THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-87-A

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Date Filed: 30 September 2009

THE PROSECUTOR

v.

NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

PUBLIC
GENERAL PAVKOVIĆ'S SUBMISSION OF HIS AMENDED APPEAL BRIEF

The Office of the Prosecutor

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Mr. Tomislav Višnjić and Mr. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Ćepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

GENERAL PAVKOVIĆ'S SUBMISSION OF HIS AMENDED APPEAL BRIEF

1. On 15 September 2009 General Pavković filed his Request to Amend his Notice of Appeal to Adopt Ground Seven of his Co-Appellant General Ojdanić's Amended Notice of Appeal.[1] In this request General Pavković sought to adopt and join the legal arguments of General Ojdanić regarding the alleged error of the Trial Chamber in the interpretation of the *mens rea* element of crimes against humanity.
2. This request was granted in part by the Appeals Chamber on 22 September whereby General Pavković was not permitted to simply adopt the legal arguments of General Ojdanić, and therefore an order was made for General Pavković to file an amended Notice of Appeal and an Amended Appellant Brief by 30 September 2009.[2]
3. General Pavković now files his Amended Appeal Brief to include this new Ground of Appeal (as Ground 13) as per the order of the Appeals Chamber as Annex A.

Word Count: 203
Respectfully Submitted

Counsel for Nebojša Pavković
John E Ackerman

[1] *Sainović et al.,* General Pavković Request to Amend his Notice of Appeal to Adopt Ground Seven of his Co-Appellant General Ojdanić's Amended Notice of Appeal, 15 September 2009
[2] *Sainović et al.,* Decision on Nebojša Pavković's Second Motion to Amend his Notice of Appeal, 22 September 2009

ANNEX A

THE INTERNATIONAL CRIMINAL TRIBUNAL
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"I am not arguing against bringing those accused of war crimes to trial. I am pointing out hazards that attend such use of the judicial process—risk on the one hand that the decision that most of the world thinks should be made may not be justified as a judicial finding, even if perfectly justified as a political policy; and the alternative risk of damage to the future credit of judicial proceedings by manipulations of trial personnel or procedure temporarily to invest with judicial character what is in fact a political decision. I repeat that I am not saying there should be no trials. I merely say that our profession should see that it is understood that any trials to which lawyers worthy of their calling lend themselves will be trials in fact, not merely trials in name, to ratify a predetermined result."

- *Justice Robert Jackson, ASIL, 13 April 1945*

I. Introduction

1. This case before the Appeals Chamber is a case of manifest injustice. It must be overturned. The case is based upon a facially flawed theory. To understand the fault in the theory it is important to understand that intense international interest was being manifested regarding the events taking place in Kosovo during 1998 and throughout the conflict that is the subject matter of this case. The United Nations was actively involved. The OSCE was actively involved. The United States and Russia were actively involved. Events in Kosovo were being very closely monitored. International observers were present throughout most of the time. Numerous forms of surveillance were being carried out. After the war this Tribunal was able to gather millions of pages of documents regarding the war and the communications by and between its various participants. This process continues. Hundreds of witnesses were interviewed and more continue to be interviewed. Not one document; not one witness provides any direct evidence of the existence of a plan by the FRY leadership to forcibly expel a sufficient number of Kosovo Albanians to maintain Serbian control of the province. After more than eleven years of searching no such evidence has surfaced.

2. In addition, the asserted existence of such a plan defies common sense and logic. No rational person could have believed at the time and in the situation then existing that the world would fail

to notice mass movements of people and would accept that they had never been in Kosovo in the first place.

II. Procedural History

3. On 26 February 2009 the Trial Chamber convicted General Pavković of counts 1 to 5 of the Indictment; Deportation, Forcible Transfer, Murder and Persecution, by commission as a member of a Joint Criminal Enterprise (JCE) pursuant to Article 7(1) of the Statute and sentenced him to twenty-two years of imprisonment.

4. On 27 May 2009 General Pavković filed his *Notice of Appeal* against the Trial Chamber Judgement of *Prosecutor v Milutinović et al.* dated 26 February 2009 (the "*Judgement*"). On 9 September 2009 the Appeals Chamber granted General Pavković's request for an amendment to his Notice of Appeal by the addition of one sub-ground and held as valid the Amended Notice of Appeal filed with his request on 28 August 2009.[3] This brief is now filed pursuant to Rule 111 of the Rules of Procedure and Evidence ("*The Rules*").

5. On 15 September 2009 General Pavković filed a *Request to Amend his Notice of Appeal to Adopt Ground Seven of his Co-Appellant Ojdanić's Amended Notice of Appeal* (*Request*). In this request General Pavković sought to adopt and join the legal arguments of General Ojdanić regarding the alleged error of the Trial Chamber in the interpretation of the *mens rea* element of

[3]*Sainović et al.,* General Pavković Motion for Amendment to his Notice of Appeal, 28 August 2009, *Sainović et al.,* Appeals Chamber Decision on Nebojša Pavković's Motion for Amendment to his Notice of Appeal, 9 September 2009

crimes against humanity. This request was granted in part by the Appeals Chamber on 22 September whereby General Pavković was not permitted to simply adopt the legal arguments of General Ojdanić, and therefore an order was made for General Pavković to file an amended Notice of Appeal and an Amended Appellant Brief by 30 September 2009.[4]

6. General Pavković has not yet had the opportunity to read the final *Judgement* in his native language because, as of the time of filing this Appeal Brief, the translation has not been completed by the Tribunal. If, once the translated *Judgement* is provided to him, it becomes clear that he wishes to raise further issues, an application will be made on his behalf to amend the Grounds of Appeal and/or this Appeal Brief. For these reasons, General Pavković reserves his position in this regard.

7. General Pavković also wishes to note that during the period between the filing of his Notice and the filing of this brief he has decided to withdraw some of his grounds of appeal. These grounds are: Sub-ground 1(E) in its entirety; Ground 4 in its entirety; and Ground 8 (a) to Volume I, paragraphs 509, 524, 528, 538, 547, 549, 550, 552, 553, 554 555, 556, 559, 562, 563, 564, 567 and 568 and Ground 8(b) to Volume I paragraphs 74, 75, 477, 971, 1006, 1012, 1069, 1070, 1105, 1121 and to Volume III paragraphs 65, 84, 305, 322, 323, 324, 325, 515, 516, 523, 530, 545, 598, 599, 654, 662, 663, and 778.

[4] *Sainović et al.,* Decision on Nebojša Pavković's Second Motion to Amend his Notice of Appeal, 22 September 2009

III. Standard of Appellate Review

8. Article 25 of the Statute provides that the Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

> (a) an error on a question of law invalidating the decision; or
> (b) an error of fact which has occasioned a miscarriage of justice.

(a) Errors of Law

9. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether they are correct.[5] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[6] In doing so, the Appeals Chamber corrects the legal error and also applies the correct legal standard to the evidence contained in the trial record in order to determine whether it is convinced beyond reasonable doubt that the factual finding challenged by the Defence should be confirmed on appeal.[7]

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[5] *Stakić*, Appeal Judgement, para.25
[6] *Blaškić,* Appeal Judgement, para.15
[7] *Id.*

10. In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the Tribunal's jurisprudence.[8]

(b) Errors of Fact

11. The Appeals Chamber will presume that a Trial Chamber took into consideration all the relevant evidence unless there is an indication that the Trial Chamber completely disregarded any piece of evidence. This may be the case where the Trial Chamber's reasoning fails to address evidence that is clearly relevant to its findings.[9]

12. A Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved beyond a reasonable doubt each element of that crime and the applicable mode of liability as well as any fact indispensable for entering the conviction.[10] This applies both to findings of fact based on direct evidence, and to those based on circumstantial evidence.[11]

13. The Appeals Chamber will give a margin of deference to a finding of fact reached by the Trial Chamber.[12] Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable trier of fact or where the evaluation

[8] *Brđanin*, Appeal Judgement, para.8
[9] *Kvočka et al.,* Appeal Judgement, para.23
[10] *Stakić* Appeal Judgement, para.219, *Kupreškić* Appeal Judgement, para.303; *Kordić and Čerkez* Appeal Judgement, para.834; *Ntagerura et al* Appeal Judgement para.174–175
[11] *Čelebići* Appeal Judgement para.458, *Brđanin* Appeal Judgement, para.13
[12] *Kupreški,* Appeal Judgement, para.30

of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[13]

14. All conclusions must be established beyond a reasonable doubt. A conclusion must be the *only* reasonable conclusion available from the evidence. If there is another conclusion that is also reasonably open from the evidence and which is consistent with the innocence of the accused, he must be acquitted.[14]

(c) Lack of a Reasoned Opinion

15. Article 23 of the Statute requires, *inter alia*, that the Trial Chamber provide "a reasoned opinion in writing." An appellant claiming an error of law because of a lack of a reasoned opinion must identify the specific issues, factual findings or arguments which he submits the Trial Chamber omitted to address and must explain why this omission invalidated the decision.[15] The right to a reasoned opinion is one of the elements of a fair trial requirement embodied in Articles 20 and 21 of the Statute.[16]

16. 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 judgement

[13] *Limaj et al,* Appeal Judgement, para.10
[14] *Čelebići* Appeal Judgement para.458., *Limaj* Appeal Judgment, para.21, *Tadić* Decision on Appellant's Motion for Extension of Time Limit and Admission of Further Evidence, 15 October 1998, para.73., *Naletilić* Appeal Judgement, para.120
[15] *Limaj et al*. Appeal Judgement, para.9, *Kvoćka et al*, Appeal Judgement, para.25
[16] *Furundžija* Appeal Judgement para.69; *Naletilić et al* Appeal Judgement para.603; *Kunarac et al* Appeal Judgement para.41; and *Hadžihasanović* Appeal Judgement para.13

or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence submitted on appeal. A Trial Chamber does not have to explain every decision it makes, as long as the decision, with a view to the evidence, is reasonable.[17] There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective.[18]

[17] *Brđanin*, Appeal Judgement, para.11
[18] *Kvoćka et al*, Appeal Judgement, para.23

III. Grounds of Appeal

GROUND 1: THE TRIAL CHAMBER COMMITTED AN ERROR IN LAW AND FACT BY CONVICTING GENERAL PAVKOVIĆ ON THE BASIS OF A JOINT CRIMINAL ENTERPRISE

17. This error of fact and law arose as a number of sub-errors listed here as 1(A-G).

SUBGROUND 1(A) – THE TRIAL CHAMBER ERRED IN LAW AND FACT AS TO FINDINGS REGARDING JOINT CRIMINAL ENTERPRISE

18. General Pavković submits that in regard to the findings on Joint Criminal Enterprise (JCE) and his involvement therein the Trial Chamber erred in law and in fact in a number of ways which invalidate the *Judgement*, which will be discussed below.

19. The Trial Chamber in paragraph 783 of Volume III of the *Judgement* simply made a blanket conclusion that all crimes committed by VJ or MUP forces were attributable to General Pavković. By simply applying this blanket conclusion the Trial Chamber applied an erroneous legal standard in the *Judgement*, which fails to comply with the Joint Criminal Enterprise principles pronounced by the Appeals Chamber. The Appeals Chamber in *Brđanin* held that:

> …to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of

> the Joint Criminal Enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.[19]

20. Thus, in a case where a JCE member uses a person outside the JCE who does not share the *mens rea* necessary to become a member of the JCE, a Trial Chamber needs to establish whether a crime perpetrated by that person forms part of the common purpose. Accordingly, it needs to establish the necessary "link between the accused and the crime as a legal basis for the imputation of criminal liability".[20] In this respect, relevant considerations are, *inter alia*, (i) whether any member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose and (ii) whether the principle perpetrator knows of the existence of the JCE.[21] This required showing must be by evidence, beyond a reasonable doubt. As will be shown below, the evidence in this case does not support such a blanket finding and no reasonable trial chamber could have so concluded.

21. The Appeals Chamber in *Krajišnik* provided additional guidance on how to establish the necessary link between the crime carried out by the principle perpetrator and the JCE member using this perpetrator. The Appeals Chamber listed a non-exhaustive number of factors indicating such a link, including "that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered,

[19] *Brđanin*, Appeal Judgement, para.413
[20] *Id. at* para.412; *Krajišnik*, Appeal Judgement, 17 March 2009, para.225
[21] *Brđanin* Appeal Judgement, para.410

encouraged, or otherwise availed himself of the non-JCE member to commit the crime".[22]

22. Regrettably, the Appeals Chamber has set a low standard of what amounts to "using" principal perpetrators by establishing a non-exhaustive list of criteria. Moreover, the Appeals Chamber has not clarified whether these criteria are objective; relating to the acts of the JCE member who is "using" or subjective; relating to the state of mind of the JCE member who is "using" or both. Consequently, Trial Chambers have not clearly identified the nature of the link between the JCE and the crime carried out by principle perpetrators who are not members of the JCE.

23. In Volume I, paragraph 101, the Trial Chamber cited correctly the law regarding JCE and the physical perpetrators of crimes and then failed to apply this principle by failing to find that with regard to each crime for which Pavković was found responsible under JCE principles that he "closely cooperated with the physical perpetrator or intermediary perpetrator in order to further the common criminal enterprise."[23]

24. In Volume I, paragraph 102, the Chamber made the following legal conclusion:

> For all three forms of Joint Criminal Enterprise, the common purpose need not be previously arranged or formulated, but may materialise spontaneously. A Chamber may infer that a common plan or purpose existed by examining the totality of the

[22] *Krajišnik* Appeal Judgement, para.226
[23] *Brđanin* Appeal Judgement, para.410; *Martić* Trial Judgement, para.438

> circumstances surrounding the commission of a crime or underlying offence. For example, the way in which the crime or underlying offence is committed may support an inference that it must have been pursuant to a common plan. In these cases, the Prosecution is not required to adduce documentary or other explicit evidence of the plan's existence.

25. Importantly, the Chamber is not saying that "the totality of circumstances surrounding the commission of a crime or underlying offence" is the Joint Criminal Enterprise. What the Chamber is saying is that it can be evidence of the existence of an agreed plan among the proven members of the JCE. There still must be a real plan emanating from a real agreement. It does not materialize out of thin air or out of events on the ground. There must be an agreement. And the "inference" of its existence must of necessity exclude all other reasonable inferences. The proof, even by inference, must be beyond a reasonable doubt.

26. There is no evidence in the trial record of a "previously arranged or formulated" Joint Criminal Enterprise. There is no evidence that the members of the alleged Joint Criminal Enterprise got together and formulated the plan to expel Kosovo Albanians in October 1998, the time when it is alleged that the JCE began. Since there is no direct evidence of its formulation the Chamber was left to search for evidence that it materialised no later than October 1998, the date charged in the Indictment.[24] Since this date is one of the elements it must be proved beyond a reasonable doubt that the plan arose at that time. Any interpretation that the date is not a material element of the

[24] Indictment, para.20

charge would deprive an accused of notice and an opportunity to defend.

27. The Trial Chamber held in Volume III, paragraph 782 that General Pavković's contribution to the JCE was significant. This was an error of law and fact which invalidates the *Judgement* and has occasioned a miscarriage of justice. The finding of the Trial Chamber that General Pavković's continued support for operations of the VJ and joint operations with the MUP constitutes proof of a substantial contribution to a JCE completely disregards the fact of the serious threats faced by the VJ of NATO bombing and possible invasion and the terrorist attacks of the KLA.

28. The Appeals Chamber has held that not every type of conduct would amount to a sufficiently significant contribution to the crime such as would prove criminal liability of the accused regarding the crime in question. In order to be found responsible it has been held that the accused "must be the cog in the wheel of events leading up to the result".[25] Thus, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.[26]

29. General Pavković was not charged with actually "committing" directly any offence cognizable by this Tribunal. All liability

[25] *Brđanin*, Appeal Judgement, para.427, footnote 909, quoting from *Trial of Feurstein and others*, by the Judge Advocate who stated that, in order to be found responsible, an accused "must be the cog in the wheel of events leading up to the result which in fact occurred." Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), Judgement of 24 August 1948
[26] *Kvočka,* Appeal Judgement, para.188

charged against him was a form of vicarious liability under concepts of JCE or otherwise.

30. There is no evidence that any crime proved beyond a reasonable doubt in this case was actually committed by anyone found to be a member of the JCE. In other words, persons found to be "tools" of members of the enterprise committed all the crimes.

31. JCE was charged by the Prosecution in this case as a form of "commission" under Article 7(1) of the Statute. The issue of whether this is appropriate in charges such as those in this case was recently raised by the Appeals chamber, as follows:

> In the *Brđanin* Appeal, footnote 891 reads as follows: The jurisprudence of the Tribunal traditionally equates a conviction for JCE with the mode of liability of "committing" under Article 7(1). The Appeals Chamber declines at this time to address whether this equating is still appropriate where the accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.

32. Judge Meron submitted a separate opinion in *Brđanin* elaborating on this issue.[27] Judge Meron concluded:

> In my view where a JCE member uses a non-JCE member to carry out a crime in furtherance of the common purpose, then all other JCE members should be liable via the JCE under the same mode of liability that attaches to this JCE member. Thus, where A and B belong to a JCE and A orders non-member X to commit a crime in furtherance of the JCE, then B's conviction for this crime via the JCE should be treated as a form of "ordering" for purposes of Article 7(1) rather than as a form of

[27] *Prosecutor v Brđanin* Separate Opinion of Judge Meron, 3 April 2007, p.167, *et. seq.*

> "committing". Since B's liability for this crime is essentially derivative of A's, he should not be convicted of a higher mode of liability than that which attaches to A's conduct.[28]

33. Thus, the Prosecutor and the Trial Chamber in this case were put on notice by the *Brđanin* Appeals Chamber that this was a matter that was troubling the Appeals Chamber in general and Judge Meron in particular. The trial proceeded and the *Judgement* was entered with no notice being paid to this concern.

34. In his final brief to the Trial Chamber, General Pavković discussed the issue at length.[29] It was argued that "commission" was inappropriate to describe the offences alleged in the Indictment since all charged offences were committed by persons who were not identified as members of the JCE. In fact, the actual perpetrators were not identified at all.

35. In addition the following language from the *Brđanin* Appeal decision was brought to the attention of the Trial Chamber:

> ...that, to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the Joint Criminal Enterprise, and that this member – when using a principle perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.[30]

36. This paragraph requires that the principle perpetrator of a charged crime would need to be identified and linked to an

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[28] *Id.* at para.6
[29] *See,* Final Brief of Nebojša Pavković, 15 July 2008, p.24-48
[30] *Brđanin,* Appeal Judgement, para.413

identified member of the JCE who in using this perpetrator as a tool was acting in accordance with the JCE. The only way such a requirement is provable beyond a reasonable doubt is by identification of the actual perpetrator. While this identification does not necessarily include identification by name it certainly requires something more than that the perpetrator was wearing a uniform that was similar to uniforms worn by members of the VJ, for instance. Absent such identification it is impossible to prove beyond a reasonable doubt the link to a specific JCE member. As the Chamber points out, there is not some general concept that can be applied here. It must be dealt with on a case-by-case basis. This does not mean Indictment-by-Indictment basis but allegation-by-allegation basis. Thus the Trial Chamber erred in paragraph 783 of Volume III of the *Judgement* by making a blanket conclusion that all crimes committed by VJ or MUP forces were attributable to General Pavković.

37. Furthermore, the concept of assigning responsibility for using a perpetrator as a tool necessarily requires proof that the member of the JCE actually did so. In other words, the JCE member must have instructed the perpetrator to commit the crime; in this case to expel Kosovo Albanians from Kosovo. There is no evidence in this case that any JCE member every issued such an order to any perpetrator.

38. The opinion of Judge Meron, quoted above, assumes that the Prosecution has been able to prove beyond a reasonable doubt that a member of the JCE ordered the non-member to commit a

crime. It is not enough to merely show that a crime was committed; it must be proved that there is a link between a member of the JCE and the perpetrator. And only then, when it is shown beyond a reasonable doubt that X committed the offence under the orders of a member of the JCE, other members of the JCE could be found guilty of "ordering" that murder, not "committing" it. Judge Meron is correct and this Chamber should accept his reasoning in this regard.

39. The Trial Chamber ignored the arguments made by General Pavković regarding these issues; the Chamber made no comment. An error of law resulting in a miscarriage of justice was the result.

40. No evidence in this case meets the *Brđanin* required criteria. There is no evidence of anyone being ordered to commit a crime by a JCE member. There is no evidence of anyone being ordered to deport anyone by a JCE member. There is no evidence of anyone being ordered to murder or rape anyone. There is no evidence of anyone being ordered to engage in destruction of any religious or other structures. The evidence that these things did happen is of no moment without the link connecting the actions to at least one member of a JCE.

41. General Pavković, has been found guilty of "committing" under a JCE theory all of the offences listed in the *Judgement* against him without a showing that any member of the JCE "committed" any of the offences. On this basis alone the *Judgement* as regards JCE cannot stand.

SUBGROUND 1(B) – THE TRIAL CHAMBER ERRED IN FACT AND LAW IN FINDING THE EXISTENCE OF A COMMON PLAN TO EXPEL KOSOVO ALBANIANS

42. The JCE case against the accused was that they participated in a Joint Criminal Enterprise to modify the ethnic balance in Kosovo in order to ensure continued control by the FRY and Serbian authorities over the province. Paragraph 20 of the Indictment charged that this Joint Criminal Enterprise came into existence no later than October 1998.

43. In October 1998 the October Agreements between Milošević and Holbrooke were adopted. Pursuant to this Agreement the OSCE entered Kosovo on a monitoring mission. According to the Indictment the JCE plan came into existence this same month.

44. The contention then is that while the FRY was entering into a cease-fire agreement and a commitment to remove excess forces from Kosovo they are at the same time plotting to take advantage of non-existent NATO bombing to deport Kosovo Albanians. It is a preposterous notion. It is crucial to understand that the FRY leadership entered into this agreement without demanding any agreement to a cease-fire or stand-down by the KLA. It was a very unique one-sided agreement on the part of the FRY; an obvious genuine effort to solve the situation. General Klaus Naumann testified that NATO made a mistake in not requiring the KLA to also enter into agreements concerning

the use of force. NATO had labeled them as terrorists and then precluded direct contact with them.[31]

45. John Crosland gave evidence that "a conscious decision had been made to support the KLA and as a result the difficult questions were not asked"[32] "The international community supported the KLA and they knew that. Bill Clinton, Richard Holbrooke, Madeline Albright had decided that there was going to be a regime change in Serbia and the KLA was one of the tools to make this happen. From that point on, whatever reservations I or others may have had against the KLA was not relevant. The position of the international community took at Rambouillet in 1999 was consistent with that policy."[33] This could be additional indication of a NATO lack of enthusiasm for actually achieving a settlement.

46. The Rambouillet conference took place in early 1999. This was not a settlement conference in any sense of that concept. The FRY was handed a document and told that it contained what the Contact Group believed to be a reasonable agreement.[34] FRY

[31] 13 December 2006, T.8265-66
[32] 3D510, 8 February 2007 T.9865-66
[33] 3D510
[34] 1D18 - Contact Group Non-negotiable Principles/Basic Elements, 30 January 1999 ("Non-negotiable Principles") - T.13187-13188 - These principles had been previously used by the international community in their calls to participate in political dialogue and peaceful mechanisms to resolve the crisis rather than by armed conflict: autonomy for KiM at the highest international level, with full respect for sovereignty and territorial integrity of the FRY, full equality for all ethnic groups in KiM, political and legal solutions which were consistent with the constitutions of the FRY and the Republic of Serbia and international treaties concerning human rights. Finally, the Conclusions expressly stated that the National Assembly did not accept the presence of foreign troops on the territory of Yugoslavia and they rejected firmly any attempts that would lead to secession of KiM from Serbia. See also–Ambassador Petritsch, 2 March 2007, T.10874-10875.

was willing to agree.[35] The deal was nearly done. Then, at the very last minute they were presented with a totally unacceptable military annex to the agreement.[36] This was a deal-breaker and known to be such by United States and NATO representatives.[37] Its very purpose was to reverse the deal and provide a pretext for NATO bombing of Serbia, including Kosovo. Again the FRY authorities were willing to reach an agreement and willing to permit international verifiers to monitor the agreement in Kosovo. They balked, however, as any state would, at giving NATO troops free run of the entire country. Such an agreement is, in effect, a surrender of sovereignty.

47. Thus, the FRY government agrees to two different settlement plans for cease-fire and international monitoring during what the Chamber found to be the existence of the Joint Criminal Enterprise. Indeed, in Volume I, paragraph 405 the Trial Chamber held that "The Chamber is convinced that there was a prospect of a negotiated solution following the October Agreements." They also found in Volume I at paragraph 407 that "the FRY/Serbian delegation went to Rambouillet genuinely in search of a solution." In spite of these findings the Chamber accepted that at the same time they are agreeing to these plans to end the crisis, they are plotting the expulsion of large numbers of Kosovo Albanians. It defies common sense and

[35] Ambassador Petritsch ,2 March 2007, T.10855-10856; P563,p.1
[36] 1D443, Item II, paras.11 and 14; Ratko Marković, 10 August 2007, T.13184-13185; P2792; Ambassador Petritsch, 1 March 2007, T.10834-10837; 1D98; P474, Chapter 7,Appendix B, Articles 8, 15, 21;Dragan Milanović, 20 August 2007, T.14058-14059
[37] See the testimony of Ambassador Petritsch, 2 March 2007, T.10908-10910;10917-10918

ignores an eminently reasonable inference to draw such a conclusion. No reasonable trial chamber could have done so.

48. The records of this case contain minutes of thirty-seven meetings of the Collegium of the General Staff between 26 September 1997 and 9 April 1999.[38] These are secret, confidential meetings. No journalists were in attendance. There is no public report of these meetings. Western observers are not present. In addition there are seventy-three secret and confidential meetings representing daily briefings of General Ojdanić during the course of the NATO campaign.[39] In addition the General Staff received secret and confidential reports from the Intelligence Service.[40] None of these meetings, none of these documents, contain any indication whatsoever that there was a plan in existence and being implemented to expel huge numbers of Kosovar Albanians in order to achieve a favourable Serb ethnic balance.

