnesses does not warrant a postponement of trial at this time[.]²⁰⁸

60. Following the Order of 5 April 2006, Pavković and Lukić argued that they would not have sufficient time to review all the disclosed material before the scheduled start of the trial.²⁰⁹ In its Decision of 28 April 2006, the Trial Chamber stated that it "ha[d] been continuously alert so that unfair prejudice [would] not be caused to the accused due to the lack of adequate time and resources

²⁰¹ Prosecution's Response Brief (Lukić), para. 8.

²⁰² Prosecution's Response Brief (Lukić), paras 11, 27-33.

²⁰³ Lukić's Reply Brief, para. 19.

²⁰⁴ Lukić's Reply Brief, para. 19.

²⁰⁵ Lukić's Reply Brief, paras 10-12.

²⁰⁶ Lukić's Reply Brief, para. 10.

²⁰⁷ Lukić's Reply Brief, paras 12-13.

²⁰⁸ Order of 5 April 2006, p. 2.

²⁰⁹ Third Motion, paras 10-12, 25-27, 29-31; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Sreten Lukic's Motion to Delay Start of Trial or in the Alternative to Grant A Severance of the Proceedings Against this Accused, 25 April 2006, paras 2, 37-41, 51-55.

for the preparation of their defences, and [...] [that it would] continue to monitor the progress of the case throughout the remainder of the pre-trial phase”.²¹⁰ In addition, it noted the Prosecution’s offer to assist the Defence in relation to some of the relevant issues.²¹¹ For the reasons explained below, the Appeals Chamber finds that neither Pavković nor Lukić has demonstrated a discernible error in setting the date for trial.

61. The Appeals Chamber notes that, in his Order of 5 April 2006, the Pre-Trial Judge referred to conferences held with the parties on 30 and 31 March 2006, “at which the parties made substantial progress in principle toward bringing this case to trial”.²¹² The extensive submissions by Pavković and Lukić regarding their trial preparation²¹³ were duly considered by both the Pre-Trial Judge and the Trial Chamber.²¹⁴ The Appeals Chamber considers that, by summer 2006, *i.e.* some 14 months after Lukić’s and Pavković’s initial appearances²¹⁵ and about a year after the assignment of their respective lead counsels,²¹⁶ a considerable amount of preparatory work, including processing continuously disclosed material, should have been carried out. Specifically in relation to the documents from the *S. Milošević* case, while acknowledging the voluminous nature of the material, the Pre-Trial Judge noted that some of it had been previously disclosed by the Prosecution.²¹⁷

62. Further, both the Pre-Trial Judge and the Trial Chamber continuously pointed out to the Defence teams that they were fully aware of the difficulties encountered by counsel and remained alert to those issues, repeatedly offering judicial assistance if such need were to arise.²¹⁸ Indeed, the Pre-Trial Judge took specific measures to assist the Defence, including: (i) monitoring the

²¹⁰ Decision of 28 April 2006, para. 4.

²¹¹ Decision of 28 April 2006, para. 4.

²¹² Order of 5 April 2006, p. 1.

²¹³ *E.g.*, Rule 65 *ter* Conference, 30 Mar 2006, T. 174-176, 179 (closed session); Status Conference, 31 Mar 2006, T. 194-196 (closed session), 201-205. See also Third Motion, Lukić’s Motion of 25 April 2006.

²¹⁴ Rule 65 *ter* Conference, 30 Mar 2006, T. 147-153, 161-164, 172, 178-180 (closed session); Status Conference, 31 Mar 2006, T. 165, 186-189, 200-201, 206-207; Decision of 28 April 2006, para. 4.

²¹⁵ *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-03-70-I, Initial Appearance, 6 Apr 2005, T. 24 *et seq.* (Lukić); *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-03-70-I, Initial Appearance, 28 Apr 2005, T. 29 *et seq.* (Pavković).

²¹⁶ *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-03-70-I, Decision of the Deputy Registrar, 2 May 2005 (assigning Mr. Theodor Scudder as counsel to Lukić); *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-03-70-PT, Decision of the Deputy Registrar, 13 June 2005 (assigning Mr. John Ackerman as counsel to Pavković). See also *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-05-87-PT, Decision of the Deputy Registrar, 16 May 2006 (withdrawing the assignment of Mr. Scudder and assigning Mr. Branko Lukić as counsel to Lukić).

²¹⁷ Rule 65 *ter* Conference, 26 April 2006, T. 197(closed session).

²¹⁸ See Decision of 28 April 2006, para. 4. See also Rule 65 *ter* Conference, 26 Apr 2006, T. 215-216 (closed session); Rule 65 *ter* Conference, 30 Mar 2006, T. 179-180 (closed session): “[...] there seemed [*sic*] to be almost indefinite opportunities in the Rules of this Tribunal for review of the situation, should there be injustice. So the Rules do provide for opportunities to resolve matters that come to light later, in spite of the best efforts of everyone to ensure that all relevant material is explored at the trial stage. So I have to take that into account as well, and I have to balance all of the interests that impinge upon the broad interests of justice here and impinge upon the accused’s right to a fair trial.”

disclosure issues with respect to the Prosecution's witnesses;²¹⁹ (ii) clarifying that the very beginning of the trial would not deal with controversial evidentiary issues and thus would allow the Defence to be ready by the time the trial was "into gear, ready for a proper run immediately after the recess";²²⁰ and (iii) encouraging the Defence teams to apply for the Trial Chamber's assistance under Rule 54 *bis* of the Rules.²²¹

63. Accordingly, the Trial Chamber satisfied itself that counsel would be able to catch up with the remaining preparatory work as the trial proceeded and made it known that counsel could seek appropriate remedies as the proceedings progressed. The Appeals Chamber considers that the Trial Chamber acted within the reasonable exercise of its discretion when it concluded that, with the trial set to commence on 10 July 2006, it would be able to ensure that the accused were afforded adequate time and resources for the preparation of their defence and could take necessary measures if and when appropriate. In light of this finding, the Appeals Chamber does not consider it necessary to address Pavković's submission that the Trial Chamber erred in denying his request for certification to appeal the Decision of 28 April 2006. The Appeals Chamber reserves, however, its final determination as to whether Pavković and Lukić indeed had sufficient time to review the disclosed material, which will be made following a holistic assessment of the Trial Chamber's management of the proceedings as a whole.

64. Finally, with regard to Pavković's contention that the Pre-Trial Judge's statement on the application of Rule 68 of the Rules was erroneous, the Appeals Chamber notes that the impugned statement reads as follows:

My experience of this Tribunal so far suggests to me that the Prosecution do not actually apply strictly Rule 68(i) that requires them to disclose material which, in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt. What seems to be happen [*sic*] something [*sic*] they protect their back by disclosing everything under the sun, giving you, I accept, a difficulty, which you may not be able to entirely reassure yourself you have resolved.²²²

The Appeals Chamber recalls that the impugned remark was directly preceded by the following statement from the Pre-Trial Judge:

[I]f you really want to persuade the Chamber that there is some injustice here, or potential injustice, then you will need to put meat on that skeleton, because there's nothing in what you've said that indicates that you have been, for example, building up a case based on Rule 68 material that you're studying at great length which suggests that you have to continue this exercise on the

²¹⁹ Rule 65 *ter* Conference, 30 Mar 2006, T. 130-145, 165, 167-168 (with respect to Rule 70 material); Status Conference, 31 Mar 2006, T. 163-165.

²²⁰ Rule 65 *ter* Conference, 30 Mar 2006, T. 161-164 (closed session); Status Conference, 31 Mar 2006, T. 186.

²²¹ Rule 65 *ter* Conference, 30 Mar 2006, T. 172 (closed session); Status Conference, 31 Mar 2006, T. 198-201.

²²² Rule 65 *ter* Conference, 30 Mar 2006, T. 179 (closed session).

same time-scale so far. You have to make judgements along the way about how productive an exercise is going to be.²²³

65. Having considered the impugned remark in its proper context,²²⁴ the Appeals Chamber does not find it to be indicative of any discernible error in the Pre-Trial Judge's or the Trial Chamber's reasoning with respect to the scope of the Prosecution's disclosure obligations. Rather, it simply refers to the realities of the complex cases brought before this Tribunal, which indeed require counsel to manage their task priorities and find a proper balance when processing the typically voluminous material disclosed to them.²²⁵

(c) Reliance on crimes that took place in 1998

(i) Submissions of the parties

66. In arguing that he was afforded insufficient time for the preparation of his defence due to the timing and volume of the Prosecution's disclosure, Pavković notes that in spring 2006 there was still no final indictment.²²⁶ He submits that in its Decision of 22 March 2006 the Trial Chamber "required amendments to the Indictment that could and did have a major impact on preparation."²²⁷ Pavković claims that it was made clear that, in order to establish the charges related to crimes allegedly committed in 1999, the Prosecution would be entitled to rely on alleged crimes that took place in 1998, by identifying with specificity their dates, locations, the connection to each of the accused, and the supporting material.²²⁸ Pavković claims that "[t]his opened up a whole new avenue of investigation into 1998 matters that was still being pursued as late as August, 2009."²²⁹

²²³ 65 *ter* Conference, 30 Mar 2006, T. 178-179 (closed session).

²²⁴ See also 65 *ter* Conference, 30 Mar 2006, T. 149-151 (closed session), where the Pre-Trial Judge stated: "I have sympathy for the task that you face because of the volume of material, which I'm not entirely convinced has to be thrown at you, but has been that [*sic*]. But nevertheless the Prosecution go beyond that, and they do try to identify, and have in this case identified the witnesses and the material they have in relation to these witnesses, and concentration really has to be on them. [...] I would suggest to you that really before you see what use you can make of the Rule 68 material that might be used to impeach the witness, you really have to know what the witness is saying in the first place."

²²⁵ Cf. *Krajišnik* Appeal Judgement, para. 59, citing with approval *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Defense Motion for Adjournment (Written Reasons), 21 September 2004, para. 15. With respect to Pavković's claim that the Prosecution provided only summaries of Rule 68 material rather than the material itself, the Appeals Chamber notes that Pavković has failed to provide any references or to substantiate his allegation in any way. The Appeals Chamber therefore dismisses this argument without detailed consideration.

²²⁶ Pavković's Appeal Brief, para. 334.

²²⁷ Pavković's Appeal Brief, para. 334, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, 22 March 2006 ("Decision of 22 March 2006"), para. 33(3)(b).

²²⁸ Pavković's Appeal Brief, para. 334, referring to Decision of 22 March 2006, para. 33(3)(b).

²²⁹ Pavković's Appeal Brief, para. 334. See also the Appeals Chamber's Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 (public redacted version), paras 21-23.

67. Lukić also argues that his case was complicated by the Trial Chamber authorising the Prosecution to add allegations concerning crimes that took place in 1998.²³⁰

68. In response, the Prosecution asserts that both Pavković and Lukić were put on notice at the time of their initial appearance that the Prosecution intended to rely on crimes that took place in 1998 in order to prove responsibility for the crimes committed in 1999.²³¹ The Prosecution points out that, as noted in the Decision of 11 May 2006, “[t]he amendments which the [Trial] Chamber ordered enhanced Defence preparation by clarifying these allegations”.²³²

69. Lukić replies that the amendments to an indictment can only become valid once authorised by the Trial Chamber and, therefore, it cannot be disputed that he received proper notice of the relevant amendments only two months before the commencement of the trial.²³³

(ii) Analysis

70. In its Decision of 22 March 2006, the Trial Chamber found that the proposed amended indictment and the Prosecution’s Pre-Trial Brief did not provide a sufficient description of the crimes allegedly committed in 1998.²³⁴ It ordered the Prosecution to “identify the dates and locations of the crimes, the connection to each Accused and supporting material for its allegations”.²³⁵ An amended version of the indictment providing specification of the alleged crimes committed in 1998 was filed on 5 April 2006.²³⁶ The supporting material for the amended allegations and the updated Rule 65 *ter* witness list were disclosed to the Defence teams approximately three months before the start of the trial²³⁷ and the Trial Chamber accepted the Second Amended Indictment on 11 May 2006,²³⁸ *i.e.* two months before the commencement of the trial.

71. The Order of 5 April 2006 setting the trial date noted that “the bulk of the indictment already is in finalised form and the Trial Chamber will take account of the proximity of trial in

²³⁰ Lukić’s Appeal Brief, para. 17(a).

²³¹ Prosecution’s Response Brief (Pavković), para. 137, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Motion to Amend the Indictment, 11 May 2006 (“Decision of 11 May 2006”), para. 12; Prosecution’s Response Brief (Lukić), para. 26.

²³² Prosecution’s Response Brief (Pavković), para. 137, referring to Decision of 11 May 2006, paras 2, 11-13.

²³³ Lukić’s Reply Brief, para. 16.

²³⁴ Decision of 22 March 2006, para. 16.

²³⁵ Decision of 22 March 2006, para. 33(3)(b).

²³⁶ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Second Amended Joinder Indictment, 5 April 2006 (“Second Amended Indictment”).

²³⁷ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Confidential Annex C: Supporting Material (1998), 5 April 2006 (confidential).

²³⁸ Decision of 11 May 2006, para. 22.

addressing the proposed redactions”.²³⁹ In its Decision of 11 May 2006, the Trial Chamber further found that:

[t]he Accused have been aware of the Prosecution’s basic assertions with regard to the alleged commission of uncharged crimes in 1998, albeit with far less precision than they are currently presented, since their initial appearances under earlier indictments in their previously separate respective cases. What has been made clear now are more specific facts of the incidents from that period upon which the Prosecution will rely to establish certain elements of charged crimes and forms of responsibility at trial.²⁴⁰

72. The Trial Chamber considered that the accused had approximately two months before the scheduled start of trial and over three months before witness testimony was likely to begin, and thus had adequate time to prepare for the “more precise allegations”.²⁴¹ Moreover, the Trial Chamber took into account the fact that the allegations did not result in the inclusion of new charges in the Second Amended Indictment.²⁴² Thus the Trial Chamber concluded that no postponement of the trial was warranted.²⁴³

73. The Appeals Chamber is satisfied that the Trial Chamber’s ruling to maintain the trial date of 10 July 2006 was within the reasonable exercise of its discretion. In this regard, the Appeals Chamber notes that, although the amendments introduced in the Second Amended Indictment amounted to new material facts and necessitated the processing of voluminous supporting material,²⁴⁴ they did not constitute new charges previously unknown to any of the accused. The jurisprudence of the Tribunal provides that, under certain conditions, the Prosecution may amend the indictment (to introduce new material facts or clarify any vague pleadings) even after the trial has started.²⁴⁵ The question for a trial chamber is whether the Defence can adequately prepare to face the charges in light of the amendments. In the instant case, the Trial Chamber considered the nature of the amendments, took into account the extra work required by the Defence to prepare and the time available for that purpose, and found that there was no need to postpone the trial. Neither Pavković nor Lukić have shown that the Trial Chamber erred in this regard.

²³⁹ Order of 5 April 2006, p. 2.

²⁴⁰ Decision of 11 May 2006, para. 12 (footnotes omitted). See also Status Conference, 31 Mar 2006, T. 188-189.

²⁴¹ Decision of 11 May 2006, para. 13.

²⁴² Decision of 11 May 2006, para. 13.

²⁴³ Decision of 11 May 2006, para. 13.

²⁴⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Confidential Annex C: Supporting Material (1998), 5 April 2006 (confidential); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Annex D: Supporting Material (Joint Command), 5 April 2006.

²⁴⁵ *Muvunyi I* Appeal Judgement, para. 18, and references therein.

(d) Late assignment of counsel(i) Late assignment of Pavković's counsel

74. Pavković bases his arguments regarding the lack of adequate time and facilities for the preparation of his defence on, *inter alia*, the fact that the counsel who “could be categorised as an Article 21 ‘counsel of his own choosing’” was only appointed on 13 June 2005, *i.e.* less than a year before the commencement of the trial.²⁴⁶

75. Given that Pavković's submission is unsubstantiated in terms of either identification of the alleged error of the Trial Chamber or the prejudice resulting there from, the Appeals Chamber declines to consider its merits.

(ii) Late assignment of Lukić's co-counsela. Submissions of the parties

76. Lukić submits that his lead counsel and co-counsel were only appointed on 1 May 2006, with the trial commencing on 10 July 2006.²⁴⁷ In particular, Lukić submits that despite his request to have Jovan Simić assigned as co-counsel in December 2005, he did not have a fully composed Defence team until just before the commencement of the trial. In his view, this was due to the fact that the Registry's estimation regarding the start of the trial was “dashed when the Chamber accelerated the proceedings.”²⁴⁸

77. The Prosecution responds that it was open to Lukić to have a co-counsel appointed sooner and that the delay in the assignment of co-counsel Dragan Ivetić, the second co-counsel requested by Lukić who at that time was a legal consultant on his Defence team, was due to co-counsel's own failure to provide the necessary documentation and to meet the eligibility requirements.²⁴⁹ The Prosecution adds that Lukić's arguments were addressed by the Pre-Trial Judge, who noted that the Registry allowed a lump-sum payment for pre-trial preparation which could be utilised over a shorter period of time.²⁵⁰

78. In reply, Lukić insists that the responsibility for the failure to appoint a co-counsel in a timely manner lies with the Registry and argues that the Trial Chamber erred in not ensuring a

²⁴⁶ Pavković's Appeal Brief, para. 320.

²⁴⁷ Lukić's Appeal Brief, para. 20. See also *ibid.*, para. 37.

²⁴⁸ Lukić's Appeal Brief, para. 37.

²⁴⁹ Prosecution's Response Brief (Lukić), paras 36-37.

²⁵⁰ Prosecution's Response Brief (Lukić), paras 35-36.

remedy for the situation.²⁵¹ He claims that the Prosecution's attempt to shift the focus from the issue of Jovan Simić's appointment to the "status" of Dragan Ivetić can only be read as admitting the validity of Lukić's appeal on this point.²⁵² Lukić argues that Jovan Simić met all the requirements to be appointed as co-counsel but, according to the Registry, a co-counsel could not be assigned earlier than five months before the commencement of the trial.²⁵³ He adds that the fact that Dragan Ivetić was part of the Defence team is irrelevant to the issue of not having a co-counsel, especially given that legal consultants, such as Dragan Ivetić at the relevant time, are not reimbursed for travels related to investigation work.²⁵⁴ Lukić argues that, although a Defence team should have a co-counsel five months prior to the commencement of the trial, his team was only fully composed in April 2006 with the appointment of new lead counsel and Dragan Ivetić as co-counsel,²⁵⁵ which was approximately two months before the commencement of the trial.

b. Analysis

79. The Appeals Chamber recalls that Lukić was transferred to the seat of the Tribunal on 4 April 2005 and had Mr. Victor Koppe assigned to him as duty counsel on 6 April 2005.²⁵⁶ On 2 May 2005, the Registry assigned Mr. Theodor Scudder as counsel to Lukić, directing Mr. Koppe to hand over any case-related materials received during his assignment as duty counsel to Mr. Scudder.²⁵⁷ Following the withdrawal of the assignment of Mr. Scudder on 16 May 2006, Mr. Branko Lukić was assigned as lead counsel to Lukić²⁵⁸ and on 29 May 2006, Mr. Dragan Ivetić was assigned as co-counsel.²⁵⁹ The Appeals Chamber notes that the issue of the lack of co-counsel was raised before the Pre-Trial Judge during the status conference on 31 March 2006 and the Rule 65 *ter* Conference on 26 April 2006.²⁶⁰ The Appeals Chamber is satisfied that the Trial Chamber took this issue into account in its general finding that, despite the identified difficulties in

²⁵¹ Lukić's Reply Brief, para. 24.

²⁵² Lukić's Reply Brief, para. 24.

²⁵³ Lukić's Reply Brief, para. 25.

²⁵⁴ Lukić's Reply Brief, para. 27.

²⁵⁵ Lukić's Reply Brief, paras 25-26.

²⁵⁶ *Prosecutor v. Pavković et al.*, Case No. IT-03-70-I, Decision of the Registrar, 6 April 2005 (assigning Mr. Victor Koppe as a duty counsel to represent Lukić at his initial appearance, and in such other matters as might be necessary until a permanent counsel was assigned).

²⁵⁷ *Prosecutor v. Sreten Lukić*, Case No. IT-03-70-I, Decision of the Deputy Registrar, 2 May 2006.

²⁵⁸ *Prosecutor v. Sreten Lukić*, Case No. IT-05-87-PT, Decision of the Deputy Registrar, 16 May 2006.

²⁵⁹ *Prosecutor v. Sreten Lukić et al.*, Case No. IT-05-87-PT, Decision of the Deputy Registrar, 29 May 2006.

²⁶⁰ The matter was raised with the Pre-Trial Judge (see Status Conference, 31 Mar 2006, T. 204-205; Rule 65 *ter* Conference, 26 April 2006, T. 195-197 (closed session)) and submitted to the Trial Chamber (see Lukić's Motion of 25 April 2006, paras 21-33). See also Decision of 28 April 2006, para. 4 (stating that "[t]he Trial Chamber has carefully considered each and every argument of the accused, as has been set forth in their motions [...]").

pre-trial preparation, it was able to ensure the fairness of the proceedings without delaying the commencement of the trial.²⁶¹

80. The Appeals Chamber finds that Lukić has failed to demonstrate that the late assignment of co-counsel resulted in any discernible prejudice to him. Indeed, Lukić had the assistance of counsel shortly following his transfer to the Tribunal, including at his initial appearance, and throughout the proceedings. Further, as discussed during the Rule 65 *ter* Conference on 26 April 2006, in order to prepare for trial, lead counsel was provided with a lump-sum for a level three complexity case through the Pre-Trial Legal Aid Policy.²⁶² The Appeals Chamber observes that it was open to lead counsel to use these funds in a manner best suited to the preparation of the defence.²⁶³ In this regard, the Appeals Chamber notes that prior to his assignment as co-counsel, Mr. Dragan Ivetić was hired as a legal consultant for Lukić's Defence team and was therefore able to familiarise himself with the case prior to his assignment as co-counsel.²⁶⁴ Lukić has failed to substantiate how the delayed assignment of co-counsel actually affected the preparation of his defence, for instance by illustrating what specific investigative acts were planned but could not be performed by lead counsel or by other members of the Defence team²⁶⁵ and how they impacted upon his preparedness for trial. The Appeals Chamber therefore finds that Lukić has failed to demonstrate that in scheduling the commencement of the trial the Trial Chamber committed a discernible error that resulted in a miscarriage of justice.

(e) Refusal to adjourn the trial during the absence of Pavković's lead counsel

(i) Background

81. On 13 July 2006, Pavković notified the Trial Chamber that for medical reasons his lead counsel would not be able to attend the court hearings until September 2006 and requested an adjournment of the proceedings.²⁶⁶ The Trial Chamber denied Pavković's request on

²⁶¹ Decision of 28 April 2006, para. 4.

²⁶² Rule 65 *ter* Conference, 26 April 2006, T. 192-195 (closed session).

²⁶³ Defence Counsel Pre-Trial Legal Aid Policy, 1 November 2004, para. 1.

²⁶⁴ It transpires from the trial record that one of the main reasons for the delay in assigning Mr. Ivetić as Lukić's co-counsel was that he only became qualified for such assignment, in terms of the required seven years of relevant experience, in April 2006, and therefore could not be assigned at an earlier stage (see Rule 65 *ter* Conference, 26 April 2006, T. 195-197 (closed session)).

²⁶⁵ While Lukić asserts that Mr. Dragan Ivetić, who worked as a legal consultant at the relevant time, was not reimbursed for travels related to investigation work (Lukić's Reply Brief, para. 27), he has failed to explain for which specific travels such reimbursement was necessary but not provided by the Tribunal or why the lump-sum that lead counsel received could not cover the costs incurred by other members of the Defence team, including travel costs incurred by Mr. Dragan Ivetić.

²⁶⁶ Pavković's Appeal Brief, para. 344, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Pavković Objection to Trial Proceedings in Absence of his Lead Counsel, 13 July 2006 ("Motion of 13 July 2006"), paras 2, 6-7.

14 July 2006,²⁶⁷ concluding that no reason existed “to doubt the ability of co-counsel, under the authority of lead counsel, to deal with the proceedings during the physical absence of lead counsel from the trial”.²⁶⁸ Consequently, having commenced on 10 July 2006, the trial continued in the absence of Pavković’s lead counsel.

(ii) Submissions of the parties

82. Pavković asserts that, in dismissing his Motion of 13 July 2006 requesting an adjournment of the proceedings, the Trial Chamber misinterpreted Article 16(C) of the Directive on the Assignment of Defence Counsel.²⁶⁹ He argues that the Trial Chamber’s conclusion that a co-counsel is assigned to replace the lead counsel should the lead counsel be unable to attend was erroneous as, in his view, a co-counsel is authorised to proceed only pursuant to a decision, and under the authority and direction, of the lead counsel.²⁷⁰ Pavković notes in this respect that, during the initial stage of the trial, witnesses testified in English whereas his co-counsel’s knowledge of that language was limited.²⁷¹

83. The Prosecution responds that Pavković’s challenge should be dismissed because it exceeds the scope of his Notice of Appeal.²⁷² If the challenge is considered on the merits, the Prosecution argues that Pavković fails to show that the Trial Chamber committed any error in refusing to delay the trial because of the absence of his lead counsel.²⁷³

(iii) Analysis

84. The Appeals Chamber notes that Pavković’s arguments were not set forth in his Notice of Appeal and the Appeals Chamber is thus not required to consider them.²⁷⁴ However, taking into account that, in its response, the Prosecution addresses the substance of Pavković’s submission and would therefore suffer no material prejudice if the arguments are addressed in this Judgement, the Appeals Chamber will exercise its discretion and consider the merits of this submission in the interests of justice, notwithstanding Pavković’s failure to comply with the Rules.²⁷⁵

²⁶⁷ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Pavković Motion to Stay Proceedings, 14 July 2006 (“Decision of 14 July 2006”), para. 9.

²⁶⁸ Decision of 14 July 2006, para. 8.

²⁶⁹ Pavković’s Appeal Brief, para. 344, referring to Motion of 13 July 2006, Decision of 14 July 2006, para. 8. Pavković submits that his lead counsel was advised to undergo “major surgery” preventing him from attending the “early stages of the trial and until September 2006” (Pavković’s Appeal Brief, para. 344).

²⁷⁰ Pavković’s Appeal Brief, para. 344.

²⁷¹ Pavković’s Appeal Brief, fn. 343.

²⁷² Prosecution’s Response Brief (Pavković), paras 131, 141.

²⁷³ Prosecution’s Response Brief (Pavković), para. 142.

²⁷⁴ *Galić* Appeal Judgement, para. 78.

²⁷⁵ Cf. *Deronjić* Judgement on Sentencing Appeal, paras 102-103, 129-130.

85. At the outset, the Appeals Chamber observes that, according to the trial record, Pavković's lead counsel was absent from 7 July 2006 until 13 August 2006.²⁷⁶ Taking into account that the Trial Chamber was in recess from 17 July 2006 until 4 August 2006, the lead counsel was effectively absent for 11 hearing days.²⁷⁷

86. The Appeals Chamber recalls that pursuant to Article 16(C) of the Directive on the Assignment of Defence Counsel, “[a]cting under the authority of lead counsel, the co-counsel may deal with all stages of the proceedings and all matters arising out of the defence of the suspect or accused.” The Appeals Chamber has previously considered that when the accused is represented, the presence of his lead counsel *or* co-counsel at trial is essential.²⁷⁸ Thus, a lead counsel who absents himself has the duty to ensure that his co-counsel is present at trial.²⁷⁹ The Trial Chamber therefore did not err in holding that one of the purposes of Article 16(C) of the Directive on the Assignment of Defence Counsel is to allow for the accused to be represented at trial hearings by a co-counsel in the event that the lead counsel is unable to attend.²⁸⁰ Furthermore, the Appeals Chamber notes that the Trial Chamber explicitly took into account that Pavković's lead counsel and co-counsel were in contact with each other, so that the co-counsel could continue to act under the authority of the lead counsel in compliance with the relevant requirement of Rule 16(C) of the Directive on the Assignment of Defence Counsel.²⁸¹ In light of these considerations, the Appeals Chamber finds that the Trial Chamber did not err in holding that the Directive on the Assignment of Defence Counsel allowed for representation by co-counsel acting under the authority of lead counsel in the absence of the latter.

87. With respect to the limited proficiency in English of Pavković's co-counsel, the Appeals Chamber notes that the Registry's Decision assigning Mr. Aleksandar Aleksić as co-counsel accounted for the fact that he did not speak either of the working languages of the Tribunal to the requisite standard.²⁸² The Appeals Chamber notes that this argument was not raised by lead counsel when requesting an adjournment of the trial and was therefore not explicitly considered by the Trial Chamber in reaching the Decision of 14 July 2006. However, the Appeals Chamber is satisfied that the measures adopted by the Trial Chamber in rescheduling the examination of certain witnesses,

²⁷⁶ See Pre-Trial Conference, 7 Jul 2006, T. 282; Nike Peraj, 14 Aug 2006, T. 1641.

²⁷⁷ See *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order on Close of Prosecution Case-in-Chief, Rule 98 *bis* Proceedings, and Defence Rule 65 *ter* Filings, 5 March 2007 (“Order of 5 March 2007”), fn. 7.

²⁷⁸ *Nahimana et al.* Appeal Judgement, para. 139.

²⁷⁹ *Nahimana et al.* Appeal Judgement, para. 139.

²⁸⁰ Decision of 14 July 2006, para. 7.

²⁸¹ Decision of 14 July 2006, para. 8.

²⁸² *Prosecutor v. Nebojša Pavković*, Case No. IT-03-70-PT, Decision of the Deputy Registrar, 17 June 2005, p. 1. The Appeals Chamber recalls that pursuant to Article 16(D) of the Directive on the Assignment of Defence Counsel, “[a]t the request of the lead counsel and where the interests of justice so require, the Registrar may assign a co-counsel who

coupled with the availability of simultaneous interpretation of the court proceedings from English into B/C/S, the language of the co-counsel, were sufficient to ensure that Pavković was not prejudiced as a result of his lead counsel's absence.

88. In this respect, the Appeals Chamber observes that on 7 July 2006 the Presiding Judge encouraged the Prosecution to avoid presenting evidence "that would be particularly controversial for Pavković's case" during the absence of his lead counsel.²⁸³ The Prosecution assured the Trial Chamber that it had rescheduled the examination of one witness in order to accommodate this concern and that it would not call any witnesses in August 2006 who had face-to-face meetings with Pavković.²⁸⁴ The Presiding Judge further encouraged the Prosecution to communicate directly with Pavković's co-counsel and to give him the opportunity to comment upon the order in which witnesses would be called during the lead counsel's absence.²⁸⁵

89. In light of the foregoing, the Appeals Chamber finds that Pavković has failed to show that he suffered any prejudice resulting from the conduct of the hearings in question. The Appeals Chamber therefore dismisses this sub-ground of Pavković's eleventh ground of appeal.

(f) Production of documents pursuant to Rule 54 bis of the Rules

(i) Submissions of the parties

90. Lukić submits that the Trial Chamber's Decision of 29 September 2006, granting in part his requests pursuant to Rule 54 bis of the Rules, was rendered two months after the commencement of the trial and that Serbia only complied with it one month thereafter.²⁸⁶ As a result, Lukić submits that the documents at issue continued to be received "well into the trial, including the defense phase."²⁸⁷ Lukić argues that, in these circumstances, his Defence team was unable to review all the necessary documents in preparation for the trial and suffered further prejudice when the admission into evidence of many of them was denied because they had not been tendered through a relevant witness.²⁸⁸

does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused".

²⁸³ Pre-Trial Conference, 7 Jul 2006, T. 379.

²⁸⁴ Pre-Trial Conference, 7 Jul 2006, T. 380-381.

²⁸⁵ Pre-Trial Conference, 7 Jul 2006, T. 380.

²⁸⁶ Lukić's Appeal Brief, para. 38. Lukić alleges that he experienced various problems in obtaining documents from Serbia, despite having sent "no fewer than 26 requests" to the Serbian authorities between 10 November 2005 and 14 April 2006 and having had more than 23 meetings with Serbian officials (Lukić's Appeal Brief, para. 38, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Sreten Lukić's Amended Rule 54 bis Application, 29 September 2006 ("Decision of 29 September 2006"), para. 4, Motion Hearing, 6 July 2006, T. 208 *et seq.*).

²⁸⁷ Lukić's Appeal Brief, para. 38.

²⁸⁸ Lukić's Appeal Brief, para. 38.

91. The Prosecution responds that despite the Pre-Trial Judge continuously encouraging the accused to make applications pursuant to Rule 54 *bis* of the Rules should they experience any problems obtaining necessary documents from States, Lukić only filed such an application on 17 May 2006.²⁸⁹ According to the Prosecution, the Trial Chamber took appropriate action following the application and Lukić fails to identify any errors in the Decision of 29 September 2006 and to show that he suffered any prejudice as a result of the delay in receiving the documents from Serbia.²⁹⁰

(ii) Analysis

92. The Appeals Chamber notes that, on a number of occasions, the Pre-Trial Judge encouraged the parties not to wait too long for the Serbian authorities to respond before requesting the court's assistance, pursuant to Rule 54 *bis* of the Rules.²⁹¹ On 17 May 2006, Lukić requested that the Trial Chamber issue an order directed to Serbia for the production of documents.²⁹² Following a separate hearing on this matter,²⁹³ on 10 July 2006, the Trial Chamber ordered Lukić to submit two reformulated requests to Serbia.²⁹⁴ On 21 August 2006, Lukić filed an amended application pursuant to Rule 54 *bis* of the Rules.²⁹⁵ On 29 September 2006, the Trial Chamber issued the impugned decision, which granted all the requests that met the requirements of Rule 54 *bis* of the Rules.²⁹⁶

93. The Appeals Chamber observes that, before issuing an order for a State to produce documents, a Judge or trial chamber must be satisfied that the requirements under Rule 54 *bis* of the Rules have been met.²⁹⁷ The Appeals Chamber is not satisfied that Lukić has demonstrated that the circumstances required or allowed the Trial Chamber to issue such an order any earlier. Notwithstanding the Trial Chamber's offer to assist the Defence, Lukić only filed his application in May 2006, nearly six weeks after the 10 July 2006 trial date had been fixed. In addition, more than

²⁸⁹ Prosecution's Response Brief (Lukić), paras 38-40.

²⁹⁰ Prosecution's Response Brief (Lukić), paras 40-41.

²⁹¹ *E.g.*, Rule 65 *ter* Conference, 30 March 2006, T. 172 (closed session); Status Conference, 31 March 2006, T. 162, 198, 200.

²⁹² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Sreten Lukic's [*sic*] Motion, Pursuant to Rule 54 *bis* for a Binding Order Directed to Serbia-Montenegro for Production of Documents, 17 May 2006.

²⁹³ Motion Hearing, 6 July 2006, T. 208 *et seq.*

²⁹⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order Arising from Hearing on Sreten Lukic's Rule 54 *bis* Application, 10 July 2006, para. 31(1).

²⁹⁵ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Sreten Lukic's [*sic*] Amended Application Pursuant to Trial Chambers [*sic*] Order from 10th of July, 21 August 2006.

²⁹⁶ Decision of 29 September 2006, para. 24(1).

²⁹⁷ Rule 54 *bis* of the Rules provides, in part: "(A) A party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber and shall: (i) identify as far as possible the documents or information to which the application relates; (ii) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter; and (iii) explain the steps that have been taken by the applicant to secure the State's assistance."

six months elapsed between Lukić's first request to Serbia and the filing of his Rule 54 *bis* application.²⁹⁸ The Appeals Chamber is of the view that, considering the slow and at times problematic cooperation with the Serbian authorities, in terms of producing the requested documents on the one hand and the imminent commencement of the trial on the other, it was incumbent upon Lukić to apply for the Trial Chamber's assistance earlier in order to ensure that the documents were received in a timely manner.

94. Given that Lukić has failed to demonstrate that the Trial Chamber erred, the Appeals Chamber need not address his submissions regarding the prejudice that allegedly resulted from the manner in which the Trial Chamber handled his requests pursuant to Rule 54 *bis* of the Rules.

3. Length of court sessions

(a) Submissions of the parties

(i) Pavković's appeal

95. Pavković asserts that throughout the trial, the Trial Chamber was concerned with the speed rather than with the fairness of the proceedings.²⁹⁹ He points out that, pursuant to Article 21 of the Statute, the right to be tried without undue delay belongs to the accused only, and that none of the accused in the case sought a "speedy trial", but instead requested "reasonable delays" in order to prepare their defence.³⁰⁰ To illustrate the allegedly erroneous approach of the Trial Chamber, Pavković avers that in its Decision of 9 October 2006 dealing with, *inter alia*, the trial schedule, the Trial Chamber selectively cited Article 21 of the Statute, omitting that an accused is entitled to adequate time and facilities for the preparation of his defence.³⁰¹ He further points out that the extended trial sessions had an adverse impact upon his trial preparation and that, despite his request for "fairness and 'due' delay in the process", in its Scheduling Order of 15 November 2006, the Trial Chamber referred solely to its obligation to ensure the right of the accused to be tried without undue delay, thus compromising the need for enhancing justice.³⁰² Pavković insists that none of the accused were "asserting" the right to be tried without undue delay and suggests that, in both its Decision of 9 October 2006 and the Scheduling Order of 15 November 2006, the Trial Chamber

²⁹⁸ See Lukić's Appeal Brief, para. 38.

²⁹⁹ Pavković's Appeal Brief, para. 346, referring, *inter alia*, to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Use of Time, 9 October 2006 ("Decision of 9 October 2006").

³⁰⁰ Pavković's Appeal Brief, para. 346.

³⁰¹ Pavković's Appeal Brief, para. 346.

³⁰² Pavković's Appeal Brief, paras 347-348, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Joint Defence Objection to Trial Schedule for Week Commencing 27 November 2006, 2 November 2006 ("Joint Defence Motion of 2 November 2006"), *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Scheduling Order, 15 November 2006 ("Scheduling Order of 15 November 2006").

unnecessarily emphasised the need for that right to be respected.³⁰³ Finally, Pavković asserts that the issue of “speed versus justice” was repeatedly brought to the attention of the Trial Chamber.³⁰⁴

96. The Prosecution responds that the Trial Chamber properly balanced its obligation to ensure both the expeditious conduct of the trial and the rights of the accused to sufficient time for preparation of their defence.³⁰⁵ According to the Prosecution, the Trial Chamber “showed a willingness to adjust the pace of trial where justified to facilitate Defence preparation” without compromising the need for expeditious conduct of the proceedings.³⁰⁶

(ii) Lukić’s appeal

97. Lukić argues that the guarantees for the accused’s right to be tried without undue delay must be applied to the benefit rather than to the detriment of the accused.³⁰⁷ He submits that, although he tried to compensate during trial for his lack of sufficient pre-trial preparation, the Decision of 9 October 2006 setting longer trial sessions exacerbated the situation and rendered his efforts futile.³⁰⁸ He asserts that the sitting schedule endangered his health and that of his counsel, hampered preparation for the examination of witnesses, and prevented essential attorney-client meetings from taking place.³⁰⁹ Lukić insists that the combination of the extended sitting sessions, the Prosecution’s rescheduling of witnesses, the last-minute disclosure of additional information as well as the intensive preparation of defence witnesses “exhausted” and “overwhelmed” his Defence team.³¹⁰ He argues that, for the same reasons, he could not “undertake significant discovery” and thus a number of Rule 70 documents were obtained by him only after the conclusion of the Prosecution case and could not be used to confront Prosecution witnesses.³¹¹ Particularly with respect to the witnesses who had previously testified in the *S. Milošević* case, Lukić submits that, due to the extended sitting schedule, he was unable to “foresee [or] locate” all potential documents necessary for their effective cross-examination.³¹² Lukić claims that the cumulative effect of these factors was that the “effective assistance of counsel was lessened”, which, in turn, had a negative impact upon the fairness and integrity of the proceedings.³¹³ Lukić also asserts that the Trial Chamber abused its

³⁰³ Pavković’s Appeal Brief, paras 346, 348.

³⁰⁴ Pavković’s Appeal Brief, paras 349-350.

³⁰⁵ Prosecution’s Response Brief (Pavković), para. 137.

³⁰⁶ Prosecution’s Response Brief (Pavković), para. 136, referring to Decision of 9 October 2006, pp. 2, 6, Scheduling Order of 15 November 2006, para. 2, Evidentiary Matters, 23 Nov 2006, T. 7241-7242.

³⁰⁷ Lukić’s Appeal Brief, para. 43, referring to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Second Defence Motion for Provisional Release, 9 February 2006, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 46.

³⁰⁸ Lukić’s Appeal Brief, para. 51.

³⁰⁹ Lukić’s Appeal Brief, paras 53-54.

³¹⁰ Lukić’s Appeal Brief, paras 51-52.

³¹¹ Lukić’s Appeal Brief, para. 39, referring to documents marked 6D1635, 6D1637, 6D1638, 6D1639, 6D1640.

³¹² Lukić’s Appeal Brief, para. 51.

³¹³ Lukić’s Appeal Brief, para. 51.

discretion by demanding the withdrawal of part of his motion requesting alteration of the court schedule.³¹⁴ He argues that this act constituted an attempt by the Trial Chamber to prevent him from having his objection recorded for the purposes of a future appeal.³¹⁵

98. With respect to Lukić's assertion that the Trial Chamber enforced his right to an expeditious trial to his detriment, the Prosecution responds that Lukić fails to demonstrate any discernible error on the part of the Trial Chamber.³¹⁶ As to the longer sitting hours, the Prosecution contends that Lukić's arguments were considered at trial and that he fails to show how the trial schedule caused him any identifiable prejudice such as to render the Trial Judgement invalid.³¹⁷ The Prosecution claims that Lukić fails to demonstrate that the Trial Chamber abused its discretion in concluding that he had sufficient time to prepare his defence case while simultaneously presenting evidence in court.³¹⁸ It further submits that the Rule 70 documents mentioned by Lukić were admitted into evidence and therefore no prejudice was caused.³¹⁹ As to Lukić's submission that the last-minute disclosure of witness statements prevented him from effectively preparing for witness cross-examination, the Prosecution again argues that Lukić fails to allege "any specific instance of prejudice".³²⁰ It claims that Lukić was supposed to request any relief he deemed necessary from the Trial Chamber at the appropriate time, which he failed to do.³²¹ Concerning Lukić's assertion that the Trial Chamber pressured him to withdraw part of his motion requesting alteration of the court schedule, the Prosecution submits that the Trial Chamber in fact found that the relevant part of the motion could constitute offensive conduct under Rule 46(A) of the Rules.³²²

99. In reply, Lukić argues that the extended sitting schedule had a "dramatic and significant" effect upon his ability to prepare for trial, which was already hampered by the "severe problems and limitations" imposed on his pre-trial preparation.³²³ With respect to the Rule 70 documents, Lukić claims that they show that, contrary to the Trial Chamber's findings: (i) the Kosovo Liberation Army ("KLA") was both present and active in Peć/Peja and Đakovica/Gjakova during the bombing by the North Atlantic Treaty Organization ("NATO"); (ii) the civilian population in

³¹⁴ Lukić's Appeal Brief, para. 55, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Alteration of Court Schedule, 20 February 2008 ("Decision of 20 February 2008"), para. 10, Procedural Matters, 4 Mar 2008, T. 23666-23668.

³¹⁵ Lukić's Appeal Brief, para. 55.

³¹⁶ Prosecution's Response Brief (Lukić), paras 49-50.

³¹⁷ Prosecution's Response Brief (Lukić), para. 63.

³¹⁸ Prosecution's Response Brief (Lukić), para. 63, referring to Decision of 20 February 2008, para. 6.

³¹⁹ Prosecution's Response Brief (Lukić), para. 42, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence Motions for Admission of Documents From Bar Table, 11 June 2008 ("Decision of 11 June 2008"), paras 106-110.

³²⁰ Prosecution's Response Brief (Lukić), para. 64.

³²¹ Prosecution's Response Brief (Lukić), para. 64, referring to Trial Judgement, vol. 1, para. 48.

³²² Prosecution's Response Brief (Lukić), para. 63, referring to Decision of 20 February 2008, paras 7, 12.

Priština/Prishtina feared the NATO bombing and was leaving the area due to the resultant hardships; and (iii) there was an exchange of information and cooperation between “KLA informants on the ground and NATO”.³²⁴ Lukić argues that if these documents had been available during the Prosecution case, they could have been used to undermine the credibility of, *inter alia*, witness Shaun Byrnes.³²⁵

(b) Analysis

100. The Appeals Chamber recalls that the primary duty of the trial chamber is to safeguard the fairness of the trial, ensuring that the proceedings are conducted with full respect for the rights of the accused.³²⁶ In this context, the Appeals Chamber also recalls that the right to be tried without undue delay is provided under Article 21(4)(c) of the Statute and embodied in numerous international human rights instruments and is “an inseparable and constituent element of the right to a fair trial.”³²⁷ Accordingly, the trial chamber has a duty to be proactive in ensuring that the accused is tried without undue delay, regardless of whether the accused himself asserts that right.³²⁸ In addition, the Appeals Chamber recalls that:

[p]rocedural equality requires that the concept of a fair trial be applied taking into account the interests of both parties. The Prosecution acts on behalf of and in the interests of the international community. Thus, as the international community has an interest in the enforcement of such guarantee, it cannot be deprived of it by the mere circumstance that the Appellant would like to waive his own entitlement to a fair trial.³²⁹

³²³ Lukić’s Reply Brief, para. 20. In this respect Lukić reiterates his arguments that at the time of joinder he had only three months of pre-trial preparation and that by the time the trial commenced he had less than 64% of the pre-trial preparation time that was required by the complexity level of his case (Lukić’s Reply Brief, paras 21-22).

³²⁴ Lukić’s Reply Brief, para. 17, referring to Trial Judgement, vol. 2, paras 30, 48, 115, 230, 233, 887.

³²⁵ Lukić’s Reply Brief, para. 18.

³²⁶ See Article 20(1) of the Statute.

³²⁷ *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006, para. 17, citing *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-AR73.5, Decision on Interlocutory Appeal by the Accused Zoran Žigić Against the Decision of Trial Chamber I Dated 5 December 2000, 25 May 2001 (“*Kvočka* Decision of 25 May 2001”), para. 20. See also *Prosecutor v. Jadranko Prlić et al.*, Case 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 on Association of Defence Counsel’s Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 (“*Prlić* Decision of 4 July 2006”), p. 4, fn. 18, referring to Article 14(3)(c) of the ICCPR, Article 6(1) of the ECHR, Article 8(1) of the ACHR.

³²⁸ This is consistent with the interpretation provided by the HRCee and the ECtHR to the relevant international human rights instruments. For instance, in *Pratt and Morgan v. Jamaica*, the HRCee held that the responsibility for the delay in the delivery of the Court of Appeal’s written judgement was attributable to the judicial authorities only and that “[t]his responsibility is neither dependent on a request for production by the accused in a trial nor is non-fulfilment of this responsibility excused by the absence of a request from the accused.” (*Pratt and Morgan v. Jamaica* Communication No. 210/1986 and 225/1987, 6 April 1989, para. 13.4). In *Doran v. Ireland* the ECtHR held that “whether or not a system allows a party to apply to expedite proceedings, the courts are not exempted from ensuring that the reasonable time requirement of Article 6 is complied with, as the duty to administer justice expeditiously is incumbent in the first place on the relevant authorities” (*Doran v. Ireland*, ECtHR, no. 50389/99, 31 July 2003, para. 47, ECHR 2003-X (extracts)). See also *Philis v. Greece (no. 2)*, ECtHR, no. 19773/92, 27 June 1997, para. 49, *Reports of Judgments and Decisions* 1997-IV.

³²⁹ *Kvočka* Decision of 25 May 2001, para. 21, referring to *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 25.

101. The Appeals Chamber is mindful, however, that in cases of significant scope and complexity such as the present one, the trial chamber's duty to ensure the expeditiousness of the trial will often entail a delicate balancing of interests.³³⁰ In upholding the overall fairness of the proceedings, while the trial chamber must ensure that the proceedings do not suffer undue delays and that the trial is completed within a reasonable time, it must equally ascertain that the proceedings are not compromised by the imposition of excessive time constraints. In this regard, the Appeals Chamber has held that logistical considerations should not take priority over the trial chamber's duty to safeguard the fairness of the proceedings.³³¹

102. In its Order of 15 September 2006, the Trial Chamber scheduled hearings from 9:00 a.m. to 5:30 p.m. for the trial week of 25 September 2006.³³² Following the submissions of the parties that the extended sitting schedule had had an adverse impact upon their ongoing trial preparation,³³³ in its Decision of 9 October 2006 the Trial Chamber held that it:

will sit longer hours when courtroom availability permits and the Chamber deems it appropriate, but such sittings will generally not exceed five hours per day, and any period of extended hours normally will be followed by an equivalent period when the Chamber sits only half-days.³³⁴

103. On 2 November 2006, all of the accused again objected to the "full day" sittings scheduled for most of the last week of November 2006, emphasising in particular that Pavković, Lazarević, and Lukić had insufficient time for pre-trial preparation and were relying on out-of-court time to catch up.³³⁵ It was indicated that the full-day sittings allowed Pavković and Lukić time only for the preparation of the cross-examination of witnesses who were to testify on the following day.³³⁶ Consequently, the accused requested that the Trial Chamber proceed with half-day sittings until the

³³⁰ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.12, Decision on Slobodan Praljak's Appeal of the Trial Chamber's 13 October 2008 Order Limiting the Translation of Defence Evidence, 5 December 2008 ("Prlić Decision of 5 December 2008"), para. 28, referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007 ("Prlić Decision of 6 February 2007"), para. 16.

³³¹ *Haradinaj et al.* Appeal Judgement, para. 46. See also *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Corrigendum to Judgement of 19 July 2010, 23 July 2010, p. 1.

³³² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Scheduling Order and Decision on Joint Defence Motion to Modify Trial Schedule for Trial Week Beginning 25 September 2006, 15 September 2006 ("Order of 15 September 2006"), para. 12.

³³³ Procedural Matters, 29 Sep 2006, T. 4431-4441.

³³⁴ Decision of 9 October 2006, p. 6.

³³⁵ Joint Defence Motion of 2 November 2006, paras 1, 4-5, referring in particular to the inability of the accused to carry out the following activities: "[c]ontinuing the perusal of Rule 68 material in EDS; organising the defence case, choosing witnesses, reviewing potential exhibits; submitting materials to [the Tribunal's Conference and Language Services Section ("CLSS")] for translation; reviewing materials provided during trial by the [Prosecution]; preparing submissions on matters arising during trial; reading and categorising exhibits admitted by the Chamber; meeting with and taking instructions from the accused; conducting legal research into matters arising in the trial or which will be significant at submission time revealed by the evidence; analysing and organising testimony and exhibits received to date; and more."

³³⁶ Joint Defence Motion of 2 November 2006, para. 4.

end of the trial.³³⁷ In its Scheduling Order of 15 November 2006, the Trial Chamber stated that “adequate rest periods [have been] built into the trial schedule so that the parties have adequate time to prepare their cases, especially the Defence.”³³⁸ The Trial Chamber noted that: (i) there were no hearings on 15 September 2006, from 2 until 6 October 2006, 20, 23 and 24 October 2006; (ii) an extended winter recess had been scheduled and a two-week break was likely to take place in April 2007; and (iii) the parties would be able to benefit from a four-week summer recess in 2007 in order to advance with their trial preparation.³³⁹ Furthermore, it scheduled hearings not exceeding five hours per day for 20 to 24 November, 27 to 30 November 2006, 1 December, 4 to 8 December 2006, and 11 to 15 December 2006.³⁴⁰

104. The Appeals Chamber observes that, contrary to Pavković’s assertion, the reasoning of both the Decision of 9 October 2006 and the Scheduling Order of 15 November 2006 shows that the Trial Chamber was cognisant of the need to strike a proper balance between ensuring the expeditious conduct of the proceedings and the need for the accused to have sufficient time for the preparation of their defence. For instance, in the Decision of 9 October 2006 the Trial Chamber noted the parties’ concerns that the extended sitting schedule had adversely impacted upon their ongoing trial preparations.³⁴¹ Further, in the Scheduling Order of 15 November 2006 the Trial Chamber explicitly considered Article 20 of the Statute and its obligation to ensure that the trial was both fair and expeditious.³⁴² It also referred to Article 21 of the Statute, emphasising that an accused is entitled to adequate time and facilities for the preparation of his defence.³⁴³ Moreover, the Trial Chamber took into account the number of non-sitting days that would allow the Defence adequate time to prepare.³⁴⁴ In light of these considerations, the Appeals Chamber finds Pavković’s assertion that the Trial Chamber was “unconcerned about justice” to be unfounded.³⁴⁵

105. Furthermore, the Appeals Chamber is not satisfied that either Pavković or Lukić has shown that the Trial Chamber abused its discretion in ordering longer sitting sessions. The Appeals Chamber notes that the Trial Chamber’s approach articulated in the Decision of 9 October 2006 was sufficiently flexible in that it provided for equal periods of extended and half-day sitting sessions and stated that such extended sessions would only take place when the circumstances were conducive. Moreover, in its Scheduling Order of 15 November 2006, the Trial Chamber was

³³⁷ Joint Defence Motion of 2 November 2006, para. 11.

³³⁸ Scheduling Order of 15 November 2006, para. 2.

³³⁹ Scheduling Order of 15 November 2006, para. 3, fn. 4, citing Order of 15 September 2006, para. 9.

³⁴⁰ Scheduling Order of 15 November 2006, para. 4.

³⁴¹ Decision of 9 October 2006, p. 3.

³⁴² Scheduling Order of 15 November 2006, para. 1.

³⁴³ Scheduling Order of 15 November 2006, para. 1.

³⁴⁴ See *supra*, para. 103. See also Scheduling Order of 15 November 2006, para. 2.

³⁴⁵ Pavković’s Appeal Brief, para. 348, referring to Scheduling Order of 15 November 2006.

particularly mindful that a number of non-sitting days would allow the parties to advance with their trial preparation work.³⁴⁶ Neither Pavković nor Lukić has shown that the periods with no court hearings envisaged by the Trial Chamber were insufficient to meet their trial preparation needs.

106. Moreover, the records show that the hearings on only 79 out of 287 trial days lasted approximately five hours or more, which amounts to about 28% of the total number of trial days in the case. In addition, there were only three days of court hearings in April 2007 and the Defence benefited from a three-month break between the end of the Prosecution case and the beginning of the Defence case.³⁴⁷ Further, Pavković and Lukić did not commence the presentation of their cases until 22 October 2007³⁴⁸ and 7 February 2008³⁴⁹ respectively, thus having had additional time for preparation. Neither Pavković nor Lukić has demonstrated that, overall, the periods of non-sitting days combined with the half-day sitting sessions were insufficient for the purposes of their ongoing trial preparation.

107. As for Lukić's argument that the extended sitting schedule eventually hampered his health and that of his counsel, the Appeals Chamber notes that, when alerted to Lukić's need to follow a specific medical regime, the Trial Chamber ordered that for the remainder of the presentation of Lukić's case every alternate sitting day would be limited to four hours of trial hearing.³⁵⁰ Lukić does not allege that the trial schedule continued to be detrimental to his or his counsel's health despite the measures adopted by the Trial Chamber.

108. As to Lukić's submission that due to the longer sitting hours "essential attorney-client meetings" did not take place, the Appeals Chamber notes that Lukić has failed to particularise his assertion and to explain why he could not arrange the meetings in question on the days when the trial schedule provided for five or less hours of sittings. Considering the overlap in Lukić's arguments, the Appeals Chamber will address his allegation that the Trial Chamber abused its discretion by demanding the withdrawal of part of his motion requesting alteration of the court schedule when addressing his submissions alleging bias.³⁵¹

109. In view of the above, the Appeals Chamber finds that neither Pavković nor Lukić has shown that the Trial Chamber committed a discernible error in ordering trial sittings exceeding four hours per day.

³⁴⁶ Scheduling Order of 15 November 2006, paras 2-3.

³⁴⁷ Evidentiary Matters, 1 May 2007, T. 12306; Milutinović Opening Statement, 6 Aug 2007, T. 12852 *et seq.*

³⁴⁸ Velimir Obradović, 22 Oct 2007, T. 17357 *et seq.*

³⁴⁹ Procedural Matters, 7 Feb 2008, T. 21840.

³⁵⁰ Decision of 20 February 2008, para. 10.

³⁵¹ See *infra*, sub-section III.D.2.(b)(iii)d.

4. Alleged prejudice caused by lack of translation resources

(a) Submissions of the parties

110. Lukić asserts that, due to the Tribunal's insufficient translation resources, he was denied a full and fair opportunity to present evidence, as certain documents were refused admission solely due to a lack of translation.³⁵² He submits in this regard that, because he was the last accused to present his case, CLSS gave priority to the translation requests filed by the other co-accused in the case.³⁵³

111. Lukić explains that all documents on his Rule 65 *ter* list were submitted for translation to CLSS, which raised concerns relating to its limited translation capacity.³⁵⁴ According to Lukić, the Trial Chamber encouraged CLSS and Lukić's Defence team to reach an agreement on the matter, which they did.³⁵⁵ Pursuant to that agreement, Lukić was allegedly required to withdraw all documents so that, following a review of priorities and a re-assessment of deadlines, new requests for translation could be made.³⁵⁶ However, Lukić submits that, while the process was still underway, the Trial Chamber ordered that all un-translated documents on his Rule 65 *ter* list be submitted to CLSS by 30 November 2007.³⁵⁷ Although Lukić attempted to comply with the Trial Chamber's order, CLSS allegedly objected to the translation requests, viewing them as a breach of the previous agreement reached with Lukić's Defence team.³⁵⁸ Therefore, Lukić argues that the Trial Chamber's Order of 14 November 2007 and two subsequent decisions were erroneous, prejudicial,³⁵⁹ and resulted in a lack of adequate time and facilities for translation of the evidence.³⁶⁰

112. The Prosecution responds that Lukić fails to identify a discernible error in the Trial Chamber's Order of 14 November 2007.³⁶¹ It further contends that Lukić had adequate time and facilities to have the documents he intended to present as evidence translated³⁶² and that his position as the last accused to present his case afforded him the maximum amount of time to obtain

³⁵² Lukić's Appeal Brief, para. 65.

³⁵³ Lukić's Appeal Brief, para. 66.

³⁵⁴ Lukić's Appeal Brief, para. 66.

³⁵⁵ Lukić's Appeal Brief, para. 66.

³⁵⁶ Lukić's Appeal Brief, para. 66.

³⁵⁷ Lukić's Appeal Brief, para. 66, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order on Timing of Motions Prior to Winter Recess and Presentation of Lukić Defence Case, 14 November 2007 ("Order of 14 November 2007").

³⁵⁸ Lukić's Appeal Brief, para. 66(d).

³⁵⁹ Lukić's Appeal Brief, para. 66, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence (1) First, Second, Third, and Fourth Motions for Further Enlargement of Time in Relation to Motions for Admission of Documents from Bar Table and (2) Motion for Leave to File Replies, 2 June 2008 ("Decision of 2 June 2008"), *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence Motion for Reconsideration of Denial of Extension of Time and Leave to File Replies, 10 June 2008 ("Decision of 10 June 2008").

³⁶⁰ Lukić's Appeal Brief, para. 67.

³⁶¹ Prosecution's Response Brief (Lukić), para. 76, referring to Order of 14 November 2007.

³⁶² Prosecution's Response Brief (Lukić), para. 77, citing Decision of 10 June 2008, para. 5.

translations.³⁶³ Finally, the Prosecution claims that Lukić fails to specify any document from his Rule 65 *ter* list that was denied admission due to lack of translation and to identify any resulting prejudice.³⁶⁴

113. In reply, Lukić argues that the Prosecution’s assertion that, as the last accused to present his case, he had the maximum amount of time to obtain translations is incorrect.³⁶⁵ According to Lukić, the Head of CLSS informed him that his translation requests would not be dealt with, save for essential cross-examination documents, until the translations requested by the other co-accused had been completed.³⁶⁶ Lukić argues that being the last to present his case placed him at a disadvantage compared to his co-accused and reiterates that he “should not be penalized for administrative decisions of CLSS that are beyond his control and the inadequate resources made available for CLSS in light of the trial schedule.”³⁶⁷

(b) Analysis

114. The Appeals Chamber notes that the Trial Chamber’s decisions setting time limits within which Lukić was required to file the translations of the exhibits on his Rule 65 *ter* list are discretionary decisions to which the Appeals Chamber must accord deference.³⁶⁸ It further recalls that, pursuant to Rule 3(E) of the Rules, “[t]he Registrar shall make any necessary arrangements for interpretation and translation into and from the working languages” of the Tribunal. This obligation does not imply, however, that the parties have unlimited access to the translation resources of the Tribunal. Rather, a trial chamber may impose certain limitations provided that they are consistent with the right of the accused to have adequate time and facilities for the preparation of his defence.³⁶⁹ Any such limitations must be based on a reasonable assessment of the Defence needs of each particular accused in a multi-accused trial, taking into account the legal and factual complexity of the case.³⁷⁰ Accordingly, it is not appropriate to limit a party’s access to translation resources solely because of CLSS capacity restraints.³⁷¹

115. Turning to the specific circumstances of the case, the Appeals Chamber notes that, pursuant to the Trial Chamber’s Order of 5 March 2007, all of the accused were to file their Rule 65 *ter*

³⁶³ Prosecution’s Response Brief (Lukić), para. 78, referring to Decision of 10 June 2008, para. 6.

³⁶⁴ Prosecution’s Response Brief (Lukić), para. 79.

³⁶⁵ Lukić’s Reply Brief, para. 23.

³⁶⁶ Lukić’s Reply Brief, para. 23.

³⁶⁷ Lukić’s Reply Brief, para. 23.

³⁶⁸ *Cf. Krajišnik* Appeal Judgement, para. 81, and references therein.

³⁶⁹ See Article 21(4)(b) of the Statute. See also *Prosecutor v. Jadranko Prlić et al.*, Case 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 (“*Prlić* Decision of 4 September 2008”), para. 25.

³⁷⁰ See *Prlić* Decision of 5 December 2008, para. 28, referring to *Prlić* Decision of 6 February 2007, para. 16.

³⁷¹ *Prlić* Decision of 5 December 2008, para. 24.

exhibit lists by 15 June 2007 and to serve upon the Prosecution copies of the exhibits translated into English where necessary.³⁷² As Lukić was unable to comply with this deadline, the Trial Chamber attempted to facilitate the translation process by mediating between him and CLSS.³⁷³ It also held a meeting with Lukić’s Defence team and the Office of Legal Aid and Detention Matters (“OLAD”) over the provision of additional resources so that Lukić could hire a translator for translations of documents that were rejected by CLSS due to its capacity constraints.³⁷⁴

116. In its Order of 14 November 2007, the Trial Chamber expressed its concern over the fact that, despite these efforts, Lukić had still not submitted many documents included in his Rule 65 *ter* exhibit list for translation.³⁷⁵ Noting that documents that had not been translated might be denied admission, the Trial Chamber ordered Lukić to submit all un-translated documents on his Rule 65 *ter* exhibit list to CLSS by 30 November 2007, “in accordance with the required procedures of CLSS, along with an indication of the order in which the Lukić Defence would like them to be translated.”³⁷⁶ The Trial Chamber explicitly took into account “the recent attempts by the Lukić Defence and the Registry to translate a number of documents” and encouraged Lukić to “take a practical approach” in its cooperation with CLSS.³⁷⁷ In addition, throughout the presentation of Lukić’s case, the Trial Chamber adopted the practice of admitting documents pending translation.³⁷⁸ On 21 May 2008, the Trial Chamber ordered Lukić to submit all outstanding translations by 30 May 2008.³⁷⁹ In a subsequent motion, Lukić requested an extension of the time limit, enclosing his communication with CLSS, according to which CLSS was unable to complete all Lukić’s requests for translation by 30 May 2008.³⁸⁰ Both the motion and Lukić’s subsequent request for reconsideration were denied by the Trial Chamber on 2 June 2008 and 10 June 2008 respectively.³⁸¹

117. The Appeals Chamber observes that, in its Decision of 2 June 2008, the Trial Chamber reaffirmed its oral order setting 30 May 2008 as the final date by which all outstanding translations of exhibits were to be submitted.³⁸² The Trial Chamber held that, in light of the extension of nearly a year that Lukić had already been granted, no further extension beyond 30 May 2008 was

³⁷² Order of 5 March 2007, para. 8(d)(ii).

³⁷³ Order of 14 November 2007, para. 3; Decision of 2 June 2008, para. 6.

³⁷⁴ Decision of 10 June 2008, para. 5.

³⁷⁵ Order of 14 November 2007, para. 3.

³⁷⁶ Order of 14 November 2007, para. 6(b).

³⁷⁷ Order of 14 November 2007, paras 3, 5.

³⁷⁸ Decision of 2 June 2008, para. 8.

³⁷⁹ Evidentiary Matters, 21 May 2008, T. 26560-26561.

³⁸⁰ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Motion for Enlargement of Time to Provide Translations of Documents with Exhibit A, 29 May 2008 (“Lukić’s Motion of 29 May 2008”), p. 3. See also *ibid.*, Exhibit A.

³⁸¹ Decision of 2 June 2008, para. 15; Decision of 10 June 2008, para. 14.

³⁸² Decision of 2 June 2008, paras 8, 15, referring to Evidentiary Matters, 21 May 2008, T. 26560-26561.

warranted.³⁸³ The Appeals Chamber finds that the Trial Chamber erred in reaching this conclusion. While not explicitly imposing a limit on the number of pages that Lukić was entitled to have translated by CLSS, the Trial Chamber effectively limited his access to the translation resources of the Tribunal by setting deadlines within which CLSS was unable to complete all of Lukić's outstanding requests for translation due to its capacity constraints.³⁸⁴ As recalled above, when imposing such limitations, a trial chamber is required to ensure that the allotted resources are reasonably sufficient in light of the complexity and number of issues to be litigated.³⁸⁵ The Trial Chamber failed to make this assessment and to adequately consider whether the extension of time given to Lukić to obtain translations was in fact sufficient for him to have adequate time and facilities for the preparation of his defence.

118. Further, in its Decision of 10 June 2008, the Trial Chamber reiterated that every effort had been made to assist Lukić in translating the documents he sought to be admitted into evidence and that he had been provided with more time and resources than any other accused.³⁸⁶ However, the Trial Chamber again failed to assess whether the additional resources provided were indeed sufficient in light of the specific needs of Lukić's case. In addition, the Appeals Chamber recalls that whereas a comparison between resources allocated to co-accused is relevant to ensure the fair treatment of each defendant *vis-à-vis* each other, the Trial Chamber must ultimately make a separate assessment of the resources available to each accused in order to ensure that these resources are sufficient for the conduct of that accused's case pursuant to Article 21(4)(b) of the Statute.³⁸⁷

119. Accordingly, the Appeals Chamber finds that in its Decisions of 2 June 2008 and 10 June 2008 the Trial Chamber committed a discernible error in failing to make an individualised assessment of the resources needed by Lukić for the translation of documents to ensure the effective presentation of his case.

120. As to whether the Trial Chamber's error resulted in prejudice to Lukić, the Appeals Chamber notes that Lukić contends that he was denied a "full [and] fair opportunity" to present evidence and that "critical" documents were refused admission solely due to lack of translation.³⁸⁸ However, he has failed to particularise his assertion by identifying the relevant findings of the Trial Chamber denying the admission of the documents or by providing reference to documents the non-

³⁸³ Decision of 2 June 2008, para. 9.

³⁸⁴ See Lukić's Motion of 29 May 2008, Exhibit A.

³⁸⁵ See *supra*, para. 114.

³⁸⁶ Decision of 10 June 2008, paras 3, 7.

³⁸⁷ *Prlić* Decision of 4 September 2008, para. 20.

³⁸⁸ Lukić's Appeal Brief, paras 65, 67.

admission of which resulted in prejudice.³⁸⁹ In other words, Lukić has failed to show that the time and translation resources that were allocated to him were indeed insufficient. Accordingly, the Appeals Chamber finds that Lukić has failed to demonstrate that the Trial Chamber's error resulted in prejudice to him.

5. Conclusion

121. The Appeals Chamber recalls that it has found no error in the Trial Chamber's decision to join the *Milutinović et al.* case with the *Pavković et al.* case, the scheduling of the trial, or the management of the trial proceedings. The Appeals Chamber is satisfied that throughout the proceedings the Trial Chamber gave proper consideration to all the submissions of Pavković and Lukić and took the necessary measures to ensure that Pavković and Lukić had adequate time and facilities to prepare their defence.

122. The Appeals Chamber notes that the presentation of the Prosecution case began more than a year after Pavković's and Lukić's surrender to the Tribunal³⁹⁰ and the presentation of their respective cases commenced 15 and 18 months after the start of the trial.³⁹¹ Further, shortly after their transfer to the Tribunal and throughout the proceedings, both Pavković and Lukić had the assistance of counsel. Both lead counsel were provided with the maximum funding available – a lump-sum for a level three complexity case – to be used in the manner they considered best suited to the preparation of the defence. In addition, mindful of its continuous obligation to ensure that the parties had sufficient time for trial preparation, the Trial Chamber allowed for multiple breaks in the hearing of evidence, including no court hearings in April 2007, with the exception of three days, and a three-month break between the end of the Prosecution case and the beginning of the Defence case.³⁹² Pavković and Lukić have failed to demonstrate that the impugned decisions fell outside the scope of the Trial Chamber's discretion or occasioned prejudice to them. Based on a holistic assessment of the Trial Chamber's management of the proceedings, the Appeals Chamber finds that

³⁸⁹ Moreover, the Appeals Chamber recalls that, on 15 December 2009, Lukić sought the admission as additional evidence on appeal of a number of documents which were denied admission by the Trial Chamber due to the lack of translation (Sreten Lukic's [*sic*] Motion to Present Additional Evidence Before Appeals Chamber, 15 December 2009 ("Lukić's First Rule 115 Motion"), Annex A, referring to documents marked 6DA1 (formerly document Marked Not Admitted ("MNA") 6D1323), 6DA3 (formerly document MNA 6D1322), 6DA5 (formerly document MNA 6D1262), 6DA6 (formerly document MNA 6D1263), 6DA7 (formerly document MNA 6D1264), 6DA8 (formerly document MNA 6D1265), 6DA9 (formerly document MNA 6D1266), 6DA10 (formerly document MNA 6D1648), 6DA11 (formerly document MNA 6D1649), 6DA12 (formerly document MNA 6D1109), 6DA13 (formerly document MNA 6D1111), 6DA14 (formerly document MNA 6D1115), 6DA15 (formerly document MNA 6D1116), 6DA16 (formerly document MNA 6D1117)). On 11 March 2010, the Appeals Chamber dismissed Lukić's request, finding that he had failed to show that the documents sought to be admitted could have affected the verdict (Decision on Sreten Lukic's First Motion to Admit Additional Evidence on Appeal, 11 March 2010 ("Lukić First Rule 115 Decision"), paras 27, 32, 44, 50-51, 56). Consequently, those documents cannot be considered as "critical" to his case.

³⁹⁰ Pavković surrendered on 25 April 2005 and Lukić surrendered on 4 April 2005 (Joinder Decision, p. 3).

³⁹¹ See *supra*, para. 106.

³⁹² See *supra*, para. 106.

Pavković and Lukić were accorded adequate time and facilities for the preparation of their defence and dismisses their arguments to the contrary.

C. Alleged violation of the principle of equality of arms

123. The Appeals Chamber recalls that it is well established in the Tribunal's jurisprudence that the principle of equality of arms, which goes to the heart of the fair trial guarantee, requires that neither party is put at a disadvantage when presenting its case.³⁹³ When assessing whether this balance has been properly struck "a principle of basic proportionality, rather than a strict principle of mathematical equality" applies.³⁹⁴ Accordingly, ensuring that the accused has been provided with an adequate opportunity to present his case does not necessarily require affording him the same amount of time or the same number of witnesses afforded to the Prosecution.³⁹⁵ Rather, the time granted to an accused "must be reasonably proportional to the time allocated to the Prosecution, and objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights under Article 21 of the Statute."³⁹⁶ Further, the Appeals Chamber recalls that trial chambers enjoy considerable discretion with regard to the allocation of time to the parties for the presentation of their cases.³⁹⁷

1. Alleged difficulties in visiting crime sites in Kosovo

124. Lukić argues that he experienced difficulties in visiting crime sites in Kosovo relevant to the preparation of his defence. He submits that "[d]ue to the restrictions on the size of this brief" he cannot substantiate this assertion and adopts by reference the relevant arguments set forth by

³⁹³ *Krajišnik* Appeal Judgement, para. 106, citing *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 ("Orić Decision of 20 July 2005"), para. 7. The ECtHR has defined the principle of equality of arms as requiring "each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent" (*Zhuk v. Ukraine*, ECtHR, no. 45783/05, 21 October 2010, para. 25; *Kress v. France* [GC], ECtHR, no. 39594/98, 7 June 2001, para. 72, ECHR 2001-VI). The ECtHR has also stated that the principle implies "the opportunity for the parties to have knowledge of and discuss all evidence adduced or observations filed with a view to influencing the court's decision" (*Užkauskas v. Lithuania*, ECtHR, no. 16965/04, 6 July 2010, para. 45; *Fretté v. France*, ECtHR, no. 36515/97, 26 February 2002, para. 47, ECHR 2002-I). The HRCee has also held that "the right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant" (HRCee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (27 July 2007)).

³⁹⁴ *Krajišnik* Appeal Judgement, para. 106, citing *Orić* Decision of 20 July 2005, para. 7.

³⁹⁵ *Krajišnik* Appeal Judgement, para. 106, citing *Orić* Decision of 20 July 2005, para. 7.

³⁹⁶ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendants Appeal Against "Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge", 1 July 2008 ("Prlić Decision of 1 July 2008"), para. 16, referring to *Orić* Decision of 20 July 2005, paras 8-9.

³⁹⁷ *Lukić and Lukić* Appeal Judgement, para. 17, referring to *Krajišnik* Appeal Judgement, paras 81, 99.

Ojdanić in this regard.³⁹⁸ The Prosecution responds that Lukić’s arguments warrant summary dismissal.³⁹⁹

125. The Appeals Chamber recalls that, where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that a trial chamber violated a provision of the Statute and/or the Rules and that this caused prejudice to the *alleging party*, such as to amount to an error of law invalidating the trial judgement.⁴⁰⁰ The Appeals Chamber further recalls that, absent special circumstances, a party cannot remain silent on a matter at trial only to raise it for the first time on appeal.⁴⁰¹ The Appeals Chamber notes that Lukić has failed to: (i) identify the difficulties which he in particular encountered in visiting crime sites in Kosovo; (ii) specify the efforts he made, if any, to bring this issue to the attention of the Trial Chamber; (iii) articulate an error in the Trial Chamber’s adjudication on this matter; and (iv) identify the resulting prejudice he suffered. In adopting by reference arguments concerning alleged violations of Ojdanić’s right to a fair trial, which were subsequently withdrawn, Lukić has failed to meet his burden on appeal.⁴⁰² Moreover, the Appeals Chamber recalls that Lukić was granted a considerable extension of the word limit for his Appeal Brief.⁴⁰³ Therefore, the word limit, as such, was no impediment to his ability to present salient and cogent arguments in this regard.

126. For the foregoing reasons, the Appeals Chamber dismisses Lukić’s arguments.

2. Time allocated for the presentation of Lukić’s case

(a) Submissions of the parties

127. Lukić submits that, in response to his submission that he did not have adequate time “simultaneously to prepare for the cross-examination of Prosecution witnesses, for [his] Rule 98 *bis* submission and for the Defence case”, in its Decision of 23 May 2007, the Trial Chamber altered the date of the commencement of the defence cases without amending the briefing schedule.⁴⁰⁴ Lukić avers that he was nevertheless able to identify 109 witnesses and approximately 400 exhibits, although exhibits were “constantly being received and added through the defence case.”⁴⁰⁵

³⁹⁸ Lukić’s Appeal Brief, para. 68.

³⁹⁹ Prosecution’s Response Brief (Lukić), para. 80.

⁴⁰⁰ *Lukić and Lukić* Appeal Judgement, para. 17, referring to *Haradinaj et al.* Appeal Judgement, para. 17, *Krajišnik* Appeal Judgement, para. 28, *Galić* Appeal Judgement, para. 21, *Kordić and Čerkez* Appeal Judgement, para. 119.

⁴⁰¹ *Haradinaj et al.* Appeal Judgement, para. 112.

⁴⁰² In this regard, the Appeals Chamber notes that Lukić also failed to substantiate these submissions during the appeal hearing. See Appeal Hearing, 14 Mar 2013, AT. 482-570.

⁴⁰³ Decision on Defence Motions for Extension of Word Limit, 8 September 2009, p. 5.

⁴⁰⁴ Lukić’s Appeal Brief, paras 56-57, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Joint Defence Motion to Postpone Trial Schedule, 23 May 2007 (“Decision of 23 May 2007”).

⁴⁰⁵ Lukić’s Appeal Brief, para. 58.

128. As to the time afforded for the presentation of his case, Lukić argues that it was significantly less than the time afforded to the Prosecution, thus forcing him to reduce his witness list and the length and scope of witness examination.⁴⁰⁶ As a result, Lukić asserts that he managed to present “less than half” of his case and had to remove several former international observers from the witness list because he could not “locate/present them” within the allocated time.⁴⁰⁷ In this regard, Lukić emphasises that the Trial Chamber relied extensively upon the testimony of international observers called by the Prosecution in determining his criminal responsibility.⁴⁰⁸

129. The Prosecution responds that, with respect to the Decision of 23 May 2007, Lukić merely repeats his arguments presented at trial without showing that the Trial Chamber erred or that he suffered any prejudice.⁴⁰⁹ It also argues that the Trial Chamber was correct in setting the time limit for the presentation of the defence case.⁴¹⁰ The Prosecution adds that Lukić’s assertion that he had less than a third of the time accorded to the Prosecution is erroneous.⁴¹¹ It emphasises that Lukić had more time to present his case than any of his co-accused and that he called the largest number of witnesses.⁴¹² As to Lukić’s purported difficulties in locating several international observers and presenting their evidence, the Prosecution submits that Lukić fails to specify whether he sought any relief from the Trial Chamber in this respect or to explain why he could not have sought admission of their written statements pursuant to Rule 92 *bis* or Rule 92 *ter* of the Rules.⁴¹³

(b) Analysis

130. In its Decision of 23 May 2007, the Trial Chamber granted in part a request submitted by all six accused for a delay in the commencement of the Defence cases, refusing, however, to extend the deadline for the filing of the Rule 65 *ter* submissions or to reschedule the Pre-Defence Conference.⁴¹⁴ The Appeals Chamber observes that, apart from stating that the Trial Chamber did not grant the request for amendment of the briefing schedule, Lukić has failed to identify any purported error in the Trial Chamber’s exercise of its discretion. His general assertion that he was “receiv[ing] and add[ing]” evidence during the presentation of his case is not sufficient to show that

⁴⁰⁶ Lukić’s Appeal Brief, para. 60, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Use of Time Remaining for Defence Phase of Trial, 21 November 2007 (“Decision of 21 November 2007”).

⁴⁰⁷ Lukić’s Appeal Brief, para. 61, referring to Dietmar Hartwig, John Christopher Clark, Richard Haeslip, Guy Sands, and Keith Roland.

⁴⁰⁸ Lukić’s Appeal Brief, para. 61, referring to Trial Judgement, vol. 3, paras 1041-1048.

⁴⁰⁹ Prosecution’s Response Brief (Lukić), paras 65-68.

⁴¹⁰ Prosecution’s Response Brief (Lukić), para. 69, referring to *Orić* Decision of 20 July 2005, para. 7.

⁴¹¹ The Prosecution asserts that it used only 166 hours of the allocated 260 hours for the presentation of its evidence (Prosecution’s Response Brief (Lukić), para. 69).

⁴¹² Prosecution’s Response Brief (Lukić), para. 70.

⁴¹³ Prosecution’s Response Brief (Lukić), para. 71.

⁴¹⁴ Decision of 23 May 2007, paras 4-5. See also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Urgent Joint Defence Request to Reschedule the Timetable for the Filing of Rule 65 *ter* Submissions, the Pre-Defence Conference, and the Commencement of the Defence Case, 21 May 2007.

the Trial Chamber erred in denying the requested amendment to the briefing schedule.⁴¹⁵ Accordingly, the Appeals Chamber finds that Lukić's unsubstantiated submission does not merit detailed consideration on appeal and is therefore dismissed.

131. With respect to the allocation of time in this case, the Appeals Chamber recalls that at the outset of the trial the Trial Chamber decided not to impose time limits upon the parties, "relying instead upon the professional judgement of counsel".⁴¹⁶ As the trial progressed, the Trial Chamber found it necessary to allocate to the Prosecution approximately 260 hours for the presentation of its case-in-chief, of which the Prosecution used 166 hours.⁴¹⁷ The total time for the presentation of the defence cases was set at 240 hours⁴¹⁸ and the Trial Chamber encouraged the accused to reach an agreement on the division of this time among themselves.⁴¹⁹ Following the presentation of the case-in-chief of the other accused, the remaining time for the presentation of Lazarević's and Lukić's cases was 145 hours.⁴²⁰ As the two accused failed to reach an agreement on the division of this time, the Trial Chamber issued a decision on 21 November 2007, allocating 80 hours of the remaining 145 hours to Lukić.⁴²¹ Ultimately, Lukić completed the presentation of his case within 79 hours.⁴²²

132. The Appeals Chamber must first assess whether the 80 hours allocated to Lukić for the presentation of his case were reasonably proportionate to the time afforded to the Prosecution. At the outset, the Appeals Chamber notes that the Prosecution bears the burden of proving beyond a reasonable doubt every element of the crimes charged. By contrast, "[d]efense strategy [...] often focuses on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses".⁴²³ In addition, in a case of multiple accused, the Prosecution has to present evidence concerning issues common to all the accused and to further tailor its time so that it can prove the guilt of each individual accused for each crime charged. On the other hand, while each accused should be allowed time to respond to the common elements of the Prosecution case, each accused is unlikely to challenge every piece of evidence presented by the Prosecution in relation to the individual responsibility of each co-accused.⁴²⁴ In the instant case, Lukić had at his disposal 80 hours for the presentation of his defence case, which is nearly half of the time actually

⁴¹⁵ Lukić's Appeal Brief, para. 58.

⁴¹⁶ Decision of 9 October 2006, p. 3, referring to Pre-Trial Conference, 7 Jul 2006, T. 359-360. See also, however, Rule 65 *ter* Conference, 30 Mar 2006, T. 155-157; Pre-Trial Conference, 31 Mar 2006, T. 167.

⁴¹⁷ See Decision of 21 November 2007, para. 1. See also Decision of 9 October 2006, pp. 4, 6.

⁴¹⁸ Pre-Defence Conference, 22 June 2007, T. 12847.

⁴¹⁹ Pre-Defence Conference, 22 June 2007, T. 12847-12848.

⁴²⁰ Decision of 21 November 2007, para. 4.

⁴²¹ Decision of 21 November 2007, paras 6, 9.

⁴²² Trial Judgement, vol. 1, fn. 29.

⁴²³ *Krajišnik* Appeal Judgement, para. 106, citing *Orić* Decision of 20 July 2005, para. 7.

⁴²⁴ *Prlić* Decision of 1 July 2008, paras 34-35.

used by the Prosecution in bringing its case against all six accused. In these circumstances, the Appeals Chamber finds that Lukić has failed to demonstrate that the time allocated by the Trial Chamber for the presentation of his defence case was unreasonably disproportionate.

133. The Appeals Chamber turns to consider whether the time allocated to Lukić was objectively adequate to permit him to present his case in a manner consistent with his fair trial rights. It recalls that, upon allocating 240 hours for the collective presentation of the defence cases, the Trial Chamber explicitly noted that, in light of the specifics of each defence case, it did not expect an even division of the allocated time among the co-accused.⁴²⁵ The Trial Chamber further explained that, in reaching this determination, it considered a variety of factors, including the significant amount of evidence that could be admitted by agreement or without being tendered through a witness.⁴²⁶ It also took into account the possibility that the evidence of a considerable number of defence witnesses could be presented through the means envisaged in Rule 92 *bis* and 92 *ter* of the Rules.⁴²⁷ Finally, the Trial Chamber emphasised that it was available to reconsider its decision whenever a proper justification for increasing the allocated time was presented.⁴²⁸ As such, the Trial Chamber's approach was sufficiently flexible and oriented towards the specific needs of each defence case.

134. As the case unfolded, the Trial Chamber determined the time for the presentation of the Lazarević and Lukić defence cases. In so doing, it explicitly took into account that Lukić was the only MUP member accused in the case and that there was consequently "a potentially not insignificant body of evidence relating to the MUP" and relevant to Lukić.⁴²⁹ For these reasons, the Trial Chamber allocated Lukić one third of the total time allowed for the presentation of the defence cases of all six accused, indicating again the possibility of altering its decision upon good cause being shown by the parties.⁴³⁰ At the time, Lukić did not contest the Trial Chamber's determination. The Appeals Chamber reiterates that a party is required to raise formally any issue of contention before the Trial Chamber and that failure to do so may result in the complainant having waived his right to raise the issue on appeal.⁴³¹ In any event, Lukić does not identify any error in the decision of the Trial Chamber.

⁴²⁵ Pre-Defence Conference, 22 Jun 2007, T. 12847.

⁴²⁶ Pre-Defence Conference, 22 Jun 2007, T. 12845-12846.

⁴²⁷ Pre-Defence Conference, 22 Jun 2007, T. 12846.

⁴²⁸ Pre-Defence Conference, 22 Jun 2007, T. 12847-12848.

⁴²⁹ Decision of 21 November 2007, para. 6.

⁴³⁰ Decision of 21 November 2007, paras 6, 9(d).

⁴³¹ *Boškoski and Tarčulovski* Appeal Judgement, para. 185, and references therein.

135. Concerning Lukić's submission that he was required to limit the length and scope of witness examination,⁴³² the Appeals Chamber recalls that the parties are expected to present their cases as efficiently as possible, taking advantage of all available avenues for presentation of relevant evidence, including those provided for under Rules 92 *bis* and 92 *ter* of the Rules.⁴³³ In his arguments on appeal, Lukić has failed to substantiate what efforts, if any, he made during the trial proceedings in order to present the evidence in the most efficient manner, and to demonstrate that despite such efforts, additional time for calling and examining witnesses was reasonably required. Lukić has further failed to specify whether he sought any relief from the Trial Chamber at the relevant time.

136. As regards the number of witnesses Lukić could call and his purported inability to present the evidence of five international observers, as noted above, the Trial Chamber repeatedly indicated that its decision on allocation of time was subject to reconsideration upon good cause being shown by a party.⁴³⁴ Lukić does not indicate that he explored this opportunity or that he notified the Trial Chamber of any difficulty in locating, calling, or examining witnesses whom he considered to be crucial for his case.

137. Accordingly, the Appeals Chamber finds that Lukić has failed to show that the Trial Chamber committed any discernible error in the allocation of time for the presentation of his defence case.

3. Method of time-keeping

(a) Submissions of the parties

138. Lukić submits that on numerous occasions the Trial Chamber applied an erroneous method of time-keeping, thus further reducing the time available for the presentation of his case.⁴³⁵ As an example, he points to the cross-examination of Radojko Stefanović which was recorded by the Trial Chamber as direct examination by Lukić and therefore more than one hour was counted towards the time allotted for the presentation of Lukić's case.⁴³⁶ He also claims that the Trial Chamber's questioning of witnesses remained under-reported and was counted towards the time allocated for

⁴³² Lukić's Appeal Brief, para. 60.

⁴³³ *Cf. Prlić* Decision of 1 July 2008, para. 23.

⁴³⁴ The Appeals Chamber further notes that, during the Pre-Defence Conference, Lukić admitted that his witness list included individuals he was not certain would actually testify, that the evidence of some witnesses could be presented pursuant to Rule 92 *bis* of the Rules, and that overall there was "some overlap built into [the] witness list to try and cover all the facts and areas" (Pre-Defence Conference, 22 Jun 2007, T. 12825-12827, 12838-12839).

⁴³⁵ Lukić's Appeal Brief, paras 63-64.

⁴³⁶ Lukić's Appeal Brief, paras 50, 63.

the presentation of his defence case.⁴³⁷ In this regard, Lukić refers to the direct examination of Miroslav Mijatović. According to Lukić, the Trial Chamber's interventions during the first day of the direct examination lasted almost half an hour.⁴³⁸ Lukić contends that the Trial Chamber's Decision of 16 April 2008 dealing with his objection to the recording of time revealed that, in addition to Stefanović's cross-examination, over four hours of cross-examination of other witnesses were erroneously counted towards the presentation of his defence case.⁴³⁹ As a result, Lukić asserts, the erroneous time-keeping practices employed by the Trial Chamber prevented his case from being "heard fully" and infringed upon his right to equality of arms.⁴⁴⁰

139. The Prosecution responds that the Trial Chamber did not abuse its discretion by deducting part of the time of Stefanović's cross-examination by Lukić from the time available for the presentation of Lukić's defence case.⁴⁴¹ As to Lukić's objection related to the Trial Chamber's questions put to Mijatović, the Prosecution notes that when the Trial Chamber intervened to clarify an issue during the examination of a party, this was properly calculated towards the time for the presentation of that party's case.⁴⁴² The Prosecution further submits that despite arguing that the Trial Chamber's practice of time-keeping unfairly reduced the time to present his case, Lukić fails to specify any alleged prejudice this occasioned him.⁴⁴³

(b) Analysis

140. As to Lukić's objection that Stefanović's cross-examination was partially counted by the Trial Chamber as direct examination by him, the Appeals Chamber recalls that, nearly five months earlier, in relation to the cross-examination of Miodrag Simić by Pavković, the Trial Chamber explained that, depending on the nature of the questions, a portion of the time spent by a party in cross-examining a witness could be counted towards the time for presentation of that party's case.⁴⁴⁴ Furthermore, in response to Lazarević's question as to how the parties would be notified about such an apportionment of time, the Presiding Judge emphasised that the information would be transmitted through the regular records on the use of time, which the parties would be able to

⁴³⁷ Lukić's Appeal Brief, para. 63.

⁴³⁸ Lukić's Appeal Brief, para. 63, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Sreten Lukić's [*sic*] Motion Objecting to the Registry's Record of Time in These Trial Proceedings, 26 March 2008 ("Motion of 26 March 2008"), para. 6, referring to Miroslav Mijatović, 12 Feb 2008, T. 22165-22167, 22169-22171, 22180-22181, 22185-22188, 22192-22194, 22200, 22217, 22219-22221, 22233-22234, *ibid.*, 13 Feb 2008, T. 22258-22260, 22267-22275.

⁴³⁹ Lukić's Appeal Brief, para. 64, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence Objection to February 2008 Report on Use of Time, 16 April 2008 ("Decision of 16 April 2008").

⁴⁴⁰ Lukić's Appeal Brief, para. 64.

⁴⁴¹ Prosecution's Response Brief (Lukić), para. 73.

⁴⁴² Prosecution's Response Brief (Lukić), para. 73, referring to Decision of 16 April 2008, para. 13.

⁴⁴³ Prosecution's Response Brief (Lukić), para. 74.

⁴⁴⁴ Miodrag Simić, 13 Sep 2007, T. 15548-15550.

contest.⁴⁴⁵ Accordingly, and contrary to Lukić's assertion of lack of prior notice, Lukić was alerted well in advance of the Trial Chamber's practice of counting time spent by a party in cross-examination towards the time allotted for the presentation of that party's case.

141. The Appeals Chamber notes that in a multi-accused trial a witness called by one co-accused may testify on subjects relevant to the case-in-chief of another co-accused.⁴⁴⁶ Where, during cross-examination, a co-accused questions a witness on issues that would otherwise be properly raised during the presentation of that accused's case-in-chief,⁴⁴⁷ it is not unreasonable for a trial chamber to count the time spent by the cross-examining party towards the time allotted for the presentation of that party's case-in-chief. In the present case, the Trial Chamber provided prior notice to the parties and afforded them an opportunity to contest any such counting towards the time allotted for the presentation of their case-in-chief.⁴⁴⁸ In these circumstances, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion.

142. Regarding the questioning of Mijatović, the Appeals Chamber recalls that under Rules 85(B) and 90(F) of the Rules, it is within a trial chamber's discretion to intervene where an issue requires clarification. A trial chamber may do so either by communicating with counsel or by directly clarifying the issue with the witness. As the Trial Chamber correctly observed, as long as its questions did not pursue an independent enquiry into the evidence of the witness, they were properly apportioned to the time of the examining party.⁴⁴⁹

143. Turning to the excerpts of the transcript referred to by Lukić,⁴⁵⁰ the Appeals Chamber observes that the Trial Chamber indeed intervened on several occasions during the testimony of Mijatović. A careful examination of those instances shows, however, that the Trial Chamber strictly confined its questions to issues arising from the testimony of the witness that required clarification, and did not pursue new lines of examination. Accordingly, the time taken by the Trial Chamber was properly counted towards the time apportioned for the presentation of Lukić's defence case. Lukić's arguments in this regard are dismissed.

⁴⁴⁵ Miodrag Simić, 13 Sep 2007, T. 15550.

⁴⁴⁶ *Cf. Prlić* Decision of 1 July 2008, para. 27.

⁴⁴⁷ See Rule 90(H)(i) of the Rules.

⁴⁴⁸ Miodrag Simić, 13 Sep 2007, T. 15549-15550.

⁴⁴⁹ Decision of 16 April 2008, para. 13.

⁴⁵⁰ Lukić's Appeal Brief, para. 63, referring to Motion of 26 March 2008, para. 6, referring to Miroslav Mijatović, 12 Feb 2008, T. 22165-22167, 22169-22171, 22180-22181, 22185-22188, 22192-22194, 22200, 22217, 22219-22221, 22233-22234, *ibid.*, 13 Feb 2008, T. 22258-22260, 22267-22275.

4. Alleged violation of Lukić's right to file replies to motions

(a) Submissions of the parties

144. Lukić challenges the Trial Chamber's Order of 11 July 2006, which allegedly shortened the deadlines prescribed by the Rules for filing replies.⁴⁵¹ He maintains that, pursuant to this order, his request for leave to file replies in support of his motion for admission of documents from the bar table was denied, thus preventing him from "making an adequate record".⁴⁵² Lukić argues that these errors, when placed in the context of the proceedings in their entirety, occasioned a mistrial.⁴⁵³

145. In response, the Prosecution argues that, contrary to Lukić's allegation, the Trial Chamber did not abruptly shorten the deadlines for filing replies to motions and that Lukić failed to seek an extension of time despite the instruction of the Trial Chamber to this effect.⁴⁵⁴ Moreover, according to the Prosecution, Lukić's request for leave to file replies was denied not only on account of its late filing, but also because it contained substantive arguments in contravention of the Trial Chamber's respective order.⁴⁵⁵ Finally, the Prosecution contends that Lukić fails to demonstrate any prejudice stemming from the challenged decisions.⁴⁵⁶

(b) Analysis

146. The Appeals Chamber recalls that, pursuant to Rule 126 *bis* of the Rules, a party shall file a reply, if any, in support of a motion within seven days of the filing of the response, with the leave of the relevant trial chamber. Contrary to Lukić's submission, in its Order of 11 July 2006 the Trial Chamber did not alter the deadline prescribed by the Rules for filing replies. Rather, it introduced a three-day time-limit for seeking leave to file replies,⁴⁵⁷ which fell squarely within the Trial Chamber's power to exercise control over the conduct of the proceedings. In any case, Lukić's request for leave to file a reply was filed not only after the expiration of the said three-day deadline, but also past the seven-day deadline prescribed by Rule 126 *bis* of the Rules.⁴⁵⁸ In these

⁴⁵¹ Lukić's Appeal Brief, para. 44, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order on Procedure and Evidence, 11 July 2006 ("Order of 11 July 2006").

⁴⁵² Lukić's Appeal Brief, para. 44, referring to Decision of 10 June 2008, Decision of 2 June 2008.

⁴⁵³ Lukić's Appeal Brief, para. 44.

⁴⁵⁴ Prosecution's Response Brief (Lukić), para. 52, referring to Decision of 10 June 2008, para. 12.

⁴⁵⁵ Prosecution's Response Brief (Lukić), paras 51, 53, referring to Decision of 2 June 2008, para. 14, Order of 11 July 2006, para. 11.

⁴⁵⁶ Prosecution's Response Brief (Lukić), para. 54, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Motion of the Defense of the Accused Sreten Lukic [*sic*] for Leave to File Reply in Support of Bar Table Motion with Exhibits A and B, 27 May 2008.

⁴⁵⁷ Order of 11 July 2006, para. 11.

⁴⁵⁸ On 7 May 2008 Lukić filed a motion for admission of documents from the bar table (*Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Sreten Lukic's [*sic*] Motion for Admission of Documents from the Bar Table and Motion to Exceed Word Limit for Filing with Confidential Annex A ("Lukić's Motion of 7 May 2008")). Pavković filed a response on 20 May 2008 (*Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Pavković Objection to

circumstances, the Appeals Chamber finds that it was within the Trial Chamber's discretion to deny Lukić's request to file a reply as untimely.

5. Errors concerning the admission of evidence by the Trial Chamber

(a) Errors concerning the admission into evidence of Lukić's interview with the Prosecution

147. Lukić's interview with the Prosecution took place on 21, 22, and 23 May 2002.⁴⁵⁹ The audiovisual recording and the English transcript of the interview were disclosed to Lukić in 2005 and subsequently during the pre-trial phase of the proceedings.⁴⁶⁰ Pursuant to Rule 89(C) of the Rules, on 10 October 2006, the Trial Chamber admitted into evidence the interview with the English transcript attached.⁴⁶¹ The combined English-B/C/S transcript was made available to Lukić on 7 February 2008⁴⁶² and, on 11 February 2008, the Trial Chamber granted the Prosecution's request for the merged English-B/C/S transcript to be attached to the exhibit.⁴⁶³

148. On 6 May 2008, Lukić requested that the Trial Chamber reconsider its decision on the admission of the interview, arguing that the transcript of the interview was not provided to him at the conclusion of the interview sessions, that he was deprived of the opportunity to correct any deficiencies in the transcript, and that he could not have been aware of the extent of the errors in the translation until 7 February 2008, when the merged English-B/C/S transcript was disclosed to him.⁴⁶⁴ On 22 May 2008, the Trial Chamber dismissed Lukić's request to remove the interview from the official record of the proceedings⁴⁶⁵ and ordered that a revised version of the English-B/C/S transcript be attached to the exhibit.⁴⁶⁶ A further motion by Lukić, identifying purported

"Sreten Lukić's [*sic*] Motion for Admission of Documents from the Bar Table", 20 May 2008) and the Prosecution filed its response on 21 May 2008 (*Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Prosecution Response to Sreten Lukić's Motion for Admission of Documents from the Bar Table, 21 May 2008). Pursuant to Rule 126 *bis* of the Rules, Lukić's replies were due on 26 and 27 May 2008, respectively. However, Lukić's motion for leave to file a reply together with a consolidated reply was filed on 28 May 2008, *i.e.* a day after the expiration of the deadline prescribed by Rule 126 *bis* of the Rules (*Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Motion of the Defence of the Accused Sreten Lukić [*sic*] for Leave to File Reply in Support of Bar Table Motion with Exhibits A and B, 28 May 2008).

⁴⁵⁹ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Request for Reconsideration of the Trial Chamber's Admission into Evidence of His Interview with the Prosecution (Exhibit P948), 22 May 2008 ("Decision of 22 May 2008"), para. 6. See also Exh. P948.

⁴⁶⁰ Decision of 22 May 2008, para. 7. The audiovisual recording and the English transcript of the interview were disclosed on 20 April 2005 and on 22 August 2005, respectively (Decision of 22 May 2008, para. 7, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Prosecution's Submissions Pursuant to Rule 65*ter*(E) with Confidential Annex A and Annexes B and C, 10 May 2006, Annex B, p. 103).

⁴⁶¹ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 52(1)(hh).

⁴⁶² Decision of 22 May 2008, paras 3, 7.

⁴⁶³ See Ljubivoje Joksić, 11 Feb 2008, T. 22057-22058.

⁴⁶⁴ Decision of 22 May 2008, paras 1, 3.

⁴⁶⁵ Decision of 22 May 2008, para. 14.

⁴⁶⁶ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order on Admission into Evidence of Revised Version of Lukić Interview with the Prosecution (Exhibit P948), 22 May 2008.

mistakes in the merged English-BCS transcript and requesting that the interview be denied admission “until it has been retranslated or all errors in translation be rectified”,⁴⁶⁷ was denied by the Trial Chamber on 2 June 2008.⁴⁶⁸

(i) Submissions of the parties

149. Lukić argues that the Trial Chamber erred in admitting the transcript of the interview into evidence despite various procedural flaws.⁴⁶⁹ He asserts that the interview was conducted prior to the issuance of the indictment against him, in the absence of counsel, and that, although promised, he was not provided with an opportunity to clarify matters related to the MUP Staff prior to the conclusion of the interview.⁴⁷⁰ Lukić further claims that there were “serious errors in translation” which could not be detected until the late disclosure of a merged English-B/C/S transcript.⁴⁷¹

150. In response, the Prosecution submits that it was reasonable for the Trial Chamber to admit the transcript of the interview into evidence.⁴⁷² It argues that Lukić gave the interview voluntarily, that the video recording was disclosed to him in a timely fashion in accordance with the Rules,⁴⁷³ and that, as the Trial Chamber concluded, any prejudice based on Lukić’s inability to detect translation deficiencies in the English language transcript was cured in February 2008 when he received the combined English-B/C/S transcript.⁴⁷⁴ The Prosecution further contends that Lukić fails to explain what the alleged “serious” translation errors were or their impact on the Trial Chamber’s findings.⁴⁷⁵

151. Lukić replies that no accurate B/C/S transcript was provided at the time of the admission of the interview into evidence.⁴⁷⁶ He further asserts that he did not object earlier to its admission because he “relied upon the representations of the [Prosecution] that the translation and the transcript [...] were accurate”⁴⁷⁷ and because he received the B/C/S transcript at a time when he was “about to embark on a very comprehensive defence case in chief”.⁴⁷⁸ Lukić argues that the resulting

⁴⁶⁷ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Objection to Translation of Revised Exhibit P948, 23 May 2008, p. 5.

⁴⁶⁸ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Second Decision on Lukić Request for Reconsideration of the Trial Chamber’s Admission into Evidence of his Interview with the Prosecution (Exhibit P948), 2 June 2008 (“Second Decision of 2 June 2008”), para. 6.

⁴⁶⁹ Lukić’s Appeal Brief, paras 166-170.

⁴⁷⁰ Lukić’s Appeal Brief, paras 166-168, 177; Lukić’s Reply Brief, paras 46-47, 50-51, referring to Exh. P948, pp. 3-4, 68, 154, 157.

⁴⁷¹ Lukić’s Appeal Brief, paras 166, 169.

⁴⁷² Prosecution’s Response Brief (Lukić), paras 128-130.

⁴⁷³ Prosecution’s Response Brief (Lukić), paras 128, 131-132.

⁴⁷⁴ Prosecution’s Response Brief (Lukić), para. 133, referring to Decision of 22 May 2008, para. 11.

⁴⁷⁵ Prosecution’s Response Brief (Lukić), para. 134.

⁴⁷⁶ Lukić’s Reply Brief, para. 43.

⁴⁷⁷ Lukić’s Reply Brief, paras 44-45, 48.

⁴⁷⁸ Lukić’s Reply Brief, paras 48-49.

prejudice is manifested in the Trial Chamber's finding, based on his statement given during the interview, that the MUP Staff played a central role in planning, organising, controlling, and directing the work of the MUP units in Kosovo.⁴⁷⁹

(ii) Analysis

152. The Appeals Chamber recalls that, in determining the admissibility of evidence, trial chambers exercise broad discretion and the Appeals Chamber must accord deference to a trial chamber's decision in this respect.⁴⁸⁰ Therefore, the question before the Appeals Chamber is whether the Trial Chamber correctly exercised its discretion in reaching the decision – that is, whether it has committed a “discernible error” resulting in prejudice to a party challenging the decision.⁴⁸¹

153. The Appeals Chamber notes that Lukić was a suspect at the time of the interview.⁴⁸² He was warned at the outset that he was under suspicion of committing acts for which he might be later tried by the Tribunal and that the record of the interview could be used as evidence against him in the proceedings.⁴⁸³ He was further informed of his right to have a legal counsel present during the interview, which he waived, and that if, at any stage, he wished to have a counsel, the interview would be suspended for the purpose of arranging the appointment of counsel.⁴⁸⁴ It was further emphasised to Lukić that he was not under arrest and free to leave at any time.⁴⁸⁵ Therefore, considering that Lukić voluntarily agreed to give the interview and that he waived his right to have a counsel present, to the extent that he alleges an infringement of his rights under Rule 42 of the Rules, his arguments are dismissed.

154. The Appeals Chamber further notes that, in accordance with Rule 43(iii) of the Rules, at the end of the interview Lukić was explicitly given the opportunity to correct or clarify anything he had

⁴⁷⁹ Lukić's Reply Brief, paras 50-53, referring to Trial Judgement, vol. 3, paras 1012-1013.

⁴⁸⁰ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić's Consolidated Interlocutory Appeal against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009 (“Prlić Decision of 12 January 2009”), para. 5.

⁴⁸¹ See also *supra*, para. 29.

⁴⁸² Lukić was first indicted on 2 October 2003 (Case No. IT-03-70-I). Following the joinder of the *Milutinović et al.* and *Pavković et al.* cases (see Joinder Decision), and the severance of Vlastimir Đorđević from the case, the operative indictment was confirmed on 26 June 2006 (*Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Order Replacing Third Amended Joinder Indictment and Severing Vlastimir Đorđević from the Trial, 26 June 2006 (“Indictment Order of 26 June 2006”); Indictment).

⁴⁸³ Exh. P948, p. 1.

⁴⁸⁴ Exh. P948, p. 2. Lukić was reminded of his right to remain silent and his right to legal representation at the beginning of every tape (See *ibid.*, pp. 1, 26, 51-52, 74, 91-92, 116-117, 141, 159-160).

⁴⁸⁵ Exh. P948, p. 1.

stated.⁴⁸⁶ As the Trial Chamber correctly opined, such opportunity was not predicated upon him being furnished with the merged English-B/C/S transcript.⁴⁸⁷

155. Concerning Lukić's claim that, despite being promised, he was not provided with the transcript at the conclusion of the interview, Rule 43(vi) of the Rules provides that the tape with the video-recording of a suspect's questioning shall be transcribed if the suspect becomes an accused.⁴⁸⁸ As indicated above, Lukić was provided with the English transcript as early as August 2005, nearly a year before the commencement of the trial. In addition, at the time of the admission of the interview into evidence, he did not raise an objection on the basis that he had not been furnished with the merged transcript.⁴⁸⁹

156. As for Lukić's assertions that the interview included "serious errors in translation", the Appeals Chamber notes that, in its Decision of 22 May 2008, the Trial Chamber found that the English-B/C/S transcript of the interview had been available to the Lukić Defence "for some time [...] to make any corrections it deems fit".⁴⁹⁰ It further concluded that "[a]ny prejudice that may have occurred would have been remedied by the provision of the merged English-B/C/S transcript", noting that some corrections had already been identified and were being attended to.⁴⁹¹ Moreover, in its Decision of 2 June 2008, the Trial Chamber noted that Lukić could address in his closing submissions any issues in relation to the interview and emphasised that it would take into account the circumstances surrounding the interview when deciding upon the weight to be attributed to it.⁴⁹² Lukić was thus provided with sufficient opportunity to review the transcript and seek corrections and clarifications thereof.

157. For the reasons set out above, the Appeals Chamber finds that the Trial Chamber's decision to admit the interview was within the reasonable exercise of the Trial Chamber's discretion. The Appeals Chamber dismisses Lukić's arguments in this respect.

⁴⁸⁶ See Exh. P948, pp. 170-171.

⁴⁸⁷ Decision of 22 May 2008, para. 10.

⁴⁸⁸ See also Decision of 22 May 2008, para. 10.

⁴⁸⁹ Decision of 22 May 2008, para. 7; Second Decision of 2 June 2008, para. 3.

⁴⁹⁰ Decision of 22 May 2008, para. 10.

⁴⁹¹ Decision of 22 May 2008, para. 11.

⁴⁹² Second Decision of 2 June 2008, para. 5. See also Decision of 22 May 2008, para. 12.

(b) Errors concerning the non-admission of evidence(i) Submissions of the parties

158. Lukić asserts that in denying the admission of “critical” documentary evidence the Trial Chamber infringed his right to a fair trial.⁴⁹³ In particular, Lukić submits that the Trial Chamber erred in finding that the map extracts of anti-terrorist actions that he sought to present were not related to an issue at trial, thus denying their admission.⁴⁹⁴ Lukić claims that the map extracts contradict the Trial Chamber’s conclusion regarding his role in the preparation of such maps.⁴⁹⁵ Further, Lukić submits that the Trial Chamber erroneously denied the admission of postings from the MUP website showing that persons were attacked, injured, or killed by members of the KLA in areas of Kosovo in relation to which Prosecution witnesses testified that no KLA activities were taking place.⁴⁹⁶ Consequently, Lukić asserts that he was deprived of the opportunity to rebut the evidence presented by the Prosecution on this point.⁴⁹⁷ Finally, Lukić argues that the documents underlying Exhibit 6D614 should have been admitted into evidence, as they show that he had knowledge that disciplinary and criminal charges were brought against members of the police for crimes committed in Kosovo.⁴⁹⁸ He further adds that there was “no legitimate rationale which could serve the interests of justice” for denying the admission of Exhibit 6D614 in its entirety.⁴⁹⁹

159. The Prosecution responds that Lukić fails to explain how the Trial Chamber abused its discretion in denying the admission of the map extracts of anti-terrorist activities and to demonstrate their potential impact on the Trial Chamber’s findings.⁵⁰⁰ The Prosecution also argues that the Trial Chamber correctly denied the admission of the lists of individuals killed or injured by KLA activities, as Lukić did not provide any reference to the underlying material supporting these MUP postings.⁵⁰¹ Finally, the Prosecution submits that Lukić fails to show why the Trial Chamber erred in denying the admission into evidence of the material underlying Exhibit 6D614⁵⁰² and further fails to demonstrate why Exhibit 6D614 should have been admitted in its entirety.⁵⁰³

⁴⁹³ Lukić’s Appeal Brief, paras 69, 72, 76.

⁴⁹⁴ Lukić’s Appeal Brief, para. 73, referring to documents marked 6D1622, 6D1623, 6D1624, 6D1625.

⁴⁹⁵ Lukić’s Appeal Brief, para. 73.

⁴⁹⁶ Lukić’s Appeal Brief, para. 74, referring to documents marked 6D1109, 6D1111, 6D1112, 6D1115, 6D1116, 6D1117. See also Lukić’s Reply Brief, para. 30. The Appeals Chamber notes that Lukić also refers to Exhibits 6D1468 and 6D1469, which, however, were admitted into evidence at trial (see Decision of 11 June 2008, para. 125(m)). Consequently, Lukić’s challenge concerning the non-admission of this material is moot.

⁴⁹⁷ Lukić’s Appeal Brief, para. 74.

⁴⁹⁸ Lukić’s Appeal Brief, para. 75. Appeal Hearing, 14 Mar 2013, AT. 530-531.

⁴⁹⁹ Lukić’s Appeal Brief, para. 75.

⁵⁰⁰ Prosecution’s Response Brief (Lukić), paras 83-84.

⁵⁰¹ Prosecution’s Response Brief (Lukić), para. 85.

⁵⁰² Prosecution’s Response Brief (Lukić), para. 86, referring to documents marked 6D889, 6D925.

⁵⁰³ Prosecution’s Response Brief (Lukić), para. 87. Appeal Hearing, 14 Mar 2013, AT. 559-560.

160. In reply, Lukić reiterates that the postings from the MUP website relate to KLA attacks in the same municipalities where crimes were allegedly committed and that the postings allow for more than one reasonable conclusion as to the reasons behind the movement of the population in these areas.⁵⁰⁴ With regard to Exhibit 6D614, Lukić maintains that, if included as a whole, it “would have had a very dramatic effect in the judgement”.⁵⁰⁵

(ii) Analysis

161. At the outset, the Appeals Chamber recalls that trial chambers are entitled to admit any relevant evidence which they deem to have probative value.⁵⁰⁶ In determining the admissibility of evidence, trial chambers exercise broad discretion and the Appeals Chamber must therefore accord deference to a trial chamber’s decision in this respect.⁵⁰⁷ The Appeals Chamber’s examination of challenges concerning a trial chamber’s refusal to admit material into evidence is limited to establishing whether the trial chamber abused its discretion by committing a discernible error.⁵⁰⁸

162. The Appeals Chamber observes that, with respect to the map extracts of anti-terrorist actions, the Trial Chamber found that Lukić had failed to demonstrate how the maps related to an issue at trial.⁵⁰⁹ It stated that Lukić had not described “the locations, dates or other details of the actions to which the maps purport to relate” or explained why the maps could not be tendered through a witness during the presentation of Lukić’s case.⁵¹⁰ The Appeals Chamber considers that Lukić’s submission that “the documents speak for themselves”⁵¹¹ is insufficient to meet the burden of showing that the tendered documents relate to a material issue. Moreover, Lukić’s argument that the documents were refused admission “simply because witnesses did not introduce [them]” is without merit.⁵¹² The Trial Chamber explicitly noted that Lukić failed to show the relevance of the documents to an issue at trial.⁵¹³ Considering that it is for the party tendering the material to show that it has the required indicia of relevance in order to be admissible under Rule 89(C) of the Rules,⁵¹⁴ the Appeals Chamber finds that Lukić has failed to demonstrate that the Trial Chamber committed a discernible error in refusing the admission of the evidence in question.

⁵⁰⁴ Lukić’s Reply Brief, para. 30.

⁵⁰⁵ Lukić’s Reply Brief, para. 29.

⁵⁰⁶ Rule 89(C) of the Rules.

⁵⁰⁷ *Prlić* Decision of 12 January 2009, para. 5.

⁵⁰⁸ *Prlić* Decision of 12 January 2009, para. 5.

⁵⁰⁹ Decision of 11 June 2008, para. 103.

⁵¹⁰ Decision of 11 June 2008, para. 103.

⁵¹¹ Lukić’s Appeal Brief, para. 73.

⁵¹² Lukić’s Appeal Brief, para. 73.

⁵¹³ Decision of 11 June 2008, para. 103.

⁵¹⁴ *Prlić* Decision of 12 January 2009, para. 17.

163. Concerning the postings from the MUP website, the Trial Chamber found that they were deficient in terms of both relevance and probative value.⁵¹⁵ It explicitly noted the insufficient reasoning provided by Lukić in support of their admission.⁵¹⁶ Indeed, Lukić merely submitted that “all documents [...] speak for themselves and provide relevant material for the Trial Chamber”.⁵¹⁷ Considering that the criteria for admission of evidence set out in Rule 89(C) of the Rules are cumulative⁵¹⁸ and that the party bears the burden of showing that those criteria are met, and bearing in mind the deference accorded to the Trial Chamber, the Appeals Chamber finds that Lukić has again failed to demonstrate any discernible error on the part of the Trial Chamber.⁵¹⁹

164. The Appeals Chamber further observes that Lukić appears to refer to documents marked 6D889 and 6D925 as “documents underlying 6D614” which he alleges were erroneously denied admission.⁵²⁰ The Trial Chamber noted that Lukić sought the admission of the two documents together with 58 other documents by providing merely “one sentence of argumentation in relation to all of them together”.⁵²¹ The Trial Chamber found Lukić’s submission unsatisfactory as he failed to demonstrate how most of the documents, including documents marked 6D889 and 6D925, “fit into the case”.⁵²² Lukić has failed to show that the Trial Chamber abused its discretion in denying the admission into evidence of documents marked 6D889 and 6D925. As to Exhibit 6D614, the Appeals Chamber observes that portions of the document were ultimately admitted into evidence by the Trial Chamber. The Trial Chamber reasoned that “[a]s with other hearsay documents with limited indicia of reliability that were put to witnesses on the stand, those portions of the police logs that were put to witnesses who were able to give *viva voce* evidence relating to the contents of 6D614 will be admitted into evidence”.⁵²³ The Trial Chamber was apparently concerned with the probative value of Exhibit 6D614 and thus admitted into evidence only those portions of the

⁵¹⁵ Decision of 11 June 2008, para. 94.

⁵¹⁶ Decision of 11 June 2008, para. 94.

⁵¹⁷ Decision of 11 June 2008, para. 94. See also Lukić’s Motion of 7 May 2008, para. 84.

⁵¹⁸ See *Prlić* Decision of 12 January 2009, para. 17.

⁵¹⁹ The Appeals Chamber notes that Lukić sought the admission of documents marked 6D1109, 6D1111, 6D1115, 6D1116, and 6D1117 as additional evidence on appeal (Lukić’s First Rule 115 Motion, paras 36-40). However, he failed to satisfy the criteria of Rule 115 of the Rules as he did not demonstrate that the evidence he sought to be admitted on appeal could have affected the verdict (Lukić First Rule 115 Decision, para. 56. See also *ibid.*, fn. 162, para. 62). Consequently, and contrary to Lukić’s assertion, these documents cannot be considered as “critical” to his case.

⁵²⁰ Lukić’s Appeal Brief, para. 75. Lukić further refers to Exhibits 6D1631 and 6D1647. The Appeals Chamber notes that Exhibit 6D1631 was admitted into evidence on 21 May 2008 (see Evidentiary Matters, 21 May 2008, T. 26559) and Exhibit 6D1647 was admitted into evidence on 11 June 2008 (Decision of 11 June 2008, para. 125(m)). See also Appeal Hearing, 14 Mar 2013, AT. 531.

⁵²¹ Decision of 11 June 2008, para. 125(m).

⁵²² Decision of 11 June 2008, para. 125(m).

⁵²³ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber’s Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008 (“Decision of 2 July 2008”), para. 30.

document whose probative value was reinforced through the testimony of *viva voce* witnesses.⁵²⁴ Lukić has failed to show that the Trial Chamber committed a discernible error in its evaluation of the probative value of the tendered material.

165. In light of the above, Lukić's arguments are dismissed.

6. Alleged violation of Lukić's right to examine and cross-examine witnesses

(a) Submissions of the parties

166. Lukić asserts that in its Decision of 9 October 2006 the Trial Chamber violated his right to cross-examine witnesses by imposing "[r]igid time constraints" upon the collective Defence cross-examination.⁵²⁵ He argues that the imposed limitations infringed upon his right to a fair trial under Article 6 of the ECHR⁵²⁶ and maintains that any measures restricting the rights of the Defence must be only those strictly necessary, such that if a less restrictive measure is available it ought to be employed.⁵²⁷ Lukić argues that the Trial Chamber chose the most restrictive measure, notably a "stop-watch" approach to cross-examination.⁵²⁸ This is despite the fact, he argues, that the Trial Chamber had other means at its disposal, pursuant to Rule 90(F) of the Rules, such as the opportunity to intervene where questioning became irrelevant, repetitious, or improper.⁵²⁹

167. In support of this assertion, Lukić submits that the Trial Chamber erroneously curtailed the cross-examination of Radojko Stefanović, rejecting Lukić's "attempts to present documents for review",⁵³⁰ and later denied admission of documentary evidence on the sole ground that it had not been presented to witnesses during cross-examination.⁵³¹

168. Lukić further asserts that the Trial Chamber "attempted to curtail" the direct examination of Miloš Deretić, whose testimony was relevant to the proper assessment of Exhibit P1505.⁵³² He

⁵²⁴ Decision of 2 July 2008, paras 30, 46. See also Decision of 11 June 2008, paras 115-124.

⁵²⁵ Lukić's Appeal Brief, paras 45-46, referring to Decision of 9 October 2006.

⁵²⁶ Lukić's Appeal Brief, para. 45, citing *Krasniki v. The Czech Republic*, ECtHR, no. 51277/99, 28 February 2006, para. 33, *Kostovski v. The Netherlands*, ECtHR, no. 11454/85, 20 November 1989, para. 41, Series A no. 166, *Saïdi v. France*, ECtHR, no. 14647/89, 20 September 1993, para. 44, Series A no. 261-C, *Moreira de Azevedo v. Portugal* (Article 50), ECtHR, no. 11296/84, 28 August 1991, para. 66, Series A no. 208-C, *Artico v. Italy*, ECtHR, no. 6694/74, 13 May 1980, Series A no. 37; *Daud v. Portugal*, ECtHR, no. 22600/93, 21 April 1998, *Reports of Judgments and Decisions* 1998-II, *Acquaviva v. France*, ECtHR, no. 19248/91, 21 November 1995, para. 66, Series A no. 333-A. Although in his appeal Lukić refers to Article 6 of the ICCPR, the Appeals Chamber understands the reference to be to Article 6 of the ECHR.

⁵²⁷ Lukić's Appeal Brief, para. 46, referring to *Van Mechelen and Others v. The Netherlands*, ECtHR, nos. 21363/93, 21364/93, 21427/93, 22056/93, 23 April 1997, *Reports of Judgments and Decisions* 1997-III.

⁵²⁸ Lukić's Appeal Brief, para. 46.

⁵²⁹ Lukić's Appeal Brief, para. 46, citing *Orić* Decision of 20 July 2005, para. 6.

⁵³⁰ Lukić's Appeal Brief, paras 49-50, referring to Radojko Stefanović, 6 Feb 2008, T. 21733 -21734, 21739-21743.

⁵³¹ Lukić's Appeal Brief, para. 50, referring to Decision of 11 June 2008, paras 78-80, 82-87, 91.

⁵³² Lukić's Appeal Brief, paras 47-48, citing Miloš Deretić, 15 Feb 2008, T. 22563-22564.

contends that Exhibit P1505 was extensively relied upon in the Trial Judgement and was central to the Trial Chamber's conclusions as to the functions of the MUP Staff for Kosovo.⁵³³

169. In response, the Prosecution claims that the Trial Chamber's approach in limiting the parties' time for cross-examination was "sufficiently flexible", conformed to Lukić's rights, and was in compliance with Rule 90(F) of the Rules and the relevant jurisprudence.⁵³⁴ As to the cross-examination of Stefanović, the Prosecution argues that the Presiding Judge's intervention aimed to ensure that the cross-examination of the witness was not impeded by "useless and irrelevant" questions.⁵³⁵ The Prosecution further submits that, with the exception of the document marked 6D1467, which was denied admission because of lack of relevance, all documents mentioned by Lukić in relation to Stefanović's cross-examination were denied admission because they were authored by witnesses who should have been confronted with them.⁵³⁶ The Prosecution claims that Lukić fails to demonstrate how putting these documents to Stefanović, who was not in a position to comment on them, would have made their admission more likely.⁵³⁷

170. Similarly, with respect to the direct examination of Deretić, the Prosecution asserts that the Trial Chamber was merely inquiring into the relevance of the questions put to the witness, as part of its duty to exercise sufficient control over the process of examination.⁵³⁸

(b) Analysis

171. The Appeals Chamber recalls that the right to cross-examine witnesses is a fundamental right recognised under international human rights law and embodied in Article 21(4) of the Statute.⁵³⁹ Relevant to the exercise of this right is the trial chamber's duty to exercise control over the mode and order of witness examination so that it facilitates the "ascertainment of truth" and avoids "needless consumption of time."⁵⁴⁰ In this respect, the Appeals Chamber has previously held that trial chambers enjoy considerable discretion in setting the parameters of cross-examination and

⁵³³ Lukić's Appeal Brief, para. 48, referring to Trial Judgement, vol. 3, paras 945, 947, 949-952, 957, 963-965, 983, 1012, 1015, 1018, 1051, 1114.

⁵³⁴ Prosecution's Response Brief (Lukić), paras 55-59, citing *Prlić* Decision of 4 July 2006, p. 3, Decision of 9 October 2006, p. 6.

⁵³⁵ Prosecution's Response Brief (Lukić), para. 61.

⁵³⁶ Prosecution's Response Brief (Lukić), para. 62.

⁵³⁷ Prosecution's Response Brief (Lukić), para. 62.

⁵³⁸ Prosecution's Response Brief (Lukić), para. 60.

⁵³⁹ *Prlić* Decision of 4 July 2006, p. 2, referring to Article 14(3)(e) ICCPR, Article 6(3)(d) ECHR; Article 8(2)(f) ACHR, HRCee General Comment No.13 of 1984, para. 12, *Peart and Peart v. Jamaica*, HRCee, Communication No. 482/1991, UN Doc. CCPR/C/54/D/482/1991 (24 July 1995), paras 11.4-11.5, *Saïdi v. France*, ECtHR, no. 14647/89, 20 September 1993, paras 43-44, Series A no. 261-C, *van Mechelen and Others v. The Netherlands*, ECtHR, nos. 21363/93, 21364/93, 21427/93, 22056/93, 23 April 1997, para. 51, Reports of Judgements and Decisions 1997-III, *Krasniki v. the Czech Republic*, ECtHR, no. 51277/99, 28 February 2006, para. 75, *Kostovski v. the Netherlands*, ECtHR, no. 11454/85, 20 November 1989, para. 41, Series A no. 166, *P.S. v. Germany*, ECtHR, no. 33900/96, 20 December 2001, para. 21.

⁵⁴⁰ See Rule 90(F) of the Rules.

in outlining the exercise of this right.⁵⁴¹ Therefore, the question before the Appeals Chamber is whether the Trial Chamber ventured outside its discretion and violated Lukić's right under Article 21(4) of the Statute in setting certain limits upon the time afforded to the Defence for cross-examination.

172. Turning to Lukić's challenge to the Decision of 9 October 2006, the Appeals Chamber notes that the Trial Chamber afforded the Defence "collectively the same amount of time [for the cross-examination of a *viva voce* witness] as the Prosecution [had] taken".⁵⁴² For a witness whose evidence was to be brought pursuant to Rule 92 *ter* of the Rules, the Prosecution was afforded 30 minutes to conduct both direct and re-examination, and the Defence had at its disposal a total of 60 minutes for cross-examination.⁵⁴³

173. The Appeals Chamber finds that the decision of the Trial Chamber to allocate the same amount of time for the cross-examination of a *viva voce* witness as the time taken by the Prosecution for that witness's examination-in-chief complies with the principle of basic proportionality described above.⁵⁴⁴ Similarly, Lukić has failed to show that the Trial Chamber ventured outside its discretion in allowing the Defence twice the amount of time afforded to the Prosecution for cross-examining witnesses whose evidence was to be presented pursuant to Rule 92 *ter* of the Rules. Moreover, the Trial Chamber allowed the accused to agree among themselves on the apportionment of the allocated time, without imposing additional time limits, and indicated the possibility of altering its decision upon good cause being shown by the parties.⁵⁴⁵ Accordingly, the Appeals Chamber finds that the Trial Chamber did not err with respect to the time allowed for the cross-examination of Prosecution witnesses.

174. Lukić further contends that the cross-examination of Stefanović "was curtailed by the [Trial] [C]hamber and attempts to present documents for review were rebuffed."⁵⁴⁶ The Appeals Chamber notes that the portions of the transcript referred to by Lukić show that the Presiding Judge urged Lukić's co-counsel to conduct the cross-examination of Stefanović in a more focused manner and on issues within the knowledge of the witness.⁵⁴⁷ Upon review of the relevant portions of the trial record, the Appeals Chamber finds no error in the Presiding Judge's interventions. Moreover, all but one of the documents referred to by Lukić were denied admission because he failed to confront

⁵⁴¹ *Prlić* Decision of 4 July 2006, p. 3.

⁵⁴² Decision of 9 October 2006, p. 6.

⁵⁴³ Decision of 9 October 2006, p. 6.

⁵⁴⁴ See *supra*, para. 123.

⁵⁴⁵ Decision of 9 October 2006, p. 6.

⁵⁴⁶ Lukić's Appeal Brief, para. 50.

⁵⁴⁷ Radojko Stefanović, 6 Feb 2008, T. 21733-21734, 21738-21739.

the witnesses who authored the documents with them.⁵⁴⁸ In these circumstances, the Appeals Chamber is not persuaded that putting the documents to Stefanović would have ensured their admission.

175. Concerning Lukić's arguments with respect to the conduct of the direct examination of Deretić, the Appeals Chamber finds that the intervention of the Presiding Judge was directed at clarifying the relevance of the questions put to the witness. Once the Presiding Judge was satisfied that inquiring into the name of Lukić's deputy was material to Lukić's case, counsel was allowed to continue the direct examination of the witness.⁵⁴⁹ There was no error in the intervention of the Presiding Judge, which fell squarely within the Trial Chamber's powers under Rule 90(F) of the Rules. Moreover, the time spent in clarifying the issue was minimal and did not result in any discernible prejudice to Lukić. Lukić's arguments are therefore dismissed.

D. Alleged violation of Lukić's right to be tried before an impartial tribunal

1. Submissions of the parties

176. Lukić submits that on several occasions the Trial Chamber exhibited "personal bias" against him, thus violating his right to be heard by an independent and impartial tribunal.⁵⁵⁰ In support of his assertion, Lukić notes that the Presiding Judge, Judge Bonomy, was a member of the Bench in the *S. Milošević* case, "which shared many witnesses and subject-matter with this case."⁵⁵¹ He further refers to several remarks made by Judge Bonomy which, in Lukić's view, show "disparaging" treatment⁵⁵² and argues that the pressure of the Tribunal's completion strategy coupled with Judge Bonomy's prior work in advocating the speeding-up of trials in Scotland might have been the reason for such "prejudgement [or] bias".⁵⁵³ Lukić alleges that as a result of this bias: (i) he received a significantly higher sentence compared to that of Ojdanić and Lazarević and was sentenced to 22 years of imprisonment along with other co-accused who, unlike him, did not have

⁵⁴⁸ Decision of 11 June 2008, paras 78-80, 82-85, 87, 91, referring to documents marked 6D707, 6D719, 6D733, 6D739, 6D740, 6D748, 6D753, 6D1133, 6D1467 and witnesses Lazarević, Božidar Delić, Ljubiša Diković, Dragan Živanović, and Ljubomir Savić. As to document marked 6D1028, the Trial Chamber denied its admission on the basis that, save for the map attached, the document was essentially identical to document 6D1092 which was admitted into evidence (Decision of 11 June 2008, para. 86) With respect to document marked 6D1467, the Trial Chamber found that Lukić had failed to demonstrate how the document "fits into the trial" in order to be admitted into evidence (*ibid.*, para. 91).

⁵⁴⁹ Miloš Deretić, 15 Feb 2008, T. 22563-22564.

⁵⁵⁰ Lukić's Appeal Brief, paras 183-185, referring to Article 6 of the ECHR, *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 13.

⁵⁵¹ Lukić's Appeal Brief, para. 186.

⁵⁵² Lukić's Appeal Brief, paras 186-187, referring to Emin Kabashi, 22 Aug 2006, T. 2090, Ljubivoje Joksić, 8 Feb 2008, T. 21925, Closing Arguments, 26 Aug 2008, T. 27372, Danica Marinković, 4 Mar 2008, T. 23630-23631, Miroslav Mijatović, 14 Feb 2008, T. 22393, Decision of 10 June 2008, para. 7.

⁵⁵³ Lukić's Appeal Brief, para. 188.

circumstances in mitigation;⁵⁵⁴ (ii) his voluntary surrender, unlike that of Lazarević, was not regarded as a mitigating factor;⁵⁵⁵ (iii) Milutinović, who had attended the same meetings and had a similar level of knowledge of the crimes, was acquitted;⁵⁵⁶ (iv) motions filed by Lukić for admission of documents from the bar table were dismissed by the Trial Chamber;⁵⁵⁷ and (v) the evidence of defence witnesses was almost entirely disregarded in the Trial Judgement, thus suggesting that Lukić's defence had not been considered.⁵⁵⁸

177. In response, the Prosecution submits that Lukić fails to demonstrate an appearance of bias and that the examples he alleges show instead the efforts of the Presiding Judge to ensure the fair and expeditious conduct of the proceedings.⁵⁵⁹ The Prosecution claims that the Trial Chamber correctly distinguished the criminal responsibility of the individual co-accused,⁵⁶⁰ had valid reasons for denying the admission of certain evidence tendered by Lukić,⁵⁶¹ and provided detailed conclusions on the credibility of the defence witnesses.⁵⁶²

178. Lukić replies that the combination of the Trial Judgement's "openly hostile disposition" towards him, the difference in treatment he received compared to that received by Milutinović, Lazarević, and Ojdanić, and the impugned remarks of the Presiding Judge establish bias that invalidates the Trial Judgement.⁵⁶³

2. Discussion

(a) Applicable law

179. The Appeals Chamber recalls that the right to be tried before an independent and impartial tribunal is an integral component of the right to a fair trial enshrined in Article 21 of the Statute.⁵⁶⁴ This fundamental guarantee is also reflected in Article 13 of the Statute, which provides that the Judges of the Tribunal "shall be persons of high moral character, impartiality and integrity", and is further reinforced by Rule 15(A) of the Rules, stipulating that "[a] Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality."

⁵⁵⁴ Lukić's Appeal Brief, para. 189.

⁵⁵⁵ Lukić's Appeal Brief, para. 189.

⁵⁵⁶ Lukić's Appeal Brief, para. 190.

⁵⁵⁷ Lukić's Appeal Brief, para. 190, referring to Decision of 11 June 2008, Decision of 2 July 2008.

⁵⁵⁸ Lukić's Appeal Brief, para. 191.

⁵⁵⁹ Prosecution's Response Brief (Lukić), para. 143.

⁵⁶⁰ Prosecution's Response Brief (Lukić), paras 147-149.

⁵⁶¹ Prosecution's Response Brief (Lukić), para. 150.

⁵⁶² Prosecution's Response Brief (Lukić), para. 150.

⁵⁶³ Lukić's Reply Brief, paras 55, 58-59.

⁵⁶⁴ *Martić* Appeal Judgement, para. 39, and references therein.

180. In the *Furundžija* Appeal Judgement, upon reviewing the interpretation of the impartiality requirement in a number of national legal systems and under the ECHR, the Appeals Chamber enunciated the principles that should guide the interpretation and application of this requirement under the Statute as follows:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁵⁶⁵

181. With regard to the "reasonable observer" standard, the Appeals Chamber has held that a "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."⁵⁶⁶ The Appeals Chamber must therefore determine whether the reaction of such a hypothetical fair-minded observer would be that a Judge might not bring an impartial and unprejudiced mind to the issues arising in the case.⁵⁶⁷ It must be emphasised in this respect that Judges enjoy a presumption of impartiality and that there is a high threshold to reach in order to rebut that presumption.⁵⁶⁸ In this respect, the Appeals Chamber has held that:

in the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal can disabuse their minds of any irrelevant personal beliefs or predispositions. It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that [the] Judge [...] was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality. As has been stated, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be firmly established.⁵⁶⁹

182. The Appeals Chamber observes that Lukić did not raise the question of Judge Bonomy's impartiality before the Trial Chamber. Although such an omission could constitute waiver of the right to raise the matter on appeal, it has been the practice of the Appeals Chamber to treat the issue

⁵⁶⁵ *Furundžija* Appeal Judgement, para. 189 (internal references omitted).

⁵⁶⁶ *Furundžija* Appeal Judgement, para. 190 (internal references omitted).

⁵⁶⁷ *Nahimana et al.* Appeal Judgement, para. 50, referring to *Rutaganda* Appeal Judgement, para. 41, *Čelebići* Appeal Judgement, para. 683.

⁵⁶⁸ *Hadžihasanović and Kubura* Appeal Judgement, para. 78.

⁵⁶⁹ *Furundžija* Appeal Judgement, para. 197 (internal quotation marks omitted).

of bias as a special circumstance allowing it to address the merits of the challenge despite the waiver.⁵⁷⁰ The Appeals Chamber will therefore consider the merits of Lukić's challenges.

(b) Analysis

(i) Judge Bonomy's previous involvement in the *S. Milošević* case

183. The Appeals Chamber notes that following the resignation of Judge Richard May and pursuant to an order of the President of the Tribunal, on 10 June 2004 Judge Bonomy was assigned to Trial Chamber III, hearing the case of *S. Milošević*.⁵⁷¹ He performed the functions of a trial judge in that case until 14 March 2006 when, following the death of Slobodan Milošević, the proceedings were terminated.⁵⁷²

184. Lukić alleges that the *S. Milošević* case "shared many witnesses and subject-matter with this case."⁵⁷³ However, he has failed to present any arguments explaining how Judge Bonomy's involvement in the *S. Milošević* proceedings would lead a reasonable and informed observer to apprehend bias. The Appeals Chamber recalls that the Judges of the Tribunal often become involved in several trials which, by their very nature, concern issues that overlap and may be presented with witness testimony that was already admitted in another case.⁵⁷⁴ It is assumed, in the absence of evidence to the contrary that, by virtue of their training and experience, Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case.⁵⁷⁵ Lukić's generic contention falls short of rebutting this presumption of impartiality. His submission is therefore dismissed.

(ii) Judge Bonomy's prior work in advocating the speeding-up of trials in Scotland and the Tribunal's completion strategy

185. Lukić submits that Judge Bonomy "was known in Scotland for his work in advocating the speeding-up of the trial process."⁵⁷⁶ He refers in this respect to a 142-page document entitled "Improving Practice: 2002 Review of the Practices and Procedure of the High Court of Justiciary",

⁵⁷⁰ Cf. *Martić* Appeal Judgement, para. 44; *Galić* Appeal Judgement, para. 34; *Čelebići* Appeal Judgement, paras 651-709; *Furundžija* Appeal Judgement, para. 174.

⁵⁷¹ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Replacing a Judge in a Case Before a Trial Chamber, 10 June 2004.

⁵⁷² *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Terminating the Proceedings, 14 March 2006.

⁵⁷³ Lukić's Appeal Brief, para. 186.

⁵⁷⁴ *Nahimana et al.* Appeal Judgement, para. 78. See also *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 16 February 2007, para. 25.

⁵⁷⁵ *Nahimana et al.* Appeal Judgement, para. 78; *Akayesu* Appeal Judgement, para. 269; *Čelebići* Appeal Judgement, para. 700.

⁵⁷⁶ Lukić's Appeal Brief, para. 186.

authored by Judge Bonomy.⁵⁷⁷ However, Lukić neither substantiates his contention nor provides any precise references to information in this document that would support the allegation of apprehension of bias. He does not specify how this document is relevant to the work of the Tribunal and, in particular, to his case. Accordingly, the Appeals Chamber finds that Lukić has failed in this respect to demonstrate any apprehension of bias.

186. Lukić also contends that the pressure of the Tribunal’s completion strategy was another factor contributing to the apprehension of bias. However, he has again failed to substantiate his allegation and the Appeals Chamber will not address it further. Lukić’s contention in this respect is therefore dismissed.

(iii) Statements made by Judge Bonomy during trial

187. As a preliminary matter, the Appeals Chamber recalls that, when examining allegations of apprehension of bias, extracts from transcripts must be placed in their proper context so that the intent of the Judge who made the impugned remarks may be inferred.⁵⁷⁸ The Appeals Chamber will therefore examine each of Lukić’s allegations in the context of the trial record, taking into account the particular circumstances in which the impugned statement was made and any subsequent remarks made by the parties or the Trial Chamber.

a. Cross-examination of Emin Kabashi

188. Lukić asserts that, during the cross-examination of Emin Kabashi, Judge Bonomy made a remark “essentially curtailing vigorous cross-examination by co-counsel for Appellant”.⁵⁷⁹ In particular, Lukić challenges the following statement made by Judge Bonomy in relation to a question put by Lukić’s co-counsel to Kabashi: “Perry Mason probably once got somebody to break down and admit to that but let’s move on”.⁵⁸⁰ In response, the Prosecution submits that the Presiding Judge properly directed Lukić to proceed with another question.⁵⁸¹

189. The trial record indicates that, prior to the impugned remark, the Prosecution objected to the question put to the witness by Lukić’s co-counsel and the Presiding Judge intervened, inquiring into its relevance.⁵⁸² A hypothetical fair-minded observer, properly informed, would recognise that the

⁵⁷⁷ Lukić’s Appeal Brief, para. 186. See also Book of Authorities for the Defence Appellant’s Brief, 7 October 2009, Section I.

⁵⁷⁸ *Rutaganda* Appeal Judgement, paras 47, 51; *Akayesu* Appeal Judgement, para. 316.

⁵⁷⁹ Lukić’s Appeal Brief, para. 186(a), referring to Emin Kabashi, 22 Aug 2006, T. 2090: “Perry Mason probably once got somebody to break down and admit to that but let’s move on.”

⁵⁸⁰ Emin Kabashi, 22 Aug 2006, T. 2090.

⁵⁸¹ Prosecution’s Response Brief (Lukić), para. 145.

⁵⁸² Emin Kabashi, 22 Aug 2006, T. 2089-2090.

Presiding Judge's allegoric remark was made in the context of an intervention the purpose of which was to ensure that the mode of the witness examination was effective.⁵⁸³ Accordingly, the Appeals Chamber finds that no appearance of bias has been demonstrated in this case.

b. Cross-examination of Danica Marinković and Miroslav Mijatović

190. Lukić further claims that on two occasions the Presiding Judge prevented him "from attempting to make a record and be heard."⁵⁸⁴ Lukić refers to a statement of the Presiding Judge made on 14 February 2008:

JUDGE BONOMY: Mr. Lukic, sit down, please. Mr. Mijatovic can answer questions[.]⁵⁸⁵

He also refers to the following exchange which took place on 4 March 2008:

JUDGE BONOMY: Sit down. You're just interfering with the cross-examination now.

MR. IVETIC: I don't believe so, Your Honour. I think this is a very important point.

JUDGE BONOMY: Sit down.

MR. IVETIC: And I want it on the record.

JUDGE BONOMY: Sit down and deal with it in re-examination. Ms. Carter.⁵⁸⁶

191. In response, the Prosecution argues that in both instances the intervention of the Presiding Judge was appropriate as, first, he directed Lukić's lead counsel not to give evidence on behalf of the witness, and, second, he overruled an unfounded objection by Lukić's co-counsel.⁵⁸⁷

192. As shown by the trial record, in the first instance, Lukić's lead counsel intervened when the Presiding Judge was seeking to elicit an answer from Miroslav Mijatović concerning the reporting obligations of the Kosovo Secretariats of the Interior.⁵⁸⁸ A reading of the relevant section of the transcript shows that not only was Lukić's lead counsel not prevented from having his objection recorded, but he engaged in an extensive discussion with the Presiding Judge, who invited counsel

Q. Okay. Now, what I'm getting at, sir, is that much of your testimony is either inaccurate or biased in favour of the KLA. Isn't that correct?

MR. HANNIS: Your Honour, I object to that. That's an argument.

JUDGE BONOMY: Pretty pointless question, Mr. Ivetic in the situation that we are in here. It's one that you might ask in other jurisdictions, I suspect [...] Perry Mason probably once got somebody to break down and admit to that but let's move on.

⁵⁸³ See Rule 90(F) of the Rules.

⁵⁸⁴ Lukić's Appeal Brief, para. 186(d)-(e).

⁵⁸⁵ Lukić's Appeal Brief, para. 186 (e), referring to Miroslav Mijatović, 14 Feb 2008, T. 22393.

⁵⁸⁶ Lukić's Appeal Brief, para. 186 (d), referring to Danica Marinković, 4 Mar 2008, T. 23630-23631.

⁵⁸⁷ Prosecution's Response Brief (Lukić), para. 145.

⁵⁸⁸ Miroslav Mijatović, 14 Feb 2008, T. 22391-22392.

to address any possible concerns he may have during the re-examination of the witness.⁵⁸⁹ Lukić does not claim that he was subsequently prevented from effectively re-examining the witnesses in question. In the second instance, Lukić's co-counsel attempted to intervene during the cross-examination of Danica Marinković by the Prosecution. The Presiding Judge instructed him to refrain from doing so and to pursue any clarification he deemed necessary during the re-examination of the witness.⁵⁹⁰ Thus, having considered Judge Bonomy's remarks in their proper context, the Appeals Chamber finds that Lukić has failed to demonstrate that they would lead a reasonable and well-informed observer to apprehend bias.

c. Direct examination of Ljubivoje Joksić

193. Lukić asserts that, in the course of Ljubivoje Joksić's direct examination, the Presiding Judge made a statement "essentially curtailing consultations" between Lukić and his counsel and constituting "a disparaging remark about both during a critical point of the proceedings".⁵⁹¹ In response, the Prosecution submits that the Presiding Judge correctly instructed that only one person speak at a time, and that the impugned remark does not show any improper restriction upon communication between Lukić and his counsel.⁵⁹²

194. The impugned remark reads as follows:

I'd prefer just to hear from the puppet rather than the puppet master as well. One person at a time will be sufficient for our purposes.⁵⁹³

When the court session resumed the Presiding Judge made the following clarification:

In reviewing the transcript [...] I was reminded of a hurried intervention when accused and counsel appeared to be speaking loudly at the same time when I made reference to puppetry. [I]t concerned me when I re-read it that it could be regarded as a general comment and not confined to that particular occasion, so [for the] avoidance of any doubt whatsoever, I want to say one thing. I hope, indeed I think, that counsel know that I appreciate the responsible way in which the proceedings have been handled in general by counsel and that the comment was one made in the heat of the moment.⁵⁹⁴

⁵⁸⁹ Miroslav Mijatović, 14 Feb 2008, T. 22393-22395.

JUDGE BONOMY: Would you confine yourself to making submissions on this in due course –

MR. LUKIC: Okay.

JUDGE BONOMY: -- and re-examining insofar as you think it appropriate to re-examine.

(Miroslav Mijatović, 14 Feb 2008, T. 22395).

⁵⁹⁰ Danica Marinković, 4 Mar 2008, T. 23630-23631.

⁵⁹¹ Lukić's Appeal Brief, para. 186(b), referring to Ljubivoje Joksić, 8 Feb 2008, T. 21925.

⁵⁹² Prosecution's Response Brief (Lukić), para. 145.

⁵⁹³ Ljubivoje Joksić, 8 Feb 2008, T. 21925.

⁵⁹⁴ Ljubivoje Joksić, 11 Feb 2008, T. 22014.

195. It is clear from the record that the impugned remark addressed a particular situation where the accused and his counsel were speaking loudly at the same time.⁵⁹⁵ The Appeals Chamber considers that the impugned remark reflects the immediate reaction of Judge Bonomy to an unsatisfactory instance during the trial. As illustrated above, shortly after making the impugned remark, Judge Bonomy clarified his statement to ensure that the parties fully understood that it was an immediate reaction to a specific incident and was not to be interpreted as a general comment regarding counsel's handling of the proceedings. In these circumstances, the Appeals Chamber finds that a reasonable and well-informed observer cannot apprehend any bias in Judge Bonomy's statement.

d. Hearing of 4 March 2008

196. Lukić asserts that the Presiding Judge "attempt[ed] to prevent a record as to the serious complaints raised about the rush of the trial" expressed in Lukić's motion objecting to the trial sitting schedule.⁵⁹⁶ In response, the Prosecution submits that the Presiding Judge merely sought clarification as to whether Lukić intended to withdraw a comment according to which he alleged that the Trial Chamber viewed the trial as a formality and had already assumed Lukić's guilt.⁵⁹⁷

197. The Appeals Chamber considers that the Presiding Judge's impugned statement must be considered in its procedural context. The trial record shows that, on 11 February 2008, Lukić submitted a motion objecting to the trial sitting schedule and seeking an amendment thereof.⁵⁹⁸ He stated, *inter alia*: "Surely, the Trial Proceedings themselves are of more substantive value than simply being a mere legal formality to be endured before a judgement is rendered (particularly in light of the requirement of the presumption of innocence)."⁵⁹⁹ The Trial Chamber found Lukić's submission to be "unfounded and impertinent" in suggesting that the Trial Chamber disregarded the presumption of innocence.⁶⁰⁰ It considered that, pursuant to Rule 46(A) of the Rules, Lukić's assertion could constitute conduct that is offensive and invited him to withdraw the relevant part of the Motion.⁶⁰¹ Lukić neither complied with nor sought leave to appeal the decision of the Trial Chamber. The matter was raised again by the Presiding Judge during the hearing of 4 March 2008 when he made the following impugned statement:

⁵⁹⁵ Ljubivoje Joksić, 11 Feb 2008, T. 22014.

⁵⁹⁶ Lukić's Appeal Brief, para. 186(f). See also Lukić's Appeal Brief, Annex D, section (f).

⁵⁹⁷ Prosecution's Response Brief (Lukić), para. 145.

⁵⁹⁸ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Sreten Lukic's [*sic*] Motion Objecting to Trial Sitting Schedule and Seeking Amendment of the Same, 11 February 2008 ("Lukić's Motion of 11 February 2008").

⁵⁹⁹ Lukić's Motion of 11 February 2008, para. 19.

⁶⁰⁰ Decision of 20 February 2008, para. 7.

⁶⁰¹ Decision of 20 February 2008, para. 12.

[I]n that decision on the 20th of February we drew attention to a remark that had been made in the motion itself, which depending perhaps on how you interpret it, others might say perhaps not, might have constituted a comment that wasn't exactly appropriate. And we did indicate that you ought to consider whether that comment should be withdrawn or remain. Now, there's been no response from you to that. Do we take it from that that you have made a deliberate decision to take no action?⁶⁰²

In response to the Presiding Judge's impugned remark, Lukić clarified that the submission in question "was not meant as a criticism [...] or [...] as an accusation" and refused to proceed with its withdrawal.⁶⁰³ No further action was undertaken by the Trial Chamber in this regard.

198. When considered in its proper context, it is clear that Judge Bonomy's impugned statement at the hearing of 4 March 2008 was aimed at clarifying Lukić's position as to whether he intended to withdraw the submission in question. Rather than preventing Lukić from raising his concerns with respect to the pace of the trial, the trial record clearly shows that the true intention of the Presiding Judge was to elucidate Lukić's position on the matter. In these circumstances, the Appeals Chamber is not convinced that a reasonable and well-informed observer would apprehend any bias as a result of Judge Bonomy's statement. Lukić's argument is therefore dismissed.

e. Lukić's Closing Arguments

199. Lukić asserts that Judge Bonomy rejected without consideration "the glaring misstatements/misrepresentations of evidence" in the Prosecution's Closing Brief, which he claims were validly brought to the attention of the Trial Chamber.⁶⁰⁴ In response, the Prosecution submits that the Presiding Judge's reaction to the allegation of dishonesty made by Lukić's co-counsel against the Prosecution during his Closing Arguments was appropriate, in that inaccuracies in the Prosecution's Closing Brief were not a sufficient basis for an accusation that the Prosecution purposefully sought to mislead the Trial Chamber.⁶⁰⁵

200. The impugned statement reads:

Mr. Ivetic, I'm not prepared to sit back any longer and listen to allegations of lack of candour when there have been many instances in this trial when the Lukić briefs have been less than accurate without the allegation being made against you of lack of candour. Do you consider that what you're doing is an appropriate way to be addressing us in regard to matters which do not simply on the face of your assertion justify that claim?⁶⁰⁶

It is evident from the transcript that Judge Bonomy's remark was made in response to the following statement of Lukić's co-counsel: "You cannot believe a word of what is contained in the

⁶⁰² Procedural Matters, 4 Mar 2008, T. 23666-23667.

⁶⁰³ Procedural Matters, 4 Mar 2008, T. 23667.

⁶⁰⁴ Lukić's Appeal Brief, para. 186(c).

⁶⁰⁵ Prosecution's Response Brief (Lukić), para. 145.

[Prosecution's] brief because they make a mockery of candour and honesty in their citations."⁶⁰⁷ Lukić's co-counsel later recognised that "perhaps candour is a strong word" but maintained that the Trial Chamber should carefully examine the evidence cited by the Prosecution.⁶⁰⁸ The Presiding Judge responded as follows:

[Y]our actual remarks were that the Prosecution submissions make a mockery of candour and honesty, and that's just one of a series of remarks that bear the interpretation that there is a deliberate attempt on the part of the Prosecution to mislead the Bench. Now, we recognise the highly charged atmosphere which surrounds this stage in the proceedings; nevertheless, we regret that you have not had the courtesy to recognise that the language you've just used is not appropriate language for counsel appearing in any Tribunal. At this late stage in the proceedings, we choose to simply record that we do not accept that there is a basis for claiming that the Prosecution deliberately set out to mislead the Bench.⁶⁰⁹

201. Considering Judge Bonomy's remark in its context, the Appeals Chamber does not find that a reasonable and well-informed observer would have apprehended bias on his part. The Presiding Judge did not suggest in any way that the evidence cited by the Prosecution would not be subject to scrutiny. Rather, he reproached Lukić's co-counsel for using inappropriate language, the legitimacy of which seems to have been recognised by counsel himself.⁶¹⁰ The Appeals Chamber therefore dismisses Lukić's argument.

(iv) Trial Chamber's remark concerning the translation of evidence

202. Lukić argues that the "disparaging treatment" he received was also illustrated by the Trial Chamber's observation about the "unsatisfactory manner in which the Lukic Defense has chosen to litigate this matter".⁶¹¹

203. The Appeals Chamber notes that, in its Decision of 10 June 2008, the Trial Chamber stated that:

[t]he intervention of the Chamber and the efforts of CLSS and OLAD have enabled the Lukić Defence to have as many documents translated as it did, despite the unsatisfactory manner in which the Lukić Defence has pursued these matters.⁶¹²

In addition to misquoting the Trial Chamber, Lukić takes the impugned statement out of its context. The Decision of 10 June 2008 dealt with Lukić's request for reconsideration of a previous decision, which denied him, *inter alia*, an extension of time for submitting additional translations of

⁶⁰⁶ Lukić Defence Closing Statement, 26 Aug 2008, T. 27372.

⁶⁰⁷ Lukić Defence Closing Statement, 26 Aug 2008, T. 27371.

⁶⁰⁸ Lukić Defence Closing Statement, 26 Aug 2008, T. 27372-27373.

⁶⁰⁹ Lukić Defence Closing Statement, 26 Aug 2008, T. 27373.

⁶¹⁰ Lukić Defence Closing Statement, 26 Aug 2008, T. 27372-27373.

⁶¹¹ Lukić's Appeal Brief, para. 187, citing Decision of 10 June 2008, para. 7.

⁶¹² Decision of 10 June 2008, para. 7.

documents.⁶¹³ Considered in its proper context, it is apparent that the impugned statement concerned the “unsatisfactory manner” in which Lukić had pursued the translation of documents to be tendered into evidence during his case. It was neither a general observation nor a comment on the manner Lukić had decided to litigate his case. Accordingly, the Appeals Chamber finds that a reasonable and well-informed observer would not have apprehended bias in the impugned statement.

(c) Conclusion

204. Having found that no apprehension of bias has been demonstrated, the Appeals Chamber concludes that it need not further address the allegation of prejudice raised under Lukić’s ground G of appeal.

E. Alleged lack of reasoned opinion

205. Lukić asserts that the Trial Chamber committed a discernible error in the manner in which it analysed the evidence.⁶¹⁴ He argues that the Trial Chamber did not comply with its obligation to “make clear in its judgement that it has considered crucial, exculpatory evidence and explain the weight which it has given to evidence and its reasons.”⁶¹⁵

206. The Appeals Chamber finds that Lukić’s submission that the Trial Chamber failed to provide a reasoned opinion without providing any reference to a particular finding in the Trial Judgement or in any other way substantiating his assertion fails to meet the burden on appeal. Accordingly, the Appeals Chamber dismisses ground E of Lukić’s appeal.⁶¹⁶

F. Conclusion

207. For the foregoing reasons, the Appeals Chamber dismisses Pavković’s eleventh ground of appeal, and grounds A, B, E, and G of Lukić’s appeal in their entirety.

⁶¹³ Decision of 10 June 2008, para. 1, referring to Decision of 2 June 2008.

⁶¹⁴ Lukić’s Appeal Brief, para. 164.

⁶¹⁵ Lukić’s Appeal Brief, paras 164-165.

⁶¹⁶ Lukić’s submission that the Trial Chamber’s approach of not discussing some of the evidence it considered made it difficult to discern: (i) the extent to which the Trial Judgement was based on evidence not discussed therein; and (ii) that all of the evidence was correctly considered (Lukić’s Appeal Brief, para. 83, referring to Trial Judgement, vol. 1, para. 64) is likewise dismissed.

IV. ALLEGED ERRORS IN RELATION TO THE INDICTMENT

208. On 26 June 2006, the Trial Chamber confirmed the operative Indictment in this case.⁶¹⁷ Šainović, Lazarević, and Lukić present a number of challenges in relation to the pleadings contained in the Indictment and the Trial Chamber's interpretation thereof.⁶¹⁸ The Prosecution also alleges that the Trial Chamber erred in its interpretation of Count 5 of the Indictment.⁶¹⁹ The Appeals Chamber will address these arguments in turn.

A. Šainović's appeal

209. In determining Šainović's individual criminal responsibility for commission through participation in a JCE, the Trial Chamber found that:

as one of the leading members of the Joint Command, Šainović possessed extensive *de facto* powers over both the VJ and the MUP forces in Kosovo. As such, he was able to make proposals, give suggestions, and issue instructions to both Pavković and Lukić and thus to the VJ and the MUP respectively. He was the crucial link between Milošević, who was in Belgrade, and the VJ and MUP units that were operating in Kosovo. His role was, therefore, that of the *political coordinator* of the forces in Kosovo.⁶²⁰

1. Submissions of the parties

210. Šainović argues that the Trial Chamber erred in convicting him as "the political coordinator" of the VJ and MUP forces in Kosovo.⁶²¹ Šainović contends that he was not indicted as a political coordinator, but rather as Head of the Joint Command for "having commanded, controlled, directed and otherwise exercised effective control over forces of the FRY and Serbia in Kosovo" and for having "participated in planning, instigating and ordering the operations of the FRY and Serbian forces in Kosovo."⁶²² As a result, he argues that he was denied the right to a fair trial, thus invalidating the finding that he participated in the JCE and was guilty pursuant to Counts 1 through 5 of the Indictment.⁶²³

211. Šainović argues that his defence case would have been different had he been notified that he was accused of being a political coordinator, rather than a commander, of the forces of the FRY and Serbia in Kosovo.⁶²⁴ In support of this argument, Šainović asserts that the Trial Chamber did not

⁶¹⁷ Trial Judgement, vol. 1, para. 3, referring to Indictment Order of 26 June 2006.

⁶¹⁸ Šainović's Notice of Appeal, para. 10; Šainović's Appeal Brief, paras 23-27; Lazarević's Notice of Appeal, paras 21-22; Lazarević's Appeal Brief, paras 138-140, 142; Lukić's Notice of Appeal, Grounds AA, CC, DD, Y; Lukić's Appeal Brief, paras 748, 751-752.

⁶¹⁹ Prosecution's Notice of Appeal, para. 2; Prosecution's Appeal Brief, paras 3-34.

⁶²⁰ Trial Judgement, vol. 3, para. 462 (emphasis added).

⁶²¹ Šainović's Appeal Brief, paras 23-27, referring, *inter alia*, to Trial Judgement, vol. 3, para. 462.

⁶²² Šainović's Appeal Brief, paras 24, 27, referring to Indictment, para. 46(c)-(d).

⁶²³ Šainović's Appeal Brief, paras 27, 272.

⁶²⁴ Šainović's Appeal Brief, para. 26; Appeal Hearing, 11 Mar 2013, AT. 170-171, 192.

use the label “political coordinator” to describe some of the tasks he carried out.⁶²⁵ He argues that the Trial Chamber instead viewed the role of “political coordinator” as a function that itself signifies “rights and responsibilities that entail criminal responsibility in the case of infringement or abuse thereof”.⁶²⁶

212. The Prosecution responds that the Trial Chamber convicted Šainović on the basis of the form of liability that was pleaded in the Indictment and of which he was adequately notified.⁶²⁷ The Prosecution further argues that the Trial Chamber only used the label “political coordinator” as a descriptive term in relation to its findings which are “fully consistent with the way the Prosecution pled its case”.⁶²⁸ It argues that the following allegations were pleaded in the Indictment: (i) “Šainović participated in the JCE by receiving instructions from Milošević which he passed on and elaborated to the VJ and the MUP through the Joint Command”;⁶²⁹ (ii) “through his position in the Joint Command, Šainović exercised effective control over the forces of FRY/Serbia in Kosovo”;⁶³⁰ and (iii) “the Joint Command was entrusted with coordinating the work of civil affairs organs with the activities of the forces of FRY/Serbia in Kosovo to ensure that they conducted operations in accordance with political objectives.”⁶³¹ The Prosecution argues that the same allegations were reiterated consistently throughout the trial.⁶³²

2. Analysis

213. The Appeals Chamber recalls that, in accordance with Article 21(4)(a) of the Statute, an accused has the right “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”. In application of this right, Rule 47(C) of the Rules states that an indictment must set forth “a concise statement of the facts of the case and of the crime with which the suspect is charged.” In order to provide proper notice to the accused, the Prosecution is required to plead in an indictment all of the charges and the underpinning material facts with

⁶²⁵ Šainović’s Appeal Brief, para. 25.

⁶²⁶ Šainović’s Appeal Brief, para. 25. Šainović further contends that the function of “political coordinator” differs in all key respects from that of Head of the Joint Command. Šainović’s Reply Brief, para. 11.

⁶²⁷ Prosecution’s Response Brief (Šainović), para. 45.

⁶²⁸ Prosecution’s Response Brief (Šainović), paras 45-46. See also *ibid.*, paras 41-44.

⁶²⁹ Prosecution’s Response Brief (Šainović), para. 46, referring to Indictment, para. 46(b)-(d).

⁶³⁰ Prosecution’s Response Brief (Šainović), para. 46, referring to Indictment, paras 24, 46(c), 47(a), 48.

⁶³¹ Prosecution’s Response Brief (Šainović), para. 46, referring to Indictment, para. 24.

⁶³² Prosecution’s Response Brief (Šainović), para. 48, referring to Prosecution Opening Statement, 10 Jul 2006, T. 435, 444, Prosecution Submissions, Rule 98 *bis* Hearing, 4 May 2007, T. 12703, 12706, 12707, 12709, 12719-12720, 7 May 2007, T. 12718, Rule 98 *bis* Decision, 18 May 2007, T. 12793, 12975, Prosecution’s Closing Brief, paras 202, 658, 673, 680, 722.

sufficient precision, but is not required to set out the evidence by which the material facts are to be proven.⁶³³

214. The Appeals Chamber notes that the Prosecution's case was premised upon Šainović's participation in a JCE.⁶³⁴ In cases where the Prosecution alleges liability pursuant to a JCE, the following material facts must be pleaded: "the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused's participation in the enterprise."⁶³⁵

215. Šainović's argument that the nature of his participation in the JCE was not adequately pleaded is without merit. In this regard, the Appeals Chamber notes that the Indictment alleged that Šainović participated in the JCE in ways which include "[a]s Deputy Prime Minister of the FRY with responsibility for Kosovo, [exercising] the authority of Slobodan Milošević with regard to Kosovo, including authority over the VJ and the MUP and civilian bodies".⁶³⁶ The Prosecution alleged further that Šainović's role as Deputy Prime Minister of the FRY with responsibility for Kosovo involved "receiv[ing] instructions from Slobodan Milošević which he passed on, and elaborated, to the VJ and the MUP, both directly and through the Joint Command".⁶³⁷ In addition, the Prosecution claimed that "Šainović's participation in the crimes charged is [...] the only inference to be drawn from [...], among other factors, [h]is authority over the VJ and the MUP in accordance with instructions from Slobodan Milošević".⁶³⁸ Further, the Indictment alleged that the Joint Command, headed by Šainović, "was mandated to co-ordinate the work of civil affairs organs with the activities of the organisations that constituted the forces of the FRY and Serbia in Kosovo and to ensure that they conducted operations in accordance with political objectives."⁶³⁹

216. In the context of the allegations set out in the Indictment, the Trial Chamber's determination that Šainović was the "political co-ordinator of the forces in Kosovo"⁶⁴⁰ was merely a shorthand label for referring to its findings that Šainović was "one of the leading members of the Joint Command", "possessed extensive *de facto* powers over both the VJ and the MUP forces in Kosovo", "was able to make proposals, give suggestions, and issue instructions to both Pavković

⁶³³ *Martić* Appeal Judgement para. 162; *Simić* Appeal Judgement, para. 20; *Naletilić and Martinović* Appeal Judgement, para. 23; *Kvočka et al.* Appeal Judgement, para. 27; *Kupreškić et al.* Appeal Judgement, para. 88; *Karera* Appeal Judgement, para. 292; *Muvunyi I* Appeal Judgement, para. 18; *Seromba* Appeal Judgement, paras 27, 100; *Nahimana et al.* Appeal Judgement, para. 322.

⁶³⁴ Indictment, paras 18-21.

⁶³⁵ *Simić* Appeal Judgement, para. 22; *Kvočka et al.* Appeal Judgement, para. 28; *Ntagerura et al.* Appeal Judgement, para. 24.

⁶³⁶ Indictment, para. 46(a).

⁶³⁷ Indictment, para. 46(b).

⁶³⁸ Indictment, para. 47(b).

⁶³⁹ Indictment, para. 24.

and Lukić”, and “was the crucial link between Milošević, who was in Belgrade, and the VJ and MUP units that were operating in Kosovo.”⁶⁴¹ The Appeals Chamber therefore finds that the term “political coordinator” does not constitute a material fact in itself that should have been pleaded in the Indictment and, therefore, dismisses sub-ground 1(2) of Šainović’s appeal.

B. Lazarević’s appeal

217. In relation to the crimes committed in villages in the Srbica/Skenderaj municipality, the Trial Chamber accepted:

Abdullah Salihu’s evidence that the VJ arrived in Ćirez/Qirez, or at least the area surrounding Ćirez/Qirez, sometime around 20 or 21 March, as confirmed by the Joint Command orders of 19 and 22 March, as well as the testimony of Ljubiša Diković. [...] Salihu’s evidence about another “Serb offensive” in the area taking place on 29 April is also supported by the 37th Motorised Brigade’s report of 1 May 1999, which places the brigade near Salihu’s village, Baks.⁶⁴²

218. The Trial Chamber found that many civilians in Srbica/Skenderaj municipality were displaced from their homes by the VJ and MUP forces and directed towards the border and into either Albania or Macedonia.⁶⁴³ It subsequently convicted Lazarević of aiding and abetting the commission of deportation and other inhumane acts (forcible transfer) in four specific locations in the Srbica/Skenderaj municipality, including the area of the village of Ćirez/Qirez.⁶⁴⁴

1. Submissions of the parties

219. Lazarević argues that the Trial Chamber erred in holding him responsible for deportation and forcible transfer committed in the area of the village of Ćirez/Qirez in the Srbica/Skenderaj municipality on the basis of acts that occurred outside of the time-frame specified in the Indictment.⁶⁴⁵ In this regard, Lazarević refers to the Trial Chamber’s findings concerning the presence of the VJ in Ćirez/Qirez on 20 or 21 March 1999.⁶⁴⁶ He submits that the time period concerned – namely, 20 and 21 March 1999 – is not covered by the relevant part of the Indictment, as the charges listed therein refer to the period from on or about 25 March 1999 until the end of March 1999.⁶⁴⁷ Lazarević also refers to the Trial Chamber’s findings concerning a “Serb offensive”

⁶⁴⁰ Trial Judgement, vol. 3, para. 462.

⁶⁴¹ Trial Judgement, vol. 3, para. 462.

⁶⁴² Trial Judgement, vol. 2, para. 673.

⁶⁴³ Trial Judgement, vol. 2, para. 675.

⁶⁴⁴ Trial Judgement, vol. 3, para. 930.

⁶⁴⁵ Lazarević’s Appeal Brief, paras 138-140, 142. See also Lazarević’s Reply Brief, para. 81.

⁶⁴⁶ Lazarević’s Appeal Brief, paras 138, 145, referring to Trial Judgement, vol. 2, para. 673.

⁶⁴⁷ Lazarević’s Appeal Brief, paras 139-140, referring to Indictment para. 72(c).

in the area on 29 April 1999 and similarly argues that this date is not covered by the relevant part of the Indictment.⁶⁴⁸

220. The Prosecution responds that the Trial Chamber did not rely on events outside the scope of the Indictment.⁶⁴⁹ It points out that the Indictment charged Lazarević with “the crimes of deportation and other inhumane acts (forcible transfer) that were committed by the FRY/Serbian forces ‘beginning on or about 1 January 1999 and continuing until 20 June 1999.’”⁶⁵⁰ It argues that the events of 20 or 21 March 1999 and 29 April 1999 therefore fall within the Indictment period.⁶⁵¹ The Prosecution submits that paragraph 72(c) of the Indictment describes attacks by the FRY and Serbian forces in the Srbica/Skenderaj municipality as “*beginning on or about 25 March 1999*”.⁶⁵² It contends that the discrepancy with the Trial Chamber’s finding that the VJ arrived in Ćirez/Qirez “around 20 or 21 March” is only a minor difference which did not prevent the Trial Chamber from considering the charges in the Indictment in light of the evidence presented at trial.⁶⁵³ As regards Lazarević’s argument concerning the events of 29 April 1999, the Prosecution contends that “given the general allegations described above and use of the word ‘beginning’, paragraph 72(c) does not exclude crimes committed in April 1999.”⁶⁵⁴

221. The Prosecution also argues that Lazarević has waived the right to raise these arguments on appeal as he has failed to demonstrate that he raised this objection at trial or that he suffered any prejudice.⁶⁵⁵

222. In reply to the Prosecution’s argument that he has waived the right to make this objection on appeal, Lazarević submits that “a reasonable trier of fact must exercise caution so as not to step outside an indictment, whether the parties object to it or not”.⁶⁵⁶

2. Analysis

223. The Appeals Chamber recalls that parties “cannot remain silent on [a] matter only to return on appeal to seek a trial *de novo*”⁶⁵⁷ and are, therefore, under an obligation to raise any issue of

⁶⁴⁸ Lazarević’s Appeal Brief, para. 142, referring to Trial Judgement, vol. 2, para. 673.

⁶⁴⁹ Prosecution’s Response Brief (Lazarević), para. 142, referring to Lazarević’s Appeal Brief, paras 139-142.

⁶⁵⁰ Prosecution’s Response Brief (Lazarević), para. 142, referring to Indictment, paras 25-32, 72-73.

⁶⁵¹ Prosecution’s Response Brief (Lazarević), para. 142, referring to Trial Judgement, vol. 2, para. 673.

⁶⁵² Prosecution’s Response Brief (Lazarević), para. 143.

⁶⁵³ Prosecution’s Response Brief (Lazarević), para. 143, referring to Trial Judgement, vol. 2, para. 673, *Rutaganda* Appeal Judgement, para. 302, *Kunarac et al.* Appeal Judgement, para. 217.

⁶⁵⁴ Prosecution’s Response Brief (Lazarević), para. 143, referring to *Rutaganda* Appeal Judgement, para. 302.

⁶⁵⁵ Prosecution’s Response Brief (Lazarević), para. 144, referring to Lazarević’s Closing Trial Brief, paras 142-159, *Niyitegeka* Appeal Judgement, para. 199.

⁶⁵⁶ Lazarević’s Reply Brief, para. 82.

⁶⁵⁷ *Blaškić* Appeal Judgement, para. 222; *Tadić* Appeal Judgement, para. 55; *Kambanda* Appeal Judgement, para. 25; *Akayesu* Appeal Judgement, para. 361.

contention before the Trial Chamber, either during trial or pre-trial.⁶⁵⁸ The Appeals Chamber has held that:

[i]f a party raises no objection to a particular issue before the Trial Chamber when it could have reasonably done so, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to bring the issue as a valid ground of appeal.⁶⁵⁹

224. However, the Appeals Chamber further recalls that waiver “should not entirely foreclose” indictment defects from being raised for the first time on appeal by the defence.⁶⁶⁰ The rationale behind this holding is premised upon the accused’s right to be informed of the charges against him pursuant to Article 24(a) of the Statute and the possibility of serious prejudice to the accused should the Appeals Chamber foreclose the accused from raising such arguments on appeal for the first time.⁶⁶¹ However, in such circumstances, the burden of proof shifts from the Prosecution to the Defence who is then required to demonstrate the existence of the said prejudice.⁶⁶² The Appeals Chamber will therefore first assess whether there was a defect in the Indictment. Only if such a defect exists, will the questions of: (i) whether the argument was raised; and (ii) whether it would have been reasonable for the party concerned to have raised the argument, become relevant to which party bears the burden of proof in relation to the question of prejudice.

225. The Indictment alleges that, “*beginning on or about 25 March 1999*”, events occurred which amounted to deportation and forcible transfer in the village of Ćirez/Qirez in the Srbica/Skenderaj municipality.⁶⁶³ The Appeals Chamber recalls that charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to an accused.⁶⁶⁴ However, an Indictment need not have the degree of specificity of the evidence underpinning it.⁶⁶⁵ In these circumstances, the Appeals Chamber finds that the reference to

⁶⁵⁸ *Bošković and Tarčulovski* Appeal Judgement, para. 185; *Naletilić and Martinović* Appeal Judgement, para. 21; *Blaškić* Appeal Judgement, para. 222; *Čelebići* Appeal Judgement, para. 640. See also *Krajišnik* Appeal Judgement, para. 654; *Furundžija* Appeal Judgement, para. 174.

⁶⁵⁹ *Naletilić and Martinović* Appeal Judgement, para. 21. See *Bošković and Tarčulovski* Appeal Judgement, paras 185, 244; *Blaškić* Appeal Judgement, para. 222; *Akayesu* Appeal Judgement, para. 361. See also *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 20; *Čelebići* Appeal Judgement, para. 640; *Muhimana* Appeal Judgement, para. 80; *Gacumbitsi* Appeal Judgement, para. 51; *Niyitegeka* Appeal Judgement, paras 199-200; *Kambanda* Appeal Judgement, para. 25.

⁶⁶⁰ *Simić* Appeal Judgement, para. 25; *Naletilić and Martinović* Appeal Judgement, fn. 76.

⁶⁶¹ *Simić* Appeal Judgement, para. 25; *Niyitegeka* Appeal Judgement, para. 200.

⁶⁶² *Simić* Appeal Judgement, para. 25; *Kvočka et al.* Appeal Judgement, para. 35; *Kupreškić et al.* Appeal Judgement, paras 122-123; *Niyitegeka* Appeal Judgement, paras 199-200.

⁶⁶³ Indictment para. 72(c) (emphasis added).

⁶⁶⁴ *Karera* Appeal Judgement, para. 292; *Muvunyi I* Appeal Judgement, para. 18; *Seromba* Appeal Judgement, paras 27, 100; *Simba* Appeal Judgement, para. 63; *Muhimana* Appeal Judgement, paras 76, 167, 195; *Gacumbitsi* Appeal Judgement, para. 49.

⁶⁶⁵ *Rutaganda* Appeal Judgement, para. 302. Moreover, in the *Kunarac et al.* Appeal Judgement, the Appeals Chamber held that “minor discrepancies between the dates in the Trial Judgement and those in the Indictment in this case go to prove the difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred and not, as implied by the Appellant, that the events charged in Indictment IT-96-23 did not occur” (*Kunarac et al.* Appeal Judgement, para. 217). See also *Kvočka et al.* Appeal Judgement, para. 436.

“beginning on or about 25 March 1999” is of sufficient scope to include acts which occurred around 20 or 21 March 1999.

226. As regards the events of 29 April 1999, the Appeals Chamber notes that pursuant to the *chapeau* of paragraph 72 of the Indictment, the particular crimes at stake were charged and listed among others as part of a campaign of expulsion of around 800,000 Kosovo Albanian civilians “[b]eginning on or about 1 January 1999 and continuing until 20 June 1999”.⁶⁶⁶ The Appeals Chamber further notes that paragraph 72 (c) of the Indictment alleges that these crimes were committed *beginning* on or about 25 March 1999 without providing an end date. Consequently, the time-frame set out in paragraph 72 (c) of the Indictment, when read together with the allegations contained in the *chapeau* of the same paragraph, provides sufficient notice with respect to the timing of the acts which occurred on 29 April 1999. Moreover, the Appeals Chamber notes that Lazarević has not identified any prejudice in the preparation of the material aspects of his defence.⁶⁶⁷ In these circumstances, the Appeals Chamber finds that the Indictment adequately put Lazarević on notice as to the date of the crimes charged. The Appeals Chamber therefore dismisses ground 1(F) of Lazarević’s appeal, to the extent that it alleges a defect in the Indictment.

C. Lukić’s appeal

227. The Trial Chamber convicted Lukić of, *inter alia*, murder both as a crime against humanity and as a violation of the laws or customs of war, committed in several locations in the Suva Reka/Suhareka, Srbica/Skenderaj, and Vučitrn/Vushtrria municipalities.⁶⁶⁸

1. Submissions of the parties

228. Lukić argues that the Trial Chamber erred in holding him responsible for the murder of “victims who were not previously in the Indictment” with respect to the Suva Reka/Suhareka, Srbica/Skenderaj, and Vučitrn/Vushtrria municipalities.⁶⁶⁹ Lukić argues that “the Prosecution must particularize the criminal episodes it seeks to prove at trial in a manner which is consistent with the Defense’s right to be informed promptly of the nature and cause of the charges against them.”⁶⁷⁰ He claims that the Prosecution could have applied to amend the Indictment to include alleged victims

⁶⁶⁶ Indictment para. 72.

⁶⁶⁷ In this case, Lazarević does not refer to any relevant objections made at trial, which means that he bears the burden of showing that the alleged defect of the Indictment materially impaired the preparation of his defence. See also Lazarević’s Closing Brief, paras 153-159.

⁶⁶⁸ Trial Judgement, vol. 3, para. 1138.

⁶⁶⁹ Lukić’s Appeal Brief, paras 748, 752, referring to Trial Judgement, vol. 2, paras 611-612, 616, 619, 621, 799, *ibid.*, vol. 4, paras 646-647, 649, 651-652, 654-663, 666-675, 677-684, 686-689, 691-718, 720-727, 729-737, 739-746, 748, 750-760, 762-763, 765-767, 872.

⁶⁷⁰ Lukić’s Appeal Brief, para. 749, referring to *Ntakirutimana* Appeal Judgement, paras 77-79.

not previously mentioned, but did not do so and that liability for these deaths is unjust.⁶⁷¹ Lukić claims that, as a result, the preparation of his defence was impaired.⁶⁷²

229. The Prosecution responds that, of the 47 victims to whom Lukić refers, the Trial Chamber found only 27 to be proven victims of murder.⁶⁷³ In relation to these 27 victims, the Prosecution argues that Lukić has waived his right to challenge the issue of notice on appeal.⁶⁷⁴ The Prosecution also submits that Lukić has not demonstrated any prejudice caused by the lack of timely notice of these victims.⁶⁷⁵ As regards 22 of those 27 victims, the Prosecution contends that Lukić received timely notice through the Prosecution Proof of Death Charts of 28 March 2007.⁶⁷⁶ In relation to the other five,⁶⁷⁷ the Prosecution argues that “a conviction for murder may be sound even where the victim ‘was not listed in the Schedule to the Indictment nor in [subsequent] Clarifications, provided that all required material elements are proven’”.⁶⁷⁸ In this regard, the Prosecution notes that “[e]vidence of the death of the victims concerned was contained in evidence relied upon by the Prosecution with respect to other victims”.⁶⁷⁹

230. In response to the argument that it should have sought to amend the Indictment to include victims not originally specified therein, the Prosecution argues that the materiality of information about alleged victims is assessed “on a case-by-case basis, considering, *inter alia*, the ‘sheer scale of the alleged crimes’ and the subsequent impracticability to require a high degree of specificity, and the proximity of the accused person to the events for which he is alleged to be criminally responsible.”⁶⁸⁰ The Prosecution adds that in this case, “a high degree of specificity was impractical and the Accused was structurally remote from the events for which he is criminally responsible”,

⁶⁷¹ Lukić’s Appeal Brief, para. 751.

⁶⁷² Lukić’s Appeal Brief, paras 751-752.

⁶⁷³ Prosecution’s Response Brief (Lukić), para. 466, referring to Trial Judgement, vol. 2, paras 382, 433, 539, 543, 799, *ibid.*, vol. 4, paras 473–477, 583–598, 646–647, 872.

⁶⁷⁴ Prosecution’s Response Brief (Lukić), para. 467, referring to *Kunarac et al.* Appeal Judgement, para. 61.

⁶⁷⁵ Prosecution’s Response Brief (Lukić), paras 467, 470.

⁶⁷⁶ Prosecution’s Response Brief (Lukić), para. 467, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Prosecution Submission of Proof of Death Charts in Relation to Individuals Listed in the Schedules to the Indictment, 28 March 2007 (“Prosecution Proof of Death Charts of 28 March 2007”), *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber’s Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 26 January 2009 (“*Gotovina* Decision of 26 January 2009”), paras 18, 20, *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Second Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 2 March 2009 (“*Gotovina* Decision of 2 March 2009”), para. 4, Trial Judgement, vol. 1, para. 25.

⁶⁷⁷ Prosecution’s Response Brief (Lukić), para. 468, referring to Trial Judgement, vol. 2, paras 382, 433, *ibid.*, vol. 4, paras 473, 581–583, 593.

⁶⁷⁸ Prosecution’s Response Brief (Lukić), para. 468, referring to *Gotovina* Decision of 2 March 2009, para. 4, *Gotovina* Decision of 26 January 2009, para. 12.

⁶⁷⁹ Prosecution’s Response Brief (Lukić), fn. 1467, comparing: (i) Trial Judgement, vol. 4, para. 473 with *ibid.*, vol. 4, para. 474; (ii) *ibid.*, vol. 4, paras 581-583 with *ibid.*, vol. 4, paras 584-586; and (iii) *ibid.*, vol. 4, para. 593 with *ibid.*, vol. 4, para. 594.

⁶⁸⁰ Prosecution’s Response Brief (Lukić), para. 469, referring to *Gotovina* Decision of 26 January 2009, para. 17, *Kupreškić et al.* Appeal Judgement, paras 89-90, *Blaškić* Appeal Judgement, paras 212-213, *Kvočka et al.* Appeal Judgement, para. 65, *Naletilić and Martinović* Appeal Judgement, para. 24, *Gacumbitsi* Appeal Judgement, para. 50.

and therefore, the “personal details of particular victims were thus not facts material to the murder charges.”⁶⁸¹

2. Analysis

231. As a preliminary matter, the Appeals Chamber notes that the accuracy of Lukić’s submissions is at issue. In particular, the Appeals Chamber notes that only four of the victims of murder referred to by Lukić were not mentioned by name in the Schedules annexed to the Indictment.⁶⁸² These include: three victims of murder in Suva Reka/Suhareka on 26 March 1999,⁶⁸³ and one victim of murder in Vučitrn/Vushtrria on 2 May 1999.⁶⁸⁴ The remaining victims of murder referred to by Lukić are listed in Schedules D, F, and I of the Indictment.⁶⁸⁵ Consequently, the remainder of the analysis in this section focuses on the four victims identified above.

232. With regard to the Prosecution’s argument that Lukić has waived his right to challenge this issue on appeal, the Appeals Chamber recalls that waiver “should not entirely foreclose” indictment defects from being raised for the first time on appeal by the defence.⁶⁸⁶ Consistent with the legal standard set out above,⁶⁸⁷ the Appeals Chamber will first assess whether the omission of the above-mentioned four victims constitutes a defect in the Indictment.

233. The Appeals Chamber recalls that, when assessing whether certain facts should have been pleaded in an indictment, the court will consider, *inter alia*, the proximity of the accused person to the events for which he is alleged to be criminally responsible,⁶⁸⁸ and the “sheer scale of the alleged crimes”; with massive crimes it may be impracticable to provide a high degree of specificity in relation to certain matters, such as the identity of the victims.⁶⁸⁹ The Appeals Chamber has clarified that:

⁶⁸¹ Prosecution’s Response Brief (Lukić), para. 470, referring to *Gotovina* Decision of 2 March 2009, para. 7, *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 9 October 2008, para. 11.

⁶⁸² See Lukić’s Appeal Brief, fn. 1070; Indictment, Schedules D, F, I. In relation to Sofije Dragaj (see Lukić’s Appeal Brief, fn. 1070, referring to Trial Judgement, vol. 4, para. 767) who was not listed in Schedule F of the Indictment, the Appeals Chamber notes that Lukić was not found responsible for her death (see Trial Judgement, vol. 2, fn. 1488, paras 613, 621, 682-685; *ibid.*, vol. 4, para. 767). Consequently, the Appeals Chamber will not consider Lukić’s submission in this respect.

⁶⁸³ Lukić’s Appeal Brief, fn. 1070, referring to Trial Judgement, vol. 4, paras 646-647. The victims concerned are Genc Berisha, Graniti Berisha, and Jashar Berisha.

⁶⁸⁴ Lukić’s Appeal Brief, fn. 1070, referring to Trial Judgement, vol. 4, para. 872, *ibid.*, vol. 2, para. 799. The victim concerned is Miran Xhafa.

⁶⁸⁵ Indictment, para. 75(d), (f), (i).

⁶⁸⁶ *Simić* Appeal Judgement, para. 25; *Naletilić and Martinović* Appeal Judgement, fn. 76.

⁶⁸⁷ See *supra*, para. 224.

⁶⁸⁸ *Blaškić* Appeal Judgement, paras 210, 212-213; *Kvočka et al.* Appeal Judgement, para. 65; *Naletilić and Martinović* Appeal Judgement, para. 24; *Gacumbitsi* Appeal Judgement, para. 89.

⁶⁸⁹ *Gacumbitsi* Appeal Judgement, para. 50; *Kupreškić et al.* Appeal Judgement, para. 89; *Niyitegeka* Appeal Judgement, para. 193. See also, *Gotovina* Decision of 26 January 2009, para. 17.

[s]uch would be the case where the Prosecution alleges that an accused participated, as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment. Similarly, an accused may be charged with having participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings and forced removals. In such a case the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying the material facts of the case in the indictment. Nevertheless, since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so.⁶⁹⁰

234. In the present case, the charges under Counts 3 and 4 of the Indictment refer to “hundreds of Kosovo Albanians and other persons taking no active part in the hostilities” as victims of murder.⁶⁹¹ With respect to specific murder allegations in each village, the Prosecution attached appendices listing “[t]hose persons killed who are known by name”.⁶⁹²

235. The Appeals Chamber notes that the Prosecution specified, by name, a total of 264 victims in relation to the incidents addressed by Schedules D, F, and I of the Indictment. Further, the above-mentioned four victims were listed in the Prosecution Proof of Death Charts of 28 March 2007, in a manner which linked them to the locations concerned.⁶⁹³ While this indicates that the Prosecution was aware of the identities of these four victims in advance of 28 March 2007, Lukić has failed to show that the Prosecution was in a position to name the victims at the time the Indictment was confirmed in June 2006. Given the circumstances of this case, including the high number of victims alleged, Lukić’s distance from the actual killings, and the fact that the Schedules to the Indictment were not meant to provide exhaustive lists,⁶⁹⁴ the Appeals Chamber finds that the omission of the four victims’ names does not amount to a defect in the Indictment. The Appeals Chamber thus dismisses ground Q of Lukić’s appeal, to the extent that it relates to the Indictment.

D. Prosecution’s appeal

236. Under Count 1 of the Indictment, charging the Appellants with deportation as a crime against humanity, the Prosecution alleged at paragraph 72 that forces of the FRY and Serbia “perpetrated the actions set forth in paragraphs 25-32” of the Indictment, which resulted in the deportation of Kosovo Albanian civilians from specific locations in 13 municipalities in Kosovo. The Prosecution repeated this allegation by referring to paragraph 72 under Count 2 of the Indictment, which charged the Appellants with other inhumane acts (forcible transfer) as a crime

⁶⁹⁰ *Kupreškić et al.* Appeal Judgement, para. 90 (internal references omitted). See also *Gotovina* Decision of 26 January 2009, para. 18, stating that “even if in a given case the identity of victims does not qualify as a material fact required to be pleaded in the indictment, there can be little doubt that it constitutes a fact or information relevant for the preparation of an effective defence”.

⁶⁹¹ Indictment, para. 75.

⁶⁹² Indictment, para. 75(d), (f), (i).

⁶⁹³ Prosecution Proof of Death Charts of 28 March 2007, pp. 47, 55, 92.

against humanity.⁶⁹⁵ Further, under Count 5 of the Indictment, charging the Appellants with persecution as a crime against humanity, the Prosecution alleged at paragraph 77(a) that the persecution included, *inter alia*, “[t]he forcible transfer and deportation by forces of the FRY and Serbia of approximately 800,000 Kosovo Albanian civilians as described in paragraphs 25-32 [of the Indictment].”

237. The Trial Chamber found that, since paragraph 72 under Count 1 of the Indictment, was not explicitly incorporated into paragraph 77(a) under Count 5, the specific deportations and forcible transfers detailed in paragraph 72 of the Indictment were not also charged as forms of persecution.⁶⁹⁶

1. Submissions of the parties

(a) Prosecution’s submissions

238. The Prosecution asserts that the Trial Chamber erred in law in its reading of the Indictment. According to the Prosecution, this error is reflected both in the Trial Chamber’s oral decision rendered pursuant to Rule 98 *bis* of the Rules on 18 May 2007 (“Rule 98 *bis* Decision”)⁶⁹⁷ and in the Trial Judgement.⁶⁹⁸

239. The Prosecution contends that the Trial Chamber’s reading of paragraph 77(a) under Count 5 of the Indictment, which refers to “forcible transfer and deportation [...] as described in paragraphs 25-32”, was improperly narrow.⁶⁹⁹ In particular, the Prosecution argues that paragraph 77(a) of the Indictment incorporates the material allegations contained in paragraph 72.⁷⁰⁰ In support of this assertion, the Prosecution claims that an explicit reference to paragraph 72 was unnecessary because the allegation in paragraph 77(a), of the forcible displacement of approximately 800,000 Kosovo Albanian civilians, included “by internal cross-references the locations and municipalities described in paragraph 72”.⁷⁰¹ Specifically, the Prosecution contends that paragraph 77(a) expressly incorporates paragraph 32 among others,

⁶⁹⁴ See Indictment, pp. 44-68, containing Schedules A-K, which explicitly state that they list only those “persons known by name” who were killed at various locations (emphasis added).

⁶⁹⁵ Indictment, para. 73.

⁶⁹⁶ Trial Judgement, vol. 1, para. 12, referring to Rule 98 *bis* Decision, 18 May 2007, T. 12778-12779.

⁶⁹⁷ Prosecution’s Appeal Brief, para. 4, referring to Rule 98 *bis* Decision, 18 May 2007, T. 12778-12779, 12783.

⁶⁹⁸ Prosecution’s Appeal Brief, paras 4, 7, referring to Trial Judgement, vol. 1, para. 12, Rule 98 *bis* Decision, 18 May 2007, T. 12778-12779, 12783.

⁶⁹⁹ Prosecution’s Appeal Brief, paras 7-12.

⁷⁰⁰ Prosecution’s Appeal Brief, para. 7, referring to Trial Judgement, vol. 1, para. 12, fn. 7, Rule 98 *bis* Decision, 18 May 2007, T. 12778-12779, Procedural Matters Hearing, 30 Oct 2006 (“Hearing of 30 October 2006”), T. 5409-5410.

⁷⁰¹ Prosecution’s Appeal Brief, para. 7.

which itself refers to paragraph 72,⁷⁰² and that these cross-references “make plain that the reference to the 800,000 Kosovo Albanians in subparagraph 77(a) included the Kosovo Albanians forcibly transferred or deported from the specific municipalities and locations described in paragraph 72.”⁷⁰³ Moreover, the Prosecution submits that the underlying acts of forcible transfer and deportation alleged in paragraph 72 are the only specific charges of forcible transfer and deportation in the Indictment.⁷⁰⁴

240. The Prosecution further argues that the manner in which it conducted its case “as a whole made clear that [it] relied upon the forcible transfers and deportations within paragraph 72 as persecutory acts”.⁷⁰⁵ The Prosecution contends that the link between paragraph 77(a) of the Indictment with paragraph 72 was pleaded before and after the Hearing of 30 October 2006 and after the Rule 98 *bis* Decision.⁷⁰⁶ During the Hearing of 30 October 2006, the Trial Chamber raised the lack of reference to paragraph 72 in paragraph 77(a) which it considered “may be” a “technical” question about the pleading.⁷⁰⁷

241. The Prosecution also contends that the Trial Chamber understood and acknowledged that the core of the Prosecution’s case included forcible transfer and deportation of the Kosovo Albanian civilian population on discriminatory grounds, *i.e.* amounting to persecution.⁷⁰⁸ It further argues that throughout the proceedings, the Defence was aware and acknowledged that the persecution charged included the acts of forcible transfer and deportation listed in paragraph 72 of the Indictment,⁷⁰⁹ and that in substance, the Defence responded to those charges.⁷¹⁰ According to the Prosecution, there would therefore be no prejudice in imposing convictions for persecution through forcible transfer and deportation.⁷¹¹

242. Finally, the Prosecution argues that Šainović, Pavković, and Lukić should be convicted for committing persecution by forcible transfer and deportation through their participation in the JCE

⁷⁰² Prosecution’s Appeal Brief, para. 9. See also Prosecution’s Reply Brief, para. 5.

⁷⁰³ Prosecution’s Appeal Brief, para. 10. The Prosecution insists that paragraph 32 of the Indictment explicitly incorporates paragraph 72, and that the result of this is that subparagraph 77(a) includes paragraph 72 (*ibid.*, para. 11).

⁷⁰⁴ Prosecution’s Appeal Brief, para. 12.

⁷⁰⁵ Prosecution’s Appeal Brief, paras 13-15, 17, referring, *inter alia*, to the Prosecution’s Pre-Trial Brief, Opening Statement, Rule 65 *ter* witness lists, closing arguments and Closing Brief.

⁷⁰⁶ Prosecution’s Appeal Brief, paras 13, 16, referring to Hearing of 30 October 2006, T. 5409-5410, Prosecution Closing Statement, 19 Aug 2008, T. 26788.

⁷⁰⁷ See Prosecution’s Appeal Brief, paras 13, 16, referring to Hearing of 30 October 2006, T. 5409-5410.

⁷⁰⁸ Prosecution’s Appeal Brief, paras 13, 18, 19, referring to Pre-Trial Conference, 7 July 2006, T. 368, Rule 98 *bis* Decision, 18 May 2007, T. 12787, 12795, Hearing of 30 October 2006, T. 5410, Trial Judgement, vol. 1, para. 11, *ibid.*, vol. 2, paras 838, 1151, *ibid.*, vol. 3, paras 7, 16, 410, 428, 506, 679, 820.

⁷⁰⁹ Prosecution’s Appeal Brief, paras 13, 18-24, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Defence Pre-Trial Brief Filed on Behalf of Mr. Nebojša Pavković Pursuant to Rule 65*ter*(F), 6 June 2006, paras 8, 25, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Defence Pre-Trial Brief Filed on Behalf of Mr. Milan Milutinović Pursuant to Rule 65*ter*(F), 6 June 2006, paras 8, 25. See also Prosecution’s Reply Brief, para. 4.

⁷¹⁰ Prosecution’s Appeal Brief, paras 22-24, and references therein.

⁷¹¹ Prosecution’s Appeal Brief, paras 23-24.

and their sentences increased to reflect the totality of their criminal conduct.⁷¹² The Prosecution also seeks the conviction of Lazarević for aiding and abetting persecution by forcible transfer and deportation, and concomitant an increase in his sentence.⁷¹³

(b) Submissions in response

243. All of the Appellants argue that the first ground of the Prosecution's appeal should be dismissed.⁷¹⁴ Šainović and Pavković assert that the Prosecution has waived its right to raise these arguments on appeal.⁷¹⁵ They submit that the Prosecution did not raise these matters at the appropriate time during the trial,⁷¹⁶ and that this failure precludes the Prosecution from requesting that the Appeals Chamber review the Trial Chamber's determinations.⁷¹⁷

244. Šainović and Pavković argue that the inconsistency in pleading material facts in connection with Count 5 was brought to the attention of the Prosecution by the Trial Chamber on two occasions.⁷¹⁸ First, they refer to the Hearing of 30 October 2006,⁷¹⁹ in which Judge Bonomy pointed out to the Prosecution that paragraphs 76 and 77(a) under Count 5 of the Indictment failed to incorporate paragraph 72 thereof.⁷²⁰ Second, Šainović and Pavković observe that the Trial Chamber found, in its Rule 98 *bis* Decision, that persecution alleged in Count 5 did not include deportation and forcible transfer of Kosovo Albanians as described in paragraph 72.⁷²¹ They submit that, having been made aware of the Trial Chamber's view and directed to consider the matter, the Prosecution took no action to address it.⁷²²

245. Šainović and Lazarević further submit that the Trial Chamber did not err in this regard, as the Indictment does not allege persecution, under Count 5, by way of the acts of deportation and

⁷¹² Prosecution's Appeal Brief, paras 25-27. See also *ibid.*, paras 4, 6.

⁷¹³ Prosecution's Appeal Brief, paras 28, 32-34. The Appeals Chamber recalls that the Prosecution has withdrawn its appeal in relation to Ojdanić (see Decision of 31 January 2013).

⁷¹⁴ Šainović's Response Brief, para. 47; Pavković's Response Brief, paras 1-8; Lazarević's Response Brief, paras 5-16; Lukić's Response Brief, para. 9.

⁷¹⁵ Šainović's Response Brief, paras 19-20, 28-36; Pavković's Response Brief, paras 1-8.

⁷¹⁶ Šainović's Response Brief, para. 33; Pavković's Response Brief, paras 5-6.

⁷¹⁷ Šainović's Response Brief, para. 35. See also Šainović's Response Brief, para. 36; Pavković's Response Brief, paras 1, 8. Šainović also argues that the Defence could only have interpreted the Prosecution's lack of response to the Trial Chamber having raised the matter "as a withdrawal of the charges of forcible transfer and deportation under Count 5 Persecutions" (Šainović's Response Brief, para. 34). See also Lukić's Response Brief, para. 7.

⁷¹⁸ Šainović's Response Brief, para. 28; Pavković's Response Brief, para. 3, referring to Prosecution's Appeal Brief, para. 13.

⁷¹⁹ Šainović's Response Brief, para. 28, referring to Hearing of 30 October 2006, T. 5409-5410. See also Pavković's Response Brief, para. 5.

⁷²⁰ Pavković's Response Brief, para. 5, referring to Hearing of 30 October 2006, T. 5409-5410.

⁷²¹ Šainović's Response Brief, paras 29-30, 32, referring to Rule 98 *bis* Decision, 18 May 2007, T. 12779, 12783; Pavković's Response Brief, para. 7, referring to Rule 98 *bis* Decision, 18 May 2007, T. 12778-12779.

⁷²² Šainović's Response Brief, para. 36; Pavković's Response Brief, para. 6.

forcible transfer described in paragraph 72 of the Indictment.⁷²³ They also claim that granting the Prosecution's appeal in this regard would cause unfair prejudice to the defence⁷²⁴ and that, in the alternative, if the Appeals Chamber were to grant it, no increase in sentence is warranted.⁷²⁵

(c) Submissions in reply

246. The Prosecution replies that the main issue before the Appeals Chamber is the interpretation of the Indictment, rather than waiver.⁷²⁶ The Prosecution argues that it did not deliberately choose to exclude persecution by forcible transfer and deportation or make any mistake to that effect either, as evinced by its Pre-Trial Brief.⁷²⁷

247. The Prosecution further submits that the fact that it chose not to amend the Indictment following the Trial Chamber's remarks during the Hearing of 30 October 2006 or its finding in the Rule 98 *bis* Decision does not amount to waiver to raise the relevant arguments on appeal.⁷²⁸ The Prosecution argues that "[n]o response to the Chamber's inquiries was required because the Indictment provided clear notice that persecutions included forcible transfers and deportations",⁷²⁹ and that the Trial Chamber's reading of the Indictment was legally erroneous and "overly technical".⁷³⁰ The Prosecution also submits that "there was no need to correct a technicality that does not alter the substance of a pleading."⁷³¹ The Prosecution argues that throughout the proceedings, it presented its "core case" – namely, that persecution included acts of forcible transfer and deportation - thereby providing an adequate response to the Trial Chamber's view that the acts of forcible transfer and deportation were not alleged under Count 5.⁷³²

248. In the alternative, the Prosecution argues that, even if waiver were found to be applicable, the situation "amounts to special circumstances constituting an exception to waiver"⁷³³ and that the

⁷²³ Šainović's Response Brief, paras 7, 9-27; Lazarević's Response Brief, paras 5-9. See also Lukić's Response Brief, para. 8.

⁷²⁴ Šainović's Response Brief, paras 41, 44; Lazarević's Response Brief, paras 10-16.

⁷²⁵ Šainović's Response Brief, paras 45-46; Lukić's Response Brief, paras 3-6.

⁷²⁶ Prosecution's Reply Brief, para. 2.

⁷²⁷ Prosecution's Reply Brief, para. 3, referring, *inter alia*, to Prosecution's Pre-Trial Brief, paras 37-41. See also Prosecution's Reply Brief, paras 6-7.

⁷²⁸ Prosecution's Reply Brief, para. 8.

⁷²⁹ Prosecution's Reply Brief, para. 9. See also *ibid.*, para. 2.

⁷³⁰ Prosecution's Reply Brief, para. 9, referring to Prosecution's Appeal Brief, para. 4.

⁷³¹ Prosecution's Reply Brief, para. 8, referring to Prosecution's Appeal Brief, para. 13.

⁷³² Prosecution's Reply Brief, para. 8, referring to Prosecution's Appeal Brief, para. 13, Prosecution Closing Statement, 19 Aug 2008, T. 26788.

⁷³³ Prosecution's Reply Brief, para. 10, referring to *Galić* Appeal Judgement, para. 34, *Simić* Appeal Judgement, para. 212, *Furundžija* Appeal Judgement, para. 173, *Kambanda* Appeal Judgement, para. 28.

Appellants have not demonstrated that they would suffer any prejudice if the Prosecution's appeal were to be granted in this regard.⁷³⁴

2. Analysis

249. As a preliminary matter, the Appeals Chamber must decide whether the Prosecution is entitled to appeal on this point. The crux of the matter is whether the Prosecution has waived its right to appeal because it failed to raise this issue at the trial stage. The Appeals Chamber will also consider whether there are special circumstances that justify an exception to the waiver rule.

250. Recalling that waiver "should not entirely foreclose" indictment defects from being raised for the first time on appeal by *the defence*,⁷³⁵ the Appeals Chamber notes that it has not previously considered whether waiver should preclude the Prosecution from arguing for the first time on appeal that its Indictment should have been interpreted differently, when it had been put on notice at trial that the Trial Chamber considered the Indictment to be defective. The Appeals Chamber observes that the rationale for allowing the Defence to raise such objections for the first time on appeal does not apply to the Prosecution who bears the obligation of ensuring that the indictment adequately pleads its case against the accused.

251. The Appeals Chamber will thus consider whether, in the circumstances of the present case, the Prosecution has waived its right to appeal. The Prosecution had at least two opportunities to raise the issue at the trial stage: first, by responding to the observations of the Presiding Judge on 30 October 2006⁷³⁶; and, second, by appealing the Rule 98 *bis* Decision.⁷³⁷ The Appeals Chamber will consider these in turn.

252. On 30 October 2006, the Presiding Judge specifically drew the Prosecution's attention to this matter in the following exchange:

JUDGE BONOMOY: Noting that this evidence relates to Count 5 caused me to have another look at the phraseology of Count 5, and there is one peculiarity you might [want] to give some attention to. Paragraph 76, which is the principal paragraph re-alleging and incorporating earlier paragraphs makes no reference to paragraph 72, oddly. Now, it doesn't matter for this evidence because you specifically refer to paragraph 72 and subparagraph (d), and it doesn't matter for sexual assault either because you refer to it there, but it may have relevance to (a).

MR. HANNIS: Well, under the same reasoning as to (b) then, too.

JUDGE BONOMOY: Well (b) is slightly different because paragraph 75 is already incorporated in 76 --

⁷³⁴ Prosecution's Reply Brief, paras 10-13.

⁷³⁵ See *supra*, para. 224.

⁷³⁶ Hearing of 30 October 2006, T. 5409-5410.

⁷³⁷ See Rule 98 *bis* Decision, 18 May 2007, T. 12778-12783.

MR. HANNIS: Yes, yes.

JUDGE BONOMO: -- and it may be that, for the avoidance of doubt, you should be looking at (b) as well to ...

MR. HANNIS: I see your point, Your Honour. I don't have an answer –

JUDGE BONOMO: Where it really bites is in relation to forcible transfer and deportation. It may be technical, of course, but you should, at least at some stage - in fact, sooner rather than later – give consideration to this.

MR. HANNIS: Thank you for bringing that [to] our attention, Your Honour. We will.⁷³⁸

253. The Appeals Chamber finds that the above exchange between the Presiding Judge and the Prosecution put the parties on notice that the Trial Chamber considered that Count 5 of the Indictment, as drafted, did not incorporate forcible transfer and deportation, as described in paragraph 72 of the Indictment, within the crime of persecution. However, despite this clear direction by the Presiding Judge, the Prosecution did not clarify its position or request an amendment of the Indictment.

254. If the Prosecution considered that the Trial Chamber had misinterpreted the scope of Count 5 it was incumbent upon the Prosecution to bring this to the attention of the Trial Chamber as soon as practicable. However, the Prosecution chose not to raise an objection or to take any action. Accordingly, the Defence was entitled to proceed on the basis of the Trial Chamber's interpretation of the Indictment, subject to any amendment.

255. On 18 May 2007 the Trial Chamber issued its Rule 98 *bis* Decision. In that Decision the Trial Chamber made the following finding:

Finally, under the fifth count, "Persecutions," paragraph 77 of the indictment asserts that the accused are responsible for a campaign of persecution against the Kosovo Albanian population. While this paragraph refers in general to deportation and forcible transfer as among the ways in which this persecution was conducted, along with murder, sexual assault, and wanton destruction or damage of religious sites, the Chamber notes that the specific allegations of forcible transfer and deportation contained in paragraph 72 are not incorporated by reference into count 5. The Chamber brought this fact to the attention of the Prosecution in court on 30th October, but the Prosecution took no action to address it, and therefore the persecutions alleged in count 5 do not include by means of the deportation and forcible transfer of Kosovo Albanians described in paragraph 72.⁷³⁹

[...]

As we have already noted, the persecution charges falling under count 5 of the indictment are composed of allegations of sexual assault, murder, and the wanton destruction or damage of Kosovo Albanian religious sites.⁷⁴⁰

⁷³⁸ Hearing of 30 October 2006, T. 5409-5410.

⁷³⁹ Rule 98 *bis* Decision, 18 May 2007, T. 12778-12779.

⁷⁴⁰ Rule 98 *bis* Decision, 18 May 2007, T. 12783.

256. The Prosecution did not appeal the Rule 98 *bis* Decision.⁷⁴¹ Again, if the Prosecution considered that the Trial Chamber's ruling was incorrect then it was open to the Prosecution to request leave to appeal the decision. It chose not to do so.

257. The Prosecution claims that no specific action on its part was necessary as the presentation of its case and subsequent submissions consistently confirmed its position that Count 5 of the Indictment included the acts of forcible transfer and deportation set out in paragraph 72 thereof,⁷⁴² and it thus "answered the Chamber's comment by presenting its core case".⁷⁴³ The Appeals Chamber does not find these arguments persuasive. Since the Presiding Judge indicated that Count 5 of the Indictment was not sufficiently pleaded, if the Prosecution had wanted to incorporate forcible transfer and deportation in that Count, it should have addressed the lack of clarity through a procedure that would have enabled the Defence and the Trial Chamber to understand the nature of the intended charges. In the circumstances, it was not sufficient for the Prosecution simply to present its case in a certain manner. In effect, the Prosecution's position is that because it disagreed with the Trial Chamber's interpretation of the Indictment, it was entitled to ignore the Trial Chamber's ruling and to continue to present its case in the manner it saw fit. This argument must fail.

258. In view of the above, the Appeals Chamber finds that the Prosecution has failed to raise an objection to the Trial Chamber's interpretation of the Indictment when it could have reasonably done so.

259. Finally, the Appeals Chamber turns to the Prosecution's argument that the situation "amounts to special circumstances constituting an exception to waiver."⁷⁴⁴ The Appeals Chamber recalls that "special circumstances", allowing consideration of the matter despite the waiver, have been deemed to include situations where the relevant arguments are based on issues of "general importance", such as judicial bias,⁷⁴⁵ or allege the incompetence of counsel.⁷⁴⁶ However, the Prosecution does not provide adequate justification as to why the circumstances of this case should be considered "special circumstances";⁷⁴⁷ it simply makes bare assertions that the issue is

⁷⁴¹ See *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98 *bis* Decision, 14 June 2007 (denying the accused's applications for certification of appeal against the Rule 98 *bis* Decision).

⁷⁴² Prosecution's Appeal Brief, paras 4, 7, 13.

⁷⁴³ Prosecution's Reply Brief, para. 8, referring to Prosecution's Appeal Brief, para. 13.

⁷⁴⁴ See Prosecution's Reply Brief, para. 10, referring to *Galić* Appeal Judgement, para. 34, *Simić* Appeal Judgement, para. 212, *Furundžija* Appeal Judgement, para. 173, *Kambanda* Appeal Judgement, para. 28.

⁷⁴⁵ *Galić* Appeal Judgement, para. 34; *Furundžija* Appeal Judgement, para. 173.

⁷⁴⁶ *Kambanda* Appeal Judgement, para. 28.

⁷⁴⁷ See Prosecution's Reply Brief, para. 10, referring to *Furundžija* Appeal Judgement, para. 173, *Galić* Appeal Judgement, para. 34, *Simić* Appeal Judgement, para. 212, *Kambanda* Appeal Judgement, para. 28.

“important” and may result in “injustice” without substantiating its arguments any further.⁷⁴⁸ The Appeals Chamber therefore finds that the Prosecution has failed to show the existence of “special circumstances” which would justify an exception to the application of waiver.

260. In light of the above, the Appeals Chamber finds that the Prosecution has waived its right to raise on appeal the argument that Count 5 of the Indictment included the acts of deportation and forcible transfer as detailed in paragraph 72 thereof. The Appeals Chamber will therefore not consider the Prosecution’s substantive arguments on the interpretation of the Indictment, including those addressing the possibility of curing defects therein. Consequently, the Appeals Chamber dismisses the first ground of the Prosecution’s appeal.

E. Tušilje/Tushila

261. The Trial Chamber found Šainović, Pavković, Lazarević, and Lukić responsible for the crimes of deportation and other inhumane acts (forcible transfer) committed in Tušilje/Tushila, in Srbica/Skenderaj municipality, on 29 March 1999.⁷⁴⁹ However, the Appeals Chamber observes that this particular incident was not pleaded in the Indictment.⁷⁵⁰

262. The Appeals Chamber recalls that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.⁷⁵¹ An indictment is defective if it does not plead the material facts underpinning the charges in sufficient detail so as to provide notice to the accused and enable the accused to prepare his or her defence.⁷⁵² The defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charges.⁷⁵³ However, a defective indictment which has not been cured causes prejudice to the

⁷⁴⁸ Prosecution’s Reply Brief, para. 10.

⁷⁴⁹ Trial Judgement, vol. 3, paras 475, 477, 788, 790, 930, 935, 1138, 1140. See also *ibid.*, vol. 2, paras 648, 672, 1219-1222.

⁷⁵⁰ See Indictment, para. 72(c); Order for the Preparation of the Appeal Hearing, 20 February 2013, pp. 3-4. In this regard, the Appeals Chamber notes that the Appellants submit that the Trial Chamber erred in convicting them for this incident as it was not pleaded in the Indictment and this defect was not subsequently cured (Appeal Hearing, 11 Mar 2013, AT. 209; *ibid.*, 12 Mar 2013, AT. 313; *ibid.*, 13 Mar 2013, AT. 393; *ibid.*, 14 Mar 2013, AT. 500-501).

⁷⁵¹ See, e.g., *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 188; *Munyakazi* Appeal Judgement, para. 36. Whether a fact is “material” depends on the nature of the Prosecution’s case. See, e.g., *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, fn. 205; *Renzaho* Appeal Judgement, para. 53; *Karera* Appeal Judgement, para. 292; *Ntagerura et al.* Appeal Judgement, para. 23.

⁷⁵² *Simić* Appeal Judgement, para. 20, referring to *Kupreškić et al.* Appeal Judgement, para. 88; *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189; *Kupreškić et al.* Appeal Judgement, para. 114.

⁷⁵³ See, e.g., *Naletilić and Martinović* Appeal Judgement, para. 26; *Kvočka et al.* Appeal Judgement, para. 33; *Kupreškić et al.* Appeal Judgement, para. 114; *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189; *Rukundo* Appeal Judgement, para. 29.

accused.⁷⁵⁴ The defect may only be deemed harmless through demonstrating that the accused's ability to prepare his defence was not materially impaired.⁷⁵⁵

263. As the Appeals Chamber has noted, the Indictment does not mention the incident in Tušilje/Tushila. The Indictment was thus defective in this respect. Moreover, the Appeals Chamber considers that this defect was not cured. As the Prosecution concedes, no corrective actions were taken with respect to the defect in either the Prosecution's pre-trial brief or Rule 65*ter* filings.⁷⁵⁶ In these circumstances, the Appeals Chamber finds that the omission of the incident in Tušilje/Tushila from the Indictment and the resulting lack of notice caused prejudice and materially impaired the Appellants in the preparation of their defence. Accordingly, the Appeals Chamber vacates the convictions of Šainović, Pavković, Lazarević, and Lukić in relation to the incident in Tušilje/Tushila on 29 March 1999.⁷⁵⁷ The impact of this finding, if any, will be addressed below in the section on Sentencing.

⁷⁵⁴ *Simić* Appeal Judgement, paras 24, 57; *Nahimana et al.* Appeal Judgement, para. 326; *Ntagerura et al.* Appeal Judgement, para. 30; *Ntakirutimana* Appeal Judgement, para. 58.

⁷⁵⁵ See, e.g., *Nahimana et al.* Appeal Judgement, para. 326; *Simić* Appeal Judgement, paras 24, 57; *Ntakirutimana* Appeal Judgement, para. 58; *Kupreškić et al.* Appeal Judgement, para. 122.

⁷⁵⁶ See Appeal Hearing, 11 Mar 2013, AT. 240. The Prosecution submits, however, that overturning the convictions for this incident should have no impact on sentencing (see *ibid.*).

⁷⁵⁷ The challenges raised by Lazarević to the Trial Chamber's findings with respect to the incident in Tušilje/Tushila are therefore moot and the Appeals Chamber dismisses them as such. See Lazarević's Appeal Brief, paras 135-137.

V. ALLEGED ERRORS CONCERNING THE *MENS REA CHAPEAU* REQUIREMENT OF ARTICLE 5 OF THE STATUTE

A. Introduction

264. The Appeals Chamber recalls that, in order to enter a conviction for a crime against humanity, it must be determined that the *chapeau* requirements of Article 5 have been established: namely, the crime in question must comprise part of a widespread or systematic attack directed against the civilian population and the perpetrator must know that his acts were part thereof.⁷⁵⁸

265. The Trial Chamber convicted Pavković pursuant to Article 7(1) of the Statute for committing, through participation in a JCE, the crimes of deportation, other inhumane acts (forcible transfer), murder, and persecution as crimes against humanity.⁷⁵⁹ For the purposes of determining whether these underlying crimes could be categorised as crimes against humanity, the Trial Chamber examined whether the *chapeau* requirements had been established. It found that the crimes were part of a widespread and systematic attack against Kosovo Albanian civilians in at least 13 municipalities of Kosovo⁷⁶⁰ and concluded that the principal perpetrators,⁷⁶¹ or those at whose behest they were acting, were aware that they were acting in the context of a larger attack upon the Kosovo Albanian population.⁷⁶² It thus concluded that these crimes constituted crimes against humanity pursuant to Article 5 of the Statute.⁷⁶³

266. Pavković raises a number of challenges to the Trial Chamber's findings in relation to the *mens rea chapeau* requirement of crimes against humanity. In particular, Pavković argues that the Trial Chamber erred in finding that: (i) the "knowledge requirement" of Article 5 of the Statute could be satisfied by an individual taking the risk that his acts comprise part of the attack against the civilian population; (ii) the *mens rea chapeau* requirement of Article 5 could be satisfied without identifying who had the requisite knowledge for the offence to constitute a crime against humanity; and (iii) an "intermediary perpetrator", including any member of a JCE, could satisfy the

⁷⁵⁸ See *Mrkšić and Šljivančanin* Appeal Judgement, para. 41; *Martić* Appeal Judgement, para. 316; *Kunerac et al.* Appeal Judgement, para. 85; *Tadić* Appeal Judgement, para. 248.

⁷⁵⁹ Trial Judgement, vol. 3, paras 788, 790, 1210.

⁷⁶⁰ Trial Judgement, vol. 2, paras 1181, 1184, 1189, 1194, 1199, 1201, 1206, 1210, 1212, 1214, 1220, 1226, 1229, 1232, 1236, 1240, 1246, 1250, 1253, 1256, 1259.

⁷⁶¹ The Appeals Chamber notes that the Trial Chamber referred to the principal perpetrator as the "physical perpetrator" throughout the Trial Judgement (see Trial Judgement, vol. 1, para. 69). In order to ensure the consistency in the Appeals Chamber's jurisprudence, such individuals will be referred to hereafter as "principal" perpetrators (see *Brdanin* Appeal Judgement, para. 362).

⁷⁶² Trial Judgement, vol. 2, paras 1181, 1184, 1189, 1194, 1199, 1201, 1206, 1210-1212, 1214, 1220, 1226, 1230, 1232, 1236, 1241, 1246, 1250, 1253, 1256, 1259.

⁷⁶³ Trial Judgement, vol. 2, paras 1183, 1186, 1188, 1191-1193, 1196-1198, 1200, 1203, 1208-1209, 1211, 1213, 1216, 1222-1224, 1228, 1231, 1233-1234, 1236-1237, 1239, 1243, 1248-1249, 1252, 1255, 1257, 1261-1262.

“knowledge requirement”.⁷⁶⁴ The Prosecution responds that Pavković’s arguments warrant summary dismissal.⁷⁶⁵ The Appeals Chamber will consider Pavković’s challenges in turn.

B. Whether the *mens rea chapeau* requirement of Article 5 of the Statute could be satisfied by an individual taking the risk that his acts comprise part of the attack against the civilian population

267. The Trial Chamber held that for the *mens rea chapeau* requirement of Article 5 of the Statute to be satisfied, it should be established that:

the physical perpetrator, or the person who planned, ordered, or instigated his conduct (a) knows that there is a widespread or systematic attack on the civilian population and (b) knows or takes the risk that the conduct of the physical perpetrator comprises part of that attack.⁷⁶⁶

268. Pavković contends that the Trial Chamber erred in law in holding that the *mens rea chapeau* requirement of Article 5 of the Statute could be satisfied by an individual taking the risk that his acts comprise part of the attack against the civilian population, thus erroneously introducing a standard of recklessness.⁷⁶⁷ In particular, Pavković argues that the Trial Chamber erred in departing from the Appeals Chamber’s ruling in *Blaškić* which, in his view, specifically rejected the recklessness standard.⁷⁶⁸

269. In response, the Prosecution submits that the Trial Chamber correctly articulated the *mens rea* element of crimes against humanity and argues that Pavković misinterprets the Appeals Chamber’s holding in *Blaškić*.⁷⁶⁹

270. The Appeals Chamber recalls that the *Kunarac et al.* Appeal Judgement endorsed the holding of the trial chamber in that case that the accused must have known of the attack against the civilian population and that his acts comprised part of the attack, or at least must have taken the risk that his acts were part thereof.⁷⁷⁰ Subsequently, in *Blaškić* the Appeals Chamber held that what is

⁷⁶⁴ Pavković’s Appeal Brief, paras 368-373.

⁷⁶⁵ Prosecution’s Response Brief, paras 154, 156-157.

⁷⁶⁶ Trial Judgement, vol. 1, para. 160, referring to *Kordić and Čerkez* Appeal Judgement, para. 99, *Blaškić* Appeal Judgement, paras 124–125, *Kunarac et al.* Appeal Judgement, paras 99, 102–103.

⁷⁶⁷ Pavković’s Appeal Brief, paras 368(a), 369, referring to *Blaškić* Appeal Judgement, para. 126.

⁷⁶⁸ Pavković’s Appeal Brief, paras 368(a), 369, referring to *Blaškić* Appeal Judgement, para. 126. The Appeals Chamber notes that Pavković does not advance substantive arguments in reply (see Pavković’s Reply Brief, para. 76).

⁷⁶⁹ Prosecution’s Response Brief (Pavković), paras 153, 165, 168-169. The Prosecution specifically argues that in the *Blaškić* case the Appeals Chamber did not reject the standard of “taking the risk”, but rather “the object of the person’s knowledge - implementation of an ideology” (*ibid.*, para. 168). See also *ibid.*, para. 170.

⁷⁷⁰ *Kunarac et al.* Appeal Judgement, para. 102, citing *Kunarac et al.* Trial Judgement, para. 434.

required is “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”.⁷⁷¹

271. The dispute between the parties in the present case revolves around the question of whether the *Blaškić* Appeal Judgement rescinded the ruling in *Kunarac et al.* with regard to the *mens rea chapeau* requirement of Article 5 of the Statute. When analysed in the context of the other relevant considerations in the *Blaškić* Appeal Judgement, it becomes evident that the Appeals Chamber did not intend to depart from its previous holding in *Kunarac et al.* This is illustrated by the fact that in defining the *mens rea* of crimes against humanity, the *Blaškić* Appeal Judgement explicitly referred to paragraph 102 of the *Kunarac et al.* Appeal Judgement, which in turn cites with approval the *mens rea* standard adopted by the trial chamber in that case.⁷⁷² Such interpretation is further supported by the Appeals Chamber’s subsequent jurisprudence adhering to the “taking the risk” standard endorsed in the *Kunarac et al.* Appeal Judgement.⁷⁷³ Accordingly, Pavković’s argument is dismissed.⁷⁷⁴

C. Whether in establishing that crimes against humanity had been committed, the Trial Chamber sufficiently identified the category of persons who satisfied the *mens rea chapeau* requirement of Article 5 of the Statute

272. In determining whether the legal elements of the crimes against humanity charged in the Indictment were proved in relation to the events that took place in Prizren, Celina, Bela Crkva/Bellacërka, Mala Kruša/Krusha e Vogël, Suva Reka/Suhareka, Srbica/Skenderaj, Kosovska Mitrovica/Mitrovica, Vučitrn/Vushtrria, Gnjilane/Gjilan, Kotlina/Kotllina, Kačanik/Kaçanik town, and Dubrava/Lisnaja, the Trial Chamber found that either the principal perpetrators “or those at whose behest they were acting” were aware that they were acting as part of a larger attack against the Kosovo Albanian population.⁷⁷⁵ This finding was made in the context of determining whether a

⁷⁷¹ *Blaškić* Appeal Judgement, para. 126, referring to *Tadić* Appeal Judgement, para. 248; *Kunarac et al.* Appeal Judgement, paras 99, 103.

⁷⁷² *Blaškić* Appeal Judgement, para. 124, fn. 248, referring, *inter alia*, to *Kunarac et al.* Appeal Judgement, para. 102, and citing with approval *Kunarac et al.* Trial Judgement, para. 434.

⁷⁷³ *Martić* Appeal Judgement, para. 316. See also *Mrkšić and Šljivančanin* Appeal Judgement, para. 41, referring for the *mens rea* of crimes against humanity to *Kunarac et al.* Appeal Judgement, paras 102-103.

⁷⁷⁴ Pavković’s Appeal Brief, paras 368(a), 369.

⁷⁷⁵ Trial Judgement, vol. 2, paras 1199 (in relation to Prizren), 1206 (in relation to Celina), 1210 (in relation to Bela Crkva/Bellacërka), 1212 (in relation to Mala Kruša/Krusha e Vogël), 1217 (in relation to Suva Reka/Suhareka), 1220 (in relation to Srbica/Skenderaj), 1230 (in relation to Kosovska Mitrovica/Mitrovica), 1233 (in relation to Vučitrn/Vushtrria town), 1236 (in relation to other parts of Vučitrn/Vushtrria municipality), 1246 (in relation to Gnjilane/Gjilan), 1253 (in relation to Kotlina/Kotllina), 1256 (in relation to Kačanik/Kaçanik town), 1259 (in relation to Dubrava/Lisnaja).

crime against humanity had been committed, not whether a particular accused bore criminal responsibility for such a crime.⁷⁷⁶

273. Pavković argues that the Trial Chamber failed to identify the principal perpetrators or the persons at whose behest they were acting who had the requisite knowledge in order for the offence to constitute a crime against humanity.⁷⁷⁷

274. The Prosecution responds that none of the errors alleged by Pavković has an impact on his conviction and that therefore his arguments should be summarily dismissed.⁷⁷⁸

275. In relation to the crimes committed in Prizren, Celina, Bela Crkva/Bellacërka, Mala Kruša/Krusha e Vogël, Suva Reka/Suhareka, Srbica/Skenderaj, Kosovska Mitrovica/Mitrovica, Vučitrn/Vushtrria, Gnjilane/Gjilan, Kotlina/Kotllina, Kačanik/Kaçanik town, and Dubrava/Lisnaja, the Trial Chamber found that either the principal perpetrators “or those at whose behest they were acting” were aware that they were acting as part of a larger attack against the Kosovo Albanian population.⁷⁷⁹ The Trial Chamber identified those involved in the commission of the crimes with respect to each location, by reference to their membership in the MUP and/or VJ forces.⁷⁸⁰ The Appeals Chamber understands these references to encompass both the principal perpetrators and those on the ground who were commanding them during the operations,⁷⁸¹ *i.e.* individuals at a higher level in the chains of command of the VJ and MUP forces, who were used by the members

⁷⁷⁶ See Trial Judgement, vol. 1, para. 159.

⁷⁷⁷ Pavković argues that, as a result, the Trial Chamber failed to establish beyond reasonable doubt that: (i) the principal perpetrators fulfilled the *mens rea chapeau* requirement of Article 5 of the Statute; (ii) the principal perpetrators were acting on their own or at the behest of other individuals; and (iii) those at whose behest the perpetrators may have been acting had the knowledge required by the *chapeau* of Article 5 of the Statute. Pavković’s Appeal Brief, paras 372-373, referring to Trial Judgement, vol. 2, paras 1199, 1206, 1220, 1230, 1233, 1246, 1253, 1256, 1259.

⁷⁷⁸ Prosecution’s Response Brief (Pavković), paras 160, 163. The Prosecution specifically asserts that, under JCE I, which involved the commission of deportation and forcible transfer as crimes against humanity, Pavković shared the intent that these crimes would be part of the attack against the Kosovo Albanian civilian population (*ibid.*, para. 161). The Prosecution further asserts that, in relation to his conviction under JCE III, Pavković took the risk that the crimes of murder, sexual assault, and destruction of religious property, as crimes against humanity, would be committed as part of the same attack against the Kosovo Albanian civilian population (*ibid.*, para. 162).

⁷⁷⁹ Trial Judgement, vol. 2, paras 1199 (in relation to Prizren), 1206 (in relation to Celina), 1210 (in relation to Bela Crkva/Bellacërka), 1212 (in relation to Mala Kruša/Krusha e Vogël), 1217 (in relation to Suva Reka/Suhareka), 1220 (in relation to Srbica/Skenderaj), 1230 (in relation to Kosovska Mitrovica/Mitrovica), 1233 (in relation to Vučitrn/Vushtrria town), 1236 (in relation to other parts of Vučitrn/Vushtrria municipality), 1246 (in relation to Gnjilane/Gjilan), 1253 (in relation to Kotlina/Kotllina), 1256 (in relation to Kačanik/Kaçanik town), 1259 (in relation to Dubrava/Lisnaja).

⁷⁸⁰ Trial Judgement, vol. 2, paras 1199-1200, 1202 (in relation to Prizren), 1206-1207 (in relation to Celina), 1210 (in relation to Bela Crkva/Bellacërka), 1212 (in relation to Mala Kruša/Krusha e Vogël), 1214-1215 (in relation to Suva Reka/Suhareka), 1219, 1221 (in relation to Srbica/Skenderaj), 1225-1227 (in relation to Kosovska Mitrovica/Mitrovica), 1232 (in relation to Vučitrn/Vushtrria town), 1239 (in relation to other parts of Vučitrn/Vushtrria municipality), 1246-1247 (in relation to Gnjilane/Gjilan), 1253-1254 (in relation to Kotlina/Kotllina), 1256-1257 (in relation to Kačanik/Kaçanik town), 1259-1260 (in relation to Dubrava/Lisnaja).

⁷⁸¹ See for example Trial Judgement, vol. 2, paras 266, 275-276 (in relation to Prizren), 310, 312, 314 (in relation to Celina), 351 (in relation to Bela Crkva/Bellacërka), 492, 498-499, 503 (in relation to Suva Reka/Suhareka), 578-579, 658-659 (in relation to Srbica/Skenderaj), 743, 746 (in relation to Vučitrn/Vushtrria town), 774 (in relation to other

of the JCE to carry out the crimes charged in the Indictment.⁷⁸² The Appeals Chamber finds such identification to be sufficient for the purpose of establishing that crimes against humanity had been committed in those locations.⁷⁸³ Given that the members of the respective forces on the ground were acting in a concerted manner, it sufficed that the Trial Chamber found beyond reasonable doubt that either the principal perpetrators or those on the ground at whose behest they were acting, *i.e.* who were commanding them during the operations, were aware that their acts comprised part of a larger attack against the Kosovo Albanian population in the region. Pavković's arguments in this regard are therefore dismissed.⁷⁸⁴

D. Whether an “intermediary perpetrator” could satisfy the *mens rea chapeau* requirement of Article 5 of the Statute

276. The Trial Chamber found Pavković responsible for committing, through participation in a JCE, crimes against humanity perpetrated in various locations throughout Kosovo.⁷⁸⁵ In defining the relationship between the accused and other persons who were involved in the commission of the crimes, the Trial Chamber referred to the “intermediary perpetrator” as follows:

[W]here there is a person involved in the crime who is between the physical perpetrator and the accused in the chain of command, he has been termed an “intermediary perpetrator”, in order to distinguish with precision the different relationships between all the relevant players in respect of their individual criminal responsibility.⁷⁸⁶

277. When setting out the general requirements of crimes against humanity under Article 5 of the Statute, the Trial Chamber held that “if 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.”⁷⁸⁷ It further held that “for an underlying offence to be categorised as a crime against humanity on the basis of an individual’s knowledge of the context in which it occurs, the relationship between the individual and the commission of an offence must be sufficiently direct or proximate.”⁷⁸⁸ Consequently, the Trial Chamber concluded that an underlying offence may constitute a crime against humanity even if the principal perpetrator lacks knowledge

parts of Vučitrn/Vushtrria municipality), 901-902, 912 (in relation to Gnjilane/Gjilan), 1048 (in relation to Kotlina/Kotllina), 1089 (in relation to Kačanik/Kaçanik town), 1145-1146 (in relation to Dubrava/Lisnaja).

⁷⁸² See Trial Judgement, vol. 3, paras 468, 783, 1132. Concerning the structure of the VJ and its chain of command see *ibid.*, vol. 1, paras 417-420, 482-484. With regard to the MUP structure see *ibid.*, vol. 1, paras 659-704. See also *ibid.*, vol. 1, fn. 294, where the Trial Chamber explained that the link between the principal perpetrator and the person at whose behest he is acting represents “the simplest chain of command or authority.”

⁷⁸³ See *Krstić* Appeal Judgement, para. 143. Cf. *Bošković and Tarčulovski* Appeal Judgement, para. 75.

⁷⁸⁴ Pavković's Appeal Brief, paras 372-373.

⁷⁸⁵ Trial Judgement, vol. 3, paras 788, 790, 1210.

⁷⁸⁶ Trial Judgement, vol. 1, para. 69.

⁷⁸⁷ Trial Judgement, vol. 1, para. 156.

⁷⁸⁸ Trial Judgement, vol. 1, para. 158.

that his conduct is part of a widespread or systematic attack against the civilian population, provided that the “intermediary perpetrator” who is “the planner, orderer or instigator of that conduct, or member of the joint criminal enterprise knows that it forms part of the attack.”⁷⁸⁹ The Trial Chamber emphasised that this conclusion was only relevant to the question of whether a crime against humanity had been committed and that it should not be confused with the question of whether the accused bore criminal responsibility for such a crime.⁷⁹⁰

278. Pavković argues that the Trial Chamber erred in law: (i) in finding that an “intermediary perpetrator” could satisfy the *mens rea chapeau* requirement of Article 5 of the Statute, even where the principal perpetrator and the accused lacked knowledge that the act comprised part of an attack against the civilian population; and (ii) by including within the category of intermediary perpetrators any JCE member with knowledge that the crime comprises part of an attack against the civilian population.⁷⁹¹

279. In response, the Prosecution argues that none of the alleged errors has an impact on Pavković’s convictions and therefore his arguments should be summarily dismissed.⁷⁹²

280. At the outset, the Appeals Chamber notes that to the extent that Pavković interprets the Trial Chamber’s finding as suggesting that the *mens rea* of the “intermediary perpetrator” could substitute that of the accused,⁷⁹³ his argument is without merit. The Trial Chamber found that a principal or intermediary perpetrator could satisfy the *mens rea chapeau* requirement of Article 5 of the Statute in the context of determining whether a crime against humanity had been committed at all; not in the context of determining whether the accused bore individual criminal responsibility for the crime.⁷⁹⁴ The Trial Chamber’s definition of the “intermediary perpetrator” was merely designed to describe the complex interaction between different actors involved in the commission of a crime.

281. As to Pavković’s argument that the Trial Chamber erred in law in finding that an “intermediary perpetrator” could satisfy the *mens rea chapeau* requirement of Article 5 of the Statute, the Appeals Chamber observes that Pavković has failed to point to any crime for which the Trial Chamber found that only an “intermediary perpetrator”, as opposed to the accused, fulfilled the *mens rea chapeau* requirement of Article 5. The Appeals Chamber recalls in this context the Trial Chamber’s finding that Pavković was a member of a JCE, the common purpose of which was to be achieved through a widespread and systematic campaign of violence and terror against the

⁷⁸⁹ Trial Judgement, vol. 1, para. 158. See also *ibid.*, vol. 1, paras 156, 162.

⁷⁹⁰ Trial Judgement, vol. 1, para. 159.

⁷⁹¹ Pavković’s Appeal Brief, paras 368(b)-(c), 370-371.

⁷⁹² Prosecution’s Response Brief (Pavković), paras 160-163.

⁷⁹³ See Pavković’s Appeal Brief, para. 368(b).

⁷⁹⁴ See Trial Judgement, vol. 1, para. 159.

Kosovo Albanian civilian population.⁷⁹⁵ The Trial Chamber thus found that, as a JCE member, Pavković had the requisite *mens rea* for crimes against humanity at the time of their commission. The Appeals Chamber therefore considers that Pavković has not shown how his challenges to the Trial Chamber's finding that an "intermediary perpetrator" could satisfy the *mens rea chapeau* requirement of Article 5 of the Statute would invalidate his conviction. Accordingly, Pavković's submissions in this regard are dismissed.

E. Conclusion

282. In view of the foregoing, the Appeals Chamber dismisses Pavković's thirteenth ground of appeal.

⁷⁹⁵ Trial Judgement, vol. 3, paras 95, 781-782.

VI. UNDERLYING CRIMES

A. Introduction

283. The Trial Chamber found that during the spring of 1999, forces of the FRY and Serbia forcibly displaced the Kosovo Albanian population both within and outside Kosovo.⁷⁹⁶ The Trial Chamber also found that during this period, the forces of the FRY and Serbia killed at least 600 individuals⁷⁹⁷ and destroyed or damaged mosques during their forcible displacement of the Kosovo Albanian population.⁷⁹⁸ On the basis of these findings, Šainović, Pavković, and Lukić were convicted through their participation in a JCE of deportation and other inhumane acts (forcible transfer) as crimes against humanity pursuant to JCE I. Šainović, Pavković, and Lukić were also convicted, pursuant to JCE III, of murder and persecution through murder and destruction of or damage to religious property as crimes against humanity and murder as a violation of the laws or customs of war.⁷⁹⁹ In addition, Pavković was convicted of persecution through sexual assaults in Beleg and Ćirez/Qirez pursuant to JCE III.⁸⁰⁰ Lazarević was convicted for aiding and abetting the crimes of deportation and other inhumane acts (forcible transfer) as crimes against humanity.⁸⁰¹

284. The Trial Chamber found that forces of the FRY and Serbia were responsible for raping Kosovo Albanian women in Priština/Prishtina in early April and in late May 1999,⁸⁰² but it concluded that the Prosecution had failed to prove that the perpetrators of those crimes acted with discriminatory intent. As a result, the Trial Chamber concluded that the sexual assaults in question did not constitute persecution. In these circumstances, the Trial Chamber did not determine whether Šainović, Pavković, or Lukić should be held criminally responsible for the sexual assaults in Priština/Prishtina pursuant to JCE III.⁸⁰³

285. Lazarević and Lukić challenge various findings of the Trial Chamber related to the underlying offences of forcible displacement.⁸⁰⁴ In addition, the Prosecution contends that the Trial Chamber erred in law and fact in acquitting Lazarević of aiding and abetting the underlying offences of forcible displacement in certain municipalities.⁸⁰⁵ Lukić also challenges his convictions

⁷⁹⁶ Trial Judgement, vol. 2, para. 1156; *ibid.*, vol. 3, para. 95.

⁷⁹⁷ Trial Judgement, vol. 2, paras 1197, 1211-1213, 1215, 1217, 1221, 1223, 1235-1237, 1259, 1262.

⁷⁹⁸ Trial Judgement, vol. 2, paras 390, 549, 795, 946, 1209, 1218, 1234, 1249.

⁷⁹⁹ Trial Judgement, vol. 3, paras 475, 788, 1138, 1208, 1210, 1212.

⁸⁰⁰ Trial Judgement, vol. 3, paras 788, 1210.

⁸⁰¹ Trial Judgement, vol. 3, paras 930, 1211.

⁸⁰² Trial Judgement, vol. 2, para. 1244.

⁸⁰³ Trial Judgement, vol. 2, para. 1245.

⁸⁰⁴ Lukić's Appeal Brief, paras 77-83, 201-221, 389-396, 402-405, 708-709, 753-774, 783-785; Lazarević's Appeal Brief, paras 1-275, 527, 539.

⁸⁰⁵ Prosecution's Appeal Brief, paras 105, 109-119.

with respect to killings in certain municipalities.⁸⁰⁶ The Prosecution avers that the Trial Chamber erred in law and fact when it failed to find that the sexual assaults committed in Priština/Prishtina in early April and in late May 1999 constituted persecution as a crime against humanity.⁸⁰⁷ The Appeals Chamber will address these challenges in turn.

B. Alleged errors relating to convictions and acquittals for deportation and other inhumane acts (forcible transfer)

286. In all of the 13 municipalities where specific crimes were charged, the Trial Chamber found that forces of the FRY and Serbia deliberately expelled Kosovo Albanians from their homes, either by ordering them to leave or by creating an atmosphere of terror in order to effect their departure.⁸⁰⁸

287. Lukić and Lazarević have challenged various findings of the Trial Chamber related to the underlying offences of forcible displacement, including, in particular, findings concerning the identity of the perpetrators, what caused the Kosovo Albanians to leave their homes, and the role of the KLA in their departure.⁸⁰⁹ The Prosecution has also appealed against the Trial Chamber's acquittal of Lazarević in relation to certain municipalities.⁸¹⁰ The Appeals Chamber will address these challenges in turn.

1. Dečani/Deçan

288. The Trial Chamber found that on or around 28 March 1999, MUP personnel (including members of the Special Police Unit of the MUP ("PJP")) and VJ personnel (including VJ "paramilitary" reservists) arrived in Beleg village in Dečani/Deçan municipality.⁸¹¹ There, according to the Trial Chamber, they detained, harassed, and strip-searched Kosovo Albanians from Beleg and nearby villages.⁸¹² The Trial Chamber further found that several young women were sexually assaulted, on or around 29 March 1999,⁸¹³ and that the following day villagers were forced to leave Beleg and go to Albania, although a number of them remained behind and have not been heard from since.⁸¹⁴ The Trial Chamber concluded that the VJ and the MUP were not engaged in combat with the KLA in Beleg at this time, that their acts amounted to an attack on the civilian

⁸⁰⁶ Lukić's Appeal Brief, paras 692-696, 712-752.

⁸⁰⁷ Prosecution's Appeal Brief, paras 83-103.

⁸⁰⁸ Trial Judgement, vol. 2, para. 1156. See also *ibid.*, paras 48, 68-69, 147, 163, 230-232, 334-335, 380, 382, 432, 546, 673-675, 728, 795, 800, 885, 887-888, 943-944, 998-1003, 1067, 1099, 1116, 1148.

⁸⁰⁹ Lukić's Notice of Appeal, pp. 20-38; Lukić's Appeal Brief, paras 77-83, 201-221, 389-396, 402-405, 708-709, 753-774, 783-785; Lazarević's Notice of Appeal, paras 8-48, 54-55; Lazarević's Appeal Brief, paras 1-274, 527, 539.

⁸¹⁰ Prosecution's Appeal Brief, paras 105, 109-119.

⁸¹¹ Trial Judgement, vol. 2, paras 68, 1184.

⁸¹² Trial Judgement, vol. 2, paras 68, 1158, 1184.

⁸¹³ Trial Judgement, vol. 2, paras 68, 1158, 1184, 1187.

⁸¹⁴ Trial Judgement, vol. 2, paras 68, 1158, 1184-1185.

population, and that all of the elements of deportation and other inhumane acts (forcible transfer) as crimes against humanity had been satisfied.⁸¹⁵

289. The Trial Chamber convicted Lazarević of these crimes on the basis of the VJ's participation.⁸¹⁶ Lazarević challenges his conviction for these crimes.⁸¹⁷

(a) Submissions of the parties

290. Lazarević submits that the Trial Chamber erred in fact when it concluded that the VJ was present and working with the MUP in Beleg village on or around 28 to 30 March 1999 and committed crimes there.⁸¹⁸ He submits that the Trial Chamber erred in finding, based upon the unreliable evidence of Mehmet Mazrekaj, K20, and K58, that the VJ was present in Beleg, and he likewise challenges the evidence underlying the Trial Chamber's finding that there were VJ armoured vehicles there.⁸¹⁹ Lazarević also points to war diaries, combat reports, and the evidence of Dragan Živanović, commander of the 125th Motorised Brigade of the Priština Corps, in support of his claim that the VJ was not present in Beleg.⁸²⁰ In addition, Lazarević argues that no reasonable trial chamber could have concluded that there were no clashes between KLA and MUP forces in Beleg at the relevant time and notes that the Trial Chamber itself made findings suggesting that such clashes occurred.⁸²¹ Finally, Lazarević submits that the Trial Chamber also erred in law in reaching its findings with respect to the events in Beleg.⁸²²

291. The Prosecution responds that Lazarević's submissions warrant summary dismissal.⁸²³ According to the Prosecution, Lazarević's assertions also fail on the merits as he simply misquotes or mischaracterises evidence and fails to show that the Trial Chamber erred when, faced with conflicting evidence, it made a reasoned decision based on the consistent evidence of witnesses

⁸¹⁵ Trial Judgement, vol. 2, paras 68-69, 1184-1186.

⁸¹⁶ Trial Judgement, vol. 3, para. 930.

⁸¹⁷ Lazarević's Appeal Brief, paras 13-30. See also *ibid.*, paras 223-230, 233-236. The Appeals Chamber notes that Lazarević's Appeal Brief erroneously contains two sub-grounds referred to as 1(c), the first relating to Dečani/Dečan municipality and the second to Đakovica/Gjakova municipality.

⁸¹⁸ Lazarević's Appeal Brief, paras 13-30, 223-230, 233-236.

⁸¹⁹ Lazarević's Appeal Brief, paras 21-29, referring, *inter alia*, to Trial Judgement, vol. 2, paras 55, 65-66. See also Lazarević's Appeal Brief, paras 230, 233-236, raising similar claims and arguing that they show that the Trial Chamber erred as a matter of law.

⁸²⁰ Lazarević's Appeal Brief, paras 28-29, referring to Trial Judgement, vol. 2, para. 66, Exh. P2032, Exh. P2033, Exh. P2034, Exh. P2035, Exh. P2616, Exh. P2802.

⁸²¹ Lazarević's Appeal Brief, paras 14-16, referring to Trial Judgement, vol. 2, para. 57, fn. 148.

⁸²² Lazarević's Appeal Brief, paras 233-236. See also *ibid.*, paras 223-230. Lazarević makes similar submissions arguing legal errors in the Trial Chamber's evidentiary approach with respect to findings for several other villages and municipalities. See Lazarević's Appeal Brief, paras 223-230, 231-232 (Peć/Peja), 237-240 (Đakovica/Gjakova town), 241-247 (Reka/Caragoj valley), 248-251 (Pirane/Pirana), 252-254 (Orahovac/Rahovec), 255-257 (Srbica/Skenderaj, including Turićevac/Turićev, Tušilje/Tushila, Ćirez/Qirez, Izbica/Izbicë), 258-259 (Priština/Priština town), 260-263 (Žegra/Zhegra and Vladovo/Lladova), 264-265 (Prilepnica/Përlepnic), 266-267 (Kačanik/Kaçanik generally), 268-270 (Kotlina/Kotllina), 271-273 (Kačanik/Kaçanik town), 274-275 (Dubrava/Lisnaja).

⁸²³ Prosecution's Response Brief (Lazarević), paras 33, 35, 45, 52, 54.

whom it found to be reliable.⁸²⁴ In addition, the Prosecution disputes Lazarević's assertions concerning a KLA presence in Beleg, arguing that Lazarević's claim is based on different events⁸²⁵ and a mischaracterisation of K20's testimony.⁸²⁶ Finally, the Prosecution submits that Lazarević fails to articulate any specific error of law and the alleged errors of law to which he refers simply repeat his general evidentiary challenges on appeal and warrant summary dismissal.⁸²⁷

292. In reply, Lazarević reiterates that the evidence consistently shows that the VJ was not present in Beleg at the relevant time and he disputes the Prosecution's characterisation of the evidence of K20 and K58.⁸²⁸ Finally, he underscores that he has clearly demonstrated a strong KLA presence in Beleg at the relevant time and adds that Bislim Zyrapri's testimony demonstrates the KLA's impact on population movement.⁸²⁹

(b) Analysis

293. In challenging the Trial Chamber's findings related to participation of the VJ in the crimes committed in the village of Beleg, the Appeals Chamber notes that Lazarević first contests the findings that VJ forces and VJ armoured vehicles were present in Beleg. The Trial Chamber based these findings on, *inter alia*, the eye-witness accounts of Mehmet Mazrekaj, K20, and K58 as well as documentary and witness evidence concerning the presence of VJ forces working with the MUP in the area.⁸³⁰

294. With regard to Mazrekaj, a village elder and school teacher from the village of Drenovac/Drenovc,⁸³¹ Lazarević submits that the witness should have been found "biased and therefore unreliable" in light of his evasive testimony regarding the KLA and the fact that he failed to explain why he gave *viva voce* testimony describing the participation of the VJ but made no mention of the VJ's participation in his written statement years earlier.⁸³² The Trial Chamber found Mazrekaj to be an unreliable witness concerning the extent of KLA activity in the area, but it noted that his evidence was consistent with the accounts of K20 and K58 on the key events, and it

⁸²⁴ Prosecution's Response Brief (Lazarević), paras 44-53.

⁸²⁵ Prosecution's Response Brief (Lazarević), paras 34-35.

⁸²⁶ Prosecution's Response Brief (Lazarević), paras 36-37, referring to Trial Judgement, vol. 2, paras 52, 57.

⁸²⁷ Prosecution's Response Brief (Lazarević), paras 216-217. This response by the Prosecution to Lazarević's submission that the Trial Chamber erred in law also applies to his similar arguments with respect to the other municipalities (see *ibid.*).

⁸²⁸ Lazarević's Reply Brief, paras 30-34.

⁸²⁹ Lazarević's Reply Brief, paras 21-24.

⁸³⁰ Trial Judgement, vol. 2, paras 53-67.

⁸³¹ Trial Judgement, vol. 2, para. 52.

⁸³² Lazarević's Appeal Brief, para. 24, referring to Mehmet Mazrekaj, 3 Nov 2006, T. 5846, Mehmet Mazrekaj, Exh. P2374. Lazarević also submits that Mazrekaj testified that on 27 March 1999 only the police entered the village of Drenovac/Drenovc and "never mention[ed] members of the VJ" (Lazarević's Appeal Brief, para. 25), but has failed to demonstrate why this evidence, which concerns a different village, is relevant to the findings at issue here. His argument in this regard is, accordingly, dismissed.

therefore deemed his account generally reliable.⁸³³ The Appeals Chamber recalls that a trial chamber can reasonably accept certain parts of a witness's testimony and reject others,⁸³⁴ and is therefore not persuaded that the Trial Chamber erred in this regard. As for Lazarević's argument concerning a divergence between Mazrekaj's written statement and his later *viva voce* evidence describing the arrival of armed forces, including police, army, and paramilitary personnel,⁸³⁵ Lazarević simply repeats an argument raised and rejected at trial⁸³⁶ without demonstrating any error by the Trial Chamber warranting the Appeals Chamber's intervention.

295. The Trial Chamber also considered the account of K20, who gave evidence concerning, *inter alia*, the arrival in Beleg of forces whom she described as "Serbian police and Serbian soldiers" or "the Serbian police and military", escorted by armoured vehicles.⁸³⁷ Lazarević challenges her evidence, arguing that she could not clearly identify to which formation the troops she saw belonged and that, on cross-examination, she failed to offer reliable identification information.⁸³⁸ As Lazarević simply repeats an argument made and rejected at trial⁸³⁹ without showing an error warranting the Appeals Chamber's intervention, his claim is dismissed.⁸⁴⁰

296. As for K58, Lazarević asserts that the Trial Chamber erroneously stated that she gave evidence that both the army and police arrived in Beleg "at the relevant time", since, he claims, none of the evidence cited by the Trial Chamber in fact refers to the VJ.⁸⁴¹ Lazarević is correct that K58 did not explicitly refer to the VJ arriving in Beleg. Instead, she stated that in addition to the police, "paramilitaries" wearing caps and "camouflage-like green, grass green uniforms", who were on or accompanied by a tank, entered the village and forced her to leave.⁸⁴² The Appeals Chamber

⁸³³ Trial Judgement, vol. 2, para. 52.

⁸³⁴ *Boškoski and Tarčulovski* Appeal Judgement, para. 59, and references therein.

⁸³⁵ Lazarević's Appeal Brief, para. 24; Trial Judgement, vol. 2, para. 54, noting Mazrekaj's testimony distinguishing between army members and paramilitary personnel. See also Mehmet Mazrekaj, 3 Nov 2006, T. 5808-5809, 5846, testifying as to how he was able to identify members of the army versus those of the police.

⁸³⁶ Lazarević's Closing Brief, para. 200; Trial Judgement, vol. 2, para. 52, noting that the Trial Chamber "has carefully considered the credibility of these witnesses, taking into account *inter alia* challenges made to their evidence during cross-examination and in the parties' final briefs".

⁸³⁷ Trial Judgement, vol. 2, para. 55.

⁸³⁸ Lazarević's Appeal Brief, para. 22, discussing, *inter alia*, K20, Exh. P2649, T. 2520 (under seal), and referring to K20, 9 Feb 2007, T. 10062-10063 (closed session). Contrary to Lazarević's suggestion (Lazarević's Appeal Brief, para. 22), the Appeals Chamber finds no error in the Trial Chamber's reference to K20's evidence in this regard.

⁸³⁹ Compare Lazarević's Appeal Brief, para. 22, and references therein, with Lazarević's Closing Brief, para. 196, and references therein. See also Trial Judgement, vol. 2, para. 52, noting that the Trial Chamber "carefully considered the credibility of these witnesses [including K20], taking into account *inter alia* challenges made to their evidence during cross-examination and in the parties' final briefs".

⁸⁴⁰ Lazarević also challenges K20's credibility on the grounds that she gave evidence that she saw soldiers and police officers in blue camouflage uniforms, although only members of the MUP wore blue (Lazarević's Appeal Brief, para. 22). The Appeals Chamber notes, however, that K20 gave evidence that she saw "soldiers *or* policemen in blue camouflage uniforms" (K20, Exhibit P2669, p. 2 (emphasis added)), and consequently finds his argument to be without merit.

⁸⁴¹ Lazarević's Appeal Brief, para. 23, discussing Trial Judgement, vol. 2, para. 55, fn. 142, K58, Exh. P2550, K58, 29 Nov 2006, T. 7464, 7469.

⁸⁴² K58, 29 Nov 2006, T. 7464-7465, 7469; K58, Exh. P2550, pp. 2-4.

considers that, taken in isolation, this evidence does not offer a sufficiently clear identification of VJ forces.⁸⁴³ However, in light of the other evidence in the record regarding the presence of regular VJ forces,⁸⁴⁴ the Appeals Chamber is not persuaded that the Trial Chamber erred in finding that there was a VJ presence in Beleg at the relevant time.

297. In contesting the Trial Chamber's finding as to the presence of VJ members in Beleg, Lazarević also challenges its finding that there were VJ armoured vehicles in the village at the relevant time.⁸⁴⁵ In this regard, the Trial Chamber considered the evidence of K20, who stated that she saw 30 vehicles arrive in Beleg, including trucks and APCs in blue camouflage as well as "green camouflage weapons".⁸⁴⁶ She identified the vehicles as including BRDM-2, Praga, and BOV-3 anti-aircraft artillery.⁸⁴⁷ Mehmet Mazrekaj also gave evidence that armed forces arrived in Beleg with armoured vehicles which he described as belonging to the police and the army,⁸⁴⁸ and that he subsequently saw three APCs as the displaced villagers left Beleg, two of which he said were blue and belonged to the police, and one in grey or "army colour" belonging to the VJ.⁸⁴⁹ Although this evidence, taken in isolation, may not be sufficient to clearly identify the vehicles at issue as belonging to the VJ, in light of the other evidence in the record as to the presence of the VJ, the Appeals Chamber is not convinced that the Trial Chamber erred in finding that there were VJ armoured vehicles in the village at the relevant time.⁸⁵⁰

298. Lazarević also submits that the evidence of Dragan Živanović, commander of the 125th Motorised Brigade of the Priština Corps,⁸⁵¹ as well as certain war diaries and combat reports, show that there was no VJ presence in Beleg at the relevant time and that the only VJ activity in the vicinity was in the village of Požare/Poshar.⁸⁵² The Trial Chamber noted that both Živanović and the war diaries cited by Lazarević confirmed the presence of VJ forces in Dečani/Dečan

⁸⁴³ The Trial Chamber found that it was incorrect to assume that the VJ were the only ones to wear green uniforms (Trial Judgement, vol. 2, para. 727) as both members of the PJP and the Special Anti-Terrorist Units of the MUP ("SAJ") wore green camouflage uniforms at the relevant time (Trial Judgement, vol. 1, paras 710, 712, 714, 716).

⁸⁴⁴ *E.g.*, Trial Judgement, vol. 2, paras 54-56, and references therein. See also *ibid.*, para. 66.

⁸⁴⁵ See Trial Judgement, vol. 2, para. 66, finding that "armoured vehicles of the VJ and MUP were present in the village on 28 to 30 March 1999."

⁸⁴⁶ Trial Judgement, vol. 2, para. 55; K20, Exh. P2669, p. 2.

⁸⁴⁷ Trial Judgement, vol. 2, fn. 139, and references therein. The Appeals Chamber notes that the Trial Chamber refers to tanks weaponry (*ibid.*; *ibid.*, vol. 3, para. 926).

⁸⁴⁸ Mehmet Mazrekaj, 3 Nov 2006, T. 5808. See also Trial Judgement, vol. 2, para. 54, and references therein.

⁸⁴⁹ Mehmet Mazrekaj, 3 Nov 2006, T. 5808, 5811-5812, 5835-5836, 5847-5848. See also Trial Judgement, vol. 2, para. 65, referring, *inter alia*, to Mehmet Mazrekaj, 3 Nov 2006, T. 5811-5813. Lazarević argues that the Trial Chamber omitted to mention that Mazrekaj could not see any insignia on the vehicles "or reliably identify the APC's" (Lazarević's Appeal Brief, para. 28). Although, as Lazarević suggests, Mazrekaj indicated that he could not observe any markings or details on the vehicles since he saw them from a distance (Mehmet Mazrekaj, 3 Nov 2006, T. 5835-5836, 5847-5848), Lazarević has failed to explain why this renders Mazrekaj's other evidence identifying the vehicles unreliable.

⁸⁵⁰ See Trial Judgement, vol. 2, para. 66.

⁸⁵¹ Dragan Živanović, 17 Jan 2008, T. 20439.

⁸⁵² Lazarević's Appeal Brief, para. 29, referring to Exh. P2032, Exh. P2033, Exh. P2034, Exh. P2035, Exh. P2616, Exh. P2802.

municipality in late March 1999.⁸⁵³ The Trial Chamber also noted Živanović's testimony that it was not possible for a VJ APC to have been in Beleg at the relevant time, as his unit (the 125th Motorised Brigade) did not have any APCs in the area.⁸⁵⁴ However, the Trial Chamber explained its preference for the evidence of Mazrekaj, K20, and K58 with respect to the events in Beleg itself, finding Živanović's evidence to be less reliable because, unlike that of Mazrekaj, K20, and K58, it was not based on his direct personal experience of events there.⁸⁵⁵ Lazarević has failed to show that the Trial Chamber erred in this regard. As for the war diaries and combat reports to which Lazarević refers, the Appeals Chamber recalls that trial chambers have a broad discretion in weighing evidence⁸⁵⁶ and is therefore not persuaded that the Trial Chamber erred in relying on the evidence of eye-witnesses simply because there is other evidence in the record which, in Lazarević's view, is inconsistent.⁸⁵⁷

299. Turning, finally, to Lazarević's claim that no reasonable trial chamber could have concluded that there were no clashes between KLA and MUP forces in Beleg at the relevant time,⁸⁵⁸ the Appeals Chamber notes that Lazarević primarily relies on evidence of a KLA presence in Beleg at a different time, evidence of a KLA presence at or around the relevant time but in other villages, or evidence of the general strategic importance of the area, much of which was explicitly considered by the Trial Chamber.⁸⁵⁹ He has failed to show, however, how this evidence or the other evidence to which he refers⁸⁶⁰ demonstrates that the Trial Chamber erred in finding that VJ and MUP forces

⁸⁵³ Trial Judgement, vol. 2, para. 56, referring, *inter alia*, to Exh. P2616, Exh. P2802, Dragan Živanović, 17 Jan 2008, T. 20469-20470.

⁸⁵⁴ Trial Judgement, vol. 2, para. 66, referring to Dragan Živanović, 17 Jan 2008, T. 20471.

⁸⁵⁵ Trial Judgement, vol. 2, para. 52.

⁸⁵⁶ See *Krajišnik* Appeal Judgement, para. 27; *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21. See also *Brđanin* Appeal Judgement, para. 24; *Čelebići* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 115.

⁸⁵⁷ The Appeals Chamber notes that Lazarević also challenges the Trial Chamber's finding that paramilitary members were incorporated into VJ formations, including the one in Beleg, and asserts that this finding is based on an erroneous interpretation of the evidence (Lazarević's Appeal Brief, paras 17-20, discussing Trial Judgement, vol. 2, para. 54). In response, the Prosecution argues that the finding that paramilitary members were incorporated into VJ formations is supported by the evidence (Prosecution's Response Brief (Lazarević), paras 38-43). Having concluded that a reasonable trier of fact could have found that VJ forces and armoured vehicles were present in Beleg at the relevant time, the Appeals Chamber declines to address Lazarević's argument concerning the incorporation of paramilitary members into VJ formations as volunteers (see Trial Judgement, vol. 2, para. 54, and references therein), as he has failed to show how any error in this regard would render his conviction unsafe. Lazarević's claims of legal error with respect to the events in Beleg (see *supra*, para. 290) are likewise dismissed, as his allegations of legal error simply repeat several of his evidentiary arguments which have been found to be without merit.

⁸⁵⁸ See Trial Judgement, vol. 2, para. 69, finding that the VJ and the MUP were not engaged in combat with the KLA in Beleg at the relevant time. See also *ibid.*, para. 57, stating that there is no evidence of KLA activity in the village of Beleg in the period of 26 to 29 March 1999.

⁸⁵⁹ See Lazarević's Appeal Brief, paras 14-15, referring, *inter alia*, to Trial Judgement, vol. 2, paras 51, 56-57, fn. 148, and discussing, *inter alia*, events in the villages of Požare/Poshar and Ločane/Lloqan.

⁸⁶⁰ See Lazarević's Appeal Brief, para. 14, referring, *inter alia*, to Exh. 6D1639, p. 3, K20, Exh. P2670, T. 2556 (under seal). The Appeals Chamber notes that Exhibit 6D1639 contains no specific mention of KLA fighting in Beleg and relates to events in mid-April 1999. As for K20, while she reported hearing from unidentified persons that there was some fighting between Serbian forces and the KLA on 28 March 1999, she did not specify where the fighting took place, and elsewhere in her testimony she stated that there was no KLA presence in Beleg (K20, Exh. P2670, T. 2517, 2556 (under seal)).

were not engaged in combat with the KLA in Beleg itself on or around 28 to 30 March 1999. He has likewise failed to show how evidence of a KLA presence “in the area”⁸⁶¹ demonstrates that the KLA had an impact on the movement of the civilian population of Beleg.

300. For the foregoing reasons, the Appeals Chamber is satisfied that the evidence before the Trial Chamber could lead a reasonable trier of fact to find that the only reasonable inference was that crimes of forcible displacement were committed in Beleg by, *inter alia*, VJ forces, and accordingly dismisses sub-ground 1(c) of Lazarević’s appeal.

2. Kosovska Mitrovica/Mitrovica

301. The Trial Chamber found that in mid-April 1999, VJ and MUP forces expelled a large number of Kosovo Albanians from Žabare/Zhabar and nearby villages in Kosovska Mitrovica/Mitrovica municipality and forced them to leave Kosovo.⁸⁶² The Trial Chamber based this finding on, *inter alia*, the evidence of Mahmut Halimi and Sadije Sadiku.⁸⁶³ The Trial Chamber concluded that the eye-witness evidence was “not indicative of combat operations against the KLA”,⁸⁶⁴ and proceeded to find that these actions constituted an attack upon the civilian population and amounted to deportation and other inhumane acts (forcible transfer) as crimes against humanity.⁸⁶⁵ However, when it considered the criminal responsibility of Lazarević in this regard, the Trial Chamber stated that the MUP had carried out these crimes, without the participation of the VJ, and consequently acquitted Lazarević.⁸⁶⁶ The Prosecution appeals this acquittal.⁸⁶⁷

(a) Submissions of the parties

302. The Prosecution submits that the Trial Chamber erred by failing to apply its findings that the VJ participated in deportation and other inhumane acts (forcible transfer) as crimes against humanity in Žabare/Zhabar when it acquitted Lazarević of aiding and abetting those crimes.⁸⁶⁸ Noting that the Trial Chamber made numerous findings concerning the VJ’s participation in these crimes, the Prosecution observes that the Trial Judgement offers no explanation for the Trial Chamber’s subsequent inconsistent findings and acquittal, and suggests that the Trial Chamber “erroneously assumed” that the VJ was not involved.⁸⁶⁹ The Prosecution adds that no reasonable

⁸⁶¹ Lazarević’s Appeal Brief, para. 14. See also Lazarević’s Reply Brief, para. 22.

⁸⁶² Trial Judgement, vol. 2, para. 728. See also *ibid.*, para. 1165.

⁸⁶³ Trial Judgement, vol. 2, paras 696, 711-725, 728-729.

⁸⁶⁴ Trial Judgement, vol. 2, para. 728.

⁸⁶⁵ Trial Judgement, vol. 2, paras 1229-1231.

⁸⁶⁶ Trial Judgement, vol. 3, paras 930-932.

⁸⁶⁷ Prosecution’s Appeal Brief, paras 105, 114-115, 118-119, referring to Trial Judgement, vol. 3, para. 932.

⁸⁶⁸ Prosecution’s Appeal Brief, paras 105, 114, 118, referring to Trial Judgement, vol. 3, para. 932.

⁸⁶⁹ Prosecution’s Appeal Brief, paras 105, 114-115, 118.

trial chamber would have acquitted Lazarević of aiding and abetting the crimes and requests that the Appeals Chamber set aside the acquittal and enter convictions.⁸⁷⁰

303. Lazarević responds that the Trial Chamber correctly found that he did not aid and abet the crimes in Žabare/Zhabar.⁸⁷¹ He asserts that Sadije Sadiku, a Kosovo Albanian woman from the village, did not mention that members of the army ever entered the village or committed any crimes against civilians.⁸⁷² Lazarević also points to evidence from Mahmut Halimi, a Kosovo Albanian lawyer who lived and worked in Kosovska Mitrovica/Mitrovica town, which, he claims, shows the unreliability of Halimi’s evidence, which the Trial Chamber did not discuss.⁸⁷³ Moreover, according to Lazarević, Defence evidence rebuts the evidence that VJ forces were in the area at the relevant time and illustrates that it was the MUP which was present.⁸⁷⁴ Finally, Lazarević claims that the presence of KLA forces in Žabare/Zhabar shows that there was combat “in the area” and he cites evidence of a “KLA pattern of conduct” which, he suggests, supports the reasonable conclusion that “population migrations in this area” were influenced by the KLA.⁸⁷⁵

304. The Prosecution replies that Lazarević selectively quotes witness testimony to minimise the role of the VJ in the relevant crimes and ignores relevant findings.⁸⁷⁶ It further submits that he fails to show that the Trial Chamber’s finding that the VJ committed the crimes was unreasonable.⁸⁷⁷

(b) Analysis

305. In volume 2 of the Trial Judgement, the Trial Chamber stated its finding that large numbers of Kosovo Albanians from Žabare/Zhabar and other villages, along with others staying there, were expelled from their homes by MUP and VJ forces and forced to leave Kosovo.⁸⁷⁸ In volume 3 of the Trial Judgement, however, the Trial Chamber did not hold Lazarević responsible for aiding and

⁸⁷⁰ Prosecution’s Appeal Brief, para. 119. The Prosecution also argues that the Appeals Chamber should increase Lazarević’s sentence accordingly (*ibid.*).

⁸⁷¹ Lazarević’s Response Brief, paras 72-73, 100, 109.

⁸⁷² Lazarević’s Response Brief, para. 102, referring to Trial Judgement, vol. 2, paras 718-724. He adds that Sadiku saw “the army significantly further from the village” and that she testified that the members of the army treated civilians “exceptionally humanely” (Lazarević’s Response Brief, para. 102, referring to Trial Judgement, vol. 2, para. 720).

⁸⁷³ Lazarević’s Response Brief, paras 104-107, referring to Mahmut Halimi, 9 Oct 2006, T. 4477-4478, 4482. Lazarević also argues that Halimi’s connections with the KLA demonstrate the “biased nature of his testimony” (Lazarević’s Response Brief, para. 110).

⁸⁷⁴ Lazarević Response Brief, para. 108, referring to Dragan Živanović, 17 Jan 2008, T. 20462; Exh. P2616, Exh. P2618, Exh. P2032, Exh. P2033, Exh. P2034, Exh. P2035, Exh. 5D1417, Trial Judgement, vol. 2, para. 715.

⁸⁷⁵ Lazarević’s Response Brief, paras 110-113, referring to Trial Judgement, vol. 2, para. 711, Bislim Zyrapi, 7 Nov 2006, T. 6003, Mahmut Halimi, 9 Oct 2006, T. 4447-4448, 4494. Lazarević refers to his Appeal Brief for his submissions on sentencing (Lazarević’s Response Brief, para. 126).

⁸⁷⁶ Prosecution’s Reply Brief, paras 62-64.

⁸⁷⁷ Prosecution’s Reply Brief, para. 64.

⁸⁷⁸ Trial Judgement, vol. 2, para. 728.

abetting the crimes of forcible displacement in Žabare/Zhabar, stating that these crimes were “carried out by the MUP, without the participation of the VJ.”⁸⁷⁹

306. These two statements are in direct, material conflict and, when read in isolation, it is unclear which embodies the Trial Chamber’s actual finding as to the VJ’s participation in the crimes in Žabare/Zhabar. The Appeals Chamber recalls, however, that a trial judgement must be read as a whole.⁸⁸⁰

307. In the relevant sections of volume 2 of the Trial Judgement, the Trial Chamber carefully considered the evidence pertaining to the VJ’s participation in the events in Žabare/Zhabar⁸⁸¹ before concluding that “[i]n mid-April 1999 many Kosovo Albanians living or temporarily sheltering in Žabare/Zhabar and other nearby villages were forced to form convoys and leave Kosovo by MUP and VJ forces which began to burn houses in the villages.”⁸⁸² By contrast, the Trial Chamber did not purport to reach factual findings concerning the underlying crimes, including the VJ’s participation therein, in volume 3 of the Trial Judgement, which addresses the individual criminal responsibility of each accused. Indeed, the Trial Chamber repeatedly indicated that in discussing relevant crimes in volume 3 of the Trial Judgement, it was referring to findings which had already been reached in volume 2.

308. Accordingly, the Appeals Chamber considers that the Trial Chamber’s factual findings relevant to the crimes themselves were pronounced in volume 2 of the Trial Judgement and does not consider that the Trial Chamber’s statement in volume 3 of the Trial Judgement that the crimes in Žabare/Zhabar were committed without the VJ’s participation amounts to a new factual finding.⁸⁸³ Given that the factual findings set forth in volume 2 of the Trial Judgement indicate, *inter alia*, that VJ forces expelled Kosovo Albanians from Žabare/Zhabar,⁸⁸⁴ the Appeals Chamber is satisfied that the Trial Chamber’s statement in volume 3 of the Trial Judgement that the crimes in Žabare/Zhabar were “carried out by the MUP, without the participation of the VJ”⁸⁸⁵ was an oversight. By acquitting Lazarević of aiding and abetting the crimes of forcible displacement in Žabare/Zhabar on the basis that these crimes were committed without the participation of the VJ,

⁸⁷⁹ Trial Judgement, vol. 3, para. 932.

⁸⁸⁰ See *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38; *Naletilić and Martinović* Appeal Judgement, para. 435; *Stakić* Appeal Judgement, para. 344.

⁸⁸¹ See Trial Judgement, vol. 2, paras 696, 699-700, 711-719, 726, 728.

⁸⁸² Trial Judgement, vol. 2, para. 1165. See also *ibid.*, vol. 2, paras 1229-1231, referring to earlier findings concerning the VJ’s involvement.

⁸⁸³ *Cf. Deronjić* Judgement on Sentencing Appeal, para. 49.

⁸⁸⁴ Trial Judgement, vol. 2, para. 728.

⁸⁸⁵ Trial Judgement, vol. 3, para. 932.

the Trial Chamber thus erred by failing to apply its own factual finding that the VJ was involved in the commission of the crimes.⁸⁸⁶

309. Lazarević argues, however, that his acquittal should be sustained on the basis that no reasonable trier of fact would have found that the VJ participated in the crimes at issue based on the evidence of Mahmut Halimi and Sadije Sadiku.⁸⁸⁷ Turning first to the evidence of Halimi concerning events on 14 through 16 April 1999, the Appeals Chamber notes that the witness gave evidence that he observed “Serbian forces” with APCs approaching and shooting towards the village of Žabare/Zhabar on 14 April 1999, causing him and his family to move to Gornje (Upper) Žabare/Zhabar.⁸⁸⁸ Halimi further stated that, on 15 April 1999, he saw large numbers of people travelling on foot from other villages and was told that Serbian forces were expelling them.⁸⁸⁹ With regard to events on 16 April 1999, he described how “Serb forces”, including the police, regular military forces, and “paramilitaries”, entered Gornje (Upper) Žabare/Zhabar and started burning houses in a part of the village.⁸⁹⁰ As these “Serb forces” entered the village, he and his family attempted to flee towards Montenegro in three cars, but they were stopped by two young VJ soldiers who ordered them out of the cars, allowing them to continue on foot.⁸⁹¹ After spending a night in a carpentry compound, Halimi and his family together with other people from Gornje (Upper) Žabare/Zhabar were ordered out by members of the police.⁸⁹²

310. The Trial Chamber did not explicitly discuss Halimi’s evidence acknowledging that he was too far away to distinguish the specific forces involved in the events of 14 April 1999 and suggesting that he was unable to identify the forces involved in the expulsion of people from other villages.⁸⁹³ However, the Trial Chamber took note of Defence challenges to some of this evidence.⁸⁹⁴ The Appeals Chamber considers that Lazarević has failed to show that the Trial Chamber’s conclusion concerning VJ involvement based on Halimi’s remaining evidence regarding events on 16 April 1999 was erroneous.⁸⁹⁵ The Appeals Chamber is likewise unconvinced by Lazarević’s suggestion that Halimi is biased due to his cooperation with the KLA. The Trial

⁸⁸⁶ See *Krajišnik* Appeal Judgement, para. 318, explaining that where a trial chamber makes the factual findings necessary to establish a crime but no conviction is entered, the trial chamber’s failure to enter such a conviction constitutes error. Cf. *Rutaganda* Appeal Judgement, paras 572-580.

⁸⁸⁷ Lazarević’s Response Brief, paras 102-109.

⁸⁸⁸ Trial Judgement, vol. 2, para. 713; Mahmut Halimi, 9 Oct 2006, T. 4448-4449.

⁸⁸⁹ Trial Judgement, vol. 2, paras 713-714; Mahmut Halimi, 9 Oct 2006, T. 4449-4451, 4456, 4478-4483.

⁸⁹⁰ Trial Judgement, vol. 2, para. 716; Mahmut Halimi, 9 Oct 2006, T. 4453.

⁸⁹¹ Trial Judgement, vol. 2, para. 716; Mahmut Halimi, 9 Oct 2006, T. 4455. At this time, Halimi saw five or six “paramilitaries” who were looting houses, two small lorries, and “a military jeep with a machine gun on the top” (*ibid.*).

⁸⁹² Trial Judgement, vol. 2, para. 717; Mahmut Halimi, 9 Oct 2006, T. 4456, 4495.

⁸⁹³ See Lazarević’s Response Brief, para. 104-107, referring to Mahmut Halimi, 9 Oct 2006, T. 4477-4478, 4482.

⁸⁹⁴ Trial Judgement, vol. 2, para. 715.

⁸⁹⁵ See also Trial Judgement, vol. 2, para. 716, referring, *inter alia*, to Mahmut Halimi, 9 Oct 2006, T. 4453, where the witness indicated that he had the opportunity to see the forces in Žabare/Zhabar on 16 April 1999 “from very close” and distinguished among police, paramilitary forces, and “regular military forces.”

Chamber carefully assessed credibility challenges with regard to this witness and found him to be “frank and honest in his testimony.”⁸⁹⁶ Lazarević has failed to show how the Trial Chamber erred in this regard.

311. As regards Sadiku, the Appeals Chamber notes that this witness testified that members of the police expelled civilians from Žabare/Zhabar and did not refer to the involvement of the VJ in the expulsion.⁸⁹⁷ This alone is not dispositive, however, in light of Halimi’s evidence as to the participation of VJ in the events. Moreover, Lazarević has failed to show how Sadiku’s evidence that, following her departure from Žabare/Zhabar, VJ forces treated civilians humanely demonstrates that the Trial Chamber erred in finding that VJ forces were involved in the expulsion itself.

312. Lazarević also points to the evidence of Dragan Živanović, commander of the 125th Motorised Brigade of the Priština Corps⁸⁹⁸ and various documentary evidence which, he argues, directly rebuts evidence that VJ forces were in the area at the relevant time and illustrates that it was the MUP that was present.⁸⁹⁹ The Appeals Chamber observes that the Trial Chamber did not explicitly address Živanović’s evidence denying that his troops were in the area of Žabare/Zhabar or had any checkpoints in the area.⁹⁰⁰ However, the Trial Chamber cited evidence indicating that there were VJ troops in the area⁹⁰¹ and, with respect to events in another municipality, deemed Živanović’s evidence credible on some points but less credible on others.⁹⁰² In these circumstances, the Appeals Chamber is not persuaded that Živanović’s general denial shows that the Trial Chamber erred in this regard. The Appeals Chamber is likewise not convinced that the documentary evidence cited by Lazarević demonstrates any error by the Trial Chamber.⁹⁰³

⁸⁹⁶ Trial Judgement, vol. 2, para. 696.

⁸⁹⁷ See Trial Judgement, vol. 2, paras 718, 720-724; Sadije Sadiku, 18 Aug 2006, T. 1892-1894, 1903; Sadije Sadiku, Exh. P2256, paras 9-17, 20, 38; Sadije Sadiku, Exh. P2252, pp. 3-4.

⁸⁹⁸ Dragan Živanović, 17 Jan 2008, T. 20439.

⁸⁹⁹ Lazarević’s Response Brief, para. 108, referring to Dragan Živanović, 17 Jan 2008, T. 20462, Exh. P2616, Exh. P2618, Exh. P2032, Exh. P2033, Exh. P2034, Exh. P2035, Exh. 5D1417. See also Lazarević’s Response Brief, paras 102-107.

⁹⁰⁰ Dragan Živanović, 17 Jan 2008, T. 20462.

⁹⁰¹ Trial Judgement, vol. 2, para. 700, noting Nebojša Bogunović’s testimony that there was a joint VJ and MUP checkpoint in the area of Šipolje/Shipol (Nebojša Bogunović, Exh. 6D1614, para. 89). The Trial Chamber also specifically noted that Lazarević argued that there were no VJ forces in the area, relying on the testimony of Živanović (*ibid.*, para. 715).

⁹⁰² Trial Judgement, vol. 2, para. 88.

⁹⁰³ The Appeals Chamber notes that Exhibits P2033-P2035, regular combat reports of the 125th Motorised Brigade, are dated 28-30 March 1999 and therefore fall outside the relevant time-frame of the events which occurred in Žabare/Zhabar. Similarly, Exhibit P2616, the war diary of the 125th Motorised Brigade does not cover the period of mid-April 1999. Exhibit P2618, the war diary of the Howitzer Battalion of the 125th Motorised Brigade suggests that the unit was active in a different area of Kosovo, namely western Kosovo, at the relevant time. In light of a trial chamber’s broad discretion in weighing evidence, the Appeals Chamber is not convinced that this evidence alone demonstrates that the Trial Chamber’s ultimate finding, based, *inter alia*, on the evidence of an eye-witness, was erroneous. As for Exhibit 5D1417, the Appeals Chamber notes that Lazarević simply repeats an argument raised and

313. Turning, finally, to Lazarević's arguments concerning the KLA, the Appeals Chamber observes that the Trial Chamber explicitly considered evidence of "a KLA medical clinic, and a KLA presence from time to time in the village"⁹⁰⁴ but found that "the testimony of Halimi and Sadiku concerning the burning of houses and looting of property in Žabare/Zhabar, and the threatening and forcible expulsion of its residents, including women and children, is not indicative of combat operations against the KLA."⁹⁰⁵ Lazarević points to no convincing evidence of actual combat or evidence that civilians in Žabare/Zhabar left as a result of such combat. Nor does he show that civilians left as the result of any KLA order to do so. His arguments in this regard are therefore dismissed.

314. For the foregoing reasons, the Appeals Chamber is satisfied that the evidence before the Trial Chamber would lead a reasonable trier of fact to find that the only reasonable inference was that crimes of forcible displacement were committed in Žabare/Zhabar by, *inter alia*, VJ forces and considers that the Trial Chamber erred by failing to apply the factual findings made in volume 2 in volume 3 of the Trial Judgement. The Appeals Chamber accordingly grants, in part, the fifth ground of the Prosecution's appeal insofar as it relates to Žabare/Zhabar. The impact of these findings, if any, on Lazarević's liability will be addressed in the section concerning his individual criminal responsibility.⁹⁰⁶

3. Prizren

315. The Trial Chamber found that in late March 1999 a joint VJ and MUP operation was launched in a broad area covering, *inter alia*, parts of Prizren municipality.⁹⁰⁷ While this operation was "ostensibly targeted against the KLA", Kosovo Albanian civilians living in the area were also systematically attacked.⁹⁰⁸ Thus, although the Trial Chamber was satisfied that there was a KLA presence close to, if not in, the village of Pirane/Pirana at the commencement of the NATO bombing on 24 March 1999,⁹⁰⁹ the Trial Chamber found that between 25 and 29 March 1999 Kosovo Albanian residents of Pirane/Pirana fled their homes as a consequence of the shelling of the village by the VJ and the torching of houses by MUP forces, with people displaced from the village subsequently ordered by the police and other forces to go to Albania.⁹¹⁰ The Trial Chamber also found that on 28 March 1999 Kosovo Albanian residents of Dušanovo/Dushanova, a

rejected at trial (see Trial Judgement, vol. 2, para. 715) without demonstrating any error warranting the Appeals Chamber's intervention.

⁹⁰⁴ Trial Judgement, vol. 2, para. 711.

⁹⁰⁵ Trial Judgement, vol. 2, para. 728.

⁹⁰⁶ See *infra*, sub-section VIII.B.5.

⁹⁰⁷ Trial Judgement, vol. 2, paras 259, 1199.

⁹⁰⁸ Trial Judgement, vol. 2, para. 1199.

⁹⁰⁹ Trial Judgement, vol. 2, para. 250.

⁹¹⁰ Trial Judgement, vol. 2, paras 259, 1160, 1162, 1199-1200.

neighbourhood of Prizren town, were expelled from their homes, beaten, threatened, robbed, and directed towards Albania.⁹¹¹ The Trial Chamber concluded that these acts amounted to an attack upon the civilian population of Pirane/Pirana and Dušanovo/Dushanova and that all of the elements of deportation and other inhumane acts (forcible transfer) as crimes against humanity had been satisfied.⁹¹²

316. The Trial Chamber convicted Lazarević of aiding and abetting the crimes with respect to Pirane/Pirana, but it acquitted him of aiding and abetting the crimes in Dušanovo/Dushanova.⁹¹³ The Prosecution appeals Lazarević's acquittal with respect to Dušanovo/Dushanova,⁹¹⁴ and Lazarević appeals his convictions with respect to Pirane/Pirana.⁹¹⁵ The Trial Chamber also convicted Lukić for committing the crimes in both Pirane/Pirana and Dušanovo/Dushanova (through his participation in a JCE) under Article 7(1) of the Statute.⁹¹⁶ Lukić challenges these convictions.⁹¹⁷ The Appeals Chamber will address these challenges in turn.

(a) Prosecution's appeal regarding Dušanovo/Dushanova

(i) Submissions of the parties

317. The Prosecution submits that the Trial Chamber found that the VJ participated in deportation and other inhumane acts (forcible transfer) as crimes against humanity in Dušanovo/Dushanova on 28 March 1999 and erred in fact by failing to apply its finding when it acquitted Lazarević of aiding and abetting these crimes.⁹¹⁸ Noting that extensive evidence supported the Trial Chamber's factual findings concerning the VJ's participation in the crimes, the Prosecution avers that, when reaching its legal findings with regard to Dušanovo/Dushanova the Trial Chamber only cited MUP involvement in the crimes.⁹¹⁹ The Prosecution notes, however, that the Trial Judgement offers no explanation for the Trial Chamber's inconsistent findings and asserts that Lazarević's acquittal is the result of the Trial Chamber's erroneous assumption that the VJ was

⁹¹¹ Trial Judgement, vol. 2, paras 286, 1162, 1201-1202.

⁹¹² Trial Judgement, vol. 2, paras 1199-1203.

⁹¹³ Trial Judgement, vol. 3, paras 930-932.

⁹¹⁴ Prosecution's Appeal Brief, paras 105, 114, 116-119.

⁹¹⁵ Lazarević's Appeal Brief, paras 93-105. See also *ibid.*, paras 248-251.

⁹¹⁶ Trial Judgement, vol. 3, paras 1138, 1212.

⁹¹⁷ Lukić's Appeal Brief, paras 753-782. Lukić's arguments concerning the foreseeability of the crimes and his knowledge of them (*ibid.*, paras 774-782) relate to the Trial Chamber's findings as to his individual criminal responsibility as a participant in the JCE and are considered in that context (see *infra*, sub-sections VII.F.4.(k) and VII.F.5.(c)(iii)).

⁹¹⁸ Prosecution's Appeal Brief, paras 105, 114, 116-118, referring, *inter alia*, to Trial Judgement, vol. 3, para. 932.

⁹¹⁹ Prosecution's Appeal Brief, paras 116-117, referring, *inter alia*, to Trial Judgement, vol. 2, paras 269-286, 1162, 1201-1203.

not involved.⁹²⁰ The Prosecution adds that no reasonable trial chamber would have entered this acquittal and requests that the Appeals Chamber set aside the acquittal and enter convictions.⁹²¹

318. Lazarević responds that the Trial Chamber correctly found that he was not responsible for the expulsion of Kosovo Albanian civilians from Dušanovo/Dushanova and he rejects the Prosecution's suggestion that there is extensive evidence supporting the conclusion that the VJ participated in the crimes there.⁹²² In particular, he submits that it was impossible for VJ forces under his command or control to have been involved in the crimes, as they were deployed elsewhere on 28 March 1999.⁹²³ He adds that the evidence of Rexhep Krasniqi identifying tanks in the area was refuted by Božidar Delić, Commander of the 549th Motorised Brigade of the Priština Corps.⁹²⁴ He also asserts that the Trial Chamber erroneously relied on the evidence of Franjo Glončak, a VJ soldier, and Exhibit P2575, the war diary of the Anti-Aircraft Defence Light Artillery Rocket Battalion, as both relate to events well after 28 March 1999.⁹²⁵ Moreover, according to Lazarević, Hysni Kryeziu simply identified the perpetrators of the relevant crimes as policemen "who cooperated with irregular armed and uniformed forces".⁹²⁶

319. In reply, the Prosecution argues that Lazarević selectively quotes witness testimony to minimize the role of the VJ in the relevant crimes and ignores relevant findings.⁹²⁷ According to the Prosecution, Lazarević nonetheless fails to show that the Trial Chamber's factual finding that the VJ committed the crimes was unreasonable.⁹²⁸

(ii) Analysis

320. In volume 2 of the Trial Judgement, the Trial Chamber found, based in part on the evidence of Rexhep Krasniqi and Hysni Kryeziu, that Kosovo Albanian civilians in Dušanovo/Dushanova were expelled from their homes and directed towards Albania "by police and VJ forces working together".⁹²⁹ In volume 3 of the Trial Judgement, however, the Trial Chamber did not hold

⁹²⁰ Prosecution's Appeal Brief, paras 105, 118.

⁹²¹ Prosecution's Appeal Brief, para. 119. The Prosecution also argues that the Appeals Chamber should increase Lazarević's sentence accordingly (*ibid.*).

⁹²² Lazarević's Response Brief, paras 71-73, 114, 116, 125, discussing, *inter alia*, Trial Judgement, vol. 3, para. 932.

⁹²³ Lazarević's Response Brief, paras 115, 118-119.

⁹²⁴ Lazarević's Response Brief, paras 117-118, referring, *inter alia*, to Božidar Delić, 29 Nov 2007, T. 19388-19390.

⁹²⁵ Lazarević's Response Brief, paras 123-124.

⁹²⁶ Lazarević's Response Brief, paras 120, 122. Lazarević also argues that certain evidence of Rexhep Krasniqi cited by the Prosecution only describes acts by the police (*ibid.*, para. 121, discussing Prosecution's Appeal Brief, fn. 283, referring to, *inter alia*, Trial Judgement, vol. 2, fns 743, 746). Lazarević refers to his Appeal Brief for his submissions on sentencing (*ibid.*, para. 126).

⁹²⁷ Prosecution's Reply Brief, paras 62-64.

⁹²⁸ Prosecution's Reply Brief, paras 62-64.

⁹²⁹ Trial Judgement, vol. 2, para. 279. See also *ibid.*, para. 286. The Trial Chamber's legal findings as to whether the elements of the crimes of forcible displacement had been satisfied, also found in volume 2 of the Trial Judgement, are discussed below (see *infra*, sub-section VI.B.3.(c)).

Lazarević responsible for aiding and abetting the crimes of forcible displacement in Dušanovo/Dushanova, stating that these crimes were “carried out by the MUP, without the participation of the VJ”.⁹³⁰

321. These two statements are in direct, material conflict and, when read in isolation, it is unclear which embodies the Trial Chamber’s actual finding as to the VJ’s participation in the crimes in Dušanovo/Dushanova. The Appeals Chamber recalls, however, that a trial judgement must be read as a whole⁹³¹ and notes, in particular, that the Trial Chamber did not purport to reach factual findings concerning the underlying crimes, including the VJ’s participation therein, in volume 3 of the Trial Judgement. To the contrary, as the Appeals Chamber has already observed in the context of the Prosecution’s appeal concerning Kosovska Mitrovica/Mitrovica municipality,⁹³² the Trial Chamber repeatedly indicated that in discussing relevant crimes in volume 3 of the Trial Judgement, it was referring to findings which had already been reached in volume 2, which were based on an assessment of the evidence presented at trial. Accordingly, the Appeals Chamber considers that the Trial Chamber’s factual findings relevant to the crimes themselves were already pronounced in volume 2 of the Trial Judgement and does not consider that the Trial Chamber’s statement in volume 3 of the Trial Judgement that the crimes in Dušanovo/Dushanova were committed without the VJ’s participation amounts to a new factual finding.⁹³³

322. This does not fully settle the question of which findings in volume 2 of the Trial Judgement are the operative findings, however. In particular, while the Trial Judgement’s factual findings in volume 2 of the Trial Judgement indicate that the VJ and the MUP worked together to expel residents from Dušanovo/Dushanova, the legal findings as to whether the elements of the crimes of forcible displacement had been satisfied, set forth in that same volume, twice refer to the MUP only when describing the commission of the crimes.⁹³⁴ Yet, in making these statements, the Trial Chamber also indicated that it was referring to factual findings already made.⁹³⁵ Indeed, the first paragraph of the Trial Chamber’s discussion of its legal findings specifies that:

[h]aving made the above factual findings on events between March and May 1999 in 13 of the municipalities in Kosovo, the Trial Chamber now turns to the question of whether the legal

⁹³⁰ Trial Judgement, vol. 3, para. 932.

⁹³¹ See *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38; *Naletilić and Martinović* Appeal Judgement, para. 435; *Stakić* Appeal Judgement, para. 344.

⁹³² See *supra*, sub-section VI.B.2.

⁹³³ Cf. *Deronjić* Judgement on Sentencing Appeal, para. 49.

⁹³⁴ Trial Judgement, vol. 2, paras 1201-1202.

⁹³⁵ Trial Judgement, vol. 2, paras 1201, stating that “[t]he Chamber *has also found above* that on 28 March 1999 a large number of Kosovo Albanians from Dušanovo/Dushanova, a neighbourhood of Prizren town, were violently expelled from their homes by the police” (emphasis added), 1202, explaining that “[a]s *noted above*, the MUP drove out Kosovo Albanians from their homes” there (emphasis added).

elements of the crimes charged in the Indictment are satisfied in relation to each of the crime sites where it has found the relevant facts to be proved.⁹³⁶

Moreover, the Appeals Chamber notes that the Trial Chamber also states in its legal findings that the expulsions from Dušanovo/Dushanova were carried out by “forces of the FRY and Serbia”,⁹³⁷ a phrase that encompasses both the VJ and the MUP.⁹³⁸ For similar reasons to those articulated above, the Appeals Chamber is therefore satisfied that any conflict between the Trial Chamber’s factual findings in volume 2 of the Trial Judgement and its statement of those findings in the context of its legal findings in that same volume must be resolved by looking to the former.

323. Given that the factual findings set forth in volume 2 of the Trial Judgement indicate that Kosovo Albanian civilians were expelled from their homes in Dušanovo/Dushanova “by police and VJ forces working together”,⁹³⁹ the Appeals Chamber is persuaded that the Trial Chamber’s statements in its legal findings in that same volume referring only to the MUP were oversights. Furthermore, the Appeals Chamber is satisfied that the Trial Chamber’s statement in volume 3 of the Trial Judgement that the crimes in Dušanovo/Dushanova were “carried out by the MUP, without the participation of the VJ”⁹⁴⁰ was also an oversight. By acquitting Lazarević of aiding and abetting the crimes of forcible displacement in Dušanovo/Dushanova on the basis that these crimes were committed without the participation of the VJ, the Trial Chamber thus erred by failing to apply its own factual finding that the VJ was involved in the commission of the crimes.⁹⁴¹

324. Lazarević argues, however, that his acquittal should be sustained on the basis that no reasonable trier of fact would have found that the VJ participated in the crimes at issue.⁹⁴² Turning to the evidence relied upon by the Trial Chamber in reaching its finding, the Appeals Chamber notes that the Trial Chamber considered Hysni Kryeziu’s account that on 28 March 1999, a large number of “police and military forces” with tanks and armoured vehicles arrived in Dušanovo/Dushanova and started firing shots into the air and at the houses, shouting such things as “Kosovo belongs to Serbia, you belong to Albania”.⁹⁴³ He also described how the whole

⁹³⁶ Trial Judgement, vol. 2, para. 1179 (emphasis added).

⁹³⁷ Trial Judgement, vol. 2, para. 1203.

⁹³⁸ Trial Judgement, vol. 1, para. 10.

⁹³⁹ Trial Judgement, vol. 2, para. 279. See also *ibid.*, para. 286.

⁹⁴⁰ Trial Judgement, vol. 3, para. 932.

⁹⁴¹ See *Krajišnik* Appeal Judgement, para. 318, explaining that where a trial chamber makes the factual findings necessary to establish a crime but no conviction is entered, the trial chamber’s failure to enter such a conviction constitutes an error. Cf. *Rutaganda* Appeal Judgement, paras 572-580.

⁹⁴² The Appeals Chamber recalls that where the Prosecution relies on a particular ground to reverse an acquittal, the Defence in its Respondent’s Brief may seek to support the acquittal on additional grounds (Practice Direction on Formal Requirements for Appeals from Judgement, Doc. IT/201, 7 March 2002, para. 5). See also *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Order, 21 March 2000, p. 4; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Ljube Bošković’s Defence Motion for Extension of Word Limit, 25 November 2008, p. 3).

⁹⁴³ Trial Judgement, vol. 2, para. 276. Kryeziu also gave evidence that not only the police threatened him and his family as they were departing Dušanovo/Dushanova, but also “soldiers” wearing black “Chetnik caps” with cockades (*ibid.*;

neighbourhood left their homes and began moving in a convoy, of which he was a part.⁹⁴⁴ The Trial Chamber accepted Kryeziu's ability to recognise "some of the perpetrators" as policemen, and stated that the police forces were working in concert with "other irregular armed and uniformed forces."⁹⁴⁵ Based upon Kryeziu's evidence as well as documentary evidence and the eye-witness account of Rexhep Krasniqi, the Trial Chamber found that the Kosovo Albanian residents of Dušanovo/Dushanova were expelled from their homes by police and VJ forces working together and that the VJ then took up a position there.⁹⁴⁶

325. The Trial Chamber did not explicitly address on what basis Kryeziu identified some of the individuals he saw as "military forces".⁹⁴⁷ The Appeals Chamber notes, however, that when asked at trial how he distinguished between the police and the soldiers referred to in his written statement, Kryeziu stated that "[t]he policemen had blue uniforms, dark blue; solid colour and camouflage pattern. The soldiers, on the other hand, had also plain-colour uniform, the SMB uniform as we call it, and some others had camouflage uniforms."⁹⁴⁸ This evidence, which is consistent with the evidence received by the Trial Chamber concerning the uniforms worn by VJ reservists,⁹⁴⁹ is not specifically discussed in the Trial Judgement. The Appeals Chamber recalls, however, that the Trial Chamber has broad discretion in weighing evidence and is not required to articulate every step of its reasoning or to list every piece of evidence which it considers in making its finding.⁹⁵⁰

326. As to Lazarević's argument that Božidar Delić refuted Rexhep Krasniqi's account concerning the presence of 50 green tanks on 23 March 1999,⁹⁵¹ Lazarević has failed to show how Delić's evidence in this regard, even if it were accepted,⁹⁵² renders unreasonable the Trial

Hysni Kryeziu, 29 Nov 2006, T. 7544). In addition, he stated that he saw masked policemen and soldiers beating two men and setting fire to their house and some soldiers wearing "the emblem of the White Eagles paramilitary group on the upper left arm of their uniforms" (Trial Judgement, vol. 2, para. 276; Hysni Kryeziu, Exh. P2514, (statement of 14 May 1999), p. 3; Hysni Kryeziu, 29 Nov 2006, T. 7544, 7548-7549).

⁹⁴⁴ Trial Judgement, vol. 2, para. 276; Hysni Kryeziu, 30 Nov 2006, T. 7567; Hysni Kryeziu, Exh. P2514, (statement of 14 May 1999), p. 3.

⁹⁴⁵ Trial Judgement, vol. 2, para. 276. Contrary to Lazarević's assertion (see Lazarević's Response Brief, paras 120, 122), the Trial Chamber did not find that the perpetrators were solely policemen.

⁹⁴⁶ Trial Judgement, vol. 2, para. 279.

⁹⁴⁷ Trial Judgement, vol. 2, paras 276-277.

⁹⁴⁸ Hysni Kryeziu, 29 Nov 2006, T. 7546. The term "SMB" is an abbreviation for "sivo maslinasta boja" or "olive drab", as such a uniform was of a solid olive-green colour (Trial Judgement, vol. 1, para. 430, and references therein).

⁹⁴⁹ Trial Judgement, vol. 1, para. 430, referring to Zlatimir Pešić, 22 Nov 2006, T. 7156-7157, *ibid.*, 23 Nov 2006, T. 7248, *ibid.*, 24 Nov 2006, T. 7280, 7293, 7324-7325, Abdylhaqim Shaqiri, 5 Sep 2006, T. 2808-2809, Abdullah Salihu, Exh. P2255, p. 7.

⁹⁵⁰ See *Krajišnik* Appeal Judgement, para. 27; *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21. See also *Brdanin* Appeal Judgement, para. 24; *Čelebići* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 115.

⁹⁵¹ Lazarević's Response Brief, para. 118, discussing, *inter alia*, Trial Judgement, vol. 2, para. 270.

⁹⁵² The Trial Chamber considered Delić's denials concerning the presence of tanks in Dušanovo/Dushanova, but nonetheless found that VJ forces worked together with the MUP to expel Kosovo Albanian residents from their homes (Trial Judgement, vol. 2, paras 278-279). In this regard, the Appeals Chamber notes that the Trial Chamber only found some aspects of Delić's evidence credible (*ibid.*, para. 244) and that the Trial Chamber, in discussing his evidence in relation to other municipalities, repeatedly found that his denials of VJ presence or involvement in certain acts lacked

Chamber's finding regarding VJ participation in the events of 28 March 1999 in light of the other evidence in the record.⁹⁵³

327. Lazarević also contends that the Trial Chamber relied on certain evidence of Franjo Glončak as well as Exhibit P2575, noting that both relate to events more than a week after 28 March 1999.⁹⁵⁴ Contrary to Lazarević's suggestion, the Appeals Chamber is satisfied that the Trial Chamber did not rely on Glončak's evidence in reaching its findings as to expulsion.⁹⁵⁵ As for Exhibit P2575, the war diary of the Anti-Aircraft Defence Light Artillery Rocket Battalion, the Appeals Chamber notes that the Trial Chamber referred to an entry in this exhibit concerning 7 April 1999, although it is not clear to what extent the Trial Chamber relied upon the exhibit in reaching its findings.⁹⁵⁶ Even if the Trial Chamber erred in relying on Exhibit P2575 to make findings with respect to events on 28 March 1999,⁹⁵⁷ the Appeals Chamber considers that Lazarević has failed to demonstrate that the Trial Chamber's findings would not stand based on the remaining evidence, including the evidence of eye-witnesses.

328. For the foregoing reasons, the Appeals Chamber is satisfied that the evidence before the Trial Chamber would lead a reasonable trier of fact to find that the only reasonable inference was that the crimes in Dušanovo/Dushanova were committed by, *inter alia*, VJ forces. The Appeals Chamber considers that the Trial Chamber erred by failing to apply its own factual findings made in volume 2 in volume 3 of the Trial Judgement. The Appeals Chamber accordingly grants, in part, the fifth ground of the Prosecution's appeal insofar as it relates to Dušanovo/Dushanova. The impact of these findings, if any, on Lazarević's liability will be addressed in the section concerning his individual criminal responsibility.⁹⁵⁸

credibility, particularly where he had otherwise acknowledged that his troops were in the area (*ibid.*, paras 333, 380, 432).

⁹⁵³ Lazarević has also failed to show how evidence that VJ forces under Delić's command were involved in an operation in the area of Mališevo/Malisheva (Orahovac/Rahovec municipality) beginning on 30 March 1999 (see Trial Judgement, vol. 2, para. 302; Lazarević's Response Brief, para. 119) demonstrates any error with respect to the Trial Chamber's findings as to the presence of the VJ in Dušanovo/Dushanova on 28 March 1999, *i.e.*, two days earlier. His remaining arguments concerning the evidence of Rexhep Krasniqi (Lazarević's Response Brief, para. 121) fail to articulate any error by the Trial Chamber and are dismissed.

⁹⁵⁴ Trial Judgement, vol. 2, paras 278-279, and references therein.

⁹⁵⁵ See Trial Judgement, vol. 2, paras 278-279, 286. See also *ibid.*, para. 244, stating that the Trial Chamber did not find Glončak to be generally credible.

⁹⁵⁶ See Trial Judgement, vol. 2, paras 278-279.

⁹⁵⁷ Trial Judgement, vol. 2, para. 278, discussing Exh. P2575.

⁹⁵⁸ See *infra*, sub-section VIII.B.5.

(b) Lazarević's appeal regarding Pirane/Pirana(i) Submissions of the parties

329. Lazarević submits that the Trial Chamber erred in concluding that the VJ, acting jointly with the MUP, shelled Pirane/Pirana village and forced Kosovo Albanian civilians to leave out of fear between 25 and 29 March 1999.⁹⁵⁹ In particular, he argues that Božidar Delić gave evidence, corroborated by war documents, that his forces did not shell the village⁹⁶⁰ and that, even if there had been shelling, the shelling resulted in no damage or casualties, which, Lazarević claims, shows that the shelling was not aimed at civilians but at KLA positions.⁹⁶¹ Lazarević also asserts that the Trial Chamber ignored evidence that the village was a KLA stronghold and that the attack launched by Serbian forces was aimed at KLA positions, not civilians.⁹⁶² Lazarević suggests that the Trial Chamber misinterpreted Bislim Zyrapi's evidence concerning KLA activity in the area and he points, *inter alia*, to Zyrapi's testimony that it was normal for the KLA to order the movement of the population.⁹⁶³ Finally, Lazarević notes that the Trial Chamber relied upon the evidence of Rahim Latifi, a Kosovo Albanian resident of the municipality, despite finding the witness unreliable in some respects, while it rejected the evidence of witnesses "most competent for that area and the relevant time".⁹⁶⁴ Lazarević avers that the Trial Chamber failed to provide a "valid justification" for approaching the evidence in this manner.⁹⁶⁵

330. The Prosecution responds that Lazarević's arguments warrant summary dismissal and, in any event, fail on their merits.⁹⁶⁶ The Prosecution rejects Lazarević's claim as to the significance of the evidence that the shelling of Pirane/Pirana resulted in no damage or casualties, arguing that he fails to explain how residents' escape from damage "excuses the VJ's joint operation with the MUP to drive the Kosovo Albanians out of the village."⁹⁶⁷ The Prosecution also submits that the Trial Chamber found that the KLA was present in or near Pirane/Pirana at the relevant time but nonetheless concluded that the "violent and intimidating behavior" of those involved in the attack

⁹⁵⁹ Lazarević's Appeal Brief, paras 93, 248-250, referring, *inter alia*, to Trial Judgement, vol. 2, paras 259, 1160. See also Lazarević's Appeal Brief, para. 535.

⁹⁶⁰ Lazarević's Appeal Brief, para. 100, referring to "P2576", Trial Judgement, vol. 2, paras 253, 257.

⁹⁶¹ Lazarević's Appeal Brief, para. 103, referring to Trial Judgement, vol. 2, paras 256, 259.

⁹⁶² Lazarević's Appeal Brief, paras 94-95, 97-98, referring, *inter alia*, to Trial Judgement, vol. 2, para. 249, Bislim Zyrapi, 7 Nov 2006, T. 5991-5992, Exh. P2447, Exh. P2469, Exh. 6D1013, Exh. 3D1048, item 2.6. He adds that the evidence of Zyrapi and Delić as well as documentary evidence show that fights took place between the KLA and "the forces of order of VJ/MUP in the area at the relevant time" (Lazarević's Appeal Brief, paras 99-101, referring to Trial Judgement, vol. 2, paras 253, 257, Exh. P2576).

⁹⁶³ Lazarević's Appeal Brief, paras 96-98, referring to Trial Judgement, vol. 2, para. 252, Bislim Zyrapi, 7 Nov 2006, T. 5991-5992, 6003. See also Lazarević's Appeal Brief, para. 535.

⁹⁶⁴ Lazarević's Appeal Brief, paras 102, 104. Lazarević does not indicate to which witnesses he is referring.

⁹⁶⁵ Lazarević's Appeal Brief, paras 248-250.

⁹⁶⁶ Prosecution's Response Brief (Lazarević), paras 103-104.

⁹⁶⁷ Prosecution's Response Brief (Lazarević), para. 109. The Prosecution adds that the Trial Chamber found that Latifi's account of the shelling and burning of Pirane/Pirana was corroborated by Morina (*ibid.*, para. 108).

on the village demonstrated that the attack's aim was to expel Kosovo Albanians.⁹⁶⁸ According to the Prosecution, Lazarević fails to show that the Trial Chamber erred in this regard⁹⁶⁹ and the evidence he cites from Zyrapi concerning population movement relates to villages other than Pirane/Pirana.⁹⁷⁰ Finally, the Prosecution asserts that the Trial Chamber reasonably accepted the evidence of Latifi and rejected that of Delić, and argues that Lazarević cannot establish that the Trial Chamber erred simply by citing evidence inconsistent with the evidence upon which it relied.⁹⁷¹

331. Lazarević replies that Delić's evidence was both credible and corroborated, and that he clearly showed that the village of Pirane/Pirana was not shelled because it would have been impossible to shell it without causing damage or casualties.⁹⁷² Lazarević adds that he correctly quoted Zyrapi's testimony that the KLA moved the population from Pirane/Pirana at the relevant time and that this testimony was corroborated by documentary evidence.⁹⁷³

(ii) Analysis

332. Turning first to Lazarević's arguments concerning the shelling of Pirane/Pirana, the Appeals Chamber notes that the Trial Chamber based its finding that the village was shelled on the eye-witness evidence of Rahim Latifi, whose account of events on 25 March 1999 was partially supported by Halil Morina.⁹⁷⁴ The Trial Chamber also considered the evidence of Božidar Delić, who acknowledged that VJ members entered Pirane/Pirana on 25 March 1999 but disputed Latifi's suggestion that the village was surrounded by VJ forces.⁹⁷⁵ Lazarević argues that Delić denied that his forces shelled the village but cites no evidence in the record in support of this assertion,⁹⁷⁶ which is, accordingly, dismissed. Lazarević has likewise failed to show how the absence of damage or casualties demonstrates that the shelling could not have occurred or that any shelling that did occur was aimed at the KLA.

⁹⁶⁸ Prosecution's Response Brief (Lazarević), para. 105, citing Trial Judgement, vol. 2, para. 1200.

⁹⁶⁹ Prosecution's Response Brief (Lazarević), para. 105.

⁹⁷⁰ Prosecution's Response Brief (Lazarević), para. 106, arguing that Zyrapi's evidence relates to the withdrawal of civilians from villages other than Pirane/Pirana.

⁹⁷¹ Prosecution's Response Brief (Lazarević), paras 107-108, 110. The Prosecution also asserts that Lazarević's citation to "P2576" is inapt, as this document was not admitted into evidence at trial (*ibid.*, para. 111).

⁹⁷² Lazarević's Reply Brief, paras 63-64.

⁹⁷³ Lazarević's Reply Brief, para. 62.

⁹⁷⁴ Trial Judgement, vol. 2, paras 255-256, 259. The Trial Chamber also referred to documentary evidence concerning the joint VJ and MUP operation in the area, including evidence of a VJ and MUP "encirclement" at Pirane/Pirana as of 26 March 1999 (*ibid.*, para. 253).

⁹⁷⁵ Trial Judgement, vol. 2, para. 257; Božidar Delić, 29 Nov 2007, T. 19372-19373.

⁹⁷⁶ Document P2576, to which Lazarević refers, was not admitted into evidence (see *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Confidential Exhibit List, Public Exhibit List, Certificate on Confidential Exhibit List and the Certificate on the Public Exhibit List, all filed on 10 November 2009). In any event, the Appeals Chamber recalls that the Trial Chamber repeatedly found that witness Delić's general denial of his units' involvement in criminal acts was not credible (see *supra*, fn. 952).

333. As for Lazarević's claims concerning the KLA, the Appeals Chamber notes that the Trial Chamber specifically considered evidence concerning the KLA presence in and around Pirane/Pirana, including the evidence of Delić and Lazarević himself that the village was a KLA stronghold.⁹⁷⁷ Having reviewed this evidence, the Trial Chamber was satisfied that there was a KLA presence close to, if not in, Pirane/Pirana at the commencement of the NATO bombing on 24 March 1999.⁹⁷⁸ Although Lazarević argues that the Trial Chamber ignored Exhibits 6D1013 and 3D1048, the Trial Chamber explicitly considered Exhibit 6D1013, a MUP report dated 13 March 1999 on the location of KLA forces in the area of Prizren, as corroboration for the accounts of Delić and Lazarević,⁹⁷⁹ and Lazarević has failed to explain how Exhibit 3D1048, a VJ report dated 2 March 1999, demonstrates that the Trial Chamber's conclusion concerning events weeks later was erroneous.

334. Lazarević also claims that the Trial Chamber failed to take into account Zyrapi's evidence confirming that the attack by the VJ and the MUP was aimed at KLA positions. The Appeals Chamber notes that the Trial Chamber expressly considered documentary evidence and witness testimony from Zyrapi and Delić that an operation involving VJ and MUP forces was carried out in parts of Prizren municipality, including Pirane/Pirana village as well as Orahovac/Rahovec and Suva Reka/Suhareka municipalities in late March 1999.⁹⁸⁰ The Trial Chamber also considered evidence, including testimony from Zyrapi, and Defence arguments that the KLA's presence was a reason for the operation,⁹⁸¹ but concluded that:

this does not alter the fact that, through the joint actions of the VJ and the MUP of first shelling the village and then driving inhabitants out by burning houses there, Kosovo Albanian civilians were forced to leave Pirane/Pirana out of fear for their lives, caused by the actions of the FRY/Serbian forces, rather than the KLA.⁹⁸²

Although the Trial Chamber did not explicitly address the evidence of Zyrapi that there was combat activity in a broad geographic area "starting from Pirane",⁹⁸³ Lazarević has failed to show how this evidence demonstrates that the Trial Chamber erred with respect to its conclusion as to the specific reason for the departure of Kosovo Albanian civilians from Pirane/Pirana or its conclusion that the actions of the VJ and the MUP there constituted an attack on the civilian population.⁹⁸⁴

335. The Appeals Chamber is similarly unpersuaded that the Trial Chamber erred in its consideration of Zyrapi's testimony concerning the reasons for the movement of the civilian

⁹⁷⁷ Trial Judgement, vol. 2, paras 247-249, and references therein.

⁹⁷⁸ Trial Judgement, vol. 2, para. 250.

⁹⁷⁹ Trial Judgement, vol. 2, para. 249, fn. 685.

⁹⁸⁰ Trial Judgement, vol. 2, paras 251-253, 259. See also *ibid.*, paras 1199-1200.

⁹⁸¹ Trial Judgement, vol. 2, paras 251-253, 259, 1199.

⁹⁸² Trial Judgement, vol. 2, para. 259. See also *ibid.*, para. 1199.

⁹⁸³ Bislim Zyrapi, 7 Nov 2006, T. 5991.

population. The Trial Chamber explicitly considered Zyrapi's general statement that when KLA forces in the area began to withdraw from their positions, they withdrew together with the local population, and it correctly noted that while Zyrapi discussed the withdrawal of civilians from certain villages, he made no reference to such a withdrawal from Pirane/Pirana.⁹⁸⁵ Although Lazarević contests the Trial Chamber's interpretation of the evidence and cites other, similarly non-specific evidence from Zyrapi concerning the KLA's movement of the civilian population,⁹⁸⁶ he has failed to show that the Trial Chamber's findings were erroneous with respect to the reason for the departure of the Kosovo Albanian civilians from Pirane/Pirana.

336. Finally, with regard to Lazarević's challenge to the Trial Chamber's general approach to the evidence, the Appeals Chamber recalls that a trial chamber can reasonably accept certain parts of a witness's testimony and reject others⁹⁸⁷ and that trial chambers have a broad discretion in weighing evidence.⁹⁸⁸ The Appeals Chamber is therefore not persuaded that the Trial Chamber erred in relying on some of Latifi's testimony merely because it rejected certain other aspects of his evidence⁹⁸⁹ or because there is evidence in the record which, in Lazarević's view, is inconsistent with Latifi's account. As for Lazarević's claim that the Trial Chamber erroneously failed to provide a "valid justification" for its approach to the evidence,⁹⁹⁰ the Appeals Chamber observes that the Trial Chamber based its findings on Latifi's "eye-witness evidence" partially supported by Morina.⁹⁹¹ The Trial Chamber also noted that Zyrapi gave no specific evidence undermining this account⁹⁹² and explicitly rejected a variety of Defence challenges to Latifi's evidence.⁹⁹³ The Appeals Chamber finds no error in either the Trial Chamber's approach or its explanation thereof.⁹⁹⁴

⁹⁸⁴ See Trial Judgement, vol. 2, para. 1200.

⁹⁸⁵ Trial Judgement, vol. 2, para. 252, referring to Bislim Zyrapi, 7 Nov 2006, T. 5992. The Trial Chamber made no finding as to whether and when KLA members may have withdrawn from Pirane/Pirana, although it discusses documentary evidence from the VJ suggesting, *inter alia*, that while there were still KLA members in the village as of 26 March 1999, "full control of the territory was established" as of 29 March 1999 (see Trial Judgement, vol. 2, para. 253, and references therein).

⁹⁸⁶ See Lazarević's Appeal Brief, para. 98, referring to Bislim Zyrapi, 7 Nov 2006, T. 6003, stating that it was "normal for us to order the movement of the population but also of the KLA."

⁹⁸⁷ *Boškoski and Tarčulovski* Appeal Judgement, para. 59, and references therein.

⁹⁸⁸ See *Krajišnik* Appeal Judgement, para. 27; *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21. See also *Brđanin* Appeal Judgement, para. 24; *Čelebići* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 115.

⁹⁸⁹ See Trial Judgement, vol. 2, para. 244, noting that the Trial Chamber found Latifi's evidence unreliable insofar as it related to the KLA presence in the area and "his evidence in general thus worthy of close scrutiny." See also *ibid.*, para. 250.

⁹⁹⁰ Lazarević's Appeal Brief, para. 249.

⁹⁹¹ Trial Judgement, vol. 2, paras 256, 259.

⁹⁹² Trial Judgement, vol. 2, para. 252.

⁹⁹³ Trial Judgement, vol. 2, paras 256-257, 259.

⁹⁹⁴ Lazarević's claims of legal error with respect to events in Pirane/Pirana (see *supra*, fn. 822) are likewise dismissed, as his allegations of legal error simply repeat several of his evidentiary arguments which have been found to be without merit.

337. For the foregoing reasons, the Appeals Chamber dismisses sub-ground 1(d) of Lazarević's appeal.

(c) Lukić's appeal regarding Prizren municipality in general

(i) Submissions of the parties

338. Lukić claims that the Trial Chamber erred in fact when it rejected alternative reasons for the displacement of Kosovo Albanians from Prizren municipality.⁹⁹⁵ In particular, he submits that the Trial Chamber overlooked evidence demonstrating the KLA's presence and activity in Prizren municipality, including that of Nebojša Ognjenović, Franjo Glončak, Božidar Delić, Miloš Vojnović, Joseph Maisonneuve, and Bislim Zyrapi, and instead erroneously based its findings on the evidence of Rahim Latifi and Hysni Kryeziu, whom he argues are unreliable.⁹⁹⁶ Given the evidence of the KLA's presence and activity, Lukić argues that no reasonable trier of fact could discount the KLA's "influence upon the movement of civilians from Prizren in 1999."⁹⁹⁷ He also claims that the Trial Chamber overlooked substantial evidence of NATO bombing, including the bombing of civilians at Koriša/Korishë and he posits that NATO attacks "would have been known to the civilian population in Prizren and influenced their decision to leave the municipality in 1999."⁹⁹⁸

339. The Prosecution responds that Lukić's arguments should be summarily dismissed on various grounds, including because he simply repeats arguments raised at trial.⁹⁹⁹ The Prosecution asserts that in any event the Trial Chamber considered alternative explanations for the departure of Kosovo Albanians from Prizren municipality but reasonably concluded that the mass displacement of Kosovo Albanian civilians was caused by MUP and VJ activity, in light of, *inter alia*, evidence from a number of sources found to be reliable.¹⁰⁰⁰ The Prosecution adds that Lukić's broad allegations concerning NATO bombing are not supported and notes that, contrary to Lukić's suggestion, the Trial Chamber specifically referred to the incident at Koriša/Korishë.¹⁰⁰¹

⁹⁹⁵ Lukić's Appeal Brief, paras 753-754, 756-757.

⁹⁹⁶ Lukić's Appeal Brief, paras 755, 758-767.

⁹⁹⁷ Lukić's Appeal Brief, para. 765. Lukić also contends that the Trial Chamber found that there was significant KLA activity in the border area between Prizren municipality and Albania in 1998 and early 1999, and that the Trial Chamber therefore erred in concluding that such activity "could be discounted as a cause for movement of civilians" (*ibid.*, para. 768, referring, *inter alia*, to Trial Judgement, vol. 2, para. 245).

⁹⁹⁸ Lukić's Appeal Brief, paras 769-773.

⁹⁹⁹ Prosecution's Response Brief (Lukić), paras 473-474, 480-481.

¹⁰⁰⁰ Prosecution's Response Brief (Lukić), paras 472, 475-480. The Prosecution notes that many of the Defence witnesses to whom Lukić refers were found to be generally unreliable or did not mention KLA presence in Prizren (*ibid.*, paras 477-479).

¹⁰⁰¹ Prosecution's Response Brief (Lukić), paras 482-483, referring to Trial Judgement, vol. 1, para. 1214, fn. 3318.

340. In reply, Lukić contends that the Prosecution fails to rebut his arguments, including his claim that the Trial Chamber erred in relying on the evidence of Latifi once it had found him unreliable due to his denial of KLA presence in the area.¹⁰⁰²

(ii) Analysis

341. In reaching its findings concerning events in Prizren municipality, the Trial Chamber rejected suggestions that Kosovo Albanian civilians left because of the KLA's presence; instead, it accepted evidence, including the eye-witness evidence of Rahim Latifi and Hysni Kryeziu, that civilians were forcibly displaced by MUP and VJ forces.¹⁰⁰³

342. Turning first to Lukić's submission that the Trial Chamber's finding was in error since it was based on Latifi's allegedly unreliable evidence, the Appeals Chamber rejects this argument for the reasons already set forth with respect to Lazarević's appeal.¹⁰⁰⁴ As for Lukić's challenge to the Trial Chamber's reliance on Kryeziu's evidence, the Appeals Chamber recalls that a trial chamber may reasonably accept certain parts of a witness's testimony and reject others.¹⁰⁰⁵ The Appeals Chamber is, accordingly, not persuaded that possible minor inaccuracies in Kryeziu's account¹⁰⁰⁶ demonstrate that the Trial Chamber erred in relying on other aspects of his evidence, particularly given that the Trial Chamber found the witness to be generally credible and his account to be largely consistent with that of Rexhep Krasniqi, whom the Trial Chamber found to be reliable.¹⁰⁰⁷

343. In respect of Lukić's challenges regarding the presence of the KLA in Prizren and the influence of the KLA on the departure of civilians, the Appeals Chamber observes that Lukić has failed to direct the Appeals Chamber to any evidence from Nebojša Ognjenović¹⁰⁰⁸ and cites the entirety of Franjo Glončak's *viva voce* testimony without identifying relevant passages.¹⁰⁰⁹ In any event, Lukić has failed to acknowledge that the Trial Chamber did not find the evidence of either Ognjenović or Glončak to be generally credible.¹⁰¹⁰ As for Miloš Vojnović, the evidence cited by

¹⁰⁰² Lukić's Reply Brief, paras 115-121.

¹⁰⁰³ Trial Judgement, vol. 2, paras 259, 285-286, and references therein.

¹⁰⁰⁴ See *supra*, para. 336.

¹⁰⁰⁵ *Boškosi and Tarčulovski* Appeal Judgement, para. 59, and references therein.

¹⁰⁰⁶ For example, Kryeziu stated that he heard of the death of a neighbour whom Ognjenović later heard was actually alive. Compare Hysni Kryeziu, Exh. P2514, (statement of 14 May 1999) p. 2, stating that he saw Haki Cuni taken away in a police van and "later learned that he had been killed", with Nebojša Ognjenović, 20 Feb. 2008, T. 22875-22880 (private session), describing having been told that Haki Cuni was still alive. Lukić also argues that Ognjenović's evidence shows that there was KLA fighting in Dušanovo/Dushanova in May 1999 (Lukić's Appeal Brief, para. 767, referring to Nebojša Ognjenović, 20 Feb. 2008, T. 22881 (private session)), but he has failed to show how such evidence demonstrates that the Trial Chamber erred in its findings with regard to events there in March 1999.

¹⁰⁰⁷ Trial Judgement, vol. 2, para. 244.

¹⁰⁰⁸ Lukić's Appeal Brief, para. 762, and references therein. Lukić also refers to Exh. 3D97, Exh. 3D98, and Exh. 3D100 without explaining how this evidence relates to the testimony of the witnesses in question (Lukić's Appeal Brief, fn. 1075).

¹⁰⁰⁹ Lukić's Appeal Brief, para. 762, referring, *inter alia*, to Franjo Glončak, 25 Jan 2008, T. 21107-21139.

¹⁰¹⁰ Trial Judgement, vol. 2, para. 244. See also *ibid.*, vol. 2, paras 278-285.

Lukić is either extremely general in nature, unrelated to the events at issue in Dušanovo/Dushanova or Pirane/Pirana, or both.¹⁰¹¹ Lukić has failed to show how this evidence, or the similarly broad or inapposite evidence of Božidar Delić, Joseph Maisonneuve, and Bislim Zyrapi to which he refers,¹⁰¹² demonstrates that the Trial Chamber erred in its findings concerning the reason Kosovo Albanian civilians left either Dušanovo/Dushanova or Pirane/Pirana.¹⁰¹³

344. Turning to Lukić’s submissions regarding NATO air strikes, the Appeals Chamber observes that the Trial Chamber discussed a variety of evidence concerning air strikes of VJ sites in Prizren town in late March 1999.¹⁰¹⁴ The Trial Chamber, however, rejected the suggestion that people left Prizren town due to, *inter alia*, NATO bombing, noting that the suggestion “was not supported by the testimony of those who themselves left the town [or] the evidence relating to the targets hit by NATO in the area”.¹⁰¹⁵ Lukić contends that the Trial Chamber overlooked other evidence of NATO bombing, pointing to Miloš Vojnović’s evidence that NATO bombed Prizren town on a daily basis, bombed the centre of Prizren town on 25 March 1999, and hit convoys of civilians on various occasions.¹⁰¹⁶ Lukić has failed to show how Vojnović’s evidence renders the Trial Chamber’s conclusion as to the reasons for the displacement of Kosovo Albanian civilians from the neighbourhood of Dušanovo/Dushanova in Prizren town erroneous and his claim is, accordingly, dismissed.

345. Finally, and contrary to Lukić’s claim, the Trial Chamber specifically acknowledged that the village of Koriša/Korisha was hit on 14 May 1999 during NATO bombing.¹⁰¹⁷ The Trial Chamber referred to this event and other “tragic events” involving the bombing of civilian infrastructure by NATO as “relevant to the Defence argument that the large-scale movement of the civilian population in Kosovo was caused by NATO bombing” and indicated that they would be “dealt with

¹⁰¹¹ See Lukić’s Appeal Brief, para. 763, referring to Miloš Vojnović, 12 Mar 2008, T. 24155-24156, 24175, Miloš Vojnović, Exh. 6D1532, (statement of 11 March 2008), paras 27, 31, Exh. 6D787. See also Lukić’s Appeal Brief, para. 762, referring, *inter alia*, to Miloš Vojnović, 13 Mar 2008, T. 24223, 24254. Contrary to Lukić’s suggestion, the Trial Chamber specifically referred to evidence by Vojnović concerning events in the village of Ješkovo/Jeshkovë (Trial Judgement, vol. 2, para. 246, fn. 677).

¹⁰¹² See Lukić’s Appeal Brief, paras, 762, 764, referring to Joseph Maisonneuve, 7 Mar 2007, T. 11180, Božidar Delić, 29 Nov 2007, T. 19336-19337, Exh. P2067. See also Trial Judgement, vol. 2, para. 278, noting that Vojnović, Delić, and Glončak were not asked about or did not mention a KLA presence in Prizren town or in Dušanovo/Dushanova in particular.

¹⁰¹³ Lukić also argues that the Trial Chamber erred because it discounted its own finding concerning significant KLA activity in 1998 and early 1999 (Lukić’s Appeal Brief, para. 768, referring to Trial Judgement, vol. 2, para. 245). The Appeals Chamber finds, however, that Lukić has failed to show how evidence of general KLA activity in the border area between Prizren and Albania renders the Trial Chamber’s specific findings, based on eye-witness evidence, concerning the reasons that Kosovo Albanian civilians left Pirane/Pirana and Dušanovo/Dushanova erroneous.

¹⁰¹⁴ Trial Judgement, vol. 2, paras 271-272.

¹⁰¹⁵ Trial Judgement, vol. 2, para. 285.

¹⁰¹⁶ Lukić’s Appeal Brief, para. 771, referring to Miloš Vojnović, Exh. 6D1532, paras 36-38, Miloš Vojnović, 12 Mar 2008, T. 24184.

¹⁰¹⁷ Trial Judgement, vol. 1, para. 1214, and references therein.

below in relation to the individual municipalities”.¹⁰¹⁸ Although Lukić correctly notes that the Trial Chamber did not specifically address the bombing of Koriša/Korisha in connection with its consideration of events in Prizren municipality, he has failed to explain how the evidence he cites of this bombing, which occurred in mid-May 1999,¹⁰¹⁹ demonstrates that the Trial Chamber erred in its conclusions as to the displacements from Dušanovo/Dushanova and Pirane/Pirana a month and a half earlier.¹⁰²⁰

346. For the foregoing reasons, the Appeals Chamber dismisses ground U of Lukić’s appeal in part.

4. Uroševac/Ferizaj

347. The Trial Chamber found that at the beginning of April 1999, houses in and around the village of Sojevo/Sojeva in Uroševac/Ferizaj municipality were burned, at least two civilians were killed by the police “and other unidentified armed forces”, and residents were expelled from the village and forced to walk to Uroševac/Ferizaj town.¹⁰²¹ The Trial Chamber concluded that “elements of the 243rd Mechanised Brigade of the Priština Corps, reservists, and members of the MUP were among the forces involved in the expulsion of Kosovo Albanians from [the village of] Sojevo/Sojeva.”¹⁰²² The Trial Chamber also found that on 5 April 1999, a group of approximately 80 “paramilitaries” entered the village of Staro Selo/Fshat i Vjetër, that these “paramilitaries” were incorporated into the VJ as volunteers, and that many villagers subsequently left their homes after hearing that the “paramilitaries” had killed at least three people.¹⁰²³ In addition, the Trial Chamber found that VJ troops entered the village of Mirošavlje/Mirosala on 8 April 1999 with a tank, causing people there to flee.¹⁰²⁴ The Trial Chamber found that people from these three villages were first displaced to Uroševac/Ferizaj town and then, from there, many people were sent on buses and trains to Macedonia and the border crossing at Đeneral Janković/Hani I Elezit.¹⁰²⁵ The Trial Chamber concluded that these acts amounted to an attack upon the civilian population of these villages and concluded that all of the elements of deportation and other inhumane acts (forcible

¹⁰¹⁸ Trial Judgement, vol. 1, para. 1214.

¹⁰¹⁹ See Lukić’s Appeal Brief, para. 769, referring to Exh. 6D604 (under seal).

¹⁰²⁰ Lukić also makes the general assertion that his claims concerning Prizren municipality are “an example of the flawed modus of the Judgement as to all Municipalities” (Lukić’s Reply Brief, para. 115). As this claim is wholly undeveloped, the Appeals Chamber dismisses his argument.

¹⁰²¹ Trial Judgement, vol. 2, para. 998. See also *ibid.*, para. 1169.

¹⁰²² Trial Judgement, vol. 2, para. 999. See also *ibid.*, paras 1169, 1250.

¹⁰²³ Trial Judgement, vol. 2, para. 1002. See also *ibid.*, paras 1169, 1250.

¹⁰²⁴ Trial Judgement, vol. 2, para. 1001. See also *ibid.*, paras 1169, 1250.

¹⁰²⁵ Trial Judgement, vol. 2, paras 1003, 1250. See also *ibid.*, para. 1169.

transfer) as crimes against humanity had been satisfied with respect to the villages of Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Mirosavlje/Mirosala.¹⁰²⁶

348. However, when the Trial Chamber considered Lazarević's responsibility for these crimes, it stated that they were committed only by the MUP and, consequently, acquitted Lazarević.¹⁰²⁷ The Prosecution challenges Lazarević's acquittals with respect to each of the three villages.¹⁰²⁸

349. The Trial Chamber also convicted Lukić of committing these crimes (through his participation in a JCE) under Article 7(1) of the Statute.¹⁰²⁹ Lukić challenges these convictions.¹⁰³⁰

(a) Prosecution's appeal

(i) Submissions of the parties

350. The Prosecution submits that, having made the necessary findings to convict Lazarević for aiding and abetting deportation and other inhumane acts (forcible transfer) as crimes against humanity in Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Mirosavlje/Mirosala, the Trial Chamber erred in acquitting him of these crimes.¹⁰³¹ Moreover, the Prosecution contends that this acquittal is inconsistent with the Trial Chamber's decision to convict Ojdanić for aiding and abetting these same crimes based on the VJ's participation¹⁰³² and adds that Lazarević controlled the Priština Corps, including the troops in question.¹⁰³³ According to the Prosecution, the Trial Judgement offers no explanation for these inconsistent findings and acquittals.¹⁰³⁴ In the Prosecution's view, no reasonable trial chamber would have acquitted Lazarević of aiding and abetting the crimes at issue and, accordingly, the Prosecution requests that the Appeals Chamber set aside the acquittals and enter convictions.¹⁰³⁵

351. Lazarević responds that the Trial Chamber correctly found that he was not responsible for the crimes in the three villages.¹⁰³⁶ With regard to the village of Sojevo/Sojeva, he submits that

¹⁰²⁶ Trial Judgement, vol. 2, paras 1250-1252.