49. In an absolutely bizarre finding the Trial Chamber refused to accept this "absence" of evidence in all these official secret documents and accepted the Prosecution's *arguments* instead. Prosecution arguments were judged by the Chamber to outweigh unchallenged unequivocal written evidence. In the *Judgement* at Volume III, paragraph 93, in rejecting evidence of all these meetings and reports there appear cites to portions of the briefs of the parties detailing this evidence.[41] Instead, the

[38] See Annex A to this Brief, a listing of all these Collegium meetings. (Annexes A-F were filed in a separate public document to this Brief.)
[39] See Annex B to this Brief a listing of all these briefings
[40] See Annex C
[41] *See,* fn.188 of Volume III

Chamber reaches a contrary conclusion and cites as support the *arguments* of Prosecution counsel.[42] Arguments of counsel are not evidence. That there was no such plan, based on these documents, is certainly a conclusion consistent with the evidence in the case. The plan was certainly not proved beyond a reasonable doubt. No reasonable trial chamber could have made such a conclusion.

50. The absence of evidence is sometimes as telling as or even more telling than its presence. The alleged Joint Criminal Enterprise is confined to that period of time between October 1998 and April 1999. It has been well over ten years since those events. Yet, in all that time, no one has come forward to reveal the existence of such a plan or any orders or instructions coming from alleged members of this Joint Criminal Enterprise to carry out its goals.

51. Another example of the Trial Chamber's error in this regard is found in Volume III of the Trial Judgement, paragraph 40, where the Chamber erred in finding that the confiscation and destruction of identity documents was some of "the strongest evidence" in the case showing the existence of a common plan. The Trial Chamber failed to take proper account of the evidence presented by the Defence that countered this evidence. In addition by failing to make correct credibility findings regarding the evidence of certain witnesses, the Trial Chamber committed an error in law and in fact by finding that this evidence demonstrates the existence of a common plan.

[42] *See,* fn. 189, referring to closing arguments of the Prosecution

52. In paragraph 870 of Volume III the Chamber "notes that the evidence does not demonstrate any prosecutions undertaken or punishments imposed in respect of the forcible expulsion of Kosovo Albanians by VJ members."[43] For such a finding to have significance the evidence would need to show very clearly that persons responsible for initiating such prosecutions were made aware, during the conflict, that VJ personnel were involved in illegal expulsions. There is no indication in the record that clear evidence of such was available to the appropriate authorities at the time.

53. In such a conflict there is a serious question about whether refugees are fleeing due to the danger of the fighting and/or bombing; whether they are being moved by authorities to shelter them from upcoming dangerous war events, or; whether they are being illegally expelled from an area. Illegal expulsion is the least likely of these possible conclusions in the situation that existed in Kosovo in 1998 and 1999. Kosovo was clearly a war zone. Civilians were clearly in danger. This danger was magnified when NATO began bombing, putting the civilians in even more danger. If local authorities kept the civilians from leaving they could have been accused of using them as human shields against NATO bombing. If on the other hand they encouraged them in some way to get out of the war zone they could be accused of forcible expulsion. Since the conclusion of forcible expulsion is dependent upon acceptance that it was a plan by the Serbs to reduce the Albanian population in Kosovo

[43] Volume III, para.870

so that it could be controlled by Serbs it becomes the most unlikely of the possibilities. It is an absurd concept in the context of international attention focused on Kosovo at the time.

54. The Trial Chamber simply disregarded the evidence of Prosecution witness Sandra Mitchell, from the OSCE–KVM mission in Kosovo, who testified that the numbers they received were that as many as 100,000 Serbs had also fled their homes although they had not crossed an international border. She testified that these were the numbers they were working with at the time and it had gone up since then.[44]

55. As General Drewienkiewicz stated, ". . . we must remember that the refugees we are seeing at the borders are the lucky ones, for they have escaped."[45] In other words, what he seemed to be saying was that however they got to the border is was a good humanitarian outcome. They were in a great deal more danger in Kosovo than they were across the border. This is clearly the case since there was no fighting or NATO bombing in the various refugee locations, primarily Albania.

56. In various places in the *Judgement* the Chamber found significance in their belief that the movement of Kosovo civilians to and across the borders was organised. This organisation was seen as evidence of advanced planning.[46] In actuality the movement of refugees out of Kosovo during the NATO bombing was, from an organisational standpoint, virtually

[44] 11 July 2006, T.565-566
[45] P2542
[46] *See, e.g.,*Volume III, para.924

indistinguishable from the flight of refugees from Iraq, Sri Lanka, Pakistan or any other places where civilians have fled from war. The Kosovo refugees were ill-prepared to travel. They were without food and water. There were long lines at the borders. The Chamber has failed to point to any feature of the flight of the Kosovo refugees that would support a conclusion that it was a result of "significant planning and co-ordination."[47]

57. The Prosecution witness Nike Peraj testified that a MUP checkpoint was set up in Meja where MUP personnel confiscated identification documents.[48] Another prosecution witness Merita Deda gave evidence that the refugees in a column she was in were ordered back to their villages by VJ soldiers on 28 April 1999.[49] The Lazarević defence argued that this undermined the allegation of a deportation plan.[50] The Chamber disagreed, referring to the witness K90 who "testified that some Kosovo Albanians were not removed 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."[51] The witness also testified that his commander "never ordered the expulsion of villagers, that is to say, to have them expelled to Albania."[52] He went on to say that the population was not relocated until the cluster bombs started falling around mid-April.[53] Only NATO dropped cluster bombs. This testimony was clarification by the witness of assertions in his 92*ter*

[47] *Ibid.*
[48] 16 August 2006, T.1772
[49] P2233. p.4, para.15
[50] Lazarević Final Trial Brief, 29 July 2008 (public version), para.384
[51] Volume III, para.44
[52] 29 January 2007, T.9273
[53] *Id.*

statement which tended to support Prosecution assertions. It is likely that the Prosecutor believed that he would bolster their case regarding a deportation plan. To the contrary he provided very persuasive evidence that there was no such plan and that civilians were only moved once NATO began endangering their lives by dropping cluster bombs.

58. The Chamber sought to bolster and support the testimony of K90 that civilians were not deported to provide cover from NATO bombing by referring to the testimony of Momir Stojanović who testified that there was no organized plan of expulsion since the presence of civilians was a deterrent to NATO bombing.[54] This evidence clearly demonstrates the lack of a plan or common purpose to deport civilians and thus the conclusion reached by the Trial Chamber was an error of fact which occasioned a miscarriage of justice.

59. In Volume III, paragraph 32 of the *Judgement* the Chamber outlined the testimony of Kosovo Albanian refugees regarding the taking of their documents. In doing so, the Chamber opined as follows:

> A few of these witnesses were not subject to confiscation of identification, but the majority testified to identity document confiscation at the border by the forces of the FRY and Serbia.[55]

60. The Chamber thus treats the testimonies as if they were a representative sample of the whole. By the Chamber's reasoning the fact that a majority of the witnesses called by the

[54] Volume III, para.44
[55] Volume III, para.32

Prosecution testified to having their documents confiscated means that a majority of persons crossing the border had their documents confiscated. This does not follow. These witnesses were not a scientifically-selected representative sample of all those who crossed the borders. The Prosecution chose the witnesses. It would have been easy to choose mostly witnesses who were willing to so testify. The trial of this matter was not held in a vacuum. Negotiations regarding the status of Kosovo were ongoing during the trial. This is a matter of common knowledge of which this Chamber can clearly take judicial notice. It is not totally beyond possibility that certain Albanian witnesses enhanced their testimony in an anti-Serb manner.[56] There are instances in the *Judgement* where the testimony of such witnesses was found not to be credible.[57]

61. The Chamber referred to two witnesses, Hani Hoxha, and Luzlim Vejsa, who crossed the border at the Ćafa Prušit border crossing on 2 April 1999 along with "thousands of other people."[58] Hani Hoxha testified that there were approximately 300-400 documents only in the box where documents were being collected. This may indicate a very small percentage indeed.

[56] Indeed, in Volume I, para.55, the Trial Chamber noted that: "A number of Kosovo Albanian witnesses, living in areas where the Kosovo Liberation Army ("KLA") had a presence and were widely known to be active, denied any knowledge of the KLA's activity or even presence in the area. In some instances, even when confronted with apparently reliable material clearly indicating a basis for concluding that the witness must have known something of the KLA, the witness maintained the denial. This seemed to border upon the irrational."

[57] For instance, see Volume II, para.467 where the Trial Chamber discusses the evidence of both Shefqet Zogaj and Hamide Fondaj; Volume II, para.616, where the evidence of Milazim Thaqi is discussed; Volume II, para.736 where the evidence of Shukri Gërxhaliu is discussed

[58] Volume III, para.33

62. There is no evidence whatsoever as to the percentage of the alleged 700,000 refugees actually had documents forcibly taken from them. There is simply no basis on the evidence that was before the Trial Chamber to conclude that a vast majority of those did. If that percentage is small, and it may very well be, then it is impossible to conclude that it is evidence supporting the conclusion that there was an organised plan.

63. In addition, citizenship was guaranteed to every citizen of FRY by Article 17 of the *Constitution of the FRY Constitution*, which stated that a "Yugoslav citizen may not be deprived of his citizenship, deported from the country, or extradited to another state".[59] The *Law on Yugoslav Citizenship* prescribed that a citizen can be released of citizenship by renunciation only on the expressed free will of each individual, and that no release or renunciation of citizenship is possible during the state of war.[60] FRY leaders alleged to be part of the JCE would have known this and would have known that document confiscation would not prevent return.

64. In its arguments to the Chamber during the trial, counsel for General Pavković argued that there was no plan to confiscate documents. In response the Chamber referred to testimony of witness K89 who said his commanding officer told them "not a single Albanian ear was to remain in Kosovo and that their identification papers were to be *torn*, so as to prevent them

[59] 1D139
[60] 1D226, Articles 19-25,39

from coming back."[61] It is important to note that in this same testimony the witness revealed that he was with a mortar group, not a group of border guards or crossing guards. A mortar being a long-range weapon it is very unlikely his group would encounter civilians and thus very unlikely that he would have received such an instruction. More importantly, the Chamber apparently failed to consider the rest of the witness' testimony on this point. On cross-examination the examiner suggested that the commander had said "that no ear of any terrorist should remain in combat." K89 accepted that this was possible indicating that his memory of the actual incident was certainly vague and subject to correction.[62] Later on it was revealed that the date of this alleged instruction was 25 March 1999 before there were any refugees. This supports the suggestion that the commander was talking about terrorists not refugees.[63] Thus, the Chamber's conclusion that the Pavković denial of a plan to confiscate documents "rings hollow in the face of the evidence of K89"[64] is not persuasive, certainly not beyond a reasonable doubt.

65. If it is assumed that the confiscation of identity documents was actually part of a plan to permanently expel Kosovo Albanians from Kosovo and thus change the ethnic balance, then it would seem that there would have to have been a general understanding among the members of the JCE that confiscation would achieve the desired result, *e.g.* permanent expulsion.

[61] Volume III, para.34. Emphasis supplied. Note the witness says "torn" not "confiscated."
[62] 25 January 2007, T.9179
[63] 25 January 2007, T.9200-9202
[64] Volume III, para.34

Those whose documents were seized would never be able to prove that they were citizens of Serbia in the first place, and thus could not return.

66. To reiterate a bit, the Chamber first concluded in paragraph 40 of Volume III of the Judgement 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.

67. Following this conclusion the Chamber then said this:

> Nevertheless, having looked at all of the evidence above, the Chamber is satisfied that the Kosovo Albanian citizens of the FRY whose identity documents were seized did not lose their citizenship as a result. The Chamber notes, as acknowledged by Simonović, that proving identity and thus citizenship would be easier for a person in possession of a Yugoslav identity document. However, this would have been the case regardless of whether or not the ID Decree was in force at the time, especially if the person trying to prove his or her citizenship had been out of Kosovo for more than 15 days. In addition, the Chamber received no evidence of Kosovo Albanians encountering problems on their return to Kosovo because of the loss of the identity documents. Accordingly, the Chamber is of the view that the Prosecution failed to explain and show how the ID Decree actually worked in practice in order to achieve the aim of the Joint Criminal Enterprise.[65]

68. The document seizure simply could not at once be the strongest evidence of a common purpose and a totally useless act. Just as there was no evidence that persons had difficulty returning to Kosovo due to loss of identity documents there was also no

[65] Volume III, para.172. Emphasis supplied

evidence of anyone not even trying to return due to loss of identity documents.

69. The persons identified by the Prosecution as members of the alleged JCE were all high-ranking members of the government and military. In the face of its conclusion in paragraph 172, quoted above, the Chamber simply could not have concluded beyond a reasonable doubt that the evidence of confiscation was some of the strongest evidence of the existence of a common purpose to permanently expel Kosovo Albanian citizens.

SUBGROUND 1 (C) – THE TRIAL CHAMBER ERRED IN FACT BY FINDING THAT GENERAL PAVKOVIĆ ENGAGED IN DISARMING KOSOVO ALBANIANS AND ARMING SERBS AND MONTENEGRINS ON AN ETHNIC BASIS.

70. The Trial Chamber erred in its analysis of the trial record in regard to this issue in Volume III, paragraph 72, in finding that the disarming of Kosovo Albanians was done on a discriminatory basis and was done at the same time as "empowering" the non-Albanian population. They failed to have adequate regard to evidence pointing to another reasonable explanation.

71. The Trial Chamber erred in fact in finding in Volume III, paragraph 667 that General Pavković demonstrated support for arming of the non-Albanian population. The Trial Chamber also erred in fact in finding in Volume III, paragraph 669 in finding that General Pavković concurrently disarmed the Kosovo Albanian population.

72. In Volume III, Paragraph 667 the Chamber was discussing the arming of the Serb population in Kosovo and in footnote 1621 pointed to testimony of Zlatomir Pešić as support for the proposition that Pavković was responsible for this arming. The actual testimony fails, however, to support the Chamber's conclusions and in fact lends a new twist to the subject. According to Pešić such arming was going on in 1996 or 1997.[66] This fails to support contentions of Pavković arming in 1998. At least some of the villages were armed prior to 1998. The numbers are not a matter of record in this case, however.

73. Although the pronouncement by the Trial Chamber makes it appear that the arming of Serbs was somehow a result of Pavković's meeting with villagers from Priluzje, what the Chamber fails to mention is that the testimony of this witness only resulted in Pavković passing their request along to the Ministry of Defence, the competent organ to issue such a decision. Apparently the request met with approval of the Ministry of Defence since, according to the witness, after June 1998, orders were issued by the Pristina Corps commander, Pavković to subordinate units to arm military conscripts in small Serb ethnic communities. They were armed to defend their villages from terrorist attacks and the witness he was not aware that they ever participated in any attacks outside their villages. "They were simply protecting and guarding their own villages."[67]

[66] Zlatomir Pešič, 23 November 2006. T.7190
[67] Momir Stojanović, 12 December 2007, T.20072-73

74. All of this apparently happened because the terrorist forces were burning and looting small Serb villages.[68]

75. The Trial Chamber determined that during 1998, Serb civilians were being armed and Albanian civilians were being disarmed. The Chamber determined that it could not be concluded that such arming was illegal, but questioned whether it was done along ethnic lines.[69]

76. The conclusion that the arming of the population was somehow illegal or improper is not justified. It must be remembered that Kosovo was part of Yugoslavia. It was not a separate, sovereign state. The government of Yugoslavia was completely and totally justified in an attempt to repel a terrorist rebellion against the State. The attacks that were the subject of the rebellion were attacks by Albanian terrorists against the Serb population of Kosovo. Yugoslavia simply did not have the police forces necessary to protect the citizens of Kosovo who were coming under attack by the terrorists. Thus, pursuant to the law, as set out in the *Judgement*, they provided arms to the threatened population. That population was primarily Serbian since that was the population under attack.

77. By the same token, as is true of most terrorist organizations, the Albanian terrorists did not go around with signs identifying themselves as terrorists. Terrorists arise from the indigenous population and return to that population after carrying out their terrorist attacks. Thus, disarming the Albanian population was a

[68] *Ibid.*
[69] Volume III, para.56

sensible and legal way to attempt to control terrorist attacks. Displaying ethnic neutrality by arming both sides as the Chamber seems to suggest simply invites death and destruction. It does not deter it.

78. In Volume III, paragraph 66 of the *Judgement*, the Trial Chamber determined that several Serb civilians armed by the Serb forces were not part of the civil defence or civil protection structures.

79. The obvious implication of the Chamber's concern about arming this class of Serb civilians is that they would commit illegal acts against the Albanian population. Not being tied to any of the governing structures, these crimes would be outside any existing chain of command and therefore outside any effective control of alleged members of the JCE.

80. The *Judgement* utterly failed to distinguish between crimes committed by these persons and those committed by persons within the normal structures.

SUBGROUND 1 (D) – NO REASONABLE TRIER OF FACT COULD HAVE DRAWN THE CONCLUSION THAT GENERAL PAVKOVIĆ'S PROMOTIONS DID NOT GO THROUGH THE REGULAR PROCEDURE AND WERE THUS EVIDENCE OF HIS MEMBERSHIP IN THE JOINT CRIMINAL ENTERPRISE.

81. In Volume III, in paragraphs 649 and 778, the Trial Chamber erred in concluding that Pavković's promotions did not go through the regular procedure. No reasonable trier of fact could have found that this was the *only* reasonable interpretation of

the evidence. In Volume III, paragraph 680 the Trial Chamber erred in finding that tension existed between General Pavković and Dušan Samardžić concerning the use of the VJ in Kosovo . It is concluded that this "tension" contributed to the promotion of Pavković to Third Army Commander. The Trial Chamber failed to take due consideration of evidence to the contrary.

82. At the eighth session of the VSO on 25 December 1998, there was a discussion concerning five generals that President Milošević had decided to promote to a superior rank.[70] When President Milošević asked whether there were any comments, suggestions or remarks to make about the promotions, President Đukanović stated that he needed to have more information before being able to express a view on the matter. He had heard conflicting information coming from Kosovo in recent months on the involvement of the Priština Corps and he expressed concern about the promotion of General Pavković as commander of the 3rd Army. The Trial Chamber failed to give due consideration to the fact that following these remarks, President Milošević noted that a mistake had been made and that members of the VSO should have received listings, containing more information about each promotion, along with the proposals for promotion. He ordered General Ojdanić to provide those files to the members of the VSO.

83. After looking at these documents, President Đukanović stated that he did not actually know General Pavković.[71] The Trial Chamber erred in their assessment of this evidence in their

[70] P1000, 1D761
[71] *Id.*

Judgement and then inferred the promotion to be evidence of his membership in a Joint Criminal Enterprise. This was a clear error on the part of the Trial Chamber.

84. At the same meeting, President Milošević stated that there had been no complaints about any illegal actions by the Priština Corps, either from abroad, or from any side, and that the army had demonstrated exceptional discipline and organisation. President Milutinović, who was acquitted on all counts of the Indictment by the Trial Chamber, stated that reports of alleged lack of discipline and unconstitutional actions by the Priština Corps were usually inflated. Following this discussion, the VSO unanimously adopted this final position: "In Kosovo and Metohija, the Yugoslav Army operated in accordance with the Rules of Service. The Priština Corps carried out its tasks very successfully".[72] Indeed in Volume III, paragraph 682 of the *Judgement* the Trial Chamber noted that Branko Fezer (who was Chief of Personnel Administration for the VJ General Staff) testified that all changes to personnel in the VJ were always carried out in strict compliance with the law, and in particular on the orders of the President of the FRY who had exclusive authority in these matters pursuant to Article 136 of the *Constitution of the FRY* and Article 151 of the *Law on the Army of Yugoslavia*.[73] This runs contrary to the finding in Volume III, paragraph 778 that General Pavković's promotions were rapid and were rewards from Milošević for participation in a Joint Criminal Enterprise. Indeed, it is an illogical conclusion to be

[72] P1000, p.9-10, It is significant that Đukanović supported this conclusion. This sheds considérable light on what he meant when he said he was satisfied after being provided additional information from Ojdanić.
[73] T.16483,16485-16487

drawn from the evidence where the Trial Chamber seems to have accepted the testimony of Branko Fezer in paragraph 682 and yet reaches the opposite conclusion a few pages later in the *Judgement.*

85. The Trial Chamber relied on P1319, an interview with General Pavković on Belgrade RTS Television First Program, from 20 October 2000, where he stated that he received early promotions five times in his career despite the rules only allowing for three such early promotions. However, nowhere in the VJ Rules of Service[74] or in Article 151 of the FRY Law on the VJ, which regulated this procedure, is there *any* limitation set for the amount of early promotions. In fact Article 151 provides merely that:

> The President of the Republic shall:
> a) promote professional and reserve officers to their ranks;
> b) promote officers to the rank of major general or higher rank;
> c) issue decisions on generals transfer, service status, admission to professional military service and termination of service;
> d) appoint officers with the rank of Colonel to duties for which the rank of general has been determined in the establishment.[75]

86. In Volume III, paragraph 680, the Trial Chamber erred in finding that tension existed between General Pavković and Dušan Samardžić concerning the use of the VJ in Kosovo . It is concluded that this "tension" contributed to the promotion of Pavković to 3rd Army Commander. In Volume III, paragraph 83 of the *Judgement* the Trial Chamber relied on P1439, 4D100 and

[74] 4D532
[75] P984, Art.151, p.37-38

4D119 to conclude that such tension existed. These documents were erroneously interpreted by the Trial Chamber and such interpretation amounts to an error of fact. In addition the Trial Chamber relied on these documents to the exclusion of other equally reliable and valuable evidence that demonstrates no tension existing between General Samardžić and General Pavković. Thus, other reasonable inferences were available.

87. The *Judgement* examined P1439, 4D100 and 4D119 in isolation and then reached the flawed conclusion that due to the language of these documents there existed a tension between General Pavković and General Samardžić. A Trial Chamber must have regard to *all* the evidence before it and where there is another conclusion that is also reasonably open from the evidence and which is consistent with the innocence of the accused, that conclusion must be adopted.[76] Other evidence which was not evaluated accurately by the Trial Chamber will be shown to point to a logical and reasoned account of the situation which should have been reached by the Trial Chamber and which would have been reached by *any* reasonable trier of fact.

88. 4D100 is a request from General Pavković on the 22 July 1998 to General Samarđžić for guidance on the implementation of the plan for combating terrorism as decided by Milošević, the FRY President on 21 July 1998. It is unclear how this document shows any tension between General Pavković and General Samarđžić. General Samarđžić was present at the meeting on

[76] *Čelebići* Appeal Judgement para.458., *Limaj* Appeal Judgment, para.21, *Tadić* Decision on Appellant's Motion for Extension of Time Limit and Admission of Further Evidence, 15 October 1998, para.73., *Naletilić* Appeal Judgement, para.120

21 July 1998.[77] Perišić released his GROM Directive (GROM 98) on 28 July 1998.[78] On the same date Perišić ordered General Samarđžić to prepare a plan of engagement of forces in two stages pursuant to the Directive.[79] There is no evidence that General Samarđžić objected to the plan being put in place at this 21 July 1998 meeting, and indeed, on 29 July he issued the GROM 98 order pursuant to this plan to all Army units.[80] 4D119 is the response from General Samarđžić to General Pavković concerning 4D100. In it, he acknowledged the plan as decided and ordered the engagement of Priŝtina Corps forces as requested by General Pavković.

89. On 14 August 1998, General Perišić chaired a meeting, at which General Samarđžić was present, at the forward command post of the 3rd Army. The situation in Kosovo was discussed and oral reports were made to Perišić.[81] Following this visit and inspection by Perišić, he issued an Order to the 3rd Army on 17 August 1998 entitled "measures to further strengthen combat readiness."[82]

90. On 19 August 1998, General Samarđžić issued an order in response to the 17 August Perišić Order, implementing its parts.[83] Daily combat reports from the 3rd Army to the General

[77] Volume I, para.995
[78] 4D137
[79] 3D702
[80] 4D140
[81] 4D416, para.4
[82] 4D416
[83] 4D528, para.4b

Staff reveal that General Samarđžić was in full control of the Priština Corps, issuing decisions and orders.[84]

91. On 2 October 1998 the 3rd Army Forward Command Post issued an "Analysis of the Tasks Executed on the Territory of Kosovo and Metohija."[85] This document shows that the 3rd Army Forward Command Post "was established in Priština on 27 of July 1998 for the purpose of commanding the entire Army in Kosovo and Metohija."[86] Hence, there is evidence of concrete management by General Samarđžić from *at least* 27 July 1998 onwards.

92. P1439 is a report from 5 October 1998 sent by General Pavković to Samardžić, the then 3rd Army Commander. General Pavković informed him that due to the plan by the FRY President to form rapid intervention forces, of which General Pavković had informed him by telephone on 19 and 20 of September 1998, Samardžić's previous order to form new combat groups could not be completed. This was a decision of the Joint Command for Kosovo and, although rapid intervention forces had been previously forbidden by Samardžić, they were necessary because the forces for combat groups were already engaged in other axes.[87] 4D91, a 3rd Army Order of 30 July 1998, shows the hands-on control exerted by Samarđžić. In this Order he sets out the procedure for Pavković to follow in the Joint Command

[84] 4D141, para.5
[85] 3D697
[86] 3D697, para.1.4
[87] P1439

meetings.[88] No proposals of the Joint Command could be carried out without approval of the 3rd Army Commander or his Chief of Staff.[89]

93. 4D136, the final evaluation of General Pavković given by General Samarđžić as Pavković is moving from the Priština Corps to the 3rd Army, assessed him as "exceptional," the highest possible rating. This is noted by the Trial Chamber in Volume III, paragraph 682 of the *Judgement.* Although this is clear evidence of a good relationship between the two generals it was not appropriately evaluated as such by the Trial Chamber and constitutes an error of fact occasioning a miscarriage of justice.

94. The Trial Chamber reached unreasonable conclusions based on an analysis of documents in isolation and in addition failed to give sufficient consideration to evidence to the contrary. The apparent conclusion that General Samarđžić was sidelined is directly contradicted by the Trial Chamber then proceeding to rely upon evidence of Samarđžić's engagement in high level meetings of the General Staff.[90] These two conclusions cannot exist at the same time; this is a patently illogical approach by the Trial Chamber.

SUBGROUND 1 (E) THE TRIAL CHAMBER ERRED IN FACT IN THEIR FINDINGS REGARDING THE POWERS AND RESPONSIBILITIES OF GENERAL PAVKOVIĆ

[88] 4D91
[89] 13 September 2007, T.15529-15532
[90] Such as the reliance on collegiums of 25 February 1999 - P941; 9 April 1999 – P929

95. General Pavković notes that he has withdrawn this ground of appeal and will keep the numbering present only for consistency with the Notice of Appeal as provided for by the *Practice Direction on Formal Requirements for Appeals from Judgement (IT/201, 7 March 2002).*

SUBGROUND 1 (F) - THE TRIAL CHAMBER ERRED IN FACT AND IN LAW BY INFERRING INTENT TO PARTICIPATE IN A JOINT CRIMINAL ENTERPRISE IN FINDING GENERAL PAVKOVIĆ HAD A CLOSE RELATIONSHIP WITH SLOBODAN MILOSEVIC

96. In Volume III, paragraph 778 the Trial Chamber erred by inferring General Pavković 's intent to participate in the Joint Criminal Enterprise from his close relationship with Slobodan Milošević in 1998 and 1999. The Trial Chamber relied at various paragraphs of the *Judgement* on meetings General Pavković attended with Slobodan Milošević as evidence for his intent to participate in the JCE.[91] However, this inference based on meetings with Slobodan Milošević as evidence of General Pavković's intent to participate in a JCE is erroneous and irrational in a number of ways. There is no evidence in the record of this case regarding the subject matter and content of any meeting between Pavković and Milošević during this period, except for those meetings attended by other persons.

97. To prove the mental element for the first category of Joint Criminal Enterprise the Prosecution must prove that the accused

[91] Volume III, paras.778 and 708, 709,710, 738, 739,740

voluntarily participated in at least one aspect of the common purpose and in addition that the accused shared with the other Joint Criminal Enterprise members the intent to commit the crime or underlying offence.[92] A trial chamber "can only find that the accused has the requisite intent if this is the *only* reasonable inference on the evidence."[93] General interaction with the President of the FRY cannot be considered to be direct evidence of a criminal intent. The *Brđanin* Appeal Judgement makes it clear that *mere* association with criminal persons *cannot* be considered to meet the requirements for participation in a JCE.[94] As stated by Judge Schomburg, "the Statute does not criminalize the membership in any association or organization. The purpose of this International Tribunal is to punish individuals and not to decide on the responsibility of states, organizations or associations."[95]

98. The Trial Chamber erred in inferring General Pavković's intent to participate in a JCE from evidence of meetings with Slobodan Milošević as this was not the *only* reasonable inference on this evidence. If this were a reasonable inference then any officer of the VJ who met with Milošević could be considered to be part of the JCE if it is assumed, as this Chamber did, that they discussed and planned the commission of crimes. As Commander in Chief of the VJ, President Milošević could demand a meeting with any officer. Hence, because a meeting or meetings occurred does not in any way mean that some sort of

[92] *Brđanin*, Appeal Judgement, paras.365, 429
[93] *Id. at* para.429
[94] *Id. at* para.431
[95] *Martić* Appeal Judgement, Separate Opinion of Judge Schomburg, para.5

nefarious plan was being concocted or implemented without specific evidence regarding the content of such a meeting.

99. The Trial Chamber failed to take due account of other evidence which provides a logical basis for meetings with Milošević. In Volume I of the *Judgement* the Trial Chamber recognised that the crisis in Kosovo worsened in 1998 and that efforts to promote a peaceful solution were accompanied by "persistent threats of NATO military action".[96] The *Judgement* correctly asserts that under Article 135 of the FRY Constitution the VJ was commanded by the FRY President in accordance with decisions of the Supreme Defence Council (SDC).[97] During 1998 clashes were occurring between the KLA and VJ forces, General Pavković was the Commander of the Priština Corps; the main body of the VJ involved in clashes with the KLA, from 5th January 1998 until 13th January 1999. Thus, he was uniquely situated to report to the FRY President, at this time Slobodan Milošević, on the activities on the ground and the possibility of NATO military action. It would be no surprise if Milošević had asked Pavković to meet with him to make such reports, although no evidence exists of the subject matter of any such meetings he had with Milošević, if indeed such meetings occurred outside the presence of other officers, a matter of some question and certainly not proved beyond reasonable doubt.

100. The *Judgement* is contradictory in its assessment of the evidence for General Pavković and that of the other accused . The tenuous link made between General Pavković and Milošević

[96] Volume I, paras.312 and 313
[97] Volume I, para.433

could have been met for other accused and this reveals the lack of a reasoned opinion on the part of the Trial Chamber. The Trial Chamber found that General Ojdanić, who was found not to be a member of any Joint Criminal Enterprise, met with Milošević daily during the NATO campaign and that the two were located in the same building in Belgrade during this time.[98] How could a conclusion on the one hand that in one or two meetings between Pavković and Milošević they were implementing an illegal plan and in dramatically more meetings between Milošević and Ojdanić they were not? No evidence supports either conclusion. In both cases it is simply guesswork. One should not and cannot be convicted of crime on a guess. General Ojdanić also attended meetings with Milošević and others , including General Pavković in May 1999.[99] Additionally the Trial Chamber found that General Pavković was regularly present on the ground in Kosovo in 1999.[100] The conclusion then drawn by the Trial Chamber was that , although General Ojdanić met with Milošević daily, whereas General Pavković was physically distanced from Belgrade and met with Milošević and others only occasionally and in instances where he was summoned by General Ojdanić, General Pavković's intent to participate in a JCE could be inferred from these meetings.[101] This fails to hold as logical and reasonable and is clearly a legal and factual miscarriage of justice.

[98] Volume III, para.530
[99] Volume III, paras.557, 575, 576,578
[100] Volume III,paras.715, 716, 717
[101] The Chamber's Judgement regarding Ojdanić's role as to the JCE is an absolutely correct finding both on the law and facts. Nothing argued by Pavković in this brief should be seen to argue to the contrary.

101. The first meeting that the Chamber discusses where Pavković met with Milošević was on 30 May 1998.[102] The Chamber relies upon Pavković's statement to the Prosecution for this information. Although one might conclude that this was a private meeting between Milošević and Pavković such is not the case. Others present were Milutinović, Perišić, Stanišić, Samardžić, Dimitrijević, Đorđević, Marković, Stevanović, Lukić and Šušić.[103]

102. To establish this "close relationship" the Chamber next relies on the testimony of Aleksandar Dimitrivejić. The Chamber reported that Dimitrijević provided information that Pavković utilized communications with Milošević which allowed him to act without approval from the General Staff.[104] First of all, it must be noted that at this time, 1998, Pavković was commander of the Priština Corps; his immediate commander was General Samardžić, commander of the 3rd Army. It would never have been required for Pavković to seek approval from the General Staff for any of his actions. His approval would come from the 3rd Army, Samardžić. Clearly, Dimitrijević knew this and was simply manufacturing evidence. The Chamber relies further on Dimitrijević testimony that there was a direct line of communication leading from Pavković to the President.[105] That describes the chain of command. It is a line of communication from Pavković to the President, passing through the 3rd Army and the General Staff. Dimitrijević, though obviously anxious to

[102] Volume III, para.643.
[103] *See,* Volume III, para.643, fn.1533; The Information given comes from this interview.
[104] Volume III, para.644
[105] 8 July 2008, T.26641-2

implicate Pavković for personal reasons, was not able to identify any activity engaged in by Pavković in Kosovo that was outside the normal functioning of the chain of command.[106]

103. As the Chamber acknowledged, Dimitrijević could have a revenge motive against Pavković, since Pavković was partly responsible for his dismissal in 1999.[107]

104. In no case is the conclusion that the testimony of Dimitrijević plus the evidence of the 30 May 1998 meeting any basis for concluding a close relationship between Milošević and Pavković.

105. The Chamber next relies on the testimony of Aleksandar Vasiljević who the Chamber found to have testified that Pavković was known for by-passing two levels of command in 1998. This was hearsay evidence coming from retired General associates of Vasiljević. This is not exactly what Vasiljević actually testified. His hearsay testimony was to the effect that the Generals told him that Pavković had spoken with Šainović and Milošević about the use of the army in Kosovo.[108] Vasiljević went on to testify that he had spoken with Pavković who said he had been in contact with Milosević and Šainović. He did not know if Pavković reported these meetings to his immediate superior. Again this evidence does not add sufficiently to other evidence to establish a close relationship with Milošević.

[106] 8 July 2008, T.26625-26630
[107] 8 July 2008, T.26625
[108] 18 January 2007, T.8671

106. In June of 1999, Vasiljević accompanied Ojdanić to the White Palace. As they arrived they saw Pavković leaving, assuming he had been meeting with Milošević. Ojdanić complained at the time that such meetings occurred often and were never reported to Ojdanić.[109] When Vasiljević and Ojdanić saw Milošević at that time, Milošević told them that Pavković was not there in his official capacity.[110]

107. Again the detailed subject matter of any such meetings is not known, there is no evidence about their content. It would not be surprising that Milošević would be anxious to hear from the commander on the ground in Kosovo his thoughts about how matters appeared. In fact, it would be wise. They were trying to deal with a NATO attack against their country.

108. Đorđe Ćurčin testified that on 17 April 1999 Pavković came to see Ojdanić after having met with Miloševič. Again this was characterised by the witness as a by-pass. It does not however, show the close relationship found by the Trial Chamber. No evidence proves the content of such a meeting or who may have been present.

109. This evidence from these two witnesses is countered by Pavković's statement to the Prosecution in which he said that once he became 3rd Army Commander he never met with

[109] This is logically ridiculous and again smacks of manufactured testimony. If such meetings were not reported to Ojdanić, then Ojdanić could not have known that they were occurring. On the other hand if he knew they were occurring they had been reported to him. It must be one or the other. As Commander of Pavković he could have prohibited such meetings.
[110] 18 January 2007, T.8668-68;This is the only evidence of the content of any meeting between the two. Anything else is pure speculation.

Milošević without Ojdanić also present.[111] He told the Prosecution that he never received any orders directly from Milošević during the NATO campaign.[112]

110. What is detailed above is a significant part of the basic evidence relied upon by the Trial Chamber to circumstantially prove that Pavković was a member of the Joint Criminal Enterprise and contributed to its implementation. Such reasoning stretches the definition of "circumstantial evidence" beyond the breaking point. A miscarriage of justice resulted.

SUB-GROUND 1(G) – THE TRIAL CHAMBER ERRED IN HOLDING THAT GENERAL PAVKOVIĆ BY-PASSED THE CHAIN OF COMMAND, AN ERROR CONTAINED IN VOLUME III, PARAGRAPH 665.

111. As set out in Volume III, paragraph 642 of the *Judgement*, the Prosecution case was that General Pavković in his role as Priština Corps Commander enthusiastically supported the use of the VJ in Kosovo in 1998 and did so by by-passing the established chain of command. The Trial Chamber essentially accepted this contention by the Prosecution and found it to have been proven beyond a reasonable doubt. No reasonable trial chamber could have arrived at such a conclusion. This allegation was strongly contested by the Pavković defence using all material known and available at the time of the trial.[113]

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[111] Volume III, para.709
[112] *Id.*
[113] Since completion of the trial additional material supporting the Defence position has become available.

112. The Prosecution allegations were that General Pavković was operating outside the chain of command in Kosovo in 1998 and using the VJ in ways that were unconstitutional, illegal, or had been prohibited by his superiors. No evidence supports any such allegations that a reasonable trial chamber could have found to be proof beyond a reasonable doubt. At no point did the Prosecution point to any part of the Constitution that would have restricted the use of the VJ to fight against terrorism in Kosovo, nor any rule of law that prohibited the same.

113. To succeed the Prosecution would need to have shown that Pavković was not under the control of his immediate superior, General Samardžić, Commander of the 3rd Army. Clear and convincing evidence established the contrary.

114. For example, the Pavković defence submitted Exhibit 4D91, an Order from General Samardžić. The preamble of this Order indicates that Samardžić issued it pursuant to an Order of the Chief of the General Staff, who at that time was General Perišić. The Order refers to the Joint Command that was a coordinating body operating in Kosovo during this time. General Pavković is ordered to attend the Joint Command meetings; prior to his attendance he is ordered to advise the Chief of Staff of the 3rd Army of any requests and "proposals for the engagement of forces with reinforcements." With the consent of the Chief of Staff as to any of these proposals or requests, Pavković was then to attend the meeting. After the meeting he was ordered to report back to the Chief of Staff as to the meeting and any

additional proposals or requests which may have arisen during the meeting not discussed beforehand. He was then to report back to the Joint Command any VJ decisions concerning these additional requests. Clearly, General Samardžić is controlling the activities of the VJ in Kosovo, as is his duty as commander of the 3rd Army. Neither General Pavković nor the Joint Command could engage in activities without the approval of Samaržić

115. The Chief of Staff mentioned in 4D91 was Miodrag Simić who testified in the case. Simić plainly stated that the VJ could only be used in Kosovo with the approval of the 3rd Army Commander, Samardžić.[114] Exhibit 4D91, makes it clear and the testimony of the Chief of Staff of the 3rd Army makes it clear. This evidence makes the case that Pavković could only operate in Kosovo within the chain of command. It is evidence totally consistent with his innocence of the Prosecutor's allegations in this regard. Unreasonably, the Trial Chamber found otherwise. It must be remembered that during 1998 there was an international presence in Kosovo. In the face of 4D91 and the Simić testimony the Chamber found:

> In light of the evidence surrounding the operation of the Joint Command in 1998 and Pavković's by-passing of the chain of command to communicate directly with Milošević, the Chamber considers that these orders demonstrate attempts by Samardžić to retain some control over Pavković's involvement in the Joint Command, consistent with the contention that Pavković was by-passing the regular VJ chain of command to plan operations in Kosovo with Milošević.[115]

[114] 12 September 2007,T.15517
[115] Volume III, para.657

116. The Chamber further supported its unwarranted conclusion by citing a clash between Pavković and Samardžić over a request "to make a helicopter available to the Priština Corps."[116] Again the Chamber erred by failing to consult the appropriate documents in the evidence. The Chamber first cites P1011, page 64, which contains no information whatsoever regarding any clash between the Generals. The Chamber then cites 4D230, apparently to show that Samardžić rejected a Pavković request. The appropriate sequence based on all documents available is to first look at the joint command meeting of 6 September which is referenced by Pavković in his 6 September request.[117] Confirmation that helicopters were discussed at the 6 September Joint Command meeting can be found in P1468, page 94, where Šainović makes a reference to helicopters and a request that should be made to RV and PVO. The next document then is the Pavković request based on the Šainović suggestion. The Joint Command minutes are not a verbatim account of those meetings and are thus incomplete reports of such meetings. Apparently the specific request from the meeting was for at least ten helicopters. Since Pavković could not make this request directly to RV and PVO he directed the request to his superior, Samardžić, asking him to make the request of RV and PVO command.[118]

117. Next comes the reply from Samardžić.[119] Samardžić is not denying the Pavković request. He is not clashing with him in any way. He is reporting back to Pavković that the Chief of the

[116] Volume III, para.659
[117] *See,* 4D392
[118] 4D392
[119] 4D230

General Staff, General Perišić, has denied the request. The preamble makes this clear. The request was sent by Samardžić to Perišić and Perišić did not approve. Finally, on 13 September Pavković informed a meeting of the Joint Command that the helicopters had not been approved.[120] Only an unreasonable Chamber could treat a request by Pavković which was denied by Perišić as a clash between Pavković and Samardžić.

118. Several conclusions can flow from these documents. The first is that Nikola Šainović, described by the Trial Chamber as a man of supreme power second only to Milošević did not have the power to order up these helicopters. Pavković who is described by the Chamber as having a close personal relationship with Milošević could not order up these helicopters. He could not even communicate directly with the RV and PVO to make the request. He could not operate outside the chain of command. Finally the much-vaunted Joint Command was no command at all since it could not command helicopters.

119. What these documents do show is a fully functioning chain of command. A request was made up through the chain and the request was denied at the top of that chain and the matter came to an end. That is exactly the way a military chain of command is supposed to work and exactly the way it worked in Kosovo. What they do not show is any clash between Pavković and Samardžić. No reasonable trial chamber could have reached such a conclusion. Since much of the basis for the Trial Chamber's conclusions regarding the culpability of Pavković is

[120] P1468, p.109

based on these supposed clashes the integrity of the entire *Judgement* is brought in to question and cannot stand.

120. In Volume III, paragraph 657, the Trial Chamber concluded that there was evidentiary support for the proposition that Pavković was by-passing the regular chain of command to plan operations in Kosovo with Miloševič. There is simply no basis for this conclusion other than mere speculation and assumption. The evidence of Pavković meeting with Milošević is extremely vague and ambiguous as detailed elsewhere herein. Whether secret meetings took place is subject to serious question. There was certainly no evidence that Pavković was meeting with Milošević to "plan operations in Kosovo." No evidence would support a reasonable inference in this regard.

121. Evidently, things were happening on the ground in Kosovo that did not meet with the approval of the international monitors. John Crosland was a UK Defence Attaché assigned to Kosovo. He testified about a conversation he had with General Dimitrijević on 5 November 1998. During that conversation Mr. Crosland was complaining about what he deemed to be excessive use of force by VJ forces in Kosovo. Dimitrijević explained, according to Crosland, that Pavković was working outside the chain of command. Crosland reported that it was obvious that Perišić and Dimitrijević were not being informed about what was going on in Kosovo. Dimitrijević was even contending in Collegium meetings, that VJ units could be used in Kosovo only if they were threatened.[121]

[121] This information is from paragraphs 662-664 of Volume III of the *Judgement*.

122. When confronted with 4D137 during his testimony Crosland agreed that Perišić's contention that the army was being used illegally outside the border belt was contradicted by his own order to the contrary. He was asked if in any of his conversations with Perišić where he was suggesting that Pavković was acting outside the chain of command he had been made aware of 4D137. He indicated that he had not.[122]

123. Later in his testimony, on re-examination by the Prosecutor, Crosland, as an experienced military officer said this about 4D137:

> Forgive me for being a simple soldier, this document [4D137] – and I apologize sincerely if I am not answering the question – to me, this document gives firsthand evidence of the chain of command and is exactly what I would have expected to have been produced as a directive prior to an operational order which I think is in one of the annexes, if I remember rightly, by General Samardžić, the commander of the 3rd Army then to be passed down to General – General Pavković, who was then the 52 Corps commander in Priština.[123]

124. Crosland is now making it very clear that he understands that he was being seriously misled by Perišić. He makes it clear that this was a normal functioning of a Chain of Command; that Perišić's Directive, 4D137, that he did not see at the time. This was implemented by Samardžić in his Order, 4D140, then put into action by Pavković totally within the chain of command. Pavković was not operating outside the chain of command. Crosland said the following:

[122] 8 February 2007, T.9983-84
[123] 9 February 2007, T.10027

> Q. But it is not in line with the proposition that General Pavkovic was going outside that chain of command. These seem to be documents fully within the chain of command directing activity that Perisic – that Perisic and Dimitrijevic were telling you was not proper.
> A. I -- I fully accept that, sir. All I'm -- I will repeat is that when two senior generals of that nature make that comment to me, as a defence attache, I think it's only right and proper that I report it up the chain of command.

125. Crosland's report up his chain of command was undoubtedly a basis for allegations being made against Pavković by the Prosecutor, charges which now are shown to be completely false, blatant lies by Dimitrijević and Perišić.[124]

126. At the SDC meeting on 9 June 1998, Perišić was reporting on the situation in Kosovo. In 1D760 on page 8 he is talking about settlement talks. He indicated that if the talks go well then tensions will likely ease. However if the talks do not go well he expects stepped-up terrorist activity, stepped up activity by the KLA and names the areas within Kosovo where this stepped-up activity will likely occur. These are areas outside the border belt. He speaks of the threat of a NATO attack and then he says:

> It is therefore imperative to do whatever it takes to stop this from happening through political negotiations. Otherwise, we will be forced to engage, depending on how far it escalates, the peacetime Army and - in case of a threat of an aggression from outside, we should start with mobilisation, on which the Supreme Defence Council and other federal organs need to decide.[125]

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[124] Bear in mind that this is the Aleksandar Dimitrijević that the Trial Chamber unaccountably found to be credible in the face of evidence that he had lied to Crosland and caused Crosland to make a false report. He has apparently caused the Trial Chamber to make a false Judgement.
[125] 1D760, p.9, para.4

127. What he is clearly saying is that if the talks do not go well and terrorist attacks increase the peacetime Army will need to be engaged. This is without any declarations of war or immediate threat of war. It is only when there is a threat of aggression from outside that mobilization should begin.

128. In Volume III, paragraph 656 of the *Judgement* the Chamber accepted that Perišić had ordered use of the VJ outside the border belt in his Grom 3 Directive of 28 July 1998. The Chamber went on to say, however, that Pavković had used the VJ outside the border belt prior to 28 July without the approval of Perišić. To arrive at this conclusion the Chamber had to ignore other language of the Grom 3 Directive. On page 2, under the heading "THE YUGOSLAV ARMY'S DEPLOYMENT SO FAR", Perišić boasts that:

> Through 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 *Siptar* /Albanian/ terrorist forces and it has offered direct assistance to the forces of the MUP of the Republic of Serbia.
> In the period up to now, the Yugoslav Army has successfully carried out the assigned tasks.[126]

129. He shows both knowledge and approval for the VJ in support of MUP on the "entire territory of Kosovo and Metohija" in repelling the terrorist forces. He further indicates that all tasks carried out by the Yugoslav Army were assigned, not carried out by Pavković outside proper orders and assignment.

[126] 4D137, p.2

130. No reasonable trial chamber could have analysed Exhibit 4D137 and completely ignored and overlooked the language quoted above.

131. It must be remembered that the VJ was being criticized by Crosland and other internationals for using what they believed to be excessive force in Kosovo. It is not beyond imagination that high ranking officers like Dimitrijević and Perišić might seek to absolve themselves from responsibility by accusing Pavković of operating outside the chain of command. In fact the inference that this is the case is much stronger than one that Pavković was acting without Orders. Not one action carried out in Kosovo in 1998 was presented by the Prosecution to the Trial Chamber that was not carried out in accordance with orders emanating from Perišić and down through the chain. The Prosecution was not able to point to one VJ activity in 1998 that was exclusively carried out at Pavković's direction without an order to him from his immediate commander.

132. There is evidence to support that Dimitrijević and Perišić were simply trying to absolve themselves of responsibility. That evidence is Exhibit 4D137. This is a Directive issued by General Perišić on 28 July 1998. In a section denominated by Roman Numeral II, on page 2 of the English translation, General Perišić clearly indicates his knowledge that the VJ was operating outside the border areas and in fact seems proud of the successes of the Army he commanded. He stated:

> Through 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 *Šiptar* /Albanian/

> terrorist forces and it has offered direct assistance to the forces of the MUP of the Republic of Serbia.[127]

133. Perišić was pandering to the international observers while in private he was ordering the uses of the Army that were being carried out in Kosovo. It must be understood that 4D137 was issued as a "State Secret." Therefore, Perišić knew it would not be made public and knew the international observers would not see it.

134. On 7 April 1998, Perišić issued an Order in evidence as 4D379. The Order dealt with the moving of some weapons and ammunition armouries to place them in safer locales. In the preamble he makes it clear that he was aware of the security situation in Kosovo. General Simić was asked about this document and agreed that it showed that Perišić was fully aware of what specifically was going on in Kosovo at that time.[128] Perišic then toured Kosovo on 14 and 15 May, 1998.[129]

135. General Simić, as Deputy Commander of the 3rd Army Chief of Staff reported directly to General Samardžić, the Commander of the 3rd Army. Exhibit 4D91, discussed above, sets out his presence there. He was in Kosovo continuously between 28 May 1998 and 8 June 1998 and 27 July and 28 August 1998. Much of this time was spent in the forward command post of the Priština Corps alongside General Pavković.[130]

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[127] 4D137, p.3
[128] 12 September 2007, T.15509
[129] This tour is shown in the preamble to 4D183. Please note that there is a translation error in the first line of the preamble. The word "inspection" should be "tour." See 12 September 07, T.15512
[130] 13 September 2007, T.15520

136. In his testimony about the Joint Command, General Simić agreed that nobody in the Joint Command could direct himself or General Pavković to engage VJ forces. That was a decision to be made by General Simić and General Samardžić.[131] General Perišić and the General Staff were informed in combat reports on a daily basis of all uses of the VJ.[132]

137. Finally, Simić testified that he never heard complaints about Pavković going around the chain of command and taking orders directly from Milošević from Samardžic, Perišić or Ojdanić.[133]

138. It is necessary to refer back to 4D137 to understand the progression of a series of documents resulting there from. 4D137 is the Directive issued by Perišić on 28 July 1998 setting out plans for the use of the VJ in protecting the state border and crushing the armed rebel forces. Although the Prosecution contended that this was merely a planning document the evidence is overwhelmingly to the contrary. On the same day that Perišić issued this Directive he issued an Order to General Samardžić of the 3rd Army requesting that he draw up a plan for the engagement of forces pursuant to the Directive, asking that it be submitted by 3 August 1998.[134]

[131] 13 September 2007, T.15532
[132] 13 September 2007, T.15534
[133] 14 September 2007, T.15700
[134] 3D702, 28 July 1998

139. On the very next day, Samardžić issued his Order pursuant to the Grom 98 Directive (4D137).[135] On pages 5 and 6 of this Order, under a heading "I HAVE HEREBY DECIDED," Samardžić orders VJ units in coordination with MUP units to smash and destroy DT (rebel) forces in Kosovo and Metohija. On page 6 he instructs units to "Launch rapid and energetic attacks, in coordination with Serbian MUP forces, to smash and destroy DT (rebel – KLA) forces in Kosovo and Metohija . . ."