¹⁰²⁷ Trial Judgement, vol. 3, paras 930-932, 1211.

¹⁰²⁸ Prosecution's Appeal Brief, paras 105, 109-113, 119.

¹⁰²⁹ Trial Judgement, vol. 3, paras 1138, 1212.

¹⁰³⁰ Lukić's Appeal Brief, paras 101-102. See also *ibid.*, paras 91-93.

¹⁰³¹ Prosecution's Appeal Brief, paras 105, 109-113, 119, referring, *inter alia*, to Trial Judgement, vol. 3, para. 932.

¹⁰³² Prosecution's Appeal Brief, para. 111, referring to Trial Judgement, vol. 3, para. 630.

¹⁰³³ Prosecution's Appeal Brief, para. 113. The Prosecution submits that the Trial Chamber found that the VJ's 243rd Mechanised Brigade was involved in the crimes in Sojevo/Sojeva and further found that troops under Lazarević's control participated in crimes in Staro Selo/Fshat i Vjetër (*ibid.*, fn. 278). The Prosecution adds that the village of Mirosavlje/Mirosala was within the zone of responsibility of the 243rd Mechanised Brigade and cites evidence which, the Prosecution asserts, shows that the 252nd Tactical Group was also active in the village (*ibid.*).

¹⁰³⁴ Prosecution's Appeal Brief, para. 105.

¹⁰³⁵ Prosecution's Appeal Brief, para. 119. The Prosecution also argues that the Appeals Chamber should increase Lazarević's sentence accordingly (*ibid.*).

¹⁰³⁶ Lazarević's Response Brief, paras 71-73, 81, 87, 96, 99.

there is no reliable evidence that VJ forces under his command were either deployed or committed crimes there in April 1999 and he points, *inter alia*, to discrepancies in the accounts of Bedri Hyseni and Florim Krasniqi concerning relevant events.¹⁰³⁷ In relation to the village of Staro Selo/Fshat i Vjetër, Lazarević likewise contests the evidence that forces under his authority committed the crimes in question, pointing to Exhibit P2021, the war diary of the VJ's 243rd Mechanised Brigade, as evidence that the VJ was not in the village and adding that there is no conclusive evidence that the paramilitaries who entered the village on 5 April 1999 were VJ forces or, more specifically, belonged to elements of the Priština Corps.¹⁰³⁸ As to the village of Mirosavlje/Mirosala, Lazarević argues that the evidence of Florim Krasniqi is unclear and fails to establish that VJ forces committed crimes there on 8 April 1999.¹⁰³⁹ Lazarević challenges the Prosecution's suggestion that the village was within the zone of responsibility or activity of VJ forces under his command.¹⁰⁴⁰ Finally, Lazarević asserts that the Trial Chamber overlooked certain US Embassy reports which describe a KLA presence in Uroševac/Ferizaj municipality, combat between KLA forces and regular MUP and VJ forces, and bombing in the area of all three villages at the relevant time.¹⁰⁴¹

352. In reply, the Prosecution asserts that Lazarević selectively relies on evidence in order to downplay the participation of the VJ, misreads other evidence, and fails to show that the Trial Chamber's finding that the VJ committed the crimes of deportation and forcible transfer in the three villages was unreasonable.¹⁰⁴²

(ii) Analysis

353. In volume 2 of the Trial Judgement, the Trial Chamber found that Kosovo Albanian civilians were expelled from or forced to leave the villages of Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Mirosavlje/Mirosala by, *inter alia*, VJ forces, including reservists, or "paramilitaries" incorporated into the VJ as volunteers.¹⁰⁴³ In volume 3 of the Trial Judgement, however, the Trial Chamber did not hold Lazarević responsible for aiding and abetting the crimes of forcible

¹⁰³⁷ Lazarević's Response Brief, paras 77-81.

¹⁰³⁸ Lazarević's Response Brief, paras 82-87.

¹⁰³⁹ Lazarević's Response Brief, paras 88-90.

¹⁰⁴⁰ Lazarević's Response Brief, paras 92-96, discussing, *inter alia*, Exh. P1615, Exh. P1971, Exh. P2021. With respect to Lazarević's submissions in this regard, the Appeals Chamber observes that he challenges the Prosecution's suggestion that: (i) the VJ were involved in the crimes committed; and (ii) the paramilitaries were part of the VJ. Lazarević does not submit not having been in control of the Priština Corps.

¹⁰⁴¹ Lazarević's Response Brief, paras 97-98, referring to Exh. 6D1635, Exh. 6D1637, Exh. 6D1638, Exh. 6D1639. See also Lazarević's Response Brief, para. 91. He also underscores that the Prosecution neglects to mention that the VJ was not responsible for maintaining public order in the area, but only for the defence of the country (Lazarević's Response Brief, paras 75-76). Lazarević refers to his Appeal Brief for his submissions on sentencing (*ibid.*, para. 126).

¹⁰⁴² Prosecution's Reply Brief, paras 64-65.

¹⁰⁴³ Trial Judgement, vol. 2, paras 998-1004.

displacement in these villages, stating that these crimes were “carried out by the MUP, without the participation of the VJ.”¹⁰⁴⁴

354. These two statements are in direct, material conflict and, when read in isolation, it is unclear which embodies the Trial Chamber’s actual finding as to the participation of the VJ in the crimes in Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Mirosavlje/Mirosala. The Appeals Chamber notes however that in the relevant sections of volume 2 of the Trial Judgement, the Trial Chamber consistently found, based on the evidence presented at trial, that VJ forces, reservists, or volunteers participated in the events in Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Mirosavlje/Mirosala.¹⁰⁴⁵ In these circumstances, and for the reasons already set forth with respect to the Prosecution’s appeal concerning Kosovska Mitrovica/Mitrovica municipality,¹⁰⁴⁶ the Appeals Chamber considers that the Trial Chamber’s factual findings relevant to the crimes themselves were pronounced in volume 2 of the Trial Judgement. Accordingly, the Appeals Chamber does not consider that the Trial Chamber’s statement in volume 3 of the Trial Judgement that the crimes in Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Mirosavlje/Mirosala were committed without the participation of VJ forces amounts to a new factual finding.¹⁰⁴⁷ Given that the factual findings set forth in volume 2 of the Trial Judgement indicate that Kosovo Albanians were expelled from or forced to leave these villages by, *inter alia*, VJ forces, reservists, or volunteers,¹⁰⁴⁸ the Appeals Chamber is thus satisfied that the Trial Chamber’s statement in volume 3 of the Trial Judgement that these crimes were “carried out by the MUP, without the participation of the VJ”¹⁰⁴⁹ was an oversight. By acquitting Lazarević of aiding and abetting the crimes of forcible displacement in Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Mirosavlje/Mirosala on the basis that these crimes were committed without the participation of VJ forces, the Trial Chamber erred by failing to apply its own factual finding that VJ forces were involved in the commission of the crimes.¹⁰⁵⁰

355. Lazarević argues, however, that his acquittal should be sustained because of errors in the Trial Chamber’s findings and evidence, which he submits is consistent with the acquittal. The Appeals Chamber will address his arguments pertaining to each village in turn.

¹⁰⁴⁴ Trial Judgement, vol. 3, para. 932.

¹⁰⁴⁵ Trial Judgement, vol. 2, paras 1169, 1250-1252. Moreover, in its discussion of Lazarević’s individual criminal responsibility, the Trial Chamber made specific reference to the involvement of VJ volunteers in the crimes in the village of Staro Selo/Fshat i Vjetër and was satisfied that these volunteers were under the jurisdiction of the Priština Corps at the relevant time (*ibid.*, vol. 3, fn. 2326).

¹⁰⁴⁶ See *supra*, sub-section VI.B.2.

¹⁰⁴⁷ Cf. *Deronjić* Judgement on Sentencing Appeal, para. 49.

¹⁰⁴⁸ Trial Judgement, vol. 2, paras 998-1004.

¹⁰⁴⁹ Trial Judgement, vol. 3, paras 632, 932.

¹⁰⁵⁰ See *Krajišnik* Appeal Judgement, para. 318, explaining that where a trial chamber makes the factual findings necessary to establish a crime but no conviction is entered, the trial chamber’s failure to enter such a conviction constitutes an error. Cf. *Rutaganda* Appeal Judgement, paras 572-580.

a. Sojevo/Sojeva

356. The Trial Chamber found that among the forces involved in the expulsion of Kosovo Albanians from the village of Sojevo/Sojeva were “elements of the 243rd Mechanised Brigade of the Priština Corps, reservists, and members of the MUP”.¹⁰⁵¹ The Trial Chamber primarily based its findings concerning events in Sojevo/Sojeva on the evidence of Bedri Hyseni and Florim Krasniqi.¹⁰⁵² Hyseni gave evidence that he saw, *inter alia*, three tanks and two anti-aircraft artillery cannons near his uncle’s house in Sojevo/Sojeva on 2 April 1999, a VJ unit outside the village on 4 April 1999, and two VJ units at the Sojevo/Sojeva school on 6 April 1999.¹⁰⁵³ He also described seeing a group of 18 “paramilitaries” and two “policemen” enter the village on 6 April 1999, who subsequently burned 90 percent of the houses and killed Kosovo Albanians there.¹⁰⁵⁴ On 10 April 1999, according to Hyseni, a group of villagers informed him that the commander of the VJ tank unit stationed at the school had given an order for all Sojevo/Sojeva residents to leave and he and others subsequently left the village.¹⁰⁵⁵ The Trial Chamber concluded that Florim Krasniqi “partially corroborated this account”, as he gave evidence that he saw from a distance what appeared to be houses in Sojevo/Sojeva on fire at around this time and on 8 April 1999 he observed tanks and “paramilitary” soldiers, whom he later explained were VJ reservists, in Sojevo/Sojeva.¹⁰⁵⁶

357. Lazarević challenges the Trial Chamber’s findings as to VJ presence and involvement in crimes in Sojevo/Sojeva, arguing first that Bedri Hyseni only described paramilitary and police forces entering the village on 6 April 1999, not VJ forces.¹⁰⁵⁷ The Trial Chamber did not make an explicit finding as to whether the “paramilitary” soldiers observed by Hyseni on 6 April 1999 were incorporated into the VJ as reservists or otherwise. The Trial Chamber nonetheless was satisfied that Hyseni could distinguish between police and those whom he called “paramilitaries”.¹⁰⁵⁸ Moreover, on the basis of Florim Krasniqi’s evidence concerning “paramilitary” soldiers, the Trial Chamber explicitly found that VJ reservists were among the forces deployed in Sojevo/Sojeva at the time.¹⁰⁵⁹ Lazarević has failed to show how Hyseni’s evidence demonstrates that the Trial

¹⁰⁵¹ Trial Judgement, vol. 2, para. 999.

¹⁰⁵² Trial Judgement, vol. 2, paras 960-971.

¹⁰⁵³ Trial Judgement, vol. 2, paras 963-964; Bedri Hyseni, 11 Sep 2006, T. 3096-3097; Bedri Hyseni, Exh. P2270, (statement of 8 May 1999), p. 2; Bedri Hyseni, Exh. P2270, (statement of 1 Sep 2001), p. 5.

¹⁰⁵⁴ Trial Judgement, vol. 2, para. 965; Bedri Hyseni, 11 Sep 2006, T. 3097; Bedri Hyseni, Exh. P2270, (statement of 8 May 1999), p. 2; Bedri Hyseni, Exh. P2270, (statement of 1 Sep 2001), p. 5.

¹⁰⁵⁵ Trial Judgement, vol. 2, paras 970-971; Bedri Hyseni, 11 Sep 2006, T. 3099, 3120-3121; Bedri Hyseni, Exh. P2270, (statement of 8 May 1999), p. 3; Bedri Hyseni, Exh. P2270, (statement of 1 Sep 2001), p. 6.

¹⁰⁵⁶ Trial Judgement, vol. 2, para. 966; Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), pp. 4-6; Florim Krasniqi, 8 Sep 2006, T. 3052.

¹⁰⁵⁷ Lazarević’s Response Brief, para. 79.

¹⁰⁵⁸ Trial Judgement, vol. 2, para. 968.

¹⁰⁵⁹ Trial Judgement, vol. 2, para. 968.

Chamber erred in finding that VJ forces, including VJ reservists, were involved in the expulsion of Kosovo Albanian civilians from Sojevo/Sojeva.¹⁰⁶⁰

358. As for Florim Krasniqi, Lazarević claims that this witness is “inherently unreliable and inaccurate” because he was not a direct witness to the events in the village of Sojevo/Sojeva, having only observed them from a distance.¹⁰⁶¹ The Trial Chamber took explicit note of the fact that the witness testified to having seen “in the distance” what appeared to him to be houses on fire in Sojevo/Sojeva and nonetheless concluded that Krasniqi, who was found to be generally credible and reliable, “partially corroborated” Hyseni’s account.¹⁰⁶² Lazarević has failed to show that the Trial Chamber erred in this respect or in relying on Florim Krasniqi’s account of seeing, *inter alia*, five tanks and “paramilitary” soldiers at a military checkpoint in Sojevo/Sojeva on 8 April 1999 as confirmation of “the presence of military forces in Sojevo/Sojeva at the time”.¹⁰⁶³ Moreover, although Lazarević underscores that Florim Krasniqi saw the military checkpoint in Sojevo/Sojeva on 8 April 1999 and not 6 April 1999, he has failed to show that this amounts to a meaningful discrepancy with Hyseni’s account of events on 6 April 1999 such as would render the Trial Chamber’s findings or its reliance on the evidence of these witnesses erroneous.

359. With regard to the Trial Chamber’s finding that elements of the 243rd Mechanised Brigade of the Priština Corps were among the forces involved in the expulsion of Kosovo Albanians from Sojevo/Sojeva, Lazarević notes that Krsman Jelić, the then commander of the VJ’s 243rd Mechanised Brigade, denied that members of his Brigade participated in any crimes against civilians in the area and he argues that Jelić’s position is “fully supported” by the Brigade’s war diary, Exhibit P2021, which shows that the Brigade was not deployed in Sojevo/Sojeva at the relevant time.¹⁰⁶⁴ Insofar as Lazarević seeks to show that the Trial Chamber erred in its assessment of Jelić’s evidence, he ignores the Trial Chamber’s conclusion that Jelić denied allegations with general statements, “which were subsequently shown to be wrong”, and that because his general explanations “often were not credible”, the Trial Chamber doubted the reliability of his testimony where it clashed with that of other witnesses.¹⁰⁶⁵ Lazarević challenge is, accordingly, dismissed.

¹⁰⁶⁰ Trial Judgement, vol. 2, paras 998-999. Lazarević also suggests that Hyseni stayed in the village until 10 April 1999 “when he himself decided to leave” (Lazarević’s Response Brief, para. 80, referring to Bedri Hyseni, Exh. P2270, p. 6). As Lazarević’s claim in this regard is undeveloped and appears to simply challenge the Trial Chamber’s interpretation of the evidence, it is dismissed.

¹⁰⁶¹ Lazarević’s Response Brief, para. 80.

¹⁰⁶² Trial Judgement, vol. 2, paras 955, 966.

¹⁰⁶³ Trial Judgement, vol. 2, para. 966, and references therein. Florim Krasniqi observed the checkpoint as he was passing through Sojevo/Sojeva as part of a convoy (*ibid.*; Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), p. 5) and not at a distance, as Lazarević appears to suggest (Lazarević’s Response Brief, para. 80).

¹⁰⁶⁴ Lazarević’s Response Brief, para. 78, referring to Trial Judgement, vol. 2, para. 967, Exh. P2021.

¹⁰⁶⁵ Trial Judgement, vol. 2, para. 956. See also *ibid.*, para. 967.

360. As for Exhibit P2021, the Appeals Chamber notes that this exhibit makes no mention of the 243rd Mechanised Brigade being present in the village of Sojevo/Sojeva in early April 1999. However, the Trial Chamber observed Jelić's testimony that the village of Biba was within the area of responsibility of the 243rd Mechanised Brigade¹⁰⁶⁶ and is located two kilometres from Sojevo/Sojeva.¹⁰⁶⁷ The Trial Chamber also noted that Jelić "confirmed the presence of his units in the municipality", including that an anti-armour detachment and two of the strongest units of the 243rd Mechanised Brigade were located on the road leading from the village of Grlica/Gërlica towards Vitina/Viti municipality, located to the southwest of Sojevo/Sojeva.¹⁰⁶⁸ Lazarević has not addressed this evidence. In light of this and other evidence in the record,¹⁰⁶⁹ Lazarević has failed to show that the Trial Chamber erred in its findings as to elements of the 243rd Mechanised Brigade. His argument in this regard is therefore dismissed.¹⁰⁷⁰

361. Finally, Lazarević claims that the Trial Chamber overlooked US Embassy reports allegedly demonstrating, *inter alia*, a KLA presence in the area and "significant bombardment" of Sojevo/Sojeva as well as Staro Selo/Fshat i Vjetër and Mirosavlje/Mirosala.¹⁰⁷¹ Lazarević has failed to show, however, how evidence of a KLA presence in Uroševac/Ferizaj municipality in February 1999¹⁰⁷² demonstrates any error with respect to the Trial Chamber's findings concerning events that occurred in Sojevo/Sojeva weeks later. He has likewise failed to show how general evidence of bombing in the municipality on 11 April 1999 and thereafter¹⁰⁷³ shows any error with regard to the Trial Chamber's findings concerning events in Sojevo/Sojeva before that date.¹⁰⁷⁴ His argument in this regard is accordingly dismissed.

b. Staro Selo/Fshat i Vjetër

362. Based primarily on the evidence of Bajram Bucaliu,¹⁰⁷⁵ a Kosovo Albanian man who worked as a cashier at the Uroševac/Ferizaj railway station until 25 March 1999, the Trial Chamber found that on 5 April 1999, approximately 80 "paramilitaries" entered the village of Staro

¹⁰⁶⁶ Trial Judgement, vol. 2, para. 959; Krsman Jelić, 23 Nov 2007, T. 18966; *ibid.*, 27 Nov 2007, T. 19125.

¹⁰⁶⁷ Trial Judgement, vol. 2, para. 952; Bedri Hyseni, Exh. P2270, (statement of 8 May 1999), p. 2.

¹⁰⁶⁸ Trial Judgement, vol. 2, para. 963, fn. 2370; Krsman Jelić, 23 Nov 2007, T. 18947.

¹⁰⁶⁹ See, e.g., Bedri Hyseni, 11 Sep 2006, T. 3096-3097; Bedri Hyseni, Exh. P2270, (statement of 8 May 1999), p. 2; Bedri Hyseni, Exh. P2270, (statement of 1 Sep 2001), p. 5; Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), pp. 5-6.

¹⁰⁷⁰ Lazarević's argument that the VJ was not responsible for maintaining public order in Uroševac/Ferizaj municipality (Lazarević's Response Brief, paras 75-76) is also dismissed, as he has failed to articulate any error by the Trial Chamber.

¹⁰⁷¹ Lazarević's Response Brief, paras 97-98, referring to Exh. 6D1635, p. 9, Exh. 6D1637, p. 2, Exh. 6D1638, p. 5, Exh. 6D1639, p. 7.

¹⁰⁷² See Exh. 6D1635.

¹⁰⁷³ See Exh. 6D1637; Exh. 6D1639. See also Exh. 6D1638.

¹⁰⁷⁴ See Trial Judgement, vol. 2, paras 963-972, 998.

¹⁰⁷⁵ Trial Judgement, vol. 2, paras 985-995.

Selo/Fshat i Vjetër and imposed a curfew.¹⁰⁷⁶ It further found that once the news of killings carried out by these paramilitaries spread among the villagers, many decided to leave their homes.¹⁰⁷⁷ Based on evidence of the equipment in their possession, including military tanks as well as how they described themselves, the Trial Chamber was satisfied that these “paramilitaries” were incorporated into the VJ as volunteers.¹⁰⁷⁸

363. Lazarević argues that there is no “decisive evidence” that the “paramilitary forces” in question were, in fact, VJ forces or belonged to elements of the Priština Corps¹⁰⁷⁹ and he points to the evidence of Bucaliu, who, he claims, clearly distinguished between the VJ forces who were present in the village of Staro Selo/Fshat i Vjetër from 2 to 5 April 1999 and the paramilitaries who subsequently came to the village.¹⁰⁸⁰ However, Lazarević has failed to demonstrate how Bucaliu’s differentiation between the regular VJ forces and the “paramilitaries” he observed, or the similar distinction made by Hyseni with respect to events in a different village,¹⁰⁸¹ demonstrates that the “paramilitary forces” in Staro Selo/Fshat i Vjetër were not VJ volunteers. With respect to Exhibit P2021,¹⁰⁸² the Appeals Chamber notes that this exhibit makes no mention of the 243rd Mechanised Brigade being deployed in the area of Staro Selo/Fshat i Vjetër at this time. The Appeals Chamber observes, however, that Jelić testified that the village of Staro Selo/Fshat i Vjetër was within the area of responsibility of the 243rd Mechanised Brigade.¹⁰⁸³ In light of this evidence, the Appeals Chamber considers that the absence of any mention in the war diary of the Brigade being present in the Staro Selo/Fshat i Vjetër is not sufficient to show that the Trial Chamber erred in its finding.

364. As for Lazarević’s more general claim that there is no “decisive evidence” supporting the Trial Chamber’s finding,¹⁰⁸⁴ the Appeals Chamber notes that he has failed to address any of the evidence cited by the Trial Chamber, such as the evidence of military tanks¹⁰⁸⁵ or to show that the

¹⁰⁷⁶ Trial Judgement, vol. 2, paras 1002. See also *ibid.*, vol. 2, para. 1250.

¹⁰⁷⁷ Trial Judgement, vol. 2, paras 1002. See also *ibid.*, vol. 2, para. 1250.

¹⁰⁷⁸ Trial Judgement, vol. 2, para. 1002.

¹⁰⁷⁹ Lazarević’s Response Brief, para. 84.

¹⁰⁸⁰ Lazarević’s Response Brief, para. 84; Bajram Bucaliu, 7 Sep 2006, T. 2984-2985; Bajram Bucaliu, Exh. P2287, T. 2063-2064; Bajram Bucaliu, Exh. P2298, p. 3.

¹⁰⁸¹ Bedri Hyseni, 11 Sep 2006, T. 3097-3098; Bedri Hyseni, Exh. P2270, (statement of 8 May 1999), p. 2; Bedri Hyseni, Exh. P2270, (statement of 1 Sep 2001), p. 5.

¹⁰⁸² See Lazarević’s Response Brief, para. 86.

¹⁰⁸³ Trial Judgement, vol. 2, para. 959; Krsman Jelić, 23 Nov 2007, T. 18966-18967. In addition, the Trial Chamber also noted that, although Jelić claimed the VJ was never in the village of Staro Selo/Fshat i Vjetër, he did concede that to the south-east of the village there was one unit which was preparing defence from “aggression” (Trial Judgement, vol. 2, para. 987; Krsman Jelić, 23 Nov 2007, T. 18938).

¹⁰⁸⁴ Lazarević’s Response Brief, para. 84.

¹⁰⁸⁵ See Trial Judgement, vol. 2, paras 990-991, 1002; *ibid.*, vol. 3, fn. 2326. See also *ibid.*, vol. 2, para. 959, noting that Jelić gave evidence that his forces were reinforced with volunteers during March and April 1999.

Trial Chamber's reliance on this evidence was erroneous. His arguments in this regard are unsubstantiated and, accordingly, dismissed.¹⁰⁸⁶

c. Mirosavlje/Mirosala

365. Based primarily on the evidence of Florim Krasniqi,¹⁰⁸⁷ the Trial Chamber found that at the beginning of April 1999 VJ units were positioned in the village of Softovic/Softoviq (also known as Softaj) and shelled in the direction of Rahovica/Rahovicë and Zlatare/Zllatar villages, located near the village of Mirosavlje/Mirosala.¹⁰⁸⁸ The Trial Chamber also accepted that approximately 1,000 displaced people arrived in Mirosavlje/Mirosala at the beginning of April 1999¹⁰⁸⁹ and found that VJ troops then entered the village on 8 April 1999 with a tank, causing people in the village to flee.¹⁰⁹⁰ In reaching its legal findings with regard to Uroševac/Ferizaj municipality, the Trial Chamber further noted that the Serbian forces operating in Mirosavlje/Mirosala and the other relevant villages at the time "either directly ordered the Kosovo Albanians to leave their homes, or caused them to leave by their violent and intimidating behaviour", and it was satisfied that the events in Mirosavlje/Mirosala constituted an attack upon the civilian population of the village.¹⁰⁹¹

366. Lazarević submits that the passage of a sovereign state's armed forces through its territory "is a legitimate act" and he contends that Florim Krasniqi's evidence is insufficient to establish that any crimes were committed against civilians in Mirosavlje/Mirosala.¹⁰⁹² The Appeals Chamber recalls that the term "forced", when used in reference to the crimes of deportation and forcible transfer, is not limited to the use of physical force to displace the victims.¹⁰⁹³ Threat of force or coercion, such as fear of violence, duress, detention, psychological oppression, and other such circumstances, may create an environment where there is no choice but to leave, thus amounting to forcible displacement.¹⁰⁹⁴

¹⁰⁸⁶ Lazarević's arguments with regard to Exhibit P2021, KLA presence, and bombing in the area are dismissed for the same reasons set forth above with respect to the village of Sojevo/Sojeva (see *supra*, sub-section VI.B.4.(a)(ii)a.).

¹⁰⁸⁷ Trial Judgement, vol. 2, paras 977-984.

¹⁰⁸⁸ Trial Judgement, vol. 2, para. 1000.

¹⁰⁸⁹ Trial Judgement, vol. 2, para. 1000.

¹⁰⁹⁰ Trial Judgement, vol. 2, paras 1001, 1250.

¹⁰⁹¹ Trial Judgement, vol. 2, paras 1250-1251.

¹⁰⁹² Lazarević's Response Brief, paras 90-91. Lazarević also contends that it is unclear from Florim Krasniqi's evidence whether the forces in question actually entered the village of Mirosavlje/Mirosala or, instead, stayed in the periphery or passed through (*ibid.*, para. 89, discussing Trial Judgement, vol. 2, para. 981). In light of the Trial Chamber's explicit finding that the VJ entered the village (Trial Judgement, vol. 2, para. 1001), Lazarević's argument appears to simply question the Trial Chamber's interpretation of the evidence and fails to articulate any error. It is, accordingly, dismissed.

¹⁰⁹³ *Krajišnik* Appeal Judgement, paras 319, 333; *Stakić* Appeal Judgement, paras 281-283. See also Trial Judgement, vol. 1, para. 165.

¹⁰⁹⁴ *Krajišnik* Appeal Judgement, para. 319; *Stakić* Appeal Judgement, paras 281-283.

367. In this regard, the Appeals Chamber notes that Florim Krasniqi described, *inter alia*, observing, from the “vicinity” of Miroslavlje/Mirosala, the shelling of Rahovica/Rahovicë and Zlatara/Zllatar villages, and that he later learned that four people in these villages had been killed and five wounded due to the shelling.¹⁰⁹⁵ Florim Krasniqi also questioned about 20 to 30 of the approximately 1,000 displaced people who arrived in Miroslavlje/Mirosala in early April 1999, seeking safety,¹⁰⁹⁶ as Miroslavlje/Mirosala “was calm and the Serb forces had not yet entered [the] village at that point.”¹⁰⁹⁷ He was told that Serbian forces had entered their villages, searched houses, and forced them to leave their villages.¹⁰⁹⁸ Florim Krasniqi further explained that subsequently on 8 April 1999 he saw several green military vehicles, including a tank and a number of APCs, travelling in the direction of Miroslavlje/Mirosala¹⁰⁹⁹ and as the military convoy approached, several soldiers jumped from the APCs and began running towards houses in the village,¹¹⁰⁰ which “created a great deal of fear and started to panic the people”.¹¹⁰¹ He, his brothers, and other villagers then fled Miroslavlje/Mirosala.¹¹⁰² In light of the evidence in the record, including Florim Krasniqi’s evidence concerning the shelling of other villages, what he learned from displaced people who arrived in Miroslavlje/Mirosala, and the manner in which the VJ forces entered Miroslavlje/Mirosala, the Appeals Chamber is not persuaded that the Trial Chamber erred in relying upon this evidence to find that the VJ’s entry into Miroslavlje/Mirosala amounted to “violent and intimidating behaviour” causing the villagers there to flee.¹¹⁰³

368. Lazarević also takes issue with the finding that the VJ’s 243rd Mechanised Brigade was engaged in an operation in the village of Miroslavlje/Mirosala on 8 April 1999, pointing to the

¹⁰⁹⁵ Trial Judgement, vol. 2, paras 978-979; Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), p. 2.

¹⁰⁹⁶ Trial Judgement, vol. 2, para. 979; Florim Krasniqi, 8 Sep 2006, T. 3063; Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), pp. 2-4. Florim Krasniqi also described how many of those who had arrived in the village, having fled the nearby villages, arrived with very few belongings and only the clothes on their backs, many with bare feet (Exh. P2269, (statement of 23 Apr 1999), p. 4).

¹⁰⁹⁷ Florim Krasniqi, 8 Sep 2006, T. 3063, Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), pp. 2-3. See also Trial Judgement, vol. 2, para. 979.

¹⁰⁹⁸ Trial Judgement, vol. 2, para. 979; Florim Krasniqi, 8 Sep 2006, T. 3063; Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), pp. 2-4. Florim Krasniqi also heard accounts that Serbian forces had killed and injured several individuals, and he himself saw several of the victims who had been shot. See Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), pp. 3-4.

¹⁰⁹⁹ Trial Judgement, vol. 2, para. 981; Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), p. 5.

¹¹⁰⁰ Trial Judgement, vol. 2, para. 981; Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), p. 5.

¹¹⁰¹ Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), p. 5.

¹¹⁰² Trial Judgement, vol. 2, para. 981; Florim Krasniqi, 8 Sep 2006, T. 3074; Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), p. 5.

¹¹⁰³ Trial Judgement, vol. 2, para. 1251. The Appeals Chamber notes, moreover, that Florim Krasniqi gave evidence that the soldiers’ advance towards the village provoked a significant amount of fear and panic among the civilian population (Florim Krasniqi, Exh. P2269, (statement of 23 Apr 1999), p. 5; Florim Krasniqi, 8 Sep 2006, T. 3074-3076, 3082-3083). He further stated that his knowledge of what had occurred in other villages made him afraid for himself and for his family (*ibid.*). Although this evidence is not explicitly addressed in the Trial Judgement, the Appeals Chamber notes that the Trial Chamber underscored that, “where an item of evidence is not mentioned in this Judgement, it does not mean that it has not been considered” (Trial Judgement, vol. 1, para. 64. See also *Kupreškić et al.* Appeal Judgement, para. 458; *Čelebići* Appeal Judgement, para. 481).

Brigade's war diary, Exhibit P2021,¹¹⁰⁴ which makes no mention of the Brigade being present on that date. However, in light of trial chambers' broad discretion in weighing evidence,¹¹⁰⁵ the eye-witness evidence of Florim Krasniqi and the other evidence in the record,¹¹⁰⁶ the Appeals Chamber is not persuaded that the Trial Chamber erred in finding that "VJ troops" entered Miroslavlje/Mirosala simply because there is other evidence which, Lazarević asserts, is inconsistent.¹¹⁰⁷

d. Conclusion

369. For the foregoing reasons, the Appeals Chamber is satisfied that the evidence before the Trial Chamber would lead a reasonable trier of fact to find that the only reasonable inference was that crimes of forcible displacement were committed in Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Miroslavlje/Mirosala by, *inter alia*, VJ forces, including reservists or volunteers. The Appeals Chamber considers that the Trial Chamber erred by failing to apply the factual findings made in volume 2 in volume 3 of the Trial Judgement. The Appeals Chamber accordingly grants, in part, the fifth ground of the Prosecution's appeal insofar as it relates to Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Miroslavlje/Mirosala. The impact of these findings, if any, on Lazarević's liability will be addressed in the section concerning his individual criminal responsibility.¹¹⁰⁸

(b) Lukić's appeal

(i) Submissions of the parties

370. Lukić challenges the Trial Chamber's reliance on Bedri Hyseni's testimony with regard to events in the village of Sojevo/Sojeva. In particular, Lukić asserts that Hyseni's claim that the police wore blue-black uniforms is unacceptable, as the police wore blue or blue-camouflage uniforms, and he argues that the witness made several other statements that demonstrate his

¹¹⁰⁴ Lazarević's Response Brief, paras 92-93, discussing Prosecution's Appeal Brief, fn. 278, Exh. P2021.

¹¹⁰⁵ See *Krajišnik* Appeal Judgement, para. 27; *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21. See also *Brđanin* Appeal Judgement, para. 24; *Čelebići* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 115.

¹¹⁰⁶ The Trial Chamber considered evidence, *inter alia*, from Jelić that Miroslavlje/Mirosala was within the 243rd Mechanised Brigade's zone of responsibility, that there were VJ forces in the vicinity of the nearby villages of Softovic/Softoviq, Rahovica/Rahovicë, and Zlatare/Zllatar, and that the Brigade employed tanks, albeit of a different type than that described by Florim Krasniqi (Trial Judgement, vol. 1, para. 618; *ibid.*, vol. 2, paras 959, 978, 982).

¹¹⁰⁷ Lazarević also disputes the Prosecution's argument that Exhibits P1615 and P1971 demonstrate that the 252nd Tactical Group was active in Miroslavlje/Mirosala (Lazarević's Response Brief, paras 92, 94-95, discussing Prosecution's Appeal Brief, fn. 278, Exh. P1615, p. 70, Exh. P1971). Lazarević correctly observes that these exhibits relate to events several days or weeks after 8 April 1999, but has failed to articulate any error by the Trial Chamber warranting the Appeals Chamber's intervention. Lazarević's remaining arguments with regard to KLA presence and bombing in the area are dismissed for the same reasons set forth above with respect to the village of Sojevo/Sojeva (see *supra*, sub-section VI.B.4.(a)(ii)a.).

¹¹⁰⁸ See *infra*, sub-section VIII.B.5.

arbitrariness and unreliability.¹¹⁰⁹ The Prosecution responds that Lukić's argument concerning Hyseni's evidence about police uniforms merely repeats his submission at trial and should be dismissed.¹¹¹⁰

(ii) Analysis

371. The Appeals Chamber notes that the Trial Chamber found that Lukić was a member of a JCE¹¹¹¹ and that crimes of both the MUP and the VJ were imputable to him as member of this JCE, including crimes of forcible displacement.¹¹¹² Accordingly, even if Lukić could establish that the Trial Chamber erred in finding that members of the MUP were involved in the specific crimes at issue, he has failed to show how this would render his conviction unsafe, given the involvement of VJ members in these same crimes and his responsibility for the crimes of both the MUP and the VJ.¹¹¹³ Given that VJ members were involved in the crimes at Sojevo/Sojeva as set forth above¹¹¹⁴ and that Lukić, as a member of the JCE, incurs responsibility for the crimes of both the MUP and the VJ, he has failed to demonstrate how the Trial Chamber's alleged error in relying upon, *inter alia*, Hyseni's evidence concerning the involvement of the MUP in those crimes would have affected his convictions. His remaining arguments concerning Hyseni's evidence are unsubstantiated or likewise fail to show any error with regard to the Trial Chamber's findings as to VJ involvement.¹¹¹⁵

¹¹⁰⁹ Lukić's Appeal Brief, paras 101-102. See also *ibid.*, para. 93.

¹¹¹⁰ Prosecution's Response Brief (Lukić), para. 104.

¹¹¹¹ Trial Judgement, vol. 3, paras 1130-1131. Lukić's challenges with respect to the Trial Chamber's findings regarding his JCE membership are addressed below (see *infra*, sub-section VII.F.).

¹¹¹² Trial Judgement, vol. 3, paras 1132-1133.

¹¹¹³ Lukić's submissions concerning protections provided by the MUP to civilians (Lukić's Appeal Brief, para. 811; Lukić's Reply Brief, para. 124) as well as his claims that the Trial Chamber overlooked evidence that the "paramilitaries" present in Žegra/Zhegra were VJ reservists or volunteers (Lukić's Appeal Brief, para. 800) and that armed locals who wore solid blue uniforms in Vladovo/Lladova could have been part of the Civilian Protection, not of the police (Lukić's Appeal Brief, para. 100), are rejected on this same basis. Further, the Appeals Chamber notes that, although Lukić has challenged the Trial Chamber's findings as to his membership in the JCE (see *infra*, sub-section VII.F.), he has not made specific challenges as to the Trial Chamber's findings of MUP involvement in crimes in a number of municipalities.

¹¹¹⁴ See *supra*, sub-section VI.B.4.(a)(ii)a.

¹¹¹⁵ Lukić also challenges the Trial Chamber's evaluation of witnesses' evidence in identifying perpetrators of crimes as members of MUP forces and its findings on police uniforms and insignia in general (Lukić's Appeal Brief, paras 89-103), arguing that: (i) the police uniforms were blue or blue-camouflaged, which is clearly different from the colour black contrary to the Trial Chamber's finding (Lukić's Appeal Brief, paras 93 (referring to Trial Judgement, vol. 1, para. 708, Radojica Nikčević, 26 Feb 2008, T. 23235), 101 (referring to Trial Judgement, vol. 1, paras 965, 968, 1089, Isuf Zhuniqi, 27 Sep 2006, T. 4106-4107, Sabri Popaj, 2 Nov 2006, T. 5766)); and (ii) none of the police wore white ribbons in 1999 contrary to some witness testimony (Lukić's Appeal Brief, paras 94 (referring to Trial Judgement, vol. 1, para. 715, Isuf Zhuniqi, 27 Sep 2006, T. 4126, Exh. 6D237, Exh. 6D579, Exh. 6D667), 96 (referring to Abdylhaqim Shaqiri, 5 Sep 2006, T. 2789), 103). Concerning the colour of police uniforms, the Trial Chamber found, based on various witness testimony and photographs, that uniforms described by a witness as "solid blue uniforms, comprised of light blue shirts, navy-blue trousers and navy-blue jackets", could be "described as very dark blue, almost black in colour" (Trial Judgement, vol. 1, para. 708, and references therein). Concerning the ribbons, the Trial Chamber noted that in the middle of April 1999, MUP members were "instructed to use different combinations of yellow, blue, and red ribbons on different dates" but also noted, and accepted, the evidence of a number of eye-witnesses that MUP forces wore "different colored ribbons" or armbands – including white ones – on their uniforms in late March and early

372. For the foregoing reasons, the Appeals Chamber dismisses sub-ground D(2) of Lukić's appeal in part.

5. Đakovica/Gjakova

373. The Trial Chamber found that members of the VJ, *inter alia*, participated in the commission of deportation and other inhumane acts (forcible transfer) as crimes against humanity in Đakovica/Gjakova town and in Dobroš/Dobrosh, Ramoc, Korenica/Korenicë, Meja/Mejë, and other villages in the Reka/Caragoj valley, all in Đakovica/Gjakova municipality.¹¹¹⁶ Lazarević was convicted for aiding and abetting these crimes under Article 7(1) of the Statute.¹¹¹⁷ He challenges these convictions.¹¹¹⁸

(a) Đakovica/Gjakova town

374. The Trial Chamber found that, from the start of the NATO bombing through May 1999, both VJ and MUP forces targeted Kosovo Albanian civilians and created an atmosphere of terror in Đakovica/Gjakova town.¹¹¹⁹ The Trial Chamber also found that the MUP and paramilitaries were responsible for burning the houses of Kosovo Albanians in the town in March and April 1999,¹¹²⁰ and it concluded that this and other activity contributed to an atmosphere of fear and violence created by the MUP and, later, the VJ in the town.¹¹²¹ It further found that following the killing of members of their families by MUP forces, Lulzim Vejsa, Hani Hoxha, Dren Caka, and K74 left Đakovica/Gjakova town at the start of April 1999 out of fear of further actions by the MUP.¹¹²² The Trial Chamber found that MUP and VJ forces controlled their departure, along with that of significant numbers of other Kosovo Albanian residents, and it concluded that the residents were

April 1999 (Trial Judgement, vol. 1, para. 715, and references therein. See also *ibid.*, vol. 2, para. 323, and reference therein). With respect to Lukić's various arguments concerning the Trial Chamber's general findings on police uniforms, Appeals Chamber considers that he merely requests that the Appeals Chamber weigh and interpret the evidence differently without showing any error on the part of the Trial Chamber. Likewise, Lukić's arguments that witnesses who provided evidence on uniforms and ribbons were influenced and or misled by the Prosecution are unfounded and undeveloped (see Lukić's Appeal Brief, paras 91, 94, 96, 101). Accordingly, the Appeals Chamber dismisses the part of Lukić's sub-ground D(2), impugning the Trial Chamber's general findings on police uniforms. His arguments challenging findings based on evidence about perpetrators at specific crime sites are addressed in the relevant sub-sections.

¹¹¹⁶ Trial Judgement, vol. 2, paras 1189-1191, 1194-1196.

¹¹¹⁷ Trial Judgement, vol. 3, paras 930, 1211.

¹¹¹⁸ Lazarević's Appeal Brief, paras 31-92. See also *ibid.*, paras 237-247. The Appeals Chamber notes that Lazarević's Appeal Brief erroneously contains two sub-grounds referred to as "1(c)", the first relating to Dečani/Dečan municipality and the second to Đakovica/Gjakova municipality.

¹¹¹⁹ Trial Judgement, vol. 2, paras 147, 1159, 1189.

¹¹²⁰ Trial Judgement, vol. 2, para. 145. The Trial Chamber stated that "[t]he only evidence of VJ involvement in the burning of Kosovo Albanian houses in Đakovica/Gjakova town at this stage was that provided by K90, who testified about his own participation" (*ibid.*).

¹¹²¹ Trial Judgement, vol. 2, para. 147. See also *ibid.*, paras 1159, 1189.

¹¹²² Trial Judgement, vol. 2, para. 147. See also *ibid.*, para. 1159.

expelled over the border to Albania.¹¹²³ In addition, the Trial Chamber found that the VJ was involved in arson and the MUP in arson and looting in the town in May 1999.¹¹²⁴ Although the Trial Chamber was satisfied that the KLA had “some presence” in and around Đakovica/Gjakova town in late March 1999,¹¹²⁵ it concluded that Kosovo Albanian civilians in the town were targeted and that these events amounted to an attack upon the town’s civilian population.¹¹²⁶

(i) Submissions of the parties

375. Lazarević asserts that the Trial Chamber erred in fact in its findings with regard to Đakovica/Gjakova town and that a reasonable trier of fact would have concluded, *inter alia*, that the VJ did not influence the “migrations” of the town’s residents.¹¹²⁷ Lazarević challenges the Trial Chamber’s finding that the KLA had only “some presence” in and around Đakovica/Gjakova town in late March 1999, arguing that the Trial Chamber failed to adequately consider reports from the US Embassy in Skopje which, he suggests, are corroborated by Defence evidence and show that KLA units had penetrated into the town and attacked the town’s centre.¹¹²⁸ He also contends that bombing raids and fighting between the “forces of order” and the KLA in Đakovica/Gjakova town constitute “a clear reason for migrations of its residents”, and suggests that the Trial Chamber failed to consider evidence of NATO air strikes on 10 April 1999.¹¹²⁹ Lazarević contests the Trial Chamber’s finding that members of the VJ controlled the departure of residents from the town, arguing that this finding is not supported by the witness evidence upon which the Trial Chamber relied and asserting that VJ members, in fact, offered help to departing residents.¹¹³⁰ Finally, he submits that the Trial Chamber erred in finding, based on the unreliable identification evidence of Fuat Haxhibeqiri, that the VJ participated in arson in Đakovica/Gjakova town, thereby creating an atmosphere of fear and violence.¹¹³¹

¹¹²³ Trial Judgement, vol. 2, paras 147, 1159, 1189.

¹¹²⁴ Trial Judgement, vol. 2, para. 147.

¹¹²⁵ Trial Judgement, vol. 2, para. 115.

¹¹²⁶ Trial Judgement, vol. 2, para. 1189.

¹¹²⁷ Lazarević’s Appeal Brief, paras 31, 41, referring to Trial Judgement, vol. 2, paras 147, 1159. Repeating several of his factual arguments, Lazarević also argues that the Trial Chamber erred as a matter of law in failing to explain how it reached its conclusion “in direct contradiction” to the evidence of Prosecution witnesses (*ibid.*, para. 239. See also *ibid.*, paras 223-230, 237-238).

¹¹²⁸ Lazarević’s Appeal Brief, paras 32-33, referring, *inter alia*, to Trial Judgement, vol. 2, para. 112, Exh. 6D1638, p. 3, Exh. 6D1639, p. 3. He also suggests that “[a] reasonable number of facts demonstrates that there was a strong presence of KLA members in [Đakovica/Gjakova town] over a longer period of time during the bombings and that heavy fights were held in the town itself” (Lazarević’s Appeal Brief, para. 33).

¹¹²⁹ Lazarević’s Appeal Brief, paras 34-35, referring, *inter alia*, to Exh. 6D1638, p. 3.

¹¹³⁰ Lazarević’s Appeal Brief, paras 36-39, 238. See also Appeal Hearing, 13 Mar 2013, AT. 395-396. According to Lazarević, Dren Caka and K74 made no reference to VJ members in their testimony, Lulzim Vejsa only mentioned encountering members of the VJ right before the state border with Albania, and Hani Hoxha described seeing the VJ in Đakovica/Gjakova town but does not refer to any acts by the VJ against civilians (*ibid.*, paras 37-38. See also *ibid.*, para. 238).

¹¹³¹ Lazarević’s Appeal Brief, paras 31, 40, 237.

376. According to the Prosecution, Lazarević's arguments should be summarily dismissed and, in any event, fail on the merits.¹¹³² The Prosecution asserts, *inter alia*, that the reports of the US Embassy in Skopje discuss the situation on 11 and 17 April 1999 and are therefore irrelevant to the Trial Chamber's finding concerning the KLA presence in and around Đakovica/Gjakova town in late March 1999, the time-frame to which Lazarević refers.¹¹³³ The Prosecution likewise disputes his suggestion that NATO air strikes led residents to leave, noting that Lazarević ignores relevant findings and cites evidence that actually undermines his argument.¹¹³⁴ In the Prosecution's view, the Trial Chamber reasonably accepted the consistent, reliable evidence of Hani Hoxha and Lulzim Vejsa in finding that the VJ controlled the departure of Kosovo Albanians from Đakovica/Gjakova town and Lazarević mischaracterises witness evidence in this regard.¹¹³⁵ Finally, the Prosecution avers that Lazarević fails to show any error in the Trial Chamber's careful approach to Fuat Haxhibeqiri's evidence concerning the VJ's involvement in arson in May 1999, adding that the witness's evidence is corroborated by Exhibit P1993, the minutes of a MUP Staff meeting.¹¹³⁶

377. In reply, Lazarević rejects the Prosecution's suggestion that the April 1999 reports of the US Embassy in Skopje are irrelevant and states that he is contesting the Trial Chamber's findings related to the entire period of March-May 1999.¹¹³⁷ He likewise disputes the Prosecution's argument that he failed to address relevant findings regarding why residents left the town¹¹³⁸ and argues that the Prosecution misinterprets the evidence of NATO air strikes, ignoring the context in which the evidence was presented.¹¹³⁹ According to Lazarević, the Prosecution also misinterprets the evidence of Hani Hoxha and Lulzim Vejsa, which, he claims, shows that the VJ was far away from Đakovica/Gjakova town and was transporting civilians "in the area along the very border" to protect them from mines and NATO air strikes.¹¹⁴⁰ Finally, Lazarević disputes the Prosecution's suggestion that Exhibit P1993 corroborates the evidence of the VJ's involvement in arson in Đakovica/Gjakova town on the ground that it does not refer specifically to the town.¹¹⁴¹

¹¹³² Prosecution's Response Brief (Lazarević), paras 56-57.

¹¹³³ Prosecution's Response Brief (Lazarević), paras 58-59.

¹¹³⁴ Prosecution's Response Brief (Lazarević), paras 60-61, referring, *inter alia*, to Trial Judgement, vol. 2, paras 140, 147, 1159, Exh. 6D1638, p. 3.

¹¹³⁵ Prosecution's Response Brief (Lazarević), para. 62. The Prosecution adds that Lazarević is incorrect in suggesting that the VJ sought to assist Kosovo Albanians (*ibid.*).

¹¹³⁶ Prosecution's Response Brief (Lazarević), paras 63-64. The Prosecution further argues that Fuat Haxhibeqiri's evidence in this regard was corroborated and that even if the Trial Chamber erred in relying upon Haxhibeqiri's evidence, Lazarević fails to show how this error renders unreasonable its findings concerning the expulsion of Kosovo Albanians more than a month earlier (*ibid.*, paras 64-65).

¹¹³⁷ Lazarević's Reply Brief, para. 36, referring, *inter alia*, to Trial Judgement, vol. 2, para. 147.

¹¹³⁸ Lazarević's Reply Brief, paras 37-38.

¹¹³⁹ Lazarević's Reply Brief, para. 39.

¹¹⁴⁰ Lazarević's Reply Brief, paras 40-41. See also *ibid.*, paras 38, 530. Lazarević submits that this evidence is corroborated by the testimony of Defence witnesses and material evidence from the relevant time period (*ibid.*, para. 41, referring to Exh. 5D891, Lazarević's Appeal Brief, paras 530 (discussing evidence of Jevtović), 531).

¹¹⁴¹ Lazarević's Reply Brief, para. 42.

(ii) Analysis

378. In considering evidence in relation to Đakovica/Gjakova town, the Trial Chamber noted that several reports from the US Embassy in Skopje dated 11 to 19 April 1999 indicated that on or after 11 April 1999 KLA forces entered Đakovica/Gjakova town “and started to make gains in the town.”¹¹⁴² Lazarević claims that the Trial Chamber did not adequately consider the contents of these reports, but the Appeals Chamber recalls that the Trial Chamber has broad discretion in weighing evidence and is not required to articulate every step of its reasoning or to list every piece of evidence, which it considers in making its finding.¹¹⁴³ In any event, Lazarević has failed to show how any information contained in the cited reports renders the Trial Chamber’s finding unreasonable that the KLA had “some presence” in and around Đakovica/Gjakova town in late March 1999¹¹⁴⁴ or any other findings related to VJ conduct during the period of March through May 1999.¹¹⁴⁵ His argument in this regard is therefore dismissed.¹¹⁴⁶

379. The Appeals Chamber also dismisses Lazarević’s argument that a reasonable trier of fact would have found that NATO air strikes constituted a “clear reason” for the departure of civilians from Đakovica/Gjakova town. Lazarević simply challenges the Trial Chamber’s interpretation of the evidence without addressing its relevant factual findings¹¹⁴⁷ and has failed to show that the evidence before the Trial Chamber could not lead a reasonable trier of fact to reach the same conclusion in light of the other evidence in the record.¹¹⁴⁸ Moreover, the Appeals Chamber notes that Lazarević has failed to show how a report concerning NATO air strikes on 10 April 1999, which occurred after Hani Hoxha, Lulzim Vejsa, and many other residents left the town,¹¹⁴⁹ demonstrates that the Trial Chamber’s findings as to the reasons residents left are unreasonable.

380. Turning to Lazarević’s argument that the Trial Chamber erred in concluding that the VJ controlled the departure of a number of Kosovo Albanians from Đakovica/Gjakova town, the

¹¹⁴² Trial Judgement, vol. 2, para. 112, referring to Exh. 6D1637, p. 5, Exh. 6D1638, p. 2, Exh. 6D1639, p. 3.

¹¹⁴³ See *Krajišnik* Appeal Judgement, para. 27; *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21. See also *Brđanin* Appeal Judgement, para. 24; *Čelebići* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 115.

¹¹⁴⁴ Trial Judgement, vol. 2, para. 115.

¹¹⁴⁵ E.g., Trial Judgement, vol. 2, para. 147, finding that the MUP and VJ forces created an atmosphere of fear and violence in Đakovica/Gjakova town, that they controlled the departure of civilians from the town at the start of April 1999, and that the VJ was involved in arson in the town in May 1999.

¹¹⁴⁶ The Appeals Chamber likewise rejects Lazarević’s suggestion that “[a] reasonable number of facts demonstrates that there was a strong presence of KLA members in [Đakovica/Gjakova town] over a longer period of time” (Lazarević’s Appeal Brief, para. 33), as he fails to cite any evidence in support of his argument.

¹¹⁴⁷ E.g., Trial Judgement, vol. 2, para. 147, finding, based upon the “consistent” and “reliable” evidence of Vejsa, Hoxha, Caka, and K74, that their sudden departure from Đakovica/Gjakova town “was precipitated by the killing of members of their families by MUP forces, and their fear of the further actions of those forces.” See also *ibid.*, paras 139-140, and references therein.

¹¹⁴⁸ Lazarević’s claim that “heavy fights” with the KLA caused residents of Đakovica/Gjakova town to leave (Lazarević’s Appeal Brief, para. 35) is unsubstantiated and, accordingly, dismissed.

¹¹⁴⁹ Trial Judgement, vol. 2, paras 139-140, 147, and references therein.

Appeals Chamber observes that the Trial Chamber did not specify by what means VJ forces controlled this departure. The Trial Chamber indicated, however, that it found the “consistent evidence of Lulzim Vejsa, Hani Hoxha, Dren Caka, and K74 relating to their departure from Đakovica/Gjakova town at the start of April 1999 to be reliable.”¹¹⁵⁰ In this context, the Appeals Chamber notes that Hoxha described seeing “police and army” on almost every street corner as he left the town¹¹⁵¹ and Hoxha and Vejsa both gave evidence that, upon leaving the town with a convoy of other Kosovo Albanians, they and others were stopped by members of the VJ and detained for several hours.¹¹⁵² According to Vejsa, the VJ then told the people to continue to the border with Albania¹¹⁵³ and, according to Hoxha, as the convoy approached the border, VJ forces collected the elderly and transported them to the border on tractor trailers.¹¹⁵⁴

381. Although Lazarević contends that Vejsa only mentions seeing members of the VJ “right before” the border with Albania,¹¹⁵⁵ he has not explained how this fact, even if established,¹¹⁵⁶ would render the Trial Chamber’s finding unreasonable that the VJ, together with MUP forces, controlled the departure of Vejsa and others from Đakovica/Gjakova town. As for Lazarević’s claim that the VJ’s transportation of certain Kosovo Albanians to the border was undertaken to ensure their safety, the Appeals Chamber notes that he challenges the Trial Chamber’s interpretation of the evidence of Hoxha and Vejsa without showing that its interpretation of that evidence, including the evidence that some of the town’s residents were detained and then directed to the Albanian border by the VJ,¹¹⁵⁷ was unreasonable.¹¹⁵⁸ His arguments in this regard are, accordingly, dismissed.

¹¹⁵⁰ Trial Judgement, vol. 2, para. 147.

¹¹⁵¹ Hani Hoxha, Exh. P2267, p. 5. See also Trial Judgement, vol. 2, para. 139.

¹¹⁵² Hani Hoxha, Exh. P2267, p. 5; Hani Hoxha, 11 Aug 2006, T. 1550; Lulzim Vejsa, Exh. P2350, p. 4. See also Trial Judgement, vol. 2, para. 139.

¹¹⁵³ Lulzim Vejsa, Exh. P2350, p. 4.

¹¹⁵⁴ Hani Hoxha, Exh. P2267, p. 5. Vejsa also stated that he and his father-in-law were among those put on a truck by the VJ and taken to the border (Lulzim Vejsa, Exhibit P2350, p. 4). As Lazarević argues and the Prosecution appears to concede (compare Lazarević’s Appeal Brief, para. 37, with Prosecution’s Response Brief (Lazarević), para. 62), Caka and K74 did not offer any evidence concerning the role of the VJ in facilitating the departure of residents from Đakovica/Gjakova town (see also Trial Judgement, vol. 2, paras 139-140, and references therein).

¹¹⁵⁵ Lazarević’s Appeal Brief, para. 37.

¹¹⁵⁶ The Appeals Chamber observes that Hoxha indicated that he, like Vejsa, was detained for several hours by VJ forces, and that this occurred only three kilometres outside of Đakovica/Gjakova town (Hani Hoxha, Exh. P2267, p. 5; Hani Hoxha, 11 Aug 2006, T. 1550. See also Trial Judgement, vol. 2, para. 139; Lulzim Vejsa, Exh. P2350, p. 4; Lulzim Vejsa, 27 Sep 2006, T. 4081-4082).

¹¹⁵⁷ Trial Judgement, vol. 2, para. 139, and references therein.

¹¹⁵⁸ Lazarević also refers to Exhibit 5D891 and the evidence of Jevtović in support of his assertion that the VJ showed “care” for civilians by transporting them to the border (Lazarević’s Reply Brief, para. 41, referring, *inter alia*, to Exh. 5D891; Lazarević’s Appeal Brief, paras 527, 530-531, referring, *inter alia*, to Trial Judgement, vol. 3, para. 850). The Appeals Chamber notes, however, that Exhibit 5D891, an order of the 549th Motorised Brigade, is dated 18 April 1999, well after the start of April 1999 when Hoxha, Vejsa, and others left Đakovica/Gjakova town, and that the Trial Chamber did not find Jevtović to be a reliable witness “on controversial matters” (Trial Judgement, vol. 2, para. 91). Lazarević’s claims in this regard are, accordingly, dismissed.

382. As to Lazarević's challenge to the reliability of Haxhibeqiri's evidence that VJ members participated in arson in May 1999, the Appeals Chamber observes that the Trial Chamber expressly noted its reservations concerning Haxhibeqiri's evidence and explained that it would only rely on his evidence when that evidence was based on "direct personal experience or else is consistent with other evidence from independent sources".¹¹⁵⁹ The Trial Chamber thus declined to rely on portions of Haxhibeqiri's evidence¹¹⁶⁰ but accepted his account of arson committed by, *inter alia*, VJ members in Đakovica/Gjakova town in May 1999 because he witnessed the arson himself and his evidence was consistent with other evidence, namely, a MUP report describing the burning of houses by VJ reservists.¹¹⁶¹ Recalling that trial chambers may reasonably accept certain parts of a witness's testimony but reject others,¹¹⁶² the Appeals Chamber is not persuaded that the Trial Chamber erred in relying on only certain portions of Haxhibeqiri's evidence. Nor is the Appeals Chamber convinced that inconsistencies in Haxhibeqiri's description of police uniforms¹¹⁶³ have any bearing on the reliability of the witness's evidence identifying members of the VJ, as Lazarević claims.¹¹⁶⁴ Lazarević's argument is, accordingly, rejected.¹¹⁶⁵

(b) Reka/Caragoj valley

383. The Trial Chamber found that VJ and MUP forces, acting jointly, expelled Kosovo Albanian civilians from Dobroš/Dobrosh, Ramoc, Korenica/Korenicë, Meja/Mejë, and other villages during an operation in the Reka/Caragoj valley on 27 and 28 April 1999 and sent many of the civilians to Albania.¹¹⁶⁶ It further found that the operation was launched in part as a response to the killing of five policemen on 22 April 1999 and that one of the motives behind the operation was vengeance against the Kosovo Albanians in the area.¹¹⁶⁷ An additional motive, according to the Trial Chamber, was to cleanse the villages of their Kosovo Albanian inhabitants.¹¹⁶⁸ In light of, *inter alia*, the number of different units involved in the operation and the level of coordination required, the Trial Chamber was convinced that the expulsion was an organised joint operation of the VJ and the

¹¹⁵⁹ Trial Judgement, vol. 2, para. 81. The Trial Chamber noted that much of the witness's evidence "was based on hearsay rather than personal experience and parts of it were confusing" (*ibid.*, para. 81).

¹¹⁶⁰ *E.g.*, Trial Judgement, vol. 2, para. 147, discussing Haxhibeqiri's "indirect evidence" concerning seeing bodies during the period from 7 to 11 May 1999.

¹¹⁶¹ Trial Judgement, vol. 2, paras 142 (referring, *inter alia*, to Exh. P1993, p. 6), 147. See also Trial Judgement, vol. 2, para. 141. Although Lazarević suggests that the MUP report does not corroborate Haxhibeqiri's evidence because it does not refer to Đakovica/Gjakova town, the Appeals Chamber observes that the report in fact makes specific reference to the town (*e.g.*, Exh. P1993, p. 6, stating that "people and refugees in Đakovica town were treated correctly during the operations, however, after all the operations VJ reservists burned houses and went into them").

¹¹⁶² *Boškoski and Tarčulovski* Appeal Judgement, para. 59, and references therein.

¹¹⁶³ Trial Judgement, vol. 2, para. 124, and references therein.

¹¹⁶⁴ Lazarević's Appeal Brief, para. 40.

¹¹⁶⁵ In light of the foregoing, the Appeals Chamber likewise dismisses Lazarević's argument that the Trial Chamber failed to provide a reasoned opinion with respect to its treatment of certain evidence and its findings concerning events in Đakovica/Gjakova town (see *supra*, fn. 822).

¹¹⁶⁶ Trial Judgement, vol. 2, paras 228-235, 1159, 1194-1195.

¹¹⁶⁷ Trial Judgement, vol. 2, para. 228.

MUP, and was carried out with the awareness and approval of the superior MUP and VJ chains of command, including the Priština Corps command.¹¹⁶⁹ The Trial Chamber also found that the KLA presence in the area was “not significant” at the time of the operation and that the operation was primarily directed at the Kosovo Albanian civilian population.¹¹⁷⁰

(i) Submissions of the parties

384. Lazarević submits that the Trial Chamber erred in fact when it found that on 27 and 28 April 1999 the VJ acted jointly with the MUP to expel Kosovo Albanian civilians from villages in the Reka/Caragoj valley, in disregard of Defence evidence to the contrary.¹¹⁷¹ He raises a number of challenges to both the Trial Chamber’s findings concerning the aims of the operation and its findings concerning the VJ’s involvement therein.

385. With regard to the aims of the Reka/Caragoj valley operation, Lazarević argues that the Trial Chamber erred in finding that the KLA presence in the area was not significant on 27 and 28 April 1999 and he insists that, in light of evidence demonstrating a strong KLA presence in the area, including two US Embassy reports and a 25 April 1999 VJ combat report, a reasonable trier of fact would have found that the operation was a legitimate, counter-terrorist engagement directed exclusively at the KLA.¹¹⁷² In this context, he also asserts that the Trial Chamber erred in accepting the evidence of Nike Peraj that the operation was undertaken as an act of vengeance in light of, *inter alia*, Defence evidence to the contrary and discrepancies in Peraj’s evidence.¹¹⁷³ Lazarević likewise challenges the Trial Chamber’s findings that an additional motive for the operation was to ethnically cleanse the area and to send Kosovo Albanian residents to Albania, arguing, *inter alia*, that a number of residents remained in their villages or returned to their homes after the operation and that the VJ did not expel civilians but merely relocated them for the sake of their security.¹¹⁷⁴

¹¹⁶⁸ Trial Judgement, vol. 2, para. 228.

¹¹⁶⁹ Trial Judgement, vol. 2, para. 228.

¹¹⁷⁰ Trial Judgement, vol. 2, paras 230, 1194-1195.

¹¹⁷¹ Lazarević’s Appeal Brief, paras 42-43. He also argues that the Trial Chamber erred as a matter of law by failing to provide a “valid explanation” for its findings in light of the Defence evidence he cites (*ibid.*, para. 246. See also *ibid.*, paras 223-230, 241-245).

¹¹⁷² Lazarević’s Appeal Brief, paras 44-50, 241, and references therein. Lazarević notes that the Trial Chamber’s finding concerning the degree of KLA presence is based upon the evidence of two witnesses who, in his view, were incapable of having knowledge of the broader context of the situation (*ibid.*, para. 44. See also *ibid.*, para. 60 (arguing that the Trial Chamber omitted evidence demonstrating that the operation was launched because of an increased terrorist threat)).

¹¹⁷³ Lazarević’s Appeal Brief, paras 51-52.

¹¹⁷⁴ Lazarević’s Appeal Brief, paras 53-59, 242-243. Lazarević further claims that Pnishi [a Kosovo Albanian resident of the village of Meja/Mejë] was able to move back and forth between the villages of Meja/Mejë and Jahoc several times during the relevant period, which, according to Lazarević, demonstrates that the movement of civilians was not restricted (*ibid.*, para. 54).

386. As for the Trial Chamber's findings concerning the VJ's involvement in the Reka/Caragoj valley operation, Lazarević first claims that evidence shows that the MUP was the operation's "principal executor".¹¹⁷⁵ Lazarević also submits that the Trial Chamber erroneously concluded that the operation was approved by the Priština Corps Command, arguing that it disregarded relevant evidence.¹¹⁷⁶ In addition, Lazarević asserts that the Trial Chamber erred in finding that members of the VJ participated in crimes in the villages of Dobroš/Dobrosh and Ramoc, noting, *inter alia*, that there was evidence of KLA clashes in the area of Ramoc.¹¹⁷⁷ He also submits that the Trial Chamber erred in finding that VJ members committed crimes in the village of Korenica/Korenicë, suggesting that the Trial Chamber, *inter alia*, overlooked and misconstrued relevant evidence of Vlatko Vuković and Saša Antić regarding events there and erroneously accepted evidence that VJ forces were inside the village itself.¹¹⁷⁸ Finally, Lazarević avers that, in light of the evidence in the record, no reasonable trial chamber would have found that VJ forces entered the village of Meja/Mejë on 27 April 1999 and participated in any crime there, and further submits that members of the VJ aided civilians in the area of Meja/Mejë¹¹⁷⁹ and elsewhere.¹¹⁸⁰

387. The Prosecution responds that Lazarević's arguments should be summarily dismissed in their entirety and, in any event, fail on the merits.¹¹⁸¹ With respect to Lazarević's challenge concerning the degree of KLA presence in the area, the Prosecution contends, *inter alia*, that the evidence Lazarević cites does not undermine the Trial Chamber's finding and that he fails to show how any error by the Trial Chamber in this regard would impact the findings underlying his conviction.¹¹⁸² According to the Prosecution, Lazarević also fails to show that the Trial Chamber erred in accepting Nike Peraj's evidence that the Reka/Caragoj valley operation was undertaken to exact revenge upon Kosovo Albanians.¹¹⁸³ The Prosecution further avers that the Trial Chamber correctly found that an additional motive for the operation was to ethnically cleanse the area of Kosovo Albanians and stresses that the arguments advanced by Lazarević in this regard were

¹¹⁷⁵ Lazarević's Appeal Brief, paras 65-66, arguing, *inter alia*, that MUP forces "actually planned" the operation and that an on-site investigation after the operation was conducted by the MUP and civilian investigating bodies. See also *ibid.*, para. 244.

¹¹⁷⁶ Lazarević's Appeal Brief, paras 61-65, 67, 244, referring, *inter alia*, to Trial Judgement, vol. 2, para. 228. See also Lazarević's Reply Brief, paras 54-55.

¹¹⁷⁷ Lazarević's Appeal Brief, paras 68-76, referring, *inter alia*, to Trial Judgement, vol. 2, paras 231-232.

¹¹⁷⁸ Lazarević's Appeal Brief, paras 77-86, referring, *inter alia*, to Trial Judgement, vol. 2, para. 233.

¹¹⁷⁹ Lazarević's Appeal Brief, paras 87-92.

¹¹⁸⁰ Lazarević's Appeal Brief, para. 75.

¹¹⁸¹ Prosecution's Response Brief (Lazarević), paras 67-68.

¹¹⁸² Prosecution's Response Brief (Lazarević), paras 69-75.

¹¹⁸³ Prosecution's Response Brief (Lazarević), para. 76. The Prosecution adds that Peraj's evidence was, in fact, consistent with a variety of other evidence (*ibid.*, para. 77).

reasonably rejected by the Trial Chamber, are unsubstantiated, or are not supported by the evidence he identifies.¹¹⁸⁴

388. With regard to the VJ's involvement, the Prosecution responds that Lazarević cites evidence that does not support his claims that the MUP was the principal executor of the operation and that the Trial Chamber erred in finding that the Priština Corps Command approved the operation, and submits that he ignores relevant Trial Chamber findings.¹¹⁸⁵ With respect to Lazarević's arguments concerning events in the villages of Dobroš/Dobrosh and Ramoc, the Prosecution argues that Lazarević relies upon evidence that is irrelevant to the Trial Chamber's findings and ignores other relevant evidence consistent with the Trial Chamber's findings.¹¹⁸⁶ The Prosecution likewise asserts that Lazarević fails to show any error with respect to the Trial Chamber's assessment of the evidence concerning events in the village of Korenica/Korenicë.¹¹⁸⁷ The Prosecution adds that Lazarević ignores relevant factual findings when he argues that VJ forces did not take part in killings in and around the village of Meja/Mejë and that, in any event, he fails to show how any error in this regard or any purported assistance provided by the VJ to civilians would impact the Trial Chamber's finding that he aided and abetted the expulsion of Kosovo Albanians from Meja/Mejë and other villages in the Reka/Caragoj valley.¹¹⁸⁸

389. In reply, Lazarević stresses that he has pointed to relevant evidence showing that there was a significant KLA presence in the Reka/Caragoj valley area at the relevant time and that there was combat with the KLA there, "rather than the expulsion of Kosovo Albanians".¹¹⁸⁹ With respect to the motives behind the Reka/Caragoj valley operation, Lazarević argues that the Prosecution misconstrues and speculates unjustifiably regarding certain evidence and reiterates that the fact that key Prosecution witnesses did not go to Albania undermines the Prosecution's assertion that the aim of the operation was to expel the civilian population to Albania.¹¹⁹⁰ Lazarević also points to evidence that, he claims, shows that the MUP was the principal executor of the Reka/Caragoj valley operation and asserts that VJ members did not expel civilians from the village of Ramoc.¹¹⁹¹ Finally, he disputes the Prosecution's interpretation of evidence related to events in the village of

¹¹⁸⁴ Prosecution's Response Brief (Lazarević), paras 78-83.

¹¹⁸⁵ Prosecution's Response Brief (Lazarević), paras 84-86.

¹¹⁸⁶ Prosecution's Response Brief (Lazarević), paras 87-92.

¹¹⁸⁷ Prosecution's Response Brief (Lazarević), paras 93-97.

¹¹⁸⁸ Prosecution's Response Brief (Lazarević), paras 98-100.

¹¹⁸⁹ Lazarević's Reply Brief, paras 43-47.

¹¹⁹⁰ Lazarević's Reply Brief, paras 48-49, 53. He insists that, contrary to the Prosecution's suggestion, he has shown that the challenges to Vuković's credibility were groundless and notes that the Trial Chamber misquoted Vuković's evidence (Lazarević's Reply Brief, paras 50-52, discussing Trial Judgement, vol. 2, para. 84. See also Lazarević's Appeal Brief, para. 80, discussing Trial Judgement, vol. 2, para. 181).

¹¹⁹¹ Lazarević's Reply Brief, paras 55-56.

Korenica/Korenicë and insists that the Prosecution's submissions related to, *inter alia*, Meja/Mejë are speculative.¹¹⁹²

(ii) Analysis

a. Aims of the Reka/Caragoj valley operation

390. The Appeals Chamber first turns to Lazarević's argument that the Trial Chamber erred in its assessment of the degree of KLA activity in the Reka/Caragoj valley area and should have found that the Reka/Caragoj valley operation was a legitimate, counter-terrorist engagement. In this regard, the Appeals Chamber notes that the Trial Chamber found, based upon, *inter alia*, the eye-witness evidence of K73 and K90, that the KLA's presence in the Reka/Caragoj valley on 27 and 28 April 1999 was "limited" and "not significant".¹¹⁹³ Lazarević submits that these witnesses were not qualified to give reliable testimony on the issue of the KLA's presence in the valley because they were ordinary VJ soldiers who could not have had either insight into the entirety of the situation or access to the relevant information.¹¹⁹⁴ The Appeals Chamber notes that Lazarević has failed to substantiate his claims in this regard and that the Trial Chamber considered the evidence of both witnesses concerning their experience in the Reka/Caragoj valley during the operation there, including their testimony that they encountered limited or no KLA presence and that the area was under the control of the MUP and the VJ at the time.¹¹⁹⁵ Lazarević has not shown that the Trial Chamber acted unreasonably in accepting their evidence on this matter.

391. The Appeals Chamber is likewise not persuaded that the other evidence to which Lazarević points shows a strong presence of the KLA in the area on 27 and 28 April 1999, as he claims.¹¹⁹⁶ First, the Appeals Chamber fails to see how either the two US Embassy reports that he identifies, which relate to events on 11 April and 17 April 1999, respectively,¹¹⁹⁷ or Nike Peraj's cited evidence, which concerns June 1999,¹¹⁹⁸ demonstrate any error in the Trial Chamber's findings as to events that occurred on 27 and 28 April 1999.¹¹⁹⁹ With regard to Bislim Zyrap's evidence that

¹¹⁹² Lazarević's Reply Brief, paras 57-61.

¹¹⁹³ Trial Judgement, vol. 2, paras 115, 230.

¹¹⁹⁴ Lazarević's Appeal Brief, para. 44.

¹¹⁹⁵ Trial Judgement, vol. 2, paras 114, 186-188, 199-201. See also *ibid.*, vol. 2, para. 176.

¹¹⁹⁶ Lazarević's Appeal Brief, paras 45-48, referring, *inter alia*, to Exh. 6D1638, p. 2, Exh. 6D1639, pp. 2-3, Nike Peraj, Exh. P2253, para. 105, Bislim Zyrap, 9 Nov 2006, T. 6238-6239, Exh. P2023. See also Lazarević's Appeal Brief, para. 49; Lazarević's Reply Brief, paras 44-47. Lazarević also refers to document "6D1636" (Lazarević's Appeal Brief, fn. 56). The Appeals Chamber observes, however, that this document was not admitted into evidence at trial (see *Prosecutor v. Milutinović et al.*, Case no. IT-05-87-T, Confidential Exhibit List, Public Exhibit List, Certificate on Confidential Exhibit List and the Certificate on the Public Exhibit List, all filed on 10 November 2009) and will therefore not be considered.

¹¹⁹⁷ Exh. 6D1638, p. 1; Exh. 6D1639, p. 1.

¹¹⁹⁸ Nike Peraj, Exh. P2253, para. 105.

¹¹⁹⁹ The Appeals Chamber considers Lazarević's arguments to the contrary (Lazarević's Reply Brief, paras 45, 47) unpersuasive. His assertion that statements found in the US Embassy reports "are consistent with the testimonies of

KLA artillery was active from Albania as of 9 April 1999, the Appeals Chamber considers that even if the KLA artillery activity continued until May 1999, as Lazarević claims,¹²⁰⁰ the cited evidence contains no information concerning the degree of KLA presence in the Reka/Caragoj valley on 27 and 28 April 1999 and thus is irrelevant.¹²⁰¹

392. As for the 25 April 1999 VJ combat report cited by Lazarević, the Appeals Chamber notes that the Trial Chamber considered, *inter alia*, this report in connection with Lazarević's testimony that the Reka/Caragoj valley operation was launched in response to the presence of "several hundred terrorists" there.¹²⁰² In assessing the extent of the KLA's presence in the area, however, the Trial Chamber appears to have attached greater weight to, *inter alia*, the first-hand evidence of K90, who gave evidence that there was no KLA presence in or around the villages of Korenica/Korenicë and Meja/Mejë.¹²⁰³ Recalling that a trial chamber has a broad discretion in weighing evidence and is not required to articulate every step of its reasoning,¹²⁰⁴ the Appeals Chamber is not convinced that it was unreasonable for the Trial Chamber to have done so and, accordingly, dismisses Lazarević's challenge.¹²⁰⁵

393. The Appeals Chamber next turns to Lazarević's contention that the Trial Chamber erred in relying upon Nike Peraj's evidence to find that one motive for the Reka/Caragoj valley operation was to exact vengeance in response to the killing of five police officers.¹²⁰⁶ Lazarević argues that a number of Defence witnesses challenged the evidence of Peraj.¹²⁰⁷ However, he ignores the Trial Chamber's other relevant findings, including its finding that Peraj was "generally credible and reliable",¹²⁰⁸ its credibility determinations as to the evidence of the witnesses identified by

Defence witnesses and VJ and MUP documents" (Lazarević's Appeal Brief, para. 49, referring to Trial Judgement, vol. 2, paras 109-113) is undeveloped and, in light of the conclusion reached above, irrelevant.

¹²⁰⁰ Lazarević's Reply Brief, para. 46.

¹²⁰¹ Bislim Zyrap, 9 Nov 2006, T. 6231.

¹²⁰² Trial Judgement, vol. 2, paras 102, 113, referring, *inter alia*, to Exh. P2023. Exh. P2023 refers to around 200 people who fought against the VJ in the area of the villages of Račaj/Rracaj, Pacaj, Šeremet, and Dobroš/Dobrosh and "are now posing as civilian refugees" (Exh. P2023, p. 2).

¹²⁰³ See Trial Judgement, vol. 2, paras 114, 201, and references therein. See also *ibid.*, vol. 2, paras 113-115, contrasting Lazarević's testimony, a 25 April 1999 VJ combat report, and other evidence concerning the presence of KLA forces with the evidence of K90 and Malaj and finding, "on the basis of K90's evidence", that the KLA presence in the Reka/Caragoj valley was "limited".

¹²⁰⁴ See *Krajišnik* Appeal Judgement, para. 27; *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21. See also *Brđanin* Appeal Judgement, para. 24; *Čelebići* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 115.

¹²⁰⁵ Lazarević also challenges the Trial Chamber's findings on the ground that the Trial Chamber omitted "the evidence" showing that the Reka/Caragoj valley operation was launched in response to the appearance of "stronger terrorist forces in the area" (Lazarević's Appeal Brief, para. 60). As he fails to substantiate this claim or to specify the "documents of US.KDOM cited in this Appeal brief" to which he refers, his claim in this regard is dismissed.

¹²⁰⁶ Trial Judgement, vol. 2, para. 228. See also *ibid.*, vol. 2, paras 169, 174.

¹²⁰⁷ Lazarević's Appeal Brief, para. 52, referring to evidence from Lazarević as well as from Jevtović, Kotur, Perović, Stojanović, and Vintar. The Appeals Chamber notes that the Trial Chamber expressly recognised the divergence between various witnesses' accounts as to the motivations for the Reka/Caragoj valley operation (Trial Judgement, vol. 2, paras 169-179).

¹²⁰⁸ Trial Judgement, vol. 2, para. 82.

Lazarević,¹²⁰⁹ and its conclusion that challenges to Peraj’s credibility failed to undermine Peraj’s credibility “on the material issues” or were “vague or unfounded”.¹²¹⁰ Lazarević’s argument in this regard is therefore dismissed. His claim that Peraj changed his evidence with regard to the Reka/Caragoj valley operation¹²¹¹ is likewise dismissed, as Lazarević has failed to explain how the evidence he cites demonstrates that the Trial Chamber’s reliance on Peraj’s evidence was unreasonable.¹²¹²

394. Lazarević also challenges the Trial Chamber’s finding that another aim of the Reka/Caragoj valley operation was “to cleanse the villages in the area of their Kosovo Albanian inhabitants”.¹²¹³ According to Lazarević, many residents remained in their villages or in Kosovo and others returned to the area after the operation was completed.¹²¹⁴ The Appeals Chamber is not persuaded, however, that evidence concerning the result of the operation, even if accepted,¹²¹⁵ renders the impugned finding as to the aim of the operation, which was based in part on the “credible and reliable”¹²¹⁶ evidence of K73 and Peraj, unreasonable.¹²¹⁷ The Appeals Chamber likewise rejects Lazarević’s suggestion that evidence that the VJ ordered some residents to stay in their homes undermines the Trial Chamber’s finding as to motive,¹²¹⁸ since the Trial Chamber accepted K90’s evidence that “some Kosovo Albanians were not removed from areas in which the VJ was operating as that

¹²⁰⁹ The Trial Chamber found, *inter alia*, that Stojanović was not credible (Trial Judgement, vol. 2, para. 85), deemed Perović “entirely unreliable” (*ibid.*, vol. 2, para. 86), that Jevtović’s challenge to Peraj’s description of the Reka/Caragoj valley operation was “unsustainable”, and that Jevtović was not a reliable witness “on controversial matters” (*ibid.*, vol. 2, para. 91). The Trial Chamber also held that Kotur was “less credible” on certain issues (*ibid.*, vol. 2, para. 90) and that Vintar’s attacks on Peraj’s credibility “were largely undermined on cross examination” (*ibid.*, vol. 2, para. 83).

¹²¹⁰ Trial Judgement, vol. 2, para. 82.

¹²¹¹ Lazarević’s Appeal Brief, para. 52, and references therein.

¹²¹² In addition, Lazarević asserts that Peraj stated on cross-examination that he did not believe the crimes in Meja/Mejë were committed under the VJ’s control (Lazarević’s Appeal Brief, para. 52, referring to Nike Peraj, 15 Aug 2006, T. 1665). The Appeals Chamber notes, however, that in the portion of the transcript to which Lazarević refers the witness discussed events in Đakovica/Gjakova town, not in Meja/Mejë. Lazarević’s argument in this regard is therefore rejected.

¹²¹³ Trial Judgement, vol. 2, para. 228. See also Lazarević’s Appeal Brief, paras 53, 55.

¹²¹⁴ Lazarević’s Appeal Brief, paras 53-57, referring to evidence from Deda, Pnishi, Peraj, and Vuković. See also *ibid.*, para. 529.

¹²¹⁵ The Appeals Chamber notes that the Trial Chamber concluded that Vuković “did not impress the Chamber as a credible witness” and it only accepted his evidence “on non-controversial matters” (Trial Judgement, vol. 2, para. 84). Lazarević contests this finding, arguing that the Trial Chamber relied only on a previous, minor conviction rather than anything substantive in Vuković’s testimony when it found him to be not credible and that it misquoted his testimony on this matter (Lazarević’s Reply Brief, paras 50-52). Contrary to Lazarević’s contention, the Trial Chamber’s finding on Vuković’s credibility was not based solely on his prior conviction. The Trial Chamber noted, *inter alia*, that the witness disputed the “apparent meaning of statements” in his unit’s war diary and that his attacks on the credibility of K90 lacked foundation (Trial Judgement, vol. 2, paras 74, 84. See also *ibid.*, vol. 2, paras 333, 380). In light of the foregoing and the broad discretion enjoyed by trial chambers in determining credibility, Lazarević fails to show that the Trial Chamber erred in its conclusion as to Vuković’s credibility.

¹²¹⁶ Trial Judgement, vol. 2, paras 78, 82.

¹²¹⁷ Trial Judgement, vol. 2, para. 228. The Appeals Chamber is also not persuaded by Lazarević’s contention that simply because Pnishi was able to move between the villages of Meja/Mejë and Jahoc, it follows that there were no movement restrictions placed on civilians or that the Trial Chamber was unreasonable in finding that one of the motives of the operation was ethnic cleansing (Lazarević’s Appeal Brief, para. 54).

¹²¹⁸ Lazarević’s Appeal Brief, para. 56, referring to Trial Judgement, vol. 2, para. 150. See also Lazarević’s Appeal Brief, para. 54, referring, *inter alia*, to Vlatko Vuković, Exh. 5D1442, para. 61.

would have left the VJ without the protection of surrounding civilians and thus vulnerable to NATO attacks”.¹²¹⁹

395. Lazarević further challenges the Trial Chamber’s finding as to motive on the basis that the VJ did not expel civilians, but simply relocated them for their own safety. According to Lazarević, the Trial Chamber “erroneously cites” K90’s evidence concerning orders for the expulsion of villagers and he points to K90’s evidence that the population was not “relocated” until cluster bombs started falling.¹²²⁰ Contrary to Lazarević’s suggestion, the Trial Chamber did not err in its reference to K90’s evidence and specifically considered the evidence Lazarević cites.¹²²¹ The Trial Chamber noted, however, that K90 tried to minimise the role of the VJ in the expulsion of civilians by using the term “relocation” during his oral testimony¹²²² and that:

when it was suggested to him that the villagers were removed because of NATO bombing and the danger of land invasion, he disagreed with this proposition. Although initially reluctant to say in court that Kosovo Albanian civilians were expelled, he ultimately testified “if you’re [sic] clearing up a village, you’re expelling these people”.¹²²³

In light of K90’s clarifications as well as the fact that trial chambers may reasonably accept certain parts of a witness’s testimony but reject others,¹²²⁴ the Appeals Chamber finds that Lazarević has failed to demonstrate any error by the Trial Chamber in its treatment of K90’s evidence.

b. The VJ’s involvement

396. Turning first to Lazarević’s claim concerning the MUP’s alleged role as the “principal executor” of the Reka/Caragoj valley operation,¹²²⁵ the Appeals Chamber notes that the Trial Chamber found that the operation was “an organised joint operation of the VJ and MUP”.¹²²⁶ Even if it were proven that the MUP was the “principal” executor of the operation, Lazarević has failed to demonstrate how this fact would render the Trial Chamber’s findings that the operation was a joint endeavour and that the VJ thus participated therein unreasonable. His claim in this regard is, accordingly, dismissed. In addition, the Appeals Chamber fails to see how Lazarević’s argument

¹²¹⁹ Trial Judgement, vol. 2, paras 226, 229, noting that Stojanović partly agreed with K90’s evidence in this regard and that the Trial Chamber explicitly accepted the evidence of K90 concerning events during the Reka/Caragoj valley operation.

¹²²⁰ Lazarević’s Appeal Brief, paras 58-59, referring to Trial Judgement, vol. 2, para. 152, K90, 29 Jan 2007, T. 9273.

¹²²¹ Trial Judgement, vol. 2, para. 153, noting that during his oral testimony K90 “stated that his commander never ordered the ‘expulsion’ of villagers” and further stated that “civilians were not directed towards Albanian until after cluster bombs were dropped by NATO.”

¹²²² Trial Judgement, vol. 2, para. 74, stating that, when giving his oral evidence, K90 “minimised the allegations made in his witness statement as to the involvement of the VJ in criminal activity in Đakovica/Gjakova, most notably by requesting that the terms ‘expulsion’ and ‘expelled’ in relation to the VJ’s conduct toward Kosovo Albanian civilians be replaced by the terms ‘relocation’ and ‘relocate’.”

¹²²³ Trial Judgement, vol. 2, para. 153 (internal reference omitted), referring to K90, 29 Jan 2007, T. 9331.

¹²²⁴ *Boškoski and Tarčulovski* Appeal Judgement, para. 59, and references therein.

¹²²⁵ Lazarević’s Appeal Brief, paras 65-66.

¹²²⁶ Trial Judgement, vol. 2, para. 228.

that the orders for the operation were transmitted to subordinate units by the Chief of Staff of the Priština Corps and head of the Forward Command Post, Veroljub Živković,¹²²⁷ undermines the Trial Chamber's finding that the Priština Corps Command approved the operation. Furthermore, the Appeals Chamber considers that even if the MUP was the "principal" executor of the operation, it was not unreasonable for the Trial Chamber to nevertheless find that the Priština Corps approved of the operation, as indicated in the documentary evidence relied upon by the Trial Chamber in reaching this conclusion.¹²²⁸

397. The Appeals Chamber turns next to Lazarević's challenges concerning the Trial Chamber's findings regarding the participation of members of the VJ in crimes in the villages of Dobroš/Dobrosh, Ramoc, Korenica/Korenicë, and Meja/Mejë in the Reka/Caragoj valley. First, Lazarević contends that the Trial Chamber ignored K73's evidence that there was no order to burn houses and that members of the VJ, to the contrary, offered help to civilians in the area.¹²²⁹ The Appeals Chamber notes, however, that the Trial Chamber specifically stated that it was unclear from K73's evidence whether acts of arson "resulted from a direct order, routine practice, or rogue behaviour."¹²³⁰ Lazarević has thus failed to demonstrate any error in this regard. The Appeals Chamber is also not persuaded that instances of help offered to civilians, even if proven, would render unreasonable any of the Trial Chamber's findings in relation to events in the Reka/Caragoj valley.

398. As to events in the village of Ramoc, Lazarević points to evidence of fighting between VJ members and members of the KLA in the area of Ramoc during the night of 27 April 1999 and suggests that this shows that there were clashes with KLA in the area.¹²³¹ The Appeals Chamber notes that the Trial Chamber's finding that the VJ forced inhabitants of Ramoc to leave on 27 and 28 April 1999 is based primarily on the testimony of K73, who gave evidence that, *inter alia*, his VJ unit arrived in Ramoc at the end of the day on 27 April 1999 and summoned villagers out of their homes, after which he was ordered to instruct about 50 civilians to go to Korenica/Korenicë and the civilians left in the direction of Korenica/Korenicë.¹²³² K73 also gave evidence that his unit was ordered to another village and took four detained Kosovo Albanians from Ramoc along.¹²³³ In light of this evidence concerning the circumstances of civilians' departure from Ramoc, the Appeals

¹²²⁷ Lazarević's Appeal Brief, paras 62-63.

¹²²⁸ See Trial Judgement, vol. 2, para. 228; Exh. P2024, Exh. P2025, Exh. P2026.

¹²²⁹ Lazarević's Appeal Brief, paras 74-75, referring to Trial Judgement, vol. 2, para. 185, K73, 13 Sep 2006, T. 3323-3324, 3329, 3352.

¹²³⁰ Trial Judgement, vol. 2, para. 186.

¹²³¹ Lazarević's Appeal Brief, para. 69. Lazarević also suggests that Peraj referred to the KLA being present in the village more than a month later (*ibid.*, para. 69), but fails to show the relevance of this evidence.

¹²³² Trial Judgement, vol. 2, para. 187, referring to K73, Exh. P2440, para. 43, stating that the group of approximately 50 civilians left "around 18:00 hrs".

¹²³³ Trial Judgement, vol. 2, para. 189, and references therein.

Chamber is not persuaded that a clash with the KLA during the night of 27 April 1999¹²³⁴ demonstrates any error with respect to the Trial Chamber's findings concerning forcible displacement in Ramoc. The Appeals Chamber is likewise not persuaded by Lazarević's assertion that the statements of VJ members to civilians in Ramoc show that the VJ had "neither the order nor the intention" to commit a crime against civilians there¹²³⁵ and observes that he has failed to address other relevant findings in this regard.¹²³⁶

399. In the context of Lazarević's challenge to the findings regarding the village of Ramoc, he also points to a combat report of the 125th Motorised Brigade of 27 April 1999 describing the formation of a column of civilians who "want to" pull out from the "general area of the Ramoč facility"¹²³⁷ and suggests that this demonstrates the residents' desire to leave "the zone of combat activities."¹²³⁸ The Trial Chamber referred to this combat report, stating that it partially supported K73's account.¹²³⁹ However, the combat report describes a column of civilians formed "[d]uring the day at 0800 hours",¹²⁴⁰ many hours before K73's unit arrived in Ramoc, which according to his testimony occurred at the end of the day.¹²⁴¹ In light of this discrepancy, even if the combat report is credited, the Appeals Chamber is not convinced that it demonstrates any error with respect to the Trial Chamber's findings of forcible displacement based on K73's account of events in Ramoc, namely that civilians were displaced from the village on the evening of 27 April 1999 and the morning of 28 April 1999.¹²⁴²

400. With respect to the village of Korenica/Korenicë, Lazarević disputes the Trial Chamber's findings that VJ forces were present in the village and committed crimes there,¹²⁴³ arguing that

¹²³⁴ According to K73, during the night of 27 April 1999 there was some shooting and a VJ soldier and a member of the KLA were killed (Trial Judgement, vol. 2, para. 188, and references therein. See also *ibid.*, vol. 2, para. 185, describing the event as a "random attack").

¹²³⁵ Lazarević's Appeal Brief, para. 70, noting K73's evidence that he assured residents of Ramoc that nothing would happen to them in Korenica/Korenicë while Antić inquired whether there were any KLA members in the village.

¹²³⁶ *E.g.*, Trial Judgement, vol. 2, paras 228-230.

¹²³⁷ Exh. P2024, p. 2. According to the report: "During the day at 0800 hours, a column of Šiptar [a term for Albanians] civilians was formed on the following axis: Šeremet village – Pačaj village - /illegible/ Đakovica and further on. We believe that they want to pull out of the sector of operations of our forces in the general area of the Ramoč facility" (*ibid.*).

¹²³⁸ Lazarević's Appeal Brief, paras 72-73, referring, *inter alia*, to Trial Judgement, vol. 2, para. 187.

¹²³⁹ Trial Judgement, vol. 2, para. 187.

¹²⁴⁰ Exh. P2024, p. 2.

¹²⁴¹ Trial Judgement, vol. 2, para. 187. The Appeals Chamber notes that the combat report also does not indicate where the civilian convoy was formed and whether any inhabitants of the village of Ramoc took part (see Exh. P2024, p. 2).

¹²⁴² In light of the foregoing, it is not apparent on what basis the Trial Chamber concluded that the combat report provided partial support for K73's account with respect to events in Ramoc. The Appeals Chamber notes, however, that Lazarević has not challenged K73's evidence in relation to this village and that the Trial Chamber considered K73 "both credible and reliable" (Trial Judgement, vol. 2, para. 78). The Appeals Chamber is therefore not convinced that the Trial Chamber's reliance on the combat report, even if in error, renders unreasonable its overall findings concerning events in Ramoc.

¹²⁴³ The Trial Chamber found, *inter alia*, that on 27 April 1999, members of the VJ, "including the 549th Motorised Brigade, and reservists [...] killed a number of Kosovo Albanian men during a joint operation [with the MUP], and forcibly expelled a number of Kosovo Albanian civilians" from the village (Trial Judgement, vol. 2, para. 233).

Merita Deda could not reliably identify the people she saw in the village as VJ members, because, *inter alia*, they did not wear regular army uniforms and she did not see their insignia.¹²⁴⁴ The Appeals Chamber notes that the Trial Chamber specifically considered Deda's evidence identifying individuals she saw as VJ members and describing them as wearing "different uniforms, including green and brown camouflage, black masks, scarves, bandanas, and ribbons."¹²⁴⁵ The Appeals Chamber considers that while such evidence, on its own, might not be sufficient to reliably identify VJ members,¹²⁴⁶ the Trial Chamber found Deda's evidence to be consistent with that of Lizane Malaj,¹²⁴⁷ who identified, *inter alia*, the insignia on the sleeves of the uniforms of some of the men she saw as that of the VJ.¹²⁴⁸ The Trial Chamber also found Deda's evidence to be consistent with certain documentary evidence, according to which members of the VJ's 549th Motorised Brigade undertook operations in the Korenica/Korenicë cemetery on the same day that Deda and Malaj stated that they saw VJ soldiers in the village.¹²⁴⁹ The Trial Chamber accordingly accepted Deda's evidence identifying VJ members.¹²⁵⁰ Lazarević has failed to show an error of the Trial Chamber in this regard.

401. Lazarević also contends that the Trial Chamber misstated certain aspects of Vlatko Vuković's testimony¹²⁵¹ and failed to take into account parts of Vuković's evidence which, he avers, show that the VJ never entered the village of Korenica/Korenicë.¹²⁵² While Lazarević does not specify relevant sections in the Vuković's testimony that were purportedly overlooked, the Appeals Chamber notes that the Trial Chamber specifically addressed Vuković's evidence regarding the presence of his unit in the area of Korenica/Korenicë and found it to be contradictory to the war diary of the 549th Motorised Brigade and other evidence.¹²⁵³ The Appeals Chamber further notes that the Trial Chamber did not find Vuković to be a credible witness and accepted his

¹²⁴⁴ Lazarević's Appeal Brief, para. 83, referring to Merita Deda, 10 Aug 2006, T. 1401.

¹²⁴⁵ Trial Judgement, vol. 2, para. 193, and references therein.

¹²⁴⁶ The Trial Chamber found that it was incorrect to assume that the VJ were the only ones to wear green uniforms (Trial Judgement, vol. 2, para. 727) and that both members of the PJP and the SAJ units of the MUP wore green camouflage uniforms at the relevant time (*ibid.*, vol. 1, paras 710, 712, 714, 716).

¹²⁴⁷ Trial Judgement, vol. 2, para. 233.

¹²⁴⁸ Lizane Malaj, 9 Aug 2006, T. 1319. See also Trial Judgement, vol. 2, para. 194, and references therein.

¹²⁴⁹ Trial Judgement, vol. 2, para. 233, referring to Exh. P2019, p. 11 (under seal). Lazarević also challenges the reliability of Malaj's identification of the individuals whom she identified as VJ members, suggesting that her description does not match that given by K73 concerning the colour of the uniforms and use of ribbons by members in his VJ unit (Lazarević's Appeal Brief, para. 84, referring to Trial Judgement, vol. 2, para. 196; Lazarević's Reply Brief, para. 58). However, this same argument was raised and rejected at trial (Trial Judgement, vol. 2, para. 196) and Lazarević has failed to show that the Trial Chamber's rejection of this argument warrants the Appeals Chamber's intervention.

¹²⁵⁰ Trial Judgement, vol. 2, para. 233. See also *ibid.*, vol. 2, para. 77.

¹²⁵¹ Lazarević's Appeal Brief, paras 80-81, discussing Trial Judgement, vol. 2, para. 181.

¹²⁵² Lazarević's Appeal Brief, para. 79, referring to Exh. IC174.

¹²⁵³ Trial Judgement, vol. 2, paras 197-198. The Trial Chamber also noted that Vuković disputed the apparent meaning of statements in the war diary but failed to provide "satisfactory explanations for his assertions" (Trial Judgement, vol. 2, para. 84).

evidence “only on non-controversial matters.”¹²⁵⁴ The Appeals Chamber discerns no error in the Trial Chamber’s conclusions in this regard,¹²⁵⁵ nor, as a result, in the Trial Chamber’s acceptance of evidence other than Vuković’s regarding events in Korenica/Korenice.¹²⁵⁶

402. As for Lazarević’s suggestion that evidence from Saša Antić undermines K73’s evidence that he entered the village of Korenica/Korenice,¹²⁵⁷ the Appeals Chamber observes that the Trial Chamber specifically noted the conflicting evidence between the two witnesses in this regard¹²⁵⁸ and accepted K73’s evidence.¹²⁵⁹ Lazarević has failed to show that the Trial Chamber erred in doing so and the Appeals Chamber considers that his suggestion that the Trial Chamber “erroneously cites” K90’s evidence concerning the existence of orders to expel civilians¹²⁶⁰ is likewise without merit, for the reasons already provided above.¹²⁶¹

403. Finally, with regard to events in the village of Meja/Mejë, the Appeals Chamber notes that the Trial Chamber found that the VJ provided support to the MUP there, “as demonstrated by *inter alia* the evidence of Nike Peraj that members of the territorial defence units, commanded by Mičunović of the VJ, were responsible for the killings in and around Meja.”¹²⁶² Lazarević points to Nike Peraj’s testimony that the commander of the territorial defence unit was not, in fact, under VJ command and argues that the Trial Chamber therefore erred in finding that the VJ participated in any crimes.¹²⁶³ However, Lazarević has failed to address either the Trial Chamber’s reasoning addressing Peraj’s testimony on this point¹²⁶⁴ or its finding that Military Territorial Detachments, which were composed of VJ reservists, were part of the VJ structure.¹²⁶⁵ His argument is, accordingly, dismissed. His claims that VJ members helped civilians and that MUP forces requested support from the VJ to protect them against possible attacks by the KLA¹²⁶⁶ are likewise dismissed,

¹²⁵⁴ Trial Judgement, vol. 2, para. 84.

¹²⁵⁵ See *supra*, fn. 1215.

¹²⁵⁶ As for Lazarević’s claim that the Trial Chamber misstated certain evidence, the Appeals Chamber notes that the Trial Judgement mistakenly suggests that Vuković confirmed the positions of certain unit formations on a map (compare Trial Judgement, vol. 2, para. 181, referring to Exh. IC174, with Vlatko Vuković, 29 Jan 2008, T. 21340-21345). The Trial Judgement also incorrectly suggests that Vuković stated that he engaged various units “in Korenica” (compare Trial Judgement, vol. 2, para. 181, referring to Vlatko Vuković, Exh. 5D1442, para. 69, with Vlatko Vuković, Exh. 5D1442, paras 69, 71). However, Lazarević has failed to show how these errors render the Trial Chamber’s findings concerning Korenica/Korenice unsafe.

¹²⁵⁷ Lazarević’s Appeal Brief, para. 82.

¹²⁵⁸ Trial Judgement, vol. 2, paras 199-200. See also *ibid.*, vol. 2, para. 89.

¹²⁵⁹ Trial Judgement, vol. 2, para. 233.

¹²⁶⁰ Lazarević’s Appeal Brief, para. 85, referring to Trial Judgement, vol. 2, para. 230, K90, Exh. P2652, K90, 29 Jan 2007, T. 9273.

¹²⁶¹ See *supra*, para. 395; Trial Judgement, vol. 2, paras 152-153, and references therein.

¹²⁶² Trial Judgement, vol. 2, para. 235.

¹²⁶³ Lazarević’s Appeal Brief, paras 87, 90.

¹²⁶⁴ The Trial Chamber observed that Peraj’s evidence indicated that he did not consider the territorial defence forces to form a part of the VJ, but that he “acknowledged that these units were subordinate to military districts” (Trial Judgement, vol. 2, para. 214).

¹²⁶⁵ Trial Judgement, vol. 1, paras 627, 635-641. See also *ibid.*, vol. 3, para. 819.

¹²⁶⁶ Lazarević’s Appeal Brief, paras 88-89, 91.

as he has failed to explain how such assertions, even if proven, would render any of the Trial Chamber's findings underlying his convictions erroneous.¹²⁶⁷

404. For the foregoing reasons, the Appeals Chamber is satisfied that the evidence before the Trial Chamber could lead a reasonable trier of fact to find that the only reasonable inference was that crimes of forcible displacement were committed in Đakovica/Gjakova town and the Reka/Caragoj valley by, *inter alia*, VJ forces, and dismisses sub-ground 1(c) of Lazarević's appeal.

6. Gnjilane/Gjilan

405. The Trial Chamber found that in late March 1999, the VJ and the MUP, supported by armed civilians and other irregular forces, drove Kosovo Albanians out of the villages of Žegra/Zhegra and Vladovo/Lladova in Gnjilane/Gjilan municipality, either directly or by means of threats, beatings, and killings.¹²⁶⁸ The Trial Chamber also found that "members of the VJ" ordered residents of the village of Prilepnica/Përlepnica to leave on 13 April 1999 and that police escorted a convoy of around 3,000 people to the Macedonian border.¹²⁶⁹ The Trial Chamber further found, *inter alia*, that while many of the Kosovo Albanians who were displaced were either escorted or intentionally directed towards the border and into Macedonia, others sought shelter in the village of Donja Stubla/Stublla e Poshtme in Vitina municipality.¹²⁷⁰

406. The Trial Chamber concluded that these acts amounted to deportation and other inhumane acts (forcible transfer) as crimes against humanity.¹²⁷¹ It convicted Lazarević for aiding and abetting these crimes under Article 7(1) of the Statute.¹²⁷² Lazarević challenges these convictions.¹²⁷³ The Trial Chamber also convicted Lukić for committing these crimes (through his participation in a JCE) under Article 7(1) of the Statute.¹²⁷⁴ Lukić challenges these convictions.¹²⁷⁵ The Appeals Chamber will address the arguments of Lazarević and Lukić in turn.

¹²⁶⁷ In light of the foregoing, the Appeals Chamber likewise dismisses Lazarević's argument that the Trial Chamber failed to provide a reasoned opinion with respect to its treatment of certain evidence and its findings concerning events in Reka/Caragoj valley (see *supra*, fn. 822).

¹²⁶⁸ Trial Judgement, vol. 2, paras 944-945, 1246.

¹²⁶⁹ Trial Judgement, vol. 2, para. 943. See also *ibid.*, para. 1246.

¹²⁷⁰ Trial Judgement, vol. 2, paras 943-944, 947, 1247.

¹²⁷¹ Trial Judgement, vol. 2, para. 1248.

¹²⁷² Trial Judgement, vol. 3, paras 930, 1211.

¹²⁷³ Lazarević's Appeal Brief, paras 171-184. See also *ibid.*, paras 260-265.

¹²⁷⁴ Trial Judgement, vol. 3, paras 1138, 1212.

¹²⁷⁵ Lukić's remaining arguments under sub-ground D(2) are addressed elsewhere (see *supra*, sub-section VI.B.4.; *infra*, sub-sections VI.B.7. and VII.F.8(c)). His challenges under ground GG pertaining to his knowledge of the crimes in Gnjilane/Gjilan municipality (Lukić's Appeal Brief, paras 791, 814-821) relate to the Trial Chamber's findings as to his individual criminal responsibility as a participant in the JCE and are considered in that context (see *infra*, sub-section VII.F.). His arguments regarding the confiscation of identity documents (Lukić's Appeal Brief, paras 787, 808) are similarly addressed below (see *infra*, sub-section VII.B.). His claims regarding certain orders identified as being issued by the Joint Command are addressed below (see Lukić's Appeal Brief, para. 790; see *infra*,

(a) Lazarević's appeal(i) Žegra/Zhegra and Vladovo/Lladovaa. Submissions of the parties

407. Lazarević argues that the Trial Chamber erred in fact when it found that the VJ, together with the MUP and irregular forces, operated in Žegra/Zhegra and Vladovo/Lladova towards the end of March 1999 to expel Kosovo Albanian civilians.¹²⁷⁶ In particular, Lazarević challenges the reliability of K81¹²⁷⁷ and submits that the Trial Chamber erroneously rejected evidence, including that of Dušan Gavrančić, that the NATO bombing of VJ positions in the surrounding hills was the primary reason civilians vacated Žegra/Zhegra and Vladovo/Lladova, adding that there was also a strong KLA presence “in that area.”¹²⁷⁸ Lazarević further asserts that the Trial Chamber “fails to state” that murders committed in Žegra/Zhegra on 29 and 30 March 1999 were “the other key reason of disturbance” among civilian residents.¹²⁷⁹ The fact that the VJ reservists responsible for these killings were arrested by the police with the assistance of the VJ shows, in his view, that “the competent state authorities took all the necessary and timely measures to prevent possible incidents directed against the civilian population.”¹²⁸⁰

408. The Prosecution responds that Lazarević's submissions should be summarily dismissed and, in any event, fail on the merits.¹²⁸¹ The Prosecution argues, *inter alia*, that Lazarević repeats unsuccessful challenges made at trial concerning the reliability of K81 and ignores relevant findings by the Trial Chamber.¹²⁸² The Prosecution also submits that the Trial Chamber considered and reasonably rejected the suggestion that people fled Žegra/Zhegra and Vladovo/Lladova because of NATO bombing.¹²⁸³ According to the Prosecution, Lazarević's argument that the KLA had a strong presence in the area of Žegra/Zhegra and Vladovo/Lladova is raised for the first time on appeal, is undeveloped, ignores relevant findings, and relies on material outside the relevant time period and outside of the trial record.¹²⁸⁴ Finally, the Prosecution contends that Lazarević fails to show how his

sub-section VII.C.), as are his arguments related to the burning of the mosque in the village of Vlačica/Llashtica (see Lukić's Appeal Brief, paras 786, 809; *infra*, sub-section VII.F.8.(c)).

¹²⁷⁶ Lazarević's Appeal Brief, paras 177-184, 260-262, referring to Trial Judgement, vol. 2, paras 944-945, 948, 1168, 1246-1248.

¹²⁷⁷ Lazarević's Appeal Brief, para. 179.

¹²⁷⁸ Lazarević's Appeal Brief, paras 180-181, referring, *inter alia*, to an indictment brought by the Prosecutor for War Crimes of the Republic of Serbia dated 11 August 2009.

¹²⁷⁹ Lazarević's Appeal Brief, para. 182.

¹²⁸⁰ Lazarević's Appeal Brief, para. 183. Lazarević also avers that the Trial Chamber's failure to take into account evidence that the perpetrators of these killings were arrested and charged shows “an inconsistent evidentiary reasoning and decision making” and constitutes an error of law (*ibid.*, paras 260-263. See also *ibid.*, paras 223-230).

¹²⁸¹ Prosecution's Response Brief (Lazarević), para. 170.

¹²⁸² Prosecution's Response Brief (Lazarević), paras 178-179.

¹²⁸³ Prosecution's Response Brief (Lazarević), paras 178, 180.

¹²⁸⁴ Prosecution's Response Brief (Lazarević), paras 181-182.

claims that crimes committed by VJ reservists were adequately prosecuted would absolve him of liability, since he was convicted of aiding and abetting, not for superior responsibility under Article 7(3) of the Statute.¹²⁸⁵

409. In reply, Lazarević maintains that he has clearly demonstrated “the relevance and necessity” of the measures taken to prosecute those responsible for crimes in Žegra/Zhegra and how such actions exculpate him.¹²⁸⁶

b. Analysis

410. In challenging the reliability of K81, Lazarević points to the witness’s written statement, in which K81 explains that when the VJ arrived near the village of Vladovo/Lladova they “conducted themselves professionally.”¹²⁸⁷ Lazarević merely submits that this “dramatically changed in his oral testimony” and he has failed to substantiate this claim with a reference to any evidence.¹²⁸⁸ His argument is, accordingly, dismissed.¹²⁸⁹

411. As for Lazarević’s contention that the Trial Chamber erroneously rejected Dušan Gavranic’s testimony and other evidence demonstrating that civilians fled the villages of Žegra/Zhegra and Vladovo/Lladova because of nearby NATO bombing, the Appeals Chamber observes that the testimony to which Lazarević refers in support of this argument is not that of Gavranic, but rather that of Nebojša Ognjenović, which is irrelevant to his argument.¹²⁹⁰ In any event, the Appeals Chamber notes that Lazarević raised this same argument concerning Gavranic’s testimony at trial¹²⁹¹ and that he has failed to show that the Trial Chamber’s rejection of the argument¹²⁹² constitutes an error warranting the Appeals Chamber’s intervention.¹²⁹³ Because his assertion

¹²⁸⁵ Prosecution’s Response Brief (Lazarević), paras 178, 183.

¹²⁸⁶ Lazarević’s Reply Brief, para. 94, referring to Lazarević’s Appeal Brief, “Sub-grounds 3e, 3f, 3h”, paras 514-566.

¹²⁸⁷ Lazarević’s Appeal Brief, para. 179, referring to Exh. P2268, p. 2 (under seal).

¹²⁸⁸ Lazarević’s Appeal Brief, para. 179.

¹²⁸⁹ In any event, the Appeals Chamber notes that when witness K81 was questioned about his statement at trial, he explained that the VJ behaved properly until they were stationed near the village, after which point they began mistreating the population (K81, 21 Nov 2006, T. 7082). In light of this clarification, the Appeals Chamber is not persuaded that any inconsistency between witness K81’s written statement and his oral testimony renders unreasonable the Trial Chamber’s conclusion that witness K81 was generally credible and reliable (Trial Judgement, vol. 2, para. 894) or shows that it erred in relying on his evidence. Lazarević also notes that the Trial Chamber took into account difficulties with the manner in which the Prosecution presented the evidence of K81 (Lazarević’s Appeal Brief, para. 179, discussing Trial Judgement, vol. 2, para. 894) but has failed to indicate the relevance of this point to his argument. Insofar as this constitutes a separate claim, it is undeveloped and likewise dismissed.

¹²⁹⁰ See Lazarević’s Appeal Brief, para. 180, fn. 196; Nebojša Ognjenović, 20 Feb 2008, T. 22861.

¹²⁹¹ Lazarević’s Closing Brief, para. 242.

¹²⁹² See Trial Judgement, vol. 2, para. 942.

¹²⁹³ In addition to Gavranic’s evidence, Lazarević cites Exhibit 5D1336, a map of purported military and civilian targets hit by NATO in Kosovo (Lazarević’s Appeal Brief, para. 181, fn. 197). However, he has failed to explain how this exhibit renders unreasonable either the Trial Chamber’s reliance on the evidence of K81 and Shabani that NATO bombing was not one of the reasons for their departure, or the Trial Chamber’s ultimate conclusion that NATO bombing did not cause the flight of the civilians in the municipality (see Trial Judgement, vol. 2, para. 942).

regarding the KLA is based on a document that was neither part of the record at trial nor admitted on appeal,¹²⁹⁴ that submission is likewise dismissed.¹²⁹⁵

412. Turning to Lazarević's claim that the Trial Chamber "fails to state" that the killings committed on 29 and 30 March 1999 were "the other key reason of disturbance" amongst residents of Žegra/Zhegra,¹²⁹⁶ the Appeals Chamber observes that the Trial Chamber explicitly considered evidence of Qamil Shabani and Dušan Gavranic confirming that such killings took place.¹²⁹⁷ The Trial Chamber found, moreover, that the VJ and the MUP as well as other irregular forces drove Kosovo Albanians from the village either directly or "by the use of threats, beatings *and killings*, creating a climate of fear."¹²⁹⁸ The Appeals Chamber is therefore not persuaded that the Trial Chamber erred by failing to recognise the impact of the killings committed on 29 and 30 March 1999 on the civilian population.

413. Finally, although Lazarević stresses that the Trial Chamber failed to consider evidence of arrests and other investigative activities undertaken after the killings, he has failed to show that, based on the evidence in the record, no reasonable trier of fact could have reached the same conclusions as the only reasonable inference concerning the crimes of forcible displacement. Similarly, he has failed to explain how the Trial Chamber's purported failure to consider this evidence constitutes an error of law.¹²⁹⁹ His arguments in this regard are, accordingly, rejected.¹³⁰⁰

(ii) Prilepnica/Përlepnica

a. Submissions of the parties

414. Lazarević argues that the Trial Chamber erred in fact and law when it found that the VJ operated in Prilepnica/Përlepnica village on 6 and 13 April 1999 and ordered the expulsion of Kosovo Albanian civilians.¹³⁰¹ In particular, he submits that the Trial Chamber failed to mention that Abdylhaqim Shaqiri identified the perpetrators of acts occurring on 6 April 1999 as Goran

¹²⁹⁴ Lazarević refers to an indictment issued by the Prosecutor for War Crimes of the Republic of Serbia on 11 August 2009 (See Lazarević's Appeal Brief, para. 181, fn. 198), but this indictment was not made part of the trial record and the Appeals Chamber rejected a request to admit it as additional evidence on appeal (see Decision on Vladimir Lazarević's Motion to Present Additional Evidence and on Prosecution's Motion for Order Requiring Translations of Excerpts of Annex E of Lazarević's Rule 115 Motion, 26 January 2010, paras 34-37).

¹²⁹⁵ See also Rule 109 of the Rules.

¹²⁹⁶ Lazarević's Appeal Brief, para. 182.

¹²⁹⁷ Trial Judgement, vol. 2, paras 920-922, 925, and references therein. See also *ibid.*, vol. 1, para. 545.

¹²⁹⁸ Trial Judgement, vol. 2, paras 944 (emphasis added), 1246.

¹²⁹⁹ Insofar as Lazarević argues that other sub-grounds of his appeal demonstrate the relevance of such investigative activities, those claims are addressed below (see *infra*, sub-section VIII.B.).

¹³⁰⁰ Lazarević's claims of legal error with respect to events in Žegra/Zhegra and Vladovo/Lladova (see *supra*, fn. 822) are likewise dismissed, as his allegations of legal error simply repeat several of his evidentiary arguments which have been found to be without merit.

¹³⁰¹ Lazarević's Appeal Brief, paras 171, 176, 264, referring to Trial Judgement, vol. 2, paras 943, 1168.

Denić and Negovan Denić, local Serbs dressed in military uniforms, and he points to evidence that both men were subsequently arrested as civilians.¹³⁰² He further submits that the Trial Chamber erred in finding that Ljubo Palamarević and Đilas Mladenović, the perpetrators of the 13 April 1999 incident, were members of the VJ and that the Trial Chamber failed to discuss evidence that one of the men was a local judge while the other was a director of a factory and that both wore camouflage uniforms, were “without military ranks”, and were unarmed.¹³⁰³

415. The Prosecution responds that Lazarević’s submissions should be summarily dismissed and, in any event, fail on their merits.¹³⁰⁴ The Prosecution observes that the Trial Chamber declined to find that residents of Prilepnica/Përlepnica were forcibly displaced on 6 April 1999 and suggests that Lazarević’s claims concerning the purported perpetrators of this event are therefore irrelevant.¹³⁰⁵ The Prosecution further submits that the Trial Chamber reasonably found that the two men who told Kosovo Albanian residents that they had to leave the village on 13 April 1999 were VJ reservists.¹³⁰⁶

416. In reply, Lazarević submits that he clearly demonstrated that the persons who arrived in the village on 13 April 1999 were not members of the VJ, but rather civilians wearing unidentified green uniforms and stresses that examples of the misuse of military uniforms show that no crimes were committed by VJ members in this instance.¹³⁰⁷

b. Analysis

417. Turning first to Lazarević’s argument concerning Goran Denić and Negovan Denić, the Appeals Chamber notes that Abdylhaqim Shaqiri only identified these men in relation to an evacuation of Prilepnica/Përlepnica village on 6 April 1999.¹³⁰⁸ The Trial Chamber concluded that the Prosecution had not established that residents of Prilepnica/Përlepnica were forcibly displaced on 6 April 1999 and therefore did not convict Lazarević for the events that occurred in the village

¹³⁰² Lazarević’s Appeal Brief, paras 172-173.

¹³⁰³ Lazarević’s Appeal Brief, para. 174. Lazarević also cites evidence which he claims demonstrates that there were cases of misuse of military uniforms (*ibid.*, para. 175).

¹³⁰⁴ Prosecution’s Response Brief (Lazarević), para. 170. See also *ibid.*, para. 174, suggesting that Lazarević’s claim that VJ uniforms were misused merely repeats unsuccessful trial arguments and should be summarily dismissed.

¹³⁰⁵ Prosecution’s Response Brief (Lazarević), paras 171-172, and references therein.

¹³⁰⁶ Prosecution’s Response Brief (Lazarević), para. 173. See also *ibid.*, para. 175, arguing that the civilian occupations of the men in question are irrelevant to the Trial Chamber’s finding. The Prosecution adds that Lazarević ignores the Trial Chamber’s findings that the VJ was involved in events following the issuance of the order of 13 April 1999 to leave the village (*ibid.*, para. 176).

¹³⁰⁷ Lazarević’s Reply Brief, paras 90-91.

¹³⁰⁸ Abdylhaqim Shaqiri, Exh. 4D4, p. 2; Abdylhaqim Shaqiri, 5 Sep 2006, T. 2783-2784; *ibid.*, 6 Sep 2006, T. 2860.

on that date.¹³⁰⁹ Because Lazarević challenges a finding on which his conviction does not rely, his argument in this regard is dismissed.

418. As for Lazarević's claim that the Trial Chamber erroneously identified Ljubo Palamarević and Đilas Mladenović as members of the VJ, the Appeals Chamber notes that Abdylhaqim Shaqiri gave evidence that he saw these two men on 13 April 1999 and identified them as VJ reservists who were wearing yellow-green camouflage military uniforms.¹³¹⁰ At that time, according to Shaqiri, the men conveyed an order from the "regular army" for the residents to leave the village and, when asked why they were doing this, they stated that they had to carry out their orders.¹³¹¹ The Trial Chamber, while taking note of certain inconsistencies in Shaqiri's evidence, observed that his "description of the soldiers as members of the VJ was clear".¹³¹² The Appeals Chamber notes that VJ reservists were considered members of the VJ when performing military duty¹³¹³ and, accordingly, finds no error in the Trial Chamber's references to the two men as "soldiers" or "members of the VJ".¹³¹⁴ The Appeals Chamber is also not persuaded that Lazarević's challenges concerning the men's uniforms, their civilian occupations, or the misuse of military uniforms demonstrate that the Trial Chamber's findings as to the two men or the order they conveyed were erroneous. Lazarević's argument in this regard is, accordingly, rejected.¹³¹⁵

419. For the foregoing reasons, the Appeals Chamber dismisses sub-ground 1(h) of Lazarević's appeal.

(b) Lukić's appeal

(i) Submissions of the parties

420. Lukić contends that the Trial Chamber erred in law and fact by disregarding relevant evidence and finding him responsible for the forcible displacement of civilians in Gnjilane/Gjilan municipality based upon the unreliable evidence of Prosecution witnesses.¹³¹⁶ In his view, the Trial

¹³⁰⁹ Trial Judgement, vol. 2, para. 1246.

¹³¹⁰ Trial Judgement, vol. 2, para. 908, and references therein.

¹³¹¹ Trial Judgement, vol. 2, para. 908, and references therein. Contrary to Lazarević's suggestion, the Trial Chamber explicitly referred to Shaqiri's evidence that the two men wore camouflage uniforms and were unarmed until a third soldier arrived and gave them each a Kalashnikov (*ibid.*).

¹³¹² Trial Judgement, vol. 2, para. 909.

¹³¹³ As the Trial Chamber explained, according to the Law on the VJ, the membership of the VJ consisted of professional soldiers as well as, *inter alia*, individuals in the reserve forces while they were performing their military duty in the army (Trial Judgement, vol. 1, para. 421).

¹³¹⁴ See, *e.g.*, Trial Judgement, vol. 2, para. 909.

¹³¹⁵ Lazarević's claims of legal error with respect to events in Prilepnica/Përlepnica (see *supra* fn. 822) are likewise dismissed, as his allegations of legal error simply repeat several of his evidentiary arguments which have been found to be without merit.

¹³¹⁶ Lukić's Appeal Brief, paras 783-785. See also *ibid.*, paras 91-94, 96, 100. Lukić argues that finding him responsible for forcible displacement is particularly untenable in light of the Trial Chamber's conclusion that there was insufficient

Chamber exhibited bias in favour of the Prosecution in its acceptance of inconsistent evidence and ignored or misconstrued other evidence, including evidence with respect to the reasons Qamil Shabani and others left the village of Donja Stubla/Stublla e Poshtme.¹³¹⁷ He further claims that the evidence shows that civilians left the village of Prilepnica/Përlepnica, and the municipality in general, due to their fear of NATO bombing and contends that the Trial Chamber erred in holding otherwise, thereby ignoring its own findings about frequent NATO bombing and the “unrebutted” testimony of Dušan Gavrančić, and violating the principle of *in dubio pro reo*.¹³¹⁸ Finally, Lukić disputes the Trial Chamber’s interpretation of evidence concerning the MUP’s role with respect to Prilepnica/Përlepnica, challenges the evidence underlying the findings that MUP members were present or were the perpetrators of crimes in Žegra/Zhegra and Vladovo/Lladova, and points to “exculpatory” evidence that the MUP investigated and facilitated the prosecution of certain crimes as well as evidence that the MUP offered protection to civilians.¹³¹⁹

421. The Prosecution responds that Lukić’s arguments should be summarily dismissed and, in any event, fail on their merits.¹³²⁰ The Prosecution argues that Lukić’s claims about the Trial Chamber’s alleged “bias” are unsupported and asserts that the Trial Chamber reasonably concluded that NATO bombings did not cause the mass displacement of Kosovo Albanians from Prilepnica/Përlepnica in light of Abdylhaqim Shaqiri’s evidence and other evidence in the record.¹³²¹ The Prosecution also submits that the Trial Chamber reasonably concluded that Lukić was responsible for the forcible displacement of Kosovo Albanians in Žegra/Zhegra and Vladovo/Lladova and that Lukić consistently ignores the Trial Chamber’s relevant findings, including its finding that as a member of the JCE, he was responsible for crimes committed by both the VJ and the MUP.¹³²²

422. In reply, Lukić reiterates that the Trial Chamber erred in convicting him for crimes committed by VJ members who were arrested by the MUP and properly tried and convicted.¹³²³ He further claims that the Trial Chamber failed to consider evidence of Prosecution witnesses

evidence of forcible displacement in relation to Nosalje (*ibid.*, para. 785, referring to Trial Judgement, vol. 2, para. 947).

¹³¹⁷ Lukić’s Appeal Brief, paras 788-789. See, e.g., *ibid.*, paras 96, 100, 797-799, 803-804.

¹³¹⁸ Lukić’s Appeal Brief, paras 792-796, 811.

¹³¹⁹ Lukić’s Appeal Brief, paras 96, 100, 797-802, 805-807, 810-813. Lukić stresses that none of the Trial Chamber’s findings in relation to police activities in Gnjilane/Gjilan municipality satisfy the elements of deportation, which he describes as being the deprivation of “the right of a victim to stay in his/her [*sic*] home or community, or the right not to be disabled from their property by means of forceful movement to another place” (*ibid.*, para. 813, referring to *Simić et al.* Trial Judgement, para. 130, *Krnojelac* Appeal Judgement, para. 218).

¹³²⁰ Prosecution’s Response Brief (Lukić), paras 490-492, 499-500, 502.

¹³²¹ Prosecution’s Response Brief (Lukić), paras 494-497.

¹³²² Prosecution’s Response Brief (Lukić), paras 103, 498-499.

¹³²³ Lukić’s Reply Brief, para. 123.

indicating that they were treated properly by the MUP and that MUP forces were not involved in the alleged crimes.¹³²⁴

(ii) Analysis

a. General challenges

423. The Appeals Chamber first turns to Lukić's argument that the Trial Chamber showed bias towards the Prosecution by accepting inconsistent Prosecution evidence and ignoring Defence evidence. In this regard, the Appeals Chamber observes that the Trial Chamber found Prosecution witnesses Abdylhaqim Shaqiri, Qamil Shabani, and K81 to be "generally credible and reliable due to the broad consistency of their evidence concerning the events that they witnessed [...] and the impression the Chamber formed of them in court", although it noted that "there were difficulties with the manner in which the Prosecution presented the evidence of K81."¹³²⁵ The Trial Chamber stated that:

although a number of inconsistencies in the evidence of Shaqiri and Shabani were explored in cross-examination, it is satisfied, in light of the explanations given, that they do not render their evidence unreliable on the key issues discussed below. Where an inconsistency was more than insignificant, the Chamber has left the evidence of the witness on that point out of account.¹³²⁶

424. Although Lukić asserts that the Trial Chamber mischaracterised the problems with K81's evidence,¹³²⁷ he does not substantiate this submission, which is, accordingly, dismissed.¹³²⁸ As for Lukić's claim that the Trial Chamber erred in accepting Shabani's clarifications regarding his own evidence,¹³²⁹ the Appeals Chamber recalls that a trial chamber has broad discretion in weighing evidence.¹³³⁰ The Appeals Chamber further recalls that it is not a legal error *per se* to rely on evidence that is inconsistent with a prior statement or other evidence adduced at trial, although a trial chamber must take into account any explanations offered for these inconsistencies when determining the probative value of the evidence.¹³³¹ Because Lukić simply challenges the Trial Chamber's acceptance of Shabani's clarifications without demonstrating that the Trial Chamber

¹³²⁴ Lukić's Reply Brief, para. 124.

¹³²⁵ Trial Judgement, vol. 2, para. 894.

¹³²⁶ Trial Judgement, vol. 2, para. 894.

¹³²⁷ Lukić's Appeal Brief, para. 789.

¹³²⁸ Lukić also argues that K81 "certainly did not speak the truth" because he gave evidence that he had entered Macedonia via Serbia rather than directly from Kosovo and no one else "mentioned this possibility" (Lukić's Appeal Brief, para. 100). The Appeals Chamber is not persuaded, however, that the mere fact that no witnesses but K81 gave such evidence demonstrates that the Trial Chamber erred in relying upon K81's evidence.

¹³²⁹ See Lukić's Appeal Brief, para. 799.

¹³³⁰ See *Krajišnik* Appeal Judgement, para. 27; *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21. See also *Brdanin* Appeal Judgement, para. 24; *Čelebići* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 115.

¹³³¹ *Nchamihigo* Appeal Judgement, para. 201, referring to *Muhimana* Appeal Judgement, para. 135; *Niyitegeka* Appeal Judgement, para. 96, referring to *Kupreškić et al.* Appeal Judgement, para. 31.

committed a reversible error in doing so, his argument in this regard is dismissed. Given the Trial Chamber's broad discretion in weighing evidence, the Appeals Chamber is also not persuaded that the differences in the evidence of Shabani and K81 identified by Lukić¹³³² render the Trial Chamber's conclusion that Shabani confirmed K81's account¹³³³ erroneous.¹³³⁴

425. As for Lukić's argument that "defense witnesses/evidence were simply disregarded totally",¹³³⁵ the Appeals Chamber notes that the Trial Chamber explicitly considered, *inter alia*, the evidence of Defence witnesses Božidar Delić and Franjo Glončak.¹³³⁶ The Trial Chamber also found that it could rely upon "large parts" of the evidence of Defence witness Gavranić and that portions of Glončak's evidence confirmed that of Shabani and K81, although the Trial Chamber also found that much of Glončak's evidence was unreliable.¹³³⁷ Lukić's submission on this point is thus rejected.

b. Challenges concerning specific villages

426. Lukić's remaining claims that evidence was ignored or misinterpreted are also without merit. Contrary to Lukić's submission,¹³³⁸ the Trial Chamber did not err in referring to Shabani's testimony as to the involvement of the police in Žegra/Zhegra on 29 March 1999.¹³³⁹ As for Lukić's assertion that the Trial Chamber ignored evidence that the police did not order people from the village of Prilepnica/Përlepnică to leave and that the MUP provided a protective escort for a convoy of residents upon Shaqiri's request,¹³⁴⁰ the Appeals Chamber notes that the Trial Chamber considered the evidence in this regard and found that VJ forces ordered civilians to leave the village.¹³⁴¹ Lukić has failed to show how the evidence he cites demonstrates any error by the Trial Chamber on this point or casts doubt on the Trial Chamber's findings concerning subsequent events before and at the Macedonian border, as he claims.¹³⁴² Finally, although Lukić challenges the Trial Chamber's recitation of the evidence concerning how Shabani and others left Donja Stubla/Stublla

¹³³² See Lukić's Appeal Brief, para. 797, referring to Trial Judgement, vol. 2, paras 917-918.

¹³³³ Trial Judgement, vol. 2, paras 917-918.

¹³³⁴ For the reasons already stated (see *supra*, fn. 1115), the Appeals Chamber also does not consider that Lukić's challenge to Shaqiri's testimony concerning "white cloth with a ribbon" on police uniforms (see Lukić's Appeal Brief, para. 96. See also Trial Judgement, vol. 2, para. 905) demonstrates that the Trial Chamber erred in accepting Shaqiri's testimony.

¹³³⁵ Lukić's Appeal Brief, para. 789.

¹³³⁶ Trial Judgement, vol. 2, para. 894.

¹³³⁷ Trial Judgement, vol. 2, paras 894, 944.

¹³³⁸ Lukić's Appeal Brief, para. 798.

¹³³⁹ Trial Judgement, vol. 2, para. 921, referring, *inter alia*, to Qamil Shabani, Exh. P2264, T. 1528-1529, Qamil Shabani, 31 Aug 2006, T. 2682.

¹³⁴⁰ Lukić's Appeal Brief, para. 810.

¹³⁴¹ Trial Judgement, vol. 2, paras 899, 906-908, 910-911, 914, 943, 1246.

¹³⁴² Lukić's Appeal Brief, para. 810, referring, *inter alia*, to Trial Judgement, vol. 2, para. 948, finding that "Kosovo Albanians from the municipality were mistreated at VJ checkpoints before the border with Macedonia" and that at the Macedonian border "Serbian police searched them and took their identification papers and passports."

e Poshtme, he simply offers his own interpretation of that evidence and does not demonstrate any specific error by the Trial Chamber.¹³⁴³ In light of the foregoing discussion, the Appeals Chamber considers that Lukić has failed to show any “bias”¹³⁴⁴ in the Trial Chamber’s approach to the evidence concerning events in Gnjilane/Gjilan municipality.

427. As for Lukić’s argument that the Trial Chamber erred in failing to find that NATO bombing caused civilians to flee the village of Prilepnica/Përlepnica, the Appeals Chamber notes that the Trial Chamber considered the possibility that civilians left the village due to fear of NATO air strikes.¹³⁴⁵ The Trial Chamber dismissed this explanation, however, in light of both its acceptance of the evidence of Shaqiri, who rejected the suggestion that villagers were scared of NATO bombing, and the lack of evidence of such bombing in the area.¹³⁴⁶ The Trial Chamber also considered but rejected the evidence of Gavranić that people left Gnjilane/Gjilan municipality due to NATO bombing.¹³⁴⁷ In so concluding, the Trial Chamber noted that police and VJ reports stated that NATO bombed mainly military and infrastructure installations in the municipality¹³⁴⁸ and that:

there is no evidence of NATO targeting areas inhabited by civilians, neither K81 nor Shabani cited fear of NATO as among the reasons for their and their families['] flight, and the municipality was not the site of intense NATO bombardment, as explained by Smiljanić.¹³⁴⁹

Lukić’s suggestion that Gavranić’s evidence is un rebutted and must therefore be given precedence under the principle of *in dubio pro reo* thus fails, as do his remaining evidentiary arguments.¹³⁵⁰ His claims in this regard are, accordingly, dismissed.

428. Finally, the Appeals Chamber notes that Lukić challenges the evidence underlying the findings that MUP members were present or were the perpetrators of crimes in Žegra/Zhegra and

¹³⁴³ Lukić’s Appeal Brief, paras 803-804, referring, *inter alia*, to Trial Judgement, vol. 2, paras 926-927.

¹³⁴⁴ Lukić’s Appeal Brief, para. 789.

¹³⁴⁵ Trial Judgement, vol. 2, para. 915.

¹³⁴⁶ Trial Judgement, vol. 2, para. 915, stating that “the Chamber does not accept Gavranić’s assertion that people left Prilepnica/Përlepnica because of NATO bombing.” Although Lukić claims that the Trial Chamber omitted Gavranić’s evidence that civilians fleeing Prilepnica/Përlepnica told police that they left when NATO bombing intensified (Lukić’s Appeal Brief, para. 795, citing Dušan Gavranić, 19 Feb 2008, T. 22702-22705. See also Lukić’s Appeal Brief, para. 811), the witness indicated only that NATO bombing was increasing as the villagers were leaving, not that anyone stated that this was the reason for their departure (Dušan Gavranić, 19 Feb 2008, T. 22702-22705. See also *ibid.*, T. 22706, describing Gavranić’s own conclusion that villagers became scared of the bombing).

¹³⁴⁷ Trial Judgement, vol. 2, paras 941-942. See also *ibid.*, vol. 2, paras 894, 915.

¹³⁴⁸ Trial Judgement, vol. 2, para. 941.

¹³⁴⁹ Trial Judgement, vol. 2, para. 942.

¹³⁵⁰ Lukić argues that the Trial Chamber omitted to mention Smiljanić’s evidence that “around 40% of NATO targets were civilian” and that cluster bombs and munitions with depleted uranium were used (Lukić’s Appeal Brief, para. 794, referring to Spasoje Smiljanić, 17 Sep 2007, T. 15749-15752). However, Lukić has failed to show how this evidence, which concerns air strikes in the entirety of the Federal Republic of Yugoslavia (see Spasoje Smiljanić, 17 Sep 2007, T. 15750), demonstrates that the Trial Chamber erred in its findings as to NATO actions in Gnjilane/Gjilan municipality in particular. His assertion that evidence of K81 supports Gavranić’s claim that civilians fled out of fear of NATO attacks (Lukić’s Appeal Brief, para. 795, referring to Trial Judgement, vol. 2, para. 930) is likewise unsupported by the evidence.

Vladovo/Lladova.¹³⁵¹ In this respect, he also points to evidence of the MUP's alleged investigations of killings, theft, and destruction of property as supporting the conclusion that MUP members were not involved in the crimes committed in these locations.¹³⁵² The Appeals Chamber however notes that the Trial Chamber found that Lukić was a member of a JCE¹³⁵³ and that crimes of both the MUP and the VJ were imputable to him as member of this JCE, including crimes of forcible displacement.¹³⁵⁴ Accordingly, even if Lukić could establish that the Trial Chamber erred in finding that members of the MUP were involved in the crimes at issue, he has failed to show how this would render his convictions unsafe, given the involvement of VJ members in these same crimes and his responsibility for the crimes of both the MUP *and* the VJ. Lukić's challenge is, accordingly, dismissed.¹³⁵⁵

429. For the foregoing reasons, the Appeals Chamber dismisses sub-ground D(2) in part and ground GG in part of Lukić's appeal.

7. Kačanik/Kaçanik

430. The Trial Chamber found that the VJ and the MUP, *inter alia*, participated in the commission of deportation and other inhumane acts (forcible transfer) as crimes against humanity in Kotlina/Kottlina village, Dubrava/Lisnaja village, and Kačanik/Kaçanik town in Kačanik/Kaçanik municipality.¹³⁵⁶ Lazarević was convicted for aiding and abetting these crimes under Article 7(1) of the Statute.¹³⁵⁷ Lazarević challenges these convictions.¹³⁵⁸ Lukić was also convicted of committing these crimes (through his participation in a JCE) under Article 7(1) of the Statute.¹³⁵⁹ Lukić challenges the Trial Chamber's relevant findings in this regard.¹³⁶⁰ The Appeals Chamber will address the arguments of Lazarević and Lukić in turn.

¹³⁵¹ Lukić's Appeal Brief, paras 96, 100, 797-802, 805-807, 810-813.

¹³⁵² Lukić's Appeal Brief, paras 801-802, 805-806, 812.

¹³⁵³ Trial Judgement, vol. 3, paras 938, 1130-1131. Lukić's challenges with respect to the Trial Chamber's findings regarding his JCE membership are addressed below (see *infra*, sub-section VII.F.).

¹³⁵⁴ Trial Judgement, vol. 3, paras 1132-1133.

¹³⁵⁵ Lukić's submissions concerning protections provided by the MUP to civilians (Lukić's Appeal Brief, para. 811; Lukić's Reply Brief, para. 124) as well as his claims that the Trial Chamber overlooked evidence that the "paramilitaries" present in Žegra/Zhegra were VJ reservists or volunteers (Lukić's Appeal Brief, para. 800) and that armed locals who wore solid blue uniforms in Vladovo/Lladova could have been part of the Civilian Protection, not of the police (Lukić's Appeal Brief, para. 100), are rejected on this same basis. Additionally, insofar as Lukić submits that the Trial Chamber's findings as to conduct by the MUP do not satisfy a legal standard for deportation (Lukić's Appeal Brief, para. 813), his claim is undeveloped and, therefore, dismissed. Lukić also argues that the Trial Chamber's error in holding him liable for forcible displacement in Gnjlane/Gjilan municipality is "particularly true given its finding as to Nosalje that insufficient evidence existed of forcible displacement" (Lukić's Appeal Brief, para. 785, referring to Trial Judgement, vol. 2, para. 947), but has failed to develop his argument, which is likewise rejected.

¹³⁵⁶ Trial Judgement, vol. 2, paras 1067, 1099, 1148, 1253-1257, 1259-1261. See also *ibid.*, vol. 2, paras 1170-1171.

¹³⁵⁷ Trial Judgement, vol. 3, paras 930, 1211.

¹³⁵⁸ Lazarević's Appeal Brief, paras 186-208. See also *ibid.*, paras 266-275.

¹³⁵⁹ Trial Judgement, vol. 3, paras 1138, 1212.

¹³⁶⁰ Lukić's Appeal Brief, para. 101. See also *ibid.*, paras 91-93.

(a) Lazarević's appeal(i) Kotlina/Kotllina

431. Based upon, *inter alia*, the evidence of Hazbi Loku, the Trial Chamber found that VJ and MUP forces attacked and partially burned the village of Kotlina/Kotllina on 9 March 1999.¹³⁶¹ The Trial Chamber also found that on 24 March 1999, elements of the 243rd Mechanised Brigade of the VJ, in cooperation with MUP forces, shelled and encircled the village.¹³⁶² The Trial Chamber further found that there was a KLA presence “of some kind” in, or close to, Kotlina/Kotllina on 24 March 1999.¹³⁶³ According to the Trial Chamber, however, even if the purpose of the VJ and MUP action on 24 March 1999 had been to “destroy” the KLA, many villagers were also forced to flee, with women and children forced to board or walk behind military trucks headed to Kačanik/Kaçanik town.¹³⁶⁴ Other villagers fled out of fear to Macedonia following the attack.¹³⁶⁵ The Trial Chamber concluded that “these events amounted to an attack upon the civilian population in the area”¹³⁶⁶ and that “[t]he fact that houses were set on fire and people were abused shows that the physical perpetrators intended for the Kosovo Albanian residents of Kotlina/Kotllina to go to Macedonia”.¹³⁶⁷

a. Submissions of the parties

432. Lazarević argues that the Trial Chamber erred in fact when it found that the VJ, in cooperation with the MUP, first attacked and partially burned Kotlina/Kotllina village on 9 March 1999 and then later shelled and encircled the village on 24 March 1999, forcing its residents to flee.¹³⁶⁸ In particular, Lazarević submits that a report of the Kosovo Verification Mission (“KVM”) describes fighting at the relevant time and suggests that actions of the “forces of order” on 9 March 1999 were not aimed at civilians, but rather that there was a legitimate, anti-terrorist operation there, of which the MUP was the principal executor.¹³⁶⁹ Lazarević also contends

¹³⁶¹ Trial Judgement, vol. 2, paras 1067, 1253-1255.

¹³⁶² Trial Judgement, vol. 2, paras 1067, 1253-1255.

¹³⁶³ Trial Judgement, vol. 2, para. 1053.

¹³⁶⁴ Trial Judgement, vol. 2, paras 1067, 1170, 1253-1255.

¹³⁶⁵ Trial Judgement, vol. 2, paras 1067, 1253-1255.

¹³⁶⁶ Trial Judgement, vol. 2, para. 1253.

¹³⁶⁷ Trial Judgement, vol. 2, para. 1254.

¹³⁶⁸ Lazarević's Appeal Brief, paras 185-196. Lazarević also claims that the Trial Chamber erred as a matter of law in entering convictions with respect to events in Kotlina/Kotllina (*ibid.*, paras 268-269. See also *ibid.*, paras 223-230). In addition, he cites evidence which, he claims, illustrates “the factors of influence on the movement of civilians in the area” of Kačanik/Kaçanik municipality in general and shows that any actions by the VJ were taken against the KLA rather than civilians (*ibid.*, paras 266-267).

¹³⁶⁹ Lazarević's Appeal Brief, para. 186, referring to Exh. 3D179, also admitted as Exh. P444. Lazarević also asserts that the KVM document does not establish whether VJ members entered the village itself (Lazarević's Appeal Brief,

that the testimony of 6D1 shows that the VJ did not lead the operation on 24 March 1999¹³⁷⁰ and that, in any event, the operation was a legitimate, counter-terrorist action.¹³⁷¹ He adds that no reasonable trier of fact could have found Hazbi Loku to be credible given the inconsistencies in Loku's evidence.¹³⁷² Finally, in Lazarević's view, the removal of civilians from Kotlina/Kotllina to Kačanik/Kaçanik town can be interpreted as evacuation from a combat zone and the fact that they were not taken to Macedonia, but rather away from the state border, suggests that there was no intention to expel or forcibly relocate them.¹³⁷³

433. The Prosecution responds that Lazarević's arguments should be summarily dismissed and, in any event, fail on the merits.¹³⁷⁴ With regard to the events of 9 March 1999, the Prosecution submits that Lazarević fails to show that the Trial Chamber erred in concluding both that the principal perpetrators intended to displace the Kosovo Albanian residents of Kotlina/Kotllina and that they had no reason for doing so.¹³⁷⁵ Moreover, according to the Prosecution, the KVM report cited by Lazarević corroborates Loku's account of the VJ's participation in the operation.¹³⁷⁶ As for the events of 24 March 1999, the Prosecution argues that Lazarević fails to show that the Trial Chamber erred in its conclusions with regard to the testimony of 6D1¹³⁷⁷ and adds that Lazarević likewise fails to show that the Trial Chamber erred in its careful approach to Loku's evidence.¹³⁷⁸ Finally, the Prosecution contends that Lazarević does not explain how a legitimate attack or lawful evacuation could include forcing women and children to board military trucks and forcing others, at gunpoint, to walk to Kačanik/Kaçanik town.¹³⁷⁹

434. In reply, Lazarević reiterates that the evidence shows that the MUP was engaged in a legitimate action against the KLA on 9 March 1999¹³⁸⁰ and that the VJ was not involved in the events of 24 March 1999.¹³⁸¹ He also asserts that he reasonably contested "the biased and inconsistent testimony" of Loku.¹³⁸²

para. 186) and that the Trial Chamber failed to consider document marked 5D1220 which, in his view, shows that they did not (*ibid.*, para. 187).

¹³⁷⁰ Lazarević's Appeal Brief, paras 192-193.

¹³⁷¹ Lazarević's Appeal Brief, paras 189, 194, discussing Trial Judgement, vol. 2, para. 1053, Exh. 6D501.

¹³⁷² Lazarević's Appeal Brief, paras 190-191.

¹³⁷³ Lazarević's Appeal Brief, para. 195.

¹³⁷⁴ Prosecution's Response Brief (Lazarević), paras 186-187, 216-217.

¹³⁷⁵ Prosecution's Response Brief (Lazarević), para. 190.

¹³⁷⁶ Prosecution's Response Brief (Lazarević), para. 191. The Prosecution submits that the other document to which Lazarević refers, document marked 5D1220, was ultimately not admitted into evidence and is therefore outside the scope of the appeal (*ibid.*, para. 194).

¹³⁷⁷ Prosecution's Response Brief (Lazarević), para. 197.

¹³⁷⁸ Prosecution's Response Brief (Lazarević), para. 196.

¹³⁷⁹ Prosecution's Response Brief (Lazarević), para. 198.

¹³⁸⁰ Lazarević's Reply Brief, para. 96.

¹³⁸¹ Lazarević's Reply Brief, para. 98.

¹³⁸² Lazarević's Reply Brief, para. 97.

b. Analysis

435. At the outset, the Appeals Chamber observes that although the Trial Chamber found that VJ and MUP forces attacked and partially burned the village of Kotlina/Kotllina during clashes with the KLA on 9 March 1999, it did not find that the local residents were forcibly displaced *during* this incident in early March.¹³⁸³ Rather, the Trial Chamber found that forcible displacement was committed in this location, after finding that VJ and MUP forces shelled and encircled the village on 24 March 1999, causing the local residents to flee.¹³⁸⁴ The Trial Chamber found the incident in this village on 24 March 1999 to be part of the pattern of events demonstrating that there was a campaign of violence directed against the Kosovo Albanian population during the period starting from 24 March 1999 that caused the departure of at least 700,000 Kosovo Albanians from Kosovo.¹³⁸⁵ Thus, the Appeals Chamber understands the Trial Chamber to have not considered its finding on the attack of 9 March 1999 to be relevant to its conclusion that VJ and MUP forces committed the crimes of deportation and other inhumane acts (forcible transfer) as crimes against humanity in this location. Accordingly, Lazarević's arguments concerning the incident on 9 March 1999 are dismissed as the errors he alleges have no impact on his conviction.¹³⁸⁶

436. Turning to the events of 24 March 1999, the Appeals Chamber notes that the Trial Chamber found, based primarily on the evidence of Hazbi Loku, that an attack by VJ and MUP forces forced many villagers to flee Kotlina/Kotllina in what amounted to an attack upon the civilian population.¹³⁸⁷ Loku gave evidence, *inter alia*, that men from the village were beaten, kicked, and struck with rifle butts, that some 400 individuals (mainly women and children) were forcibly loaded onto trucks while others were forced to walk behind the trucks at gunpoint and threatened, and that every building in the village, including the school, started to burn almost simultaneously.¹³⁸⁸ Although, the Trial Chamber found that there was a KLA presence in or close to Kotlina/Kotllina on the day in question, Lazarević has failed to show how this fact or the other evidence to which he refers of alleged terrorist acts in the village¹³⁸⁹ demonstrates that the Trial Chamber's findings as to the relevant actions of VJ and MUP forces were unreasonable. His arguments concerning 6D1 are similarly unavailing, as he simply repeats arguments that were unsuccessful at trial without

¹³⁸³ Trial Judgement, vol. 2, paras 1067, 1253, read together with *ibid.*, vol. 2, paras 1018-1020, 1027, 1029-1030.

¹³⁸⁴ Trial Judgement, vol. 2, paras 1067, 1253.

¹³⁸⁵ Trial Judgement, vol. 2, paras 1156, 1170, 1178, 1253.

¹³⁸⁶ See Lazarević's Appeal Brief, paras 186-188.

¹³⁸⁷ Trial Judgement, vol. 2, paras 1067, 1253. See also *ibid.*, vol. 2, para. 1254, noting that "houses were set on fire and people were abused".

¹³⁸⁸ Trial Judgement, vol. 2, paras 1035-1038, and references therein.

¹³⁸⁹ Lazarević's Appeal Brief, para. 194, discussing Exh. 6D501.

demonstrating that their rejection by the Trial Chamber amounts to an error warranting the Appeals Chamber's intervention.¹³⁹⁰

437. Lazarević also points to purported inconsistencies in Loku's evidence concerning certain murders that allegedly took place in Kotlina/Kotllina and argues that the witness is therefore not credible.¹³⁹¹ The Appeals Chamber notes that the Trial Chamber's findings related to forcible displacement were based on Hazbi Loku's evidence, which was corroborated by that of Krsman Jelić and by documentary evidence.¹³⁹² The Appeals Chamber further observes that the Trial Chamber considered the evidence of Loku cautiously, finding him credible in general but taking particular note of inconsistencies in his evidence concerning the allegations of murder.¹³⁹³ The Trial Chamber also provided detailed reasons as to why it decided not to rely on Loku's evidence in relation to the alleged murders.¹³⁹⁴ The Appeals Chamber recalls that trial chambers are best placed to assess the credibility of a witness¹³⁹⁵ and further recalls that trial chambers may reasonably accept certain parts of a witness's testimony, but reject others.¹³⁹⁶ In light of the foregoing, Lazarević has failed to show that the Trial Chamber erred in accepting Loku's evidence regarding forcible displacement.

438. Finally, Lazarević claims that the "alleged removal of civilians" from Kotlina/Kotllina "can be interpreted as evacuation of civilians from the zone of combat activities",¹³⁹⁷ since the civilians were moved in the direction away from the state border¹³⁹⁸ and since, in his view, they would have been sent towards the border if the purpose had, indeed, been to forcibly relocate or expel them.¹³⁹⁹ The Appeals Chamber considers, however, that Lazarević merely seeks to offer his own interpretation of the evidence and has not shown that the Trial Chamber's findings as to forcible displacement were unreasonable. The Appeals Chamber therefore dismisses this claim.¹⁴⁰⁰

¹³⁹⁰ Compare Lazarević's Appeal Brief, paras 192-193, with Lazarević's Closing Brief, paras 291-292, 295-296. See also *supra*, para. 396 for finding as to argument that MUP was "principal executor".

¹³⁹¹ Lazarević's Appeal Brief, paras 190-191.

¹³⁹² Trial Judgement, vol. 2, para. 1067.

¹³⁹³ Trial Judgement, vol. 2, paras 1009, 1068-1078.

¹³⁹⁴ Trial Judgement, vol. 2, paras 1068-1078. See also *ibid.*, vol. 2, para. 1009.

¹³⁹⁵ See, e.g., *Nahimana et al.* Appeal Judgement, para. 949; *Rutaganda* Appeal Judgement, para. 188; *Tadić* Appeal Judgement, para. 64.

¹³⁹⁶ *Bošković and Tarčulovski* Appeal Judgement, para. 59, and references therein.

¹³⁹⁷ Lazarević's Appeal Brief, para. 195.

¹³⁹⁸ See Trial Judgement, vol. 2, paras 1008, 1067.

¹³⁹⁹ Lazarević's Appeal Brief, para. 195.

¹⁴⁰⁰ Lazarević's claims of legal error with respect to events in Kotlina/Kotllina (see *supra*, fn. 822) are likewise dismissed, as his allegations of legal error simply repeat several of his evidentiary arguments which have been found to be without merit. As for his claims concerning evidence related to Kačanik/Kaçanik municipality in general (see *supra* fn. 822), he has failed to articulate any specific error and merely advances his own interpretation of the evidence. His arguments are, accordingly, rejected.

(ii) Dubrava/Lisnaja

439. Based upon, *inter alia*, the evidence of Fadil Vishi, the Trial Chamber found that VJ, MUP, and other unidentified forces attacked the village of Dubrava/Lisnaja on 25 May 1999, forcing residents to flee to other villages and then to Macedonia.¹⁴⁰¹ The Trial Chamber further found that the attack was mounted against the civilian population of Dubrava/Lisnaja and that it was the actions of VJ and MUP forces that caused the Kosovo Albanians from Dubrava/Lisnaja to leave “out of fear of the consequences should they remain”.¹⁴⁰²

a. Submissions of the parties

440. Lazarević contends that the Trial Chamber erred in finding that the VJ and others attacked Dubrava/Lisnaja on 25 May 1999.¹⁴⁰³ In particular, he challenges the Trial Chamber’s finding that VJ actions were directed against the civilian population, arguing that the evidence shows instead that there was a significant KLA presence “in the area”, that the actions of the VJ and the MUP were undertaken solely against the KLA, and that the VJ undertook no offensive activities.¹⁴⁰⁴ Lazarević also notes that the incident in Dubrava/Lisnaja occurred considerably after the time period in which the majority of other incidents charged in the Indictment occurred.¹⁴⁰⁵ Finally, he suggests that the civilian population left the village upon the orders of Fadil Vishi, “the village chief”, and were not forcibly expelled by Serbian forces.¹⁴⁰⁶

441. The Prosecution responds that the Trial Chamber correctly found that the VJ’s actions could not qualify as legitimate combat and submits that Lazarević ignores the evidence regarding the events in Dubrava/Lisnaja upon which the Trial Chamber relied.¹⁴⁰⁷ The Prosecution adds that

¹⁴⁰¹ Trial Judgement, vol. 2, paras 1148, 1259-1260.

¹⁴⁰² Trial Judgement, vol. 2, paras 1259-1260. See also *ibid.*, vol. 2, para. 1148.

¹⁴⁰³ Lazarević’s Appeal Brief, para. 202, referring to Trial Judgement, vol. 2, paras 1148, 1171. Lazarević also claims that the Trial Chamber erred as a matter of law and lists examples which, he suggests, demonstrate that the Trial Chamber applied an “arbitrary approach” to the evidence and failed to take into account all available evidence (Lazarević’s Appeal Brief, para. 274. See also *ibid.*, paras 223-230).

¹⁴⁰⁴ Lazarević’s Appeal Brief, paras 203-206, 208, referring, *inter alia*, to Exh. P370 and document marked “6D1314.1.1” or “5D1314”.

¹⁴⁰⁵ Lazarević’s Appeal Brief, para. 206.

¹⁴⁰⁶ Lazarević’s Appeal Brief, paras 207-208.

¹⁴⁰⁷ Prosecution’s Response Brief (Lazarević), p. 68, para. 206, referring to Trial Judgement, vol. 2, paras 1141-1146. The Prosecution notes that one of the documents to which Lazarević refers, document marked 6D1314 (or 5D1314), was not admitted at trial and therefore may not be considered by the Appeals Chamber (Prosecution’s Response Brief (Lazarević), para. 205).

Lazarević misrepresents the Trial Chamber’s finding that Vishi advised villagers to leave Dubrava/Lisnaja and that Vishi never ordered them to leave.¹⁴⁰⁸

442. In reply, Lazarević denies misrepresenting the testimony of Vishi, which, he insists, demonstrates that residents were instructed to go to Macedonia before “any action took place”.¹⁴⁰⁹

b. Analysis

443. In support of his argument that the Trial Chamber erred in finding that VJ actions were directed against the civilian population of Dubrava/Lisnaja, Lazarević points to evidence that there was a KLA presence “in the area”.¹⁴¹⁰ However, he does not address the evidence underlying the Trial Chamber’s findings, including the evidence of Fadil Vishi, partially corroborated by Krsman Jelić and other evidence, that “Serbian forces” surrounded the village in the night equipped with heavy weapons, that Vishi advised villagers to leave, that the villagers agreed to do so because they knew about and feared what had happened in other villages, and that thereafter Vishi saw his house burning and heard about bodies being found in and around the village.¹⁴¹¹ Lazarević has also not shown how evidence of a KLA presence “in the area” is inconsistent with the Trial Chamber’s finding that VJ forces and others attacked the village of Dubrava/Lisnaja and that this attack amounted to an attack against the civilian population. Nor does he substantiate his assertion that the actions of the VJ and the MUP were undertaken solely against the KLA.¹⁴¹² His claim in this regard is, accordingly, dismissed.

444. As for Lazarević’s submission that VJ forces undertook no offensive action, the Appeals Chamber notes that the Trial Chamber explicitly considered Krsman Jelić’s assertion that his unit only defended its own positions in the area, but also took into account that Jelić gave contradictory

¹⁴⁰⁸ Prosecution’s Response Brief (Lazarević), para. 207, referring to Trial Judgement, vol. 2, para. 1142. The Prosecution further submits that Lazarević’s arguments of legal error are undeveloped, repeat his evidentiary claims, and should be summarily dismissed (Prosecution’s Response Brief (Lazarević), paras 216-217).

¹⁴⁰⁹ Lazarević’s Reply Brief, paras 100-101.

¹⁴¹⁰ Lazarević’s Appeal Brief, paras 203, 206. In particular, Lazarević points to the evidence of Vishi that the headquarters of the KLA’s 162nd Brigade was located about three kilometres outside the village (see *ibid.*, para. 203; Trial Judgement, vol. 2, para. 1141) and suggests that Dashi also gave evidence that the KLA used to come to the village (Lazarević’s Appeal Brief, para. 203). The Appeals Chamber notes, however, that in the testimony cited by Lazarević, Dashi states that he had heard that the KLA stayed away from Dubrava/Lisnaja and that it only *might* have entered the village, though he does not specify when this might have occurred (Muharrem Dashi, 11 Oct 2006, T. 4628-2629).

¹⁴¹¹ Trial Judgement, vol. 2, paras 1141-1147, and references therein.

¹⁴¹² Lazarević cites a document alternately referred to as “6D1314.1.1” and “5D1314” in support of this claim (Lazarević’s Appeal Brief, para. 204, and references therein), but the Appeals Chamber notes that this document was never admitted into evidence at trial (see *Prosecutor v. Milutinović et al.*, Case no. IT-05-87-T, Confidential Exhibit List, Public Exhibit List, Certificate on Confidential Exhibit List and the Certificate on the Public Exhibit List, all filed on 10 November 2009) and therefore is not part of the record on appeal. Lazarević also refers to the testimony of Jelić (Lazarević’s Appeal Brief, para. 204, referring to Krsman Jelić, 23 Nov 2007, T. 18920-18921), but has failed to

evidence on cross-examination concerning a “joint action” under the name “Dubrava”, whereby the VJ, together with MUP forces, crushed the “terrorists” and blocked them from their combat positions.¹⁴¹³ In light of this latter evidence as well as the other evidence in the record,¹⁴¹⁴ the Appeals Chamber considers that Lazarević has failed to demonstrate that the Trial Chamber’s finding was erroneous.

445. Turning to Lazarević’s argument that the Trial Chamber should have found that the villagers left Dubrava/Lisnaja on the orders of Vishi, the Appeals Chamber notes that the Trial Chamber considered the evidence that Vishi advised the villagers to leave and go to Macedonia after he learned that “Serbian forces” equipped with heavy weapons had surrounded Dubrava/Lisnaja.¹⁴¹⁵ The Trial Chamber further considered Vishi’s evidence that the villagers decided to leave because “they knew about, and feared, what had happened in other villages.”¹⁴¹⁶ Bearing in mind the Trial Chamber’s general finding that Vishi was credible,¹⁴¹⁷ the Appeals Chamber considers that Lazarević has failed to show that the Trial Chamber committed an error concluding that the villagers left Dubrava/Lisnaja out of fear, as Vishi testified.¹⁴¹⁸

(iii) Kaçanik/Kaçanik town

446. Based primarily on the evidence of Isa Raka, the Trial Chamber found that VJ and MUP forces entered Kačanik/Kaçanik town on 27 March 1999 and fired on houses.¹⁴¹⁹ The Trial Chamber further found that this event caused several hundred residents to leave Kačanik/Kaçanik town, either out of fear or because they were directly expelled from their homes by the police.¹⁴²⁰ The Trial Chamber concluded that these events amounted to an attack on the Kosovo Albanian civilian population of Kačanik/Kaçanik town.¹⁴²¹

explain how this testimony, which concerns the recovery of weapons from various locations at unspecified times, demonstrates that VJ and MUP forces acted solely against the KLA.

¹⁴¹³ Trial Judgement, vol. 2, paras 1145-1146, and references therein. See also *ibid.*, vol. 2, para. 1010. Lazarević also refers to Exhibit P370 in support of his claim that the VJ only took defensive positions (Lazarević’s Appeal Brief, paras 203, 205). According to Jelić, the map included in Exhibit P370, which is part of an Austrian forensic report, correctly depicts the VJ artillery positions near Dubrava/Lisnaja (Krsman Jelić, 27 Nov 2007, T. 19146-19147). However, Lazarević does not substantiate his claim that these positions were taken for the purpose of the defence of the FRY from the direction of Macedonia, nor does he show how this evidence demonstrates any error by the Trial Chamber.

¹⁴¹⁴ Trial Judgement, vol. 2, paras 1141-1144, and references therein.

¹⁴¹⁵ Trial Judgement, vol. 2, paras 1141-1142.

¹⁴¹⁶ Trial Judgement, vol. 2, para. 1142.

¹⁴¹⁷ Trial Judgement, vol. 2, para. 1009.

¹⁴¹⁸ Lazarević’s argument that the incident in Dubrava/Lisnaja occurred considerably after the time period in which the majority of other incidents charged in the Indictment fails to articulate any error and is, accordingly, dismissed. Lazarević’s claims of legal error with respect to events in Dubrava/Lisnaja (see *supra*, fn. 822) are likewise dismissed, as his allegations of legal error simply repeat several of his evidentiary arguments which have been found to be without merit.

¹⁴¹⁹ Trial Judgement, vol. 2, paras 1099, 1256.

¹⁴²⁰ Trial Judgement, vol. 2, paras 1099, 1256-1257.

¹⁴²¹ Trial Judgement, vol. 2, para. 1256.

a. Submissions of the parties

447. Lazarević submits that the Trial Chamber wrongly based its conclusion that the VJ participated in the 27 March 1999 operation in Kačanik/Kaçanik town on the testimony of Isa Raka, as that witness was “unable to offer reliable data” that the individuals whom he identified as wearing green camouflage uniforms “were indeed army members”.¹⁴²² Moreover, according to Lazarević, Raka’s evidence that a member of the police led the operation further demonstrates that VJ forces were not involved, as it would have been “impossible for one structure to be under the command of the other”.¹⁴²³ Lazarević adds that, in light of a US Embassy report which confirms that there was a significant KLA presence in Kačanik/Kaçanik town and combat activities there, a reasonable trier of fact would have found that the Serbian “forces of order” were engaged in a legitimate, counter-terrorist operation.¹⁴²⁴

448. The Prosecution responds that Isa Raka consistently described two different types of uniforms worn by perpetrators, adding that Lazarević’s argument that it would have been impossible for the VJ to have been involved in a MUP-led operation “disregards the situation on the ground”, which involved “scores of VJ reservists and VJ volunteers”.¹⁴²⁵ The Prosecution also points out that the Trial Chamber rejected Krsman Jelić’s denial of VJ involvement in any action in the town and contends that, for all of these reasons, Lazarević’s argument should be rejected.¹⁴²⁶ Finally, the Prosecution submits that Lazarević’s claims concerning KLA activities repeat arguments already rejected at trial and are without merit.¹⁴²⁷

449. In reply, Lazarević reiterates his arguments and submits that the Prosecution is engaging in mere speculation when it asserts that VJ reservists and VJ volunteers could have been under the command of the police in Kačanik/Kaçanik town.¹⁴²⁸

b. Analysis

450. In finding that the VJ was present in Kačanik/Kaçanik town on 27 March 1999, the Trial Chamber relied upon Isa Raka’s evidence that he saw two “military jeeps” and a white “Niva” car

¹⁴²² Lazarević’s Appeal Brief, para. 198. Lazarević further suggests that the Trial Chamber erred as a matter of law by employing an incorrect “principle of evidentiary reasoning and decision making” with respect to Raka’s evidence (*ibid.*, paras 271-272. See also *ibid.*, paras 223-230).

¹⁴²³ Lazarević’s Appeal Brief, paras 198-199.

¹⁴²⁴ Lazarević’s Appeal Brief, paras 200-201, referring to Exh. 6D1638, p. 4, Trial Judgement, vol. 2, para. 1089.

¹⁴²⁵ Prosecution’s Response Brief (Lazarević), para. 201. The Prosecution also argues that Lazarević’s claim of alleged legal errors is undeveloped and repetitive of his factual arguments, and should be summarily dismissed (*ibid.*, paras 216-217).

¹⁴²⁶ Prosecution’s Response Brief (Lazarević), para. 201.

¹⁴²⁷ Prosecution’s Response Brief (Lazarević), para. 202.

¹⁴²⁸ Lazarević’s Reply Brief, para. 99.

approach a lime factory.¹⁴²⁹ According to Raka, approximately 20 to 30 policemen wearing blue and white camouflage police uniforms and two officers wearing regular VJ green and brown camouflage disembarked from these vehicles¹⁴³⁰ and took up positions in and around the lime factory, from which they began shooting towards houses.¹⁴³¹ Raka testified repeatedly that the latter two individuals wore “green camouflage” uniforms.¹⁴³²

451. The Appeals Chamber notes that Raka did not give evidence concerning any markings on the vehicles or any insignia on the uniforms of the two men he saw wearing green camouflage.¹⁴³³ The Appeals Chamber observes that it is unclear how Raka identified the jeeps as “military jeeps” as he did not provide any indication as to how he knew these were military jeeps or identified them as such at the time. In addition, the Appeals Chamber notes that “Nivas” were also used by PJP units.¹⁴³⁴ The Appeals Chamber further notes that, as explained in the context of another municipality,¹⁴³⁵ the Trial Chamber found that it was wrong to assume that the VJ were the only ones to wear green uniforms¹⁴³⁶ and that members of the PJP, SAJ, and the Special Operations Unit of the MUP State Security Department (“JSO”) of the MUP wore green camouflage uniforms at the relevant time.¹⁴³⁷ In these circumstances, Raka’s testimony, taken in isolation, cannot reasonably provide sufficient identification of the two individuals as members of the VJ.

452. Although the Prosecution suggests that the situation on the ground involved scores of VJ reservists and VJ volunteers, the Prosecution has failed to point to any evidence demonstrating that the two men observed by Raka were VJ reservists or volunteers.¹⁴³⁸ The Appeals Chamber observes, moreover, that there is no other evidence of VJ presence in Kačanik/Kaçanik town at the relevant time¹⁴³⁹ and that the Trial Chamber found that “several hundred of the town’s residents left their homes out of fear of the *police* forces, or because they were directly expelled from their homes

¹⁴²⁹ Trial Judgement, vol. 2, para. 1089, and references therein. See also *ibid.*, vol. 2, para. 1099.

¹⁴³⁰ Trial Judgement, vol. 2, para. 1089, and references therein.

¹⁴³¹ Trial Judgement, vol. 2, paras 1090-1091, and references therein.

¹⁴³² Isa Raka, 19 Sep 2006, T. 3519, 3547. See also *ibid.*, T. 3547 (“I know that the police uniforms are blue camouflage, and these were different.”).

¹⁴³³ See Isa Raka, Exh. P2301, paras 12-21; Isa Raka, 19 Sep 2006, T. 3514-3551.

¹⁴³⁴ Trial Judgement, vol. 1, para. 672; Dragan Živaljević, Exh. 6D1606, para. 9.

¹⁴³⁵ See *supra*, fn. 1246.

¹⁴³⁶ Trial Judgement, vol. 2, para. 727.

¹⁴³⁷ Trial Judgement, vol. 1, paras 710, 712, 714, 716.

¹⁴³⁸ See Prosecution’s Response Brief (Lazarević), para. 201, referring to Trial Judgement, vol. 1, paras 570-657.

¹⁴³⁹ The Trial Chamber took note of a MUP report suggesting that on 27 March 1999 a column of VJ vehicles was attacked by “terrorists” from the lime factory described by Raka, but it made no finding as to the report’s accuracy (Trial Judgement, vol. 2, para. 1091, referring, *inter alia*, to Exh. P1099, p. 3). The Appeals Chamber observes that, in any event, the incident described in the MUP report purportedly occurred between 4:00 p.m. and 5:00 p.m. and involved a purported “terrorist” attack from the lime factory (Exh. P1099, p. 3), while the incident described by Raka occurred in the morning and involved MUP forces and others taking positions in and shooting from the lime factory (Trial Judgement, vol. 2, para. 1089-1091; Isa Raka, Exh. P2301, para. 15).

by the *police*".¹⁴⁴⁰ Accordingly, the Appeals Chamber considers that the evidence before the Trial Chamber could not lead a reasonable trier of fact to conclude that the only reasonable inference was that members of the VJ forcibly displaced residents of Kačanik/Kaçanik town.¹⁴⁴¹

453. For the foregoing reasons, the Appeals Chamber grants in part sub-ground 1(i) of Lazarević's appeal insofar as it relates to Kačanik/Kaçanik town and vacates his conviction in relation to the incident in this town. The impact of this finding, if any, on Lazarević's sentence will be addressed below.¹⁴⁴²

(b) Lukić's appeal

454. Lukić challenges the Trial Chamber's reliance on Isa Raka's testimony with respect to its findings concerning the perpetrators of forcible displacement in Kačanik/Kaçanik town. In particular, Lukić avers that Raka's claim that the police wore blue-white uniforms is unacceptable, as the police wore blue or blue-camouflage uniforms and that the witness is therefore unreliable.¹⁴⁴³ In reaching the impugned findings, the Trial Chamber considered, *inter alia*, Raka's evidence that he saw a group of policemen who wore "blue and white camouflage police uniforms"¹⁴⁴⁴ and also took into account that Raka identified one of them, who appeared to be in charge of this group, as a "Deputy Commander" from the police station in Kačanik/Kaçanik whom he knew.¹⁴⁴⁵ The Appeals Chamber recalls that a slight difference between Raka's description of the colour of police uniforms and other evidence does not, in itself, render his evidence unreliable in its entirety or show that his evidence was "adjusted to the needs" of the Prosecution's case.¹⁴⁴⁶ Accordingly, the Appeals Chamber dismisses sub-ground D(2) of Lukić's appeal in part.

8. Orahovac/Rahovec

455. With regard to events in the village of Celina in Orahovac/Rahovec municipality, the Trial Chamber found, *inter alia*, that:

¹⁴⁴⁰ Trial Judgement, vol. 2, para. 1099 (emphasis added). See also *ibid.*, vol. 2, para. 1256; Isa Raka, Exh. P2301, para. 22; Isa Raka, 19 Sep 2006, T. 3526-3527.

¹⁴⁴¹ As a result, the Appeals Chamber does not address any of Lazarević's remaining arguments with regard to Kačanik/Kaçanik town.

¹⁴⁴² See *infra*, sub-section IX.I.

¹⁴⁴³ Lukić's Appeal Brief, para. 101, referring to Trial Judgement, vol. 2, para. 1089. See also Lukić's Appeal Brief, para. 93. The Prosecution does not respond specifically on this point.

¹⁴⁴⁴ Trial Judgement, vol. 2, para. 1089, referring to Isa Raka, Exh. P2301, para. 12, Isa Raka, 19 Sep 2006, T. 3519.

¹⁴⁴⁵ Trial Judgement, vol. 2, para. 1089, referring to Isa Raka, 19 Sep 2006, T. 3520, Isa Raka, Exh. P2301, para. 13.

¹⁴⁴⁶ Lukić's Appeal Brief, para. 101. See *supra*, fn. 1115.

the VJ surrounded Celina on 25 March 1999 and shelled the village. Mixed VJ and MUP forces, including irregular forces, entered the village and looted and set fire to houses. The villagers consequently fled out of fear.¹⁴⁴⁷

The Trial Chamber concluded that these and other actions “amounted to an attack upon the civilian population of Celina”¹⁴⁴⁸ and that the VJ and MUP forces caused the departure of the residents of Celina “without legitimate reason.”¹⁴⁴⁹ The Trial Chamber convicted Lazarević for aiding and abetting, under Article 7(1) of the Statute, deportation and other inhumane acts (forcible transfer) as crimes against humanity in relation to the events in Celina.¹⁴⁵⁰ Lazarević challenges these convictions.¹⁴⁵¹

(a) Submissions of the parties

456. Lazarević submits that the Trial Chamber erred in fact when it concluded that the VJ, acting jointly with the MUP and irregular forces, surrounded and shelled the village of Celina on 25 and 26 March 1999, causing its residents to flee.¹⁴⁵² He asserts that the Trial Chamber erred in relying upon the evidence of Agim Jemini and Reshit Salihi to find that VJ forces were present in Celina¹⁴⁵³ and shelled Celina at the relevant time.¹⁴⁵⁴ Lazarević also contends that no reasonable trial chamber could have found that VJ activities in the area around Celina were directed against civilians.¹⁴⁵⁵ In this regard, he argues that the Trial Chamber erred both in fact and in law in rejecting the testimony of Božidar Delić and Vlatko Vuković concerning VJ activities on the days in question without providing a “valid explanation”.¹⁴⁵⁶ He also posits that the Trial Chamber failed to consider evidence, including Zyrapi’s testimony and Exhibit P2447, a map of KLA held areas, showing that there were clashes with the KLA in the area and that Celina was inside the KLA combat zone.¹⁴⁵⁷ In his view, if there was any shelling of Celina, the evidence demonstrates that the shelling was aimed at KLA positions and that there was neither damage to civilian objects nor any injuries.¹⁴⁵⁸ Finally, Lazarević stresses that a reasonable trier of fact would have found that the civilian population was moved from Celina upon orders of the KLA.¹⁴⁵⁹

¹⁴⁴⁷ Trial Judgement, vol. 2, paras 334. See also *ibid.*, vol. 2, para. 1206.

¹⁴⁴⁸ Trial Judgement, vol. 2, para. 1206.

¹⁴⁴⁹ Trial Judgement, vol. 2, para. 1207.

¹⁴⁵⁰ Trial Judgement, vol. 3, paras 930, 1211.

¹⁴⁵¹ Lazarević’s Appeal Brief, paras 106-128. See also *ibid.*, paras 252-253.

¹⁴⁵² Lazarević’s Appeal Brief, para. 106.

¹⁴⁵³ Lazarević’s Appeal Brief, paras 111-115. See also *ibid.*, para. 107.

¹⁴⁵⁴ Lazarević’s Appeal Brief, p. 29, paras 108-109.

¹⁴⁵⁵ Lazarević’s Appeal Brief, paras 116-121. See also *ibid.*, paras 108-110.

¹⁴⁵⁶ Lazarević’s Appeal Brief, paras 116, 120-121, 252-253. See also *ibid.*, paras 107, 223-230.

¹⁴⁵⁷ Lazarević’s Appeal Brief, paras 121-125, 127.

¹⁴⁵⁸ Lazarević’s Appeal Brief, paras 108-110.

¹⁴⁵⁹ Lazarević’s Appeal Brief, paras 126, 128.

457. The Prosecution responds that this sub-ground of appeal warrants summary dismissal,¹⁴⁶⁰ but that, in any event, Lazarević fails to demonstrate any error on the part of the Trial Chamber.¹⁴⁶¹ In particular, the Prosecution submits that the Trial Chamber considered and dismissed Lazarević's arguments concerning the identification evidence of Agim Jemini and Reshit Salihi and that the Trial Chamber reasonably rejected the Defence evidence cited by Lazarević concerning the location and actions of the VJ in the area.¹⁴⁶² According to the Prosecution, the Trial Chamber correctly found that the VJ actions in Celina were not legitimate combat activity and that Kosovo Albanian villagers in Celina fled because of the violent attacks of the VJ and the MUP and not because the KLA instructed them to leave.¹⁴⁶³

458. In reply, Lazarević reiterates his arguments and submits that the Prosecution's position is speculative.¹⁴⁶⁴ He underscores that he has shown that Celina was not shelled, that the VJ was engaged in legitimate combat against the KLA outside of Celina, and that the population withdrew from Celina upon the order of the KLA.¹⁴⁶⁵

(b) Analysis

459. The Appeals Chamber first turns to Lazarević's argument that the Trial Chamber erred in relying upon the evidence of Agim Jemini and Reshit Salihi in finding that VJ members were present in Celina. In this regard, the Appeals Chamber notes that the Trial Chamber found that mixed VJ and MUP forces, including irregular forces, "entered the village and looted and set fire to houses" on 25 March 1999.¹⁴⁶⁶ In reaching this finding, the Trial Chamber considered, *inter alia*, the evidence of Jemini, who stated that the VJ forces who entered Celina were wearing brown-green camouflage uniforms with a two-headed eagle insignia on their left upper arm and that those in command wore dark green, beret-style hats, while "the soldiers wore hats that resembled 'Partisan' style hats" with the same eagle insignia."¹⁴⁶⁷ The Trial Chamber also considered the evidence of Salihi, who testified that "Serb forces" who entered the village were dressed in "black uniforms".¹⁴⁶⁸ The Trial Chamber observed that it found "no reason to doubt the credibility of the

¹⁴⁶⁰ Prosecution's Response Brief (Lazarević), para. 115. See also *ibid.*, para. 123.

¹⁴⁶¹ Prosecution's Response Brief (Lazarević), para. 116.

¹⁴⁶² Prosecution's Response Brief (Lazarević), paras 117-122.

¹⁴⁶³ Prosecution's Response Brief (Lazarević), paras 124-127.

¹⁴⁶⁴ Lazarević's Reply Brief, paras 66-76.

¹⁴⁶⁵ Lazarević's Reply Brief, paras 69-74.

¹⁴⁶⁶ Trial Judgement, vol. 2, para. 334.

¹⁴⁶⁷ Trial Judgement, vol. 2, para. 310, and references therein.

¹⁴⁶⁸ Trial Judgement, vol. 2, para. 310, and references therein.

very detailed and consistent evidence” given by Jemini and Salihi concerning events in Celina on 25 and 26 March 1999.¹⁴⁶⁹

460. As Lazarević underscores,¹⁴⁷⁰ Jemini initially testified that the military forces he saw on 25 March 1999 at about 5:30 a.m. wore “blue camouflage uniforms with patterns” with the two-headed eagle insignia on the left upper arm.¹⁴⁷¹ However, upon further examination, Jemini clarified, to the satisfaction of the Trial Chamber, that he observed forces wearing brown-green camouflage uniforms as well as forces wearing blue uniforms both with double-headed eagles on the chest.¹⁴⁷² Furthermore, the Appeals Chamber observes that the Trial Chamber noted elsewhere in the Trial Judgement that VJ soldiers wore a patch depicting a double-headed eagle on the left shoulder of their uniforms and that “the camouflage pattern of the standard uniform worn in the VJ was a mixture of brown, black and three shades of green”.¹⁴⁷³ The Appeals Chamber cannot discern any error on the part of the Trial Chamber in accepting Jemini’s evidence in this regard.

461. As for Lazarević’s contention that it was a “generally known fact” that the “Partisan” style hats described by Jemini were only worn by the JNA until 1992, Lazarević does not substantiate his claim apart from referring to Božidar Delić’s evidence that his soldiers all wore berets and the “Tito-style caps” were “put out of use a long time ago”.¹⁴⁷⁴ The Appeals Chamber notes that the Trial Chamber explicitly considered Delić’s evidence concerning the uniforms worn by the soldiers in his brigade, but, on the basis of the evidence, rejected the contention that Jemini’s description of uniforms was inconsistent with VJ uniforms worn at the time.¹⁴⁷⁵ Although the Trial Judgement does not address Delić’s testimony concerning headgear,¹⁴⁷⁶ the Appeals Chamber recalls that a trial chamber has a broad discretion in weighing evidence and is not required to articulate every step of its reasoning, nor to list every piece of evidence that it considers in reaching its finding.¹⁴⁷⁷ Lazarević’s claim in this regard is, accordingly, dismissed, as is his submission that the Trial Chamber erred in relying upon the evidence of Jemini identifying VJ members in Celina.

¹⁴⁶⁹ Trial Judgement, vol. 2, para. 333.

¹⁴⁷⁰ Lazarević’s Appeal Brief, para. 111.

¹⁴⁷¹ Agim Jemini, 28 Sep 2006, T. 4232-4233.

¹⁴⁷² Agim Jemini, 28 Sep 2006, T. 4232-4234, 4271-4273; Trial Judgement, vol. 2, para. 310. See also Agim Jemini, Exh. P2338, (statement of 17 July 1999), p. 2.

¹⁴⁷³ Trial Judgement, vol. 1, para. 427.

¹⁴⁷⁴ Lazarević’s Appeal Brief, para. 111, referring to Božidar Delić, 29 Nov 2007, T. 19368.

¹⁴⁷⁵ Trial Judgement, vol. 2, para. 310, referring to Lazarević’s Closing Brief, para. 42, referring to Božidar Delić, 29 Nov 2007, T. 19367-19368.

¹⁴⁷⁶ Trial Judgement, vol. 2, para. 310, referring to Božidar Delić, 29 Nov 2007, T. 19367-19368.

¹⁴⁷⁷ See *Krajišnik* Appeal Judgement, para. 27; *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21. See also *Brdanin* Appeal Judgement, para. 24; *Čelebići* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 115.

462. Lazarević also points to Salihi's evidence that the forces which entered Celina wore black uniforms.¹⁴⁷⁸ The Appeals Chamber notes that the Trial Chamber accepted Salihi's evidence identifying members of the MUP¹⁴⁷⁹ and considers that Lazarević has failed to show how this evidence renders the Trial Chamber's findings concerning the presence of VJ forces unreasonable.¹⁴⁸⁰

463. With regard to Lazarević's arguments that the Trial Chamber erred in finding that the VJ shelled Celina, the Appeals Chamber first notes that he has failed to demonstrate how the evidence of Jemini and Salihi which he cites supports his claim.¹⁴⁸¹ As for the evidence of SD1, a VJ officer,¹⁴⁸² Lazarević correctly observes that the Trial Chamber misapprehended SD1's testimony regarding his unit's position in Celina on 25 March 1999.¹⁴⁸³ Although SD1 gave evidence that his unit took up positions in the school yard in Celina for several hours,¹⁴⁸⁴ the Trial Judgement states that he denied being there.¹⁴⁸⁵ Lazarević has not established, however, that this error renders the Trial Chamber's finding that the VJ shelled Celina on that date unreasonable. In particular, while Lazarević argues that the VJ would not have shelled the village because it would have hit SD1's unit, the Appeals Chamber takes note of Salihi's account, considered credible by the Trial Chamber, that the VJ ceased shelling when its own forces entered the village but recommenced upon their withdrawal and that this pattern was repeated throughout the day.¹⁴⁸⁶ In light of the foregoing and the other evidence of shelling accepted by the Trial Chamber,¹⁴⁸⁷ Lazarević's arguments in this regard are dismissed.

464. The Appeals Chamber next turns to Lazarević's contention that the Trial Chamber rejected the evidence of Božidar Delić and Vlatko Vuković concerning the actions of the VJ without "valid explanation",¹⁴⁸⁸ despite the fact that, Lazarević claims, both gave testimony that was "credible and

¹⁴⁷⁸ Lazarević's Appeal Brief, para. 112. See also *ibid.*, paras 113-115.

¹⁴⁷⁹ Trial Judgement, vol. 2, para. 310. The Trial Chamber explained that other witnesses "also described police uniforms as black" and recalled that "the dark blue police uniform could be described as almost black in colour", noting, however, that "the forces seen by the witnesses may have included reservists, volunteers, and other irregular forces" (*ibid.*).

¹⁴⁸⁰ Trial Judgement, vol. 2, paras 306-307 (referring to evidence that the village was shelled and surrounded by the VJ and that VJ together with MUP forces entered the village), 334.

¹⁴⁸¹ Lazarević's Appeal Brief, p. 29, paras 108-109, referring to Reshit Salihi, 28 Sep 2006, T. 4204-4206, 4209, Agim Jemini, Exh. P2338, p. 2, Agim Jemini, 28 Sep 2006, T. 4245, Exh. IC58, Exh. IC59, Exh. IC60, Exh. IC62, Exh. IC63.

¹⁴⁸² Trial Judgement, vol. 2, para. 318.

¹⁴⁸³ Lazarević's Appeal Brief, para. 117; Trial Judgement, vol. 2, para. 318.

¹⁴⁸⁴ SD1, 13 Dec 2007, T. 20229-20230 (closed session).

¹⁴⁸⁵ Trial Judgement, vol. 2, para. 318.

¹⁴⁸⁶ Trial Judgement, vol. 2, para. 307, referring to Reshit Salihi, Exh. P2336, p. 2. See also Trial Judgement, vol. 2, para. 333. The Appeals Chamber also notes that Lazarević has failed to cite any evidence supporting his contention that SD1's unit was the "only VJ formation in possession of any means capable of shelling" (Lazarević's Appeal Brief, para. 119, referring to SD1, 13 Dec 2007, T. 20229 (closed session)).

¹⁴⁸⁷ Trial Judgement, vol. 2, para. 306, referring to Reshit Salihi, 28 Sep 2006, T. 4209-4210, Reshit Salihi, Exh. P2336, p. 2, Agim Jemini, 28 Sep 2006, T. 4232-4234, 4245, Agim Jemini, Exh. P2338, (statement of 17 July 1999), p. 2. See also Trial Judgement, vol. 2, paras 333-334.

¹⁴⁸⁸ Lazarević's Appeal Brief, paras 252-253.

corroborated by material evidence.”¹⁴⁸⁹ The Appeals Chamber first observes that, contrary to Lazarević’s suggestion,¹⁴⁹⁰ the Trial Chamber did not ignore these witnesses’ statements concerning purported clashes with the KLA in Celina on the morning of 25 March 1999.¹⁴⁹¹ However, the Trial Chamber considered both witnesses’ general denials that their VJ units saw or participated in any of the events in Celina to lack credibility and based its findings with regard to events in Celina primarily on the “very detailed and consistent evidence” of Jemini and Salihi.¹⁴⁹² The Appeals Chamber further notes that even if there were reliable evidence that VJ units engaged in combat with the KLA *outside* of Celina on the dates in question,¹⁴⁹³ as Lazarević suggests,¹⁴⁹⁴ he has not explained how such evidence would render the conclusion unreasonable that the VJ, *inter alia*, shelled and looted Celina on the same dates, causing the villagers to leave out of fear. The Appeals Chamber recalls that trial chambers are best placed to assess the credibility of a witness and the reliability of the evidence adduced¹⁴⁹⁵ and finds that Lazarević has failed to show that the Trial Chamber erred in its approach to the evidence of Delić and Vuković, nor any deficiency in the Trial Chamber’s reasoning which would amount to an error of law.

465. As to the argument that the Trial Chamber overlooked the evidence of Bislim Zyrapi and Exhibit P2447 concerning clashes with the KLA in the area of Celina, the Appeals Chamber notes that Zyrapi did not mention Celina in the portion of his testimony that was purportedly overlooked.¹⁴⁹⁶ Moreover, on Exhibit P2447, a map marked by Zyrapi, the witness indicated the territory controlled by the KLA on 24 March 1999 and Celina falls outside the area he designated.¹⁴⁹⁷ Lazarević’s submission in this regard is, accordingly, dismissed. His argument that the shelling of Celina, if it occurred, was aimed at KLA positions is also dismissed, as he has failed to point to any evidence substantiating his claim. His argument that any such shelling caused no damage to civilian objects or persons likewise fails, as he has not shown how the degree and type of

¹⁴⁸⁹ Lazarević’s Appeal Brief, para. 116, referring, *inter alia*, to Vlatko Vuković, Exh. 5D1442, paras 27-31. See also Lazarević’s Appeal Brief, paras 120-121, referring, *inter alia*, to Exh. P2019.

¹⁴⁹⁰ Lazarević’s Appeal Brief, para. 121.

¹⁴⁹¹ See Trial Judgement, vol. 2, para. 316.

¹⁴⁹² Trial Judgement, vol. 2, para. 333.

¹⁴⁹³ Lazarević refers to Exhibit P2019, the war diary of the 2nd Motorised Battalion of the 549th Motorised Brigade, which, he asserts, supports the evidence of Delić and Vuković concerning fighting in areas outside of Celina and the movements of VJ units in the area on 25 March 1999 (Lazarević’s Appeal Brief, paras 116, 120-121). Having reviewed the exhibit, the Appeals Chamber notes that it does not suggest any VJ activity near Celina on 25 March 1999 and thus does not support Lazarević’s claims (see Exh. P2019, pp. 2-3 (under seal)).

¹⁴⁹⁴ Lazarević’s Appeal Brief, paras 116, 121. See also *ibid.*, paras 124-125.

¹⁴⁹⁵ See, e.g., *Nahimana et al.* Appeal Judgement, para. 949; *Rutaganda* Appeal Judgement, para. 188; *Tadić* Appeal Judgement, para. 64.

¹⁴⁹⁶ Bislim Zyrapi, 7 Nov 2006, T. 5989-6000.

¹⁴⁹⁷ Exh. P2447; Bislim Zyrapi, 7 Nov 2006, T. 5990-5991, 5995.

damage caused by such shelling, even if it were established, would render the Trial Chamber's finding that the shelling occurred and caused villagers to flee out of fear unreasonable.¹⁴⁹⁸

466. Turning, finally, to Lazarević's argument that the population in Celina was ordered to leave by the KLA and hence did not leave as a result of any actions by the VJ, the Appeals Chamber notes that the only evidence identified by Lazarević in support of this argument is the testimony of Bislim Zyrapi that it was normal for the KLA to order the movement of a population outside a combat area.¹⁴⁹⁹ Lazarević does not refer to evidence that there was any such order from the KLA with respect to Celina or that the civilians who moved out of Celina were following such an order. His argument is, accordingly, rejected.¹⁵⁰⁰

467. For the foregoing reasons, the Appeals Chamber dismisses sub-ground 1(e) of Lazarević's appeal.

9. Peć/Peja

468. The Trial Chamber found that a significant number of Kosovo Albanians in Peć/Peja town were directly expelled from their homes on 27 and 28 March 1999, with many of them forced to go either to Albania or Montenegro.¹⁵⁰¹ According to the Trial Chamber "[p]arts of the town were shelled by the VJ, vehicles were confiscated, money stolen, houses were burned and large numbers of Kosovo Albanians were either directly expelled from their homes, or fled out of fear."¹⁵⁰² The Trial Chamber was satisfied that this expulsion was conducted in an organised manner with the participation of the VJ as well as the MUP, armed Serb civilians, and other irregular forces.¹⁵⁰³ Although the Trial Chamber concluded that there was a strong KLA presence "in the period immediately prior to the commencement of the NATO bombing and the events alleged in the Indictment",¹⁵⁰⁴ it found that there was "no legitimate reason for this massive expulsion"¹⁵⁰⁵ and that the events amounted to an attack upon the civilian population of the town.¹⁵⁰⁶ Accordingly, it held that the VJ, together with the MUP and other associated forces, was responsible for deportation and other inhumane acts (forcible transfer) as crimes against humanity.¹⁵⁰⁷ The Trial Chamber

¹⁴⁹⁸ Trial Judgement, vol. 2, para. 334.

¹⁴⁹⁹ Lazarević's Appeal Brief, para. 126, referring to Bislim Zyrapi, 7 Nov 2006, T. 6003.

¹⁵⁰⁰ Lazarević's claims of legal error with respect to events in Orahovac/Rahovec (see *supra*, fn. 822) are likewise dismissed, as his allegations of legal error simply repeat several of his evidentiary arguments which have been found to be without merit.

¹⁵⁰¹ Trial Judgement, vol. 2, para. 48. See also *ibid.*, vol. 2, paras 1157, 1182.

¹⁵⁰² Trial Judgement, vol. 2, para. 1181. See also *ibid.*, vol. 2, paras 48, 1157, 1182.

¹⁵⁰³ Trial Judgement, vol. 2, paras 48, 1157, 1181-1183.

¹⁵⁰⁴ Trial Judgement, vol. 2, para. 7.

¹⁵⁰⁵ Trial Judgement, vol. 2, para. 1182.

¹⁵⁰⁶ Trial Judgement, vol. 2, paras 1181-1182.

¹⁵⁰⁷ Trial Judgement, vol. 2, para. 1183.

convicted Lazarević for aiding and abetting these crimes under Article 7(1) of the Statute.¹⁵⁰⁸ Lazarević challenges these convictions.¹⁵⁰⁹

(a) Submissions of the parties

469. Lazarević submits that the Trial Chamber erred in fact when it found that the VJ was present and participated in the crimes in Peć/Peja town on 27 and 28 March 1999.¹⁵¹⁰ In particular, he claims that the Trial Chamber failed to properly consider documentary evidence supported by the testimony of Dragan Živanović demonstrating that the combat formations of the VJ were outside of Peć/Peja town.¹⁵¹¹ He also asserts that the Trial Chamber erroneously dismissed Radovan Paponjak's evidence that there were no members of the VJ in the town at the relevant time, and he adds that this evidence was corroborated by, *inter alia*, military documents and Edison Zatriqi.¹⁵¹² Lazarević further avers that the Trial Chamber erred in relying on Ndrec Konaj's identification of VJ members and vehicles¹⁵¹³ and failed to provide a "valid motivation" for why it accepted the evidence of Konaj concerning the involvement of the VJ rather than that of three other reliable witnesses.¹⁵¹⁴ Finally, Lazarević submits that the Trial Chamber erred in failing to consider exhibits and testimony showing that there were fights between "regular forces" and the KLA in both Peć/Peja municipality and Peć/Peja town.¹⁵¹⁵

470. The Prosecution responds that Lazarević's arguments concerning the evidence of the VJ's presence and participation warrant summary dismissal and, in addition, fail on their merits.¹⁵¹⁶ According to the Prosecution, Lazarević's arguments concerning certain documentary evidence and Defence witnesses ignore the Trial Chamber's findings and fail to show any error by the Trial Chamber.¹⁵¹⁷ The Prosecution also contends that the Trial Chamber reasonably and correctly identified VJ forces and equipment based upon the testimony of Edison Zatriqi and Ndrec Konaj.¹⁵¹⁸ Further, the Prosecution submits that Lazarević has not demonstrated the relevance of evidence suggesting the KLA's presence in Peć/Peja two weeks after the expulsions occurred.¹⁵¹⁹

¹⁵⁰⁸ Trial Judgement, vol. 3, paras 930, 1211.

¹⁵⁰⁹ Lazarević's Appeal Brief, paras 2-12. See also *ibid.*, paras 231-232.

¹⁵¹⁰ Lazarević's Appeal Brief, paras 2-4, referring to Trial Judgement, vol. 2, paras 48, 1157.

¹⁵¹¹ Lazarević's Appeal Brief, para. 4, referring to Exh. P2802, Exh. P2616.

¹⁵¹² Lazarević's Appeal Brief, paras 5-6, 231.

¹⁵¹³ Lazarević's Appeal Brief, paras 7-9, referring to Ndrec Konaj, 16 Oct 2006, T. 4893 (identification of troops), 4900 (identification of vehicles).

¹⁵¹⁴ Lazarević's Appeal Brief, para. 231, referring to Zatriqi, Paponjak, and Živanović.

¹⁵¹⁵ Lazarević's Appeal Brief, para. 10, referring to Exh. 6D1637, p. 4, Exh. 6D1639, p. 5.

¹⁵¹⁶ Prosecution's Response Brief (Lazarević), paras 18, 22. See also *ibid.*, paras 19-21, 23-29.

¹⁵¹⁷ Prosecution's Response Brief (Lazarević), paras 26-28.

¹⁵¹⁸ Prosecution's Response Brief (Lazarević), paras 19-24.

¹⁵¹⁹ Prosecution's Response Brief (Lazarević), para. 29.

471. In reply, Lazarević disputes the suggestion that many of his arguments warrant summary dismissal.¹⁵²⁰ He asserts that the Prosecution itself confirmed that Edison Zatriqi did not identify members of the VJ as perpetrators of the crimes at issue and contests the Prosecution's submissions in relation to this witness.¹⁵²¹ Lazarević also contends that Ndrec Konaj's identification of individuals wearing green uniforms is not sufficient to identify VJ members in light of the green uniforms worn by other formations at this same location and time,¹⁵²² and adds that the Trial Chamber failed to consider Konaj's admission that he was unable to identify army members or vehicles because he had not served in the army.¹⁵²³

(b) Analysis

472. Turning first to Lazarević's argument that the Trial Chamber erred in finding that the VJ was present and participated in crimes in Peć/Peja town, the Appeals Chamber notes that the Trial Chamber found that from 27 March to mid-April 1999, VJ forces, including a number of reservists, were based in Peć/Peja town itself.¹⁵²⁴ In reaching this finding, the Trial Chamber relied on military documents, including Exhibit P2802 (the war diary of the Armoured Battalion of the 125th Motorised Brigade) and Exhibit P2616 (the war diary of the 125th Motorised Brigade), as well as, *inter alia*, the testimony of Dragan Živanović, the commander of the 125th Motorised Brigade of the Priština Corps.¹⁵²⁵ In reaching its finding concerning the events that occurred in Peć/Peja town on 27 and 28 March 1999, the Trial Chamber "accepted the evidence given in the consistent accounts of Zatriqi and Konaj, supported by documentary records."¹⁵²⁶

473. Lazarević contests the Trial Chamber's findings, claiming that Exhibits P2802 and P2616 as well as Dragan Živanović's testimony show that the VJ was outside Peć/Peja town at the relevant time.¹⁵²⁷ Upon review of these exhibits, the Appeals Chamber sees no error in the Trial Chamber's use of these documents to establish the arrival of the VJ's 125th Motorised Brigade in Peć/Peja town on 26-27 March 1999 as well as the Brigade's presence there until at least 11 April 1999.¹⁵²⁸ The Appeals Chamber further notes that the Trial Chamber considered and accepted certain aspects of Živanović's testimony and that it found this testimony to be consistent with contemporaneous

¹⁵²⁰ Lazarević's Reply Brief, paras 3-11, 17.

¹⁵²¹ Lazarević's Reply Brief, paras 12-13. Lazarević underscores that Exhibit P2616, which was referred to by the Prosecution, does not support Zatriqi's testimony, as it shows that VJ forces deployed "in that area" were not in Peć/Peja town (*ibid.*, para. 13).

¹⁵²² Lazarević's Reply Brief, para. 14, referring, *inter alia*, to Trial Judgement, vol. 1, paras 705, 710, 712, 714, 716, 839.

¹⁵²³ Lazarević's Reply Brief, para. 15.

¹⁵²⁴ Trial Judgement, vol. 2, para. 10.

¹⁵²⁵ Trial Judgement, vol. 2, paras 8-10, 16, 33, 39, and references therein.

¹⁵²⁶ Trial Judgement, vol. 2, para. 39. See also *ibid.*, vol. 2, paras 15-38, 48.

¹⁵²⁷ Lazarević's Appeal Brief, para. 4.

¹⁵²⁸ See Exh. P2616, p. 4; Exh. P2802, pp. 1-2. See also Trial Judgement, vol. 2, para. 10.

documentary records.¹⁵²⁹ Lazarević has failed to specify which part of Živanović’s testimony contradicts the challenged finding or to demonstrate how the Trial Chamber erred in its approach.

474. With regard to Lazarević’s argument that the Trial Chamber erred in dismissing Radovan Paponjak’s testimony that there were no members of the VJ in Peć/Peja town at the relevant time, the Appeals Chamber notes that the Trial Chamber gave detailed explanations as to why it rejected Paponjak’s testimony, finding that it was inconsistent with relevant documentary evidence and in direct contradiction with other evidence, including that of Živanović.¹⁵³⁰ According to the Trial Chamber, Paponjak “lacked candour” in giving his account and it found that account “unreliable”.¹⁵³¹ Lazarević has failed to substantiate his claim that military documents support Paponjak’s account. Furthermore, the Appeals Chamber finds no merit in Lazarević’s submission that Edison Zatriqi’s testimony that “he did not see any members of the VJ positioned along the streets and directing Kosovo Albanians through the town”¹⁵³² thus corroborates Paponjak’s evidence. The Appeals Chamber observes that the Trial Chamber accepted Zatriqi’s testimony that on 27 March 1999 the “Serb military” started shelling the neighbourhood of Kapešnica/Karpeshnica in Peć/Peja town from the vicinity of a hospital and school there.¹⁵³³ In light of the Trial Chamber’s acceptance of this evidence, the Appeals Chamber considers that Lazarević has failed to show that Zatriqi corroborated Paponjak’s evidence or that the Trial Chamber erred in its conclusions with regard to Paponjak’s evidence.

475. The Appeals Chamber will next consider Lazarević’s contention that the Trial Chamber erroneously relied upon Ndreć Konaj’s evidence identifying VJ troops and vehicles. The Appeals Chamber notes in this regard that the Trial Chamber considered evidence from Konaj describing the presence and actions in Peć/Peja town of, *inter alia*, individuals whom he identified as uniformed men who were soldiers or paramilitaries¹⁵³⁴ and military forces.¹⁵³⁵ The Trial Chamber also considered evidence from Konaj that whilst in Peć/Peja town he encountered two vehicles on 27 March 1999, one of which he described as belonging to the military and the other to the

¹⁵²⁹ Trial Judgement, vol. 2, para. 8, and references therein.

¹⁵³⁰ Trial Judgement, vol. 2, paras 31-39, and references therein.

¹⁵³¹ Trial Judgement, vol. 2, para. 39.

¹⁵³² Lazarević’s Appeal Brief, para. 6, referring to Edison Zatriqi, 29 Sep 2006, T. 4418-4419.

¹⁵³³ Trial Judgement, vol. 2, para. 16. See also Edison Zatriqi, Exh. P2347, p. 2. The Trial Chamber noted that Živanović and Exhibit P2616 partially corroborated Zatriqi’s account (Trial Judgement, vol. 2, para. 16, and references therein). While Lazarević attempts to contradict this aspect of Zatriqi’s testimony by arguing that Exhibit P2616 demonstrates a lack of VJ presence in Peć/Peja town (Lazarević’s Reply Brief, para. 13), he has failed to offer any explanation as to why this is the case.

¹⁵³⁴ Trial Judgement, vol. 2, para. 23, and references therein.

¹⁵³⁵ Trial Judgement, vol. 2, paras 25-26, and references therein. The Trial Judgement also discusses Konaj’s account of being stopped by “two military soldiers” dressed in camouflage uniforms, but refers to evidence discussing “two paramilitary soldiers” (Trial Judgement, vol. 2, para. 21, referring to Ndreć Konaj, Exh. P2372, p. 3).

police,¹⁵³⁶ and three army tanks on 28 March 1999.¹⁵³⁷ The Trial Chamber noted that it “exercised particular care in assessing [Konaj’s] credibility” and concluded that his account of events in March 1999 was “credible and reliable” when considered in light of how it fits with other evidence referred to in the Trial Judgement in relation to Peć/Peja.¹⁵³⁸

476. The Appeals Chamber observes that it is not apparent from Konaj’s evidence how he identified various troops as police, military, or paramilitary, although he referred to some of the military troops he observed as wearing green uniforms, in contrast to his account of the blue uniforms of the police and the green camouflage trousers worn by paramilitaries.¹⁵³⁹ In this regard, the Appeals Chamber recalls the Trial Chamber’s findings that VJ members wore a camouflage uniform that had a predominantly green appearance and VJ reservists wore uniforms in both green camouflage and solid olive-green colour.¹⁵⁴⁰ The Appeals Chamber further recalls, however, that members of the PJP, the SAJ, and the JSO wore green camouflage uniforms at the relevant time¹⁵⁴¹ and that the Trial Chamber referred to evidence that members of the PJP units in Peć/Peja were issued green camouflage uniforms with police insignia on the sleeves at the beginning of September 1998.¹⁵⁴² In these circumstances, the Appeals Chamber does not find that Konaj’s testimony, taken in isolation, offers a sufficiently clear identification of VJ troops.

477. As for Lazarević’s challenge to Konaj’s identification of military vehicles, the Appeals Chamber observes that some confusion arose during cross-examination, including with respect to the types of vehicles observed by Konaj.¹⁵⁴³ The witness stated that he could differentiate between the police vehicles he observed, which were blue with large tires and had men in their crews who wore blue uniforms, and a military vehicle, which was of a green camouflage colour and had a gun barrel.¹⁵⁴⁴ Upon being shown a selection of photographs, he identified the vehicles he had observed and, in particular, identified the vehicle listed under number two in Exhibit P1325 as belonging to the police and the vehicle under number three as belonging to the military.¹⁵⁴⁵ The Appeals Chamber notes that Konaj’s identification based upon Exhibit P1325 is at odds with the evidence of

¹⁵³⁶ Trial Judgement, vol. 2, para. 22, and references therein.

¹⁵³⁷ Trial Judgement, vol. 2, para. 27, and references therein.

¹⁵³⁸ Trial Judgement, vol. 2, para. 30.

¹⁵³⁹ Ndrec Konaj, 16 Oct 2006, T. 4890.

¹⁵⁴⁰ Trial Judgement, vol. 1, paras 427-430.

¹⁵⁴¹ Trial Judgement, vol. 1, paras 710, 714, 716.

¹⁵⁴² Trial Judgement, vol. 2, para. 14, and references therein.

¹⁵⁴³ Ndrec Konaj, 16 Oct 2006, T. 4895-4900. See also Trial Judgement, vol. 2, para. 22. In addressing his use of the term “Pinzgauer”, Konaj acknowledged that he could not distinguish between different vehicle makes and stated that he was “never in the army” and not “an expert” (Ndrec Konaj, 16 Oct 2006, T. 4899). Contrary to Lazarević’s suggestion (Lazarević’s Reply Brief, paras 15-16), however, the Appeals Chamber does not consider that the absence of experience in the military necessarily renders Konaj’s evidence unreliable.

¹⁵⁴⁴ Ndrec Konaj, 16 Oct 2006, T. 4897, 4899-4900.

¹⁵⁴⁵ Ndrec Konaj, 16 Oct 2006, T. 4914-4916; Exh. P1325.

Živanović¹⁵⁴⁶ and that the Trial Chamber did not explicitly address this discrepancy. The Appeals Chamber considers that the Trial Chamber should have done so. Nonetheless, the Appeals Chamber recalls that the Trial Chamber found Konaj's account of events in March 1999 "credible and reliable" in light of the other evidence in the record.¹⁵⁴⁷ In this context, the Appeals Chamber fails to see how any error by the Trial Chamber in accepting Konaj's identification of VJ troops and military vehicles demonstrates that the Trial Chamber's findings as to the presence and actions of VJ forces in Peć/Peja town based on the totality of the evidence were erroneous.

478. With regard to Lazarević's remaining arguments, the Appeals Chamber notes that the Trial Chamber expressly acknowledged that there was a "sharp clash between the Prosecution and Defence accounts" and provided detailed reasons as to how it resolved this conflict.¹⁵⁴⁸ Lazarević's argument that the Trial Chamber failed to provide a reasoned opinion as to why it accepted Konaj's testimony therefore fails. Lazarević has likewise failed to demonstrate the relevance of documents suggesting that there was fighting between "regular forces" and the KLA in Peć/Peja municipality and Peć/Peja town two weeks *after* the expulsions occurred.¹⁵⁴⁹ Accordingly, his argument in this regard fails to meet the standard of appellate review and will not be considered further.¹⁵⁵⁰

479. For the foregoing reasons, the Appeals Chamber dismisses sub-ground 1(a) of Lazarević's appeal.

10. Priština/Prishtina

480. The Trial Chamber found that, beginning on 24 March 1999, large numbers of Kosovo Albanian residents were expelled from Priština/Prishtina town, with many of them transported by train or otherwise going to Macedonia.¹⁵⁵¹ The Trial Chamber further found that some residents were directly evicted from their homes by the VJ, the MUP, and other armed forces, while other residents left due to the prevailing atmosphere of fear in the town caused by the violent evictions of their neighbours as well as by threats, killings, beatings, and other acts of intimidation carried out by these forces.¹⁵⁵² The Trial Chamber found that three women were raped in the course of the operation to remove large numbers of Kosovo Albanians from Priština/Prishtina town, including

¹⁵⁴⁶ Živanović stated that the vehicle listed under number two in Exhibit P1325 was only used by the army and that the vehicle under number three was largely used by the special MUP forces in Kosovo, such as the PJP (Dragan Živanović, 18 Jan 2008, T. 20548-20549).

¹⁵⁴⁷ Trial Judgement, vol. 2, para. 30.

¹⁵⁴⁸ Trial Judgement, vol. 2, paras 3, 15-39.

¹⁵⁴⁹ See Lazarević's Appeal Brief, para. 10, referring to Exh. 6D1637, p. 4, Exh. 6D1639, p. 3.

¹⁵⁵⁰ Lazarević's claims of legal error with respect to events in Peć/Peja (see *supra*, fn. 822) are likewise dismissed, as his allegations of legal error simply repeat several of his evidentiary arguments which have been found to be without merit.

¹⁵⁵¹ Trial Judgement, vol. 2, paras 885, 1240, 1242.

¹⁵⁵² Trial Judgement, vol. 2, paras 885, 1240, 1242.

K62, who was raped “by three VJ or MUP personnel”, and K31, who was raped “by three VJ soldiers.”¹⁵⁵³ The Trial Chamber also found that, although the NATO bombing of targets in or around Priština/Prishtina town had an impact on civilians, “this was not the reason why thousands of Kosovo Albanians left their homes in the days and weeks following the start of the airstrikes”, and it added that even if certain people left because of KLA fighting, NATO bombing, or propaganda calls for them to depart Kosovo, this did not affect the Trial Chamber’s finding.¹⁵⁵⁴

481. The Trial Chamber concluded that these events amounted to an attack against the civilian population and that the VJ, the MUP, and associated armed forces committed deportation and other inhumane acts (forcible transfer) as crimes against humanity in Priština/Prishtina.¹⁵⁵⁵ The Trial Chamber convicted Lazarević for aiding and abetting these crimes under Article 7(1) of the Statute.¹⁵⁵⁶ Lazarević challenges these convictions.¹⁵⁵⁷

(a) Submissions of the parties

482. Lazarević submits that the Trial Chamber erred in finding that VJ members were reliably identified as committing crimes in Priština/Prishtina town at the relevant time and in ignoring evidence to the contrary.¹⁵⁵⁸ In particular, he argues that the Trial Chamber erred in relying upon both the evidence of Emin Kabashi, who was a KLA member, and, in Lazarević’s view, gave contradictory and unreliable evidence identifying VJ members and the evidence of Nazlie Bala, whose evidence concerning the presence of barbed wire and the location from which she observed events was contradicted by other evidence.¹⁵⁵⁹ Lazarević also contends that the Trial Chamber erred in ignoring the evidence of Milutin Filipović that there were “exceptionally few, non-combat units” of the VJ in Priština/Prishtina town and in failing to accept Filipović’s corroborated testimony that there were no VJ tanks on Vranjevac/Vranjevc bridge on or about 28 March 1999, instead accepting the evidence of witnesses Kabashi and Bala.¹⁵⁶⁰ He adds that Antonio Russo’s evidence concerning VJ uniforms demonstrates the unreliability of witnesses’ descriptions of VJ members and further questions the Trial Chamber’s findings that K62 and K31 were raped by VJ members.¹⁵⁶¹

¹⁵⁵³ Trial Judgement, vol. 2, para. 889.

¹⁵⁵⁴ Trial Judgement, vol. 2, para. 887.

¹⁵⁵⁵ Trial Judgement, vol. 2, paras 1240-1243.

¹⁵⁵⁶ Trial Judgement, vol. 3, paras 930, 1211.

¹⁵⁵⁷ Lazarević’s Appeal Brief, paras 152-170. See also *ibid.*, paras 258-259.

¹⁵⁵⁸ Lazarević’s Appeal Brief, paras 160-170. See also Appeal Hearing, 13 Mar 2013, AT. 393-394.

¹⁵⁵⁹ Lazarević’s Appeal Brief, paras 160-164.

¹⁵⁶⁰ Lazarević’s Appeal Brief, paras 164, 168.

¹⁵⁶¹ Lazarević’s Appeal Brief, paras 165-167.

483. In addition, Lazarević submits that the Trial Chamber erred with respect to its findings as to when and why residents left Priština/Prishtina town.¹⁵⁶² He contends that the Trial Chamber erred in ignoring witness evidence that residents left Priština/Prishtina as early as 21 March 1999 out of fear of NATO bombing¹⁵⁶³ and in concluding that there was no evidence that civilian objects were targeted during the NATO bombing.¹⁵⁶⁴ He further submits that any reasonable trier of facts would have found that residents also fled out of fear of terrorist attacks by the KLA.¹⁵⁶⁵ In his view, the Trial Chamber also erred as a matter of law by failing to provide a “valid explanation” reconciling its findings with the evidence of Prosecution and Defence witnesses that civilians left Priština/Prishtina starting on 21 March 1999 and that, given the circumstances, life in Priština/Prishtina was normal.¹⁵⁶⁶

484. The Prosecution responds that Lazarević’s arguments should be summarily dismissed and otherwise fail on the merits.¹⁵⁶⁷ The Prosecution submits that the Trial Chamber did not err in accepting the evidence of Kabashi and Bala and reasonably rejected certain contrary evidence from Filipović in accordance with the Trial Chamber’s general finding that he lacked credibility.¹⁵⁶⁸ The Prosecution also argues that Lazarević ignores that Russo and other witnesses distinguished between the MUP and the VJ and suggests summarily dismissing Lazarević’s challenges regarding the rapes of K62 and K31, as Lazarević was not convicted for these crimes.¹⁵⁶⁹ Finally, the Prosecution avers that Lazarević’s arguments concerning NATO bombing and KLA fighting fail to demonstrate any error by the Trial Chamber.¹⁵⁷⁰

485. In reply, Lazarević disputes the Prosecution’s submission that many of his arguments warrant summary dismissal.¹⁵⁷¹ In his view, the Prosecution merely repeats challenged findings from the Trial Judgement and the Prosecution’s submissions, when taken as a whole, are “speculative”.¹⁵⁷²

¹⁵⁶² Lazarević’s Appeal Brief, paras 154-156. See also *ibid.*, para. 258.

¹⁵⁶³ Lazarević’s Appeal Brief, para. 154, referring to Merovci and Filipović.

¹⁵⁶⁴ Lazarević’s Appeal Brief, paras 157-159.

¹⁵⁶⁵ Lazarević’s Appeal Brief, paras 155-156.

¹⁵⁶⁶ Lazarević’s Appeal Brief, para. 258, referring to Adnan Merovci, Milutin Filipović, SD3, and Milivoje Mihajlović.

¹⁵⁶⁷ Prosecution’s Response Brief (Lazarević), paras 155-156.

¹⁵⁶⁸ Prosecution’s Response Brief (Lazarević), paras 164-165. See also *ibid.*, para. 159, referring to Trial Judgement, vol. 2, paras 805, 809, 833, 837, 844-845, 865, 885-888, 1154.

¹⁵⁶⁹ Prosecution’s Response Brief (Lazarević), paras 166-167.

¹⁵⁷⁰ Prosecution’s Response Brief (Lazarević), paras 157-158, 161.

¹⁵⁷¹ Lazarević’s Reply Brief, paras 3-11.

¹⁵⁷² Lazarević’s Reply Brief, paras 87-89.

(b) Analysis(i) Presence and involvement of the VJ

486. Based upon the testimony of multiple witnesses and documentary evidence, the Trial Chamber found that both the MUP and the VJ were present in Priština/Prishtina town during the relevant period and that these forces expelled Kosovo Albanians from Priština/Prishtina.¹⁵⁷³ The Trial Chamber noted that the consistent evidence of Nazlie Bala, K62, K63, and Emin Kabashi about their expulsion from their homes, supported by the statement of Russo, was not undermined by Defence challenges or evidence led by the Defence and it considered these witnesses “reliable on the material events.”¹⁵⁷⁴

487. Turning first to Lazarević’s suggestion that Kabashi’s association with the KLA renders his testimony unreliable,¹⁵⁷⁵ the Appeals Chamber notes that, while the Trial Chamber found Kabashi’s testimony regarding the KLA to be unreliable, his evidence as to material events was frequently corroborated by other witnesses and therefore accepted.¹⁵⁷⁶ The Appeals Chamber recalls that a trial chamber may reasonably accept certain parts of a witness’s testimony and reject others¹⁵⁷⁷ and, accordingly, finds that Lazarević has failed to demonstrate any error in the Trial Chamber’s assessment of Kabashi’s evidence.

488. As to Lazarević’s argument that the Trial Chamber erred in relying upon Kabashi’s identification evidence,¹⁵⁷⁸ the Appeals Chamber notes that Kabashi gave evidence that he was expelled from a house in the Dragodan/Arbëria neighbourhood in late March 1999 by four members of the army and eight members of the “special police”.¹⁵⁷⁹ Kabashi testified that the soldiers were wearing light blue camouflage uniforms, with VJ insignia on the sleeves which read “soldier of the Yugoslav Army”, while he described the policemen’s uniforms as being of a darker blue colour with police insignia.¹⁵⁸⁰ He also gave evidence that the soldiers identified themselves as members of the VJ.¹⁵⁸¹ The Appeals Chamber observes that in its discussion of VJ and MUP uniforms, the Trial Chamber found that only MUP forces had blue camouflage uniforms.¹⁵⁸² However, in light of Kabashi’s testimony as to the insignia he observed and the soldiers’ self-identification, Lazarević

¹⁵⁷³ Trial Judgement, vol. 2, paras 805, 832-833, 839-873, 885-888.

¹⁵⁷⁴ Trial Judgement, vol. 2, para. 805.

¹⁵⁷⁵ Lazarević’s Appeal Brief, para. 161.

¹⁵⁷⁶ Trial Judgement, vol. 2, paras 805, 814, 836, 873, 888.

¹⁵⁷⁷ *Boškoski and Tarčulovski* Appeal Judgement, para. 59, and references therein.

¹⁵⁷⁸ Lazarević’s Appeal Brief, para. 161.

¹⁵⁷⁹ Trial Judgement, vol. 2, para. 842, and references therein.

¹⁵⁸⁰ Emin Kabashi, 21 Aug 2006, T. 2047-2048, 2055-2057; Emin Kabashi, Exh. P2250, pp. 3-4.

¹⁵⁸¹ Emin Kabashi, 21 Aug 2006, T. 2057.

¹⁵⁸² Trial Judgement, vol. 1, paras 426-431, 705-716.

has failed to demonstrate that the Trial Chamber erred in accepting Kabashi's evidence identifying the individuals in question as members of the VJ.

489. Lazarević's challenge to Bala's credibility is likewise dismissed, as Lazarević merely repeats unsuccessful arguments raised at trial without demonstrating that their rejection by the Trial Chamber constitutes a reversible error¹⁵⁸³ and disputes Bala's evidence on a point as to which the Trial Chamber made no finding.¹⁵⁸⁴

490. Turning next to Lazarević's argument that the Trial Chamber ignored the evidence of Milutin Filipović "that only exceptionally few, non-combat units of the VJ were stationed within the Priština town",¹⁵⁸⁵ the Appeals Chamber notes that the Trial Chamber considered and dismissed Filipović's evidence that VJ forces had left the town "on the very eve of the aggression".¹⁵⁸⁶ The Trial Chamber further found Filipović's account of events in Priština/Prishtina, including with respect to the presence of VJ troops, to be contrary to documentary evidence and the evidence of witnesses whom it found credible.¹⁵⁸⁷ The Appeals Chamber recalls that a trial chamber has a broad discretion in weighing evidence and is not required to articulate every step of its reasoning or to list every piece of evidence which it considers in making its finding.¹⁵⁸⁸ The Appeals Chamber therefore dismisses this argument. As for Lazarević's assertion that the Trial Chamber erred in relation to the corroborated testimony of Filipović that there were no VJ tanks on Vranjevac/Vranjevc bridge on or about 28 March 1999,¹⁵⁸⁹ the Appeals Chamber notes that the Trial Chamber specifically considered and dismissed Filipović's evidence on this matter, accepting instead the evidence of Kabashi, as partially corroborated by Bala.¹⁵⁹⁰ Lazarević has failed to show any error in this approach.

491. With regard to Lazarević's claim that Russo's evidence casts doubt on the identification evidence of other unspecified witnesses,¹⁵⁹¹ the Appeals Chamber notes that Russo reported seeing "MUP men, wearing the same uniforms as VJ" but with a badge bearing an insignia depicting

¹⁵⁸³ Contrary to Lazarević's suggestion that the Trial Chamber failed to explain why it accepted Bala's account over the evidence he cites (see Lazarević's Appeal Brief, para. 163), the Trial Chamber explained that it was "satisfied" with Bala's explanation as to how she was able to see what she saw (Trial Judgement, vol. 2, para. 818).

¹⁵⁸⁴ Compare Lazarević's Appeal Brief, para. 162, with Trial Judgement, vol. 2, paras 801-890.

¹⁵⁸⁵ Lazarević's Appeal Brief, para. 168.

¹⁵⁸⁶ Trial Judgement, vol. 2, para. 845, referring to Milutin Filipović, 27 Nov 2007, T.19177.

¹⁵⁸⁷ Trial Judgement, vol. 2, paras 805, 809-810, 833, 837, 845, 865, 885-888.

¹⁵⁸⁸ See *Krajišnik* Appeal Judgement, para. 27; *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21. See also *Brđanin* Appeal Judgement, para. 24; *Čelebići* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 115.

¹⁵⁸⁹ Lazarević's Appeal Brief, para. 164.

¹⁵⁹⁰ See Trial Judgement, vol. 2, paras 844-845, noting that Bala described seeing a tank on 28 March 1999 firing from the hillside of Vranjevac/Vranjevc.

¹⁵⁹¹ Lazarević's Appeal Brief, para. 167.

4-5 rocket-propelled grenades.¹⁵⁹² The Appeals Chamber observes that it is not apparent to what degree the Trial Chamber accepted this specific identification evidence when it relied upon Russo's evidence as to the "movement of people being directed".¹⁵⁹³ The Appeals Chamber also observes that the Trial Chamber treated Russo's evidence with circumspection,¹⁵⁹⁴ generally citing it only as support for the evidence given by *viva voce* witnesses,¹⁵⁹⁵ and considered *viva voce* witnesses Bala, K62, K63, and Kabashi "reliable on the material events."¹⁵⁹⁶ In these circumstances, the Appeals Chamber finds that Lazarević has failed to show how Russo's evidence demonstrates that the Trial Chamber acted unreasonably in accepting other witness evidence identifying VJ members.

492. Finally, with regard to Lazarević's challenge to the findings of VJ involvement in the rapes of K62 and K31,¹⁵⁹⁷ the Appeals Chamber observes that even if Lazarević could demonstrate that the Trial Chamber erred in finding that the rapes were committed by members of the VJ, he has not shown how this would undermine the Trial Chamber's separate finding that VJ troops expelled Kosovo Albanians from Priština/Prishtina.¹⁵⁹⁸ The Appeals Chamber recalls that challenges to factual findings on which a conviction does not rely may be summarily dismissed and, accordingly, dismisses Lazarević's arguments.

(ii) NATO bombing and KLA attacks

493. Lazarević contests the Trial Chamber's findings as to when and why residents left Priština/Prishtina town. Contrary to Lazarević's suggestion,¹⁵⁹⁹ however, the Trial Chamber did not ignore the evidence of Adnan Merovci and Milutin Filipović that some residents began leaving Priština/Prishtina town prior to the NATO airstrikes or that some left, according to Filipović, out of fear of NATO bombing.¹⁶⁰⁰ Nor has Lazarević shown that the Trial Chamber ignored any documentary evidence that NATO "targeted" civilian objects in Priština/Prishtina, as he claims,¹⁶⁰¹ or that the Trial Chamber failed to draw reasonable inferences concerning evidence related to the KLA.¹⁶⁰² Indeed, the Trial Chamber specifically acknowledged that certain people may have left

¹⁵⁹² Antonio Russo, Exh. P2261, p. 6. See also Trial Judgement, vol. 2, para. 849.

¹⁵⁹³ Trial Judgement, vol. 2, para. 848. See also *ibid.*, vol. 2, paras 885-888.

¹⁵⁹⁴ Trial Judgement, vol. 1, para. 38, referring to the written statement of Russo and noting that the witness died before he was able to give evidence at trial.

¹⁵⁹⁵ *E.g.*, Trial Judgement, vol. 2, paras 805, 807-808, 816, 820, 848.

¹⁵⁹⁶ Trial Judgement, vol. 2, para. 805.

¹⁵⁹⁷ Lazarević's Appeal Brief, paras 165-166.

¹⁵⁹⁸ Compare Trial Judgement, vol. 2, paras 838-873, 885, with *ibid.*, paras 874-881, 889.

¹⁵⁹⁹ Lazarević's Appeal Brief, para. 154.

¹⁶⁰⁰ Trial Judgement, vol. 2, paras 806, 865, 886, and references therein.

¹⁶⁰¹ Lazarević's Appeal Brief, para. 157, referring to Exh. 5D1336, Exh. 5D981, Exh. 5D241, Exh. 5D302, Exh. 5D305, Exh. 5D307, Exh. 5D308, Exh. 5D309. These exhibits suggest that civilian objects may have been impacted by NATO airstrikes, but as the Trial Chamber found with respect to, *inter alia*, Exhibits 5D305, 5D307, and 5D308 "none of them confirms Marinković and Filipović's testimony that civilian buildings in Priština/Prishtina were targeted" (Trial Judgement, vol. 2, para. 837, and references therein).

¹⁶⁰² See Lazarević's Appeal Brief, paras 155-156.

because of KLA fighting or NATO bombing and found that “the NATO bombing of targets in or around Priština/Prishtina town had an impact on civilians in the town, for example by cutting off the supply of electricity and water and damaging civilian buildings”.¹⁶⁰³ It found, however, that:

this was not the reason why thousands of Kosovo Albanians left their homes in the days and weeks following the start of the airstrikes. Rather, these Kosovo Albanians were driven out of their homes by the words and actions of the VJ and MUP forces, and other armed forces operating with them.¹⁶⁰⁴

Lazarević has failed to show that, based on the evidence presented, no reasonable trier of fact could have reached this conclusion as the only reasonable inference.¹⁶⁰⁵

494. Lazarević also claims that the Trial Chamber erred as a matter of law in failing to provide a “valid explanation” as to why it reached its conclusions notwithstanding the evidence of Adnan Merovci, Milutin Filipović, SD3, and Milivoje Mihajlović.¹⁶⁰⁶ The Appeals Chamber notes, however, that the Trial Chamber’s finding that a large number of Kosovo Albanians were expelled from Priština/Prishtina town starting on 24 March 1999 is not contradicted by the evidence of Merovci that he saw many people leaving on 21 March 1999.¹⁶⁰⁷ The Appeals Chamber further notes that the Trial Chamber indicated that the evidence of Filipović, SD3, and Mihajlović concerning conditions in Priština/Prishtina was contrary to the other evidence in the record¹⁶⁰⁸ and that the Trial Chamber did not consider the evidence of Filipović and SD3, in particular, “to be credible” in this regard.¹⁶⁰⁹ Lazarević therefore has not shown that the Trial Chamber failed to provide a reasoned opinion in this regard.

495. For the foregoing reasons, the Appeals Chamber dismisses sub-ground 1(g) of Lazarević’s appeal.

11. Srbica/Skenderaj

496. The Trial Chamber found that, upon the commencement of the NATO bombing campaign, VJ and MUP forces mounted attacks throughout Srbica/Skenderaj municipality.¹⁶¹⁰ The Trial Chamber found, *inter alia*, that FRY and Serbian forces shelled the village of Turićevac/Turiçec,

¹⁶⁰³ Trial Judgement, vol. 2, para. 887.

¹⁶⁰⁴ Trial Judgement, vol. 2, para. 887.

¹⁶⁰⁵ During the appeal hearing, Pavković also argued that Kosovo Albanians left Priština/Prishtina town due to the NATO bombing which targeted civilian structures, relying on the testimony of Marinković, Filipović, and SD3 as well as Exhibit P2004 (Appeal Hearing, 12 Mar 2013, T. 288-289, 317-318, referring to Trial Judgement, vol. 2, paras 837-838, 867, 873). The Appeals Chamber finds no merit in Pavković’s argument for the same reasons set out in the current sub-section.

¹⁶⁰⁶ Lazarević’s Appeal Brief, para. 258. See also *ibid.*, paras 223-230.

¹⁶⁰⁷ Trial Judgement, vol. 2, paras 806, 885. See also *ibid.*, vol. 2, para. 887.

¹⁶⁰⁸ See Trial Judgement, vol. 2, paras 833, 865-867.

¹⁶⁰⁹ Trial Judgement, vol. 2, para. 833.

¹⁶¹⁰ Trial Judgement, vol. 2, paras 671-673, 1164, 1219.

causing inhabitants to leave, and that after the arrival of MUP and VJ forces in the village of Tušilje/Tushila, the residents formed a convoy and left.¹⁶¹¹ The Trial Chamber concluded that, while partly directed at the KLA, the attacks in these villages as well as in the villages of Ćirez/Qirez and Izbica/Izbicë were “mounted in a heavy-handed and indiscriminate way” and that the actions of the VJ, the MUP, and associated armed forces caused the Kosovo Albanians to leave their homes “by their violent and intimidating behaviour.”¹⁶¹² The Trial Chamber concluded that these events amounted to an attack upon the civilian population of the municipality and proceeded to find that all the elements of deportation and other inhumane acts (forcible transfer) as crimes against humanity had been satisfied.¹⁶¹³ The Trial Chamber convicted Lazarević for aiding and abetting, under Article 7(1) of the Statute, these crimes in the villages of Turićevac/Turiçec, Ćirez/Qirez, and Izbica/Izbicë.¹⁶¹⁴ Lazarević challenges these convictions.¹⁶¹⁵

(a) Turićevac/Turiçec

497. The Trial Chamber found, *inter alia*, that FRY and Serbian forces shelled the village of Turićevac/Turiçec from Broćna/Buroja, a neighbouring village, on 26 March 1999 and that the attack mounted by both VJ and MUP forces caused inhabitants, including Hadije Fazliu, to form a convoy and leave.¹⁶¹⁶ The Trial Chamber observed that there was evidence that the KLA was present in Turićevac/Turiçec at the time and had a headquarters there and acknowledged that the attacks mounted by the VJ and MUP forces throughout Srbica/Skenderaj municipality were partly directed at the KLA.¹⁶¹⁷ The Trial Chamber nonetheless concluded that these attacks were mounted in a heavy-handed and indiscriminate way, that the VJ and the MUP caused Kosovo Albanians to leave their homes by their violent and intimidating behaviour, and that the events amounted to an attack against the civilian population.¹⁶¹⁸

(i) Submissions of the parties

498. According to Lazarević, the Trial Chamber erred in finding that the VJ caused the displacement of civilians in Turićevac/Turiçec by shelling or other acts and in failing to

¹⁶¹¹ Trial Judgement, vol. 2, paras 671, 672.

¹⁶¹² Trial Judgement, vol. 2, paras 1219, 1221. See also *ibid.*, vol. 2, paras 671-675.

¹⁶¹³ Trial Judgement, vol. 2, paras 1220-1222.

¹⁶¹⁴ Trial Judgement, vol. 3, paras 930, 1211.

¹⁶¹⁵ Lazarević’s Appeal Brief, paras 129-151. See also *ibid.*, paras 255-256. The Appeals Chamber recalls that it has already rejected Lazarević’s claim, raised under ground 1(f) of his appeal, that his convictions related to events in Ćirez/Qirez fall outside the scope of the Indictment (see *supra*, sub-section IV.B.).

¹⁶¹⁶ Trial Judgement, vol. 2, paras 671, 1164, 1219.

¹⁶¹⁷ Trial Judgement, vol. 2, paras 671, 1219.

¹⁶¹⁸ Trial Judgement, vol. 2, paras 1219-1221.

acknowledge Defence evidence in this regard.¹⁶¹⁹ In particular, he submits that the Trial Chamber erroneously concluded that VJ forces under the command of Ljubiša Diković and Dragan Živanović were in the area of Turićevac/Turičec at the relevant time and improperly ignored evidence to the contrary.¹⁶²⁰ Furthermore, Lazarević argues that Hadije Fazliu did not remember any injuries or material damage and claims that this shows that, if any shelling took place, it was not aimed at the civilian population.¹⁶²¹ Lazarević also submits that the Trial Chamber should have considered Bislim Zyrapi's testimony regarding the general pattern of KLA conduct in the area¹⁶²² and that, had it done so, it would have concluded that any displacement of civilians was ordered by the KLA.¹⁶²³

499. The Prosecution responds that Lazarević misconstrues the evidence concerning the presence of VJ troops in the area of Turićevac/Turičec and ignores the Trial Chamber's evaluation of the totality of the evidence, including the evidence that VJ combat groups were in the area of Broćna/Buroja.¹⁶²⁴ The Prosecution also submits that Fazliu's inability to remember if there were casualties or material damage from the shelling does not render the Trial Chamber's finding that the attack on Turićevac/Turičec was indiscriminate unreasonable.¹⁶²⁵ Finally, the Prosecution argues that Lazarević ignores Fazliu's testimony that she left the village due to Serbian shelling.¹⁶²⁶

500. In reply, Lazarević submits that there is clear evidence showing that Živanović's troops stopped their advance before arriving at the village of Turićevac/Turičec.¹⁶²⁷ According to Lazarević, Diković's unit was not in a location from which it could have shelled the village¹⁶²⁸ and the Trial Chamber failed to consider evidence demonstrating that Diković neither reached Broćna/Buroja nor shelled Turićevac/Turičec.¹⁶²⁹

(ii) Analysis

501. In finding that VJ forces were present in the area of Turićevac/Turičec at the relevant time, the Trial Chamber relied upon the evidence of Hadije Fazliu, which it found to be corroborated by

¹⁶¹⁹ Lazarević's Appeal Brief, paras 130-134, referring, *inter alia*, to Trial Judgement, vol. 2, para. 671. See also Lazarević's Appeal Brief, para. 129.

¹⁶²⁰ Lazarević's Appeal Brief, para. 131, referring to Exh. P2032, Exh. P2033, Exh. P2034, Exh. P2035, Exh. P2043, Exh. P2044, Exh. P2045, Exh. P2046, Exh. P2047, Exh. P2616, Exh. P2802, Dragan Živanović, 17 Jan 2008, T. 20468-20469.

¹⁶²¹ Lazarević's Appeal Brief, para. 132, referring to Hadije Fazliu, Exh. P2241, para. 6.

¹⁶²² Lazarević's Appeal Brief, para. 133, referring to Trial Judgement, vol. 2, para. 671, Bislim Zyrapi, 7 Nov 2006, T. 6003.

¹⁶²³ Lazarević's Appeal Brief, paras 133-134.

¹⁶²⁴ Prosecution's Response Brief (Lazarević), paras 132-134. See also Appeal Hearing, 13 Mar 2013, AT. 392-393.

¹⁶²⁵ Prosecution's Response Brief (Lazarević), para. 135.

¹⁶²⁶ Prosecution's Response Brief (Lazarević), para. 136.

¹⁶²⁷ Lazarević's Reply Brief, para. 77, referring to Dragan Živanović, 17 Jan 2008, T. 20468-20469, Exh. IC164.

¹⁶²⁸ Lazarević's Reply Brief, para. 78.

¹⁶²⁹ Lazarević's Reply Brief, para. 79, referring to Exh. P2045.

the Joint Command order of 24 March 1999 as well as by the evidence of Ljubiša Diković and Dragan Živanović that their units were engaged in the area.¹⁶³⁰ In particular, the Trial Chamber found that the presence of VJ forces in the area was confirmed by Diković's evidence that he engaged his combat group and used tanks in the vicinity¹⁶³¹ and noted evidence that his combat group supported MUP forces in the area of Broćna/Buroja during the relevant period.¹⁶³²

502. Lazarević has failed to show how the evidence he cites demonstrates that Ljubiša Diković's unit was, instead, at an entirely different location, "at a significant distance", from Turićevac/Turićec,¹⁶³³ or otherwise to establish any error by the Trial Chamber. Indeed, one of the exhibits to which he refers, Exhibit P2043, the 37th Motorised Brigade's operation report of 25 March 1999, indicates that Diković's unit's main task for the following day involved being in the area of Broćna/Buroja.¹⁶³⁴ While Lazarević suggests that Diković and his unit never actually reached Broćna/Buroja,¹⁶³⁵ the Appeals Chamber notes that Hadije Fazliu testified that the shelling came "from the direction of Broćna/Buroja", not necessarily from within the village,¹⁶³⁶ and that the evidence cited by Lazarević confirms that Diković and his unit were in the area of Broćna/Buroja.¹⁶³⁷

503. As for Lazarević's argument that Dragan Živanović's forces neither entered the village nor shelled it, the Appeals Chamber notes that the Trial Chamber took into account the testimony of Živanović that his brigade was engaged in the area, but to the east of the village.¹⁶³⁸ Lazarević has failed to show how the evidence he cites¹⁶³⁹ demonstrates any error by the Trial Chamber in this respect.

504. The Appeals Chamber next turns to Lazarević's submission that the shelling, if it occurred, was not aimed at the civilian population because Hadije Fazliu's evidence indicates that she did not recall whether anyone was injured by the shelling of Turićevac/Turićec.¹⁶⁴⁰ The Appeals Chamber observes that the only evidence of the alleged forcible displacement of Kosovo Albanians in Turićevac/Turićec by Serbian forces is that of Hadije Fazliu. The Appeals Chamber further

¹⁶³⁰ Trial Judgement, vol. 2, paras 647, 671.

¹⁶³¹ Trial Judgement, vol. 2, paras 595, 671.

¹⁶³² Trial Judgement, vol. 2, para. 595.

¹⁶³³ Lazarević's Appeal Brief, para. 131, referring to Exh. P2043, Exh. P2044, Exh. P2045, Exh. P2046, Exh. P2047.

¹⁶³⁴ Exh. P2043, p. 2.

¹⁶³⁵ Lazarević's Reply Brief, paras 78-79, referring to Ljubiša Diković, 10 Dec 2007, T. 19971, Exh. P2045.

¹⁶³⁶ Trial Judgement, vol. 2, para. 647, and references therein.

¹⁶³⁷ Ljubiša Diković, 10 Dec 2007, T. 19971.

¹⁶³⁸ Trial Judgement, vol. 2, para. 671. Živanović marked his troops' movements on Exhibit IC164, indicating that his combat groups stopped just outside of Turićevac/Turićec (Dragan Živanović, 17 Jan 2008, T. 20467-20470. See also Trial Judgement, vol. 2, para. 596).

¹⁶³⁹ Lazarević's Appeal Brief, para. 131, referring to Dragan Živanović, 17 Jan 2008, T. 20468-20469, Exh. P2032, Exh. P2033, Exh. P2034, Exh. P2035, Exh. P2616, Exh. P2802.

¹⁶⁴⁰ Hadije Fazliu, Exh. P2241, p. 2.

observes that Fazliu gave evidence that she fled Turićevac/Turićec because of the shelling by Serbian forces.¹⁶⁴¹ However, the Appeals Chamber notes that there is no evidence to demonstrate that such shelling by the Serbian forces was directed at causing the civilians residents of the village to flee, given the established KLA presence in the village, in order to support the only reasonable inference that the Serbian forces acted with the necessary intent to forcibly displace the civilian population of the village. In this respect, the Appeals Chamber notes the absence of evidence of any other conduct, besides shelling, on the part of the Serbian forces against Kosovo Albanian civilians in the village. Additionally, the Appeals Chamber further recalls that the Trial Chamber observed that there was evidence that the KLA had headquarters there at the time and acknowledged that the attacks mounted by the VJ and the MUP forces throughout Srbica/Skenderaj municipality were partly directed at the KLA.¹⁶⁴² In these circumstances, the Appeals Chamber considers that a reasonable trier of fact could not have concluded based on the evidence that the only reasonable inference was that VJ and MUP forces forcibly displaced Kosovo Albanians in Turićevac/Turićec. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in this regard.

(b) Ćirez/Qirez

505. The Trial Chamber found, *inter alia*, that the VJ arrived in Ćirez/Qirez or its surrounding area around 20 or 21 March 1999 and again on 29 April 1999.¹⁶⁴³ The Trial Chamber also accepted the evidence of, *inter alia*, Abdullah Salihu that on the latter occasion, outside the village of Baks, Salihu was detained and mistreated by people whom he referred to as “paramilitaries”, who took his identification documents and money and then marched him and over 150 other men to Ćirez/Qirez, where mistreatment continued before they were transferred to Glogovac/Gllogoc.¹⁶⁴⁴ The Trial Chamber further found that Salihu and Xhevahire Rrahmani as well as many others were forcibly displaced by the VJ and MUP forces.¹⁶⁴⁵

(i) Submissions of the parties

506. Lazarević argues, *inter alia*,¹⁶⁴⁶ that the Trial Chamber erred in finding that VJ forces committed criminal acts against the civilian population in the area of Ćirez/Qirez.¹⁶⁴⁷ With respect to events around 20 and 21 March 1999, he submits that the Trial Chamber failed to expressly

¹⁶⁴¹ Trial Judgement, vol. 2, paras 563, 647; Hadije Fazliu, 18 Aug 2006, T. 1952-1954; Hadije Fazliu, Exh. P2241, p.2.

¹⁶⁴² Trial Judgement, vol. 2, paras 671, 1219.

¹⁶⁴³ Trial Judgement, vol. 2, para. 673.

¹⁶⁴⁴ Trial Judgement, vol. 2, paras 673, 1164, 1219.

¹⁶⁴⁵ Trial Judgement, vol. 2, para. 675.

¹⁶⁴⁶ The Appeals Chamber recalls that Lazarević’s arguments that his convictions related to events in Ćirez/Qirez fall outside the scope of the Indictment as well as the Prosecution’s response thereto are addressed above (see *supra*, sub-section IV.B.).

¹⁶⁴⁷ Lazarević’s Appeal Brief, p. 37, para. 145. See also *ibid.*, para. 129.

consider Ljubiša Diković's evidence that VJ forces were fighting the KLA in the area and that Diković retreated with his unit when he encountered civilians near Ćirez/Qirez village.¹⁶⁴⁸ According to Lazarević, two VJ combat reports, Exhibits P2039 and P2042, also demonstrate the existence of fighting at the time, including in the area around Ćirez/Qirez and show that the MUP took care of civilians.¹⁶⁴⁹ As to the events of 29 April 1999, Lazarević contends that the Trial Chamber's finding that the paramilitaries who mistreated Abdullah Salihu could have been VJ reservists is "only an assumption and not a fact"¹⁶⁵⁰ and argues that a combat report of 1 May 1999, Exhibit 5D1036, shows that fighting in the area was not aimed at the civilian population.¹⁶⁵¹ Finally, he submits that the fact that Salihu stayed in the area for the duration of the war demonstrates that the witness was not deported.¹⁶⁵²

507. In response, the Prosecution maintains that the Trial Chamber correctly found that VJ and MUP forces expelled Kosovo Albanians from Ćirez/Qirez.¹⁶⁵³ In particular, the Prosecution submits that the Trial Chamber only discussed those parts of Diković's evidence which it deemed to be reliable¹⁶⁵⁴ and acted within its discretion in relying upon Salihu's testimony rather than that of Diković.¹⁶⁵⁵ Moreover, according to the Prosecution, Lazarević misinterprets the Trial Chamber's finding concerning paramilitaries and fails to show how this finding is relevant to his conviction.¹⁶⁵⁶ The Prosecution adds that Lazarević fails to establish any error with respect to the combat reports he cites or to substantiate his claim that Exhibit 5D1036 shows that fighting in the area was not aimed at the civilian population.¹⁶⁵⁷ While conceding that the Trial Chamber did not find that Salihu had been moved across a *de facto* or *de jure* border, the Prosecution submits that the *actus reus* elements of deportation were still satisfied for Hadije Fazliu and Xhevahire Rrahmani and that Lazarević's conviction for deportation should therefore remain undisturbed.¹⁶⁵⁸

508. In reply, Lazarević notes that Fazliu did not testify to incidents in Ćirez/Qirez¹⁶⁵⁹ and argues that the Trial Chamber's findings relating to Rrahmani do not show that she was expelled from Ćirez/Qirez by VJ forces.¹⁶⁶⁰

¹⁶⁴⁸ Lazarević's Appeal Brief, para. 140.

¹⁶⁴⁹ Lazarević's Appeal Brief, paras 140-141.

¹⁶⁵⁰ Lazarević's Appeal Brief, para. 142, referring to Trial Judgement, vol. 2, para. 673.

¹⁶⁵¹ Lazarević's Appeal Brief, para. 143, referring to Trial Judgement, vol. 2, para. 673, discussing the 1 May 1999 report of the 37th Motorised Brigade (Exh. 5D1036).

¹⁶⁵² Lazarević's Appeal Brief, para. 144.

¹⁶⁵³ Prosecution's Response Brief (Lazarević), paras 141-148.

¹⁶⁵⁴ Prosecution's Response Brief (Lazarević), para. 145, referring to Trial Judgement, vol. 2, para. 564.

¹⁶⁵⁵ Prosecution's Response Brief (Lazarević), para. 145.

¹⁶⁵⁶ Prosecution's Response Brief (Lazarević), para. 146.

¹⁶⁵⁷ Prosecution's Response Brief (Lazarević), paras 145, 147.

¹⁶⁵⁸ Prosecution's Response Brief (Lazarević), para. 148.

¹⁶⁵⁹ Lazarević's Reply Brief, para. 83.

¹⁶⁶⁰ Lazarević's Reply Brief, para. 83, referring to Trial Judgement, vol. 2, paras 669-675.

(ii) Analysis

509. The Appeals Chamber observes that while the Trial Chamber noted the presence of the VJ in and close to Ćirez/Qirez around 20 or 21 March 1999, it convicted Lazarević only for the forcible displacement in which the VJ was involved on 29 April 1999.¹⁶⁶¹ Accordingly, Lazarević's arguments concerning the events on 20 or 21 March 1999 are dismissed as the errors he alleges have no impact on his conviction.¹⁶⁶²

510. With regard to Lazarević's argument concerning the identity of the "paramilitaries" who mistreated Salihu on or around 29 April 1999, the Appeals Chamber observes that it is not apparent from the Trial Judgement whether the Trial Chamber concluded that the "paramilitaries" only "could have been", or in fact were, VJ reservists.¹⁶⁶³ However, the Trial Chamber found that the "paramilitaries" collaborated with, *inter alia*, the VJ and that VJ forces were involved in the mistreatment and transfer of over 150 Kosovo Albanian men in Ćirez/Qirez and the surrounding area.¹⁶⁶⁴ Lazarević has therefore failed to show how his challenge to the Trial Chamber's findings concerning the identity of the "paramilitaries" renders unsound his conviction, which is premised upon the involvement of VJ forces in the underlying crime.

511. As for Lazarević's argument that evidence "shows that there was constant fighting in the area not aimed at the civilian population",¹⁶⁶⁵ the Appeals Chamber recalls that the Trial Chamber found that VJ and MUP forces mounted attacks throughout the municipality which were "partly directed at the KLA".¹⁶⁶⁶ The Trial Chamber further found, however, that these attacks were mounted in a "heavy-handed and indiscriminate way, such that Kosovo Albanian villages and groups of civilians were also attacked"¹⁶⁶⁷ and concluded that they constituted an attack upon the civilian population.¹⁶⁶⁸ While the combat report referred to by Lazarević is consistent with the Trial Chamber's finding that attacks were partly directed at the KLA,¹⁶⁶⁹ he has failed to establish how the report demonstrates any error with respect to the Trial Chamber's finding that these attacks were

¹⁶⁶¹ Trial Judgement, vol. 2, paras 673, 1164, 1219. See also *ibid.*, vol. 2, paras 654-663.

¹⁶⁶² See Lazarević's Appeal Brief, paras 140-141.

¹⁶⁶³ Compare Trial Judgement, vol. 2, para. 673, stating that "these 'paramilitaries' were not operating independently of the VJ and the MUP, and indeed were collaborating with them, and [...] *they could have been VJ reservists or other special forces of some kind*" (emphasis added), with *ibid.*, vol. 2, para. 1219, stating that "[i]n Ćirez/Qirez and the surrounding area, VJ forces, *including VJ reservists*, as well as the MUP, targeted Kosovo Albanian men, detaining and abusing over 150 of them, and then transferring them to Glogovac/Gillogoc where they were held for seven days and further beaten by the police" (emphasis added).

¹⁶⁶⁴ Trial Judgement, vol. 2, paras 673, 675, 1219. See also *ibid.*, vol. 2, paras 655-664, describing Salihu's evidence concerning the actions of "soldiers" and a "member of the regular army" as well as the presence of "military jeeps".

¹⁶⁶⁵ Lazarević's Appeal Brief, para. 143, referring to Exh. 5D1036.

¹⁶⁶⁶ Trial Judgement, vol. 2, para. 1219.

¹⁶⁶⁷ Trial Judgement, vol. 2, para. 1219.

¹⁶⁶⁸ Trial Judgement, vol. 2, para. 1220.

¹⁶⁶⁹ The report indicates, *inter alia*, that the goal of the VJ operation in the area was to "break up and destroy ŠTS/Šiptar/Albanian/terrorist forces" and that "148 members of the ŠTS were liquidated" (Exh. 5D1036, p. 1).

also mounted in a “heavy-handed and indiscriminate way, such that Kosovo Albanian villages and groups of civilians were also attacked”¹⁶⁷⁰ or otherwise shows that his conviction is unsound. His argument is, accordingly, dismissed.

512. Finally, with respect to Lazarević’s claim that Abdullah Salihu remained in the area throughout the war,¹⁶⁷¹ the Appeals Chamber notes that the Prosecution concedes that the Trial Chamber did not find that Salihu had been moved across a border.¹⁶⁷² However, the Appeals Chamber recalls that the Trial Chamber found that Xhevahire Rrahmani was told to go to Glogovac/Gllogoc from Ćirez/Qirez but once the bus that she was on arrived at Glogovac/Gllogoc, it was directed by Serbian forces to Macedonia from there.¹⁶⁷³ The Appeals Chamber therefore considers that evidence as to whether Salihu was deported over a state border would not affect the Trial Chamber’s conclusion that both deportation and other inhumane acts (forcible transfer) were committed in Ćirez/Qirez. The Appeals Chamber accordingly dismisses Lazarević’s argument in this regard.¹⁶⁷⁴

(c) Izbica/Izbicë

513. The Trial Chamber found that, with the commencement of the NATO bombing campaign, VJ and MUP forces “mounted attacks throughout Srbica/Skenderaj municipality”, including in the village of Izbica/Izbicë,¹⁶⁷⁵ thereby causing Kosovo Albanians to leave their homes “by their violent and intimidating behaviour.”¹⁶⁷⁶ The Trial Chamber also found that on 28 March 1999, approximately 103 men in Izbica/Izbicë who were gathered in a field were separated from women and children, divided into two groups, shot, and that at least 89 of them were killed.¹⁶⁷⁷ The Trial Chamber further found that the corpses of four elderly people were seen in the field in Izbica/Izbicë, leading it to find that a total of approximately 93 people were killed on that day.¹⁶⁷⁸ The Trial Chamber concluded that these executions were carried out by the MUP, in particular the PJP, but

¹⁶⁷⁰ Trial Judgement, vol. 2, para. 1219.

¹⁶⁷¹ See Lazarević’s Appeal Brief, para. 144.

¹⁶⁷² Prosecution’s Response Brief (Lazarević), para. 148.

¹⁶⁷³ Trial Judgement, vol. 2, para. 674. In his Reply Brief, Lazarević alleges that the Trial Chamber’s findings relating to Rrahmani “do not indicate that she was expelled by VJ members” (Lazarević’s Reply Brief, para. 83). However, the Trial Chamber clearly found that Rrahmani was among those displaced by the VJ and MUP forces when she was told to leave Ćirez/Qirez to go to Glogovac/Gllogoc, and was then directed to Macedonia (Trial Judgement, vol. 2, paras 674-675), and the evidence discussed in relation to these findings refers to “soldiers” (*ibid.*, vol. 2, para. 635, referring to Xhevahire Rrahmani, 17 Aug 2006, T. 1841, Xhevahire Rrahmani, Exh. P2239, p. 8). Lazarević’s argument is, accordingly, dismissed.

¹⁶⁷⁴ Lazarević’s claims of legal error with respect to events in Ćirez/Qirez (see *supra*, fn. 822) are likewise dismissed, as his allegations of legal error simply repeat several of his evidentiary arguments which have been found to be without merit.

¹⁶⁷⁵ Trial Judgement, vol. 2, para. 1219.

¹⁶⁷⁶ Trial Judgement, vol. 2, para. 1221.

¹⁶⁷⁷ Trial Judgement, vol. 2, paras 679-681, 1164.

¹⁶⁷⁸ Trial Judgement, vol. 2, paras 681, 685, 1223.

with VJ units present in the vicinity,¹⁶⁷⁹ and further found that the police ordered the women and children to go to Albania.¹⁶⁸⁰

(i) Submissions of the parties

514. Lazarević argues that the Trial Chamber erred in finding that members of the VJ displaced residents of Izbica/Izbičë at the end of March 1999.¹⁶⁸¹ In particular, he notes that the Trial Chamber found that the killings in Izbica/Izbičë were not committed by VJ members and submits that the evidence demonstrates that VJ forces never entered Izbica/Izbičë or the surrounding villages, that they had no contact with civilians, and that they did not act against the civilian population in this area.¹⁶⁸² Lazarević also maintains that heavy fighting took place between the KLA and Serbian forces in the area and that it is clear that the civilian population was moved on the orders of the KLA.¹⁶⁸³

515. The Prosecution responds that the Trial Chamber correctly found that members of the VJ displaced Kosovo Albanian citizens from Izbica/Izbičë village in March 1999.¹⁶⁸⁴ The Prosecution submits that the Trial Chamber found that although VJ and MUP attacks in Izbica/Izbičë were partly directed at the KLA, they were “carried out in a heavy-handed and indiscriminate way”, thereby causing civilians to flee.¹⁶⁸⁵ It also asserts that the Trial Chamber considered the same arguments by Lazarević at trial and that he fails to show any error in the Trial Chamber’s rejection of them.¹⁶⁸⁶ Furthermore, the Prosecution argues that it is irrelevant that VJ troops did not actually enter Izbica/Izbičë, given the general pattern of joint VJ and MUP attacks in the municipality.¹⁶⁸⁷

516. In reply, Lazarević reiterates that the Trial Chamber did not find that the VJ took part in the killings in Izbica/Izbičë¹⁶⁸⁸ and asserts that he has clearly established that no VJ forces acted against civilians in Izbica/Izbičë or anywhere else in Srbica/Skenderaj municipality.¹⁶⁸⁹

¹⁶⁷⁹ Trial Judgement, vol. 2, paras 686-687.

¹⁶⁸⁰ Trial Judgement, vol. 2, paras 578, 1164.

¹⁶⁸¹ Lazarević’s Appeal Brief, paras 146-151. See also *ibid.*, para. 129.

¹⁶⁸² Lazarević’s Appeal Brief, paras 146-149, referring to Trial Judgement, vol. 2, paras 686-687, Ljubiša Diković, 11 Dec 2007, T. 19887, 19890-19891, 20016-20017, Exh. IC157, Exh. P2046, Exh. P2048, Sladjan Pantić, 5 Mar 2008, T. 23679-23681.

¹⁶⁸³ Lazarević’s Appeal Brief, paras 150-151.

¹⁶⁸⁴ Prosecution’s Response Brief (Lazarević), paras 149-152.

¹⁶⁸⁵ Prosecution’s Response Brief (Lazarević), para. 149, referring to Trial Judgement, vol. 2, para. 1219.

¹⁶⁸⁶ Prosecution’s Response Brief (Lazarević), para. 151.

¹⁶⁸⁷ Prosecution’s Response Brief (Lazarević), para. 151.

¹⁶⁸⁸ Lazarević’s Reply Brief, para. 84, referring to Trial Judgement, vol. 2, para. 687.

¹⁶⁸⁹ Lazarević’s Reply Brief, para. 85.

(ii) Analysis

517. While the Trial Chamber found that at least 93 people were executed in Izbica/Izbicë on 28 March 1999,¹⁶⁹⁰ it did not accept witness evidence suggesting that VJ soldiers were present during or participated in the killings¹⁶⁹¹ and found only that “units of the VJ were also in the vicinity.”¹⁶⁹² In so holding, the Trial Chamber accepted much of the evidence on which Lazarević now relies in his submission, including the evidence of Ljubiša Diković, supported by VJ orders and, to some extent, the evidence of Slađan Pantić, that his unit did not enter Izbica/Izbicë village and had no contact with civilians in the vicinity of Izbica/Izbicë.¹⁶⁹³

518. Lazarević has failed to establish, however, how the fact that VJ forces did not enter Izbica/Izbicë renders unreasonable the Trial Chamber’s findings that members of the VJ forcibly displaced residents of Izbica/Izbicë. In this regard, the Appeals Chamber notes that the Trial Chamber considered a variety of VJ orders and combat reports showing that VJ units were engaged in a joint VJ and MUP action in villages in the area of Izbica/Izbicë at the relevant time.¹⁶⁹⁴ The Trial Chamber also considered evidence that there were KLA forces in Izbica/Izbicë¹⁶⁹⁵ and referred to Ljubiša Diković’s testimony that if the KLA were launching attacks from villages, his unit would return fire in order to neutralise them, adding that the artillery positions were always outside of populated areas.¹⁶⁹⁶ In addition, the Trial Chamber took into account evidence suggesting that the village was fired upon on 27 March 1999.¹⁶⁹⁷ In light of this evidence, the Trial Chamber’s findings as to events in nearby villages¹⁶⁹⁸ and the overall pattern of events in the municipality, the Appeals Chamber is not persuaded that the Trial Chamber erred in concluding that the only reasonable inference from the evidence presented was that the presence of VJ forces in the vicinity

¹⁶⁹⁰ Trial Judgement, vol. 2, paras 687, 1164, 1219. See also Trial Judgement, vol. 3, paras 885, 933.

¹⁶⁹¹ Trial Judgement, vol. 2, paras 686-687.

¹⁶⁹² Trial Judgement, vol. 2, para. 687.

¹⁶⁹³ Trial Judgement, vol. 2, para. 687. See also *ibid.*, vol. 2, paras 597-600, and references therein. The Appeals Chamber considers that, by accepting the evidence that Diković’s unit did not enter Izbica/Izbicë village or have any contacts with civilians, the Trial Chamber must have rejected the Diković’s evidence to the contrary, which suggested, *inter alia*, that his unit entered and was firing in Izbica/Izbicë itself (*ibid.*, vol. 2, para. 598, and references therein. See also *ibid.*, vol. 2, para. 597, and references therein, referring to Diković’s subsequent clarifications denying that his unit entered Izbica/Izbicë or opened fire). The Appeals Chamber notes that the Trial Chamber indicated that it was setting forth in the Trial Judgement only those portions of Diković’s testimony “deemed reliable” (*ibid.*, vol. 2, para. 564), but, in this instance, the Trial Chamber appears to have set forth evidence from the witness that was necessarily contradictory.

¹⁶⁹⁴ Trial Judgement, vol. 2, paras 594-597, and references therein.

¹⁶⁹⁵ Trial Judgement, vol. 2, paras 567, 596-597, and references therein.

¹⁶⁹⁶ Trial Judgement, vol. 2, para. 597; Ljubiša Diković, 10 Dec 2007, T. 19953-19954; *ibid.*, 11 Dec 2007, 19981-19983, 20005-20007.

¹⁶⁹⁷ Trial Judgement, vol. 2, para. 600, and references therein, describing Pantić’s evidence that, on the morning of 27 March 1999, a group consisting of both MUP and VJ forces were attacked from the direction of Izbica/Izbicë and returned fire. See also *ibid.*, vol. 2, para. 564, explaining that those parts of Pantić’s evidence deemed reliable were set forth in the Trial Judgement.

¹⁶⁹⁸ Trial Judgement, vol. 2, paras 671-672.

constituted “violent and intimidating behaviour” which caused residents of Izbica/Izbičë to leave their homes.¹⁶⁹⁹

519. Lazarević’s remaining arguments are likewise without merit. Although Lazarević asserts that heavy fighting took place between “the forces of order and terrorist KLA forces” in this particular area, he has failed to demonstrate any error by the Trial Chamber, which found that VJ and MUP attacks in the municipality were “partly directed at the KLA” but mounted in a way “such that Kosovo Albanian villages and groups of civilians were also attacked”.¹⁷⁰⁰ As to his claim that the civilian population was moved on the orders of the KLA, the only evidence proffered by Lazarević in support of this contention is the testimony of Bislim Zyrapli that it was normal for the KLA to order the movement of a population outside a combat area.¹⁷⁰¹ Lazarević has failed to identify evidence that there was such an order from the KLA with respect to Izbica/Izbičë and, accordingly, has failed to demonstrate any error by the Trial Chamber.¹⁷⁰²

(d) Conclusion

520. For the foregoing reasons, the Appeals Chamber grants in part sub-ground 1(f) of Lazarević’s appeal insofar as it relates to Turičevac/Turičec and vacates his conviction in relation to the incident in this village. The impact of this finding, if any, on Lazarević’s sentence will be addressed below.¹⁷⁰³ In addition, as the Appeals Chamber has found that the Trial Chamber erred in finding that the VJ and MUP forces forcibly displaced Kosovo Albanians in Turičevac/Turičec, the Appeals Chamber vacates the convictions of Šainović, Pavković, and Lukić in relation to this incident. The impact of this finding, if any, on their sentences will be discussed below.¹⁷⁰⁴

12. Overall pattern of events

521. The Trial Chamber found, *inter alia*, that “there was a campaign of violence directed against the Kosovo Albanian civilian population” and that it was the deliberate actions of the VJ and the MUP during this campaign “that caused the departure of at least 700,000 Kosovo Albanians from

¹⁶⁹⁹ Trial Judgement, vol. 2, para. 1221. As for his arguments regarding contact with civilians, Lazarević has failed to show how the evidence he cites demonstrates that members of the VJ did not “undertake any actions against the civilians in the area” (Lazarević’s Appeal Brief, para. 149).

¹⁷⁰⁰ Trial Judgement, vol. 2, para. 1219.

¹⁷⁰¹ Lazarević’s Appeal Brief, paras 150-151, and references therein.

¹⁷⁰² Lazarević’s claims of legal error with respect to events in Izbica/Izbičë (see *supra*, fn. 822) are likewise dismissed, as his allegations of legal error simply repeat several of his evidentiary arguments which have been found to be without merit.

¹⁷⁰³ See *infra*, sub-section IX.I.

¹⁷⁰⁴ See *infra*, sub-section IX.I.

Kosovo in the short period of time between the end of March and beginning of June 1999.”¹⁷⁰⁵ Lazarević challenges the Trial Chamber’s assessment of the overall pattern of events.¹⁷⁰⁶

(a) Submissions of the parties

522. Lazarević argues that the Trial Chamber erred in implicating the VJ in unlawful actions as set forth in the Trial Chamber’s assessment of the overall pattern of events in Kosovo, including in finding that the massive displacement of the Kosovo Albanian population in 1999 was at least partly due to the actions of the VJ.¹⁷⁰⁷ In particular, he submits that there is evidence “in contradiction to” the Trial Chamber’s conclusion that it was the actions of VJ and MUP forces, rather than NATO bombing, that was the main reason for the departure of the Kosovo Albanian civilian population from Kosovo.¹⁷⁰⁸ Lazarević also asserts that the Trial Chamber “failed to quote” Bislim Zyrapi in discussing the reasons that Kosovo Albanian civilians departed Kosovo.¹⁷⁰⁹ Lazarević further contends that it would have been reasonable for the Trial Chamber to conclude, based on Zyrapi’s evidence, maps, and “other credible evidence”, that the movement of the civilian population in Kosovo was pursuant to KLA orders and that VJ and MUP attacks were only directed against the KLA, not civilians.¹⁷¹⁰ Lazarević adds that the VJ undertook measures to treat civilians humanely and to ensure their safety and he cites evidence that the VJ provided assistance to civilians.¹⁷¹¹

523. The Prosecution responds that this sub-ground of Lazarević’s appeal warrants summary dismissal¹⁷¹² and, in any event, fails on its merits.¹⁷¹³ In the Prosecution’s submission, the Trial Chamber expressly considered and rejected arguments that the reason for the large-scale movement of the Kosovo Albanian population in Kosovo was NATO bombing or instructions of the KLA.¹⁷¹⁴ The Prosecution argues that the evidence proffered by Lazarević in support of his claims was dismissed by the Trial Chamber and that he fails to demonstrate that the Trial Chamber erred in so

¹⁷⁰⁵ Trial Judgement, vol. 2, para. 1178. See also *ibid.*, vol. 2, para. 1156.

¹⁷⁰⁶ Lazarević’s Appeal Brief, paras 209-222, referring, *inter alia*, to Trial Judgement, vol. 2, paras 1150-1262.

¹⁷⁰⁷ Lazarević’s Appeal Brief, paras 209, 527.

¹⁷⁰⁸ Lazarević’s Appeal Brief, para. 210, referring to Trial Judgement, vol. 2, paras 1153-1155, and references therein. See also Lazarević’s Appeal Brief., para. 527-531.

¹⁷⁰⁹ Lazarević’s Appeal Brief, paras 210-212, referring, *inter alia*, to Trial Judgement, vol. 2, paras 1153-1156. Lazarević cites as an example Zyrapi’s evidence that the civilian population in Belanica in Suva Reka/Suhareka municipality moved “pursuant to his order” (Lazarević’s Appeal Brief, para. 212, referring to Exh. P2469).

¹⁷¹⁰ Lazarević’s Appeal Brief, paras 213-216, referring, *inter alia*, to Bislim Zyrapi, 7 Nov 2006, T. 5990-6003, Exh. P2447, Exh. IC105. See also Lazarević’s Appeal Brief, paras 211-212, 217, referring, *inter alia*, Exh. P2469. Lazarević does not identify the “other credible evidence” to which he refers (Lazarević’s Appeal Brief, para. 216). See also Appeal Hearing, 13 Mar 2013, AT. 392-393, 396-397.

¹⁷¹¹ Lazarević’s Appeal Brief, paras 218-222, 527-531. See also Appeal Hearing, 13 Mar 2013, AT. 390-392, 394-396.

¹⁷¹² Prosecution’s Response Brief (Lazarević), paras 212, 215.

¹⁷¹³ Prosecution’s Response Brief (Lazarević), para. 213.

¹⁷¹⁴ Prosecution’s Response Brief (Lazarević), para. 213, referring to Trial Judgement, vol. 2, paras 1175-1178. See also Prosecution’s Response Brief (Lazarević), para. 306.

doing.¹⁷¹⁵ Finally, the Prosecution contends that whether the VJ attempted on a few occasions to provide aid to specific civilians during their displacement is irrelevant to the Trial Chamber's finding that the VJ, together with the MUP, orchestrated the forcible displacement of the civilian population.¹⁷¹⁶

524. In reply, Lazarević reiterates his earlier arguments¹⁷¹⁷ and adds that, contrary to the Prosecution's suggestion, the VJ gave aid to thousands of individuals and "at almost all significant locations in Kosovo".¹⁷¹⁸ In his view, the conduct of the VJ in this regard is highly relevant to his conviction.¹⁷¹⁹

(b) Analysis

525. Lazarević's claims that attacks of the VJ and MUP forces were only directed against the KLA and not directed against civilians and that the civilian population in Kosovo moved as the result of KLA orders or NATO bombing are dismissed, as he merely suggests that the Trial Chamber should have interpreted the evidence differently or did not consider relevant evidence but has failed to show that no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the only reasonable inference.¹⁷²⁰ Lazarević's arguments also ignore relevant factual findings and reasoning by the Trial Chamber.¹⁷²¹

526. As for Lazarević's submissions that the VJ engaged in humane conduct and provided assistance to the civilian population in many areas in Kosovo, the Appeals Chamber considers that he has failed to clearly identify the factual findings he is challenging in this respect or otherwise demonstrate how his submissions, even if accepted, would affect the Trial Chamber's findings that the VJ was involved in the commission of the specific crimes underlying his convictions. His arguments in this regard are, accordingly, dismissed.

527. For the foregoing reasons, the Appeals Chamber dismisses sub-ground 1(j) of Lazarević's appeal.

¹⁷¹⁵ Prosecution's Response Brief (Lazarević), para. 214, referring, *inter alia*, to Trial Judgement, vol. 2, para. 1175. See also Prosecution's Response Brief (Lazarević), para. 306.

¹⁷¹⁶ Prosecution's Response Brief (Lazarević), para. 215. See also Prosecution's Response Brief (Lazarević), para. 306.

¹⁷¹⁷ Lazarević's Reply Brief, para. 107. See also *ibid.*, para. 103.

¹⁷¹⁸ Lazarević's Reply Brief, paras 103-106.

¹⁷¹⁹ Lazarević's Reply Brief, para. 106.

¹⁷²⁰ Insofar as Lazarević has also raised similar claims with respect to events in specific municipalities, the Appeals Chamber refers to its findings addressing these arguments (see *supra*, sub-sections VI.B.1.(b), VI.B.2(b), VI.B.3.(b)(ii), VI.B.5.(a)(ii), VI.B.5.(b)(ii)a., VI.B.6.(a)(i)b., VI.B.7.(a)(ii), VI.B.8.(b), and VI.B.10.(b)(ii)).

¹⁷²¹ See Trial Judgement, vol. 2, paras 1175-1178, discussing, *inter alia*, findings with respect to Suva Reka/Suhareka municipality.

C. Alleged errors relating to convictions for murder

528. The Trial Chamber found that a total of at least 600 individuals were killed by VJ and MUP forces in the municipalities of Đakovica/Gjakova, Orahovac/Rahovec, Suva Reka/Suhareka, Srbica/Skenderaj, Vučitrn/Vushtrria, and Kačanik/Kaçanik.¹⁷²² The Trial Chamber found Lukić guilty for these killings under Article 7(1) of the Statute for committing (through his participation in a JCE) murder as a crime against humanity, persecution (murder) as a crime against humanity, and murder as a violation of the laws or customs of war.¹⁷²³ In particular, Lukić challenges his convictions with respect to killings in the municipalities of Đakovica/Gjakova, Orahovac/Rahovec, and Srbica/Skenderaj.¹⁷²⁴ The Appeals Chamber will address Lukić’s general challenges first, before turning to consider his arguments in relation to events in specific municipalities.

1. General challenges

(a) The OMPF List

529. In reaching findings regarding, *inter alia*, events in Đakovica/Gjakova and Srbica/Skenderaj municipalities, the Trial Chamber referred to a consolidated list of missing persons created and regularly updated by the Office of Missing Persons and Forensics (“OMPF”) in conjunction with the International Committee of the Red Cross (“ICRC”), which was intended as an exhaustive record of all those unaccounted for after the Kosovo conflict.¹⁷²⁵

(i) Submissions of the parties

530. Lukić submits that the Trial Chamber erred by relying upon Prosecution evidence that lacks indicia of credibility, citing the list of missing persons prepared by the OMPF, admitted as Exhibit P2798 (“OMPF List”).¹⁷²⁶ In particular, Lukić submits that sources for the hearsay assertions contained in the OMPF List were not identified or subjected to cross-examination, thus depriving him of the right to confront crucial evidence against him.¹⁷²⁷ Lukić adds that “[t]hese

¹⁷²² Trial Judgement, vol. 2, paras 1197, 1211-1212, 1215, 1217, 1221, 1223, 1235-1237, 1259, 1262.

¹⁷²³ Trial Judgement, vol. 3, paras 1138, 1212.

¹⁷²⁴ Lukić has consolidated grounds Q through JJ of his Notice of Appeal (with the exception of grounds U and GG) under ground Q in his Appeal Brief (see Lukić’s Appeal Brief, para. 7). The Appeals Chamber notes that Lukić raises similar challenges in relation to his convictions with respect to killings in the municipalities of Suva Reka/Suhareka and Kačanik/Kaçanik (see *infra*, fn. 1766). This section only addresses Lukić’s arguments under ground Q of his Appeal Brief in part. The remainder of his arguments raised under ground Q, including his challenge with respect to his conviction related to Vučitrn/Vushtrria municipality, are addressed elsewhere herein (see *supra*, sub-section IV.C.; *infra*, sub-section VII.F.5.).

¹⁷²⁵ Trial Judgement, vol. 2, paras 216, 613.

¹⁷²⁶ Lukić’s Appeal Brief, paras 712, 714-719. Lukić twice refers to the OMPF List as Exhibit P2454, rather than as Exhibit P2798 (*ibid.*, paras 715, 717). In light of the context in which these references are made, the Appeals Chamber construes Lukić’s arguments as pertaining to the OMPF List.

¹⁷²⁷ Lukić’s Appeal Brief, paras 716, 719.

findings” violate the principle of *in dubio pro reo*, Rules 92 *bis* and 92 *ter* of the Rules, and the Trial Chamber’s own ruling barring the admission of similar evidence.¹⁷²⁸

531. In response, the Prosecution submits that the OMPF List was admitted into evidence without objection and that Lukić has therefore waived any argument against its admission.¹⁷²⁹ Moreover, according to the Prosecution, Lukić’s submissions regarding the limitations of the OMPF List, including its hearsay nature, are irrelevant.¹⁷³⁰ In addition, the Prosecution argues that despite his general attacks on the reliability and credibility of the OMPF material, Lukić has failed to show that no reasonable trial chamber could have relied upon it.¹⁷³¹

(ii) Analysis

532. The Appeals Chamber notes that the OMPF List was admitted into evidence through OMPF Head Jose-Pablo Baraybar.¹⁷³² According to Baraybar’s statement, the OMPF List was compiled “from information and records collected by the OMPF during the course of its work” and consolidates lists maintained by ICRC, the Police/Missing Persons Unit of the United Nations Interim Administration in Kosovo, the Organization for Security and Cooperation in Europe (“OSCE”), and various family associations.¹⁷³³ As Lukić points out, the OMPF List does not refer to a source for the information that a person was last seen at a particular location on a particular date.¹⁷³⁴ This fact was apparent at the time the OMPF List was tendered for admission, however. It was likewise apparent from Baraybar’s statement that the OMPF List was used in connection with OMPF’s mandate to identify the human remains of persons missing from various locations.¹⁷³⁵ Lukić nevertheless declined to cross-examine Baraybar and did not object to the admission of the OMPF List.¹⁷³⁶

533. The Appeals Chamber recalls that “[i]f a party raises no objection to a particular issue before the Trial Chamber when it could have reasonably done so, in the absence of special

¹⁷²⁸ Lukić’s Appeal Brief, para. 720, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006. Lukić contends that the Trial Chamber relied on the OMPF list in making findings with respect to killings in both Đakovica/Gjakova and Srbica/Skenderaj municipalities (Lukić’s Appeal Brief, paras 713-714, 718, 725).

¹⁷²⁹ Prosecution’s Response Brief (Lukić), para. 457.

¹⁷³⁰ Prosecution’s Response Brief (Lukić), para. 460, referring, *inter alia*, to Lukić’s Appeal Brief, para. 718.

¹⁷³¹ Prosecution Response Brief (Lukić), para. 458.

¹⁷³² Trial Judgement, vol. 2, para. 216. See also Jose-Pablo Baraybar, 6 Mar 2007, T. 11020-11023.

¹⁷³³ Jose-Pablo Baraybar, Exh. P2794, para. 31. See also Trial Judgement, vol. 2, paras 216, 1351; Jose-Pablo Baraybar, 6 Mar 2007, T. 11020.

¹⁷³⁴ Exh. P2798. The OMPF List (Exh. P2798) contains information concerning more than 5,000 individuals. The entry relating to each individual contains a number of columns, such as columns for name, date of birth, and ethnicity. Under the columns “Group Disappearance” and “DateEvent”, for instance, the entries for some individuals refer to Meja/Mejë and 27 April 1999, respectively, suggesting that these are the location at and date on which the individuals in question were last seen.

¹⁷³⁵ Jose-Pablo Baraybar, Exh. P2794, paras 3, 14, 31.

¹⁷³⁶ Trial Judgement, vol. 2, para. 216; Jose-Pablo Baraybar, 6 Mar 2007, T. 11020-11024.

circumstances, the Appeals Chamber will find that the party has waived his right to bring the issue as a valid ground of appeal.”¹⁷³⁷ In the absence of any specific submissions as to the existence of special circumstances,¹⁷³⁸ the Appeals Chamber is of the view that any challenge to the OMPF List reasonably could and should have been made at trial and finds that Lukić has waived the right to raise such an argument on appeal.¹⁷³⁹

(b) Victim identification

534. The Trial Chamber observed on several occasions that there were discrepancies between the evidence and the facts alleged in the Indictment, including with respect to the spelling of the names of certain victims who were found to have been killed.¹⁷⁴⁰ The Trial Chamber found that “in most cases these discrepancies are so minor that the Chamber is nevertheless able to conclude that the relevant information relates to a certain victim.”¹⁷⁴¹

(i) Submissions of the parties

535. Lukić submits that the Trial Chamber erred in concluding that discrepancies between the names of victims listed in the Indictment and mortal remains that were identified were minor and did not affect the ability to identify relevant victims.¹⁷⁴² He argues that, given the similarity of many Kosovo Albanian names, it becomes impossible for the Defence to have actual knowledge of the alleged victims and therefore to make the necessary challenges in the absence of “proper biographical information”.¹⁷⁴³ Lukić also suggests that there are “several forensic discrepancies” which cast doubt on the factual allegations of the Indictment and he cites the example of an individual named Pjeter Abazi.¹⁷⁴⁴

¹⁷³⁷ *Naletilić and Martinović* Appeal Judgement, para. 21.

¹⁷³⁸ Although Lukić makes no specific reference to special circumstances, he suggests that when the OMPF List was tendered it was not apparent that the information it contained would become the “crux/lynchpin” of the Trial Judgement convicting him (Lukić’s Appeal Brief, para. 719). For the reasons set forth below (see *infra*, sub-section VI.C.2.), the Appeals Chamber rejects Lukić’s argument in this regard. Consequently, the Appeals Chamber will not consider whether the unanticipated use of evidence in a trial judgement may constitute “special circumstances” allowing a waived argument to be raised on appeal (see *Naletilić and Martinović* Appeal Judgement, para. 21).

¹⁷³⁹ With regard to Lukić’s arguments that “[t]hese findings” violate the principle of *in dubio pro reo*, Rules 92 *bis* and 92 *ter* of the Rules, and the Trial Chamber’s own ruling barring the admission of similar evidence (Lukić’s Appeal Brief, para. 720), the Appeals Chamber notes that he has failed to identify the challenged findings, to develop his arguments, or to indicate why Rules 92 *bis* and 92 *ter* of the Rules are relevant. His arguments in this regard are, accordingly, dismissed.

¹⁷⁴⁰ See, e.g., Trial Judgement, vol. 4, paras 22, 648, 873.

¹⁷⁴¹ See, e.g., Trial Judgement, vol. 4, paras 22, 648, 873.

¹⁷⁴² Lukić’s Appeal Brief, paras 727-728, referring to Trial Judgement, vol. 4, paras 22, 649, 934.

¹⁷⁴³ Lukić’s Appeal Brief, para. 729.

¹⁷⁴⁴ Lukić’s Appeal Brief, paras 731-732, referring to Trial Judgement, vol. 4, para. 26.

536. In response, the Prosecution submits that Lukić's claims should be summarily dismissed and, in any event, fail on their merits.¹⁷⁴⁵ In particular, the Prosecution argues that, in his challenge to the Trial Chamber's treatment of certain minor spelling discrepancies, he fails to articulate an error.¹⁷⁴⁶ In addition, the Prosecution contends that the Trial Chamber properly assessed the evidence of death in reaching its conclusions.¹⁷⁴⁷

(ii) Analysis

537. Although Lukić challenges the Trial Chamber's conclusion that many of the discrepancies it identified "are so minor that the Chamber is nevertheless able to conclude that the relevant information relates to a certain victim",¹⁷⁴⁸ he has not demonstrated any error in this regard. Lukić has likewise failed to support his assertion that the alleged absence of "proper biographical information" as to victims could prejudice his ability to mount his defence. As for Lukić's arguments concerning an individual named Pjeter Abazi, the Appeals Chamber notes that the Trial Chamber declined to find that an individual by this name had been murdered where there was a multi-decade discrepancy between the approximate age listed in the Indictment Schedule and the age listed in the autopsy report.¹⁷⁴⁹ Lukić has failed to show how the discrepancy identified by the Trial Chamber demonstrates any error with respect to the Trial Chamber's treatment of minor discrepancies concerning other individuals named in the Trial Judgement.

2. Đakovica/Gjakova

538. The Trial Chamber found that VJ and MUP forces targeted Kosovo Albanian civilians in Dobroš/Dobrosh, Ramoc, Korenica/Korenicë, Meja/Mejë, and other villages during an operation in the Reka/Caragoj valley in Đakovica/Gjakova municipality on 27 and 28 April 1999.¹⁷⁵⁰ During this joint VJ and MUP operation, Kosovo Albanians were not only systematically expelled from their villages but many were also killed.¹⁷⁵¹ The Trial Chamber concluded that the operation was launched in part as a response to the killing of five policemen on 22 April 1999, and that one of the motives behind the operation was vengeance against the Kosovo Albanians in the area, while another was to cleanse the villages of their Kosovo Albanian inhabitants.¹⁷⁵² With respect to murders committed during this operation, the Trial Chamber found that after the Serbian forces entered the villages and while they expelled residents, Kosovo Albanian men from these villages

¹⁷⁴⁵ Prosecution's Response Brief (Lukić), paras 440-444. See also *ibid.*, paras 461, 463, 465.

¹⁷⁴⁶ Prosecution's Response Brief (Lukić), para. 461.

¹⁷⁴⁷ Prosecution's Response Brief (Lukić), paras 462-464.

¹⁷⁴⁸ See, e.g., Trial Judgement, vol. 4, paras 22, 648, 873.

¹⁷⁴⁹ Trial Judgement, vol. 4, para. 26.

¹⁷⁵⁰ Trial Judgement, vol. 2, paras 228-235, 1159, 1194-1195.

¹⁷⁵¹ Trial Judgement, vol. 2, paras 1194, 1195. See also *ibid.*, vol. 2, paras 180-238.

¹⁷⁵² Trial Judgement, vol. 2, para. 228.

were frequently separated and subsequently killed by VJ and MUP forces.¹⁷⁵³ The Trial Chamber also noted that “the physical perpetrators targeting Kosovo Albanians during the Reka/Caragoj valley operation made comments such as describing that they were ‘slaughtering šiptars’.”¹⁷⁵⁴

539. The Trial Chamber concluded that, *inter alia*, the evidence of specific killings in Korenica/Korenicë, Meja/Mejë, and other villages in the Reka/Caragoj valley in Đakovica/Gjakova municipality on 27 April 1999 was “indicative of a far greater massacre that occurred as a part of the Reka/Caragoj valley operation carried out by VJ and MUP personnel, along with members of paramilitary groups”.¹⁷⁵⁵ The Trial Chamber found that this massacre resulted in the killing of at least 287 Kosovo Albanians and concluded that “[t]he only reasonable inference from all of the evidence is that many of these [287] killed people were civilians or *hors de combat* at the time of their killing”.¹⁷⁵⁶ The Trial Chamber further found that all of the elements of murder as a violation of the law or customs of war punishable under Article 3 of the Statute and murder as a crime against humanity under Articles 5(a) and 5(h) of the Statute had been satisfied.¹⁷⁵⁷

(a) Submissions of the parties

540. Lukić submits that the OMPF List and the other evidence relied upon by the Trial Chamber was insufficient to establish beyond reasonable doubt that certain individuals were killed in Đakovica/Gjakova municipality.¹⁷⁵⁸ Lukić submits that for the “vast majority” of named victims in Đakovica/Gjakova municipality, there was little or no evidence given by Prosecution witnesses and that the OMPF List is the sole evidence relied upon by the Trial Chamber,¹⁷⁵⁹ although the OMPF List fails to establish where individuals were killed, in what manner they were killed, and whether they died as civilians or combatants.¹⁷⁶⁰ Moreover, he asserts that two instances in which the Trial Chamber declined to attribute criminal responsibility for a death demonstrate the “unreliable nature” of the Prosecution’s witnesses.¹⁷⁶¹ Lukić adds that, for 84 of the 287 victims from Đakovica/Gjakova municipality with respect to whom he was convicted, the manner of death was

¹⁷⁵³ Trial Judgement, vol. 2, paras 180-215, 232-238.

¹⁷⁵⁴ Trial Judgement, vol. 2, para. 1198. The Appeals Chamber notes that “šiptars” refers to Albanians (see, e.g., Veton Surroi, 10 Oct 2006, T. 4540-4542).

¹⁷⁵⁵ Trial Judgement, vol. 2, para. 236.

¹⁷⁵⁶ Trial Judgement, vol. 2, para. 236.

¹⁷⁵⁷ Trial Judgement, vol. 2, paras 1197-1198.

¹⁷⁵⁸ Lukić’s Appeal Brief, paras 713-718, 721-724. In Lukić’s view, the Trial Chamber should have followed the same approach it employed with respect to Suva Reka/Suhareka municipality, where, he asserts, it refused to find that an individual was killed based solely on the OMPF List and in the absence of direct, eye-witness testimony (*ibid.*, para. 726, referring to Trial Judgement, vol. 2, paras 537-544, *ibid.*, vol. 4, para. 633).

¹⁷⁵⁹ Lukić’s Appeal Brief, paras 713-714, 723 referring, *inter alia*, to Trial Judgement, vol. 2, para. 233. Lukić also suggests that those individuals named in Schedule H of the Indictment whose death was not found to be criminally caused illustrate the flaws in relying solely upon the OMPF list (Lukić’s Appeal Brief, para. 732).

¹⁷⁶⁰ Lukić’s Appeal Brief, paras 717, 721-722.

¹⁷⁶¹ Lukić’s Appeal Brief, para. 724, referring to Trial Judgement, vol. 2, paras 233, 235.

not forensically ascertained and that there was therefore insufficient evidence to establish criminal liability for murder.¹⁷⁶²

541. Lukić also submits that the Trial Chamber erred in finding that a majority of the 287 deaths found in Đakovica/Gjakova municipality resulted from the commission of crimes, in disregard of alternative explanations.¹⁷⁶³ In his view, it would have been equally reasonable to infer, in light of the evidence, that some of the bodies were those of terrorists or combatants whose deaths were the result of legitimate combat operations.¹⁷⁶⁴ He argues that the Trial Chamber did not even consider this possibility¹⁷⁶⁵ and that it erred in its assessment of the degree of KLA presence in the Reka/Caragoj valley on 27 and 28 April 1999 as well as in its subsequent finding that the Serbian forces' operation was directed against the civilian population.¹⁷⁶⁶ Lukić also contends that significant evidence of NATO air strikes was adduced and "simply was not considered as an alternative reason reasonable under the evidence".¹⁷⁶⁷

542. In response, the Prosecution submits that Lukić's claims should be summarily dismissed and, in any event, fail on their merits.¹⁷⁶⁸ The Prosecution argues that Lukić fails to articulate any error in asserting that "very little or no" direct evidence was adduced regarding the deaths of the 274 of the 287 people identified as victims of the murder in the Reka/Caragoj valley.¹⁷⁶⁹ In addition, the Prosecution argues that Lukić's characterisation of the OMPF List as the "sole evidence" for "a vast majority of the named victims" misrepresents the Trial Judgement and that Lukić ignores other relevant findings made by the Trial Chamber.¹⁷⁷⁰ With respect to Lukić's arguments concerning alternative explanations for the killings involving, *inter alia*, a KLA presence

¹⁷⁶² Lukić's Appeal Brief, para. 733, referring to Trial Judgement, vol. 4, paras 27, 29, 34-35, 41-43, 48, 55, 58-59, 64-65, 71-73, 75-79, 86-87, 90, 96-97, 109, 126, 132, 140, 145, 157, 175, 178, 180, 183-184, 186, 189, 206, 210-211, 218-221, 227, 238, 247-248, 250-251, 264, 277, 280, 282-283, 285, 301, 304-306, 308-309, 312, 322, 330-331, 333, 338, 345, 349, 351-352, 371, 373, 375, 379, 387, 396, 399, 401, 404. In view of the order of paragraphs listed in his appeal brief and his arguments related thereto, the Appeals Chamber considers that Lukić intended to refer to paragraph 209 rather than 109 of Trial Judgement, volume 4.

¹⁷⁶³ Lukić's Appeal Brief, paras 692-699.

¹⁷⁶⁴ Lukić's Appeal Brief, paras 695-696, referring to Exh. 6D1468, Radovan Zlatković, Exh. 6D1627, Radovan Zlatković, 14 Apr 2008, T. 25281-25285.

¹⁷⁶⁵ Lukić's Appeal Brief, para. 696.

¹⁷⁶⁶ Lukić's Appeal Brief, paras 697-699. Lukić adds that the errors he describes with respect to Đakovica/Gjakova municipality apply to all municipalities (*ibid.*, para. 707. See also *ibid.*, para. 692) and submits that considerable evidence relating to the presence and activity of the KLA in nine other municipalities was omitted from the Trial Chamber's findings (*ibid.*, para. 709, listing the municipalities of Peć/Peja, Dečani/Dečan, Orahovac/Rahovec, Suva Reka/Suhareka, Srbica/Skenderaj, Kosovska Mitrovica/Mitrovica, Priština/Prishtina, Uroševac/Ferizaj, and Kačanik/Kaçanik). The Appeals Chamber notes that Lukić was convicted for murder in four of these municipalities in addition to Đakovica/Gjakova: Orahovac/Rahovec, Suva Reka/Suhareka, Srbica/Skenderaj, and Kačanik/Kaçanik (see Trial Judgement, vol. 3, para. 1138).

¹⁷⁶⁷ Lukić's Appeal Brief, para. 708, referring to evidence in relation to the municipalities of Peć/Peja, Dečani/Dečan, Orahovac/Rahovec, Suva Reka/Suhareka, Srbica/Skenderaj, Kosovska Mitrovica/Mitrovica, Priština/Prishtina, Uroševac/Ferizaj, and Kačanik/Kaçanik.

¹⁷⁶⁸ Prosecution's Response Brief (Lukić), paras 440-444. See also *ibid.*, paras 452-456.

¹⁷⁶⁹ Prosecution's Response Brief (Lukić), para. 453.

¹⁷⁷⁰ Prosecution's Response Brief (Lukić), paras 454-455, 458.

and NATO air strikes, the Prosecution responds that Lukić fails to address the Trial Chamber's relevant findings or its consideration of the evidence to which he refers.¹⁷⁷¹

543. In reply, Lukić argues that before someone may be regarded as having been murdered, forensic review must be conducted to determine the manner of death and to exclude any natural causes or causes that do not lead to criminal liability.¹⁷⁷² According to Lukić, in a large number of instances in relation to Đakovica/Gjakova municipality, these standards were not followed in the Trial Judgement.¹⁷⁷³ Lukić also submits that the Prosecution fails to contest his claim that for many of the victims named in the Indictment there is neither forensic proof nor direct witness testimony to indicate that the deaths resulted from a crime.¹⁷⁷⁴ In Lukić's view, the Trial Chamber therefore erred in entering murder convictions, in disregard of its own established standard.¹⁷⁷⁵

(b) Analysis

544. With respect to the findings on murder in the Đakovica/Gjakova municipality, the Appeals Chamber notes that the Trial Chamber considered a range of eye-witness and documentary evidence in finding that 287 people were killed on 27 April 1999 in and around the villages of Korenica/Korenicë and Meja/Mejë, located in the Reka/Caragoj valley.¹⁷⁷⁶ The Trial Chamber received forensic evidence confirming that human remains exhumed from mass graves in Batajnica were identified, through DNA testing and comparisons with surviving family members, as 287 people listed in the OMPF List as missing from the area of Meja/Mejë.¹⁷⁷⁷ The Trial Chamber also received evidence from various witnesses who reported seeing dead bodies in the area of Meja/Mejë on 27 April 1999¹⁷⁷⁸ and described the involvement of, *inter alia*, VJ and MUP forces in criminal activities in Korenica/Korenicë.¹⁷⁷⁹ In two instances, witnesses heard shots after having been separated from family members and others and subsequently had the remains of 13 of these individuals returned to them from mass graves in Batajnica.¹⁷⁸⁰ Based upon the forensic and testimonial evidence before it, the Trial Chamber found that:

the specific killings described by Malaj, Deda, Pnishi, Peraj, and K90 in Meja and Korenica, and other villages in the Reka/Caragoj valley on 27 April 1999, are indicative of a far greater massacre

¹⁷⁷¹ Prosecution's Response Brief (Lukić), paras 446-448.

¹⁷⁷² Lukić's Reply Brief, para. 112. See also *ibid.*, para. 111.

¹⁷⁷³ Lukić's Reply Brief, para. 112.

¹⁷⁷⁴ Lukić's Reply Brief, para. 109. See also *ibid.*, para. 110.

¹⁷⁷⁵ Lukić's Reply Brief, para. 111. See also *ibid.*, para. 114.

¹⁷⁷⁶ Trial Judgement, vol. 2, paras 165-227.

¹⁷⁷⁷ Trial Judgement, vol. 2, para. 216, referring to Exh. P942, Exh. P943, Exh. P944, Exh. P2394, Exh. P2415, Exh. P2454, Exh. P2559 (under seal).

¹⁷⁷⁸ Trial Judgement, vol. 2, paras 203, 210, 212.

¹⁷⁷⁹ *E.g.*, Trial Judgement, vol. 2, para. 199. See also *ibid.*, paras 229, 232.

¹⁷⁸⁰ Trial Judgement, vol. 2, paras 192-196. See also *ibid.*, para. 233.

that occurred as a part of the Reka/Caragoj valley operation carried out by VJ and MUP personnel, along with members of paramilitary groups.¹⁷⁸¹

545. Although there is no direct, eye-witness evidence as to the murder of each one of the 287 individuals found to have been killed in the Reka/Caragoj valley operation, the Appeals Chamber recalls that such evidence is not required. Rather,

[t]he fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber. All that is required to be established from that evidence is that the only reasonable inference from the evidence is that the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible.¹⁷⁸²

It follows that the specific types of evidence that will satisfy this standard may vary on a case-by-case basis. As indicated in the Trial Judgement, the Trial Chamber relied upon the specific killings described by witnesses and the other evidence before it as circumstantial evidence of a greater massacre committed by VJ and MUP personnel, together with members of paramilitary groups.¹⁷⁸³ Lukić has failed to demonstrate that the Trial Chamber's approach was unreasonable.

546. Lukić's argument concerning the "unreliable nature" of the Prosecution's witnesses¹⁷⁸⁴ is also without merit. The Trial Chamber concluded that there was insufficient proof that Skender Pjetri was killed in the village of Korenica/Korenice on 27 April 1999 or that MUP forces killed Kole Duzhmani on 27 or 28 April 1999,¹⁷⁸⁵ notwithstanding evidence given by Merita Deda and Martin Pnishi, respectively.¹⁷⁸⁶ The Appeals Chamber recalls, however, that a trial chamber may reasonably accept certain parts of a witness's testimony and reject others¹⁷⁸⁷ and notes that the Trial Chamber indicated why it was declining to rely solely upon witness testimony with respect to the deaths of Skender Pjetri¹⁷⁸⁸ and Kole Duzhmani.¹⁷⁸⁹ Lukić has failed to show that the Trial Chamber erred in this regard or in relying upon Merita Deda and Martin Pnishi or other witnesses in making its findings concerning victims named in the Trial Judgement.

547. As Lukić's submission suggests, the cause of death for many of the 287 victims listed in the Trial Judgement with respect to Đakovica/Gjakova municipality is described as "unascertained" in

¹⁷⁸¹ Trial Judgement, vol. 2, para. 236.

¹⁷⁸² *Kvočka et al.* Appeal Judgement, para. 260, referring to *Krnjelac* Trial Judgement, paras 326-327, *Tadić* Trial Judgement, para. 240.

¹⁷⁸³ Trial Judgement, vol. 2, para. 236.

¹⁷⁸⁴ Lukić's Appeal Brief, para. 724.

¹⁷⁸⁵ Trial Judgement, vol. 2, paras 233-234.

¹⁷⁸⁶ Trial Judgement, vol. 2, paras 192, 202, fn. 529.

¹⁷⁸⁷ *Boškoski and Tarčulovski* Appeal Judgement, para. 59, and references therein.

¹⁷⁸⁸ Trial Judgement, vol. 4, para. 285, noting that Deda did not see Skender Pjetri being killed or his body.

¹⁷⁸⁹ Trial Judgement, vol. 2, paras 202, 234. The Trial Chamber noted that Pnishi, who saw Kole Duzhmani's bullet-ridden body 19 days after he was shot, "explained the lack of degradation of the corpse by saying that it had been preserved because of the smoke from the fire" (*ibid.*, vol. 2, para. 202). The Trial Chamber deemed this evidence as to the state of the body "unconvincing" (*ibid.*, vol. 2, para. 234).

the relevant death certificates or autopsy reports.¹⁷⁹⁰ He has failed to explain, however, why the Trial Chamber's findings as to the cause of death of these victims cannot stand on the basis of the other evidence in the record, including forensic evidence and eye-witness testimony specific to the individuals concerned¹⁷⁹¹ as well as evidence concerning other individuals whose remains were recovered from the same site. His argument in this regard is thus dismissed.

548. The Appeals Chamber turns to Lukić's submissions regarding alternative explanations for the killings at issue. The Appeals Chamber notes that contrary to Lukić's submission,¹⁷⁹² the Trial Chamber considered evidence of KLA activity and presence in the Reka/Caragoj valley area, including all of the exhibits and witness testimony identified by Lukić.¹⁷⁹³ It nonetheless found, based upon the evidence of K73 and K90 among others, that "the KLA presence in this area was not significant on 27 and 28 April 1999, and that the Reka/Caragoj valley operation was primarily directed at the Kosovo Albanian civilian population."¹⁷⁹⁴ Although Lukić argues that these findings were not supported, he does not address the evidence underlying them, nor does he demonstrate that a reasonable trial chamber could not have reached such findings.

549. The Appeals Chamber finally turns to Lukić's argument that some of the 287 human remains recovered could have been the bodies of combatants and that therefore the Trial Chamber erred in its finding that the Serbian forces' operation was directed against the civilian population.¹⁷⁹⁵ The Appeals Chamber recalls that in order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any

¹⁷⁹⁰ See Lukić's Appeal Brief, para. 733, and references therein. See also, *e.g.*, Trial Judgement, vol. 4, paras 27, 34, 96.

¹⁷⁹¹ The Trial Chamber referred to eye-witness testimony concerning the killings of eight individuals listed by Lukić as having an unascertained cause of death (Trial Judgement, vol. 4, paras 95 (Linton Deda), 97 (Mark Deda), 175 (Andrush Kabashi), 177 (Arben Kabashi), 179 (Nikoll Kabashi), 226 (Mark Markaj), 237 (Pren Markaj), 285 (Skender Pjetri). See also Trial Judgement, vol. 2, para. 233 (declining to find that Skender Pjetri had been murdered in Korenica on 27 April 1999)). For 60 more of the individuals whose cause of death was unascertained, in the relevant death certificates or autopsy reports, the Trial Chamber noted that there were multiple bone fractures caused by blunt instruments and evidence of the persons having been exposed to high temperatures and/or evidence of projectile traces and gunshots recorded in the relevant autopsy reports (Trial Judgement, vol. 4, paras 27 (Bekim Ademaj), 29 (Isuf Ademi), 34 (Blerim Ahmeti), 35 (Hysen Ahmeti), 41 (Ali Aliaj), 42 (Sali Aliaj), 43 (Zenun Aliaj), 48 (Bajrush Avdyli), 55 (Shaban Bajrami), 58 (Xhavit Bajrami), 59 (Ali Bala), 64 (Demush Bardheci), 65 (Idriz Bardheci), 71 (Dritan Beqaj), 72 (Emin Beqaj), 73 (Kujtim Beqaj), 77 (Rasim Beqaj), 78 (Tafe Beqaj), 79 (Ymer Beqaj), 86 (Avni Binaku), 87 (Binak Binaku), 90 (Fixhri Cuni), 126 (Haxhi Fetaj), 132 (Deme Gjocaj), 145 (Gjon Hasanaj), 157 (Ardian Hoxha), 184 (Gëzim Kameri), 186 (Rrustem Kameri), 189 (Fran Komani), 209 (Kllaudie Mala), 210 (Kol Mala), 211 (Monika Mala), 218 (Burim Maloku), 219 (Petrit Maloku), 220 (Ymer Maloku), 221 (Besim Malushaj), 247 (Quash Mehmeti), 250 (Marash Merturi), 251 (Bajram Meta), 264 (Sokol Nuza), 277 (Shkelzen Pajaziti), 280 (Zenel Pajaziti), 283 (Gasper Pjetri), 304 (Viktor Prendi), 305 (Hajdar Qestaj), 309 (Sadri Rama), 312 (Zeqir Rama), 322 (Isuf Rexhaj), 330 (Osman Sadiku), 333 (Hysni Sadriu), 338 (Osman Salihaj), 349 (Ujkan Selmani), 352 (Deme Shala), 371 (Rexhep Syla), 373 (Bajram Tahiraj), 375 (Isuf Tahiraj), 396 (Halit Ymeri), 399 (Musa Ymeri), 401 (Zenel Ymeri), 404 (Zenel Zenuni)).

¹⁷⁹² Lukić's Appeal Brief, para. 696.

¹⁷⁹³ *E.g.*, Trial Judgement, vol. 2, paras 106, 109-115, 175-177, 185, and references therein.

¹⁷⁹⁴ Trial Judgement, vol. 2, para. 230.

¹⁷⁹⁵ Lukić's Appeal Brief, paras 693-697.

civilian population.¹⁷⁹⁶ The jurisprudence of the Tribunal provides that the “civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.¹⁷⁹⁷ In order to consider whether a population is “civilian” for the purposes of Article 5 of the Statute, “the civilian status of the victims, the number of the civilians, and the proportions of civilians” within the population must be evaluated.¹⁷⁹⁸ The Appeals Chamber notes that the Trial Chamber did not conclude that all of the 287 Kosovo Albanians killed were civilians but rather found that the only reasonable inference to be drawn from the evidence was that “many of these killed people were civilians or *hors de combat* at the time of their killing.”¹⁷⁹⁹ The Appeals Chamber further notes that in its conclusions, the Trial Chamber noted that “these murders were committed as a part of the joint VJ and MUP operation in the Reka/Caragoj valley, which was a widespread and systematic attack directed against the civilian population.”¹⁸⁰⁰ The Appeals Chamber therefore concludes that the fact that some combatants may have been among those killed does not deprive the Kosovo Albanian population at hand of its “civilian” status pursuant to Article 5 of the Statute. The Appeals Chamber therefore finds that the *chapeau* requirement of Article 5 of the Statute that the crimes be “directed against any civilian population” is met.

550. The Appeals Chamber is nevertheless concerned by the Trial Chamber’s finding that the killing of all 287 Kosovo Albanians constituted murder under Articles 3 and 5 of the Statute.¹⁸⁰¹ The Appeals Chamber notes that the Trial Chamber relied on limited evidence with respect to the circumstances and status of each of the victims¹⁸⁰² and failed to determine whether, at the time of their death, each victim was a civilian taking no active part in the hostilities or was *hors de combat*.¹⁸⁰³ In this context, the Appeals Chamber recalls the Trial Chamber’s finding that the

¹⁷⁹⁶ *Blaškić* Appeal Judgement, para. 98.

¹⁷⁹⁷ *Kordić and Čerkez* Appeal Judgement, para. 50. See also *Galić* Appeal Judgement, para. 136; *Mrkšić and Sljivančanin* Appeal Judgement, para. 31; *Martić* Appeal Judgement, para. 311; *Blaškić* Appeal Judgement, para. 116.

¹⁷⁹⁸ *Mrkšić and Sljivančanin*, para. 32; *Blaškić* Appeal Judgement, para. 115.

¹⁷⁹⁹ Trial Judgement, vol. 2, para. 236 (emphasis added). See also *ibid.*, vol. 2, para. 220, discussing evidence that some of the bodies were clad in civilian clothing.

¹⁸⁰⁰ Trial Judgement, vol. 2, para. 1197.

¹⁸⁰¹ The Trial Chamber found that: “With respect to the killing of at least 287 Kosovo Albanians, many of whom were civilians, in and around Korenica and Meja on 27 April 1999 by MUP and VJ forces acting together, it is established that the physical perpetrators caused and intended these deaths. The Chamber finds, therefore, that all of the elements of murder, as a violation of the law or customs of war punishable under Article 3 of the Statute, are satisfied. In addition, these murders were committed as a part of the joint VJ and MUP operation in the Reka/Caragoj valley, which was a widespread and systematic attack directed against the civilian population. The physical perpetrators’ actions were part of that attack and they knew this to be the case, as shown by the organised nature and large number of killings. Consequently, the Chamber is satisfied that all of the elements of murder as a crime against humanity, punishable under Article 5(a) of the Statute, are satisfied” (see Trial Judgement, vol. 2, para. 1197). The Appeals Chamber thus understands the Trial Chamber to have found that the killing of all 287 Kosovo Albanians amounted to murder under Articles 3 and 5 of the Statute (see Trial Judgement, vol. 2, paras 1197-1198).

¹⁸⁰² Trial Judgement, vol. 2, paras 189, 192-195, 203-205, 210, 212, 216-222, 232-238, and references therein.

¹⁸⁰³ Cf. for Article 3 of the Statute *e.g.*, *Strugar* Appeal Judgement, paras 172-179; *Kvočka et al.* Appeal Judgement, para. 261; and for Article 5 of the Statute *e.g.*, *Martić* Appeal Judgement, paras 306-314; *Blaškić* Appeal Judgement, paras 113-114.

Reka/Caragoj valley operation was *primarily* directed at the Kosovo Albanian civilian population and notes the evidence that Serbian forces engaged in some fighting with the KLA in this region at the relevant time and that a number of KLA members were killed during these clashes.¹⁸⁰⁴ In these circumstances, the Appeals Chamber considers that in the absence of sufficient evidence on the circumstances and status of each of the victims, the Trial Chamber erred to the extent it found that all 287 killings during the Reka/Caragoj valley operation amounted to murder under Articles 3 and 5 of the Statute and thereby entering convictions for murder with regard to all of these killings. However, with respect to 13 of the total 287 individuals killed, the Appeals Chamber notes that the Trial Chamber based its conclusions on the evidence of Merita Deda, Lizane Malaj, and K73, who described these specific killings and the circumstances pertaining to each of the victims.¹⁸⁰⁵ Having reviewed the relevant evidence, the Appeals Chamber is satisfied that the only reasonable inference is that these 13 individuals killed were taking no active part in hostilities or were *hors de combat* at the time of their deaths.¹⁸⁰⁶

551. In light of the foregoing, the Appeals Chamber thus quashes Lukic's convictions for murder under Articles 3 and 5 of the Statute with respect to 274 of the 287 Kosovo Albanians found to be murdered.¹⁸⁰⁷ The Appeals Chamber recalls that Pavković was also convicted of these murders committed during the Reka/Caragoj valley operation.¹⁸⁰⁸ For the same reasons above, the Appeals Chamber therefore also quashes Pavković's convictions for murder under Articles 3 and 5 of the Statute with respect to 274 of the 287 Kosovo Albanians found to be murdered.¹⁸⁰⁹ The impact of these findings, if any, on their sentences will be addressed below.¹⁸¹⁰

3. Srbica/Skenderaj

552. The Trial Chamber found that on 28 March 1999 over 100 men were first separated from women and children gathered in a field at Izbica/Izbičë in Srbica/Skenderaj municipality, then divided into two groups, and shot.¹⁸¹¹ The Trial Chamber found that approximately 89 of the men were killed in this manner and that four other elderly people were also killed.¹⁸¹² The Trial Chamber

¹⁸⁰⁴ See Trial Judgement, vol. 2, paras 185, 188, 197, and references therein; Exh. 6D1468.

¹⁸⁰⁵ Trial Judgement, vol. 2, paras 192, 194-195, 199, 216, 233.

¹⁸⁰⁶ Trial Judgement, vol. 2, paras 192, 194-195, 199, 216, 233, and references therein.

¹⁸⁰⁷ Trial Judgement, vol. 2, para. 1197; Trial Judgement, vol. 3, para. 1138.

¹⁸⁰⁸ Trial Judgement, vol. 2, para. 1197; Trial Judgement, vol. 3, para. 788.

¹⁸⁰⁹ Trial Judgement, vol. 2, para. 1197. With respect to Šainović, the Appeals Chamber notes that it has quashed his conviction for murder as a violation of the laws or customs of war, and murder and persecution, through murder, as crimes against humanity, in relation to this incident in Đakovica/Gjakova municipality in late April 1999 (see *infra*, sub-section VII.D.5.(b)).

¹⁸¹⁰ See *infra*, sub-section IX.I.

¹⁸¹¹ Trial Judgement, vol. 2, para. 679.

¹⁸¹² Trial Judgement, vol. 2, paras 679, 681. See also *ibid.*, vol. 2, para. 685.

also found that MUP forces were involved in the killings.¹⁸¹³ The Trial Chamber further found that all of the elements of murder as a violation of the law or customs of war punishable under Article 3 of the Statute and murder as a crime against humanity under Articles 5(a) and 5(h) of the Statute had been satisfied.¹⁸¹⁴

(a) Submissions of the parties

553. In relation to the village of Izbica/Izbičë in Srbica/Skenderaj municipality, Lukić argues that the OMPF List and a list compiled by Liri Loshi comprise the only evidence that many of the alleged victims were killed there by the MUP on 28 March 1999.¹⁸¹⁵ Because the OMPF List states that many of the named victims disappeared after that date, Lukić submits that the Trial Chamber erred in finding that these victims were killed on 28 March 1999.¹⁸¹⁶ He adds that eye-witness testimony does not link these deaths to killings at Izbica/Izbičë and that, in at least one instance, the OMPF List did not even record the person as having gone missing in Izbica/Izbičë.¹⁸¹⁷ He further contends that the *actus reus* for the crime of murder was not satisfied because no body was recovered or offered as proof of death for 48 of the victims identified in the Indictment and that a finding of murder is not the only reasonable inference available from the remaining circumstantial evidence.¹⁸¹⁸ Moreover, although the Trial Chamber identified 27 victims at Izbica/Izbičë as listed in Schedule F of the Indictment, Lukić underscores that the Trial Chamber was unable to identify which of the remaining victims in Schedule F were among the approximately 93 people killed in Izbica/Izbičë.¹⁸¹⁹ He also argues that there was no evidence demonstrating that many of the victims died in a violent manner and that the Trial Chamber otherwise had insufficient evidence to find murder, listing several examples.¹⁸²⁰

554. In response, the Prosecution submits that Lukić's challenges to the Trial Chamber's use of the OMPF material in support of its identification of victims murdered at Srbica/Skenderaj warrant summary dismissal.¹⁸²¹ The Prosecution adds that the fact of a victim's death can be inferred from

¹⁸¹³ Trial Judgement, vol. 2, para. 686.

¹⁸¹⁴ Trial Judgement, vol. 2, para. 1223.

¹⁸¹⁵ Lukić's Appeal Brief, para. 725.

¹⁸¹⁶ Lukić's Appeal Brief, para. 725.

¹⁸¹⁷ Lukić's Appeal Brief, para. 725, referring to Trial Judgement, vol. 4, para. 680.

¹⁸¹⁸ Lukić's Appeal Brief, paras 742, 745. See also *ibid.*, paras 736-741, 747. Lukić adds that, in relation to other municipalities, the Trial Chamber declined to enter a finding of murder if no body was recovered and suggests that the only explanation for such "disparate treatment" is that the Trial Chamber erred in relation to Izbica/Izbičë and the other villages for which it entered murder convictions in the absence of a body (*ibid.*, para. 746).

¹⁸¹⁹ Lukić's Appeal Brief, para. 725.

¹⁸²⁰ Lukić's Appeal Brief, para. 734. Lukić submits that there is no evidence linking "IV/658" and "IV686" to Izbica/Izbičë, that there is no evidence at all concerning "IV/676/685/728/749", and, with respect to "IV/683", that the Chamber is unsure as to how the Prosecution linked the name to a victim (*ibid.*, para. 734).

¹⁸²¹ Prosecution's Response Brief (Lukić), paras 452-454.

circumstantial evidence,¹⁸²² that the Trial Chamber carefully considered the evidence,¹⁸²³ and that it properly ascertained proof of death.¹⁸²⁴

555. In reply, Lukić argues that before someone may be regarded as having been murdered, forensic review must be conducted to determine the manner of death and to exclude any natural causes or causes that do not amount to criminal liability.¹⁸²⁵ According to Lukić, in a large number of instances for Izbica/Izbicë, these standards were not followed in the Trial Judgement.¹⁸²⁶ Lukić also submits that the Prosecution fails to contest his claim that for many of the victims named in the Indictment there is neither forensic proof nor direct witness testimony to indicate that the deaths resulted from a crime.¹⁸²⁷ In Lukić's view, the Trial Chamber therefore erred in entering murder convictions, in disregard of its own established standard.¹⁸²⁸

(b) Analysis

556. Contrary to Lukić's suggestion, the OMPF List and a separate list submitted by Liri Loshi¹⁸²⁹ were not the only evidence that many of the alleged victims were killed in Izbica/Izbicë. The Trial Chamber considered a range of evidence concerning the killings, including the eye-witness testimony of three survivors who testified as to when and how killings at Izbica/Izbicë occurred, detailed the number of men present before the killings and how many survived, and described the perpetrators.¹⁸³⁰ The Trial Chamber also considered forensic evidence, which identified certain victims and demonstrated that a number of victims were killed by gunshot wounds, consistent with the testimony of the survivors.¹⁸³¹ In addition, the Trial Chamber heard the testimony of Liri Loshi, which, together with the video footage taken by Loshi and a friend recording bodies found in Izbica/Izbicë, corroborated the eye-witness evidence.¹⁸³² Based upon this evidence, the Trial Chamber found that approximately 93 people were killed by MUP forces on 28 March 1999 in Izbica/Izbicë, including at least 27 individuals named in Schedule F of the Indictment.¹⁸³³

¹⁸²² Prosecution's Response Brief (Lukić), paras 462-463, referring, *inter alia*, to *Kvočka et al.* Appeal Judgement, para. 260.

¹⁸²³ Prosecution's Response Brief (Lukić), para. 439.

¹⁸²⁴ Prosecution's Response Brief (Lukić), para. 464.

¹⁸²⁵ Lukić's Reply Brief, para. 112. See also *ibid.*, para. 111.

¹⁸²⁶ Lukić's Reply Brief, para. 112.

¹⁸²⁷ Lukić's Reply Brief, paras 108-109. See also *ibid.*, para. 110.

¹⁸²⁸ Lukić's Reply Brief, para. 111. See also *ibid.*, para. 114.

¹⁸²⁹ See Trial Judgement, vol. 2, para. 606, discussing a list of names of victims who were identified based upon a video-recording made after the killings.

¹⁸³⁰ Trial Judgement, vol. 2, paras 559, 572-587. See also *ibid.*, paras 678, 683.

¹⁸³¹ Trial Judgement, vol. 2, paras 609, 612-621.

¹⁸³² Trial Judgement, vol. 2, paras 561, 588-593, 606-607, 621, 683-684, referring, *inter alia*, to Exh. P230, Exh. P231, Exh. P232, Liri Loshi, Exh. P2436.

¹⁸³³ Trial Judgement, vol. 2, paras 621, 681-685.

557. The OMPF List identifies certain individuals as having gone missing in Izbica/Izbicë *after* 28 March 1999.¹⁸³⁴ The Appeals Chamber observes, however, that the Trial Chamber found the eye-witness testimony concerning the killings in Izbica/Izbicë “both credible and reliable in most respects”¹⁸³⁵ and accepted the evidence of multiple witnesses concerning the date and manner of the killings and the approximate number of people killed.¹⁸³⁶ Lukić has failed to show that the Trial Chamber acted unreasonably in relying on this other evidence to make the challenged findings as to when and how the killing of approximately 93 people in Izbica/Izbicë occurred.¹⁸³⁷

558. With regard to Lukić’s claim that the Trial Chamber erred because it was only able to identify 27 of the victims identified on Schedule F of the Indictment, the Appeals Chamber recalls that although the identity of a victim is information that is valuable to the preparation of a defence,¹⁸³⁸ convictions may be entered for unidentified victims¹⁸³⁹ and that the Schedules to the Indictment do not purport to provide exhaustive lists of victims.¹⁸⁴⁰ The Appeals Chamber therefore considers that Lukić has failed to demonstrate how the Trial Chamber’s failure to positively identify which of the remaining victims on Schedule F were among the approximately 93 people killed in Izbica/Izbicë constitutes an error and his argument in this regard is, accordingly, dismissed.

559. The Appeals Chamber thus finds that Lukić has failed to show that the evidence before the Trial Chamber could not lead a reasonable trier of fact to conclude that the only reasonable inference was that at least 93 individuals were murdered in the village of Izbica/Izbicë in Srbica/Skenderaj municipality.¹⁸⁴¹

¹⁸³⁴ *E.g.*, Trial Judgement, vol. 4, paras 671-675. As Lukić also argues, in at least one instance, the OMPF List does not record the person in question as having gone missing in Izbica/Izbicë (see *ibid.*, para. 680). He has failed to show the relevance of his challenge, however, as the Trial Chamber made no finding that the individual in question had been murdered (see Trial Judgement, vol. 2, paras 683-685).

¹⁸³⁵ Trial Judgement, vol. 2, para. 678.

¹⁸³⁶ Trial Judgement, vol. 2, paras 679-681.

¹⁸³⁷ Although Lukić submits that there is no eye-witness testimony concerning the killing of a number of the victims, nor forensic proof of death or cause of death, the Appeals Chamber recalls that the burden of proof may be satisfied with either direct or circumstantial evidence (see *supra*, para. 545) and considers that he, accordingly, fails to identify any error. Lukić’s remaining challenges concerning alleged evidentiary deficiencies are irrelevant, as the Trial Chamber did not find that the seven individuals identified by Lukić were among the approximately 93 people killed (see Trial Judgement, vol. 2, paras 683-685. See also Lukić’s Appeal Brief, para. 734, referring to Trial Judgement, vol. 4, paras 658, 676, 683, 685, 686, 728, 749).

¹⁸³⁸ See *supra*, para. 233.

¹⁸³⁹ *E.g.*, *Krstić* Trial Judgement, paras 74, 84, 653, 688, 727.

¹⁸⁴⁰ See *supra*, para. 235.

¹⁸⁴¹ The Prosecution appears to suggest that although the Trial Chamber found that at least 93 individuals had been killed, Lukić was only convicted for the murder of 27 individuals (see Prosecution’s Response Brief (Lukić), para. 444, referring to Trial Judgement, vol. 2, paras 681-685). The Appeals Chamber considers that this interpretation of the Trial Chamber’s findings is at odds with the Trial Judgement itself (see Trial Judgement, vol. 2, paras 685, 1221, 1223).

4. Orahovac/Rahovec

(a) Mala Kruša/Krusha e Vogël

560. With regard to events in the village of Mala Kruša/Krusha e Vogël in Orahovac/Rahovec municipality, the Trial Chamber found, *inter alia*, that on 26 March 1999, MUP forces grouped together more than 100 men in the village and escorted them to an empty barn, where the MUP opened fire on the men, killing almost all of them, and then set the barn on fire.¹⁸⁴² The Trial Chamber found that 111 men were killed.¹⁸⁴³ The Trial Chamber further found that all of the elements of murder as a violation of the law or customs of war punishable under Article 3 of the Statute and murder as a crime against humanity under Articles 5(a) and 5(h) of the Statute had been satisfied.¹⁸⁴⁴

(i) Submissions of the parties

561. Lukić submits that the evidence was not adequate to dispel reasonable doubt as to whether individuals were killed in the village of Mala Kruša/Krusha e Vogël. Specifically, he argues that none of the bodies of the 111 named victims in Mala Kruša/Krusha e Vogël were recovered and that, in the absence of such forensic proof of death, it is impossible for the only reasonable inference to be that these victims were murdered.¹⁸⁴⁵ He also asserts that the two witnesses relied upon by the Trial Chamber in relation to the killings there were found to be “unreliable and contradictory” in relation to other alleged victims for whom the Trial Chamber declined to enter a finding of murder.¹⁸⁴⁶

562. In response, the Prosecution submits that Lukić’s claims should be summarily dismissed and, in any event, fail on their merits.¹⁸⁴⁷ The Prosecution adds that the fact of a victim’s death can be inferred from circumstantial evidence,¹⁸⁴⁸ that the Trial Chamber carefully considered the evidence,¹⁸⁴⁹ and that it properly ascertained proof of death.¹⁸⁵⁰

¹⁸⁴² Trial Judgement, vol. 2, paras 432, 1161, 1212.

¹⁸⁴³ Trial Judgement, vol. 2, paras 433, 1212.

¹⁸⁴⁴ Trial Judgement, vol. 2, para. 1213.

¹⁸⁴⁵ Lukić’s Appeal Brief, paras 742-743. See also *ibid.*, paras 736-741, 746-747.

¹⁸⁴⁶ Lukić’s Appeal Brief, para. 743, referring to Trial Judgement, vol. 2, para. 434.

¹⁸⁴⁷ Prosecution’s Response Brief (Lukić), paras 440-444. See also *ibid.*, paras 461, 463, 465.

¹⁸⁴⁸ Prosecution’s Response Brief (Lukić), paras 462-463, referring, *inter alia*, to *Kvočka et al.* Appeal Judgement, para. 260.

¹⁸⁴⁹ Prosecution’s Response Brief (Lukić), para. 439.

¹⁸⁵⁰ Prosecution’s Response Brief (Lukić), para. 464.

(ii) Analysis

563. The Trial Chamber based its findings concerning the killings at the village of Mala Kruša/Krusha e Vogël primarily on the eye-witness evidence of two survivors of the massacre at the barn, Mehmet Krasniqi and Lutfi Ramadani,¹⁸⁵¹ who described how they escaped from the barn and provided the names of people who were with them in the barn on that day.¹⁸⁵² The Trial Chamber considered both witnesses to be credible and reliable¹⁸⁵³ and found their evidence to be partially corroborated by the hearsay evidence of John Paul Sweeney as well as by documentary evidence.¹⁸⁵⁴

564. Although, as Lukić notes, the Trial Chamber found that it had not been proven that FRY and Serbian forces killed seven other individuals as to whom Mehmet Krasniqi and Lutfi Ramadani had given evidence,¹⁸⁵⁵ the Appeals Chamber recalls that a trial chamber may reasonably accept certain parts of a witness's testimony and reject others.¹⁸⁵⁶ Because Lukić has not established that the Trial Chamber was unreasonable in relying upon portions of the evidence of these two witnesses, his argument in this regard is dismissed, as is his claim that the Trial Chamber erred in finding that the victims had been murdered in the absence of forensic proof of death.¹⁸⁵⁷

(b) Bela Crkva/Bellacërka

565. With respect to the events in the area of Bela Crkva/Bellacërka in Orahovac/Rahovac municipality, the Trial Chamber found that on 25 March 1999, 59 people, including women and children, were killed by MUP forces at, in, or close to Belaja stream.¹⁸⁵⁸ The Trial Chamber further found that all of the elements of murder as a violation of the law or customs of war punishable under Article 3 of the Statute and murder as a crime against humanity under Articles 5(a) and 5(h) of the Statute had been satisfied.¹⁸⁵⁹

(i) Submissions of the parties

566. Lukić challenges the sufficiency of the evidence underlying his conviction with regard to events in the village of Bela Crkva/Bellacërka. In particular, he submits that the fact that no remains

¹⁸⁵¹ Trial Judgement, vol. 2, paras 432-433.

¹⁸⁵² Trial Judgement, vol. 2, paras 409-417, 433. See also Trial Judgement, vol. 4, paras 480-599, and references therein.

¹⁸⁵³ Trial Judgement, vol. 2, paras 402-403, 432. The Trial Chamber stated that Krasniqi "impressed the Chamber as a straightforward witness" and Ramadani likewise "impressed the Chamber as a credible witness who gave reliable evidence about events in his village at the end of March 1999" (*ibid.*, vol. 2, paras 402-403).

¹⁸⁵⁴ Trial Judgement, vol. 2, paras 423-427.

¹⁸⁵⁵ Trial Judgement, vol. 2, para. 434. See also Trial Judgement, vol. 4, paras 515, 533, 538, 561, 563, 575, 599.

¹⁸⁵⁶ *Boškoski and Tarčulovski* Appeal Judgement, para. 59, and references therein.

¹⁸⁵⁷ See *supra*, sub-section VI.C.2.

¹⁸⁵⁸ Trial Judgement, vol. 2, paras 381-382, 1210-1211.

were recovered for seven of the 59 victims casts doubt on the reliability of the Prosecution witnesses' description as to how the deaths occurred and who was involved therein.¹⁸⁶⁰ He also challenges the Trial Chamber's reliance on the evidence of Sabri Popaj and Isuf Zhuniqi identifying the perpetrators of the killings, asserting that the witnesses described the colour of blue as green or yellow whilst describing police uniforms¹⁸⁶¹ and that Isuf Zhuniqi incorrectly testified that the police had white ribbons around their arms.¹⁸⁶²

567. In response, the Prosecution submits that Lukić's claims should be summarily dismissed and, in any event, fail on their merits.¹⁸⁶³ The Prosecution adds that the fact of a victim's death can be inferred from circumstantial evidence,¹⁸⁶⁴ that the Trial Chamber carefully considered the evidence,¹⁸⁶⁵ and that it properly ascertained proof of death.¹⁸⁶⁶ In the Prosecution's view, the Trial Chamber also reasonably accepted the witness evidence identifying the perpetrators.¹⁸⁶⁷

(ii) Analysis

568. The Trial Chamber based its findings concerning events in the area of Bela Crkva/Bellacërka on, *inter alia*, the forensic evidence of Eric Baccard and a British Forensic Team¹⁸⁶⁸ as well as the eye-witness testimony of Sabri Popaj, who had observed the events and participated in the burial of the victims on the next day, and of Isuf Zhuniqi, who had survived by pretending to be dead and hiding under victims' corpses.¹⁸⁶⁹ The Trial Chamber accepted the evidence of Popaj and Zhuniqi as "very detailed and consistent".¹⁸⁷⁰

569. While no human remains were identified for seven of the 59 victims identified by Sabri Popaj and/or Isuf Zhuniqi as having been killed,¹⁸⁷¹ the Trial Chamber accepted the evidence of these witnesses regarding these seven individuals.¹⁸⁷² Lukić has failed to explain how the absence of identified remains renders the witnesses' eye-witness evidence as to the killings of these individuals unreliable.

¹⁸⁵⁹ Trial Judgement, vol. 2, para. 1211.

¹⁸⁶⁰ Lukić's Appeal Brief, para. 744, referring to Trial Judgement, vol. 4, paras 412, 415, 418, 423, 427, 467, 477.

¹⁸⁶¹ Lukić's Appeal Brief, para. 101, referring to Isuf Zhuniqi, 27 Sep 2006, T. 4106-4107, Sabri Popaj, 2 Nov 2006, T. 5766.

¹⁸⁶² Lukić's Appeal Brief, para. 94, referring to Isuf Zhuniqi, 27 Sep 2006, T. 4126.

¹⁸⁶³ Prosecution's Response Brief (Lukić), paras 440-444. See also *ibid.*, paras 452-453, 461, 463, 465.

¹⁸⁶⁴ Prosecution's Response Brief (Lukić), paras 462-463, referring, *inter alia*, to *Kvočka et al.* Appeal Judgement, para. 260.

¹⁸⁶⁵ Prosecution's Response Brief (Lukić), para. 439.

¹⁸⁶⁶ Prosecution's Response Brief (Lukić), para. 464.

¹⁸⁶⁷ Prosecution's Response Brief (Lukić), paras 98, 101.

¹⁸⁶⁸ Trial Judgement, vol. 2, paras 376-379, and references therein.

¹⁸⁶⁹ Trial Judgement, vol. 2, paras 341-355, 367-370, and references therein.

¹⁸⁷⁰ Trial Judgement, vol. 2, para. 380.

¹⁸⁷¹ Trial Judgement, vol. 4, paras 412, 415, 418, 423, 427, 467, 477.

¹⁸⁷² Trial Judgement, vol. 2, paras 380, 382.

570. As for Lukić's challenges concerning the identity of the perpetrators of the killings at Bela Crkva/Bellacërka, the Appeals Chamber notes that where Sabri Popaj and Isuf Zhuniqi described the colour of police uniforms as green or yellow, the Trial Chamber assessed what colour they had in mind by considering not only the terms they used¹⁸⁷³ but also the colour of blue objects in the courtroom which they equated with the colours of the uniforms.¹⁸⁷⁴ The Trial Chamber also considered that the testimony of both witnesses corroborated each other.¹⁸⁷⁵ Lukić has failed to show that the Trial Chamber acted unreasonably in this regard, or, as discussed elsewhere,¹⁸⁷⁶ in accepting Zhuniqi's evidence that the police he saw wore white ribbons or armbands.¹⁸⁷⁷

(c) Conclusion

571. The Appeals Chamber thus finds that Lukić has failed to show that the evidence before the Trial Chamber could not lead a reasonable trier of fact to conclude that the only reasonable inference was that 170 individuals were murdered in and around the villages of Mala Kruša/Krusha e Vogël and Bela Crkva/Bellacërka in Orahovac/Rahovec municipality.

5. Conclusion

572. For the foregoing reasons, the Appeals Chamber grants in part ground Q of Lukić's appeal insofar as it relates to the killing of the 287 Kosovo Albanians during the Reka/Caragoj valley operation and dismisses sub-ground D(2) in part and ground Q of Lukić's appeal in relevant part.

¹⁸⁷³ For example, the Trial Chamber noted that Popaj described their uniforms as "mixed, blue in colour and army camouflage colour" (Trial Judgement, vol. 2, para. 345, referring to Sabri Popaj, Exh. P2446, p. 3) and that Zhuniqi described them as being dressed in a greenish blue camouflage pattern uniforms with badges on their sleeves (Trial Judgement, vol. 2, para. 348. See also Isuf Zhuniqi, Exh. P2331, p. 3).

¹⁸⁷⁴ Sabri Popaj, 1 Nov 2006, T. 5657, 2 Nov 2006, T. 5727; Isuf Zhuniqi, 27 Sep 2006, T. 4106-4107. For example, in this regard, the Trial Chamber noted that "[w]hile Popaj explained that these policeman wore camouflage uniforms of 'green' colour, he also described a blue curtain in the courtroom as 'green'" (Trial Judgement, vol. 2, para. 345 (citations omitted), referring to Sabri Popaj, 1 Nov 2006, T. 5657, *ibid.*, 2 Nov 2006, T. 5727). Regarding Popaj's testimony, Lukić's defence counsel advanced the same argument at trial, which was rejected by the Trial Chamber (Trial Judgement, vol. 2, para. 345; Lukić's Closing Brief, para. 837. See also Trial Judgement, vol. 2, para. 406 (referring to, *inter alia*, Mehmet Krasniqi, 29 Sep 2006, T. 4373, in relation to the colour of police uniforms which he saw in the context of the events in Mala Kruša/Krusha e Vogël)).

¹⁸⁷⁵ Trial Judgement, vol. 2, paras 345, 348. The Appeals Chamber observes in particular that the Trial Chamber noted the discrepancy in Popaj's description of the colour of the uniforms but found that it could nevertheless rely on his identification of the group as being members of the police, especially in consideration of the corroborating evidence from Zhuniqi (Trial Judgement, vol. 2, para. 345).

¹⁸⁷⁶ See *supra*, fn. 1115.