140. Perišić then visited Kosovo again and chaired a meeting at the Forward Command Post of the 3rd Army. Pavković was one of the attendees, along with General Samardžić. This was an additional opportunity for Perišić to become aware of all VJ activities within Kosovo. He heard reports from several officers, including the deputy Chief of Security, who reported that his security officers and soldiers had "praised the command of the 3rd Army and the PrK (Priština Corps – Pavković) for planning combat operations and their engagement in combat operations which always served their purpose."[136]

141. It is significant that there is no indication in the minutes of this meeting that Perišić or Samardžić were concerned in any way that Pavković was failing to work within the appropriate chain of command. Both had the power to dismiss him had that been the case.

[135] 4D140, 29 July 1998 In item 4 of this Order Samardzić orders the Army to be on stand-by to mobilise the whole of the army
[136] 4D143, 14 August 1998

142. Following this meeting, General Perišić issued an Order setting out measures to strengthen combat readiness within the 3rd Army based on deficiencies found during the 13 to 15 August 1998 inspection.[137] There was no concern that Pavković was operating outside the chain of command. Although Perišić was publicly claiming that the VJ was being used illegally in Kosovo it is clear that he was surreptitiously and clandestinely in very close control on the events. In paragraph 3 of this document he speaks of using Priština Corps units to secure and defend the state border in the border area, *and wider if necessary.*[138] In paragraph 4 of this Order he orders a *continuation* of coordination and joint action with MUP forces and in keeping with assessments, support MUP forces in destroying the DTG /sabotage and terrorist groups/ but not to disturb the execution of the main tasks of the VJ units." In other words, the VJ is to assist the MUP in carrying out their activities outside the border belt as long as these activities do not interfere with the main task of defending the border.

143. Paragraph 8(b) of this Order, at page 3 is an example of the hands-on supervision by Perišić of the activities of the VJ in Kosovo. In this paragraph he orders twenty handheld radios to be re-distributed from the 1st Army to the Priština Corps and for fifty batteries for these handsets to be supplied.

144. In paragraph 11, Perišić orders recruitment to bring the Priština Corps manpower levels up to peacetime levels. This

[137] 4D416, 17 August 1998
[138] *Id.* at p.2, para.3, emphasis supplied

would permit wider use of Corps units to support MUP activities outside the border belt.

145. Finally in paragraphs 26 and 27 on page 6 of the Order he makes it clear that he wants the General Staff to monitor the implementation of this Order. He wants to maintain a very hands-on control of the VJ in Kosovo.

146. After the passage of a week, General Perišić issues yet another Order to the 3rd Army Command.[139] Again it calls for VJ support of MUP activities in routing and destroying DTS /sabotage and terrorist/ forces when consistent with basic tasks.[140]

147. Exhibit 4D508 of 4 September 1998 is a typical example of a daily combat report sent from the 3rd Army to the General Staff. It sets out activities in detail and also advises the General Staff of future activities of 3rd Army units. Paragraph 3 outlines specific activities of VJ units in support of MUP and paragraph 5 orders the continuation of these activities.

148. Exhibit 4D495 is an example of a map typical of a proposed combat operation against the KLA forces. It is signed by General Samardžić signifying his approval for the proposed action. It is a visualization of a combat order.[141]

149. Exhibit 3D697 is a summary document issued by the 3rd Army Forward Command Post. General Mladenović participated in its

[139] 4D418, 24 August 1998
[140] *Id.* at para.3
[141] 25 October 2007, T.17578, T.17589

creation.[142] It is an analysis of the implementation of a series of Orders as set out in its preamble beginning with the Perišić Order of 20 April 1998 through a 3rd Army Order of 29 September 1998. It first sets forth the tasks assigned to the forces on the territory of Kosovo and Metohija. Of significance is the recognition of the assignment of assistance to MUP forces as one of the tasks to be performed. The authors of this summary found that experiences assisting MUP in performing tasks within its competence were negative experiences.[143]

150. As is clear, the Prosecution contention that Pavković was operating as a maverick in Kosovo in 1998 and the Trial Chamber conclusion that he had an "aggressive strategy of using the VJ and MUP together in Kosovo including by-passing the usual chain of command"[144] simply holds no water. This conclusion is overwhelmed by the evidence of the involvement of Perišić in all activities. All actions of the VJ in Kosovo were carried out pursuant to Orders emanating from Perišić as passed along by Samardžić to Pavković. None of these orders carried instructions to carry out any criminal activity.

GROUND 2 – THE TRIAL CHAMBER ERRED IN LAW AND IN FACT IN FINDING THAT THE CRIMES FALLING OUTSIDE OF THE COMMON PURPOSE OF THE JOINT CRIMINAL ENTERPRISE WERE REASONABLY FORSEEABLE TO GENERAL PAVKOVIĆ

[142] 25 October 2007, T.17594
[143] 3D697, p.4
[144] Volume III, para.665

151. In Volume III of the *Judgement*, paragraphs 784, 785 and 786, the Trial Chamber erred in finding that the crimes falling outside the common purpose of the Joint Criminal Enterprise were reasonably foreseeable and attributable to General Pavković.

152. The third category of JCE liability allows conviction of a participant in a JCE for certain crimes committed by other participants in the JCE even though those crimes were outside the common purpose of the JCE. However, for a finding of responsibility under the third category of JCE, it is not sufficient that an accused created the conditions making the commission of a crime falling outside the common purpose possible; it is actually necessary that the occurrence of such crimes was foreseeable to the accused *and* that he willingly took the risk that this crime might be committed, the *dolus eventualis*.[145] Thus, mere negligence on the part of the accused will not suffice; it is the *dolus eventualis* which is required.[146] In addition, the crime must be shown to have been foreseeable to the accused in particular.[147]

153. The requirement that the crime be a natural and foreseeable consequence of the Joint Criminal Enterprise was examined by the Appeals Chamber in *Kvočka:*

> It is to be emphasized that this question must be assessed in relation to the knowledge of a particular accused. This is particularly important in relation to the systemic form of Joint Criminal Enterprise, which may involve a large

[145] Martić Appeal Judgement, para.83
[146] *Tadić* Appeal Judgement, para.220
[147] *Stakić* Appeal Judgement, para. 65; *Tadić* Appeal Judgement, para.220

> number of participants performing distant and distinct roles. What is natural and foreseeable to one person participating in a systemic Joint Criminal Enterprise, might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a systemic Joint Criminal Enterprise does not necessarily entail criminal responsibility for *all* crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.[148]

154. In the *Judgement,* the Trial Chamber considered that the crimes of the principle perpetrators falling outside the JCE were imputable to General Pavković because he was in command and control of the VJ forces in Kosovo at the time and he issued orders for the operations of the VJ in Kosovo during this time.[149] However, the Trial Chamber also held that General Ojdanić exercised command authority over the entirety of the VJ forces[150] and also issued orders for the operations of the VJ in Kosovo during the *Indictment* period.[151] Thus, the nature of the link between General Pavković and the principle perpetrators he was "using" is not defined by the Trial Chamber in any real meaningful way. It is not shown by the Chamber that there was any degree of difference between the three Generals, Ojdanić, Pavković and Lazarević in this regard. Pavković's position as 3rd Army commander simply cannot be a decisive factor. He was one command level above Lazarević and one below Ojdanić. He was closer than Ojdanić to the ground events but further than

[148] *Kvočka* Appeal Judgement, para.86
[149] Volume III para.783
[150] Volume III para.487
[151] Volume III para.531

Lazarević. Thus, the Trial Chamber clearly erred in law and in fact by failing to establish the necessary "link between the accused and the crime as legal basis for the imputation of criminal liability".[152]

155. The evidence clearly establishes that General Pavković did not *willingly take the risk* that these crimes might be committed and this finding by the Trial Chamber was one that no reasonable Trial Chamber could have made.

156. In it's analysis of the responsibility of General Lazarević the Chamber found that there was no evidence showing that he had knowledge that VJ forces were involved in the specific crimes of killings, sexual assaults, or destruction of religious and cultural property. The only killings of which he was found to have knowledge were those in Izbica. No VJ forces were involved in these killings.[153] Since Pavković was situated one level above Lazarević in the command chain his only source of such information would have been through reports from Lazarević. Since such reports would have been impossible due to Lazarević's lack of knowledge, the same conclusion must, of necessity, apply to Pavković, absent a showing that Pavković had a source of information outside the normal reporting chain. There is no such evidence.

157. General Pavković ordered on several occasions during the conflict that forces under his command strictly comply with

[152] *Brđanin* Appeal Judgement, para.412; *Krajišnik* Appeal Judgement, para.225
[153] Volume III, para.933

International Humanitarian Law (IHL).[154] These orders clearly show that he did not fulfil this criteria of "willingly taking the risk" that the crimes outside of the common purpose of the JCE; namely murder, sexual assault and the destruction of cultural property, might be committed by some VJ troops. If these orders had been correctly assessed by the Trial Chamber the reasonable conclusion would have to be that General Pavković was *not* willingly taking the risk that his orders for compliance with IHL would be completely ignored by VJ troops and consequently, he should stand to be acquitted on this ground.

158. Actions against the KLA forces took place in areas where civilians were present. A recognised tactic of the KLA was to fire upon VJ and MUP patrols from buildings in civilian-occupied villages.[155] In recognition of the problems these actions presented to civilians General Pavković issued an order on 9 September 1998 in which he ordered that combat hardware was not to be engaged in sectors where the civilian population was present until such time as they have been evacuated and cared for; they were to be provided food and medical assistance.[156]

159. General Pavković's orders in this regard stem from a document issued by the General Staff in June 1998 setting out procedures to be followed by the VJ in dealing with terrorist activity.[157] The

[154] These orders are contained in Annex D to this Brief
[155] Bislam Zyrapi, 7 November 2006, T.6050
[156] P1430
[157] P626

document prohibited VJ entry into inhabited places[158] and contained a section dealing with treatment of the civilian population and various facilities.[159]

160. In his capacity as Commander of the 3rd Army, General Pavković's concern for the application of international law continued. On 1 February 1999 in a document outlining measures to prevent surprise attacks he ordered that the "entire complement" was to be briefed on the provisions of the Geneva Convention and the procedure regarding captured and wounded enemy forces.[160]

161. On 23 March 1999, just before the beginning of NATO strikes General Pavković ordered that after the initial air strikes the priority for commanders was to prevent panic, desertion and criminal activities.[161] Just after the beginning of the NATO bombing he ordered that any form of looting, robbery, theft or property destruction should be vigorously prevented. Perpetrators were to be found in the shortest possible time and

[158] P626,para.1; This paragraph also sets out that during combat: 'do not use units smaller than companies or batteries in a search(pursuit) or attack to destroy DTGs; When hostile groups conduct action from fortified features or an inhabited place, after issuing a warning use artillery weapons for direct targeting and selectively destroy the enemy and the features from which activity is conducted; Use armoured and mechanised units to surround and seal off an inhabited place; Do not enter inhabited places with VJ units. Forbid unprepared units from setting out to perform tasks

[159] P626,para.4

[160] 5D249

[161] 4D103

brought before an investigating judge.[162] On this same date, Pavković also ordered that unit commanders and each individual member of the 3rd Army is responsible for "the correct application of the provisions of the Rules of the International Law of War".[163]

162. In his regular combat orders General Pavković also stressed the prevention of crimes. In the 6 April 1999 order about measures to be taken to defend against aggression, one paragraph ordered prevention of misconduct by individuals such as "looting, murder, etc." Subordinate formation commanders were specifically held responsible for carrying this out.[164] Again on 10 April in an order regarding GROM 4, he ordered adherence to the Geneva Conventions and respect for the regulations of International Humanitarian Law and the laws of war.[165]

163. The Trial Chamber erred when it concluded in Volume III, paragraph 777, that these orders were "manifestly insufficient" in the face of the crimes committed by the VJ and MUP. Before such a conclusion would be possible it would need to be proved beyond reasonable doubt that Pavković had detailed knowledge regarding crimes having been committed by VJ personnel on a very large scale in complete disregard of his orders. No such evidence exists. The inclusion of MUP personnel is irrelevant.

[162] 4D152
[163] 4D170
[164] 4D224, para.8
[165] 4D308, para.10.7

He had no control over these personnel. It is settled law that evidence must be assessed by the Trial Chamber in the light most favourable to the Accused.[166] By dismissing these orders without giving due consideration to the criteria of "willingly taking the risk" for crimes falling outside the scope of the JCE, the Trial Chamber committed a clear error which justifies intervention by the Appeals Chamber.

GROUND 3 – THE TRIAL CHAMBER ERRED IN LAW AND IN FACT IN RELATION TO THE ALLEGED BREACHES OF THE OCTOBER AGREEMENTS IN 1998

164. In Volume III, paragraph 689, The Trial Chamber erred in fact in holding that General Pavković brought the 72nd Special Brigade into the interior of Kosovo prior to 25 February 1999 despite an instruction from General Ojdanić to keep it in the border belt area. In Volume III, paragraph 690 the Trial Chamber erred in fact in finding that General Pavković introduced additional troops into Kosovo without notice to KVM, breaching October agreements.

165. The conclusion regarding the 72nd Special Brigade is repeated in paragraphs 518 and 617 of in Volume III of the *Judgement* indicating the high significance the Chamber attached to this matter in determining the culpability of Pavković. The conclusion of the Chamber is mistaken. Pavković did not bring that Brigade into Kosovo without permission. The Chamber's conclusion is

[166] *Kvocka et al*, Appeal Judgement, para.237

contrary to clear evidence in the case that was not properly considered and analyzed by the Chamber.

166. The Trial Chamber proceeded to infer from this erroneous conclusion that the breaches of the October Agreements placed the authorities in a position in the spring of 1999 to be able to mount a widespread attack on the Kosovo Albanian civilian population, indicative of a common purpose.[167]

167. The Chamber's conclusion that Pavković brought the 72nd Special Brigade in to Kosovo in violation of an Order from Ojdanić is based on two items. The first is P941, Minutes of a meeting of the Collegium on 25 February 1999. In that meeting Dimitrijević said:

> With respect to the departure of an anti-terrorist batallion from the 72nd Special Brigade for KiM, I found it inappropriate that nobody had ever consulted me about it. I had been informed about a written order and the dispatch of the best anti-terrorist unit only after it had arrived down there.[168]

168. Later in the meeting General Ojdanić responds:

> I can see that we are still settling into routine with this anti-terrorist batallion. I sustain the objection made by General Dimitrijević that at the stage of making the decision he should have been . . . because the proposal came from the commander of the Third Army, not for them to go to Niš but to Kosovo. I disagreed and responded, in

[167] Volume III, para.76
[168] P941, p.16

> general terms, that for the time being the units should be deployed at the edges of Kosovo and not inside Kosovo.[169]

169. If this were indeed all the evidence then the conclusion of the Trial Chamber would be appropriate. However, it is not. The Chamber also refers to testimony by Dimitrijević. When asked about this by Judge Bonomy, Dimitrijević indicated that his reaction at the Collegium meeting was because he was not aware the battalion was "being sent to the area of Kosovo and Metohija." He then says: "Of course, I reacted to General Ćurčin and Obradović, as well, because they're the ones who wrote that order; but this order probably came from the Chief of General Staff.[170]

170. It must be noted that at the Collegium Dimitrijević spoke of a written order transferring this unit. At the same Collegium Ojdanić spoke of a request from the 3rd Army Commander. Thus, these two documents would be the best evidence to reveal what exactly was requested and what exactly was ordered.

171. First, it is helpful to be aware of the Ojdanić Directive of 16 January 1999 in which he warned of possible NATO attack and ordered measures to be taken to prepare for such an eventuality. This included bringing units into Kosovo to repel such attacks.[171]

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[169] *Id.* at p.24
[170] 8 July 2008, T.26648
[171] 3D690

172. It must also be noted that Bislam Zyrapi testified the KLA organization strengthened towards the end of December 1998 and that the territory under the KLA's control was greater than before.[172] Thus the KLA had filled in positions which the Serbs withdrew from pursuant to the UN Resolution.[173]

173. In that context then, Pavković on 2 February 1999, to "raise the level of combat readiness of the PrK," requested that the 72nd Special Purpose Brigade be subordinated to the PrK (Priština Corp) Command, "for the purpose of carrying out complex anti-terrorist tasks in the PrK area of responsibility."[174] This request was for *one* military police battalion from the Brigade to be subordinated. It is important to note here that the Priština Corps area of responsibility was confined to Kosovo. It had no responsibility outside those borders.

174. Ojdanić responded with his Order of 19 February 1999.[175] He orders that the 72nd Special Purpose Brigade is to be subordinated to the 3rd Army Command "for the purpose of carrying out anti-terrorist and anti-sabotage tasks." The Order describes the route and time for arrival of the unit at the Niš airport. On arrival it is subordinated to the 3rd Army Command.[176] There is nothing in the Order requiring this unit to be kept out of Kosovo. On the contrary the Order specifically describes the use of the unit for "carrying out anti-terrorist and anti-sabotage tasks." This is exactly the purpose Pavković cited

[172] 7 November 2006 T.6028-33
[173] 7 November 2006, T.6034
[174] P1947
[175] P1948
[176] P1948

in his request. There was certainly no need for that unit to carry out anti-terrorist and anti-sabotage attacks outside Kosovo.

175. It would be idle speculation to attempt to understand what Ojdanić had in mind in his statement to the Collegium mentioned above. His Order was clear. A finding by the Trial Chamber that the evidence shows that Pavković brought this unit into Kosovo in violation of the orders of Ojdanić is certainly not a conclusion that could have been reached by any reasonable trial chamber viewing the actual Pavković request and Ojdanić response.

176. In Volume III, paragraph 521, the Chamber found that Ojdanić was aware of and approved of breaches of the October Agreements.[177] The Chamber concluded however, as follows:

> . . . Ojdanić's motivation to breach the October Agreements was his fear of a genuine threat from NATO and the KLA, rather than a desire to prepare for a widespread campaign of forcible displacement in the interior of Kosovo.

177. Previously 3D690 was discussed where Ojdanić specifically directed preparation to deal with the "genuine threat from NATO and the KLA." In response Pavković made his request for resubordination of the 72nd Special Purpose Brigade,[178] followed by Ojdanić's approval.[179] An eminently reasonable conclusion and the one that would have been drawn by a reasonable trial chamber was that Pavković's motivation to comply with

[177] By referring to this paragraph and making the argument, Pavković is not agreeing that there were any material violations of the October Agreements.
[178] P1947
[179] P1948

Ojdanić's order to enhance VJ presence in Kosovo was identical to that of Ojdanić; fear of a genuine threat from NATO and the KLA, rather than a desire to prepare for a widespread campaign of forcible displacement in the interior of Kosovo.

178. Since the Chamber's finding was a significant part of the fabric supporting conclusions regarding the culpability of Pavković it clearly, along with other erroneous conclusions cited herein, led to a miscarriage of justice.

179. In Volume I, paragraph 579 the Chamber held that it:

> [I]s not in a position to determine the lawfulness, or otherwise, of the deployment of VJ forces in Kosovo outside the border area, prior to the declaration of some kind of state of emergency, nor need it do so. Whatever the legal position, there were powerful voices within the VJ expressing concerns about the propriety of using the VJ inside Kosovo in 1998 and early 1999 without a state of emergency.[180]

180. This pronouncement reveals bias on the part of the Trial Chamber. The reason they could not make this conclusion is that the Prosecution was never able to point to a constitutional or statutory provision prohibiting the deployment of VJ forces in Kosovo outside the border area prior to the declaration of a state of emergency. Therefore, the Chamber was required to reject the notion, not announce that they could make no determination. When a party makes assertions and provides no

[180] As has been made clear elsewhere herein, the most powerful of these voices, Perišić, while complaining to outside observers, was ordering the use of the VJ outside the border area. Crosland even testified that he believed Perišić and Dimitrijević misled him in this regard.

evidence in support a court should reject the assertion, not announce that it cannot make a determination.

181. General Perišić wrote a letter to Milošević on 23 July 1998. There is no evidence in the record as to when, if ever, this letter was actually delivered to Milošević. Be that as it may, in the letter Perišić complained that without a declaration of a state of emergency or immediate threat of war, use of the VJ outside the border belt in support of MUP was illegal.[181] He did not say what rule, law or constitutional provision such use violated.

182. General Pavković, although not referring specifically to the Perišić letter reported to a meeting of the Inter-Departmental Staff for the Suppression of Terrorism in Kosovo and Metohija his analysis as to why a declaration of a state of emergency was not an acceptable tactic. He believed that it would "provoke a reaction from other countries which would intervene militarily on behalf of the terrorist forces to authenticate their initial successes when they controlled about 50% of KiM territory."[182] In addition the declaration would have entailed an order to mobilize young Serbian men that may have been both unpopular and unsuccessful. Third, he believed that the mobilization of additional forces and an increase in force levels would cause extensive casualties and that it would be impossible to avoid civilian casualties. Finally he pointed out that the "plan was not to kill all the Šiptars or expel them from KiM, but to

[181] P717
[182] P2166, p.3

destroy the main terrorist forces and separate the terrorists from the people."[183]

183. It must be noted that these minutes were a State Secret. They were not publicly disseminated at any time. The meeting was on 29 October 1998, when the plan for expulsion of Kosovo Albanians was in existence.[184] Yet, Pavković makes it plain in this document that there was no plan to expel Kosovo Albanians.

184. The Trial Chamber response to this document is very curious. Without any stated basis whatsoever, the Chamber expressed reservations about the precision of the record of what was said at the meeting, indicating by such language, apparently, that if the record was precise it would have a major effect on their conclusions. There is no evidence that it is not a precise record, or at least as precise as numerous similar records that the Chamber has relied upon. It is clear from this document that Pavković is reporting on the period between 25 July and 29 October 1998 when the plan for combating terrorism was carried out. He is talking about why it would have been unwise to declare a state of emergency during that period of time. Nevertheless, the Chamber concluded that "Pavković's comments at that meeting do not have a bearing on his attitude to the use of the VJ in Kosovo prior to the October Agreements being concluded in 1998."[185] This conclusion is simply in error

[183] P2166, p.3
[184] The Trial Chamber cited the arming of the Serbian population as evidence of the existence of the JCE plan which arming started as early as the spring of 1998. See Volume III, paragraph 57 and 95
[185] Volume III, para.661

and cannot be sustained. No reasonable trial chamber could have made this conclusion. It becomes part of the fabric of material that has caused this Trial Chamber to make its major conclusions about the role of Pavković and has thus contributed to a miscarriage of justice.

185. NATO General Klaus Naumann believed that the Serbs had honoured the October agreement from the following exchange:

> Q. Thank you, Mr. Naumann. Mr. Perisic also participated in the agreement, and I believe you met him subsequently on the 25th of October, 1998. It was defined that the units were to return to their garrisons, apart from three or four companies which were used to protect certain roads, as well as the border units which were to stay to secure the state border. As opposed to the special agreement which defined the exact number of the police, this agreement, as well as some other agreements, did not define any exact figure of military personnel. Isn't that correct, Mr. Naumann?
> A. I think the agreement is in front of the Court, and I can only repeat what I have said also in the Milošević case, that the Serb side honoured their agreement.[186]

186. The conclusion that General Pavković violated the October agreements is certainly not the only reasonable conclusion to be drawn from the evidence in this case.

GROUND 4 – THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY IMPUTING CRIMINAL LIABILITY TO GENERAL PAVKOVIĆ FOR CRIMES BASED UPON MATTERS OCCURING DURING 1998 NOT CHARGED IN THE INDICTMENT.

[186] Klaus Naumann,14 December 2006,T.8356-57

187. General Pavković notes that he has withdrawn this ground of appeal and will keep the numbering present only for consistency with the Notice of Appeal as provided for by the *Practice Direction on Formal Requirements for Appeals from Judgement (IT/201, 7 March 2002).*

188. This withdrawal is no indication that General Pavković admits any criminal liability whatsoever or that the Prosecution has successfully proved the same.

GROUND 5 – THE TRIAL CHAMBER ERRED IN LAW AND IN FACT IN FINDING THAT GENERAL PAVKOVIĆ FAILED TO BRING TO ACCOUNT THOSE RESPONSIBLE FOR CRIMES AND THAT HE COULD HAVE PREVENTED CRIMES BY REFUSING TO CO-ORDINATE WITH THE MUP.

189. In Volume III , paragraph 780 the Trial Chamber found that General Pavković did not use his authority to bring to account those responsible for crimes. The Trial Chamber failed to have sufficient regard to the evidence submitted by the Defence on this matter. In Volume I, paragraph 529 they note the various 3rd Army combat reports which reported about the numbers of people being brought before the military courts but the Trial Chamber failed to give proper consideration to the same.

190. The Trial Chamber failed to give sufficient regard in Volume I, paragraphs 530 and 531, to the evidence presented regarding the difficulties of the working conditions of the courts during

wartime. The Trial Chamber then failed to give these issues the appropriate weight in considering General Pavković's ability to bring to account those under his command that did commit crimes. The Trial Chamber also erred in fact by failing in Volume III, paragraph 777, to give proper consideration to the exculpatory evidence relating to General Pavković in this regard.

191. In its analysis in Volume I of the *Judgement* the Chamber found that VJ soldiers were involved in some of the crimes charged in the Indictment. These findings form the list of the only crimes proved by the Prosecutor to implicate VJ forces. To establish, and for the Chamber to find a failure on the part of General Pavković to properly prosecute these crimes it was incumbent to show beyond a reasonable doubt that he had knowledge of these specific crimes during the conflict and with that knowledge failed to take any action whatsoever to have them investigated. Any other analysis involves several assumptions. It is apparently assumed by the Chamber that unspecified crimes were being committed and further that General Pavković was made aware of those unspecified crimes during the course of the 1999 NATO war. Inferences from the Chamber's findings in this regard are thus based on speculations and assumptions.

192. In making this analysis, it is very important to understand that the NATO war, the subject of the Indictment, lasted seventy-three days only. When it ended the VJ was removed from Kosovo. No VJ court personnel were permitted to conduct investigations in Kosovo after 10 June 1999. It is absolutely

impossible that all crimes would have been detected, reported and prosecuted within this time frame, although that is what the Trial Chamber seems to expect and demand.

193. In Volume III, paragraph 872, the Chamber details a request by Lazarević to Pavković on 26 April 1999 for assignment of a military forensic pathologist to investigate a situation in which VJ personnel may have been involved in the commission of crime. Pavković assigned a forensic pathologist the very next day. This prompt action on his part seriously challenges the Trial Chamber's conclusions that Pavković was seeking to hide the commission of crimes in Kosovo. It's clear here that he was anxious to have an immediate investigation performed. All efforts by Lazarević to investigate crimes in Kosovo must also be attributed to Pavković since he was regularly present in Kosovo during the events in question,[187] and as his immediate superior was in constant contact.

194. Ojdanić, Pavković and Lazarević all issued numerous orders during the conflict regarding adherence to International Humanitarian Law and the punishment for crimes.[188] The question arises as to what a commander must do to fulfil his responsibility to prevent and/or punish. Clearly he cannot be present each time opposing forces clash, unless of course he is the commander on-the-ground of those forces. Thus, when Ojdanić issued such an Order for adherence to law he had the legitimate expectation that his immediate subordinates, the

[187] Volume III, para.717
[188] See Annex D to this Brief

> Army commanders, would transmit those orders on down to their immediate subordinates, the Corps commanders. Those Army commanders would then expect those orders to be passed on by the Corps commanders to the combat units. That is exactly what happened in the situation. When discussing this with regard to Lazarević the Chamber stated: "the mere issuance of orders without ensuring their implementation does not fulfil the responsibility of a Corps Commander.[189] The Chamber cites no authority in law for this proposition and fails to explain just what it is that the law requires a commander to do further. This pronouncement is apparently invented to support a previously-drawn conclusion. The Chamber does acknowledge that as Lazarević issued such orders his subordinate commanders passed those orders on down the chain to the soldiers on the ground, events of which Lazarević was aware.[190]

195. It is submitted that nothing more can be demanded of a busy commander in a war situation. He has done what the law requires. He has confirmed that his subordinates are forwarding the orders down the chain of command. The only other requirement, it seems, would be to take appropriate action upon learning of a possible violation of these orders. It was exactly what he did with regard to the situation described above and detailed by the Chamber in paragraph 872 of Volume III of the *Judgement*. He learned of a possible violation. He applied to his commander for assignment of a forensic pathologist and his commander, Pavković, immediately made the assignment. This

[189] Volume III, para.887
[190] Volume III, para.888, fn.2252

is what should happen and is what did happen. No evidence shows that there were other such events that were not promptly and properly dealt with.

196. The fact that it was learned during Tribunal investigations after the war that Kosovo Albanians were contending that crimes had been committed is of no moment whatsoever in judging the actions of Pavković during the war. He could only be expected to deal with what he knew about, specifically, at the time. There is no evidence that he failed to do so.

GROUND 6 – THE TRIAL CHAMBER ERRED IN FACT IN FINDING THAT GENERAL PAVKOVIĆ POSESSED CRIMINAL INTENT

197. The Trial Chamber erred in fact in holding in Volume III, paragraph 781, that the only reasonable inference is that General Pavković had the intent to forcibly displace the Kosovo Albanian population and that he shared that intent with the other members of the Joint Criminal Enterprise.

198. In paragraph 754 of Volume III of the *Judgement* the Trial Chamber seeks to show that Pavković had knowledge of deportations and other crimes that were occurring since General Drewienkewicz issued a press release regarding crimes by 2 April 1999 at the latest. The report of General Drewienkewicz is very interesting. As to its reliability it appears that much of the information came from the KLA. As he says at the beginning, "As you know we were ordered out 12 days ago. Since then we

have remained in contact with the KLA."[191] Thus, the KLA, hardly an unbiased source, appears to be responsible for much of the information. In addition there is no indication on the document that it is a press release. It does not say it is a press release and it contains language which would be unusual for a press release, for example; "As you know we were ordered out 12 days ago . . ."[192] Upon questioning by the Prosecutor, General Drewienkewicz agreed that it was either a press statement or his note for a press statement. There is no evidence that this document was released to the press or that its contents were made available to the press in any way.[193] The Trial Chamber simply presumes that this document was in the hands of all the world press by around 2 April 1999 without one shred of evidence to support such an assumption.

199. There are three OSCE Press Releases in the records of this case.[194] They are very different in form from P2542, raising substantial doubt that the Drewienkewicz document is a press release, as it was characterized by the Trial Chamber. If it was not a press release then the Chamber's conclusions regarding it are completely in error and without substance.

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[191] P2542, p.1
[192] P2542
[193] 4 December 2006, T.7815
[194] *See,* P733, a series of press releases dated 7 January 1999 through 19 January 1999 and clearly identified as OSCE Press Releases. P638 is a Drewienkewicz Press Release of 8 January 1999. Again it is clearly designated as a Press Release. It condemns a KLA attack on MUP vehicles. 3D473 is an OSCE Press Release dated 9 January 1999. Again it is clearly designated as a Press Release. Again it condemns violations by the KLA. Contrary to findings of the Trial Chamber regarding the Yugoslavian behaviour during the cease fire, the OSCE in this release says: "KVM wishes to make it clear that it finds the reaction by Yugoslavian authorities to these KLA provocations has been up to this point very restrained. The representatives of the Yugoslavian authorities have shown a willingness to co-operate in the present situation."

200. The Chamber first leaps to the conclusion that this document was released to the world press and thus became widely available. No press report from any journal confirms this, nor does the testimony of General Drewienkewicz himself. Thus, an impermissible inference is made, based on pure conjecture, which no reasonable trial chamber would make.

201. However, the Chamber goes further again. It then makes an additional inference based upon the initial improper inference that there was an intelligence department in the 3rd Army which was supposed to provide intelligence to the 3rd Army commander and since General Drewienkewicz was a well-known personage Pavković must have been made aware of his statement.

202. No Judge of any trial chamber could seriously consider this chain of inferences as having proved beyond a reasonable doubt that Pavković knew of the General Drewienkewicz report.

203. Volume III, paragraph 755, has similar unsupported inferences. The first is the inference that the information supplied by Louise Arbour in her letter contains "allegations that crimes had been committed by VJ personnel on a large scale."[195] This is simply untrue. The Arbour letter makes no such allegations.[196] This letter was written only two days after the beginning of the conflict. The letter complains that ICTY investigators have been denied access to Kosovo and OSCE

[195] Volume III, para.755
[196] P401

verifiers have left and the result is that she has no information. She expresses concern, without specific knowledge, that serious violations of International Humanitarian Law have been committed. She then asks General Ojdanić to exercise authority over his subordinates to prevent and punish crimes.[197]

204. In accordance with Arbour's request of General Ojdanić, the letter was sent to Pavković, one of his subordinates. Although the Trial Chamber concludes that Pavković received this letter by 29 April 1999 at the latest, there seems to be no support for this conclusion. Pavković's written response was dated 17 May and only received on 27 May 1999.[198] In his response to Ojdanić, Pavković states: "I fully performed my leadership role in implementing the provisions of International Humanitarian Law and in preventing the commission of war crimes by commanders subordinate to me."[199] In his letter Pavković listed eleven documents that he issued regarding prevention of crimes.

205. Following this letter there were at least fourteen documents issued by various levels of the VJ dealing with prevention and/or punishment of crimes.[200]

206. The Chamber goes on to mention in this paragraph that the original Indictment against Milošević, Milutinović, Šainović,

[197] P401
[198] 3D790
[199] 4D246;This is the Pavković letter with attachments not referred to by the Chamber
[200] *See,* 4D242, 4D330, 4D239, 4D189, 4D247, 4D246, 4D342, 3D483, 4D249, P1268, 4D237, 4D396, 4D395 and 4D158

> Ojdanić and Stojiljković was made public on 27 May 1999. It was discussed at a command staff briefing on 28 May 1999. Pavković was not present at this meeting; he was not a member of the General Staff. There is not even any indication of the detail with which it was discussed. There is no evidence that it was actually available to those in attendance. There is a very brief mention, hardly specific, which probably referred to the Indictment. Based on this information alone, the Chamber concludes that Pavković must have been informed of the existence of the Indictment around 27 May 1999. This is, of course, rank speculation without any evidence to support it. Even if he heard about the Indictment there is no indication that he ever learned of its specific content or allegations during the war. The date, 28 May 1999, was the sixty-sixth day of the NATO war. Its end was one week away. Even if Pavković had learned of this Indictment on that very day, there was very little he could have done with that information. Once the VJ left Kosovo, investigations were impossible. They were not allowed back into the province to investigate.[201]

207. In Volume III, paragraph 757, the Chamber speaks of Pavković's response to receipt of the "Indictment." It is believed that this is a typographical error and that the Chamber is referring to his receipt of the Arbour letter. There is no evidence that he ever received the "Indictment," except much later when he was in fact indicted himself. The Chamber seriously misread the last paragraph of the Arbour response, concluding that

[201] Geza Farkaš testified that there were problems after the withdrawal from Kosovo as the VJ and its prosecutorial and judicial organs had no further access to the territory to continue their investigations; 25 September 2007, T.16328-16329

Pavković was saying that he was unable to take further measures against the perpetrators of crimes in Kosovo. This is simply not the case. In paragraph four of his response he was pointing out that he did not have the authority to give the ICTY permission to investigate but that there was a responsible organ of the Federal Government that could do so. No reasonable trial chamber could have read the Pavković response as was done by this trial chamber.

208. These unsupported conclusions among others were the basis for the Trial Chamber concluding as follows:

> The 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.[202]

209. In Volume III, paragraph 678, the Chamber criticizes Pavković for his reporting of the incident at Gornje Obrinje suggesting that he was withholding evidence of VJ involvement in the killings. Further in paragraph 785, the Chamber stated: "For example, the incident at Gornje Obrinje/Abri e Epërme in October 1998 made it reasonably foreseeable to Pavković that MUP and VJ forces would engage in crimes, including murder, if engaged in Kosovo." This conclusion is without merit since it is clear that Pavković had no knowledge that VJ forces had engaged in any crimes at this location. This is made abundantly clear just a few paragraphs later in the *Judgement*.

[202] Volume III, para.774

210. In Volume III, paragraph 815 of the *Judgement* with regard to these killings in Gornje Obrinje, the Chamber finds that the evidence fails to show that Lazarević had any awareness of any VJ responsibility for these killings. There is certainly no showing that Pavković had knowledge separate and apart from his subordinate Lazarević.

211. The Commander of the Corps, Pavković had ordered a complete investigation into this incident for the purpose of determining whether any VJ personnel had been involved. As Chief of Staff of the Priština Corps, significant responsibility was placed on Lazarević and certainly any reports regarding this matter would have passed through his hands.[203]

212. Since both Lazarević and Pavković possessed exactly the same information then the conclusion regarding Lazarević must apply with equal force to Pavković.[204]

213. In Volume III, paragraph 698 of the *Judgement*, the Chamber analysed some of Pavković's orders as Commander of the 3rd Army. The apparent purpose was to show evidence of Pavković's intent that crimes would be committed.

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[203] Lazarević became Priština Corps Chief of Staff on 9 January 1998, Testimony of General Lazarević, 6 November 2007, T.17740

[204] At para.678 the Trial Chamber criticizes Pavković for his reporting of this incident, suggesting that he was withholding evidence of VJ involvement in the killings. In para.785, the Chamber said: "For example, the incident at Gornje Obrinje/Abri e Epërme in October 1998 made it reasonably foreseeable to Pavković that MUP and VJ forces would engage in crimes, including murder, if engaged in Kosovo."

214. In one of these orders analyzed in paragraph 694, Volume III of the *Judgement* the Trial Chamber found that "An order issued by Pavković on 23 March 1999 directed that the VJ was to be immediately engaged against all enemy forces." What must be understood by this Appeals Chamber and may have been misunderstood or overlooked by the Trial Chamber is that as 3rd Army Commander, Pavković did not issue any orders to combat groups in the Priština Corps. The Order referred to by the Trial Chamber was sent to the Priština Corps Commander and other units directly subordinate to the 3rd Army. It was the duty of the Priština Corps commander to forward the order to combat units under his command, and he did so. On 23 March 1999, the same date as the Pavković Order, Lazarević issued a document, Exhibit 5D1293, a basic duplicate of the Pavković Order. One can see that this is the Order that was actually distributed to the Priština Corps combat units. Thus, while the Chamber's conclusion is technically correct, it was actually the Lazarević Order that directed the actual VJ forces. This is exemplary of the way the chain of command operated. Pavković never issued direct orders to combat organs in his capacity as 3rd Army commander. His orders were directed to the specific Corps or other organization under his immediate command. And in all cases Pavković was implementing Orders and Directives he received from the General Staff. He was a conduit through whom the orders passed. His job was to design a specific 3rd Army Order to implement a broader General Staff Order. It was then the task of his subordinates, mainly Corps commanders, to specifically implement his more general order, such as designating specific unit tasks and dates and times of

implementations, weapons to be utilized and other necessary details.

215. During the testimony of Momir Stojanović the witness was shown a video clip that showed General Pavković meeting with some villagers. Stojanović explained that they were in Batusa, an Albanian village and the senior man in the village, Zejnil Batusa, an Albanian, was asking General Pavković for protection from the Albanian terrorists. This meeting occurred in May, 1998. The Albanian villagers were complaining to Pavković that every night they were being disturbed by terrorists from neighbouring Junik village trying to give them weapons and threatening to take away their young men if they would not accept weapons. Pavković agreed that the Army would protect the village if the village would not join with the KLA.[205] This demonstrates Pavković's willingness to protect the civilian population in 1998 which displays that he could not have had the criminal intent as found by the Trial Chamber.

216. These conclusions and errors form part of the fabric supporting the Chamber's conclusions regarding the culpability of Pavković; especially his intent. It is impossible at this stage to speculate as to whether the Chamber could have found the requisite intent without engaging in faulty reasoning and improper conclusions. Thus, the improper reasoning and conclusions occasioned a miscarriage of justice.

[205] Momir Stojanović,7 December 2007, T.19746-49

217. Beginning at paragraph 1263 of Volume II, the Trial Chamber analysed the evidence regarding the concealment of bodies. At paragraph 1356, the Chamber found that involvement by General Pavković in the concealment of crimes was not established by the Prosecution. This finding was then ignored by the Trial Chamber when assessing the evidence regarding General Pavković's intent. In Volume III, paragraph 88 of the *Judgement* the Trial Chamber makes a finding that evidence of concealment of bodies supports a finding of a common purpose without any explanation as to how this evidence supports such a finding.

218. In Volume II, paragraph 1356 the Trial Chamber held that:

> There can be no doubt that a clandestine operation involving the exhumation of over 700 bodies originally buried in Kosovo and their transportation to Serbia proper took place during the NATO bombing. The main personalities involved in organising this large scale operation were the Minister of Interior, Vlajko Stojiljković; the President of the FRY, Slobodan Milošević; and the Head of the RJB at the time, Vlastimir Đorđević, all of whom are also, in this Indictment, named members of the Joint Criminal Enterprise...

219. In paragraph 1357 the Trial Chamber went on to hold that:

> ...The fact that the persons involved felt this concealment to be necessary in the first place also leads the Chamber to conclude that they knew that the great majority of the corpses moved were victims of crime, as opposed to combatants or people who perished during legitimate combat activities, such as the victims from the area of Meja and from Suva Reka/Suhareka town.

220. The Trial Chamber correctly held that there was no VJ involvement in the concealment of bodies; a position held by all the VJ Accused during the trial.[206] However, on the one hand the Trial Chamber made this factual finding in Volume II of the *Judgement,* yet on the other hand failed to give this any weight in their analysis of the intent of General Pavković. This is an illogical and unreasonable approach to the evidence and as such constitutes a miscarriage of justice which justifies the intervention of the Appeals Chamber. Additionally, the common purpose alleged by the Prosecution was a plan to expel Kosovo Albanians from Kosovo to alter the ethnic balance in favour of the Serbs. The crimes of murder were specifically outside the common purpose and treated by the Chamber as crimes that should have been foreseen by certain members of the JCE, but not part of the common purpose.

221. This evidence, as damning as it is of possible MUP involvement in murders and concealment of murders, does not, even circumstantially, make the existence of the alleged common purpose more likely. No reasonable Trial Chamber could have concluded beyond a reasonable doubt that this evidence "circumstantially supports a finding that there was a common purpose." At least not the common purpose charged in the Indictment.

222. As noted previously the right to a reasoned opinion is one of the elements of a fair trial requirement embodied in Articles 20

[206] Volume II, para.1356

and 21 of the Statute.[207] Any reasonable Trial Chamber would have taken account of the factual finding that the VJ were not involved in any concealment of crimes to be an indicia of the absence of intent on the part of the VJ accused and in particular General Pavković.

223. An integral element of committing a crime is usually covering-up the evidence of that crime. What is clear from the evidence in this case, to the satisfaction of the Trial Chamber, is that General Pavković was not involved in any cover-up of crimes committed in Kosovo. This demonstrates what was consistently argued by his Defence, that he did not have any criminal intent nor did he participate in any Joint Criminal Enterprise. Any other finding is completely unreasonable and one no reasonable trial chamber and trier of fact would have made.

224. General Pavković's consistent concern with International Humanitarian Law as demonstrated by documents dealt with previously in this brief, and the legal steps taken by him pursuant to orders and in defence of his country, under attack from both NATO and KLA, negate the finding of criminal intent in this regard.

GROUND 7 – THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY FAILING TO DEFINE A LEGAL DEFINITION OF EXCESSIVE USE OF FORCE AND BY MAKING FINDINGS WITHOUT OPINING A LEGAL DEFINITION

[207] *Furundžija* Appeal Judgement para.69; *Naletilić et al* Appeal Judgement para.603; *Kunarac et al* Appeal Judgement para.41; and *Hadžihasanović* Appeal Judgement para.13

225. In Volume I, paragraphs 919 and 920, the Trial Chamber found that the VJ used excessive and indiscriminate force in some areas in 1998 causing the displacement of the civilian population. However, the Trial Chamber gave no legal definition of what excessive force consists of or what elements the Prosecution must prove for the Trial Chamber to make a factual finding of the same. Thus, their finding must be considered an error of fact and of law. Without some standard as to what constitutes excessive and indiscriminate force, defending against such a claim becomes impossible.

226. General Pavković was charged in the *Indictment* with both Article 5 of the Statute, Crimes against Humanity and Article 3, Violations of the Laws and Customs of War for the same crimes. However, he was not convicted under Article 3(b) or (c); which do include indiscriminate or excessive force.[208] The Appeals Chamber has held that the list of violations in Article 3 is merely illustrative, not exhaustive.[209] The Prosecution allegations of excessive force were contained in paragraphs 94-102 of the

[208] Article 3 of the Statute provides that: The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property

[209] *See Tadić* Jurisdiction Decision para.91 (stating that Article 3 confers jurisdiction "over *any* serious offence against International Humanitarian Law" not covered elsewhere in the Statute). See also *Galić*, Appeal Judgement, para.118

Indictment in the section entitled "background and context for the allegations". There are no specific charges related to these allegations and indeed, the Trial Chamber noted in the *Judgement* that none of the Accused was charged with responsibility for crimes committed in 1998.[210]

227. The Prosecution contended that these allegations were proof that the Accused were members of the JCE, that they had the *mens rea* required to commit the charged crimes and to show knowledge, intent, command ability and as "part of the story that unfolded in Kosovo".[211] The Trial Chamber ruled during the pre-trial period that to rely on possible crimes committed in 1998 the Prosecution had to prove that these crimes were, in fact, committed.[212] These general allegations by the Prosecution were not in fact proven beyond a reasonable doubt in *most* of the locations mentioned in paragraphs 94 and 95 of Indictment; which was acknowledged by the Trial Chamber in Volume I, paragraph 849 of the *Judgement*. However despite this finding the Trial Chamber then proceeded to apportion intent to General Pavković.

228. The Trial Chamber held that Pavković's knowledge of crimes committed by the VJ in 1998 was indicative of his intent and the determination of his responsibility.[213] They held that he was

[210] Volume I, para.844
[211] Prosecution's Response to Milutinovic's Response to Prosecution Motion to Amend Indictment and Challenge to Amended Joinder Indictment, 17 October 2005, para.5, note 10
[212] Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, 22 March 2006, para.17, See also *Judgement*, Volume I, paragraph 844
[213] Volume III, para.774

aware of allegations in the international community that excessive and indiscriminate use of force by the VJ and MUP forces in 1998 had led to the forcible displacement of Kosovo Albanians.[214] This error of law impacts the *Judgement* significantly as the inference of intent based on this error goes to the core of the findings against General Pavković. By finding that excessive and indiscriminate force was used in 1998 without applying any legal test for the same, and then attributing knowledge of this to General Pavković in order to assess a criminal intent is a clear error of law by the Trial Chamber invalidating the *Judgement*. It is blatantly unreasonable for the Trial Chamber to then have proceeded to attribute a criminal intent to General Pavković on this basis.[215]

229. A trier of fact is called upon to make findings beyond reasonable doubt based on all of the evidence on the trial record – direct or circumstantial – not only on facts which are essential to proving the elements of the crimes and the forms of responsibility.[216] All facts underlying the elements of the crime or the form of responsibility alleged as well as all those, which are indispensable for entering a conviction, must be proven beyond reasonable doubt.[217] However, in this instance the use of force, whether indiscriminate or excessive is not merely a factual finding; it is also a legal term of art evinced by Article 2 and Article 3 of the Statute which both outline violations under

[214] *Id.*
[215] If the 1999 aerial bombing by NATO using cluster bombs and depleted uranium weapons is not excessive use of force then nothing done by FRY and Serbia forces in the conflict should meet any definition of excessive use. See 4D90.
[216] *Halilović*, Appeal Judgement, para.129
[217] *Ntagerura et al.* Appeal Judgement, para.174; *Blagojević and Jokić* Appeal Judgement, para.226.

these headings;[218] upon which the Trial Chamber did not articulate a definition before considering the factual evidence. As indiscriminate or excessive force are themselves crimes under the Statute this is not merely a background finding on the part of the Trial Chamber. General Pavković reasserts that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved beyond a reasonable doubt *each* element of that crime and the applicable mode of liability as well as any fact indispensable for entering the conviction.[219] The Trial Chamber itself emphasized that:

> "Implicit in the requirement that a Trial Chamber make findings upon the elements of the underlying offences, statutory crimes, and forms of responsibility is that "the presumption of innocence requires that each fact on which an accused's conviction is based must be proved beyond reasonable doubt''.[220]

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[218] Article 2 of the Statute provides that: The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.
Article 3 provides that: The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

[219] *Stakić* Appeal Judgement, para.219, *Kupreškić* Appeal Judgement, para.303; *Kordić and Čerkez* Appeal Judgement, para.834; *Ntagerura et al* Appeal Judgement para.174–175.

[220] Volume I, para.63

The Trial Chamber in fact imposed criminal liability upon General Pavković for crimes not pleaded as charges in the Indictment and for which they did not make any findings on the applicable *mens rea* or the *actus reus*, the essential elements of any crime. This is a serious error on the part of the Trial Chamber which invalidates the judgement.

230. Article 3 of the Statute is a residual clause which gives the Tribunal jurisdiction over any serious violation of International Humanitarian Law not covered by Articles 2, 4, or 5 of the statute. In order to fall within this residual jurisdiction, the offence must meet the following criteria:

> (1) It must constitute and infringement of a rule of International Humanitarian Law;
> (2) the rule infringed on must be customary in nature or covered by a treaty binding on the parties at the time that conforms with international law;
> (3) the violation must be serious—breach of a rule having important values and having grave consequences for the victims; and
> (4) the violation of the rule must entail individual criminal responsibility under customary or conventional law.

231. These conditions must be fulfilled whether the crime is expressly listed in Article 3 of the Statute or not.[221]

232. The Trial Chamber found that excessive or indiscriminate force had been used at the following locations: Junik, Jablanica and Prilep between July and September 1998[222]; Mališevo in July

[221] *Strugar*, Trial Judgement, 31 January 2005, at para.218; *Halilovic*, Trial Judgement, 16 November 2005, at para.30; *Oric*, Trial Judgement, 30 June 2006, at para.257; *Krajisnik*, Trial Judgement and Sentence, 27 September 2006 at para.842; *Kunarac et al,* Trial Judgement*,* at para.66
[222] Volume I, para.881

1998[223]; Drenica in August 1998[224] and Gornje Obrinje in September 1998.[225] General Pavković submits that the requirements for a finding of the use of indiscriminate and excessive force necessitated a consideration of *inter alia* the principles of proportionality and distinction on the part of the Trial Chamber which was omitted from the *Judgement*. Criminal responsibility can only be triggered either where there is an *intentional* attack directed against civilians, the principle of distinction,[226] or an attack is launched against a military objective with knowledge that civilian deaths would be *clearly excessive* in relation to the anticipated military advantage; the principle of proportionality.[227] The Trial Chamber also omitted to make a finding on the *mens rea* of these crimes for which they then inferred a criminal intent to General Pavković to commit crimes in 1999.

233. The *mens rea* for offences under Article 3(b) is satisfied where the destruction or devastation is either perpetrated intentionally, with the knowledge and will of the proscribed result, or in reckless disregard of the likelihood of the destruction or devastation.[228] The elements of this offence are: (i) the destruction of property occurred on a large scale; (ii) the destruction was not justified by military necessity; and (iii) the perpetrator acted with intent to destroy the property in

[223] Volume I, para.886
[224] Volume I, para.894
[225] Volume I, para.912
[226] See Article 8(2)(b)(i) and 8(2)(e)(i) of the ICC Statute; Article 51(2) of Additional Protocol I to the 1949 Geneva Conventions
[227] See Article 8(2)(b)(iv) of the ICC Statute drawing upon the principles in Article 51(5)(b) and 85(3)(b) of Additional Protocol I to the 1949 Geneva Conventions.
[228] *Brđanin,*Trial Judgement, at para.593; *Blaskić*, Trial Judgement at para.183; *Kordić & Čerkez*, Trial Judgement, at para.346

question.[229] The Trial Chamber failed to make findings on all three of these elements.