¹⁸⁷⁷ Trial Judgement, vol. 1, para. 715; *ibid.*, vol. 2, para. 348. See also *ibid.*, vol. 2, para. 323.

D. Whether the rapes committed in Priština/Prishtina in early April and in late May 1999 constituted persecution

573. The Trial Chamber found that K31, K14, and K62 were raped by VJ and MUP forces in Priština/Prishtina in April and May 1999.¹⁸⁷⁸ It found that all three women “gave detailed accounts of their ordeals at the hands of Serbian soldiers and police officers” and was satisfied that their evidence was credible and reliable.¹⁸⁷⁹ However, the Trial Chamber considered that the Prosecution failed to present any evidence from which the discriminatory intent of the principal perpetrators could be inferred and that, consequently, the Prosecution failed to prove that the sexual assaults in question constituted persecution.¹⁸⁸⁰ In these circumstances, the Trial Chamber did not assess the criminal responsibility of Šainović, Pavković, or Lukić pursuant to JCE III, for the crime of persecution for these sexual assaults.¹⁸⁸¹

1. Submissions of the parties

574. The Prosecution submits that the Trial Chamber erred in law and fact in failing to find that K31, K14, and K62 were raped with discriminatory intent.¹⁸⁸² It avers that the Trial Chamber’s finding that the Prosecution failed to adduce “any evidence” from which such intent could be inferred is manifestly unreasonable as it ignores the substantial evidence presented at trial.¹⁸⁸³ According to the Prosecution, the Trial Chamber “unduly limited the scope of evidence it deemed relevant to its determination of discriminatory intent for the rapes”¹⁸⁸⁴ and, contrary to the correct legal standard, it considered the evidence of the rapes in isolation, without properly evaluating evidence relating to the context and the circumstances in which the crimes occurred.¹⁸⁸⁵ The Prosecution asserts that had the Trial Chamber properly considered the totality of the relevant evidence it would have found that the rapes of K31, K14, and K62 were committed with the intent to discriminate against Kosovo Albanians and thus amounted to acts of persecution.¹⁸⁸⁶

575. In support of these contentions, the Prosecution underscores that the rapes of K31, K14, and K62 were committed during an organised operation in which large numbers of Kosovo Albanians

¹⁸⁷⁸ Trial Judgement, vol. 2, para. 889.

¹⁸⁷⁹ Trial Judgement, vol. 2, para. 874. See also *ibid.*, vol. 2, para. 876.

¹⁸⁸⁰ Trial Judgement, vol. 2, para. 1245.

¹⁸⁸¹ See Trial Judgement, vol. 2 para. 1245.

¹⁸⁸² Prosecution’s Appeal Brief, para. 83, referring to Trial Judgement, vol. 2, para. 1245.

¹⁸⁸³ Prosecution’s Appeal Brief, para. 83.

¹⁸⁸⁴ Prosecution’s Appeal Brief, para. 101. The Prosecution contends that the Trial Chamber erred in law in evaluating the rapes of K31, K14, and K62 “in isolation” and in considering “only a sub-set of the relevant evidence” (see *ibid.*, para. 101).

¹⁸⁸⁵ Prosecution’s Appeal Brief, paras 84, 102, referring to *Naletilić and Martinović* Appeal Judgement, para. 129; *Krnjelac* Appeal Judgement, paras 184-186; *Kvočka et al.* Appeal Judgement, paras 366, 460; *Blaškić* Appeal Judgement, para. 164. See also Prosecution’s Appeal Brief, paras 87, 101.

¹⁸⁸⁶ Prosecution’s Appeal Brief, paras 84, 103.

were evicted from their homes in Priština/Prishtina town “by VJ, MUP, and other armed forces, while others left due to the prevailing atmosphere of fear in the town caused by the violent evictions of their neighbours, and by threats, killings, beatings, and other acts of intimidation carried out by these forces.”¹⁸⁸⁷ The Prosecution maintains that the rapes constitute examples of such “other acts of intimidation” committed by joint VJ and MUP forces in their effort to expel the Kosovo Albanian population from Priština/Prishtina town and were thus acts undertaken with discriminatory intent.¹⁸⁸⁸ The Prosecution submits that the discriminatory intent of the perpetrators is further substantiated by the specific circumstances of each rape¹⁸⁸⁹ and that the only reasonable conclusion to be drawn from the evidence is that K31, K14, and K62 were raped by joint VJ and MUP forces because they were Kosovo Albanian.¹⁸⁹⁰

576. The Prosecution requests that the Appeals Chamber find that the rapes of K31, K14, and K62 were committed with discriminatory intent, convict Šainović, Pavković, and Lukić for these rapes as persecution, and increase their respective sentences.¹⁸⁹¹

577. Šainović responds that the Trial Chamber did not err in its assessment of the evidence and contends that the Prosecution erroneously relies on the general characterisation of the attack against the civilian population, whereas the jurisprudence “requires an analysis of the elements of the individual attack and the circumstances under which the attack took place.”¹⁸⁹² Similarly, Lukić submits that the Trial Chamber properly acquitted him of responsibility for the rapes as the Prosecution failed to demonstrate that the perpetrators possessed the requisite discriminatory intent and that, as such, these rapes constituted ordinary crimes.¹⁸⁹³ Pavković, in turn, argues that a reasonable trier of fact could have reached the impugned findings and that therefore the Appeals Chamber should not substitute its own evaluation of the evidence for that of the Trial Chamber.¹⁸⁹⁴

¹⁸⁸⁷ Prosecution’s Appeal Brief, para. 86, citing Trial Judgement, vol. 2, para. 885. See also Prosecution’s Appeal Brief, paras 85, 87.

¹⁸⁸⁸ Prosecution’s Appeal Brief, para. 86.

¹⁸⁸⁹ Prosecution’s Appeal Brief, para. 86. See also *ibid.*, paras 87-100.

¹⁸⁹⁰ Prosecution’s Appeal Brief, para. 83. See also *ibid.*, paras 87-100.

¹⁸⁹¹ Prosecution’s Appeal Brief, para. 104.

¹⁸⁹² Šainović’s Response Brief, para. 121.

¹⁸⁹³ Lukić’s Response Brief, paras 86-87. Lukić submits that rapes occurred both within and outside Kosovo with victims of different ethnicities (*ibid.*, para. 86, referring to Prosecution’s Appeal Brief, Appendix 1, entries 3, 12). Lukić also maintains that the Prosecution fails to show: that he “has either before, during or after the incidents in any way supported or assisted in the actual commission of the act”; that he had effective control over the MUP units, knew or had reason to know about the rapes, or could have prevented them; or that a causal relationship existed between the rapes and his acts or omissions (*ibid.*, paras 88-90). The Appeals Chamber considers it more appropriate to address these arguments as well as the Prosecution’s arguments in reply (Prosecution’s Reply Brief, para. 60) when examining the parties’ submissions in relation to the third ground of the Prosecution’s appeal (see *infra*, sub-section VII.G.3.(b)(ii)).

¹⁸⁹⁴ Pavković’s Response Brief, paras 9-10.

578. In reply, the Prosecution maintains that the rapes of K31, K14, and K62 cannot be considered in isolation and that they were directly connected with the operation to remove Kosovo Albanians from Priština/Prishtina town.¹⁸⁹⁵

2. Analysis

579. The Appeals Chamber recalls that persecution as a crime against humanity requires evidence that the principal perpetrator had the specific intent to discriminate on political, racial, or religious grounds.¹⁸⁹⁶ While the requisite discriminatory intent may not be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity, the “discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.”¹⁸⁹⁷

580. Although the Trial Chamber correctly articulated the applicable law in this respect,¹⁸⁹⁸ it failed to apply this standard in determining whether the rapes of K31, K14, and K62 constituted persecution. Notably, the Trial Chamber found that, in April and May 1999, Kosovo Albanians were targeted across Priština/Prishtina town by VJ and MUP forces: parts of the town were shelled by the VJ, buildings were set on fire, houses were looted, and large numbers of Kosovo Albanians were directly expelled from their homes, or fled due to the prevailing atmosphere of fear created by this campaign of violence.¹⁸⁹⁹ Significantly, the Trial Chamber found that the Prosecution had failed to present “*any evidence*” from which the discriminatory intent of the perpetrators of the rapes could be inferred,¹⁹⁰⁰ notwithstanding its finding that K31, K14, and K62 – all Kosovo Albanian women – were raped by VJ and MUP forces “*in the course of the operation to remove large numbers of Kosovo Albanians from Priština/Prishtina town*”.¹⁹⁰¹ In these circumstances, the Appeals Chamber considers that the Trial Chamber failed to properly consider the context in which the rapes occurred and erred in finding that there was no evidence from which the discriminatory intent of the perpetrators could be inferred. In light of this error, the Appeals Chamber will consider whether the only reasonable inference to be drawn from the evidence presented at trial was that K31, K14, and K62 were raped because they were Kosovo Albanian.

¹⁸⁹⁵ Prosecution’s Reply Brief, paras 58-59.

¹⁸⁹⁶ *Krnojelac* Appeal Judgement, para. 184. See also *Blaškić* Appeal Judgement, para. 164.

¹⁸⁹⁷ *Blaškić* Appeal Judgement, para. 164, referring to *Krnojelac* Appeal Judgement, para. 184.

¹⁸⁹⁸ Trial Judgement, vol. 1, para. 180, referring to *Blaškić* Appeal Judgement, para. 164.

¹⁸⁹⁹ See Trial Judgement, vol. 2, paras 885-888, 1240-1242.

¹⁹⁰⁰ Trial Judgement, vol. 2, para. 1245 (emphasis added).

¹⁹⁰¹ Trial Judgement, vol. 2, para. 889 (emphasis added).

(a) Rape of K31

581. The Trial Chamber noted that, towards the end of May 1999, K31, a Kosovo Albanian woman from Kačanik/Kaçanik municipality, then in her late teens, was sexually assaulted by a soldier when she and her injured brother were transported to a hospital in Priština/Prishtina town.¹⁹⁰² The Trial Chamber observed that upon her arrival at the hospital, K31 was taken to the basement and locked inside a dark room with about 10 to 15 other women, all of whom were Kosovo Albanian.¹⁹⁰³ The Trial Chamber found that she was subsequently beaten, drugged, and raped by three VJ soldiers, one of whom bit her during the assault.¹⁹⁰⁴

582. The Prosecution submits that the only reasonable inference to be drawn from the totality of the evidence is that K31 was raped with discriminatory intent.¹⁹⁰⁵ It contends that the Trial Chamber erred: (i) in failing to give sufficient weight to the circumstances surrounding the rape of K31, in particular, her expulsion from her village and her detention with other Kosovo Albanian women;¹⁹⁰⁶ and (ii) by ignoring direct evidence of the discriminatory intent of the perpetrators, notably that immediately after the first soldier raped her, K31 heard him “swearing at Albanians”.¹⁹⁰⁷ The Prosecution avers that the detention and rape of K31 did not occur in isolation: rather, these acts were an integral part of a larger series of discriminatory events in which K31 was targeted because she was Kosovo Albanian.¹⁹⁰⁸

583. In response, Šainović argues that the discriminatory character of the attack against the Kosovo Albanian population “cannot be extended to cover the act of rape simply based on the location or time coincidence.”¹⁹⁰⁹ He adds that none of the particular circumstances surrounding the rape of K31 contain discriminatory elements¹⁹¹⁰ and that the language used by one of the perpetrators does not constitute proof of a discriminatory intent.¹⁹¹¹ In his response, Lukić claims that the rape of K31 was unconnected with the alleged deportation of the Kosovo Albanian population because, according to Prosecution evidence, the displacements were “completed” by the end of April 1999 whereas K31 was raped in Priština/Prishtina in May 1999 after “she was returned from the border” with Macedonia.¹⁹¹²

¹⁹⁰² Trial Judgement, vol. 2, para. 879.

¹⁹⁰³ Trial Judgement, vol. 2, para. 880. See also *ibid.*, vol. 2, para. 1244.

¹⁹⁰⁴ See Trial Judgement, vol. 2, paras 874, 880. See also *ibid.*, vol. 2, paras 889, 1244.

¹⁹⁰⁵ Prosecution’s Appeal Brief, paras 87, 93.

¹⁹⁰⁶ Prosecution’s Appeal Brief, paras 87-92.

¹⁹⁰⁷ Prosecution’s Appeal Brief, paras 87, 91, referring to K31, Exh. P2596, p. 5 (under seal).

¹⁹⁰⁸ Prosecution’s Appeal Brief, para. 92.

¹⁹⁰⁹ Šainović’s Response Brief, para. 123.

¹⁹¹⁰ Šainović’s Response Brief, para. 124.

¹⁹¹¹ Šainović’s Response Brief, paras 125-126.

¹⁹¹² Lukić’s Response Brief, para. 96.

584. The Appeals Chamber is satisfied that the only reasonable inference to be drawn from the evidence presented at trial is that K31 was raped with discriminatory intent by three VJ soldiers. In so finding, the Appeals Chamber notes the circumstances in which K31 was raped as well as the context in which these crimes occurred. K31 was transported to Priština/Prishtina town after having been expelled from her village in Kačanik/Kaçanik municipality, which was attacked by joint VJ and MUP forces as part of a violent campaign to expel Kosovo Albanians.¹⁹¹³ In the course of this attack, K31 witnessed the killing of some of her relatives, who were Kosovo Albanian civilians, by FRY and Serbian forces because of their ethnicity.¹⁹¹⁴ K31 and her brother, who was shot during the attack,¹⁹¹⁵ were then transported to Priština/Prishtina town via Kačanik/Kaçanik town by VJ soldiers.¹⁹¹⁶ Significantly, in the course of this journey, K31 was handcuffed,¹⁹¹⁷ interrogated,¹⁹¹⁸ threatened,¹⁹¹⁹ beaten,¹⁹²⁰ and sexually assaulted¹⁹²¹ by one of the soldiers.

585. K31 was subsequently taken to the hospital in Priština/Prishtina town, locked in a basement with 10 to 15 Kosovo Albanian women,¹⁹²² singled out and raped by three VJ soldiers,¹⁹²³ the first of whom swore at Albanians after he raped her.¹⁹²⁴ In light of the totality of the evidence, the Appeals Chamber finds that the only reasonable inference is that K31 was raped by the VJ soldiers because she was Kosovo Albanian. Contrary to Šainović's submission, this conclusion is not based merely on "location or time coincidence"¹⁹²⁵ but is supported by both the circumstances and the context of the rape of K31, from which the discriminatory intent of the perpetrators is clear. The Appeals Chamber considers that there is no merit in Lukić's mere assertion that the rape of K31 was unconnected with the contemporaneous deportation of Kosovo Albanians and notes that Lukić has failed to identify any evidence in the record in support of his submissions.

¹⁹¹³ See Trial Judgement, vol. 2, paras 1253-1262.

¹⁹¹⁴ K31, Exh. P2595 pp. 3-4 (under seal). See also K31, 25 Jan 2007, T. 9239 (closed session); K31, Exh. P2597, T. 8149, 8151-8152 (under seal).

¹⁹¹⁵ K31, Exh. P2595 p. 4 (under seal); K31, Exh. P2596 p. 2 (under seal). See also K31, 25 Jan 2007, T. 9243-9244, 9247 (closed session); K31, Exh. P2597, T. 8152, 8160 (under seal).

¹⁹¹⁶ See Trial Judgement, vol. 2, para. 879; K31, Exh. P2595 pp. 4-5 (under seal); K31, Exh. P2596 pp. 2-3 (under seal); K31, 25 Jan 2007, T. 9240-9242 (closed session).

¹⁹¹⁷ K31, Exh. P2596 pp. 2-3 (under seal); K31, Exh. P2597, T. 8158 (under seal); K31, 25 Jan 2007, T. 9240, 9250-9251 (closed session). See also K31, Exh. P2597, T. 8136 (under seal).

¹⁹¹⁸ K31, Exh. P2595 pp. 4-5 (under seal); K31, 25 Jan 2007, T. 9249-9250 (closed session).

¹⁹¹⁹ K31, Exh. P2595 pp. 4-5 (under seal). At one point, the vehicle stopped on a bridge and the soldiers tried to force K31 into the river. She resisted and was ordered back into the vehicle. See K31, Exh. P2595 pp. 4-5 (under seal); K31, Exh. P2596 p. 3 (under seal); K31, Exh. P2597, T. 8135-8136, 8158-8160 (under seal).

¹⁹²⁰ K31, Exh. P2596 p. 3 (under seal); K31, Exh. P2597, T. 8158-8159 (under seal); K31, 25 Jan 2007, T. 9240, 9251, 9253 (closed session).

¹⁹²¹ K31, Exh. P2596 p. 3 (under seal); K31, 25 Jan 2007, T. 9240-9241, 9251 (closed session).

¹⁹²² Trial Judgement, vol. 2, para. 880; K31, Exh. P2596 pp. 3-4 (under seal). See also K31, 25 Jan 2007, T. 9241, 9254 (closed session).

¹⁹²³ Trial Judgement, vol. 2, para. 880; K31, Exh. P2596 pp. 4-6 (under seal). See also K31, 25 Jan 2007, T. 9251, 9253-9254, 9256 (closed session); K31, Exh. P2597, T. 8147 (under seal).

¹⁹²⁴ K31, Exh. P2596 p. 5 (under seal).

¹⁹²⁵ Šainović's Response Brief, para. 123.

586. Accordingly, the Appeals Chamber finds that K31 was raped by three VJ soldiers with discriminatory intent and that these acts constitute persecution as a crime against humanity, committed in the context of a systematic attack against the civilian population of Priština/Prishtina, which was itself part of the widespread and systematic attack against Kosovo Albanian civilians in Kosovo.¹⁹²⁶

(b) Rape of K14

587. The Trial Chamber noted that K14 was in her mid-teens when she was raped by a policeman in the course of an operation to remove large numbers of Kosovo Albanians from Priština/Prishtina in late May 1999.¹⁹²⁷ According to K14's evidence, a group of policemen wearing blue ribbons tied on their right arms came to her house in Priština/Prishtina town.¹⁹²⁸ Two of these policemen returned the following day, together with a local person wearing police uniform, and took K14 and her sister to their car. While her sister was allowed to return to the house, K14 was forced into the car,¹⁹²⁹ where one of the policemen hit her with a rifle butt, slapped her face, bit her neck, and drugged her.¹⁹³⁰ She was then taken to the Bozhur Hotel, where she was raped.¹⁹³¹ The Trial Chamber noted that, after the ordeal, the policeman who had raped K14 told her that he would not let the other policeman into the room if she promised to return on Monday and bring her sister for his friend.¹⁹³² That day and the next, both policemen drove past her house several times honking the

¹⁹²⁶ See Trial Judgement, vol. 2, para. 1240. At the appeal hearing, Pavković argued that K31's description of the men who sexually assaulted her resembles paramilitaries rather than VJ soldiers since one of the men had a long beard (Appeal Hearing, 12 Mar 2013, AT. 307-308, referring to K31, 25 Jan 2007, T. 9250, *ibid.*, Exh. P2596, p. 1, K73, 13 Sep 2006, T. 3310). The Appeals Chamber recalls that K31 testified that the Serb soldier who assaulted her in the vehicle on the way to the hospital in the Priština/Prishtina town had a long beard and wore a light and dark green army uniform with some brown in it, a black vest, and a lot of weaponry (K31, 25 Jan 2007, T. 9240, 9256-9257 (closed session)). Moreover, she described the three soldiers, who raped her at the hospital, as having worn military uniforms that were greenish camouflage (K31, Exh. P2596, p. 4 (confidential)). She also stated that one of them had a beard while the other two soldiers were clean-shaven (K31, 25 Jan 2007, T. 9256 (closed session)). The Appeals Chamber notes that the Trial Chamber found that the standard uniform worn in the VJ had a camouflage pattern with a mixture of brown, black, and three shades of green (Trial Judgement, vol. 1, para. 427). It also noted evidence indicating that military personnel were required to be 'clean-shaven' although if a man had a beard, it might be a sign that he was a reservist, and that two types of reservist uniforms were camouflage and corresponded with regular VJ uniforms (Trial Judgement, vol. 1, paras 428-430). The Appeals Chamber is satisfied that, in light of the evidence of VJ involvement in the attack on K31's village, from which K31 was transported (Trial Judgement, vol. 2, paras 1253-1262. See also, *supra*, sub-section VI.B.7.(a)(ii)), its presence in Priština/Prishtina town (Trial Judgement, vol. 1, paras 599-600. See also *ibid.*, vol. 2, paras 885, 1240, 1242; *supra*, sub-section VI.B.10.(b)(i)), and K31's description of her attackers, the only reasonable inference is that K31 was raped by three VJ soldiers.

¹⁹²⁷ Trial Judgement, vol. 2, paras 876-877, 889.

¹⁹²⁸ Trial Judgement, vol. 2, para. 877, referring to K14, 2 Mar 2007, T. 10981-10982 (closed session); K14, Exh. P2643, p. 4 (under seal).

¹⁹²⁹ Trial Judgement, vol. 2, para. 877.

¹⁹³⁰ Trial Judgement, vol. 2, para. 877. See also K14, Exh. P2643, p. 5 (under seal); K14, Exh. P2644, T1429 (under seal).

¹⁹³¹ Trial Judgement, vol. 2, para. 878. See also K14, Exh. P2643, p. 6 (under seal).

¹⁹³² Trial Judgement, vol. 2, para. 878. See also K14, Exh. P2643, p. 6 (under seal).

car horn.¹⁹³³ At 4 a.m. the following Monday, when she was supposed to go back to the hotel, K14 and her family fled Priština/Prishtina.¹⁹³⁴

588. The Prosecution submits that the only reasonable inference to be drawn from the totality of the evidence is that K14 was raped by a policeman with discriminatory intent.¹⁹³⁵ It maintains that, viewed in its proper context, the specific circumstances of K14's rape demonstrate that it was an act of persecution perpetrated during the discriminatory campaign to expel ethnic Albanians from Priština/Prishtina.¹⁹³⁶ Specifically, the Prosecution points to evidence that, prior to the rape, K14's house was targeted because of its Kosovo Albanian inhabitants and that, both prior and subsequent to the rape, K14 and her family were subject to numerous acts of intimidation by the police.¹⁹³⁷ The Prosecution also underscores that the Bozhur Hotel, the scene of this rape, was filled with Kosovo Albanians on the day in question and was notorious for the beatings of those taken there.¹⁹³⁸

589. In response, Šainović argues that the fact that K14's house was inhabited by Kosovo Albanians is irrelevant for proving the discriminatory intent of the perpetrator.¹⁹³⁹ He maintains that the manner in which the crime was committed fulfilled the elements of rape as a domestic crime, rather than of persecution as a crime against humanity.¹⁹⁴⁰ In turn, Lukić argues that K14's testimony is unreliable, as the witness erroneously identified the policemen as wearing blue ribbons while on that specific day they were wearing red ribbons.¹⁹⁴¹ Consequently, Lukić claims that it has not been established beyond reasonable doubt that the perpetrator of the crime was a member of the MUP forces.¹⁹⁴²

590. In reply to Lukić's submission that K14 erroneously identified the policemen as wearing blue ribbons, the Prosecution submits that this argument was considered by the Trial Chamber and avers that Lukić fails to show that no reasonable trial chamber could have found the witness to be credible.¹⁹⁴³

591. The Appeals Chamber is satisfied that the only reasonable inference to be drawn from the evidence presented at trial is that K14 was raped with discriminatory intent by a member of the

¹⁹³³ Trial Judgement, vol. 2, para. 878. See also K14, Exh. P2643, p. 7 (under seal).

¹⁹³⁴ Trial Judgement, vol. 2, para. 878. See also K14, Exh. P2643, p. 7 (under seal).

¹⁹³⁵ Prosecution's Appeal Brief, para. 97. See also Prosecution's Reply Brief, paras 58-59.

¹⁹³⁶ Prosecution's Appeal Brief, para. 98.

¹⁹³⁷ Prosecution's Appeal Brief, paras 94-97.

¹⁹³⁸ Prosecution's Appeal Brief, paras 96-97.

¹⁹³⁹ Šainović's Response Brief, para. 129.

¹⁹⁴⁰ Šainović's Response Brief, paras 130-131.

¹⁹⁴¹ Lukić's Response Brief, para. 94, referring to K14, 2 Mar 2007, T. 10981-10983 (closed session), Exh. 6D579, Vladimir Ilić, 17 Mar 2008, T. 24326. See also Lukić's Appeal Brief, paras 95.

¹⁹⁴² Lukić's Response Brief, para. 94.

¹⁹⁴³ Prosecution's Response Brief (Lukić), para. 102, referring to Trial Judgement, vol. 2, para. 877. See also Prosecution's Reply Brief, para. 61.

MUP. In so finding, the Appeals Chamber notes the circumstances in which K14 was raped as well as the context in which this crime occurred. The sequence of events demonstrates that K14 was deliberately selected by the police from a Kosovo Albanian household, where, on the day prior to the rape, a group of policemen told K14 and her family to fill out forms and instructed them not to “keep refugees”.¹⁹⁴⁴ The policemen indicated that they would return the following day and take the family to the Bozhur Hotel in order to have the papers stamped.¹⁹⁴⁵ The next day, two of these policemen returned to the house and selected K14 and her sister to leave with them.¹⁹⁴⁶ K14 was taken to the Bozhur Hotel, where she was raped by a policeman, who later instructed her to return on Monday and bring her sister for his friend.¹⁹⁴⁷ Significantly, the Bozhur Hotel, the scene of the rape, was a place with a reputation for violence and was feared by local Kosovo Albanians.¹⁹⁴⁸ Contrary to Šainović’s assertion, the Appeals Chamber considers that these combined factors demonstrate that the only reasonable inference to be drawn from the evidence is that K14, a Kosovo Albanian teenager, was deliberately targeted by members of the MUP, in the midst of a campaign to expel Kosovo Albanians from Priština/Prishtina, and was raped by a policeman with discriminatory intent.

592. As to Lukić’s contention challenging the reliability of K14’s evidence, the Appeals Chamber observes that the Trial Chamber specifically noted, when assessing K14’s evidence, that “some of her evidence in relation to the incident was contradictory” but considered that “in light of her age, the traumatic nature of the event, and the passage of time” such contradictions were understandable and found her evidence to be generally reliable.¹⁹⁴⁹ Moreover, the Trial Chamber specifically noted documentary evidence suggesting that some police forces in Kosovo were instructed to wear red ribbons on the date in question.¹⁹⁵⁰ The Trial Chamber nonetheless concluded that such evidence did not undermine the reliability of K14’s account or her identification of the perpetrators as police, who she correctly identified as wearing blue uniforms.¹⁹⁵¹ Given that the Trial Chamber carefully evaluated the reliability of K14’s evidence and had the advantage of observing her demeanour in court, the Appeals Chamber considers that the Trial Chamber reasonably relied on the testimony of K14 as a reliable account of the incident.

¹⁹⁴⁴ K14, Exh. P2643, p. 4 (under seal); K14, Exh. P2644, T. 1429 (under seal).

¹⁹⁴⁵ K14, Exh. P2643, p. 4 (under seal).

¹⁹⁴⁶ K14, Exh. P2643, pp. 4-5 (under seal); K14, Exh. P2644, T1429 (under seal). In this context, the Appeals Chamber notes that K14’s mother was deemed to be too old to go with them. (see K14, Exh. P2643, p. 5 (under seal)).

¹⁹⁴⁷ K14, Exh. P2643, pp. 5-6 (under seal).

¹⁹⁴⁸ K14, Exh. P2643, p. 4 (under seal). The Appeals Chamber notes that K14 stated in this regard that the police officers “told us that on Friday they would come and take us to the Hotel Bozhur to get these papers stamped and left. We were scared because we heard that those that went there would get beaten up.” (*ibid.*).

¹⁹⁴⁹ Trial Judgement, vol. 2, para. 876.

¹⁹⁵⁰ Trial Judgement, vol. 2, para. 877, referring to Exh. 6D579.

¹⁹⁵¹ See Trial Judgement, vol. 2, para. 876. See also K14, 2 Mar 2007, T. 10981 (closed session); K14, Exh. P2643, pp. 3-4 (under seal); K14, Exh. P2644, T. 1422-1423 (under seal); Trial Judgement, vol. 1, para. 716.

593. In light of the foregoing, the Appeals Chamber finds that K14 was raped by a policeman with discriminatory intent and that this act constitutes persecution as a crime against humanity, committed in the context of a systematic attack against the civilian population of Priština/Prishtina, which was itself part of the widespread and systematic attack against Kosovo Albanian civilians in Kosovo.¹⁹⁵²

(c) Rape of K62

594. The Trial Chamber found that on 1 April 1999, K62 was alone at home when three VJ or MUP personnel entered her apartment. Two of the men started to search the apartment, while the other pushed K62 to the floor and raped her. Subsequently, the second man also raped K62 and the third man put his penis in her mouth.¹⁹⁵³

595. The Prosecution contends that the circumstances in which K62 was raped demonstrate that these rapes were committed with the requisite discriminatory intent and thus constituted persecution.¹⁹⁵⁴ In particular, the Prosecution notes that the VJ or MUP personnel arrived at K62's apartment and asked her whether there were any KLA members inside.¹⁹⁵⁵ Two of the men then proceeded to search the apartment, while the third man raped K62, followed by the other two.¹⁹⁵⁶ In addition, the Prosecution maintains, K63, K62's husband, gave evidence that, upon his immediate return to the apartment that afternoon, he saw armed police in the vicinity of his neighbourhood expelling Kosovo Albanians from Priština/Prishtina, calling them names and telling them to leave Kosovo.¹⁹⁵⁷ The Prosecution avers that the rape of K62 was not a simple crime of opportunity committed in isolation: rather, it was an act of violence and intimidation that formed part of the discriminatory operation targeting K62's neighbourhood as well as the broader campaign to expel ethnic Albanians from Kosovo.¹⁹⁵⁸

596. In response, Šainović contends that the circumstances referred to by the Prosecution are general in character and not specific to the crime itself.¹⁹⁵⁹ He also claims that the manner in which K62 was raped does not demonstrate that the perpetrators had discriminatory intent.¹⁹⁶⁰ Lukić, in turn, argues that K62 explicitly stated in her testimony that the perpetrators did not belong to the

¹⁹⁵² See Trial Judgement, vol. 2, para. 1240.

¹⁹⁵³ Trial Judgement, vol. 2, para. 875. See also *ibid.*, vol. 2, para. 889.

¹⁹⁵⁴ Prosecution's Appeal Brief, para. 99; Prosecution's Reply Brief, paras 58-59.

¹⁹⁵⁵ Prosecution's Appeal Brief, para. 99, referring to K63, Exh. P2443, para. 30.

¹⁹⁵⁶ Prosecution's Appeal Brief, para. 99, referring to Trial Judgement, vol. 2, para. 875.

¹⁹⁵⁷ Prosecution's Appeal Brief, para. 99, referring to Trial Judgement, vol. 2, para. 875.

¹⁹⁵⁸ Prosecution's Appeal Brief, para. 100.

¹⁹⁵⁹ Šainović's Response Brief, paras 134-135.

¹⁹⁶⁰ Šainović's Response Brief, para. 133.

police forces.¹⁹⁶¹ He further contends that K63, K62's husband, was not a reliable witness and that he did not personally witness the incident.¹⁹⁶²

597. The Appeals Chamber is satisfied that the only reasonable inference to be drawn from the evidence presented at trial is that K62 was raped with discriminatory intent by three VJ or MUP personnel. In so finding, the Appeals Chamber notes the circumstances in which K62 was raped as well as the context in which this crime occurred. Significantly, on the same day these three VJ or MUP personnel targeted K62's apartment, local Kosovo Albanian residents were being expelled from their homes by police in the immediate vicinity of her neighbourhood.¹⁹⁶³ Moreover, the conduct of the policemen or VJ soldiers who searched K62's apartment and their questions relating to the presence of KLA members further demonstrate that the perpetrators acted with discriminatory intent towards their victim.¹⁹⁶⁴ Considering the totality of the evidence, the Appeals Chamber finds no merit in Šainović's submission that the "manner" in which the rape was committed did not exhibit any discriminatory elements.¹⁹⁶⁵

598. As to Lukić's arguments with regard to the identity of the perpetrators, the inconsistency in the evidence as to whether the perpetrators were VJ or MUP personnel is irrelevant to his criminal responsibility.¹⁹⁶⁶ The Appeals Chamber recalls in this respect the Trial Chamber's finding that the crimes of both the VJ and the MUP were imputable to Lukić.¹⁹⁶⁷

599. Accordingly, the Appeals Chamber finds that K62 was raped by three VJ or MUP personnel with discriminatory intent and that these acts constitute persecution as a crime against humanity, committed in the context of a systematic attack against the civilian population of Priština/Prishtina, which was itself part of the widespread and systematic attack against Kosovo Albanian civilians in Kosovo.¹⁹⁶⁸

¹⁹⁶¹ Lukić's Response Brief, para. 95, referring to K62, 24 Aug 2006, T. 2274-2275 (private session), 2284. See also Lukić's Appeal Brief, para. 98.

¹⁹⁶² Lukić's Response Brief, para. 95, referring to K62, 24 Aug 2006, T. 2282-2283.

¹⁹⁶³ See K63, Exh. P2443, paras 28-29.

¹⁹⁶⁴ See K62, 24 Aug 2006, T. 2271-2272, 2274 (private session); K63, Exh. P2443, para. 30.

¹⁹⁶⁵ See Šainović's Response Brief, paras 133.

¹⁹⁶⁶ See K62, 24 Aug 2006, T. 2274-2275 (private session), 2284; K63, Exh. P2443, para. 30.

¹⁹⁶⁷ Trial Judgement, vol. 3, para. 1132.

¹⁹⁶⁸ See Trial Judgement, vol. 2, para. 1240. At the appeal hearing, Pavković also argued that K62's testimony was insufficient to identify the perpetrators who assaulted her and cited evidence suggesting that there were army surplus points where uniforms could be bought (Appeal Hearing, 12 Mar 2013, AT. 308-309, referring to K62, 24 Aug 2006, T. 2269, 2274-2275, Zlatimir Pešić, 24 Nov 2006, T. 7316). The Appeals Chamber recalls that K62 described her attackers' clothing as soldiers' uniforms, explaining that they were not like the uniform of the police she had seen before. She described the colours of the uniforms as a combination of brown and green camouflage with no insignia and stated that they wore hats, boots, and masks on their faces (K62, 24 Aug 2006, T. 2274-2275 (private session)). Her evidence corresponds to the evidence concerning VJ uniforms, including those of reservists, considered by the Trial Chamber (Trial Judgement, vol. 1, paras 427-430). The Appeals Chamber finds that, in light of this evidence and the evidence that on the same day as the assault, police were expelling Kosovo Albanian residents in the immediate vicinity of K62's

3. Conclusion

600. For the reasons set out above, the Appeals Chamber grants, in part, the Prosecution's fourth ground of appeal. The impact of the Appeals Chamber's findings will be considered in the context of whether these sexual assaults were foreseeable to Šainović, Pavković and Lukić pursuant to JCE III.¹⁹⁶⁹

neighbourhood (K63, Exh. P2443, paras 28-29) as well as the Trial Chamber's finding that VJ and MUP troops were involved in the expulsion of Kosovo Albanian civilians from Priština/Prishtina town around this time (Trial Judgement, vol. 2, paras 885, 1240, 1242. See also *supra*, sub-section VI.B.10.(b)(i)), the only reasonable inference is that the perpetrators of the sexual assaults on K62 were either VJ or MUP members.

¹⁹⁶⁹ See *infra*, sub-section VII.G.

VII. JOINT CRIMINAL ENTERPRISE

A. Introduction

601. The Trial Chamber found that Šainović, Pavković, and Lukić¹⁹⁷⁰ were members of a JCE, the common purpose of which was to forcibly displace the Kosovo Albanian population both within and outside Kosovo “[t]hrough a widespread *and* systematic campaign of terror and violence”.¹⁹⁷¹ The Trial Chamber concluded that, as JCE members, Šainović, Pavković, and Lukić shared the intent to forcibly displace the Kosovo Albanian population, both within and outside Kosovo, and thereby ensure the continued control of the FRY and Serbian authorities over the province.¹⁹⁷² It also found that they made a significant contribution to the common purpose of the JCE.¹⁹⁷³ The Trial Chamber accordingly convicted Šainović, Pavković, and Lukić of deportation and other inhumane acts (forcible transfer) as crimes against humanity pursuant to JCE I.¹⁹⁷⁴

602. The Trial Chamber found that the other charged crimes went beyond the scope of the common purpose,¹⁹⁷⁵ but concluded that the commission of the crimes of murder and persecution, through murder and destruction of or damage to religious property, as crimes against humanity, and murder as a violation of the laws or customs of war was foreseeable to Šainović, Pavković, and Lukić.¹⁹⁷⁶ The Trial Chamber accordingly convicted them of these crimes pursuant to JCE III.¹⁹⁷⁷ It also found that the commission of persecution, through sexual assault, as a crime against humanity was foreseeable to Pavković¹⁹⁷⁸ and convicted him thereof under JCE III.¹⁹⁷⁹

603. Šainović, Pavković, and Lukić claim that the Trial Chamber erred in holding them criminally responsible under the first and third categories of JCE.¹⁹⁸⁰ In addition, the Prosecution submits that the Trial Chamber erred in acquitting Šainović and Lukić of persecution, through sexual assault.¹⁹⁸¹ The Appeals Chamber will address their submissions in turn.¹⁹⁸²

¹⁹⁷⁰ The Trial Chamber found that throughout the period when the crimes were committed, Šainović was the political coordinator of VJ and MUP activities in Kosovo; Pavković, as the commander of the 3rd Army of the VJ, was in command and control of all the VJ forces there; and Lukić, as Head of the MUP Staff, had both *de jure* and *de facto* powers over the MUP forces in the province (Trial Judgement, vol. 3, paras 427, 462, 467-468, 782-783, 1118, 1131-1132).

¹⁹⁷¹ Trial Judgement, vol. 3, para. 95 (emphasis in original). See also Trial Judgement, vol. 3, paras 468, 783, 1132.

¹⁹⁷² Trial Judgement, vol. 3, paras 466, 781, 1130.

¹⁹⁷³ Trial Judgement, vol. 3, paras 467, 782, 1131.

¹⁹⁷⁴ Trial Judgement, vol. 3, paras 475, 477, 788, 790, 1138, 1140, 1208, 1210, 1212.

¹⁹⁷⁵ Trial Judgement, vol. 3, paras 94, 469, 784, 1133.

¹⁹⁷⁶ Trial Judgement, vol. 3, paras 470-471, 473, 785-786, 1134, 1136.

¹⁹⁷⁷ Trial Judgement, vol. 3, paras 475, 477, 788, 790, 1138, 1140, 1208, 1210, 1212.

¹⁹⁷⁸ Trial Judgement, vol. 3, para. 785.

¹⁹⁷⁹ Trial Judgement, vol. 3, paras 788, 790, 1210.

¹⁹⁸⁰ Šainović’s grounds 1-6; Pavković’s grounds 1-3, 5-10; Lukić’s grounds D, F, H, I, K, N, O, P, Q, U, GG.

¹⁹⁸¹ Prosecution’s ground 3.

B. The existence of a common plan, design, or purpose

1. Introduction

604. The Trial Chamber found that it was “established beyond reasonable doubt that there was a common purpose” shared by the members of the JCE “during the time of the crimes alleged in the Indictment that amounted to or involved the commission of those crimes under the Statute”.¹⁹⁸³ It further found that the common purpose of the JCE was to forcibly displace the Kosovo Albanian population both within and outside Kosovo “[t]hrough a widespread *and* systematic campaign of terror and violence”.¹⁹⁸⁴ The Trial Chamber considered that the members of the JCE “were aware that it was unrealistic to expect to be able to displace each and every Kosovo Albanian from Kosovo, so the common purpose was to displace a number of them sufficient to tip the demographic balance” to ensure continued control over Kosovo.¹⁹⁸⁵ The Trial Chamber reached this conclusion on the basis of circumstantial evidence derived from a number of factors.¹⁹⁸⁶

605. Šainović, Pavković, and Lukić submit that the Trial Chamber erred in concluding that the existence of the common purpose was proven beyond reasonable doubt and raise various challenges to the Trial Chamber’s assessment of the evidence.¹⁹⁸⁷ In addition to challenging the Trial Chamber’s findings concerning the respective factors from which it inferred the existence of the common purpose and the evidence allegedly militating against the existence of the common purpose, they appear to argue that the Trial Chamber could not be satisfied that the existence of the common purpose was the only reasonable inference available from the evidence in the trial record.¹⁹⁸⁸ Pavković also raises arguments concerning the components of the common purpose.

¹⁹⁸² Moreover, having overturned the Trial Chamber’s conclusion that the sexual assaults committed in Priština/Pristina on 1 April and in late May 1999 did not constitute persecution (*supra*, sub-section VI.D.), the Appeals Chamber will consider the Prosecution’s arguments that Šainović, Pavković, and Lukić should be convicted of these sexual assaults (Prosecution’s Appeal Brief, para. 104 (Prosecution’s ground 4); Appeal Hearing, 12 Mar 2013, AT. 357).

¹⁹⁸³ Trial Judgement, vol. 3, para. 96.

¹⁹⁸⁴ Trial Judgement, vol. 3, para. 95 (emphasis in original).

¹⁹⁸⁵ Trial Judgement, vol. 3, para. 95.

¹⁹⁸⁶ Trial Judgement, vol. 3, paras 30-88, 90-92, 94-95. See also *infra*, paras 606, 612.

¹⁹⁸⁷ Šainović’s Appeal Brief, paras 411-486, 504-505 (sub-grounds 6(1)-(11)); Pavković’s Appeal Brief, paras 24-26, 42-70, 75-80, 166, 183, 185, 217-221 (sub-grounds 1(A) in part, 1(B), 1(C), grounds 3 in part, 6 in part); Lukić’s Appeal Brief, paras 84-88, 148, 150-152, 157-161, 194-196, 200-221, 225-233, 234-246, 260, 265-268, 359-396, 402-407, 451-452, 504-515, 519-551 (sub-grounds D(1), D(4) in part, D(6), H in part, I(1), I(2), I(3), I(4) in part, O in part, O(1), O(1)(a), O(1)(c), O(1)(d) in part, O(1)(e) in part, O(2) in part, O(3)). See also Lukić’s Appeal Brief, paras 77-82 (sub-ground D in part).

¹⁹⁸⁸ Šainović’s Appeal Brief, paras 444-445, read together with *ibid.*, paras 413-443; Pavković’s Appeal Brief, paras 25-26; Lukić’s Appeal Brief, paras 202, 359. With regard to Šainović’s contention that “[t]he Prosecution should have proven the circumstantial evidence beyond reasonable doubt” (Šainović’s Appeal Brief, para. 445; *contra* Prosecution’s Response Brief (Šainović), para. 294), the Appeals Chamber notes that it is not “circumstantial evidence”, but “the facts forming the elements of the crime or the form of responsibility alleged against the accused [and] the facts which are indispensable for entering a conviction”, that need to be proven beyond reasonable doubt. The proof of such facts may

2. Components of the common purpose and its temporal scope

606. In inferring the existence of the common purpose, the Trial Chamber relied, *inter alia*, on the following factors: (i) the discernible pattern of forcible displacement of Kosovo Albanians committed by the forces of the FRY and Serbia in spring 1999;¹⁹⁸⁹ (ii) the routine seizure and the destruction of Kosovo Albanians' identity documents ("IDs") by the forces of the FRY and Serbia in the course of their displacement in spring 1999;¹⁹⁹⁰ (iii) the abuse of power by the FRY and Serbian authorities prior to 1998 in an attempt to "adversely affect the socio-economic circumstances of the Kosovo Albanian majority";¹⁹⁹¹ (iv) the discriminatory arming of the non-Albanian population in Kosovo and disarming of the Kosovo Albanian population in 1998 and early 1999;¹⁹⁹² (v) the use of the period of diplomatic negotiations by the FRY and Serbian authorities to bring additional forces into Kosovo in breach of the Holbrooke-Milošević Agreement and other associated Agreements (collectively, "October Agreements") in late 1998 and early 1999;¹⁹⁹³ (vi) Slobodan Milošević's decision at the end of 1998 to replace Momčilo Perišić with Ojdanić as Chief of the VJ General Staff, and to replace Dušan Samardžić with Pavković as Commander of the 3rd Army;¹⁹⁹⁴ and (vii) the clandestine operation in spring 1999 to conceal hundreds of bodies of victims of crimes from international representatives and/or NATO ground forces, by transferring them from Kosovo to Serbia proper.¹⁹⁹⁵ On this basis, the Trial Chamber concluded that the common purpose was "established beyond reasonable doubt [...] during the time of the crimes alleged in the Indictment that amounted to or involved the commission of those crimes under the Statute".¹⁹⁹⁶

607. Pavković submits that the date on which the common plan or purpose arose is an element of JCE liability and must be proven beyond reasonable doubt.¹⁹⁹⁷ According to Pavković, there is no evidence that members of the JCE "got together and formulated the plan to expel Kosovo Albanians in October 1998, the time when it is alleged that the JCE began."¹⁹⁹⁸ He adds that the Trial Chamber was thus "left to search for evidence" that the plan materialised no later than that date, but

be based on circumstantial evidence (*Ntagerura et al.* Appeal Judgement, para. 174. See also *Halilović* Appeal Judgement, para. 129; *Blagojević and Jokić* Appeal Judgement, para. 226; *Galić* Appeal Judgement, para. 218).

¹⁹⁸⁹ Trial Judgement, vol. 3, paras 41-46. See also *ibid.*, vol. 3, para. 94.

¹⁹⁹⁰ Trial Judgement, vol. 3, paras 30-40.

¹⁹⁹¹ Trial Judgement, vol. 3, para. 48. See also *ibid.*, vol. 3, para. 47.

¹⁹⁹² Trial Judgement, vol. 3, paras 49-72. See also *ibid.*, vol. 1, paras 764-766, 775, 787.

¹⁹⁹³ Trial Judgement, vol. 3, paras 73-76. See also *ibid.*, vol. 1, paras 934-943, 962-983, 988-989.

¹⁹⁹⁴ Trial Judgement, vol. 3, paras 77-85.

¹⁹⁹⁵ Trial Judgement, vol. 3, paras 86-88.

¹⁹⁹⁶ Trial Judgement, vol. 3, para. 96.

¹⁹⁹⁷ Pavković's Appeal Brief, para. 26.

¹⁹⁹⁸ Pavković's Appeal Brief, para. 26, referring to Indictment, para. 20 and also arguing that not interpreting the date as a material element would deprive an accused of notice and an opportunity to defend. See also Appeal Hearing, 12 Mar 2013, AT. 311-312.

that the plan was not proven beyond reasonable doubt.¹⁹⁹⁹ He also maintains that there must be “a real plan emanating from a real agreement” and that such a plan “does not materialize out of thin air or out of events on the ground”.²⁰⁰⁰ According to him, “a real agreement” in this context means that the evidence must show that every JCE member “had the same goal in mind” and that “they agreed with each other about what they were doing”.²⁰⁰¹

608. The Prosecution responds that a common plan or purpose of a JCE need not be previously arranged or formulated and may be inferred from the totality of circumstances and evidence relating to the commission of crimes.²⁰⁰² Further, it contends that Pavković misinterprets the law as requiring an agreement in addition to a common plan.²⁰⁰³ Moreover, the Prosecution submits that the Trial Chamber’s findings and its approach to the evidence in the Trial Judgement demonstrate that it accepted that the common purpose “had crystallized” and “had come into existence” no later than October 1998 as pleaded in the Indictment.²⁰⁰⁴

609. At the outset, the Appeals Chamber observes that Pavković misconstrues the law of JCE liability. The Appeals Chamber recalls that JCE liability requires “the existence of a common purpose which amounts to, or involves, the commission of a crime” and that the common purpose need not be previously arranged or formulated; it may materialise extemporaneously.²⁰⁰⁵ Thus, while the existence of a common purpose at the time of the crimes is one of the elements of JCE liability, the date of its formation is not.²⁰⁰⁶ In the instant case, the Trial Chamber found that “it has been established beyond reasonable doubt that there was a common purpose during the time of the crimes alleged in the Indictment that amounted to or involved the commission of those crimes under the Statute”.²⁰⁰⁷ Consequently, Pavković’s argument in this regard is dismissed.

610. As noted above, the Trial Chamber concluded that “it has been established beyond reasonable doubt that there was a common purpose *during the time of the crimes alleged in the Indictment that amounted to or involved the commission of those crimes under the Statute*”.²⁰⁰⁸ In this regard, the Appeals Chamber observes that the Trial Chamber made findings of the commission

¹⁹⁹⁹ Pavković’s Appeal Brief, para. 26. See also *ibid.*, paras 49-50; Appeal Hearing, 12 Mar 2013, AT. 312.

²⁰⁰⁰ Pavković’s Appeal Brief, para. 25.

²⁰⁰¹ Appeal Hearing, 12 Mar 2013, AT. 338.

²⁰⁰² Prosecution’s Response Brief (Pavković), para. 16.

²⁰⁰³ Prosecution’s Response Brief (Pavković), paras 8-9, also arguing that Pavković had proper notice of the temporal scope of the JCE.

²⁰⁰⁴ Appeal Hearing, 11 Mar 2013, AT. 219; *ibid.*, 12 Mar 2013, AT. 360. See also *ibid.*, 11 Mar 2013, AT. 220-221, 244, 248, referring to Trial Judgement, vol. 3, paras 68, 72, 76, 85, 92, 778.

²⁰⁰⁵ *Brđanin* Appeal Judgement, para. 418. See also *Stakić* Appeal Judgement, para. 64; *Tadić* Appeal Judgement, para. 227(ii). See also *Vasiljević* Appeal Judgement, paras 100, 109.

²⁰⁰⁶ See *Brđanin* Appeal Judgement, paras 364, 418; *Stakić* Appeal Judgement, para. 64; *Kvočka et al.* Appeal Judgement, para. 81; *Vasiljević* Appeal Judgement, para. 100; *Tadić* Appeal Judgement, para. 227.

²⁰⁰⁷ Trial Judgement, vol. 3, para. 96.

²⁰⁰⁸ Trial Judgement, vol. 3, para. 96 (emphasis added).

of crimes charged in the Indictment in relation to events starting from 24 March until the end of May 1999.²⁰⁰⁹ Therefore, the Appeals Chamber understands the Trial Chamber's finding on the existence of the common purpose to be related to the period of the occurrence of those crimes as found by the Trial Chamber. Contrary to the Prosecution's submissions, there is no other finding in the Trial Judgement on the temporal scope of the existence of the common purpose, let alone whether the common purpose existed beyond reasonable doubt prior to this period. In this regard, the Prosecution refers to findings in the Trial Judgement in relation to events prior to this period,²⁰¹⁰ such as: (i) the process of arming of the non-Albanian population in Kosovo and disarming of the Kosovo Albanian population in 1998 and early 1999;²⁰¹¹ (ii) the use of the period of diplomatic negotiations by the FRY and Serbian authorities to bring additional forces into Kosovo allegedly in breach of the October Agreements in late 1998 and early 1999;²⁰¹² and (iii) Milošević's decision at the end of 1998 to replace Perišić with Ojdanić as Chief of the VJ General Staff, and to replace Samardžić with Pavković as Commander of the 3rd Army.²⁰¹³ However, the Appeals Chamber does not consider that those findings can be interpreted as amounting to a finding that the common purpose existed beyond reasonable doubt at the time of the occurrence of these events. Those

²⁰⁰⁹ Trial Judgement, vol. 2, paras 1179-1262, read together with *ibid.*, vol. 1, para. 1209. The Appeals Chamber notes that, with two exceptions, all of the dates of the events described in the Indictment in the context of the charged underlying crimes fell in the period between 24 March and the end of May 1999. The two exceptions are the event in the village of Kotlina/Kotllina in Kačanik/Kaçanik municipality in the beginning of March 1999 (Indictment, paras 72(k)(i), 73) and an incident in Račak/Reçek in Štimlje/Shtime municipality in January 1999 (Indictment, para. 75(a)). While the Trial Chamber made some findings with regard to the allegations on the event in the village of Kotlina/Kotllina in the beginning of March 1999 (Trial Judgement, vol. 2, paras 1067, 1253, read together with *ibid.*, vol. 2, paras 1018-1020, 1027, 1029-1030), the Appeals Chamber has understood the Trial Chamber to have not considered those findings to be relevant to its conclusions on the commission of crimes charged in this location. Rather, the Appeals Chamber has understood the Trial Chamber to have considered relevant only findings concerning events in the same location as of 24 March 1999 (see *supra*, sub-section VI.B.7.(a)(i); *ibid.*, vol. 2, paras 1067, 1253, read together with *ibid.*, vol. 2, paras 1156, 1170, 1178). Further, with regard to the allegations concerning the incident in Račak/Reçek in January 1999, the Trial Chamber disallowed the evidence to be led, made no finding thereon in the Trial Judgement, and subsequently declared that no charge was outstanding against the accused in this case before the Tribunal (see *supra*, fn. 19).

²⁰¹⁰ Appeal Hearing, 11 Mar 2013, AT. 219-221.

²⁰¹¹ Appeal Hearing, 11 Mar 2013, AT. 220-221, referring to Trial Judgement, vol. 3, paras 68, 72, 92, read together with *ibid.*, vol. 1, paras 764-766, 775, 787; *ibid.*, vol. 3, paras 57-58, 69-71. In particular, the Prosecution quoted the Trial Chamber's finding that the process of arming and disarming in 1998 and early 1999 was "designed to render the Kosovo Albanian population vulnerable to the forces of the FRY and Serbia, while at the same time empowering the non-Albanian population" (*ibid.*, vol. 3, para. 72). See also *infra*, fn. 2012.

²⁰¹² Appeal Hearing, 11 Mar 2013, AT. 220-221, referring to Trial Judgement, vol. 3, paras 76, 92, read together with *ibid.*, vol. 1, paras 934-943, 962-983, 988-989; *ibid.*, vol. 3, para. 75. In particular, the Prosecution quoted the Trial Chamber's finding that while the failure of the diplomatic negotiations was the responsibility of all the participants, the FRY and Serbian authorities "made use of the period of the negotiations" to bring additional forces into Kosovo in late 1998 and early 1999 in breach of the October Agreements, "thus placing [themselves] in the position in the spring of 1999 to be able to mount a widespread attack upon the Kosovo Albanian civilian population" (*ibid.*, vol. 3, para. 76). The Prosecution further quoted the Trial Chamber's finding that through the process of arming and disarming and by moving additional forces to Kosovo, the JCE members "prepared [...] to deal a heavy blow to the KLA and to displace [...] enough Kosovo Albanians to change the ethnic balance in Kosovo" (*ibid.*, vol. 3, para. 92).

²⁰¹³ Appeal Hearing, 11 Mar 2013, AT. 220, referring to Trial Judgement, vol. 3, paras 85, 778, read together with *ibid.*, vol. 3, paras 80, 83. In particular the Prosecution quoted the Trial Chamber's findings that: (i) Milošević appointed Ojdanić the Chief of the VJ General Staff and promoted Pavković to the 3rd Army Commander at the end of 1998 "in order to facilitate the implementation of the common purpose" (*ibid.*, vol. 3, para. 85); and (ii) Pavković's promotion at the end of 1998 was a reward "from Milošević to Pavković for his participation in the [JCE]" (*ibid.*, vol. 3, para. 778).

findings are merely part of a number of factors considered by the Trial Chamber to infer the existence of the common purpose. Only based on all factors, and particularly its findings concerning the pattern of the crimes,²⁰¹⁴ the Trial Chamber reached the conclusion that the common purpose existed “*beyond reasonable doubt* [...] during the time of the crimes”.²⁰¹⁵ The Appeals Chamber thus finds the Prosecution’s submissions in this regard unpersuasive.

611. As to Pavković’s contention that there must be “a real plan emanating from a real agreement”²⁰¹⁶ in the sense that all JCE members “agreed with each other about what they were doing” with “the same goal in mind”²⁰¹⁷ and that such a plan “does not materialize [...] out of events on the ground”,²⁰¹⁸ the Appeal Chamber recalls that JCE liability requires the existence of “a common plan, design or purpose” amounting to, or involving the commission of a crime.²⁰¹⁹ Such a common plan, design, or purpose may “be inferred from the facts”,²⁰²⁰ including events on the ground.²⁰²¹ Pavković has failed to demonstrate that the Trial Chamber erred in this respect. Accordingly, his argument is dismissed.

3. Factors from which the Trial Chamber inferred the existence of the common purpose

612. Šainović, Pavković, and Lukić challenge the Trial Chamber’s assessment of evidence concerning the factors from which it inferred the existence of the common purpose. The Appeals Chamber recalls that the factors relied upon by the Trial Chamber include: (i) the discernible pattern of forcible displacement of Kosovo Albanians committed by the forces of the FRY and Serbia in spring 1999;²⁰²² (ii) the routine seizure and the destruction of Kosovo Albanians’ IDs by the forces of the FRY and Serbia in the course of their displacement in spring 1999;²⁰²³ (iii) the abuse of power by the FRY and Serbian authorities prior to 1998 in an attempt to “adversely affect the socio-economic circumstances of the Kosovo Albanian majority”;²⁰²⁴ (iv) the discriminatory arming of

²⁰¹⁴ Trial Judgement, vol. 3, paras 41-46. See also *ibid.*, vol. 3, para. 17.

²⁰¹⁵ Trial Judgement, vol. 3, para. 96 (emphasis added).

²⁰¹⁶ Pavković’s Appeal Brief, para. 25.

²⁰¹⁷ Appeal Hearing, 12 Mar 2013, AT. 338.

²⁰¹⁸ Pavković’s Appeal Brief, para. 25. In this regard, the Appeals Chamber notes that Pavković does not challenge the Trial Chamber’s statements that the Prosecution was required to prove that “the accused and at least one other person [...] came to an express or implied agreement that a particular crime or underlying offence would be committed” (Trial Judgement, vol. 1, para. 101) and that “the common purpose need not be previously arranged or formulated, but may materialise spontaneously” (*ibid.*, vol. 1, para. 102). See also Appeal Hearing, 12 Mar 2013, AT. 339.

²⁰¹⁹ *Tadić* Appeal Judgement, para. 227(ii) (emphasis omitted). See also *Krajišnik* Appeal Judgement, paras 184-185; *Brdanin* Appeal Judgement, paras 364, 418; *Stakić* Appeal Judgement, para. 64; *Kvočka et al.* Appeal Judgement, paras 81, 96, 117; *Vasiljević* Appeal Judgement, para. 100.

²⁰²⁰ *Vasiljević* Appeal Judgement, para. 100; *Tadić* Appeal Judgement, para. 227(ii).

²⁰²¹ See, e.g., *Martić* Trial Judgement, paras 442-445 (affirmed by *Martić* Appeal Judgement, paras 92-116); *Krajišnik* Trial Judgement, para. 1097 (affirmed by *Krajišnik* Appeal Judgement, paras 192, 605-647). See also Trial Judgement, vol. 1, para. 102.

²⁰²² Trial Judgement, vol. 3, paras 41-46. See also *ibid.*, vol. 3, para. 94.

²⁰²³ Trial Judgement, vol. 3, paras 30-40.

²⁰²⁴ Trial Judgement, vol. 3, para. 48. See also *ibid.*, vol. 3, para. 47.

the non-Albanian population in Kosovo and disarming of the Kosovo Albanian population in 1998 and early 1999;²⁰²⁵ (v) the use of the period of diplomatic negotiations by the FRY and Serbian authorities to bring additional forces into Kosovo in breach of the October Agreements in late 1998 and early 1999;²⁰²⁶ (vi) Slobodan Milošević's decision at the end of 1998 to replace Momčilo Perišić with Ojdanić as Chief of the VJ General Staff and to replace Dušan Samardžić with Pavković as Commander of the 3rd Army;²⁰²⁷ and (vii) the clandestine operation in spring 1999 to conceal hundreds of bodies of victims of crimes from international representatives and/or NATO ground forces, by transferring them from Kosovo to Serbia proper.²⁰²⁸

613. The Trial Chamber found that “the most compelling evidence of a common plan, design, or purpose is that which pertains to the pattern of crimes in 1999”²⁰²⁹ and that “the confiscation and destruction of identity documents is some of the strongest evidence in the case going to show that the events of spring 1999 in Kosovo were part of a common purpose”.²⁰³⁰ The Appeals Chamber will accordingly first address the arguments of Šainović, Pavković, and Lukić concerning the Trial Chamber's assessment of evidence on the pattern of forcible displacement and the confiscation of IDs.

(a) Discernible pattern of forcible displacement

614. Referring to its findings on the events on the ground, the Trial Chamber found that upon the commencement of the NATO bombing on 24 March 1999, the forces of the FRY and Serbia launched a broad campaign of violence against the Kosovo Albanian civilian population, “using the bombing as a window of opportunity to do this.”²⁰³¹ The Trial Chamber further found that the deliberate actions of the forces of the FRY and Serbia during this campaign “caused the departure of at least 700,000 Kosovo Albanians from Kosovo in the short period of time between the end of March and the beginning of June 1999.”²⁰³² In reaching this conclusion, the Trial Chamber also found that “although the NATO bombing and the activities of the KLA were factors in the complicated situation on the ground, they were not the cause of over 700,000 people moving *en masse* both within Kosovo and then across the border” during this short time period.²⁰³³

²⁰²⁵ Trial Judgement, vol. 3, paras 49-72. See also *ibid.*, vol. 1, paras 764-766, 775, 787.

²⁰²⁶ Trial Judgement, vol. 3, paras 73-76. See also *ibid.*, vol. 1, paras 934-943, 962-983, 988-989.

²⁰²⁷ Trial Judgement, vol. 3, paras 77-85.

²⁰²⁸ Trial Judgement, vol. 3, paras 86-88.

²⁰²⁹ Trial Judgement, vol. 3, para. 17.

²⁰³⁰ Trial Judgement, vol. 3, para. 40.

²⁰³¹ Trial Judgement, vol. 3, para. 41, read together with *ibid.*, vol. 2, para. 1178; *ibid.*, vol. 3, para. 92.

²⁰³² Trial Judgement, vol. 2, para. 1178. See also *ibid.*, vol. 2, para. 1156; *ibid.*, vol. 3, paras 41-42.

²⁰³³ Trial Judgement, vol. 3, para. 45. See also *ibid.*, vol. 2, paras 1156, 1175-1177.

615. Furthermore, the Trial Chamber found that crimes committed by the forces of the FRY and Serbia in Kosovo during this period follow a clearly discernible pattern of forcible displacement²⁰³⁴ and that “[t]hese crimes were not committed in a random and un-orchestrated manner, but rather according to a common purpose.”²⁰³⁵ This eventually led the Trial Chamber to conclude that the common purpose was to forcibly displace a number of Kosovo Albanians both within and outside Kosovo through a widespread and systematic campaign of terror and violence.²⁰³⁶

(i) Causes of the displacement

616. Šainović, Pavković, and Lukić submit that in its analysis of the overall pattern of events, the Trial Chamber erred in concluding that the reason for the departure of Kosovo Albanians from Kosovo was the deliberate actions by the FRY and Serbian forces.²⁰³⁷ They assert that the Trial Chamber violated the principle of *in dubio pro reo* since there were a number of other reasonable explanations for the flight of the population from Kosovo.²⁰³⁸ They argue that civilians left due to: (i) the NATO bombing, which caused civilian casualties and devastation as well as a shortage of basic necessities;²⁰³⁹ and (ii) the fear of fighting between the KLA and the FRY and Serbian forces.²⁰⁴⁰ In addition, Lukić submits that civilians left due to instructions and orders by the KLA,²⁰⁴¹ or in order to avoid forced mobilisation by the KLA²⁰⁴² or retaliation from the KLA for being “Serbian collaborators”.²⁰⁴³ Lukić also asserts that the causes of the exodus included the creation of an “artificial humanitarian catastrophe” through an agreement between NATO and the KLA,²⁰⁴⁴ and propaganda of non-FRY and Serbian media and NATO.²⁰⁴⁵ Furthermore, Šainović and Lukić submit that, while the Trial Chamber acknowledged some of these factors, it failed to

²⁰³⁴ Trial Judgement, vol. 3, paras 41, 46, 94. See also *ibid.*, vol. 3, para. 44.

²⁰³⁵ Trial Judgement, vol. 3, para. 46.

²⁰³⁶ Trial Judgement, vol. 3, para. 95.

²⁰³⁷ Šainović’s Appeal Brief, paras 428-429; Pavković’s Appeal Brief, para. 53; Lukić’s Appeal Brief, paras 201-221, 241, 362.

²⁰³⁸ Lukić’s Appeal Brief, paras 202-219, 240, 246, 363, 405; Lukić’s Reply Brief, para. 70; Šainović’s Appeal Brief, paras 428-430; Pavković’s Appeal Brief, para. 53. Lukić also avers that even some of the Prosecution witnesses, who are Kosovo Albanians, testified that they had left their homes for reasons other than being evicted by the security forces (Lukić’s Appeal Brief, paras 205, 242). See also Appeal Hearing, 14 Mar 2013, AT. 567-569.

²⁰³⁹ Lukić’s Appeal Brief, paras 207-208, 216-218, 235-239, 243(e)(f)(g), 363, 393; Šainović’s Appeal Brief, paras 428-429, 431, 463-465; Pavković’s Appeal Brief, paras 53, 55, referring to Karol John Drewienkiewicz, Exh. P2542. See also Lukić’s Appeal Brief, para. 388. See also Appeal Hearing, 11 Mar 2013, AT. 169-170, 12 Mar 2013, AT. 314-318.

²⁰⁴⁰ Lukić’s Appeal Brief, paras 209, 243(d), 363; Pavković’s Appeal Brief, paras 53, 55-56; Šainović’s Appeal Brief, paras 428, 430, referring to Peć/Peja and Đakovica/Gjakova and other parts of Kosovo as locations of such fighting.

²⁰⁴¹ Lukić’s Appeal Brief, paras 200, 210, 212, 228(b)(c), 233, 243(a)(e), 363, 378-379, 394, in particular, asserting that the KLA caused the movement of civilians in order “to hide among them and escape from encirclement”, and that witness Joksić prepared a list of villages which were abandoned due to KLA actions (Ljubivoje Joksić, Exh. 6D1491, paras 52-53; Exh. 6D775; Exh. 6D776). See also Lukić’s Reply Brief, paras 71-73.

²⁰⁴² Lukić’s Appeal Brief, paras 214, 243(b), 363. See also Pavković’s argument during the appeal hearing in this regard (Appeal Hearing, 12 Mar 2013, AT. 315).

²⁰⁴³ Lukić’s Appeal Brief, para. 215. See also *ibid.*, paras 243(c), 363.

²⁰⁴⁴ Lukić’s Appeal Brief, paras 219, 243(e), 363. See also *ibid.*, paras 161, 213.

²⁰⁴⁵ Lukić’s Appeal Brief, paras 211, 243(e).

assess how many people left as a result of each specific reason and attributed the departure of 700,000 Kosovo Albanians solely to the actions of the FRY and Serbian forces.²⁰⁴⁶

617. According to Lukić, the Trial Chamber also erred in concluding that the NATO bombing was not the primary reason for the mass displacement of civilians based on evidence that people did not leave Belgrade and other parts of the FRY which were also bombed by NATO.²⁰⁴⁷ He submits that the Trial Chamber failed to consider that, in those parts of the FRY, there was no KLA which forced the civilians to leave.²⁰⁴⁸ In addition, Šainović and Lukić argue that the Trial Chamber erred when it assessed the impact of the NATO bombing in relation to each individual municipality in Kosovo, instead of the whole of Kosovo and the FRY.²⁰⁴⁹ Lukić adds that the fact that there was no mass departure of civilians prior to the NATO air campaign suggests that it was the cause of their departure.²⁰⁵⁰

618. Šainović and Lukić also contend that in finding the pattern of forcible displacement, the Trial Chamber erred in “almost exclusively” relying on the testimony of Kosovo Albanians and argue that in light of the unnatural consistency of their accounts on their forcible displacement by VJ and MUP forces, the Trial Chamber should have found them unreliable.²⁰⁵¹

619. The Prosecution responds that on the basis of evidence regarding the specific offences committed throughout Kosovo at the relevant time, the Trial Chamber reasonably identified an overall pattern of crimes committed by the FRY and Serbian forces and found this to be the most compelling evidence of the existence of the common criminal purpose.²⁰⁵² The Prosecution further argues that the Trial Chamber reasonably found that the FRY and Serbian forces’ campaign of terror and violence caused the displacement of at least 700,000 Kosovo Albanians in about two

²⁰⁴⁶ Šainović’s Appeal Brief, paras 428-429, referring to Trial Judgement, vol. 2, paras 1175, 1178; Lukić’s Appeal Brief, paras 386, 405, referring to Trial Judgement, vol. 3, paras 45-46, 95.

²⁰⁴⁷ Lukić’s Appeal Brief, para. 161, referring to Trial Judgement, vol. 2, para. 1176.

²⁰⁴⁸ Lukić’s Appeal Brief, para. 161.

²⁰⁴⁹ Šainović’s Appeal Brief, paras 463-465, also claiming that the NATO bombing transformed a limited conflict in Kosovo to a general conflict in the whole of the FRY; Lukić’s Appeal Brief, paras 158-159, 234-238.

²⁰⁵⁰ Lukić’s Appeal Brief, para. 239, referring to Trial Judgement, vol. 2, para. 1177.

²⁰⁵¹ Šainović’s Appeal Brief, paras 432-435; Lukić’s Appeal Brief, paras 160, 241, 364, 402, referring to the Trial Judgement, vol. 1, para. 55, where the Trial Chamber found that Kosovo Albanian witnesses’ consistent denial of the KLA’s presence seemed to “border upon the irrational”. See also Lukić’s Appeal Brief, paras 160, 206, 242, arguing that some of the Kosovo Albanian witnesses changed their testimony under KLA pressure and that the Trial Chamber should have rather relied upon the testimony of Defence witnesses who were VJ and MUP officers and presented “their direct knowledge based on conversations with Albanians” according to which the latter were leaving due to the NATO bombing and the KLA. During the appeal hearing, Pavković also contested the reliability of the testimony of Kosovo Albanian witnesses concerning the reason for their departure (Appeal Hearing, 12 Mar 2013, AT. 317, 374-375).

²⁰⁵² Prosecution’s Response Brief (Šainović), paras 262-265; Prosecution’s Response Brief (Lukić), para. 177, referring, *inter alia*, to Trial Judgement, vol. 3, paras 17, 46. See also Prosecution’s Response Brief (Pavković), paras 16, 23. See also Appeal Hearing, 11 Mar 2013, AT. 216, 221-228.

months,²⁰⁵³ and that none of the other possible explanations for the displacement affected its finding regarding the main cause for the displacement.²⁰⁵⁴ Moreover, the Prosecution submits that few Kosovo Albanians left Kosovo for reasons unrelated to VJ and MUP actions and that the exact number of such individuals was irrelevant.²⁰⁵⁵ Finally, the Prosecution submits that the Trial Chamber carefully assessed the credibility of the Kosovo Albanian witnesses and extensively relied on other corroborating evidence.²⁰⁵⁶

620. The Appeals Chamber observes that the Trial Chamber carefully evaluated the evidence concerning the causes of the Kosovo Albanians' displacement. In particular, the Trial Chamber was mindful of the fact that there was a continuing conflict between the KLA and the forces of the FRY and Serbia and that the flood of Kosovo Albanians *en masse* across the borders began at the same time as the NATO bombing.²⁰⁵⁷ Moreover, the Trial Chamber noted witness testimony referring to reasons for their movement other than the conduct of the forces of the FRY and Serbia²⁰⁵⁸ as well as the evidence relevant to KLA activity and the NATO bombing, including its overall effect with regard to Kosovo and the FRY.²⁰⁵⁹ The Trial Chamber acknowledged that "in some parts of Kosovo, [...] people may have left their homes for different reasons, such as instructions from the KLA, the desire to avoid being present while combat between the KLA and forces of the FRY and

²⁰⁵³ Prosecution's Response Brief (Šainović), paras 274-275; Prosecution's Response Brief (Lukić), paras 169, 173, referring, *inter alia*, to Trial Judgement, vol. 2, para. 1178, *ibid.*, vol. 3, para. 45. See also Appeal Hearing, 14 Mar 2013, AT. 549-551.

²⁰⁵⁴ Prosecution's Response Brief (Šainović), paras 276-277, 316-318; Prosecution's Response Brief (Pavković), para. 22; Prosecution's Response Brief (Lukić), paras 160, 169-171, 173-175, 179. The Prosecution also argues that Lukić merely repeats his submission at trial (Prosecution's Response Brief (Lukić), paras 169-171, 173, 175-176).

²⁰⁵⁵ Prosecution's Response Brief (Šainović), para. 277.

²⁰⁵⁶ Prosecution's Response Brief (Šainović), paras 266-268; Prosecution's Response Brief (Lukić), paras 172, 178, referring, *inter alia*, to Trial Judgement, vol. 1, para. 50, *ibid.*, vol. 2, para. 1175.

²⁰⁵⁷ Trial Judgement, vol. 2, para. 1177.

²⁰⁵⁸ Trial Judgement, vol. 2, paras 1152-1155, 1174, and references therein (as reasons for the flight of the civilians from Kosovo, these witnesses referred, *inter alia*, to: (i) the fear of fighting between the FRY and Serbian forces on the one hand, and the KLA and NATO on the other hand; (ii) fear of forcible mobilisation by the KLA; (iii) fear of NATO bombing; (iv) KLA pressure on Kosovo Albanians to create an image of a humanitarian catastrophe; and (v) KLA leaflets calling upon Kosovo Albanians to leave). See also *e.g.*, Trial Judgement, vol. 2, paras 31-33, 84, 156, 190, 198, 227, 244, 278-286, 300, 532-533, 554-555, 640, 665-666, 672, 725, 757-758, 804-805, 820, 835, 865-866, 869, 886-887, 907, 914-915, 941-942, 967, 1102. See also *supra*, section VI. Furthermore, the Appeals Chamber observes that the Trial Chamber duly considered the testimony of the Prosecution witnesses which, according to Lukić (Lukić's Appeal Brief, paras 205, 242), mentioned reasons other than the conduct of the FRY and Serbian forces (Trial Judgement, vol. 2, paras 52-53, 647, 756-758, 822, 979, 984, 993, 1003).

²⁰⁵⁹ The Trial Chamber's examination of this evidence with regard to the individual municipalities is set out in *e.g.*, Trial Judgement, vol. 2, paras 31-33, 57, 69, 104-115, 118-120, 143, 147, 153, 156, 158, 165, 174-177, 190, 230, 245-259, 276, 278-279, 282, 285-286, 294, 296, 316, 473-477, 497, 524-528, 531, 554-555, 561, 567-570, 574, 596-600, 623, 628, 646, 657, 670-672, 677, 679, 697, 725-726, 728, 748-752, 756-758, 796-797, 814-815, 834-837, 869, 886-887, 896-897, 899, 914-916, 941-942, 958, 960, 967, 973, 1009-1013, 1020, 1067, 1074, 1120, 1132, 1152-1155. See also *supra*, section VI. Regarding the overall effect of the NATO bombing with regard to the territory of Kosovo as well as Serbia and Montenegro, and damage and destruction to numerous targets therein, including buildings and objects forming part of the Serbian civilian infrastructure, see Trial Judgement, vol. 1, para 1209-1214; *ibid.*, vol. 2, para. 1176. This demonstrates that Šainović's and Lukić's arguments that the Trial Chamber omitted to consider the overall impact of the NATO bombing (Šainović's Appeal Brief, paras 463-465; Lukić's Appeal Brief, paras 158-159, 234-238) are without merit.

Serbia was taking place, or indeed the fact that NATO was bombing targets close to where they lived.”²⁰⁶⁰

621. However, the Trial Chamber also observed that none of the Kosovo Albanian witnesses cited the NATO bombing as a reason for their departure²⁰⁶¹ and that, while NATO bombs struck targets across the FRY, people did not leave other parts of the FRY, including Belgrade, in the large numbers in which people left Kosovo.²⁰⁶² The Trial Chamber further considered the evidence establishing that in only two locations people moved as a result of KLA action²⁰⁶³ and noted that, while displaced Kosovo Albanians remained within Kosovo when the armed conflict between the KLA and the forces of the FRY and Serbia intensified in 1998, the massive flight of people across the borders began only on 24 March 1999.²⁰⁶⁴ In addition, the Trial Chamber took into account that the KLA forces were small in contrast to the large number of VJ and MUP personnel deployed to Kosovo between March and June 1999.²⁰⁶⁵ Furthermore, there was a significant body of evidence showing the commission of numerous crimes by the forces of the FRY and Serbia in 13 municipalities of Kosovo during the relevant period.²⁰⁶⁶ This, as found by the Trial Chamber, included “[t]he consistent eye-witness accounts of the systematic terrorisation of Kosovo Albanian civilians by the forces of the FRY and Serbia, their removal from their homes, and the looting and deliberate destruction of their property”.²⁰⁶⁷

²⁰⁶⁰ Trial Judgement, vol. 2, para. 1175.

²⁰⁶¹ Trial Judgement, vol. 2, para. 1175, wherein the Trial Chamber further stated that it gave “little weight to anonymous hearsay from VJ and MUP officers about the reasons for the departure of Kosovo Albanians from their homes” and noted that displaced Kosovo Albanians might have been reluctant to give the real reasons to these officers wearing uniforms. Lukić’s argument that the Trial Chamber should have relied upon this evidence given by VJ and MUP officers rather than Kosovo Albanian witnesses (Lukić’s Appeal Brief, para. 160; *supra*, fn. 2051) is dismissed as it does not show any error in the Trial Chamber’s evaluation of contradicting evidence, which should not be lightly disturbed by the Appeals Chamber (see *Galić* Appeal Judgement, para. 300).

²⁰⁶² Trial Judgement, vol. 2, para. 1176, referring to Spasoje Smiljanić, 17 Sep 2007, T. 15776-15777. Lukić’s argument that the Trial Chamber failed to take into account the absence of the KLA in Belgrade and other parts of the FRY excluding Kosovo (Lukić’s Appeal Brief, para. 161) is without merit, since this argument ignores the Trial Chamber’s finding that only in two locations the movement of the Kosovo Albanians was a consequence of actions of the KLA (Trial Judgement, vol. 2, para. 1175).

²⁰⁶³ Trial Judgement, vol. 2, para. 1175, specifying that those locations were in Vučitrn/Vushtrria municipality and in Suva Reka/Suhareka municipality. See also Trial Judgement, vol. 2, paras 524-525, 554-555, 749, 757-758, 796, and reference therein; *supra*, section VI.

²⁰⁶⁴ Trial Judgement, vol. 2, para. 1177.

²⁰⁶⁵ Trial Judgement, vol. 2, para. 1177, also finding that the KLA did not have the kinds of heavy equipment to which the state forces had access.

²⁰⁶⁶ Trial Judgement, vol. 2, paras 1156, 1178; *ibid.*, vol. 3, paras 41, 46. See also *ibid.*, vol. 2, paras 1-1149, 1157-1174. See also *supra*, section VI. During the appeal hearing, Pavković contested the Trial Chamber’s reliance on the testimony of former VJ soldiers, K90, K73, and K54 who described the expulsion of Kosovo Albanians from their homes during the NATO air campaign (Appeal Hearing, 12 Mar 2013, AT. 323-325, referring to Trial Judgement, vol. 2, para. 1172). The Appeals Chamber, however, dismisses his argument as he merely presented his own interpretation of the testimony without showing any error on the part of the Trial Chamber. With regard to K90’s testimony, see also *supra*, sub-section VI.B.5.(b)(ii)a.; *infra*, sub-section VII.B.3.(a)(iv).

²⁰⁶⁷ Trial Judgement, vol. 2, para. 1178. See also *ibid.*, vol. 2, para. 1156.

622. Consequently, the Trial Chamber concluded that there was a broad campaign of violence against the Kosovo Albanian civilian population and that it was the deliberate actions of the forces of the FRY and Serbia during this campaign that caused the departure of at least 700,000 Kosovo Albanians from Kosovo between the end of March and the beginning of June 1999.²⁰⁶⁸ In so doing, the Trial Chamber rejected the arguments by the Defence that the primary reasons for their mass movement were the NATO bombing, the actions of the KLA, and the combat between the KLA and the FRY and Serbian forces.²⁰⁶⁹ According to the Trial Chamber, these were “factors in the complicated situation on the ground”, but “not the cause of over 700,000 people moving *en masse* both within Kosovo and then across the border.”²⁰⁷⁰ Most of the contentions of Šainović, Pavković, and Lukić merely repeat the alternative reasons for the Kosovo Albanians’ flight and fail to demonstrate any error in the Trial Chamber’s findings. These submissions are accordingly dismissed. In light of the overwhelming evidence demonstrating a clearly discernible pattern of forcible displacement committed in Kosovo by the forces of the FRY and Serbia, the Appeals Chamber also finds that Šainović and Lukić have failed to substantiate why it would have been necessary to establish the number of people who left for each specific possible reason.

623. Šainović’s and Lukić’s contentions that the Trial Chamber almost exclusively relied on the witness testimony of Kosovo Albanians in making a finding on the overall pattern of events²⁰⁷¹ are misconceived, since the Trial Chamber relied not only on this testimony, but also on other evidence.²⁰⁷² Furthermore, while the Trial Chamber found the consistent denial of Kosovo Albanian witnesses as to the KLA activity in their areas of residence untrustworthy,²⁰⁷³ it reasonably considered that this did not render these witnesses wholly unreliable.²⁰⁷⁴ It was within the Trial

²⁰⁶⁸ Trial Judgement, vol. 2, para. 1178. See also *ibid.*, vol. 2, para. 1156; *ibid.*, vol. 3, para. 42. See also *supra*, subsection VI.B.12.

²⁰⁶⁹ Trial Judgement, vol. 2, paras 1175-1177. See also *ibid.*, vol. 3, paras 42, 45. The Appeals Chamber further notes that the Trial Chamber did not find many of the witnesses who asserted these alternative reasons to be entirely reliable, and rejected parts of their testimony concerning the alternative reasons (see *e.g.*, Trial Judgement, vol. 2, paras 83-84, 89, 244, 285, 468, 725, 826, 833, 894, 915, 956). The Appeals Chamber has confirmed a number of the Trial Chamber’s findings on the credibility of these witnesses (see *supra*, section VI.).

²⁰⁷⁰ Trial Judgement, vol. 3, para. 45. See also *ibid.*, vol. 3, para. 42.

²⁰⁷¹ Šainović’s Appeal Brief, para. 432; Lukić’s Appeal Brief, paras 160, 241, 364, 402.

²⁰⁷² Such evidence includes that provided by former VJ and MUP members (*e.g.*, Trial Judgement, vol. 2, paras 74, 82, 145, 152-155, 163, 226, 228-237, 398-401, 469-470, 498, 536-537, 547, 831, 997, 1172-1174; *ibid.*, vol. 3, para. 43), foreign journalists (*e.g.*, *ibid.*, vol. 2, paras 423-429, 805, 848-850, 858), and expert witnesses (*e.g.*, *ibid.*, vol. 2, paras 42, 137, 161, 509, 523, 609, 611-612, 615-618, 621, 1149) as well as various documentary evidence (*e.g.*, *ibid.*, vol. 2, paras 56-57, 216, 248).

²⁰⁷³ Trial Judgement, vol. 1, para. 55.

²⁰⁷⁴ In this regard, the Appeals Chamber recalls that it is not unreasonable for a trial chamber to accept certain parts of a witness’s testimony and reject others (see *Boškoski and Tarčulovski* Appeal Judgement, para. 59; *Krajišnik* Appeal Judgement, para. 354; *Blagojević and Jokić* Appeal Judgement, para. 82; *Kupreškić et al.* Appeal Judgement, para. 333; *Muvunyi II* Appeal Judgement, para. 26). For the same reasons, the Appeals Chamber dismisses Lukić’s general submission that the Trial Chamber erred in law by finding some witnesses reliable on certain issues and not on others, and by accepting parts of their testimony while rejecting others (Lukić’s Appeal Brief, paras 77, 80, 82, referring to Trial Judgement, vol. 1, paras 50, 53, 64, and describing several characteristics witnesses allegedly exhibited which—he purports—categorically render a witness’s evidence unreliable: inconsistency, bias (specifically, “evident hatred”),

Chamber's discretion²⁰⁷⁵ to find that the consistency in their testimony about their experiences of expulsion and ensuing crimes, which was corroborated by other evidence, supports its conclusion that there was a pattern of forcible displacement.²⁰⁷⁶ The arguments raised by Šainović and Lukić in this regard are therefore dismissed.²⁰⁷⁷

624. For the foregoing reasons, the Appeals Chamber dismisses the submissions of Šainović, Pavković, and Lukić with regard to the causes underlying the displacement of Kosovo Albanians.

(ii) Use of the NATO bombing as an opportunity to launch an attack

625. Šainović argues that the Trial Chamber erroneously found that the FRY and Serbian forces used the start of the NATO bombing campaign "as an opportunity to launch a widespread and systematic attack on villages", leading to the flight of people from both these and neighbouring villages.²⁰⁷⁸ Šainović contends that this finding is implausible considering that the war with NATO created the most unfavourable circumstances for the FRY and Serbia to implement the alleged

and exaggeration; *contra* Prosecution's Response Brief (Lukić), paras 92-94). Lukić also asserts that the Trial Chamber unjustifiably blamed the Defence for lack of preparation during the Prosecution case and for the resulting failure to ask Prosecution witnesses about contradictions that Defence witnesses brought to light in the Defence case (Lukić's Appeal Brief, paras 78-79, referring to Trial Judgement, vol. 1, para. 52; *contra* Prosecution's Response Brief (Lukić), para. 95). Lukić's argument in this regard is neither substantiated nor identifies a finding to his detriment based on this consideration by the Trial Chamber and, accordingly, is dismissed.

²⁰⁷⁵ *Kupreškić et al.* Appeal Judgement, paras 31-32; *Nahimana et al.* Appeal Judgement, para. 194, and references therein; *Bikindi* Appeal Judgement, para. 116.

²⁰⁷⁶ See Trial Judgement, vol. 2, para. 1175, stating:

The Kosovo Albanian witnesses, who testified about their own expulsion and that of many others from Kosovo, came from a broad cross-section of that community, generally with no connection to one another beyond their victimisation, and it is inconceivable that they could or would all have concocted such detailed and consistent accounts of the events that they experienced and witnessed.

²⁰⁷⁷ Lukić also claims that Kosovo Albanian witnesses changed their testimony under pressure by the KLA, referring to Hyseni's and Fazliji's testimonies as examples (Lukić's Appeal Brief, paras 206, 242, referring to Bedri Hyseni, 11 Sep 2006, T. 3110, Shaban Fazliji, 11 Apr 2008, T. 25227-25228 (private session)). However, Hyseni's testimony does not indicate any such pressure. Fazliji's testimony has no link with witness evidence about the crimes on the ground.

²⁰⁷⁸ Šainović's Appeal Brief, paras 422, 462, referring to Trial Judgement, vol. 3, para. 41. Lukić also challenges this finding, understanding it to mean that the FRY and Serbia provoked the NATO bombing in order to proceed with the expulsion of the Kosovo Albanians (Lukić's Appeal Brief, paras 196, 202, 390; *contra* Prosecution's Response Brief (Lukić), para. 167. See also Pavković's Appeal Brief, para. 44). This argument is a misconstruction of the Trial Judgement and is therefore dismissed. The Trial Chamber did not find that the FRY and Serbia provoked the NATO bombing, but found that the bombing provided the FRY and Serbian forces with an opportunity to launch a widespread and systematic attack and displace Kosovo Albanians (Trial Judgement, vol. 3, paras 41, 92).

common plan.²⁰⁷⁹ The Prosecution responds that the Trial Chamber reasonably found that the JCE members used the NATO campaign as an opportunity to implement the common purpose.²⁰⁸⁰

626. The Appeals Chamber recalls the Trial Chamber's finding that the FRY and Serbian forces used the NATO bombing as an opportunity to initiate a widespread and systematic attack aimed at the expulsion of Kosovo Albanians,²⁰⁸¹ as "this could all be done with plausible deniability because it could be blamed not only upon the KLA, but upon NATO as well".²⁰⁸² By arguing that the NATO bombing and the ensuing conflict between NATO and the FRY and Serbian forces created the "most unfavourable" circumstances for the FRY and Serbia to implement the common purpose, Šainović has failed to refer to any evidence supporting his contention.²⁰⁸³ His argument is thus dismissed as unsubstantiated.

(iii) Target of the attack

627. Šainović and Lukić contest the Trial Chamber's finding that the objective of the widespread and systematic attack launched by the FRY and Serbian forces was the "villages".²⁰⁸⁴ Šainović avers that the evidence shows that the VJ and the MUP legitimately targeted the KLA forces, which had assumed positions in various villages, amidst the civilian population.²⁰⁸⁵ Lukić argues that the KLA did not comply with the laws or customs of war and abused civilians by intermingling with civilians and using them as shields.²⁰⁸⁶ He maintains that the Trial Chamber improperly expanded

²⁰⁷⁹ Šainović's Appeal Brief, para. 423. See also Appeal Hearing, 11 Mar 2013, AT. 169. Šainović also argues that it was unreasonable for the Trial Chamber to reach this conclusion, without making any finding as to why the NATO campaign was initiated (Šainović's Appeal Brief, paras 460-462; *contra* Prosecution's Response Brief (Šainović), paras 313-315). This argument is dismissed as it misrepresents the Trial Judgement. The Trial Chamber found that international negotiators decided to abandon the negotiations and resort to the NATO air campaign because they were faced with the FRY and Serbian authorities' persistent intransigence on an international presence (see Trial Judgement, vol. 1, paras 312-409, 1206-1207).

²⁰⁸⁰ Prosecution's Response Brief (Šainović), paras 269-270, also asserting that Šainović's argument in this regard merely repeats his trial submission and should be summarily dismissed.

²⁰⁸¹ Trial Judgement, vol. 3, paras 41, 92.

²⁰⁸² Trial Judgement, vol. 3, para. 92. See also *ibid.*, vol. 3 para. 41.

²⁰⁸³ During the appeal hearing, Pavković also argued that the NATO bombing would have been the worst time for the expulsion of Kosovo Albanians as NATO surveillance aircrafts were observing everything that was happening on the ground during the bombing, without referring to any evidence supporting this assertion (Appeal Hearing, 12 Mar 2013, AT. 280). His argument is thus dismissed as unfounded and speculative. Regarding the effect of the NATO bombing in the territory of Kosovo as well as Serbia and Montenegro, see *supra*, para. 620.

²⁰⁸⁴ Šainović's Appeal Brief, para. 424. See also Lukić's Appeal Brief, para. 260.

²⁰⁸⁵ Šainović's Appeal Brief, paras 424-427, referring to Vladimir Lazarević, 8 Nov 2007, T. 17917, Exh. P1966, Exh. P1968, Exh. P1969, Exh. P1970, Exh. P1990, Exh. P2808, Exh. 3D690, Exh. 5D245, Exh. 5D249.

²⁰⁸⁶ Lukić's Appeal Brief, paras 200, 226-228, 233. Lukić's arguments that the Trial Chamber erred in finding that an armed conflict existed "with the KLA, which was a terrorist organization" (Lukić's Appeal Brief, para. 159) and that the KLA was "an organized armed force that fought by legally acceptable means that complied with the laws or customs of war" (Lukić's Appeal Brief, paras 225-226; *contra* Prosecution's Response Brief (Lukić), para. 196) misrepresent the Trial Judgement. The Trial Chamber found the KLA to be an organised armed group (Trial Judgement, vol. 1, paras 840-841). However, the Trial Chamber did not make any findings as to whether the KLA complied with the laws or customs of war or whether it was a "terrorist" group (Trial Judgement, vol. 1, paras 795, 840-841), since it was immaterial for the determination of the organised nature of the KLA and the existence of an armed conflict (Trial Judgement, vol. 1, para. 791, correctly setting out the law in this regard). The Appeals Chamber does not see any error in this approach. Lukić's submissions in this regard are therefore dismissed.

the definition of “civilian” to include KLA members who engaged in combat wearing civilian clothes and that if the definition of “civilian” in international humanitarian law excluding “combatants or fighters *hors de combat*” had been properly applied, the presence of a large number of soldiers or combatants would have deprived the population of the civilian character.²⁰⁸⁷

628. The Prosecution submits that the Trial Chamber correctly found that the FRY and Serbian authorities conducted “an orchestrated, widespread and systematic campaign of terror and violence against the Kosovo Albanian civilian population” and not simply legitimate operations against the KLA.²⁰⁸⁸ The Prosecution adds that, having discussed evidence related to KLA activity and set forth the correct law that the population need only be predominantly civilian, the Trial Chamber carefully considered whether the VJ and the MUP were legitimately combating the KLA in each of the relevant locations.²⁰⁸⁹

629. The Appeals Chamber notes that the Trial Chamber carefully considered whether the VJ and the MUP were engaged in legitimate combat against the KLA in each of the relevant locations and took into account the KLA’s presence and activities.²⁰⁹⁰ It also examined evidence showing that in several instances the KLA intermingled with civilians.²⁰⁹¹ As a result, in some instances the Trial Chamber did not find that an attack on the civilian population or criminal acts were established, since it could not exclude the possibility that the concerned acts were part of legitimate operations against the KLA.²⁰⁹² In other instances, the Trial Chamber found that although the FRY and Serbian forces targeted the KLA, they simultaneously attacked Kosovo Albanian civilians in the area in a systematic manner.²⁰⁹³ Based on the specific findings with respect to each of the 13 municipalities, the Trial Chamber concluded that the FRY and Serbian forces conducted a broad campaign of violence directed against the Kosovo Albanian civilian population.²⁰⁹⁴ The general assertions of Šainović and Lukić that the VJ and the MUP targeted the KLA intermingling with civilians fall short of establishing any error in the Trial Chamber’s specific analysis as to each location, which was the basis for its overall conclusion. For the same reason, Lukić’s general claim that the Trial

²⁰⁸⁷ Lukić’s Appeal Brief, paras 229-232, referring to *Blaškić* Appeal Judgement, para. 115, *Galić* Appeal Judgement, para. 50, *Mrkšić et al.* Trial Judgement, para. 461, Article 50 of Additional Protocol to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977 (“Additional Protocol I”).

²⁰⁸⁸ Prosecution’s Response Brief (Šainović), paras 271-273, referring to Trial Judgement, vol. 2, paras 1156, 1178, *ibid.*, vol. 3, para. 95.

²⁰⁸⁹ Prosecution’s Response Brief (Šainović), paras 272-273, and references therein; Prosecution’s Response Brief (Lukić), para. 197, referring to Trial Judgement, vol. 1, paras 145-146, 797-820, *ibid.*, vol. 2, paras 1179-1262.

²⁰⁹⁰ See *e.g.*, Trial Judgement, vol. 2, paras 57, 69, 109-115, 147, 165, 174-177, 230, 245-259, 276, 278, 285, 294, 296, 316, 473-477, 497, 524-528, 561, 567-570, 574, 596-600, 623, 646, 657, 677, 679, 697, 726, 728, 748-752, 796-797, 814-815, 896-897, 899, 916, 958, 960, 1009-1013, 1020, 1067, 1074, 1102, 1120, 1132.

²⁰⁹¹ See *e.g.*, Trial Judgement, vol. 2, paras 294, 477, 734, 759, 767, 797. See also *ibid.*, vol. 1, paras 828, 837-838.

²⁰⁹² See *e.g.*, Trial Judgement, vol. 2, paras 147, 552-555, 1258.

²⁰⁹³ Trial Judgement, vol. 2, paras 230, 259, 671-675, 679, 795-797, 1067, 1199, 1206, 1219.

²⁰⁹⁴ Trial Judgement, vol. 2, paras 1156, 1178.

Chamber improperly expanded the definition of “civilian” is unsubstantiated. The Appeals Chamber thus dismisses the arguments of Šainović and Lukić in this regard.

(iv) Use of Kosovo Albanians to deter the NATO bombing

630. Pavković and Lukić argue that Merita Deda, K90, and Momir Stojanović provided evidence demonstrating the VJ’s attempt to prevent Kosovo Albanians from leaving their villages and contest the Trial Chamber’s finding that such evidence does not undermine the general pattern of displacement.²⁰⁹⁵ Pavković also avers that the evidence shows the non-existence of a plan to expel Kosovo Albanians.²⁰⁹⁶ More specifically, Pavković and Lukić submit that: (i) Deda testified that she and her convoy were ordered back to their villages by VJ soldiers on 28 April 1999;²⁰⁹⁷ (ii) K90 testified that it was decided at the command level of the VJ not to remove some Kosovo Albanians from areas in which the VJ was operating because that would have left the VJ without the protection of surrounding civilians and thus vulnerable to NATO attacks;²⁰⁹⁸ (iii) K90 further clarified in court that his commander “never ordered the expulsion of villagers” to Albania and that the population was not relocated until the shelling of cluster bombs by NATO around mid-April 1999;²⁰⁹⁹ and (iv) Stojanović provided corroborating testimony that there was no organised plan of expulsion since the presence of civilians was a deterrent to the NATO bombing.²¹⁰⁰ The Prosecution responds that the fact that some Kosovo Albanians were instructed to go back to their villages does not undermine the existence of a JCE to forcibly displace Kosovo Albanians.²¹⁰¹

631. The Appeals Chamber observes that the Trial Chamber carefully assessed the testimony of Deda, K90, and Stojanović in this regard²¹⁰² and concluded that this evidence did not undermine the general pattern of displacement.²¹⁰³ Moreover, the evidence that *some* Kosovo Albanians were ordered back to their villages and used as protection against NATO attacks is in keeping with the Trial Chamber’s finding that the common purpose was not to displace every Kosovo Albanian from Kosovo, but to displace a sufficient number to tip the demographic balance of the region.²¹⁰⁴

²⁰⁹⁵ Pavković’s Appeal Brief, paras 57-58; Lukić’s Appeal Brief, paras 403-404.

²⁰⁹⁶ Pavković’s Appeal Brief, para. 58.

²⁰⁹⁷ Pavković’s Appeal Brief, para. 57, referring to Exh. P2233, p. 4, Trial Judgement, vol. 3, para. 44.

²⁰⁹⁸ Pavković’s Appeal Brief, paras 57-58; Lukić’s Appeal Brief, para. 404, referring to Trial Judgement, vol. 3, para. 44.

²⁰⁹⁹ Pavković’s Appeal Brief, para. 57; Lukić’s Appeal Brief, para. 403, referring to K90, 29 Jan 2007, T. 9273.

²¹⁰⁰ Pavković’s Appeal Brief, para. 58, referring to Trial Judgement, vol. 3, para. 44.

²¹⁰¹ Prosecution’s Response Brief (Pavković), para. 24.

²¹⁰² Trial Judgement, vol. 3, para. 44. See also Merita Deda, Exh. P2233, p. 4.

²¹⁰³ Trial Judgement, vol. 3, para. 44, rejecting Lazarević’s argument to the contrary.

²¹⁰⁴ Trial Judgement, vol. 3, para. 95. In relation to this finding, Šainović, Pavković, and Lukić argue that the ethnic balance in Kosovo was eventually unchanged as 100,000 Serbs, almost half of the Serb population in Kosovo, had also left Kosovo as a result of the NATO campaign, which actually tipped the demographic balance to the detriment of the Serbs (Šainović’s Appeal Brief, para. 431; Pavković’s Appeal Brief, para. 54; Lukić’s Appeal Brief, paras 244, 386-388; *contra* Prosecution’s Response Brief (Šainović), paras 278-279). The Appeals Chamber dismisses this argument as

632. Furthermore, the assertion of Pavković and Lukić that K90 stated that his commander never ordered the expulsion of villagers to Albania, takes his testimony out of context. As noted by the Trial Chamber, K90 testified that he was ordered to direct the people towards Đakovica/Gjakova [town] and that civilians were not directed towards Albania until after cluster bombs were dropped by NATO, but disagreed with the proposition that the villagers were removed because of the NATO bombing.²¹⁰⁵ The Trial Chamber also noted that while K90 described the removal of Kosovo Albanians to Đakovica/Gjakova town as “relocation”, he also stated that “[i]f [you’re] clearing up a village, you’re expelling these people.”²¹⁰⁶ Moreover, Pavković has failed to demonstrate that the Trial Chamber erred in its assessment of Stojanović’s evidence. The Trial Chamber was entitled to partly rely on his testimony as corroboration for the use of some civilians as protection against NATO attacks, while placing little weight on other parts of his evidence in which he denied having heard of any plan to expel Kosovo Albanians from the area.²¹⁰⁷

633. Accordingly, the Appeals Chamber dismisses the submissions of Pavković and Lukić concerning the non-expulsion of Kosovo Albanians as protection from the NATO bombing.

(v) Conclusion

634. Šainović, Pavković, and Lukić have failed to show any error in the Trial Chamber’s findings regarding the discernible pattern of forcible displacement and its reliance upon this pattern in inferring a common purpose. The Appeals Chamber therefore dismisses all of their arguments in this regard.

(b) Seizure of IDs

635. The Trial Chamber found that the forces of the FRY and Serbia systematically confiscated the IDs of Kosovo Albanians in the course of their displacement.²¹⁰⁸ Noting that a number of Kosovo Albanian witnesses had their IDs confiscated or witnessed other Kosovo Albanians having their IDs seized “at the borders and, on occasion, as they were being expelled from their homes”, it found that “this was a common practice, carried out primarily by members of the police.”²¹⁰⁹ The

irrelevant, since the existence of a common purpose can be established regardless of whether the political goal of the JCE has materialised as a result of the execution of the common purpose. Šainović’s argument that had there been a common purpose to change the ethnic balance, the perpetrators of the crimes would not have allowed the Serbs to leave (Šainović’s Appeal Brief, para. 431) is also dismissed as unsubstantiated.

²¹⁰⁵ Trial Judgement, vol. 3, fn. 84, referring to K90, 29 Jan 2007, T. 9273, *ibid.*, 30 Jan 2007, T. 9407-9408.

²¹⁰⁶ Trial Judgement, vol. 3, para. 43, referring to K90, 29 Jan 2007, T. 9271-9272, 9297-9298, 9302-9303, 9331, K90, Exh. P2652, paras 40-45. See also *supra*, sub-section VI.B.5.(b)(ii)a.

²¹⁰⁷ Trial Judgement, vol. 3, para. 44, referring to Momir Stojanović, 6 Dec 2007, T. 19732. See also *infra*, sub-section VII.B.4.(a) where the Appeals Chamber affirms the Trial Chamber’s finding dismissing the testimony of witnesses categorically denying the existence of a plan to expel Kosovo Albanians.

²¹⁰⁸ Trial Judgement, vol. 3, para. 40. See also *ibid.*, vol. 3, paras 34, 38.

²¹⁰⁹ Trial Judgement, vol. 3, para. 38.

Trial Chamber further found that many of the confiscated IDs were destroyed and concluded that “the confiscation and destruction of [IDs] is some of the strongest evidence in the case going to show that the events of spring 1999 in Kosovo were part of a common purpose.”²¹¹⁰

636. Šainović, Pavković, and Lukić contest the Trial Chamber’s finding that the confiscation and destruction of IDs is “some of the strongest evidence” showing that “the events of spring 1999 in Kosovo were part of a common purpose.”²¹¹¹ They submit that the Trial Chamber failed to explain the relevance of the seizure of IDs and how it contributed to the execution of the common purpose to alter the ethnic balance.²¹¹² In particular, Šainović, Pavković, and Lukić challenge the Trial Chamber’s findings concerning the scope and manner in which IDs were confiscated and argue that in any event, the seizure of IDs could not have contributed to the execution of the common purpose, given that it did not cause the loss of citizenship or make Kosovo Albanians’ return to Kosovo difficult. The Appeals Chamber will address these arguments in turn.

(i) Confiscation of IDs as a common practice

637. Šainović, Pavković, and Lukić challenge the Trial Chamber’s finding that seizure of IDs “was a common practice.”²¹¹³ In particular, Šainović submits that had a common plan to forcibly displace the Kosovo Albanian population existed, it would have entailed a systematic seizure of IDs everywhere in Kosovo and not merely at border crossings.²¹¹⁴ Šainović also contends that the evidence shows that IDs were not seized from everyone and that cases of seizure of IDs, if any, were “isolated incidents.”²¹¹⁵ Lukić asserts that although 62 Kosovo Albanian witnesses testified before the Trial Chamber, it noted only the testimony of 26 Kosovo Albanians who gave evidence of the confiscation of IDs at the border.²¹¹⁶ Lukić also points to two border crossings where no witness stated that his or her ID was confiscated²¹¹⁷ and challenges the Trial Chamber’s reliance on the testimony of Hamide Fondaj and Sadije Sadiku describing ID confiscation at another border crossing.²¹¹⁸ Pavković contends that, as the exact percentage of Kosovo Albanians whose IDs were confiscated is unknown, there was no basis for the Trial Chamber to conclude that a “vast majority”

²¹¹⁰ Trial Judgement, vol. 3, para. 40.

²¹¹¹ Trial Judgement, vol. 3, para. 40; Šainović’s Appeal Brief, para. 421; Pavković’s Appeal Brief, para. 51; Lukić’s Appeal Brief, para. 504.

²¹¹² Šainović’s Appeal Brief, para. 413; Pavković’s Appeal Brief, para. 65; Lukić’s Appeal Brief, para. 504, referring to Trial Judgement, vol. 3, para. 40.

²¹¹³ Lukić’s Appeal Brief, para. 505, referring to Trial Judgement, vol. 3, para. 38. The Appeals Chamber understands Šainović and Pavković to also challenge this finding from the context of their arguments (see Šainović’s Appeal Brief, paras 418, 420; Pavković’s Appeal Brief, paras 51, 59-62). See also Pavković’s Reply Brief, para. 10.

²¹¹⁴ Šainović’s Appeal Brief, paras 418, 420.

²¹¹⁵ Šainović’s Appeal Brief, paras 418, 420.

²¹¹⁶ Lukić’s Appeal Brief, para. 507.

²¹¹⁷ Lukić’s Appeal Brief, para. 510, referring to the Đeneral Janković/Hani i Elezit and Globočica/Gllobočica border crossings.

²¹¹⁸ Lukić’s Appeal Brief, paras 508, 515, referring to the Vrbnica/Verbnica (Morina) border crossing.

of Kosovo Albanians were subject to this practice.²¹¹⁹ He adds that certain Kosovo Albanian witnesses might have “enhanced their testimony in an anti-Serb manner.”²¹²⁰

638. In addition, Šainović argues that MUP officials denied the existence of any order to seize IDs²¹²¹ and refers to Krsman Jelić’s evidence that VJ unit commanders prohibited the inspection of IDs.²¹²² Lukić adds that there is no evidence that he issued any order, instruction or recommendation, or expressed support for the confiscation or destruction of IDs.²¹²³

639. The Prosecution responds that the Trial Chamber “reasonably concluded that confiscating and destroying [IDs] of Kosovo Albanians was a ‘common practice’” of the FRY and Serbian forces during the NATO campaign.²¹²⁴ Contrary to Šainović’s argument that these were only “isolated incidents”, the Prosecution maintains that the fact that IDs were not confiscated in a few instances does not render the practice isolated.²¹²⁵ In response to Pavković, the Prosecution argues that the Trial Chamber did not need to find that the vast majority of the forcibly displaced Kosovo Albanians were subject to ID confiscation.²¹²⁶ The Prosecution adds that Lukić’s argument about the number of witnesses who testified on ID confiscation is undeveloped and that he also misinterprets the Trial Chamber’s findings and the evidence.²¹²⁷

640. With regard to orders to seize Kosovo Albanians’ IDs, the Prosecution contends that Šainović fails to show any error in the Trial Chamber’s decision not to rely on the evidence of MUP officials denying such orders.²¹²⁸ Concerning Jelić’s evidence that VJ units were not authorized to check IDs, the Prosecution responds that the Trial Chamber found Jelić unreliable and that, at any rate, it would not contradict its finding that primarily police forces confiscated IDs.²¹²⁹

²¹¹⁹ Pavković’s Appeal Brief, para. 62. See also Appeal Hearing, 12 Mar 2013, AT. 373-374. In support of this contention, Pavković refers to witness testimony allegedly showing that only a small percentage of Kosovo Albanians was required to leave IDs at the Čafa Prushit/Qafa e Prushit border crossing (Pavković’s Appeal Brief, para. 61). He also asserts that the Trial Chamber treated Kosovo Albanian witnesses who testified to the seizure of their IDs as if they were representative of the whole Kosovo Albanian population (*ibid.*, paras 59-60). See also Lukić’s Appeal Brief, para. 512.

²¹²⁰ Pavković’s Appeal Brief, para. 60, arguing that negotiations on the status of Kosovo were ongoing during the trial.

²¹²¹ Šainović’s Appeal Brief, para. 417.

²¹²² Šainović’s Appeal Brief, para. 419, referring to Krsman Jelić, 26 Nov 2007, T. 19023.

²¹²³ Lukić’s Appeal Brief, para. 517.

²¹²⁴ Prosecution’s Response Brief (Šainović), para. 282. See also Prosecution’s Response Brief (Pavković), paras 25-26; Prosecution’s Response Brief (Lukić), para. 180.

²¹²⁵ Prosecution’s Response Brief (Šainović), paras 284-285, also arguing that his argument was reasonably rejected at trial and referring, *inter alia*, to Pavković’s Closing Brief, para. 359.

²¹²⁶ Prosecution’s Response Brief (Pavković), para. 26. The Prosecution further submits that the Trial Chamber carefully considered the evidence of Kosovo Albanian witnesses while taking into account possible bias towards the KLA (Prosecution’s Response Brief (Pavković), para. 25).

²¹²⁷ Prosecution’s Response Brief (Lukić), paras 184-185, referring, *inter alia*, to Trial Judgement, vol. 2, para. 531, *ibid.*, vol. 3, para. 35, fn. 64.

²¹²⁸ Prosecution’s Response Brief (Šainović), para. 283.

²¹²⁹ Prosecution’s Response Brief (Šainović), para. 286.

641. The Appeals Chamber finds that a reasonable trier of fact could have concluded that the only reasonable inference was that the confiscation of IDs was a common practice.²¹³⁰ The Trial Chamber reached this conclusion based, *inter alia*, on the testimony of Kosovo Albanian witnesses who gave evidence of the confiscation of IDs belonging to them and other Kosovo Albanians along the border or in convoy on their way to the border as well as in various other locations, including villages, towns, and fields in different municipalities.²¹³¹ The Trial Chamber further relied on evidence of witnesses from the FRY and Serbian forces describing ID confiscation.²¹³² The Trial Chamber also considered the evidence of a number of witnesses depicting the organised manner in which large numbers of IDs were confiscated.²¹³³ Furthermore, in reaching its conclusion, the Trial Chamber took into account that IDs were not confiscated from all Kosovo Albanians. It observed that “[a] few of [the] witnesses [in convoys to the border] were not subject to confiscation of their identification, but the majority testified to [ID] confiscation at the border by the forces of the FRY and Serbia.”²¹³⁴

642. Šainović’s and Lukić’s arguments concerning Kosovo Albanian witnesses who did not testify to ID confiscation or who testified that they were not subject to it²¹³⁵ are mere attempts to

²¹³⁰ Trial Judgement, vol. 3, para. 38.

²¹³¹ Regarding ID confiscation at the border or on the way to the border (for instance, at or *en route* to the Vrbnica/Vërbnica (Morina) border crossing to Albania; the Čafa Prušit/Qafa e Prushit border crossing to Albania; Đeneral Janković/Hani i Elezit adjacent to the border with Macedonia; and Miratovac close to the border with Macedonia), see Trial Judgement, vol. 2, paras 28-29, 67, 75, 139, 147, 184, 208, 225, 266-268, 275, 277, 281, 285, 375, 457, 514-515, 530-531, 717, 724, 782, 860, 936, and references therein; *ibid.*, vol. 3, paras 32-33, 35, and references therein. Other locations in which IDs were confiscated include a field in Dečani/Dečan municipality, a house in the village of Korenica/Korenicë in Đjakovica/Gjakova municipality, sites in and around houses in Dušanovo/Dushanova in Prizren municipality (see *ibid.*, vol. 2, para. 269), the forest near Celina in Orahovac/Rahovec municipality, a railway bridge in Bela Crkva/Bellacërka in Orahovac/Rahovec municipality, the woods in Mala Kruša/Krusha e Vogël municipality, a meadow in Srbica/Skenderaj municipality, and a house in Priština/Prishtina town in Priština/Prishtina municipality (see *ibid.*, vol. 2, paras 60, 273, 276, 323, 351, 410, 656, 673, 842, and references therein; *ibid.*, vol. 3, paras 35-36, and references therein).

²¹³² See Trial Judgement, vol. 3, paras 32, 34, 39, and references therein. In addition, see *ibid.*, vol. 3, para. 39, referring to the testimony of a former KVM observer, Richard Ciaglinski, who saw a very large pile of Kosovo Albanians’ documents, including IDs and passports, being burned at the MUP office in Priština/Prishtina (Richard Ciaglinski, 17 Nov 2006, T. 6848-6850; *ibid.*, 21 Nov 2006, T. 6983-6987; Richard Ciaglinski, Exh. P2489, T. 3210-3211).

²¹³³ For instance, the Trial Chamber noted that: (i) at Vrbnica/Vërbnica (Morina) border crossing, four witnesses reported that the confiscated IDs were thrown into a box or basket, and described the quantity of IDs there as “‘a heap’, ‘a hill’, or ‘a pile’” (Trial Judgement, vol. 3, para. 33, and references therein); and (ii) at Čafa Prušit/Qafa e Prushit border crossing, witnesses testified that there was a box where the MUP threw the confiscated IDs (Trial Judgement, vol. 3, para. 33, and references therein). The Appeals Chamber further recalls that the Trial Chamber specifically cited some witnesses’ descriptions of confiscation of IDs, which show that not only the witnesses but also others who were with them in the respective convoys or groups were almost all subject to the confiscation of IDs (Trial Judgement, vol. 3, para. 32, fn. 47, citing Sabit Kadriu, Exh. P2377, p. 20, Rahim Latifi, Exh. P2381, p. 3, Martin Pnishi, Exh. P2236, 4 Apr 2000, p. 4, Mehmet Mazrekaj, 3 Nov 2006, T. 5813, 5838).

²¹³⁴ Trial Judgement, vol. 3, para. 32.

²¹³⁵ Šainović’s Appeal Brief, para. 418; Lukić’s Appeal Brief, para. 507. See also Lukić’s Appeal Brief, para. 510, concerning two border crossings about which no witness mentioned confiscation of his or her ID. The Appeals Chamber notes that while Bala, as Lukić points out, did not testify to the confiscation of her own ID, she mentioned that at one of the two border-crossings in question (Đeneral Janković/Hani i Elezit) she saw Serb forces demanding IDs from male Kosovo Albanians and tearing them up and heard from many other Kosovo Albanian men in her convoy that their IDs had been confiscated (see Trial Judgement, vol. 2, para. 860; *ibid.*, vol. 3, para. 32, referring to Nazlie Bala, 23 Aug 2006, T. 2173, 2191-2192, Nazlie Bala, Exh. P2262, p. 8).

introduce their own interpretation of the evidence without showing any error in the Trial Chamber's assessment of the totality of the evidence in this regard. Nor do Lukić's challenges to the Trial Chamber's reliance on the testimony of Fondaj and Sadiku regarding ID confiscation demonstrate any error on the part of the Trial Chamber.²¹³⁶ Šainović's submission stressing the fact that IDs had not been seized "everywhere"²¹³⁷ is also unpersuasive, since consistent practice of ID confiscation mainly at border crossings and *en route* to the border can still suggest the existence of a common practice.

643. Furthermore, in light of the evidence showing a consistent pattern of the confiscation of IDs as recounted above, the Appeals Chamber is not persuaded by Pavković's argument that there was no basis for the Trial Chamber to conclude that a "vast majority" of Kosovo Albanians were subject to this practice.²¹³⁸ While the evidence did not establish the percentage of people whose IDs had been confiscated, it provided a sufficient basis for the Trial Chamber to reasonably conclude that the confiscation was a common practice.

644. Neither is the Appeals Chamber persuaded by Pavković's argument that certain Kosovo Albanian witnesses might have "enhanced their testimony in an anti-Serb manner" as the Trial Chamber itself expressed its reservations as to the denial of Kosovo Albanian witnesses regarding the KLA's activity or presence.²¹³⁹ Given that a trial chamber can reasonably accept certain parts of a witness's testimony and reject others,²¹⁴⁰ Pavković has failed to show that it was unreasonable for

²¹³⁶ According to Lukić, the Trial Chamber's observation that "at the Vrbnica/Verbnica (Morina) border crossing, witnesses reported the burning of Kosovo Albanian identity documents after their confiscation by the forces of the FRY and Serbia" is based on a misinterpretation of the evidence of Fondaj, who in fact stated that the police had properly treated her group (Lukić's Appeal Brief, para. 515, referring to Hamide Fondaj, Exh. P2283, p. 5). However, this finding was based on the evidence of Popaj and Sadiku, who were eye-witnesses to the confiscation and destruction of documents including IDs and passports (Trial Judgement, vol. 3, para. 35. fn. 64, referring to Sabri Popaj, Exh. P2446, p. 12, Sadije Sadiku, 18 Aug 2006, T. 1903), and Fondaj's evidence that while she and her group were not subject to ID confiscation at the border crossing (Trial Judgement, vol. 3, para. 32, referring to Hamide Fondaj, Exh. P2283, p. 5), "[t]hose people in the convoy who crossed two hours later were beaten and all their ID cards were taken away and burnt" (Trial Judgement, vol. 3, para. 35, fn. 64, referring to Hamide Fondaj, Exh. P2283, p. 5). Lukić also asserts that Sadiku, who stated that her documents were taken at the border crossing, was never issued any passport by the Serbian Government and therefore that her documents could not have been seized in 1999 (Lukić's Appeal Brief, para. 508, referring to Exh. 6D1324, Petar Dujković, 28 Feb 2008, T. 23355-23356). This submission is unsupported by the evidence to which Lukić refers and does not contradict her testimony that she and others in her convoy were stopped by the border police at a checkpoint and forced to give their "IDs, passports, whatever [they] had on [them]", which were subsequently burned (Sadije Sadiku, 18 Aug 2006, T. 1903; Sadije Sadiku, Exh. P2256, para. 38). Consequently, Lukić neither shows a misinterpretation by the Trial Chamber of Fondaj's evidence nor demonstrates why its finding does not stand on the basis of Popaj's and Sadiku's eye-witness accounts and the portion of Fondaj's evidence as to what she later learned.

²¹³⁷ Šainović's Appeal Brief, paras 418, 420.

²¹³⁸ Pavković's Appeal Brief, para. 62.

²¹³⁹ Pavković's Appeal Brief, paras 59-60, referring, *inter alia*, to Trial Judgement, vol. 1, para. 55.

²¹⁴⁰ See *Boškosi and Tarčulovski* Appeal Judgement, para. 59; *Krajišnik* Appeal Judgement, para. 354; *Blagojević and Jokić* Appeal Judgement, para. 82; *Kupreškić et al.* Appeal Judgement, para. 333; *Muvunyi II* Appeal Judgement, para. 26.

the Trial Chamber to rely on the evidence of Kosovo Albanian witnesses concerning ID confiscation.

645. Šainović's submission that MUP officials denied the existence of orders to seize IDs²¹⁴¹ is a mere assertion that the Trial Chamber failed to give sufficient weight to certain pieces of evidence without showing any error in its evaluation of the relevant evidence. The Trial Chamber was aware of the testimony of Nebojša Ognjenović and Petar Dujković, both police personnel, who denied receiving orders or ordering anyone to seize IDs from Kosovo Albanians crossing the border.²¹⁴² However, it did not rely on their evidence in light of the overwhelming evidence of the extensive seizure of IDs²¹⁴³ as well as other witness testimony referring to orders within the VJ and the MUP to confiscate or destroy Kosovo Albanians' IDs.²¹⁴⁴ Furthermore, Lukić's submission that there is no evidence that he issued orders for ID confiscation²¹⁴⁵ does not demonstrate why the Trial Chamber's finding cannot stand on the basis of other evidence.

646. Moreover, with regard to Jelić's evidence that VJ unit commanders prohibited the inspection of IDs,²¹⁴⁶ the Appeals Chamber recalls that the Trial Chamber identified several indicia diminishing Jelić's credibility and doubted the reliability of his testimony where it clashed with that of other witnesses.²¹⁴⁷ Given that there was evidence which conflicted with Jelić's testimony,²¹⁴⁸ the Trial Chamber was consistent in declining to rely on his evidence in this respect. Šainović has failed to demonstrate any error in its assessment of his evidence.

647. Consequently, Šainović, Pavković, and Lukić have failed to demonstrate that the Trial Chamber was unreasonable in concluding that a common practice of ID confiscation existed.

²¹⁴¹ Šainović's Appeal Brief, para. 417, read together with *ibid.*, paras 418-420.

²¹⁴² Trial Judgement, vol. 3, para. 37, and references therein. As for these witnesses' affiliations, see Trial Judgement, vol. 2, paras 280, 284.

²¹⁴³ See Trial Judgement, vol. 3, paras 37-38. The Appeals Chamber also recalls that the Trial Chamber did not consider Ognjenović to be generally credible (Trial Judgement, vol. 2, para. 244).

²¹⁴⁴ Trial Judgement, vol. 3, paras 34, 39, wherein the Trial Chamber refers to the evidence of K89, a VJ soldier in Đakovica/Gjakova, who was told by his commanding officer to tear apart Kosovo Albanians' IDs (K89, 24 Jan 2007, T. 9124; *ibid.*, 25 Jan 2007, 9154-9156, 9201), and the evidence of K54, a VJ soldier, who was informed by a colleague that the police were under orders to confiscate IDs of Kosovo Albanians at one border crossing (K54, 26 Feb 2007, T. 10520). Regarding K89's evidence, see also *infra*, para. 651.

²¹⁴⁵ Lukić's Appeal Brief, para. 517.

²¹⁴⁶ Šainović's Appeal Brief, para. 419, referring to Krsman Jelić, 26 Nov 2007, T. 19023.

²¹⁴⁷ Trial Judgement, vol. 2, para. 956, stating that: (i) Jelić frequently changed his own testimony when confronted with contradictory evidence; (ii) Jelić denied allegations with general statements, which were subsequently shown to be wrong; and (iii) Jelić's general explanations were often not credible. See also *supra*, para. 359.

²¹⁴⁸ See *supra*, para. 645.

(ii) Whether the common purpose could be inferred from the seizure of IDs

648. Šainović, Pavković, and Lukić assert that the seizure of IDs could not have contributed to the implementation of the common purpose, and thus could not have been part of it,²¹⁴⁹ since Kosovo Albanian citizens of the FRY whose IDs were seized did not lose their citizenship as a result,²¹⁵⁰ nor did they encounter any problems on their return to Kosovo.²¹⁵¹ Šainović also contends that the Trial Chamber's conclusion regarding the seizure of IDs in the context of the common purpose contradicts its finding in relation to Milutinović's decree concerning IDs, namely, that the loss of IDs did not simultaneously mean the loss of citizenship.²¹⁵² In addition, Lukić argues that passports, rather than IDs, were required to cross the state border to return to Kosovo.²¹⁵³ In the same context, Pavković contends that when rejecting his assertion that there was no plan to confiscate IDs, the Trial Chamber erroneously relied upon the evidence of K89.²¹⁵⁴

649. In response, the Prosecution maintains that the confiscation and destruction of IDs as part of the forcible displacement of Kosovo Albanians was not "a legal procedural matter ruled by the laws of FRY/Serbia", but rather "violent conduct which took place during the criminal execution of the JCE."²¹⁵⁵ It submits that the Trial Chamber reasonably found that although ethnic Albanian citizens of the FRY did not lose their citizenship by deprivation of their IDs, without IDs it would be more difficult for forcibly displaced Kosovo Albanians to prove their identity and citizenship and thus to return.²¹⁵⁶ According to the Prosecution, it is irrelevant whether the seizure and destruction of the IDs implied the loss of citizenship.²¹⁵⁷ Furthermore, the Prosecution asserts that Lukić merely repeats his submission at trial that passports, and not IDs, were needed to cross the state border.²¹⁵⁸ With respect to Pavković's contention regarding K89's evidence, the Prosecution submits that the Trial Chamber properly accepted this evidence.²¹⁵⁹

650. As to the legal effect of the seizure of IDs, the Appeals Chamber recalls that the Trial Chamber was cognisant of the relevant legislation and decrees concerning IDs and citizenship,

²¹⁴⁹ Pavković's Appeal Brief, paras 63, 65-68; Šainović's Appeal Brief, para. 416; Lukić's Appeal Brief, para. 504.

²¹⁵⁰ Lukić's Appeal Brief, para. 514; Pavković's Appeal Brief, para. 67, referring to Trial Judgement, vol. 3, para. 172. See also Šainović's Appeal Brief, para. 421.

²¹⁵¹ Lukić's Appeal Brief, para. 504; Šainović's Appeal Brief, paras 416, 420; Pavković's Appeal Brief, paras 67-68, referring to Trial Judgement, vol. 3, para. 172. See also Pavković's Appeal Brief, para. 63, referring to the Constitution of the FRY and the Law on Yugoslav Citizenship. Šainović and Lukić further argue that because records were kept, lost IDs could have been easily re-issued (Šainović's Appeal Brief, paras 414-416; Lukić's Appeal Brief, paras 506, 509).

²¹⁵² Šainović's Appeal Brief, para. 421, referring to Trial Judgement, vol. 3, para. 164.

²¹⁵³ Lukić's Appeal Brief, para. 513.

²¹⁵⁴ Pavković's Appeal Brief, para. 64, referring to Trial Judgement, vol. 3, para. 34.

²¹⁵⁵ Prosecution's Response Brief (Pavković), para. 26 (internal reference omitted).

²¹⁵⁶ Prosecution's Response Brief (Šainović), para. 287; Prosecution's Response Brief (Lukić), para. 182, referring to Trial Judgement, vol. 3, paras 166, 172.

²¹⁵⁷ Prosecution's Response Brief (Lukić), para. 182. See also Prosecution's Response Brief (Šainović), para. 288.

²¹⁵⁸ Prosecution's Response Brief (Lukić), para. 183, requesting summary dismissal of this argument.

²¹⁵⁹ Prosecution's Response Brief (Pavković), para. 27, referring to Trial Judgement, vol. 3, para. 34.

including Milutinović's Decree on Identity Cards During the State of War,²¹⁶⁰ as well as the testimony of an expert witness, Branislav Simonović, referring to the FRY Constitution.²¹⁶¹ Having examined this evidence, the Trial Chamber acknowledged that "the Kosovo Albanian citizens of the FRY whose [IDs] were seized did not lose their citizenship as a result"²¹⁶² and that it "received no evidence of Kosovo Albanians encountering problems on their return to Kosovo because of the loss of the [IDs]."²¹⁶³ Nonetheless, the Trial Chamber also found, on the basis of the evidence, that "proving identity and thus citizenship would be easier for a person in possession of a Yugoslav identity document".²¹⁶⁴

651. In any event, given that the Trial Chamber found that ID confiscation was conducted in the context of a broad campaign of violence against Kosovo Albanians, against the background of a clear pattern of their forcible displacement,²¹⁶⁵ and in light of its finding on the extensive scale of ID confiscation as a common practice,²¹⁶⁶ the Appeals Chamber is of the view that it was not unreasonable for the Trial Chamber to consider the seizure of IDs – irrespective of its legal consequences – as circumstantial evidence from which the existence of a common purpose could be inferred. In particular, the Trial Chamber rejected Pavković's argument that the ID confiscation was not part of a plan in light of the testimony of VJ soldier K89 that his commanding officer told him that "not a single Albanian ear was to remain in Kosovo and that their identification papers were to be torn, so as to prevent them from coming back."²¹⁶⁷ Furthermore, the Trial Chamber considered

²¹⁶⁰ Trial Judgement, vol. 3, para. 164, referring, *inter alia*, to Exh. 1D226, Exh. P993.

²¹⁶¹ Trial Judgement, vol. 3, para. 166, referring, *inter alia*, to Branislav Simonović, 17 Apr 2008, T. 25635-25636, 25639-25642, Exh. 6D668, p. 44.

²¹⁶² Trial Judgement, vol. 3, para. 172. See also *ibid.*, vol. 3, para. 164.

²¹⁶³ Trial Judgement, vol. 3, para. 172. The Trial Chamber was also aware of the evidence that IDs were of no use at the state border crossings (Trial Judgement, vol. 3, para. 166, referring to Exh. 6D668, p. 44). Lukić's argument that passports, not IDs, were required to cross the state border merely repeats his contention at trial (Lukić's Closing Brief, para. 210) without showing any error on the part of the Trial Chamber and is therefore dismissed.

²¹⁶⁴ Trial Judgement, vol. 3, para. 172. See also *ibid.*, vol. 3, para. 166, referring to Branislav Simonović, 17 Apr 2008, T. 25638-25639. Šainović's and Lukić's arguments that lost IDs could have been easily re-issued since records were kept (Šainović's Appeal Brief, paras 414-416; Lukić's Appeal Brief, paras 506, 509) ignore the Trial Chamber's evaluation of the relevant evidence in this regard and merely seek to substitute it with their own evaluation. The Appeals Chamber notes that the Trial Chamber conducted the analysis on the legal effect of the seizure of IDs in the section of the Trial Judgement concerning Milutinović's individual criminal responsibility (see Trial Judgement, vol. 3, paras 161-173).

²¹⁶⁵ Trial Judgement, vol. 2, paras 1156, 1177-1178; *ibid.*, vol. 3, paras 40-46. See also *supra*, sub-section VII.B.3.(a).

²¹⁶⁶ See *e.g.* Trial Judgement, vol. 3, paras 32-36, in particular, para. 34. See also *supra*, sub-section VII.B.3.(b)(i).

²¹⁶⁷ Trial Judgement, vol. 3, para. 34, referring to K89, 24 Jan 2007, T. 9124. The Appeals Chamber finds Pavković's submission that K89 would not have received such an instruction since his mortar unit, being in charge of long-range weapons, would not have encountered civilians (Pavković's Appeal Brief, para. 64), to be speculative and unsupported by any evidence. Pavković's suggestion that the instruction referred to terrorists rather than to Kosovo Albanian civilians since it was given on 25 March 1999, allegedly before there were any refugees (Pavković's Appeal Brief, para. 64) is also speculative. While K89 stated that he did not know whether his commanding officer meant terrorists or other persons (K89, 25 Jan 2007, T. 9179. See also *ibid.*, 25 Jan 2007, T. 9180-9183, 9200-9203), the Trial Chamber reasonably relied on K89's testimony in light of his own account that he subsequently saw VJ members confiscating and destroying IDs of women, children and elderly people in a large column in Đakovica/Gjakova (Trial Judgement, vol. 3, paras 34, 39, referring to K89, 24 Jan 2007, T. 9124, *ibid.*, 25 Jan 2007, T. 9154-9156, 9201) as well as the other ample evidence showing the extensive seizure and destruction of IDs, as discussed above.

evidence of derogatory comments and violence by police and army members while seizing IDs as well as evidence of the extensive destruction of confiscated IDs.²¹⁶⁸ Such evidence includes: (i) the testimony of a Kosovo Albanian witness that “[Kosovo Albanians who had reached the Albanian border] were told by the policemen that the reason for [the confiscation of IDs] was that they did not need [the IDs] anymore because they would never come back to Kosovo and would live in Albania”;²¹⁶⁹ (ii) the evidence of other Kosovo Albanian witnesses that the Serbian and FRY forces who took away their IDs tore them up and told them to leave Kosovo;²¹⁷⁰ and (iii) the testimony of various witnesses referring to the burning of piles of confiscated IDs.²¹⁷¹ The Appeals Chamber thus finds that Šainović, Pavković, and Lukić have failed to show how the apparent absence of legal consequences of the seizure of IDs would render the Trial Chamber’s inference of a common purpose based on the evidence described above erroneous.²¹⁷²

(iii) Conclusion

652. In light of the above, Šainović, Pavković, and Lukić have not demonstrated that the Trial Chamber erred in finding that the seizure of Kosovo Albanian’s IDs was a common practice and that this practice, combined with the destruction of many of the confiscated IDs, indicated that “the events of spring 1999 in Kosovo were part of a common purpose.”²¹⁷³ Therefore, their arguments concerning the seizure of IDs are dismissed.

(c) Conclusion

653. Šainović, Pavković, and Lukić have failed to demonstrate that the Trial Chamber erred in its assessment of the evidence regarding the pattern of forcible displacement of Kosovo Albanians and the confiscation of their IDs. As noted above, while the Trial Chamber inferred the existence of a common purpose from several factors, it placed the most weight on these two factors.²¹⁷⁴

²¹⁶⁸ Trial Judgement, vol. 2, paras 273, 351, 457, 530, 842; *ibid.*, vol. 3, paras 34-36, 39.

²¹⁶⁹ Trial Judgement, vol. 2, para. 457, referring to Ali Hoti, 27 Sep 2006, T. 4157.

²¹⁷⁰ See, e.g., Trial Judgement, vol. 2, paras 28-29, 194, 273, 276, 351, 514, 530, 842; *ibid.*, vol. 3, para. 36, and references therein.

²¹⁷¹ Trial Judgement, vol. 3, paras 35-36, 39, and references therein.

²¹⁷² The Appeals Chamber also dismisses Lukić’s argument that none of the Kosovo Albanian witnesses stated that they were searched by policemen when they said that they did not have their IDs (Lukić’s Appeal Brief, para. 512; *contra* Prosecution’s Response Brief (Lukić), para. 185), as he ignores the Trial Chamber’s relevant findings. His assertion that the confiscated documents could have been invalid IDs issued by the KLA (Lukić’s Appeal Brief, para. 511, referring to Exh. 6D665; *contra* Prosecution’s Response Brief (Lukić), para. 183) is also dismissed, as he merely repeats his submission at trial (Lukić’s Closing Brief, paras 213-214) without showing any error on the part of the Trial Chamber.

²¹⁷³ Trial Judgement, vol. 3, para. 40. See also *ibid.*, vol. 3, para. 38.

²¹⁷⁴ Trial Judgement, vol. 3, paras 17, 30-46.

654. As Šainović, Pavković, and Lukić assert, these two factors are indeed circumstantial.²¹⁷⁵ Yet, in view of the magnitude of forcible displacement committed in an orchestrated manner and showing a discernible pattern as well as the extensive seizure and destruction of IDs during the forcible displacement, the Appeals Chamber is satisfied that the evidence regarding these two factors is sufficient for a reasonable trier of fact to find that the only reasonable inference is that a common purpose to forcibly displace a number of Kosovo Albanians existed.²¹⁷⁶ Consequently, it is not necessary for the Appeals Chamber to address the arguments raised by Šainović, Pavković, and Lukić asserting errors in the Trial Chamber's findings on the remaining factors, since such errors, even if established, would not have any impact upon the Trial Chamber's conclusion as to the existence of the common purpose.

4. Evidence militating against the existence of a common purpose

655. In addition to the challenges addressed above, Šainović, Pavković, and Lukić advance arguments pointing to evidence allegedly militating against the finding that a common purpose existed and argue that the Trial Chamber erred in its assessment of this evidence. The Appeals Chamber now turns to address their arguments in this regard.²¹⁷⁷

(a) Evidence undermining the existence of a common purpose

656. Šainović, Pavković, and Lukić argue that the Trial Chamber erroneously dismissed evidence showing that a common purpose did not exist.²¹⁷⁸ Šainović and Lukić aver that a number of witnesses denied ever hearing about a plan or the intention to expel Kosovo Albanians in order to alter the ethnic balance in Kosovo.²¹⁷⁹ Lukić and Pavković further contest the Trial Chamber's finding on the reliability of these witnesses and submit that it failed to refer to any evidence in

²¹⁷⁵ Šainović's Appeal Brief, paras 444-445; Pavković's Appeal Brief, paras 25-26; Lukić's Appeal Brief, paras 202, 359.

²¹⁷⁶ Trial Judgement, vol. 3, paras 95-96.

²¹⁷⁷ The Appeals Chamber summarily dismisses Pavković's unfounded argument that the Kosovo Albanians' ill-preparation for travel when they fled does not show any advanced planning or coordination (Pavković's Appeal Brief, para. 56) as well as Lukić's speculative and unsubstantiated arguments that, since the territorial integrity of Serbia was guaranteed by its Constitution and other international legal instruments, it would not have been necessary to try to ensure continued control over Kosovo by criminal means (Lukić's Appeal Brief, paras 381-384; *contra* Prosecution's Response Brief (Lukić), para. 164) and that, as the international community closely observed the entire situation in the FRY and Serbia, if a plan of expulsion existed, it would have been known (Lukić's Appeal Brief, para. 196; *contra* Prosecution's Response Brief (Lukić), para. 163). Pavković's same argument during the appeal hearing pointing to the close observation by the international community is also dismissed as unsubstantiated (Appeal Hearing, 12 Mar 2013, AT. 279-280). Pavković's submission that at a meeting on 29 October 1998 he made a statement that the plan was not to kill or expel all the Kosovo Albanians but rather to destroy terrorist forces (Pavković's Appeal Brief, paras 182-183, referring to Exh. P2166, p. 3) is also dismissed, as he has failed to demonstrate how his statement undermines the Trial Chamber's finding of the existence of a common purpose to forcibly displace the Kosovo Albanian population at the time of the crimes alleged in the Indictment.

²¹⁷⁸ Šainović's Appeal Brief, para. 446, referring to Šainović's Closing Brief, paras 872-874; Lukić's Appeal Brief, paras 360, 395. See also Pavković's Appeal Brief, para. 49.

support of its finding.²¹⁸⁰ In addition, Šainović, Pavković, and Lukić argue that neither documentary evidence nor “insider” witness testimony mentions the formation or existence of a plan to expel Kosovo Albanians.²¹⁸¹ In particular, Šainović and Pavković maintain that none of the reports from the intelligence service or the records of secret meetings contain any indication of such a plan despite their confidential nature.²¹⁸²

657. The Prosecution responds that the submissions of Šainović and Lukić regarding witnesses who denied the existence of a plan to expel Kosovo Albanians are unfounded and merely repeat their arguments at trial.²¹⁸³ It submits that Šainović fails to show any error in the Trial Chamber’s assessment of the evidence or credibility of these witnesses.²¹⁸⁴ In response to Šainović and Pavković, the Prosecution also argues that based on a solid body of evidence, the Trial Chamber properly concluded that there was a common purpose notwithstanding the lack of documentary evidence mentioning a JCE to forcibly displace Kosovo Albanians.²¹⁸⁵

658. The Appeals Chamber observes that the Trial Chamber accorded little weight to testimony that there was no common plan to displace the Kosovo Albanian population, since it found that these witnesses either had a motive to lie or were only able to provide speculative information.²¹⁸⁶ In reaching this finding, the Trial Chamber made specific reference to paragraphs of the Defence Closing Briefs which enumerated the evidence of various witnesses on this point.²¹⁸⁷ It is thus clear that the Trial Chamber observed and considered various factors in assessing the credibility of these witnesses and their evidence, including their demeanour in court, their affiliations and other individual circumstances as well as inconsistencies with other evidence.²¹⁸⁸ Given that a trial

²¹⁷⁹ Šainović’s Appeal Brief, para. 446, referring to Šainović’s Closing Brief, paras 872-874; Lukić’s Appeal Brief, paras 194, 265-266, 359, 369-376, and references therein.

²¹⁸⁰ Lukić’s Appeal Brief, para. 395; Pavković’s Appeal Brief, para. 49, referring to Trial Judgement, vol. 3, para. 93.

²¹⁸¹ Lukić’s Appeal Brief, para. 359. See also Pavković’s Appeal Brief, paras 26, 49-50; Šainović’s Appeal Brief, para. 446.

²¹⁸² Pavković’s Appeal Brief, paras 48-49; Šainović’s Appeal Brief, para. 446. The secret meetings, to which they refer, include meetings of the Collegium of the VJ General Staff, daily briefings of Ojdanić, meetings of the MUP Staff, and meetings of the Joint Command.

²¹⁸³ Prosecution’s Response Brief (Šainović), para. 302; Prosecution’s Response Brief (Lukić), paras 163, 168.

²¹⁸⁴ Prosecution’s Response Brief (Šainović), para. 304.

²¹⁸⁵ Prosecution’s Response Brief (Šainović), paras 261-262, 295, 303, 305; Prosecution’s Response Brief (Pavković), paras 16, 20, referring to Trial Judgement, vol. 3, paras 40, 45-46, 48, 72, 76, 85, 87-88, 688-690.

²¹⁸⁶ Trial Judgement, vol. 3, para. 93, agreeing with the Prosecution’s submission at trial (Prosecution Closing Arguments, 20 Aug 2008, T. 26900-26901).

²¹⁸⁷ Trial Judgement, vol. 3, para. 93, referring, *inter alia*, to Ojdanić’s Closing Brief, paras 13-21, Lazarević’s Closing Brief, para. 502, Lukić’s Closing Brief, paras 379-390.

²¹⁸⁸ See *Nahimana et al.* Appeal Judgement, para. 194. The Appeals Chamber also recalls that the majority of the concerned witnesses were “[s]enior officials of the government, political parties, the army, and the police, who were used to participating actively in the routine work of their organisations” and that regarding this type of witnesses, the Trial Chamber made an observation that they “often tended to rely for their answers upon the terms of a document as sacrosanct”, which “seemed at times to be a reassuring refuge from having to address the stark realities of the conduct of forces that ought to have been subject to a regime of discipline” (Trial Judgement, vol. 1, para. 54). Lukić challenges this particular observation by the Trial Chamber, arguing that it targeted Defence witnesses in particular and was an erroneous conclusion based on the Trial Chamber’s unfamiliarity with the law governing certain institutions (Lukić’s

chamber has a broad discretion in weighing the contradicting evidence of different witnesses²¹⁸⁹ and is not required to refer to the testimony of every witness on the trial record,²¹⁹⁰ the Appeals Chamber finds that Šainović, Pavković, and Lukić have failed to show an error in the Trial Chamber's dismissal of the evidence of those witnesses who maintained that there was no common plan. Furthermore, the alleged absence of documentary evidence and insider witness testimony indicating a common purpose to expel Kosovo Albanians does not in and of itself render erroneous the Trial Chamber's finding that such a common purpose existed. By merely pointing out the lack of such evidence, they have failed to demonstrate why the Trial Chamber's finding based on the other evidence should not stand. Their arguments in this respect are also dismissed.

(b) Orders to prevent the departure of Kosovo Albanians

659. Lukić submits that the Trial Chamber erred in finding that the existence of some orders directing the police to prevent the departure of civilians from Kosovo does not create doubt as to the existence of the common purpose and its execution by the VJ and MUP forces.²¹⁹¹ He asserts that the Trial Chamber disregarded evidence showing that such orders were implemented and that Kosovo Albanians were provided with humanitarian aid and protection and urged to return to their homes.²¹⁹² He also argues that the Trial Chamber adopted an inconsistent approach by both finding that these orders were systematically violated and relying on them in Milutinović's favour to conclude that his decrees may not have been issued to encourage the expulsion of Kosovo Albanians, but to control their whereabouts.²¹⁹³ The Prosecution responds that the Trial Chamber considered and reasonably rejected Lukić's argument concerning the orders to prevent the departure of civilians.²¹⁹⁴

660. The Appeals Chamber finds that a reasonable trier of fact could have concluded that orders directing the police to prevent the departure of civilians from Kosovo while the mass exodus was

Appeal Brief, para. 81; *contra* Prosecution's Response Brief (Lukić), para. 93). His argument in this regard is unsubstantiated and, accordingly, dismissed.

²¹⁸⁹ *Galić* Appeal Judgement, para. 300; *Kupreškić et al.* Appeal Judgement, paras 31-32; *Nahimana et al.* Appeal Judgement, para. 194; *Bikindi* Appeal Judgement, para. 116.

²¹⁹⁰ *Kvočka et al.* Appeal Judgement, para. 23.

²¹⁹¹ Lukić's Appeal Brief, para. 391, referring to Trial Judgement, vol. 3, para. 92.

²¹⁹² Lukić's Appeal Brief, para. 391, and references therein. See also Lukić's Appeal Brief, paras 195, 220, 245, 266, 360, 365, 377, and references therein. Lukić's assertions that as almost all of the civilians who had left in 1998 returned to their homes, it was not possible to envisage that they would not return in 1999 (Lukić's Appeal Brief, paras 195, 366) and that the Trial Chamber held that the crimes of forcible transfer and deportation required the "intent that the victims be displaced permanently" (Lukić's Appeal Brief, paras 365, 380), misconstrue the Trial Judgement. The Trial Chamber rather correctly found that a lack of genuine choice may be inferred "from threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will" and that "offences of deportation and forcible transfer *do not* require intent that the victims be displaced permanently" (Trial Judgement, vol. 1, paras 165, 167 (emphasis added)). His arguments based on his misrepresentation of the Trial Judgement are therefore dismissed.

²¹⁹³ Lukić's Appeal Brief, para. 396, referring to Trial Judgement, vol. 3, paras 92, 173.

²¹⁹⁴ Prosecution's Response Brief (Lukić), para. 165, referring to Trial Judgement, vol. 3, para. 92.

already underway do not create doubt as to the existence of the common purpose and its execution by VJ and MUP forces, as such orders were systematically violated.²¹⁹⁵ The Appeals Chamber is not persuaded by Lukić's contention that the Trial Chamber disregarded the evidence suggesting that such orders were implemented. Some evidence referred to by Lukić shows that some Kosovo Albanians were ordered to return to where they had come from, while others were not allowed to return and ordered to go to another location.²¹⁹⁶ This evidence does not contradict the Trial Chamber's finding that the common purpose was to displace a sufficient number of Kosovo Albanians to change the demographic balance, rather than to displace each and every one of them.²¹⁹⁷ Evidence suggesting that the FRY and Serbian authorities provided humanitarian aid and protection for Kosovo Albanians, and that MUP forces urged them to return to their homes²¹⁹⁸ did not raise doubt as to the mass expulsion of Kosovo Albanians, since there was overwhelming evidence demonstrating the organised manner in which Kosovo Albanians were forcibly displaced and the inhumane conditions to which those displaced were subjected.²¹⁹⁹

661. Moreover, the Appeals Chamber is not persuaded by Lukić's argument concerning the Trial Chamber's finding that Milutinović's decrees on IDs, residence, and restriction of certain rights and Lukić's order to prevent civilians from leaving their place of residence may have been issued to control the whereabouts of Kosovo Albanians, rather than to encourage expulsions.²²⁰⁰ In itself, this finding does not contradict the Trial Chamber's conclusion on the basis of other evidence that a common purpose to forcibly displace Kosovo Albanians existed.

²¹⁹⁵ Trial Judgement, vol. 3, para. 92.

²¹⁹⁶ Lizane Malaj, 10 Aug 2006, T. 1352-1354; Sadije Sadiku, Exh. P2252, p. 4. Lukić's citation of Ilić's testimony is incorrect. Furthermore, some evidence referred to by Lukić is irrelevant to the implementation of orders for prevention of Kosovo Albanians' departure (Shaban Fazliji, Exh. 6D1629, paras 16-18, 21, describing the suffering of Kosovo Albanians caused by the KLA's conduct; Duško Adamović, 8 Apr 2008, T. 24958-24959, explaining combat actions with which he was tasked, and which he executed), or merely shows that such orders were issued, but fails to demonstrate their implementation (Dragan Živaljević, 3 Apr 2008, T. 24863-24864; Exh. 6D666; Exh. 5D1418; Exh. 6D778; Exh. 6D269; Exh. 6D770).

²¹⁹⁷ Trial Judgement, vol. 3, para. 95.

²¹⁹⁸ Lukić refers to Ljubivoje Joksić, 11 Feb 2008, T. 22051-22052, Milivoje Mihajlović, Exh. 6D1530, paras 36-37, Miloš Vjonović, Exh. 6D1532, paras 40, 43-45, Branislav Debeljković, Exh. 6D1533, paras 44-46, Radovan Paponjak, Exh. 6D1603, paras 54-56, 88, 90-91, Momir Pantić, Exh. 6D1604, paras 34-38, Dragan Živaljević, Exh. 6D1606, paras 19-20, 38-39, Duško Adamović, Exh. 6D1613, paras 47-48, Nebojša Bogunović, Exh. 6D1614, paras 68-70, 85-87, Radovan Zlatković, Exh. 6D1627, paras 38, 46, Exh. 6D2, Exh. 6D1631, paras 49-50, 55-56, 58, 63, Bozidar Filić, 7 Mar 2008, T. 23935, *ibid.*, 10 Mar 2008, T. 24012, Petar Damjanac, 6 Mar 2008, T. 23755-23757, Zoran Anđelković, 30 Aug 2007, T. 14675, Dragan Milenković, 22 Feb 2008, T. 23101, Miroslav Mijatović, Exh. 6D1492, para. 43, Exh. 1D32, Exh. 2D16, Exh. 2D217, pp. 5-6 (see Lukić's Appeal Brief, paras 195, 220, 245, 266, 360, 365, 377, 391). The citations of Vučurević's and Bogosavljević's evidence provided by Lukić (Lukić's Appeal Brief, paras 266, 391) are incorrect. Exh. 2D182 referred to by Lukić (Lukić's Appeal Brief, para. 360) contains no relevant information.

²¹⁹⁹ Trial Judgement, vol. 2. See in particular, *ibid.*, vol. 2, paras 838-873, 887-888. See also the Appeals Chamber's analysis regarding the challenges to the Trial Chamber's findings on the overall pattern of events (*supra*, subsection VII.B.3.(a)).

²²⁰⁰ Trial Judgement, vol. 3, para. 173.

662. Accordingly, Lukić's submissions regarding the Trial Chamber's findings on orders to prevent the departure of Kosovo Albanians are dismissed.²²⁰¹

(c) Conclusion

663. For the foregoing reasons, Šainović, Pavković, and Lukić fail to demonstrate any error in the Trial Chamber's assessment of the evidence allegedly militating against the existence of a common purpose to displace a number of Kosovo Albanians. The Appeals Chamber dismisses their arguments in this regard.

5. Conclusion

664. On the basis of its findings on several factors, the Trial Chamber concluded that a common purpose to forcibly displace a number of Kosovo Albanians within and outside Kosovo existed during the time of the commission of the crimes alleged in the Indictment.²²⁰² The Appeals Chamber has found that among these factors, the evidence regarding the routine seizure and the destruction of IDs and the pattern of forcible displacement is sufficient for a reasonable trier of fact to find that the only reasonable inference is that there existed a common purpose as found by the Trial Chamber. In addition, as shown above, Šainović, Pavković, and Lukić have not demonstrated any error in the Trial Chamber's assessment of the evidence allegedly militating against the existence of a common purpose. Consequently, the Appeals Chamber is satisfied that the evidence in the trial record could lead a reasonable trier of fact to find that the only reasonable inference was that a common purpose to forcibly displace a number of Kosovo Albanians within and outside Kosovo existed during the time of the commission of the crimes alleged in the Indictment. Šainović, Pavković, and Lukić have failed to demonstrate that the Trial Chamber erred in reaching this conclusion. Thus, the Appeals Chamber dismisses their arguments with regard to the existence of the common purpose in their entirety.²²⁰³

C. Alleged errors in the Trial Chamber's findings on the Joint Command

665. The Trial Chamber found that, in 1998 and 1999, according to the FRY Constitution and relevant legislation, the FRY President and the Supreme Defence Council ("SDC") exercised

²²⁰¹ For the same reasons, the Appeals Chamber finds no merit in Pavković's argument during the appeal hearing that the announcements of the FRY government and the VJ General Staff as well as some VJ reports (Exh. 4D510; Exh. 2D301; Exh. 3D753; Exh. 4D511; Exh. 5D885) show that the FRY and Serbian authorities, including the VJ, attempted to prevent the departure of Kosovo Albanians and that this militates against the existence of the common purpose to expel Kosovo Albanians (Appeal Hearing, 12 Mar 2013, AT. 304, 313-314, 316).

²²⁰² Trial Judgement, vol. 3, paras 95-96.

²²⁰³ Šainović's sub-grounds 6(1)-(11); Pavković's sub-grounds 1(A) in part, 1(B), 1(C), and grounds 3 in part, 6 in part; Lukić's sub-grounds D in part, D(1), D(4) in part, D(6), ground H in part, and sub-grounds I(1), I(2), I(3), I(4) in part, O in part, O(1), O(1)(a), O(1)(c), O(1)(d) in part, O(1)(e) in part, O(2) in part, O(3).

political control over the VJ.²²⁰⁴ Immediately subordinate to this civilian leadership in the VJ chain of command was the General Staff, which became known as the Supreme Command Staff after the declaration of the state of war in March 1999.²²⁰⁵ The Priština Corps, which was responsible for the Kosovo region, was subordinate to the 3rd Army,²²⁰⁶ which, in turn, was subordinate to the General Staff/Supreme Command Staff.²²⁰⁷ With regard to the MUP, the Trial Chamber found that its main organisational units were the Public Security Department (“RJB”) and the State Security Department (“RDB”).²²⁰⁸ MUP units subordinate to these departments included various units active in Kosovo.²²⁰⁹

666. Apart from these regular command structures, the Trial Chamber further found that an entity known as “the Joint Command for Kosovo and Metohija” or the “Joint Command” was created around June 1998 and played a role in the coordination of VJ and MUP forces in Kosovo in the second half of 1998 and in the first half of 1999.²²¹⁰ The participants in the Joint Command included “individuals from the political structures of the FRY and Serbia, the military, and the police.”²²¹¹ The Trial Chamber also found that Šainović, Deputy Prime Minister of the FRY at the time, Pavković, Priština Corps Commander in 1998 and 3rd Army Commander in 1999, and Lukić, then Head of the MUP Staff for Kosovo,²²¹² were among the members of the Joint Command.²²¹³ The Trial Chamber considered their respective roles in the coordination of the VJ and MUP forces through the Joint Command to infer their intent and contribution to the common criminal purpose of the JCE.²²¹⁴ Šainović, Pavković, and Lukić challenge the Trial Chamber’s findings concerning the Joint Command,²²¹⁵ contesting both its existence and its authority over the VJ and the MUP in 1998 and 1999.

²²⁰⁴ Trial Judgement, vol. 1, paras 255, 433, 468, 482. According to the Constitution of the FRY and the FRY Law on Defence, the SDC consisted of the FRY President and the presidents of the member republics, such as the Republic of Serbia and the Republic of Montenegro (see *ibid.*, vol. 1, paras 255, 291, and references therein). The FRY President was to command the VJ in accordance with decisions of the SDC (see *ibid.*, vol. 1, paras 255, 257, 443, and references therein).

²²⁰⁵ Trial Judgement, vol. 1, paras 468-469, 482.

²²⁰⁶ Trial Judgement, vol. 1, paras 482, 584.

²²⁰⁷ Trial Judgement, vol. 1, paras 417-418, 468, 482.

²²⁰⁸ Trial Judgement, vol. 1, para. 659.

²²⁰⁹ Trial Judgement, vol. 1, paras 660-661, 665-667, 675-676, 686-687.

²²¹⁰ Trial Judgement, vol. 1, paras 1109-1110, 1151. See also *ibid.*, vol. 3, paras 300, 337, 703, 1023.

²²¹¹ Trial Judgement, vol. 1, para. 1109.

²²¹² The Trial Chamber found that the MUP Staff for Kosovo was an entity which played a central role in planning, organising, and directing the work of the various MUP units active in Kosovo and, in particular, played a role in the exchange of information between the RJB and the RDB forces and in directing and controlling the activities of the RJB. See Trial Judgement, vol. 3, paras 995, 1012, 1051. See also *infra*, para. 1298.

²²¹³ Trial Judgement, vol. 1, paras 1059, 1109-1110; *ibid.*, vol. 3, paras 331, 462, 647, 665, 710, 773, 1032, 1118.

²²¹⁴ Trial Judgement, vol. 3, paras 331, 359, 441-443, 462, 467, 647, 665, 672, 698, 710, 773, 780, 782, 1032, 1079-1081, 1118, 1131.

²²¹⁵ Šainović’s sub-grounds 1(4), 1(5), 1(6), 1(7), 1(8), 1(9), 1(10), 1(11), 1(13) in part, 1(14) in part, 1(15), 1(16), 1(17), 1(23) in part, 2(1) in part, 6(12); Pavković’s sub-grounds 1(D) in part, 1(G) in part; Lukić’s sub-grounds D(5) in part, D(7), F(2) in part, N in part, N(1), N(2) in part, N(3) in part, P(6) in part, GG(1) in part.

667. While the Indictment charges crimes committed in 1999, the Trial Chamber examined in detail and relied, in part, on the evidence concerning the Joint Command in 1998 to infer the existence and role of the Joint Command in 1999.²²¹⁶ Consequently, the Appeals Chamber will address the challenges of Šainović, Pavković, and Lukić to the Trial Chamber’s findings concerning the Joint Command both in 1998 and in 1999 in detail.

1. Existence of the Joint Command in 1998

(a) Introduction

668. The Trial Chamber found that an entity known as the Joint Command existed in 1998 and that it was “created by means of the *de facto* power of [Milošević] around June 1998 and in response to the need for greater co-ordination between the MUP and VJ forces in Kosovo.”²²¹⁷ The Trial Chamber found that, while members included “individuals from the political structures of the FRY and Serbia, the military, and the police”, membership was “an informal affair, without technical requirements, and the composition of the Joint Command was different at various times.”²²¹⁸

669. In assessing the circumstances surrounding the establishment of the Joint Command, the Trial Chamber noted that, on 10 June 1998, the Main Board of the Social Party of Serbia (“SPS”) adopted the FRY President Slobodan Milošević’s proposal to send a working group to Kosovo, consisting of three civilian SPS members, Milomir Minić, Duško Matković, and Zoran Anđelković (“Working Group”).²²¹⁹ The Working Group was tasked “to assist the state organs there and co-ordinate political activities [...] to stabilise the situation in Kosovo.”²²²⁰ Subsequently, on 21 July 1998, a plan comprising both military and political measures for suppressing and combating terrorism in Kosovo (“Plan for Combating Terrorism” or “Plan”) was formally adopted in a meeting convened by Milošević at Beli Dvor, his official residence, in Belgrade.²²²¹ The Plan comprised five stages²²²² and also involved “organising [...] and co-ordinating the operations of the MUP and VJ forces in order to oppose ‘terrorist’ forces” and “taking control of territory in Kosovo”.²²²³

²²¹⁶ See Trial Judgement, vol. 1, paras 1109-1111, 1151.

²²¹⁷ Trial Judgement, vol. 1, para. 1109.

²²¹⁸ Trial Judgement, vol. 1, para. 1109.

²²¹⁹ Trial Judgement, vol. 1, paras 302, 304, 1007.

²²²⁰ Trial Judgement, vol. 1, para. 1007. See also *ibid.*, vol. 1, paras 302, 304.

²²²¹ Trial Judgement, vol. 1, paras 805, 995, 997; *ibid.*, vol. 3, paras 133, 304, 650, 1021. Regarding “Beli Dvor”, see Aleksandar Dimitrijević, 8 Jul 2008, T. 26590; compare Trial Judgement, vol. 1, para. 995 with *ibid.*, vol. 3, para. 304.

²²²² Trial Judgement, vol. 1, paras 993, 995; *ibid.*, vol. 3, para. 643.

²²²³ Trial Judgement, vol. 1, para. 997. See also *ibid.*, vol. 1, para. 1107.

670. Following the adoption of the Plan for Combating Terrorism, Šainović was sent to Kosovo as a representative of the federal government.²²²⁴ There, together with the members of the Working Group, he met almost daily with MUP and VJ officers in Priština/Prishtina and discussed the realisation of various stages of the Plan, among other matters.²²²⁵ The Trial Chamber found that these daily meetings were held between 22 July and 30 October 1998 and referred to as meetings of the “Joint Command”.²²²⁶

671. The Trial Chamber noted that, on 29 October 1998, a meeting was held in Milošević’s office at Beli Dvor in Belgrade, in which the participants reviewed actions taken for the implementation of the Plan and in the name of the Joint Command, and discussed the continuation of the Joint Command.²²²⁷

672. Šainović, Pavković, and Lukić raise a number of challenges to the existence of the Joint Command in 1998, contesting: (i) the Trial Chamber’s reliance on the handwritten notes taken by Milan Đaković entitled “Meetings of the Joint Command for Kosovo and Metohija”, which record the daily meetings held in Priština/Prishtina between 22 July and 30 October 1998 (“Đaković’s Notes” or “Notes”)²²²⁸ as well as the minutes of the meeting of 29 October 1998 in Belgrade;²²²⁹ (ii) the Trial Chamber’s evaluation of evidence concerning the nature of the Joint Command; (iii) the reason for the creation of the Joint Command; and (iv) the relationship between the Joint Command and the Working Group. The Appeals Chamber will consider these challenges in turn.

(b) Reliability of Đaković’s Notes and the minutes of the meeting of 29 October 1998

673. Šainović and Lukić challenge the Trial Chamber’s findings on the reliability of two exhibits relevant to the Joint Command: (i) Đaković’s Notes;²²³⁰ and (ii) the minutes of the meeting of 29 October 1998 in Belgrade.²²³¹

(i) Đaković’s Notes

674. The Trial Chamber admitted Đaković’s Notes into evidence on 20 March 2007.²²³² Subsequently, on 6 November 2007, Šainović requested the exclusion of Đaković’s Notes from the

²²²⁴ Trial Judgement, vol. 1, para. 1008; *ibid.*, vol. 3, paras 292, 306.

²²²⁵ Trial Judgement, vol. 1, paras 806, 1055-1056; *ibid.*, vol. 3, para. 306.

²²²⁶ Trial Judgement, vol. 1, paras 1055, 1078; *ibid.*, vol. 3, para. 306. See also *ibid.*, vol. 1, para. 1057. Regular attendees of these meetings were: Šainović, Milomir Minić, Zoran Anđelković, Duško Matković, Pavković, Milan Đaković, Lukić, Vlastimir Đorđević, and David Gajić. Occasional attendees included Dušan Samardžić, Obrad Stevanović, Jovica Stanišić, and Lazarević (*ibid.*, vol. 1, para. 1059).

²²²⁷ Trial Judgement, vol. 1, paras 1003, 1097-1099, 1107, 1112.

²²²⁸ Exh. P1468.

²²²⁹ Exh. P2166.

²²³⁰ Exh. P1468.

²²³¹ Exh. P2166.

record and claimed that they contained 1,572 problematic portions, including illegible letters and translation errors.²²³³ On 21 November 2007, the Trial Chamber rejected this request and stated that Šainović's submissions would be considered when determining the weight to be accorded to Đaković's Notes, rather than the admissibility of the document.²²³⁴ In May 2008, Milan Đaković, the author of the Notes, testified before the Trial Chamber. On this occasion, at the proposal of the Prosecution and in consultation with the other parties, the Trial Chamber requested him to rewrite some illegible portions of the Notes identified by the Prosecution.²²³⁵ Despite the Trial Chamber's invitation to all the parties, it was only the Prosecution who specifically identified portions for this purpose.²²³⁶ When the method of rewriting these illegible portions by Đaković was discussed in court, counsel for Šainović stated:

As you know, there are over 1,600 mistakes in the document that we wrote in translation [...]. I really don't have a problem with that, but they are mistakes, so it's up to you whether that will be corrected. [...] you are going to have of an incomplete document, [...] and it is for you to decide now, and I won't object.²²³⁷

In light of this statement, and considering, *inter alia*, that Šainović thereafter neither insisted upon his objections concerning 1,572 portions of Đaković's Notes nor sought to clarify any portions of particular concern during Đaković's testimony, the Trial Chamber found that Šainović's objections in this respect had been waived.²²³⁸

675. The Trial Chamber nonetheless took into account "the fact that portions of [Đaković's Notes were] illegible" and "weighed the evidence as a whole in this matter in drawing conclusions from the Notes."²²³⁹ The Trial Chamber substantially relied on Đaković's Notes in its examination of various issues, including those related to the Joint Command, while it noted that the Notes were "not official minutes of Joint Command meetings" and thus "not a comprehensive record of everything that participants discussed".²²⁴⁰

²²³² Ruling, 20 Mar 2007, T. 12023.

²²³³ *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-T, Defence Request Seeking that Exhibit P1468 be Removed from Evidence – or Alternatively – Seeking Grant to Present Additional Evidence, 6 November 2007 ("Motion re Exhibit P1468"), para. 12 and Annex.

²²³⁴ *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-T, Decision on Šainović Motions re Exhibit P1468, 21 November 2007 ("Decision re Exhibit P1468"), paras 10-11.

²²³⁵ Milan Đaković, 20 May 2008, T. 26475-26477, 26510-26511; Trial Judgement, vol. 1, para. 1064.

²²³⁶ Milan Đaković, 20 May 2008, T. 26510-26511; Trial Judgement, vol. 1, para. 1064.

²²³⁷ Milan Đaković, 20 May 2008, T. 26511 (also quoted in Trial Judgement, vol. 1, para. 1064).

²²³⁸ Trial Judgement, vol. 1, para. 1064.

²²³⁹ Trial Judgement, vol. 1, para. 1064.

²²⁴⁰ Trial Judgement, vol. 1, para. 1062.

a. Submissions of the parties

676. Šainović submits that the Trial Chamber erred in relying on Đaković's Notes, despite the fact that they were not the minutes of the meetings in question but merely notes for Đaković's personal use. Šainović argues that the Trial Chamber erroneously dismissed Đaković's explanation that he was selective in taking notes and wrote down what he could catch in the meetings, which he translated into "military-speak".²²⁴¹ Šainović further asserts that the Trial Chamber erred in finding that he had waived his 1,572 objections alleging translation mistakes and vague or illegible portions in the Notes. He contends that his counsel did not waive his objections to the Notes in court, but simply stated that it was up to the Trial Chamber to decide whether it would receive an incomplete document with mistakes.²²⁴² Lukić also submits that the Trial Chamber failed to adequately assess the credibility of Đaković's Notes,²²⁴³ since they were inaccurate,²²⁴⁴ selective and incomplete in their coverage of the relevant meetings,²²⁴⁵ did not constitute official minutes of those meetings, and were neither verified nor adopted by the participants.²²⁴⁶

677. The Prosecution responds that the Trial Chamber duly considered Đaković's testimony and other documentary evidence in determining the weight to be accorded to Đaković's Notes.²²⁴⁷ The Prosecution further contends that Šainović's argument regarding the waiver of his objections is moot, since it is clear that, despite its finding that Šainović had waived his objections, the Trial Chamber took into account the existence of illegible portions and translation errors in Đaković's Notes.²²⁴⁸ As to Lukić's arguments regarding the inaccuracy of Đaković's Notes, the Prosecution submits that they misrepresent the evidence and are belied by the fact that Lukić himself relies upon the Notes in support of his own arguments.²²⁴⁹

²²⁴¹ Šainović's Appeal Brief, paras 178-179, referring to Milan Đaković, 19 May 2008, T. 26375, 26425-26426. See also Šainović's Appeal Brief, para. 180; Šainović's Reply Brief, para. 29.

²²⁴² Šainović's Appeal Brief, para. 181, referring to Trial Judgement, vol. 1, para. 1064, Milan Đaković, 20 May 2008, T. 26511, Šainović's Closing Brief, para. 204, *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-T, Defence Request Seeking that Exhibit P1468 be Removed from Evidence – or Alternatively – Seeking Grant to Present Additional Evidence, 6 November 2007. See also Šainović's Reply Brief, para. 29.

²²⁴³ Lukić's Appeal Brief, para. 278, referring to Exh. P1468. See also Lukić's Reply Brief, para. 79.

²²⁴⁴ Lukić's Appeal Brief, paras 281-282; Lukić's Reply Brief, paras 80-81.

²²⁴⁵ Lukić's Appeal Brief, para. 278, referring to Trial Judgement, vol. 1, para. 1062, Milan Đaković, 19 May 2008, T. 26374-26375, *ibid.*, 20 May 2008, T. 26514. In particular, Lukić quotes Đaković's explanation that he was unfamiliar with the MUP and argues that he was incompetent to make adequate notes beyond the scope of the army.

²²⁴⁶ Lukić's Appeal Brief, paras 279, 283.

²²⁴⁷ Prosecution's Response Brief (Šainović), para. 99; Prosecution's Response Brief (Lukić), paras 246-247, referring to Trial Judgement, vol. 1, paras 1057-1063.

²²⁴⁸ Prosecution's Response Brief (Šainović), para. 102, citing Trial Judgement, vol. 1, para. 1064. See also Prosecution's Response Brief (Šainović), fn. 330, referring to Trial Judgement, vol. 3, paras 364 (fn. 773), 367.

²²⁴⁹ Prosecution's Response Brief (Lukić), para. 248.

b. Analysis

678. The Appeals Chamber is of the view that the Trial Chamber carefully considered and accepted the testimony of Milan Đaković, an officer in the Priština Corps Command, about how the Notes were generated.²²⁵⁰ The Trial Chamber consequently held that they were notes of one of the attendees and did not constitute “official minutes of the Joint Command meetings” or “a *verbatim*, comprehensive record” of what the participants discussed in the meetings.²²⁵¹ Nevertheless, the Trial Chamber found that they:

may be regarded as a fairly reliable record of parts of the meetings of the Joint Command, particularly for the activities of the MUP and VJ and comments made upon the VJ and MUP’s activities, including by the non-VJ and MUP personnel attending.²²⁵²

In reaching this conclusion, the Trial Chamber explicitly considered Đaković’s testimony that he recorded fewer political comments and more security issues and other matters relevant to his work.²²⁵³ The Trial Chamber further noted that the contents of Đaković’s Notes were corroborated by other documents in evidence, including those issued by the Priština Corps and the 3rd Army.²²⁵⁴ Šainović’s assertion that the Trial Chamber dismissed Đaković’s explanations as to how he took notes in the meetings therefore misrepresents the Trial Judgement. Lukić’s argument in this regard merely refers to the Trial Chamber’s findings and has failed to substantiate why the fact that Đaković’s Notes were neither official minutes of the meetings nor reviewed by the participants render them unreliable.

679. As for the illegible portions and alleged translation errors in Đaković’s Notes, the Appeals Chamber recalls that although the Trial Chamber considered Šainović’s objections thereto as having been waived, it nonetheless took into account “the fact that portions of the Notes [were] *illegible*” and had “weighed the evidence as a whole in this matter in drawing conclusions from the Notes.”²²⁵⁵ The Trial Chamber further held that “[e]ven if the Chamber had considered the objections to be valid, it would have proceeded in the same manner and reached the same result.”²²⁵⁶ Consequently, Šainović’s argument that the Trial Chamber erred in finding that he had waived his objections regarding illegible portions of the Notes is moot. However, the Appeals

²²⁵⁰ Trial Judgement, vol. 1, paras 1058, 1060. As regards Đaković’s position, see Trial Judgement, vol. 1, para. 587.

²²⁵¹ Trial Judgement, vol. 1, para. 1062 (emphasis in the original).

²²⁵² Trial Judgement, vol. 1, para. 1062.

²²⁵³ Trial Judgement, vol. 1, para. 1062. Given that joint VJ and MUP operations were discussed in the meetings, that MUP representatives made comments therein, and that Đaković was present in the meetings, the Appeals Chamber is not persuaded by Lukić’s argument that Đaković lacked the competence to make adequate notes beyond the scope of the army (Lukić’s Appeal Brief, para. 278). Lukić has failed to substantiate why Đaković could not accurately reflect what he heard about the MUP in the meetings.

²²⁵⁴ Trial Judgement, vol. 1, para. 1063, referring, *inter alia*, to Exh. P1428, Exh. P1435, Exh. P1439, Exh. 4D230. See also Trial Judgement, vol. 1, para. 1085.

²²⁵⁵ Trial Judgement, vol. 1, para. 1064 (emphasis added).

Chamber observes that it is not clear whether the Trial Chamber considered Šainović's assertions concerning translation errors when it assessed the evidence.²²⁵⁷ In these circumstances, the Appeals Chamber considers that it is necessary to address the merits of Šainović's argument that the Trial Chamber erred in finding that he waived his objections to translation mistakes.

680. In this regard, the Appeals Chamber recalls that some time after the admission of Đaković's Notes into evidence²²⁵⁸ Šainović requested that the Trial Chamber exclude them from the record, asserting, *inter alia*, that they contained 1,572 problematic portions which were illegible, illogical or included different handwriting or unknown abbreviations, or whose translations were erroneous, arbitrary, omitted original texts, or suffered from other miscellaneous problems.²²⁵⁹ The Trial Chamber rejected this request, stating that Šainović's submissions would be considered when determining the weight to be accorded to Đaković's Notes, rather than the admissibility of the document.²²⁶⁰ In the same decision, the Trial Chamber also stated that "[t]he parties may make submissions regarding the issues with the translation of the document into English in due course" and invited them "to explore the document with the witnesses called to give evidence [...] and address the weight to be attached to it in closing submissions."²²⁶¹ No submission regarding the translation was made thereafter, until Đaković's appearance in court.

681. When Đaković testified before the Trial Chamber, he rewrote, at the Trial Chamber's request, some illegible portions of the Notes identified by the Prosecution in a new document.²²⁶² This supplementary document was admitted into evidence along with its translation provided by the CLSS of the Registry.²²⁶³ None of the Defence teams objected to this procedure or to the admission

²²⁵⁶ Trial Judgement, vol. 1, para. 1064.

²²⁵⁷ On a few occasions, the Trial Chamber relied upon the in-court interpretation of certain portions of Đaković's Notes, rather than its written translation (*e.g.*, Trial Judgement, vol. 1, para. 1063 (fn. 2852), regarding p. 54 of Đaković's Notes (Exh. P1468) and the in-court interpretation during Lazarević's testimony (Vladimir Lazarević, 14 Nov 2007, T. 18298); Trial Judgement, vol. 3, paras 364 (fn. 773), 367, regarding p. 160 of Đaković's Notes (Exh. P1468) and the in-court interpretation at Šainović closing argument, 21 Aug 2008, T. 27069). However, this does not appear to be a systematic practice, as the other parts of the Trial Judgement only refer to page numbers of the English translation of Đaković's Notes. Nor does the Trial Judgement elucidate how the Trial Chamber could examine the alleged inaccuracy of the translation through its consideration of the evidence as a whole.

²²⁵⁸ Ruling, 20 Mar 2007, T. 12023.

²²⁵⁹ Motion re Exhibit P1468, para. 12 and Annex. The Annex consists of Šainović's 1,572 contentions inserted in the word document of the English translation of Đaković's Notes by means of the "Comments" function. "Arbitrary translations" appear to include cases where portions which Šainović believed were illegible had been translated. Šainović's 1,572 comments in the Annex, however, did not provide any concrete alternative translations which should replace the portions which he identified as false.

²²⁶⁰ Decision re Exhibit P1468, paras 10-11.

²²⁶¹ Decision re Exhibit P1468, para. 11.

²²⁶² Milan Đaković, 20 May 2008, T. 26510-26511; Trial Judgement, vol. 1, para. 1064.

²²⁶³ Exh. IC199; Trial Judgement, vol. 1, para. 1064; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order re Exhibits P1468 and IC199, 11 June 2008; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Second Order re Exhibits P1468 and IC199, 13 June 2008 ("Second Order re Exhibit P1468").

of this supplementary document.²²⁶⁴ However, when the method of rewriting some illegible portions by Đaković was discussed in court, counsel for Šainović stated:

As you know, there are over 1,600 mistakes in the document that we wrote in translation, should it remain in with that many—that many translations in the document or not. I really don't have a problem with that, but they are mistakes, so it's up to you whether that will be corrected. I mean, I don't want to insist. I don't want to extend the trial. This was written in November, and now it's already May, but you are going to have of an incomplete document, and that worries me because really, every one of the mistakes I pointed out is really there, and it is for you to decide now, and I won't object.²²⁶⁵

The Appeals Chamber considers that, in itself, this statement does not clearly indicate that Šainović waived or withdrew his contentions regarding 1,572 portions of Đaković's Notes, including alleged translation errors. Rather, it shows that Šainović indicated his intention not to oppose Đaković's Notes remaining in the trial record and the proposed method of clarifying some illegible portions identified by the Prosecution, while alerting the Trial Chamber of nearly 1,600 problematic portions.

682. Nonetheless, the Appeals Chamber considers that, although Šainović was afforded a number of opportunities to address any specific translation errors he wished to have corrected, he failed to do so. In particular, the Trial Chamber requested that Đaković rewrite selected portions and invited the Defence to identify any illegible portions which they wished Đaković to clarify.²²⁶⁶ In so doing it referred to Šainović's earlier filing containing his objections to both illegible portions and translation errors.²²⁶⁷ However, the Defence teams, including Šainović, failed to identify any specific portions of Đaković's Notes or the translation thereof, which they considered to be problematic and wished to have clarified or corrected.²²⁶⁸ Moreover, Šainović did not question Đaković on the problematic portions of the Notes during his cross-examination and failed to verify the accuracy of the translation using the in-court interpretation.²²⁶⁹ Equally, Šainović failed to address this issue with other witnesses, such as Milomir Minić, Duško Matković, and Zoran Anđelković, who regularly attended the daily meetings recorded in Đaković's Notes.²²⁷⁰ Šainović

²²⁶⁴ Trial Judgement, vol. 1, para. 1064; Second Order re Exhibit P1468, para. 2.

²²⁶⁵ Milan Đaković, 20 May 2008, T. 26510-26511 (also quoted in Trial Judgement, vol. 1, para. 1064).

²²⁶⁶ Milan Đaković, 20 May 2008, T. 26475-26477.

²²⁶⁷ Milan Đaković, 20 May 2008, T. 26476, in which Judge Bonomy states: "we know that [the counsel of Šainović] has an interest in this having identified all the illegible portions in an earlier filing and no doubt assisted [the Prosecution] by doing so, so he may wish to identify some."

²²⁶⁸ Milan Đaković, 20 May 2008, T. 26509-26512.

²²⁶⁹ The Trial Chamber itself noted that during Đaković's evidence, Šainović did not even identify any particular portions of Đaković's Notes relied upon by the Prosecution that he wished Đaković to clarify (see Trial Judgement, vol. 1, para. 1064). On this particular point, Šainović has not advanced any counter argument on appeal.

²²⁷⁰ Duško Matković, 29 Aug 2007, T. 14583-14617; *ibid.*, 30 Aug 2007, T. 14625-14647; Zoran Anđelković, 30 Aug 2007, T. 14650-14720; *ibid.*, 31 Aug 2007, T. 14721-14740; Milomir Minić, 31 Aug 2007, T. 14740-14796. See also Trial Judgement, vol. 1, paras 1056-1057, 1059. Šainović once argued that a term in a passage of Đaković's Notes translated as "confiscation" was illegible in the B/C/S original (Exh. P1468, p. 50 (the corresponding page in the B/C/S original is p. 40)), when the Prosecution presented this passage to Anđelković during his cross-examination. However, Anđelković accepted that the term in question could be "oduzimanje" which means taking away or seizing

did not subsequently refer to the 1,572 allegedly problematic portions, including translation errors, until his Closing Brief. On appeal, Šainović himself relies on Đaković's Notes in support of his appeal, including on portions he initially indicated as containing various problems.²²⁷¹

683. In these circumstances, the Appeals Chamber discerns no error in the Trial Chamber's finding that Šainović waived his objections regarding translation errors in Đaković's Notes.²²⁷² Consequently, Šainović's submission in this regard is rejected.

684. The Appeals Chamber therefore dismisses the challenges raised by Šainović and Lukić concerning the reliability of Đaković's Notes.²²⁷³

(ii) Minutes of the meeting at Beli Dvor in Belgrade on 29 October 1998

a. Submissions of the parties

685. Šainović avers that the Trial Chamber erred in finding the minutes of a meeting held at Beli Dvor in Belgrade on 29 October 1998 to be an authentic record of this meeting and, as a result, erroneously concluded that the meeting was convened in order to review the actions taken for the implementation of the Plan for Combating Terrorism in the name of the Joint Command.²²⁷⁴ In support of this argument, Šainović submits that none of those in attendance at the meeting were aware of records or minutes being taken.²²⁷⁵ Šainović also asserts that Aleksandar Dimitrijević, then Head of the Security Administration of the VJ General Staff,²²⁷⁶ who attended the meeting, testified that the document containing the minutes appeared "as though it was created to cover some things."²²⁷⁷ Šainović also argues that it is impossible to distinguish the parts of the document showing the participants' statements from those presenting the narrative of its author.²²⁷⁸ He further submits that the Trial Chamber was inconsistent in its findings as to the credibility of the minutes²²⁷⁹ and that, contrary to the Trial Chamber's finding, the minutes were not corroborated by

(Zoran Anđelković, 30 Aug 2007, T. 14699-14702; *ibid.*, 31 Aug 2007, T. 14730-13734). The Trial Chamber duly took this into account when examining Đaković's Notes (Trial Judgement, vol. 3, para. 311 (fn. 640)). Šainović did not refer to any other allegedly problematic portions of Đaković's Notes during the testimony of these witnesses. Neither did he address this issue during the testimony of Lazarević, who occasionally attended the daily meetings in question (Vladimir Lazarević, 6 Nov 2007, T. 17734, *et seq.*; Trial Judgement, vol. 1, para. 1059; *ibid.*, vol. 3, para. 804).

²²⁷¹ See, for instance, Šainović's Appeal Brief, paras 9, 91, 94, 164, 172, 174, 446, referring, *inter alia*, to Exh. P1468 in general and pp. 5, 8, 17, 20-24, 98-102, 161 (compared with the Annex to Motion re Exhibit P1468). The Appeals Chamber notes that Lukić also relies upon various portions of Đaković's Notes, Lukić's Appeal Brief, paras 282, 302, 634.

²²⁷² Lukić's allegations that a portion in Đaković's Notes in the B/C/S original version recording Stevanović's absence is inaccurate and that the English translation does not correctly reflect this inaccuracy (Lukić's Appeal Brief, para. 281; Lukić's Reply Brief, para. 80; *contra* Prosecution's Response Brief (Lukić), para. 248) are also dismissed. While this was one of the 1,572 problematic portions that Šainović pointed out at trial, Lukić was silent about it before the Trial Chamber, even when the method of clarifying illegible portions was discussed in court, during Đaković's examination, and in his Closing Brief. Therefore, the Appeals Chamber considers that Lukić has waived his right to raise this issue on appeal (*Boškovski and Tarčulovski* Appeal Judgement, para. 185).

an extract from the *Vojska* magazine.²²⁸⁰ The Prosecution responds that in light of all the relevant evidence, the Trial Chamber properly found the minutes to be an authentic record of the meeting and reasonably relied upon them.²²⁸¹

b. Analysis

686. The Appeals Chamber considers that the Trial Chamber was fully aware that the reliability of the minutes was a matter of dispute and carefully determined the weight to be accorded to them.²²⁸² It analysed in detail the evidence of a number of witnesses regarding the authenticity and accuracy of the minutes, including the testimony of participants in the meeting.²²⁸³ In particular, the Trial Chamber confirmed that the document bore sufficient indicia of authenticity, including the seal identified by Aleksandar Vasiljević, former Deputy Head of the Security Administration of the VJ General Staff,²²⁸⁴ as that of the Military Office of the FRY President.²²⁸⁵ The Trial Chamber also noted that the evidence of Momir Bulatović, Milan Đaković, Lazarević, and – to some extent – Duško Matković supported this finding.²²⁸⁶ The Trial Chamber observed that the main challenge to the reliability of the contents of the minutes came from the testimony of Aleksandar Dimitrijević, who had participated in the meeting, while doubts expressed by other witnesses who had also attended were generally limited to the use of the term “Joint Command” in the minutes.²²⁸⁷ The Trial Chamber also considered other corroborating evidence, namely: (i) the minutes of another meeting held in the MUP building on 5 November 1998, in which Milutinović referred to the 29 October 1998 meeting;²²⁸⁸ (ii) an extract from a 2001 publication of *Vojska* magazine referring to a report of the Joint Command substantially corresponding to Pavković’s remarks “on behalf of the Joint Command” recorded in the minutes of the 29 October 1998 meeting;²²⁸⁹ and

²²⁷³ Šainović’s sub-ground 1(13) in part; Lukić’s ground N in part.

²²⁷⁴ Šainović’s Appeal Brief, paras 104-105, referring, *inter alia*, to Trial Judgement, vol. 1, para. 1107, Exh. P2166. See also Šainović’s Appeal Brief, para. 107, referring to Trial Judgement, vol. 1, paras 1097-1107.

²²⁷⁵ Šainović’s Appeal Brief, para. 105, referring to Milomir Minić, 31 Aug 2007, T. 14764, 14767, Aleksandar Dimitrijević, 8 Jul 2008, T. 26597-26598.

²²⁷⁶ See Trial Judgement, vol. 1, para. 34.

²²⁷⁷ Šainović’s Appeal Brief, para. 105, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26612-26615.

²²⁷⁸ Šainović’s Appeal Brief, para. 105, referring to Exh. P2166, pp. 1, 7, 8.

²²⁷⁹ Šainović’s Appeal Brief, para. 105, referring to Trial Judgement, vol. 3, para. 136.

²²⁸⁰ Šainović’s Appeal Brief, para. 106, referring to Trial Judgement, vol. 1, para. 1106, Exh. P1011, p. 51 (B/C/S original), arguing that the extract from the *Vojska* magazine merely contains a narrative of the author, who speaks of the existence of a certain report.

²²⁸¹ Prosecution’s Response Brief (Šainović), para. 86, referring to Trial Judgement, vol. 1, paras 1097-1107.

²²⁸² Trial Judgement, vol. 1, paras 1097-1107.

²²⁸³ Trial Judgement, vol. 1, paras 1100-1104, 1107 (fn. 3021).

²²⁸⁴ See Trial Judgement, vol. 1, para. 439.

²²⁸⁵ Trial Judgement, vol. 1, para. 1100, referring to Aleksandar Vasiljević, 19 Jan 2007, T. 8729-8731.

²²⁸⁶ Trial Judgement, vol. 1, fn. 3021. See also *ibid.*, vol. 1, paras 1100, 1103-1104, and references therein.

²²⁸⁷ Trial Judgement, vol. 1, fn. 3021. See also *ibid.*, vol. 1, paras 1102-1104, and references therein.

²²⁸⁸ Trial Judgement, vol. 1, para. 1105, referring to Exh. P2805.

²²⁸⁹ Trial Judgement, vol. 1, para. 1106, comparing Exh. P1011, p. 72 with Exh. P2166, pp. 5-6.

(iii) Đaković's Notes recording Minić's comments referring to the report at Joint Command meetings.²²⁹⁰

687. As a result of its assessment of all the evidence relevant to the 29 October 1998 meeting, the Trial Chamber accorded less weight to Dimitrijević's evidence and concluded that, although the minutes of this meeting were not a verbatim record, "significant weight [could] be given" to them.²²⁹¹ Consequently, Šainović's arguments concerning evidence that attendees were unaware that the minutes were being taken, Dimitrijević's testimony, and the incomplete nature of the minutes are requests to re-evaluate the evidence in a manner which the Trial Chamber rejected,²²⁹² without showing that the Trial Chamber erred.²²⁹³

688. Šainović's assertion that the Trial Chamber was inconsistent in its findings as to the credibility of the minutes is also without merit. While the Trial Chamber stated that it was "not convinced that [the minutes were] a genuine record of the content of the meeting",²²⁹⁴ it also clarified that the minutes were "not a *verbatim* record of the content of the meeting".²²⁹⁵ Indeed, the Trial Chamber consistently held that there was no reason to doubt that the meeting took place, that it was attended by most senior political, VJ and MUP figures, and that the general topics appearing in the minutes were discussed at the meeting.²²⁹⁶ As a result, the Trial Chamber placed "significant weight" on the minutes²²⁹⁷ and relied on them when corroborated, in the portions of the Trial Judgement identified by Šainović.²²⁹⁸ The Appeals Chamber does not discern any inconsistency in this regard.

689. Moreover, the Appeals Chamber considers that a reasonable trier of fact could have relied on the extract from a 2001 publication of *Vojska* magazine as corroboration, as the Trial Chamber did. The Trial Chamber was aware that the extract was not an exact record of the Joint Command's "Report and Conclusions on the Implementation of the Plan on Stamping out Terrorism in Kosovo and Metohija".²²⁹⁹ Indeed, the extract summarises parts of the report and describes it as having been signed by the Joint Command.²³⁰⁰ However, the Trial Chamber observed that the extract listed numbers of displaced Kosovo Albanians who had returned and that these numbers corresponded to

²²⁹⁰ Trial Judgement, vol. 1, para. 1106, referring to Exh. P1468, pp. 130, 161.

²²⁹¹ Trial Judgement, vol. 1, para. 1107, wherein the Trial Chamber further clarified that it relied upon the minutes when corroborated and used them to corroborate other testimonial and documentary evidence of the meeting.

²²⁹² See Šainović's Closing Brief, paras 217-218, 221.

²²⁹³ See also *infra*, para. 689.

²²⁹⁴ Trial Judgement, vol. 3, para. 136. See also *ibid.*, vol. 3, para. 661.

²²⁹⁵ Trial Judgement, vol. 3, para. 332 (emphasis added). See also *ibid.*, vol. 1, para. 1107.

²²⁹⁶ Trial Judgement, vol. 1, para. 1107; *ibid.*, vol. 3, paras 136, 332, 661.

²²⁹⁷ Trial Judgement, vol. 1, para. 1107.

²²⁹⁸ Trial Judgement, vol. 1, para. 1107; *ibid.*, vol. 3, para. 136.

²²⁹⁹ Trial Judgement, vol. 1, para. 1106.

²³⁰⁰ Exh. P1011, p. 72 (the corresponding page in the B/C/S original is p. 51).

those in the minutes of the 29 October 1998 meeting. The Trial Chamber noted that the minutes recorded Pavković as having referred to these numbers “on behalf of the Joint Command”.²³⁰¹ As a result, the Trial Chamber found that the content of the magazine extract, read together with the minutes of the 29 October 1998 meeting in Belgrade and Đaković’s Notes on the Joint Command meetings, suggested that Pavković was reading from the report adopted by the Joint Command when he gave his comments at the 29 October 1998 meeting.²³⁰² In the Trial Chamber’s view, the extract from the *Vojska* magazine and the minutes corroborated each other on this point and supported the finding that the minutes were an authentic record of the 29 October 1998 meeting.²³⁰³ The Appeals Chamber does not discern any error in this evaluation of the evidence. Šainović merely seeks to replace the Trial Chamber’s interpretation of the evidence with his own, without showing any error.

690. Accordingly, the Appeals Chamber dismisses Šainović’s arguments regarding the reliability of the minutes of the meeting at Beli Dvor in Belgrade on 29 October 1998.²³⁰⁴

(c) Nature of the Joint Command

691. The Trial Chamber considered the nature of the Joint Command and concluded that “an entity known as the ‘Joint Command for Kosovo and Metohija’ existed in 1998.”²³⁰⁵ The Trial Chamber also found that meetings were held daily between Šainović, members of the Working Group and MUP and VJ officers in Priština/Prishtina between 22 July and 30 October 1998, and that these meetings were referred to as meetings of the Joint Command.²³⁰⁶

(i) Submissions of the parties

692. Šainović and Lukić submit that the Trial Chamber erred in drawing these conclusions based on an improper assessment of the evidence.²³⁰⁷ In particular, Šainović argues that the Trial Chamber erred in relying solely on the testimony of Ljubinko Cvetić to conclude that the meetings held between members of the Working Group, Šainović, and MUP and VJ officers between 22 July and 30 October 1998 were referred to as Joint Command meetings,²³⁰⁸ as Cvetić’s testimony was not

²³⁰¹ Trial Judgement, vol. 1, para. 1106, referring, *inter alia*, to Exh. P1011, p. 72, Exh. P2166, pp. 5-6.

²³⁰² Trial Judgement, vol. 1, para. 1106, and references therein.

²³⁰³ See Trial Judgement, vol. 1, para. 1107.

²³⁰⁴ Šainović’s sub-ground 1(8) in part.

²³⁰⁵ Trial Judgement, vol. 1, para. 1109.

²³⁰⁶ Trial Judgement, vol. 1, paras 1055, 1078. See also *ibid.*, vol. 1, para. 1057.

²³⁰⁷ Šainović’s Appeal Brief, paras 71-77, referring to Trial Judgement, vol. 1, paras 1056-1078. See also Šainović’s Notice of Appeal, para. 15; Lukić’s Appeal Brief, paras 153, 162-163, 179-181, 274, 277, 290-291, 592.

²³⁰⁸ Šainović’s Appeal Brief, para. 74, referring to Trial Judgement, vol. 1, para. 1078.

credible.²³⁰⁹ Šainović also contends that the Trial Chamber ignored the testimony of a number of witnesses regarding the nature and name of the meetings.²³¹⁰ Lukić submits that the Trial Chamber observed that no one who attended the relevant meetings referred to them as the “Joint Command”, and points to Đaković’s testimony that the term “Joint Command” was used internally between him and Pavković without other participants knowing it.²³¹¹ Lukić also asserts that the Trial Chamber erroneously relied upon Cvetic’s testimony concerning the establishment of the Joint Command although Cvetic participated neither in its establishment nor in its meetings.²³¹² In addition, Lukić claims that Cvetic’s evidence is unreliable because he was removed from his position as a result of his failure to report crimes.²³¹³

693. The Prosecution responds that both Šainović and Lukić fail to show any error in the Trial Chamber’s assessment of the evidence.²³¹⁴ It submits that the Trial Chamber considered the evidence referred to by Šainović, but did not find it to be credible or convincing and that Šainović simply repeats his submissions on the reliability of Cvetic’s testimony previously raised at trial.²³¹⁵ The Prosecution also submits that it is irrelevant whether Cvetic was present at “the establishment of the Joint Command” or its meetings as the Trial Chamber took into consideration the fact that his knowledge of the creation of the Joint Command stemmed from what he had been told by

²³⁰⁹ Šainović’s Appeal Brief, paras 72, 74, referring to Trial Judgement, vol. 1, paras 1071, 1078. See also Šainović’s Appeal Brief, para. 183, referring to Trial Judgement, vol. 3, paras 315, 317. Šainović also argues that Cvetic is not credible “for personal reasons” and that, with respect to another issue, the Trial Chamber did not believe his testimony (Šainović’s Appeal Brief, para. 186, referring to Ljubinko Cvetic, 7 Dec 2006, T. 8088, Trial Judgement, vol. 1, para. 1029).

²³¹⁰ Šainović’s Appeal Brief, paras 71-72, 74-77, 185, 187, referring to Trial Judgement, vol. 1, paras 1065-1077 and, in particular, Zoran Anđelković, 30 Aug 2007, T. 14655, 14690, Milomir Minić, 31 Aug 2007, T. 14752, Dušan Matković, 29 Aug 2007, T. 14595, Milan Đaković, 19 May 2008, T. 26382, *ibid.*, 20 May 2008, T. 26444-26445, Miroslav Mijatović, 13 Feb 2008, T. 22284, Radovan Vučurević, 25 Feb 2008, T. 23130-23131, Duško Adamović, 8 Apr 2008, T. 24967-24968, Nebojša Bogunović, 10 Apr 2008, T. 25118-25119. Šainović also argues that the Trial Chamber failed to explain its assessment of the credibility of these witnesses and failed to apply the proper standard of proof (Šainović’s Appeal Brief, paras 76-77).

²³¹¹ Lukić’s Appeal Brief, para. 277, referring to Trial Judgement, vol. 1, para. 1057, Exh. P2943, para. 33, Milan Đaković, 19 May 2008, T. 26380-26381, *ibid.*, 20 May 2008, T. 26444-26445. See also Lukić’s Appeal Brief, para. 289; Lukić’s Reply Brief, para. 79.

²³¹² Lukić’s Appeal Brief, paras 153, 289, referring to Trial Judgement, vol. 1, para. 1071, and also arguing that this is an example of the Trial Chamber’s “wholesale approach” of giving more weight to the evidence concerning the Joint Command furnished by the Prosecution than the evidence provided by the Defence. See also Lukić’s Reply Brief, para. 37, referring to Ljubinko Cvetic, 7 Dec 2006, T. 8080.

²³¹³ Lukić’s Reply Brief, para. 37. See also Lukić’s Appeal Brief, paras 162-163, referring to Trial Judgement, vol. 2, para. 1178, and pointing out the Trial Chamber’s purportedly inconsistent approach in assessing the reliability of witnesses Vojnović and Cvetic.

²³¹⁴ Prosecution’s Response Brief (Šainović), para. 75; Prosecution’s Response Brief (Lukić), para. 245. The Prosecution also points out that, at trial, Lukić did not deny the existence of the Joint Command, but rather made submissions about its nature and function (Prosecution’s Response Brief (Lukić), para. 142, referring to Trial Judgement, vol. 1, para. 1052, *ibid.*, vol. 3, para. 1023).

²³¹⁵ Prosecution’s Response Brief (Šainović), paras 74-75, referring to Trial Judgement, vol. 1, paras 1065-1076, 1108, Šainović’s Closing Brief, paras 86-90, and requesting summary dismissal of his arguments in this regard. See also Prosecution’s Response Brief (Šainović), para. 66, referring to Trial Judgement, vol. 1, para. 1108.

others.²³¹⁶ Finally, the Prosecution avers that Lukić’s argument regarding the manner in which Đaković used the term “Joint Command” is mere speculation.²³¹⁷

(ii) Analysis

694. The Trial Chamber found that “Joint Command meetings” were held on a daily basis in Priština/Prishtina between 22 July and 30 October 1998²³¹⁸ and concluded that an entity called “the Joint Command” existed in 1998.²³¹⁹ In so doing, the Trial Chamber considered an abundance of witness testimony and documentary evidence, suggesting that the daily meetings in question were in fact referred to as meetings of the Joint Command.²³²⁰ Such evidence included Đaković’s Notes entitled “Meetings of the Joint Command for Kosovo and Metohija”.²³²¹ In addition to the evidence regarding the daily meetings, the Trial Chamber also took into account other evidence, in which the “Joint Command” and the establishment thereof were mentioned.²³²² This evidence included the testimony of Ljubinko Cvetić, then Head of the Kosovska Mitrovica Secretariat of the Interior

²³¹⁶ Prosecution’s Response Brief (Lukić), paras 127, 254, referring to Trial Judgement, vol. 1, para. 1071. See also Prosecution’s Response Brief (Lukić), para. 125.

²³¹⁷ Prosecution’s Response Brief (Lukić), para. 255.

²³¹⁸ Trial Judgement, vol. 1, paras 1055, 1078. See also *ibid.*, vol. 1, para. 1057; *ibid.*, vol. 3, para. 306.

²³¹⁹ Trial Judgement, vol. 1, para. 1109. See also *ibid.*, vol. 1, para. 1108.

²³²⁰ See Trial Judgement, vol. 1, paras 1030, 1057-1059, 1070, and references therein.

²³²¹ Trial Judgement, vol. 1, paras 1057-1058, referring to Exh. P1468.

²³²² Trial Judgement, vol. 1, paras 1003, 1028, 1031-1032, 1057, 1069, 1071-1073, 1076-1077, 1080, 1089-1090, 1097-1099, 1105-1107, 1112; *ibid.*, vol. 3, paras 314-315, and references therein. See also Exh. 4DA22, p. 1. Šainović’s and Lukić’s challenges to the Trial Chamber’s assessment of the following evidence are dismissed: (i) an intelligence report addressed to the Joint Command and reproduced in *Nedeljni Telegraf*. Lukić’s argument that, in relation to this evidence, the Trial Chamber reversed the burden of proof “where it noted that witnesses Stojanović and Đaković failed to address or explain certain issues” (Lukić’s Appeal Brief, para. 290; *contra* Prosecution’s Response Brief (Lukić), para. 257)) is dismissed as undeveloped (see Trial Judgement, vol. 1, para. 1076, referring to Exh. P2945, pp. 10-11, Momir Stojanović, 12 Dec 2007, T. 20094, Milan Đaković, 19 May 2008, T. 26428); (ii) an issue of the *Vojska* magazine from 2001, mentioning that a handbook was printed and distributed to VJ members by the Joint Command. By arguing that the nature of the handbook and its authorship are unclear from the content of this *Vojska* publication and that the Trial Chamber simply relied on a journalist’s interpretation unsupported by any other evidence, Šainović misrepresents the Trial Judgement (Šainović’s Appeal Brief, para. 73). The Trial Chamber assessed the reference to the handbook in the issue of the *Vojska* magazine not only in light of a journalist’s interpretation reflected therein but also witness testimony and another document (Trial Judgement, vol. 1, para. 1077, referring to Exh. P1011, p. 49, Exh. P2113, Vladimir Lazarević, 20 Nov 2007, T. 18638, Dragan Živanović, 17 Jan 2008, T. 20506, Božidar Delić, 4 Dec 2007, T. 19489). Lukić’s assertion that the same issue of the *Vojska* magazine indicating that the handbook bore the log number of the Priština Corps Command suggests that the term “Joint Command” was also used when a document was issued by the army without any participation of the MUP (Lukić’s Appeal Brief, para. 291; *contra* Prosecution’s Response Brief (Lukić), para. 258) is dismissed as unsubstantiated; and (iii) Lukić’s interview with the Prosecution concerning the Joint Command. While Lukić contends that the Trial Chamber selectively relied upon and misinterpreted the interview, in which he stated that there was “no Joint Command in existence as such (no command body)” and that all plans were prepared by the Priština Corps (Lukić’s Appeal Brief, paras 179-181, 592, referring to Trial Judgement, vol. 3, para. 1023; *contra* Prosecution’s Response Brief (Lukić), paras 141-142), he has not shown any selective reliance or misinterpretation by the Trial Chamber. In the portions of his interview, which he cites, he does not affirm the existence of the Joint Command *as a command body* (Exh. P948, pp. 48-49, 54, 84, 100-101). However, he does not deny the existence of a body called the Joint Command in 1998 and rather mentions that such a body held meetings (see, *e.g.*, Trial Judgement, vol. 3, para. 1024, referring to Exh. P948, p. 77 (see also *ibid.*, p. 85)). Moreover, while he states in the interview that the Priština Corps prepared plans for joint anti-terrorist actions, this is not in contradiction with the Trial Chamber’s findings as discussed below and does not, in and of itself, negate the existence and the nature of the Joint Command as found by the Trial Chamber (see *infra*, para. 770; *infra*, sub-section VII.F.3.(a); Trial Judgement, vol. 1, paras 1055, 1078, 1109-1110).

(“SUP”),²³²³ that at a meeting of the MUP Staff on 10 July 1998, he was informed that “a command had been set up at the highest level with a mandate to integrate the activities of the army and police in the implementation of anti-terrorist operations.”²³²⁴ The Trial Chamber also noted that Cvetic testified that in a meeting of the MUP Staff on 22 July 1998, Đorđević “reiterated that the establishment of the ‘Joint Command’ comprised Šainović, Matković, Minić, Lukić, Pavković, Anđelković, and Gajić.”²³²⁵

695. The Trial Chamber noted the testimony of a number of witnesses – including Duško Matković, Milomir Minić, and Zoran Anđelković, who had been members of the Working Group and had participated in the daily meetings in Priština/Prishtina – describing how the daily meetings were conducted while stating that neither these daily meetings nor the group of people who attended them had an official name, such as “Joint Command”.²³²⁶ The Trial Chamber also noted the testimony of a number of witnesses, including Milan Đaković, that the term “Joint Command” merely meant coordinated actions or plans for coordination of the VJ and the MUP in Kosovo, and was an internal fictitious name used by Pavković and Đaković for orders of the Priština Corps to be accepted by the MUP.²³²⁷ Moreover, the Trial Chamber was aware of the testimony of witnesses denying the proposition that the Joint Command existed as an entity.²³²⁸

696. However, the Trial Chamber noted that “there was a remarkable degree of hypersensitivity by many witnesses called during the case to the suggestion that Joint Command meetings took place or that meetings that did take place were those of an entity designated as ‘Joint Command’.”²³²⁹ The Trial Chamber thus considered that:

[e]vidence from several witnesses that the Joint Command did not exist, or exercised no influence over anything, must be weighed against the significant body of evidence showing that meetings were regularly held by such a body in 1998, and that important members of the VJ, MUP, and civilian leadership attended these meetings, at which issues regarding the combat operations conducted in Kosovo at that time were discussed and information exchanged.²³³⁰

As a result, in certain instances, the Trial Chamber accorded less weight to the testimony of witnesses who participated in the daily meetings in Priština/Prishtina. Instead, the Trial Chamber

²³²³ See Trial Judgement, vol. 1, para. 661.

²³²⁴ Trial Judgement, vol. 1, para. 1071, referring to Ljubinko Cvetic, 7 Dec 2006, T. 8051-8052. As for the MUP Staff, see *infra*, sub-section VII.F.2.(b). See also Trial Judgement, vol. 1, para. 1073 (fn. 2894); *ibid.*, vol. 3, para. 315.

²³²⁵ Trial Judgement, vol. 1, para. 1071, referring to Ljubinko Cvetic, 7 Dec 2006, T. 8077, *ibid.*, 8 Dec 2006, T. 8123. See also Trial Judgement, vol. 3, para. 315.

²³²⁶ Trial Judgement, vol. 1, paras 1056-1057, 1065, 1073, and references therein.

²³²⁷ Trial Judgement, vol. 1, paras 1005, 1028, 1032, 1073 (fn. 2894), and references therein

²³²⁸ Trial Judgement, vol. 1, paras 1028 (fn. 2739), 1057, 1073 (fns 2888-2889), 1074-1075, and references therein.

²³²⁹ Trial Judgement, vol. 1, para. 1054. See also *ibid.*, vol. 1, para. 1073, in which the Trial Chamber indicated its distrust of the evidence provided by a considerable number of Serbian and FRY politicians and military personnel that the existence of the Joint Command is inconceivable because there was no legal basis for such a body in the constitutional provisions and the organisational scheme of the VJ.

²³³⁰ Trial Judgement, vol. 1, para. 1108.

placed greater weight on documentary evidence and on the testimony of witnesses such as Ljubinko Cvetić, who did not attend the meetings, but heard about the Joint Command from participants in the meetings.²³³¹ The Trial Chamber also relied on Cvetić's testimony despite the contrary testimony of MUP members, who attended the same MUP Staff meeting where Cvetić heard about the establishment of the Joint Command.²³³² Such assessments were within the Trial Chamber's discretion.²³³³ The arguments of Šainović and Lukić merely request that the Appeals Chamber re-evaluate the evidence, without showing any error.

697. Contrary to Šainović's and Lukić's arguments, the Trial Chamber did not solely rely on Cvetić's testimony in determining the creation and existence of the Joint Command.²³³⁴ Moreover, the Appeals Chamber observes that both Šainović and Lukić challenged the credibility of Cvetić at trial on the basis of his character and particularly in light of the fact that he had been removed from his position as Head of the Kosovska Mitrovica SUP due to his failure to report crimes.²³³⁵ The Trial Chamber explicitly rejected their challenges in this regard. Significantly, the Trial Chamber was "impressed by the straightforward way in which Cvetić responded to questions in court" and considered him to be well-informed and credible.²³³⁶ Šainović and Lukić merely repeat their challenges at trial and have failed to demonstrate that the Trial Chamber erred in its assessment of the evidence.²³³⁷

698. For the foregoing reasons, Šainović and Lukić have failed to demonstrate that the Trial Chamber erred in concluding that the daily meetings in question were held by an entity called "the Joint Command".²³³⁸ The Appeals Chamber therefore dismisses their arguments in this regard.²³³⁹

²³³¹ See also Trial Judgement, vol. 1, para. 1056, wherein the Trial Chamber explicitly found it difficult to accept the claims of Matković, Minić, and Anđelković not to know or to be able to explain exactly how these meetings came about.

²³³² Trial Judgement, vol. 1, para. 1071, referring, *inter alia*, to Miroslav Mijatović, 13 Feb 2008, T. 22284, Radovan Vučurević, 25 Feb 2008, T. 23130-23131, Duško Adamović, 8 Apr 2008, T. 24967-24968.

²³³³ See *Galić* Appeal Judgement, para. 300; *Kupreškić et al.* Appeal Judgement, paras 31-32; *Nahimana et al.* Appeal Judgement, para. 194; *Bikindi* Appeal Judgement, para. 116.

²³³⁴ Trial Judgement, vol. 1, paras 1003, 1028, 1030-1032, 1057-1059, 1069, 1070-1073, 1076-1077, 1080, 1089-1090, 1097-1099, 1105-1107, 1112; *ibid.*, vol. 3, paras 314-315, and references therein. See also *supra*, para. 694.

²³³⁵ Trial Judgement, vol. 3, para. 317, referring, *inter alia*, to Šainović Final Trial Brief, 15 July 2008 (public version), para. 725, Šainović Closing Arguments, 21 Aug 2008, T. 27064, Lukić Closing Arguments, 26 Aug 2008, T. 27363. See also Trial Judgement, vol. 1, para. 720.

²³³⁶ Trial Judgement, vol. 3, para. 317. See also *ibid.*, vol. 1, para. 720. Moreover, contrary to Lukić's argument (Lukić's Appeal Brief, paras 162-163), it was within the Trial Chamber's discretion to accept Cvetić's evidence and reject Vojnović's evidence based on their demeanours in court while both of them stated that they, as SUP chiefs, were not aware of killings in their respective areas of jurisdiction. As for Cvetić, see Trial Judgement, vol. 1, para. 720; *ibid.*, vol. 3, para. 317. Regarding Vojnović, see *ibid.*, vol. 3, para. 960. See also *Galić* Appeal Judgement, para. 300; *Kupreškić et al.* Appeal Judgement, paras 31-32; *Nahimana et al.* Appeal Judgement, para. 194.

²³³⁷ With regard to Šainović's submission that the Trial Chamber did not rely on Cvetić's testimony with respect to another issue (Šainović's Appeal Brief, para. 186), the Appeals Chambers notes that it is not unreasonable for a trial chamber to accept certain parts of a witness's testimony and reject others (see *Boškoski and Tarčulovski* Appeal Judgement, para. 59; *Krajišnik* Appeal Judgement, para. 354; *Blagojević and Jokić* Appeal Judgement, para. 82).

²³³⁸ Trial Judgement, vol. 1, paras 1078, 1108-1109.

(d) Reason for the creation of the Joint Command

699. The Trial Chamber found that the Joint Command was created “by means of the *de facto* power of the FRY President Slobodan Milošević around June 1998 and in response to the need for greater coordination between the MUP and VJ forces in Kosovo.”²³⁴⁰ The Trial Chamber further found that it “was part of a co-ordination system put in place as early as May 1998 by which the VJ and the MUP were able to work together in Kosovo” and that “[i]t allowed the commanders of the MUP to ‘save face’ by not having to be commanded by the VJ both before and during the state of emergency.”²³⁴¹ The Trial Chamber also found that the Joint Command allowed Milošević to direct the actions of the MUP in Kosovo, through Pavković, in a situation of questionable legality and for such actions to enjoy the support of the VJ.²³⁴² The Trial Chamber concluded that this arrangement “was important to Milošević because certain members of the VJ disagreed with the deployment of the army within Kosovo, save to guard the border, and complained of the behaviour of the MUP in Kosovo and its failure to co-ordinate with and resubordinate itself to the VJ.”²³⁴³

(i) Submissions of the parties

700. Šainović argues that the Trial Chamber erred in finding that the reason for the creation of the Joint Command was to facilitate better coordination of the activities of the VJ and the MUP in Kosovo, based on the testimony of Aleksandar Dimitrijević, then Head of the Security Administration of the VJ General Staff.²³⁴⁴ Šainović contends that Dimitrijević never mentioned the need for developing a mechanism for efficient coordination between the VJ and the MUP and that the part of Dimitrijević’s testimony to which the Trial Judgement referred concerns Pavković’s actions in connection with the VJ, and his use of the term “Joint Command” to provide cover for his own activities.²³⁴⁵ Šainović further submits that Dimitrijević admitted that his testimony in this regard was speculative.²³⁴⁶ Šainović also contends that the Trial Chamber disregarded evidence providing credible explanations about the manner in which the VJ and the MUP were coordinated,

²³³⁹ Šainović’s sub-grounds 1(6), 1(14) in part; Lukić’s ground D(5) in part, D(7), F(2) in part, N in part, P(6) in part.

²³⁴⁰ Trial Judgement, vol. 1, para. 1109. See also *ibid.*, vol. 1, para. 1006.

²³⁴¹ Trial Judgement, vol. 1, para. 1111.

²³⁴² Trial Judgement, vol. 1, para. 1111.

²³⁴³ Trial Judgement, vol. 1, para. 1111.

²³⁴⁴ Šainović’s Appeal Brief, paras 61, 63-64, 66, referring to Trial Judgement, vol. 1, para. 1006. With regard to Dimitrijević’s position, see Trial Judgement, vol. 1, para. 34.

²³⁴⁵ Šainović’s Appeal Brief, para. 62, referring to Trial Judgement, vol. 1, para. 1005, Aleksandar Dimitrijević, 8 Jul 2008, T. 26595, *ibid.*, 9 Jul 2008, T. 26713. See also Šainović’s Reply Brief, para. 14.

²³⁴⁶ Šainović’s Appeal Brief, paras 62, 65, referring to Aleksandar Dimitrijević, 9 Jul 2008, T. 26713. See also Šainović’s Reply Brief, para. 14.

which shows that there was no need for the participation of civilian representatives, such as Šainović, or any kind of additional body or authority for this coordination.²³⁴⁷

701. In addition, Šainović maintains that the Trial Chamber erred in concluding that the Joint Command allowed Milošević, through Pavković, to direct the actions of the MUP in Kosovo and to ensure that the VJ supported MUP units, because certain VJ officers disagreed with the deployment of the VJ in Kosovo. According to Šainović, nothing in the trial record suggests that Milošević needed to act through Pavković or to establish a special body for these purposes.²³⁴⁸ Furthermore, he avers that the Trial Chamber erred in failing to conclude that the deployment of the VJ beyond the border area in 1998 and early 1999 was lawful.²³⁴⁹ Šainović argues that, had the Trial Chamber established that the deployment was indeed lawful, this would have undermined the Trial Chamber's conclusion that Milošević needed the Joint Command to bypass the VJ officers who questioned the legality of the deployment of the VJ in the interior of Kosovo.²³⁵⁰

702. The Prosecution responds that the Trial Chamber's findings on the origin of the Joint Command and the need for the Joint Command were reasonable, and that Šainović merely repeats his submissions at trial, asserts a different interpretation of the evidence, and misrepresents the Trial Chamber's findings.²³⁵¹ It further submits that the Trial Chamber's reliance upon Dimitrijević's testimony was reasonable and supported by other evidence,²³⁵² and that the Trial Chamber reasonably declined to determine the lawfulness of the deployment of the VJ forces in Kosovo beyond the border area prior to the declaration of a state of emergency.²³⁵³

(ii) Analysis

703. The Trial Chamber accepted Aleksandar Dimitrijević's evidence "as a clear rationale for the need for the development of a Joint Command, namely the need to find effective mechanisms for ensuring the better co-ordination of the activities of the state forces involved in Kosovo".²³⁵⁴ The

²³⁴⁷ Šainović's Appeal Brief, paras 63-65, referring to Trial Judgement, vol. 1, paras 1007-1010.

²³⁴⁸ Šainović's Appeal Brief, paras 113-114, arguing that there were no subordination problems in the MUP, that the actions of the VJ in Kosovo in 1998 were controlled entirely through the usual chain of command, which overcame the disagreement by the issuance of orders, and that Milošević was able to legally remove the opposition, if any.

²³⁴⁹ Šainović's Appeal Brief, paras 487-488, referring to Šainović's Closing Brief, paras 134-142. While Šainović submits that the Trial Chamber erred in failing to determine the legality of the VJ deployment "in the border area" (see Šainović's Appeal Brief, para. 487), the Appeals Chamber understands that he meant to state "beyond the border area", in light of the context of his argument and his reference to Trial Judgement, vol. 1, para. 579.

²³⁵⁰ Šainović's Appeal Brief, paras 489-490.

²³⁵¹ Prosecution's Response Brief (Šainović), paras 63, 66, 78, 88. See also Appeal Hearing, 11 Mar 2013, AT. 233-235.

²³⁵² Prosecution's Response Brief (Šainović), paras 63-65, referring to Trial Judgement, vol. 1, paras 1005-1006, 1025-1026, 1028, 1031-1032, and mentioning, *inter alia*, Stojanović's and Đaković's testimony as well as documentary evidence.

²³⁵³ Prosecution's Response Brief (Šainović), paras 339-341, referring to Trial Judgement, vol. 1, paras 579, 1006, 1111, arguing that irrespective of whether such deployment was legal, the important fact is that certain members of the VJ disagreed with such deployment, which was "one of the reasons for the need for the Joint Command."

²³⁵⁴ Trial Judgement, vol. 1, para. 1006.

Appeals Chamber considers that, in so doing, the Trial Chamber carefully analysed the testimony of Dimitrijević regarding the use of the term “Joint Command” and the lead-up to the daily meetings in Priština/Prishtina between civilian representatives and VJ and MUP members.²³⁵⁵ In this context, the Trial Chamber referred to Dimitrijević’s testimony that the term “Joint Command” was created to provide Pavković with a cover for his activities and use of certain units, “so that he could say ‘I have the Joint Command behind me.’”²³⁵⁶ The Trial Chamber understood this to include securing the coordination between VJ and MUP forces.²³⁵⁷ The Trial Chamber’s interpretation was based on Dimitrijević’s account that, since the spring of 1998, the need to establish coordination between the VJ and the MUP had become apparent due to the difficulty in issuing orders to the MUP.²³⁵⁸ In this regard, the Trial Chamber also noted that Dimitrijević and Momčilo Perišić, then Chief of the VJ General Staff,²³⁵⁹ opposed appointing Pavković as commander of all the forces in Kosovo since they doubted that the MUP would subordinate its units to him.²³⁶⁰ Although the Trial Chamber was aware of Dimitrijević’s admission in cross-examination that his testimony about the term “Joint Command” as a cover for Pavković was speculation on his part,²³⁶¹ it clearly indicated its inclination to reject Dimitrijević’s “attempted retraction” in cross-examination.²³⁶² Accordingly, Šainović’s contention that Dimitrijević did not explicitly mention the need to create efficient coordination mechanisms ignores the Trial Chamber’s assessment of Dimitrijević’s testimony in this regard.

704. Furthermore, Aleksandar Dimitrijević’s evidence is corroborated by the testimony of other witnesses considered by the Trial Chamber,²³⁶³ including Momir Stojanović²³⁶⁴ and Milan Đaković,²³⁶⁵ indicating that the lack of cooperation between the VJ and the MUP, which operated in separate chains of command, was making coordination between them difficult and that improving the coordination was pressing in mid 1998. Contrary to Šainović’s submissions, the Trial Chamber duly considered the evidence concerning the manner in which the VJ and the MUP coordinated

²³⁵⁵ Trial Judgement, vol. 1, paras 1005-1006, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26592-26596, 26619-26621, *ibid.*, 9 Jul 2008, T. 26712-26713.

²³⁵⁶ Trial Judgement, vol. 1, para. 1005, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26595, *ibid.*, 9 Jul 2008, T. 26713.

²³⁵⁷ Trial Judgement, vol. 1, para. 1005.

²³⁵⁸ Aleksandar Dimitrijević, 8 Jul 2008, T. 26596, cited in Trial Judgement, vol. 1, para. 1005.

²³⁵⁹ See Trial Judgement, vol. 1, para. 470.

²³⁶⁰ Trial Judgement, vol. 1, para. 1005, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26592-26594.

²³⁶¹ Trial Judgement, vol. 1, para. 1005, referring to Aleksandar Dimitrijević, 9 Jul 2008, T. 26712-26713.

²³⁶² Trial Judgement, vol. 1, para. 1006.

²³⁶³ Trial Judgement, vol. 1, para. 1028 (fn. 2737), referring to Božidar Delić, 4 Dec 2007, T. 19422-19423, 19495. See also Trial Judgement, vol. 1, para. 1071, referring to Ljubinko Cvetić, 7 Dec 2006, T. 8051-8052. See further Trial Judgement, vol. 1, para. 1028 (fn. 2739), referring to Vladimir Lazarević, 6 Nov 2007, T. 17795, Milan Kotur, 21 Jan 2008, T. 20675, 20724-20725, Mihajlo Gergar, 1 Feb 2008, T. 21528, Miloš Mandić, 23 Jan 2008, T. 20925-20926, Ljubiša Diković, 10 Dec 2007, T. 19881.

²³⁶⁴ Trial Judgement, vol. 1, paras 1005, 1030, referring to Momir Stojanović, 7 Dec 2007, T. 19761-19762, 19765.

²³⁶⁵ Trial Judgement, vol. 1, paras 1025, 1028, referring to Milan Đaković, 19 May 2008, T. 26411, *ibid.*, 20 May 2008, T. 26444-26445, 26453.

their actions in 1998.²³⁶⁶ This evidence does not contradict the evidence regarding the difficulty in the coordination. Šainović merely attempts to replace the Trial Chamber's interpretation of the evidence with his own, without showing any error. In these circumstances, Šainović's contention that the Trial Chamber failed to demonstrate why the Joint Command was necessary or why the involvement of civilian representatives was required in the coordination process is also unfounded. Consequently, Šainović has not shown that the Trial Chamber erred in relying on Dimitrijević's evidence to show that the Joint Command was created out of the need to find effective mechanisms for ensuring better coordination between the VJ and the MUP.²³⁶⁷

705. Šainović's challenges to the Trial Chamber's finding that the Joint Command "allowed Slobodan Milošević, through Pavković, to direct the actions of the MUP in Kosovo in a situation of questionable legality, and for these actions of the MUP to enjoy the support of the VJ",²³⁶⁸ are also without merit. In addition to the evidence concerning the need to establish coordination between the VJ and the MUP,²³⁶⁹ the Trial Chamber considered documentary evidence and witness testimony showing that, in 1998 and early 1999, "there were powerful voices within the VJ" – mainly Perišić and Dimitrijević – expressing concerns about the lawfulness or propriety of the deployment of VJ forces in Kosovo beyond the border area without a declaration of a state of emergency or the equivalent.²³⁷⁰ Furthermore, the Appeals Chamber notes that Perišić pointed out, in his letter to Milošević dated 23 July 1998, problems relating to the unprofessional use of VJ units, caused by members of the MUP who sought to use and subordinate VJ units to them, and actually did so in certain operations.²³⁷¹ In addition, the Trial Chamber considered evidence of instances in which the regular VJ chain of command had been circumvented,²³⁷² demonstrating that contrary to Šainović's claim, the disagreement within the VJ had not been resolved by way of the issuance of orders through the usual chain of command. The Trial Chamber further took into account the evidence that around the same time Pavković had been "one of the main proponents of the increased utilisation of

²³⁶⁶ See, in particular, Trial Judgement, vol. 1, paras 1025-1032.

²³⁶⁷ Trial Judgement, vol. 1, para. 1006.

²³⁶⁸ Trial Judgement, vol. 1, para. 1111.

²³⁶⁹ See *supra*, paras 703-704.

²³⁷⁰ Trial Judgement, vol. 1, paras 572-579. See also *ibid.*, vol. 1, para. 1088; *ibid.*, vol. 3, paras 80-81, 319, 494, 648-654, 664. See also *infra*, sub-section VII.E.2.(c)(ii).

²³⁷¹ Exh. P717, pp. 1-2 (item 1.a and item 3.a). Although the Trial Chamber does not make a particular reference to this portion of Perišić's letter in the Trial Judgement, the Appeals Chamber considers that the Trial Chamber was aware of and relied upon it, in light of the Trial Chamber's repeated references to other portions of the letter and its finding that "certain members of the VJ [...] complained of the behaviour of the MUP in Kosovo and its failure to co-ordinate with and resubordinate itself to the VJ" (Trial Judgement, vol. 1, para. 1111). See also *infra*, fn. 2424. Regarding disputes over the re-subordination of the MUP to the VJ, which continued even after the declaration of a state of war in March 1999, see also *ibid.*, vol. 1, paras 1166, 1170-1189, 1202. In particular, as to the dissatisfaction of VJ members with the MUP's unwillingness to be resubordinated to the VJ, see *ibid.*, vol. 1, paras 1166, 1179, 1181-1184, and evidence cited therein, including the testimony of various witnesses who were VJ officers.

²³⁷² See *infra*, sub-sections VII.C.2.(c)(v) and VII.C.2.(c)(vi).

the VJ in the interior of Kosovo”, *i.e.* beyond the border area,²³⁷³ Dimitrijević’s testimony that Pavković had become a “favourite of the President”,²³⁷⁴ and Perišić’s letter complaining that Pavković had turned into “something like a service” for Šainović, Minić, and the MUP by planning operations at their request.²³⁷⁵ In arguing that no evidence indicates that Milošević needed Pavković and the Joint Command, Šainović disregards this evidence and presents his own interpretation of evidence, without showing any error on the part of the Trial Chamber.

706. The Appeals Chamber is not persuaded by Šainović’s contention that the Trial Chamber erred in not determining the legality of the use of the VJ beyond the border area without a declaration of a state of emergency or the equivalent. Irrespective of the legality of the deployment of the VJ in the interior of Kosovo, the Trial Chamber was entitled to find that the objections raised by some senior VJ members to this use of the VJ prompted Milošević to explore other means of exercising his power, namely through the Joint Command.

707. Consequently, Šainović has not shown any error in the Trial Chamber’s findings as to the reason for the creation of the Joint Command.²³⁷⁶ The Appeals Chamber dismisses his arguments in this regard.²³⁷⁷

(e) The Joint Command and the Working Group

708. The Trial Chamber found that Šainović and the members of the Working Group, namely, Milomir Minić, Duško Matković, and Zoran Anđelković were sent to Kosovo²³⁷⁸ and met almost daily with MUP and VJ officers in Priština/Prishtina between 22 July and 30 October 1998.²³⁷⁹ It also found that these meetings were referred to as meetings of the “Joint Command”, which was an

²³⁷³ Trial Judgement, vol. 3, para. 665.

²³⁷⁴ Trial Judgement, vol. 3, para. 644, also finding Dimitrijević to be “generally reliable”.

²³⁷⁵ Trial Judgement, vol. 3, para. 653, citing Exh. P717. See also Trial Judgement, vol. 1, para. 1088; *ibid.*, vol. 3, para. 654.

²³⁷⁶ Šainović also challenges the Trial Chamber’s findings that the Joint Command “was part of a co-ordination system put in place as early as May 1998 by which the VJ and the MUP were able to work together in Kosovo” and that the Joint Command “allowed the commanders of the MUP to ‘save face’ by not having to be commanded by the VJ” (Trial Judgement, vol. 1, para. 1111), arguing that these findings were mere speculation (Šainović’s Appeal Brief, para. 112). His assertion disregards the Trial Chamber’s analysis of the evidence and fails to show an error by the Trial Chamber. As to the date of the formation of the Joint Command (Šainović’s Appeal Brief, para. 112), Šainović also misrepresents the Trial Judgement (see Trial Judgement, vol. 1, para. 1109). Lukić’s submission that the Trial Chamber erroneously found that the Joint Command allowed the MUP commanders to “save face” (Lukić’s Appeal Brief, para. 300; *contra* Prosecution’s Response Brief (Lukić), para. 264. See also Trial Judgement, vol. 1, paras 998, 1071) is undeveloped and thus dismissed.

²³⁷⁷ Šainović’s grounds 1(4), 1(8) in part, 6(12). For the reasons set out above (see *supra*, fn. 2376), Lukić’s argument in this regard is also dismissed (Lukić’s ground N(1) in part).

²³⁷⁸ Trial Judgement, vol. 1, paras 302, 304, 1007-1008; *ibid.*, vol. 3, paras 292, 306.

²³⁷⁹ Trial Judgement, vol. 1, paras 1055-1056, 1059, 1078; *ibid.*, vol. 3, para. 306.

entity “created by means of the *de facto* power of [Milošević] around June 1998 and in response to the need for greater co-ordination between the MUP and VJ forces in Kosovo.”²³⁸⁰

(i) Submissions of the parties

709. Šainović argues that the Trial Chamber’s findings as to the formation, position, and envisaged role of the Working Group are incompatible with its conclusions on the Joint Command, including that the Joint Command was composed of, *inter alia*, representatives of the political structures of the FRY and Serbia and was established by Milošević’s decision in order to respond to the need for greater coordination of the VJ and the MUP.²³⁸¹ According to Šainović, the Trial Chamber found that the Working Group was established to represent the Joint Command or form some part of it. He contends that this finding is erroneous as the Working Group was a separate entity with separate authority and that there was no decision to establish a joint command at the same time as the Working Group.²³⁸² Šainović also maintains that a joint meeting of people occupying different roles in different bodies (in this case, members of the Working Group and Šainović as a representative of the FRY government) does not in itself indicate that they formed a third body, the Joint Command.²³⁸³ He avers that the joint meetings were no more than a mutual exchange of information required to perform the tasks that were entrusted to them.²³⁸⁴

710. The Prosecution responds that the Trial Chamber’s findings concerning the position and role of the Working Group are not incompatible with its conclusions regarding the Joint Command.²³⁸⁵ It avers that the duties of the members of the Working Group did not prevent them from attending Joint Command meetings and that the evidence shows they did so.²³⁸⁶

(ii) Analysis

711. The Trial Chamber found that the Working Group consisted of three civilian SPS members, namely, Milomir Minić, Duško Matković, and Zoran Anđelković, and was established by the SPS Main Board on 10 June 1998 to coordinate political activities in Kosovo and to stabilise the situation there.²³⁸⁷ The Trial Chamber found that the Joint Command was composed of individuals

²³⁸⁰ Trial Judgement, vol. 1, paras 1055, 1078, 1109. See also *ibid.*, vol. 3, para. 306.

²³⁸¹ Šainović’s Appeal Brief, paras 78-81, 84, referring to Trial Judgement, vol. 1, paras 302-307, *ibid.*, vol. 3, paras 292, 299, 302-311.

²³⁸² Šainović’s Appeal Brief, para. 81. In this regard, Šainović contends that had there been a decision to establish a joint command at the same time as the Working Group, and had Milošević intended to send Šainović to Kosovo as his representative, Milošević would not have withheld such information from the highest body of the SPS, whose undivided support he enjoyed (Šainović’s Appeal Brief, para. 81, referring to Trial Judgement, vol. 3, paras 292, 299).

²³⁸³ Šainović’s Reply Brief, para. 20.

²³⁸⁴ Šainović’s Reply Brief, para. 20.

²³⁸⁵ Prosecution’s Response Brief (Šainović), para. 76.

²³⁸⁶ Prosecution’s Response Brief (Šainović), para. 76, referring to Trial Judgement, vol. 1, paras 302-311, Exh. P1468.

²³⁸⁷ Trial Judgement, vol. 1, paras 302, 304, 1007.

from the political structures of the FRY and Serbia, the military and the police and had been “created by means of the *de facto* power of the FRY President Slobodan Milošević around June 1998 [...] in response to the need for greater co-ordination between the MUP and VJ forces in Kosovo.”²³⁸⁸ The Appeals Chamber does not discern any incompatibility in these findings.

712. Contrary to Šainović’s contention, the Trial Chamber did not find that the Working Group had been established to represent the Joint Command or some part of it. In finding that the Joint Command had been established, the Trial Chamber considered not only evidence that members of the Working Group and Šainović sat together at daily meetings with VJ and MUP representatives, but also other evidence.²³⁸⁹ Based on the evidence in its entirety, the Trial Chamber concluded that the Joint Command was an entity “created by means of the *de facto* power of the FRY President Slobodan Milošević around June 1998” and held daily meetings at which the members of the Working Group, Šainović, and VJ and MUP representatives would assemble.²³⁹⁰ Šainović’s arguments on the relations between the Working Group and the Joint Command misrepresent the Trial Chamber’s findings, ignore its other relevant factual findings and analysis of the evidence, and do not show any error on the part of the Trial Chamber. Accordingly, the Appeals Chamber dismisses his arguments in this regard.²³⁹¹

2. Authority of the Joint Command in 1998

(a) Introduction

713. In determining the authority of the Joint Command over the VJ and the MUP in 1998, the Trial Chamber held that the Joint Command meetings “were more than a daily flow of information, as there is no doubt that on occasions participating politicians stated what was to be done by the VJ and MUP”.²³⁹² The Trial Chamber also found “that decisions regarding how and when the Plan [for Combating Terrorism] was to be implemented were discussed at the Joint Command meetings, and that, at times, Minić and Šainović [...] stipulated that certain things be done.”²³⁹³ The Trial

²³⁸⁸ Trial Judgement, vol. 1, para. 1109.

²³⁸⁹ For instance, the Trial Chamber considered evidence showing the lead-up to the daily meetings and how the meetings were conducted and referred to. See, *inter alia*, Trial Judgement, vol. 1, paras 992-1011, 1025-1032, 1055-1108. The Trial Chamber’s assessment of various pieces of evidence is discussed above. See *supra*, sub-section VII.C.1.(c).

²³⁹⁰ Trial Judgement, vol. 1, paras 1055, 1078, 1108-1109. Šainović’s assertion that Milošević would not have withheld from members of the SPS Main Board the information on a decision to create a joint command and his intention to send Šainović to Kosovo had there been such a decision (Šainović’s Appeal Brief, para. 81) is also unfounded. It was unknown to the Trial Chamber whether Milošević withheld such information from members of the SPS Main Board. The Trial Chamber thus made no finding in this regard. The portions of the Trial Judgement cited by Šainović do not contain such a finding (Trial Judgement, vol. 3, paras 292, 299).

²³⁹¹ Šainović’s sub-ground 1(7) in part.

²³⁹² Trial Judgement, vol. 1, para. 1079.

²³⁹³ Trial Judgement, vol. 1, para. 1110.

Chamber further found that “based on discussions that had been held during Joint Command meetings”, Pavković, as the Priština Corps Commander, “several times submitted requests to” his immediate superior, Dušan Samardžić, the 3rd Army Commander.²³⁹⁴

714. The Trial Chamber also noted that “a significant amount of evidence suggest[ed] that the formal command structures, as well as the reporting system, of the VJ and the MUP remained intact during the period of operation of the Joint Command.”²³⁹⁵ In particular, the Trial Chamber found that, within the VJ, the Priština Corps, which was responsible for the Kosovo region, was subordinate to the 3rd Army,²³⁹⁶ which, in turn, was subordinate to the highest VJ organ, the General Staff.²³⁹⁷ The Trial Chamber held that “the VJ command structure continued to operate during the operations conducted in 1998 and that regular combat reports were sent from subordinate units to the Priština Corps, and not the Joint Command.”²³⁹⁸ In this context, the Trial Chamber also took into account evidence suggesting that the proposals discussed at the Joint Command meetings were contingent upon prior approval from VJ organs and that requests made during the meetings were to be authorised by the VJ afterwards.²³⁹⁹

715. The Trial Chamber nonetheless identified instances that showed the tension between the Joint Command and the 3rd Army Command²⁴⁰⁰ and found that the regular VJ chain of command was sometimes circumvented or ignored by Pavković and the Joint Command.²⁴⁰¹

716. The Trial Chamber also examined the Joint Command’s role in joint operations of the VJ and the MUP in 1998²⁴⁰² and concluded:

The entity referred to as the Joint Command played a role in the co-ordination and exchange of information and intelligence between the MUP and the VJ in the latter half of 1998. Decisions and orders for joint operations were implemented through the existing chains of command; and, both directly or indirectly [*sic*], the Joint Command had influence over the MUP and VJ in respect of the implementation of the various stages of the Plan for Combating Terrorism. Even if some members of the Joint Command may not have had the *de jure* authority to issue orders directly to either MUP or VJ units, *the individual members of the Joint Command* brought their influence to bear on how the Plan was put into effect, utilising the established systems of command and control within the VJ and MUP.²⁴⁰³

²³⁹⁴ Trial Judgement, vol. 1, para. 1110. As for such requests, see, in particular, *ibid.*, vol. 1, paras 1080-1086. With regard to Samardžić’s position, see *ibid.*, vol. 1, para. 583.

²³⁹⁵ Trial Judgement, vol. 1, para. 1081, referring to Exh. 4D91, Exh. P1419, Ljubinko Cvetić, 8 Dec 2006, T. 8123, Miodrag Simić, 14 Sep 2007, T. 15687.

²³⁹⁶ Trial Judgement, vol. 1, paras 482, 584.

²³⁹⁷ Trial Judgement, vol. 1, paras 417-418, 468, 482.

²³⁹⁸ Trial Judgement, vol. 1, para. 1095.

²³⁹⁹ Trial Judgement, vol. 1, paras 1067, 1080-1084, 1087, and references therein.

²⁴⁰⁰ Trial Judgement, vol. 1, paras 1085-1086, 1088. See also *ibid.*, vol. 1, para. 1082; *ibid.*, vol. 3, para. 659.

²⁴⁰¹ Trial Judgement, vol. 1, para. 1086.

²⁴⁰² See, for instance, Trial Judgement, vol. 1, para. 1092.

²⁴⁰³ Trial Judgement, vol. 1, para. 1110 (emphasis in original). The Trial Chamber also held that in 1998 the Joint Command “had significant influence over the actions of MUP and VJ forces” (*ibid.*, vol. 3, para. 300), and “played a

717. Furthermore, the Trial Chamber found that the Joint Command “allowed Slobodan Milošević, through Pavković, to direct the actions of the MUP in Kosovo in a situation of questionable legality, and for these actions of the MUP to enjoy the support of the VJ [...] because certain members of the VJ disagreed with the deployment of the army within Kosovo, save to guard the border, and complained of the behaviour of the MUP in Kosovo and its failure to co-ordinate with and resubordinate itself to the VJ.”²⁴⁰⁴

(b) Preliminary matters

(i) Submissions of the parties

718. Šainović and Lukić submit that the Trial Chamber erred in finding that the Joint Command had influence over the MUP and the VJ in respect of the implementation of the various stages of the Plan for Combating Terrorism.²⁴⁰⁵ They argue that the meetings of the Joint Command recorded in Đaković’s Notes were of an informative nature and did not have the character of a body with a command or coordination role.²⁴⁰⁶ Pavković also avers that the Joint Command was “no command”.²⁴⁰⁷ In addition, Šainović argues that, although the Trial Chamber found that the “Joint Command played a role in the co-ordination [...] between the MUP and the VJ”, it failed to qualify the nature of this role in the coordination.²⁴⁰⁸

719. Šainović further maintains that the Trial Chamber failed to examine whether statements made at the meetings had any influence on the events that unfolded in the field²⁴⁰⁹ and that units of the Priština Corps were never deployed in the absence of an order from the Commander of the 3rd Army.²⁴¹⁰ Similarly, Pavković argues that, in 1998, neither he nor the Joint Command could engage in activities without Samardžić’s approval, since Samardžić, the Commander of the 3rd Army, controlled the activities of the VJ in Kosovo at the time.²⁴¹¹ In this regard, Pavković

significant role in directing and co-ordinating the activities of the VJ and the MUP in Kosovo” (*ibid.*, vol. 3, para. 1023).

²⁴⁰⁴ Trial Judgement, vol. 1, para. 1111.

²⁴⁰⁵ Šainović’s Appeal Brief, paras 87, 107-109; Lukić’s Appeal Brief, paras 292, 301, referring, *inter alia*, to Trial Judgement, vol. 1, para. 1110. Šainović also challenges the Trial Chamber’s finding that members of the Joint Command brought their influence to bear on the implementation of the Plan for Combating Terrorism, using established systems of command and control within the VJ and the MUP (Šainović’s Appeal Brief, para. 108).

²⁴⁰⁶ Šainović’s Appeal Brief, para. 88; Lukić’s Appeal Brief, paras 276, 292, 304-307, 308(5)(6), referring, *inter alia*, to Trial Judgement, vol. 1, paras 889, 905, 1003. Lukić also challenges the Trial Chamber’s use of the term “Joint Command”, arguing that it gives a false impression that there existed a body that *commanded* both the army and the police units (Lukić’s Appeal Brief, para. 274, referring to Trial Judgement, vol. 1, para. 909).

²⁴⁰⁷ Pavković’s Appeal Brief, para. 118.

²⁴⁰⁸ Šainović’s Appeal Brief, para. 109, referring to Trial Judgement, vol. 1, para. 1110.

²⁴⁰⁹ Šainović’s Appeal Brief, paras 88, 92, 95.

²⁴¹⁰ Šainović’s Appeal Brief, para. 108.

²⁴¹¹ Pavković’s Appeal Brief, paras 92, 114-115. See also *ibid.*, para. 136.

asserts that the VJ chain of command was fully functioning.²⁴¹² Likewise, Lukić refers to the Trial Chamber's finding that the command structures and reporting systems of the VJ and the MUP remained intact during the operation of the Joint Command in 1998.²⁴¹³

720. The Prosecution responds that the Trial Chamber's findings on the authority of the Joint Command over the VJ and the MUP in 1998 were reasonable²⁴¹⁴ and that most of the arguments raised by Šainović and Lukić warrant summary dismissal for various reasons, including misrepresentation of the Trial Chamber's findings.²⁴¹⁵

(ii) Analysis

721. At the outset, the Appeals Chamber observes that insofar as Šainović, Pavković, and Lukić understand the Trial Chamber to have found or implied that the Joint Command had the power of command, they misconstrue its finding.²⁴¹⁶ The Trial Chamber concluded that both directly and indirectly “the Joint Command had *influence* over the MUP and VJ in respect of the implementation of the various stages of the Plan for Combating Terrorism”, although “[d]ecisions and orders for joint operations were implemented through the existing chains of command”.²⁴¹⁷ The Trial Chamber found that the Joint Command exercised influence by “play[ing] a role in the *co-ordination* and exchange of information and intelligence between the MUP and the VJ”, not by replacing the established systems of command and control within these two forces.²⁴¹⁸ According to the Trial Chamber, such systems were used by individual members of the Joint Command to exert their influence on the implementation of the Plan.²⁴¹⁹ Therefore, to the extent that Šainović, Pavković, and Lukić submit that the Trial Chamber found that the Joint Command had the power of command, their arguments misrepresent the Trial Chamber's findings and are thus dismissed.

722. The Trial Chamber noted the fact that the command structures and reporting systems of the VJ and the MUP remained intact in 1998,²⁴²⁰ but considered that this did not undermine the conclusion that the Joint Command had influence over the VJ and the MUP.²⁴²¹ By merely

²⁴¹² Pavković's Appeal Brief, para. 119.

²⁴¹³ Lukić's Appeal Brief, paras 287, 292, 308(4), referring to Trial Judgement, vol. 1. paras 1081, 1091, 1093, 1095-1096.

²⁴¹⁴ Prosecution's Response Brief (Šainović), para. 78, referring to Trial Judgement, vol. 1, paras 1055-1111.

²⁴¹⁵ Prosecution's Response Brief (Šainović), para. 78; Prosecution's Response Brief (Lukić), paras 240, 243, 249-252.

²⁴¹⁶ Contrary to Lukić's argument (Lukić's Appeal Brief, para. 274), the Trial Chamber's use of the term “Joint Command” reflects the evidence showing that such term was used (*e.g.*, Trial Judgement, vol. 1, paras 1057-1058, 1071, 1076-1077, 1098-1099) and does not constitute any error regardless of the impression that the term may convey.

²⁴¹⁷ Trial Judgement, vol. 1, para. 1110 (emphasis added).

²⁴¹⁸ Trial Judgement, vol. 1, para. 1110 (emphasis added).

²⁴¹⁹ Trial Judgement, vol. 1, para. 1110.

²⁴²⁰ Trial Judgement, vol. 1, paras 1081, 1095.

²⁴²¹ See Trial Judgement, vol. 1, para. 1110.

reiterating the Trial Chamber's finding that VJ and MUP command structures remained intact,²⁴²² Lukić has not shown any error. His argument in this regard is therefore dismissed.

723. Furthermore, the Appeals Chamber considers that the Trial Chamber carefully assessed the coordination role of the Joint Command and found, *inter alia*, that: (i) it "was part of a coordination system put in place as early as May 1998 by which the VJ and the MUP were able to work together in Kosovo"; and (ii) "[i]t allowed the commanders of the MUP to 'save face' by not having to be commanded by the VJ".²⁴²³ Šainović's contention that the Trial Chamber failed to "qualify" the nature of the coordination role played by the Joint Command therefore ignores these findings and misrepresents the Trial Judgement. Accordingly, his argument in this regard is dismissed.

724. Šainović, Pavkovkić, and Lukić also raise a number of challenges concerning the influence of the Joint Command over the VJ and the MUP as well as its role in coordinating these forces, and contest the Trial Chamber's assessment of various pieces of evidence in this regard. The Appeals Chamber will examine these specific challenges in turn.²⁴²⁴

(c) Alleged errors in the assessment of evidence

(i) Meetings of the Joint Command

a. Submissions of the parties

725. Šainović argues that, based on Đaković's Notes, the Trial Chamber erroneously found that the meetings it designated as "Joint Command meetings" were "more than a daily flow of information", without further defining the nature of these meetings, their content, and "their relevance with respect to the events that unfolded in the field".²⁴²⁵ He also submits that Đaković's Notes as well as the testimony of those present show that no decision was adopted at any of these

²⁴²² Lukić's Appeal Brief, para. 292. See also *ibid.*, para. 287.

²⁴²³ Trial Judgement, vol. 1, para. 1111. See also, *inter alia*, *ibid.*, vol. 1, paras 1079-1107.

²⁴²⁴ In the context of determining the authority of the Joint Command, the Trial Chamber considered Perišić's letter to Milošević dated 23 July 1998, in which Perišić expressed his concern "regarding the use of VJ units outside the regular institutions of the system, the attempted command by unauthorised persons, [...] the by-passing of levels of command", and "the fact that the Commander of the Priština Corps planned operations 'at the request of Šainović and Minić and the MUP'". As corroboration, the Trial Chamber also referred to the testimony of Crosland as to what he heard from Dimitrijević in the autumn of 1998 (Trial Judgement, vol. 1, para. 1088, referring to Exh. P717, pp. 1-3, John Crosland, Exh. P2645, paras 54, 56, 58). While Šainović argues that Perišić mentions in his letter only an *attempt* by unauthorised persons "to make an impact on the VJ chain of command" and that the Trial Chamber should have relied upon Dimitrijević's testimony rather than Crosland's evidence and a corresponding telegram of 3 October 1998 with regard to such an impact (Šainović's Appeal Brief, paras 97-99, 107; Šainović's Reply Brief, para. 21; *contra* Prosecution's Response Brief (Šainović), para. 85), these arguments are dismissed for the reasons set out elsewhere in detail (see *infra*, sub-section VII.D.2.(b)(iii)).

²⁴²⁵ Šainović's Appeal Brief, para. 88, referring to Trial Judgement, vol. 1, para. 1079.

meetings. In his view, this shows that these meetings were merely “of an informative nature” with the “character of a platform for discussions and not a command or co-ordination body.”²⁴²⁶

726. Lukić submits that, contrary to the Trial Chamber’s finding, the meetings of the Joint Command had no “significant influence”, because no decisions were taken and the information exchanged during these meetings concerned events that had already occurred.²⁴²⁷ He maintains that Đaković’s Notes record suggestions, and not orders, made in the meetings.²⁴²⁸ He also contends that the Trial Chamber erred in not relying upon Đaković’s explanation that the purpose of the meetings was primarily to exchange information.²⁴²⁹ According to Lukić, the Trial Chamber’s finding that politicians participating in these meetings stated what was to be done by the VJ and the MUP contradicts its conclusion that the proposals or requests made at Joint Command meetings were contingent upon prior approval or subsequent authorisation by VJ organs.²⁴³⁰

727. The Prosecution responds that Đaković’s Notes show more than a “flow of information” at Joint Command meetings as well as Šainović’s leading role therein.²⁴³¹ The Prosecution further responds that Lukić ignores the Trial Chamber’s relevant findings regarding the meetings of the Joint Command and that his contention that no formal orders were issued during the Joint Command meetings is irrelevant.²⁴³²

b. Analysis

728. The Appeals Chamber is of the view that, in its assessment of the authority of the Joint Command, the Trial Chamber duly considered the testimony of participants in the Joint Command meetings. The Trial Chamber noted that all the members of the Working Group, namely, Duško Matković, Zoran Anđelković, and Milomir Minić, maintained that the meetings were of an informational nature and that no decisions were made therein.²⁴³³ It also considered Milan Đaković’s testimony that the meetings were “primarily for the exchange of information, with a view

²⁴²⁶ Šainović’s Appeal Brief, paras 88-89. See also *ibid.*, para. 110, referring to Trial Judgement, vol. 1, para. 1110.

²⁴²⁷ Lukić’s Appeal Brief, paras 276-277, 286-287, 308(5)(6), referring, *inter alia*, to Trial Judgement, vol. 1, paras 889, 905, 1003. See also Lukić’s Appeal Brief, para. 592, referring to Trial Judgement, vol. 3, para. 1023.

²⁴²⁸ Lukić’s Appeal Brief, paras 286, 289, also arguing that, had these meetings constituted a command, Đaković, being a soldier, would have recognised this and recorded orders and any other matters which would indicate that this entity had a command feature. Lukić’s challenges concerning the reliability of Đaković’s Notes are addressed in *supra*, subsection VII.C.1.(b)(i).

²⁴²⁹ Lukić’s Appeal Brief, paras 285, 288, also arguing that Đaković’s explanation is corroborated by the testimony of Adamović and Mijatović. See also Lukić’s Reply Brief, para. 79.

²⁴³⁰ Lukić’s Appeal Brief, paras 286-287, referring to Trial Judgement, vol. 1, paras 1080-1081, 1087.

²⁴³¹ Prosecution’s Response Brief (Šainović), para. 79, referring to Exh. P1468, pp. 136-137, 141-142, 145, 148-149, 153-154, 156-157, 160-161, 164.

²⁴³² Prosecution’s Response Brief (Lukić), para. 252, referring to Trial Judgement, vol. 1, paras 1079, 1110.

²⁴³³ Trial Judgement, vol. 1, para. 1065, referring, *inter alia*, to Duško Matković, 29 Aug 2007, T. 14588, *ibid.*, 30 Aug 2007, T. 14644-14645, Duško Matković, Exh. P2913, pp. 10-12, Zoran Anđelković, 30 Aug 2007, T. 14687-14690, Milomir Minić, 31 Aug 2007, T. 14749-14752.

to co-ordinating activities of the MUP and the VJ” and that his Notes did not contain any reference to decisions or orders adopted by the Joint Command.²⁴³⁴

729. However, rather than relying on such testimony,²⁴³⁵ the Trial Chamber examined Đaković’s Notes, which recorded the Joint Command meetings and, based on their content as a whole, concluded “that the Joint Command meetings were more than a daily flow of information, as there is no doubt that on occasions participating politicians stated what was to be done by the VJ and MUP.”²⁴³⁶ The Trial Chamber also found that Đaković’s Notes demonstrated “that decisions regarding how and when the Plan [for Combating Terrorism] was to be implemented were discussed at the Joint Command meetings, and that, at times, Minić and Šainović played leading roles in these discussions and actually stipulated that certain things be done.”²⁴³⁷ While both Šainović and Lukić argue that Đaković’s Notes do not contain any record of orders, decisions or conclusions being adopted, the Appeals Chamber observes that they in fact describe “participating politicians” stating “what was to be done by the VJ and MUP”, after having heard oral reports presented by participants in the meetings.²⁴³⁸ Neither Šainović nor Lukić specifically points to any error in the Trial Chamber’s interpretation of Đaković’s Notes in this regard; they merely request that the Appeals Chamber interpret them differently.²⁴³⁹ As a result, Šainović and Lukić have not shown that the Trial Chamber erred in relying on Đaković’s Notes rather than witness testimony in relation to the nature of the Joint Command meetings.²⁴⁴⁰

730. The Trial Chamber also examined the effect of what was discussed in the Joint Command meetings on the events in the field, in light of Đaković’s Notes and other evidence, which showed that the stages of the Plan for Combating Terrorism and joint operations were discussed in Joint

²⁴³⁴ Trial Judgement, vol. 1, para. 1067, referring, *inter alia*, to Milan Đaković, 19 May 2008, T. 26375, 26379-26380, 26383.

²⁴³⁵ The Appeals Chamber also notes that, while the Trial Chamber was fully aware of the testimony of a number of VJ officers denying any authority of the Joint Command and its effect upon the singleness of command within the VJ, it was unconvinced by their position and considered they were being less than candid on this particular point (Trial Judgement, vol. 1, para. 1073, fn. 2894).

²⁴³⁶ Trial Judgement, vol. 1, para. 1079.

²⁴³⁷ Trial Judgement, vol. 1, para. 1110. See also *ibid.*, vol. 1, para. 1059. In these findings, the Trial Chamber depicts the nature of the meetings as the evidence suggests. Šainović’s assertion that the Trial Chamber failed to define the nature of the meetings misrepresents the Trial Judgement.

²⁴³⁸ Trial Judgement, vol. 1, para. 1079. See Exh. P1468, in particular, pp. 4, 8, 20, 23, 28, 33, 40, 43, 45, 47-48, 50-51, 55-56, 64, 76, 83, 85, 94-95, 97, 102, 110, 112, 115, 117, 123-124, 128-132, 135-137, 141-142, 145, 148, 153-154, 156, 160-161, 164.

²⁴³⁹ The Appeals Chamber also notes that while Šainović challenges the Trial Chamber’s interpretations of his own remarks recorded in Đaković’s Notes, he concedes that Đaković’s Notes indicate that Minić, one of the “participating politicians”, was making concluding remarks in the meetings, stating what to be done (Šainović’s Appeal Brief, para. 174, referring, *inter alia*, to Exh. P1468, pp. 5, 8, 20, 163).

²⁴⁴⁰ The Trial Chamber’s finding is further supported by the minutes of a briefing to the 3rd Army Commander on 21 August 1998, admitted as additional evidence on appeal, recording Đaković as reporting that the Joint Command had “adopted a decision tasking MUP units with” disarming the Albanian villages (Exh. 4DA22, p. 1).

Command meetings and were indeed carried out.²⁴⁴¹ Some operations discussed or decided in Joint Command meetings were even carried out prior to the issuance of orders or approval by the General Staff or the 3rd Army Command.²⁴⁴² The Trial Chamber was also furnished with the minutes of the meeting at Beli Dvor in Belgrade on 29 October 1998, which recorded that the participants reviewed actions implementing the Plan in the name of the Joint Command and that Pavković orally reported “on behalf of the Joint Command” as to the implementation of the Plan.²⁴⁴³ Šainović’s contention that the Trial Chamber failed to address the relevance of the Joint Command meetings with respect to the events on the ground disregards the Trial Chamber’s analysis of the evidence in this regard.

731. Moreover, the Trial Chamber took into account evidence, including Đaković’s testimony, suggesting that the proposals discussed at the Joint Command meetings were contingent upon prior approval from VJ organs and that requests made during the meetings were to be authorised by the VJ afterwards.²⁴⁴⁴ Contrary to Lukić’s assertion, this does not contradict the Trial Chamber’s observation that in the Joint Command meetings “participating politicians stated what was to be done by the VJ and MUP.”²⁴⁴⁵ Significantly, the Trial Chamber found that although “the VJ command structure continued to operate” in 1998,²⁴⁴⁶ the Joint Command played a role in the

²⁴⁴¹ *E.g.* Trial Judgement, vol. 1, para. 806, referring to Exh. P1468, pp. 10, 13, 15, 17, 24, 35, 41, 71, 130, 161. Đaković’s Notes considered by the Trial Chamber show that participants discussed the preparation for the realisation of the second, third, fourth, and fifth stages of the Plan for Combating Terrorism in the Joint Command meetings (see Exh. 1468, pp 24, 29, 33, 35, 44-45, 71-72, 76; Trial Judgement, vol. 1, paras 888, 891, 1086, and references therein). With regard to specific operations, see, in particular, the following examples: (i) the operations in Prizren in late July 1998 (see Exh. P1468, pp. 4, 12, 15, 25); (ii) the operations in Dulje/Duhël in late July 1998 (see Trial Judgement, vol. 1, paras 871-872, and references therein; Exh. P1468, pp. 11, 13, 17-18, 23, 25-26, 31); (iii) the operations in Peć/Peja between July and September 1998 (see Trial Judgement, vol. 1, paras 879-881, and references therein; Exh. P1468, pp. 4, 6-7, 15); (iv) the operations in and around Junik between July and September (see Trial Judgement, vol. 1, paras 874-881, and references therein, including Exh. P1468, p. 49; Exh. P1468, pp. 16, 19-20, 22, 25, 26, 31, 43, 59); (v) the operations in Drenica area, including Rudnik, in late July to early August 1998 (see Trial Judgement, vol. 1, paras 887-894, 1086, and references therein, including Exh. 1468, pp. 21, 25-26, 30, 33, 36; Exh. P1468, pp. 16-17, 29); (vi) operations in Bajgora/Bajgorë in mid-September 1998 (see Exh. P1468, pp. 93, 105-106, 109, 115-116, 118); (vii) operations in Čičevica/Çiçavicë in late-September 1998 (see Exh. P1468, pp. 85, 93, 121, 123, 125); (viii) the “Jezerce” operation at the end of September 1998 (see Exh. P1468, pp. 128-129); and (ix) the operations in Gornje Obrinje/Abria e Epërme at the end of September 1998 (see Trial Judgement, vol. 1, paras 899-912, and references therein, including Exh. P1468, pp. 128-129, 134; Trial Judgement, vol. 3, para. 1081, and references therein, including Exh. P1468, pp. 129, 136 read with IC199, p. 7).

²⁴⁴² Operations in Dulje/Duhël, Štimlje/Shtima, and Blace/Blaca in late July 1998 (Trial Judgement, vol. 1, paras 871-872; *ibid.*, vol. 3, paras 655-656, referring, *inter alia*, to Exh. P1468, p. 13, Exh. P922, pp. 3, 12-13, Exh. 4D137, Exh. 4D140; *infra*, sub-section VII.E.2.(c)(i)b.i.); operations in Drenica and Jablanica/Jabllanica in late July to early August 1998 (Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 658, referring, *inter alia*, to Exh. P1468, pp. 33, 36, Exh. 4D125, Exh. P1419, Exh. 4D311 (cited erroneously as Exh. 4D458); *infra*, sub-section VII.C.2.(c)(vi)).

²⁴⁴³ Trial Judgement, vol. 1, paras 1003, 1097-1099, 1107, referring, *inter alia*, to Exh. P2166, pp. 1-7. See also Trial Judgement, vol. 1, para. 1106, referring to Exh. P1011, p. 72, corroborating this portion of Exh. P2166. The Appeals Chamber has rejected Šainović’s argument on the reliability of the minutes (see *supra*, sub-section VII.C.1.(b)(ii)).

²⁴⁴⁴ Trial Judgement, vol. 1, paras 1067, 1080-1084, 1087, and references therein. Insofar as Lukić understands this description of the evidence by the Trial Chamber as its “finding” (Lukić’s Appeal Brief, para. 286), he misrepresents the Trial Judgement.

²⁴⁴⁵ Trial Judgement, vol. 1, para. 1079.

²⁴⁴⁶ Trial Judgement, vol. 1, para. 1095. See also the evidence cited in *e.g.*, *ibid.*, vol. 1, paras 1067, 1080-1084, 1087, 1091-1094.

coordination between the VJ and the MUP in joint operations and members of the Joint Command exerted their influence by “utilising the established systems of command and control within the VJ and MUP.”²⁴⁴⁷ Lukić’s argument ignores the Trial Chamber’s findings, and he has failed to demonstrate any error in this regard.

732. For the foregoing reasons, the arguments of Šainović and Lukić concerning the Trial Chamber’s assessment of evidence pertaining to Joint Command meetings are dismissed.

(ii) Samardžić’s order of 30 July 1998 and the role of the 3rd Army Forward Command Post

733. In assessing the authority of the Joint Command in 1998, the Trial Chamber referred to the order of 30 July 1998 issued by Dušan Samardžić, the 3rd Army Commander. In this order, Samardžić directed Pavković to: (i) attend the meetings of the Joint Command; (ii) inform Miodrag Simić, the Chief of Staff of the 3rd Army,²⁴⁴⁸ of any requests or “proposals for engagement of forces with reinforcements”; and (iii) obtain Simić’s consent thereon, before attending those meetings.²⁴⁴⁹ The order also directed that Pavković report back to the Chief of Staff after the meetings to convey any additional requests or proposals made during the meetings and report back to the Joint Command any VJ decisions concerning these additional requests or proposals.²⁴⁵⁰

734. Šainović submits that the Trial Chamber erroneously assessed the role of the Forward Command Post of the 3rd Army in Priština. He submits that, as the 3rd Army Commander, Samardžić made the final decisions to approve or deny Pavković’s proposals, which Pavković presented to Samardžić or Simić at the Forward Command Post before going to the Joint Command meetings. Šainović avers that Samardžić would likewise approve or deny the requests of the Joint Command, which Pavković would convey after the Joint Command meetings had taken place.²⁴⁵¹ Šainović argues that had the Trial Chamber correctly assessed the role of the Forward Command Post, it would not have found that members of the Joint Command used the established system of the command and control of the VJ, or that Šainović politically coordinated or directed VJ and MUP actions.²⁴⁵² Pavković submits that neither he nor the Joint Command could engage in activities without Samardžić’s approval and that this is supported by the order of 30 July 1998.²⁴⁵³

²⁴⁴⁷ Trial Judgement, vol. 1, para. 1110.

²⁴⁴⁸ See Trial Judgement, vol. 1, para. 583.

²⁴⁴⁹ Trial Judgement, vol. 1, para. 1080, referring to Exh. 4D91.

²⁴⁵⁰ Trial Judgement, vol. 1, para. 1080, referring to Exh. 4D91.

²⁴⁵¹ Šainović’s Appeal Brief, paras 193-195, referring to Trial Judgement, vol. 1, para. 587.

²⁴⁵² Šainović’s Appeal Brief, para. 195, referring to Trial Judgement, vol. 1, para. 1110, *ibid.*, vol. 3, paras 309, 468.

²⁴⁵³ Pavković’s Appeal Brief, paras 92, 114, referring to Exh. 4D91, also pointing out that Samardžić issued this order pursuant to an order of Perišić, Chief of the General Staff. See also Pavković’s Reply Brief, para. 17.

Pavković further recalls the testimony of Simić that the VJ could only be used in Kosovo with the approval of Samardžić.²⁴⁵⁴

735. The Prosecution responds that the Trial Chamber’s relevant findings show that it assessed the role of the Forward Command Post of the 3rd Army and its relationship with the Joint Command.²⁴⁵⁵ The Prosecution also contends that the evidence demonstrated that Pavković operated outside the control of Perišić and Samardžić.²⁴⁵⁶

736. The Appeals Chamber notes that the Trial Chamber considered the 30 July 1998 order as evidence suggesting “that the proposals discussed at Joint Command meetings were contingent upon prior approval from VJ organs, and that requests made during Joint Command meetings were to be authorised by the VJ afterwards.”²⁴⁵⁷ Based on this order and other evidence,²⁴⁵⁸ including Simić’s testimony that Pavković was duty-bound to request approvals and authorisations at the 3rd Army Forward Command Post before and, if appropriate, after attending the Joint Command meetings,²⁴⁵⁹ the Trial Chamber concluded that “the VJ command structure continued to operate during the operations conducted in 1998”.²⁴⁶⁰

737. Evidence was also presented at trial which showed that “the regular VJ chain of command was sometimes circumvented or ignored by Pavković and the Joint Command.”²⁴⁶¹ In this regard, the Trial Chamber considered “evidence surrounding the operation of the Joint Command in 1998”, together with the evidence concerning “Pavković’s by-passing of the chain of command to communicate directly with Milošević”.²⁴⁶² In light of this evidence, the Trial Chamber found that Samardžić’s orders, such as the 30 July 1998 order, demonstrated attempts by Samardžić to retain

²⁴⁵⁴ Pavković’s Appeal Brief, para. 115, referring to Miodrag Simić, 12 Sep 2007, T. 15517. See also Pavković’s Appeal Brief, paras 92, 135-136, referring to Miodrag Simić, 13 Sep 2007, T. 15520, 15529-15532. Pavković’s argument that the international presence in Kosovo in 1998 should also have been taken into account in this context (Pavković’s Appeal Brief, para. 115) fails to substantiate why such presence would lead to a conclusion that Pavković and the Joint Command could not act without Samardžić’s approval.

²⁴⁵⁵ Prosecution’s Response Brief (Šainović), paras 107-110, referring to Trial Judgement, vol. 1, paras 586-588, 1091-1093, 1095, 1110, 1151.

²⁴⁵⁶ Prosecution’s Response Brief (Pavković), paras 55, 59 referring to Trial Judgement, vol. 1, para. 1088, *ibid.*, vol. 3, paras 649, 653, 656-658, 660.

²⁴⁵⁷ Trial Judgement, vol. 1, para. 1080.

²⁴⁵⁸ *E.g.* Trial Judgement, vol. 1, paras 1067, 1081-1084, 1087, 1091-1094.

²⁴⁵⁹ Trial Judgement, vol. 1, para. 1081, referring to Miodrag Simić, 13 Sep 2007, T. 15531-15532. In this part of the testimony, Simić elaborates what he stated in the portion cited by Pavković (Pavković’s Appeal Brief, para. 115, referring to Miodrag Simić, 12 Sep 2007, T. 15517).

²⁴⁶⁰ Trial Judgement, vol. 1, para. 1095. Therefore, Šainović’s argument that the Trial Chamber failed to make any conclusion on the 3rd Army forward command post misrepresents the Trial Judgement. See also *ibid.*, vol. 1, para. 586, finding that the 3rd Army forward command post was responsible for, *inter alia*, “issuing orders by the 3rd Army Commander” and “approving decisions from subordinate units’ commanders.”

²⁴⁶¹ Trial Judgement, vol. 1, para. 1086.

²⁴⁶² Trial Judgement, vol. 3, para. 657. See also Trial Judgement, vol. 1, paras 1085-1086, 1088, and references therein; *infra*, sub-section VII.C.2.(c)(vi), where the Appeals Chamber affirms the Trial Chamber’s assessment of the evidence in these paragraphs of the Trial Judgement. See also *infra*, sub-section VII.E.2.(c)(ii).

some control over Pavković's involvement in the Joint Command.²⁴⁶³ Thus, the Trial Chamber was not convinced that the 30 July 1998 order and the authority of the 3rd Army Forward Command Post were respected at all times. Consequently, the Trial Chamber also concluded that members of the Joint Command used the VJ and MUP chains of command to bring their influence to bear on how the Plan for Combating Terrorism was put into effect.²⁴⁶⁴ Šainović and Pavković merely insist that the 30 July 1998 order and Simić's testimony support the proposition that neither Pavković nor the Joint Command could engage in activities without Samardžić's approval at the 3rd Army Forward Command Post. In so doing, Šainović and Pavković ignore the Trial Chamber's assessment of the evidence and present their own interpretation of the evidence, without demonstrating any error on the part of the Trial Chamber.²⁴⁶⁵ Their arguments regarding the 30 July 1998 order and related evidence are therefore dismissed.

(iii) Request by the Joint Command to the VJ for use of helicopters

738. The Trial Chamber found that, on 6 September 1998, Šainović reported at a Joint Command meeting that a helicopter was to be used for humanitarian purposes and that a request was to be sent to the Air Force and the Anti-Aircraft Defence.²⁴⁶⁶ On the same day, Pavković requested that the 3rd Army Command forward a request for the use of a helicopter to the Air Force Command.²⁴⁶⁷ On 12 September 1998, Dušan Samardžić, the 3rd Army Commander, responded to Pavković that the General Staff had rejected this request, and explained that such requests had to correctly specify certain elements.²⁴⁶⁸ At the Joint Command meeting on 13 September 1998, Pavković reported that the request for the use of helicopters had been rejected.²⁴⁶⁹ Based on a second request made by the Joint Command at this meeting, Pavković submitted another request on 14 September 1998, which specified various elements in compliance with Samardžić's instruction.²⁴⁷⁰ The Trial Chamber found that this demonstrated "the effect of the requests made during the meetings of the Joint Command upon the decision adopted within the VJ."²⁴⁷¹ The Trial Chamber further found that Samardžić and Pavković clashed over this request.²⁴⁷²

²⁴⁶³ Trial Judgement, vol. 3, para. 657. While Pavković takes issue with the fact that the order of 30 July 1998 (Exh. 4D91) is a Defence exhibit, and not a Prosecution exhibit, he has failed to substantiate why this renders the Trial Chamber's assessment of the evidence unreasonable (Pavković's Reply Brief, para. 17).

²⁴⁶⁴ Trial Judgement, vol. 1, para. 1110.

²⁴⁶⁵ The Appeals Chamber also notes that Pavković's argument mainly repeats his submission at trial (see Pavković's Closing Brief, paras 250, 252).

²⁴⁶⁶ Trial Judgement, vol. 1, para. 1082, referring to Exh. P1468, p. 94.

²⁴⁶⁷ Trial Judgement, vol. 1, para. 1082, referring to Exh. 4D230.

²⁴⁶⁸ Trial Judgement, vol. 1, para. 1082, referring to Exh. 4D230.

²⁴⁶⁹ Trial Judgement, vol. 1, para. 1082, referring to Exh. P1468, pp. 108-109.

²⁴⁷⁰ Trial Judgement, vol. 1, para. 1082, referring to Exh. P1011, pp. 64-65.

²⁴⁷¹ Trial Judgement, vol. 1, para. 1082.

²⁴⁷² Trial Judgement, vol. 3, para. 659. Pavković submits that the Trial Chamber's finding that there was a "clash" between him and Samardžić over this request for helicopters is unsupported by the evidence, which rather shows that

739. Šainović asserts that the Trial Chamber erred in finding that this incident demonstrated “the effect of the requests made during the meetings of the Joint Command”.²⁴⁷³ He contends that the evidence actually indicates that he could not even obtain a single helicopter and that he, as well as the Joint Command, lacked the power to influence the deployment of VJ resources even for humanitarian purposes.²⁴⁷⁴ The Prosecution responds that the Trial Chamber reasonably concluded that requests made during Joint Command meetings had an effect on the decisions of the VJ.²⁴⁷⁵

740. The Appeals Chamber observes that while the evidence considered by the Trial Chamber showed that Pavković’s initial request for use of helicopters was rejected by the General Staff, it did not show what happened in response to Pavković’s second modified request.²⁴⁷⁶ Thus, the evidence remains inconclusive as to how much influence the Joint Command had over the VJ in this particular instance, or how much control Pavković’s superiors in the VJ could exert over his actions in this respect.²⁴⁷⁷ However, the Appeals Chamber considers that the request for the use of helicopters and the subsequent exchange between Samardžić and Pavković suggested that Pavković submitted his initial request which had stemmed from the discussions in a Joint Command meeting, reported to the Joint Command his VJ superiors’ rejection of this request, and renewed his request on the basis of what was discussed in a Joint Command meeting, rather than renewing his request on his own. This, in turn, suggested that there was a procedure through which Pavković’s VJ superiors had to consider requests stemming from discussions in Joint Command meetings and conveyed to them *via* Pavković through the regular chain of command. Consequently, a reasonable trier of fact could have found that this instance demonstrated “the effect of the requests made during the meetings of the Joint Command upon the decision adopted within the VJ”, as found by the Trial

neither he nor the Joint Command could operate outside the chain of command, and that the Joint Command lacked authority over the VJ (Pavković’s Appeal Brief, paras 116-119. See also *ibid.*, para. 114; *contra* Prosecution’s Response Brief (Pavković), para. 41). Pavković bases his argument solely on the rejection by the General Staff of his initial request (see, in particular, Pavković’s Appeal Brief, para. 117, arguing that “[o]nly an unreasonable Chamber could treat a request by Pavković which was denied by Perišić as a clash between Pavković and Samardžić (emphasis added)”, and *ibid.*, para. 119, asserting that “[a] request was made up through the chain and the request was denied at the top of the chain and the matter came to an end.”), disregarding the Trial Chamber’s consideration of his second modified request (see Trial Judgement, vol. 1, para. 1082; *ibid.*, vol. 3, fn. 1595). Thus, his argument in this regard misrepresents the evidence and is therefore dismissed. The Appeals Chamber notes that a document referred to as “4D392” by Pavković (Pavković’s Appeal Brief, para. 116) is not in evidence (see public and confidential Exhibit Lists filed by the Registry at trial on 10 November 2009).

²⁴⁷³ Šainović’s Appeal Brief, paras 90, 107, referring to Trial Judgement, vol. 1, para. 1082.

²⁴⁷⁴ Šainović’s Appeal Brief, para. 90; Šainović’s Reply Brief, para. 21.

²⁴⁷⁵ Prosecution’s Response Brief (Šainović), paras 80-81, referring to Trial Judgement, vol. 1, para. 1082.

²⁴⁷⁶ Trial Judgement, vol. 1, para. 1082, referring to Exh. 1468, pp. 94, 108-109, Exh. 4D230, Exh. P1011, pp. 64-65.

²⁴⁷⁷ Šainović’s assertion that the evidence in question actually shows that he and the Joint Command lacked the power to influence the VJ’s deployment of helicopters (Šainović’s Appeal Brief, para. 90) is based on his misrepresentation of the evidence as showing that the second modified request was also rejected.

Chamber.²⁴⁷⁸ In these circumstances, the Appeals Chamber does not discern any error in this finding. Šainović's argument in this regard is therefore dismissed.

(iv) Request by the Joint Command to the VJ for the formation and deployment of various units

741. The Trial Chamber found that a document of 22 September 1998 from the Priština Corps Command to the 3rd Army Command demonstrated the link between a discussion held during a Joint Command meeting and a subsequent request submitted within the VJ.²⁴⁷⁹ In this document, Pavković reminded Dušan Samardžić, the 3rd Army Commander, that on 1 and 7 September 1998 he had requested that the fifth stage of the Plan for Combating Terrorism be implemented. Pavković also noted that, during a meeting of the Joint Command on 10 September 1998, "other Command organs" had indicated that the VJ had failed to carry out two of its duties under the Plan, namely, to form rapid intervention helicopter units and deploy two combat groups.²⁴⁸⁰ In the document of 22 September 1998, Pavković further recalled that he had sent a request to Samardžić on 11 September 1998 pursuant to a decision made in the Joint Command meeting of 10 September 1998, but that the 3rd Army Command only partially approved the request. The Trial Chamber noted that in the document of 22 September 1998, Pavković expressed his concern regarding this partial approval, made suggestions to the 3rd Army Command to solve this issue, and added that members of the Joint Command had been given the opportunity to report to Milošević that the VJ had not discharged its duties under the Plan.²⁴⁸¹

742. Šainović avers that, based on the document of 22 September 1998, the Trial Chamber erroneously found a "link between discussions held during a [Joint Command] meeting and a subsequent request submitted within the VJ."²⁴⁸² According to Šainović, Đaković's Notes recording the Joint Command meeting of 10 September 1998 would have contained a reference to the VJ's non-compliance with the duties under the Plan, had such an important matter been mentioned during the meeting.²⁴⁸³ In addition, Šainović maintains that Pavković's invocation of the authority of the Joint Command had no influence over Samardžić, the 3rd Army Commander, or the events in the field, since the document of 22 September 1998 indicates that the formation and deployment of

²⁴⁷⁸ Trial Judgement, vol. 1, para. 1082. Also compare with *ibid.*, vol. 1, para. 1086, wherein the Trial Chamber did not consider these events as an example of the circumvention by the Joint Command of the regular VJ chain of command. See also *ibid.*, vol. 1, para. 1110.

²⁴⁷⁹ Trial Judgement, vol. 1, para. 1084.

²⁴⁸⁰ Trial Judgement, vol. 1, para. 1084, referring to Exh. P1435 (fn. 2933 cites, by mistake, Exh. P1439 instead of Exh. P1435). See also Trial Judgement, vol. 1, paras 1063, 1087.

²⁴⁸¹ Trial Judgement, vol. 1, para. 1084 (fn. 2934 cites, by mistake, Exh. P1439 instead of Exh. P1435).

²⁴⁸² Šainović's Appeal Brief, para. 91, referring to Trial Judgement, vol. 1, para. 1084, Exh. P1435.

combat groups occurred solely on the basis of the assessment of the 3rd Army Commander, regardless of Pavković's request.²⁴⁸⁴ The Prosecution responds that the Trial Chamber did not rely on the document of 22 September 1998 in assessing the influence of a discussion in a Joint Command meeting on the activities in the field.²⁴⁸⁵ Moreover, according to the Prosecution, the fact that Đaković's Notes do not mention the same information as the document of 22 September 1998 does not render this document unreliable.²⁴⁸⁶

743. The Appeals Chamber observes that the portion of Đaković's Notes relevant to 10 September 1998 does not record any mention of the VJ's non-compliance with their duties to form rapid intervention helicopter units and deploy two combat groups.²⁴⁸⁷ However, the Trial Chamber considered Đaković's Notes concerning the 11 September 1998 meeting, which record Pavković's statement: "we shall again renew our request for 'BG' and 'units'".²⁴⁸⁸ Đaković's Notes and the document of 22 September 1998 therefore corroborate each other, both suggesting that the necessity of forming combat groups and rapid intervention helicopter units was discussed in Joint Command meetings immediately before Pavković's request of 11 September 1998 was submitted to Samardžić, the 3rd Army Commander.²⁴⁸⁹ Šainović has failed to demonstrate that the Trial Chamber erred in its evaluation of these documents.

744. The Appeals Chamber observes that it is not clear whether Samardžić rejected Pavković's suggestions of 22 September 1998 following his partial approval of Pavković's initial request of 11 September 1998.²⁴⁹⁰ Consequently, the sequence of events reflected in the document of 22 September 1998 does not provide a definitive conclusion as to whose influence was determinative in the decision-making process for combat operations. Rather, the Trial Chamber relied on this exchange as an example of recurrent instances in which Pavković would make a further request, supported by the Joint Command, after his initial request arising from Joint

²⁴⁸³ Šainović's Appeal Brief, para. 91, referring to Exh. P1468, pp. 98-102; Šainović's Reply Brief, para. 21. Šainović also contends that, in view of this, Dimitrijević's evidence that the label "Joint Command" was used as cover by Pavković is more persuasive (Šainović's Appeal Brief, para. 91, referring to Trial Judgement, vol. 1, para. 1005).

²⁴⁸⁴ Šainović's Appeal Brief, paras 92, 107. See also Šainović's Reply Brief, para. 21. The Appeals Chamber observes that, as Šainović points out, paragraph 1084 and footnotes 2933 and 2934 of volume 1 of the Trial Judgement refer to Exhibit P1439, instead of Exhibit P1435 which is the report of 22 September 1998 (Šainović's Appeal Brief, para. 92, fn. 139). From the context of paragraph 1048 of volume 1 of the Trial Judgement, it is clear that the Trial Chamber meant to refer to Exhibit P1435 in these two footnotes, while it inadvertently referred to Exhibit P1439. This error has no impact on the Trial Chamber's findings.

²⁴⁸⁵ Prosecution's Response Brief (Šainović), para. 82, referring to Trial Judgement, vol. 1, para. 1084. *Contra* Šainović's Reply Brief, para. 21.

²⁴⁸⁶ Prosecution's Response Brief (Šainović), para. 83, referring to Trial Judgement, vol. 1, para. 1062.

²⁴⁸⁷ Exh. 1468, pp. 98-102 (read together with Exh. IC199).

²⁴⁸⁸ Trial Judgement, vol. 1, para. 1063, referring to Exh. P1468, pp. 102-104 (in comparison with Exh. P1435). While the Trial Chamber does not explain the meaning of "BG", the Appeals Chamber notes that the document of 22 September 1998 (Exh. P1435), for instance, uses the abbreviation "BG" for a combat group.

²⁴⁸⁹ See Trial Judgement, vol. 1, para. 1063.

²⁴⁹⁰ Trial Judgement, vol. 1, paras 1063, 1084, referring to Exh. P1435.

Command meetings was not accepted by his superior unit.²⁴⁹¹ The Appeals Chamber does not discern any error in the Trial Chamber's description of it as a "link between a discussion held during a Joint Command meeting and a subsequent request submitted within the VJ."²⁴⁹² Furthermore, contrary to Šainović's submission, the sequence of the events described in the document of 22 September 1998 does not indicate that the deployment of combat groups occurred solely based on the 3rd Army Commander's decision, without any influence from the Joint Command meeting of 10 September 1998. Šainović's arguments in this regard merely present his own interpretation of the evidence, without showing any error on the part of the Trial Chamber and are accordingly dismissed.

(v) Request by the Joint Command to the VJ for the formation of rapid-intervention forces

745. The Trial Chamber found that, in his communication of 5 October 1998, Pavković reminded Dušan Samardžić, the 3rd Army Commander, that a decision to form rapid-intervention forces had been made in the Joint Command meetings of 19 and 20 September 1998 and that he had conveyed this decision to Samardžić.²⁴⁹³ However, Samardžić had forbidden the formation of rapid-intervention forces on 3 October 1998.²⁴⁹⁴ In the communication of 5 October 1998, Pavković also informed Samardžić that, contrary to his order of 3 October 1998, the Priština Corps Command had not formed new combat groups, and requested that Samardžić determine the composition of the intervention forces.²⁴⁹⁵ The Trial Chamber found that this was an instance of the tension between the Joint Command and the 3rd Army Command²⁴⁹⁶ as well as between Pavković and Samardžić,²⁴⁹⁷ and also demonstrated that the regular VJ chain of command was sometimes circumvented or ignored by Pavković and the Joint Command.²⁴⁹⁸

746. Šainović submits that the Trial Chamber erred in considering the communication of 5 October 1998 as evincing that a decision to form rapid-intervention forces was taken during the Joint Command meetings of 19 and 20 September 1998.²⁴⁹⁹ He contends that Đaković's Notes contain no record of any such decision²⁵⁰⁰ and argues that, even if such a decision had existed, it

²⁴⁹¹ Trial Judgement, vol. 1, paras 1082, 1084-1085, and references therein.

²⁴⁹² Trial Judgement, vol. 1, para. 1084.

²⁴⁹³ Trial Judgement, vol. 1, para. 1085, referring, *inter alia*, to Exh. P1439, Exh. P1468, p. 124.

²⁴⁹⁴ Trial Judgement, vol. 1, para. 1085, referring, *inter alia*, to Exh. P1439.

²⁴⁹⁵ Trial Judgement, vol. 1, para. 1085, referring, *inter alia*, to Exh. P1439.

²⁴⁹⁶ Trial Judgement, vol. 1, para. 1086.

²⁴⁹⁷ Trial Judgement, vol. 3, para. 83. See also *ibid.*, vol. 3, paras 660, 680.

²⁴⁹⁸ Trial Judgement, vol. 1, para. 1086.

²⁴⁹⁹ Šainović's Appeal Brief, paras 93-95, referring to Trial Judgement, vol. 1, para. 1085, Exh. P1439.

²⁵⁰⁰ Šainović's Appeal Brief, paras 93-94, referring to Exh. P1468, Trial Judgement, vol. 1, para. 1085, arguing that Šainović's instruction "to prepare units for faster interventions", recorded in Đaković's Notes, meant to prepare *existing* units for faster interventions, and not to create *new* rapid-intervention forces.

would have had no influence on the actual situation in Kosovo, since it is evident that the 3rd Army Commander denied Pavković's requests.²⁵⁰¹ Lukić argues that the communication of 5 October 1998 and Đaković's Notes show that the decision to form rapid-intervention forces was adopted "along with" the Plan for Combating Terrorism in a meeting convened by Milošević in Belgrade on 21 July 1998 and not during Joint Command meetings of 19 and 20 September 1998.²⁵⁰² Pavković asserts that the communication of 5 October 1998 does not show any tension between him and Samardžić, or between the Joint Command and Samardžić,²⁵⁰³ and that this was an "explanatory" request, not defiance *vis-à-vis* Samardžić.²⁵⁰⁴

747. The Prosecution responds that the fact that Đaković's Notes do not mention the same information as the communication of 5 October 1998 does not render the document unreliable.²⁵⁰⁵ The Prosecution also maintains that the Trial Chamber reasonably concluded that the communication of 5 October 1998 showed a breach of the principle of subordination in the VJ.²⁵⁰⁶

748. The Appeals Chamber observes that the communication of 5 October 1998²⁵⁰⁷ plainly shows that the decision to form rapid-intervention forces was reached in the Joint Command meetings held on 19 and 20 September 1998.²⁵⁰⁸ As noted by the Trial Chamber, Đaković's Notes record Šainović's instruction in the Joint Command meeting of 20 September 1998 "to prepare units for faster interventions", which reasonably corroborates the communication of 5 October 1998.²⁵⁰⁹ The arguments of Šainović and Lukić that the decision in question was not taken in the Joint Command meetings are based on their own interpretations of the evidence without showing any error on the part of the Trial Chamber.

749. Furthermore, the Appeals Chamber observes that the communication of 5 October 1998 clearly states that the Priština Corps Command did not form new combat groups, contrary to the

²⁵⁰¹ Šainović's Appeal Brief, paras 95, 107; Šainović's Reply Brief, para. 21.

²⁵⁰² Lukić's Appeal Brief, para. 302, referring to Exh. P1439, item 2, Exh. P1468, pp. 121-123. See also Lukić's Appeal Brief, para. 300.

²⁵⁰³ Pavković's Appeal Brief, paras 86-87, referring to Trial Judgement, vol. 3, paras 83, 680. See also Pavković's Appeal Brief, para. 92.

²⁵⁰⁴ Pavković's Reply Brief, para. 18; Pavković's Appeal Brief, para. 92, arguing that it was to inform Samardžić that due to the FRY President's plan to form rapid intervention forces – which Pavković also calls "a decision of the Joint Command" – Samardžić's previous order to form new combat groups could not be completed and that rapid intervention forces were necessary despite Samardžić's prohibition.

²⁵⁰⁵ Prosecution's Response Brief (Šainović), para. 83, referring to Trial Judgement, vol. 1, para. 1062.

²⁵⁰⁶ Prosecution's Response Brief (Pavković), para. 40, referring to Trial Judgement, vol. 3, para. 660.

²⁵⁰⁷ Exh. P1439: "On my return from the reporting session with the [Joint Command] on 19 and 20 September 1998, I informed you personally by telephone of the decision to form rapid-intervention forces. *As part of the conclusions from the [Joint Command] meeting*, I sent you the decision to form rapid-intervention forces [...] (emphasis added)."

²⁵⁰⁸ Even if, as Lukić suggests (Lukić's Appeal Brief, para. 302), there had already been a plan to form rapid-intervention forces before this meeting, the document of 5 October 1998 indicates that the decision to carry out such a formation at that point in time was made in the meetings of 19 and 20 September 1998.

order of Samardžić, the 3rd Army Commander. Instead, Pavković resubmitted his request to Samardžić to determine the composition of the rapid intervention forces as decided during Joint Command meetings, although Samardžić had previously rejected the request.²⁵¹⁰ As the Trial Chamber noted, the evidence in the record does not show what the response of the 3rd Army Command was to Pavković's resubmitted request to form rapid intervention forces.²⁵¹¹ Consequently, Šainović's contention that Samardžić also denied Pavković's resubmitted request misconstrues the evidence.²⁵¹² Šainović's argument that the decision of the Joint Command meetings would have had no influence on the actual situation in Kosovo is based on this erroneous interpretation of the evidence and is therefore also without merit.

750. Irrespective of who eventually prevailed on the issue of the formation of rapid intervention forces, the sequence of events demonstrates that Samardžić's order was not immediately implemented by Pavković, his subordinate, who instead responded by declaring that he had not carried out Samardžić's order and by referring to a decision made in the Joint Command meetings. The Trial Chamber observed that this was "a breach of the VJ principle of subordination, which required that orders from superior commands be 'unconditionally, exactly and promptly' executed by subordinates."²⁵¹³ The Appeals Chamber therefore considers that, contrary to Pavković's submission, a reasonable trier of fact could have reached the Trial Chamber's conclusions that this exchange shows "the tension between the Joint Command and the 3rd Army Command"²⁵¹⁴ as well as the tension between Pavković and Samardžić,²⁵¹⁵ and that "the regular VJ chain of command was sometimes circumvented or ignored by Pavković and the Joint Command."²⁵¹⁶

751. The arguments of Šainović, Pavković and Lukić regarding the communication of 5 October 1998 are accordingly dismissed.

²⁵⁰⁹ Exh. P1468, p. 124, cited in Trial Judgement, vol. 1, para. 1085. Contrary to Šainović's assertion (Šainović's Appeal Brief, para. 94), the phrase "to prepare units for faster interventions" does not necessarily suggest that units specifically for fast interventions already existed prior to Šainović's instruction.

²⁵¹⁰ Exh. P1439.

²⁵¹¹ Trial Judgement, vol. 1, para. 1085.

²⁵¹² Šainović's Appeal Brief, paras 95, 107; Šainović's Reply Brief, para. 21.

²⁵¹³ Trial Judgement, vol. 3, para. 660, referring to, as an example, Exh. P984, p. 2, Exh. P1401, pp. 62, 96.

²⁵¹⁴ Trial Judgement, vol. 1, para. 1086.

²⁵¹⁵ Trial Judgement, vol. 3, para. 83. See also *ibid.*, vol. 3, paras 660, 680.

²⁵¹⁶ Trial Judgement, vol. 1, para. 1086. During the appeal hearing, Pavković suggested that the expression "[c]ontrary to your orders" in the English translation of the communication of 5 October 1998 (Exh. P1439) was an erroneous translation (Appeal Hearing, 12 Mar 2013, AT. 331-334). However, in so doing, Pavković relied on his own interpretation of Radinović's and Vasiljević's testimony, ignoring the Trial Chamber's detailed assessment of their testimony, which does not indicate the existence of any error in the English translation (Trial Judgement, vol. 1, para. 1085; *ibid.*, vol. 3, para. 660, referring, *inter alia*, to Radovan Radinović, 19 Oct 2007, T. 17338-17342, Aleksandar Vasiljević, 24 Jan 2007, T. 9092-9094. See also Aleksandar Vasiljević, 24 Jan 2007, T. 9095). Pavković's argument in this regard is thus dismissed.

(vi) Joint Command's decision to launch the third stage of the Plan for Combating Terrorism

752. The Trial Chamber found that, pursuant to a decision made at a meeting of the Joint Command on or around 31 July 1998, Pavković sent a request on 1 August 1998 to the 3rd Army Forward Command Post to launch the third stage of the Plan for Combating Terrorism on the following day.²⁵¹⁷ On 1 August 1998, Dušan Samardžić, the 3rd Army Commander, denied this request and issued an order forbidding the engagement of the Priština Corps units in the execution of the plan for the implementation of the third stage of the Plan for Combating Terrorism, pending his approval on 2 August 1998 and that of the FRY President at a meeting scheduled for 3 August 1998.²⁵¹⁸ However, Đaković's Notes reflect that, on 2 August 1998, Pavković reported at a Joint Command meeting that units had begun combat operations in Drenica and Jablanica/Jabllanica,²⁵¹⁹ which were the locations designated for the third stage of the Plan in a Joint Command meeting of 30 July 1998.²⁵²⁰ On 3 August 1998, Samardžić issued an order to the 3rd Army Forward Command Post, banning unauthorised use of VJ units and instructed units engaged in supporting the MUP to be sent back to their redeployment areas.²⁵²¹ Based on this evidence, the Trial Chamber found that this was an instance of the tension between the Joint Command and the 3rd Army Command²⁵²² as well as a clash between Pavković and Samardžić,²⁵²³ and also an indication that the regular VJ chain of command was sometimes circumvented or ignored by Pavković and the Joint Command.²⁵²⁴

a. Submissions of the parties

753. Šainović submits that the Trial Chamber erroneously found that this sequence of events demonstrated that the Joint Command circumvented the VJ chain of command.²⁵²⁵ He asserts that, contrary to Pavković's request of 1 August 1998, Đaković's Notes pertaining to the 31 July 1998 meeting do not contain any record of a decision being taken by the Joint Command to launch the third stage of the Plan.²⁵²⁶ He also contends that the record in Đaković's Notes of a meeting on 30 July 1998 merely makes a reference to the "realization of the third phase", without any specific

²⁵¹⁷ Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 658, referring to Exh. P1419, Exh. P1468, p. 33.

²⁵¹⁸ Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 658, referring to Exh. 4D125.

²⁵¹⁹ Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 658, referring to Exh. P1468, p. 36.

²⁵²⁰ Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 658, referring to Exh. P1468, p. 33.

²⁵²¹ Trial Judgement, vol. 1, para. 1086, referring, by mistake, to a document bearing the number "4D458", which is not in evidence. Pavković pointed this out during the appeal hearing (Appeal Hearing, 12 Mar 2013, AT. 283). The same document was, however, admitted into evidence as Exh. 4D311.

²⁵²² Trial Judgement, vol. 1, para. 1086.

²⁵²³ Trial Judgement, vol. 3, para. 658.

²⁵²⁴ Trial Judgement, vol. 1, para. 1086.

²⁵²⁵ Šainović's Appeal Brief, para. 96, referring to Trial Judgement, vol. 1, para. 1086, Exh. P1419.

information as to who uttered those words and why.²⁵²⁷ Šainović asserts that this shows that Pavković merely made use of the term “Joint Command” in his request²⁵²⁸ and that, even if such a decision had been taken on 31 July 1998, it triggered no changes in the field, as Samardžić banned the use of VJ units for the execution of the third phase of the Plan.²⁵²⁹ Lukić, in turn, argues that the Trial Chamber erroneously concluded that the Joint Command had influence over the implementation of the various stages of the Plan, despite the Trial Chamber’s own observations that a decision to proceed with the third stage of the Plan had not been made at the Joint Command meeting of 31 July 1998 and that Samardžić did not permit the use of the forces until the Plan was approved at a meeting with the FRY President.²⁵³⁰

754. Pavković argues that the combat reports of 2 and 3 August 1998 from the 3rd Army Forward Command Post to the General Staff, admitted as additional evidence on appeal, show that Samardžić was fully in charge and aware of the action of VJ units in Drenica and reported it to the General Staff and that Pavković was not bypassing his superiors.²⁵³¹

755. The Prosecution responds that the Trial Chamber’s conclusions were reasonable as the evidence shows that, despite Samardžić’s denial of Pavković’s request, combat operations in Drenica and Jablanica/Jabllanica commenced on 2 August 1998 in line with the Plan and the Joint Command’s wishes.²⁵³² The Prosecution also responds that the Trial Chamber’s finding that the Joint Command had influence over the implementation of the Plan is not contradictory to its finding that the decision to proceed with the third stage of the Plan was not made at the Joint Command meeting of 31 July 1998.²⁵³³ The Prosecution further asserts that Pavković wrongly suggests that the lack of criticism in the combat report of 2 August 1998 shows that Samardžić approved of his action, as the evidence shows that the 3rd Army Command in fact “disapproved”.²⁵³⁴

²⁵²⁶ Šainović’s Appeal Brief, para. 96, referring to Exh. P1468, pp. 33-34.

²⁵²⁷ Šainović’s Appeal Brief, para. 96, referring to Exh. P1468, p. 33.

²⁵²⁸ Šainović’s Appeal Brief, para. 96, referring to Exh. P1419. See also Šainović’s Reply Brief, para. 21.

²⁵²⁹ Šainović’s Appeal Brief, paras 96, 107, referring to Exh. 4D125 and a document bearing the number “4D458”.

See also Šainović’s Reply Brief, para. 21.

²⁵³⁰ Lukić’s Appeal Brief, para. 301, referring to Trial Judgement, vol. 1, paras 891, 1086. See also Lukić’s Appeal Brief, paras 287, 292, 308.

²⁵³¹ Pavković’s Supplemental Appeal Brief, paras 8, 15-16, referring to Exh. 4DA3, Exh. 4DA4, and also arguing that the combat report of 3 August 1998 indicates that Samardžić rejected Pavković’s proposal to support MUP forces, *inter alia*, in the sector of Jablanica village.

²⁵³² Prosecution’s Response Brief (Šainović), para. 84, referring to Trial Judgement, vol. 1, para. 1086.

²⁵³³ Prosecution’s Response Brief (Lukić), para. 263, referring to Trial Judgement, vol. 1, paras 891-892, 1086.

²⁵³⁴ Prosecution’s Supplemental Response Brief (Pavković), paras 24-26, referring to Trial Judgement, vol. 1, paras 888-894, 1086, *ibid.*, vol. 3, paras 658-659, Exh. 4DA3, Exh. 4DA4.

b. Analysis

756. At the outset, the Appeals Chamber recalls that the Trial Chamber observed that, while Pavković's request of 1 August 1998 stated that the decision to launch the third stage of the Plan had been made at a Joint Command meeting on 31 July 1998,²⁵³⁵ Đaković's Notes did "not clearly indicate whether such a decision had in fact been made [that day]."²⁵³⁶ Contrary to Lukić's submission, this does not mean that the Trial Chamber found that such a decision had not been made at the Joint Command meeting of 31 July 1998. Rather, the Trial Chamber observed that Đaković's Notes recorded the discussion during a Joint Command meeting on 30 July 1998 that the third stage of the Plan would be realised through actions in Drenica and Jablanica/Jabllanica.²⁵³⁷ The Trial Chamber interpreted the evidence to show that the decision, made at a Joint Command meeting around this time, became the basis for Pavković's request sent to the Samardžić, the 3rd Army Commander, on 1 August 1998 for permission to launch the third stage of the Plan.²⁵³⁸ Although Đaković's Notes do not mention who stated that the third stage of the Plan would be implemented or why, the Appeals Chamber considers that this does not in and of itself undermine the Trial Chamber's observation that this decision was made at a Joint Command meeting around this time.²⁵³⁹ Šainović has failed to demonstrate that the Trial Chamber's assessment of the evidence in this regard was unreasonable or to substantiate his assertion that the evidence shows that Pavković was merely making use of the term "Joint Command".

757. Samardžić's orders of 1 and 3 August 1998²⁵⁴⁰ as well as the portion of Đaković's Notes relevant to 2 August 1998²⁵⁴¹ clearly indicate that, despite Samardžić's order prohibiting the engagement of the Priština Corps units pending the approval of the plan for the execution of the third stage by the FRY President on 3 August 1998, units of the Priština Corps were deployed in Drenica and Jablanica/Jabllanica to support the MUP prior to that day, in line with what was discussed in the Joint Command meeting.²⁵⁴² This is further corroborated by the Trial Chamber's finding, based on other documentary evidence and witness testimony, that, between 25 July and 6 August 1998, a number of MUP units, together with Priština Corps combat groups, were engaged

²⁵³⁵ Exh. P1419.

²⁵³⁶ Trial Judgement, vol. 1, para. 1086.

²⁵³⁷ Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 658; Exh. P1468, p. 33.

²⁵³⁸ Trial Judgement, vol. 1, para. 1086, read as a whole. In particular, the Appeals Chamber notes that the Trial Chamber presents this sequence of evidence as an instance of "the tension between the Joint Command and the 3rd Army Command". See also *ibid.*, vol. 3, para. 658.

²⁵³⁹ In this regard, the Appeals Chamber recalls the Trial Chamber's finding that Đaković's Notes are not a *verbatim* record of Joint Command meetings (Trial Judgement, vol. 1, para. 1062).

²⁵⁴⁰ Exh. 4D125; Exh. 4D311 (cited erroneously as Exh. 4D458 in Trial Judgement, vol. 1, para. 1086).

²⁵⁴¹ Exh. P1468, p. 36.

²⁵⁴² See Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 658.

in the Drenica area.²⁵⁴³ The Appeals Chamber therefore finds that a reasonable trier of fact could have reached the conclusions that this demonstrated the tension between the Joint Command and the 3rd Army Command and that “the regular VJ chain of command was sometimes circumvented or ignored by Pavković and the Joint Command.”²⁵⁴⁴ Šainović and Lukić merely advance their own interpretation of the evidence, without showing any error on the part of the Trial Chamber.

758. As to the additional evidence admitted on appeal, the Appeals Chamber observes that both the combat reports of 2 and 3 August 1998 were issued by the 3rd Army Forward Command Post to the General Staff and to the 3rd Army Command, the operations centre, for its information, and refer to activities of VJ forces supporting MUP forces in Drenica and Jablanica/Jabllanica sectors.²⁵⁴⁵ The 2 August 1998 report also states that a decision had been taken to support MUP forces in, *inter alia*, Jablanica/Jabllanica.²⁵⁴⁶ The 3 August 1998 report mentions that Samardžić’s order banning the unauthorised use of VJ units in Kosovo had been observed and that Pavković’s proposal to support MUP forces in, *inter alia*, Jablanica/Jabllanica had been rejected.²⁵⁴⁷

759. The Appeals Chamber notes that the references to the decision to assist MUP forces in the 2 August 1998 report ostensibly contradict Samardžić’s order of 1 August 1998 prohibiting the engagement of the Priština Corps units pending the FRY President’s action on 3 August 1998.²⁵⁴⁸ However, the 2 August 1998 report, addressed not only to the General Staff but also to the 3rd Army Command, only bears the name and signature of Miodrag Simić, Chief of Staff of the 3rd Army,²⁵⁴⁹ who was stationed in the 3rd Army Forward Command Post at that time.²⁵⁵⁰ As noted by the Trial Chamber, on 3 August 1998, Samardžić issued an order from the 3rd Army Command instructing VJ units engaged in supporting the MUP to be sent back to their redeployment areas.²⁵⁵¹ This order was addressed to the 3rd Army Forward Command Post and to the Chief of Staff “personally”.²⁵⁵² It is thus unclear whether the contents of the report of 2 August 1998, including the decision to assist MUP forces, were attributable to Samardžić.²⁵⁵³ The reference to Samardžić’s order in the 3 August 1998 report²⁵⁵⁴ mirrors and corroborates his actual order of 3 August 1998 directing VJ

²⁵⁴³ Trial Judgement, vol. 1, para. 892 (in particular, evidence cited in fn. 2328).

²⁵⁴⁴ Trial Judgement, vol. 1, para. 1086.

²⁵⁴⁵ Exh. 4DA3, pp. 1-2, 4DA4, p. 2.

²⁵⁴⁶ Exh. 4DA3, p. 3.

²⁵⁴⁷ Exh. 4DA4, pp. 2-3.

²⁵⁴⁸ Exh. 4D125; Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 658.

²⁵⁴⁹ Exh. 4DA3, p. 3.

²⁵⁵⁰ Trial Judgement, vol. 1, para. 587.

²⁵⁵¹ Trial Judgement, vol. 1, para. 1086, erroneously referring to a document bearing the number “4D458” instead of the same document admitted into evidence as Exh. 4D311.

²⁵⁵² Exh. 4D311.

²⁵⁵³ See also Miodrag Simić, 13 Sep 2007, T. 15532-15534; Exh. 4D378; Exh. 4DA5; Exh. 4D505, para. 11. *Cf.* Trial Judgement, vol. 1, paras 586-587, 1081.

²⁵⁵⁴ Exh. 4DA3, p. 2. The 3 August 1998 report also bears only Miodrag Simić’s name and signature.

units back to their redeployment areas.²⁵⁵⁵ Thus, the Appeals Chamber finds that the two combat reports of 2 and 3 August 1998 do not create a reasonable doubt that would cause the Appeals Chamber to reverse the Trial Chamber's findings on the events surrounding the launch of the third stage of the Plan.²⁵⁵⁶

760. For the reasons set out above, the arguments of Šainović, Lukić, and Pavković concerning the decision of the Joint Command to launch the third stage of the Plan are dismissed.

(vii) Instructions of the Joint Command for the defence of populated areas and six operative reports of the Joint Command

761. Šainović submits that while the Trial Chamber referred to the instructions for the defence of populated areas as issued by the Joint Command in July 1998 as well as to six operative reports of the Joint Command dated October and November 1998,²⁵⁵⁷ Đaković testified that these documents were created by another organ, namely the Priština Corps, and not the Joint Command.²⁵⁵⁸ Šainović further contends that there is no evidence showing that the instructions and the content of the reports were implemented in the field.²⁵⁵⁹ The Prosecution responds that his arguments are mere assertions that the Trial Chamber failed to interpret the evidence in the manner favoured by him.²⁵⁶⁰

762. The Trial Chamber assessed the instructions²⁵⁶¹ and the six operative reports²⁵⁶², taking into account not only Đaković's testimony, but also their content as well as other documentary and testimonial evidence.²⁵⁶³ In particular, with regard to the six operative reports, the Trial Chamber

²⁵⁵⁵ Exh. 4D311 (cited erroneously as Exh. 4D458 in Trial Judgement, vol. 1, para. 1086). The rejection of Pavković's proposal to support MUP forces in Jablanica/Jabllanica, referred to in the 3 August 1998 report (Exh. 4DA3, p. 3), further corroborates Samardžić's order of 3 August 1998.

²⁵⁵⁶ Equally, the Appeals Chamber finds no merit in Pavković's reliance, during the appeal hearing, on Exhibit 4D378, which is an order of 31 July 1998 from the 3rd Army Forward Command Post, signed by Simić, to use Priština Corps troops on 3 August 1998 to "destroy terrorist forces in the Smonica village sector, [...] ensuring safe use of the Đakovica-Batuša road." Pavković submitted that this was the activity which the 2 August 1998 report mentioned (Exh. 4DA3) and which he reported in the Joint Command meeting of 2 August 1998 (Exh. P1468, p. 36), and therefore that the activity he reported in this Joint Command meeting was in accordance with Simić's order and not in violation of Samardžić's order (see Appeal Hearing, 12 Mar 2013, AT. 282-283). However, in so arguing, Pavković ignores all other relevant evidence considered by the Trial Chamber.

²⁵⁵⁷ Šainović's Appeal Brief, paras 100, 107, referring to Trial Judgement, vol. 1, paras 1089-1090.

²⁵⁵⁸ Šainović's Appeal Brief, para. 100, referring to Milan Đaković, 19 May 2008, T. 26416-26417, 26429-26430.

²⁵⁵⁹ Šainović's Appeal Brief, paras 100, 107.

²⁵⁶⁰ Prosecution's Response Brief (Šainović), para. 78, also arguing that his arguments are little more than repetitions of his submissions at trial and requesting summary dismissal thereof.

²⁵⁶¹ Exh. P2086.

²⁵⁶² Exh. P1203; Exh. P1204; Exh. P1206; Exh. P1197; Exh. P1198; Exh. P2623.

²⁵⁶³ With regard to the instructions, the Trial Chamber took into consideration: (i) their cover letter sent to various defence departments on 28 July 1998 stating that the Joint Command had issued these instructions and had "determined a new composition of municipal defence staffs"; and (ii) Đaković's Notes recording that the defence of towns was discussed in the Joint Command meeting of 22 July 1998, where Minić said that Pavković was to give directions, while it was also aware of Đaković's testimony that the instructions were without the force of an order, that the term "Joint Command" may have been added to invoke some kind of "fictitious authority", and that these instructions did not emerge from a meeting of the Joint Command, but were prepared by the Priština Corps (Trial Judgement, vol. 1, para. 1089, referring to Exh. P1064, Milan Đaković, 19 May 2008, T. 26414, 26416-26417. See also Exh. P1468, pp. 2,

found that, although these operative reports may have emanated from the VJ, their content, which included detailed political analysis as well as detailed reviews and proposals of MUP engagements, “indicates the involvement of personnel outside the military in producing them, as well as the role of this body in co-ordinating VJ and MUP joint action.”²⁵⁶⁴ By merely referring to Đaković’s testimony, Šainović has failed to demonstrate any error in the Trial Chamber’s assessment of the relevant evidence. The fact that the evidence was inconclusive as to whether the instructions and the content of the operative reports were in fact implemented in the field did not prevent the Trial Chamber from taking them into consideration when assessing the relationship between the Joint Command and other entities. The effect of what was discussed in Joint Command meetings on the events in the field was established by other evidence, which the Trial Chamber carefully examined.²⁵⁶⁵ Consequently, Šainović’s arguments on the instructions and the six operative reports are dismissed.

(viii) Two decisions of the Priština Corps referring to the Joint Command

763. The Trial Chamber took into consideration a decision issued by the Priština Corps on 10 August 1998 concerning the joint engagement of MUP and VJ forces in several areas of Kosovo, which was to take place on 11 August 1998,²⁵⁶⁶ and a decision issued by the Priština Corps on 14 August 1998, ordering VJ units to support MUP units in a particular operation in the sector of the Slup/Sllup and Vokša/Voksh villages.²⁵⁶⁷ Both decisions stated that these combat operations were to be “commanded by the Joint Command for Kosovo and Metohija”.²⁵⁶⁸ Having assessed these decisions in light of witness testimony, the Trial Chamber found that “the Slup/Sllup and Vokša/Voksh operation was under the control of the Priština Corps Command from the Forward Command Post and that the function of the [Joint Command] in relation to the operation was that of co-ordination.”²⁵⁶⁹

4). With respect to the six operative reports, whereas the Trial Chamber was cognisant of Đaković’s testimony that the reports were written in the Priština Corps Command by simply combining MUP, RJB, and RDB reports with a military report, the Trial Chamber also observed that: (i) the term “Joint Command for Kosovo and Metohija” appears typed at the end of each document in place of the signature line; and (ii) two of these reports were admitted with a cover page of a handwritten note, “To Milomir Minić, personally”. In addition, it considered Minić’s testimony that he received this kind of document from the VJ (Trial Judgement, vol. 1, para. 1090, referring to Milomir Minić, 31 Aug 2007, T. 14787-14788, Milan Đaković, 19 May 2008, T. 26428-26432).

²⁵⁶⁴ Trial Judgement, vol. 1, para. 1090.

²⁵⁶⁵ See *supra*, para. 730.

²⁵⁶⁶ Trial Judgement, vol. 1, paras 1031, 1091, referring, *inter alia*, to Exh. P1427.

²⁵⁶⁷ Trial Judgement, vol. 1, paras 1031, 1091, referring, *inter alia*, to Exh. P1428.

²⁵⁶⁸ Trial Judgement, vol. 1, paras 1032, 1091, referring, *inter alia*, to Exh. P1427, p. 3, Exh. P1428, p. 3.

²⁵⁶⁹ Trial Judgement, vol. 1, para. 1092. The quoted sentence originally reads: “the function of the *Joint Command order* in relation to the operation was that of co-ordination” (emphasis added). The reference to the “Joint Command order” is misleading, as the 14 August 1998 decision on the Slup/Sllup and Vokša/Voksh operation was issued by the Priština Corps, with the heading of the Priština Corps Command. From the context of the Trial Judgement, the Appeals Chamber understands the Trial Chamber to have meant to state the “Joint Command”, rather than the “Joint Command order”. The Appeals Chamber does not find that this error has affected the Trial Chamber’s further findings.

764. Šainović submits that, based on the decisions of 10 August 1998²⁵⁷⁰ and 14 August 1998, the Trial Chamber erroneously concluded that the function of the Joint Command “was that of co-ordination” as “there is no mention of some kind of co-ordination role in the explanation given with regard to this engagement.”²⁵⁷¹ In particular, he argues that, with respect to the joint operation in the sector of Slup/Sllup and Vokša/Voksh, the evidence shows that the relevant actions had already been coordinated between the VJ and the MUP prior to the Joint Command meeting of 13 August 1998, where Pavković merely conveyed what was ordered by Samardžić.²⁵⁷² Lukić also challenges the same finding, arguing that the evidence shows that the operation in the sector of Slup/Sllup and Vokša/Voksh was prepared before the discussion at the Joint Command meeting took place and was conducted under the control of the Priština Corps Command.²⁵⁷³ The Prosecution responds that Lukić’s argument misconstrues the Trial Chamber’s relevant findings.²⁵⁷⁴

765. The Appeals Chamber notes that the Trial Chamber found that, before the Priština Corps decisions of 10 and 14 August 1998 were issued, “some co-ordination or exchange of information had occurred between the MUP and the VJ”²⁵⁷⁵ and the MUP had agreed to carry out the various attacks referred to therein.²⁵⁷⁶ The Trial Chamber also found that the joint operation in the sector of Slup/Sllup and Vokša/Voksh – the subject of the 14 August 1998 decision – was discussed during a Joint Command meeting on 13 August 1998, while the operation had been planned prior to this meeting.²⁵⁷⁷ However, contrary to the submissions of Šainović and Lukić, these findings do not in themselves suggest that the Joint Command had no role in the coordination between the VJ and the MUP for the Slup/Sllup and Vokša/Voksh operation.

766. In its assessment of the decisions of 10 and 14 August 1998, the Trial Chamber observed that although the decisions stipulated that the joint operations were to be “commanded by the Joint Command”, Đaković testified that this phrase meant that “both the VJ and MUP command had agreed upon the tasks that were to be carried out by the VJ and MUP units during the joint

²⁵⁷⁰ Although Šainović mentions this date as 11 August 1998 (Šainović Appeal Brief, para. 101), the Appeals Chamber understands him to mean 10 August 1998 based on the content of Exh. P1427 as well as Trial Judgement, vol. 1, para. 1091, to which he refers in relation to this topic.

²⁵⁷¹ Šainović’s Appeal Brief, paras 101, 107, referring to Trial Judgement, vol. 1, paras 1091-1092.

²⁵⁷² Šainović’s Appeal Brief, paras 101-102, referring to Trial Judgement, vol. 1, para. 1083.

²⁵⁷³ Lukić’s Appeal Brief, paras 304-305, 329-330, referring, *inter alia*, to Trial Judgement, vol. 1, paras 1032, 1091-1092, *ibid.*, vol. 3, para. 802, Exh. 6D731, Exh. P1427, Exh. P1428. Lukić also appears to understand the Trial Chamber to have found that the Joint Command not only coordinated but also commanded the operation in question (Lukić’s Appeal Brief, para. 305). Furthermore, Lukić argues that the Trial Chamber relied only on the 10 and 14 August 1998 decisions in reaching the general conclusion that the Joint Command had a coordination role, ignoring other orders in evidence which contained no reference to the Joint Command (Lukić’s Appeal Brief, paras 303, 306). From the context of Lukić’s Appeal Brief, the Appeals Chamber understands his references to the decisions as dated 14 and 18 August 1998, respectively (Lukić’s Appeal Brief, para. 303), to be an inadvertent error on his part.

²⁵⁷⁴ Prosecution’s Response Brief (Lukić), paras 265-266, referring to Trial Judgement, vol. 1, paras 1031-1032.

²⁵⁷⁵ Trial Judgement, vol. 1, para. 1031.

²⁵⁷⁶ Trial Judgement, vol. 1, para. 1032.

²⁵⁷⁷ Trial Judgement, vol. 1, para. 1083, and references therein.

operation.”²⁵⁷⁸ The Trial Chamber also took into account evidence showing that while coordination was already taking place between the VJ and the MUP, Pavković informed the Joint Command, in its meeting of 13 August 1998, of the readiness to start the operation.²⁵⁷⁹ In light of this evidence, considered together with the evidence establishing the role of the Joint Command in coordinating VJ and MUP joint actions,²⁵⁸⁰ a reasonable trier of fact could have concluded that the function of the Joint Command in relation to this operation was “that of co-ordination”, as found by the Trial Chamber.²⁵⁸¹ Consequently, the arguments of Šainović and Lukić in this regard are dismissed.

(ix) The Joint Command and the MUP

767. The Trial Chamber found that MUP representatives, such as Lukić, were among those who regularly attended the Joint Command meetings in 1998²⁵⁸² and that, in the latter half of 1998, the Joint Command “played a role in the co-ordination and exchange of information and intelligence between the MUP and the VJ” and “had influence over the MUP and VJ in respect of the implementation of [...] the Plan for Combating Terrorism.”²⁵⁸³

²⁵⁷⁸ Trial Judgement, vol. 1, para. 1032. See Milan Đaković, 19 May 2008, T. 26381, 26434, *ibid.*, 20 May 2008, T. 26456-26457.

²⁵⁷⁹ Trial Judgement, vol. 1, para. 1083, referring, *inter alia*, to Exh. P1468, pp. 52, 54.

²⁵⁸⁰ Such evidence included Đaković’s Notes (Trial Judgement, vol. 1, para. 1079, and references therein), some instances where the Joint Command circumvented or ignored the VJ chain of command in the context of VJ deployment in support of the MUP (Trial Judgement, vol. 1, paras 1085-1086, and references therein), and six operative reports of the Joint Command (Trial Judgement, vol. 1, para. 1090, and references therein). Lukić’s argument that the Trial Chamber relied only on the decisions of 10 and 14 August 1998 to conclude that the Joint Command had a coordination role (Lukić’s Appeal Brief, paras 303, 306) thus misconstrues the Trial Judgement. In support of their arguments that the Joint Command had no coordination role, Šainović and Lukić (Šainović’s Appeal Brief, para. 103; Lukić’s Appeal Brief, para. 307) also refer to the Trial Chamber’s finding that, while the order of the 125th Motorised Brigade of 7 July 1998 (Exh. P2113) prohibited its subordinate units from executing any actions without “the approval of the Joint Command”, “in reality, it required that the Priština Corps and MUP Commands approve the operations” (Trial Judgement, vol. 1, para. 1096). However, this finding is compatible with the Trial Chamber’s conclusions that the role of the Joint Command was not to control or command joint operations, but to coordinate them, and that orders for the operations were implemented through the existing chains of command (Trial Judgement, vol. 1, paras 1092, 1110). The Appeals Chamber further observes that, while the Trial Chamber stated that “[t]he orders for the joint operations during [the period between around 25 July and 29 October 1998] contained references to the ‘Joint Command’” (Trial Judgement, vol. 1, para. 1004, cited in Lukić’s Appeal Brief, para. 303), which could suggest that all such orders included references to the “Joint Command”, the Trial Chamber considered the existence of orders issued by the Priština Corps in 1998 regarding VJ and MUP joint operations, with no reference to the Joint Command (see, e.g., Trial Judgement, vol. 1, para. 874; *ibid.*, vol. 3, paras 675, 1081, referring, *inter alia*, to Exh. P1101, Exh. P1429, Exh. 6D700). Lukić’s submission that the Trial Chamber ignored such orders (Lukić’s Appeal Brief, paras 303, 306, referring to Exh. 6D697, Exh. 6D696, Exh. P1101, Exh. P1429, Exh. P1431, Exh. 6D700, Exh. 6D701, Exh. P1434) is thus dismissed. The existence of such orders is also compatible with the Trial Chamber’s conclusions as recounted above.

²⁵⁸¹ Trial Judgement, vol. 1, para. 1092. Insofar as Lukić understands the Trial Chamber to have also found that the operation was literally “commanded by the Joint Command” (Lukić’s Appeal Brief, para. 305) and that “the Joint Command was supposed to go in the field and co-ordinate execution of each individual anti-terrorist action” (Lukić’s Appeal Brief, para. 304), he misrepresents the Trial Judgement.

²⁵⁸² Trial Judgement, vol. 1, paras 1055-1056, 1059, 1078; *ibid.*, vol. 3, para. 306.

²⁵⁸³ Trial Judgement, vol. 1, para. 1110.

768. Šainović submits that the Trial Judgement features “almost no analysis of evidence” establishing a link between the Joint Command and the MUP.²⁵⁸⁴ However, his contention disregards the Trial Chamber’s analysis of such evidence.²⁵⁸⁵ His argument in this regard is thus dismissed.

769. Lukić submits that “the MUP was directed solely by the Minister”, as the evidence showed that the MUP was obliged to engage in Kosovo and coordinate with the VJ under relevant laws and orders sent from “the MUP seat in Belgrade”, and as the Trial Chamber made no finding that the command and control system of the MUP was disturbed.²⁵⁸⁶ The Appeals Chamber dismisses his contention as he has failed to demonstrate how such evidence contradicts the Trial Chamber’s finding that the MUP command structure operated while the Joint Command had influence over the MUP and the VJ.²⁵⁸⁷

770. In support of his argument that the Joint Command had no influence,²⁵⁸⁸ Lukić asserts that the Plan for Combating Terrorism was developed by the VJ without the MUP and that VJ and MUP joint actions in accordance with the Plan were implemented exclusively on the orders of the Priština Corps.²⁵⁸⁹ However, Lukić has failed to substantiate why the purported non-involvement of the MUP leads to the conclusion that the VJ had absolute control over joint operations without any

²⁵⁸⁴ Šainović’s Appeal Brief, para. 111, referring to Trial Judgement, vol. 1, paras 1055-1107. *Contra* Prosecution’s Response Brief (Šainović), para. 87.

²⁵⁸⁵ Such evidence includes: (i) Cvetić’s testimony that, at a meeting of the MUP Staff in Priština/Prishtina on 10 July 1998, all the heads of SUPs from Kosovo were informed that “a command had been set up at the highest level with a mandate to integrate the activities of the army and police” and that, on 22 July 1998, in a meeting of the MUP Staff in Priština/Prishtina, Đorđević reiterated that the establishment of the Joint Command comprised, *inter alia*, Lukić (Trial Judgement, vol. 1, para. 1071, referring, *inter alia*, to Ljubinko Cvetić, 7 Dec 2006, T. 8051-8052, 8077, *ibid.*, 8 Dec 2006, T. 8123. See also Trial Judgement, vol. 3, paras 315, 985, 1033); (ii) the evidence of meetings of the Joint Command held between July and October 1998, in which MUP representatives, including Đorđević and Lukić, participated (Trial Judgement, vol. 1, paras 1055-1056, 1059, 1078; *ibid.*, vol. 3, para. 306, and references therein); (iii) six operative reports of the Joint Command dated October and November 1998 addressing engagement of MUP and VJ forces and proposals for further engagements of both forces (Trial Judgement, vol. 1, para. 1090, referring, *inter alia*, to Exh. P1203, Exh. P1204, Exh. P1206, Exh. P1197, Exh. P1198, Exh. P2623. See also *supra*, subsection VII.C.2.(c)(vii)); (iv) the evidence of the meeting of 29 October 1998 in Belgrade, where senior members of the MUP and other participants reviewed the achievement of the Joint Command and discussed the continuation of the Joint Command (Trial Judgement, vol. 1, paras 1003, 1097-1099, 1107, referring to Exh. P2166. See also *supra*, subsection VII.C.1.(b)(ii)); and (v) the evidence of a meeting of 5 November 1998 in the MUP building in Priština/Prishtina among MUP members and representatives from other sectors, where Milutinović indicated that “[w]ith regard to the Yugoslav army and police, everything [– including a joint command –] will stay the same as it has been” (Trial Judgement, vol. 1, para. 1105, referring to Exh. P2805, p. 4. See also Exh. P2805, p. 3). See also Exh. 4DA22, p. 1.

²⁵⁸⁶ Lukić’s Appeal Brief, paras 293-298, and references therein. See also *ibid.*, paras 307-308. *Contra* Prosecution’s Response Brief (Lukić), paras 252, 259-260.

²⁵⁸⁷ Trial Judgement, vol. 1, paras 1081, 1110.

²⁵⁸⁸ Lukić’s Appeal Brief, para. 292. See also *ibid.*, para. 308.

²⁵⁸⁹ Lukić’s Appeal Brief, paras 299-300, 308(1)(2)(3), read together with *ibid.*, para. 292. See also *ibid.*, paras 566, 589-590. See further *ibid.*, paras 284, 326-328, 331, 339, 564-565, 567-568, arguing that no evidence shows that the MUP planned any actions or issued any orders for the purpose of joint operations of the VJ and the MUP.

influence by the Joint Command. His argument in this regard is dismissed to the extent it pertains to the Joint Command.²⁵⁹⁰

(d) Conclusion

771. Having failed to demonstrate any error in the Trial Chamber's assessment of the evidence, Šainović, Pavković, and Lukić have not shown that the Trial Chamber erred in concluding that the Joint Command had influence over the VJ and the MUP in 1998 and played a role in the coordination between these two forces. Consequently, the Appeals Chamber dismisses all their submissions in this regard.²⁵⁹¹

3. Existence and authority of the Joint Command in late 1998 and 1999

(a) Introduction

772. The Trial Chamber found that following the conclusion of the October Agreements, namely the Holbrooke-Milošević Agreement and other associated Agreements, in the latter half of October 1998,²⁵⁹² a meeting of the FRY and Serbian leadership was held in Milošević's office at Beli Dvor in Belgrade on 29 October 1998, wherein the participants reviewed actions taken for the implementation of the Plan for Combating Terrorism in the name of the Joint Command.²⁵⁹³ The Trial Chamber also found that, in this meeting, the participants "agreed that the Joint Command should continue to function – albeit with a different composition."²⁵⁹⁴

773. With regard to the existence of the Joint Command in 1999, the Trial Chamber noted the absence of evidence on daily meetings similar to those held in 1998, and noted only evidence of one meeting on 1 June 1999.²⁵⁹⁵ However, it held:

[I]mportant actors, including some of the Accused, referred to the "Joint Command" in 1999, which they had to take into account in their duties. When referring to the "Joint Command" in 1999, they adverted to the whole co-ordination system established in 1998 between the VJ and the MUP. As explained above, in 1998 an entity known as the Joint Command was part of this system. In 1999 the co-ordination system continued to function. It had become standard practice

²⁵⁹⁰ Lukić's contention as to the non-involvement of the MUP in 1998 is further discussed in detail below, in relation to his own contribution to the JCE and *mens rea*. See *infra*, sub-section VII.F.3.

²⁵⁹¹ Šainović's sub-ground 1(8) in part, 1(16); Pavković's sub-grounds 1(D) in part, 1(G) in part; Lukić's sub-grounds N in part, N(1), N(3) in part, P(6) in part.

²⁵⁹² See Trial Judgement, vol. 1, paras 312-314, 330-334, 337-339, 347-349, 812, 921, wherein the Trial Chamber found that, in view of the fact that the crisis in Kosovo had worsened in 1998, international intermediaries brokered the October Agreements, whereby the FRY and Serbian authorities agreed upon a number of matters, including, the reduction of the number of VJ and MUP forces in Kosovo and the introduction of the OSCE Kosovo Verification Mission, also known as the KVM, to monitor compliance with the Agreements.

²⁵⁹³ Trial Judgement, vol. 1, paras 1003, 1097-1099, 1107. See also *supra*, sub-section VII.C.1.(b)(ii).

²⁵⁹⁴ Trial Judgement, vol. 1, para. 1112. See also *ibid.*, vol. 1, para. 1099.

²⁵⁹⁵ Trial Judgement, vol. 1, para. 1150. See also *ibid.*, vol. 1, para. 1112.

for MUP and VJ representatives to hold co-ordination meetings before finalising plans for and conducting joint operations.²⁵⁹⁶

774. Regarding the authority of the Joint Command in 1999, the Trial Chamber took into account, *inter alia*, 16 orders with the heading “Joint Command” and found that “even though the Priština Corps Command was the source of the 16 orders [...], a heading ‘Joint Command’ was added to them to ensure that they would be accepted into the MUP chain of command [...] and to lend them an air of greater authority.”²⁵⁹⁷ The Trial Chamber held that “the references to the ‘Joint Command’ [...] evoked the authority of the entity referred to in 1998 as the ‘Joint Command’.”²⁵⁹⁸

775. The Trial Chamber also found that the 16 orders with the heading “Joint Command” were “put into effect by both MUP and VJ forces.”²⁵⁹⁹ It further held that “the VJ and MUP chains of command remained separate and intact and the VJ and MUP units were commanded by their respective commands”,²⁶⁰⁰ although “the VJ chain of command functioned with a degree of flexibility in 1999.”²⁶⁰¹ The Trial Chamber also found that “there existed a direct line from Pavković to Milošević” and that, “[a]lthough this did not, strictly speaking, constitute a breach of subordination, [Pavković] essentially by-passed his immediate superior when he met with Milošević.”²⁶⁰²

776. According to the Trial Chamber’s findings, in the first half of 1999, two large-scale plans – *Grom 3* and *Grom 4* plans – were prepared within the VJ, aimed mainly at suppressing NATO forces, but also “terrorist” forces in Kosovo.²⁶⁰³ The MUP also prepared its own plans in

²⁵⁹⁶ Trial Judgement, vol. 1, para. 1151.

²⁵⁹⁷ Trial Judgement, vol. 1, para. 1151.

²⁵⁹⁸ Trial Judgement, vol. 1, para. 1151. See also *ibid.*, vol. 1, para. 1135, regarding the source of the 16 orders.

²⁵⁹⁹ Trial Judgement, vol. 1, para. 1123.

²⁶⁰⁰ Trial Judgement, vol. 1, para. 1144.

²⁶⁰¹ Trial Judgement, vol. 1, para. 1119.

²⁶⁰² Trial Judgement, vol. 1, para. 1119.

²⁶⁰³ With regard to the *Grom 3* plan, see Trial Judgement, vol. 1, paras 1012-1015, 1017 (The Trial Chamber found that, on 16 January 1999, Ojdanić, the then Chief of the VJ General Staff, issued the *Grom 3* directive, which set out a plan comprising two stages: the first stage was to prevent NATO from entering Kosovo and the second stage was to eliminate NATO as well as “terrorist” forces. The Trial Chamber also found that, on 27 January 1999, Pavković, the then 3rd Army Commander, issued the *Grom 3* order for the use of the 3rd Army and that, on 7 February 1999, the Priština Corps Command also issued its own *Grom 3* order). With respect to the *Grom 4* plan, see Trial Judgement, vol. 1, paras 1018-1020, 1022 (The Trial Chamber found that, on 9 April 1999, the Supreme Command Staff/VJ General Staff issued the *Grom 4* directive setting out another plan, which was “for the engagement of the VJ in defence against the NATO aggression”, while also taking into consideration the aggression by “terrorist” forces with the support of NATO forces. The Trial Chamber also found that, on 10 April 1999, the 3rd Army Command issued its *Grom 4* order and that, on 6 April 1999, three days before the issuance of the *Grom 4* directive, the Priština Corps Command issued its *Grom 4* order based on a meeting with Pavković, the then 3rd Army Commander, on 5 April 1999). The Appeals Chamber notes the Trial Chamber’s finding that it appears from the *Grom 3* and *Grom 4* plans that the VJ’s “enemy” at the beginning of the year and in April 1999 “was NATO rather than the ‘terrorist’ forces” (Trial Judgement, vol. 1, para. 1012) and Lukić’s argument that this finding is erroneous (Lukić’s Appeal Brief, para. 340; *contra* Prosecution’s Response Brief (Lukić), paras 274-276). However, the Trial Chamber’s subsequent analysis of the evidence shows that it was aware that those plans also aimed at suppressing “terrorists”, although this objective may have been an auxiliary

parallel.²⁶⁰⁴ Joint operations of the VJ and the MUP, corresponding to the *Grom 3* and *Grom 4* plans, were conducted in the latter half of March 1999 and in mid-April 1999, respectively.²⁶⁰⁵

777. On 24 March 1999, the NATO airstrikes started.²⁶⁰⁶ On the same day, the FRY Government declared a state of war.²⁶⁰⁷ During the state of war, the General Staff of the VJ became known as the “Supreme Command Staff”.²⁶⁰⁸ Starting from 18 April 1999, Milošević, the Supreme Command Staff, the 3rd Army, and the Priština Corps issued orders to resubordinate the MUP to the VJ.²⁶⁰⁹ However, these orders were not put into effect.²⁶¹⁰ The Trial Chamber found that “[a]lthough MUP units were not resubordinated to the VJ [after the issuance of the re-subordination orders], there was still a high level of co-operation or co-ordination between the forces of the FRY and Serbia, in the conduct of joint operations in Kosovo during the Indictment period.”²⁶¹¹ In the beginning of June 1999, the warring parties reached a peace agreement.²⁶¹²

(b) Preliminary matters

(i) Submissions of the parties

778. Šainović submits that it was unreasonable for the Trial Chamber to find that a body designated as the Joint Command by the Trial Chamber continued to exist after October 1998 with the same goals as before.²⁶¹³ He also maintains that the Trial Chamber erred in making “vague and imprecise” findings, with “evasive explanations”, concerning the Joint Command in 1999 and that the only possible conclusion on the evidence was that the Joint Command neither existed nor exerted any influence in 1999, and that no civilians were members of such an entity.²⁶¹⁴ Moreover, Šainović asserts that the Trial Chamber reached contradictory findings with respect to the existence of the Joint Command, by alluding to the fact that the Joint Command did not exist in 1999, while stating elsewhere that the Joint Command existed and had influence.²⁶¹⁵ He contends that this

one (Trial Judgement, vol. 1, paras 1012-1015, 1018-1020). Furthermore, Lukić has not shown any impact of the alleged error on the outcome of the Trial Judgement. His argument in this regard is thus dismissed.