234. The destruction must be both serious in relation to the individual object and cover a substantial range in a particular city, town, or village. The sporadic or isolated destruction of a few houses of a settlement is insufficient, but total destruction of a city, town, or village is not required.[230] Military necessity includes those lawful measures which are indispensible for securing the ends of the war.[231] Collateral damage to civilian property may be justified by military necessity. The protection of civilians and civilian property provided by modern international law may cease entirely, or be reduced or suspended, when the target of a military attack is comprised of military objectives and belligerents cannot avoid causing damage to civilians.[232]

235. The Trial Chamber in *Galić,* in its discussion of indiscriminate and disproportionate attacks under the chapeau elements of Article 3; held that disproportionate attacks "may" give rise to the inference of direct attacks on civilians.[233] The Appeals Chamber found this finding to be "a justified pronouncement on the evidentiary effects of certain findings, not a conflation of different crimes" and noted that :

[229] *Orić*, Trial Judgement at para.581; *Hadzihasanovic & Kubura*, Trial Judgement at para.39
[230] *Orić,* Trial Judgement, at para.583, 85
[231] *Kordić & Čerkez*, Appeal Judgement, at para.686
[232] *Hadzihasanovic & Kubura*, Trial Judgement, at para.45
[233] *Galić* Appeal Judgement, at para.133

> …the Trial Chamber endeavoured, in its evaluation of the evidence, to consider questions such as: 'distance between the victim and the most probable source of fire; distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; appearance of the victim as to age, gender, clothing; the activity the victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight.[234]

236. The same evaluation of this sort of fact evidence was not engaged in by the Trial Chamber in its *Judgement*, rather only very general evidence, much of which was un-detailed hearsay, was considered which did not meet the standard of beyond reasonable doubt and constitutes an error of fact.

237. The Trial Chamber erred in fact in holding that General Pavković was aware of the use of excessive or disproportionate force by troops under his command in 1998. The Trial Chamber noted that the evidence presented generally was not such to prove specific criminal acts committed by particular groups of VJ and/or MUP forces in 1998.[235]

238. The Trial Chamber held in Volume I, paragraph 881, that MUP and VJ forces engaged in conduct during their operations against the KLA that violated International Humanitarian Law in Junik, Jablanica and Prilep between July and September 1998. However, in their analysis of this action the Trial Chamber noted that this area "was the site of significant combat operations between the VJ and MUP, on the one side, and the KLA, on the

[234] *Galić*, Appeal Judgement, at para.133, citing *Galić* Trial Judgement, at para.188
[235] Volume I, para.920

other, between July and September 1998."[236] They also noted that no evidence was brought to demonstrate that any village was "razed", as no detailed evidence was brought demonstrating the complete destruction or effacing of buildings.[237] Thus, having noted such a lack of evidence the Trial Chamber proceeded to hold that due to the accounts of just two witnesses John Crosland and Karol John Drewienkiewicz was sufficient to conclude that "MUP and VJ forces engaged in conduct during their operations against the KLA that violated International Humanitarian Law." This simply fails to meet the *actus reus* of what is required under Article 3(b), that the destruction of property occurred on a *large scale* and constitutes an error of law.

239. While the Trial Chamber held that General Pavković had knowledge of excessive force used by VJ troops in 1998, they made no reference to the specific area of Junik, Jablanica and Prilep in regards to his individual criminal responsibility. In fact what is clear from the evidence is that General Pavković endeavoured to prevent the use of excessive force and assure adherence to International Humanitarian Law.[238]

240. In Volume I, paragraph 886, the Trial Chamber held that VJ and MUP forces used excessive force to combat the KLA in Mališevo in late July 1998 which resulted in destruction to civilian property and the displacement of a significant number of Kosovo Albanians from the town. Once again the Trial Chamber

[236] Volume I, para.881
[237] Volume I, para.881
[238] See Annex D to this brief

failed to assess the essential elements of the crime of excessive or indiscriminate force. The Trial Chamber noted that Mališevo was the undisputed KLA headquarters in 1998,[239] and thus, this was a legitimate and necessary area for targeting by the VJ forces. The disproportionate use of force is prohibited in International Humanitarian Law; however, civilian casualties or damage to property does not automatically mean that the use of force is disproportionate.[240]

241. While the Trial Chamber held that General Pavković had knowledge of excessive force used by VJ troops in 1998, they yet again, made no reference to the specific area of Mališevo when addressing his individual criminal responsibility.

242. In Volume I, paragraph 894, the Trial Chamber found that excessive and indiscriminate force was used by the FRY and Serbian forces against villages in the Drenica area in August 1998. Again, this is an error of fact and law by the Trial Chamber. The Trial Chamber relied on the evidence of one witness, John Crosland to hold that excessive and indiscriminate force was used in this area.[241] The Trial Chamber noted that the 125th Motorised Brigade (who were involved in this action) report did not adequately explain damage to civilian property

[239] Volume I, para.885
[240] See 4D90, ICTY Final Report, para.90 concluding that over 500 civilian deaths and hundreds injured by the NATO bombing of FRY was not disproportionate. The question becomes whether there was a valid military objective. In Kosovo in 1998 there clearly was. Kosovo terrorists were operating from villages, supported by the village populations. The only way to combat the terrorism was to go after the terrorists in the villages where they were being supported and were taking refuge. It is noteworthy that UN forces are encountering a very similar situation with the Taliban terrorists in Afghanistan. Although civilian casualties are not the intent they are unavoidable in legitimate efforts to root out terrorist groups.
[241] Volume I, paras.892-894

and thus concluded on this basis that excessive force was used. To impute criminal liability to General Pavković based on a report from Brigade level which is lacking in information and is an unreasonable conclusion by the Trial Chamber. In addition the evidence given by John Crosland is not direct evidence of excessive force, it is evidence of KLA-FRY clashes, and this is not evidence beyond a reasonable doubt of use of excessive force.

243. The Trial Chamber found in Volume III, paragraph 678 that General Pavković was informed of allegations of excessive or disproportionate force in joint actions, specifically at Gornje Obrinje in September 1998.

244. However P1440, a report from the Priština Corps on this incident in which it is reported that; the troops were interviewed and the border post visited; an investigation is underway; and that based on all combat and intelligence reports from all units that the Priština Corps did not have information about a massacre of civilians. The report from the 125th Motorised Brigade did not contain information about a massacre and merely contained information that children were handed over to the MUP before the VJ forces retreated.[242] The Trial Chamber noted that in relation to events in Drenica in August 1998 this brigade, 125th Motorised Brigade, report did not adequately explain damage to civilian property. As there was no information given to General Pavković after investigations and reports on this incident at Gornje Obrinje, it would have been impossible

[242] P1011, p.70-71

for him to make a conclusion that VJ forces had been involved in any murders and for the Trial Chamber to conclude otherwise violates the principle of *in dubio pro reo.*

245. In Volume III, paragraph 617, the Trial Chamber held that Ojdanić was not a member of the JCE based *inter alia* on the fact that he was not receiving all the information on crimes from General Pavković, which is contested by General Pavković. Following this particular line of logic it is conceivable that General Pavković did not receive full and correct information from some of his subordinates about the incident at Gornje Obrinje in 1998 and therefore it is unreasonable to conclude beyond a reasonable doubt that he was aware of the use of any excessive or disproportionate force at Gornje Obrinje.

246. Other orders and reports from the time period of July-September 1998 also show that General Pavković was continually engaged in monitoring the VJ units in Kosovo and was trying to minimize, to the extent that was possible, any collateral damage to civilians and property. Exhibit P1420 is an order from General Pavković from 7 August 1998. In this order he requests that an analysis and a report on the engagement of MUP forces be carried out and to report if there was excessive force by MUP forces in the period 25 July 1998 to 6 August 1998. His concern with whether any excessive force was used by MUP forces further demonstrates General Pavković's concern with preventing the use of excessive force and upholding of International Humanitarian Law.

247. In response to General Pavković's request for an analysis of the MUP engagement and request for a report in P1420 Colonel Mladen Ćirkovic of the 15th Armoured Brigade reported to General Pavković on the 7 August 1998 in Exhibit P1423. He stated that "not once did VJ units and MUP forces on the axes listed in item 1 use excessive force. Fire was opened on the armed Šiptar separatists only to neutralise targets which were endangering human lives." General Pavković again did not receive any information from this Brigade that units were using excessive force.[243]

248. In P1424 the report of the 243rd Mechanised Brigade paragraph two states that "There was no use of excessive force either by the VJ or the MUP". It goes on to state that "MUP and VJ members behaved correctly towards civilians and property without abuse of rights or resorting to theft or crime. In some situations, assistance in the form of food and clothing was delivered to women and children."[244]

249. Bozidar Delic, of the 549th Motorised Brigade, reported on 8 August 1998 that between 18 July and 6 August 1998 that MUP forces and the combat group of the 549th Motorised Brigade were engaged on the same axis in the areas of Bela Crkva village, Orahovac and Mece village. He reported at paragraph two that "The use of force by the MUP units and forces towards the terrorists was in the spirit of combat rules and adequate to

[243] P1423
[244] P1424, para.3

the terrorists' resistance".[245] He goes on at paragraph 3 to state:

> Behaviour towards the population and prisoners was decent. While carrying out combat actions, we came across a very small number of civilians whom we treated fairly. The prisoners in Bela Crkva, Orahovac and Troja were sent on to the Prizren MUP for processing. Behaviour towards property in the axis of action was satisfactory, except for individual instances. Force adequate to the resistance offered was applied to the features from which the terrorists fired (these were mostly houses and features on the axis of operation).[246]

250. Receiving this report could not have put General Pavković on notice that excessive or indiscriminate force was being used by the VJ in these actions. Indeed, as noted in the report, fire was being targeted at the VJ from houses in the axis of combat. These houses would then fall under the category of legitimate military targets. For property to be protected it must not have been in use for military purposes at the time of an attack and military necessity affords a justification under Article 3(b) of the ICTY Statute.[247] Here this property would have lost its protection under International Humanitarian Law as it was being used for military purposes by the KLA. This was not even considered by the Trial Chamber in their analysis of the use of excessive or indiscriminate force in 1998. Shelling does not constitute excessive force unless it is known for certain that there were no enemy combatants in the dwelling at the time.

[245] P1425, para.2
[246] P1425, para.2
[247] See also Article 25 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 provides that "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are **undefended** is prohibited."

The Trial Chamber did not consider whether some houses were legitimate military targets and disregarded the evidence that many may have been legitimate military objectives. In omitting to consider this evidence the Trial Chamber erred as this evidence was clearly relevant to the findings on force used 1998.

251. Joseph Omer Michel Maisonneuve, of the OSCE, gave evidence that it was his first-hand experience that the KLA based itself in village houses. Maisonneuve described how he would meet a KLA Commander named Drini in villagers' houses, and that he presumed the KLA were using houses as bases.[248] General Drewienkiewicz, another prosecution witness, testified that it was a common KLA tactic to operate from civilian areas, to carry out attacks and then when the VJ exercised its right of self-defence and responded, it would appear as if there was no KLA presence and then a "big claim" was made that civilians were being attacked.[249]

252. Bislam Zyrapi testified that the KLA was assisted by a civilian population which provided food, lodging, and any other assistance they could give.[250] He testified that the KLA had village staffs which remained in the villages and were provided arms, they normally did not have KLA uniforms.[251]

253. Again on 8 August 1998 Colonel Dragan Živanović reported to General Pavković that:

[248] 6 March 2007, T.11135
[249] 5 December 2006, T.7878.
[250] 7 November 2006, T.6050
[251] 9 November 2006 T. 6232

> "According to our observations, there was no excessive use of force, looting, capture of the civilian population etc. However, when combat operations were being conducted, due to the high temperature, resistance offered from certain houses, and use of tracer ammunition, haystacks, wheat and wooden ancillary buildings caught fire."[252]

254. The decisive factor for the Trial Chamber should have been whether the military action that was carried out was criminal or not.[253] If they had not omitted to consider the factual evidence such as these reports there is no other reasonable conclusion but that these actions were not criminal and forces did not engage in excessive or indiscriminate force.

255. In Volume III, paragraph 678 of the *Judgement* the Chamber made the following conclusion:

> . . . the Chamber does not accept the explanation that the order not to fire on areas when international observers may be present was designed to protect international observers, but considers rather that its terms demonstrated that it was an effort to avoid the VJ being detected committing crimes.

256. The Chamber provided no basis whatsoever for this conclusion. None of the sources cited in its footnote support the conclusion, they simply set out the documents involved.

257. It must be remembered that during this time in 1998 there were numerous international observers, diplomats, humanitarian representatives and journalists in Kosovo. They were able to move around freely without notice as to their

[252] P1426, para.2
[253] *Kordić and Čerkez* Appeal Judgement, para.812. See Also - ICRC Commentary on Additional Protocols, para.1927

destinations to the FRY authorities. Frequently they were visiting Kosovo Albanian villages or representatives of the KLA. It was very important to protect these persons from harm to the extent possible. As General Pavković pointed out in his Order, these visitors "tour certain areas according to their own plans and without announcement."[254] Use of artillery weapons was prohibited without specific authority of the Corps commander. VJ combat activity is restricted for the protection of these persons as well as civilians. This Order was passed on to combat units by Lazarević.[255]

258. Serious repercussions could have resulted had such an order not been entered and enforced. Had any of these foreign visitors inadvertently come under attack by Serb forces the consequences would have been extreme. It was, thus, imperative that such an order be circulated.

259. No reasonable trial chamber could conclude, completely without evidence, that the orders were an effort to avoid being detected committing crimes. Only a trial chamber determined to convict in spite of the evidence could do so. If such orders had not been entered, such a trial chamber could then conclude that the Serb forces even failed to take steps to protect such persons, evidence of total disregard for humanitarian law and human life.

260. On the 3 October 1998 General Pavković again requested reports from units in the Priština Corps in connection with

[254] 4D177
[255] P969

actions on 26 and 27 September 1998.[256] He requested any information on a "massacre" against civilians and whether there were any departures from his previous orders. The 57th Border Battalion reported back on the 4 October 1998 that they did not take part in combat operations on 26 and 27 September and they had no information on any massacres.[257] Exhibit 4D389 is a report from the 243rd Mechanised Brigade which states that the combat action was carried out without deviation from orders and there was no massacre of civilians. Exhibit 4D390 is a report from the 52nd anti-aircraft defence artillery rocket brigade which reports the same information to General Pavković as the previous reports. The 15th Armoured Brigade reported on 5 October 1998 and again does not relay any information to General Pavković regarding excessive force or any massacres.[258] General Lazarević, from the Forward Command Post of the Priština Corps reported also on 5 October 1998 that actions on the 26 and 27 September were carried out in keeping with the commands and that Priština Corps units did not commit any massacres of civilians.[259]

261. These reports demonstrate the information General Pavković was receiving regarding the summer 1998 actions of the Priština Corps. Not one report shows he received information from his troops that excessive or indiscriminate force was used or that the actions were criminal in nature. The international community was claiming that excessive force was being used and General Pavković was aware of these claims as Exhibit P1422 makes

[256] 4D199
[257] 4D387
[258] 4D391
[259] 4D401

clear. However, his efforts to prohibit any excessive use of force and the reports he was requesting and receiving show he was actively investigating such claims and that he had no intent to engage in criminal actions.

262. The Trial Chamber essentially imposed criminal liability upon General Pavković for crimes not pleaded as charges in the Indictment, and for which they did not make any findings on the applicable *mens rea* or *actus reus*, the essential elements of any crime. The finding that General Pavković then had any knowledge of the use of excessive or indiscriminate use of force is a factual error on the part of the Chamber. It is clearly unreasonable for the Trial Chamber to then have proceeded to attribute a criminal intent to General Pavković in 1999 on this basis. This is a serious error on the part of the Trial Chamber which invalidates the *Judgement* and justifies the intervention of the Appeals Chamber.

GROUND 8 – THE TRIAL CHAMBER FAILED TO MAKE PROPER CREDIBILITY FINDINGS

8 (a) The Trial Chamber failed to make correct and reasonable credibility and reliability findings on the evidence of witness Lakić Đorović in Volume III paragraphs 760, 761, 762, 764.

263. General Pavković notes that he has withdrawn his appeal regarding the other paragraphs in his original Notice of Appeal, namely: Volume I, paragraphs 509, 524, 528, 538, 547, 549, 550, 552, 553, 554 555, 556, 559, 562, 563, 564, 567 and 568.

264. The Trial Chamber held correctly at Volume I, paragraph 61 that "While reliability and credibility are often referred to as separate concepts, credibility is essentially a factor of reliability. The ultimate question is whether the evidence is reliable." It is submitted that the evidence given by Lakić Đorović was not reliable and in their assessment of the evidence the Trial Chamber misinterpreted the evidence on which it relied in making the findings in the paragraphs appealed. The Trial Chamber erred in fact in making these conclusions and thus occasioned a miscarriage of justice.

265. In Volume I, paragraph 498 the Trial Chamber held that while there was evidence that "Đorović had a somewhat unstable temperament, the Chamber does not consider that this necessarily undermines his credibility as a witness." This was despite evidence of his erratic and aggressive behaviour. Đorović committed a physical assault on his former deputy, causing him grievous bodily harm on 30 May 1999[260] and in April of 2007, Đorović was again charged with a criminal offence for the illegal use of his assigned weapon.[261] As a result of this behaviour, Đorović was dismissed from his role as the wartime military prosecutor in Priština. He then started making accusations against members of the VJ, the MUP, and others regarding alleged war crimes in Kosovo without any supporting evidence.[262] Furthermore, numerous witnesses who worked within the military justice system rejected the general

[260] 3D1137, p.9, See also 3D541
[261] *Id.*,p.4
[262] *Id.*,p.9

allegations made by Đorović that untoward pressure was exerted upon military judicial organs.[263] No reasonable trial chamber could have held that the work of military judicial organs was impeded or that General Pavković had knowledge of any alleged ring of stolen goods. Holding that he was a credible witness before this Tribunal was therefore an incorrect and unreasonable finding on the part of the Trial Chamber and thus occasioned a miscarriage of justice.

266. In Volume III, paragraphs 760, 761, 762 and 764 the Trial Chamber discusses the testimony of Đorović regarding the seizure of civilian goods by the VJ and MUP. In Volume III, paragraph 764 the Chamber found that Đorović's knowledge of the role of Pavković in this matter was based on indirect knowledge, yet despite this held that Pavković was aware of the illegal taking and distribution of Kosovo Albanian property by VJ forces and the involvement of members of the military justice system in this practice.

267. No reasonable trial chamber could have held Đorović to be a reliable and therefore, credible witness. During his testimony he admitted that he thought that General Pavković was the Chief of the General Staff in 1999.[264] Đorović also testified that a person by the name of Dasic, who was the assistant for logistics was at a meeting of the General Staff where the seizing of civilian property was discussed.[265] However, Milan Uzelac who was chief

[263] See the evidence of: Vasiljević, 23 January 2007, T.8909; Radosavljević, 23 October 2007, T.17469; 28 January 2008, Mladenović, T.21248; Blagojević, I February 2008, T.21563; Spasojević, 19 September 2007, T.15990-1
[264] 13 March 2007, T.11644-11645
[265] 13 March 2007, T.11644

of the transport administration of the General Staff in 1999 testified that no one by this name worked in the General Staff at this time and it was only in 2002 that this General Dasic came to work in the General Staff.[266]

268. Documents show the procedure regarding seized and found vehicles. Exhibit 4D174 is an official note by Major Miroslav Panić of the security organ of the VJ. In this official note vehicles which were seized were recorded and it is clear that records were kept of all seized vehicles. In paragraph 2 of this note Major Panić states:

> Since the Security Organ of the 175th Infantry Brigade keeps records of the vehicles seized and found in the brigade zone and guards them, none of the vehicles have been handed out for use outside the unit, except for 6 (six) which were issued to the Brigade Command, clearly marked with Yugoslav Army labels and accompanied by valid travel documents."

269. On 9 May 1999 General Pavković issued an order regarding seized motor vehicles.[267] He noted in this order that based on inspection it had come to his attention that a part of the units were not carrying out tasks related to seized material as per his previous order of 1 April 1999. He orders the units to include accurate information in the record for receipt of seized motor vehicles and orders that commanders of Corps, independent army units and the logistics base to be responsible for approving the use of vehicles.[268]

[266] 21 September 2007, T.16172
[267] 4D164
[268] 4D164, paras.2-3

270. Those who did not follow these orders and seized vehicles illegally were in fact prosecuted as is evidenced in P1182, information sent by the Priŝtina Corps to the 52nd Artillery Rocket Brigade on 15 May 1999.

271. The Trial Chamber erroneously disregarded the defence evidence which clearly shows Đorović as an unreliable witness whose evidence should have been disregarded by any reasonable trial chamber. Defence witnesses, Đordje Strunjas, Arsenije Katanić, Branko Žigić, Đura Blagojević and Stanimir Radosavljević all testified that Đorović's claims were false.[269] These witnesses were lawyers, judges and prosecutors, people who should have been considered as credible over a person who is obviously unstable and violent.

272. Exhibit 4D159, a performance report for the period between the date of establishment at the Military District Command and 31 May 1999, was signed by Đorović one day before the incident from which he was removed from office. He did not mention any problems or pressures put on him. The report reveals that he spent less than ten days in Priština, from 22 May 1999. Therefore, conclusions he drew about the workings of the military justice system for the entire war period should not have been given any weight by the Trial Chamber.

[269] Djordje Strunjas – witness statement - 3D529, paras.3-6, Arsenije Katanic – witness statement – 3D530 paras.3-5, Branko Zigic – witness statement – 3D528, paras.3-5, Djura Blagojevic – witness statement-5D1402, paras.66-68 and Stanimir Radosavljević – witness statement - 4D502, paras.15-17

8 (b) The Trial Chamber failed to make correct and reasonable credibility and reliability findings on the evidence of witness Aleksandar Dimitrijević in Volume III paragraphs 518, 525, 598, 599, 644, 649, 650, 664, 676,688, 689.

273. General Pavković notes that he has withdrawn his appeal regarding the other paragraphs in his original Notice of Appeal, namely: Volume I paragraphs 74, 75, 477, 971, 1006, 1012, 1069, 1070, 1105, 1121 and in Volume III paragraphs 65, 84, 305, 322, 323, 324, 325, 515, 516, 523, 530, 545, 598, 599, 654, 662, 663, and 778.

274. At the outset, the Trial Chamber stated that, as at this Tribunal the Chamber is not an investigating organ, evidence called by the Chamber itself would be "highly unlikely" to provide "the principal foundation for the most significant findings in any prosecution before this Tribunal."[270] They went on to hold that "As it is, the findings in this Judgement are based almost exclusively on the evidence the parties have chosen to present to the Chamber."[271] Aleksandar Dimitrijević was one of the witnesses called to give evidence by the Trial Chamber.

275. With regard to the evidence of Aleksandar Dimitrijević this statement is incorrect on the part of the Trial Chamber. Their reliance on the testimony of Dimitrijević despite their declaration to the contrary is clear from the numerous times his

[270] Volume I, para.33
[271] Volume I, para.33

evidence is referred to in the *Judgement*[272] and the extent that his testimony is relied on in their findings on the criminal liability of General Pavković[273].

276. Secondly, General Pavković submits that the credibility of the testimony of Aleksandar Dimitrijević was not properly assessed by the Trial Chamber and any reasonable trial chamber could not have assessed his credibility in the same manner as in the *Judgement*.

277. The Trial Chamber held correctly at Volume I, paragraph 61 that "While reliability and credibility are often referred to as separate concepts, credibility is essentially a factor of reliability. The ultimate question is whether the evidence is reliable." It is submitted that the evidence given by Dimitrijević was not reliable and in their assessment of the evidence the Trial Chamber misinterpreted the evidence on which it relied in making the findings in the paragraphs appealed. The Trial Chamber erred in fact in making these conclusions and thus occasioned a miscarriage of justice.

278. In Volume III paragraph 518 the Trial Chamber concluded that General Pavković brought the 72nd Special Brigade into Kosovo prior to 25 February 1999 despite an instruction from Ojdanić to keep it in the border belt. To reach this conclusion the Trial

[272] He is mentioned 85 times in Volume I of the *Judgement* and 139 times in Volume III

[273] The Trial Chamber relied on the testimony of Dimitrijević at 19 separate footnotes in the section on the responsibility of General Pavković, see footnotes in Volume III – 1538, 1539, 1540, 1541, 1554, 1555, 1575, 1605, 1606, 1611, 1614, 1616, 1653, 1684, 1685, 1686, 1687, 1688 and 1979.

Chamber relied in part on the testimony of Dimitrijević[274]; The Trial Chamber erred in fact in reaching this conclusion.[275] This error has previously been discussed in this Brief at Ground 3, above and thus will not be reiterated here.

279. In Volume III, paragraph 525 the Trial Chamber cited the testimony of Dimitrijević that he was replaced as Head of the Security Administration by Geza Farkaš because Milošević was under pressure from Pavković. This is an illogical conclusion and constitutes an error of fact on the part of the Trial Chamber. During his testimony on this issue Dimitrijević stated that Pavković "…had already secured for himself the role of someone who had resolved the problems in Kosovo, who had become a favourite of the president…"[276] At this Judge Bonomy intervened stating: "Well, Mr. Dimitrijević, I don't want to be disrespectful, but if that's what's – if that's all that's involved, then it sounds as though you were jealous…".[277] This was in fact a correct assessment of the demeanour and attitude of Dimitrijević towards General Pavković which the Trial Chamber did not correctly assess in reaching their conclusions on this witness's reliability.

280. The Trial Chamber again erred in fact in Volume III, paragraph 644 in holding that the evidence of Dimitrijević regarding the drafting of the Plan for Combating Terrorism was reliable despite his obvious bias and jealousy against General Pavković. The

[274] The Trial Chamber relied on his testimony from - 9 July 2008, T.26708
[275] In Volume III, paragraph 689 the Trial Chamber made the same error and it is also appealed along with paragraph 518
[276] 8 July 2008, T.26625
[277] 8 July 2008, T.26625

Trial Chamber held the evidence of Dimitrijević was reliable that Pavković was the one asked to draft the Plan for Combating Terrorism because Milošević wanted Pavković to be in command of "all the forces in Kosovo" and that Pavković was a "favourite of Milošević".[278] This is contrary to the testimony of Milan Đaković, another witness called by the Trial Chamber who testified that the Plan for Combating Terrorism was done in accordance with the order of the army commander, General Samardžić.[279] Milan Đaković, was also found to be a credible and reliable witness by the Trial Chamber, a witness who had no reason to bear any rancor against General Pavković.

281. The Trial Chamber erred in considering as reliable in Volume III, paragraph 649, the testimony of Dimitrijević that General Samardžić tried to initiate disciplinary proceedings against General Pavković. Not a single piece of evidence in the trial was brought that demonstrated that General Samardžić tried to initiate disciplinary proceedings. No other witness agreed with this assertion. And, this is the General Samardžić who gave Pavkković the highest possible rating upon his departure from 3rd Army Command. General Pavković submits that this ground overlaps with Ground 1 (G) outlined above and therefore will not reiterate the same arguments here.

282. The Trial Chamber erred in their assessment of the evidence of Dimitrijević as reliable in Volume III, paragraphs 650, 664, 676, 688 and 689. The error in paragraph 689 is the same error contained in paragraph 518 and thus the same arguments apply

[278] Volume III, para.644, 8 July 2008, T.26625
[279] 19 May 2008, T.26405, T.26409-26411

as have been discussed above. Paragraphs 650, 664 and 676 all describe evidence of Dimitrijević regarding what he has referred to as 'unusual incidents'. Dimitrijević complained at Collegiums about unusual incidents and lack of reporting by General Pavković. In his testimony he stated that he never saw any of the Priština Corps reports during the summer 1998[280], but that he knew that actions were carried out without the approval of General Samardžić on the basis of reports of the army commander, however he could not think of one example of this happening.[281] This is simply illogical as if he did not see the reports he could not have known from them that unusual incidents were occurring as he stated. This cannot be considered reliable evidence by any reasonable Trial Chamber.

283. Dimitrijević testified that in December 1998 due to the reporting problems, General Perišić first, and then Ojdanić when he took over, ordered the reporting of ammunition usage. Specifically Dimitrijević said that information in the reports showed no actions by the VJ and nevertheless ammunition was being spent.[282] The Trial Chamber referred to this testimony in Volume III, paragraph 676 as an example of Pavković's failure of reporting, thus supporting a Prosecution contention.

284. The testimony, however, makes no sense and no reasonable trial chamber could have analysed this testimony and concluded that it supported contentions of a failure of reporting. When reports are being filed that show ammunition usage but no

[280] 9 July 2008, T.26737
[281] 9 July 2008, T.26740
[282] 8 July 2008, T.26628

actions that would justify such ammunition usage you do not solve that problem by ordering that reports contain ammunition usage. In fact, there are several reports in evidence that contain reports of actions undertaken by VJ troops and the ammunition that was expended. This is exactly what Dimitrijević claims was not being reported.[283] Exhibit 3D484 cited by the Trial Chamber in support of this conclusion contains nothing about the reporting of ammunition.

285. This testimony by Dimitrijević simply further confirms his animus against Pavković and his willingness to condemn him at the ICTY due to his understanding that Pavković was partly responsible for his dismissal from the Army. No reasonable Trial Chamber would have given any credence to testimony of Dimitrijević. This Chamber did and included this false testimony as part of the fabric from which it was concluded that there was a Joint Criminal Enterprise and that Pavković was a part of it. A miscarriage of justice resulted.

286. In Volume III, paragraph 688 the Trial Chamber erred in assessing as reliable the testimony of Dimitrijević regarding the Podujevo incident in December 1998. In assessing his evidence as reliable the Trial Chamber erred in fact and failed to consider other more reliable evidence to the contrary. The Trial Chamber held that Dimitrijević's evidence called into question Pavković's position that the actions of the Priština Corps were a legitimate and necessary response to KLA provocations.[284] This evidence

[283] *See,* 4D96, 29 May 98, 4D129, 20 June 98, 4D130, 23 June 98, 4D141, 9 August 98 and 4D142, 10 August 98.
[284] Volume III, para.688

given by Dimitrijević was that the characterisation by the 3rd Army and the Priština Corps of all of the VJ operations in Kosovo during 1998 as defensive was misleading.[285] However, the preponderance of evidence of other reliable witnesses demonstrated that the General Staff of the VJ (GS VJ) had consistent information regarding the use and deployment of the units of the 3rd army and Priština Corps; that the GS VJ gave orders for combat groups in the Podujevo area; that the GS VJ issued the instructions for the cooperation with KVM and that VJ units were allowed to respond on KLA attacks.

287. Exhibit 4D381 is a map signed and approved by Samardžić depicting the deployment of the Priština Corp units before the KVM mission arrived. It depicts four combat groups in the field including one in Podujevo – CG 15. On 19 October 1998 General Ojdanić ordered, as Perišić's deputy, that the decision by General Samardžić from 18 October to engage forces of the Priština Corps in Kosovo was approved.[286] These movements were outlined by General Perišić at VJ Collegiums.[287]

288. In the Collegium of 10 December 1998 Dimitrijević discussed the deteriorating situation in Kosovo and the idea of introducing the OSCE into Kosovo to verify weapons he hailed as a dangerous expansion of the agreement.[288] On 11 December 1998, a General Staff Working Group was formed and toured the subordinate units to assess cooperation with the KVM.[289]

[285] 8 July 2008 T. 26627, 26653, P928, p.14; P933,p.15; P938, p.21
[286] 4D503, 4D451
[287] 3D645, 3D646
[288] 3D484, p.8
[289] 3D786

The Working Group submitted a report and highlighted a number of areas for improvement.[290] The report emphasised the FRY's interpretation of the October Agreements that the KVM was not entitled to access VJ barracks.[291]

289. Exhibit 3D785, a 3rd Army Report from Tomislav Mlađenović to the VJ Liaison Team to the KVM, describes events on 19 December 1998. It reports that a company strength unit went to the Batlava airfield to practice whereupon the KLA opened fire. The OSCE Mission was in fact informed about the planned exercises and after the weapons fire was encountered it was decided that, in response to the threat, the unit would remain in the area until after 22 December 1998.[292]

290. Obradović testified that according to the reports the General Staff received, notification was sent to the OSCE mission saying that this company was not a combat group and the OSCE checked the composition of the unit and had no objection.[293]

291. Dimitrijević was receiving reports from the Priština Corps security department detailing the attacks by KLA forces on VJ and MUP personnel. On 27 October 1998 the Priština Corps security department sent a report detailing attacks from terrorists on the Albanian border on VJ troops.[294] It is worth noting that at paragraph four of this document it is reported that General Dimitrijević had authorised the US, Canadian and British envoys to verify weapons, something he later described

[290] 3D787
[291] 7 September 2007, T.14982-3
[292] 4 September 2007, T.14948; 3D785
[293] 5 September 2007, T.15057
[294] 3D1012, p.1, para.1.1

as dangerous in the Collegium of 10 December. [295] It goes on to report that on 27 October the KLA opened fire at a MUP check point in Brestovac village and in Rudnik a MUP patrol was attacked.[296] On 28 October 1998 another report was sent to the Security Administration of 3rd Army Command in which it is reported that nine attacks were launched by the KLA against MUP units and also that the KLA were mounting operations against the Serb civilian population.[297]

292. On 29 October 1998 the report from the Priština Corp security department reported that the foreign military envoys were pleased with the reception and the situation apart from the Canadian envoy Arthur Armstrong who objected because they had been refused permission to inspect the combat groups in the border belt without special authorisation.[298]

293. On 26 December 1998 the Priština Corps security department sent a report to the Security Administration of 3rd Army Command.[299] In his position Dimitrijević would have routinely seen this report. It was reported that terrorist forces had set up trenches and other fortifications and had opened fire at police and VJ members moving along the Priština- Podujevo road.[300]

294. In the Collegium of 30 December 1998, General Dimitrijević discussed events in Podujevo suggesting that the situation in

[295] 3D484, p.8
[296] 3D1012, p.2, para.2.3
[297] 4D87
[298] 3D1014
[299] 3D1036
[300] 3D1036, para.2.4

Podujevo was complex and that the suggestion that it was a planned exercise was untrue.[301] General Obradović also attended this Collegium, during which he stated that many institutions in the Podujevo area had stopped functioning; courts had stopped functioning because judges had fled in fear.[302] General Obradović rejected Dimitrijević's assertion explaining how it could simply not be the case. It could have been nothing but a training exercise.[303]

295. General Dimitrijević then testified that during afterwards General Obradovic "explained that after an additional report was requested they established that, after all, this was not a provocation; rather, this was a planned exercise."[304] In the same Collegium General Dimitrijević e**x**pressed concern about KLA attempts to spread terrorism into urban areas and that this was especially pronounced in Podujevo.[305]

296. It is clear from the above analysis that General Dimitrijević's testimony about Podujevo could not be considered credible or reliable by a reasonable Trial Chamber. He is a person who playing a double role, on the one hand pandering to the international community and on the other receiving all security administration reports and thus knew that the KLA was constantly attacking the VJ and MUP in Kosovo and approving of the actions being taken in secret. It is submitted that the Trial Chamber committed an error in fact by omitting to consider the

[301] 5 September 2007, T.15054-5; P928, p.14
[302] 4 September 2007, T.14951; P928, p.9
[303] 5 September 2007, T.15055
[304] 8 July 2008, T.26631
[305] 4 September 2007, T.14951; P928, p.7-8

voluminous evidence to the contrary regarding events in Podujevo.

GROUND 9 – THE TRIAL CHAMBER REACHED CONCLUSIONS IN VOLUME III, PARAGRAPH 678 OF THE JUDGEMENT THAT ARE UNREASONABLE WHEN REASONABLE CONCLUSIONS TO THE CONTRARY WERE APPARENT AND, ACCORDING TO LAW, MUST HAVE BEEN DRAWN.

297. In numerous places the Trial Chamber arrives at conclusions such as that found in Volume III, paragraph 678. In this paragraph the Chamber held:

> Despite his knowledge of criminal activities by VJ and MUP forces in Kosovo, Pavković continued to order the VJ engage in joint operations in Kosovo and continued to participate in the joint command.[306]

298. This conclusion deals with that period of time when Pavković was commanding the Priština Corps and utilizing VJ forces as ordered by Samardžić.[307]

299. The law of superior responsibility requires that a commander seek to prevent the commission of crime by those over whom he has effective control and to punish those found to have committed crime.[308] There is overwhelming evidence that

[306] *See, also,* Volume III, para.720.
[307] *See,* 4D91, discussed in detail in Ground 1 (G) in this brief.
[308] To hold a commander responsible for the crimes of his subordinates, it must be established beyond reasonable doubt that: (1) there existed a superior-subordinate relationship between the superior and the perpetrator of the crime; (2) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof. *Blagojevic & Jokic*, Trial Judgement, at para.790; *Kordic & Cerkez*, Appeal Judgement, at para.

Pavković did both of these things.[309] There is no requirement on a commander that upon learning that crimes have been committed by forces under his control to immediately cease combat activities and, in effect, surrender to the enemy. The clear implication, however, of the Chamber's finding as quoted above is that there is such a law and that by failing to abide by that law General Pavković revealed his membership in a Joint Criminal Enterprise and his enthusiasm for it being carried out.

300. In its analysis here and elsewhere the Chamber seems to have ignored the reality of the situation faced by the government of FRY in 1998 and 1999. Kosovo was not a sovereign state separate from Serbia. It was part of Serbia. Residents of Kosovo had taken up arms against their legitimate government and were engaging in terrorist activities. Under the law, the FRY and any other sovereign state had the absolute right, and/or duty to seek to put down such a rebellion and protect its sovereignty and integrity. As 1998 turned into 1999, FRY then came under attack from NATO. In addition to fighting an internal insurgency they were now defending against an overwhelming air attack in which highly sophisticated weapons were being deployed, some of which continue to do their damage to this day.[310] If there was excessive force in FRY in 1999, it was that used by NATO forces.

827; *Halilovic*, Trial Judgement, at para.56; *Limaj et al*, Trial Judgement, at para. 520; *Oric*, Trial Judgement, at para.294

[309] See Annex D to this Brief

[310] Cluster bombs are still killing and maiming and the effects of depleted uranium munitions are still being felt.

301. No commander in the world ever has capitulated to the enemy upon learning that crimes were committed by persons under his control. Crimes in intense combat situations are virtually inevitable. Responsible and law-abiding commanders seek to limit such crimes and to punish them when possible. That is exactly what General Pavković did.

302. Later on in this same paragraph the Chamber concludes that Pavković, in his reporting, minimized the criminal activity of his subordinates. There is no citation for this conclusion. There is no support in the evidence for this conclusion. Based then, on this unsupported conclusion or inference the Chamber then leaps to the preposterous conclusion that Pavković's "written orders calling for adherence to International Humanitarian Law were not genuine efforts to take effective measures to prevent the commission of crimes against Kosovo Albanians."[311] There is absolutely no indication in the evidence that either these orders were not properly transmitted down the chain of command or that when they were there were companion instructions to ignore them. Such instructions, if they really existed, would surely have come to light after years of intense investigations. They have not.

[311] Volume III, para.678

GROUND 10– THE TRIAL CHAMBER ERRED IN FACT AND IN LAW IN FINDING THAT CRIMES WERE UNDER-REPORTED

303. In Volume III, paragraph 753 the Trial Chamber erred in fact and in law in finding that crimes were known about by General Pavković and that reporting was suppressed.

304. The Trial Chamber in Volume III , paragraph 776 found that General Pavković under -reported crimes in 1999. Again, the Trial Chamber committed an error of fact in this regard of which no reasonable trier of fact could have made.

305. The Chamber agreed with the Prosecution contention that Pavković under-reported the number of crimes being committed and that this had the effect of encouraging further criminal activity.[312] This conclusion is not one that could have been arrived at by any reasonable trial chamber.

306. It must be clear that the 3rd Army could only report what was being reported to the 3rd Army. There is no evidence that the 3rd Army failed in any way to pass along to the General Staff crime reports that were contained in Priština Corps reports. For there to be under-reporting there must be a showing that the 3rd Army was in possession of such information that was not passed on to the General Staff.

307. The largest failure of this trial chamber, however, is in ascribing this alleged under-reporting to General Pavković. The

[312] Volume III, paras.744-753

uncontested evidence in the case is that 3rd Army combat reports were prepared daily in the operations centre of the 3rd Army. Velimir Obradović testified that Pavković was never present in this operations centre during the conflict and never instructed him to leave any information out of the combat reports. He testified that these reports were prepared by several new duty officers and that Pavković would have simply had no opportunity to have influenced the reports being drafted by so many different people.[313] In his admitted statement, Obradović noted that any attempt by the 3rd Army to under-report information coming from the Priština Corps would have been futile in any event since the Priština Corps reports were going directly to the General Staff.[314] Priština Corps reports started going directly to the General Staff on 12 April 1999.[315] Although Pavković maintains there was no under-reporting, even if there was it was between Priština Corps and 3rd Army. Everything being reported by the Priština Corps was going to the General Staff.

308. In the first week of June, 1999, Vasiljević and Gajić were dispatched to Kosovo to look into a suggestion that crimes were not being properly reported.[316] In paragraph 737 of Volume III of the *Judgement*, the Trial Chamber noted that witness Vasiljević testified that the 3rd Army Command in Priština made the decision "not to report the occurrence of certain crimes in the regular combat reports on the ground that they were being

[313] 22 October 2007, T.17365-17400, 4D499, para. 16
[314] 4D499, para.16
[315] 22 October 2007, T.17364, Although 5D85 shows the General Staff receiving reports from the Priština Corps as early as 4 April 1999.
[316] 19 January 2007, T.8751

dealt with by the military judicial organs." The conclusion is not supported by the testimony at all. Vasiljević was testifying about a tour he made of the security organs in Kosovo. The issue had to do with reporting by the *security organs* of the Priština Corps. The Priština Corps *chief of security* "said that he had not reported because all those cases had been processed already."[317] Vasiljević testified further:

> But I must say that those cases were not covered up or concealed; that was my impression. They didn't report it the way I suggested because the cases had already been prosecuted and processed. They simply thought that the problem had been resolved, the perpetrators had been arrested, and that's why they committed this omission in reporting.
> ….
> And I believe the military prosecutor did submit that information to the military court, as it should have.[318]

309. Nothing in the reported testimony would permit the conclusion that there was a decision by the 3rd Army Command not to report crimes. The decision, according to Vasiljević in this testimony was made by the Priština Corps security chief; a decision not to include such reports in the reports from security organs. Security organs attached to army units had their own reporting mechanism separate from regular combat reports. These organs were primarily responsible for detecting crime, referring cases to the Prosecutors and reporting their activity up the security chain of command.[319]

[317] 19 January 2007, T.8750
[318] 19 January 2007, T.8750-8751
[319] See Annex C to this brief - Intelligence Administration Briefings

310. The Trial Chamber apparently confused reporting requirements by failing to appreciate that there were two reporting chains in operation. There was the security reporting chain that dealt with security matters including crimes and the regular unit combat reports which dealt with the military activities of the reporting units.

311. On 8 May, General Vasiljević met with the Deputy Head of Security Services for the Priština Corps. This security officer informed him of some crimes committed by VJ personnel, including a rape and two murders. Vasiljević made this known to General Farkaš.[320] Vasiljević was told by the Chief of Priština Corps Security that these matters had not been reported because they had all been processed. Although Vasiljević was convinced there was no concealment going on he does believe that these crimes should have been reported through the *security organ* chain of command.[321]

312. Farkaš informed Ojdanić of the report and Ojdanić then summoned Pavković to a meeting in Belgrade on 16 May to be followed by a meeting with Milošević on 17 May.[322] Both meetings were held as scheduled and at both meetings Pavković suggested formation of a Commission to investigate the matter of crimes being committed in Kosovo by VJ and MUP

[320] P2594, para.59
[321] T.8750. Note that he believes the report should have been through security organs not through Third Army chain of command. On 5 April, the Chief of Staff of the Supreme Command concluded that "[m]easures against perpetrators should be undertaken immediately." Colonel General Ojdanić assigned responsibility to security organs for crime investigation. See 3D619, p.3
[322] P2594, para.59

members.[323] Ojdanić and Šainović supported the Pavković proposal at the Milošević meeting, but it was not accepted by Milošević for unstated reasons.[324]

313. Based upon the information regarding these meetings the Chamber concluded:

> . . . that these meetings provide further indications that VJ and MUP members were committing crimes in Kosovo, and does not consider that Pavković's abortive suggestion concerning the commission, on which he took no further action, evinces a genuine will to take effective measures against criminal activity in Kosovo.[325]

314. This is certainly not the only conclusion available from the evidence. Pavković could not have known that Milošević would reject his suggestion. He thus made the suggestion in a good faith attempt to have the matter investigated by a commission. He needed a high-level commission with powers to investigate both MUP and VJ activity. He did not have the power to appoint such a commission himself. When Milošević who did have such power rejected the idea, he had no place to turn as regards the commission. He could not take further action on the appointment of a commission. It is telling that he recommended the commission very late in the war. It had been going for 54 days at that point and had only 24 days left. Only a person with nothing to fear from such a commission would make such a suggestion. It shows the absence of a guilty mind on the part of Pavković. He obviously knew the commission if accepted and implemented would find him not to be culpable in any way.

[323] 19 January 2007, T.8756-7, 25 September 2007, T.16297
[324] 22 January 2007, T.8783, P2594, para.70
[325] Volume III, para.740

315. Finally, the proposition that Pavković "took no further action" is simply not correct. On 27 May he issued a reminder on the procedure for reporting and processing crimes.[326] The war ended less than two weeks later leaving little room for Pavković to take any further action.

316. The unreasonable conclusion reached by the Trial Chamber regarding this matter was part of the fabric upon which the Chamber relied to establish the culpability of Pavković. As a result his conviction represents a miscarriage of justice.

GROUND 11 – THE TRIAL CHAMBER ERRED IN LAW BY CONDUCTING THE TRIAL WITH PROCEDURAL UNFAIRNESS TO GENERAL PAVKOVIĆ

317. General Pavković appeals the manner in which the trial was conducted which resulted in procedural unfairness against him and which constituted an error of law . General Pavković appeals the following decisions by the Trial Chamber:

a. 7 September 2005 – *Decision on Pavković Motion to set aside Joinder or in the Alternative to Grant Severance*
b. 2 December 2005 – Decision on Nebjoša Pavković's Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance

[326] 4D158

c. 28 April 2006 – *Second Decision on Motions to Delay Proposed Date for Start of Trial*

d. 12 May 2006 - *Decision on Defence Request for Certification of an Interlocutory Appeal of Second Decision Denying Motion for Delay of Trial*[327]

318. Where a party alleges on appeal that the right to a fair trial has been infringed, it must prove that the violation caused such prejudice to it as to amount to an error of law invalidating the judgement".[328] Thus, it is incumbent upon General Pavković to demonstrate how this procedural unfairness amounts to an error of law to invalidate the *Judgement*.

319. Article 21 of the Statute of the ICTY provides:

> In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees in full equality:
>
> > (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

320. Lead counsel for the accused Pavković was assigned to the case on 13 June 2005. That counsel, John Ackerman, was the first lawyer assigned to the case who could be categorised as an Article 21 "counsel of his own choosing."

321. On 8 July 2005, with no input from nor notice to new counsel for Pavković, the Chamber granted a motion joining his case

[327] The motions and decisions discussed herein are attached at Annex E

[328] *Galić* Appeal Judgement, para.21; *Kordić and Čerkez* Appeal Judgement, para.119.

with that of *Milutinović, et. al.*[329] This joinder decision indicated no reason why the trial could not commence as early as December 2005 or January 2006.

322. On 16 August 2005, Pavković, through his counsel filed a "Motion to Set Aside Joinder Order or in the Alternative to Grant a Severance."[330] At the time of this Motion the team assembled to aid General Pavković had spent approximately six weeks in preparation. They had managed to peruse about 80 of 200 CDs provided by the Prosecution. Three large databases were made available through the electronic discovery system containing at least 250,000 pages, it was believed at the time. It is, of course, the duty of counsel to become familiar with all material relevant to the defence of the case.[331]

323. For proper preparation, it was pointed out in the motion, counsel would also need to review all of the exhibits and testimony generated in the Milošević case dealing with the Kosovo parts of his Indictment.

324. At the time of this motion, counsel estimated that he could be prepared for trial by September 2007.

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[329] *Milutinović et al.; Pavković et al.;* Decision on Prosecution Motion for Joinder, 8 July 2005

[330] *Milutinović et al.* IT-05-87-PT, Pavković Motion to Set Aside Joinder or in the Alternative to Grant Severance, 16 August 2005

[331] The Registry calculates that reading such material requires two minutes per page. This would result in the expenditure of 208 weeks of reading by one person if that person read constantly for 40 hours per week. Two counsel would require approximately two years to get through all the material.

325. This Motion was denied by the Chamber on 7 September 2005.[332]

326. On 7 November, 2005, Pavković filed a "Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance". At a Status Conference held on 25 August 2005, Judge Bonomy directed the Registry to provide counsel with transcripts of all testimony in the Milošević trial plus all exhibits including exhibits designated *MFI* exhibits which were marked but not admitted. By the time of the filing of the Motion of 7 November 2005, this directive of Judge Bonomy had only been partially complied with; only transcripts of public sessions in the Milošević trial had been provided; no exhibits, no closed session transcripts. Trial preparation was being severely hampered. This Motion sets forth the considerable barriers to disclosure erected by the Registry which severely delayed and frustrated preparation efforts.

327. Preparation was further hampered by the Prosecution supplying only summaries of Rule 68 material rather than the Rule 68 material itself as required by the rules.

328. Starting at paragraph 21 of the Motion the enormous breadth of material which needed to be read and evaluated to properly and completely prepare for trial of the case is set out. At this point the number of pages of material thought relevant by the Prosecution totalled 1,755,372 pages. Plainly, counsel would need to determine which of those pages could be safely ignored;

[332] *Milutinović et al.* IT-05-87-PT, Trial Chamber Decision on Pavković Motion to Set Aside Joinder or in the Alternative to Grant Severance, 7 September 2005

an impossible task. It would be impossible to be ready for trial before mid-2007 even if absolutely heroic preparation work were carried out.

329. This Motion has annexes showing the correspondence by counsel in an effort to get the material to do the work. An E-Mail to the Chamber dated 13 September 2005 makes this point: "We cannot be ordered to speed our preparation so the trial can start and then not be provided the tools and materials to make that possible." This was the dilemma faced by counsel in the efforts to prepare the case.

330. On 2 December 2005 this Motion was denied on the grounds that it was premature since no trial date had been set. This Order did not assist with the preparation problems set out in the Motion.[333]

331. On 13 April 2006, Pavković filed a "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.'"[334] This Motion contains important and significant arguments and information regarding the denial to Pavković of a fair trial. First, at a 65*ter* conference on 30 March 2006, the pre-trial Judge announced that with the death of Slobodan Milošević "circumstances have changed fairly

[333] *Milutinović et al.,* Decision on Pavkovic to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance, 2 December 2005
[334] *Milutinović et al.* IT-05-87-PT, Renewal of and Supplement to 7 November Pavković Motion Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance, 13 April 2006

dramatically."[335] Because of this dramatic change the trial was scheduled to start on 10 July 2006, 3 ½ months after this conference. Clearly, the death of Milošević freed up substantial resources at the Tribunal, including courtroom time, judges and support personnel. All those resources were then dedicated to getting the Milutinović trial underway as soon as possible, without regard, apparently to the rights of the accused. It is notable that no additional resources were made available to the defence for preparation purposes, even though that was suggested in the 13 April Motion. The death of Slobodan Milošević should not have been an occasion to violate the Statute and Rules denying at least some of the Milutinović accused a fair trial.

332. Pavković's 4 November 2005 Motion, discussed above set out the enormity of the preparation task. This Motion was deemed premature by the Trial Chamber. Recall, however, that Pavković had been assured by the 7 September 2005 decision that he would have adequate time and facilities for the preparation of his defence.

333. By the time of the filing of the 13 April 2006 Motion the task facing the Pavkovic defence team had grown with the addition of over 1,700 documents from the Milošević trial and approximately 10,000 additional pages of Rule 68 material.[336] At the 65*ter* and Pre-trial conferences on 30 and 31 March 2006, respectively, the Prosecution announced that they would be

[335] 65*ter* Conference, 30 March 2006, p.126
[336] *Milutinović et al.,* Renewal of and Supplement to 7 November 2005 Pavković "Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance, 13 April 2006

calling an additional 50 witnesses for whom disclosure had not been provided. This was a 50% increase in witnesses, from 100 to 150. A few days later on 10 April 2006 the Prosecution provided an additional 11 CD Roms containing significant additional material pursuant to Rules 66 and 68.