²⁶⁰⁴ Trial Judgement, vol. 1, paras 1015-1017, 1021-1022. See also *ibid.*, vol. 1, paras 1037-1042.

²⁶⁰⁵ Trial Judgement, vol. 1, paras 1017, 1022.

²⁶⁰⁶ Trial Judgement, vol. 1, para. 1209.

²⁶⁰⁷ Trial Judgement, vol. 1, paras 1167, 1208. On 23 March 1999, a state of immediate threat of war was proclaimed (Trial Judgement, vol. 1, paras 1167, 1208).

²⁶⁰⁸ Trial Judgement, vol. 1, para. 469.

²⁶⁰⁹ Trial Judgement, vol. 1, paras 1167-1174.

²⁶¹⁰ Trial Judgement, vol. 1, paras 1189, 1203.

²⁶¹¹ Trial Judgement, vol. 1, para. 1203.

²⁶¹² Trial Judgement, vol. 1, para. 1215.

²⁶¹³ Šainović’s Appeal Brief, paras 67, 70, 85-86, referring to Trial Judgement, vol. 1, para. 1010.

²⁶¹⁴ Šainović’s Appeal Brief, paras 121, 132-135, 141, referring to Trial Judgement, vol. 1, para. 1151.

²⁶¹⁵ Šainović’s Appeal Brief, paras 142-146, referring to Trial Judgement, vol. 1, para. 1151, *ibid.*, vol. 3, para. 300. See also Šainović’s Reply Brief, para. 25.

incoherence suggests that the Trial Chamber's findings on his individual responsibility were based on a non-existent finding regarding the existence and power of the Joint Command in 1999.²⁶¹⁶

779. Lukić maintains that there is no evidence confirming the existence of the Joint Command in 1999²⁶¹⁷ and that the Trial Chamber's use of the term "Joint Command", implying that the body in question possessed command authority, contradicts other findings of the Trial Chamber.²⁶¹⁸

780. The Prosecution responds that the Trial Chamber reasonably found that the Joint Command continued to exist after October 1998 and in 1999.²⁶¹⁹ The Prosecution contends that the arguments of Šainović and Lukić to the contrary warrant summary dismissal for various reasons, including misrepresenting and disregarding the Trial Chamber's findings and relevant evidence.²⁶²⁰ The Prosecution also argues that the system of coordination between the VJ and the MUP, which was found to have been established in 1998 and continued to function in 1999, included the Joint Command and that the ambiguity in the Trial Chamber's findings, if any, is remedied – not contradicted – by other parts of the Trial Judgement.²⁶²¹

(ii) Analysis

781. At the outset, the Appeals Chamber observes that Šainović is inconsistent in asserting both that the Trial Chamber erred in affirming the existence of the Joint Command in 1999²⁶²² and that it erred in not making a clear conclusion on this point.²⁶²³ The Trial Chamber concluded that "in 1998 an entity known as the Joint Command was part of [the whole coordination system established in 1998 between the VJ and the MUP]" and that "[i]n 1999 the co-ordination system continued to function."²⁶²⁴ The Trial Chamber recounted this finding, stating that "a co-ordinating body called the Joint Command existed in the second half of 1998 and the first half of 1999, and [...] it had significant influence over the actions of MUP and VJ forces."²⁶²⁵ These findings, read together,²⁶²⁶ were sufficiently clear to reflect that the Joint Command existed in 1999, as in 1998, as part of the coordination system which was established between the VJ and the MUP in 1998 and continued to exist in 1999. Therefore, the Appeals Chamber dismisses Šainović's argument insofar as he claims

²⁶¹⁶ Šainović's Appeal Brief, para. 145. See also Šainović's Reply Brief, para. 25.

²⁶¹⁷ Lukić's Appeal Brief, para. 154. See also *ibid.*, para. 320, referring to Trial Judgement, vol. 1, para. 1112.

²⁶¹⁸ Lukić's Appeal Brief, para. 274, referring to Trial Judgement, vol. 1, paras 909, 1135, 1144.

²⁶¹⁹ Prosecution's Response Brief (Šainović), paras 37, 67-68, 73, 93.

²⁶²⁰ Prosecution's Response Brief (Šainović), paras 67, 93; Prosecution's Response Brief (Lukić), paras 243, 245, 250-252.

²⁶²¹ Prosecution's Response Brief (Šainović), paras 91-92, 96.

²⁶²² Šainović's Appeal Brief, paras 67, 70, 85-86.

²⁶²³ Šainović's Appeal Brief, paras 133-135, 141.

²⁶²⁴ Trial Judgement, vol. 1, para. 1151.

²⁶²⁵ Trial Judgement, vol. 3, para. 300. See also *ibid.*, vol. 3, paras 337, 703, 1023.

that the Trial Chamber failed to make a clear finding in this regard, and that its findings on his individual responsibility were based on a non-existent finding regarding the existence and power of the Joint Command in 1999.

782. The Trial Chamber was also unequivocal in concluding that the nature of the authority of the Joint Command in 1998 – exercising influence over the VJ and the MUP through its role in coordination –²⁶²⁷ did not essentially change in 1999.²⁶²⁸ Therefore, insofar as Šainović and Lukić argue that the Trial Chamber found that the Joint Command had command authority in 1999, their arguments misrepresent the Trial Judgement and are thus dismissed.

783. Šainović and Lukić also raise specific challenges to the Trial Chamber’s assessment of various pieces of evidence concerning the existence and authority of the Joint Command in late 1998 and 1999. The Appeals Chamber will examine these specific challenges in turn.

(c) Alleged errors in the assessment of evidence

(i) The Joint Command, the TEC, and the Commission for Cooperation with the KVM – change of situation in late 1998

784. Šainović contends that the fact that the Provisional or Temporary Executive Council of the Autonomous Province of Kosovo and Metohija (“TEC”) was established at the end of September 1998 to work towards a political resolution of the crisis and to organise elections in Kosovo should have prompted the Trial Chamber to conclude that a new political situation arose in Kosovo following the October Agreements.²⁶²⁹ In particular, Šainović appears to assert that the Trial Chamber’s own description of the TEC is inconsistent with its finding that the Joint Command remained composed of political representatives of the FRY and Serbia even after the autumn of 1998.²⁶³⁰ Šainović also refers to his own appointment as Chairman of the Commission of the Federal Government for the Co-operation with the OSCE Mission for Verification in Kosovo and Metohija, established on 19 October 1998 (“Commission for Cooperation with the KVM” or “Commission”), arguing that this indicates a “significantly different phase in [his] engagement in

²⁶²⁶ See *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38; *Naletilić and Martinović* Appeal Judgement, para. 435; *Stakić* Appeal Judgement, para. 344.

²⁶²⁷ See *supra*, sub-section VII.C.2.

²⁶²⁸ See Trial Judgement, vol. 1, para. 1151; *ibid.*, vol. 3, paras 300, 337, 703, 1023.

²⁶²⁹ Šainović’s Appeal Brief, para. 82, arguing that this is also apparent from the appointment of Anđelković as President of the TEC, a position entailing an entirely different role from that of a member of the Joint Command, which the Trial Chamber found he played during the period between July and September 1998. See also *ibid.*, para. 69; Šainović’s Reply Brief, para. 19.

²⁶³⁰ Šainović’s Appeal Brief, para. 84, referring to Trial Judgement, vol. 1, paras 302-311. See also Šainović’s Reply Brief, para. 20.

Kosovo.”²⁶³¹ The Prosecution responds that the Trial Chamber’s descriptions of the position and role of the TEC were not incompatible with its conclusions regarding the Joint Command and that the duties of members of the TEC did not prevent them from attending Joint Command meetings.²⁶³²

785. The Appeals Chamber notes that the Trial Chamber found that the Serbian National Assembly formed the TEC on 28 September 1998.²⁶³³ It noted that the purpose of the TEC was to hold “an election in Kosovo as soon as possible, and thereby constitute appropriate authorities, such as the provincial assembly”.²⁶³⁴ The Trial Chamber also found that the TEC distributed humanitarian aid to all citizens of Kosovo and that Zoran Anđelković, as the President of the TEC, had extensive dealings with foreign diplomats.²⁶³⁵ The Trial Chamber found that, on 19 October 1998, the FRY Government established the Commission for Cooperation with the KVM, headed by Šainović, which was tasked “to consider and co-ordinate the political, security and logistical aspect[s] of the functioning of the OSCE Mission for verification in Kosovo and Metohija.”²⁶³⁶

786. The Trial Chamber also found that the activities of the Working Group – composed of Milomir Minić, Duško Matković, and Zoran Anđelković – ceased altogether after the meeting on 29 October 1998 at Beli Dvor in Belgrade.²⁶³⁷ It noted, however, that Anđelković remained in Kosovo in his new capacity as the President of the TEC.²⁶³⁸ The Trial Chamber found that “the work of the Joint Command or its influence over the actions of the MUP and the VJ in Kosovo” did not cease and noted evidence of high-level officials making references to the Joint Command, “Joint Command orders, and at least one meeting of the Joint Command in 1999.”²⁶³⁹

787. These findings clearly show that the Trial Chamber was aware of the political development around the time of the conclusion of the October Agreements. In view of the mandates of the TEC and the Commission for Cooperation with the KVM described by the Trial Chamber, which are not disputed by Šainović, the Appeals Chamber considers that Šainović has failed to demonstrate that the TEC and the Commission could not coincide with the Joint Command, which involved political representatives and played a role in coordinating the activities of the VJ and the MUP in Kosovo. Similarly, Šainović has failed to demonstrate in what way his function as head of the Commission

²⁶³¹ Šainović’s Appeal Brief, para. 83, referring to Exh. P2166, p. 15. See also Trial Judgement, vol. 1, para. 922.

²⁶³² Prosecution’s Response Brief (Šainović), para. 76, referring to Trial Judgement, vol. 1, paras 302-311, Exh. P1468.

²⁶³³ Trial Judgement, vol. 1, para. 308.

²⁶³⁴ Trial Judgement, vol. 1, para. 309.

²⁶³⁵ Trial Judgement, vol. 1, para. 309.

²⁶³⁶ Trial Judgement, vol. 1, para. 922. See also *ibid.*, vol. 1, para. 340.

²⁶³⁷ Trial Judgement, vol. 1, para. 1010.

²⁶³⁸ Trial Judgement, vol. 1, para. 1010.

²⁶³⁹ Trial Judgement, vol. 1, para. 1010.

and Anđelković's position as head of the TEC were incompatible with their membership of the Joint Command. Šainović has not shown any error in the Trial Chamber's findings. His arguments are thus dismissed.

(ii) Evidence of witnesses who testified that the Joint Command meetings ceased in October 1998 and that the Joint Command did not exist thereafter

788. Šainović submits that the Trial Chamber erred in not relying on the evidence of participants in the Joint Command meetings, including Milomir Minić, Duško Matković, Zoran Anđelković, Milan Đaković, Branko Gajić,²⁶⁴⁰ and Pavković, that the meetings ceased in October 1998 and that the Joint Command no longer existed from that point in time.²⁶⁴¹ He also challenges the reliability of Aleksandar Vasiljević's evidence on the role of the Joint Command in 1999, arguing that Vasiljević was retired and reinstated only on 27 April 1999 and that the source of his information regarding the Joint Command in 1998 was Momir Stojanović, from whom he had heard nothing about it in 1999.²⁶⁴² The Prosecution responds that the Trial Chamber considered the evidence of witnesses who testified that the Joint Command did not exist in 1999, but was entitled not to rely upon it, in light of the evidence establishing the existence of the Joint Command in 1999, including Vasiljević's testimony regarding his attendance at the 1 June 1999 Joint Command meeting.²⁶⁴³

789. The Trial Chamber noted the testimony of witnesses – including Đaković, who participated in Joint Command meetings in 1998 – that there were no Joint Command meetings after October 1998.²⁶⁴⁴ The Trial Chamber was also aware of the testimony of witnesses who denied the existence of the Joint Command in 1999 or throughout 1998 and 1999.²⁶⁴⁵ However, the Appeals Chamber recalls that the Trial Chamber observed that there was “a remarkable degree of

²⁶⁴⁰ While Šainović refers to Branko Gajić's testimony as that of one of the participants in the meetings (Šainović's Appeal Brief, para. 68), it was not Branko Gajić, but David Gajić, who participated in the meetings (Trial Judgement, vol. 1, para. 1059).

²⁶⁴¹ Šainović's Appeal Brief, paras 68, 85, 122, referring to Milomir Minić, 31 Aug 2007, T. 14748-14750, 14754, Duško Matković, 29 Aug 2007, T. 14597, Zoran Anđelković, 30 Aug 2007, T. 14663, Branko Gajić, 11 Sep 2007, T. 15413, Milan Đaković, 19 May 2008, T. 26389, Exh. P1468, p. 160, Trial Judgement, vol. 1, paras 1113, 1115.

²⁶⁴² Šainović's Appeal Brief, paras 122, 132, referring to Trial Judgement, vol. 1, paras 1114, 1145-1152, Aleksandar Vasiljević, 22 Jan 2007, T. 8812, 8820, Aleksandar Dimitrijević, 9 Jul 2008, T. 26755, Exh. P2594, para. 53.

²⁶⁴³ Prosecution's Response Brief (Šainović), para. 93, referring, *inter alia*, to Trial Judgement, vol. 1, paras 1115, 1145. See also Prosecution's Response Brief (Šainović), para. 37.

²⁶⁴⁴ Trial Judgement, vol. 1, paras 1113 (referring to Milan Đaković, 19 May 2008, T. 26388-26389), 1115 (referring to Tomislav Mladenović, 25 Oct 2007, T. 17619, Velimir Obradović, 22 Oct 2007, T. 17419, Momir Stojanović, 7 Dec 2007, T. 19766). See also Trial Judgement, vol. 1, para. 1146, referring to Zoran Anđelković, 30 Aug 2007, T. 14663.

²⁶⁴⁵ Trial Judgement, vol. 1, para. 1115, referring to Branko Gajić, 11 Sep 2007, T. 15413, Momir Stojanović, 11 Dec 2007, T. 20058, Ljubivoje Joksić, 8 Feb 2008, T. 22005-22006, Miroslav Mijatović, 14 Feb 2008, T. 22412-22413, Miloš Deretić, 18 Feb 2008, T. 22589, Dušan Gavrančić, 19 Feb 2008, T. 22723, Radovan Vučurević, 25 Feb 2008, T. 23131, Božidar Filić, 10 Mar 2008, T. 24008, 24010, Miloš Vojnović, 12 Mar 2008, T. 24190, Vladimir Ilić, 17 Mar 2008, T. 24345. See also *supra*, para. 695; Trial Judgement, vol. 1, paras 1028 (fn. 2739), 1057, 1073 (fns 2888-2889), 1074-1075 and witness testimony cited therein. See also Pavković's statement in one of the Joint

hypersensitivity by many witnesses” with regard to the existence of the Joint Command.²⁶⁴⁶ It was within the Trial Chamber’s discretion²⁶⁴⁷ not to rely on the testimony of such witnesses in light of documentary evidence recording references to the Joint Command in various meetings, reports, and orders in 1999²⁶⁴⁸ as well as other testimonial evidence, including: (i) Đorđe Ćurčin’s testimony that he had heard of the Joint Command at a Collegium meeting of the VJ General Staff at the beginning of 1999;²⁶⁴⁹ and (ii) Aleksandar Vasiljević’s evidence that the Joint Command of 1999 had the force of “a mini-Supreme Command” and had the function of being “in-charge of joint operations of the VJ and MUP forces in the absence of official MUP subordination to the VJ”.²⁶⁵⁰

790. The Appeals Chamber observes that Vasiljević indeed stated that he had heard from Stojanović about the Joint Command in 1998.²⁶⁵¹ The evidence also shows that he had been retired until he was reinstated in the VJ as the Deputy Head of the Security Administration around 27 April 1999.²⁶⁵² However, it is apparent from his in-court testimony and his written statement²⁶⁵³ that his evidence about the Joint Command was not only based on Stojanović’s information, but also on his experiences in the VJ as a career military man and as the Deputy Head of the Security Administration from the end of April 1999 as well as on his participation in the meeting of 1 June 1999, which the Trial Chamber found to be similar to the Joint Command meetings held

Command meetings: “my command from Niš believes that this command should cease to exist” (Exh. P1468, p. 160, cited in Šainović’s Appeal Brief, para. 68).

²⁶⁴⁶ Trial Judgement, vol. 1, para. 1054. See also *ibid.*, vol. 1, para. 1073. See also *supra*, para. 696.

²⁶⁴⁷ See *Galić* Appeal Judgement, para. 300; *Kupreškić et al.* Appeal Judgement, paras 31-32; *Nahimana et al.* Appeal Judgement, para. 194; *Bikindi* Appeal Judgement, para. 116.

²⁶⁴⁸ See, for instance: (i) the evidence concerning the meeting in Belgrade on 29 October 1998, at which the participants “agreed that the Joint Command should continue to function – albeit with a different composition” (Trial Judgement, vol. 1, para. 1112. See also *ibid.*, vol. 1, paras 1003, 1097-1099, 1107; *supra*, sub-section VII.C.1.(b)(ii)); (ii) minutes of the Collegium of the VJ General Staff on 21 January 1999, recording Ojdanić making references to the Joint Command and suggesting the possibility of it receiving orders directly from the FRY President (Trial Judgement, vol. 1, fn. 3027, para. 1120; *ibid.*, vol. 3, para. 504; *infra*, fn. 2731); (iii) two combat reports of 25 and 29 April 1999 made by the Priština Corps and the 3rd Army, respectively, and mentioning that operations were conducted in line with decisions of the Joint Command (Trial Judgement, vol. 1, para. 1116; *infra*, sub-section VII.C.3.(c)(iv)); (iv) Pavković’s report of 25 May 1999 to the Supreme Command Staff requesting that the order on the re-subordination of the MUP to the VJ be reinforced or otherwise annulled, leaving the command of the MUP units in the hands of the MUP Staff for Kosovo “through the Joint Command as has so far been the case” (Trial Judgement, vol. 1, paras 1121, 1183; *infra*, sub-section VII.C.3.(c)(vii)); (v) Pavković’s public announcement that the cooperation between the police and the army was coordinated through “political actors in joint command, formed for that purpose” (Trial Judgement, vol. 1, para. 1117; *infra*, sub-section VII.C.3.(c)(v)); (vi) a document of 17 April 1999 containing “suggestions” by Ojdanić, the Chief of the VJ General Staff, to Pavković, the 3rd Army Commander, that a particular Joint Command order be modified (Trial Judgement, vol. 1, paras 1118-1119; *infra*, sub-section VII.C.3.(c)(vi)); (vii) evidence regarding the meeting of 1 June 1999, which the Trial Chamber found to have been a meeting of the Joint Command (Trial Judgement, vol. 1, paras 1145-1149; *infra*, sub-section VII.C.3.(c)(viii)); and (viii) the 16 orders issued in March and April 1999, which bore the term “Joint Command” in their headings and signature lines (Trial Judgement, vol. 1, paras 1122, 1151; *infra*, sub-section VII.C.3.(c)(iii)).

²⁶⁴⁹ Trial Judgement, vol. 1, para. 1114, referring to Đorđe Ćurčin, 5 Oct 2007, T. 16972, Slobodan Kosovac, 18 Sep 2007, T. 15870-15871.

²⁶⁵⁰ Trial Judgement, vol. 1, para. 1114, referring to Aleksandar Vasiljević, Exh. P2600, para. 46.

²⁶⁵¹ Aleksandar Vasiljević, Exh. P2600, para. 47; Aleksandar Vasiljević, 22 Jan 2007, T. 8812, 8820.

²⁶⁵² Aleksandar Vasiljević, Exh. P2600, paras 5-7. See also Aleksandar Vasiljević, 18 Jan 2007, T. 8626-8627.

²⁶⁵³ Aleksandar Vasiljević, 18-24 Jan 2007, T. 8616-9111; Aleksandar Vasiljević, Exh. P2600.

in 1998.²⁶⁵⁴ In these circumstances, the Appeals Chamber finds that a reasonable trier of fact could have relied on Vasiljević's evidence, despite the fact that he was retired until around 27 April 1999 and that he did not hear from Stojanović about the Joint Command in 1999.

791. Šainović has failed to demonstrate any error in the Trial Chamber's evaluation of the witnesses' evidence in question. His arguments in this regard are therefore dismissed.

(iii) 16 orders with the heading of "Joint Command" and the effect of the term "Joint Command"

792. The Trial Chamber received in evidence 16 orders for VJ and MUP joint operations dated between March and April 1999, bearing the heading "Joint Command" and containing a clause to the effect that the Joint Command "shall command and control all forces" during the concerned operations.²⁶⁵⁵ With regard to these orders, the Trial Chamber found:

[E]ven though the Priština Corps Command was the source of the 16 orders issued in 1999, a heading "Joint Command" was added to them to ensure that they would be accepted into the MUP chain of command [...]; to inform VJ units that an operation would involve the MUP; and to lend them an air of greater authority. In the view of the Chamber, the references to the "Joint Command" constituted [*sic*] an important factor during the planning and implementation of joint operations between the VJ and the MUP, as they evoked the authority of the entity referred to in 1998 as the "Joint Command".²⁶⁵⁶

a. Submissions of the parties

793. Šainović avers that the Trial Chamber drew erroneous conclusions regarding the Joint Command on the basis of the 16 orders.²⁶⁵⁷ In particular, referring to the Trial Chamber's acceptance that the Priština Corps was the source of these orders and that the VJ and MUP chains of command remained separate and intact, he asserts that the orders do not prove the existence of the Joint Command in 1999.²⁶⁵⁸ He also maintains that the Trial Chamber erred in disregarding the testimony of Radojko Stefanović and Lazarević, in mischaracterising Milan Đaković's evidence,²⁶⁵⁹ and in consequently finding that the heading "Joint Command" was added to make the orders more

²⁶⁵⁴ Trial Judgement, vol. 1, paras 1145, 1149.

²⁶⁵⁵ Trial Judgement, vol. 1, para. 1122. See also *ibid.*, vol. 1, paras 1037-1041, 1123-1144. The 16 orders are: Exh. P3049; Exh. P1966; Exh. P2031; Exh. P2015; Exh. P1968; Exh. P1969; Exh. P2003; Exh. P1970; Exh. P1971; Exh. P1972; Exh. P1973; Exh. P1974; Exh. P1975; Exh. P1976; Exh. P1878; Exh. P1977.

²⁶⁵⁶ Trial Judgement, vol. 1, para. 1151. See also *ibid.*, vol. 1, para. 1135, regarding the source of the 16 orders.

²⁶⁵⁷ Šainović's Appeal Brief, para. 127.

²⁶⁵⁸ Šainović's Appeal Brief, para. 127, referring to Trial Judgement, vol. 1, paras 1135, 1144. See also Šainović's Reply Brief, para. 17, referring to Trial Judgement, vol. 1, paras 1122-1144.

²⁶⁵⁹ Šainović's Appeal Brief, para. 138, referring to Radojko Stefanović, 5 Feb 2008, T. 21661, Vladimir Lazarević, 8 Nov 2007, T. 17928, Milan Đaković, 19 May 2008, T. 26389, 26392. See also Lukić's Appeal Brief, para. 311, referring to Exh. 3D697, arguing that the Trial Chamber's conclusion was based on Đaković's "false testimony".

acceptable to the MUP and to “lend them an air of greater authority”.²⁶⁶⁰ Šainović further maintains that the finding that the term “Joint Command” was needed to provide an air of greater authority for the orders is illogical because there is no evidence that the MUP received any orders headed “Joint Command”.²⁶⁶¹ In addition, Šainović submits that the Trial Chamber’s finding that the references to the Joint Command “evoked the authority of the entity referred to in 1998 as the ‘Joint Command’”²⁶⁶² implies that the use of the term “Joint Command” was a mere reminder of something that used to exist, but no longer existed in 1999.²⁶⁶³

794. Lukić submits that, although the Trial Chamber accepted that the 16 orders were issued by the Priština Corps Command and that VJ and MUP units were commanded by their respective commands, it contradicted itself elsewhere by referring to some of the orders as those of the Joint Command.²⁶⁶⁴ He also submits that the Trial Chamber erred in finding that references to the “Joint Command” evoked the authority of the entity referred to in 1998 as the “Joint Command” and that the term was used in order to ensure their acceptance by the MUP chain of command in 1999,²⁶⁶⁵ since no orders for joint anti-terrorist operations bore the heading of “Joint Command” in 1998, but rather the heading of the Priština Corps Command.²⁶⁶⁶

795. The Prosecution responds that the 16 orders directed VJ units to conduct several actions in coordination with MUP units; that each of these orders contained a phrase to the effect that “the Joint Command [...] shall command and control all forces”; and that the forces, areas, and dates of combat operations specified in several of these orders correspond with the crime sites in the Indictment.²⁶⁶⁷ The Prosecution also points out the Trial Chamber’s finding that the “Joint Command” heading was added to the orders to ensure their acceptance by the MUP chain of command and to lend them an air of greater authority,²⁶⁶⁸ and argues that reference to a non-existent

²⁶⁶⁰ Šainović’s Appeal Brief, para. 139. See also Trial Judgement, vol. 1, para. 1151.

²⁶⁶¹ Šainović’s Appeal Brief, para. 139, referring to Trial Judgement, vol. 1, paras 1029, 1143, and also arguing that there is no evidence of any problems in the execution of the superior commands’ orders in the Priština Corps and that there were units in Kosovo in 1999 which had not been deployed in 1998 and to which the term “Joint Command” was meaningless. See also Appeal Hearing, 11 Mar 2013, AT. 188.

²⁶⁶² Šainović’s Appeal Brief, para. 140, citing Trial Judgement, vol. 1, para. 1151.

²⁶⁶³ Šainović’s Appeal Brief, paras 135, 140, referring to Trial Judgement, vol. 1, para. 1151. See also Appeal Hearing, 11 Mar 2013, AT. 188, 268.

²⁶⁶⁴ Lukić’s Appeal Brief, paras 275, 317(b)(c)(e), 321-322, 790, referring, *inter alia*, to Trial Judgement, vol. 1, paras 785, 1135, 1144, 1151, *ibid.*, vol. 2, para. 897, *ibid.*, vol. 3, para. 827, Vladimir Lazarević, 22 Nov 2007, T. 18638, and also arguing that these findings show no role of the Joint Command and that the Trial Chamber presented the facts in an ambiguous manner, thereby erroneously implying that the Joint Command issued orders.

²⁶⁶⁵ Lukić’s Appeal Brief, paras 309-310, referring to Trial Judgement, vol. 1, paras 1028, 1151.

²⁶⁶⁶ Lukić’s Appeal Brief, paras 310-311, referring to Exh. P1427, Exh. P1428, Exh. P1101, Exh. P1329, Exh. P1431, Exh. P1434, Exh. 6D696, Exh. 6D697, Exh. 6D700, Exh. 6D701, and pointing out one exception, Exh. P1613, bearing a MUP heading but containing a signature of Pavković and the stamp of the Priština Corps at the end of the document.

²⁶⁶⁷ Prosecution’s Response Brief (Šainović), para. 71, referring to Trial Judgement, vol. 1, paras 1122-1123.

²⁶⁶⁸ Prosecution’s Response Brief (Šainović), paras 71, 94, referring to Trial Judgement, vol. 1, paras 1135, 1151.

entity would not achieve these purposes.²⁶⁶⁹ It further contends that the Trial Chamber neither presented “the facts in an ambiguous manner” nor implied that the Joint Command issued orders.²⁶⁷⁰

b. Analysis

796. The Appeals Chamber first notes that the 16 orders in question bore the heading of the “Joint Command for Kosovo and Metohija”.²⁶⁷¹ As a result, the Trial Chamber referred to these orders as “Joint Command orders”.²⁶⁷² Irrespective of whether this designation was appropriate, the Trial Chamber duly took into account the fact that the source of these orders was the Priština Corps Command and that the VJ and MUP chains of command remained intact, when assessing the existence and authority of the Joint Command in 1999.²⁶⁷³ In these circumstances, Lukić has not shown how the terminology used by the Trial Chamber renders his conviction unsafe.

797. Turning to Šainović’s assertion that the 16 orders do not prove the existence of the Joint Command,²⁶⁷⁴ the Appeals Chamber recalls that, mindful of the source of the orders, the Trial Chamber relied not only on the orders but also on other evidence²⁶⁷⁵ to conclude that the Joint Command existed in 1999. Furthermore, the Trial Chamber found that the “Joint Command” heading was added to the orders “to ensure that they would be accepted into the MUP chain of command” and “to lend them an air of greater authority”.²⁶⁷⁶ Thus, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that a reasonable trier of fact could have considered this heading as corroborating evidence tending to show the existence of the Joint Command.²⁶⁷⁷ Šainović has not demonstrated how the reference to a non-existent entity would generate “an air of greater authority”. Consequently, he has not shown any error in the Trial Chamber’s assessment of the evidence.

798. The Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that, contrary to Šainović’s assertion,²⁶⁷⁸ the Trial Chamber’s finding that the references to the Joint Command “evoked the authority of the entity referred to in 1998 as the ‘Joint Command’” does not in itself imply that the term “Joint Command” was a mere reminder of something that no longer existed in

²⁶⁶⁹ Prosecution’s Response Brief (Šainović), para. 94, referring to Trial Judgement, vol. 1, para. 1151.

²⁶⁷⁰ Prosecution’s Response Brief (Lukić), para. 252.

²⁶⁷¹ Exh. P3049; Exh. P1966; Exh. P2031; Exh. P2015; Exh. P1968; Exh. P1969; Exh. P2003; Exh. P1970; Exh. P1971; Exh. P1972; Exh. P1973; Exh. P1974; Exh. P1975; Exh. P1976; Exh. P1878; Exh. P1977.

²⁶⁷² *E.g.*, Trial Judgement, vol. 1, paras 1123-1134, 1136-1137, 1139, 1142.

²⁶⁷³ Trial Judgement, vol. 1, paras 1135, 1144, 1151.

²⁶⁷⁴ Šainović’s Appeal Brief, para. 127.

²⁶⁷⁵ See *supra*, sub-section VII.C.3.(c)(ii).

²⁶⁷⁶ Trial Judgement, vol. 1, para. 1151.

²⁶⁷⁷ See Trial Judgement, vol. 1, para. 1151.

1999.²⁶⁷⁹ His argument ignores the Trial Chamber’s findings that in 1998, the Joint Command was part of the coordination system which had been established between the VJ and the MUP that year²⁶⁸⁰ and that the Joint Command itself continued to exist and function as part of this system in 1999.²⁶⁸¹ Lukić’s challenge to the same finding is also without merit since it is based on the erroneous premise that no orders for joint operations bore the Joint Command heading in 1998,²⁶⁸² ignoring the evidence to the contrary.²⁶⁸³

799. The Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that the challenges raised by Šainović and Lukić with regard to the authority of the Joint Command are likewise without merit. In this regard, they challenge the Trial Chamber’s finding that the Joint Command heading was added to the 16 orders “to ensure that they would be accepted into the MUP chain of command, as suggested by Đaković” and “to lend them an air of greater authority”.²⁶⁸⁴ The Appeals Chamber finds that a reasonable trier of fact could have reached this conclusion. Contrary to Šainović’s submission, the Trial Chamber did not disregard the evidence of Stefanović and Lazarević to the effect that the format of orders with the heading “Joint Command” was used where VJ and MUP forces executed tasks together.²⁶⁸⁵ Neither did the Trial Chamber mischaracterise Đaković’s testimony on the same issue. It properly recorded his evidence that “in an action where there was joint activity by the MUP and VJ, orders would be in the form of these Joint Command orders, with the phrase ‘Joint Command’ in the header and signature block”; and that Đaković’s “replacement [*i.e.*, Stefanović] in 1999 probably used the title [Joint Command] to have the documents show that co-ordination between the MUP and the military was to be carried out.”²⁶⁸⁶ However, the Trial Chamber also considered Đaković’s evidence that the term “Joint Command” was used to “create co-ordination documents with the MUP because the MUP could not and would not accept a single document where it said ‘Command of the Priština Corps’”.²⁶⁸⁷

²⁶⁷⁸ Šainović’s Appeal Brief, para. 140, referring to Trial Judgement, vol. 1, para. 1151.

²⁶⁷⁹ Šainović’s Appeal Brief, paras 135, 140.

²⁶⁸⁰ Trial Judgement, vol. 1, paras 1111, 1151.

²⁶⁸¹ Trial Judgement, vol. 1, para. 1151; *ibid.*, vol. 3, paras 300, 337, 703, 1023.

²⁶⁸² Lukić’s Appeal Brief, para. 310.

²⁶⁸³ *E.g.*, Trial Judgement, vol. 1, paras 1028-1029, 1035, 1077, referring, *inter alia*, to Milan Đaković, 19 May 2008, T. 26380-26381, 26393-26394, 26398, 26434-26436, Radojko Stefanović, 5 Feb 2008, T. 21661-21662, *ibid.*, 6 Feb 2008, T. 21793-21795, Exh. P2113.

²⁶⁸⁴ Trial Judgement, vol. 1, para. 1151; Šainović’s Appeal Brief, paras 138-139; Lukić’s Appeal Brief, para. 310.

²⁶⁸⁵ Trial Judgement, vol. 1, paras 1128, 1134, referring to Radojko Stefanović, 5 Feb 2008, T. 21661, Vladimir Lazarević, 8 Nov 2007, T. 17928.

²⁶⁸⁶ Trial Judgement, vol. 1, para. 1137, referring to Milan Đaković, 19 May 2008, T. 26389, 26393-26398. See also Trial Judgement, vol. 1, para. 1029.

²⁶⁸⁷ Trial Judgement, vol. 1, para. 1028, referring to Milan Đaković, 20 May 2008, T. 26444-26445, Boždar Delić, 4 Dec 2007, T. 19422-19423, 19495. See also Trial Judgement, vol. 1, para. 1143. While Lukić also challenges Đaković’s testimony, he fails to identify any specific part of the testimony (Lukić’s Appeal Brief, para. 311). Therefore his argument does not warrant any further discussion.

800. Furthermore, in addition to this witness testimony, the Trial Chamber took into account other evidence supporting its conclusion, including evidence indicating that the need for the Joint Command arising from the difficulty in controlling the MUP was still present in 1999.²⁶⁸⁸ The Trial Chamber also considered Pavković's report of 25 May 1999 to the Supreme Command Staff complaining about the failure of the MUP to carry out the re-subordination orders and the ensuing problems, and requesting that the original re-subordination order be reinforced or otherwise annulled, leaving the command of the MUP units in the hands of the MUP Staff for Kosovo "through the Joint Command as has so far been the case".²⁶⁸⁹ Moreover, the Trial Chamber took into consideration the contents of the discussion in the meeting of 1 June 1999, which was found to be a meeting of the Joint Command, where details about VJ and MUP activities were exchanged and Šainović made remarks as to what should be done.²⁶⁹⁰ The Trial Chamber also considered evidence that the 16 orders with the "Joint Command" heading were indeed "put into effect by both MUP and VJ forces" in areas and on dates corresponding to crime sites indicated in the Indictment.²⁶⁹¹ Šainović and Lukić present their own interpretation of the evidence in this regard, without showing any error on the part of the Trial Chamber.²⁶⁹²

801. Moreover, contrary to Šainović's submission,²⁶⁹³ the Appeals Chamber does not consider that it was illogical for the Trial Chamber to find that the Joint Command heading was added to the 16 orders to ensure their acceptance by the MUP and "to lend them an air of greater authority".²⁶⁹⁴ The testimony of MUP officers that they never received any orders headed "Joint Command" in 1999²⁶⁹⁵ does not undermine the Trial Chamber's conclusion. According to the Trial Chamber, before the orders with the Joint Command heading were issued, the VJ and the MUP met to coordinate their actions, and after the issuance of these orders, their coordination continued at a

²⁶⁸⁸ Trial Judgement, vol. 1, para. 1111, finding that the Joint Command "allowed the commanders of the MUP to 'save face' by not having to be commanded by the VJ both before and during the state of emergency." See also *supra*, sub-section VII.C.1.(d). For instance, the evidence showed that throughout 1998 and early 1999, certain VJ members complained about the behaviour of the MUP in Kosovo and its failure to coordinate with and re-subordinate itself to the VJ (Trial Judgement, vol. 1, para. 1111. See also *ibid.*, vol. 1, paras 1088, 1166, 1179, 1181, and references therein; Exh. P717, p. 2 (item 3.a)) and that even after the declaration of a state of war on 24 March 1999, orders by Milošević and the VJ to re-subordinate the MUP to the VJ were not put into effect due to the resistance from the MUP side (Trial judgement, vol. 1, paras 1174-1175, 1180, 1189, 1203. See also *ibid.*, vol. 1, paras 1170-1189, 1202, and references therein).

²⁶⁸⁹ Trial Judgement, vol. 1, paras 1121, 1183, referring to Exh. P1459, Exh. P1724, Exh. 3D1106. See also *infra*, sub-section VII.C.3.(c)(vii).

²⁶⁹⁰ Trial Judgement, vol. 1, paras 1145-1146, 1148, and references therein; *ibid.*, vol. 3, paras 355-359, and references therein. See also *infra*, sub-section VII.C.3.(c)(viii).

²⁶⁹¹ Trial Judgement, vol. 1, para. 1123. See also *ibid.*, vol. 1, paras 1123-1126; *ibid.*, vol. 2, paras 251, 253, 296, 302, 484, 527, 570, 594-596, 637, 646-647, 671, 673, 699, 751, 897, and references therein (in particular, Exh. P2015, Exh. P1969, Exh. P3049, Exh. P2031, Exh. P1968, Exh. P1966, Exh. P1975, Exh. P1971).

²⁶⁹² Furthermore, contrary to Lukić's argument (Lukić's Appeal Brief, para. 275), this conclusion, read together with its finding that the Priština Corps was the source of the 16 orders, is sufficiently clear and cannot be read as implying that the Joint Command issued orders as a matter of fact.

²⁶⁹³ Šainović's Appeal Brief, para. 139.

²⁶⁹⁴ Trial Judgement, vol. 1, para. 1151.

²⁶⁹⁵ Trial Judgement, vol. 1, para. 1143, and references therein.

tactical level while the VJ and the MUP separately issued orders for their own units.²⁶⁹⁶ In this context, the Trial Chamber considered evidence showing that the contents of the orders with the Joint Command heading, if not the orders themselves, were made known to the MUP through this coordination system,²⁶⁹⁷ including through map excerpts for joint operations passed from the Priština Corps to the MUP.²⁶⁹⁸ The fact that the MUP, which was normally unwilling to act under orders of the VJ,²⁶⁹⁹ cooperated with the VJ in line with the contents of the orders with the Joint Command heading,²⁷⁰⁰ indicates that the references to the Joint Command generated “an air of greater authority”. Thus, irrespective of whether the MUP in fact received tangible orders headed “Joint Command”, the Trial Chamber’s finding in this regard would remain undisturbed.²⁷⁰¹ Šainović has therefore failed to show any error in this regard.

802. In view of the above, the arguments advanced by Šainović and Lukić with respect to the 16 orders with the Joint Command heading are dismissed.

(iv) Combat reports of 25 and 29 April 1999

803. The Trial Chamber considered two military documents mentioning the Joint Command: (i) a combat report of 25 April 1999 from the Priština Corps Command to the 3rd Army and Supreme Command Staff, reporting that operations were continuing “in line with the decision of the Joint Command”,²⁷⁰² and (ii) a combat report of 29 April 1999 from the 3rd Army Command to the VJ General Staff, specifying that measures were undertaken to block certain sectors and carry out tasks in line with the “joint KiM command decision”.²⁷⁰³

804. Šainović asserts that the Trial Chamber erroneously construed these two combat reports.²⁷⁰⁴ He contends that, although they mention orders of the Joint Command, they in fact refer to orders of the Priština Corps, when interpreted in accordance with the Trial Chamber’s findings elsewhere in

²⁶⁹⁶ Trial Judgement, vol. 1, paras 1037-1042, and references therein.

²⁶⁹⁷ Trial Judgement, vol. 1, paras 1035, 1041-1042, and references therein.

²⁶⁹⁸ Trial Judgement, vol. 1, para. 1035, and references therein. See also *ibid.*, vol. 1, para. 1029. See also *infra*, sub-section VII.F.3.

²⁶⁹⁹ Trial Judgement, vol. 1, para. 1111. See also *ibid.*, vol. 1, paras 1028, 1088, 1166, 1179, 1181, and references therein; Exh. P717, p. 2 (item 3.a). See also *supra*, sub-section VII.C.1.(d).

²⁷⁰⁰ See *supra*, para. 800.

²⁷⁰¹ Furthermore, contrary to Šainović’s argument, the fact that no evidence indicated any problems in the execution of the superior commands’ orders within the Priština Corps is irrelevant since “an air of greater authority” was necessary primarily for the 16 orders to be accepted in the MUP chain of command (see Trial Judgement, vol. 1, para. 1151). Šainović has also failed to sufficiently substantiate his assertion that the term “Joint Command” was meaningless for units in Kosovo in 1999 which had not been deployed in 1998 (Šainović’s Appeal Brief, para. 139).

²⁷⁰² Trial Judgement, vol. 1, para. 1116, referring to Exh. P2016, p. 2.

²⁷⁰³ Trial Judgement, vol. 1, para. 1116, referring to Exh. P2017, p. 2.

²⁷⁰⁴ Šainović’s Appeal Brief, paras 123, 132, referring to Trial Judgement, vol. 1, paras 1116, 1135, 1144, Exh. P2016, Exh. P2017.

the Trial Judgement.²⁷⁰⁵ The Prosecution responds that these combat reports are not the only military documents from 1999 mentioning the Joint Command²⁷⁰⁶ and that, although orders referred to in the two combat reports may be among the 16 orders emanating from the Priština Corps Command, this does not invalidate the Trial Chamber's reliance upon them.²⁷⁰⁷

805. The Appeals Chamber observes that, contrary to Šainović's claim, it is not clear from the relevant documents whether the decisions of the Joint Command mentioned in the two combat reports of 25 and 29 April 1999²⁷⁰⁸ correspond with two of the 16 orders with the Joint Command heading, which the Trial Chamber found to have emanated from the Priština Corps Command.²⁷⁰⁹ Nonetheless, the two combat reports show that the authors of these reports – Lazarević, the Priština Corps Commander, and Pavković, the 3rd Army Commander, respectively – referred to the concerned decisions as those of the Joint Command, not as those of the Priština Corps Command, and stated that operations had been conducted in line with such decisions.²⁷¹⁰ This suggests, as the Trial Chamber found, that "important actors, including some of the [Appellants], referred to the 'Joint Command' in 1999, which they had to take into account in their duties", regardless of which entity officially issued these decisions.²⁷¹¹ The Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that a reasonable trier of fact could have considered, together with other evidence, these two combat reports as circumstantial evidence showing the existence and authority of the Joint Command in 1999.²⁷¹² Šainović has failed to demonstrate why high-ranking officials would have referred to or taken into account a non-existent body with no influence when

²⁷⁰⁵ Šainović's Appeal Brief, paras 123, 132, referring to Trial Judgement, vol. 1, paras 1135, 1144; Šainović's Reply Brief, para. 24. See also Šainović's Reply Brief, para. 15, explaining that the order referred to in the combat report of 25 April 1999 and the order concerning Malo Kosovo mentioned in the combat report of 29 April 1999 are, respectively, Exhibits P1878 and P1966, which are among the 16 orders that the Trial Chamber found to have emanated from the Priština Corps Command although they bore the headings of the "Joint Command".

²⁷⁰⁶ Prosecution's Response Brief (Šainović), paras 68, 70, 94, referring to Trial Judgement, vol. 1, paras 1116, 1121, Exh. P2016, p. 2, Exh. P2017, p. 2, Exh. P1459, p. 2.

²⁷⁰⁷ Prosecution's Response Brief (Šainović), para. 94, recalling the Trial Chamber's finding that the "Joint Command" heading was added to the 16 orders to ensure acceptance thereof into the MUP chain of command and to lend them an air of greater authority (Trial Judgement, vol. 1, para. 1151).

²⁷⁰⁸ Exh. P2016, p. 2; Exh. P2017, p. 2.

²⁷⁰⁹ Exh. P1878; Exh. P1966. As regards the 16 orders, see Trial Judgement, vol. 1, paras 1135, 1151. See also *infra*, sub-section VII.C.3.(c)(iii). Šainović does not point to any indicia to prove this, apart from a location (Malo Kosovo) mentioned in one of the two combat reports and one of the two orders with the Joint Command heading (Šainović's Appeal Brief, paras 123, 132; Šainović's Reply Brief, paras 15, 24). The Appeals Chamber observes that there are indeed a few overlaps in references to some locations in the two combat reports of 25 and 29 April 1999 and the two orders with the Joint Command heading. However, such indicia are not determinative in concluding to which specific decision of the Joint Command the two combat reports refer, as the two combat reports convey information on operations in several different areas in Kosovo, and also as there is more than one month of discrepancy between the 29 April 1999 combat report and the allegedly corresponding order with the Joint Command heading dated 22 March 1999 (see Exh. P1878, p. 2, dated 15 April 1999 mentioning Rugova Gorge sector – in comparison with Exh. P2016, p. 2, dated 25 April 1999 mentioning Rugovska Klisura / Rugova Gorge; Exh. P1966, pp. 2-3, dated 22 March 1999, mentioning Malo Kosovo – in comparison with Exh. P2017, p. 2, dated 29 April 1999, mentioning Malo Kosovo).

²⁷¹⁰ Exh. P2016, p. 2; Exh. P2017, p. 2.

²⁷¹¹ Trial Judgement, vol. 1, para. 1151.

²⁷¹² See *e.g. infra*, sub-sections VII.C.3.(c)(v), VII.C.3.(c)(vi), and VII.C.3.(c)(vii). *Contra* Šainović's Appeal Brief, paras 134-135.

discharging their duties. Šainović does not show any error on the part of the Trial Chamber in this regard. Thus, the Appeals Chamber, Judge Tuzmukhamedov dissenting, dismisses his argument.

(v) Pavković's public announcement in 2001

806. The Trial Chamber found that, during the NATO bombing, the MUP and its employees were involved in a clandestine operation to exhume over 700 bodies originally buried in Kosovo and to transfer them to other parts of Serbia, where they were concealed,²⁷¹³ and that, in April 1999, during this operation, a refrigerated truck containing corpses was discovered in the Danube River, thereby causing additional people to become involved in the cover-up of this operation.²⁷¹⁴ In its assessment of the existence and authority of the Joint Command in 1999, the Trial Chamber considered a public announcement made by Pavković on the VJ website from June 2001 regarding this refrigerated truck. In relation to the police, Pavković stated that:

[C]ooperation with the Army was coordinated through political actors in joint command, formed for the purpose. Therefore, the information to what the police force units were doing can best be provided by the police commanders and the members of the Joint command in charge of them.²⁷¹⁵

807. Šainović maintains that this public statement was simply Pavković's attempt to divert responsibility away from himself.²⁷¹⁶ He also avers that, in his testimony, Milan Đaković denied the accuracy of Pavković's allegations in the statement, only partially agreed to its content, and "distanc[ed] himself" from a question put to him about the Joint Command and coordination through political representatives.²⁷¹⁷ The Prosecution responds that Šainović merely presents his own interpretation of the evidence.²⁷¹⁸

808. The Appeals Chamber observes that, regardless of his motive, Pavković stated in this public announcement that cooperation between the police and the army was coordinated through "political actors in joint command, formed for the purpose."²⁷¹⁹ Šainović has failed to demonstrate why Pavković would have mentioned a non-existent entity in attempting to absolve himself of responsibility. The Trial Chamber also took into account Đaković's testimony in which he disagreed with Pavković's statement with respect to the mention of the involvement of "political actors" in the Joint Command. However, Đaković partly agreed with Pavković's statement insofar as "the Joint Command represented a joint command that co-ordinated activities between the VJ

²⁷¹³ Trial Judgement, vol. 2, paras 1266-1357; *ibid.*, vol. 3, para. 87.

²⁷¹⁴ Trial Judgement, vol. 2, paras 1269, 1283-1294, 1312, 1320, 1356.

²⁷¹⁵ Trial Judgement, vol. 1, para. 1117, citing Exh. P1281, p. 2.

²⁷¹⁶ Šainović's Appeal Brief, para. 124. See also Šainović's Reply Brief, para. 24.

²⁷¹⁷ Šainović's Appeal Brief, para. 124; Šainović's Reply Brief, para. 16, referring to Milan Đaković, 20 May 2008, T. 26473-26474.

²⁷¹⁸ Prosecution's Response Brief (Šainović), paras 69, 95. See also *ibid.*, para. 37.

²⁷¹⁹ Exh. P1281, p. 2.

and MUP Staff and specifically [...] represented co-operation between Pavković and Lukić.”²⁷²⁰ The Trial Chamber’s conclusion that the Joint Command existed as part of the coordination system in 1999²⁷²¹ suggests that it relied on Đaković’s testimony to the extent that it confirmed the role of the Joint Command in the coordination between the VJ and the MUP. The Trial Chamber did not rely on the portion of Đaković’s testimony, in which he refused to confirm that “political actors” were involved in the Joint Command. Šainović has not shown that the Trial Chamber’s assessment of Đaković’s testimony in this regard was erroneous. Šainović’s arguments merely present his own interpretation of Pavković’s public announcement and the relevant evidence, without showing any error on the part of the Trial Chamber. His arguments are therefore dismissed.

(vi) Ojdanić’s suggestions to Pavković on 17 April 1999

809. The Trial Chamber took into account a document dated 17 April 1999 containing “suggestions” of Ojdanić, the then Chief of the VJ General Staff, to Pavković, the then 3rd Army Commander, that a particular “Joint Command order” be modified.²⁷²² The Trial Chamber also noted the last sentence of this document addressed to Pavković, providing:

It is our opinion that it would be useful for you to consider our suggestions thoroughly and correct your decision and deployment of forces in order to prevent a new spill out, and thus achieve your fundamental objective—destruction.²⁷²³

The Trial Chamber considered the circumstances surrounding these “suggestions” and found that “the VJ chain of command functioned with a degree of flexibility in 1999.”²⁷²⁴

810. Šainović argues that the content of this document indicates that Ojdanić directed his communications solely towards Pavković with the understanding that a decision labelled “Joint Command” was in fact exclusively a decision by Pavković.²⁷²⁵ Šainović also avers that the Trial Chamber’s finding that “the chain of command functioned with a degree of flexibility” only concerns Pavković and has no relevance to the Joint Command in 1999.²⁷²⁶ The Prosecution responds that Šainović merely asserts his own interpretation of the evidence.²⁷²⁷

²⁷²⁰ Trial Judgement, vol. 1, para. 1117, referring to Milan Đaković, 20 May 2008, T. 26473-26474.

²⁷²¹ Trial Judgement, vol. 1, para. 1151.

²⁷²² Trial Judgement, vol. 1, paras 1118-1119, referring to Exh. P1487.

²⁷²³ Trial Judgement, vol. 1, para. 1118, citing Exh. P1487.

²⁷²⁴ Trial Judgement, vol. 1, para. 1119.

²⁷²⁵ Šainović’s Appeal Brief, paras 125-126, 132. See also Šainović’s Reply Brief, para. 15, referring to Trial Judgement, vol. 1, paras 1135, 1144, and asserting that the order that Ojdanić suggested be modified is one of the 16 orders which are headed the Joint Command but which the Trial Chamber found to have originated from the Priština Corps Command.

²⁷²⁶ Šainović’s Appeal Brief, para. 126, referring to Trial Judgement, vol. 1, para. 1119.

²⁷²⁷ Prosecution’s Response Brief (Šainović), para. 95. See also *ibid.*, para. 70.

811. The Appeals Chamber observes that the subject line of the document of 17 April 1999 clearly indicates that the “suggestions” listed therein pertain to the content of a “Joint Command order”.²⁷²⁸ In this document, Ojdanić also refers to “your decision”, when recommending Pavković to correct it in light of his suggestions.²⁷²⁹ However, Šainović has not shown why this language indicates that Ojdanić understood a decision labelled “Joint Command” to be a decision made exclusively by Pavković. Having considered witness testimony that “suggestions” from a higher-ranking level to a lower-ranking level were an anomaly in military communications and in light of the circumstances surrounding this document,²⁷³⁰ the Trial Chamber found that “the VJ chain of command functioned with a degree of flexibility in 1999.”²⁷³¹ Šainović’s assertion that this was only related to Pavković is based solely on his own interpretation of the document of 17 April 1999, without showing how the Trial Chamber erred in its analysis of the document itself and of the evidence surrounding it. Šainović’s arguments are thus dismissed.²⁷³²

(vii) Pavković’s report to the Supreme Command Staff dated 25 May 1999

812. The Trial Chamber also considered Pavković’s report of 25 May 1999 to the Supreme Command Staff, in which he requested that the order on the re-subordination of the MUP to the VJ issued in April 1999 be reinforced or otherwise annulled, leaving the command of the MUP units in the hands of the MUP Staff for Kosovo “through the Joint Command as has so far been the case.”²⁷³³

813. Šainović submits that the Trial Chamber erred in finding that the report of 25 May 1999 was authentic,²⁷³⁴ as: (i) the information contained in the report with regard to the Joint Command and crimes committed by the MUP is not consistent with other evidence;²⁷³⁵ (ii) the report was found in

²⁷²⁸ Exh. P1487, p. 1.

²⁷²⁹ Exh. P1487, p. 2.

²⁷³⁰ Trial Judgement, vol. 1, paras 1118-1119, and references therein.

²⁷³¹ Trial Judgement, vol. 1, para. 1119. This finding is further supported by the minutes of the Collegium of the VJ General Staff on 21 January 1999, in which Ojdanić stated that “if the ‘joint staff, command, or whatever’ decided that an operation in Račak/Rečak village could not be carried out without the assistance of the VJ, they would have to seek approval from the FRY President” and that “the ‘joint command down there’ might receive orders directly from FRY [P]resident which it would then pass on to him indicating that they were ‘by order of the President of the FRY’” (Trial Judgement, vol. 1, para. 1120, citing Exh. P939, pp. 11-12 and referring to *ibid.*, p. 9). In this context, Šainović’s argument that, as the Collegium was not a commanding body of the VJ, the position of the General Staff could not be judged from these minutes (Šainović’s Appeal Brief, para. 196; *contra* Prosecution’s Response Brief (Šainović), paras 70, 111-112) is dismissed because it does not demonstrate that the Trial Chamber unreasonably took into consideration the minutes as a record of what Ojdanić and others stated in relation to the issue of the operation in Račak/Rečak.

²⁷³² See also *infra*, para. 1167.

²⁷³³ Trial Judgement, vol. 1, para. 1121, citing Exh. P1459, p. 2. See also Trial Judgement, vol. 1, para. 1183.

²⁷³⁴ Šainović’s Appeal Brief, paras 188, 192, referring to Trial Judgement, vol. 3, para. 594.

²⁷³⁵ Šainović’s Appeal Brief, paras 188-189.

the VJ archives “under suspicious circumstances”,²⁷³⁶ (iii) Aleksandar Dimitrijević testified that the term “Joint Command” used by Pavković was made up after the relevant events so as to cover up some of his activities;²⁷³⁷ and (iv) the report was among the documents surrendered to the Prosecutor of the Tribunal in 2002 “without adhering to the prescribed procedure”.²⁷³⁸ The Prosecution responds that this report was not the only evidence relied upon by the Trial Chamber to conclude that the Joint Command existed in 1999 and that Šainović merely repeats the challenges on the authenticity of the report made at trial by Ojdanić and Lukić.²⁷³⁹

814. The Appeals Chamber notes that the Trial Chamber carefully examined and affirmed the authenticity and reliability of the 25 May 1999 report, rejecting Ojdanić’s arguments²⁷⁴⁰ that the report was planted in VJ archives after 25 May 1999²⁷⁴¹ and that the content of the report referring to crimes committed by the MUP was incongruous with other combat reports not containing such references.²⁷⁴² To the extent that Šainović repeats Ojdanić’s submissions at trial²⁷⁴³ without showing any error in the Trial Chamber’s rejection thereof, his arguments are dismissed.

815. Neither is the Appeals Chamber persuaded by Šainović’s argument that the reference in the report to the command placed in the hands of the MUP Staff “through the Joint Command” is inconsistent with other evidence. Such a reference is indeed consistent with other evidence supporting the Trial Chamber’s finding that the Joint Command continued to exist as part of the coordination system in 1999.²⁷⁴⁴ In light of this evidence on the Joint Command and out of its concern regarding the “hypersensitivity” of witnesses with respect to this issue,²⁷⁴⁵ the Trial Chamber did not accept Dimitrijević’s claim that the term “Joint Command” was made up at a later stage to cover up Pavković’s activities, or that a document containing such a term could be unreliable.²⁷⁴⁶ By merely referring to Dimitrijević’s testimony, without showing any error in the

²⁷³⁶ Šainović’s Appeal Brief, para. 190, referring to Mladenovski’s evidence (Dušan Mladenovski, 22 April 2008, T. 25795, 25797, 25810, Dušan Mladenovski, Exh. 3D1135, para. 14) on the VJ Archive list (Exh. 3D1130).

²⁷³⁷ Šainović’s Appeal Brief, para. 191, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26595, 26599, 26611-26612, 26617-26619.

²⁷³⁸ Šainović’s Appeal Brief, para. 191.

²⁷³⁹ Prosecution’s Response Brief (Šainović), paras 105-106, referring to Trial Judgement, vol. 1, paras 1116, 1121, 1183, *ibid.*, vol. 3, paras 584-594 and requesting summary dismissal of his arguments in this regard.

²⁷⁴⁰ Trial Judgement, vol. 1, para. 1183, fn. 3229; *ibid.*, vol. 3, paras 584-594.

²⁷⁴¹ Trial Judgement, vol. 3, paras 587-590, 594, wherein the Trial Chamber meticulously examined the evidence, including the VJ Archive list and Mladenovski’s testimony, concerning the circumstances in which the receipt of the report by the Supreme Command Staff was recorded in VJ archives; Ojdanić’s Closing Brief, paras 245-247.

²⁷⁴² Trial Judgement, vol. 3, paras 592, 594, and references therein, whereby the Trial Chamber compared the 25 May 1999 report with other VJ report.

²⁷⁴³ Ojdanić’s Closing Brief, paras 245-248. See also Lukić’s Closing Brief, paras 1353, 1356, 1358-1367.

²⁷⁴⁴ Trial Judgement, vol. 1, paras 1112-1149, 1151, and references therein. See also *supra* and *infra*, subsection VII.C.3.(c).

²⁷⁴⁵ Trial Judgement, vol. 1, para. 1054. See also Aleksandar Dimitrijević, 8 Jul 2008, T. 26595.

²⁷⁴⁶ Trial Judgement, vol. 1, paras 1104, 1107, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26598, 26610-26615, in connection with Exh. P2166. See also Aleksandar Dimitrijević, 8 Jul 2008, T. 26595, cited in Trial Judgement, vol. 1, para. 1005.

Trial Chamber's assessment thereof, Šainović has failed to demonstrate that it was unreasonable for the Trial Chamber not to rely on Dimitrijević's evidence when assessing the 25 May 1999 report. Šainović's assertion that the report was among the documents surrendered to the Prosecutor of the Tribunal "without adhering to the prescribed procedure" is unsubstantiated and therefore without merit.²⁷⁴⁷ Consequently, his arguments on the authenticity of the 25 May 1999 report are dismissed.

(viii) Meeting at the Grand Hotel in Priština/Prishtina on 1 June 1999

a. Submissions of the parties

816. Šainović argues that the Trial Chamber erred in finding, solely on the basis of Aleksandar Vasiljević's evidence, that the meeting of 1 June 1999 held in the basement of the Grand Hotel in Priština/Prishtina was "similar to the Joint Command meetings held in 1998".²⁷⁴⁸ He contends that Vasiljević's statements concerning this meeting were contradictory²⁷⁴⁹ and that the Trial Chamber failed to provide reasons for its decision to accept only one version of Vasiljević's evidence, in which he identified the meeting as that of the Joint Command, disregarding the other versions of his evidence as well as the testimony of Zoran Anđelković and Momir Stojanović.²⁷⁵⁰ Šainović further asserts that the Trial Chamber's conclusion was unreasonable due to a number of differences between the meeting of 1 June 1999 and those held in 1998, including the fact that: (i) the positions and responsibility of the participants altered due to the state of war involving NATO air strikes; (ii) key participants in the meetings of 1998, such as Milomir Minić, were not present at the 1 June 1999 meeting; and (iii) there was no continuity of meetings in 1999 which would have enabled coordination and exchange of information between the VJ and the MUP.²⁷⁵¹ Finally, Šainović submits that a finding that the meeting of 1 June 1999 was "similar" to the Joint Command meetings held in 1998 means that it was not the same.²⁷⁵²

²⁷⁴⁷ The material to which Šainović refers suggests that the documents were handed over by former President Đinđić on behalf of Pavković in 2002 "without any decision [...] by state organs" (see *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Defence Response: "Prosecution's Request for Admission of Exhibits P-1000, P-1249, P-1418, P-1460, P-1468, P-1487, P-1503, P-1898, P-1966, P-1967, P-2031, P-2113, and P-2116", 31 Jan 2007, para. 4; Philip Coe, 21 Mar 2007, T. 12080-12081, commenting on Exh. P2845). However, Šainović does not substantiate how the fact that the hand-over was carried out without any decision by state organs renders the documents unauthentic or unreliable.

²⁷⁴⁸ Šainović's Appeal Brief, paras 128-131, referring to Trial Judgement, vol. 1, para. 1149. See also Trial Judgement, vol. 1, para. 1145; Šainović's Appeal Brief, paras 234-235.

²⁷⁴⁹ Šainović's Appeal Brief, paras 129, 132, referring to Aleksander Vasiljević, Exh. 2D387, para. 1, Aleksander Vasiljević, Exh. P2600, para. 80, Exh. P2862.

²⁷⁵⁰ Šainović's Appeal Brief, paras 128-129.

²⁷⁵¹ Šainović's Appeal Brief, para. 130; Šainović's Reply Brief, para. 18. See also Šainović's Appeal Brief, paras 279-280, arguing that the Trial Chamber erred in law "in using analogy as means of evidence" – namely, drawing conclusions about one period on the basis of findings regarding another period. See also Appeal Hearing, 11 Mar 2013, AT. 198-201, 268.

²⁷⁵² Šainović's Appeal Brief, para. 131; Šainović's Reply Brief, para. 18.

817. Similarly, Lukić contends that the Trial Chamber misapplied the standard of proof in finding that the meeting of 1 June 1999 was “similar to the Joint Command meetings held in 1998”, solely relying upon Vasiljević’s statement that he had the “impression that the meetings were a daily occurrence”.²⁷⁵³ Furthermore, he avers that Vasiljević was not a regular attendant and his evidence was inconsistent and contradictory to the testimony of other witnesses.²⁷⁵⁴ Lukić also refers to Vasiljević’s testimony that no orders were issued at this meeting.²⁷⁵⁵

818. The Prosecution responds that based on various witnesses’ evidence, the Trial Chamber found the meeting of 1 June 1999 to be similar to the Joint Command meetings held in 1998.²⁷⁵⁶ The Prosecution also avers that Lukić mischaracterises Vasiljević’s evidence.²⁷⁵⁷

b. Analysis

819. The Appeals Chamber recalls the Trial Chamber’s finding that a meeting held in the basement of the Grand Hotel in Priština/Prishtina on 1 June 1999 and attended by, *inter alia*, Šainović, Zoran Anđelković, Pavković, Lazarević, Momir Stojanović, Vlastimir Đorđević, Lukić, and Obrad Stevanović “was a meeting similar to the Joint Command meetings held in 1998.”²⁷⁵⁸ In so finding, the Trial Chamber did not only take into account Aleksandar Vasiljević’s evidence but also the accounts of the meeting provided by Zoran Anđelković and Momir Stojanović, and considered that they were “similar” to Vasiljević’s evidence “in most material respects.”²⁷⁵⁹ The assertions of Šainović and Lukić that the Trial Chamber relied solely on Vasiljević’s evidence with respect to the meeting of 1 June 1999 therefore misrepresent the Trial Chamber’s finding.

820. As regards the nature of the meeting, Vasiljević noted in his diary that he had attended a meeting “in the Command of the Priština Corps”.²⁷⁶⁰ In his statement dated 25 July 2007, he mentioned that Pavković had told him that a meeting of the “joint staff” would be held there.²⁷⁶¹ During his oral testimony, Vasiljević stood by his statement of 14 January 2007 that Pavković had described to him the meeting of 1 June 1999 as “a meeting of the Joint Command”.²⁷⁶² Vasiljević explained that there was no difference between the terms “joint staff” and “Joint Command” and

²⁷⁵³ Lukić’s Appeal Brief, paras 323-324, citing Trial Judgement, vol. 1, para. 1149 and referring to Aleksander Vasiljević, Exh. P2594, para. 81. See also Lukić’s Appeal Brief, para. 277.

²⁷⁵⁴ Lukić’s Appeal Brief, paras 154-155, 597.

²⁷⁵⁵ Lukić’s Appeal Brief, para. 156, referring to Aleksander Vasiljević, Exh. P2600, para. 81. Lukić also points out that the Trial Chamber did not suggest that what was said or concluded at this meeting in 1999 or any of Joint Command meetings in 1998 comprised or caused a crime of any kind (Lukić’s Appeal Brief, para. 325).

²⁷⁵⁶ Prosecution’s Response Brief (Šainović), para. 72, referring to Trial Judgement, vol. 1, paras 1145-1149.

²⁷⁵⁷ Prosecution’s Response Brief (Lukić), para. 392. See also Prosecution’s Response Brief (Lukić), para. 252.

²⁷⁵⁸ Trial Judgement, vol. 1, para. 1149. See also Trial Judgement, vol. 1, para. 1145.

²⁷⁵⁹ Trial Judgement, vol. 1, para. 1146. See also *ibid.*, vol. 1, paras 1145, 1147-1148; *ibid.*, vol. 3, paras 355-359.

²⁷⁶⁰ Exh. P2862.

²⁷⁶¹ Aleksander Vasiljević, Exh. 2D387, para. 1.

that it was merely a linguistic finesse.²⁷⁶³ Vasiljević's reference to the Priština Corps Command in the diary concerns the location where the meeting was held, rather than the label of the meeting, and does not contradict his statement of 14 January 2007 or his in-court testimony.²⁷⁶⁴ Therefore, there is no inconsistency in Vasiljević's evidence in this respect. The Trial Chamber was cognisant of, and evaluated all of Vasiljević's evidence relevant to the 1 June 1999 meeting and primarily relied upon his 14 January 2007 statement, which he confirmed in court²⁷⁶⁵ and which was corroborated by his diary and his other statement in substance. Šainović has failed to demonstrate that no reasonable trier of fact could have evaluated the evidence in the way the Trial Chamber did.

821. With respect to Vasiljević's evidence that, at the 1 June 1999 meeting, he received the "impression that the meetings were a daily occurrence", it is clear from the Trial Judgement that the Trial Chamber did not rely on such an "impression". The Trial Chamber did not conclude that Joint Command meetings were held daily in 1999. It left this question open, stating that "there is no record of its meetings; or, if such a record was kept, it is not available to the Chamber."²⁷⁶⁶ Insofar as Lukić argues that the Trial Chamber relied upon Vasiljević's "impression", he misrepresents the Trial Chamber's findings.

822. The Trial Chamber was also aware of the circumstances which Šainović characterises as "differences" between the meeting of 1 June 1999 and the daily meetings held in 1998.²⁷⁶⁷ The Appeals Chamber is not persuaded by his argument concerning the state of war, since he has failed to explain how the changes of responsibilities and positions of the participants due to the state of war affected the nature of the 1 June 1999 meeting. Neither does the Appeals Chamber find that the lack of evidence showing continuity of the meetings in 1999 renders the Trial Chamber's conclusion unreasonable. Like the daily meetings in 1998, the meeting on 1 June 1999 was attended by political representatives (Šainović and Anđelković), VJ representatives (Pavković, Lazarević, and Stojanović), and MUP representatives (Đorđević, Lukić, and Stevanović).²⁷⁶⁸ They also exchanged details about the activities of the MUP and VJ forces, and Šainović made remarks as to

²⁷⁶² Aleksander Vasiljević, Exh. P2600, para. 80.

²⁷⁶³ Aleksandar Vasiljević, 29 Aug 2007, T. 14504-14505.

²⁷⁶⁴ Exh. P2862. See also Aleksandar Vasiljević, 29 Aug 2007, T. 14504; Aleksandar Vasiljević, Exh. P2600, para. 79.

²⁷⁶⁵ Trial Judgement, vol. 1, para. 1145 (in particular, fn. 3138), and references therein.

²⁷⁶⁶ Trial Judgement, vol. 1, para. 1112. See also *ibid.*, vol. 1, para. 1150.

²⁷⁶⁷ Concerning the declaration of a state of war on 24 March 1999, on-going hostilities between the FRY and Serbian forces and the KLA around that time, and the NATO air campaign, see Trial Judgement, vol. 1, paras 272, 812-820, 1208-1214. Regarding the absence of evidence showing continuity of the daily meetings in 1999, see *ibid.*, vol. 1, paras 1112, 1150. With regard to the participants in the 1 June 1999 meeting, see *ibid.*, vol. 1, paras 1145, 1149. With respect to a dinner served following the meeting, see *ibid.*, vol. 3, para. 358. Šainović fails to substantiate why such a minor difference as the fact that participants were served food and drinks would show that it was not a Joint Command meeting (Šainović's Appeal Brief, para. 130).

²⁷⁶⁸ Trial Judgement, vol. 1, para. 1145; *ibid.*, vol. 3, paras 355.

what should be done.²⁷⁶⁹ Notably, the change in the composition of the Joint Command was envisaged from October 1998.²⁷⁷⁰ Of the members of the Working Group (Minić, Matković and Anđelković) who had participated in the Joint Command meetings in 1998, only Anđelković remained in Kosovo in his new capacity as the President of the TEC after the activities of the Working Group ceased in October 1998.²⁷⁷¹ Hence, the absence of Minić and Matković from the 1 June 1999 meeting cannot be an indication that it was not a meeting of the Joint Command.

823. Accordingly, the Appeals Chamber finds that Šainović and Lukić have not shown any error in the Trial Chamber's conclusion that the 1 June 1999 meeting "was a meeting similar to the Joint Command meetings held in 1998."²⁷⁷² Although the Trial Chamber should have used less ambiguous language, the Appeals Chamber considers that the Trial Judgement read as a whole makes it clear that the Trial Chamber concluded that the 1 June 1999 meeting was a meeting of the Joint Command.²⁷⁷³ The similarity between the meeting of the 1 June 1999 and the daily meetings in 1998²⁷⁷⁴ as well as Vasiljević's evidence that Pavković told Vasiljević that it was a meeting of the Joint Command²⁷⁷⁵ led the Trial Chamber to reach this conclusion. The Appeals Chamber does not discern any error in the Trial Chamber's evaluation of the evidence in this regard.

824. Consequently, all the arguments advanced by Šainović and Lukić regarding the meeting of 1 June 1999 are dismissed.

(ix) The Joint Command as part of the coordination system

a. Submissions of the parties

825. Šainović submits that, in finding that, in 1998, the Joint Command was part of the whole coordination system established between the VJ and the MUP and that, in 1999, "the co-ordination system continued to function",²⁷⁷⁶ the Trial Chamber erroneously assumed that the coordination between the army and the police of a country is an exceptional activity, requiring special, extra-

²⁷⁶⁹ Trial Judgement, vol. 1, paras 1145-1146, 1148-1149; *ibid.*, vol. 3, paras 355-359.

²⁷⁷⁰ Trial Judgement, vol. 1, para. 1099.

²⁷⁷¹ Trial Judgement, vol. 1, para. 1010, referring, *inter alia*, to Milomir Minić, 31 Aug 2007, T. 14787-14794, Milan Jovanović, 21 Aug 2007, T. 14152, *ibid.*, 22 Aug 2007, T. 14219-14221.

²⁷⁷² Trial Judgement, vol. 1, para. 1149.

²⁷⁷³ See Trial Judgement, vol. 1, para. 1150, providing: "There is less evidence of the existence of the Joint Command as an entity in 1999. The Trial Chamber notes the absence of evidence that daily meetings were organised at the Temporary Executive Council buildings in Priština/Prishtina as they were in 1998. There is evidence of only one meeting held on 1 June 1999"; *ibid.*, vol. 3, para. 355, providing: "As discussed earlier in this Judgement, on 1 June 1999 another meeting of the Joint Command took place in the basement of the Grand Hotel in Priština/Prishtina" (internal references omitted).

²⁷⁷⁴ Trial Judgement, vol. 1, paras 1145-1149.

²⁷⁷⁵ Trial Judgement, vol. 1, para. 1145.

²⁷⁷⁶ Šainović's Appeal Brief, para. 136, referring to Trial Judgement, vol. 1, para. 1151.

institutional solutions.²⁷⁷⁷ Referring to the Trial Chamber's finding that "[i]t had become standard practice for MUP and VJ representatives to hold co-ordination meetings before finalising plans for and conducting joint operations",²⁷⁷⁸ Šainović maintains that such standard practice for coordination suggests that civilian representatives such as himself and the Joint Command played no role in the coordination.²⁷⁷⁹ He further avers that the Trial Chamber's description of the coordination between the VJ and the MUP in 1999 indicates that it did not necessitate civilian intermediaries, which is considerably different from the coordination activities in 1998.²⁷⁸⁰

826. Likewise, Lukić submits that the Trial Chamber failed to identify any role of the Joint Command in its findings that the coordination system continued to function in 1999 and that it had become standard practice for MUP and VJ representatives to hold coordination meetings before joint operations.²⁷⁸¹ He also asserts that the Trial Chamber categorised each instance of combined activities of the VJ and the MUP as the work of the Joint Command, disregarding the fact that the VJ and the MUP were by law obliged to cooperate and coordinate their activities in a state of war.²⁷⁸²

827. The Prosecution responds that the Trial Chamber's descriptions of the coordination between the VJ and the MUP during the preparation and implementation of the plans for the suppression of the NATO and/or "terrorists" in 1999 do not indicate that there was a change in the positions and roles of the Joint Command and its members in 1999.²⁷⁸³ The Prosecution avers that Šainović artificially isolates these descriptions from the context of the Trial Judgement.²⁷⁸⁴ The Prosecution further contends that Lukić misrepresents or disregards the Trial Chamber's findings.²⁷⁸⁵

b. Analysis

828. The Appeals Chamber observes that, in arguing that the coordination between the army and the police did not require the Joint Command or political representatives to be involved, Šainović and Lukić ignore a substantial part of the evidence and the Trial Chamber's relevant findings. When assessing the evidence regarding how the VJ and the MUP coordinated their activities in 1999, especially in preparation and implementation of joint operations under the *Grom 3* and *Grom 4*

²⁷⁷⁷ Šainović's Appeal Brief, para. 136. See also Šainović's Reply Brief, para. 24.

²⁷⁷⁸ Šainović's Appeal Brief, para. 137, referring to Trial Judgement, vol. 1, para. 1151.

²⁷⁷⁹ Šainović's Appeal Brief, paras 137, 279; Šainović's Reply Brief, para. 23.

²⁷⁸⁰ Šainović's Appeal Brief, paras 115-119, 137, referring to Trial Judgement, vol. 1, paras 1012-1023, 1033-1042.

²⁷⁸¹ Lukić's Appeal Brief, paras 317(a), 322, referring to Trial Judgement, vol. 1, para. 1151. See also Lukić's Appeal Brief, paras 317(c)(d)(f)(h), referring to Trial Judgement, vol. 1, paras 1037, 1039, *ibid.*, vol. 3, para. 827.

²⁷⁸² Lukić's Appeal Brief, paras 319-320, referring to Exh. P985. See also Lukić's Appeal Brief, para. 295.

²⁷⁸³ Prosecution's Response Brief (Šainović), para. 89, referring to Trial Judgement, vol. 1, paras 1012-1023.

²⁷⁸⁴ Prosecution's Response Brief (Šainović), paras 89-90, referring to Trial Judgement, vol. 1, paras 1043, 1108-1110, 1150-1152 and requesting summary dismissal of Šainović's argument in this regard.

plans, the Trial Chamber took into consideration, together with other evidence, a number of orders for joint operations with the Joint Command heading.²⁷⁸⁶ Based on its assessment, the Trial Chamber found that “[i]t had become standard practice for MUP and VJ representatives to hold coordination meetings before finalising plans for and conducting joint operations”.²⁷⁸⁷ According to the Trial Chamber, the issuance of the orders with the Joint Command heading for the joint operations and the continuation thereafter of planning and coordination between VJ and MUP units at a tactical level were also part of the standard practice.²⁷⁸⁸ Taking this system of coordination and cooperation into account, the Trial Chamber further examined how the Joint Command fitted into the framework of this system.²⁷⁸⁹ Regardless of whether the VJ and the MUP were legally obliged to cooperate and coordinate their activities in a state of war,²⁷⁹⁰ the Trial Chamber had ample evidence before it indicating that the situation which had necessitated the Joint Command comprising political representatives in 1998, due to the MUP’s unwillingness to accept the VJ’s orders,²⁷⁹¹ did not change in 1999.²⁷⁹² This and other evidence showing the existence of the Joint Command in 1999²⁷⁹³ led the Trial Chamber to conclude that the coordination system encompassing the Joint Command, which involved political representatives and had influence over the VJ and the MUP,²⁷⁹⁴ continued to exist in 1999, and whereby references to the “Joint Command” were added to orders for joint operations to imbue them with an air of greater authority and to make them acceptable to the MUP.²⁷⁹⁵

829. Šainović and Lukić have failed to show any error in the Trial Chamber’s findings as to the role of the Joint Command in the coordination between the two forces. Their arguments are therefore dismissed.

(x) The MUP’s involvement in planning and ordering joint operations in 1999

830. In support of his argument that the Joint Command had no role in 1999, Lukić argues that VJ and MUP joint operations in 1999 were planned and ordered solely by the VJ without any

²⁷⁸⁵ Prosecution’s Response Brief (Lukić), paras 243, 252, requesting summary dismissal of these arguments.

²⁷⁸⁶ E.g. Trial Judgement, vol. 1, paras 1017, 1022, 1035, 1037-1042. Therefore, insofar as Šainović argues that the Trial Chamber made no reference to the Joint Command in describing the coordination between the VJ and the MUP in 1999 (Šainović’s Appeal Brief, para. 137), he misrepresents the Trial Judgement. See also *supra*, sub-section VII.C.3.(c)(iii).

²⁷⁸⁷ Trial Judgement, vol. 1, para. 1151.

²⁷⁸⁸ Trial Judgement, vol. 1, para. 1041.

²⁷⁸⁹ Trial Judgement, vol. 1, para. 1043.

²⁷⁹⁰ *Contra* Lukić’s Appeal Brief, para. 319.

²⁷⁹¹ E.g. Trial Judgement, vol. 1, paras 1005, 1028, 1088, 1111, and references therein; *ibid.*, vol. 3, paras 80-81, 319, 653-654, and references therein. See *supra*, sub-section VII.C.1.(d).

²⁷⁹² E.g. Trial Judgement, vol. 1, paras 1111, 1166, 1179, 1181, 1189, 1203, and references therein. See *supra*, sub-section VII.C.3.(c)(iii).

²⁷⁹³ See *supra*, sub-section VII.C.3.(c)(ii).

²⁷⁹⁴ Trial Judgement, vol. 1, paras 1109-1110.

²⁷⁹⁵ Trial Judgement, vol. 1, para. 1151.

involvement of the MUP.²⁷⁹⁶ Lukić has failed to substantiate why the non-involvement of the MUP necessarily implies that the VJ had complete control over joint operations without any influence by the Joint Command. His argument in this regard is dismissed to the extent that it pertains to the Joint Command.²⁷⁹⁷

(d) Conclusion

831. Šainović and Lukić have failed to demonstrate any error in the Trial Chamber's assessment of the evidence regarding the existence and authority of the Joint Command in 1999.²⁷⁹⁸ All of their submissions in this respect are thus dismissed.²⁷⁹⁹

4. Conclusion

832. For the reasons set out above, the Appeals Chamber dismisses the submissions of Šainović, Pavković, and Lukić regarding the existence and authority of the Joint Command both in 1998 and 1999 in their entirety.²⁸⁰⁰

D. Alleged errors in relation to Šainović's participation in the JCE

1. Introduction

833. Šainović served as Deputy Prime Minister of the FRY from February 1994 until on or about 4 November 2000.²⁸⁰¹ The Trial Chamber convicted Šainović pursuant to Article 7(1) of the Statute for committing, through participation in a JCE, the crimes of deportation, other inhumane acts (forcible transfer), murder and persecution, through murder and destruction of or damage to

²⁷⁹⁶ Lukić's Appeal Brief, paras 284, 313-316, 317(a)(g)(h), 318, 322. See also *ibid.*, paras 332-358.

²⁷⁹⁷ Lukić's contention as to the non-involvement of the MUP in 1999 is further discussed in detail below, in relation to his own contribution to the JCE and *mens rea*. See *infra*, sub-section VII.F.3.(b).

²⁷⁹⁸ The Appeals Chamber also dismisses Šainović's argument that at a secret, closed meeting of 17 May 1999 in Belgrade, in which Milošević, Šainović, and senior VJ and MUP officers discussed crimes allegedly committed by FRY and Serbian forces, a body coordinating the VJ and MUP forces in Kosovo was not mentioned, and that this shows that the Joint Command did not exist in 1999 (Šainović's Appeal Brief, para. 233; *contra* Prosecution's Response Brief (Šainović), para. 125). The Trial Chamber was aware of what was the contents of discussions in the meeting of 17 May 1999 (Trial Judgement, vol. 1, para. 741; *ibid.*, vol. 3, paras 266, 576, 739). However, given other evidence showing that the Joint Command was referred to in various meetings, reports, and orders, which were partly discussed above (Trial Judgement, vol. 1, paras 1112, 1114, 1116-1149, 1151, and references therein; *supra*, sub-sections VII.C.3.(a), VII.C.3.(b), and VII.C.3.(c)), the Appeals Chamber finds that the Trial Chamber did not err in failing to find that the lack of reference to the Joint Command in this particular meeting raised a reasonable doubt as to the existence of the Joint Command in 1999. Šainović merely advances his own interpretation of the evidence.

²⁷⁹⁹ Šainović's sub-grounds 1(5), 1(7) in part, 1(9), 1(10), 1(11), 1(15), 1(17), 1(23) in part, 2(1) in part; Lukić's sub-grounds D(5) in part, N in part, N(2) in part, P(6) in part, GG(1) in part.

²⁸⁰⁰ Šainović's sub-grounds 1(4), 1(5), 1(6), 1(7), 1(8), 1(9), 1(10), 1(11), 1(13) in part, 1(14) in part, 1(15), 1(16), 1(17), 1(23) in part, 2(1) in part, 6(12); Pavković's sub-grounds 1(D) in part, 1(G) in part; Lukić's sub-grounds D(5) in part, D(7), F(2) in part, N in part, N(1), N(2) in part, N(3) in part, P(6) in part, GG(1) in part.

²⁸⁰¹ Trial Judgement, vol. 3, para. 285.

religious property, as crimes against humanity under Article 5 of the Statute, and murder as a violation of the laws or customs of war under Article 3 of the Statute.²⁸⁰²

834. Šainović challenges the Trial Chamber's findings on his participation in the JCE and his contribution to the common purpose²⁸⁰³ as well as its finding that he shared the intent to forcibly displace part of the Kosovo Albanian population, both within Kosovo and across the border, and thereby change the ethnic balance in the province to ensure the continued control by the FRY and Serbian authorities.²⁸⁰⁴ In addition, Šainović challenges the Trial Chamber's finding that he was responsible for the crimes of murder, as a violation of the laws or customs of war, and murder and persecution, through murder and destruction of or damage to religious property, as crimes against humanity pursuant to JCE III.²⁸⁰⁵

2. Alleged errors in relation to Šainović's contribution to the common purpose

835. The Trial Chamber found that Šainović was a member of a JCE, the common purpose of which was to ensure the continued control of Kosovo by the FRY and Serbian authorities through the crimes of deportation and forcible transfer.²⁸⁰⁶ It convicted Šainović for crimes committed by the VJ and MUP forces in Kosovo in the period from 24 March 1999 until 25 May 1999.²⁸⁰⁷ In concluding that Šainović made a significant contribution to the common purpose, the Trial Chamber found:

[...] [Šainović] was the person Milošević used to orchestrate the events in Kosovo. His purpose was to co-ordinate the forces in Kosovo, convey Milošević's instructions for the activities of the various actors there, and provide his own suggestions and instructions to these actors, all in pursuit of the ultimate goal to retain control in Kosovo. As such, Šainović was one of the most crucial members of this joint criminal enterprise. While the Chamber notes that the direct evidence of his activity in influencing and co-ordinating the activities of the forces of the FRY and Serbia in 1999 is not as extensive as that relating to 1998, that evidence nevertheless indicates clearly that his authority and influence were undiminished and his presence at a number of meetings in Kosovo during the NATO campaign is in keeping with his previous involvement with the province.²⁸⁰⁸

836. In reaching its conclusion on Šainović's powers and authority, the Trial Chamber specifically considered evidence of his relationship with Slobodan Milošević. It concluded that Šainović was "one of the closest and most trusted associates" of Milošević in both 1998 and 1999, and that it was this relationship that led him to take a leading role in various meetings involving VJ

²⁸⁰² Trial Judgement, vol. 3, paras 458-477, 1208.

²⁸⁰³ Šainović's sub-grounds 1(1), 1(3), 1(12)-1(14), 1(18)-1(25), 2(1)-2(14), 6(13), 6(14).

²⁸⁰⁴ Šainović's sub-grounds 3(1)-3(6).

²⁸⁰⁵ Šainović's grounds 4 and 5.

²⁸⁰⁶ Trial Judgement, vol. 3, paras 95, 460, 468.

²⁸⁰⁷ Trial Judgement, vol. 3, para. 475. The first crimes for which Šainović was convicted occurred on 24 March 1999, *inter alia*, in Priština/Prishtina town (see *ibid.*, vol. 2, paras 885-888, 1240-1243) and Kotlina/Kotllina (see *ibid.*, vol. 2, paras 1067, 1253-1255). The last crime for which Šainović was convicted occurred on 25 May 1999 in Dubrava/Lisnaja (see *ibid.*, vol. 2, paras 1148, 1259-1261).

²⁸⁰⁸ Trial Judgement, vol. 3 para. 467.

and MUP officials as well as becoming Chairman of the Commission for Cooperation with the KVM.²⁸⁰⁹ The Trial Chamber further opined that “[t]hese various roles in turn enabled [Šainović] to be a political co-ordinator of both civilian and military activities in Kosovo and somebody who had a decision-making role with respect to the province.”²⁸¹⁰

837. In challenging his contribution to the common purpose, Šainović contests the Trial Chamber’s findings on: (i) his close relationship with Milošević and, in this context, his participation at the Rambouillet conference as an indicator of this close relationship; (ii) his role and authority in dealing with actors on the ground in Kosovo, including his participation at various meetings in 1998 and 1999; (iii) his authority as Chairman of the Commission for Cooperation with the KVM; and (iv) the significance of his contribution to the common purpose. The Appeals Chamber will consider these submissions in turn.

(a) Šainović’s relationship with Milošević

(i) The source of Šainović’s authority

838. The Trial Chamber was satisfied that “Šainović was a powerful official, who not only relayed information to Milošević and conveyed Milošević’s orders to those in Kosovo, but also had a great deal of influence over events in the province and was empowered to make decisions.”²⁸¹¹

839. In reaching this finding, the Trial Chamber relied primarily on the evidence of foreign interlocutors who met Šainović in 1998 and 1999²⁸¹² as well as on the evidence of Momir Bulatović, the then Prime Minister of the FRY, Ibrahim Rugova, leader of the Democratic League of Kosovo (“LDK”), Dušan Lončar, Head of the field office in Priština/Prishtina of the Commission for Cooperation with the KVM, and Veton Surroi, a Kosovo Albanian journalist and negotiator.²⁸¹³ The Trial Chamber also considered that Šainović was assigned to go to Kosovo in the summer of 1998 by Bulatović, at the behest of Milošević²⁸¹⁴ and concluded that since “Bulatović was not issuing tasks to Šainović, the only possible source of Šainović’s actual authority was Milošević.”²⁸¹⁵

²⁸⁰⁹ Trial Judgement, vol. 3, para. 427.

²⁸¹⁰ Trial Judgement, vol. 3, para. 427.

²⁸¹¹ Trial Judgement, vol. 3, para. 299.

²⁸¹² Trial Judgement, vol. 3, paras 295-297.

²⁸¹³ Trial Judgement, vol. 3, paras 292-293, 295, 297.

²⁸¹⁴ Trial Judgement, vol. 3, para. 292.

²⁸¹⁵ Trial Judgement, vol. 3, para. 293.

840. The Trial Chamber noted further evidence of Šainović's attendance at various meetings with Milošević during which it found that the activities of the VJ and the MUP were discussed²⁸¹⁶ and concluded that:

[...] Šainović was indeed one of the closest and most trusted associates of Slobodan Milošević both in 1998 and 1999. It was this relationship that led to him undertaking a leading role during the Joint Command meetings and various other meetings involving VJ and MUP officials. It was also this relationship that led to him becoming the Chairman of the Commission for Co-operation with the KVM. These various roles in turn enabled him to be a political co-ordinator of both civilian and military activities in Kosovo and somebody who had a decision-making role with respect to the province.²⁸¹⁷

a. Submissions of the parties

841. Šainović argues that since the Trial Chamber did not establish Milošević's responsibility, his relationship with Milošević is irrelevant.²⁸¹⁸ He further asserts that the Trial Chamber erred in finding that he was Milošević's representative in Kosovo.²⁸¹⁹ Šainović contends that the Trial Chamber's finding that he was sent to Kosovo pursuant to Milošević's instruction was unreasonable²⁸²⁰ and ignored the evidence of witnesses "who were directly involved in the decision-making process".²⁸²¹ He also argues that the Trial Chamber erred in finding that since Bulatović, the FRY Prime Minister, did not issue him tasks, the source of his authority was Milošević.²⁸²² In this respect, Šainović claims that the Trial Chamber failed to explain the way in which the political system functioned, or to refer to evidence showing Milošević's position and role.²⁸²³ Šainović challenges the Trial Chamber's evaluation of the evidence given by each of the 12 witnesses it relied upon to infer Šainović's authority in Kosovo and to conclude that Milošević was the source of that authority.²⁸²⁴

²⁸¹⁶ Trial Judgement, vol. 3, paras 419-426.

²⁸¹⁷ Trial Judgement, vol. 3, para. 427.

²⁸¹⁸ Šainović Appeal Brief, para. 337.

²⁸¹⁹ Šainović's Notice of Appeal, para. 12; Šainović's Appeal Brief, paras 28-29, referring to Trial Judgement, vol. 3, paras 292-299.

²⁸²⁰ Šainović's Appeal Brief, para. 36, referring to Trial Judgement, vol. 3, para. 292. In addition, Šainović argues that the Trial Chamber erred in finding that he was sent to Kosovo due to his prior participation in a fact-finding mission in the province (Šainović's Appeal Brief, paras 30-32).

²⁸²¹ Šainović's Appeal Brief, para. 56, referring to Momir Bulatović, 16 Aug 2007, T. 13817, 13819, Živadin Jovanović, 20 Aug 2007, T. 13997, Duško Matković, 29 Aug 2007, T. 14589, Milomir Minić, 31 Aug 2007, T. 14743. Šainović further claims that the Trial Chamber ignored Bulatović's testimony that the Deputy Prime Minister was not being issued specific tasks but that the relationship between the members of the Government was "based on principles of cooperation in achieving common goals" (Šainović's Appeal Brief, paras 35, 57, referring to Momir Bulatović, 17 Aug 2007, T. 13901-13902. See also Šainović's Reply Brief, para. 12).

²⁸²² Šainović's Appeal Brief, paras 33-34, 37, citing Trial Judgement, vol. 3, para. 293; Šainović's Reply Brief, para. 6.

²⁸²³ Šainović's Appeal Brief, para. 34; Šainović's Reply Brief, para. 12.

²⁸²⁴ Šainović's Appeal Brief, paras 38-50, referring to Klaus Naumann, Knut Vollebaek, Richard Ciaglinski, Michael Phillips, Joseph Maisonneuve, Ibrahim Rugova, Adnan Merovci, Dušan Lončar, Karol John Drewienkiewicz, Veton Surroi, Wolfgang Petrtsch, and Shaun Byrnes; Šainović's Reply Brief, para. 6. Šainović also claims that the Trial Chamber erred in not relying on the testimony of "direct participants in the events", such as Dimitrijević and Đaković, and relying instead on the statements of Vollebaek, Ciaglinski, and Crosland who had limited or no contact with him

842. Šainović also argues that the Trial Chamber erred in finding that he was one of Milošević's closest and most trusted associates in both 1998 and 1999.²⁸²⁵ He contends that his meetings with Milošević involved numerous other state representatives and that no evidence exists as to the content of his private talks with Milošević.²⁸²⁶ In this respect, Šainović asserts that the Trial Chamber's conclusion that he must have spoken with Milošević about matters concerning the VJ and the MUP has no basis in the evidence and is based instead on "a series of mutually conditional assumptions."²⁸²⁷ Moreover, Šainović argues that, during the period when the crimes were committed, the Trial Chamber relied on evidence concerning only three or four meetings that he had with Milošević, lasting not more than ten minutes, which, in his view, is insufficient to show that he was one of Milošević's closest and most trusted associates or the crucial link with Kosovo.²⁸²⁸

843. In response, the Prosecution avers that the Trial Chamber's finding that Šainović acted as Milošević's representative in Kosovo was reasonable.²⁸²⁹ It claims that the evidence showed that Bulatović assigned Šainović to Kosovo at the behest of Milošević and that Šainović acted under Milošević's authority and reported to him.²⁸³⁰ The Prosecution further argues that Šainović's challenge to each of the 12 witnesses relied upon in the Trial Judgement should be summarily dismissed as he merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.²⁸³¹ The Prosecution contends that the Trial Chamber's finding that Šainović was one of Milošević's closest and most trusted associates was reasonable and was based on the totality of the evidence.²⁸³² It adds that, even in the absence of credible direct evidence as to the content of

(Šainović's Appeal Brief, para. 301, referring to Trial Judgement, vol. 3, paras 295, 325, 330; Šainović's Reply Brief, para. 45).

²⁸²⁵ Šainović's Notice of Appeal, para. 53; Šainović Appeal Brief, paras 53, 59, 336, 349, referring to Trial Judgement, vol. 3, paras 292, 427. Šainović further claims that: (i) at key meetings of the Socialist Party of Serbia which were presided by Milošević, he did not participate in the discussions (Šainović Appeal Brief, paras 54, 341, 343, referring to Milan Jovanović, 21 Aug 2007, T. 14147, Exh. P1012, Exh. P2875); (ii) when the SPS formed a team to coordinate political activities in Kosovo, Minić was appointed team leader upon Milošević's proposal (Šainović Appeal Brief, para. 54, referring to Milomir Minić, 31 Aug 2007, T. 14743, Exh. P1012, pp. 6, 79); (iii) on 24 May 1997, at a meeting presided by Milošević and upon his proposal, Šainović was removed from the position of Vice-President of the SPS Main Board and was later nominated to the SPS Executive Board which, in his view, constitutes a "de facto demotion in the party hierarchy" (Šainović's Appeal Brief, paras 339-340, 342; Šainović's Notice of Appeal, para. 54. See also Šainović's Appeal Brief, para. 55; Šainović's Reply Brief, para. 12); and (iv) with respect to the SPS meetings which took place on 14 and 27 October 1998, Šainović claims that he took part in the discussions but that the minutes of the latter meeting do not specify what he said (Šainović's Appeal Brief, para. 341).

²⁸²⁶ Šainović's Appeal Brief, para. 343.

²⁸²⁷ Šainović's Appeal Brief, para. 348, referring to Trial Judgement, vol. 3, paras 426, 462. See also Šainović's Reply Brief, para. 41.

²⁸²⁸ Šainović's Appeal Brief, paras 344-345.

²⁸²⁹ Prosecution's Response Brief (Šainović), para. 50.

²⁸³⁰ Prosecution's Response Brief (Šainović), paras 29, 50, referring to Trial Judgement, vol. 3, paras 292-293, 297.

²⁸³¹ Prosecution's Response Brief (Šainović), paras 51-61, discussing the evidence of John Crosland, Klaus Naumann, Knut Vollebaek, Richard Ciaglinski, Michael Phillips, Joseph Maignonneuve, Adnan Merovci, Dušan Lončar, Karol John Drewienkiewicz, Veton Surroi, Wolfgang Petritsch, and Shaun Byrnes.

²⁸³² Prosecution's Response Brief (Šainović), paras 62, 179-181.

Šainović's conversations with Milošević, it was reasonable for the Trial Chamber to infer that issues concerning the VJ and the MUP were discussed.²⁸³³

b. Analysis

844. The Appeals Chamber considers Šainović's assertion concerning the relevance of his relationship with Milošević to be unpersuasive. The Trial Chamber held that Šainović's close relationship with Milošević enabled him to be a political coordinator of, *inter alia*, the military activities in Kosovo and to have a decision-making role with respect to the province.²⁸³⁴ In addition, the Trial Chamber held that Milošević was a JCE member who shared the intent to forcibly displace part of the Kosovo Albanian population²⁸³⁵ and together with the other members of the JCE, including Šainović, Pavković, and Lukić, used the VJ and MUP forces to carry out the crimes charged.²⁸³⁶ The Appeals Chamber is thus of the view that the Trial Chamber adequately explained the relevance of Šainović's relationship with Milošević to the assessment of Šainović's responsibility pursuant to JCE.

845. In relation to Šainović's assignment to Kosovo, the Trial Chamber relied upon Bulatović's testimony to conclude that while he gave the assignment to Šainović in accordance with the law, it was done at the behest of Milošević.²⁸³⁷ Indeed, in cross-examination, Bulatović clearly stated that he issued a decision sending Šainović to Kosovo after having agreed with Milošević's proposal to this effect.²⁸³⁸ None of the evidence referred to by Šainović suggests that Bulatović's testimony on this point was unreliable.²⁸³⁹ Further, the Trial Chamber took into account the fact that Bulatović neither issued specific tasks nor received reports on certain incidents from Šainović.²⁸⁴⁰ The Trial Chamber found that this was contrary to the constitutional order whereby the members of the Federal Cabinet were essentially advisors to the Federal Prime Minister without any scope for autonomous work and decision-making.²⁸⁴¹ The Trial Chamber concluded that the only reasonable

²⁸³³ Prosecution's Response Brief (Šainović), para. 183.

²⁸³⁴ Trial Judgement, vol. 3, para. 427.

²⁸³⁵ Trial Judgement, vol. 3, para. 466.

²⁸³⁶ Trial Judgement, vol. 3, para. 468.

²⁸³⁷ Trial Judgement, vol. 3, para. 292.

²⁸³⁸ Momir Bulatović, 17 Aug 2007, T. 13897. See also Exh. P2895, p. 2.

²⁸³⁹ As to whether Šainović was sent to Kosovo due to his prior participation in a fact-finding mission, the Appeals Chamber finds that Šainović's conviction does not rely on this factual finding and therefore will not entertain his argument in this respect.

²⁸⁴⁰ Trial Judgement, vol. 3, para. 293, referring to Momir Bulatović, 17 Aug 2007, T. 13901-13902, 13910-13913. The Appeals Chamber notes that contrary to Šainović's assertion, Bulatović did not testify that the relationship between the members of the Government was based "on principles of cooperation" (Šainović Appeal Brief, para. 35, referring to Momir Bulatović, 17 Aug 2007, T. 13901-13902). Rather, he stated that he personally did not issue orders to his "associates" as he was "simply not the type of person" who would do that, nor did he "believe that they would have accepted that sort of practice gladly" (Momir Bulatović, 17 Aug 2007, T. 13902).

²⁸⁴¹ Trial Judgement, vol. 3, para. 293, referring to Exh. 2D393, e-court p. 84.

inference from the evidence was that Šainović acted on the authority of, and reported to, Milošević.²⁸⁴² Šainović has failed to demonstrate any error on the part of the Trial Chamber.

846. The Trial Chamber referred to the testimony of several Prosecution witnesses with respect to the source of Šainović's authority. All of them interacted with Šainović at different times in 1998 and 1999 and consistently stated that Šainović appeared to be Milošević's representative and the person with responsibility for Kosovo.²⁸⁴³ With respect to the evidence given by Knut Vollebaek, the Norwegian Minister of Foreign Affairs and OSCE Chairman at the relevant time, Richard Ciaglinski, who was involved with the KVM in late 1998 and early 1999, Karol John Drewienkiewicz, also part of the KVM, and Veton Surroi, a Kosovo Albanian journalist and negotiator, Šainović asserts that their testimony was based on "impressions", "assumption[s]", and was not first-hand knowledge.²⁸⁴⁴ The Trial Chamber considered that the evidence of these witnesses was based on their presence, role, and interactions with Šainović.²⁸⁴⁵ The Appeals Chamber recalls that a trial chamber has considerable discretion in assessing the credibility and the appropriate weight to be accorded to witness testimony²⁸⁴⁶ and to rely on hearsay evidence that it finds reliable.²⁸⁴⁷ Šainović's mere assertions in this regard are not capable of demonstrating that the Trial Chamber erred in exercising its discretion.²⁸⁴⁸

847. Šainović also makes reference to portions of the evidence of Klaus Naumann, Chairman of the NATO Military Committee at the time, Michael Phillips, Chief of Staff for the KVM head, Joseph Maisonneuve, Head of KVM Regional Centre in Prizren, Ibrahim Rugova, leader of the LDK, Adnan Merovci, Rugova's secretary, Wolfgang Petritsch, Austrian Ambassador to the FRY, and Shaun Byrnes, Head of the United States Kosovo Diplomatic Observer Mission ("US-KDOM"), without clearly alleging any error in the Trial Chamber's evaluation of their evidence.²⁸⁴⁹ To the extent that Šainović argues that he interacted with these witnesses in his official capacity as Deputy Prime Minister of the FRY, the Appeals Chamber recalls that it was not his position, but the

²⁸⁴² Trial Judgement, vol. 3, para. 293.

²⁸⁴³ Trial Judgement, vol. 3, para. 295, referring to Klaus Naumann, 13 Dec 2006, T. 8251, Exh. P1767, para. 26, Exh. P2512, T. 6993, Knut Vollebaek, 31 Jan 2007, T. 9508, Exh. P2634, para. 19, Richard Ciaglinski, 17 Nov 2006, T. 6825, Michael Phillips, 19 Mar 2007, T. 11831, Joseph Maisonneuve, 6 Mar 2007, T. 11033, Ibrahim Rugova, Exh. P2612, T. 4235–4236, Dušan Lončar, 30 Nov 2006, T. 7590, Karol John Drewienkiewicz, Exh. P2508, para. 201, Veton Surroi, 10 Oct 2006, T. 4547, John Crosland, Exh. P2645, para. 58, Wolfgang Petritsch, Exh. P2792, pp. 7–8, Exh. P2793, T. 7216–7217, Shaun Byrnes, 16 Apr 2007, T. 12138.

²⁸⁴⁴ See Šainović's Appeal Brief, paras 41-42, 47-48; Appeal Hearing, 11 Mar 2013, AT. 178-179.

²⁸⁴⁵ Trial Judgement, vol. 3, para. 295.

²⁸⁴⁶ *Kupreškić et al.* Appeal Judgement, paras 31-32.

²⁸⁴⁷ *Naletilić and Martinović* Appeal Judgement, para. 217, citing *Semanza* Appeal Judgement, para. 159.

²⁸⁴⁸ In addition, Šainović's submissions alleging an error in the Trial Chamber's decision not to rely on the evidence of Dimitrijević and Đaković and to accept instead the evidence of Vollebaek, Ciaglinski, and Crosland, fail to address the Trial Chamber's relevant reasoning and advance instead a different interpretation of the evidence. Consequently, these submissions are dismissed without detailed consideration.

²⁸⁴⁹ Šainović's Appeal Brief, paras 40, 43-45, 49-50.

particular functions that he performed which were determinative for the Trial Chamber's conclusion on his criminal responsibility.²⁸⁵⁰ Šainović's arguments in this regard are therefore dismissed.²⁸⁵¹

848. In finding that Šainović was one of the closest and most trusted associates of Milošević, the Trial Chamber also considered that in 1998 Šainović attended consultations in Belgrade and spoke to Milošević on the phone about once a week.²⁸⁵² Specifically with respect to 1999, the Trial Chamber considered evidence of a political consultation that took place on 24 March 1999 and two or three meetings with Milošević and representatives of the Serbian and FRY organs during the NATO campaign.²⁸⁵³ It noted that the latter meetings during the NATO campaign lasted about ten minutes and "were held mostly to show the public that the state leadership was still working together."²⁸⁵⁴ Although the evidence on meetings between Šainović and Milošević in 1999 is scarce, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that in light of the extensive evidence considered by the Trial Chamber, including the evidence showing that in 1999, Šainović was appointed Chairman of the Commission for Cooperation with the KVM,²⁸⁵⁵ was involved in the Rambouillet negotiations,²⁸⁵⁶ had extensive dealings with Rugova,²⁸⁵⁷ and continued to convey Milošević's instructions,²⁸⁵⁸ a reasonable trier of fact could have concluded that Šainović was also one of Milošević's closest and most trusted associates in 1999.²⁸⁵⁹ For the same reasons, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds no error in the Trial Chamber's

²⁸⁵⁰ See Trial Judgement, vol. 3, para. 401.

²⁸⁵¹ The Appeals Chamber also finds no merit in Šainović's submission that the Trial Chamber took out of context Lončar's evidence that Šainović was trying to do more than his various functions strictly compelled him to do (Šainović's Appeal Brief, para. 46). Lončar testified that Šainović "worked very conscientiously" in establishing the local authorities, including the local police (Dušan Lončar, 30 Nov 2006, T. 7590). His evidence supports the Trial Chamber's conclusion that Šainović was a powerful official who had a great deal of influence over events in Kosovo (Trial Judgement, vol. 3, para. 299).

²⁸⁵² Trial Judgement, vol. 3, para. 423, referring to Exh. P605, e-court pp. 220, 223-224.

²⁸⁵³ Trial Judgement, vol. 3, para. 424.

²⁸⁵⁴ Trial Judgement, vol. 3, para. 424, referring to Exh. P605, e-court pp. 865.

²⁸⁵⁵ See Trial Judgement, vol. 3, para. 380. See also *infra*, sub-section VII.D.2.(d)(i).

²⁸⁵⁶ See Trial Judgement, vol. 3, para. 409. See also *infra*, sub-section VII.D.2.(a)(ii).

²⁸⁵⁷ See Trial Judgement, vol. 3, para. 413. See also *infra*, sub-section VII.D.2.(e).

²⁸⁵⁸ See Trial Judgement, vol. 3, para. 359. See also *infra*, sub-sections VII.D.2.(f)(iii) and VII.D.2.(g).

²⁸⁵⁹ With respect to the SPS meetings of 14 and 27 October 1998, the Appeals Chamber finds that Šainović fails to show that his conviction relies on his participation in those meetings. His arguments are therefore dismissed without detailed consideration. Concerning Šainović's purported demotion in the SPS in May 1997, the Appeals Chamber notes that while the Trial Chamber considered evidence on this matter (Trial Judgement, vol. 3, para. 419) Šainović fails to explain the relevance of this fact to his later relationship with Milošević in 1998 and 1999. Likewise, the fact that he did not participate in the debate on 10 June 1998 at the Main Board of the SPS is plainly insufficient to show that the Trial Chamber's finding that he was Milošević's closest and most trusted associate both in 1998 and in 1999 was unreasonable. As to Minić's appointment as head of the Working Group, the Trial Chamber explicitly found that the Working Group reported to Milošević, Milutinović, and Šainović on 25 June 1998 (*ibid.*, vol. 3, para. 303). While other evidence suggested that Šainović was neither superior nor subordinate to the Working Group (*ibid.*, vol. 3, para. 420, referring to Zoran Andelković, 30 Aug 2007, T. 14654, Duško Matković, 29 Aug 2007, T. 14588, Milomir Minić, 31 Aug 2007, T. 14752), the Appeals Chamber finds that his presence at the meeting of 25 June 1998 supports the Trial Chamber's conclusion with respect to his authority and his close relationship with Milošević.

decision not to rely on Šainović's statement that he never discussed the activities of the VJ and the MUP with Milošević.²⁸⁶⁰

849. Accordingly, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Šainović has not demonstrated any error in the Trial Chamber's findings concerning his close relationship with Milošević. In light of the foregoing, the Appeals Chamber dismisses Šainović's arguments in this regard.²⁸⁶¹

(ii) Šainović's participation at the Rambouillet conference

850. The Trial Chamber found that on 29 January 1999, the Contact Group, which was the principal international body involved in negotiations concerning Kosovo in 1998 and into 1999,²⁸⁶² called for a peace conference in Rambouillet, France.²⁸⁶³ The Trial Chamber concluded that following the acceptance of the invitation by the Serbian National Assembly, the Serbian Government appointed a delegation of 12 members, including Šainović, to represent both the FRY and Republic of Serbia at the conference.²⁸⁶⁴ The Rambouillet conference commenced on 6 February 1999 and lasted until 23 February 1999.²⁸⁶⁵ On 23 March 1999, after making a final attempt to reach an agreement with Milošević, US Ambassador Richard Holbrooke announced the failure of the negotiations.²⁸⁶⁶ The Trial Chamber noted that the NATO air campaign commenced on the evening of the following day.²⁸⁶⁷

851. In relation to Šainović's participation at the Rambouillet conference, the Trial Chamber found that he was allowed to travel to Belgrade in order to consult with Milošević while the negotiations were taking place, was one of Milošević's closest associates, and was, in effect, the most senior and influential member of the FRY and Serbian delegation.²⁸⁶⁸

a. Submissions of the parties

852. Šainović contends that the Trial Chamber erred in finding that his role at the Rambouillet conference was indicative of his close relationship with Milošević and that he was the most senior

²⁸⁶⁰ See Trial Judgement, vol. 3, para. 426.

²⁸⁶¹ Šainović's sub-grounds 1(3), 2(13), 2(5)-2(6) and 2(8)-2(9) in part, and 2(14).

²⁸⁶² Trial Judgement, vol. 1, para. 314, referring to Wolfgang Petritsch, 28 Feb 2007, T. 10710, Veton Surroi, 10 Oct 2006, T. 4549. The Trial Chamber found that the Contact Group was composed of representatives from the United Kingdom, France, Germany, Italy, the European Union, the United States, and Russia (Trial Judgement, vol. 1, para. 314).

²⁸⁶³ Trial Judgement, vol. 1, para. 353, referring to Exh. P979, p. 2.

²⁸⁶⁴ Trial Judgement, vol. 1, para. 357, referring to Exh. P967.

²⁸⁶⁵ Trial Judgement, vol. 1, para. 358, referring to Exh. 1D32, p. 6.

²⁸⁶⁶ Trial Judgement, vol. 1, para. 398, referring to Klaus Naumann, 14 Dec 2006, T. 8339, Exh. 2D244, Exh. 2D293.

²⁸⁶⁷ Trial Judgement, vol. 1, para. 1209.

and influential member of the FRY and Serbian delegation.²⁸⁶⁹ He submits that he was selected following a proposal made by Zoran Anđelković, the Head of the TEC²⁸⁷⁰ and upon a decision taken by the Government of the Republic of Serbia, and that he participated in the negotiations in his capacity of Deputy Prime Minister of the FRY.²⁸⁷¹ Šainović asserts that the Trial Chamber failed to consider his role or his views and actions in Rambouillet²⁸⁷² and claims that Vladan Kutlešić was Milošević's special envoy at the conference.²⁸⁷³ Šainović further submits that his trip to Belgrade while the negotiations were taking place is irrelevant to the issue of whether he had a close relationship with Milošević. He claims that he had the permission of the delegation's co-chairman to leave Rambouillet and as the only member of the delegation with experience in foreign policy matters, it was reasonable for him to travel to Belgrade to discuss such matters with Milošević, Bulatović, and Živadin Jovanović, the Federal Minister of Foreign Affairs.²⁸⁷⁴

853. In response, the Prosecution submits that Šainović repeats his trial submissions, misstates the Trial Chamber's conclusion about his role in Rambouillet, and fails to show any error in the Trial Chamber's findings.²⁸⁷⁵ Therefore, the Prosecution avers, Šainović's arguments should be summarily dismissed.²⁸⁷⁶

b. Analysis

854. With respect to Šainović's role at the Rambouillet conference, the Trial Chamber held that "what the witnesses confirm[ed] yet again is that Šainović was one of the closest associates of Slobodan Milošević at the time and, in effect, the most senior and influential member of the delegation at Rambouillet."²⁸⁷⁷ The Trial Chamber explicitly considered Anđelković's evidence that he personally proposed the inclusion of Šainović in the FRY and Serbian delegation, and the testimony of Jovanović that Šainović participated in the talks because of his diplomatic experience and his function as Head of the Commission for Cooperation with the KVM.²⁸⁷⁸ The Trial Chamber also noted that the FRY and Serbian delegation included Vladan Kutlešić who was a Deputy Prime

²⁸⁶⁸ Trial Judgement, vol. 3, paras 405, 409.

²⁸⁶⁹ Šainović's Notice of Appeal, para. 52; Šainović's Appeal Brief, para. 330, referring to Trial Judgement, vol. 3, para. 409.

²⁸⁷⁰ See Trial Judgement, vol. 1, para. 308.

²⁸⁷¹ Šainović's Appeal Brief, para. 331. See also *ibid.*, para. 153.

²⁸⁷² Šainović's Appeal Brief, para. 332.

²⁸⁷³ Šainović's Appeal Brief, para. 54, referring to Wolfgang Petritsch, 1 Mar 2007, T. 10828, Momir Bulatović, 17 Aug 2007, T.13846.

²⁸⁷⁴ Šainović Appeal Brief, para. 335. See also *ibid.*, paras 333-334.

²⁸⁷⁵ Prosecution's Response Brief (Šainović), paras 177-178.

²⁸⁷⁶ Prosecution's Response Brief (Šainović), paras 177-178.

²⁸⁷⁷ Trial Judgement, vol. 3, para. 409.

²⁸⁷⁸ Trial Judgement, vol. 3, para. 404, referring to Zoran Anđelković, 30 Aug 2007, T. 14661; Živadin Jovanović, 20 Aug 2007, T. 14053.

Minister of the FRY at the time and Milošević's personal envoy.²⁸⁷⁹ Accordingly, Šainović's arguments concerning his appointment, role, and Kutlešić's presence were taken into account by the Trial Chamber.

855. The Trial Chamber also considered the evidence of Petritsch, the Austrian Ambassador, who testified that although the FRY and Serbian delegation was formally headed by Ratko Marković, a Deputy Prime Minister of the Republic of Serbia, Šainović was seen as the political head of the delegation.²⁸⁸⁰ Furthermore, the Trial Chamber referred to the evidence of Surroi, the Kosovo Albanian journalist and negotiator, who considered Šainović to be the political leader of the delegation and the one responsible for contacting Milošević.²⁸⁸¹ Surroi was also told by Christopher Hill, US Ambassador to Macedonia, that Šainović was Milošević's most trusted man.²⁸⁸² The Trial Chamber was also satisfied that Šainović communicated with Milošević during the Rambouillet talks and sought instructions from him. In this respect, it considered that when the negotiations reached a critical point, Šainović was granted permission to leave Rambouillet and visit Belgrade in order to get approval and further directions from Milošević.²⁸⁸³ Šainović does not dispute the fact that during the negotiations he liaised with Milošević and conveyed his instructions. The formal capacity in which he performed this role is irrelevant.

856. In view of the above, the Appeals Chamber finds that Šainović has failed to show that the Trial Chamber's conclusion that he was one of Milošević's closest associates and the most influential member of the delegation at Rambouillet, was unreasonable. The Appeals Chamber therefore dismisses sub-ground 2(12) of Šainović's appeal.

(b) Šainović's leading role during Joint Command meetings in 1998

857. The Trial Chamber found that an "entity referred to as the Joint Command played a role in the co-ordination and exchange of information and intelligence between the MUP and the VJ in the latter half of 1998."²⁸⁸⁴ In relation to Šainović's role in the Joint Command, the Trial Chamber concluded that:

[...] Šainović, along with Minić, was an active participant in the Joint Command meetings where he undertook a leading role. In addition, on his own admission, he reported to Milošević, Bulatović, and the Federal Ministry for Foreign Affairs. Given that politicians liaised with the VJ and the MUP at the time, and given that both of those organs had to get approval from Milošević,

²⁸⁷⁹ Trial Judgement, vol. 1, para. 357.

²⁸⁸⁰ Trial Judgement, vol. 3, para. 403, referring to Wolfgang Petritsch, 28 Feb 2007, T. 10717. See also Trial Judgement, vol. 1, para. 292.

²⁸⁸¹ Trial Judgement, vol. 3, para. 403, referring to Veton Surroi, 10 Oct 2006, T. 4544, 4585.

²⁸⁸² Trial Judgement, vol. 3, para. 403, referring to Veton Surroi, 10 Oct 2006, T. 4547.

²⁸⁸³ Trial Judgement, vol. 3, para. 405, referring to Veton Surroi, 10 Oct 2006, T. 4544-4545, 4586, Wolfgang Petritsch, P2792, p. 4.

²⁸⁸⁴ Trial Judgement, vol. 1, para. 1110, referring to Exh. P1468.

Šainović's role was pivotal in both giving such approval and issuing instructions. The various instructions he issued [...] reveal that he was indeed a political co-ordinator of the activities of the VJ and the MUP in Kosovo in 1998.²⁸⁸⁵

858. In reaching this conclusion, the Trial Chamber relied on: (i) Đaković's Notes, which comprise, *inter alia*, statements made by Šainović during Joint Command meetings in 1998;²⁸⁸⁶ (ii) the fact that in July 1998, Momčilo Perišić, the VJ Chief of Staff, complained about an alternative chain of command, pursuant to which Šainović and Milomir Minić, a member of the Main Board of the SPS and a deputy in the FRY Assembly,²⁸⁸⁷ were involved in directing VJ units;²⁸⁸⁸ and (iii) a telegram prepared by the UK Embassy, which recorded the dissatisfaction of Aleksandar Dimitrijević, chief of the VJ Security Administration, with Šainović's actions in Kosovo.²⁸⁸⁹ Notably, the Trial Chamber did not accept Dimitrijević's denial of the significant role played by Šainović in the Joint Command or in exercising authority over the police and the VJ forces in Kosovo,²⁸⁹⁰ and rejected Đaković's description of Šainović's role at the Joint Command meetings.²⁸⁹¹

859. Šainović argues that the Trial Chamber's conclusion that he had a leadership role during the Joint Command meetings in 1998 was unreasonable.²⁸⁹² The Prosecution responds that the Trial Chamber's conclusion was supported by the evidence²⁸⁹³ and that Šainović's arguments should be summarily dismissed as they repeat his trial submissions without showing any error on the part of the Trial Chamber.²⁸⁹⁴

(i) Reasons for sending Šainović to Kosovo and Minić's role during Joint Command meetings

860. Šainović submits that in considering his role during the Joint Command meetings, the Trial Chamber disregarded the situation in Kosovo in the summer of 1998 when, in response to the vast international presence, "the Federal Government acknowledged the need to send to Kosovo a high-ranking state official to demonstrate a politically responsible attitude towards the international community."²⁸⁹⁵ Šainović maintains that he interacted with VJ and MUP representatives at the time

²⁸⁸⁵ Trial Judgement, vol. 3, para. 331.

²⁸⁸⁶ Trial Judgement, vol. 3, paras 309-314.

²⁸⁸⁷ Trial Judgement, vol. 1, para. 302.

²⁸⁸⁸ Trial Judgement, vol. 3, para. 319.

²⁸⁸⁹ Trial Judgement, vol. 3, para. 320.

²⁸⁹⁰ Trial Judgement, vol. 3, para. 325.

²⁸⁹¹ Trial Judgement, vol. 3, para. 330.

²⁸⁹² Šainović's Notice of Appeal, paras 21-23, 43, 45; Šainović's Appeal Brief, paras 147-148, 155, 291-292, referring, *inter alia*, to Trial Judgement, vol. 3, paras 309, 462.

²⁸⁹³ Prosecution's Response Brief (Šainović), paras 23-26, 113-114, 161, referring to Trial Judgement, vol. 3, paras 318-325.

²⁸⁹⁴ Prosecution's Response Brief (Šainović), paras 21-22, 97-98, 103-104, 115.

²⁸⁹⁵ Šainović's Appeal Brief, para. 150. See also *ibid.*, paras 149, 151.

in his official capacity as a Deputy Prime Minister of the FRY so that he could be informed of the “more important events in order to successfully perform his duties.”²⁸⁹⁶

861. Šainović further claims that it was not him but Milomir Minić who played a “dominant role” during the Joint Command meetings in 1998.²⁸⁹⁷ He also contends that the Trial Chamber erred in not relying on Đaković’s explanation of Šainović’s role²⁸⁹⁸ and in relying on only parts of the testimony of Branko Gajić, Deputy Head of the VJ Security Administration.²⁸⁹⁹

862. In response, the Prosecution submits that Šainović’s arguments warrant summary dismissal as he repeats his trial submissions.²⁹⁰⁰ The Prosecution also claims that while it was recognised by the Trial Chamber that at one point Minić had a leading role in the Joint Command meetings, the conclusion that Šainović was one of the leading members of the Joint Command in 1998 was reasonable.²⁹⁰¹ It argues that the evidence cited by Šainović in this regard was taken into account by the Trial Chamber and does not contradict its ultimate finding.²⁹⁰²

863. Šainović’s argument that the Trial Chamber ignored the reasons as to why he was sent to Kosovo is without merit. The Appeals Chamber notes that he merely repeats his trial submissions without showing any error on the part of the Trial Chamber.²⁹⁰³ Moreover, Šainović does not explain how “the vast international presence in Kosovo” is relevant to the Trial Chamber’s findings concerning his particular role during the Joint Command meetings. For the same reason, the Appeals Chamber will not entertain Šainović’s unsupported submission that he was only in contact with the VJ and the MUP to obtain the information necessary for the fulfilment of his duties as a Deputy Prime Minister of the FRY, rather than as a leading member of the Joint Command.

864. As to Šainović’s assertion that it was not him but Milomir Minić who played a “dominant role” during the Joint Command meetings in 1998,²⁹⁰⁴ the Appeals Chamber notes that Minić’s

²⁸⁹⁶ Šainović’s Appeal brief, para. 155.

²⁸⁹⁷ Šainović’s Appeal Brief, para. 9, referring to Exh. P1012, Exh. P1468, Milomir Minić, 31 Aug 2007, T.14743, Milan Đaković, 20 May 2008, T. 26461. See also Šainović’s Appeal Brief, para. 174, referring to Exh. P1468, pp. 2, 5, 8, 20, 23-24, 161, 163; Šainović’s Reply Brief, para. 6. Šainović adds that although the Trial Chamber accepted Cvetić’s testimony that Šainović had been appointed “Head” of the Joint Command, the Trial Judgement did not “establish anything quite to that effect” (Šainović’s Appeal Brief, para. 184. See also *ibid.*, para. 183, referring to Trial Judgement, vol. 3, paras 315, 317; Šainović’s Notice of Appeal, para. 25).

²⁸⁹⁸ Šainović’s Appeal Brief, paras 179, 182.

²⁸⁹⁹ Šainović’s Appeal Brief, para. 299, referring to Trial Judgement, vol. 3, para. 318. See also Šainović’s Reply Brief, para. 45. Concerning Gajić’s position see Trial Judgement, vol. 1, para. 536.

²⁹⁰⁰ Prosecution’s Response Brief (Šainović), para. 97.

²⁹⁰¹ Prosecution’s Response Brief (Šainović), para. 21, referring to Trial Judgement, vol. 3, paras 319, 330-331.

²⁹⁰² Prosecution’s Response Brief (Šainović), para. 22. See also *ibid.*, paras 23-25, referring to Trial Judgement, vol. 3, paras 318-322.

²⁹⁰³ Cf. Šainović’s Appeal Brief, paras 149-150 and the evidence cited therein with Šainović’s Closing Brief, paras 45-46, 52, 55-57 and the evidence cited therein.

²⁹⁰⁴ See Šainović’s Appeal Brief, para. 9.

leading role was recognised by the Trial Chamber.²⁹⁰⁵ The Trial Chamber also explicitly took into account the fact that Minić was sent to Kosovo by the Main Board of the SPS together with Duško Matković, a Vice-President of the SPS in charge of economic issues and a deputy in the National Assembly of Serbia,²⁹⁰⁶ and Zoran Anđelković.²⁹⁰⁷ It also considered Milan Đaković's evidence that Minić seemed to be participating in the Joint Command meetings the most.²⁹⁰⁸ However, the Trial Chamber explained that while Minić took an active role during the Joint Command meetings, Đaković's Notes showed that "Šainović often discussed various VJ and MUP-related issues that went beyond foreign policy."²⁹⁰⁹ The statements made by Duško Matković, Milomir Minić, and Vlastimir Đorđević, the Head of the Public Security Department,²⁹¹⁰ at the meetings on 23 and 25 July 1998²⁹¹¹ do not undermine the Trial Chamber's conclusion that Šainović played a leading role during the Joint Command meetings. Nor does Šainović explain why the Trial Chamber erred in declining to rely on Đaković's evidence in this respect.²⁹¹²

865. As to the Trial Chamber's evaluation of Branko Gajić's evidence, the Appeals Chamber notes that in direct examination, Gajić testified that Šainović and Minić were sent to Kosovo to coordinate, *inter alia*, the activities between the VJ and the MUP in the fight against terrorism.²⁹¹³ In cross-examination, Gajić agreed with counsel's proposition that during the Joint Command meetings attended by Šainović there was no interference with the command of the MUP or the VJ.²⁹¹⁴ The Trial Chamber considered both statements and concluded that they were consistent with Đaković's Notes which showed that the leading roles played by Šainović and Minić during the Joint

²⁹⁰⁵ Trial Judgement, vol. 3, paras 309, 318-319, 330-331.

²⁹⁰⁶ See Trial Judgement, vol. 1, para. 302.

²⁹⁰⁷ Trial Judgement, vol. 3, para. 303, referring, *inter alia*, to Exh. P1012, pp. 6-8, Milomir Minić, 31 Aug 2007, T. 14744-14751.

²⁹⁰⁸ Trial Judgement, vol. 3, para. 329, referring to Milan Đaković, 20 May 2008, T. 26481. The Appeals Chamber notes that in his Appeal Brief Šainović refers to a different portion of Đaković's testimony (see Šainović's Appeal Brief, para. 9, referring to Milan Đaković, 20 May 2008, T. 26461). However, the Appeals Chamber notes that the transcript page referred to by Šainović contains no reference to Minić's leading role during the Joint Command meetings.

²⁹⁰⁹ Trial Judgement, vol. 3, para. 330.

²⁹¹⁰ See Trial Judgement, vol. 1, para. 659.

²⁹¹¹ See Šainović's Appeal Brief, paras 161-162.

²⁹¹² See Šainović's Appeal Brief, para. 182. With respect to Šainović's challenge to the evaluation of Cvetić's evidence, the Appeals Chamber notes that Cvetić testified that at MUP Staff meetings held in July 1998, he and the MUP chiefs were informed that Šainović was the "Head" of the Joint Command and that he was entrusted with the coordination of the military and the police (Trial Judgement, vol. 3, para. 315, referring to Ljubinko Cvetić, 7 Dec 2006, T. 8077-8078, *ibid.*, 8 Dec 2006, T. 8123-8124. See also *supra*, sub-section VII.C. The Appeals Chamber considers that although the Trial Chamber did not ultimately find Šainović to have been the "Head" of the Joint Command, Cvetić's evidence generally supports the Trial Chamber's finding that Šainović was the political coordinator of the VJ and the MUP in Kosovo in 1998. His evidence was corroborated by that of Gajić, who testified that Šainović and Minić were sent to Kosovo to coordinate activities between the VJ and the MUP (Trial Judgement, vol. 3, para. 318, referring to Branko Gajić, 12 Sep 2007, T. 15439-15446). While, as pointed out by Šainović (Šainović's Reply Brief, para. 6), Gajić indeed stated that he was not familiar with the existence of the Joint Command (Branko Gajić, 12 Sep 2007, T. 15446), he confirmed his statement concerning the coordination role of Šainović (Branko Gajić, 12 Sep 2007, T. 15441, 15443). Šainović's arguments are therefore dismissed.

²⁹¹³ Trial Judgement, vol. 3, para. 318, referring to Branko Gajić, 11 Sept 2007, T. 15412.

²⁹¹⁴ Trial Judgement, vol. 3, para. 318, referring to Branko Gajić, 12 Sept 2007, T. 15439-15446.

Command meetings “consisted of co-ordinating the activities of the VJ and MUP rather than interfering with their internal command processes.”²⁹¹⁵ Šainović’s assertion that the Trial Chamber erroneously relied only on portions of Gajić’s testimony therefore misrepresents the Trial Chamber’s finding.

(ii) Šainović’s statements during Joint Command meetings

866. Šainović avers that the Trial Chamber’s finding that he was one of the leading members of the Joint Command was based on a series of assumptions.²⁹¹⁶ He further contends that the Trial Chamber cited a number of his statements during Joint Command meetings out of context and provided no support for its finding that he played a leading role in discussions regarding the implementation of the Plan for Combating Terrorism.²⁹¹⁷ Šainović claims that the Trial Chamber disregarded evidence showing that the Joint Command meetings in 1998 were only a forum for discussion without any role in the decision-making.²⁹¹⁸ In this respect, he argues that what he said at those meetings had already been ordered via the respective chains of command of the VJ and the MUP.²⁹¹⁹ Šainović also asserts that there is no evidence establishing a cause and effect relationship between what he said at the Joint Command meetings and what happened in Kosovo, thus arguing that he had no influence over the events on the ground.²⁹²⁰

867. The Prosecution responds that the Trial Chamber’s interpretation of Šainović’s statements during Joint Command meetings in 1998, as recorded in Đaković’s Notes, was reasonable.²⁹²¹ It adds that Šainović repeats his trial submissions which were duly considered by the Trial Chamber and that therefore his arguments warrant summary dismissal.²⁹²² The Prosecution further claims that the information contained in Đaković’s Notes was corroborated by other evidence, and that the fact that such corroboration does not relate to specific statements made by Šainović is irrelevant.²⁹²³

868. Šainović’s assertion that the Trial Chamber’s conclusion on his leadership role at Joint Command meetings was based on a series of assumptions is without foundation.²⁹²⁴ Not only did the Trial Chamber refer to its findings regarding the Joint Command meetings,²⁹²⁵ but the Trial

²⁹¹⁵ Trial Judgement, vol. 3, para. 318.

²⁹¹⁶ Šainović’s Appeal Brief, paras 147-148, referring to Trial Judgement, vol. 1, para. 1110, *ibid.*, vol. 3, paras 309, 462. See also Šainović’s Reply Brief, para. 26.

²⁹¹⁷ See Šainović’s Appeal Brief, paras 110, 119, referring to Trial Judgement, vol. 1, paras 1015, 1110.

²⁹¹⁸ Šainović’s Appeal Brief, paras 158-165, 168-173.

²⁹¹⁹ Šainović’s Appeal Brief, paras 157-160, 164-165, 167, 172.

²⁹²⁰ Šainović’s Appeal Brief, paras 51, 157-168, 172, 176-177; Šainović’s Reply Brief, paras 6, 27.

²⁹²¹ Prosecution’s Response Brief (Šainović), para. 98.

²⁹²² Prosecution’s Response Brief (Šainović), para. 98.

²⁹²³ Prosecution’s Response Brief (Šainović), paras 100-101, referring, *inter alia*, to Trial Judgement, vol. 1, paras 733, 806, 874, 1082-1086.

²⁹²⁴ See Šainović’s Appeal Brief, paras 147-148.

²⁹²⁵ Trial Judgement, vol. 3, para. 309, referring to *ibid.*, vol. 1, Section VI.E.

Chamber also relied on specific examples of the leading role taken by Šainović in the meetings, explicitly referring to statements made by Šainović in more than 20 Joint Command meetings held from July through October 1998.²⁹²⁶

869. Šainović's contention that the Trial Chamber misinterpreted the statements he made at Joint Command meetings in 1998 is likewise without merit. With respect to the meeting held on 26 July 1998, the Trial Chamber considered Šainović's statement that he would take responsibility for failures, but noted that it was "unclear whether he was referring to the failures of the Joint Command or of specific VJ/MUP actions."²⁹²⁷ Although Đaković's Notes do not contain an explicit reference to failures associated with the work of the VJ or the MUP, the statement immediately preceding the phrase in question refers to "[o]ur forces", "casualties in the Blace MUP", and to the "units in Blace and Orahovac."²⁹²⁸ Based on the foregoing, it was reasonable for the Trial Chamber to conclude that Šainović was either referring to failures of the Joint Command, or of the VJ or MUP forces.

870. As to the meeting of 8 August 1998, the Trial Chamber noted Šainović's instruction that "the next phase is to be prepared for Tuesday [and] the village of Josić is to be 'done'".²⁹²⁹ Contrary to Šainović's claim,²⁹³⁰ the fact that combat activities were still ongoing in the area of Josić on 14 August 1998, despite his instruction, does not undermine the Trial Chamber's reliance on this evidence in finding that he was directing the actions of the VJ and the MUP in 1998.²⁹³¹

871. With respect to the meetings of 2 and 22 September 1998, Šainović merely presents a different interpretation of the evidence without showing why the Trial Chamber's reliance on this evidence was unreasonable.²⁹³² Likewise, Šainović has failed to show that the Trial Chamber misconstrued in any way his statement at the meeting on 15 September 1998.²⁹³³ In fact, the Trial Chamber's description of Šainović's statement accurately reflects his actual words, as recorded in Đaković's Notes.²⁹³⁴

872. The Trial Chamber further noted that at the meeting on 21 September 1998, Šainović stated that "the Joint Command should not implement Milošević and Yeltsin's 'matters listed on the

²⁹²⁶ Trial Judgement, vol. 3, paras 310-314, and the references therein.

²⁹²⁷ Trial Judgement, vol. 3, para. 311, referring to Exh. P1468, p. 16.

²⁹²⁸ Exh. P1468, p. 16. See also Šainović's Appeal Brief, para. 163.

²⁹²⁹ Trial Judgement, vol. 3, para. 311, citing Exh. P1468, p. 47.

²⁹³⁰ See Šainović's Appeal Brief, para. 166.

²⁹³¹ Trial Judgement, vol. 3, para. 309.

²⁹³² See Šainović's Appeal Brief, paras 168, 171, 173.

²⁹³³ See Šainović's Appeal Brief, para. 169.

²⁹³⁴ Trial Judgement, vol. 3, para. 312, referring to Exh. P1468, p. 115.

statement,’ and that they should not decrease the number of men in Kosovo.”²⁹³⁵ Although Đaković’s Notes do not contain an explicit reference to the “Joint Command” as the body told not to implement the Milošević-Yeltsin agreement.²⁹³⁶ Šainović’s use of the plural pronoun “we” in his statement clearly indicates a reference to the forces coordinated by the Joint Command.²⁹³⁷ Consequently, the Appeals Chamber does not discern any error in the Trial Chamber’s interpretation of this evidence.

873. The Appeals Chamber notes that, in its conclusions about the Joint Command in 1998, the Trial Chamber did not refer to particular instances in which Šainović played a leading role during the discussions concerning the implementation of the Plan for Combating Terrorism.²⁹³⁸ Nevertheless, in its discussion of Šainović’s individual criminal responsibility, the Trial Chamber explicitly referred to statements he made during more than 20 Joint Command meetings.²⁹³⁹ In these circumstances, Šainović has failed to show that the Trial Chamber’s conclusion concerning his role was unreasonable.²⁹⁴⁰

874. The Appeals Chamber further recalls the Trial Chamber’s finding concerning the role of the Joint Command in 1998:

The entity referred to as the Joint Command played a role in the co-ordination and exchange of information and intelligence between the MUP and the VJ in the latter half of 1998. Decisions and orders for joint operations were implemented through the existing chains of command; and, both directly or indirectly, the Joint Command had influence over the MUP and VJ in respect of the implementation of the various stages of the Plan for Combating Terrorism. Even if some members of the Joint Command may not have had the *de jure* authority to issue orders directly to either MUP or VJ units, *the individual members of the Joint Command* brought their influence to bear on how the Plan was put into effect, utilising the established systems of command and control within the VJ and MUP.²⁹⁴¹

875. The Appeals Chamber recalls that the fact that operations discussed at Joint Command meetings had already been planned or approved by VJ or MUP organs does not contradict the Trial Chamber’s finding that the Joint Command had “significant influence” over the coordination of the military and police forces on the ground.²⁹⁴² Therefore, Šainović’s argument that he had no influence over the events in the field since what he said at certain Joint Command meetings “had

²⁹³⁵ Trial Judgement, vol. 3, para. 312, referring to Exh. P1468, p. 124.

²⁹³⁶ See Šainović’s Appeal Brief, para. 170. Concerning the Milošević-Yeltsin agreement see Trial Judgement, vol. 1, para. 326.

²⁹³⁷ Exh. P1468, p. 124 recording Šainović’s statement: “We shouldn’t implement M[ilošević]’s and Y[eltsin]’s matters listed in the statement, and we shouldn’t decrease the number of men.”

²⁹³⁸ See Trial Judgement, vol. 1, para. 1110.

²⁹³⁹ See Trial Judgement, vol. 3, paras 310-314, referring to Exh. P1468, pp. 7-8, 11, 16, 27, 34, 47, 50, 55-56, 78, 85, 115, 123-129, 132, 135-136, 141-142, 145, 148, 152-153, 156, 164, Exh. IC199, p. 8; Šainović’s closing arguments, 21 Aug 2008, T. 27069. See also Exh. P1468, p. 160.

²⁹⁴⁰ Šainović’s arguments challenging the reliability of Đaković’s Notes are addressed in sub-section VII.C.1.(b)(i).

²⁹⁴¹ Trial Judgement, vol. 1, para. 1110 (emphasis in the original), referring to Exh. P1468.

²⁹⁴² See *supra*, sub-sections VII.C.1.(d) and VII.C.2. See also Trial Judgement, vol. 3, paras 300, 307.

been already ordered through the usual command channels of the VJ and the MUP”, is inapposite.²⁹⁴³ Likewise, the Appeals Chamber has already dismissed Šainović’s contention that the Joint Command meetings were merely a forum for discussion, and that the Joint Command had no influence over the events on the ground.²⁹⁴⁴

876. As to Šainović’s argument that the evidence did not show that what he said at the Joint Command meetings in 1998 had any impact on the events in Kosovo, the Appeals Chamber recalls that the evidence considered by the Trial Chamber showed that during Joint Command meetings in 1998, the participants discussed and determined VJ and MUP joint operations, which were later in fact carried out.²⁹⁴⁵ Contrary to Šainović’s assertion,²⁹⁴⁶ the Trial Chamber was not required to establish any other “cause-effect relationship” between his numerous statements at Joint Command meetings²⁹⁴⁷ and what occurred in the field in 1998.

(iii) UK Embassy telegram and Dimitrijević’s evidence

877. In finding that Šainović’s role within the Joint Command was significant, the Trial Chamber relied, *inter alia*, on a telegram by the UK Embassy recounting a meeting of 3 October 1998 between John Crosland, the Defence Attaché at the UK Embassy in Belgrade, UK Ambassador Robert Donnelly, and Aleksandar Dimitrijević, chief of the VJ Security Administration.²⁹⁴⁸ The telegram recorded Dimitrijević saying that he “did not agree with the actions that had been taken in recent months since Šainović had taken over in Kosovo” and that Šainović “had been responsible for policy and deployments” thereby “over-riding General Staff wishes”.²⁹⁴⁹ The telegram concluded with the observation that Dimitrijević might have feared an investigation by the Tribunal and thus “was very keen to shuffle responsibility to the MUP.”²⁹⁵⁰ When invited to comment on the contents of the telegram, Dimitrijević denied having made the statements mentioned therein, insisting that Šainović had no authority in Kosovo.²⁹⁵¹ The Trial Chamber disbelieved Dimitrijević’s testimony on this point as it contradicted “the plain import of what he had said earlier”, and decided to rely instead on: (i) the telegram; (ii) another complaint made by Dimitrijević about Pavković working outside the chain of command and going straight to Milošević

²⁹⁴³ See Šainović’s Appeal Brief, paras 157-160, 164-165, 167, 172.

²⁹⁴⁴ See *supra*, sub-section VII.C.2.(c)(i).

²⁹⁴⁵ See *supra*, sub-section VII.C.2.(c)(i).

²⁹⁴⁶ Šainović’s Appeal Brief, paras 157-168, 172, 176-177; Šainović’s Reply Brief, para. 27.

²⁹⁴⁷ See Trial Judgement, vol. 3, paras 310-314, referring to Exh. P1468, pp. 7-8, 11, 16, 27, 34, 47, 50, 55-56, 78, 85, 115, 123-129, 132, 135-136, 141-142, 145, 148, 152-153, 156, 164, Exh. IC199, p. 8, Šainović’s closing arguments, 21 Aug 2008, T. 27069. See also Exh. P1468, p. 160.

²⁹⁴⁸ See Trial Judgement, vol. 3, para. 320.

²⁹⁴⁹ Trial Judgement, vol. 3, para. 320, citing Exh. P683, paras 6, 8-9.

²⁹⁵⁰ Trial Judgement, vol. 3, para. 320, citing Exh. P683, para. 12. See also Exh. P684, para. 5.

²⁹⁵¹ Trial Judgement, vol. 3, para. 323, referring to Aleksandar Dimitrijević, 9 Jul 2008, T. 26666-26669.

and Šainović; and (iii) a complaint made in July 1998 by the VJ Chief of Staff Momčilo Perišić, about Šainović and Minić being involved in directing VJ units.²⁹⁵²

878. Šainović argues that the Trial Chamber erred in failing to provide reasons as to why it considered Dimitrijević's description of Šainović's role within the Joint Command to be unreliable.²⁹⁵³ He avers that the Trial Chamber's decision to rely on the UK Embassy telegram rather than on Dimitrijević's testimony was erroneous²⁹⁵⁴ because: (i) Crosland "base[d] his assessment of Šainović's role upon assumptions and impressions of other persons";²⁹⁵⁵ (ii) Dimitrijević denied having made the statements described in the telegram;²⁹⁵⁶ (iii) Crosland described Dimitrijević's account as "an attempt to distance" himself from responsibility;²⁹⁵⁷ and (iv) the content of the telegram ought to be interpreted "in the context of intelligence and counter-intelligence activity".²⁹⁵⁸

879. The Prosecution responds that the Trial Chamber's decision not to rely on Dimitrijević's evidence was reasonable.²⁹⁵⁹ It adds that the Trial Chamber provided reasons for its decision by referring to documentary evidence which corroborated Crosland's account.²⁹⁶⁰

880. The Appeals Chamber finds that the Trial Chamber sufficiently explained why it was unconvinced by Dimitrijević's denial that Šainović's role within the Joint Command was significant.²⁹⁶¹ By challenging the Trial Chamber's reliance on the telegram, Šainović merely submits a different interpretation of the evidence without showing that the Trial Chamber's evaluation of Dimitrijević's testimony was unreasonable. Contrary to Šainović's assertion,²⁹⁶² the Trial Chamber was not required to rely on witness testimony as opposed to documentary evidence. It had the advantage of observing Dimitrijević's demeanour in assessing the reliability and credibility of his evidence, but found it unconvincing in light of the documentary evidence presented. While the telegram indeed concludes that Dimitrijević might have attempted to distance

²⁹⁵² Trial Judgement, vol. 3, para. 325. See also *ibid.*, vol. 3, para. 319, citing Exh. P717, pp. 2-3; Trial Judgement, vol. 3, para. 321, referring to Exh. P2645, para. 54.

²⁹⁵³ Šainović's Notice of Appeal, para. 29; Šainović's Appeal Brief, para. 203.

²⁹⁵⁴ Šainović's Appeal Brief, paras 197, 300, referring to Trial Judgement, vol. 3, paras 320-325. See also Šainović's Reply Brief, para. 33.

²⁹⁵⁵ Šainović's Appeal Brief, para. 198, citing Exh. P2645, para. 58.

²⁹⁵⁶ Šainović's Appeal Brief, paras 199, 202. See also Šainović's Reply Brief, para. 12.

²⁹⁵⁷ Šainović's Appeal Brief, paras 200, 202, citing, *inter alia*, Exh. P683, paras 9, 12, Exh. P684, para. 5.

²⁹⁵⁸ Šainović's Appeal Brief, para. 201. See also Šainović's Reply Brief, paras 6, 28, 30, 33 where he argues that: (i) "[t]he allegation 'leading role' [...] requires consequences on the ground"; (ii) Gajić heard about the Joint Command only in the course of his preparation to testify; (iii) Momčilo Perišić's complaint concerned only an "attempt" to establish an alternative chain of command; (iv) Dimitrijević denied Crosland's allegations; and (v) Cvetic's and Vasiljević's evidence was unreliable.

²⁹⁵⁹ Prosecution's Response Brief (Šainović), paras 26, 113-114, referring to Trial Judgement, vol. 3, paras 320-325.

²⁹⁶⁰ Prosecution's Response Brief (Šainović), para. 113, referring to Trial Judgement, vol. 3, para. 326.

²⁹⁶¹ See Trial Judgement, vol. 3, para. 325. See also *ibid.*, vol. 3, paras 320-322.

²⁹⁶² Šainović's Appeal Brief, para. 203.

himself from responsibility, when viewed in the context of the other evidence presented at trial, including Dimitrijević's statement during one of the VJ Collegium meetings,²⁹⁶³ Perišić's complaint,²⁹⁶⁴ and the testimony of Petritsch and Jan Kickert, an Austrian diplomat,²⁹⁶⁵ that Šainović was in charge of coordinating the security forces in Kosovo,²⁹⁶⁶ the Appeals Chamber finds that a reasonable trier of fact could have relied on Dimitrijević's statements, as reflected in the telegram, rather than on his oral testimony. Furthermore, Šainović has failed to substantiate his allegation that information exchanged between intelligence agencies is generally untruthful.

(iv) Conclusion

881. In light of the foregoing, the Appeals Chamber finds that Šainović has not demonstrated any error in the Trial Chamber's finding that he had a leadership role during Joint Command meetings in 1998. The Appeals Chamber therefore dismisses Šainović's arguments in this regard.²⁹⁶⁷

(c) Meetings in Belgrade in 1998 discussing the Plan for Combating Terrorism

882. Šainović asserts that the Trial Chamber failed to properly evaluate the evidence concerning the meetings at which the Plan for Combating Terrorism in Kosovo was discussed and the presence thereof of high-ranking VJ and MUP representatives.²⁹⁶⁸ In his view, the evidence shows that "the centre of decision-making regarding the engagement and deployment of the VJ and MUP units was in Belgrade and that Milošević did not need anybody to provide a 'crucial link' between Belgrade and Kosovo."²⁹⁶⁹

²⁹⁶³ Trial Judgement, vol. 3, para. 322, citing Exh. P928, p. 14: "I think that it is a priority to ensure that not even Šainović, or any other Šainović can solve these problems by lightly deciding to use the units."

²⁹⁶⁴ The Trial Chamber considered a complaint by Momčilo Perišić, VJ Chief of Staff in 1998, about an alternative chain of command, pursuant to which Šainović and Minić were involved in directing VJ units (Trial Judgement, vol. 3, para. 319, citing Exh. P717, pp. 2-3). The Appeals Chamber finds Šainović's argument that Perišić's complaint concerned merely an "attempt" by Šainović and Minić to command the VJ unpersuasive (see Šainović's Reply Brief, paras 6, 28). While the complaint indeed mentions an "attempt by the civilian part of the Staff to command the Corps", it clearly states that "[i]n practice, the commander of the Priština Corps plans what he has been ordered to, and this is at the request of Š[ainović] and M[inić] and the MUP, and so turns into something like a service of theirs, for planning and execution." (Exh. P717, pp. 2-3. See also Trial Judgement, vol. 3, para. 654, where the Trial Chamber concluded that Perišić's complaint "clearly alleged that a parallel chain of command was in operation, rather than just an attempt, as it referred to what was occurring 'in practice'.")

²⁹⁶⁵ See Trial Judgement, vol. 1, para. 903.

²⁹⁶⁶ Trial Judgement, vol. 3, para. 326, referring to Wolfgang Petritsch, 1 Mar 2007, T. 10766-10767, Jan Kickert, 7 Mar 2007, T. 11235, Exh. P560, p. 1. See also Trial Judgement, vol. 3, paras 320-321, referring to John Crosland, Exh. P2645, paras 54, 56, 58.

²⁹⁶⁷ Šainović's sub-grounds 1 (12) and 1 (18) in their entirety. Šainović's sub-grounds 1(1), 1(13), 1(14), 2(3), 2(5)-2(6), and 2(8)-2(9) in part.

²⁹⁶⁸ Šainović's Notice of Appeal, para. 50; Šainović's Appeal Brief, para. 310, referring to Trial Judgement, vol. 1, paras 992-1004, *ibid.*, vol. 3, paras 136-137, 332.

²⁹⁶⁹ Šainović's Appeal Brief, para. 315 (emphasis omitted). See also *ibid.*, paras 311-314. Šainović also argues that the Trial Chamber erred in concluding that he had authority over the VJ and the MUP on the basis of his presence at meetings in Kosovo in May 1998 and at Beli Dvor in Belgrade on 21 July 1998, absent any evidence as to whether he

883. In response, the Prosecution submits that Šainović's participation in a number of meetings with senior political, VJ, and MUP officials at which the Plan for Combating Terrorism in Kosovo was discussed, demonstrates that he was "an integral part of the senior leadership in Kosovo."²⁹⁷⁰ It adds that Šainović submits an alternative interpretation of the evidence without showing any error in the Trial Chamber's conclusions and therefore his arguments should be summarily dismissed.²⁹⁷¹

884. The Trial Chamber found that Šainović's attendance at meetings involving the highest ranking officials in Belgrade and officials entrusted with dealing with the situation in Kosovo was indicative of his influence and supported the conclusion that he was a political coordinator of the VJ and the MUP at the relevant time.²⁹⁷² The Appeals Chamber finds that a reasonable trier of fact could have reached this conclusion. The fact that the Plan for Combating Terrorism was discussed at meetings in Belgrade in the presence of high-ranking VJ and MUP officials does not conflict in any way with the extensive evidence considered by the Trial Chamber as to Šainović's specific role in Kosovo. Rather, his presence at meetings in Belgrade, combined with his leadership role during the Joint Command meetings in 1998,²⁹⁷³ reinforces the Trial Chamber's conclusion of the importance of his role in ensuring proper coordination between the VJ and MUP forces on the ground following the adoption of strategic decisions.²⁹⁷⁴ The Appeals Chamber recalls in this regard, that the Trial Chamber's conclusion that Šainović was the crucial link between Milošević who was in Belgrade and the VJ and MUP units operating in Kosovo is to a large extent based on the finding that Šainović was one of the leading members of the Joint Command in 1998.²⁹⁷⁵

885. Consequently, Šainović has failed to show that the Trial Chamber erred in considering his participation at meetings at which the Plan for Combating Terrorism in Kosovo was discussed.²⁹⁷⁶ The Appeals Chamber dismisses sub-ground 2(10) of Šainović's appeal.

(d) Šainović's authority as Chairman of the Commission for Cooperation with the KVM

886. The Trial Chamber found that, on 19 October 1998, in order to aid the implementation of the October Agreements, namely the Holbrooke-Milošević Agreement, the KVM Agreement, the

said anything during those meetings (Šainović's Appeal Brief, paras 297-298, referring to Trial Judgement, vol. 3, paras 302-305).

²⁹⁷⁰ Prosecution's Response Brief (Šainović), para. 171.

²⁹⁷¹ Prosecution's Response Brief (Šainović), para. 170.

²⁹⁷² Trial Judgement, vol. 3, para. 335.

²⁹⁷³ See Trial Judgement, vol. 3, paras 306-331.

²⁹⁷⁴ See also *infra*, sub-section VII.D.2(i).

²⁹⁷⁵ Trial Judgement, vol. 3, para. 462.

²⁹⁷⁶ The Appeals Chamber also notes that on the basis of Šainović's visits to Kosovo in May and early June 1998 and his attendance at the meeting in Beli Dvor on 21 July 1998, the Trial Chamber did not reach any independent conclusions as to the scope of Šainović's authority over the VJ and the MUP in 1998. Šainović has failed to show that these are findings on which his conviction relies. His arguments are therefore dismissed without detailed consideration.

NATO-FRY Agreement, and the Clark-Naumann Agreement, the FRY Government established the Commission for Cooperation with the KVM, headed by Šainović.²⁹⁷⁷

887. In relation to Šainović's authority as the Chairman of the Commission, the Trial Chamber found that:

Milošević was instrumental in [Šainović's] appointment, which in turn enabled Šainović to expand his role as Milošević's political representative in Kosovo and to continue liaising not only with the VJ and the MUP representatives, but also with KVM personnel. Thus, the Chamber finds that, in his official capacity as the Chairman of the Commission, Šainović was able to continue his dealings with high-level VJ and MUP officials in Kosovo, in the manner similar to that employed during 1998. In other words, his dealings with and influence over Pavković and Lukić continued without interruption. The evidence [...] also shows that he was more than simply 'an exposed entity of the FRY' as argued by the Šainović Defence, as he still exhibited authority over all representatives of the VJ and MUP he came into contact with.²⁹⁷⁸

888. The Trial Chamber concluded that in his capacity as Chairman of the Commission for Cooperation with the KVM, Šainović continued to be the political coordinator and the "crucial link" between Milošević, who was in Belgrade, and the VJ and MUP units operating in Kosovo.²⁹⁷⁹

(i) Šainović's appointment as Chairman of the Commission for Cooperation with the KVM

889. Šainović argues that the Trial Chamber erred in considering that the "purpose" of the Commission was to expand his role as Milošević's representative in Kosovo.²⁹⁸⁰ He refers to the reasons for the creation, the composition, and the content of the work of the Commission,²⁹⁸¹ asserting that it was "natural" for him, as chairman of the Commission, to be informed of "any developments" on the ground and to cooperate with VJ and MUP representatives.²⁹⁸² In this respect, Šainović avers that the conclusion that Milošević appointed him in order to enable him to continue his interaction with high level VJ and MUP officials in Kosovo is "unfounded".²⁹⁸³

890. Šainović further claims that the evidence of Michael Phillips and Joseph Maisonneuve shows that he was discharging his duties in accordance with his function "and/or" that the Trial Chamber reached conclusions on the basis of the "assumptions and impressions" of these witnesses.²⁹⁸⁴ He further submits that the Trial Chamber erred in finding that, as the Chairman of the Commission, he continued to be the "crucial link" between Belgrade and Kosovo and to act as a

²⁹⁷⁷ Trial Judgement, vol. 1, paras 921-922.

²⁹⁷⁸ Trial Judgement, vol. 3, para. 401.

²⁹⁷⁹ Trial Judgement, vol. 3, para. 462.

²⁹⁸⁰ Šainović's Appeal Brief, para. 317, referring to Trial Judgement, vol. 3, para. 380.

²⁹⁸¹ Šainović's Appeal Brief, paras 318-321.

²⁹⁸² Šainović's Appeal Brief, paras 322-323. See also *ibid.*, paras 18, 155; Šainović's Reply Brief, para. 12.

²⁹⁸³ Šainović's Appeal Brief, para. 323.

²⁹⁸⁴ Šainović's Appeal Brief, paras 324-325, citing Trial Judgement, vol. 3, paras 384, 386.

political coordinator.²⁹⁸⁵ He claims that this is inconsistent with the Trial Chamber's prior finding that the Commission had no command authority over the VJ and the MUP.²⁹⁸⁶

891. In response, the Prosecution submits that the Trial Chamber acknowledged that Šainović's activities at the time were part of his official role and reasonably concluded, on the totality of the evidence, that Milošević was instrumental in Šainović's appointment as chairman of the Commission.²⁹⁸⁷ The Prosecution further contends that it was reasonable for the Trial Chamber to consider Šainović's activities as Chairman of the Commission as evidence of his significant contribution to the JCE.²⁹⁸⁸ According to the Prosecution, Šainović merely suggests a different interpretation of the evidence, repeats his trial submissions, and fails to articulate any error in the Trial Chamber's findings. Therefore, the Prosecution claims, his arguments should be summarily dismissed.²⁹⁸⁹

892. The Appeals Chamber notes that, contrary to Šainović's assertion, the Trial Chamber did not find that the purpose behind the creation of the Commission was to expand Šainović's authority as Milošević's representative in Kosovo. Rather, it explicitly stated that the Commission was established to support the implementation of the October Agreements.²⁹⁹⁰ Šainović's argument is based on a misinterpretation of the Trial Chamber's relevant finding and is therefore dismissed.

893. Further, Šainović misrepresents the Trial Judgement in relation to his appointment as Chairman of the Commission. Contrary to Šainović's submission, the Trial Chamber did not find that he was "appoint[ed]" by Milošević "so as to enable him to continue his dealings with high level

²⁹⁸⁵ Šainović's Appeal Brief, para. 316, referring to Trial Judgement, vol. 3, paras 368-399, 401, 462. See also Šainović's Appeal Brief, para. 18; Šainović's Notice of Appeal, para. 51.

²⁹⁸⁶ Šainović's Appeal Brief, paras 18, 152, referring to Trial Judgement, vol. 3, para. 369. Šainović further claims that the Trial Chamber incorrectly evaluated three KVM requests to the FRY and Serbian authorities relating to: (i) the security of the KVM; (ii) the establishment of a "consular office" in Priština/Prishtina; and (iii) the non-provision by Šainović of information on minefields. He claims that had the Trial Chamber correctly evaluated the "nature of the [KVM] requests", it would have found that he "fully cooperated with [the] KVM, within the boundaries of his powers, which finding would have had a considerable impact upon the assessment of [his] *mens rea*" (Šainović's Appeal Brief, paras 500-501, referring to Trial Judgement, vol. 1, paras 944-961, 989, *ibid.*, vol. 3, para. 401; Šainović's Notice of Appeal, para. 86). It appears that in relation to this submission, Šainović further claims that the Trial Chamber "erred in law in failing to draw conclusions about the facts of relevance for the assessment of [his] responsibility" (Šainović's Appeal Brief, para. 503). He also submits that the Trial Chamber erred in fact in finding, on the basis of Phillips' testimony, that the meetings between the KVM and the FRY and Serbian authorities ceased after the Račak/Rečak incident (Šainović's Appeal Brief, paras 502-503, referring to Trial Judgement, vol. 1, para. 946, Exh. P2521, paras 69, 73, Exh. 2D239, Exh. P460).

²⁹⁸⁷ Prosecution's Response Brief (Šainović), paras 174-175, referring, *inter alia*, to Trial Judgement, vol. 3, paras 380, 401.

²⁹⁸⁸ Prosecution's Response Brief (Šainović), para. 172, referring to Trial Judgement, vol. 3, paras 400-401, 462. See also Prosecution's Response Brief (Šainović), paras 174-176, referring, *inter alia*, to Trial Judgement, vol. 3, paras 380, 401. The Prosecution adds that the Trial Chamber's description of the KVM requests to the FRY and Serbian authorities is irrelevant to Šainović's conviction, as "[t]he [Trial] Chamber did not rely on any alleged findings regarding Šainović's uncooperativeness with the KVM" in reaching a conclusion on his *mens rea* (Prosecution's Response Brief (Šainović), para. 351).

²⁹⁸⁹ Prosecution's Response Brief (Šainović), paras 172-173.

VJ and MUP officials in Kosovo.”²⁹⁹¹ Rather, the Trial Chamber concluded that Milošević “was *instrumental* in this appointment”²⁹⁹² and that “in his official capacity as the Chairman of the Commission, Šainović was able to continue his dealings with high-level VJ and MUP officials in Kosovo”.²⁹⁹³ The Appeals Chamber is equally unpersuaded by Šainović’s submission that in reaching this conclusion the Trial Chamber erred by attributing greater weight to the means and methods of work of the Commission, than to the circumstances leading to its creation.²⁹⁹⁴ The Trial Chamber considered whether in his capacity as Chairman of the Commission, Šainović continued to exercise influence through his dealings with high-level VJ and MUP officials in Kosovo.²⁹⁹⁵ The fact that the Commission had no command authority over the VJ and the MUP²⁹⁹⁶ does not undermine the Trial Chamber’s conclusion, as Šainović’s role was found to be that of a political coordinator of the forces, rather than of a *de jure* commander.²⁹⁹⁷

894. In addition, the Appeals Chamber finds no error in the Trial Chamber’s reasoning that it was the nature, rather than the source of Šainović’s authority that is determinative for his criminal responsibility.²⁹⁹⁸ Consequently, the Appeals Chamber finds no merit in Šainović’s arguments that he was merely performing his duties as a Chairman of the Commission.²⁹⁹⁹ Nor has Šainović demonstrated that the Trial Chamber erred in its evaluation of the evidence of Phillips and Maisonneuve, which was based on their personal interactions with Šainović.³⁰⁰⁰

(ii) Šainović’s involvement in various incidents

895. The Trial Chamber considered Šainović’s involvement in several incidents as examples of his authority and ability to exert influence over the VJ and MUP representatives, in his capacity as Chairman of the Commission for Cooperation with the KVM.³⁰⁰¹

²⁹⁹⁰ Trial Judgement, vol. 1, para. 921.

²⁹⁹¹ Šainović’s Appeal Brief, para. 323.

²⁹⁹² Trial Judgement, vol. 3, para. 401 (emphasis added).

²⁹⁹³ Trial Judgement, vol. 3, para. 401.

²⁹⁹⁴ Šainović’s Appeal Brief, para. 323.

²⁹⁹⁵ Trial Judgement, vol. 3, para. 401.

²⁹⁹⁶ See Trial Judgement, vol. 3, para. 369.

²⁹⁹⁷ See Trial Judgement, vol. 3, para. 462.

²⁹⁹⁸ See Trial Judgement, vol. 3, para. 401.

²⁹⁹⁹ The Appeals Chamber further notes that although Šainović claims that the Trial Chamber erroneously evaluated the “nature of the [KVM] requests” to the FRY and Serbian authorities, he fails to develop his submission by sufficiently explaining what in the nature of those requests indicates an error by the Trial Chamber. As to whether more weekly meetings between the KVM and the Commission were held following the Račak/Rečak incident, the Trial Chamber considered Phillips’ evidence that the final meeting took place on 15 January 1999, just after the incident (Trial Judgement, vol. 1, para. 946; *ibid.*, vol. 3, para. 396, referring to Michael Phillips, 19 Mar 2007, T. 11830-11831). Nothing in the evidence referred to by Šainović contradicts Phillips’ testimony on this point. Šainović’s submissions in this regard are therefore dismissed.

³⁰⁰⁰ Trial Judgement, vol. 3, paras 384, 386-387.

³⁰⁰¹ Trial Judgement, vol. 3, para. 401.

896. One of the incidents concerned the kidnapping of a Serb farmer by the KLA in Podujevo/Podujeva in December 1998.³⁰⁰² The Trial Chamber found that an attack to free the farmer was planned by both the MUP and the VJ. Following a suggestion by Richard Ciaglinski and Karol John Drewienkiewicz that the KVM contact the KLA and negotiate the release of the farmer, Dušan Lončar, the Head of the Priština Office of the Commission for Cooperation with the KVM,³⁰⁰³ made a telephone call.³⁰⁰⁴ Ciaglinski first suspected that Lončar called Šainović for authorisation, but was later told by Milan Kotur, another member of the Commission for Cooperation with the KVM,³⁰⁰⁵ that Lončar had contacted a person at an even higher level of authority.³⁰⁰⁶ Ciaglinski testified that he “could only imagine at the time that it was Mr. Milošević.”³⁰⁰⁷ On the basis of this evidence, the Trial Chamber concluded that “[i]t does not matter whether it was Šainović or Milošević whom Lončar contacted since they were in regular contact with each other.”³⁰⁰⁸

897. Šainović argues that the Trial Chamber based its conclusion concerning his involvement in this incident on an assumption. He contends that no reasonable trier of fact could have found that the question whether Lončar spoke to Šainović or to Milošević was irrelevant to the assessment of Šainović’s influence over the VJ and MUP representatives.³⁰⁰⁹ The Prosecution responds that Šainović fails to show any error.³⁰¹⁰

898. The Appeals Chamber considers that since the Trial Chamber relied on Ciaglinski’s evidence as an example of Šainović’s authority as Chairman of the Commission, it was material to determine whether Šainović was involved in the provision of the authorisation sought by Lončar. Evidence of authorisation given by Milošević or someone else, without Šainović’s intervention, could not be reasonably relied upon as showing Šainović’s authority. Consequently, the Appeals Chamber considers that the Trial Chamber erred in relying on this evidence with respect to Šainović’s continued influence over Pavković and Lukić in his capacity of Chairman of the Commission.³⁰¹¹

³⁰⁰² Trial Judgement, vol. 3, para. 391.

³⁰⁰³ See Trial Judgement, vol. 1, para. 924.

³⁰⁰⁴ Trial Judgement, vol. 3, para. 391.

³⁰⁰⁵ See Trial Judgement, vol. 1, para. 924.

³⁰⁰⁶ Trial Judgement, vol. 3, para. 391.

³⁰⁰⁷ Richard Ciaglinski, 17 Nov 2006, T. 6825.

³⁰⁰⁸ Trial Judgement, vol. 3, para. 391.

³⁰⁰⁹ Šainović’s Appeal Brief, para. 326; Šainović’s Reply Brief, para. 47.

³⁰¹⁰ Prosecution’s Response Brief (Šainović), para. 176.

³⁰¹¹ See Trial Judgement, vol. 3, para. 401.

899. The Trial Chamber also considered Šainović's involvement in the incident in Račak/Rečak on 15 January 1999, in which a large number of Kosovo Albanian men were killed.³⁰¹² The Trial Chamber observed that Pavković and Lukić directly informed Šainović of the incident, whereas Lončar learned about it from Drewienkiewicz.³⁰¹³ The Trial Chamber concluded that the aftermath of the incident was closely managed by Šainović.³⁰¹⁴

900. Šainović alleges an error in the Trial Chamber's conclusion as, in his view, the evidence did not show that the aftermath of the Račak/Rečak incident was closely managed by him, but only that he was informed of the incident.³⁰¹⁵

901. The Appeals Chamber observes that the Trial Chamber noted Šainović's explanation that he knew that the MUP was preparing to "neutralise" a KLA group and that he decided to become involved because of the international complications that resulted from it.³⁰¹⁶ The Trial Chamber also noted Šainović's statement that he demanded that an investigative judge come to the scene and conduct an investigation.³⁰¹⁷ In view of this evidence, the Appeals Chamber finds that Šainović has failed to show any error in the Trial Chamber's conclusions in this regard.³⁰¹⁸

902. Another example considered by the Trial Chamber in the context of Šainović's authority as Chairman of the Commission concerned an incident in January 1999, when nine VJ soldiers were taken hostage by the KLA, a group of KLA fighters were detained by the VJ, and FRY and Serbian special forces were positioned to launch a rescue operation.³⁰¹⁹ The Trial Chamber noted that Wolfgang Petritsch, who was asked to mediate to secure the release of the two groups, confirmed that while Šainović was the negotiator he dealt with, probably Milošević alone could have made the relevant decision to release the KLA fighters and that Šainović must have prevailed upon Milošević to decide in a positive way.³⁰²⁰ Drewienkiewicz testified that Šainović assured the French Ambassador that "whatever was being contemplated would be put on hold" and that he was content for the negotiations to continue.³⁰²¹ The Trial Chamber also considered Ciaglinski's evidence that

³⁰¹² Trial Judgement, vol. 3, para. 395. See also *ibid.*, vol. 3, para. 470.

³⁰¹³ Trial Judgement, vol. 3, para. 395, referring to Dušan Lončar, P2521, paras 50-51, 55.

³⁰¹⁴ Trial Judgement, vol. 3, para. 395.

³⁰¹⁵ Šainović's Appeal Brief, para. 328, citing Trial Judgement, vol. 3, para. 395.

³⁰¹⁶ Trial Judgement, vol. 3, para. 398, referring to Exh. P605, e-court pp. 731, 735, 760, 763-768, 804.

³⁰¹⁷ Trial Judgement, vol. 3, para. 398, referring to Exh. P605, e-court pp. 735, 760, 804.

³⁰¹⁸ See Trial Judgement, vol. 3, paras 395, 401.

³⁰¹⁹ Trial Judgement, vol. 3, para. 393.

³⁰²⁰ Trial Judgement, vol. 3, para. 393, referring to Wolfgang Petritsch, P2793, T. 7241, 7296, *ibid.*, 2 Mar 2007, T. 10946.

³⁰²¹ Trial Judgement, vol. 3, para. 393, citing Karol John Drewienkiewicz, 4 Dec 2006, T. 7745, and referring to *ibid.*, 4 Dec 2006, T. 7742-7744, Exh. 2D181, p. 4.

Šainović was very closely involved in arranging for the KVM to visit the detained KLA fighters and in their subsequent release.³⁰²²

903. Šainović argues that the Trial Chamber erred in relying on his involvement in this incident. He contends that he acted strictly within the limits of his authority as Chairman of the Commission, and that there is no evidence as to who decided on the VJ involvement and approved the visit to the imprisoned KLA members.³⁰²³

904. The Appeals Chamber notes that the evidence considered by the Trial Chamber does not show whether Šainović or someone else took the decision for the special forces not to intervene, or who authorised the KVM visit to the detained KLA fighters. Nevertheless, the Appeals Chamber finds that a reasonable trier of fact could have relied on this evidence to the extent that it showed Šainović's continuous involvement in Kosovo and his dealings with the VJ and MUP representatives.³⁰²⁴

905. The Appeals Chamber notes that the Trial Chamber's conclusion concerning Šainović's authority over the VJ and MUP representatives finds further support in Lončar's evidence that Šainović would issue specific tasks to MUP and VJ representatives during the Belgrade meetings of the Commission,³⁰²⁵ even if those tasks were discussed only to the extent that they related to the work of the Commission,³⁰²⁶ and his evidence that Šainović's authority was among "all the structures" in Kosovo.³⁰²⁷ It is indicative in this respect that Lukić and Pavković were instructed to inform Šainović of important incidents even before informing their own superiors.³⁰²⁸ The Trial Chamber also considered Phillips' testimony that Šainović had "some authority" over the activities of both the VJ and the MUP,³⁰²⁹ and the evidence given by Maisonneuve that Šainović was well apprised of what was happening in Kosovo and that the power to act was, to a great extent, in his hands.³⁰³⁰ In view of this evidence and notwithstanding the Trial Chamber's factual error in relation to Šainović's involvement in the release of the kidnapped Serb farmer, the Appeals Chamber finds that a reasonable trier of fact could have concluded that in 1999, Šainović was able to continue his dealings with high-level VJ and MUP officials in Kosovo, in a manner similar to that employed in 1998.

³⁰²² Trial Judgement, vol. 3, para. 394, referring to Richard Ciaglinski, 20 Nov 2006, T. 6878-6879, Exh. P2488, p. 5.

³⁰²³ Šainović's Appeal Brief, para. 327, referring to Trial Judgement, vol. 3, para. 393.

³⁰²⁴ See Trial Judgement, vol. 3, para. 401.

³⁰²⁵ Trial Judgement, vol. 3, para. 378, referring to Dušan Lončar, 1 Dec 2006, T. 7691-7692, Exh. P2521, paras 30, 67.

³⁰²⁶ Trial Judgement, vol. 3, para. 378, referring to Dušan Lončar, 30 Nov 2006, T. 7601, Exh. P2521, para. 30.

³⁰²⁷ Trial Judgement, vol. 3, para. 381, citing Dušan Lončar, 30 Nov 2006, T. 7603, and referring to *ibid.*, 30 Nov 2006, T. 7604, Exh. P2530, para. 8.

³⁰²⁸ Trial Judgement, vol. 3, para. 373, referring to Dušan Lončar, 1 Dec 2006, T. 7652-7654.

³⁰²⁹ Trial Judgement, vol. 3, para. 384, citing Michael Phillips, 19 Mar 2007, T. 11855-11857.

³⁰³⁰ Trial Judgement, vol. 3, para. 387, referring to Joseph Maisonneuve, 6 Mar 2007, T. 11033, Exh. P2772, para. 9.

(iii) Conclusion

906. In view of the foregoing considerations, Šainović has not demonstrated any error in the Trial Chamber's findings that as Chairman of the Commission for Cooperation with the KVM he continued to exert influence over the VJ and the MUP. The Appeals Chamber is also satisfied that a reasonable trial chamber could have reached the conclusion that, in his capacity as Chairman of the Commission for Cooperation with the KVM, Šainović could be regarded as having been the "crucial link" between Milošević, who was in Belgrade, and the VJ and MUP units operating in Kosovo at the time. The Appeals Chamber therefore dismisses sub-grounds 2(11) and 6(14) of Šainović's appeal.

(e) Šainović's dealings with Rugova

907. The Trial Chamber found that in 1999 Šainović continued to be the political coordinator of the forces in Kosovo.³⁰³¹ In doing so, it considered, *inter alia*, that during the NATO air campaign Šainović had extensive dealings with Ibrahim Rugova, the leader of the LDK.³⁰³² The Trial Chamber considered evidence that one of Šainović's tasks was to establish political contacts and dialogue with Rugova who, according to the Trial Chamber, was under house arrest at the time.³⁰³³ The Trial Chamber concluded that Šainović's dealings with Rugova were "not an attempt at negotiating a solution, but rather a campaign which involved threats to the personal safety of Rugova and his associates, designed to show that the FRY/Serbian authorities were meeting with Kosovo Albanians in the hope that this would lead to cessation of the NATO campaign."³⁰³⁴

908. The Trial Chamber considered Šainović's extensive dealings with Rugova as an indication that in 1999 he was the political coordinator of the VJ and MUP forces in Kosovo – a factor relevant to the assessment of his intent and contribution to the common purpose.³⁰³⁵ It also took into account the fact that during his meetings with Rugova, Šainović was informed about the commission of crimes against the Kosovo Albanian population.³⁰³⁶

(i) Submissions of the parties

909. Šainović argues that the Trial Chamber erred in finding that his talks with Rugova were not an attempt at negotiating a solution, but rather a campaign, involving threats against Rugova and his

³⁰³¹ Trial Judgement, vol. 3, para. 462.

³⁰³² Trial Judgement, vol. 3, para. 462.

³⁰³³ Trial Judgement, vol. 3, para. 410. See also *ibid.*, vol. 2, para. 826.

³⁰³⁴ Trial Judgement, vol. 3, para. 417.

³⁰³⁵ Trial Judgement, vol. 3, paras 462, 467.

³⁰³⁶ Trial Judgement, vol. 3, para. 464.

associates, in the hope that the talks would lead to a cessation of the NATO campaign.³⁰³⁷ Relying on the evidence of Adnan Merovci, Rugova's secretary, and Ljubivoje Joksić, Šainović claims that the Trial Chamber erred in finding that Rugova and his associates were under house arrest.³⁰³⁸ With respect to the Trial Chamber's finding that the meetings with Rugova were merely for propaganda purposes, Šainović submits that the call for the refugees to return and the invitation for dialogue were an attempt to resolve the situation, and that the Trial Chamber did not explain how the alleged campaign against Rugova could have led to a cessation of the NATO bombing.³⁰³⁹ Šainović concludes that "his role was inconsequential and reduced to intermediation and arranging meetings with the highest ranking state officials."³⁰⁴⁰

910. In response, the Prosecution submits that the Trial Chamber's findings regarding the meetings between Šainović and Rugova were reasonable and supported by the evidence.³⁰⁴¹ It argues that Šainović ignores the evidence of Merovci and Rugova that Rugova was in fact under house arrest.³⁰⁴² Therefore, the Prosecution argues that Šainović's arguments should be summarily dismissed.³⁰⁴³

(ii) Analysis

911. In finding that at the relevant time Rugova was under house arrest, the Trial Chamber relied on the evidence of Rugova and Merovci who confirmed that in April 1999 they were kept together with another 15 or 20 people, mainly members of their families, at Rugova's house.³⁰⁴⁴ Rugova explicitly stated that he was unable to move without permission and that at the relevant time he was willing to leave Kosovo but was unable to do so.³⁰⁴⁵ Whether Rugova's associates were able to leave Kosovo is irrelevant in this respect.³⁰⁴⁶ Similarly, with regard to the meeting with Milošević on 1 April 1999 and the press-conferences held at Rugova's house, the evidence clearly shows that these events were arranged under pressure, without Rugova's consent, and despite his

³⁰³⁷ Šainović's Notice of Appeal, para. 36; Šainović's Appeal Brief, para. 244, referring to Trial Judgement, vol. 3, para. 417.

³⁰³⁸ Šainović's Appeal Brief, paras 245-248, referring to Exh. P2588, paras 46, 49-50, 61-63, 66, 69, Ljubivoje Joksić, 8 Feb 2008, T. 21988-21989, Adnan Merovci, 17 Jan 2007, T. 8528-8529.

³⁰³⁹ Šainović's Appeal Brief, paras 249-251. See also *ibid.*, para. 154.

³⁰⁴⁰ Šainović's Appeal Brief, para. 252.

³⁰⁴¹ Prosecution's Response Brief (Šainović), para. 131.

³⁰⁴² Prosecution's Response Brief (Šainović), para. 131, referring to Exh. P2588, paras 52, 59-74, Ibrahim Rugova, Exh. P2613, pp. 10-12, Exh. P2612, T. 4226-4227, 4234-4236, 4253-4255.

³⁰⁴³ Prosecution's Response Brief (Šainović), para. 131.

³⁰⁴⁴ Trial Judgement, vol. 2, para. 826, referring to Exh. P2588, paras 52, 59-74, Exh. P2613, pp. 10-12, Ibrahim Rugova, Exh. P2612, T. 4226-4227, 4234-4236, 4253-4255.

³⁰⁴⁵ Ibrahim Rugova, P2612, T. 4252-4253.

³⁰⁴⁶ In addition, the Appeals Chamber finds Šainović's references to the period between 24 and 29 March 1999 when, according to Merovci, Rugova was unwilling to leave Kosovo, to be misguided. The Trial Chamber's finding concerning Rugova's house arrest relates to the month of April and the beginning of May 1999 (Trial Judgement, vol. 2, para. 826).

objections.³⁰⁴⁷ Therefore, such events do not tend to show that the Trial Chamber's conclusion that Rugova was under house arrest was unreasonable.

912. As to whether the meetings with Rugova were arranged in the hope that they would lead to a cessation of the NATO campaign, Šainović merely presents a different interpretation of the evidence without showing that the Trial Chamber's conclusion was unreasonable. In view of the carefully orchestrated meetings which took place while Rugova was under house arrest,³⁰⁴⁸ the threats to his personal safety and that of his associates,³⁰⁴⁹ and the insistence that he demand that NATO stop the bombing campaign,³⁰⁵⁰ the Appeals Chamber considers that a reasonable trier of fact could have concluded that the meetings were arranged in the hope that they would lead to a cessation of the NATO campaign.

913. Finally, the Appeals Chamber is not persuaded by Šainović's unsubstantiated submission concerning the degree of his involvement in the dealings with Rugova. Significantly, the Trial Chamber found that: (i) Šainović met with Rugova a number of times during Rugova's house arrest, insisting that Rugova demand that NATO stop the bombing campaign;³⁰⁵¹ and (ii) following the meeting of 5 April 1999, a joint statement was issued confirming the purported readiness of Šainović and Rugova to work together on the political process and on returning displaced persons to their homes.³⁰⁵² In view of these findings, the Appeals Chamber is not persuaded that Šainović's role was "inconsequential" or simply limited to arranging meetings, and thus finds that he has failed to show that the Trial Chamber's conclusion in this regard was unreasonable.

914. Consequently, Šainović has failed to demonstrate any error in the Trial Chamber's evaluation of the evidence concerning his dealings with Rugova. The Appeals Chamber dismisses sub-ground 1(25) of Šainović's appeal.

(f) Šainović's participation in meetings in April and May 1999

915. The Trial Chamber considered that in 1999, Šainović continued to liaise between the VJ and the MUP on the one hand, and Milošević on the other.³⁰⁵³ It relied on this factor, among others, to find that he was the political coordinator of the forces in Kosovo.³⁰⁵⁴ The Trial Chamber considered evidence showing that Šainović attended a number of meetings with VJ and MUP officials both in

³⁰⁴⁷ See Exh. P2613, pp. 10-12, Ibrahim Rugova, Exh. P2612, T. 4226-4228, Exh. P2588, paras 56-57, 63.

³⁰⁴⁸ Trial Judgement, vol. 3, paras 412-415.

³⁰⁴⁹ Trial Judgement, vol. 3, para. 413.

³⁰⁵⁰ Trial Judgement, vol. 3, para. 414. See also *ibid.*, vol. 3, para. 412.

³⁰⁵¹ Trial Judgement, vol. 3, paras 412-416.

³⁰⁵² Trial Judgement, vol. 3, para. 413. The Trial Chamber further found that on 16 April 1999, Šainović gave substantive instructions to Merovci with respect to his visit to Skopje (Trial Judgement, vol. 3, para. 414).

³⁰⁵³ Trial Judgement, vol. 3, paras 337, 462.

Belgrade and in Kosovo.³⁰⁵⁵ Šainović challenges the Trial Chamber's evaluation of the evidence in relation to his attendance at the meetings of 4 April, 13 April, 4 May, 7 May, and 17 May 1999.

(i) MUP Staff meeting of 4 April 1999

916. Šainović argues that the Trial Chamber erred in finding that during a meeting held at the MUP Staff offices on 4 April 1999, he demonstrated a "leadership role with respect to the use of the MUP forces in Kosovo" similar to the role he had in summer 1998.³⁰⁵⁶ He asserts that the Trial Chamber ignored his late arrival at the meeting and the way in which the other attendants perceived his participation.³⁰⁵⁷ He also argues that during the meeting he "simply repeated" what had been previously said by Obrad Stevanović, Head of the PJP,³⁰⁵⁸ and that his statement that the police should protect the state territory could not be interpreted as giving directions to the MUP forces.³⁰⁵⁹

917. In response, the Prosecution submits that the Trial Chamber's conclusions regarding Šainović's participation in the meeting were reasonable and supported by the evidence.³⁰⁶⁰ It adds that Šainović repeats his trial submissions or provides his own interpretation of the evidence, and therefore his arguments should be summarily dismissed.³⁰⁶¹ The Prosecution further argues that the similarities in the statements of Šainović and Stevanović do not undermine the conclusion regarding Šainović's specific role during the meeting.³⁰⁶²

918. In reply, Šainović submits that if the MUP forces were acting upon Stevanović's directives, then "Šainović's influence and contribution [cannot] be characterized as significant."³⁰⁶³

919. The Trial Chamber concluded that, at the MUP Staff meeting of 4 April 1999, "Šainović was exhibiting a leadership role with respect to the use of the MUP forces in Kosovo, much like the one he had during summer 1998 and despite the fact that he was a federal politician not in the formal chain of command of the republican MUP."³⁰⁶⁴ Contrary to Šainović's assertion, the Trial Chamber explicitly acknowledged Šainović's late arrival at the meeting and the testimony of Miloš Vojnović, Chief of the Prizren SUP,³⁰⁶⁵ that the purpose of Šainović's visit was to provide

³⁰⁵⁴ Trial Judgement, vol. 3, para. 462.

³⁰⁵⁵ Trial Judgement, vol. 3, paras 338-354.

³⁰⁵⁶ Šainović's Appeal Brief, para. 204, referring to Trial Judgement, vol. 3, para. 341; Šainović's Notice of Appeal, para. 30.

³⁰⁵⁷ Šainović's Appeal Brief, para. 205, referring, *inter alia*, to Miloš Vojnović, 12 Mar 2008, T. 24186, Dragan Živaljević, 3 Apr 2008, T. 24841-24842, Ljubinko Cvetić, 8 Dec 2006, T. 8135.

³⁰⁵⁸ Šainović's Appeal Brief, para. 206, referring to Exh. P1989, p. 4. See also Trial Judgement, vol. 1, para. 666.

³⁰⁵⁹ Šainović's Appeal Brief, para. 207.

³⁰⁶⁰ Prosecution's Response Brief (Šainović), para. 116.

³⁰⁶¹ Prosecution's Response Brief (Šainović), para. 117.

³⁰⁶² Prosecution's Response Brief (Šainović), para. 118.

³⁰⁶³ Šainović's Reply Brief, para. 34.

³⁰⁶⁴ Trial Judgement, vol. 3, para. 341.

³⁰⁶⁵ See Trial Judgement, vol. 3, para. 341.

encouragement.³⁰⁶⁶ Moreover, the Appeals Chamber considers that the similarities between Šainović's statement and what was said previously by Stevanović in the meeting in no way undermine the Trial Chamber's conclusion that Šainović exhibited a leadership role. Notably, the Trial Chamber based its conclusion on the minutes of the meeting which record Šainović saying that "it was necessary for the first stage of anti-terrorist operations to be completed today" and that "persons who have been detained for perpetrating crimes should be held in custody until they are taken over by judicial organs."³⁰⁶⁷

920. In addition, the Trial Chamber relied on the evidence of Ljubinko Cvetić, Head of the Kosovska Mitrovica SUP,³⁰⁶⁸ who was also present at the meeting. Cvetić testified that, at the meeting, Šainović requested that actions be concluded by the end of that day following which MUP forces were to proceed to: (i) protect the units at the last attained positions by making trenches and camouflaging themselves; and (ii) protect and secure the border so as to prevent NATO ground forces from coming in.³⁰⁶⁹ In view of this evidence, the Appeals Chamber discerns no error in the Trial Chamber's conclusion regarding Šainović's role in the meeting. Equally, the Appeals Chamber finds unpersuasive Šainović's attempt to interpret his participation at the meeting in isolation, rather than in the context of the totality of the evidence considered by the Trial Chamber in finding that his contribution to the common purpose was significant.

921. Accordingly, Šainović has not demonstrated any error in the Trial Chamber's finding that during the meeting held at the MUP Staff offices on 4 April 1999, he was "exhibiting a leadership role" with respect to the use of the MUP forces in Kosovo. The Appeals Chamber dismisses sub-ground 1(19) of Šainović's appeal.

(ii) Meeting of 13 April 1999 with Zlatomir Pešić

922. The Trial Chamber found that on 13 April 1999, Zlatomir Pešić, the Commander of the Priština Military District, was summoned to a building near the Grand Hotel in Priština/Prishtina where he was asked about a "detachment in Istok which allegedly formed a detention camp" for Kosovo Albanians.³⁰⁷⁰ It noted that Šainović, Anđelković, Pavković, Lazarević, and Stojanović as well as some MUP Colonels were present at the meeting. The Trial Chamber found that Pešić's

³⁰⁶⁶ Trial Judgement, vol. 3, para. 341, referring to Dušan Gavranović, 19 Feb 2008, T. 22719-22720, Miloš Vojnović, 12 Mar 2008, T. 24185-24186, Dragan Živaljević, 3 Apr 2008, T. 24841-24842.

³⁰⁶⁷ Trial Judgement, vol. 3, para. 341, referring to Exh. P1989, p. 4.

³⁰⁶⁸ See Trial Judgement, vol. 1, para. 661.

³⁰⁶⁹ Trial Judgement, vol. 3, para. 341, referring to Ljubinko Cvetić, 7 Dec 2006, T. 8085.

³⁰⁷⁰ Trial Judgement, vol. 3, para. 342, citing Zlatomir Pešić, P2502, para. 34.

testimony confirmed that Šainović was able to exert influence over the VJ and its high level officers during the NATO bombing.³⁰⁷¹

923. Šainović argues that the Trial Chamber erred in finding that the meeting of 13 April 1999 with Pešić was indicative of his position of influence over the VJ.³⁰⁷² He submits that the Trial Chamber's interpretation of Pešić's testimony was erroneous, as apart from being present during the meeting, Šainović neither summoned Pešić nor spoke or gave any orders to him.³⁰⁷³

924. In response, the Prosecution submits that the Trial Chamber's conclusion was reasonable and that Šainović's arguments seeking to substitute his own evaluation of the evidence for that of the Trial Chamber should be summarily dismissed.³⁰⁷⁴ It adds that Pešić was summoned by all those present at the meeting.³⁰⁷⁵ The Prosecution contends that Šainović's participation in the meeting, when viewed in the context of the other evidence presented at trial, shows his "active and detailed involvement in VJ affairs".³⁰⁷⁶

925. According to Pešić's evidence, on 13 April 1999, he was called to meet with Šainović, Anđelković, Pavković, Lazarević, and Stojanović as well as with some MUP Colonels.³⁰⁷⁷ He stated that those present wanted to know about a "detachment in Istok which allegedly formed a detention camp" for Kosovo Albanians.³⁰⁷⁸ Pešić confirmed that he was summoned to appear by those present at the meeting, among them Šainović, who were interested in knowing this information.³⁰⁷⁹ The Appeals Chamber observes that apart from being present at the meeting, the evidence considered by the Trial Chamber does not show that Šainović issued any instructions or made any statements. Consequently, while Šainović's presence showed his continuous involvement with VJ issues, it did not provide support to the Trial Chamber's finding that he was able to exert influence over the VJ and its high level officers. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in relying on Šainović's presence at the meeting of 13 April 1999.

³⁰⁷¹ Trial Judgement, vol. 3, para. 342.

³⁰⁷² Šainović's Appeal Brief, para. 208, referring to Trial Judgement, vol. 3, para. 342; Šainović's Notice of Appeal, para. 31.

³⁰⁷³ Šainović's Appeal Brief, paras 208-209; Šainović's Reply Brief, para. 35.

³⁰⁷⁴ Prosecution's Response Brief (Šainović), para. 119.

³⁰⁷⁵ Prosecution's Response Brief (Šainović), para. 120, citing Exh. P2502, para. 34.

³⁰⁷⁶ Prosecution's Response Brief (Šainović), para. 120.

³⁰⁷⁷ Trial Judgement, vol. 3, para. 342. See also Zlatimir Pešić, P2502, para. 34.

³⁰⁷⁸ Trial Judgement, vol. 3, para. 342, citing Zlatimir Pešić, Exh. P2502, para. 34.

³⁰⁷⁹ Zlatimir Pešić, Exh. P2502, para. 34: "They called me to come with my head of security Vujica Vujisić. [...] They called me about information they had in relation to a detachment in Istok [...]."

926. Consequently, the Appeals Chamber grants sub-ground 1(20) of Šainović’s appeal. The impact of the Trial Chamber’s error on its finding that in 1999 Šainović continued to liaise between the VJ and the MUP on the one hand and Milošević on the other will be addressed below.³⁰⁸⁰

(iii) Meeting of 4 May 1999 with Milošević and MUP Staff meeting of 7 May 1999

927. The Trial Chamber found that Šainović’s task as a politician was to liaise between the VJ and the MUP on the one hand, and Milošević on the other, and that this continued in 1999.³⁰⁸¹ The Trial Chamber considered, *inter alia*, evidence of two meetings which took place on 4 May and 7 May 1999, respectively. In relation to the meeting of 4 May 1999 with Milošević, the Trial Chamber found that “Šainović either attended or, at the very least, was fully informed about the contents of [the] meeting where events in Kosovo were discussed”.³⁰⁸² The Trial Chamber further found that at the MUP Staff meeting of 7 May 1999, “Šainović was providing approval for [the MUP] actions and was also issuing instructions and conveying Milošević’s orders.”³⁰⁸³ In reaching this conclusion, the Trial Chamber relied primarily on the minutes of the meeting recording Šainović’s statement in relation to, *inter alia*, what was to be done after the completion of “Operation Jezerce”.³⁰⁸⁴

928. Šainović argues that there is no evidence that he attended the meeting on 4 May 1999 and that no reasonable trier of fact could have found that the meeting constituted evidence of his authority over the VJ and the MUP in 1999.³⁰⁸⁵

929. In relation to the MUP Staff meeting of 7 May 1999, Šainović asserts that the Trial Chamber erred in finding that he issued instructions, conveyed Milošević’s orders, and provided approval for MUP actions.³⁰⁸⁶ He further argues that the Trial Chamber misinterpreted the content of his “political speech” at the meeting which, according to him, is inconsistent with the role of someone directing the MUP actions on a daily basis.³⁰⁸⁷ He contends that in his speech he merely referred to the content of the *Politika* article of which the MUP Staff was already aware³⁰⁸⁸ and that the Trial Chamber misinterpreted his statement concerning “Operation Jezerce” as conveying Milošević’s

³⁰⁸⁰ See *infra*, sub-section VII.D.2.(i).

³⁰⁸¹ Trial Judgement, vol. 3, para. 337.

³⁰⁸² Trial Judgement, vol. 3, para. 343.

³⁰⁸³ Trial Judgement, vol. 3, para. 348.

³⁰⁸⁴ Trial Judgement, vol. 3, para. 346.

³⁰⁸⁵ Šainović’s Notice of Appeal, para. 32; Šainović’s Appeal Brief, paras 210, 212, referring to Trial Judgement, vol. 3, para. 343.

³⁰⁸⁶ Šainović’s Notice of Appeal, para. 33; Šainović’s Appeal Brief, para. 213, referring to Trial Judgement, vol. 3, para. 348. Šainović further asserts that he was present only at the beginning of the meeting and therefore no one reported to him about the events in the field (Šainović’s Appeal Brief, para. 214).

³⁰⁸⁷ Šainović’s Appeal Brief, paras 215-217.

³⁰⁸⁸ Šainović’s Appeal Brief, paras 222-223.

orders, although the operation “commenced and was proceeding without any influence on his part.”³⁰⁸⁹

930. The Prosecution responds that it was reasonable for the Trial Chamber to conclude that Šainović was either present at the 4 May 1999 meeting or was fully informed about it, given that he referred to the content of the meeting of 4 May 1999 during the meeting of 7 May 1999.³⁰⁹⁰ In relation to the 7 May 1999 meeting, the Prosecution submits that Šainović repeats his trial submissions and seeks to substitute his own evaluation of the evidence for that of the Trial Chamber. Thus, the Prosecution asserts, Šainović’s arguments should be summarily dismissed.³⁰⁹¹

931. The Trial Chamber relied on documentary evidence and witness testimony indicating that on 4 May 1999 a meeting took place during which Milošević heard reports from Pavković and Lukić.³⁰⁹² It also referred to the minutes of the MUP Staff meeting of 7 May 1999, which show that Šainović was aware of the outcome of the 4 May 1999 meeting, as he made direct reference to the said reports and the ensuing press statement.³⁰⁹³ The Appeals Chamber is of the view that, on the basis of this evidence, a reasonable trier of fact could have concluded that Šainović was either present or fully informed about the meeting of 4 May 1999. Further, Šainović misstates the Trial Chamber’s findings in relation to his authority to the extent that the Trial Chamber did not rely on the meeting of 4 May 1999 in isolation, but in conjunction with Šainović’s participation in the MUP Staff meeting of 7 May 1999.³⁰⁹⁴

932. In relation to the MUP Staff meeting of 7 May 1999, the Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that Šainović merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber, without showing that the Trial Chamber’s interpretation of the statement he made during the meeting was unreasonable. The Trial Chamber specifically referred to Šainović’s words setting out the main objectives and tasks in “defending the country from the aggressor” and the “struggle against terrorism”, including his reference to Milošević’s order which was to be relayed to “all police commanders as a task assigned by the Supreme Command.”³⁰⁹⁵ The Trial Chamber noted the evidence of Miroslav Mijatović, the Deputy Head of the MUP Staff,³⁰⁹⁶ that Šainović was simply reiterating what Milošević had said a few days

³⁰⁸⁹ Šainović’s Appeal Brief, para. 219. See also *ibid.*, paras 218, 220.

³⁰⁹⁰ Prosecution’s Response Brief (Šainović), para. 121, referring to Exh. P1996, pp. 1, 4.

³⁰⁹¹ Prosecution’s Response Brief (Šainović), para. 124.

³⁰⁹² Trial Judgement, vol. 3, paras 343-344, referring to Exh. P1696, p. 1, Exh. 4D406, Exh. 5D1289, Milovan Vljaković, 20 Sep 2007, T. 16081-16082, Ljubiša Stojimirović, 26 Oct 2007, T. 17684.

³⁰⁹³ Trial Judgement, vol. 3, para. 344, referring to Exh. P1996, p. 4, Miroslav Mijatović, 13 Feb 2008, T. 22286-22289.

³⁰⁹⁴ See Trial Judgement, vol. 3, paras 343-348.

³⁰⁹⁵ Trial Judgement, vol. 3, para. 346, citing Exh. P1996, pp. 2, 4.

³⁰⁹⁶ See Trial Judgement, vol. 1, para. 673.

earlier, as published in an article in *Politika*.³⁰⁹⁷ However, the Trial Chamber explicitly considered that Šainović's statement was significantly longer and more detailed than the *Politika* article.³⁰⁹⁸ Thus Šainović's assertion that he was merely referring to the *Politika* article is unsupported by the evidence and ignores the Trial Chamber's relevant finding.

933. As to "Operation *Jezerce*", the minutes record Šainović's statement that after the operation "all detachments of PJP will return to their Secretariats and, in co-operation with the VJ, work on destroying the remaining terrorist groups."³⁰⁹⁹ Šainović's assertion that the operation commenced and proceeded without his involvement is irrelevant, as the essence of his statement is the action to be undertaken following the completion of the operation. Consequently, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that a reasonable trier of fact could have concluded that Šainović's statement constituted more than passing a message of encouragement.³¹⁰⁰

934. Accordingly, Šainović has failed to show any error in the Trial Chamber's findings concerning the 4 May and the 7 May 1999 meetings. The Appeals Chamber, Judge Tuzmukhamedov dissenting, dismisses sub-grounds 1(21) and 1(22) of Šainović's appeal.

(iv) Meeting with Milošević on 17 May 1999

935. The Trial Chamber found that on 17 May 1999, Šainović attended a meeting in Belgrade with, *inter alios*, Milošević, Ojdanić, Pavković, and Aleksandar Vasiljević, Deputy Head of the VJ Security Administration, where reports of crimes committed against Kosovo Albanian civilians by the VJ, the MUP, and members of the Scorpions were discussed, including MUP allegations of crimes committed by the VJ, involving some 800 bodies.³¹⁰¹ The Trial Chamber relied on Šainović's presence at this meeting in discussing his authority over the VJ and the MUP in 1999³¹⁰² and in finding that his role as the politician whose task was to liaise between the VJ and the MUP on the one hand and Milošević on the other, continued in 1999.³¹⁰³

936. Šainović argues that the Trial Chamber erred in finding that his participation in the 17 May 1999 meeting was indicative of his authority over the VJ and the MUP.³¹⁰⁴ He contends

³⁰⁹⁷ Trial Judgement, vol. 3, para. 347, referring to Miroslav Mijatović, 13 Feb 2008, T. 22287-22289, Exh. 5D1289.

³⁰⁹⁸ Trial Judgement, vol. 3, para. 348.

³⁰⁹⁹ Trial Judgement, vol. 3, para. 346, citing Exh. P1996, p. 2.

³¹⁰⁰ The Appeals Chamber further considers that the fact that Šainović did not stay until the end of the meeting is irrelevant to the Trial Chamber's conclusion, which is based not on the length of his attendance but on the content of his address to the participants (see Trial Judgement, vol. 3, para. 348).

³¹⁰¹ Trial Judgement, vol. 3, paras 350-351.

³¹⁰² See Trial Judgement, vol. 3, paras 336-361. See also *ibid.*, vol. 3, para. 467.

³¹⁰³ Trial Judgement, vol. 3, para. 337.

³¹⁰⁴ Šainović's Notice of Appeal, para. 34; Šainović's Appeal Brief, para. 225, referring to Trial Judgement, vol. 3, paras 349-353. The Appeals Chamber understands Šainović's reference to Trial Judgement, vol. 3, para. 343 to be a typographical error.

that he made only a few comments during the meeting which is inconsistent with his position of authority over the VJ and the MUP, as established by the Trial Chamber.³¹⁰⁵

937. The Prosecution responds that Šainović was an “active participant” in the high level meeting which was not attended by any MUP general and that it was reasonable for the Trial Chamber to rely on his participation as evidence of his authority over the VJ and the MUP in Kosovo.³¹⁰⁶

938. The Trial Chamber considered evidence showing that during the meeting on 17 May 1999, Šainović: (i) made the commitment to check whether volunteer groups were present in the “Kosovo Polje centre”; (ii) stated that people were paying large sums of money in order to obtain VJ or MUP uniforms and were entering Kosovo illegally in order to loot; and (iii) agreed to the proposal of having a neutral body to investigate the allegations of crimes made at the meeting.³¹⁰⁷ While his participation may not have been extensive, the Appeals Chamber, Judge Tuzmukhamedov dissenting, is not persuaded that the Trial Chamber’s reliance on this, among other, evidence as showing Šainović’s role as a politician liaising between the VJ and the MUP on the one hand, and Milošević on the other, was erroneous. Šainović’s speculative assertions that if he had authority “there would not have been any tension between [the VJ and the MUP]” and that “Milošević would have given him orders or expected answers from him”³¹⁰⁸ fall short of showing that the Trial Chamber’s interpretation of the evidence was unreasonable.

939. In light of the foregoing, the Appeals Chamber, Judge Tuzmukhamedov dissenting, dismisses Šainović’s arguments concerning his role in liaising with and influence over the VJ and MUP forces.³¹⁰⁹

(g) Joint Command meeting on 1 June 1999

940. In finding that Šainović was the political coordinator of the forces in Kosovo in 1999, the Trial Chamber noted that he was able to convey orders and provide approval for certain VJ and

³¹⁰⁵ Šainović’s Appeal Brief, paras 229, 231-232. See also Šainović’s Reply Brief, para. 37. In addition, Šainović submits a number of challenges to the Trial Chamber’s findings in relation to a meeting which took place on 16 May 1999 between Ojdanić, Pavković, Vasiljević, Geza Farkaš, and Branko Gajić (Šainović’s Appeal Brief, paras 227-228, referring to Trial Judgement, vol. 3, para. 349). Considering that Šainović was not present at the meeting, the majority of his arguments challenge factual findings on which his conviction does not rely. Consequently, these arguments are dismissed without detailed consideration. Šainović’s contention that there is no evidence showing that Pavković actually informed him that members of the Scorpions were present in Kosovo (Šainović’s Appeal Brief, para. 228) and that the Trial Chamber erred in inferring that arranging for an investigation into the deaths reported during the meeting was within his authority (Šainović’s Appeal Brief, paras 229-230, citing Trial Judgement, vol. 3, para. 353) are addressed *infra*, sub-sections VII.D.3.(d) and VII.D.3.(e), respectively.

³¹⁰⁶ Prosecution’s Response Brief (Šainović), para. 128.

³¹⁰⁷ Trial Judgement, vol. 3, para. 351, referring to Aleksandar Vasiljević, Exh. P2600, paras 69-70, Geza Farkaš, 25 Sept 2007, T. 16297, 16329-16330, Branko Gajić, 7 Sep 2007, T. 15290-15291.

³¹⁰⁸ Šainović’s Appeal Brief, para. 232.

³¹⁰⁹ Šainović’s sub-ground of appeal 1(23) in part.

MUP activities.³¹¹⁰ In particular, the Trial Chamber considered evidence showing that Šainović attended the Joint Command meeting of 1 June 1999 in the basement of the Grand Hotel in Priština/Priština.³¹¹¹ The Trial Chamber concluded that at the meeting, Šainović was seen as the most senior figure and someone who could order the completion of the activities of the joint VJ and MUP forces.³¹¹² In this regard, the Trial Chamber relied principally on the evidence of Aleksandar Vasiljević, Deputy Head of the Security Administration,³¹¹³ Momir Stojanović, Head of the Priština Corps security department,³¹¹⁴ Lazarević, and Zoran Anđelković, who all attended the meeting of 1 June 1999.³¹¹⁵

941. In relation to the meeting, Šainović argues that the Trial Chamber erred in relying on the fact that the participants rose when he entered the room and on the impression he created of “being important” in its assessment of his position and authority.³¹¹⁶ He asserts that Vasiljević’s evidence of Šainović’s role was unreliable and inconsistent³¹¹⁷ and claims that, contrary to the Trial Chamber’s finding, Vasiljević, Lazarević, Stojanović, and Anđelković gave different accounts of the meeting.³¹¹⁸ He avers that the Trial Chamber’s conclusion that he conveyed Milošević’s orders and that he was a person in a position to order the termination of the MUP and VJ activities due to the Milošević-Ahtisaari agreement was unreasonable and contradicted by the evidence in the record.³¹¹⁹ In particular, Šainović argues that he could not have ordered the withdrawal of the MUP and VJ forces on 1 June 1999, given that the Milošević-Ahtisaari agreement was concluded only on 4 June 1999.³¹²⁰

942. In response, the Prosecution submits that the Trial Chamber’s conclusions regarding the 1 June 1999 meeting and its assessment of Vasiljević’s testimony were reasonable and that Šainović’s arguments repeating his trial submissions should be summarily dismissed.³¹²¹ According to the Prosecution, the evidence clearly shows that at the meeting Šainović was referring to an interim agreement and to the fact that the final agreement was to be signed soon.³¹²²

³¹¹⁰ Trial Judgement, vol. 3, para. 359.

³¹¹¹ Trial Judgement, vol. 1, paras 1145, 1150. The Trial Chamber considered evidence of only one meeting of the Joint Command in 1999. The Appeals Chamber has previously dismissed Šainović’s arguments that the meeting of 1 June 1999 was not a meeting of the Joint Command (see *supra*, sub-section VII.C.3.(c)(viii)).

³¹¹² Trial Judgement, vol. 3, para. 359.

³¹¹³ See Trial Judgement, vol. 3, para. 571.

³¹¹⁴ See Trial Judgement, vol. 1, para. 567.

³¹¹⁵ Trial Judgement, vol. 3, paras 355-358.

³¹¹⁶ Šainović’s Appeal Brief, para. 236, referring to Trial Judgement, vol. 3, paras 355, 357, 359.

³¹¹⁷ Šainović’s Appeal Brief, paras 237-238, referring, *inter alia*, to Exh. 2D387, para. 3, Exh. P2589, T. 16430.

³¹¹⁸ Šainović’s Appeal Brief, paras 237, 239-240, referring to Trial Judgement, vol. 3, para. 359.

³¹¹⁹ Šainović’s Notice of Appeal, paras 35, 43; Šainović’s Appeal Brief, paras 241-242. See also *ibid.*, paras 291-292.

³¹²⁰ Appeal Hearing, 11 Mar 2003, AT. 179, 272-273.

³¹²¹ Prosecution’s Response Brief (Šainović), para. 129. See also *ibid.*, paras 38-40.

³¹²² Appeal Hearing, 11 Mar 2003, AT. 254.

943. In reaching its conclusion on Šainović's participation in the 1 June 1999 meeting, the Trial Chamber considered Vasiljević's evidence that when Šainović entered the room everyone rose as well as Stojanović's explanation that this was standard behaviour in the VJ "when somebody senior comes in".³¹²³ The Trial Chamber also relied on Vasiljević's evidence that Šainović was "treated deferentially" by the other participants in the meeting as well as that he presided over and "gave the distinct impression that he was the head."³¹²⁴ Contrary to Šainović's claim, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that a reasonable trier of fact could have relied on this, among other, evidence in reaching its conclusions with respect to Šainović's authority in 1999.

944. As to the discrepancies in Vasiljević's evidence, the Trial Chamber noted that in his statement to Šainović's Defence, Vasiljević stated that he did not know what the official function of Šainović was at the meeting of 1 June 1999, but that he "was under the impression that Šainović was 'to be informed and co-ordinate the eventual problems between the VJ and the MUP, and to follow the overall situation in Kosovo, keeping Belgrade informed thereof.'"³¹²⁵ In his testimony in the *S. Milošević* case, which was admitted into evidence in the present case, with respect to the Joint Command meeting of 22 July 1998, Vasiljević stated that "[Šainović's] authority was the commander of the Joint Command and to coordinate the operations of the MUP forces and the forces of the army of Yugoslavia with regard to a concrete assignment."³¹²⁶ The Appeals Chamber notes that the two statements refer to different Joint Command meetings. Moreover, contrary to Šainović's assertion, the statements are essentially consistent. In both statements Vasiljević was consistent in his claim as to the nature of Šainović's authority.

945. Further, in his statement to the Šainović's Defence, Vasiljević stated that "[t]he presentation of Šainović at th[e] meeting [of 1 June 1999] was not in a form of issuing a particular order. As a man of undisputed political authority, he has agreed with what was presented by the Generals of the Army and MUP."³¹²⁷ In his statement to the Prosecution, Vasiljević confirmed that Šainović agreed to the plan presented by Lukić, Lazarević, and Pavković adding, however, "that the remaining terrorist groups were to be destroyed in the next 3-4 days and that the organisation of activities in the filed [*sic*] and cooperation between the MUP and the army is to be improved."³¹²⁸ The Appeals Chamber notes that in his statement to the Prosecution, Vasiljević explicitly said that "[n]obody

³¹²³ Trial Judgement, vol. 3, para. 355 and fn. 747, referring to Aleksandar Vasiljević, Exh. P2600, para. 80, Momir Stojanović, 7 Dec 2007, T. 19803-19804.

³¹²⁴ Trial Judgement, vol. 3, para. 357, referring to Aleksandar Vasiljević, Exh. P2600, para. 80.

³¹²⁵ Trial Judgement, vol. 3, para. 357, referring to Exh. 2D387, para. 3.

³¹²⁶ Aleksandar Vasiljević, Exh. P2589, T. 16430.

³¹²⁷ Exh. 2D387, para. 2.

³¹²⁸ Aleksandar Vasiljević, Exh. P2600, para. 81.

stood at attention to receive that as an order, but [Šainović's] word was the last.”³¹²⁹ The Appeals Chamber discerns no contradiction between the two statements. Rather, the statement given to the Prosecution is more detailed as to what Šainović actually said during the meeting.

946. The Trial Chamber further found that the various accounts of the 1 June 1999 meeting were “largely consistent with each other.”³¹³⁰ The Appeals Chamber notes that the accounts of Vasiljević and Stojanović differ as to the content of Šainović's statements during the meeting. While Stojanović recalled Šainović saying that an agreement between the FRY and the international community would be signed and that the withdrawal of the VJ and MUP forces envisaged in that agreement would have to commence soon,³¹³¹ Vasiljević did not mention such a statement. However, such discrepancy is insignificant considering that both witnesses confirmed that at the meeting Šainović did not issue formal orders³¹³² and that Šainović's statement concerning the withdrawal was also confirmed by Lazarević's testimony.³¹³³ Indeed, it was Šainović's statement concerning the withdrawal of the VJ and MUP forces that the Trial Chamber relied upon in its finding on Šainović's role during the meeting.³¹³⁴ Anđelković also confirmed that at the meeting Šainović spoke about talks in Belgrade between Martti Ahtisaari, the Finish President,³¹³⁵ Viktor Chernomyrdin, the Russian Prime Minister,³¹³⁶ and Milošević.³¹³⁷ The Appeals Chamber recalls that it is not necessary for testimonies that corroborate each other to be identical in all aspects or describe the same facts in the same way. Corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is incompatible with the description given in another credible testimony.³¹³⁸ Šainović has failed to show that, notwithstanding the discrepancy between Vasiljević's evidence and that of Stojanović and Lazarević, the Trial Chamber was unreasonable in relying upon Vasiljević's testimony.

947. The Trial Chamber found that at the meeting of 1 June 1999 Šainović was seen as “somebody who could order that activities of the joint forces cease due to an agreement reached between Milošević and Martti Ahtisaari”, and consequently concluded “that also in 1999 he was

³¹²⁹ Aleksandar Vasiljević, Exh. P2600, para. 81.

³¹³⁰ Trial Judgement, vol. 3, para. 359.

³¹³¹ Momir Stojanović, 7 Dec 2007, T. 19774-19775.

³¹³² Momir Stojanović, 7 Dec 2007, T. 19775; Aleksandar Vasiljević, Exh. P2600, para. 81.

³¹³³ Trial Judgement, vol. 3, para. 356, referring to Vladimir Lazarević, 12 Nov 2007, T. 18123.

³¹³⁴ See Trial Judgement, vol. 3, para. 359.

³¹³⁵ See Trial Judgement, vol. 1, para. 1215.

³¹³⁶ See Trial Judgement, vol. 1, para. 1215.

³¹³⁷ Trial Judgement, vol. 3, para. 358, referring to Zoran Anđelković, 30 Aug 2007, T. 14663-14664.

³¹³⁸ *Rukundo* Appeal Judgement, para. 76, citing *Nahimana et al.* Appeal Judgement, para. 428. See also *Haradinaj et al.* Appeal Judgement, para. 139; *Kupreškić et al.* Appeal Judgement, para. 31.

able to convey orders and provide approval for certain VJ and MUP activities.”³¹³⁹ The Trial Chamber’s interpretation of the evidence was reasonable. The evidence shows that Šainović informed the participants in the meeting of the forthcoming agreement which envisaged the withdrawal of the VJ and MUP forces from Kosovo and stated that “all activities should be terminated as soon as possible.”³¹⁴⁰ While in military terms this may not have constituted a formal order, it was clearly an instruction for what was to be done pursuant to the forthcoming agreement.³¹⁴¹ The fact that the actual agreement was signed later, does not contradict this evidence.³¹⁴² The binding effect of what was conveyed by Šainović is also confirmed by the reactions of Lazarević and Lukić, who expressed dissatisfaction with the decision for withdrawal, as their units were engaged in combat operations.³¹⁴³ The extent of Šainović’s authority is further confirmed by his approval of the action in Drenica and his instruction that the cooperation between the VJ and MUP forces should be improved.³¹⁴⁴ Šainović has failed to demonstrate an error on the part of the Trial Chamber.³¹⁴⁵

948. The Appeals Chamber recalls that it has upheld the Trial Chamber’s finding that the meeting of 1 June 1999 was a meeting of the Joint Command.³¹⁴⁶ By the same token, and considering Šainović’s specific statements made during the 1 June 1999 meeting, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that it was reasonable for the Trial Chamber to conclude that Šainović’s authority within the Joint Command in 1998 continued in 1999.

949. For the foregoing reasons, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Šainović has failed to show an error in the Trial Chamber’s conclusion in relation to his role during the 1 June 1999 Joint Command meeting. The Appeals Chamber therefore dismisses sub-grounds 1(24) and 2(3) of Šainović’s appeal.

³¹³⁹ Trial Judgement, vol. 3, para. 359.

³¹⁴⁰ Momir Stojanović, 7 Dec 2007, T. 19775. See also Trial Judgement, vol. 3, para. 356.

³¹⁴¹ The Appeals Chamber notes that this is also consistent with the Trial Chamber’s finding that the Joint Command did not replace the existing VJ and MUP chains of command (see Trial Judgement, vol. 1 paras 1081, 1110).

³¹⁴² See Trial Judgement, vol. 1, para. 1215, referring to Exh. P472.

³¹⁴³ Trial Judgement, vol. 3, para. 356, referring, *inter alia*, to Momir Stojanović, 7 Dec 2007, T. 19775.

³¹⁴⁴ Trial Judgement, vol. 3, para. 356, referring to Aleksandar Vasiljević, 23 Jan 2007, T. 8954-8955, *ibid.*, 29 Aug 2007, T. 14505-14506, *ibid.*, Exh. P2600, paras 81-82, Exh. 2D387, paras 1-4, Exh. P2862.

³¹⁴⁵ Judge Tuzmukhamedov dissents on this entire paragraph.

³¹⁴⁶ See *supra*, sub-section VII.C.3.(c)(viii).

(h) Šainović's ability to issue instructions, make proposals, and give suggestions

950. The Trial Chamber found that Šainović possessed extensive *de facto* powers over both the VJ and MUP forces in Kosovo and therefore was able to make proposals, give suggestions, and issue instructions to both Pavković and Lukić.³¹⁴⁷

951. Šainović argues that the Trial Chamber failed to provide a “legal interpretation of the meaning of the terms instruction, proposal or suggestion” and erred in law in failing to differentiate, in terms of their respective consequences, between orders and instructions, proposals, and suggestions.³¹⁴⁸ He claims that an order is “legally defined as a method of committing a crime as part of individual criminal responsibility.”³¹⁴⁹ In his view, unlike an order, an instruction, a proposal or a suggestion do not entail a legal relationship between the party issuing the order and the one receiving it, with defined responsibilities on both sides.³¹⁵⁰

952. In response, the Prosecution contends that Šainović's submission that the Trial Chamber conflated his factual contribution to the JCE with the legal concept of ordering is unsubstantiated.³¹⁵¹ In the Prosecution's view, given that the Trial Chamber's assessment of Šainović's contribution was a factual one, no legal interpretation of the terms “instruction”, “proposal”, or “suggestion” was required.³¹⁵² The Prosecution avers that Šainović's actions evince a high level of influence which is consistent with the Trial Chamber's finding that Šainović had *de facto*, rather than *de jure*, authority over the VJ and the MUP.³¹⁵³

953. In reply, Šainović asserts that providing suggestions, proposals, and instructions does not imply, in itself, a high level of influence.³¹⁵⁴

954. The Appeals Chamber considers that the Trial Chamber was under no obligation to provide a legal definition of the terms “order”, “instruction”, “proposal”, or “suggestion”, as these terms were used to describe factual findings rather than to provide a legal qualification of Šainović's acts. Further, to the extent that Šainović suggests that the Trial Chamber conflated the modes of liability of commission through JCE and ordering, his submission is unsubstantiated. The two are distinct categories of individual criminal responsibility, each with specific legal requirements. For JCE liability to arise, it is sufficient that the accused “perform acts that in some way are directed to the

³¹⁴⁷ Trial Judgement, vol. 3, para. 462.

³¹⁴⁸ Šainović's Appeal Brief, paras 303-305, 309, referring to Trial Judgement, vol. 3, paras 331, 341-342, 346-348, 359, 462, 467, 782. See also Šainović's Notice of Appeal, para. 47.

³¹⁴⁹ Šainović's Appeal Brief, para. 306.

³¹⁵⁰ Šainović's Appeal Brief, para. 307.

³¹⁵¹ Prosecution's Response Brief (Šainović), para. 166.

³¹⁵² Prosecution's Response Brief (Šainović), para. 167.

³¹⁵³ Prosecution's Response Brief (Šainović), para. 168, referring to Trial Judgement, vol. 3, para. 462.

furthering” of the JCE.³¹⁵⁵ Such acts may include giving orders, instructions, proposals or suggestions as long as they significantly contribute to the commission of the crimes encompassed by the common purpose.

955. For the reasons set out above, Šainović has not demonstrated a legal error in the Trial Chamber’s finding that he was able to make proposals, give suggestions, and issue instructions. The Appeals Chamber dismisses sub-ground 2(7) of Šainović’s appeal.

(i) Alleged errors in finding that Šainović was the “political coordinator” of the forces in Kosovo

956. In its assessment of Šainović’s participation in the JCE, the Trial Chamber found that:

Šainović possessed extensive *de facto* powers over both the VJ and the MUP forces in Kosovo. As such, he was able to make proposals, give suggestions, and issue instructions to both Pavković and Lukić and thus to the VJ and the MUP respectively. He was the crucial link between Milošević, who was in Belgrade, and the VJ and MUP units that were operating in Kosovo. His role was, therefore, that of the political co-ordinator of the forces in Kosovo. He continued to hold it following the completion of the Plan for Combating Terrorism in October 1998, first as the Chairman of the Commission for Co-operation with the KVM and then, in the period of the NATO bombing, both as a member of the Joint Command and as the highest-ranking politician who continued meeting with Pavković and Lukić, was travelling to Kosovo often, and had extensive dealings with Ibrahim Rugova. In addition, as seen from the meeting of 7 May 1999 in the MUP Staff building, he was also relaying Milošević’s orders to the Serbian MUP.³¹⁵⁶

957. Specifically with respect to Šainović’s authority over the VJ and the MUP in 1998, the Trial Chamber concluded that:

[g]iven that politicians liaised with the VJ and the MUP at the time, and given that both of those organs had to get approval from Milošević, Šainović’s role was pivotal in both giving such approval and issuing instructions. The various instructions he issued [...] reveal that he was indeed a political co-ordinator of the activities of the VJ and the MUP in Kosovo in 1998.³¹⁵⁷

958. In addition, the Trial Chamber considered that Šainović attended: (i) a meeting with Milošević on 29 October 1998 where the Plan for Combating Terrorism was discussed;³¹⁵⁸ (ii) a meeting at the MUP Staff in Priština/Prishtina on 5 November 1998 where Lukić briefed the participants on the current situation in Kosovo and on the readiness of the MUP forces to continue with their duties and tasks;³¹⁵⁹ and (iii) a meeting at MUP in Belgrade on 27 November 1998, where the duties and further engagement of members of the police in Kosovo were defined.³¹⁶⁰ The Trial Chamber found that Šainović’s presence at these meetings was “in line” with other evidence

³¹⁵⁴ Šainović’s Reply Brief, para. 46.

³¹⁵⁵ *Krajišnik* Appeal Judgement, para. 695, citing *Tadić* Appeal Judgement, para. 229.

³¹⁵⁶ Trial Judgement, vol. 3, para. 462. See also *ibid.*, para. 467.

³¹⁵⁷ Trial Judgement, vol. 3, para. 331.

³¹⁵⁸ Trial Judgement, vol. 3, para. 332. See also *supra*, sub-section VII.D.2.(c).

³¹⁵⁹ Trial Judgement, vol. 3, para. 333.

³¹⁶⁰ Trial Judgement, vol. 3, para. 334.

showing that he exerted influence when it came to Kosovo and was a political coordinator of the VJ and MUP at this time.³¹⁶¹

(i) Submissions of the parties

959. Šainović advances a number of challenges to the Trial Chamber's findings. He argues that the Trial Chamber erred in finding that he was the political coordinator of the VJ and MUP units in Kosovo³¹⁶² and that, specifically in relation to 1999, it did not explicitly find that he continued to perform this function.³¹⁶³ He asserts that the Trial Chamber failed to explain "the nature and substance of political coordination".³¹⁶⁴

960. Šainović also claims that the Trial Chamber erred in "characterising [his] role as pivotal in both giving approval and issuing instructions" to the MUP and the VJ in 1998.³¹⁶⁵ He asserts that Milošević was in daily contact with the highest representatives of the VJ and the MUP and had all structures at his disposal, with all decisions on the deployment being taken at the highest level and then forwarded down the chain of command which remained intact both in 1998 and 1999.³¹⁶⁶ Šainović claims that there are no examples of Milošević being unable to secure approval or give instructions through the regular chain of command, adding that, with the exception of a reference to the *Politika* article,³¹⁶⁷ there is no evidence showing that he ever conveyed any order of Milošević, or that he took an independent decision, issued instructions or made suggestions.³¹⁶⁸ With respect to his participation in the meetings of 29 October, 5 November, and 27 November 1998, Šainović claims that no reasonable trier of fact could have relied on this evidence considering the limited degree of his participation.³¹⁶⁹

961. Šainović further argues that in its conclusion that he had extensive *de facto* powers over the VJ and the MUP, the Trial Chamber drew inferences based on evidence pertaining to 1998 for the period throughout 1998 and 1999.³¹⁷⁰ He claims that, in the absence of any evidence that he

³¹⁶¹ Trial Judgement, vol. 3, para. 335.

³¹⁶² Šainović's Notice of Appeal, para. 10; Šainović's Appeal Brief, para. 22. See also *ibid.*, paras 7-8, referring to Trial Judgement, vol. 3, paras 331, 335, 462.

³¹⁶³ Šainović's Appeal Brief, para. 13, referring to Trial Judgement, vol. 1, para. 1144, *ibid.*, vol. 3, paras 336-361.

³¹⁶⁴ Šainović's Appeal Brief, paras 17, 19-20; Appeal Hearing, 13 Mar 2013, AT. 174.

³¹⁶⁵ Šainović's Appeal Brief, para. 10, referring to Trial Judgement, vol. 3, para. 331.

³¹⁶⁶ Šainović's Appeal Brief, paras 11, 284-287, 289, referring, *inter alia*, to Trial Judgement, vol. 3, paras 487, 710, Đorđe Ćurčin, 15 Oct 2007, T. 16979. See also Šainović's Appeal Brief, para. 175; Appeal Hearing, 11 Mar 2013, AT. 173.

³¹⁶⁷ Šainović's Appeal Brief, paras 11, 224, 288, 290, referring to Trial Judgement, vol. 1, para. 1088; Šainović's Reply Brief, paras 8, 39; Appeal Hearing, 11 Mar 2013, AT. 175.

³¹⁶⁸ Šainović's Appeal Brief, paras 15, 51, 60, 308, referring to Trial Judgement, vol. 3, paras 291-299; Šainović's Reply Brief, paras 7, 13. Šainović adds that the witnesses described only activities that he performed in his capacity as Chairman of the Commission for Cooperation with the KVM (Šainović's Appeal Brief, paras 51-52).

³¹⁶⁹ Šainović's Appeal Brief, para. 12, referring to Trial Judgement, vol. 3, paras 332-335.

³¹⁷⁰ Šainović's Notice of Appeal, para. 44; Šainović's Appeal Brief, paras 293-294.

coordinated the activities of the FRY and Serbian forces in 1999, the Trial Chamber reached conclusions on the basis of “analogy” with events which occurred in 1998, thus committing an error of law by misapplying the standard of proof.³¹⁷¹ Specifically with respect to 1999, Šainović avers that the Trial Chamber was presented with evidence concerning only three meetings at which he had contact with the VJ and the MUP, which according to him does not support the conclusion that he had extensive powers in Kosovo.³¹⁷²

962. In addition, Šainović contends that the Trial Chamber’s finding that he was the “crucial link” between Milošević and the VJ and MUP forces in Kosovo and that therefore he was the political coordinator of these forces has no basis in the evidence.³¹⁷³ He claims that the Trial Chamber ignored evidence that after 24 March 1999 he had only two or three short meetings with Milošević, always in the presence of other representatives of the state authorities of Serbia and FRY.³¹⁷⁴

963. Finally, Šainović contends that although the Trial Chamber found that he was a coordinator of the civilian activities in Kosovo, it failed to specify the civilian activities in question.³¹⁷⁵

964. In response, the Prosecution submits that the Trial Chamber used the term “political coordinator” as a descriptive term, on the basis of its prior findings that: (i) as a leading member of the Joint Command Šainović had extensive powers over the VJ and MUP forces; (ii) he was able to make proposals, give suggestions, and issue instructions to the forces in Kosovo; and (iii) he was the crucial link between Milošević and the VJ and MUP units operating on the ground.³¹⁷⁶

965. The Prosecution further submits that on the basis of Šainović’s leadership role during the Joint Command meetings in 1998, the Trial Chamber reasonably concluded that his role in giving approval and issuing instructions was pivotal.³¹⁷⁷ The Prosecution points out that numerous witnesses testified with respect to Šainović’s authority in Kosovo and its source, and that Šainović himself admitted that he served as an intermediary between Milošević and the international

³¹⁷¹ Šainović’s Appeal Brief, paras 279-282, referring to Trial Judgement, vol. 3, para. 467. See also Šainović’s Reply Brief, para. 42; Appeal Hearing, 11 Mar 2013, AT. 199-200.

³¹⁷² Šainović’s Appeal Brief, para. 295, referring to the meetings which took place on 4 April 1999, 7 May 1999, and 1 June 1999. See also Šainović’s Reply Brief, para. 43.

³¹⁷³ Šainović’s Notice of Appeal, para. 42; Šainović’s Appeal Brief, paras 14-15, 283, referring, *inter alia*, to Trial Judgement, vol. 3, paras 331, 335, 462.

³¹⁷⁴ Šainović’s Appeal Brief, paras 16, 343, referring to Exh. P605, pp. 223-224, 227, 348. See also Šainović’s Reply Brief, paras 48-49; Appeal Hearing, 11 Mar 2013, AT. 176.

³¹⁷⁵ Šainović’s Appeal Brief, para. 21, referring to Trial Judgement, vol. 3, para. 427.

³¹⁷⁶ Prosecution’s Response Brief (Šainović), paras 41-42, referring to Trial Judgement, vol. 3, para. 462.

³¹⁷⁷ Prosecution’s Response Brief (Šainović), paras 27-28, referring to Trial Judgement, vol. 3, paras 309-315, 331. See also Prosecution’s Response Brief (Šainović), para. 169, referring to the Trial Chamber’s findings that Šainović continued to instruct Pavković and Lukić in his capacity as Chairman of the Commission for Cooperation with the KVM.

community.³¹⁷⁸ The Prosecution adds that the issue is not whether Milošević could have issued instructions and orders without Šainović's involvement, but rather how it was actually done.³¹⁷⁹ It further argues that the Trial Chamber reached its conclusion on the totality of the evidence and not, as claimed by Šainović, on the basis of his participation in the meetings of 29 October 1998, 5 November 1998, and 27 November 1998.³¹⁸⁰

966. The Prosecution also submits that Šainović fails to articulate any error in the Trial Chamber's finding that he possessed extensive *de facto* powers over the VJ and the MUP and that therefore his submissions should be summarily dismissed.³¹⁸¹ It adds that the Trial Chamber "was entitled to consider evidence from 1998 to the extent that this evidence was probative of [Šainović's] powers in 1999."³¹⁸² In this respect, the Prosecution avers that the Trial Chamber correctly applied the standard of proof, was alert to the difference in the situation in Kosovo between 1998 and 1999, and correctly concluded that the evidence showed that Šainović's authority remained undiminished in 1999.³¹⁸³ The Prosecution further avers that with respect to Šainović's role in 1999 and particularly during the NATO campaign, the Trial Chamber also relied on: (i) Vasiljević's evidence that Šainović had the "executive command" in Kosovo; (ii) Pešić's testimony that Šainović exerted influence over the VJ; and (iii) the meeting of 1 June 1999 showing that Šainović's leadership role remained intact.³¹⁸⁴

967. Finally, the Prosecution submits that the Trial Chamber reasonably concluded that Šainović was a leading member of the Joint Command and a crucial link to Milošević in 1999.³¹⁸⁵ It contends that the Trial Chamber's conclusion that Milošević used Šainović to convey orders was based on the totality of the evidence and that Šainović's claim that the sole basis for the conclusion was the *Politika* article should be summarily dismissed.³¹⁸⁶ The Prosecution adds that the fact that Milošević may have been in contact with others does not undermine the conclusion that Šainović served as the crucial link.³¹⁸⁷

³¹⁷⁸ Prosecution's Response Brief (Šainović), para. 30, referring to Trial Judgement, vol. 3, paras 295-298.

³¹⁷⁹ Prosecution's Response Brief (Šainović), para. 31.

³¹⁸⁰ Prosecution's Response Brief (Šainović), para. 32.

³¹⁸¹ Prosecution's Response Brief (Šainović), para. 155.

³¹⁸² Prosecution's Response Brief (Šainović), para. 156.

³¹⁸³ Prosecution's Response Brief (Šainović), para. 148, referring to Trial Judgement, vol. 3, para. 467.

³¹⁸⁴ Prosecution's Response Brief (Šainović), para. 157, referring to Trial Judgement, vol. 3, paras 339, 342, 359.

³¹⁸⁵ Prosecution's Response Brief (Šainović), paras 33, 40. See also *ibid.*, paras 34, 36-39, referring to Trial Judgement, vol. 1, paras 1112, 1117, 1183, *ibid.*, vol. 3, paras 339, 341, 348, 356-357, 359, Exh. P2589, Exh. P1989, Exh. P1996, Exh. P2166, pp. 13-15, Exh. P1281, p. 2, Exh. P2600, para. 80, Ljubinko Cvetić, 7 Dec 2006, T. 8085.

³¹⁸⁶ Prosecution's Response Brief (Šainović), para. 151. See also Prosecution's Response Brief (Šainović), para. 35, citing Trial Judgement, vol. 3, paras 380-381, 401.

³¹⁸⁷ Prosecution's Response Brief (Šainović), paras 149-150.

968. In reply, Šainović submits that the Prosecution's reference to the totality of the evidence in showing that he was a political coordinator is misplaced.³¹⁸⁸

(ii) Analysis

969. The Appeals Chamber recalls that the Trial Chamber's holding that Šainović was "the political co-ordinator of the forces in Kosovo",³¹⁸⁹ was merely a shorthand label for referring to its findings on the evidence that Šainović was "one of the leading members of the Joint Command", who "possessed extensive *de facto* powers over both the VJ and the MUP forces in Kosovo" and "was able to make proposals, give suggestions, and issue instructions to both Pavković and Lukić", and "was the crucial link between Milošević, who was in Belgrade, and the VJ and MUP units that were operating in Kosovo."³¹⁹⁰ Consequently, Šainović's submission that the Trial Chamber failed to explain "the nature and substance of political coordination"³¹⁹¹ is unsubstantiated. In addition, the plain reading of the Trial Chamber's conclusion on Šainović's political coordination clearly shows that it concerned Šainović's activities both in 1998 and 1999.³¹⁹²

970. In finding that Šainović was the political coordinator of the VJ and MUP forces in Kosovo in 1998 and 1999, the Trial Chamber relied on evidence showing Šainović's multiple interactions with VJ and MUP representatives. It specifically referred to instructions conveyed by Šainović to VJ and MUP members during more than 20 Joint Command meetings held from July through October 1998.³¹⁹³ It also noted that, as Chairman of the Commission for Cooperation with the KVM in late 1998 and early 1999, Šainović was issuing specific tasks to MUP and VJ representatives,³¹⁹⁴ and instructed Lukić and Pavković to inform him of important incidents even before informing their own superiors.³¹⁹⁵ The Trial Chamber also considered that during the MUP meeting of 4 April 1999, Šainović issued directives with respect to the use of the MUP forces in Kosovo³¹⁹⁶

³¹⁸⁸ Šainović's Reply Brief, paras 9-10, 41, 44.

³¹⁸⁹ Trial Judgement, vol. 3, para. 462.

³¹⁹⁰ See *supra*, para. 216.

³¹⁹¹ See Šainović's Appeal Brief, para. 17.

³¹⁹² See Trial Judgement, vol. 3, para. 462.

³¹⁹³ See Trial Judgement, vol. 3, paras 310-314, referring to Exh. P1468, pp. 7-8, 11, 16, 27, 34, 47, 50, 55-56, 78, 85, 115, 123-129, 132, 135-136, 141-142, 145, 148, 152-153, 156, 164, Exh. IC199, p. 8. See also *supra*, sub-section VII.D.2.(b).

³¹⁹⁴ Trial Judgement, vol. 3, para. 378, referring to Dušan Lončar, 1 Dec 2006, T. 7691-7692, Exh. P2521, paras 30, 67. See also Trial Judgement, vol. 3, paras 389-400. For example, the Trial Chamber found that: (i) Šainović once told Stojiljković that patrols should be increased on a dangerous road and that "Stojiljković complied with this direction" (*ibid.*, vol. 3, para. 378); (ii) when Ciaglini complained to Lončar on 24 December 1998 about the lack of information given to the KVM regarding troop movements, Lončar said that while he spoke with Pavkovic and this would be fixed, it still had to be confirmed at a later meeting with Šainović, Walker, and the MUP commander (*ibid.*, vol. 3, para. 392); and (iii) in early January 1999, Šainović was responsible for allowing the KVM to visit detained KLA men who were being held in the military prison in Niš and was very closely involved in arranging the release of the same prisoners (*ibid.*, vol. 3, paras 393-394).

³¹⁹⁵ Trial Judgement, vol. 3, para. 373, referring to Dušan Lončar, 1 Dec 2006, T. 7652-7654. See also *supra*, para. 905.

³¹⁹⁶ Trial Judgement, vol. 3, para. 341. See also *supra*, sub-section VII.D.2.(f)(i).

and at the MUP Staff meeting of 7 May 1999, in addition to setting out the main objectives and tasks in “defending the country from the aggressor” and the “struggle against terrorism”, Šainović instructed that after the “Operation *Jezerce*” “all detachments of PJP will return to their Secretariats and, in co-operation with the VJ, work on destroying the remaining terrorist groups.”³¹⁹⁷ Further, the Trial Chamber considered that on 17 May 1999 Šainović attended a meeting with, *inter alios*, Milošević, Ojdanić, and Pavković, at which he: (i) made the commitment to check whether volunteer groups were present in the “Kosovo Polje centre”; (ii) stated that people were paying large sums of money in order to obtain VJ or MUP uniforms and were entering Kosovo illegally in order to loot; and (iii) agreed with the proposal of having a neutral body to investigate the allegations of crimes made at the meeting.³¹⁹⁸ Finally, the Trial Chamber also considered that at the 1 June 1999 Joint Command meeting, Šainović instructed Lazarević, the Priština Corps Commander, and Lukić, the Head of the MUP Staff, to finalise the ongoing operations as soon as possible.³¹⁹⁹ In view of this evidence, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that the Trial Chamber’s error in relying on Šainović’s presence at the meeting of 13 April 1999 with Pešić³²⁰⁰ has no impact on its conclusion that in 1999 Šainović continued to liaise between the VJ and the MUP on the one hand and Milošević on the other.

971. The Trial Chamber also relied on Šainović’s attendance at the meetings of 29 October, 5 November, and 27 November 1998 with other senior politicians and VJ and MUP officers.³²⁰¹ While the evidence suggests that Šainović had a minimal role in these meetings, it was reasonable for the Trial Chamber to find that his presence thereat was consistent with its finding that he was the political coordinator of the VJ and the MUP at that time.

972. Further, Šainović’s assertion that the Trial Chamber’s conclusion that he relayed Milošević’s orders was based solely on the reference he made to the *Politika* article during the MUP Staff meeting on 7 May 1999 ignores the totality of the evidence considered and relied upon by the Trial Chamber. In particular, as recalled above, the Trial Chamber found that Šainović conveyed instructions during the Joint Command meetings in 1998 and 1999³²⁰² and was directing the MUP forces during the meetings on 4 April and 7 May 1999.³²⁰³ In light of the Trial Chamber’s further findings that Šainović had a close relationship with Milošević who was also the source of

³¹⁹⁷ Trial Judgement, vol. 3, para. 346, citing Exh. P1996, p. 2. See also *supra*, sub-section VII.D.2.(f)(iii).

³¹⁹⁸ Trial Judgement, vol. 3, para. 351, referring to Aleksandar Vasiljević, Exh. P2600, paras 69-70, Geza Farkaš, 25 Sep 2007, T. 16297, 16329-16330, Branko Gajić, 7 Sep 2007, T. 15290-15291. See also *supra*, sub-section VII.D.2.(f)(iv).

³¹⁹⁹ Trial Judgement, vol. 3, para. 356, referring to Momir Stojanović, 7 Dec 2007, T. 19772–19776, 19802–19803, Vladimir Lazarević, 12 Nov 2007, T. 18122–18124. See also *supra*, sub-section VII.D.2.(g).

³²⁰⁰ See *supra*, sub-section VII.D.2.(f)(ii).

³²⁰¹ Trial Judgement, vol. 3, para. 335. See also *ibid.*, vol. 3, paras 332-334.

³²⁰² Trial Judgement, vol. 3, para. 331. See also *supra*, sub-sections VII.D.2.(b) and VII.D.2.(g).

³²⁰³ Trial Judgement, vol. 3, para. 341. See also *supra*, sub-sections VII.D.2.(f)(i) and VII.D.2.(f)(iii).

his authority³²⁰⁴ and that both the VJ and the MUP had to get approval from Milošević,³²⁰⁵ the Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that a reasonable trier of fact could have concluded that Šainović's role was pivotal in both relaying Milošević's approval and issuing instructions. Moreover, the Appeals Chamber recalls the Trial Chamber's finding that the Joint Command was part of a coordination system by which the VJ and the MUP were able to work together in Kosovo.³²⁰⁶ Consequently, the Appeals Chamber finds no contradiction between Šainović's role as a leading member of the Joint Command and thereby the political coordinator of the VJ and MUP forces in Kosovo and the Trial Chamber's finding that the VJ and MUP chains of command remained intact. As Šainović's arguments concerning the reasons behind the establishment of the Joint Command have been addressed and dismissed,³²⁰⁷ the Appeals Chamber will not entertain Šainović's related challenges as to whether Milošević could have secured the implementation of his orders without Šainović's involvement in his capacity of a leading member of the Joint Command.

973. As to Šainović's submission that the Trial Chamber erred in finding that he was the "crucial link" between Milošević and the VJ and MUP units operating in Kosovo, the Appeals Chamber notes that it was not the number of meetings that took place between Milošević and Šainović, but the nature of Šainović's activities in Kosovo and the source of his authority which were determinative for the Trial Chamber's finding. The Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Šainović's unsubstantiated submission that no evidence supports the Trial Chamber's finding ignores the extensive evidence considered by the Trial Chamber with respect to both 1998 and 1999.

974. The Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Šainović has failed to show an error in the Trial Chamber's finding that the only reasonable conclusion from the evidence of his interactions with VJ and MUP officials was that he had extensive powers over the VJ and the MUP and acted as the political coordinator of these forces in both 1998 and 1999. While the Trial Chamber acknowledged that "the direct evidence of [Šainović's] activity in influencing and coordinating the activities of the forces of the FRY and Serbia in 1999 is not as extensive as that relating to 1998", it was persuaded that the evidence indicated that his authority and influence remained undiminished in 1999.³²⁰⁸ The Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that, contrary to Šainović's assertion, nothing in the Trial Chamber's reasoning suggests that it misapplied the standard of proof or that it reached its conclusion on the basis of an "analogy" with

³²⁰⁴ See *supra*, sub-section VII.D.2.(a).

³²⁰⁵ Trial Judgement, vol. 3, para. 331. See also Trial Judgement, vol. 1, paras 467, 482, 682, 1020.

³²⁰⁶ See *supra*, sub-section VII.C. (in particular, sub-sections VII.C.1.(d), VII.C.2.(c)(viii), and VII.C.3.(c)(ix)).

³²⁰⁷ See *supra*, sub-section VII.C.1.(d).

Šainović's actions in 1998. Rather, the Trial Chamber acknowledged the differences in the evidence, emphasising that the evidence of Šainović's activity in 1999 showed his continuous involvement with the province and interaction with VJ and MUP officials. Šainović's argument in this regard is therefore dismissed.

975. Finally, the Trial Chamber found that Šainović was the political coordinator of both civilian and military activities in Kosovo.³²⁰⁹ Read in context, the Appeals Chamber understands the reference to civilian activities to be in relation to Šainović's coordination of the MUP forces in the province. The Appeals Chamber recalls in this respect that the Trial Chamber extensively discussed evidence showing Šainović's *de facto* authority over the MUP and VJ forces in Kosovo and that Šainović's conviction rests on the finding that he influenced and coordinated the activities of those forces.³²¹⁰ Consequently, Šainović's argument that the Trial Chamber failed to specify the civilian activities which he coordinated is dismissed.

976. In light of the foregoing, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Šainović has not demonstrated an error in the Trial Chamber's finding that he was the political coordinator of the VJ and MUP forces in Kosovo both in 1998 and 1999. The Appeals Chamber therefore dismisses sub-grounds 1(1), 2(2), and 2(4) of Šainović's appeal.

(j) Alleged error of law in the evaluation of evidence regarding Šainović's authority

977. Šainović claims that the Trial Chamber erred in law "by making a selection of witnesses and testimonies in an inadmissible manner, by disregarding the procedural principle of direct presentation of evidence, by drawing conclusions based on assessment of probability rather than beyond a reasonable doubt."³²¹¹ In response, the Prosecution submits that the Trial Chamber correctly applied the standard of proof.³²¹²

978. The Appeals Chamber notes that the Trial Chamber correctly articulated the standard of proof beyond reasonable doubt.³²¹³ Šainović's general and unsubstantiated allegations that the Trial Chamber misapplied the standard of proof "by drawing conclusions based on assessment of

³²⁰⁸ Trial Judgement, vol. 3, para. 467.

³²⁰⁹ Trial Judgement, vol. 3, para. 427.

³²¹⁰ See Trial Judgement, vol. 3, para. 467.

³²¹¹ Šainović's Appeal Brief, para. 302.

³²¹² Prosecution's Response Brief (Šainović), para. 165. See also *ibid.*, paras 159-164.

³²¹³ Trial Judgement, vol. 1, paras 62-63.

probability”³²¹⁴ are insufficient to show an error. The Appeals Chamber therefore dismisses Šainović’s argument.³²¹⁵

(k) Alleged errors in finding that Šainović’s contribution to the common purpose was significant

979. Šainović challenges the Trial Chamber’s conclusion that he made a significant contribution to the common purpose of the JCE.³²¹⁶ He asserts that the Trial Chamber failed to explain how a political coordinator could contribute to the accomplishment of the JCE objective³²¹⁷ and that the conclusion that he was “the person Milošević used to orchestrate the events” is erroneous as it misinterprets the state organisation, suggesting that the state was “Milošević’s private property”.³²¹⁸ He claims that “the modality and extent of Milošević’s influence over the position and role of Šainović” should be interpreted in a context “which is typical of any state organization and carries no criminogenic implications whatsoever.”³²¹⁹ He further argues that there is nothing inherently illegal in holding confidential political conversations with state officials.³²²⁰ Šainović maintains that he acted within his powers stipulated by the FRY Constitution.³²²¹

980. Šainović also argues that he did not coordinate the VJ and MUP forces “especially not after 24 March 1999”, and that there is no evidence showing that his activities had any effect on the events on the ground.³²²² In particular, Šainović contends that the Trial Chamber erred in concluding, on the basis of a single meeting which took place close to the end of the war on 1 June 1999, that he had influence over the events in the field during the period the crimes were committed.³²²³

981. In response, the Prosecution submits that the Trial Chamber’s conclusion that Šainović made a significant contribution to the JCE was reasonable and supported by the totality of the evidence.³²²⁴ It argues that the finding that Šainović was the person Milošević used to orchestrate the events is accurate and “does not imply absence of state institutions”.³²²⁵ Further, the Prosecution claims that there is no requirement that all of Šainović’s activities in Kosovo were criminal, but

³²¹⁴ Šainović’s Appeal Brief, para. 302.

³²¹⁵ Šainović’s sub-grounds 2(5)-2(6), 2(8)-2(9) in part.

³²¹⁶ Šainović’s Notice of Appeal, para. 41; Šainović’s Appeal Brief, para. 274, referring to Trial Judgement, vol. 3, para. 467.

³²¹⁷ Šainović’s Appeal Brief, para. 17.

³²¹⁸ Šainović’s Appeal Brief, para. 275 (emphasis omitted), citing Trial Judgement, vol. 3, para. 467.

³²¹⁹ Šainović’s Appeal Brief, para. 275.

³²²⁰ Appeal Hearing, 11 Mar 2013, AT. 193-194.

³²²¹ Šainović’s Appeal Brief, para. 276; Appeal Hearing, 11 Mar 2013, AT. 195-196.

³²²² Šainović’s Appeal Brief, paras 221, 277-278, 296, 308. See also Šainović’s Reply Brief, para. 40; Appeal Hearing, 11 Mar 2013, AT. 180, 196-198, 269-270.

³²²³ Šainović’s Appeal Brief, paras 243, 292.

³²²⁴ Prosecution’s Response Brief (Šainović), para. 141.

³²²⁵ Prosecution’s Response Brief (Šainović), para. 142.

rather that they furthered the execution of the common purpose.³²²⁶ The Prosecution points out that Šainović contributed to the JCE by coordinating the forces in Kosovo, conveying Milošević's instructions, and providing his own instructions, including in 1999 when he exerted influence over the VJ and the MUP through his involvement with the Commission for Cooperation with the KVM and through participation in MUP and Joint Command meetings.³²²⁷

982. With respect to Šainović's submission that his actions had no effect on the events, the Prosecution refers to the Trial Chamber's findings that Šainović had extensive *de facto* authority over the VJ and MUP forces in Kosovo, serving as the "crucial link" with Milošević, and coordinated the activities of these forces, including through 1999.³²²⁸ The Prosecution also responds that the Trial Chamber considered evidence showing that VJ operations were planned at the request of Šainović and Minić, and that Šainović was known as the man "directly responsible for events in Kosovo."³²²⁹ The Prosecution maintains that the conclusion concerning Šainović's leadership role was based on the totality of the evidence and was not limited, as suggested by Šainović, to the 1 June 1999 meeting.³²³⁰

983. In relation to Šainović's contribution to the common purpose, the Trial Chamber observed that Šainović's political coordination of the forces in Kosovo, through the provision of suggestions and instructions, was in pursuit of the ultimate goal of retaining control in Kosovo.³²³¹ In view of this reasoning, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that the Trial Chamber adequately explained the nature of Šainović's contribution to the common purpose as a political coordinator of the VJ and MUP forces in Kosovo, which were used by the members of the JCE to carry out the crimes.³²³² Consequently, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds no merit in Šainović's contention that the Trial Chamber failed to explain the nature of his contribution to the common purpose.

984. The Appeals Chamber also finds no merit in Šainović's submission that the Trial Chamber misinterpreted the state organisation. It is clear from the context that the Trial Chamber's reference to Šainović as "the person Milošević used to orchestrate the events in Kosovo"³²³³ is merely a summary of the Trial Chamber's prior findings that Šainović was one of Milošević's closest associates³²³⁴ and his representative in Kosovo, relaying his instructions.³²³⁵ Moreover, in reaching

³²²⁶ Prosecution's Response Brief (Šainović), para. 143, citing *Krajišnik* Appeal Judgement, para. 218.

³²²⁷ Prosecution's Response Brief (Šainović), paras 144-146.

³²²⁸ Prosecution's Response Brief (Šainović), para. 147, referring to Trial Judgement, vol. 3, paras 462, 467.

³²²⁹ Prosecution's Response Brief (Šainović), para. 147, referring to Trial Judgement, vol. 1, para. 1088.

³²³⁰ Prosecution's Response Brief (Šainović), paras 153-154.

³²³¹ Trial Judgement, vol. 3, para. 467.

³²³² Trial Judgement, vol. 3, paras 467-468.

³²³³ Trial Judgement, vol. 3, para. 467.

³²³⁴ Trial Judgement, vol. 3, para. 409.

its findings the Trial Chamber was mindful that “civilian involvement in meetings with military and police leaders during a time of war or emergency is a generally appropriate activity”.³²³⁶

985. As to Šainović’s assertion that he was acting within his constitutionally determined powers, the Appeals Chamber recalls that while JCE liability requires that the accused has made a significant contribution to the commission of the crime, there is no requirement for such contribution to be criminal *per se*. The Appeals Chamber has repeatedly held that the contribution “need not involve commission of a specific crime” under the Statute.³²³⁷ Šainović’s submission is thus dismissed.

986. The Appeals Chamber notes that Šainović’s argument that he did not coordinate the VJ and MUP forces, particularly not after 24 March 1999 when the NATO air campaign commenced, was considered at trial.³²³⁸ However, the Trial Chamber took into account Šainović’s participation in a number of meetings, including the MUP Staff meetings on 4 April and 7 May 1999,³²³⁹ and the Joint Command meeting of 1 June 1999.³²⁴⁰ Apart from repeating his trial submissions, Šainović has failed to address the Trial Chamber’s reasoning or to show any error. His argument is therefore dismissed.

987. With respect to Šainović’s argument that none of his statements had any effect on the events in Kosovo, especially after 24 March 1999, the Appeals Chamber recalls that:

the contribution to the JCE “may take the form of assistance in, or contribution to, the execution of the common purpose,” and that it is not required that the accused physically committed or participated in the *actus reus* of the perpetrated crime. It is sufficient that the accused “perform acts that in some way are directed to the furthering” of the JCE in the sense that he significantly contributes to the commission of the crimes involved in the JCE.³²⁴¹

988. The Trial Chamber found that Šainović’s “purpose was to co-ordinate the forces in Kosovo, convey Milošević’s instructions for the activities of the various actors there, and provide his own suggestions and instructions to these actors”.³²⁴² The Trial Chamber further found that there was “a clearly discernible pattern” of crimes committed in Kosovo by the FRY and Serbian forces and that

³²³⁵ Trial Judgement, vol. 3, paras 291-299.

³²³⁶ Trial Judgement, vol. 1, para. 1054.

³²³⁷ *Krajišnik* Appeal Judgement, para. 695, citing *Brđanin* Appeal Judgement, para. 431; *Tadić* Appeal Judgement, para. 227.

³²³⁸ Trial Judgement, vol. 3, para. 336. See also *ibid.*, vol. 3, para. 401.

³²³⁹ Trial Judgement, vol. 3, paras 341, 346-348.

³²⁴⁰ Trial Judgement, vol. 3, paras 355-359. Contrary to Šainović’s submission, the Trial Chamber did not rely only on his participation in the 1 June 1999 Joint Command meeting. Rather, The Trial Chamber inferred from the nature of his participation in that meeting that his influence remained undiminished during the Indictment period (see Trial Judgement, vol. 3, paras 359, 467).

³²⁴¹ *Krajišnik* Appeal Judgement, para. 695, citing *Brđanin* Appeal Judgement, para. 424, *Tadić* Appeal Judgement, para. 229. See also *Brđanin* Appeal Judgement, para. 427; *Vasiljević* Appeal Judgement, para. 100; *Kvočka et al.* Appeal Judgement, paras 99, 263; *Krnjelac* Appeal Judgement, paras 31, 81; *Tadić* Appeal Judgement, para. 227.

³²⁴² Trial Judgement, vol. 3, para. 467.

the crimes “were not committed in a random and un-orchestrated manner, but rather according to a common purpose.”³²⁴³ The Appeals Chamber has already upheld elsewhere in this Judgement the Trial Chamber’s findings that Šainović had extensive *de facto* authority over the VJ and MUP forces in Kosovo both in 1998 and 1999 and that he was the link between Milošević and those forces.³²⁴⁴ Considering the Trial Chamber’s finding that JCE members used VJ and MUP forces under their control to carry out the crimes charged,³²⁴⁵ a reasonable trier of fact could have concluded that Šainović, as the political coordinator of those forces, including through his leading role in the Joint Command in 1999,³²⁴⁶ furthered the execution of the common purpose. The Appeals Chamber recalls that not every type of conduct would amount to a significant contribution to the common purpose, thus giving rise to JCE liability.³²⁴⁷ However, Šainović has failed to demonstrate that, in the circumstances of this case, no reasonable trier of fact could have come to the conclusion that his role in coordinating the MUP and VJ activities in Kosovo was significant enough to give rise to his criminal responsibility.³²⁴⁸

989. For the reasons set out above, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Šainović has not demonstrated any error in the Trial Chamber’s findings that his contribution to the common purpose was significant. The Appeals Chamber dismisses sub-ground 2(1) of Šainović’s appeal in relevant part.

3. Alleged errors in finding that Šainović had the intent to forcibly displace part of the Kosovo Albanian population

990. The Trial Chamber found that:

[t]he information received by Šainović before and during the NATO air campaign is important evidence for the determination of his responsibility, because knowledge of the commission of crimes by individuals associated with an accused, combined with continuing participation in joint operations with those individuals, can be conclusive as to an accused’s intent.³²⁴⁹

³²⁴³ Trial Judgement, vol. 3, para. 46.

³²⁴⁴ See *supra*, sub-sections VII.D.2.(a)-VII.D.2.(h). In particular, the Trial Chamber found that Šainović played a leading role in the Joint Command, which had a role in coordinating the VJ and the MUP forces in Kosovo (Trial Judgement, vol. 1, paras 1110-1111, 1123-1126, 1151; *ibid.*, vol. 2, paras 251, 253, 296, 302, 484, 527, 570, 594-596, 637, 646-647, 671, 673, 699, 751, 897, and references therein (in particular, Exh. P2015, Exh. P1969, Exh. P3049, Exh. P2031, Exh. P1968, Exh. P1966, Exh. P1975, Exh. P1971); Trial Judgement, vol. 3, paras 359, 462. See also *supra*, sub-section VII.C.

³²⁴⁵ Trial Judgement, vol. 3, para. 468.

³²⁴⁶ See Trial Judgement, vol. 3, para. 359, where the Trial Chamber found that the 1 June 1999 meeting had the hallmarks of the Joint Command meetings in 1998. See also *ibid.*, vol. 3, para. 300.

³²⁴⁷ See *Brdanin* Appeal Judgement, para. 427.

³²⁴⁸ Judge Tuzmukhamedov dissents on this entire paragraph.

³²⁴⁹ Trial Judgement, vol. 3, para. 463.

991. The Trial Chamber further found that Šainović was well aware of displacements and crimes taking place in Kosovo in 1998³²⁵⁰ and continued to acquire information on the commission of crimes, including forcible displacement, throughout 1999.³²⁵¹ It concluded that the only reasonable inference on the evidence was that “Šainović had the intent to forcibly displace part of the Kosovo Albanian population, both within and without Kosovo, and thereby change the ethnic balance in the province to ensure continued control by the FRY and Serbian authorities over it.”³²⁵²

992. Šainović asserts that the Trial Chamber erred in finding that he shared the intent to forcibly displace part of the Kosovo Albanian population.³²⁵³ In particular, Šainović claims that the Trial Chamber failed to apply the correct legal standard in determining his *mens rea*³²⁵⁴ and erred in finding that he: (i) was of the view that the Kosovo Albanian population did not belong in Kosovo;³²⁵⁵ (ii) knew of the commission of crimes by VJ and MUP forces in 1998 and during the NATO campaign in 1999;³²⁵⁶ and (iii) made little effort to ensure that the crimes were prevented or dealt with.³²⁵⁷

(a) Alleged error of law with respect to Šainović’s *mens rea*

993. Šainović argues that the Trial Chamber failed to establish that he had the requisite *mens rea* for the crimes committed by the “direct/principal and intermediary perpetrators” and instead applied a “strict liability test”.³²⁵⁸ He contends that in the absence of direct evidence with regard to his state of mind, the Trial Chamber could not have relied on his knowledge of crimes and on his failure to prevent or punish them because on the basis of such evidence “an entire palette of other conclusions” was available to the Trial Chamber.³²⁵⁹

994. The Prosecution responds that Šainović’s arguments should be summarily dismissed as he fails to identify the challenged legal or factual findings and fails to offer any alternative inference that was available on the evidence.³²⁶⁰ The Prosecution maintains that it was sufficient that Šainović shared with the other JCE members the intent that the crimes forming part of the common criminal purpose be carried out. Thus, the Prosecution argues, the Trial Chamber was not required to make

³²⁵⁰ Trial Judgement, vol. 3, para. 463.

³²⁵¹ Trial Judgement, vol. 3, para. 464.

³²⁵² Trial Judgement, vol. 3, para. 466.

³²⁵³ See Šainović’s Appeal Brief, para. 352, referring to Trial Judgement, vol. 3, para. 466. See also Šainović’s sub-grounds of appeal 3(1)-3(6).

³²⁵⁴ Šainović’s Appeal Brief, paras 382-384.

³²⁵⁵ Šainović’s Appeal Brief, paras 352-367.

³²⁵⁶ Šainović’s Appeal Brief, paras 368-381, 385, 387-391.

³²⁵⁷ Šainović’s Appeal Brief, paras 392-394.

³²⁵⁸ Šainović’s Appeal Brief, paras 382, 384; Šainović’s Notice of Appeal, para. 62.

³²⁵⁹ Šainović’s Appeal Brief, para. 383.

³²⁶⁰ Prosecution’s Response Brief (Šainović), paras 187-188.

specific findings on Šainović's *mens rea* with respect to every act of forcible transfer and deportation.³²⁶¹

995. To the extent that Šainović argues that the Trial Chamber erroneously relied on circumstantial evidence in determining his *mens rea*, the Appeals Chamber finds Šainović's arguments to be without merit. The Appeals Chamber recalls that intent can be proved through inference from circumstantial evidence.³²⁶² When inferring intent from circumstantial evidence, it must be the only reasonable inference based on the evidence.³²⁶³ Šainović has failed to demonstrate that the Trial Chamber erred in finding that the only reasonable conclusion, based on this evidence, was that he shared the intent to forcibly displace part of the Kosovo Albanian population. His broad submission that "an entire palette of other conclusions" was available on the evidence is plainly insufficient to discharge his burden on appeal.

996. Further, Šainović has failed to substantiate his assertion that the Trial Chamber applied a "strict liability" standard. The Trial Chamber correctly articulated the requisite *mens rea* for the first category of JCE, explaining that it had to be proved "that the accused shared with the other joint criminal enterprise members the intent to commit the crime or underlying offence."³²⁶⁴ It further concluded that the common purpose of the JCE was to ensure continued control by the FRY and Serbian authorities over Kosovo and that this common purpose was to be achieved by forcibly displacing the Kosovo Albanian population both within and outside Kosovo.³²⁶⁵ The Trial Chamber then inferred, based on circumstantial evidence, that Šainović shared the intent to forcibly displace part of the Kosovo Albanian population.³²⁶⁶ Šainović has failed to show that in doing so the Trial Chamber erred in the application of the legal standard.

997. On the basis of the foregoing, the Appeals Chamber dismisses sub-ground 3(5) of Šainović's appeal.

(b) Šainović's state of mind in relation to Kosovo and Kosovo Albanians

998. The Trial Chamber found that Šainović was of the view that the Kosovo Albanian population did not belong in Kosovo.³²⁶⁷ In reaching this conclusion, the Trial Chamber relied on Michael Phillips' testimony that during one of their meetings in November 1998, Šainović stated

³²⁶¹ Prosecution's Response Brief (Šainović), para. 192. See also *ibid.*, paras 189-191.

³²⁶² *Strugar* Appeal Judgement, para. 271, referring to *Galić* Appeal Judgement, fn. 707. See also *Kupreškić et al.* Appeal Judgement, para. 303; *Ntagerura et al.* Appeal Judgement, paras 304-306.

³²⁶³ *Kvočka et al.* Appeal Judgement, para. 237; *Krstić* Appeal Judgement, para. 41; *Stakić* Appeal Judgement, para. 219; *Vasiljević* Appeal Judgement, para. 120.

³²⁶⁴ Trial Judgement, vol. 1, para. 108.

³²⁶⁵ Trial Judgement, vol. 3, para. 95.

³²⁶⁶ Trial Judgement, vol. 3, para. 466.

that Kosovo was a Serbian homeland and the cradle of Serbian civilisation and that he felt that the Kosovo Albanian people had no desire to co-exist with the Serbs.³²⁶⁸

999. Šainović asserts that the Trial Chamber's finding that he was of the view that the Kosovo Albanian population did not belong in Kosovo was erroneous.³²⁶⁹ In support of his submission, Šainović refers to the evidence of Shaun Byrnes, Dušan Lončar, and Wolfgang Petritsch, and claims that the Trial Chamber misinterpreted the evidence of Phillips.³²⁷⁰

1000. In particular, Šainović relies on the evidence given by Byrnes and Petrisch that he was always cooperative and genuinely seeking to find a political solution, including at the Rambouillet conference.³²⁷¹ He claims that the Trial Chamber based its conclusion on one statement by Phillips disregarding the fact that the witness also testified that "Šainović was in favour of the co-existence of Serbs and Albanians in Kosovo, that he was in favour of a political solution, [...] hoped that such a solution was feasible and that an agreement had to be worked on."³²⁷² Šainović concludes that in light of the reliable evidence showing that he was in favour of a political solution and was seeking to resolve the Kosovo issue through negotiations, the Trial Chamber's conclusion that he had the intent to forcibly displace part of the Kosovo Albanian population was unreasonable.³²⁷³ In addition, Šainović argues that the Trial Chamber erred in law in attributing undue weight to the evidence of witnesses who did not have "direct insight into his state of mind".³²⁷⁴

1001. In response, the Prosecution submits that Šainović's arguments warrant summary dismissal.³²⁷⁵ The Prosecution contends that Šainović's cooperation with the international representatives prior to the NATO campaign was taken into consideration by the Trial Chamber,³²⁷⁶ and that none of the evidence cited by him demonstrates that he was involved "in finding a negotiated outcome once the JCE was being implemented."³²⁷⁷ The Prosecution also claims that the frequency of witness encounters with Šainović is not determinative as to the weight to be given to

³²⁶⁷ Trial Judgement, vol. 3, para. 438.

³²⁶⁸ Trial Judgement, vol. 3, para. 433, referring to Michael Phillips, 19 Mar 2007, T. 11840.

³²⁶⁹ Šainović's Appeal Brief, para. 352, referring to Trial Judgement, vol. 3, para. 438.

³²⁷⁰ Although Šainović also refers to the evidence given by Naumann, he does not appear to allege any error in the Trial Chamber's evaluation of this evidence (Šainović's Appeal Brief, para. 353).

³²⁷¹ Šainović's Appeal Brief, paras 354-356. See also *ibid.*, paras 357, 365, referring to Trial Judgement, vol. 3, paras 436-437, Momir Bulatović, 16 Aug 2007, T. 13808, Živadin Jovanović, 20 Aug 2007, T. 14070, Andreja Milosavljević, 23 Aug 2007, T. 14309, Duško Matković, 29 Aug 2007, T. 14600, Zoran Andelković, 30 Aug 2007, T. 14665, Exh. 2D323. See also Šainović's Reply Brief, paras 50, 52.

³²⁷² Šainović's Appeal Brief, para. 359, referring to Exh. 2D17, Exh. 2D20. See also Šainović's Appeal Brief, paras 358, 360-362, 364; Šainović's Reply Brief, paras 51-52.

³²⁷³ Šainović's Appeal Brief, paras 366-367; Appeal Hearing, 11 Mar 2013, AT. 203-207.

³²⁷⁴ Šainović's Appeal Brief, para. 363. See also Šainović's Notice of Appeal, paras 58, 61.

³²⁷⁵ Prosecution's Response Brief (Šainović), paras 193-196.

³²⁷⁶ Prosecution's Response Brief (Šainović), para. 197.

³²⁷⁷ Prosecution's Response Brief (Šainović), paras 198-199.

their evidence.³²⁷⁸ With respect to the evaluation of Phillips' testimony, the Prosecution submits that "the fact that Šainović might have appeared to support a political outcome at one time does not outweigh the fact that he said to Phillips that the Kosovo Albanian population did not belong in Kosovo."³²⁷⁹

1002. The Trial Chamber accepted Phillips' evidence that, during one of their meetings in November 1998, Šainović stated that ethnic Albanians did not belong in Kosovo, that Kosovo "was the Serbian homeland and the cradle of Serbian civilisation" and "belonged to the Serbian people and that the Albanian people had no desire to co-exist with them."³²⁸⁰ While the Trial Chamber did not explicitly refer to this evidence in its analysis of Šainović's *mens rea*,³²⁸¹ it noted that it had taken "all the relevant evidence into account" in reaching its finding. In these circumstances, the Appeals Chamber considers that this evidence was indeed taken into account by the Trial Chamber as part of the body of evidence relevant to the determination of Šainović's intent.³²⁸²

1003. With respect to Šainović's state of mind in relation to Kosovo and Kosovo Albanians, the Trial Chamber also explicitly considered Phillips' evidence that Šainović was sincere about trying to find a strategy for the co-existence of the Serbian and Kosovo Albanian population in Kosovo.³²⁸³ It also took into account: (i) the evidence of Byrnes that Šainović thought that the situation in Kosovo should be resolved by political means;³²⁸⁴ (ii) Petritsch's testimony that Šainović was ready to achieve an agreement by peaceful means on the basis of the October Agreements, at least up until the Račak/Reçak incident,³²⁸⁵ including that at the Rambouillet negotiations he listened and tried to provide answers to the demands made by the international community;³²⁸⁶ and (iii) Lončar's evidence that Šainović tried to form multi-ethnic police forces to protect villages and to improve the relationship with the Kosovo Albanians.³²⁸⁷ Moreover, in its finding on Šainović's intent, the Trial Chamber explicitly recalled its conclusion that Šainović was not obstructive at Rambouillet.³²⁸⁸

³²⁷⁸ Prosecution's Response Brief (Šainović), paras 200-201.

³²⁷⁹ Prosecution's Response Brief (Šainović), paras 202-204. See also *ibid.*, paras 205-208, citing Michael Phillips, 19 Mar 2007, T. 11887.

³²⁸⁰ Michael Phillips, 19 Mar 2007, T. 11840. See also Trial Judgement, vol. 3, para. 433.

³²⁸¹ Trial Judgement, vol. 3, paras 462-466.

³²⁸² Trial Judgement, vol. 3, para. 466.

³²⁸³ Trial Judgement, vol. 3, para. 433, referring to Michael Phillips, 19 Mar 2007, T. 11877-11879, 11886-11887, Exh. 2D17.

³²⁸⁴ Trial Judgement, vol. 3, para. 434, referring to Shaun Byrnes, 16 Apr 2007, T. 12188.

³²⁸⁵ Trial Judgement, vol. 3, para. 435, referring to Wolfgang Petritsch, 2 Mar 2007, T. 10947.

³²⁸⁶ Trial Judgement, vol. 3, para. 435, referring to Wolfgang Petritsch, 2 Mar 2007, T. 10945, Exh. P2792, p. 3. See also Trial Judgement, vol. 3, para. 437, referring to Wolfgang Petritsch, 2 Mar 2007, T. 10947, Exh. 2D15.

³²⁸⁷ Trial Judgement, vol. 3, para. 436, referring to Dušan Lončar, 30 Nov 2006, T. 7591, Exh. P2521, para. 76.

³²⁸⁸ Trial Judgement, vol. 3, para. 466. See also *ibid.*, vol. 3, para. 409.

1004. In view of the above, and in light of the fact that a trial chamber is not required to refer to every piece of evidence on the record,³²⁸⁹ the Appeals Chamber is not persuaded by Šainović's argument that the Trial Chamber ignored evidence indicating that he was in favour of resolving the situation in Kosovo through political means. To the extent that Šainović argues that the Trial Chamber erred in accepting Phillips' testimony that Šainović had stated that the Kosovo Albanian population did not belong in Kosovo, the Appeals Chamber finds no error. Moreover, absent any further mention in the Trial Judgement of Phillips' testimony with regard to Šainović's state of mind in relation to Kosovo and Kosovo Albanians, it is apparent that the Trial Chamber attributed minimal, if any, weight to that evidence. In this regard, the Appeals Chamber observes that the Trial Chamber's conclusion regarding Šainović's intent rested primarily on two bases: (i) his knowledge of the commission of crimes by individuals associated with him; and (ii) his continuing participation in joint operations with those individuals.³²⁹⁰ The Trial Chamber specifically recalled the evidence showing Šainović's knowledge of displacement and crimes committed in 1998 and 1999 by the VJ and MUP forces.³²⁹¹

1005. Further, the Trial Chamber explicitly acknowledged that Šainović was cooperative with the international representatives at least until the Podujevo/Podujeva and Račak/Reçak incidents in December 1998 and January 1999,³²⁹² respectively, as well as during the Rambouillet negotiations in February 1999.³²⁹³ However, such evidence is not sufficient to demonstrate an error in the Trial Chamber's finding that Šainović had the requisite intent at the time when the crimes encompassed by the common purpose were committed, notably between March and May 1999.³²⁹⁴ Thus, Šainović has failed to show that, notwithstanding his cooperation with the international representatives, the Trial Chamber's overall conclusion on his intent is one which no reasonable trier of fact could have reached beyond a reasonable doubt.

1006. Finally, Šainović has failed to substantiate his submission that the Trial Chamber erred in law in weighing the evidence before it. His general allegation is insufficient to show that the Trial Chamber abused its discretion in evaluating the credibility and reliability of the witnesses' testimony.

³²⁸⁹ The Appeals Chamber recalls that a "Trial Chamber does not have to refer to the testimony of every witness or every piece of evidence on the trial record; it is to be presumed that the Trial Chamber evaluated all the evidence before it." (*Krajišnik* Appeal Judgement, para. 141. See also *Kvočka et al.* Appeal Judgement, para. 23).

³²⁹⁰ Trial Judgement, vol. 3, para. 463. See also *ibid.*, vol. 3, paras 401, 409.

³²⁹¹ Trial Judgement, vol. 3, paras 463-464.

³²⁹² See Trial Judgement, vol. 1, paras 931-943, 946.

³²⁹³ Trial Judgement, vol. 3, para. 438.

³²⁹⁴ See Trial Judgement, vol. 3, paras 466, 475. The first crimes for which Šainović was convicted occurred on 24 March 1999, *inter alia*, in Priština/Prishtina town (see Trial Judgement, vol. 2, paras 885-888, 1240-1243) and Kottlina/Kotlina (see *ibid.*, vol. 2, paras 1067, 1253-1255). The last crime for which Šainović was convicted occurred on 25 May 1999 in Dubrava/Lisnaja (see *ibid.*, vol. 2, paras 1148, 1259-1261).

1007. Accordingly, Šainović has not demonstrated any error in the Trial Chamber’s finding on his state of mind in relation to Kosovo and Kosovo Albanians. The Appeals Chamber therefore dismisses sub-grounds 3(1) and 3(4) of Šainović’s appeal.

(c) Šainović’s knowledge of the commission of crimes in 1998

1008. The Trial Chamber found that Šainović was aware of displacements and crimes committed in Kosovo in 1998. In particular, it held that Šainović knew that the heavy-handed approach of the FRY and Serbian forces resulted in the displacement of over 200,000 people and that “he would have been well able to predict the repetition of this situation” in 1999.³²⁹⁵

(i) Submissions of the parties

1009. Šainović submits that the Trial Chamber erred in law by impermissibly relying on its findings pertaining to 1998 to establish the commission of crimes in 1999.³²⁹⁶ He argues that the appearance of refugees and the crime of forcible displacement have no elements in common, and that therefore the movement of refugees in 1998 cannot serve as an indication of the forcible displacement which occurred the following year or, indeed, of his knowledge thereof.³²⁹⁷ In this respect, Šainović claims that his *mens rea* was established “exclusively by analogy”.³²⁹⁸ Šainović also challenges the Trial Chamber’s findings concerning the events in 1998, in which it found excessive and indiscriminate force was used by the VJ and the MUP. He avers that such events only amounted to “reminiscences of a conflict which do not contain elements of crime”.³²⁹⁹ According to Šainović, not only was there no evidence that either deportation or forcible transfer was committed in 1998, but the state authorities assisted the return of refugees.³³⁰⁰ He adds that the Trial Chamber erroneously relied upon the events in 1998, which it designated “crimes”, in finding his knowledge of crimes and consequently his *mens rea*.³³⁰¹ He further claims that the events from 1998 “bear no resemblance to the events of 1999 either by their major characteristics, the manner of their

³²⁹⁵ Trial Judgement, vol. 3, paras 456, 463.

³²⁹⁶ Appeal Hearing, 11 Mar 2013, AT. 199-200. See also Šainović’s Appeal Brief, para. 377.

³²⁹⁷ Šainović’s Appeal Brief, para. 370, referring to Trial Judgement, vol. 3, paras 442, 463. See also Šainović’s Appeal Brief, para. 385; Šainović’s Notice of Appeal, para. 59; Appeal Hearing, 11 Mar 2013, AT. 201-203.

³²⁹⁸ Appeal Hearing, 11 Mar 2013, AT. 200-201. Šainović adds that he did not have the intent for the commission of any crime in 1998 (Appeal Hearing, 11 Mar 2013, AT. 203).

³²⁹⁹ Šainović’s Appeal Brief, para. 373, referring to Trial Judgement, vol. 3, para. 447. See also Šainović’s Appeal Brief, paras 374, 498, referring to Trial Judgement, vol. 1, paras 899-903. Šainović also argues that the evidence of the events in 1998, relied upon by the Trial Chamber, consists mainly of hearsay and the impression of persons who passed through the concerned areas after the events, which shows that the Trial Chamber erroneously applied a probability standard rather than the standard of proof beyond reasonable doubt (Šainović’s Appeal Brief, paras 492-493, 499). More specifically, Šainović argues that the Trial Chamber erred in its assessment of evidence when it found that the VJ and the MUP used excessive and indiscriminate force in villages in western Kosovo, Mališevo/Malisheva, Drenica, and Gornje Obrinje/Abria e Epërme (Šainović’s Appeal Brief, paras 372, 374, 494-497; Šainović’s Reply Brief, para. 53).

³³⁰⁰ Appeal Hearing, 11 Mar 2013, AT. 202-203.

³³⁰¹ Šainović’s Appeal Brief, paras 375-377, 492-493.

execution, the scale or circumstances in which the events took place.”³³⁰² Thus, he argues, awareness of crimes committed in 1998 cannot serve to show the “predictability of crimes [committed] in 1999 which differ in all important components.”³³⁰³

1010. Šainović also challenges the Trial Chamber’s conclusion that on the basis of the excessive and disproportionate force used by the FRY and Serbian forces in 1998, which resulted in the displacement of over 200,000 civilians, he would have been able to predict the reoccurrence of this situation in 1999.³³⁰⁴ Šainović points to the Trial Chamber’s prior finding that the specific reasons for the movement of people may have varied and included the continuing combat operations between the KLA and the FRY and Serbian forces.³³⁰⁵

1011. In response, the Prosecution submits that the Trial Chamber reasonably found that Šainović was aware that the excessive and indiscriminate force used by the FRY and Serbian forces in 1998 caused the displacement of over 200,000 civilians and that these forces committed crimes against civilians.³³⁰⁶ The Prosecution contends that Šainović’s knowledge came from multiple sources, including: (i) the time he spent in Kosovo during the second half of 1998;³³⁰⁷ (ii) “FRY/Serbian information, and from repeated and concordant reporting of crimes”;³³⁰⁸ (iii) discussions held during at least 24 Joint Command meetings;³³⁰⁹ (iv) reports received in his capacity as Chairman of the Commission for Cooperation with the KVM;³³¹⁰ and (v) information received from international interlocutors on the use of excessive and disproportionate force by the FRY and Serbian forces.³³¹¹

1012. The Prosecution further argues that, to infer Šainović’s *mens rea*, the Trial Chamber reasonably relied on Šainović’s knowledge of the massive displacement of civilians caused by the excessive and indiscriminate use of force in 1998, among other factors, as it “served as a clear warning that a similar use of force would lead to the same outcome.”³³¹² The Prosecution argues

³³⁰² Šainović’s Appeal Brief, para. 375.

³³⁰³ Šainović’s Appeal Brief, para. 376.

³³⁰⁴ Šainović’s Appeal Brief, para. 371, referring to Trial Judgement, vol. 3, para. 456.

³³⁰⁵ Šainović’s Appeal Brief, para. 371, referring to Trial Judgement, vol. 1, para. 919.

³³⁰⁶ Prosecution’s Response Brief (Šainović), para. 209, referring to Trial Judgement, vol. 3, paras 456, 463-464. The Prosecution also avers that no error has been shown in the Trial Chamber’s conclusions that the FRY and Serbian forces used excessive and indiscriminate force in certain combat operations in Kosovo in 1998 (Prosecution’s Response Brief (Šainović), paras 214-216, 344-350). According to the Prosecution, the Trial Chamber correctly applied the “beyond reasonable doubt” standard and that by insisting that it applied a “probability” standard, Šainović incorrectly suggests that only direct eye-witness testimony can support a conviction (Prosecution’s Response Brief (Šainović), paras 342-343).

³³⁰⁷ Prosecution’s Response Brief (Šainović), para. 209.

³³⁰⁸ Prosecution’s Response Brief (Šainović), paras 209, 220.

³³⁰⁹ Prosecution’s Response Brief (Šainović), paras 210, 218.

³³¹⁰ Prosecution’s Response Brief (Šainović), paras 210, 219.

³³¹¹ Prosecution’s Response Brief (Šainović), paras 211-212, 221.

³³¹² Prosecution’s Response Brief (Šainović), paras 213, 222-223; Appeal Hearing, 11 Marh 2013, AT. 260. See also *ibid.*, AT. 259, arguing that the Trial Chamber did not find that Šainović had the shared intent for JCE liability before the common purpose of the JCE came into existence.

that the fact that the crimes in 1998 were committed “on a lower and less systematic scale” than those in 1999 has no impact on “Šainović’s knowledge of the continuing risk of crimes.”³³¹³ It maintains that according to the Trial Chamber, the use of such force was the main cause of the displacement in 1998 and not legitimate combat activity alone.³³¹⁴

1013. In reply, Šainović claims that the proposition “that every crime is a warning of other crimes is unsustainable.”³³¹⁵

(ii) Analysis

1014. The Appeals Chamber is concerned that, in relying on Šainović’s knowledge of events which occurred in 1998, the Trial Chamber used language suggesting that it might have erred in law in relation to the *mens rea* standard for JCE I. In particular, the Trial Chamber’s reference to Šainović’s ability “to predict” the situation in 1999³³¹⁶ resembles the foreseeability standard embedded in the *mens rea* for JCE III.³³¹⁷ Pursuant to JCE I, the accused must share the intent for the commission of the crimes alleged in the Indictment and not merely foresee their occurrence.³³¹⁸ In assessing whether the Trial Chamber indeed applied an erroneous *mens rea* standard, the Appeals Chamber will consider the broader context of the Trial Chamber’s findings.

1015. The Appeals Chamber observes that, in reaching its conclusion on Šainović’s *mens rea* under JCE I, the Trial Chamber clearly required that Šainović had knowledge of, as opposed to ability to foresee, the commission of crimes and shared the intent for their commission with the other members of the JCE. In particular, the Trial Chamber found that Šainović was well aware of displacements and crimes taking place in Kosovo in 1998³³¹⁹ and continued to acquire information on the commission of crimes, including forcible displacement, throughout 1999.³³²⁰ It concluded that the only reasonable inference from the evidence was that “Šainović had the intent to forcibly displace part of the Kosovo Albanian population, both within and without Kosovo, and thereby change the ethnic balance in the province to ensure continued control by the FRY and Serbian authorities over it.”³³²¹ In view of these findings which accurately reflect the applicable JCE I *mens rea* standard, the Appeals Chamber finds that the earlier reference in the Trial Judgement to

³³¹³ Prosecution’s Response Brief (Šainović), para. 224.

³³¹⁴ Prosecution’s Response Brief (Šainović), para. 225, referring to Trial Judgement, vol. 3, para. 456.

³³¹⁵ Šainović’s Reply Brief, para. 54.

³³¹⁶ Trial Judgement, vol. 3, para. 456.

³³¹⁷ *Kvočka et al.* Appeal Judgement, para. 83, referring to *Tadić* Appeal Judgement, paras 204, 220, 228; *Vasiljević* Appeal Judgement, para. 99. See also *Brđanin* Appeal Judgement, paras 365, 411.

³³¹⁸ See *Tadić* Appeal Judgement, para. 228.

³³¹⁹ Trial Judgement, vol. 3, para. 463.

³³²⁰ Trial Judgement, vol. 3, para. 464.

³³²¹ Trial Judgement, vol. 3, para. 466.

Šainović’s ability “to predict” the commission of crimes in 1999, although improper, is not indicative of a legal error of the Trial Chamber when determining Šainović’s *mens rea* under JCE I.

1016. Further, to what extent in relation to the *mens rea* for JCE I a trial chamber may rely on the accused’s knowledge of the commission of past crimes, as circumstantial evidence among others, will necessarily depend on the circumstances of the particular case. The Appeals Chamber considers that relevant evidence may include the type of crimes that were committed, the circumstances of their commission, the identity of the perpetrators, and the geographical and temporal scope. In finding that Šainović shared the intent to forcibly displace the Kosovo Albanian population in 1999 by using MUP and VJ forces, the Trial Chamber relied, *inter alia*, on circumstantial evidence showing Šainović’s knowledge of the commission of crimes and excessive use of force by the MUP and VJ forces which had resulted in the displacement of Kosovo Albanians in 1998 as well as allegations thereof.³³²²

1017. In relation to the use of force by the FRY and Serbian forces in 1998, the Trial Chamber found that:

a significant number of people from Kosovo had been displaced from their homes by the end of October 1998. While the specific reasons for their movement may have been varied, the excessive use of force by the MUP and VJ in some areas, along with the continuing combat operations between the KLA and the forces of the FRY and Serbia were a significant contributing factor.³³²³

1018. With respect to Šainović’s knowledge of the displacement of civilians in 1998, the Trial Chamber referred to the Joint Command meetings of 2 and 26 August 1998, at which Šainović was informed that “huge numbers of the refugees were spotted on the road toward the village of Lauša” and that 16,000 to 17,000 people took refuge in Albania and 40,000 people took refuge in Montenegro.³³²⁴ Indeed, while the information conveyed during these meetings referred to the movement of “refugees”, the Trial Chamber also considered evidence showing that Šainović was informed, through various sources, of the commission of crimes, including that Albanian houses were being robbed and set on fire,³³²⁵ and was made aware, through his interaction with international interlocutors, of instances of excessive use of force, harassment of civilians, and in particular of the existence of large numbers of displaced civilians.³³²⁶ In addition, the Trial Chamber found that Šainović was aware of the UN Security Council resolution 1199 of 23 September 1998 (“UN Security Council Resolution 1199” or “Resolution 1199”), which stated

³³²² See Trial Judgement, vol. 3, para. 463.

³³²³ Trial Judgement, vol. 1, para. 919.

³³²⁴ Trial Judgement, vol. 3, paras 442, 463, referring to Exh. P1468, pp. 36, 74.

³³²⁵ Trial Judgement, vol. 3, paras 441, 444, 463, referring to Exh. P1468, pp. 9, 46, 52, Exh. P605, pp. 653, 664-665, 673-674, 692, 695-702, 706-709.

³³²⁶ Trial Judgement, vol. 3, para. 447, referring, *inter alia*, to Michael Phillips, 19 Mar 2007, T. 11838–11839, Karol John Drewienkiewicz, 4 Dec 2006, T. 7779–7781. See also Trial Judgement, vol. 3, para. 463, referring to Exh. 2D16.

that “the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army” had resulted in “the displacement of over 230,000 persons from their homes.”³³²⁷ Consequently, Šainović’s submission that in 1998 he was aware merely of the appearance of “refugees” ignores the totality of the evidence examined and relied upon by the Trial Chamber.³³²⁸

1019. Further, the fact that the excessive use of force by the MUP and the VJ was a significant contributing factor, rather than the sole reason for the displacement of the civilian population in 1998 is of limited relevance. In addition, the Appeals Chamber is not persuaded by Šainović’s argument that the difference in scale is determinative. The Trial Chamber was not required to, and in fact did not make a legal finding³³²⁹ that in 1998 the MUP and VJ forces committed the crimes of deportation, forcible transfer, or other crimes, such as murder and wanton destruction, under Article 3 or 5 of the Statute. Nonetheless, on the basis of Šainović’s awareness of the similarities in the means employed by the VJ and MUP forces, including the excessive use of force and commission of crimes, and the ensuing consequences in terms of displacement of civilians, a reasonable trier of fact could have relied on such circumstantial evidence, among others, in finding that Šainović shared the intent for the commission of the crimes in 1999. The Appeals Chamber also finds no merit in Šainović’s submission that his *mens rea* was established by analogy. It recalls in this regard that the Trial Chamber extensively relied on Šainović’s knowledge of the events on the ground and, in particular, on his knowledge of the commission of crimes during the Indictment period in 1999.³³³⁰

1020. In view of the foregoing, and considering that Šainović’s arguments in relation to the occurrence of the events in 1998 have been dismissed,³³³¹ the Appeals Chamber dismisses sub-grounds 3(2) and 6(13) of Šainović’s appeal.

(d) Šainović’s knowledge of the commission of crimes in 1999

1021. The Trial Chamber found that during the NATO air campaign Šainović continued to receive information that crimes were being committed by the VJ and MUP forces in Kosovo.³³³² In reaching this conclusion, the Trial Chamber relied upon evidence showing that: (i) at the 4 April 1999 meeting in the MUP Staff building, Šainović stated that persons detained for

³³²⁷ Trial Judgement, vol. 3, para. 443, citing Exh. P456, p. 1. See also *ibid.*, para. 463.

³³²⁸ While Šainović also asserts that the Trial Chamber erred in its assessment of evidence when it found that the VJ and the MUP used excessive and indiscriminate force in some locations in Kosovo in 1998 (Šainović’s Appeal Brief, paras 372, 374, 492-499; Šainović’s Reply Brief, para. 53), the Trial Chamber did not rely on this finding in concluding that Šainović knew of the commission of crimes in 1998 and in inferring his *mens rea* (see Trial Judgement, vol. 3, paras 443, 456, 463, 466). Therefore, his arguments in this regard are dismissed without further discussion.

³³²⁹ See *infra*, para. 1194.

³³³⁰ See Trial Judgement, vol. 3, paras 449-452, 464. See also *infra*, sub-section VII.D.3.(d).

³³³¹ See *supra*, fn. 3328.

committing crimes should be held in custody until they were taken over by judicial organs; (ii) on 13 April 1999 Šainović was present when Pešić was summoned and questioned about an allegation of a detention camp; (iii) at the MUP Staff meeting of 7 May 1999 Šainović emphasised the need to separately regulate the conduct of VJ reservists who were known to be committing crimes in Kosovo; (iv) at the 17 May 1999 meeting with Milošević, Ojdanić, and other VJ and MUP personnel, Šainović “was informed of the behaviour of MUP and paramilitary units in Kosovo, which included the murder of Kosovo Albanians and a reference to 800 bodies”; (v) Šainović was informed about the presence of the Scorpions in Kosovo which were alleged to have committed crimes; (vi) during his dealings with Rugova, Šainović was told of the widespread commission of crimes against the Kosovo Albanian population, including the forcible displacement of large numbers of civilians; (vii) on 26 March 1999, the Tribunal Prosecutor Louise Arbour sent a letter to Šainović in which she expressed concern about violations of international humanitarian law and stated her intention to investigate all such violations; and (viii) on 27 May 1999, the original indictment issued against Šainović and others became public and included specific information on various crimes committed in Kosovo during the relevant period (“Original Indictment”).³³³³ The Appeals Chamber will consider Šainović’s challenges to the Trial Chamber’s reliance on this evidence in turn.

(i) Submissions of the parties

1022. Šainović asserts that the Trial Chamber erred in finding that he was aware of the commission of crimes in 1999, including forcible displacement, arguing that the evidence relied upon by the Trial Chamber does not reveal that he had such knowledge.³³³⁴

1023. With respect to the MUP Staff meeting of 4 April 1999, Šainović argues that his statement that persons detained for committing crimes should be held in custody until taken over by judicial organs reveals no knowledge on his part of any crime being committed and is rather an encouragement to abide by the law.³³³⁵ Referring to the meeting of 13 April 1999 when Pešić was summoned and questioned about an allegation concerning a detention camp, Šainović claims that the allegation proved to be untrue.³³³⁶ In addition, Šainović submits that the Trial Chamber erroneously concluded that he learned of crimes during the meeting of 17 May 1999. According to Šainović, all he learned at the meeting concerned an ongoing investigation into the murder of a

³³³² Trial Judgement, vol. 3, para. 464.

³³³³ Trial Judgement, vol. 3, para. 464.

³³³⁴ Šainović’s Appeal Brief, paras 378-381, 385-391, referring, *inter alia*, to Trial Judgement, vol. 3, paras 452, 464.

³³³⁵ Šainović’s Notice of Appeal, para. 60; Šainović’s Appeal Brief, paras 378-379.

³³³⁶ Šainović’s Appeal Brief, para. 387, referring to Exh. P2502, paras 34-35.

married couple and the deaths of 800 other people. He maintains that the causes of death of the 800 people were not clear from the information he received at the meeting.³³³⁷

1024. Šainović also claims that even if Pavković had indeed informed him of the presence of the Scorpions in Kosovo, there was no information relating to the commission of any crimes.³³³⁸ Referring to the information that he received during his dealings with Rugova about widespread commission of crimes, including forcible displacement, Šainović submits that the Trial Chamber applied “double standards” in that it found Merovci’s statement insufficient to show Milutinović’s knowledge of crimes and did not rely on Rugova’s evidence with respect to Milutinović because of lack of corroboration.³³³⁹ Šainović claims that Louise Arbour’s letter does not contain “any information on any specific crimes”³³⁴⁰ and that the Original Indictment is irrelevant to the determination of his intent as it was issued after the commission of the last crime.³³⁴¹ Finally, Šainović maintains that the Trial Chamber failed to refer to any evidence showing that in 1999, and in particular after 24 March 1999, he learned of any of the crimes with which he was charged.³³⁴²

1025. In response, the Prosecution submits that Šainović’s statement during the MUP Staff meeting of 4 April 1999 indicates that he was aware that members of the FRY and Serbian forces were suspected of having committed crimes.³³⁴³ The Prosecution points to the fact that Šainović’s statement was preceded by reports about persons, including volunteers, arrested for committing crimes and about massive displacement of civilians.³³⁴⁴ With respect to the meeting with Pešić on 13 April 1999, the Prosecution submits that the Trial Chamber decided not to rely on the contents of a report, according to which a detention camp for Kosovo Albanian refugees did not exist.³³⁴⁵

1026. The Prosecution further submits that during the meeting on 17 May 1999, Šainović learned about specific crimes committed by the VJ, the MUP, and volunteers, and that the VJ and the MUP

³³³⁷ Šainović’s Appeal Brief, para. 380. See also Šainović’s Appeal Brief, para. 228, referring to Trial Judgement, vol. 3, para. 349. Šainović also challenges the Trial Chamber’s reliance on Vasiljević’s evidence that during the 16 May 1999 meeting, Pavković informed those attending that he had told Šainović about the presence of members of the Scorpions in Kosovo (Šainović’s Appeal Brief, para. 228, referring to Trial Judgement, vol. 3, para. 349. See also Trial Judgement, vol. 3, para. 351). Šainović refers in this respect to Dimitrijević’s testimony that Pavković “was looking for a cover for his actions by referring to other persons” (Šainović’s Appeal Brief, para. 228, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26595, *ibid.*, 9 Jul 2008, T. 26713).

³³³⁸ Šainović’s Appeal Brief, para. 381.

³³³⁹ Šainović’s Appeal Brief, paras 388-389.

³³⁴⁰ Šainović’s Appeal Brief, para. 390.

³³⁴¹ Appeal Hearing, 11 Mar 2013, AT. 208. Šainović further claims that his knowledge of the Original Indictment could have been relevant only if he had the ability to sanction the perpetrators (Appeal Hearing, 11 Mar 2013, AT. 208, 273). He also argues that the general accessibility of the Original Indictment does not establish that he was actually aware of it (Appeal Hearing, 11 Mar 2013, AT. 207-208).

³³⁴² Šainović’s Appeal Brief, para. 391; Šainović’s Notice of Appeal, para. 63.

³³⁴³ Prosecution’s Response Brief (Šainović), para. 231.

³³⁴⁴ Prosecution’s Response Brief (Šainović), para. 231, referring to Exh. P1989, pp. 1-2. See also *ibid.*, para. 230.

³³⁴⁵ Prosecution’s Response Brief (Šainović), para. 239, referring to Trial Judgement, vol. 3, para. 721, Milomir Pantić, 2 Apr 2008, T. 24779-24782, 24791.

were accusing each other of bearing responsibility for 800 bodies.³³⁴⁶ The Prosecution claims that this information “was reliable and alarming enough to provide Šainović with knowledge of crimes by the FRY/Serbian forces.”³³⁴⁷ With respect to Šainović’s awareness of the presence of the Scorpions in Kosovo, the Prosecution asserts that “[w]hile it was not direct information of crimes, the criminal propensity of this group was sufficiently well-known to put Šainović on notice of the risk of the commission of crimes”, which was confirmed at the 17 May 1999 meeting when Vasiljević reported about the crimes committed by the Scorpions in Podujevo/Podujeva.³³⁴⁸

1027. The Prosecution also claims that Šainović’s assertion about “double standards” is unfounded, as the Trial Chamber did rely on Merovci’s statement with respect to Milutinović.³³⁴⁹ It further submits that while the Trial Chamber did not rely on Rugova’s evidence concerning the exchange between him and Milutinović on 16 April 1999 because of lack of corroboration, it correctly relied on Rugova’s evidence with respect to the meeting on 28 April 1999 which was corroborated.³³⁵⁰ As to Louise Arbour’s letter, the Prosecution contends that Šainović repeats his trial submissions and that the information contained in the letter “served as an additional reliable warning to Šainović.”³³⁵¹

1028. The Prosecution avers that the Trial Chamber also relied on Šainović’s presence in Kosovo in late March and early April 1999,³³⁵² the information relayed at the 4 May 1999 meeting in Belgrade of which Šainović was aware³³⁵³ as well as notifications that he received through the Foreign Ministry and the MUP, including the State Security Department and Public Security Department.³³⁵⁴ It adds that Šainović knew of specific crimes charged in the Indictment. The Prosecution refers in this respect to the crimes of deportation, forcible transfer, and persecution charged in the Indictment, asserting that Šainović was present when Merovci told Milutinović that Kosovo Albanians were leaving Priština/Prishtina because of the activities of the FRY and Serbian forces and was present in the city when the VJ and MUP forces carried out massive expulsions.³³⁵⁵ Also, soon after 27 May 1999, Šainović became aware of the Original Indictment issued against

³³⁴⁶ Prosecution’s Response Brief (Šainović), paras 233-234.

³³⁴⁷ Prosecution’s Response Brief (Šainović), para. 233. See also *ibid.*, para. 232.

³³⁴⁸ Prosecution’s Response Brief (Šainović), para. 235 (footnote omitted), referring, *inter alia*, to Trial Judgement, vol. 1, para. 741.

³³⁴⁹ Prosecution’s Response Brief (Šainović), para. 237.

³³⁵⁰ Prosecution’s Response Brief (Šainović), para. 238.

³³⁵¹ Prosecution’s Response Brief (Šainović), para. 240.

³³⁵² Prosecution’s Response Brief (Šainović), para. 227, referring to Trial Judgement, vol. 2, paras 885-888, 1167, 1240-1242, *ibid.*, vol. 3, paras 449, 456, 462.

³³⁵³ Prosecution’s Response Brief (Šainović), para. 228, referring to Trial Judgement, vol. 1, para. 541, *ibid.*, vol. 3, paras 343-348, 455-456, 464, 471.

³³⁵⁴ Prosecution’s Response Brief (Šainović), para. 229, referring to Trial Judgement, vol. 3, para. 451, fn. 988.

³³⁵⁵ Prosecution’s Response Brief (Šainović), para. 241.

him which charged him with many of the crimes he faced at trial.³³⁵⁶ The Prosecution argues that despite his knowledge of the Original Indictment, Šainović did nothing to encourage the persons in charge to prosecute or punish the physical perpetrators of the crimes listed therein.³³⁵⁷ The Prosecution maintains that Šainović's inactivity in this respect confirms that his statements in 1998 and 1999 to the effect that crimes should be punished were disingenuous.³³⁵⁸

1029. In reply, Šainović submits that, contrary to the Prosecution's assertion, nothing in the evidence suggests that he was in Kosovo when the majority of the crimes were committed and that, in fact, the Trial Chamber found that he was in Kosovo for only nine days at the time of the NATO campaign.³³⁵⁹ With respect to reports delivered during the MUP Staff meeting of 4 April 1999, Šainović submits that they did "not point to crimes in the way presented by the Prosecutor" and that in any event, he arrived late at the meeting so he could not have heard the previous discussions.³³⁶⁰ Finally, Šainović claims that it was unreasonable for the Trial Chamber to rely upon Vasiljević's evidence that he had been informed about the Scorpions' presence in Kosovo.³³⁶¹

(ii) Analysis

1030. The Trial Chamber held that Šainović demonstrated his awareness of the commission of crimes at the MUP Staff meeting of 4 April 1999, where he stated that persons detained for committing crimes should be held in custody until taken over by the judicial authorities.³³⁶² The Appeals Chamber notes that, at the meeting, the chiefs of the SUPs in Priština/Prishtina, Peć/Peja, Đakovica/Gjakova, Prizren, Uroševac/Ferizaj, and Gnjilane/Gjilane reported on a significant number of people, including policemen, reservists, and volunteers, detained for perpetrating crimes.³³⁶³ Although the evidence shows that Šainović joined the meeting towards the end,³³⁶⁴ his statement that persons detained for committing crimes should be held in custody until taken over by judicial authorities was evidently tailored to address the existing situation on the ground, which in turn is an indication that he was aware of the commission of crimes. The Appeals Chamber therefore considers that a reasonable trier of fact could have relied on this evidence.

³³⁵⁶ Prosecution's Response Brief (Šainović), para. 241, comparing Exh. P968 with the Indictment.

³³⁵⁷ Appeal Hearing, 11 Mar 2013, AT. 261.

³³⁵⁸ Appeal Hearing, 11 Mar 2013, AT. 261.

³³⁵⁹ Šainović's Reply Brief, para. 55.

³³⁶⁰ Šainović's Reply Brief, para. 56.

³³⁶¹ Šainović's Reply Brief, para. 57.

³³⁶² Trial Judgement, vol. 3, para. 464. See also *ibid.*, vol. 3, para. 455, referring to Exh. P1989, p. 4.

³³⁶³ Exh. P1989, pp. 1-2.

³³⁶⁴ Dušan Gavrančić, 19 Feb 2008, T. 22719-22720 (stating that Šainović walked in at the end of the meeting); Miloš Vojnović, 12 Mar 2008, T. 24185-24186 (stating that Šainović joined in just before the meeting ended); Dragan Živaljević, 3 Apr 2008, T. 24841-24842 (stating that Šainović arrived towards the end of the meeting). See also Trial Judgement, vol. 3, para. 341.

1031. In finding that Šainović continued to receive information about the commission of crimes by the VJ and MUP forces in 1999, the Trial Chamber also relied on Pešić's evidence that Šainović was present at a meeting on 13 April 1999 when Pešić was summoned and questioned about an allegation of a detention camp for Kosovo Albanians.³³⁶⁵ The Appeals Chamber notes, however, that Pešić's evidence does not indicate that at the meeting Šainović learned that the group of Kosovo Albanians allegedly detained comprised victims of crimes.³³⁶⁶ Accordingly, the Appeals Chamber considers that the Trial Chamber erred in relying on Šainović's presence at this meeting as evidence of his knowledge of the commission of crimes in 1999.

1032. The Trial Chamber also relied on the fact that during the meeting of 17 May 1999 with, *inter alios*, Milošević, Ojdanić, and Vasiljević, Šainović "was informed of the behaviour of MUP and paramilitary units in Kosovo, which included the murder of Kosovo Albanians and a reference to 800 bodies."³³⁶⁷ The evidence shows that during the meeting, Vasiljević presented information on reports of crimes committed by the VJ and volunteers in Kosovo, such as murders and rapes of civilians by soldiers, and crimes committed by the Scorpions in Podujevo/Podujeva.³³⁶⁸ Moreover, it was clearly stated that the 800 bodies were associated with "crimes" and that there was a disagreement between the VJ and the MUP as to which forces bore responsibility.³³⁶⁹ Consequently, the Appeals Chamber finds no error in the Trial Chamber's reliance on this evidence as showing Šainović's awareness that crimes were being committed. In addition, whether Pavković informed Šainović of the Scorpion's presence in Kosovo in advance of the 17 May 1999 meeting is irrelevant since Šainović was aware that the Scorpions were implicated in the commission of crimes as of the date of this meeting, at the latest.³³⁷⁰

³³⁶⁵ Trial Judgement, vol. 3, para. 464.

³³⁶⁶ See Trial Judgement, vol. 3, para. 342, referring to Zlatimir Pešić, Exh. P2502, paras 34-35. The Prosecution refers to the Trial Chamber's finding that the commission which was formed to investigate the allegations established that no such detention camp existed (Prosecution's Response Brief (Šainović), para. 239, referring to Trial Judgement, vol. 3, para. 342, Exh. P1721). The Prosecution further points out that the Trial Chamber found the contents of the commission's report to be unreliable (Prosecution's Response Brief (Šainović), para. 239, referring to Trial Judgement, vol. 3, para. 721). The Appeals Chamber notes, however, that the Trial Chamber did not find that Šainović was aware of the existence of the report or of the unreliability of the information contained therein.

³³⁶⁷ Trial Judgement, vol. 3, para. 464.

³³⁶⁸ Trial Judgement, vol. 3, para. 351, referring to Exh. P2600, paras 65-68, Aleksandar Vasiljević, Exh. P2589, T. 15999-16004, Exh. P2592. See also Exh. P605, pp. 869-870.

³³⁶⁹ See Trial Judgement, vol. 3, para. 351, referring, *inter alia*, to Aleksandar Vasiljević, Exh. P2600, para. 67, *ibid.*, Exh. P2589, T. 15999-16000. The Appeals Chamber notes that, at trial, Šainović accepted that at the meeting on 17 May 1999 he was put on notice about crimes. See Trial Judgement, vol. 3, paras 440, 452, referring, *inter alia*, to Šainović's Final Trial Brief, para. 741.

³³⁷⁰ In relation to Šainović's submission that Pavković "was looking for a cover for his actions by referring to other persons" (Šainović's Appeal Brief, para. 228), the Appeals Chamber notes that Dimitrijević testified that it was his impression that the term "Joint Command" was used by "Pavković, to cover some of his activities so that he could say, I have the Joint Command behind me" (Aleksandar Dimitrijević, 8 Jul, 2008, T. 26595. See also *ibid.*, 9 Jul 2008, T. 26713). However, in light of the totality of the evidence, the Trial Chamber did not find this testimony to undermine its findings as to the role of the Joint Command in coordination of the MUP and the VJ and the involvement therein of political representatives, including Šainović (Trial Judgement, vol. 1, paras 1005-1006, 1109-1111. See also *supra*,

1033. The Trial Chamber further found that Šainović was told about the widespread commission of crimes during his dealings with Rugova.³³⁷¹ The Trial Chamber observed that, at a meeting with Milutinović, Šainović, Marković, and Anđelković held on 28 April 1999, Rugova and Merovci complained about the fact that the MUP forces were forcing the Kosovo Albanian population from their homes.³³⁷² The Appeals Chamber notes that Šainović essentially avers that the Trial Chamber evaluated Merovci's evidence differently in the context of determining Milutinović's responsibility as compared with his own.³³⁷³ Recalling that such challenges will not be given detailed consideration,³³⁷⁴ the Appeals Chamber finds no error in the Trial Chamber's reliance on Merovci's evidence. Šainović's reference to the Trial Chamber's evaluation of Rugova's evidence in relation to Milutinović is equally inapposite. The Trial Chamber declined to rely on Rugova's evidence in that regard because it was admitted pursuant to Rule 92 *quater* and contained a reference to a statement made by Milutinović that was otherwise uncorroborated.³³⁷⁵ The Appeals Chamber notes that this has no bearing on Šainović's criminal responsibility. Consequently, the Appeals Chamber will not address Šainović's challenge to the Trial Chamber's reliance on Rugova's evidence.

1034. Further, the Appeals Chamber finds no error in the Trial Chamber's reliance on Louise Arbour's letter as evidence that Šainović received information that crimes were being committed by members of the VJ and the MUP.³³⁷⁶ Indeed, the letter expressed the Tribunal Prosecutor's concern "that serious violations of international humanitarian law continue to be committed" and her intention to investigate all such violations, particularly those involving attacks on the civilian population.³³⁷⁷ The letter clearly indicated to Šainović that there were, at least, allegations of crimes falling within the jurisdiction of the Tribunal. The absence of references in the letter to specific crimes does not undermine the Trial Chamber's reliance on this evidence.

1035. The Appeals Chamber turns to Šainović's contention that the Trial Chamber failed to refer to any evidence showing that after 24 March 1999 he learned of any of the crimes with which he was charged. The Appeals Chamber notes in this regard that the Trial Chamber took into account that on 27 May 1999 the Original Indictment against Milošević, Milutinović, Šainović, Ojdanić, and

sub-section VII.C.1.(d)). Šainović disregards the Trial Chamber's analysis of Dimitrijević's testimony. Consequently, the Appeals Chamber fails to discern any error in the Trial Chamber's reliance on Vasiljević's testimony that he personally heard from Pavković that the latter had informed Šainović about the presence of the Scorpions in Kosovo.

³³⁷¹ Trial Judgement, vol. 3, para. 464.

³³⁷² Trial Judgement, vol. 3, para. 450, referring to Adnan Merovci, Exh. P2588, para. 72, Ibrahim Rugova, Exh. P2613, p. 12, Adnan Merovci, 16 Jan 2007, T. 8469-8471. The Appeals Chamber considers that the Trial Chamber's reference to the evidence of Ibrahim Rugova contains a clerical error as Rugova's statement "that Kosovo was being emptied of Albanians" is found on page 11 of the referred exhibit.

³³⁷³ See Šainović's Appeal Brief, paras 388-389.

³³⁷⁴ See *supra*, sub-section VII.D.4.

³³⁷⁵ Trial Judgement, vol. 3, paras 243, 263.

³³⁷⁶ See Trial Judgement, vol. 3, para. 464.

³³⁷⁷ Trial Judgement, vol. 3, para. 448, referring to Exh. P400.

Stojiljković became public.³³⁷⁸ The Trial Chamber found that given the publicity it received in the media, Šainović would have been made aware of it soon thereafter.³³⁷⁹ The Appeals Chamber notes, however, that the last crime for which Šainović was convicted occurred on 25 May 1999.³³⁸⁰ In view of the late date when the Original Indictment would have become known to Šainović, the Appeals Chamber considers that a reasonable trier of fact could not have relied upon this evidence in determining Šainović's knowledge of the crimes at the time of their commission. Nor is the Appeals Chamber persuaded by the Prosecution's argument that Šainović's subsequent failure to encourage the persons in charge to prosecute or punish the physical perpetrators of the crimes listed in the Original Indictment is indicative of his intent at the time when the crimes were committed.

1036. However, Šainović's knowledge of crimes charged in the Indictment is supported by the Trial Chamber's finding that he was informed about expulsions of Kosovo Albanians during the meeting with Rugova and Merovci on 28 April 1999 in Priština/Prishtina.³³⁸¹ In addition, the Trial Chamber found that he was in Kosovo on a number of occasions in March, April, May, and June 1999, and that most of his trips were in late March and early April, when the majority of crimes were committed, including his trips to Priština/Prishtina on 29 March and 4 April 1999 when massive expulsions were taking place.³³⁸² The Appeals Chamber is therefore satisfied that the Trial Chamber considered evidence from which it could infer that, after 24 March 1999, Šainović learned of crimes with which he was charged.

1037. The Appeals Chamber has found that the Trial Chamber erred in relying on Šainović's presence at the meeting on 13 April 1999 and on his knowledge of the Original Indictment. However, notwithstanding these errors, the Appeals Chamber considers that Šainović has failed to demonstrate that no reasonable trier of fact could have found that he knew of the commission of crimes by the VJ and MUP forces in Kosovo in 1999. In this regard, the Appeals Chamber notes the Trial Chamber's finding that the common purpose of the JCE involved the forcible displacement of the Kosovo Albanian population through a widespread and systematic campaign of terror and violence.³³⁸³ The remaining evidence considered by the Trial Chamber shows that Šainović had knowledge of various crimes committed by the VJ and MUP forces in the course of the campaign of terror and violence against the Kosovo Albanian population and was specifically informed about the forcible displacement of civilians.

³³⁷⁸ Trial Judgement, vol. 3, para. 453, referring to Exh. P968. See also Trial Judgement, vol. 3, para. 464.

³³⁷⁹ Trial Judgement, vol. 3, para. 453.

³³⁸⁰ See Trial Judgement, vol. 2, paras 1148, 1259-1261.

³³⁸¹ Trial Judgement, vol. 3, para. 450.

³³⁸² Trial Judgement, vol. 3, paras 449, 456, 462. See also *ibid.*, vol. 2, paras 838-873, 885-888.

³³⁸³ Trial Judgement, vol. 3, para. 95.

1038. In particular, the Trial Chamber considered evidence showing that: (i) on 26 March 1999, the Tribunal Prosecutor Louise Arbour sent a letter to Šainović in which she expressed concern about violations of international humanitarian law and stated her intention to investigate all such violations, particularly those involving attacks on the civilian population;³³⁸⁴ (ii) at the 4 April 1999 meeting in the MUP Staff building, Šainović stated that persons detained for committing crimes should be held in custody until they were taken over by judicial organs;³³⁸⁵ (iii) at the MUP Staff meeting of 7 May 1999, Šainović emphasised the need to separately regulate the conduct of VJ reservists who were known to be committing crimes in Kosovo,³³⁸⁶ and stated that there should be no private wars, that private killings must be prevented, and that they could not “allow the Serbs to be stigmatised as those who torch, loot and swagger about in abandoned and deserted villages”;³³⁸⁷ and (iv) at the 17 May 1999 meeting with Milošević, Ojdanić, and other VJ personnel, Šainović learned about 800 bodies and was informed of behaviour of the MUP and crimes committed against Kosovo Albanians by the VJ, paramilitaries, and volunteer units in Kosovo, including murders and rapes, and crimes committed by the Scorpions.³³⁸⁸ The Trial Chamber further found that Šainović was informed about expulsions of Kosovo Albanians during the meeting with Rugova and Merovci on 28 April 1999 in Priština/Prishtina.³³⁸⁹ In addition, the Trial Chamber found that he was in Kosovo on a number of occasions between March and June 1999, including in late March and early April, when the majority of crimes were committed, and that he was in Priština/Prishtina on 29 March and 4 April 1999 when massive expulsions were taking place.³³⁹⁰

1039. In light of the evidence recounted above, the Appeals Chamber finds that a reasonable trier of fact could have concluded that, in 1999, Šainović had knowledge of the commission of crimes encompassed by the common purpose. The Appeals Chamber therefore dismisses sub-ground 3(3) of Šainović’s appeal in its entirety as well as sub-ground 1(23) and 3(6) in the part concerning Šainović’s knowledge of the commission of crimes in 1999.

(e) Whether Šainović’s efforts to prevent and punish crimes were genuine

1040. The Trial Chamber found that, on 17 May 1999, Šainović attended a meeting in Belgrade with, *inter alios*, Milošević, Ojdanić, Pavković, and Vasiljević where reports of crimes committed against Kosovo Albanian civilians by the VJ, the MUP, and members of the Scorpions were

³³⁸⁴ Trial Judgement, vol. 3, para. 448, referring to Exh. P400. See also Trial Judgement, vol. 3, para. 464.

³³⁸⁵ Trial Judgement, vol. 3, para. 455, referring to Exh. P1989, p. 4. See also Trial Judgement, vol. 3, para. 464.

³³⁸⁶ Trial Judgement, vol. 3, para. 464. See also *ibid.*, vol. 3, para. 346, referring to Exh. P1996, p. 4.

³³⁸⁷ Trial Judgement, vol. 3, para. 455, referring to Exh. P1996, p. 3.

³³⁸⁸ Trial Judgement, vol. 3, para. 351, referring to Aleksandar Vasiljević, Exh. P2600, paras 65-68, *ibid.*, Exh. P2589, T. 15999-16004, Exh. P2592. See also Exh. P605, pp. 869-870; Trial Judgement, vol. 3, paras 452, 464, 739.

³³⁸⁹ Trial Judgement, vol. 3, para. 450, referring to Adnan Merovci, Exh. P2588, para. 72, Ibrahim Rugova, Exh. P2613, p. 11 (incorrectly citing p. 12), Adnan Merovci, 16 Jan 2007, T. 8469-8471. See also Trial Judgement, vol. 3, para. 464.

³³⁹⁰ Trial Judgement, vol. 3, paras 449, 456, 462. See also *ibid.*, vol. 2, paras 838-873, 885-888.

discussed, including MUP allegations of crimes committed by the VJ, involving some 800 bodies.³³⁹¹ The Trial Chamber referred to evidence showing that in reporting about the 800 bodies, Pavković added that the problem stemmed from the MUP and the VJ shifting blame onto each other.³³⁹² The Trial Chamber accepted that Šainović supported Pavković in his suggestion that both the MUP and the VJ should be investigated by a joint commission in relation to all allegations made at the meeting and that this suggestion was rejected by Milošević.³³⁹³ The Trial Chamber concluded that while an investigation in relation to these crimes was carried out within the VJ, neither Milošević nor Šainović arranged for a similar investigation within the MUP.³³⁹⁴

1041. In discussing Šainović's efforts to ensure that crimes committed by the VJ and MUP forces were either prevented or punished, the Trial Chamber held that even though Šainović made statements encouraging VJ and MUP officials to prevent and punish crimes, he failed to use his extensive authority in Kosovo and his own initiative to persuade those in charge of the principal perpetrators of crimes to act with urgency to eliminate such conduct.³³⁹⁵ According to the Trial Chamber, this indicated that Šainović's statements "were simply window dressing."³³⁹⁶

1042. Specifically in relation to Šainović's intent, the Trial Chamber concluded that: "[i]n contrast to his extensive knowledge of crimes in Kosovo, Šainović showed little initiative in dealing with the allegations, other than making a few statements. This was despite his extensive *de facto* and *de jure* authority within the province, and his close relationship with Milošević."³³⁹⁷

(i) Submissions of the parties

1043. In relation to the Trial Chamber's conclusion that he made little or no effort to ensure that widespread crimes were prevented or punished, Šainović claims that nothing in the evidence suggests that he had the right or obligation to prevent or punish crimes.³³⁹⁸ He adds that it was unreasonable for the Trial Chamber to find that arranging for an investigation into the allegations made during the 17 May 1999 meeting was within his authority.³³⁹⁹ Šainović maintains that he "called for abiding by the law in a general manner" and supported the establishment of a committee for the investigation of the "issues" raised at the meeting of 17 May 1999.³⁴⁰⁰ Šainović argues that

³³⁹¹ Trial Judgement, vol. 3, paras 350-351.

³³⁹² Trial Judgement, vol. 3, para. 351, referring, *inter alia*, to Aleksandar Vasiljević, Exh. P2592.

³³⁹³ Trial Judgement, vol. 3, paras 351, 452.

³³⁹⁴ Trial Judgement, vol. 3, paras 353, 452.

³³⁹⁵ Trial Judgement, vol. 3, para. 457.

³³⁹⁶ Trial Judgement, vol. 3, para. 457.

³³⁹⁷ Trial Judgement, vol. 3, para. 465.

³³⁹⁸ Šainović's Notice of Appeal, para. 63; Šainović's Appeal Brief, paras 392-393, referring to Trial Judgement, vol. 3, paras 457. See also Šainović's Appeal Brief, para. 385.

³³⁹⁹ Šainović's Appeal Brief, paras 229-230.

³⁴⁰⁰ Šainović's Appeal Brief, para. 393, referring to Trial Judgement, vol. 3, paras 454-455, 542.

given the Trial Chamber's finding that the source of his authority was Milošević, it was unreasonable for the Trial Chamber to conclude that he should have used his authority "against Milošević".³⁴⁰¹

1044. The Prosecution responds that Šainović's arguments should be summarily dismissed as a repetition of his trial submissions.³⁴⁰² It adds that Šainović misrepresents the Trial Chamber's findings as the Trial Chamber did not consider that he had the duty to prevent or punish the commission of crimes, but that he failed to use his extensive authority "to persuade, encourage or influence those in charge of the physical perpetrators of crimes to prevent and punish them."³⁴⁰³ In the Prosecution's view, the Trial Chamber was reasonable in considering this as a relevant factor in establishing Šainović's intent.³⁴⁰⁴

(ii) Analysis

1045. The Trial Chamber found that Šainović had a great deal of influence over the events in Kosovo and was empowered to make decisions,³⁴⁰⁵ was providing approval and issuing instructions to the MUP,³⁴⁰⁶ and had extensive *de facto* powers over both the VJ and the MUP.³⁴⁰⁷ The Appeals Chamber considers that the Trial Chamber was not required to determine, in addition, that Šainović had the right or the obligation to prevent or punish crimes as he was not convicted as a superior pursuant to Article 7(3) of the Statute. For the purposes of establishing the *mens rea* element of commission through participation in a JCE pursuant to Article 7(1) of the Statute, it was within the Trial Chamber's discretion to consider, among other factors,³⁴⁰⁸ whether Šainović used his extensive authority in Kosovo and his own initiative to encourage those in charge of the principal perpetrators of crimes to prevent or punish such conduct.³⁴⁰⁹

1046. In relation to Šainović's failure to arrange for an investigation of the allegations of crimes communicated during the 17 May 1999 meeting, contrary to Šainović's submission, nothing in the Trial Chamber's finding suggests that it considered to be within Šainović's authority to prevent and punish the commission of crimes. It is apparent that the Trial Chamber meant that Šainović failed to

³⁴⁰¹ Šainović's Appeal Brief, para. 394.

³⁴⁰² Prosecution's Response Brief (Šainović), paras 125, 242.

³⁴⁰³ Prosecution's Response Brief (Šainović), paras 243-244, referring to Trial Judgement, vol. 3, para. 457. See also Prosecution's Response Brief (Šainović), para. 245.

³⁴⁰⁴ Prosecution's Response Brief (Šainović), para. 244, referring to *Krajišnik* Appeal Judgement, paras 204, 697, *Martić* Appeal Judgement, paras 139-140, 142-143, *Martić* Trial Judgement, para. 342.

³⁴⁰⁵ Trial Judgement, vol. 3, paras 299, 335, 427.

³⁴⁰⁶ Trial Judgement, vol. 3, para. 348.

³⁴⁰⁷ Trial Judgement, vol. 3, paras 299, 462.

³⁴⁰⁸ See Trial Judgement, vol. 3, paras 463-465.

³⁴⁰⁹ Cf. *Krajišnik* Appeal Judgement, paras 193, 204; *Martić* Appeal Judgement, paras 139-140.

encourage the conduct of such investigations by those who were in charge, despite his extensive authority in Kosovo.³⁴¹⁰

1047. The Appeals Chamber turns to consider whether a reasonable trier of fact could have reached this conclusion. The Trial Chamber accepted that at the meeting Šainović supported Pavković in his suggestion that both the MUP and the VJ should be investigated by a joint commission in relation to all allegations made at the meeting, and that this suggestion was rejected by Milošević.³⁴¹¹ The Trial Chamber further noted that while an inspection of the Priština Corps was conducted upon Ojdanić's initiative, Šainović did not arrange for such an investigation within the MUP.³⁴¹² The Trial Chamber failed to explain, however, how Šainović could have arranged for such an investigation, particularly in light of Milošević's opposition to the formation of a joint commission. In this context, the Trial Chamber's finding that Milošević was the source of Šainović's actual authority is highly relevant.³⁴¹³ In these circumstances, the Appeals Chamber finds that the Trial Chamber erred in finding that Šainović's failure to arrange for an investigation within the MUP with respect to the crimes discussed in the 17 May 1999 meeting was indicative of his intent.

1048. Nonetheless, the Appeals Chamber considers that this error of fact did not occasion a miscarriage of justice. Significantly, the Trial Chamber found that, in his role as political coordinator in 1998 and 1999, Šainović was able to make proposals, give suggestions, and issue instructions to both Pavković and Lukić and thus to the VJ and the MUP, respectively.³⁴¹⁴ The Trial Chamber further considered that Šainović continued to receive information about crimes in 1998 and 1999 and despite this knowledge, continued to participate in the coordination of the VJ and MUP forces which engaged in the commission of forcible displacement during the NATO bombing in 1999.³⁴¹⁵

1049. In this regard, the Appeals Chamber recalls that in 1998 Šainović was aware of displacements of Kosovo Albanians and crimes such as looting and arson committed against them in Kosovo³⁴¹⁶ as well as the allegation that "the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army" had resulted in "the displacement of over 230,000

³⁴¹⁰ See Trial Judgement, vol. 3, para. 457.

³⁴¹¹ Trial Judgement, vol. 3, paras 351, 452.

³⁴¹² Trial Judgement, vol. 3, paras 353, 452.

³⁴¹³ Trial Judgement, vol. 3, para. 293.

³⁴¹⁴ Trial Judgement, vol. 3, para. 462.

³⁴¹⁵ See Trial Judgement, vol. 3, paras 457, 462-464.

³⁴¹⁶ Trial Judgement, vol. 3, paras 441-442, 444, 447, 463, referring, inter alia, to Exh. P1468, pp. 9, 36, 46, 52, 74, Exh. P605, pp. 653, 664-665, 673-674, 692, 695-702, 706-709, Michael Phillips, 19 Mar 2007, T. 11838-11839, Karol John Drewienkiewicz, 4 Dec 2006, T. 7779-7781, Exh. 2D16. See also *supra*, sub-section VII.D.3.(c).

persons from their homes.”³⁴¹⁷ The Appeals Chamber has found that a reasonable trier of fact could have relied on such circumstantial evidence, among others, in finding that Šainović shared the intent for the commission of the crimes in 1999.³⁴¹⁸ Regarding Šainović’s knowledge in 1999, the Trial Chamber found that, at a meeting on 19 January 1999, Šainović was informed of violations of the Clark-Naumann Agreement, including issues of excessive and disproportionate use of force by police and military forces in Kosovo.³⁴¹⁹ Moreover, the Appeals Chamber recalls its finding that, despite errors in the Trial Chamber’s factual findings, a reasonable trier of fact could have concluded, based on the remaining evidence considered by the Trial Chamber,³⁴²⁰ that, after 24 March 1999, Šainović knew of crimes committed by the VJ and MUP forces in the course of the campaign of terror and violence against the Kosovo Albanian population and was specifically informed about the forcible displacement of civilians.³⁴²¹

1050. In these circumstances, the Trial Chamber considered that statements made by Šainović in both in 1998 and 1999 insisting on the prosecution and punishment of those committing crimes³⁴²² were “simply window dressing”.³⁴²³ The Trial Chamber noted that, notwithstanding these statements, crimes continued to be committed “on a major scale” and that Šainović continued to be informed about them.³⁴²⁴ The Trial Chamber considered that “nothing much” was done in the face of widespread crimes despite Šainović’s extensive knowledge of crimes in Kosovo and his extensive authority within the province.³⁴²⁵ In this context, the Trial Chamber also observed that Šainović showed little initiative in dealing with the allegations.³⁴²⁶

1051. In view of the above, the Appeals Chamber considers that a reasonable trier of fact could have concluded that Šainović’s statements insisting on the prevention and punishment of crimes were merely “window dressing” and that the only reasonable inference was that he shared the intent to forcibly displace part of the Kosovo Albanian population. The Appeals Chamber recalls that

³⁴¹⁷ Trial Judgement, vol. 3, para. 443, citing Exh. P456, p. 1. See also *ibid.*, para. 463. See also *supra*, sub-section VII.D.3.(c).

³⁴¹⁸ See *supra*, para. 1019.

³⁴¹⁹ Trial Judgement, vol. 3, para. 447, referring to Klaus Naumann, Exh. P1767, paras 36-37, *ibid.*, Exh. P2512, T. 7007-7009.

³⁴²⁰ Trial Judgement, vol. 3, paras 346, 351, 448-450, 452, 455-456, 462, 464. Such evidence includes Šainović’s presence in Kosovo on a number of occasions in March, April, May, and June 1999, including at the time when forcible displacement was being committed there as well as the information he learned during the meeting with Rugova and Merovci in Priština/Prishtina on 28 April 1999, the meeting with Milošević and VJ senior officials in Belgrade on 17 May 1999, and his statements in the meetings with police officials on 4 April and 7 May 1999. See *supra*, sub-section VII.D.3.(d).

³⁴²¹ See *supra*, sub-section VII.D.3.(d).

³⁴²² Trial Judgement, vol. 3, para. 456. See also *ibid.*, vol. 3, paras 454-455.

³⁴²³ Trial Judgement, vol. 3, para. 457.

³⁴²⁴ Trial Judgement, vol. 3, para. 457. With regard to the magnitude of the crimes committed on the ground in 1999, see Trial Judgement, vol. 2; *supra*, section VI.

³⁴²⁵ Trial Judgement, vol. 3, para. 457.

³⁴²⁶ Trial Judgement, vol. 3, para. 465. See also *ibid.*, vol. 3, para. 457.

orders for expulsions were passed down orally during the forcible displacement in 1999.³⁴²⁷ By contrast, during the same period, Šainović made statements insisting on the suppression of crimes in meetings where written records, such as minutes, were taken and/or where some of those present were not found to be JCE members.³⁴²⁸ The fact that the VJ and the MUP continued to commit crimes, including forcible displacement, on an extensive scale, despite these statements, combined with the fact that Šainović was continuously informed of crimes and continued to coordinate VJ and MUP operations, which resulted in the forcible displacement of a large number of Kosovo Albanians, further supports the Trial Chamber's finding that Šainović's statements were not genuine.

1052. The Appeals Chamber therefore finds that a reasonable trier of fact could have found that the only reasonable inference to be drawn from the evidence was that Šainović shared the intent to forcibly displace part of the Kosovo Albanian population in 1999. The Appeals Chamber thus dismisses the part of Šainović's sub-ground 3(6) concerning his failure to ensure that crimes were prevented or punished.

4. Allegations of bias and "double standards" in the evaluation of the evidence

1053. Šainović argues that the Trial Chamber's "unequa[l]" treatment of him and Milutinović and its "bias" against him occasioned a miscarriage of justice.³⁴²⁹ He maintains that the Trial Chamber applied "double standards" in assessing his respective role and that of Milutinović, thereby misconstruing the facts about their positions and roles, "infringing its obligation to treat defendants equally", and "derogating from principles of assessment of evidence".³⁴³⁰ In particular, Šainović submits that the Trial Chamber: (i) considered his presence at several meetings as evidence of his authority and awareness of the commission of crimes in Kosovo, while Milutinović's presence was evaluated as merely morale-boosting or insignificant;³⁴³¹ (ii) misconstrued the evidence regarding Šainović's and Milutinović's respective dealings with Rugova³⁴³² and involvement at

³⁴²⁷ Trial Judgement, vol. 2, paras 153, 1172, *ibid.*, vol. 3, paras 43, 858, referring to K90's evidence that the orders his VJ unit received to "relocate" Kosovo Albanians from villages were never written but rather passed down verbally and his comment that: "If [you're] clearing up a village, you're expelling these people." See also *supra*, sub-sections VI.B.5.(b)(ii)a. and VII. B.3.(a)(iv).

³⁴²⁸ Trial Judgement, vol. 3, paras 452, 455, wherein the Trial Chamber noted such statements made by Šainović at the meetings with senior police officials on 4 April and 7 May 1999 recorded in the respective minutes and the meeting of 17 May 1999 with, *inter alia*, Milošević and VJ senior officials, including Ojdanić, Pavković, and Vasiljević. In this regard, see also *ibid.*, vol. 3, paras 341, 346, 350-353, and references therein.

³⁴²⁹ Šainović's Appeal Brief, para. 271.

³⁴³⁰ Šainović Appeal Brief, paras 253, 258, 259, 271. See also Šainović Reply Brief, paras 36, 38.

³⁴³¹ Šainović Appeal Brief, paras 211 (regarding the 4 May 1999 meeting), 260-261 (regarding the 5 November 1998 meeting), 262-264 (regarding the 25 December 1998 meeting), 265 (regarding the 21 July 1998 meeting), 266 (regarding the meeting of 29 October 1998), 267 (regarding the 4 April 1999 meeting which appears to be a typographical error meaning 4 May 1999). See also Šainović Reply Brief, paras 36, 38.