334. It must be understood that at this late stage there was still no final Indictment in the case. On 22 March 2006 the Chamber required amendments to the Indictment that could and did have a major impact on preparation. It was made clear that even though the Indictment charged only crimes from 1999, the Prosecution would be entitled to rely on alleged crimes of 1998 by identifying with specificity "dates and locations of those crimes, the connection to each Accused and the supporting material for such allegations."[337] This opened up a whole new avenue of investigation into 1998 matters that was still being pursued as late as August, 2009.

335. The Motion of 13 April 2006 detailed some of the discussion from the March 30 and 31 conferences. Counsel for Pavković pointed out that while the Prosecution had spent seven years preparing its case, he had been given seven months up to that point. He suggested that this disparity, by itself, was a denial of equality of arms. The Pre-trial Judge pointed out at that time that there were "indefinite opportunities in the Rules of this Tribunal for review of the situation should there be an injustice."[338] In response, counsel then pointed out to the Judge

[337] *Milutinović at al.,* Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, 22 March 2006, para.33 (3) (b)
[338] 65*ter* Conference, 30 March 2006, p.179

that one cannot urge post-trial consideration of evidence that was *available* to the accused during the trial. No jurisprudence of the Tribunal would excuse the failure to read this material and make use of it.

336. Jurisprudence of the Tribunal supporting the Pavković position is found in the Motion of 13 April 2006 beginning at paragraph 18. The Motion is attached as an appendix to this brief.

337. The *Krstić* Appeal Judgement does, however, bear mention here. This case dealt with Rule 68 disclosure, pointing out that: "The right of an accused to a fair trial is a fundamental right, protected by the Statute, and Rule 68 is essential for the conduct of fair trials before the Tribunal."[339]

338. Clearly, 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. Otherwise the right is meaningless and hollow. In *Krstić*, the Chamber determined that there was no Rule 68 violation because the defence had both time to analyze the material and the opportunity to challenge it during cross-examination.[340]

339. At the 30 March 65*ter* conference after General Pavković had raised his concern about lack of time to review the Rule 68 material the Pre-Trial Judge rather cavalierly dismissed his concern with the following remarks:

[339] *Krstić,* Appeal Judgement, at para.211
[340] *Krstić,* Appeal Judgement, at para.192

> You have to make judgements along the way about how productive an exercise is going to be. 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 happen sometimes 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.[341]

340. This is a clearly indefensible position. What is being stated by the Judge is that because the Prosecutor violates Rule 68 by providing excessive and irrelevant information, defence counsel should not waste time going through it in search of that material which is relevant and may suggest the innocence of the accused or provide valuable material for the cross-examination of Prosecution witnesses. It was based on this view of Rule 68 and the right to time to prepare that the Judge then issued his Order setting the case for trial on 10 July 2006, knowing full well that the defence of General Pavković would be unable to review and assess all the Rule 68 material provided by the Prosecution. The Judge's pronouncement cited above makes it clear that he understood this. This is simply unacceptable in a body that fashions itself a court of justice.

341. There were other options available to the judge. He could have ordered the Registry to provide sufficient additional resources to the defence team so that the material could be considered before trial. He could have devised a combination of additional resources and a shorter delay in the start of the trial. The path

[341] 65*ter* Conference Transcript, p.178-179

he chose was to simply deny counsel for the accused a chance to consider this material in their trial preparations.

342. The Prosecutors in this Tribunal are carefully selected for their broad experience and professionalism. They are all, of course, very familiar with the requirements of Rule 68. By implication when one of these professional prosecutors provides information to the defence under the provisions of Rule 68, that Prosecutor is asserting as an officer of the court that the material is relevant to issues in the case and suggests the innocence or mitigates the guilt of the accused or affects the credibility of the Prosecution's evidence. To suggest, as the Pre-Trial judge did that it may not be productive for the defence to peruse this material and that trial can start without time being given for doing so is an error of egregious proportions. Among other things it denigrates the professionalism of the members of the Office of the Prosecutor.

343. On 28 April 2006 this Motion was denied by the Chamber.[342] There was no assertion of Tribunal jurisprudence supporting this decision. In fact its language was in conflict with the statement of the Pre-Trial Judge set out above. In paragraph 4, the Chamber says: "The Chamber has carefully considered each and every argument of the accused, as has been set forth in their motions, and is satisfied that *the accused will have adequate time and resources to prepare for the trial* scheduled to commence on the date proposed in the work plan." The only way this pronouncement could be correct is if the Chamber

[342] *Milutinović et al.,* Second Decision on Motions to Delay Proposed Date for Start of Trial, 28 April 2006

adopted the view of the Pre-trial Judge that reviewing the Rule 68 material would be a meaningless and wasteful exercise. At the hearing on 30 March the Judge conceded that counsel for Pavković would not have adequate time to review this material. It must be noted that all other accused in the case joined this motion and most significantly the Prosecution did not oppose the Motion or any of the joinder motions filed by other parties.

344. As the trial date was approaching, Lead Counsel John Ackerman was advised by medical doctors that he needed to undergo major surgery. This major surgery would prevent his attendance during the early stages of the trial and until early September 2006. On 13 July 2006, counsel on behalf of Pavković filed a motion entitled "Pavković Objection to Trial Proceeding in Absence of his Lead Counsel." This Motion set out an oral request that lead counsel requested his co-counsel to present to the Chamber. Co-counsel was unable to do so and was later directed to present any such objection in writing. This motion was that objection reduced to writing. It simply requested a few days delay in the trial so that Lead Counsel could be present during the crucial early stages of the trial. This Motion was also denied by the Trial Chamber. In doing so the Chamber seriously misinterpreted Article 16(C) of the Directive on the Assignment of Defence Counsel. The Chamber's interpretation of this Directive was that co-counsel was assigned to take the place of lead counsel should lead counsel be unable to attend. That is neither the language nor the plain meaning of the rule. Co-counsel is authorized to proceed with all stages of the proceedings only under the authority and direction of lead

counsel, not independently under the authority and direction of the Trial Chamber. Clearly, lead counsel can authorize co-counsel to appear in his stead when he feels the issues being dealt with can be completely and adequately addressed by co-counsel. The decision must of necessity, however, always be that of lead counsel.[343]

345. On 5 May 2006, Pavković, through his counsel filed a Motion for Leave to Appeal the 28 April Trial Chamber decision.[344] This Motion was summarily denied on 12 May 2006 without reasoned opinion, simply stating that it "does not meet the standards set out in the Rules of Procedure and Evidence and jurisprudence of the Tribunal for either certification or reconsideration."[345] This statement was made in the face of the Motion's having referred to the *Orić* case in which the Trial Chamber restricted the time permitted to the defence to present its case, which restriction was reversed by the Appeals Chamber on interlocutory appeal.[346] The issue was very similar and certainly met the standards set forth in Rule 73(B).

346. Throughout, the Trial Chamber seemed to put the need for a quick trial ahead of any concern for the procedural fairness of the proceedings. In that light it may be productive and

[343] It should be noted here that the records of the Registry will reveal that co-counsel assigned to the Pavković case was denied assignment as lead counsel because of his limited knowledge of the English language. The early witnesses in the case testified in that language.
[344] *Milutinović et al.,* Motion for Leave to Appeal Second Decision on Motions to Delay Proposed Date for Start of Trial, D4313-D4315, 5 May 2006
[345] *Milutinović et al.,* Decision on Defence Request for Certification of a Interlocutory Appeal of Second Decision Denying Motion for Delay of Trial, D5206-5207, 12 May 2006
[346] *Prosecutor v. Orić,* IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case,* 20 July 2005

instructive for the Appeals Chamber to compare and contrast the Chamber's "Second Decision on Motions to Delay Proposed Date for Start of Trial,"[347] with the Chamber's "Decision on Use of Time."[348] The first decision was responding to serious and detailed motions raising issues of fairness in the denial of equality of arms and appropriate time for preparation for trial. The issue was basically dealt with in one paragraph, paragraph 4, giving it virtually no consideration. However, when it came to speeding the trial along without regard to the rights of the accused the Chamber on its own issued the Decision on the Use of Time. It is 7 pages in length. Although the Decision cites Article 21 of the Statute it leaves out the provision of time and facilities for preparation of the defence. It instead focuses on the right to be tried without undue delay, a right that no Accused was asserting. The very plain and clear language of Article 21 makes it clear that the right to be tried without undue delay is a right of the Accused, not the Prosecution and not the Chamber. No Accused was requesting a speedy trial. All Accused were requesting reasonable delays so that they could properly prepare their defences. The fixation with "time" is made clear, perhaps inadvertently, by the report of the number of minutes used by the parties through 29 September 2006, as found on page 4 of the Decision.

347. On 2 November 2006 all parties to the case filed a "Joint Defence Objection to Trial Schedule for Week Commencing 27

[347] *Milutinović et al.* IT-05-87-PT, Second Decision on Motions to Delay Proposed Date for Start of Trial, 28 April 2006
[348] *Milutinović et al.* IT-05-87-T, Decision on Use of Time, 9 October 2006

November 2006."[349] Paragraph 3 reads: "As was argued extensively in written submissions and otherwise, the parties and especially the three 'new' parties had very little time to prepare for trial and were not ready as the trial commenced. Counsel for these parties have had to rely on out-of-court time to continue trial preparation activities." This motion pointed out that expediency is inconsistent with justice. It urged that the Chamber sit normal half-day sessions. The Motion also compared this trial with other "mega" trials proceeding in the Tribunal and made it clear that this trial was proceeding much faster. This speed was at the expense of justice and of the health and welfare of the participants.

348. This Motion was effectively denied on 15 November 2006 in a Scheduling Order.[350] Again it is clear that the Chamber is obsessed with time and unconcerned with justice. Again the Chamber refers to its need to honour the rights of the Accused to proceed without undue delay even though no Accused is asserting that right. In fact Accused are pleading for fairness and "due" delay in the process. No delay in a trial that enhances justice can be seen as an undue delay.

349. Throughout the trial the issue of speed versus justice was raised before the trial chamber.[351]

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[349] *Milutinović et al.* IT-05-87-T, Joint Defence Objection to Trial Scheduling Order for week beginning 27 November 2006, 2 November 2006
[350] *Milutinović et al.* IT-05-87-T, Scheduling Order, 15 November 2006
[351] *See,* 14 September 2006, T.3444-3454; 23 November 2006, T.7241-42; 22 June 2007, T.12824-12834

350. As the situation before the Chamber developed, veteran trial lawyers with years of trial experience repeatedly informed the Trial Chamber that sufficient time was not being given for proper preparation of the case consistent with the requirements of the Statue and Rules and basic human rights. These counsel with their years of experience were ignored. Judges with much less trial experience substituted their judgements of the time required for adequate preparation for those of the experienced trial lawyers, with no reasonable basis for doing so.

351. What is before this Appeals Chamber is a case in which the Judge who ultimately serves as chief judge of the Trial Chamber admits in pre-trial conferences that counsel did not have time and would not have time to read and consider all the material provided pursuant to the Rules, especially Rule 68. He determined that counsel needed to pick and choose what to read, an impossible task. A document must be read to know if it is relevant to the case. You have a situation where the Prosecution did not object to the very detailed Motion of 13 April 2006 requesting additional preparation time, a motion summarily and disingenuously denied by the Trial Chamber. In short, you have a case in which justice was not done, where expediency ruled and justice rode in the back seat largely ignored.

352. Preparation for the trial has thus continued in a fashion following the Judgement. Several documents have been discovered which will be the subject of a Motion under Rule 115 for admission before this Appeals Chamber, not the ideal forum

for the consideration of further evidence. It is however the only forum left available at this time.

GROUND 12 – THE TRIAL CHAMBER ERRED IN THE APPLICATION OF MITIGATING AND AGGRAVATING FACTORS IN SENTENCING GENERAL PAVKOVIĆ

353. The Trial Chamber correctly identified the principles of sentencing and the relevant factors to be considered pursuant to the jurisprudence of the Tribunal in the *Judgement.* However, The Trial Chamber erred in Volume III in paragraphs 1190-1194 in assessing the aggravating and mitigating factors in sentencing General Pavković and therefore he asserts that his sentence was unjustifiably excessive by these errors. By imposing this sentence of 22 years the Trial Chamber ventured outside its discretionary framework which justifies the intervention of the Appeals Chamber.

Aggravating Factors

i. Abuse of Superior Position

354. The Trial Chamber erred in holding in the *Judgement,* Volume III, paragraph 1190; that abuse of superior position was an aggravating factor. The Trial Chamber held that Pavković continued to approve of joint MUP and VJ operations, despite his knowledge of crimes being committed against Kosovo Albanians during previous joint operations. Throughout history military

commanders have not suspended operations due to reports of crimes. It is perhaps fanciful and naïve to believe that the war would not go on. What commanders are obligated do is warn and prevent such violations and see that if they still occur that they are properly reported to the appropriate judicial authorities, who must then prosecute to the full extent of the law.

355. The Appeals Chamber has held that "Where an aggravating factor is present and yet is not an element of the crime, that factor may be considered in aggravation of sentence. However, where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing.[352]

356. The Trial Chamber held in the *Judgement*, Volume III, paragraph 774, that:

> The 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.

357. Thus, having found that General Pavković's knowledge of crimes by MUP members combined with his continuing ordering

[352] *Blaskić* Appeal Judgement, para.693 *Vasiljević* Appeal Judgement, paras.172-173

of, and participation in, the joint operations is indicative of a criminal intent, the Trial Chamber then proceeded to again consider this evidence as an aggravating factor. It is submitted that this is a discernable error of law and an abuse of the Trial Chamber's discretion in consideration of aggravating factors. Criminal intent, or *mens rea*, is a fundamental element of every crime and thus, within the jurisprudence of this Tribunal, cannot be considered to be an aggravating factor for sentencing.

358. Additionally, General Pavković was not the most senior military official in the FRY.[353] However, it has been held a position of authority does not in and of itself attract a harsher sentence.[354] Rather, it is the abuse of that authority which attracts consideration upon sentencing.[355] If there was to be a modification of the war plan it would have come through the proper chain of command from Milošević and General Ojdanić. Aggravating factors *must* be circumstances which are directly related to the offence charged *and* to the offender himself when he committed the offence.[356] General Pavković had no other alternative but to continue to engage the VJ in cooperation with the MUP. Indeed, he took active steps to try to bring the MUP under the control of the VJ so as to attempt to prevent crimes being committed by the MUP. General Pavković did not have any authority to discipline MUP members or have any effective control over the actions of the MUP. Thus; he could not have

[353] This was a position occupied by General Ojdanić
[354] *Hadžihasanović* Appeal Judgement, para.320, *Stakić* Appeal Judgement, para.411; *Babić* Judgement on Sentencing Appeal, para.80
[355] *Hadžihasanović* Appeal Judgement, para.320, *Galić* Appeal Judgement, para.412
[356] *Simba* Appeal Judgement, para.82, *Kunarac et al*. Trial Judgement, para.850

abused his authority by continuing to engage the VJ in cooperation with the MUP. He was ordered to do so.

359. The Trial Chamber specifically acknowledges that this finding was made despite the fact the Pavković "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." (Emphasis added).

360. This fails to accord with the finding made by the Trial Chamber in Volume I, paragraph 820 of the *Judgement* where they held that there was a "protracted armed conflict" and that "the level of violence reached that of an internal armed conflict, rather than "internal disturbances, characterised by isolated or sporadic acts of violence", by the middle of 1998, and the evidence thereafter is of ongoing hostilities right up to and beyond 24 March 1999."

361. The Trial Chamber erred by concluding on the one hand that there was a protracted armed conflict from the middle of 1998 continuing through 24 March 1999, yet, on the other hand, also concluding that this protracted internal armed conflict in addition to a seventy-eight day aerial bombardment campaign by NATO was *merely* a "complicated" situation where there were *some* combat actions by the KLA. This severely underestimates the threat facing the army and by extension General Pavković

and in addition, is of itself illogical given the previous findings within the *Judgement.* Thus, it is a miscarriage of justice and an error of law and fact on the part of the Trial Chamber to have assessed this as an aggravating factor upon sentencing General Pavković.

(b) Mitigating Circumstances

362. The standard of proof with regard to mitigating circumstances is not, as with aggravating circumstances, proof beyond reasonable doubt,[357] but proof on a balance of probabilities: the circumstance in question must have existed or exists "more probably than not".[358]An appellant challenging the weight given by a Trial Chamber to a particular mitigating factor thus bears "the burden of demonstrating that the Trial Chamber abused its discretion".[359] The Appellant must demonstrate that the Trial Chamber failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[360]

[357] *Čelebići* Appeal Judgement, para.763
[358] *Čelebići* Appeal Judgement, para.590
[359] *Kayishema and Ruzindana* Appeal Judgement, para.366;*Niyitegeka* Appeal Judgement, para.266
[360] *See Prosecutor v. Krajišnik*, IT-00-39-AR73.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005, para.7. *See* also *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para.9; *Prosecutor v. Slobodan Milošević*, IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 1 February 2002, paras.5-6

(i) Substantial Co-operation with the Prosecutor

363. Neither the Statute nor the Rules exhaustively define the factors which may be taken into account by a Trial Chamber in mitigation or aggravation of a sentence. However, Rule 101(B)(ii) of the Rules states that in determining a sentence, a Trial Chamber shall take into account "any mitigating circumstances including the *substantial cooperation* with the Prosecutor by the convicted person before or after conviction".[361]

364. General Pavković did in fact cooperate substantially with the Prosecutor of this Tribunal. He gave documents of significant value to the Prosecutor, indeed, Philip Coo testified that although he was not involved directly he was told that General Pavković had given a collection of documents to the Prosecutor on a visit that she had to Belgrade in 2002.[362] He testified these included operational reports, orders issued in 1998 and 1999, the diary of the 3rd Army Forward Command Post and the minutes of the Joint Command from July to October 1998.[363] Also, in November 2002 before he was indicted, General Pavković gave a lengthy interview to the Prosecution.[364] The Trial Chamber failed to give sufficient weight to this substantial cooperation and thus it failed to exercise its discretion properly which justifies the intervention of the Appeals Chamber.

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[361] As stated in the *Serushago* Sentencing Appeal Judgement, Trial Chambers are "required as a matter of law to take account of mitigating circumstances." *See* para.22; *see* also *Musema* Appeal Judgement, para.395.
[362] 21 March 2007, T.12081
[363] *Id.*
[364] P949

(ii) Voluntary surrender

365. In the *Judgement,* Volume III, paragraph 1194, the Trial Chamber held that the circumstances of Pavković's surrender were not to be considered as a mitigating circumstance in the determination of his sentence. General Pavković submits that this was an abuse of discretion on the part of the Trial Chamber which warrants the intervention of the Appeals Chamber.

366. The Appeals Chamber has held previously that "mere facilitation of the transfer process cannot be considered voluntary surrender. Nevertheless, such facilitation may be considered in mitigation of sentence."[365] In the *Naletilić and Martinović* case the Appeals Chamber found that the appellant Martinović had facilitated his transfer and thus, as such, this factor *should* have been considered in mitigation.[366]

367. The Trial Chamber relied in its consideration of Pavković's surrender on the decision of the Appeals Chamber regarding provisional release in 2005.[367] In this decision the Appeals Chamber held that Pavković's surrender could not be characterised as voluntary and that the Trial Chamber was correct in assigning no credit to Pavković for the conditions of his eventual surrender.[368] It is submitted that this decision was given an erroneous consideration as regards mitigating circumstances as it does not examine the facilitation of his

[365] *Naletilić and Martinović* Appeal Judgement, para.600
[366] *Naletilić and Martinović* Appeal Judgement, paras.599-600
[367] *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
[368] *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, para.9

transfer and therefore this is an error of law and an abuse of the Trial Chamber's discretion. In addition the Trial Chamber did not consider the circumstances of the transfer in the *Judgement* as it is bound to do given the jurisprudence.

GROUND 13 – THE TRIAL CHAMBER ERRED IN LAW BY EXPANDING THE DEFINITION OF CRIMES AGAINST HUMANITY

368. General Pavković argues under this ground that the Trial Chamber committed error by misinterpreting the *mens rea* requirement for proof of a crime against humanity. Specifically the Trial Chamber erred in the following respects:

> a. finding that the knowledge requirement could be satisfied by evidence that the person "took the risk" that his acts were part of the attack (recklessness standard);
> b. finding that some "intermediary perpetrator" could satisfy the knowledge requirement, even where the physical perpetrator and the accused lacked knowledge that the act was part of the attack;
> c. finding that any member of a joint criminal enterprise could satisfy the knowledge requirement; and
> d. finding the *mens rea* requirement satisfied without identifying that person or his or her role in the offence.[369]

369. The Trial Chamber failed to take account of paragraph 126 of the *Blaškić* Appeal Judgement specifically rejecting the recklessness standard.The Trial Chamber held that the chapeau *mens rea* requirement was satisfied when an individual "knows or *takes the risk* that the conduct of the physical perpetrator comprises part of that attack"[370], this was an error of law on the part of the Trial Chamber. The *Blaškić* Appeals Chamber

[369] General Ojadanić's Appeal Brief, 23 September 2009, para. 377.
[370] Judgement, Volume I, para.160, emphasis added

rejected the notion that the knowledge requirement could be satisfied by a "taking the risk" standard.[371]

370. The Trial Chamber created new law, rather than interpreting existing law in deciding that an "intermediary perpetrator" could satisfy the *mens rea* requirement for a crime against humanity.[372]

371. In Volume I, paragraph 158 of the *Judgement* the Trial Chamber compounded its error by then including any member of the joint criminal enterprise with knowledge that the crime forms part of the attack as one of these "intermediary perpetrators."

372. Finally, and perhaps most importantly, the Chamber was not able to identify either a perpetrator or an intermediary in their findings and conclusions regarding events in Prižren, Orahovac, Srbica, Gnjilane, Kaćanik (Kotlina), Kaćanik (Kaćanik town), Kaćanik (Dubrava), Kosovska Mitrovica, and Vuciturn.[373]

373. The Chamber simply concluded in these instances that either the perpetrators who they failed to identify or the persons at whose behest the perpetrators were acting, who they also failed to identify were the persons with the requisite knowledge to qualify the offense as a crime against humanity. This kind of reasoning does not come even close to satisfying the requirement of proof beyond reasonable doubt. In effect the Chamber is saying, "The Prosecution could not prove who

[371] *Blaškić* Appeal Judgement, para.126; See also *Mrkšić* Appeal Judgement, paras.41-42, *Limaj* Appeal Judgement para.190
[372] Judgement, Vol.I, para. 156, 158.
[373] Volume II, paras.1199, 1206, 1220, 1246, 1253, 1256, 1259, 1230, 1233

committed this crime, but we believe whoever it was knew he was part of a broader attack on the civilian population or if he did not know that, then whoever directed him to do what he was doing must have known." This involves a lot of presuming and guessing. It was not directly proved in any instance that the "perpetrator" of any crime for which any accused was convicted had the requisite *mens rea* for conviction of a crime against humanity. Nor was it proved in any instance whether the "perpetrator" was acting alone or under someone's direction. And since it was not proved that any individual "perpetrator" was acting at the behest of any particular person the Chamber could not possibly conclude that it had been proved beyond reasonable doubt that the person at whose behest the "perpetrator" may have been acting was a person with knowledge that the crime committed by the "perpetrator" was part of the broader attack.

374. Finally, it is noteworthy that in paragraph 16 of its "Decision on Nebojša Pavković's Second Motion to Amend His Notice of Appeal" the Appeals Chamber referred in some detail to the Ojdanić Notice of Appeal, Ground 7, indicating some familiarity with the issue raised therein. By then finding that Pavković's counsel was "negligent" for failing to assert these arguments earlier suggests that any competent, non-negligent counsel would have noticed and raised an error of this magnitude. Further, such a conclusion is a recognition by the Chamber that the Trial Chamber overlooked this point in the Judgement and

was thus in error in its conclusions as regards the *mens rea* requirement in crimes against humanity.[374]

[374] Pavković's counsel John E Ackerman has been a member of the bar for 42 years in the United States. He has been a District Court Judge. He has been President of the National Association of Criminal Defence Lawyers. He has served as a member of the Criminal Justice Council of the American Bar Association. He has been the Dean of a continuing legal education college at the University of Houston. He currently serves as a member of the Board of Directors of the Texas Criminal Defense Lawyers Association. During these 42 years he has had an exemplary record of accomplishment until this Chamber determined that he was negligent. This determination also indicts lawyers for other appellants in this case who were likewise negligent in failing to raise this issue.

IV. Conclusion

375. The Trial Chamber in this case appears to have made a classic error in its analysis. There are two ways to analyse and solve a case. The proper one is to analyse all the evidence and see where it points, beyond all reasonable doubt. Evidently that was not done by this Trial Chamber. The second is to make a decision and then find evidence in the record to support that conclusion. That is what was done. This is an approach which causes inconvenient evidence to be ignored and illogical conclusions to be reached from other evidence. Numerous examples have been set out in this brief. The approach was completely improper and has led to a fatally flawed *Judgement.* It is not the approach a reasonable trial chamber would have taken. A totally independent and unbiased judge looking at this record with no pre-conceived notions could only find that none of the allegations against any of the accused have been proved beyond a reasonable doubt.

376. This Court should stand as an example to the world of fairness and justice. As Justice Robert Jackson said to the American Society for International Law in 1945, just after some of the most horrific war crimes ever "The ultimate principle is that you must put no man on trial under the form of judicial proceedings if you are not willing to see him freed if not proven guilty." This Appeals Chamber should insure the lasting legacy of this Tribunal by giving life to Justice Jackson's wise pronouncement by declaring in no uncertain terms that General Pavković was not proven guilty and must be freed.

377. General Pavković respectfully requests the Appeals Chamber to allow his appeal, to quash his conviction on all counts of the Indictment and to substitute a Not Guilty verdict.

Word Count: 42,552

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