³⁴³² Šainović Appeal Brief, paras 253-257.

Rambouillet;³⁴³³ and (iii) failed to employ a “unique standard for measuring closeness to Milošević”, ignoring evidence that Milutinović was seen a number of times during the NATO bombing in an “underground bunker where the Supreme Command was located”.³⁴³⁴

1054. The Prosecution responds that the Trial Chamber’s findings regarding Milutinović are not inconsistent with its findings concerning Šainović and that Šainović ignores the totality of the evidence and misrepresents the Trial Chamber’s findings.³⁴³⁵

1055. At the outset, the Appeals Chamber recalls that there is an unacceptable appearance of bias if “the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”³⁴³⁶ It further recalls that Judges enjoy a presumption of impartiality and that there is a high threshold to be reached in order to rebut that presumption.³⁴³⁷ Further, a trial chamber’s conclusion on the individual criminal responsibility of an accused is the result of a complex evaluation of all the evidence presented in relation to that accused.³⁴³⁸ Thus, while the assessment of the conduct of co-accused in general, and of alleged members of a JCE in particular, will often depend on evidence of their involvement in the same events, they will not necessarily be considered alike. Any given case contains a multitude of variables and “[t]o focus on one or two variables that are similar to the exclusion of numerous others that differ will not suffice to make the cases [...] analogous”.³⁴³⁹ The appellant bears the burden of showing that the Trial Chamber’s findings in relation to his own participation in the commission of the crime were unreasonable.

1056. The Appeals Chamber finds that Šainović’s submissions about the inferences drawn from his and Milutinović’s presence at several meetings as well as his argument about their respective relationships with Milošević display a disregard for the totality of the evidence considered by the Trial Chamber. In finding that Šainović’s role was distinct from Milutinović’s role, the Trial Chamber specifically considered that Šainović often conveyed orders from Milošević, travelled to Kosovo more frequently than Milutinović did, and was privy to more discussions on the activities of the

³⁴³³ Šainović Appeal Brief, paras 268-270. Šainović’s submits that it is unclear how Milutinović, as president of a state, could be considered a spokesperson whereas Šainović’s involvement in the Rambouillet negotiations was evidence of Šainović being a close associate of Milošević (Šainović Appeal Brief, para. 270.)

³⁴³⁴ Šainović Appeal Brief, paras 346-347, referring to Spašoje Mučibabić. 28 September 2007, T. 16580, Miodrag Simić, 14 September 2007, T. 15634-15635. See also Šainović Appeal Brief, para. 58; Šainović Reply Brief, paras 12, 48-49; Appeal Hearing, 11 Mar 2013, AT. 173-174, 181-182.

³⁴³⁵ Prosecution Response Brief (Šainović), paras 122-123, 134-138, 181-183.

³⁴³⁶ *Furundžija* Appeal Judgement, para. 189. See also *supra*, para. 180.

³⁴³⁷ *Hadžihasanović and Kubura* Appeal Judgement, para. 78. See also *Furundžija* Appeal Judgement, para. 197. See also *supra*, para. 181.

³⁴³⁸ See *Halilović* Appeal Judgement, para. 125, quoting *Ntagerura et al.* Appeal Judgement, para. 174, where the Appeals Chamber held: “Only after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies.” See also *Halilović* Appeal Judgement, para. 128.

³⁴³⁹ *Cf. Kvočka et al.* Appeal Judgement, para. 696, where the Appeals Chamber made this observation particularly in relation to the sentences imposed in that case.

FRY and MUP forces.³⁴⁴⁰ Moreover, regarding Šainović's and Milutinović's dealings with Rugova, the Trial Chamber explained why it came to different conclusions about their knowledge and role, finding that, "[...] unlike Šainović and Joksić who dealt with Rugova on a more regular basis and would visit his house, Milutinović's dealings with Rugova consisted of two meetings [...]" and that "[...] although it is possible that Milutinović had knowledge of Rugova's house arrest and the situation he was in, that is far from clear."³⁴⁴¹ Similarly, Šainović ignores the Trial Chamber's assessment of the totality of the evidence in relation to his and Milutinović's participation in the Rambouillet negotiations.³⁴⁴²

1057. For the reasons set out above, the Appeals Chamber finds that Šainović has failed to show any apprehension of bias or "double standards" in the evaluation of the evidence. Accordingly, the Appeals Chamber dismisses Šainović's arguments in this regard.³⁴⁴³

5. Alleged errors in relation to Šainović's responsibility under JCE III

(a) Introduction

1058. The Trial Chamber found that Šainović was a member of a JCE, the common purpose of which was to ensure, by criminal means, continued control by the FRY and Serbian authorities over Kosovo.³⁴⁴⁴ Having concluded that the common purpose was to be achieved through the crimes of deportation and forcible transfer, the Trial Chamber considered whether, pursuant to JCE III, the crimes of murder and persecution, including through murder, sexual assault, and the destruction of cultural property,³⁴⁴⁵ were foreseeable to Šainović and whether he willingly took the risk that they would be committed.³⁴⁴⁶ The Trial Chamber concluded that the crimes of murder, as a violation of the laws or customs of war, and murder and persecution, through murder and destruction of or damage to religious property, as crimes against humanity were foreseeable to Šainović.³⁴⁴⁷

³⁴⁴⁰ Trial Judgement, vol. 3, paras 274-275. See also *ibid.*, vol. 3, paras 133, 135-137, 140-143 (in relation to Milutinović), 304, 332-333, 343-345 (in relation to Šainović). Moreover, the Trial Chamber considered the importance of Šainović's relationship with Milošević for the purposes of his criminal responsibility to be that: Šainović relayed information to Milošević, conveyed Milošević's orders to those in Kosovo, had a great deal of influence over events in the province, and was empowered to make decisions (*ibid.*, vol. 3, paras 299, 427, 467).

³⁴⁴¹ Trial Judgement, vol. 3, para. 221 (footnotes omitted).

³⁴⁴² Trial Judgement, vol. 3, paras 202-213, 274 (in relation to Milutinović), 402-409, 435 (in relation to Šainović).

³⁴⁴³ Šainović's sub-grounds of appeal 1(25)-1(26) in their entirety and Šainović's sub-grounds of appeal 1(21), 2(13), and 2(14) in part.

³⁴⁴⁴ Trial Judgement, vol. 3, paras 95, 466.

³⁴⁴⁵ Although the Trial Chamber referred to "cultural property", the Appeals Chamber understands the reference to be to "cultural or religious property".

³⁴⁴⁶ Trial Judgement, vol. 3, paras 94-95, 469.

³⁴⁴⁷ Trial Judgement, vol. 3, paras 470, 473, 475.

1059. As a result, the Trial Chamber convicted Šainović³⁴⁴⁸ of murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity committed at Đakovica/Gjakova town (on the night of 1 April 1999),³⁴⁴⁹ Korenica/Korenice, and Meja/Mejė (27 April 1999),³⁴⁵⁰ Bela Crkva/Bellacërka (25 March 1999),³⁴⁵¹ Mala Kruša/Krusha e Vogël (26 March 1999),³⁴⁵² Suva Reka/Suhareka town (26 March 1999),³⁴⁵³ Izbica/Izbicë (28 March 1999),³⁴⁵⁴ near Gornja Sudimlja/Studimja e Epërme in relation to the convoy (2 and 3 May 1999),³⁴⁵⁵ and at Dubrava/Lisnaja (around 25 May 1999).³⁴⁵⁶ It also convicted Šainović³⁴⁵⁷ for persecution, through destruction of or damage to religious property, as a crime against humanity committed at Celina (28 March 1999),³⁴⁵⁸ Suva Reka/Suhareka town (during the attack commencing on 26 March 1999),³⁴⁵⁹ Vučitrn/Vushtrria (27 March 1999),³⁴⁶⁰ and Vlaštica/Llashtica (on or about 6 April 1999).³⁴⁶¹

1060. Šainović argues that the Trial Chamber erred in finding that it was foreseeable to him that murder, as a violation of the laws or customs of war, and murder and persecution, through murder and destruction of or damage to religious property, as crimes against humanity, would be committed and that he willingly took that risk pursuant to JCE III.³⁴⁶² The Prosecution responds that Šainović's arguments should be dismissed.³⁴⁶³

1061. The Appeals Chamber notes its finding elsewhere in this Judgement that the Trial Chamber erred in holding that for JCE III liability to arise, it has to be foreseeable to the accused that the crime "would be committed", thus applying a "probability" standard.³⁴⁶⁴ The correct legal standard for the JCE III *mens rea* requires that it was foreseeable to the accused that such a crime might be committed by a member of the JCE or one or more of the persons used by the accused (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the

³⁴⁴⁸ Trial Judgement, vol. 3, paras 471, 475.

³⁴⁴⁹ Trial Judgement, vol. 2, para. 1192.

³⁴⁵⁰ Trial Judgement, vol. 2, para. 1197.

³⁴⁵¹ Trial Judgement, vol. 2, paras 382, 1211.

³⁴⁵² Trial Judgement, vol. 2, para. 1213.

³⁴⁵³ Trial Judgement, vol. 2, para. 1217.

³⁴⁵⁴ Trial Judgement, vol. 2, para. 1223.

³⁴⁵⁵ Trial Judgement, vol. 2, paras 1235-1236.

³⁴⁵⁶ Trial Judgement, vol. 2, paras 1149, 1259, 1262.

³⁴⁵⁷ Trial Judgement, vol. 3, para. 475.

³⁴⁵⁸ Trial Judgement, vol. 2, paras 390, 1206, 1209.

³⁴⁵⁹ Trial Judgement, vol. 2, para. 1218. The Trial Chamber did not make a specific finding as to the date on which the mosque was destroyed (see Trial Judgement, vol. 2, paras 508-510).

³⁴⁶⁰ Trial Judgement, vol. 2, paras 742, 746, 1234.

³⁴⁶¹ Trial Judgement, vol. 2, paras 937, 946, 1249.

³⁴⁶² Šainović Appeal Brief, paras 397, 405.

³⁴⁶³ Prosecution's Response Brief (Šainović), paras 252, 258.

³⁴⁶⁴ Trial Judgement, vol. 1, para. 111, referring to *Prosecutor v. Brđanin*, Case No. IT-99-36-AR73.10, Decision on Interlocutory Appeal, 19 March 2004 ("*Brđanin* Decision"), para. 5, *Martić* Appeal Judgement, para. 83. See *infra*, sub-section VII.G.2.

common purpose³⁴⁶⁵ and the accused willingly took the risk that such a crime might occur by joining or continuing to participate in the enterprise.³⁴⁶⁶ As a result of this legal error, the Trial Chamber applied a higher degree of foreseeability for the crimes that fell outside the scope of the common purpose than that required under the correct legal standard. The Appeals Chamber will bear this in mind in its assessment of the parties' submissions.³⁴⁶⁷

(b) Alleged error in finding that the commission of murder of Kosovo Albanians was foreseeable to Šainović and that he willingly took that risk

1062. In concluding that murder was foreseeable to Šainović, the Trial Chamber stated:

[...] Šainović intended to forcibly displace part of the Kosovo Albanian population and shared this intent with other members of the joint criminal enterprise, the object of which was to forcibly displace Kosovo Albanians within and deport them from Kosovo in order to maintain control over the province. Šainović was aware of the strong animosity between ethnic Serbs and Kosovo Albanians in Kosovo during 1998 and 1999. He was aware of the context in which the forcible displacement took place. It was thus reasonably foreseeable that other crimes, including murder, would be committed by physical and intermediary perpetrators with intent to discriminate against Kosovo Albanians. The Chamber is of the view that Šainović's detailed knowledge of events on the ground in Kosovo in 1998 and 1999 put him on notice that murders would be by [*sic*] committed by the VJ and MUP as a result of the displacements taking place in 1999.³⁴⁶⁸

The Trial Chamber held that, in addition to the above considerations, specific evidence supported the conclusion that murder was foreseeable to Šainović. It referred to meetings held on 1 and 4 October 1998 where the killings in Gornje Obrinje/Abria e Epërme as well as an allegation of a mass grave in Jablanica/Jabllanica were discussed. The Trial Chamber also relied on the 26 October 1998 Joint Command meeting at which Šainović referred to the wounding of a young man and the killing of a child in a village, and on witness testimony that Šainović was told of harassment of the Kosovo Albanian population in Mališevo/Malisheva and of a large number of Kosovo Albanian men killed at Račak/Rečak.³⁴⁶⁹ Referring to the meetings of 4 April, 7 and 17 May 1999, the Trial Chamber concluded that Šainović was aware that members of the FRY and Serbian forces were committing crimes, including murder and looting during the early part of the

³⁴⁶⁵ *Brđanin* Appeal Judgement, paras 365, 411.

³⁴⁶⁶ *Kvočka et al.* Appeal Judgement, para. 83, referring to *Tadić* Appeal Judgement, paras 204, 220, 228; *Vasiljević* Appeal Judgement, para. 99. See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009 ("*Karadžić JCE III Decision*"), paras 15, 18, also holding that the possibility a crime be committed must be "sufficiently substantial as to be foreseeable" to an accused.

³⁴⁶⁷ During the appeal hearing, Šainović argued that, irrespective of whether the Trial Chamber applied the correct legal standard in relation to the *mens rea* for JCE III, he was erroneously convicted pursuant to this mode of liability (Appeal Hearing, 11 Mar 2013, AT. 208-209). In response, the Prosecution argued that, if the Appeals Chamber were to find that the Trial Chamber erred in law in relation to the *mens rea* standard for JCE III liability, this will have no impact on Šainović's convictions pursuant to JCE III liability (Appeals Hearing, 11 Mar 2013, AT. 261).

³⁴⁶⁸ Trial Judgement, vol. 3, para. 470.

³⁴⁶⁹ Trial Judgement, vol. 3, para. 470.

NATO campaign.³⁴⁷⁰ It also noted that Šainović was informed of the widespread campaign of crimes against the Kosovo Albanian population during his dealings with Rugova.³⁴⁷¹

(i) Submissions of the parties

1063. Šainović submits that the Trial Chamber erred in fact in finding that the murder of Kosovo Albanians was reasonably foreseeable to him and that he willingly took the risk that it would be committed.³⁴⁷² He argues that the finding is unsupported by the evidence³⁴⁷³ and requests the Appeals Chamber to overturn his convictions of murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity.³⁴⁷⁴

1064. Šainović argues that the events in 1998 do not provide grounds to establish that the murders committed in 1999 were reasonably foreseeable to him.³⁴⁷⁵ In particular, he argues that the Trial Chamber did not “draw any conclusions” regarding murders in Jablanica/Jabllanica,³⁴⁷⁶ and relied on Đaković’s Notes which contained unclear information about a mass grave and its location, and no information on the identity of the perpetrators.³⁴⁷⁷ Further, Šainović submits that he had no knowledge about the murder incident in Gornje Obrinje/Abria e Epërme, as the investigation into the incident was never completed.³⁴⁷⁸

1065. In relation to the meeting of 26 October 1998, Šainović asserts that, without any “information on the background of the events”, his statement concerning the wounding of a young man and the killing of a child could not be relied upon to establish the foreseeability of murders in 1999.³⁴⁷⁹ Likewise, Šainović submits that the Trial Chamber failed to reach a finding that murders were committed in Mališevo/Malisheva and Račak/Rečak.³⁴⁸⁰ In relation to

³⁴⁷⁰ Trial Judgement, vol. 3, para. 471.

³⁴⁷¹ Trial Judgement, vol. 3, para. 471.

³⁴⁷² Šainović’s Notice of Appeal, paras 64-66; Šainović’s Appeal Brief, paras 397, 402, referring to Trial Judgement, vol. 3, para. 471. The Appeals Chamber notes that Šainović incorporates by reference submissions set forth in sub-grounds 3(2) and 3(3) of his Appeal Brief (see Šainović’s Appeal Brief, paras 399-400). These submissions are addressed in sub-sections VII.D.3.(c) and VII.D.3.(d) above. The Appeals Chamber further notes that while Šainović also alleges that the Trial Chamber committed an error of law in finding that the murder of Kosovo Albanians was foreseeable to him and that he willingly took the risk that it would be committed (See Šainović’s Appeal Brief, para. 402), he has failed to explain the nature of the legal error and therefore the Appeals Chamber is unable to consider his submission on this point.

³⁴⁷³ Šainović’s Appeal Brief, para. 401.

³⁴⁷⁴ Šainović’s Appeal Brief, para. 404.

³⁴⁷⁵ Šainović’s Appeal Brief, para. 399.

³⁴⁷⁶ Šainović’s Appeal Brief, para. 398, referring to Trial Judgement, vol. 1, paras 874-881.

³⁴⁷⁷ Šainović’s Appeal Brief, para. 369 referring to Trial Judgement, vol. 3, para. 441 and citing Exh. P1468, p. 134.

³⁴⁷⁸ Šainović’s Appeal Brief, paras 398-399, incorporating by reference Šainović’s Appeal Brief, paras 372-374. See also Šainović’s Reply Brief, para. 53. Šainović claims that the Trial Chamber’s conclusion that murder was committed in Gornje Obrinje/Abria e Epërme was unreasonable (Šainović’s Appeal Brief, paras 372-374. Šainović’s Reply Brief, para. 53). See also Appeal Hearing, 11 Mar 2013, AT. 202.

³⁴⁷⁹ Šainović’s Appeal Brief, para. 399.

³⁴⁸⁰ Šainović’s Appeal Brief, paras 398-399, referring to Trial Judgement, vol. 1, paras 882-886.

Mališevo/Malisheva, Šainović maintains that it is unclear how the harassment of the Kosovo Albanian population there rendered the murders committed in 1999 foreseeable.³⁴⁸¹

1066. Finally, Šainović submits that during his presence at the MUP Staff meetings of 4 April and 7 May 1999 murders were not mentioned, and that since the meeting of 17 May 1999 took place at the very end of the conflict, it could not be relied upon to establish foreseeability of future crimes.³⁴⁸²

1067. The Prosecution responds that Šainović's claims that the Trial Chamber erred in law are undeveloped and should be summarily dismissed, and that he has failed to show an error of fact in the Trial Chamber's findings.³⁴⁸³ The Prosecution argues that the Trial Chamber relied on the fact that Šainović was informed about the commission of crimes rather than on "the actual proof of the events themselves."³⁴⁸⁴ In this regard, the Prosecution refers to Šainović's presence at the Joint Command meetings on 1 and 4 October 1998 where the events in Gornje Obrinje/Abria e Epërme were discussed and an allegation of a mass grave in Jablanica/Jabllanica was mentioned,³⁴⁸⁵ and the information he received about a large number of Kosovo Albanian men killed at Račak/Reçak.³⁴⁸⁶ The Prosecution also refers to Šainović's presence at the 26 October 1998 Joint Command meeting where the wounding of a young man and killing of a child were discussed.³⁴⁸⁷ As to Mališevo/Malisheva, the Prosecution submits that "[e]xtensive burning and 'aggressive' police treatment of the civilian population are relevant indicia that show that further violence or killings was [*sic*] foreseeable."³⁴⁸⁸ The Prosecution further submits that Šainović's statements at the MUP Staff meetings of 4 April and 7 May 1999 demonstrate his knowledge that crimes were committed by FRY and Serbian forces,³⁴⁸⁹ and that the Trial Chamber was entitled to consider the information exchanged at the 17 May 1999 meeting in determining the foreseeability of murder to Šainović.³⁴⁹⁰

³⁴⁸¹ Šainović's Appeal Brief, para. 399.

³⁴⁸² Šainović's Appeal Brief, paras 380, 400, referring to Trial Judgement, vol. 3, para. 471.

³⁴⁸³ Prosecution's Response Brief (Šainović), para. 252. See also *ibid.*, para. 246.

³⁴⁸⁴ Prosecution's Response Brief (Šainović), para. 247.

³⁴⁸⁵ Prosecution's Response Brief (Šainović), para. 248, referring to Trial Judgement, vol. 3, paras 441, 470. In response to Šainović's submissions that the events at Gornje Obrinje/Abria e Epërme were not established, the Prosecution argues that it is irrelevant that the investigation was not completed and that the Trial Chamber reasonably relied on Abrahams' evidence. It avers that it is uncontested that the VJ and the MUP were conducting operations against the KLA in the area at the time of the killings and that the VJ General Staff's request for information about the alleged massacre demonstrates that there was some concern that VJ forces might have been involved. The Prosecution adds that the Trial Chamber also took into account VJ reports suggesting that the MUP was responsible (Prosecution's Response Brief (Šainović), paras 215-216).

³⁴⁸⁶ Prosecution's Response Brief (Šainović), para. 249, citing Trial Judgement, vol. 3, para. 470.

³⁴⁸⁷ Prosecution's Response Brief (Šainović), para. 248, referring to Trial Judgement, vol. 3, paras 441, 470.

³⁴⁸⁸ Prosecution's Response Brief (Šainović), para. 249.

³⁴⁸⁹ Prosecution's Response Brief (Šainović), para. 250, referring to Trial Judgement, vol. 3, paras 341, 451, 455-456, 464, 471, Exh. P1989, p. 4, Exh. P1996, p. 3, Ljubinko Cvetić, 7 Dec 2006, T. 8084-8085.

³⁴⁹⁰ Prosecution's Response Brief (Šainović), para. 251, referring to Trial Judgement, vol. 3, para. 452.

1068. In reply, Šainović claims that it is important whether the information he received about crimes was factually correct, as the mere mention of murder does not make future crimes foreseeable.³⁴⁹¹ He further submits that specific knowledge, as opposed to general knowledge about crimes, is required.³⁴⁹²

(ii) Analysis

1069. The Appeals Chamber will first address Šainović's challenges to the Trial Chamber's factual findings on his knowledge of the commission of earlier crimes which, the Trial Chamber reasoned, in conjunction with other factors made the crimes outside the common purpose foreseeable to him as well as his argument that he did not willingly take the risk that they would be committed. In so doing, the Appeals Chamber will apply the standard of reasonableness.³⁴⁹³ It will then address the impact of the Trial Chamber's legal error,³⁴⁹⁴ if any, on its conclusion that the crimes of murder, as a violation of the laws or customs of war, and murder and persecution, through murder, as crimes against humanity, were foreseeable to Šainović pursuant to JCE III.

1070. In relation to Jablanica/Jabllanica, the Trial Chamber noted that Šainović attended the Joint Command meeting on 1 October 1998 where Lukić stated that "[a]llegedly, there is a mass grave in the region of Jablanica."³⁴⁹⁵ Although Lukić's statement followed a comment by Milomir Minić that "[r]evealing a crime has top-priority",³⁴⁹⁶ the Appeals Chamber notes that the evidence is unclear as to whether the alleged mass grave was associated with crimes committed by the FRY and Serbian forces or by the KLA. In these circumstances, the Appeals Chamber finds that it was unreasonable for the Trial Chamber to rely on Lukić's statement in assessing whether murder committed by the MUP and VJ forces was foreseeable to Šainović.

1071. The Trial Chamber further found that in late September 1998, a number of civilians, including women and children, were killed in Gornje Obrinje/Abria e Epërme by FRY and Serbian forces.³⁴⁹⁷ It found that Šainović was present at the Joint Command meeting on 26 September 1998, when Pavković and Lukić reported that the action in Gornje Obrinje/Abria e Epërme was completed.³⁴⁹⁸ The Trial Chamber further considered that during the 1 and 4 October 1998 Joint Command meetings attended by Šainović, the events in Gornje Obrinje/Abria e Epërme were

³⁴⁹¹ Šainović's Reply Brief, para. 58.

³⁴⁹² Šainović's Reply Brief, para. 59.

³⁴⁹³ See *supra*, para. 22.

³⁴⁹⁴ See *supra*, para. 1061. See also *infra*, sub-section VII.G.2.

³⁴⁹⁵ Trial Judgement, vol. 3, para. 441, citing Exh. P1468, p. 134. The Appeals Chamber notes that the English translation of p. 134 of P1468 states: "Mr. Lukić: Allegedly, there is a mass grave in /illegible/." However, "reg. Jablanica" is visible in the BCS original (see the BCS original of Exh. P1468, ERN number: K0228530).

³⁴⁹⁶ Exh. P1468, p. 134.

³⁴⁹⁷ See Trial Judgement, vol. 1, para. 912.

discussed.³⁴⁹⁹ In particular, the Trial Chamber noted that at the 1 October 1998 meeting, “Radović brought a newspaper article on events in Gornje Obrinje/Abria e Epërme to the attention of the Joint Command” and that at the 4 October 1998 Joint Command meeting David Gajić stated that “there are some indications that they are going to come up with some more cases, as D. and G. Obrinje”. Đaković’s Notes record that in response Šainović said that a commission for investigation of crimes was to be formed at the state level.³⁵⁰⁰ The Appeals Chamber observes that the Trial Chamber also noted Frederick Abrahams’ evidence that Human Rights Watch reports on incidents in Kosovo were sent to FRY government officials and the media, including a report on the Gornje Obrinje/Abria e Epërme incident.³⁵⁰¹

1072. The Appeals Chamber observes that the events mentioned in the newspaper article and discussed during the Joint Command meeting on 1 October 1998 are not recorded in Đaković’s Notes nor is the article admitted in the trial record. As a result, it is unclear what information was conveyed to Šainović during this meeting. In addition, neither Gajić’s remark nor Šainović’s comment at the 4 October 1998 Joint Command meeting indicate that Šainović was aware of allegations of murder of civilians in particular. The Appeals Chamber also considers that Abraham’s evidence that the Human Rights Watch report was sent to FRY government officials and the media is insufficient to establish that Šainović was in fact aware of the contents of the report.³⁵⁰² In these circumstances, the Appeals Chamber finds that it was unreasonable for the Trial Chamber to rely on Šainović’s knowledge of the Gornje Obrinje/Abria e Epërme incident in assessing the foreseeability of murder to him.

1073. The Trial Chamber further relied on Šainović’s statement at the Joint Command meeting on 26 October 1998 that the wounding of a young man and the killing of a child in a village had caused a lot of “damage”.³⁵⁰³ The Appeals Chamber observes that, when read in its context,³⁵⁰⁴ it is unclear whether the incident was regarded as murder or as the result of legitimate combat activity. Accordingly, the Appeals Chamber is of the view that it was unreasonable for the Trial Chamber to rely on this evidence in assessing the foreseeability of murder to Šainović.

³⁴⁹⁸ Trial Judgement, vol. 3, para. 312.

³⁴⁹⁹ Trial Judgement, vol. 3, para. 470. See also *ibid.*, para. 441.

³⁵⁰⁰ Trial Judgement, vol. 3, para. 441.

³⁵⁰¹ Trial Judgement, vol. 3, para. 448, referring to Frederick Abrahams, 13 Jul 2006, T. 811-812, 818, *ibid.*, 7 Aug 2006, T. 984. In his testimony, Abrahams referred to Exh. P441, a Human Rights Watch report, titled “A Week of Terror in Drenica – Humanitarian Law Violations in Kosovo”, published in January or February 1999, which documents the incident at Gornje Obrinje/Abria e Epërme in late September 1998 (Frederick Abrahams, 13 Jul 2006, T. 811-812). See also Trial Judgement, vol. 1, para. 900.

³⁵⁰² See Trial Judgement, vol. 3, para. 448.

³⁵⁰³ Trial Judgement, vol. 3, para. 470, citing Exh. P1468, p. 159.

³⁵⁰⁴ See Exh. P1468, p. 159: “The wounding of a young man and the killing of a child in the village of /Koprivnika?/ has caused us a lot of damage. There always must be a reason for acting. Nobody is allowed to act without a cause.”

1074. In relation to Mališevo/Malisheva, the Trial Chamber noted Karol John Drewienkiewicz's testimony that during a meeting on 4 December 1998, Šainović was informed about the harassment of the Kosovo Albanian population there by members of the police.³⁵⁰⁵ Drewienkiewicz testified that the police station in Mališevo/Malisheva was heavily fortified and that the behaviour of the police was making the situation worse.³⁵⁰⁶ He explained that the police were aggressive towards Kosovo Albanians, who were often stopped and searched at check-points, and that "it was almost impossible for a Kosovar Albanian to go from A to B without being stopped and harassed by the Serb police on several occasions".³⁵⁰⁷ The Appeals Chamber notes that Šainović is correct that the Trial Chamber did not find that murders were committed in Mališevo/Malisheva and considers that the rather general nature of the information conveyed by Drewienkiewicz about the harassment of Kosovo Albanian civilians would be insufficient on its own to render murder foreseeable to Šainović. However, the Appeals Chamber finds that a reasonable trier of fact could have considered this evidence, among other evidence, in assessing whether murder was foreseeable to Šainović.

1075. Regarding the Račak/Reçak incident on 15 January 1999, the Trial Chamber noted that Šainović was told that a large number of Kosovo Albanian men had been killed.³⁵⁰⁸ The Trial Chamber had earlier considered Klaus Naumann's evidence that at a meeting on 19 January 1999 attended by Šainović, a list of violations of the Clark-Naumann Agreement mentioning Račak/Reçak, including issues of excessive and disproportionate use of force by police and military forces, was handed to Milošević.³⁵⁰⁹ The Trial Chamber also referred to Šainović's interview with the Prosecution, in which he stated that on 15 January 1999, a local journalist informed him over the phone that the MUP had destroyed a large terrorist unit and that 100 persons had been killed.³⁵¹⁰ Šainović was then informed by Lukić that there had been a battle with terrorists in Račak/Reçak and that, as a result, 15 terrorists had been killed. Vlastimir Đorđević also confirmed to him that a large KLA group had been destroyed.³⁵¹¹ The Appeals Chamber notes that the evidence referred to by the Trial Chamber does not indicate whether Šainović knew that the incident in Račak/Reçak constituted murder or that it was the result of legitimate combat activity. Consequently, the Appeals Chamber is of the view that it was unreasonable for the Trial Chamber to rely on this evidence in assessing the foreseeability of murder to Šainović.

³⁵⁰⁵ Trial Judgement, vol. 3, para. 447 referring to Karol John Drewienkiewicz, 4 Dec 2006, T. 7777-7782, *ibid.*, Exh. P2508, paras 72-79.

³⁵⁰⁶ Karol John Drewienkiewicz, 4 Dec 2006, T. 7779.

³⁵⁰⁷ Karol John Drewienkiewicz, 4 Dec 2006, T. 7780-7781.

³⁵⁰⁸ Trial Judgement, vol. 3, para. 470.

³⁵⁰⁹ Trial Judgement, vol. 3, para. 447, referring to Klaus Naumann, 13 Dec 2006, T. 8270, Exh. P1767, paras 36-37, Exh. P2512, T. 7007-7009.

³⁵¹⁰ Trial Judgement, vol. 3, para. 397, referring to Exh. P605, pp. 722-723, 795-796, 825.

³⁵¹¹ Trial Judgement, vol. 3, para. 397, referring to Exh. P605, pp. 723, 725-726, 748.

1076. The Appeals Chamber turns to address Šainović's argument that at the MUP Staff meeting on 4 April 1999, no murders were mentioned in his presence. The Appeals Chamber notes that at the meeting, the chiefs of the SUPs in Priština/Prishtina, Peć/Peja, Đakovica/Gjakova, Prizren, Uroševač/Ferizaj, and Gnjilane/Gjilane reported on a significant number of people, including policemen, reservists, and volunteers, detained for perpetrating crimes.³⁵¹² However, in relation to these crimes the minutes of the meeting mention explicitly only looting.³⁵¹³ In these circumstances, the Appeals Chamber finds that the information Šainović received at this meeting would be insufficient on its own to render murder foreseeable to Šainović. However, the Appeals Chamber finds that a reasonable trier of fact could have relied on it, among other evidence, in assessing whether murder was foreseeable to Šainović.

1077. The Trial Chamber further noted that at the 7 May 1999 MUP Staff meeting Šainović reported that Milošević and Milutinović had received reports during an earlier meeting on 4 May 1999 from Pavković and Lukić about criminal activity associated with MUP and VJ operations³⁵¹⁴ and: (i) commented on the need to separately regulate the conduct of the VJ reservists;³⁵¹⁵ (ii) warned that those officers whose conduct was poor should be prosecuted and punished;³⁵¹⁶ and (iii) indicated that the MUP was to ensure the security of citizens and property and arrest those who were caught stealing.³⁵¹⁷ He also stated that there should be no private wars and that private killings must be prevented.³⁵¹⁸ Šainović's statements indicate that he had a general awareness that crimes were being committed by FRY and Serbian forces during the NATO bombing campaign, including "private killings". The Appeals Chamber, Judge Liu dissenting, finds that in light of Šainović's statements, a reasonable trier of fact could have relied on this evidence in assessing whether murder was foreseeable to him. The Appeals Chamber further notes that the murders in Dubrava/Lisnaja occurred on 25 May 1999³⁵¹⁹ and therefore, contrary to Šainović's submission,³⁵²⁰ the allegations of murder he learned about at the 17 May 1999 meeting³⁵²¹ are

³⁵¹² Exh. P1989, pp. 1-2.

³⁵¹³ See Exh. P1989, p. 1 recording that the Chief of the SUP in Peć/Peja "[m]entioned the problem of VJ members seizing vehicles".

³⁵¹⁴ Trial Judgement, vol. 3, paras 344-345, 455. The Appeals Chamber notes that the Trial Chamber also found that Šainović attended or "at the very least, was fully informed about the contents" of the 4 May 1999 meeting (Trial Judgement, vol. 3, paras 343-345). Although the Trial Chamber does not rely on this meeting as evidence of Šainović's knowledge of crimes, it found that at this meeting, information was presented that the "security forces" had dealt with numerous cases of violence, killings, pillage, and other crimes" (Trial Judgement, vol. 3, para. 345, referring to Exh. P1696). The Trial Chamber found that the statements Šainović "made at the meeting of the MUP Staff for Kosovo on 7 May, corroborate these accounts of the 4 May meeting" (Trial Judgement, vol. 3, para. 344).

³⁵¹⁵ Trial Judgement, vol. 3, paras 346, 464, 471 referring to Exh. P1996, p. 4.

³⁵¹⁶ Trial Judgement, vol. 3, paras 346, 464, referring to Exh. P1996, p. 4.

³⁵¹⁷ Trial Judgement, vol. 3, para. 455, referring to Exh. P1996, p. 3.

³⁵¹⁸ Trial Judgement, vol. 3, para. 455, referring to Exh. P1996, p. 3. See also Trial Judgement, vol. 3, paras 140, 344, 346, referring to Exh. P1996, p. 4.

³⁵¹⁹ Trial Judgement, vol. 2, paras 1149, 1259.

³⁵²⁰ Šainović's Appeal Brief, paras 380, 400, referring to Trial Judgement, vol. 3, para. 471.

relevant in establishing whether the murders committed in Dubrava/Lisnaja were foreseeable to him.

1078. The Appeals Chamber has found that, in assessing whether murder was foreseeable to Šainović, the Trial Chamber erred in concluding that he knew about the commission of murder in Jablanica/Jabllanica, Račak/Rečak, Gornje Obrinje/Abria e Epërme, and in relation to the deaths he referred to at the 26 October 1998 meeting. The Appeals Chamber will therefore consider whether the Trial Chamber's remaining factual findings establish that murder was foreseeable to Šainović pursuant to JCE III. In doing so, the Appeals Chamber will apply the correct legal standard which requires that it was foreseeable to the accused that such a crime might be committed by a member of the JCE or one or more of the persons used by the accused (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose³⁵²² and that the accused willingly took the risk that such a crime might occur by joining or continuing to participate in the enterprise.³⁵²³

1079. The Appeals Chamber has upheld the Trial Chamber's conclusion that Šainović had the intent to forcibly displace the Kosovo Albanian population, both within and outside Kosovo, through a campaign of terror and violence.³⁵²⁴ The evidence considered by the Trial Chamber shows that Šainović was aware of various criminal acts and acts of violence committed against the Kosovo Albanian population both in 1998 and 1999.³⁵²⁵ Regarding Šainović's knowledge in 1998, the Trial Chamber found that he was aware of the robbing and burning of houses by FRY and Serbian forces,³⁵²⁶ harassment of the Kosovo Albanian civilian population by the MUP in Mališevo/Malisheva,³⁵²⁷ and of the existing "humanitarian catastrophe".³⁵²⁸ Moreover, the Trial Chamber found that Šainović was aware of UN Security Council Resolution 1199 of 23 September 1998, which stated that "the excessive and indiscriminate use of force by Serbian

³⁵²¹ See *supra*, para. 1032. At the 17 May 1999 meeting Šainović learned about crimes being committed in Kosovo, including murders and rapes of civilians by soldiers and crimes committed by the Scorpions in Podujevo/Podujeva (Trial Judgement, vol. 3, para. 351, referring to Aleksandar Vasiljević, Exh. P2600, paras 65-68, *ibid.*, Exh. P2589, T. 15999-16004, Exh. P2592. See also Exh. P605, pp. 869-870). It was stated that the 800 bodies referred to were associated with "crimes" (Aleksandar Vasiljević, P2600, para. 67; *ibid.*, P2589, T. 15999-16000).

³⁵²² *Brđanin* Appeal Judgement, paras 365, 411.

³⁵²³ *Kvočka et al.* Appeal Judgement, para. 83, referring to *Tadić* Appeal Judgement, paras 204, 220, 228; *Vasiljević* Appeal Judgement, para. 99. See also *Karadžić JCE III* Decision, paras 15, 18, also holding that the possibility a crime be committed must be "sufficiently substantial as to be foreseeable" to an accused.

³⁵²⁴ See *supra*, sub-section VII.D.3. See also Trial Judgement, vol. 3, paras 466, 473.

³⁵²⁵ See *supra*, sub-sections VII.D.3.(c) and VII.D.3.(d).

³⁵²⁶ Trial Judgement, vol. 3, para. 441, referring to Exh. P1468, pp. 9, 46, 52; Trial Judgement, vol. 3, para. 444, referring to Exh. P605, pp. 653, 664-665, 673-674, 692, 695-702, 706-709.

³⁵²⁷ Trial Judgement, vol. 3, para. 447 referring to Karol John Drewienkiewicz, 4 Dec 2006, T. 7777-7782, *ibid.*, Exh. P2508, paras 72-79.

³⁵²⁸ Trial Judgement, vol. 3, para. 442, referring to Exh. P1468, p. 124.

security forces and the Yugoslav army” had resulted in “the displacement of over 230,000 persons from their homes.”³⁵²⁹

1080. Regarding Šainović’s knowledge in 1999, the Trial Chamber found that Šainović learned of the use of excessive force, displacements, and criminal activity by VJ and MUP forces. Specifically, the Trial Chamber found that at a meeting on 19 January 1999, Šainović was informed of violations of the Clark-Naumann Agreement, including issues of excessive and disproportionate use of force by police and military forces.³⁵³⁰ The Trial Chamber also considered Louise Arbour’s letter of 26 March 1999 sent to Šainović in which she expressed her concerns about serious breaches of international humanitarian law, including attacks against the civilian population, being committed.³⁵³¹ It further found that at a meeting on 28 April 1999 with the LDK leader Ibrahim Rugova, Šainović was told that the MUP forces were evicting Kosovo Albanians from their homes.³⁵³² The Trial Chamber also found that Šainović was informed of crimes at the 4 April 1999 meeting with senior police officials in Kosovo,³⁵³³ however the Appeals Chamber notes that the minutes of the meeting only explicitly mention looting.³⁵³⁴ The Trial Chamber noted that at the 7 May 1999 MUP Staff meeting Šainović stated that there should be no private wars and that private killings must be prevented³⁵³⁵ and that at the 17 May 1999 meeting he was informed of crimes, including murders and rapes of civilians by soldiers and crimes committed by the Scorpions in Podujevo/Podujeva.³⁵³⁶ The Trial Chamber also found that Šainović was in Kosovo during the NATO bombing on 24, 29 March, 4, 5, 9, 13, 28 April, 7 May, and 1 June. It noted that most of Šainović’s trips took place in late March and early April when the majority of the crimes took place. The Trial Chamber emphasised that Šainović was in Priština/Prishtina on 29 March and 4 April 1999, “the time when massive expulsions were taking place there.”³⁵³⁷

³⁵²⁹ Trial Judgement, vol. 3, para. 443, referring to Exh. P456, p. 1. See also *supra*, para. 1018.

³⁵³⁰ Trial Judgement, vol. 3, para. 447.

³⁵³¹ Trial Judgement, vol. 3, paras 448, 464. See also *supra*, para. 1034.

³⁵³² Trial Judgement, vol. 3, paras 450, 464, referring to Adnan Merovci, Exh. P2588, para. 72, Ibrahim Rugova, Exh. P2613, p. 12, Adnan Merovci, 16 Jan 2007, T. 8469–8471. The Appeals Chamber considers that the Trial Chamber’s reference to Exh. P2613 contains a clerical error as Rugova’s statement “that Kosovo was being emptied of Albanians” is found on page 11 of the referred exhibit. See also *supra*, para. 1033.

³⁵³³ Trial Judgement, vol. 3, paras 455, 464, 471, referring to Exh. P1989. See also *supra*, para. 1030.

³⁵³⁴ The Appeals Chamber notes that in relation to these crimes, the minutes of the meeting mention explicitly only looting (see Exhibit P1989, p. 1, recording that the Chief of the SUP in Peć/Peja “[m]entioned the problem of VJ members seizing vehicles”).

³⁵³⁵ Trial Judgement, vol. 3, para. 455, referring to Exh. P1996, p. 3. See also Trial Judgement, vol. 3, paras 140, 344, 346, referring to Exh. P1996, p. 4.

³⁵³⁶ Trial Judgement, vol. 3, para. 351, referring to Aleksandar Vasiljević, Exh. P2600, paras 65-68, *ibid.*, Exh. P2589, T. 15999-16004, Exh. P2592. See also Exh. P605, pp. 869-870; Trial Judgement, vol. 3, para. 739. It was stated that the 800 bodies referred to were associated with “crimes” (Aleksandar Vasiljević, Exh. P2600, para. 67; *ibid.*, Exh. P2589, T. 15999-16000).

³⁵³⁷ Trial Judgement, vol. 3, para. 449. See also *ibid.*, paras 340-341; *supra*, para. 1036.

1081. As noted above, the evidence considered by the Trial Chamber and its findings, which have not been overturned on appeal, show that Šainović was aware that killings were occurring in Kosovo around 7 May 1999.³⁵³⁸ The Appeals Chamber is mindful that it is not necessary for the purposes of JCE III liability that an accused be aware of the past occurrence of a crime in order for the same crime to be foreseeable to him. However, the JCE III *mens rea* standard does require that the possibility a crime could be committed be sufficiently substantial as to be foreseeable to the accused.³⁵³⁹ The Appeals Chamber is not convinced that the information available to Šainović prior to 7 May 1999 made the possibility that murder could be committed sufficiently substantial as to be foreseeable to him. The evidence considered by the Trial Chamber shows that, prior to that date, in 1998, Šainović was aware of allegations of excessive and disproportionate force used by police and military forces, the displacement of civilians, and property related crimes, such as looting and arson. It also shows that, in 1999, he was aware of crimes such as looting, unspecified violations of international humanitarian law, including allegations of attacks on the civilian population, and forcible displacement of the Kosovo Albanian civilian population. The Trial Chamber further considered Šainović's awareness of the animosity between ethnic Serbs and Kosovo Albanians in Kosovo and of the context in which the forcible displacement took place.³⁵⁴⁰ Undoubtedly, Šainović was aware that these events created an atmosphere of violence and insecurity, rendering the Kosovo Albanian population particularly vulnerable to a wide range of criminality. However, the evidence does not establish that prior to 7 May 1999 Šainović was aware of acts of violence to civilians of such a gravity as to make murders, in particular, foreseeable to him.

1082. Consequently, the Appeals Chamber, Judge Liu dissenting, is satisfied that as of 7 May 1999, it was foreseeable to Šainović that murders could be committed. In relation to Šainović's argument that the Trial Chamber erred in fact in finding that he willingly took the risk that murder could be committed, the Appeals Chamber notes that he has failed to present any arguments in support of his submission. His participation in the JCE through his role in the coordination of joint VJ and MUP operations demonstrates that he acted in furtherance of the common plan of the JCE while being aware of the possibility that murder could be committed, thus showing that he willingly took that risk.³⁵⁴¹

(iii) Conclusion

1083. The Appeals Chamber therefore grants Šainović's fourth ground of appeal, in part, and quashes his convictions for murder as a violation of the laws or customs of war, and murder and

³⁵³⁸ See Trial Judgement, vol. 3, paras 140, 344, 455, referring to Exh. P1996, p. 4.

³⁵³⁹ *Karadžić JCE III* Decision, para. 18.

³⁵⁴⁰ See Trial Judgement, vol. 3, para. 470.

persecution, through murder, as crimes against humanity, committed prior to 7 May 1999, *i.e.* at Đakovica/Gjakova town (on the night of 1 April 1999),³⁵⁴² Korenica/Korenicë and Meja/Mejë (27 April 1999),³⁵⁴³ Bela Crkva/Bellacërka (25 March 1999),³⁵⁴⁴ Mala Kruša/Krusha e Vogël (26 March 1999),³⁵⁴⁵ Suva Reka/Suhareka town (26 March 1999),³⁵⁴⁶ Izbica/Izbicë (28 March 1999),³⁵⁴⁷ and near Gornja Sudimlja/Studimja e Epërme in relation to the convoy (2 and 3 May 1999).³⁵⁴⁸ The Appeals Chamber, Judge Liu dissenting, upholds Šainović's conviction for murder as a violation of the laws or customs of war, and murder and persecution, through murder, as crimes against humanity, committed at Dubrava/Lisnaja (around 25 May 1999).³⁵⁴⁹ The impact of this conclusion, if any, on Šainović's sentence will be discussed below.³⁵⁵⁰

(c) Alleged error in finding that the commission of persecution through destruction of or damage to religious property was foreseeable to Šainović and that he willingly took that risk

1084. In concluding that destruction of or damage to religious property was foreseeable to Šainović, the Trial Chamber considered that: (i) the conflict involved ethnic divisions; (ii) the common purpose of the JCE was to be achieved through a campaign of terror and violence against the Kosovo Albanian civilian population; and (iii) Šainović had detailed knowledge of the events on the ground.³⁵⁵¹

1085. The Trial Chamber consequently convicted Šainović³⁵⁵² for persecution, through destruction of or damage to religious property, committed at Celina (28 March 1999),³⁵⁵³ Suva Reka/Suhareka town (during the attack commencing 26 March 1999),³⁵⁵⁴ Vučitrn/Vushtrria (27 March 1999),³⁵⁵⁵ and Vlačica/Llashtica (6 April 1999).³⁵⁵⁶

³⁵⁴¹ See Trial Judgement, vol. 3 para. 467.

³⁵⁴² Trial Judgement, vol. 2, para. 1192.

³⁵⁴³ Trial Judgement, vol. 2, para. 1197. See also *supra*, sub-section VI.C.2.

³⁵⁴⁴ Trial Judgement, vol. 2, paras 382, 1211.

³⁵⁴⁵ Trial Judgement, vol. 2, para. 1213.

³⁵⁴⁶ Trial Judgement, vol. 2, para. 1217.

³⁵⁴⁷ Trial Judgement, vol. 2, para. 1223.

³⁵⁴⁸ Trial Judgement, vol. 2, paras 1235-1236.

³⁵⁴⁹ Trial Judgement, vol. 2, para. 1149.

³⁵⁵⁰ See *infra*, sub-section IX.I.

³⁵⁵¹ Trial Judgement, vol. 3, para. 473.

³⁵⁵² Trial Judgement, vol. 3, paras 473, 475.

³⁵⁵³ Trial Judgement, vol. 2, paras 390, 1206, 1209.

³⁵⁵⁴ Trial Judgement, vol. 2, para. 1218. The Trial Chamber did not make a specific finding of the date the mosque was destroyed (see Trial Judgement, vol. 2, paras 508-510).

³⁵⁵⁵ Trial Judgement, vol. 2, paras 742, 746, 1234.

³⁵⁵⁶ Trial Judgement, vol. 2, paras 937, 946, 1249.

(i) Submissions of the parties

1086. Šainović submits that the Trial Chamber erred in law and fact in finding that the wanton destruction of and damage to Kosovo Albanian cultural and religious property was reasonably foreseeable to him, and that he willingly took the risk that it would be committed.³⁵⁵⁷ He requests that the Appeals Chamber overturn his conviction for persecution, through destruction of or damage to religious property, as a crime against humanity.³⁵⁵⁸

1087. Šainović argues that the Trial Chamber failed to provide any reasons for its finding that these crimes were reasonably foreseeable to him, stating only that the conflict involved ethnic divisions and that the JCE's purpose was to be achieved through terror and violence.³⁵⁵⁹ He argues that there was no evidence of destruction of religious sites in 1998 and further notes that ethnic tensions have existed in Kosovo for centuries.³⁵⁶⁰ Finally, Šainović claims that according to the Trial Chamber's reasoning "the mere existence of a common purpose also entails the existence of crimes falling outside of [the] common purpose".³⁵⁶¹

1088. In response, the Prosecution submits that Šainović fails to demonstrate any error, arguing that the Trial Chamber provided sufficient reasons for its conclusion that the destruction of religious sites was foreseeable to him.³⁵⁶² The Prosecution argues that foreseeability does not require a showing that crimes have previously been committed, but rather that the crimes "'might' be perpetrated and that the accused willingly took the risk."³⁵⁶³ It further contends that the Trial Chamber's approach does not imply that a common purpose will "automatically" lead to other crimes, but rather that the "specific nature" of the common purpose, which was ethnically-based and involved a "campaign of terror and violence", made further ethnically-motivated crimes foreseeable. It submits that these are relevant factors, and that the Trial Chamber did not err by taking them into account.³⁵⁶⁴

(ii) Analysis

1089. The Appeals Chamber is of the view that the Trial Chamber sufficiently explained the factors it took into account in finding that destruction of or damage to religious property was foreseeable to Šainović. It explicitly considered that the conflict involved ethnic divisions, that the

³⁵⁵⁷ Šainović's Notice of Appeal, paras 67-69; Šainović's Appeal Brief, paras 405, 408-409.

³⁵⁵⁸ Šainović's Appeal Brief, para. 410.

³⁵⁵⁹ Šainović's Appeal Brief, para. 406.

³⁵⁶⁰ Šainović's Appeal Brief, paras 406-407.

³⁵⁶¹ Šainović's Appeal Brief, para. 407.

³⁵⁶² Prosecution's Response Brief (Šainović), paras 253-254, 258.

³⁵⁶³ Prosecution's Response Brief (Šainović), para. 255, referring to *Karadžić JCE III* Decision, paras 15, 17-18, *Krstić* Appeal Judgement, para. 150.

common purpose was to be achieved through a campaign of terror and violence against the Kosovo Albanian population, and that Šainović had detailed knowledge of the events on the ground in Kosovo during the conflict.³⁵⁶⁵ The Appeals Chamber is not convinced that the Trial Chamber merely inferred from the common purpose the foreseeability of crimes falling outside the common purpose. Rather, the Trial Chamber considered the means through which the common purpose was to be achieved, namely the campaign of terror and violence, among the factors which made the commission of a specific type of crimes falling outside the common purpose foreseeable to Šainović. Consequently, the Appeals Chamber considers that Šainović has failed to demonstrate that the Trial Chamber erred in its approach.

1090. In addition, in discussing the evidence in relation to Šainović's knowledge, the Trial Chamber specifically noted that Šainović was aware that Kosovo Albanian property was being damaged by the MUP and VJ forces in 1998.³⁵⁶⁶ It found that: (i) at the Joint Command meeting of 7 August 1998, Šainović stated that the "greatest damage to us is caused by burning the houses without any need;"³⁵⁶⁷ (ii) at the Joint Command meeting of 12 August 1998, Šainović was present when Milomir Minić said that "setting houses on fire has to stop;"³⁵⁶⁸ (iii) Šainović acknowledged, in his interview with the Prosecution, being "present at one of the 'coordination' meetings when Momčilo Perišić complained of unnecessary damage being caused to private property in Kosovo" and explained that he thought it was the result of legitimate combat operations;³⁵⁶⁹ and (iv) Michael Phillips testified that he informed Šainović and Milošević in November 1998 of displaced persons from Mališevo/Malisheva, which had been "burned to the ground".³⁵⁷⁰ Moreover, the fact that Šainović was not aware of destruction of religious property in 1998, in particular, is not determinative; rather it is one factor to be considered in assessing whether the destruction of or damage to such property was foreseeable to him in 1999.³⁵⁷¹ The Appeals Chamber thus finds no error in the factors relied upon by the Trial Chamber.

1091. As to Šainović's submission that the Trial Chamber erred in law and fact in finding that he willingly took the risk that wanton destruction of and damage to Kosovo Albanian cultural and religious property would be committed, he has failed to present any arguments in support of his submission. This part of his appeal is therefore dismissed.

³⁵⁶⁴ Prosecution's Response Brief (Šainović), para. 257.

³⁵⁶⁵ Trial Judgement, vol. 3, para. 473.

³⁵⁶⁶ Trial Judgement, vol. 3, paras 441, 444, 447 referring to Exh. P1468, pp. 46, 52, Exh. P605, pp. 653, 664-665, 673-674, 692, 695-702, 706-709.

³⁵⁶⁷ Trial Judgement, vol. 3, paras 441, referring to Exh. P1468, p. 46.

³⁵⁶⁸ Trial Judgement, vol. 3, para. 441, referring to Exh. P1468, p. 52.

³⁵⁶⁹ Trial Judgement, vol. 3, para. 444, referring to Exh. P605, e-court pp. 653, 664-665, 673-674, 692, 695-702, 706-709.

³⁵⁷⁰ Trial Judgement, vol. 3, para. 447, referring to Michael Phillips, 19 Mar 2007, T. 11838-11839.

³⁵⁷¹ See *Stakić* Appeal Judgement, para. 232.

1092. The Appeals Chamber therefore finds that Šainović has failed to demonstrate any error in the factual findings relied upon by the Trial Chamber in concluding that it was foreseeable to him that persecution, through destruction of or damage to religious property would be committed and that he willingly took that risk. Consequently, the Trial Chamber's legal error with regard to the degree of foreseeability required under JCE III has no impact on Šainović's conviction for persecution through destruction of or damage to religious property. Since on the basis of the Trial Chamber's factual findings a higher degree of foreseeability was met, a lower degree of foreseeability is necessarily satisfied as well.³⁵⁷²

(iii) Conclusion

1093. In light of the foregoing, Šainović has not demonstrated any error in the Trial Chamber's finding that destruction of or damage to religious property was foreseeable to him. The Appeals Chamber dismisses Šainović's fifth ground of appeal.

E. Alleged errors in relation to Pavković's participation in the JCE

1. Introduction

1094. Pavković held numerous positions in the JNA and the VJ. On 9 January 1998, he was appointed Commander of the Priština Corps. On 28 December 1998, he was appointed Commander of the 3rd Army, and took up this position on 13 January 1999, which he kept until early 2000 when he was appointed Chief of the General Staff of the VJ.³⁵⁷³

1095. The Trial Chamber convicted Pavković pursuant to Article 7(1) of the Statute for committing, through participation in a JCE, the crimes of deportation, other inhumane acts (forcible transfer), murder and persecution, through murder, sexual assault, and destruction of or damage to religious property, as crimes against humanity under Article 5 of the Statute, and murder as a violation of the laws or customs of war under Article 3 of the Statute.³⁵⁷⁴

1096. Pavković challenges the Trial Chamber's finding that he significantly contributed to the JCE and shared the intent to forcibly displace the Kosovo Albanian population with other JCE members.³⁵⁷⁵ In addition, Pavković contests the Trial Chamber's findings that crimes of both the VJ and the MUP are imputable to him³⁵⁷⁶ and that he was responsible for the deviatory crimes, *i.e.* the

³⁵⁷² See *supra*, para. 1061; *infra*, sub-section VII.G.2.

³⁵⁷³ Trial Judgement, vol. 3, para. 636.

³⁵⁷⁴ Trial Judgement, vol. 3, paras 788-790, 1210.

³⁵⁷⁵ Pavković's sub-grounds 1(A) in part, 1(C) in part, 1(D), 1(F)-(G), grounds 3 in part, 5, 6 in part, 7, sub-grounds 8(a)-(b), and grounds 9-10.

³⁵⁷⁶ Pavković's sub-ground 1(A) in part.

crimes of murder and persecution, as crimes against humanity, and murder, as a violation of the laws or customs of war, pursuant to JCE III.³⁵⁷⁷

2. Alleged errors in finding that Pavković participated in the JCE

(a) Introduction

1097. The Trial Chamber found that Pavković was a member of a JCE, the common purpose of which was to ensure continued control by the FRY and Serbian authorities over Kosovo through crimes of forcible displacement of the Kosovo Albanian population.³⁵⁷⁸ The Trial Chamber concluded that Pavković made a significant contribution to the JCE,³⁵⁷⁹ based on its findings that he: (i) ordered and supported the operations of the VJ in Kosovo in 1999, including joint operations with the MUP, throughout the period in which the crimes were committed; (ii) mobilised the troops for, and commanded them during these operations; (iii) introduced additional VJ forces into Kosovo in early 1999, in breach of the October Agreements, which put the VJ in a position to engage in widespread operations throughout Kosovo in March 1999; (iv) supported the arming of the non-Albanian population and the disarming of the Kosovo Albanian population in 1998, which assisted the efforts of the JCE members to pursue their aims; and (v) contributed to the creation and maintenance of an environment of impunity by under-reporting crimes committed by forces under his control and failing to take effective measures in response to information thereon, which encouraged the commission of crimes by forces under the control of JCE members.³⁵⁸⁰ In this context, the Trial Chamber also considered Pavković's close working relationship to the then FRY President Slobodan Milošević in 1998 and 1999, which was evinced by Pavković's rapid promotions and which enabled him to bring troops into the interior of Kosovo in contravention of the orders of his military superiors.³⁵⁸¹ The Trial Chamber further found that Pavković knew of crimes committed by VJ and MUP members and allegations thereof in 1998 and 1999.³⁵⁸² Based on these findings,³⁵⁸³ the Trial Chamber concluded that Pavković had the requisite intent to forcibly displace the Kosovo Albanian population and shared that intent with other members of the JCE.³⁵⁸⁴

1098. Pavković argues that the Trial Chamber erred in finding that he significantly contributed to the JCE and shared the requisite intent with other JCE members.³⁵⁸⁵ In particular, Pavković contests

³⁵⁷⁷ Pavković's grounds 2, 6 in part.

³⁵⁷⁸ Trial Judgement, vol. 3, paras 95, 770, 783.

³⁵⁷⁹ Trial Judgement, vol. 3, para. 782.

³⁵⁸⁰ Trial Judgement, vol. 3, para. 782.

³⁵⁸¹ Trial Judgement, vol. 3, paras 773, 778. See also *ibid.*, vol. 3, paras 665, 710.

³⁵⁸² Trial Judgement, vol. 3, paras 774-775, 780. See also *ibid.*, vol. 3, paras 678, 765-766.

³⁵⁸³ Trial Judgement, vol. 3, paras 773-780.

³⁵⁸⁴ Trial Judgement, vol. 3, paras 772, 781.

³⁵⁸⁵ Pavković's Appeal Brief, paras 27-28, 197.

the Trial Chamber's findings on: (i) the credibility of witness Aleksandar Dimitrijević; (ii) his close relationship with Milošević; (iii) his deployment of troops in Kosovo in breach of the October Agreements; (iv) his role in disarming the Kosovo Albanian population and arming the non-Albanian population in Kosovo; and (v) his knowledge of criminal activity by VJ and MUP members, his reactions thereto, and his continuous orders for joint operations. The Appeals Chamber will consider these submissions in turn.

(b) Credibility of witness Aleksandar Dimitrijević

1099. In determining whether Pavković participated in the JCE, the Trial Chamber relied in part on the evidence of Aleksandar Dimitrijević, former Head of the Security Administration of the VJ General Staff, who was summoned *proprio motu* as a witness by the Trial Chamber.³⁵⁸⁶ Dimitrijević testified about, among others, various issues relevant to Pavković's relationship with Milošević, including Pavković's promotions, his aggressive strategy of using the VJ and the MUP together in Kosovo, his by-passing of the chain of command, and his involvement in planning VJ and MUP joint operations and deployment of VJ units in the interior of Kosovo in breach of his superiors' orders in 1998 and early 1999.³⁵⁸⁷ Pavković submits that the Trial Chamber erred in relying heavily upon the testimony of Dimitrijević, despite having stated elsewhere that its findings were based almost exclusively on the evidence presented by the parties and that the evidence it called *proprio motu* would be highly unlikely to provide the principal foundation of significant findings.³⁵⁸⁸ Pavković also avers that Dimitrijević's testimony was unreliable given his "obvious bias and jealousy" against Pavković whom he believed was partly responsible for his dismissal from the VJ in 1999.³⁵⁸⁹ Pavković further asserts that for the same reason, it is an error to rely on Dimitrijević's uncorroborated evidence.³⁵⁹⁰ The Prosecution responds that the Trial Chamber carefully assessed Dimitrijević's credibility and reasonably relied on his evidence.³⁵⁹¹

1100. The Trial Chamber considered the extent of its power to summon witnesses and determined that:

³⁵⁸⁶ Trial Judgement, vol. 1, para. 34.

³⁵⁸⁷ See e.g., Trial Judgement, vol. 1, paras 1005-1006, 1068, 1104, 1107, 1120; *ibid.*, paras vol. 3, paras 644, 649-650, 654, 662-664, 676, 688-689, 778.

³⁵⁸⁸ Pavković's Appeal Brief, paras 274-275, referring, *inter alia*, to Trial Judgement, vol. 1, para. 33. Regarding the position of Dimitrijević, see *ibid.*, vol. 3, para. 525.

³⁵⁸⁹ Pavković's Appeal Brief, paras 279-280. See also *ibid.*, paras 102-103, 276-277, 285; Pavković's Reply Brief, paras 28, 32-33.

³⁵⁹⁰ Pavković's Reply Brief, para. 66. The Appeals Chamber also notes that Pavković advances various arguments regarding the reliability of Dimitrijević's testimony in relation to the Trial Chamber's specific factual findings (Pavković's Appeal Brief, para 280-296). These arguments will be addressed in the relevant sub-sections below. See *infra*, sub-sections VII.E.2.(c) and VII.E.2.(d).

³⁵⁹¹ Prosecution's Response Brief (Pavković), para. 111, referring to Trial Judgement, vol. 1, paras 60, 1006, *ibid.*, vol. 3, paras 325, 663, 644, 688. See also Prosecution's Response Brief (Pavković), paras 50, 106.

*It is where the Chamber is of the view that issues raised by the parties could be productively explored by examining a witness not called by the parties that such power is likely to be used. It is highly unlikely that such an exercise would ever provide the principal foundation for the most significant findings in any prosecution before this Tribunal. As it is, the findings in this Judgement are based almost exclusively on the evidence the parties have chosen to present to the Chamber.*³⁵⁹²

The Appeals Chamber notes that the Trial Chamber explained that it summoned Aleksandar Dimitrijević precisely because it considered that issues raised by the parties could be productively explored by examining him.³⁵⁹³ Contrary to Pavković's assertion,³⁵⁹⁴ the Trial Chamber did not find that, due to Dimitrijević's status as a Chamber witness, his evidence had less probative value than that of witnesses called by the parties and was therefore unreliable. Indeed, the Trial Chamber considered Dimitrijević to be generally reliable³⁵⁹⁵ and found some of his evidence to be "helpful",³⁵⁹⁶ without making any distinction between him and other witnesses called by the parties. The Appeals Chamber finds no inconsistency in the Trial Chamber's approach in its evaluation of, and reliance upon, Dimitrijević's evidence. Moreover, the Appeals Chamber notes that the Trial Chamber's approach is consistent with the jurisprudence of the Tribunal which draws no distinction, for the purposes of evaluation of evidence, between witnesses called by the parties and witnesses called by a chamber.³⁵⁹⁷

1101. Moreover, Pavković's contention that Dimitrijević's testimony was unreliable due to his "obvious bias and jealousy" is without merit. In this regard, the Appeals Chamber recalls that "evidence of witnesses who might have motives or incentives to implicate the accused is not *per se* unreliable, especially where such a witness may be thoroughly cross-examined; therefore, reliance upon this evidence does not, as such, constitute a legal error."³⁵⁹⁸ Furthermore, the Trial Chamber's discretion to rely on uncorroborated, but otherwise credible, witness testimony applies equally to the evidence of witnesses who may have motive to implicate the accused, provided that appropriate caution is exercised in the evaluation of their testimony.³⁵⁹⁹

1102. The Trial Chamber was aware of the fact that Dimitrijević was removed from his position as Head of the Security Administration of the VJ General Staff on 23 March 1999;³⁶⁰⁰ indeed, he

³⁵⁹² Trial Judgement, vol. 1, para. 33 (emphasis added).

³⁵⁹³ Trial Judgement, vol. 1, para. 34.

³⁵⁹⁴ Pavković's Appeal Brief, paras 274-275.

³⁵⁹⁵ Trial Judgement, vol. 3, para. 644.

³⁵⁹⁶ Trial Judgement, vol. 1, para. 34.

³⁵⁹⁷ See, e.g. *Krajišnik* Appeal Judgement, paras 37, 401, Annex A: para. 64, read together with *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Scheduling Order for Evidentiary Hearing, 21 October 2008, p. 2; *Hadžihasanović and Kubura* Trial Judgement, paras 270, 284-285.

³⁵⁹⁸ *Krajišnik* Appeal Judgement, para. 146. See also *Nchamihigo* Appeal Judgement, para. 42; *Niyitegeka* Appeal Judgement, para. 98; *Ntagerura et al.* Appeal Judgement, para. 204.

³⁵⁹⁹ See *Nchamihigo* Appeal Judgement, paras 42-48.

³⁶⁰⁰ Trial Judgement, vol. 1, para. 34; *ibid.*, vol. 3, paras 82, 516.

testified that Pavković was partly responsible for his dismissal.³⁶⁰¹ Nevertheless, after Dimitrijević was carefully examined by the Trial Chamber and thoroughly cross-examined by the parties, the Trial Chamber found that he was generally reliable and that his evidence in relation to Pavković was not undermined.³⁶⁰² Significantly, the Trial Chamber accepted and rejected specific parts of Dimitrijević's evidence and duly exercised caution in taking into account, *inter alia*, his demeanour and responses in direct and cross-examination as well as consistencies and inconsistencies within his testimony and with other evidence.³⁶⁰³ Thus, Pavković has not shown any error in the Trial Chamber's assessment of Dimitrijević's credibility.³⁶⁰⁴ The Appeals Chamber dismisses Pavković's sub-ground 8(b) insofar as it generally challenges Dimitrijević's credibility.

(c) Pavković's relationship with Milošević

1103. The Trial Chamber found that at the time relevant to the Indictment, the Priština Corps was responsible for the Kosovo region and was subordinate to the 3rd Army,³⁶⁰⁵ which, in turn, was subordinate to the highest organ of the VJ, the General Staff.³⁶⁰⁶ The General Staff was immediately subordinate to the FRY President, Milošević, who commanded the VJ in accordance with decisions of the SDC (*i.e.*, the Supreme Defence Council).³⁶⁰⁷

1104. The Trial Chamber relied on the way in which Pavković, as Priština Corps Commander and subsequently as 3rd Army Commander, "worked closely with Milošević on the issue of Kosovo in 1998 and 1999" to find that Pavković participated in the JCE and shared the requisite intent with other JCE members.³⁶⁰⁸ In assessing his relationship with Milošević, the Trial Chamber considered a number of factors, including: (i) Pavković's rapid ascension up the VJ chain of command; (ii) Pavković's ability to by-pass the VJ chain of command in 1998, demonstrated, *inter alia*, by instances of his conduct in contravention of orders by superiors; (iii) Pavković's ability to deploy troops in contravention of Ojdanić's order in early 1999; and (iv) the private meetings between Pavković and Milošević in 1998 and 1999.³⁶⁰⁹

³⁶⁰¹ Trial Judgement, vol. 3, paras 525, 644, referring, *inter alia*, to Aleksandar Dimitrijević, 8 Jul 2008, T. 26580, *ibid.*, 9 Jul 2008, T. 26673, 22675.

³⁶⁰² Trial Judgement, vol. 3, para. 644.

³⁶⁰³ *E.g.*, Trial Judgement, vol. 1, paras 574-575, 1005-1006, 1011; *ibid.*, vol. 3, paras 84-85, 320-325, 515-517, 523-525, 643-645, 662-663, 688.

³⁶⁰⁴ See also *Galić* Appeal Judgement, para. 300; *Kupreškić et al.* Appeal Judgement, paras 31-32; *Nchamihigo* Appeal Judgement, para. 47; *Nahimana et al.* Appeal Judgement, para. 194.

³⁶⁰⁵ Trial Judgement, vol. 1, paras 482, 584.

³⁶⁰⁶ Trial Judgement, vol. 1, paras 417-418, 468, 482.

³⁶⁰⁷ Trial Judgement, vol. 1, paras 255, 291, 433, 468, 482.

³⁶⁰⁸ Trial Judgement, vol. 3, paras 778, 781.

³⁶⁰⁹ Trial Judgement, vol. 3, para. 778, and references therein. See also *ibid.*, vol. 3, paras 643-665, 689, 703-710.

(i) Pavković's promotions

1105. The Trial Chamber found that upon Milošević's order, Pavković replaced Dušan Samardžić as the 3rd Army Commander on 28 December 1998 after clashes between the two officers.³⁶¹⁰ It also considered that "Pavković's rapid ascension up the VJ chain of command" demonstrated Milošević's approval of Pavković's approach to the problem in Kosovo.³⁶¹¹ The Trial Chamber noted evidence indicating that Pavković's promotions were irregular³⁶¹² and concluded that his promotion to 3rd Army Commander, and his subsequent promotion to Chief of the VJ General Staff in February 2000, were rewards from Milošević for his participation in the JCE.³⁶¹³

1106. Pavković asserts that the Trial Chamber erred in relying on his promotions as evidence of his membership in the JCE, since its findings as to the manner in which he was promoted and the tension between him and Samardžić, which preceded his promotions, were erroneous.³⁶¹⁴

a. Manner in which Pavković was promoted

1107. The Trial Chamber noted that Pavković rapidly ascended up the VJ chain of command.³⁶¹⁵ It concluded that Pavković's promotion to 3rd Army Commander and his subsequent promotion to Chief of the VJ General Staff were rewards from Milošević for his participation in the JCE.³⁶¹⁶ In so doing, it considered evidence recording a discussion on Pavković's promotion at the eighth session of the SDC held on 25 December 1998. The Trial Chamber found that, notwithstanding objections raised by Milo Đukanović, the President of the Republic of Montenegro, in this session, Milošević ordered Pavković's promotion to 3rd Army Commander.³⁶¹⁷ The Trial Chamber also noted that appointment to higher ranking posts fell under the jurisdiction of the President of the FRY and was regulated by legislation.³⁶¹⁸ In this context, the Trial Chamber considered the evidence of Branko Fezer, Chief of the Personnel Administration of the VJ General Staff, who testified that the procedure for appointment and promotion of VJ officers was adhered to in the promotion of Pavković.³⁶¹⁹ However, the Trial Chamber also considered Pavković's media interview in 2000, in which he stated that he received early promotions five times in his career,

³⁶¹⁰ Trial Judgement, vol. 3, paras 85, 665, 680-681, 778.

³⁶¹¹ Trial Judgement, vol. 3, para. 778. See also *ibid.*, vol. 3, paras 85, 665.

³⁶¹² Trial Judgement, vol. 3, paras 85, 649.

³⁶¹³ Trial Judgement, vol. 3, paras 85, 778.

³⁶¹⁴ Pavković's Appeal Brief, para. 81 and the title of sub-ground 1(D).

³⁶¹⁵ Trial Judgement, vol. 3, paras 85, 778.

³⁶¹⁶ Trial Judgement, vol. 3, paras 85, 778.

³⁶¹⁷ Trial Judgement, vol. 3, para. 681, referring to Exh. 4D35, Exh. P801.

³⁶¹⁸ Trial Judgement, vol. 3, para. 682, referring to Branko Fezer, 27 Sep 2007, T. 16482-16485, 16489-16490, Branko Fezer, Exh. 3D1118, para. 5. See also Exh. P984 (FRY Law on the VJ), Article 151, Exh. P986 (Constitution of the FRY), Article 136.

despite the rules only allowing for three such early promotions.³⁶²⁰ In addition, the Trial Chamber took into account the testimony of Aleksandar Vasiljević, former Deputy Head of the Security Administration of the VJ General Staff, that “Pavković’s promotion did not go through the regular procedure”³⁶²¹ as well as evidence indicating that, in July 1998, Dušan Samardžić attempted to initiate disciplinary proceedings against Pavković for breaching orders on the use of the VJ in Kosovo and that Pavković subsequently met Milošević, who instead promoted him.³⁶²²

i. Submissions of the parties

1108. Pavković submits that the Trial Chamber erred in finding that his promotions did not comport with regular procedure.³⁶²³ In particular, he contends that it erred in its assessment of the discussion on his promotion at the SDC session of 25 December 1998, since Milo Đukanović, who initially expressed concern about Pavković’s promotion, subsequently stated in this session that he did not actually know Pavković.³⁶²⁴ In support of this contention, Pavković also refers to the remarks of Milošević and Milutinović and the SDC’s conclusion in this session that the Priština Corps behaved “in accordance with Rules of Service.”³⁶²⁵ Pavković also argues that the Trial Chamber was inconsistent in finding that his promotions were rapid and were rewards from Milošević, while accepting Branko Fezer’s testimony that all changes to personnel in the VJ were carried out in strict compliance with the law and on the orders of the FRY President.³⁶²⁶ Pavković further submits that the Trial Chamber erred in relying on comments from his media interview that he received more early promotions than the rules allow, since no such limitation was stipulated in the VJ Rules of Service or the FRY Law on the VJ.³⁶²⁷

1109. Pavković also challenges the Trial Chamber’s assessment of evidence concerning Dušan Samardžić’s attempt to discipline him in July 1998. According to Pavković, the Trial Chamber erred in relying solely on Aleksandar Dimitrijević’s testimony, which was false. Specifically, he contends that the document referred to by Dimitrijević, in support of the claim that Samardžić

³⁶¹⁹ Trial Judgement, vol. 3, para. 682, referring to Branko Fezer, 27 Sep 2007, T. 16483-16485, 16489-16490, Branko Fezer, Exh. 3D1118, para. 5.

³⁶²⁰ Trial Judgement, vol. 3, para. 683, referring to Exh. P1319, p. 9.

³⁶²¹ Trial Judgement, vol. 3, para. 649, referring to Aleksandar Vasiljević, T. 8676, 18 Jan 2007. Regarding Vasiljević’s position, see Trial Judgement, vol. 1, para. 439.

³⁶²² Trial Judgement, vol. 3, para. 649, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26622-26624, *ibid.*, 9 Jul 2008, T. 26682-26683, Exh. P1510.

³⁶²³ Pavković’s Appeal Brief, para. 81, referring to Trial Judgement, vol. 3, paras 649, 778.

³⁶²⁴ Pavković’s Appeal Brief, paras 82-84, referring to Exh. P1000, Exh. 1D761.

³⁶²⁵ Pavković’s Appeal Brief, para. 84, referring to Exh. P1000, pp. 9-10.

³⁶²⁶ Pavković’s Appeal Brief, para. 84, referring to Trial Judgement, vol. 3, paras 682, 778, Branko Fezer, 27 Sep 2007, T. 16483, 16485-16487.

³⁶²⁷ Pavković’s Appeal Brief, para. 85, referring to Exh. 4D532, Exh. P984, pp. 37-38.

attempted to discipline him, was not in evidence.³⁶²⁸ Pavković also refers to the minutes of a meeting held at the Forward Command Post on 13 August 1998, admitted as additional evidence on appeal. Pavković underscores that the minutes record the statements of Momčilo Perišić, then Chief of the VJ General Staff, and Samardžić that the Priština Corps had professionally carried out its assignments in the spirit of the FRY Constitution. Pavković contends that it is illogical that his superiors would praise him for the conduct of the Priština Corps in a meeting held shortly after Samardžić's alleged attempt to discipline him.³⁶²⁹

1110. Pavković also challenges the Trial Chamber's assessment of evidence of a meeting between him and Milošević that took place after Samardžić's alleged attempt to discipline him. Pavković claims that there is no evidence as to what was discussed at the meeting, following which he was promoted by Milošević.³⁶³⁰

1111. The Prosecution responds that none of the evidence cited by Pavković shows that the Trial Chamber was unreasonable in finding that his promotions did not follow the established procedure.³⁶³¹ It also avers that the absence of express limitation in the legislation as to the number of times that an officer could receive early promotion does not undermine the Trial Chamber's finding, in light of Pavković's own admission that his promotions did not comply with the rules.³⁶³² In addition, the Prosecution submits that Pavković's argument concerning Branko Fezer's testimony should be summarily dismissed for merely asserting that the Trial Chamber failed to give sufficient weight to this evidence.³⁶³³ As for the additional evidence, the Prosecution contends that Pavković overemphasises Dušan Samardžić's statement in the 13 August 1998 meeting, which does not outweigh the concerns over Pavković's actions expressed by his superiors many times.³⁶³⁴

ii. Analysis

1112. The Appeals Chamber considers Pavković's submissions regarding the SDC session of 25 December 1998 to be without merit. The Trial Chamber reasonably concluded that Milošević

³⁶²⁸ Pavković's Appeal Brief, para. 281; Pavković's Reply Brief, paras 13-14; Pavković's Supplemental Appeal Brief, paras 3, 25, referring to Trial Judgement, vol. 3, para. 649. Pavković's challenge regarding Dimitrijević's credibility (Pavković's Appeal Brief, para. 281) has already been rejected (see *supra*, sub-section VII.E.2.(b)).

³⁶²⁹ Pavković's Supplemental Appeal Brief, para. 25, referring to Exh. 4DA13. Regarding the position of Perišić, see Trial Judgement, vol. 1, para. 470.

³⁶³⁰ Pavković's Reply Brief, paras 13-14.

³⁶³¹ Prosecution's Response Brief (Pavković), paras 33-34, referring to Trial Judgement, vol. 1, para. 574, *ibid.*, vol. 3, paras 120-123, 524, 681, and also arguing that Milošević promoted Pavković despite Đukanović's objection. Regarding Dimitrijević's credibility, see Prosecution's Response Brief (Pavković), para. 115; Prosecution's Supplemental Response Brief (Pavković), para. 18.

³⁶³² Prosecution's Response Brief (Pavković), para. 35, referring to Trial Judgement, vol. 3, paras 85, 683.

³⁶³³ Prosecution's Response Brief (Pavković), para. 36.

³⁶³⁴ Prosecution's Supplemental Response Brief (Pavković), para. 31, referring, *inter alia*, to Exh. 4DA22.

ordered Pavković's promotion despite objections raised by Milo Đukanović³⁶³⁵ based on its analysis of the discussions at this session as a whole. The Trial Chamber not only considered Đukanović's remarks questioning the propriety of promoting Pavković, but also the responses of Milošević and Milutinović, Đukanović's reaction thereto as well as their related discussions as to the legality of VJ actions in Kosovo.³⁶³⁶ The Trial Chamber noted Đukanović's statement at the end of the session that he did not personally know Pavković and Đukanović's undertaking that he would not publicise the fact that there were objections to Pavković's promotion.³⁶³⁷ The records of this session indicate that Đukanović's objections were overwhelmed by Milošević and other participants.³⁶³⁸ Thus, Pavković merely presents his own interpretation of the evidence, without showing that the Trial Chamber's conclusion was unreasonable.

1113. Contrary to Pavković's submission, the Appeals Chamber does not consider that the Trial Chamber accepted Branko Fezer's evidence that the procedure for appointment and promotion of VJ officers was adhered to when promoting Pavković. In this regard, the Trial Judgement, read as a whole, suggests that the Trial Chamber accorded little weight to Fezer's evidence and instead relied on other evidence indicating the irregularity of Pavković's promotions³⁶³⁹ when it found that his promotions were rapid and were rewards from Milošević.³⁶⁴⁰ Moreover, the fact that the VJ Rules of Service and the FRY Law on the VJ did not stipulate any limitation on the number of early promotions does not invalidate Pavković's own statement in his media interview that he received more early promotions than the rules allowed. Pavković's arguments merely seek to interpret the evidence differently from the Trial Chamber, without showing any error on its part.

1114. Likewise, the Trial Chamber did not err in its reliance on Aleksandar Dimitrijević's testimony in considering Dušan Samardžić's attempt to initiate disciplinary proceedings against Pavković in July 1998.³⁶⁴¹ Contrary to Pavković's assertion, the Trial Chamber's reliance on Dimitrijević's evidence in the absence of corroboration does not *per se* constitute an error, as a trial chamber has discretion to rely on uncorroborated, but otherwise credible, witness testimony.³⁶⁴² In

³⁶³⁵ Trial Judgement, vol. 3, para. 681, referring to Exh. 4D35, Exh. P801.

³⁶³⁶ Trial Judgement, vol. 3, paras 121-123, 524, 681, referring, *inter alia*, to Exh. P1000, pp. 9-11, Exh. 1D761, pp. 21-25.

³⁶³⁷ See Trial Judgement, vol. 3, para. 123, referring to Exh. P1000, pp. 10-11, Exh. 1D761, pp. 24-25.

³⁶³⁸ Exh. P1000, pp. 10-11; Exh. 1D761, pp. 22-25.

³⁶³⁹ Such evidence includes Pavković's media interview (Trial Judgement, vol. 3, para. 683, referring to Exh. P1319, p. 9) and Vasiljević's testimony (Trial Judgement, vol. 3, para. 649, referring to Aleksandar Vasiljević, T. 8676, 18 Jan 2007), as recounted above (see *supra*, para. 1107).

³⁶⁴⁰ Trial Judgement, vol. 3, paras 83-85, 649, 665, 680-683, 778.

³⁶⁴¹ Trial Judgement, vol. 3, para. 649, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26622-26623, *ibid.*, 9 Jul 2008, T. 26682-26683.

³⁶⁴² *D. Milošević* Appeal Judgement, para. 215; *Limaj et al.* Appeal Judgement, para. 203; *Nchamihigo* Appeal Judgement, para. 42; *Karera* Appeal Judgement, para. 45; *Muvunyi I* Appeal Judgement, para. 128; *Muhimana* Appeal Judgement, para. 101. In this regard, the Appeals Chamber recalls that the Trial Chamber found Dimitrijević "generally

his testimony, Dimitrijević referred to a document concerning the initiation of the disciplinary proceedings,³⁶⁴³ which is not in evidence. However, the Appeals Chamber considers that the absence of this document from the trial record does not in itself render Dimitrijević's testimony false. Pavković's argument in this regard is thus without merit.

1115. Moreover, the Appeals Chamber is not persuaded that the minutes of the 13 August 1998 meeting, admitted as additional evidence, raise a reasonable doubt as to Samardžić's attempt to discipline Pavković. This evidence, which reflects the comments of Momčilo Perišić and Dušan Samardžić regarding the propriety of the conduct of the VJ and the Priština Corps, does not in itself undermine Dimitrijević's evidence, as the trial record contains overwhelming evidence showing the tension between Pavković and Samardžić, Pavković's execution of operations and use of Priština Corps units without the specific authorisation of VJ superiors as well as the concerns of Perišić and other VJ officers about the use of the VJ in Kosovo.³⁶⁴⁴

1116. It is unclear from the evidence what Pavković and Milošević discussed at their meeting following Samardžić's attempt to discipline Pavković. However, the evidence shows that, after this meeting, Pavković was promoted to Lieutenant-General on 21 July 1998 by Milošević, who simply announced this promotion to VJ General Staff members *ex post facto*.³⁶⁴⁵ Significantly, this promotion was decided in a manner which does not correspond to the practice described by Branko Fezer. According to Fezer, the regular practice was for the FRY President to make decisions based upon the General Staff's proposal in consultation with the SDC.³⁶⁴⁶ In these circumstances, Pavković has failed to demonstrate that the Trial Chamber was unreasonable in relying on this evidence in corroboration of Aleksandar Vasiljević's testimony that Pavković's promotion did not comport with regular procedure.³⁶⁴⁷

reliable", including in relation to his evidence concerning Pavković, although Pavković was partly responsible for Dimitrijević's dismissal in 1999 (Trial Judgement, vol. 3, para. 644). See *supra*, sub-section VII.E.2.(b).

³⁶⁴³ Aleksandar Dimitrijević, 8 Jul 2008, T. 26623.

³⁶⁴⁴ Trial Judgement, vol. 3, paras 643-665, 680, and references therein. See *supra*, sub-sections VII.C.1.(d), VII.C.2.(b), VII.C.2.(c)(i) and VII.C.2.(c)(iii)-VII.C.2.(c)(vi); *infra*, sub-sections VII.E.2.(c)(i)b.i. and VII.E.2.(c)(i)b.ii.

³⁶⁴⁵ Trial Judgement, vol. 3, paras 649-650, referring, *inter alia*, to Aleksandar Dimitrijević, 8 Jul 2008, T. 26622-26624, *ibid.*, 9 Jul 2008, T. 26682, Exh. P1510.

³⁶⁴⁶ Branko Fezer, 27 Sep 2007, T. 16489-16490; Branko Fezer, Exh. 3D1118, para. 5. See also Branko Fezer, 27 Sep 2007, T. 16482-16485; Trial Judgement, vol. 3, para. 682.

³⁶⁴⁷ Trial Judgement, vol. 3, para. 649, referring to Aleksandar Vasiljević, 18 Jan 2007, T. 8676. While Pavković also argues that it is inconceivable that the issuance of Perišić's order regarding the use of the VJ, Pavković's violation thereof, Samardžić's attempt to discipline him, Pavković's visit to Milošević and his promotion, all occurred within two days (Pavković's Reply Brief, para. 14), Pavković misrepresents the Trial Judgement in this regard. The evidence indicates that Pavković's use of the VJ in an unplanned manner triggered Perišić's order of 20 July 1998 explicitly prohibiting the use of the VJ except in the border areas, and that Samardžić's attempt to discipline Pavković for breaching orders coincided around this time. The Trial Chamber accurately described this evidence, and did not determine that Pavković's violation of orders, which Samardžić tried to discipline, was a violation of Perišić's order of 20 July 1998 (See Trial Judgement, vol. 3, para. 649, fn. 1553, referring to Exh. P922, p. 3, Exh. P717, pp. 2-3. See also Aleksandar Dimitrijević, 8 Jul 2008, T. 26622-26623; *ibid.*, 9 Jul 2008, T. 26682-26684. See also Trial Judgement,

1117. Consequently, Pavković has failed to show any error on the part of the Trial Chamber in its findings as to the manner in which his promotions were decided. His arguments in this regard are thus dismissed.

b. Tension between Pavković and Samardžić

1118. The Trial Chamber found that before Pavković replaced Dušan Samardžić as 3rd Army Commander on 28 December 1998, there was tension between the two officers and they clashed about Pavković intensifying the VJ presence in Kosovo without strict adherence to the VJ chain of command.³⁶⁴⁸

1119. Pavković submits that the Trial Chamber erred in finding that there was tension between him and Samardžić concerning the use of the VJ in Kosovo and that this contributed to his promotion to Commander of the 3rd Army.³⁶⁴⁹ In particular, Pavković argues that the Trial Chamber erred in: (i) assessing the communication between him and Samardžić regarding the implementation of the second stage of the Plan for Combating Terrorism (Exhibits 4D100 and 4D119);³⁶⁵⁰ (ii) assessing Samardžić's order of 7 August 1998;³⁶⁵¹ (iii) failing to appropriately assess Samardžić's favourable evaluation of Pavković;³⁶⁵² (iv) failing to correctly evaluate Samardžić's control over Pavković and the Priština Corps;³⁶⁵³ and (v) finding that Samardžić was sidelined.³⁶⁵⁴ The Appeals Chamber will consider these submissions in turn.

i. Exchange between Pavković and Samardžić concerning the implementation of the second stage of the Plan for Combating Terrorism

1120. The Trial Chamber considered that in 1998, certain VJ officers, including Momčilo Perišić, Chief of the VJ General Staff, spoke out against the use of the VJ beyond the border area (*i.e.* in the

vol. 3, para. 650, referring to the evidence that Milošević and Pavković indicated in a meeting of 21 July 1998 that certain actions had already been undertaken pursuant to a decision of the SDC on 9 June 1998). Pavković has not shown any error in the Trial Chamber's assessment of this evidence.

³⁶⁴⁸ Trial Judgement, vol. 3, paras 83, 85, 665, 680. See also *ibid.*, vol. 3, paras 648-660.

³⁶⁴⁹ Pavković's Appeal Brief, paras 81, 86-87, referring to Trial Judgement, vol. 3, paras 83, 680. See also Pavković's Reply Brief, para. 16. *Contra* Prosecution's Response Brief (Pavković), paras 37-38.

³⁶⁵⁰ Pavković's Appeal Brief, paras 86-88. Pavković also challenges the Trial Chamber's assessment of the following event as an example of the tension or clash between him and Samardžić: the exchange between the two from mid-September to early October 1998 – reflected in a document sent from Pavković to Samardžić on 5 October 1998 (Exh. P1439) – concerning the decision of the Joint Command to form rapid-intervention forces (Pavković's Appeal Brief, paras 86-87, 92, referring to Exh. P1439, Exh. 4D91, Miodrag Simić, 13 Sep 2007, T. 15529-15532. See also Pavković's Reply Brief, paras 17-18). In the foregoing section concerning the authority of the Joint Command, the Appeals Chamber has discussed and rejected Pavković's submissions in this respect (see *supra*, subsections VII.C.2.(c)(ii) and VII.C.2.(c)(v)).

³⁶⁵¹ Pavković's Reply Brief, para. 15, referring to Exh. P1421.

³⁶⁵² Pavković's Appeal Brief, para. 93, referring to Exh. 4D136. See also Pavković's Appeal Brief, paras 86-87.

³⁶⁵³ Pavković's Appeal Brief, paras 89-91. See also *ibid.*, paras 86-87.

interior of Kosovo) absent a declaration of a state of emergency or war.³⁶⁵⁵ The Trial Chamber further noted that Perišić prohibited VJ deployment in the interior of Kosovo without his specific orders.³⁶⁵⁶ The Trial Chamber found that despite these objections, the Plan for Combating Terrorism was formally adopted in a meeting with Slobodan Milošević in Belgrade on 21 July 1998, where Pavković presented this Plan.³⁶⁵⁷ The Plan for Combating Terrorism was comprised of five stages and envisaged the reinforcement of “the security of the state border in the border belt and in depth”.³⁶⁵⁸ The Trial Chamber also found that in furtherance of the Plan for Combating Terrorism, the VJ made its own plan for engagement, known as *Grom 98*.³⁶⁵⁹ On 28 July 1998, Perišić issued the *Grom 98* directive containing this plan.³⁶⁶⁰ On the following day, Dušan Samardžić, 3rd Army Commander, issued the *Grom 98* order implementing the directive.³⁶⁶¹ While Perišić and Samardžić, through the *Grom 98* directive and order, permitted VJ deployment in the interior of Kosovo, they specified that VJ actions were to be carried out in accordance with their “special” orders.³⁶⁶²

1121. The Trial Chamber further found that on 22 July 1998, one day after the formal adoption of the Plan for Combating Terrorism, Pavković, then Priština Corps Commander, sent a letter to Samardžić, reminding him of the adoption of the Plan and directing him to draw up details of the Priština Corps operations (Exhibit 4D100).³⁶⁶³ That same day, Samardžić replied to Pavković informing him that because the FRY President had accepted the second phase of the Plan “personally” proposed by Pavković, the Priština Corps Command should prepare a plan for VJ involvement therein (Exhibit 4D119).³⁶⁶⁴ On 23 July 1998, Pavković wrote to Samardžić regarding the implementation of the second phase of the Plan, calling for the engagement of units of the Priština Corps in support of MUP units in several operations.³⁶⁶⁵ In response, Samardžić refused to approve some of the requested actions, on the ground that Milošević had not been informed thereof.³⁶⁶⁶

³⁶⁵⁴ Pavković’s Appeal Brief, para. 94.

³⁶⁵⁵ Trial Judgement, vol. 1, paras 572-575; *ibid.*, vol. 3, paras 112, 494, 648-649, 653, referring, *inter alia*, to Exh. 1D760, pp. 3-10, Exh. P922, p. 3, Exh. P717.

³⁶⁵⁶ Trial Judgement, vol. 1, para. 572; *ibid.*, vol. 3, para. 649, referring, *inter alia*, to Exh. P922, p. 3.

³⁶⁵⁷ Trial Judgement, vol. 1, paras 805, 995; *ibid.*, vol. 3, para. 650.

³⁶⁵⁸ Trial Judgement, vol. 1, paras 805, 995, 997; *ibid.*, vol. 3, para. 650.

³⁶⁵⁹ Trial Judgement, vol. 1, paras 807, 999, also finding that the *Grom 98* plan corresponded to the first three stages of the Plan for Combating Terrorism; *ibid.*, vol. 3, paras 494, 650.

³⁶⁶⁰ Trial Judgement, vol. 1, paras 807-808; *ibid.*, vol. 3, para. 655, referring, *inter alia*, to Exh. 4D137.

³⁶⁶¹ Trial Judgement, vol. 1, para. 809; *ibid.*, vol. 3, para. 655, referring, *inter alia*, to Exh. 4D140.

³⁶⁶² Trial Judgement, vol. 3, paras 655-656, referring to Exh. 4D137, Exh. 4D140.

³⁶⁶³ Trial Judgement, vol. 3, para. 651, referring, *inter alia*, to Exh. 4D100.

³⁶⁶⁴ Trial Judgement, vol. 3, para. 651, referring to Exh. 4D119.

³⁶⁶⁵ Trial Judgement, vol. 3, para. 651, referring, *inter alia*, to Exh. 4D101. See also Trial Judgement, vol. 1, paras 888, 996.

³⁶⁶⁶ Trial Judgement, vol. 3, para. 651, referring, *inter alia*, to Exh. 4D102. See also Trial Judgement, vol. 1, paras 888, 996.

1122. Pavković submits that the Trial Chamber erred in its interpretation of, and reliance upon, the communication between him and Samardžić concerning the implementation of the second stage of the Plan for Combating Terrorism to find that there was tension between them.³⁶⁶⁷ He contends that it is unclear how his letter of 22 July 1998, or Samardžić's response on the same day, evince such tension.³⁶⁶⁸ According to Pavković, there is no evidence that Samardžić objected to the adoption of the Plan at the meeting of 21 July 1998.³⁶⁶⁹ He asserts that on 29 July 1998, Samardžić issued his *Grom 98* order to all 3rd Army units pursuant to this Plan and Perišić's *Grom 98* directive.³⁶⁷⁰ Pavković further avers that his letter of 22 July 1998 is nothing more than a standard request for direction from a superior³⁶⁷¹ and that Samardžić's response on the same day acknowledged the Plan as decided and ordered the engagement of Priština Corps forces as requested by Pavković.³⁶⁷² Pavković also maintains that what followed was in line with the "normal military chain-of-command protocol".³⁶⁷³

1123. The Prosecution responds that Pavković's letter of 22 July 1998 and the subsequent exchange between him and Samardžić support the Trial Chamber's finding that the two officers clashed over the use of the VJ in Kosovo.³⁶⁷⁴

1124. The Appeals Chamber considers Pavković's submissions to be without merit. The Trial Chamber assessed extensive evidence of the differing views in the leadership of the FRY and Serbia concerning the use of the VJ in Kosovo beyond the border area (*i.e.* in the interior of Kosovo) and objections raised by certain VJ officers, including Perišić, to this use of the VJ.³⁶⁷⁵ Although the Plan for Combating Terrorism included "taking measures to reinforce the security of the state border *in the border belt and in depth*",³⁶⁷⁶ there is no evidence that Samardžić voiced objections in this regard in the meeting of 21 July 1998 where the Plan was formally adopted.³⁶⁷⁷ However, the

³⁶⁶⁷ Pavković's Appeal Brief, paras 86-88, referring to Exh. 4D100, Exh. 4D119.

³⁶⁶⁸ Pavković's Appeal Brief, para. 88, referring to Exh. 4D100, Exh. 4D119. See also Pavković's Reply Brief, para. 25.

³⁶⁶⁹ Pavković's Appeal Brief, para. 88, referring to Trial Judgement, vol. 1, para. 995; Pavković's Reply Brief, para. 20, arguing that the attendance of Samardžić and Pavković at this meeting shows that Pavković could not implement the Plan without authority of Samardžić.

³⁶⁷⁰ Pavković's Appeal Brief, para. 88, referring to Exh. 4D140, Exh. 4D137, Exh. 3D702.

³⁶⁷¹ Pavković's Reply Brief, para. 20, referring to Exh. 4D100, Aleksandar Vasiljević, 24 Jan 2007, T. 9091-9093.

³⁶⁷² Pavković's Appeal Brief, para. 88, referring to Exh. 4D119.

³⁶⁷³ Pavković's Reply Brief, paras 21-25, referring to Exh. 4D101, Exh. 4D102, Exh. 4D119.

³⁶⁷⁴ Prosecution's Response Brief (Pavković), para. 39, referring to Trial Judgement, vol. 1, para. 996, *ibid.*, vol. 3, para. 651.

³⁶⁷⁵ Trial Judgement, vol. 1, paras 572-579; *ibid.*, vol. 3, para. 648. See also *ibid.*, vol. 1, para. 1088; *ibid.*, vol. 3, paras 80-81, 319, 494, 649-654, 664. In particular, the Trial Chamber considered the evidence that Perišić expressed his concern in this regard in a meeting of the SDC on 9 June 1998 (Trial Judgement, vol. 1, para. 572; *ibid.*, vol. 3, para. 648) and that on 20 July 1998 – one day before the formal adoption of the Plan – he explicitly prohibited the use of the VJ except in the border areas, outside of his explicit instructions (Trial Judgement, vol. 3, paras 649 (referring to Exh. P922, p. 3, Exh. P717, pp 2-3), 656). See also *supra*, sub-section VII.C.1.(d) and fn. 2424; *infra*, sub-section VII.E.2.(c)(ii).

³⁶⁷⁶ Trial Judgement, vol. 1, para. 997 (emphasis added).

³⁶⁷⁷ Trial Judgement, vol. 1, paras 805, 995 (incl. fn. 2613), 997; *ibid.*, vol. 3, paras, 133, 304, 650, 1021.

Appeals Chamber considers that the absence of any evidence to this effect does not undermine the Trial Chamber's conclusion that there was tension between Pavković and Samardžić. Furthermore, contrary to Pavković's contention, the Appeals Chamber considers that the communication between him and Samardžić on 22 and 23 July 1998 concerning the implementation of the second stage of the Plan for Combating Terrorism supports this conclusion.

1125. The Appeals Chamber is of the view that the Trial Chamber carefully examined the letter of 22 July 1998 from Pavković to Samardžić and the subsequent exchange between them.³⁶⁷⁸ Pavković mischaracterises the evidence by asserting that, in response to his letter of 22 July 1998, Samardžić ordered the engagement of Priština Corps forces, thereby granting Pavković's request. In fact, Samardžić responded to Pavković's letter of 22 July 1998 by requesting that Pavković prepare a proposal for the engagement of Priština Corps units, as the FRY President had approved the second phase of the Plan proposed by Pavković and had tasked the VJ to deploy its forces "in the territory".³⁶⁷⁹ The Trial Chamber noted evidence showing that on 23 July 1998, in reply to Samardžić's response, Pavković sent Samardžić a proposal containing details for an operation to unblock certain roads in the interior of Kosovo,³⁶⁸⁰ which Samardžić rejected on the same day.³⁶⁸¹ Moreover, it noted that, despite Samardžić's opposition to this proposal, a brigade of the Priština Corps was used in late July to early August 1998 in an operation to clear one of the roads designated in Pavković's rejected proposal of 23 July 1998.³⁶⁸²

1126. The Trial Chamber also considered evidence suggesting that Pavković deployed the VJ in the interior of Kosovo prior to the formal authorisation by his VJ superiors, Perišić and Samardžić, on the basis of the FRY President's approval of the Plan for Combating Terrorism.³⁶⁸³ The Trial Chamber noted that Perišić and Samardžić authorised the use of the VJ to secure the border "in depth" and permitted VJ actions in coordination with the MUP in the interior of Kosovo only pursuant to the *Grom 98* directive and the *Grom 98* order, issued on 28 and 29 July 1998,

³⁶⁷⁸ Trial Judgement, vol. 3, para. 651, referring, *inter alia*, Exh. 4D100, Exh. 4D119, Exh. 4D101, Exh. 4D102. See also Trial Judgement, vol. 1, para. 888.

³⁶⁷⁹ Exh. 4D119. See also Trial Judgement, vol. 3, para. 651.

³⁶⁸⁰ Exh. 4D101. See also Trial Judgement, vol. 1, paras 887-888, 996; *ibid.*, vol. 3, para. 651, noting that, in this proposal, Pavković stresses that the Plan for Combating Terrorism was accepted by the President and that his proposal was in the spirit of the President's order.

³⁶⁸¹ Exh. 4D102. See also Trial Judgement, vol. 1, paras 888, 996; *ibid.*, vol. 3, para. 651. In describing Samardžić's response rejecting Pavković's proposal of 23 July 1998, the Trial Chamber stated that Samardžić "asserted the obligation to adhere to the VJ chain of command" (Trial Judgement, vol. 3, para. 651). Pavković argues that Samardžić did not articulate this obligation in his response (Pavković's Reply Brief, para. 24). However, in his response, he directed Pavković to follow an order of the 3rd Army Command when using Corps units (Exh. 4D102, para. 1). Thus, Pavković has not shown that the Trial Chamber erred in this regard.

³⁶⁸² Trial Judgement, vol. 1, para. 888, referring to Dragan Živanović, Exh. P3062, para. 96.

³⁶⁸³ Trial Judgement, vol. 3, para. 656.

respectively.³⁶⁸⁴ However, prior to this authorisation, Pavković reported in a Joint Command meeting on 26 July 1998 that VJ operations had been undertaken in locations in the interior of Kosovo as part of the Plan for Combating Terrorism.³⁶⁸⁵ In these circumstances, it was reasonable for the Trial Chamber to conclude that the letter of 22 July 1998 from Pavković to Samardžić and the subsequent exchange between them demonstrated clashes between the two officers.³⁶⁸⁶ Pavković has failed to demonstrate that the Trial Chamber erred in its assessment of this evidence and merely seeks to substitute his own interpretation for that of the Trial Chamber. Pavković's arguments in this regard are accordingly dismissed.

ii. Samardžić's order of 7 August 1998

1127. The Trial Chamber found that on 7 August 1998, Dušan Samardžić issued an order providing for, *inter alia*, VJ support of MUP operations. The Trial Chamber considered that this order was "apparently aimed at Pavković", since it specified that the units were not to be used contrary to this order and that, if they were, unit commanders who received such orders should immediately inform "the second superior officer" and act according to his orders.³⁶⁸⁷

1128. Pavković argues that Samardžić's order of 7 August 1998 should be read as authorising VJ units to support MUP units. He also claims that it ran counter to Momčilo Perišić's order to only use the VJ within the border belt, since the MUP's responsibilities lay beyond the border belt. Pavković also argues that this order was not specifically aimed at him as it provides that the use of units in contravention of this order should be reported to the "second superior officer" and not directly to Samardžić.³⁶⁸⁸

1129. The Appeals Chamber considers Pavković's submissions to be without merit. He ignores the Trial Chamber's finding that, prior to Samardžić's order of 7 August 1998, Perišić's *Grom* 98 directive of 28 July 1998 authorised the use of the VJ in the interior of Kosovo (*i.e.* beyond the border belt).³⁶⁸⁹ The Trial Chamber also considered evidence that while the *Grom* 98 directive and Samardžić's *Grom* 98 order of 29 July 1998 specified that VJ actions must be carried out in

³⁶⁸⁴ Trial Judgement, vol. 3, paras 655, referring, *inter alia*, to Exh. 4D137, Exh. 4D140. See also Trial Judgement, vol. 1, paras 807-809.

³⁶⁸⁵ Trial Judgement, vol. 3, paras 655-656, referring, *inter alia*, to Exh. P1468, p. 13, Exh. P922, pp. 3, 12-13.

³⁶⁸⁶ Trial Judgement, vol. 3, paras 83, 651, read together with *ibid.*, vol. 3, paras 648, 656-658, 665, 680.

³⁶⁸⁷ Trial Judgement, vol. 3, para. 659, referring to Exh. P1421, p. 2, Dragan Živanović, 18 Jan 2008, T. 20534-20536.

³⁶⁸⁸ Pavković's Reply Brief, para. 15, referring to Exh. P1421, preamble, para. 2. *Contra* Prosecution's Response Brief (Pavković), paras 37-38.

³⁶⁸⁹ Trial Judgement, vol. 3, paras 655, referring, *inter alia*, to Exh. 4D137, Exh. 4D140. See also Trial Judgement, vol. 1, paras 807-809.

accordance with special orders of the General Staff and the 3rd Army Commander,³⁶⁹⁰ Pavković deployed Priština Corps units on 2 August 1998 despite Samardžić's order prohibiting it.³⁶⁹¹

1130. Furthermore, Samardžić directed that his order of 7 August 1998 be personally delivered to Pavković, then Priština Corps Commander, and to “the commanders of directly subordinated units of the Priština Corps Command for their information.”³⁶⁹² As Pavković was the first or immediate superior officer of the commanders of directly subordinated units of the Priština Corps Command, Samardžić, then 3rd Army Commander, was the “second superior officer” for these commanders. Thus, it was reasonable for the Trial Chamber to find that Samardžić's order of 7 August 1998 anticipated Pavković issuing orders in contravention of Samardžić's order and required commanders directly subordinated to Pavković to inform Samardžić of any violations thereof. In these circumstances, Pavković has failed to demonstrate that the Trial Chamber erred in its assessment of Samardžić's order of 7 August 1998. Pavković's arguments in this regard are accordingly dismissed.

iii. Samardžić's favourable evaluation of Pavković

1131. Pavković submits that the Trial Chamber failed to appropriately evaluate evidence that reasonably shows that there was no tension between him and Dušan Samardžić.³⁶⁹³ In this regard, he contends that the Trial Chamber failed to accord sufficient weight to the fact that, as part of his professional evaluation, Samardžić awarded him the highest rating, which, Pavković avers, is indicative of a good relationship between the two officers.³⁶⁹⁴ The Prosecution responds that the Trial Chamber reasonably determined that Samardžić's favourable evaluation of Pavković did not outweigh the extensive evidence of conflict between the two officers.³⁶⁹⁵

1132. The Appeals Chamber notes that the Trial Chamber considered that Samardžić evaluated Pavković in January 1999, rating him “excellent” and “exceptional”.³⁶⁹⁶ However, the fact that Samardžić gave Pavković a favourable evaluation is not, on its own, indicative of the relationship between these two officers. In this context, the Appeals Chamber recalls that the Trial Chamber considered overwhelming evidence showing disagreements between the two concerning the use of

³⁶⁹⁰ Trial Judgement, vol. 3, para. 655, referring to Exh. 4D137, pp. 2-3, Exh. 4D140, p. 7. See also Exh. 4D140, p. 5.

³⁶⁹¹ Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 658; Exh. 4D125; Exh. 4D458; Exh. P1468, p. 36. See also *supra*, sub-section VII.C.2.(c)(vi).

³⁶⁹² Exh. P1421, p. 2.

³⁶⁹³ Pavković's Appeal Brief, paras 86-87, referring to Trial Judgement, vol. 3, paras 83, 680.

³⁶⁹⁴ Pavković's Appeal Brief, paras 93, 281, referring to Exh. 4D136, Trial Judgement, vol. 3, para. 682.

³⁶⁹⁵ Prosecution's Response Brief (Pavković), para. 42, referring to Trial Judgement, vol. 3, para. 682.

³⁶⁹⁶ Trial Judgement, vol. 3, para. 682, citing Exh. 4D136.

the VJ.³⁶⁹⁷ It was thus reasonable for the Trial Chamber not to accord much weight to the evidence of Pavković's favourable evaluation in concluding that tension existed between Pavković and Samardžić. Pavković's argument in this regard is accordingly dismissed.

iv. Samardžić's control over Pavković and the Priština Corps

1133. Pavković maintains that as Commander of the 3rd Army, Dušan Samardžić was in full control of the Priština Corps³⁶⁹⁸ and that the evidence shows his "concrete management" from 27 July 1998, at the latest.³⁶⁹⁹ According to Pavković, the Trial Chamber failed to appropriately consider this evidence, which he avers demonstrates that there was no tension between him and Samardžić.³⁷⁰⁰ Pavković further asserts that additional evidence admitted on appeal demonstrates Samardžić's control over VJ activities and operations.³⁷⁰¹

1134. The Prosecution responds that the Trial Chamber reasonably found that the evidence pertaining to Samardžić's issuance of various orders did not outweigh the extensive evidence of conflict between the two officers.³⁷⁰² With regard to the additional evidence, the Prosecution contends that most of the exhibits referred to by Pavković are repetitive of evidence presented at trial³⁷⁰³ and that some exhibits showing his superiors rejecting his proposals in fact strengthen the Trial Chamber's finding that he clashed with his superiors.³⁷⁰⁴

1135. The Trial Chamber noted that "a significant amount of evidence suggests that the formal command structures [...] of the VJ [...] remained intact during the period of operation of the Joint Command"³⁷⁰⁵ and found that "the VJ command structure continued to operate during the operations conducted in 1998."³⁷⁰⁶ However, the Trial Chamber also found that there was tension between Pavković and his military superiors over the use of the VJ in Kosovo, and that on several occasions Pavković executed operations and used Priština Corps units without the specific

³⁶⁹⁷ See *supra*, sub-sections VII.E.2.(c)(i)b.i. and VII.E.2.(c)(i)b.ii. See also Trial Judgement, vol. 3, paras 643-665, 680. See also *supra*, sub-sections VII.C.1.(d), VII.C.2.(b), and VII.C.2.(c)(iii)-VII.C.2.(c)(vi).

³⁶⁹⁸ Pavković's Appeal Brief, para. 90.

³⁶⁹⁹ Pavković's Appeal Brief, paras 89-91, referring to Exh. 3D697, para. 1.4, Exh. 4D141, para. 5, Exh. 4D416, para. 4, Exh. 4D528, para. 4b.

³⁷⁰⁰ Pavković's Appeal Brief, paras 89-91, read together with *ibid.*, paras 86-87.

³⁷⁰¹ Pavković's Supplemental Appeal Brief, paras 11-17, 20-24, 26-34, referring to Exh. 4DA1, Exh. 4DA2, Exh. 4DA3, Exh. 4DA4, Exh. 4DA5, Exh. 4DA8, Exh. 4DA9, Exh. 4DA10, Exh. 4DA11, Exh. 4DA12, Exh. 4DA14, Exh. 4DA15, Exh. 4DA16, Exh. 4DA17, Exh. 4DA18, Exh. 4DA19, Exh. 4DA20, Exh. 4DA21, Exh. 4DA22, Exh. 4DA23, Exh. 4DA24.

³⁷⁰² Prosecution's Response Brief (Pavković), para. 42, referring to Trial Judgement, vol. 2, para. 6, fn. 10 (referring to Exh. 4D141), Trial Judgement, vol. 3, para. 657, fn. 1589 (referring to Exh. 3D697).

³⁷⁰³ Prosecution's Supplemental Response Brief (Pavković), paras 27-28. See also *ibid.*, para. 16.

³⁷⁰⁴ Prosecution's Supplemental Response Brief (Pavković), paras 30, 32.

³⁷⁰⁵ Trial Judgement, vol. 1, para. 1081.

³⁷⁰⁶ Trial Judgement, vol. 1, para. 1095.

authorisation of his VJ superiors.³⁷⁰⁷ This and other evidence³⁷⁰⁸ led the Trial Chamber to conclude that Pavković by-passed the regular VJ chain of command using his direct access to Milošević.³⁷⁰⁹ In this context, the Trial Chamber noted orders of the 3rd Army which allegedly provided the basis for Pavković's orders to the Priština Corps in 1998. However, it found that these orders were consistent with its conclusion that Pavković by-passed the regular VJ chain of command, since they demonstrated "attempts to retain some control over Pavković's involvement in the Joint Command."³⁷¹⁰

1136. The Appeals Chamber considers that the evidence on which Pavković relies as showing Samardžić's control over him and the Priština Corps – both the evidence in the trial record³⁷¹¹ and additionally admitted on appeal³⁷¹² – is similar in nature to the evidence that the Trial Chamber explicitly mentioned in the Trial Judgement³⁷¹³ and shows nothing more than the limited degree of control that it found Samardžić retained.³⁷¹⁴ Pavković has thus failed to demonstrate that the Trial Chamber erred in its assessment of the evidence in this regard. Moreover, the Appeals Chamber considers that no reasonable doubt as to Pavković's guilt arises from the additional evidence. Accordingly, Pavković's arguments concerning Samardžić's control over him and the Priština Corps are dismissed.

v. Whether Samardžić was sidelined

1137. Pavković submits that the Trial Chamber erred in finding that Dušan Samardžić was sidelined after he replaced Samardžić as 3rd Army Commander. According to Pavković, this conclusion contradicts the Trial Chamber's reliance on Samardžić's subsequent engagement in high level meetings of the VJ General Staff.³⁷¹⁵ The Prosecution responds that the Trial Chamber did not

³⁷⁰⁷ See *supra*, sub-sections VII.C.1.(d), VII.C.2.(b), VII.C.2.(c)(v), VII.C.2.(c)(vi), VII.E.2.(c)(i)b.i., and VII.E.2.(c)(i)b.ii. See also Trial Judgement, vol. 3, paras 643-665, 680.

³⁷⁰⁸ See *infra*, sub-section VII.E.2.(c)(iv).

³⁷⁰⁹ Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 665. See also *ibid.*, vol. 3, para. 680.

³⁷¹⁰ Trial Judgement, vol. 3, para. 657, referring to, as examples, Exh. P1427, Exh. 3D697, Milan Kotur, 21 Jan 2008, T. 20724-20727.

³⁷¹¹ Exh. 4D528; Exh. 4D416; Exh. 4D141; Exh. 3D697. The Appeals Chamber also notes that Pavković repeats his arguments regarding these exhibits at trial (Pavković's Closing Brief, paras 144-145, 147, 149-153, 155; Trial Judgement, vol. 3, para. 657).

³⁷¹² Exh. 4DA1; Exh. 4DA2; Exh. 4DA3; Exh. 4DA4; Exh. 4DA5; Exh. 4DA8; Exh. 4DA9; Exh. 4DA10; Exh. 4DA11; Exh. 4DA12; Exh. 4DA14; Exh. 4DA15; Exh. 4DA16; Exh. 4DA17; Exh. 4DA18; Exh. 4DA19; Exh. 4DA20; Exh. 4DA21; Exh. 4DA22; Exh. 4DA23; Exh. 4DA24 (With respect to Exh. 4DA3 and Exh. 4DA4, see also *supra*, paras 758-759. As regards Exh. 4DA23 and Exh. 4DA24, see also *infra*, para. 1149).

³⁷¹³ Trial Judgement, vol. 1, para. 1081, referring to Exh. 4D91, Exh. P1419, Ljubinko Cvetić, 8 Dec 2006, T. 8123, Miodrag Simić, 14 Sep 2007, T. 15687; Trial Judgement, vol. 3, para. 657, referring to, as examples, Exh. P1427, Exh. 3D697, Milan Kotur, 21 Jan 2008, T. 20724-20727. See also Trial Judgement, vol. 1, paras 888, 1082, 1084-1086; *ibid.*, vol. 3, 651, 658-660, and references therein.

³⁷¹⁴ See Trial Judgement, vol. 3, para. 680.

³⁷¹⁵ Pavković's Appeal Brief, para. 94, pointing out the Trial Chamber's reliance on meetings of the Collegium of 25 February 1999 (Exh. P941) and of 9 April 1999 (Exh. P929).

focus on whether Samardžić was “sidelined” after Pavković replaced him; rather, it considered whether the tension between the two officers led to Samardžić being ousted from his position.³⁷¹⁶

1138. Contrary to Pavković’s assertion, the Trial Chamber did not conclude that Samardžić was sidelined. The Trial Chamber found that after Samardžić and Pavković clashed over the use of VJ forces in Kosovo, Milošević removed Samardžić from his post of 3rd Army Commander, which had authority over the VJ forces deployed in Kosovo, and appointed Pavković instead.³⁷¹⁷ The fact that Samardžić, as “Yugoslav Army Inspectorate”, attended meetings of the Collegium of the VJ General Staff³⁷¹⁸ has no bearing on this finding. Pavković has failed to demonstrate any error on the part of the Trial Chamber and his argument in this regard is accordingly dismissed.

c. Conclusion

1139. For the foregoing reasons, Pavković has failed to demonstrate any error in the Trial Chamber’s assessment of the evidence concerning the manner in which he was promoted and the tension between him and Dušan Samardžić which preceded his promotions,³⁷¹⁹ or its reliance upon this evidence to infer his intent to participate in the JCE. The Appeals Chamber therefore dismisses Pavković’s sub-ground 1(D) in its entirety and part of sub-ground 8(b) in this regard.

(ii) Whether Pavković by-passed the VJ chain of command in 1998

1140. The Trial Chamber found that in 1998, Pavković, then Priština Corps Commander, “was one of the main proponents of the increased utilisation of the VJ in the interior of Kosovo” and as a member of the Joint Command, “used the influence of this body and his direct access to Milošević to advance his aggressive strategy of using the VJ and MUP together in Kosovo including by by-passing the usual VJ chain of command.”³⁷²⁰ The Trial Chamber based this conclusion on witness testimony describing Pavković by-passing the chain of command³⁷²¹ as well as its findings on the series of events in 1998, which led to the implementation of the Plan for Combating Terrorism. In this regard, the Trial Chamber considered: (i) Pavković’s active role in the Joint Command; (ii) tension between Pavković and his VJ superiors, such as Momčilo Perišić and Dušan Samardžić,

³⁷¹⁶ Prosecution’s Response Brief (Pavković), para. 43.

³⁷¹⁷ Trial Judgement, vol. 1, paras 583-584; *ibid.*, vol. 3, paras 83-85, 523, 665, 680-681, 683-684.

³⁷¹⁸ Exh. P941; Exh. P929. See also Trial Judgement, vol. 1, para. 478 describing that in meetings of the Collegium, the leadership of the VJ General Staff discussed “issues of a general nature or of long-term significance”.

³⁷¹⁹ The Trial Chamber’s finding concerning the tension between Pavković and Samardžić is further corroborated by the minutes of a briefing to the 3rd Army Commander on 21 August 1998, admitted as additional evidence on appeal (Exh. 4DA22). The minutes record General Mladenović as reporting problems with the Priština Corps Command, and the Chief of Staff of the 3rd Army – Miodrag Simić (see Trial Judgement, vol. 1, para. 587) – as referring to “a certain atmosphere of intolerance between the commands” of the Priština Corps and the 3rd Army (Exh. 4DA22, p. 3).

³⁷²⁰ Trial Judgement, vol. 3, para. 665. See also *ibid.*, vol. 3, para. 657.

³⁷²¹ Trial Judgement, vol. 3, paras 644-645, 663, and references therein.

who were reluctant to use the VJ in the interior of Kosovo absent a declaration of state of emergency or war; (iii) Pavković's deployment of VJ units in the interior of Kosovo prior to Perišić's *Grom* 98 directive of 28 July 1998, which permitted VJ actions there pending special order; and (iv) subsequent instances of Pavković's conduct in contravention of the instructions of his VJ superiors.³⁷²²

a. Submissions of the parties

1141. Pavković submits that the Trial Chamber erred in finding that he advanced an "aggressive strategy of using the VJ and the MUP together in Kosovo including by by-passing the usual VJ chain of command."³⁷²³ According to Pavković, all actions of the VJ in Kosovo in 1998 were carried out pursuant to orders issued by Momčilo Perišić, Chief of the General Staff, and passed along by Dušan Samardžić, 3rd Army Commander, to Pavković.³⁷²⁴ Pavković maintains that he could only operate within the chain of command as the evidence establishes that Samardžić and Perišić closely controlled VJ activity in Kosovo.³⁷²⁵ Pavković submits that this is further supported by the evidence that, immediately after issuing the *Grom* 98 directive on 28 July 1998, Perišić ordered Samardžić to draw up a plan for the engagement of forces³⁷²⁶ and that Samardžić issued a corresponding order, which, in turn, was put into action by Pavković within the chain of command.³⁷²⁷ Pavković also argues that there is no evidence to support the proposition that he used the VJ in illegal ways or against his superiors' orders,³⁷²⁸ or by-passed the regular chain of command in planning operations in Kosovo with Slobodan Milošević.³⁷²⁹

1142. Pavković further challenges the Trial Chamber's finding that he used the VJ in the interior of Kosovo prior to 28 July 1998 without Perišić's approval.³⁷³⁰ In support of his contention, Pavković argues that two combat reports of 2 and 13 June 1998 from the 3rd Army Command to the General Staff, admitted as additional evidence on appeal, as well as evidence in the trial record show that Samardžić and/or Perišić authorised the use of the VJ in the interior of Kosovo prior to

³⁷²² Trial Judgement, vol. 3, paras 647-660, 664-665. See also *ibid.*, vol. 1, paras 807-808, 888, 996, 1081, 1085-1086, 1088.

³⁷²³ Pavković's Appeal Brief, para. 150, referring to Trial Judgement, vol. 3, para. 665. See also Pavković's Appeal Brief, para. 111, referring to Trial Judgement, vol. 3, para. 642.

³⁷²⁴ Pavković's Appeal Brief, para. 150, also arguing that none of these orders contained instructions to carry out any criminal activity. See also *ibid.*, para. 131.

³⁷²⁵ Pavković's Appeal Brief, paras 113-119, 134-137, 140-149, and references therein. See also Pavković's Supplemental Appeal Brief, paras 15-16, 18-24, 27-29, 31-33, 36-37, and references therein.

³⁷²⁶ Pavković's Appeal Brief, para. 138, referring to Exh. 3D702.

³⁷²⁷ Pavković's Appeal Brief, paras 124, 139, referring to Exh. 4D140, pp. 5-6.

³⁷²⁸ Pavković's Appeal Brief, para. 112; Pavković's Reply Brief, para. 30.

³⁷²⁹ Pavković's Appeal Brief, para. 120; Pavković's Reply Brief, para. 30, referring to Trial Judgement, vol. 3, para. 657. See also Pavković's Reply Brief, paras 16, 35.

³⁷³⁰ Pavković's Appeal Brief, para. 128, referring to Trial Judgement, vol. 3, para. 656.

the issuance of the *Grom 98* directive.³⁷³¹ Pavković also argues that the wording of the *Grom 98* directive suggests that Perišić was aware of and approved the deployment of the VJ in support of the MUP in the interior of Kosovo prior to its issuance.³⁷³² He asserts that the confidential nature of the *Grom 98* directive implies that Perišić sought to conceal his mindset from international observers.³⁷³³ In this context, Pavković also contends that as John Crosland, then British Defence Attaché,³⁷³⁴ and other international observers criticised the VJ for using excessive force in Kosovo, Aleksandar Dimitrijević, former Head of the Security Administration of the VJ General Staff, and Perišić sought to absolve themselves from responsibility by accusing Pavković of operating outside the chain of command.³⁷³⁵ He adds that when shown the *Grom 98* directive in court, Crosland accepted that he had been misled by Perišić and Dimitrijević.³⁷³⁶

1143. The Prosecution responds that the Trial Chamber reasonably found that Pavković repeatedly by-passed the chain of command to communicate directly with Milošević³⁷³⁷ and operated outside the control of Perišić and Samardžić, and that their orders do not undermine the Trial Chamber's finding.³⁷³⁸ The Prosecution also submits that the Trial Chamber declined to determine the lawfulness of the VJ deployment in the interior of Kosovo and focused instead on Pavković's divergent approach on this issue from that of his superiors and the subsequent clashes between them.³⁷³⁹ The Prosecution further points out that both Perišić and Samardžić voiced concerns over

³⁷³¹ Pavković's Supplemental Appeal Brief, paras 11-12, referring to Exh. 4DA23, Exh. 4DA24. See also Pavković's Reply Brief, paras 39, 41-42, concerning the use of the VJ at Orahovac/Rahovec discussed in the VJ General Staff Collegium meeting of 20 July 1998 (Trial Judgement, vol. 3, para. 649; Exh. P922, pp. 3, 12, 22) and a VJ action in Djule/Duhël reported in the Joint Command meeting a few days before the issuance of the *Grom 98* directive (Trial Judgement, vol. 3, para. 656; Exh. P922, p. 21; Exh. P1468, pp. 17, 19). He also argues that had Perišić in fact issued an order prohibiting the use of the VJ outside the border belt, it was Samardžić who violated this order (Pavković's Reply Brief, para. 43).

³⁷³² Pavković's Appeal Brief, paras 128-130, 132, referring to Exh. 4D137, pp. 2-3, and mistakenly calling it "Grom 3" directive. In addition, Pavković argues that in the SDC meeting of 9 June 1998, Perišić stated that "if [...] terrorist attacks increase, the peacetime Army will need to be engaged [inside Kosovo], [...] without any declarations of war or immediate threat of war" (Pavković's Appeal Brief, paras 126-127, referring to Exh. 1D760, pp. 8-9). Furthermore, Pavković also avers that, while the minutes of the VJ General Staff Collegium meeting of 20 July 1998 recorded that Perišić prohibited the use of VJ units outside the border belt, there is no evidence that any order in this regard was delivered to Samardžić or Pavković, or that any of them attended the Collegium meeting or received its minutes (Pavković's Reply Brief, paras 39-40, referring to Trial Judgement, vol. 1, para. 572, *ibid.*, vol. 3, paras 649, 656, Exh. P922, p. 3).

³⁷³³ Pavković's Appeal Brief, paras 132-133; Pavković's Reply Brief, paras 46-49.

³⁷³⁴ See Trial Judgement, vol. 1, paras 575, 688.

³⁷³⁵ Pavković's Appeal Brief, para. 131; Pavković's Reply Brief, para. 45. See also Pavković's Appeal Brief, paras 121, 124.

³⁷³⁶ Pavković's Appeal Brief, paras 121-125, 131, referring to Trial Judgement, vol. 3, paras 662-664, Exh. 4D137, John Crosland, 8 Feb 2007, T. 9983-9984, *ibid.*, 9 Feb 2007, T. 10027. See also Pavković's Reply Brief, paras 44-45. Pavković also avers that Crosland's assertion that Pavković was acting upon Šainović's orders is based solely on what Crosland heard from Dimitrijević, who is unreliable (Pavković's Reply Brief, para. 38. See also Pavković's Supplemental Appeal Brief, paras 2, 7, referring to Trial Judgement, vol. 3, para. 644).

³⁷³⁷ Prosecution's Response Brief (Pavković), paras 53-54, 67. See also Prosecution's Supplemental Response Brief (Pavković), paras 15-17. *Contra* Pavković's Reply Brief, para. 37.

³⁷³⁸ Prosecution's Response Brief (Pavković), paras 55-59, 68. See also *ibid.*, paras 41, 113.

³⁷³⁹ Prosecution's Response Brief (Pavković), para. 63, referring to Trial Judgement, vol. 1, para. 579, *ibid.*, vol. 3, para. 648.

Pavković's actions.³⁷⁴⁰ It also argues that Pavković used the VJ in the interior of Kosovo prior to the issuance of the *Grom* 98 directive in contravention of Perišić's earlier instructions and that, consequently, the *Grom* 98 directive and Samardžić's follow-up order do not show that Crosland was "seriously misled" as to Pavković operating outside the chain of command".³⁷⁴¹ The Prosecution further contends that various combat reports cited by Pavković and admitted as additional evidence on appeal do not alter the fact that Pavković disobeyed Perišić by using the VJ in the interior of Kosovo prior to his authorisation.³⁷⁴²

b. Analysis

1144. The Appeals Chamber considers Pavković's assertion that all the actions of the VJ in Kosovo in 1998 were carried out pursuant to the orders of Momčilo Perišić and Dušan Samardžić to be without merit.³⁷⁴³ In this regard, the Appeals Chamber observes that it has already addressed and rejected Pavković's contention that he was under the full control of Samardžić and could not operate without his approval.³⁷⁴⁴ While Pavković also seeks to demonstrate that Perišić retained control over the activities of the VJ by relying on evidence in the trial record and additional evidence admitted on appeal,³⁷⁴⁵ this evidence is identical³⁷⁴⁶ or similar³⁷⁴⁷ to that considered by the

³⁷⁴⁰ Prosecution's Response Brief (Pavković), paras 56, 60, referring to Trial Judgement, vol. 1, paras 1003, 1088, *ibid.*, vol. 3, paras 648-649, 653, 659, Exh. P717, p. 3. The Prosecution adds that the 9 June 1998 SDC meeting is one of several instances where Perišić noted that the VJ's role in Kosovo should be limited absent authorisation (Prosecution's Response Brief (Pavković), para. 62, referring to Trial Judgement, vol. 1, para. 572, *ibid.*, vol. 3, paras 112, 648).

³⁷⁴¹ Prosecution's Response Brief (Pavković), paras 61, 64. The Prosecution also submits that there is no basis for Pavković's claim that Dimitrijević and Perišić sought to avoid responsibility for VJ operations in Kosovo by casting blame on him (Prosecution's Response Brief (Pavković), para. 51).

³⁷⁴² Prosecution's Supplemental Response Brief (Pavković), paras 20-22, 29, referring to Trial Judgement, vol. 1, paras 572, 1086, *ibid.*, vol. 3, paras 649, 655-656, 659, submitting that these reports either pre-date Perišić's order of 20 July 1998 banning the use of the VJ in the interior of Kosovo absent his instructions, or post-date his authorisation of 28 July 1998 of VJ operations in the interior of Kosovo.

³⁷⁴³ Pavković's Appeal Brief, paras 131, 150; Pavković's Supplemental Appeal Brief, para. 9. Pavković's challenges in this regard also partly repeat his arguments at trial (Trial Judgement, vol. 3, para. 642, referring to Pavković's Closing Brief, paras 127, 242).

³⁷⁴⁴ See *supra*, sub-section VII.E.2.(c)(i)b.iv. In this context, Pavković also argues that there was no clash between him and Samardžić and challenges the Trial Chamber's finding as to a clash between the two over his request for use of helicopters based on a decision of the Joint Command (Pavković's Appeal Brief, paras 116-119, referring to Trial Judgement, vol. 3, para. 659, Exh. 4D392, Exh. 4D230, Exh. P1468, p. 109). He also submits that Simić's testimony and Samardžić's order of 30 July 1998 stipulating the procedure for Pavković's participation in the Joint Command meetings show that he operated within the chain of command (Pavković's Appeal Brief, paras 114-115, 136, referring to Exh. 4D91, Miodrag Simić, 12 Sep 2007, T. 15517, *ibid.*, T. 15532, 15534). In a previous section of this Judgement, the Appeals Chamber has rejected these arguments (see *supra*, sub-sections VII.C.2.(c)(ii) and VII.C.2.(c)(iii)).

³⁷⁴⁵ Among such evidence are Perišić's orders and numerous VJ combat reports. See Pavković's Appeal Brief, paras 134-137, 140-149, referring to Exh. 4D379, Exh. 4D183, Exh. 4D143, Exh. 4D416, Exh. 4D418, Exh. 4D508, Exh. 4D495, Exh. 3D697, Miodrag Simić, 12 Sep 2007, T. 15509, 15512, *ibid.*, 13 Sep 2007, T. 15520, 15532, 15534, *ibid.*, 14 Sep 2007, T. 15700, Tomislav Mladenović, 25 Oct 2007, T. 17578-17589, 17594. See also Pavković's Supplemental Appeal Brief, paras 15-16, 18-24, 27-29, 31-33, referring to Exh. 4DA3, Exh. 4DA4, Exh. 4DA6, Exh. 4DA7, Exh. 4DA8, Exh. 4DA9, Exh. 4DA10, Exh. 4DA11, Exh. 4DA12, Exh. 4DA14, Exh. 4DA15, Exh. 4DA16, Exh. 4DA18, Exh. 4DA19, Exh. 4DA20.

³⁷⁴⁶ See *e.g.*, Trial Judgement, vol. 3, para 657, 715, referring, *inter alia*, to Exh. 3D697.

Trial Chamber. It took into account evidence showing some control that both Perišić and Samardžić retained over the VJ forces and found that, although the VJ command structure continued to operate in 1998,³⁷⁴⁸ Pavković sometimes circumvented the VJ chain of command.³⁷⁴⁹ Therefore, Pavković has not shown any error in the Trial Chamber's assessment of the evidence. Moreover, the additional evidence admitted on appeal does not raise reasonable doubt as to his circumvention of the chain of command.

1145. The Appeals Chamber is also not persuaded by Pavković's arguments that he was only implementing Perišić's *Grom 98* directive and Samardžić's *Grom 98* order within the chain of command, that there is no evidence suggesting that he deployed the VJ against his superiors' orders, and that even prior to the issuance of the *Grom 98* directive Perišić and/or Samardžić allowed him to engage VJ forces in the interior of Kosovo.³⁷⁵⁰

1146. The Trial Chamber noted that the *Grom 98* directive issued by Perišić on 28 July 1998 and Samardžić's corresponding order issued on the following day permitted VJ actions in coordination with the MUP in the interior of Kosovo.³⁷⁵¹ However, it also considered a significant body of evidence showing that, before the *Grom 98* directive was issued, Perišić advocated the view that the VJ should not be used beyond the border area, absent a declaration of a state of emergency or war, and tried to minimise such use of the VJ by prohibiting its deployment in the interior of Kosovo without his specific orders.³⁷⁵² In this regard, the Trial Chamber considered, *inter alia*, Perišić's statements recorded in the notes of the SDC meeting of 9 June 1998³⁷⁵³ and the minutes of the VJ General Staff Collegium meeting of 20 July 1998.³⁷⁵⁴ The Trial Chamber also considered evidence

³⁷⁴⁷ Cf., e.g., Trial Judgement, vol. 1, para. 1081, and references therein. See also Exh. 4D141. The Appeals Chamber also notes that Pavković repeats his arguments regarding some of the evidence presented at trial (Pavković's Closing Brief, paras 143-144, 149-155).

³⁷⁴⁸ Trial Judgement, vol. 1, paras 1081, 1095.

³⁷⁴⁹ Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, para. 665. See also *supra*, sub-sections VII.C.1.(d), VII.C.2.(b), VII.C.2.(c)(v), VII.C.2.(c)(vi), VII.E.2.(c)(i)b.i., and VII.E.2.(c)(i)b.ii. See also Trial Judgement, vol. 3, paras 643-665, 680.

³⁷⁵⁰ Pavković's Appeal Brief, paras 112, 124, 128-130, 132, 138-139; Pavković's Reply Brief, para. 30. Pavković also partly repeats his arguments at trial (Pavković's Closing Brief, paras 137-155).

³⁷⁵¹ Trial Judgement, vol. 1, paras 807-809; *ibid.*, vol. 3, para. 655, referring, *inter alia*, to Exh. 4D137, Exh. 4D140.

³⁷⁵² Trial Judgement, vol. 1, paras 572-575; *ibid.*, vol. 3, paras 112, 494, 648-649, 653, referring, *inter alia*, to Exh. 1D760, pp. 3-10, Exh. P922, p. 3, Exh. P717.

³⁷⁵³ Trial Judgement, vol. 1, para. 572; *ibid.*, vol. 3, paras 112, 494, 648, referring to Exh. 1D760, pp. 3-10. Pavković's argument that in the SDC meeting of 9 June 1998, Perišić already accepted the need for the VJ engagement in the interior of Kosovo without a declaration of state of war or threat of war (Pavković's Appeal Brief, paras 126-127, referring to Exh. 1D760, p. 8 and quoting *ibid.*, p. 9, para. 4) is dismissed, as it is based on Pavković's own interpretation of certain portions of the notes of this meeting out of context, without showing any error on the part of the Trial Chamber. The Appeals Chamber considers that a reasonable trier of fact could have found, on the basis of the notes (see Exh. 1D760, in particular, pp. 5, 9-10), that Perišić presented in this meeting the possibility of intensifying VJ activities in Kosovo, but at the same time expressed his reluctance to increase the VJ presence beyond its "legitimate" position in the border belt (Trial Judgement, vol. 3, para. 648. See also *ibid.*, vol. 1, para. 572; *ibid.*, vol. 3, paras 112, 494).

³⁷⁵⁴ Trial Judgement, vol. 1, para. 572; *ibid.*, vol. 3, paras 494, 649, referring to Exh. P922, p. 3. With regard to the minutes of this meeting recording Perišić's reference to his order banning the use of the VJ in the interior of Kosovo

showing that, like Perišić, Samardžić was also reluctant to deploy the VJ in the interior of Kosovo.³⁷⁵⁵

1147. By contrast, the Trial Chamber observed that the Plan for Combating Terrorism, which envisaged reinforcing the security of the state border “in depth” and taking control of territory in Kosovo by MUP and VJ forces, was officially adopted in a meeting with Slobodan Milošević in Belgrade on 21 July 1998 where Pavković presented this Plan.³⁷⁵⁶ The Trial Chamber further noted that Perišić was ordered to prepare a purely military plan in parallel to the Plan for Combating Terrorism, which he issued as the *Grom 98* directive of 28 July 1998, permitting VJ deployment in the interior of Kosovo.³⁷⁵⁷ Significantly, Perišić’s *Grom 98* directive and Samardžić’s corresponding order, specified that VJ actions were to be carried out in accordance with their “special” orders.³⁷⁵⁸

1148. Notwithstanding the requirements imposed by Perišić and Samardžić before and after the issuance of the *Grom 98* directive, the Trial Chamber noted evidence that Pavković engaged the VJ in the interior of Kosovo without “special” instructions prior to the *Grom 98* directive³⁷⁵⁹ and continued to do so after it had been issued.³⁷⁶⁰ Consequently, Pavković ignores all of this evidence when he argues that there is no evidence suggesting that he deployed the VJ against his superiors’ orders and that he was only implementing the *Grom 98* directive and the *Grom 98* order within the chain of command.

without any specific instruction, Pavković is correct in arguing that there is no direct evidence indicating that Samardžić or Pavković were aware of this particular order (Pavković’s Reply Brief, para. 39). However, the Appeals Chamber is of the view that a reasonable trier of fact could have considered this order as corroborating a considerable amount of other evidence recounted above and below showing efforts of Perišić and Samardžić to prevent Pavković’s unauthorised use of the VJ as well as Pavković’s propensity to act without his VJ superiors’ specific instructions. Among such evidence is Dimitrijević’s testimony that Samardžić attempted to discipline Pavković for breaching “orders” (Trial Judgement, vol. 3, para. 649, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26622-26623, *ibid.*, 9 Jul 2008, T. 26682-26683). Pavković’s challenge regarding Dimitrijević’s credibility (Pavković’s Reply Brief, para. 40) has already been rejected (see *supra*, sub-section VII.E.2.(b)).

³⁷⁵⁵ Trial Judgement, vol. 1, paras 888, 996, 1080, 1082, 1084-1087; *ibid.*, vol. 3, paras 649, 651, 657-660, and references therein. See also *supra*, sub-sections VII.C.2.(c)(ii)-VII.C.2.(c)(vi), VII.E.2.(c)(i)b.i., and VII.E.2.(c)(i)b.ii.

³⁷⁵⁶ Trial Judgement, vol. 1, paras 995, 997, referring, *inter alia*, to Duško Matković, 30 Aug 2007, T. 14636-14637, Duško Matković, Exh. P2913, p. 9, Exh. 4D100, Exh. 4D101, Exh. P2166, pp. 2-4.

³⁷⁵⁷ Trial Judgement, vol. 3, paras 494, 650, referring to Exh. 4D137, Exh. P949, Milan Đaković, 19 May 2008, T. 26409. See also Trial Judgement, vol. 1, paras 807, 999.

³⁷⁵⁸ Trial Judgement, vol. 3, para. 655, referring to Exh. 4D137, Exh. 4D140. See also *supra*, sub-section VII.E.2.(c)(i)b.ii.

³⁷⁵⁹ In particular, see Trial Judgement, vol. 1, paras 888, 995-996; *ibid.*, vol. 3, paras 649-651, 656, and references therein. In previous sections, the Appeals Chamber has rejected his challenges to some of the Trial Chamber’s findings with regard to Pavković’s conduct before the issuance of the *Grom 98* directive (see *supra*, paras 1109-1110, 1114-1116, sub-section VII.E.2.(c)(i)b.i.).

³⁷⁶⁰ In particular, see Trial Judgement, vol. 1, para. 1086; *ibid.*, vol. 3, paras 657-659, and references therein. In previous sections, the Appeals Chamber has dismissed Pavković’s challenges to the Trial Chamber’s findings concerning his conduct after the issuance of the *Grom 98* directive (see *supra*, sub-sections VII.E.2.(c)(i)b.ii. and VII.C.2.(c)(vi)).

1149. Furthermore, although Pavković refers to evidence, which, in his view, shows that even prior to the issuance of the *Grom 98* directive Perišić and/or Samardžić allowed him to actively engage VJ forces in the interior of Kosovo, his arguments in this regard are unpersuasive.³⁷⁶¹ In particular, the two combat reports of 2 and 13 June 1998 from the 3rd Army to the General Staff,³⁷⁶² admitted as additional evidence on appeal, do not undermine the Trial Chamber's finding that Pavković by-passed the VJ chain of command, in part, by deploying VJ units in the interior of Kosovo in contravention of his VJ superiors' instructions before the *Grom 98* directive was issued.³⁷⁶³ The Appeals Chamber observes that, although Pavković asserts that the locations of VJ activity referred to in these combat reports were beyond the border belt, he has failed to substantiate this assertion.³⁷⁶⁴ Accordingly, the two combat reports do not give rise to any reasonable doubt that Pavković by-passed the VJ chain of command.³⁷⁶⁵

³⁷⁶¹ With regard to the use of the VJ in Orahovac/Rahovec, which Perišić criticised in the 20 July 1998 Collegium meeting (Trial Judgement, vol. 3, para. 649), Pavković asserts that Perišić attributed to Samardžić the use of the VJ (Pavković's Reply Brief, para. 39). This argument is dismissed, as it ignores the Trial Chamber's finding that Perišić subsequently clarified in his letter to Milošević of 23 July 1998 that it was Pavković who was ordering those VJ operations in Kosovo (Trial Judgement, vol. 3, fn. 1553, referring to Exh. P922, p. 3, Exh. P717, pp. 2-3). As evidence of Pavković's use of the VJ in the interior of Kosovo on the basis of Milošević's approval of the Plan for Combating Terrorism prior to the issuance of the *Grom 98* directive, the Trial Chamber noted that on 26 July 1998, Pavković reported to the Joint Command that VJ operations had been undertaken in several locations in the interior of Kosovo, including Djule/Duhël, as part of the Plan (Trial Judgement, vol. 3, para. 656 and fn. 1586, referring to Exh. P1468, p. 13, Exh. 3D739). Pavković argues that the operation in Djule/Duhël was carried out with Samardžić's approval (Pavković's Reply Brief, paras 42-43), since Đaković's Notes indicate that in the Joint Command meeting of 27 July 1998, Pavković reported about this operation in the presence of Samardžić who commented that "[f]rom the area of Dujle, forces should not be rushed" (Exh. P1468, pp. 17-20). However, the Appeals Chamber is not convinced that Samardžić's mere presence and comment in this meeting suggest that he approved the operation. The Appeals Chamber also notes that according to Đaković's Notes, Samardžić was absent in the Joint Command meeting of 26 July 1998 when Pavković for the first time reported about the operation in Dulje/Duhël (Exh. P1468, pp. 13-16). The Trial Chamber explicitly noted only Pavković's report at the Joint Command meeting of 26 July 1998, erroneously stating that Samardžić was present there (Trial Judgement, vol. 3, para. 656). However, this error has no adverse impact on its conclusions. Pavković also submits that Perišić authorised the operation in Djule/Duhël prior to the issuance of the *Grom 98* directive, on the basis of the minutes of the Collegium meeting of 20 July 1998 recording Perišić's comment that the VJ soldiers must know that a unit of the KLA "plans to seal off [...] or to attack the Dulje Pass, so that [they] can take measures" (Pavković's Reply Brief, para. 41, citing Exh. P922, p. 21). However, the Appeals Chamber observes that Perišić made this statement in the context of the necessity to monitor the KLA activities, while insisting on the need to declare an imminent threat of war for the mobilisation of sufficient forces, should the KLA activities amount to a "mass uprising" (Exh. P922, p. 21). In light of this context in which Perišić made this statement and in view of the other evidence showing Perišić's view in favour of a restrictive use of the VJ in Kosovo, the Appeals Chamber is not persuaded that his statement in question meant to specifically authorise the Djule/Duhël action.

³⁷⁶² Exh. 4DA23, Exh. 4DA24. These reports not only describe VJ activity in certain locations in Kosovo, but also refer to Samardžić's decisions thereon.

³⁷⁶³ Trial Judgement, vol. 3, paras 656, 665, read together with *ibid.*, vol. 1, paras 888, 995-996; *ibid.*, vol. 3, paras 649-651.

³⁷⁶⁴ Pavković's Supplemental Appeal Brief, paras 11-12, 36-37 and an annex thereto. In the annex, Pavković lists locations – including some mentioned in the combat reports of 2 and 13 June 1998 – which he argues were outside of the border belt, without any substantiation. Although the Prosecution has responded in its Supplemental Response Brief that his argument concerning this annex lacks references to any supporting evidence (Prosecution's Supplemental Response Brief (Pavković), para. 20), Pavković has filed no brief in reply. Therefore, it was inappropriate for Pavković to reply to the Prosecution during the appeal hearing that his argument in this regard was supported by Exhibit 4D381 (Appeal Hearing, 12 Mar 2013, AT. 334). In any event, Pavković failed to explain how this exhibit, a map of Kosovo annotated in B/C/S without English translation, supported his argument. The Appeals Chamber further notes that while the report of 13 June 1998 refers to certain locations, which the trial record indicates were beyond the border belt (Exh. 4DA24, pp. 1-2, compared with Exh. 3D739, Exh. 4D323, Exh. 3D388; Trial Judgement, vol. 1, para. 578; *ibid.*,

1150. Moreover, Pavković's contention that the wording of the *Grom* 98 directive suggests that Perišić was aware of and approved the deployment of the VJ in the interior of Kosovo prior to its issuance is misconceived. Pavković quotes the portion of the directive stating that: "[t]hrough its presence and by carrying out the training in the entire territory of Kosovo and Metohija, the Army has had a repelling effect with regard to the [Albanian] terrorist forces and it has offered direct assistance to the forces of the MUP".³⁷⁶⁶ However, this language does not, on its own, suggest that Perišić approved the use of the VJ to support the MUP in combat operations in the interior of Kosovo prior to the issuance of the directive. Given that Perišić was in favour of restricting the deployment of the VJ³⁷⁶⁷ and that Perišić was ordered to prepare the *Grom* 98 directive despite his reservation as to the deployment of the VJ in the interior of Kosovo,³⁷⁶⁸ Pavković has failed to demonstrate that the Trial Chamber erred in its evaluation of the *Grom* 98 directive, irrespective of the fact that it was issued confidentially.

1151. The Appeals Chamber is likewise not persuaded by Pavković's unfounded claim that Aleksandar Dimitrijević and Momčilo Perišić sought to absolve themselves from responsibility and mislead international observers, including John Crosland, by accusing Pavković of operating outside the chain of command.³⁷⁶⁹ On the contrary, Dimitrijević's statements to Crosland that Pavković was working outside the VJ chain of command, as recounted by Crosland,³⁷⁷⁰ are corroborated by other evidence showing the tension between Pavković and his VJ superiors; such evidence includes specific instances of his conduct without the approval of his VJ superiors and his close connection with Milošević.³⁷⁷¹ Further corroboration is provided by Perišić's letter to

vol. 3, para. 656 (fn. 1586)), it is not clear from the report whether the type of VJ activity at these locations was permissible in Perišić's view (see Trial Judgement, vol. 1, para. 572, referring to Perišić's order mentioned in the 20 July 1998 Collegium meeting and banning the use of the VJ without specific instructions, except in the defence of the border area, to protect military facilities and to defend army personnel).

³⁷⁶⁵ See Trial Judgement, vol. 3, para. 665.

³⁷⁶⁶ Exh. 4D137, p. 2, quoted in Pavković's Appeal Brief, paras 128, 132.

³⁷⁶⁷ Trial Judgement, vol. 1, paras 572-574; *ibid.*, vol. 3, paras 648-649, 653, 664, referring, *inter alia*, to Exh. P922, Exh. 1D760, Exh. P717, Exh. P1571, Exh. 3D494, Exh. P928, Exh. 3D646, Exh. 3D484.

³⁷⁶⁸ See *supra*, paras 1146-1147.

³⁷⁶⁹ Pavković's Appeal Brief, paras 124-125, 132-133; Pavković's Reply Brief, paras 46-49.

³⁷⁷⁰ Trial Judgement, vol. 1, para. 1088; *ibid.*, vol. 3, paras 320-321, 663, referring to John Crosland, Exh. P2645, paras 48, 52, 54, 56, 58, Exh. P683, Exh. P684.

³⁷⁷¹ See *supra* VII.C.2.(c)(iii)-VII.C.2.(c)(vi), VII.E.2.(c)(i)a., VII.E.2.(c)(i)b.i., and VII.E.2.(c)(i)b.ii.; *infra*, sub-sections VII.E.2.(c)(iii) and VII.E.2.(c)(iv). In addition, Pavković argues that the Trial Chamber erred in relying upon Dimitrijević's testimony as to what he described as "unusual incidents", the lack of reporting thereof by Pavković, and Priština Corps actions without Samardžić's approval, about which Dimitrijević complained at meetings of the Collegium of the General Staff in late 1998 and early 1999. Pavković asserts that Dimitrijević gave this testimony without having seen any reports from the Priština Corps, and could not think of any specific example of actions carried out without Samardžić's approval (Pavković's Appeal Brief, para. 282, referring, *inter alia*, to Trial Judgement, vol. 3, paras 650, 664, 676, Aleksandar Dimitrijević, 9 Jul 2008, T. 26737, 26740). The Appeals Chamber is not persuaded by this argument. In light of the evidence recounted above, it finds that a reasonable trier of fact could have relied, as corroboration, upon Dimitrijević's evidence concerning the situations about which he learned from other sources than Priština Corps reports, such as an analysis conducted throughout the VJ, reports from Samardžić, and meetings of the Collegium of the General Staff (Aleksandar Dimitrijević, 8 Jul 2008, T. 26624, 26627-26628, 26653-26655; *ibid.*, 9 Jul 2008, T. 26740. See also Exh. 3D484, pp. 14-15; Exh. P928; p. 14; Exh. 3D559, p. 20; Exh. P933, p. 15;

Milošević of 23 July 1998, complaining about Pavković planning operations at the request of Šainović, Milomir Minić, and the MUP and Milošević “by-passing levels of command”.³⁷⁷²

1152. Consequently, Pavković has failed to demonstrate any error in the Trial Chamber’s conclusion that he advanced an aggressive strategy of using the VJ and the MUP together in Kosovo in 1998 and by-passed the usual VJ chain of command. The Appeals Chamber dismisses Pavković’s sub-ground 1(G) in its entirety and sub-ground 8(b) in relevant part.

(iii) Pavković’s deployment of a VJ unit in contravention of Ojdanić’s order in early 1999

1153. The Trial Chamber found that Pavković, then 3rd Army Commander, deployed the 72nd Special Brigade in the interior of Kosovo in early 1999, despite the instruction of Ojdanić, then Chief of the VJ General Staff, to keep it within the border area.³⁷⁷³ The Trial Chamber based this finding, *inter alia*, on the minutes of the General Staff Collegium meeting of 25 February 1999, which recorded: (i) Aleksandar Dimitrijević complaining about not having been consulted on the dispatch of a military police unit from the 72nd Special Brigade for Kosovo; (ii) Ojdanić’s agreement with Dimitrijević; and (iii) Ojdanić’s comment that the unit should be moved to “the edges of Kosovo and not inside Kosovo”.³⁷⁷⁴ Furthermore, the Trial Chamber found that the fact that Pavković had ordered troops into the interior of Kosovo in contravention of Ojdanić’s orders in this incident was an indication of Pavković’s “influence through his connection with Milošević”.³⁷⁷⁵

a. Submissions of the parties

1154. Pavković submits that the Trial Chamber erred in finding that he brought the 72nd Special Brigade into the interior of Kosovo in contravention of Ojdanić’s instruction, based on the minutes

Exh. P938, p. 21. See also Trial Judgement, vol. 3, paras 664, 676, 688). In the same context, the Trial Chamber also referred to Dimitrijević’s testimony that Perišić and later Ojdanić asked for “daily information about ammunition spent” by the Priština Corps, since the information they received indicated that ammunition was used even when no action was taken (Aleksandar Dimitrijević, 8 July 2008, T. 26628, referred to in Trial Judgement, vol. 3, para. 676). Pavković argues that it is illogical to assert that in order to solve this problem, it was ordered that reports contain information on the usage of ammunition, not actions justifying such usage (Pavković’s Appeal Brief, paras 283-284). However, the Appeals Chamber considers that Dimitrijević’s testimony can be reasonably understood to mean that Perišić and Ojdanić sought to gather on a daily basis more detailed information about how ammunition was spent, rather than the mere amount of ammunition used. Pavković’s challenge regarding Dimitrijević’s credibility (Pavković’s Appeal Brief, para. 285) has already been rejected (see *supra*, sub-section VII.E.(2)(b)).

³⁷⁷² Trial Judgement, vol. 1, para. 1088; *ibid.*, vol. 3, paras 80, 319, 653-654. See also *supra*, fns 2424, 2964. Contrary to Pavković’s argument (Pavković’s Reply Brief, para. 38), Perišić’s letter also corroborates Crosland’s account that according to Dimitrijević, Pavković was given Milošević’s orders through Šainović. While no written order by Šainović to Pavković is in evidence, the Appeals Chamber recalls the Trial Chamber’s finding based on Đaković’s Notes that in the Joint Command, Šainović played a leading role, stating what was to be done by the VJ and the MUP (see *supra*, sub-section VII.D.2.(b)(ii)). This further corroborates Crosland’s testimony.

³⁷⁷³ Trial Judgement, vol. 3, para. 689. See also *ibid.*, vol. 1, para. 970.

³⁷⁷⁴ Exh. P941, pp. 16, 24, cited in Trial Judgement, vol. 3, para. 689. See also Trial Judgement, vol. 1, para. 970, and references therein.

³⁷⁷⁵ Trial Judgement, vol. 3, para. 778.

of the Collegium meeting of 25 February 1999.³⁷⁷⁶ Pavković asserts that the Trial Chamber should have taken into account Aleksandar Dimitrijević's testimony that the order to send the unit from the 72nd Special Brigade into Kosovo probably came from Ojdanić.³⁷⁷⁷ In this context, Pavković also contends that, as 3rd Army Commander, on 2 February 1999, he had requested the subordination of the 72nd Special Brigade to the Priština Corps Command for the purpose of carrying out anti-terrorist tasks in Kosovo,³⁷⁷⁸ in response to the expansion of the KLA's area of control and Ojdanić's *Grom 3* directive ordering that units be brought into Kosovo to repel possible NATO attacks.³⁷⁷⁹ According to Pavković, on 19 February 1999, Ojdanić responded by ordering the subordination of the Brigade to the 3rd Army Command also for the purpose of carrying out anti-terrorist tasks in Kosovo, without specifying that the Brigade be kept outside Kosovo.³⁷⁸⁰ In light of this evidence, Pavković argues that it would be mere speculation to assert what Ojdanić had in mind at the Collegium meeting of 25 February 1999³⁷⁸¹ and adds that his own motivation in complying with Ojdanić's order was identical to Ojdanić's motivation as found by the Trial Chamber: namely, the fear of the threat from NATO and the KLA.³⁷⁸²

1155. The Prosecution responds that, based on the evidence, the Trial Chamber reasonably found that Pavković violated Ojdanić's instructions by engaging the 72nd Special Brigade.³⁷⁸³

b. Analysis

1156. The Appeals Chamber does not discern any error in the Trial Chamber's assessment of the minutes of the Collegium meeting of 25 February 1999. In his testimony, Aleksandar Dimitrijević explained his dissatisfaction, which he had raised at the meeting, about not having been informed of the deployment of a military police unit from the 72nd Special Brigade to Kosovo.³⁷⁸⁴ Dimitrijević testified that his dissatisfaction was aimed at Đorđe Ćurčin and Milorad Obradović, who authored

³⁷⁷⁶ Pavković's Appeal Brief, paras 164-165, 167-169, 175, 178, 278, 282, referring to Trial Judgement, vol. 3, paras 518, 617, 689-690, Exh. P941, pp. 16, 24.

³⁷⁷⁷ Pavković's Appeal Brief, para. 169, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26648. Pavković's challenges concerning Dimitrijević credibility (Pavković's Appeal Brief, paras 278, 282) have already been rejected (see *supra*, sub-section VII.E.2.(b)).

³⁷⁷⁸ Pavković's Appeal Brief, para. 173, referring to Exh. P1947.

³⁷⁷⁹ Pavković's Appeal Brief, paras 171-172, referring to Exh. 3D690, Bislim Zyrapi, 7 Nov 2006, T. 6028-6034.

³⁷⁸⁰ Pavković's Appeal Brief, para. 174, referring to Exh. P1948, and also arguing that there was no such need.

³⁷⁸¹ Pavković's Appeal Brief, paras 170, 175.

³⁷⁸² Pavković's Appeal Brief, paras 176-177, citing Trial Judgement, vol. 3, para. 521, and referring to Exh. P1947, Exh. P1948. See also Pavković's Reply Brief, para. 52. Pavković also points to his own statements at a meeting on 29 October 1998 mentioning his similar motivation – *i.e.* destruction of terrorists forces – as well as his concerns about unwanted mobilisation and extensive casualties (Pavković's Appeal Brief, paras 182-184). Further, he asserts that instead of refraining from determining the lawfulness of the deployment of VJ forces in Kosovo outside the border area prior to the declaration of a state of emergency, the Trial Chamber should have rejected the notion that such deployment was illegal (Pavković's Appeal Brief, paras 179-181, citing Trial Judgement, vol. 1, para. 579).

³⁷⁸³ Prosecution's Response Brief (Pavković), paras 76, 78, referring to Trial Judgement, vol. 1, para. 970, *ibid.*, vol. 3, paras 518, 599, 617, 689-690.

the order to deploy the unit, but conceded that the order might have come from the Chief of the VJ General Staff, Ojdanić.³⁷⁸⁵ However, Dimitrijević subsequently explained that, although the Chief of the VJ General Staff ordered the unit to the rim of Kosovo, the unit moved into the interior of Kosovo. Dimitrijević added that it was probably the 3rd Army that decided to do so.³⁷⁸⁶ The Trial Chamber concluded that Ojdanić was unaware that the unit had been moved into Kosovo, based on Dimitrijević's explanation as well as Ojdanić's comments at the Collegium meeting that he had only ordered the deployment of the concerned unit to "the edge of Kosovo and not inside Kosovo".³⁷⁸⁷

1157. Contrary to Pavković's contention,³⁷⁸⁸ his request of 2 February 1999 for the re-subordination of a military police unit of the 72nd Special Brigade to the Priština Corps Command³⁷⁸⁹ and Ojdanić's order of 19 February 1999, which re-subordinated this unit to the 3rd Army Command – rather than the Priština Corps Command –³⁷⁹⁰ support the Trial Chamber's finding.³⁷⁹¹ In his order, Ojdanić specified that the re-subordination was "for the purpose of carrying out anti-terrorist and anti-sabotage tasks", but directed the unit to go to the Niš Airport, which was located outside Kosovo.³⁷⁹² This corresponds with Dimitrijević's testimony as well as Ojdanić's statement at the Collegium meeting that he disagreed with Pavković's proposal for the unit to go to Kosovo instead of Niš.³⁷⁹³

1158. The Appeals Chamber further observes that the Trial Chamber was cognisant of the evidence showing the escalation of KLA activity as well as the anticipation of VJ officers concerning a combined NATO/KLA strike in the spring of 1999.³⁷⁹⁴ However, regardless of whether Pavković's motivation for bringing a unit of the 72nd Special Brigade in the interior of Kosovo was his fear of the threat from NATO and the KLA, the Trial Chamber found that, in so doing, Pavković violated Ojdanić's order that the unit be kept at the border.³⁷⁹⁵ Thus, Pavković's alleged motivation based on such fear does not render the Trial Chamber's finding unsafe.³⁷⁹⁶

³⁷⁸⁴ Aleksandar Dimitrijević, 8 Jul 2008, T. 26648-26649.

³⁷⁸⁵ Aleksandar Dimitrijević, 8 Jul 2008, T. 26648.

³⁷⁸⁶ Aleksandar Dimitrijević, 9 Jul 2008, T. 26707-26708.

³⁷⁸⁷ Trial Judgement, vol. 1, para. 970; *ibid.*, vol. 3, paras 518, 689 referring, *inter alia*, to Aleksandar Dimitrijević, 8 Jul 2008, T. 26648-26649, *ibid.*, 9 Jul 2008, T. 26708, Exh. P941, pp. 16-17, 24.

³⁷⁸⁸ Pavković's Appeal Brief, paras 170, 173-175, 186.

³⁷⁸⁹ Exh. P1947.

³⁷⁹⁰ Exh. P1948.

³⁷⁹¹ See Trial Judgement, vol. 3, paras 518, 689, referring to Exh. P1947, Exh. P1948 as corroboration.

³⁷⁹² Exh. P1948.

³⁷⁹³ Aleksandar Dimitrijević, 8 Jul 2008, T. 26648-26649; *ibid.*, 9 Jul 2008, T. 26707-26708; Exh. P941, p. 24.

³⁷⁹⁴ Trial Judgement, vol. 1, paras 973-978.

³⁷⁹⁵ Trial Judgement, vol. 1, para. 970; *ibid.*, vol. 3, paras 518, 689. *Cf. ibid.*, vol. 3, paras 521, 690.

³⁷⁹⁶ Pavković has also failed to explain how the legality of the deployment of VJ forces in Kosovo beyond the border area without a declaration of state of emergency is relevant to the question whether he acted in contravention of

1159. Consequently, Pavković has failed to show that the Trial Chamber erred in finding that he, then 3rd Army Commander, deployed the 72nd Special Brigade in the interior of Kosovo in early 1999 in contravention to Ojdanić's instruction to keep it within the border belt. The Appeals Chamber therefore dismisses Pavković's third ground of appeal in relevant part and sub-ground 8(b), in part, in this regard.

(iv) Pavković's private meetings with Milošević

a. Submissions of the parties

1160. Pavković submits that the Trial Chamber erred in finding that he had the requisite intent to participate in the JCE based on his close relationship with Slobodan Milošević and, in particular, on his meetings with Milošević in 1998 and 1999.³⁷⁹⁷ In this regard, Pavković contends that the evidence does not prove the existence or the content of his private meetings with Milošević.³⁷⁹⁸ He also argues that his general interaction with the FRY President cannot be regarded as direct evidence of criminal intent and that the conclusion that he had such intent was not the only reasonable conclusion available from this evidence. He underscores that mere association with criminals cannot be considered to meet the requirements for participation in a JCE.³⁷⁹⁹ Pavković contends that, in light of the worsening crisis in Kosovo in 1998 and the persistent threats of NATO military action, it is unsurprising that Milošević, the Commander in Chief of the VJ, met with Pavković, the Priština Corps Commander, as he was uniquely placed to report to Milošević on the activities on the ground.³⁸⁰⁰

1161. Moreover, Pavković asserts that the Trial Chamber erred in relying on the evidence of Aleksandar Dimitrijević, Aleksandar Vasiljević, and Đorđe Ćurčin, then Chief of the First Administration of the Sector for Operations and Staff Affairs of the VJ General Staff³⁸⁰¹ to establish his close relationship with Milošević. He claims that their evidence does not disclose what he and Milošević discussed in their meetings or whether a close relationship existed between them.³⁸⁰²

Ojdanić's order. His argument impugning the lack of a finding as to the legality of such deployment (Pavković's Appeal Brief, paras 179-181; *contra* Prosecution's Response Brief (Pavković), para. 79) is therefore without merit.

³⁷⁹⁷ Pavković's Appeal Brief, para. 96, referring to Trial Judgement, vol. 3, paras 708-710, 738-740, 778 (while he refers to the paragraphs of the Trial Judgement describing both Pavković's private meetings with Milošević and meetings attended not only by the two of them but also others, his subsequent arguments appear to focus on meetings between the two).

³⁷⁹⁸ Pavković's Appeal Brief, paras 96, 98-99, 106-108, 120. See also Pavković's Reply Brief, paras 29-33, 36.

³⁷⁹⁹ Pavković's Appeal Brief, paras 97-99, referring to *Brđanin* Appeal Judgement, para. 431, *Martić* Appeal Judgement, Separate Opinion of Judge Schomburg, para. 5. See also Pavković's Appeal Brief, para. 110.

³⁸⁰⁰ Pavković's Appeal Brief, paras 98-99, 107.

³⁸⁰¹ See Trial Judgement, vol. 3, para. 503.

³⁸⁰² See Pavković's Appeal Brief, paras 102-109; Pavković's Reply Brief, para. 32, referring to Trial Judgement, vol. 3, para. 778. See also Pavković's Supplemental Appeal Brief, paras 2, 7, referring to Trial Judgement, vol. 3, para. 644. See also Appeal Hearing, 12 Mar 2013, AT. 301-302, 375-376.

Pavković also avers that Ojdanić, who met with Milošević daily in Belgrade during the NATO campaign, was not found to be a member of the JCE, whereas Pavković, who only met with Milošević and others occasionally when summoned by Ojdanić, was found to have had the intent to participate in the JCE. Pavković submits that this inconsistency evinces the lack of a reasoned opinion.³⁸⁰³

1162. The Prosecution responds that the Trial Chamber reasonably found that Pavković “worked closely with Milošević on the issue of Kosovo in 1998 and 1999” and possessed the requisite intent for the JCE.³⁸⁰⁴ The Prosecution asserts that Pavković wrongly implies that the Trial Chamber relied solely on his relationship with Milošević in determining his *mens rea* and submits that the Trial Chamber considered a range of other evidence in reaching its finding.³⁸⁰⁵ It also avers that the Trial Chamber did not find Pavković guilty by association because he met with Milošević frequently.³⁸⁰⁶ According to the Prosecution, the Trial Chamber was not required to make a finding as to the content of Pavković’s private meetings with Milošević, given that Pavković reported to, and received orders from, Milošević outside the VJ chain of command.³⁸⁰⁷

1163. The Prosecution also maintains that the Trial Chamber was reasonable in relying upon Dimitrijević’s evidence³⁸⁰⁸ and that Pavković’s arguments concerning Vasiljević’s and Ćurčin’s evidence merely offer a different interpretation of their evidence.³⁸⁰⁹ In addition, the Prosecution submits that Pavković’s comparison between his own responsibility and that of Ojdanić misconstrues the Trial Judgement. The Prosecution maintains that Ojdanić’s situation is not comparable with that of Pavković who acted outside the chain of command.³⁸¹⁰ Furthermore, it requests that the Appeals Chamber summarily dismiss Pavković’s explanation as to why he had direct contact with Milošević, as Pavković merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.³⁸¹¹

³⁸⁰³ Pavković’s Appeal Brief, para. 100, referring to Trial Judgement, vol. 3, paras 530, 557, 575-576, 578, 715-717. See also Pavković’s Reply Brief, para. 29.

³⁸⁰⁴ Prosecution’s Response Brief (Pavković), paras 44-45, citing Trial Judgement, vol. 3, para. 778, and referring to *ibid.*, vol. 1, paras 574, 1119; *ibid.*, vol. 3, paras 82, 120-123, 321, 361, 524, 644, 649, 663, 665, 681, 778. See also Appeal Hearing, 12 Mar 2013, AT. 349-351.

³⁸⁰⁵ Prosecution’s Response Brief (Pavković), para. 48, referring to Trial Judgement, vol. 3, paras 774, 776, 779-780.

³⁸⁰⁶ Prosecution’s Response Brief (Pavković), para. 45.

³⁸⁰⁷ Prosecution’s Response Brief (Pavković), para. 46, referring to Trial Judgement, vol. 1, para. 1088; *ibid.*, vol. 3, paras 657, 663, 705.

³⁸⁰⁸ Prosecution’s Response Brief (Pavković), paras 49-51.

³⁸⁰⁹ Prosecution’s Response Brief (Pavković), para. 66. See also *ibid.*, para. 49; Appeal Hearing, 12 Mar 2013, AT. 349, 370.

³⁸¹⁰ Prosecution’s Response Brief (Pavković), para. 47. *Contra* Pavković’s Reply Brief, para. 34, asserting that the Prosecution’s argument amounts to stating that contributing to a JCE from a position within the chain of command does not give rise to JCE liability.

³⁸¹¹ Prosecution’s Response Brief (Pavković), para. 52, referring to Pavković’s Appeal Brief, paras 99, 107.

b. Analysis

1164. Insofar as Pavković suggests that the Trial Chamber found that he had a close relationship with Milošević based solely on the evidence of meetings between the two, and that such relationship was the only or principal basis for inferring his intent to participate in the JCE,³⁸¹² Pavković misrepresents the Trial Judgement. The Trial Chamber took into account not only Pavković's close connection with Milošević but also a number of other factors in concluding that Pavković had the intent to participate in the JCE.³⁸¹³

1165. Moreover, in finding that Pavković had a "close connection" with Milošević and "worked closely" with him on the "issue of Kosovo" and the activities of the MUP and the VJ there in 1998 and 1999,³⁸¹⁴ the Trial Chamber did not only rely on the evidence of meetings between Pavković and Milošević. The Trial Chamber also considered that, in 1998: (i) Pavković was one of the main proponents of the increased utilisation of the VJ in the interior of Kosovo; (ii) Pavković was Milošević's favourite and was asked to draft the Plan for Combating Terrorism, as Milošević wanted him to be in command of "all the forces in Kosovo"; (iii) tension existed between Pavković and his VJ superiors over the question of the use of the VJ in Kosovo; and (iv) Pavković engaged units of the Priština Corps on several occasions by implementing the Plan for Combating Terrorism in contravention of the orders of his VJ superiors.³⁸¹⁵ The Trial Chamber also considered that Milošević repeatedly promoted Pavković, despite the complaints about Pavković's conduct by high-ranking VJ officers, such as Momčilo Perišić and Aleksandar Dimitrijević.³⁸¹⁶ The Trial Chamber further considered that, in 1999, Pavković was able to deploy troops in the interior of Kosovo in

³⁸¹² Pavković's Appeal Brief, paras 96-99, 110.

³⁸¹³ See, for instance, Trial Judgement, vol. 3, paras 773-777, 779-780.

³⁸¹⁴ Trial Judgement, vol. 3, paras 773, 778. See also *ibid.*, vol. 3, paras 657, 665, 710.

³⁸¹⁵ Trial Judgement, vol. 1, paras 888, 993-996, 1063, 1082, 1084-1088; *ibid.*, vol. 3, paras 643-645, 648-660, 663-665. See *supra*, sub-sections VII.C.1.(d), VII.C.2.(b), VII.C.2.(c)(vi), VII.E.2.(c)(i)b.i., and VII.E.2.(c)(i)b.ii. The Appeals Chamber notes that in this context, the meeting with Milošević of 30 May 1998 attended by VJ and MUP representatives (Exh. P949, pp. 321-325) was cited by the Trial Chamber as evidence for Pavković discussing the adoption of the Plan for Combating Terrorism which he had proposed (Trial Judgement, vol. 3, para. 643). Contrary to Pavković's assertion (Pavković's Appeal Brief, paras 101, 104), the Trial Chamber did not refer to this meeting as a private meeting between Milošević and Pavković. Furthermore, contrary to Pavković's contention (Pavković's Appeal Brief, para. 280; *contra* Prosecution's Response Brief (Pavković), para. 112), Dimitrijević's testimony that Pavković was asked to draft the Plan for Combating Terrorism because Milošević wanted him to be in command of "all the forces in Kosovo" (Trial Judgement, vol. 3, para. 644, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26592-26593) is not inconsistent with Đaković's testimony that Pavković was tasked by Samardžić to devise the Plan after Pavković and Samardžić were ordered to "work out the basic postulates" of the Plan when they went to Belgrade at the end of May where they and Perišić met Milošević (Trial Judgement, vol. 1, para. 993, referring to Milan Đaković, 19 May 1998, T. 26409-26411).

³⁸¹⁶ Trial Judgement, vol. 1, paras 574, 1088; *ibid.*, vol. 3, paras 120-123, 649, 664, 680-683, 778. See also *supra*, sub-section VII.E.2.(c)(i).a. Pavković's argument that the Trial Chamber erroneously relied on the minutes of the VJ General Staff Collegium of 10 December 1998 (Exh. 3D484) as evidence of a meeting where Pavković and Milošević worked closely on the issue of Kosovo (Pavković's Reply Brief, para. 32) is dismissed as a misrepresentation of the Trial Judgement (see Trial Judgement, vol. 3, paras 664, 778).

breach of orders of Ojdanić, his superior, without sanction and that Pavković was further promoted thereafter.³⁸¹⁷

1166. Although the evidence concerning private meetings between Pavković and Milošević does not provide any description of what they discussed in their meetings, the Trial Chamber considered the context in which such private meetings and communications took place.³⁸¹⁸ In particular, the Trial Chamber noted Aleksandar Dimitrijević's testimony that, in July 1998, after having been informed of Dušan Samardžić's attempt to discipline him, Pavković visited Milošević who instead announced his promotion³⁸¹⁹ and that, starting in 1998, Pavković by-passed the usual chain of command, utilising direct communications with Milošević which allowed him to act without prior approval from the General Staff.³⁸²⁰ The Trial Chamber also considered Aleksandar Vasiljević's testimony that Pavković was known for by-passing two levels of command in 1998 and had contact and meetings with Milošević and that this evidence was based on what Vasiljević had heard from two generals and Pavković himself.³⁸²¹

³⁸¹⁷ Trial Judgement, vol. 3, paras 689-690, 778, referring, *inter alia*, to Exh. P941, pp. 16, 24-25, Aleksandar Dimitrijević, 9 Jul 2008, T. 26708. See also *supra*, sub-section VII.E.2.(c)(iii).

³⁸¹⁸ Trial Judgement, vol. 1, para. 1119; *ibid.*, vol. 3, paras 644-645, 649, 705, 708, and references therein.

³⁸¹⁹ Trial Judgement, vol. 3, para. 649, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26622-26623, *ibid.*, 9 Jul 2008, T. 26682-26683. See also *supra*, sub-section VII.E.2.(c)(i)a. where Pavković's challenges the Trial Chamber's assessment of this evidence are rejected.

³⁸²⁰ Trial Judgement, vol. 3, para. 644, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26592-26595, 26624, 26642. The Appeals Chamber is not convinced by Pavković's argument (Pavković's Appeal Brief, para. 102; *contra* Prosecution's Response Brief (Pavković), paras 49-50; Prosecution's Supplemental Response Brief (Pavković), para. 18) that by mentioning a direct line of communication between Pavković and Milošević, Dimitrijević merely meant communication through the normal chain of command – that is, communication from the Priština Corps to the President, passing through the 3rd Army and the General Staff. In this regard, see Aleksandar Dimitrijević, 8 Jul 2008, T. 26622-26625; Exh. 3D484, p. 14. See also Trial Judgement, vol. 3, paras 649, 664. Neither is the Appeals Chamber persuaded by Pavković's assertion (Pavković's Appeal Brief, para. 102; Pavković's Reply Brief, para. 35; Pavković's Supplemental Appeal Brief, paras 6-7; *contra* Prosecution's Response Brief (Pavković), para. 51) that Dimitrijević was "manufacturing evidence" since Pavković would have had to seek approval from his immediate superior, Samardžić, and not from the General Staff. In this regard, see Trial Judgement, vol. 1, para. 487. Pavković's assertion that Dimitrijević did not identify any activity by Pavković in Kosovo that was outside the normal chain of command (Pavković's Appeal Brief, para. 102) misrepresents the evidence, since Dimitrijević mentioned Samardžić's unsuccessful attempt to initiate disciplinary proceedings against Pavković's non-compliance with orders (Trial Judgement, vol. 3, para. 649, referring to Aleksandar Dimitrijević, 8 Jul 2008, T. 26622-26623, *ibid.*, 9 Jul 2008, T. 26682-26683) as well as Pavković's use of units without the knowledge of the General Staff (Trial Judgement, vol. 3, para. 664, referring to Aleksandar Dimitrijević, 9 Jul 2008, T. 26693, Exh. 3D646, p. 9). Pavković's challenge regarding Dimitrijević's credibility (Pavković's Appeal Brief, paras 102-103, 280; Pavković's Reply Brief, paras 28, 32-33) has already been rejected (see *supra*, sub-section VII.E.2.(b)).

³⁸²¹ Aleksandar Vasiljević, Exh. P2600, paras 20-21; Aleksandar Vasiljević, 18 Jan 2007, T. 8669-8672. See also Trial Judgement, vol. 3, paras 645, 708. Contrary to Pavković's argument (Pavković's Appeal Brief, para. 105), the Trial Chamber did not misrepresent Vasiljević's evidence as to what he heard from two generals (Trial Judgement, vol. 3, para. 645). Furthermore, while the evidence suggests that Pavković's VJ superiors, including Ojdanić, were not informed by Pavković himself of such meetings (Aleksandar Vasiljević, 18 Jan 2007, T. 8672; Trial Judgement, vol. 3, para. 708, and references therein), this does not necessarily mean – contrary to Pavković's claim (Pavković's Appeal Brief, para. 106; Pavković's Reply Brief, para. 29; *contra* Prosecution's Response Brief (Pavković), para. 65) – that they could not have become aware that such meetings were taking place. On the contrary, the evidence indicates that they were aware of such meetings (Trial Judgement, vol. 3, paras 653, 708, and references therein). Pavković fails to demonstrate any error in the Trial Chamber's reliance on Vasiljević's evidence in this regard.

1167. In addition, the Trial Chamber noted Aleksandar Vasiljević's evidence that he and Ojdanić saw Pavković leaving Beli Dvor which housed Milošević's office in mid-June 1999. According to Vasiljević, Ojdanić then complained to him that Pavković had not reported about his private meetings with Milošević which had often occurred.³⁸²² Đorđe Ćurčin's evidence, which was considered by the Trial Chamber, also indicates that, in April 1999, Pavković met Ojdanić, stating that he had come from Milošević's office, and showed Ojdanić a map outlining an operation in a certain area in Kosovo. On the basis of this map, Ojdanić immediately drafted his "suggestions" to the 3rd Army Command on 17 April 1999 to modify a Joint Command order bearing the same number as the map, despite the fact that Ojdanić, as the Chief of the VJ General Staff, formally possessed the power to issue orders to the 3rd Army Command.³⁸²³ When considered in context, the evidence of the private meetings between Pavković and Milošević does not support Pavković's assertion that these meetings were no more than general interactions with the FRY President to inform him of situations in Kosovo.³⁸²⁴ Pavković has thus failed to show that it was unreasonable for the Trial Chamber to rely, in part, on the evidence of his private meetings with Milošević in concluding that he worked closely with Milošević and to infer, in part, his intent to participate in the JCE from this evidence.³⁸²⁵

³⁸²² Trial Judgement, vol. 3, paras 361, 708, referring to Aleksandar Vasiljević, Exh. P2600, paras 19-20, Aleksandar Vasiljević, 18 Jan 2007, T. 8669-8670, *ibid.*, 22 Jan 2007, T. 8811, *ibid.*, 23 Jan 2007, T. 8932. During the appeal hearing, Pavković argued that the Trial Chamber erred in relying on this evidence, as it pertained to the meeting held in mid-June, after the conflict was over (Appeal Hearing, 12 Mar 2013, AT. 375-376). The Appeals Chamber finds no merit in his argument. It was reasonable for the Trial Chamber to consider this evidence, which referred to Ojdanić's complaint about the frequent occurrence of the private meetings between Pavković and Milošević prior to this meeting. The Appeals Chamber notes that this is further corroborated by the letter from Perišić to Milošević of 23 July 1998, in which Perišić states that Milošević was by-passing levels of command by having official talks with members of the VJ without the knowledge of the Chief of the General Staff (Trial Judgement, vol. 3, para. 653; Exh. P717, p. 3). See also *infra*, fn. 3824 where Pavković's challenges to the Trial Chamber's assessment of Vasiljević's evidence are dismissed.

³⁸²³ Trial Judgement, vol. 1, para. 1119; *ibid.*, vol. 3, para. 705, referring to Đorđe Ćurčin, 5 Oct 2007, T. 16966-16969, 16976-16977, *ibid.*, 16 Oct 2007, T. 17025-17027, Exh. P1487. The Appeals Chamber dismisses Pavković's submissions during the appeal hearing that, contrary to the Trial Chamber's finding (Trial Judgement, vol. 3, para. 705), Ćurčin did not state that the meeting between Milošević and Pavković was a bypass of his immediate superior, Ojdanić, and that the fact that the Joint Command order in question had been issued by Lazarević showed that Ojdanić's "suggestions" to modify the order were part of a regular consultation between two military leaders, Ojdanić and Pavković (Appeal Hearing, 12 Mar 2013, AT. 301-302). In so arguing, Pavković merely attempted to substitute the Trial Chamber's interpretation of the evidence with his own, without showing any error on the part of the Trial Chamber. See also *supra*, sub-section VII.C.3.(c)(vi); *infra*, fn. 3824 where Pavković's challenges to the Trial Chamber's assessment of Ćurčin's evidence are dismissed.

³⁸²⁴ Pavković's Appeal Brief, paras 97-99, 107. The Appeals Chamber also notes that Pavković partly repeats his arguments at trial (Trial Judgement, vol. 3, para. 702). Furthermore, Pavković's argument that his interview with the Prosecution contradicts the evidence of Ćurčin and Vasiljević (Pavković's Appeal Brief, para. 109; *contra* Prosecution's Response Brief (Pavković), para. 67) is a mere assertion that the Trial Chamber should have weighed the relevant pieces of evidence differently. The Trial Chamber, in light of other evidence, explicitly rejected Pavković's account in his interview, including that he only had minimal contact with Milošević in 1999 and that Ojdanić always accompanied him to meetings with Milošević (Trial Judgement, vol. 3, paras 709-710, referring to Exh. P949, pp. 2, 11-12, 123, 203, 282, 299, 396. See also Trial Judgement, vol. 3, para. 646, referring to Exh. P949, pp. 1-2, 10-11, 120, 298). Pavković does not show any error on the part of the Trial Chamber in doing so.

³⁸²⁵ Trial Judgement, vol. 3, paras 773, 778, 781. See also *ibid.*, vol. 3, paras 657, 665, 710.

1168. Moreover, Pavković's comparison of his individual criminal responsibility with that of Ojdanić³⁸²⁶ is misconceived. By focusing on the evidence concerning meetings with Milošević, Pavković ignores all the other evidence which is particular to him and distinguishes his responsibility from that of Ojdanić.

1169. For the foregoing reasons, Pavković has failed to demonstrate that the Trial Chamber erred in relying on the evidence of his private meetings with Milošević to find that they had a close relationship and to infer, in part, his intent to participate in the JCE.³⁸²⁷ Consequently, the Appeals Chamber dismisses Pavković's sub-ground 1(F) in its entirety and sub-ground 8(b) in relevant part.

(d) Pavković's engagement in disarming the Kosovo Albanian population and arming the non-Albanian population in Kosovo and his deployment of troops in Kosovo in breach of the October Agreements

1170. The Trial Chamber found that "[i]n 1998 Pavković was involved in the process of arming of the non-Albanian population and the disarming of the Kosovo Albanian population" in Kosovo and that "[h]is enthusiasm for and involvement with these processes supports the Prosecution contention that Pavković acted in concert with the members of the [JCE] to further the common purpose of maintaining control over Kosovo through various criminal means."³⁸²⁸ The Trial Chamber relied upon this finding to infer Pavković's intent.³⁸²⁹ Furthermore, in its evaluation of his significant contribution to the JCE, the Trial Chamber took into account that Pavković "supported the arming of the non-Albanian population and disarming of the Kosovo Albanian population in 1998, which assisted the efforts of the [JCE] members to pursue their aims".³⁸³⁰

1171. The Trial Chamber further found that Pavković breached the October Agreements, based on its findings that: (i) Priština Corps units under his control engaged in provocative action at Podujevo/Podujeva in December 1998; and (ii) he introduced additional troops to Kosovo, without notice to the KVM, in early 1999.³⁸³¹ In this context, the Trial Chamber also considered that he deployed the 72nd Special Brigade in the interior of Kosovo prior to 25 February 1999, despite

³⁸²⁶ Pavković's Appeal Brief, para. 100.

³⁸²⁷ For the same reasons, the Appeals Chamber does not consider Pavković's challenges concerning the same evidence in relation to his contribution to the JCE (see Pavković's Appeal Brief, para. 110).

³⁸²⁸ Trial Judgement, vol. 3, para. 779. See also *ibid.*, vol. 3, para. 669.

³⁸²⁹ Trial Judgement, vol. 3, paras 779, 781.

³⁸³⁰ Trial Judgement, vol. 3, para. 782.

³⁸³¹ Trial Judgement, vol. 3, para. 690. See also *ibid.*, vol. 3, paras 686-689. Regarding the KVM, also known as the OSCE Mission, see Trial Judgement, vol. 1, paras 331, 337-341. With respect to the incident in Podujevo/Podujeva, the Trial Chamber found that the VJ breached the October Agreements by deploying a company of the Priština Corps to Batlava/Batllava airfield – about six kilometres southwest of the town Podujevo/Podujeva – in December 1998 (Trial Judgement, vol. 1, paras 931, 934, 943; *ibid.*, vol. 3, para. 686). The Trial Chamber also found that it was a planned

Ojdanić's instruction to keep it within the border area.³⁸³² The Trial Chamber further found that Pavković's deployment of additional VJ forces into Kosovo in early 1999, in breach of the October Agreements, put the VJ in a position to engage in widespread operations throughout Kosovo in March 1999 and considered this to be an act of contribution to the JCE.³⁸³³

(i) Submissions of the parties

1172. Pavković argues that the Trial Chamber erred in finding that he demonstrated support for arming the non-Albanian population and simultaneously disarmed the Kosovo Albanian population.³⁸³⁴ In particular, he contests the Trial Chamber's assessment of evidence with regard to his involvement in the arming.³⁸³⁵

1173. Pavković also avers that the Trial Chamber erred in concluding that he introduced additional troops into Kosovo without notice to the KVM and thereby breached the October Agreements.³⁸³⁶ In so doing, Pavković contests the Trial Chamber's findings that: (i) Priština Corps units under his control engaged in provocative action at Podujevo/Podujeva in December 1998;³⁸³⁷ and (ii) he brought the 72nd Special Brigade into the interior of Kosovo in contravention of Ojdanić's instruction.³⁸³⁸ Pavković also argues that he did not violate the October Agreements except as ordered by Ojdanić.³⁸³⁹ He underlines the Trial Chamber's finding that: Ojdanić breached the October Agreements out of his fear of the threat from NATO and the KLA, and argues that his motivation in complying with Ojdanić's order was the same fear "rather than a desire to prepare for a widespread campaign of forcible displacement in the interior of Kosovo."³⁸⁴⁰

1174. Moreover, Pavković submits that a JCE member cannot be found to have acted in furtherance of the common purpose or plan prior to the time when it was found to have existed.³⁸⁴¹ He also contends that one cannot intend to carry out the goals of a plan when there is no plan and

provocation rather than a training exercise and was intended to draw KLA fire, which provided an excuse to introduce more forces into Kosovo (Trial Judgement, vol. 1, para. 943; *ibid.*, vol. 3, paras 686, 690).

³⁸³² Trial Judgement, vol. 3, para. 689. See also *supra*, sub-section VII.E.2.(c)(iii).

³⁸³³ Trial Judgement, vol. 3, para. 782. See also *ibid.*, vol. 3, para. 690.

³⁸³⁴ Pavković's Appeal Brief, para. 71, referring to Trial Judgement, vol. 3, paras 667, 669.

³⁸³⁵ Pavković's Appeal Brief, paras 72-74. See also *ibid.*, paras 78-80; Pavković's Reply Brief, para. 11.

³⁸³⁶ Pavković's Appeal Brief, paras 164, 178, 186, referring to Trial Judgement, vol. 3, para. 690.

³⁸³⁷ Pavković's Appeal Brief, paras 286-296, referring, *inter alia*, to Trial Judgement, vol. 3, para. 688, read together with Pavković's Appeal Brief, para. 164 and Trial Judgement, vol. 3, para. 690. In particular, Pavković challenges the Trial Chamber's reliance on Aleksandar Dimitrijević's testimony in this regard.

³⁸³⁸ Pavković's Appeal Brief, paras 164-165, 167-178, 278, 282, referring to Trial Judgement, vol. 3, paras 518, 521, 617, 689-690.

³⁸³⁹ Pavković's Reply Brief, para. 52; Pavković's Appeal Brief, paras 176-177. See also Pavković's Appeal Brief, paras 185-186, referring to Klaus Naumann, 14 Dec 2006, T. 8356-8357. See further Pavković's Reply Brief, para. 53, referring to Klaus Naumann, 13 Dec 2006, T. 8264.

³⁸⁴⁰ Pavković's Appeal Brief, paras 176-178, citing Trial Judgement, vol. 3, para. 521. See also Pavković's Reply Brief, para. 52; Pavković's Appeal Brief, paras 179-184.

³⁸⁴¹ Appeal Hearing, 12 Mar 2013, AT. 298-299.

therefore that a plan must exist before intent to carry it out can be formed.³⁸⁴² According to him, “if [a plan to expel Kosovo Albanians] came into existence with a pattern of crimes” from 24 March 1999,³⁸⁴³ “[n]othing [he] was doing before that date could have been found to be the *mens rea* for the carrying out of the plan.”³⁸⁴⁴ In his view, his involvement in the process of arming the non-Albanian population in Kosovo and disarming the Kosovo Albanian population as well as the introduction of VJ troops into Kosovo in late 1998 and early 1999 in breach of the October Agreements are examples of such conduct and thus irrelevant to his JCE liability.³⁸⁴⁵

1175. The Prosecution responds that the evidence considered by the Trial Chamber shows that Pavković demonstrated his support for arming the non-Albanian population in Kosovo.³⁸⁴⁶ It also submits that the Trial Chamber properly assessed the relevant evidence³⁸⁴⁷ and reasonably found that, irrespective of the stated purpose, Pavković breached the October Agreements which prohibited the VJ from bringing additional troops into Kosovo in order to engage in widespread operations in March 1999.³⁸⁴⁸

1176. In addition, the Prosecution avers that, while the *actus reus* requirement that an accused significantly contributed to the common purpose of a JCE and his *mens rea* as a JCE member cannot be fulfilled before the common purpose comes into existence, his conduct carried out before the existence of the common purpose can be taken into consideration as circumstantial evidence for the proof of his JCE liability.³⁸⁴⁹ The Prosecution adds that, in any event, as the Trial Chamber found that the common purpose came into existence no later than October 1998,³⁸⁵⁰ Pavković’s contribution to the JCE encompassed his preparatory acts for the implementation of the campaign of violence in 1999, including his involvement in the process of arming the non-Albanian

³⁸⁴² Appeal Hearing, 12 Mar 2013, AT. 311-312.

³⁸⁴³ Appeal Hearing, 12 Mar 2013, AT. 312, read together with Trial Judgement, vol. 2, paras 1156, 1178, *ibid.*, vol. 3, paras 17, 41, 46, 94-95.

³⁸⁴⁴ Appeal Hearing, 12 Mar 2013, AT. 312.

³⁸⁴⁵ Appeal Hearing, 12 Mar 2013, AT. 298-299, read together with *ibid.*, AT. 311-312.

³⁸⁴⁶ Prosecution’s Response Brief (Pavković), paras 29, 31, referring to Trial Judgement, vol. 3, paras 50, 54, 56, 62, 66-68, 72, 666-669, 779, 782.

³⁸⁴⁷ Prosecution’s Response Brief (Pavković), paras 76, 78, 114-115, referring to Trial Judgement, vol. 1, paras 59, 64, 931-943, 970; *ibid.*, vol. 3, paras 518, 599, 617, 689-690. See also Prosecution’s Supplemental Response Brief (Pavković), para. 18, referring to Trial Judgement, vol. 3, para. 664. See further, Prosecution’s Response Brief (Pavković), paras 79-81.

³⁸⁴⁸ Prosecution’s Response Brief (Pavković), paras 76-77, referring to Trial Judgement, vol. 3, paras 518, 689-690.

³⁸⁴⁹ Appeal Hearing, 11 Mar 2013, T. 246. See also *ibid.*, 12 Mar 2013, T. 359-360. The Prosecution argues that, when an accused, with the required intent, brings in or makes use of the results of conduct predating the existence of the common purpose to further that common purpose, “bringing in” or “making use of” those results may constitute a contribution to this common purpose (Appeal Hearing, 11 Mar 2013, AT. 247-248, referring to *Krajišnik* Appeal Judgement, paras 162-218, *Martić* Appeal Judgement, para. 117, *Martić* Trial Judgement, paras 445, 448). The Prosecution also contends that the state of mind and conduct of an accused prior to the existence of the common purpose can be taken into consideration as evidence of that accused’s *mens rea* for JCE liability (Appeal Hearing, 11 Mar 2013, AT. 247, referring to *Krajišnik* Appeal Judgement, paras 200-204, 492, *Krajišnik* Trial Judgement, paras 925-929).

³⁸⁵⁰ Appeal Hearing, 11 Mar 2013, AT. 219-221, 244, 248; *ibid.*, 12 Mar 2013, AT. 360.

population and disarming the Kosovo Albanian population and the movement of troops into Kosovo in breach of the October Agreements.³⁸⁵¹ It also avers that, in finding that Pavković shared the intent during the time of the existence of the common purpose, the Trial Chamber properly examined the pattern of his aggressive approach through 1998 and 1999 to keep control over Kosovo, including his involvement in the process of arming and disarming.³⁸⁵²

(ii) Analysis

1177. The jurisprudence of the Tribunal has held that, in order for an accused to be held responsible for a crime committed pursuant to JCE liability, it must be established that he or she performed “acts that in some way [were] directed to the furthering of the common plan or purpose” of the JCE.³⁸⁵³ In this regard, the Appeals Chamber recalls its conclusion that the Trial Chamber’s finding that a common purpose existed beyond reasonable doubt “during the time of the crimes alleged in the Indictment”³⁸⁵⁴ concerned the period starting from 24 March 1999.³⁸⁵⁵ The Appeals Chamber further notes that, based on the Trial Chamber’s findings, both the arming of the non-Albanian population and the disarming of the Kosovo Albanian population were carried out earlier than 24 March 1999.³⁸⁵⁶ Moreover, the Trial Chamber’s finding on Pavković’s involvement in the process of arming and disarming was based on evidence concerning his conduct in 1998.³⁸⁵⁷ In these circumstances, it was unreasonable for the Trial Chamber to find that Pavković “acted [...] to further the common purpose” through his enthusiastic involvement in, and support for, the process of arming and disarming and thereby finding that he contributed to the common purpose of the JCE prior to its existence.³⁸⁵⁸

1178. The Appeals Chamber further notes that, according to the Trial Chamber, Pavković deployed additional VJ forces into Kosovo in breach of the October Agreements in late 1998 and

³⁸⁵¹ Appeal Hearing, 12 Mar 2013, AT. 360.

³⁸⁵² Appeal Hearing, 12 Mar 2013, AT. 342-343, 350-351, 353.

³⁸⁵³ *Tadić* Appeal Judgement, para. 229(iii). See also *Krajišnik* Appeal Judgement, para. 695; *Brdanin* Appeal Judgement, para. 427.

³⁸⁵⁴ Trial Judgement, vol. 3, para. 96.

³⁸⁵⁵ See *supra*, para. 610.

³⁸⁵⁶ Trial Judgement, vol. 1, paras 764-766, 775, 787; *ibid.*, vol. 3, paras 57-58, 68-72.

³⁸⁵⁷ Trial Judgement, vol. 3, paras 667-668. It follows that, contrary to the Prosecution’s contention (Appeal Hearing, 11 Mar 2013, AT. 247), Pavković’s engagement in the process of arming and disarming, as such, cannot be considered as “bringing in” or “making use of” the results of the arming and disarming during the time when the common purpose was in existence.

³⁸⁵⁸ Trial Judgement, vol. 3, paras 779, 782. In this regard, the jurisprudence of the Tribunal, referred to by the Prosecution, indicates that certain conduct of a JCE member which started prior to, and continued during, the period when a common purpose of a JCE was found to have existed could constitute an act in furtherance of the common purpose by virtue of the continuation of this conduct while the common purpose was in existence (see *Krajišnik* Appeal Judgement, paras 162, 209-218; *Martić* Appeal Judgement, para. 117; *Martić* Trial Judgement, paras 445, 448). This was not the case with respect to Pavković’s engagement in the process of arming and disarming.

early 1999, which was the period prior to 24 March 1999.³⁸⁵⁹ Thus, under the circumstances of this case, it was unreasonable for the Trial Chamber to find that Pavković acted in furtherance of the common purpose of the JCE and contributed to it by deploying additional VJ forces into Kosovo in breach of the October Agreements, prior to the time when the common purpose was found to have existed.³⁸⁶⁰

1179. Nevertheless, the Appeals Chamber considers that the Trial Chamber's overall conclusion that Pavković made a significant contribution to the JCE is unaffected by these errors. This conclusion was based on an abundance of other evidence, including his other conduct as the Commander of the 3rd Army which continued through 1999.³⁸⁶¹ The Appeals Chamber is satisfied that this evidence was sufficient for a reasonable trier of fact to conclude that the only reasonable inference was that he significantly contributed to the JCE. As a result, the Trial Chamber's errors, as found above, did not occasion a miscarriage of justice.

1180. Furthermore, regardless of whether the Trial Chamber erred in relying on Pavković's involvement in the process of arming the non-Albanian population and disarming the Kosovo Albanian population to infer his intent, the Appeals Chamber is satisfied that other evidence concerning his mindset and conduct was sufficient for a reasonable trier of fact to conclude that the only reasonable inference was that Pavković had the requisite intent for JCE liability.³⁸⁶² Therefore, to the extent that Pavković asserts that the Trial Chamber erred in this regard, he has failed to demonstrate that the alleged error would have resulted in a miscarriage of justice.³⁸⁶³

1181. Consequently, it is not necessary for the Appeals Chamber to consider Pavković's remaining challenges to the Trial Chamber's factual findings on his engagement in the arming of the non-

³⁸⁵⁹ Trial Judgement, vol. 3, paras 686-690. See also *ibid.*, vol. 1, paras 934-943, 962-983, 988-989. It follows that, contrary to the Prosecution's contention (Appeal Hearing, 11 Mar 2013, AT. 247), Pavković's deployment of additional VJ forces into Kosovo in breach of the October Agreements, as such, cannot be considered to be an act of "bringing in" or "making use of" the results of the arming and disarming during the time when the common purpose was in existence.

³⁸⁶⁰ Trial Judgement, vol. 3, para. 782. See also *ibid.*, vol. 3, para. 690.

³⁸⁶¹ Trial Judgement, vol. 3, paras 773-777, 780, 782. More specifically, the Trial Chamber considered evidence showing that, throughout the time when the common purpose was found to have existed, Pavković: (i) ordered and supported the operations of the VJ in Kosovo, including joint operations with the MUP through the Joint Command; (ii) mobilised the troops for, and commanded them during, these operations; and (iii) contributed to the creation and maintenance of an environment of impunity by under-reporting crimes committed by forces under his control and failing to take effective measures in response to information thereon, which encouraged the commission of crimes by forces under the control of JCE members. See also *ibid.*, vol. 3, paras 698, 710, 765. See *infra*, sub-section VII.E.2.(e).

³⁸⁶² Trial Judgement, vol. 3, paras 773-778, 780-781. More specifically, the Trial Chamber considered evidence showing that Pavković: (i) despite his knowledge of crimes committed by VJ and MUP members and allegations thereof both in 1998 and 1999 (including after 24 March 1999), continued to order the VJ operations in conjunction with the MUP during the period when the common purpose was found to have existed; (ii) under-reported crimes committed by forces under his control and failed to take effective measures in response to information thereon; and (iii) had a close working relationship with the then FRY President Slobodan Milošević in 1998 and 1999, particularly in relation to the VJ and MUP activities in Kosovo. See also *ibid.*, vol. 3, paras 665, 678, 698, 710, 765-766. See *supra*, sub-section VII.E.2.(c); *infra*, sub-section VII.E.2.(e).

³⁸⁶³ Trial Judgement, vol. 3, paras 779, 781.

Albanian population and the disarming of the Kosovo Albanian population and his deployment of VJ troops in Kosovo in breach of the October Agreements.³⁸⁶⁴

1182. In light of the foregoing, the Appeals Chamber dismisses Pavković's sub-ground 1(C) in relevant part, third ground of appeal in relevant part, and sub-ground 8(b), in part, in this regard. However, given that the Trial Chamber erred in finding that he contributed to the JCE through his involvement in the process of arming and disarming and his deployment of VJ troops in Kosovo in breach of the October Agreements, the Appeals Chamber will consider the impact of these errors, if any, on Pavković's sentence below.³⁸⁶⁵

(e) Pavković's knowledge of criminal activity by VJ and MUP members, his reactions thereto, and his continuous orders for joint operations

1183. The Trial Chamber found that Pavković's "knowledge of the commission of crimes by VJ subordinates and MUP members [before and during the NATO air campaign], combined with his continuing ordering of and participation in the joint operations with those perpetrators" was indicative of his intent and showed his significant contribution to the forcible displacement of the Kosovo Albanian population.³⁸⁶⁶ The Trial Chamber also considered a number of relevant factors in this context, including: the under-reporting or minimisation of crimes by Pavković³⁸⁶⁷ and his failure to take effective measures against them.³⁸⁶⁸

(i) Pavković's knowledge of the use of excessive and indiscriminate force in 1998

1184. While the Appellants were charged with crimes allegedly perpetrated in Kosovo in 1999 by the FRY and Serbian forces,³⁸⁶⁹ the Prosecution also pleaded in the Indictment that the same forces used "excessive and indiscriminate force" during their operations against the KLA in various locations in Kosovo in 1998.³⁸⁷⁰ According to the Prosecution, this was for the purpose of proving,

³⁸⁶⁴ With regard to the Trial Chamber's finding that Pavković brought the 72nd Special Brigade into the interior of Kosovo in contravention of Ojdanić's order in early 1999, the Appeals Chamber has addressed Pavković's challenges to this finding elsewhere, to the extent that they are related to the Trial Chamber's conclusion regarding his close connection with Milošević, which started prior to, and continued during, the time when the common purpose was found to have existed, and from which the Trial Chamber inferred, in part, his intent during this time period (see *supra*, sub-section VII.E.2.(c)(iii)). The Appeals Chamber's analysis in the current sub-section pertains to his challenges to the Trial Chamber's finding on Pavković's deployment of the 72nd Special Brigade insofar as they are pertinent to the Trial Chamber's conclusion that he deployed additional VJ forces into Kosovo in breach of the October Agreements, thereby contributing to the JCE.

³⁸⁶⁵ See also *infra*, sub-section IX.I.

³⁸⁶⁶ Trial Judgement, vol. 3, para. 774. See also *ibid.*, vol. 3, para. 782.

³⁸⁶⁷ Trial Judgement, vol. 3, paras 774, 776, 782.

³⁸⁶⁸ Trial Judgement, vol. 3, paras 777, 780, 782.

³⁸⁶⁹ Indictment, paras 71-77.

³⁸⁷⁰ Indictment, paras 94-96, wherein the Prosecution pleaded wanton destruction of villages and killings of villagers including women and children in specific areas, as incidents of use of "excessive and indiscriminate force".

inter alia, the Appellants' membership in the JCE and their requisite *mens rea*.³⁸⁷¹ During the pre-trial phase of the proceedings, the Trial Chamber found that the alleged incidents in 1998 were "material facts that must be pleaded sufficiently" and that "for the Prosecution to rely on possible crimes committed in 1998, it had to prove that these crimes were committed."³⁸⁷²

1185. In the Trial Judgement, the Trial Chamber found that while "the Prosecution [had] failed to prove beyond reasonable doubt that specific crimes were committed by the VJ or MUP [in 1998] in most of the locations" mentioned in the Indictment,³⁸⁷³ "[i]n some cases excessive and indiscriminate force was used during [the operations of the VJ and the MUP against the KLA in 1998], evinced by the deliberate damage and destruction of houses and the killing of women and children."³⁸⁷⁴ A comprehensive reading of the relevant section of the Trial Judgement suggests that the specific cases in which the Trial Chamber found that "excessive and indiscriminate force was used" concerned the following locations: villages in western Kosovo; Mališevo/Malisheva; Drenica; and Gornje Obrinje/Abria e Epërme.³⁸⁷⁵ The Trial Chamber concluded that excessive use of force by the VJ and the MUP was a partial cause of the displacement of a significant number of people in Kosovo by the end of October 1998.³⁸⁷⁶

1186. The Trial Chamber considered evidence showing that Pavković was aware of the use of excessive force during joint VJ and MUP operations in 1998, and allegations thereof.³⁸⁷⁷ Based, in part, on this evidence, the Trial Chamber inferred his intent in relation to the commission of crimes in 1999.³⁸⁷⁸

a. Submissions of the parties

1187. Pavković avers that the Trial Chamber erred in law in finding that the VJ used excessive and indiscriminate force in some areas in 1998 causing the displacement of the civilian population, without giving a legal definition of "excessive force" or making any findings on the constituent

³⁸⁷¹ Trial Judgement, vol. 1, para. 844, citing *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Prosecution's Response to Mr. Milutinović's Response to Prosecution Motion to Amend Indictment and Challenge to Amended Joinder Indictment, 17 October 2005, para. 5, fn. 10.

³⁸⁷² Trial Judgement, vol. 1, para. 844, referring to *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, 22 March 2006, ("Form of Indictment Decision"), paras 15, 17.

³⁸⁷³ Trial Judgement, vol. 1, para. 849. See also *ibid.*, vol. 1, para. 920.

³⁸⁷⁴ Trial Judgement, vol. 1, para. 920.

³⁸⁷⁵ Trial Judgement, vol. 1, paras 881, 886, 894, 912, 920.

³⁸⁷⁶ Trial Judgement, vol. 1, para. 919.

³⁸⁷⁷ Trial Judgement, vol. 3, paras 678, 774.

³⁸⁷⁸ Trial Judgement, vol. 3, paras 678, 774.

mens rea or *actus reus* of crimes committed in 1998.³⁸⁷⁹ Pavković asserts that, as a result, the Trial Chamber erred in finding that Pavković was aware of the use of such force and crimes committed by the VJ and the MUP in 1998 and that his awareness was indicative of his intent in relation to crimes committed in 1999.³⁸⁸⁰ He further argues that by doing so, the Trial Chamber in effect erroneously imposed criminal liability upon him for crimes, which were not charged in the Indictment.³⁸⁸¹

1188. Pavković further posits that the use of force, which is indiscriminate or excessive, is itself a crime under Articles 2 and 3 of the Statute.³⁸⁸² In this context, he asserts that: (i) a finding of the use of indiscriminate or excessive force requires the consideration of, *inter alia*, the principles of distinction and proportionality;³⁸⁸³ (ii) the crime of wanton destruction under Article 3(b) of the Statute requires that the destruction was not justified by military necessity;³⁸⁸⁴ and (iii) the crime of attack on civilians under Article 3 of the Statute requires direct attacks on civilians, which could be inferred from disproportionate attacks examined together with various other factors.³⁸⁸⁵ He maintains that the Trial Chamber failed to assess the evidence and make findings in this regard.³⁸⁸⁶ In particular, Pavković contends that the Trial Chamber did not consider the evidence indicating that some houses may have been military objectives and thus legitimate military targets.³⁸⁸⁷ Pavković also argues that the evidence of the events in 1998 does not meet the standard of proof beyond reasonable doubt, as it is general and consists mainly of hearsay that lacks detail.³⁸⁸⁸ In particular, he challenges the Trial Chamber's assessment of evidence and findings concerning the

³⁸⁷⁹ Pavković's Appeal Brief, paras 225, 228-229, 232, 262, referring, *inter alia*, to Trial Judgement, vol. 1, paras 881, 886, 894, 912, 919-920. In this context, Pavković recalls that the Trial Chamber held during the pre-trial stage of the case that even for the purpose of proving the accused's membership in the JCE, *mens rea* and/or background leading up to the Indictment period, the Prosecution must prove that alleged crimes in 1998 were in fact committed (Pavković's Appeal Brief, paras 229, 262).

³⁸⁸⁰ Pavković's Appeal Brief, paras 228-229, 232, 262, referring, *inter alia*, to Trial Judgement, vol. 3, para. 774. He also submits that the Trial Chamber erroneously found his intent, although the use of excessive force in 1998 was not proven beyond reasonable doubt in most of the locations mentioned in the Indictment (Pavković's Appeal Brief, para. 227).

³⁸⁸¹ Pavković's Appeal Brief, paras 229, 262.

³⁸⁸² Pavković's Appeal Brief, paras 229-235.

³⁸⁸³ Pavković's Appeal Brief, para. 232, referring to Articles 8(2)(b)(i) and 8(2)(e)(i) of the Rome Statute of the International Criminal Court, Rome, 17 July 1998 ("ICC Statute"), Article 51(2) of Additional Protocol I, Article 8(2)(b)(iv) of the ICC Statute drawing upon the principles in Articles 51(5)(b) and 85(3)(b) of Additional Protocol I.

³⁸⁸⁴ Pavković's Appeal Brief, paras 233-234.

³⁸⁸⁵ Pavković's Appeal Brief, para. 235, referring to *Galić* Appeal Judgement, para. 133.

³⁸⁸⁶ Pavković's Appeal Brief, paras 232, 236.

³⁸⁸⁷ Pavković's Appeal Brief, paras 250, 254. See also *ibid.*, paras 249-253, referring to Exh. P1425, Exh. P1426, Joseph Maisonneuve, 6 Mar 2007, T. 11135, Karol John Drewienkiewicz, 5 Dec 2006, T. 7878, Bislim Zyrapi, 7 Nov 2006, T. 6050, *ibid.*, 9 Nov 2006, T. 6232. See further Pavković's Appeal Brief, fn. 240, referring to Exh. 4D90.

³⁸⁸⁸ Pavković's Appeal Brief, para. 236. See also Pavković's Appeal Brief, para. 237, referring to Trial Judgement, vol. 1, para. 920.

specific incidents in which excessive and indiscriminate force was found to have been used in 1998.³⁸⁸⁹

1189. Pavković also contends that the Trial Chamber erred in fact in finding that he was aware of the use of excessive or disproportionate force in 1998.³⁸⁹⁰ He argues that although the Trial Chamber found that excessive force was used in villages in western Kosovo and in Mališevo/Malisheva between July and September 1998, the Trial Chamber made no specific reference to his knowledge of the use of such force by the VJ in these locations when reaching its finding as to his knowledge in 1998.³⁸⁹¹ He also maintains that the evidence – including the reports he requested and received – shows that he was unaware of the use of excessive force by the VJ and the MUP and that he endeavoured to: prevent the use of excessive force; investigate claims thereupon; and ensure compliance with international humanitarian law.³⁸⁹² In addition, he argues that none of the sources cited by the Trial Chamber support its conclusion that the order not to fire on areas where international observers may have been present was an effort to keep the VJ's crimes from being detected.³⁸⁹³

1190. Finally, Pavković argues that the Trial Chamber erred in considering Pavković's knowledge of crimes in 1998 to infer his intent in relation to forcible displacement, since the evidence does not establish the existence of a common purpose to forcibly displace Kosovo Albanians in 1998.³⁸⁹⁴

1191. The Prosecution responds that Pavković's intent as a JCE member in 1999 arose, *inter alia*, from his awareness of crimes in 1998 perpetrated by forces under his control and his awareness of allegations by the international community that the excessive and indiscriminate use of force by the VJ and the MUP in 1998 "had led to the forcible displacement of over 230,000 Kosovo Albanians."³⁸⁹⁵ The Prosecution also maintains that the Trial Chamber did not impose criminal

³⁸⁸⁹ His challenges pertain to the following locations: villages in western Kosovo (Pavković's Appeal Brief, para. 238); Mališevo/Malisheva (Pavković's Appeal Brief, para. 240); and Drenica (Pavković's Appeal Brief, para. 242).

³⁸⁹⁰ Pavković's Appeal Brief, paras 237, 262.

³⁸⁹¹ Pavković's Appeal Brief, paras 239, 241.

³⁸⁹² Pavković's Appeal Brief, paras 239, 246, 250, 261-262, Annex D. Concerning the period between July and September 1998, Pavković refers to his order of 7 August 1998 requesting a report on whether the MUP forces used excessive force as well as reports from his subordinate brigades in response stating that neither VJ nor MUP forces used excessive force (Pavković's Appeal Brief, paras 246-249, referring to Exh. P1420, Exh. P1423, Exh. P1424, para. 3, Exh. P1425, para. 2). Pavković also challenges the Trial Chamber's finding as to his knowledge of the killings in Gornje Obrinje/Abria e Epërme, *inter alia*, on the basis of the reports he received from his subordinates units in response to his inquiry (Pavković's Appeal Brief, paras 243-245, 260). His arguments in this regard are addressed in the next sub-section. See *infra*, sub-section VII.E.2.(e)(ii).

³⁸⁹³ Pavković's Appeal Brief, paras 255-259, citing Trial Judgement, vol. 3, para. 678, and referring to Exh. 4D177, Exh. P969.

³⁸⁹⁴ Appeal Hearing, 12 Mar 2013, AT. 312-313.

³⁸⁹⁵ Prosecution's Response Brief (Pavković), para. 100, referring to Trial Judgement, vol. 3, paras 670-678, 773-781. See also Prosecution's Response Brief (Pavković), paras 101, 104-105, referring to Trial Judgement, vol. 1, paras 894, 912, *ibid.*, vol. 3, paras 658-660, 665, 672-678, 774. See further Prosecution's Response Brief (Pavković), para. 102,

liability on him for crimes not charged in the Indictment, but merely found that in *some* cases in 1998, VJ and MUP forces violated international humanitarian law, including by using excessive and indiscriminate force.³⁸⁹⁶ According to the Prosecution, the Trial Chamber's analysis of the legality of the use of force was in line with the law on the legality of military conduct set out in the *Galić* Appeal Judgement and the Trial Chamber carefully assessed the evidence in this regard.³⁸⁹⁷ The Prosecution adds that even if the Trial Chamber did not specify the departures of civilians from their homes in 1998 as forcible displacement, these departures were clearly not voluntary or lawful under international humanitarian law.³⁸⁹⁸

1192. Moreover, the Prosecution contends that a state of mind of an accused prior to the existence of the common purpose can be taken into consideration as evidence of his or her *mens rea* for JCE liability.³⁸⁹⁹ According to the Prosecution, it was appropriate for the Trial Chamber to rely, among other evidence, on the information about crimes he received in 1998 as it provides notice to him of the VJ's and the MUP's propensity for violence and shows that he could successfully use the same troops again in 1999 to achieve the same results, namely a campaign of violence resulting in mass expulsions.³⁹⁰⁰

b. Analysis

1193. At the outset, it is clear from the Trial Judgement that the Trial Chamber did not convict Pavković of crimes committed in 1998, but of crimes committed between March and May 1999 which were charged in the Indictment.³⁹⁰¹ The Trial Chamber considered the evidence showing Pavković's knowledge of criminal acts by the VJ and the MUP in 1998 and allegations thereof, only as circumstantial evidence from which his intent in relation to the crimes in 1999 could be inferred.³⁹⁰² Nothing in the Trial Judgement suggests otherwise.

1194. The Trial Judgement does not contain any legal finding as to whether the evidence of the incidents in 1998 established crimes under the Statute.³⁹⁰³ Insofar as Pavković asserts that such a legal finding was required to establish his knowledge of crimes in 1998, his argument is

referring to Trial Judgement, vol. 1, para. 920, *ibid.*, vol. 3, paras 754, 774, regarding concerns expressed by international observers and organisations. *Contra* Pavković's Reply Brief, para. 64.

³⁸⁹⁶ Prosecution's Response Brief (Pavković), para. 102.

³⁸⁹⁷ Prosecution's Response Brief (Pavković), paras 102-103, referring, *inter alia*, to *Galić* Appeal Judgement, paras 190-193.

³⁸⁹⁸ Appeal Hearing, 12 Mar 2013, AT. 354, referring to Trial Judgement, vol. 1, paras 880-920.

³⁸⁹⁹ Appeal Hearing, 11 Mar 2013, AT. 247, referring to *Krajišnik* Appeal Judgement, paras 200-204, 492, *Krajišnik* Trial Judgement, paras 925-929.

³⁹⁰⁰ Appeal Hearing, 12 Mar 2013, AT. 352, 354-355.

³⁹⁰¹ Trial Judgement, vol. 3, paras 639, 788, 1210. See also *ibid.*, vol. 2, paras 1179-1262.

³⁹⁰² Trial Judgement, vol. 3, paras 678, 774. See also *ibid.*, vol. 1, para. 844.

³⁹⁰³ See, in particular, Trial Judgement, vol. 1, paras 849, 881, 886, 894, 912, 919-920. See also *supra*, para. 1185.

misconceived. The fact that the Trial Chamber did not make such a legal finding does not in itself constitute an error, as none of the Appellants were charged in relation to those incidents.³⁹⁰⁴ By the same token, Pavković's argument that the incidents in question in 1998 must amount to crimes prescribed in Articles 2 and 3 of the Statute is misplaced and thus dismissed.

1195. The Trial Chamber found beyond reasonable doubt that excessive force was used by the VJ and the MUP in Gornje Obrinje/Abria e Epërme as evinced by the killing of civilians, including women and children,³⁹⁰⁵ and in villages in western Kosovo, Mališevo/Malisheva, and Drenica as evinced by the burning and looting of houses.³⁹⁰⁶ However, in concluding that Pavković knew of the use of excessive force and allegations thereof in 1998, the Trial Chamber's reliance on its own findings as to what occurred in these specific incidents was limited.³⁹⁰⁷ As described below,³⁹⁰⁸ the Trial Chamber considered other evidence, including information he received with regard to these incidents. This evidence sufficiently supported its conclusion on his knowledge in 1998, from which it in part inferred his intent.³⁹⁰⁹ Consequently, Pavković's challenges to the Trial Chamber's assessment of evidence concerning the circumstances of the specific incidents have no impact upon his conviction.³⁹¹⁰

1196. The Trial Chamber found that in 1998, Pavković was aware of criminal activities by his VJ subordinates and MUP forces in Kosovo and of allegations that excessive or disproportionate force was being used in joint VJ and MUP operations there.³⁹¹¹ In so finding, the Trial Chamber considered that he had general knowledge of criminal acts, such as the practice of burning Kosovo

³⁹⁰⁴ When the Trial Chamber stated that "for the Prosecution to rely on possible crimes committed in 1998, it had to prove that these crimes were committed" (Trial Judgement, vol. 1, para. 844, referring to Form of Indictment Decision, para. 17), the Appeals Chamber understands the Trial Chamber to have simply meant that it would examine whether the factual circumstances of the incidents in 1998 as alleged in the Indictment were proven.

³⁹⁰⁵ Trial Judgement, vol. 1, paras 912, 920, read together with *ibid.*, vol. 1, para. 849.

³⁹⁰⁶ Trial Judgement, vol. 1, paras 881 (villages in western Kosovo), 886 (Mališevo/Malisheva), 894 (Drenica), 920, read together with *ibid.*, vol. 1, para. 849.

³⁹⁰⁷ Of these findings, the Trial Chamber appears to have relied only on the finding concerning Drenica when it found that Pavković was aware of the commission of crimes in 1998 (Trial Judgement, vol. 3, para. 774).

³⁹⁰⁸ See *infra*, para. 1196.

³⁹⁰⁹ Trial Judgement, vol. 3, paras 678, 774. Cf. *Halilović* Appeal Judgement, para. 125, quoting *Ntagerura et al.* Appeal Judgement, para. 174.

³⁹¹⁰ Pavković's arguments in this regard include not only his specific challenges to the Trial Chamber's assessment of evidence concerning each of the incidents in which the Trial Chamber found that excessive and indiscriminate use of force was used (Pavković's Appeal Brief, paras 238, 240, 242), but also: (i) his general assertion that in reaching its findings, the Trial Chamber failed to give a legal definition of "excessive force" or to apply principles of international humanitarian law, such as distinction and proportionality, in particular by disregarding the evidence indicating that some houses may have been legitimate military targets (Pavković's Appeal Brief, paras 225, 232-236, 249-254); and (ii) his general assertion that the evidence of the events in 1998, consisting mainly of hearsay which lacks details, does not meet the standard of proof beyond reasonable doubt (Pavković's Appeal Brief, para. 236). It also follows that contrary to Pavković's assertion, the fact that the Trial Chamber found that the commission of crimes in 1998 was not proven beyond reasonable doubt in most of the locations mentioned in the Indictment does not render its finding on his intent erroneous.

³⁹¹¹ Trial Judgement, vol. 3, paras 678, 774, and references therein.

Albanian houses, and his subordinates' involvement therein in 1998.³⁹¹² In this regard, the Trial Chamber considered: evidence recording discussions in the Joint Command meetings attended by Pavković and his interview with the Prosecution, mentioning the practice of burning Kosovo Albanian houses in 1998 and the involvement of members of VJ units therein;³⁹¹³ and the orders Pavković issued in 1998, referring to breaches of international humanitarian law by VJ forces, including the mistreatment of prisoners of war as well as looting and damaging of Kosovo Albanian property.³⁹¹⁴ In addition, the Trial Chamber considered: Pavković's orders in 1998 attributing the alleged displacement of Kosovo Albanians to the KLA;³⁹¹⁵ his receipt of information in 1998 that MUP members executed individuals taken into custody at Gornje Obrinje/Abria e Epërme;³⁹¹⁶ and evidence demonstrating his knowledge of UN Security Council resolutions alleging that the use of excessive force by the MUP and the VJ resulted in numerous civilian casualties and the displacement of over 230,000 people.³⁹¹⁷ In these circumstances, the Appeals Chamber considers that a reasonable trier of fact could have concluded that, in 1998, Pavković knew of criminal activities by his subordinates and MUP forces, and allegations thereof.³⁹¹⁸

1197. Pavković's receipt of reports from his subordinate units stating that neither VJ nor MUP forces used excessive force does not undermine the Trial Chamber's conclusion in this regard either.³⁹¹⁹ Significantly, the evidence shows that there were other channels through which Pavković acquired the relevant information, such as meetings of the Joint Command where the burning of

³⁹¹² Trial Judgement, vol. 3, paras 678, 774.

³⁹¹³ Trial Judgement, vol. 3, paras 672, 774, referring, *inter alia*, to Exh. P1468, pp. 46, 52, 124-125, Exh. 4D97, p. 3, Exh. P949, p. 358.

³⁹¹⁴ Trial Judgement, vol. 3, para. 673, referring, *inter alia*, to Exh. 4D428, p. 1, Exh. 4D231 (also admitted as Exh. 5D1772), Exh. 4D201, Exh. P1422, Exh. 4D375, Exh. P1011, p. 47, Exh. P2098.

³⁹¹⁵ Trial Judgement, vol. 3, para. 674, referring to Exh. P1430, Exh. P1434.

³⁹¹⁶ Trial Judgement, vol. 1, para. 907; *ibid.*, vol. 3, paras 675, 774, 815, referring, *inter alia*, to Exh. 4D403, Exh. P1440, p. 4 and also finding that Pavković was aware of allegations by the international community and foreign media that a massacre of civilians was committed during the VJ and MUP operations in Gornje Obrinje/Abria e Epërme and that the VJ and the MUP were involved therein. See also *infra*, sub-section VII.E.2.(e)(ii) wherein the Appeals Chamber dismisses his challenge concerning this evidence.

³⁹¹⁷ Trial Judgement, vol. 3, paras 677, referring to Exh. P455, Exh. P456, Exh. P1468, p. 161. During the appeal hearing, Pavković, for the first time, contested the Trial Chamber's finding that he was aware of the contents of UN Security Council resolutions, including the ones making these assertions, adopted on 31 March and 23 September 1998 (Trial Judgement, vol. 3, paras 677, 774). The Trial Chamber's finding was based on his statement in a Joint Command meeting on 28 October 1998 that "the principles as regulated in the resolution of the UN should be respected" (Exh. P1468, p. 161), during a discussion on the realisation of the Plan for Combating Terrorism and the possibility of allowing OSCE monitors to inspect weapons (Exh. P1468, pp. 161-162). The Appeals Chamber finds that a reasonable trier of fact could have reached the Trial Chamber's finding as the only reasonable conclusion. By arguing that his statement in the 28 October 1998 Joint Command meeting did not show that he was aware of the particular UN Security Council resolutions in question (Appeal Hearing, 12 Mar 2013, AT. 371-372), Pavković merely presented his own interpretation of the evidence, without demonstrating an error on the part of the Trial Chamber. His argument is therefore dismissed.

³⁹¹⁸ Trial Judgement, vol. 3, paras 678, 774.

³⁹¹⁹ Exh. P1423, Exh. P1424, Exh. P1425, referred to in Pavković's Appeal Brief, paras 247-249. See also Exh. 4D387, Exh. 4D391, Exh. 4D401, Exh. P1011, pp. 70-71, referred to in Pavković's Appeal Brief, paras 244, 260.

houses was discussed³⁹²⁰ and his superiors' orders enquiring into a massacre of civilians alleged by the international community.³⁹²¹

1198. Furthermore, as discussed in greater detail below,³⁹²² the Appeals Chamber considers that a reasonable trier of fact could have found, based on the evidence of his knowledge in 1998 and other evidence, that Pavković's orders calling for compliance with international humanitarian law were not genuine efforts to take effective measures to prevent the commission of crimes against Kosovo Albanians.³⁹²³ In the same vein, the Trial Chamber concluded that Pavković's order not to fire on areas when international observers may have been present was an effort to keep the VJ's crimes from being detected, rather than to protect international observers.³⁹²⁴ By merely claiming that this order was issued to protect international observers, Pavković asks for a different interpretation of the evidence from that of the Trial Chamber, without demonstrating any error on its part.

1199. Finally, the Appeals Chamber is aware that the evidence showing Pavković's knowledge of criminal acts by the VJ and the MUP in 1998 and allegations thereof concerned the period preceding the existence of the common purpose of the JCE to forcibly displace the Kosovo Albanian population.³⁹²⁵ To what extent the accused's intent may be inferred from his knowledge of the commission of past crimes depends on the circumstances of the particular case.³⁹²⁶ In the circumstances of this case, the Trial Chamber relied, among other evidence, on Pavković's knowledge of criminal acts by the VJ and the MUP in 1998 and the allegations thereof, including the allegation that excessive use of force by the MUP and VJ forces resulted in the displacement of Kosovo Albanians in 1998, to infer his shared intent to forcibly displace the Kosovo Albanian population in 1999 by using MUP and VJ forces.³⁹²⁷ The Appeals Chamber finds no error in the Trial Chamber's reliance on such evidence as circumstantial evidence.

1200. Accordingly, Pavković has failed to demonstrate any error in the Trial Chamber's findings with regard to his knowledge of the use of excessive force in 1998 and allegations thereof. He has also failed to show that the Trial Chamber erred by inferring, in part, his intent to forcibly displace the Kosovo Albanian population based on this knowledge. Consequently, the Appeals Chamber dismisses his seventh ground of appeal in its entirety.

³⁹²⁰ Trial Judgement, vol. 3, paras 672, 675, 774, referring, *inter alia*, to Exh. P1468, pp. 46, 52, 124-125, 129.

³⁹²¹ Trial Judgement, vol. 1, para. 907; *ibid.*, vol. 3, para. 675, referring, *inter alia*, to Exh. 4D403, Exh. P1440.

³⁹²² See *infra*, sub-section VII.E.2.(e)(v).

³⁹²³ Trial Judgement, vol. 3, para. 678, referring to Exh. P1468, p. 53, Exh. P949, p. 364.

³⁹²⁴ Trial Judgement, vol. 3, para. 678, referring to Miodrag Simić, 13 Sep 2007, T. 15562-15565, Exh. 4D177, Exh. P969. See also Trial Judgement, vol. 3, para. 673.

³⁹²⁵ See *supra*, para. 610.

³⁹²⁶ In this regard, see also *supra*, para. 1016.

³⁹²⁷ Trial Judgement, vol. 3, paras 678, 774, 781. See also *ibid.*, vol. 3, para. 783.

(ii) Whether Pavković minimised the criminal activity of his subordinates in 1998

1201. The Trial Chamber found that, in some cases, excessive and indiscriminate force was used during joint VJ and MUP operations against the KLA in 1998, as evinced by the burning and looting of houses and the killing of women and children.³⁹²⁸ In particular, the Trial Chamber found that “during VJ and MUP operations in and around Gornje Obrinje/Abria e Epërme at the end of September 1998 a number of civilians were killed, including women and children [...], by forces of the FRY and Serbia”.³⁹²⁹ The Trial Chamber further found that, although Pavković was aware of criminal activities by his VJ subordinates and MUP forces in Kosovo in 1998, he sought to minimise the seriousness of the incident in Gornje Obrinje/Abria e Epërme as well as the criminal activity of his subordinates.³⁹³⁰ The Trial Chamber relied, in part, on this finding to infer his intent to forcibly displace the Kosovo Albanian population in 1999.³⁹³¹

a. Submissions of the parties

1202. Pavković submits that the evidence does not support the Trial Chamber’s finding that he minimised the criminal activity of his subordinates in his reporting in 1998.³⁹³² In particular, in relation to the incident in Gornje Obrinje/Abria e Epërme, Pavković argues that the Trial Chamber erred in: (i) finding that when reporting the incident, he withheld evidence of the VJ’s involvement in the killings; and (ii) inferring, from this finding, his intent to forcibly displace the Kosovo Albanian population.³⁹³³ Pavković maintains that he had no knowledge that VJ forces had engaged in any crimes or used excessive force at this location,³⁹³⁴ since the reports in response to his inquiry from his subordinate units, including the 125th Motorised Brigade, and from Lazarević did not contain any information regarding a massacre of civilians.³⁹³⁵ He submits that his report to the 3rd Army Commander reflected these reports and stated that an investigation was underway.³⁹³⁶

³⁹²⁸ Trial Judgement, vol. 1, paras 881, 886, 894, 912, 920.

³⁹²⁹ Trial Judgement, vol. 1, para. 912. See also *ibid.*, vol. 1, paras 900-903.

³⁹³⁰ Trial Judgement, vol. 3, paras 678, 774, and references therein.

³⁹³¹ Trial Judgement, vol. 3, paras 678, 774, read together with *ibid.*, vol. 3, para. 771.

³⁹³² Pavković’s Appeal Brief, para. 302, referring to Trial Judgement, vol. 3, para. 678, and also pointing out that the Trial Judgement gives no citation for this conclusion.

³⁹³³ Pavković’s Appeal Brief, para. 209, referring to Trial Judgement, vol. 3, para. 678, and read in conjunction with Pavković’s Appeal Brief, paras 197, 243, 262. See also Pavković’s Reply Brief, para. 62.

³⁹³⁴ Pavković’s Appeal Brief, paras 209, 245. See also Pavković’s Reply Brief, para. 62.

³⁹³⁵ Pavković’s Appeal Brief, paras 244, 260, referring to Exh. 4D199, Exh. 4D387, Exh. 4D389, Exh. 4D390, Exh. 4D391, Exh. 4D401, Exh. P1011, pp. 70-71. See also Appeal Hearing, 12 Mar 2013, AT. 378-380. Pavković also contends that he had the same information as his subordinate Lazarević, who the Trial Chamber found was not aware that the VJ was responsible for the killings in Gornje Obrinje/Abria e Epërme, and adds that Lazarević would have received reports regarding this matter, if any, in his role as Chief of Staff of the Priština Corps (Pavković’s Appeal Brief, paras 210-212, referring to Trial Judgement, vol. 3, para. 815).

³⁹³⁶ Pavković’s Appeal Brief, paras 244-245, referring to Exh. P1440. See also Pavković’s Reply Brief, para. 67. See also Appeal Hearing, 12 Mar 2013, AT. 379-380, in which Pavković argued that his report to the 3rd Army

1203. The Prosecution responds that the Trial Chamber's finding that Pavković minimised the criminal activity of his subordinates is well supported.³⁹³⁷ It also submits that Pavković's awareness of the VJ's use of excessive or disproportionate force and of crimes, including murder, in Gornje Obinje/Abria e Epërme in 1998 is indicative of his intent.³⁹³⁸

b. Analysis

1204. The Trial Chamber found that both Lazarević and Pavković were aware of allegations of a massacre of civilians during the joint MUP and VJ operation at Gornje Obrinje/Abria e Epërme at the end of September 1998. The Trial Chamber considered that these allegations, made by the international community including foreign media, led the VJ General Staff to demand further information from the concerned subordinate units.³⁹³⁹ Pavković followed up on 3 October 1998, requesting information from his subordinate units.³⁹⁴⁰ The Trial Chamber considered that Lazarević and various units denied that there had been a massacre or reported to the Priština Corps Command that units of the Priština Corps were not involved,³⁹⁴¹ while Pavković also received a report from the 125th Motorised Brigade, which stated, *inter alia*, that a woman's body was found in the village of Gornje Obrinje/Abria e Epërme and that three children aged between two and four years old were handed to the MUP who left them in a house with supplies to wait for the local villagers to return.³⁹⁴²

1205. Pavković reported to Samardžić, the then 3rd Army Commander, on 5 October 1998 stating that the Priština Corps did not have any information on the "alleged massacre against the civilian population" in Gornje Obrinje/Abria e Epërme on and around 26 and 27 September 1998.³⁹⁴³ In his report, Pavković did not include all the information he had received, such as the fact that a woman's body had been found.³⁹⁴⁴ Therefore, contrary to Pavković's assertions,³⁹⁴⁵ the evidence considered

Commander conveyed the unchecked information from the Priština Corps security department that MUP members executed individuals taken into custody.

³⁹³⁷ Prosecution's Response Brief (Pavković), para. 119, referring to Trial Judgement, vol. 3, paras 672-674, 678, Exh. P1430, p. 1.

³⁹³⁸ Prosecution's Response Brief (Pavković), para. 95, referring to Trial Judgement, vol. 3, paras 678, 774, 785. The Prosecution also argues that unlike Pavković, Lazarević did not know that VJ soldiers were responsible for the killings in Gornje Obinje/Abria e Epërme (Prosecution's Response Brief (Pavković), para. 96, referring to Trial Judgement, vol. 3, paras 675, 678, 774, 815).

³⁹³⁹ Trial Judgement, vol. 1, paras 900, 907; *ibid.*, vol. 3, paras 675, 815, referring, *inter alia*, to Exh. 4D403, Exh. P1440, Exh. P441, Frederick Abrahams, 13 Jul 2006, T. 806-814, 818, Vladimir Lazarević, 16 Nov 2007, T. 18489.

³⁹⁴⁰ Trial Judgement, vol. 1, para. 907, referring to Exh. 4D199.

³⁹⁴¹ Trial Judgement, vol. 1, para. 907 (fns 2371-2372); *ibid.*, vol. 3, para. 815, referring, *inter alia*, to Exh. 4D401, Exh. 4D387, Exh. 4D389, Exh. 4D390, Exh. 4D391.

³⁹⁴² Exh. P1011, pp. 70-71. See also Trial Judgement, vol. 3, para. 675.

³⁹⁴³ Trial Judgement, vol. 1, para. 907; *ibid.*, vol. 3, para. 675, referring to Exh. P1440, p. 4.

³⁹⁴⁴ Trial Judgement, vol. 3, para. 675, referring to Exh. P1440, p. 4.

³⁹⁴⁵ Pavković's Appeal Brief, paras 210-212; Pavković's Reply Brief, para. 67.

by the Trial Chamber shows that he possessed more information than he reported to the 3rd Army Commander.³⁹⁴⁶ Furthermore, based on the information sent from the Priština Corps security department to the Security Administration of the VJ General Staff, Pavković stated in his report that unidentified members of MUP units had executed “persons taken into custody”, but added that this information “was not about the massacre of civilian population, as mentioned in the media.”³⁹⁴⁷ In these circumstances, the Appeals Chamber finds that a reasonable trier of fact could have concluded that Pavković’s report “sought to minimise the seriousness of the incident and omitted relevant knowledge in his possession.”³⁹⁴⁸

1206. The Appeals Chamber further observes that Pavković’s report of 5 October 1998 mentions that unidentified members of MUP units had executed “persons taken into custody”,³⁹⁴⁹ showing his knowledge of MUP members’ reported involvement in killings of protected persons in Gornje Obrinje/Abria e Epërme, but does not establish his knowledge that the VJ was responsible for them. Thus, the Appeals Chamber finds that a reasonable trier of fact could have reached the Trial Chamber’s conclusion that, in his report, Pavković sought to minimise “the seriousness of the incident,” not the VJ’s involvement.³⁹⁵⁰ By asserting that the Trial Chamber found that he had withheld the VJ’s involvement in the incident, Pavković misrepresents the Trial Chamber’s findings.³⁹⁵¹

1207. The Appeals Chamber notes that in addition to Pavković’s minimisation of the “seriousness of the incident” in Gornje Obrinje/Abria e Epërme, the Trial Chamber found that he was responsible for minimising “the criminal activity of his subordinates”.³⁹⁵² While Pavković contests

³⁹⁴⁶ Contrary to Pavković’s argument (Pavković’s Appeal Brief, paras 210-211), the evidence also shows that Pavković had more information than what Lazarević knew.

³⁹⁴⁷ Exh. P1440, p. 4, referred to in Trial Judgement, vol. 3, para. 675. The Appeals Chamber notes that the Trial Chamber in some parts of the Trial Judgement (Trial Judgement, vol. 1, para. 907; *ibid.*, vol. 3, para. 815) described this report as stating that MUP members executed “civilians taken into custody.” However, the report refers to “persons taken into custody”, without specifying whether they were civilians. Considering that those executed were in custody and therefore should have been protected from execution even if they had not been civilians, this error of the Trial Chamber does not have any impact on the relevant findings of the Trial Chamber regarding Pavković’s knowledge of the incident at Gornje Obrinje/Abria e Epërme.

³⁹⁴⁸ Trial Judgement, vol. 3, paras 678, 774.

³⁹⁴⁹ Exh. P1440, p. 4, referred to in Trial Judgement, vol. 3, para. 675.

³⁹⁵⁰ Trial Judgement, vol. 3, paras 678, 774.

³⁹⁵¹ Pavković’s Appeal Brief, paras 209, 244. The Appeals Chamber further notes that, in light of the evidence showing that Pavković was informed of allegations of the international community attributing the killings in Gornje Obrinje/Abria e Epërme to the Serbian forces fighting there (Exh. P441, in particular, p. 32, Exh. 4D403, Exh. P1440, p. 4, referred to in Trial Judgement, vol. 3, paras 675, 678, 774. See also Trial Judgement, vol. 1, paras 900, 902-903, 907), the Trial Chamber concluded that Pavković was aware of the commission of the crimes and the use of excessive force *during* the joint VJ and MUP operations there and of *the allegations* that both the VJ and the MUP were responsible for these crimes (Trial Judgement, vol. 3, paras 678, 774). This cannot be read as a finding that Pavković knew that the VJ was in fact involved in the killings. The Trial Chamber’s finding is rather consistent with its finding as to Lazarević’s knowledge that “[a]lthough [he] knew of the killings of civilians and the *alleged* involvement of the MUP and VJ in this incident, the evidence does not show that he knew of VJ responsibility for these killings” (Trial Judgement, vol. 3, para. 815 (emphasis added)).

³⁹⁵² Trial Judgement, vol. 3, para. 678.

this finding and argues that it is not supported by any evidence, this finding was based on evidence other than that related to Gornje Obrinje/Abria e Epërme.³⁹⁵³ Pavković has failed to substantiate his challenge in this regard.

1208. Finally, Pavković's argument that the Trial Chamber erred in finding that he had the intent to forcibly displace the Kosovo Albanian population despite his lack of knowledge as to the VJ's involvement in the killings in Gornje Obrinje/Abria e Epërme is without merit.³⁹⁵⁴ The Appeals Chamber recalls that the Trial Chamber found that, as a member of the JCE, crimes committed by both the MUP and the VJ in 1999 were imputable to Pavković.³⁹⁵⁵ In these circumstances, the Trial Chamber reasonably relied on his knowledge of the reported involvement of MUP members in killings in 1998 to infer, in part, his intent for JCE liability.³⁹⁵⁶ Therefore, the fact that he had no knowledge as to the VJ's involvement in the killings does not undermine the Trial Chamber's finding that he had the intent to participate in the JCE and forcibly displace the Kosovo Albanian population.

1209. For the reasons set out above, Pavković has not shown any error in the Trial Chamber's findings with regard to his knowledge and minimisation of crimes perpetrated by his VJ subordinates and MUP members in 1998 and its reliance thereon to infer, in part, his *mens rea*.³⁹⁵⁷ The Appeals Chamber dismisses, in relevant part, Pavković's sixth, seventh, and ninth grounds of appeal, containing Pavković's submissions in this regard.

(iii) Pavković's knowledge of the forcible displacement and commission of other crimes in 1999

1210. The Trial Chamber concluded that Pavković had the intent to forcibly displace the Kosovo Albanian population,³⁹⁵⁸ based, in part, on its finding that Pavković knew of the forcible displacement and other crimes committed by VJ and MUP members during the NATO air campaign in 1999 and allegations thereof.³⁹⁵⁹ In so finding, the Trial Chamber relied upon:

³⁹⁵³ Trial Judgement, vol. 3, paras 672, 674, referring, *inter alia*, to Exh. P1430, Exh. P1434, pp. 2, 5, which are orders wherein Pavković stated that "allegations in the international media about VJ and MUP displacement of Kosovo Albanians were false" and attributed this to the KLA, although he was aware of VJ members' involvement in the practice of burning Kosovo Albanian houses.

³⁹⁵⁴ Pavković's Appeal Brief, paras 197, 209, 243, 262.

³⁹⁵⁵ Trial Judgement, vol. 3, para. 783. In contrast, Lazarević was convicted as an aider and abetter of crimes committed by VJ members (*ibid.*, vol. 3, paras 927, 930).

³⁹⁵⁶ See *e.g.*, Trial Judgement, vol. 3, para. 774, holding that "[t]he information received by Pavković *before* and during the NATO air campaign is important evidence for the determination of his responsibility, because his knowledge of the commission of crimes by *VJ subordinates* and *MUP members*, combined with his continuing ordering of and participation in the joint operations with those perpetrators, is indicative of his intent that those crimes occur" (emphasis added).

³⁹⁵⁷ Trial Judgement, vol. 3, paras 678, 774, 781.

³⁹⁵⁸ Trial Judgement, vol. 3, para. 781.

³⁹⁵⁹ Trial Judgement, vol. 3, paras 774-775.

(i) Pavković’s “frequent presence on the ground in Kosovo [during the period between March and June 1999], in conjunction with the widespread practice of displacing Kosovo Albanians”;³⁹⁶⁰ (ii) reports to the 3rd Army, Pavković’s orders, and his reports dated from the end of March to the beginning of June 1999 as well as Pavković’s interview with the Prosecution regarding this period, in which the movement of Kosovo Albanians, the confiscation of their IDs, and/or serious crimes, including killings, rape, looting, and burning of houses, committed by VJ and/or MUP members were mentioned;³⁹⁶¹ (iii) Pavković’s attendance at meetings in Belgrade on 4, 16, and 17 May 1999 with the FRY and Serbian military and civilian leadership, where such crimes were discussed;³⁹⁶² and (iv) information provided by the international community through: (a) a press statement issued no later than 2 April 1999 by Karol John Drewienkiewicz, Deputy Head of the KVM;³⁹⁶³ (b) a letter by Louise Arbour, then Prosecutor of the Tribunal, which reached Pavković around the end of April 1999; and (c) the Original Indictment publicised by the Tribunal on 27 May 1999.³⁹⁶⁴

1211. Pavković contests the Trial Chamber’s assessment of the evidence concerning his awareness of the information provided by the international community through Karol John Drewienkiewicz’s press statement, Louise Arbour’s letter, and the Original Indictment.³⁹⁶⁵ Pavković claims that the Trial Chamber erred in finding that he was aware of this information and appears to argue, solely on this basis, that the Trial Chamber erred in concluding that he knew about the crimes in 1999.³⁹⁶⁶ However, Pavković has failed to demonstrate why the Trial Chamber’s finding on his knowledge of the crimes in 1999 should not stand on the basis of the remaining evidence, including: (i) his frequent presence on the ground in Kosovo during the period between March and June 1999;³⁹⁶⁷

³⁹⁶⁰ Trial Judgement, vol. 3, para. 775, and references therein, whereby the Trial Chamber also found that “Pavković was present at the command post of the Priština Corps in Priština/Prishtina regularly during the conflict, and attended a meeting there with Stevanović and Đorđević from the MUP while Kosovo Albanians were being forcibly displaced from the town by VJ and MUP forces acting together.” See also Trial Judgement, vol. 3, paras 716-717, and references therein.

³⁹⁶¹ Trial Judgement, vol. 3, para. 775, and references therein. See also *e.g.*, *ibid.*, vol. 3, paras 719-722, 726-727, 729, 736, 741-742, 747-748, 750, 785, referring, *inter alia*, to Exh. 4D409 (erroneously referred to as Exh. 4D407), Exh. 4D154, Exh. 4D191, Exh. 4D86 (also admitted as Exh. P1720), Exh. P1721 (read in light of Momir Pantić, 2 Apr 2008, 24760-24765, 24779-24795; *ibid.*, 3 Apr 2008, T. 24805-24806), Exh. P1011, pp. 80-81, 90, Exh. P1454, Exh. P1766 (also admitted as Exh. 4D350), Exh. 4D273, p. 2, Exh. 4D198, p. 2, Exh. 4D315, p. 1, Exh. P1459, para. 4, Exh. P1458 (also admitted as Exh. 4D192 and Exh. P1723), Exh. P1725, para. 1, Exh. 4D278, p. 2, Exh. 5D84, p. 2, Exh. P1938, p. 2, Exh. 4D307, p. 3, Exh. 4D281, p. 2, Exh. P1448, p. 2, Exh. 4D224, p. 3, Exh. P949, pp. 76-80, 91-92, 171-172, 220, 353-355. See further Exh. 4D172, p. 3 and Exh. 3D1128, p. 2, referred to in Trial Judgement, vol. 3, fns 1822-1823.

³⁹⁶² Trial Judgement, vol. 3, para. 775, and references therein. See also *ibid.*, vol. 3, paras 734-735, 738-740, and references therein.

³⁹⁶³ See Trial Judgement, vol. 1, para. 327.

³⁹⁶⁴ Trial Judgement, vol. 3, paras 754-757, 766, 775, and references therein.

³⁹⁶⁵ Pavković’s Appeal Brief, paras 198-207.

³⁹⁶⁶ Pavković’s Appeal Brief, paras 198-208, read in conjunction with *ibid.*, para. 303. See, however, Pavković’s additional arguments during the appeal hearing (Appeal Hearing, 12 Mar 2013, AT. 287-289, 303-304, 381-382) and the Appeals Chamber’s findings thereon (*infra*, fns 3967-3968).

³⁹⁶⁷ See *supra*, (i) in para. 1210. See, in particular, Trial Judgement, vol. 3, para. 775, wherein the Trial Chamber found that “Pavković was present at the command post of the Priština Corps in Priština/Prishtina regularly during the conflict, and attended a meeting there with Stevanović and Đorđević from the MUP while Kosovo Albanians were being

(ii) reports to the 3rd Army, his orders, and his reports dated from the end of March to the beginning of June 1999 as well as his interview with the Prosecution regarding this period;³⁹⁶⁸ and (iii) his attendance at meetings in Belgrade on 4, 16, and 17 May 1999.³⁹⁶⁹ The Appeals Chamber therefore dismisses Pavković's sixth ground of appeal in relevant part.

(iv) Whether Pavković under-reported crimes in 1999

1212. The Trial Chamber inferred Pavković's intent and significant contribution to the JCE based, in part, on its finding that in 1999, Pavković, then 3rd Army Commander, "under-reported and sought to minimise the involvement of forces subordinate to him in the commission of crimes in

forcibly displaced from the town by VJ and MUP forces acting together." In his Appeal Brief, Pavković challenges neither the Trial Chamber's finding nor its reliance upon this finding when inferring his knowledge of forcible displacement and commission of crimes by the VJ and the MUP. However, during the appeal hearing, Pavković advanced a challenge in this regard, arguing that the Trial Chamber's finding was not supported by the evidence, which rather suggests that Kosovo Albanians left Priština town on their own due to the NATO bombing (Appeal Hearing, 12 Mar 2013, AT. 287-289). For the reasons set out in a previous section, the Appeals Chamber dismisses this argument. See *supra*, fn. 1605.

³⁹⁶⁸ See *supra*, (ii) in para. 1210. In his Appeal Brief, Pavković does not raise any challenges to the Trial Chamber's reliance on this evidence in finding his knowledge of commission of crimes by the VJ and the MUP, while he raises a challenge focusing on the Trial Chamber's finding as to his under-reporting of crimes, which is addressed in the next section (*infra*, sub-section VII.E.2.(e)(iv)). During the appeal hearing (Appeal Hearing, 12 Mar 2013, AT. 303-304), Pavković submitted that the Trial Chamber erred in finding that "[b]y 31 March [1999] Pavković had information indicating that VJ Military Territorial Units and MUP forces were 'channelling' displaced Kosovo Albanians to Albania" (Trial Judgement, vol. 3, para. 719), as the report of 31 March 1999 cited by the Trial Chamber in support of this finding was sent from a Priština Corps combat group to the Priština Corps operations centre (Exh. P2930). The Appeals Chamber finds that the Trial Chamber indeed erred in this regard. However, this error has no impact upon the outcome of the Trial Judgement, given that other evidence sufficiently supports the Trial Chamber's finding that Pavković was aware of crimes by the VJ and the MUP, including forcible displacement, in 1999 (see the portions of the Trial Judgement and the evidence referred to in *supra*, fns 3960-3962). At the appeal hearing (Appeal Hearing, 12 Mar 2013, AT. 303), Pavković also argued that the Trial Chamber erroneously noted that the combat reports from the 3rd Army to the General Staff/Supreme Command Staff of 1 and 2 April 1999 stated that "crimes of looting from abandoned houses of Kosovo Albanians had occurred" (Trial Judgement, vol. 3, para. 729, referring to Exh. 4D274, p. 2, Exh. 4D275, p. 3). Indeed, these two reports only refer to "isolated" incidents of attempted theft and robbery (Exh. 4D274, p. 3; Exh. 4D275, p. 3). However, the Trial Chamber's erroneous description of these two reports does not have any impact upon its conclusion on Pavković's knowledge in 1999, since another combat report from the 3rd Army to the General Staff/Supreme Command Staff of 2 April 1999 considered by the Trial Chamber (Exh. 4D278, p. 2, cited in Trial Judgement, vol. 3, para. 747) refers to the "looting of tape recorders and other technical equipment from abandoned [Kosovo Albanian] houses." Furthermore, Pavković argued at the appeal hearing that the Trial Chamber erred in relying on a combat report of 3 April 1999 from the Priština Corps Command to the 3rd Army Command referring to criminal reports of murder and attempted murder submitted to the military prosecutor's office (Exh. 5D84) as this report did not specify who the victims of these crimes were (Appeal Hearing, 12 Mar 2013, AT. 381-382, referring to Trial Judgement, vol. 3, para. 748). However, having assessed the context of this report detailing combat situations against NATO and Albanian "terrorist forces" and referring to "[c]olumns of civilians heading towards Albania and Macedonia" (Exh. 5D84, pp. 1-2) in light of the events on the ground involving widespread crimes against Kosovo Albanians (Trial Judgement, vol. 2), the Appeals Chamber finds that a reasonable trier of fact could have relied on this report in finding Pavković's knowledge of crimes committed by VJ members against Kosovo Albanians.

³⁹⁶⁹ See *supra*, (iii) in para. 1210. Pavković does not challenge the Trial Chamber's reliance on this evidence in finding his knowledge of commission of crimes by the VJ and the MUP, while he challenges the Trial Chamber's assessment of his suggestion in one of these meetings to establish a state commission for investigation (*infra*, sub-section VII.E.2.(e)(iv)).

Kosovo”³⁹⁷⁰ and that, through this, he contributed to the creation of an environment of impunity, which encouraged the commission of crimes by forces under the control of JCE members.³⁹⁷¹

1213. This finding was based on a number of factors, including: (i) discrepancies between the 175th Infantry Brigade and 3rd Army reports;³⁹⁷² (ii) discrepancies between the Priština Corps and 3rd Army reports;³⁹⁷³ (iii) numerous 3rd Army combat reports to the VJ General Staff/Supreme Command Staff³⁹⁷⁴ with no reference to details of serious offences committed against the civilian population;³⁹⁷⁵ (iv) the evidence of Aleksandar Vasiljević, then Deputy Head of the VJ Security Administration, attributing the under-reporting to the 3rd Army Command;³⁹⁷⁶ and (v) the discovery by the Supreme Command Staff of the under-reporting by the 3rd Army, based on the information gathered by Aleksandar Vasiljević and Geza Farkaš, then Head of the VJ Security Administration, which led to meetings in Belgrade on 16 and 17 May 1999 involving Ojdanić, Pavković, and other VJ personnel.³⁹⁷⁷ The Trial Chamber further found that, in these meetings, Pavković reported on crimes committed by VJ members and the discovery of 800 bodies from Kosovo and that, in the 17 May 1999 meeting, which Slobodan Milošević also attended, Pavković suggested the creation of a “joint state commission” to investigate the situation in Kosovo. The Trial Chamber found this suggestion to be “abortive” and considered that it did not evince “a genuine will to take effective measures against criminal activity in Kosovo.”³⁹⁷⁸

a. Submissions of the parties

1214. Pavković argues that the Trial Chamber erred in concluding that he under-reported crimes in 1999 and that this had the effect of encouraging further criminal activity.³⁹⁷⁹ He further submits that the Trial Chamber erred in finding his intent and significant contribution to the JCE based, in part, on his under-reporting.³⁹⁸⁰

1215. Pavković contends that there is no evidence that the 3rd Army failed to pass on information, which was contained in reports from the Priština Corps to the 3rd Army, to the VJ General

³⁹⁷⁰ Trial Judgement, vol. 3, para. 753. See also *ibid.*, vol. 3, para. 776.

³⁹⁷¹ Trial Judgement, vol. 3, para. 782.

³⁹⁷² Trial Judgement, vol. 3, para. 747, and references therein.

³⁹⁷³ Trial Judgement, vol. 3, para. 748, and references therein.

³⁹⁷⁴ With regard to the use of the term “Supreme Command Staff”, see *supra*, para. 777.

³⁹⁷⁵ Trial Judgement, vol. 3, paras 750-751, 753, 776, and references therein.

³⁹⁷⁶ Trial Judgement, vol. 3, paras 737, 751, and references therein.

³⁹⁷⁷ Trial Judgement, vol. 3, paras 737-740, 752-753, and references therein. See also *ibid.*, vol. 3, paras 349-350.

³⁹⁷⁸ Trial Judgement, vol. 3, paras 739-740, and references therein.

³⁹⁷⁹ Pavković’s Appeal Brief, paras 303-305, referring to Trial Judgement, vol. 3, paras 744-753, 776. See also Pavković’s Reply Brief, para. 69.

³⁹⁸⁰ Pavković’s Appeal Brief, paras 314, 316. See also Trial Judgement, vol. 3, para. 782.

Staff/Supreme Command Staff.³⁹⁸¹ He argues that the Trial Chamber erred in finding that, in his reports to the Supreme Command Staff on behalf of the 3rd Army, he under-reported the crimes mentioned in a report from the 175th Infantry Brigade to the Priština Corps. In this regard, Pavković claims that the Trial Chamber failed to consider the possibility that the Priština Corps did not report the crimes to the 3rd Army.³⁹⁸² He further asserts that although the Trial Chamber referred to an instance in which the 3rd Army report did not include details contained in the Priština Corps report, the essential facts regarding the commission of crimes were communicated to the Supreme Command Staff, which could have requested further information.³⁹⁸³ Pavković also refers to the evidence of Velimir Obradović, Chief of the Operational Centre in the 3rd Army Command in 1999,³⁹⁸⁴ that Pavković did not instruct him to omit any information from the combat reports and would not have had any opportunity to influence combat reports, because they were prepared daily by several duty officers in the operations centre of the 3rd Army and Pavković was never present at the centre during the conflict.³⁹⁸⁵ Pavković further argues that any attempt by the 3rd Army to under-report information coming from the Priština Corps would have been futile since Priština Corps reports were sent directly to the Supreme Command Staff as of 12 April 1999.³⁹⁸⁶

1216. Moreover, according to Pavković, the Trial Chamber misconstrued Aleksandar Vasiljević's testimony when it described him as stating that the 3rd Army Command decided not to report certain crimes in the regular combat reports because they were being dealt with by the military judicial organs.³⁹⁸⁷ Pavković contends that, on the contrary, Vasiljević's testimony reveals that the Chief of Security of the Priština Corps made the decision not to report certain crimes in the reports from security organs as these cases had already been processed and prosecuted.³⁹⁸⁸ He adds that these security organs had their own reporting mechanism, which was separate from regular combat reports and which reported their activity up the security chain of command.³⁹⁸⁹ Pavković maintains that the Trial Chamber thus failed to appreciate that there were two reporting chains in the army:

³⁹⁸¹ Pavković's Appeal Brief, para. 306. See also Appeal Hearing, 12 Mar 2013, AT. 302-303; *supra*, fn. 3968, regarding Exhibits 4D274 and 4D275.

³⁹⁸² Pavković's Reply Brief, para. 71, referring to Trial Judgement, vol. 3, para. 747. See also Pavković's Appeal Brief, para. 307; Appeal Hearing, 12 Mar 2013, AT. 382, in which Pavković referred to Exhibits 6D1135, 4D731, and 6D69, p. 38 and submitted that the crimes were instead reported to the Priština Corps prosecutor's office.

³⁹⁸³ Pavković's Reply Brief, para. 72, referring to Trial Judgement, vol. 3, para. 748.

³⁹⁸⁴ See Trial Judgement, vol. 3, para. 731.

³⁹⁸⁵ Pavković's Appeal Brief, para. 307, referring to Velimir Obradović, 22 Oct 2007, T. 17365-17400, Velimir Obradović, Exh. 4D499, para. 16. See also Pavković's Reply Brief, para. 73.

³⁹⁸⁶ Pavković's Appeal Brief, para. 307, referring to Velimir Obradović, 22 Oct 2007, T. 17364, Velimir Obradović, Exh. 4D499, para. 16, and noting that Exhibit 5D85 in fact shows the Supreme Command Staff receiving reports from the Priština Corps as early as 4 April 1999.

³⁹⁸⁷ Pavković's Appeal Brief, para. 308, referring to Trial Judgement, vol. 3, para. 737. See also Appeal Hearing, 12 Mar 2013, AT. 289-292.

³⁹⁸⁸ Pavković's Appeal Brief, paras 308-309, 311, referring to Aleksandar Vasiljević, 19 Jan 2007, T. 8750-8751, Exh. P2594, para. 59, Exh. 3D619, p. 3, also arguing that Vasiljević stated that he was convinced that there was no concealment of crimes. See also Pavković's Reply Brief, para. 70.

³⁹⁸⁹ Pavković's Appeal Brief, para. 309, referring to *ibid.*, Annex C listing "intelligence administration briefings".

one chain of security organs dealing with security matters, including crimes, and the other transmitting “regular unit combat reports” on the military activities.³⁹⁹⁰

1217. Pavković also contests the Trial Chamber’s findings with regard to the meetings held in Belgrade on 16 and 17 May 1999 on the basis of the information provided by Aleksandar Vasiljević and Geza Farkaš. He argues that the Trial Chamber erred in finding “that these meetings provide further indications that VJ and MUP members were committing crimes in Kosovo,” and that “Pavković’s abortive suggestion [to establish a commission to investigate incidents in Kosovo], on which he took no further action, [does not evince] a genuine will to take effective measures against criminal activity in Kosovo.”³⁹⁹¹ Pavković avers that his suggestion shows that he had “nothing to fear” from an investigation and that as his suggestion to establish a commission was rejected by Milošević, who had the power to appoint such a commission, he had no further means to pursue his proposal thereafter.³⁹⁹²

1218. The Prosecution responds that the Trial Chamber reasonably found that Pavković under-reported his subordinates’ crimes in 1999 and that he ignores the evidence considered by the Trial Chamber in this regard.³⁹⁹³ With respect to his argument that he was not involved in drafting 3rd Army combat reports to the Supreme Command Staff, the Prosecution avers that he merely repeats his trial submissions without addressing the Trial Chamber’s findings in this respect.³⁹⁹⁴ As to his assertion that the Priština Corps reported directly to the Supreme Command Staff from around 10 April 1999, the Prosecution recalls the Trial Chamber’s finding that the change in the reporting mechanism did not relieve him of his responsibility to report the crimes to the Supreme Command Staff.³⁹⁹⁵ The Prosecution also submits that Pavković misinterprets Aleksandar Vasiljević’s testimony and ignores the Trial Chamber’s assessment thereof.³⁹⁹⁶ As to Pavković’s proposition that reporting of crimes should have occurred only through the security organ chain of command, the Prosecution contends that VJ members were to report crimes to both the regular VJ

³⁹⁹⁰ Pavković’s Appeal Brief, para. 310.

³⁹⁹¹ Pavković’s Appeal Brief, paras 311-313, 316, citing Trial Judgement, vol. 3, para. 740.

³⁹⁹² Pavković’s Appeal Brief, paras 312, 314, also arguing that the fact that he made the suggestion at a very late stage of the war shows that he had no guilty mind and no fear about such investigation. Pavković also maintains that he issued a reminder on the procedure for reporting and processing crimes on 27 May 1999, less than two weeks before the end of the war, leaving little opportunity for him to take any further action (Pavković’s Appeal Brief, para. 315, referring to Exh. 4D158).

³⁹⁹³ Prosecution’s Response Brief (Pavković), paras 121-122, referring to Trial Judgement, vol. 3, paras 571-572, 577, 737, 740, 747-748, 750-752, and requesting summary dismissal of this argument. See also Appeal Hearing, 12 Mar 2013, AT. 348.

³⁹⁹⁴ Prosecution’s Response Brief (Pavković), para. 123, referring to Trial Judgement, vol. 3, paras 571-572, 577, 737, 740, 751-752, and requesting summary dismissal of this argument.

³⁹⁹⁵ Prosecution’s Response Brief (Pavković), para. 124, referring to Trial Judgement, vol. 3, para. 549.

³⁹⁹⁶ Prosecution’s Response Brief (Pavković), paras 125-126, referring to Trial Judgement, vol. 3, paras 572, 737, 751, Aleksandar Vasiljević, 19 Jan 2007, T. 8749-8751, Aleksandar Vasiljević, Exh. P2600, paras 51-52, 55-56.

chain of command and the security organ chain of command.³⁹⁹⁷ Finally, in response to Pavković's argument concerning his proposal to form an investigation commission in May 1999, the Prosecution avers that the Trial Chamber reasonably found that he failed to hold VJ members accountable for their serious crimes in Kosovo in 1999 through other available means.³⁹⁹⁸

b. Analysis

1219. The Trial Chamber considered a number of reports in its assessment of the reporting practice of the 3rd Army. In particular, it noted a report of 31 March 1999 from the 175th Infantry Brigade to the Priština Corps Command detailing the arrest of eight volunteers who were suspected of having committed "the crime in Žegra/[Zhegra] village", without specifying which crime had been committed.³⁹⁹⁹ The Trial Chamber compared this report with two reports from the 3rd Army Command to the Supreme Command Staff of 1 and 2 April 1999. The two reports referred to offences by VJ members, such as lack of discipline, failure to respond to call-ups, abandonment of position, and looting from Kosovo Albanian houses, but did not mention any specific information about the arrest of the eight volunteers in relation to "the crime in Žegra village".⁴⁰⁰⁰ However, it is unclear whether the Priština Corps Command or the 3rd Army Command omitted the specific information pertaining to the crime in Žegra/Zhegra village. Consequently, the Appeals Chamber considers that this instance does not, in itself, prove that "Pavković was under-reporting certain criminal activity with the VJ."⁴⁰⁰¹

1220. The Trial Chamber also referred to another instance in which the Priština Corps Command reported to the 3rd Army Command on 3 April 1999 that 32 criminal reports had been submitted to the military prosecutor's office, including eight for murder and three for attempted murder,⁴⁰⁰² while reports from the 3rd Army to the Supreme Command Staff that same day and the next did not include these details, but simply mentioned "isolated incidents of attempted robbery and other criminal offences".⁴⁰⁰³ Contrary to Pavković's assertion, this cannot be regarded as communicating "essential facts regarding the commission of crimes".⁴⁰⁰⁴

³⁹⁹⁷ Prosecution's Response Brief (Pavković), para. 127, referring to Trial Judgement, vol. 3, paras 549, 745, 748, 864.

³⁹⁹⁸ Prosecution's Response Brief (Pavković), para. 128, referring to Trial Judgement, vol. 3, paras 740, 757, 765, 777, 782.

³⁹⁹⁹ Trial Judgement, vol. 3, para. 747, referring to Exh. 5D825, p. 1. The Appeals Chamber notes that the report is dated 31 March 1999 and not 29 March 1999 as referred to by the Trial Chamber.

⁴⁰⁰⁰ Trial Judgement, vol. 3, para. 747, referring to Exh. 4D274, p. 2, Exh. 4D278, p. 2.

⁴⁰⁰¹ Trial Judgement, vol. 3, para. 747.

⁴⁰⁰² Trial Judgement, vol. 3, para. 748, referring to Exh. 5D84, p. 2.

⁴⁰⁰³ Trial Judgement, vol. 3, para. 748, citing Exh. 4D276, pp. 2-3, and referring to Exh. 3D1128. During the appeal hearing (Appeal Hearing, 12 Mar 2013, AT. 381-382), Pavković submitted that the 3 April 1999 report of the 3rd Army to the Supreme Command Staff (Exh. 4D276, item 6) suggested that when the 3rd Army sent this report, it had not received the 3 April 1999 report from the Priština Corps Command (Exh. 5D84). Given that the Trial Chamber also

1221. Pavković's assertion that, in cases where information was reported in general terms to the Supreme Command Staff, Ojdanić could have requested additional information merely repeats his submission at trial, without demonstrating any error.⁴⁰⁰⁵ The Trial Chamber rejected this argument and concluded that Pavković under-reported and sought to minimise the involvement of his subordinate forces in the commission of crimes in Kosovo.⁴⁰⁰⁶ This conclusion was based not only on the discrepancies between the Priština Corps and 3rd Army reports of 3 April 1999,⁴⁰⁰⁷ but also on the evidence that: (i) on 2 April 1999, Ojdanić ordered that crimes be reported to both the security organs and the Supreme Command, which should have been followed promptly and precisely in accordance with the VJ command principle;⁴⁰⁰⁸ (ii) most cases mentioned in combat reports from the 3rd Army to the Supreme Command Staff were related to crimes committed against the VJ, such as failure to respond to mobilisation, and did not refer to other more serious criminal offences committed against the civilian population despite the widespread commission of forcible displacement occurring on the ground;⁴⁰⁰⁹ and (iii) the VJ had discovered that the 3rd Army was under-reporting crimes, leading to a series of meetings involving Ojdanić, Pavković, Milošević, and other VJ and MUP personnel.⁴⁰¹⁰

1222. The Trial Chamber also considered the reporting system within the VJ and noted evidence that, from around 10 April 1999, combat reports from the Priština Corps were sent both to the Supreme Command Staff and the 3rd Army Command.⁴⁰¹¹ Based on the evidence before it, the Trial Chamber nonetheless found that "crimes committed within the area of VJ responsibility should have been reported in the regular combat reports."⁴⁰¹² Pavković was thus bound to report crimes in his regular combat reports to the Supreme Command Staff, regardless of the change in the reporting system. Pavković merely repeats the evidence addressed by the Trial Chamber, without showing any error in its assessment in this regard. Moreover, the Trial Chamber explicitly considered and rejected Velimir Obradović's evidence that Pavković never instructed the exclusion of information from combat reports and would not have been able to exercise any influence on combat reports

noted that the report of the 3rd Army to the Supreme Command Staff on the following day did not mention these details (Exh. 3D1128), Pavković's argument has no impact upon the conclusion of the Trial Chamber.

⁴⁰⁰⁴ Pavković's Reply Brief, para. 72.

⁴⁰⁰⁵ Pavković's Reply Brief, para. 72; Trial Judgement, vol. 3, para. 749, referring to Pavković's Closing Brief, paras 216-217.

⁴⁰⁰⁶ Trial Judgement, vol. 3, para. 753, read together with *ibid.*, vol. 3, para. 749.

⁴⁰⁰⁷ Trial Judgement, vol. 3, paras 748, 753.

⁴⁰⁰⁸ Trial Judgement, vol. 3, para. 748, referring to Đorđe Ćurčin, 5 Oct 2007, T. 16961, Exh. 3D480, Exh. P984, Exh. P1041, pp. 61-63, 96.

⁴⁰⁰⁹ Trial Judgement, vol. 3, paras 728-729, 750, 753, and references therein.

⁴⁰¹⁰ Trial Judgement, vol. 3, paras 734, 737-739, 752-753, and reference therein. During the appeal hearing, Pavković challenged the Trial Chamber's reliance on Farkaš's testimony in this regard (Appeal Hearing, 12 Mar 2013, AT. 290). However, Pavković interpreted a portion of the testimony (Geza Farkaš, 25 Sep 2007, T. 16292) out of context, without showing any error in the Trial Chamber's assessment thereof (Trial Judgement, vol. 3, paras 571-572, 737, referring, *inter alia*, to Geza Farkaš, 25 Sep 2007, T. 16292-16294, 16303-16304). His argument is therefore dismissed.

⁴⁰¹¹ Trial Judgement, vol. 3, para. 549, referring to Radojko Stefanović, 5 Feb 2008, T. 21710.

drafted by different duty officers at the operations centre of the 3rd Army.⁴⁰¹³ In so doing, the Trial Chamber relied on Aleksandar Vasiljević's evidence attributing the under-reporting to the 3rd Army Command and also noted that those reports were sent in the name of Pavković.⁴⁰¹⁴

1223. Contrary to Pavković's claim, the Trial Chamber did not misrepresent Vasiljević's evidence when it described him as stating that "a decision had been taken by the 3rd Army Command in Priština/Prishtina not to report the occurrence of certain crimes in the regular combat reports".⁴⁰¹⁵ In his testimony, Vasiljević mentioned that when he toured the VJ security organs in Kosovo, the Chief of Security of the Priština Corps told him that he had not reported criminal cases because all those cases had already been processed by military judicial organs.⁴⁰¹⁶ However, Vasiljević also stated that the 3rd Army Command thought that it was not necessary to include information of crimes in its daily reports to the Supreme Command Staff as it had already taken steps for those crimes to be investigated.⁴⁰¹⁷ Thus, Pavković has failed to demonstrate that the Trial Chamber erred in its interpretation of Vasiljević's evidence in this respect.

1224. Moreover, Pavković's reliance on the existence of the reporting line within the security service is misplaced. Although Vasiljević stated that the crimes should have been reported through the line of the security organs, his testimony as well as that of other witnesses and documentary evidence show that the same information should have also been passed along the regular chain of command to the Supreme Command Staff through regular combat reports.⁴⁰¹⁸ In his testimony, Vasiljević also opined that there was no attempt on the part of the security service to conceal crimes and that they mistakenly believed that reports were unnecessary once crimes were prosecuted.⁴⁰¹⁹ However, the Trial Chamber found that his explanation was inconsistent with the fact that less serious crimes continued to be reported to the superior commands even after being referred to the military justice system.⁴⁰²⁰ Thus, Pavković merely seeks to substitute his own evaluation of Vasiljević's evidence for that of the Trial Chamber, without demonstrating any error.

⁴⁰¹² Trial Judgement, vol. 3, para. 549, referring to Aleksandar Vasiljević, Exh. P2600, para. 55.

⁴⁰¹³ Trial Judgement, vol. 3, para. 751, referring to Velimir Obradović, 22 Oct 2007, T. 17365-17366, 17400, Velimir Obradović, Exh. 4D499, para. 16.

⁴⁰¹⁴ Trial Judgement, vol. 3, para. 751, referring to Exh. 3D1128. See also Trial Judgement, vol. 3, paras 571-572, 737, referring, *inter alia*, to Aleksandar Vasiljević, Exh. P2600, para. 56, Aleksandar Vasiljević, 19 Jan 2007, T. 8749-8751.

⁴⁰¹⁵ Trial Judgement, vol. 3, para. 737. See also *ibid.*, vol. 3, para. 572.

⁴⁰¹⁶ Aleksandar Vasiljević, 19 Jan 2007, T. 8750.

⁴⁰¹⁷ Aleksandar Vasiljević, 19 Jan 2007, T. 8751; Aleksandar Vasiljević, Exh. P2600, paras 55-56.

⁴⁰¹⁸ Trial Judgement, vol. 1, para. 512; *ibid.*, vol. 3, paras 549, 745, 747, referring, *inter alia*, to Branko Gajić, 7 Sep 2007, T. 15188-15189, Geza Farkaš, 25 Sep 2007, T. 16292, Radojko Stefanović, 6 Feb 2008, T. 21728, Miloš Mandić, 23 Jan 2008, T. 20924, Aleksandar Vasiljević, 18 Jan 2007, T. 8666, Aleksandar Vasiljević, Exh. P2600, para. 52, Exh. 3D480, pp. 1-2, Exh. P984, p. 2, Exh. P1041, pp. 61-63, 96. See also Aleksandar Vasiljević, 19 Jan 2007, T. 8750-8751.

⁴⁰¹⁹ Aleksandar Vasiljević, 19 Jan 2007, T. 8750.

⁴⁰²⁰ Trial Judgement, vol. 3, paras 737, 776.

1225. Pavković's arguments regarding the 16 and 17 May 1999 meetings convened to discuss the information on under-reporting of crimes and Pavković's "abortive suggestion" in the 17 May 1999 meeting to form a state commission for investigation⁴⁰²¹ are likewise without merit. The Trial Chamber was aware that Milošević did not show much interest in Pavković's proposal, but nonetheless found that Pavković's suggestion did not stem from a genuine desire to take effective measures against criminal activity in Kosovo.⁴⁰²² In this regard, the Trial Chamber took into consideration that the 16 and 17 May 1999 meetings were convened due to the discovery of the under-reporting of crimes by the 3rd Army and that Pavković did not implement any further effective measures in relation to the discovery of 800 bodies from Kosovo "despite the considerable array of powers at his disposal."⁴⁰²³ The Appeals Chamber recalls that the Trial Chamber found that, in 1999, Pavković had the power to form commissions in the 3rd Army to swiftly enquire into alleged criminal activity.⁴⁰²⁴ In addition, the Trial Chamber enumerated several other measures at his disposal⁴⁰²⁵ and also noted that after becoming Chief of the VJ General Staff in 2000, Pavković did not exercise his power to form a special commission to investigate the VJ involvement in the crimes in 1999.⁴⁰²⁶ By merely relying on the necessity of Milošević's approval to establish a state commission, Pavković has not shown any error in the Trial Chamber's assessment of the evidence in this regard.

1226. For the foregoing reasons, Pavković has shown no error in the Trial Chamber's findings concerning his under-reporting of crimes in 1999 and in its reliance on these findings in inferring his intent and contribution to the JCE.⁴⁰²⁷ Accordingly, the Appeals Chamber dismisses Pavković's tenth ground of appeal in this regard in its entirety.

⁴⁰²¹ On the basis of Vasiljević's testimony, Pavković argues that he made the same suggestion also in the 16 May 1999 meeting (Pavković's Appeal Brief, para. 312). However, this is a misrepresentation of Vasiljević's testimony that, in this meeting, Pavković stated that a military commission which he had set up was obstructed by Lukić who refused to cooperate and that his military organs continued some investigation. Vasiljević also explained that this was to verify the number of bodies which were found and that no formal military investigation was ordered (see Aleksandar Vasiljević, 19 Jan 2007, T. 8756-8757, 8760-8762, partly referred to in Trial Judgement, vol. 3, para. 738).

⁴⁰²² Trial Judgement, vol. 3, paras 739-740.

⁴⁰²³ Trial Judgement, vol. 3, paras 740, 765.

⁴⁰²⁴ Trial Judgement, vol. 3, para. 721, referring, *inter alia*, to Exh. 4D86 dated 13 April 1999, in which Pavković ordered the establishment of a commission to investigate within two days the alleged existence of a detention camp for Kosovo Albanians in Istok/Istog municipality. The commission reported back to Pavković on the next day (Trial Judgement, vol. 3, para. 721, referring to Exh. P1721 (also admitted as Exh. 4D212)). In light of this evidence, the Trial Chamber rejected his argument that he did not have time to take measures before the end of the NATO air campaign (Trial Judgement, vol. 3, para. 757, referring to Exh. 4D86).

⁴⁰²⁵ Such measures include: (i) disciplinary measures (Trial Judgement, vol. 3, paras 684, 757, 765); (ii) the use of the 3rd Army Security Department, whose tasks included investigating alleged crimes by VJ members (*ibid.*, vol. 1, paras 508-509, 590; *ibid.*, vol. 3, paras 757, 765); and (iii) the engagement of forensic experts for exhumation (*ibid.*, vol. 2, paras 1333-1341, 1356; *ibid.*, vol. 3, paras 732-733, 757, 765).

⁴⁰²⁶ Trial Judgement, vol. 3, para. 765.

⁴⁰²⁷ Trial Judgement, vol. 3, paras 753, 775-776, 782.

(v) Pavković's failure to take effective measures to prevent and punish crimes

1227. The Trial Chamber inferred Pavković's intent and significant contribution to the JCE based, in part, on its finding that he failed to take effective measures to prevent crimes and to bring to account those responsible for crimes, in response to information indicating the commission of crimes by forces under his control in Kosovo.⁴⁰²⁸

a. Submissions of the parties

1228. Pavković challenges the Trial Chamber's findings on his failure to take effective measures. He submits that the Trial Chamber erred in law in holding that the mere issuance of orders, without ensuring their implementation, does not meet the responsibility of a commander to prevent and/or punish his subordinates' crimes.⁴⁰²⁹ In this regard, Pavković contends that, like Ojdanić and Lazarević, he issued a number of orders demanding the adherence to international humanitarian law and the punishment of crimes. He maintains that a commander, remote from the action on the ground, has a legitimate expectation that his subordinates will transmit the orders down the chain of command and that it is sufficient for him to be aware that such orders were in fact transmitted and to take appropriate measures upon learning of violations thereof.⁴⁰³⁰

1229. Pavković also contends that the Trial Chamber erred in finding that his orders for compliance with international humanitarian law, in both 1998 and 1999, were not genuine efforts to take effective measures to prevent the commission of crimes against Kosovo Albanians.⁴⁰³¹ He asserts that there is no evidence that the orders he issued in 1998 were not properly transmitted down the chain of command or that there were accompanying instructions to ignore the orders.⁴⁰³² He also refers to other evidence allegedly showing his desire to protect the civilian population.⁴⁰³³ In addition, Pavković contends that the Trial Chamber failed to explain how it concluded that his orders for compliance with international humanitarian law in 1999 were not genuine efforts to take

⁴⁰²⁸ Trial Judgement, vol. 3, paras 678, 740, 765, 777, 780, 782.

⁴⁰²⁹ Pavković's Appeal Brief, para. 194, referring to Trial Judgement, vol. 3, para. 887.

⁴⁰³⁰ Pavković's Appeal Brief, paras 194-195, referring to Trial Judgement, vol. 3, para. 888, fn. 2252. See also Pavković's Appeal Brief, paras 190, 224, 299, 301, Annex D, listing "orders regarding international humanitarian law". See also Appeal Hearing, 12 Mar 2013, AT. 319-321, referring, *inter alia*, to Branko Krga, 4 Oct 2007, T. 16916, Exh. 4D308, Exh. 4D212, Exh. P1306, Exh. 4D350, Exh. 5D201, Exh. 5D1033, Exh. 5D1004.

⁴⁰³¹ Pavković's Appeal Brief, para. 302; Pavković's Reply Brief, para. 60, referring to Trial Judgement, vol. 3, paras 678, 765.

⁴⁰³² Pavković's Appeal Brief, para. 302. During the appeal hearing, Pavković also pointed out that these orders were confidential (Appeal Hearing, 12 Mar 2013, AT. 322).

⁴⁰³³ Pavković's Appeal Brief, para. 215, referring to Momir Stojanović, 7 Dec 2007, T. 19746-19749, recounting Pavković's promise to protect an Albanian village on the condition that it would not support the KLA. Pavković also asserts that his instruction of 7 May 1999 requiring his subordinates to "ensure complete control of the territory and movement of Šiptar [a term for Albanians] civilians" (Exh. 4D198) was for the purpose of preventing, *inter alia*, theft and arson, and ensuring the Kosovo Albanian civilians' protection (Pavković's Reply Brief, paras 2-5).

effective measures against crimes, based on: (i) an incomprehensible comment made by Milomir Minić, one of the leading civilian members of the Joint Command,⁴⁰³⁴ in a Joint Command meeting;⁴⁰³⁵ and (ii) witness K90's statement that Kosovo Albanians were prevented by the VJ from leaving.⁴⁰³⁶

1230. Pavković further submits that the Trial Chamber erred in finding that he did not exercise his authority to bring to account those responsible for crimes.⁴⁰³⁷ He maintains that in assessing his ability to do so, it failed to give sufficient regard to: (i) various combat reports of the 3rd Army concerning the number of people brought before the military courts;⁴⁰³⁸ (ii) the difficult working conditions of the courts during wartime;⁴⁰³⁹ and (iii) the fact that after the war against NATO, which lasted only 73 days, the VJ was removed from Kosovo and that thereafter no VJ court personnel were permitted to conduct investigations there.⁴⁰⁴⁰ In addition, Pavković avers that the Trial Chamber failed to establish his knowledge of specific crimes involving VJ forces.⁴⁰⁴¹

1231. Pavković also contends that the Trial Chamber erroneously concluded that he sought to hide the commission of crimes in Kosovo.⁴⁰⁴² In support of this contention, he refers to a request by Lazarević, dated 26 April 1999, for the assignment of a military forensic pathologist to investigate the possible commission of a crime by VJ personnel, to which Pavković responded by assigning a forensic pathologist the next day.⁴⁰⁴³ In addition, Pavković posits that there is no evidence that there were other incidents that were not promptly and properly dealt with.⁴⁰⁴⁴ In his view, the Trial Chamber failed to properly take into account other exculpatory evidence relating to his efforts to

⁴⁰³⁴ See Trial Judgement, vol. 1, paras 302, 1009, 1055, 1059, 1110.

⁴⁰³⁵ Pavković's Reply Brief, para. 60, referring to Exh. P1468, p. 53, where Minić is recorded as stating: "we have to mask our actions with undertakings for civilians". During the appeal hearing, Pavković also underlined that Minić made this statement in a Joint Command meeting held eight months earlier than the relevant events in spring 1999 (Appeal Hearing, 12 Mar 2013, AT. 322).

⁴⁰³⁶ Pavković's Reply Brief, para. 61, referring to Trial Judgement, vol. 3, para. 765, and also pointing out that K90's testimony is contrary to the Prosecution's case that Kosovo Albanians were forced to leave.

⁴⁰³⁷ Pavković's Appeal Brief, para. 189, referring to Trial Judgement, vol. 3, para. 780.

⁴⁰³⁸ Pavković's Appeal Brief, para. 189, referring to Trial Judgement, vol. 1, para. 529. See also Appeal Hearing, 12 Mar 2013, AT. 382, referring to Exh. P953.

⁴⁰³⁹ Pavković's Appeal Brief, para. 190, referring to Trial Judgement, vol. 1, paras 530-531.

⁴⁰⁴⁰ Pavković's Appeal Brief, para. 192; Pavković's Reply Brief, para. 56. Pavković also contends that the Trial Chamber had no standard to evaluate the statistics of crimes committed versus prosecutions conducted during the situation of war (Pavković's Reply Brief, para. 57). Therefore, in Pavković's view, the Trial Chamber's conclusion that he had been aware of the improper functioning of the VJ military justice system was based on an impermissible inference that he "must have known" it due to the discrepancy between the large number of crimes and the small number of prosecutions (*ibid.*, para. 55). See also Pavković's Appeal Brief, para. 196.

⁴⁰⁴¹ Pavković's Appeal Brief, para. 191. See also Pavković's Reply Brief, para. 59, arguing that one must know details about a specific crime in order to be able to urge prosecutors – who are not in his chain of command – to investigate and prosecute that crime. See also Pavković's Appeal Brief, para. 52.

⁴⁰⁴² Pavković's Appeal Brief, para. 193.

⁴⁰⁴³ Pavković's Appeal Brief, paras 193, 195, referring to Trial Judgement, vol. 3, para. 872. Pavković further submits that all efforts by Lazarević to investigate crimes in Kosovo must be attributed to Pavković since he was regularly present in Kosovo during the events in question and, as Lazarević's immediate superior, was in constant contact with him (Pavković's Appeal Brief, para. 193, referring to Trial Judgement, vol. 3, para. 717).

⁴⁰⁴⁴ Pavković's Appeal Brief, para. 195.

limit and investigate the commission of crimes in Kosovo, including his suggestion for the creation of a joint state commission and the dismissal of three brigade commanders.⁴⁰⁴⁵

1232. The Prosecution responds that the Trial Chamber reasonably found that Pavković failed to hold accountable perpetrators of crimes in Kosovo in 1999⁴⁰⁴⁶ and that his orders for compliance with international humanitarian law were not “genuine measures to limit” VJ crimes, but rather attempts to mask his subordinates’ criminal activity.⁴⁰⁴⁷ The Prosecution also avers that orders issued and steps taken by others do not show that Pavković took effective measures.⁴⁰⁴⁸ It further submits that Pavković shows no error in the Trial Chamber’s conclusion that the overall military justice system was not effective in punishing war crimes and that he failed to take action despite his awareness thereof.⁴⁰⁴⁹ The Prosecution also argues that for the purpose of JCE liability, the Trial Chamber was not obliged to find that he was aware of specific crimes committed by VJ members and failed to take action.⁴⁰⁵⁰ In addition, the Prosecution avers that Pavković’s approval in April 1999 of Lazarević’s request for a forensic pathologist to exhume suspected mass graves does not demonstrate that he took steps to investigate crimes.⁴⁰⁵¹ It adds that Pavković’s argument that he dealt “promptly and properly” with all the potential VJ crimes he was aware of ignores the Trial Chamber’s relevant findings.⁴⁰⁵²

b. Analysis

1233. Contrary to Pavković’s contention, the Trial Chamber did not hold that the failure of a commander to ensure the implementation of his orders amounted to the failure to meet his

⁴⁰⁴⁵ Pavković’s Appeal Brief, para. 190, referring to Trial Judgement, vol. 3, para. 777.

⁴⁰⁴⁶ Prosecution’s Response Brief (Pavković), para. 82, referring to Trial Judgement, vol. 3, paras 571-572, 577, 715-766, 776-777, 782. See also Appeal Hearing, 12 Mar 2013, AT. 369-370.

⁴⁰⁴⁷ Prosecution’s Response Brief (Pavković), paras 88, 99, 117-118, referring to Trial Judgement, vol. 3, paras 92, 678, 740, 757, 765, 777. See also Appeal Hearing, 12 Mar 2013, AT. 368-369. See also Prosecution’s Response Brief (Pavković), para. 3, arguing that Exh. 4D198 cited by Pavković rather shows that he furthered the displacement of Kosovo Albanians. See also *ibid.*, para. 97.

⁴⁰⁴⁸ Prosecution’s Response Brief (Pavković), paras 87, 117. The Prosecution also notes that Pavković refers to Exh. 4D305, which was not admitted (*ibid.*, fn. 503).

⁴⁰⁴⁹ Prosecution’s Response Brief (Pavković), para. 83, referring to Trial Judgement, vol. 1, paras 528-530, 569, *ibid.*, vol. 3, paras 763, 765, 782; Pavković’s Closing Brief, paras 314-337, and also contending that Pavković repeats his argument at trial. See also Prosecution’s Response Brief (Pavković), para. 21. The Prosecution also points out that the Trial Chamber found Pavković’s failure to institute effective measures not only during the conflict but also during the following period – *i.e.* his time as Chief of the General Staff in 2000 (Prosecution’s Response Brief (Pavković), para. 85, referring to Trial Judgement, vol. 3, paras 740, 757, 765, 777).

⁴⁰⁵⁰ Prosecution’s Response Brief (Pavković), para. 84, referring to Trial Judgement, vol. 3, paras 715-766, 776-777, 780, 782, and also arguing that the Trial Chamber in any case found that he was aware of various specific crimes perpetrated by VJ members as part of the JCE.

⁴⁰⁵¹ Prosecution’s Response Brief (Pavković), para. 86, referring to Trial Judgement, vol. 2, paras 1334-1335, 1337-1339, *ibid.*, vol. 3, paras 732-733, 872.

⁴⁰⁵² Prosecution’s Response Brief (Pavković), para. 89, referring to Trial Judgement, vol. 3, paras 740, 757, 765, 777, 782, and requesting summary dismissal of this argument.

responsibility as a commander.⁴⁰⁵³ In any event, Pavković was not convicted as a superior under Article 7(3) of the Statute. Rather, he was convicted of committing crimes through participation in a JCE pursuant to Article 7(1) of the Statute. In assessing Pavković's intent and contribution to the common purpose of the JCE, the Trial Chamber considered the ineffectiveness of the measures taken by Pavković to limit his subordinates' criminal activities.⁴⁰⁵⁴ The extent of Pavković's ability and failure to take effective measures against his subordinates' crimes as well as whether he should have done more than ensuring that orders were passed down the chain of command were simply questions of evidence and not determinative of his criminal responsibility under Article 7(1) of the Statute.⁴⁰⁵⁵

1234. Irrespective of whether Pavković's orders requiring adherence to international humanitarian law were properly transmitted down the chain of command, the Trial Chamber found that such orders were not genuine efforts to prevent the commission of crimes in Kosovo both in 1998 and 1999.⁴⁰⁵⁶ In this regard, the Trial Chamber considered evidence showing that Pavković did not take other measures that were at his disposal. In 1999, such measures included disciplinary measures, the formation of a commission into the widespread expulsions, the use of the security service in his unit, and the engagement of forensic experts that were available to him.⁴⁰⁵⁷ The Trial Chamber also considered: (i) Pavković's under-reporting or minimisation of criminal activity of his subordinates and other participants in joint operations in 1998 and 1999; (ii) the evidence of witness K90 that in 1999, some Kosovo Albanians were prevented from leaving in order to provide the VJ with protection from NATO attacks;⁴⁰⁵⁸ and (iii) evidence that during a discussion on the security situation in Kosovo at a meeting of the Joint Command on 13 August 1998, Milomir Minić told those present, including Pavković, that they had to "mask [their] actions with undertakings for civilians".⁴⁰⁵⁹ Contrary to Pavković's assertions,⁴⁰⁶⁰ Minić's statement is sufficiently comprehensible, and the relevance of the evidence of Minić and K90 is apparent as it shows the

⁴⁰⁵³ Pavković's Appeal Brief, para. 194, referring to Trial Judgement, vol. 3, para. 887. The portion of the Trial Judgement cited by Pavković in this regard is the Trial Chamber's reference to the Prosecution's assertion in relation to Lazarević.

⁴⁰⁵⁴ Trial Judgement, vol. 3, para. 777.

⁴⁰⁵⁵ See *Martić* Appeal Judgement, para. 28; *Krajišnik* Appeal Judgement, paras 193, 204. As regards the elements of JCE liability, see *Brđanin* Appeal Judgement, paras 365, 429-430; *Stakić* Appeal Judgement, paras 64-65; *Tadić* Appeal Judgement, paras 227-228.

⁴⁰⁵⁶ Trial Judgement, vol. 3, paras 678, 765, 777.

⁴⁰⁵⁷ Trial Judgement, vol. 3, paras 757, 765. See also *supra*, para. 1225.

⁴⁰⁵⁸ Trial Judgement, vol. 3, para. 765, referring to K 90, 30 Jan 2007, T. 9408. See also Trial Judgement, vol. 3, para. 44, referring to K90, 30 Jan 2007, T. 9408, Momir Stojanović, 6 Dec 2007, T. 19732. K90 and his VJ unit were involved in the "relocation" of Kosovo Albanians, *inter alia*, from nine or ten villages around Đakovica/Gjakova in mid-April 1999, which was conducted in accordance with orders passed down orally within the VJ (Trial Judgement, vol. 2, paras 152-155; *ibid.*, vol. 3, para. 43). In this context K90 also mentioned some Kosovo Albanians who were not removed for the purpose of providing the VJ with protection from the NATO attacks. See also *supra*, sub-sections VI.B.5.(b)(ii)a. and VII.B.3.(a)(iv).

⁴⁰⁵⁹ Trial Judgement, vol. 3, paras 678, 765, referring to Exh. P1468, pp. 52-53, Exh. P949, p. 364.

⁴⁰⁶⁰ Pavković's Reply Brief, paras 60-61.

dishonesty with regard to combat actions adopted against Kosovo Albanians and the disregard for the lives of Kosovo Albanian residents by those coordinating joint operations in Kosovo, including Pavković. In these circumstances, the Appeals Chamber finds that a reasonable trier of fact could have accorded little weight to the evidence allegedly showing Pavković's desire to protect the civilian population and concluded that his orders to adhere to international humanitarian law were not "genuine measures to limit the criminal offending occurring in Kosovo."⁴⁰⁶¹

1235. The Trial Chamber concluded that the military judicial system within the VJ functioned "during the conflict in Kosovo that commenced on 24 March 1999."⁴⁰⁶² However, the Trial Chamber further found that while military prosecutors and courts processed "a number of cases, mainly minor crimes, and those committed against the VJ itself, such as evasion of military service or desertion", the system was not effective in "prosecuting, and punishing those responsible for committing serious crimes against the civilian population."⁴⁰⁶³ The Trial Chamber also considered that this was in part due to VJ members obstructing the judicial process and preventing prosecutions as well as the significant under-reporting of criminal offences to the military judicial system.⁴⁰⁶⁴ The Trial Chamber concluded that Pavković must have been aware of the improper functioning of the VJ military justice system, since there was a discrepancy between the number of reported investigations and prosecutions for serious crimes and the large number of incidents involving serious crimes including forcible displacement⁴⁰⁶⁵ about which Pavković was informed.⁴⁰⁶⁶

⁴⁰⁶¹ Trial Judgement, vol. 3, paras 678, 765, 777. Regarding Exh. 4D198 wherein Pavković instructed his subordinates on 7 May 1999 to "ensure complete control of the territory and movement of Šiptar [a term for Albanians] civilians", the Trial Chamber noted that, although a witness asserted that the instruction was to protect moving civilians, he could not explain why the ethnic distinction was made therein. Rejecting to consider this instruction as aiming at civilian protection, the Trial Chamber reasonably referred to it as one of the various pieces of evidence indicating Pavković's awareness of the significant movements of the Kosovo Albanian population (Trial Judgement, vol. 3, paras 736, 775; Pavković's Reply Brief, paras 2-5).

⁴⁰⁶² Trial Judgement, vol. 1, para. 569.

⁴⁰⁶³ Trial Judgement, vol. 1, para. 569.

⁴⁰⁶⁴ Trial Judgement, vol. 1, para. 569. See also *ibid.*, vol. 1, paras 529, 538-547, 549-568; *ibid.*, vol. 3, paras 728-729, 747-750, 763 (fn. 1947), and references therein.

⁴⁰⁶⁵ Trial Judgement, vol. 3, para. 763. See also Trial Judgement, vol. 2 in its entirety. In light of the evidence considered by the Trial Chamber, including a considerable number of reports within the VJ and various reports on the work of the military justice system, showing that only a small number of serious crimes were reported to the military justice organs (Trial Judgement, vol. 1, paras 529, 539-547; *ibid.*, vol. 3, paras 728-729, 747-750, 763 (fn. 1947), and references therein), the Appeals Chamber is not persuaded by Pavković's argument that a statistical standard is necessary in order to perceive this discrepancy (Pavković's Reply Brief, paras 55, 57). His argument that neither NATO nor any of its members has prosecuted their military personnel who committed crimes in Kosovo by indiscriminately bombing and killing civilians (Pavković's Reply Brief, para. 58) is dismissed as irrelevant.

⁴⁰⁶⁶ Trial Judgement, vol. 3, paras 715-743, 754-757, 775. See also *ibid.*, vol. 1, paras 563-566; *ibid.*, vol. 3, paras 759-762, 764. In relation to the malfunctioning of the military judicial system within the VJ and his knowledge thereof, the Appeals Chamber also dismisses Pavković's argument that it was unreasonable for the Trial Chamber to rely on the evidence of Lakić Đorović, a former military prosecutor, in finding that Pavković was aware of the illegal taking of Kosovo Albanian property by the VJ forces during the period relevant to the Indictment, subsequent illegal distribution thereof, and the involvement of members of the military justice system therein (Pavković's Appeal Brief, paras 264-272; Pavković's Reply Brief, para. 65; *contra* Prosecution's Response Brief (Pavković), paras 107-110). Pavković points to: (i) Đorović's erratic and aggressive behaviour recorded in official reports; and (ii) testimony of numerous witnesses who worked within the military justice system rejecting Đorović's claims (Pavković's Appeal Brief,

1236. Moreover, the Trial Chamber was cognisant of the external factors which made the investigations and prosecutions difficult, including “the short period for the operation of the wartime courts, the difficulties of functioning in a war zone, and limited access to Kosovo following the war.”⁴⁰⁶⁷ However, these external factors did not undermine the Trial Chamber’s conclusion regarding Pavković’s failure to bring to account those responsible for crimes, since it found that Pavković knew that the improper functioning of the VJ military justice system was, in part, caused by VJ members.⁴⁰⁶⁸ By merely relying on his own evaluation of the evidence and

paras 265, 271). However, the Trial Chamber was aware of these factors (Trial Judgement, vol. 1, paras 497-499, 550-551, 553-554, 557-558, 560, 565-567; *ibid.*, vol. 3, paras 759, 761, 764, and references therein) and yet found Đorović credible and determined to rely on his account (Trial Judgement, vol. 1, paras 497-499, 554, 558; *ibid.*, vol. 3, para. 764, and references therein), in light of: (i) the conclusory nature of the official reports referring to what Pavković calls Đorović’s “erratic and aggressive behaviour”; (ii) three positive evaluations of his professional performance, his demeanour in court, and his behaviour in the past – including refusing to execute orders, showing his independent mind and forthright nature; and (iii) the documentary evidence consistent with his account (Trial Judgement, vol. 1, paras 497-499, 539-548, 553-554; *ibid.*, vol. 3, para. 758, and references therein). While Pavković also asserts that Đorović’s account on Pavković’s role in the illegal seizure and distribution of Kosovo Albanian property was based on indirect knowledge (Pavković’s Appeal Brief, para. 266), the Trial Chamber was cognisant of it and yet concluded that “the involvement of over 30 officers of the VJ, including members of the military justice system, and the fact that this was an issue concerning property seized from Kosovo” support his evidence that Pavković was aware of this matter (Trial Judgement, vol. 3, para. 764). Pavković does not demonstrate any error in the Trial Chamber’s finding. Contrary to Pavković’s contention (Pavković’s Appeal Brief, para. 267), given that the lack of precision and minor discrepancies between the evidence of different witnesses do not necessarily discredit their testimony (*Kupreškić et al.* Appeal Judgement, para. 31; *Čelebići* Appeal Judgement, paras 496-498), it was also reasonable for the Trial Chamber to credit Đorović’s evidence despite his reference to Pavković as being the Chief of the VJ General Staff in 1999 (Lakić Đorović, 13 Mar 2007, T. 11644-11645) as well as a minor inconsistency between his testimony and Uzelac’s testimony (Lakić Đorović, 13 Mar 2007, T. 11644; Milan Uzelac, 21 Sep 2007, T. 16163). As Pavković additionally argues (Pavković’s Appeal Brief, para. 272), the “performance report” dated 1 June 1999, in which Đorović describes the work of his office until 31 May 1999, does not report any problems within the military justice system or interference by VJ members (Exh. 4D159). However, considering that the focus of this report is the number and nature of the cases that Đorović’s office dealt with, the fact that he did not raise his concerns in this document does not undermine his evidence on such problems, which is supported by other evidence (Trial Judgement, vol. 1, paras 537-548; *ibid.*, vol. 3, para. 758, and references therein). While the evidence does not support Pavković’s argument that Đorović spent only less than ten days in Priština/Prishtina from 22 May 1999 (Pavković’s Appeal Brief, para. 272), the Trial Chamber was aware that he had been attached to the Priština Military District only from 20 May 1999 to 5 June 1999 and had arrived in Priština on 22 May 1999 (Trial Judgement, vol. 1, paras 496, 562. See also Exh. 3D1137 (under seal), p. 9). However, a reasonable trier of fact could have relied on what Đorović could observe during this period as well as when he was assigned to military judicial organs in Belgrade before and after this period (see Trial Judgement, vol. 1, paras 496). Neither do Exhibits 4D164, 4D174, and P1182 referred to by Pavković (Pavković’s Appeal Brief, paras 268-270; *contra* Prosecution’s Response Brief (Pavković), para. 109) undermine Đorović’s evidence. Exhibits 4D164 and 4D174 showing that records were kept for all seized or confiscated vehicles and that Pavković ordered that the use of vehicles be subject to approval of, *inter alia*, commanders of the Corps do not provide any information as to the lawfulness of the confiscation or seizure. They show that the VJ possessed and used the confiscated or seized goods and to that extent corroborate Đorović’s evidence. Exhibit P1182 showing that, by 10 May 1999, criminal proceedings were conducted against six individuals who seized vehicles neither suggests that the majority of the cases of illegal seizure were prosecuted nor that Pavković ensured such prosecution. Nor does it show whether the vehicles seized by these six individuals were subsequently returned to their owners or illegally distributed.

⁴⁰⁶⁷ Trial Judgement, vol. 1, para. 569. See also *ibid.*, vol. 3, paras 530-531, 536, and references therein. These external factors were alleged by Ojdanić and/or Pavković at trial (see Trial Judgement, vol. 1, para. 527; Ojdanić’s Closing Brief, paras 284-288, 305-306; Pavković’s Closing Brief, para. 322).

⁴⁰⁶⁸ See Trial Judgement, vol. 1, para. 569; *ibid.*, vol. 3, para. 763. The Appeals Chamber also notes the evidence referred to by the Trial Chamber that after the cessation of hostilities in Kosovo on 10 June 1999, it was possible for the VJ to continue to investigate war crimes perpetrated during those hostilities (Trial Judgement, vol. 1, para. 536; *ibid.*, vol. 3, para. 743, and references therein).

repeating his arguments at trial,⁴⁰⁶⁹ Pavković does not demonstrate any error in the Trial Chamber's assessment of the evidence in this regard.

1237. Pavković's argument that the Trial Chamber failed to establish his knowledge of specific crimes involving VJ forces, which would have enabled him to take action, is likewise without merit.⁴⁰⁷⁰ JCE liability does not require, as a constitutive element, the failure of the accused to punish his subordinates' crimes despite his knowledge thereof.⁴⁰⁷¹ Pavković's general knowledge of forcible displacement and other crimes committed by his subordinates or MUP members, his awareness of such crimes or allegations thereof in some of the specific locations alleged in the Indictment,⁴⁰⁷² his failure to intervene to prevent the recurrence of such crimes,⁴⁰⁷³ and his persistence in ordering operations and cooperating with the MUP⁴⁰⁷⁴ were correctly considered by the Trial Chamber as evidence from which his intent and contribution to the JCE could be inferred.⁴⁰⁷⁵

1238. The Trial Chamber was also aware of evidence that, at the end of April 1999, the 3rd Army Command granted Lazarević's request for the engagement of a forensic pathologist to examine bodies found in mass graves in Izbica/Izbicë.⁴⁰⁷⁶ However, the Trial Chamber did not consider this to be a step for an effective investigation, since the forensic pathologist and her team assigned to this matter had two meetings with Pavković and Lazarević with little discussion, and did not submit her report to anyone because no one asked for it.⁴⁰⁷⁷ The Trial Chamber also noted that Pavković's dismissal of three brigade commanders was, in his own words, "mostly because they did not undertake certain measures for protection and camouflage of the units" and that, except for one, none of them was criminally prosecuted.⁴⁰⁷⁸ Pavković has failed to advance any argument substantiating why the Trial Chamber's assessment of the evidence was unreasonable.

1239. The Appeals Chamber also recalls that the Trial Chamber reasonably found that Pavković's abortive suggestion in the meetings of 17 May 1999 to establish a joint state commission to

⁴⁰⁶⁹ Pavković's Closing Brief, paras 314-322.

⁴⁰⁷⁰ Pavković's Appeal Brief, para. 191.

⁴⁰⁷¹ See *Martić* Appeal Judgement, para. 28. Cf. *Kvočka et al.* Appeal Judgement, para. 276.

⁴⁰⁷² Trial Judgement, vol. 3, para. 775. See also *ibid.*, vol. 3, paras 717 (in connection with forcible displacement from Priština/Prishtina town in late March and early April 1999, perpetrated by the VJ, the MUP and associated forces), 732-733 (in connection with killings in Izbica/Izbicë at the end of March 1998, perpetrated by MUP).

⁴⁰⁷³ Trial Judgement, vol. 3, paras 776-777, 780.

⁴⁰⁷⁴ Trial Judgement, vol. 3, paras 774-775, 780.

⁴⁰⁷⁵ See also *Martić* Appeal Judgement, para. 28; *Krajišnik* Appeal Judgement, para. 204.

⁴⁰⁷⁶ Trial Judgement, vol. 2, paras 1334-1336; *ibid.*, vol. 3, para. 732, and references therein.

⁴⁰⁷⁷ Trial Judgement, vol. 2, paras 1337-1339; *ibid.*, vol. 3, para. 733, and references therein, whereby the Trial Chamber also noted that Pavković only told the forensic pathologist and her team to ensure the non-spreading of disease and to take necessary steps for identification and cause of death. Pavković's argument that all efforts made by Lazarević to investigate crimes in Kosovo must be attributed to Pavković (Pavković's Appeal Brief, para. 193) is dismissed as speculative.

⁴⁰⁷⁸ Trial Judgement, vol. 3, para. 725, and references therein.

investigate the situations in Kosovo does not reflect a genuine will to take effective measures against criminal activity there.⁴⁰⁷⁹ By asserting that there were no incidents that he did not deal with “promptly and properly”, Pavković ignores the Trial Chamber’s findings and the supporting evidence concerning his failure to take measures at his disposal against serious crimes committed by the VJ,⁴⁰⁸⁰ his under-reporting of crimes to the Supreme Command Staff,⁴⁰⁸¹ and his awareness of the improper functioning of the VJ military justice system.⁴⁰⁸²

1240. In sum, Pavković has not shown that the Trial Chamber’s findings on his failure to take measures to prevent crimes and to bring to account those responsible for crimes were unreasonable. Consequently, the Appeals Chamber dismisses his fifth ground of appeal and sub-ground 8(a) in their entirety, and his sixth and ninth grounds of appeal in relevant part.

(vi) Alleged errors in requiring that a commander not only punish crimes but also immediately cease combat activities

1241. Pavković submits that the Trial Chamber erred in finding that a commander was required, upon learning about the crimes committed by forces under his control, not only to punish his subordinates but also to immediately cease combat activities. Pavković maintains that the law of superior responsibility does not require the cessation of combat or surrender to the enemy in such circumstances.⁴⁰⁸³ He also argues that the Trial Chamber erroneously found that his failure to meet this requirement in 1998 demonstrated “his membership in a [JCE] and his enthusiasm for it being carried out.”⁴⁰⁸⁴ In addition, he avers that the FRY, as a sovereign state, had to fight an internal insurgency in 1998 and additionally NATO – which used excessive force – in 1999⁴⁰⁸⁵ and that, in intense combat situations, crimes are “virtually inevitable.”⁴⁰⁸⁶ The Prosecution responds that the Trial Chamber did not consider Pavković’s conduct in 1998 in isolation⁴⁰⁸⁷ and that his submission referring to the threat posed by the KLA and NATO in 1999 disregards the circumstances from which the Trial Chamber inferred his intent to participate in the JCE.⁴⁰⁸⁸

⁴⁰⁷⁹ Trial Judgement, vol. 3, para. 740. See *supra*, para. 1225.

⁴⁰⁸⁰ Trial Judgement, vol. 3, paras 757, 765, 777, 780. See also *ibid.*, vol. 3, paras 715-766 and references therein. See also *supra*, paras 1225, 1234.

⁴⁰⁸¹ Trial Judgement, vol. 3, paras 753, 765, 776. See also *ibid.*, vol. 3, paras 571-572, 577, 734-739, 745-752, and references therein. See also *supra*, sub-section VII.E.2.(e)(iv).

⁴⁰⁸² Trial Judgement, vol. 1, para. 569; *ibid.*, vol. 3, paras 763-764. See also *ibid.*, vol. 1, paras 528-568; *ibid.*, vol. 3, paras 759-762. See also *supra*, paras 1235-1236.

⁴⁰⁸³ Pavković’s Appeal Brief, paras 299, 301, Annex D, listing “orders regarding international humanitarian law”.

⁴⁰⁸⁴ Pavković’s Appeal Brief, paras 297-299, referring to Trial Judgement, vol. 3, paras 678, 720.

⁴⁰⁸⁵ Pavković’s Appeal Brief, para. 300. See also *ibid.*, para. 27.

⁴⁰⁸⁶ Pavković’s Appeal Brief, para. 301.

⁴⁰⁸⁷ Prosecution’s Response Brief (Pavković), para. 116, referring to Trial Judgement, vol. 3, paras 774-779. See also Prosecution’s Response Brief (Pavković), para. 117.

⁴⁰⁸⁸ Prosecution’s Response Brief (Pavković), paras 10, 120.

1242. The Appeals Chamber reiterates that the Trial Chamber convicted Pavković as a participant in a JCE, not as a superior pursuant to Article 7(3) of the Statute. For the purpose of JCE liability, Pavković's duty to prevent or punish his subordinates' crimes and his failure to do so was not determinative of his criminal responsibility.⁴⁰⁸⁹ Rather, this factor was part of the circumstantial evidence from which his intent and contribution to the JCE could be inferred.⁴⁰⁹⁰ The Trial Chamber found that "[d]espite his knowledge of criminal activities by VJ and MUP forces in Kosovo [in 1998], Pavković continued to order the VJ to engage in joint operations in Kosovo".⁴⁰⁹¹ In so doing, the Trial Chamber considered the fact that Pavković continued to order the VJ engagement in operations with the MUP without taking genuine measures to prevent or punish their crimes despite his knowledge thereof.⁴⁰⁹² The Trial Chamber also found that, in 1999, he continued to issue orders for the use of the VJ in joint operations with the MUP in Kosovo, despite his awareness of crimes committed by the VJ and the MUP.⁴⁰⁹³ In so finding, the Trial Chamber considered his failure to take effective and genuine measures against the crimes and concluded that he continued to order the use of the VJ in conjunction with the MUP even though "he knew that he could impede and even prevent the objective of forcibly displacing the Kosovo Albanian population if he used his *de jure* and *de facto* authority to bring to account those responsible for crimes or by refusing to order the VJ to operate in Kosovo jointly with the MUP."⁴⁰⁹⁴ The Trial Chamber considered these factors to be indicative of Pavković's *mens rea* as a participant in the JCE.⁴⁰⁹⁵

1243. This also indicates that the Trial Chamber took into account Pavković's continuous orders for VJ engagement despite his awareness of the crimes, in conjunction with his failure to take effective and genuine measures to prevent and punish the crimes. In other words, the Trial Chamber considered that Pavković could have continued combat activities while making genuine efforts to limit criminal offences by the VJ and the MUP, but that he failed to make such efforts. Thus, contrary to Pavković's contention, the Appeals Chamber does not find that the Trial Chamber required him to immediately cease combat activities as such, upon learning that crimes had been committed by forces under his control.

1244. Consequently, the Appeals Chamber dismisses, in relevant part, Pavković's sub-ground 1(A) and his ninth ground of appeal in this respect.

⁴⁰⁸⁹ See *Martić* Appeal Judgement, para. 28. As regards the elements of JCE liability, see *Brdanin* Appeal Judgement, paras 365, 429-430; *Stakić* Appeal Judgement, paras 64-65; *Tadić* Appeal Judgement, paras 227-228.

⁴⁰⁹⁰ See *Martić* Appeal Judgement, para. 28; *Krajišnik* Appeal Judgement, paras 193, 204.

⁴⁰⁹¹ Trial Judgement, vol. 3, para. 678.

⁴⁰⁹² Trial Judgement, vol. 3, para. 678. See also *supra*, sub-section VII.E.2.(e)(v).

⁴⁰⁹³ Trial Judgement, vol. 3, paras 720, 774-775.

⁴⁰⁹⁴ Trial Judgement, vol. 3, para. 780. See also *ibid.*, vol. 3, paras 765, 777.

⁴⁰⁹⁵ Trial Judgement, vol. 3, paras 678, 765, 774-775, 777, 780-781.

(vii) Pavković's orders for the VJ's engagement in 1999 and the absence of his involvement in the concealment of bodies

1245. The Trial Chamber found that in 1999, "Pavković, as Commander of the 3rd Army, ordered VJ units to engage in operations within Kosovo, [...] which in some cases coincided in time and area of implementation with the locations of crimes committed by forces of the VJ."⁴⁰⁹⁶ Based, in part, on his continuous orders to engage the VJ in joint operations with the MUP in March 1999 and thereafter, the Trial Chamber inferred Pavković's intent and significant contribution to the JCE.⁴⁰⁹⁷

1246. Pavković argues that the Trial Chamber erred in considering some of his orders as the 3rd Army Commander as evidence of his intent and his significant contribution to the JCE.⁴⁰⁹⁸ He submits that his order of 23 March 1999 for immediate VJ engagement was not addressed to combat groups within the Priština Corps, but to the Priština Corps Commander, Lazarević, who forwarded it to combat units under his command and directed the actual VJ forces.⁴⁰⁹⁹ Moreover, Pavković contends that in all cases he was a "conduit through whom the orders passed" as he was merely implementing orders and directives from the General Staff.⁴¹⁰⁰ Pavković also submits that the absence of his and the VJ's involvement in the concealment of 700 bodies from Kosovo in 1999 shows that he neither had the criminal intent nor participated in the JCE.⁴¹⁰¹ The Prosecution responds that Pavković was not a middleman, but a dominant military commander in control over the 3rd Army which operated in Kosovo at the time the crimes were perpetrated,⁴¹⁰² and that the fact that mainly MUP members were involved in concealing bodies does not undermine Pavković's criminal intent.⁴¹⁰³

1247. The Appeals Chamber recalls the Trial Chamber's finding that, as the 3rd Army Commander, Pavković exercised *de jure* and *de facto* powers and command authority over all the forces subordinated to him, including the Priština Corps.⁴¹⁰⁴ Lazarević was thus under Pavković's control and directed units within the Priština Corps in accordance with Pavković's orders.⁴¹⁰⁵

⁴⁰⁹⁶ Trial Judgement, vol. 3, para. 698.

⁴⁰⁹⁷ Trial Judgement, vol. 3, paras 774-775, 780, 782.

⁴⁰⁹⁸ Pavković's Appeal Brief, paras 213, 216, referring to Trial Judgement, vol. 3, para. 698.

⁴⁰⁹⁹ Pavković's Appeal Brief, para. 214, referring to Trial Judgement, vol. 3, para. 694, Exh. 5D1293. See also Appeal Hearing, 12 Mar 2013, AT. 299-301.

⁴¹⁰⁰ Pavković's Appeal Brief, para. 214.

⁴¹⁰¹ Pavković's Appeal Brief, paras 217-220, 222-223, referring to Trial Judgement, vol. 2, paras 1263, 1356-1357.

⁴¹⁰² Prosecution's Response Brief (Pavković), para. 97, referring to Trial Judgement, vol. 1, para. 588, *ibid.*, vol. 3, paras 679, 690, 773, 775, 778, 780. See also Appeal Hearing, 12 Mar 2013, AT. 362-364.

⁴¹⁰³ Prosecution's Response Brief (Pavković), para. 98.

⁴¹⁰⁴ Trial Judgement, vol. 3, paras 684, 773. See also *ibid.*, vol. 3, para. 780. Furthermore, the Trial Chamber found that his *de facto* authority was such that through his connection with Milošević, he was able to deploy troops in contravention of orders of his superior, Ojdanić, and that the VJ chain of command functioned "with a degree of flexibility". It also found that these circumstances enabled Pavković to exert major influence on the planning of VJ actions (Trial Judgement, vol. 3, paras 690, 710, 778, and reference therein).

⁴¹⁰⁵ E.g., Trial Judgement, vol. 3, paras 693, 818, 824.

Pavković's order of 23 March 1999, setting out in detail how the units of the 3rd Army must be engaged,⁴¹⁰⁶ and Lazarević's subsequent order to his subordinate units, copying most of the terms of Pavković's order,⁴¹⁰⁷ show Pavković's control over actions of the units within the Priština Corps. Pavković's argument that he was merely passing orders from his superiors to his subordinates ignores all of these findings and does not show any error on the part of the Trial Chamber.⁴¹⁰⁸

1248. Moreover, Pavković has not demonstrated that the fact that the MUP – rather than the VJ or Pavković – was involved in the concealment of bodies from Kosovo in 1999⁴¹⁰⁹ has any impact upon the Trial Chamber's conclusion as to his intent and contribution to the JCE. In this context, the Appeals Chamber recalls that this conclusion is supported by other, overwhelming evidence.⁴¹¹⁰

1249. Pavković has not demonstrated any error in the Trial Chamber's assessment of the above-mentioned evidence. Therefore, the Appeals Chamber dismisses this aspect of his sixth ground of appeal.

(f) Conclusion

1250. In view of the foregoing, Pavković has not demonstrated that the Trial Chamber erred in finding that he had the intent to participate in the JCE to forcibly displace the Kosovo Albanian population, and that he significantly contributed to it. Accordingly, the Appeals Chamber dismisses his submissions in this regard.⁴¹¹¹

⁴¹⁰⁶ Exh. 4D103; Trial Judgement, vol. 3, para. 694.

⁴¹⁰⁷ Exh. 5D1293.

⁴¹⁰⁸ See also *Boškoski and Tarčulovski* Appeal Judgement, para. 167. During the appeal hearing, Pavković argued that his order of 23 March 1999 directed that VJ units were to be immediately engaged against all enemy forces “[a]t the beginning of NATO strikes and in cases of communications break with superior commands and officers” (Exh. 4D103, p. 1, item 1.6) and that this order was never implemented as the communication break never happened (Appeal Hearing, 12 Mar 2013, AT. 299-301, referring to Exh. 4D103, Exh. 5D1293, Exh. 5D708). The Appeals Chamber notes that the Trial Chamber considered the evidence that, during the NATO air campaign, the communication system of the VJ was operational although difficulties were experienced at the levels of commands below the 3rd Army (see Trial Judgement, vol. 1, paras 493-494, references therein). However, Pavković failed to demonstrate why the start of the NATO strikes and the communication break mentioned in this order should be interpreted as cumulative conditions for the immediate VJ engagement. In this regard, the Appeals Chamber notes: (i) the Trial Chamber's findings that the FRY and Serbian forces in fact launched attacks in various locations in Kosovo simultaneously with, or immediately after the start of the NATO bombing (Trial Judgement, vol. 2, paras 1181, 1184, 1189, 1194, 1199, 1206, 1210, 1212, 1214, 1219, 1225, 1232, 1240, 1246, 1250, 1253, 1256, 1259); and (ii) the fact that the 23 March 1999 order, issued in view of the NATO threats “becoming more definite”, pertained to the tasks of VJ units which were to be immediately deployed “[i]n case of bombing of any part of the FRY territory” (Exh. 4D103, p. 1, preamble and item 1).

⁴¹⁰⁹ Trial Judgement, vol. 2, para. 1356.

⁴¹¹⁰ Trial Judgement, vol. 3, paras 773-778, 780-782. See also *supra*, sub-sections VII.E.2.(c) and VII.E.2.(e).

⁴¹¹¹ Pavković's sub-grounds 1(A) in part, 1(C) in part, 1(D), 1(F)-(G), grounds 3 in part, 5, 6 in part, 7, sub-grounds 8(a)-(b), and grounds 9-10.

3. Link between Pavković and the principal perpetrators

(a) Introduction

1251. Based on its findings that Milošević, Šainović, Pavković, and Lukić were among the members of the JCE and that the members of the JCE “used the VJ and MUP forces under their control to carry out the crimes charged in the [...] Indictment”, the Trial Chamber concluded that “the crimes of both the VJ and the MUP [were] imputable to Pavković.”⁴¹¹² In reaching this conclusion, the Trial Chamber also noted that it was not necessary for every individual member of these forces to be a member of the JCE.⁴¹¹³

(b) Submissions of the parties

1252. Pavković submits that the Trial Chamber erred in law and fact when it found that all crimes committed by VJ and MUP forces were imputable to him.⁴¹¹⁴ He submits that such attribution requires a link between the accused and a crime perpetrated by an individual who did not share the intent necessary to become a JCE member.⁴¹¹⁵ When establishing this link, Pavković avers that a Trial Chamber must establish whether a crime perpetrated by such an individual forms part of the common purpose and that one of the relevant considerations in this regard is “whether any member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose”.⁴¹¹⁶ Pavković also asserts that the Trial Chamber failed to examine whether he had closely cooperated with principal perpetrators with respect to each crime for which he was found responsible.⁴¹¹⁷

1253. Pavković further contends that the Trial Chamber failed to sufficiently identify principal perpetrators for the link between them and a member of the JCE to be established.⁴¹¹⁸ According to Pavković, such identification “requires something more than that the perpetrator was wearing a uniform that was similar to uniforms worn by members of the VJ, for instance.”⁴¹¹⁹ He maintains that while such identification must be dealt with on a case-by-case basis, it must be made on an “allegation-by-allegation basis”, not an “Indictment-by-Indictment basis”.⁴¹²⁰ In his view, the Trial

⁴¹¹² Trial Judgement, vol. 3, para. 783.

⁴¹¹³ Trial Judgement, vol. 3, para. 783.

⁴¹¹⁴ Pavković’s Appeal Brief, paras 18-19, 36.

⁴¹¹⁵ Pavković’s Appeal Brief, para. 20.

⁴¹¹⁶ Pavković’s Appeal Brief, para. 20, referring to *Brđanin* Appeal Judgement, paras 410, 412, *Krajišnik* Appeal Judgement, para. 225.

⁴¹¹⁷ Pavković’s Appeal Brief, para. 23.

⁴¹¹⁸ Pavković’s Appeal Brief, paras 35-36, referring to *Brđanin* Appeal Judgement, para. 413.

⁴¹¹⁹ Pavković’s Appeal Brief, para. 36.

⁴¹²⁰ Pavković’s Appeal Brief, para. 36.

Chamber took the latter approach, resulting in a blanket conclusion that all crimes committed by VJ or MUP forces were attributable to him.⁴¹²¹

1254. Pavković also argues that “‘commission’ was inappropriate to describe the offences alleged in the Indictment” since all charged offences were committed by “tools”, *i.e.* by persons who were not found to be members of the JCE.⁴¹²² He contends that in *Brđanin*, the Appeals Chamber was “troubl[ed]” by the issue of convicting an individual for “commission” under Article 7(1) of the Statute, where he or she is found liable pursuant to JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.⁴¹²³ Pavković maintains that the Trial Chamber did not address this issue although he raised it at trial.⁴¹²⁴ He further asserts that in order to incur “responsibility for using a perpetrator as a tool”, a JCE member must have instructed or ordered the perpetrator to commit the crime⁴¹²⁵ and that, when it is proven that an individual committed the offence under orders of a JCE member, other JCE members may be found guilty of “ordering” that crime, but not committing it.⁴¹²⁶ Furthermore, Pavković contends that the lack of evidence that any JCE member actually issued orders to principal perpetrators to expel Kosovo Albanians, or to murder, rape, or destroy religious or other property indicates that the requirements articulated in the *Brđanin* Appeal Judgement for the establishment of the link between their actions and one of the JCE members were not met.⁴¹²⁷

1255. The Prosecution responds that the crimes perpetrated by VJ and MUP forces were properly attributed to Pavković as a member of the JCE, since: (i) he possessed *de facto* and *de jure* authority over the VJ forces; (ii) he was in command of the 3rd Army and ordered military activity, which resulted in the perpetration of crimes; (iii) he shared the intent to displace Kosovo Albanians and closely cooperated with Šainović and Lukić, who exercised leadership and control over the MUP forces; (iv) the crimes of forcible displacement were part of the JCE; and (v) the perpetrators of

⁴¹²¹ Pavković’s Appeal Brief, para. 36.

⁴¹²² Pavković’s Appeal Brief, paras 30, 34. See also Pavković’s Appeal Brief, para. 29, arguing that he was not charged with directly “committing” offences, but was instead charged with “a form of vicarious liability” under JCE.

⁴¹²³ Pavković’s Appeal Brief, paras 31-33, also referring to Separate Opinion of Judge Meron, pp. 167 *et seq.*, appended to *Brđanin* Appeal Judgement.

⁴¹²⁴ Pavković’s Appeal Brief, paras 33-34, 39, referring to Pavković’s Closing Brief, pp. 24-28.

⁴¹²⁵ Pavković’s Appeal Brief, paras 37-38. Pavković also argues that the non-exhaustive list, provided in the *Krajišnik* Appeal Judgement, of factors establishing links between a JCE member and principal perpetrators sets a low standard for what amounts to “using” principal perpetrators. According to him, it remains unclear whether the criteria are objective (relating to the acts of the JCE member) or subjective (relating to the state of mind of the JCE member), Pavković Appeal Brief, paras 21-22, referring to *Krajišnik* Appeal Judgement, para. 226.

⁴¹²⁶ Pavković’s Appeal Brief, para. 38. In this regard, Pavković appears to rely on Judge Meron’s Separate Opinion that if another JCE member “orders” a principal perpetrator to commit a crime, then the other JCE members should not be convicted under a higher form of liability than “ordering” (*i.e.* “committing”) (Pavković Appeal Brief, paras 32, 34, referring to *Prosecutor v. Brđanin* Separate Opinion of Judge Meron, 3 April 2007, p. 167 *et seq.*). Pavković also maintains that he has been erroneously “found guilty of ‘committing’ under a JCE theory all of the offences listed in the [Trial Judgement] against him without a showing that any member of the JCE ‘committed’ any of the offences” (Pavković’s Appeal Brief, para. 41).

these crimes were VJ and MUP forces acting jointly and separately.⁴¹²⁸ The Prosecution also argues that “JCE as a mode of liability under Article 7(1) of the Statute is applicable when the physical perpetrators of the common purpose crimes are not JCE members.”⁴¹²⁹ It also contends that “when the *actus reus* of the JCE crime is perpetrated by a non-JCE member, the essential requirement is to show that the crime formed part of the common purpose”, not that there was close cooperation between that principal perpetrator and a JCE member.⁴¹³⁰ The Prosecution further submits that the Appeals Chamber has recognised several ways in which a link can be established between a principal perpetrator and a member of the JCE and that ordering or instructing a non-JCE member to commit a crime is but one of several possible types of such a link.⁴¹³¹

(c) Analysis

1256. The Appeals Chamber recalls that the essential requirement for holding a JCE member responsible for a crime under the first category of JCE is that the crime formed part of the common purpose of the JCE.⁴¹³² In this respect, the Appeals Chamber recalls that JCE members may be held responsible for crimes carried out by principal perpetrators who were non-JCE members, provided that it has been shown that the crimes can be imputed to at least one JCE member and that the latter – when using the principal perpetrators – acted in accordance with the common objective.⁴¹³³ The existence of this link between the crimes in question and a JCE member is to be assessed on a case-by-case basis.⁴¹³⁴

1257. Pavković’s argument that the Trial Chamber failed to examine whether he closely cooperated with the principal perpetrators for each crime charged⁴¹³⁵ is without merit. Close cooperation between a principal perpetrator and a JCE member, including the accused, is but one of various factors from which a chamber may infer that a crime formed part of the common purpose

⁴¹²⁷ Pavković’s Appeal Brief, paras 37, 40.

⁴¹²⁸ Prosecution’s Response Brief (Pavković), paras 6-7, 12, 14, referring to Trial Judgement, vol. 2, paras 1182-1183, 1185-1186, 1190-1191, 1195-1196, 1200-1203, 1205, 1207-1208, 1210, 1214-1216, 1221-1222, 1227-1231, 1233, 1239, 1242-1243, 1247-1248, 1251-1252, 1254-1255, 1257, 1260-1261, *ibid.*, vol. 3, paras 92, 684, 698, 772-783.

⁴¹²⁹ Prosecution’s Response Brief (Pavković), para. 12, referring to *Krajišnik* Appeal Judgement, paras 225-226, 662-665. *Contra* Pavković’s Reply Brief, para. 8.

⁴¹³⁰ Prosecution’s Response Brief (Pavković), para. 7, referring to Trial Judgement, vol. 1, para. 101, *Brdanin* Appeal Judgement, para. 418.

⁴¹³¹ Prosecution’s Response Brief (Pavković), paras 13-14, referring to *Stakić* Appeal Judgement, para. 69, *Brdanin* Appeal Judgement, para. 410, *Krajišnik* Appeal Judgement, paras 226, 239, 241, *Martić* Appeal Judgement, paras 181, 195.

⁴¹³² *Martić* Appeal Judgement, para. 168; *Brdanin* Appeal Judgement, paras 410, 418.

⁴¹³³ *Krajišnik* Appeal Judgement, para. 225; *Martić* Appeal Judgement, para. 168; *Brdanin* Appeal Judgement, para. 413.

⁴¹³⁴ *Krajišnik* Appeal Judgement, para. 226; *Martić* Appeal Judgement, para. 169; *Brdanin* Appeal Judgement, para. 413. See also *Brdanin* Appeal Judgement, para. 410; *Krajišnik* Appeal Judgement, paras 226, 237-282; *Martić* Appeal Judgement, paras 174-181, 187-189, 205-206, regarding factors indicative of such a link.

⁴¹³⁵ Pavković’s Appeal Brief, paras 20, 23.

and is thus imputable to JCE members.⁴¹³⁶ It is not a prerequisite for imputing the crime to JCE members. Pavković's argument in this regard is based on a misunderstanding of the law and is therefore dismissed.

1258. Moreover, the Appeals Chamber is not persuaded by Pavković's argument that the Trial Chamber erred in concluding that all crimes committed by VJ and MUP forces were attributable to him, without sufficiently identifying principal perpetrators.⁴¹³⁷ The Appeals Chamber observes that the Trial Chamber examined whether there was evidence to sufficiently identify principal perpetrators for the purpose of linking their crimes with one of the JCE members, with respect to each crime site alleged in the Indictment. In order to establish who had perpetrated each individual crime, the Trial Chamber carefully considered various evidence, including: (i) the accounts of Kosovo Albanian victims describing the principal perpetrators at each alleged crime site, either by specifying the affiliation of the principal perpetrators, or by describing their outfits; (ii) the accounts of VJ and MUP members regarding their own involvement in various incidents; and (iii) other documentary and testimonial evidence indicating the presence of certain troops in concerned areas.⁴¹³⁸ The Trial Chamber only imputed crimes to the JCE members at various sites, once it was satisfied that there was sufficient evidence to identify principal perpetrators as members of the VJ and/or the MUP.⁴¹³⁹ Given the prominent positions of JCE members such as Milošević, Šainović, Pavković, and Lukić and their significant power over the VJ and/or the MUP in Kosovo,⁴¹⁴⁰ the Trial Chamber's findings regarding the principal perpetrators at each crime site was sufficiently specific to identify them as persons used by one of the JCE members.⁴¹⁴¹ Consequently, the Trial Chamber properly imputed the crimes of these principal perpetrators to Pavković. The Appeals Chamber notes that the Trial Chamber sufficiently identified principal perpetrators in its examination of each incident charged in the Indictment. Consequently, the identification was indeed

⁴¹³⁶ *Brđanin* Appeal Judgement, para. 410.

⁴¹³⁷ Pavković's Appeal Brief, para. 36.

⁴¹³⁸ See *e.g.*, Trial Judgement, vol. 2, Peć/Peja, paras 8-39, 48; Dečani/Decan, paras 52-69; Đakovica/Gjakova, paras 95-103, 124-125, 129, 130-137, 139-142, 145, 147-148, 150-153, 157, 163, 167-215, 223-238; Prizren, paras 244, 246, 251, 253-254, 256-259, 272-279, 286; Orahovac/Rahovec, paras 295-302, 306-325, 333-335, 339-366, 380-382, 384-385, 389-390, 398-429, 432-433; Suva Reka/Suhareka, paras 466-471, 484-485, 488-489, 492-516, 535, 546-547, 549; Srbica/Skenderaj, paras 559-564, 568-570, 573-600, 623-644, 646-664, 686-687, 690; Kosovska Mitrovica/Mitrovica, paras 696-700, 703-709, 713-714, 716-724, 726-727; Vučitern/Vushtrria, paras 734, 739-761, 763-786, 795-796, 799-780; Priština/Prishtina, paras 805-813, 816-833, 839-873, 874-881, 885, 887-888, 889; Gnjilane/Gjilan, paras 894-895, 899-940, 943-944, 946; Uroševac/Ferizaj, paras 955-957, 960-976, 978-984, 986-1003; M. Kačanik/Kacanik, paras 1009-1010, 1016-1020, 1023, 1025-1050, 1067, 1117-1118, 1139-1146, 1148-1149. See also Trial Judgement, vol. 4, paras 934, 936 (in connection with Trial Judgement, vol. 2, para. 1149).

⁴¹³⁹ Trial Judgement, vol. 3, paras 468, 475, 783, 788, 1132, 1138. When the evidence was insufficient for such identification of principal perpetrators, the Trial Chamber found that their identity was not established and did not link their crimes with any JCE member for the purpose of determining the criminal responsibility of Šainović, Pavković, and Lukić (see *e.g.*, Trial Judgement, vol. 2, paras 121-122, 144, 161, 164, 396, 440-460, 667-668, 692, 710, 730, 798, 943, 945, 1077, 1110-1111, 1117, 1129, 1137, 1140, 1143, 1149 (compare with *ibid.*, vol. 3, paras 475, 788, 1138)).

⁴¹⁴⁰ See Trial Judgement, vol. 3, paras 468, 783, 1132.

⁴¹⁴¹ See *Martić* Appeal Judgement, paras 188, 192, 195, 198, 200, 205; *Krajišnik* Appeal Judgement, paras 239-247, 250-282.

conducted on an “allegation-by-allegation” basis. There was no “blanket conclusion” in this regard by the Trial Chamber. Pavković’s arguments are thus dismissed.

1259. The Appeals Chamber is not persuaded by Pavković’s assertions that in order to incur liability for using a principal perpetrator as a tool, a JCE member must have ordered or instructed the principal perpetrator to commit the crime and that there was no evidence of any such orders.⁴¹⁴² A JCE member’s order or instruction to non-JCE members to commit a crime is not a *sine qua non* prerequisite but one of several factors which may be taken into account by a chamber when determining whether to impute the crime to that JCE member.⁴¹⁴³

1260. There is no merit in Pavković’s arguments that it was inappropriate to charge him with “committing” crimes as those who carried out the *actus reus* of the crimes were not members of the JCE⁴¹⁴⁴ and that, if it were proven that he or other JCE members ordered non-JCE members to commit crimes, “ordering” would have been the appropriate mode of liability.⁴¹⁴⁵ The Appeals Chamber recalls that it has “consistently held that participation in a JCE is a form of ‘commission’ under Article 7(1) of the Statute.”⁴¹⁴⁶ Moreover, the Trial Chamber’s finding regarding the necessary link between non-JCE members and JCE members did not hinge upon whether one or more JCE members issued an explicit order to commit the crimes. Rather, the Trial Chamber considered various other factors to determine the link between the crimes carried out by non-JCE members and JCE members.

1261. The Trial Chamber found that Pavković had *de jure* command authority over the VJ forces in Kosovo, as Commander of the Priština Corps in 1998 and as Commander of the 3rd Army in 1999.⁴¹⁴⁷ With regard to his *de facto* authority, the Trial Chamber further held that he “had a close connection with the ‘Supreme Commander’ [i.e. Milošević], particularly in relation to the activities of the MUP and VJ in Kosovo, which continued from 1998 through 1999.”⁴¹⁴⁸ The Trial Chamber also found that Pavković continued to “[order] the VJ operations in conjunction with the MUP in Kosovo in March 1999 and thereafter” despite his knowledge of previous criminal activity on the part of VJ subordinates and MUP members and his awareness of allegations of widespread

⁴¹⁴² Pavković’s Appeal Brief, paras 37-38, 40.

⁴¹⁴³ See *Krajišnik* Appeal Judgement, para. 226, holding that factors indicative of a link between crimes committed by non-JCE members and members of the JCE include “evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime.”

⁴¹⁴⁴ Pavković’s Appeal Brief, paras 30-31, 34.

⁴¹⁴⁵ Pavković’s Appeal Brief, paras 37-38.

⁴¹⁴⁶ *Krajišnik* Appeal Judgement, para. 662; *Kvočka et al.* Appeal Judgement, paras 79-80; *Tadić* Appeal Judgement, paras 188, 190-191, 226-228. Cf. *Brđanin* Appeal Judgement, fn. 891; *Krajišnik* Appeal Judgement, para. 664.

⁴¹⁴⁷ Trial Judgement, vol. 3, para. 773.

⁴¹⁴⁸ Trial Judgement, vol. 3, para. 773.

criminal activity by VJ and MUP forces.⁴¹⁴⁹ Moreover, the Trial Chamber held that, even though Pavković could have impeded the objective of forcibly displacing the Kosovo Albanian population by using his *de jure* and *de facto* authority, he continued to issue orders for the use of the VJ in Kosovo and “continued to be aware and approving of the co-ordination of VJ and MUP activities through the Joint Command.”⁴¹⁵⁰

1262. The Trial Chamber further held:

Šainović was a political co-ordinator of the VJ and MUP forces in Kosovo. Pavković’s counterpart with respect to the MUP was Lukić who, throughout the NATO air campaign, had both *de jure* and *de facto* responsibility over MUP forces that committed crimes on a massive scale. Pavković, as the Commander of the 3rd Army of the VJ, was in command and control of all the VJ forces in Kosovo throughout the period when the crimes were committed, and issued orders for the operations of the VJ in Kosovo during this time. All three were involved in the co-ordination of VJ and MUP activities. Slobodan Milošević, another member of the joint criminal enterprise, was both the “Supreme Commander” of the VJ and had significant *de facto* powers over the MUP.⁴¹⁵¹

1263. In these circumstances, the Trial Chamber found the necessary link between JCE members, including Pavković, and non-JCE members who carried out the crimes in question and attributed those crimes to JCE members.⁴¹⁵² The absence of proof of JCE members’ explicit orders to commit the crimes did not prevent the Trial Chamber from finding those links. Pavković has not shown that the Trial Chamber’s conclusion in this regard was unreasonable. Consequently, Pavković’s arguments in this respect are dismissed.

(d) Conclusion

1264. For the foregoing reasons, the Appeals Chamber dismisses Pavković’s sub-ground 1(A) to the extent that it concerns the Trial Chamber’s conclusion that crimes carried out by VJ and MUP forces are attributable to the JCE members, including Pavković, pursuant to the first category of JCE.⁴¹⁵³

4. Alleged errors in relation to Pavković’s responsibility under JCE III

(a) Introduction

1265. Having found that Pavković was a member of a JCE, the common purpose of which was to be achieved through the crime of forcible displacement, the Trial Chamber further considered whether the crimes of murder and persecution, including through murder, sexual assault, and the

⁴¹⁴⁹ Trial Judgement, vol. 3, para. 774, and references therein. See also *ibid.*, vol. 3, para. 775, and references therein.

⁴¹⁵⁰ Trial Judgement, vol. 3, para. 780, and references therein.

⁴¹⁵¹ Trial Judgement, vol. 3, para. 783. See also *ibid.*, vol. 3, paras 468, 1132.

⁴¹⁵² Šainović – Trial Judgement, vol. 3, paras 468, 475; Pavković – Trial Judgement, vol. 3, paras 783, 788; Lukić – Trial Judgement, vol. 3, paras 1132, 1138.

⁴¹⁵³ See *infra*, fn. 4218.

destruction of cultural property,⁴¹⁵⁴ were foreseeable to Pavković and whether he willingly took the risk that they would be committed, pursuant to the third category of JCE.⁴¹⁵⁵

1266. With regard to the crimes of murder as a violation of the laws or customs of war and murder and persecution, through murder and sexual assault, as crimes against humanity, the Trial Chamber found that “it was reasonably foreseeable to Pavković that VJ and MUP forces would commit murder and sexual assault against Kosovo Albanians during their forcible displacement.”⁴¹⁵⁶ The Trial Chamber reached this conclusion in view of Pavković’s: (i) intent to forcibly displace part of the Kosovo Albanian population, which he shared with other JCE members; (ii) awareness of “the strong animosity between ethnic Serbs and Kosovo Albanians in Kosovo during 1998 and 1999” and “the context in which the forcible displacement took place”; and (iii) “detailed knowledge of events on the ground in Kosovo in 1998 and 1999”, which put him on notice that “murders and sexual crimes would by [*sic*] committed by the VJ and MUP as a result of the displacements taking place in 1999.”⁴¹⁵⁷

1267. The Trial Chamber found that the following evidence supported this conclusion: (i) the information Pavković received about the incident at Gornje Obrinje/Abria e Epërme in October 1998;⁴¹⁵⁸ (ii) an order issued by Pavković on 4 April 1999 to the Niš Corps to prevent the population from being robbed, raped, or mistreated; (iii) an order issued by Pavković on 6 April 1999 to the Priština Corps and the Niš Corps to improve discipline and prevent misconduct, including looting and murder; (iv) a report of 10 April 1999 issued by Pavković indicating that volunteers who were either convicted or awaiting sentence had been deployed to Kosovo and that seven volunteers had been detained for, *inter alia*, killing and rape; and (v) a report of 25 May 1999 sent by Pavković to the Supreme Command Staff, referring to murder and rape committed by MUP forces against the Kosovo Albanian population.⁴¹⁵⁹

1268. Consequently, the Trial Chamber convicted Pavković⁴¹⁶⁰ of murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity

⁴¹⁵⁴ Although the Trial Chamber refers to “cultural property”, the Appeals Chamber understands the reference to be to “cultural or religious property”.

⁴¹⁵⁵ Trial Judgement, vol. 3, paras 94-95, 781-782, 784.

⁴¹⁵⁶ Trial Judgement, vol. 3, para. 785.

⁴¹⁵⁷ Trial Judgement, vol. 3, para. 785 (internal references omitted).

⁴¹⁵⁸ The Trial Chamber found that Pavković was aware of allegations by the international community and foreign media that a massacre of civilians was committed during the VJ and MUP operations in Gornje Obrinje/Abria e Epërme and that the VJ and the MUP were involved therein. The Trial Chamber also found that he received unconfirmed information that MUP members had executed individuals taken into custody there. See Trial Judgement, vol. 3, paras 675, 774, referring to Exh. 4D403, Exh. P1440, p. 4. See also Trial Judgement, vol. 3, para. 785.

⁴¹⁵⁹ Trial Judgement, vol. 3, para. 785.

⁴¹⁶⁰ Trial Judgement, vol. 3 paras 785, 788.

for the killings at Đakovica/Gjakova town (on the night of 1 April 1999),⁴¹⁶¹ Korenica/Korenicë, and Meja/Mejë (27 April 1999),⁴¹⁶² Bela Crkva/Bellacërka (25 March 1999),⁴¹⁶³ Mala Kruša/Krusha e Vogël (26 March 1999),⁴¹⁶⁴ Suva Reka/Suhareka town (26 March 1999),⁴¹⁶⁵ Izbica/Izbicë (28 March 1999),⁴¹⁶⁶ near Gornja Sudimlja/Studimja e Epërme in relation to the convoy (2 and 3 May 1999),⁴¹⁶⁷ and at Dubrava/Lisnaja (around 25 May 1999).⁴¹⁶⁸ Furthermore, the Trial Chamber convicted Pavković⁴¹⁶⁹ of persecution as a crime against humanity for the sexual assaults committed at Beleg (on or about 29 March 1999)⁴¹⁷⁰ and Ćirez/Qirez (mid-April 1999).⁴¹⁷¹

1269. In relation to the crime of persecution, through destruction of or damage to religious property, the Trial Chamber found that “it was reasonably foreseeable to Pavković that the forces of the FRY and Serbia would commit wanton destruction or damage of Kosovo Albanian religious sites, cultural monuments, and Muslim sacred sites during their forcible displacement of the Kosovo Albanian population.”⁴¹⁷² The Trial Chamber reached this conclusion based on the nature of the conflict involving ethnic divisions, the common purpose of the JCE, which was to be achieved through a campaign of terror and violence against the Kosovo Albanian civilian population, and “Pavković’s detailed knowledge of events on the ground in Kosovo during the conflict”.⁴¹⁷³

1270. Accordingly, the Trial Chamber convicted Pavković⁴¹⁷⁴ of persecution, through destruction of or damage to religious property, as a crime against humanity committed at Celina (28 March 1999),⁴¹⁷⁵ Suva Reka/Suhareka town (during the attack commencing 26 March 1999),⁴¹⁷⁶ Vučitrn/Vushtrria (27 March 1999),⁴¹⁷⁷ and Vlačica/Llashtica (on or about 6 April 1999).⁴¹⁷⁸

1271. Pavković argues that the Trial Chamber erred in law and fact when it found that the commission of the crimes of murder and persecution through murder, sexual assault, and

⁴¹⁶¹ Trial Judgement, vol. 2, para. 1192.

⁴¹⁶² Trial Judgement, vol. 2, para. 1197.

⁴¹⁶³ Trial Judgement, vol. 2, paras 382, 1210-1211.

⁴¹⁶⁴ Trial Judgement, vol. 2, paras 1212-1213.

⁴¹⁶⁵ Trial Judgement, vol. 2, paras 1214-1215, 1217.

⁴¹⁶⁶ Trial Judgement, vol. 2, paras 1221, 1223.

⁴¹⁶⁷ Trial Judgement, vol. 2, paras 1235-1236.

⁴¹⁶⁸ Trial Judgement, vol. 2, paras 1149, 1259, 1262.

⁴¹⁶⁹ Trial Judgement, vol. 3 paras 785, 788.

⁴¹⁷⁰ Trial Judgement, vol. 2, para. 68.

⁴¹⁷¹ Trial Judgement, vol. 2, para. 689.

⁴¹⁷² Trial Judgement, vol. 3, para. 786.

⁴¹⁷³ Trial Judgement, vol. 3, para. 786.

⁴¹⁷⁴ Trial Judgement, vol. 3 paras 786, 788.

⁴¹⁷⁵ Trial Judgement, vol. 2, paras 390, 1209.

⁴¹⁷⁶ Trial Judgement, vol. 2, paras 1214, 1218. The Trial Chamber did not make a specific finding of the date the mosque was destroyed (see Trial Judgement, vol. 2, paras 508-510).

⁴¹⁷⁷ Trial Judgement, vol. 2, paras 746, 1234.

⁴¹⁷⁸ Trial Judgement, vol. 2, paras 937, 946, 1249.

destruction of or damage to religious property, was reasonably foreseeable to him, that he willingly took the risk that these crimes “might” be committed, and that these crimes were imputable to him.⁴¹⁷⁹ The Prosecution responds that Pavković fails to establish an error of law or fact.⁴¹⁸⁰

1272. The Appeals Chamber notes its finding elsewhere in this Judgement that the Trial Chamber erred in holding that for JCE III liability to arise, it has to be foreseeable to the accused that the crime “would be committed”, thus applying a “probability” standard.⁴¹⁸¹ The correct legal standard for the JCE III *mens rea* requires that it was foreseeable to the accused that such a crime might be committed by a member of the JCE or one or more of the persons used by the accused (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose⁴¹⁸² and the accused willingly took the risk that such a crime might occur by joining or continuing to participate in the enterprise.⁴¹⁸³ As a result of this legal error, the Trial Chamber applied a higher degree of foreseeability for the crimes that fell outside the scope of the common purpose than that required under the correct legal standard. The Appeals Chamber will bear this in mind in its assessment of the parties’ submissions.⁴¹⁸⁴

(b) Submissions of the parties

1273. Pavković submits that the Trial Chamber erred in finding that the commission of the crimes of murder, sexual assault, and destruction of or damage to religious property were reasonably foreseeable to him.⁴¹⁸⁵ He argues that since he was one level above Lazarević in the chain of command, his only source of information on crimes would have been reports submitted by Lazarević.⁴¹⁸⁶ He claims that since the Trial Chamber found that there was no evidence that Lazarević knew that VJ forces were involved in killings, sexual assaults, or destruction of or damage to religious and cultural property, Pavković could not have received such reports either.⁴¹⁸⁷ Furthermore, with respect to the incident in Gornje Obrinje/Abria e Epërme in 1998, Pavković argues that, like Lazarević, he had no knowledge that VJ forces had engaged in any crimes at this

⁴¹⁷⁹ Pavković’s Appeal Brief, paras 151, 154-155, referring to Trial Judgement, vol. 3, paras 783-786.

⁴¹⁸⁰ Prosecution’s Response Brief (Pavković), para. 75.

⁴¹⁸¹ Trial Judgement, vol. 1, para. 111, referring to *Brđanin* Decision, para. 5, *Martić* Appeal Judgement, para. 83. See *infra*, sub-section VII.G.2.

⁴¹⁸² *Brđanin* Appeal Judgement, paras, 365, 411.

⁴¹⁸³ *Kvočka et al.* Appeal Judgement, para. 83, referring to *Tadić* Appeal Judgement, paras 204, 220, 228; *Vasiljević* Appeal Judgement, para. 99. See also *Karadžić JCE III* Decision, paras 15, 18, also holding that the possibility a crime be committed must be “sufficiently substantial as to be foreseeable” to an accused.

⁴¹⁸⁴ During the appeal hearing, Pavković argued that, irrespective of whether the Trial Chamber applied the correct legal standard in relation to the *mens rea* for JCE III, he was erroneously convicted pursuant to this mode of liability (Appeal Hearing, 12 Mar 2013, AT. 305-306). In response, the Prosecution argued that, if the Appeals Chamber were to find that the Trial Chamber erred in law in relation to the *mens rea* standard for JCE III liability, this will have no impact on Pavković’s convictions pursuant to JCE III liability (Appeals Hearing, 12 Mar 2013, AT. 356-357).

⁴¹⁸⁵ Pavković’s Appeal Brief, para. 151, referring to Trial Judgement, vol. 3, paras 784-786.

⁴¹⁸⁶ Pavković’s Appeal Brief, para. 156.

⁴¹⁸⁷ Pavković’s Appeal Brief, para. 156, referring to Trial Judgement, vol. 3, para. 933.

location, and that therefore the Trial Chamber erred in concluding that this incident made the commission of crimes, including murder, by “MUP and VJ forces” foreseeable to him.⁴¹⁸⁸

1274. Pavković also submits that the Trial Chamber incorrectly assessed his orders for compliance with international humanitarian law, which demonstrate that he did not willingly take the risk that crimes going beyond the common purpose might be committed.⁴¹⁸⁹ In this respect, he also claims that the Trial Chamber erred in concluding that the measures he took to limit and investigate the commission of crimes in Kosovo were “manifestly insufficient” as there was no evidence that he had detailed knowledge of crimes committed by VJ personnel on a large scale in complete disregard of his orders.⁴¹⁹⁰ According to Pavković, the acts of the MUP members are irrelevant because he had no control over them.⁴¹⁹¹

1275. Pavković further submits that the Trial Chamber erred in law and in fact by failing to establish “the nature of the link between [him] and the principal perpetrators he was ‘using’”.⁴¹⁹² He argues that his role as Commander of the 3rd Army and the fact that he was in command and control of the VJ forces in Kosovo and consequently issued orders are not decisive in establishing such a link, given that he was one command level above Lazarević and one below Ojdanić, and that all three officers commanded and issued orders to VJ forces in Kosovo at different levels.⁴¹⁹³

1276. The Prosecution responds that Pavković had detailed knowledge of the events occurring in Kosovo in 1998 and 1999.⁴¹⁹⁴ It also claims that Pavković was not required to have knowledge of the specific crimes of killings, sexual assaults, and destruction of religious or cultural property⁴¹⁹⁵ and that his orders for compliance with international humanitarian law were fully considered by the

⁴¹⁸⁸ Pavković’s Appeal Brief, paras 209-212, referring to Trial Judgement, vol. 3, paras 785, 815.

⁴¹⁸⁹ Pavković’s Appeal Brief, paras 155, 157 referring to Pavković’s Appeal Brief, Annex D. Pavković also contends that for JCE III liability to arise, it must be established that the crimes were foreseeable to him specifically and that he “willingly took the risk” that the crimes might be committed; “mere negligence” or simply “creat[ing] the conditions” for the crimes does not suffice (Pavković’s Appeal Brief, paras 152-153, referring to *Martić* Appeal Judgement, para. 83, *Tadić* Appeal Judgement, para. 220, *Stakić* Appeal Judgement, para. 65, *Kvočka et al.* Appeal Judgement, para. 86). Pavković refers in particular to his orders for: (i) combat hardware not to be used in sectors where the civilian population was present until it had been evacuated; (ii) the forces to be briefed on the Geneva Conventions and the procedure regarding captured and wounded enemy forces; (iii) commanders to prevent criminal activities; (iv) the prevention of any form of theft or destruction of property; and (v) the individual responsibility of each member of the 3rd Army for the correct application of international humanitarian law (Pavković Appeal Brief, paras 158-162, referring to *Bislim Zyrapi*, 7 Nov 2006, T. 6050, Exh. P1430, Exh. P626; Exh. 5D249, Exh. 4D103, Exh. 4D152, Exh. 4D170).

⁴¹⁹⁰ Pavković’s Appeal Brief, para. 163, referring to Trial Judgement, vol. 3, para. 777.

⁴¹⁹¹ Pavković Appeal Brief, para. 163.

⁴¹⁹² Pavković’s Appeal Brief, para. 154, referring, *inter alia*, to *Brdanin* Appeal Judgement, para. 412, *Krajišnik* Appeal Judgement, para. 225.

⁴¹⁹³ Pavković’s Appeal Brief, para. 154, referring to Trial Judgement, Vol. 3, paras 487, 531, 783. See also Pavković’s Reply Brief, para. 50, arguing that there is no evidence that Pavković circumvented Lazarević to directly command the VJ forces in Kosovo.

⁴¹⁹⁴ Prosecution’s Response Brief (Pavković), paras 69-70, 75, 95, referring to Trial Judgement, vol. 3, paras 715-722, 732-743, 753-757, 776, 785-786.

⁴¹⁹⁵ Prosecution’s Response Brief (Pavković), para. 72.

Trial Chamber.⁴¹⁹⁶ In addition, the Prosecution argues that, unlike Ojdanić and Lazarević, Pavković shared the intent with JCE members and that the command he exercised over the VJ in Kosovo is sufficient to establish the link between him and the principal perpetrators.⁴¹⁹⁷ The Prosecution further argues that the crimes committed by the MUP are imputable to Pavković because Lukić, as a JCE member, had *de jure* and *de facto* responsibility over them.⁴¹⁹⁸

(c) Analysis

1277. The Appeals Chamber will first address Pavković's challenges to the Trial Chamber's factual findings on his knowledge of the commission of earlier crimes which, the Trial Chamber reasoned, in conjunction with other factors made the crimes outside the common purpose foreseeable to him as well as his argument that he did not willingly take the risk that they might be committed. In so doing, the Appeals Chamber will apply the standard of reasonableness.⁴¹⁹⁹ It will then address the impact of the Trial Chamber's legal error,⁴²⁰⁰ if any, on its conclusion that the crimes of murder as a violation of the laws or customs of war and murder and persecution, through murder, sexual assault, and destruction of or damage to religious property, as crimes against humanity were foreseeable to Pavković and that he willingly took the risk that they would be committed pursuant to JCE III.

1278. In finding that Pavković was aware of the commission of crimes, including murder and rape, by members of the VJ during the NATO air campaign, the Trial Chamber relied on evidence that was not limited to reports from Lazarević to the 3rd Army.⁴²⁰¹ Consequently, the Appeals Chamber finds that Pavković's submission that he did not receive information about crimes from sources other than Lazarević's reports is without merit. Moreover, with regard to the incident in Gornje Obrinje/Abria e Epërme in 1998, the Trial Chamber found that Pavković acknowledged in a report that he had received unconfirmed information that MUP forces had executed individuals taken into custody during the incident.⁴²⁰² The evidence considered by the Trial Chamber does not suggest Pavković's knowledge of VJ involvement in crimes at this location.⁴²⁰³ However, the Trial Chamber did not err in relying upon this evidence since it shows that Pavković was aware of the reported involvement of MUP members in killings and is therefore relevant to Pavković's ability to

⁴¹⁹⁶ Prosecution's Response Brief (Pavković), paras 73-74, citing Trial Judgement, vol. 3, paras 771, 777. See also Prosecution's Response Brief (Pavković), para. 99.

⁴¹⁹⁷ Prosecution's Response Brief (Pavković), para. 71.

⁴¹⁹⁸ Prosecution's Response Brief (Pavković), para. 71.

⁴¹⁹⁹ See *supra*, para. 22.

⁴²⁰⁰ See *supra*, para. 1272. See also *infra*, sub-section VII.G.2.

⁴²⁰¹ Trial Judgement, vol. 3, paras 716-757, 775, 785, and references therein. See also *supra*, sub-section VII.E.2.(e)(iii).

⁴²⁰² Trial Judgement, vol. 3, para. 675, referring to Exh. P1440, p. 4. See *supra*, sub-section VII.E.2.(e)(ii).

⁴²⁰³ See *supra*, sub-section VII.E.2.(e)(ii) where the Appeals Chamber assesses the Trial Chamber's relevant findings.

foresee the commission of murder during subsequent joint operations conducted with the MUP forces.

1279. The Appeals Chamber is not persuaded by Pavković's argument that his orders for compliance with international humanitarian law demonstrate that he did not willingly take the risk that the crimes going beyond the common purpose might be committed. The Trial Chamber gave adequate consideration to the evidence that Pavković issued a number of orders in 1998⁴²⁰⁴ and in 1999, including during the NATO air campaign, instructing his subordinates to abide by the rules of international humanitarian law.⁴²⁰⁵ However, having considered other relevant evidence, the Trial Chamber was not convinced that Pavković's orders were genuine efforts to take effective measures to prevent the commission of crimes against Kosovo Albanians.⁴²⁰⁶ The Appeals Chamber recalls that Pavković has not shown any error in this finding.⁴²⁰⁷ Furthermore, in arguing that there is no evidence that he received information that crimes occurred on a mass scale despite his orders to abide by international humanitarian law,⁴²⁰⁸ Pavković ignores the evidence considered by the Trial Chamber in support of its finding that he continued to receive information about the commission of crimes, including murder and rape, in 1998 and 1999.⁴²⁰⁹ Consequently, Pavković has not shown that a reasonable trier of fact could not have concluded that his efforts to limit the commission of crimes in Kosovo, including his orders for adherence to international humanitarian law, were insufficient given the continued perpetration of crimes and his knowledge thereof.⁴²¹⁰

⁴²⁰⁴ Trial Judgement, vol. 3, para. 673, referring to Exh. P1535, p. 2, 4D183, Exh. 4D428, Exh. 4D231 (also admitted as Exh. 5D1172), Exh. 4D201, Exh. P1422, Exh. 4D375, Exh. 6D698 (also admitted as Exh. P1101), Exh. P1430, Exh. P626, Exh. 4D150.

⁴²⁰⁵ Trial Judgement, vol. 3, paras 719, 726-727, referring to Exh. 5D249, p. 5, Exh. 4D103, Exh. 4D409 (erroneously cited as Exh. "4D407"), p. 3, Exh. P1011, pp. 80-81, 90, Exh. P1454, p. 1, Exh. 4D506, paras 60-61, Exh. 4D513, p. 1, Exh. P1766 (also admitted as Exh. 4D350), Exh. 5D1101. In this regard, the Appeals Chamber recalls that the Trial Chamber is not required to refer to every piece of evidence on the trial record and that it is to be presumed that the Trial Chamber evaluated all of the evidence before it (see *Krajišnik* Appeal Judgement, para. 141, referring to *Kvočka et al.* Appeal Judgement, para. 23). The Trial Chamber's awareness of the evidence cited by Pavković is also shown by the fact that the majority of it is explicitly referred to throughout the Trial Judgement. For instance, Exh. P1481, Exh. 5D249, Exh. 4D308, Exh. P2029, Exh. 4D103, Exh. 4D201, Exh. 4D198, Exh. 5D385, Exh. 3D480, Exh. P1477, Exh. P1486 (also admitted as Exh. 3D482 and Exh. 4D216), Exh. P1944, Exh. 4D428, Exh. 4D372, Exh. 4D203, Exh. 5D176, Exh. 5D198, Exh. 5D396, Exh. 5D398, Exh. 5D417, are referred to at Trial Judgement, vol. 1, paras 456, 639, 649, 760, 784, 1014, 1018, 1124, 1168; *ibid.*, vol. 2, paras 642, 810; *ibid.*, vol. 3, paras 261, 486-487, 533, 555, 569, 600, 641, 672-673, 684, 693-694, 697, 704-705, 719, 722, 725, 731, 736, 745, 765, 774-776, 814, 823, 826, 846, 866-867, 888-889, 891. The Appeals Chamber notes that while Pavković also refers to orders issued by Ojdanić and Lazarević, he fails to explain the relevance of such evidence to the Trial Chamber's determination of his individual criminal responsibility (see Pavković's Appeal Brief, Annex D, referring to Exh. 3D712, Exh. 3D711, Exh. P1475 (also admitted as Exh. 3D480), Exh. P1477, Exh. P1481, Exh. P1486 (also admitted as Exh. 3D482 and Exh. 4D216), Exh. 3D488, Exh. P1944, Exh. 4D221, Exh. 4D305, Exh. P2029, Exh. 5D176, Exh. 5D198, Exh. 5D385, Exh. 5D396, Exh. 5D398, Exh. 5D417, Exh. 4D250).

⁴²⁰⁶ Trial Judgement, vol. 3, paras 678, 765. See also *ibid.*, vol. 3, para. 777.

⁴²⁰⁷ See *supra*, sub-section VII.E.2.(e)(v).

⁴²⁰⁸ Pavković's Appeal Brief, para. 163.

⁴²⁰⁹ Trial Judgement, vol. 3, paras 678, 716-743, 753-757, 774-776, 785. See also *supra*, sub-sections VII.E.2.(e)(i) and VII.E.2.(e)(iii).

⁴²¹⁰ Trial Judgement, vol. 3, para. 777.

1280. The Appeals Chamber therefore finds that Pavković has failed to demonstrate any error in the factual findings relied upon by the Trial Chamber in concluding that it was foreseeable to him that the crimes of murder as a violation of the laws or customs of war and murder and persecution, through murder, sexual assault, and destruction of or damage to religious property, as crimes against humanity would be committed by VJ and MUP forces and that he willingly took that risk.⁴²¹¹ Consequently, the Appeals Chamber considers that the legal error as to the degree of foreseeability has no impact on Pavković's conviction. Since a higher degree of foreseeability was met, a lower degree of foreseeability is necessarily satisfied.⁴²¹²

1281. With respect to Pavković's submission that the Trial Chamber erred in failing to establish the nature of the link between him and the principal perpetrators who committed the crimes outside the scope of the common purpose, the Appeals Chamber recalls the requirements for imputing liability pursuant to the third category of JCE:

When the accused, or any other member of the JCE, in order to further the common criminal purpose, uses persons who, in addition to (or instead of) carrying out the *actus reus* of the crimes forming part of the common purpose, commit crimes going beyond that purpose, the accused may be found responsible for such crimes provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.⁴²¹³

1282. The Trial Chamber found that the members of the JCE, including Šainović, Pavković, and Lukić used VJ and MUP forces under their control to carry out the crimes charged in the Indictment.⁴²¹⁴ It further concluded that the same forces committed crimes of murder, sexual assault, and destruction of or damage to religious property, which were reasonably foreseeable to Pavković who was in command and control of all the VJ forces in Kosovo and issued orders for their operations throughout the period when the crimes were committed.⁴²¹⁵ Pavković ordered and supported VJ operations with the MUP, which were coordinated through the Joint Command⁴²¹⁶ and was aware of murder and rape committed by MUP forces against the Kosovo Albanian

⁴²¹¹ Trial Judgement, vol. 3, paras 784-786, 788. In light of the evidence concerning the incident in Gornje Obrinje/Abria e Epërme as discussed above (see *supra*, para. 1278), the Appeals Chamber finds that the Trial Chamber erred in making the legal finding that this incident made the commission of crimes, including murder, by *VJ forces* foreseeable to Pavković (Trial Judgement, vol. 3, para. 785). The Appeals Chamber is of the view that even a lower degree of foreseeability is not met in this regard. However, this error has no impact upon the Trial Chamber's overall conclusion as to the foreseeability of the crimes outside the common purpose, which was based not only on the evidence concerning the incident at Gornje Obrinje/Abria e Epërme but also on other evidence.

⁴²¹² See *supra*, para. 1272; *infra*, sub-section VII.G.2.

⁴²¹³ *Brđanin* Appeal Judgement, para. 411. See also *Martić* Appeal Judgement, paras 168-173, referring, *inter alia*, to *Stakić* Appeal Judgement, paras 69-70, 79-85, 88-98, 104.

⁴²¹⁴ Trial Judgement, vol. 3, para. 783.

⁴²¹⁵ Trial Judgement, vol. 3, paras 783, 785-786.

⁴²¹⁶ Trial Judgement, vol. 3, paras 780, 782.

population.⁴²¹⁷ Contrary to Pavković's assertion, as Ojdanić and Lazarević were found not to be members of the JCE, their relationship to the principal perpetrators need not be considered in this context. Pavković's submission that he had no control over the MUP forces is equally without merit. The Trial Chamber correctly found that the crimes committed by the MUP forces were imputable to him because Lukić, another JCE member, exercised control over these forces in furtherance of the common purpose.⁴²¹⁸

(d) Conclusion

1283. Consequently, Pavković has failed to demonstrate that the Trial Chamber erred in finding him responsible, pursuant to the third category of JCE, for the commission of murder as a violation of the laws or customs of war and murder and persecution, through murder, sexual assault, and destruction of or damage to religious property, as crimes against humanity.⁴²¹⁹ The Appeals Chamber therefore dismisses Pavković's second ground of appeal in its entirety and the relevant part of his sixth ground of appeal.

F. Alleged errors in relation to Lukić's participation in the JCE

1. Introduction

1284. The Trial Chamber found that, throughout his career, Lukić served in various posts within the MUP and that, as of 11 June 1998, he was appointed Head of the MUP Staff for Kosovo and Metohija in Priština/Prishtina.⁴²²⁰

1285. The Trial Chamber convicted Lukić pursuant to Article 7(1) of the Statute of committing, through participation in a JCE, the crimes of deportation, other inhumane acts (forcible transfer), murder, and persecution, through murder and destruction of or damage to religious property, as crimes against humanity under Article 5 of the Statute and murder as a violation of the laws or customs of war under Article 3 of the Statute committed in various locations in Kosovo.⁴²²¹

⁴²¹⁷ Trial Judgement, vol. 3, para. 785, referring to Exh. P1459, paras 3-4.

⁴²¹⁸ Trial Judgement, vol. 3, para. 783. Pavković also argues that the Trial Chamber failed to sufficiently identify principal perpetrators for the link between them and a member of the JCE to be established; that in order to incur "responsibility for using a perpetrator as a tool", a JCE member must have instructed or ordered the perpetrator to commit the crime; and that when an individual committed the crime under orders of a JCE member, other JCE members could be found guilty of "ordering" that crime, not committing it (Pavković's Appeal Brief, paras 30-41). To the extent that his arguments pertain to the link between one of the JCE members, including him, and the principal perpetrators who committed the crimes outside of the scope of the common purpose, the Appeals Chamber dismisses his arguments for the same reasons as set out in the previous section (see *supra*, sub-section VII.E.3.).

⁴²¹⁹ The Trial Chamber's finding on Pavković's responsibility for the murder in Korenica/Korenice and Meja/Mejë is upheld to the extent that it concerns 13 victims. See *supra*, sub-section VI.C.2.

⁴²²⁰ Trial Judgement, vol. 3, paras 936-937, 945.

⁴²²¹ Trial Judgement, vol. 3, paras 1138, 1212.

1286. The Trial Chamber found that, as the Head of the MUP Staff, Lukić shared the intent with other members of the JCE “to forcibly displace the Kosovo Albanian population, both within and without Kosovo, and thereby ensure continued control by the FRY and Serbian authorities over the province”,⁴²²² thus fulfilling the *mens rea* requirement for JCE liability. It further found that Lukić made a significant contribution to the JCE as he was: (i) the *de facto* commander over MUP forces deployed in Kosovo from mid-1998 to mid-1999, including units of the regular police in each Secretariat of the Interior also known as SUP, the Special Police Unit of the MUP also known as the PJP, and the Special Anti-Terrorist Unit of the MUP also known as the SAJ; (ii) the “bridge between the policy-planners in Belgrade, such as Slobodan Milošević, Vlastimir Đorđević, and Vlastimir Đorđević and those on the ground in Kosovo”; and (iii) “directly involved in the planning process and in ensuring that day-to-day operations were conducted by the various MUP forces in accordance with those plans.”⁴²²³

1287. Lukić challenges the Trial Chamber’s findings on the MUP’s structure and the MUP Staff’s authority and role in planning and coordinating joint operations of the MUP and the VJ.⁴²²⁴ He also contests the Trial Chamber’s findings as to his role as Head of the MUP Staff and argues that the Trial Chamber erred in finding that he voluntarily participated in and significantly contributed to the implementation of the common purpose, and that he shared the intent to forcibly displace the Kosovo Albanian population.⁴²²⁵ In addition, Lukić challenges the Trial Chamber’s finding that he was responsible pursuant to JCE III for the crimes of murder as a violation of the laws or customs of war and murder and persecution, through murder and destruction of or damage to religious property, as crimes against humanity.⁴²²⁶ The Prosecution responds that Lukić’s arguments should be dismissed.⁴²²⁷

2. Alleged errors with regard to the MUP structure

1288. The Trial Chamber found that the main organisational units of the MUP were the Public Security Department also known as the RJB, and the State Security Department also known as the RDB.⁴²²⁸ The RJB, headed by Vlastimir Đorđević, was tasked with maintaining public order, while

⁴²²² Trial Judgement, vol. 3, para. 1130. See also *ibid.*, vol. 3, para. 1117.

⁴²²³ Trial Judgement, vol. 3, para. 1131.

⁴²²⁴ *E.g.*, Lukić’s Appeal Brief, paras 271, 284, 296-297, 299, 308, 572, 601, 607.

⁴²²⁵ *E.g.*, Lukić’s Appeal Brief, paras 361, 418, 477-479, 490, 552, 555.

⁴²²⁶ *E.g.*, Lukić’s Appeal Brief, paras 499-503, 703-705, 783, 786, 809.

⁴²²⁷ See, *e.g.*, Prosecution’s Response Brief (Lukić), paras 222-224, 239-242, 281, 285, 437.

⁴²²⁸ Trial Judgement, vol. 1, para. 659.

the RDB, headed by Radomir Marković,⁴²²⁹ was responsible for maintaining state security and responding to threats to the state as an entity.⁴²³⁰

1289. Under the RJB, 33 SUPs operated across the geographical divisions of the territory of Serbia, with seven located in Kosovo.⁴²³¹ Each SUP contained several local Sectors of the Interior (“OUP”s) and police stations.⁴²³² The RJB also had special police units: the “PJP”, entrusted with carrying out “special security tasks” and commanded by Obrad Stevanović,⁴²³³ and the SAJ, “established to fight terrorism, address hostage situations, and handle arrests of large criminal groups”, commanded by Živko Trajković.⁴²³⁴ The RDB had an “elite armed unit”, the Special Operations Unit also known as the JSO, led by Franko Simatović, as its Head, and Milorad Ulemek Luković, as its operational commander.⁴²³⁵

1290. The Trial Chamber found that the MUP Staff played a broad role in directing and controlling the activities of the SUP chiefs and PJP and SAJ commanders, including their subordinate units, as well as in ensuring that they acted in accordance with overarching policies and plans.⁴²³⁶

(a) The Trial Chamber’s evaluation of the evidence of witness Branislav Simonović

1291. In its assessment of the MUP and its structure, the Trial Chamber considered the evidence of Branislav Simonović, an expert witness called by Lukić.⁴²³⁷ The Trial Chamber heard his testimony on 16 and 17 April 2008⁴²³⁸ and admitted his expert report in an oral decision on 21 April 2008.⁴²³⁹ In its decision, the Trial Chamber explained that, although it accepted Simonović’s evidence as expert testimony, it might, during its final deliberations, consider the weight to be given to his evidence in light of, *inter alia*, his qualifications and expertise.⁴²⁴⁰ Subsequently, in the Trial Judgement, the Trial Chamber found that Simonović was not qualified to speak as an expert on the

⁴²²⁹ The Trial Chamber found that Marković assumed this position, replacing Jovica Stanišić, on 5 November 1998 (Trial Judgement, vol. 1, para. 659).

⁴²³⁰ Trial Judgement, vol. 1, para. 659.

⁴²³¹ Trial Judgement, vol. 1, para. 660.

⁴²³² Trial Judgement, vol. 1, para. 661.

⁴²³³ Trial Judgement, vol. 1, para. 666, referring, *inter alia*, to Exh. P1507, Exh. P1508.

⁴²³⁴ Trial Judgement, vol. 1, para. 675. See also *ibid.*, vol. 1, para. 665.

⁴²³⁵ Trial Judgement, vol. 1, para. 686.

⁴²³⁶ Trial Judgement, vol. 3, para. 1012.

⁴²³⁷ Trial Judgement, vol. 1, para. 658.

⁴²³⁸ See Branislav Simonović, 16 Apr 2008, T. 25511-25531; *ibid.*, 17 Apr 2008, T. 25532-25652.

⁴²³⁹ See Procedural Matters, 21 Apr 2008, T. 25754-25756 admitting into evidence Exh. 6D688.

⁴²⁴⁰ Procedural Matters, 21 Apr 2008, T. 25754-25755. See also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Third Order re Disclosure of Expert Reports, 27 September 2007, para. 3(b), requesting the Prosecution to specify whether it: (i) accepted the report; (ii) intended to cross-examine the witness; and (iii) intended to challenge the qualifications of the expert witness or the relevance of all or any parts of the report. The Prosecution responded that it did not accept Simonović’s expert report and requested to cross-examine the expert witness pursuant to Rule 94 *bis* (B)(ii) of the Rules (Prosecution’s Notice Re Expert Witness Simonović, 22 October 2007, para. 2).

organisational structure of the MUP, as his expertise was related to the field of crime and community policing.⁴²⁴¹

1292. Lukić argues that the Trial Chamber erred in rejecting the testimony of Simonović and in relying instead on “lay witnesses” who lacked the necessary knowledge and training as to the functioning of the MUP.⁴²⁴² He submits that, in doing so, the Trial Chamber “infringed upon [his] rights [...], abused its discretion and erred in law in all segments of the Judgement dealing with the organizational aspects and functioning of the Serbian MUP.”⁴²⁴³ Lukić further contends that the Trial Chamber had no reason to reject Simonović’s conclusion that Lukić had no ability to control or punish as it relied on other portions of his testimony and reached its findings in the absence of any other expert evidence on this matter.⁴²⁴⁴

1293. The Prosecution responds that the Trial Chamber was entitled to find Simonović’s testimony unreliable based on his concession that he had no experience studying the MUP Staff prior to this case.⁴²⁴⁵ The Prosecution adds that Lukić fails to point to any specific error in the Trial Chamber’s assessment of Simonović’s testimony.⁴²⁴⁶

1294. In reply, Lukić submits that Simonović’s expertise is demonstrated by his substantive expert report and by “the level of inquiry he made” in order to detail the MUP structure.⁴²⁴⁷ Lukić adds that none of the other witnesses who testified on this issue and were relied upon by the Trial Chamber studied the MUP Staff’s structure and functioning prior to the trial.⁴²⁴⁸

1295. The Appeals Chamber recalls that “it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony.”⁴²⁴⁹ In the instant case, the Trial Chamber noted that, in considering the admission of and weight to be afforded to expert evidence, it had taken into account, *inter alia*, the professional competence of the expert.⁴²⁵⁰ The Trial Chamber found that

⁴²⁴¹ Trial Judgement, vol. 1, para. 658.

⁴²⁴² Lukić’s Appeal Brief, paras 270, 603, referring to Trial Judgement, vol. 1, para. 658.

⁴²⁴³ Lukić’s Appeal Brief, para. 271.

⁴²⁴⁴ Lukić’s Appeal Brief, paras 271-273, referring to Trial Judgement, vol. 3, paras 166, 172, 924, 952.

⁴²⁴⁵ Prosecution’s Response Brief (Lukić), para. 282, referring to Trial Judgement, vol. 1, para. 658, *ibid.*, vol. 3, para. 942, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, paras 9, 21-22, *Martić* Trial Judgement, para. 29, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94bis, 9 November 2006, para. 12, Branislav Simonović, 17 Apr 2008, T. 25628-22569.

⁴²⁴⁶ Prosecution’s Response Brief (Lukić), para. 283. See also *ibid.*, paras 155, 158.

⁴²⁴⁷ Lukić’s Reply Brief, para. 83, referring to Exh. 6D668.

⁴²⁴⁸ Lukić’s Reply Brief, para. 84, referring to Trial Judgement, vol. 1, paras 1028-1029, *ibid.*, vol. 3, paras 974, 1024, Milan Đjaković, 20 May 2008, T. 26514, 26518-26520, 26522, 265[2]7.

⁴²⁴⁹ *Nahimana et al.* Appeal Judgement, para. 199, referring to *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 bis, 9 November 2006, para. 11.

⁴²⁵⁰ Trial Judgement, vol. 1, para. 40.

Simonović's field of expertise was crime and community policing rather than the organisational structure of the MUP.⁴²⁵¹ Indeed, Simonović stated that, before being approached by Lukić's Defence team, he had written no study on the MUP Staff and his prior research work concerned "community policing [...] aspects of traditional policing and police work, [...] the application of crime methods and other fields of criminal law."⁴²⁵² In view of Simonović's statement, it was open to the Trial Chamber to conclude that he lacked the necessary expertise with respect to the MUP's organisational structure. As to Lukić's assertion that the Trial Chamber relied on other portions of Simonović's evidence, the Appeals Chamber recalls that a trial chamber may accept or reject, in whole or in part, the contribution of an expert witness.⁴²⁵³ Therefore, the Trial Chamber's selective reliance on Simonović's evidence, as such, does not constitute an error.

1296. The Appeals Chamber further recalls that the Trial Chamber's findings concerning the MUP's structure and functioning were based on a wide array of testimonial evidence as well as on a significant amount of documentary evidence.⁴²⁵⁴ The Trial Chamber had the advantage of observing the witnesses in person and was better positioned than the Appeals Chamber to assess the credibility and weight to be accorded to their testimony.⁴²⁵⁵ Lukić's assertion that the Trial Chamber erred in relying on evidence other than that provided by Simonović as to the MUP structure and functioning is plainly insufficient to demonstrate an error in the Trial Chamber's evaluation of witness testimony.

1297. For the reasons set out above, the Appeals Chamber dismisses Ground K of Lukić's appeal alleging errors in the Trial Chamber's evaluation of Simonović's evidence.

(b) MUP Staff authority over the MUP forces in Kosovo

1298. The Trial Chamber found that "in the period leading up to and during the NATO air campaign, the MUP Staff played a central role in planning, organising, controlling, and directing the work of the various MUP units active in Kosovo, as well as co-ordinating and planning joint operations with the VJ."⁴²⁵⁶ It further found that the MUP Staff fulfilled the broader role of directing and controlling the activities of the RJB units, in particular the PJP and SAJ units, ensuring that they adhered to the overarching policies and plans, but without replacing their day-to-

⁴²⁵¹ Trial Judgement, vol. 1, para. 658.

⁴²⁵² Branislav Simonović, 17 Apr 2008, T. 25628.

⁴²⁵³ *Strugar* Appeal Judgement, para. 58.

⁴²⁵⁴ Trial Judgement, vol. 1, paras 658-746. Specifically in relation to the MUP Staff see Trial Judgement, vol. 3, paras 947-1015, and references therein.

⁴²⁵⁵ *Haradinaj et al.* Appeal Judgement, para. 201, referring to *Čelebići* Appeal Judgement, paras 485, 496-498, *Furundžija* Appeal Judgement, para. 37. See also *Ntawukulilyayo* Appeal Judgement, para. 21, *Nchamihigo* Appeal Judgement, para. 47, *Muvunyi II* Appeal Judgement, para. 56, *Nahimana et al.* Appeal Judgement, para. 194.

⁴²⁵⁶ Trial Judgement, vol. 3, para. 1012. See also *ibid.*, vol. 3, para. 1051.

day command structures.⁴²⁵⁷ The Trial Chamber attributed the lack of combat orders giving specific deployment tasks to MUP units to the differences between the organisation and structure of the MUP and the VJ.⁴²⁵⁸ It further relied on the minutes of the MUP Staff meeting of 2 December 1998 to conclude that the MUP Staff played a role in the exchange of information between the RJB and the RDB forces.⁴²⁵⁹

(i) Submissions of the parties

1299. Lukić argues that the Trial Chamber erred in finding that the MUP Staff had a central role in planning, organising, and managing the work of the RJB units.⁴²⁶⁰ He adds that this conclusion contradicts the Trial Chamber's further finding that the "chains of reporting and command remained intact."⁴²⁶¹ Lukić submits that the Trial Chamber ignored evidence showing that the MUP Staff was not a "MUP organisational unit" and therefore had no ability to command other MUP units.⁴²⁶² He claims that the Trial Chamber's conclusion that there were no combat orders in evidence due to the differences in organisation and structure between the MUP and the VJ is unreasonable and that in fact no such orders were ever issued.⁴²⁶³ Lukić also points to the testimony of Radojko Stefanović, Chief of the Department for Operations and Training in the Priština Corps in 1999,⁴²⁶⁴ that he personally saw no order from the MUP Staff to the SUPs to plan anti-terrorist actions, and argues that the Trial Chamber's finding that such an order existed contradicts its conclusion elsewhere in the Trial Judgement that the SUPs did not plan specific anti-terrorist actions.⁴²⁶⁵

1300. Lukić also argues that the Trial Chamber erred in concluding that the MUP Staff had a role in the exchange of information between the RJB and RDB forces.⁴²⁶⁶ In support of his submission, Lukić points to the minutes of the MUP Staff meeting of 2 December 1998 recording Ljubinko Cvetić, Head of the Kosovska Mitrovica SUP,⁴²⁶⁷ complaining that he was not receiving information from the RDB Chiefs.⁴²⁶⁸

⁴²⁵⁷ Trial Judgement, vol. 3, para. 1012.

⁴²⁵⁸ Trial Judgement, vol. 3, para. 1051.

⁴²⁵⁹ Trial Judgement, vol. 3, para. 995.

⁴²⁶⁰ Lukić's Appeal Brief, paras 572, 601, referring to Trial Judgement, vol. 3, para. 983.

⁴²⁶¹ Lukić's Appeal Brief, para. 572, referring to Trial Judgement, vol. 3, para. 983.

⁴²⁶² Lukić's Appeal Brief, paras 199, 559, referring to Trial Judgement, vol. 3, paras 951-958, Exh. 6D668, p. 150. Specifically, Lukić asserts that the MUP Staff did not have authority over the PJP deployment to Kosovo, the dismissal or appointment of the SUPs' Chiefs, the allocation or promotion of policemen, or the disciplinary proceedings against or criminal prosecution of policemen. Lukić's Appeal Brief, para. 560, referring to Exh. P1884, Exh. P1886; Exh. P11885, Exh. 6D291, Exh. 6D464, Exh. 6D683, Exh. 6D684, Exh. 6D685, Exh. 6D686, Exh. 6D687, Exh. 6D1339, Exh. 6D1340, Exh. 6D1344, Exh. 6D1348, Exh. 6D1613, paras 41-43.

⁴²⁶³ Lukić's Appeal Brief, para. 607, referring to Trial Judgement, vol. 3, para. 1051.

⁴²⁶⁴ Trial Judgement, vol. 1, paras 512, 1128.

⁴²⁶⁵ Lukić's Appeal Brief, para. 581-582, referring to Trial Judgement, vol. 3, paras 972, 1002-1003.

⁴²⁶⁶ Lukić's Appeal Brief, para. 579. See Trial Judgement, vol. 3, para. 995.

⁴²⁶⁷ Trial Judgement, vol. 1, para. 661.

⁴²⁶⁸ Lukić's Appeal Brief, para. 579, referring to Exh. P3122, p. 4.

1301. In response, the Prosecution argues that Lukić's submissions warrant summary dismissal as they misrepresent either the Trial Chamber's findings⁴²⁶⁹ or the evidence.⁴²⁷⁰ It further contends that Lukić ignores the Trial Chamber's finding that the MUP did issue orders for the execution of its actions during joint operations and that, in the MUP, an officer could be commanded by another officer of a lower rank.⁴²⁷¹ The Prosecution further argues that, contrary to Lukić's submission, the Trial Chamber noted Stefanović's evidence but reasonably preferred that of Lazarević.⁴²⁷² Concerning the MUP Staff's role in the exchange of information, the Prosecution asserts that the evidence referred to by Lukić in fact supports the Trial Chamber's finding.⁴²⁷³

(ii) Analysis

1302. The Appeals Chamber finds no merit in Lukić's contention that the Trial Chamber reached contradictory findings with respect to the MUP Staff's role and the chains of reporting and command within the RJB units.⁴²⁷⁴ The Trial Chamber considered evidence showing that the MUP Staff fulfilled its task in planning, organising, and managing the work of the RJB units "without disturbing the commanding functions of specific unit commanders and their normal chain of reporting."⁴²⁷⁵ It found that the MUP Staff provided "broad directions" to the SUPs and PJP detachments and required information from them to ensure that their activities were in line with the overall policy or plan of the MUP.⁴²⁷⁶ In these circumstances, the Appeals Chamber is satisfied that the Trial Chamber clearly explained the role of the MUP Staff and the role of specific unit commanders without any contradiction in its factual findings.

1303. With regard to Lukić's argument that the Trial Chamber ignored evidence relating to the MUP Staff's position within the MUP and its authority over the RJB units,⁴²⁷⁷ the Appeals Chamber notes that the Trial Chamber considered Lukić's submission that the MUP Staff was not an "organisational unit" of the MUP and that its structure and functioning did not allow it to control the work of the SUPs within the RJB, or issue orders to them.⁴²⁷⁸ Although the Trial Chamber did not specifically cite all the evidence referred to by Lukić on appeal, the Trial Chamber thoroughly

⁴²⁶⁹ Prosecution's Response Brief (Lukić), para. 330, citing Trial Judgement, vol. 3, para. 983.

⁴²⁷⁰ Prosecution's Response Brief (Lukić), paras 333-334, citing Radojko Stefanović, 6 Feb 2008, T. 21770-21771.

⁴²⁷¹ Prosecution's Response Brief (Lukić), paras 361-362, citing Trial Judgement, vol. 1, para. 1029, *ibid.*, vol. 3, para. 1051, and referring to *ibid.*, vol. 3, para. 944.

⁴²⁷² Prosecution's Response Brief (Lukić), para. 332, referring to Trial Judgement, vol. 3, paras 1002-1003.

⁴²⁷³ Prosecution's Response Brief (Lukić), para. 331, referring to Trial Judgement, vol. 3, para. 992.

⁴²⁷⁴ See Lukić's Appeal Brief, para. 572.

⁴²⁷⁵ Trial Judgement, vol. 3, para. 983.

⁴²⁷⁶ Trial Judgement, vol. 3, para. 995.

⁴²⁷⁷ Lukić's Appeal Brief, paras 559-560. See also *ibid.*, 432.

⁴²⁷⁸ Trial Judgement, vol. 3, paras 951-958, extensively citing witness testimony and documentary evidence presented by Lukić on this issue. Further, the Trial Chamber explicitly considered the documentary evidence referred to by Lukić with respect to the deployment of various PJP detachments to Kosovo (Trial Judgement, vol. 1, para. 726, fn. 1874, referring, *inter alia*, to Exh. 6D683, Exh. 6D684, Exh. 6D685, Exh. 6D687).

considered Lukić's argument in this regard. Consequently, Lukić has failed to demonstrate that the Trial Chamber erred in its assessment and his submission in this respect is accordingly dismissed.

1304. Moreover, the Appeals Chamber finds unconvincing Lukić's submission that the Trial Chamber erred in finding that the differences between the organisation and structure of the MUP and the VJ explained the lack of MUP combat orders.⁴²⁷⁹ The Trial Chamber considered the evidence of Duško Adamović, a MUP Staff officer and assistant to Lukić,⁴²⁸⁰ that, during joint operations, the MUP units were provided only with excerpts from maps drawn by the Priština Corps, without any accompanying orders.⁴²⁸¹ It also noted that, according to the evidence of Miroslav Mijatović, Deputy Head of the MUP Staff,⁴²⁸² the MUP Staff did not issue any decisions because the MUP units acted on the basis of the map excerpts provided by the Priština Corps.⁴²⁸³ The Trial Chamber noted, however, that the map extracts provided by the VJ did not contain specific instructions as to how the various actions or attacks were to be carried out by the MUP units in practice. It therefore concluded that the MUP issued orders for the execution of the various actions during joint operations.⁴²⁸⁴ The differences in the organisation and structure of the MUP and the VJ only reinforced the Trial Chamber's conclusion.⁴²⁸⁵ While Lukić provides a different interpretation of the evidence, he has failed to show that the Trial Chamber's conclusion was unreasonable. His submission in this respect is therefore dismissed.⁴²⁸⁶

1305. There is also no merit in Lukić's contention that the Trial Chamber erred in finding that the MUP Staff ordered the SUPs to plan anti-terrorist actions. The Trial Chamber considered Stefanović's statement that he personally did not see such an order.⁴²⁸⁷ However, the Trial Chamber also considered a dispatch authored by Lazarević, dated 9 April 1999, according to which the MUP Staff had issued an order to all the SUPs to "commence planning actions to crush the terrorist groups that remain in their respective zones of responsibility."⁴²⁸⁸ Moreover, the Appeals Chamber observes that Stefanović did not deny the existence of such an order⁴²⁸⁹ and that, in any event,

⁴²⁷⁹ See Lukić's Appeal Brief, para. 607.

⁴²⁸⁰ See Trial Judgement, vol. 1, para. 1026.

⁴²⁸¹ Trial Judgement, vol. 1, para. 1029, referring to Duško Adamović, 9 Apr 2008, T. 24970-24971, 25063. The Appeals Chamber considers the correct reference to be to Duško Adamović, 8 Apr 2008, T. 24969.

⁴²⁸² Trial Judgement, vol. 1, para. 1071.

⁴²⁸³ Trial Judgement, vol. 1, para. 1029, citing Miroslav Mijatović, 13 Feb 2008, T. 22335.

⁴²⁸⁴ Trial Judgement, vol. 1, paras 1029, 1042.

⁴²⁸⁵ Trial Judgement, vol. 3, para. 1051.

⁴²⁸⁶ See also *infra*, sub-section VII.F.3.(c).

⁴²⁸⁷ Trial Judgement, vol. 3, para. 1003, referring to Radojko Stefanović, 6 Feb 2008, T. 21770-21771.

⁴²⁸⁸ Trial Judgement, vol. 3, para. 1002, citing Exh. 5D476, p. 1. See also Vladimir Lazarević, 9 Nov 2007, T. 18006-18007.

⁴²⁸⁹ The relevant part of Stefanović's testimony reads: "No, I personally didn't see such an order, but information came - the information came from MUP in any case. Thousands and thousands of orders and plans were drafted, so you cannot expect one man to do all of that. This has been -- this is something that was done consistently. It's not just one -- a one-off thing. A plan is what should be expected in the coming period, what to be prepared for in order to be able to plan". Radojko Stefanović, 6 Feb 2008, T. 21770-21771.

Lukić has failed to explain why the evidence of Stefanović, who was Chief of the Department for Operations and Training in the Priština Corps, is decisive as to whether such an order was issued by the MUP Staff. Further, the Appeals Chamber can discern no contradiction between the existence of such an order and the Trial Chamber’s conclusion that the SUPs did not have their own work plans on “anti-terrorist” actions.⁴²⁹⁰ The latter finding clearly referred to the SUPs’ routine duties and is not inconsistent with the finding that on this specific occasion they were requested by the MUP Staff to commence planning “anti-terrorist” actions.

1306. In addition, the Appeals Chamber notes that in reaching its conclusion the Trial Chamber also relied on Lukić’s interview with the Prosecution, in which he explained that the main role of the MUP Staff was to coordinate, plan, and direct the MUP units, primarily in the task of “curbing terrorism”.⁴²⁹¹ In light of the evidence considered by the Trial Chamber, Lukić has failed to show any error in the Trial Chamber’s finding that the MUP Staff played a central role in planning, organising, controlling, and directing the work of the various MUP units in Kosovo.⁴²⁹²

1307. Concerning the exchange of information between the RJB and the RDB, the Trial Chamber considered that, during the MUP Staff meeting of 2 December 1998, Ljubinko Cvetić had complained that information was not being properly submitted by the RDB.⁴²⁹³ Lukić later instructed those present at the meeting that he should be notified of problems concerning the exchange of information with a view to finding a solution.⁴²⁹⁴ In light of Lukić’s involvement with this issue, the Appeals Chamber considers that a reasonable trier of fact could have found that the MUP Staff played a role in the exchange of information.⁴²⁹⁵

1308. Therefore, the Appeals Chamber dismisses Lukić’s submissions in relation to the MUP Staff’s authority over the MUP forces in Kosovo.

(c) Presence and activity of paramilitaries in Kosovo

1309. In its assessment of the forces participating in the armed conflict in Kosovo, the Trial Chamber considered evidence regarding the organs of the MUP, including the PJP, SAJ, and JSO forces⁴²⁹⁶ as well as paramilitaries in Kosovo.⁴²⁹⁷ With regard to the latter, the Trial Chamber considered evidence concerning the presence and activity in Kosovo during the Indictment period of several paramilitary groups, such as the “Scorpions”, “Legija”, “Arkan’s Tigers”, and “Wolves

⁴²⁹⁰ See Trial Judgement, vol. 3, paras 971-972.

⁴²⁹¹ Trial Judgement, vol. 3, para. 1013, citing Exh. P948, p. 41.

⁴²⁹² See Trial Judgement, vol. 3, para. 1012.

⁴²⁹³ Trial Judgement, vol. 3, para. 992.

⁴²⁹⁴ Trial Judgement, vol. 3, para. 992, citing Exh. P3122, pp. 4, 6.

⁴²⁹⁵ See Trial Judgement, vol. 3, para. 995.

of the Drina”.⁴²⁹⁸ The Trial Chamber further considered evidence pertaining to several meetings and dispatches in which paramilitary groups were discussed.⁴²⁹⁹ The Trial Chamber also considered evidence showing that SAJ forces were deployed in Kosovo and that the “Scorpions” were incorporated into the SAJ.⁴³⁰⁰

(i) Submissions of the parties

1310. Lukić challenges the Trial Chamber’s assessment of the evidence concerning paramilitary groups, claiming that these groups were not under MUP authority and that, in any event, they were not present in Kosovo.⁴³⁰¹ He asserts that, while Aleksandar Vasiljević, former Deputy Head of the VJ Security Administration,⁴³⁰² testified that a group named “Legija” operated in Kosovo, the investigation conducted by Sergej Perović, the former chief of the security organ of the 52nd Artillery Rocket Brigade,⁴³⁰³ confirmed that these allegations were untrue.⁴³⁰⁴ Lukić submits that therefore Vasiljević’s testimony is unreliable.⁴³⁰⁵ He also argues that, according to the evidence presented at trial, the group known as “Arkan Tigers” was dissolved in 1995 and never operated in Kosovo.⁴³⁰⁶ Likewise, Lukić maintains that the evidence showed that the group called the “Wolves of the Drina” did not operate in Kosovo⁴³⁰⁷ and claims that the Trial Chamber erred in relying on

⁴²⁹⁶ Trial Judgement, vol. 1, paras 658-736.

⁴²⁹⁷ Trial Judgement, vol. 1, paras 737-745.

⁴²⁹⁸ Trial Judgement, vol. 1, paras 738-740.

⁴²⁹⁹ Trial Judgement, vol. 1, paras 741-745.

⁴³⁰⁰ Trial Judgement, vol. 1, paras 730-731.

⁴³⁰¹ Lukić’s Appeal Brief, paras 131, 133, referring to Ljubinko Cvetić, 7 Dec 2006, T. 8062-8065, Miroslav Mijatović, 13 Feb 2008, 22275, Ljubivoje Joksić, 8 Feb 2008, T. 21952, Dragan Milenković, 21 Feb 2008, T. 22945-22946, Petar Damjanać, 6 Mar 2008, T. 23760, Bozidar Filić, 10 Mar 2008, T. 23947, Milos Vojnović, 12 Mar 2008, T. 24154, Vladimie Ilić, 17 Mar 2008 T. 24327. See also Lukić’s Appeal Brief, paras 104-107, 110-122. While Lukić submits that there is no evidence that there were any paramilitaries/volunteers within the MUP, he fails to identify the specific factual finding he seeks to challenge. His argument in this regard is thus dismissed.

⁴³⁰² Trial Judgement, vol. 1, para. 439.

⁴³⁰³ Trial Judgement, vol. 1, para. 620.

⁴³⁰⁴ Lukić’s Appeal Brief, para. 106, referring to Aleksander Vasiljević, 24 Jan 2007, T. 9034-9035, Sergej Perović, 25 Jan 2008, T. 21083-21084, Momir Stojanović, 7 Dec 2007, T. 19833-34.

⁴³⁰⁵ Lukić’s Appeal Brief, para. 106. Lukić further contests the Trial Chamber’s finding that Vasiljević, Gajić, and Farkaš toured the area of Kosovo together (Lukić’s Appeal Brief, paras 107, 109, referring to Trial Judgement, vol. 1, para. 738, *ibid.*, vol. 3, para. 572). However, Lukić fails to clarify how this allegation, if accepted, would have any impact on his conviction. Consequently, his argument is dismissed.

⁴³⁰⁶ Lukić’s Appeal Brief, para. 110-112. Lukić further argues that since Farkaš, Head of the VJ Security Administration (See Trial Judgement, vol. 1, para. 551), reported on “problems with paramilitaries in Kosovo, including rapes, looting, and theft” without mentioning any murders, he did not report on the “Scorpions” or on the “Arkan’s Tigers” (Lukić’s Appeal Brief, para. 120; *contra* Prosecution’s Response Brief (Lukić), paras 114, 117). The Appeals Chamber finds that Lukić’s argument in this regard is speculative and, in any event, fails to articulate an error in the Trial Chamber’s finding that members of “Arkan’s Tigers” and the “Scorpions” were present in Kosovo during the Indictment period. His submission is thus dismissed.

⁴³⁰⁷ Lukić’s Appeal Brief, paras 113-119, referring to Geza Farkaš, 25 Sep 2007, T. 16345, Vladimir Lazarević, 13 Nov 2007, T. 18189, Momir Stojanović, 7 Dec 2007, T. 19832, Vladimie Ilić, 17 Mar 2008, T. 24334-24336, Ljubivoje Joksić, 8 Feb 2008, T. 21954. Lukić further relies on Filić’s testimony, but fails to correctly refer to his testimony (Lukić’s Appeal Brief, para. 117, fn. 162).

the “incorrect and unreliable” evidence of Branko Gajić regarding the presence of the “Wolves of the Drina” in Kosovo.⁴³⁰⁸

1311. Lukić further argues that the Trial Chamber erred in finding that the group known as the “Scorpions” was incorporated into the SAJ and sent to Kosovo.⁴³⁰⁹ In this respect, he refers to the testimony of Goran Stoparić, a former member of the “Scorpions”,⁴³¹⁰ who stated that he was in Kosovo as a member of the SAJ and not the “Scorpions”.⁴³¹¹ Moreover, Lukić contends that the Trial Chamber erred in relying on Vasiljević’s evidence that the “Scorpions” were mentioned at the meeting of 17 May 1999, asserting that “the term ‘Scorpions’ meant nothing in 1999”.⁴³¹²

1312. The Prosecution responds that the Trial Chamber properly relied upon the evidence of Vasiljević and Gajić.⁴³¹³ With respect to Lukić’s challenges to Vasiljević’s testimony, the Prosecution submits that Lukić merely attempts to substitute his own evaluation of the evidence for that of the Trial Chamber and thus his challenges should be summarily dismissed.⁴³¹⁴ Concerning Gajić’s evidence on the presence of the “Wolves of the Drina” in Kosovo, the Prosecution responds that Lukić merely repeats his trial submissions without articulating any error.⁴³¹⁵ Further, the Prosecution contends that the Trial Chamber considered Lukić’s argument that the “Scorpions” as a unit ceased to exist in 1998-1999 and reasonably found that former members of that unit were incorporated into the SAJ.⁴³¹⁶

1313. Lukić replies that Vasiljević’s evidence should not be relied upon in light of his “propensity [...] to lie under oath against [...] Lukić”⁴³¹⁷ and his own statement that his job “in the VJ Security Service was not to follow the MUP in Kosovo, but rather the VJ.”⁴³¹⁸

⁴³⁰⁸ Lukić’s Appeal Brief, para. 119.

⁴³⁰⁹ Lukić’s Appeal Brief, paras 254-255, referring to Trial Judgement, vol. 1, paras 730-731.

⁴³¹⁰ See Trial Judgement, vol. 1, para. 677.

⁴³¹¹ Lukić’s Appeal Brief, paras 104-105, 255, referring to Goran Stoparić, 12 July 2006, T. 698-699 705, 726, *ibid.*, 13 July 2006, T. 771, Exh. P2224, para. 80.

⁴³¹² Lukić’s Appeal Brief, para. 121, referring to Geza Farkaš, 25 Sep 2007, T. 16342-43. In support of his submission, Lukić also refers to “the diary kept by Vasiljević” and to a “document prepared by VJ Security Administration”, arguing that the “the paramilitary group of Slobodan Medić-Boca” was discussed, but without referring to the group as “Scorpions”. Lukić’s Appeal Brief, paras 121-122, referring to Exh. P2592, Exh. 3D1055.

⁴³¹³ Prosecution’s Response Brief (Lukić), paras 107-112.

⁴³¹⁴ Prosecution’s Response Brief (Lukić), paras 108-111.

⁴³¹⁵ Prosecution’s Response Brief (Lukić), para. 112.

⁴³¹⁶ Prosecution’s Response Brief (Lukić), para. 231, referring to Trial Judgement, vol. 1, paras 677, 687, 737.

⁴³¹⁷ Lukić’s Reply Brief, paras 34-35, referring to Aleksandar Vasiljević, 23 Jan 2007, T. 8982, *ibid.*, 24 Jan 2007, T. 9066, Exh. 6D170, p. 4. Lukić further argues that Vasiljević was “shown to have lied and/or misrepresented what VJ intelligence organs reported to him”. See also Lukić’s Reply Brief, para. 36.

⁴³¹⁸ Lukić’s Reply Brief, para. 36.

(ii) Analysis

1314. Lukić's assertion that Perović's evidence contradicts that of Vasiljević concerning the presence of a group called "Legija", commanded by Kovačević, a member of the MUP, in the area of Đakovica/Gjakova is without merit. The Appeals Chamber notes that when asked about the context in which the information about "Legija" was provided to him, Vasiljević noted that "such information was also provided by other security organs, not only Perović".⁴³¹⁹ Consequently, Lukić's reference to evidence purportedly indicating that this information was not given to Vasiljević by Perović does not demonstrate an error in the Trial Chamber's reliance on Vasiljević's testimony in this regard. His argument is therefore dismissed.

1315. With regard to Lukić's assertions that "Arkan's Tigers" did not exist as a group and did not operate in Kosovo, the Appeals Chamber recalls that the Trial Chamber relied on Gajić's testimony that the "30 members of the group known as Arkan's Tigers were sent to Kosovo on the authority of the then RDB Head Rade Marković."⁴³²⁰ In addition, the Trial Chamber relied on the evidence of Stoparić and Vasiljević that "members of Arkan's Tigers" were incorporated into the JSO⁴³²¹ and that the JSO commander "was himself a former member of Arkan's Tigers".⁴³²² The Appeals Chamber does not discern a contradiction between Lukić's assertion that "Arkan's Tigers" did not operate as a unit in Kosovo and the Trial Chamber's finding that individual members of "Arkan's Tigers" were integrated into the JSO. In these circumstances, Lukić has failed to demonstrate an error in the Trial Chamber's reliance on the evidence in this regard. Moreover, given the evidence showing that members of "Arkan's Tigers" were present in Kosovo,⁴³²³ Lukić's references to inconclusive evidence such as Momir Stojanović's testimony that he did not obtain information that a formation called "Arkan's Tigers" was active in Kosovo⁴³²⁴ and Milivoje Mihajlović's testimony that journalists based in Priština did not report on "Arkan's Tigers",⁴³²⁵ are insufficient to demonstrate that the Trial Chamber erred in its assessment of the evidence.

1316. The Appeals Chamber observes that the group called the "Wolves of the Drina" is not mentioned in the Trial Chamber's assessment of the evidence or in its findings with regard to the

⁴³¹⁹ See Aleksandar Vasiljević, 19 Jan 2007, T. 8699-8700.

⁴³²⁰ Trial Judgement, vol. 1, para. 739, referring to Branko Gajić, 11 Sep 2007, T. 15379.

⁴³²¹ See Trial Judgement, vol. 1, para. 739, referring to Exh. P2224, para. 10, Exh. P2600, para. 42. See also Trial Judgement, vol. 1, para. 686.

⁴³²² Trial Judgement, vol. 1, para. 739, referring to Exh. P2600, paras 33, 40-42. See also Trial Judgement, vol. 1, paras 686-687.

⁴³²³ Trial Judgement, vol. 1, para. 687, referring to Exh. P2600, paras 40-42. In addition, the Trial Chamber also received evidence that "Arkan's men" were present at the Grand Hotel, where the "information centre" of the 3rd Army and the Priština Corps Command was then located (see Trial Judgement, vol. 1, para. 600, referring to Adnan Merovci, 16 Jan 2007, T. 8433-8434).

⁴³²⁴ Lukić's Appeal Brief, paras 111. See also, Lukić's Closing Brief, para. 346.

⁴³²⁵ Lukić's Appeal Brief, para. 112.

underlying crimes and that none of the crimes for which Lukić was convicted were attributed to this paramilitary group.⁴³²⁶ Therefore, Lukić’s submissions with regard to the presence of the “Wolves of the Drina” in Kosovo are incapable of disturbing any of his convictions and are summarily dismissed.⁴³²⁷

1317. The Appeals Chamber notes that the Trial Chamber found that, in early 1999, the “Scorpions”, which were formerly associated with the RDB,⁴³²⁸ were incorporated into the SAJ⁴³²⁹ and that following the killing of “at least a dozen civilians” by former members of the “Scorpions” in Podujevo/Podujeva,⁴³³⁰ their unit was withdrawn from Kosovo.⁴³³¹ It further found that, nonetheless, approximately 15 days after the Podujevo/Podujeva incident, individual former members of the “Scorpions” who were involved in the killings were redeployed in Kosovo.⁴³³² Although Lukić contends that the Trial Chamber erroneously concluded that the “Scorpions” were incorporated into the SAJ and sent to Kosovo,⁴³³³ he accepts that individual former members of the “Scorpions” were reservists of the SAJ⁴³³⁴ and that Stoparić and other former members of the “Scorpions” were in Kosovo as members of the SAJ and not of the “Scorpions”.⁴³³⁵ Lukić also suggests that the perpetrators of the Podujevo/Podujeva killing were SAJ reservists.⁴³³⁶ In light of

⁴³²⁶ See Trial Judgement, vol. 2.

⁴³²⁷ See Lukić’s Appeal Brief, paras 113-119.

⁴³²⁸ Trial Judgement, vol. 1, paras 677.

⁴³²⁹ Trial Judgement, vol. 1, paras 677, 687, 731, 737.

⁴³³⁰ Trial Judgement, vol. 2, para. 1173.

⁴³³¹ Trial Judgement, vol. 1, paras 731, 741.

⁴³³² Trial Judgement, vol. 1, para. 731.

⁴³³³ Lukić’s Appeal Brief, para. 255. Lukić also challenges the Trial Chamber’s finding that SAJ forces were deployed in Kosovo, asserting that the reason that the Trial Chamber relied on a document from the 3rd Army, and not on a document by the MUP Staff, is that there is no MUP document in support of this finding (Lukić’s Appeal Brief, para. 254). In reaching this finding, the Trial Chamber relied not only on a document prepared by the 3rd Army Forward Command Post on 2 October 1998, but also on Joksić’s testimony that SAJ personnel were stationed in a privately owned company in Kosovo Polje/Fushë Kosova (Trial Judgement, vol. 1, para. 730). Lukić’s submission lacks explanation as to why the Trial Chamber erred in relying on this evidence. His submission is thus dismissed.

⁴³³⁴ Lukić’s Appeal Brief, para. 104.

⁴³³⁵ Lukić’s Appeal Brief, para. 105.

⁴³³⁶ Lukić’s Appeal Brief, para. 256. In this context, Lukić enumerates five “crucial facts” which the Trial Chamber allegedly ignored: (a) that the perpetrators of the Podujevo killing – albeit being SAJ reservists – carried out these killings in the absence of any orders to do so by police superiors; (b) “police superiors were very irate at the Podujevo shooting” and thus the “Scorpions” were sent out of Kosovo; (c) MUP personnel offered assistance to victims of the Podujevo incident and conducted an investigation; (d) the perpetrators of the Podujevo killings were arrested and tried; and (e) there is no evidence the crimes were committed by the “SAJ reserve component made up of former ‘Scorpions’” after their redeployment in Kosovo (Lukić’s Appeal Brief, para. 256; *contra* Prosecution’s Response Brief (Lukić), para. 116). He further contests the Trial Chamber’s finding that the Podujevo/Podujeva incident was discussed in the meeting of 16 May 1999, arguing that since it was “immediately processed (criminal report was filed by the MUP, all members of the reserve forces were withdrawn etc.)”, there was no reason to discuss it any further (Lukić’s Appeal Brief, paras 124-125). The Appeals Chamber notes that none of these assertions contradict the Trial Chamber’s finding that former members of the Scorpions were incorporated into the SAJ. As Lukić fails to point to a specific finding that he challenges, the Appeals Chamber dismisses his argument.

the above, the Appeals Chamber finds no inconsistency between Lukić's submissions and the Trial Chamber's findings. Lukić thus has failed to point to an error on the part of the Trial Chamber.⁴³³⁷

(d) Summarily dismissed submissions

1318. The Appeals Chamber notes that a number of Lukić's submissions, challenging the Trial Chamber's findings in relation to the MUP Staff's structure and authority are clearly irrelevant,⁴³³⁸ misrepresent the challenged factual findings,⁴³³⁹ fail to articulate an error therein,⁴³⁴⁰ or fail to

⁴³³⁷ Similarly, Lukić's contention that the Trial Chamber erred in relying on Vasiljević's evidence that at the meeting of 17 May 1999 information about the "Scorpions" was discussed because the Scorpions did not exist as a unit at that time (Lukić's Appeal Brief, para. 121) is unpersuasive. The Appeals Chamber finds that a reasonable trier of fact could have relied on Vasiljević's evidence, even if the official formation of the "Scorpions" was no longer in place at the time. Lukić also argues that the Trial Chamber "misquoted" Vasiljević in relation to "the meeting held with Milošević on 17.5.1999" and adds that Vasiljević testified that "Pavković reported the number of unidentified bodies in Kosovo" on the meeting of 16 May 1999 and not that of 17 May 1999 (Lukić's Appeal Brief, para. 126, referring to Trial Judgement, vol. 3, para. 576). Lukić also submits that Vasiljević testified that Milošević, and not Lukić, rejected a suggestion raised by Ojdanić and Pavković to establish "a 'joint state commission' to examine what was occurring in Kosovo" (Lukić's Appeal Brief, para. 127, referring to Trial Judgement, vol. 3, para. 741 (the Appeals Chamber understands that the correct reference should be to para. 739). With regard to these submissions, the Appeals Chamber finds that Lukić is challenging findings on which his conviction does not rely. These submissions are hence dismissed.

⁴³³⁸ Lukić's Appeal Brief, paras 407-415, referring to Trial Judgement, vol. 3, paras 542-544, 557, 575-576, 579-583, 585, 591-594 (Lukić challenges findings on the presence and activity of paramilitaries in Kosovo that were made in relation to the criminal responsibility of other accused in the *Milutinović et al.* case, arguing that the Trial Chamber "misquoted" the evidence and, in particular, Gajić's evidence. These submissions are dismissed as they do not challenge findings on which Lukić's conviction relies). See also, Lukić's Appeal Brief, para. 416, referring to Trial Judgement, vol. 3, paras 609, 611, 615-616, 623-626, 718-719, 735, 765-766, 772-775, 778-786, 788, 808, 815, 838, 848, 853-856, 859, 885, 922-925, 928, 932.

⁴³³⁹ Lukić's Appeal Brief, paras 248-249 (submitting that the Trial Chamber "failed to comprehend the evidence and organizational structure" of the Serbian authorities, erred in "finding that the influence of Milosevic [*sic*] over the organs/institutions was based exclusively on his charisma" (Lukić's Appeal Brief, para. 248), and misperceived the powers of Milosevic. In these submissions, Lukić misrepresents the Trial Judgement (see Trial Judgement, vol. 1, paras 284-285) and fails to show the relevance of the challenged findings to his conviction). Lukić's Appeal Brief, paras 132, 134, 454 (contesting the Trial Chamber's reliance on Cvetić's evidence with respect to the meeting of 17 March 1999, and asserting that the Trial Chamber ignored evidence given by Cvetić during his cross-examination and by Vojnović and Gavrančić, "who stated that there was no meeting on that day and that they never heard Lukić mention volunteers." Lukić misrepresents the Trial Judgement as the Trial Chamber explicitly considered this evidence (Trial Judgement, vol. 1, para. 744). He merely repeats his trial submissions without showing any error). Lukić's Appeal Brief, para. 561 (misrepresenting the Trial Judgement by submitting that the Trial Chamber "disregarded" that Živko Trajković was not a member of the MUP Staff (see Trial Judgement, vol. 3, para. 960)).

⁴³⁴⁰ Lukić's Appeal Brief, para. 558 (submitting that during his testimony Cvetić was not presented with the Decision of 16 June 1998 and that he was neither a MUP Staff member nor a professional police officer); Lukić's Appeal Brief, para. 691 (arguing that the Trial Chamber erroneously relied on "Pavković's report of 4.6.1999"). Lukić's Appeal Brief, para. 128 (with regard to Lukić's submission that the Trial Chamber "misquoted" the content of the MUP Staff meeting of 17 February 1999 when it noted that Stojilković gave an instruction to engage volunteers carefully, the Appeals Chamber notes that it does not discern a contradiction between Lukić's contention and the Trial Judgement in this respect (see Trial Judgement, vol. 1, para. 742, referring to Exh. P1990). Further, Stojilković was recorded as giving instructions to "approach and engage volunteers carefully, linking their engagement through the reserve police force when assessed as necessary" (Exh. P1990, p. 3)). Lukić's Appeal Brief, paras 129-130 (Lukić's contention that a dispatch sent by Stojilković was sent to all Serbian SUPs and not only the Kosovo SUPs, indicating that, contrary to the Trial Chamber's interpretation, the objective of the dispatch was to prevent volunteers and paramilitaries from "operating in war circumstances", fails to demonstrate an error on the part of the Trial Chamber. The Trial Chamber noted that the dispatch was sent to "the heads of the Kosovo SUPs, MUP Staff, and other MUP organs" (Trial Judgement, vol. 1, para. 742)).

explain how the alleged errors resulted in a miscarriage of justice.⁴³⁴¹ Consequently, these submissions are summarily dismissed.

(e) Conclusion

1319. In view of the foregoing, the Appeals Chamber dismisses Lukić's arguments in relation to the MUP structure.⁴³⁴²

3. The role of the MUP Staff in planning and coordinating joint operations of the MUP and the VJ

(a) Coordination in planning joint VJ and MUP operations in 1998

1320. In reaching its conclusion that the MUP Staff played a central role in planning joint operations of the MUP and the VJ prior to and during the NATO air campaign,⁴³⁴³ the Trial Chamber noted the testimony of Ljubinko Cvetić, former Head of the Kosovska Mitrovica SUP.⁴³⁴⁴ Cvetić ascribed a central role to the MUP Staff in planning how particular MUP units were to be deployed in Kosovo as part of the "anti-terrorism" plan.⁴³⁴⁵ The Trial Chamber found that, in 1998, Milan Đaković, the person then responsible within the Priština Corps Command for ensuring coordination between the VJ and the MUP during combat operations, attended coordination meetings with MUP organs, including with Duško Adamović, a MUP Staff officer, and Obrad Stevanović, the overall head of the PJP.⁴³⁴⁶ The Trial Chamber considered Adamović's denial that neither he nor the MUP Staff had a role in the formulation of plans or in preparing operation maps for joint actions with the VJ.⁴³⁴⁷ However, it decided to rely on Đaković's evidence that "he could not have planned the joint MUP/VJ actions and drafted the corresponding maps without the help of Adamović",⁴³⁴⁸ thus finding Đaković "more reliable on this issue".⁴³⁴⁹ Notwithstanding this finding,

⁴³⁴¹ Lukić's Appeal Brief, paras 684-690 (asserting that the Trial Chamber erroneously relied on Exhibits P1458 and P1459. The Trial Chamber discussed Exh. P1458 and Exh. P1459 in the context of its finding that the re-subordination of the MUP to the VJ never took place (Trial Judgement, vol. 1, paras 1175, 1182-1183, 1189). The Appeals Chamber notes that Lukić also refers to Trial Judgement, vol. 3, paras 757, 848 (see Lukić's Appeal Brief, fns. 993, 997). Nevertheless, none of these paragraphs refers to Lukić's criminal responsibility). Lukić's Appeal Brief, para. 148, referring to Trial Judgement, vol. 1, para. 926 (asserting that the Trial Chamber erred in relying on Richard Ciaglinski's evidence that Mijatović, Lukić's deputy, "was in the chain of command of the MUP").

⁴³⁴² Dismissing, in relevant part, Lukić's sub-grounds D(3), H, I(4), K, P(1), P(4)(a)-(b), P(7), and O(1)(e).

⁴³⁴³ Trial Judgement, vol. 3, para. 1012.

⁴³⁴⁴ Trial Judgement, vol. 1, para. 661.

⁴³⁴⁵ Trial Judgement, vol. 3, para. 970, referring to Ljubinko Cvetić, 7 Dec 2006, T. 8074-8075.

⁴³⁴⁶ Trial Judgement, vol. 1, para. 1026. See also *ibid.*, vol. 1, para. 666.

⁴³⁴⁷ Trial Judgement, vol. 3, para. 974, referring to Duško Adamović, 10 Apr 2008, T. 25097.

⁴³⁴⁸ Trial Judgement, vol. 3, para. 974, referring to Milan Đaković, 19 May 2008, T. 26397, Trial Judgement, vol. 1, para. 1027.

⁴³⁴⁹ Trial Judgement, vol. 3, para. 974.

the Trial Chamber found that other parts of Adamović's testimony demonstrated that the MUP Staff was involved in the planning of joint operations.⁴³⁵⁰

1321. Lukić challenges the Trial Chamber's conclusion that the MUP Staff had a central role in planning the deployment of MUP units in Kosovo as part of the implementation of the "anti-terrorism" plan.⁴³⁵¹ He submits that, in reaching this conclusion, the Trial Chamber erroneously relied on Cvetic's conjecture, while ignoring other contradictory parts of his testimony concerning the role of the Joint Command.⁴³⁵² Further, he asserts that, in assessing the role of the MUP Staff, the Trial Chamber failed to take into consideration its own finding that the MUP Staff did not plan the actions of the PJP units.⁴³⁵³

1322. Lukić also avers that the Trial Chamber incorrectly found that Adamović took part in drafting plans for joint operations. He asserts that the evidence shows that Adamović merely provided information about the location of the MUP forces.⁴³⁵⁴ He further submits that, contrary to the Trial Chamber's finding, Adamović's testimony demonstrates that no joint actions were planned at, or involved, the MUP Staff⁴³⁵⁵ and that there were only one or two meetings attended by Đorđević, Stevanović, and military officers where the Plan for Combating Terrorism as a whole was presented.⁴³⁵⁶ Lukić further contests the Trial Chamber's reliance on Đaković's evidence, arguing that the Trial Chamber failed to take into account statements Đaković made in cross-examination.⁴³⁵⁷

1323. In response, the Prosecution submits that none of Lukić's arguments show that the Trial Chamber reached unreasonable conclusions.⁴³⁵⁸ Specifically, the Prosecution argues that Lukić fails

⁴³⁵⁰ Trial Judgement, vol. 1, para. 1027.

⁴³⁵¹ Lukić's Appeal Brief, paras 564-568, referring to Trial Judgement, vol. 3, paras 970, 973-975.

⁴³⁵² Lukić's Appeal Brief, paras 564-565, referring to Ljubinko Cvetic, 7 Dec 2006, T. 8075.

⁴³⁵³ Lukić's Appeal Brief, para. 331, referring to Trial Judgement, vol. 1, para. 1032. See also Lukić's Appeal Brief, paras 328, 358, referring to Trial Judgement, vol. 1, paras 1021, 1027, Milan Đaković, 20 May 2008, T. 26522, Exh. 6D1647.

⁴³⁵⁴ Lukić's Appeal Brief, para. 326, referring to Trial Judgement, vol. 1, para. 1026, Exh. 6D1613, paras 17-18, Exh. 6D1606, para. 24, Duško Adamović, 8 Apr 2008, T. 24968-24969, 24981, Miroslav Mijatović, 12 Feb 2008, T. 22190-22191, Dragan Zivaljević, 3 Apr 2008, T. 24820-24821.

⁴³⁵⁵ Lukić's Appeal Brief, paras 327, 568, referring to Exh. 6D1613, paras 18, 31-34.

⁴³⁵⁶ Lukić's Appeal Brief, para. 568, referring to Trial Judgement, vol. 3, para. 975, Duško Adamović, 8 Apr 2008, T. 24976-24977, Exh. 6D1613 (witness statement), paras 17, 31-34, Miroslav Mijatović, 12 Feb 2008, T. 22197-22198, and arguing that Adamović's testimony is corroborated by Mijatović.

⁴³⁵⁷ Lukić's Appeal Brief, para. 567, referring to Milan Đaković, 20 May 2008, T. 26514, 26518, 26522-26523, 26526-26527.

⁴³⁵⁸ Prosecution's Response Brief (Lukić), paras 244, 267-270, 329, referring to the Trial Judgement, vol. 1, paras 1026-1027, 1034, *ibid.*, vol. 3, paras 973, 975. See also Prosecution's Response Brief (Lukić), paras 327-329.

to show that the Trial Chamber was unreasonable in relying on the evidence of Cvetić, Đaković, and Adamović.⁴³⁵⁹

1324. The Appeals Chamber finds no contradiction between Cvetić’s testimony that the MUP Staff adopted plans on the deployment of MUP units in countering terrorism⁴³⁶⁰ and his evidence that the Joint Command was also involved in such planning by coordinating the VJ and the MUP.⁴³⁶¹ The involvement of the MUP Staff in charge of MUP units did not preclude the involvement of the Joint Command coordinating the MUP and the VJ. Lukić’s contention in this regard is therefore dismissed.

1325. The Appeals Chamber further finds unpersuasive Lukić’s assertion that, in assessing the role of the MUP Staff, the Trial Chamber failed to take into consideration its own finding that the MUP Staff did not plan the actions of the PJP units. Contrary to Lukić’s submission, by noting that a Priština Corps order on joint operations was sent, *inter alia*, to the “‘Republic of Serbia MUP PJP Command’, which usually planned the actions of the PJP units,”⁴³⁶² the Trial Chamber did not find that the MUP Staff was not involved in the planning of these operations. This is congruent with the Trial Chamber’s conclusion that the MUP Staff did not replace the day-to-day command structures within the MUP, but had a broad role in directing and controlling PJP commanders and their subordinate units, ensuring that they acted in accordance with overarching policies and plans.⁴³⁶³

1326. The Appeals Chamber also finds no merit in Lukić’s argument that the Trial Chamber erred in finding that Adamović, a MUP Staff officer, took part in drafting plans for joint operations. The Trial Chamber rejected Adamović’s insistence that the MUP Staff did not participate in such planning,⁴³⁶⁴ noting his testimony that he provided information to the VJ about the MUP units that were to participate in joint operations,⁴³⁶⁵ and his evidence that, before operations were conducted, meetings were held at the MUP Staff during which the VJ and the MUP discussed the plan for carrying out “anti-terrorist” actions.⁴³⁶⁶ Contrary to Lukić’s argument, the Appeals Chamber does not consider the Trial Chamber’s description of the evidence to be flawed, including with regard to the frequency of these planning meetings. The Trial Chamber concluded that “by providing the

⁴³⁵⁹ Prosecution’s Response Brief (Lukić), paras 267-268, 270, 322, 325, referring to Trial Judgement, vol. 1, paras 1026-1027.

⁴³⁶⁰ Trial Judgement, vol. 3, para. 970, referring to Ljubinko Cvetić, 7 Dec 2006, T. 8074-8075.

⁴³⁶¹ Ljubinko Cvetić, 7 Dec 2006, T. 8075.

⁴³⁶² Trial Judgement, vol. 1, para. 1032, referring to Exh. P1427, p. 4.

⁴³⁶³ Trial Judgement, vol. 3, para. 1012. See also *ibid.*, vol. 3, para. 995.

⁴³⁶⁴ Trial Judgement, vol. 1, para. 1027, referring to Duško Adamović, 8 Apr 2008, T. 24981; Trial Judgement, vol. 3, para. 974, referring to Duško Adamović, 10 Apr 2008, T. 25097.

⁴³⁶⁵ Trial Judgement, vol. 1, para. 1027; *ibid.*, vol. 3, para. 974, referring to Duško Adamović, 9 Apr 2008, T. 25067, 25071.

⁴³⁶⁶ Trial Judgement, vol. 1, para. 1027, referring to, *inter alia*, Duško Adamović, 8 Apr 2008, T. 24979–24981, *ibid.*, 9 Apr 2008, T. 25063, 25067, 25071, 25077, 25087, *ibid.*, 10 Apr 2008, T. 25097, Exh. 6D1613, paras 17, 31.

Priština Corps Command with information about the MUP units that were to participate in the joint operations, the MUP Staff participated in the planning of these operations.”⁴³⁶⁷ The Appeals Chamber finds that Lukić has failed to demonstrate that the Trial Chamber committed an error in its interpretation of the evidence.

1327. Moreover, the Trial Chamber considered Đaković’s testimony that he could not have planned the joint MUP and VJ actions and drafted the corresponding maps without the assistance of Adamović.⁴³⁶⁸ The portions of Đaković’s testimony referred to by Lukić do not undermine this part of his statement.⁴³⁶⁹ Consequently, Lukić has failed to demonstrate any error in the Trial Chamber’s reliance on Đaković’s testimony.⁴³⁷⁰

1328. Consequently, Lukić’s arguments regarding the coordination in planning joint VJ and MUP operations in 1998 are dismissed.

(b) Meetings held in 1999 and the elaboration of large-scale plans

1329. The Trial Chamber concluded that the period between January and March 1999 was devoted to planning the major joint VJ and MUP operations which were to commence from the latter part of March 1999.⁴³⁷¹ In particular, the Trial Chamber found⁴³⁷² that the VJ and the MUP communicated and exchanged information during the elaboration of the *Grom 3* plan, pursuant to which three major operations were to be carried out in the areas of Malo Kosovo, Drenica, and Mališevo/Malisheva.⁴³⁷² In reaching this conclusion, the Trial Chamber relied on a Priština Corps Command order of 16 February 1999,⁴³⁷³ Lazarević’s testimony,⁴³⁷⁴ and the minutes of a MUP Staff meeting held on 17 February 1999.⁴³⁷⁵ The Trial Chamber found that this evidence, together

⁴³⁶⁷ Trial Judgement, vol. 1, para. 1027.

⁴³⁶⁸ Trial Judgement, vol. 3, para. 974, referring to Milan Đaković, 19 May 2008, T. 26397.

⁴³⁶⁹ See Lukić’s Appeal Brief, para. 567, and references therein.

⁴³⁷⁰ See Trial Judgement, vol. 3, para. 974.

⁴³⁷¹ Trial Judgement, vol. 1, para. 1017.

⁴³⁷² Trial Judgement, vol. 1, para. 1015.

⁴³⁷³ Trial Judgement, vol. 1, para. 1015, referring to Exh. P2808, p. 4, a Priština Corps Command order of 16 February 1999 for the elimination of Albanian “terrorist” forces in the areas of Malo Kosovo, Drenica, and Mališevo/Malisheva, listing tasks that were to be carried out by Priština Corps units in coordination with the MUP forces. The Appeals Chamber notes that Lukić argues that the Trial Chamber erroneously referred to an order issued by Lazarević on 16 February 1999 as “the *Grom 3* Order”, although the *Grom 3* order was issued on 7 February 1999 (Lukić’s Appeal Brief, para. 342, referring to Trial Judgement, vol. 1, paras 1014-1015, Exh. 5D249, Vladimir Lazarević, 8 Nov 2007, T. 17905). However, the Appeals Chamber is of the view that this has no effect on the Trial Chamber’s findings.

⁴³⁷⁴ Trial Judgement, vol. 1, para. 1015, citing Vladimir Lazarević, 8 Nov 2007, T. 17917, testifying that when the order of 16 February 1999 was prepared within the Priština Corps Command, “the operative organs of the Corps Command achieved co-ordination with the people dealing with planning in the MUP in order to have co-ordination and co-ordinated action.”

⁴³⁷⁵ Trial Judgement, vol. 1, para. 1015, citing Exh. P1990, p. 1, which records Lukić’s statement that the MUP Staff “plan[ned] [...] to carry out three mopping up operations in the Podujevo, Dragobilja and Drenica areas”, but was waiting for an order to do so. The Trial Chamber further noted that the minutes of the meeting indicated that “tasks and

with the minutes of a MUP Staff meeting of 21 December 1998, supported the conclusion that the MUP also prepared plans for “anti-terrorist” actions at the beginning of 1999.⁴³⁷⁶ In addition, the Trial Chamber found that, at the beginning of April 1999, when the Priština Corps issued the *Grom 4* order, the MUP also devised plans for action⁴³⁷⁷ and that several joint operations carried out in mid-April 1999 “appear[ed] to have been conducted in furtherance” of the plans elaborated by the MUP and the VJ.⁴³⁷⁸

1330. Lukić contends that no MUP representative participated in “key elements” of the planning of joint VJ and MUP operations. He submits that, contrary to the Trial Chamber’s finding, the Priština Corps Command order of 16 February 1999 merely sets out details of actions decided in advance by the higher command and that, based on Lazarević’s testimony, coordination with the MUP took place only after the order was issued.⁴³⁷⁹ In relation to the MUP Staff meeting of 17 February 1999, Lukić argues that the Trial Chamber did not rely on the official minutes of the meeting⁴³⁸⁰ and misquoted the evidence.⁴³⁸¹

1331. Lukić further argues that the Trial Chamber erroneously found that the period between January and March 1999 was devoted to planning the major joint VJ and MUP operations which were to commence from the latter part of March 1999.⁴³⁸² He contends that none of the VJ orders cited by the Trial Chamber dated before March 1999⁴³⁸³ and indeed that no evidence shows that the MUP Staff participated in any manner in the planning and execution of the joint operations.⁴³⁸⁴ Finally, Lukić avers that the Trial Chamber’s finding that several joint operations carried out in mid-April 1999 “appear to have been conducted in furtherance of the plans elaborated by the MUP and the VJ at the beginning of April 1999” shows that no evidence demonstrated that there was any plan prepared by the MUP.⁴³⁸⁵ With regard to joint operations conducted in the latter part of March 1999 and in mid-April 1999, Lukić argues that all the orders assigning tasks to the police were issued by the VJ.⁴³⁸⁶

activities” relating to anti-terrorist actions had been determined at the “annual meetings” (Trial Judgement, vol. 1, para. 1016, citing Exh. P1990, p. 1).

⁴³⁷⁶ Trial Judgement, vol. 1, para. 1016.

⁴³⁷⁷ Trial Judgement, vol. 1, paras 1019, 1021.

⁴³⁷⁸ Trial Judgement, vol. 1, para. 1022.

⁴³⁷⁹ Lukić’s Appeal Brief, paras 343-345, referring to Trial Judgement, vol. 1, para. 1015, Exh. 5D249, Vladimir Lazarević, 8 Nov 2007, T. 17905-17907, Radojko Stefanović, 5 Feb 2008, T. 21654-21655.

⁴³⁸⁰ Lukić’s Appeal Brief, para. 347.

⁴³⁸¹ Lukić’s Appeal Brief, paras 347-348, 350, referring to Exh. P1990. See also Appeal Hearing, 14 Mar 2013, AT. 566-567.

⁴³⁸² Lukić’s Appeal Brief, paras 351-352.

⁴³⁸³ Lukić’s Appeal Brief, para. 351.

⁴³⁸⁴ Lukić’s Appeal Brief, paras 353, referring to Exh. P2808. See also Lukić’s Appeal Brief, paras 284, 345, 357-358.

⁴³⁸⁵ Lukić’s Appeal Brief, para. 357, citing Trial Judgement, vol. 1, para. 1022 (emphasis added).

⁴³⁸⁶ Lukić’s Appeal Brief, para. 352, referring to Exh. P2067, Exh. P2808, Exh. 4D147, Exh. 4D332, Exh. 5D243, Exh. 5D245. See also Lukić’s Appeal Brief, para. 354, referring to Trial Judgement, vol. 1, paras 1012-1022,

1332. The Prosecution responds that Lukić's submissions should be dismissed as he ignores the Trial Chamber's relevant findings⁴³⁸⁷ and fails to show that the Trial Chamber's interpretation of the evidence was unreasonable.⁴³⁸⁸

1333. The Appeals Chamber finds no error in the Trial Chamber's finding that the VJ and the MUP exchanged information during the planning of the operations in the areas of Malo Kosovo, Drenica, and Mališevo/Malisheva. Contrary to Lukić's submission, Lazarević's testimony clearly suggests that there was already coordination between the VJ and the MUP in preparation of the Priština Corps Command order of 16 February 1999.⁴³⁸⁹ The Trial Chamber also noted that the order identified specific MUP units with which VJ units were to act in coordination, which further indicates that exchange of information between the VJ and the MUP had taken place before the issuance of the order.⁴³⁹⁰ Lukić's arguments are therefore dismissed.

1334. Regarding the reliability of the minutes of the MUP Staff meeting of 17 February 1999, Lukić has shown neither that the minutes were not an official record of the meeting, nor that the purported lack of official status makes them unreliable. Further, contrary to Lukić's assertion, the Trial Judgement correctly captures the content of the relevant portion of the minutes, in which Lukić is recorded as referring to measures taken against "terrorist activities", including an engagement of the police and the VJ in the Podujevo area, and mentioning in this context the "annual meetings" which determined "further tasks and activities".⁴³⁹¹

1335. The Appeals Chamber further finds that, contrary to Lukić's assertion, the Trial Chamber's finding that the period between January and the beginning of March 1999 was devoted to planning major VJ and MUP joint operations was based on evidence originating prior to March 1999. In this regard, the Trial Chamber relied on the Priština Corps Command order of 16 February 1999 as well as on MUP Staff meetings at the end of December 1998 and in February 1999, which indicated that the MUP was also conducting the corresponding planning for "anti-terrorist" actions in the beginning of 1999.⁴³⁹² The Trial Chamber also analysed a "template order" corresponding to the contents of the 16 February 1999 order, which was prepared by the Priština Corps Command to

Exh. 3D690, Exh. 4D332, Exh. 5D249, Exh. P2808, Exh. P2072, Exh. 6D1465, Exh. 6D1465, Exh. P1483, Exh. 5D175, Exh. P1966, Exh. P2031, Exh. P1967, Exh. P2015, Exh. P1968, Exh. P3049, Exh. P1969, Exh. P2003, Exh. P19970, Exh. P1971, Exh. P1972, Exh. P1973, Exh. P1974, Exh. P1975, Exh. P1976, Exh. P1977, Exh. 6D136, Exh. 6D704, Exh. 6D705, Exh. 6D709, Exh. 6D710, Exh. 6D712, Exh. P2011, Exh. P2014, Exh. P1503, Vladimir Lazarević, 8 Nov 2007, T. 17905.

⁴³⁸⁷ Prosecution's Response Brief (Lukić), paras 244, 270.

⁴³⁸⁸ Prosecution's Response Brief (Lukić), paras 278-280.

⁴³⁸⁹ Trial Judgement, vol. 1, para. 1015, referring to Vladimir Lazarević, 8 Nov 2007, T. 17917. See also Vladimir Lazarević, 8 Nov 2007, T.17905-17919.

⁴³⁹⁰ Trial Judgement, vol. 1, para. 1015, referring to Exh. P2808.

⁴³⁹¹ See Exh. P1990, p. 1. See also Trial Judgement, vol. 1, para. 1016.

⁴³⁹² Trial Judgement, vol. 1, paras 1015-1016, 1039, referring to Exh. P1990, Exh. P1991.

assist the MUP personnel in producing a similar document within the MUP.⁴³⁹³ The Appeals Chamber further notes that the Trial Chamber referred to the orders issued by the VJ in March 1999 for implementation of specific joint operations as evidence of the realisation of the planned operations, rather than their planning phase.⁴³⁹⁴ Indeed, the Trial Chamber held that the areas specified in those implementation orders corresponded to the three areas identified in the 16 February 1999 order of the Priština Corps and those referred to by Lukić in the MUP Staff meeting of 17 February 1999.⁴³⁹⁵ Lukić's arguments are thus dismissed.

1336. Finally, the Appeals Chamber turns to Lukić's contention that no evidence suggested that there was any plan prepared by the MUP, or with the MUP Staff involvement, for the joint operations carried out in mid-April 1999. Contrary to his assertion, the Trial Chamber explicitly referred to a meeting of 4 April 1999, attended by Obrad Stevanović, Lukić, all the Kosovo SUP chiefs, PJP commanders, and SAJ and JSO commanders, at which Stevanović ordered that "plans on how to control the territory" be prepared and that "co-operation with the VJ through the commander on the ground" be conducted.⁴³⁹⁶ The Trial Chamber also cited a document issued by the Priština Corps Command on 9 April 1999, according to which the MUP Staff "issued an order to all Secretariats of the Interior to commence planning actions to crush the terrorist groups that remain in their respective zones of responsibility".⁴³⁹⁷ Lukić's argument thus fails.

1337. For the reasons set out above, Lukić's arguments regarding meetings held in 1999 and the elaboration of large-scale plans are dismissed.

(c) Coordination in planning joint VJ and MUP operations in 1999

1338. The Trial Chamber found that "before the major joint VJ and MUP operations were conducted at the end of March to mid-April 1999, the two bodies co-ordinated their respective plans and activities" and that "[d]epending upon the operation, either the MUP plan or the VJ plan prevailed."⁴³⁹⁸ In reaching this conclusion, the Trial Chamber relied, *inter alia*, on the evidence of Radojko Stefanović, Chief of the Department for Operations and Training in the Priština Corps in 1999,⁴³⁹⁹ Dragan Živaljević, Commander of the PJP 122nd Intervention Brigade,⁴⁴⁰⁰ and Lazarević who testified on the process of preparing and planning joint operations, which included the receipt of map excerpts from the VJ by the MUP for the purpose of coordinating joint

⁴³⁹³ Trial Judgement, vol. 1, para. 1039, referring to Exh. 6D716, Milan Đaković, 19 May 2008, T. 26390.

⁴³⁹⁴ Trial Judgement, vol. 1, para. 1017, and the evidence cited therein.

⁴³⁹⁵ Trial Judgement, vol. 1, para. 1017.

⁴³⁹⁶ Trial Judgement, vol. 1, para. 1021, citing Exh. P1989, p. 4.

⁴³⁹⁷ Trial Judgement, vol. 1, para. 1021, citing Exh. 5D476, p. 1.

⁴³⁹⁸ Trial Judgement, vol. 1, para. 1041. See also *ibid.*, vol. 1, paras 1033-1040.

⁴³⁹⁹ Trial Judgement, vol. 1, para. 1026.

operations.⁴⁴⁰¹ The Trial Chamber also examined orders by the Priština Corps and the 3rd Army, including 16 orders with the heading “Joint Command”. Based on the dates and content of these documents, the Trial Chamber found that the planning process of the joint operations concerned included coordination with the MUP.⁴⁴⁰² Having considered further testimonial and documentary evidence, the Trial Chamber concluded that “[i]t had become standard practice for MUP and VJ representatives to hold co-ordination meetings before finalising plans for and conducting joint operations.”⁴⁴⁰³ In addition, the Trial Chamber found that in 1999, as in 1998, the MUP “issued orders in some form, as the Joint Command orders did not contain specific instructions regarding how the various actions or attacks were, in practice, to be carried out.”⁴⁴⁰⁴

1339. Lukić argues that the Trial Chamber erroneously found that MUP and VJ representatives regularly held coordination meetings prior to joint operations.⁴⁴⁰⁵ In particular, he challenges the Trial Chamber’s assessment of: (i) the 16 “Joint Command” orders; (ii) Stefanović’s testimony; and (iii) MUP orders for the execution of joint operations. The Appeals Chamber will consider these arguments in turn.

(i) The 16 “Joint Command” orders

1340. Lukić contends that the fact that the 16 orders referred to by the Trial Chamber as bearing the Joint Command heading as well as an order issued by the Priština Corps to conduct a joint action in the *Bajgora* sector around 25 April 1999⁴⁴⁰⁶ did not contain tasks for the MUP units shows that there were no coordination meetings prior to joint operations⁴⁴⁰⁷ and that the orders were not sent to the MUP units.⁴⁴⁰⁸

1341. In relation to a “Joint Command” order concerning a joint operation in the Podujevo/Podujeva area, Lukić argues that the Trial Chamber erred in its analysis of a document authored by Lazarević,⁴⁴⁰⁹ asserting that “[h]ad a MUP representative participated in the planning, the MUP units would have been listed in accordance with the formation structure to which they

⁴⁴⁰⁰ Trial Judgement, vol. 1, para. 669.

⁴⁴⁰¹ Trial Judgement, vol. 1, paras 1033-1036, 1039.

⁴⁴⁰² Trial Judgement, vol. 1, paras 1037-1038, 1040.

⁴⁴⁰³ Trial Judgement, vol. 1, para. 1151. See also *ibid.*, vol. 1, paras 1039, 1041.

⁴⁴⁰⁴ Trial Judgement, vol. 1, para. 1042. See also *ibid.*, vol. 1, para. 1029.

⁴⁴⁰⁵ Lukić’s Appeal Brief, para. 317(a), citing Trial Judgement, vol. 1, para. 1151.

⁴⁴⁰⁶ See Trial Judgement, vol. 1, para. 1040.

⁴⁴⁰⁷ Lukić’s Appeal Brief, para. 317(a), referring to Trial Judgement, vol. 1, para. 1151. See also Lukić’s Appeal Brief, para. 317(g), referring to Trial Judgement, vol. 1, para. 1040, Exh. P1975.

⁴⁴⁰⁸ Lukić’s Appeal Brief, para. 313, referring to Miroslav Mijatović, 13 Feb 2008, T. 22290, Duško Adamović, 9 Apr 2008, T. 25062, Dušan Gavrančić, 19 Feb 2008, T. 22723, Miloš Vojnoviač, 12 Mar 2008, T. 24189, Exh. 6D1606, para. 41.

⁴⁴⁰⁹ Lukić’s Appeal Brief, paras 335-336, referring to Trial Judgement, vol. 1, para. 1037, Exh. 6D1416. Lukić seems to have mistakenly identified the evidence he is referring to as a “3rd Army Order” while it is in fact a Priština Corps Command order issued on 18 March 1999 (See Exh. 6D1416).

belonged”.⁴⁴¹⁰ He also argues that there is a contradiction between this document and Lazarević’s testimony that the MUP conducted its own planning for the operations and that, prior to the issuance of orders for the execution of these operations, the VJ and the MUP conducted “specific co-ordination”.⁴⁴¹¹ Finally, Lukić contends that the Trial Chamber ignored evidence showing that the first contact between the MUP and the VJ representatives occurred only at the final stage of entering decisions on the maps, after the orders had been prepared by VJ commanders.⁴⁴¹²

1342. In response, the Prosecution contends that Lukić’s arguments ignore the Trial Chamber’s reasonable findings that the VJ and the MUP coordinated their actions before each anti-terrorist operation in 1998 and in 1999.⁴⁴¹³

1343. Lukić’s argument that the 16 orders with the Joint Command heading did not contain information about MUP units and thus demonstrate that no coordination meetings were held between MUP and VJ representatives⁴⁴¹⁴ is without merit. Lukić disregards the Trial Chamber’s analysis of other evidence, including witness testimony and documentary evidence, which demonstrate, when considered in conjunction with the 16 orders, that before joint operations the VJ and the MUP coordinated the actions that were to be carried out by their units. Such evidence included documents by the Priština Corps Command and minutes of meetings, issued close in time to the issuance of the 16 orders.⁴⁴¹⁵ Specifically, with regard to the joint operation conducted in the *Bajgora* sector on 25 April 1999, in addition to the relevant Joint Command order of 15 April 1999,⁴⁴¹⁶ the Trial Chamber relied on a Priština Corps Command order of 9 April 1999 and on Stefanović’s and Lazarević’s testimony, showing coordination efforts by the VJ and the MUP that preceded the Joint Command order.⁴⁴¹⁷

1344. Lukić’s challenges to the Trial Chamber’s reliance on a plan of action issued on 18 March 1999 by the Priština Corps Command and addressed to the 3rd Army Command regarding a joint operation in the Podujevo/Podujeva area are likewise without merit. As the Trial Chamber explained, the plan of action stated that the planning process had been conducted in accordance with the 3rd Army Command’s plans and indicated that the Priština Corps Command had organised

⁴⁴¹⁰ Lukić’s Appeal Brief, para. 336.

⁴⁴¹¹ Lukić’s Appeal Brief, para. 337, referring to Trial Judgement, vol. 1, para. 1039.

⁴⁴¹² Lukić’s Appeal Brief, paras 313, 339, referring to Exh. 6D1610, Exh. 6D1618, Exh. 6D1619, Exh. 6D1620, Exh. 6D1621, Radojko Stefanović, 5 Feb 2008, T. 21646-21647.

⁴⁴¹³ Prosecution’s Response Brief (Lukić), para. 244.

⁴⁴¹⁴ Lukić’s Appeal Brief, para. 317(a), (g).

⁴⁴¹⁵ Trial Judgement, vol. 1, paras 1037-1041, referring, *inter alia*, to Exh. 6D1416, Exh. 5D276; Exh. P1990, p. 1, Exh. 5D476, p. 1.

⁴⁴¹⁶ Trial Judgement, vol. 1, para. 1040, referring to Exh. P1975.

⁴⁴¹⁷ Trial Judgement, vol. 1, para. 1040, referring to Exh. 5D476, p.2, Radojko Stefanović, 5 Feb 2008, T. 21702, Vladimir Lazarević, 9 Nov 2007, T. 18007.

a “specific co-ordinated action” with the MUP for this joint operation.⁴⁴¹⁸ Therefore, the fact that MUP units were not listed in this document does not render the Trial Chamber’s conclusion that the planning process of this operation included coordination with the MUP unreasonable. Further, contrary to Lukić’s submission, this does not contradict Lazarević’s testimony that “the MUP conducted its own planning for the operations that were to be conducted at the end of March 1999 and that, before orders for the execution of these operations were issued, the VJ and the MUP conducted ‘specific co-ordination’.”⁴⁴¹⁹ Lukić’s arguments in this regard are accordingly dismissed.

1345. Finally, Lukić’s submission that the meetings between MUP and VJ representatives at the stage of entering decisions on maps were their first contact and took place after the relevant plans had already been prepared by the VJ is unpersuasive. The evidence showed that during coordination meetings MUP representatives actively participated in deciding upon details of joint operations, including the tasks of various units.⁴⁴²⁰ The fact that the 16 orders did not contain specific tasks for the MUP units, apart from general references to “MUP forces” and specific areas of planned attacks, does not show that the Trial Chamber’s finding regarding the occurrence of the coordination meetings was unreasonable. Moreover, the Trial Chamber considered evidence showing that the contents of the orders with the Joint Command heading, if not the orders themselves, were made known to the MUP through the existing coordination system,⁴⁴²¹ including through map excerpts for joint operations passed from the Priština Corps to the MUP.⁴⁴²² Lukić’s submissions in this regard are thus dismissed.

(ii) Stefanović’s testimony

1346. Lukić contests the Trial Chamber’s reliance on Radojko Stefanović’s testimony, arguing that his evidence on the manner in which the MUP acted upon receiving maps from the army was based merely on his own assumptions since, as military personnel, he was unfamiliar with the functioning of the MUP.⁴⁴²³ In this regard, Lukić submits that the Trial Chamber failed to take into account other evidence of knowledgeable witnesses who explicitly testified on the same issues.⁴⁴²⁴ Lukić further claims that it was illogical for Stefanović not to mention Duško Adamović as his counterpart in the MUP Staff, even though Adamović was in Kosovo until 29 March 1999.⁴⁴²⁵

⁴⁴¹⁸ Trial Judgement, vol. 1, para. 1037, referring to Exh. 6D1416 pp. 1-2.

⁴⁴¹⁹ Trial Judgement, vol. 1, para. 1039, referring to Vladimir Lazarević, 13 Nov 2007, T. 18200.

⁴⁴²⁰ See Trial Judgement, vol. 1, paras 1034, 1036, 1038-1041, and the evidence cited therein.

⁴⁴²¹ Trial Judgement, vol. 1, paras 1035, 1041-1042, and references therein.

⁴⁴²² Trial Judgement, vol. 1, para. 1035, and references therein. See also *ibid.*, vol. 1, para. 1029. See also *supra*, sub-section VII.C.3.(c)(iii).

⁴⁴²³ Lukić’s Appeal Brief, para. 332.

⁴⁴²⁴ Lukić’s Appeal Brief, paras 332-333, referring to Exh. 6D1613, paras 17, 28, 31-34, Exh. 6D1614, para. 12; Miroslav Mijatović, 12 Feb 2008, T. 22240, Duško Adamović, 8 Apr 2008, T. 24968-24969.

⁴⁴²⁵ Lukić’s Appeal Brief, para. 334, referring to Radojko Stefanović, 5 Feb 2008, T. 21684-21689, Exh. P1888.

According to Lukić, it follows that all orders issued from January through 29 March 1999 were issued without prior coordination with any MUP representative.⁴⁴²⁶ Lukić also claims that the Trial Chamber’s conclusion that “[d]epending upon the operation, either the MUP plan or the VJ plan prevailed” has no support in the evidence.⁴⁴²⁷ The Prosecution responds that Lukić merely argues for an alternative interpretation of the evidence without showing how no reasonable trial chamber could have reached the Trial Chamber’s conclusion.⁴⁴²⁸

1347. The Appeals Chamber considers that the fact that Stefanović was a VJ member does not undermine his testimony as to how the MUP representatives participated in the coordination meetings, given that he attended those meetings.⁴⁴²⁹ The Trial Chamber further noted that Stefanović “assumed that, following these co-ordination meetings, the MUP created its decisions too.”⁴⁴³⁰ Accordingly, the Trial Chamber was mindful that Stefanović did not have first-hand knowledge of how the MUP acted upon the map extracts they received following the coordination meetings.⁴⁴³¹ Moreover, although Stefanović mentioned Arsenijević but did not mention Adamović as one of his counterparts on the MUP side in the coordination meetings,⁴⁴³² the Appeals Chamber notes that Arsenijević was Adamović’s successor in the MUP Staff. Furthermore, Stefanović testified that there might have been others whom he could not recall, adding that his deputy also contacted different people for exchange of information and data.⁴⁴³³ Hence, it was within the Trial Chamber’s discretion to rely on his testimony.

1348. As to Lukić’s contention that the Trial Chamber’s conclusion that “[d]epending upon the operation, either the MUP plan or the VJ plan prevailed” has no basis in the evidence,⁴⁴³⁴ the Appeals Chamber notes that the Trial Chamber analysed extensive evidence showing the planning and coordination between the VJ and the MUP in relation to joint operations.⁴⁴³⁵ The Appeals Chamber is unable to discern, however, the particular evidence relied upon by the Trial Chamber in reaching the impugned finding.⁴⁴³⁶ The Appeals Chamber considers this to amount to a failure on the part of the Trial Chamber to provide a reasoned opinion. However, Lukić fails to explain the effect of this error on the Trial Chamber’s conclusion that the MUP and the VJ coordinated their

⁴⁴²⁶ Lukić’s Appeal Brief, para. 334, referring to Exh. P1966, Exh. P1967, Exh. P3049, Exh. P1968, Exh. P1969, Exh. P2015, Exh. P2031, Exh. 6D1416, Exh. 5D273, Exh. 5D276.

⁴⁴²⁷ Lukić’s Appeal Brief, para. 333, citing Trial Judgement, vol. 1, para. 1041.

⁴⁴²⁸ Prosecution’s Response Brief (Lukić), paras 268, 270.

⁴⁴²⁹ Trial Judgement, vol. 1, paras 1033-1034.

⁴⁴³⁰ Trial Judgement, vol. 1, para. 1034, referring to Radojko Stefanović, 6 Feb 2008, T. 21752.

⁴⁴³¹ See Trial Judgement, vol. 1, para. 1035.

⁴⁴³² Trial Judgement, vol. 1, para. 1033, referring to Radojko Stefanović, 5 Feb 2008, T. 21684-21689.

⁴⁴³³ Radojko Stefanović, 5 Feb 2008, T. 21686.

⁴⁴³⁴ Lukić’s Appeal Brief, para. 333, citing Trial Judgement, vol. 1, para. 1041.

⁴⁴³⁵ See Trial Judgement, vol. 1, para. 1033-1043.

⁴⁴³⁶ The Appeals Chamber notes that the impugned finding does not contain a reference to the evidence in support thereof (see Trial Judgement, vol. 1, para. 1041).

respective plans prior to joint operations and, consequently, to demonstrate the impact of this error on his conviction. His argument is thus dismissed.

(iii) MUP orders for the execution of joint operations

1349. Lukić contends that, despite the lack of evidence that the MUP issued any orders for the execution of joint operations, the Trial Chamber found that such orders were issued.⁴⁴³⁷ He argues that the implementation of joint actions of the VJ and the MUP was carried out exclusively on the orders and decisions of the Priština Corps and the VJ.⁴⁴³⁸ Further, he asserts that, in reaching its conclusion, the Trial Chamber erroneously relied on a MUP Staff dispatch which was not an order in relation to combat operations but merely “provide[d] assistance to a senior police officer who requested it in relation to taking care of civilians.”⁴⁴³⁹ Moreover, Lukić contends that, contrary to the Trial Chamber’s finding that the MUP issued orders in 1999, all orders for joint actions issued after 20 April 1999 – that is, after the 3rd Army Commander’s order to re-subordinate all MUP units to the Priština Corps and the Niš Corps – had the “Priština Corps Command” heading and were signed by Lazarević.⁴⁴⁴⁰ In response, the Prosecution maintains that Lukić’s assertion ignores the Trial Chamber’s relevant findings and should be summarily dismissed.⁴⁴⁴¹

1350. The Appeals Chamber finds no merit in Lukić’s assertion that there is no evidence showing that the MUP organs issued orders for the execution of the various actions during joint operations. The Trial Chamber found that, despite limited documentary evidence, the MUP did issue such orders.⁴⁴⁴² In this regard, the Trial Chamber considered, *inter alia*: (i) a “template order” of 19 February 1999, prepared by the Priština Corps Command to assist MUP personnel in “produc[ing] documents that would more or less correspond to the documents produced by the military;”⁴⁴⁴³ (ii) minutes of a meeting of MUP officials held on 4 April 1999 in which Stevanović

⁴⁴³⁷ Lukić’s Appeal Brief, paras 284, 312, 314, referring to Trial Judgement, vol. 1, para. 1042, Milan Đaković, 20 May 2008, T. 26523-26524, Exh. 6D1618, Exh. 6D1619, Exh. 6D1620, Exh. 6D1621.

⁴⁴³⁸ Lukić’s Appeal Brief, paras 300, 308(2), 308(3), 329-330.

⁴⁴³⁹ Lukić’s Appeal Brief, para. 314, referring to Exh. 5D1418.

⁴⁴⁴⁰ Lukić’s Appeal Brief, paras 315-316, referring to Trial Judgement, vol. 1, para. 1042, Exh. 6D136, Exh. 6D704, Exh. 6D705, Exh. 6D709, Exh. 6D710, Exh. 6D712, Exh. P2011, Exh. P2014, Exh. P1503. See also Trial Judgement, vol. 2, para. 1169.

⁴⁴⁴¹ Prosecution’s Response Brief (Lukić), para. 270.

⁴⁴⁴² Trial Judgement, vol. 1, para. 1042.

⁴⁴⁴³ Trial Judgement, vol. 1, para. 1039, referring to Exh. 6D716, Milan Đaković, 19 May 2008, T. 26390. Lukić avers that the Trial Chamber erroneously referred to the “template order” as the “MUP plan”, and that, based on an order of 27 August 1998 bearing an identical heading and signed by the then Priština Corps Commander, Pavković, the Trial Chamber could have reasonably concluded that the “template order” was a preparatory order which would be finalized at a later stage by the Priština Corps Command (Lukić’s Appeal Brief, para. 317(h), referring to Trial Judgement, vol. 1, para. 1039). Lukić misrepresents the challenged factual findings and merely suggests an alternative interpretation of the evidence (see Trial Judgement, vol. 1, para. 1039). Lukić adds that the Trial Chamber erroneously stated that the “template order” had a “MUP Staff” heading, although it referred to the “MUP Command” (Lukić’s Appeal Brief, para. 317(h)). The English translation of the heading, as correctly noted by the Trial Chamber, reads “MUP Staff” (Exh. 6D716). Lukić’s assertion that the correct translation of the heading is “MUP Command”, in light of Đaković’s

ordered that “plans on how to control the territory” be prepared and cooperation with the VJ be conducted;⁴⁴⁴⁴ (iii) a document issued by the Priština Corps on 9 April 1999, ordering the Priština Corps units to coordinate with the SUPs on the ground and stating that the MUP Staff had issued an order to all SUPs “to commence planning actions to crush the terrorist groups that [had] remain[ed] in their respective zones of responsibility”;⁴⁴⁴⁵ (iv) evidence indicating that “[o]nce the coordination phase was completed, the actions remained to be planned at the tactical level;”⁴⁴⁴⁶ and (v) the fact that the 16 orders with the Joint Command heading “did not contain specific instructions regarding how the various actions or attacks were, in practice, to be carried out”, suggesting that further orders were required for the actions to materialise.⁴⁴⁴⁷

1351. The Trial Chamber also relied on a MUP Staff’s dispatch dated 26 May 1999, ordering a brigade commander to return civilians to their villages and arrest able-bodied men.⁴⁴⁴⁸ In relation to Lukić’s assertion that the dispatch was not an order in relation to combat operations, the Appeals Chamber notes that the dispatch was sent in response to a request, which also contained information on the lines achieved and the positions taken.⁴⁴⁴⁹ Hence, given the content of this exhibit, it was not unreasonable of the Trial Chamber to rely on it in addition to other evidence.⁴⁴⁵⁰

1352. Consequently, Lukić’s argument disregards the totality of the evidence considered by the Trial Chamber. Lukić has failed to demonstrate that a reasonable trier of fact could not have concluded that MUP organs issued orders for the execution of actions during joint operations.⁴⁴⁵¹ Likewise, Lukić’s contention that all orders for the implementation of joint actions issued after 20 April 1999 had the “Priština Corps Command” heading and were signed by Lazarević is without merit and is therefore dismissed.

(iv) Conclusion

1353. For the reasons set out above, Lukić’s arguments regarding the coordination in planning joint VJ and MUP operations in 1999 are dismissed.

testimony that this “template order” was prepared by the Priština Corps Command in order to assist MUP personnel in “produc[ing] documents that would more or less correspond to the documents produced by the military” is unpersuasive (Trial Judgement, vol. 1, para. 1039, referring to Milan Đaković, 19 May 2008, T. 26390, Exh. 6D716). He fails to demonstrate how, even if his argument prevails, this error invalidates the Trial Chamber’s finding that plans for actions involving VJ and MUP units were prepared within the VJ and the MUP prior to operations. His argument is therefore dismissed.

⁴⁴⁴⁴ Trial Judgement, vol. 1, para. 1021, referring to Exh. P1989, p. 4.

⁴⁴⁴⁵ Trial Judgement, vol. 1, para. 1021, citing Exh. 5D476, p. 1.

⁴⁴⁴⁶ Trial Judgement, vol. 1, para. 1041-1042 and the evidence cited therein.

⁴⁴⁴⁷ Trial Judgement, vol. 1, para. 1042.

⁴⁴⁴⁸ Trial Judgement, vol. 1, para. 1042, fn. 2802, referring to Exh. 5D1418.

⁴⁴⁴⁹ Exh. 5D1418, p. 3.

⁴⁴⁵⁰ See *supra*, para. 1350.

⁴⁴⁵¹ See Trial Judgement, vol. 1, para. 1042.

(d) Summarily dismissed submissions

1354. The Appeals Chamber notes that a number of Lukić's submissions challenging the Trial Chamber's findings on the MUP's involvement in planning and coordinating joint operations of the VJ and the MUP misrepresent the Trial Judgement,⁴⁴⁵² lack reference to evidence in support of the alleged factual errors,⁴⁴⁵³ or fail to explain how the alleged errors resulted in a miscarriage of justice.⁴⁴⁵⁴ Consequently, these submissions are summarily dismissed.

(e) Conclusion

1355. In view of the foregoing, the Appeals Chamber dismisses Lukić's arguments in relation to the role of the MUP Staff in planning and coordinating joint operations of the MUP and the VJ.⁴⁴⁵⁵

4. Lukić's role as Head of the MUP Staff(a) Introduction

1356. The Trial Chamber found that Lukić "was a *de facto* commander over MUP forces deployed in Kosovo from mid-1998 to mid-1999", which included the regular police in the SUPs as well as the PJP and SAJ units.⁴⁴⁵⁶ In reaching this conclusion, the Trial Chamber relied on its earlier

⁴⁴⁵² Lukić's Appeal Brief, paras 338, 347-348, referring to Exh. P1990 (asserting that the Trial Chamber misquoted the minutes of the MUP Staff meeting of 17 February 1999). Lukić misrepresents the Trial Chamber's accurate description of the evidence (see Trial Judgement, vol. 1, paras 1015, 1039). Lukić's Appeal Brief, para. 355, referring to Exh. 5D476 (arguing that the Trial Chamber failed to take into account that the Priština Corps Commander ordered his brigade commanders to establish contact with heads of the SUPs and carry out the planning and implementation of actions in designated locations upon approval of the Priština Corps Command. Contrary to Lukić's assertion, the Trial Chamber explicitly noted the evidence to which Lukić refers (Trial Judgement, vol. 1, para. 1040, fn. 2791, referring to Exh. 5D476)).

⁴⁴⁵³ Lukić's Appeal Brief, paras 349, referring to Trial Judgement, vol. 1, para. 1016 (Lukić asserts that, in its analysis of the meeting of 21 December 1998, the Trial Chamber confused law-enforcement activities of the police with joint anti-terrorist actions carried out by the VJ and the MUP according to plans prepared by the Priština Corps. However, none of the portions of the minutes from the meeting cited by Lukić supports his argument). Lukić's Appeal Brief, para. 318 (asserting that, while item 13 of the 16 orders contains the phrase, "combined action with the MUP forces", the Trial Chamber erroneously conflated the term "combined action" with "co-ordination". Lukić's assertion that the correct phrase should be "organise combined action" has no support in the evidence to which he refers. In fact, Čurčin testified that "[i]t's obvious that it's about coordinated action [...]") (Đorđe Čurčin, 16 Oct 2007, T. 17036), and Radinović testified that "the brigade is planning the combat operation and its commander is responsible for cooperation" (Radovan Radinović, 17 Oct 2007, T. 17142). These statements support the Trial Chamber's finding). Further, in light of the other evidence referred to by the Trial Chamber, Lukić fails to explain how his assertion renders the Trial Chamber's finding that the planning and coordination of actions continued at the tactical level between the VJ and the MUP invalid (Trial Judgement, vol. 1, para. 1041, referring to Exh. P2000, p. 8, Krsman Jelić, 26 Nov 2007, T. 18989, 18991, 19008-19009, 19037, 19081-19082, Vladimir Lazarević, 8 Nov 2007, T. 17926)).

⁴⁴⁵⁴ Lukić's Appeal Brief, para. 314, referring to Trial Judgement, vol. 1, para. 1198, Exh. 6D709, item 5/14 (submitting that the Trial Chamber failed to note that the joint operation in the Palatna sector was carried out on the basis of an order of the Priština Corps Command rather than of the Joint Command). Lukić's Appeal Brief, para. 358, referring to Trial Judgement, vol. 1, para. 1021 (Lukić seems to claim that the Trial Chamber erred in stating that the MUP Staff ordered the SUPs to commence planning actions to "crush terrorist groups", while the concerned plans of the SUPs actually pertained to "activities to arrest terrorists". See also Exh. 5D476, referred to in Trial Judgement, vol. 1, para. 1021).

⁴⁴⁵⁵ Dismissing, in relevant part, Lukić's sub-grounds D(4), N, and P(2).

⁴⁴⁵⁶ Trial Judgement, vol. 3, para. 1051. See also *ibid.*, vol. 3, para. 1131.

findings that the MUP Staff played a central role in controlling and directing the MUP units in Kosovo and in coordinating and planning joint VJ and MUP operations as well as on its findings as to Lukić's central role in the MUP Staff as its Head.⁴⁴⁵⁷

1357. The Trial Chamber further found that Lukić was “the bridge between the policy-planners in Belgrade, such as Slobodan Milošević, Vljako Stojiljković [Serbian Minister of Interior], and Vlastimir Đorđević [Head of the RJB], and those on the ground in Kosovo” and that “he was directly involved in the planning process and in ensuring that day-to-day operations were conducted by the various MUP forces in accordance with those plans.”⁴⁴⁵⁸

(b) Lukić's appointment as Head of the MUP Staff

1358. The Trial Chamber found that throughout his career Lukić served in various MUP posts, including Deputy Head of the Užice SUP and Head of Traffic Matters in the Belgrade Headquarters of the MUP.⁴⁴⁵⁹ It also found that, in 1991, Lukić was appointed to the position of Deputy Head of the Belgrade City SUP, and that in May 1998 he was reassigned to serve at the MUP Staff.⁴⁴⁶⁰ The Trial Chamber noted that, on 11 May 1999, Stojiljković recommended that Lukić be promoted to the rank of Lieutenant-General.⁴⁴⁶¹ Following his assignment in Kosovo, Lukić was appointed the Head of the Border Police Administration and in 2001 was promoted to the position of Head of the RJB.⁴⁴⁶² The Trial Chamber noted that Lukić's promotions did not fit the pattern of high-level officials who were carefully positioned by Milošević as the crisis in Kosovo escalated.⁴⁴⁶³

1359. Lukić submits that the Trial Chamber incorrectly “interpreted [his] career.”⁴⁴⁶⁴ He argues that, following his dismissal from the Republican MUP, he was demoted to the position of Deputy Head of the Belgrade SUP and then sent to Kosovo in June 1998.⁴⁴⁶⁵ In support of his argument that he was not a JCE member, Lukić points to the Trial Chamber's finding that his appointment to the Head of the MUP Staff did not fit the pattern of appointments of individuals who were close to Milošević⁴⁴⁶⁶ and that it was only after the fall of Milošević that he was appointed Assistant Minister and RJB Chief.⁴⁴⁶⁷ In addition, Lukić asserts that his promotion letter, sent by Stojiljković to Milutinović, does not show that he was a *de facto* commander of the MUP forces, because it was

⁴⁴⁵⁷ Trial Judgement, vol. 3, para. 1051. See also *ibid.*, vol. 3, para. 1131.

⁴⁴⁵⁸ Trial Judgement, vol. 3, para. 1131.

⁴⁴⁵⁹ Trial Judgement, vol. 3, para. 936.

⁴⁴⁶⁰ Trial Judgement, vol. 3, para. 937.

⁴⁴⁶¹ Trial Judgement, vol. 3, paras 945, 1051, referring to Exh. 1D680.

⁴⁴⁶² Trial Judgement, vol. 3, para. 937.

⁴⁴⁶³ Trial Judgement, vol. 3, para. 85.

⁴⁴⁶⁴ Lukić's Appeal Brief, para. 552, referring to Trial Judgement, vol. 3, paras 936-937.

⁴⁴⁶⁵ Lukić's Appeal Brief, para. 552, referring to Exh. P948, pp. 10, 11, Exh. 6D1613, para. 51, Exh. P1252.

⁴⁴⁶⁶ Lukić's Appeal Brief, paras 420, 497, referring to Trial Judgement, vol. 3, para. 85.

⁴⁴⁶⁷ Lukić's Appeal Brief, paras 497, 552, referring to Exh. P948, p. 17.

“pro-forma rather than substantive” and was authored by clerks who followed “pre-established formulaic language.”⁴⁴⁶⁸ In response, the Prosecution submits that Lukić’s arguments concerning the alleged misinterpretation of his career and Stojiljković’s letter warrant summary dismissal.⁴⁴⁶⁹

1360. The Appeals Chamber is not persuaded by Lukić’s assertion that, since his appointment did not fit into the pattern of promotions of high level officials, the Trial Chamber erred in concluding that he was a JCE member. Lukić merely seeks to advance a different interpretation of the evidence without explaining why his conviction should not stand on the basis of the totality of the evidence relied upon by the Trial Chamber. Therefore, his argument is dismissed. Likewise, his submission that the Trial Chamber incorrectly “interpreted [his] career”⁴⁴⁷⁰ is without merit.

1361. With respect to the contention that the Trial Chamber erroneously relied on Stojiljković’s letter to Milutinović as evidence of Lukić’s role,⁴⁴⁷¹ the Appeals Chamber notes that the Trial Chamber explicitly referred to the part of the letter stating that Lukić “excelled in successful command and control of the MUP units engaged in the prevention of terrorism in Kosovo and Metohija.”⁴⁴⁷² The Appeals Chamber is not persuaded by Lukić’s assertion that the letter used “formulaic language” and finds that he has failed to demonstrate an error in the Trial Chamber’s interpretation of this evidence. Therefore his argument is dismissed.

(c) Lukić’s authority over MUP forces in Kosovo

(i) Lukić’s powers

a. Submissions of the parties

1362. Lukić argues that the Trial Chamber reached three contradictory findings in relation to his role, namely that he: (i) was the *de facto* commander over MUP forces in Kosovo;⁴⁴⁷³ (ii) had *de jure* powers over those forces;⁴⁴⁷⁴ and (iii) was a “bridge” between the commanders in Kosovo and the policy-makers in Belgrade.⁴⁴⁷⁵ Lukić argues that the Trial Chamber “converted its conclusion regarding [his] powers [...] into a conclusion that he was a ‘commander’.”⁴⁴⁷⁶

⁴⁴⁶⁸ Lukić’s Appeal Brief, para. 608, referring to Exh. 1D680, Miroslav Mijatović, 15 Feb 2008, T. 22471-22472, Branislav Simonović, 17 Apr 2008, T. 25591-25592.

⁴⁴⁶⁹ Prosecution’s Response Brief (Lukić), paras 318, 363-364, referring to Trial Judgement, vol. 3, para. 1051.

⁴⁴⁷⁰ Lukić’s Appeal Brief, para. 552.

⁴⁴⁷¹ Lukić’s Appeal Brief, para. 608.

⁴⁴⁷² Trial Judgement, vol. 3, para. 1051, citing Exh. 1D680, p. 2.

⁴⁴⁷³ Lukić’s Appeal Brief, para. 480, referring to Trial Judgement, vol. 3, para. 1131.

⁴⁴⁷⁴ Lukić’s Appeal Brief, para. 481, referring to Trial Judgement, vol. 3, para. 1118.

⁴⁴⁷⁵ Lukić’s Appeal Brief, paras 484, 606.

⁴⁴⁷⁶ Lukić’s Appeal Brief, para. 482, 484.

1363. Lukić also contends that there is “ample evidence” showing that he had neither *de jure* nor *de facto* authority over MUP units in Kosovo.⁴⁴⁷⁷ He claims in this respect that he had no authority over the deployment of MUP units, the appointment and dismissal of staff, or the initiation of criminal or disciplinary proceedings.⁴⁴⁷⁸ Thus, Lukić argues that he had no “effective control” over the MUP forces in Kosovo, which, he claims, is a prerequisite for finding that he shared with the other JCE members the intent to forcibly displace the Kosovo Albanian population.⁴⁴⁷⁹

1364. Lukić further asserts that his interview with the Prosecution and other evidence show that, during the relevant times, MUP officers of higher rank and superior position were present in Kosovo, including Vlastimir Đorđević, Obrad Stevanović, and Vlajko Stojiljković⁴⁴⁸⁰ and that there was no “dual authority” over the MUP units in Kosovo.⁴⁴⁸¹ He also argues that the Trial Chamber “incompletely and inaccurately quoted” Milan Đaković’s evidence as identifying Lukić as the person in command of MUP forces in Kosovo.⁴⁴⁸² Lukić further contends that the Trial Chamber erroneously relied on his interview with the Prosecution,⁴⁴⁸³ misapplying the standard of proof beyond reasonable doubt.⁴⁴⁸⁴ Finally, he contests the Trial Chamber’s conclusion that “the precise title of [his] position, and its translation into English is immaterial.”⁴⁴⁸⁵

1365. The Prosecution responds that Lukić fails to show an error in the Trial Chamber’s conclusion that he was the *de facto* commander of MUP forces in Kosovo.⁴⁴⁸⁶ In addition, the Prosecution submits that Lukić misstates the law as, for JCE liability to arise, the Trial Chamber was not required to find that Lukić exercised effective control over the MUP forces, in the sense of a material ability to prevent or punish criminal conduct.⁴⁴⁸⁷

⁴⁴⁷⁷ Lukić’s Appeal Brief, para. 432. See also *ibid.*, para. 480, referring to Trial Judgement, vol. 3, para. 1131. Appeal Hearing, 14 Mar 2013, 506-507, referring to Exh. 3D728, Aleksandar Vasiljević, 24 Jan 2007. T. 9066.

⁴⁴⁷⁸ Lukić’s Appeal Brief, para. 432. See also *ibid.*, paras 251, 560.

⁴⁴⁷⁹ Lukić’s Appeal Brief, para. 251, 262-264, 367, referring, *inter alia*, to Trial Judgement, vol. 1, paras 719-720, 723.

⁴⁴⁸⁰ Lukić’s Appeal Brief, para. 173-176, 553-554, 562, referring, *inter alia*, to Exh. P948, pp. 41-42, 228, Trial Judgement, vol. 3, para. 961. See also Lukić’s Appeal Brief, paras 483, 491-492, 553-556, 562, 604-605, referring to Trial Judgement, vol. 1, paras 658-660, 666, 675, 700, *ibid.*, vol. 3, para. 1051.

⁴⁴⁸¹ Lukić’s Appeal Brief, para. 176-177, referring to Trial Judgement, vol. 3, para. 961. In relation to a MUP Staff meeting held on 21 December 1998, Lukić contends that the Trial Chamber failed to consider the presence of Stojiljković, Stevanović, and Dragan Ilić, Head of the Crime Police Administration in Belgrade, and the fact that Stevanović was issuing tasks to the SUP Chiefs and to the PJP commanders. Lukić’s Appeal Brief, para. 578, referring to Trial Judgement, vol. 3, para. 994.

⁴⁴⁸² Lukić’s Appeal Brief, para. 557, referring to Milan Đaković, 20 May 2008, T. 26518, *ibid.*, 21 May 2008, T. 26534-26535.

⁴⁴⁸³ Lukić’s Appeal Brief, paras 171, 173, 182, 562, referring to Trial Judgement, vol. 3, paras 941, 961.

⁴⁴⁸⁴ Lukić’s Appeal Brief, para. 172, referring to *Čelebići* Trial Judgement, paras 600, 603, *Čelebići* Appeal Judgement, para. 458.

⁴⁴⁸⁵ Lukić’s Appeal Brief, para. 588, citing Trial Judgement, vol. 3, para. 1018.

⁴⁴⁸⁶ Prosecution’s Response Brief (Lukić), para. 358.

⁴⁴⁸⁷ Prosecution’s Response Brief (Lukić), paras 226-227. See also *ibid.*, paras 155-156, 158.

1366. Further, the Prosecution submits that whether Lukić was the highest ranked MUP officer in Kosovo is irrelevant, as what matters is the scope of his tasks and responsibilities.⁴⁴⁸⁸ Concerning Lukić’s role as a “bridge” and his position *vis-à-vis* Đorđević, Stevanović, and Stojiljković, the Prosecution submits that Lukić controlled the work of his subordinates while taking orders and directions from his superiors.⁴⁴⁸⁹ Finally, the Prosecution submits that the Trial Chamber correctly relied on Lukić’s interview and on Đaković’s evidence.⁴⁴⁹⁰

b. Analysis

1367. The Appeals Chamber considers that there is no contradiction in the Trial Chamber’s findings that Lukić had both *de jure* and *de facto* powers over MUP forces deployed in Kosovo and that he was a “bridge” between the commanders in Kosovo and the policy-makers in Belgrade.⁴⁴⁹¹

1368. The Appeals Chamber further notes that Lukić was convicted pursuant to Article 7(1) of the Statute for committing crimes against humanity and war crimes through his participation in a JCE.⁴⁴⁹² The Appeals Chamber recalls that participation in a JCE pursuant to Article 7(1) of the Statute and superior responsibility pursuant to Article 7(3) of the Statute are distinct categories of individual criminal responsibility, each with specific legal requirements.⁴⁴⁹³ Contrary to Lukić’s contention, the ability to exercise “effective control” over the perpetrators of the crime is not a requirement for establishing responsibility for commission through participation in a JCE.⁴⁴⁹⁴ While not every position of authority necessarily leads to superior responsibility under Article 7(3) of the Statute, this does not preclude a trial chamber from considering the accused’s authority over the direct perpetrators in finding him responsible pursuant to Article 7(1) of the Statute for his participation in a JCE.⁴⁴⁹⁵ In the present case, the Trial Chamber found that Lukić significantly contributed to the JCE in his capacity as *de facto* commander over the MUP forces in Kosovo from mid-1998 to mid-1999 by being involved in the planning process and ensuring compliance with the plans for the conduct of joint operations as well as by acting as a “bridge” between the policy-

⁴⁴⁸⁸ Prosecution’s Response Brief (Lukić), paras 136-137, 319, referring to Trial Judgement, vol. 3, paras 941, 944.

⁴⁴⁸⁹ Prosecution’s Response Brief (Lukić), paras 359-360, referring to Trial Judgement, vol. 3, para. 1131. Concerning the MUP Staff meeting of 21 December 1999, the Prosecution submits that Lukić’s arguments as to the presence of Stojiljković, Stevanović, and Ilić should be dismissed as irrelevant and that Lukić fails to show that the Trial Chamber erred in concluding that he had significant authority over the SUPs and the PJP units (Prosecution’s Response Brief (Lukić), paras 342-343).

⁴⁴⁹⁰ Prosecution’s Response Brief (Lukić), paras 135-137, 320-321, citing Milan Đaković, 19 May 2008, T. 26433-26434.

⁴⁴⁹¹ Trial Judgement, vol. 3, paras 1051, 1118.

⁴⁴⁹² Trial Judgement, vol. 3, paras 1138, 1212.

⁴⁴⁹³ *Kvočka et al.* Appeal Judgement, para. 104. See also *Blaškić* Appeal Judgement, para. 91.

⁴⁴⁹⁴ See *Kvočka et al.* Appeal Judgement, paras 144, 383.

⁴⁴⁹⁵ *Cf. Kvočka et al.* Appeal Judgement, para. 144.

planners in Belgrade and the forces on the ground.⁴⁴⁹⁶ Lukić's submission that the Trial Chamber should have established that he had "effective control" over the MUP forces in Kosovo is without merit.

1369. Further, Lukić ignores the Trial Chamber's comprehensive analysis of evidence concerning his powers as Head of the MUP Staff.⁴⁴⁹⁷ The Trial Chamber also explicitly acknowledged Lukić's argument that several high-ranking MUP officials senior to him were often present in Kosovo in 1998 and 1999.⁴⁴⁹⁸ It noted that, in his interview with the Prosecution, Lukić explained that the PJP units "had practically dual responsibility" to the PJP commander and, at the same time, to the MUP Staff⁴⁴⁹⁹ and that, from mid-July until the end of September or the beginning of October 1998, Đorđević, Head of the RJB,⁴⁵⁰⁰ and Obrad Stevanović, overall Head of the PJP,⁴⁵⁰¹ were present with him in Priština.⁴⁵⁰² When asked who had primacy, Lukić stressed that Đorđević and Stevanović were "by all means above" the Head of the MUP Staff.⁴⁵⁰³ In light of the command and ranking structure within the MUP, in which position and function were more important than rank, the Trial Chamber considered that it was unnecessary to determine who was the highest ranked police official in Kosovo⁴⁵⁰⁴ or the precise title of Lukić's position.⁴⁵⁰⁵ Rather, it reached its conclusion with respect to Lukić's role on the basis of his tasks and responsibilities.⁴⁵⁰⁶ Lukić has failed to show that the Trial Chamber's approach in this respect was erroneous. The Trial Chamber also acknowledged that the MUP Staff did not replace the day-to-day command structure and that the SUP chiefs and other unit commanders maintained their direct control over their forces.⁴⁵⁰⁷ Lukić's assertion that other commanders and high ranking officers, such as Stevanović, Đorđević, Stojiljković, and Ilić maintained their authority and were present in Kosovo does not contradict these findings. In view of these considerations, the Appeals Chamber finds that Lukić has also failed to show that the Trial Chamber misapplied the standard of proof in evaluating the evidence.

1370. Lukić's assertion that the Trial Chamber misrepresented Đaković's evidence is similarly unpersuasive. Đaković testified that "no one else in the chain of command could issue orders to the MUP units apart from General Lukić and to the army units apart from General Pavković or General

⁴⁴⁹⁶ Trial Judgement, vol. 3, para. 1131.

⁴⁴⁹⁷ Trial Judgement, vol. 3, paras 1016-1051.

⁴⁴⁹⁸ Trial Judgement, vol. 3, para. 941.

⁴⁴⁹⁹ Trial Judgement, vol. 3, paras 961, 1013, citing Exh. P948, p. 41.

⁴⁵⁰⁰ Trial Judgement, vol. 1, para. 659.

⁴⁵⁰¹ Trial Judgement, vol. 1, para. 666.

⁴⁵⁰² Trial Judgement, vol. 3, para. 961, citing Exh. P948, p. 41. Cf. Lukić's Appeal Brief, para. 562.

⁴⁵⁰³ Trial Judgement, vol. 3, para. 961, referring to Exh. P948, p. 42.

⁴⁵⁰⁴ Trial Judgement, vol. 3, paras 942, 944.

⁴⁵⁰⁵ Trial Judgement, vol. 3, para. 1018.

⁴⁵⁰⁶ See Trial Judgement, vol. 3, para. 944.

⁴⁵⁰⁷ Trial Judgement, vol. 3, para. 1012.

Samardžić.”⁴⁵⁰⁸ Consequently, the Trial Chamber noted that “Đaković identified Lukić as the person in command of the MUP forces in Kosovo.”⁴⁵⁰⁹ Contrary to Lukić’s submission, Đaković’s statements that he “didn’t really give much thought to the role of the MUP” and that Stevanović had specific authority to deploy and engage the PJP units,⁴⁵¹⁰ do not render the Trial Chamber’s analysis of the evidence incomplete or inaccurate. His argument is thus dismissed.

(ii) Instructions to the MUP units issued by Lukić

1371. The Trial Chamber found that Lukić issued numerous dispatches on behalf of the MUP Staff, containing tasks and instructions for the SUP, PJP, and SAJ units operating in Kosovo.⁴⁵¹¹ Lukić submits that the Trial Chamber’s finding was erroneous as the documents in question “were neither ‘dispatches’ nor signed by him.”⁴⁵¹² With regard to the dispatches of 7 and 9 August 1998, Lukić argues that the Trial Chamber erroneously concluded that the MUP Staff issued an “order” and that he “directed” the heads of the Kosovo SUPs to interview Kosovo Albanians seeking copies of their identity documents.⁴⁵¹³

1372. Lukić further contends that the Trial Chamber relied on an erroneous translation of a dispatch dated 6 May 1999 in finding that he instructed the SUP, PJP, and SAJ commanders to familiarise their forces with the content of an article published in *Politika* and that he directed them to take measures to “prevent paramilitary formations and individuals from committing acts of violence.”⁴⁵¹⁴ Lukić argues that it was not him but Miroslav Mijatović, Deputy Head of the MUP Staff, who sent the dispatch and that the dispatch concerned the continuation of measures already undertaken.⁴⁵¹⁵ Further, Lukić submits that the Trial Chamber ignored evidence showing that there was a practice in accordance with which documents bearing a MUP Staff heading or Lukić’s typed name were drafted and sent by other MUP officials who were not MUP Staff members.⁴⁵¹⁶

1373. In response, the Prosecution submits that the dispatches referred to by Lukić were sent from the MUP Staff and included his typewritten name, and that nothing suggests that their issuance was unauthorized.⁴⁵¹⁷ Regarding the dispatches of 7 and 9 August 1998, the Prosecution maintains that

⁴⁵⁰⁸ Trial Judgement, vol. 3, para. 1024, fn. 2561, citing Milan Đaković, 19 May 2008, T. 26434.

⁴⁵⁰⁹ Trial Judgement, vol. 3, para. 1024.

⁴⁵¹⁰ Milan Đaković, 20 May 2008, T. 26518, 21 May 2008, T. 26534, referred to in Lukić’s Appeal Brief, para. 557.

⁴⁵¹¹ Trial Judgement, vol. 3, para. 1051.

⁴⁵¹² Lukić’s Appeal Brief, paras 587, 599, referring to Trial Judgement, vol. 3, paras 1005, 1051, Exh. 5D1289, Exh. 6D690, Exh. P2528, Exh. 6D237, Exh. 6D874, Exh. 6D876, Exh. 5D1418.

⁴⁵¹³ Lukić’s Appeal Brief, para. 575, referring to Trial Judgement, vol. 3, para. 987.

⁴⁵¹⁴ Lukić’s Appeal Brief, para. 583, citing Trial Judgement, vol. 3, para. 1005.

⁴⁵¹⁵ Lukić’s Appeal Brief, para. 583.

⁴⁵¹⁶ Lukić’s Appeal Brief, para. 587, referring to Trial Judgement, vol. 3, para. 1005, Exh. 6D1122. See also Appeal Hearing, 14 Mar 2013, AT. 527, referring to Exh. 6D874, Gvozden Gagić, 18 Mar 2008, T. 24476-24478.

⁴⁵¹⁷ Prosecution’s Response Brief (Lukić), para. 356, referring to Trial Judgement, vol. 3, paras 984, 987-988, 1005.

Lukić fails to show that the Trial Chamber's interpretation of the evidence was unreasonable.⁴⁵¹⁸ Concerning the dispatch of 6 May 1999, the Prosecution claims that, even if the dispatch concerned the continuation of measures already undertaken, the document still shows that Lukić had authority over the SUPs and PJP detachments in Kosovo.⁴⁵¹⁹

1374. The Appeals Chamber finds that Lukić fails to show an error in the Trial Chamber's finding that he issued numerous dispatches on behalf of the MUP Staff.⁴⁵²⁰ The documents referred to in his submission contain explicit tasks and instructions and were sent from the MUP Staff on his behalf, containing his typed name and, some of them, a MUP stamp.⁴⁵²¹

1375. Lukić's assertion that the Trial Chamber erroneously interpreted the dispatches of 7 and 9 August 1998 is equally without merit. It is clear from the dispatch of 7 August 1998 that Lukić indeed issued an order to the Kosovo SUPs and to the PJP commanders to take disciplinary measures against police officers involved in looting.⁴⁵²² Similarly, the dispatch of 9 August 1998 directed the heads of the Kosovo SUPs to interview Kosovo Albanians seeking copies of their identity documents.⁴⁵²³ Both documents contain Lukić's typewritten name. Whether they were issued upon his initiative or he "only passed along the opinion" of the MUP⁴⁵²⁴ is irrelevant. Lukić fails to show any error in the Trial Chamber's reliance on this evidence.

1376. With regard to Lukić's argument that the Trial Chamber relied on an erroneous translation of the dispatch of 6 May 1999, the Appeals Chamber considers that, even if, as suggested by Lukić, the dispatch referred to the continuation of measures that had already been taken,⁴⁵²⁵ Lukić fails to explain how this undermines the Trial Chamber's conclusion that he exercised authority over the SUPs and PJP detachments in Kosovo.⁴⁵²⁶ Concerning Lukić's argument that the Trial Chamber erred in finding that he was the sender of the *Politika* article to the chiefs of the Kosovo SUPs,⁴⁵²⁷ the Trial Chamber specifically noted that, even if the dispatch were not sent by Lukić himself, it was sent from the MUP Staff on his behalf and that no suggestion was made that it was unauthorised.⁴⁵²⁸ In this respect, the Trial Chamber explicitly considered Gvozden Gagić's evidence that he drafted the dispatch which was signed later by Dragan Ilić and that there was a MUP Staff

⁴⁵¹⁸ Prosecution's Response Brief (Lukić), para. 398. See also *ibid.*, paras 335-336, 338, 340.

⁴⁵¹⁹ Prosecution's Response Brief (Lukić), para. 335.

⁴⁵²⁰ Lukić's Appeal Brief, para. 599, referring to Trial Judgement, vol. 3, paras 1005, 1051, Exh. 5D1289, Exh. 6D690, Exh. P2528, Exh. 6D237, Exh. 6D874, Exh. 6D876, Exh. 5D1418.

⁴⁵²¹ See Exh. 5D1289, p. 1-2; Exh. 6D237, p. 1; Exh. 6D874, p. 2; Exh. 6D876, p. 1; Exh. 6D690, pp. 1-2; Exh. P2528, pp. 1-2.

⁴⁵²² Trial Judgement, vol. 3, para. 987, referring to Exh. 6D768.

⁴⁵²³ Trial Judgement, vol. 3, para. 987, referring to Exh. 6D665.

⁴⁵²⁴ See Lukić's Appeal Brief, para. 575.

⁴⁵²⁵ Lukić's Appeal Brief, para. 583.

⁴⁵²⁶ Trial Judgement, vol. 3, paras 1012-1013.

⁴⁵²⁷ Lukić's Appeal Brief, para. 583, referring to Trial Judgement, vol. 3, para. 1005.

log book which registered the identity of the sender of the dispatch.⁴⁵²⁹ The Appeals Chamber notes that Gagić further explained that due to this log book he did not need a “separate authorisation” from Lukić to issue a dispatch bearing Lukić’s typed name.⁴⁵³⁰ Lukić thus fails to demonstrate that the Trial Chamber misinterpreted the evidence or that its finding in this regard was unreasonable.

1377. Finally, Lukić has failed to substantiate his assertion that the Trial Chamber ignored evidence showing that, as a matter of practice, documents bearing a MUP Staff heading or Lukić’s typed name were sent by other MUP officials who were not MUP Staff members. The only document referred to by Lukić is a dispatch bearing Stevanović’s typewritten name and a MUP Staff heading, dated 13 June 1999, and addressed to Stojiljković and Đorđević.⁴⁵³¹ This document does not render the Trial Chamber’s reliance on numerous dispatches bearing Lukić’s name unreasonable.⁴⁵³²

(iii) Lukić’s *de facto* authority to require the conduct of investigations

1378. With respect to Lukić’s disciplinary powers, the Trial Chamber found that “disciplinary proceedings were generally initiated by a person’s immediate supervisor and were dealt with by the relevant SUPs”.⁴⁵³³ It further found that the evidence showed that Lukić “had *de facto* authority to require the chiefs of the SUPs to conduct investigations into crimes, even if he was not the person who actually initiated proceedings.”⁴⁵³⁴

1379. Lukić challenges the reasonableness of the Trial Chamber’s conclusion that he had *de facto* authority to require that investigations be conducted.⁴⁵³⁵ He argues that the evidence relied upon by the Trial Chamber does not show that he issued “orders” for the conduct of investigations⁴⁵³⁶ and that, prior to initiating criminal or disciplinary proceedings, the SUPs would request approval from the MUP in Belgrade, without any obligation to copy in the MUP Staff.⁴⁵³⁷ He adds that Đorđević

⁴⁵²⁸ Trial Judgement, vol. 3, para. 1005.

⁴⁵²⁹ Trial Judgement, vol. 3, para. 1005, referring to Gvozden Gagić, 18 Mar 2008, T. 24476-24478, *ibid.*, 19 Mar 2008, T. 24517-24524.

⁴⁵³⁰ See Gvozden Gagić, 19 Mar 2008, T. 24518.

⁴⁵³¹ Lukić’s Appeal Brief, para. 587, referring to Exh. 6D1122.

⁴⁵³² See Trial Judgement, vol. 3, paras 984, 987-988, 1005, and evidence cited therein.

⁴⁵³³ Trial Judgement, vol. 3, para. 1049.

⁴⁵³⁴ Trial Judgement, vol. 3, para. 1049, referring to Exh. 6D768, Exh. 6D872.

⁴⁵³⁵ Lukić’s Appeal Brief, paras 636, 640, referring, *inter alia*, to Trial Judgement, vol. 3, para. 1049. Lukić also argues that “he had no knowledge of any crimes that were about to be committed” and that he “had no power as the Head of MUP Staff to issue orders preventing the committing of crimes or punishing the perpetrators” (Lukić’s Appeal Brief, para. 264). See also Appeal Hearing, 14 Mar 2013, AT. 511-512.

⁴⁵³⁶ Lukić’s Appeal Brief, para. 640. See also *ibid.*, para. 575.

⁴⁵³⁷ Lukić’s Appeal Brief, para. 636-637, referring to Trial Judgement, vol. 3, para. 1049.

or Zeković issued instructions concerning disciplinary proceedings directly to the SUPs, without informing the MUP Staff.⁴⁵³⁸

1380. Lukić also stresses that the MUP in general did initiate proceedings and took measures against policemen who had committed crimes.⁴⁵³⁹ Lukić contests the Trial Chamber's reliance on Ljubinko Cvetić's evidence that he was not aware of police officers charged for crimes in Kosovo, claiming that the minutes of the meeting of 4 April 1999 show that Cvetić was the only head of a SUP who did not take measures with respect to criminal offences.⁴⁵⁴⁰

1381. In response, the Prosecution submits that the Trial Chamber's conclusion that Lukić had *de facto* authority to require the conduct of investigations was correct and supported by the evidence.⁴⁵⁴¹ It maintains that the Trial Chamber did not err in relying on Cvetić's testimony and that it expressly considered the testimony of Nebojša Bogunović, Assistant Head of the Kosovska Mitrovica SUP,⁴⁵⁴² and Miloš Vojnović, Chief of the Prizren SUP,⁴⁵⁴³ in rejecting Lukić's argument that the circumstances of Cvetić's removal undermined his credibility.⁴⁵⁴⁴

1382. The Trial Chamber considered evidence showing that, in order to initiate a disciplinary procedure, the relevant SUP was required to obtain authorisation from the MUP in Belgrade.⁴⁵⁴⁵ In finding that Lukić had *de facto* authority to require the conduct of investigations the Trial Chamber relied upon Lukić's order of 7 August 1998 requesting the SUP chiefs and the commanders of PJP detachments to "[v]igorously institute criminal, misdemeanour and disciplinary proceedings" against police officers involved in looting, torching, and other "unprofessional" conduct.⁴⁵⁴⁶ The Trial Chamber also referred to a dispatch of 24 January 1999, in which Lukić instructed the Chiefs of SUPs and the commanders of the PJP and SAJ units to take "disciplinary and other measures" against MUP members who had been found "guilty of abuse or overstepping of authority."⁴⁵⁴⁷ Moreover, the Trial Chamber referred to Lukić's interview with the Prosecution, in which he recounted an occasion when perpetrators of a massacre "were immediately arrested" after he was

⁴⁵³⁸ Lukić's Appeal Brief, para. 638. See also *ibid.*, para. 639 where Lukić argues that decisions concerning appointments of SUP chiefs were made exclusively by the RJB Chief, without his involvement.

⁴⁵³⁹ Lukić's Appeal Brief, para. 252.

⁴⁵⁴⁰ Lukić's Appeal Brief, para. 253, referring to Exh. P1989; Lukić's Reply Brief, para. 37.

⁴⁵⁴¹ Prosecution's Response Brief (Lukić), para. 395-397, referring to Trial Judgement, vol. 3, paras 987, 996, 1049, Exh. P948, pp. 155-156.

⁴⁵⁴² Trial Judgement, vol. 1, para. 720.

⁴⁵⁴³ Trial Judgement, vol. 1, para. 717.

⁴⁵⁴⁴ Prosecution's Response Brief (Lukić), para. 228.

⁴⁵⁴⁵ Trial Judgement, vol. 1, para. 717, referring to Ljubinko Cvetić, 8 Dec 2006, T. 8152-8153, Exh. 6D1325, Exh. 6D134.

⁴⁵⁴⁶ Exh. 6D768, p. 1. See also Trial Judgement, vol. 3, para. 1049.

⁴⁵⁴⁷ Exh. 6D872, p. 1. See also Trial Judgement, vol. 3, para. 1049.

informed about the incident.⁴⁵⁴⁸ Lukić has failed to show that the Trial Chamber misinterpreted this evidence.

1383. The Appeals Chamber finds that, in view of this evidence, Lukić's assertion that, prior to initiating criminal or disciplinary proceedings, the SUPs would request an approval from the MUP in Belgrade does not undermine the Trial Chamber's finding regarding his *de facto* authority. The evidence considered by the Trial Chamber showed that, in initiating disciplinary proceedings against individual members of the MUP, the relevant SUP was required to obtain authorisation from the MUP in Belgrade.⁴⁵⁴⁹ The evidence in relation to Lukić's *de facto* authority poses no contradiction. Rather, Lukić's order of 7 August 1998 and his dispatch of 24 January 1999 demonstrate that he provided general instructions to the SUP chiefs and the commanders of PJP detachments to institute disciplinary or other proceedings where required. In these circumstances, the Appeals Chamber finds that it was open to the Trial Chamber to conclude that Lukić had *de facto*, as opposed to *de jure*, authority to require the conduct of investigations. His submission that he was not involved in the process of amending certain instructions concerning disciplinary proceedings is dismissed for the same reason.

1384. Further, in its discussion on discipline within the MUP, the Trial Chamber accepted Cvetić's evidence that he knew of no police officer charged for murder, arson, or expulsion of Kosovo Albanians while he was Head of the Kosovska Mitrovica SUP.⁴⁵⁵⁰ The Trial Chamber explicitly considered the testimony of Bogunović and Vojnović that Cvetić was removed from his position due to his inability to carry out his duties as a head of the SUP.⁴⁵⁵¹ Nonetheless, the Trial Chamber found that the circumstances of Cvetić's removal from office did not undermine the credibility and reliability of his account.⁴⁵⁵² Considering that the Trial Chamber had the advantage of observing the witnesses in person⁴⁵⁵³ and that the Appeals Chamber will not lightly disturb the Trial Chamber's broad discretion in weighing witness evidence,⁴⁵⁵⁴ Lukić has failed to show an error in the Trial Chamber's decision to rely on Cvetić's testimony. His argument is therefore dismissed.

⁴⁵⁴⁸ Trial Judgement, vol. 3, para. 1049, citing Exh. P948, pp. 155-156.

⁴⁵⁴⁹ Ljubinko Cvetić, 8 Dec 2006, T. 8152-8153; Exh. 6D1325; Exh. 6D134. See also Exh. 6D1613, paras 41-43; Exh. 6D1339; Exh. 6D1340; Exh. 6D464.

⁴⁵⁵⁰ Trial Judgement, vol. 1, para. 720, referring to Ljubinko Cvetić, 7 Dec 2006, T. 8112-8113.

⁴⁵⁵¹ Trial Judgement, vol. 1, para. 720, referring to Nebojša Bogunović, 10 Apr 2008, T. 25119-25120, Miloš Vojnović, 12 Mar 2008, T. 24155-24158.

⁴⁵⁵² Trial Judgement, vol. 1, para. 720.

⁴⁵⁵³ *Haradinaj et al.* Appeal Judgement, para. 201; *Furundžija* Appeal Judgement, para. 37. See also *supra*, sub-section VII.C.1.(c).

⁴⁵⁵⁴ *Galić* Appeal Judgement, para. 300.

(iv) Summarily dismissed submissions

1385. The Appeals Chamber notes that a number of Lukić's submissions challenging the Trial Chamber's findings that he issued numerous dispatches containing tasks and instructions for the MUP units and that he had authority over the MUP forces in Kosovo are unsubstantiated,⁴⁵⁵⁵ misrepresent⁴⁵⁵⁶ or fail to identify the challenged factual findings,⁴⁵⁵⁷ or seek to substitute his interpretation of the evidence for that of the Trial Chamber without showing any error.⁴⁵⁵⁸ Consequently, these submissions are summarily dismissed.

(d) Lukić's presence and role during MUP Staff meetings(i) Submissions of the parties

1386. Lukić challenges the Trial Chamber's evaluation of evidence concerning his presence and role during a number of MUP Staff meetings held in 1998 and 1999. In particular, Lukić challenges the Trial Chamber's finding that he chaired most of the meetings held at the MUP Staff in the presence of high level officials.⁴⁵⁵⁹ He refers in this respect to the meetings of 22 July, 28 July, and 3 November 1998.⁴⁵⁶⁰ Lukić argues that, in discussing the meeting of 22 July 1998, the Trial Chamber ignored the presence of Vlastimir Đorđević and Obrad Stevanović, who were considerably higher ranking officials than Lukić.⁴⁵⁶¹ In relation to the meeting of 28 July 1998, Lukić asserts that the Trial Chamber erred in finding that Rade Marković was Head of the RDB and that all seven SUP Chiefs were present.⁴⁵⁶² Concerning the meeting of 3 November 1998, Lukić contends that the Trial Chamber ignored that the measures discussed with respect to armoured vehicles and weapons were previously agreed upon.⁴⁵⁶³

⁴⁵⁵⁵ Lukić's Appeal Brief, paras 588, 602 (submitting that by relying on the testimony of witnesses with military backgrounds, the Trial Chamber erroneously applied military terminology, such as "order" and "command," to Lukić's position within the MUP Staff).

⁴⁵⁵⁶ Lukić's Appeal Brief, para. 584 (claiming that the Trial Chamber misquoted and misinterpreted one of the dispatches sent on 6 May 1999 (Exh. 6D874). See also Trial Judgement, vol. 3, para. 1005). Lukić's Appeal Brief, para. 563 (alleging that the Trial Chamber "ignored" witness K25's statement that his knowledge was not first hand knowledge. See Trial Judgement, vol. 3, para. 962).

⁴⁵⁵⁷ Lukić's Appeal Brief, para. 600 (submitting that "[c]ertain exhibits were 'promoted' by the Chamber into orders/commands/tasks/instructions").

⁴⁵⁵⁸ Lukić's Appeal Brief, para. 580, referring to Trial Judgement, vol. 3, para. 996 (contending that the Trial Chamber erred in finding that he "directed" the SUP and PJP units to ensure correct behavior toward KVM, while he was merely "remind[ing] of measures already determined by MUP in Belgrade"). Lukić's Appeal Brief, para. 586, referring to Trial Judgement, vol. 3, para. 1011 (asserting that the Trial Chamber "misquoted" Živaljević's telegram of 26 May 1999 and erred in finding that the response to this telegram was sent by Lukić. The Trial Chamber explicitly noted that the response to the telegram was sent by the MUP Staff (See Trial Judgement, vol. 3, para. 1011)).

⁴⁵⁵⁹ Lukić's Appeal Brief, para. 598. See Trial Judgement, vol. 3, para. 1050.

⁴⁵⁶⁰ Lukić's Appeal Brief, paras 574, 576, 598. Although Lukić refers to Exh. 6D789 (*ibid.*, para. 598), the Appeals Chamber understands the reference to be to Exh. 6D798.

⁴⁵⁶¹ Lukić's Appeal Brief, para. 573.

⁴⁵⁶² Lukić's Appeal Brief, para. 574, referring to Trial Judgement, vol. 3, para. 986.

⁴⁵⁶³ Lukić's Appeal Brief, para. 576, referring to Trial Judgement, vol. 3, para. 989.

1387. As to meetings held in 1999, Lukić submits that the Trial Chamber failed to consider that Đorđević attended the meeting on 17 February 1999 and that the plan, referred to at the meeting, was prepared by the RJB, rather than by Lukić or the MUP Staff.⁴⁵⁶⁴ Finally, Lukić contends that, in concluding that at the meeting of 7 May 1999, which was chaired by him, Stevanović instructed the heads of the SUPs to organise “anti-terrorist” actions which must be approved by the MUP Staff,⁴⁵⁶⁵ the Trial Chamber disregarded Miroslav Mijatović’s evidence that Stevanović himself was a “person who would approve the plan, with an address at the Staff.”⁴⁵⁶⁶

1388. In response, the Prosecution submits that, in challenging the Trial Chamber’s finding that he chaired most of the meetings held at the MUP Staff, Lukić merely seeks to substitute his interpretation of the evidence for that of the Trial Chamber.⁴⁵⁶⁷ It also asserts that the presence of higher-ranking MUP officers at the meetings on 22 July and 21 December 1998 has no impact on the Trial Chamber’s finding that Lukić was in charge of the MUP Staff from June 1998 to July 1999.⁴⁵⁶⁸ Regarding Lukić’s submissions that he did not chair the meetings on 28 July and 3 November 1998, the Prosecution responds that Lukić fails to demonstrate that the Trial Chamber’s findings were unreasonable.⁴⁵⁶⁹ Finally, in relation to the meeting of 7 May 1999, the Prosecution contends that Lukić misrepresents Mijatović’s testimony.⁴⁵⁷⁰

(ii) Analysis

1389. The Trial Chamber explicitly considered Lukić’s argument that several high-ranking MUP officials senior to him were often present on the ground in Kosovo in 1998 and 1999.⁴⁵⁷¹ Contrary to Lukić’s submission, the Trial Chamber also noted that Đorđević and Stevanović were among those present at the 22 July 1998 meeting.⁴⁵⁷² The Appeals Chamber finds that it was open

⁴⁵⁶⁴ Lukić’s Appeal Brief, para. 580, referring to Trial Judgement, vol. 3, para. 996.

⁴⁵⁶⁵ See Trial Judgement, vol. 3, para. 1007.

⁴⁵⁶⁶ Lukić’s Appeal Brief, para. 585, referring to Miroslav Mijatović, 13 Feb 2008, T. 22303.

⁴⁵⁶⁷ Prosecution’s Response Brief (Lukić), paras 353-355.

⁴⁵⁶⁸ Prosecution’s Response Brief (Lukić), para. 319.

⁴⁵⁶⁹ Prosecution’s Response Brief (Lukić), paras 353, 379.

⁴⁵⁷⁰ Prosecution’s Response Brief (Lukić), para. 339, referring to Miroslav Mijatović, 13 Feb 2008, T. 22304-22305.

⁴⁵⁷¹ Trial Judgement, vol. 3, para. 941.

⁴⁵⁷² Trial Judgement, vol. 3, para. 985, referring to Exh. 6D798. With regard to the meeting of 22 July 1998, Lukić further asserts that the absence of his deputies shows that the MUP Staff “was not functioning in accordance to [Decision of 16 June 1998], neither in terms of tasks, nor personnel” (Lukić’s Appeal Brief, para. 573). Lukić fails to identify the factual finding which he challenges or to explain the impact of the alleged error. Moreover, concerning Lukić’s assertion that the Trial Chamber erred in identifying Gajić as his deputy (*ibid.*), the Trial Chamber explicitly acknowledged, albeit not in relation to the meeting of 23 July 1998, that Miroslav Mijatović was Lukić’s deputy from July 1998 to the end of May 1999 (Trial Judgement, vol. 3, para. 949). Further, by asserting that the MUP Staff’s role was to provide logistical support (Lukić’s Appeal Brief, para. 573, referring to Exh. P3120), Lukić ignores the Trial Chamber’s extensive analysis of evidence on the functions of the MUP Staff (see Trial Judgement, vol. 3, paras 947-1015).

to the Trial Chamber to conclude that Lukić led the meeting, considering that he proposed the agenda.⁴⁵⁷³

1390. Likewise, with respect to the meeting of 28 July 1998, the Appeals Chamber considers that, in light of the evidence showing that Lukić welcomed the participants, delivered opening and concluding remarks, and briefed the participants on the “measures and activities of police units”,⁴⁵⁷⁴ a reasonable trier of fact could have concluded that Lukić chaired the meeting.⁴⁵⁷⁵ While, contrary to the Trial Chamber’s statement, Marković was not yet Head of the RDB⁴⁵⁷⁶ at the time of the meeting and not all the heads of the Kosovo SUPs were present,⁴⁵⁷⁷ Lukić has failed to explain how these errors affected the Trial Chamber’s conclusion in relation to his specific role during the meeting.

1391. With regard to the meeting on 3 November 1998, the minutes of the meeting clearly state that it “was chaired by the Head of Staff, Major General Sreten Lukić.”⁴⁵⁷⁸ Moreover, in relation to the meeting’s conclusions, including the instruction that armoured vehicles were not to be used, the Trial Chamber noted that the meeting addressed “the current security situation [...] following the signing of the Agreement on the OSCE Verification Mission in Kosmet”.⁴⁵⁷⁹ The minutes further identify that the basis for the activities discussed in the meeting was a report by Milutinović on the Holbrooke-Milošević Agreement, the OSCE Verification Mission in Kosmet, and the Đorđević-Byrnes agreement.⁴⁵⁸⁰ Lukić has failed to show that the Trial Chamber ignored these facts in its analysis of the evidence.

1392. Furthermore, the Trial Chamber accurately cited Lukić’s statement at the meeting of 17 February 1999 that “[a] plan of the RJB has been worked out” and that “[t]he Staff plans, when it is ordered, to carry out three mopping up operations in the Podujevo, Dragobilja, and Drenica areas and has allotted around 4,000 policemen, around 70 policemen of the [operation pursuit group] and around 900 police reservists.”⁴⁵⁸¹ While Lukić presents his own interpretation of this evidence, he fails to show any error on the part of the Trial Chamber.⁴⁵⁸² Similarly, he fails to explain how Đorđević’s presence at the meeting has an impact on the Trial Chamber’s evaluation of the evidence.

⁴⁵⁷³ Trial Judgement, vol. 3, para. 1050, referring to Exh. 6D798.

⁴⁵⁷⁴ Exh. P3121, pp. 3, 8.

⁴⁵⁷⁵ Trial Judgement, vol. 3, para. 986.

⁴⁵⁷⁶ See Exh. 1D437.

⁴⁵⁷⁷ See Exh. P3121, p. 3.

⁴⁵⁷⁸ Exh. P3130, p. 2.

⁴⁵⁷⁹ Trial Judgement, vol. 3, para. 989, citing Exh. P3130, p. 2.

⁴⁵⁸⁰ Exh. P3130, p. 2.

⁴⁵⁸¹ Trial Judgement, vol. 3, para. 996, citing Exh. P1990, p. 1.

⁴⁵⁸² See Lukić’s Appeal Brief, para. 580.

1393. Finally, with regard to the meeting of 7 May 1999, Mijatović testified that, according to Stevanović's statement, the PJP and SUPs had to obtain the MUP Staff's approval, but that he, Mijatović, did not know whether they could proceed in carrying out the plans without such approval.⁴⁵⁸³ Consequently, Lukić misrepresents Mijatović's evidence.

(e) Reporting of the SUPs to the MUP Staff and Lukić's role in reporting to the MUP in Belgrade

1394. The Trial Chamber considered evidence showing that the SUPs regularly reported on their activity to the MUP Staff as well as to the MUP in Belgrade.⁴⁵⁸⁴ It found that the MUP Staff collated the information it received in these reports and, on this basis, prepared general reports to the MUP in Belgrade, consisting of "a summary of 'events', [...] and other 'information' related to 'security'."⁴⁵⁸⁵ In reaching its findings, the Trial Chamber noted, *inter alia*, Lukić's order of 1 April 1999 to the SUPs that the number of Kosovo Albanians leaving Kosovo through their border crossings should be tracked.⁴⁵⁸⁶ It also considered a number of reports sent by the MUP Staff to the MUP in Belgrade between 1 January and 1 May 1999 as well as the minutes of a meeting held on 28 July 1998 at which Lukić reported to the MUP.⁴⁵⁸⁷ The Trial Chamber concluded that the reporting procedure showed "that Lukić held an instrumental position in co-ordinating information exchange between the MUP forces in Kosovo and the MUP headquarters in Belgrade."⁴⁵⁸⁸

1395. Lukić challenges the Trial Chamber's findings with regard to the reporting of the Kosovo SUPs to the MUP Staff as well as his role, as the Head of the MUP Staff, in reporting to the MUP in Belgrade. The Appeals Chamber will address these contentions in turn.

(i) Submissions of the parties

1396. Lukić contests the Trial Chamber's finding that the MUP Staff had a coordinating role in the reporting process.⁴⁵⁸⁹ In particular, he challenges the Trial Chamber's reliance on evidence that the SUPs reported to the MUP Staff,⁴⁵⁹⁰ arguing that the SUPs regularly reported to the MUP in Belgrade while merely "copying" the MUP Staff, who received the information either at the same time as the MUP in Belgrade or later.⁴⁵⁹¹ Lukić also submits that the Trial Chamber misinterpreted his interview with the Prosecution, stressing that his "description of PJP sending reports to the Staff

⁴⁵⁸³ Miroslav Mijatović, 13 Feb 2008, T. 22302-22305.

⁴⁵⁸⁴ Trial Judgement, vol. 3, paras 976-982.

⁴⁵⁸⁵ Trial Judgement, vol. 3, para. 1054. See also *ibid.*, vol. 3, paras 1053, 1055-1059.

⁴⁵⁸⁶ Trial Judgement, vol. 3, para. 1054, referring to Exh. 6D808, p. 2.

⁴⁵⁸⁷ Trial Judgement, vol. 3, paras 1053-1058.

⁴⁵⁸⁸ Trial Judgement, vol. 3, para. 1059.

must be read alongside evidence that PJP commander Stevanovic [*sic*] was present at/used the Staff premises in 1999.”⁴⁵⁹² He further asserts that the Trial Chamber erred in: (i) relying on Ljubinko Cvetić’s testimony, who “had no knowledge/experience of PJP”; and (ii) ignoring the testimony of Dragan Živaljević, the overall commander of the 122nd PJP Intervention Brigade,⁴⁵⁹³ that he did not report to the MUP Staff.⁴⁵⁹⁴

1397. Lukić also submits that the “MUP Staff didn’t prepare periodical (monthly/annual) information/reports”,⁴⁵⁹⁵ but merely compiled the information received from the SUPs and prepared “overviews” according to a “uniformly prescribed procedure.”⁴⁵⁹⁶ As to the content of the SUP reports, Lukić contends that the Trial Chamber erred in its assessment of the evidence when it concluded that, following an order by Lukić, the reports began to incorporate information on the number of “persons from the Albanian and other national communities” leaving Kosovo.⁴⁵⁹⁷ He submits that his order was inconsequential as such information was included in previous reports⁴⁵⁹⁸ and that this information was not transmitted between 29 March 1999 and 1 April 1999 only due to the fact that the MUP Staff headquarters in Priština/Prishtina was bombed.⁴⁵⁹⁹

1398. Lukić further contests the Trial Chamber’s analysis of the meeting of 28 July 1998 held in Priština/Prishtina with Vljako Stojiljković, the Minister of Interior. According to Lukić, the Trial Chamber “mis-identified the manner of presenting information” at the meeting.⁴⁶⁰⁰ He asserts that the Trial Chamber ignored the fact that “the SUP Chiefs [...] shared their information/evaluations/conclusions on equal footing with Lukić” and thus directly reported to the Minister of Interior.⁴⁶⁰¹ He argues that he learnt the information he conveyed at the meeting from Đorđević and Pavković⁴⁶⁰² and that, had Stojiljković not come to Priština/Prishtina, this information would not have been sent as part of the MUP Staff’s report to the MUP in Belgrade.⁴⁶⁰³

⁴⁵⁸⁹ Lukić’s Appeal Brief, para. 635.

⁴⁵⁹⁰ See Trial Judgement, vol. 3, para. 976.

⁴⁵⁹¹ Lukić’s Appeal Brief, paras 569, 620-621, 623.

⁴⁵⁹² Lukić’s Appeal Brief, para. 570.

⁴⁵⁹³ See Trial Judgement, vol. 1, para. 669.

⁴⁵⁹⁴ Lukić’s Appeal Brief, para. 570, referring to Dragan Živaljević, 3 April 2008, T. 24843, 24877-24878. See also Lukić’s Appeal Brief, para. 571, referring to Duško Adamović, 9 April 2008, T. 25078.

⁴⁵⁹⁵ Lukić’s Appeal Brief, para. 625.

⁴⁵⁹⁶ Lukić’s Appeal Brief, paras 615-620, 622-625, 629, 631, 635, 668.

⁴⁵⁹⁷ Lukić’s Appeal Brief, paras 627-628, referring to Trial Judgement, vol. 3, para. 1054.

⁴⁵⁹⁸ Lukić’s Appeal Brief, para. 627, referring to Exh. 6D1208, Exh. 6D1211, Exh. 6D1232, Exh. P1099.

⁴⁵⁹⁹ Lukić’s Appeal Brief, para. 628.

⁴⁶⁰⁰ Lukić’s Appeal Brief, paras 632-634, referring to Trial Judgement, vol. 3, para. 1058.

⁴⁶⁰¹ Lukić’s Appeal Brief, para. 633.

⁴⁶⁰² Lukić’s Appeal Brief, para. 634, referring to Exh. P1468. The Appeals Chamber considers the reference in Lukić’s submission to 27 July 1998 instead of 28 July 1998 to be a clerical error.

⁴⁶⁰³ Lukić’s Appeal Brief, para. 632.

1399. The Prosecution responds that the Trial Chamber properly concluded that the SUPs reported regularly to the MUP Staff on a wide range of security-related topics⁴⁶⁰⁴ and argues that Lukić fails to demonstrate the impact of the alleged errors on the Trial Chamber’s conclusions.⁴⁶⁰⁵ Similarly, with regard to the content of the MUP Staff reports, the Prosecution asserts that Lukić fails to demonstrate how his submissions, if accepted, would impact on the Trial Judgement.⁴⁶⁰⁶

(ii) Analysis

1400. The Appeals Chamber observes that Lukić concedes that the MUP Staff “compiled the information received from the SUPs, based on which the MUP Staff analytics officer prepared an ‘Overview of important security-related events, phenomena, and insights’.”⁴⁶⁰⁷ Thus, the Appeals Chamber understands that, although using the term “overviews” instead of “reports”, Lukić does not dispute the factual findings that the SUPs regularly informed the MUP Staff of their activity and that the MUP Staff, in turn, collated the information and sent it to the MUP in Belgrade.⁴⁶⁰⁸ Lukić has failed to explain how the term “overviews”, rather than “reports”, affects the substance of these findings.

1401. Further, the Trial Chamber considered Duško Adamović’s evidence that the SUPs also reported to the MUP in Belgrade.⁴⁶⁰⁹ Adamović’s evidence does not undermine the Trial Chamber’s conclusion that Lukić “held an instrumental position in co-ordinating information exchange between the MUP forces in Kosovo and the MUP in Belgrade.”⁴⁶¹⁰ In reaching its conclusion, the Trial Chamber considered the content of numerous reports sent by the MUP Staff to the MUP in Belgrade between 1 January and 1 May 1999.⁴⁶¹¹ The existence of other reporting lines does not diminish Lukić’s specific role in transmitting information to the MUP in Belgrade.

1402. Furthermore, the Trial Chamber referred to Lukić’s statement in his interview with the Prosecution that, in relation to actions that involved the units of more than one SUP, the commanders of the relevant units reported to the MUP Staff.⁴⁶¹² The Appeals Chamber observes that this statement concerned the reporting lines in general and was unrelated to Obrad Stevanović’s

⁴⁶⁰⁴ Prosecution’s Response Brief (Lukić), para. 346, referring to Trial Judgement, vol. 3, paras 976, 981-982.

⁴⁶⁰⁵ Prosecution’s Response Brief (Lukić), paras 349-350, citing Exh. P948, p. 57; Prosecution’s Response Brief (Lukić), para. 378, arguing specifically with regard to the meeting of 28 July 1998 that the fact that the SUP chiefs also reported to the MUP Minister at the meeting does not undermine the Trial Chamber’s conclusion. Regarding Živaljević’s testimony, the Prosecution maintains that Lukić misrepresents the evidence and that he fails to explain why the Trial Chamber’s finding was unreasonable (Prosecution’s Response Brief (Lukić), paras 351-352, referring to Dragan Živaljević, 3 Apr 2008, T. 24877).

⁴⁶⁰⁶ Prosecution’s Response Brief (Lukić), para. 377.

⁴⁶⁰⁷ Lukić’s Appeal Brief, para. 622 (emphasis omitted).

⁴⁶⁰⁸ Trial Judgement, vol. 3, paras 976-982, 1052-1059.

⁴⁶⁰⁹ Trial Judgement, vol. 3, para. 977, referring, *inter alia*, to Duško Adamović, 6D1613, paras 25, 49-50.

⁴⁶¹⁰ Trial Judgement, vol. 3, para. 1059.

⁴⁶¹¹ Trial Judgement, vol. 3, para. 1053, and references therein.

presence in Kosovo.⁴⁶¹³ The Trial Chamber also noted the evidence of Ljubinko Cvetić, Head of the Kosovska Mitrovica SUP,⁴⁶¹⁴ that the commanders of units participating in operations reported to the MUP Staff on the activity undertaken,⁴⁶¹⁵ and that “manoeuvre and combat units in the field” had the obligation to inform the head of the MUP Staff.⁴⁶¹⁶ The Trial Chamber was aware, however, that no such reports were tendered into evidence.⁴⁶¹⁷ Accordingly, in considering Lukić’s role in reporting to the MUP in Belgrade, the Trial Chamber limited its finding to reporting based on information received from the SUPs and not directly from the PJP units.⁴⁶¹⁸ Lukić has failed to show that the evidence of Dragan Živaljević, the overall commander of the 122nd PJP Intervention Brigade, that he did not report to the MUP Staff has an impact on this finding.

1403. In relation to the reports sent by the MUP Staff to the MUP in Belgrade, the Trial Chamber found that:

[f]rom 26 March 1999 the reports included information about the “consequences of the NATO bombing”, while from 2 April 1999 they began addressing the numbers of “persons from the Albanian and other national communities who fled” Kosovo. This followed a 1 April 1999 order by Lukić to the SUPs that the number of Albanians leaving Kosovo through their border crossings should be tracked.⁴⁶¹⁹

1404. In support of his argument that information on the number of Kosovo Albanians crossing the border was provided even before his 1 April 1999 order, Lukić refers to MUP Staff reports from 24 February 1999, 3 March 1999, 24 March 1999, and 28 March 1999.⁴⁶²⁰ Indeed, these reports include information about the number of Kosovo Albanians departing Kosovo under the title “other”. Lukić’s order of 1 April 1999 to the SUPs, however, specified that daily summaries should be sent to the MUP Staff containing, as a *separate* category, information about “Albanian and people of other national communities” who had fled Kosovo, including details such as the number of people, the border crossing, and the time and manner of leaving.⁴⁶²¹ It is noteworthy that, following this order, the MUP Staff report of 1 May 1999 to which the Trial Chamber referred contained a separate category of information under the title “[p]ersons who fled the territory of the

⁴⁶¹² Trial Judgement, vol. 3, para. 981, referring to Exh. P948, p. 57.

⁴⁶¹³ See Exh. P948, pp. 56-57.

⁴⁶¹⁴ See Trial Judgement, vol. 1, para. 661.

⁴⁶¹⁵ Trial Judgement, vol. 3, para. 981, referring to Ljubinko Cvetić, 8 Dec 2006, T. 8193–8194.

⁴⁶¹⁶ Trial Judgement, vol. 3, para. 981, citing Ljubinko Cvetić, 8 Dec 2006, T. 8195.

⁴⁶¹⁷ Trial Judgement, vol. 3, para. 981.

⁴⁶¹⁸ See Trial Judgement, vol. 3, para. 1059.

⁴⁶¹⁹ Trial Judgement, vol. 3, para. 1054, referring to Exh. 6D808, p. 2.

⁴⁶²⁰ Lukić’s Appeal Brief, para. 627, referring to Exh. 6D1208, section 7, Exh. 6D1232, section 7, Exh. P1099, section 7. Lukić also refers to Exh. 6D1211. However, the Appeals Chamber notes that the document was not admitted into evidence and therefore Lukić’s argument in this regard will not be considered (see *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence Motions for Admission of Documents from Bar Table, 11 June 2008, para. 125(n)).

⁴⁶²¹ Exh. 6D808, p. 2.

Kosovo and Metohija.”⁴⁶²² The evidence thus indicates that following Lukić’s order to the SUPs the MUP Staff began to receive more detailed information which it reported in turn to the MUP in Belgrade. This shows that Lukić’s order had a binding effect and was followed by the SUPs. The Appeals Chamber finds that the Trial Chamber reasonably relied upon it in finding that Lukić had an instrumental position in coordinating the information exchange between MUP forces in Kosovo and the MUP in Belgrade.

1405. With respect to the meeting of 28 July 1998, the minutes of the meeting show that Lukić provided a comprehensive briefing in the presence of the Minister of the Interior Vljako Stojiljković and other MUP officials.⁴⁶²³ The Appeals Chamber considers that Lukić merely suggests an alternative interpretation of the evidence without showing any error in the Trial Chamber’s finding. His submission is therefore dismissed.

(iii) Summarily dismissed submissions

1406. The Appeals Chamber notes that a number of Lukić’s submissions challenging the Trial Chamber’s findings on the system of reporting are undeveloped⁴⁶²⁴ or misrepresent the Trial Judgement.⁴⁶²⁵ Consequently, these submissions are summarily dismissed.

(f) Lukić’s role as the “bridge” between the policy-makers in Belgrade and the commanders of MUP units in Kosovo

1407. Lukić challenges the Trial Chamber’s finding that he was the “bridge” between the policy-makers in Belgrade and the MUP Staff deployed in Kosovo.⁴⁶²⁶ According to Lukić, this conclusion is unreasonable because: (i) Vlastimir Đorđević and Obrad Stevanović were present in Kosovo and all instructions were sent directly to the SUPs, to whom the PJP units were attached;⁴⁶²⁷ (ii) at the meeting on 7 May 1999, Dragan Ilić, rather than Lukić, addressed the heads of the SUPs about their

⁴⁶²² Trial Judgement, vol. 3, fn. 2643, referring to Exh. P1693, p. 8.

⁴⁶²³ Trial Judgement, vol. 3, para. 1058, citing Exh. P3121.

⁴⁶²⁴ Lukić’s Appeal Brief, para. 630, referring to Trial Judgement, vol. 3, para. 1055, Exh. 6D1238, Exh. 6D1239, Exh. 6D1240, Exh. 6D668, pp. 151-153 (arguing that the Trial Chamber “failed to thoroughly analyse” some of the reports sent from the MUP Staff to the MUP in Belgrade and referred to examples that were “qualified as terrorism, and were as such supposed to be reported in accordance with the Instruction”).

⁴⁶²⁵ Lukić’s Appeal Brief, paras 626, 668, referring to Trial Judgement, vol. 3, para. 1053, Exh. P1228, Exh. P1093, Exh. P1100, Exh. P1099, Exh. 6D1246 (submitting that the Trial Chamber “incorrectly noted that all “reports” contained [Lukić’s] typewritten name and signature”, while the Trial Chamber concluded that the reports sent by the MUP Staff to the MUP in Belgrade between 1 January 1999 and 1 May 1999 “bear Sreten Lukić’s typed name as a signature” (Trial Judgement, vol. 3, para. 1053, fns 2639-2641)). Lukić’s Appeal Brief, para. 614, referring to Exh. P1505 (submitting that the Trial Chamber “misquoted the Decision to establish the MUP Staff” and misrepresenting the evidence).

⁴⁶²⁶ Lukić’s Appeal Brief, paras 609-611. See also *ibid.*, paras 471-476.

⁴⁶²⁷ Lukić’s Appeal Brief, para. 609.

further tasks;⁴⁶²⁸ (iii) at the meeting on 11 May 1999, Obrad Stevanović himself issued tasks, while Lukić merely “repeated what the Assistant Minister ordered;”⁴⁶²⁹ (iv) Radojko Stefanović confirmed that Lukić was not involved in determining which MUP units were to take part in joint operations;⁴⁶³⁰ (v) Lukić never attended a meeting in Belgrade that was not also attended by Vlajko Stojiljković, Vlastimir Đorđević, or Obrad Stevanović;⁴⁶³¹ (vi) the MUP forces carried out anti-terrorist actions pursuant to the plans prepared by the Priština Corps;⁴⁶³² and (vii) the Trial Chamber found that Lukić was not involved in the formulation of the Plan for Combating Terrorism⁴⁶³³ and that he “was not a person in charge of approving the engagement of MUP forces.”⁴⁶³⁴

1408. In response, the Prosecution submits that Lukić fails to demonstrate an error in the Trial Chamber’s findings.⁴⁶³⁵ It adds that the presence of higher-ranking MUP officers at meetings that Lukić attended, as well as Stevanović’s command over the PJP forces, is irrelevant.⁴⁶³⁶ The Prosecution further maintains that Lukić’s argument that he could not have acted as a “bridge”, because he was not involved in the formulation of the Plan for Combating Terrorism, should be summarily dismissed.⁴⁶³⁷

1409. The Trial Chamber found that:

Lukić did not replace Stevanović, Đorđević, or Ilić, the heads of the SUPs, or the commanders of PJP or SAJ units, but rather was the bridge between those commanders and the policy and plans set in Belgrade, as well as being directly involved in the planning process and in ensuring that day-to-day operations were conducted by the various MUP forces in accordance with those plans.⁴⁶³⁸

1410. Lukić’s argument that Obrad Stevanović, Head of the PJP units,⁴⁶³⁹ Vlastimir Đorđević, Head of the RJB,⁴⁶⁴⁰ and Dragan Ilić, Head of the Crime Police Administration in Belgrade,⁴⁶⁴¹ assigned tasks to the MUP units is not inconsistent with this finding. The Appeals Chamber further

⁴⁶²⁸ Lukić’s Appeal Brief, paras 471-472.

⁴⁶²⁹ Lukić’s Appeal Brief, para. 473, referring to Trial Judgement, vol. 3, para. 1127.

⁴⁶³⁰ Lukić’s Appeal Brief, paras 474-475, referring to Radojko Stevanović, 6 Feb 2008, T. 21803.

⁴⁶³¹ Lukić’s Appeal Brief, para. 610.

⁴⁶³² Lukić’s Appeal Brief, para. 485.

⁴⁶³³ Lukić’s Appeal Brief, para., 611, referring to Trial Judgement, vol. 3, para. 1021. See also Lukić’s Appeal Brief, para. 591.

⁴⁶³⁴ Lukić’s Appeal Brief, para. 476.

⁴⁶³⁵ Prosecution’s Response Brief (Lukić), para. 215.

⁴⁶³⁶ Prosecution’s Response Brief (Lukić), paras 319, 367-368.

⁴⁶³⁷ Prosecution’s Response Brief (Lukić), paras 369-370. The Prosecution understands Lukić’s argument with respect to the meeting of 7 May 1999 and his submission that Đorđević and Obrad Stevanović issued tasks to the police units which engaged in joint operations as challenges to the Trial Chamber’s finding that he was aware of the commission of crimes. The Prosecution submits that these arguments should be summarily dismissed (See Prosecution’s Response Brief (Lukić), paras 153, 204, 208, 212, 215.).

⁴⁶³⁸ Trial Judgement, vol. 3, paras 1051. See also *ibid.*, vol. 3, para. 1131 where the Trial Chamber found that “Lukić was also the bridge between the policy-planners in Belgrade, such as Milošević, Stojiljković, and Đorđević, and those on the ground in Kosovo.”

⁴⁶³⁹ Trial Judgement, vol. 1, para. 666.

⁴⁶⁴⁰ Trial Judgement, vol. 1, para. 659.

⁴⁶⁴¹ Trial Judgement, vol. 1, para. 700.

finds Lukić's assertion that the direct communication between the MUP in Belgrade and the SUPs and PJP units in Kosovo undermines the Trial Chamber's conclusion to be unpersuasive. The Trial Chamber found that the MUP Staff regularly received reports from the SUPs, collated them, and sent them to Belgrade, showing that Lukić's position was instrumental in coordinating the exchange of information between the MUP forces in Kosovo and the MUP in Belgrade.⁴⁶⁴² The Trial Chamber also referred to a number of meetings at which Lukić briefed high-level officials on the security situation in Kosovo.⁴⁶⁴³ It further found that on 6 May 1999 he instructed the chiefs of the Kosovo SUPs and the PJP and SAJ commanders in Kosovo to familiarise their forces with the contents of an article from *Politika* which related to the outcome of a meeting held in Belgrade involving Milošević and various high-ranking officials, including Lukić himself.⁴⁶⁴⁴ In view of the foregoing, Lukić's argument that he never attended a meeting in Belgrade that was not also attended by Stojiljković, Đorđević, or Stevanović does not render the Trial Chamber's conclusion unreasonable.

1411. The Trial Chamber also concluded that "Lukić was not involved in the actual formulation of the Plan [for Combating Terrorism] at the highest levels; he was, however, involved in the meeting at which it was adopted and in implementing measures to ensure proper execution of the Plan."⁴⁶⁴⁵ Lukić's assertion that this finding indicates that he was not a "bridge" between the SUPs and Belgrade is not supported by the plain reading of this sentence and is therefore dismissed.

1412. Finally, Lukić's allegation that "there was no need for a 'bridge'" because the MUP forces carried out anti-terrorist actions pursuant to the plans that were prepared by the Priština Corps⁴⁶⁴⁶ is unsupported by the evidence. The Appeals Chamber further recalls that it has found no error in the Trial Chamber's findings that he was "directly involved in the planning process and in ensuring that day-to-day operations were conducted by the various MUP forces in accordance with those plans".⁴⁶⁴⁷ His argument in this respect is therefore dismissed.

(g) Lukić's participation in high-level meetings

1413. The Trial Chamber considered that, in his capacity as Head of the MUP Staff, Lukić participated in meetings involving senior MUP, VJ, and political figures of the FRY and Serbia.⁴⁶⁴⁸ In this regard, the Trial Chamber considered evidence of, *inter alia*, Lukić's presence at meetings in

⁴⁶⁴² Trial Judgement, vol. 3, para. 1059. Lukić's specific challenges to this finding are addressed in *supra*, sub-section VII.F.4.(e).

⁴⁶⁴³ Trial Judgement, vol. 3, para. 1050.

⁴⁶⁴⁴ Trial Judgement, vol. 3, para. 1005.

⁴⁶⁴⁵ Trial Judgement, vol. 3, para. 1021.

⁴⁶⁴⁶ Lukić's Appeal Brief, para. 485.

⁴⁶⁴⁷ Trial Judgement, vol. 3, paras 1051. See also *infra*, sub-section VII.F.4.(i).

Belgrade on 30 May and 27 November 1998⁴⁶⁴⁹ as well as his participation in Joint Command meetings.⁴⁶⁵⁰ The Trial Chamber concluded that Lukić's participation in the "vast majority of Joint Command meetings [...] often as the only representative from the MUP, show[ed] that he had a senior and central role in co-ordinating the actions of the MUP and the VJ."⁴⁶⁵¹ It further found that Lukić was "a crucial member of the Joint Command, involved in ensuring the implementation of its directives in a co-ordinated manner between the VJ and MUP forces".⁴⁶⁵²

1414. In this context, Lukić challenges the Trial Chamber's assessment of the evidence concerning: (i) the meeting of 30 May 1998; (ii) Joint Command meetings in 1998; and (iii) the meeting of 27 November 1998. In response, the Prosecution asserts that Lukić's attendance and active participation at key meetings with high-level officials is evidence of his contribution to the JCE.⁴⁶⁵³ The Appeals Chamber will consider these arguments in turn.

(i) Meeting of 30 May 1998

1415. Lukić contests the Trial Chamber's findings that on 30 May 1998 he attended a meeting with Milošević in Belgrade and that, at this meeting, "a plan for fighting terrorism" was discussed.⁴⁶⁵⁴ He adds that the Trial Chamber erred in relying in this regard on Milan Đaković's testimony, who only "heard second-hand from Pavković."⁴⁶⁵⁵ Lukić further argues that the Trial Chamber erroneously interpreted his statement during his interview with the Prosecution in finding that he attended multiple meetings with Milošević.⁴⁶⁵⁶

1416. The Prosecution submits that Lukić fails to substantiate his assertion that he was not present at the 30 May 1998 meeting.⁴⁶⁵⁷ It further argues that Lukić's submissions that "a plan for fighting terrorism" was not discussed at the meeting on 30 May 1998 and that the Trial Chamber misinterpreted his statement in his interview mischaracterize the evidence.⁴⁶⁵⁸

⁴⁶⁴⁸ Trial Judgement, vol. 3, para. 1019.

⁴⁶⁴⁹ Trial Judgement, vol. 3, paras 1020, 1037.

⁴⁶⁵⁰ Trial Judgement, vol. 3, paras 1022-1031.

⁴⁶⁵¹ Trial Judgement, vol. 3, para. 1032.

⁴⁶⁵² Trial Judgement, vol. 3, para. 1033.

⁴⁶⁵³ Prosecution's Response Brief (Lukić), paras 382, 386, referring to Trial Judgement, vol. 3, paras 137, 333, 986, 989-990, 1006, 1009, 1022, 1035, 1050, 1131. Specifically, with regard to Lukić's presence at the meeting of 30 May 1998, the Prosecution contends that Lukić fails to explain how the Trial Chamber's finding was unreasonable (Prosecution's Response Brief (Lukić)), para. 383.

⁴⁶⁵⁴ Lukić's Appeal Brief, paras 589-590.

⁴⁶⁵⁵ Lukić's Appeal Brief, para. 590.

⁴⁶⁵⁶ Lukić's Appeal Brief, para. 596, referring to Exh. P948, pp. 142-143.

⁴⁶⁵⁷ Prosecution's Response Brief (Lukić), para. 383.

⁴⁶⁵⁸ Prosecution's Response Brief (Lukić), para. 384, referring to Trial Judgement, vol. 3, para. 643; Prosecution's Response Brief (Lukić), paras 390-391, referring to Trial Judgement, vol. 1, paras 993, 1097, *ibid.*, vol. 3, paras 643, 1020-1021, 1035, 1038, Exh. P948, pp. 141, 144.

1417. Relying on Đaković's testimony, the Trial Chamber found that, on 30 May 1998, Lukić attended a meeting called by Milošević at which a plan for fighting terrorism in Kosovo was discussed.⁴⁶⁵⁹ Lukić's argument that he was only appointed Head of the MUP Staff by a decision of 11 June 1998⁴⁶⁶⁰ does not necessarily contradict this finding. Further, Lukić's submission that Aleksandar Dimitrijević did not mention this meeting in his testimony is insufficient to show that the Trial Chamber's reliance on Đaković's hearsay evidence about the meeting was unreasonable. Lukić also seeks to rely on his statement in his interview with the Prosecution that he only attended one meeting with Milošević.⁴⁶⁶¹ The Appeals Chamber observes that this statement concerned a meeting with Milošević in May 1999⁴⁶⁶² and was made in response to the question "did you have any other such meetings or briefing during the period of the war?".⁴⁶⁶³ It is thus clear that Lukić's statement referred to a specific period of time in 1999. Accordingly, it does not contradict the Trial Chamber's finding that he attended meetings with Milošević on other occasions and specifically the meeting on 30 May 1998.⁴⁶⁶⁴

(ii) Joint Command meetings in 1998

1418. With respect to his presence at Joint Command meetings in 1998, Lukić contends that the Trial Chamber erred in finding that he was often the only MUP representative at the meetings as Vlastimir Đorđević and Obrad Stevanović were also present.⁴⁶⁶⁵ He argues that the Trial Chamber relied on Đaković's Notes without questioning "the manner in which he recorded the presence of participants".⁴⁶⁶⁶

1419. Lukić further submits that the Trial Chamber erred in finding that Duško Adamović's testimony confirmed Lukić's role as a crucial member of the Joint Command,⁴⁶⁶⁷ arguing that Adamović's evidence was not related to the Joint Command and that, after 29 March 1999, Adamović was no longer in Kosovo.⁴⁶⁶⁸ With respect to the Joint Command meeting on 1 June 1999, Lukić contends that the Trial Chamber failed to take into account Aleksandar

⁴⁶⁵⁹ Trial Judgement, vol. 3, para. 1020, referring to Milan Đaković, 19 May 2008, T. 26410-26411. See also Trial Judgement, vol. 1, para. 993.

⁴⁶⁶⁰ Lukić's Appeal Brief, para. 589, referring to Exh. P1252. See also Trial Judgement, vol. 3, para. 945.

⁴⁶⁶¹ Lukić's Appeal Brief, para. 596, referring to Exh. P948, pp. 142-143.

⁴⁶⁶² Exh. P948, pp. 142-143.

⁴⁶⁶³ Exh. P948, p. 144. The interview transcript indicates that by "the period of the war" the interviewer was referring to the period of time "after the NATO bombing started ... 24th of March" (Exh. P948, p. 141). Also, in explaining the issues discussed during the meeting, Lukić mentioned, *inter alia*, "the consequences of the bombing" (*ibid.*, p. 143).

⁴⁶⁶⁴ Trial Judgement, vol. 3, paras 1020-1021.

⁴⁶⁶⁵ Lukić's Appeal Brief, para. 282.

⁴⁶⁶⁶ Lukić's Appeal Brief, para. 280, referring to Trial Judgement, vol. 3, para. 1032.

⁴⁶⁶⁷ Lukić's Appeal Brief, para. 593, referring to Trial Judgement, vol. 3, para. 1033.

⁴⁶⁶⁸ Lukić's Appeal Brief, para. 593.

Vasiljević's evidence that "Lukić's role was to give a briefing", as opposed to "any command role."⁴⁶⁶⁹

1420. The Prosecution responds that the Trial Chamber reasonably concluded that Lukić was involved in the coordination of Joint Command directives, regardless of whether Adamović referred to the "Joint Command" in his testimony.⁴⁶⁷⁰ With respect to Vasiljević's testimony, the Prosecution submits that Lukić's assertion should be summarily dismissed as it fails to explain how the Trial Chamber's reliance on the evidence was unreasonable and how it affected the Judgement.⁴⁶⁷¹

1421. The Appeals Chamber finds Lukić's assertion that the Trial Chamber relied on Đaković's Notes in relation to the Joint Command meetings "without asking Đaković to describe the manner in which he recorded the presence of participants"⁴⁶⁷² to be misguided, as Lukić had the opportunity to cross-examine Đaković himself and to clarify any issues as he deemed it necessary.⁴⁶⁷³ Moreover, following an analysis of Lukić's interventions during a series of Joint Command meetings, the Trial Chamber found that his participation demonstrated his senior and central role in coordinating the actions of the MUP and the VJ.⁴⁶⁷⁴ In this respect, the Trial Chamber also noted Adamović's testimony that, following the meeting of 22 July 1998 at the MUP Staff, he was assigned by Lukić to forward maps of joint MUP and VJ operations to the MUP units on the ground.⁴⁶⁷⁵ The Trial Chamber considered that this evidence confirmed "Lukić's role as a crucial member of the Joint Command, involved in ensuring the implementation of its directives in a coordinated manner between the VJ and MUP forces".⁴⁶⁷⁶ Lukić has failed to explain why the fact that Adamović did not explicitly refer to the Joint Command renders this finding unreasonable. He has also failed to explain how his assertion that he was not the only MUP representative at the Joint Command meetings affects the Trial Chamber's conclusion with respect to his specific role, as reflected in his statements and follow up actions. Moreover, his submission that he did not have a "command role" at the 1 June 1999 Joint Command meeting is irrelevant, as the Trial Chamber found that he had a "senior and central" role.⁴⁶⁷⁷ Accordingly, these arguments are dismissed.

⁴⁶⁶⁹ Lukić's Appeal Brief, para. 156.

⁴⁶⁷⁰ Prosecution's Response Brief (Lukić), para. 388, referring to Trial Judgement, vol. 3, paras 1032-1033.

⁴⁶⁷¹ Prosecution's Response Brief (Lukić), paras 125-126.

⁴⁶⁷² Lukić's Appeal Brief, para. 280.

⁴⁶⁷³ See Milan Đaković, 20 May 2008, T. 26513-26529; 21 May 2008, T. 26532-26533.

⁴⁶⁷⁴ Trial Judgement, vol. 3, paras 1024-1032.

⁴⁶⁷⁵ Trial Judgement, vol. 3, para. 1033, referring to Duško Adamović, 8 Apr 2008, T. 24969-24970, 24978, *ibid.*, 9 Apr 2008, T. 25063-25065.

⁴⁶⁷⁶ Trial Judgement, vol. 3, para. 1033.

⁴⁶⁷⁷ Trial Judgement, vol. 3, para. 1032.

(iii) Meeting of 27 November 1998

1422. Lukić argues that the Trial Chamber erred in its finding on the issues discussed at a meeting on 27 November 1998 in Belgrade which he attended and which, according to him, dealt with the implementation of the October Agreements.⁴⁶⁷⁸

1423. In response, the Prosecution submits that Lukić's argument with respect to the meeting of 27 November 1998 should be summarily dismissed as it merely seeks to substitute the Trial Chamber's interpretation of the evidence without showing how the alleged errors affect a finding on which his conviction relies.⁴⁶⁷⁹

1424. The Trial Chamber found that those present at the 27 November 1998 meeting in Belgrade "examined the situation in Kosovo and discussed the further engagement of MUP forces in 'anti-terrorist actions'."⁴⁶⁸⁰ In this context, the Trial Chamber referred to the minutes of a meeting held on 2 December 1998, in which Lukić was recorded as explaining that "[t]he current security situation in Kosovo was examined in the meeting [of 27 November 1998], in which the duties and further engagement of members of the police in Kosovo were defined. The essence of the meeting was to continue execution of anti-terrorist actions."⁴⁶⁸¹ Lukić fails to show that the Trial Chamber erred either in its description of the issue discussed at the 27 November meeting, namely, the further engagement of MUP forces, or in considering Lukić's attendance at this meeting as an indication of his involvement in planning, organising, and controlling MUP units in Kosovo.⁴⁶⁸² His submission is therefore dismissed.

(iv) Summarily dismissed submissions

1425. The Appeals Chamber notes that a number of Lukić's submissions challenging the Trial Chamber's findings on his participation at meetings fail to articulate an error,⁴⁶⁸³ fail to identify the

⁴⁶⁷⁸ Lukić's Appeal Brief, para. 595, referring to Trial Judgement, vol. 3, para. 1037, Exh. P3122.

⁴⁶⁷⁹ Prosecution's Response Brief (Lukić), para. 389.

⁴⁶⁸⁰ Trial Judgement, vol. 3, para. 1037, referring to Exh. P3122, p. 3.

⁴⁶⁸¹ Exh. P3122, p. 3. See also, Trial Judgement, vol. 3, para. 990.

⁴⁶⁸² See Trial Judgement, vol. 3, para. 1050. Lukić also argues that the Trial Chamber ignored "the full context" of the meetings on 27 November 1998 and 2 December 1998 and failed to consider that the Plan for Combating Terrorism had a preventive, rather than an offensive goal (Lukić's Appeal Brief, para. 577, referring to Exh. P3122, p. 8). However, he fails to articulate any error in the Trial Chamber's assessment of the evidence.

⁴⁶⁸³ Lukić's Appeal Brief, para. 594 (asserting that, with respect to the meeting of 29 October 1998, the Trial Chamber failed to appropriately assess the fact that Stojiljković, Đorđević, Stevanović, and Marković attended the meeting as MUP officials. Lukić fails to articulate a clear error in the Trial Chamber's finding related to his participation at the meeting of 29 October 1998 or to explain how the presence at the meeting of other MUP high-ranking officials affects the Trial Chamber's findings).

challenged factual findings,⁴⁶⁸⁴ or do not contradict the Trial Chamber’s findings.⁴⁶⁸⁵ Consequently, these submissions are summarily dismissed.

(h) Lukić’s interaction with international observers

1426. The Trial Chamber found that “the accumulation of consistent evidence about what Lukić said to the international observers and the impression he gave them leads to the conclusion that Lukić did present himself as the Chief of Police in Kosovo.”⁴⁶⁸⁶ In reaching this conclusion, the Trial Chamber relied, *inter alia*, on the evidence of Shaun Byrnes, Head of the US-KDOM⁴⁶⁸⁷ and Michael Phillips, the Chief of Staff of the Head of the KVM.⁴⁶⁸⁸ Byrnes recalled that he was told that Lukić had replaced Obrad Stevanović as the “Serbian police chief in Kosovo” and that Lukić reported to Stevanović in Belgrade.⁴⁶⁸⁹ The Trial Chamber further noted Phillips’ testimony that in 1998 he met weekly with Lukić, together with Šainović and Dušan Lončar, the Head of the Priština Office of the Commission for Cooperation with the KVM,⁴⁶⁹⁰ to resolve the problem of the movement of the KVM monitors in Kosovo.⁴⁶⁹¹ The Trial Chamber also noted evidence from Phillips that, when faced with complaints about the use of disproportionate force by the forces of the FRY and Serbia in Kosovo,⁴⁶⁹² Šainović and Lukić “would react defensively, always pleading that they had to protect the Serbian people, as KVM failed to do so, and that they were doing something that was perfectly logical, responding to KLA activity.”⁴⁶⁹³

1427. Lukić argues that Byrnes’ evidence was unreliable as it contained “serious inconsistencies” with regard to the MUP structure.⁴⁶⁹⁴ He further claims that, in noting his defensive reaction to allegations of excessive use of force, the Trial Chamber failed to consider that Phillips confused

⁴⁶⁸⁴ Lukić’s Appeal Brief, para. 401 (submitting that the Trial Chamber erred in finding that he participated “in two important meetings with Milošević”).

⁴⁶⁸⁵ Lukić’s Appeal Brief, paras 430-431 (alleging that, in assessing his participation at several high-level meetings at which the Plan for Combating Terrorism was addressed, the Trial Chamber ignored several findings which show that he did not play any role in the preparation of the Plan. The Trial Chamber explicitly found that Lukić was not involved in “the actual formulation of the Plan at the highest levels”, but that he was “involved in the meeting at which it was adopted and in implementing measures to ensure proper execution of the Plan” (Trial Judgement, vol. 3, para. 1021). Accordingly, Lukić fails to point to an error in the Trial Chamber’s findings. (See also *supra*, sub-section VII.F.4.(f)).

⁴⁶⁸⁶ Trial Judgement, vol. 3, para. 1048.

⁴⁶⁸⁷ Byrnes testified that KDOM encompassed three international observer missions, which were organised by Russia (Ru-KDOM), the European Union (EU-KDOM), and the United States (US-KDOM). Trial Judgement, vol. 1, para. 327.

⁴⁶⁸⁸ Trial Judgement, vol. 3, paras 1041, 1044, 1047. Concerning Phillips’ position, see Trial Judgement, vol. 1, para. 944.

⁴⁶⁸⁹ Shaun Byrnes, 16 Apr 2007, T. 12146.

⁴⁶⁹⁰ See Trial Judgement, vol. 1, para. 924.

⁴⁶⁹¹ Trial Judgement, vol. 3, para. 1047.

⁴⁶⁹² Trial Judgement, vol. 3, para. 1047, referring to Michael Phillips, 19 Mar 2007, T. 11845–11846.

⁴⁶⁹³ Trial Judgement, vol. 1, para. 944, referring to Michael Phillips, 19 Mar 2007, T. 11845-11846. See also Trial Judgement, vol. 3, para. 1047.

⁴⁶⁹⁴ Lukić’s Appeal Brief, para. 648, referring to Shaun Byrnes, 16 Apr 2007, T. 12145-12146, 12151.

Lukić with Lončar.⁴⁶⁹⁵ The Prosecution responds that Byrnes’s testimony concerning the MUP structure was largely correct and reveals no inconsistencies.⁴⁶⁹⁶ It adds that even though on one occasion Phillips confused Lukić with Lončar, the context of his testimony shows that it was indeed Lukić who reacted defensively to concerns about the heavy-handed use of FRY and Serbian forces in Kosovo.⁴⁶⁹⁷

1428. The Appeals Chamber notes that, in challenging the Trial Chamber’s reliance on Byrnes’ testimony, Lukić avers that Byrnes’ evidence was inconsistent as he stated that his “understanding was that Lukić was in charge of the Serbian police in Kosovo,”⁴⁶⁹⁸ while he also mentioned that Lukić reported to Stevanović and that both of them were subordinate to Đorđević.⁴⁶⁹⁹ The Appeals Chamber is unable to discern any inconsistency in this evidence: Byrnes merely stated that Lukić had superiors and collaborated with other senior officials.⁴⁷⁰⁰ Further, the Appeals Chamber finds that, in this context, a reasonable trier of fact could have relied on Byrnes’ evidence that Lukić was “the Serbian police chief in Kosovo,” even though Byrnes’ evidence is partly inaccurate given that Lukić did not replace Stevanović in this position.⁴⁷⁰¹

1429. The Appeals Chamber further notes that, when asked to elaborate on the defensive reactions of Šainović and Lukić, Phillips mentioned Lončar, not Lukić.⁴⁷⁰² Considering the confusion in Phillips’ testimony, it remains unclear whether it was Lukić or Lončar who reacted defensively to information about the use of excessive force. Moreover, in direct examination, Phillips stated that at his first meeting with Lukić, the latter was introduced to him, *inter alia*, as Milošević’s “personal representative” in Kosovo.⁴⁷⁰³ In cross-examination, Phillips acknowledged that - in relation to this part of his testimony - it was possible that he had confused Lukić with Lončar.⁴⁷⁰⁴ The Appeals Chamber is not persuaded, however, that this renders unreasonable the Trial Chamber’s reliance on Phillips’ evidence regarding Lukić’s role in Kosovo, as Phillips also stated that Lukić was introduced to him as the “chief of police, chief of the MUP”.⁴⁷⁰⁵ Consequently, Lukić’s arguments are dismissed.

⁴⁶⁹⁵ Lukić’s Appeal Brief, paras 149, referring to Trial Judgement, vol. 1, para. 944, Michael Phillips, 19 Mar 2007, T. 11846, *ibid.*, 20 Mar 2007, T. 11981.

⁴⁶⁹⁶ Prosecution’s Response Brief (Lukić), paras 410-411, referring to Shaun Byrnes, 17 Apr 2007, T. 12151, T. 12150-12152.

⁴⁶⁹⁷ Prosecution’s Response Brief (Lukić), para. 124, referring to Michael Phillips, 19 Mar 2007, T. 11845-11846, *ibid.*, 20 Mar 2007, T. 11981.

⁴⁶⁹⁸ Lukić’s Appeal Brief, para. 648, referring to Shaun Byrnes, 16 Apr 2007, T. 12151.

⁴⁶⁹⁹ Lukić’s Appeal Brief, para. 648, referring to Shaun Byrnes, 16 Apr 2007, T. 12145-12146.

⁴⁷⁰⁰ See also Trial Judgement, vol. 3, paras 961.

⁴⁷⁰¹ Shaun Byrnes, 16 Apr 2007, T. 12146. See also K25, 12 Oct 2006, T. 4732 (private session).

⁴⁷⁰² Michael Phillips, 19 Mar 2007, T. 11846.

⁴⁷⁰³ Michael Phillips, 19 Mar 2007, T. 11832 (closed session).

⁴⁷⁰⁴ Michael Phillips, 20 Mar 2007, T. 11981.

⁴⁷⁰⁵ Michael Phillips, 19 Mar 2007, T. 11832 (closed session).

(i) Lukić's involvement in planning and coordinating anti-terrorist actions

1430. The Trial Chamber concluded that Lukić was “involved in the planning process and in ensuring that day-to-day operations were conducted by the various MUP forces in accordance with [the] plans” adopted in Belgrade.⁴⁷⁰⁶ The Trial Chamber further found that, as a member of the Joint Command, Lukić worked closely with Pavković, who was the Commander of the Priština Corps, and later of the 3rd Army.⁴⁷⁰⁷ It noted that Lukić was Pavković’s “counterpart” and had, throughout the NATO air campaign, both *de jure* and *de facto* responsibility over the MUP forces in Kosovo.⁴⁷⁰⁸

1431. Lukić argues that the Trial Chamber’s finding that he “was directly involved in the planning process” is not supported by the evidence.⁴⁷⁰⁹ He submits that he was not identified by Lazarević, Milan Đaković, Radojko Stefanović, or “the MUP witnesses” as a participant in the planning and approval of actions carried out by the various MUP units.⁴⁷¹⁰ Lukić argues that, consequently, the conclusion that he was an important member of the JCE is unsubstantiated.⁴⁷¹¹

1432. Lukić further argues that the evidence contradicts the Trial Chamber’s finding that he worked closely with Pavković.⁴⁷¹² He contends that the Trial Chamber’s conclusions with respect to Pavković’s and Lazarević’s responsibility as well as its conclusion that the Priština Corps Command was the principal agent of anti-terrorist activities show that he was in contact with the Priština Corps, rather than with the 3rd Army organs, and thus could not have coordinated with Pavković when the latter took up his duties as Commander of the 3rd Army in 1999.⁴⁷¹³

1433. In relation to the Trial Chamber’s finding that he was Pavković’s “counterpart”, Lukić asserts that the Trial Chamber erred in equating Pavković’s role as the 3rd Army Commander, who had 180,000 people under his command,⁴⁷¹⁴ with the role of Lukić, who was “directly in charge” of eight members of the MUP Staff, “whereas the total number of MUP personnel in Kosovo amounted to about 15,000”.⁴⁷¹⁵

⁴⁷⁰⁶ Trial Judgement, vol. 3, para. 1131. See also *ibid.*, vol. 3, para. 1120.

⁴⁷⁰⁷ Trial Judgement, vol. 3, para. 1118.

⁴⁷⁰⁸ Trial Judgement, vol. 3, para. 1132.

⁴⁷⁰⁹ Lukić’s Appeal Brief, paras 487, referring to Trial Judgement, vol. 3, para. 1131. See also Lukić’s Appeal Brief, para. 260.

⁴⁷¹⁰ Lukić’s Appeal Brief, paras 488-489, 613.

⁴⁷¹¹ Lukić’s Appeal Brief, para. 490.

⁴⁷¹² Lukić’s Appeal Brief, para. 424. See also *ibid.*, para. 423.

⁴⁷¹³ Lukić’s Appeal Brief, paras 425-429, referring to Trial Judgement, vol. 3, paras 773, 825-828.

⁴⁷¹⁴ Lukić’s Appeal Brief, para. 494, referring to Exh. P2943, para. 3.

⁴⁷¹⁵ Lukić’s Appeal Brief, para. 494. See also *ibid.*, paras 495-496, referring to Trial Judgement, vol. 3, para. 775.

1434. In response, the Prosecution submits that Lukić fails to show that the Trial Chamber's findings were unreasonable.⁴⁷¹⁶ It further claims that Lukić's submission that the Trial Chamber erred in finding that he worked closely with Pavković is unclear and does not show an error in the Trial Chamber's finding.⁴⁷¹⁷

1435. When discussing the functions of the MUP Staff and of Lukić as its Head, the Trial Chamber noted that the testimony of witnesses called by the Lukić Defence was often in conflict with the admitted documentary evidence.⁴⁷¹⁸ In reaching the conclusion that Lukić was involved in planning the work of the MUP units in Kosovo, the Trial Chamber relied on documentary evidence showing his activities as Head of the MUP Staff in both 1998 and 1999.⁴⁷¹⁹ The Trial Chamber referred to the minutes of a MUP Staff meeting held on 3 November 1998 and chaired by Lukić, at which it was concluded that "[t]he MUP Staff in Priština will now take on the role of planning and the Secretariats will have greater independence in carrying out their regular duties".⁴⁷²⁰ At the MUP Staff meeting on 2 December 1998, Lukić provided detailed instructions regarding the content of a "plan for the prevention of terrorism".⁴⁷²¹ The Trial Chamber also noted that, at a meeting held on 17 February 1999 at the MUP Staff, Lukić stated that "[t]he Staff plans, when it is ordered, to carry out three mopping up operations in the Podujevo, Dragobilja and Drenica areas" and reported on the allotment of personnel for the conduct of these operations.⁴⁷²² It further considered that, following the MUP Staff meetings on 7 and 11 May 1999, conclusions were issued by the MUP Staff setting out the forthcoming tasks.⁴⁷²³ The Trial Chamber also took into account Lukić's role in ensuring the implementation of the Joint Command directives⁴⁷²⁴ and his presence at meetings with senior VJ and MUP officials as well as political leaders, at which he was involved in planning further operations.⁴⁷²⁵

1436. The Trial Chamber emphasised that it was particularly conscious of the conflict between the documentary evidence and the oral testimony in reaching its conclusions.⁴⁷²⁶ The Appeals Chamber recalls that, at trial, witnesses frequently contradict one another and it is the duty of the Trial Chamber to weigh different witnesses' evidence according to certain, well-settled indicia. Such

⁴⁷¹⁶ Prosecution's Response Brief (Lukić), para. 380-381, referring, *inter alia*, to Trial Judgement, vol. 1, paras 1026-1027; vol. 3, paras 973, 1033, 1131. See also Prosecution's Response Brief (Lukić), para. 230.

⁴⁷¹⁷ Prosecution's Response Brief (Lukić), para. 234, referring to Trial Judgement, vol. 3, paras 1120, 1132.

⁴⁷¹⁸ Trial Judgement, vol. 3, para. 947.

⁴⁷¹⁹ The Trial Chamber explicitly noted that much of the evidence in relation to the powers and functions of the MUP Staff also revealed the extent of Lukić's involvement in planning the work of the MUP units in Kosovo (Trial Judgement, vol. 3, para. 1050).

⁴⁷²⁰ Trial Judgement, vol. 3, para. 989, citing Exh. P3130, p. 3.

⁴⁷²¹ Trial Judgement, vol. 3, paras 991, 993, citing Exh. P3122, pp. 7-8.

⁴⁷²² Trial Judgement, vol. 3, para. 996, citing Exh. P1990, p. 1.

⁴⁷²³ Trial Judgement, vol. 3, para. 1009, referring to Exh. 6D802.

⁴⁷²⁴ Trial Judgement, vol. 3, para. 1033, citing Duško Adamović, 9 Apr 2008, T. 25065.

⁴⁷²⁵ Trial Judgement, vol. 3, para. 1034. See also *ibid.*, vol. 3, para. 1037, referring to Exh. P3122, p. 3.

weighing will not be lightly disturbed by the Appeals Chamber.⁴⁷²⁷ In view of the evidence considered and relied upon by the Trial Chamber, the Appeals Chamber finds that Lukić's mere assertion that the Trial Chamber's finding on his involvement in planning activities was contradicted by the evidence of some witnesses must fail.⁴⁷²⁸

1437. Further, the Appeals Chamber finds no error in the Trial Chamber's finding that, as a member of the Joint Command, Lukić worked closely with the Commander of the Priština Corps, and then of the 3rd Army, Nebojša Pavković.⁴⁷²⁹ In relation to 1998, the Trial Chamber found that, as Priština Corps Commander, Pavković regularly attended Joint Command meetings where Lukić was also present.⁴⁷³⁰ It further found that Pavković's involvement in the Joint Command continued throughout the NATO air campaign in 1999 in his capacity as Commander of the 3rd Army.⁴⁷³¹ The Trial Chamber noted that Pavković attended the 1 June 1999 Joint Command meeting,⁴⁷³² which was also attended by Lukić.⁴⁷³³ In view of these considerations, Lukić's submission that the Trial Chamber erred in finding that he worked closely with Pavković fails.

1438. The Appeals Chamber also finds unpersuasive Lukić's argument that a comparison of the number of staff of which he and Pavković were in charge⁴⁷³⁴ undermines the Trial Chamber's conclusion in relation to the nature of Lukić's duties. Consequently, his argument in this regard is dismissed.

1439. Finally, the Appeals Chamber notes that a number of Lukić's submissions challenging the Trial Chamber's findings that he planned and coordinated MUP actions misrepresent the evidence⁴⁷³⁵ or lack reference to evidence in support of the alleged factual error.⁴⁷³⁶ Consequently, these submissions are summarily dismissed.

⁴⁷²⁶ Trial Judgement, vol. 3, para. 947.

⁴⁷²⁷ *Galić* Appeal Judgement, para. 300, referring to *Kupreškić et al.* Appeal Judgement, paras 31-32.

⁴⁷²⁸ See also *supra*, sub-section VII.F.3.

⁴⁷²⁹ Trial Judgement, vol. 3, para. 1118.

⁴⁷³⁰ Trial Judgement, vol. 3, paras 665, 1024-1032.

⁴⁷³¹ Trial Judgement, vol. 3, para. 704.

⁴⁷³² Trial Judgement, vol. 3, para. 707.

⁴⁷³³ Trial Judgement, vol. 3, para. 1040.

⁴⁷³⁴ Lukić's Appeal Brief, paras 493-494.

⁴⁷³⁵ Lukić's Appeal Brief, paras 447-448, referring to Exh. P3130, Exh. P3122, Exh. P1991 (arguing that the minutes of the MUP Staff meetings relied upon by the Trial Chamber do not show that the MUP Staff planned anti-terrorist actions in cooperation with the VJ or issued corresponding instructions to the SUPs. Lukić's argument is without merit as it misrepresents the evidence (Trial Judgement, vol. 3, para. 1120, referring to Exh. P3130, p. 3, Exh. P3122, pp. 7-8, P1991, pp. 10-11. Exh. P3130, p. 3: "[t]he MUP Staff in Priština will now take on the role of planning [...]"; Exh. P1991, pp. 10-11: "Broader actions towards terrorist bases should be planned by the Ministry Staff, however, the initiative should be with the Secretariats, who should make preparations and compile recommendations of the Activity Plan." See also Exh. P3122, pp. 7-8)).

⁴⁷³⁶ Lukić's Appeal Brief, paras 486, 612 (contending that in 1999 "there was no plan executing joint actions of the VJ/MUP that had been prepared and adopted in Belgrade" and that "[a]ll joint actions were carried out pursuant to the

(j) Lukić's involvement in the arming of the RPOs and the disarming of the Kosovo Albanian population

1440. The Trial Chamber found that, between July 1998 and March 1999, a large number of non-Albanian citizens from local villages and towns in Kosovo were armed by the VJ and the MUP.⁴⁷³⁷ It further found that the armed non-Albanian population was organised into units, which were known as Reserve Police Detachments or Reserve Police Squads ("RPOs").⁴⁷³⁸ The Trial Chamber further found that by March 1999 most of the RPO members responded to the mobilisation and joined either the MUP or the VJ, reducing the number of armed non-Albanians in Kosovo without wartime assignments to about 6,000.⁴⁷³⁹ The Trial Chamber considered that, as Head of the MUP Staff, Lukić was involved in the establishment of the RPOs and in the arming of its members.⁴⁷⁴⁰ The Trial Chamber concluded that Lukić was actively involved in the process of arming the non-Albanian population, under the auspices of the RPOs, and the disarming of the Kosovo Albanian population, despite his awareness of the commission of criminal acts during inter-ethnic clashes. According to the Trial Chamber, this showed that Lukić acted in concert with the JCE members to further the common purpose of maintaining control over Kosovo through various criminal means.⁴⁷⁴¹

1441. Lukić argues that the Trial Chamber's finding that he was involved in the process of arming the non-Albanian population despite his awareness of the commission of crimes has no support in the evidence and that the issuance of weapons was lawfully conducted by the SUPs pursuant to an instruction issued by Vlatko Stojilković.⁴⁷⁴² He further contends that the RPOs were never part of or under the command of the MUP.⁴⁷⁴³ Lukić also advances challenges to the Trial Chamber's finding that he was involved in the disarming of Kosovo Albanians, alleging that the Trial Chamber failed to assess the evidence in this regard and that disarming was in fact a voluntary surrender of illegal arms pursuant to the applicable law.⁴⁷⁴⁴

Directive issued by Ojdanić", while specific orders to the police were given by the 3rd Army Commander and the PrK Commander. Lukić fails to refer to any evidence in support of his assertions).

⁴⁷³⁷ Trial Judgement, vol. 1, paras 764-765, 787. See also Trial Judgement, vol. 1, para. 764.

⁴⁷³⁸ Trial Judgement, vol. 1, para. 765.

⁴⁷³⁹ Trial Judgement, vol. 1, para. 788.

⁴⁷⁴⁰ Trial Judgement, vol. 3 paras 1061-1067.

⁴⁷⁴¹ Trial Judgement, vol. 3, para. 1121.

⁴⁷⁴² Lukić's Appeal Brief, paras 449-450, 453, referring to Trial Judgement, vol. 3, paras 56, 1121, Exh. P1989, p. 3, Ljubinko Cvetić, 8 Dec 2006, T. 8169-8170. See also Lukić's Appeal Brief, paras 452, 519-551.

⁴⁷⁴³ Lukić's Appeal Brief, para. 535. See also, *ibid.*, para. 528, referring to Exh. 4D521, and further asserting that the Trial Chamber's finding that Lukić was reprimanded in July 1998 for transgression of powers by assigning RPO members to MUP units despite their previous assignment to other defence structures is not supported by the evidence. See also Trial Judgement, vol. 1, para. 779.

⁴⁷⁴⁴ Lukić's Appeal Brief, para. 451; Appeal Hearing, 14 Mar 2013, AT. 486-491, 562.

1442. With regard to the Trial Chamber's finding that his active involvement in the process of arming the non-Albanian population and disarming the Kosovo Albanian population showed that he acted to further the common purpose, Lukić submits that the *actus reus* and *mens rea* elements of the first category of JCE cannot be fulfilled prior to the existence of the common purpose.⁴⁷⁴⁵ He argues that a conclusion to the contrary would result in impermissibly extending JCE liability to individuals who acted without any intention to further a common purpose, as that common purpose simply did not exist at the time when he acted.⁴⁷⁴⁶

1443. The Prosecution responds that, contrary to Lukić's understanding of the Trial Judgement, the Trial Chamber's conclusions on his involvement in the process of arming the non-Albanian population and disarming the Kosovo Albanian population are well-founded and based on a detailed discussion of the evidence.⁴⁷⁴⁷

1444. Moreover, the Prosecution contends that, while the *actus reus* requirement that an accused significantly contributed to the common purpose of a JCE and his *mens rea* as a JCE member cannot be fulfilled before the common purpose comes into existence, his conduct carried out before the existence of the common purpose can be taken into consideration as circumstantial evidence for the proof of his JCE liability.⁴⁷⁴⁸ The Prosecution adds that, in any event, as the Trial Chamber found that the common purpose came into existence no later than October 1998,⁴⁷⁴⁹ Lukić's contribution to the JCE encompassed his preparatory acts for the implementation of the campaign of violence in 1999, including the arming of the non-Albanian population and the disarming of the Kosovo Albanian population.⁴⁷⁵⁰

1445. The jurisprudence of the Tribunal has held that, in order for an accused to be held responsible for a crime pursuant to JCE liability, it must be established that he or she performed "acts that in some way [were] directed to the furthering of the common plan or purpose" of the JCE.⁴⁷⁵¹ In this regard, the Appeals Chamber recalls its conclusion that the Trial Chamber's finding that a common purpose existed beyond reasonable doubt "during the time of the crimes alleged in

⁴⁷⁴⁵ Appeal Hearing, 14 Mar 2013, AT. 493-494.

⁴⁷⁴⁶ Appeal Hearing, 14 Mar 2013, AT. 494, referring to *Kvočka et al.* Appeal Judgement, para. 187; *Vasiljević* Appeal Judgement, para. 102, and underlining that a person accused of participating in the first category of JCE "must act in the implementation of a common purpose through acts directed to the furthering of the same."

⁴⁷⁴⁷ Prosecution's Response Brief (Lukić), para. 190, referring to Trial Judgement, vol. 3, paras 1060-1067, 1121, Exh. P1989, Exh. P2804. See also Appeal Hearing, 14 Mar 2013, AT. 544-548, referring to Exh. P1468, pp. 48, 49, 52, 77, 92, 97, 100, 106, 110, 131, 139, Exh. P1203, pp. 5, 8, Exh. P1204, pp. 5, 7, Exh. P1206, pp. 4, 7, Exh. P1197, pp. 3, 6, Exh. P1198, pp. 4, 6, Exh. P2166, Trial Judgement, vol. 1, paras 997, 1097-1195, *ibid.*, vol. 3, paras 58, 1029.

⁴⁷⁴⁸ Appeal Hearing, 11 Mar 2013, T. 246-248. See also Appeal Hearing, 14 Mar 2013, AT. 552. With regard to the Prosecution's arguments concerning a JCE member's conduct prior to the time when the common purpose was found to have existed, see also *supra*, sub-section VII.E.2.(d).

⁴⁷⁴⁹ Appeal Hearing, 11 Mar 2013, AT. 219-221, 244, 248; *ibid.*, 12 Mar 2013, AT. 360.

⁴⁷⁵⁰ Appeal Hearing, 11 Mar 2013, AT. 248; *ibid.*, 14 Mar 2013, AT. 535-536.

the Indictment⁴⁷⁵² concerned the period starting on 24 March 1999.⁴⁷⁵³ The Appeals Chamber further notes that, based on the Trial Chamber's findings, both the arming of the RPOs and the disarming of the Kosovo Albanian population took place earlier than 24 March 1999.⁴⁷⁵⁴ In these circumstances, it was unreasonable for the Trial Chamber to find that Lukić "acted [...] to further the common purpose" through his "active involvement" in the process of arming the non-Albanian population and disarming the Kosovo Albanian population,⁴⁷⁵⁵ thereby finding that he contributed to the common purpose of the JCE prior to its existence.⁴⁷⁵⁶

1446. Nonetheless, the Appeals Chamber considers that the Trial Chamber's conclusion that Lukić made a significant contribution to the JCE is unaffected by this error. Its conclusion was based on an abundance of other evidence, including his other conduct as the Head of the MUP Staff which continued through 1999.⁴⁷⁵⁷ The Appeals Chamber is satisfied that this evidence was sufficient for a reasonable trier of fact to conclude that the only reasonable inference was that he significantly contributed to the JCE. Thus, the Trial Chamber's error did not occasion a miscarriage of justice.

1447. Furthermore, regardless of whether the Trial Chamber erred in relying on Lukić's involvement in the process of arming the non-Albanian population and disarming the Kosovo Albanian population to infer his intent, the Appeals Chamber is satisfied that other evidence concerning his mindset and conduct was sufficient for a reasonable trier of fact to conclude that the only reasonable inference was that Lukić had the requisite intent for JCE liability.⁴⁷⁵⁸ Therefore, to the extent that Lukić asserts that the Trial Chamber erred in this regard, he has failed to demonstrate that the alleged error would have resulted in a miscarriage of justice.

1448. As a result, it is not necessary for the Appeals Chamber to consider Lukić's remaining challenges to the Trial Chamber's factual findings concerning his involvement in the arming of the non-Albanian population and the disarming of the Kosovo Albanian population.

1449. Lukić's arguments in this regard are therefore dismissed. However, given that the Trial Chamber erred in finding that Lukić contributed to the JCE through his involvement in the arming

⁴⁷⁵¹ *Tadić* Appeal Judgement, para. 229(iii). See also *Krajišnik* Appeal Judgement, para. 695; *Brđanin* Appeal Judgement, para. 427.

⁴⁷⁵² Trial Judgement, vol. 3, para. 96.

⁴⁷⁵³ See *supra*, para. 610.

⁴⁷⁵⁴ Trial Judgement, vol. 1, paras 764-766, 775, 787; *ibid.*, vol. 3, paras 57-58, 68-72.

⁴⁷⁵⁵ Trial Judgement, vol. 3, para. 1121.

⁴⁷⁵⁶ Trial Judgement, vol. 3, para. 1131, read together with *ibid.*, vol. 3, para. 1121. See also *supra*, sub-section VII.E.2.(d).

⁴⁷⁵⁷ See Trial Judgement, vol. 3, paras 1118, 1120, 1128-1129, 1131. See also *supra*, sub-sections VII.F.4.(c)-VII.F.4.(g) and VII.F.4.(i).

⁴⁷⁵⁸ See Trial Judgement, vol. 3, paras 1117-1120, 1123-1130. See also *supra*, sub-sections VII.F.4.(c)-VII.F.4.(g) and VII.F.4.(i); *infra*, sub-section VII.F.5.

and disarming, the Appeals Chamber will consider the effect of this error, if any, on Lukić's sentence in the section concerning sentencing below.⁴⁷⁵⁹

(k) Confiscation and destruction of identity documents

1450. Lukić asserts that he was not involved in the confiscation and destruction of the identity documents of Kosovo Albanian civilians and that the Trial Chamber thus erred in finding that he provided a significant contribution to the common purpose through it.⁴⁷⁶⁰ However, his submissions in this regard are irrelevant to his conviction as the Trial Chamber did not find that he contributed to the JCE through the confiscation and destruction of identity documents.⁴⁷⁶¹ These submissions are thus dismissed without detailed consideration. Lukić's submissions contesting the Trial Chamber's findings on the confiscation and destruction of identity documents as evidence showing the existence of the common plan have already been addressed.⁴⁷⁶²

(l) Conclusion

1451. In light of the above, and notwithstanding the Trial Chamber's error in relation to Lukić's involvement in the arming of the RPOs and the disarming of the Kosovo Albanian population, the Appeals Chamber dismisses Lukić's arguments in relation to his role as Head of the MUP Staff.⁴⁷⁶³

5. Lukić's intent to forcibly displace part of the Kosovo Albanian population

1452. The Trial Chamber found that Lukić shared the intent with other JCE members "to forcibly displace the Kosovo Albanian population, both within and without Kosovo, and thereby ensure

⁴⁷⁵⁹ See also *infra*, sub-section IX.I.

⁴⁷⁶⁰ Specifically, Lukić submits that the Trial Chamber erred in finding that he provided a significant contribution to the common purpose through the confiscation and destruction of the identity documents of Kosovo Albanian civilians, while finding that he had no control over the border police stations (Lukić's Appeal Brief, paras 516, 787, 820-821, referring to Trial Judgement, vol. 3, paras 32, 40, 1075, Exh. 6D1603, para. 100, Petar Dujković, 28 Feb 2008, T. 23366-23368). Lukić makes a similar argument specifically with regard to Preševo, asserting that the Trial Chamber erred in holding him responsible for confiscation of identity documents that took place there since it is outside Kosovo. (Lukić's Appeal Brief, para. 808, referring to Trial Judgement, vol. 2, para. 936). Lukić further claims that he neither issued orders for, nor expressed support to, the confiscation and destruction of identity documents, but rather made efforts to ensure that all Kosovo Albanians were supplied with such documents (Lukić's Appeal Brief, paras 517-518). Specifically with regard to the mistreatment and taking of identity documents of civilians at the Vrbnica/Vërbnica (Morina) border crossing, Lukić claims that the commander of the station rejected any such claims (Lukić's Appeal Brief, paras 779-780, referring to Nebojša Ognjenović, 21 Feb 2008, T. 22917-22918.)

⁴⁷⁶¹ The Appeals Chamber notes that, in support of his assertion, Lukić refers to the Trial Chamber's reliance on the confiscation and destruction of identity documents as evidence that the events in 1999 were part of a common purpose. To the extent that the Trial Chamber did not find that Lukić provided a significant contribution to the common purpose through the confiscation and destruction of identity documents, Lukić's submissions are dismissed as irrelevant. For the same reason the Appeals Chamber dismisses Lukić's argument that considering he had no control over the border police stations in Kosovo, he had no knowledge of the situation there (Lukić's Appeal Brief, paras 781-782, referring to Trial Judgement, vol. 3, 1073-1075).

⁴⁷⁶² See *supra*, sub-section VII.B.3.(b).

⁴⁷⁶³ Dismissing, in relevant part, Lukić's sub-grounds D(5), F(2), I(4), N, N(1), O(1)(b), O(1)(e), O(2), P(1)-(3), P(4)(a)-(b), P(5)-(8), GG, and GG(2).

continued control by the FRY and Serbian authorities over the province.”⁴⁷⁶⁴ In reaching this conclusion, the Trial Chamber considered, *inter alia*, that Lukić was aware that there were serious allegations of criminal activity by various forces, including PJP and SAJ forces, in Kosovo in mid-to late 1998⁴⁷⁶⁵ and also that in 1999, during the period concerned by the Indictment, Lukić had information on the commission of crimes.⁴⁷⁶⁶ The Trial Chamber concluded that:

[Lukić’s] knowledge of the commission of crimes by MUP subordinates and VJ members from mid-1998 until the end of the NATO campaign in 1999, combined with his continuing work to ensure co-operation of the joint MUP/VJ operations despite the knowledge of such crimes, is indicative of his intent that those crimes occur.⁴⁷⁶⁷

1453. Lukić challenges the Trial Chamber’s conclusion in relation to his intent, arguing that the Trial Chamber erred in law in articulating the *mens rea* standard.⁴⁷⁶⁸ He also argues that the Trial Chamber erred in finding that he: (i) had knowledge of crimes committed in 1998 and 1999; (ii) voluntarily participated in the common purpose; and (iii) shared the intent for the commission of the crimes encompassed by the common purpose.⁴⁷⁶⁹ In particular, Lukić argues that another reasonable conclusion remained open on the evidence, namely, that he “was trying to uphold law and order”.⁴⁷⁷⁰

(a) Alleged errors of law in relation to Lukić’s *mens rea*

1454. Lukić submits that the “*mens rea* and *actus reus* elements of the crimes charged were erroneously applied” as these “elements cannot be satisfied if what is planned/ordered is a legal operation.”⁴⁷⁷¹ Referring to the *mens rea* standard in relation to planning, ordering, and instigating, Lukić argues that “an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.”⁴⁷⁷² Further, Lukić argues that the Trial Chamber erred in law in holding that an accused who planned, ordered, or instigated the conduct of the principal perpetrator need not have possessed discriminatory intent to be liable for persecution, as long as the principal perpetrator possessed such intent.⁴⁷⁷³

1455. The Prosecution responds that, since Lukić was convicted for commission through his participation in a JCE, his challenges to the *mens rea* required for other modes of liability is

⁴⁷⁶⁴ Trial Judgement, vol. 3, para. 1130. See also *ibid.*, vol. 3, para. 1117.

⁴⁷⁶⁵ Trial Judgement, vol. 3, paras 1086, 1120.

⁴⁷⁶⁶ Trial Judgement, vol. 3, para. 1097. See also *ibid.*, vol. 3, para. 1123.

⁴⁷⁶⁷ Trial Judgement, vol. 3, para. 1119.

⁴⁷⁶⁸ Lukić’s Appeal Brief, paras 222-224, 247.

⁴⁷⁶⁹ *E.g.*, Lukić’s Appeal Brief, paras 261, 361, 385, 418-419, 435-436, 440-441, 455-462, 465-470, 477-478, 641-646, 656-661, 665-666, 670, 672-673, 677-683, 774-782.

⁴⁷⁷⁰ Appeal Hearing, 14 Mar 2013, AT. 502.

⁴⁷⁷¹ Lukić’s Appeal Brief, paras 222-223.

⁴⁷⁷² Lukić’s Appeal Brief, para. 224, citing *Blaškić* Appeal Judgement, para. 41 and referring to *Kordić and Čerkez* Appeal Judgement, paras 29-32.

irrelevant to his conviction.⁴⁷⁷⁴ Further, the Prosecution submits that Lukić was convicted for persecution under JCE III where proof of the accused's discriminatory intent is not required.⁴⁷⁷⁵

1456. The Appeals Chamber recalls that Lukić was convicted for commission, through his participation in a JCE.⁴⁷⁷⁶ Therefore, his reliance on the *mens rea* standard for planning, ordering, and instigating is inapposite. Furthermore, Lukić was convicted for persecution as a crime against humanity pursuant to JCE III.⁴⁷⁷⁷ The Appeals Chamber recalls that, in order for the accused to be held responsible under JCE III, it must be established that the commission of the crime was foreseeable to him.⁴⁷⁷⁸ He need not share the specific intent of the principal perpetrator of that crime.⁴⁷⁷⁹ Consequently, Lukić's arguments are dismissed.

(b) Lukić's knowledge of crimes in 1998

(i) Information received during Joint Command meetings

1457. The Trial Chamber found that, in 1998, Lukić regularly attended Joint Command meetings at which issues such as joint VJ and MUP operations, the "refugee" crisis, and the need to discipline the forces of the FRY and Serbia were discussed.⁴⁷⁸⁰ In addition, the Trial Chamber noted that the joint operation at Gornje Obrinje/Abria ë Eperme was discussed, including the need for opening an investigation.⁴⁷⁸¹

1458. Lukić asserts that the Trial Chamber erroneously interpreted the content of the Joint Command meetings in 1998.⁴⁷⁸² He claims that the information presented at those meetings was unverified and that, in any event, the relevant authorities acted appropriately upon it.⁴⁷⁸³ Concerning the incident in Gornje Obrinje/Abria ë Eperme, Lukić submits that "what ha[d] been established and

⁴⁷⁷³ Lukić's Appeal Brief, para. 247, referring to Trial Judgement, vol. 1, para. 181.

⁴⁷⁷⁴ Prosecution's Response Brief (Lukić), para. 205.

⁴⁷⁷⁵ Prosecution's Response Brief (Lukić), para. 206.

⁴⁷⁷⁶ Trial Judgement, vol. 3, para. 1138.

⁴⁷⁷⁷ Trial Judgement, vol. 3, paras 1134, 1136.

⁴⁷⁷⁸ *Karadžić JCE III* Decision, para. 18.

⁴⁷⁷⁹ *Brđanin* Decision, para. 5.

⁴⁷⁸⁰ Trial Judgement, vol. 3, para. 1079, referring to Exh. P1468.

⁴⁷⁸¹ Trial Judgement, vol. 3, para. 1081. The Trial Chamber found that in the course of this operation, the forces of the FRY and Serbia killed a number of civilians, including women and children. Trial Judgement, vol. 1, para. 912.

⁴⁷⁸² Lukić's Appeal Brief, para. 641, referring to Trial Judgement, vol. 3, para. 1079.

⁴⁷⁸³ Lukić's Appeal Brief, para. 642, referring to Exh. P948, p. 159, Exh. 6D612, Exh. 6D613, Exh. 6D1631, paras 27-31, 60, 93. See also Appeal Hearing, 14 Mar 2013, AT. 496-497. Lukić further claims that the Trial Chamber "*a priori*" attributed crimes to the FRY and Serbian forces (Lukić's Appeal Brief, para. 643, referring to Trial Judgement, vol. 1, paras 801-802, *ibid.*, vol. 3, paras 1029, 1031, 1086, 1091-1092, 1097). The Appeals Chamber notes that Trial Judgement, vol. 1, paras 801-802 do not contain references to crimes committed by FRY and Serbian forces; similarly Trial Judgement, vol. 3, paras 1086 and 1097 do not contain references to specific crimes. As to the evidence described in Trial Judgement, vol. 3, paras 1029 and 1031, it served to support the Trial Chamber's conclusion that Lukić had detailed knowledge of the events on the ground in Kosovo in 1998 and not of specific crimes committed by the VJ and MUP forces (see Trial Judgement, vol. 3, para. 1032). Lukić's challenges to the Trial Chamber's findings in vol. 3, paras 1091-1092 are addressed *infra*, sub-sections VII.F.5.(c)(ii)b. and .VII.F.5.(c)(iv).

was known at the time” was that there had been fighting against the KLA and that efforts had been made to conduct an investigation.⁴⁷⁸⁴ Lukić submits that his knowledge of crimes committed in Gornje Obrinje/Abria ë Eperme was based only on Albanian newspapers and on information provided by “American diplomats” that the crimes were committed by “Albanians.”⁴⁷⁸⁵ Lukić further points out that the KLA prevented the investigative judge from visiting the crime scene.⁴⁷⁸⁶ He also claims that the Trial Chamber failed to consider that, in addition to being informed of the commission of crimes, he was also put on notice of measures taken by the competent authorities.⁴⁷⁸⁷

1459. In response, the Prosecution submits that Lukić mischaracterises the Trial Chamber’s findings and fails to show that the Trial Chamber misinterpreted the evidence.⁴⁷⁸⁸ As to the incident in Gornje Obrinje/Abria ë Eperme, the Prosecution submits that Lukić seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.⁴⁷⁸⁹ It adds that Lukić’s argument that “American diplomats” reported that “Albanians” committed the crimes is unsupported by the evidence.⁴⁷⁹⁰ The Prosecution further submits that the Trial Chamber correctly considered Lukić’s awareness that measures were allegedly taken to repress crimes as confirmation that he was aware of the crimes.⁴⁷⁹¹

1460. Concerning the allegations of crimes conveyed during the Joint Command meetings in 1998, the Trial Chamber noted that acts of arson were often discussed at those meetings.⁴⁷⁹² Lukić’s submission that the information presented at the Joint Command meetings was unverified does not undermine the Trial Chamber’s conclusion that he was aware that there were serious allegations of criminal activity.⁴⁷⁹³

1461. Further, the Trial Chamber considered that information concerning the joint MUP and VJ action in Gornje Obrinje/Abria e Epërme was discussed at the Joint Command meetings on 26 September and 4 October 1998, in particular that, following the operation, “refugees” were

⁴⁷⁸⁴ Lukić’s Appeal Brief, paras 261, 435. See also Appeal Hearing, 14 Mar 2013, AT. 497-498.

⁴⁷⁸⁵ Lukić’s Appeal Brief, para. 646. See also *ibid.*, paras 139, 147, referring to Trial Judgement, vol. 1, para. 900. Lukić’s arguments challenging the Trial Chamber’s reliance on the incident at Gornje Obrinje/Abria e Epërme in October 1998 in finding that the murder of Kosovo Albanians was foreseeable to him in the context of his liability under the third category of JCE are addressed below (see Lukić’s Appeal Brief, paras 499-500, referring to Trial Judgement, vol. 3, para. 1134; *infra*, sub-section VII.F.8.(b)).

⁴⁷⁸⁶ Lukić’s Appeal Brief, para. 646.

⁴⁷⁸⁷ Lukić’s Appeal Brief, paras 435, 439. Concerning Lukić’s statement during the Joint Command meeting on 1 October 1998 regarding the existence of a mass grave in Jablanica/Jabllanica, Lukić claims that the Trial Chamber misinterpreted the evidence as what he meant was that the mass grave contained bodies of people killed by the KLA (Lukić’s Appeal Brief, para. 659). Although Lukić refers to Trial Judgement, vol. 3, para. 1931, the Appeals Chamber understands the reference to be to Trial Judgement, vol. 3, para. 1031.

⁴⁷⁸⁸ Prosecution’s Response Brief (Lukić), paras 404-408.

⁴⁷⁸⁹ Prosecution’s Response Brief (Lukić), para. 214.

⁴⁷⁹⁰ Prosecution’s Response Brief (Lukić), para. 418.

⁴⁷⁹¹ Prosecution’s Response Brief (Lukić), para. 217, referring to Trial Judgement, vol. 3, paras 1091-1093, 1097.

⁴⁷⁹² Trial Judgement, vol. 3, para. 1080, referring to Exh. P1468, pp. 46, 52, 96, 125.

⁴⁷⁹³ Trial Judgement, vol. 3, para. 1086.

spotted near the village of Trdevac/Tërdec and that there was a need to initiate an investigation.⁴⁷⁹⁴ The Appeals Chamber notes that Lukić was neither charged with nor convicted of the crimes committed during the incident.⁴⁷⁹⁵ Therefore, to the extent that his arguments relate to his intent to commit these crimes and his contribution thereto,⁴⁷⁹⁶ they are dismissed. As to Lukić's knowledge of the incident, the Appeals Chamber is of the view that, without further evidence as to what Lukić knew about the allegations giving rise to the need for an investigation, it is unclear whether Lukić had reason to believe that crimes, as opposed to legitimate combat casualties, occurred. In light of this, the Appeals Chamber finds that a reasonable trier of fact could not have relied on this evidence in finding that Lukić was aware of serious allegations of criminal activity by MUP forces in Kosovo in late 1998.⁴⁷⁹⁷

(ii) Information received from international representatives

1462. The Trial Chamber found that Lukić was in constant communication with KDOM and KVM representatives in Kosovo, who kept him informed of their observations.⁴⁷⁹⁸ In reaching this conclusion, the Trial Chamber relied primarily on the evidence of Shaun Byrnes and Karol John Drewienkiewicz.⁴⁷⁹⁹ Byrnes stated that he had notified Lukić of an incident during which PJP units were leaving a village near Kijevo/Kieva which was deserted and in flames.⁴⁸⁰⁰ He also stated that he had complained to Lukić about the MUP using unnecessary force in returning displaced Kosovo Albanians in the Peć/Peja area.⁴⁸⁰¹ Drewienkiewicz testified that he had informed Lukić about unconfirmed reports that the MUP was using excessive force in the area of Kosovo Polje/Fushë Kosova.⁴⁸⁰²

⁴⁷⁹⁴ Trial Judgement, vol. 3, para. 1081.

⁴⁷⁹⁵ As to Lukić's submission concerning his statement at the Joint Command meeting of 1 October 1998 regarding the existence of a mass grave in Jablanica/Jabllanica, the Appeals Chamber notes that indeed the evidence does not specify whether the mass grave was associated with the commission of crimes (see Exh. P1468, p. 134). The Appeals Chamber notes, however, that the Trial Chamber did not rely on this evidence with respect to Lukić's knowledge of crimes committed in 1998, but rather referred to it in relation to its finding that Lukić had detailed knowledge of the events in Kosovo in 1998 (see Trial Judgement, vol. 3, para. 1032). Consequently, Lukić fails to show any error in the Trial Chamber's reliance on this evidence.

⁴⁷⁹⁶ See Lukić's Appeal Brief, para. 261.

⁴⁷⁹⁷ At the appeal hearing, the Prosecution argued that a report on the incident published by Human Rights Watch was widely disseminated to the media and government organisations in the FRY and Serbia, and to Serbian and Albanian-language media in Kosovo in February 1999 (Appeal Hearing, 14 Mar 2013, AT. 554-555. See also Trial Judgement, vol. 1, para. 900, referring to Frederick Abrahams, Exh. P2228, p. 7, Exh. P441, pp. 35-39). However, the Trial Chamber neither found that Lukić was in fact aware of the contents of this report, nor relied on the evidence in this regard to find that he knew of allegations of serious criminal activity by MUP forces in 1998 (see, in particular, Trial Judgement, vol. 3, paras 1079-1086, 1120). Therefore, this evidence is irrelevant to the Trial Chamber's finding concerning Lukić's knowledge of crimes in 1998.

⁴⁷⁹⁸ Trial Judgement, vol. 3, para. 1082.

⁴⁷⁹⁹ Trial Judgement, vol. 3, paras 1082-1084.

⁴⁸⁰⁰ Trial Judgement, vol. 3, para. 1082.

⁴⁸⁰¹ Trial Judgement, vol. 3, para. 1083.

⁴⁸⁰² Trial Judgement, vol. 3, para. 1084.

1463. Lukić argues that, despite noting that the information he received from international representatives concerning criminal activity of MUP members was unverified, the Trial Chamber “treated it as verified in determining guilt.”⁴⁸⁰³ In this regard, Lukić challenges the Trial Chamber’s reliance upon the evidence of Byrnes and Drewienkiewicz.⁴⁸⁰⁴ Lukić avers that, with respect to the village that Byrnes saw in flames, Byrnes stated that he did not see PJP officers committing any crimes but that they were leaving the village.⁴⁸⁰⁵ Concerning the events in the Peć/Peja area, Lukić asserts that a joint anti-terrorist action took place in that area and that, in any event, Byrnes was not present himself but was informed about the events by his team.⁴⁸⁰⁶ In relation to Drewienkiewicz’s evidence about the MUP use of excessive force in the area of Kosovo Polje/Fushë Kosova, Lukić claims that the Trial Chamber failed to “establish the limits of an adequate use of force.”⁴⁸⁰⁷

1464. In response, the Prosecution submits that it was reasonable for the Trial Chamber to rely on the evidence of Byrnes and Drewienkiewicz.⁴⁸⁰⁸

1465. The Trial Chamber noted Byrnes’ testimony that, in mid- or late September 1998, he observed PJP units leaving a village, south of Kijevo/Kieva, which was deserted and in flames.⁴⁸⁰⁹ While Byrnes testified that he “did not see a single PJP officer pull a trigger” or “light a house by whatever means” on that occasion,⁴⁸¹⁰ he also stated that he saw PJP units leaving the village without anybody trying to put out the fire.⁴⁸¹¹ The Trial Chamber also considered Byrnes’ evidence that “in August and September 1998 his team observed, on an almost day-to-day basis, PJP and other police units burning villages, destroying crops, killing farm animals, intimidating Kosovo Albanian civilians, and driving them from their homes,” which was brought to Lukić’s attention.⁴⁸¹² The Trial Chamber concluded that Byrnes’ “evidence that PJP units stood by while homes in deserted villages burned was not undermined by cross examination.”⁴⁸¹³ Clearly, the Trial Chamber’s conclusion was not limited to Byrnes’ testimony concerning the one village located south of Kijevo/Kieva, but applied to the numerous occasions on which his team witnessed the

⁴⁸⁰³ Lukić’s Appeal Brief, para. 644.

⁴⁸⁰⁴ Lukić’s Appeal Brief, paras 652, 656.

⁴⁸⁰⁵ Lukić’s Appeal Brief, paras 649-650, referring to Shaun Byrnes, 16 Apr 2007, T. 12148, Dragan Paunović, 7 Feb 2008, T. 21872-21873.

⁴⁸⁰⁶ Lukić’s Appeal Brief, paras 651, 653, referring to Shaun Byrnes, 17 Apr 2007, T. 12228, Exh. P1429, Trial Judgement, vol. 1, para. 881.

⁴⁸⁰⁷ Lukić’s Appeal Brief, para. 656, referring to Trial Judgement, vol. 3, para. 1084. With regard to the breach of the cease-fire in Podujevo/Podujeva and the Trial Chamber’s finding that Lukić did not take any measures in this regard, Lukić claims that the Trial Chamber failed to establish that it was the MUP forces who breached the cease-fire. Lukić’s Appeal Brief, para. 656, referring to Trial Judgement, vol. 1, paras 931, 936.

⁴⁸⁰⁸ Prosecution’s Response Brief (Lukić), paras 410-415, 417.

⁴⁸⁰⁹ Trial Judgement, vol. 3, para. 1082, referring to Shaun Byrnes, 16 Apr 2007, T. 12148-12149.

⁴⁸¹⁰ See Lukić’s Appeal Brief, para. 649, citing Shaun Byrnes, 16 Apr 2007, T. 12148.

⁴⁸¹¹ Trial Judgement, vol. 3, para. 1082, referring to Shaun Byrnes, 16 Apr 2007, T. 12148-12149.

⁴⁸¹² Trial Judgement, vol. 3, para. 1082, referring to Shaun Byrnes, 16 Apr 2007, T. 12149–12150, 12152–12153.

⁴⁸¹³ Trial Judgement, vol. 3, para. 1082.

PJP's presence and activities in the area.⁴⁸¹⁴ Moreover, the Appeals Chamber recalls that Lukić was not convicted for the crimes committed in 1998 and therefore no criminal responsibility was attributed to him for the event witnessed by Byrnes in the village south of Kijevo/Kieva.

1466. The Trial Chamber also considered Byrnes' evidence about an event in September 1998 in the Peć/Peja area.⁴⁸¹⁵ Lukić takes issue with the Trial Chamber's holding that Byrnes photographed this event.⁴⁸¹⁶ Byrnes exact words were "we photographed much of what was going on"⁴⁸¹⁷ and he confirmed in cross-examination that he did not personally witness the event.⁴⁸¹⁸ Lukić has failed to explain how the alleged error renders the Trial Chamber's reliance on Byrnes' testimony unreasonable. He also misrepresents the Trial Judgement by referring to an alleged finding that the "terrorists, not civilians, were the only target" of the operations in the Peć/Peja area.⁴⁸¹⁹ In fact, the Trial Chamber found that, while there were indeed clashes between the FRY and Serbian forces and the KLA, the conduct of the MUP and the VJ forces in the area violated international humanitarian law, including by deliberately setting houses on fire.⁴⁸²⁰ Lukić has failed to show any error.

1467. The Trial Chamber further noted that, on 24 December 1998, Drewienkiewicz informed Lukić about unconfirmed reports that the MUP was using excessive force during village searches in the area of Kosovo Polje/Fushë Kosova.⁴⁸²¹ Contrary to Lukić's assertion, in order to rely on Drewienkiewicz's factual remarks, the Trial Chamber was not required to "establish the limits of an adequate use of force."⁴⁸²² Moreover, the Trial Chamber considered evidence that, at the time, Lukić already knew about allegations of police units "burning villages, destroying crops, killing farm animals, intimidating Kosovo Albanian civilians, and driving them from their homes".⁴⁸²³ Accordingly, the Appeals Chamber considers that it was open to the Trial Chamber to rely on

⁴⁸¹⁴ Lukić's reference to Paunović's evidence that, in some instances, the KLA set the harvest on fire is plainly insufficient to show that the Trial Chamber's reliance on this particular part of Byrnes' evidence was unreasonable. (Lukić's Appeal Brief, para. 650, referring to Dragan Paunović, 7 Feb 2008, T. 21872-21873).

⁴⁸¹⁵ Trial Judgement, vol. 3, para. 1083.

⁴⁸¹⁶ See Lukić's Appeal Brief, para. 651, referring to Trial Judgement, vol. 3, para. 1083.

⁴⁸¹⁷ Shaun Byrnes, 16 Apr 2007, T. 12154.

⁴⁸¹⁸ Shaun Byrnes, 17 Apr 2007, T. 12228.

⁴⁸¹⁹ See Lukić's Appeal Brief, para. 651, referring to Trial Judgement, vol. 1, para. 881.

⁴⁸²⁰ Trial Judgement, vol. 1, para. 881.

⁴⁸²¹ Trial Judgement, vol. 3, para. 1084. The Trial Chamber noted that, during the same meeting, Drewienkiewicz stated that the ongoing "VJ/MUP operation" around Podujevo/Podujeva was a serious breach of the cease-fire and recommended that the operation be ceased (Trial Judgement, vol. 3, para. 1084, referring to Exh. P2544). Drewienkiewicz testified that Lukić disagreed that it was an inappropriate activity (Karol John Drewienkiewicz, 4 Dec 2006, T. 7786). As Lukić points out, the Trial Chamber did not find that the MUP was responsible for the breach of the cease-fire in Podujevo/Podujeva (Lukić's Appeal Brief, para. 656, referring to Trial Judgement, vol. 1, paras 931, 936). He fails to explain, however, how the responsibility for the breach of the cease-fire has a bearing upon the Trial Chamber's finding concerning his knowledge of allegations of criminal activity against the Kosovo Albanian civilian population.

⁴⁸²² See Lukić's Appeal Brief, para. 656, referring to Trial Judgement, vol. 3, para. 1084.

⁴⁸²³ Trial Judgement, vol. 3, para. 1082, referring to Shaun Byrnes, 16 Apr 2007, T. 12149–12150, 12152–12153.

Drewienkiewicz's evidence in inferring Lukić's awareness of further allegations of criminal activity by MUP forces in Kosovo in 1998. Lukić's submissions are therefore dismissed.

(iii) The Trial Chamber's reliance on knowledge of crimes in 1998 in inferring Lukić's intent

1468. Lukić asserts that the Trial Chamber erred in law in inferring his intent to forcibly displace the Kosovo Albanian population in 1999 from his knowledge of the commission of other types of crimes in the past.⁴⁸²⁴ He further argues that the Trial Chamber erred in finding that the only reasonable inference from the evidence showing his knowledge of the commission of crimes in 1998 was that he shared the intent for the commission of deportation and forcible transfer in 1999.⁴⁸²⁵ In addition, he avers that the *mens rea* elements of the first category of JCE cannot be fulfilled prior to the existence of the common purpose.⁴⁸²⁶

1469. In response, the Prosecution submits that in concluding that Lukić shared the intent to forcibly displace the Kosovo Albanian population, the Trial Chamber did not solely rely on his knowledge of crimes in 1998, but also on his knowledge of crimes in 1999 coupled with his continuing participation in the violent campaign against the Kosovo Albanian civilians.⁴⁸²⁷ The Prosecution also contends that, as a matter of law, even though the *mens rea* of a JCE member cannot be fulfilled prior to the existence of the common purpose of the JCE, it can be inferred from his knowledge of crimes committed before the JCE came into existence.⁴⁸²⁸ Moreover, it argues that Lukić knew that the crimes, committed during joint operations of the MUP and the VJ in 1998, caused the displacement of civilians⁴⁸²⁹ and that "he knew that he could use the same types of operations, using the same troops targeting the same ethnic group to achieve the same result in 1999."⁴⁸³⁰

1470. The Appeals Chamber recalls that the *mens rea* standard relevant to liability for commission through participation in a JCE is that the accused must share the intent for the commission of the crimes alleged in the Indictment and not merely foresee their occurrence.⁴⁸³¹ As noted earlier in this Judgement, the extent to which intent may be inferred from knowledge of the commission of crimes

⁴⁸²⁴ Appeal Hearing, 14 Mar 2013, AT. 495-496, referring to *Krnojelac* Appeal Judgement, para. 84, *Vasiljević* Appeal Judgement, para. 101, *Stakić* Appeal Judgement, para. 65.

⁴⁸²⁵ Appeal Hearing, 14 Mar 2013, AT. 496-497, 499-500.

⁴⁸²⁶ Appeal Hearing, 14 Mar 2013, AT. 494.

⁴⁸²⁷ Appeal Hearing, 14 Mar 2013, AT. 552-556.

⁴⁸²⁸ Appeal Hearing, 14 Mar 2013, AT. 552, referring to *Krajišnik* Appeal Judgement, paras 200-204, *Krajišnik* Trial Judgement, paras 925-929.

⁴⁸²⁹ Appeal Hearing, 14 Mar 2013, AT. 555, referring to Trial Judgement, vol. 1, para. 916, *ibid.*, vol. 3, paras 443, 677, 1082, 1120.

⁴⁸³⁰ Appeal Hearing, 14 Mar 2013, AT. 553.

⁴⁸³¹ See *Tadić* Appeal Judgement, para. 228.

which were committed earlier than the charged crimes will necessarily depend on the circumstances of the particular case.⁴⁸³² In concluding that Lukić shared the intent to forcibly displace the Kosovo Albanian population, the Trial Chamber considered that, despite his knowledge of the commission of crimes by the MUP and the VJ and allegations thereof in both 1998 and 1999, he continued to instruct the MUP to engage in joint operations with the VJ in Kosovo which resulted in the massive displacement of Kosovo Albanians.⁴⁸³³ In these circumstances, the Appeals Chamber finds no error in the Trial Chamber's reliance, in part, on his knowledge of events in 1998. Further, to the extent that Lukić argues that the Trial Chamber erred in relying solely on his knowledge of crimes in 1998 to infer his intent, his argument is without merit.

(iv) Conclusion

1471. In view of the above considerations, and notwithstanding the Trial Chamber's error in relation of Lukić's knowledge of the crimes committed during the incident in Gornje Obrinje/Abria e Epërme, Lukić has failed to show that the Trial Chamber's finding that he was aware of allegations of serious criminal activity by MUP forces in 1998 was unreasonable.⁴⁸³⁴ Similarly, he has failed to show that the Trial Chamber erred in relying, in part, on this evidence in inferring that he shared the intent to forcibly displace the Kosovo Albanian population in 1999.

(c) Lukić's knowledge of crimes in 1999

1472. The Trial Chamber found that, during the Indictment period, Lukić continued to receive information that crimes were being committed by MUP and VJ members against Kosovo Albanian civilians in Kosovo.⁴⁸³⁵ In reaching this conclusion, the Trial Chamber relied on evidence showing: (i) that the MUP Staff received daily reports from the Kosovo SUPs, which dealt with events throughout Kosovo;⁴⁸³⁶ (ii) Lukić's awareness of the discovery of bodies in Izbica/Izbiçë and Pusto Selo/Pastasella;⁴⁸³⁷ (iii) Lukić's awareness that large numbers of civilians were leaving Kosovo in 1999;⁴⁸³⁸ (iv) Lukić's presence at a meeting on 4 May 1999 where information was presented

⁴⁸³² See *supra*, para. 1016.

⁴⁸³³ Trial Judgement, vol. 3, paras 1120, 1123-1128.

⁴⁸³⁴ In this context, Lukić also contests the Trial Chamber's findings as to what occurred on the ground in 1998 and challenges its assessment of the evidence in this regard. In particular, Lukić asserts that the Trial Chamber erred in its assessment of the evidence when it found that the VJ and the MUP used excessive and indiscriminate force in Mališevo/Malisheva, Drenica, and Gornje Obrinje/Abria e Epërme in 1998 (Lukić's Appeal Brief, paras 136-138, 140-146, 258-259; *contra* Prosecution's Response Brief (Lukić), paras 123-124, 195, 198, 201. See also Trial Judgement, vol. 1, paras 886, 894, 912, 920). However, the Trial Chamber did not rely on this evidence in concluding that Lukić was aware of allegations of serious criminal activity by MUP forces in 1998 (Trial Judgement, vol. 3, paras 1079-1086, 1120). His arguments in this respect are therefore dismissed without further discussion.

⁴⁸³⁵ Trial Judgement, vol. 3, para. 1123.

⁴⁸³⁶ Trial Judgement, vol. 3, paras 1091, 1093, 1123.

⁴⁸³⁷ Trial Judgement, vol. 3, paras 1092, 1123.

⁴⁸³⁸ Trial Judgement, vol. 3, paras 1094, 1096, 1124, 1127.

about numerous cases of violence, killings, pillage, and other crimes;⁴⁸³⁹ and (v) Lukić's presence at a meeting on 7 May 1999 at which measures for the prevention of crimes and means to protect the civilian population were addressed.⁴⁸⁴⁰

1473. Lukić argues that the Trial Chamber "failed to establish in what manner [he] was informed about incidents", "did not reference that [he] was aware of any indicted crimes", and "could not draw any conclusions as to whether [incidents registered in the daily overviews] occurred as a result of crimes."⁴⁸⁴¹

(i) The Trial Chamber's evaluation of evidence in relation to meetings attended by Lukić

a. Meeting of 4 May 1999

1474. The Trial Chamber noted that, following the receipt of a letter from the then Prosecutor of the Tribunal, Louise Arbour, noting her concerns about the continued commission of serious violations of international humanitarian law in Kosovo, on 4 May 1999, Milošević convened a meeting attended by Lukić. The Trial Chamber found that, at the meeting, information was presented that the security forces of the VJ and the MUP had dealt with numerous crimes and had apprehended several hundred perpetrators.⁴⁸⁴²

1475. Lukić argues that the Trial Chamber erred in concluding that the meeting of 4 May 1999 was convened following the receipt of a letter from Louise Arbour.⁴⁸⁴³ He also claims that, contrary to the Trial Chamber's finding, the report of the meeting does not mention that MUP forces had dealt with numerous cases of violence, killings, pillage, and other crimes⁴⁸⁴⁴ and that no crimes committed by MUP forces were reported at the meeting.⁴⁸⁴⁵

1476. The Prosecution responds that Lukić misrepresents the evidence concerning the meeting of 4 May 1999, which shows that the MUP forces dealt with a number of serious crimes.⁴⁸⁴⁶ It further avers that whether the meeting was called because of Louise Arbour's letter is irrelevant.⁴⁸⁴⁷

⁴⁸³⁹ Trial Judgement, vol. 3, paras 1095, 1125.

⁴⁸⁴⁰ Trial Judgement, vol. 3, para. 1126.

⁴⁸⁴¹ Lukić's Appeal Brief, para. 670.

⁴⁸⁴² Trial Judgement, vol. 3, paras 1095, 1125.

⁴⁸⁴³ Lukić's Appeal Brief, paras 678-679. See also Lukić's Appeal Brief, para. 464.

⁴⁸⁴⁴ Lukić's Appeal Brief, para. 465, citing Trial Judgement, vol. 3, para. 1125, and referring to Exh. P1696.

⁴⁸⁴⁵ Lukić's Appeal Brief, paras 680-681.

⁴⁸⁴⁶ Prosecution's Response Brief (Lukić), para. 210, citing Exh. P1696. See also Prosecution's Response Brief (Lukić), paras 433-444.

⁴⁸⁴⁷ Prosecution's Response Brief (Lukić), paras 211, 436.

1477. The Appeals Chamber notes that Lukić's conviction does not rely on whether the meeting on 4 May 1999 was called following the receipt of a letter from Louise Arbour. Rather, what was clearly relevant to the determination of Lukić's *mens rea* was the Trial Chamber's finding that, at the said meeting, information was presented about "numerous cases of violence, killings, pillage, and other crimes."⁴⁸⁴⁸ Whether the crimes were committed by VJ or MUP forces and whether the reference to the "security forces" which dealt with those cases encompasses the MUP or only the VJ⁴⁸⁴⁹ are also irrelevant to Lukić's conviction, as the Trial Chamber found that the crimes of both the VJ and the MUP were imputable to him.⁴⁸⁵⁰ Accordingly, the Appeals Chamber dismisses Lukić's submissions in relation to the meeting of 4 May 1999.

b. Meeting of 7 May 1999

1478. The Trial Chamber found that "[a]t the MUP Staff meeting held on 7 May 1999, measures for the prevention of crimes and means to protect the civilian population were addressed once again."⁴⁸⁵¹

1479. Lukić submits that: (i) the meeting of 7 May 1999 was not a meeting of the MUP Staff but a meeting held at the MUP Staff premises;⁴⁸⁵² (ii) no measures for the prevention of crimes and for the protection of the civilian population were addressed at the meeting;⁴⁸⁵³ (iii) his "role was only to receive information";⁴⁸⁵⁴ and (iv) he merely "pointed out the statistical discrepancies" in relation to the number of murder investigations.⁴⁸⁵⁵

1480. The Prosecution responds that measures for the prevention of crimes and means to protect the civilian population were discussed at the meeting of 7 May 1999.⁴⁸⁵⁶

1481. The Appeals Chamber considers that whether the meeting of 7 May 1999 was a meeting of the MUP Staff or was simply held at the MUP Staff premises is irrelevant to the question of whether Lukić continued to receive information that crimes were being committed. Further, the minutes of the meeting clearly support the Trial Chamber's conclusion that the prevention of crimes and measures to protect the civilian population were discussed.⁴⁸⁵⁷ As to Lukić's assertion that at the meeting he merely highlighted the "statistical discrepancies" in the number of murder

⁴⁸⁴⁸ Trial Judgement, vol. 3, para. 1095, referring to Exh. P1696, p. 1. See also Trial Judgement, vol. 3, para. 1097.

⁴⁸⁴⁹ See Exh. P1696, p. 1.

⁴⁸⁵⁰ Trial Judgement, vol. 3, para. 1132.

⁴⁸⁵¹ Trial Judgement, vol. 3, para. 1126.

⁴⁸⁵² Lukić's Appeal Brief, para. 467, referring to Exh. P1996.

⁴⁸⁵³ Lukić's Appeal Brief, para. 468.

⁴⁸⁵⁴ Lukić's Appeal Brief, para. 469.

⁴⁸⁵⁵ Lukić's Appeal Brief, para. 470.

⁴⁸⁵⁶ Prosecution's Response Brief (Lukić), para. 212, referring to Exh. P1996, pp. 2-3, 6, 10.

investigations, Lukić has failed to explain how his suggested interpretation of the evidence undermines the Trial Chamber’s finding that he was indeed aware of the commission of crimes.⁴⁸⁵⁸ Accordingly, the Appeals Chamber dismisses Lukić’s submissions in relation to the meeting of 7 May 1999.

(ii) The Trial Chamber’s evaluation of documentary evidence

1482. In finding that, during the Indictment period, Lukić received information on the events on the ground, and in particular on the commission of crimes,⁴⁸⁵⁹ the Trial Chamber considered that various reporting initiatives were available to Lukić as Head of the MUP Staff.⁴⁸⁶⁰ The Trial Chamber relied upon, *inter alia*: (i) instructions issued on 15 February 1999 by Vesko Petrović, the Deputy Chief for Operative Affairs of the MUP, ordering shift leaders at police stations throughout Kosovo to report incidents in their area to the MUP Staff in Kosovo as well as to the MUP in Belgrade;⁴⁸⁶¹ and (ii) a report sent by Lukić to the MUP in Belgrade on 3 April 1999, recording the discovery of more than 60 bodies.⁴⁸⁶² The Appeals Chamber will address Lukić’s challenges in turn.

a. Instructions of 15 February 1999

1483. In relation to the instructions sent on 15 February 1999, Lukić argues that the Trial Chamber committed a number of factual errors. In particular, he argues that: (i) the document was not an “order” but “information”; (ii) it was sent not to the shift leaders at police stations throughout Kosovo, but only to those of the Priština SUP; and (iii) the shift leaders subordinate to the Priština SUP were supposed to inform the shift leader of the Priština SUP so that he would report to the MUP in Belgrade⁴⁸⁶³ and thus the “principal user of the information” was the MUP in Belgrade.⁴⁸⁶⁴

⁴⁸⁵⁷ Exh. P1996, pp. 2-3, 6, 11.

⁴⁸⁵⁸ Trial Judgement, vol. 3, para. 1123.

⁴⁸⁵⁹ Trial Judgement, vol. 3, para. 1097.

⁴⁸⁶⁰ Trial Judgement, vol. 3, para. 1090.

⁴⁸⁶¹ Trial Judgement, vol. 3, para. 1090, referring to Exh. P1092.

⁴⁸⁶² Trial Judgement, vol. 3, paras 1056, 1091, citing Exh. 6D1239, pp. 2-3. The Trial Chamber also relied upon a MUP Staff report to the MUP in Belgrade dated 10 April 1999 and signed by Lukić, indicating that it did not include incidents from the Gnjilane SUP, “whose reports ha[d] not yet been received”. The Trial Chamber found that this evidence suggested that normally the daily reports were compiled based on information sent from the SUPs to the MUP Staff (Trial Judgement, vol. 3, para. 1090, citing Exh. 6D1246, p. 4). Lukić submits that such reports were exclusively compiled based on the information sent from the SUPs and did not relate to any incidents alleged in the Indictment (Lukić’s Appeal Brief, paras 668-669, referring to Exh. 6D1613, paras 25, 37). The Appeals Chamber considers that Lukić’s submission does not contradict the Trial Chamber’s finding that he was updated on a daily basis about events throughout Kosovo (Trial Judgement, vol. 3, para. 1090). Lukić’s argument that the MUP Staff report of 10 April 1999 was not a “report” but an “overview” which was not signed by him is addressed *supra*, para. 1400.

⁴⁸⁶³ Lukić’s Appeal Brief, para. 665.

⁴⁸⁶⁴ Lukić’s Appeal Brief, para. 666.

1484. The Prosecution responds that, while the evidence concerning the instructions sent on 15 February 1999 appears to relate only to the subordinate divisions of the Priština MUP, Lukić fails to explain the impact of this error on the Trial Chamber's finding.⁴⁸⁶⁵

1485. The Trial Chamber found that shift leaders at police stations throughout Kosovo were ordered to report incidents in their area to the MUP Staff in Kosovo as well as to the MUP in Belgrade.⁴⁸⁶⁶ In so doing, the Trial Chamber relied on the instructions issued on 15 February 1999 by Vesko Petrović.⁴⁸⁶⁷ The Appeals Chamber finds Lukić's argument that the document relied upon by the Trial Chamber was not an "order" but "information" to be without merit as the document clearly contains an instruction on reporting of incidents.⁴⁸⁶⁸ Further, Lukić has failed to explain how the Trial Chamber's reference to the shift leaders at police stations throughout Kosovo, rather than to the shift leaders of the OUPs and police stations subordinate to the Priština SUP, would impact his conviction.⁴⁸⁶⁹ Moreover, the document clearly indicates that the purpose of the reporting was to ensure that the MUP Staff and the MUP in Belgrade were duly informed about the events on the ground.⁴⁸⁷⁰ Lukić's arguments in this regard are accordingly dismissed.

b. Report of 3 April 1999

1486. Lukić claims that: (i) the report of 3 April 1999 neither shows that the unidentified bodies were related to the commission of crimes nor identifies the individuals responsible for the deaths;⁴⁸⁷¹ and (ii) his duty ended upon reporting the incident.⁴⁸⁷²

1487. The Prosecution responds that the reference to dead bodies contained in the report of 3 April 1999, combined with the information Lukić had about crimes committed in 1998, shows that Lukić knew the deaths were associated with crimes and that the VJ or MUP forces might be responsible.⁴⁸⁷³ The Prosecution adds that, in arguing that his duty came to an end upon reporting

⁴⁸⁶⁵ Prosecution's Response Brief (Lukić), para. 425.

⁴⁸⁶⁶ Trial Judgement, vol. 3, para. 1090, referring to Exh. P1092.

⁴⁸⁶⁷ Trial Judgement, vol. 3, para. 1090, referring to Exh. P1092.

⁴⁸⁶⁸ Exh. P1092.

⁴⁸⁶⁹ See Lukić's Appeal Brief, para. 665; Prosecution's Response Brief (Lukić), para. 425.

⁴⁸⁷⁰ Exh. P1092.

⁴⁸⁷¹ Lukić's Appeal Brief, para. 672.

⁴⁸⁷² Lukić's Appeal Brief, para. 672. In addition, Lukić claims that the document "was not a report but an overview, which confirms that it only contained a summary of reports written elsewhere" (Lukić's Appeal Brief, para. 671, referring to Trial Judgement, vol. 3, paras 1056, 1091). The Appeals Chamber finds the question of whether the document of 3 April 1999 was a "report" or an "overview" to be irrelevant to Lukić's conviction. Therefore, it will not entertain Lukić's argument in this regard.

⁴⁸⁷³ Prosecution's Response Brief (Lukić), para. 430.

the incident, Lukić conflates criminal liability under Article 7(3) of the Statute with commission through participation in a JCE under Article 7(1) of the Statute.⁴⁸⁷⁴

1488. The Trial Chamber considered Lukić's report of 3 April 1999, recording that, on 1 April 1999, the police had found 11 unidentified male bodies in the village of Mamuša/Mamusha, Prizren as well as the bodies of 30 unidentified "men killed during operations by *Šiptar* [a term for Albanians] terrorist gangs" and that, on 2 April 1999, "25 unidentified charred bodies of men were found in several houses of unknown owners at the crossroads for the *Kosovo vino* wine cellar in Mala Kruša."⁴⁸⁷⁵

1489. The Appeals Chamber notes that it is not clear from the report whether the men whose bodies were found were killed during legitimate combat activity or were victims of crimes. The Appeals Chamber is not persuaded by the Prosecution's submission that, combined with the information Lukić had about crimes committed in 1998, it was reasonable for the Trial Chamber to infer that he knew that the deaths mentioned in the 3 April 1999 report were associated with crimes and might have been committed by the VJ or MUP forces. In support of its submission, the Prosecution refers to the Trial Chamber's finding that, in 1998, Shaun Byrnes, Head of the US-KDOM,⁴⁸⁷⁶ informed Lukić that police units were "burning villages, destroying crops, killing farm animals, intimidating Kosovo Albanian civilians, and driving them from their homes".⁴⁸⁷⁷ However, the evidence before the Trial Chamber does not show that Byrnes informed Lukić about killings of civilians. Consequently, the Appeals Chamber finds that the Trial Chamber's reliance on Lukić's report of 3 April 1999 as showing Lukić's knowledge of crimes committed by MUP and VJ forces was unreasonable. Accordingly, the Appeals Chamber grants Lukić's challenges in relation to the report of 3 April 1999.

(iii) Knowledge of crimes committed in Prizren municipality

1490. Lukić argues that the Trial Chamber erred in finding that he had knowledge of the crimes committed in the Prizren municipality.⁴⁸⁷⁸ He submits that in so doing the Trial Chamber violated the principle *in dubio pro reo*,⁴⁸⁷⁹ since the evidence showed that the MUP Staff in Priština was unable to communicate with the field during the conflict.⁴⁸⁸⁰ Lukić also contends that the "Daily

⁴⁸⁷⁴ Prosecution's Response Brief (Lukić), para. 431.

⁴⁸⁷⁵ Trial Judgement, vol. 3, paras 1056, 1091, citing Exh. 6D1239, pp. 2-3.

⁴⁸⁷⁶ See Trial Judgement, vol. 3, para. 1041.

⁴⁸⁷⁷ Prosecution's Response Brief (Lukić), para. 430, citing Trial Judgement, vol. 3, para. 1082.

⁴⁸⁷⁸ Lukić's Appeal Brief, paras 777, 782.

⁴⁸⁷⁹ Lukić's Appeal Brief, para. 774.

⁴⁸⁸⁰ Lukić's Appeal Brief, paras 775-776, referring to Miloš Deretić, 18 Feb 2008, T. 22582-22586.

Bulletins”, which he prepared based on information from the Prizren SUP as well as the testimony of SUP personnel show that he had no knowledge of the crimes committed there.⁴⁸⁸¹

1491. The Trial Chamber made no finding that Lukić knew specifically about the crimes committed in Prizren municipality. However, the Appeals Chamber recalls the Trial Chamber’s finding that the common purpose of the JCE was to ensure the continued control by the FRY and Serbian authorities over Kosovo by forcibly displacing the Kosovo Albanian population within and outside Kosovo. In particular, the Trial Chamber found that the Kosovo Albanian population was to be forcibly displaced through a widespread and systematic campaign of terror and violence.⁴⁸⁸² As a participant in the JCE, Lukić need not have known of each specific crime committed by the MUP and VJ forces in order to be criminally liable.⁴⁸⁸³ It suffices that he shared the intent for the commission of these crimes and acted in furtherance of the common purpose. Therefore, Lukić’s submission that he lacked specific knowledge of the crimes committed in Prizren is inapposite.

(iv) Lukić’s awareness of the discovery of bodies in Izbica/Izbicë and Pusto Selo/Pastasella

1492. In addressing Lukić’s knowledge of the activities of the MUP in Kosovo, including the commission of crimes in 1999, the Trial Chamber held that:

Lukić stated in his interview that once the MUP received information about the mass graves in Izbica and Pusto Selo/Pastasella it complied with the law and informed the relevant court in charge of the area. Subsequently, an order was given by an investigative judge and bodies were examined, identified, and buried. According to Lukić, the examination of the bodies confirmed that the victims were members of the KLA who died in combat, as most bodies sustained fire-arm injuries. The Chamber recalls here its finding that at least 93 Izbica victims, the majority of whom were of advanced age, were not killed in combat.⁴⁸⁸⁴

1493. Lukić argues that the Trial Chamber misinterpreted the statement in his interview with the Prosecution pertaining to Pusto Selo/Pastasella when it considered that it related to Izbica/Izbicë.⁴⁸⁸⁵ With regard to Pusto Selo/Pastasella, Lukić stresses that he merely knew that the persons were killed in combat, which is insufficient to establish knowledge of crimes.⁴⁸⁸⁶ Further, Lukić argues

⁴⁸⁸¹ Lukić’s Appeal Brief, paras 777-778, referring to Milos Vojnović, 12 Mar 2008, T. 24182-24184. See also Lukić’s Appeal Brief, paras 710-711, referring to Exh. 6D1232, Exh. 6D1252, Exh. 6D1254, Exh. 6D1255, Exh. 6D1256, 6D1257, Exh. 6D1259, Exh. 6D1260, Exh. 6D1261, Exh. P1693.

⁴⁸⁸² Trial Judgement, vol. 3, para. 95.

⁴⁸⁸³ See *Kvočka et al.* Appeal Judgement, para. 276.

⁴⁸⁸⁴ Trial Judgement, vol. 3, para. 1092, referring to Exh. P948, pp. 160-162. See also Trial Judgement, vol. 3, para. 1097. See also *ibid.*, vol. 2, paras 1221, 1223.

⁴⁸⁸⁵ Lukić’s Appeal Brief, para. 673, referring to Trial Judgement, vol. 3, para. 1092. See also Lukić’s Appeal Brief, para. 460.

⁴⁸⁸⁶ Lukić’s Appeal Brief, para. 460.

that he had no information about the involvement of MUP members in the killings in Izbica/Izbičë and that all he knew at the time was that an investigation into the incident was under way.⁴⁸⁸⁷

1494. The Prosecution responds that, in his interview, Lukić indeed referred to the victims of Pusto Selo/Pastasella as members of the KLA who died in combat and not to the victims in Izbica/Izbičë. It contends that Lukić nonetheless fails to explain how this alleged error has any impact on the Trial Chamber's relevant findings.⁴⁸⁸⁸ The Prosecution submits that Lukić learnt about the mass grave in Izbica/Izbičë "through satellite or through the internet"⁴⁸⁸⁹ and that the evidence shows that Lukić had detailed information about the activities of the MUP in Kosovo, including the commission of crimes.⁴⁸⁹⁰

1495. In his interview with the Prosecution, Lukić confirmed that he knew of the mass graves in Izbica/Izbičë and Pusto Selo/Pustasella.⁴⁸⁹¹ A review of the evidence shows that Lukić's statement that the bodies included KLA members who had been killed in combat was only made in the context of Pusto Selo/Pastasella.⁴⁸⁹² Therefore, to the extent that the Trial Chamber attributed Lukić's comment about Pusto Selo/Pastasella to Izbica/Izbičë, it erred. Further, while the Trial Chamber heard evidence about the exhumation of bodies in Pusto Selo/Pastasella, their examination, and subsequent reburial, it did not reach a finding as to the cause of death.⁴⁸⁹³ There is also no reference in the Trial Judgement to evidence showing that Lukić was aware that the deaths were associated with the commission of crimes. Consequently, the Appeals Chamber finds that, to the extent that the Trial Chamber relied on Lukić's interview with the Prosecution in finding that he was aware of the commission of crimes in Pusto Selo/ Pastasella, it was in error.

1496. Further, Lukić stated in his interview that he learned about the incident in Izbica/Izbičë "through satellite or through the internet"⁴⁸⁹⁴ and that an investigation into the incident was carried out.⁴⁸⁹⁵ The Appeals Chamber finds that it was open to the Trial Chamber to rely on Lukić's

⁴⁸⁸⁷ Lukić's Appeal Brief, paras 461, 661 (Lukić's Appeal Brief, para. 661 ("None of the cIndictment [*sic*] crimes was known to Lukić at the relevant time, nor was it then reasonably suspected that crimes such as Izbica were committed by MUP. When there were indicia of the existence of a mass grave, the competent authorities took the measures envisaged by the law, the PrK initiated an investigation, as did the competent Prosecutor and judge of the Kosovska Mitrovica District Court.)) Lukić's Appeal Brief, para. 461 ("As regards Izbica, Appellant was informed that all legally prescribed measures had been taken in this case upon the order of the investigative judge. Appellant was informed that the VJ had undertaken all necessary measures to discover the perpetrators. Due to his limited authority Appellant was not in the position to take any further steps with regard to Izbica, especially since the matter was within the competence of military/civil investigative judges/prosecutors.")).

⁴⁸⁸⁸ Prosecution's Response Brief (Lukić), para. 432.

⁴⁸⁸⁹ Prosecution's Response Brief (Lukić), para. 422, citing Exh. P948, p. 160.

⁴⁸⁹⁰ Prosecution's Response Brief, para. 422, referring to Trial Judgement, vol. 3, para. 1097.

⁴⁸⁹¹ Exh. P948, pp. 160-162.

⁴⁸⁹² Exh. P948, p. 162.

⁴⁸⁹³ See Trial Judgement, vol. 2, paras 1275, 1282. See also *ibid.*, vol. 2, fn. 2889.

⁴⁸⁹⁴ Exh. P948, p. 160.

⁴⁸⁹⁵ Exh. P948, pp. 160-161.

knowledge of the mass grave in Izbica/Izbicë, among other evidence,⁴⁸⁹⁶ in finding that he had detailed information about the activities of the MUP in Kosovo. However, the Trial Chamber did not refer to any evidence showing that Lukić knew that the victims of the incident were not killed in combat. Absent such evidence, the Trial Chamber's reliance on Lukić's awareness of the mass grave in Izbica/Izbicë in inferring his knowledge of the commission of crimes was erroneous.

(v) Conclusion

1497. The Appeals Chamber recalls that it has found errors in the Trial Chamber's reliance on Lukić's report of 3 April 1999 and on his statement concerning the mass graves in Pusto Selo/Pustasella and Izbica/Izbicë. However, having due regard to the Trial Chamber's findings on the information Lukić received, through various sources, about the commission of crimes and the mass departure of the civilian population in 1999,⁴⁸⁹⁷ the Appeals Chamber finds that the Trial Chamber's conclusion on Lukić's knowledge of crimes based on the totality of the evidence was reasonable and that it is therefore undisturbed by the factual errors.

(d) Measures addressing the commission of crimes

1498. The Trial Chamber found that:

while some orders may have been issued by Lukić directing the police to prevent the departure of civilians from Kosovo after the mass exodus was underway, such orders were similar to those to VJ forces to abide by international humanitarian law, which were systematically violated. The fact that Lukić, despite his knowledge of the events on the ground, nevertheless continued to order the MUP to engage in joint operations with the VJ shows that his orders were not genuine, and thus do not create any doubt as to his intent to further the objectives of the joint criminal enterprise.⁴⁸⁹⁸

1499. The Trial Chamber considered a dispatch issued by Lukić on 15 April 1999, stating that, even though an earlier order had been issued to prevent civilians from leaving and to ensure their safety, some of the commanders had not been obeying the order and were "tolerating massive-scale departures of civilian population."⁴⁸⁹⁹ The Trial Chamber noted that, after Lukić's dispatch, the mass departure of Kosovo Albanian civilians continued.⁴⁹⁰⁰

1500. Lukić submits that, in view of the conclusion that he issued orders demanding the prevention of crimes and the punishment of the perpetrators, the Trial Chamber erred in finding that he shared the intent to commit the crimes encompassed by the common purpose.⁴⁹⁰¹ He also argues

⁴⁸⁹⁶ Trial Judgement, vol. 3, paras 1090-1091, 1093-1096.

⁴⁸⁹⁷ See Trial Judgement, vol. 3, paras 1090, 1093-1096, 1123-1127.

⁴⁸⁹⁸ Trial Judgement, vol. 3, para. 1129 (internal reference omitted).

⁴⁸⁹⁹ Trial Judgement, vol. 3, para. 1094, citing Exh. 6D778.

⁴⁹⁰⁰ Trial Judgement, vol. 3, para. 1094.

⁴⁹⁰¹ Lukić's Appeal Brief, paras 361, 436, 440-441, citing Trial Judgement, vol. 3, para. 1129. See also Lukić's Appeal Brief, para. 683, referring to Trial Judgement, vol. 3, para. 1096. See also Appeal Hearing, 14 Mar 2013, AT. 509-510,

that the Trial Chamber's conclusion that he knew "that some PJP commanders were 'tolerating massive-scale departures of civilian population'" is not supported by the evidence. He adds that his dispatch of 15 April 1999 showed neither that PJP commanders were tolerating civilians' departures nor that the Kosovo Albanian population was being forcibly displaced. Rather, it reflected the need to prevent the large-scale departures of civilians regardless of their ethnicity.⁴⁹⁰² Lukić claims that the decrease in the number of people leaving Kosovo following his dispatch of 15 April 1999 shows that the dispatch was largely obeyed and that the "greatest mass departure of civilians was a consequence of a shock that ensued after the bombing had started."⁴⁹⁰³

1501. Lukić also submits that, in finding that he continued to receive information about crimes committed by the MUP and VJ members during the NATO campaign, the Trial Chamber failed to consider that he was also informed, on the basis of the reports sent by the Kosovo SUPs and the information conveyed at meetings held in May 1999, that measures addressing those crimes had been taken by the competent authorities.⁴⁹⁰⁴ Finally, Lukić argues that his cooperation with the ICTY and his investigation of crimes following the time-period of the indictment show that he did not share the JCE intent.⁴⁹⁰⁵

1502. The Prosecution responds that the Trial Chamber considered and correctly rejected Lukić's arguments.⁴⁹⁰⁶ The Prosecution further submits that, contrary to Lukić's assertion, the evidence supports the Trial Chamber's conclusion that he knew that some PJP commanders were tolerating the departure of large numbers of civilians from Kosovo.⁴⁹⁰⁷

1503. The Trial Chamber considered that at various meetings attended by Lukić measures for the prevention of crimes and means to protect the civilian population were discussed.⁴⁹⁰⁸ On this basis, it found that Lukić knew that the ill-treatment and forcible displacement of civilians were

referring to Exh. 6D768, Exh. 6D872, Exh. 6D666, Exh. P1989, Exh. 6D778, Exh. 6D874, Exh. P1996, Exh. 6D773, Exh. P1993, Exh. 5D1423, Exh. 5D1418, Exh. 5D1421, Exh. P1468. Lukić further argues that the Trial Chamber reached contradictory findings in stating that, on the one hand, his orders for the prevention of the mistreatment of the civilian population were disingenuous and, on the other hand, that he had authority over the MUP units (Appeal Hearing, 14 Mar 2013, AT. 510). The Appeals Chamber finds that Lukić's conclusion on this point does not flow from the argumentation.

⁴⁹⁰² Lukić's Appeal Brief, paras 462-463, citing Trial Judgement, vol. 3, para. 1124, and referring to Exh. 6D778.

⁴⁹⁰³ Lukić's Appeal Brief, para. 677.

⁴⁹⁰⁴ Lukić's Appeal Brief, paras 455-458, 466, 682, citing Trial Judgement, vol. 3, para. 1123. Lukić further submits that, contrary to the Trial Chamber's finding, he was not informed about crimes committed by members of the RPOs (Lukić's Appeal Brief, para. 459). His submission is, however, contradicted by the plain import of the evidence (see, e.g., Exh. 6D1239, p. 5).

⁴⁹⁰⁵ Appeal Hearing, 14 Mar 2013, AT. 508-509.

⁴⁹⁰⁶ Prosecution's Response Brief (Lukić), para. 217, referring, *inter alia*, to Trial Judgement, vol. 3, paras 1124-1127, 1129-1130.

⁴⁹⁰⁷ Prosecution's Response Brief (Lukić), paras 209, 217, 436, referring to Exh. 6D778, Trial Judgement, vol. 3, paras 1124-1127, 1129.

⁴⁹⁰⁸ See Trial Judgement, vol. 3, paras 1124-1127.

occurring⁴⁹⁰⁹ and that orders for the protection of the civilian population were systematically violated.⁴⁹¹⁰ In this context, the Trial Chamber further considered that despite his knowledge of the events, Lukić continued to order the MUP to engage in joint operations with the VJ.⁴⁹¹¹ Consequently, the Trial Chamber correctly took this into account when reaching its conclusion on Lukić's intent. Furthermore, Lukić's actions following the indictment period do not undermine this conclusion.

1504. The Trial Chamber also concluded that "Lukić knew that large numbers of civilians were leaving Kosovo in 1999 and that some PJP commanders were 'tolerating massive-scale departures of civilian population.'"⁴⁹¹² In reaching its conclusion, the Trial Chamber relied, *inter alia*, on a dispatch sent by Lukić on 15 April 1999 to the chiefs of SUPs and commanders of separate police units in Kosovo.⁴⁹¹³ In this dispatch, Lukić indicated his awareness that some commanders had not been obeying a previous order to prevent the departure of the civilian population and had instead tolerated such departures.⁴⁹¹⁴ To the extent that Lukić argues that this evidence does not support the Trial Chamber's finding, his argument fails.

1505. As to Lukić's argument that the dispatch showed that the civilian population was not being forcibly displaced, the Appeals Chamber considers that Lukić merely submits a different interpretation of the evidence. Similarly, with regard to the fact that the dispatch does not specify the ethnicity of the civilian population, Lukić fails to show that it was unreasonable for the Trial Chamber to conclude, based on the totality of the evidence, that he knew that the majority of the departing civilians were Kosovo Albanians. His arguments in this regard are therefore dismissed.

1506. Further, the Appeals Chamber considers Lukić's submission that his dispatch of 15 April 1999 "produced appropriate results" as well as his interpretation of the fact that 101,628 Kosovo Albanians left Kosovo between 5 April and 30 April 1999, as compared to the 613,530 Kosovo Albanians who left the province from 24 March to 5 April 1999,⁴⁹¹⁵ to be speculative, merely seeking to substitute his own interpretation of the evidence for that of the Trial Chamber. Moreover, Lukić has failed to show that the Trial Chamber erred in relying on this evidence in finding that he had detailed information about the activities of the MUP in Kosovo,

⁴⁹⁰⁹ Trial Judgement, vol. 3, para. 1124.

⁴⁹¹⁰ Trial Judgement, vol. 3, para. 1129.

⁴⁹¹¹ Trial Judgement, vol. 3, para. 1129.

⁴⁹¹² Trial Judgement, vol. 3, para. 1124.

⁴⁹¹³ Trial Judgement, vol. 3, para. 1124, citing Exh. 6D778.

⁴⁹¹⁴ Exh. 6D778. Concerning the position and structure of the PJP detachments, see Trial Judgement, vol. 1, paras 666-674. To the extent that Lukić argues that the dispatch of 15 April 1999 did not refer to the commanders of PJP units specifically, Lukić fails to demonstrate how, even if his argument prevailed, this error would invalidate the Trial Chamber's finding. In this regard, the Appeals Chamber notes that the dispatch clearly referred to commanders of police units.

including the commission of crimes. Finally, his actions following the indictment period do not undermine this finding. His argument is accordingly dismissed.

(e) Lukić's voluntary participation in the common purpose

1507. The Trial Chamber found that all of Lukić's actions were voluntary rather than coerced.⁴⁹¹⁶

1508. Lukić claims that the Trial Chamber failed to establish "which act or conduct [...] proves that he voluntarily [...] went to Kosovo [...] identified and/or accepted the authority and tasks that clearly comprised a common criminal purpose to forcibly displace Albanians."⁴⁹¹⁷ He asserts that he was deployed to Kosovo in order to conduct a lawful operation combating terrorism and was obliged by law to comply with the decision of his deployment.⁴⁹¹⁸

1509. In response, the Prosecution submits that Lukić repeats his trial submissions which were considered and correctly rejected by the Trial Chamber.⁴⁹¹⁹ It maintains that the contribution of a JCE member need not be criminal in itself and that Lukić's submissions should be summarily dismissed.⁴⁹²⁰

1510. The Appeals Chamber finds Lukić's arguments that he had the legal duty to comply with the decision for his deployment and that the KLA was considered a "terrorist" organisation to be misguided. What is required is that he voluntarily participated in at least one aspect of the common purpose.⁴⁹²¹ Neither his deployment as such nor his engagement in the fight against the KLA was the basis for the Trial Chamber's conclusion that he made a significant contribution to the JCE. Rather, the Trial Chamber found that, as Head of the MUP Staff and a JCE member, Lukić used MUP forces under his control to carry out the crimes encompassed by the common purpose.⁴⁹²² Accordingly, Lukić has failed to demonstrate an error in the Trial Chamber's finding that his actions in furtherance of the common purpose were voluntary.

⁴⁹¹⁵ Lukić's Appeal Brief, para. 677. See also Trial Judgement, vol. 3, para. 1094.

⁴⁹¹⁶ Trial Judgement, vol. 3, para. 1117.

⁴⁹¹⁷ Lukić's Appeal Brief, para. 418.

⁴⁹¹⁸ Lukić's Appeal Brief, paras 419, 421-422. See also *ibid.*, para. 385. Appeal Hearing, 14 Mar 2013, AT. 502-504.

⁴⁹¹⁹ Prosecution's Response Brief (Lukić), paras 196, 216, 218, referring, *inter alia*, to Trial Judgement, vol. 1, para. 847; vol. 3, para. 939.

⁴⁹²⁰ Prosecution's Response Brief (Lukić), para. 218.

⁴⁹²¹ See *Vasiljević* Appeal Judgement, para. 119; *Tadić* Appeal Judgement, para. 196.

⁴⁹²² Trial Judgement, vol. 3, paras 1131-1132.

(f) Summarily dismissed submissions

1511. The Appeals Chamber notes that a number of Lukić's submissions challenging the Trial Chamber's findings on his *mens rea* are obscure,⁴⁹²³ undeveloped,⁴⁹²⁴ clearly irrelevant,⁴⁹²⁵ fail to articulate an error,⁴⁹²⁶ misrepresent⁴⁹²⁷ or fail to identify the challenged factual findings,⁴⁹²⁸ seek to substitute his interpretation of the evidence for that of the Trial Chamber,⁴⁹²⁹ lack reference to

⁴⁹²³ Lukić's Appeal Brief, para. 197 ("The Defence contests the theory of the JCE discussed I/102. This suggests Appellant need not be aware of the common purpose, but that the Prosecution may, ten years after the events, allege that there was a common purpose, which the Chamber accepts and introduces thus as a thinly veiled mode of strict liability that becomes part of one people's history although they were not aware of its existence at the time of the events."). Lukić's Appeal Brief, para. 652 ("The evidence referred to in [Trial Judgement, vol. 1, para. 874] clearly contradicts Byrnes", failing to explain what the alleged contradiction is).

⁴⁹²⁴ Lukić's Appeal Brief, para. 654 (with regard to the event which took place in 1998 in the Peć/Peja area, Lukić claims that "[t]he measures taken for the civilian population to return to their homes show that these activities did not ensue because of the international media reports, as incorrectly claimed by Byrnes." However, he fails to develop his assertion any further or to explain how the alleged factual error has an impact on the Trial Chamber's conclusions).

⁴⁹²⁵ Lukić's Appeal Brief, para. 655 (submitting that "[t]he notes of the meeting of 10.9.1998 reflect that Lukić was able to relay to Byrnes only the information he gathered from the reporting by Stevanović, who was in charge of the activities related to return of civilians", without explaining the relevance of his argument to the Trial Chamber's findings).

⁴⁹²⁶ Lukić's Appeal Brief, para. 417 ("In III/1115 the [Trial] Chamber stated 'For Lukić's liability to arise pursuant to the first category of the JCE, the evidence must show that he participated in at least one aspect of the common purpose to ensure continued control by the FRY and Serbian authorities over Kosovo, through crimes of forcible displacement, which the Chamber has already found existed.' This formulation shows that in establishing criminal responsibility of Appellant the [Trial] Chamber started from erroneous postulates, which inevitably led to erroneous conclusions.") Lukić's Appeal Brief, para. 664 ("The [Trial] Chamber further noted that Lukić instructed the chiefs of the Kosovo SUPs to send urgent daily reports, containing information about 'terrorist actions'. This was a lawful instruction. Concerning the document referenced by the Chamber, Mijatović said 'this document was produced in accordance with the obligation of the MUP to inform the KVM on incidents and potential actions and movement of the police'. This obligation stemmed from the signed agreements." Lukić fails to articulate any error in the Trial Judgement). Lukić's Appeal Brief, para. 674 (asserting that "[c]oncerning the dispatch of 28.5.1999, as Gagić explained, the MUP Staff was used as an address to which he sent the dispatch on behalf of the Crime Police Administration to Crime Police Departments (OKPs) on the ground. The [Trial] Chamber's reference to the indictment of Milošević/Stojiljković is not clear as this fact is not mentioned in this dispatch and its attachment." Lukić fails to articulate any error in the Trial Judgement).

⁴⁹²⁷ Lukić's Appeal Brief, para. 667, referring to Exh. 6D238 (by submitting that "[t]he [Trial] Chamber misquoted the Minister's dispatch by noting that the MUP Staff was to be informed first, and then the MUP in Belgrade", Lukić misrepresents the Trial Chamber's finding that "at the beginning of the NATO campaign, the Minister of Interior instructed all organisational units of the MUP in Kosovo to report any security incidents to the MUP Staff in Kosovo, as well as to the MUP in Belgrade" (Trial Judgement, vol. 3, para. 1090, referring to Exh. 6D238, point 9)).

⁴⁹²⁸ Lukić's Appeal Brief, para. 660 (arguing that "[w]hen referring to Cvetic's testimony that the MUP Staff received information from the SUPs and various PJP/SAJ, the [Trial] Chamber did not note that Cvetic had no knowledge of the incident in Izbica, which was in the area of his SUP. Clearly, Cvetic did not inform the MUP Staff about this incident." Lukić fails to provide reference to the Trial Judgement or to the evidence he is relying upon). Lukić's Appeal Brief, para. 662 ("When noting that the arguments advanced by the defence are contrary to the testimony of Adamović/Cvetic, the [Trial] Chamber did not differentiate between the 'combat reports' which, were not submitted to the MUP Staff, and reports on the security-related events that fall into the category of the knowledge of crimes." Lukić fails to refer to the relevant finding of the Trial Chamber and to identify the evidence he is relying upon).

⁴⁹²⁹ Lukić's Appeal Brief, para. 670. See also *ibid.*, para. 455 ("The [Trial] Chamber failed to establish in what manner Lukić was informed about incidents, and did not reference that Lukić was aware of any indicted crimes". Lukić ignores the Trial Chamber's relevant findings and the evidence in support thereof). Lukić's Appeal Brief, para. 477 ("The [Trial] Chamber has not referred to any evidence proving 'Lukić had the intent to forcibly displace the Kosovo Albanian population', as inferred by it. This inference is not substantiated by any evidence presented". Lukić ignores the Trial Chamber's relevant findings and the evidence in support thereof). Lukić's Appeal Brief, para. 478 ("Furthermore, the [Trial] Chamber concluded that Appellant shared intent with Milošević/Pavković/Šainović. However, it did not refer to any evidence that would confirm, or even "suggest" that Appellant had knowledge that Milošević/Pavković/Šainović shared such intent, if any." Lukić disregards the extensive evidence considered by the

evidence in support of the alleged factual errors,⁴⁹³⁰ or fail to explain how these errors have an effect on the conclusions of the Trial Chamber.⁴⁹³¹ Consequently, these submissions are summarily dismissed.

(g) Conclusion

1512. In light of the above, the Appeals Chamber finds that Lukić has failed to show an error in the Trial Chamber's finding that the only reasonable inference from the evidence was that he shared the intent to forcibly displace part of the Kosovo Albanian population. His arguments are therefore dismissed.⁴⁹³²

6. Alleged "double standards" in the evaluation of the evidence

1513. Lukić submits that the Trial Chamber erred by applying "double standards when drawing conclusions on responsibility of different accused."⁴⁹³³ In particular, he submits that the Trial Chamber erred: (i) by applying disparate standards to the evidence concerning his presence and that of Milutinović and Lazarević at meetings;⁴⁹³⁴ (ii) by ignoring that, like Milutinović, he was

Trial Chamber in reaching its findings on the common purpose and the members of the JCE (Trial Judgement, vol. 3, paras 16-97. See also *ibid.*, vol. 3, paras 468, 783, 1132)).

⁴⁹³⁰ Lukić's Appeal Brief, para. 645 (alleging that "[a] closer analysis taking into account the contents of previous/subsequent meetings shows that the discussions dealt with arson committed by criminals and not FRY/Serbian forces", but failing to support his submission with reference to relevant evidence. Lukić's reference to Đorđević's remark, which was taken into account by the Trial Chamber, does not, as such, provide support to his submission (see Trial Judgement, vol. 3, para. 1080, referring to Exh. P1468, p. 96)). Lukić's Appeal Brief, para. 647, referring to Trial Judgement, vol. 3, para. 1082 (arguing that "[t]he [Trial] Chamber failed to note that when asked whether the VJ participated in the actions with the police, Byrnes gave a negative answer. Therefore, Byrnes either had no information about the situation he was monitoring or he failed to tell the truth." Lukić however fails to refer to the portion of Byrnes's testimony that he is relying upon in support of his assertion). Lukić's Appeal Brief, para. 657 (asserting that "the [Trial] Chamber failed to discuss the reliability of information that was presented even before the UN Security Council", without specifying the information referred to and its relevance to the Trial Chamber's findings). Lukić's Appeal Brief, para. 658, citing Trial Judgement, vol. 3, para. 1086 ("The [Trial] Chamber's finding that 'Lukić was aware that there were serious allegations of criminal activity by MUP forces in Kosovo in mid/late 1998, directed against the Kosovo Albanian civilian population', does not correspond with the established facts. The [Trial] Chamber failed to assess the totality of evidence and drew arbitrary conclusions based, *inter alia*, on unverified newspaper articles published in the *Koha Ditore*." Lukić fails to substantiate his submission with reference to evidence allegedly ignored by the Trial Chamber). Lukić's Appeal Brief, para. 434; see also *ibid.*, para. 433, citing Trial Judgement, vol. 3, para. 1119 (submitting that "[The Trial Chamber] categorized all information received by Lukić as information on crimes, which does not correspond with the truth", but failing to substantiate his submission with reference to the evidence on the record). Lukić's Appeal Brief, para. 436 (contending that "[t]he record reflects evidence indicating that the information received was often unreliable/unverified, and that quite often such information was propaganda", without referring to the evidence).

⁴⁹³¹ Lukić's Appeal Brief, para. 663 ("The Rules of Internal Organization, as amended in 1996 were incorrectly found to be a 'reporting alternative'" as they "represented the only basis of reporting that needed to be communicated through dispatches." Lukić fails to explain the impact of the alleged error on the Trial Chamber's findings).

⁴⁹³² Dismissing, in relevant part, Lukić's sub-grounds D(3), H, I(4), O(1)(e), P(9)(a)-(b), Q(1), U(2), and GG(2).

⁴⁹³³ Lukić Appeal Brief, para. 437. See also *ibid.*, paras 108, 178, 269, 325, 397-401, 437-440, 706.

⁴⁹³⁴ Lukić Appeal Brief, paras 178, 591, referring, *inter alia*, to Trial Judgement, vol. 3, para. 143 (21 July 1998); Lukić's Appeal Brief, para.269, referring to Trial Judgement, vol. 3, paras 142, 1201 (4 May 1999 meeting); Lukić's Appeal Brief, paras 323, 325, referring to Trial Judgement, vol. 3, paras 356, 843 (1 June 1999). Lukić further contends that had the Trial Chamber not erroneously noted his participation in two important meetings with Milošević, it would have found that like Lazarević, he was distanced from the policy makers (Lukić Appeal Brief, paras 398-401, referring

informed that measures were undertaken by the competent authorities in response to crimes and that some incidents were considered not to be criminal offences, or identified as propaganda;⁴⁹³⁵ (iii) in finding his orders to prevent and punish crimes to be disingenuous, meanwhile finding that Lazarević's similar attempts demonstrated that he made efforts to ameliorate the circumstances in which the forcible displacement occurred;⁴⁹³⁶ and (iv) in placing more weight on Aleksandar Vasiljević's evidence in assessing Lukić's responsibility than in assessing Ojdanić's responsibility.⁴⁹³⁷

1514. The Prosecution responds that Lukić's submissions misrepresent the Trial Chamber's findings and should be summarily dismissed.⁴⁹³⁸ In particular, it submits that the Trial Chamber did not find Vasiljević's evidence unreliable in relation to Ojdanić⁴⁹³⁹ and that "Lukić's attempt to compare his *mens rea* with that of Milutinović and Lazarević is misguided given their different roles in the events."⁴⁹⁴⁰

1515. The Appeals Chamber recalls that a trial chamber's conclusion on the individual criminal responsibility of an accused is the result of an evaluation of all the evidence presented in relation to that accused.⁴⁹⁴¹ Lukić's submissions concerning the Trial Chamber's assessment of the respective roles of Lukić, Milutinović, and Lazarević and their knowledge of crimes ignore the totality of the evidence considered by the Trial Chamber and fail to demonstrate that the Trial Chamber's conclusions in relation to Lukić's individual criminal responsibility were unreasonable. In addition, Lukić ignores the Trial Chamber's finding that he knew that the ill-treatment and forcible displacement of civilians was occurring and that orders for the protection of the civilian population were systematically violated.⁴⁹⁴² Accordingly, the Appeals Chamber dismisses Lukić's submissions in this regard.⁴⁹⁴³

to Trial Judgement, vol. 3, para. 918, referring to Vladimir Lazarević, 12 Nov 2007, T. 18134, *ibid.*, 20 Nov 2007, T. 18657. See also Lukić Appeal Brief, paras 397, 706).

⁴⁹³⁵ Lukić Appeal Brief, paras 437-439. See also Lukić's Appeal Brief, paras 455-456, 466, 682, 818.

⁴⁹³⁶ Lukić Appeal Brief, paras 440-442, referring to Trial Judgement, vol. 3, paras 918, 1129; Exh. 6D765, Exh. 6D769.

⁴⁹³⁷ Lukić Appeal Brief, para. 108, referring to Trial Judgement, vol. 3, para. 572.

⁴⁹³⁸ Prosecution Response Brief (Lukić), paras 109, 220, 385.

⁴⁹³⁹ Prosecution Response Brief (Lukić), para. 109, referring to Trial Judgement, vol. 3, para. 572.

⁴⁹⁴⁰ Prosecution Response Brief (Lukić), paras 219-220, 386. See also Prosecution Response Brief (Lukić), para. 449, referring to, *inter alia*, Trial Judgement, vol. 3, paras 274-276, 284, 1012-1015, 1024-1040, 1051-1059, 1091-1096.

⁴⁹⁴¹ See *Halilović* Appeal Judgement, para. 125, quoting *Ntagerura et al.* Appeal Judgement, para. 174 where the Appeals Chamber held: "Only after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies." See also *Halilović* Appeal Judgement, para. 128. See also *supra*, sub-section VII.D.4.

⁴⁹⁴² See Trial Judgement, vol. 3, paras 1124-1127, 1129.

⁴⁹⁴³ Dismissing, in relevant part, Lukić's sub-grounds D(3), F(2), I(4), N(3), O(1)(b), and O(1)(e).

7. Lukić's responsibility for crimes committed by the MUP and the VJ

1516. Relying on the standard set out by the Appeals Chamber in *Brđanin*, the Trial Chamber held that:

in order to hold a member of a joint criminal enterprise responsible for crimes or underlying offences committed by non-members of the enterprise, it has to be shown (a) that the crime or underlying offence can be imputed to one member of the joint criminal enterprise (not necessarily the accused) and (b) that this member—when using a physical perpetrator or intermediary perpetrator—acted in accordance with the common plan. The existence of this link is to be assessed on a case-by-case basis.⁴⁹⁴⁴

1517. Lukić argues that the Trial Chamber erroneously relied on the *Brđanin* Appeal Judgement, thus lowering the standard for criminal responsibility.⁴⁹⁴⁵ He contends that the application of this standard led the Trial Chamber to find that MUP members, including Lukić, were responsible for the actions of the army, despite having no control over army personnel or knowledge of their actions.⁴⁹⁴⁶ Lukić also argues that the Trial Chamber erred when it found that he “implemented the objectives of the JCE through members of the forces of the FRY/Serbia, whom [JCE members] controlled”, since he was unable to issue orders to, discipline, or punish any MUP or VJ personnel, which are necessary elements to demonstrate control over subordinates.⁴⁹⁴⁷

1518. Lukić also claims that, with respect to the crimes committed by the VJ forces in Gnjilane/Gjilan, the evidence does not show that he “had any notice that would impute criminal liability to him.”⁴⁹⁴⁸

1519. The Prosecution responds that Lukić misrepresents the legal requirements for JCE and that whether or not Lukić had effective control over VJ forces is irrelevant for JCE liability.⁴⁹⁴⁹ It further submits that Lukić was frequently informed of crimes committed by the MUP and the VJ in Kosovo and had detailed information about the events there throughout the Indictment period.⁴⁹⁵⁰

⁴⁹⁴⁴ Trial Judgement, vol. 1, para. 99, referring to *Brđanin* Appeal Judgement, para. 413, *Martić* Appeal Judgement, paras 168–169.

⁴⁹⁴⁵ Lukić's Appeal Brief, para. 193, citing Trial Judgement, vol. 1, para. 99, which refers, *inter alia*, to *Brđanin* Appeal Judgement, para. 413.

⁴⁹⁴⁶ Lukić's Appeal Brief, paras 193, 367-368, 498. See also Lukić's Reply Brief, paras 64-67.

⁴⁹⁴⁷ Lukić's Appeal Brief, para. 367, referring to Trial Judgement, vol. 3, para. 11. Lukić further submits that the Trial Chamber found Lazarević and Ojdanić not guilty for acts committed by police officers because neither of them had “effective control over the police units” (Lukić's Appeal Brief, para. 193).

⁴⁹⁴⁸ Lukić's Appeal Brief, paras 815-818. See *ibid.*, para. 814, referring to Trial Judgement, vol. 2, paras 943-944, 946, 948.

⁴⁹⁴⁹ Prosecution's Response Brief (Lukić), paras 155-157.

⁴⁹⁵⁰ Prosecution's Response Brief (Lukić), para. 485, referring to Trial Judgement, vol. 3, paras 1097, 1123. The Prosecution also submits that Lukić's arguments warrant summary dismissal as he repeats his trial submissions and ignores the Trial Chamber's relevant findings (Prosecution's Response Brief (Lukić), paras 484-485, referring to Lukić Closing Brief, paras 451-463, 539-596, Trial Judgement, vol. 3, paras 1097, 1123. See also Prosecution's Response Brief (Lukić), para. 491).

1520. Lukić's submission that, in order for him to incur JCE liability, it must be shown that he "exercised authority/control over members of the forces" is misconceived.⁴⁹⁵¹ He appears to conflate superior responsibility under Article 7(3) of the Statute with JCE liability under Article 7(1) of the Statute.⁴⁹⁵² For the purpose of establishing superior responsibility, it must be proven that the accused exercised effective control – in the sense of the material ability to prevent and to punish – over his subordinates who committed crimes.⁴⁹⁵³ However, the authority or control of the accused over principal perpetrators is not a necessary element to establish JCE liability. It is one of the various factors that a chamber *may* take into account in determining whether crimes of principal perpetrators were linked with the accused.⁴⁹⁵⁴ Furthermore, under the JCE doctrine, an accused who participated in a JCE with the requisite *mens rea* may be held responsible for crimes committed by principal perpetrators who were not JCE members, so long as those crimes were linked with, and therefore can be imputed to, *one of the JCE members*, who acted in accordance with the JCE common plan. This JCE member does not necessarily have to be the accused.⁴⁹⁵⁵ The Appeals Chamber thus finds that the Trial Chamber correctly described the law in this regard.⁴⁹⁵⁶

1521. The Appeals Chamber recalls the Trial Chamber's finding that "the members of the joint criminal enterprise used VJ and MUP forces under their control to carry out the crimes charged in the Indictment."⁴⁹⁵⁷ The Trial Chamber subsequently concluded that the actions of those forces were imputable to the members of the JCE, including Lukić, recalling in particular that Šainović, who was the political coordinator of the VJ and MUP forces in Kosovo, and Pavković, who was in command and control of all VJ forces in Kosovo, were members of the same JCE.⁴⁹⁵⁸ The Trial Chamber emphasised that Šainović, Pavković, and Lukić were all involved in the coordination of VJ and MUP activities in Kosovo.⁴⁹⁵⁹ Therefore, Lukić's arguments that he had no authority over the VJ troops or access to their reports and that he received information that the police arrested the alleged perpetrators are not pertinent. Similarly, his submission that the Trial Chamber failed to

⁴⁹⁵¹ See Lukić's Appeal Brief, para. 367. The Appeals Chamber also observes that the Trial Chamber merely restated the Prosecution's allegation in the Indictment that the named members of the JCE "implemented the objectives of the JCE through members of the forces of the FRY and Serbia, whom they controlled" (Trial Judgement, vol. 3, para. 11) and that Lukić misinterprets this as the Trial Chamber's finding (Lukić's Appeal Brief, para. 367).

⁴⁹⁵² See *Kvočka et al.* Appeal Judgement, para. 104.

⁴⁹⁵³ *Halilović* Appeal Judgement, para. 59; *Čelebići* Appeal Judgement, paras 196, 198, 256.

⁴⁹⁵⁴ *Cf. supra*, paras 1259, 1261.

⁴⁹⁵⁵ *Krajišnik* Appeal Judgement, para. 225; *Martić* Appeal Judgement, para. 168; *Brdanin* Appeal Judgement, para. 413.

⁴⁹⁵⁶ See Trial Judgement, vol. 1 para. 99.

⁴⁹⁵⁷ Trial Judgement, vol. 3, para. 1132.

⁴⁹⁵⁸ Trial Judgement, vol. 3, para. 1132.

⁴⁹⁵⁹ Trial Judgement, vol. 3, para. 1132.

provide reasons as to why the crimes committed by the VJ were imputable to him is without merit.⁴⁹⁶⁰ Accordingly, the Appeals Chamber dismisses his arguments in this regard.⁴⁹⁶¹

8. Alleged errors in relation to Lukić's responsibility under JCE III

(a) Introduction

1522. The Trial Chamber found that Lukić was a member of a JCE, the common purpose of which was to ensure continued control by the FRY and Serbian authorities over Kosovo.⁴⁹⁶² Having concluded that the common purpose was to be achieved through the crimes of deportation and forcible transfer, the Trial Chamber considered whether, pursuant to the third category of JCE, the crimes of murder and persecution, including through murder, sexual assault, and the destruction of cultural property,⁴⁹⁶³ were foreseeable to Lukić, and whether he willingly took the risk that they would be committed.⁴⁹⁶⁴ The Trial Chamber concluded that the crimes of murder as a violation of the laws or customs of war and murder and persecution, through murder and destruction of or damage to religious property, as crimes against humanity were foreseeable to Lukić.⁴⁹⁶⁵

1523. As a result, the Trial Chamber convicted Lukić of murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity committed at Đakovica/Gjakova town (on the night of 1 April 1999),⁴⁹⁶⁶ Korenica/Korenice and Meja/Mejë (27 April 1999),⁴⁹⁶⁷ Bela Crkva/Bellacërka (25 March 1999),⁴⁹⁶⁸ Mala Kruša/Krusha e Vogël (26 March 1999),⁴⁹⁶⁹ Suva Reka/Suhareka town (26 March 1999),⁴⁹⁷⁰ Izbica/Izbiçe (28 March 1999),⁴⁹⁷¹ near Gornja Sudimlja/Studimja e Epërme in relation to the convoy (2 and 3 May 1999),⁴⁹⁷² and at Dubrava/Lisnaja (around 25 May 1999).⁴⁹⁷³ The Trial Chamber further convicted Lukić of persecution, through destruction of or damage to religious property, committed

⁴⁹⁶⁰ The Appeals Chamber notes that Lukić's allusion to the Trial Chamber's findings on the individual criminal responsibility of Lazarević and Ojdanić similarly confounds differing notions of liability. The Trial Chamber found Lukić liable under JCE, whereas Ojdanić and Lazarević were found liable for aiding and abetting the crimes of forcible transfer and deportation committed by VJ members (see Trial Judgement, vol. 3, paras 618, 628, 630, 919, 927, 930, 1138).

⁴⁹⁶¹ Dismissing, in relevant part, Lukić's sub-grounds H, O, O(1)(e), and GG(2).

⁴⁹⁶² Trial Judgement, vol. 3, paras 95, 1130.

⁴⁹⁶³ Although the Trial Chamber refers to "cultural property", the Appeals Chamber understands the reference to be to "cultural or religious property".

⁴⁹⁶⁴ Trial Judgement, vol. 3, paras 94-95, 1133.

⁴⁹⁶⁵ Trial Judgement, vol. 3, paras 1134, 1136, 1138.

⁴⁹⁶⁶ Trial Judgement, vol. 2, para. 1192.

⁴⁹⁶⁷ Trial Judgement, vol. 2, para. 1197.

⁴⁹⁶⁸ Trial Judgement, vol. 2, paras 382, 1211.

⁴⁹⁶⁹ Trial Judgement, vol. 2, para. 1213.

⁴⁹⁷⁰ Trial Judgement, vol. 2, para. 1217.

⁴⁹⁷¹ Trial Judgement, vol. 2, para. 1223.

⁴⁹⁷² Trial Judgement, vol. 2, para. 1235-1236.

⁴⁹⁷³ Trial Judgement, vol. 2, paras 1149, 1259.

at Celina (28 March 1999),⁴⁹⁷⁴ Suva Reka/Suhareka town (during the attack commencing 26 March 1999),⁴⁹⁷⁵ Vučitrn/Vushtrria (27 March 1999),⁴⁹⁷⁶ and Vlačica/Llashtica (on or about 6 April 1999).⁴⁹⁷⁷

1524. Lukić submits that the Trial Chamber erred in convicting him of murder as a violation of the laws or customs of war and murder and persecution, through murder and destruction of or damage to religious property, as crimes against humanity.⁴⁹⁷⁸ In response, the Prosecution submits that Lukić's arguments are "undeveloped and unsupported assertions" which demonstrate no error and should be summarily dismissed.⁴⁹⁷⁹

1525. The Appeals Chamber notes its finding elsewhere in this Judgement that the Trial Chamber erred in holding that for JCE III liability to arise, it has to be foreseeable to the accused that the crime "would be committed", thus applying a "probability" standard.⁴⁹⁸⁰ The correct legal standard for the JCE III *mens rea* requires that it was foreseeable to the accused that such a crime might be committed by a member of the JCE or one or more of the persons used by the accused (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose⁴⁹⁸¹ and the accused willingly took the risk that such a crime might occur by joining or continuing to participate in the enterprise.⁴⁹⁸² As a result of this legal error, the Trial Chamber applied a higher degree of foreseeability for the crimes that fell outside the scope of the common purpose than that required under the correct legal standard. The Appeals Chamber will bear this in mind in its assessment of the parties' submissions.⁴⁹⁸³

⁴⁹⁷⁴ Trial Judgement, vol. 2, paras 390, 1206, 1209.

⁴⁹⁷⁵ Trial Judgement, vol. 2, para. 1218. The Trial Chamber did not make a specific finding as to the date on which the mosque was destroyed (see Trial Judgement, vol. 2, paras 508-510).

⁴⁹⁷⁶ Trial Judgement, vol. 2, paras 746, 1234.

⁴⁹⁷⁷ Trial Judgement, vol. 2, paras 937, 946, 1249.

⁴⁹⁷⁸ Lukić's Appeal Brief, paras 501-502.

⁴⁹⁷⁹ Prosecution's Response Brief (Lukić), paras 208, 450, 490-491, fn. 1566.

⁴⁹⁸⁰ Trial Judgement, vol. 1, para. 111, referring to *Brdanin* Decision, para. 5, *Martić* Appeal Judgement, para. 83. See *infra*, sub-section VII.G.2.

⁴⁹⁸¹ *Brdanin* Appeal Judgement, paras 365, 411.

⁴⁹⁸² *Kvočka et al.* Appeal Judgement, para. 83, referring to *Tadić* Appeal Judgement, paras 204, 220, 228; *Vasiljević* Appeal Judgement, para. 99. See also *Karadžić JCE III* Decision, paras 15, 18, also holding that the possibility a crime be committed must be "sufficiently substantial as to be foreseeable" to an accused.

⁴⁹⁸³ During the appeal hearing Lukić argued that, irrespective of whether the Trial Chamber applied the correct legal standard in relation to the *mens rea* for JCE III, he was erroneously convicted pursuant to this mode of liability (Appeal Hearing, 14 Mar 2013, AT. 485). In response, the Prosecution argued that, if the Appeals Chamber were to find that the Trial Chamber erred in law in relation to the *mens rea* standard for JCE III liability, this will have no impact on Lukić's convictions pursuant to JCE III liability (Appeal Hearing, 14 Mar 2013, AT. 557-558).

(b) Alleged error in finding that the commission of murder of Kosovo Albanians was foreseeable to Lukić and that he willingly took that risk

1526. In concluding that the crimes of murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity were foreseeable to Lukić, the Trial Chamber held that:

[...] Lukić intended to forcibly displace part of the Kosovo Albanian population and shared this intent with other members of the joint criminal enterprise, the object of which was to forcibly displace Kosovo Albanians within and deport them from Kosovo in order to maintain control over the province. Lukić was aware of the strong animosity between ethnic Serbs and Kosovo Albanians in Kosovo during 1998 and 1999. He was aware of the context in which the forcible displacement took place. It was thus reasonably foreseeable that other crimes, including murder, would be committed by physical and intermediary perpetrators with intent to discriminate against Kosovo Albanians. The Chamber is of the view that Lukić's detailed knowledge of events on the ground in Kosovo in 1998 and 1999 put him on notice that murders would by [sic] committed by the VJ and MUP as a result of the displacements taking place in 1999.⁴⁹⁸⁴

1527. The Trial Chamber also based its conclusion on Lukić's knowledge of: (i) the incident at Gornje Obrinje/Abria e Epërme in October 1998; and (ii) his dispatch of 6 May 1999, urging the Heads of the Kosovo SUPs to familiarise all PJP members with the content of the *Politika* article, which recounted allegations of murder committed by the VJ forces, and instructing them to prevent killings, rapes, and looting.⁴⁹⁸⁵

(i) Submissions of the parties

1528. Lukić argues that the conclusion that he was responsible, pursuant to JCE III, for the murders committed by members of the VJ is "absurd" in light of the Trial Chamber's finding that Lazarević, the Commander of the Priština Corps, was not responsible for these crimes.⁴⁹⁸⁶

1529. Lukić also argues that the Trial Chamber erred in relying on the incident at Gornje Obrinje/Abria e Epërme, in October 1998, in finding that he was put on notice that murder and persecution through murder were likely to be committed by members of the VJ and the MUP.⁴⁹⁸⁷ He argues that the KLA prevented any on-site investigation of the alleged killings, despite efforts by the "competent authorities".⁴⁹⁸⁸ Lukić avers that the Trial Chamber erred in its assessment of his letter urging the Heads of the Kosovo SUPs to familiarise all the members of the PJP with the contents of the *Politika* article and submits that the article did not suggest that murder was

⁴⁹⁸⁴ Trial Judgement, vol. 3, para. 1134, referring to Exh. P948, pp. 67-68, 133, 167-168.

⁴⁹⁸⁵ Trial Judgement, vol. 3, para. 1134, referring to Exh. P1468, p. 136, Exh. IC-199, p. 7, Exh. 5D1289 (also admitted as Exh. P2159).

⁴⁹⁸⁶ Lukić's Appeal Brief, para. 498, referring to Trial Judgement, vol. 3, para. 928.

⁴⁹⁸⁷ Lukić's Appeal Brief, paras 499-500, referring to Trial Judgement, vol. 3, para. 1134. See also Appeal Hearing, 14 Mar 2013, AT. 497-500.

⁴⁹⁸⁸ Lukić's Appeal Brief, para. 500.

committed by the VJ operating jointly with MUP forces.⁴⁹⁸⁹ He submits that it neither shows that he was put on notice that murders would occur nor that he willingly took that risk.⁴⁹⁹⁰

1530. Lukić further submits that his conviction for murder committed in Đakovica/Gjakova must be vacated as there is no evidence that he had actual knowledge that the crime had been committed.⁴⁹⁹¹ He submits that, at most, he could have had knowledge that homicides were being investigated by the local authorities – circumstances which led the Trial Chamber to acquit Milutinović.⁴⁹⁹² He also claims that the Trial Chamber erred in attributing to him the “linkage of the exhumation/reburial process to criminal participation and liability of MUP forces”.⁴⁹⁹³ In his view, having acquitted him of involvement in the concealment of bodies, the vast majority of which were bodies of victims from Đakovica/Gjakova, it was improper to hold him criminally responsible for murder on the basis of the same concealment.⁴⁹⁹⁴

1531. In relation to the crimes in Gornje Obrinje/Abria e Epërme, the Prosecution responds that Lukić fails to articulate an error and merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.⁴⁹⁹⁵ The Prosecution further claims that Lukić’s submissions that he did not have actual knowledge of the murders committed in Đakovica/Gjakova are irrelevant.⁴⁹⁹⁶ It points out that Lukić does not contest the fact that his prior knowledge of VJ and MUP criminal activity made the risk of murder being committed reasonably foreseeable to him.⁴⁹⁹⁷

(ii) Analysis

1532. The Appeals Chamber will first address Lukić’s challenges to the Trial Chamber’s factual findings on his knowledge of the commission of earlier crimes which, the Trial Chamber reasoned, in conjunction with other factors made the crimes outside the common purpose foreseeable to him as well as his argument that he did not willingly take the risk that they would be committed. In so

⁴⁹⁸⁹ Lukić’s Appeal Brief, para. 501. See also Exh. 5D1289 (also admitted as Exh. P2159); Appeal Hearing, 14 Mar 2013, AT. 514.

⁴⁹⁹⁰ Lukić’s Appeal Brief, para. 501.

⁴⁹⁹¹ Lukić submits that there is no evidence that he was present in Đakovica/Gjakova on 27 or 28 April 1999. He further submits that there is no evidence he was informed of the murders through MUP reports and that the VJ report on the topic refers only to “terrorists” having been killed (Lukić’s Appeal Brief, paras 700-703, referring to Miroslav Mijatović, 12 Feb 2008, T. 22222-22223, Radovan Vučurević, 25 Feb 2008, T. 23052-23053, Radovan Žlatković, 15 April 2008, T. 25304-25305, Exh.6D1232, Exh. 6D1233, Exh. 6D1234, Exh. 6D1235, Exh. 6D1236, Exh. 6D1237, Exh. 6D1238, Exh. 6D1239, Exh. 6D1240, Exh. 6D1241, Exh. 6D1242, Exh. 6D1243, Exh. 6D1244, Exh. 6D1245, Exh. 6D1246, Exh. 6D1247, Exh. 6D1248, Exh. 6D1249, Exh. 6D1250, Exh. 6D1251, Exh. 6D1252, Exh. 6D1254, Exh. 6D1255, Exh. 6D1256, Exh. 6D1257, Exh. 6D1259, Exh. 6D1260, Exh. 6D1261, Exh. 6D1468, Exh. P1693).

⁴⁹⁹² Lukić’s Appeal Brief, para. 703, referring to Trial Judgement, vol. 3, para. 281.

⁴⁹⁹³ Lukić’s Appeal Brief, para. 704.

⁴⁹⁹⁴ Lukić’s Appeal Brief, paras 704-705, referring to Trial Judgement, vol. 3, para. 1113.

⁴⁹⁹⁵ Prosecution’s Response Brief (Lukić), para. 214.

⁴⁹⁹⁶ Prosecution’s Response Brief (Lukić), paras 449-450.

⁴⁹⁹⁷ Prosecution’s Response Brief (Lukić), para. 450.

doing, the Appeals Chamber will apply the standard of reasonableness.⁴⁹⁹⁸ It will then address the impact of the Trial Chamber's legal error,⁴⁹⁹⁹ if any, on its conclusion that the crimes of murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity were foreseeable to Lukić and that he willingly took the risk that they would be committed pursuant to JCE III.

1533. In arguing that he should not be held responsible for murder under JCE III because Lazarević was not found responsible for these crimes, Lukić misconstrues the law on JCE III liability. Unlike Lazarević, who was convicted for aiding and abetting crimes, Lukić was found to be a member of the JCE⁵⁰⁰⁰ and therefore the question of foreseeability arises in the context of his criminal responsibility.

1534. Regarding the Gornje Obrinje/Abria e Epërme incident, the Appeals Chamber recalls its finding that the Trial Chamber erred in relying on discussions in two Joint Command meetings concerning the joint MUP and VJ action in Gornje Obrinje/Abria e Epërme to find that Lukić had reason to believe that crimes occurred during the incident.⁵⁰⁰¹ In these circumstances, the Appeals Chamber finds that a reasonable trier of fact could not have relied on this evidence in finding that murder was foreseeable to Lukić.

1535. The Trial Chamber found that, on 6 May 1999, Lukić sent a copy of an article from *Politika*, dated 5 May 1999, to the chiefs of the Kosovo SUPs, the PJP, and SAJ commanders in Kosovo.⁵⁰⁰² He instructed them to familiarise their forces with the content of the article, which related to a meeting held in Belgrade on 4 May 1999 with Milošević, Pavković, Lukić, and various high-ranking officials.⁵⁰⁰³ The *Politika* article recounts that “the security forces dealt with numerous cases of violence, killings, pillage, and other crimes, arresting several hundred perpetrators whose crimes were a great danger to the civilian population.”⁵⁰⁰⁴ It goes on to state that military courts had imposed a large number of sentences for the crimes committed and that army commanders and police units “set out the planned measures and activities that [would] enable them to carry out their assignments in a legal, professional, committed, and comprehensive manner.”⁵⁰⁰⁵ With reference to the article, Lukić directed the SUP chiefs and PJP and SAJ commanders to take “all measures in the forthcoming period to prevent paramilitary formations and individuals from committing acts of

⁴⁹⁹⁸ See *supra*, para. 22.

⁴⁹⁹⁹ See *supra*, para. 1525. See also *infra*, sub-section VII.G.2.

⁵⁰⁰⁰ See Trial Judgement, vol. 3, para. 1138.

⁵⁰⁰¹ See *supra*, para. 1461.

⁵⁰⁰² Trial Judgement, vol. 3, paras 1005, 1095. See also, *supra*, sub-section VII.F.4.(c)(ii).

⁵⁰⁰³ Trial Judgement, vol. 3, para. 1005, referring to Exh. 5D1289.

⁵⁰⁰⁴ Exh. P1696, p. 1.

⁵⁰⁰⁵ Exh. P1696, p. 2.

violence, [including] killing”.⁵⁰⁰⁶ The Appeals Chamber considers that a reasonable trier of fact could have relied on this evidence in finding that the murders committed by the MUP and VJ forces were foreseeable to Lukić.

1536. The Appeals Chamber has found that, in assessing whether murder was foreseeable to Lukić, the Trial Chamber erred in relying on the information he received about the incident in Gornje Obrinje/Abria e Epërme in Joint Command meetings. The Appeals Chamber will therefore consider whether the Trial Chamber’s remaining factual findings establish that murder was foreseeable to Lukić pursuant to JCE III. In doing so, the Appeals Chamber will apply the correct legal standard which requires that it was foreseeable to the accused that such a crime might be committed by a member of the JCE or one or more of the persons used by the accused (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose⁵⁰⁰⁷ and that the accused willingly took the risk that such a crime might occur by joining or continuing to participate in the enterprise.⁵⁰⁰⁸

1537. The Appeals Chamber has upheld the Trial Chamber’s conclusion that Lukić had the intent to forcibly displace the Kosovo Albanian population, both within and outside Kosovo, and thereby ensure continued control by the FRY and Serbian authorities over the province.⁵⁰⁰⁹ The evidence considered by the Trial Chamber shows that Lukić was aware of various criminal acts and acts of violence committed against the Kosovo Albanian population both in 1998 and 1999. Regarding Lukić’s knowledge in 1998,⁵⁰¹⁰ the Trial Chamber considered evidence that Lukić was told that the MUP and VJ forces had allegedly used excessive force during joint operations⁵⁰¹¹ and that he was informed about numerous cases of arson,⁵⁰¹² “burning villages, destroying crops, killing farm

⁵⁰⁰⁶ Exh. 5D1289, p. 2. See also Trial Judgement, vol. 3, paras 1005, 1093.

⁵⁰⁰⁷ *Brđanin* Appeal Judgement, paras 365, 411.

⁵⁰⁰⁸ *Kvočka et al.* Appeal Judgement, para. 83, referring to *Tadić* Appeal Judgement, paras 204, 220, 228; *Vasiljević* Appeal Judgement, para. 99. See also *Karadžić JCE III* Decision, paras 15, 18, also holding that the possibility a crime be committed must be “sufficiently substantial as to be foreseeable” to an accused.

⁵⁰⁰⁹ See *supra*, sub-section VII.F.5.(g).

⁵⁰¹⁰ The Appeals Chamber recalls that the Trial Chamber noted evidence that a report on the Gornje Obrinje/Abria e Epërme incident published by Human Rights Watch was widely disseminated to the media and government organisations in the FRY and Serbia, and to Serbian and Albanian-language media in Kosovo in February 1999 (Trial Judgement, vol. 1, para. 900, referring to Frederick Abrahams, Exh. P2228, p. 7, Exh. P441, pp. 35-39. See also Trial Judgement, vol. 3, paras 252, 448, 543). At the appeal hearing, the Prosecution argued that this is indicative of Lukić’s knowledge of killings during the incident (Appeal Hearing, 14 Mar 2013, AT. 554-555). However, the Appeals Chamber is not satisfied that Lukić was in fact made aware of the contents of the report. In this regard, the Appeals Chamber notes Frederick Abrahams’s testimony that Human Rights Watch disseminated documents to the MUP but not to the police organs and structures on the territory of Kosovo (Frederick Abrahams, 13 Jul 2006, T. 811-813, 818; *ibid.*, 7 Aug 2006, T. 968-969), and that the Trial Chamber neither found that Lukić was in fact aware of its contents, nor relied on the evidence in this regard to find that he knew of allegations of serious criminal activity by MUP forces in 1998 (see, in particular, Trial Judgement, vol. 3, paras 1079-1086, 1120).

⁵⁰¹¹ Trial Judgement, vol. 3, paras 1043, 1084, referring to Exh. P2544. See also *supra*, sub-sections VII.F.5.(b)(i) and VII.F.5.(b)(ii).

⁵⁰¹² Trial Judgement, vol. 3, para. 1080, referring to Exh. P1468, pp. 46, 52, 96, 125. See also *supra*, sub-section VII.F.5.(b)(ii).

animals, intimidating Kosovo Albanian civilians, and driving them from their homes.”⁵⁰¹³ The Trial Chamber also noted that Lukić became aware of allegations that widespread crimes committed by VJ and MUP forces in 1998 had led to the displacement of 230,000 Kosovo Albanians from Kosovo.⁵⁰¹⁴ Regarding Lukić’s knowledge in 1999, the Trial Chamber found that, through various reporting alternatives, Lukić was regularly informed about events throughout Kosovo.⁵⁰¹⁵ It noted evidence that, on 1 April 1999, Lukić issued an instruction to the heads of the Kosovo SUPs to report to the MUP Staff on crimes, including murder, committed in their respective areas of responsibility,⁵⁰¹⁶ and that, on 6 May 1999, a follow up instruction was issued requiring the heads of the Kosovo SUPs to report twice a month on the most serious crimes, such as murders, rapes, ill-treatment, and arson.⁵⁰¹⁷ On 4 May 1999, Lukić attended a meeting involving Milošević and other high-ranking officials where information was presented that the “security forces” had dealt with numerous cases of violence, killings, pillage, and other crimes⁵⁰¹⁸ and on 6 May 1999 he instructed the Heads of the Kosovo SUPs to prevent killings, rapes, and looting.⁵⁰¹⁹ The Trial Chamber also noted that, at a MUP Staff meeting on 7 May 1999, Lukić commented that the reported number of murder investigations was unrealistically low.⁵⁰²⁰ Moreover, the Trial Chamber considered evidence showing that Lukić was aware of the large number of displaced Kosovo Albanian civilians in 1999.⁵⁰²¹

1538. The Appeals Chamber recalls that the JCE III *mens rea* standard requires that the possibility a crime could be committed be sufficiently substantial as to be foreseeable to the accused.⁵⁰²² The evidence described above shows that, prior to 4 May 1999 when he learned specifically about murders, Lukić was aware of allegations of the use of excessive force, arson, destruction of property, killing of livestock, intimidation and displacement of Kosovo Albanian civilians in 1998 and of the forcible displacement of Kosovo Albanian civilians in 1999. In addition, the Trial Chamber noted Lukić’s awareness of the animosity between ethnic Serbs and Kosovo Albanians in

⁵⁰¹³ Trial Judgement, vol. 3, para. 1082, referring to Shaun Byrnes, 16 Apr 2007, T. 12149–12153. See also *supra*, sub-section VII.F.5.(b)(ii).

⁵⁰¹⁴ Trial Judgement, vol. 3, paras 1085, 1120, referring to Exh. P455, p. 1, Exh. P456, p. 1.

⁵⁰¹⁵ Trial Judgement, vol. 3, paras 1090, 1123.

⁵⁰¹⁶ Trial Judgement, vol. 3, para. 1093, referring to Exh. 6D808.

⁵⁰¹⁷ Trial Judgement, vol. 3, para. 1093, referring to Exh. 6D874.

⁵⁰¹⁸ Trial Judgement, vol. 3, paras 1095, 1125, referring, *inter alia*, to Exh. P1696, p. 1. See also *supra*, sub-section VII.F.5.(c)(i)a.

⁵⁰¹⁹ Trial Judgement, vol. 3, paras 1095, 1134, referring to Exh. 5D1289 (also admitted as Exh. P2159). See also *supra*, para. 1535.

⁵⁰²⁰ Trial Judgement, vol. 3, para. 1126, referring to Exh. P1996, p. 10. See also *supra*, sub-section VII.F.5.(c)(i)b.

⁵⁰²¹ Trial Judgement, vol. 3, paras 1094, 1096, 1124, 1127, referring to Exh. 6D666, Exh. 6D778, Exh. 6D1232, Exh. 6D1236 (also admitted as Exh. P1099), Exh. 6D1238, Exh. 6D1239, Exh. 6D1240, Exh. 6D1241, Exh. 6D1242, Exh. 6D1244, Exh. 6D1254, Exh. 6D1255, Exh. 6D1256, Exh. 6D1257, Exh. 6D1259, Exh. 6D1260, Exh. 6D1261, Exh. P1693, Exh. P1993. See also *supra*, sub-section VII.F.5.(d).

⁵⁰²² *Karadžić JCE III Decision*, para. 18.

Kosovo and of the context in which the forcible displacement took place.⁵⁰²³ Undoubtedly, Lukić was aware of the climate of intimidation of the Kosovo Albanian civilian population and of the atmosphere of violence and insecurity which rendered the Kosovo Albanian population particularly vulnerable to a wide range of criminality. The Appeals Chamber considers that Lukić's instruction on 1 April 1999 to the heads of the Kosovo SUPs to report on crimes, including murder, committed in their respective areas of responsibility⁵⁰²⁴ indicates that Lukić knew of the possibility that murders could be committed by FRY and Serbian forces in Kosovo by that time. The Appeals Chamber is therefore satisfied beyond reasonable doubt that, at least as of 1 April 1999, the only reasonable inference is that murder was foreseeable to Lukić.

1539. In addition, the Appeals Chamber notes that Lukić, in his role as Head of the MUP Staff in Priština/Prishtina, continued to act in furtherance of the common plan of the JCE after 1 April 1999.⁵⁰²⁵ The Appeals Chamber therefore finds that Lukić willingly took the risk that, as of that date, murder could be committed.

1540. Turning now to Lukić's submissions in relation to his conviction for the murders committed in Đakovica/Gjakova, the Appeals Chamber finds that Lukić misunderstands the third category of JCE liability. The Trial Chamber was not required to determine that he was actually aware that the crimes outside the common purpose were being committed; it was sufficient that their occurrence was foreseeable to him and that those crimes did in fact occur.⁵⁰²⁶ Accordingly, Lukić's submission that he had no knowledge of the murders at Đakovica/Gjakova is inapposite in the context of his responsibility under JCE III. Lukić's submission that it was improper for the Trial Chamber to convict him of murder in Đakovica/Gjakova, while also finding that he did not participate in the concealment of bodies, is equally unsubstantiated. The Trial Chamber's findings on Lukić's lack of involvement in the concealment of bodies is irrelevant to his culpability for murder, which, as stated above, derives from the fact that murder was foreseeable to him on the basis of JCE III liability.

(iii) Conclusion

1541. Consequently, the Appeals Chamber grants Lukić's appeal concerning his responsibility for murder pursuant to JCE III, in part,⁵⁰²⁷ and quashes his convictions for murder as a violation of the

⁵⁰²³ Trial Judgement, vol. 3, para. 1134.

⁵⁰²⁴ Trial Judgement, vol. 3, para. 1093, referring to Exh. 6D808.

⁵⁰²⁵ See for example Trial Judgement, vol. 3, paras 1052-1057, 1059 (Lukić's role in reporting to the MUP in Belgrade); *ibid.*, vol. 3, para. 1000 (Lukić's involvement at the meeting on 4 April 1999); *ibid.*, vol. 3, paras 1038, 1095 (Lukić's involvement in the meeting in Belgrade on 4 May 1999); *ibid.*, vol. 3, paras 1006-1009, 1066, 1096, 1126-1127; Exh. 6D802, para. 19 (Lukić's involvement in the MUP Staff meetings of 7 and 11 May 1999); Trial Judgement, vol. 3, para. 1040 (Lukić's presence at the Joint Command meeting on 1 June 1999).

⁵⁰²⁶ See *Krstić* Appeal Judgement, para. 150.

⁵⁰²⁷ Granting, in relevant part, Lukić's sub-grounds O(1)(e) and Q(1).

laws or customs of war and murder and persecution, through murder, as crimes against humanity committed prior to or on 1 April 1999, *i.e.* at Bela Crkva/Bellacërka (25 March 1999),⁵⁰²⁸ Mala Kruša/Krusha e Vogël (26 March 1999),⁵⁰²⁹ Suva Reka/Suhareka town (26 March 1999),⁵⁰³⁰ Izbica/Izbiçë (28 March 1999),⁵⁰³¹ and Đakovica/Gjakova town (on the night of 1 April 1999).⁵⁰³² The Appeals Chamber upholds Lukić's convictions for murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity committed at Korenica/Korenicë and Meja/Mejë (27 April 1999),⁵⁰³³ near Gornja Sudimlja/Studimja e Epërme in relation to the convoy (2 and 3 May 1999),⁵⁰³⁴ and at Dubrava/Lisnaja (around 25 May 1999).⁵⁰³⁵ The impact of this finding, if any, on Lukić's sentence will be addressed below.⁵⁰³⁶

(c) Alleged error in finding that destruction to or damage of religious property was foreseeable to Lukić and that he willingly took that risk

1542. In relation to Lukić's responsibility for persecution, through destruction of or damage to religious property, the Trial Chamber found that:

[...] it was reasonably foreseeable to Lukić that the forces of the FRY and Serbia would commit wanton destruction or damage of Kosovo Albanian religious sites, cultural monuments, and Muslim sacred sites during their forcible displacement of the Kosovo Albanian population. The conflict was one that involved ethnic divisions. Moreover, the common purpose was to be achieved through a campaign of terror and violence against the Kosovo Albanian civilian population. Under these conditions, and keeping in mind Lukić's detailed knowledge of events on the ground in Kosovo during the conflict, the inescapable conclusion is that it was reasonably foreseeable to Lukić that, while the forces of the FRY and Serbia were forcibly transferring and deporting the Kosovo Albanian population, they would at the same time wantonly destroy or damage their religious sites, cultural monuments, and sacred sites.⁵⁰³⁷

(i) Submissions of the parties

1543. Lukić argues that the destruction of or damage to religious property was not foreseeable to him and that he did not willingly accept the risk that it would be committed, as any information he received regarding the destruction of cultural or religious property indicated that it was the result of NATO bombing.⁵⁰³⁸ Regarding the Celina mosque, Lukić claims that the Trial Chamber applied "double standards" in finding that the destruction of the mosque was foreseeable to him but not to

⁵⁰²⁸ Trial Judgement, vol. 2, paras 382, 1211.

⁵⁰²⁹ Trial Judgement, vol. 2, paras 1212-1213.

⁵⁰³⁰ Trial Judgement, vol. 2, paras 1214-1215, 1217.

⁵⁰³¹ Trial Judgement, vol. 2, paras 1221, 1223.

⁵⁰³² Trial Judgement, vol. 2, para. 1192.

⁵⁰³³ Trial Judgement, vol. 2, para. 1197. Lukić's conviction is upheld only to the extent that it concerns 13 victims. See *supra*, sub-section VI.C.2.

⁵⁰³⁴ Trial Judgement, vol. 2, para. 1235-1236.

⁵⁰³⁵ Trial Judgement, vol. 2, paras 1149, 1259, 1262.

⁵⁰³⁶ See *infra*, sub-section IX.I.

⁵⁰³⁷ Trial Judgement, vol. 3, para. 1136.

⁵⁰³⁸ Lukić's Appeal Brief, para. 502, referring to Exh. 6D1249, p. 2.

Lazarević, despite the fact that it was Lazarević who ordered the operation.⁵⁰³⁹ Lukić also submits that the Trial Chamber erred in finding him criminally responsible for the burning of the mosque in Vlaštica/Llashtica.⁵⁰⁴⁰ He notes that the Trial Chamber found that this act was carried out by the VJ and armed locals and submits that no reasonable trier of fact could reasonably infer MUP involvement.⁵⁰⁴¹

1544. In relation to the burning of the Vlaštica/Llashtica mosque, the Prosecution claims that Lukić ignores the Trial Chamber's finding that, as a JCE member, he is liable for the crimes of both the VJ and the MUP.⁵⁰⁴²

(ii) Analysis

1545. The Appeals Chamber recalls that Lukić's responsibility under JCE III is not based on actual knowledge that similar crimes had been committed in the past; rather, it is based on whether the information available to him made it foreseeable that such crimes could be committed if he pursued the common purpose of the JCE.⁵⁰⁴³ The Appeals Chamber notes that the Trial Chamber found that the destruction of the four mosques was foreseeable to Lukić because the conflict involved ethnic divisions and the common plan of the JCE was put into effect through a campaign of terror and violence against the Kosovo Albanian civilian population.⁵⁰⁴⁴ Moreover, elsewhere in the Trial Judgement, the Trial Chamber held that Lukić was informed of crimes committed by VJ and MUP members that caused damage to or destruction of Kosovo Albanian property. It found that, during combat activities in 1998, forces of the FRY and Serbia committed numerous acts of arson which were made known to Lukić at Joint Command meetings and by international observers.⁵⁰⁴⁵ Specifically, the Trial Chamber found that Lukić was present at the Joint Command meetings on: (i) 7 August 1998, in which Šainović noted that "the greatest damage to us is caused by burning the houses without any need"; (ii) 12 August 1998, in which Milomir Minić instructed those present that setting houses on fire must stop; (iii) 1 September 1998, in which Šainović noted that tasks should be accomplished in a disciplined manner in order to avoid arson; and (iv) 7 September 1998, in which Vlastimir Đorđević warned against persons who set houses on

⁵⁰³⁹ Lukić's Appeal Brief, para. 503.

⁵⁰⁴⁰ Lukić's Appeal Brief, paras 503, 783, 786.

⁵⁰⁴¹ Lukić's Appeal Brief, paras 100, 503, 809. See also Lukić's Reply Brief, paras 123-125. Lukić also argues that the Trial Chamber ignored evidence that the police conducted an investigation into the incident and helped an Albanian whose parents were trapped under the rubble (Lukić's Appeal Brief, para. 809). In addition, Lukić argues that armed locals who wore dark blue uniforms in Vlaštica/Llashtica could have been members of the Civilian Protection (*ibid.*, para. 100. See also *ibid.*, paras 91-94).

⁵⁰⁴² Prosecution's Response Brief (Lukić), paras 103, 498, fn. 1566.

⁵⁰⁴³ See *Karadžić JCE III* Decision, para. 18.

⁵⁰⁴⁴ Trial Judgement, vol. 3, para. 1136.

⁵⁰⁴⁵ Trial Judgement, vol. 3, paras 1080, 1082, referring to Exh. P1468, pp. 46, 52, 96, 125; Shaun Byrnes, 16 Apr 2007, T. 12148-12153.

fire.⁵⁰⁴⁶ In addition, the Trial Chamber found that Shaun Byrnes told Lukić that his team observed “on an almost day-to-day basis, PJP and other police units burning villages [and] destroying crops” and PJP units leaving while homes in deserted villages near Kijevo/Kieva in mid or late September 1998 burned.⁵⁰⁴⁷ In this context, Lukić’s reliance on a MUP report referring to one mosque hit by NATO bombs is inapposite.⁵⁰⁴⁸ In light of the factors relied upon by the Trial Chamber and its findings on Lukić’s awareness of the destruction of Kosovo Albanian property by MUP and VJ forces, the Appeals Chamber finds that a reasonable trier of fact could have concluded that the destruction of or damage to religious property was foreseeable to Lukić.

1546. Further, in arguing that he should not be held responsible for the destruction of the Celina mosque because Lazarević was not found responsible despite having ordered the action in Celina, Lukić misconstrues the law on JCE III liability. The Appeals Chamber recalls that, unlike Lazarević, Lukić was found to be a member of the JCE and, therefore, it is with respect to him that the question of foreseeability arises.

1547. In relation to the destruction of the Vlačica/Llhashtica mosque, the Trial Chamber found that the mosque was burned down by VJ soldiers and “armed locals”.⁵⁰⁴⁹ The Trial Chamber correctly found that the crimes committed by VJ forces, including the destruction of or damage to religious property,⁵⁰⁵⁰ were imputable to Lukić because Pavković, another JCE member, exercised control over these forces in furtherance of the common purpose.⁵⁰⁵¹ Therefore, Lukić’s submissions are dismissed.⁵⁰⁵²

1548. The Appeals Chamber therefore finds that Lukić has failed to demonstrate any error in the factual findings relied upon by the Trial Chamber in concluding that it was foreseeable to him that persecution through destruction of or damage to religious property would be committed and that he willingly took that risk. Consequently, the Trial Chamber’s legal error with regard to the degree of foreseeability required under JCE III has no impact on Lukić’s conviction for persecution through

⁵⁰⁴⁶ Trial Judgement, vol. 3, para. 1080, referring to Exh. P1468, pp. 46, 52, 96, 125.

⁵⁰⁴⁷ Trial Judgement, vol. 3, para. 1082, referring to Shaun Byrnes, 16 Apr 2007, T. 12148-12153.

⁵⁰⁴⁸ See Lukić’s Appeal Brief, para. 502, referring to Exh. 6D1249, p. 2.

⁵⁰⁴⁹ Trial Judgement, vol. 2, paras 946, 1249.

⁵⁰⁵⁰ Trial Judgement, vol. 3, para. 1136, finding that it was “reasonably foreseeable to Lukić that, while the forces of the FRY and Serbia were forcibly transferring and deporting the Kosovo Albanian population, they would at the same time wantonly destroy or damage their religious sites, cultural monuments, and sacred sites.” See also *ibid.*, para. 1133.

⁵⁰⁵¹ Trial Judgement, vol. 2, paras 946; *ibid.*, vol. 3, paras 782-783. See also *Brdanin* Appeal Judgement, para. 411. Accordingly, even if Lukic could establish that the Trial Chamber erred in finding that the mosque in Vlastica/Llashtica was burned down by, *inter alia*, armed locals wearing dark blue police uniforms, he fails to show how this would render his conviction unsafe, given the Trial Chamber’s finding that VJ members were also involved in committing the crime and his responsibility for the crimes of both the MUP and the VJ.

⁵⁰⁵² Lukić’s claims concerning a police investigation and assistance given to an Albanian man are likewise dismissed as the Trial Chamber specifically considered evidence in this regard (See Trial Judgement, vol. 2, para. 938). Moreover, Lukić fails to show how such police actions cast doubt on the Trial Chamber’s findings regarding the VJ’s involvement in the crime or relieve him of responsibility under Article 7(1) of the Statute.

destruction of or damage to religious property. Since on the basis of the Trial Chamber's factual findings a higher degree of foreseeability was met, a lower degree of foreseeability is satisfied *a fortiori*.⁵⁰⁵³

(iii) Conclusion

1549. In view of the foregoing, Lukić has not demonstrated any error in the Trial Chamber's finding in relation to his JCE III liability for the destruction of or damage to religious property. The Appeals Chamber dismisses Lukić's arguments in this regard.⁵⁰⁵⁴

G. Prosecution's appeal as to alleged errors concerning the *mens rea* for JCE III in relation to persecution through sexual assaults

1. Introduction

1550. The Trial Chamber found that persecution as a crime against humanity was committed through sexual assaults in Beleg on or about 29 March 1999 and in Ćirez/Qirez in mid-April 1999.⁵⁰⁵⁵ While it convicted Pavković for these crimes pursuant to JCE III,⁵⁰⁵⁶ it acquitted Šainović and Lukić, finding that the Prosecution had failed to prove that the crimes were reasonably foreseeable to them in order to give rise to JCE III liability.⁵⁰⁵⁷ The Trial Chamber held that, following the Appeals Chamber's decision in the *Brdanin* case, for an accused to incur criminal responsibility pursuant to JCE III "it has to be reasonably foreseeable on the basis of the information available to the accused that the crime or underlying offence would be committed."⁵⁰⁵⁸

1551. The Prosecution argues that in acquitting Šainović and Lukić of persecution through sexual assaults committed in Beleg and Ćirez/Qirez, the Trial Chamber erred in law by applying a flawed *mens rea* standard for JCE III liability.⁵⁰⁵⁹ The Prosecution requests that the Appeals Chamber apply the correct legal standard and reverse the acquittals of Šainović and Lukić in this regard.⁵⁰⁶⁰

1552. In relation to the sexual assaults committed in Priština/Prishtina on 1 April and in late May 1999, the Trial Chamber concluded that the Prosecution had failed to prove that the perpetrators of the crimes acted with discriminatory intent and, consequently, failed to prove that

⁵⁰⁵³ See *supra*, para. 1525; *infra*, sub-section VII.G.2.

⁵⁰⁵⁴ Dismissing, in relevant part, Lukić's sub-ground D(2), ground GG, and sub-ground O(1)(e).

⁵⁰⁵⁵ Trial Judgement, vol. 2, paras 68, 1187-1188, 1224.

⁵⁰⁵⁶ Trial Judgement, vol. 3, para. 785.

⁵⁰⁵⁷ Trial Judgement, vol. 3, paras 469, 472, 1133, 1135.

⁵⁰⁵⁸ Trial Judgement, vol. 1, para. 111, referring to *Brdanin* Decision, para. 5, *Martić* Appeal Judgement, para. 83.

⁵⁰⁵⁹ Prosecution's Appeal Brief, para. 60.

⁵⁰⁶⁰ Prosecution's Appeal Brief, paras 63, 66, 82. See also *ibid.*, fn. 137. The Prosecution also argues that the Appeals Chamber should increase their sentences respectively (*ibid.*, paras 63, 82).

the sexual assaults in question constituted persecution as a crime against humanity.⁵⁰⁶¹ As the Indictment charged sexual assault only as a form of persecution, the Trial Chamber did not further examine the question of whether Šainović, Pavković, or Lukić were liable for the sexual assaults committed in Priština/Prishtina.⁵⁰⁶² The Appeals Chamber recalls that it has overturned the Trial Chamber’s finding that the sexual assaults committed in Priština/Prishtina did not constitute persecution⁵⁰⁶³ and will therefore consider the Prosecution’s arguments that Šainović, Pavković, and Lukić should be convicted of the sexual assaults committed in Priština/Prishtina.⁵⁰⁶⁴

2. Alleged error of law in relation to the *mens rea* for JCE III

(a) Submissions of the parties

1553. The Prosecution argues that the Trial Chamber erred in law in relation to the *mens rea* for JCE III by applying a “probability” standard based on the *Brđanin* Decision and thus erroneously requiring that it be reasonably foreseeable that the relevant crime “would be committed”.⁵⁰⁶⁵ The Prosecution submits that the appellate jurisprudence after the *Brđanin* Decision, as articulated in the *Karadžić JCE III* Decision, requires awareness that the crime is a “possible” rather than “probable” consequence of the implementation of the JCE.⁵⁰⁶⁶

1554. In response, Šainović submits that the Trial Chamber did not err by adopting the “probability” standard enshrined in the *Brđanin* Decision instead of following the subsequent Appeals Chamber jurisprudence, because “there is no hierarchy in the decisions of the Appeals Chamber.”⁵⁰⁶⁷ Consequently, Šainović asserts that the Appeals Chamber’s intervention in this matter is not required.⁵⁰⁶⁸ In the alternative, Šainović submits that the Trial Chamber’s articulation of the *mens rea* standard for JCE III does not amount to an error of law because its holding that the commission of a crime must be “reasonably foreseeable on the basis of the information available to the accused” is consistent with the Appeals Chamber’s formulation that the possibility a crime could be committed must be “sufficiently substantial”.⁵⁰⁶⁹

⁵⁰⁶¹ Trial Judgement, vol. 2, paras 875-880, 1245.

⁵⁰⁶² Trial Judgement, vol. 2, para. 1245.

⁵⁰⁶³ See *supra*, sub-section VI.D.

⁵⁰⁶⁴ Prosecution’s Appeal Brief, para. 104. The Prosecution also argues that the Appeals Chamber should increase their sentences respectively (*ibid.*).

⁵⁰⁶⁵ Prosecution’s Appeal Brief, para. 64.

⁵⁰⁶⁶ Prosecution’s Appeal Brief, paras 64-65, referring to *Karadžić JCE III* Decision, paras 15, 17-18. See also Prosecution’s Reply Brief, para. 43.

⁵⁰⁶⁷ Šainović’s Response Brief, para. 50.

⁵⁰⁶⁸ Šainović’s Response Brief, para. 50.

⁵⁰⁶⁹ Šainović’s Response Brief, paras 53-54, 56, citing Trial Judgement, vol. 1, para. 111; *Karadžić JCE III* Decision, para. 18.

1555. Lukić responds that the focus of the analysis should be on “what was foreseeable and substantial to the accused.”⁵⁰⁷⁰ He relies on the Appeals Chamber’s holding in the context of liability for ordering⁵⁰⁷¹ that “knowledge of any kind of risk, however low, does not suffice for the imposition of criminal liability for serious violations of international humanitarian law” and that “awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.”⁵⁰⁷²

1556. In reply, the Prosecution accepts that *mens rea* for JCE III must be determined on the basis of the “information available to the accused.”⁵⁰⁷³ The Prosecution asserts that “[t]he JCE III ‘possibility’ standard is justified because ‘the actor already possesses the intent to participate and further the common criminal purpose of a group.’”⁵⁰⁷⁴

(b) Analysis

1557. The Appeals Chamber finds that the Trial Chamber erred in law in concluding that for JCE III liability to arise, it must be foreseeable to the accused that the crime “would be committed”.⁵⁰⁷⁵ The Appeals Chamber recalls that the jurisprudence subsequent to the *Brđanin* Decision⁵⁰⁷⁶ confirmed that JCE III liability arises even if the JCE member knows that the commission of the crime is only a “possible consequence” of the execution of the common purpose.⁵⁰⁷⁷ It is necessary “that the possibility a crime could be committed is sufficiently substantial as to be foreseeable to the accused.”⁵⁰⁷⁸ The correct legal standard for the JCE III *mens rea* requires that it was foreseeable to the accused that such a crime might be committed by a member of the JCE or one or more of the persons used by the accused (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose⁵⁰⁷⁹

⁵⁰⁷⁰ Lukić’s Response Brief, para. 18, referring to *Karadžić JCE III* Decision, para. 18. See also Appeal Hearing, 15 Mar 2013, AT. 647-648.

⁵⁰⁷¹ Lukić’s Response Brief, para. 19, citing *Blaškić* Appeal Judgement, para. 41, and submitting that the same standard was adopted for planning, citing *Kordić and Čerkez* Appeal Judgement, paras 29-32.

⁵⁰⁷² *Blaškić* Appeal Judgement, para. 41.

⁵⁰⁷³ Prosecution’s Reply Brief, para. 44.

⁵⁰⁷⁴ Prosecution’s Reply Brief, paras 45, 52, citing *Blaškić* Appeal Judgement, para. 33.

⁵⁰⁷⁵ Trial Judgement, vol. 1, para. 111, referring to *Brđanin* Decision, para. 5, *Martić* Appeal Judgement, para. 83.

⁵⁰⁷⁶ The Appeals Chamber notes that paragraph 5 of the *Brđanin* Decision reads: for an accused to be convicted of a crime under the third category of JCE, it is required to be “reasonably foreseeable to him” that the crime “*would* be committed” (emphasis added).

⁵⁰⁷⁷ *Karadžić JCE III* Decision, paras 15, 17-18, referring to *Vasiljević* Appeal Judgement, para. 101, *Brđanin* Appeal Judgement, paras 365, 411, *Stakić* Appeal Judgement, paras 65, 87, *Blaškić* Appeal Judgement, para. 33, *Martić* Appeal Judgement, para. 168, *Krnjelac* Appeal Judgement, para. 32, *Kvočka et al.* Appeal Judgement, para. 83, *Deronjić* Judgement on Sentencing Appeal, para. 44. The Appeals Chamber further notes that insofar as the Trial Chamber suggested that paragraph 83 of the *Martić* Appeal Judgement also supports its definition, it was mistaken as the formulation adopted in the *Martić* Appeal Judgement reflects the “possibility” standard: “it is actually necessary that the occurrence of such crime was foreseeable to the accused and that he willingly took the risk that this crime *might* be committed” (see *Martić* Appeal Judgement, para. 83, emphasis added).

⁵⁰⁷⁸ *Karadžić JCE III* Decision, para. 18.

⁵⁰⁷⁹ *Brđanin* Appeal Judgement, paras, 365, 411.

and the accused willingly took the risk that such a crime might occur by joining or continuing to participate in the enterprise.⁵⁰⁸⁰ The Appeals Chamber discerns no cogent reason to depart from its jurisprudence on this matter.

1558. Furthermore, the Appeals Chamber finds no merit in Šainović’s assertion that the Trial Chamber’s approach is “deeply compatible and consistent”,⁵⁰⁸¹ with the Appeals Chamber’s affirmation of the “possibility” standard. While it is necessary that the crime be foreseeable based on the “information available to the accused”,⁵⁰⁸² this does not reflect the degree of foreseeability required. It is the degree of foreseeability that marks the difference between the “possibility” and “probability” standards. Šainović’s argument is therefore dismissed. The Appeals Chamber further considers that awareness of a higher likelihood of risk and a volitional element are reflected in the *mens rea* for JCE III. The Appeals Chamber recalls in this respect that “criminal responsibility may be imposed upon an actor for a crime falling outside [the common purpose], even where he only knew that the perpetration of such a crime was merely a possible consequence, rather than substantially likely to occur, and nevertheless participated in the [JCE]” because the accused already possesses the intent to participate and further the common criminal purpose of a group.⁵⁰⁸³ Lukić’s argument is accordingly dismissed.

1559. Having found that the Trial Chamber erred in law in determining the degree of foreseeability required for the *mens rea* for JCE III, the Appeals Chamber will apply the correct legal standard to the evidence and determine whether it is itself convinced beyond reasonable doubt that persecution, through sexual assaults, committed in Beleg, Ćirez/Qirez, and Priština/Prishtina was foreseeable to Šainović and Lukić and that they willingly took the risk that the crimes could be committed. The Appeals Chamber will also consider whether the *mens rea* for JCE III is met with regard to Pavković for persecution, through sexual assaults committed in Priština/Prishtina.

⁵⁰⁸⁰ *Kvočka et al.* Appeal Judgement, para. 83, referring to *Tadić* Appeal Judgement, paras 204, 220, 228; *Vasiljević* Appeal Judgement, para. 99.

⁵⁰⁸¹ Šainović’s Response Brief, para. 56.

⁵⁰⁸² Trial Judgement, vol. 1, para. 111. See also *Brđanin* Appeal Judgement, para. 365, referring to *Tadić* Appeal Judgement, para. 220, *Kvočka et al.* Appeal Judgement, para. 86, *Blaškić* Appeal Judgement, para. 33, *Stakić* Appeal Judgement, paras 65, 99-103.

⁵⁰⁸³ *Blaškić* Appeal Judgement, para. 33.

3. Whether the *mens rea* for JCE III was met with respect to Šainović and Lukić for persecution through sexual assaults

(a) Submissions of the parties

(i) Prosecution's appeal

1560. The Prosecution submits that once the correct legal standard is applied, the Trial Chamber's findings and the trial record demonstrate beyond reasonable doubt that Šainović and Lukić had the requisite *mens rea* for JCE III liability in relation to persecution through the sexual assaults committed in Beleg, Ćirez/Qirez, and Priština/Prishtina.⁵⁰⁸⁴ The Prosecution claims that both Šainović, in his leading role during Joint Command meetings and with his *de facto* authority in directing actions of the VJ and MUP forces in 1998 and 1999, and Lukić, as Head of the MUP Staff with a central role in planning, organising, controlling, and directing the work of the MUP units in Kosovo as well as coordinating and planning joint operations with the VJ, "gained substantial knowledge forecasting the possibility of sexual assaults being committed during the ethnic cleansing campaign in 1999."⁵⁰⁸⁵ The Prosecution asserts that Šainović and Lukić were aware that violent crimes, including murder and other mistreatment of civilians, were committed by joint VJ and MUP forces during the mass displacement of Kosovo Albanians in 1998.⁵⁰⁸⁶ In this regard, it refers to the information exchanged during Joint Command meetings,⁵⁰⁸⁷ various reporting mechanisms⁵⁰⁸⁸ as well as the information conveyed to Šainović and Lukić by the international observers in the field and by members of the international community.⁵⁰⁸⁹ The Prosecution further submits that Šainović and Lukić knew of concerns about lack of proper training and the crimes committed by reservists, volunteers, and paramilitaries in 1998 and nevertheless used such individuals in the campaign to expel Kosovo Albanian civilians in 1999.⁵⁰⁹⁰

⁵⁰⁸⁴ Prosecution's Appeal Brief, para. 82.

⁵⁰⁸⁵ Prosecution's Appeal Brief, paras 68, 76, referring to Trial Judgement, vol. 3, paras 300, 309, 315, 317, 331, 337, 356-357, 359, 427, 441-453, 456, 462, 464-465, 470-473, 1012, 1024, 1031-1033, 1051, 1079-1086, 1090-1097, 1118, 1120, 1123-1127, 1134-1136. See also Prosecution's Reply Brief, para. 42.

⁵⁰⁸⁶ Prosecution's Appeal Brief, para. 69, referring, *inter alia*, to Trial Judgement, vol. 1, paras 882-886, 900-919, Exh. P1468, p. 37. The Prosecution submitted in its Appeal Brief that Šainović and Lukić were aware of sexual assaults committed prior to the commencement of the campaign of forcible displacement (See Prosecution's Appeal Brief, para. 75, Appendix 1). However, during the appeal hearing, the Prosecution withdrew this argument (See Appeal Hearing, 15 Mar 2013, AT. 575).

⁵⁰⁸⁷ Prosecution's Appeal Brief, para. 70, referring to Trial Judgement, vol. 3, paras 441-442, 463, 1079-1081, Exh. P1468, p. 37. See also Prosecution's Reply Brief, paras 49-50.

⁵⁰⁸⁸ Prosecution's Appeal Brief, para. 70, referring to Trial Judgement, vol. 3, paras 294, 302-305, 335, 372-379, 445, 464, 976-982, 995, 1036, 1052, 1058-1059. See also Prosecution's Reply Brief, para. 53.

⁵⁰⁸⁹ Prosecution's Appeal Brief, para. 72, referring to Trial Judgement, vol. 3, paras 385, 443, 445-447, 456, 463, 1043-1044, 1047, 1079, 1082-1086, 1120.

⁵⁰⁹⁰ Prosecution's Appeal Brief, para. 71, referring, *inter alia*, to Exh. P1468, pp. 20, 22-23, 26, 30, 40, 52, 101, 109, 111, 155, Trial Judgement, vol. 1, paras 645, 686-687, 731, 742-745, *ibid.*, vol. 3, paras 575, 997, 1122. See also Prosecution's Reply Brief, paras 51, 55.

1561. The Prosecution submits that knowledge that the same type of crime had previously been committed is not “an essential ingredient in proving foreseeability”. Rather it argues that foreseeability ought to be assessed in relation to the overall context in which the crimes were committed and the nature of the common criminal purpose of the JCE.⁵⁰⁹¹ It submits in this regard that there are three main factors that made it foreseeable to Šainović and Lukić that sexual assaults might be committed.⁵⁰⁹² First, it submits that the use of violence and terror in the execution of the common plan made sexual assaults foreseeable to Šainović and Lukić.⁵⁰⁹³ Secondly, the Prosecution submits that Šainović and Lukić knew of “the strong animosity between ethnic Serbs and Kosovo Albanians in Kosovo”.⁵⁰⁹⁴ Thirdly, it asserts that in the course of the “humanitarian catastrophe” and “refugee crisis” of which Šainović and Lukić were aware,⁵⁰⁹⁵ “[v]ulnerable Kosovo Albanians including women had inadequate protection making it foreseeable [...] that violent crimes might be perpetrated against them.”⁵⁰⁹⁶

1562. In addition, the Prosecution submits that it “is consistent with common sense and recent history in the former Yugoslavia, and confirmed by the pattern of sexual violence throughout the municipalities in Kosovo” that sexual assaults might be committed during the execution of the ethnic cleansing campaign in 1999, which was carried out on a vastly larger scale than in 1998.⁵⁰⁹⁷ It further submits that there is no legal requirement that a crime be committed in large numbers for it to be foreseeable pursuant to JCE III and that the focus should be on whether “the violations of physical integrity stemming from the sexual assaults fits in with the overall pattern of violations of

⁵⁰⁹¹ Appeal Hearing, 15 Mar 2013, AT. 577-580, referring to *Krštić* Trial Judgement, paras 616-617, *Krštić* Appeal Judgement, para. 149, *Kvočka et al.* Trial Judgement, para. 327, *Tolimir* Trial Judgement, paras 1136, 1140.

⁵⁰⁹² Appeal Hearing, 15 Mar 2013, AT. 581-586. The Prosecution submits that the jurisprudence of the Tribunal confirms the relevance of these factors to the assessment of the foreseeability of sexual violence or other violent crimes (Appeal Hearing, 15 Mar 2013, AT. 581, referring to *Krštić* Trial Judgement, para. 616, *Krštić* Appeal Judgement, para. 149, *Kvočka et al.* Trial Judgement, para. 327, *Popović et al.* Trial Judgement, para. 1088, *Tolimir* Trial Judgement, para. 1136).

⁵⁰⁹³ Appeal Hearing, 15 Mar 2013, AT. 581-585.

⁵⁰⁹⁴ Prosecution’s Appeal Brief, para. 69, citing Trial Judgement, vol. 3, paras 470, 1134.

⁵⁰⁹⁵ Prosecution’s Appeal Brief, para. 70, citing Trial Judgement, vol. 3, paras 442, 1079.

⁵⁰⁹⁶ Prosecution’s Appeal Brief, para. 70, referring to *Krštić* Appeal Judgement, para. 149, *Krštić* Trial Judgement, para. 616, *Kvočka et al.* Trial Judgement, para. 327. See also Prosecution’s Reply Brief, para. 55.

⁵⁰⁹⁷ Prosecution’s Appeal Brief, para. 74. See also *ibid.*, paras 73-74, referring to Trial Judgement, vol. 1, paras 184, 881, 886, 894, 912; *ibid.*, vol. 2, paras 60, 644, 1156-1178; *ibid.*, vol. 3, paras 473, 1136, p. 481 (Partially Dissenting Opinion of Judge Chowhan), Exh. 4D171, Exh. 5D726, Exh. 6D1260, p. 3, Exh. P385, pp. 4-6, Exh. P388, p. 1, Exh. 6D614, p. 39. See also Appeal Hearing, 15 Mar 2013, AT. 578-581.

physical integrity in the violent campaign.”⁵⁰⁹⁸ In addition, the Prosecution emphasises that sexual assaults are not qualitatively different than other violent acts.⁵⁰⁹⁹

1563. The Prosecution avers that despite their awareness that sexual assaults were a possible consequence of implementing the JCE, Šainović and Lukić willingly took the risk by participating in the JCE.⁵¹⁰⁰ According to the Prosecution, Šainović and Lukić knew that during joint operations in 1998, the VJ and MUP forces had committed violent crimes against Kosovo Albanian civilians; that they incorporated paramilitary groups and armed Serb civilians into the MUP and the VJ; and that the means they adopted to implement the JCE increased the vulnerability of Kosovo Albanian civilians to sexual violence, including by separating women from men and detaining them before their transportation from Kosovo.⁵¹⁰¹ The Prosecution submits that Šainović and Lukić personally witnessed the impact of the forcible displacements in Kosovo⁵¹⁰² and received regular reports on the recurrence of forcible displacement, murder, and rape.⁵¹⁰³ Finally, the Prosecution argues that they took no meaningful steps to prevent the commission of the crimes.⁵¹⁰⁴

(ii) Šainović’s response

1564. Šainović claims that he had no information at his disposal that made sexual assaults reasonably foreseeable to him⁵¹⁰⁵ and therefore, regardless of the Trial Chamber’s purported legal error, the conclusion that he bears no responsibility for persecution through sexual assaults is correct.⁵¹⁰⁶ According to Šainović, the Prosecution erroneously suggests that the commission of sexual assault is foreseeable whenever deportation and forcible transfer are committed pursuant to JCE I.⁵¹⁰⁷

⁵⁰⁹⁸ Appeal Hearing, 15 Mar 2013, AT. 588. See also *ibid.*, AT. 589, 662-664, referring to *Kunarac* Appeal Judgement, para. 96, *Blaškić* Appeal Judgement, para. 101. It submits that although the Trial Chamber found 11 incidents of sexual assault to have been proven, there is evidence of around 50 additional sexual assaults and the Trial Chamber referred to additional reports of sexual assaults committed during the 1999 campaign (Appeal Hearing, 15 Mar 2013, AT. 588, referring to Trial Judgement, vol. 2, paras 63, 629-636, 880, *ibid.*, vol. 3, paras 552, 572, 576, 578, 585, 726, 737, 749, 785, 1135, Exh. P2596. See also Appeal Hearing, 15 Mar 2013, AT. 663-664).

⁵⁰⁹⁹ Appeal Hearing, 15 Mar 2013, AT. 588-589, referring to *Kunarac* Appeal Judgement, paras 153, 155.

⁵¹⁰⁰ Prosecution’s Appeal Brief, para. 81.

⁵¹⁰¹ Prosecution’s Appeal Brief, para. 77, referring, *inter alia*, to Trial Judgement, vol. 2, paras 635, 855-864, 1156, 1158, 1161, 1164, 1166, 1170, 1184-1185.

⁵¹⁰² Prosecution’s Appeal Brief, para. 79, referring, *inter alia*, to Trial Judgement, vol. 1, para. 690, *ibid.*, vol. 3, paras 449, 961-962, 1000, 1053, Exh. P948, pp. 18-19, 84-86, Exh. P1989, p. 1.

⁵¹⁰³ Prosecution’s Appeal Brief, para. 78, referring to Trial Judgement, vol. 3, paras 445, 450-452, 464, 470-472, 1090-1094, 1097, 1123-1124, 1135, Exh. 6D1260, p. 3, Exh. 6D1261, p. 4, Exh. 6D874, pp. 1-2.

⁵¹⁰⁴ Appeal Hearing, 15 Mar 2013, AT. 589, referring to Trial Judgement, vol. 3, paras 458-477, 1114-1140.

⁵¹⁰⁵ Šainović’s Response Brief, paras 58-60, referring, *inter alia*, to *Kvočka et al.* Trial Judgement, para. 327. Šainović claims that unlike Pavković, for whom the Trial Chamber “had tangible evidence on knowledge about the occurrence of rapes or evidence that rape was foreseeable”, no such evidence exists in relation to Šainović (Šainović’s Response Brief, para. 60, referring to Trial Judgement, vol. 3, para. 785, Exh. P1448, Exh. P1459, Exh. P1938). See also *ibid.*, para. 61.

⁵¹⁰⁶ Šainović’s Response Brief, para. 62.

⁵¹⁰⁷ Appeal Hearing, 15 Mar 2013, AT. 615-616.

1565. Šainović emphasises the different position he had compared to Lukić⁵¹⁰⁸ and claims that nothing in the trial record relied upon by the Prosecution points to the possibility of sexual assaults being committed.⁵¹⁰⁹ He further submits that no mass displacement occurred in 1998 in the manner described by the Prosecution⁵¹¹⁰ and that Đaković's Notes on Joint Command meetings have "extremely limited" probative value,⁵¹¹¹ describing rape and murder only with reference to crimes committed by the KLA.⁵¹¹² Concerning the Prosecution's claim that he had various reporting mechanisms at his disposal, Šainović submits that such reporting refers to the period prior to the commencement of the NATO air campaign and contains no information about violent crimes.⁵¹¹³ As to his remark during the Joint Command meeting of 7 August 1998 concerning the burning of houses, Šainović contends that this indicates his unawareness of the commission of any other crimes, particularly of rape, given that rape is an "entirely different serious" crime.⁵¹¹⁴ Šainović maintains that the circumstances and his position in 1998 were fundamentally different from 1999 and that he should not be "judged based on analogy".⁵¹¹⁵

1566. Šainović also claims that none of the evidence relied upon by the Prosecution supports its assertion that he used individuals with known criminal propensity during operations in Kosovo in 1999.⁵¹¹⁶

1567. As to his awareness of the strong animosity between ethnic Serbs and Kosovo Albanians in Kosovo, Šainović submits that such animosity existed for many years before but it never gave rise to sexual assaults.⁵¹¹⁷ He contends that the Prosecution's argument that the occurrence of sexual assaults was consistent with common sense and the recent history in the former Yugoslavia is similarly inapposite.⁵¹¹⁸ Šainović further claims that "there is no specific evidence in [this] case [...]"

⁵¹⁰⁸ Šainović's Response Brief, paras 63-64, 106.

⁵¹⁰⁹ Šainović's Response Brief, paras 66, 71-73, 101, 112, referring to Trial Judgement, vol. 1, para. 886, *ibid.*, vol. 3, paras 441-453, 470-473, Exh. P1468, pp. 9, 46, 159.

⁵¹¹⁰ Šainović's Response Brief, paras 68-70, referring to Trial Judgement, vol. 1, paras 919-920.

⁵¹¹¹ Šainović's Response Brief, paras 74-76, 96, referring to Exh. P1468.

⁵¹¹² Šainović's Response Brief, paras 77-80, 85-86, referring to Exh. P1468, pp. 37-38.

⁵¹¹³ Šainović's Response Brief, paras 83-84, 99, referring, *inter alia*, to Trial Judgement, vol. 1, para. 919, *ibid.*, vol. 3, para. 442, Exh. P1468, pp. 36, 74.

⁵¹¹⁴ Šainović's Response Brief, para. 87, referring to Trial Judgement, vol. 3, para. 441, Exh. P1468, p. 46.

⁵¹¹⁵ Šainović's Response Brief, para. 100.

⁵¹¹⁶ Šainović's Response Brief, paras 92, 97, discussing, *inter alia*, Exh. P1468, pp. 22-30, 40, 52, 101. Šainović emphasises that Đaković's Notes refer to individuals other than reservists, and in several instances where reservists are mentioned, their identity, fatigues, and combat experience remain unclear. He adds that Đaković's Notes provide no support for the Prosecution's allegation that concerns about crimes committed by reservists were expressed during Joint Command meetings (Šainović Response Brief, paras 93-95).

⁵¹¹⁷ Šainović's Response Brief, paras 81-82, referring, *inter alia*, to Trial Judgement, vol. 1, paras 211-237, Exh. P2228, p. 14.

⁵¹¹⁸ Šainović's Response Brief, para. 98.

with respect to the condition of women, which would point to a particular danger, any different from the ‘usual’ danger which is, unfortunately, intrinsic to every armed conflict”.⁵¹¹⁹

1568. As to the Prosecution’s argument that he willingly took the risk that sexual assault was a possible consequence of implementing the JCE by, *inter alia*, incorporating paramilitary groups and armed Serb civilians into the MUP and the VJ, and separating women from men and detaining them before transportation out of Kosovo, Šainović claims that the Prosecution misrepresents his role in the events and the Trial Chamber’s relevant findings.⁵¹²⁰ Šainović further avers that his presence in Priština/Prishtina on 29 March and 4 April 1999 did not make sexual assaults foreseeable to him, because there is no evidence about what he saw while he was there.⁵¹²¹ He further submits that the “isolated and sporadic” nature of the sexual assaults in question supports this conclusion.⁵¹²²

1569. Šainović maintains that the Prosecution’s arguments should be dismissed as the Prosecution misconstrues the evidence and makes factual allegations constituting an “implausibly remote scenario”.⁵¹²³

(iii) Lukić’s response

1570. Lukić submits that even if the Trial Chamber applied an incorrect *mens rea* standard for JCE III, as alleged by the Prosecution, this legal error has no impact on his conviction as he did not have the requisite *mens rea* to be held responsible for persecution through sexual assaults.⁵¹²⁴ Lukić submits that the Prosecution advances a strict liability standard, pursuant to which any state official could be found culpable of sexual assaults committed by unknown individuals during a state of war.⁵¹²⁵

1571. Lukić claims that the rapes “were individual instances of crime” and were not connected with any “planning” or “order” given either by him or the Joint Command.⁵¹²⁶ He submits that the evidence cited by the Prosecution shows the commission of “separate isolated opportunistic acts” of sexual violence which did not occur during joint VJ and MUP actions and were investigated and

⁵¹¹⁹ Šainović’s Response Brief, para. 88. See also *ibid.*, paras 89-91.

⁵¹²⁰ Šainović’s Response Brief, paras 103-105.

⁵¹²¹ Šainović’s Response Brief, para. 107. See also Appeal Hearing, 15 Mar 2013, AT. 618-619.

⁵¹²² Šainović’s Response Brief, paras 108-110, referring to Trial Judgement, vol. 2, paras 68, 689, 1187-1188, 1224. See also Appeal Hearing, 15 Mar 2013, AT. 619-620.

⁵¹²³ Šainović’s Response Brief, paras 114-119, referring, *inter alia*, to *Karadžić JCE III Decision*, para. 18.

⁵¹²⁴ Lukić’s Response Brief, para. 10. Lukić also avers that given that the sentence imposed by the Trial Chamber was within the range sought by the Prosecution at trial, its request on appeal seeking increase in the sentence should be denied (*ibid.*, paras 13, 83).

⁵¹²⁵ Appeal Hearing, 15 Mar 2013, AT. 649.

⁵¹²⁶ Lukić’s Response Brief, para. 20.

punished by the relevant authorities.⁵¹²⁷ He further argues that he could not be held responsible as a superior for the sexual assaults, as he did not have effective control over the forces.⁵¹²⁸

1572. Lukić also submits that the evidence of his knowledge is insufficient to establish that sexual assaults were foreseeable to him.⁵¹²⁹ In particular, he avers that the Prosecution misrepresents the evidence in claiming that he was aware of crimes committed by the VJ and MUP forces against Kosovo Albanians in 1998.⁵¹³⁰ In addition, he argues that the evidence concerning incidents that occurred after the commencement of the NATO air campaign in 1999 could not have made sexual assaults foreseeable to him.⁵¹³¹ He claims that the evidence relied upon by the Prosecution shows that: (i) no members of the MUP were involved in the crimes and appropriate measures were taken against the perpetrators;⁵¹³² (ii) he was unaware of the commission of the crimes;⁵¹³³ (iii) the charges were withdrawn by military judicial organs or the victims were not of Kosovo Albanian ethnicity;⁵¹³⁴ and (iv) no sexual assault was committed.⁵¹³⁵ He further submits that the victims of rapes in Priština/Prishtina did not testify that “their rapes were reported or known to the Yugoslav authorities, let alone Lukić.”⁵¹³⁶

1573. Lukić further argues that volunteers and paramilitaries were not incorporated into the MUP⁵¹³⁷ and that he “made efforts to prevent and suppress any paramilitary engagement, and to take rigorous measures in case paramilitaries appeared.”⁵¹³⁸

⁵¹²⁷ Appeal Hearing, 15 Mar 2013, AT. 648. Lukić submits that his position is supported by the evidence proffered by the Prosecution to show that he was aware of the commission of sexual assaults in 1998 and 1999 in Appendix 1 to the Prosecution’s Appeal Brief (See Appeal Hearing, 15 Mar 2013, AT. 648).

⁵¹²⁸ Lukić’s Response Brief, paras 23-31.

⁵¹²⁹ See, in particular, Lukić’s Response Brief, para. 32.

⁵¹³⁰ Lukić’s Response Brief, paras 33, 38-40. Regarding his knowledge of crimes in 1998, Lukić argues, *inter alia*, that the information conveyed during Joint Command meetings was either unverified or lacking legal qualification by the prosecuting authorities (Lukić’s Response Brief, para. 33).

⁵¹³¹ Lukić’s Response Brief, para. 44.

⁵¹³² Lukić’s Response Brief, paras 44(a)-(b), (d), (g)-(h), (k)-(o), referring to Exh. P1938, p. 2, Exh. 4D171, Exh. 5D1148, Exh. 5D1149, Exh. 5D1396, paras 9-10, Exh. 5D1405, para. 23, Exh. P955, p. 16, Exh. P962, pp. 15-16, Exh. P987, p. 1, Exh. 6D1260, p. 3, Exh. P830, pp. 4, 6, Exh. 6D614, pp. 9, 19, 22-23, Exh. P1693, p. 7, Exh. P1086, p. 43, Exh. 3D38, Exh. 3D1110, Exh. 4D398, Exh. 5D1401, para. 77 (under seal), Exh. P955, p. 18, Exh. 6D1542, p. 67, Exh. 6D1556, pp. 14, 98, Exh. 6D1604, para. 39, Exh. 6D868, Exh. 4D00171, p. 7. See also Lukić’s Response Brief, para. 45.

⁵¹³³ Lukić’s Response Brief, para. 44(c), (h), (i), (j), referring to Exh. P1086, p. 43, Exh. 3D38, Exh. 3D1116, paras 354-355, Exh. 3D1140, Exh. 3D1135, Exh. 3D692, Exh. 6D1614, Milovan Vlajković, 20 Sep 2007, T. 16016-16121, Đorđe Čurčin, 5 Oct 2007, T. 16964-16965, 17020-17022, Dušan Mladenovski, 21 Apr 2008, T. 25761-25817, Miodrag Simić, 14 Sep 2007, T. 15673-15676, 15717, Momir Stojanović, 7 Dec 2007, T. 19815, Radojko Stefanović, 5 Feb 2008, T. 21715, Dragan Živaljević, 3 Apr 2008, T. 24837-24838.

⁵¹³⁴ Lukić’s Response Brief, paras 44(e), (k), referring to Exh. P830, pp. 4, 6, Exh. 3D1110, Exh. 4D398, Exh. 5D1401, para. 77 (under seal), Exh. P955, p. 18, Exh. P962, p. 16.

⁵¹³⁵ Lukić’s Response Brief, para. 44(f), referring to Exh. P2257, p. 4.

⁵¹³⁶ Lukić’s Response Brief, para. 22. He also submits that the admission into evidence of a Human Rights Watch press-release dated 28 April 1999 did not comply with the requirements of Rule 92 *bis* of the Rules (see Lukić’s Response Brief, paras 44(c), (p), referring to Exh. P388, Exh. P2228).

⁵¹³⁷ Specifically, Lukić claims that: (i) there were neither volunteers (see Lukić’s Response Brief, paras 48-51, discussing, *inter alia*, Exh. P1468, pp. 19-20, 22-23, 40, 52, 101, 111, 155) nor paramilitaries (see *ibid.*, paras 52-53) in

(iv) Prosecution's reply

1574. The Prosecution submits that the possibility that sexual assaults might take place was sufficiently substantial, rather than remote and implausible, and that on the basis of the information at their disposal, the crimes were foreseeable to Šainović and Lukić.⁵¹³⁹ According to the Prosecution, Lukić misstates the law⁵¹⁴⁰ and makes unsubstantiated submissions in challenging the Trial Chamber's findings relied upon by the Prosecution in its appeal.⁵¹⁴¹ Finally, the Prosecution submits that its approach "does not result in an overly broad or unfair approach to responsibility" because it is not "the general risk of sexual assaults happening during conflict",⁵¹⁴² but "the considerably heightened risk of it happening in the midst of a violent expulsion campaign to terrify a population into leaving."⁵¹⁴³

(b) Analysis

1575. The question of whether persecution, through sexual assaults, committed in Beleg, Ćirez/Qirez, and Priština/Prishtina were foreseeable to Šainović and Lukić must be assessed in relation to their individual knowledge. Depending on the information available, what may be foreseeable to one member of a JCE, might not be foreseeable to another.⁵¹⁴⁴ Consequently, the Appeals Chamber will consider whether it was foreseeable to them, individually, that sexual assaults could be committed and that they willingly took that risk. While the Appeals Chamber is cognisant that situations of widespread violence against the civilian population are conducive to the commission of a wide range of criminal acts, for JCE III liability to arise it must be established that the possibility of sexual violence being committed was sufficiently substantial as to be foreseeable to each accused.⁵¹⁴⁵

the MUP; (ii) the "Scorpions" were "proper and legitimate reservists within the SAJ" who did not commit any crimes the second time they were deployed to Kosovo and were not notorious in 1999 (see *ibid.*, paras 55, 57, 59); (iii) even if "Arkan's Tigers" were affiliated with the JSO, which he contests, he had no authority over them and no crimes involving sexual assaults were committed by them upon orders by the MUP Staff or the RJB (see *ibid.*, paras 67, 70-71. See also *ibid.*, paras 62-69); (iv) appropriate measures were taken in response to the only known crime committed by members of the JSO in Kosovo (see *ibid.*, paras 67, 70); and (v) no reliable evidence was presented at trial as to the presence of the "Grey Wolves" or the "Wolves of the Drina" in Kosovo (see *ibid.*, paras 72-79. See also *ibid.*, paras 80-82).

⁵¹³⁸ Lukić's Response Brief, para. 47, referring to Ljubinko Cvetić, 7 Dec 2006, T. 8063-8065, Exh. 6D269.

⁵¹³⁹ Prosecution's Reply Brief, para. 44.

⁵¹⁴⁰ Prosecution's Reply Brief, paras 45-46.

⁵¹⁴¹ Prosecution's Reply Brief, para. 52.

⁵¹⁴² Appeal Hearing, 15 Mar 2013, AT. 589.

⁵¹⁴³ Appeal Hearing, 15 Mar 2013, AT. 590.

⁵¹⁴⁴ *Brdanin* Appeal Judgement, para. 365, referring to *Tadić* Appeal Judgement, para. 220, *Kvočka et al.* Appeal Judgement, para. 86, *Blaškić* Appeal Judgement, para. 33, *Stakić* Appeal Judgement, paras 65, 99-103.

⁵¹⁴⁵ See *Karadžić JCE III* Decision, para. 18.

(i) Whether the *mens rea* for JCE III was met with respect to Šainović for persecution through sexual assaults

1576. The Trial Chamber found that the common purpose of the JCE was to be achieved by criminal means, namely “[t]hrough a widespread *and* systematic campaign of terror and violence, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo.”⁵¹⁴⁶ It further concluded that “Šainović had the intent to forcibly displace the Kosovo Albanian population, both within and without Kosovo, and thereby change the ethnic balance in the province to ensure continued control by the FRY and Serbian authorities over it.”⁵¹⁴⁷

1577. The Trial Chamber concluded that the evidence of Šainović’s role and involvement in Kosovo established that he had knowledge of crimes committed there in 1998 and 1999.⁵¹⁴⁸ In relation to 1998, the Trial Chamber found that Šainović was informed at the Joint Command meetings of 2 and 26 August 1998 of large numbers of refugees⁵¹⁴⁹ and that he was aware of UN Security Council Resolution 1199 of 23 September 1998, which stated that “the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army” had resulted in “the displacement of over 230,000 persons from their homes.”⁵¹⁵⁰ It also found that he was aware of the robbing and burning of houses by FRY and Serbian forces.⁵¹⁵¹ Furthermore, the Trial Chamber found that Šainović knew of the existing “humanitarian catastrophe”⁵¹⁵² and that on 4 December 1998, he was told of the harassment of Kosovo Albanian civilians in Mališevo/Malisheva by the police.⁵¹⁵³

1578. With regard to Šainović’s knowledge of criminal activity in 1999, the Trial Chamber considered Louise Arbour’s letter of 26 March 1999 sent to Šainović in which she expressed her concerns about serious breaches of international humanitarian law, including attacks against the civilian population, being committed.⁵¹⁵⁴ The Trial Chamber also found that Šainović’s comments at the 4 April 1999 meeting with senior police officials in Kosovo demonstrated his awareness of

⁵¹⁴⁶ Trial Judgement, vol. 3, para. 95 (emphasis in the original).

⁵¹⁴⁷ Trial Judgement, vol. 3, para. 466.

⁵¹⁴⁸ Trial Judgement, vol. 3, paras 456, 463-464.

⁵¹⁴⁹ Trial Judgement, vol. 3, paras 442, 463, referring to Exh. P1468, pp. 34, 36, 74, 124. See also *supra*, para. 1018.

⁵¹⁵⁰ Trial Judgement, vol. 3, para. 443, referring to Exh. P456, p. 1. See also *supra*, para. 1018.

⁵¹⁵¹ Trial Judgement, vol. 3, para. 441, referring to Exh. P1468, pp. 9, 46, 52, Trial Judgement, vol. 3, para. 444, referring to Exh. P605, pp. 653, 664-665, 673-674, 692, 695-702, 706-709.

⁵¹⁵² Trial Judgement, vol. 3, paras 442, 463, citing Exh. P1468, p. 124.

⁵¹⁵³ Trial Judgement, vol. 3, para. 447, referring to Karol John Drewienkiewicz, 4 Dec 2006, T. 7777-7782, Exh. P2508, paras 72-79. The Appeals Chamber considers that, contrary to Šainović’s submission, evidence on the events in 1998 and his position at that time is probative, as circumstantial evidence, among others, of the foreseeability that crimes, not specifically intended by the members of the JCE, might be committed during the execution of the common plan of the JCE. See also *supra*, sub-section VII.D.5.(b).

⁵¹⁵⁴ Trial Judgement, vol. 3, paras 343, 448, 464. See also *supra*, para. 1034.

crimes.⁵¹⁵⁵ It further found that at a meeting on 28 April 1999, Šainović was told by LDK leader Ibrahim Rugova and his secretary Adnan Merovci that the MUP forces were evicting Kosovo Albanians from their homes.⁵¹⁵⁶ It further considered that at the 7 May 1999 meeting in the MUP Staff Building, Šainović reported that Milošević and Milutinović had received reports during an earlier meeting on 4 May 1999 from Pavković and Lukić about criminal activity associated with MUP and VJ operations⁵¹⁵⁷ and: (i) commented on the need to separately regulate the conduct of the VJ reservists;⁵¹⁵⁸ (ii) warned that those officers whose conduct was poor should be prosecuted and punished;⁵¹⁵⁹ and (iii) indicated that the MUP was to ensure the security of citizens and property and arrest those who were caught stealing.⁵¹⁶⁰ He also stated that there should be no private wars and that private killings must be prevented.⁵¹⁶¹ The Trial Chamber found that he received further information about crimes being committed by the VJ, the MUP, and volunteers in Kosovo, such as murders and rapes of civilians, at the 17 May 1999 meeting involving Milošević and other high-ranking officials.⁵¹⁶² Finally, the Trial Chamber noted that most of Šainović's trips to Kosovo took place in late March and early April when the majority of the crimes were committed, including his trips to Priština/Pristina on 29 March and 4 April 1999, when massive expulsions were taking place there.⁵¹⁶³

1579. The Appeals Chamber notes that the Trial Chamber found that Šainović was made aware of sexual assaults for the first time during the 17 May 1999 meeting.⁵¹⁶⁴ While the Prosecution refers to numerous internal VJ reports and documents concerning cases processed by the military judicial organs, containing allegations of MUP and VJ members, including volunteers, having committed

⁵¹⁵⁵ Trial Judgement, vol. 3, paras 464, 471. The Trial Chamber found that Šainović “stated that persons detained for committing crimes should be held in custody until they were taken over by judicial organs” (see Trial Judgement, vol. 3 paras 341, 455, 464). However, the Appeals Chamber notes that while the commission of crimes were referred to by several participants in the meeting, the minutes of the meeting only explicitly mention looting (see Exh. P1989, p. 1, recording that the Chief of the SUP in Peć/Peja “[m]entioned the problem of VJ members seizing vehicles”). See also *supra*, para. 1076. See also *supra*, para. 1030.

⁵¹⁵⁶ Trial Judgement, vol. 3, paras 450, 464, referring to Exh. P2588, para. 72, Exh. P2613, p. 12, Adnan Merovci, 16 Jan 2007, T. 8469-8471. The Appeals Chamber considers that the Trial Chamber's reference to Exh. P2613 contains a clerical error as Rugova's statement “that Kosovo was being emptied of Albanians” is found on page 11 of the referred exhibit. See also *supra*, para. 1033.

⁵¹⁵⁷ Trial Judgement, vol. 3, paras 344-345, 455. The Appeals Chamber notes that the Trial Chamber also found that Šainović attended or “at the very least, was fully informed about the contents” of the 4 May 1999 meeting (Trial Judgement, vol. 3, paras 343-345). Although the Trial Chamber does not rely on this meeting as evidence of Šainović's knowledge of crimes, it found that at this meeting, information was presented that the “security forces” had dealt with numerous cases of violence, killings, pillage, and other crimes” (Trial Judgement, vol. 3, para. 345, referring to Exh. P1696). The Trial Chamber found that the statements Šainović “made at the meeting of the MUP Staff for Kosovo on 7 May, corroborate these accounts of the 4 May meeting” (Trial Judgement, vol. 3, para. 344).

⁵¹⁵⁸ Trial Judgement, vol. 3, paras 346, 455, 464, 471 referring to Exh. P1996, p. 4. See also *supra*, para. 1077.

⁵¹⁵⁹ Trial Judgement, vol. 3, paras 346, 464, referring to Exh. P1996, p. 4. See also *supra*, para. 1077.

⁵¹⁶⁰ Trial Judgement, vol. 3, para. 455, referring to Exh. P1996, p. 3. See also *supra*, para. 1077.

⁵¹⁶¹ Trial Judgement, vol. 3, para. 455, referring to Exh. P1996, p. 3. See also Trial Judgement, vol. 3, paras 140, 344, referring to Exh. P1996, p. 4. See also *supra*, para. 1077.

⁵¹⁶² Trial Judgement, vol. 3, paras 350-351, 470-472, referring to Exh. P2600, paras 65-68, Exh. P2589, T. 15999-16004, Exh. P2592. See also Exh. P605, pp. 869-870. also *supra*, para. 1032.

⁵¹⁶³ Trial Judgement, vol. 3, para. 449. also *supra*, para. 1036.

sexual assaults prior to or after that date,⁵¹⁶⁵ it has failed to establish that Šainović was privy to those communications. The Prosecution's general reliance on Šainović's role and knowledge of other crimes being committed is insufficient to show that he was aware of these particular allegations of sexual assault.⁵¹⁶⁶ Nor has the Prosecution shown that during his visits to Kosovo, Šainović witnessed the separation of women from men and their detention before their transportation from Kosovo, or any other form of mistreatment of Kosovo Albanian women.⁵¹⁶⁷ Moreover, while some of the evidence relied upon by the Prosecution provides support for its assertion that Šainović "knew of concerns about lack of proper training" it does not in itself support the Prosecution's assertion that he was aware of "the crimes committed by reservists, volunteers, and paramilitaries in 1998".⁵¹⁶⁸

1580. The Prosecution also refers to a report and a press-release published by Human Rights Watch in February 1999 and in late April 1999, respectively.⁵¹⁶⁹ With reference to two Kosovo Albanian girls who were murdered by FRY forces in Gornje Obrinje/Abria e Epërme at the end of September 1998, the report states that: "[a]llegations [...] that the two girls had been raped before being murdered could not be confirmed by Human Rights Watch."⁵¹⁷⁰ While the Trial Chamber found that the report was widely disseminated to the media and government organisations in the

⁵¹⁶⁴ Trial Judgement, vol. 3, para. 472.

⁵¹⁶⁵ Prosecution's Appeal Brief, Appendix 1, referring to Exh. P490, p. 1, Exh. P1938, p. 2, Exh. P830, pp. 4-6, Exh. P845, p. 2, Exh. P954, pp. 23, 42-43, 61, Exh. P955, pp. 16-18, Exh. P962, pp. 15-16, Exh. 3D589, p. 1, Exh. 3D1110, pp. 368-369, 387, 559, 561, Exh. 4D171, pp. 5-7, Exh. 4D513, p. 1, Exh. 5D726, pp. 5-6, Exh. 5D889, p. 1, Exh. 5D890, pp. 2-3, Exh. ; 5D1148, p. 1, Exh. 4D174, p. 2, Exh. P1086, p. 43, Exh. 3D38, pp. 1-2, Exh. 3D1116, p. 215, para. 355, Exh. 4D398, p. 1, Exh. 5D1351, pp. 1-2, Exh. P1459.

⁵¹⁶⁶ Similarly, the Prosecution fails to advance any argument showing that Šainović was aware of the allegations of rape contained in Exh. 5D1396, Exh. 5D1401, para. 77 (under seal), Exh. P2228, pp. 6-7, 24, Exh. P2248, Exh. P2253, Exh. P2257, p. 4, and Exh. P2258, p. 5. The Appeals Chamber further notes that the victims of the sexual assaults described in Exh. 5D1401, para. 80 were not of Kosovo Albanian ethnicity (see Exh. P830, p. 4) and that there is no information that the perpetrators of the sexual assaults described in Exh. 6D614, p. 39 and Exh. 6D1604, p. 10, para. 39 were affiliated with the MUP or VJ forces.

⁵¹⁶⁷ Prosecution's Appeal Brief, paras 74, 77, referring, *inter alia*, to Trial Judgement, vol. 2, paras 60, 635, 644, 855-864, 1156, 1158, 1161, 1164, 1166, 1170, 1178, 1184-1185.

⁵¹⁶⁸ Most of the Joint Command meetings referred to by the Prosecution do not mention concerns about lack of proper training or commission of crimes by reservists, volunteers or paramilitaries (see Prosecution's Appeal Brief, para. 71, referring to Exh. P1468, pp. 20, 22-23, 26, 30, 101, 109, 111). While at the Joint Command meetings of 3 August, 12 August, and 21 October 1998, the need for more intensive training was mentioned (see Exh. P1468, pp. 40, 52 referred to in Prosecution's Appeal Brief, para. 71), such information did not show that he knew of crimes or make the possibility that sexual violence could be committed by those forces sufficiently substantial to be foreseeable to Šainović. Similarly the Prosecution fails to show that Šainović was aware that volunteers with criminal backgrounds were incorporated into the VJ (Prosecution's Appeal Brief, para. 71, referring to Trial Judgement, vol. 1, para. 645) and that paramilitaries who had previously committed crimes were attached to the JSO (Prosecution's Appeal Brief, para. 71, referring to Trial Judgement, vol. 1, para. 687).

⁵¹⁶⁹ Prosecution's Appeal Brief, Appendix 1, referring to Exh. P441, p. 49, Exh. P388, p. 1, Exh. P2228, p. 22; Frederick Abrahams, 13 Jul 2006, T. 819-822. Concerning the date of issuance of the press-release, see Frederick Abrahams, 13 Jul 2006, T. 821-822. The Prosecution also seeks to rely on a report by the Institute of War & Peace Reporting, containing information on rapes committed in March, October, and November 1998 in various locations in Kosovo. The report is dated 18 June 1999 which is after the commission of the sexual assaults in Beleg, Ćirez/Qirez, and Priština/Prishtina and therefore, even if Šainović was aware of its content, it could not have made the crimes committed in these locations foreseeable to him (Prosecution's Appeal Brief, Appendix 1, referring to Exh. P385, pp. 5-6. See also Exh. P385, p. 1).

FRY and Serbia, and to Serbian and Albanian-language media in Kosovo,⁵¹⁷¹ the Appeals Chamber is not satisfied that Šainović was in fact aware of its contents.⁵¹⁷² In addition, due to the ambiguous nature of the rape allegations set forth in the report, the Appeals Chamber is not satisfied that it put Šainović on notice that sexual assaults might be committed. The press-release, issued by Human Rights Watch on 28 April 1999, reported that Serbian security forces sexually assaulted two Kosovo Albanian women on 21 April 1999 in Suva Reka/Suhareka.⁵¹⁷³ Frederick Abrahams, Human Rights Watch researcher,⁵¹⁷⁴ stated that such press-releases were produced on an almost daily basis and released to the public in the same manner as the report.⁵¹⁷⁵ While the allegations contained in the press-release are sufficiently clear, the Appeals Chamber is not convinced that the mere fact of their public announcement establishes that Šainović learned about the sexual assaults allegedly committed in Suva Reka/Suhareka.

1581. The Appeals Chamber recalls that it has upheld the Trial Chamber's conclusion that Šainović had the intent to forcibly displace the Kosovo Albanian population, both within and outside Kosovo, through a campaign of terror and violence.⁵¹⁷⁶ The evidence considered by the Trial Chamber shows that Šainović was aware of various criminal acts and acts of violence committed against the Kosovo Albanian population both in 1998 and 1999⁵¹⁷⁷ and therefore was aware of the context in which the forcible displacement took place, including the existing "humanitarian catastrophe".⁵¹⁷⁸ In particular, the evidence shows that, in 1998, Šainović was aware of allegations of excessive and disproportionate force used by police and military forces, the displacement of civilians, and property related crimes, such as looting and arson. It also shows that, in 1999, he was aware of crimes such as looting, harassment of civilians, unspecified violations of international humanitarian law, including allegations of attacks on the civilian population, and forcible displacement of the Kosovo Albanian civilian population. Moreover, at the 7 May 1999 MUP Staff meeting Šainović stated that there should be no private wars and that private killings must be prevented.⁵¹⁷⁹ In these circumstances, the Appeals Chamber, Judge Liu dissenting, finds that Šainović must have been aware that sexual assaults could be committed on discriminatory grounds in an environment of ethnic animosity in which hundreds of thousands of Kosovo Albanian

⁵¹⁷⁰ Exh. P441, p. 49, referred to in Prosecution's Appeal Brief, Appendix 1.

⁵¹⁷¹ Trial Judgement, vol. 1, para. 900; *ibid.*, vol. 3, para. 448, referring to Frederick Abrahams, 13 July 2006, T. 811-812, 818; *ibid.*, 7 August 2006, T. 984.

⁵¹⁷² See Trial Judgement, vol. 3, para. 448. See also *supra*, para. 1072.

⁵¹⁷³ Prosecution's Appeal Brief, Appendix 1, referring to Exh. P388, p. 1, Exh. P2228, p. 22, Frederick Abrahams, 13 Jul 2006, T. 819-822.

⁵¹⁷⁴ Trial Judgement, vol. 1, paras 218, 901.

⁵¹⁷⁵ Exh. P2228, p. 22; Frederick Abrahams, 13 Jul 2006, T. 819-822.

⁵¹⁷⁶ See *supra*, sub-section VII.D.3. See also Trial Judgement, vol. 3, paras 466, 473.

⁵¹⁷⁷ See *supra*, sub-sections VII.D.3.(c) and VII.D.3.(d).

⁵¹⁷⁸ Exh. P1468, p. 124.

⁵¹⁷⁹ Trial Judgement, vol. 3, para. 455, referring to Exh. P1996, p. 3. See also Trial Judgement, vol. 3, paras 140, 344, referring to Exh. P1996, p. 4.

civilians were being forcibly displaced. The inescapable conclusion is that in light of his awareness of the atmosphere of aggression and violence that prevailed, Šainović knew that the Kosovo Albanian women forced out of their homes were rendered particularly vulnerable. In addition, the evidence shows that at the 17 May 1999 meeting Šainović received specific information about the commission of rapes.⁵¹⁸⁰

1582. Considering the totality of the circumstances surrounding the forcible displacement of the Kosovo Albanian population and Šainović's knowledge thereof, the Appeals Chamber, Judge Liu dissenting, is convinced beyond reasonable doubt that persecution, through sexual assaults, committed in Beleg on or about 29 March 1999, in Ćirez/Qirez in mid-April 1999, and in Priština/Prishtina on 1 April and in late May 1999 was foreseeable to Šainović. Further, Šainović's participation in the JCE through his role in the coordination of joint VJ and MUP operations demonstrates that he acted in furtherance of the common purpose of the JCE while being aware of the possibility that sexual assaults could be committed, thus showing that he willingly took that risk.⁵¹⁸¹ As a result, pursuant to Articles 5(h) and 7(1) of the Statute, the Appeals Chamber, Judge Liu dissenting, finds Šainović responsible for committing, through his participation in a JCE, persecution, through sexual assaults, as a crime against humanity in Beleg, Ćirez/Qirez, and Priština/Prishtina.

(ii) Whether the *mens rea* for JCE III was met with respect to Lukić for persecution through sexual assaults

1583. At the outset, the Appeals Chamber considers that Lukić's arguments that he could not be held responsible as a commander for the commission of persecution, through sexual assaults, because he lacked effective control over the MUP forces and that he did not plan or order the crimes are inapposite.⁵¹⁸² Lukić's alleged responsibility for persecution, through sexual assaults, is connected to his participation in the JCE to forcibly displace the Kosovo Albanian population. The question is therefore whether the extended crimes, including sexual assaults, were foreseeable consequences of the implementation of the common purpose. Moreover, as to Lukić's argument that no members of the MUP committed sexual assault, the Appeals Chamber recalls that as a JCE member his liability extends to crimes committed by all FRY and Serbian forces.⁵¹⁸³ Likewise, whether the victims of the rapes committed in Priština/Prishtina reported the crimes to the FRY and

⁵¹⁸⁰ Trial Judgement, vol. 3, paras 351, 472, referring to Exh. P2600, paras 65-68, Exh. P2589, T. 15999-16004, Exh. P2592. See also Exh. P605, pp. 869-870.

⁵¹⁸¹ Trial Judgement, vol. 3, para. 467.

⁵¹⁸² See Lukić's Response Brief, paras 23-30.

⁵¹⁸³ See *supra*, sub-sections VII.F.7. and VII.F.8.(c).

Serbian authorities or to Lukić⁵¹⁸⁴ is irrelevant. For Lukić to incur JCE III liability it is not necessary to establish that he was aware that the sexual assaults were committed; it is sufficient that their occurrence was foreseeable to him.⁵¹⁸⁵

1584. The Trial Chamber found that the common purpose of the JCE was to be achieved by criminal means, namely “[t]hrough a widespread *and* systematic campaign of terror and violence, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo.”⁵¹⁸⁶ It further concluded that “Lukić had the intent to forcibly displace the Kosovo Albanian population, both within and without Kosovo, and thereby ensure continued control by the FRY and Serbian authorities over the province.”⁵¹⁸⁷

1585. In relation to Lukić’s intent, the Trial Chamber found that, as Head of the MUP Staff and *de facto* commander of the MUP forces deployed in Kosovo,⁵¹⁸⁸ Lukić was aware that there were serious allegations of criminal activity by MUP forces in Kosovo in mid to late 1998⁵¹⁸⁹ and continued to receive information about crimes being committed by the MUP and VJ members against Kosovo Albanian civilians during the NATO campaign in 1999.⁵¹⁹⁰

1586. In relation to the allegations of crimes committed in 1998, the Trial Chamber considered evidence that Lukić was told that the MUP and VJ forces used excessive force during joint operations⁵¹⁹¹ and that he was informed of numerous cases of arson,⁵¹⁹² “burning villages, destroying crops, killing farm animals, intimidating Kosovo Albanian civilians, and driving them from their homes.”⁵¹⁹³ The Trial Chamber also noted that Lukić became aware of allegations that widespread crimes committed by VJ and MUP forces in 1998 had led to the displacement of 230,000 Kosovo Albanians from Kosovo.⁵¹⁹⁴

1587. In relation to Lukić’s knowledge of crimes committed in 1999, the Trial Chamber found that, through various means of reporting, Lukić was regularly informed about events throughout Kosovo.⁵¹⁹⁵ It noted that, on 1 April 1999, Lukić issued an instruction to the heads of the Kosovo

⁵¹⁸⁴ See Lukić’s Response Brief, para. 22.

⁵¹⁸⁵ *Krstić* Appeal Judgement, para. 150.

⁵¹⁸⁶ Trial Judgement, vol. 3, para. 95 (emphasis in the original).

⁵¹⁸⁷ Trial Judgement, vol. 3, para. 1130.

⁵¹⁸⁸ Trial Judgement, vol. 3, para. 1051.

⁵¹⁸⁹ Trial Judgement, vol. 3, para. 1086. See also *ibid.*, para. 1120.

⁵¹⁹⁰ Trial Judgement, vol. 3, para. 1123. See also *ibid.*, para. 1097.

⁵¹⁹¹ Trial Judgement, vol. 3, paras 1043, 1084, referring to Exh. P2544. See also *supra*, sub-sections VII.F.5.(b)(i) and VII.F.5.(b)(ii).

⁵¹⁹² Trial Judgement, vol. 3, para. 1080, referring to Exh. P1468, pp. 46, 52, 96, 125. See also *supra*, sub-section VII.F.5.(b)(ii).

⁵¹⁹³ Trial Judgement, vol. 3, para. 1082, referring to Shaun Byrnes, 16 Apr 2007, T. 12149–12153. See also *supra*, sub-section VII.F.5.(b)(ii).

⁵¹⁹⁴ Trial Judgement, vol. 3, paras 1085, 1120, referring to Exh. P455, p. 1, Exh. P456, p. 1.

⁵¹⁹⁵ Trial Judgement, vol. 3, paras 1090, 1123.

SUPs to report to the MUP Staff on, *inter alia*, crimes, including rape, committed in their respective areas of responsibility⁵¹⁹⁶ and that, on 6 May 1999, a follow up instruction was issued requiring the heads of the Kosovo SUPs to report twice a month on the most serious crimes, such as murders, rapes, ill-treatment, and arson.⁵¹⁹⁷ On 4 May 1999, Lukić attended a meeting involving Milošević, Pavković, and other high-ranking officials where information was presented that the “security forces” had dealt with numerous cases of violence, killings, pillage, and other crimes⁵¹⁹⁸ and on 6 May 1999 he instructed the Heads of the Kosovo SUPs to prevent killings, rapes, and looting.⁵¹⁹⁹ The Trial Chamber also noted that at a MUP Staff meeting on 7 May 1999, Lukić commented that the reported number of murder investigations was unrealistically low.⁵²⁰⁰ Moreover, the Trial Chamber considered evidence showing that Lukić was aware of the large number of displaced Kosovo Albanian civilians in 1999.⁵²⁰¹

1588. In relation to Lukić’s knowledge of the commission of sexual assaults, the Prosecution refers to numerous internal VJ reports and documents concerning cases processed by the military judicial organs, containing allegations that MUP and VJ members, including volunteers, had committed sexual assaults.⁵²⁰² The Prosecution has failed to demonstrate, however, that Lukić was privy to those internal VJ communications. The Prosecution’s general reliance on Lukić’s role and the information on the commission of various crimes which he received through other channels is insufficient to show that Lukić was aware of the internal VJ communications containing allegations of sexual assaults. Nor has the Prosecution shown that while present in Kosovo, Lukić witnessed

⁵¹⁹⁶ Trial Judgement, vol. 3, para. 1093, referring to Exh. 6D808. The Appeals Chamber notes that although not mentioned in the Trial Judgement, Lukić requested information on crimes, including “murder, robbery, theft, looting, rape, etc.” (See Exh. 6D808, p. 2.)

⁵¹⁹⁷ Trial Judgement, vol. 3, para. 1093, referring to Exh. 6D874.

⁵¹⁹⁸ Trial Judgement, vol. 3, paras 1095, 1125, referring, *inter alia*, to Exh. P1696, p. 1. See also *supra*, sub-section VII.F.5.(c)(i)a.

⁵¹⁹⁹ Trial Judgement, vol. 3, paras 1095, 1134, referring to Exh. 5D1289 (also admitted as Exh. P2159). See also *supra*, para. 1535.

⁵²⁰⁰ Trial Judgement, vol. 3, para. 1126, referring to Exh. P1996, p. 10. See also *supra*, sub-section VII.F.5.(c)(i)b.

⁵²⁰¹ Trial Judgement, vol. 3, paras 1094, 1096, 1124, 1127, referring to Exh. 6D666, Exh. 6D778, Exh. 6D1232, Exh. 6D1236 (also admitted as Exh. P1099), Exh. 6D1238, Exh. 6D1239, Exh. 6D1240, Exh. 6D1241, Exh. 6D1242, Exh. 6D1244, Exh. 6D1254, Exh. 6D1255, Exh. 6D1256, Exh. 6D1257, Exh. 6D1259, Exh. 6D1260, Exh. 6D1261, Exh. 6D1634, Exh. P1693, Exh. P1993. See also *supra*, sub-section VII.F.5.(d).

⁵²⁰² Prosecution’s Appeal Brief, Appendix 1, referring to Exh. P490, p. 1, Exh. P1938, p. 2, Exh. P830, pp. 4-6, Exh. P845, p. 2, Exh. P954, pp. 42-43, 61, Exh. P955, pp. 16-18, Exh. P962, pp. 15-16, Exh. 3D589, p. 1, Exh. 3D1110, pp. 368-369, 387, 559, 561, Exh. 4D171, pp. 5-6, Exh. 4D513, p. 1, Exh. 5D726, pp. 5-6, Exh. 5D889, p. 1, Exh. 5D890, pp. 2-3, Exh. 5D1148, p. 1, Exh. P830, p. 6, Exh. P845, p. 2, Exh. P954, p. 23, Exh. P955, p. 18, Exh. 4D174, p. 2, Exh. P1086, p. 43, Exh. 3D38, pp. 1-2, Exh. 3D1116, p. 215, para. 355, Exh. 4D398, p. 1, Exh. 5D1351, pp. 1-2, Exh. 4D171, pp. 5, 7. The Prosecution also refers to Exh. P1459, a report sent by Pavković to the Supreme Command Staff on 25 May 1999, informing about the commission of serious crimes, including murder and rape, by MUP members against the Kosovo Albanian population. The report does not indicate, however, whether this information was conveyed to the MUP Staff or Lukić (Exh. P1459, paras 3-4). Similarly, the Prosecution fails to advance any argument showing that Lukić was aware of the allegations of rape contained in Exh. 5D1396, Exh. 5D1401, para. 77 (under seal); Exh. P2228, pp. 6-7, 24; Exh. P2248; Exh. P2253; Exh. P2257, p. 4; and Exh. P2258, p. 5. Regarding the Prosecution’s references to Exh. 5D1401, para. 80, Exh. 6D614, p. 39, Exh. 6D1604, p. 10, para. 39, the Appeals Chamber finds that they do not establish that Lukić was aware of sexual assaults for the reasons set forth *supra*, fn. 5166.

the separation of women from men and their detention before transportation out of Kosovo, or any other form of mistreatment of Kosovo Albanian women.⁵²⁰³ Moreover, while some of the evidence relied upon by the Prosecution provides support for its assertion that Lukić “knew of concerns about lack of proper training”, it does not support the Prosecution’s assertion that Lukić was aware of “the crimes committed by reservists, volunteers, and paramilitaries in 1998”.⁵²⁰⁴

1589. The Appeals Chamber notes, however, the Trial Chamber’s finding that on 1 May 1999, Lukić reported that “a MUP reservist had been detained for committing indecent assault against a Kosovo Albanian woman, indicating [Lukić’s] knowledge, by that time, that such crimes were being committed.”⁵²⁰⁵ The Prosecution further seeks to rely on a document listing a number of registered criminal offences committed in Kosovo and the measures taken in relation thereto in the period between July 1998 and June 1999.⁵²⁰⁶ The document records the rape of two Kosovo Albanian women by several VJ members on 16 April 1999 and states that the MUP Staff was informed about the incident.⁵²⁰⁷ The Prosecution also submits that on 24 April 1999, Lukić reported the rapes of two displaced women committed by unidentified perpetrators, one of them wearing a military uniform.⁵²⁰⁸ Contrary to Lukić’s submissions,⁵²⁰⁹ the evidence suggesting that measures had been taken to identify the alleged perpetrators does not undermine the conclusion that he was aware of the two incidents.

1590. The Prosecution also refers to the report and press-release published by Human Rights Watch in February 1999 and in late April 1999, respectively.⁵²¹⁰ The Appeals Chamber recalls its

⁵²⁰³ Prosecution’s Appeal Brief, paras 74, 77, referring, *inter alia*, to Trial Judgement, vol. 2, paras 60, 635, 644, 855-864, 1156, 1158, 1161, 1164, 1166, 1170, 1178, 1184-1185.

⁵²⁰⁴ Most of the Joint Command meetings referred to by the Prosecution do not mention concerns about lack of proper training or commission of crimes by reservists, volunteers or paramilitaries (see Prosecution’s Appeal Brief, para. 71, referring to Exh. P1468, pp. 20, 22-23, 26, 30, 101, 109, 111). While at the Joint Command meetings of 3 August, 12 August and 21 October 1998, the need for more intensive training was mentioned (see Exh. P1468, pp. 40, 52 referred to in Prosecution’s Appeal Brief, para. 71), such information did not show that he knew of crimes or make the possibility that sexual violence could be committed by those forces sufficiently substantial to be foreseeable to Lukić. Similarly the Prosecution fails to show that Lukić was aware that volunteers with criminal backgrounds were incorporated into the VJ (Prosecution’s Appeal Brief, para. 71, referring to Trial Judgement, vol. 1, para. 645) and that paramilitaries who had previously committed crimes were attached to the JSO (Prosecution’s Appeal Brief, para. 71, referring to Trial Judgement, vol. 1, para. 687. See also Trial Judgement, vol. 3, para. 1015, finding that Lukić had no authority over the RDB which comprised the JSO).

⁵²⁰⁵ Trial Judgement, vol. 3, para. 1135, referring to Exh. P1693, p. 7, Exh. 5D1289 (also admitted as Exh. P2159). See also Prosecution’s Appeal Brief, Appendix 1, referring to Exh. P1693, p. 7.

⁵²⁰⁶ Prosecution’s Appeal Brief, Appendix 1, referring to Exh. 6D614, p. 17, para. 11. See also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber’s Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, p. 22.

⁵²⁰⁷ Prosecution’s Appeal Brief, Appendix 1, referring to Exh. 6D614, p. 17, para. 11.

⁵²⁰⁸ Prosecution’s Appeal Brief, para. 78, fn. 187, referring, *inter alia*, to Exh. 6D1260, p. 3.

⁵²⁰⁹ See Lukić’s Response Brief, paras 44(b), (d).

⁵²¹⁰ Prosecution’s Appeal Brief, Appendix 1, referring to Exh. P441, p. 49, Exh. P388, p. 1, Exh. P2228, p. 22, Frederick Abrahams, 13 Jul 2006, T. 819-822. Concerning the date of issuance of the press-release, see Frederick Abrahams, 13 Jul 2006, T. 821-822. The Prosecution also seeks to rely on a report by the Institute of War & Peace Reporting, containing information on rapes committed in March, October, and November 1998 in various locations in

findings that the evidence does not establish that Lukić was made aware of the February 1999 report⁵²¹¹ and that the rape allegations contained in it are obscure.⁵²¹² Regarding the 28 April 1999 press-release,⁵²¹³ the Appeals Chamber recalls that Frederick Abrahams stated that such press-releases were produced on a nearly daily basis and were widely disseminated to the media and government organisations, in the FRY and Serbia, and to Serbian and Albanian-language media in Kosovo.⁵²¹⁴ While the allegations contained in the press-release are sufficiently clear, the Appeals Chamber is not convinced that the mere fact of their public announcement establishes that Lukić learned about the sexual assaults allegedly committed in Suva Reka/Suhareka.

1591. The Appeals Chamber recalls that it has upheld the Trial Chamber's conclusion that Lukić had the intent to forcibly displace the Kosovo Albanian population, both within and outside Kosovo, through a campaign of terror and violence.⁵²¹⁵ The evidence considered by the Trial Chamber shows that Lukić was aware of various allegations of criminal acts and acts of violence committed against the Kosovo Albanian population in 1998⁵²¹⁶ and 1999,⁵²¹⁷ and therefore was aware of the context in which the forcible displacement took place, including the existing "humanitarian catastrophe".⁵²¹⁸ Lukić must have known that the commission of sexual assaults with the intent to discriminate was possible in an environment of ethnic animosity where hundreds of thousands of Kosovo Albanian civilians were being forcibly displaced. The inescapable conclusion is that in such circumstances, where aggression and violence prevailed, the Kosovo Albanian women removed from their homes were rendered particularly vulnerable. In addition, the evidence shows that on 1 April and 6 May 1999, Lukić requested that the Heads of the Kosovo SUPs regularly submit detailed reports on the serious crimes, including rape, committed in their respective areas of responsibility.⁵²¹⁹ He was also informed of the rape of two Kosovo Albanian women by several VJ members on 16 April 1999,⁵²²⁰ and on 24 April 1999 he reported the rapes of

Kosovo. The report is dated 18 June 1999 which is after the commission of the sexual assaults in Beleg, Ćirez/Qirez, and Priština/Prishtina and therefore, even if Lukić was aware of its content, it could not have made the crimes committed in these locations foreseeable to him (Prosecution's Appeal Brief, Appendix 1, referring to Exh. P385, pp. 5-6. See also P385, p. 1).

⁵²¹¹ See *supra*, fn. 5010.

⁵²¹² See *supra*, para. 1580.

⁵²¹³ The Appeals Chamber finds that Lukić's submission that reliance on the 28 April 1999 press-release violates Rule 92 *bis* of the Rules is unsubstantiated (see Lukić's Response Brief, para. 44(c)).

⁵²¹⁴ Exh. P2228, p. 22; Frederick Abrahams, 13 Jul 2006, T. 819-822. See also Trial Judgement, vol. 1, para. 900; *ibid.*, vol. 3, para. 448, referring to Frederick Abrahams, 13 July 2006, T. 811-812, 818, *ibid.*, 7 August 2006, T. 984.

⁵²¹⁵ See *supra*, sub-section VII.F.5. See also Trial Judgement, vol. 3, para. 1130.

⁵²¹⁶ See *supra*, sub-section VII.F.5.(b). In this regard, the Appeals Chamber finds that it suffices that Lukić was informed during Joint Command meetings in 1998 of allegations that serious crimes were being committed during the joint VJ and MUP operations in Kosovo. Lukić's submission that they were unverified does not undermine the Trial Chamber's conclusion that he was aware of serious allegations of criminal activity. See Trial Judgement, vol. 3, para. 1080, referring to Exh. P1468, pp. 46, 52, 96, 125; *ibid.*, vol. 3, para. 1081.

⁵²¹⁷ See *supra*, sub-section VII.F.5.(c).

⁵²¹⁸ Exh. P1468, p. 124.

⁵²¹⁹ Exh. 6D808, Exh. 6D874.

⁵²²⁰ Exh. 6D614, p. 17, para. 11.

two displaced women committed by unidentified perpetrators, one of them wearing a military uniform.⁵²²¹ Finally, on 1 May 1999, Lukić reported that a MUP reservist had been detained for committing indecent assault against a Kosovo Albanian woman.⁵²²²

1592. Considering the totality of the circumstances surrounding the forcible displacement of the Kosovo Albanian population and Lukić's knowledge thereof, the Appeals Chamber is convinced beyond reasonable doubt that persecution, through sexual assaults, committed in Beleg in late March 1999, in Ćirez/Qirez in mid-April 1999, and in Priština/Prishtina in early April and in late May 1999 was foreseeable to Lukić. In addition, Lukić's participation in the JCE through his role as Head of the MUP Staff in Priština/Prishtina, demonstrates that Lukić acted in furtherance of the common plan of the JCE while being aware of the possibility that sexual assaults could be committed,⁵²²³ thus establishing that he willingly took that risk. As a result, pursuant to Articles 5(h) and 7(1) of the Statute, the Appeals Chamber finds Lukić responsible for committing, through his participation in a JCE, persecution, through sexual assaults, as a crime against humanity in Beleg, Ćirez/Qirez, and Priština/Prishtina.

4. Whether the *mens rea* for JCE III was met with respect to Pavković for persecution through sexual assaults committed in Priština/Prishtina

(a) Submissions of the parties

1593. The Prosecution submits that, if the Appeals Chamber were to grant its argument that the sexual assaults of K62, K14, and K31 committed in Priština/Prishtina constituted persecution, Pavković should be held responsible pursuant to JCE III liability for these sexual assaults.⁵²²⁴ It submits that this is because the Trial Chamber found him responsible pursuant to JCE III liability for persecution through sexual assaults committed in Beleg and Ćirez/Qirez during the course of the campaign of forcible displacement.⁵²²⁵ It contends that, in finding that these sexual assaults were foreseeable to Pavković, the Trial Chamber applied a higher standard than that required, and considered: (i) his awareness of the propensity of the VJ and the MUP for violence; (ii) the aim of the JCE to displace people using a campaign of terror and violence; and (iii) specific evidence of

⁵²²¹ Exh. 6D1260, p. 3.

⁵²²² Exh. P1693, p. 7; Exh. 5D1289 (also admitted as Exh. P2159).

⁵²²³ See for example Trial Judgement, vol. 3, paras 1052-1057, 1059 (Lukić's role in reporting to the MUP in Belgrade); *ibid.*, vol. 3, para. 1000 (Lukić's involvement at the meeting on 4 April 1999); *ibid.*, vol. 3, paras 1038, 1095 (Lukić's involvement in the meeting in Belgrade on 4 May 1999); *ibid.*, vol. 3, paras 1006-1009, 1066, 1096, 1126-1127; Exh. 6D082, para. 19 (Lukić's involvement in the MUP Staff meetings of 7 and 11 May 1999); Trial Judgement, vol. 3, para. 1040 (Lukić's presence at the Joint Command meeting on 1 June 1999).

⁵²²⁴ Prosecution's Appeal Brief, para. 104. See also Appeal Hearing, 12 Mar 2013, AT. 357. See also *supra*, sub-section VI.D.. The Prosecution also argues that the Appeals Chamber should increase his sentence (Prosecution's Appeal Brief, para. 104).

⁵²²⁵ Appeal Hearing, 12 Mar 2013, AT. 357.

Pavković's awareness of sexual assaults.⁵²²⁶ The Prosecution further submits that since the Trial Chamber found a link between the principal perpetrators of the crimes and at least one JCE member for all indicted crimes that were proven, Pavković is linked to the perpetrators of the sexual assaults in Priština/Prishtina, who the Trial Chamber found were either VJ or MUP personnel.⁵²²⁷

1594. Pavković submits that he should not be held responsible pursuant to JCE III liability for the sexual assaults of K62, K14, and K31 in Priština/Prishtina.⁵²²⁸ He argues that no link has been established between him or any other JCE member and the perpetrators of these crimes.⁵²²⁹ He also underlines that he could not foresee the commission of crimes by individuals who were not members of units under his command.⁵²³⁰ He submits that rather the evidence: (i) shows that paramilitaries committed the sexual assault on K31;⁵²³¹ (ii) is insufficient to identify the perpetrators who assaulted K62; and (iii) shows that a policeman committed the sexual assault against K14.⁵²³²

(b) Analysis

1595. Regarding the parties' arguments pertaining to the link between Pavković and the principal perpetrators of the sexual assaults in Priština/Prishtina, the Appeals Chamber recalls that the Trial Chamber found "that three women were raped in the course of the operation to remove large numbers of Kosovo Albanians from Priština/Prishtina town – K62 by three VJ or MUP personnel, K14 by a policeman, and K31 by three VJ soldiers."⁵²³³ While the identity of the perpetrators of the sexual assaults against K62 and K31 is disputed by Pavković, the Appeals Chamber recalls its finding that the evidence in this respect sufficiently establishes the affiliation of these perpetrators as found by the Trial Chamber.⁵²³⁴ The Appeals Chamber further recalls that it has upheld the Trial Chamber's finding that a link was established between members of the JCE, including Šainović, Pavković, and Lukić, and the members of the VJ and MUP forces whom they used to carry out crimes charged in the Indictment, including persecution through sexual assault, and therefore that the crimes of both the VJ and the MUP were imputable to Pavković.⁵²³⁵ Given that the sexual

⁵²²⁶ Appeal Hearing, 12 Mar 2013, AT. 357, referring to Trial Judgement, vol. 3, paras 785-786. The Prosecution relies on a handout it provided during the appeals hearing, setting forth Trial Judgement references to Pavković's awareness of crimes committed by the VJ and the MUP in Kosovo in 1998 and 1999.

⁵²²⁷ Appeal Hearing, 12 Mar 2013, AT. 358, referring to Trial Judgement, vol. 2, para. 889, *ibid.*, vol. 3, paras 468, 783, 1132.

⁵²²⁸ Appeal Hearing, 12 Mar 2013, AT. 307.

⁵²²⁹ Appeal Hearing, 12 Mar 2013, AT. 307, 309.

⁵²³⁰ Appeal Hearing, 12 Mar 2013, AT. 307.

⁵²³¹ Appeal Hearing, 12 Mar 2013, AT. 307-308.

⁵²³² Appeal Hearing, 12 Mar 2013, AT. 308-309.

⁵²³³ Trial Judgement, vol. 2, para. 889.

⁵²³⁴ See *supra*, fns 1926 and 1968.

⁵²³⁵ Trial Judgement, vol. 3, paras 783, 785-786. See also *supra*, sub-sections VII.E.3. and VII.E.4.

assaults in Priština/Prishtina were committed by VJ and/or MUP forces, the Appeals Chamber finds that these crimes are also attributable to Pavković, as a JCE member.

1596. Turning to the question of whether the sexual assaults in Priština/Prishtina were foreseeable to Pavković, the Appeals Chamber recalls that, unlike Šainović and Lukić, the Trial Chamber convicted Pavković of persecution through sexual assaults committed in Beleg on or around 29 March 1999 and Ćirez/Qirez in mid-April 1999 pursuant to JCE III liability.⁵²³⁶ In holding him responsible for these sexual assaults, the Trial Chamber found that “it was reasonably foreseeable to [him] that VJ and MUP forces would commit [...] sexual assault against Kosovo Albanians during their forcible displacement” with intent to discriminate against them.⁵²³⁷ In this regard, the Trial Chamber considered: (i) the common purpose of the JCE, which was to forcibly displace Kosovo Albanians “[t]hrough a widespread *and* systematic campaign of terror and violence”;⁵²³⁸ (ii) Pavković’s intent to forcibly displace part of the Kosovo Albanian population;⁵²³⁹ (iii) his awareness of “the strong animosity between ethnic Serbs and Kosovo Albanians in Kosovo during 1998 and 1999”; and (iv) his awareness of “the context in which the forcible displacement took place”.⁵²⁴⁰ It also found that his “detailed knowledge of events on the ground in Kosovo in 1998 and 1999 put him on notice that murders and sexual crimes would by [*sic*] committed by the VJ and MUP as a result of the displacements taking place in 1999.”⁵²⁴¹

1597. The Trial Chamber found that specific evidence supported this conclusion, namely: (i) the incident at Gornje Obrinje/Abri e Epërme in October 1998;⁵²⁴² (ii) a 4 April 1999 order issued by Pavković to the Niš Corps to prevent the population from being robbed, raped, or mistreated;⁵²⁴³ (iii) a 6 April 1999 order issued by Pavković to the Priština Corps and the Niš Corps to improve discipline and prevent misconduct, including looting and murder;⁵²⁴⁴ (iv) the 10 April 1999 report from Pavković which indicated that volunteers who were either convicted or awaiting sentence were deployed in Kosovo and that seven volunteers had been detained for *inter alia* killing and

⁵²³⁶ Trial Judgement, vol. 2, paras 68, 689-690, 1187-1188, 1224; *ibid.*, vol. 3, paras 785, 788. The Appeals Chamber upheld this conviction elsewhere in this Judgement (see *supra*, sub-section VII.E.4.).

⁵²³⁷ Trial Judgement, vol. 3, para. 785.

⁵²³⁸ Trial Judgement, vol. 3, para. 95 (emphasis in the original). See also *ibid.*, vol. 3, para. 785

⁵²³⁹ Trial Judgement, vol. 3, paras 781, 785.

⁵²⁴⁰ Trial Judgement, vol. 3, para. 785.

⁵²⁴¹ Trial Judgement, vol. 3, para. 785.

⁵²⁴² Trial Judgement, vol. 3, para. 785. The Trial Chamber found that Pavković was informed of violent crimes committed during the joint VJ and MUP operations in Gornje Obrinje/Abri e Epërme and of allegations that the VJ and the MUP were responsible. In particular, the Trial Chamber found that Pavković acknowledged in a report that he had received unconfirmed information that MUP forces had executed individuals taken into custody during this incident. (See Trial Judgement, vol. 3, paras 675, 774, referring to Exh. P441, pp. 16-48, Exh. P1011, pp. 70-72, Exh. P1440, p. 4, Frederick Abrahams, 13 Jul 2006, T. 806-811). See also *supra*, sub-section VII.E.2.(e)(ii).

⁵²⁴³ Trial Judgement, vol. 3, para. 785, referring to Exh. P1448, p. 2.

⁵²⁴⁴ Trial Judgement, vol. 3, para. 785, referring *inter alia*, to Exh. 4D224, p. 3.

rape,⁵²⁴⁵ and (v) the report of 25 May 1999 sent by Pavković to the Supreme Command Staff referring to murder and rape committed by MUP forces against the Kosovo Albanian population.⁵²⁴⁶

1598. The Appeals Chamber also considers the additional findings made by the Trial Chamber on Pavković's awareness of crimes. The Trial Chamber found that Pavković was aware that crimes were committed by the VJ and MUP forces in 1998 and throughout the NATO air campaign in 1999.⁵²⁴⁷ In relation to Pavković's knowledge in 1998, the Trial Chamber found that, in addition to the incident at Gornje Obrinje/Abri e Epërme in October 1998,⁵²⁴⁸ Pavković: (i) was aware of large numbers of displaced civilians in Kosovo and UN Security Council Resolutions attributing responsibility, in part, to the MUP and VJ's excessive and indiscriminate use of force;⁵²⁴⁹ (ii) was aware that arson was committed by FRY and Serbian forces, including members of VJ units and local Serbs;⁵²⁵⁰ and (iii) issued an order in May 1998, stating that prisoners of war were mistreated near Brestovac.⁵²⁵¹ The Trial Chamber also referred to evidence which indicates that Pavković knew that members of the VJ committed theft, and excessively destroyed property and fired into inhabited areas during VJ operations.⁵²⁵²

1599. Regarding Pavković's knowledge in 1999, the Trial Chamber found that on 27 March 1999, Pavković warned the Priština Corps and the Military Territorial Commands about the risk of the lack of discipline among Military Territorial Units, especially concerning Kosovo Albanian civilians and their property, and noted that the lack of discipline and misconduct had increased in the previous days.⁵²⁵³ The Trial Chamber also noted evidence showing that Pavković learned of looting and property related offences committed by VJ and MUP forces throughout the NATO air

⁵²⁴⁵ Trial Judgement, vol. 3, para. 785, referring to Exh. P1938, p. 2. See also Trial Judgement, vol. 3, para. 748.

⁵²⁴⁶ Trial Judgement, vol. 3, para. 785, referring to Exh. P1459, paras 3-4. The Trial Chamber noted that, in this report, Pavković advised the Supreme Command Staff, *inter alia*, that the security situation in Kosovo was unstable due to crimes against civilians frequently being committed by the MUP, including "murder, rape, plunder, aggravated theft, etc" in Kosovo Albanian settlements and refugee shelters and that MUP personnel committing these crimes would then attribute or plan to attribute those crimes to the VJ (see Trial Judgement, vol. 3, para. 741, referring to Exh. P1459, paras 4, 6-7, Exh. 3D1078, Exh. 3D1077).

⁵²⁴⁷ Trial Judgement, vol. 3, paras 774-775.

⁵²⁴⁸ Trial Judgement, vol. 3, paras 675, 774, 785. See *supra*, para. 1597; sub-section VII.E.2.(e)(ii).

⁵²⁴⁹ Trial Judgement, vol. 3, paras 677, 718, referring to Exh. P1468, pp. 36, 40-41, 121, 161, Exh. P455, Exh. P456. See also Trial Judgement, vol. 3, paras 672, 754, 774. Regarding Pavković's awareness of the UN Security Council resolutions, see *supra*, fn. 3917. See further Trial Judgement, vol. 3, para. 673, referring to Exh. 4D150.

⁵²⁵⁰ Trial Judgement, vol. 3, paras 672, 718, 774, referring to Exh. P1468, pp. 46, 52, 124-125, Exh. 4D97, Exh. P949, p. 358.

⁵²⁵¹ Trial Judgement, vol. 3, para. 673, referring to Exh. 4D428, p. 1, which states that this mistreatment occurred on 23 May 1998.

⁵²⁵² Trial Judgement, vol. 3, para. 673, referring to Exh. 4D201 (also admitted as Exh. P1422), Exh. 4D375, Exh. 4D231 (also admitted as Exh. 5D1172), Exh. P1011, p. 47, Exh. P2098.

⁵²⁵³ Trial Judgement, vol. 3, paras 719, 775, referring to Exh. 4D154. Similarly, the Trial Chamber found that on 5 May 1999, Pavković noted that "armed VJ members operating outside combat zones had been conducting themselves 'inappropriately' and compromising the reputation of the VJ" and ordered "subordinate commands to ensure that the

campaign.⁵²⁵⁴ In addition, the Trial Chamber found that he knew that Kosovo Albanian civilians were being displaced during the NATO air campaign.⁵²⁵⁵ Moreover, the Trial Chamber found that the contention that Pavković knew that MUP and VJ forces were committing criminal offences in Kosovo, was supported by the fact that he was regularly in Priština/Prishtina throughout the conflict combined “with the widespread practice of displacing Kosovo Albanians” in Kosovo, including Priština/Prishtina.⁵²⁵⁶ In addition, the Trial Chamber considered evidence showing that Pavković learned of violent crimes, including murder.⁵²⁵⁷

1600. Specifically regarding sexual assaults, in addition to considering Pavković’s 4 April 1999 order and his 10 April and 25 May 1999 reports as recounted above,⁵²⁵⁸ the Trial Chamber

activities of VJ members outside of combat zones were monitored” (Trial Judgement, vol. 3, para. 735, referring to Exh. P1672).

⁵²⁵⁴ Trial Judgement, vol. 3, paras 719, 721, 726-729, 742, 747, 750. In particular, the Trial Chamber referred to: (i) the 3rd Army combat reports of 30 and 31 March 1999 (Trial Judgement, vol. 3, para. 750, referring to Exh. 4D307, p. 3, Exh. 4D273, p. 2. See also Trial Judgement, vol. 3, para. 729, referring to Exh. 4D273, p. 2, Exh. P1736); (ii) a 3rd Army combat report of 2 April 1999 (Trial Judgement, vol. 3, para. 747, referring to Exh. 4D278, p. 2; Exh. 4D278, p. 3); (iii) the combat reports from the 3rd Army to the General Staff/Supreme Command Staff of 1 and 2 April 1999 (Exh. 4D274, p. 2, Exh. 4D275, p. 3, referred to in Trial Judgement, vol. 3, para. 729; Exh. 4D274, p. 3. See also *supra*, fn. 3968); (iv) a 3rd Army combat report of 4 April 1999 (Trial Judgement, vol. 3, para. 729, referring to Exh. 3D1128, p. 2); (v) a 3rd Army combat report of 5 April 1999 (Trial Judgement, vol. 3, para. 719, fn. 1782, citing Exh. 4D409, p. 3 (while erroneously referring to Exh. 4D407)); (vi) the 14 April 1999 report from the Priština Corps to the 3rd Army and the Supreme Command Staff (Trial Judgement, vol. 3, para. 728, fn. 1822, referring to Exh. 4D172, p. 3); (vii) Pavković’s order of 15 April 1999 (Trial Judgement, vol. 3, para. 721, fn. 1790, referring to Exh. 4D191, p. 1); (viii) Pavković’s warning issued on 17 April 1999 (Trial Judgement, vol. 3, para. 726, referring to Exh. P1454, p. 1); (ix) Pavković’s order of 19 April 1999 (Trial Judgement, vol. 3, para. 727, referring to Exh. P1766 (also admitted as 4D350), Exh. 5D1101); (x) a 3rd Army combat report of 24 April 1999 (Trial Judgement, vol. 3, para. 750, referring to Exh. 4D281, p. 2); and (xi) Pavković’s telegram to the Supreme Command Staff of 4 June 1999, in which he outlined problems noted during visits to some of the units between 23 and 26 May 1999 (Trial Judgement, vol. 3, para. 742, citing Exh. P1725, para. 1).

⁵²⁵⁵ Trial Judgement, vol. 3, para. 736. See also *ibid.*, vol. 3, paras 719-720. In particular, the Trial Chamber noted: (i) Pavković’s phone call in early April 1999 (Trial Judgement, vol. 3, para. 720, referring to Branko Krga, 4 Oct 2007, T. 16916-16917); (ii) Pavković’s interview with the Prosecution (Trial Judgement, vol. 3, para. 727, referring to Exh. P949, pp 1, 77-78. See also Trial Judgement, vol. 3, para. 736, referring to Exh. P949, pp. 171-172, 220, 353-355); (iii) Pavković’s order of 19 April 1999 (Trial Judgement, vol. 3, para. 727, referring to Exh. P1766 (also admitted as Exh. 4D350)); (iv) Pavković’s directions of 7 May 1999 (Trial Judgement, vol. 3, para. 736, referring to Exh. 4D198); and (v) the 3rd Army report of 10 May 1999 (Trial Judgement, vol. 3, para. 736, referring to Exh. 4D315, p. 1). See also Trial Judgement, vol. 3, para. 721, referring to Exh. P1721; Momir Pantić, 2 Apr 2008, T. 24760-24765, 24779-24795; *ibid.*, 3 Apr 2008, T. 24805-24806. The Appeals Chamber does not rely on Exh. P2930 for the reasons provided *supra*, fn. 3968. The Trial Chamber further noted that Paković acknowledged in his interview with the Prosecution that identity documents were taken from displaced Kosovo Albanians by MUP personnel at the Đeneral Janković/Hani i Elezit border crossing (Trial Judgement, vol. 3, paras 720, 775, referring to Exh. P949, pp. 76-80, 91-92).

⁵²⁵⁶ Trial Judgement, vol. 3, para. 775, referring, *inter alia*, to Exh. P949, p. 92, Vladimir Lazarević, 12 Nov 2007, T. 18080, *ibid.*, 14 Nov 2007, T. 18260, Mirko Starčević, 22 Oct 2007, T. 17436. See also Trial Judgement, vol. 3, paras 716-717, 754. See also, *supra*, fn. 3967, in which the Appeals Chamber dismisses Pavković’s challenge to this finding at the appeal hearing.

⁵²⁵⁷ Trial Judgement, vol. 3, paras 728, 734-735, 748, 775, fn. 1821. In addition to considering Pavković’s 6 April 1999 order and his 10 April 1999 report as recounted above (see *supra*, para. 1597; Trial Judgement, vol. 3, para. 785, referring to Exh. 4D224, p. 3, Exh. P1938, p. 2), the Trial Chamber noted: (i) a report from the Priština Corps Command to the 3rd Army Command dated 3 April 1999 (Trial Judgement, vol. 3, paras 728, 748, fn. 1821, referring to Exh. 5D84, p. 2. See also, *supra*, fn. 3968, in which the Appeals Chamber dismisses Pavković’s challenge to the Trial Chamber’s reliance on this evidence); and (ii) Pavković’s presence at the meeting of 4 May 1999 (Trial Judgement, vol. 3, para. 734, referring to Exh. P1696, pp. 1-2. See also Trial Judgement, vol. 3, para. 735, referring to Exh. P1672, Exh. P1996, pp. 4-5 as corroboration. See also Trial Judgement, vol. 3, para. 775).

⁵²⁵⁸ See *supra*, para. 1597; Trial Judgement, vol. 3, para. 785, referring to Exh. P1448, p. 2, Exh. P1938, p. 2, Exh. P1459, paras 3-4.

considered that Pavković attended a meeting held on 17 May 1999 with Milošević and others, in which Aleksandar Vasiljević presented a report about serious crimes committed by VJ forces and volunteers against civilians, including rapes.⁵²⁵⁹ The Trial Chamber also found that Pavković received a report from Lazarević on 24 May 1999, detailing serious crimes, including rape, being committed by MUP members against Kosovo Albanian civilians.⁵²⁶⁰

1601. The Appeals Chamber recalls that the Trial Chamber found that while evidence was presented that Pavković made efforts to limit and investigate the commission of crimes in Kosovo, these measures were “manifestly insufficient in light of the widespread commission of crimes by VJ and MUP forces against Kosovo Albanians, of which Pavković was aware.”⁵²⁶¹

1602. The Appeals Chamber also recalls that it has upheld the Trial Chamber’s conclusion that Pavković had the intent to forcibly displace the Kosovo Albanian population through a campaign of terror and violence⁵²⁶² as well as Pavković’s convictions under JCE III for persecutions through sexual assaults committed in Beleg on or about 29 March 1999 and Ćirez/Qirez in mid-April 1999.⁵²⁶³ The evidence considered by the Trial Chamber, as recounted above, shows that Pavković was aware of various criminal acts and acts of violence committed against the Kosovo Albanian population in 1998 and 1999 by VJ and MUP forces,⁵²⁶⁴ and therefore was aware of the context in which the forcible displacement took place. In addition, the evidence shows that Pavković frequently learned about sexual assaults being committed by VJ and MUP forces during the NATO air campaign.⁵²⁶⁵ In these circumstances, there is no merit in Pavković’s contention that he could not foresee the commission of crimes by individuals who were not members of units under his command.⁵²⁶⁶ Considering the totality of the circumstances surrounding the forcible

⁵²⁵⁹ Trial Judgement, vol. 3, para. 739, referring to Exh. P2600, para. 65, Brako Gajić, 7 Sep 2007, T. 15269, 15273. See also Trial Judgement, vol. 3, para. 775. The Trial Chamber also found that Vasiljević informed the group of crimes committed by the Scorpions and a paramilitary figure, Slobodan Medić. See also *supra*, sub-sections VII.E.2.(e)(iii) and VII.E.2.(e)(iv).

⁵²⁶⁰ Trial Judgement, vol. 3, para. 741, referring to Exh. P1458 (also admitted as Exh. 4D192 and Exh. P1723). The report states in relevant part that: “the work of mixed checkpoints of the MUP and the Military Police units is fraught with problems and salient issues since the MUP tolerates criminal activities of its members against the *Šiptar* [a term for Albanians] civilian population – murder, rape, looting, robbery, aggravated theft; particularly conspicuous is the appropriation of motor vehicles, technical goods and other movables” (Exh. P1458, p. 1).

⁵²⁶¹ Trial Judgement, vol. 3, para. 777. See also *supra*, sub-sections VII.E.2.(e)(v) and VII.E.4.

⁵²⁶² See *supra*, sub-section VII.E.2.(f). See also Trial Judgement, vol. 3, paras 95, 781, 786.

⁵²⁶³ Trial Judgement, vol. 3, paras 785, 788. See also *supra*, sub-section VII.E.4.

⁵²⁶⁴ See *supra*, paras 1597-1600. The Appeals Chamber considers that the evidence recounted in the current sub-section is sufficient to establish Pavković’s awareness in this regard. Therefore, it is not necessary to address his arguments (Pavković’s Appeal Brief, paras 198-207) concerning information on crimes in Kosovo provided by the international community through: (a) a press statement issued no later than 2 April 1999 by Karol John Drewienkiewicz, Deputy Head of the KVM (Exh. P2542); (b) a letter by Louise Arbour, then Prosecutor of the Tribunal, which the Trial Chamber found had reached Pavković around the end of April 1999 (Exh. P401; Exh. 3D788); and (c) the Original Indictment publicised by the Tribunal on 27 May 1999 (Exh. P968), although the Trial Chamber also relied on this evidence (Trial Judgement, vol. 3, paras 754-757, 766, 775).

⁵²⁶⁵ See *supra*, para. 1600.

⁵²⁶⁶ Appeal Hearing, 12 Mar 2013, AT. 307.

displacement of the Kosovo Albanian population and Pavković's knowledge thereof, the Appeals Chamber is convinced beyond reasonable doubt that the sexual assaults committed in Priština/Prishtina on 1 April 1999 and in late May 1999 were foreseeable to Pavković. In addition, Pavković's participation in the JCE, through his role as Commander of the 3rd Army, demonstrates that he acted in furtherance of the common purpose of the JCE while being aware of the possibility that sexual assaults might be committed, thus establishing that he willingly took that risk.⁵²⁶⁷

1603. As a result, pursuant to Articles 5(h) and 7(1) of the Statute, the Appeals Chamber finds Pavković responsible for committing, through his participation in a JCE, persecution, through sexual assaults, as a crime against humanity in Priština/Prishtina on 1 April 1999 and in late May 1999.

5. Conclusion

1604. For the foregoing reasons, the Appeals Chamber concludes that the Trial Chamber erred in failing to find Šainović and Lukić liable under Articles 5(h) and 7(1) of the Statute for committing, through their participation in a JCE, persecution, through sexual assaults, as a crime against humanity in Beleg, Ćirez/Qirez, and Priština/Prishtina and thereby disallowing convictions against them under Count 5 in relation to these sexual assaults. The Appeals Chamber further concludes that the Trial Chamber erred in failing to find Pavković liable under Articles 5(h) and 7(1) of the Statute for committing, through his participation in a JCE, persecution, through sexual assaults, as a crime against humanity in Priština/Prishtina and thereby disallowing convictions against him under Count 5 in relation to these sexual assaults. Consequently, the Appeals Chamber grants, in part, the Prosecution's third ground of appeal and the Prosecution's submissions in relation to Pavković's responsibility pursuant to JCE III for persecution through sexual assaults committed in Priština/Prishtina.⁵²⁶⁸ However, in the circumstances of the present case, the Appeals Chamber, Judge Ramaroson dissenting, declines to enter new convictions on appeal in relation to the sexual assaults in question.⁵²⁶⁹

⁵²⁶⁷ See Trial Judgement, vol. 3, paras 694-695, 697-698, 705-708, 710, 712-713, 736, 742, 782.

⁵²⁶⁸ See also Prosecution's fourth ground of appeal.

⁵²⁶⁹ Article 25 (2) of the Statute provides that "[t]he Appeals Chamber *may* affirm, reverse or revise the decisions taken by the Trial Chambers" (emphasis added). See also *Jelisić* Appeal Judgement, para. 73, holding: "the choice of remedy lies within [the] discretion [of the Appeals Chamber]. Article 25 of the Statute (relating to appellate proceedings) is wide enough to confer such a faculty [...]. The discretion must of course be exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case in hand and considerations of public interest. These factors (and others) would be determined on a case by case basis." Cf. *Aleksovski* Appeal Judgement, paras 153-154, 192; *Jelisić* Appeal Judgement, para. 77; *Krstić* Appeal Judgement, paras 220-227, 229, p. 87; *Stakić* Appeal Judgement, paras 359-367, pp. 141-142; *Naletilić and Martinović* Appeal Judgement, paras 588-591, p. 207.

VIII. AIDING AND ABETTING

A. Introduction

1605. The Trial Chamber found that Lazarević provided practical assistance, encouragement, and moral support to the VJ forces engaging in the deportation and forcible transfer of the Kosovo Albanian population in coordinated action with the MUP.⁵²⁷⁰ The Trial Chamber accordingly convicted Lazarević pursuant to Article 7(1) of the Statute for aiding and abetting the crimes of deportation and other inhumane acts (forcible transfer) as crimes against humanity.⁵²⁷¹

1606. Lazarević claims that the Trial Chamber erred in holding him criminally responsible for aiding and abetting deportation and forcible transfer.⁵²⁷² In addition, the Prosecution submits that the Trial Chamber erred in acquitting Lazarević of aiding and abetting murder as a violation of the laws or customs of war and murder and persecution as crimes against humanity.⁵²⁷³ The Appeals Chamber will address the parties' submissions in turn.

B. Alleged errors in finding that Lazarević aided and abetted deportation and forcible transfer

1. Introduction

1607. Lazarević held numerous positions in the JNA and the VJ.⁵²⁷⁴ In January 1998, he was appointed Chief of Staff of the Priština Corps and, on 25 December 1998, he was appointed Commander of the Priština Corps.⁵²⁷⁵ He remained in this position until 28 December 1999 when he was appointed Chief of Staff of the 3rd Army and subsequently became Commander of the 3rd Army on 13 March 2000.⁵²⁷⁶

1608. The Trial Chamber convicted Lazarević pursuant to Article 7(1) of the Statute for aiding and abetting the crimes of deportation and other inhumane acts (forcible transfer) as crimes against humanity under Article 5 of the Statute committed by the VJ in coordinated action with the MUP throughout Kosovo between 24 March and 25 May 1999.⁵²⁷⁷

⁵²⁷⁰ Trial Judgement, vol. 3, para. 925.

⁵²⁷¹ Trial Judgement, vol. 3, paras 930, 935, 1211.

⁵²⁷² Lazarević's grounds 2-3.

⁵²⁷³ Prosecution's ground 2.

⁵²⁷⁴ Trial Judgement, vol. 3, para. 791.

⁵²⁷⁵ Trial Judgement, vol. 3, para. 791.

⁵²⁷⁶ Trial Judgement, vol. 3, para. 791.

⁵²⁷⁷ Trial Judgement, vol. 3, paras 930, 935, 1211. The first crimes for which Lazarević was convicted occurred on 24 March 1999, *inter alia*, in Priština/Prishtina town (see Trial Judgement, vol. 2, paras 885-888, 1240-1243) and Kotlina/Kotllina (see *ibid.*, vol. 2, paras 1067, 1253-1255). The last crime for which Lazarević was convicted occurred

1609. Lazarević challenges the Trial Chamber's findings that he fulfilled the *actus reus* and *mens rea* of aiding and abetting forcible displacement.⁵²⁷⁸

2. Alleged errors in relation to the existence of the common plan

1610. Lazarević challenges the Trial Chamber's conclusion that a JCE existed, the common purpose of which was to ensure continued control by the FRY and Serbian authorities over Kosovo through a campaign of forcible displacement of the Kosovo Albanian population.⁵²⁷⁹ In this regard, Lazarević contests the Trial Chamber's factual findings that: (i) it was common practice for the FRY and Serbian forces to confiscate and destroy identity documents of Kosovo Albanians in the course of their displacement;⁵²⁸⁰ (ii) a discernible pattern of crimes committed by the FRY and Serbian forces existed;⁵²⁸¹ (iii) the arming of the non-Albanian population and the disarming of the Kosovo Albanian population were carried out on ethnic grounds;⁵²⁸² and (iv) the authorities of the FRY and Serbia brought additional forces into Kosovo in breach of the October Agreements.⁵²⁸³ Lazarević further argues that it was unreasonable for the Trial Chamber to conclude that he: (i) knew about and assisted in the confiscation of identity documents of Kosovo Albanians;⁵²⁸⁴ (ii) was aware that the arming of the non-Albanian population and the disarming of the Kosovo Albanian population were carried out on ethnic grounds⁵²⁸⁵ and "participated or in any other way contributed to the arming of [the] non-Albanian population";⁵²⁸⁶ and (iii) aided and abetted the violation of the October Agreements by the VJ.⁵²⁸⁷ Lazarević further submits that it was not proved that he "intend[ed] to contribute to the implementation" of the common plan.⁵²⁸⁸

1611. In response, the Prosecution avers that Lazarević's submissions warrant summary dismissal as his conviction for aiding and abetting does not rely on the Trial Chamber's factual findings in

on 25 May 1999 in Dubrava/Lisnaja (see *ibid.*, vol. 2, paras 1148, 1259-1261). The Trial Chamber acquitted Lazarević of crimes of forcible displacement carried out by the MUP without the participation of the VJ and of charges under Articles 7(1) and 7(3) of the Statute in relation to murder as a crime against humanity and a violation of the laws or customs of war and persecution through murder, sexual assaults, and wanton destruction of religious and cultural property (see *ibid.*, vol. 3, paras 928, 932-933).

⁵²⁷⁸ Lazarević's Notice of Appeal, paras 49-113.

⁵²⁷⁹ Lazarević's Appeal Brief, para. 385.

⁵²⁸⁰ Lazarević's Appeal Brief, paras 276-281, referring, *inter alia*, to Trial Judgement, vol. 3, paras 38, 40.

⁵²⁸¹ Lazarević's Appeal Brief, paras 283-295, referring, *inter alia*, to Trial Judgement, vol. 3, paras 41, 43. See also Trial Judgement, vol. 3, para. 46.

⁵²⁸² Lazarević's Appeal Brief, paras 296-301, 303-310, 312-320, 322-345, referring, *inter alia*, to Trial Judgement, vol. 3, paras 54, 56, 57, 68, 72.

⁵²⁸³ Lazarević's Appeal Brief, paras 346-384, referring to Trial Judgement, vol. 3, paras 75-76.

⁵²⁸⁴ Lazarević's Appeal Brief, para. 282.

⁵²⁸⁵ Lazarević's Appeal Brief, para. 311.

⁵²⁸⁶ Lazarević's Appeal Brief, paras 302, 321.

⁵²⁸⁷ Lazarević's Appeal Brief, para. 384.

⁵²⁸⁸ Lazarević's Appeal Brief, paras 446-447. In support of his assertion, Lazarević refers to evidence that he was an exemplary commander (*ibid.*, paras 448-452, referring to Dušan Lončar, 1 Dec 2006, T. 7687, K73, 14 Sep 2006, T. 3415 (closed session), Exh. P2004). See also Lazarević's Appeal Brief, para. 586, referring to Vladimir Lazarević, 12 Nov 2007, T. 18129.

relation to the JCE.⁵²⁸⁹ It further argues that Lazarević merely repeats his trial submissions without showing any error.⁵²⁹⁰

1612. In reply, Lazarević submits that his challenges to the Trial Chamber's findings in relation to the common plan are advanced only for "reasons of cautiousness" to reiterate that no plan to expel the Kosovo Albanians with the purpose of changing the ethnic balance of Kosovo existed and that he thus could not have been aware of such a plan.⁵²⁹¹

1613. The Appeals Chamber recalls that Lazarević was acquitted of JCE liability.⁵²⁹² He was convicted instead for aiding and abetting the crimes of deportation and forcible transfer.⁵²⁹³ Given the Trial Chamber's findings, the Appeals Chamber considers that the Trial Chamber's discussion of evidence on the existence of the common plan⁵²⁹⁴ is irrelevant to Lazarević's conviction for aiding and abetting. Moreover, contrary to Lazarević's assertion,⁵²⁹⁵ in finding that his acts and omissions had a substantial effect upon the commission of the crimes by VJ members, the Trial Chamber made no reference to his purported awareness or assistance regarding the confiscation of identity documents of Kosovo Albanians, the arming of the non-Albanian population, and the disarming of the Kosovo Albanian population, or the violations of the October Agreements.⁵²⁹⁶ For the same reasons, Lazarević's assertion that he did not intend to contribute to the common purpose is misguided.

1614. In light of the foregoing, the Appeals Chamber dismisses the second ground of Lazarević's appeal and sub-ground 3(c) in relevant part.

⁵²⁸⁹ Prosecution's Response Brief (Lazarević), paras 219-220.

⁵²⁹⁰ Prosecution's Response Brief (Lazarević), para. 221.

⁵²⁹¹ Lazarević's Reply Brief, para. 109.

⁵²⁹² Trial Judgement, vol. 3, para. 919.

⁵²⁹³ Trial Judgement, vol. 3, paras 925-927, 930.

⁵²⁹⁴ Trial Judgement, vol. 3, paras 30-40 (the seizure of identity documents of Kosovo Albanians), 41-46 (the discernible pattern of forcible displacement), 49-72 (the arming of the non-Albanian and the disarming of the Kosovo Albanian populations), 73-76 (the breaches of the October Agreements by the FRY and Serbian forces).

⁵²⁹⁵ See Lazarević's Appeal Brief, paras 282, 302, 311, 321, 384.

⁵²⁹⁶ See Trial Judgement, vol. 3, paras 922-927.

3. Alleged errors in finding that Lazarević provided practical assistance, encouragement, and moral support to the VJ forces engaging in forcible displacement

1615. The Trial Chamber found that Lazarević voluntarily provided practical assistance, encouragement, and moral support to the VJ forces involved in the forcible displacement of Kosovo Albanians in coordinated action with the MUP.⁵²⁹⁷ The Trial Chamber noted that, as the Commander of the Priština Corps, Lazarević significantly participated in the planning and execution of the joint operations conducted by the VJ and that his orders provided authorisation within the VJ chain of command for the VJ to operate in the crime sites where forcible displacement took place.⁵²⁹⁸ It also considered that “Lazarević’s presence in the field, inspecting VJ units that were involved in the commission of crimes against Kosovo Albanians, was expressly noted to improve the morale of soldiers”,⁵²⁹⁹ and that he “knew that his failure to take adequate measures to secure the proper investigation of serious crimes committed by the VJ enabled the forces to continue their campaign of terror, violence, and displacement.”⁵³⁰⁰ The Trial Chamber concluded that Lazarević’s:

acts and omissions provided a substantial contribution to the commission of the crimes that the Chamber has found to have been committed by VJ members [...] as they provided assistance in terms of soldiers on the ground to carry out the acts, the organisation and equipping of VJ units, and the provision of weaponry, including tanks, to assist these acts. Furthermore, Lazarević’s acts and omissions provided encouragement and moral support by granting authorisation within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes by VJ members.⁵³⁰¹

1616. Lazarević contends that the Trial Chamber erred in finding that, through his acts and omissions, he provided practical assistance, encouragement, and moral support to members of the VJ who were involved in the commission of deportation and forcible transfer and that his conduct had a substantial effect upon the commission of these crimes.⁵³⁰² The Appeals Chamber will address his submissions in turn.

(a) Preliminary issue – specific direction

1617. Lazarević submits that the Trial Chamber erred in failing to determine whether his alleged acts and omissions were specifically directed to assist the commission of deportation and forcible

⁵²⁹⁷ Trial Judgement, vol. 3, paras 925-927.

⁵²⁹⁸ Trial Judgement, vol. 3, para. 925.

⁵²⁹⁹ Trial Judgement, vol. 3, para. 925.

⁵³⁰⁰ Trial Judgement, vol. 3, para. 925.

⁵³⁰¹ Trial Judgement, vol. 3, para. 926.

⁵³⁰² Lazarević’s Appeal Brief, paras 575, 599-601, 607-608, referring to Trial Judgement, vol. 3, paras 925, 927.

transfer and thus in concluding that he aided and abetted these crimes.⁵³⁰³ He argues that, in accordance with the Tribunal's prevailing jurisprudence, specific direction is a required element of the *actus reus* of aiding and abetting liability.⁵³⁰⁴ The Prosecution disputes this interpretation of the jurisprudence. It argues that specific direction is not an essential ingredient of the *actus reus* of aiding and abetting liability and that there are cogent reasons for the Appeals Chamber to depart from the recent *Perišić* Appeal Judgement in this regard. According to the Prosecution, the *Perišić* Appeal Judgement incorrectly interprets the established jurisprudence on the elements of aiding and abetting liability.⁵³⁰⁵ The Appeals Chamber, Judge Tuzmukhamedov dissenting, will address the issue of specific direction raised by the parties before turning to Lazarević's other challenges to the Trial Chamber's findings that he provided practical assistance, encouragement, or moral support to the VJ members responsible for committing the crimes in question.⁵³⁰⁶

1618. In the *Perišić* Appeal Judgement, the Appeals Chamber, by majority, held that "specific direction remains an element of the *actus reus* of aiding and abetting liability" and that "no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt".⁵³⁰⁷ In support of this conclusion, the Appeals Chamber relied on the *Tadić* Appeal Judgement, which described the *actus reus* of aiding and abetting liability as "acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime".⁵³⁰⁸ It observed that "many subsequent Tribunal and ICTR appeal judgements explicitly referred to 'specific direction' in enumerating the elements of aiding and abetting".⁵³⁰⁹

1619. By contrast, in the *Mrkšić and Šljivančanin* Appeal Judgement, the Appeals Chamber had held that "'specific direction' is *not* an essential ingredient of the *actus reus* of aiding and abetting."⁵³¹⁰ This holding was confirmed by the Appeals Chamber in the *Lukić and Lukić* Appeal Judgement, stating that "[in] *Mrkšić and Šljivančanin*, the Appeals Chamber has clarified 'that

⁵³⁰³ Appeal Hearing, 13 Mar 2013, AT. 402-403. In this regard, Lazarević submits that the evidence demonstrates that his conduct was directed at the legitimate efforts to defend against the KLA and the NATO campaign, as opposed to directed at the commission of crimes (see *ibid.*, 13 Mar 2013, AT. 403-416, 418-420).

⁵³⁰⁴ Appeal Hearing, 13 Mar 2013, AT. 402-403, 415-416, 418-420. See also *ibid.*, 13 Mar 2013, AT. 471-473.

⁵³⁰⁵ Appeal Hearing, 13 Mar 2013, AT. 440-460. The Prosecution thus submits that the Appeals Chamber should reiterate that specific direction is not a distinct requirement of aiding and abetting liability, or that if it is involved in the *actus reus* of aiding and abetting, it is inherently included within the element of substantial effect (*ibid.*, 13 Mar 2013, AT. 460).

⁵³⁰⁶ Judge Tuzmukhamedov dissents from the discussion of the issue of specific direction in this section in its entirety.

⁵³⁰⁷ *Perišić* Appeal Judgement, para. 36.

⁵³⁰⁸ *Perišić* Appeal Judgement, para. 26, quoting *Tadić* Appeal Judgement, para. 229 (emphasis added).

⁵³⁰⁹ *Perišić* Appeal Judgement, para. 28. See also *ibid.*, paras 29-35.

⁵³¹⁰ *Mrkšić and Šljivančanin* Appeal Judgement, para. 159 (emphasis added), referring to *Blagojević and Jokić* Appeal Judgement, para. 189.

‘specific direction’ is not an essential ingredient of the *actus reus* of aiding and abetting’ and finds that there is no ‘cogent reason’ to depart from this jurisprudence.”⁵³¹¹

1620. The *Perišić* Appeal Judgement found that the *Mrkšić and Šljivančanin* Appeal Judgement was ambiguous⁵³¹² on the matter of specific direction and did not reflect “an intention to depart from the settled precedent established by the *Tadić* Appeal Judgement”.⁵³¹³ It considered that the *Mrkšić and Šljivančanin* Appeal Judgement merely made “passing reference to specific direction”⁵³¹⁴ and concluded that, since the *Mrkšić and Šljivančanin* Appeal Judgement did not state cogent reasons for departing from earlier precedent, it neither attempted nor intended to depart from settled jurisprudence.⁵³¹⁵ The *Perišić* Appeal Judgement further found that the *Lukić and Lukić* Appeal Judgement confirmed that the *Mrkšić and Šljivančanin* Appeal Judgement is not antithetical in its approach to specific direction.⁵³¹⁶

1621. The Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that in effect, the interpretation given in the *Perišić* Appeal Judgement would appear to be at odds not only with a plain reading of the *Mrkšić and Šljivančanin* Appeal Judgement, which states that specific direction is not an “essential ingredient” of aiding and abetting liability,⁵³¹⁷ but also with the *Lukić and Lukić*

⁵³¹¹ *Lukić and Lukić* Appeal Judgement, para. 424 (internal references omitted). This holding was adopted by majority.

⁵³¹² *Perišić* Appeal Judgement, para. 36.

⁵³¹³ *Perišić* Appeal Judgement, para. 32. See also *ibid.*, paras 33-35.

⁵³¹⁴ See *Perišić* Appeal Judgement, para. 34.

⁵³¹⁵ *Perišić* Appeal Judgement, para. 34. In support of its conclusion on specific direction, the *Perišić* Appeal Judgement also considered that the *Mrkšić and Šljivančanin* Appeal Judgement: (i) relied on a section of the *Blagojević and Jokić* Appeal Judgement which held that a finding of specific direction may be implicit; and (ii) found that specific direction was “not an essential ingredient” of the *actus reus* of aiding and abetting liability in the context of considering the *mens rea* of aiding and abetting liability. As a result, the *Perišić* Appeal Judgement concluded that the *Mrkšić and Šljivančanin* Appeal Judgement did not intend to depart from the “precedent established by the *Tadić* Appeal Judgement” (see *ibid.*, para. 32).

⁵³¹⁶ *Perišić* Appeal Judgement, para. 35. In support of its conclusion the *Perišić* Appeal Judgement also considered that the *Lukić and Lukić* Appeal Judgement: (i) approvingly quoted the *Blagojević and Jokić* Appeal Judgement’s conclusion that a finding of specific direction can be implicit in an analysis of substantial contribution; and (ii) found that there were no cogent reasons to deviate from the holding of the *Mrkšić and Šljivančanin* Appeal Judgement with respect to specific direction. As a result, the *Perišić* Appeal Judgement concluded that “[t]he *Lukić and Lukić* Appeal Judgement thus confirms that the *Blagojević and Jokić* and *Mrkšić and Šljivančanin* Appeal Judgements are not antithetical in their approach to specific direction” (see *ibid.*, para. 35).

⁵³¹⁷ The Appeals Chamber observes that the *Mrkšić and Šljivančanin* Appeal Judgement cited a section of the *Blagojević and Jokić* Appeal Judgement which stated that 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 a crime” (see *Blagojević and Jokić* Appeal Judgement, para. 189). However, for the reasons set out below, the Appeals Chamber considers that the *Mrkšić and Šljivančanin* Appeal Judgement did not depart from the *Blagojević and Jokić* Appeal Judgement (see *infra*, paras 1625, 1650). Moreover, the Appeals Chamber does not agree with the proposition in the *Perišić* Appeal Judgement that the issue of specific direction was merely considered in passing in the *Mrkšić and Šljivančanin* Appeal Judgement. The Appeals Chamber further considers that the *Perišić* Appeal Judgement placed undue emphasis on the fact that in the *Mrkšić and Šljivančanin* Appeal Judgement specific direction was discussed in a section that also addressed the *mens rea* of aiding and abetting. In this regard, the Appeals Chamber notes that the *Mrkšić and Šljivančanin* Appeal Judgement clearly considered specific direction in the context of the *actus reus* of aiding and abetting liability. Significantly, it stated that: “specific direction is *not* an essential ingredient of the *actus reus* of aiding and abetting” (see *Mrkšić and Šljivančanin* Appeal Judgement, para. 159 (emphasis added)). Finally, the Appeals Chamber considers that the *Mrkšić and Šljivančanin* Appeal Judgement did not

Appeal Judgement, which confirmed this holding.⁵³¹⁸ In this respect, the Appeals Chamber considers that when interpreting a particular judgement, primary consideration should be given to positions expressly taken and clearly set out in the judgement concerned. It is not clear that this approach was adopted in the *Perišić* Appeal Judgement with respect to the issue of specific direction as expressed in the *Mrkšić and Šljivančanin* and *Lukić and Lukić* Appeal Judgements. It would thus be more appropriate to conclude that the *Mrkšić and Šljivančanin* Appeal Judgement and the *Lukić and Lukić* Appeal Judgement, on one hand, and the *Perišić* Appeal Judgement, on the other hand, diverge on the issue of specific direction.

1622. The Appeals Chamber recalls that where it is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.⁵³¹⁹ In view of the divergence between the *Mrkšić and Šljivančanin* and *Lukić and Lukić* Appeal Judgements, on one hand, and the *Perišić* Appeal Judgement, on the other hand, the Appeals Chamber, Judge Tuzmukhamedov dissenting, will determine the correct approach.⁵³²⁰ In so doing, mindful of its duty to act in the interests of legal certainty and predictability while ensuring that justice is done in all cases,⁵³²¹ the Appeals Chamber will consider the jurisprudence of the Tribunal and the ICTR as well as customary international law to ascertain where the law stands on the issue of specific direction.

1623. Turning first to the jurisprudence of the Tribunal and the ICTR, the Appeals Chamber recalls that the *Tadić* Appeal Judgement held that an “aider and abettor carries out acts specifically

state cogent reasons for departing from earlier precedent because, for the reasons set out below, that precedent did not clearly establish a specific direction requirement. Judge Tuzmukhamedov dissents from the reasoning in this footnote.

⁵³¹⁸ *Lukić and Lukić* Appeal Judgement, para. 424. The Appeals Chamber does not agree with the proposition in the *Perišić* Appeal Judgement that the *Lukić and Lukić* Appeal Judgement confirmed that the *Mrkšić and Šljivančanin* Appeal Judgement is not antithetical in its approach to specific direction.

⁵³¹⁹ *Aleksovski* Appeal Judgement, para. 111.

⁵³²⁰ The Appeals Chamber, Judge Tuzmukhamedov dissenting, further considers that the issue at hand concerns the constituent elements of aiding and abetting liability and that its significance warrants the intervention by the Appeals Chamber. In this regard, the Appeals Chamber also recalls that the issue was raised by the parties (Appeal Hearing, 13 Mar 2013, AT. 402-416, 418-420, 440-460). In addition, the Appeals Chamber notes in this context that the Trial Chamber found that Lazarević, as the Priština Corps Commander, was present in Kosovo and regularly inspected his troops in the field throughout the period during which the campaign of forcible displacements was carried out (see Trial Judgement, vol. 3, paras 924-925). However, the Trial Chamber did not find that he was physically present at the crime sites during the commission of the crimes by members of the VJ. Consequently, the Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that if it were to adopt the ruling of the *Perišić* Appeal Judgement requiring “explicit consideration of specific direction” in cases where the aider and abettor is “remote” (see *Perišić* Appeal Judgement, paras 38-39), it would be necessary to examine whether Lazarević’s assistance was remote as to require explicit consideration of specific direction. This is a matter disputed by the parties (Appeal Hearing, 13 Mar 2013, AT. 402, 418-420, 461-470). Therefore, the Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that the discussion as to whether the Appeals Chamber should follow the *Perišić* Appeal Judgement with respect to the issue of specific direction cannot be circumvented in determining the outcome of the present case. The Appeals Chamber further considers that even if the application of the ruling of the *Perišić* Appeal Judgement would not ultimately invalidate the Trial Judgement, it may “hear appeals in which a party has raised a legal issue that would not lead to the invalidation of the trial judgement but that is nevertheless of general significance to the Tribunal’s jurisprudence”, so long as such issues have a *nexus* with the case at hand (see *supra*, para. 19), and references therein; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor’s Appeal, 5 May 2005, p. 3).

directed to assist, encourage or lend moral support to the perpetration of a certain specific crime”.⁵³²² This delineation of accessorial liability appears in the context of contrasting JCE liability with that of aiding and abetting.⁵³²³ Consequently, the *Tadić* Appeal Judgement, which focused on JCE liability, does not purport to be a comprehensive statement of aiding and abetting liability.⁵³²⁴ The Appeals Chamber, Judge Tuzmukhamedov dissenting, therefore considers that the analysis of the previous case law conducted in the *Perišić* Appeal Judgement relied on the flawed premise that the *Tadić* Appeal Judgement established a precedent with respect to specific direction. As noted in the *Perišić* Appeal Judgement, subsequent appeal judgements have referred to specific direction, often repeating verbatim the language used in the *Tadić* Appeal Judgement.⁵³²⁵ However, a number of appeal judgements have not mentioned specific direction when examining the elements of the *actus reus* of aiding and abetting liability.⁵³²⁶ Moreover, the *Čelebići* Appeal Judgement explicitly endorsed a definition of aiding and abetting liability that neither refers to specific direction nor contains equivalent language.⁵³²⁷

1624. The Appeals Chamber observes that the *Čelebići* Appeal Judgement was not alone in its endorsement of a trial judgement that defined the *actus reus* of aiding and abetting liability without

⁵³²¹ See *Aleksovski* Appeal Judgement, paras 101-106, 111.

⁵³²² *Tadić* Appeal Judgement, para. 229.

⁵³²³ See *Aleksovski* Appeal Judgement, para. 163. See also *Tadić* Appeal Judgement, para. 229. See also *Blagojević and Jokić* Appeal Judgement para. 186, referring to *Aleksovski* Appeal Judgement, para. 163.

⁵³²⁴ See *Aleksovski* Appeal Judgement, para. 163.

⁵³²⁵ See *Perišić* Appeal Judgement, para. 28, fn. 70. See also *Blagojević and Jokić* Appeal Judgement, para. 127; *Kvočka et al.* Appeal Judgement, para. 89; *Blaškić* Appeal Judgement, para. 45; *Vasiljević* Appeal Judgement, para. 102; *Krnjelac* Appeal Judgement, para. 33; *Kupreškić et al.* Appeal Judgement, para. 254; *Aleksovski* Appeal Judgement, para. 163; *Kalimanzira* Appeal Judgement, para. 74; *Muvunyi I* Appeal Judgement, para. 79; *Seromba* Appeal Judgement, para. 139; *Muhimana* Appeal Judgement, para. 189; *Ntagerura et al.* Appeal Judgement, para. 370; *Ntakirutimana* Appeal Judgement, para. 530. The *Ntawukulilyayo* and *Rukundo* Appeal Judgements refer to acts that are “specifically aimed” towards the relevant crimes (see *Ntawukulilyayo* Appeal Judgement, para. 214; *Rukundo* Appeal Judgement, para. 52). See also *Nahimana et al.* Appeal Judgement, para. 482. By contrast, the *Simić* Appeal Judgement states that “the *actus reus* of aiding and abetting consists of acts directed to assist, encourage or lend moral support to the perpetration of a specific crime” (see *Simić* Appeal Judgement, para. 85 (emphasis added)). No mention is made of a “specific direction requirement”. *Contra Perišić* Appeal Judgement, para. 27 (“the *actus reus* of aiding and abetting requires a closer link between the assistance provided and particular criminal activities: assistance must be ‘specifically’ – rather than ‘in some way’ – directed towards relevant crimes”). Likewise, the *Orić* Appeal Judgement provides that “omission 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 (*actus reus*)” (see *Orić* Appeal Judgement, para. 43 (emphasis added)).

⁵³²⁶ See, e.g., *Gotovina and Markač* Appeal Judgement, para. 127 (stating that “for an individual to be held liable for aiding and abetting, he must have substantially contributed to a crime and must have known that the acts he performed assisted the principal perpetrator’s crime”); *Brdanin* Appeal Judgement, para. 151 (stating that “in the case of aiding and abetting, the issue is whether, *inter alia*, the acts of the aider and abettor had a substantial effect on the commission of the crime of the principal offender”); *Krstić* Appeal Judgement, para. 137 (containing no explicit mention of specific direction); *Karera* Appeal Judgement, para. 321 (holding that the “*actus reus* of aiding and abetting liability is constituted by acts or omissions that assist, further, or lend moral support to the perpetration of a specific crime, and which substantially contribute to the perpetration of the crime”).

⁵³²⁷ See *Čelebići* Appeal Judgement, para. 352, citing with approval *Čelebići* Trial Judgement, para. 327 (defining aiding and abetting as including “all acts of assistance that lend encouragement and support to the perpetration of an offence and which are accompanied by the requisite *mens rea*. Subject to the caveat that it be found to have contributed to, or have had an effect on, the commission of the crime, the relevant act of assistance may be removed both in time and place from the actual commission of the offence”).

reference to specific direction.⁵³²⁸ The *Blaškić* Appeal Judgement explicitly found that the *Blaškić* Trial Judgement “was correct” in holding that “the *actus reus* of aiding and abetting ‘consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.’”⁵³²⁹ In so doing, the *Blaškić* Appeal Judgement noted that the *Blaškić* Trial Judgement followed the *Furundžija* Trial Judgement,⁵³³⁰ which pronounced this definition based on an analysis of customary international law.⁵³³¹ Although the *Blaškić* Appeal Judgement also referred to the *Tadić* Appeal Judgement’s formulation of aiding and abetting liability, the fact that the *Blaškić* Appeal Judgement ultimately relied upon and applied a statement of applicable law that excluded any reference to specific direction strongly suggests that it did not consider specific direction to be an element of aiding and abetting liability.⁵³³²

1625. After having examined the jurisprudence of the Tribunal, the *Blagojević and Jokić* Appeal Judgement subsequently confirmed that specific direction is not an element of the *actus reus* of aiding and abetting liability. While the *Blagojević and Jokić* Appeal Judgement stated that “the *Tadić* definition has not been explicitly departed from”, it noted that “specific direction has not always been included as an element of the *actus reus* of aiding and abetting” and considered that “this may be explained by the fact that such a finding 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.”⁵³³³ It thus merely observed that specific direction can be at times, though not necessarily always, factually implicit in a finding of substantial contribution. In so doing, and in light of the *Čelebići* and *Blaškić* precedents, it considered that specific direction is not an element of the *actus reus* of aiding and abetting, while the substantial contribution of the aider and abettor is.⁵³³⁴ Such interpretation is consonant with the fact that, prior to the *Perišić* Appeal Judgement, no independent specific direction requirement was applied by the Appeals Chamber to

⁵³²⁸ See, by contrast, *Perišić* Appeal Judgement, para. 31.

⁵³²⁹ *Blaškić* Appeal Judgement, para. 46, quoting *Blaškić* Trial Judgement, para. 283, in turn quoting *Furundžija* Trial Judgement, para. 249.

⁵³³⁰ *Blaškić* Appeal Judgement, para. 46, quoting *Blaškić* Trial Judgement, para. 283, in turn quoting *Furundžija* Trial Judgement, para. 249.

⁵³³¹ *Furundžija* Trial Judgement, paras 234-235, 249.

⁵³³² Moreover, the Appeals Chamber notes that the *Blaškić* Appeal Judgement was not the only case to follow this approach. For example, the *Krnjelac* Appeal Judgement cited the *Tadić* Appeal Judgement formulation of the *actus reus* of aiding and abetting liability but proceeded to specify that “by his acts or omissions, the aider and abettor must assist, encourage or lend moral support to the principal perpetrator of the crime and this support must have a substantial effect upon the perpetration of the crime” (see *Krnjelac* Appeal Judgement, paras 33, 37). Likewise, the *Nahimana et al.* Appeal Judgement, having first cited the *Tadić* language, then proceeded to find that, to convict a defendant of aiding and abetting the commission of a crime, “it is sufficient to prove that the defendant’s acts or omissions substantially contributed to the commission of the crime by the principal perpetrator” (see *Nahimana et al.* Appeal Judgement, paras 482, 672). See also *Kvočka et al.* Appeal Judgement, paras 89-90; *Kalimanzira* Appeal Judgement, para. 74.

⁵³³³ *Blagojević and Jokić* Appeal Judgement, para. 189.

⁵³³⁴ The Appeals Chamber notes that the *Blagojević and Jokić* Appeal Judgement indeed focused on the “principal question” of whether Jokić’s conduct had a substantial effect on the perpetration of the crime (see *Blagojević and Jokić* Appeal Judgement, paras 191, 193-194).

the facts of any case before it.⁵³³⁵ By contrast, the substantial contribution of the accused has consistently been an element of the *actus reus* of aiding and abetting liability.⁵³³⁶

1626. The Appeals Chamber further observes that the definition of 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”⁵³³⁷ reflects customary international law. As noted above, the *Blaškić* Appeal Judgement approved of this definition without inclusion of specific direction, noting that this standard was initially adopted in the *Furundžija* Trial Judgement.⁵³³⁸ The *Furundžija* Trial Judgement elicited this definition from an analysis of customary international law.⁵³³⁹ Nevertheless, in order to dispel any doubt in this regard, the Appeals Chamber will re-examine customary international law concerning the elements of aiding and abetting liability.

1627. The Appeals Chamber first turns to examine the jurisprudence which dealt with crimes committed during the Second World War (collectively, “post WWII cases”) and which the Appeals Chamber considers instructive for the purpose of identifying the elements of aiding and abetting liability.⁵³⁴⁰ The Appeals Chamber observes that in none of these relevant cases “specific direction” was required as a distinct element. Rather, they focused on: (i) the degree of each defendant’s contribution to a crime, demonstrated through the role he played in, and the impact he exerted on,

⁵³³⁵ In this regard, the Appeals Chamber notes that specific direction was only ever explicitly addressed in two cases. In the *Vasiljević* Appeal Judgement, it was mentioned in the context of the substantial contribution of Vasiljević’s acts (see *Vasiljević* Appeal Judgement, paras 134-135). Significantly, the *Vasiljević* Appeal Judgement found that, “in preventing the men from escaping on the way to the river bank and during the shooting, the Appellant’s actions had a ‘substantial effect upon the perpetration of the crime’” before concluding that “the acts of the Appellant were specifically directed to assist the perpetration of the murders and the inhumane acts and his support had a substantial effect upon the perpetration of the crimes.” In the *Kupreškić et al.* case, the Appeals Chamber stated: “Still, mere presence outside the Hotel Vitez cannot be said to amount to an act specifically directed towards assisting, encouraging or lending moral support to the offence of persecution” (*Kupreškić et al.* Appeal Judgement, para. 283). The Appeals Chamber notes that neither of these appeal judgements engaged in any analysis with respect to the application of specific direction to the facts at issue.

⁵³³⁶ See, e.g., *Ntawukulilyayo* Appeal Judgement, para. 216 (“The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that Ntawukulilyayo substantially contributed to the Kabuye hill killings by encouraging Tutsis to seek refuge there and then providing reinforcements to those attempting to kill them. These acts alone suffice to constitute the *actus reus* of aiding and abetting”); *Rukundo* Appeal Judgement, para. 52 (“there is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime nor that such conduct served as a condition precedent to the commission of the crime. It is sufficient for the aider and abettor’s assistance or encouragement to have had a substantial effect on the realisation of that crime, the establishment of which is a ‘fact-based inquiry’. The Appeals Chamber is satisfied that the Trial Chamber’s findings on Rukundo’s role in the attacks, as set out above, demonstrate that his acts substantially contributed to the commission of the crimes”).

⁵³³⁷ *Blaškić* Appeal Judgement, para. 46, quoting *Blaškić* Trial Judgement, para. 283, in turn quoting *Furundžija* Trial Judgement, para. 249.

⁵³³⁸ *Blaškić* Appeal Judgement, para. 46, quoting *Blaškić* Trial Judgement, para. 283, in turn quoting *Furundžija* Trial Judgement, para. 249.

⁵³³⁹ *Furundžija* Trial Judgement, paras 191-249, in particular, *ibid.*, paras 234-235, 249.

⁵³⁴⁰ Some of these cases clearly concern accessory or aiding and abetting liability. However, there are also cases in which, in light of the limited reasoning and discussion (including in terms of legal characterization of conduct and *mens rea*), it is difficult to ascertain with certainty under what form of liability the accused was held responsible. The Appeals Chamber has nonetheless considered such cases when there is some indication that aiding and abetting liability might have been applied. In so doing, the Appeals Chamber was mindful of the legal instruments applied in different courts

the commission of the crime; and (ii) whether the defendant knew that his acts contributed to the commission of the crime.

1628. In the *Zyklon B* case before a British military court,⁵³⁴¹ three members of a private firm were charged with knowingly supplying poison gas, mainly “Zyklon B”, used for the extermination of allied nationals interned in concentration camps.⁵³⁴² Among the three, the owner and the second-in-command of the firm were found guilty, following the Judge Advocate’s instruction that the court must examine: (i) whether “[a]llied nationals had been gassed by means of Zyklon B”; (ii) whether “this gas had been supplied by [the firm]; and (iii) whether “the accused knew that the gas was to be used for the purpose of killing human beings.”⁵³⁴³ The firm’s first gassing technician, who was in a subordinate position, was acquitted, following the Judge Advocate’s instruction that the court must consider whether he “was in a position either to influence the transfer of gas to Auschwitz or to prevent it.”⁵³⁴⁴ The analysis therefore focused on whether each defendant had influence over the supply of the gas and knew of the unlawful use of the gas despite the stated lawful purposes, such as disinfecting buildings.⁵³⁴⁵ Whether the defendants specifically directed the supply of the gas to the extermination was not a basis for the convictions.⁵³⁴⁶

1629. In the *Schonfeld* case heard by a British military court,⁵³⁴⁷ four defendants were found guilty of being “concerned in the killing of” three airmen of the allied forces.⁵³⁴⁸ In light of the factual circumstances in this case, the Judge Advocate provided, *inter alia*, an overview of aiding and abetting liability in English law, noting that a party is an aider and abettor if he is “actually or

and tribunals, including the Charter of the International Military Tribunal of 8 August 1945 (“IMT Charter”), Control Council Law No. 10, and the British Royal Warrant of 14 June 1945 as well as national legislation.

⁵³⁴¹ The *Zyklon B* Case, Trial of Bruno Tesch and Two Others, British Military Court, Hamburg, 1-8 March 1946, in *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission* (London: His Majesty’s Stationery Office, 1947-1949) (“UNWCC Law Reports”), vol. I, pp. 93-103 (“*Zyklon B* case”).

⁵³⁴² *Zyklon B* case, pp. 93-94.

⁵³⁴³ *Zyklon B* case, pp. 101-102.

⁵³⁴⁴ *Zyklon B* case, p. 102, also recording the Judge Advocate’s instruction that if the defendant were not in such a position, he could not be found guilty even though he had knowledge of the unlawful use of the gas.

⁵³⁴⁵ *Zyklon B* case, pp. 94-102. See also *Furundžija* Trial Judgement, paras 222-223, 238.

⁵³⁴⁶ The *Perišić* Appeal Judgement held that “the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators” and that “[i]n such circumstances, in order to enter a conviction, evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary” (*Perišić* Appeal Judgement, para. 44). In support of this finding, the *Perišić* Appeal Judgement referred to the *Zyklon B* case, stating that the court in this case found “two defendants guilty [...], despite arguments that the gas was to be used for lawful purposes, after reviewing evidence that defendants arranged for S.S. units to be trained in using this gas to kill humans in confined spaces” (*Perišić* Appeal Judgement, fn. 115). However, although there was evidence concerning the provision of such training for S.S. units, this pertained only to one of the two convicted defendants. This and the Judge Advocate’s instructions described above clearly indicate that the evidence concerning the provision of such training was not dispositive of the case (*Zyklon B* case, pp. 95-98, 101-102).

⁵³⁴⁷ Trial of Franz Schonfeld and Nine Others, British Military Court, Essen, 11-26 June 1946, in UNWCC Law Reports, vol. XI, pp. 64-73 (“*Schonfeld* case”).

constructively present when the felony is committed”⁵³⁴⁹ and that there must be “participation in the act” although it is not necessary to prove that he “actually aided in the commission of the offence”.⁵³⁵⁰ The Judge Advocate further explained:

[I]f [a party] watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting.⁵³⁵¹

These examples mentioned by the Judge Advocate suggest that the accused’s presence in the vicinity (moral encouragement as opposed to tangible support) could constitute the *actus reus* of aiding and abetting liability if it has the effect of giving additional confidence to the principal perpetrator, and that the purpose of the accused’s act, together with the principal perpetrator’s knowledge thereof, *could* be considered as potentially relevant evidence in this evaluation.⁵³⁵²

1630. In the *Rohde* case heard by a British military court,⁵³⁵³ six defendants were found guilty of being “concerned in the killing of” British prisoners who were executed by lethal injection without any trial and then cremated. The convicted included the person who lit the oven at the crematorium after the killing.⁵³⁵⁴ The Judge Advocate explained that for an accused to be “concerned in a killing” it was not necessary that he must have actually been present.⁵³⁵⁵ The Judge Advocate further stated that if a lookout standing half a mile away from the actual murder took part with another “man with the knowledge that that other man was going to put the killing into effect then he was just as guilty as the person who fired the shot or delivered the blow.”⁵³⁵⁶ Thus, the convictions were based on each accused’s contribution demonstrated through his role – including in carrying out *ex post facto* cremation – and knowledge of the crime, *i.e.* the unlawful killing.⁵³⁵⁷

⁵³⁴⁸ *Schonfeld* case, pp. 64-65, 67-68, noting that one of the four convicted defendants actually shot the airmen. The remaining six defendants were acquitted. The court did not specify the modes of liability based on which it entered the convictions and acquittals.

⁵³⁴⁹ *Schonfeld* case, p. 69.

⁵³⁵⁰ *Schonfeld* case, p. 70.

⁵³⁵¹ *Schonfeld* case, p. 70.

⁵³⁵² See also *Furundžija* Trial Judgement, paras 200-202, 239.

⁵³⁵³ Trial of Werner Rohde and Eight Others, British Military Court, Wuppertal, Germany, 29 May – 1 June 1946, in UNWCC Law Reports, vol. V, pp. 54-59 (“*Rohde* case”).

⁵³⁵⁴ *Rohde* case, pp. 54-55, noting that this cremator was sentenced to five years of imprisonment, while the “Kommandant” of the detention camp where the prisoners were detained and the medical officer, who gave at least one injection, were sentenced to life imprisonment and death, respectively.

⁵³⁵⁵ *Rohde* case, p. 56.

⁵³⁵⁶ *Rohde* case, p. 56.

⁵³⁵⁷ *Rohde* case, pp. 54-56, 58. See also similar analysis conducted by other British military courts, focusing on the effect of each accused’s contribution demonstrated through his role and knowledge of the unlawful killing at issue, in: Trial of Karl Adam Golkel and Thirteen Others, British Military Court, Wuppertal, Germany, 15-21 May 1946, in UNWCC Law Reports, vol. V, pp. 45-53; The Almelo Trial, Trial of Otto Sandrock and Three Others, British Military Court, Almelo, Holland, 24-26 November 1945, in UNWCC Law Reports, vol. I, pp. 35-45. The United States Military Commission also conducted similar analysis in: The Jaluit Atoll Case, Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy, United States Military Commission, Marshall Islands, 7-13 December 1945, in

1631. In the *Stalag Luft III* case heard by a British military court,⁵³⁵⁸ 18 defendants were convicted of “being concerned in the killing” of British prisoners of war, who were unlawfully executed by shooting.⁵³⁵⁹ In light of the factual circumstances in this case, the Judge Advocate stated that “if people are all present, aiding and abetting one another to carry out a crime they knew was going to be committed, they are taking their respective parts in carrying it out, whether it be to shoot or whether it is to keep off other people or act as an escort [...], they are all in law equally guilty of committing that offence”.⁵³⁶⁰ In explaining the term “concerned in the killing”, he further stated:

I do not think that the prosecution can ask you to consider a case of a minor official who was concerned with some administrative matter. What they had in mind is that the persons concerned must have been part of the machine doing some duty, *carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if that person had not contributed his willing aid.*⁵³⁶¹

This suggests that, in addition to the knowledge of a defendant, the important question to be asked was whether the concerned act “had some real bearing on the killing”, *i.e.* had a substantial effect on the killing, and that this is what the Judge Advocate meant when he used the expression “performance which went on directly to achieve the killing”. This observation is further supported by the court’s focus on: (i) what part each defendant played in the shooting of the prisoners, which showed the degree of his contribution to the commission of the crimes; and (ii) whether it was a knowing participation.⁵³⁶²

1632. In the *Holstein* and *Wagner* cases before French military tribunals,⁵³⁶³ the accused who were found guilty as accomplices were considered to fall within one of the following two categories pursuant to Article 60 of the then French Penal Code: (i) “[t]hose who have furnished arms, instruments or any other means which have served in the action [constituting a crime or delict] knowing that they would serve this purpose”; and (ii) “[t]hose who knowingly aided or assisted the

UNWCC Law Reports, vol. I, pp. 71-80 (see, in particular, the analysis concerning the defendant Tasaki). With regard to the *Rohde* case, see also *Furundžija* Trial Judgement, paras 203-204, except for the statement in footnote 226 that “two defendants appear to have been convicted without proof of knowledge”, which the Appeals Chamber finds to be incorrect.

⁵³⁵⁸ Trial of Max Wielen and 17 Others, the *Stalag Luft III* Case, British Military Court, Hamburg, Germany, 1 July – 3 September 1947, in UNWCC Law Reports, vol. XI, pp. 31-52 (“*Stalag Luft III* case”).

⁵³⁵⁹ *Stalag Luft III* case, pp. 31-32, 34-35, 44-46. Of the 18 defendants, those who gave orders for the execution, fired shots, or acted as guards and escorts were sentenced to death, while two defendants, Denkmann and Struve, who acted as drivers with the task to “keep the road clear of curious passers-by” were sentenced to ten years of imprisonment (see *Stalag Luft III* case, pp. 40-46).

⁵³⁶⁰ *Stalag Luft III* case, pp. 43-44, recording that the Judge Advocate also noted that “their individual responsibility with regard to punishment may vary.”

⁵³⁶¹ *Stalag Luft III* case, p. 46 (emphasis added).

⁵³⁶² *Stalag Luft III* case, pp. 40-44, 51. With regard to the knowledge, the court examined whether the defendants knew that the victims were prisoners of war, and even if not, whether they knew that the execution was unlawful due to the lack of meaningful trials (see *ibid.*, pp. 40, 51). See also *Furundžija* Trial Judgement, fn. 226.

⁵³⁶³ Trial of Franz Holstein and 23 Others, Permanent Military Tribunal at Dijon, 3 February 1947, in UNWCC Law Reports, vol. VIII, pp. 22-33 (“*Holstein* case”); Trial of Lobert Wagner, Gauleiter and Head of the Civil Government of Alsace during the Occupation and Six Others, Permanent Military Tribunal at Strasbourg, 23 April – 3 May 1946, and Court of Appeal, 24 July 1946, in UNWCC Law Reports, vol. III, pp. 23-55 (“*Wagner* case”).

perpetrator or perpetrators of the action in the facts which have prepared or facilitated or in those which have consummated [*sic*] the action”.⁵³⁶⁴ The record does not indicate that the tribunals additionally examined whether the accused specifically directed their acts to the crimes.⁵³⁶⁵

1633. In the *Pig-cart parade* case heard by the German supreme court in the British occupied zone,⁵³⁶⁶ the accused L, G, and S were found guilty of a crime against humanity under Control Council Law No. 10⁵³⁶⁷ for having participated in a parade in which two political opponents of the Nazi party were exposed to public humiliation in a pig truck. The accused P was acquitted.⁵³⁶⁸ The court found that L, G, and S *caused* in part what the two victims suffered: (i) L got hold of the pig truck; (ii) G led the marching band and accompanied the demonstration; and (iii) S accompanied the pig truck wearing his uniform and carrying a rifle.⁵³⁶⁹ It found that the three accused were old Nazi officials and that it was inconceivable that they were not at least aware of the risk of people being assaulted by a system of violence and injustice and accepted such an outcome by reconciling themselves with it (*dolus eventualis*). The court also held that more is not required in respect of the mental elements.⁵³⁷⁰ Regarding the accused P, the court found that he followed the parade merely as spectator in civilian clothes. It found that, accordingly, it was neither proved that he became part of the cause nor that he possessed the *mens rea* meeting the standard of *dolus eventualis*.⁵³⁷¹

⁵³⁶⁴ *Holstein* case, pp. 32-33, providing an English translation of Article 60 of the then French Penal Code. See also *ibid.*, pp. 23-26, 31; *Wagner* case, pp. 24, 30-32, 41-42, read together with *ibid.*, p. 49. See also UNWCC Law Reports, vol. III, p. 94, which provides a similar translation of this provision of the then French Penal Code.

⁵³⁶⁵ See also Trial of Gustav Becker, Wilhelm Weber and 18 Others, Permanent Military Tribunal at Lyon, 17 July 1947, in UNWCC Law Reports, vol. VII, pp. 67-73, which contains analysis of jurisprudence on “forms of complicity”, including “aid[ing] and assist[ing]”, in illegal arrests and deportation through denunciation of individuals which resulted in their arrest, detention, and death. It was noted: “A decision was made [in the United Nations War Crimes Commission] to the effect that denunciation did not in itself, constitute a war crime. The offence is committed only if, by giving information, the informer becomes a party to, or accomplice in, a war crime recognized as such in international law. This condition is fulfilled if circumstances constituting complicity are present, e.g., if the informer knew that his action would lead to the commission of a war crime and either intended to bring about this consequence or was recklessly indifferent with regard to it. This decision was applied by the War Crimes Commission in numerous instances.” See *ibid.*, pp. 70-71, also referring to two other judgements of French military tribunals in this regard.

⁵³⁶⁶ Strafsenat, Urteil vom 14. Dezember 1948 gegen L. und andere, StS 37/48 in Entscheidungen des Obersten Gerichtshofs für die Britische Zone. Entscheidungen in Strafsachen, Vol. I (1949), pp. 229-234 (“*Pig-cart parade* case”).

⁵³⁶⁷ Article II(2) of Control Council Law No. 10 provided, in relevant part, that “[a]ny person [...] is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime”.

⁵³⁶⁸ *Pig-cart parade* case, pp. 230-232, 234. Interpreting Article II(2) of Control Council Law No. 10, the court stated that, for a finding of guilt with regard to a crime against humanity under Control Council Law No. 10, it was not necessary to determine the form of liability under German criminal law (see *Pig-cart parade* case, p. 231). The court did, however, apply aiding and abetting liability for the remaining crimes charged under German criminal law.

⁵³⁶⁹ *Pig-cart parade* case, p. 232.

⁵³⁷⁰ *Pig-cart parade* case, p. 232.

⁵³⁷¹ *Pig-cart parade* case, p. 234, also finding that P’s conduct could not even with certainty be construed as objective and subjective consent and furthermore that silent consent that does not contribute to causing the offence would by no means meet the requirements for criminal liability. See also *Furundžija* Trial Judgement, para. 208.

Therefore, the convictions and acquittal were based on whether the defendants contributed to the commission of the crime and whether the *mens rea* met the *dolus eventualis* standard.⁵³⁷²

1634. In the *Roechling* case,⁵³⁷³ dealt with by French military tribunals under Control Council Law No. 10, Hermann Roechling, General Director of his family-owned steel firm, was found guilty of having committed war crimes involving economic spoliation of the occupied countries.⁵³⁷⁴ Ernst Roechling, who acted as the firm's representative in France, was found guilty as an accessory to these actions by Hermann Roechling. In its analysis the appellate tribunal focused on the importance of Ernst Roechling's role in the economic plunder and spoliation in France as well as his knowledge of the significance of his own role and of Hermann Roechling's activities. As a result, it overturned Ernst Roechling's acquittal entered by the tribunal of first instance.⁵³⁷⁵ In addition, the appellate tribunal upheld the convictions of two members of the Directorate of the firm⁵³⁷⁶ as "coauthors or accomplices" to Hermann Roechling's acts in relation to the deportation

⁵³⁷² The Appeals Chamber is of the view that the *Hechingen Deportation* case before German courts cited in the *Furundžija* Trial Judgement is not informative for the present analysis (see *Furundžija* Trial Judgement, paras 224-225). The court of first instance convicted the accused based on aiding and abetting liability. However, the court of appeal applied a different *mens rea* standard required for a principal (Täter) rather than for an aider or abettor (Gehilfe), interpreting Article II(2) of Control Council Law No. 10 as not distinguishing between perpetration (Täterschaft) and accessoryship/complicity (Teilnahme) (see Landgericht Hechingen, 28.6.1947, KLS 23/47 and Oberlandesgericht Tübingen, 20.1.1948, Ss 54/47, decision on appeal reported in Justiz und NS-Verbrechen, vol. I, pp. 469-502, in particular, p. 498). As a result, the court of appeal quashed the convictions of some of the defendants (see *ibid.*, p. 499). The Appeals Chamber considers that Article II(2) of Control Council Law No. 10 *does* distinguish various forms of liability. The *Synagogue* case before a German court cited in the *Furundžija* Trial Judgement is also not instructive for the purpose of identifying elements of aiding and abetting liability (see *Furundžija* Trial Judgement, paras 205-207), as this case addresses "Mittäterschaft", namely the liability of a co-perpetrator (Mittäter), as opposed to "Beihilfe", namely the liability of an aider and abettor (Gehilfe) (see Strafsenat, Urteil vom 10. August 1948 gegen K. und A., STS 18/48 in Entscheidungen des Obersten Gerichtshofs für die Britische Zone. Entscheidungen in Strafsachen, vol. I (1949), pp. 53-56).

⁵³⁷³ The Roechling Case – Indictment, Judgment, and Judgment on Appeal, dated on 25 November 1947, 30 June 1948, and 25 January 1949, respectively, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, October 1946 – April 1949* (Washington, D.C.: U.S. Government Printing Office, 1949-1953) ("Trials before NMTs"), vol. XIV, pp. 1061-1143 ("*Roechling* case").

⁵³⁷⁴ *Roechling* case, pp. 1111, 1133, 1140.

⁵³⁷⁵ *Roechling* case, p. 1119-1124, 1140. See, in particular, *ibid.*, p. 1119 ("[Ernst Roechling] was fully aware of the significance of his own role and of Hermann's activities. [...] The role which [Ernst Roechling] played in the enslavement of the French industry and in its systematic spoliation, was of great importance."), p. 1120 ("[Ernst Roechling] was well aware of the fact that Hermann Roechling had set himself the task of increasing the war potential of the Reich, and that he assisted him voluntarily in this task in France"). With regard to his specific acts, see, e.g., *ibid.*, p. 1120 ("It was Ernst Roechling who, as a result of his personal relations to the French Ministers [...], was able to effect this robbery"), p. 1123 ("It cannot be assumed that the administrator of a company (and Ernst Roechling held this office in the Société de Crédits et d'Investissements; he was indeed, together with Kreuter, its founder) which was formed for the purpose of committing criminal acts and whose activity consisted thereof, should be absolved of criminal responsibility because he played no specific part. He could only escape this responsibility by proving that he was only a *pro forma* administrator, had been deceived as to the true purpose of the company, and had known nothing of its operations. No such excuse [has] been put forward. [...] Ernst Roechling's role in the operation of the so-called Lorsar purchasing office is of decisive importance, for he was the delegated administrator of this company. Its criminal character was discussed in connection with the statements on the acts with which Hermann Roechling was charged. Thus, Ernst Roechling is an accessory to the war crimes proved against Hermann Roechling."). Compare with the findings of the tribunal of first instance in *ibid.*, pp. 1090-1091. Also compare with the findings on Hans Lothar Von Gemmingen-Hornberg and Albert Maier in *ibid.*, pp. 1124-1125, 1142.

⁵³⁷⁶ *Roechling* case, pp. 1133, 1139. These two were Hans Lothar Von Gemmingen-Hornberg, president of the Directorate of the firm, and Wilhelm Rodenhauer, director in charge of manpower.

and employment of persons and prisoners of war and the ill-treatment inflicted upon them.⁵³⁷⁷ In reaching these conclusions, the appellate tribunal held:

Hermann Roechling and the other accused members of the Directorate of the [firm] are not accused of having ordered this horrible treatment, but of having permitted it; and indeed supported it, and in addition, of not having done their utmost to put an end to these abuses. In adopting this attitude they permitted the continued existence and further development of this inhuman situation and thus, particularly through this tolerance, participated in the maltreatment within the meaning of Law No. 10.⁵³⁷⁸

The appellate tribunal's analysis thereby focused on the positions and powers of the above-mentioned three defendants which provided them with sufficient authority to intervene and improve the treatment of the deported workers who were subject to the terrible conditions that were known or must have been known to these defendants.⁵³⁷⁹ Accordingly, the Appeals Chamber observes that, in the *Roechling* case, the essential consideration in determining accessorial or accomplice liability was the impact that each defendant could exert on the principal's offences as well as their awareness thereof.

1635. Applying Control Council Law No. 10, the US military tribunals in Nuremberg also similarly focused on: (i) the degree of each defendant's contribution to the commission of the crimes, evinced through the part each defendant played and the effect of his conduct on the crimes; and (ii) the knowledge that each defendant had.

1636. For instance, in the *Einsatzgruppen* case,⁵³⁸⁰ the tribunal acquitted defendant Ruehl, a member of a Sonderkommando of Einsatzgruppe D, of war crimes and crimes against humanity finding that, while he "had knowledge of some of the illegal operations of" this Sonderkommando,⁵³⁸¹ he did not take part in any "executive operation nor did his low rank place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation."⁵³⁸² Additionally, in relation to defendant Graf, a member of Einsatzkommando 6, the tribunal held that while he knew of some of the executions, "more than

⁵³⁷⁷ *Roechling* case, pp. 1096, 1140-1142.

⁵³⁷⁸ *Roechling* case, p. 1136.

⁵³⁷⁹ *Roechling* case, pp. 1134, 1136-1137. In particular, the appellate tribunal rejected the assertion of Von Gemmingen-Hornberg and Rodenhauser that the material conditions of the workers were dependent on the "German Labour Front" and disciplinary matters on the "Gestapo" and found that, despite having sufficient authority, these two defendants failed to intervene in order to improve the conditions of the workers disciplined and detained in a camp (see *ibid.*, pp. 1136-1137). In contrast, the appellate tribunal confirmed the acquittals of Ernst Roechling and Albert Maier with respect to the deportation and ill-treatment of the workers, stating that "[a]s a result of the positions they held, [they] were not connected with manpower matters, and their conduct can therefore not be considered as participation in these abuses" (see *ibid.*, p. 1136).

⁵³⁸⁰ *United States of America v. Otto Ohlendorf et al.*, Military Tribunal II-A, Opinion and Judgment, 8-9 April 1948, in *Trials before NMTs*, vol. IV ("*Einsatzgruppen* case").

⁵³⁸¹ *Einsatzgruppen* case, p. 580.

⁵³⁸² *Einsatzgruppen* case, p. 581. The tribunal also found that "it was not established beyond reasonable doubt that he was in a position to control, prevent, or modify the severity of [the program of his Sonderkommando]" (see *ibid.*, p. 580).

mere knowledge of illegality of crime is required in order to establish guilt”.⁵³⁸³ The tribunal further opined that “[s]ince there is no evidence in the record that Graf was at any time in a position to protest against the illegal actions of others, he cannot be found guilty as an accessory [to crimes against humanity and war crimes].”⁵³⁸⁴ In contrast, with respect to defendant Klingelhofer, who was in charge of various units and later an interpreter with Einsatzgruppe B, the tribunal held that, even if his functions had been limited to that of an interpreter, “it would not exonerate him from guilt because in locating, evaluating and turning over lists of Communist party functionaries to the executive department of his organization he was aware that the people listed would be executed when found” and that, “[i]n this function, therefore, he served as an accessory to the crime.”⁵³⁸⁵ The tribunal also convicted defendant Fendler, who served in Einsatzgruppe C and was not alleged to have personally conducted executions.⁵³⁸⁶ The tribunal found that he knew that executions were taking place and failed to do anything about it, although as the second highest ranking officer in the *Kommando* his views could have been heard.⁵³⁸⁷

1637. As the *Furundžija* trial chamber observed, the above findings in the *Einsatzgruppen* case indicate that “knowledge of the criminal activities of the organisation combined with a role in that organisation was not sufficient”.⁵³⁸⁸ Rather, in addition, “the defendants’ acts in carrying out their duties had to have a substantial effect on the commission of the offence for responsibility to ensue.”⁵³⁸⁹ The Appeals Chamber concurs with this observation.

1638. The *Flick* case⁵³⁹⁰ further supports this conclusion. In this case, the tribunal found defendants Flick and Steinbrinck guilty of contributing large sums to the financing of the SS.⁵³⁹¹ In reaching this conclusion, the tribunal first opined that:

⁵³⁸³ *Einsatzgruppen* case, p. 585, also finding that “in view of his various absences from the Kommando it cannot be assumed that his membership in the organization of itself proves his presence at and knowledge of any particular executive operation, without there being proof of that fact.”

⁵³⁸⁴ *Einsatzgruppen* case, p. 585 also finding that “[s]ince there is no proof that he personally participated in any of the executions or their planning, he may not be held as a principal.”

⁵³⁸⁵ *Einsatzgruppen* case, p. 569. In finding Klingelhofer guilty, the tribunal also considered that he was not a mere interpreter but “an active leader and commander” who supervised executions and had the requisite knowledge (see *ibid.*).

⁵³⁸⁶ *Einsatzgruppen* case, p. 571.

⁵³⁸⁷ *Einsatzgruppen* case, p. 572. The tribunal concluded that while the evidence did not conclusively establish that Fendler “was guilty of planning the killing of people or ordering their death”, it did show that he took a “consenting part in the criminal activities” (*ibid.*, p. 573). See also the tribunals’ findings on defendant Seibert, who was found to have “participated as a principal as well as an accessory in [the operations of Einsatzgruppe D] which violated international law” (*ibid.*, pp. 536-539) as well as defendant von Radetzky, who was found to have taken “a consenting part” in the executions of Jews (*ibid.*, pp. 576-578).

⁵³⁸⁸ *Furundžija* Trial Judgement, para. 221.

⁵³⁸⁹ *Furundžija* Trial Judgement, para. 221. See also *ibid.*, paras 217-220.

⁵³⁹⁰ *United States of America v. Friedrich Flick et al.*, Opinion and Judgment, 22 December 1947, in Trials before NMTs, vol. VI (“*Flick* case”).

⁵³⁹¹ *Flick* case, p. 1222-1223, read together with *ibid.*, pp. 1190, 1216, concerning the relevant count.

One who knowingly by his influence and money contributes to the support [of an organisation which on a large scale is responsible for war crimes and crimes against humanity] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.⁵³⁹²

1639. The tribunal found that Steinbrinck could not have remained wholly ignorant of the criminal activities of the SS under the administration of Himmler.⁵³⁹³ It further found that Flick and Steinbrinck became members of the Himmler Circle of Friends⁵³⁹⁴ and that members of the Circle were called upon to contribute money to Himmler and were informed that the money was “to be spent for some of [Himmler’s] cultural hobbies and for emergencies for which he had no appropriations.”⁵³⁹⁵ Flick and Steinbrinck each had to contribute annually 100,000 Reichsmarks and, through a special fund of a bank, this money went into a second bank account upon which Himmler’s personal adjutant drew checks. The tribunal held that none of the defendants knew of the “specific purpose” of the checks.⁵³⁹⁶ It further held:

Nor did the prosecution show that any part of the money was directly used for the criminal activities of the SS. It is reasonably clear that some of the funds were used purely for cultural purposes. But during the war and particularly after the beginning of the Russian campaign we cannot believe that there was much cultural activity in Germany. A hundred thousand Reichsmarks even to a wealthy man was not then a trifling but a substantial contribution. Ten times that sum annually was placed in the hands of Himmler, the Reich Leader SS, for his personal use and was continued year after year without a thought on [the part of the defendants], according to their testimony, that any portion of it might be used by him to maintain the organization of which he was the head. It is a strain upon credulity to believe that he needed or spent annually a million Reichsmarks solely for cultural purposes or that members of the Circle could reasonably believe that he did.

[...] It remains clear from the evidence that each of them gave to Himmler, the Reich Leader SS, a blank check. His criminal organization was maintained and we have no doubt that some of this money went to its maintenance. It seems to be immaterial whether it was spent on salaries or for lethal gas.⁵³⁹⁷

1640. The convictions were therefore based on the defendants’ substantial contribution to and knowledge of criminal activities. It was not additionally required that the contribution be specifically directed to criminal activities.

1641. This approach was also taken in the *Justice* case.⁵³⁹⁸ The tribunal found that defendant Rothenberger, president of the District Court of Appeals in Hamburg and later Under Secretary in

⁵³⁹² *Flick* case, p. 1217.

⁵³⁹³ *Flick* case, p. 1217

⁵³⁹⁴ *Flick* case, pp. 1217-1218, also finding that while there was no evidence that during the meetings of the Circle the criminal activities of the SS were discussed, the defendants were aware that Himmler was Reich Leader SS.

⁵³⁹⁵ *Flick* case, p. 1219.

⁵³⁹⁶ *Flick* case, p. 1220.

⁵³⁹⁷ *Flick* case, pp. 1220-1221.

⁵³⁹⁸ *United States of America v. Josef Altstoetter et al.*, Military Tribunal III, Opinion and Judgment, 3-4 December 1947, in *Trials before NMTs*, vol. III (“*Justice* case”).

the Ministry of Justice, was “instrumental” in denying Jews their fair trial rights.⁵³⁹⁹ The tribunal found that, while this appeared to be a “small matter compared to the extermination of Jews by the millions under other procedures”, it was “nevertheless a part of the government-organized plan for the persecution of the Jews, not only by murder and imprisonment but by depriving them of the means of livelihood and of equal rights in the courts of law.”⁵⁴⁰⁰ The tribunal further found that Rothenberger must have known that the inmates of the Mauthausen concentration camp were there either without trial, following acquittal, or after the expiration of their term of imprisonment.⁵⁴⁰¹ Thus he was aware of the system of “protective custody”⁵⁴⁰² but did not object to it. The tribunal found Rothenberger guilty of:

taking a minor but consenting part in the Night and Fog program. He aided and abetted in the program of racial persecution, and notwithstanding his many protestations to the contrary he materially contributed toward the prostitution of the Ministry of Justice and the courts and their subordination to the arbitrary will of Hitler, the Party minions, and the police. He participated in the corruption and pervasion of the judicial system.⁵⁴⁰³

1642. The Appeals Chamber further observes that, with regard to other defendants in the *Justice* case⁵⁴⁰⁴ as well as in other cases heard by the US military tribunals under Control Council Law No. 10,⁵⁴⁰⁵ “specific direction” was not required as an element of any form of accessorial liability.

⁵³⁹⁹ *Justice* case, p. 1118. More specifically, the tribunal found that Rothenberger: (i) used his influence over judges to protect party members who had been charged or convicted of crimes; (ii) participated in securing the enactment of a discriminatory law against Jews; and (iii) enforced the law and, before its enactment, acted upon his own initiative and without legal authority in denying Jews right to proceed in civil litigation without advancement of costs (*ibid.*, pp. 1110-1114). The tribunal also found that he “used his influence towards achieving discriminatory action favorable to high party officials and unfavorable to Poles and Jews” (see *ibid.*, p. 1118).

⁵⁴⁰⁰ *Justice* case, p. 1114.

⁵⁴⁰¹ *Justice* case, p. 1116. The tribunal also found that he “thought concentration camps wrong but concluded that they were not objectionable if third degree methods did not become a habit” (*ibid.*, p. 1118).

⁵⁴⁰² *Justice* case, pp. 1116-1117. According to the tribunal, in Hitler’s decree of Night and Fog, “civilians of occupied counties accused of alleged crimes in resistance activities against German occupying forces were spirited away for secret trial by special courts of the Ministry of Justice within the Reich [...]. If the accused was acquitted, or if convicted, after serving his sentence, he was handed over to Gestapo for ‘protective custody’ for the duration of the war. These proceedings resulted in the torture, ill treatment, and murder of thousands of persons” (*ibid.*, pp. 1031-1032).

⁵⁴⁰³ *Justice* case, p. 1118.

⁵⁴⁰⁴ E.g., concerning defendant Klemm, see *Justice* case, pp. 1093-1095, 1099, 1107; defendant Lautz, see *ibid.*, pp. 1120, 1123, 1127-1128; defendant Mettgenberg, see *ibid.*, pp. 1129-1130, 1132; defendant Joel, see *ibid.*, pp. 1137-1138, 1140, 1142; defendant Rothaug, see *ibid.*, see pp. 1143-1144, 1146-1156.

⁵⁴⁰⁵ *United States of America v. Carl Krauch et al.*, Opinion and Judgment of the United States Military Tribunal VI, 29-30 July 1948, in *Trials before NMTs*, vol. VIII (“*Farben* case”) – Concerning defendant Schmitz, see *Farben* case, p. 1155, in which the tribunal found him guilty under count two as he “was in a position to influence policy and effectively to alter the course of events” and “bore a responsibility for, and knew of, *Farben*’s program to take part in the spoliation of the French dyestuffs industry, and, with this knowledge, expressly and impliedly authorized and approved it”, read together with *ibid.*, p. 1153; In the *Farben* case, the tribunal found the defendants not guilty of the commission of war crimes and crimes against humanity by supplying poison gas “Cyclon-B” which was used in the extermination of inmates in concentration camps. The tribunal found that the evidence was insufficient to establish that they knew that the gas was to be used for criminal purposes (see *ibid.*, pp. 1168-1169). This is consistent with the *Zyklon B* case in which the British military court found two defendants guilty since it found, based on the evidence particular to this case, they knew of the unlawful use of poison gas “Zyklon B” and had influence over the supply of the gas (see *Zyklon B* case, pp. 94-102). *United States of America v. Ernst von Weizsaecker et al.*, Military Tribunal IV, Judgment, 11-13 April 1949, in *Trials before NMTs*, vol. XIV (“*Ministries* case”) – Concerning defendants von Weizsaecker and Woermann, see *Ministries* case, pp. 478, 492, 496-499, 506-507, 528, 693-694, in which the tribunal,

inter alia: (i) examined “whether they knew of the program [of the mass deportation of Jews to the East] and whether in any substantial manner they aided, abetted, or implemented it” and acquitted them in this regard, *inter alia*, due to the lack of knowledge; (ii) found them guilty in relation to the deportation of Jews from France to Auschwitz, since they knew of the fate of the Jews who came into the hands of the SS and Gestapo, and despite their knowledge and respective duty, neither of them raised any objection to the deportation; (iii) acquitted them in relation to the deportation of the Croatian Jews, as they did not “substantially participate” and therefore did not aid the campaign; and (iv) found the defendants not guilty of the charges relating to persecution of the church, as they “were not the originators of the unlawful policy”, “had no power in themselves to change it”, “had no part in implementing it or executing it”, and “were both in principle and in deed against it”; defendant Berger, see *ibid.*, pp. 547-548, in which the tribunal found him guilty of crimes against humanity as “a conscientious participant in the concentration camp program” because he furnished the exterior guards for the concentration camps and knew of the atrocities committed in these camps; defendant Dietrich, see *ibid.*, pp. 575-576; defendant von Erdmannsdorf, see, *ibid.*, pp. 577-578, in which the tribunal found that he knew of the crimes against humanity committed against the Jews and the persecution of the churches, but found him not guilty because he “had little or no influence” as deputy chief of the Political Division of the Foreign Office; defendant Keppler, see *ibid.*, pp. 584-586; defendant Kehrl, see *ibid.*, pp. 588-589; defendant Puhl, see *ibid.*, pp. 620-621, in which the tribunal found that he: (i) was the managing director and vice president of the Reich Bank, exercising all the powers of the president of the bank when the latter was absent; and (ii) knew that what was to be received and disposed of by the bank was stolen property and loot, including dental gold and wedding rings, taken from the inmates of concentration camps. The tribunal found that he had no part in the actual extermination of the Jews, but he “was a consenting participant in part of the execution of the entire plan, although his participation was not a major one”; defendant Rasche, see *ibid.*, pp. 621-622, 784, in which, in relation to the loans made by the Dresdner Bank to Reich spoliation agencies as well as various SS enterprises which employed slave labour and were engaged in the resettlement program, the tribunal found that Rasche, spokesman of the board of directors of the Bank, knew the purpose for which the loans were sought and how the money was to be used. However, the tribunal acquitted him of the charges stating that “[l]oans or sale of commodities to be used in an unlawful enterprise [...] can hardly be said to be a crime.” With regard to the bank’s contributions (*i.e.* donations, as opposed to loans) to a fund placed at Himmler’s personal disposal, the tribunal concluded that the evidence did not show that Rasche knew that any part of the fund was intended to be or was ever used by Himmler for any unlawful purposes; defendant Stuckart, see *ibid.*, pp. 645-646; defendant Schwerin von Krosigk, see *ibid.*, pp. 672, 676-680, in which the tribunal found that as Minister of Finance, he “was fully aware that measures to which he put his name and programs in which he played a part were contrary and abhorrent to what he [...] knew to be right”. The tribunal found him criminally responsible as he “actively and consciously participated in the crimes”, *i.e.* the confiscation of Jewish property. By contrast, the tribunal found: “As Minister of Finance the defendant furnished the means by which the concentration camps were purchased, constructed, and maintained, but it is clear that he neither originated nor planned these matters [...]. They were Reich funds [...] and he had no discretion with respect to their disposition. His act in distributing them for these purposes was actually clerical, and we cannot charge him with criminal responsibility in this matter”; defendant Lammers, see pp. 701, 706, 708-715, in which the tribunal found him guilty of taking part in plunder and spoliation, as he knew of acts of spoliation and gave “vital and extremely important assistance [...] in translating into law the various programs”; defendant Koerner, see *ibid.*, pp. 826-828, 832; defendant Pleiger, see *ibid.*, pp. 832-833, 843-844. *United States of America v. Oswald Pohl et al.*, Opinion and Judgment of the United States Military Tribunal II, 3 November 1947, in *Trials before NMTs*, vol. V (“*Pohl case*”) – This case dealt with officials of the Economic and Administrative Main Office (“*WVHA*”) of the SS and the Action Reinhardt involving the confiscation of property from concentration camp inmates. Concerning defendant Pohl, see *Pohl case*, pp. 988-989, in which the tribunal found: “The fact that Pohl [head of the *WVHA*] himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of the dead inmates, does not exculpate him. This was a broad criminal program, requiring the cooperation of many persons, and Pohl’s part was to conserve and account for the loot. Having knowledge of the illegal purposes of the action and of the crimes which accompanied it, his active participation even in the after-phases of the action make him *particeps criminis* in the whole affair”; defendant Frank, see *ibid.*, pp. 993-995, 997, in which the tribunal held that he “must conclusively be convicted of knowledge of and active and direct participation in the slave labor program”. In relation to Frank’s alleged responsibility for the extermination of Jews in the concentration camps and Action Reinhardt, the tribunal held: “Assuming that Frank ultimately heard of the extermination measures, [...] [a]ny participation of Frank’s was *post facto* participation and was confined entirely to the distribution of property previously seized by others. Unquestionably this makes him a participant in the criminal conversion of the chattels, but not in the murders which preceded the confiscation. We therefore cannot find [...] that the defendant Frank is in law guilty of the murders of the Jews in the concentration camps, but we do find that he was guilty of participating and taking a consenting part in the wholesale looting”; defendant Fanslau, see *ibid.*, pp. 998-999; defendant Hans Loerner, see *ibid.*, pp. 999-1001, in which the tribunal found that, as chief of the office of budgets dealing, *inter alia*, with the financing and payrolls of SS personnel at concentration camps, he had “vital and important functions within the structure of the *WVHA* in connection with its administration of the concentration camps”, “was more than a mere bookkeeper”, “exercised discretion and judgment and made important decisions, many of which related directly to the procurement and operation of concentration camps.” “By reason of his direct and intimate association with this program”, the

The same holds true in the findings of the International Military Tribunal.⁵⁴⁰⁶ The criteria employed in these cases were rather whether the defendants substantially and knowingly contributed to relevant crimes.

1643. The Appeals Chamber now turns to national law on the elements of aiding and abetting liability. At the outset, the Appeals Chamber recalls that under the doctrine of general principles of law recognised by nations, national legislation and case law may be relied upon as a source of international principles or rules in limited situations. Such reliance, however, is permissible only where it is shown that most, if not all, countries accept and adopt the same approach to the notion at issue.⁵⁴⁰⁷ More specifically, it would be necessary to show that the major legal systems of the world take the same approach to that notion.⁵⁴⁰⁸

1644. Having conducted a review of national law, the Appeals Chamber considers that this is not the case with respect to the notion of “specific direction”. Specifically, in light of the variation among national jurisdictions with respect to aiding and abetting liability, the Appeals Chamber

tribunal found him guilty of war crimes and crimes against humanity”; defendant Vogt, see *ibid.*, pp. 1002-1004, in which the tribunal observed that, to establish that he “took a consenting part in and was connected with” a crime, “something more than having knowledge of” a crime is required and that “[t]here is “an element of positive conduct implicit in the word ‘consent’”. The tribunal added that “[i]n the case of a person who had power or authority to either start or stop a criminal act, knowledge of the fact coupled with silence could be interpreted as consent.” It acquitted Vogt on the ground, *inter alia*, that as chief of the office of audits in the WVHA, “[h]is sole task was to inspect and analyze the records (which others had made) of past transactions” and that he did not furnish men, money, materials, or victims for the concentration camps, and had no role in determining what the inmates should wear, how hard they should work, or how they should be treated. The tribunal also found other than being aware of the existence of concentration camps, Vogt had no knowledge of what the inmates ate, wore, how they worked or were treated; defendant Georg Loerner, see *ibid.*, pp. 1004-1105, 1007-1008; defendant Kiefer, see *ibid.*, pp. 1020-1023; defendant Pook, see *ibid.*, pp. 1036-1040.

⁵⁴⁰⁶ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946 (“IMT Judgement”). See, in particular, its findings concerning defendant von Schirach in *ibid.*, pp. 317, 319-320; defendant Speer in *ibid.*, pp. 330-332; defendant Funk in *ibid.*, pp. 304-307. According to Article 6 (a) to (c) of the IMT Charter, the following crimes were within the jurisdiction of the IMT: crimes against peace, war crimes, and crimes against humanity. Article 6(a) of the IMT Charter articulated “participation in a Common Plan or Conspiracy” to wage a war of aggression as a punishable act. Article 6 of the IMT Charter further provided that “[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.” The indictment charged not only the conspiracy or common plan to commit aggressive war but also to commit war crimes and crimes against humanity. However, the IMT concluded that as the IMT Charter “does not define as a separate crime any conspiracy except the one to commit acts of aggressive war”, it would “disregard the charges [...] that the defendants conspired to commit [war crimes and crimes against humanity], and [would] consider only the common plan to prepare, initiate, and wage aggressive war” (see IMT Judgement, p. 226). Accordingly, it appears that its findings on individual criminal responsibility in relation to war crimes and crimes against humanity relied on other forms of responsibility than conspiracy or common plan liability, such as possibly in some cases accomplice liability. Article 5 of the Charter of the International Military Tribunal for the Far East (“IMTFE”) of 19 January 1946 mirrors Article 6 of the IMT Charter. In light of the nature of the charges against the IMTFE defendants (see, in particular, count 54) as well as the limited reasoning provided in the judgement of the IMTFE, it is unclear, if not unlikely, that the mode of liability of aiding and abetting was necessarily considered and/or applied in these cases. See generally International Military Tribunal for the Far East, Judgment of 12 November 1948, in R. John Pritchard ed., *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East with an Authoritative Commentary and Comprehensive Guide* (New York: The Edwin Mellen Press, 1998), vol. 103, pp. 49,770-49,851.

⁵⁴⁰⁷ See *Tadić* Appeal Judgement, para. 225. See also *Taylor* Appeal Judgement, paras 429, 447.

⁵⁴⁰⁸ See *Tadić* Appeal Judgement, para. 225.

considers that no clear common principle in this respect can be gleaned from the major legal systems of the world. As a common basis, for aiding and abetting liability to arise, national legislation and the jurisprudence of domestic courts require the provision of assistance or support which facilitates the commission of a crime. However, national jurisdictions conceptualise the link between the acts of assistance and the crime in the context of *actus reus* and the required degree of *mens rea* in various different ways in accordance with principles in their respective legal systems.⁵⁴⁰⁹

⁵⁴⁰⁹ Article 13(VI) of the Federal Criminal Code of **Mexico** provides that a participant in the offence is a person who “wilfully” [*dolosamente*] aids or abets another person in the commission of that offence. The Supreme Court of Justice has held that the accomplice “is an efficient assistant aware of the plans and conduct of the material perpetrator, instigator or necessary co-perpetrator (the accomplice’s intervention is required for the commission of the crime), who contributes to the crime by means of the previous or simultaneous use of means for its commission, but who does not have control over the crime” (*Suprema Corte de Justicia de la Nación, Tesis CXXI/2007*, vol. XXV, June 2007, p. 208; and *Contradicción de Tesis 414/2010*, vol. VIII, May 2012, p. 975). Section 107 of the **Indian** Penal Code stipulates that a person abets, *inter alia*, by “intentionally aid[ing], by any act or illegal omission”. The Penal Code further explains that “[w]hoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act” (Indian Penal Code, Section 107, Explanation 2). Therefore, in order to constitute abetment by aiding within the meaning of Section 107 of the Indian Penal Code, the abettor must be shown to have intentionally aided the commission of the offence (Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *The Indian Penal Code: Act XLV of 1860: with exhaustive notes, comments, case-law references, State Amendments along with Schedule of Classification of Offences and Forms as prescribed under Code of Criminal Procedure, 1973*, 28th Edition (New Delhi: Wadhwa and Company, 1997), p. 136). The Penal Codes of **Singapore** and **Malaysia** contain provisions mirroring Section 107 of the Indian Penal Code (see Singaporean Penal Code, Section 107; Malaysian Penal Code, Section 107). Article 29 of the Criminal Code of **Cambodia** defines an accomplice as “the person who intentionally facilitates the attempt or the realization of a felony or a misdemeanor by providing his/her help or assistance”. According to Article 56 of the Penal Code of **Indonesia**, an accomplice is a person who either deliberately aids the commission of the crime or deliberately provides opportunity, means or information for its commission. Article 20 of the Penal Code of **Vietnam** identifies “helpers” as those “who create spiritual or material conditions for the commission of crimes.” Article 17 of the Penal Code of **Laos** recognises “accomplices” as those “who have intentionally assisted in the offence, or who have previously agreed to hide the offender, to hide instruments and tools of the offence, to efface traces of the offence or to conceal any proceeds from the offence.” The High Court of **Hong Kong** has confirmed that: “the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. [...]. To find a person guilty as an aider and abettor it is not only necessary to prove that he was present while the offence is committed, that he knew an offence was being committed and that his presence, in fact, gave encouragement to the perpetrators but it must be proved that he intended to give that encouragement, that he wilfully encouraged.” (*R. v. Lam Kit* [1988] 1 HKC 679, pp. 2-3 (emphasis in the original)). Article 66(1)(b) of the Crimes Act 1961 of **New Zealand** provides that a person is a party to and guilty of an offence if that person “does or omits an act for the purpose of aiding any person to commit the offence”. The Supreme Court of New Zealand has held that aiding and abetting requires that “the secondary party intentionally helped or encouraged the principal offender with knowledge of the essential matters constituting the offence, including the principal’s *mens rea*” (*Mahana Makarini Edmonds v. R* [2011] NZSC 159, para. 22). In **South Africa**, accomplice liability requires that the person has “intentionally furthered or assisted in the commission of the crime”. In this regard, *dolus eventualis* would suffice. In addition, “the accused must also know or foresee the possibility that his or her conduct is unlawful” (Jonathan Burchell and John Milton, *Principles of Criminal Law*, 3rd Edition (Juta and Company Ltd., 2005), pp. 604-605. See also *ibid.*, pp. 600-603). In *Tladi v. S*, the Free State High Court has held that the accomplice’s “assistance may be of a negligible nature but what is required is that it must be proven that there was adequate assistance” (*Tladi v. S* [2005] ZAFSHC 143, p. 3).

1645. For instance, in some civil law countries, such as France,⁵⁴¹⁰ Belgium,⁵⁴¹¹ and Algeria,⁵⁴¹²

⁵⁴¹⁰ Article 121-7 of the **French** Penal Code provides that “the person who knowingly, by aiding and abetting, facilitates its preparation or commission” is an “accomplice to a felony or a misdemeanour”. (*« est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation. »*). (English translation is available at: <http://www.legifrance.gouv.fr/>.) More specifically, for an accused to be convicted as an accomplice to a criminal offence by aiding and abetting (*aide ou assistance*), it must be established that: (i) the act of aiding and abetting happened before or at the same time as the perpetration of the criminal act (Arrêt de la chambre criminelle de la Cour de cassation (“Crim.”), 23 July 1927: Recueil Sirey, 1929. 1. 73) and was a positive act (which could be moral encouragement through the presence) rather than a simple inaction or omission (Crim., 21 October 1948: Bulletin des arrêt de la chambre criminelle de la Cour de cassation (“Bull. crim.”), n° 242, 27 December 1960 and *ibid.*, n° 624 ; Crim., 26 March 1992: Droit pénal Dalloz 1992. 194); and (ii) the accomplice aided or abetted the principal perpetrator with the awareness of the assistance he provided in the commission of the offence by the principal perpetrator (*« De même, la question de complicité par aide ou assistance doit préciser que l'aide ou l'assistance a été prêtée avec connaissance. »* Crim., 19 March 1986: Bull. crim., n° 112; *« La complicité par aide et assistance prévue par l'al. 1er de l'art. 121-7 C. pén. n'est punissable que si cette aide a été apportée sciemment à l'auteur principal dans les faits qui ont facilité la préparation ou la consommation de l'infraction. »* Crim., 19 June 2001: Bull. crim., n° 148; Droit pénal Dalloz 2001. 111; *« L'élément intentionnel du délit de complicité exige seulement que son auteur ait eu conscience de l'aide apportée à l'action principale. »* Crim., 1 October 1984: Gazette du Palais 1985, Sommaires 96; *« Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation; ne peut servir de base à une condamnation une question qui laisse incertain le point de savoir si l'aide ou l'assistance ont été prêtées en connaissance de cause. »* Crim., 28 June 1995: Bull. crim., n° 241; Droit pénal Dalloz 1995. 274). See also Crim., 17 May 1962: Bull. crim., n° 200; Recueil Dalloz 1962. 473.

⁵⁴¹¹ Article 67 of the **Belgian** Penal Code provides that: (i) those who procured the weapons, instruments or any other means that served for a crime, knowing that they would be so used; or (ii) those who aided or assisted, with awareness, the perpetrator(s) of a crime in its preparation or commission, shall be punishable as accomplices to the crime. (*« Seront punis comme complices d'un crime ou d'un délit: ...ceux qui auront procuré des armes, des instruments, ou tout autre moyen qui a servi au crime ou au délit, sachant qu'ils devaient y servir; ceux qui, hors le cas prévu par le § 3 de l'article 66, auront, avec connaissance, aidé ou assisté l'auteur ou les auteurs du crime ou du délit dans les faits qui l'ont préparé ou facilité, ou dans ceux qui l'ont consommé. »*). The Belgian Court of Cassation held: *« Afin de constater que les demandeurs ont commis les faits en tant que complices, il est requis mais il suffit qu'il soit établi qu'ils ont coopéré sciemment à la commission de l'infraction, de la manière prévue par la loi. »* Arrêt de la Cour de cassation de Belgique (Cass.), 28 September 2010, AR P.10.0099.N, Pasicrisie belge (Pas.), 2010, n° 554. See also Christine Hennau and Jacques Verhaegen, *Droit pénal general*, 3rd Edition (Bruxelles: Bruylant, 2003), pp. 278-286, explaining that, to establish the aiding and abetting liability, the following elements have to be fulfilled: (i) the material realisation of the principal offence or its attempt; (ii) direct or indirect, but certain causation between the act of assistance and the commission of the principal offence or its attempt (in the sense that the offence belongs to the logical sequence of the assistance provided); and (iii) “intention coupable (*dolus*)”, i.e. *mens rea*, to participate in the commission of the principal offence, in the sense that the aider or abettor was aware of the essential elements of the crime and was willing, or at least accepted that the crime be committed. Moreover, in **Luxembourg**, Article 67 of Luxembourgian Penal Code mirrors Article 67 of the Belgian Penal Code. The Luxembourgian Court of Cassation held that, for Article 67 to apply, the law requires that the supplier of instruments for a crime should have known that in providing them, they were to be used for the specific crime charged, this special knowledge forming the criminal link between the accomplice and the perpetrator. (*« ...pour que l'Article 67 soit applicable,...la loi exige qu'il ait su, en les fournissant, qu'ils devaient servir au crime déterminé qui fait l'objet de l'accusation, cette connaissance spéciale formant le lien criminel qui unit le complice à l'auteur. »*) See Dean Spielmann and Alphonse Spielmann, *Droit pénal général Luxembourgais*, 2nd Edition (Bruxelles: Bruylant, 2004), p. 350, quoting la Cour Supérieure de Justice (Cour d'appel siégeant en matière correctionnelle), 24 March 1986, n° 7/86 VI, and Tribunal d'arrondissement de Luxembourg, 26 November 1987, n° 1678/86, cités dans Pasicrisie luxembourgeoise, XXVII, (Sommaires), 93, n° 18.

⁵⁴¹² In **Algeria**, Article 42 of the Algerian Penal Code provides that those who knowingly aided by all means or assisted the perpetrator(s) of a criminal offence in its preparation or commission, without directly participating in that offence, shall be considered as accomplices to the criminal offence (*« Sont considérés comme complices d'une infraction ceux qui, sans participation directe à cette infraction, ont, avec connaissance, aidé par tous moyens ou assisté l'auteur ou les auteurs de l'action dans les faits qui l'ont préparée ou facilitée, ou qui l'ont consommée. »*). Article 43 of the same code further provides that accomplices are those who, being aware of their criminal conduct, usually provided housing, place of retreat or meeting for one or more criminals engaged in robbery or violence against the security of the State, the public peace, the people or the properties (*« Est assimilé au complice celui qui, connaissant leur conduite criminelle, a habituellement fourni logement, lieu de retraite ou de réunions à un ou plusieurs malfaiteurs exerçant des brigandages ou des violences contre la sûreté de l'Etat, la paix publique, les personnes ou les propriétés. »*). There are also a number of other countries whose Penal Codes contain provisions which closely resemble the above mentioned provisions of the French, Belgian, and Algerian Penal Codes and thereby provide the equivalent definition of aiding and

it is required that the aider or abettor provided assistance to the principal perpetrator and thereby facilitated the commission of the crime by that principal perpetrator, with the awareness that his act would provide assistance to the commission of the crime. In other countries of civil law tradition, such as Germany,⁵⁴¹³ Bulgaria,⁵⁴¹⁴ China,⁵⁴¹⁵ and Japan,⁵⁴¹⁶ it is required that the aider and abettor, by providing assistance, facilitated the commission of the crime by the principal perpetrator. In addition, it must be established that he did so with the *dolus*, which is often translated in English as

abetting liability. See **Moroccan** Penal Code, Article 129; **Senegalese** Penal Code, Articles 46-47; **Tunisian** Penal Code, Article 32; **Madagascan** Penal Code, Articles 60-61; **Mauritanian** Penal Code, Articles 54-55; **Burundian** Penal Code, Article 38; Penal Code of the **Democratic Republic of Congo**, Article 22; **Malian** Penal Code, Article 24.

⁵⁴¹³ In **Germany**, any person who intentionally assists another in the intentional commission of an unlawful act shall be punished as an aider (Art. 27 (I) of the German Criminal Code reads: “*Als Gehilfe wird bestraft, wer vorsätzlich einem anderen zu dessen vorsätzlich begangener rechtswidriger Haupttat Hilfe geleistet hat*”). The assistance does not need to be *conditio sine qua non* for the commission of the crime; it is sufficient that the act of the aider and abettor has facilitated it. (Tröndle/Fischer, Strafgesetzbuch und Nebengesetze, 53. Auflage, München 2006, § 27, Anm. 2 c with references) As to the *mens rea*, it is required that the aider and abettor was at least aware of the risk of the commission of the crime and accepts such an outcome by reconciling himself with it (*dolus eventualis*). An exception from the *dolus eventualis* requirement has been found in cases of so-called “professional” or “neutral” acts, where it has been held that if the acts of the principal are exclusively targeted toward committing a crime and the person providing assistance knows this *with certainty* (*positiv weiß*), the person will be punished as aider and abettor. (Tröndle/Fischer, Strafgesetzbuch und Nebengesetze, 53. Auflage, München 2006, § 27, Anm. 2 b with references; BGH NStZ 2001, 364).

⁵⁴¹⁴ Article 20(4) of the Criminal Code of **Bulgaria** provides that the aider is a person who has “intentionally facilitated the commission of a crime through advice, explanations, promises to render assistance after the act, removal of obstacles, supply of means or in any other way.” The *actus reus* of aiding involves the creation of conditions which to a certain degree facilitate the commission of the crime (Aleksandar Stoynov, *Criminal Law: General Part* (Sofia: Ciela, 1999), p. 316). The *mens rea* of aiding requires that the aider foresee the commission of the crime and its consequences and is aware that his conduct facilitates the perpetrator. In terms of volition, the aider either aims at or agrees with the facilitation and with the commission of the crime, either wanting or accepting its consequences (*ibid.*, p. 317).

⁵⁴¹⁵ In **China**, Article 27 of the Penal Code of the People’s Republic of China provides that “an accomplice refers to any person who plays a secondary or auxiliary role in a joint crime.” (English translation available at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm). In both criminal law theories and jurisprudence, there exist a more specific category of actors that are named as aiders and abettors, which refer to those who with intent (*dolus*) provide aid or assistance to the principal perpetrator and facilitate his commission of the crime. To establish the liability of an aider and abettor, it is required that: (i) the accused was aware of the fact that he was aiding and abetting others in a crime, and intentionally created a more convenient condition for others’ commission of the crime or took the risk of the creation of such a condition; and (ii) the act of aiding and abetting was distinguishable from the act of perpetration and facilitated the perpetration of the crime. With respect to the *mens rea*, it is not required that the accused have any specific criminal intent or any intention pursuing the perpetration of the crime. With regard to the *actus reus*, tangible and intangible assistance and physical and moral support can all constitute aiding and abetting, as long as they contributed physically or mentally to the crime to a certain extent (Chen Xingliang, ed., *Xingfa Zonglun Jingshi*, (Beijing: People’s Court Press, 2010), pp. 524-527).

⁵⁴¹⁶ In **Japan**, Article 62(1) of the Japanese Penal Code provides that “[a] person who aids a principal is an accessory.” The Japanese Supreme Court held that “[t]he term ‘accessory’ as set forth in Article 62, paragraph (1) of the Penal Code refers to a person who aids another person by any tangible or intangible means with the intent [“ishi” in the Japanese original] of collaborating in such other person’s commission of a crime, thereby facilitating the person’s crime.” (2011 (A) No. 2249, decision of the Third Petty Bench of the Supreme Court of 15 April 2013, Keishu vol. 67, No. 4, referring to 1949 (Re) No. 1506, judgment of the Second Petty Bench of the Supreme Court of 1 October 1949, Keishu Vol. 3, No. 10, at 1629). See also Shigemitsu Dando, *Keiho koyo soron*, 3rd Edition, (Tokyo: Sobunsha, 1990), pp. 412-415 (English translation: Shigemitsu Dando, *The Criminal Law of Japan: The General Part*, Publication of the Comparative Criminal Law Project, vol. 19 (Littleton, Colorado: Rothman, 1997), pp. 248-250), explaining based on the jurisprudence of Japanese courts, *inter alia*, that acts of aiding are not acts of perpetration, but make it easier for a principal to perpetrate an offence, that aiding by omission could be also punishable, and that an aider must have the intent to aid the principal’s offence based on the awareness (which may be at the level of *dolus eventualis*) of the principal’s perpetration of the offence. See further Atsushi Yamaguchi, *Keiho (Criminal Law)*, 2nd Edition (Tokyo: Yuhikaku, 2011), pp. 160-161; Masahide Maeda, *Keiho soron kogi (Criminal Law: The General Part)*, 3rd Edition, (Tokyo: University of Tokyo Press, 1998), pp. 434-439 and the jurisprudence cited therein. English translations of the

“intent” and encompasses either purpose, knowledge with certainty (*dolus directus*), or the awareness and acceptance of the likelihood that the crime could be committed and that his act could facilitate the commission of the crime (*dolus eventualis*). *Dolus eventualis* is the minimum requirement. In some common law countries, such as Australia and Canada, the aider and abettor must have both intent and knowledge, while the required amount of assistance in order for liability to arise, for the most part, is relatively low.⁵⁴¹⁷ In contrast, while English law also requires both intent and knowledge, the aider and abettor must make an essential contribution to the commission of the crime.⁵⁴¹⁸ As to the United States, while there is a Model Penal Code, its approach to

Penal Code and the case of 1 October 1949 quoted above are available at: <http://www.japaneselawtranslation.go.jp/> and <http://www.courts.go.jp/english/judgments/index.html>, respectively.

⁵⁴¹⁷ In **Australia** in order for liability to attach the accused “must have in fact aided, abetted, counselled or procured” the commission of an offence which was committed and “must have intended that: (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed” (see Criminal Code Act 1995, Part 2. 4, Division 11.2). In relation to the *actus reus*, the accused “is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission” (*R. v. Russell* [1933] VLR 59, p. 67). Both knowledge of the essential facts of the principal offence and participation intentionally aimed at the commission of the act which constitutes that offence are required to render a person liable as an aider and abettor (see *Giorgianni v. R.* [1985], 156 CLR 473, pp. 500, 503-507; see also *ibid.*, p. 482). In **Canada**, a person who “does or omits to do anything for the purpose of aiding any person to commit” an offence is considered a party to that offence (see Criminal Code, RSC 1985, c. C-46, Article 21(1)(b)). The “*actus reus* of aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence” (*R. v. Briscoe* [2010] 1 S.C.R. 411, para. 14). The Supreme Court of Canada has held that the *mens rea* requirement reflected in the word “purpose” includes both “intent” and “knowledge”. For the “intent” component, it has interpreted “purpose” to mean “intention” to assist the perpetrator in the commission of the crime, rather than “desire” that the offence be successfully committed. (*R. v. Briscoe* [2010] 1 S.C.R. 411, paras 16-17; see also *R. v. Hibbert* [1995] 2 S.C.R. 973, paras 31-32, 35-36, 40). In relation to the “knowledge” component, the Supreme Court has held that “in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed” (*R. v. Briscoe* [2010] 1 S.C.R. 411, para. 17). Reference to “purpose” is found also in Section 20(1) of the Criminal Code of **Ghana** which stipulates that: “Every person who, directly or indirectly, instigates, commands, counsels, procures, solicits, or in any manner purposely aids, facilitates, encourages, or promotes, whether by his act or presence or otherwise, and every person who does any act for the purpose of aiding, facilitating, encouraging or promoting the commission of a crime by any other person, whether known or unknown, certain or uncertain, is guilty of abetting that crime, and of abetting the other person in respect of that crime.” Article 31 of the **Israeli** Penal Code defines an aider as a person who “before or during the commission of an offence, acted in order to allow, facilitate or secure the said commission, or to prevent the apprehension of its perpetrator, the discovery of the offence or its loot, or in order to contribute in any other way to the creation of conditions for the commission of the crime”. The Supreme Court of Israel has held that the *actus reus* of aiding consists of an act or omission that may assist, allow, facilitate or secure the realisation of the principal offence. There is no requirement that the assistance would be effective, that it would constitute a *conditio sine qua non* in relation to the principal offence, or that the commission of the latter was completed (Criminal Appeal 320/99, *Plonit v. The State of Israel*, PD 55(3) 22, paras 15-16). In relation to the *mens rea*, the aider must be aware of the essential elements of the principal offence and that his acts assist or otherwise allow the conditions for the commission of that offence (*ibid.*, para. 17). In addition, the aider must have the purpose to assist the principal perpetrator. The latter requirement will be satisfied also if the aider is aware that his conduct would, in high probability, constitute an assisting contribution to the principal perpetrator (*ibid.*, paras 19-20).

⁵⁴¹⁸ In **England**, in *National Coal Board v. Gamble*, Devlin J stated: “A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting. [...] Another way of putting the point is to say that aiding and abetting is a crime that requires proof of *mens rea*, that is to say, of intention to aid as well as of knowledge of the circumstances, and that proof of the intent involves proof of a positive act of assistance voluntarily done.” (*National Coal Board v. Gamble* [1959] 1 Q.B.11, p. 20; see also *Maxwell v. Director of Public Prosecutions for Northern Ireland* [1979] 68 Cr. App. R. 128, pp. 140-141; *R. v. Bryce* [2004] 2 Cr.App.R. 35, paras 42-45, 71, 75.

accomplice liability is not uniformly adopted throughout the country. Consequently, states vary with respect to the applicable theories of accomplice liability, especially in relation to the relevant *mens rea* standard.⁵⁴¹⁹ In Iran, the Islamic Penal Code requires that the accessory commit a positive act by which he knowingly and intentionally facilitates the commission of the crime.⁵⁴²⁰

1646. The survey of the above mentioned countries suffices for the Appeals Chamber to discern that requiring “specific direction” for aiding and abetting liability is not a general, uniform practice in national jurisdictions.

1647. Finally, the Appeals Chamber briefly examines international instruments. The Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission (“ILC”) in 1996 (“ILC Draft Code”) is not binding, but “is an authoritative instrument, parts of which may constitute evidence of customary international law, clarify customary rules, or, at the very least, ‘be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world.’”⁵⁴²¹ Article 2(3)(d) of the ILC Draft Code provides that “[a]n individual shall be responsible for a crime set out in [the ILC Draft Code] if that individual [...]

See also *R. v Bryce*, para. 81 where the Court held that “all that is necessary in the secondary party is the foresight of the real possibility that an offence will be committed by the person to whom the accessory's acts of assistance are directed”).

⁵⁴¹⁹ See Candace Courteau, “The Mental Element Required for Accomplice Liability: A Topic Note”, *Louisiana Law Review*, vol. 59 (Fall 1998), pp. 333-334, and references therein. The **United States** Model Penal Code defines an accomplice as a person who, “with the purpose of promoting or facilitating the commission of the offense”: (i) solicits another person to commit an offence; (ii) aids, agrees or attempts to aid another person in planning or committing it; or (iii) having a legal duty to prevent it, fails to make proper effort so to do” (U.S. Model Penal Code, §2.06(3)). While accomplice liability may be established through any act of facilitating a crime, the Model Penal Code “requires that the actor [...] have as his conscious objective the bringing about of conduct [...] [which is] criminal” (U.S. Model Penal Code and Commentaries, pp. 310, 314, 318, fn. 58). With respect to U.S. federal law and practice, for aiding and abetting liability, generally the government must prove that the accused: (i) had the specific intent to facilitate the commission of a crime by another; (ii) had the requisite intent of the underlying substantive offence; and (iii) assisted or participated in the commission of the underlying substantive offence (see, e.g., *United States v. Delgado*, 357 F.3d 1061, 1065-1066 (9th Cir. 2004); *United States v. Lucas*, 67 F.3d 956, 959 (D.C. Cir. 1995); *United States v. Gaskins*, 849 F.2d 454, 457, 459 (9th Cir. 1988); see also 18 U.S.C. §2(a)). Regarding the *actus reus*, it must be established that the accused assisted or participated in some way to the commission of the underlying offence (see, e.g., *United States v. Landerman*, 109 F.3d 1053, 1068 n.22 (5th Cir. 1997); *United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997); *United States v. McKneely*, 69 F.3d 1067, 1072 (10th Cir.1995)). With respect to the *mens rea*, the “purposive attitude” standard (*i.e.*, the accomplice must have the intent that the underlying offence be committed) is the prevailing approach of U.S. federal courts (see, e.g., *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (“In order to aid and abet another to commit a crime it is necessary that a defendant in ‘some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.’”); *United States v. Woods*, 148 F.3d 843, 847, 849-850 (7th Cir. 1998); *United States v. Bancalari*, 110 F.3d 1425, 1429 (9th Cir. 1997); *United States v. Lucas*, 67 F.3d 956 (D.C. Cir. 1995); *United States v. Williamson*, 53 F.3d 1500, 1515 (10th Cir. 1995); *United States v. Roach*, 28 F.3d 729, 736-737 (8th Cir. 1991); *United States v. Peoni*, 100 F.2d 401, 402 (2nd Cir. 1938)). For claims brought under the U.S. Alien Tort Statute, it has been held that aiding and abetting liability attaches only where an accused carries out “acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime” and acts “with a purpose” to promote or facilitate the commission of the crime (see, e.g., *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 398 (4th Cir. 2011); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 154, 158 (2nd Cir. 2010); *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 253, 259 (2nd Cir. 2009)).

⁵⁴²⁰ Kevin Jon Heller and Markus D. Dubber, eds., *The Handbook of Comparative Criminal Law* (Stanford: Stanford University Press, 2011), p. 330.

knowingly aids, abets or otherwise assists, *directly and substantially*, in the commission of such a crime, including providing the means for its commission.”⁵⁴²² Regarding the *actus reus* requirement, the Commentary of the ILC explains that, for aiding and abetting liability to arise, an individual must “provide the kind of assistance which contributes directly and substantially to the commission of the crime.”⁵⁴²³ The Commentary further notes that “[t]hus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way.”⁵⁴²⁴ As correctly noted in the *Furundžija* Trial Judgement, this conforms with the post WWII cases which demonstrate that “the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal.”⁵⁴²⁵

1648. Article 25(3)(c) of the ICC Statute, adopted in 1998, provides that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...] [f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission”. The phrase “directly and substantially” in the ILC Draft Code is not included in this provision, while the phrase “[f]or the purpose of facilitating the commission of such a crime” has been added. This has led some scholars to consider that, compared to the ILC Draft Code, the ICC Statute may have lowered the threshold of the *actus reus* requirement,⁵⁴²⁶ while apparently adopting a higher *mens rea* standard.⁵⁴²⁷ However, how the chambers of the International Criminal Court (“ICC”) interpret Article 25(3)(c) of the ICC Statute and define the elements of the mode of liability under this article remains to be seen. Moreover, while the ICC Statute may be in many areas regarded as indicative of customary rules, in some areas it creates new law or modifies

⁵⁴²¹ *Krstić* Appeal Judgement, fn. 20, quoting *Furundžija* Trial Judgement, para. 227.

⁵⁴²² Emphasis added.

⁵⁴²³ Report of the International Law Commission on the Work of its Forty-Eight Session, 6 May – 26 July 1996, UN Doc. A/51/10, p. 21.

⁵⁴²⁴ Report of the International Law Commission on the Work of its Forty-Eight Session, 6 May – 26 July 1996, UN Doc. A/51/10, p. 21.

⁵⁴²⁵ *Furundžija* Trial Judgement, para. 233. The trial chamber in the *Furundžija* case further found “the use of the term ‘direct’ [in the Commentary of the ILC to the Draft Code] in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime” (*Furundžija* Trial Judgement, para. 232).

⁵⁴²⁶ William A. Schabas, *An Introduction to the International Criminal Court*, 4th Edition (Cambridge: Cambridge University Press, 2011), p. 228. See also *Furundžija* Trial Judgement, para. 231.

⁵⁴²⁷ Albin Eser, “Individual Criminal Responsibility”, in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol. I (Oxford: Oxford University Press, 2002), pp. 800-801; Kai Ambos, “Individual Criminal Responsibility”, in Otto Triffterer ed., *Commentary on the Rome Statute on the International Criminal Court: Observers’ Notes, Article by Article*, 2nd Edition (Baden-Baden: Nomos Verlagsgesellschaft, 2008), pp. 754-755, 757.

existing law.⁵⁴²⁸ The adoption of an international treaty, by itself, does not necessarily prove that states consider the content of that treaty to express customary international law.⁵⁴²⁹

1649. Based on the foregoing, the Appeals Chamber, Judge Tuzmukhamedov dissenting, comes to the compelling conclusion that “specific direction” is not an element of aiding and abetting liability under customary international law. Rather, as correctly stated in the *Furundžija* Trial Judgement and confirmed by the *Blaškić* Appeal Judgement, under customary international law, the *actus reus* of aiding and abetting “consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”⁵⁴³⁰ The required *mens rea* is “the knowledge that these acts assist the commission of the offense”.⁵⁴³¹ The Appeals Chamber reaffirms the position taken by the *Blaškić* Appeal Judgement in this regard.

1650. Accordingly, the Appeals Chamber confirms that the *Mrkšić and Šljivančanin* and *Lukić and Lukić* Appeal Judgements stated the prevailing law in holding that “‘specific direction’ is not an essential ingredient of the *actus reus* of aiding and abetting”,⁵⁴³² accurately reflecting customary international law and the legal standard that has been constantly and consistently applied in determining aiding and abetting liability.⁵⁴³³ Consequently, the Appeals Chamber, Judge Tuzmukhamedov dissenting, unequivocally rejects the approach adopted in the *Perišić* Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard.⁵⁴³⁴

1651. In light of the foregoing, the Appeals Chamber finds that in assessing the *actus reus* of aiding and abetting, the Trial Chamber was not required to determine whether Lazarević’s acts were

⁵⁴²⁸ *Furundžija* Trial Judgement, para. 227. See also *Tadić* Appeal Judgement, para. 223. Pre-Trial Chamber I of the ICC has also recognised that the ICC Statute might not in all aspects reflect customary international law. See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 508. See also *Taylor* Appeal Judgement, paras 435, 451.

⁵⁴²⁹ See James Crawford, *Brownlie’s Principles of Public International Law*, 8th Edition (Oxford: Oxford University Press, 2012), p. 21. Cf. *Galić* Appeal Judgement, paras 84-85. Moreover, customary international law has to be assessed as of the time of the commission of the offence (See *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 21).

⁵⁴³⁰ *Blaškić* Appeal Judgement, para. 46, quoting *Blaškić* Trial Judgement, para. 283, in turn quoting *Furundžija* Trial Judgement, para. 249. See also *Taylor* Appeal Judgement, paras 471-481.

⁵⁴³¹ *Blaškić* Appeal Judgement, para. 46, quoting *Blaškić* Trial Judgement, para. 283, in turn quoting *Furundžija* Trial Judgement, para. 249. See also *Taylor* Appeal Judgement, para. 436.

⁵⁴³² *Mrkšić and Šljivančanin* Appeal Judgement, para. 159. In these circumstances, the *Mrkšić and Šljivančanin* Appeal Judgement was not required to provide cogent reasons as there was no departure from the prevailing jurisprudence. See also *Lukić and Lukić* Appeal Judgement, para. 424.

⁵⁴³³ The Appeals Chamber notes that during the interval between the rendering of the *Mrkšić and Šljivančanin* Appeal Judgement and the *Perišić* Appeal Judgement, three ICTR appeal judgements mention specific direction in passing, but do not consider it to be a required element of this mode of liability. See *Ntawukulilyayo* Appeal Judgement, paras 214, 216; *Rukundo* Appeal Judgement, para. 52; *Kalimanzira* Appeal Judgement, paras 74, 79. See also *supra*, fn. 5336. Significantly, the *Lukić and Lukić* Appeal Judgement explicitly states: “In *Mrkšić and Šljivančanin*, the Appeals Chamber has clarified that ‘specific direction’ is not an essential ingredient of the *actus reus* of aiding and abetting and finds that there is no ‘cogent reason’ to depart from this jurisprudence” (see *Lukić and Lukić* Appeal Judgement, para. 424 (internal quotation marks and references omitted, emphasis added)).

specifically directed to assist, encourage or lend moral support to the commission of the crimes by the VJ and thus dismisses Lazarević's arguments to the contrary.

(b) Lazarević's involvement in joint operations in 1998

1652. Lazarević challenges the Trial Chamber's finding that he contributed to the implementation of joint operations conducted by the MUP and the VJ in the border area between Kosovo and Albania during the second half of 1998 by ordering the engagement of units in the sector of Slup/Sllup and Vokša/Voksh villages on 14 August 1998 and by monitoring the action which took place on 15 August 1998.⁵⁴³⁵

1653. The Prosecution responds that Lazarević's arguments should be summarily dismissed since the alleged errors concern factual findings on which his conviction does not rely.⁵⁴³⁶

1654. The Appeals Chamber notes that Lazarević was neither charged with nor convicted of crimes committed in Kosovo in 1998. Nor did the Trial Chamber rely on its factual findings on Lazarević's involvement in the Slup/Sllup and Vokša/Voksh operation in 1998 to find that he aided and abetted the commission of crimes by VJ members in Kosovo in 1999.⁵⁴³⁷ Lazarević's challenges thus pertain to factual findings that have no bearing on his conviction. The Appeals Chamber therefore dismisses sub-ground 3(a) of his appeal.

(c) Lazarević's involvement in joint operations in 1999

1655. In concluding that Lazarević voluntarily provided practical assistance, encouragement, and moral support to the VJ forces engaging in the forcible displacement of Kosovo Albanians, the Trial Chamber specifically considered Lazarević's involvement in joint operations of the MUP and the VJ in 1999.⁵⁴³⁸ In particular, the Trial Chamber found that two large-scale plans, *Grom 3* and *Grom 4*, were prepared by the VJ at the beginning of 1999.⁵⁴³⁹ The Trial Chamber further found that Lazarević implemented these plans by, *inter alia*, issuing the *Grom 3* and *Grom 4* orders on 7 February and 6 April 1999, respectively,⁵⁴⁴⁰ which sent the VJ into Kosovo.⁵⁴⁴¹ The Trial Chamber concluded that several joint operations were carried out in late March through the end of

⁵⁴³⁴ See also *supra*, paras 1621-1622. See *Aleksovski* Appeal Judgement, para. 111.

⁵⁴³⁵ Lazarević's Appeal Brief, paras 386, 398-400, referring, *inter alia*, to Trial Judgement, vol. 3, paras 802-803. Lazarević further argues that the coordination and cooperation between the VJ and MUP in 1998 was legitimate and was approved by the higher command (Lazarević's Appeal Brief, paras 387-397, 401-403). See also Lazarević's Reply Brief, paras 118-120.

⁵⁴³⁶ Prosecution's Response Brief (Lazarević), paras 240-241.

⁵⁴³⁷ See Trial Judgement, vol. 3, paras 922-927.

⁵⁴³⁸ Trial Judgement, vol. 3, paras 822-829.

⁵⁴³⁹ Trial Judgement, vol. 3, paras 823, 826.

⁵⁴⁴⁰ Trial Judgement, vol. 3, paras 824, 826, referring to Vladimir Lazarević, 8 Nov 2007, T. 17905, Exh. 5D175.

⁵⁴⁴¹ Trial Judgement, vol. 3, para. 925.

May 1999, pursuant to orders issued by the Priština Corps Command.⁵⁴⁴² The Trial Chamber consequently found that:

Lazarević significantly participated in the planning and execution of the joint operations conducted by the VJ, acting solely or in co-ordination with the MUP, on the ground in Kosovo from March to June 1999. His *Grom 3* and *4* orders, and the Joint Command orders—which the Priština Corps drafted—sent the VJ into actions in Kosovo and provided the authorisation within the VJ chain of command for the VJ to operate in the crime sites where many of the forcible displacements of Kosovo Albanians were conducted.⁵⁴⁴³

The Trial Chamber further found that these acts:

provided a substantial contribution to the commission of the crimes [...] found to have been committed by VJ members [...] as they provided assistance in terms of soldiers on the ground to carry out the acts, the organization and equipping of VJ units, and the provision of weaponry, including tanks, to assist these acts.⁵⁴⁴⁴

(i) Submissions of the parties

1656. Lazarević disputes the Trial Chamber’s finding that his actions were voluntary.⁵⁴⁴⁵ He contends that: (i) he only planned the activities of his subordinate units pursuant to directives and orders from the 3rd Army Command and the VJ General Staff; (ii) nothing in the orders he received indicated that their execution would aid and abet the commission of any crime; and (iii) his activities were directed to defence against the NATO bombing and the KLA.⁵⁴⁴⁶ Lazarević further argues that it was unreasonable for the Trial Chamber to find that he assisted with the provision of weaponry because it is “legitimate and normal” for military units to be supplied with weaponry, including tanks, during a war, particularly when facing an opposing force with the might of NATO and the KLA.⁵⁴⁴⁷

1657. Lazarević further argues that the Trial Chamber misinterpreted the *Grom 3* and *Grom 4* plans which were issued for the defence of the country – not aimed at the civilian population – and were planned at a higher level than the Priština Corps.⁵⁴⁴⁸ He also claims that the Trial Chamber misinterpreted the cooperation between the VJ and the MUP, arguing that: (i) the VJ planned operations only for its units, not for the MUP;⁵⁴⁴⁹ (ii) cooperation “was reduced to a level of

⁵⁴⁴² Trial Judgement, vol. 3, paras 824-828. See also *ibid.*, vol. 1, paras 1196-1200.

⁵⁴⁴³ Trial Judgement, vol. 3, para. 925.

⁵⁴⁴⁴ Trial Judgement, vol. 3, para. 926.

⁵⁴⁴⁵ Lazarević’s Appeal Brief, para. 599, referring to Trial Judgement, vol. 3, para. 927.

⁵⁴⁴⁶ Lazarević’s Appeal Brief, paras 444, 491, 572-573, 576; Lazarević’s Reply Brief, para. 140.

⁵⁴⁴⁷ Lazarević’s Appeal Brief, para. 598, referring to Trial Judgement, vol. 3, para. 926.

⁵⁴⁴⁸ Lazarević’s Appeal Brief, para. 453, referring to Trial Judgement, vol. 3, para. 826. See also Lazarević’s Appeal Brief, paras 455-470. Lazarević further submits that the Joint Command did not exist and did not represent any real command body, or at least that he was not aware of any such parallel command during the Kosovo conflict (*ibid.*, para. 483).

⁵⁴⁴⁹ Lazarević’s Appeal Brief, para. 454, referring to Trial Judgement, vol. 3, para. 827. See also Lazarević’s Appeal Brief, para. 484.

individual contacts of lower ranking officers”,⁵⁴⁵⁰ and (iii) several joint operations were ordered in May 1999 by the Priština Corps Command based on the orders for the re-subordination of the MUP forces to the VJ, but that such re-subordination did not occur.⁵⁴⁵¹

1658. Finally, Lazarević challenges the Trial Chamber’s finding that, despite receiving information about crimes, such as murder, rape, looting, and robbery, allegedly committed by the MUP in the zone of responsibility of the VJ 37th Motorised Brigade in May 1999, Lazarević continued to approve joint VJ and MUP operations, such as the attack on the village of Dubrava/Lisnaja on 25 May 1999, which involved the forcible displacement of Kosovo Albanians.⁵⁴⁵² He argues that the operation in Dubrava/Lisnaja was in the zone of the 243rd Motorised Brigade, while the crimes allegedly committed by the MUP occurred in the zone of responsibility of the 37th Motorised Brigade.⁵⁴⁵³ Lazarević reiterates that he was duty-bound to approve the joint actions of the VJ and the MUP since Milošević’s order concerning the re-subordination of the MUP to the VJ was still in force and that he could not decline to authorise such actions without a specific order to that effect from his superior command.⁵⁴⁵⁴

1659. The Prosecution responds that Lazarević merely repeats arguments he made at trial or misrepresents the Trial Chamber’s factual findings.⁵⁴⁵⁵ It further submits that Lazarević’s argument that he acted in defence against NATO and the KLA conflates *jus ad bellum* and *jus in bello* and that his conduct remains illegal under international humanitarian law.⁵⁴⁵⁶ The Prosecution submits that the defence of military necessity is not applicable in his case because the limited exceptions where this defence is allowed under international humanitarian law do not correspond to the facts of this case, and these exceptions were expressly considered by the Trial Chamber when stating the law on forcible displacement.⁵⁴⁵⁷ It also contends that Lazarević’s argument that his actions were

⁵⁴⁵⁰ Lazarević’s Appeal Brief, paras 485-486. See also Lazarević’s Reply Brief, para. 125.

⁵⁴⁵¹ Lazarević’s Appeal Brief, paras 488-490, referring to Trial Judgement, vol. 1, para. 1203, *ibid.*, vol. 3, para. 828.

⁵⁴⁵² Lazarević’s Appeal Brief, para. 524, referring to Trial Judgement, vol. 3, para. 848.

⁵⁴⁵³ Lazarević’s Appeal Brief, para. 524.

⁵⁴⁵⁴ Lazarević’s Appeal Brief, paras 525, 569. See also *ibid.*, para. 487. Lazarević further notes that, having warned his superiors about the commission of offences by some members of the MUP one day prior to the operation in Dubrava/Lisnaja, he expected that the responsible MUP organs would investigate the allegations that he raised regarding the commission of crimes by some members of the MUP (*ibid.*, para. 525. See also Lazarević’s Reply Brief, para. 135). Lazarević also contends that in any case, the events of 25 May 1999 concerned combat with the KLA and the Trial Chamber found that witness Vishi recommended the Kosovo Albanians to leave the village (Lazarević’s Appeal Brief, para. 526, referring to Fadil Vishi, Exh. P2284, p. 4, Fadil Vishi, Exh. P2285, T. 4464-4466; Lazarević’s Reply Brief, para. 135). The Appeals Chamber has already dismissed Lazarević’s arguments in this regard in an earlier part of this Judgement (see *supra*, sub-section VI.B.7.(a)(ii)).

⁵⁴⁵⁵ Prosecution’s Response Brief (Lazarević), paras 265-267, 272-275.

⁵⁴⁵⁶ Prosecution’s Response Brief (Lazarević), paras 334-335.

⁵⁴⁵⁷ Prosecution’s Response Brief (Lazarević), paras 336-337.

not voluntary because he was merely executing orders is unsubstantiated and that, in any case, the defence of superior orders does not apply before the Tribunal.⁵⁴⁵⁸

1660. The Prosecution further submits that Lazarević's attempt to isolate the crimes committed by the MUP from the joint operation he later ordered in Dubrava/Lisnaja ignores the Trial Chamber's findings that the VJ and MUP forces cooperated in a campaign of violence aimed at displacing Kosovo Albanian civilians across the whole of Kosovo.⁵⁴⁵⁹ It further contends that Lazarević's submission that he lacked the authority to cease cooperation between the VJ and the MUP is unsubstantiated.⁵⁴⁶⁰

(ii) Analysis

1661. The Appeals Chamber first turns to Lazarević's arguments that he planned the activities of his subordinate units pursuant to directives and orders of the 3rd Army and that he was duty-bound to approve the joint actions of the VJ and the MUP while re-subordination orders were in effect. The Appeals Chamber recalls that the fact that an accused acted pursuant to superior orders does not relieve him of criminal responsibility⁵⁴⁶¹ and that, even where a lawful order exists to conduct an operation, an accused may still incur criminal responsibility for crimes committed in the course of that operation.⁵⁴⁶² The fact that a higher level of military command directed Lazarević to plan the operations of the Priština Corps does not in itself preclude his responsibility for aiding and abetting the crimes of deportation and forcible transfer committed in the course of such operations. Accordingly, his argument that he was following orders and that his actions were thus not voluntary is inapposite and he has failed to show any error on the part of the Trial Chamber.

1662. Lazarević's contention that his orders were issued in defence of the country against NATO and the KLA is likewise misguided. Whether the resort to the use of force is legitimate under international law is a question of *jus ad bellum*, which is distinct from whether the way in which that force was used was legal under international humanitarian law,⁵⁴⁶³ *i.e. jus in bello*. The rules of international humanitarian law do not require a military commander to refrain from defending his country but demand that he ensure that his conduct and that of his subordinates comply with established humanitarian principles. In any event, the Trial Chamber found that, while the VJ and

⁵⁴⁵⁸ Prosecution's Response Brief (Lazarević), para. 338.

⁵⁴⁵⁹ Prosecution's Response Brief (Lazarević), para. 303.

⁵⁴⁶⁰ Prosecution's Response Brief (Lazarević), para. 304.

⁵⁴⁶¹ Article 7(4) of the Statute. However, acting under superior orders might be considered in mitigation of sentence if the interests of justice so require (see *ibid.*).

⁵⁴⁶² *Boškoski and Tarčulovski* Appeal Judgement, para. 51.

⁵⁴⁶³ *Boškoski and Tarčulovski* Appeal Judgement, para. 31. See also *Kordić and Čerkez* Appeal Judgement, para. 812.

the MUP launched their joint offensive against the KLA and NATO, they also launched a widespread and systematic campaign of forcible displacement against the civilian population.⁵⁴⁶⁴

1663. The Appeals Chamber further finds no error in the Trial Chamber's conclusion that Lazarević's role in the provision of weaponry rendered practical assistance to the commission of crimes by the VJ forces. The Appeals Chamber finds that a reasonable trier of fact could have concluded that undertaking such tasks, *with* the awareness that the crimes of deportation and forcible transfer were being committed by the troops, amounts to rendering practical assistance to the perpetrators. In this context, the Appeals Chamber recalls, as addressed previously, that "specific direction" is not an element of the *actus reus* of aiding and abetting.⁵⁴⁶⁵ Thus Lazarević's assertion that it was legitimate to supply VJ units with weaponry in light of the fight against NATO and the KLA is inapposite.

1664. As to Lazarević's claim that the Trial Chamber misinterpreted the *Grom 3* and *Grom 4* plans and the cooperation between the VJ and the MUP, the Appeals Chamber notes that Lazarević repeats *verbatim* entire passages from his Closing Brief,⁵⁴⁶⁶ without showing any error of the Trial Chamber warranting the Appeals Chamber's intervention.⁵⁴⁶⁷ Further, Lazarević's submission that the VJ planned operations only for its units and that cooperation between the VJ and the MUP was based on "individual contacts of lower ranking officers" ignores the Trial Chamber's detailed analysis of orders issued by the Priština Corps Command for the conduct of joint operations.⁵⁴⁶⁸ Significantly, the Trial Chamber referred to Lazarević's *Grom 3* order issued on 16 February 1999, instructing the Priština Corps Command subordinate units to act in coordination with specific MUP units,⁵⁴⁶⁹ as well as to several orders issued in May 1999 envisaging the conduct of joint operations in different sectors.⁵⁴⁷⁰

1665. Lazarević's argument that the Trial Chamber erred in finding that several joint operations were ordered by the Priština Corps Command in May 1999 based on the orders for the re-subordination of the MUP forces to the VJ⁵⁴⁷¹ has no bearing on his convictions. The Trial Chamber

⁵⁴⁶⁴ Trial Judgement, vol. 3, para. 822. See also *ibid.*, vol. 2, paras 1156, 1178.

⁵⁴⁶⁵ See *supra*, sub-section VIII.B.3.(a). See also *Lukić and Lukić* Appeal Judgement, para. 424, citing *Mrkšić and Šljivančanin* Appeal Judgement, para. 159.

⁵⁴⁶⁶ Cf. Lazarević's Appeal Brief, paras 455-482, 487 and Lazarević's Closing Brief, paras 617-628, 778, 827-842.

⁵⁴⁶⁷ Lazarević's challenges to the Trial Chamber's findings on the existence and role of the Joint Command are rejected on the same basis (Cf. Lazarević's Appeal Brief, paras 483, 485-486 and Lazarević's Closing Brief, paras 776-777, 843). The Appeals Chamber further recalls that it has dismissed challenges of Šainović, Pavković, and Lukić in relation to the existence and functioning of the Joint Command (see *supra*, sub-section VII.C.).

⁵⁴⁶⁸ Trial Judgement, vol. 3, paras 824-828, and references therein.

⁵⁴⁶⁹ Trial Judgement, vol. 3, para. 824, referring to Exh. P2808.

⁵⁴⁷⁰ Trial Judgement, vol. 3, para. 828, referring to Exh. 6D704, pp. 1, 5, Exh. P2011, Exh. 6D709, Exh. P2014, Exh. 6D712, Exh. P1503.

⁵⁴⁷¹ Lazarević's Appeal Brief, paras 488-490, referring to Trial Judgement, vol. 1, para. 1203, *ibid.*, vol. 3, para. 828.

found that such re-subordination did not occur in practice; rather, it found that the relationship between the VJ and the MUP remained that of cooperation and coordination.⁵⁴⁷²

1666. Finally, the Appeals Chamber finds unpersuasive Lazarević's argument that the crimes allegedly committed by the MUP prior to the commencement of the operation in Dubrava/Lisnaja occurred in a different zone of VJ responsibility than the joint operation he later ordered. In this respect, the Appeals Chamber notes the Trial Chamber's finding on the widespread and systematic nature of the campaign of violence and forcible displacement that took place throughout Kosovo at the time and the fact that Lazarević's report to the 3rd Army Command, containing information on the commission of crimes against Kosovo Albanian civilians, did not confine the occurrence of such crimes to one area of Kosovo.⁵⁴⁷³ Consequently, Lazarević has failed to show that a reasonable trier of fact could not have concluded that he continued to approve joint VJ and MUP operations despite receiving information about crimes allegedly committed by the MUP.⁵⁴⁷⁴

1667. The Appeals Chamber recalls its finding that the Trial Chamber erred in concluding that based on his knowledge of events by the end of 1998, Lazarević was aware that forcible displacement was likely to occur if he ordered the VJ to operate in Kosovo in 1999.⁵⁴⁷⁵ The Appeals Chamber, however, recalls that it has also found that a reasonable trier of fact could have concluded that Lazarević was aware of the campaign of terror, violence, and forcible displacement carried out by the VJ and the MUP during joint operations in Priština/Prishtina from 24 March 1999.⁵⁴⁷⁶ The Appeals Chamber therefore considers that it was established that Lazarević possessed the requisite *mens rea* of aiding and abetting at this time. Accordingly, Lazarević's issuance of the *Grom 3* order to the Priština Corps units on 7 February 1999 cannot be considered as an act of assistance to the commission of deportation and forcible transfer by the VJ forces, as it was not established that at the time of its issuance, he had the requisite *mens rea* for aiding and abetting the commission of forcible displacement by the VJ.⁵⁴⁷⁷ The Appeals Chamber, however, finds that this consideration does not undermine the Trial Chamber's overall finding that Lazarević assisted the commission of crimes by sending "the VJ into actions in Kosovo and provid[ing] the authorisation within the VJ chain of command for the VJ to operate in the crime sites where many of the forcible displacements

⁵⁴⁷² Trial Judgement, vol. 1, para. 1203.

⁵⁴⁷³ See Exh. P1458.

⁵⁴⁷⁴ Trial Judgement, vol. 3, para. 848. See also *ibid.*, vol. 2, paras 1141-1148.

⁵⁴⁷⁵ See *infra*, sub-section VIII.B.4.(a).

⁵⁴⁷⁶ See *infra*, sub-section VIII.B.4.(b).

⁵⁴⁷⁷ The Appeals Chamber recalls in this respect that the principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises his *actus reus* (Cf. *Naletilić and Martinović* Appeal Judgement, para. 114. See also *Krajišnik* Appeal Judgement, para. 203). The *mens rea* of an aider and abettor must therefore exist at the time he provides assistance to the crime for which he is held responsible (See, e.g., *Haradinaj et al.* Appeal Judgement, para. 58).

of Kosovo Albanians were conducted.”⁵⁴⁷⁸ In this regard, the Appeals Chamber observes that the Trial Chamber’s finding on his participation in the planning and execution of joint operations in Kosovo (constituting part of his *actus reus* of aiding and abetting) was not based solely on his issuance of the *Grom 3* order, but also on his issuance of the *Grom 4* order to the Priština Corps units on 6 April 1999 and his role in issuing orders with the Joint Command heading⁵⁴⁷⁹ to the units for operations from late March 1999 throughout the Indictment period.⁵⁴⁸⁰

1668. In light of the foregoing, the Appeals Chamber dismisses sub-grounds 3(c), 3(f), and 3(i) of Lazarević’s appeal in relevant part.

(d) Lazarević’s involvement in incorporating volunteers into the Priština Corps

1669. Lazarević raises a number of challenges to the Trial Chamber’s findings concerning the incorporation of volunteers into the VJ units.⁵⁴⁸¹ The Appeals Chamber notes, however, that the Trial Chamber made no reference to Lazarević’s involvement in or knowledge of the problems associated with volunteers in assessing his liability for aiding and abetting the crimes committed by the VJ.⁵⁴⁸² Moreover, while the Trial Chamber found that Lazarević was aware that whole companies of volunteers continued to operate, it concluded that the Prosecution had failed to show that Lazarević assisted volunteers in by-passing regular procedure.⁵⁴⁸³ Indeed, it noted that Lazarević had in fact issued orders to improve the selection and discipline of volunteers.⁵⁴⁸⁴ The Appeals Chamber therefore considers that the errors Lazarević alleges in this regard have no impact upon his conviction.

1670. Accordingly, the Appeals Chamber dismisses sub-ground 3(d) of Lazarević’s appeal.

(e) Lazarević’s failure to take adequate measures to ensure investigations of crimes by VJ members

1671. The Trial Chamber found that Lazarević failed to take adequate measures to ensure the proper investigation of serious crimes committed by the VJ.⁵⁴⁸⁵ It concluded that his omission in

⁵⁴⁷⁸ Trial Judgement, vol. 3, para. 925.

⁵⁴⁷⁹ See Trial Judgement, vol. 3, para. 827, recalling its finding that the Priština Corps Command was the source of the Joint Command orders and noting that Lazarević took responsibility for the issuance of these orders.

⁵⁴⁸⁰ See Trial Judgement, vol. 3, paras 825-829 (referring to Exh. P1878, Exh. P1968, Exh. P1969, Exh. P1970, Exh. P1971, Exh. P1972, Exh. P1973, Exh. P1974, Exh. 1975, Exh. 1976, Exh. P1977, Exh. P2003), 925.

⁵⁴⁸¹ Lazarević’s Appeal Brief, paras 493-511, referring, *inter alia*, to Trial Judgement, vol. 1, paras 834-835. See also Lazarević’s Reply brief, para. 126.

⁵⁴⁸² Trial Judgement, vol. 3, paras 923-927.

⁵⁴⁸³ Trial Judgement, vol. 3, paras 834-835.

⁵⁴⁸⁴ Trial Judgement, vol. 3, para. 835.

⁵⁴⁸⁵ Trial Judgement, vol. 3, para. 925.

this respect contributed to the commission of the crimes of deportation and forcible transfer by VJ forces.⁵⁴⁸⁶

1672. In reaching this conclusion, the Trial Chamber relied on the evidence of Lakić Đorović, a former military prosecutor,⁵⁴⁸⁷ that, while the military justice system functioned throughout the NATO air campaign, it only prosecuted a small proportion of the violent crimes against Kosovo Albanians whereas crimes against the VJ or Serbian victims were prosecuted more effectively.⁵⁴⁸⁸ The Trial Chamber further relied on a Priština Corps order of 7 May 1999 to find that Lazarević could initiate additional investigations and disciplinary proceedings within the VJ, even where criminal investigations had commenced.⁵⁴⁸⁹ It further found that the widespread commission of forcible displacement, together with the lack of criminal prosecutions for such acts, supported the Prosecution's contention that Lazarević intentionally failed to ensure prosecutions of subordinates responsible for forcibly displacing Kosovo Albanians.⁵⁴⁹⁰

(i) Submissions of the parties

1673. Lazarević argues that he lacked control over the course of investigations and prosecutions as the military tribunals and military prosecutors functioned independently.⁵⁴⁹¹ He further contends that the Trial Chamber erred in noting that only a small proportion of the violent crimes against Kosovo Albanians were subject to prosecution.⁵⁴⁹² Lazarević refers, *inter alia*, to Đorović's testimony that 1,400 criminal reports had disappeared from his office and that pressure to cease investigations was exerted upon Đorović by members of the Security Administration and the chief military prosecutor.⁵⁴⁹³ Lazarević avers that the 1,400 criminal reports were the result of his efforts⁵⁴⁹⁴ and that whenever he acquired knowledge of crimes committed by VJ members he took

⁵⁴⁸⁶ Trial Judgement, vol. 3, para. 926.

⁵⁴⁸⁷ See Trial Judgement, vol. 1, para. 496.

⁵⁴⁸⁸ Trial Judgement, vol. 3, para. 864.

⁵⁴⁸⁹ Trial Judgement, vol. 3, para. 869, referring to Exh. 4D237.

⁵⁴⁹⁰ Trial Judgement, vol. 3, para. 870.

⁵⁴⁹¹ Lazarević's Appeal Brief, paras 554-558, 564, 587, referring to Trial Judgement, vol. 1, paras 501, 504, 506, 515. See also Lazarević's Reply Brief, para. 138. See also Appeal Hearing, 13 Mar 2013, AT. 400. Lazarević also points to the Trial Chamber's findings about the difficulties of summoning witnesses and parties for criminal proceedings during wartime and the continuing obstacles once the war had ended, including fugitives living abroad and lack of VJ access to Kosovo (Lazarević's Appeal Brief, paras 559-560. See also Lazarević's Reply Brief, para. 139).

⁵⁴⁹² Lazarević's Appeal Brief, paras 553, 571, referring to Trial Judgement, vol. 3, para. 864.

⁵⁴⁹³ Lazarević's Appeal Brief, paras 561-562, referring, *inter alia*, to Đorović's evidence that the failure to prosecute those cases submitted to the military prosecutor's office lay with pressure applied by the executive and military leadership, which in fact exercised total control over the military judicial system contrary to the law, Trial Judgement, vol. 1, paras 549-550. See also Lazarević's Reply Brief, paras 138-139.

⁵⁴⁹⁴ Lazarević's Appeal Brief, para. 562.

measures against the perpetrators.⁵⁴⁹⁵ Lazarević further contends that there is no evidence that an omission of his resulted in the commission of any crime.⁵⁴⁹⁶

1674. The Prosecution responds that the Trial Chamber correctly found that Lazarević had the power to initiate additional investigations and disciplinary proceedings within the VJ.⁵⁴⁹⁷ It maintains that Lazarević's arguments should be summarily dismissed, since he repeats his trial submissions without showing any error and seeks to replace the Trial Chamber's evaluation of the evidence with his own interpretation.⁵⁴⁹⁸ It further submits that Lazarević does not identify a specific error in the Trial Chamber's conclusions as a whole and fails to address the Trial Chamber's comprehensive findings on the functioning of the military justice system.⁵⁴⁹⁹

(ii) Analysis

1675. At the outset, the Appeals Chamber considers that, contrary to Lazarević's interpretation,⁵⁵⁰⁰ the Trial Chamber did not imply that he exercised control over the course of judicial investigations and prosecutions. Rather, in finding him responsible for aiding and abetting by omission, the Trial Chamber considered that Lazarević failed to take adequate measures within his powers as Commander of the Priština Corps, which would have facilitated subsequent criminal proceedings. This is plainly illustrated by the Trial Chamber's findings both on the functioning of the military justice system⁵⁵⁰¹ and on Lazarević's actions in relation to the investigation of crimes committed by Priština Corps members.⁵⁵⁰²

1676. Regarding the measures that Lazarević took in response to the commission of crimes by members of the VJ, the Trial Chamber found that the evidence showed that "Lazarević undertook some punitive measures against subordinates for the crimes of murder and rape, along with property crimes."⁵⁵⁰³ These measures included reporting the commission of such crimes in regular combat reports, the filing of criminal reports, and in some instances, initiating efforts to investigate

⁵⁴⁹⁵ Lazarević's Appeal Brief, para. 602. See also Lazarević's Reply Brief, para. 142.

⁵⁴⁹⁶ Lazarević's Appeal Brief, para. 602. See also Lazarević's Reply Brief, para. 142; Appeal Hearing, 13 Mar 2013, AT. 415.

⁵⁴⁹⁷ Prosecution's Response Brief (Lazarević), paras 315-320.

⁵⁴⁹⁸ Prosecution's Response Brief (Lazarević), paras 311-312, 341, referring to Trial Judgement, vol. 1, paras 497-500. See also Prosecution's Response Brief (Lazarević), para. 318.

⁵⁴⁹⁹ Prosecution's Response Brief (Lazarević), paras 313-314. In particular, it argues that: (i) Lazarević ignores the Trial Chamber's finding that there was substantial obstruction and interference with the system by members of the VJ; (ii) Lazarević points to a few reports on a small number of serious crimes but ignores the Trial Chamber's finding that on the whole serious crimes were significantly under-reported; and (iii) Lazarević's claim that he initiated 1,400 criminal reports is unsubstantiated and irrelevant in the context of whether the military justice system functioned (*ibid.*, para. 314).

⁵⁵⁰⁰ Lazarević's Appeal Brief, paras 554, 556-558, 564. See also Lazarević's Reply Brief, para. 138.

⁵⁵⁰¹ Trial Judgement, vol. 1, para. 569.

⁵⁵⁰² Trial Judgement, vol. 3, paras 869, 925.

⁵⁵⁰³ Trial Judgement, vol. 3, para. 870.

particular incidents.⁵⁵⁰⁴ The Trial Chamber, however, considered that while measures were taken in relation to some types of crimes, the evidence did not demonstrate “any prosecutions undertaken or punishments imposed in respect of [in particular] the forcible expulsion of Kosovo Albanians by VJ members” despite the widespread commission of forcible displacement.⁵⁵⁰⁵ The Trial Chamber reasoned that this supported the conclusion that Lazarević failed to undertake adequate measures to address in particular the commission of forcible displacement by the VJ, including efforts to ensure this crime was properly investigated and punished.⁵⁵⁰⁶ The Trial Chamber then found that this omission on his part contributed to the commission of forcible displacement by the VJ.⁵⁵⁰⁷

1677. The Appeals Chamber recalls that a person may be held criminally responsible for aiding and abetting by omission where he or she fails to discharge a legal duty and by this failure assists, encourages or lends moral support to the perpetration of a crime and has a substantial effect on the commission of that crime.⁵⁵⁰⁸ Additionally, aiding and abetting by omission necessarily requires that the accused has “the ability to act, or in other words, that there were means available to the accused to fulfil this duty”.⁵⁵⁰⁹

1678. The Appeals Chamber considers that while Lazarević’s failure to take investigative and punitive measures against the commission of forcible displacement may have had an effect on the ability of the military prosecutor to pursue perpetrators of such crimes, this in itself is not conclusive for the purposes of establishing aiding and abetting liability. Rather as recalled above, in order to fulfil the *actus reus* of aiding and abetting, it must be demonstrated that any such omission substantially contributed to the continued commission of forcible displacement.⁵⁵¹⁰ The Appeals Chamber, however, observes that the Trial Chamber did not engage in such an analysis or provide reasoning in support of its finding that through his omission in this respect, Lazarević provided practical assistance to members of the VJ involved in the commission of forcible displacement.

1679. The Appeals Chamber considers that, in the present case, the evidence before the Trial Chamber was insufficient to support the conclusion that had Lazarević filed additional criminal reports, initiated additional investigation or disciplinary proceedings, or otherwise taken any available adequate measures, within his powers as Commander of the Priština Corps, there would

⁵⁵⁰⁴ Trial Judgement, vol. 3, paras 865-870, 872, 874-885.

⁵⁵⁰⁵ Trial Judgement, vol. 3, para. 870.

⁵⁵⁰⁶ Trial Judgement, vol. 3, paras 870, 925.

⁵⁵⁰⁷ Trial Judgement, vol. 3, paras 925-926.

⁵⁵⁰⁸ *Mrkšić and Šljivančanin* Appeal Judgement, paras 134, 146, 200.

⁵⁵⁰⁹ *Mrkšić and Šljivančanin* Appeal Judgement, para. 154. See also *Ntagerura et al.* Appeal Judgement, para. 335.

⁵⁵¹⁰ In this regard, the Appeals Chamber recalls that to incur liability for aiding and abetting by omission, it must be established that: (i) the omission had a substantial effect on the crime in the sense that the crime would have been substantially less likely had the accused acted; and (ii) the accused knew that the commission of the crime was probable

have been more effective prosecution of the crimes committed by the VJ, including forcible transfer and deportation, and/or the commission of such crimes would have been substantially less likely. The Appeals Chamber first observes in this context that the Trial Chamber found that during the relevant time period, Lazarević did take some measures in response to the commission of crimes such as murder, rape, and property crimes, including by submitting criminal reports to the competent authorities, initiating efforts in some instances to investigate alleged crimes, and issuing orders and instructions to subordinate units regarding the procedures and measures to be taken against perpetrators of crimes.⁵⁵¹¹ The Trial Chamber also noted that in April and May 1999, reports were sent by Priština Corps subordinate units to the Priština Corps Command informing the Corps Command of actions that had been taken at the brigade level in relation to soldiers suspected of having committed crimes against civilians, including the filing of criminal reports as well as the arrest and transfer of such individuals to the competent military judicial authorities.⁵⁵¹²

1680. The Appeals Chamber further observes that notably the Trial Chamber found that the military justice system's failure to effectively investigate, prosecute, and punish those responsible for committing serious crimes against the civilian population was due to a combination of both internal and external factors, the latter being beyond the control of the VJ commanders.⁵⁵¹³ With regard to internal factors, the Appeals Chamber notes the evidence considered by the Trial Chamber indicating that the office of the military prosecutor was significantly hindered in its attempts to prosecute serious crimes committed by the Serbian forces during spring 1999.⁵⁵¹⁴ For example, the Trial Chamber noted the evidence of Lakić Đorović, a military prosecutor attached to the Belgrade Military District from 24 March to 20 May 1999, that "in practice, despite the language in the Constitution on independence and legality, military courts were neither independent nor did they adjudicate on the basis of law" and that significant pressure and control was exerted over the military prosecutor's office by the military security organs under the direction of the state and military leadership.⁵⁵¹⁵ The Trial Chamber further noted that Đorović explained that "in a large

and that his inaction assisted it (*Mrkšić and Šljivančanin* Appeal Judgement, paras 97, 101; *Orić* Appeal Judgement, para. 43).

⁵⁵¹¹ Trial Judgement, vol. 3, paras 865-885.

⁵⁵¹² Trial Judgement, vol. 1, para. 542, and references therein.

⁵⁵¹³ Trial Judgement, vol. 1, para. 569. The Trial Chamber noted evidence of external factors at the time which affected the ability of the military prosecutors and courts to work effectively, including the difficulties posed by the war-time and security conditions in which they operated (see Trial Judgement, vol. 1, paras 530-531).

⁵⁵¹⁴ See Trial Judgement, vol. 1, paras 528-569, and references therein.

⁵⁵¹⁵ Trial Judgement, vol. 1, para. 549, and references therein. The Appeals Chamber notes that Lazarević challenges the Trial Chamber's reliance on the evidence of Đorović, who he alleges lacked credibility (see Lazarević's Appeal Brief, para. 553). However, the Appeals Chamber observes that the Trial Chamber carefully assessed the challenges to Đorović's credibility raised by the Defence at trial and found that he was a credible witness with an "independent mind and forthright manner" (Trial Judgement, vol. 1, paras 497-500, 554, 558). Lazarević's unsubstantiated assertion in relation to Đorović's credibility has failed to show any error in this assessment (see Lazarević's Appeal Brief, para. 553) and his argument in this regard is therefore dismissed. The Appeals Chamber also recalls that it has also

number of cases during the conflict prosecutors were prevented from criminally prosecuting perpetrators of serious crimes” and that “in practice, the military security organs decided who would and who would not be prosecuted in cases of the most serious crimes, rather than the military prosecutors themselves.”⁵⁵¹⁶ Đorović testified that 1,400 criminal reports, including statements made concerning murders, disappeared from his office, according to him in an effort by the VJ security services to cover up the crimes.⁵⁵¹⁷ The Appeals Chamber further notes in this context the evidence of a meeting in Belgrade on 4 May 1999, attended by *inter alia* Milošević, Milutinović, Ojdanić, Pavković, and Lukić to discuss events in Kosovo, following the receipt of Tribunal Prosecutor Louise Arbour’s letter, noting her concerns about serious breaches of international humanitarian law, including attacks against the civilian population.⁵⁵¹⁸ At the meeting, “information was presented that the security forces of the VJ had dealt with numerous cases of violence, killings, pillage, and other crimes and had arrested several hundred perpetrators whose crimes were a great danger to the civilian population” and it was concluded that “the work of the military courts had made the future occurrences of such crime ‘impossible’ as they had already processed many cases for crimes against the civilian population and handed down a ‘large number’ of sentences between 5 and 20 years imprisonment for these crimes.”⁵⁵¹⁹ As observed by the Trial Chamber, the information conveyed at this meeting is “inconsistent with official reports on the work of the military justice system” as “[n]one of these reports indicate that any sentences between 5 and 20 years’ imprisonment had been imposed by the military courts for crimes against civilians by 4 May 1999”.⁵⁵²⁰ The Appeals Chamber considers this to be a further illustration of the interference of the state and military leadership in the work of the military justice system.

1681. Furthermore, the Appeals Chamber notes that, as found by the Trial Chamber, the forcible displacement crimes were committed pursuant to a joint criminal enterprise, planned and implemented by those in the highest command of the Serbian political and military leadership, including Milošević, who as President of the FRY (and as the “Supreme Commander”) exercised political control over the VJ, and Pavković, Lazarević’s immediate superior and to whom he reported.⁵⁵²¹ Taking into account these circumstances, the Appeals Chamber considers that it is

dismissed challenges to the Trial Chamber’s reliance on the evidence of Đorović brought by Pavković (see *supra*, fn. 4066).

⁵⁵¹⁶ Trial Judgement, vol. 1, para. 538, referring to Lakić Đorović, Exh. P2672, p. 2. See also *ibid.*, vol. 1, para. 549.

⁵⁵¹⁷ Trial Judgement, vol. 1, para. 550, referring to Lakić Đorović, 12 Mar 2007, T. 11504-11505. See also Lakić Đorović, Exh. P2672, p. 3 (describing the military judiciary organs as “a screen for lawlessness and abuses by military security organs and the military leadership in the country” and indicating that the military security organs had “covered up and protected criminals from criminal prosecution”).

⁵⁵¹⁸ Trial Judgement, vol. 3, paras 343, 448, 556-557, 734, 1038.

⁵⁵¹⁹ Trial Judgement, vol. 1, para. 541, referring to Exh. P1696, pp. 1-2.

⁵⁵²⁰ Trial Judgement, vol. 1, para. 541, and references therein.

⁵⁵²¹ See *supra*, sub-sections VII.B.5. and VII.E.2.; Trial Judgement, vol. 1, paras 433-435, 449, 451, 457, 482, 488; *ibid.*, vol. 3, paras 95, 683-684. In this context, the Appeals Chamber also notes that while under normal conditions the

unclear what degree of effect, if any, additional investigative and punitive measures undertaken by Lazarević at the corps level would have had on the commission of the crimes of forcible transfer and deportation by members of the VJ.

1682. The Appeals Chamber thus considers that irrespective of any failure on his part to take more adequate measures to report, investigate, and initiate disciplinary measures, no reasonable trier of fact could have found beyond reasonable doubt that his omission in this respect had a substantial effect on the commission of the forcible displacement, *i.e.* that it would have been substantially less likely had Lazarević taken such further measures. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that Lazarević aided and abetted by omission the commission of forcible displacement through “his failure to take adequate measures to secure the proper investigation of serious crimes committed by the VJ”.⁵⁵²² In light of this conclusion, it is therefore unnecessary to address Lazarević’s remaining arguments concerning this finding of the Trial Chamber.⁵⁵²³

1683. Based on the foregoing, the Appeals Chamber therefore grants sub-grounds 3(h) of Lazarević’s appeal to the extent that the Trial Chamber erred in finding that his failure to take adequate investigative and punitive measures substantially contributed to the commission of the crimes of forcible transfer and deportation by VJ forces.

(f) Lazarević’s inspection of VJ units

1684. The Trial Chamber found that “through his acts and omissions, Lazarević provided practical assistance, encouragement, and moral support to members of the VJ, who were involved in the commission of forcible transfer and deportation”.⁵⁵²⁴ The Trial Chamber concluded that Lazarević’s “presence in the field, inspecting VJ units that were involved in the commission of crimes against Kosovo Albanians, was expressly noted to improve the morale of soldiers.”⁵⁵²⁵

Priština Corps security department reported on a daily basis to the Priština Corps Commander as well as to the 3rd Army security department “when the NATO air campaign began, Stojanović [Chief of the Priština Corps security department], on orders from the Security Administration, became duty-bound to report only to the 3rd Army Command” (Trial Judgement, vol. 1, para. 605, and references therein).

⁵⁵²² See Trial Judgement, vol. 3, para. 925.

⁵⁵²³ See Lazarević’s Appeal Brief, paras 554, 563, 565-566, 571, 587.

⁵⁵²⁴ Trial Judgement, vol. 3, para. 927. See also *ibid.*, vol. 3, para. 925.

⁵⁵²⁵ Trial Judgement, vol. 3, para. 925, referring to Exh. P1903, p. 3, Exh. P2617, p. 2. See also Trial Judgement, vol. 3, para. 926.

(i) Submissions of the parties

1685. Lazarević submits that visiting and controlling the VJ units in the field cannot in and of itself satisfy the *actus reus* of aiding and abetting deportation and forcible transfer.⁵⁵²⁶ Lazarević avers that the Trial Chamber misinterpreted his presence in the field, the purpose of which was to improve the morale of soldiers under heavy bombardment by NATO, not to encourage them to participate in crimes.⁵⁵²⁷ He further submits that Kosovo as a geographic whole cannot represent one crime scene in the legal sense and that, since he was not present at any crime scene, he could not have encouraged the perpetrators.⁵⁵²⁸ Lazarević finally claims that mere presence at the crime scene is insufficient, unless it is proven that it had an encouraging effect on the perpetrators.⁵⁵²⁹

1686. The Prosecution responds that an aider and abettor need not be present at the location of the crime⁵⁵³⁰ and argues that, in any event, the Trial Chamber found that Lazarević was in Priština/Prishtina when the campaign of forcible displacement took place.⁵⁵³¹ The Prosecution further submits that regardless of the stated purpose of Lazarević's visits, the Trial Chamber correctly regarded them "as evidence of moral support and encouragement in all of the troops' activities, be it in legitimate combat or in the commission of crimes."⁵⁵³²

(ii) Analysis

1687. The Appeals Chamber recalls that for aiding and abetting liability to arise, "the encouragement and moral support provided by the accused need not be explicit, and that, in certain circumstances, even the act of being present at the crime scene (or in its vicinity) as a 'silent spectator' can be construed as tacit approval or encouragement of the crime."⁵⁵³³ The Appeals Chamber further recalls that:

In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus

⁵⁵²⁶ Lazarević's Appeal Brief, para. 521. Lazarević also argues that his visiting and controlling the VJ units in the field cannot in and of itself satisfy the requisite *mens rea* of aiding abetting deportation and forcible transfer (*ibid.*, para. 601). His contention in this respect, however, falls outside the scope of his Notice of Appeal.

⁵⁵²⁷ Lazarević's Appeal Brief, para. 587, referring to Trial Judgement, vol. 3, para. 925.

⁵⁵²⁸ Lazarević's Appeal Brief, paras 604-605; Lazarević's Reply Brief, para. 142.

⁵⁵²⁹ Lazarević's Appeal Brief, para. 604; Lazarević's Reply Brief, para. 142. Finally, he asserts that his visiting and controlling the VJ units in the field cannot in and of itself satisfy the requisite *mens rea* of aiding abetting deportation and forcible transfer (Lazarević's Appeal Brief, para. 601).

⁵⁵³⁰ Prosecution's Response Brief (Lazarević), para. 339, referring to *Simić* Appeal Judgement, para. 85, *Blaškić* Appeal Judgement, para. 48.

⁵⁵³¹ Prosecution's Response Brief (Lazarević), para. 339, referring to Trial Judgement, vol. 3, paras 838, 924-925.

⁵⁵³² Prosecution's Response Brief (Lazarević), para. 340.

⁵⁵³³ *Brđanin* Appeal Judgement, para. 277, and references therein.

substantially contributes to it. It follows that encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it.⁵⁵³⁴

1688. The Trial Chamber concluded that Lazarević's "presence in the field, inspecting VJ units that were involved in the commission of crimes against Kosovo Albanians, was expressly noted to improve the morale of soldiers."⁵⁵³⁵ The evidence the Trial Chamber explicitly cited in reaching this conclusion included two Priština Corps combat reports of 4 and 5 April 1999.⁵⁵³⁶ These two combat reports confirmed that a number of Priština Corps units were visited and inspected by Lazarević and that, during these visits, the "combat morale" was assessed and subordinate units were "inform[ed]".⁵⁵³⁷ The combat reports further indicated that "the achieved results" in combat operations and the "efficient defence and protection" against NATO attacks additionally motivated the troops and reinforced or strengthened "the combat morale" of the Priština Corps members.⁵⁵³⁸ The Appeals Chamber observes that, contrary to the Trial Chamber's finding, the combat reports contain no recognition of Lazarević's conduct as having improved the morale of soldiers.

1689. The Trial Chamber also considered evidence of Lazarević's inspections of and visits to the units in the field. However, like the combat reports, this evidence does not indicate that Lazarević's conduct was construed by the subordinate units as providing encouragement or moral support to the commission of any crime.⁵⁵³⁹ The Appeals Chamber considers that it was incumbent upon the Trial

⁵⁵³⁴ *Brdanin* Appeal Judgement, para. 277, and references therein.

⁵⁵³⁵ Trial Judgement, vol. 3, para. 925, referring to Exh. P1903, p. 3, Exh. P2617, p. 2. See also Trial Judgement, vol. 3, para. 926.

⁵⁵³⁶ Trial Judgement, vol. 3, para. 925; Exh. P2617, p. 2, Exh. P1903, p. 3.

⁵⁵³⁷ Exh. P2617, p. 2, Exh. P1903, p. 3.

⁵⁵³⁸ Exh. P1903, p. 3 (stating: "On 05.04.1999, while visiting a part of the PrK units, the state of combat morale was reviewed and informing of the subordinate units was carried out. The reviewed state as a whole is very good, and the achieved results in combat activities and efficient defence and protection from the VAP /sic/ attacks, additionally motivate the men and reinforce the combat morale of the members of PrK."), Exh. P2617, p. 2 (stating: "On 3 and 4 April 1999 a number of the PrK units were inspected, combat morale was assessed and the re-subordinated units updated informed [sic]. The conclusion of the inspection is that the overall situation is good. The results achieved in combat operations and the efficient defence and protection against VaP /airspace/ operations contribute to motivating the men and to strengthening the combat morale of PrK members."). See also Trial Judgement, vol. 3, para. 840, where the Trial Chamber correctly summarized the content of the Combat Report of 4 April 1999.

⁵⁵³⁹ See Trial Judgement, vol. 3, paras 840-842, referring, *inter alia*, to the evidence of Goran Jeftović, 16 Jan 2008, T. 20355 (confirming that on 26 May 1999 Lazarević along with Pavković paid a visit to the area of responsibility of the Forward Command Post), Exh. 5D230, p. 3 (reporting that on 26 May 1999 Lazarević and Pavković visited the area of responsibility of the Priština Corps Forward Command Post and toured a part of the units of the 125th Motorised Brigade, the 52nd Airborne PVO, and 549th Motorised Brigade), Krsman Jelić, 26 Nov 2007, T. 19038-19039 (testifying that, at least in regards to his brigade, Lazarević visited the units "three or four times"), K73, 13 Sep 2006, T. 3317-3318 (closed session) and K73, Exh. P2307, para. 34 (under seal) (stating that one month before the war, at a "morale boosting event" attended by Lazarević, Pavković gave a speech to the units), Exh. P1355, p. 2 (news report noting that the commanders of the subordinate units reported to Pavković and Lazarević during their visit on the morale in the units, and noting that Pavković and Lazarević "expressed great satisfaction with what the unit commanders had done to defend the country from the air aggression, and saluted the commanders and troops for their valor, exceptional combat morale, and high degree of competence in all weather conditions"), Mirko Starčević, 22 Oct 2007, T. 17436 ("General Pavkovic and General Lazarevic throughout their working hours continued touring the subordinate units to talk to troops, to inform them, to conduct briefings"), Mirko Starčević, Exh. 4D500, para. 19 (alluding to the occurrences of inspections by Pavković and Lazarević of the subordinate units), Ljubomir Savić, Exh. 5D1392, para. 14 ("[t]he senior officers from the PrK Command had frequently visited the brigade command for the purpose of control and providing assistance."), Exh. P1523, p. 2 (Lazarević expressing that he and the other commanders were "practically

Chamber to determine whether the VJ units construed Lazarević's presence and inspections as specifically legitimising or encouraging the commission of the crimes of deportation and forcible transfer.⁵⁵⁴⁰ Nothing in the evidence relied upon by the Trial Chamber supports such an inference. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in concluding that the only reasonable inference was that Lazarević's inspection of the Priština Corps units provided encouragement and moral support to the perpetrators. Lazarević's conduct in this respect could therefore not be considered as aiding and abetting the commission of deportation and forcible transfer by the VJ forces.

1690. Based on the foregoing, the Appeals Chamber grants sub-grounds 3(e) and 3(i) of Lazarević's appeal to the extent that the Trial Chamber erred in finding that his inspection of the VJ units provided encouragement and moral support to the VJ forces engaging in forcible displacement.

(g) Impact of the Appeals Chamber's findings

1691. The Appeals Chamber has overturned the Trial Chamber's finding that: (i) Lazarević's inspection of the VJ units provided encouragement and moral support to the VJ forces engaging in forcible displacement;⁵⁵⁴¹ and (ii) Lazarević's failure to take adequate investigative and punitive measures substantially contributed to the commission of the crimes of forcible transfer and deportation by VJ forces.⁵⁵⁴² The impact of these findings, if any, on Lazarević's sentence will be addressed below.⁵⁵⁴³

on the first front line" during the operations in Kosovo), Vladimir Lazarević, 12 Nov 2007, T. 18105 (testifying that he toured and inspected the 125th and 37th Motorised Brigades on 29 April 1999), 18110-18112 (testifying that he and Pavković went to inspect the units of the 175th Infantry Brigade on 1 May 1999), Exh. P2026, p. 2 (noting that Lazarević visited the 125th Motorised Brigade on 29 April 1999), Exh. 5D388, pp. 1-2 (noting that Lazarević and Pavković toured some of the units of the 175th Infantry Brigade on 1 May 1999), Dragan Zivanović, 18 Jan 2008, T. 20591-20593 (testifying that Lazarević visited and toured the units of 125th Motorised Brigade in the area of Dečani/Dečan on 29 April 1999), Exh. IC167 (marking made on page 21 of Exhibit P615 by witness Živanović in court showing Lazarević's location when he visited the units on 29 April 1999). In another document, Exhibit P633, cited by the Trial Chamber in this regard (see Trial Judgement, vol. 3, para. 840, fn. 2129), Lazarević explicitly praises the results achieved by several of the Priština Corps units that he visited in the field. However, this document is dated 5 March 1999, which is prior to the commission of deportation and forcible transfer by the VJ forces as found by the Trial Chamber. Thus the Appeals Chamber considers it not relevant to the issue of whether Lazarević provided moral support and encouragement to VJ units that were involved in the commission of crimes against Kosovo Albanians.

⁵⁵⁴⁰ See *Brđanin* Appeal Judgement, paras 277, 281-282.

⁵⁵⁴¹ The Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that Lazarević's issuance of the *Grom 3* order to the Priština Corps units amounted to an act of assistance to the commission of deportation and forcible transfer by the VJ forces (see *supra*, para. 1667). However, as discussed previously, this conclusion does not undermine the Trial Chamber's main finding that Lazarević contributed to the commission of crimes through his participation in the planning and execution of joint operations in Kosovo throughout the Indictment period (see *supra*, para. 1667).

⁵⁵⁴² See *supra*, sub-section VIII.B.3.(e).

⁵⁵⁴³ See *infra*, sub-section IX.I.

1692. The Appeals Chamber considers, however, that these errors have no impact on the Trial Chamber's finding that Lazarević provided practical assistance to members of the VJ involved in the commission of forcible transfer and deportation and that this had a substantial effect on the commission of these crimes. In this context, the Appeals Chamber recalls that the Trial Chamber found that Lazarević participated in the planning and execution of the joint operations conducted by the VJ and thereby substantially contributed to the commission of the crimes by the VJ as such conduct provided assistance in terms of soldiers on the ground to carry out the acts, organising and equipping VJ units, and the provision of weaponry, including tanks, to assist these acts.⁵⁵⁴⁴ The Appeals Chamber is satisfied that a reasonable trier of fact could have found that these acts had a substantial effect on the commission of deportation and forcible transfer.

1693. The Appeals Chamber therefore finds that Lazarević has failed to demonstrate that the Trial Chamber erred in finding that he aided and abetted the crimes of deportation and forcible transfer through his involvement in the joint operations of the MUP and the VJ in 1999.

4. Alleged errors in finding that Lazarević fulfilled the *mens rea* of aiding and abetting

1694. The Trial Chamber found that, in light of the information Lazarević received in 1998 on the commission of crimes against civilians and civilian property and on the humanitarian catastrophe resulting partly from the use of excessive force by the VJ and the MUP during their operations, Lazarević was "aware that similar excessive uses of force and forcible displacements were likely to occur if he ordered the VJ to operate in Kosovo in 1999."⁵⁵⁴⁵

1695. The Trial Chamber found that Lazarević was aware of the campaign of forcible displacement carried out by the VJ and MUP forces throughout Kosovo during the NATO air campaign in 1999.⁵⁵⁴⁶ The Trial Chamber noted that, as the Commander of the Priština Corps, Lazarević: (i) "was present in Kosovo where the campaign was being conducted by his subordinates acting together with the MUP"; (ii) was present in Priština/Prishtina throughout the period during which the VJ and the MUP, operating together, forcibly displaced large numbers of Kosovo Albanians and created an atmosphere of terror; (iii) showed his awareness of the previous forcible displacement of Kosovo Albanians by Priština Corps members in his orders for the prevention of mistreatment of the civilian population; (iv) was informed about the massive displacement of the

⁵⁵⁴⁴ Trial Judgement, vol. 3, paras 925-926. See also *supra*, para. 1667.

⁵⁵⁴⁵ Trial Judgement, vol. 3, para. 923.

⁵⁵⁴⁶ Trial Judgement, vol. 3, para. 924.

civilian population during VJ operations; and (v) knew of the locations of these operations, including most of the locations named in the Indictment.⁵⁵⁴⁷

1696. The Trial Chamber further found that Lazarević was aware of the intentional commission of deportation and forcible transfer and knew that his conduct assisted in the commission of these crimes.⁵⁵⁴⁸ Consequently, the Trial Chamber concluded that Lazarević possessed the requisite *mens rea* for aiding and abetting the crimes of deportation and forcible transfer committed by the VJ.⁵⁵⁴⁹

1697. Lazarević submits that in light of the evidence presented at trial, no reasonable trial chamber could have concluded that he fulfilled the *mens rea* of aiding and abetting.⁵⁵⁵⁰ He claims in this respect that he was unaware of: (i) the campaign of forcible displacement;⁵⁵⁵¹ (ii) the state of mind of the physical or intermediary perpetrators,⁵⁵⁵² and (iii) the fact that his conduct assisted in the commission of the crimes of deportation and forcible transfer.⁵⁵⁵³

(a) Alleged errors in finding that Lazarević was aware that forcible displacement was likely to occur in 1999

1698. The Trial Chamber found that Lazarević was aware of the commission of crimes against “civilians and civilian property during operations of the VJ and the MUP in 1998” and that “this had resulted in the displacement of a significant number of civilians.”⁵⁵⁵⁴ The Trial Chamber was satisfied that Lazarević was aware of UN Security Council Resolution 1199 expressing serious concerns over the excessive and indiscriminate use of force by the Serbian security forces and the VJ, which had resulted in numerous civilian casualties and the displacement of over 230,000 civilians in 1998.⁵⁵⁵⁵ It also found that: (i) Lazarević closely followed events on the ground in Kosovo while MUP and VJ forces used excessive and disproportionate force, and was aware of the existing “humanitarian catastrophe”;⁵⁵⁵⁶ (ii) a number of Priština Corps documents indicated Lazarević’s awareness of the commission of crimes in 1998;⁵⁵⁵⁷ and (iii) “Lazarević discussed the large number of displaced Kosovo Albanians and their return during meetings of the Joint Command.”⁵⁵⁵⁸ The Trial Chamber concluded that “Lazarević was aware that similar excessive uses

⁵⁵⁴⁷ Trial Judgement, vol. 3, para. 924.

⁵⁵⁴⁸ Trial Judgement, vol. 3, para. 927.

⁵⁵⁴⁹ Trial Judgement, vol. 3, para. 930.

⁵⁵⁵⁰ Lazarević’s Appeal Brief, paras 599, 601, 608; Lazarević’s Reply Brief, paras 140, 142.

⁵⁵⁵¹ Lazarević’s Appeal Brief, paras 437-438, 492, 539, 574.

⁵⁵⁵² Lazarević’s Appeal Brief, para. 601.

⁵⁵⁵³ Lazarević’s Appeal Brief, para. 603; Lazarević’s Reply Brief, para. 142.

⁵⁵⁵⁴ Trial Judgement, vol. 3, para. 817.

⁵⁵⁵⁵ Trial Judgement, vol. 3, para. 809, referring to Exh. P456. See also Trial Judgement, vol. 3, para. 923.

⁵⁵⁵⁶ Trial Judgement, vol. 3, paras 807-808, 923.

⁵⁵⁵⁷ Trial Judgement, vol. 3, paras 811-814, referring, *inter alia*, to Exh. P1011, Exh. P969, Exh. 4D231, Exh. 4D177, Exh. 4D201.

⁵⁵⁵⁸ Trial Judgement, vol. 3, paras 810, 923.

of force and forcible displacements were likely to occur if he ordered the VJ to operate in Kosovo in 1999.”⁵⁵⁵⁹

(i) Submissions of the parties

1699. Lazarević contends that his awareness of the commission of crimes in 1998 was not proved beyond reasonable doubt and therefore he could not have been aware that excessive use of force and forcible displacement were likely to occur if he ordered the VJ to operate in Kosovo in 1999.⁵⁵⁶⁰ In this respect, he challenges the Trial Chamber’s finding that he was aware of the commission of crimes against civilians and civilian property during operations conducted by the VJ and the MUP in 1998 and that these crimes resulted in the displacement of a significant number of civilians.⁵⁵⁶¹ Lazarević argues that no evidence supports the Trial Chamber’s finding that he was aware of Resolution 1199 as the resolution was never received by the Priština Corps and certainly not at the Forward Command Post where he was stationed from April 1998 until the end of the year.⁵⁵⁶² He states that during his only contact with OSCE representatives in December 1998 no crimes committed by the VJ were mentioned.⁵⁵⁶³

1700. Lazarević also avers that the Trial Chamber misinterpreted the minutes of the Joint Command meetings, arguing that the purpose of the meetings was to discuss measures for the protection of displaced persons and that no crimes were mentioned at the five meetings which he attended.⁵⁵⁶⁴ Lazarević contends that his interventions at these meetings show that he was there merely to present information concerning the situation on the state border and that he considered the population to have “temporarily [taken] refuge from the combat operations”.⁵⁵⁶⁵ He also refers to the testimony of Sandra Mitchell that there was no refugee problem prior to 22 March 1999.⁵⁵⁶⁶

1701. Lazarević submits that the Trial Chamber erred in finding that a number of Priština Corps orders had a bearing on his awareness of the commission of crimes by the VJ in 1998.⁵⁵⁶⁷ He argues that the orders were either geared towards the prevention of crimes in combat operations or to

⁵⁵⁵⁹ Trial Judgement, vol. 3, para. 923.

⁵⁵⁶⁰ Lazarević’s Appeal Brief, para. 571, referring to Trial Judgement, vol. 3, para. 923.

⁵⁵⁶¹ Lazarević’s Appeal Brief, para. 433. See Trial Judgement, vol. 3, para. 817.

⁵⁵⁶² Lazarević’s Appeal Brief, paras 416-418. See also Lazarević’s Reply Brief, paras 121-122.

⁵⁵⁶³ Lazarević’s Appeal Brief, para. 417.

⁵⁵⁶⁴ Lazarević’s Appeal Brief, paras 423-424, referring to Trial Judgement, vol. 3, para. 810.

⁵⁵⁶⁵ Lazarević’s Appeal Brief, paras 426-428. See also Lazarević’s Reply Brief, para. 123.

⁵⁵⁶⁶ Lazarević’s Appeal Brief, para. 429, referring to Sandra Mitchell, 11 Jul 2006, T. 588.

⁵⁵⁶⁷ Lazarević’s Appeal Brief, paras 430-432, referring to Trial Judgement, vol. 3, paras 811-814.

protect international observers and show that he had no knowledge of an approach to combat operations that would involve the commission of crimes.⁵⁵⁶⁸

1702. The Prosecution responds that Lazarević challenges isolated findings and ignores that the Trial Chamber considered the evidence as a whole.⁵⁵⁶⁹ It further submits that the Trial Chamber's conclusion that Lazarević was aware of Resolution 1199 was reasonable in view of the involvement of VJ troops in the implementation of the October Agreements and Lazarević's position as Chief of Staff of the Priština Corps.⁵⁵⁷⁰ It argues that Lazarević's challenges to the Trial Chamber's reliance on the minutes of the Joint Command meetings should be summarily dismissed as he merely offers a different interpretation of the evidence.⁵⁵⁷¹ Finally, the Prosecution contends that the Priština Corps orders pertaining to the prevention of crimes indicate Lazarević's knowledge of prior incidents and that, in this regard, he seeks to re-argue his trial submissions.⁵⁵⁷²

(ii) Analysis

1703. The Trial Chamber considered that in 1998 Lazarević was aware of the humanitarian catastrophe in Kosovo as described in Resolution 1199.⁵⁵⁷³ In particular, it relied on Lazarević's involvement in implementing obligations imposed on the VJ under the October Agreements, which were expressly based on Resolution 1199.⁵⁵⁷⁴ The Trial Chamber was ultimately satisfied that Lazarević was aware of the resolution and its contents.⁵⁵⁷⁵

1704. The Appeals Chamber notes that Resolution 1199 expressed the Security Council's grave concern for the "excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and [...] the displacement of over 230,000 persons from their homes".⁵⁵⁷⁶ Resolution 1199 also noted "reports of increasing violations of human rights and of international humanitarian law" and emphasised "the need to ensure that the rights of all inhabitants of Kosovo are respected."⁵⁵⁷⁷

⁵⁵⁶⁸ Lazarević's Appeal Brief, paras 431-432. See also Lazarević's Reply Brief, para. 124. Lazarević further submits that in any case, the alleged crimes committed in 1998 and those committed in 1999 were "not identical in essentials", and suggests that with the start of the NATO bombing on 24 March 1999, the circumstances and events in Kosovo changed greatly (Appeal Hearing, 13 Mar 2013, AT. 428-429). According to Lazarević, therefore, his knowledge of events in 1998 has a limited relevance to the assessment of his *mens rea* for crimes committed later in 1999 for which he was convicted (*ibid.*).

⁵⁵⁶⁹ Prosecution's Response Brief (Lazarević), paras 251-252, 262.

⁵⁵⁷⁰ Prosecution's Response Brief (Lazarević), paras 258-259.

⁵⁵⁷¹ Prosecution's Response Brief (Lazarević), paras 260-261.

⁵⁵⁷² Prosecution's Response Brief (Lazarević), para. 263.

⁵⁵⁷³ Trial Judgement, vol. 3, para. 923.

⁵⁵⁷⁴ Trial Judgement, vol. 3, para. 809.

⁵⁵⁷⁵ Trial Judgement, vol. 3, para. 809.

⁵⁵⁷⁶ Exh. P456, p. 1. See also Trial Judgement, vol. 3, para. 809.

⁵⁵⁷⁷ Exh. P456, p. 2.

1705. The October Agreements, which were expressly based on Resolution 1199, stipulated, *inter alia*, the reduction of the VJ forces and equipment in Kosovo and the introduction of a verification mission.⁵⁵⁷⁸ The VJ was also obliged to provide weekly detailed reports to the KVM.⁵⁵⁷⁹ In addition, liaison units were established in the Priština Corps to facilitate the implementation of the October Agreements.⁵⁵⁸⁰ The Appeals Chamber therefore considers that a reasonable trier of fact could have concluded that, as Chief of Staff of the Priština Corps in 1998,⁵⁵⁸¹ Lazarević was aware of the Resolution 1199 and its contents.⁵⁵⁸² The Appeals Chamber further considers that this conclusion is reasonable irrespective of whether the resolution itself was distributed within the Priština Corps. Moreover, the Trial Chamber's finding that Lazarević was aware of the humanitarian catastrophe in Kosovo was also based on other evidence, including Lazarević's attendance at the Joint Command meeting on 1 September 1998 in which Šainović drew attention to the "humanitarian catastrophe" in Kosovo.⁵⁵⁸³

1706. The Appeals Chamber is likewise not persuaded by Lazarević's submission that the Trial Chamber misinterpreted the Priština Corps Command order of 5 June 1998. This order not only ordered the prevention of theft of the property of Kosovo Albanians, but also the return of all property that had been stolen, providing a clear indication that looting had already taken place.⁵⁵⁸⁴ Similarly, the Priština Corps Command order of 7 August 1998 recognised that some units had "overused combat equipment the consequence of which was greater damage to buildings" and that a large number of houses were destroyed and torched.⁵⁵⁸⁵ The order also instructed the return of all stolen goods.⁵⁵⁸⁶

1707. The Trial Chamber expressly considered and rejected Lazarević's explanation that his order of 10 July 1998 was meant to protect international observers.⁵⁵⁸⁷ The order held that VJ units should not open fire in response to KLA provocations in the presence of international observers and that in the event that the use of force was required, it must not be excessive.⁵⁵⁸⁸ The Trial Chamber concluded that the order demonstrated that Lazarević knew of the risk that the Priština Corps units

⁵⁵⁷⁸ Trial Judgement, vol. 1, paras 328, 331, 348, 812, 921; *ibid.*, vol. 3, para. 809.

⁵⁵⁷⁹ Trial Judgement, vol. 1, paras 334, 349.

⁵⁵⁸⁰ Trial Judgement, vol. 1, para. 987.

⁵⁵⁸¹ Trial Judgement, vol. 3, para. 791.

⁵⁵⁸² Trial Judgement, vol. 3, para. 809.

⁵⁵⁸³ Trial Judgement, vol. 3, para. 808, citing Exh. P1468, p. 125. The Appeals Chamber understands the Trial Chamber's reference to the Joint Command meeting of 21 September 1998, instead of 1 September 1998, to be a typographical error (see Exh. P1468, p. 124).

⁵⁵⁸⁴ Trial Judgement, vol. 3, para. 811, referring to Exh. P2098, p. 3.

⁵⁵⁸⁵ Trial Judgement, vol. 3, para. 814, referring to Exh. 4D201, p. 1.

⁵⁵⁸⁶ Trial Judgement, vol. 3, para. 814, referring to Exh. 4D201, p. 1.

⁵⁵⁸⁷ Trial Judgement, vol. 3, paras 812-813.

⁵⁵⁸⁸ Trial Judgement, vol. 3, para. 812, referring to Exh. P969.

would “over-react” to KLA provocations and thereby commit crimes.⁵⁵⁸⁹ The Appeals Chamber notes that the stated aim of the order was to prevent “units of the Corps from opening uncontrolled and unnecessary fire at *šiptar* terrorists” in view of the fact that the KLA were “trying to provoke units of the VJ to open fire in [the] presence [of international observers] in order to show the world how much they [were] threatened”.⁵⁵⁹⁰ The order made no reference to protecting international observers from combat fire. Lazarević’s argument is therefore without merit.

1708. The Trial Chamber also took into consideration that several joint operations were conducted in the border area between Albania and Kosovo when Lazarević was stationed at the Forward Command Post and that during those operations the MUP and VJ forces used excessive or disproportionate force.⁵⁵⁹¹ It also considered that Lazarević was present at a meeting on 7 August 1998 in which Samardžić stated that fighting terrorism by torching was “a disgrace”,⁵⁵⁹² and at a Joint Command meeting on 1 September 1998 in which Šainović noted the “humanitarian catastrophe” in Kosovo and emphasised that actions were to be carried out “in a disciplined manner, in order to avoid arson”.⁵⁵⁹³ The Trial Chamber also found that Lazarević knew about the alleged involvement of the MUP in the killing of civilians in Gornje Obrinje/Abria e Epërme in October 1998⁵⁵⁹⁴ and of the VJ’s use of disproportionate force on 8 January 1999 in Slapuzane/Slapuzhan village.⁵⁵⁹⁵ The Appeals Chamber considers that Lazarević has failed to show that a reasonable trier of fact could not have relied in part on this evidence in finding that Lazarević was aware that crimes were committed against civilians and civilian property in 1998 and early 1999.⁵⁵⁹⁶ In addition, the Trial Chamber considered that the large number of displaced Kosovo Albanians and their return were discussed during Joint Command meetings in September 1998 which Lazarević attended.⁵⁵⁹⁷ Irrespective of why Lazarević attended these meetings or what he said there, the information conveyed at these meetings supports the Trial Chamber’s conclusion that he was aware of the displacement of a significant number of Kosovo Albanians in 1998.⁵⁵⁹⁸

⁵⁵⁸⁹ Trial Judgement, vol. 3, para. 813.

⁵⁵⁹⁰ Exh. P969, p. 1.

⁵⁵⁹¹ Trial Judgement, vol. 3, paras 807-808, referring to the excessive force used by the VJ and MUP forces near Glodane/Gllogjan in late August 1998 and October 1998, in Mališevo/Malisheva at the end of July 1998, and in Drenica at the end of July and the beginning of August 1998.

⁵⁵⁹² Trial Judgement, vol. 3, para. 808, citing Exh. 4D97, p. 3.

⁵⁵⁹³ Trial Judgement, vol. 3, para. 808, referring to Exh. P1468, p. 124.

⁵⁵⁹⁴ Trial Judgement, vol. 3, para. 815.

⁵⁵⁹⁵ Trial Judgement, vol. 3, para. 816.

⁵⁵⁹⁶ Trial Judgement, vol. 3, para. 817.

⁵⁵⁹⁷ Trial Judgement, vol. 3, para. 810, referring, *inter alia*, to Exh. P1468, pp. 117, 119-123. The Appeals Chamber notes that the Trial Chamber misquoted the page number with regard to its reference to the relevant intervention during the meeting of 17 September 1998, which should cite Exhibit P1468, p. 119 (not p. 117 as it appears in the Trial Judgement, vol. 3, fn. 2037).

⁵⁵⁹⁸ In this context, Lazarević also contests the Trial Chamber’s finding that the excessive use of force by the VJ and the MUP was a partial cause of the displacement of a significant number of people in Kosovo by the end of October 1998, and challenges its assessment of evidence in this regard. In particular, Lazarević asserts that the Trial Chamber erred in its assessment of evidence when it found the VJ and the MUP used excessive and indiscriminate force in villages in

Lazarević's submission that he believed the population had "temporarily [taken] refuge from the combat operations" merely presents a different interpretation of the evidence without showing any error on the part of the Trial Chamber.⁵⁵⁹⁹

1709. Nonetheless, the Appeals Chamber finds that the Trial Chamber erred in concluding based on his knowledge of events in 1998 that the only reasonable inference was that Lazarević was aware that forcible displacement was likely to occur if he ordered the VJ to operate in Kosovo in 1999. In this regard, the Appeals Chamber notes that the Trial Chamber did not find that forcible displacement took place in 1998,⁵⁶⁰⁰ or that Lazarević was aware that VJ forces were acting with the intent to displace the Kosovo Albanian population in the course of their military operations.⁵⁶⁰¹ While the use of excessive and indiscriminate force, killings of civilians, and destruction of property may be means to displace the population, such acts do not *per se* mean that the perpetrators of these acts intended to forcibly displace the population, even if they effect a movement of the population. The Appeals Chamber therefore considers that, at most, the information Lazarević received in 1998 made him aware of the probability that the VJ forces would use excessive and indiscriminate force or commit other crimes if ordered to operate in Kosovo in 1999. However, the Appeals Chamber finds that on the basis of such knowledge alone no reasonable trier of fact could have concluded that the only reasonable inference was that Lazarević knew of the probability that if ordered to operate in Kosovo in 1999, the VJ forces would act with the intent to commit deportation and forcible transfer.

1710. In light of the foregoing, the Appeals Chamber dismisses sub-ground 3(b) of Lazarević's appeal and grants sub-ground 3(i) of Lazarević's appeal to the extent that the Trial Chamber erred in finding that as of January 1999, he had the requisite *mens rea* for aiding and abetting the crimes of deportation and forcible transfer committed by the VJ forces in Kosovo between 24 March and 25 May 1999.

western Kosovo, Mališevo/Malisheva, and Drenica in 1998 (Lazarević's Appeal Brief, paras 404-412, 414, 419-422; Lazarević's Reply Brief, para. 122; *contra* Prosecution's Response Brief (Lazarević), paras 254-255. See also Trial Judgement, vol. 1, paras 881, 886, 894, 919-920). While the Trial Chamber noted that Lazarević closely followed the events on the ground at the time these incidents occurred, the Appeals Chamber observes that the Trial Chamber's reliance on this was limited when concluding that he knew of the commission of crimes in 1998 (Trial Judgement, vol. 3, para. 817). The Trial Chamber's conclusion on Lazarević's knowledge in 1998 was sufficiently supported by other evidence (see *supra*, paras 1698, 1703-1708). His arguments in this respect are therefore dismissed without further discussion.

⁵⁵⁹⁹ The Appeals Chamber notes that Lazarević also refers to the testimony of Sandra Mitchell that there was no refugee problem prior to 22 March 1999 (Lazarević's Appeal Brief, para. 429, referring to Sandra Mitchell, 11 Jul 2006, T. 588). However, Lazarević in this respect mischaracterises her evidence as, although she indicated that there were no "refugees" in 1998, she also stated that there was nevertheless displacement of civilians at that time (Sandra Mitchell, 11 Jul 2006, T. 588). Thus, contrary to his suggestion, this evidence does not undermine the Trial Chamber's findings regarding the displacement of Kosovo Albanians in 1998.

⁵⁶⁰⁰ Trial Judgement, vol. 1, paras 919-920.

⁵⁶⁰¹ Trial Judgement, vol. 3, para. 923.

(b) Alleged errors in finding that Lazarević knew of the campaign of forcible displacement(i) Lazarević's presence in Priština/Prishtina in 1999

1711. The Trial Chamber found that from 24 March 1999 the VJ and the MUP operated together for some weeks, forcibly displacing large numbers of Kosovo Albanian civilians from Priština/Prishtina.⁵⁶⁰² It further found that Lazarević was present in Priština/Prishtina for most of this period and was therefore aware of the forcible displacement and the atmosphere of terror created by the VJ and MUP forces.⁵⁶⁰³ The Trial Chamber was also satisfied that Lazarević attended at least one meeting in Priština/Prishtina while Kosovo Albanians were being forcibly displaced from the town, and was present at the 1 June 1999 Joint Command meeting at the Grand Hotel.⁵⁶⁰⁴

1712. According to Lazarević, the Trial Chamber reached its findings on his presence in Priština/Prishtina and on his awareness of the forcible displacement solely on the basis of his attendance of two meetings held on 20 April and 1 June 1999.⁵⁶⁰⁵ Lazarević contends that, contrary to the Trial Chamber's finding, he was in the "region of Priština, which means several kilometers [*sic*] from Priština".⁵⁶⁰⁶ He also avers that the evidence does not show that on 20 April 1999 Kosovo Albanians were being forcibly displaced from the town of Priština/Prishtina.⁵⁶⁰⁷ Finally, Lazarević argues that the Trial Chamber erred in finding that the meeting that took place on 1 June 1999 was a meeting of the Joint Command.⁵⁶⁰⁸

1713. The Prosecution responds that the Trial Chamber relied on several pieces of evidence in finding that Lazarević was present in Priština/Prishtina during the relevant period.⁵⁶⁰⁹ According to the Prosecution, Lazarević's claim that the meeting on 1 June 1999 was not a Joint Command meeting should be summarily dismissed since it is irrelevant to the question of whether he was present in the town.⁵⁶¹⁰ The Prosecution also submits that Lazarević fails to explain why the Trial Chamber erred in concluding that he was aware of the crimes committed in Priština/Prishtina.⁵⁶¹¹

⁵⁶⁰² Trial Judgement, vol. 3, para. 924.

⁵⁶⁰³ Trial Judgement, vol. 3, para. 924.

⁵⁶⁰⁴ Trial Judgement, vol. 3, paras 838-839. See also *ibid.*, vol. 1, paras 1145, 1149.

⁵⁶⁰⁵ Lazarević's Appeal Brief, para. 517.

⁵⁶⁰⁶ Lazarević's Appeal Brief, paras 512, 515-516, 536, 574. Lazarević's Reply Brief, para. 127.

⁵⁶⁰⁷ Lazarević's Appeal Brief, para. 512. Lazarević's argument that the evidence does not show that the VJ forcibly displaced Kosovo Albanians from Priština/Prishtina town at any time has been addressed in *supra* sub-section VI.B.10.

⁵⁶⁰⁸ Lazarević's Appeal Brief, paras 513, 518-520.

⁵⁶⁰⁹ Prosecution's Response Brief (Lazarević), para. 282, referring to Trial Judgement, vol. 1, paras 599-600, *ibid.*, vol. 3, para. 838, fn. 2123. See also Prosecution's Response Brief (Lazarević), paras 281, 283.

⁵⁶¹⁰ Prosecution's Response Brief (Lazarević), para. 284, referring to Trial Judgement, vol. 1, paras 1145-1149, fn. 3144, *ibid.*, vol. 3, para. 839.

⁵⁶¹¹ Prosecution's Response Brief (Lazarević), para. 285.

1714. The Trial Chamber found that “Lazarević was primarily located in and around Priština/Prishtina during the NATO air campaign.”⁵⁶¹² The Trial Chamber noted that the Priština Corps Command was located in 1999 in Priština/Prishtina town and that, on 30 March 1999, Lazarević ordered members of the Priština Corps Command to be located “in the general area of the Priština municipality, the Municipal Court and the premises of the [Priština Corps] Command including the Grand Hotel”.⁵⁶¹³ The Trial Chamber also considered evidence that Lazarević was present at the Priština Corps Command at the Grand Hotel in Priština/Prishtina town “almost every day” and that, together with his team, he “moved constantly” between the Priština Corps main Command Post, its Rear Command Post, the Forward Command Post, and several Command Groups throughout Kosovo.⁵⁶¹⁴ The evidence cited by Lazarević is consistent with the Trial Chamber’s finding that he was “primarily located in and around Priština/Prishtina”.⁵⁶¹⁵

1715. The Trial Chamber considered evidence showing that “Kosovo Albanians were expelled from Priština/Prishtina town beginning on 24 March 1999”⁵⁶¹⁶ and that thousands of Kosovo Albanians left their homes in Priština/Prishtina either as the result of direct eviction or due to the prevailing atmosphere of fear caused by the organised actions of the VJ and the MUP “in the days *and weeks* following the start of the airstrikes”.⁵⁶¹⁷ Thus, irrespective of whether any specific acts of deportation or forcible transfer occurred at the time of the 20 April 1999 meeting, the Trial Chamber reasonably found that Lazarević was regularly present in Priština/Prishtina during the period of the NATO air campaign when the crimes of deportation and forcible transfer were taking place.⁵⁶¹⁸ Consequently, the Appeals Chamber finds no error in the Trial Chamber’s finding that due to his presence, Lazarević was aware of the forcible displacement and the atmosphere of terror created by the VJ and MUP forces.

1716. Finally, with respect to Lazarević’s claim that the Trial Chamber erred in finding that the meeting on 1 June 1999 in the Grand Hotel was one of the Joint Command, the Appeals Chamber considers that the alleged error is irrelevant to the issue of Lazarević’s presence in Priština/Prishtina town on this date, which he does not appear to dispute.

1717. In light of the above, the Appeals Chamber dismisses sub-ground 3(e) of Lazarević’s appeal.

⁵⁶¹² Trial Judgement, vol. 3, para. 838.

⁵⁶¹³ Trial Judgement, vol. 1, para. 599, referring to Exh. 5D348, p. 1.

⁵⁶¹⁴ Trial Judgement, vol. 1, paras 600, 602.

⁵⁶¹⁵ See Lazarević’s Appeal Brief, para. 516, referring to Vladimir Lazarević, 12 Nov 2007, T. 18106.

⁵⁶¹⁶ Trial Judgement, vol. 2, para. 885.

⁵⁶¹⁷ Trial Judgement, vol. 2, para. 887 (emphasis added). The Trial Chamber also later reiterated these findings on the timing of the forcible displacement in the town in the context of its discussion of Lazarević’s responsibility as an aider and abettor (see *ibid.*, vol. 3, para. 924).

⁵⁶¹⁸ Trial Judgement, vol. 3, paras 837-838, and references therein. See also *ibid.*, vol. 1, paras 599-600, 602, and references therein.

(ii) Lazarević's knowledge of crimes committed in 1999

1718. The Trial Chamber concluded that Lazarević knew of the campaign of terror, violence, and forcible displacement carried out by the VJ and MUP forces against Kosovo Albanians in 1999.⁵⁶¹⁹ It found that Lazarević was aware of specific crimes committed by members of Priština Corps units, serious violent acts committed by MUP members against Kosovo Albanians, and the widespread forcible displacement of the Kosovo Albanian population in 1999, which was at least in part due to the actions of the VJ.⁵⁶²⁰

1719. The Trial Chamber relied, *inter alia*, on: (i) reports sent by subordinate units to the Priština Corps Command on the commission of crimes by VJ members;⁵⁶²¹ (ii) combat reports on the massive displacement of the Kosovo Albanian population as well as documents issued by the Priština Corps Command and its subordinate units pertaining to measures undertaken regarding civilians;⁵⁶²² (iii) a warning of 25 April 1999 by Ljubiša Diković that the Priština Corps was using excessive tactics during operations in and around Kosmač and Čičavica/Qiqavica;⁵⁶²³ (iv) Drewienkiewicz's press statement reporting that VJ and MUP forces were responsible for the deportation of the Kosovo Albanian population in early April 1999;⁵⁶²⁴ (v) Lazarević's awareness that the operation in the Reka/Caragoj valley in the end of April 1999 involved forcible displacement of the civilian population;⁵⁶²⁵ and (vi) "Lazarević's attempt to prevent the mistreatment of Kosovo Albanians by VJ members".⁵⁶²⁶ The Trial Chamber further noted evidence that orders for the expulsion of Kosovo Albanians, and related reports, were not written but given orally.⁵⁶²⁷

1720. Lazarević challenges the Trial Chamber's evaluation of this evidence. The Appeals Chamber will address his submissions in turn.

a. Reports on the commission of crimes sent by subordinate units

1721. The Trial Chamber considered evidence showing that in 1999, the reporting system within the Priština Corps did not always work well and that reports were not being received as often as they should have been.⁵⁶²⁸ It concluded, however, that despite some disruptions, communications

⁵⁶¹⁹ Trial Judgement, vol. 3, para. 924.

⁵⁶²⁰ Trial Judgement, vol. 3, paras 860-861.

⁵⁶²¹ Trial Judgement, vol. 3, para. 847.

⁵⁶²² Trial Judgement, vol. 3, paras 849-851.

⁵⁶²³ Trial Judgement, vol. 3, para. 852.

⁵⁶²⁴ Trial Judgement, vol. 3, para. 855. See also *ibid.*, vol. 3, para. 853.

⁵⁶²⁵ Trial Judgement, vol. 3, para. 856.

⁵⁶²⁶ Trial Judgement, vol. 3, para. 861.

⁵⁶²⁷ Trial Judgement, vol. 3, para. 858.

continued to function, allowing the continued operation of the Priština Corps Command system.⁵⁶²⁹ The Trial Chamber further found that several documents sent by subordinate units to the Priština Corps Command informed Lazarević about crimes committed by members of Priština Corps units and noted that while these documents indicated that measures had been taken against the perpetrators of crimes, they did not provide details on the measures taken.⁵⁶³⁰

1722. Lazarević argues that the Trial Chamber erred in finding that throughout the NATO air campaign the Priština Corps Command functioned continuously. According to Lazarević, the evidence shows that, on occasion, “commanding and communication were blocked for a period of several days.”⁵⁶³¹ He further avers that the Trial Chamber misinterpreted the fact that reports sent to the Priština Corps Command did not provide details on the measures taken against the perpetrators of crimes.⁵⁶³² In support of his submission, Lazarević refers to the evidence of Aleksandar Vasiljević that it was not necessary for the combat reports to be detailed.⁵⁶³³ He maintains that the lack of prosecutions shows that he did not know that forcible displacement was taking place⁵⁶³⁴ and that his mere knowledge that individual members of the Priština Corps had committed criminal offences does not prove that he was aware of a widespread and systematic campaign of forcible displacement.⁵⁶³⁵

1723. The Prosecution responds that the evidence upon which Lazarević seeks to rely as to the difficulties and partial breakdown of communications does not contradict the Trial Chamber’s finding that the Priština Corps Command functioned continuously.⁵⁶³⁶ The Prosecution contends that it is irrelevant whether the reports of the Priština Corps included details of measures taken against the perpetrators of crimes.⁵⁶³⁷ In addition, the Prosecution claims that Lazarević misrepresents Vasiljević’s testimony.⁵⁶³⁸

1724. The Trial Chamber took into account evidence that “there were some disruptions in the communications system” within the Priština Corps Command.⁵⁶³⁹ The evidence cited by Lazarević

⁵⁶²⁸ Trial Judgement, vol. 3, para. 844, and references therein.

⁵⁶²⁹ Trial Judgement, vol. 3, para. 844.

⁵⁶³⁰ Trial Judgement, vol. 3, para. 847.

⁵⁶³¹ Lazarević’s Appeal Brief, paras 434-435; Lazarević’s Reply Brief, para. 125.

⁵⁶³² Lazarević’s Appeal Brief, para. 522.

⁵⁶³³ Lazarević’s Appeal Brief, paras 522-523, 535, referring to Aleksandar Vasiljević, 23 Jan 2007, T. 8964, 8969; Lazarević’s Reply Brief, para. 130.

⁵⁶³⁴ Lazarević’s Appeal Brief, para. 563.

⁵⁶³⁵ Lazarević’s Appeal Brief, para. 564.

⁵⁶³⁶ Prosecution’s Response Brief (Lazarević), paras 266-267.

⁵⁶³⁷ Prosecution’s Response Brief (Lazarević), para. 290.

⁵⁶³⁸ Prosecution’s Response Brief (Lazarević), para. 290.

⁵⁶³⁹ Trial Judgement, vol. 3, para. 818, referring to Momir Stojanović, 6 Dec 2007, T. 19733–19734, Dragiša Marinković, Exh. 5D1379, para. 9, Milutin Filipović, 28 Nov 2007, T. 19232–19233.

does not undermine this finding or show that the communication problems had the effect of actually halting the function of the Priština Corps Command.⁵⁶⁴⁰

1725. The Trial Chamber also noted that the combat reports lacked details on measures taken against the perpetrators of crimes.⁵⁶⁴¹ The Appeals Chamber observes that there is no indication that the Trial Chamber placed undue weight on this aspect of the evidence. Rather, the Trial Chamber relied on the combat reports to find that Lazarević was aware of the commission of crimes by his subordinates, including rape and looting.⁵⁶⁴²

1726. The Appeals Chamber also finds unpersuasive Lazarević's arguments regarding his knowledge of individual incidents of crimes and the lack of criminal prosecutions. The Trial Chamber considered Lazarević's knowledge of instances of crimes, such as looting, theft, and rape committed by the VJ forces⁵⁶⁴³ and murder, rape, and looting committed by MUP members⁵⁶⁴⁴ in *conjunction* with his awareness of the massive displacement of the Kosovo Albanian population,⁵⁶⁴⁵ including of the forcible displacement carried out during the Reka/Caragoj valley operation on 27 and 28 April 1999.⁵⁶⁴⁶ The Trial Chamber also found that Lazarević was aware of the situation

⁵⁶⁴⁰ See Lazarević's Appeal Brief, para. 435, referring to the evidence of Bozidar Delić, 29 Nov 2007, T. 19289 ("The command system functioned in the usual way, nonetheless, it was hindered because the communications system was destroyed [...] [s]o communications with our superior command were therefore impeded [...]."), Miodrag Janković, 25 Oct 2007, T. 17550-17558 ("[...] the existing communications system did provide for reports to be submitted to the Supreme Command Staff, or rather, to have orders received from the Supreme Command Staff... [but problems in communications remained] from the corps command to brigade commands, from brigade commands to battalion commands, and from battalion commands towards the commands of companies, and from company command to squad leaders."), Ljubomir Anđelković, 26 Sep 2007, T. 16402-16403 ("There was a period when between the strategic command and the strategic groups there were serious communication breakdowns. Fortunately this only went on for a very brief time until we could redress the damage, but at lower levels of command those breakdowns were quite frequent and quite long sometimes."), Miloš Mandić, Exh. 5D1391, paras 23 ("Although a radio line was established with the Corps Command, it was frequently interrupted or jammed. Wire and courier liaison was established with subordinated units. Wire liaison was constantly severed by terrorists"), 25 ("In April 1999, it was impossible to abide by the order of Command of Priština Corps [...] on daily reporting to the Corps Commander due to interruption or jamming of communication lines. Such a state lasted until the end of April when the Brigade Commander requested a meeting with Corps Commander. Namely, the communication system was jammed or damaged on a daily basis by NATO air forces or ŠTS."), Vladimir Lazarević, Exh. P950, p. 81 ("at some point communications with Belgrade ended, not completely ended but in the sense that [Perišić] would call me up less frequently than before from Belgrade."), Miodrag Janković, Exh. 4D504, paras 28-52 (stating, *inter alia*, that "[t]he aggressor succeeded in putting the [Stationary Communications System] installations out of operation and partially paralysing the communications system". *Ibid.*, para. 29), Ljubomir Savić, Exh. 5D1392, para. 12 ("I emphasise that the lines of communication were very aggravated during the war, there were frequent interruptions in the lines which lead to great difficulties in commanding and reporting"), Goran Jevtović, Exh. 5D1385, para. 27 ("From the very beginning of the NATO bombing until the withdrawal of the VJ forces from [Kosovo], we often had great problems at the [Forward Command Post] with sending combat reports, which we drafted at the [Forward Command Post], but were often unable to send to the [Priština Corps] Command Post because communications were down due to frequent NATO bombing of this area").

⁵⁶⁴¹ Trial Judgement, vol. 3, para. 847.

⁵⁶⁴² See Trial Judgement, vol. 3, para. 847, referring to Exh. 5D509, p. 1, Exh. 5D825, p. 1, Exh. 5D885, p. 2, Exh. 5D1057, p. 2, Exh. 5D1061, p. 2, Exh. 5D1132, p. 2, Exh. 5D1148, Momir Stojanović, 6 Dec 2007, T. 19739, Ljubomir Savić, 24 Jan 2008, T. 20972-20973.

⁵⁶⁴³ Trial Judgement, vol. 3, paras 846-847, and references therein.

⁵⁶⁴⁴ Trial Judgement, vol. 3, para. 848, and references therein.

⁵⁶⁴⁵ Trial Judgement, vol. 3, paras 849-851, and references therein.

⁵⁶⁴⁶ Trial Judgement, vol. 3, para. 856.

in Kosovo as he was primarily located in and around Priština/Prishtina while the campaign of forcible displacement was being carried out and frequently travelled to inspect his subordinate units in the field.⁵⁶⁴⁷ Lazarević's submission that the Trial Chamber only relied on his knowledge that individual members of the Priština Corps had committed criminal offences to infer his knowledge of the campaign of forcible displacement is therefore without merit.

b. Lazarević's awareness that the operation in the Reka/Caragoj valley involved forcible displacement

1727. The Trial Chamber found that the joint VJ and MUP operation in the Reka/Caragoj valley on 27 and 28 April 1999 "was an organised operation primarily designed to displace the Kosovo Albanian civilian population down the valley."⁵⁶⁴⁸ It further found that Lazarević was aware that the operation involved the forcible displacement of the civilian population.⁵⁶⁴⁹ In reaching these conclusions, the Trial Chamber relied on K73's testimony that the expulsion of Kosovo Albanians during the operation was carried out pursuant to orders⁵⁶⁵⁰ as well as on K90's evidence that such orders would have been approved at a higher level than that of a brigade commander, such as Božidar Delić.⁵⁶⁵¹ The Trial Chamber noted that Lazarević was Delić's immediate supervisor.⁵⁶⁵² It also considered that Dragan Živanović, who was involved in the operation, testified that he had reported to Lazarević about the operation the following day.⁵⁶⁵³ The Trial Chamber further noted the evidence of Saša Antić, a Commander in the 52nd Military Police Battalion of the VJ,⁵⁶⁵⁴ on an unrelated military action that "it would be insane to think that even a chief of security would issue an order to a unit without approval and without the knowledge of the corps commander"⁵⁶⁵⁵.

1728. Lazarević claims that the Trial Chamber misinterpreted the testimonies of K73 and K90 and consequently erred in finding that he was aware that the operation in the Reka/Caragoj valley involved the forcible displacement of the civilian population.⁵⁶⁵⁶ Lazarević further seeks to rely on the evidence of K73 that Lazarević was a professional and honourable military commander.⁵⁶⁵⁷

⁵⁶⁴⁷ Trial Judgement, vol. 3, paras 837-843, 924.

⁵⁶⁴⁸ Trial Judgement, vol. 3, para. 856.

⁵⁶⁴⁹ Trial Judgement, vol. 3, para. 856.

⁵⁶⁵⁰ Trial Judgement, vol. 3, para. 856, referring to K73, 14 Sep 2006, T. 3385.

⁵⁶⁵¹ Trial Judgement, vol. 3, para. 856, referring to K90, Exh. P2652, para. 41.

⁵⁶⁵² Trial Judgement, vol. 3, para. 856.

⁵⁶⁵³ Trial Judgement, vol. 3, para. 856, referring to Exh. P2026, p. 2, Dragan Živanović, 18 Jan 2008, T. 20592–20593.

⁵⁶⁵⁴ Trial Judgement, vol. 3, para. 700.

⁵⁶⁵⁵ Trial Judgement, vol. 3, para. 856, referring to Saša Antić, 28 Jan 2008, T. 21163.

⁵⁶⁵⁶ Lazarević's Appeal Brief, para. 537; Lazarević's Reply Brief, para. 133.

⁵⁶⁵⁷ Lazarević's Appeal Brief, para. 538, referring to K73, 14 Sep 2006, T. 3415 (closed session).

1729. The Prosecution responds that Lazarević's argument should be summarily dismissed as he fails to show that the Trial Chamber erred in relying on the evidence of K90 and K73.⁵⁶⁵⁸ It further submits that Lazarević's reference to K73's evidence that he was an honourable soldier is irrelevant to the assessment of whether he knew that the VJ forcibly displaced Kosovo Albanian civilians.⁵⁶⁵⁹

1730. Lazarević merely claims that the Trial Chamber misinterpreted the evidence of K90 without identifying any specific error in the Trial Chamber's evaluation. The Appeals Chamber recalls that it has already dismissed Lazarević's general challenge to the Trial Chamber's reliance on the evidence of K90.⁵⁶⁶⁰ Similarly, Lazarević has failed to point to any specific error in relation to the Trial Chamber's evaluation of the evidence of K73. As to the testimony of K73 concerning the general professionalism of Lazarević as a military commander, the Appeals Chamber considers it to be irrelevant to the question of whether Lazarević was aware that the operation in the Reka/Caragoj valley involved forcible displacement. Lazarević's arguments are therefore dismissed.

c. Diković's warning

1731. The Trial Chamber noted that on 25 April 1999, Ljubiša Diković, the commander of the 37th Motorised Brigade,⁵⁶⁶¹ "warned Lazarević [...] that the Priština Corps was using excessive tactics which did not make military sense in operations in and around Kosmač and Čičavica/Qiqavica."⁵⁶⁶² Lazarević avers that the Trial Chamber erroneously relied on Diković's warning which concerned only combat action against the KLA and did not refer to the moving of civilians.⁵⁶⁶³ The Prosecution responds that the Appeals Chamber should summarily dismiss Lazarević's argument since "he merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber."⁵⁶⁶⁴

1732. The Appeals Chamber notes that Diković's report does not suggest that the operations in and around Kosmač and Čičavica/Qiqavica resulted in the movement of civilians.⁵⁶⁶⁵ Consequently, the Appeals Chamber finds that the Trial Chamber erred to the extent it relied on this report in finding that Lazarević was aware of the forcible displacement of the Kosovo Albanian population.

⁵⁶⁵⁸ Prosecution's Response Brief (Lazarević), para. 294.

⁵⁶⁵⁹ Prosecution's Response Brief (Lazarević), para. 294. The Appeals Chamber notes that the Prosecution refers to "his argument that K90 referred to Lazarević as an honourable soldier", however it is clear that the Prosecution meant to refer to K73.

⁵⁶⁶⁰ See *supra*, sub-section VI.B.5.(b).

⁵⁶⁶¹ Trial Judgement, vol. 2, para. 569.

⁵⁶⁶² Trial Judgement, vol. 3, para. 852, referring to Exh. P2591, p. 2.

⁵⁶⁶³ Lazarević's Appeal Brief, para. 533, referring to Trial Judgement, vol. 3, para. 852, Exh. P2591, p. 2; Lazarević's Reply Brief, para. 132.

⁵⁶⁶⁴ Prosecution's Appeal Brief (Lazarević), para. 293.

⁵⁶⁶⁵ Trial Judgement, vol. 3, para. 852, referring to Exh. P2591, p. 2.

d. Drewenkiewicz's press statement

1733. The Trial Chamber found that in early 1999 Lazarević was alerted by the international community to the forcible displacement of the Kosovo Albanian population through the press statement of Karol John Drewenkiewicz,⁵⁶⁶⁶ former Kosovo Verification Mission Chief of Operations and Deputy Head of Mission.⁵⁶⁶⁷

1734. Lazarević disputes the Trial Chamber's finding, arguing that the evidence cited by the Trial Chamber does not support the conclusion that he was aware of Drewenkiewicz's press statement.⁵⁶⁶⁸ In response, the Prosecution contends that the Trial Chamber's conclusion was correct, given the general subject-matter of the press statement and that such information would have been reported to Lazarević. The Prosecution also asserts that some of the crimes referred to in the press release were committed in Priština/Prishtina where Lazarević was located and contends that Drewenkiewicz was well known to the FRY and Serbian authorities.⁵⁶⁶⁹

1735. In concluding that Lazarević was made aware of Drewenkiewicz's press statement, the Trial Chamber reasoned that:

Drewenkiewicz's press release reported large numbers of displaced Kosovo Albanians arriving at the borders, and conveyed reports of widespread atrocities committed by the VJ and MUP, including deportation. As described in Section VI.A, the Priština Corps had an intelligence department, responsible for reporting such information to the Commander. Furthermore, the press release specifically referred to the systematic looting and forcible removal of Kosovo Albanians from Priština/Prishtina, where Lazarević was located during the conflict. Given the subject matter of Drewenkiewicz's press release and his notoriety to the FRY and Serbian authorities, the Chamber is satisfied that Lazarević was made aware of this report at the start of April 1999.⁵⁶⁷⁰

1736. The Trial Chamber considered evidence that the Priština Corps Staff consisted of various specialised departments or sections, including "Intelligence".⁵⁶⁷¹ However, the Trial Chamber did not determine the scope of the department's duties and functions. Nor does the evidence to which it referred substantiate its conclusion that Drewenkiewicz's press statement would have fallen within

⁵⁶⁶⁶ Trial Judgement, vol. 3, para. 853, fn. 2169, referring, *inter alia*, to Exh. P2542. The Appeals Chamber notes that the rest of the evidence referred to by the Trial Chamber in fn. 2169 relates to its finding that the forcible transfer and deportation of the Kosovo Albanian population in Peć/Peja town was carried out in an organised manner (*ibid.*, vol. 3, para. 853, fn. 2169, referring to Ndrec Konaj, 16 Oct 2006, T. 4894, 4912-4913, Karol John Drewenkiewicz, 4 Dec 2006, T. 7815, Exh. P2372, p. 4, Exh. P2802, p. 3). See also Trial Judgement, vol. 3, para. 855.

⁵⁶⁶⁷ Trial Judgement, vol. 1, para. 327.

⁵⁶⁶⁸ Lazarević's Appeal Brief, para. 534, referring to Trial Judgement, vol. 3, para. 853, fn. 4390. The Appeals Chamber considers the correct reference to be to fn. 2169. See also Lazarević's Appeal Brief, para. 536, referring to Trial Judgement, vol. 3, para. 855, fns 4396-4398. The Appeals Chamber considers the correct references to be to fns 2176-2178. Lazarević also submits that the Trial's Chamber conclusion that he was made aware of the press statement is "pure speculation" and violates the principle *in dubio pro reo* (Lazarević's Appeal Brief, para. 536).

⁵⁶⁶⁹ Prosecution's Appeal Brief (Lazarević), para. 308.

⁵⁶⁷⁰ Trial Judgement, vol. 3, para. 855 (internal references omitted).

⁵⁶⁷¹ Trial Judgement, vol. 1, para. 603. The Appeals Chamber notes that, although the Trial Chamber referred to the evidence of Ljubiša Stojimirović, his evidence does not provide support to the Trial Chamber's finding that the Priština

the scope of the intelligence information usually gathered and reported to Lazarević. Absent such evidence, the Appeals Chamber considers that the subject matter of the press statement and Drewienkiewicz's notoriety were insufficient for a reasonable trier of fact to conclude that the only reasonable inference from the evidence was that Lazarević was made aware of Drewienkiewicz's press statement. Nor is the Appeals Chamber persuaded by the Prosecution's submission that due to his presence in Priština/Prishtina Lazarević would have been aware of the press statement. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in relying on Drewienkiewicz's press statement to infer that Lazarević knew of the commission of crimes by the VJ forces.

e. Alleged error in finding that orders for forcible displacement were given orally

1737. The Trial Chamber noted that orders for the expulsion of Kosovo Albanians were issued orally.⁵⁶⁷² It added that "[i]t is consistent with this that a review of several combat reports from subordinate units did not include information regarding crimes and the widespread forcible displacement of Kosovo Albanians".⁵⁶⁷³

1738. Lazarević contends that the Trial Chamber's finding that orders for the expulsion of Kosovo Albanians and reports thereabout were given orally is not supported by the evidence.⁵⁶⁷⁴ He claims that the lack of such reports cannot support the conclusion that orders were given orally.⁵⁶⁷⁵ In support of his submission, Lazarević seeks to rely on orders prohibiting criminal conduct and on the testimony of Zlatomir Pešić that Lazarević never issued an illegal order.⁵⁶⁷⁶

1739. The Prosecution responds that Lazarević's arguments should be summarily dismissed as he seeks to substitute his own evaluation of the evidence for that of the Trial Chamber and merely challenges the Trial Chamber's failure to rely on Pešić's testimony.⁵⁶⁷⁷

1740. The Trial Chamber found that orders for the expulsion of Kosovo Albanians were issued orally based on K90's statement that his unit was ordered to expel Kosovo Albanians from their

Corps had an intelligence department responsible for reporting to Lazarević (Trial Judgement, vol. 3, para. 855, referring to Ljubiša Stojimirović, Exh. 4D506, para. 9).

⁵⁶⁷² Trial Judgement, vol. 3, para. 858, referring to K90, 29 Jan 2007, T. 9302–9303, K90, Exh. P2652, paras 40, 41.

⁵⁶⁷³ Trial Judgement, vol. 3, para. 858, referring to Exh. P1995, Exh. P2002, Božidar Delić, 29 Nov 2007, T. 19349–19350.

⁵⁶⁷⁴ Lazarević's Appeal Brief, para. 540, referring to Trial Judgement, vol. 3, para. 858. Lazarević's Reply Brief, para. 134.

⁵⁶⁷⁵ Lazarević's Appeal Brief, paras 540, 542.

⁵⁶⁷⁶ Lazarević's Appeal Brief, paras 540-541, referring to Exh. 5D32, Exh. 5D35, Zlatomir Pešić, 24 Nov 2006, T. 7267. Lazarević also claims that it was contradictory for the Trial Chamber to find that he was issuing orders to protect civilians and at the same time oral orders for their forcible displacement (Lazarević's Appeal Brief, para. 569).

⁵⁶⁷⁷ Prosecution's Response Brief (Lazarević), paras 296-301.

villages and that “there were never any written orders for these types of taskings [*sic*]”.⁵⁶⁷⁸ K90 further stated that “a commander would not order the expulsion of innocent Albanian civilians in a written order but rather pass the order down verbally.”⁵⁶⁷⁹ The Trial Chamber also noted that, in his testimony, K90 stated that although he was never ordered to expel villagers, “if you’re clearing up a village, you’re expelling these people”.⁵⁶⁸⁰ The Trial Chamber found K90 “generally credible and reliable on the issues from his witness statement that he re-confirmed in his oral evidence.”⁵⁶⁸¹ The Trial Chamber further considered that the fact that orders for forcible displacement were given orally was consistent with the absence of information on forcible displacement in combat reports from subordinate units.⁵⁶⁸² The Appeals Chamber considers that Lazarević merely seeks to rely on a different interpretation of the evidence without showing that the Trial Chamber’s reliance on K90’s evidence was unreasonable.

1741. Furthermore, Lazarević’s reliance on Pešić’s testimony that he had never received an illegal order from Lazarević is unpersuasive. The Appeals Chamber considers that Lazarević has failed to show the relevance of this evidence to his conviction. In this regard, the Appeals Chamber recalls that Lazarević was convicted for aiding and abetting, not ordering, the crimes of deportation and forcible transfer committed by the VJ.⁵⁶⁸³ Lazarević’s submission in this regard is dismissed.

f. Alleged error in finding that Lazarević’s attempt to prevent the mistreatment of Kosovo Albanians showed knowledge of forcible displacement

1742. The Trial Chamber considered that, in addition to the evidence showing Lazarević’s knowledge of various crimes committed by the VJ and the MUP, “Lazarević’s attempt to prevent the mistreatment of Kosovo Albanians by VJ members, shows that he was aware of the VJ and MUP forcibly displacing Kosovo Albanian civilians, and also aware that this sometimes occurred during VJ operations against the KLA and in places where NATO was bombing VJ and MUP targets”.⁵⁶⁸⁴

⁵⁶⁷⁸ Trial Judgement, vol. 3, para. 858, referring to K90, Exh. P2652, para. 41. See also *supra*, sub-sections VI.B.5.(b)(ii)a. and VII.B.3.(a)(iv).

⁵⁶⁷⁹ K90, Exh. P2652, para. 41. See also Trial Judgement, vol. 3, para. 858.

⁵⁶⁸⁰ Trial Judgement, vol. 2, para. 153, citing K90, 29 Jan 2007, T. 9273, 9331.

⁵⁶⁸¹ Trial Judgement, vol. 2, para. 74. See also *ibid.*, vol. 2, fn. 2839.

⁵⁶⁸² Trial Judgement, vol. 3, para. 858.

⁵⁶⁸³ Trial Judgement, vol. 3, para. 930. Thus, Lazarević misrepresents the Trial Judgement in claiming that the Trial Chamber found that he was issuing oral orders for the forcible displacement of the Kosovo Albanian population (Lazarević’s Appeal Brief, para. 569). See also Trial Judgement, vol. 3, paras 925-926, where the Trial Chamber described Lazarević’s conduct which it found to have provided practical assistance, encouragement, and moral support to the VJ forces engaging in the forcible displacement of Kosovo Albanians.

⁵⁶⁸⁴ Trial Judgement, vol. 3, para. 861. See also *ibid.*, vol. 3, para. 860.

1743. Lazarević claims that no reasonable trier of fact could have inferred from his attempts to prevent the mistreatment of civilians that he knew of the campaign of forcible displacement.⁵⁶⁸⁵

1744. The Trial Chamber did not specify what it meant by Lazarević's attempt to prevent the mistreatment of Kosovo Albanians by VJ members.⁵⁶⁸⁶ The Appeals Chamber notes the Trial Chamber's finding that "[t]he orders issued by the Priština Corps Command prohibiting acts of looting and other forms of crime constitute further evidence that Lazarević knew that such crimes were being committed during combat operations."⁵⁶⁸⁷ Of the evidence referred to by the Trial Chamber in this regard, the orders of 20 and 24 April 1999 originate from the Military District Command, not the Priština Corps Command, and hence are not of direct relevance.⁵⁶⁸⁸ The Priština Corps Command order of 22 April 1999 contains no reference to crimes⁵⁶⁸⁹ and the orders of 29 April and 7 May 1999 refer to the "frequent occurrence" or "daily occurrence" of "unsoldierly" behaviour on the part of some VJ members, without specifying what is meant by such behaviour.⁵⁶⁹⁰

1745. The Trial Chamber also considered Priština Corps Command orders dated 1 April and 6 May 1999, ordering the prevention of torching of houses and buildings, looting and theft, and "mistreatment and persecution" of civilians.⁵⁶⁹¹ The Appeals Chamber notes that while these documents indicate that Lazarević was aware of the previous commission of such crimes and mistreatment, this evidence is insufficient in itself to support the Trial Chamber's conclusion that Lazarević was aware of the forcible displacement of Kosovo Albanian civilians. The Trial Chamber also considered Lazarević's orders of 16 April, 19 April, 22 April, 23 April, and 2 May 1999 pertaining to the relocation, protection, and return of civilians.⁵⁶⁹² The Trial Chamber specifically found that in his order of 23 April 1999, Lazarević indicated that he was aware of the previous forcible displacement of Kosovo Albanians by members of the Priština Corps.⁵⁶⁹³ The Appeals Chamber notes that the order required the commanders of the brigades to "[t]ake in, accommodate and protect the civilian population" and "[p]revent any misconduct, especially in the lower command structure with regard to the civilian population (banning return to inhabited places and so

⁵⁶⁸⁵ Lazarević's Appeal Brief, paras 543, 574, referring to Trial Judgement, vol. 3, para. 861.

⁵⁶⁸⁶ Trial Judgement, vol. 3, para. 861.

⁵⁶⁸⁷ Trial Judgement, vol. 3, para. 846, referring to Exh. P2029, p. 5, Exh. 5D32, Exh. 5D35, p. 1, Exh. 5D396, p. 2, Exh. 5D372, Exh. 5D398, Exh. 5D385.

⁵⁶⁸⁸ Trial Judgement, vol. 3, para. 846, fn. 2148, referring to Exh. 5D32, Exh. 5D35.

⁵⁶⁸⁹ Trial Judgement, vol. 3, para. 846, fn. 2148, referring to Exh. 5D372.

⁵⁶⁹⁰ Trial Judgement, vol. 3, para. 846, fn. 2148, referring to Exh. 5D385, Exh. 5D398.

⁵⁶⁹¹ Trial Judgement, vol. 3, para. 846, fn. 2148, referring to Exh. P2029, p. 5, Exh. 5D396, p.2.

⁵⁶⁹² Trial Judgement, vol. 3, para. 851, fn. 2165, referring to Exh. P1306, Exh. 5D201, Exh. 5D372, Exh. 5D389, Exh. 5D374. The Trial Chamber analyzed the content of these orders later in the Trial Judgement (see Trial Judgement, vol. 3, paras 902-904).

⁵⁶⁹³ Trial Judgement, vol. 3, para. 851, referring to Exh. 5D374.

on)”.⁵⁶⁹⁴ However, there is no explicit recognition of past forcible displacement in the order. Similarly, Lazarević’s orders of 16 April, 19 April, 22 April, and 2 May 1999 indicate that he was aware of the displacement of civilians, but contain no acknowledgment of the commission of crimes, including forcible displacement.⁵⁶⁹⁵

1746. The Appeals Chamber however recalls that the Trial Chamber did not rely on these orders alone, or in isolation, to find that Lazarević was aware of the forcible displacement carried out by the VJ and MUP forces. Rather, the Trial Chamber considered this evidence in conjunction with other evidence demonstrating his knowledge of the campaign of terror, violence, and forcible displacement. Such other evidence showed, *inter alia*, that: (i) Lazarević was present on the ground in Kosovo throughout the relevant period, including in Priština town during part of the period when residents of the town were being forcibly removed; and (ii) he was informed in reports from his subordinate units of the commission of crimes during operations as well as the massive displacement of the civilian population and that this was due in part to fear of the VJ and MUP.⁵⁶⁹⁶ In these circumstances, the Appeals Chamber considers that Lazarević has failed to show that the Trial Chamber erred in considering his orders for the prevention of crimes and mistreatment of Kosovo Albanian civilians as further evidence supporting the conclusion that he was aware of the forcible displacement committed by the VJ and the MUP.

g. Reports from subordinate units on measures in relation to the civilian population

1747. The Trial Chamber found that reports “pertaining to the measures undertaken regarding civilians” sent by subordinate units to the Priština Corps Command demonstrated that Lazarević was aware of the massive displacement of the civilian population.⁵⁶⁹⁷ It also found that some reports indicated the compliance of subordinate units with Priština Corps Command orders pertaining to the relocation, protection, and return of civilians in certain areas in Kosovo.⁵⁶⁹⁸ The Trial Chamber concluded, however, that none of these reports related to the sites where it has been proved that forcible displacement was committed by the VJ.⁵⁶⁹⁹

⁵⁶⁹⁴ Exh. 5D374, p. 1.

⁵⁶⁹⁵ Exh. P1306; Exh. 5D201; Exh. 5D372; Exh. 5D389.

⁵⁶⁹⁶ See, *e.g.*, Trial Judgement, vol. 3, paras 838, 849, 924, and references therein.

⁵⁶⁹⁷ Trial Judgement, vol. 3, para. 851.

⁵⁶⁹⁸ Trial Judgement, vol. 3, paras 907-911, and references therein.

⁵⁶⁹⁹ Trial Judgement, vol. 3, para. 912.

1748. Lazarević contends that the reports he received showed that Kosovo Albanians left the zone of combat operations for reasons which were legitimate under international humanitarian law.⁵⁷⁰⁰ He argues that the information he received indicated that civilians were being moved as a result of KLA actions or to avoid combat operations or NATO bombing⁵⁷⁰¹ and claims that the involvement of the VJ in the movement was in fact a legitimate effort to protect civilians and channel them into safe areas.⁵⁷⁰² Lazarević submits that the lack of reporting on the expulsion of the civilian population indicates that he was unaware of its occurrence.⁵⁷⁰³

1749. The Prosecution responds that Lazarević's challenges should be summarily dismissed since "he merely seeks to substitute his own evaluation of the evidence without showing any error" on the part of the Trial Chamber.⁵⁷⁰⁴ It adds that the Trial Chamber specifically rejected the contention that civilians were merely fleeing the zone of combat.⁵⁷⁰⁵

1750. The Trial Chamber relied, *inter alia*, on: (i) a combat report from the 37th Motorised Brigade stating that the unit expected to encounter shelters with several thousand civilian refugees and requesting instructions on how to deal with the situation;⁵⁷⁰⁶ (ii) a combat report from the 252nd Armoured Brigade stating that aid had been distributed to refugees;⁵⁷⁰⁷ (iii) a combat report from the 252nd Armoured Brigade stating that between 2,000 and 3,000 refugees had been discovered and that the KLA were using civilians as human shields;⁵⁷⁰⁸ (iv) a combat report from the 211th Armoured Brigade requesting the provision of humanitarian aid to refugees;⁵⁷⁰⁹ (v) a combat report from the 52nd Mixed Artillery Brigade stating that there were many civilians in Gnjilane and that there were "no sectors available to put up civilians";⁵⁷¹⁰ (vi) a combat report from the 354th Infantry Brigade stating that approximately 50,000 refugees had been relocated;⁵⁷¹¹ and (vii) a combat report from the 354th Infantry Brigade stating that about 15,000 refugees had been accommodated.⁵⁷¹² In view of this evidence, the Appeals Chamber finds that the Trial Chamber did not err in finding that Lazarević was aware of the massive displacement of the civilian population in 1999.

⁵⁷⁰⁰ Lazarević's Appeal Brief, para. 532, referring to Trial Judgement, vol. 3, para. 851. See also Lazarević's Reply Brief, para. 131.

⁵⁷⁰¹ Lazarević's Appeal Brief, para. 568, referring to Trial Judgement, vol. 3, paras 98, 909. See also Lazarević's Appeal Brief, para. 445.

⁵⁷⁰² Lazarević's Appeal Brief, para. 567, referring to Trial Judgement, vol. 3, paras 907-910.

⁵⁷⁰³ Lazarević's Appeal Brief, paras 540, 542.

⁵⁷⁰⁴ Prosecution's Response Brief (Lazarević), para. 291.

⁵⁷⁰⁵ Prosecution's Response Brief (Lazarević), para. 292.

⁵⁷⁰⁶ Trial Judgement, vol. 3, para. 851, referring to Exh. P2046, Vladimir Lazarević, 21 Nov 2007, T. 18687-18688.

⁵⁷⁰⁷ Trial Judgement, vol. 3, para. 851, referring to Exh. 5D1072, p. 1.

⁵⁷⁰⁸ Trial Judgement, vol. 3, para. 851, referring to Exh. 5D973, p. 1.

⁵⁷⁰⁹ Trial Judgement, vol. 3, para. 851, referring to Exh. 5D615, p. 2.

⁵⁷¹⁰ Trial Judgement, vol. 3, para. 851, referring to Exh. 5D1103, p. 1.

⁵⁷¹¹ Trial Judgement, vol. 3, para. 851, referring to Exh. 5D486, p. 1.

⁵⁷¹² Trial Judgement, vol. 3, para. 851, referring to Exh. 5D499, p. 3.

1751. The Trial Chamber further referred to a combat report of 3 April 1999 by the 549th Motorised Brigade Command stating that from 24 March to 2 April 1999, over 300,000 Kosovo Albanians had crossed the border into Albania and that this was at least in part due to fear of the VJ and the MUP.⁵⁷¹³ The report also stated that Kosovo Albanians were not fearful of the VJ when it was acting alone.⁵⁷¹⁴ The Appeals Chamber considers that a reasonable trier of fact could have relied on this evidence in finding that Lazarević was aware of the massive displacement of the Kosovo Albanian population in 1999 and that it was at least in part due to the joint actions of the VJ and the MUP.⁵⁷¹⁵

1752. In challenging the Trial Chamber's conclusion that he was aware of the campaign of forcible displacement, Lazarević further seeks to rely on the Trial Chamber's finding that some reports indicated the compliance of subordinate units with Priština Corps Command orders pertaining to the relocation, protection, and return of civilians in certain areas in Kosovo.⁵⁷¹⁶ However, the Trial Chamber found that such reports did not relate to the sites where forcible displacement had been committed by the VJ.⁵⁷¹⁷ Lazarević has failed to demonstrate that the Trial Chamber erred in this regard.

1753. The Trial Chamber further considered the fact that VJ combat reports did not expressly refer to the forcible displacement of the Kosovo Albanian population in certain locations.⁵⁷¹⁸ The Trial Chamber noted that this was consistent with evidence showing that orders for the expulsion of Kosovo Albanians were not written, but were provided orally.⁵⁷¹⁹ It also considered that the reports sent by the 125th Motorised Brigade on the joint VJ and MUP operation in the Reka/Caragoj valley did not report any crimes, although the evidence demonstrated the widespread forcible displacement of the Kosovo Albanian population there,⁵⁷²⁰ and that Lazarević was aware thereof.⁵⁷²¹ The Appeals Chamber finds that in these circumstances, a reasonable trier of fact could have concluded that the absence of information in combat reports on forcible displacements in some of the crime sites where VJ operations had taken place did not raise any doubt as to Lazarević's knowledge of the campaign of forcible displacement.⁵⁷²² Lazarević's arguments are thus dismissed.

⁵⁷¹³ Trial Judgement, vol. 3, para. 849, referring to Exh. 5D885, pp. 1-2.

⁵⁷¹⁴ Trial Judgement, vol. 3, para. 849, referring to Exh. 5D885, p. 2.

⁵⁷¹⁵ Trial Judgement, vol. 3, paras 849, 851.

⁵⁷¹⁶ Lazarević's Appeal Brief, paras 567-568, referring to Trial Judgement, vol. 3, paras 907-910.

⁵⁷¹⁷ Trial Judgement, vol. 3, para. 912.

⁵⁷¹⁸ Trial Judgement, vol. 3, para. 860.

⁵⁷¹⁹ Trial Judgement, vol. 3, para. 858.

⁵⁷²⁰ Trial Judgement, vol. 3, para. 859, referring to Exh. P2024, Exh. P2025, Exh. P2026, p. 2.

⁵⁷²¹ Trial Judgement, vol. 3, para. 856.

⁵⁷²² Trial Judgement, vol. 3, para. 860.

(iii) Conclusion

1754. The Appeals Chamber finds that in concluding that Lazarević was aware of the VJ and the MUP forcibly displacing Kosovo Albanian civilians in 1999, the Trial Chamber erred in relying on Diković's warning and Drewienkiewicz's press statement. Accordingly, the Appeals Chamber grants sub-grounds 3(f) and 3(i) of Lazarević's appeal in relevant part.

1755. The Appeals Chamber observes, however, that in concluding that Lazarević was aware of the campaign of terror, violence, and forcible displacement, the Trial Chamber considered further evidence, such as: (i) Lazarević's presence in Kosovo and particularly in Priština/Prishtina for most of the time the forcible displacement of the Kosovo Albanian population was taking place;⁵⁷²³ (ii) Lazarević's awareness of the massive scale of the displacement of the civilian population in the course of VJ operations in 1999 and that this displacement was due in part to fear of the VJ and the MUP;⁵⁷²⁴ (iii) Lazarević's knowledge of the locations of the VJ operations, including at most of the locations named in the Indictment as well as his specific knowledge that the Reka/Caragoj valley operation in late April involved forcible displacement of the civilian population;⁵⁷²⁵ (iv) Lazarević's awareness of the commission of serious crimes against Kosovo Albanian civilians during operations as reported to him by his subordinate units;⁵⁷²⁶ and (v) Lazarević's orders to his units for the prevention of crimes and mistreatment of Kosovo Albanians civilians.⁵⁷²⁷ Consequently, the Appeals Chamber finds that, notwithstanding the Trial Chamber's factual errors, a reasonable trier of fact could have concluded that the only reasonable inference from the evidence is that, as of 24 March 1999 when the first crimes in Priština/Prishtina took place, Lazarević was aware of the campaign of terror, violence, and forcible displacement carried out by VJ and MUP forces against the Kosovo Albanian population. Therefore, the Appeals Chamber dismisses the relevant parts of sub-grounds 3(f) and 3(h)-(i) of Lazarević's appeal.

(c) Lazarević's orders for the protection of civilians

1756. The Trial Chamber considered a number of orders issued by Lazarević pertaining to the relocation, protection, and return of civilians. It noted that "although these measures show that Lazarević was aware of the widespread relocation of the Kosovo Albanian population by VJ forces,

⁵⁷²³ See Trial Judgement, vol. 3, paras 836-842, 924, and references therein. See also *supra*, sub-section VIII.B.4.(b)(i).

⁵⁷²⁴ See Trial Judgement, vol. 3, paras 849-851, 924, fn. 2165, referring, *inter alia*, to Exh. P2046, Exh. 5D499, p. 3, Exh. 5D885, p. 1, Exh. 5D973.

⁵⁷²⁵ Trial Judgement, vol. 3, paras 854, 856-857, 924, and references therein. See also *supra*, sub-sections VI.B.5.(b) and VIII.B.4.(b)(ii)b.

⁵⁷²⁶ Trial Judgement, vol. 3, paras 847-848, 860-861, and references therein.

⁵⁷²⁷ Trial Judgement, vol. 3, paras 846, 851, 860-861, and references therein.

they also indicate that he attempted to have this done in a non-violent way, without abuses of the displaced people.”⁵⁷²⁸

1757. Lazarević argues that the Trial Chamber reached contradictory findings by stating that he attempted to use VJ forces to relocate the Kosovo Albanian civilians in a non-violent way and that he also aided and abetted their deportation and forcible transfer.⁵⁷²⁹ In this regard, Lazarević refers to his orders of 1 April, 16 April, 19 April, 22 April, 23 April, 2 May, 6 May, and 25 May 1999 as examples of the special provisions he made to protect the civilian population, enable their return, and prevent crimes against civilians during operations.⁵⁷³⁰ He also cites a number of documents, which he claims demonstrate that subordinate units followed these orders.⁵⁷³¹

1758. The Prosecution responds that the Trial Chamber correctly placed limited weight on Lazarević’s orders for the protection of civilians.⁵⁷³² It further claims that the Trial Chamber’s finding that Lazarević attempted to relocate civilians in a non-violent manner “does not relate to the forcible character of the displacements *per se* but to additional abuses of the people that accompanied their expulsion.”⁵⁷³³

1759. The Appeals Chamber notes that the Trial Chamber specifically referred to Lazarević’s orders of 16 April, 19 April, 22 April, 23 April, and 2 May 1999 pertaining to the relocation, protection, and return of civilians.⁵⁷³⁴ The Trial Chamber also referred to Lazarević’s orders of 1 April and 6 May 1999 prohibiting acts of looting and other forms of crimes.⁵⁷³⁵ The Trial Chamber further addressed a number of reports from subordinate units to the Priština Corps Command showing that, in some parts of Kosovo, the units complied with orders for the protection of civilians.⁵⁷³⁶ It noted, however, that none of the reports on the large number of displaced Kosovo Albanians and the VJ involvement in their movement and care related to the locations where

⁵⁷²⁸ Trial Judgement, vol. 3, para. 906.

⁵⁷²⁹ Lazarević’s Appeal Brief, paras 567-568, referring to Trial Judgement, vol. 3, paras 906-912.

⁵⁷³⁰ Lazarević’s Appeal Brief, paras 544-549, 578-585, referring to Exh. P1306, Exh. 5D201, Exh. 5D372, Exh. 5D374, Exh. 5D389, Exh. P2014, Exh. 5D396, Exh. P2029. See also Lazarević’s Reply Brief, para. 140.

⁵⁷³¹ Lazarević’s Appeal Brief, paras 550-552, 585, referring to Exh. 5D86, Exh. 5D87, Exh. 5D390, Exh. 5D509, Exh. 5D793, Exh. 5D1103, Exh. 5D1104, Exh. 5D1109, Exh. 5D1101, Exh. 5D486, Exh. 5D1033, Exh. 5D1004, Exh. 5D1037, Exh. 5D816.

⁵⁷³² Prosecution’s Response Brief (Lazarević), para. 326.

⁵⁷³³ Prosecution’s Response Brief (Lazarević), para. 327.

⁵⁷³⁴ Trial Judgement, vol. 3, paras 902-904, referring to Exh. P1306, Exh. 5D201, Exh. 5D374, Exh. 5D372, Exh. 5D389.

⁵⁷³⁵ See Trial Judgement, vol. 3, para. 846, referring to Exh. P2029, Exh. 5D396.

⁵⁷³⁶ Trial Judgement, vol. 3, paras 907-911, referring to Exh. 5D486, Exh. 5D1072, Exh. 5D973, Exh. 5D974, Exh. 5D615, Exh. 5D1034, Exh. 5D1057, Exh. 5D1037, Exh. 4D303, Exh. 5D1059, Exh. 5D390, Exh. 5D793, Exh. 5D965, Exh. 5D618, Exh. 5D1109, Exh. 5D1037.

forcible displacement had taken place.⁵⁷³⁷ Lazarević repeats *verbatim* his trial submissions without showing that the Trial Chamber failed to consider the relevant evidence.⁵⁷³⁸

1760. The Appeals Chamber further finds unpersuasive Lazarević's contention that the Trial Chamber reached contradictory findings by stating that he attempted to use VJ forces to relocate the Kosovo Albanian civilians in a non-violent way and that he also aided and abetted their forcible displacement.⁵⁷³⁹ The Appeals Chamber recalls that an aider and abettor need not possess the intent to further the crime but only knowledge that his acts or omissions assist the commission of such crime.⁵⁷⁴⁰ The Trial Chamber found it significant that, despite the orders to protect civilians in combat areas, Lazarević continued to order joint VJ and MUP operations in Kosovo and VJ units continued to be involved in the forcible displacement of Kosovo Albanian civilians.⁵⁷⁴¹ The Appeals Chamber has found no error in the Trial Chamber's conclusion that Lazarević was aware of the widespread forcible displacement of Kosovo Albanians and that this was at least in part due to the actions of the VJ. Moreover, none of the reports from subordinate units complying with Lazarević's orders for the protection of the civilian population related to the locations where forcible displacement had taken place.⁵⁷⁴² In light of these considerations, the Appeals Chamber finds that a reasonable trier of fact could have relied on Lazarević's orders in relation to the protection of civilians in a limited manner and finds no contradiction in the Trial Chamber's findings in this regard.⁵⁷⁴³ The Appeals Chamber therefore dismisses Lazarević's arguments.

(d) Whether Lazarević knew that his conduct assisted forcible displacement

1761. Lazarević argues that he attended only a small number of Joint Command meetings and always insisted that the international community be informed about the situation on the ground in Kosovo and that of the civilian population.⁵⁷⁴⁴ Consequently, Lazarević maintains that he was not aware that his acts or omissions were assisting in the commission of crimes by the members of the Joint Command, who were also found to be JCE members.⁵⁷⁴⁵ The Prosecution responds that

⁵⁷³⁷ Trial Judgement, vol. 3, para. 912.

⁵⁷³⁸ Cf. Lazarević's Appeal Brief, paras 544-552 and Lazarević's Closing Brief, paras 871-876, 880-882; Lazarević's Appeal Brief, paras 578-586 and Lazarević's Closing Brief, paras 911-919.

⁵⁷³⁹ Lazarević's Appeal Brief, paras 567-568, referring to Trial Judgement, vol. 3, paras 906-912.

⁵⁷⁴⁰ *Brđanin* Appeal Judgement, para. 484; *Blaškić* Appeal Judgement, para. 49; *Vasiljević* Appeal Judgement, paras 102, 142-143; *Aleksovski* Appeal Judgement, para. 162; *Tadić* Appeal Judgement, para. 229.

⁵⁷⁴¹ Trial Judgement, vol. 3, para. 912.

⁵⁷⁴² Trial Judgement, vol. 3, para. 912.

⁵⁷⁴³ See Lazarević's Appeal Brief, para. 569.

⁵⁷⁴⁴ Lazarević's Appeal Brief, para. 603.

⁵⁷⁴⁵ Lazarević's Appeal Brief, para. 603. See also Lazarević's Reply Brief, para. 142.

Lazarević's argument fails to address the Trial Chambers finding that he knew of the crimes committed by the VJ and the MUP and that he assisted in the commission of those crimes.⁵⁷⁴⁶

1762. The Appeals Chamber finds Lazarević's argument unpersuasive. Lazarević's submissions in this respect fail to address the large evidentiary basis considered by the Trial Chamber and its reasoning in finding that he was aware that the VJ forcibly displaced Kosovo Albanian civilians during operations against the KLA and that consequently he was aware that his conduct enabling the forces to engage in such operations thereby assisted the commission of forcible displacement.⁵⁷⁴⁷ It was this knowledge, together with the provision of assistance to members of the VJ who were involved in the commission of forcible transfer and deportation, that led the Trial Chamber to conclude that Lazarević knew that his conduct contributed to the commission of crimes. Moreover, the Trial Chamber's reasoning does not suggest that Lazarević's knowledge that his conduct assisted in the commission of crimes by the VJ was limited to members of the VJ who were also found to be JCE members.

1763. In light of the foregoing, the Appeals Chamber dismisses sub-ground 3(i) of Lazarević's appeal in relevant part.⁵⁷⁴⁸

(e) Conclusion

1764. In view of the above considerations, the Appeals Chamber finds that Lazarević has failed to demonstrate that the Trial Chamber erred in finding that he was aware of the commission of the crimes of forcible transfer and deportation by the VJ and that he knew that his conduct assisted the commission of these crimes.

5. Conclusion

1765. For the foregoing reasons, the Appeals Chamber concludes that Lazarević has failed to demonstrate that the Trial Chamber erred in finding him responsible for aiding and abetting, pursuant to Article 7(1) of the Statute, the crimes of deportation and inhumane acts (forcible transfer) (under Counts 1 and 2 of the Indictment). Accordingly, the Appeals Chamber upholds his convictions in this regard, except for his convictions for the crimes committed in Kačanik/Kaçanik town, Turićevac/Turiçec village, and Tušilje/Tushila. The Appeals Chamber recalls in this respect that it has found that the Trial Chamber erred in concluding that the VJ forcibly displaced Kosovo Albanians from Kačanik/Kaçanik town and Turićevac/Turiçec village.⁵⁷⁴⁹ The Appeals Chamber

⁵⁷⁴⁶ Prosecution's Response Brief (Lazarević), para. 345.

⁵⁷⁴⁷ Trial Judgement, vol. 3, paras 844-861, 925.

⁵⁷⁴⁸ Lazarević's Appeal Brief, paras 578-583, 603.

⁵⁷⁴⁹ See *supra*, sub-sections VI.B.7.(a)(iii) and VI.B.11.(a).

has also found that Lazarević suffered prejudice due to the omission of the incident in Tušilje/Tushila from the Indictment and the resulting lack of notice.⁵⁷⁵⁰

1766. The Appeals Chamber further recalls that it has found that the Trial Chamber erred in failing to apply its own factual findings that the VJ was involved in the commission of the crimes of deportation and inhumane acts (forcible transfer) in villages in Kosovska Mitrovica/Mitrovica, Prizren, and Uroševac/Ferizaj municipalities, and consequently acquitting Lazarević of aiding and abetting these crimes.⁵⁷⁵¹ However, in the circumstances of the present case, the Appeals Chamber, Judge Ramaroson dissenting, declines to enter new convictions on appeal in relation to the forcible displacement committed in these three locations.⁵⁷⁵²

C. Alleged errors in acquitting Lazarević of aiding and abetting murder

1. Introduction

1767. The Trial Chamber found that “[w]hile forcible displacements were part of the VJ and MUP organised campaign”, it was not satisfied that “killings [...] were intended aims of this campaign.”⁵⁷⁵³ For this reason, despite finding that Lazarević was aware of VJ members killing Kosovo Albanians in some instances, the Trial Chamber concluded that he was not aware “that VJ and MUP forces were going into the specific crime sites [...] in order to commit killings [...]”.⁵⁷⁵⁴ The Trial Chamber thus found that, with respect to Lazarević, the mental element of aiding and abetting was not established in relation to the charges of murder as a crime against humanity, murder as a violation of the laws or customs of war, and murder as an underlying act of persecution as a crime against humanity.⁵⁷⁵⁵ Consequently, Lazarević was acquitted of these charges.⁵⁷⁵⁶

⁵⁷⁵⁰ See *supra*, sub-section IV.E.

⁵⁷⁵¹ See *supra*, sub-sections VI.B.2, VI.B.3.(a), and VI.B.4.(a), concerning Žabare/Zhabar (Kosovska Mitrovica/Mitrovica municipality), Dušanovo/Dushanova (Prizren municipality), and Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Mirosavlje/Mirosala (Uroševac/Ferizaj municipality).

⁵⁷⁵² Article 25 (2) of the Statute provides that “[t]he Appeals Chamber *may* affirm, reverse or revise the decisions taken by the Trial Chambers” (emphasis added). See also *Jelisić* Appeal Judgement, para. 73, holding: “the choice of remedy lies within [the] discretion [of the Appeals Chamber]. Article 25 of the Statute (relating to appellate proceedings) is wide enough to confer such a faculty [...]. The discretion must of course be exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case in hand and considerations of public interest. These factors (and others) would be determined on a case by case basis.” Cf. *Aleksovski* Appeal Judgement, paras 153-154, 188; *Jelisić* Appeal Judgement, para. 77; *Krstić* Appeal Judgement, paras 220-227, 229, p. 87; *Stakić* Appeal Judgement, paras 359-367, pp. 141-142; *Naletilić and Martinović* Appeal Judgement, paras 588-591, p. 207.

⁵⁷⁵³ Trial Judgement, vol. 3, para. 928. The Trial Chamber was also not satisfied that sexual assaults or the destruction of religious and cultural property were intended aims of the campaign. *Ibid.*

⁵⁷⁵⁴ Trial Judgement, vol. 3, para. 928.

⁵⁷⁵⁵ Trial Judgement, vol. 3, para. 928.

⁵⁷⁵⁶ Trial Judgement, vol. 3, para. 935.

1768. The Prosecution submits that the Trial Chamber erred in law in relation to the *mens rea* standard of aiding and abetting.⁵⁷⁵⁷ It contends, in the alternative, that if the Trial Chamber applied the correct legal test, then it erred in fact by acquitting Lazarević of aiding and abetting murder, since no reasonable trial chamber could have concluded, based on the findings made, that the mental element of aiding and abetting the murders charged in the Indictment had not been established.⁵⁷⁵⁸

1769. The Prosecution requests that the Appeals Chamber enter a conviction against Lazarević for aiding and abetting murder as a violation of the laws or customs of war under Article 3 of the Statute and murder and persecution as crimes against humanity under Article 5 of the Statute in relation to the killings of 287 Kosovo Albanians at Korenica/Korenice and Meja/Mejë on 27 April 1999 and of two Kosovo Albanians in Dubrava/Lisnaja around 25 May 1999. It further seeks that his sentence be increased significantly.⁵⁷⁵⁹

2. Whether the Trial Chamber applied the correct legal standard for the *mens rea* of aiding and abetting

(a) Submissions of the parties

1770. The Prosecution contends that the Trial Chamber erroneously required evidence that Lazarević was aware that the principal perpetrators “were going into the specific crimes sites [...] in order to commit killings”,⁵⁷⁶⁰ thus requiring awareness of the “precise” crimes.⁵⁷⁶¹ It argues that the Trial Chamber need only have been satisfied that Lazarević was aware “that one of a number of crimes will probably be committed”⁵⁷⁶² or in other words, that he was aware of the “likelihood” that murders would be committed.⁵⁷⁶³ The Prosecution argues that the Trial Chamber’s finding that Lazarević knew of incidents of VJ members murdering Kosovo Albanians was sufficient to satisfy the *mens rea* requirement of aiding and abetting murder.⁵⁷⁶⁴

⁵⁷⁵⁷ Prosecution’s Notice of Appeal, paras 4, 6; Prosecution’s Appeal Brief, paras 36, 39.

⁵⁷⁵⁸ Prosecution’s Notice of Appeal, para. 5; Prosecution’s Appeal Brief, paras 36, 58. The Prosecution also submits that the facts found by the Trial Chamber also satisfy the *actus reus* of aiding and abetting murder (*ibid.*, para. 58).

⁵⁷⁵⁹ Prosecution’s Notice of Appeal, para. 7; Prosecution’s Appeal Brief, para. 59. See also Prosecution’s Appeal Brief, para. 35, referring to Trial Judgement, vol. 2, paras 236, 1197, 1259, 1262.

⁵⁷⁶⁰ Prosecution’s Appeal Brief, paras 36-37, citing Trial Judgement, vol. 3, para. 928.

⁵⁷⁶¹ Prosecution’s Appeal Brief, paras 36, 38, referring, *inter alia*, to *Orić* Trial Judgement, para. 288 (expressing that the aider and abettor need not foresee “the place, time and number of the precise crimes”).

⁵⁷⁶² Prosecution’s Appeal Brief, para. 38, referring to *Simić* Appeal Judgement, para. 86, *Mrkšić and Šljivančanin* Appeal Judgement, paras 49, 63, *Blaškić* Appeal Judgement, paras 45, 50, *Ndindabahizi* Appeal Judgement, para. 122, *Furundžija* Trial Judgement, para. 246, *Blaškić* Trial Judgement, para. 287, *Brđanin* Trial Judgement, para. 272, *Strugar* Trial Judgement, para. 350.

⁵⁷⁶³ Prosecution’s Appeal Brief, para. 36.

⁵⁷⁶⁴ Prosecution’s Appeal Brief, para. 39; Prosecution’s Reply Brief, paras 16, 18, 41.

1771. Lazarević responds that, in its evaluation of his *mens rea* for aiding and abetting murder, the Trial Chamber applied a legal standard consistent with the Tribunal’s jurisprudence.⁵⁷⁶⁵

(b) Analysis

1772. It is firmly established in the jurisprudence of the Tribunal that to satisfy the *mens rea* requirement for aiding and abetting, it must be shown that the aider and abettor knew that his acts or omissions assisted the commission of the specific crime by the principal, and that the aider and abettor was aware of the essential elements of the crime which was ultimately committed, including the intent of the principal perpetrator.⁵⁷⁶⁶ In addition, the Appeals Chamber recalls that 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, and is guilty as an aider and abettor.⁵⁷⁶⁷

1773. The Appeals Chamber has previously defined “specific crime” as referring to, for example, “murder, extermination, rape, torture, wanton destruction of civilian property, etc.”⁵⁷⁶⁸ There is no legal requirement that the aider and abettor know every detail of the crime that was eventually committed. Nonetheless, the degree of knowledge pertaining to the details of the crime required to satisfy the *mens rea* of aiding and abetting will depend on the circumstances of the case, including the scale of the crimes and the type of assistance provided.

1774. In the present case, the Trial Chamber correctly set out the applicable *mens rea* standard for aiding and abetting.⁵⁷⁶⁹ It further found that it had not been proven that Lazarević knew that “VJ and MUP forces were going into the specific crime sites [...] in order to commit killings”.⁵⁷⁷⁰ The Appeals Chamber does not consider the reference to “specific crime sites” to express a requirement that Lazarević knew of the “precise” crime in terms of the exact location where murder was to be committed or the number of people to be killed. Nor is there any indication that the Trial Chamber required knowledge of a certainty, as opposed to a probability, that murder would be committed. Rather, the Appeals Chamber understands the Trial Chamber’s finding, particularly in reference to its use of “*in order to commit killings*”,⁵⁷⁷¹ to mean that it was not satisfied that Lazarević was aware of the *mens rea* of the perpetrators, that is aware that members of the VJ and MUP forces

⁵⁷⁶⁵ Lazarević’s Response Brief, para. 67. See also *ibid.*, paras 61-64, 66.

⁵⁷⁶⁶ *Haradinaj et al.* Appeal Judgement, para. 58, referring to, *inter alia*, *Aleksovski* Appeal Judgement, para. 163, *Orić* Appeal Judgement, para. 43, *Simić* Appeal Judgement, para. 86.

⁵⁷⁶⁷ *Haradinaj et al.* Appeal Judgement, para. 58; *Blaškić* Appeal Judgement, para. 50.

⁵⁷⁶⁸ *Tadić* Appeal Judgement, para. 229(iii); *Vasiljević* Appeal Judgement, para. 102(i).

⁵⁷⁶⁹ Trial Judgement, vol. 1, paras 93-94, and the references therein. See also Trial Judgement, vol. 3, para. 921.

⁵⁷⁷⁰ Trial Judgement, vol. 3, para. 928.

were going into towns or villages (*i.e.* what later became specific crimes sites) during the course of their operations with the intent to kill Kosovo Albanians. Accordingly, the Trial Chamber applied a standard whereby it required that Lazarević be aware of the essential elements of the specific crime committed, including the mental state of the perpetrators. The Appeals Chamber is therefore satisfied that the Trial Chamber applied the correct legal standard in assessing whether Lazarević had the *mens rea* for aiding and abetting murder.

1775. In light of the above, the Appeals Chamber dismisses the Prosecution's submission that the Trial Chamber erred in law in relation to the *mens rea* standard of aiding and abetting.

3. Whether the Trial Chamber erred in fact in finding that the mental element of aiding and abetting murder had not been established with respect to Lazarević

(a) Submissions of the parties

1776. The Prosecution argues that no reasonable trial chamber could have concluded that the mental element of aiding and abetting the murders at Korenica/Korenice and Meja/Meje on 27 April 1999 and in Dubrava/Lisnaja around 25 May 1999 had not been established in relation to Lazarević.⁵⁷⁷² The Prosecution submits that at the end of 1998, Lazarević was aware that VJ and MUP violence in Kosovo had resulted in numerous murders.⁵⁷⁷³ The Prosecution seeks to rely on the Trial Chamber's findings that Lazarević was closely following the events on the ground in Kosovo in 1998 and regularly received Priština Corps security department reports,⁵⁷⁷⁴ knew that the Priština Corps might commit crimes,⁵⁷⁷⁵ and learned about allegations of murder of civilians.⁵⁷⁷⁶ The Prosecution thus argues that Lazarević was "aware that murders of civilians were likely to occur if he ordered the VJ to operate in Kosovo in 1999."⁵⁷⁷⁷

1777. The Prosecution further points to the Trial Chamber's findings that during the Indictment period Lazarević continued to receive information about crimes, including the commission of murder.⁵⁷⁷⁸ It refers to the Trial Chamber's findings that Lazarević frequently visited the units in the field,⁵⁷⁷⁹ knew of the climate of terror created by the VJ and the MUP in Priština/Prishtina,⁵⁷⁸⁰

⁵⁷⁷¹ Trial Judgement, vol. 3, para. 928 (emphasis added).

⁵⁷⁷² Prosecution's Appeal Brief, paras 35-36, 58.

⁵⁷⁷³ Prosecution's Appeal Brief, para. 50.

⁵⁷⁷⁴ Prosecution's Appeal Brief, para. 50, referring to Trial Judgement, vol. 3, paras 807-808, 818, 844-845.

⁵⁷⁷⁵ Prosecution's Appeal Brief, para. 50, referring to Trial Judgement, vol. 3, paras 813-814.

⁵⁷⁷⁶ Prosecution's Appeal Brief, para. 50, referring to Trial Judgement, vol. 3, paras 809, 815, Exh. P456.

⁵⁷⁷⁷ Prosecution's Appeal Brief, para. 50, referring to Trial Judgement, vol. 3, para. 923.

⁵⁷⁷⁸ Prosecution's Appeal Brief, paras 51-54.

⁵⁷⁷⁹ Prosecution's Appeal Brief, para. 51, referring to Trial Judgement, vol. 3, para. 840.

⁵⁷⁸⁰ Prosecution's Appeal Brief, para. 51, referring to Trial Judgement, vol. 3, para. 855.

learned about specific allegations of murder,⁵⁷⁸¹ and was aware of the campaign of terror, violence and forcible displacement against the Kosovo Albanian civilian population.⁵⁷⁸²

1778. The Prosecution also submits that Lazarević knew that killings would be committed with discriminatory intent since he was aware of the discriminatory nature of the campaign of terror, violence, and forcible displacement against Kosovo Albanians in the course of which these killings were carried out.⁵⁷⁸³ Finally, it argues that since Lazarević was aware that “it was likely that murders would occur” during the unlawful displacement of the Kosovo Albanian population, he was aware that his acts and omissions would assist not only the commission of deportation and forcible transfer, but also murder.⁵⁷⁸⁴

1779. Lazarević responds that no evidence supports the allegations that he was aware of the probability that murder with discriminatory intent would be committed as a result of the forcible displacement of the Kosovo Albanian population and that his acts would assist in its commission.⁵⁷⁸⁵ He points to orders of the Priština Corps Command for the prevention of crimes and protection of the civilian population as well as to evidence of measures taken to investigate crimes and punish the perpetrators.⁵⁷⁸⁶

1780. The Prosecution replies that Lazarević erroneously suggests that measures by military and police authorities to punish VJ reservists for crimes negate his knowledge of the likelihood of their occurrence.⁵⁷⁸⁷ It also contends that Lazarević’s responsibility does not depend on whether or not

⁵⁷⁸¹ Prosecution’s Appeal Brief, paras 51-54, referring to Trial Judgement, vol. 2, paras 678-687, 944, 949, *ibid.*, vol. 3, paras 567, 846, 848, 854, 865, 872, 874, 878, 879-880, 885, 925, Exh. P2542.

⁵⁷⁸² Prosecution’s Appeal Brief, para. 49, referring to Trial Judgement, vol. 3, paras 923-924. The Prosecution highlights the Trial Chamber’s findings that Lazarević substantially contributed to the forcible displacement committed by the VJ in Korenica/Korenicë, Meja/Mejë, and Dubrava/Lisnaja by providing practical assistance, encouragement, and moral support to the VJ forces who committed the crimes. In the Prosecution’s contention, Lazarević’s acts and omissions also constituted contributions to the murders committed “as a result of the displacements” (Prosecution’s Appeal Brief, para. 47, referring to Trial Judgement, vol. 3, paras 785, 925-926, 930, 1134, *ibid.*, vol. 2, para. 1178). The Prosecution also points to the Trial Chamber’s findings that Lazarević’s subordinate units were involved in the operation in Korenica/Korenicë and Meja/Mejë, and at Dubrava/Lisnaja (Prosecution’s Appeal Brief, para. 48, referring to Trial Judgement, vol. 1, para. 612, *ibid.*, vol. 2, paras 201, 228, 233, 1146, 1148).

⁵⁷⁸³ Prosecution’s Appeal Brief, para. 56.

⁵⁷⁸⁴ Prosecution’s Appeal Brief, para. 57.

⁵⁷⁸⁵ Lazarević’s Response Brief, paras 40, 43-60. Lazarević also submits that there is no evidence to support the allegation that he contributed to the commission of murder by providing practical assistance, encouragement, and moral support (*ibid.*, paras 18, 68-70). Lazarević also reiterates challenges, raised in his own appeal, to the Trial Chamber’s findings on: (i) the VJ’s involvement in the murders in Korenica/Korenicë and Meja/Mejë on 27 April 1999 and in Dubrava/Lisnaja on 25 May 1999; (ii) his role in the approval of joint operations; and (iii) the pattern of events in Dubrava/Lisnaja (*ibid.*, paras 19-39, 57-58, 60). The Appeals Chamber has previously addressed and dismissed these challenges (see *supra*, sub-sections VI.B.5.(b), VIII.B.3.(c), and VI.B.12).

⁵⁷⁸⁶ Lazarević’s Response Brief, paras 40-42, 47-48, 56.

⁵⁷⁸⁷ Prosecution’s Reply Brief, para. 39.

the VJ was responsible for the killings, as he suggests, but rather on his knowledge of the MUP's involvement in killings during joint VJ and MUP actions.⁵⁷⁸⁸

(b) Analysis

1781. In finding that the mental element of aiding and abetting murder had not been established in relation to Lazarević, the Trial Chamber held that:

While the forcible displacements were part of the VJ and MUP organised campaign, the Chamber is not satisfied beyond reasonable doubt that killings [...] were intended aims of this campaign. Accordingly, although he was aware of VJ members killing Kosovo Albanians in some instances, it has not been proved that Lazarević was aware that VJ and MUP forces were going into the specific crime sites referred to above in order to commit killings [...].⁵⁷⁸⁹

1782. Thus, the Trial Chamber was not satisfied that Lazarević was aware that in the course of their operations the VJ and MUP forces would act with the intent to kill Kosovo Albanians.⁵⁷⁹⁰

1783. The Appeals Chamber notes that the Prosecution does not challenge any underlying factual findings relevant to Lazarević's *mens rea*, namely the various findings on his knowledge of the commission of crimes by the VJ and the MUP prior to and during spring 1999 when the charged crimes were found to have been committed. Rather, the Prosecution avers that the Trial Chamber made all the factual findings necessary to convict Lazarević and that the only reasonable conclusion based on those findings is that he possessed the requisite *mens rea* of aiding and abetting murder.⁵⁷⁹¹

1784. The Appeals Chamber observes that when addressing the issue of Lazarević's *mens rea*, the Trial Chamber specifically referred to its finding that killings were not intended aims of the VJ and the MUP organised campaign.⁵⁷⁹² In addition, the Trial Chamber found that there was no evidence of a clear pattern of murder.⁵⁷⁹³ In the circumstances of this case, the absence of killings on a widespread, organised, and consistent basis during VJ and MUP operations as to evince a discernible pattern, is a relevant factor in relation to Lazarević's *mens rea*.

1785. The Appeals Chamber turns to examine the Prosecution's argument that the Trial Chamber's factual findings in relation to Lazarević's knowledge of some instances of killings, could lead a reasonable trier of fact to conclude that the only reasonable inference was that Lazarević had the *mens rea* for aiding and abetting the murders committed at Korenica/Korenicë

⁵⁷⁸⁸ Prosecution's Reply Brief, para. 40.

⁵⁷⁸⁹ Trial Judgement, vol. 3, para. 928.

⁵⁷⁹⁰ See *supra*, sub-section VIII.C.2.

⁵⁷⁹¹ Prosecution's Appeal Brief, paras 35, 55, 58.

⁵⁷⁹² See Trial Judgement, vol. 3, para. 928.

⁵⁷⁹³ Trial Judgement, vol. 3, para. 94.

and Meja/Mejë on 27 April 1999, and of two Kosovo Albanians in Dubrava/Lisnaja around 25 May 1999. The Appeals Chamber will first assess whether no reasonable trier of fact could have found that Lazarević did not have the *mens rea* for aiding and abetting the murders committed in Korenica/Korenicë and Meja/Mejë on 27 April 1999, by addressing the relevant evidence and factual findings cited by the Prosecution related to his knowledge up to the time of these murders. Subsequently, the Appeals Chamber will consider whether no reasonable trier of fact could have concluded that Lazarević did not have the *mens rea* for aiding and abetting the murders committed in Dubrava/Lisnaja around 25 May 1999, in light of the totality of the evidence on his knowledge by this date.

1786. In support of its argument that Lazarević knew that “murders of civilians were likely to occur if he ordered the VJ to operate in Kosovo in 1999”, the Prosecution refers to the Trial Chamber’s findings in relation to Lazarević’s knowledge of incidents of murder committed in 1998, namely that he was aware of UN Security Council Resolution 1199, expressing grave concern over the “excessive and indiscriminate use of force” by the VJ and the MUP, resulting, *inter alia*, in “numerous civilian casualties”⁵⁷⁹⁴ and that he knew of the alleged involvement of the VJ in the murders of civilians in Gornje Obrinje/Abria e Epërme in late 1998.⁵⁷⁹⁵ In relation to Resolution 1199, the Appeals Chamber considers that it furnished Lazarević with relatively general information about civilian casualties in 1998.⁵⁷⁹⁶ As to the killings of a number of civilians in Gornje Obrinje/Abria e Epërme in late 1998, the Trial Chamber found that although Lazarević knew of the alleged involvement of the MUP and the VJ in the killings, he did not know of VJ responsibility for these killings.⁵⁷⁹⁷

1787. In view of the general nature of the information contained in Resolution 1199 and Lazarević’s knowledge of the alleged responsibility of the MUP forces for one isolated incident of murder in 1998, the Appeals Chamber considers that a reasonable trier of fact could have found that by the end of 1998, Lazarević was not aware of the probability that members of the VJ forces possessed the intent to kill Kosovo Albanian civilians during their operations and would continue to act with such an intent during their future operations in Kosovo in 1999.

1788. The Prosecution further seeks to rely on the Trial Chamber’s findings that, in 1998, Lazarević: (i) regularly received Priština Corps security department reports;⁵⁷⁹⁸ (ii) closely followed

⁵⁷⁹⁴ Prosecution’s Appeal Brief, para. 50, referring to Exh. P456.

⁵⁷⁹⁵ Prosecution’s Appeal Brief, para. 50, referring to Trial Judgement, vol. 3, para. 815.

⁵⁷⁹⁶ See Exh. P456.

⁵⁷⁹⁷ Trial Judgement, vol. 3, para. 815. See also *ibid.*, vol. 1, para. 912.

⁵⁷⁹⁸ Prosecution’s Appeal Brief, para. 50, referring to Trial Judgement, vol. 3, paras 818, 844-845.

the events on the ground in Kosovo;⁵⁷⁹⁹ (iii) knew that the Priština Corps might commit crimes in reaction to KLA provocations;⁵⁸⁰⁰ and (iv) knew that joint VJ and MUP action could result in “uncontrolled fire at [...] individuals not involved in combat operations.”⁵⁸⁰¹ The Appeals Chamber observes, however, that nothing in these findings suggests that Lazarević received information specifically about the commission of murder.

1789. In relation to Lazarević’s knowledge of murders committed in spring 1999, the Prosecution submits that Lazarević: (i) was aware of the content of Drewienkiewicz’s press statement which alleged widespread crimes committed by the VJ and the MUP as of 2 April 1999;⁵⁸⁰² (ii) learned, by late March 1999, of the operation in Žegra/Zhegra where VJ, MUP, and irregular forces drove Kosovo Albanians away “by use of [*inter alia*] killings”;⁵⁸⁰³ (iii) received, by early April 1999, eight criminal reports for murder;⁵⁸⁰⁴ (iv) learned, at the beginning of April 1999, of allegations about a massacre and a mass grave at Izbica;⁵⁸⁰⁵ (v) knew, by 26 April 1999, of the alleged involvement of the Priština Corps’ 252nd Armoured Brigade in the execution of 20 civilians in Mali Alaš/Hallac i Vogel on 19 April 1999;⁵⁸⁰⁶ and (vi) showed, in his report of 24 May 1999, his awareness of murders committed by the MUP at mixed MUP and VJ police checkpoints.⁵⁸⁰⁷

1790. In relation to Drewienkiewicz’s press statement, the Appeals Chamber has already found that the Trial Chamber erred in concluding that Lazarević was aware of its content.⁵⁸⁰⁸ As to the operation in Žegra/Zhegra, the Trial Chamber considered that Lazarević knew that VJ members committed crimes there at the end of March 1999.⁵⁸⁰⁹ In particular, the evidence relied upon by the Trial Chamber in this regard shows that Lazarević informed the 3rd Army Command that eight criminal reports were submitted against perpetrators of murder.⁵⁸¹⁰ The Trial Chamber also considered that in relation to the Izbica massacre, the evidence showed that Lazarević learned of the reports and satellite images of mass graves in Izbica by early April 1999, and knew that the

⁵⁷⁹⁹ Prosecution’s Appeal Brief, para. 50, referring to Trial Judgement, vol. 3, paras 807-808.

⁵⁸⁰⁰ Prosecution’s Appeal Brief, para. 50, referring to Trial Judgement, vol. 3, para. 813.

⁵⁸⁰¹ Prosecution’s Appeal Brief, para. 50, referring to Trial Judgement, vol. 3, para. 814.

⁵⁸⁰² Prosecution’s Appeal Brief, para. 52, referring to Trial Judgement, vol. 3, para. 567, Exh. P2542.

⁵⁸⁰³ Prosecution’s Appeal Brief, para. 51, referring to Trial Judgement, vol. 2, paras 944, 949, *ibid.*, vol. 3, para. 854.

⁵⁸⁰⁴ Prosecution’s Appeal Brief, para. 52, referring to Trial Judgement, vol. 3, paras 846, 865.

⁵⁸⁰⁵ Prosecution’s Appeal Brief, para. 52, referring to Trial Judgement, vol. 2, paras 678-687, *ibid.*, vol. 3, paras 879-880.

⁵⁸⁰⁶ Prosecution’s Appeal Brief, para. 53, referring to Trial Judgement, vol. 3, paras 872, 874, 878.

⁵⁸⁰⁷ Prosecution’s Appeal Brief, para. 54, referring to Trial Judgement, vol. 3, para. 848.

⁵⁸⁰⁸ See *supra*, sub-section VIII.B.4.(b)(ii)d.

⁵⁸⁰⁹ Trial Judgement, vol. 3, para. 854.

⁵⁸¹⁰ Trial Judgement, vol. 3, para. 865, fn. 2204, referring to Exh. 5D84, p. 2. See also Trial Judgement, vol. 3, para. 854, fn. 2174, referring to Exh. 5D84, Exh. 5D825. The Trial Chamber also relied upon a combat report sent to the Priština Corps Command, stating that eight volunteers had been arrested on suspicion that they had committed “the crime in Žegra” (Exh. 5D825, p. 1).

37th Motorised Brigade, which was re-subordinated to the Priština Corps at that time, had conducted operations against the KLA within two kilometres of Izbica.⁵⁸¹¹

1791. In relation to the incident at Mali Alaš/Hallac i Vogel on 19 April 1999, the Trial Chamber found that Lazarević was aware of the possible involvement of the 252nd Armoured Brigade in the execution of 20 civilians.⁵⁸¹² It also found that Lazarević was informed of the proceedings initiated by the wartime military court attached to the Priština Corps in order to determine the identities of the perpetrators.⁵⁸¹³ The Trial Chamber also considered a report sent by Lazarević to the 3rd Army Command on 24 May 1999 indicating that he was aware of problems at checkpoints. The report stated that “the MUP tolerate[d] criminal activities of its members against the [Albanian] civilian population”, including murder.⁵⁸¹⁴

1792. The Appeals Chamber considers that a reasonable trier of fact could have found that by the end of April 1999 Lazarević did not know of the probability that the VJ and MUP forces would act with the intent to murder Kosovo Albanian civilians during their operation in Korenica/Korenicë and Meja/Mejë on 27 April 1999, as opposed to simply the possibility that isolated incidents of murder might occur.

1793. The Appeals Chamber also finds that the Prosecution has failed to demonstrate that Lazarević’s 24 May 1999 report indicating his knowledge of instances of murder committed by MUP members at checkpoints, even when viewed in combination with the other evidence before the Trial Chamber, would lead a reasonable trier of fact to conclude that the only reasonable inference is that by 25 May 1999, Lazarević knew that the MUP and VJ forces would act with the intent to murder Kosovo Albanian civilians during their operation in Dubrava/Lisnaja. The Appeals Chamber recalls in this respect the Trial Chamber’s findings that VJ and MUP joint operations spread over 13 municipalities in Kosovo⁵⁸¹⁵ and that during the course of the NATO campaign the forces of the Priština Corps consisted of approximately 35,000 members.⁵⁸¹⁶ Contrasted with the

⁵⁸¹¹ Trial Judgement, vol. 3, para. 883, referring to Exh. P2046, p. 1, Exh. P2048, Exh. P615, p. 17. See also Trial Judgement, vol. 3, para. 880, referring to Vladimir Lazarević, Exh. P950, pp. 486-487. Noting its previous finding that MUP members were responsible for the killings in Izbica, the Trial Chamber considered “that the failure of the Priština Corps to launch its own forensic investigation into the mass graves” did not result in any criminal responsibility for Lazarević (Trial Judgement, vol. 3, para. 885).

⁵⁸¹² Trial Judgement, vol. 3, para. 878.

⁵⁸¹³ Trial Judgement, vol. 3, para. 878. The Trial Chamber held that “given the differing accounts of why no members of the VJ were prosecuted for this crime, the Chamber does not reach any conclusion about Lazarević’s conduct in relation to this incident, other than the fact that no punishment was imposed against the perpetrators” (*ibid*).

⁵⁸¹⁴ Trial Judgement, vol. 3, para. 848, referring to Exh. P1458, p. 2 (also admitted as Exh. 4D192 and Exh. P1723).

⁵⁸¹⁵ Trial Judgement, vol. 2, para. 1156.

⁵⁸¹⁶ Trial Judgement, vol. 1, paras 582, 595, referring to Exh. 3D1116, p. 26, Vladimir Lazarević, Exh. P950, pp. 37-38, 40-45. The Trial Chamber further noted that a combat report sent from the Priština Corps to the 3rd Army Command and to the Supreme Command Staff on 13 April 1999 detailed the manpower levels of the Priština Corps at 61,892 men – a figure including resubordinated units (Trial Judgement, vol. 1, para. 595, referring to Exh. P2004, p. 2, Milutin Filipović, 28 Nov 2007, T. 19221–19223. See also Exh. 3D1116, p. 66).

number of incidents of murder involving the VJ and the MUP of which Lazarević was aware, these figures reinforce the Trial Chamber's conclusion that Lazarević did not have the *mens rea* of aiding and abetting murder. The Prosecution has failed to demonstrate an error on the part of the Trial Chamber in this regard.

1794. Furthermore, the Prosecution suggests that Lazarević's awareness of the excessive use of force in 1998 and the campaign of terror, violence, and forcible displacement carried out by joint VJ and MUP forces against Kosovo Albanians in 1999, when viewed with the evidence of Lazarević's knowledge of some incidents of killings, confirms the conclusion that he knew "murders were likely" during joint VJ and MUP operations in Kosovo in 1999.⁵⁸¹⁷ This assertion in itself is unconvincing. The Prosecution has failed to demonstrate that the only reasonable inference from such combined knowledge on Lazarević's part, is that he was aware of the probability that murder would be committed during this campaign and that his conduct assisted in its commission. In particular, the Prosecution has failed to show that Lazarević's awareness of the forcible displacement of Kosovo Albanian civilians, the climate of terror created by the VJ and the MUP in Priština/Prishtina, and the instances of criminal activity generally lead to the only reasonable conclusion that he also knew of an intent of the VJ and MUP forces to commit murder.⁵⁸¹⁸ Additionally, the Appeals Chamber recalls that the Trial Chamber was neither satisfied that murder was a goal of the campaign nor that the killings evinced a clear pattern.⁵⁸¹⁹ Therefore, a reasonable trier of fact could have concluded that while Lazarević knew of some instances of killings that occurred during the course of the campaign of terror, violence, and forcible displacement, the evidence did not establish his knowledge of the commission of murder to *an extent* that would lead to the only reasonable conclusion that Lazarević knew that the VJ forces would act with the intent to commit murder during their operations in Korenica/Korenicë and Meja/Mejë on 27 April 1999 and in Dubrava/Lisnaja around 25 May 1999.

1795. In view of the above considerations, the Appeals Chamber finds that the Prosecution has failed to show an error in the Trial Chamber's conclusion that Lazarević did not have the requisite *mens rea* for aiding and abetting the murders in Korenica/Korenicë and Meja/Mejë on 27 April 1999, and in Dubrava/Lisnaja around 25 May 1999. In light of the foregoing, the Appeals Chamber dismisses the Prosecution's second ground of appeal with respect to Lazarević and upholds his acquittal for aiding and abetting murder.

⁵⁸¹⁷ Prosecution's Appeal Brief, para. 49, referring to Trial Judgement, vol. 3, paras 923-924, 928. See also Prosecution's Reply Brief, para. 16.

⁵⁸¹⁸ See Prosecution's Appeal Brief, paras 49-51, 55-56.

⁵⁸¹⁹ See Trial Judgement, vol. 3, paras 94-95, 928.

IX. SENTENCING

A. Introduction

1796. The Trial Chamber found Šainović, Pavković, and Lukić guilty, through participation in a JCE, of deportation, other inhumane acts (forcible transfer), murder, and persecution as crimes against humanity and of murder as a violation of the laws or customs of war, and sentenced each of them to 22 years of imprisonment.⁵⁸²⁰ Lazarević was convicted of aiding and abetting deportation and other inhumane acts (forcible transfer) as crimes against humanity, and was sentenced to 15 years of imprisonment.⁵⁸²¹ The Appellants and the Prosecution have all appealed against the sentences imposed.⁵⁸²²

1797. Pursuant to Article 24 of the Statute and Rule 101 of the Rules, a trial chamber must take the following factors into account in sentencing: the gravity of the offence or totality of the culpable conduct; the individual circumstances of the convicted person; the general practice regarding prison sentences in the courts of the former Yugoslavia; and aggravating and mitigating circumstances.⁵⁸²³

1798. Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.⁵⁸²⁴ Trial chambers are vested with broad discretion in determining an appropriate sentence.⁵⁸²⁵ As a general rule, the Appeals Chamber will not revise a sentence unless the trial chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. It is for the party challenging the sentence to demonstrate how the trial chamber ventured outside its discretionary framework in imposing the sentence.⁵⁸²⁶

1799. To show that the trial chamber committed a discernible error in exercising its discretion, an appellant must demonstrate that the trial chamber gave weight to extraneous or irrelevant considerations, failed to accord weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or demonstrate that its decision was so

⁵⁸²⁰ Trial Judgement, vol. 3, paras 475, 788, 1138, 1208, 1210, 1212.

⁵⁸²¹ Trial Judgement, vol. 3, paras 930, 1211.

⁵⁸²² Šainović's Appeal Brief, paras 506-527; Pavković's Appeal Brief, paras 353-367; Lazarević's Appeal Brief, paras 609-612, 614; Lukić's Appeal Brief, paras 822-842; Prosecution's Appeal Brief, paras 120-189, 194-198.

⁵⁸²³ *Boškosi and Tarčulovski* Appeal Judgement, para. 203; *Krajišnik* Appeal Judgement, para. 733. Rule 101(B)(iv) of the Rules also provides that a trial chamber shall take into account "the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served". However, this factor does not apply in the present case.

⁵⁸²⁴ *Boškosi and Tarčulovski* Appeal Judgement, para. 204; *Krajišnik* Appeal Judgement, para. 734.

⁵⁸²⁵ *Boškosi and Tarčulovski* Appeal Judgement, para. 204; *D. Milošević* Appeal Judgement, para. 297.

⁵⁸²⁶ *Boškosi and Tarčulovski* Appeal Judgement, para. 204; *D. Milošević* Appeal Judgement, para. 297.

unreasonable or plainly unjust that the Appeals Chamber is able to infer that the trial chamber must have failed to exercise its discretion properly.⁵⁸²⁷

B. Šainović's appeal

1. Alleged errors in assessing aggravating factors

1800. Šainović submits that the Trial Chamber erred in finding that, as an important member of the JCE, he wrongfully exercised his authority and that this aggravates his sentence.⁵⁸²⁸ In this regard, Šainović reiterates his challenges to the Trial Chamber's finding that as "political coordinator" he possessed extensive *de facto* powers over both the VJ and the MUP forces in Kosovo and was "the crucial link" between Belgrade and Priština.⁵⁸²⁹ He argues that his role was limited to the transmission of information and that his responsibility, if any, "cannot be compared with the responsibility within the chain of command or the responsibility for an issued order."⁵⁸³⁰ Moreover, Šainović contends that the "proposals, suggestions and instructions" he issued to the VJ and the MUP did not amount to "commands and orders."⁵⁸³¹ According to Šainović, the few "instructions" he was found to have issued "constitute a negligible fraction amidst hundreds or thousands of orders, commands and reports" exchanged among VJ and MUP commanders.⁵⁸³² Finally, Šainović submits that the Trial Chamber failed to "make a clear distinction between 1998 and 1999" and that his sentence should be determined only in relation to the gravity of his conduct during the period pertinent to the Indictment.⁵⁸³³

1801. The Prosecution responds that the Trial Chamber correctly found Šainović to be a crucial member of the JCE that forcibly displaced at least 700,000 Kosovo Albanians as part of a widespread and systematic campaign of terror and violence which lasted just over two months.⁵⁸³⁴ The Prosecution underscores the significance of Šainović's contribution to the JCE and contests

⁵⁸²⁷ *Boškosi and Tarčulovski* Appeal Judgement, para. 205; *Krajišnik* Appeal Judgement, para. 735.

⁵⁸²⁸ Šainović's Appeal Brief, paras 506, 512, referring to Trial Judgement, vol. 3, para. 1180. In his Notice of Appeal, Šainović submits that the Trial Chamber erred in its evaluation of the gravity of the crimes for which he was convicted as well as its assessment of his role, position, and contribution to the perpetration of these crimes. In so doing, he only cites the portion of the Trial Judgement concerning aggravating factors (Šainović's Notice of Appeal, para. 88, referring to Trial Judgement, vol. 3, paras 1180-1184). Reading this together with his Appeal Brief, the Appeals Chamber understands him to challenge the Trial Chamber's findings concerning aggravating factors rather than the gravity of the crimes.

⁵⁸²⁹ Šainović's Appeal Brief, paras 507, 509, referring to Trial Judgement, vol. 3, para. 462. In this regard, Šainović also argues that the Trial Chamber failed to state the effects of his engagement or identify "which actions were executed under his influence, what the effects of such actions were, what the prohibited consequences, if any, of such actions were." See Šainović's Appeal Brief, para. 508. See also Šainović's Reply Brief, para. 60.

⁵⁸³⁰ Šainović's Appeal Brief, para. 507.

⁵⁸³¹ Šainović's Appeal Brief, para. 507, referring to Trial Judgement, vol. 3, para. 462.

⁵⁸³² Šainović's Appeal Brief, para. 510. Specifically, Šainović avers that only three "instructions" or "proposals" were issued throughout the relevant period. See *ibid.*, paras 510-511. See also Appeal Hearing, 11 Mar 2013, AT. 209-210.

⁵⁸³³ Šainović's Appeal Brief, para. 511.

Šainović's abstract submission comparing his responsibility with that of a military figure within a chain of command.⁵⁸³⁵ It maintains that Šainović's conviction and sentence are limited to the crimes alleged in the Indictment and that the Trial Chamber carefully distinguished between 1998 and 1999 in its findings, including in its assessment of Šainović's significant contribution to the JCE.⁵⁸³⁶

1802. The Appeals Chamber recalls that the Trial Chamber found Šainović to be an "important member" of the JCE who wrongfully exercised his position of authority.⁵⁸³⁷ In support of this finding, the Trial Chamber found that Šainović possessed extensive *de facto* powers over the VJ and the MUP, including the ability to make proposals, give suggestions, or issue instructions.⁵⁸³⁸ It also found that he "was the crucial link" between Slobodan Milošević in Belgrade and the VJ and MUP units in Kosovo.⁵⁸³⁹ In an earlier section of this Judgement, the Appeals Chamber has dismissed Šainović's arguments impugning the Trial Chamber's findings in this regard.⁵⁸⁴⁰ Moreover, the Trial Chamber sufficiently distinguished between 1998 and 1999 in its assessment of his role and conduct and found that his authority and influence over the FRY and Serbian forces were undiminished in 1999.⁵⁸⁴¹ On the basis of this finding, the Trial Chamber specifically acknowledged that while "Šainović was acting in the midst of a complicated situation, including the defence of the country against NATO bombing and some combat operations against the KLA", he nevertheless "abused his position of authority and that this aggravates his sentence."⁵⁸⁴² Accordingly, Šainović has failed to demonstrate that the Trial Chamber erred in this regard. The Appeals Chamber therefore dismisses this sub-ground of Šainović's appeal.

2. Alleged errors in assessing mitigating factors

1803. Šainović submits that the Trial Chamber failed to adequately assess a number of mitigating factors in determining his sentence.⁵⁸⁴³ Specifically, he claims that the Trial Chamber ignored his

⁵⁸³⁴ Prosecution's Response Brief (Šainović), para. 355, citing Trial Judgement, vol. 3, para. 1173. See also Prosecution's Response Brief (Šainović), paras 356-357.

⁵⁸³⁵ Prosecution's Response Brief (Šainović), para. 357, referring to Šainović's Appeal Brief, para. 507.

⁵⁸³⁶ Prosecution's Response Brief (Šainović), para. 358, referring to Trial Judgement, vol. 3, paras 359, 456, 467.

⁵⁸³⁷ Trial Judgement, vol. 3, para. 1180, rejecting Šainović's argument that he played a limited role in the relevant events. See also Šainović's Closing Brief, para. 891.

⁵⁸³⁸ Trial Judgement, vol. 3, paras 462, 467.

⁵⁸³⁹ Trial Judgement, vol. 3, para. 462. See also *ibid.*, vol. 3, para. 467.

⁵⁸⁴⁰ See *supra*, sub-section VII.D.2.

⁵⁸⁴¹ Trial Judgement, vol. 3, para. 467, wherein the Trial Chamber found that "the [...] direct evidence of [Šainović's] activity in influencing and co-ordinating the activities of the forces of the FRY and Serbia in 1999 is not as extensive as that relating to 1998". It also noted that "his presence at a number of meetings in Kosovo during the NATO campaign is in keeping with his previous involvement with the province" (*ibid.*). The Appeals Chamber has upheld this finding in an earlier section, see *supra*, sub-section VII.D.2.(i).

⁵⁸⁴² Trial Judgement, vol. 3, para. 1180.

⁵⁸⁴³ Šainović's Notice of Appeal, para. 89; Šainović's Appeal Brief, paras 513-524. See also Šainović's Reply Brief, para. 61.

persistent efforts to resolve the conflict in Kosovo peacefully⁵⁸⁴⁴ and that his voluntary surrender, like that of Lazarević, should have been considered as a mitigating factor.⁵⁸⁴⁵ Šainović also argues that his interview with the Prosecution should have been accorded more weight, in light of the Trial Chamber's extensive reliance on its contents.⁵⁸⁴⁶ He further contends that the Trial Chamber gave insufficient weight to his good character, health, and family situation.⁵⁸⁴⁷ Šainović argues that a proper assessment of all these factors would confirm that his sentence warrants a significant reduction.⁵⁸⁴⁸

1804. The Prosecution responds that the Trial Chamber correctly assessed the relevant mitigating factors and that Šainović fails to demonstrate any discernible error.⁵⁸⁴⁹ It submits that Šainović seeks to advance new arguments on appeal with respect to his Prosecution interview and his alleged efforts to resolve the conflict peacefully and that these submissions should be summarily dismissed.⁵⁸⁵⁰ The Prosecution asserts that, despite Šainović's failure to raise these arguments at trial, the Trial Chamber considered his participation in conflict resolution, but determined that, after the commencement of the NATO campaign, his efforts were not genuine,⁵⁸⁵¹ and further found that Šainović's interview with the Prosecution did not amount to "substantial" cooperation.⁵⁸⁵² The Prosecution argues that Šainović fails to demonstrate that the Trial Chamber erred in its assessment of his character, his health, or the serious health conditions of close family members.⁵⁸⁵³ Finally, the Prosecution avers that the Trial Chamber correctly found Šainović's surrender to be involuntary, distinguished his situation from that of Lazarević, and properly rejected it as a mitigating factor.⁵⁸⁵⁴

1805. Šainović did not contend at trial that his interview with the Prosecution or his participation in conflict resolution were mitigating circumstances. The Trial Chamber nevertheless noted witness testimony concerning Šainović's endeavours at conflict resolution as evidence showing his good character.⁵⁸⁵⁵ However, the Trial Chamber did not consider it to be a mitigating circumstance, as

⁵⁸⁴⁴ Šainović's Appeal Brief, paras 514-518, referring to Momir Bulatović, 16 Aug 2007, T. 13808; Živadin Jovanović, 20 Aug 2007, T. 14070; Andreja Milosavljević, 23 Aug 2007, T. 14309; Zoran Anđelković, 30 Aug 2007, T. 14665; Duško Matković, 29 Aug 2007, T. 14600; Wolfgang Petritsch, 2 Mar 2007, T. 10945; Shaun Byrnes, 16 Apr 2007, T. 12139, 12188-12189; Michael Phillips, 19 Mar 2007, T. 11887.

⁵⁸⁴⁵ Šainović's Appeal Brief, para. 523, referring to Trial Judgement, vol. 3, para. 1200.

⁵⁸⁴⁶ Šainović's Appeal Brief, para. 521.

⁵⁸⁴⁷ Šainović's Appeal Brief, paras 519-520, 522, arguing that witnesses testified to his good character mainly in light of his conduct during the period relevant to the Indictment, rather than prior to that period, as found by the Trial Chamber.

⁵⁸⁴⁸ Šainović's Appeal Brief, para. 524.

⁵⁸⁴⁹ Prosecution's Response Brief (Šainović), para. 359.

⁵⁸⁵⁰ Prosecution's Response Brief (Šainović), para. 360.

⁵⁸⁵¹ Prosecution's Response Brief (Šainović), para. 362, referring, *inter alia*, to Trial Judgement, vol. 3, para. 417.

⁵⁸⁵² Prosecution's Response Brief (Šainović), para. 361, referring to Trial Judgement, vol. 3, para. 1183.

⁵⁸⁵³ Prosecution's Response Brief (Šainović), paras 363-364.

⁵⁸⁵⁴ Prosecution's Response Brief (Šainović), paras 365-366.

⁵⁸⁵⁵ Trial Judgement, vol. 3, para. 1181, fn. 2931, referring to Živadin Jovanović, 20 Aug 2007, T. 14070; *ibid.*, 22 Aug 2007, T. 14201; Andreja Milosavljević, 23 Aug 2007, T. 14304, 14309-14310; Zoran Anđelković, 30 Aug 2007, T. 14665; Duško Matković, 29 Aug 2007, T. 14600-14601.

other evidence indicated that such endeavours pre-dated the crimes for which he was criminally responsible.⁵⁸⁵⁶

1806. The Trial Chamber considered that Šainović's interview with the Prosecution did not amount to "substantial" cooperation,⁵⁸⁵⁷ but took into account "the general co-operation by Šainović in having given the interview."⁵⁸⁵⁸ The Appeals Chamber considers that the extent to which the Trial Chamber relied upon this interview elsewhere in the Trial Judgement is not indicative of the weight it attributed to the interview as a mitigating factor in the context of sentencing. In these circumstances, Šainović has not demonstrated any error in the Trial Chamber's assessment in this regard.

1807. The Trial Chamber also noted Šainović's arguments regarding his good character beyond his efforts for conflict resolution.⁵⁸⁵⁹ In addition, it observed the serious health conditions of close family members and his health problems.⁵⁸⁶⁰ However, with the exception of the serious health conditions of close family members, the Trial Chamber concluded that none of these were mitigating factors.⁵⁸⁶¹ To the extent that Šainović argues that the Trial Chamber failed to sufficiently weigh these factors in his favour, the Appeals Chamber recalls that trial chambers enjoy a considerable degree of discretion in determining what constitutes a mitigating factor as well as in deciding how much weight, if any, to accord to those factors.⁵⁸⁶² Šainović has therefore failed to demonstrate that the Trial Chamber erred in this regard.

1808. Šainović's contention that the Trial Chamber erred in finding that his surrender did not constitute a mitigating factor also fails. The circumstances of Lazarević's surrender were distinct from those of Šainović and thus the Trial Chamber was not bound to arrive at an identical conclusion.⁵⁸⁶³ Moreover, in reaching its determination, the Trial Chamber relied on the prior ruling of the Appeals Chamber, which extensively discussed the circumstances surrounding Šainović's surrender to the Tribunal and concluded that it was involuntary.⁵⁸⁶⁴ Šainović points to no error in

⁵⁸⁵⁶ Trial Judgement, vol. 3, para. 1181. See also Trial Judgement, vol. 3, paras 407, 409, 417, 433-434, 438, referring, *inter alia*, to Wolfgang Petritsch, 2 Mar 2007, T. 10945, Shaun Byrnes, 16 Apr 2007, T. 12188-12189, Michael Phillips, 19 Mar 2007, T. 11877-11879, 11886-11887.

⁵⁸⁵⁷ Trial Judgement, vol. 3, para. 1183.

⁵⁸⁵⁸ Trial Judgement, vol. 3, para. 1183.

⁵⁸⁵⁹ Trial Judgement, vol. 3, para. 1181, finding, however, that his good character was shown only prior to the events which are the subject of the Indictment, since it was proven that he persisted in the conduct that led to his criminal liability despite his awareness of the crimes.

⁵⁸⁶⁰ Trial Judgement, vol. 3, para. 1182.

⁵⁸⁶¹ Trial Judgement, vol. 3, paras 1181-1182.

⁵⁸⁶² *D. Milošević* Appeal Judgement, para. 316, and references therein.

⁵⁸⁶³ *Cf. Prosecutor v. Vladimir Lazarević*, Case No. IT-03-70-PT, Decision on Defence Request for Provisional Release, 14 April 2005, p. 3; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006 ("Decision of 5 December 2006"), fn. 42.

⁵⁸⁶⁴ See Trial Judgement, vol. 3, para. 1184, fn. 2935, referring to *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 10, *Prosecutor v. Nikola*

this assessment and has failed to demonstrate that his surrender was voluntary and constitutes a mitigating circumstance.

1809. The Appeals Chamber accordingly dismisses this sub-ground of Šainović's appeal.

C. Pavković's appeal

1. Alleged errors in assessing aggravating factor

1810. Pavković submits that the Trial Chamber erred in finding that he abused his authority and that this was an aggravating factor.⁵⁸⁶⁵ Pavković argues that the Trial Chamber impermissibly double-counted his continued approval of joint VJ and MUP operations despite his knowledge of crimes, in the context of both the *mens rea* element of JCE liability and as an aggravating factor in sentencing.⁵⁸⁶⁶ Pavković also avers that he did not abuse his authority, as he had no alternative but to continue joint VJ and MUP operations until his superiors, Slobodan Milošević and Dragoljub Ojdanić, ordered otherwise.⁵⁸⁶⁷ Pavković further argues that, despite his lack of authority over the MUP, he actively tried to prevent its crimes.⁵⁸⁶⁸ Finally, he submits that the Trial Chamber did not fully appreciate the difficult situation in Kosovo and merely noted that the situation was "complicated".⁵⁸⁶⁹

1811. The Prosecution responds that the Trial Chamber considered Pavković's abuse of authority, and not his *mens rea*, as an aggravating factor.⁵⁸⁷⁰ The Prosecution submits that Pavković's claim that he had no alternative but to continue approving joint VJ and MUP operations is without merit as he fails to address findings that he had extensive *de jure* and *de facto* authority over VJ forces in Kosovo, close ties to Milošević, and influence in planning combat operations in Kosovo.⁵⁸⁷¹ It further contends that the Trial Chamber was correct in concluding that Pavković's efforts to prevent crimes were "manifestly insufficient".⁵⁸⁷² Finally, the Prosecution maintains that the Trial Chamber duly considered the complicated situation in Kosovo, but decided that threats from NATO and the

Šainović and Dragoljub Ojdanić, Case No. IT-99-37-PT, Decision on Second Applications for Provisional Release, 29 May 2003 (public redacted version), p. 7, Decision of 5 December 2006, para. 19, fn. 42.

⁵⁸⁶⁵ Pavković's Appeal Brief, paras 354-361. See also Pavković's Notice of Appeal, Ground 12 (Registry Pagination p. 2608).

⁵⁸⁶⁶ Pavković's Appeal Brief, paras 355-357.

⁵⁸⁶⁷ Pavković's Appeal Brief, para. 358.

⁵⁸⁶⁸ Pavković's Appeal Brief, para. 358.

⁵⁸⁶⁹ Pavković's Appeal Brief, paras 359-361, also arguing that the Trial Chamber's finding in this regard (Trial Judgement, vol. 3, para. 1190) is inconsistent with its finding elsewhere in the context of the existence of an armed conflict in Kosovo (*ibid.*, vol. 1, para. 820).

⁵⁸⁷⁰ Prosecution's Response Brief (Pavković), para. 144.

⁵⁸⁷¹ Prosecution's Response Brief (Pavković), para. 145.

⁵⁸⁷² Prosecution's Response Brief (Pavković), para. 146, referring to Trial Judgement, vol. 3, para. 777.

KLA did not excuse Pavković's contribution to the forcible displacement of 700,000 Kosovo Albanians.⁵⁸⁷³

1812. Pavković's argument that the Trial Chamber double-counted his continued approval of joint VJ and MUP operations despite his knowledge of crimes, both for his *mens rea* and as an aggravating factor, is without merit. Although the Trial Chamber could have been clearer in its discussion of the aggravating factors in Pavković's case, the Appeals Chamber considers that the Trial Chamber simply meant to state that, given what Pavković knew as well as the position he held, his continued approval of joint VJ and MUP operations was an abuse of his position of authority.⁵⁸⁷⁴ It is the settled jurisprudence of the Tribunal that the abuse of a position of authority may constitute a distinct aggravating factor in the context of a conviction under Article 7(1) of the Statute.⁵⁸⁷⁵

1813. Moreover, Pavković has failed to demonstrate that the Trial Chamber erred in finding that he abused his position of authority. The Trial Chamber held that, as Commander of the 3rd Army, Pavković possessed both extensive *de jure* and *de facto* authority and could impede the objective of forcibly displacing the Kosovo Albanian population,⁵⁸⁷⁶ yet continued to approve joint VJ and MUP operations despite his knowledge of crimes committed by these forces.⁵⁸⁷⁷ Moreover, he "refrained from taking effective measures, which were at his disposal, in relation to crimes committed by his subordinates."⁵⁸⁷⁸ In a previous section of this Judgement, the Appeals Chamber has dismissed his challenges with regard to his authority and failure to take effective measures against crimes.⁵⁸⁷⁹ The Trial Chamber also fully considered the severity of the KLA and NATO attacks and Pavković's role in defending his country before determining that he abused his position of authority.⁵⁸⁸⁰ Contrary to his assertion, the fact that the Trial Chamber called the situation in Kosovo "a complicated situation"⁵⁸⁸¹ does not suggest that it failed to appreciate the severity of the KLA and NATO attacks. The Appeals Chamber discerns no error in the Trial Chamber's assessment and considers that Pavković simply seeks a re-evaluation of the evidence. Accordingly, the Appeals Chamber dismisses this sub-ground of Pavković's appeal.

⁵⁸⁷³ Prosecution's Response Brief (Pavković), para. 147, referring to Trial Judgement, vol. 1, paras 1209-1214, *ibid.*, vol. 2, paras 1175-1178, *ibid.*, vol. 3, paras 92, 1190.

⁵⁸⁷⁴ See Trial Judgement, vol. 3, para. 1190. *Cf. D. Milošević Appeal Judgement*, para. 301.

⁵⁸⁷⁵ *D. Milošević Appeal Judgement*, para. 302; *Stakić Appeal Judgement*, para. 411.

⁵⁸⁷⁶ Trial Judgement, vol. 3, paras 773, 780. See also *ibid.*, vol. 3, para. 1190.

⁵⁸⁷⁷ Trial Judgement, vol. 3, para. 1190. See also *ibid.*, vol. 3, paras 774-775, 780.

⁵⁸⁷⁸ Trial Judgement, vol. 3, para. 1190. See also *ibid.*, vol. 3, paras 777, 780.

⁵⁸⁷⁹ See *supra*, sub-section VII.E.2.

⁵⁸⁸⁰ See Trial Judgement, vol. 1, paras 797-820, 1209-1214; *ibid.*, vol. 3, para. 1190.

⁵⁸⁸¹ Trial Judgement, vol. 3, para. 1190.

2. Alleged errors in assessing mitigating factors

1814. Pavković contends that the Trial Chamber failed to accord sufficient weight to evidence of his substantial cooperation with the Prosecution⁵⁸⁸² and claims that the Trial Chamber erroneously relied on a previous Appeals Chamber provisional release decision in considering whether his surrender was mitigating.⁵⁸⁸³

1815. The Prosecution responds that the Trial Chamber correctly considered the relevant mitigating factors and that Pavković fails to demonstrate a discernible error in its assessment.⁵⁸⁸⁴ Moreover, the Prosecution avers that, at trial, Pavković did not argue that his cooperation with the Prosecution or his voluntary surrender were mitigating circumstances and that his arguments should therefore be summarily dismissed.⁵⁸⁸⁵ In the alternative, the Prosecution submits that Pavković fails to show how his cooperation with the Prosecution was “substantial”⁵⁸⁸⁶ or how the Trial Chamber erred in finding that his surrender was not a mitigating factor.⁵⁸⁸⁷

1816. Pavković did not assert at trial that his cooperation with the Prosecution or his surrender were mitigating factors. The Appeals Chamber recalls that parties should not seek to present new mitigating evidence on appeal if it was available at trial.⁵⁸⁸⁸ The Appeals Chamber nevertheless notes that the Trial Chamber expressly considered Pavković’s interview with the Prosecution, but concluded that it did not qualify as evidence of substantial cooperation with the Prosecution.⁵⁸⁸⁹ Pavković has failed to show any error in this regard. Likewise, Pavković has failed to demonstrate that the Trial Chamber erred in declining to find that the circumstances of his surrender amounted to a mitigating circumstance, based on the Tribunal’s provisional release decisions.⁵⁸⁹⁰ Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

⁵⁸⁸² Pavković’s Appeal Brief, para. 364, referring, as the evidence of his cooperation, to witness testimony that he provided documentary material to the Prosecution (Philip Coo, 21 March 2007, T. 12081) and his interview with the Prosecution (Exh. P949).

⁵⁸⁸³ Pavković’s Appeal Brief, paras 365, 367, referring to *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković Provisional Release, 1 November 2005 (“Decision of 1 November 2005”). Pavković also asserts that “facilitation” of his transfer process should have been considered in mitigation (Pavković’s Appeal Brief paras 366-367, referring to *Naletelić and Martinović* Appeal Judgement, paras 599-600; *contra* Prosecution’s Response Brief (Pavković), para. 152). As Pavković has failed to substantiate this general submission, the Appeals Chamber dismisses this argument.

⁵⁸⁸⁴ Prosecution’s Response Brief (Pavković), para. 148. See also *ibid.*, para. 150.

⁵⁸⁸⁵ Prosecution’s Response Brief (Pavković), para. 149.

⁵⁸⁸⁶ Prosecution’s Response Brief (Pavković), para. 151.

⁵⁸⁸⁷ Prosecution’s Response Brief (Pavković), para. 152.

⁵⁸⁸⁸ See Rule 86(C) of the Rules (“The parties shall [...] address matters of sentencing in closing arguments”).

⁵⁸⁸⁹ Trial Judgement, vol. 3, para. 1194.

⁵⁸⁹⁰ Trial Judgement, vol. 3, para. 1194, referring to Decision of 1 November 2005, para. 9, Decision of 5 December 2006, para. 19, fn. 42.

D. Lazarević's appeal

1. Alleged errors in the assessment of gravity

1817. Lazarević submits that the Trial Chamber erred in evaluating the gravity of his crimes.⁵⁸⁹¹ He contends that his 15-year sentence is inappropriately severe in view of his role, position, and contribution to the underlying crimes⁵⁸⁹² and “reserves the right” to elaborate on his position during oral arguments.⁵⁸⁹³ The Prosecution responds that this sub-ground should be summarily dismissed for lack of development⁵⁸⁹⁴ and argues that Lazarević has failed to explain how the Trial Chamber erred in assessing the gravity of his crimes.⁵⁸⁹⁵ Lazarević replies that his Appeal Brief sufficiently explains his position and his oral arguments will only elaborate his submissions.⁵⁸⁹⁶

1818. The Appeals Chamber recalls that it may summarily dismiss “mere assertions unsupported by any evidence” or “undeveloped assertions”.⁵⁸⁹⁷ Appellants’ briefs must include relevant factual and legal arguments in support of each ground of appeal as well as the precise relief sought.⁵⁸⁹⁸ To reserve submissions for oral argument denies the opposing party an adequate opportunity to respond, and is therefore “not proper procedure”.⁵⁸⁹⁹ Lazarević has clearly failed to substantiate his arguments in this regard.⁵⁹⁰⁰ The Appeals Chamber therefore dismisses this sub-ground of his appeal.

2. Alleged errors in assessing mitigating factors

1819. Lazarević argues that the Trial Chamber failed to properly assess or attach adequate weight to his voluntary surrender, his interview with the Prosecution, his testimony as the first witness in his own defence, his health and family circumstances, and his good character.⁵⁹⁰¹ He contends that had the Trial Chamber correctly evaluated all of these mitigating factors, it would have imposed a

⁵⁸⁹¹ Lazarević’s Appeal Brief, para. 610.

⁵⁸⁹² Lazarević’s Notice of Appeal, para. 115; Lazarević’s Appeal Brief, para. 610.

⁵⁸⁹³ Lazarević’s Appeal Brief, para. 611.

⁵⁸⁹⁴ Prosecution’s Response Brief (Lazarević), paras 347-349, 360. Specifically, the Prosecution submits that raising arguments for the first time during oral arguments would undermine principles of fairness and efficiency.

⁵⁸⁹⁵ Prosecution’s Response Brief (Lazarević), paras 350-354. The Prosecution elaborates that Lazarević commanded the VJ’s Priština Corps and the military territorial detachments in Kosovo, and participated in the planning and execution of joint VJ and MUP operations from March to June 1999 (see Prosecution’s Response Brief (Lazarević), para. 352). Further, despite learning of crimes being committed by MUP, Lazarević continued to approve joint VJ and MUP attacks and did not punish subordinates for their crimes (see *ibid.*, para. 353).

⁵⁸⁹⁶ Lazarević’s Reply Brief, para. 144.

⁵⁸⁹⁷ See *supra*, para. 27.

⁵⁸⁹⁸ Rule 111(A) of the Rules; Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, para. 4.

⁵⁸⁹⁹ *Stakić* Appeal Judgement, fn. 308, referring to Rule 111 of the Rules.

⁵⁹⁰⁰ See *supra*, paras 1798-1799.

⁵⁹⁰¹ See Lazarević’s Notice of Appeal, para. 116; Lazarević’s Appeal Brief, para. 612. See also Appeal Hearing, 15 Mar 2013, AT. 643.

more lenient sentence.⁵⁹⁰² Finally, Lazarević “reserves the right” to elaborate on the existence of “new”, unspecified, mitigating circumstances during oral arguments.⁵⁹⁰³

1820. The Prosecution responds that Lazarević’s arguments in this regard should be dismissed⁵⁹⁰⁴ because the Trial Chamber properly evaluated each of the mitigating circumstances raised and Lazarević fails to demonstrate any error warranting the intervention of the Appeals Chamber.⁵⁹⁰⁵ As to the existence of “new mitigating circumstances”, the Prosecution contends that the proper method to raise subsequent developments that mitigate a sentence is to file a motion under Rule 115 of the Rules.⁵⁹⁰⁶

1821. The Appeals Chamber observes that the Trial Chamber discussed the factors raised by Lazarević at length.⁵⁹⁰⁷ The Trial Chamber treated his surrender, his health and family circumstances, and his interview with the Prosecution as mitigating circumstances.⁵⁹⁰⁸ However, it gave limited weight to Lazarević’s purported good character and considered that his decision to take the stand in his own defence did not have a mitigating effect.⁵⁹⁰⁹ Lazarević merely contests the Trial Chamber’s evaluation of these factors and has failed to show any discernible error in this respect. Moreover, he has failed to substantiate the existence of “new” mitigating circumstances to which he alludes in his Appeal Brief. In these circumstances, the Appeals Chamber dismisses this sub-ground of his appeal.

E. Lukić’s appeal

1. Alleged errors in assessing aggravating factor

1822. Lukić asserts that the Trial Chamber double-counted the abuse of his superior position, both as a form of participation under JCE and as an aggravating factor.⁵⁹¹⁰ He also argues that the Trial Chamber’s finding that he had a “superior position” is incorrect, as he did not possess *de jure* powers to punish or discipline MUP or VJ forces.⁵⁹¹¹ The Prosecution responds that as a position of authority is not an element of JCE, there was no double-counting.⁵⁹¹² The Prosecution also avers

⁵⁹⁰² Lazarević’s Notice of Appeal, para. 116; Lazarević’s Appeal Brief, para. 612.

⁵⁹⁰³ Lazarević’s Appeal Brief, para. 612.

⁵⁹⁰⁴ Prosecution’s Response Brief (Lazarević), para. 358.

⁵⁹⁰⁵ Prosecution’s Response Brief (Lazarević), paras 356-357.

⁵⁹⁰⁶ Prosecution’s Response Brief (Lazarević), para. 359. See also *ibid.*, para. 360.

⁵⁹⁰⁷ Trial Judgement, vol. 3, paras 1196-1200, referring to Lazarević’s Closing Brief, paras 940-942, 945-950.

⁵⁹⁰⁸ Trial Judgement, vol. 3, paras 1198-1200.

⁵⁹⁰⁹ Trial Judgement, vol. 3, paras 1196-1197.

⁵⁹¹⁰ Lukić’s Appeal Brief, para. 841, referring to Trial Judgement, vol. 3, para. 1201.

⁵⁹¹¹ Lukić’s Appeal Brief, para. 842.

⁵⁹¹² Prosecution’s Response Brief (Lukić), para. 515.

that Lukić mischaracterises the Trial Chamber’s findings in that it is Lukić’s abuse of authority, not his position of authority *per se*, that is an aggravating factor.⁵⁹¹³

1823. The Appeals Chamber recalls that a position of authority is not a legal element of JCE.⁵⁹¹⁴ Although the Trial Chamber referred to Lukić’s position in describing his role in the crimes to find his JCE liability,⁵⁹¹⁵ it never suggested that the crime was graver simply because he was in a position of authority.⁵⁹¹⁶ Lukić’s contention that the Trial Chamber impermissibly double-counted the abuse of his superior position, both as a form of participation under JCE and as an aggravating factor, is therefore without merit and is accordingly dismissed. The Appeals Chamber further recalls that, in an earlier section of this Judgement, it has dismissed Lukić’s challenges to the Trial Chamber’s findings with respect to his “superior position”, including his *de jure* powers as the Head of the MUP Staff and his *de facto* authority to require the chiefs of the SUPs to conduct investigations into crimes.⁵⁹¹⁷ As Lukić has failed to demonstrate that the Trial Chamber erred in taking this factor into consideration in its evaluation of aggravating circumstances, the Appeals Chamber dismisses this sub-ground of Lukić’s appeal.

2. Alleged errors in assessing mitigating factors

1824. Lukić argues that the Trial Chamber erred in its assessment of several mitigating factors and, as a result, imposed a manifestly excessive sentence.⁵⁹¹⁸ He claims that the Trial Chamber: (i) failed to credit the “harsh environment” in Kosovo or his contributions to law and order as mitigating circumstances;⁵⁹¹⁹ (ii) overlooked original medical documents filed at the time of his surrender and thus improperly analysed his health condition;⁵⁹²⁰ and (iii) erred in not considering his “voluntary” surrender and cooperation with the Prosecution as mitigating circumstances.⁵⁹²¹

1825. The Prosecution responds that the Trial Chamber took into account the complicated situation in Kosovo when assessing Lukić’s abuse of his superior position as an aggravating

⁵⁹¹³ Prosecution’s Response Brief (Lukić), para. 516.

⁵⁹¹⁴ See *Tadić* Appeal Judgement, paras 196, 227-228; *Stakić* Appeal Judgement, paras 64-65.

⁵⁹¹⁵ Trial Judgement, vol. 3, paras 1118, 1131.

⁵⁹¹⁶ See Trial Judgement, vol. 3, paras 1173, 1175. See also *D. Milošević* Appeal Judgement, para. 302; *Stakić* Appeal Judgement, para. 411; *Babić* Judgement on Sentencing Appeal, para. 80; *Čelebići* Appeal Judgement, para. 745.

⁵⁹¹⁷ See *supra*, sub-section VII.F.4.

⁵⁹¹⁸ Lukić’s Appeal Brief, paras 825-838. See also Lukić’s Notice of Appeal, Ground KK; Appeal Hearing, 14 Mar 2013, AT. 516-522.

⁵⁹¹⁹ Lukić’s Appeal Brief, paras 828-830, referring, *inter alia*, to *Čelebići* Trial Judgement, para. 1283. See also Appeal Hearing, 14 Mar 2013, AT. 518-520; Lukić’s Appeal Brief, paras 30-31.

⁵⁹²⁰ Lukić’s Appeal Brief, paras 831-835; Lukić’s Reply Brief, paras 130-137. See also Appeal Hearing, 14 Mar 2013, AT. 516, 520-522.

⁵⁹²¹ Lukić’s Appeal Brief, paras 822, 836-838; Lukić’s Reply Brief paras 138-142, comparing his own surrender to that of Lazarević: both were named on the same indictment; they surrendered only one month apart; both had medical difficulties; and Lukić’s surrender occurred days after a round of heart surgery, against medical advice. See also Appeal Hearing, 14 Mar 2013, AT. 516-517, referring, in particular, to his interview with the Prosecution.

factor.⁵⁹²² The Prosecution also maintains that the Trial Chamber did in fact consider Lukić's contribution to law and order as a mitigating circumstance⁵⁹²³ and submits that the Trial Chamber adequately considered Lukić's state of health.⁵⁹²⁴ Finally, the Prosecution avers that the Appeals Chamber should dismiss Lukić's arguments regarding his surrender, which were not raised at trial, or, in the alternative, find that the Trial Chamber appropriately determined that Lukić's surrender did not mitigate his sentence.⁵⁹²⁵

1826. The Appeals Chamber recalls that a trial chamber has broad discretion to determine what constitutes a mitigating circumstance and the weight, if any, to be accorded to such circumstances.⁵⁹²⁶ The Trial Chamber acknowledged the fact that Lukić faced a "complicated situation, including the defence of the country against NATO bombing and some combat operations against the KLA",⁵⁹²⁷ and was fully apprised of the environment in Kosovo during the relevant period. The Trial Chamber considered this factor when assessing his abuse of authority as an aggravating circumstance.⁵⁹²⁸ The Appeals Chamber also observes that the Trial Chamber explicitly found Lukić's contribution to law and order in Kosovo as well as his interview with the Prosecution to be mitigating factors.⁵⁹²⁹ Lukić appears to argue that the Trial Chamber failed to give any weight to these factors, as it sentenced him to the same term of imprisonment as Šainović and Pavković who were also convicted pursuant to JCE liability.⁵⁹³⁰ However, the fact that his sentence did not differ from that of Šainović and Pavković does not in itself suggest that the Trial Chamber did not accord any weight to these factors.⁵⁹³¹ Accordingly, Lukić has failed to demonstrate that the Trial Chamber erred in its evaluation of these factors.

1827. Reiterating that poor health is mitigating only in exceptional cases⁵⁹³² and recalling the Trial Chamber's discretion in weighing such evidence, the Appeals Chamber is not persuaded that the Trial Chamber failed to properly assess Lukić's medical condition. Upon Lukić's request during closing arguments, the Trial Chamber "re-examined the relevant documentation in the record of the proceedings" but concluded that Lukić's state of health did not "rise to the level that would warrant

⁵⁹²² Prosecution's Response Brief (Lukić), paras 509-510, referring, *inter alia*, to *Čelebići* Trial Judgement, paras 1283-1284.

⁵⁹²³ Prosecution's Response Brief (Lukić), para. 511, referring to Trial Judgement, vol. 3, para. 1202.

⁵⁹²⁴ Prosecution's Response Brief (Lukić), para. 512, referring to Trial Judgement, vol. 3, para. 1203.

⁵⁹²⁵ Prosecution's Response Brief (Lukić), paras 513-514, referring to Trial Judgement, vol. 3, para. 1204.

⁵⁹²⁶ See *supra*, para. 1807.

⁵⁹²⁷ Trial Judgement, vol. 3, para. 1201. See also Trial Judgement, vol. 1, paras 797-820, 1209-1214.

⁵⁹²⁸ Trial Judgement, vol. 3, para. 1201.

⁵⁹²⁹ Trial Judgement, vol. 3, para. 1202.

⁵⁹³⁰ See Lukić's Appeal Brief, paras 826-830.

⁵⁹³¹ See Trial Judgement, vol. 3, para. 1205. Insofar as Lukić argues that the Trial Chamber failed to individualise his sentence in light of these factors particular to him (Lukić's Appeal Brief, para. 829), his argument will be addressed below, see *infra*, sub-section IX.G.

⁵⁹³² *Galić* Appeal Judgement, para. 436, citing *Blaškić* Appeal Judgement, para. 696.

mitigation of his sentence.”⁵⁹³³ Although the Trial Judgement does not specifically refer to the original medical documents filed at the time of Lukić’s surrender, the Trial Chamber did cite to provisional release decisions that explicitly considered contemporary information documenting the state of Lukić’s health.⁵⁹³⁴ In these circumstances, the Appeals Chamber considers that the Trial Chamber acted within its discretion in determining whether Lukić’s health constituted a mitigating circumstance.

1828. Finally, although Lukić failed to raise his surrender as a mitigating factor at trial,⁵⁹³⁵ the Trial Chamber stated that even if Lukić had raised this argument, it “would not have considered the circumstances of Lukić’s surrender to be a mitigating circumstance in the determination of his sentence, based upon past decisions relevant to this matter.”⁵⁹³⁶ However, in these decisions, the Trial Chamber accepted his explanation as to why he did not surrender during the period between 2 October 2003, when the indictment against him was made public, and 4 April 2005 when he surrendered.⁵⁹³⁷ The Appeals Chamber thus observes that the decisions cited by the Trial Chamber neither support nor substantiate its finding. The Appeals Chamber therefore finds that the Trial Chamber erred in this regard. The impact of this finding, if any, on Lukić’s sentence will be discussed below.

3. Alleged failure to properly consider sentencing practices in the FRY

1829. Lukić asserts that the Trial Chamber violated the principle of *nulla poena sine lege*⁵⁹³⁸ by sentencing him to 22 years’ imprisonment when the maximum prison sentence in the FRY at the time of the crimes in question was 20 years.⁵⁹³⁹ The Prosecution responds that the Trial Chamber considered the FRY’s sentencing practices and acted within its discretion.⁵⁹⁴⁰ The Prosecution also points out that a trial chamber is not bound by the FRY’s sentencing regime and may impose heavier sentences than those stipulated in domestic provisions.⁵⁹⁴¹

⁵⁹³³ Trial Judgement, vol. 3, para. 1203.

⁵⁹³⁴ Trial Judgement, vol. 3, para. 1203, fn. 2970, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Temporary Provisional Release, 12 December 2008, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Temporary Provisional Release, 31 October 2008 (public with confidential annex).

⁵⁹³⁵ Trial Judgement, vol. 3, para. 1204.

⁵⁹³⁶ Trial Judgement, vol. 3, para. 1204, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Decision on Sreten Lukić’s Provisional Release, 30 September 2005 (confidential) (“Decision of 30 September 2005”), *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Temporary Provisional Release, 7 December 2007 (public with confidential annex) (“Decision of 7 December 2007”).

⁵⁹³⁷ Decision of 30 September 2005, p. 8. See also Decision of 7 December 2007, paras 6, 8.

⁵⁹³⁸ Lukić’s Appeal Brief, paras 839-840, arguing that the Trial Chamber violated the *nullum crimen sine lege* principle, but based on his arguments, the Appeals Chamber understands him to mean *nulla poena sine lege*.

⁵⁹³⁹ Lukić’s Appeal Brief, para. 840.

⁵⁹⁴⁰ Prosecution’s Response Brief (Lukić), para. 507.

⁵⁹⁴¹ Prosecution’s Response Brief (Lukić), para. 506, citing *Blaškić* Appeal Judgement, para. 681.

1830. The Appeals Chamber recalls that a trial chamber is bound to consider, but not necessarily follow, the sentencing practices of the FRY.⁵⁹⁴² In determining appropriate sentences in this case, the Trial Chamber explicitly examined the Criminal Code in the FRY and its relevant sentencing provisions, domestic constitutional developments, jurisprudence of this Tribunal, the breadth of its discretion in sentencing, and the Tribunal's goals of restoration and maintenance of peace as mandated by the UN Security Council.⁵⁹⁴³ Indeed, the Appeals Chamber has, on several occasions, upheld sentences even more severe than Lukić's, notwithstanding the FRY's sentencing regime.⁵⁹⁴⁴ In view of the foregoing, the Appeals Chamber finds that the Trial Chamber acted within its discretion. The Appeals Chamber accordingly dismisses this sub-ground of Lukić's appeal.

F. Prosecution's appeal

1831. The Prosecution contends that the sentences imposed are manifestly inadequate and points out that, in the context of a four-volume judgement, the section on gravity is only six paragraphs long.⁵⁹⁴⁵ The Prosecution further argues that when assessing the gravity, the Trial Chamber failed to consider the seriousness of the underlying crimes as well as the Appellants' role and degree of participation in them.⁵⁹⁴⁶ In addition, the Prosecution maintains that the Trial Chamber failed to consider a number of mandatory factors when assessing the seriousness of the underlying crimes, including the discriminatory nature of the crimes, the vulnerability of the victims, and the effect of the crimes on victims and their relatives.⁵⁹⁴⁷

⁵⁹⁴² See Article 24(1) of the Statute; Rule 101(B)(iii) of the Rules. See also *Blaškić* Appeal Judgement, paras 681-682, referring to *Krstić* Appeal Judgement, para. 260, *Kunarac et al.* Trial Judgement, para. 829, *Kunarac et al.* Appeal Judgement, paras 347-349, *Tadić* Judgement on Sentencing Appeal, para. 21, *Čelebići* Appeal Judgement, paras 813, 816-817, 820, *Kupreškić et al.* Appeal Judgement, para. 418.

⁵⁹⁴³ Trial Judgement, vol. 3, paras 1141-1160.

⁵⁹⁴⁴ See, e.g., *Martić* Appeal Judgement, para. 355 (upholding a 35-year prison sentence); *Brđanin* Appeal Judgement, p. 157 (imposing a 30-year sentence).

⁵⁹⁴⁵ See Prosecution's Appeal Brief, paras 121-160; Prosecution's Reply Brief, paras 68, 73. See also Appeal Hearing, 15 Mar 2013, AT.602-603, 611.

⁵⁹⁴⁶ Prosecution's Appeal Brief, paras 121, 124, 161. See also Appeal Hearing, 15 Mar 2013, AT. 612.

⁵⁹⁴⁷ See Prosecution's Appeal Brief, paras 124-130, 160; Prosecution's Reply Brief, para. 74. In addition, the Prosecution asserts that the gravity of the crimes aided and abetted by Lazarević are comparable to those for which Radoslav Brđanin was convicted and sentenced to 30 years of imprisonment. Likewise, the Prosecution contends that Milan Martić was sentenced to 35 years of imprisonment as a JCE member held responsible for the commission crimes similar to those committed by Šainović, Pavković, and Lukić. See Prosecution's Appeal Brief, paras 195-197; Prosecution's Reply Brief, para. 76. *Contra* Šainović's Response Brief, para. 183; Lukić's Response Brief, paras 111-116). The Appeals Chamber recalls that sentencing decisions in other cases can provide guidance if they relate to substantially similar circumstances, but this guidance is limited by Article 24(2) of the Statute, which requires the Trial Chamber to assess the individual circumstances of the convicted person and the gravity of the offence. See *Stakić* Appeal Judgement, para. 381. The Trial Chamber clearly noted the interplay of these standards, observing that "previous sentencing practice is but one factor among a host of others that must be taken into account when determining the sentence" and that "the Chamber has applied its judgement and discretion to the facts that have been proved in this case, including the context and background circumstances amidst which the crimes were committed." See Trial Judgement, vol. 3, para. 1143. The Appeals Chamber therefore considers that the Trial Chamber did not err in this regard and dismisses the Prosecution's arguments in this respect.

1832. Šainović and Lukić respond that the Prosecution's request for higher sentences should be dismissed, as their 22-year prison sentences are within the range that the Prosecution requested at trial.⁵⁹⁴⁸ Šainović and Lukić also submit that the Prosecution based part of its arguments in this respect on crimes for which they were not convicted.⁵⁹⁴⁹ In addition, they argue that, contrary to the Prosecution's arguments, the Trial Chamber did consider the discriminatory nature of the crimes⁵⁹⁵⁰ and the vulnerability of and impact on the victims.⁵⁹⁵¹ Šainović and Lukić further submit that the Trial Chamber considered their roles and the degree of their participation in the crimes, but accorded too much weight to them⁵⁹⁵² or double-counted them.⁵⁹⁵³

1833. In reply, the Prosecution submits that, at trial, it simply indicated a sentencing range of 20 years to life for the Trial Chamber's consideration, having regard to the specific modes of liability and crimes for which the Appellants could be found criminal responsible.⁵⁹⁵⁴

1834. The Appeals Chamber recalls that trial chambers are vested with broad discretion in determining an appropriate sentence⁵⁹⁵⁵ and that it is incumbent on parties to present all information relevant to sentencing at trial.⁵⁹⁵⁶ The Appeals Chamber will only intervene where a trial chamber has abused its discretion.⁵⁹⁵⁷ The Appeals Chamber notes that in its Closing Brief and closing arguments, the Prosecution requested "sentences ranging from 20 years to life imprisonment" with regard to all the Appellants, irrespective of the modes of liability charged.⁵⁹⁵⁸ The Prosecution cannot seek to have a more severe sentence imposed on appeal where, as here, the Trial Chamber, by exercising its discretion, imposed a sentence within the Prosecution's requested range. Thus, the Appeals Chamber dismisses the Prosecution's arguments concerning Šainović, Pavković, and Lukić who were sentenced to 22 years of imprisonment.⁵⁹⁵⁹ However, as Lazarević was sentenced to 15 years of imprisonment, below the 20-year minimum sought by the Prosecution, the Appeals

⁵⁹⁴⁸ Šainović's Response Brief, paras 145-162; Lukić's Response Brief, paras 100-110. See also Appeal Hearing, 15 Mar 2013, AT. 620-628, 645. See also *ibid.*, AT. 632, in which Pavković raised the same argument.

⁵⁹⁴⁹ Šainović's Response Brief, paras 156, 173; Lukić's Response Brief, paras 121, 123(C). *Contra* Prosecution's Reply Brief, para. 75.

⁵⁹⁵⁰ Šainović's Response Brief, para. 169.

⁵⁹⁵¹ Šainović's Response Brief, paras 165-166, 169; Lukić's Response Brief, para. 122.

⁵⁹⁵² Šainović's Response Brief, paras 168, 170, 174.

⁵⁹⁵³ Lukić's Response Brief, paras 118-120.

⁵⁹⁵⁴ Prosecution's Reply Brief, paras 70-71, also arguing that it was impossible for the Prosecution to make a specific sentence submission given that the Tribunal no longer follows the practice of having a separate sentencing hearing following a finding of guilt. See also Appeal Hearing, 15 Mar 2013, AT. 668-669.

⁵⁹⁵⁵ *Bošković and Tarčulovski* Appeal Judgement, para. 204; *D. Milošević* Appeal Judgement, para. 297.

⁵⁹⁵⁶ See Rules 86(C) and 101 (B) of the Rules. See also *Ntabakuze* Appeal Judgement, para. 289.

⁵⁹⁵⁷ See *supra*, para. 1798.

⁵⁹⁵⁸ Prosecution's Closing Brief, para. 1100. See also Prosecution's Closing Argument, 20 Aug 2008, T. 26947.

⁵⁹⁵⁹ See Trial Judgement, vol. 3, paras 1208, 1210, 1212.

Chamber will examine whether the Trial Chamber erred in its assessment of the gravity of his crimes.⁵⁹⁶⁰

1835. In this regard, the Trial Chamber noted that Lazarević was guilty of aiding and abetting the forcible displacement of hundreds of thousands of Kosovo Albanians.⁵⁹⁶¹ It further noted that some victims “were of a particularly vulnerable nature, such as young women, elderly people, and children”.⁵⁹⁶² Thus, in its assessment of gravity, the Trial Chamber was clearly aware of Lazarević’s role as an aider and abettor of the crimes in question, the victims’ circumstances, and that the underlying crimes specifically targeted Kosovo Albanians in a discriminatory manner.⁵⁹⁶³ Despite the brevity of its reasoning, the Appeals Chamber is not satisfied that the Trial Chamber committed a discernible error warranting intervention. The Appeals Chamber accordingly dismisses the Prosecution’s submissions in this regard.

G. Common appeal on the failure to individualise sentences

1836. The Prosecution avers that “[t]he imposition of identical sentences for each JCE member and each aider and abettor fails to ‘individualise the penalties to fit the circumstances of the accused and the gravity of the crime.’”⁵⁹⁶⁴ Specifically, the Prosecution asserts that, in assessing the gravity of the crimes, the Trial Chamber failed to adequately consider the role of each individual and the degree of their participation in the crimes.⁵⁹⁶⁵ Šainović submits that the Trial Chamber failed to individualise the sentences, but argues that this failure should reduce rather than lengthen his sentence.⁵⁹⁶⁶ Lukić argues that the Trial Chamber failed to individualise the sentences and thereby failed to give adequate weight to mitigating factors which it found have been established.⁵⁹⁶⁷

1837. At the outset, the Appeals Chamber notes that the Prosecution’s appeal focuses on the failure to individualise sentences based on the gravity component.⁵⁹⁶⁸ The Appeals Chamber recalls that trial chambers have an “overriding obligation to tailor a penalty to fit the individual circumstances of the accused *and* the gravity of the crime, with due regard to the entirety of the

⁵⁹⁶⁰ See Trial Judgement, vol. 3, para. 1211; Prosecution’s Closing Brief, para. 1100.

⁵⁹⁶¹ Trial Judgement, vol. 3, para. 1173. See also *ibid.*, vol. 3, para. 1175.

⁵⁹⁶² Trial Judgement, vol. 3, para. 1173.

⁵⁹⁶³ See Trial Judgement, vol. 3, para. 925.

⁵⁹⁶⁴ Prosecution’s Appeal Brief, para. 121, citing *Naletilić and Martinović* Appeal Judgement, para. 593.

⁵⁹⁶⁵ Prosecution’s Appeal Brief, paras 162-163, 166; Prosecution’s Reply Brief, para. 72. See also Prosecution’s Appeal Brief, paras 167-193. According to the Prosecution, although the Trial Chamber “made findings showing the gravity of the crimes”, it failed to take these findings into account for sentencing purposes. See Prosecution’s Reply Brief, para. 73. The Appeals Chamber notes that the Prosecution “does not argue that the [Trial] Chamber failed to consider aggravating or mitigating circumstances.” See Prosecution’s Reply Brief, para. 72. See also Appeal Hearing, 15 Mar 2013, AT. 611-612.

⁵⁹⁶⁶ Šainović’s Appeal Brief, paras 525-527. See also Šainović’s Response Brief, para. 168.

⁵⁹⁶⁷ Lukić’s Appeal Brief, paras 826-829, 831-832. See also *ibid.*, paras 31-33; Lukić Response Brief, paras 140-144.

⁵⁹⁶⁸ See *supra*, fn. 5965.

case”.⁵⁹⁶⁹ Thus, gravity is not considered in isolation, but in conjunction with aggravating, mitigating, and other factors in determining the sentence.

1838. The Appeals Chamber notes that, in determining the term of imprisonment, the Trial Chamber did not consider it appropriate to distinguish between Ojdanić and Lazarević, who were sentenced to 15 years of imprisonment for aiding and abetting crimes, or to discriminate among Šainović, Pavković, and Lukić, who were each sentenced to 22 years of imprisonment for their participation in the JCE.⁵⁹⁷⁰ However, although the Trial Chamber acknowledged that the crimes attributed to each individual were not entirely identical,⁵⁹⁷¹ it failed to indicate whether it considered these differences in sentencing. For example, Pavković alone was convicted of persecution through sexual assaults in Ćirez/Qirez and Beleg,⁵⁹⁷² yet no distinction was drawn between his sentence and that imposed on Šainović and Lukić.

1839. Moreover, it is not apparent whether the Trial Chamber individually evaluated the mitigating and aggravating factors as well as the different role and participation of each of the Appellants in determining their respective sentences. For example, the Trial Chamber assessed the mitigating and aggravating factors in relation to each⁵⁹⁷³ and identified differences in the conduct and roles of Šainović, Pavković, and Lukić in executing the common purpose of the JCE.⁵⁹⁷⁴ Nonetheless, it imposed identical sentences on the three, simply because they were convicted on the basis of the same mode of liability.⁵⁹⁷⁵ The Appeals Chamber considers that, in light of the Trial Chamber’s obligation to individualise penalties in accordance with the circumstances of the accused and the gravity of the crime,⁵⁹⁷⁶ the Trial Chamber erred in declining to individualise the sentences it imposed.

1840. In these circumstances, the Appeals Chamber grants, in part, the Prosecution’s sixth ground of appeal and grants Šainović’s sub-ground 7(3), and Lukić’s sub-ground KK(1) in relevant part. The Appeals Chamber will consider the impact of these findings, if any, below.

⁵⁹⁶⁹ *D. Nikolić* Judgement on Sentencing Appeal, para. 19 (emphasis added) (internal references omitted).

⁵⁹⁷⁰ Trial Judgement, vol. 3, para. 1205.

⁵⁹⁷¹ See Trial Judgement, vol. 3, para. 1173 (“The Trial Chamber has determined, regarding some of the crimes in the Indictment, that they were committed, but that they were not attributable to some or all of the Accused”).

⁵⁹⁷² Trial Judgement, vol. 3, para. 788.

⁵⁹⁷³ Trial Judgement, vol. 3, paras 1180-1204.

⁵⁹⁷⁴ See Trial Judgement, vol. 3, paras 285-477 (Šainović), 636-790 (Pavković), 936-1140 (Lukić).

⁵⁹⁷⁵ Trial Judgement, vol. 3, paras 1205, 1208, 1210, 1212.

⁵⁹⁷⁶ *Bralo* Judgement on Sentencing Appeal, para. 9, referring to *Galić* Appeal Judgement, para. 393; *M. Nikolić* Judgement on Sentencing Appeal, para. 8; *Jokić* Judgement on Sentencing Appeal, para. 8; *Deronjić* Judgement on Sentencing Appeal, para. 8; *Babić* Judgement on Sentencing Appeal, para. 7; *D. Nikolić* Judgement on Sentencing Appeal, para. 9; *Čelebići* Appeal Judgement, para. 717.

H. Conclusion

1841. The Appeals Chamber finds that, with the exception of the arguments of the Prosecution, Šainović, and Lukić pertaining to the Trial Chamber's failure to individualise the sentences and Lukić's arguments regarding the assessment of his surrender as a mitigating circumstance, the parties have failed to demonstrate that the Trial Chamber erred in determining the sentences imposed. Accordingly, the Appeals Chamber grants the Prosecution's sixth ground of appeal, in part, sub-ground 7(3) of Šainović's appeal, and sub-grounds KK(1), in part, and KK(3) of Lukić's appeal. The Appeals Chamber will consider the impact of these findings, if any, below. The Appeals Chamber dismisses all other grounds of appeal raised by the Appellants and the Prosecution with respect to sentencing.

I. Impact of the Appeals Chamber's Findings on Sentences

1842. The Appeals Chamber recalls its finding that the Trial Chamber erred in failing to individualise the sentences of the Appellants.⁵⁹⁷⁷ Accordingly, the Appeals Chamber has duly considered the gravity of the crimes imputed to each of the Appellants. Moreover, it has carefully taken into account the conduct and contribution of Šainović, Pavković, and Lukić to the JCE, and Lazarević's acts of assistance to the forcible displacement, as well as the Appeals Chamber's reversal of some of its findings in this respect.⁵⁹⁷⁸

1843. With respect to Šainović, the Appeals Chamber recalls that it has reversed his convictions for murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity committed prior to 7 May 1999, *i.e.* at Đakovica/Gjakova town, Korenica/Korenicë and Meja/Mejë, Bela Crkva/Bellacërka, Mala Kruša/Krusha e Vogël, Suva Reka/Suhareka town, Izbica/Izbiçë, and near Gornja Sudimlja/Studimja e Epërme.⁵⁹⁷⁹ The Appeals Chamber also recalls that it has reversed his convictions for deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Tušilje/Tushila and Turićevac/Turiçec.⁵⁹⁸⁰ The Appeals Chamber considers that these reversals represent a reduction in Šainović's culpability and call for a revision of his sentence. Šainović, however, remains convicted of very serious crimes. In these circumstances, the Appeals Chamber reduces Šainović's sentence of 22 years of imprisonment to 18 years of imprisonment.

⁵⁹⁷⁷ See *supra*, para. 1839.

⁵⁹⁷⁸ See Trial Judgement, vol. 3, paras. 285-477 (Šainović), 636-790 (Pavković), 936-1140 (Lukić), 791-935 (Lazarević); *supra*, sub-sections VII.D, VII.E, VII.F, and VIII.B.

⁵⁹⁷⁹ See *supra*, sub-section VII.D.5.(b).

⁵⁹⁸⁰ See *supra*, sub-sections IV.E and VI.B.11.(d).

1844. With respect to Pavković, the Appeals Chamber recalls that it has reversed his convictions for murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity with respect to 274 of the 287 Kosovo Albanians killed in and around Korenica/Korenicë and Meja/Mejë during the Reka/Caragoj valley operation.⁵⁹⁸¹ The Appeals Chamber also recalls that it has reversed his convictions for deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Tušilje/Tushila and Turićevac/Turiçec.⁵⁹⁸² Pavković, however, remains convicted of very serious crimes.⁵⁹⁸³ In these circumstances, considering the limited nature of these reversals, the Appeals Chamber finds that no reduction of sentence is warranted. Consequently, the Appeals Chamber affirms Pavković's sentence of 22 years of imprisonment.

1845. With respect to Lukić, the Appeals Chamber recalls that it has reversed his convictions for murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity committed prior to or on 1 April 1999, *i.e.* at Bela Crkva/Bellacërka, Mala Kruša/Krusha e Vogël, Suva Reka/Suhareka town, Izbica/Izbicë, and Đakovica/Gjakova town.⁵⁹⁸⁴ The Appeals Chamber further recalls that it has reversed his convictions for murder with respect to 274 of the 287 Kosovo Albanians killed in and around Korenica/Korenicë and Meja/Mejë during the Reka/Caragoj valley operation.⁵⁹⁸⁵ The Appeals Chamber also recalls that it has reversed his convictions for deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Tušilje/Tushila and Turićevac/Turiçec.⁵⁹⁸⁶ The Appeals Chamber considers that these reversals represent a reduction in Lukić's culpability and call for a revision of his sentence. Additionally, in this context, the Appeals Chamber notes that it has found that his surrender should have been considered as a mitigating factor.⁵⁹⁸⁷ Lukić, however, remains convicted of very serious crimes.⁵⁹⁸⁸ In these circumstances, the Appeals Chamber reduces Lukić's sentence of 22 years of imprisonment to 20 years of imprisonment.

1846. With respect to Lazarević, the Appeals Chamber recalls that it has reversed his convictions for deportation and inhumane acts (forcible transfer) as crimes against humanity committed in

⁵⁹⁸¹ See *supra*, sub-section VI.C.2.

⁵⁹⁸² See *supra*, sub-sections IV.E. and VI.B.11.(d).

⁵⁹⁸³ The Appeals Chamber recalls that it has reversed the Trial Chamber's findings that Pavković contributed to the JCE through: (i) his involvement in the process of arming the non-Albanian population in Kosovo and disarming the Kosovo Albanian population; and (ii) his deployment of VJ troops in Kosovo in breach of the October Agreements (see *supra*, sub-section VII.E.2.(d)). It finds, however, that these reversals do not warrant a reduction of his sentence.

⁵⁹⁸⁴ See *supra*, sub-section VII.F.8.(b).

⁵⁹⁸⁵ See *supra*, sub-section VI.C.2.

⁵⁹⁸⁶ See *supra*, sub-sections IV.E. and VI.B.11.(d).

⁵⁹⁸⁷ See *supra*, sub-section IX.E.2.

⁵⁹⁸⁸ The Appeals Chamber does not consider that the reversal of the Trial Chamber's finding that Lukić contributed to the JCE through his involvement in the arming of the RPOs and the disarming of the Kosovo Albanian population warrants a reduction of his sentence (see *supra*, sub-section VII.F.4(j)).

Tušilje/Tushila, Kačanik/Kaçanik town, and Turićevac/Turiçec.⁵⁹⁸⁹ The Appeals Chamber also recalls that, while the Trial Chamber held Lazarević responsible as an aider and abettor in relation to three forms of assistance to the commission of deportation and forcible transfer, the Appeals Chamber has found that only one form of assistance supports his conviction for aiding and abetting the commission of these crimes.⁵⁹⁹⁰ The Appeals Chamber considers, however, that these findings have only a limited impact on Lazarević's overall culpability as he remains convicted of serious crimes. In these circumstances, the Appeals Chamber reduces Lazarević's sentence of 15 years of imprisonment to 14 years of imprisonment.

⁵⁹⁸⁹ See *supra*, sub-sections IV.E, VI.B.7.(a)(iii), and VI.B.11.(d).

⁵⁹⁹⁰ See *supra*, sub-sections VIII.B.3.(e), VIII.B.3.(f), and VIII.B.3.(g).

X. DISPOSITION

1847. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the appeal hearing on 11-15 March 2013;

SITTING in open session;

WITH RESPECT TO NIKOLA ŠAINOVIĆ,

GRANTS in part Šainović's fourth ground of appeal and **REVERSES** his convictions for committing through his participation in a JCE murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity at Bela Crkva/Bellacërka, Mala Kruša/Krusha e Vogël, Suva Reka/Suhareka town, Izbica/Izbicë, Đakovica/Gjakova town, Korenica/Korenicë and Meja/Mejë, and near Gornja Sudimlja/Studimja e Epërme (Count 3 in part, Count 4 in part, and Count 5 in part);

GRANTS sub-ground 7(3) of Šainović's appeal concerning sentencing;

DISMISSES, Judge Liu and Judge Tuzmukhamedov dissenting, Šainović's appeal in all other respects;

REVERSES *proprio motu* Šainović's convictions as a participant in a JCE for deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Tušilje/Tushila (Count 1 in part and Count 2 in part);

REVERSES Šainović's convictions as a participant in a JCE for deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Turićevac/Turiçec (Count 1 in part and Count 2 in part), as a result of granting sub-ground 1(f) of Lazarević's appeal in part;

AFFIRMS, Judge Liu and Judge Tuzmukhamedov dissenting, the remainder of Šainović's convictions under Counts 1 to 5;

ALLOWS in part, Judge Liu and Judge Tuzmukhamedov dissenting, the Prosecution's third and fourth grounds of appeal and **FINDS**, Judge Liu and Judge Tuzmukhamedov dissenting, that the Trial Chamber incorrectly found Šainović not guilty for committing through his participation in a JCE persecution, through sexual assaults, as a crime against humanity in Beleg, Ćirez/Qirez, and

Priština/Prishtina (Count 5 in part), but **DECLINES**, Judge Ramarosan dissenting, to enter new convictions against him in this regard;

GRANTS in part the Prosecution's sixth ground of appeal concerning sentencing;

DISMISSES the Prosecution's appeal concerning Šainović in all other respects;

SETS ASIDE the sentence of 22 years of imprisonment and **IMPOSES** a sentence of 18 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

WITH RESPECT TO NEBOJŠA PAVKOVIĆ,

DISMISSES Pavković's appeal in its entirety;

REVERSES *proprio motu* Pavković's convictions as a participant in a JCE for deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Tušilje/Tushila (Count 1 in part and Count 2 in part);

REVERSES Pavković's convictions as a participant in a JCE for deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Turićevac/Turičec (Count 1 in part and Count 2 in part), as a result of granting sub-ground 1(f) of Lazarević's appeal in part;

REVERSES Pavković's convictions as a participant in a JCE for murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity with respect to 274 of the 287 Kosovo Albanians killed in and around Korenica/Korenicë and Meja/Mejë during the Reka/Caragoj valley operation (Count 3 in part, Count 4 in part, and Count 5 in part), as a result of granting ground Q of Lukić's appeal in part;

AFFIRMS the remainder of Pavković's convictions under Counts 1 to 5;

ALLOWS in part the Prosecution's fourth ground of appeal and **FINDS** that the Trial Chamber incorrectly found Pavković not guilty for committing through his participation in a JCE persecution, through sexual assaults, as a crime against humanity in Priština/Prishtina (Count 5 in part), but **DECLINES**, Judge Ramarosan dissenting, to enter new convictions against him in this regard;

GRANTS in part the Prosecution's sixth ground of appeal concerning sentencing;

DISMISSES the Prosecution's appeal concerning Pavković in all other respects;

AFFIRMS the sentence of 22 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

WITH RESPECT TO VLADIMIR LAZAREVIĆ,

GRANTS in part sub-grounds 1(f) and 1(i) of Lazarević's appeal and **REVERSES** his convictions for aiding and abetting deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Turićevac/Turićec and Kačanik/Kaçanik town (Count 1 in part and Count 2 in part);

GRANTS in part sub-grounds 3(e), 3(h), and 3(i) of Lazarević's appeal and **SETS ASIDE** the Trial Chamber's findings that: (i) his failure to take adequate investigative and punitive measures substantially contributed to the commission of the crimes of forcible transfer and deportation by VJ forces; and (ii) his inspection of the VJ units provided encouragement and moral support to the VJ forces engaging in forcible displacement;

DISMISSES Lazarević's appeal in all other respects;

REVERSES *proprio motu* Lazarević's convictions for aiding and abetting deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Tušilje/Tushila (Count 1 in part and Count 2 in part);

AFFIRMS the remainder of Lazarević's convictions under Counts 1 and 2;

ALLOWS in part the Prosecution's fifth ground of appeal and **FINDS** that the Trial Chamber incorrectly found Lazarević not guilty for aiding and abetting deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Žabare/Zhabar, Dušanovo/Dushanova, Sojevo/Sojeva, Staro Selo/Fshat i Vjetër, and Mirosavlje/Mirosala (Count 1 in part and Count 2 in part), but **DECLINES**, Judge Ramaroson dissenting, to enter new convictions against him in this regard;

GRANTS in part the Prosecution's sixth ground of appeal concerning sentencing;

DISMISSES the Prosecution's appeal concerning Lazarević in all other respects;

SETS ASIDE the sentence of 15 years of imprisonment and **IMPOSES** a sentence of 14 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

WITH RESPECT TO SRETEN LUKIĆ,

GRANTS in part sub-ground O(1)(e) and ground Q of Lukić's appeal and **REVERSES** his convictions for committing through his participation in a JCE murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity at Bela Crkva/Bellacërka, Mala Kruša/Krusha e Vogël, Suva Reka/Suhareka town, Izbica/Izbicë, and Đakovica/Gjakova town as well as with respect to 274 of the 287 Kosovo Albanians killed in and around Korenica/Korenice and Meja/Mejë during the Reka/Caragoj valley operation (Count 3 in part, Count 4 in part, and Count 5 in part);

GRANTS sub-grounds KK(3) and KK(1), in part, of Lukić's appeal concerning sentencing;

DISMISSES Lukić's appeal in all other respects;

REVERSES *proprio motu* Lukić's convictions as a participant in a JCE for deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Tušilje/Tushila (Count 1 in part and Count 2 in part);

REVERSES Lukić's convictions as a participant in a JCE for deportation and inhumane acts (forcible transfer) as crimes against humanity committed in Turićevac/Turiçec (Count 1 in part and Count 2 in part), as a result of granting sub-ground 1(f) of Lazarević's appeal in part;

AFFIRMS the remainder of Lukić's convictions under Counts 1 to 5;

ALLOWS in part the Prosecution's third and fourth grounds of appeal and **FINDS** that the Trial Chamber incorrectly found Lukić not guilty for committing through his participation in a JCE persecution, through sexual assaults, as a crime against humanity in Beleg, Ćirez/Qirez, and Priština/Prishtina (Count 5 in part), but **DECLINES**, Judge Ramarosan dissenting, to enter new convictions against him in this regard;

GRANTS in part the Prosecution's sixth ground of appeal concerning sentencing;

DISMISSES the Prosecution's appeal concerning Lukić in all other respects;

SETS ASIDE the sentence of 22 years of imprisonment and **IMPOSES** a sentence of 20 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

RULES that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules;


ORDERS that, in accordance with Rules 103(C) and 107 of the Rules, that the Appellants are to remain in the custody of the Tribunal pending the finalisation of arrangements for their transfer to the State where their sentences will be served.

Done in English and French, the English text being authoritative.



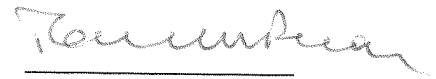
Liu Daqun

Presiding Judge



Mehmet Güney

Judge



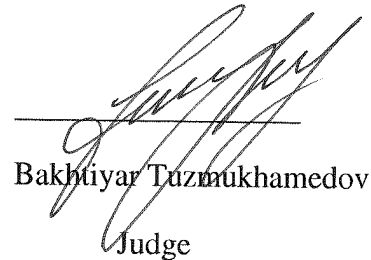
Fausto Pocar

Judge



Arlette Ramarosan

Judge



Bakhtiyar Tuzmukhamedov

Judge

Judge Liu Daqun appends a partially dissenting opinion and a declaration.

Judge Arlette Ramarosan appends a dissenting opinion.

Judge Bakhtiyar Tuzmukhamedov appends a dissenting opinion.

Dated this twenty-third day of January 2014,

At The Hague,

The Netherlands.

XI. PARTIALLY DISSENTING OPINION AND DECLARATION OF JUDGE LIU

1. In this Judgement, the Majority upholds Šainović's conviction pursuant to JCE III for murder as a violation of the laws or customs of war, and murder and persecution, through murder, as crimes against humanity.¹ In addition, the Majority finds Šainović responsible, pursuant to JCE III, for persecution, through sexual assaults, as a crime against humanity.² For the reasons set out below, I respectfully disagree with the Majority's findings that these crimes were foreseeable to Šainović and that he is therefore responsible for them pursuant to JCE III.

2. Additionally, while I am in agreement with the findings of the Judgement and its disposition, with the exception of the findings noted in my dissent, I append a Declaration in order to present my views with respect to one point of law that is discussed therein, namely liability under the third category of joint criminal enterprise ("JCE III") for crimes of specific intent.

A. Partially Dissenting Opinion: Šainović's Responsibility Pursuant to JCE III for Murder and Sexual Assaults

3. The Trial Chamber found that it was foreseeable to Šainović from the beginning of the campaign of forcible displacement in late March 1999 that VJ and MUP forces would also commit murder.³ The Appeals Chamber finds that the Trial Chamber erred in several respects in its assessment of the evidence,⁴ and concludes that the information available to Šainović prior to 7 May 1999 was insufficient to make murder, in particular, foreseeable to him.⁵ The Majority, however, finds that as of 7 May 1999, it was foreseeable to Šainović that murders could be committed and that he willingly took that risk. Consequently, the Majority upholds Šainović's conviction for murders committed at Dubrava/Lisnaja around 25 May 1999.⁶

4. The Majority bases its finding in this respect that murder was foreseeable to Šainović by this date essentially on only one piece of evidence.⁷ This is the evidence of a meeting on 7 May 1999 during which Šainović stated that "[t]here must be no private wars and private killings must be prevented."⁸ The Majority reasons that this evidence "show[s] that Šainović was aware that killings

¹ Appeal Judgement, para. 1083.

² Appeal Judgement, para. 1582.

³ Trial Judgement, vol. 3, para. 470.

⁴ See Appeal Judgement, paras 1070-1075, 1078.

⁵ Appeal Judgement, paras 1081, 1083.

⁶ Appeal Judgement, paras 1082-1083.

⁷ See Appeal Judgement, paras 1077, 1080-1083.

⁸ Exh. P1996, p. 3. See Appeal Judgement, paras 1077, 1080; Trial Judgement, vol. 3, paras 140, 344, 455, referring to Exh. P1996, p. 3.

were occurring in Kosovo around 7 May 1999” and thus supports the conclusion by this date, it was foreseeable to Šainović that murders could be committed by the Serbian forces during execution of the common purpose.⁹ I do not share the Majority’s view that this is the only reasonable conclusion to be drawn from the Šainović’s reference to “private killings” during the 7 May 1999 meeting.

5. Specifically, in my view, this evidence is insufficient to establish that it was foreseeable to Šainović that murders, constituting war crimes or crimes against humanity in particular, might be committed, as opposed to individual incidents of killings unrelated and unconnected to the operations being carried out by the VJ and MUP in implementation of the common plan.¹⁰ At the very least, I consider that it is unclear what exactly was meant by “private killings”. I also note that Šainović mentions “private killings” in the abstract – he makes no reference in this regard to any specific incidents or otherwise indicate that this reference is made in relation to his specific knowledge or awareness of the previous or on-going commission of murder by the Serbian forces.¹¹ In these circumstances, I am not convinced that this isolated statement in itself supports the conclusion that the commission of murder by Serbian forces during implementation of the common plan was foreseeable to Šainović as to support his conviction pursuant to JCE III. Furthermore, it is notable that Šainović stated not only that “private killings must be *prevented*” but further instructed to “[p]unish any such actions right away.”¹² In light of these statements, I am unable to conclude, as the only reasonable inference, that Šainović willingly took the risk that such crimes could occur.

6. With respect to the sexual assaults, the Majority concludes that sexual assaults, committed as a form of persecution, in Beleg on or about 29 March 1999, in Ćirez/Qirez in mid-April 1999, and in Priština/Prishtina on 1 April and in late May 1999 were foreseeable to Šainović.¹³ In support of this conclusion, the Majority relies on Šainović’s awareness of various crimes and acts of violence committed against the Kosovo Albanian population both in 1998 and 1999, and his resulting awareness of “the context in which the forcible displacement took place, including the existing ‘humanitarian catastrophe’”.¹⁴ The Majority subsequently reasons that “in light of his awareness of the atmosphere of aggression and violence that prevailed, Šainović knew that the Kosovo Albanian

⁹ See Appeal Judgement, paras 1081-1082.

¹⁰ Namely, in my view, it is not sufficient that Šainović merely foresaw the possibility that ordinary murders could be committed. Rather, in order to incur responsibility under JCE III, it must have been foreseeable to him that murders amounting war crimes and crimes against humanity could be committed by the Serbian forces.

¹¹ In this respect, the statement made by Šainović at the 7 May 1999 must be read in the proper context, namely what appears to be a political speech in which Šainović makes general statements on how Serbia should generally conduct itself in the war (see Exh. 1996, pp. 2-4).

¹² Exh. P1996, p. 3 (emphasis added).

¹³ Appeal Judgement, para. 1582.

¹⁴ Appeal Judgement, para. 1581.

women forced out of their homes were rendered particularly vulnerable.”¹⁵ I am unable to agree with the Majority on this conclusion.

7. In particular, I take issue with the fact that the Majority simply relies on “the totality of the circumstances surrounding the forcible displacement of the Kosovo Albanian population and Šainović’s knowledge thereof” to find that the commission of sexual assaults by the Serbian forces was reasonably foreseeable to him.¹⁶ I consider the Majority’s reasoning in this respect to be unpersuasive and speculative. In my opinion, the evidence in the record is insufficient to support as the only reasonable conclusion that persecution, through sexual assaults, was foreseeable to Šainović. In my view, Šainović’s knowledge of the circumstances in which the forcible displacement of the Kosovo Albanian population was carried out could not have, *per se*, demonstrated to him that sexual violence might be committed during the course of the Serbian forces’ operations. In other terms, the fact that Šainović was aware of an atmosphere of insecurity, rendering the Kosovo Albanian population, including namely women, vulnerable to a wide range of criminality does not lead to the only reasonable inference that he accordingly foresaw the possibility of commission of sexual assaults in particular.

8. It is also important to note that the evidence does not establish that Šainović was informed prior to 17 May 1999 of the commission of rapes or other sexual violence against women by the Serbian forces. Instead, the Majority refers to Šainović’s awareness of the commission of other distinct types of crimes, such as arson, looting, and excessive use of force. In my view, this alone does not necessarily lead to the only reasonable conclusion that he was therefore also aware that sexual assaults in particular might be committed by the Serbian forces during implementation of the common purpose.¹⁷ I am mindful that in the context of JCE III liability, it is not essential that an accused be aware of the past occurrence of a crime in order for the same crime to be foreseeable to him. However, foreseeability must be established in light of the information available to the accused and the particular circumstances of the case.¹⁸ In the circumstances of this case, I am not convinced that the requisite foreseeability on his part can be inferred solely from his knowledge of the general context and circumstances of the campaign of forcible displacement, especially taking into account: (i) the position of Šainović as a political coordinator; (ii) consequently, his distance

¹⁵ Appeal Judgement, para. 1581.

¹⁶ See Appeal Judgement, paras 1581-1582.

¹⁷ *But see* Appeal Judgement, para. 1581.

¹⁸ See, e.g., *Karadžić JCE III* Decision, para. 18

not only from the sites of the joint operations where crimes occurred¹⁹ but also in terms of his relationship to the direct perpetrators; and (iii) the information thus available to him.²⁰

9. I note that in its reasoning, the Majority also refers to the evidence that at the 17 May 1999 meeting, Šainović received specific information about the commission of rapes.²¹ In light of the Majority's conclusion that sexual assaults were already foreseeable to Šainović nearly two months prior to this meeting, it is clear that this evidence did not underpin its overall finding.²² In any case, in my view, this additional evidence, even when considered in conjunction with the other evidence relied upon by the Majority, does not demonstrate that the possibility that sexual assaults could be committed was *sufficiently substantial* as to be foreseeable to Šainović. In this regard, I note that this evidence of 17 May 1999 is Aleksandar Vasiljević's account of having presented at the meeting reports of crimes, such as rape, having been committed by soldiers.²³ However, his evidence lacks any specificity or detail as to what was conveyed in this respect at the meeting regarding the commission of rape.²⁴

10. For the foregoing reasons, I consider that the evidence in the record is insufficient to support as the only reasonable conclusion that murder and sexual assaults were foreseeable to Šainović. In these circumstances, I therefore consider that Šainović should not be held responsible, pursuant to JCE III, for murder as a violation of the laws or customs of war, and murder and persecution, through murder and sexual assaults, as crimes against humanity.

B. Declaration: Application of JCE III to Specific Intent Crimes

11. The Appeals Chamber upholds the convictions of Šainović, Pavković, and Lukić pursuant to JCE III for, *inter alia*, persecution, through murder and destruction of or damage to religious property, as a crime against humanity.²⁵ The Appeals Chamber also upholds Pavković's conviction pursuant to JCE III for persecution, through sexual assaults, as a crime against humanity.²⁶

¹⁹ While the Trial Chamber found that Šainović was present in Kosovo during the majority of the crimes committed there, I note that the evidence is inconclusive as to what he observed.

²⁰ In this respect, I am of the view that information on, and general awareness of, events on the ground was less accessible to Šainović than it was to Pavković and Lukić.

²¹ Appeal Judgement, para. 1581, referring to Trial Judgement, vol. 3, paras 351, 472, and references cited therein.

²² Appeal Judgement, paras 1581-1582.

²³ See Exh. P2600, paras 63-65. See also Trial Judgement, vol. 3, paras 350-351, 470-472, referring to Exh. P2600, paras 65-68, Exh. P2589, T. 15999-16004; Exh. P2592. See also Exh. P605, pp. 869-870.

²⁴ See Exh. P2600, para. 65.

²⁵ Appeal Judgement, paras 1083, 1093, 1283, 1541, 1549. The Appeals Chamber upholds the convictions of Šainović and Lukić for murder only in relation to some of the incidents of murder. However, as discussed above, I dissent from the findings concerning to Šainović's responsibility for murder.

²⁶ Appeal Judgement, para. 1283. The Appeals Chamber also finds Pavković responsible pursuant to JCE III for persecution, through sexual assaults, as a crime against humanity in relation to three additional sexual assaults (Appeal Judgement, para. 1603). However, in the circumstances of the present case, the Appeals Chamber declines to enter new convictions on appeal in relation to these three sexual assaults (Appeal Judgement, para. 1604).

Additionally, the Appeals Chamber finds Šainović²⁷ and Lukić responsible pursuant to JCE III for persecution, through sexual assaults, as a crime against humanity.²⁸ Šainović, Pavković, and Lukić were not found to possess the specific intent required for persecution as a crime against humanity.

12. While I acknowledge that convictions under JCE III for specific intent crimes, such as persecution, are allowed under the Tribunal's jurisprudence,²⁹ I respectfully disagree with this approach. For the reasons briefly set out below, I believe that JCE III should not be applied to specific intent crimes, such as genocide and persecution.³⁰ In particular, I consider such an approach to be highly problematic as, in application, it can lead to a paradoxical result whereby an accused is held responsible for a specific intent crime as a co-perpetrator although the requisite *mens rea* standard for such a crime is not met.

13. Genocide and persecution as a crime against humanity respectively require not only the intent to commit the underlying act but also a further specific intent – namely, the intent to destroy a protected group in whole or in part (in the case of genocide) or the intent to discriminate on racial, religious, or political grounds (in the case of persecution). The distinct mental element of *dolus specialis* sets genocide and persecution apart from other crimes falling within the jurisdiction of the Tribunal³¹ and generally reflects the high gravity that attaches to these two crimes.³² In this context, requiring proof of specific intent ensures that convictions for genocide and persecution as a crime against humanity are not imposed lightly.³³ In this context, it is important to fully appreciate the integral nature of this element to the structure of such crimes.

14. As a constitutive element of the crimes, such *dolus specialis* requires that the perpetrator's intent goes beyond the mere prohibited act (*i.e.* “a surplus of intent”³⁴). Whether or not, for example, the killing of a person may amount to genocide or persecution, as opposed to simple murder, is conditional on the presence of the requisite specific intent in the mind of the perpetrator.

²⁷ However, as discussed above, I dissent from the findings concerning to Šainović's responsibility for persecution, through sexual assaults, as a crime against humanity.

²⁸ Appeal Judgement, paras 1582, 1592. However, in the circumstances of the present case, the Appeals Chamber declines to enter new convictions on appeal in relation to these sexual assaults (Appeal Judgement, para. 1604).

²⁹ See Prosecutor v. *Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004 (“*Brđanin* Decision”), paras 5-10; *Stakić* Appeal Judgement, para. 38; Prosecutor v. *Slobodan Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 291.

³⁰ While I refer only to genocide and persecution as a crime against humanity, I note that the crime of acts or threats of violence as a war crime requires specific intent to spread terror among the civilian population (see, *e.g.*, *Galić* Appeal Judgement, para. 104), and in my view, should therefore also be excluded from the scope of JCE III. This crime, as well as genocide, even though not at issue in the present case, is nevertheless relevant to the present declaration.

³¹ See, *e.g.*, *Tadić* Appeal Judgement, para. 305; *Krnojelac* Appeal Judgement, para. 184; *Blaškić* Appeal Judgement, para. 137; *Akayesu* Trial Judgement, para. 498. See also *Krstić* Appeal Judgement, para. 134.

³² See for example *Krstić* Appeal Judgement, para. 134 (“Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent.”).

³³ See *Krstić* Appeal Judgement, para. 37.

³⁴ *Stakić* Trial Judgement, para. 552.

Specifically, with respect to persecution, the perpetrator needs to associate his conduct (*actus reus*) with the intent of discriminating on the basis of the race, religion, or politics of the victim. In these terms, the state of mind of the perpetrator qualifies the *actus reus*, thereby determining, as a result, the nature and characterization of the crime.

15. It follows that the *mens rea* required for specific intent crimes (*dolus specialis*) is incompatible with the standard of *dolus eventualis* or advertent recklessness, which consists only of an individual's awareness and acceptance of the risk that his conduct may possibly lead to a particular consequence.³⁵ Such a standard clearly falls short of the higher *mens rea* threshold to be met in order to support a conviction for specific intent crimes such as genocide or persecution. For example, mere acceptance or awareness, on the part of a perpetrator, of the possibility of that he is in fact acting a way that is discriminatory is not enough. Rather, the perpetrator must consciously seek or intend to discriminate as the further objective of his action. In the absence of proof that the perpetrator acted with such specific intent or objective, the crime is not realized and no conviction for commission of a specific intent crime, such as genocide or persecution, may be entered. Accordingly, a physical perpetrator cannot be convicted of a specific intent crime where only *dolus eventualis* is shown.

16. In my view, the bar to conviction in such circumstances with respect to physical perpetrators must likewise apply to individuals held liable pursuant their participation in a joint criminal enterprise. In this respect, I note that in the *Brdanin* Decision, the Appeals Chamber nevertheless held that an accused could be convicted of genocide under JCE III even where the accused did not possess the requisite specific intent so long as he could reasonably foresee that the crime might be carried out with genocidal intent.³⁶ In support of its conclusion, the Appeals Chamber notably reasoned that JCE III “is no different from other forms of criminal responsibility which do not require proof of intent to commit a crime on the part of an accused before criminal liability can attach”, such as command responsibility and aiding and abetting.³⁷ In my view, such reasoning is fundamentally flawed as it fails to take into account or appreciate that these other modes of liability

³⁵ See *Stakić* Appeal Judgement, paras 101-103; *Tadić* Appeal Judgement, para. 220. In other terms, *dolus eventualis* entails a situation where an accused foresees the possible consequences of his conduct, yet persists in this conduct regardless of such consequences (*i.e.* recklessly).

³⁶ *Brdanin* Decision, para. 6. See also *ibid.*, para. 9 (“[p]rovided that the standard applicable [...], *i.e.* ‘reasonably foreseeable and natural consequences’ is established, criminal liability can attach to any accused for any crime that falls outside of an agreed upon joint criminal enterprise.”).

³⁷ *Brdanin* Decision, para. 7. In this respect, the Appeals Chamber further stated that “[t]he fact that the third category of joint criminal enterprise is distinguishable from other heads of liability is beside the point” (*ibid.*, para. 9).

represent, respectively, different and lesser forms of criminal culpability than that which attaches to JCE liability.³⁸

17. Specifically, in all three of its manifestations, JCE is a form of commission and thereby distinct from the other ancillary modes of liability provided for under Article 7(1) of the Statute, namely, planning, instigating, ordering, and aiding and abetting.³⁹ Thus, there should be no difference in the constitutive elements required to establish the guilt of a direct perpetrator as compared to that of a JCE participant, who is liable as a co-perpetrator.⁴⁰ Thus while in JCE I and II the subjective element can encompass the liability for specific intent crimes,⁴¹ the *mens rea* requirement for JCE III (*dolus eventualis*) cannot be reconciled with specific intent crimes as this form of liability encompasses criminal conduct that was not specifically intended but only foreseen and accepted.⁴² Under JCE III, an accused therefore may be convicted of committing genocide or persecution notwithstanding the fact that he lacks the intention to achieve the further and primary purpose – namely the specific intent to destroy or to discriminate – which constitutes the essential feature of these crimes.⁴³ I, thus, find persuasive the words of the late Judge Cassese that “whoever

³⁸ Cf. *Kvočka* Appeal Judgement, para. 92; *Vasiljević* Appeal Judgement, para. 102; *Krnojelac* Appeal Judgement, para. 75. See also *Kvočka* Appeal Judgement, para. 91-92. This does not mean that liability under aiding and abetting or command responsibility may not, under certain situations, depending on the gravity of offence and individual circumstances of an accused, warrant a sentence that is equal to or greater than that which may be imposed with respect to a principal perpetrator of a crime.

³⁹ *Krajisnik* Appeal Judgement, para. 662; *Kvočka et al.* Appeal Judgement, paras 79-80; *Tadić* Appeal Judgement, paras 188, 191-192; *Prosecutor v. Milutinović et al.*, Case No.: IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction-Joint Criminal Enterprise, 21 May 2003, para. 20. The characterization of JCE as a form of commission, including in its third, or extended, form, is also logically implied in its conceptual structure. Namely, JCE liability follows the structure of significant contribution and intent (to further the common criminal purpose), as opposed to that of substantial contribution and knowledge or awareness which is associated with secondary liability (see, e.g., *Krajisnik* Appeal Judgement, para. 662).

⁴⁰ Cf. *Tadić* Appeal Judgement, para. 191 (“Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.”). See also *Kvočka et al.* Appeal Judgement, paras 80, 109-110.

⁴¹ See, for example, *Kvočka et al.* Appeal Judgement, paras 109-110 (holding that “participants in a basic or systemic form of joint criminal enterprise must be shown to share the required intent of the principal perpetrators. Thus, for crimes of persecution, the Prosecution must demonstrate that the accused shared the common discriminatory intent of the joint criminal enterprise.”).

⁴² Cf. Special Tribunal for Lebanon, Case No. STL-11-01/I, “Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging”, 16 February 2011 (“STL Interlocutory Appeal Decision”), para. 248. Under JCE III, criminal responsibility may be imputed to a member of the JCE for a crime falling outside of the common purpose if, in the circumstances of the case, it was foreseeable that such crime might be perpetrated by one or more members of the JCE or by persons used by any member of the JCE, and the accused willingly took that risk – that is with the awareness that such a crime was a possible consequence of the implementation of the JCE, decided to participate in the JCE (*Martić* Appeal Judgement, para. 168; *Krajisnik* Appeal Judgement, para. 225; *Brđanin* Appeal Judgement, paras 365, 411; *Stakić* Appeal Judgement, para. 87; *Kvočka et al.* Appeal Judgement, para. 83; *Blaškić* Appeal Judgement, para 33; *Vasiljević* Appeal Judgement, para. 101; *Tadić* Appeal Judgement, para. 228. See also *Tadić* Appeal Judgement, paras 204, 220 (“[w]hat is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk.”)).

⁴³ Cf. Antonio Cassese, “The Proper Limits of Individual Criminal Responsibility under the Doctrine of Joint Criminal Enterprise”, *Journal of International Criminal Justice*, vol. 5(1) (2007), p. 121 (expressing that liability under JCE III

is liable under the third category of JCE has a distinct *mens rea* from that of the ‘primary offender’: nevertheless, as the ‘secondary offender’ bears responsibility for the same crime as the ‘primary offender’, the ‘distance’ between the subjective element of the two offenders must not be so dramatic as in the case of crimes requiring specific intent. Otherwise, the crucial notions of ‘personal culpability’ and ‘causation’ would be torn to shreds.”⁴⁴

18. Accordingly, in my view, the scope of JCE III should be limited to exclude all specific intent crimes. I consider that convicting an accused who only foresaw and accepted the risk of the commission a specific intent crime – but did not possess the requisite *dolus specialis* – would either circumvent a crucial element of the crime,⁴⁵ or change the nature of the mode of liability creating a *tertium genus* between principal and accessory liability. In other terms, such an approach contravenes the fundamental principle of individual culpability.⁴⁶

19. I finally note that limiting the scope of JCE in this respect does not necessarily lead to a gap in the law. For example, where a JCE member only foresees and accepts the possibility of the commission of a specific intent crime as consequence of implementation of the JCE, he could still be held liable as an aider and abettor, provided that all other necessary conditions are met, including the appropriate standard of contribution. In my view, convicting a JCE member of this accessory form of liability is more compatible with the principle of personal culpability as it better reflects the gravity of the conduct of the accused.⁴⁷

20. Despite my disagreement with the application of JCE III to specific intent crimes, I nonetheless recognize that the law in this respect has become part of the Tribunal’s jurisprudence. Moreover, I note that none of the accused in the present case raise this particular legal challenge to JCE III liability in their respective appeals. Accordingly, I do not dissent on this basis from the

for specific intent crimes is thus “a logical impossibility” since an accused cannot be held responsible for committing a crime that requires specific intent unless that specific intent can be proved).

⁴⁴ Antonio Cassese, “The Proper Limits of Individual Criminal Responsibility under the Doctrine of Joint Criminal Enterprise”, *Journal of International Criminal Justice*, vol. 5(1) (2007), pp. 121-122.


⁴⁵ See *Brđanin* Decision, Separate Opinion of Judge Shahabuddeen, para. 4 (stating that “[t]he third category of [JCE] does not, because it cannot, vary the elements of the crime; it is not directed to the element of the crime; it leaves them untouched. The requirement that the accused be shown to have possessed a specific intent to commit genocide is an element of that crime. The result is that specific intent always has to be shown; if it is not shown, the case has to be dismissed.”).

⁴⁶ See generally *Tadić* Appeal Judgement, para. 186 (“The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).”).

⁴⁷ Cf. STL Interlocutory Appeal Decision, para. 249; *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo*, Case No. IT-96-21-A, Judgement, Separate and Dissenting Opinion of Judges Hunt and Bennouna, 20 February 2001, para. 27.

Judgement in relation to the findings on Šainović,⁴⁸ Pavković, and Lukić's responsibility for persecution as a crime against humanity pursuant to JCE III.

Done in English and French, the English text being authoritative.



Judge Liu Daqun

Dated this 23rd day of January 2014
At The Hague,
The Netherlands.

[Seal of the Tribunal]

⁴⁸ As described above previously, however, I dissent from the findings on Šainović's responsibility, pursuant to JCE III, for murder and sexual assaults on different basis – namely the lack of foreseeability of these crimes to Šainović.

XII. OPINION DISSIDENTE DU JUGE RAMAROSON

1. Dans le présent arrêt, la Chambre d'appel reconnaît que la Chambre de première instance a commis une erreur en acquittant Nikola Šainović et Streten Lukić d'actes de persécution ayant revêtu la forme de violences sexuelles comme crime contre l'humanité au titre de l'entreprise criminelle commune III, commis à Beleg, Qirez et Prishtina¹. La Chambre d'appel a considéré que Šainović et Lukić sont « responsables », conformément aux articles 5(h) et 7(1) du Statut, pour avoir commis ces crimes². En dépit de cette reconnaissance, la Chambre d'appel refuse de prononcer les condamnations correspondantes en se basant sur les « circonstances de l'affaire »³. Je souscris à la conclusion de la majorité selon laquelle la Chambre de première instance a commis une erreur en omettant de condamner Šainović et Lukić pour ces crimes. Cependant, il aurait fallu, à mon humble avis, non seulement conclure que ces accusés sont coupables, mais aussi reporter cette déclaration de culpabilité dans le dispositif tout en prononçant la peine correspondante. Je ne souscris donc pas au raisonnement de la Chambre d'appel en ce qu'il se limite à une simple constatation de l'erreur commise par la Chambre de première instance.

2. Le raisonnement de la majorité se trouve à la note de bas de page 5269 de l'arrêt⁴. Celle-ci y rappelle les dispositions de l'article 25(2) du Statut et se fonde sur cet article pour refuser d'entrer en voie de condamnation en appel au vu des circonstances de la présente affaire sans toutefois motiver les circonstances qui ont conduit la Chambre d'appel à refuser de prononcer de « nouvelles condamnations » pour ces crimes⁵.

¹ Arrêt, para. 1604. Je distingue le cas de Šainović et Lukić d'une part du cas de Lazarević et de Pavković d'autre part. En effet, Lazarević et Pavković restent condamnés, pour le premier, de crime d'expulsion et de transfert forcé commis à Peja, Deçan, Gjakova, Korenica, Dobrosh, Ramoc, Meja, Caragoj valley, Pirana, Celina, Izbica, Qirez, Prishtina, Zhegra, Lladova, Përlepnica, Kottlina, Lisnaja, pour le second, de persécutions ayant revêtu la forme de violences sexuelles comme crime contre l'humanité commises à Deçan et Qirez (cf. dispositif, pp. 740-741), tandis que Šainović et Lukić sont entièrement acquittés du crime de persécution ayant revêtu la forme de violences sexuelles comme crime contre l'humanité (cf. dispositif pp. 739-740, 742). La présente opinion se concentre donc sur les crimes de persécution à travers les actes de violences sexuelles comme crime contre l'humanité commis par Šainović et Lukić au titre de l'entreprise criminelle commune III.

² Arrêt, paras. 1582, 1592: « *As a result, pursuant to Articles 5(h) and 7(1) of the Statute, the Appeals Chamber finds Šainović responsible for committing, through his participation in a JCE, persecution, through sexual assaults, as a crime against humanity in Beleg, Ćirez/Qirez, and Priština/Prishtina* » ; « *As a result, pursuant to Articles 5(h) and 7(1) of the Statute, the Appeals Chamber finds Lukić responsible for committing, through his participation in a JCE, persecution, through sexual assaults, as a crime against humanity in Beleg, Ćirez/Qirez, and Priština/Prishtina* ».

³ Arrêt, para. 1604.

⁴ Voir également n. 5752.

⁵ Arrêt, para. 1604. Je note que les affaires citées en note de bas de page 5269 et 5752 justifient de façon explicite ou implicite le fait de ne pas infirmer les acquittements prononcés en première instance. L'Arrêt *Jelisić* indique : « *Vu les circonstances exceptionnelles de cette affaire, la Chambre d'appel, jugeant qu'il n'est pas dans l'intérêt de la justice que la requête de l'Accusation soit accueillie, décide de ne pas infirmer l'acquittement prononcé par la Chambre de première instance et de ne pas ordonner de nouveau procès* » (para. 77). L'Arrêt *Aleksovski* invoque le fait que les questions de fond à trancher concernaient davantage des points de droit que de fait, que la Chambre de première instance avait donc assis ses conclusions de fait sur un fondement erroné, enfin parce que les infractions matérielles reprochées à l'appelant à travers les charges des chefs 8 et 9 étaient identiques à celles qui sous-tendaient le chef 10

A. Il ne s'agit pas de « nouvelles condamnations »

3. Je souhaite exprimer, à titre préliminaire, mon désaccord avec le terme employé de « nouvelles condamnations ». Je soutiens qu'il ne s'agit pas de « nouvelles condamnations » car les crimes dont il est question en première instance et en appel sont inclus dans l'acte d'accusation⁶. De surcroît, les moyens de fait et de droit, soulevés par les parties, ont été plaidés tant en première instance⁷ qu'en appel⁸. Il ne s'agit donc pas d'une condamnation assise sur de nouvelles charges car les faits à l'origine de la condamnation recherchée en appel ont été discutés en première instance. A cet égard, je me rallie entièrement au raisonnement selon lequel le fait de remplacer un acquittement par une déclaration de culpabilité ne viole pas les principes du procès équitable dans la mesure où la condamnation porte sur une charge régulièrement portée, les moyens relatifs à ladite charge ayant été débattus devant la Chambre de première instance⁹.

4. A mon sens, évoquer une « nouvelle » condamnation ne pourrait se justifier que dans le cas où les charges ou bien le mode de responsabilité fondant la condamnation en appel n'auraient pas été plaidés dans l'acte d'accusation. À cet égard, le vocabulaire employé par la Chambre d'appel lorsqu'une condamnation a été omise d'être prononcée en appel atteste qu'il ne s'agit pas d'une « nouvelle » condamnation. Il s'agit en fait d'une condamnation qui devait être prononcée en première instance mais qui ne l'a pas été (« *disallowed* », « *refusé* ») en raison d'une application erronée du droit invalidant la partie du jugement ou d'une appréciation erronée des faits entraînant un déni de justice¹⁰. L'arrêt rendu par la Chambre d'appel se substitue au jugement de première instance, rétablissant ainsi la vérité judiciaire de façon rétroactive. Ce qui importe, à mon sens, est

dont l'appelant avait été reconnu coupable (para. 153). S'agissant des arrêts *Krstić, Stakić et Naletilić et Martinović*, le fait de ne pas prononcer de déclarations de culpabilité en appel était justifié par l'existence de condamnations cumulatives : Arrêt *Krstić*, paras. 220-229, p. 108 ; Arrêt *Stakić*, paras. 359-367, pp. 171-172; Arrêt *Naletilić et Martinović*, paras. 588-591, p. 251.

⁶ Acte d'Accusation, 21 Septembre 2006, paras. 16-21, 27, Chef 5 : Persécutions, paras. 76-102 (plus spécifiquement, point c, p. 61).

⁷ Voir, *inter alia*, Mémoire de mise en état de l'Accusation conformément à l'article 65 *ter* (E)(i) du RPP, 11 juin 2004, paras. 255-256 et n. 55, 65, 87 ; Mémoire de mise en état de la Défense de Šainović, 13 septembre 2004, para. 27 ; Mémoire de mise en état de l'Accusation, 10 mai 2006, paras. 2, 38, 41, 44, 52, 56, 60, 131, 144 ; Mémoire de mise en état de Lukić conformément à l'article 65 *ter* (F) du RPP, 6 juin 2006, paras. 133-134 ; Mémoire final de l'Accusation (confidentiel) 15 juillet 2008, paras 273-274, 308, 312, 316, 372, 423, 491, 502, 712, 792, 795, 827-828, 832, 898, 905 ; Mémoire final de la Défense de Lukić (confidentiel), 15 juillet 2008, pp. 156-185 ; Compte rendu d'audience du 23 août 2006, pp. 2232-2234 ; Compte rendu d'audience du 24 août 2006 (confidentiel), pp. 2260-2274 ; Compte rendu d'audience du 25 janvier 2007 (confidentiel), pp. 9242-9258 ; Compte rendu d'audience du 2 mars 2007 (confidentiel), pp. 10972-10995 ; Compte rendu d'audience du 26 août 2008, p. 27344.

⁸ Voir, *inter alia*, Mémoire d'Appel de l'Accusation (confidentiel), paras. 60-82, 87-123, 157-159 ; Mémoire en réponse de Šainović, paras. 48-119 ; Mémoire en réponse de Lukić, paras. 10-83 ; Réplique du Procureur, paras. 42-56 ; Compte rendu d'audience du 11 mars 2013, pp.159-165, 227 ; Compte rendu d'audience du 15 mars 2013 (confidentiel), pp. 577- 634, 652-654, 666-668.

⁹ Voir, par exemple, l'Opinion individuelle des Juges Shahabuddeen et Güney jointe à l'Arrêt *Semanza*, para. 7 ; voir également l'Opinion individuelle du Juge Shahabuddeen jointe à l'Arrêt *Galić*, para. 21.

¹⁰ Voir « *incorrectly disallowed* », « *refusé de déclarer* » : cf. Arrêt *Krstić*, dispositif, p. 108 ; Arrêt *Naletilić et Martinović*, para. 591 par exemple.

le fait que le procès ait été équitable en première instance comme en appel, ne violant pas ainsi les droits de l'accusé¹¹.

B. La Chambre d'appel a compétence pour infirmer les acquittements

5. Cette compétence trouve sa source dans les textes et résulte d'une interprétation conjointe des points 1) et 2) de l'article 25 du Statut¹². Tandis que l'article 25 1) autorise le Procureur à interjeter appel, l'article 25 2) fonde la compétence de la Chambre d'appel pour « *confirmer, annuler ou réviser les décisions des Chambres de première instance* ». En conséquence, la Chambre d'appel dispose du pouvoir d'annuler et de réviser les décisions de première instance. Toute interprétation contraire reviendrait à priver d'effet utile une partie de cette disposition en limitant la compétence de la Chambre d'appel au seul pouvoir de constatation. De surcroît, la jurisprudence antérieure a admis la possibilité de prononcer des déclarations de culpabilité en appel¹³. Elle a, de même, précisé que le fait d'entrer en voie de condamnation en appel ne constituait pas une violation des droits de l'accusé à un procès équitable¹⁴.

C. La Chambre d'appel aurait dû infirmer les acquittements au regard des circonstances

6. L'interprétation juridique du Statut du Tribunal et la jurisprudence antérieure permettaient à la Chambre d'appel de prononcer les déclarations de culpabilité correspondantes. J'ajoute qu'elle

¹¹ Je note à ce sujet que certains textes internationaux n'imposent pas l'institution d'un double degré de juridiction. Par exemple, l'article 6 para. 1 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales dispose que : « *Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle (...)* ». En revanche, l'article 2 du Protocole 7 à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales tel qu'amendé par le Protocole n° 11 institue le droit à un double degré de juridiction ; toutefois la cassation peut être considérée comme un second recours. « *1. Toute personne déclarée coupable d'une infraction pénale par un tribunal a le droit de faire examiner par une juridiction supérieure la déclaration de culpabilité ou la condamnation. L'exercice de ce droit, y compris les motifs pour lesquels il peut être exercé, sont régis par la loi. 2. Ce droit peut faire l'objet d'exceptions pour des infractions mineures telles qu'elles sont définies par la loi ou lorsque l'intéressé a été jugé en première instance par la plus haute juridiction ou a été déclaré coupable et condamné à la suite d'un recours contre son acquittement* ». J'ajoute que l'accusé est conscient que le Procureur peut interjeter appel d'un acquittement. En conséquence, je suis d'avis que le fait d'infirmer l'acquittement ne saurait contrevenir aux droits de l'accusé dans la mesure où, dès le déclenchement de la poursuite, l'accusé est parfaitement conscient de la peine qu'il pourrait encourir si sa culpabilité venait à être démontrée. A ce sujet, les articles 99 B) des Règlements des deux TPI, relatifs au statut de la personne acquittée, énoncent que si, lors du prononcé du jugement, le Procureur informe la Chambre de première instance en audience publique de son intention d'interjeter appel conformément aux articles 108 des Règlements des TPI, la Chambre de première instance peut, sur requête du Procureur, rendre une ordonnance avec effet immédiat dans l'attente du prononcé de l'arrêt.

¹² L'article 25 du Statut dispose : « *1. La Chambre d'appel connaît des recours introduits soit par les personnes condamnées par les Chambres de première instance, soit par le Procureur, pour les motifs suivants : a) erreur sur un point de droit qui invalide la décision ; ou b) erreur de fait qui a entraîné un déni de justice. 2. La Chambre d'appel peut confirmer, annuler ou réviser les décisions des Chambres de première instance* ».

¹³ Voir Arrêt *Strugar*, Arrêt *Galić*, Arrêt *Krnjelac*, Arrêt *Kupreskić*, Arrêt *Tadić*, Arrêt *Mrkšić and Šljivančanin*, Arrêt *Martić*.

¹⁴ Voir Arrêt *Gotovina*, para. 107 ; *Procureur c/ Mile Mrkšić and Veselin Šljivančanin*, Affaire No. IT-95-13/1-A, Decision on Motion on Behalf of Veselin Šljivančanin Seeking Reconsideration of the Judgement Rendered by the Appeals Chamber on 5 May 2009 – or an Alternative Remedy, pp. 2-3.

aurait dû le faire eu égard aux circonstances. En l'espèce, la Chambre de première instance a commis une erreur de droit s'agissant du degré de prévisibilité requis pour déterminer la *mens rea* de Šainović, Pavković et Lukić dans le cadre de l'entreprise criminelle commune III¹⁵. Cette erreur, commise par la Chambre de première instance et constatée par la Chambre d'appel, avait conduit à l'acquittement total de Šainović et Lukić des crimes en question¹⁶. Cette erreur de droit invalide certaines parties du jugement de première instance au sens de l'article 25 du Statut fixant les motifs d'appel¹⁷. Dans le cas d'espèce, la Chambre d'appel a constaté l'erreur de droit, concluant ainsi, à la lumière du critère juridique qui aurait dû être appliqué et sur la base des conclusions factuelles déjà émises par la Chambre de première instance, que Šainović et Lukić ont indûment été acquittés en première instance du crime de persécution ayant revêtu la forme de violences sexuelles comme crime contre l'humanité.

7. Si l'on se penche sur la jurisprudence antérieure du Tribunal, il appert que dans les cas où la Chambre d'appel a refusé de prononcer des déclarations de culpabilité en lieu et place des acquittements, cela se justifiait parce que les faits incriminés étaient inclus dans une autre qualification pénale¹⁸. Or, en l'espèce, le refus d'entrer en voie de condamnation en appel pourrait constituer à mon sens une violation du droit international dans la mesure où, ces faits n'étant pas incriminés à travers une qualification pénale distincte, cela a pour conséquence de laisser impunis des crimes graves de persécution sous forme de violences sexuelles en tant que crime contre l'humanité commis par Šainović et Lukić dans le cadre de l'entreprise criminelle commune III. Pour ma part, j'aurais constaté, comme la majorité, l'erreur de droit commise par la Chambre de première instance. Néanmoins, j'aurais ensuite substitué le droit applicable sans renvoyer l'affaire à la Chambre de première instance car, s'agissant d'une erreur de droit, la Chambre d'appel s'est appuyée sur les conclusions factuelles déjà émises par la Chambre de première instance, sans analyser *de novo* la crédibilité et la pertinence de la preuve soumise¹⁹. Enfin, j'aurais prononcé les déclarations de culpabilité correspondantes en les incluant dans le dispositif²⁰.

¹⁵ Arrêt, para. 1559.

¹⁶ Voir *supra* n. 1. Pavković reste condamné des crimes de persécutions ayant revêtu la forme de violences sexuelles comme crime contre l'humanité commises à Dečan et Qirez.

¹⁷ Voir *supra* n. 12.

¹⁸ Voir Arrêt *Krstić*, paras. 220-229, p. 108 ; Arrêt *Stakić*, para. 359-367, pp. 171-172 ; Arrêt *Naletilić et Martinović*, paras. 588-591, p. 251. Il s'agissait de condamnations cumulatives dans ces trois affaires, ce qui implique que les faits criminels à l'appui des condamnations cumulatives étaient tout de même punis. Voir également l'arrêt *Brđnanin*, paras 361, 414, 449. Le cas de cette affaire est particulier dans le sens où le Procureur n'a pas requis l'annulation ou la révision du jugement de première instance mais a demandé à ce que la Chambre d'appel réponde à un argument juridique soulevé aux fins d'adresser une question d'importance capitale pour la jurisprudence du Tribunal.

¹⁹ Arrêt, paras. 1575-1592.

²⁰ Voir *contra* dispositif, pp. 740, 741 : « declines (...) to enter new convictions ».

D. Les condamnations doivent figurer dans le dispositif

8. A mon humble avis, le fait d'inclure les déclarations de culpabilité dans le dispositif est fondamental car c'est au dispositif²¹, et non aux motifs, qu'est attachée l'autorité de chose jugée²². Le dispositif fixe la solution du litige. En conséquence, l'absence de solution du litige au sein du dispositif revient à occulter la requête du Procureur²³ et porte atteinte à la vérité judiciaire. Les droits de la victime sont également lésés²⁴ car cela pourrait avoir un impact sur leur demande de réparation de leur préjudice devant les tribunaux nationaux puisque la Chambre d'appel, bien que reconnaissant l'existence de violences sexuelles et leurs responsables, n'en est restée qu'au stade de motifs décisifs²⁵. Ainsi, quand bien même la Chambre d'appel a reconnu l'existence d'une erreur, l'appel du Procureur est resté sans véritable réponse juridique. En conséquence, les faits criminels restent impunis, les responsables ne sont pas reconnus coupables par la communauté internationale et le message judiciaire adressé aux victimes manque de clarté car le dispositif de l'arrêt, lequel a autorité de chose jugée, n'a point établi que les accusés ont effectivement commis le crime dont il est question.

Conclusion

9. A mon sens, le fait de refléter la condamnation dans le *quantum* de la peine de l'accusé est un point différent²⁶; cependant, les déclarations de culpabilité doivent être prononcées et reportées dans le dispositif. L'absence de déclaration de culpabilité dans le dispositif me paraît illogique tant du point de vue judiciaire que du point de vue de la justice, portant en cela atteinte à la vérité

²¹ Le dispositif se définit comme étant la « *partie d'un jugement contenant la solution du litige et à laquelle est attachée l'autorité de la chose jugée. Cette autorité n'existe pas en principe, pour les motifs du jugement qui étayent le dispositif* » (GUINCHARD (S.), MONTAGNIER (G.), *Lexique des termes juridiques*, Dalloz, 2001, p. 208).

²² Une distinction est faite dans le droit romano-germanique, comme en droit malgache et en droit français par exemple, entre les motifs décisifs et les motifs décisifs.

²³ Mémoire d'appel du Procureur, paras. 60-82.

²⁴ Voir Résolution 827 (1993) adoptée par le Conseil de sécurité à sa 3217^{ème} séance, le 25 mai 1993 : « *Le Conseil de sécurité, (...) Décide également que la tâche du Tribunal sera accomplie sans préjudice du droit des victimes de demander réparation par les voies appropriées pour les dommages résultant de violations du droit humanitaire international* ». En pratique, quand bien même les victimes ne peuvent obtenir réparation de leur préjudice directement devant les TPI, elles peuvent faire valoir les condamnations prononcées par le Tribunal devant les juridictions nationales et demandent pour ce faire, à la Section des Victimes et des Témoins, des copies certifiées des jugements et arrêts rendus par le Tribunal.

²⁵ Ces motifs sont ainsi qualifiés parce qu'ils n'ont pas autorité de chose jugée tandis que les motifs décisifs sont le lien nécessaire conduisant à la déclaration de culpabilité et à la condamnation. Voir à ce sujet : « *Les motifs décisifs, on le sait, statuent sur l'un des chefs des prétentions litigieuses, mais, par suite d'une erreur rédactionnelle, la décision n'est pas reprise dans le dispositif. Ce sont, si l'on veut, des éléments du dispositif qui se sont égarés dans les motifs. Les motifs décisifs, pour ce qui les concerne, ne décident rien par eux mêmes. Ils sont le soutien nécessaire du dispositif, ou de certains des chefs de décision que l'on retrouve dans ce dernier.* », NORMAND (J.) « L'étendue de la chose jugée au regard des motifs et du dispositif », Bulletin d'information de la Cour de cassation, hors-série, accessible sur http://www.courdecassation.fr/publications_cour_26/bulletin_information_cour_cassation_27/hors_serie_2074/jug_e_1_8625.html

²⁶ En l'espèce, la peine fixée par la Chambre d'appel reflète, à mon sens, celle qui aurait été encourue par les accusés pour l'ensemble de leurs crimes.

judiciaire. Le fait de lutter contre l'impunité est l'une des principales raisons d'être du Tribunal, constituant une part essentielle de son mandat²⁷. Compte tenu de la gravité extrême des crimes concernés, je ne peux donc souscrire à l'approche de la majorité, laquelle, bien que reconnaissant les accusés comme étant responsables, consiste à simplement prendre acte de l'erreur commise par la Chambre de première instance sans entrer en voie de condamnation à leur encontre, ceci ayant pour conséquence de laisser les crimes de persécution sous forme de violences sexuelles commis au Kosovo impunis.

Fait en français et en anglais, la version française faisant foi.



Juge Arlette Ramaroson

Le 23 janvier 2014
La Haye (Pays-Bas)

[Sceau du Tribunal]

²⁷ Voir Résolution 827 du Conseil de Sécurité des Nations Unies, *op. cit.*, « Résolu à mettre fin à de tels crimes et à prendre des mesures efficaces pour que les personnes qui en portent la responsabilité soient poursuivis en justice » ; « Préambule du Statut du TPIY : Créé par la Conseil de sécurité agissant en vertu du Chapitre VII de la Charte des Nations Unies, le Tribunal international pour juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991 (ci-après dénommé « le Tribunal international ») fonctionnera conformément aux dispositions du présent statut ».

XIII. DISSENTING OPINION OF JUDGE TUZMUKHAMEDOV

A. Introduction

1. In this Appeal Judgement, the Appeals Chamber, by majority, affirms Šainović's convictions pursuant to Article 7(1) of the Statute for committing, based on JCE I, the crimes of deportation and other inhumane acts (forcible transfer) as crimes against humanity.¹ The Majority further upholds Šainović's convictions pursuant to JCE III for murder and persecutions through murder as crimes against humanity as well as murder as a violation of the laws or customs of war in relation to a single incident at Dubrava/Lisnaja,² and persecutions through destruction of or damage to religious property as crimes against humanity.³ In addition, the Majority finds Šainović responsible under JCE III for persecutions through sexual assaults as crimes against humanity.⁴

2. For the reasons set out below, I respectfully disagree with the Majority that the Trial Chamber reasonably found that Šainović made a significant contribution to the common purpose and thus participated in the JCE.

3. With respect to Lazarević, the Appeals Chamber affirms his convictions pursuant to Article 7(1) of the Statute for aiding and abetting the crimes of deportation and other inhumane acts (forcible transfer) as crimes against humanity.⁵ I explain further below my disagreement with the Majority's discussion of the issue of specific direction as an element of aiding and abetting.

B. Šainović's contribution to the JCE

4. In concluding that Šainović made a significant contribution to the common purpose, the Trial Chamber observed that "he was the person Milošević used to orchestrate the events in Kosovo" and that "[h]is purpose was to co-ordinate the forces in Kosovo, convey Milošević's instructions for the activities of the various actors there, and provide his own suggestions and instructions to these actors, all in pursuit of the ultimate goal to retain control in Kosovo."⁶ The Trial Chamber considered that "[a]s such, Šainović was one of the most crucial members" of the JCE.⁷

¹ See Appeal Judgement, paras 835-1057, p. 740.

² Appeal Judgement, para. 1083, p. 740.

³ Appeal Judgement, paras 1092-1093, p. 740.

⁴ Appeal Judgement, paras 1576-1582, pp. 740-741.

⁵ Appeal Judgement, para. 1765, p. 742.

⁶ Trial Judgement, vol. 3, para. 467.

⁷ Trial Judgement, vol. 3, para. 467.

5. These conclusions need to be read in the context of findings which the Trial Chamber made elsewhere, in particular that: (i) Šainović was one of Milošević's closest and most trusted associates both in 1998 and 1999, and that this relationship led him to assume a leading role during meetings of the Joint Command and various other meetings involving VJ and MUP officials;⁸ (ii) as one of the leading members of the Joint Command, Šainović possessed extensive *de facto* powers over both VJ and MUP forces in Kosovo;⁹ and (iii) Šainović's "role as the politician whose task was to liaise between the VJ and the MUP on the one hand, and Milošević on the other, continued" in 1999 because he attended meetings with VJ and MUP officials.¹⁰

6. In my understanding, these findings describe the thrust of the case against Šainović with respect to his contribution to the JCE.¹¹ For a number of reasons, I disagree with the Majority's reasoning with respect to Šainović's relationship with Milošević, his role in the Joint Command in 1999, and certain meetings during the NATO air campaign. Most importantly, I consider that the Trial Chamber failed to characterize throughout the Trial Judgement any specific conduct by which Šainović contributed to the JCE. Before turning to these issues in detail, I will briefly recall some general circumstances that are relevant to Šainović's alleged participation in the JCE.

⁸ Trial Judgement, vol. 3, para. 427. See also Appeal Judgement, para. 836.

⁹ Trial Judgement, vol. 3, para. 462. See also Appeal Judgement, para. 969.

¹⁰ See Trial Judgement, vol. 3, para. 337. See also Appeal Judgement, para. 915.

¹¹ I note that, in assessing Šainović's contribution to the common purpose, this Appeal Judgement additionally addresses matters pertaining to his position as Chairman of the Commission for the Co-operation with the KVM (see Appeal Judgement, paras 886-906) and dealings with Rugova in April and May 1999 (see Appeal Judgement, paras 907-914). However, for the following reasons, I do not consider it necessary to comment on these issues.

The Trial Chamber considered that in his capacity as Chairman of the Commission for the Co-operation with the KVM, Šainović "was able to continue his dealings with high-level VJ and MUP officials in Kosovo", meaning that "his dealings with and influence over Pavković and Lukić continued without interruption" and that "he still exhibited authority over all representatives of the VJ and MUP he came into contact with." See Trial Judgement, vol. 3, para. 401.

In assessing Šainović's intent within the meaning of JCE I, the Trial Chamber concluded that since he was the "crucial link" between Milošević in Belgrade and the VJ and MUP forces on the ground in Kosovo, his role was that of the "political co-ordinator" of the forces in Kosovo. In this context, the Trial Chamber stated that Šainović "continued to hold [this role] following the completion of the Plan for Combating Terrorism in October 1998, first as the Chairman of the Commission for Co-operation with the KVM and then, in the period of the NATO bombing, both as a member of the Joint Command and as the highest-ranking politician who continued meeting with Pavković and Lukić, was travelling to Kosovo often, and had extensive dealings with Ibrahim Rugova." See Trial Judgement, vol. 3, para. 462 (emphasis added). In my view, the latter statement indicates that Šainović's position as Chairman of the Commission for the Co-operation with the KVM was not directly relevant to the Trial Chamber's assessment of his contribution to the JCE during the relevant time period between 24 March and 25 May 1999. I submit that this interpretation is further supported by an overall reading of the Trial Chamber's specific findings on Šainović's activities as Chairman of the Commission (see Trial Judgement, vol. 3, paras 368-402) as well as the Appeals Chamber's discussion of Šainović's challenges regarding his authority in this position (see Appeal Judgement, paras 886-906).

Similarly, I see no need to comment on Šainović's challenges regarding his dealings with Rugova in 1999 (see Appeal Judgement, paras 907-914) because the Trial Chamber's findings on this matter only show that Šainović met with Rugova on a number of occasions in April and May 1999 to discuss events in Kosovo and matters pertaining to Rugova's house arrest. See Trial Judgement, vol. 3, paras 410-417. Regardless of whether it was reasonable for the Trial Chamber to find that such contact was another factor indicating Šainović's role as the political co-ordinator of the Serbian forces in Kosovo during the NATO air campaign (see Trial Judgement, vol. 3, para. 462), I consider that no reasonable trier of fact could have inferred from Šainović's dealings with Rugova as such that he made a significant contribution to the common purpose.

(a) Preliminary observations: Šainović's contribution in light of the temporal scope of the JCE

7. In this Appeal Judgement, the Appeals Chamber unanimously considers that the Trial Chamber made no finding as to whether the JCE existed before 24 March 1999.¹² Since the Appeals Chamber refrains from making its own finding in this regard, it should, in accordance with the principle of *in dubio pro reo*, assume that the JCE did not exist earlier. It is furthermore important that the Trial Chamber convicted Šainović for crimes committed in Kosovo during the period of 24 March to 25 May 1999.¹³

8. It is a fundamental principle of criminal law that there be a temporal co-existence of the *actus reus* and the *mens rea* of the proscribed conduct.¹⁴ Consequently, in order for the Appeals Chamber to affirm Šainović's convictions pursuant to the JCE doctrine, it must have been reasonable for the Trial Chamber to conclude that he made a significant contribution to the common purpose some time between 24 March and 25 May 1999. Neither Šainović's conduct prior to this period nor any action on his part thereafter could, in and of itself, have reasonably amounted to a contribution to the JCE. At most, such conduct might have provided circumstantial evidence that Šainović contributed to the JCE at the relevant time.

9. The Trial Chamber expressly acknowledged that "the direct evidence of [Šainović's] activity in influencing and co-ordinating the activities of the forces of the FRY and Serbia in 1999 is not as extensive as that relating to 1998."¹⁵ Nonetheless, the Trial Chamber concluded that the available evidence "indicate[d] clearly" that Šainović's "authority and influence were undiminished and his presence at a number of meetings in Kosovo during the NATO campaign [was] in keeping with his previous involvement with the province."¹⁶

10. These findings show that the Trial Chamber's conclusions regarding Šainović's authority in Kosovo during the relevant time period of 24 March to 25 May 1999 and, in particular, his contribution to the JCE, essentially rested on circumstantial evidence. Therefore, these conclusions

¹² See Appeal Judgement, para. 610.

¹³ See Appeal Judgement, paras 835, 1059, with further references.

¹⁴ Cf. *Nahimana et al.* Appeal Judgement, para. 313 ("In the opinion of the Appeals Chamber, this clearly indicates that it was the intention of the framers of the Statute that the Tribunal should have jurisdiction to convict an accused only where all of the elements required to be shown in order to establish his guilt were present in 1994. [...] Accordingly, the Appeals Chamber finds that it must be shown that: [...] The acts or omissions of the accused establishing his responsibility under any of the modes of responsibility referred to in Article 6(1) and (3) of the Statute occurred in 1994, and *at the time of such acts or omissions the accused had the requisite intent (mens rea)* in order to be convicted pursuant to the mode of responsibility in question." (emphasis added)); *Simba* Appeal Judgement, para. 266 ("The inquiry is [...] whether at the moment of commission the perpetrators possessed the necessary intent."). See also *Krajišnik* Appeal Judgement, para. 203; *Naletilić and Martinović* Appeal Judgement, para. 114 ("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.").

¹⁵ Trial Judgement, vol. 3, para. 467.

had to be the only reasonable inferences available.¹⁷ In the remainder of this section, I will explain why in my view this standard was not met.

(b) Šainović's relationship with Milošević

11. As mentioned above, the Trial Chamber concluded that Šainović was one of Milošević's closest and most trusted associates in 1998 and 1999, and that this relationship led him to assume a leading role in Joint Command and other high-profile meetings.¹⁸ In this context, the Trial Chamber held that Šainović's various roles enabled him to be a "political co-ordinator" of civilian and military forces in Kosovo "who had a decision-making role with respect to the province".¹⁹ In assessing Šainović's intent within the meaning of JCE I, the Trial Chamber found that, since he was the "crucial link" between Milošević in Belgrade and the VJ and MUP forces on the ground in Kosovo, his role was indeed that of the "political co-ordinator" of the forces in Kosovo.²⁰ Moreover, when concluding that Šainović significantly contributed to the JCE, the Trial Chamber considered that his purpose was to co-ordinate the forces in Kosovo, convey Milošević's instructions for the activities of the forces there, and provide his own suggestions and instructions.²¹

12. The Majority addresses and rejects Šainović's appeal submissions regarding specific aspects of his relationship with Milošević in 1998 and 1999.²² I do not consider it necessary to comment on such details except for the Trial Chamber's findings that Šainović attended three or four meetings with Milošević during the NATO air campaign and that, in light of Šainović's role, inter alia, as a political co-ordinator of VJ and MUP activities in Kosovo, it was "inconceivable" that he did not ever discuss the activities of these forces with Milošević.²³ Since there appears to be no evidence in the trial record as to what was addressed during Šainović's meetings with Milošević, I find the Trial Chamber's conclusion to be rather speculative. I therefore disagree with the Majority that the Trial Chamber committed no error in this respect.²⁴

13. In any event, I note that none of the Trial Chamber's findings mentioned above demonstrate that Šainović did in fact take any specific action in furtherance of the JCE on Milošević's behalf between 24 March and 25 May 1999.²⁵ Accordingly, I consider that no reasonable trier of fact could

¹⁶ Trial Judgement, vol. 3, para. 467.

¹⁷ See *Lukić and Lukić* Appeal Judgement, para. 149; *Bošković and Tarčulovski* Appeal Judgement, para. 99.

¹⁸ See Trial Judgement, vol. 3, para. 427.

¹⁹ Trial Judgement, vol. 3, para. 427.

²⁰ Trial Judgement, vol. 3, paras 331, 462. See also *ibid.*, vol. 3, para. 427.

²¹ Trial Judgement, vol. 3, para. 467.

²² See Appeal Judgement, paras 838-856.

²³ Trial Judgement, vol. 3, paras 424, 426.

²⁴ *Contra* Appeal Judgement, para. 849.

²⁵ See also Trial Judgement, vol. 3, paras 295-299, 418-427.

have concluded from this relationship as such that Šainović made a significant contribution to the JCE.

(c) Šainović's role in the Joint Command

14. As indicated above, the Trial Chamber held that, as one of the leading members of the Joint Command, Šainović possessed extensive *de facto* powers over both the VJ and MUP forces in Kosovo.²⁶ The Trial Chamber concluded that, “[a]s such, he was *able* to make proposals, give suggestions, and issue instructions to both Pavković and Lukić and thus to the VJ and the MUP respectively.”²⁷

15. In order to find that Šainović played a leading role in the Joint Command, the Trial Chamber relied mainly on meetings of this body which took place until October 1998.²⁸ With respect to 1999, the Trial Chamber accepted that, except for one Joint Command meeting on 1 June 1999, which Šainović attended, there was no evidence that this body met in the same manner as it did in 1998.²⁹ Nonetheless, the Trial Chamber found in this context that, “even though less apparent, the Joint Command existed in 1999 and co-ordinated a number of actions in Kosovo.”³⁰ It also considered that, while there was no evidence of Šainović attending meetings in 1999 “similar to the meetings that he attended in 1998, his role as the politician whose task was to liaise between the VJ and the MUP on the one hand, and Milošević on the other, continued, since he attended a number of meetings with VJ and MUP officials in Belgrade and Kosovo.”³¹

16. I already have difficulties with the Majority's decision to dismiss Šainović's submissions that he did not play a significant role in the Joint Command in 1998,³² and that it was unreasonable for the Trial Chamber to conclude that this body existed as a distinct and self-contained entity in 1999.³³ However, there is no need to dwell on such matters because the crucial question is whether

²⁶ Trial Judgement, vol. 3, para. 462.

²⁷ Trial Judgement, vol. 3, para. 462 (emphasis added).

²⁸ See Trial Judgement, vol. 3, paras 306-331.

²⁹ Trial Judgement, vol. 3, para. 337. See also *ibid.*, vol. 1, paras 1112-1113, 1115, 1150.

³⁰ Trial Judgement, vol. 3, para. 337. See also *ibid.*, vol. 1, paras 1150-1151.

³¹ Trial Judgement, vol. 3, para. 337.

³² See Appeal Judgement, paras 857-881.

³³ See Appeal Judgement, paras 772-829. In particular, I disagree with the Majority's finding that a reasonable trier of fact could have relied on 16 orders issued by the Priština Corps Command in 1999 and bearing the heading of the “Joint Command” to conclude that the Joint Command existed and exercised authority over the events in Kosovo in 1999. See, in particular, Appeal Judgement, paras 797-799. The Trial Chamber found that the “Joint Command” heading was added to the orders in question “to ensure that they would be accepted into the MUP chain of command” and “to lend them an air of greater authority” so that they “evoked the authority of the entity referred to in 1998 as the ‘Joint Command’”. See Trial Judgement, vol. 1, para. 1151. In my view, regardless of why the 16 orders bore the heading of the Joint Command, the mere fact that they emanated from the Priština Corps Command calls into question whether it was reasonable for the Trial Chamber to rely on these orders even as corroborating evidence for its conclusions regarding the existence and authority of the Joint Command at the time.

the Trial Chamber could have reasonably found that Šainović had a leading role in the Joint Command during the relevant time period of 24 March to 25 May 1999, and made a significant contribution to the JCE by virtue of this role. For the following reasons, I am not convinced that any reasonable trier of fact could have come to such conclusions.

17. Turning first to Šainović's role in the Joint Command in 1999, I note that the witnesses who testified about the 1 June 1999 meeting consistently stated that no orders were issued there.³⁴ Nonetheless, the Trial Chamber considered that the evidence pertaining to the meeting was "consistent with the leadership role Šainović had exhibited in the 1998 Joint Command meetings, as well as the fact that he was the person responsible for relaying Milošević's orders to officials in Kosovo."³⁵ It further observed that Šainović "was seen by others in the meeting" on 1 June 1999 as the most senior figure and as somebody who could order that activities of the joint forces cease due to an international agreement reached between Milošević and Martti Ahtisaari, and had the discretion to instruct the completion of such activities.³⁶ In light of these facts, the Trial Chamber concluded that Šainović was "able to convey orders and provide approval for certain VJ and MUP activities" also in 1999.³⁷

18. I disagree with the Majority that it was reasonable for the Trial Chamber to infer from these circumstances that Šainović's authority within the Joint Command continued in 1999.³⁸ Specifically, I consider that such authority could not have reasonably been demonstrated through the evidence of witnesses who merely testified as to their personal impressions of the 1 June 1999 meeting when stating that Šainović presided over this meeting, "gave the distinct impression that he was the head", and was treated "deferentially" by other participants.³⁹

19. Furthermore, in my view, it was unreasonable for the Trial Chamber to consider that Šainović was seen at the 1 June 1999 meeting as somebody who could "order" that activities of the joint forces in Kosovo cease and that he was thus able at the time to "convey orders and provide approval for certain VJ and MUP activities".⁴⁰ According to the evidence, Šainović informed the

I further disagree with the Majority's conclusion that it was reasonable for the Trial Chamber to rely on two combat reports of 25 and 29 April 1999 which mentioned certain decisions of the Joint Command. See Trial Judgement, vol. 1, para. 1116. See also Appeal Judgement, paras 803-805. The underlying evidence does not specify when such decisions were made and whether they originated from the Joint Command as such. See Exh. P2106, p. 2; Exh. P2107, p. 2. See also Appeal Judgement, para. 805. In my view, this evidence could therefore not have reasonably supported the Trial Chamber's findings that the Joint Command existed and exercised authority over the events in Kosovo in 1999. *Contra* Appeal Judgement, para. 805.

³⁴ See Trial Judgement, vol. 3, paras 356-357. See also Appeal Judgement, para. 946.

³⁵ Trial Judgement, vol. 3, para. 359.

³⁶ Trial Judgement, vol. 3, para. 359.

³⁷ Trial Judgement, vol. 3, para. 359 (emphasis added).

³⁸ *Contra* Appeal Judgement, para. 948.

³⁹ See Trial Judgement, vol. 3, para. 357. *Contra* Appeal Judgement, para. 943.

⁴⁰ See Appeal Judgement, para. 947, referring to Trial Judgement, vol. 3, para. 359.

participants of the meeting that an agreement between the FRY and the international community, which envisaged the withdrawal of the VJ from Kosovo, would be signed soon; he further stated that this withdrawal would have to commence soon.⁴¹ I cannot join the Majority's interpretation that Šainović's statements had a "binding effect" and were "clearly an instruction for what was to be done pursuant to the forthcoming agreement".⁴² In my opinion, no reasonable trier of fact could have excluded another possible inference from the evidence, namely that, in his capacity as the Deputy Prime Minister responsible for foreign policy and international relations of the FRY and the person in charge of FRY co-operation with the KVM,⁴³ Šainović simply passed on information regarding impending events.

20. In any case, I recall that the 1 June 1999 meeting occurred after the commission of all crimes for which Šainović was convicted. Consequently, the evidence of this meeting as such could not have demonstrated that Šainović exercised authority within the Joint Command during the relevant period of 24 March to 25 May 1999. In particular, I maintain that the probative value of this evidence is tenuous at best with respect to the most pertinent issue, namely whether Šainović made any significant contribution to the JCE at the relevant time. In this regard, I now briefly turn to address whether there are any findings in the Trial Judgement as to activities of the Joint Command between 24 March and 25 May 1999 which could have been attributed to Šainović.

21. The Trial Chamber acknowledged that, while there was significant evidence regarding co-ordination efforts between the VJ and the MUP in Kosovo in 1999, there was "scant evidence specifically indicating a Joint Command through 1999".⁴⁴ The Trial Chamber further noted that there was no evidence of a clear mandate for the Joint Command in 1999.⁴⁵ However, it observed that important actors, including some of the accused in the present case, "referred to" the Joint Command in 1999, "which they had to take into account in their duties".⁴⁶ It considered that: (i) such references alluded "to the whole co-ordination system established in 1998 between the VJ and the MUP"; (ii) an entity known as the Joint Command was part of this system in 1998; (iii) the co-ordination system continued to function in 1999; and (iv) "it had become standard practice" for MUP and VJ representatives to hold co-ordination meetings before finalising plans for and

⁴¹ See Trial Judgement, vol. 3, para. 356. See also Appeal Judgement, para. 947, which specifically mentions the evidence of Witness Stojanović that Šainović stated that "all activities should be terminated as soon as possible" (see Appeal Judgement, para. 947, fn. 3140, referring to Momir Stojanović, 7 Dec 2007, T. 19775).

⁴² *Contra* Appeal Judgement, para. 947. I particularly disagree with the Majority's finding that the binding effect of Šainović's statements was demonstrated by the fact that Lazarević and Lukić expressed dissatisfaction with the decision for withdrawal. See Appeal Judgement, para. 947.

⁴³ See Trial Judgement, vol. 3, para. 290.

⁴⁴ Trial Judgement, vol. 1, para. 1112.

⁴⁵ Trial Judgement, vol. 1, para. 1112.

⁴⁶ Trial Judgement, vol. 1, para. 1151.

conducting joint operations.⁴⁷ In addition, the Trial Chamber specifically mentioned 16 orders with the heading of the “Joint Command” which were issued by the Priština Corps Command in 1999,⁴⁸ and “put into effect” by both MUP and VJ forces.⁴⁹ It also took into account “suggestions” issued by Ojdanić to Pavković on 17 April 1999, in which the former mentioned a “Joint Command order” of 15 April 1999.⁵⁰

22. It is important to emphasize that the Trial Chamber made these findings only in the context of assessing whether the Joint Command actually existed and exercised authority in Kosovo in 1999.⁵¹ At no point did the Trial Chamber conclude that the Joint Command, as a distinct entity, issued any instruction or order to VJ or MUP forces in Kosovo or was involved in the co-ordination of the activities of these forces between 24 March and 25 May 1999.⁵² Thus, the Trial Judgement does not point to any specific activity by the Joint Command at the relevant time which could have been attributed to Šainović and amounted to a significant contribution to the JCE. Neither is there any evidence that Šainović was personally involved in issuing the above-mentioned 16 orders from the Priština Corps Command or the Joint Command order to which Ojdanić referred in his suggestions of 17 April 1999.

23. For these reasons, I am of the view that, even if it were to be assumed that Šainović played a leading role in the Joint Command in 1999, no reasonable trier of fact could have inferred from this status as such that Šainović made a significant contribution to the JCE. In fact, the only tangible evidence regarding Šainović’s conduct during the relevant time period of 24 March to 25 May 1999 pertains to the meetings to which I turn now.

(d) Šainović’s participation in other meetings

24. The Trial Chamber concluded that Šainović’s “role as the politician whose task was to liaise between the VJ and the MUP on the one hand, and Milošević on the other, continued” in 1999

⁴⁷ Trial Judgement, vol. 1, para. 1151.

⁴⁸ See Trial Judgement, vol. 1, paras 1122-1135, 1151.

⁴⁹ Trial Judgement, vol. 1, para. 1123.

⁵⁰ See Trial Judgement, vol. 1, paras 1118-1119. It appears that the Joint Command order mentioned in Ojdanić’s 17 April 1999 suggestions was not tendered into evidence so it is not possible to ascertain the author of the document. I further note that the Trial Chamber relied on two VJ combat reports of 25 and 29 April 1999 which mentioned decisions of the Joint Command. See Trial Judgement, vol. 1, para. 1116. See also Appeal Judgement, paras 803-805. However, as mentioned above, the underlying evidence does not specify when such decisions were made and whether they originated from the Joint Command as such. See *supra*, fn. 33. Consequently, the Trial Chamber’s findings in this regard do not show that the Joint Command as a distinct entity issued these decisions during the relevant time period of 24 March to 25 May 1999.

⁵¹ See Trial Judgement, vol. 1, paras 1112-1152.

⁵² Judging from the relevant parts of the Appeal Judgement, it appears to me that the Majority shares my understanding that the Trial Chamber made no such finding. See Appeal Judgement, paras 778-832, in particular, *ibid.*, para. 796 (“[i]rrespective of whether [the Trial Chamber’s designation of the 16 orders issued by the Priština Corps Command

because he attended a number of meetings with VJ and MUP officials.⁵³ The Appeals Chamber unanimously finds that the Trial Chamber erred in relying on evidence of a meeting on 13 April 1999 in reaching its conclusions.⁵⁴ This leaves for consideration evidence relating to meetings on 4 April, 4 May, 7 May, and 17 May 1999.⁵⁵

25. The Trial Chamber found that at the MUP staff meeting on 4 April 1999, which was presided over by Stevanović and Lukić, Šainović “seemingly gave directives” to senior members of the MUP.⁵⁶ This finding was based on the minutes of the meeting which according to the Trial Chamber record Šainović as stating that “it was necessary for the first stage of anti-terrorist operations to be completed today for the purpose of active defence and for the protection of the territory and the border in case of a breakthrough by the aggressor deep into the territory of the FRY,” and that persons who had been detained for perpetrating crimes should be held in custody until they were taken over by judicial organs.⁵⁷ Despite his late arrival at the meeting, the Trial Chamber inferred from these remarks that Šainović exhibited a “leadership role with respect to the use of the MUP forces in Kosovo” on this occasion.⁵⁸

26. With respect to the 4 May 1999 meeting, the Trial Chamber concluded that Šainović “either attended or, at the very least, was fully informed about the contents of” the meeting during which events in Kosovo, including crimes committed there and the reaction of the military courts, were discussed.⁵⁹

27. The minutes of the 7 May 1999 MUP staff meeting indicate that the meeting was chaired by Lukić and that Šainović “took part in” it.⁶⁰ Šainović is recorded as having stated, *inter alia*:

The terrorist band, the so-called KLA [...], has been destroyed in anti-terrorist combat and numerous operations conducted by police forces in Kosovo and Metohija. After Operation *Jezerce*, there will no longer be a large terrorist stronghold, except for 30 to 40 smaller-scale strongholds numbering 500 to 700 terrorists in areas in which the Secretariats themselves will destroy and completely neutralise them.

[...]

Defending the country from the aggressor continues to be our primary task, as does the struggle against terrorism by all in their own areas. After Operation *Jezerce*, all detachments of PJP [...] will return to their Secretariats and, in cooperation with the VJ [...] work on destroying the

with the heading of the ‘Joint Command’] was appropriate, the Trial Chamber duly took into account that the source of these orders was the Priština Corps Command.”)

⁵³ See Trial Judgement, vol. 3, para. 337.

⁵⁴ See Appeal Judgement, paras 922-926.

⁵⁵ See Trial Judgement, vol. 3, paras 341-354; Appeal Judgement, paras 915-939.

⁵⁶ Trial Judgement, vol. 3, para. 341.

⁵⁷ Trial Judgement, vol. 3, para. 341.

⁵⁸ Trial Judgement, vol. 3, para. 341.

⁵⁹ Trial Judgment, vol. 3, para. 343.

⁶⁰ Exh. P1996, p. 1.

remaining terrorist groups. In addition to destroying the so-called KLA and terrorists, the main objective of antiterrorist operations will be to ensure peace in Kosovo and Metohija. Both our citizens and the entire world must realise this.⁶¹

[...]

The state's no. 1 task is to clear up the terrain; this must be done without delay. We are obligated to know everything that is happening in the field. No one may say that he did not know that he was supposed to do something. No one may do things perfunctorily, because everyone is recording our actions and observing us through a magnifying glass. There are no private wars and private killings must be prevented. Punish any such actions right away. You must inform General Lukić about every incident.

The relationship of the VJ and the police has been defined and settled and this is functioning well, and detachments are returning to the places where they are stationed on the territory of the Secretariats of the Interior in the entire region of Kosovo and Metohija in order to maintain law and order.⁶²

[...]

The President of the Republic and the Supreme Commander, Slobodan MILOŠEVIĆ, heard the report of the Commander of the Third Army and the MUP Police Staff of the Republic of Serbia for Kosovo and Metohija and the text of a statement was made public, representing a state directive and order issued by the Supreme Commander, Slobodan MILOŠEVIĆ, which should be relayed to all police commanders as a task assigned by the Supreme Command.⁶³

28. The Trial Chamber heard evidence that this was a political speech, essentially reiterating what Milošević had said following the 4 May 1999 meeting, and that Šainović was not issuing orders or directives to the MUP.⁶⁴ Nonetheless, the Trial Chamber considered that Šainović “did much more than pass on a message of encouragement from the President”, noting that he “was again demonstrating a leadership role” during the meeting and that his speech was “much longer and more detailed” than a newspaper report about the 4 May 1999 meeting.⁶⁵ Accordingly, the Trial Chamber concluded that Šainović “was providing approval for [VJ and MUP officials’] actions and was also issuing instructions and conveying Milošević’s orders”.⁶⁶

29. Finally, the Trial Chamber noted that at the 17 May 1999 meeting, information on reports of crimes committed by the VJ, the MUP, and volunteers in Kosovo was presented and that Šainović stated in this context that: (i) he had no knowledge of volunteer groups in the “Kosovo Polje centre” but would check the report on the matter; (ii) people had been paying large sums of money for army and MUP uniforms and entering Kosovo illegally in order to loot; and (iii) he agreed with Pavković that it would be a good idea to send a “neutral body” or a “joint state commission” from Belgrade to

⁶¹ Exh. P1996, p. 2.

⁶² Exh. P1996, p. 3.

⁶³ Exh. P1996, p. 4.

⁶⁴ See Trial Judgement, vol. 3, para. 347.

⁶⁵ Trial Judgement, vol. 3, para. 348. See also *ibid.*, vol. 3, para. 462.

⁶⁶ Trial Judgement, vol. 3, para. 348.

Kosovo to investigate all allegations made at the meeting.⁶⁷ The Trial Chamber did not specifically evaluate these comments.⁶⁸

30. Since the Trial Judgement does not contain any explanation as to the relevance of Šainović's attendance and statements at the 17 May 1999 meeting, I am unable to agree with the Majority that the Trial Chamber did not err in relying on this evidence as showing Šainović's role in liaising between the VJ and the MUP and Milošević.⁶⁹ I further disagree with the Majority that it was reasonable for the Trial Chamber to consider that Šainović issued instructions or conveyed orders from Milošević at the 7 May 1999 meeting.⁷⁰ Moreover, even if any of Šainović's statements at this meeting could have reasonably been interpreted as instructions or orders, I observe that the Trial Chamber did not explain how this demonstrated that such statements had an actual effect on activities of VJ and MUP forces in the course of which crimes were committed in furtherance of the common purpose.⁷¹ As explained below, I believe that such a demonstration would have been required in order to find that Šainović made a significant contribution to the JCE.⁷² For the same reason, I consider it irrelevant whether or not Šainović exhibited a "leadership role" at the 4 April and 7 May 1999 meetings.

31. Most importantly, I note that the Trial Chamber apparently did not consider that Šainović contributed to the JCE as such by participating in any of the above-mentioned meetings and making certain statements there. Rather, the Trial Chamber only used this evidence to find that Šainović had "authority over the VJ and the MUP" in 1999.⁷³ I now turn to explain why in my view this finding on Šainović's authority was insufficient for any reasonable trier of fact to conclude that he made a significant contribution to the JCE.

(e) The significance of Šainović's alleged contribution to the JCE

32. Šainović generally challenges the Trial Chamber's conclusion that he made a significant contribution to the JCE, asserting, *inter alia*, that the Trial Chamber failed to explain how he as a political co-ordinator could have contributed to the "accomplishment of the JCE objective", and

⁶⁷ Trial Judgement, vol. 3, para. 351.

⁶⁸ See also Trial Judgement, vol. 3, paras 351-353.

⁶⁹ *Contra* Appeal Judgement, paras 938-939.

⁷⁰ *Contra* Appeal Judgement, paras 932-933.

⁷¹ In this respect, I note that Šainović's reference at the 7 May 1999 meeting to a statement which was made public and represented "a state directive and order issued by" Milošević (see Exh. P1996, p. 4) appears to have concerned the prosecution of crimes committed in Kosovo. See Trial Judgement, vol. 3, paras 343-345. Likewise, Šainović mentioned at this meeting that actions such as "private wars and private killings" had to be prevented and punished "right away", and that relevant incidents had to be reported to Lukić (see Exh. P1996, p. 3). I fail to see how such statements could have reasonably been interpreted as contributing to the commission of crimes in furtherance of the common purpose.

⁷² See *infra*, paras 33-36.

pointing out that he did not co-ordinate VJ and MUP forces after 24 March 1999 and that no evidence shows that his activities had any effect on the events on the ground.⁷⁴ For the following reasons, I strongly disagree with the Majority's decision to dismiss these challenges.⁷⁵

33. I recall that the JCE doctrine demands that the accused make a significant contribution to the crimes for which he is convicted.⁷⁶ This requires the trier of fact to characterize the accused's contribution to the common purpose.⁷⁷ In my view, a proper characterization entails a designation of specific conduct by the accused which amounts to a particular act or omission. In addition, the trier of fact should provide adequate reasoning as to how such conduct had a tangible effect on crimes which were committed in furtherance of the common purpose.

34. In my view, the Trial Chamber failed to live up to these basic requirements with respect to Šainović. An overall reading of the relevant parts of the Trial Judgement demonstrates that the Trial Chamber placed considerable emphasis on the fact that Šainović was a "powerful official",⁷⁸ who had "authority",⁷⁹ demonstrated a "leadership role" on several occasions,⁸⁰ and was "able" to issue directions or influence events in Kosovo.⁸¹ However, no one incurs criminal liability merely by virtue of being a person of authority or capable of issuing instructions. Responsibility justifying a criminal conviction may attach only to individuals who actually put their powers into use for the commission of crimes or culpably fail to exert their influence over perpetrators. This is what the Prosecution should prove beyond reasonable doubt and the trier of fact should find, based on a reasoned opinion in the judgement.

35. While the Trial Chamber concluded that Šainović made a significant contribution to the common purpose because he was the person whom Milošević "used to orchestrate the events in Kosovo" and his "purpose was to co-ordinate the forces in Kosovo, convey Milošević's instructions for the activities of the various actors there, and provide his own suggestions and instructions to

⁷³ See, in particular, Trial Judgement, vol. 3, para. 301. See also *ibid.*, vol. 3, paras 336-361. In my view, this also explains why the Trial Chamber made no definite finding as to whether Šainović attended the 4 May 1999 meeting or was merely informed about what was discussed there. See Trial Judgement, vol. 3, para. 343.

⁷⁴ See Appeal Judgement, paras 979-980.

⁷⁵ *Contra* Appeal Judgement, paras 983, 986-989.

⁷⁶ See *Krajišnik* Appeal Judgement, para. 215; *Brdanin* Appeal Judgement, para. 430. See also Appeal Judgement, para. 985.

⁷⁷ See *Brdanin* Appeal Judgement, para. 430 ("In establishing [the requisite elements under the JCE doctrine], the Chamber must, among other things: [...] characterize the contribution of the accused in this common plan.").

⁷⁸ See Trial Judgement, vol. 3, para. 299.

⁷⁹ See, e.g., Trial Judgement, vol. 3, paras 295, 297, 301, 309, 325, 368, 381, 384, 401, 457, 465, 467.

⁸⁰ See, e.g., Trial Judgement, vol. 3, paras 309, 328, 341, 348, 359.

⁸¹ See, e.g., Trial Judgement, vol. 3, paras 359, 462. See also *ibid.*, vol. 3, paras 299 ("great deal of influence over events in the province and was empowered to make decisions"), 342 ("able to exert influence over the VJ and its high level officers"), 361 ("The Chamber accepts that there is no evidence that Šainović exercised authority over Ojdanić, who during the war met with Milošević on a daily basis. However, this is not to say that Šainović had no influence over the activities of the VJ and the MUP, given his close relationship with Milošević on the one hand, and his dealings with Pavković and Lukić on the other.").

these actors,”⁸² the Trial Judgement does not name any specific incident where Šainović indeed orchestrated or co-ordinated events in Kosovo between 24 March and 25 May 1999 during which FRY and Serbian forces committed crimes against Kosovo Albanians. Instead, the Trial Chamber was content simply with finding that Šainović had a leading role in the Joint Command and was involved in a number of meetings with VJ and MUP officials. However, as explained above, the Trial Judgement does not point to evidence that the Joint Command as an entity issued instructions or orders to the VJ and the MUP or was otherwise involved in the co-ordination of the activities of these forces in Kosovo during the period of 24 March to 25 May 1999.⁸³ Neither did the Trial Chamber find that Šainović’s involvement in the above-mentioned meetings on 4 April, 4 May, 7 May, or 17 May 1999 as such demonstrated that he contributed to crimes committed by VJ and MUP forces in furtherance of the common purpose.⁸⁴

36. In light of these facts, I submit that the Trial Chamber failed to properly characterize through which specific conduct Šainović contributed to the JCE during the relevant period of 24 March to 25 May 1999. In my opinion, by resorting to the above-mentioned nebulous concepts of Šainović’s authority at the time, the Trial Chamber ultimately even left open whether it held Šainović responsible for active conduct, omission, or both.⁸⁵

37. In addition, I consider it worth recalling that Šainović was a civilian politician and thus not part of the formal chain of command of the MUP or the VJ. He therefore had no direct authority over these forces.⁸⁶ While it is certainly not impossible to build a criminal case based on the idea that the accused usurped *de facto* powers outside of the proper framework, one would expect such a hypothesis to be rather delicate and complex to prove. I tend to think that an adequately reasoned opinion regarding Šainović’s role vis-à-vis the MUP and the VJ should have included, for example, a discussion as to why Milošević would have needed him to liaise between the MUP and the VJ and whether the police and military forces would in fact have followed the directions of a civilian, such as Šainović.⁸⁷ Not only does the Trial Judgement not contain any discussion on these matters, but it

⁸² Trial Judgement, vol. 3, para. 467.

⁸³ See *supra*, para. 22.

⁸⁴ See *supra*, paras 30-31.

⁸⁵ In this context, I recall that an accused’s “authority”, for example, over military forces is normally relevant to the assessment of his superior responsibility for having failed to prevent or punish crimes by his subordinates. This form of responsibility clearly describes omissions. See also Trial Judgement, vol. 3, para. 465 (“In contrast to his extensive knowledge of crimes in Kosovo, Šainović showed little initiative in dealing with the allegations, other than making a few statements. This was despite his extensive *de facto* and *de jure* authority within the province, and his close relationship with Milošević.”).

⁸⁶ See also Trial Judgement, vol. 3, paras 341, 348.

⁸⁷ On these issues, see, for example, Trial Judgement, vol. 3, paras 360-361.

also ultimately imputes to Šainović the authority over the entire VJ and MUP in Kosovo between 24 March and 25 May 1999 from a limited number of meetings.⁸⁸

38. In my view, the Majority conveniently ignores all of the problems mentioned above by adopting a piecemeal approach to Šainović's challenges to certain findings in the Trial Judgement regarding his authority in Kosovo in 1999, essentially dismissing them, with very few exceptions, one by one.⁸⁹ In doing so, the Majority loses sight of the most crucial fact that there simply was no evidence and no finding in the Trial Judgement as to what exactly Šainović did (or did not do that he should have done) during the relevant time period of 24 March to 25 May 1999 that could have amounted to a significant contribution to the JCE. In my opinion, this indicates that neither the Trial Chamber nor the Majority has been able to articulate by what measure Šainović was involved in crimes committed in furtherance of the common purpose. I submit that this alone should be a clear sign that the case against Šainović was not strong enough to justify his convictions for serious criminal offenses resulting in a significant prison sentence.

39. For these reasons, I conclude that no reasonable trier of fact could have found that the only reasonable inference available was that Šainović made a significant contribution to the JCE. I therefore dissent from the Majority's decision to affirm Šainović's convictions pursuant to JCE.

C. Specific Direction

40. In the context of Lazarević's appeal against his convictions for aiding and abetting, the Majority discusses in great detail the issue of specific direction.⁹⁰ I have no intention to comment on whether or not specific direction is an element of aiding and abetting. Rather, for the reasons set out below, I am not convinced that this Appeal Judgement is the appropriate forum to address the issue, especially because it has no pertinence to Lazarević's case. Accordingly, I also refrain from joining any finding of the Majority which in my understanding may constitute a new statement in substance on the issue of specific direction.

41. In paving the ground for its assessment, the Majority considers that the interpretation adopted by the majority in the *Perišić* Appeal Judgement that specific direction is an element of the *actus reus* of aiding and abetting and must be established beyond reasonable doubt⁹¹ "would appear

⁸⁸ See Trial Judgement, vol. 3, paras 339-359.

⁸⁹ See Appeal Judgement, paras 835-989.

⁹⁰ See Appeal Judgement, paras 1617-1651.

⁹¹ See *Perišić* Appeal Judgement, para. 36.

to be at odds [...] with a plain reading” of the *Mrkšić and Šlivančanin* Appeal Judgement and the ruling in the *Lukić and Lukić* Appeal Judgement.⁹²

42. The Majority then proceeds by stating that, where faced with conflicting previous decisions, the Appeals Chamber is obliged to determine which decision to follow or whether to depart from both decisions for cogent reasons in the interests of justice.⁹³ In an accompanying footnote, the Majority considers that: (i) the issue was raised by the parties; (ii) the Trial Chamber found that, as Commander of the Priština Corps, Lazarević was present in Kosovo and regularly inspected his troops in the field throughout the campaign of forcible displacement which took place there at the relevant time, but did not find that Lazarević was physically present at the crime sites when VJ forces committed crimes; (iii) consequently, if the ruling of the *Perišić* Appeal Judgement requiring an explicit consideration of specific direction in cases where the aider and abettor is “remote” were to be adopted in the present case, “it would be necessary to examine whether Lazarević’s assistance was remote as to require explicit consideration of specific direction;” and (iv) the remoteness of Lazarević’s assistance is a matter disputed by the parties.⁹⁴ Consequently, the Majority concludes that the discussion as to whether to follow the *Perišić* Appeal Judgement with respect to the issue of specific direction “cannot be circumvented in determining the outcome of the present case”.⁹⁵ In addition, the Majority notes that even if the application of the *Perišić* Appeal Judgement would not ultimately invalidate the Trial Judgement, the Appeals Chamber may hear appeals in which a party has raised a legal issue of general significance to the Tribunal’s jurisprudence, and concludes that the significance of the issue at hand warrants the intervention by the Appeals Chamber.⁹⁶

43. While all these explanations purport to demonstrate that it is absolutely necessary to address the issue of specific direction in this Appeal Judgement, I remain unconvinced. Specifically, I observe in bewilderment the Majority’s reasoning that if it were to adopt the ruling of the *Perišić* Appeal Judgement, it would have to examine whether Lazarević’s assistance was remote because such remoteness would require explicit consideration of specific direction. However, the Majority explicitly considers specific direction at length anyway, regardless of Lazarević’s remoteness and without adopting the approach of the majority in the *Perišić* Appeal Judgement. It is my view that the *Perišić* Appeal Judgement has no bearing on Lazarević’s case because his conduct would not fall into the category of “remote assistance” within the meaning of that judgement.⁹⁷ In this respect,

⁹² Appeal Judgement, para. 1621.

⁹³ Appeal Judgement, para. 1622.

⁹⁴ Appeal Judgement, fn. 5320.

⁹⁵ Appeal Judgement, fn. 5320.

⁹⁶ Appeal Judgement, fn. 5320.

⁹⁷ While the Majority appears to consider that the fact that Lazarević was not physically present at the crime sites during the commission of crimes by VJ forces might require, based on the *Perišić* Appeal Judgement, a discussion as to whether Lazarević’s assistance was remote (see Appeal Judgement, fn. 5320), I observe that the *Perišić* Appeal

I disagree with the Majority's underlying submission that determining whether the *Perišić* Appeal Judgement is *relevant* to the present case – and thus a precedent – is already tantamount to *applying* said jurisprudence.⁹⁸

44. Moreover, even if it were unavoidable to discuss the rulings of the *Perišić* Appeal Judgement here, I cannot discern how the Majority arrives at the conclusion that this matter “cannot be circumvented in determining the outcome of the present case”.⁹⁹ Any impact of the *Perišić* Appeal Judgement on Lazarević's case would require showing that his assistance was indeed – within the meaning of that Judgement – “remote” and not “specifically directed” at the commission of crimes.¹⁰⁰ However, the Majority makes no finding in this regard. Accordingly, it is not clear to me whether the Majority's rejection of specific direction as an element of aiding and abetting was dispositive of its decision to affirm Lazarević's convictions for aiding and abetting or is made *obiter dicta*.

45. While it is within the Appeals Chamber's discretion to consider legal matters of general importance to the Tribunal's case law,¹⁰¹ I think that this exceptional measure should not be resorted to here. It may not be possible to completely avoid disagreement between differently constituted benches of the Appeals Chamber over certain legal or factual issues, especially in the absence of a higher unified instance. However, it would be prudent to exercise some restraint in addressing such rifts in the jurisprudence of a respectable and authoritative judicial institution so as to preserve as much as possible, judicial harmony in the case law that impacts the development of international criminal law and international humanitarian law, as well as legal certainty, stability and predictability, in particular, for the benefit of the parties to proceedings before the Tribunal.

Judgement states that “acts geographically or otherwise proximate to [...] the crimes of principal perpetrators” are not “remote”, and in such cases, “specific direction may be demonstrated implicitly” through the discussion of other elements of aiding and abetting liability, such as substantial contribution. See *Perišić* Appeal Judgement, para. 38. I submit that this finding calls into question whether Lazarević's conduct would fall into the category of “remote assistance” referred to in the *Perišić* Appeal Judgement, especially since it is undisputed that Lazarević was the commander of troops involved in the commission of crimes, present in Kosovo, and regularly inspected his troops in the field throughout the campaign of forcible displacement taking place there. See also *Perišić* Appeal Judgement, fn. 100 (for cases of aiding and abetting in which the accused was not physically present at the crime site and which the *Perišić* Appeals Chamber did not consider to be “remote”). In my view, the Majority's reasoning expands the relevance of the *Perišić* Appeal Judgement potentially to all cases where the aider and abettor is not physically present when the crime is committed.

⁹⁸ As noted by the Appeals Chamber in the *Aleksovski* case: “What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.” See *Aleksovski* Appeal Judgement, para. 110.

⁹⁹ Appeal Judgement, fn. 5320.

¹⁰⁰ *Perišić* Appeal Judgement, paras 38-74.

¹⁰¹ See, e.g., *Kanyarukiga* Appeal Judgement, para. 267.

46. For these reasons, I tend to think that the issue of specific direction would have better been left for discussion in cases where this matter is clearly relevant to the conviction of an accused and the parties have reason and opportunity to focus their full attention on it.

47. In addition, I recall that in order to ensure the fair trial rights of an accused to have “like cases treated alike”, the Appeals Chamber should follow its previous decisions unless there are cogent reasons to depart from them in the interests of justice.¹⁰² Irrespective of whether there is a divergence between the *Mrkšić and Šlivančanin* and *Lukić and Lukić* Appeal Judgements on the one hand and the *Perišić* Appeal Judgement on the other, it is quite clear that the Majority in this Appeal Judgement departs from the latter. The Majority mentions the cogent reasons standard in passing,¹⁰³ but provides no explanation as to whether it was guided by that standard in reaching its conclusions.¹⁰⁴

48. Finally, I note that in its assessment of other international jurisprudence and domestic law on aiding and abetting, the Majority resorts to a discussion of post-WWII cases, some of which do not necessarily concern this mode of liability,¹⁰⁵ as well as general rules governing the *mens rea*.¹⁰⁶ The Majority concludes on the basis of its analysis that specific direction “is not an element of aiding and abetting liability under customary international law”,¹⁰⁷ while subsequently confirming the ruling in the *Mrkšić and Šlivančanin* and *Lukić and Lukić* Appeal Judgements that specific direction is not an essential ingredient of the *actus reus* of aiding and abetting.¹⁰⁸ In light of these findings, it is not clear to me whether the Majority considers its assessment and conclusions to be limited to the *actus reus* of aiding and abetting and thus indeed merely a reaffirmation of the statements in the *Mrkšić and Šlivančanin* and *Lukić and Lukić* Appeal Judgements. Arguably, to conclude that specific direction is not an “essential ingredient of the *actus reus* of aiding and abetting”¹⁰⁹ is not quite the same as saying that it is *per se* not an element of aiding and abetting.

49. For these reasons, I dissent from this section in the Appeal Judgement.

¹⁰² *Aleksovski* Appeal Judgement, paras 107, 113.

¹⁰³ Appeal Judgement, para. 1622.

¹⁰⁴ For details, see *Aleksovski* Appeal Judgement, paras 107-109.

¹⁰⁵ See Appeal Judgement, fn. 5340.

¹⁰⁶ See Appeal Judgement, paras 1627-1648.

¹⁰⁷ Appeal Judgement, para. 1649.

¹⁰⁸ Appeal Judgement, para. 1650.

¹⁰⁹ *Lukić and Lukić* Appeal Judgement, para. 424; *Mrkšić and Šlivančanin* Appeal Judgement, para. 159.

Done in English and French, the English text being authoritative.



Judge Bakhtiyar Tuzmukhamedov

Dated this 23rd day of January 2014,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

XIV. ANNEX A – PROCEDURAL HISTORY

A. Composition of the Appeals Chamber

1. On 11 March 2009, the then President of the Tribunal ordered that the Bench in the present case be composed of Judge Mehmet Güney, Judge Fausto Pocar, Judge Liu Daqun, Judge Andréia Vaz, and Judge Theodor Meron.¹ On 19 March 2009, Judge Liu Daqun, having been elected as Presiding Judge, appointed himself as the Pre-Appeal Judge.² On 4 November 2011, the then Acting President of the Tribunal appointed Judge Arlette Ramaroson to replace Judge Theodor Meron.³ On 5 July 2012, the President of the Tribunal appointed Judge Bakhtiyar Tuzmukhamedov to replace Judge Andréia Vaz.⁴

B. Notices of appeal

2. Following the Pre-Appeal Judge's decision granting the Defence motions⁵ for an extension of time to file their notices of appeal,⁶ the Prosecution, Šainović, Pavković, Lazarević, and Lukić filed their initial notices of appeal against the Trial Judgement, pursuant to Article 25 of the Statute and Rule 108 of the Rules, on 27 May 2009.⁷

3. On 9 September 2009, the Appeals Chamber granted Pavković's motion to amend his notice of appeal.⁸ On 22 September 2009, the Appeals Chamber issued a decision granting his subsequent motion to further amend his notice of appeal,⁹ pursuant to which he filed a second amended notice of appeal on 29 September 2009.¹⁰

¹ Order Assigning Judges to a Case before the Appeals Chamber, 11 March 2009; Corrigendum to Order Assigning Judges to a Case before the Appeals Chamber, 11 March 2009.

² Order Appointing the Pre-Appeal Judge, 19 March 2009.

³ Order Replacing a Judge in a Case before the Appeals Chamber, 4 November 2011.

⁴ Order Replacing a Judge in a Case before the Appeals Chamber, 5 July 2012.

⁵ Joint Motion for an Extension of Time to File Notice of Appeal, 9 March 2009; Motion for an Extension of Time to File Notice of Appeal with Annex, 9 March 2009; Sreten Lukic's [*sic*] Joinder in the Motion for Extension of Time to File Notice of Appeal Filed by the Pavkovic [*sic*] Defense, 9 March 2009.

⁶ Decision on Motions for Extension of Time to File Notices of Appeal, 23 March 2009.

⁷ Prosecution Notice of Appeal, 27 May 2009; Defence Submission Notice of Appeal, 27 May 2009; Notice of Appeal from the Judgement of 26 February 2009, 27 May 2009; Vladimir Lararevic's [*sic*] Defence Notice of Appeal, 27 May 2009 (confidential; made public per Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009); Sreten Lukic's [*sic*] Notice of Appeal from Judgment and Request for Leave to Exceed the Page Limit, 27 May 2009, respectively.

⁸ Decision on Nebojša Pavković's Motion to Amend his Notice of Appeal, 9 September 2009, wherein the Appeals Chamber accepted Pavković's amended notice of appeal attached as an annex to his motion, as validly filed; General Pavković Motion for Amendment to his Notice of Appeal, 28 August 2009.

⁹ Decision on Nebojša Pavković's Second Motion to Amend his Notice of Appeal, 22 September 2009; General Pavković Request to Amend his Notice of Appeal to Adopt Ground Seven of his Co-Appellant Ojdanić's Amended Notice of Appeal, 15 September 2009, requesting leave to incorporate Ojdanić's seventh ground of appeal into his own notice of appeal. Regarding Ojdanić's notice of appeal, see *infra*, sub-section XIV.D.

¹⁰ Notice of Appeal from the Judgement of 26 February 2009, filed as Annex A to General Pavković Submission of his Amended Notice of Appeal, 29 September 2009.

4. The B/C/S translation of the Trial Judgement was filed on 13 September 2010. On 14 September 2010, the Pre-Appeal Judge encouraged the Defence to file as soon as practicable their motions, if any, seeking to amend their grounds of appeal pursuant to Rule 108 of the Rules once they had read the B/C/S translation of the Trial Judgement.¹¹ On 17 December 2010, Lukić filed a motion requesting leave to vary his grounds of appeal,¹² which was dismissed by the Appeals Chamber on 10 February 2011 without prejudice.¹³ On 11 January 2011, Šainović filed a motion for leave to vary his grounds of appeal,¹⁴ which was dismissed by the Appeals Chamber on 22 March 2011 without prejudice.¹⁵ On 3 February 2011, Lazarević filed a notice that he would not seek to vary his grounds of appeal.¹⁶ On 17 May 2011, the Pre-Appeal Judge informed the parties that after 14 June 2011, the translation of the Trial Judgement would not constitute “good cause” for any party seeking to vary their grounds of appeal.¹⁷ On 14 June 2011, Lukić filed a second motion to vary his grounds of appeal, which the Pre-Appeal Judge ordered to be re-filed.¹⁸ On 9 September 2011, the Appeals Chamber dismissed Lukić’s second motion which he had re-filed on 21 June 2011.¹⁹

¹¹ Status Conference, 14 September 2010, AT. 78. This was pursuant to the Pre-Appeal Judge’s own observations in his decisions of 23 March 2009 and 29 June 2009 that the Defence were entitled to request amendments to their Appeal Briefs after having the opportunity to read the B/C/S translation of the Trial Judgement under Rule 108 (Decision on Motions for Extensions of Time to File Notices of Appeal, 23 March 2009; Decision on Joint Defence Motions Seeking Extension of Time to File Appeal Briefs, 29 June 2009). See also Decision on the Prosecution’s Motion Seeking Clarification and an Order Regarding the Time-Limit for the Defence to File Potential Motions to Vary Grounds of Appeal, 22 September 2010.

¹² Sreten Lukic’s [*sic*] Motion for Leave to File Variation of Appeal. [*sic*] Pursuant to Review of Judgment Translated in B/C/S, 17 December 2010.

¹³ Decision on Sreten Lukic’s Motion for Leave to Vary His Grounds of Appeal, 10 February 2011.

¹⁴ Šainović Motion for Leave to File Variation of Appeal After Delivery of the Judgement in BCS and Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 11 January 2011 (confidential; made public per Šainović Notice of Change of Status of “Motion for Leave to File Variation of Appeal After Delivery of the Judgement in BCS and Motion for Leave to Present Additional Evidence Pursuant to Rule 115”, 21 January 2011).

¹⁵ Decision on Nikola Šainović’s Motions for Leave to Vary his Grounds of Appeal Following the Translation of the Trial Judgement and for Admission of Additional Evidence on Appeal, 22 March 2011.

¹⁶ Vladimir Lazarevic [*sic*] Notice Regarding Variation of Appeal, 4 February 2011.

¹⁷ Status Conference, 17 May 2011, AT. 112.

¹⁸ Sreten Lukic’s [*sic*] Second Motion for Leave to File Variation to Notice of Appeal and Variation to Appeal Arguments, 14 June 2011; Order Requiring Sreten Lukic to Re-File his Second Motion for Leave to Vary his Notice of Appeal and Appeal Brief, 16 June 2011, p. 2, referring to Practice Direction on the Length of Briefs and Motions, IT/184 Rev. 2, 16 September 2005.

¹⁹ Decision on Sreten Lukic’s Re-Filed Second Motion for Leave to Vary his Notice of Appeal and Appeal Brief, 9 September 2011; Sreten Lukic’s [*sic*] Re-Filed Second Motion for Leave to File Variation to Notice of Appeal and Variation to Appeal Arguments, 21 June 2011.

C. Appeal briefs

1. Prosecution's appeal

5. The Prosecution filed its appeal brief on 10 August 2009.²⁰ In two decisions of 27 July 2009 and 7 August 2009, the Pre-Appeal Judge disposed of various Defence motions²¹ and granted an extension of 40 days for filing the Defence response briefs, setting the ultimate date for submitting them as 2 November 2009.²² On this date, Šainović,²³ Pavković,²⁴ Lazarević,²⁵ and Lukić²⁶ filed their respective response briefs. The Prosecution filed its consolidated reply brief on 17 November 2009.²⁷

2. Defence appeals

6. On 29 June 2009, the Pre-Appeal Judge granted, in part, the Defence's joint motion requesting an extension of time to file their appellants' briefs,²⁸ and ordered the filing of the appeal briefs to be no later than 23 September 2009.²⁹ On 8 and 11 September 2009, disposing of further motions from the Defence,³⁰ the Pre-Appeal Judge granted Lukić a word limit of 60,000 words and Šainović, Pavković, and Lazarević word limits of 45,000 words.³¹ On 1 October 2009, the Pre-Appeal Judge granted the Prosecution's motion requesting an extension of time to file its response briefs,³² and ordered the Prosecution to file its response briefs no later than 16 January 2010.³³

²⁰ Prosecution Appeal Brief, 10 August 2009 (confidential; public redacted version filed on 21 August 2009). See also Corrigendum to Prosecution Appeal Brief, 24 August 2009; Corrigendum to Prosecution Appeal Brief, 15 January 2010 (confidential; public redacted version filed on 14 May 2010). On 18 December 2013, the Appeals Chamber dismissed the Prosecution's motion, requesting leave to file certain portions of the *Taylor* Appeal Judgement as supplementary authority. See Status Conference, 18 December 2013, AT. 706-707. See also Prosecution Request Seeking Leave to File Supplementary Authority and Supplementary Authority, 30 September 2013.

²¹ Joint Defence Request Seeking Extension of Time to File Respondent's Brief, 17 July 2009; Sreten Lukic's [*sic*] Request Seeking Extension of Time to File Respondent's Brief with Confidential Annex, 29 July 2009 (confidential); General Pavković Request Seeking Extension of Time to File Respondent's Brief, 5 August 2009. See also General Ojdanic's [*sic*] Joinder in Joint Request Seeking Extension of Time to File the Respondent's Brief, 21 July 2009.

²² Decision on Joint Request for Extension of Time to File Respondent's Brief, 27 July 2009; Decision on Sreten Lukic's and Nebojša Pavković's Requests for Extension of Time to File Respondent's Briefs and Sreten Lukic's Request for a Further Extension of Time to File Appellant's Brief, 7 August 2009.

²³ Defence Respondent's Brief, 2 November 2009.

²⁴ General Pavković Reply to Prosecution Appeal Brief, 2 November 2009.

²⁵ Lazarević Defence Respondent's Brief, 2 November 2009.

²⁶ Sreten Lukic's [*sic*] Response to the Prosecution Appeal, 2 November 2009 (confidential; public redacted version filed on 31 August 2010).

²⁷ Prosecution's Consolidated Reply Brief, 17 November 2009 (confidential; public redacted version filed on 1 September 2010).

²⁸ Joint Defence Motion Seeking Extension of Time to File Appeal Briefs, 12 June 2009.

²⁹ Decision on Joint Defence Motion Seeking Extension of Time to File Appeal Briefs, 29 June 2009.

³⁰ General Ojdanic's [*sic*] and Nikola Šainović's [*sic*] Joint Motion for Extension of Word Limit, 9 September 2009; General Pavković Request to Exceed the Word Limit for Appeal Brief, 24 August 2009; Lazarević [*sic*] Defence Request to Exceed the Word Limit for Appeal Brief, 25 August 2009; Sreten Lukic's [*sic*] Motion for Leave to Exceed the Word Limit for Filing the Appeal from Judgment, 26 August 2009.

³¹ Decision on Defence Motions for Extension of Word Limit, 8 September 2009; Decision on Nikola Šainović's and Dragoljub Ojdanić's Joint Motion for Extension of Word Limit, 11 September 2009.

³² Prosecution Motion for Extension of Time to File Respondent's Briefs, 28 September 2009.

During the second Status Conference on 18 January 2010, the Defence made an oral request for an extension of 15 days to file their respective reply briefs.³⁴ In addition, Šainović and Lukić requested leave to exceed the word limit by 10,000 words, Pavković requested an extension of 5,000 words, and Lazarević requested authorization to file a brief of up to 18,000 words.³⁵ On 20 January 2010, the Pre-Appeal Judge set the date for filing reply briefs as 15 February 2010, and authorized Lukić to file a reply brief not exceeding 18,000 words, and Šainović, Pavković, and Lazarević to file reply briefs not exceeding 12,000 words.³⁶

(a) Šainović's appeal

7. Šainović filed his appeal brief on 23 September 2009.³⁷ The Prosecution filed its response brief on 15 January 2010.³⁸ Šainović filed his reply brief on 15 February 2010.³⁹

(b) Pavković's appeal

8. Pavković filed his appeal brief on 23 September 2009.⁴⁰ On 30 September 2009, pursuant to the Appeals Chamber's decision of 22 September 2009,⁴¹ Pavković filed an amended appeal brief to reflect the amendments made in his notice of appeal.⁴² The Prosecution filed its response brief on 15 January 2010.⁴³ Pavković filed his reply brief on 15 February 2010.⁴⁴

9. Following the Appeals Chamber's decision of 12 February 2010 granting, in part, his motion for the admission of additional evidence,⁴⁵ and pursuant to Rule 115(A) of the Rules, Pavković filed

³³ Decision on the Prosecution's Motion for an Extension of Time to File Respondent's Briefs, 1 October 2009.

³⁴ Status Conference, 18 January 2010, AT. 44-48.

³⁵ Status Conference, 18 January 2010, AT. 46-47.

³⁶ Decision on Defence Requests for Extension of Time and Word Limits to File Reply Briefs, 20 January 2010.

³⁷ Defence Appeal Brief, 23 September 2009.

³⁸ Prosecution Response to Šainović Brief, 15 January 2010 (confidential; public redacted version filed on 29 January 2010); Corrigendum to Public Redacted Version of Prosecution Response to Šainović Brief, 17 February 2010.

³⁹ Defence Brief in Reply, 15 February 2010 (confidential; public redacted version filed on 22 July 2010).

⁴⁰ General Pavković's Appeal Brief, 23 September 2009.

⁴¹ Decision on Nebojša Pavković's Second Motion to Amend his Notice of Appeal, 22 September 2009, para. 19.

⁴² General Pavković's Amended Appeal Brief, 30 September 2009 (filed as Annex A to General Pavković's Submission of his Amended Appeal Brief, 30 September 2009).

⁴³ Prosecution Response to General Pavković's Amended Appeal Brief, 15 January 2010 (confidential; public redacted version filed on 26 February 2010); Corrigendum to Prosecution Response to General Pavković's Amended Appeal Brief, 26 February 2010 (confidential); Corrigendum to Public Redacted Version of Prosecution Response to General Pavković's Amended Appeal Brief, 1 March 2010.

⁴⁴ General Pavković's Reply to Prosecution Response to Amended Appeal Brief, 15 February 2010.

⁴⁵ Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 (confidential; public redacted) ("Decision of 12 February 2010").

his supplemental appeal brief on the impact of the additional evidence on 8 March 2010.⁴⁶ The Prosecution filed its supplemental response brief on 18 March 2010.⁴⁷ Pavković filed no reply.

(c) Lazarević's appeal

10. Lazarević filed his appeal brief on 23 September 2009.⁴⁸ On the same day, he filed a motion requesting a further extension of the word limit by 3,900 words.⁴⁹ In an oral decision rendered during the first Status Conference on 25 September 2009, the Pre-Appeal Judge denied the motion and ordered Lazarević to re-file his appeal brief in compliance with the word limit of 45,000 words no later than 2 October 2009.⁵⁰ Lazarević complied with this order.⁵¹ The Prosecution filed its response brief on 15 January 2010.⁵² Lazarević filed his reply brief on 15 February 2010.⁵³

(d) Lukić's appeal

11. On 14 September 2009, the Pre-Appeal Judge dismissed Lukić's motion for reconsideration of his decision of 8 September 2009, which fixed the word limit for his appeal brief at 60,000 words.⁵⁴ On 23 September 2009, Lukić filed his appeal brief, in which he renewed his request to exceed the word limit.⁵⁵ On 29 September 2009, the Pre-Appeal Judge dismissed Lukić's request and ordered him to re-file his brief without exceeding the word limit.⁵⁶ Lukić re-filed his brief on 7 October 2009 in accordance with this order.⁵⁷ The Prosecution filed its response brief on

⁴⁶ General Pavković's Supplemental Brief, 8 March 2010. See also Decision on Nebojša Pavković's Motion for an Extension of Time for Filing his Supplementary Brief, 5 March 2010.

⁴⁷ Prosecution Response to General Pavković's Supplemental Brief, 18 March 2010.

⁴⁸ General Vladimir Lazarević's Appeal Brief, 23 September 2009 (made confidential by Order on Prosecution's Motion Concerning the Confidential Status of Vladimir Lazarević's Appeal Brief, 14 September 2010 (confidential) ("Order of 14 September 2010")).

⁴⁹ Lazarević [*sic*] Defence Second Request to Exceed the Word Limit for Appeal Brief, 23 September 2009.

⁵⁰ Status Conference, 25 September 2009, AT. 17.

⁵¹ General Vladimir Lazarević's Refiled Appeal Brief, 2 October 2009 (confidential; valid public redacted version filed on 25 May 2010). A public redacted version of Lazarević's Refiled Appeal Brief was filed on 20 October 2009 and made confidential by Order on Prosecution's Motion Concerning Information in Lazarević's Public Submissions, 22 February 2010 (confidential), p. 1 and Decision on Prosecution's Motion Concerning Confidential Information in Vladimir Lazarević's Public Submissions, 31 March 2010 (confidential), para. 13. A subsequent public redacted version of Lazarević's Refiled Appeal Brief was filed on 6 April 2010, and made confidential per the instructions of the Chief of the Tribunal's Court Management and Support Section pending further actions. See also Status Conference, 18 May 2010, AT. 64-65; Decision on the Prosecution's Second Motion Regarding Confidential Information in Lazarević's Public Submissions, 1 June 2010; Order of 14 September 2010, fn. 4.

⁵² Prosecution Response to Appeal of Vladimir Lazarević, 15 January 2010 (confidential; public redacted version filed on 14 May 2010).

⁵³ Lazarević Defence Reply Brief, 15 February 2010 (confidential; public redacted version filed on 10 October 2013).

⁵⁴ Decision on Sreten Lukić's Motion to Reconsider Decision on Defence Motions for Extension of Word Limit, 14 September 2009. See also Sreten Lukić's [*sic*] Motion to Reconsider Decision on Word-Limit, 11 September 2009.

⁵⁵ Defense Appellant's [*sic*] Brief, 23 September 2009, para. 10. See also Prosecution Motion for an Order to Lukić to File a Brief in Accordance with Appeals Chamber Decisions, 25 September 2009.

⁵⁶ Decision on the Prosecution's Motion for an Order Requiring Sreten Lukić to File his Appellant's Brief in Accordance with the Appeals Chamber Decisions, 29 September 2009.

⁵⁷ Defense Appellant's [*sic*] Brief Refiled, 7 October 2009.

15 January 2010.⁵⁸ On 2 February 2010, the Pre-Appeal Judge granted, in part, Lukić's motion alleging that the Prosecution had not complied with the set word limit,⁵⁹ and ordered the Prosecution to re-file its response brief.⁶⁰ The Prosecution complied on 3 February 2010.⁶¹ Lukić filed his reply brief on 15 February 2010.⁶²

D. Ojdanić

12. Ojdanić filed his initial notice of appeal on 27 May 2009,⁶³ his appeal brief on 23 September 2009,⁶⁴ and an amended appeal brief on 11 December 2009.⁶⁵ The Prosecution filed its notice of appeal on 27 May 2009⁶⁶ and its appeal brief on 10 August 2009, containing its appeal

⁵⁸ Prosecution Response to Appeal of Sreten Lukić, 15 January 2010 (confidential).

⁵⁹ Sreten Lukic's [*sic*] Motion for an Order to the Prosecution to File a Brief in Accordance with Appeals Chamber Decisions and Practice Directions, 26 January 2010 (confidential).

⁶⁰ Decision on Sreten Lukić's Motion for an Order Requiring the Prosecution to Re-File its Respondent's Brief, 2 February 2010.

⁶¹ Refiled Prosecution Response to Appeal of Sreten Lukić, 3 February 2010 (confidential; public redacted version filed on 19 April 2010); Notice of Refiled Prosecution Response to Appeal of Sreten Lukić, 3 February 2010; Corrigendum to Public Redacted Version of Refiled Prosecution Response to Appeal of Sreten Lukić, 14 May 2010.

⁶² Sreten Lukic's [*sic*] Reply Brief in Support of His Defense Appellant's Brief, 15 February 2010 (confidential; public redacted version filed on 14 September 2010).

⁶³ General Ojdanic's [*sic*] Notice of Appeal, 27 May 2009. On 2 September and 4 December 2009, the Appeals Chamber granted Ojdanić's motions to amend his notice of appeal (Decision on Dragoljub Ojdanić's Motion to Amend Ground 7 of his Notice of Appeal, 2 September 2009, wherein the Appeals Chamber accepted Ojdanić's amended notice of appeal attached as an annex to his motion, as validly filed; Decision on Dragoljub Ojdanić's Second Motion to Amend his Notice of Appeal, 4 December 2009, wherein the Appeals Chamber accepted Ojdanić's second amended notice of appeal attached as an annex to his motion, as validly filed; General Ojdanic's [*sic*] Motion to Amend Ground 7 of his Notice of Appeal, 29 July 2009; General Ojdanic's [*sic*] Motion to Amend his Amended Notice of Appeal of 29 July 2009, 16 October 2009). On 13 December 2010, Ojdanić filed a submission stating that he did not wish to vary his grounds of appeal following the filing of the B/C/S translation of the Trial Judgement (General Ojdanic's [*sic*] Submission After Translation of the Judgement, 13 December 2010).

⁶⁴ General Ojdanic's Appeal Brief, 23 September 2009. Ojdanić was granted an extension of time (Decision on Joint Defence Motion Seeking Extension of Time to File Appeal Briefs, 29 June 2009; Joint Defence Motion Seeking Extension of Time to File Appeal Briefs, 12 June 2009) and an increased word limit of 45,000 words (Decision on Nikola Šainović's and Dragoljub Ojdanić's Joint Motion for Extension of Word Limit, 11 September 2009; General Ojdanic's [*sic*] and Nikola Sainovic's [*sic*] Joint Motion for Extension of Word Limit, 9 September 2009).

⁶⁵ General Ojdanic's [*sic*] Amended Appeal Brief, 11 December 2009 (filed as Annex B to General Ojdanic's [*sic*] Motion Submitting Amended Appeal Brief, 11 December 2009). See also Decision on Dragoljub Ojdanić's Second Motion to Amend his Notice of Appeal, 4 December 2009, para. 22. The Prosecution filed its response brief on 15 January 2010 (Prosecution Response to General Ojdanic's Amended Appeal Brief, 15 January 2010 (confidential; public redacted version filed on 12 February 2010); Corrigendum and Notice of Refiling of Public Redacted Version of Prosecution Response to General Ojdanic's Amended Appeal Brief, 1 September 2010), after having been granted an extension of time (Decision on the Prosecution's Motion for an Extension of Time to File Respondent's Briefs, 1 October 2009; Prosecution Motion for Extension of Time to File Respondent's Briefs, 28 September 2009). On 20 January 2010, the Pre-Appeal Judge set the date for filing reply briefs as 15 February 2010 and authorized Ojdanić to file a reply brief of no more than 14,000 words, granting his request for extensions of time and word limits (Decision on Defence Requests for Extension of Time and Word Limits to File Reply Briefs, 20 January 2010; Status Conference, 18 January 2010, AT. 45-46). Ojdanić filed his reply brief on 15 February 2010 (General Ojdanic's Reply Brief, 15 February 2010). On 5 August 2010, Professor David J. Scheffer applied for permission to file an *amicus curiae* brief in relation to Ojdanić's argument concerning the *mens rea* of aiding and abetting (Application for Permission to File an Amicus [*sic*] Brief on behalf of David J. Scheffer, Director of the Center for International Human Rights, Northwestern University Law School, 5 August 2010). On 7 September 2010, the Appeals Chamber granted the application (Decision on David J. Scheffer's Application to File an *Amicus Curiae* Brief, 7 September 2010). Ojdanić filed his submissions in response to the *amicus curiae* brief on 27 September 2010 (General Ojdanic's Response to Ambassador Scheffer's Amicus Curiae [*sic*] Brief, 27 September 2010). The Prosecution did not file any submissions in this regard.

⁶⁶ Prosecution Notice of Appeal, 27 May 2009.

concerning Ojdanić.⁶⁷ However, on 28 January 2013, Ojdanić filed a notice of withdrawal of his appeal⁶⁸ and the Prosecution filed a notice of withdrawal of its appeal in relation to Ojdanić.⁶⁹ On 31 January 2013, the Appeals Chamber accepted the Notice of Withdrawal of Ojdanić's Appeal and the Notice of Withdrawal of the Prosecution's Appeal in Relation to Ojdanić, declaring the appellate proceedings in the case to be concluded insofar as they pertain to Ojdanić.⁷⁰

E. Decisions pursuant to Rule 115 of the Rules

13. On 14 October 2009, Pavković filed a motion requesting the Appeals Chamber to admit 35 documents obtained from the State Archives of Serbia and one other document into evidence pursuant to Rule 115 of the Rules.⁷¹ On 12 February 2010, the Appeals Chamber granted this motion, in part, admitting 24 documents as additional evidence on appeal.⁷²

14. Šainović,⁷³ Pavković,⁷⁴ Lazarević,⁷⁵ and Lukić⁷⁶ also filed a number of motions for the admission of additional evidence, which the Appeals Chamber dismissed.⁷⁷

⁶⁷ Prosecution Appeal Brief, 10 August 2009 (confidential; public redacted version filed on 21 August 2009). Ojdanić filed his response brief on 2 November 2009 (General Ojdanić's Response Brief, 2 November 2009), after having been granted an extension of time (Decision on Joint Request for Extension of Time to File Respondent's Brief, 27 July 2009; General Ojdanić's [*sic*] Joinder in Joint Request Seeking Extension of Time to File the Respondent's Brief, 21 July 2009). The Prosecution filed its reply brief on 17 November 2009 (Prosecution's Consolidated Reply Brief, 17 November 2009 (confidential; public redacted version filed on 1 September 2010).

⁶⁸ Notice of Withdrawal of Dragoljub Ojdanić's [*sic*] Appeal Against the Judgement of Trial Chamber III Dated 26 February 2009, 28 January 2013 (public with public and private annexes) ("Notice of Withdrawal of Ojdanić's Appeal").

⁶⁹ Notice of Withdrawal of Prosecution's Appeal Against the Judgement of Trial Chamber III Dated 26 February 2009 in Relation to the Accused Dragoljub Ojdanić, 28 January 2013 ("Notice of Withdrawal of the Prosecution's Appeal in Relation to Ojdanić").

⁷⁰ Final Decision on "Notice of Withdrawal of Dragoljub Ojdanić's Appeal Against the Judgement of Trial Chamber III Dated 26 February 2009" and "Notice of Withdrawal of Prosecution's Appeal Against the Judgement of Trial Chamber III Dated 26 February 2009 in Relation to the Accused Dragoljub Ojdanić", 31 January 2013.

⁷¹ General Pavković Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, with Annexes A, B, C and Request to Exceed the Word Limit, 14 October 2009 (confidential); Corrigendum to General Pavković Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115 with Annex A and B, 16 October 2009.

⁷² Decision of 12 February 2010, wherein these documents were admitted as Exhibits 4DA1-4DA24 under seal. Exhibits 4DA1-4DA24 were subsequently made public by oral order of the Pre-Appeal Judge during the Status Conference of 14 September 2010, AT. 78-80.

⁷³ Defence Motion Requesting Admission of Additional Evidence Pursuant to Rule 115 with Annex, 26 November 2009 (confidential); Defence Motion Requesting Admission of Additional Evidence Pursuant to Rule 115 with Annex, 9 June 2010.

⁷⁴ Nebojša Pavković's Motion to Join Sreten Lukić's [*sic*] Third Motion to Present Additional Evidence Before Appeals Chamber and Motion to Present Dick Marty as a Witness Before the Appeals Chamber, 24 February 2011.

⁷⁵ General Vladimir Lazarević's Motion to Admit Additional Evidence Pursuant to Rule 115 with Annexes A, B, C, D, E, F, 16 November 2009 (confidential).

⁷⁶ Sreten Lukić's [*sic*] Motion to Present Additional Evidence Before Appeals Chamber, 15 December 2009; Sreten Lukić's [*sic*] Second Motion to Present Additional Evidence Before Appeals Chamber, 16 February 2010; Sreten Lukić's [*sic*] Third Motion to Present Additional Evidence Before Appeals Chamber, 15 February 2011.

⁷⁷ Decision on Vladimir Lazarević's Motion to Present Additional Evidence and on Prosecution's Motion for Order Requiring Translations of Excerpts of Annex E of Lazarević's Rule 115 Motion, 26 January 2010; Decision on Nikola Šainović's Motion Requesting Admission of Additional Evidence Pursuant to Rule 115 of the Rules, 28 January 2010; Decision on Sreten Lukić's First Motion to Admit Additional Evidence on Appeal, 11 March 2010; Decision on Sreten

F. Provisional release

1. Šainović

15. The Appeals Chamber dismissed Šainović's motions for provisional release on 28 January 2010 and 25 August 2010.⁷⁸

2. Pavković

16. On 17 September 2009, the Appeals Chamber granted Pavković's motion for provisional release allowing him to attend his father's funeral.⁷⁹ He was released from 18 until 21 September 2009.⁸⁰ The Appeals Chamber dismissed Pavković's additional motions for provisional release on 22 September 2009,⁸¹ 18 November 2010,⁸² and 14 June 2012.⁸³

3. Lazarević

17. On 2 April 2009, the Appeals Chamber dismissed Lazarević's motion requesting provisional release.⁸⁴ On 21 May 2009, the Appeals Chamber granted Lazarević's subsequent motion for provisional release on medical grounds.⁸⁵ During his stay in Serbia, Lazarević filed three requests to

Lukić's Second Motion to Admit Additional Evidence on Appeal, 29 April 2010; Decision on Nikola Šainović's Second Motion for Admission of Additional Evidence on Appeal, 8 September 2010; Decision on Sreten Lukić's Motions for Admission of Additional Evidence on Appeal and for Extension of Word Limit, Nebojša Pavković's Motions to Join and to Call Dick Marty as a Witness Before the Appeals Chamber, and Prosecution's Motion to Strike, 12 May 2011.

⁷⁸ Decision on Nikola Šainović's Request for Temporary Provisional Release on Compassionate Grounds, 28 January 2010 (confidential); Decision on Nikola Šainović's Second Motion for Temporary Provisional Release on Compassionate Grounds, 25 August 2010 (confidential; public redacted); Defence Request Seeking Temporary Provisional Release on the Grounds of Compassion, 30 December 2009 (confidential); Defence Motion Requesting Provisional Release on the Grounds of Compassion, 20 July 2010 (confidential).

⁷⁹ Decision on Urgent Motion Requesting Provisional Release of Nebojša Pavković on Compassionate Grounds, 17 September 2009, para. 9; Urgent General Pavković Request for Provisional Release on Compassionate Grounds with Annex A, 17 September 2009 (confidential).

⁸⁰ Correspondence from the Republic of Serbia, the Office of the National Council for Cooperation with the Tribunal, to the Belgrade Liaison Office of the Registry of the Tribunal, 30 September 2009 (confidential).

⁸¹ Decision on Nebojša Pavković's Motion for Temporary Provisional Release on Compassionate Grounds, 22 September 2009 (confidential); General Pavković Request for Provisional Release on Compassionate Grounds with Annexes A and B, 27 August 2009 (confidential).

⁸² Decision on Nebojša Pavković's Third Motion for Temporary Provisional Release on Compassionate Grounds, 18 November 2010 (confidential); General Pavković Request for Provisional Release on Compassionate Grounds, 19 October 2010 (public with confidential annexes).

⁸³ Decision on Nebojša Pavković's Motion for Temporary Provisional Release on Compassionate Grounds, 14 June 2012 (confidential; public redacted); General Pavković Request for Provisional Release on Compassionate Grounds (with Confidential Annex A), 5 June 2012 (public with confidential annex).

⁸⁴ Decision on Vladimir Lazarević's Motion for Temporary Provisional Release on the Grounds of Compassion, 2 April 2009 (confidential); Vladimir Lazarević [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion, 12 March 2009 (confidential).

⁸⁵ Decision on Vladimir Lazarević's Second Motion for Temporary Provisional Release on the Grounds of Compassion, 21 May 2009 (confidential; public redacted version filed on 22 May 2009), paras 11, 17; Vladimir Lazarević [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annexes, 6 May 2009 (confidential).

extend his provisional release,⁸⁶ two of which were granted.⁸⁷ On 4 August 2009, the Appeals Chamber denied Lazarević's third motion to extend provisional release.⁸⁸ As a result, Lazarević was released from 25 May 2009 until 5 August 2009.⁸⁹ The Appeals Chamber dismissed Lazarević's further motions⁹⁰ for provisional release.⁹¹

4. Lukić

18. On 22 February 2010, the Appeals Chamber dismissed Lukić's motion seeking provisional release.⁹² On 14 July 2010, the Appeals Chamber granted his subsequent motion for provisional release to visit his ill father.⁹³ He was released from 16 until 22 July 2010.⁹⁴ On 3 September 2010, the Appeals Chamber granted Lukić's third motion for provisional release allowing him to attend

⁸⁶ Urgent Defence Motion Requesting Prolongation of Provisional Release of General Vladimir Lazarevic [*sic*] with Confidential Annexes, 19 June 2009 (confidential); Second Urgent Defence Motion Requesting Prolongation of Provisional Release of General Vladimir Lazarević with Confidential Annex, 13 July 2009 (confidential); Third Urgent Defence Motion Requesting Prolongation of Provisional Release of General Vladimir Lazarevic [*sic*] with Confidential Annexes, 3 August 2009 (confidential).

⁸⁷ Decision on Urgent Defence Motion Requesting Prolongation of Provisional Release of Vladimir Lazarević, 24 June 2009 (confidential; public redacted), paras 13-14, 16; Decision on Second Urgent Defence Motion Requesting Prolongation of Provisional Release of Vladimir Lazarević, 14 July 2009 (confidential; public redacted), paras 10, 13.

⁸⁸ Decision on the Third Urgent Defence Motion Requesting Prolongation of Provisional Release of Vladimir Lazarević, 4 August 2009 (confidential; public redacted), paras 12, 14.

⁸⁹ Correspondence from the Republic of Serbia, the Office of the National Council for Cooperation with the Tribunal, to the Embassy of the Republic of Serbia to the Kingdom of the Netherlands, 27 August 2009 (confidential).

⁹⁰ Vladimir Lazarevic [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annexes, 16 December 2009 (confidential); Vladimir Lazarevic [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annexes, 19 February 2010 (confidential); Vladimir Lazarevic [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annexes, (confidential), 19 April 2010; Vladimir Lazarevic [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annex, 19 July 2010 (confidential); Vladimir Lazarević Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annex, 2 February 2011; Vladimir Lazarevic [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion (confidential), 28 November 2011; Vladimir Lazarevic [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion (confidential), 12 April 2013.

⁹¹ Decision on Vladimir Lazarević's Motion for Temporary Provisional Release on the Grounds of Compassion, 13 January 2010 (confidential); Decision on Vladimir Lazarević's Motion of Temporary Provisional Release, 1 March 2010 (confidential; public redacted version filed on 10 March 2010); Decision on Vladimir Lazarević's Motion for Temporary Provisional Release on Compassionate Grounds, 17 May 2010 (confidential; public redacted); Decision on Vladimir Lazarević's Motion for Temporary Provisional Release on Compassionate Grounds, 4 August 2010 (confidential); Decision on Vladimir Lazarević's Motion for Temporary Provisional Release on Compassionate Grounds, 23 March 2011 (confidential); Decision on Vladimir Lazarević's Motion for Temporary Provisional Release, 15 December 2011 (confidential); Decision on Vladimir Lazarević's Motion for Temporary Provisional Release, 13 May 2013. See also Decision on Vladimir Lazarević's Motion for Temporary Provisional Release on the Grounds of Compassion, 23 December 2009 (confidential).

⁹² Decision on Sreten Lukić's Motion for Provisional Release on Compassionate Grounds, 22 February 2010 (confidential); Sreten Lukic's [*sic*] Urgent Motion for Provisional Release on Compassionate Grounds with Annex A, 11 February 2010 (confidential).

⁹³ Decision on Sreten Lukić's Second Motion for Provisional Release on Compassionate Grounds, 14 July 2010 (confidential; public redacted), paras 13, 21; Sreten Lukic's [*sic*] Urgent Motion for Provisional Release on Compassionate Grounds, 6 July 2010 (confidential).

⁹⁴ Correspondence from the Embassy of Republic of Serbia to the Kingdom of the Netherlands to the Registry of the Tribunal, 9 August 2010 (confidential).

the memorial ceremony of his deceased father.⁹⁵ He was released from 7 until 11 September 2010.⁹⁶ The Appeals Chamber dismissed Lukić's further motions for provisional release on 30 March 2012⁹⁷ and 3 April 2013.⁹⁸

G. Other Pre-Appeal decisions and orders

19. On 16 February 2010, the Appeals Chamber granted, in part, a motion by Vlastimir Đorđević,⁹⁹ requesting continuous access to all confidential transcripts, exhibits, and documents in the present case, except for certain material such as *ex parte* confidential material.¹⁰⁰

20. On 2 March 2010, the Appeals Chamber dismissed a motion¹⁰¹ filed by Pavković for a stay of proceedings due to an allegedly insufficient allotment of resources for his defence.¹⁰²

21. On 28 May 2010, the Appeals Chamber granted the Prosecution's request to replace the contents of Exhibit P2440 with a properly redacted public version.¹⁰³

22. On 5 April 2011, the Appeals Chamber ordered the Prosecution, Milutinović's Counsel, and Ojdanić's Counsel to provide public redacted versions of their exhibits consisting of partially confidential transcripts from another case by 4 May 2011.¹⁰⁴ On 26 April 2011 and 4 May 2011, respectively, the Prosecution and Ojdanić's Counsel submitted notice that they had complied with the order.¹⁰⁵ On 5 May 2011, Milutinović's Counsel submitted his redacted exhibits.¹⁰⁶ On

⁹⁵ Decision on Sreten Lukić's Third Motion for Provisional Release on Compassionate Grounds, 3 September 2010, paras 12, 18; Urgent Motion for Provisional Release on Compassionate Grounds for a Fixed Period to Permit Attendance at Memorial Ceremony, 23 August 2010 (confidential); Amendment [*sic*] to Urgent Motion for Provisional Release on Compassionate Grounds for a Fixed Period to Permit Attendance at Memorial Ceremony, 1 September 2010 (confidential).

⁹⁶ Correspondence from the Republic of Serbia, the Office of the National Council for Cooperation with the Tribunal, to the Belgrade Liaison Office of the Registry of the Tribunal, 22 September 2010 (confidential).

⁹⁷ Decision on Sreten Lukić's Motion for Provisional Release, 30 March 2012; Sreten Lukić's [*sic*] Request for Provisional Release, 16 March 2012 (confidential and *ex parte*).

⁹⁸ Decision on Sreten Lukić's Motion for Provisional Release, 3 April 2013; Sreten Lukić's [*sic*] Request for Provisional Release, 5 March 2013 (confidential and *ex parte*).

⁹⁹ Vlastimir Đorđević's Motion for Access to Transcripts, Exhibits and Documents, 29 December 2009.

¹⁰⁰ Decision on Vlastimir Đorđević's Motion for Access to Transcripts, Exhibits and Documents, 16 February 2010, paras 11-17, 21-29. See also Prosecution's Notice of Compliance with Decision Granting Vlastimir Đorđević's Motion for Access to Transcripts, Exhibits and Documents, 19 February 2010.

¹⁰¹ General Pavković's Motion for Stay of Proceedings Pending Action by the Registrar, 19 February 2010. See also Registry Submission Pursuant to Rule 33(B) Concerning General Pavković's Motion for Stay of Proceedings Pending Action by the Registrar, 26 February 2010 (confidential).

¹⁰² Decision on Nebojša Pavković's Motion for Stay of Proceedings, 2 March 2010.

¹⁰³ Decision on Prosecution Request for Substitution of an Exhibit, 28 May 2010 (confidential). See also Prosecution Request for Substitution of an Exhibit, 25 May 2010 (confidential).

¹⁰⁴ Order Regarding the Alteration of the Status of Exhibits Consisting of Transcripts from Another Case, 5 April 2011.

¹⁰⁵ Notice of Compliance with the Order Regarding the Alteration of the Status of Exhibits Consisting of Transcripts from Another Case, 26 April 2011; Notice of Compliance with the Order Regarding the Alteration of the Status of Exhibits Consisting of Transcripts from Another Case, 4 May 2011.

¹⁰⁶ Submission on Behalf of Mr. Milan Milutinović [*sic*] Pursuant to the Order Regarding the Alteration of the Status of Exhibits Consisting of Transcripts from Another Case, 5 May 2011.

13 May 2011, the Registry confirmed that the public redacted versions of their exhibits were available in the e-Court system.¹⁰⁷

H. Status conferences

23. In accordance with Rule 65*bis*(B) of the Rules, Status Conferences were held on 25 September 2009,¹⁰⁸ 18 January 2010,¹⁰⁹ 18 May 2010,¹¹⁰ 14 September 2010,¹¹¹ 18 January 2011,¹¹² 17 May 2011,¹¹³ 13 September 2011,¹¹⁴ 19 January 2012,¹¹⁵ 16 May 2012,¹¹⁶ 12 September 2012,¹¹⁷ 10 January 2013,¹¹⁸ 13 May 2013,¹¹⁹ 4 September 2013,¹²⁰ and 18 December 2013.¹²¹

I. Appeal hearing

24. The scheduling order for the appeal hearing was issued on 18 January 2013 ordering oral arguments to be held on 11-15 and 18-19 March 2013.¹²² On 31 January 2013, the Appeals Chamber issued an order amending the scheduling order and setting the timetable for the appeal hearing, pursuant to which oral arguments were ordered to take place on 11-15 March 2013.¹²³ On 20 February 2013, the Appeals Chamber issued an order, inviting the parties to discuss specifically identified issues during the appeal hearing.¹²⁴ The Appeals Chamber heard the oral arguments of all parties on 11-15 March 2013.¹²⁵

¹⁰⁷ Registry Certificate, 13 May 2011.

¹⁰⁸ Status Conference, 25 September 2009, AT. 1-24; Scheduling Order, 11 September 2009.

¹⁰⁹ Status Conference, 18 January 2010, AT. 25-49; Scheduling Order, 2 December 2009.

¹¹⁰ Status Conference, 18 May 2010, AT. 50-67; Scheduling Order, 12 April 2010.

¹¹¹ Status Conference, 14 September 2010, AT. 68-83; Scheduling Order, 23 August 2010.

¹¹² Status Conference, 18 January 2011, AT. 84-100; Scheduling Order, 30 November 2010.

¹¹³ Status Conference, 17 May 2011, AT. 101-114; Scheduling Order, 21 April 2011.

¹¹⁴ Status Conference, 13 September 2011, AT. 115-118; Scheduling Order, 30 June 2011.

¹¹⁵ Status Conference, 19 January 2012, AT. 119-130; Scheduling Order, 30 November 2011.

¹¹⁶ Status Conference, 16 May 2012, AT. 131-138; Scheduling Order, 29 March 2012.

¹¹⁷ Status Conference, 12 September 2012, AT. 139-146; Scheduling Order, 13 August 2012.

¹¹⁸ Status Conference, 10 January 2013, AT. 147-157; Scheduling Order, 23 November 2012.

¹¹⁹ Status Conference, 13 May 2013, AT. 691-696; Scheduling Order, 17 April 2013.

¹²⁰ Status Conference, 4 September 2013, AT. 697-703; Scheduling Order, 11 July 2013.

¹²¹ Status Conference, 18 December 2013, AT. 704-708; Scheduling Order, 18 November 2013.

¹²² Scheduling Order for Appeal Hearing, 18 January 2013.

¹²³ Order Amending Scheduling Order and Setting the Timetable for the Appeal Hearing, 31 January 2013.

¹²⁴ Order for the Preparation of the Appeal Hearing, 20 February 2013.

¹²⁵ Appeal Hearing, 11 March 2013, AT. 158-274; Appeal Hearing, 12 March 2013, AT. 275-385; Appeal Hearing, 13 March 2013, AT. 386-481; Appeal Hearing, 14 March 2013, AT. 482-570; Appeal Hearing, 15 March 2013, AT. 571-690.

XV. ANNEX B: CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 (“*Aleksovski Appeal Judgement*”)

BABIĆ

Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 (“*Babić Judgement on Sentencing Appeal*”)

BLAGOJEVIĆ AND JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 (“*Blagojević and Jokić Appeal Judgement*”)

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 (“*Blaškić Trial Judgement*”)

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić Appeal Judgement*”)

BOŠKOSKI AND TARČULOVSKI

Prosecutor v. Ljube Boškosi and Johan Tarčulovski, Case No. IT-04-82-A, Judgement, 19 May 2010 (“*Boškosi and Tarčulovski Appeal Judgement*”)

BRALO

Prosecutor v. Miroslav Bralo, Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007 (“*Bralo Judgement on Sentencing Appeal*”)

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 (“*Brđanin Trial Judgement*”)

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 (“*Brđanin Appeal Judgement*”)

“ČELEBIĆI”

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo, Case No. IT-96-21-T, Judgement, 16 November 1998 (“*Čelebići* Trial Judgement”)

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”)

DERONJIĆ

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 (“*Deronjić* Judgement on Sentencing Appeal”)

FURUNDŽIJA

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (“*Furundžija* Trial Judgement”)

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija* Appeal Judgement”)

GALIĆ

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 (“*Galić* Appeal Judgement”)

GOTOVINA AND MARKAČ

Prosecutor v. Ante Gotovina and Mladen Markač, Case No. IT-06-90-A, Judgement, 16 November 2012 (“*Gotovina and Markač* Appeal Judgement”)

HADŽIHASANOVIĆ AND KUBURA

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-T, Judgement, 15 March 2006 (“*Hadžihasanović and Kubura* Trial Judgement”)

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 (“*Hadžihasanović and Kubura* Appeal Judgement”)

HALILOVIĆ

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 (“*Halilović* Appeal Judgement”)

HARADINAJ et al.

Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A, Judgement, 19 July 2010 (“*Haradinaj et al.* Appeal Judgement”)

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 (“*Jelisić Appeal Judgement*”)

JOKIĆ

Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 (“*Jokić Judgement on Sentencing Appeal*”)

KORDIĆ AND ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez Appeal Judgement*”)

KRAJIŠNIK

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Judgement, 27 September 2006 (“*Krajišnik Trial Judgement*”)

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 (“*Krajišnik Appeal Judgement*”)

KRNOJELAC

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgment, 15 March 2002 (“*Krnojelac Trial Judgement*”)

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 (“*Krnojelac Appeal Judgement*”)

KRSTIĆ

Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement, 2 August 2001 (“*Krstić Trial Judgement*”)

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 (“*Krstić Appeal Judgement*”)

KUNARAC et al.

Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković, Case Nos IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001 (“*Kunarac et al. Trial Judgement*”)

Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković, Case Nos IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac et al. Appeal Judgement*”)

KUPREŠKIĆ et al.

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić et al. Appeal Judgement*”)

KVOČKA et al.

Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić, and Dragoljub Prcać, Case No. IT-98-30/1-T, Judgement, 2 November 2001 (“*Kvočka et al.* Trial Judgement”)

Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić, and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka et al.* Appeal Judgement”)

LIMAJ et al.

Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu, Case No. IT-03-66-A, Judgement, 27 September 2007 (“*Limaj et al.* Appeal Judgement”)

LUKIĆ AND LUKIĆ

Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-32/1-A, Judgement, 4 December 2012 (“*Lukić and Lukić* Appeal Judgement”)

MARTIĆ

Prosecutor v. Milan Martić, Case No. IT-95-11-T, Judgement, 12 June 2007 (“*Martić* Trial Judgement”)

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 (“*Martić* Appeal Judgement”)

D. MILOŠEVIĆ

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009 (“*D. Milošević* Appeal Judgement”)

MILUTINOVIĆ et al.

Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”)

MRKŠIĆ et al.

Prosecutor v. Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin, Case No. IT-95-13/1-T, Judgement, 27 September 2007 (“*Mrkšić et al.* Trial Judgement”)

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. 95-13/1-A, Judgement, 5 May 2009 (“*Mrkšić and Šljivančanin* Appeal Judgement”)

NALETILIĆ AND MARTINOVIĆ

Prosecutor v. Mladen Naletilić and Vinko Martinović, Case No. IT-98-34-A, Judgement, 3 May 2006 (“*Naletilić and Martinović* Appeal Judgement”)

D. NIKOLIĆ

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 (“*D. Nikolić* Judgement on Sentencing Appeal”)

M. NIKOLIĆ

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006 (“*M. Nikolić* Judgement on Sentencing Appeal”)

ORIC

Prosecutor v. Naser Orić, Case No. IT-03-68-T, Judgement, 30 June 2006 (“*Orić* Trial Judgement”)

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 (“*Orić* Appeal Judgement”)

PERIŠIĆ

Prosecutor v. Momčilo Perišić, Case No. IT-04-81-A, Judgement, 28 February 2013 (“*Perišić* Appeal Judgement”)

POPOVIĆ et al.

Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević, Case No. IT-94-1-T, Judgement, 7 May 1997 (“*Popović et al.* Trial Judgement”)

SIMIĆ

Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić, Case No. IT-95-9-T, Judgement, 17 October 2003 (“*Simić et al.* Trial Judgement”)

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 (“*Simić* Appeal Judgement”)

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 (“*Stakić* Appeal Judgement”)

STRUGAR

Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Judgement, 31 January 2005 (“*Strugar* Trial Judgement”)

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 (“*Strugar* Appeal Judgement”)

TADIĆ

Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997 (“*Tadić* Trial Judgement”)

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 (“*Tadić* Appeal Judgement”)

Prosecutor v. Duško Tadić, Case Nos IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2000 (“*Tadić* Judgement on Sentencing Appeal”)

TOLIMIR

Prosecutor v. Zdravko Tolimir, Case No. IT-05-88/2-T, Judgement, 12 December 2012 (“*Tolimir* Trial Judgement”)

VASILJEVIĆ

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 (“*Vasiljević* Appeal Judgement”)

2. ICTR

AKAYESU

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgment, 1 June 2001 (“*Akayesu* Appeal Judgement”)

BAGOSORA AND NSENGIYUMVA

Théoneste Bagosora and Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Judgement, 14 December 2011 (“*Bagosora and Nsengiyumva* Appeal Judgement”)

BIKINDI

Simon Bikindi v. The Prosecutor, Case No. ICTR-01-72-A, Judgement, 18 March 2010 (“*Bikindi* Appeal Judgement”)

GACUMBITSI

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 (“*Gacumbitsi* Appeal Judgement”)

GATETE

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2012 (“*Gatete* Appeal Judgement”)

HATEGEKIMANA

Ildephonse Hategekimana v. The Prosecutor, Case No. ICTR-00-55B-A, Judgement, 8 May 2012 (“*Hategekimana* Appeal Judgement”)

KALIMANZIRA

Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement, (“*Kalimanzira Appeal Judgement*”)

KAMBANDA

Jean Kambanda v. The Prosecutor, Case No. ICTR-97-23-A, Judgement, 19 October 2000 (“*Kambanda Appeal Judgement*”)

KARERA

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 (“*Karera Appeal Judgement*”)

MUHIMANA

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 (“*Muhimana Appeal Judgement*”)

MUGENZI AND MUGIRANEZA

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Judgement, 4 Feb 2013 (“*Mugenzi and Mugiraneza Appeal Judgement*”)

MUNYAKAZI

The Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36A-A, Judgement, 28 September 2011 (“*Munyakazi Appeal Judgement*”)

MUVUNYI I

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 29 August 2008 (“*Muvunyi I Appeal Judgement*”)

MUVUNYI II

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 1 April 2011 (“*Muvunyi II Appeal Judgement*”)

NAHIMANA et al.

Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (“*Nahimana et al. Appeal Judgement*”)

NCHAMIHIGO

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-01-63-A, Judgement, 18 March 2010 (“*Nchamihigo Appeal Judgement*”)

NDINDABAHIZI

Emmanuel Ndindabahizi v. The Prosecutor, Case No. ICTR-01-71-A, Judgement, 16 January 2007 (“*Ndindabahizi* Appeal Judgement”)

NIYITEGEKA

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (“*Niyitegeka* Appeal Judgement”)

NTABAKUZE

Aloys Ntabakuze v. The Prosecutor, Case No. ICTR-98-41A-A, Judgement, 8 May 2012 (“*Ntabakuze* Appeal Judgement”)

NTAGERURA et al.

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 (“*Ntagerura et al.* Appeal Judgement”)

NTAKIRUTIMANA

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 (“*Ntakirutimana* Appeal Judgement”)

NTAWUKULILYAYO

Dominique Ntawukulilyayo v. The Prosecutor, Case No. ICTR-05-82-A, Judgement, 14 December 2011 (“*Ntawukulilyayo* Appeal Judgement”)

RENZAHO

Tharcisse Renzaho v. The Prosecutor, Case No. ICTR-97-31-A, Judgement, 1 April 2011 (“*Renzaho* Appeal Judgement”)

RUKUNDO

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-2001-70-A, Judgement, 20 October 2010 (“*Rukundo* Appeal Judgement”)

RUTAGANDA

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 (“*Rutaganda* Appeal Judgement”)

SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 (“*Semanza* Appeal Judgement”)

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-01-66-A, Judgement, 12 March 2008 (“*Seromba Appeal Judgement*”)

SIMBA

Aloys Simba v. The Prosecutor, Case No. ICTR-01-76-A, Judgement, 27 November 2007 (“*Simba Appeal Judgement*”)

3. Special Court for Sierra Leone**TAYLOR**

Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-A, Judgment, 26 September 2013 (“*Taylor Appeal Judgement*”)

4. European Court of Human Rights

Acquaviva v. France, Application No. 19248/91, Judgment, 21 November 1995

Artico v. Italy, Application No. 6694/74, Judgment, 13 May 1990

Moreira de Azevedo v. Portugal, Application No. 11296/84, Judgment, 28 August 1991

Daud v. Portugal, Application No. 22600/93, Judgment, 21 April 1998

Doran v. Ireland, Application No. 50389/99, Judgment, 31 July 2003

Fretté v. France, Application No. 36515/97, Judgment, 26 February 2002

Galstyan v. Armenia, Application No. 26986/03, Judgment, 15 November 2007

Kornev and Karpenko v. Ukraine, Application No. 17444/04, Judgment, 21 October 2010

Krasniki v. The Czech Republic, Application No. 51277/99, Judgment, 28 February 2006

Kostovski v. The Netherlands, Application No. 1145/85, Judgment, 20 November 1989

Kress v. France, Application No. 39594/98, Judgment, 7 June 2001

Moiseyev v. Russia, Application No. 62936/00, Judgment, 9 October 2008

Natunen v. Finland, Application No. 21022/04, Judgment, 31 March 2009

Philis v. Greece (no. 2), Application No. 19773/92, Judgment, 27 June 1997

P.S. v. Germany, Application No. 33900/96, Judgment, 20 December 2001

Saïdi v. France, Application No. 14647/89, Judgment, 20 September 1993

Užkauskas. v. Lithuania, Application No. 16965/04, Judgment, 6 July 2010

Van Mechelen v. The Netherlands, Application Nos 21363/93, 21364/93, 21427/93 and 22056/93, Judgment, 23 April 1997

Zhuk v. Ukraine, Application No. 45783/05, Judgment, 21 October 2010

5. Human Rights Committee

Garfield Peart and Andrew Peart v. Jamaica, Human Rights Committee, Communication Nos 464/1991 482/1991, UN Doc. CCPR/C/54/D/464/1991 and 482/1991, 24 July 1995

Earl Pratt and Ivan Morgan v. Jamaica, Communication Nos 210/1986 and 225/1987, 6 April 1989

Perkins v. Jamaica, Human Rights Committee, Communication No. 733/1997, UN Doc. CCPR/C/63/D/733/1997

6. Post-WWII cases

Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946 (“IMT Judgement”)

International Military Tribunal for the Far East, Judgment of 12 November 1948, in R. John Pritchard ed., *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East with an Authoritative Commentary and Comprehensive Guide* (New York: The Edwin Mellen Press, 1998)

Trial of Gustav Becker, Wilhelm Weber and 18 Others, Permanent Military Tribunal at Lyon, 17 July 1947, in *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission* (London: His Majesty's Stationery Office, 1947-1949) ("UNWCC Law Reports"), vol. VII, pp. 67-73

Trial of Karl Adam Golkel and Thirteen Others, British Military Court, Wuppertal, Germany, 15-21 May 1946, in UNWCC Law Reports, vol. V, pp. 45-53

Trial of Franz Holstein and 23 Others, Permanent Military Tribunal at Dijon, 3 February 1947, in UNWCC Law Reports, vol. VIII, pp. 22-33 ("*Holstein case*")

The Jaluit Atoll Case, Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy, United States Military Commission, Marshall Islands, 7-13 December 1945, in UNWCC Law Reports, vol. I, pp. 71-80

The Roehling Case – Indictment, Judgment, and Judgment on Appeal, dated on 25 November 1947, 30 June 1948, and 25 January 1949, respectively, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, October 1946 – April 1949* (Washington, D.C.: U.S. Government Printing Office, 1949-1953) ("Trials before NMTs"), vol. XIV, pp. 1061-1143 ("*Roehling case*")

Trial of Werner Rohde and Eight Others, British Military Court, Wuppertal, Germany, 29 May – 1 June 1946, in UNWCC Law Reports, vol. V, pp. 54-59 ("*Rohde case*")

The Almelo Trial, Trial of Otto Sandrock and Three Others, British Military Court, Almelo, Holland, 24-26 November 1945, in UNWCC Law Reports, vol. I, pp. 35-45

Trial of Franz Schonfeld and Nine Others, British Military Court, Essen, 11-26 June 1946, in UNWCC Law Reports, vol. XI, pp. 64-73 ("*Schonfeld case*")

The Zyklon B Case, Trial of Bruno Tesch and Two Others, British Military Court, Hamburg, 1-8 March 1946, in UNWCC Law Reports, vol. I, pp. 93-103 ("*Zyklon B case*")

Trial of Lobert Wagner, Gauleiter and Head of the Civil Government of Alsace during the Occupation and Six Others, Permanent Military Tribunal at Strasbourg, 23 April – 3 May 1946, and Court of Appeal, 24 July 1946, in UNWCC Law Reports, vol. III, pp. 23-55 ("*Wagner case*")

Trial of Max Wielen and 17 Others, the Stalag Luft III Case, British Military Court, Hamburg, Germany, 1 July -3 September 1947, in UNWCC Law Reports, vol. XI, pp. 31-52 ("*Stalag Luft III case*")

United States of America v. Josef Altstoetter et al., Military Tribunal III, Opinion and Judgment, 3-4 December 1947, in Trials before NMTs, vol. III (“*Justice case*”)

United States of America v. Friedrich Flick et al., Opinion and Judgment, 22 December 1947, in Trials before NMTs, vol. VI (“*Flick case*”)

United States of America v. Carl Krauch et al., Opinion and Judgment of the United States Military Tribunal VI, 29-30 July 1948, in Trials before NMTs, vol. VIII (“*Farben case*”)

United States of America v. Otto Ohlendorf et al., Military Tribunal II-A, Opinion and Judgment, 8-9 April 1948, in Trials before NMTs, vol. IV (“*Einsatzgruppen case*”)

United States of America v. Oswald Pohl et al., Opinion and Judgment of the United States Military Tribunal II, 3 November 1947, in Trials before NMTs, vol. V (“*Pohl case*”)

United States of America v. Ernst von Weizsaecker et al., Military Tribunal IV, Judgment, 11-13 April 1949, in Trials before NMTs, vol. XIV (“*Ministries case*”)

Landgericht Hechingen, 28.6.1947, KLS 23/47 and Oberlandesgericht Tübingen, 20.1.1948, Ss 54/47, decision on appeal reported in Justiz und NS-Verbrechen, vol. I, pp. 469-502 (“*Hechingen Deportation case*”)

Strafsenat, Urteil vom 10. August 1948 gegen K. und A., STS 18/48 in Entscheidungen des Obersten Gerichtshofs für die Britische Zone. Entscheidungen in Strafsachen, vol. I (1949), pp. 53-56 (“*Synagogue case*”)

Strafsenat, Urteil vom 14. Dezember 1948 gegen L. und andere, StS 37/48 in Entscheidungen des Obersten Gerichtshofs für die Britische Zone. Entscheidungen in Strafsachen, Vol. I (1949), pp. 229-234 (“*Pig-cart parade case*”)

7. Other Jurisdictions

(a) Australia

Giorgianni v. R. [1985] 156 CLR 473

R. v. Russell [1933] VLR 59

(b) Belgium

Arrêt de la Cour de cassation de Belgique (Cass.), 28 September 2010, AR P.10.0099.N, Pasicrisie belge (Pas.), 2010, n° 554

(c) Canada

R. v. Briscoe [2010] 1 S.C.R. 411

R. v. Hibbert [1995] 2 S.C.R. 973

(d) France

Arrêt de la chambre criminelle de la Cour de cassation (“Crim.”), 23 July 1927: Recueil Sirey, 1929. 1. 73

Crim., 21 October 1948: Bulletin des arrêt de la chambre criminelle de la Cour de cassation (“Bull. crim.”) n° 242, 27 December 1960 and *ibid.*, n° 624

Crim., 17 May 1962: Bull. crim., n° 200; Recueil Dalloz 1962. 473

Crim., 1 October 1984: Gazette du Palais 1985, Sommaires 96

Crim., 19 March 1986: Bull. crim., n° 112

Crim., 26 March 1992: Droit pénal Dalloz 1992. 194

Crim., 28 June 1995: Bull. crim., n° 241; Droit pénal Dalloz 1995. 274

Crim., 19 June 2001: Bull. crim., n° 148; Droit pénal Dalloz 2001. 111

(e) Hong Kong

R. v. Lam Kit [1988] 1 HKC 679

(f) Israel

Criminal Appeal 320/99, *Plonit v. The State of Israel*, PD 55(3) 22

(g) Japan

2011 (A) No. 2249, decision of the Third Petty Bench of the Supreme Court of 15 April 2013, Keishu vol. 67, No. 4

1949 (Re) No. 1506, judgment of the Second Petty Bench of the Supreme Court of 1 October 1949, Keishu Vol. 3, No. 10

(h) Luxembourg

Cour Supérieure de Justice (Cour d'appel siégeant en matière correctionnelle), 24 mars 1986, n° 7/86 VI

Tribunal d'arrondissement de Luxembourg, 26 novembre 1987, n° 1678/86, cités dans Pasicrisie luxembourgeoise, XXVII, (Sommaires), 93, n° 18

(i) Mexico

Suprema Corte de Justicia de la Nación, Tesis CXXI/2007, vol. XXV, June 2007

Contradicción de Tesis 414/2010, vol. VIII, May 2012

(j) New Zealand

Mahana Makarini Edmonds v. R [2011] NZSC 159

(k) South Africa

Tladi v. S [2005] ZAFSHC 143

(l) UK

Maxwell v. Director of Public Prosecutions for Northern Ireland [1979] 68 Cr. App. R. 128

National Coal Board v. Gamble [1959] 1 Q.B.11

R. v. Bryce [2004] 2 Cr.App.R. 35

(m) US

Aziz v. Alcolac, Inc., 658 F3d 388 (4th Cir. 2011)

Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010)

Nye & Nissen v. United States, 336 U.S. 613 (1949)

Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244 (2nd Cir. 2009)

United States v. Bancalari, 110 F.3d 1425 (9th Cir. 1997)

United States v. Delgado, 357 F.3d 1061(9th Cir. 2004)

United States v. Gaskins, 849 F.2d 454 (9th Cir. 1988)

United States v. Landerman, 109 F.3d 1053 (5th Cir. 1997)

United States v. Leos-Quijada, 107 F.3d 786 (10th Cir. 1997)

United States v. Lucas, 67 F.3d 956 (D.C. Cir. 1995)

United States v. McKneely, 69 F.3d 1067 (10th Cir.1995)

United States v. Peoni, 100 F.2d 401 (2nd Cir. 1938)

United States v. Roach, 28 F.3d 729 (8th Cir. 1991)

United States v. Williamson, 53 F.3d 1500 (10th Cir. 1995)

United States v. Woods, 148 F.3d 843 (7th Cir. 1998)

B. Defined Terms and Abbreviations

Additional Protocol I	Additional Protocol to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977
ACHR	American Convention on Human Rights
Appeals Chamber	Appeals Chamber of the Tribunal
Appellants	Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić collectively
B/C/S	Bosnian/Croatian/Serbian
CLSS	Conference and Language Service Section
Commission for Cooperation with the KVM or Commission	Commission of the Federal Government for the Co-operation with the OSCE Mission for Verification in Kosovo and Metohija

Đaković's Notes or Notes	Handwritten notes taken by Milan Đaković entitled "Meetings of the Joint Command for Kosovo and Metohija", which record the daily meetings held in Priština/Prishtina between 22 July and 30 October 1998 (Exhibit P1468)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDS	Electronic Disclosure Suite
EU-KDOM	European Union Kosovo Diplomatic Observer Mission
Exh.	Exhibit
FRY	Federal Republic of Yugoslavia
HRCee	Human Rights Committee
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
IDs	Identity documents
ILC	International Law Commission

ILC Draft Code	Draft Code of Crimes against the Peace and Security of Mankind adopted by the ILC in 1996
IMT Charter	Charter of the International Military Tribunal of 8 August 1945
IMTFE	International Military Tribunal for the Far East
Indictment	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-05-87-PT, Third Amended Joinder Indictment, 21 June 2006
JCE	Joint Criminal Enterprise
JDB	Tribunal's Judicial Database
JNA	Yugoslav People's Army
JSO	Special Operations Unit of the MUP State Security Department
KiM	Kosovo and Metohija
KLA	Kosovo Liberation Army
KVM	Kosovo Verification Mission
Lazarević's Appeal Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, General Vladimir Lazarević's Refiled Appeal Brief, 2 October 2009 (confidential); public redacted version filed on 25 May 2010
Lazarević's Closing Brief	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-05-87-T, Vladimir Lazarević's [sic] Final Trial Brief, 15 July 2008 (confidential); public redacted version filed on 29 July 2008, reclassified as confidential on 22 February 2010; public redacted version refiled on 25 May 2010
Lazarević's Notice of Appeal	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Vladimir Lararević's [sic] Defence Notice of Appeal, 27 May 2009

Lazarević's Reply Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Lazarević Defence Reply Brief, 15 February 2010 (confidential); public redacted version filed on 10 October 2013
Lazarević's Response Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Lazarević Defence Respondent's Brief, 2 November 2009
Lukić's Appeal Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Defense Appellant's [<i>sic</i>] Brief Refiled, 7 October 2009
Lukić's Closing Brief	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-05-87-T, Sreten Lukic's [<i>sic</i>] Final Defense Trial Brief, 15 July 2008 (confidential); corrigendum filed on 18 July 2008; public redacted version filed on 7 August 2008
Lukić's Notice of Appeal	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Sreten Lukic's [<i>sic</i>] Notice of Appeal from Judgment and Request for Leave to Exceed the Page Limit, 27 May 2009
Lukić's Reply Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Sreten Lukic's [<i>sic</i>] Reply Brief in Support of his Defense Appellant's Brief, 15 February 2010 (confidential); public redacted version filed on 14 September 2010
Lukić's Response Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Sreten Lukic's [<i>sic</i>] Response to the Prosecution Appeal, 2 November 2009 (confidential); public redacted version filed on 31 August 2010
LDK	Democratic League of Kosovo
MNA	Marked Not Admitted
MUP	Ministry of the Interior of the Republic of Serbia
MUP Staff	MUP Staff for Kosovo and Metohija
NATO	North Atlantic Treaty Organization

October Agreements	Agreements brokered in October 1998: these included the Holbrooke-Milošević Agreement, the KVM Agreement, the NATO-FRY Agreement, and the Clark-Naumann Agreement
Ojdanić's Closing Brief	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-05-87-T, General Dragoljub Ojdanić's Closing Brief, 15 July 2008 (confidential); public redacted version filed on 15 July 2008; public redacted version refilled on 29 July 2008
OLAD	Office of Legal Aid and Detention Matters
OMPF	Office of Missing Persons and Forensics
OMPF List	A list of missing persons prepared by the OMPF (Exhibit P2798)
Original Indictment	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-99-37-I, Indictment, 23 May 1999, confirmed on 24 May 1999 and made public on 27 May 1999
OSCE	Organization for Security and Cooperation in Europe
OUP	Sectors of the Interior of the MUP
PJP	Special Police Unit of the MUP
Pavković's Appeal Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, General Pavković's Amended Appeal Brief, 30 September 2009, annexed to General Pavković's Submission of his Amended Appeal Brief, 30 September 2009
Pavković's Closing Brief	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-05-87-T, Final Brief of Nebojša Pavković, 15 July 2008 (confidential); public redacted version filed on 28 July 2008
Pavković's Notice of Appeal	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Notice of Appeal from the Judgement of 26 February 2009, annexed to General Pavković Submission of his Amended Notice of Appeal, 29 September 2009
Pavković's Reply Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, General Pavković's Reply to Prosecution Response to Amended Appeal Brief, 15 February 2010

Pavković's Response Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, General Pavković Reply to Prosecution Appeal Brief, 2 November 2009
Pavković's Supplemental Appeal Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, General Pavković's Supplemental Brief, 8 March 2010
Plan for Combating Terrorism	A plan comprising both military and political measures for suppressing and combating terrorism in Kosovo, formally adopted on 21 July 1998 in a meeting convened by Milošević at Beli Dvor, his official residence, in Belgrade
Prosecution	Office of the Prosecutor of the Tribunal
Prosecution's Appeal Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Prosecution Appeal Brief, 10 August 2009 (confidential); public redacted version filed on 21 August 2009
Prosecution's Closing Brief	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-05-87-T, Final Trial Brief, 15 July 2008 (confidential); public redacted version filed on 29 July 2008
Prosecution's Reply Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Prosecution's Consolidated Reply Brief, 17 November 2009 (confidential); public redacted version filed on 1 September 2010
Prosecution's Notice of Appeal	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Prosecution Notice of Appeal, 27 May 2009
Prosecution's Response Brief (Lazarević)	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Prosecution Response to Appeal of Vladimir Lazarević, 15 January 2010 (confidential); public redacted version filed on 14 May 2010
Prosecution's Response Brief (Lukić)	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Refiled Prosecution Response to Appeal of Sreten Lukić, 3 February 2010 (confidential); public redacted version filed on 19 April 2010
Prosecution's Response Brief (Pavković)	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Prosecution Response to General Pavković's Amended Appeal Brief, 15 January 2010 (confidential); corrigendum filed on 26 February 2010; public redacted

version filed on 26 February 2010; corrigendum to public redacted version filed on 1 March 2010

Prosecution's Response Brief (Šainović)	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Prosecution Response to Šainović's Brief, 15 January 2010 (confidential); public redacted version filed on 29 January 2010; corrigendum to public redacted version filed on 17 February 2010
Prosecution's Supplemental Response Brief (Pavković)	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Prosecution Response to General Pavković's Supplemental Brief, 18 March 2010
RDB	<i>Resora Drzavne Bezbednosti</i> (State Security Department)
RJB	<i>Resor Javne Bezbednosti</i> (Public Security Department)
RPOs	Reserve Police Detachments or Reserve Police Squads
Ru-KDOM	Russia Kosovo Diplomatic Observer Mission
Rules	The Tribunal's Rules of Procedure and Evidence
Šainović's Appeal Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Defence Appeal Brief, 23 December 2009
Sainović's Closing Brief	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-05-87-T, Defence Submission Final Trial Brief, 15 July 2008 (confidential); public redacted version filed on 29 July 2008
Šainović's Notice of Appeal	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Defence Submission Notice of Appeal, 27 May 2009
Šainović's Reply Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Defence Brief in Reply, 15 February 2010 (confidential); public redacted version filed on 22 July 2010
Šainović's Response Brief	<i>Prosecutor v. Nikola Šainović et al.</i> , Case No. IT-05-87-A, Defence Respondent's Brief, 2 November 2009

SAJ	Special Anti-Terrorist Units of the MUP
SDC	Supreme Defence Council
SMB	Olive-green-grey uniform used by the VJ
SPS	Socialist Party of Serbia
Statute	Statute of the Tribunal
SUP	<i>Sekretarijat Unutrašnjih Poslova</i> (Secretariat of the Interior)
TEC	Provisional or Temporary Executive Council of the Autonomous Province of Kosovo and Metohija
Trial Chamber	Trial Chamber III of the Tribunal
Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UN Security Council Resolution 1199 or Resolution 1199	United Nations Security Council Resolution issued on 23 September 1998, which expressed grave concern “at the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the Secretary-General, the displacement of over 230,000 persons from their homes”
US	United States of America

US-KDOM	United States Kosovo Diplomatic Observer Mission
VJ	Army of Yugoslavia
Working Group	A working group sent to Kosovo in 1998, consisting of three SPS members, Milomir Minić, Dušan Matković, and Zoran Andelković